# WEST'S ENCYCLOPEDIA *of* AMERICAN LAW

2ND EDITION

# How to Use This Book

❚1❚ Article Title

❚2❚ Definition in italics with Latin translation provided

❚3❚ First-level subhead

❚4❚ Timeline for subject of biography, including general historical events and life events

❚5❚ Sidebar expands upon an issue addressed briefly in the article

❚6❚ Quotation from subject of biography

❚7❚ Biography of contributor to American law

❚8❚ Internal cross-reference to entry within WEAL

❚9❚ In Focus article examines a controversial or complex aspect of the article topic

❚10❚ Cross-references at end of article

❚11❚ Full cite for case

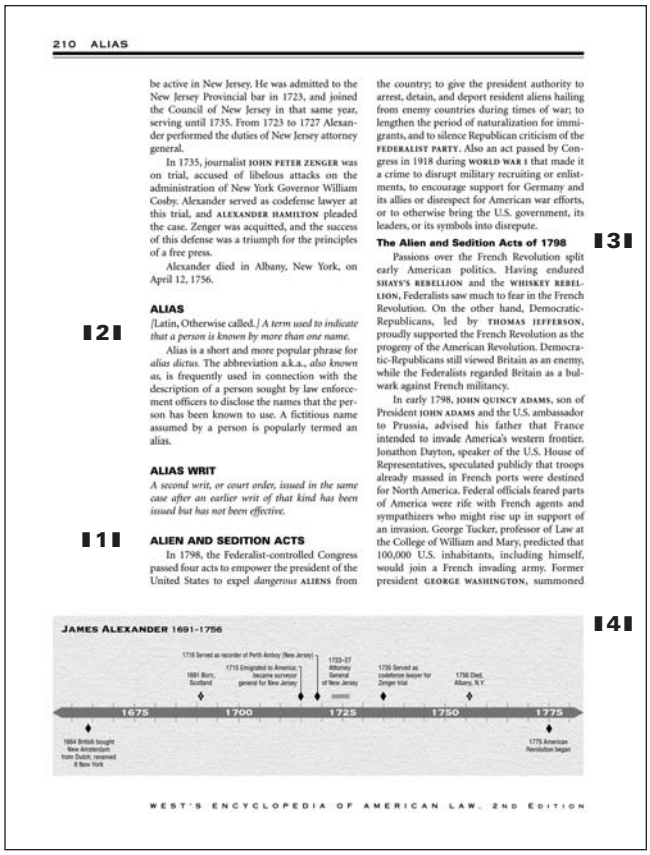



be active in New Jersey. He was admitted to the New Jersey Provincial bar in 1723, and joined the Council of New Jersey in that same year, serving until 1735. From 1723 to 1727 Alexander performed the duties of New Jersey attorney general.

In 1735, journalist JOHN PETER ZENGER was on trial, accused of libelous attacks on the administration of New York Governor William Cosby. Alexander served as codefense lawyer at this trial, and ALEXANDER HAMILTON pleaded the case. Zenger was acquitted, and the success of this defense was a triumph for the principles of a free press.

Alexander died in Albany, New York, on April 12, 1756.

**ALIAS**

❚2❚ *[Latin, Otherwise called.] A term used to indicate that a person is known by more than one name.*

Alias is a short and more popular phrase for *alias dictus.* The abbreviation a.k.a., *also known as,* is frequently used in connection with the description of a person sought by law enforcement officers to disclose the names that the person has been known to use. A fictitious name assumed by a person is popularly termed an alias.

**ALIAS WRIT**

*A second writ, or court order, issued in the same case after an earlier writ of that kind has been issued but has not been effective.*

❚1❚ **ALIEN AND SEDITION ACTS**

In 1798, the Federalist-controlled Congress passed four acts to empower the president of the United States to expel *dangerous* ALIENS from the country; to give the president authority to arrest, detain, and deport resident aliens hailing from enemy countries during times of war; to lengthen the period of naturalization for immigrants, and to silence Republican criticism of the FEDERALIST PARTY. Also an act passed by Congress in 1918 during WORLD WAR I that made it a crime to disrupt military recruiting or enlistments, to encourage support for Germany and its allies or disrespect for American war efforts, or to otherwise bring the U.S. government, its leaders, or its symbols into disrepute.

**The Alien and Sedition Acts of 1798** ❚3❚

Passions over the French Revolution split early American politics. Having endured SHAYS'S REBELLION and the WHISKEY REBELLION, Federalists saw much to fear in the French Revolution. On the other hand, Democratic-Republicans, led by THOMAS JEFFERSON, proudly supported the French Revolution as the progeny of the American Revolution. Democratic-Republicans still viewed Britain as an enemy, while the Federalists regarded Britain as a bulwark against French militancy.

In early 1798, JOHN QUINCY ADAMS, son of President JOHN ADAMS and the U.S. ambassador to Prussia, advised his father that France intended to invade America's western frontier. Jonathon Dayton, speaker of the U.S. House of Representatives, speculated publicly that troops already massed in French ports were destined for North America. Federal officials feared parts of America were rife with French agents and sympathizers who might rise up in support of an invasion. George Tucker, professor of Law at the College of William and Mary, predicted that 100,000 U.S. inhabitants, including himself, would join a French invading army. Former president GEORGE WASHINGTON, summoned

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❚5❚

## The First Payments of Social Security

After the enactment of the Social Security Act of 1935 (42 U.S.C.A. § 301 et seq.) and the creation of the Social Security Administration (SSA), the federal government had a short time to establish the program before beginning to pay benefits. Monthly benefits were to begin in 1940. The period from 1937 to 1940 was to be used both to build up the trust funds and to provide a minimum period for participation for persons to qualify for monthly benefits.

From 1937 until 1940, however, Social Security paid benefits in the form of a single, lump-sum payment. The purpose of these one-time payments was to provide some compensation to people who contributed to the program but would not participate long enough to be vested for monthly benefits.

The first applicant for a lump-sum benefit was Ernest Ackerman, a Cleveland motorman who retired one day after the Social Security Program began. During his one day of participation in the program, five cents was withheld from Ackerman's pay for Social Security, and upon retiring, he received a lump-sum payment of seventeen cents.

Payments of monthly benefits began in January 1940. On January 31, 1940, the first monthly retirement check was issued to Ida May Fuller of Ludlow, Vermont, in the amount of $22.54. Fuller died in January 1975 at the age of one hundred. During her thirty-five years as a beneficiary, she received more than $20,000 in benefits.

tions to Social Security. There is no financial need requirement to be satisfied. Once a worker qualifies for protection, his family is also entitled to protection. The entire program is geared toward helping families as a matter of social policy.

Two large funds of money are held in trust to pay benefits earned by people under OASDI: the Old Age and Survivors Trust Fund and the Disability Insurance Trust Fund. As workers and employers make payroll contributions to these funds, money is paid out in benefits to people currently qualified to receive monthly checks.

The OASDI program is funded by payroll taxes levied on employees and their employers and on the self-employed. The tax is imposed upon the employee's taxable income, up to a maximum taxable amount, with the employer contributing an equal amount. The self-employed person contributes twice the amount levied on an employee. In 2003 the rate was 6.2 percent, levied on earned income up to a maximum of $87,000.

**Old Age Benefits** A person becomes eligible for Social Security old age benefits by working a minimum number of calendar quarters. The number of quarters required for full insurance increases with the worker's age. Forty quarters is the maximum requirement. The individual is credited for income up to the maximum amount of money covered by Social Security for those years. This amount is adjusted to reflect the impact of inflation on normal earnings and ensure that a worker who pays increasing Social Security contributions during his or her work life will receive retirement benefits that keep pace with inflation.

Persons born before 1950 can retire at age 65 with full benefits based on their average income during their working years. For those born between 1950 and 1960, the retirement age for full benefits has increased to age 66. Persons born in 1960 or later will not receive full retirement benefits until age 67. Any person, however, may retire at age 62 and receive less than full benefits. At age 65, a worker's spouse who has not contributed to Social Security receives 50 percent of the amount paid to the worker.

Since 1975 Social Security benefits have increased annually to offset the corrosive effects of inflation on fixed incomes. These increases, known as cost of living allowances (COLAs), are based on the annual increase in consumer prices. Allowing benefits to increase automatically ended the need for special acts of Congress, but it has also steadily increased the cost of the Social Security Program.

have the same inheritance rights as other children. The ruling was believed to be the first on the controversial issue by any state supreme court.

Also in January 2002, Marshall addressed the Massachusetts Bar Association Conference, where she called for "a revolution in the administration of justice" stating that the court system needed to improve its management system as well as its staffing and budget controls. In March 2002, her discussion of the court system's problems were amplified in a 52-page report that was published by a blue-ribbon panel appointed by Marshall.

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*THE GOVERNMENT [THAT THE FRAMERS OF THE CONSTITUTION] DEVISED REQUIRED SEVERAL AMENDMENTS, A CIVIL WAR, AND MOMENTOUS SOCIAL TRANSFORMATION TO ATTAIN THE SYSTEM OF CONSTITUTIONAL GOVERNMENT, AND ITS RESPECT FOR THE INDIVIDUAL FREEDOMS AND HUMAN RIGHTS, THAT WE HOLD AS FUNDAMENTAL TODAY.*
*THURGOOD MARSHALL*

## MARSHALL PLAN

After **WORLD WAR II**, Europe was devastated and urgently needed an organized plan for reconstruction and economic and technical aid. The Marshall Plan was initiated in 1947 to meet this need.

The originator of the plan, U.S. Secretary of State George C. Marshall, introduced it in a speech at Harvard University on June 5, 1947. He pointed out two basic reasons for providing aid to Europe: the United States sought the reestablishment of the European countries as independent nations capable of conducting valuable trade with the United States; and the threat of a Communist takeover was more prevalent in countries that were suffering economic depression.

In 1947 a preliminary conference to discuss the terms of the program convened in Paris. The Soviet Union was invited to attend but subsequently withdrew from the program, as did other Soviet countries.

Sixteen European countries eventually participated, and, in July 1947, the Committee for European Economic Cooperation was established to allow representatives from member countries to draft a report that listed their requirements for food, supplies, and technical assistance for a four-year period.

The Committee for European Economic Cooperation subsequently became the Organization of European Economic Cooperation, an expanded and permanent organization that was responsible for submitting petitions for aid. In 1948, Congress passed the Economic Cooperation Act (62 Stat. 137), establishing funds for the Marshall Plan to be administered under the Economic Cooperation Administration, which was directed by Paul G. Hoffman.

Between 1948 and 1952, the sixteen-member countries received more than $13 billion dollars in aid under the Marshall Plan. The plan was generally regarded as a success that led to industrial and agricultural production, while stifling the Communist movement. The plan was not without its critics, however, and many Europeans believed the **COLD WAR** hostilities between the Soviet nations and the free world were aggravated by it.

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## ◊ MARSHALL, THURGOOD

Thurgood Marshall, the first African American to serve on the U.S. Supreme Court, saw law as a catalyst for social change. For nearly 60 years, as both a lawyer and a jurist, Marshall worked to dismantle the system of **SEGREGATION** and improve the legal and social position of minorities.

Marshall was born July 2, 1908, in Baltimore, the son of a Pullman porter and a schoolteacher. He was a graduate of Lincoln University, a small, all-black college in Pennsylvania, and Howard University Law School in Washington, D.C. At Howard, Marshall excelled under the guidance of Vice Dean **CHARLES HAMILTON HOUSTON**, the first African American to win a case before the U.S. Supreme Court. Houston encouraged his students to become not just lawyers but "social engineers" who could use the legal system to improve society. Marshall graduated first in his law class in 1933.

Marshall's attendance at predominantly black Howard University illustrates the barriers faced by African Americans during the early twentieth century. Although Marshall wished to attend law school at the University of Maryland (a public institution in his home town of Baltimore), he was prohibited by law from doing so because of his race. This injustice helped set Marshall on a course of opposing all forms of official segregation that denied equal opportunities to African Americans.

After law school, Marshall set up a practice in Baltimore, representing indigent clients in civil rights cases. In 1936, his mentor Houston offered him a position with the National Association for the Advancement of Colored People (**NAACP**),





and in 1940, Marshall became director of the **NAACP LEGAL DEFENSE AND EDUCATIONAL FUND**, a position he held until 1961. Determined to eliminate segregation, Marshall coordinated a nationwide campaign to integrate higher education. He filed several successful lawsuits against public graduate and professional schools that refused to accept African-American students. These suits paved the way for similar cases at the high school and elementary school levels. Marshall also journeyed throughout the deep South, traveling fifty thousand miles a year to fight **JIM CROW LAWS** (a series of laws that provided for racial segregation in the South) and to represent criminal defendants.

Marshall argued 32 cases before the U.S. Supreme Court and won 29 of them. No doubt his most famous and far-reaching triumph before the High Court was **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). In that case, the father of African-American student Linda Brown sued the school board of Topeka, Kansas, over its segregation policy. Brown was required by law to attend an all African-American school several blocks from her home even though an all white public school was located in her own neighborhood. Under Kansas law, cities of more than 15,000 people, such as Topeka, could choose to operate segregated schools. Marshall argued that these segregated schools, defended by officials as "separate but equal," were unconstitutional.

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The **SEPARATE-BUT-EQUAL** doctrine originated in **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), a case allowing segregated public accommodations for whites

*Thurgood Marshall.*
LIBRARY OF CONGRESS

and blacks. In a plainspoken argument, Marshall dismissed as fallacy the notion that segregated schools offered the same educational experiences to black and white students. Sociological and psychological studies demonstrated that black children were in fact harmed by the policy of school segregation. The students' self-esteem was damaged and their future diminished when they were forced to accept inadequate facilities, equipment, and educational opportunities. Marshall argued that the only purpose segregation served was to perpetuate the myth of African-Americans' inferiority. A unanimous Court agreed and struck down the separate-but-equal doctrine, a

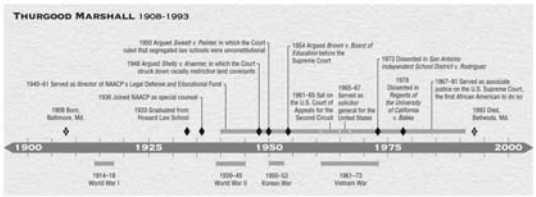






# THE FUTURE OF SOCIAL SECURITY

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The payment of **OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE** (OASDI) benefits has been a cornerstone of U.S. social welfare policy since the establishment of the **SOCIAL SECURITY ADMINISTRATION** in 1935. At the same time, the long-term financial stability of OASDI has been a constant worry. In the early years of the twenty-first century, concerns about Social Security mounted as policy makers assessed the impact of the retirement of the "Baby Boom" generation. Many younger people raised the issue of "generation equity." They express doubt that Social Security benefits will be available when they retire, and anger that they will be forced to pay, through payroll taxes, for the baby boomers' retirement benefits.

Reform of the Social Security system has always been a political hot potato. Retirees and those approaching retirement form a strong **LOBBYING** force, and they zealously protect their benefits. Employers and employees are equally vocal in their opposition to higher payroll taxes to fund OASDI. Thus, changes in Social Security required bipartisan support, which materialized in the face of an impending Social Security crisis. The 1982–83 National Commission on Social Security Reform successfully secured from Congress the short-term financing of OASDI. As a result, Congress passed a series of laws meant to accumulate surpluses as a hedge against future burdens. The Social Security surplus is the amount by which revenue from the federal payroll tax exceeds the amount of Social Security benefits paid out.

IN FOCUS

Shortly after these new laws went into effect, Social Security began running a surplus. Surplus Social Security revenue can be used to fund other government programs and to help retire the national debt. During the favorable economic climate of the late 1990s, Congress began to use the surplus to pay down the federal debt, hoping to better position the government to meet its obligations to future retirees. And, in 2000, the federal government generated enough revenue so that the entire Social Security surplus was available for paying off debt.

The state of Social Security became a major campaign issue in the 2000 elections, with both Republicans and Democrats attempting to appear as though they were guardians of Social Security assets. Candidates from both parties promised to create a "lockbox," meaning that the Social Security surplus would be spent entirely on debt retirement. With the advent of fiscally lean years in the early 2000s, the lockbox approach was largely disregarded by politicians who advanced other ideas about what to do with Social Security surpluses. These ideas included using the surplus to help offset decreases in revenues brought about by tax cuts and using the surplus to fund new or expanded spending initiatives.

Analysts argue that the real issue often is clouded. It is not how to spend the surplus now, but how to maintain the long-term solvency of the Social Security trust fund. Planners estimate that the income from the trust fund will exceed expenses each year until 2020. The trust fund balances will then start to decline as investments are redeemed to meet the increased expenses from a swelling retired workforce. Although it is estimated that 75 percent of the costs would continue to be met from current payroll and income taxes, in the absence of any changes, full benefits could not be paid beginning in 2030.

In its 1996 report, the Social Security Administration's Advisory Council looked at various long-term financing options for OASDI. The council could not reach consensus on a specific long-term plan, but it did suggest several types of financing that represent a marked departure from previous efforts to fund Social Security. The council noted that past efforts have generally featured cutting benefits and raising tax rates on a "pay-as-you-go" basis. The council agreed that this approach must be changed and offered three ways of restoring financial solvency.

One approach, called Maintenance of Benefits (MB), calls for an increase in income taxes on OASDI benefits, a redirection of some revenue from other trust funds, and, most importantly, the adoption of a plan allowing the federal government to invest a portion of the trust fund assets directly in common stocks. Rates of returns on stocks have historically exceeded those on federal government bonds, where all Social Security

A person who continues to work past the retirement age may lose some benefits because Social Security is designed to replace lost earnings. If earnings from employment do not exceed the amount specified by law, the person receives the full benefits. If earnings are greater than that amount, one dollar of benefit is withheld for every two dollars in wages earned above the exempt amount. Once a person reaches age 70, however, he does not have to report earnings to the SSA, and the benefit is not reduced.

**Survivors' Benefits** Survivors' benefits are paid to family members when a worker dies. Survivors can receive benefits if the deceased worker was employed and contributed to Social





momentous victory for Marshall, affecting public schools in twenty-one states.

Marshall was appointed to the U.S. Court of Appeals for the Second Circuit in 1961, and served there until 1965 when he was named **SOLICITOR GENERAL** for the United States. He was appointed to the U.S. Supreme Court in 1967 by President **LYNDON B. JOHNSON** and served as an associate justice for 24 years.

While on the Court, Marshall was known more for his impassioned dissents than for his majority opinions. In particular, as a staunch opponent of **CAPITAL PUNISHMENT**, he regularly voiced his disagreement with the majority in death penalty cases. He was also a firm backer of **AFFIRMATIVE ACTION** and contributed one of his most famous dissents in **REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE**, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In that case, Marshall criticized the high court's ruling that a public medical school's policy of reserving 16 of 100 spots for minority students was unconstitutional. Marshall also dissented in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), disagreeing with the majority view that a Texas property tax system used to fund public education was acceptable, even though it allowed wealthier districts to provide a better school system for students in those districts than less wealthy districts could provide. Marshall objected strongly to the property tax arrangement, claiming that it deprived poor children of an equal education.

Marshall wrote the majority opinion in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968), in which the Court declared that a shopping center was a public forum from which picketers could not be barred by private owners.

Marshall retired from the Court in 1991, but continued his criticism of government policies that were detrimental to African Americans or other disenfranchised groups.

Marshall died on January 24, 1993, in Bethesda, Maryland. Upon Marshall's death, nearly 20,000 mourners filed by his casket during the 12 hours it lay in state in the Great Hall of the U.S. Supreme Court.

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CROSS-REFERENCES

**10**

*Civil Rights Movement; Integration; School Desegregation.*

## MARTIAL LAW

*The exercise of government and control by military authorities over the civilian population of a designated territory.*

**11**

Martial law is an extreme and rare measure used to control society during war or periods of civil unrest or chaos. According to the Supreme Court, the term *martial law* carries no precise meaning (*Duncan v. Kahanamoku*, 327 U.S. 304, 66 S. Ct. 606, 90 L. Ed. 688 [1946]). However, most declarations of martial law have some common features. Generally, the institution of martial law contemplates some use of military force. To a varying extent, depending on the martial law order, government military personnel have the authority to make and enforce civil and criminal laws. Certain civil liberties may be suspended, such as the right to be free from unreasonable **SEARCHES AND SEIZURES**, **FREEDOM OF ASSOCIATION**, and freedom of movement. And the writ of **HABEAS CORPUS** may be suspended (this writ allows persons who are unlawfully imprisoned to gain freedom through a court proceeding).

In the United States, martial law has been instituted on the national level only once, during the Civil War, and on a regional level only once, during **WORLD WAR II**. Otherwise, it has been limited to the states. Uprisings, political protests, labor strikes, and riots have, at various times, caused several state governors to declare some measure of martial law.

Martial law on the national level may be declared by Congress or the president. Under

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# PREFACE

The U.S. legal system is admired around the world for the freedoms it allows the individual and the fairness with which it attempts to treat all persons. On the surface, it may seem simple, yet those who have delved into it know that this system of federal and state constitutions, statutes, regulations, and common-law decisions is elaborate and complex. It derives from the English common law, but includes principles older than England, along with some principles from other lands. The U.S. legal system, like many others, has a language all its own, but too often it is an unfamiliar language: many concepts are still phrased in Latin. The second edition of *West's Encyclopedia of American Law (WEAL)* explains legal terms and concepts in everyday language, however. It covers a wide variety of persons, entities, and events that have shaped the U.S. legal system and influenced public perceptions of it.

## MAIN FEATURES OF THIS SET

### Entries

This encyclopedia contains nearly 5,000 entries devoted to terms, concepts, events, movements, cases, and persons significant to U.S. law. Entries on legal terms contain a definition of the term, followed by explanatory text if necessary. Entries are arranged alphabetically in standard encyclopedia format for ease of use. A wide variety of additional features, listed later in this preface, provide interesting background and supplemental information.

**Definitions** Every entry on a legal term is followed by a definition, which appears at the beginning of the entry and is italicized. The Dictionary and Indexes volume includes a glossary containing all the definitions from *WEAL*.

**Further Readings** To facilitate further research, a list of Further Readings is included at the end of a majority of the main entries.

**Cross-References** *WEAL* provides two types of cross-references, within and following entries. Within the entries, terms are set in small capital letters—for example, LIEN—to indicate that they have their own entry in the encyclopedia. At the end of the entries, related entries the reader may wish to explore are listed alphabetically by title.

Blind cross-reference entries are also included to direct the user to other entries throughout the set.

### In Focus Essays

In Focus essays accompany related entries and provide additional facts, details, and arguments on particularly interesting, important, or controversial issues raised by those entries. The subjects covered include hotly contested issues, such as abortion, capital punishment, and gay rights; detailed processes, such as the Food and Drug Administration's approval process for new drugs; and important historical or social issues, such as debates over the formation of the U.S. Constitution.

### Sidebars

Sidebars provide brief highlights of some interesting facet of accompanying entries. They

complement regular entries and In Focus essays by adding informative details. Sidebar topics include the Million Man March and the branches of the U.S. armed services. Sidebars appear at the top of a text page and are set in a box.

### Biographies

*WEAL* profiles a wide variety of interesting and influential people—including lawyers, judges, government and civic leaders, and historical and modern figures—who have played a part in creating or shaping U.S. law. Each biography includes a timeline, which shows important moments in the subject's life as well as important historical events of the period. Biographies appear alphabetically by the subject's last name.

## ADDITIONAL FEATURES OF THIS SET

**Enhancements** Throughout *WEAL*, readers will find a broad array of photographs, charts, graphs, manuscripts, legal forms, and other visual aids enhancing the ideas presented in the text.

**Indexes** *WEAL* features a cases index and a cumulative index in a separate volume.

### Appendixes

Three appendix volumes are included with *WEAL*, containing hundreds of pages of documents, laws, manuscripts, and forms fundamental to and characteristic of U.S. law.

### Milestone Cases in the Law

A special Appendix volume entitled Milestones in the Law, allows readers to take a close look at landmark cases in U.S. law. Readers can explore the reasoning of the judges and the arguments of the attorneys that produced major decisions on important legal and social issues. Included in each Milestone are the opinions of the lower courts; the briefs presented by the parties to the U.S. Supreme Court; and the decision of the Supreme Court, including the majority opinion and all concurring and dissenting opinions for each case.

### Primary Documents

There is also an Appendix volume containing more than 60 primary documents, such as the English Bill of Rights, Martin Luther King Jr.'s Letter from Brimingham Jail, and several presidential speeches.

### Citations

Wherever possible, *WEAL* entries include citations for cases and statutes mentioned in the text. These allow readers wishing to do additional research to find the opinions and statutes cited. Two sample citations, with explanations of common citation terms, can be seen below and opposite.

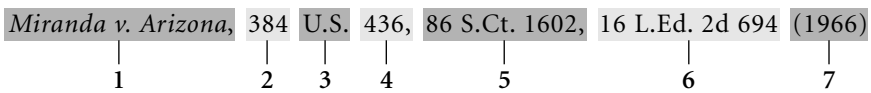


1. *Case title.* The title of the case is set in i and indicates the names of the parties. The suit in this sample citation was between Ernesto A. Miranda and the state of Arizona.
2. *Reporter volume number.* The number preceding the reporter name indicates the reporter volume containing the case. (The volume number appears on the spine of the reporter, along with the reporter name).
3. *Reporter name.* The reporter name is abbreviated. The suit in the sample citation is from the reporter, or series of books, called *U.S. Reports,* which contains cases from the U.S. Supreme Court. (Numerous reporters publish cases from the federal and state courts.)
4. *Reporter page.* The number following the reporter name indicates the reporter page on which the case begins.
5. *Additional reporter page.* Many cases may be found in more than one reporter. The suit in the sample citation also appears in volume 86 of the *Supreme Court Reporter*, beginning on page 1602.
6. *Additional reporter citation.* The suit in the sample citation is also reported in volume 16 of the *Lawyer's Edition*, second series, beginning on page 694.
7. *Year of decision.* The year the court issued its decision in the case appears in parentheses at the end of the cite.

*Brady Handgun Violence Prevention Act*, Pub. L. No. 103–159, 107 Stat. 1536 (18 U.S.C.A. §§ 921–925A)

1 2 3 4 5 6 7 8

1. *Statute title.*
2. *Public law number.* In the sample citation, the number 103 indicates this law was passed by the 103d Congress, and the number 159 indicates it was the 159th law passed by that Congress.
3. *Reporter volume number.* The number preceding the reporter abbreviation indicates the reporter volume containing the statute.
4. *Reporter name.* The reporter name is abbreviated. The statute in the sample citation is from *Statutes at Large.*
5. *Reporter page.* The number following the reporter abbreviation indicates the reporter page on which the statute begins.
6. *Title number.* Federal laws are divided into major sections with specific titles. The number preceding a reference to the U.S. Code stands for the section called Crimes and Criminal Procedure.
7. *Additional reporter.* The statute in the sample citation may also be found in the *U.S. Code Annotated.*
8. *Section numbers.* The section numbers following a reference to the *U.S. Code Annotated* indicate where the statute appears in that reporter.

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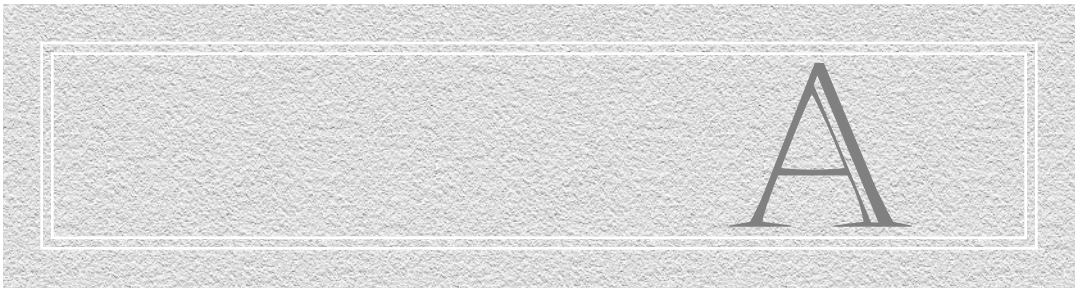

## A FORTIORI

*[*Latin, With stronger reason.*] This phrase is used in logic to denote an argument to the effect that because one ascertained fact exists, therefore another which is included in it or analogous to it and is less improbable, unusual, or surprising must also exist.*

## A MENSA ET THORO

Latin, From table and bed, *but more commonly translated as "from bed and board."*

This phrase designates a DIVORCE which is really akin to a separation granted by a court whereby a HUSBAND AND WIFE are not legally obligated to live together, but their marriage has not been dissolved. Neither spouse has the right to remarry where there is a divorce *a mensa et thoro;* only parties who have been awarded a divorce *a vinculo matrimonii,* the more common type of divorce, can do so.

## A POSTERIORI

*[*Latin, From the effect to the cause.*]*

*A posteriori* describes a method of reasoning from given, express observations or experiments to reach and formulate general principles from them. This is also called inductive reasoning.

## A PRIORI

*[*Latin, From the cause to the effect.*]*

This phrase refers to a type of reasoning that examines given general principles to discover what particular facts or real-life observations can be derived from them. Another name for this method is deductive reasoning.

## AB INITIO

*[*Latin, From the beginning; from the first act; from the inception.*] An agreement is said to be "void* ab initio*" if it has at no time had any legal validity. A party may be said to be a trespasser, an estate said to be good, an agreement or deed said to be void, or a marriage or act said to be unlawful,* ab initio. *Contrasted in this sense with* EX POST FACTO, *or with* postea.

The illegality of the conduct or the revelation of the real facts makes the entire situation illegal *ab initio* (from the beginning), not just from the time the wrongful behavior occurs. A person who enters property under the authority of law but who then by misconduct abuses his or her right to be on the property is considered a trespasser *ab initio.* If a sheriff enters property under the authority of a court order requiring him to seize a valuable painting, but instead he takes an expensive marble sculpture, he would be a trespasser from the beginning. Since the officer abused his authority, a court would presume that he intended from the outset to use that authority as a cloak from under which to enter the property for a wrongful purpose. This theory, used to correct abuses by public officers, has largely fallen into disuse.

## ABANDONMENT

*The surrender, relinquishment, disclaimer, or cession of property or of rights. Voluntary relinquishment of all right, title, claim, and possession, with the intention of not reclaiming it.*

*The giving up of a thing absolutely, without reference to any particular person or purpose. For example, vacating property with the intention of not returning, so that it may be appropriated by the next comer or finder. The voluntary relinquishment of possession of a thing by its owner with the intention of terminating ownership, but without vesting it in any other person. The relinquishing of all title, possession, or claim, or a virtual, intentional throwing away of property.*

*Term includes both the intention to abandon and the external act by which the intention is carried into effect. In determining whether someone has abandoned property or rights, the intention is the first and paramount object of inquiry, for there can be no abandonment without the intention to abandon.*

Abandonment *differs from surrender in that surrender requires an agreement, and also from* FORFEITURE*, in that forfeiture may be against the intention of the party alleged to have forfeited.*

*In the case of children, abandonment is the willful forsaking or forgoing of parental duties. Desertion as a legal concept, is similar in this respect, although broader in scope, covering both real and constructive situations; abandonment is generally seen as involving a specific and tangible forsaking or forgoing.*

### Property That Can Be Abandoned

Various types of personal property—such as personal and household items—contracts, copyrights, inventions, and PATENTS can be abandoned. Certain rights and interests in real property, such as EASEMENTS and leases, may also be abandoned. Suppose a ranch owner, for example, gives a shepherd an easement to use a path on her property so that the sheep can get to a watering hole. The shepherd later sells his flock and moves out of the state, never intending to return. This conduct demonstrates that the shepherd has abandoned the easement, since he stopped using the path and intends never to use it again. Ownership of real property cannot be obtained because someone else abandoned it but may be gained through ADVERSE POSSESSION.

### Elements of Abandonment

Two things must occur for property to be abandoned: (1) an act by the owner that clearly shows that he or she has given up rights to the property; and (2) an intention that demonstrates that the owner has knowingly relinquished control over it.

Some clear action must be taken to indicate that the owner no longer wants his or her property. Any act is sufficient as long as the property is left free and open to anyone who comes along to claim it. Inaction—that is, failure to do something with the property or nonuse of it—is not enough to demonstrate that the owner has relinquished rights to the property, even if such nonuse has gone on for a number of years. A farmer's failure to cultivate his or her land or a quarry owner's failure to take stone from his or her quarry, for example, does not mean that either person has abandoned interest in the property.

A person's intention to abandon his or her property may be established by express language to that effect or it may be implied from the circumstances surrounding the owner's treatment of the property, such as leaving it unguarded in a place easily accessible to the public. The passage of time, although not an element of abandonment, may illustrate a person's intention to abandon his or her property.

### Parental Abandonment of Children

Parental abandonment of children is different from other cases of abandonment in that it involves a person rather than property. Abandonment of children is a criminal CAUSE OF ACTION under most state laws. In the civil context, it arises when a court decides to terminate the natural rights of the parent on the grounds of abandonment to allow ADOPTION.

In a criminal context, abandonment of children is defined as actually abandoning a child, or failing to provide necessities of living to a child. In California, for example, a parent is guilty of abandonment if they fail to provide "necessary clothing, food, shelter or medical attendance, or other remedial care for their child." A parent is required to accept their minor child into their home, or provide alternative shelter. Parents in California are also punished for "desertion with intent to abandon." These laws are typical of most states.

In the late 1990s, the issue of baby abandonment in the United States came to a head as a result of several high profile cases. These cases prompted 38 states to pass so-called "safe haven laws." The laws decriminalize baby abandonment by allowing mothers to leave their

unharmed babies at a designated "safe." location such as a hospital, fire station, or licensed child-placing agency. The laws include a time frame, beginning from the baby's birth, in which abandonment may take place; the time frame varies from state to state, ranging from 72 hours up to one year.

In a civil context, abandonment of a child is usually ruled on by a court to facilitate an adoption. State courts employ various guidelines to determine if a child has been abandoned. In an action for adoption on the ground of abandonment, the petitioner generally must establish conduct by the child's natural parent or parents that shows neglect or disregard of parental duties, obligations, or responsibilities. They must also show an intent by the child's parent or parents to permanently avoid parental duties, obligations, or responsibilities. Some jurisdictions require an actual intention of the parents to relinquish their rights to find abandonment, but most allow a finding of abandonment regardless of whether the parents intended to extinguish their rights to the child.

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Magnusen, Debbie. 2001–02. "From Dumpster to Delivery Room: Does Legalizing Baby Abandonment Really Solve the Problem?" *Journal of Juvenile Law* 22.

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CROSS-REFERENCES

Desertion.

## ABATEMENT

*A reduction, a decrease, or a diminution. The suspension or cessation, in whole or in part, of a continuing charge, such as rent.*

With respect to estates, an abatement is a proportional diminution or reduction of the monetary legacies, a disposition of property by will, when the funds or assets out of which such legacies are payable are insufficient to pay them in full. The intention of the testator, when expressed in the will, governs the order in which property will abate. Where the will is silent, abatement occurs in the following order: intestate property, gifts that pass by the residuary clause in the will, general legacies, and specific legacies.

In the context of taxation, an abatement is a decrease in the amount of tax imposed. Abatement of taxes relieves property of its share of the burdens of taxation after the assessment has been made and the levy of the tax has been accomplished.

CROSS-REFERENCES

Taxation; Will.

## ABATEMENT OF AN ACTION

*An entire overthrow or destruction of a suit so that it is quashed and ended.*

The purpose of abatement is to save the time and expense of a trial when the plaintiff's suit cannot be maintained in the form originally presented. After an action abates, the plaintiff is ordinarily given an opportunity to correct errors in his or her PLEADING. If the plaintiff still is unable to allege the facts necessary to state a legal CAUSE OF ACTION, then the action is terminated.

Not every possible reason for dissatisfaction with another person can be heard by a court. When the old COMMON LAW form of action governed the procedure followed by courts (as opposed to state and federal rules of procedure, which now do), only legal wrongs that fit exactly into one of the allowed categories could be pleaded in court. If the defendant believed that the plaintiff's complaint did not fit one of these forms, the defendant could respond with a plea in abatement. A plea in abatement was called a dilatory plea because it delayed the time when the court would reach the merits of the plaintiff's claim, if ever.

The rigid formality of common law pleading became less satisfactory as legal disputes became more complicated. It has been replaced in each state by a procedure that allows the plaintiff to plead facts showing his or her right to legal relief. Modern systems of pleading retain a right for the defendant to seek abatement of the action when the plaintiff is not entitled to be in court. They allow a defendant to object to the court's jurisdiction, the venue of the trial, the sufficiency of process, or of the SERVICE OF PROCESS, the legal sufficiency of the plaintiff's claim, or the failure to include someone who must be a party. A plea in abatement is made either in the defendant's answer or by motion and order—that is, an application to the court for relief and an order that can grant it. Abatement is usually granted in the form of a dis-

missal of cause of action, and now the term *dismissal* is used more often than the term *abatement* for this procedure.

Today, the word *abatement* is most often used for the termination of a lawsuit because of the death of a party. Under the common law, a lawsuit abated automatically whenever a party died. This rule was considered a part of the substance of the law involved and was not merely a question of procedure. Whether the cause of action abated depended on whether or not the lawsuit was considered personal to the parties. For example, contract and property cases were thought to involve issues separate from the parties themselves. They were not personal and did not necessarily abate on the death of a party. Personal injury cases were considered personal, however, and did abate at death. These included claims not only for physical assault or negligent injuries inflicted on the body, but also for other injuries to the person—such as LIBEL, slander, and MALICIOUS PROSECUTION.

Today there are statutes that permit the revival of an action that was pending when a party died. An executor or administrator is substituted for the deceased party and the lawsuit continues. A lawsuit may not be revived unless the underlying cause of action, the ground for the suit, continues to have a legal existence after the party's death. Revival statutes vary from state to state, but today most lawsuits do not abate.

This general rule does not apply to matrimonial actions. A lawsuit for DIVORCE or separation is considered entirely personal and therefore cannot be maintained after the death of a party. Different states do make exceptions to this rule in order to settle certain questions of property ownership. An action for the ANNULMENT of a marriage after the death of an innocent spouse may be revived by the deceased spouse's PERSONAL REPRESENTATIVE if it is clear that the marriage was induced by FRAUD and the perpetrator of the fraud would inherit property to which he or she would otherwise not be entitled.

## ABBOTT, BENJAMIN VAUGHN

Benjamin Vaughn Abbott was born June 4, 1830, in Boston, Massachusetts. He graduated from New York University in 1850 and was admitted to the New York bar in 1852.

From 1855 to 1870 Abbott, in collaboration with his brother Austin, wrote a series of law treatises and reports, including *Digest of New York Statutes and Reports* (1860). The series led to *Abbott's New York Digest,* the most recent series of which has been renamed *West's New York Digest 4th.*

In 1864 Abbott became secretary of the New York Code Commission and was instrumental in the formulation of the New York Penal Code, much of which is still in use today.

From 1870 to 1872 he served as a commissioner to amend the statutes of the United States. Abbott died February 17, 1890, in Brooklyn, New York.

As an author, Abbott wrote several publications, including *Judge and Jury* (1880); *The Travelling Law School* (1884); and *Addison on Contracts* (1888).

## ABDICATION

*Renunciation of the privileges and prerogatives of an office. The act of a sovereign in renouncing and relinquishing his or her government or throne, so that either the throne is left entirely vacant, or is filled by a successor appointed or elected before-*

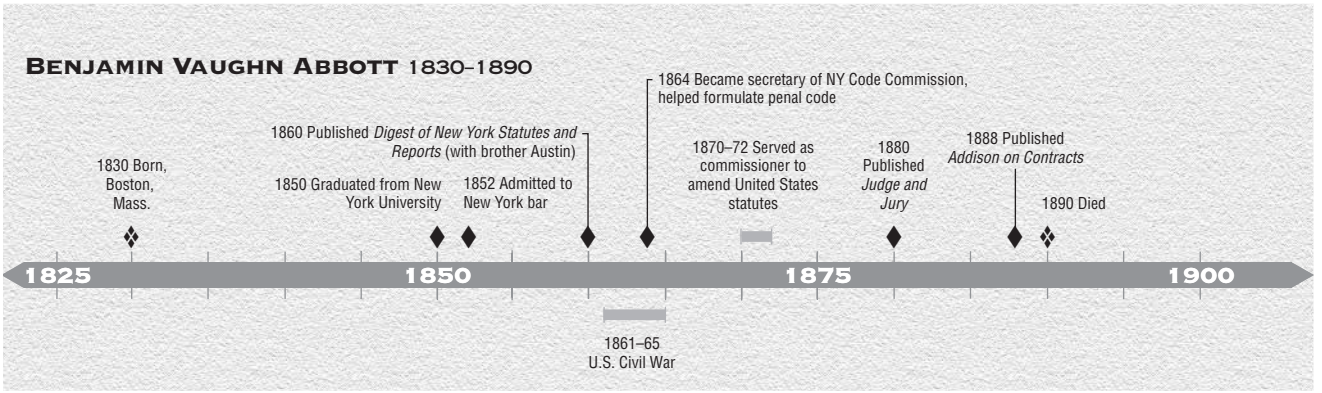

*hand. Also, where a magistrate or person in office voluntarily renounces or gives it up before the time of service has expired. It differs from resignation, in that resignation is made by one who has received an office from another and restores it into that person's hands, as an inferior into the hands of a superior; abdication is the relinquishment of an office which has devolved by act of law. It is said to be a renunciation, quitting, and relinquishing, so as to have nothing further to do with a thing, or the doing of such actions as are inconsistent with the holding of it. Voluntary and permanent withdrawal from power by a public official or monarch.*

The difference between abdicating a position and resigning one lies primarily in the irrevocability of abdication. Once an office or throne is abdicated, a return is not legally possible. Unlike resignation, abdication is not a matter of the relinquishment of a position to an employer or a superior. Instead, it is the absolute and final renunciation of an office created specifically by an act of law. After an abdication, the office remains vacant until a successor is named by appointment or election.

An early example of royal abdication occurred in 305 **A.D.**, when the Roman emperor Diocletian withdrew from power after suffering a serious illness. Another sovereign, King Louis Philippe of France (the Citizen King), abdicated on February 24, 1848, because of public hostility toward the monarchy.

Perhaps the most famous abdication of power occurred on December 11, 1936, when England's King Edward VIII (1894–1972) renounced his throne in order to marry Wallis Warfield Simpson (1896–1986). Simpson was a twice-divorced socialite whose rocky marital history and American citizenship made her an unacceptable choice as wife of the British monarch. The affair between Edward and Simpson created an international scandal because it began well before her second **DIVORCE** was finalized. Edward's ministers pleaded with him to sever his relationship with the woman, whom his mother, Queen Mary, dismissed as "the American adventuress." Edward could not remain king and head of the Church of England if he married Simpson, because of the church's opposition to divorce. Unhappy with many of his royal duties and transfixed by Simpson, Edward chose to renounce the monarchy and marry her.

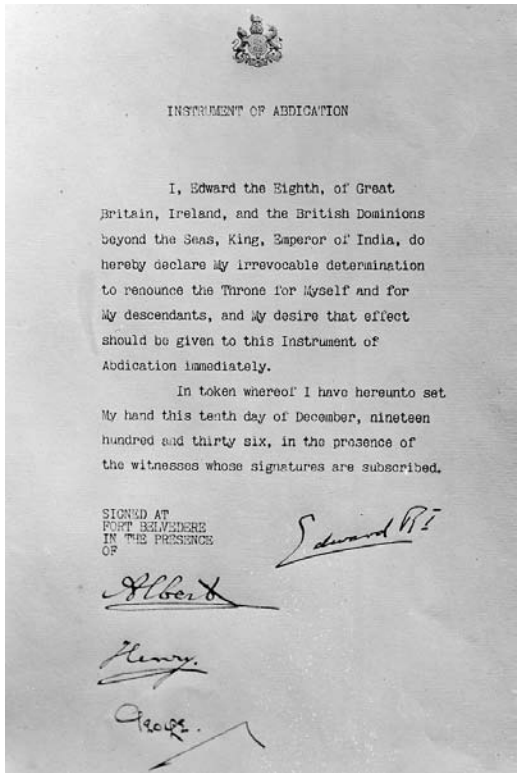

INSTRUMENT OF ABDICATION

I, Edward the Eighth, of Great Britain, Ireland, and the British Dominions beyond the Seas, King, Emperor of India, do hereby declare My irrevocable determination to renounce the Throne for Myself and for My descendants, and My desire that effect should be given to this Instrument of Abdication immediately.

In token whereof I have hereunto set My hand this tenth day of December, nineteen hundred and thirty six, in the presence of the witnesses whose signatures are subscribed.

SIGNED AT
FORT BELVEDERE
IN THE PRESENCE
OF

*The abdication document signed on December 10, 1936, by King Edward VIII and his brothers, Albert, Henry, and George.*

AP/WIDE WORLD PHOTOS

On December 11, 1936, Edward announced his decision at Fort Belvidere, his private estate six miles from Windsor Castle. There he signed an instrument of abdication and conducted a farewell radio broadcast in which he told his subjects that he relinquished the throne for "the woman I love." The 42-year-old royal, who had ascended the throne on January 20, 1936, upon the death of his father, King George V, was succeeded by his younger brother, the duke of York, who became King George VI, father of Queen Elizabeth II.

Edward and Simpson were married in Paris on June 3, 1937. Afterward, the former sovereign and his wife were addressed as the duke and duchess of Windsor. Except for a period during **WORLD WAR II** spent in colonial Bahamas, the couple resided in royal exile in Paris for most of their nearly 35-year marriage.

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## ABDUCTION

*The act of restraining another through the use or threat of* DEADLY FORCE *or through fraudulent persuasion. The requisite restraint generally requires that the abductor intend to prevent the liberation of the abductee. Some states require that the abductee be a minor or that the abductor intend to subject the abductee to prostitution or illicit sexual activity.*

CROSS-REFERENCES

Kidnapping.

## ABERNATHY, RALPH DAVID

In the long battle for CIVIL RIGHTS, few leaders have had as an important a role as Ralph David Abernathy. From the late 1950s until 1968, Abernathy was the right-hand man of MARTIN LUTHER KING JR. Together in 1957 they founded the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (SCLC), the organization chiefly responsible for the nonviolent protest movement whose gains over the next decade included major legal and social reforms for black Americans. Abernathy often shared a place next to King in meetings, marches, and jail, yet despite his considerable contributions to the CIVIL RIGHTS MOVEMENT, he labored largely in King's shadow. Later becoming SCLC president, he watched the transformation of the movement as his influence weakened and his politics changed, until controversy ultimately divided him from its mainstream.

"I DON'T KNOW WHAT THE FUTURE MAY HOLD, BUT I KNOW WHO HOLDS THE FUTURE."
—RALPH ABERNATHY

Born on March 11, 1926, in Marengo County, Alabama, Abernathy was the grandson of a slave. His family members were successful farmers, and his father's leadership in the county's black community inspired him. Upon graduating from Linden Academy, he served in the army in WORLD WAR II. He was ordained as a Baptist minister in 1948. He earned a B.A. in mathematics from Alabama State College in 1950, an M.A. in sociology from Atlanta University in 1951, and later a law degree from Allen University in 1960.

The defining moment in Abernathy's life was meeting King. As a student in Atlanta, he had heard King preach in church. From there, they began a friendship that would shape both men's futures. In 1955, while both were pastors in Montgomery, Alabama, they began the first of many local protest actions against RACIAL DISCRIMINATION. They organized a boycott of city buses by black passengers that led to the successful desegregation of local bus lines one year later. To build on this triumph, the pastors called a meeting of black leaders from ten southern states in January 1957 at an Atlanta church. This meeting marked the founding of the SCLC, which was devoted to the goal of furthering civil rights throughout the south. King was appointed the group's president, Abernathy its secretary-treasurer. The civil rights movement had begun.

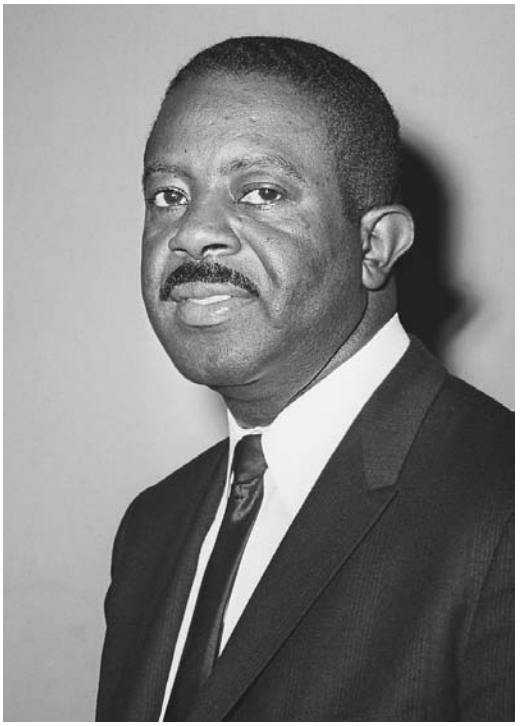

*Ralph Abernathy.* BETTMANN/CORBIS

Although the SCLC had committed itself to nonviolent protest, the forces they opposed were far from gun-shy. Segregationists bombed Abernathy's home and church. As opposition from individuals as well as government and law enforcement mounted, Abernathy continued to stress nonviolence. He said, "violence is the weapon of the weak and nonviolence is the weapon of the strong. It's the job of the state troopers to use mace on us. It's our job to keep marching. It's their job to put us in jail. It's our job to be in jail."

For nearly a decade, this philosophy was a clarion call answered by thousands. Through sit-down strikes, marches, arrests and jailings, and

frequently at great personal danger, King and Abernathy led a mass of nonviolent protesters across the south, working together to devise strategy and put it into action. The enactment of federal civil rights legislation in 1964 marked a major success. But tragedy followed with King's assassination in May 1968, after which Abernathy replaced him as SCLC president. He now added a new aggressiveness to the group's goals, notably organizing a week-long occupation of Potomac Park in Washington, D.C., by five thousand impoverished tent-dwellers in what was called the Poor People's Campaign. This effort to dramatize poverty was quickly crushed by federal law enforcement.

By the end of the 1960s, Abernathy's influence was in decline. The civil rights movement had splintered as younger, more militant members gravitated toward groups such as the **BLACK PANTHERS** and the Committee on Racial Equality (CORE). In 1977, Abernathy was forced from leadership of the SCLC amid a feud with King's widow, Coretta Scott King, and made an unsuccessful bid for Congress. In 1980, he supported the presidential campaign of conservative Republican **RONALD REAGAN**, which further divided him from former friends and associates. References to Martin Luther King Jr.'s marital infidelities in Abernathy's 1989 memoir *And the Walls Came Tumbling Down* provoked more criticism. Politically and personally isolated, Abernathy died one year later of a heart attack on April 17, 1990, at the age of 64. In death, however, the criticism faded and was replaced by praise for his contributions to civil rights.

**CROSS-REFERENCES**

Civil Rights Movement; King, Martin Luther, Jr.; Southern Christian Leadership Conference.

## ABET

*To encourage or incite another to commit a crime. This word is usually applied to aiding in the commission of a crime. To abet another to commit a murder is to command, procure, counsel, encourage, induce, or assist. To facilitate the commission of a crime, promote its accomplishment, or help in advancing or bringing it about.*

*In relation to charge of aiding and abetting, term includes knowledge of the perpetrator's wrongful purpose, and encouragement, promotion or counsel of another in the commission of the criminal offense.*

*A French word,* abeter*—to bait or excite an animal.*

For example, the manager of a jewelry store fails to turn on the store's silent alarm on the night she knows her cousin plans to rob the store. Her conduct is that of abetting the **ROBBERY**. If, however, she merely forgot to turn on the alarm, she would not have abetted the crime.

The word *abet* is most commonly used as part of the comprehensive phrase aid and abet.

## ABETTOR

*One who commands, advises, instigates, or encourages another to commit a crime. A person who, being present, incites another to commit a crime, and thus becomes a principal. To be an* abettor, *the accused must have instigated or advised the commission of a crime or been present for the purpose of assisting in its commission; he or she must share criminal intent with which the crime was committed.*

A person who lends a friend a car for use in a **ROBBERY** is an abettor even though he or she is not present when the robbery takes place. An abettor is not the chief actor, the principal, in the

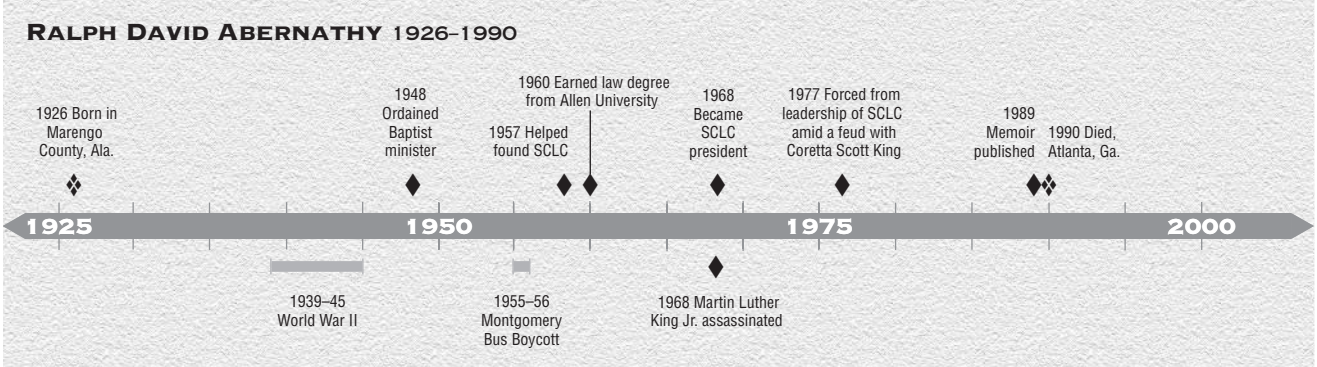

commission of a crime but must share the principal's criminal intent in order to be prosecuted for the same crime.

## ABEYANCE

*A lapse in succession during which there is no person in whom title is vested. In the law of estates, the condition of a freehold when there is no person in whom it is vested. In such cases the freehold has been said to be* in nubibus *(in the clouds),* in pendenti *(in suspension), and* in gremio legis *(in the bosom of the law). Where there is a tenant of the freehold, the remainder or reversion in fee may exist for a time without any particular owner, in which case it is said to be in abeyance. A condition of being undetermined or in state of suspension or inactivity. In regard to sales to third parties of property acquired by county at* TAX SALE*, being held in* abeyance *means that certain rights or conditions are in expectancy.*

For example, until an order of foreclosure is granted by a court, a mortgagee does not have title to the property of a delinquent debtor that is the subject of a mortgage in those jurisdictions that follow the lien theory of mortgages.

## ABIDING CONVICTION

*A definite conviction of guilt derived from a thorough examination of the whole case. Used commonly to instruct juries on the frame of mind required for guilt proved* BEYOND A REASONABLE DOUBT. *A settled or fixed conviction.*

## ABINGTON SCHOOL DISTRICT V. SCHEMPP

In 1963, the U.S. Supreme Court banned the Lord's Prayer and Bible reading in public schools in *Abington School District v. Schempp,* 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844. The decision came one year after the Court had struck down, in ENGEL V. VITALE, a state-authored prayer that was recited by public school students each morning (370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 [1962]). *Engel* had opened the floodgates; *Schempp* ensured that a steady flow of anti-school prayer rulings would continue into the future. *Schempp* was in many ways a repeat of *Engel*: the religious practices with which it was concerned were nominally different, but the logic used to find them unconstitutional was the same. This time, the majority went one step further, issuing the first concrete test for determining violations of the First Amendment's Establishment Clause.

The *Schempp* ruling involved two cases: its namesake and *Murray v. Curlett,* 228 Md. 239, 179 A.2d 698 (Md. 1962). The *Schempp* case concerned a 1949 Pennsylvania law that forced public schools to start each day with a reading of ten Bible verses (24 Pa. Stat. § 15-1516). The law did not specify which version of the Bible should be used—for instance, it could be the Catholic Douay text or the Jewish version of the Old Testament. But local school officials only bought the Protestant King James Version. Teachers ordered students to rise and recite the verses reverently and in unison, or, as in the Abington School District, students in a broadcasting class read the verses over a public-address system. Teachers could be fired for refusing to participate, and pupils occasionally were segregated from others if they did not join in the daily reading.

The Pennsylvania law was challenged by the Schempps, whose three children also attended Unitarian Sunday school. In 1958, a special three-judge federal court heard the case. The father, Edward L. Schempp, testified that he objected to parts of the Bible. Leviticus, in particular, upset him, "where they mention all sorts of blood sacrifices, uncleanness and leprosy. . . . I do not want my children believing that God is a lesser person than a human father." Although hardly the first lawsuit on this issue—Bible reading cases in state courts had yielded contradictory rulings since 1910—*Schempp* was the first to reach a federal court. The three-judge panel ruled that the Bible reading statute violated the First Amendment's Establishment Clause ("Congress shall make no law respecting an establishment of religion . . .") and interfered with its Free Exercise Clause ("or prohibiting the free exercise [of religion]"). Local and state officials immediately appealed to the U.S. Supreme Court.

The Supreme Court agreed to hear *Schempp* along with *Murray* as a consolidated case. Madalyn Murray O'Hair and her 14-year-old son, William Murray, were atheists. They had challenged a 1905 Baltimore school board rule requiring each school day to start with Bible reading or the Lord's Prayer ("Our father, who art in heaven . . ."), or both. An attorney herself, Murray brought the suit only after protesting to officials, stirring up media attention, and encouraging her son to protest in a controversial

strike that kept him out of school for 18 days. The suit said the rule transgressed the Establishment Clause by requiring compulsory religious education and violated the Free Exercise Clause by discriminating against atheists. The Murrays originally lost in state courts and on appeal.

When the U.S. Supreme Court heard oral arguments for the consolidated cases on February 27 and 28, the nation was still reacting to the previous year's ruling in *Engel.* An uproar over the *Engel* decision had produced 150 proposals in Congress to amend the Constitution. *Schempp* gave advocates of school prayer a chance to argue that the Court had been wrong in *Engel,* and this they did. Attorneys representing Pennsylvania and Baltimore officials denied that Bible reading or prayer had a religious nature, and claimed that it therefore did not violate the Establishment Clause—which, in any event, they maintained, was only designed to prevent an official state religion. Their true purpose, argued attorneys, was to keep order and provide a proper moral climate for students.

The Court stood by the *Engel* decision. In an 8–1 decision, it ruled that both Bible reading and the Lord's Prayer violated the Establishment Clause. Justice Tom C. Clark's majority opinion differed in a few respects from the previous year's ruling: it admonished prayer advocates for ignoring the law, spelled out in some detail the precedents involved, and laid out the Court's first explicit test for Establishment Clause questions. Founded on the idea of state neutrality, this test had a vital standard: any law hoping to survive the prohibitions of the Establishment Clause must have "a secular purpose and a primary effect that neither advances nor inhibits religion."

The test clearly spelled out the limits. Study of the Bible or religion was acceptable, but only so long as "presented objectively as part of a secular program of education." Religious practices in public school were not allowed under the **FIRST AMENDMENT**. "While the Free Exercise Clause clearly prohibits the use of **STATE ACTION** to deny the rights of free exercise to anyone," Justice Clark observed, "it has never meant that a majority could use the machinery of the State to practice its beliefs."

*Schempp* produced three concurring opinions, notably a 74-page opinion by Justice **WILLIAM J. BRENNAN JR.** As in *Engel,* the sole dissent came from Justice **POTTER STEWART.** Again he disagreed with the majority's emphasis on the Establishment Clause's taking precedence over the Free Exercise Clause. For Stewart, the key factor was whether the states in the case had actually coerced students into praying or Bible reading. He did not think so.

*Edward L. Schempp, his wife, Sidney, and two of his three children, Roger and Donna, challenged a Pennsylvania law that made Bible reading in the state's schools compulsory.*

AP/WIDE WORLD PHOTOS

*Schempp* concluded the initial round of the Supreme Court's prayer ban. However, the issue did not fade from public, political, and religious concern, and it came before the Supreme Court two decades later in **WALLACE V. JAFFREE**, 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985) (a one-minute period of silence for meditation or prayer had no secular purpose and was created with religious purpose).

The constitutionality of student-led prayers made its way to the Supreme Court in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000). The Court held that a Texas public school district could not let its students lead prayers over the public-address system before its high school football games. The school district's sponsorship of the public prayers by elected student representatives was unconstitutional because the schools could not coerce anyone to support or participate in religion. The Establishment Clause barred student prayers as well as those

conducted by clergy at school events such as graduation (**LEE V. WEISMAN**, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 [1992]).

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Constitutional Amendment; Religion; Schools and School Districts.

## ABJURATION

*A renunciation or* **ABANDONMENT** *by or upon oath. The renunciation under oath of one's citizenship or some other right or privilege.*

## ABODE

*One's home; habitation; place of dwelling; or residence. Ordinarily means "domicile." Living place impermanent in character. The place where a person dwells. Residence of a legal voter. Fixed place of residence for the time being. For* **SERVICE OF PROCESS**, *one's fixed place of residence for the time being; his or her "usual place of abode."*

**Abode: Home Ownership vs. Rentals in the United States, in 2001**

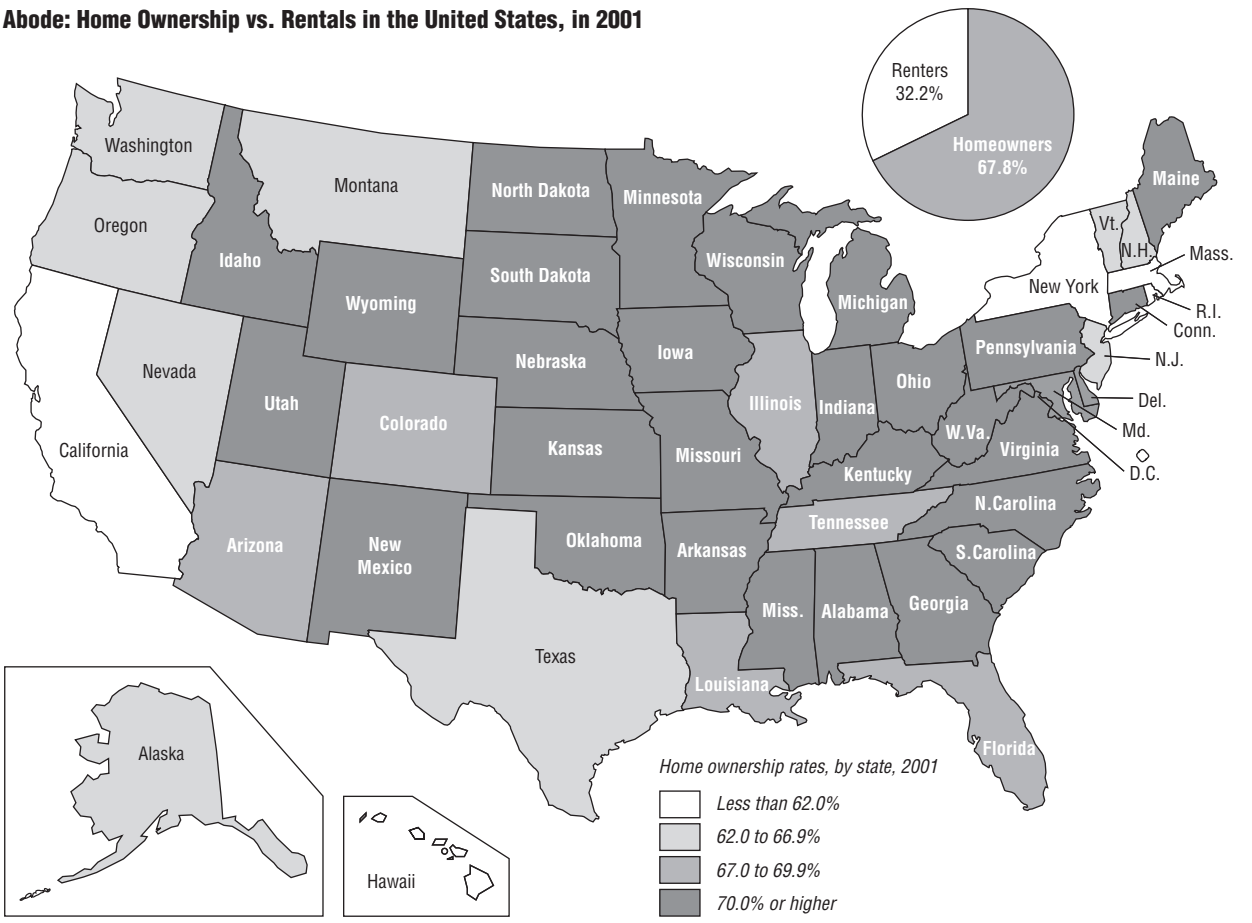


SOURCE: U.S. Census Bureau, *Housing Vacancy Survey*, 2001.

## ABOLITION

*The destruction, annihilation, abrogation, or extinguishment of anything, but especially things of a permanent nature—such as institutions, usages, or customs, as in the abolition of* SLAVERY.

In U.S. LEGAL HISTORY, the concept of abolition generally refers to the eighteenth- and nineteenth-century movement to abolish the slavery of African Americans. As a significant political force in the pre-Civil War United States, the abolitionists had significant effect on the U.S. legal and political landscape. Their consistent efforts to end the institution of slavery culminated in 1865 with the ratification of the Constitution's THIRTEENTH AMENDMENT, which outlawed slavery. The abolitionist ranks encompassed many different factions and people of different backgrounds and viewpoints, including European and African Americans, radicals and moderates. The motives of the abolitionists spanned a broad spectrum, from those who opposed slavery as unjust and inhumane to those whose objections were purely economic and focused on the effects that an unpaid Southern workforce had on wages and prices in the North.

Efforts to abolish slavery in America began well before the Revolutionary War and were influenced by similar movements in Great Britain and France. By the 1770s and 1780s, many antislavery societies, largely dominated by Quakers, had sprung up in the North. Early American leaders such as BENJAMIN FRANKLIN, ALEXANDER HAMILTON, JOHN JAY, and THOMAS PAINE made known their opposition to slavery.

The early abolitionists played an important role in outlawing slavery in Northern states by the early nineteenth century. Vermont outlawed slavery in 1777, and Massachusetts declared it inconsistent with its new state constitution, ratified in 1780. Over the next three decades, other Northern states, including Pennsylvania, New York, and New Jersey, passed gradual emancipation laws that freed all future children of slaves. By 1804, every Northern state had enacted some form of emancipation law.

In the South, where slavery played a far greater role in the economy, emancipation moved at a much slower pace. By 1800, all Southern states except Georgia and South Carolina had passed laws that eased the practice of private manumission—or the freeing of slaves by individual slaveholders. Abolitionists won a further victory in the early 1800s when the United States outlawed international trade in slaves. However, widespread SMUGGLING of slaves continued.

*Members of the Pennsylvania Abolition Society (seated, far right, William Lloyd Garrison, founder of* The Liberator, *an abolitionist newspaper).*
NATIONAL PORTRAIT GALLERY

During the first three decades of the 1800s, abolitionists continued to focus largely on gradual emancipation. As the nation expanded westward, they also opposed the introduction of slavery into the western territories. Although abolitionists had won an early victory on this front in 1787, when they succeeded in prohibiting slavery in the Northwest Territory, their efforts in the 1800s were not as completely successful. The MISSOURI COMPROMISE OF 1820 (3 Stat. 545), for example, stipulated that slavery would be prohibited only in areas of the LOUISIANA PURCHASE north of Missouri's southern boundary, except for Missouri itself, which would be admitted to the Union as a slave state. Slavery in the territories remained one of the most divisive issues in U.S. politics until the end of the Civil War in 1865.

Beginning in the 1830s, evangelical Christian groups, particularly in New England, brought a new radicalism to the cause of abolition. They focused on the sinfulness of slavery and sought to end its practice by appealing to the consciences of European Americans who supported slavery. Rather than endorsing a gradual emancipation, these new abolitionists called for the immediate and complete emancipation of slaves without compensation to slaveowners. Leaders of this movement included WILLIAM LLOYD GARRISON, founder of the abolitionist newspaper the *Liberator*; FREDERICK DOUGLASS, a noted African American writer and orator; the sisters Sarah Moore Grimké and Angelina Emily Grimké, lecturers for the Amer-

*This frontispiece illustration, entitled "A Slave Father Sold Away from His Family," is from the* Child's Antislavery Book *(1860). The book was distributed by the Sunday School Union in an effort to alert children to the horrors of slavery.*
CORBIS

ican Anti-Slavery Society and pioneers for **WOMEN'S RIGHTS**; Theodore Dwight Weld, author of an influential antislavery book, *American Slavery as It Is* (1839); and later, **HARRIET BEECHER STOWE**, whose 1852 novel *Uncle Tom's Cabin* was another important abolitionist tract.

In 1833, this new generation of abolitionists formed the American Anti-Slavery Society (AAS). The organization grew quickly, particularly in the North, and by 1840 had reached a height of 1,650 chapters and an estimated 130,000 to 170,000 members. Nevertheless, abolitionism remained an unpopular cause even in the North, and few mainstream politicians openly endorsed it.

To achieve its goals, the AAS undertook a number of large projects, many of which were frustrated by Southern opposition. For example, the organization initiated a massive postal campaign designed to appeal to the moral scruples of Southern slaveowners and voters. The campaign flooded the South with antislavery tracts sent through the mails. Although a law that would have excluded antislavery literature from the mails was narrowly defeated in Congress in 1836, pro-slavery forces, with the help of President Andrew Jackson's administration and local postmasters, effectively ended the dissemination of abolitionist literature in the South. The AAS was similarly frustrated when it petitioned Congress on a variety of subjects related to slavery. Congressional gag rules rendered the many abolitionist petitions impotent. These rules of legislative procedure allowed Congress to table and effectively ignore the antislavery petitions.

By the 1840s, the evangelical abolitionist movement had begun to break up into different factions. These factions differed on the issue of gradual versus radical change and on the inclusion of other causes, including women's rights, in their agendas. Some abolitionists decided to form a political party. The Liberty party, as they named it, nominated James G. Birney for U.S. president in 1840 and 1844. When differences later led to the dissolution of the Liberty party, many of its members created the **FREE SOIL PARTY**, which took as its main cause opposition to slavery in the territories newly acquired from Mexico. They were joined by defecting Democrats who were disgruntled with the increasing domination of Southern interests in their party. In 1848, the Free Soil party nominated as its candidate for U.S. president **MARTIN VAN BUREN**, who had served as the eighth president of the United States from 1837 to 1841, but Van Buren did not win. (**ZACHARY TAYLOR** won the election.)

After passage of the **FUGITIVE SLAVE ACT OF 1850** (9 Stat. 462), which required Northern states to return escaped slaves and imposed penalties on people who aided such runaways, abolitionists became actively involved in the Underground Railroad, a secretive network that provided food, shelter, and direction to escaped slaves seeking freedom in the North. This network was largely maintained by free African Americans and is estimated to have helped 50,000 to 100,000 slaves to freedom. Harriet Tubman, an African American and ardent abolitionist, was one organizer of the Underground Railroad. During the 1850s, she bravely traveled into Southern states to help other African Americans escape from slavery, just as she had escaped herself.

Whereas the vast majority of abolitionists eschewed violence, **JOHN BROWN** actively participated in it. In response to attacks led by pro-slavery forces against the town of Lawrence, Kansas, Brown, the leader of a Free Soil militia, led a **REPRISAL** attack that killed five pro-slavery settlers in 1856. Three years later, he undertook an operation that he hoped would inspire a massive slave rebellion. Brown and 21 followers began by capturing the U.S. arsenal at Harpers

Ferry, Virginia (now West Virginia). Federal forces under Robert E. Lee promptly recaptured the arsenal, and Brown was hanged shortly thereafter, becoming a martyr for the cause.

In 1854, abolitionists and Free Soilers joined with a variety of other interests to form the REPUBLICAN PARTY, which successfully stood ABRAHAM LINCOLN for president in 1860. Although the party took a strong stand against the introduction of slavery in the territories, it did not propose the more radical option of immediate emancipation. In fact, slavery ended as a result of the Civil War, which lasted from 1861 to 1865. Not a true abolitionist at the start of his presidency, Lincoln became increasingly receptive to antislavery opinion. In 1863, he announced the EMANCIPATION PROCLAMATION, which freed all slaves in areas still engaged in revolt against the Union. The proclamation served as an important symbol of the Union's new commitment to ending slavery. Lincoln later supported the ratification of the Thirteenth Amendment, which officially abolished slavery in the United States.

After the war, former abolitionists, including radical Republicans such as Senator CHARLES SUMNER (R-Mass.), continued to lobby for constitutional amendments that would protect the rights of the newly freed slaves, including the FOURTEENTH AMENDMENT, ratified in 1868, which guaranteed citizenship to former slaves and declared that no state could "deprive any person of life, liberty, or property, without DUE PROCESS OF LAW; nor deny to any person … the EQUAL PROTECTION of the laws." Former abolitionists also lobbied, albeit unsuccessfully, for land redistribution that would have given ex-slaves a share of their former owners' land.

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## ABORTION

*The spontaneous or artificially induced expulsion of an embryo or fetus. As used in legal context, the term usually refers to induced abortion.*

### History

English COMMON LAW generally allowed abortion before the "quickening" of the fetus (i.e., the first recognizable movement of the fetus in the uterus), which occurred between the sixteenth and eighteenth weeks of pregnancy. After quickening, however, common law was less clear as to whether abortion was considered a crime. In the United States, state legislatures did not pass abortion statutes until the nineteenth century. After 1880, abortion was criminalized by statute in every state of the Union, owing in large measure to strong anti-abortion positions taken by the AMERICAN MEDICAL ASSOCIATION (AMA). Despite the illegality, many thousands of women every year sought abortions. Under a heavy cloak of shame and secrecy, women often had abortions performed in unsafe conditions, and many died or suffered complications from the procedures.

The abortion laws developed in the late nineteenth century existed largely unchanged until the 1960s and 1970s, when a number of different circumstances combined to bring about a movement for their reform. WOMEN'S RIGHTS groups, doctors, and lawyers began an organized abortion reform movement to press for changes, in part because many of them had witnessed the sometimes deadly complications resulting from illegal abortions. Women's organizations also began to see abortion reform as a crucial step toward the goal of equality between the sexes. They argued that women must be able to control their pregnancies in order to secure equal status. In addition, new concerns regarding explosive population growth and its effect on the environment increased public awareness of the need for BIRTH CONTROL. At the same time, other countries developed far more permissive laws regarding abortion. In Japan and Eastern Europe, abortion was available on demand, and in much of Western Europe, abor-

# Three Sides to the Abortion Debate

To what extent does a woman have a right to obtain an abortion? And to what extent does a person have a right to protest the practice of abortion? These are two fundamental questions, and two conflicting rights, that have emerged in the decades following the U.S. Supreme Court's controversial decision in the 1973 case **ROE V. WADE,** 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147. With time, the conflict between those who differ on the answers to these questions, and the interpretation of these rights, has become more and more heated, to the point of violence. The question of access to abortion clinic property—whether to obtain clinic services or to protest them—has become a pressing issue.

Three major points of view dominate the abortion debate: the pro-choice, or abortion rights, view; the moderate pro-life, or moderate anti-abortion, view; and the extremist (or militant) pro-life, or anti-abortion, view.

The pro-choice, or abortion rights, side of the debate is made up of a number of women's rights, family planning, and medical organizations, and other groups of concerned citizens and professionals. These include the **NATIONAL ORGANIZATION FOR WOMEN** (NOW), the Planned Parenthood Federation of America, the National Abortion Federation, and the National Abortion and Reproductive Rights Action League (NARAL). Many religious organizations have also taken positions that endorse the right of women to seek abortions in specific situations. Most of these pro-choice groups argue that a woman's decision to carry a pregnancy to term is a private choice that should not be interfered with by the state. They also maintain that abortion, although not a preferred family planning method, has always been used by women to gain control over their pregnancies. According to this view, women must have safe and legal access to abortion; without this access, women are likely to seek unsafe, illegal abortions that may result in their injury or death. Pro-choice advocates also maintain that giving women control over their reproductive functions—what they call their reproductive rights—is a fundamental requirement for achieving equality between men and women in U.S. society. Norma McCorvey, who sought anonymity as Jane Roe in *Roe,* spoke eloquently for the pro-choice position in a 1989 speech before a women's rally:

> Prior to *Roe v. Wade,* approximately one million women had illegal abortions each year. Approximately 5,000 of these women were killed. Another 100,000 were hospitalized from botched abortions.
>
> Obviously, abortion will continue whether it is legal or not. My concern is for the safety of millions of women should our freedom of choice be taken away from us. I want it clearly understood that I do not promote abortion. I promote personal choice.
>
> If we return to the antique methods of dealing with unwanted pregnancies that existed before *Roe v. Wade,* the women's movement will be taking an enormous step backward. We are on the verge of having our reproductive freedom taken away from us if we do not take a stand and let our voices be heard NOW. (In 1995, McCorvey had a "born-again" experience and switched sides on the abortion issue.)

Pro-choice groups therefore remain committed to the constitutional right to privacy defined in *Roe.* They view anti-abortion demonstrations that prevent women from obtaining abortions as interfering with that right to privacy.

The pro-choice group also has a range of viewpoints within it. While all persons who describe themselves as pro-choice support a general right to abortion, some oppose some kinds of abortions, such as late-term abortions.

The moderate pro-life movement consists of many different organizations, including the **NATIONAL RIGHT TO LIFE COMMITTEE**, Human Rights Review, and Feminists for Life of America. Although its members are extremely diverse, most come from religious groups such as the Catholic Church and evangelical Protestant denominations. Generally, these groups believe that the fetus is a

tion was permitted to protect the mother's health.

Public awareness of the abortion issue also increased through two incidents in the early 1960s that caused a greater number of children to be born with physical defects. In 1961, the drug thalidomide, used to treat nausea during pregnancy, was found to cause serious birth defects. And a 1962–65 German measles epidemic caused an estimated 15 thousand children to be born with defects. Pregnant women who were affected by these incidents could not seek abortions because of the strict laws then in existence.

Reacting to these and other developments, and inspired by the successes of the **CIVIL RIGHTS MOVEMENT** of the 1950s and 1960s, women's rights organizations—including the **NATIONAL ORGANIZATION FOR WOMEN** (NOW), formed in 1966—sought to reform abortion

person with rights equal to those of other people, and some of these identify the unborn person as existing in the embryonic stage or from the moment of conception. Many are willing to allow abortion in certain cases, usually when pregnancy threatens the health of the mother or has resulted from rape or **INCEST**. Moderates, when they support changes in abortion laws and regulations, differ from militants in their emphasis on using existing legal channels.

Militant pro-life groups share many of the views of moderate groups, but they favor an activist use of civil disobedience to prevent abortion procedures and to save or rescue the lives of the unborn. Randall Terry and Flip Benham, of the most well known anti-abortion group, Operation Rescue, are representative of the militant views. Terry, Operation Rescue's founder and leading figure, participated in his first anti-abortion protest in 1984 and has served time in prison because of his demonstrations. As an evangelical Protestant Christian, Terry sees abortion as the work of the devil: "I believe that there is a devil, and here's Satan's agenda. First, he doesn't want anyone having kids. Secondly, if they do conceive, he wants them killed. If they're not killed through abortion, he wants them neglected or abused, physically, emotionally, sexually." Terry opposes abortion in all cases. His group's main tactics, he said, included "rescue missions, boycotts and protests."

A minority of the militant anti-abortion activists sanction the use of physical force. A small number even regard the killing of abortion providers as justifiable **HOMICIDE**. When asked to explain this increasing tendency toward violence, militant pro-life leader Joseph Scheidler, of the Pro-Life Action Network, blamed it on the 1994 Freedom of Access to Clinic Entrances Act (FACE) and buffer zone restrictions that kept protesters from conducting rallies at abortion clinics. Scheidler argued that making it tougher to have peaceful protests gave people a rationale for having violent protests. Benham, of Operation Rescue, condemned the anti-abortion killings. However, after John Salvi murdered two people and wounded others in an abortion clinic shooting in late 1994, Benham commented, "There is little that federal marshals or anyone else can do to halt this murder and violence. We will not have peace outside the womb until peace is restored within the womb." Added Terry, "We're involved in a cultural civil war." In February 2003, Scheidler and his group won a major victory when the U.S. Supreme Court ruled 8 to 1 that the RICO statute was improperly used against the group and other pro-life activists, in the case brought against them by the National Organization for Women (*Scheidler v. Nat'l Organization for Women, Inc.,* 537 U.S. 393, 123 S. Ct. 1057, 154 L. Ed. 2d 991 [2003]).

In the end, the extremist position may have done more to hurt than to help the anti-abortion cause. The publicized violence of the movement, in combination with the new prosecutorial powers granted in FACE, served to alienate many of the more moderate individuals in pro-life groups, reducing the membership of those groups to a militant core and making those outside the groups less sympathetic to their cause.

But as a positive result of the fallout, significant numbers from both sides tried to find common ground and an end to the mutual mistrust and ill will. Aptly calling themselves the Common Ground Network for Life and Choice, the alliance made its largest impact with the political issue of partial-birth abortions, when it began a campaign to ban the procedures. This more subtle collective voice of concerned citizens appeared to represent an important change in the direction of abortion debate. In specific, the committed extremists on both ends were being replaced with a new and more sophisticated national consensus concerning the acceptable limits of abortion rights. As of March 2003, the Partial Birth Abortion Ban Act had won approval from the U.S. Senate and was expected to win approval from the House of Representatives later that spring.

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### CROSS-REFERENCES

Civil Rights Acts; Schools and School Districts.

laws through legislation and lawsuits. They hoped to educate a largely male dominated legal and judicial profession about this important issue for women. Their work, supported by such groups as the **AMERICAN CIVIL LIBERTIES UNION** (ACLU), quickly began to have an effect. Between 1967 and 1970, 12 states adopted abortion reform legislation. However, the abortion activist groups began to see the abortion issue as a question of social justice and began to press for more than reform. Under the rallying cry of "reproductive freedom," they began to demand an outright repeal of existing state laws and unobstructed access for women to abortion.

The increase in abortion-related cases before the courts eventually resulted in the need for clarification of the law by the Supreme Court. After considering many abortion-related appeals and petitions, on May 31, 1971, the Court accepted two cases, **ROE V. WADE**, 410 U.S.

113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), and *Doe v. Bolton,* 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), for hearing.

### Roe v. Wade and Doe v. Bolton

Although the two cases before the Court appeared by their titles to involve the fates of two individuals, Roe and Doe, in reality both suits were brought by many people representing many different interests. *Roe v. Wade* was argued on behalf of all women of the state of Texas—in legal terminology, it was a CLASS ACTION suit. Thirty-six abortion reform groups filed briefs, or reports, with the court on Roe's behalf. These included women's, medical, university, public health, legal, WELFARE, church, population control, and other groups. The anti-abortion side of the case included representatives from seven different anti-abortion groups and the attorneys general of five states.

*Roe* involved a person using the pseudonym Jane Roe—actually Norma McCorvey, who revealed her identity in 1984. Roe, an unmarried, pregnant woman from Texas, wanted to have an abortion, but an existing abortion statute prevented her from doing so. The Texas statute, originally passed in 1857, outlawed abortion except to save the mother's life. Roe filed a lawsuit in federal district court on behalf of herself and all other pregnant women. She sought to have the abortion statute declared unconstitutional as an invasion of her right to privacy as was protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments in GRISWOLD V. CONNECTICUT, 381 U.S. 479, 513, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). She also sought to have an INJUNCTION, or court order, issued against the statute's enforcement so that she might go forward with the abortion. The abortion reform movement attached two other cases to Roe's in an attempt to represent a wider range of the interests involved in the issue. A physician, James Hallford, who was being prosecuted under the statute for two abortions he had performed, also filed suit against the Texas law, as did a childless couple, the Does.

The three-judge district court combined Roe's case with the cases of Hallford and the Does, but later dismissed the suit brought by the Does on the grounds that neither had violated the law and the woman was not pregnant. The district court agreed with Roe that the law was unconstitutionally vague and violated her right to privacy under the Ninth Amendment—which allows for the existence of rights, like that of privacy, not explicitly named in the Constitution's Bill of Rights—and the FOURTEENTH AMENDMENT. It refused, however, to grant the injunction allowing her to go ahead with the abortion. Roe then appealed the denial of the injunction to the U.S. Supreme Court.

*Doe v. Bolton* involved a 1968 Georgia statute that allowed abortion if necessary to save the mother's life, in the case of pregnancy resulting from rape or INCEST, or if the baby was likely to be born with serious birth defects (Ga. Crim. Code § 26-1202 a,b). However, the statute also created procedural requirements that effectively would have allowed few abortions. Those requirements included hospital accreditation, committee approval, two-doctor agreement, and state residency. The case concerned Mary Doe, who had sought an abortion at Grady Memorial Hospital, in Atlanta. She claimed that she had been advised that pregnancy would endanger her health, but the hospital's Abortion Rights Committee denied her the abortion. She sought a DECLARATORY JUDGMENT holding that the Georgia law unconstitutionally violated her right to privacy as well as her Fourteenth Amendment guarantees of DUE PROCESS and EQUAL PROTECTION. She also sought an injunction against the law's enforcement.

*Roe* and *Doe* were filed in March and April of 1970, and the women's pregnancies would not have lasted through December 1970. The Court heard the cases in December 1971 and October 1972, and they were not resolved until January 1973, when the Court announced its decisions.

In *Roe,* the Court, on a 7–2 vote, found the Texas abortion statute unconstitutional. In its opinion, written by Justice HARRY A. BLACKMUN, the Court held that the law violated a right to privacy guaranteed by the Due Process Clause of the Fourteenth Amendment. However, the Court further held that such a right is a "qualified" one and subject to regulation by the state. The state has "legitimate interests in protecting both the pregnant woman's health and the potentiality of human life" (i.e., the life of the fetus). To specify when the state's interests emerge, the Court divided pregnancy into twelve-week trimesters. In the first trimester, the state cannot regulate abortion or prevent a woman's access to it. It can only require that abortions be performed by a licensed physician and under medically safe conditions. During the second trimester, the state can regulate abortion procedures as long as the regulations are reason-

ably related to the promotion of the mother's health. In the third trimester, the state has a dominant interest in protecting the "potentiality" of the fetus's life. A state may prohibit abortions during this time except in cases where they are essential to preserve the life or health of the mother. The Court also cited judicial precedent in holding that the fetus is not a "person" as defined by the Fourteenth Amendment.

In *Doe,* the Court found the Georgia statute to be unconstitutional as well, holding that it infringed on privacy and personal liberty by permitting abortion only in restricted cases. The Court ruled further that the statute's four procedural requirements—hospital accreditation, hospital committee approval, two-doctor agreement, and state residency—violated the Constitution. The state could not, for example, require that abortions be performed only at certain hospitals, because it had not shown that such restrictions advanced its interest in promoting the health of the pregnant woman. Such a requirement interfered with a woman's right to have an abortion in the first trimester of pregnancy, which the Court in *Roe* had declared was outside the scope of state regulation.

### After Roe v. Wade

After the Supreme Court decisions in *Roe v. Wade* and *Doe v. Bolton,* states began to liberalize their abortion laws. However, abortion quickly became a divisive political issue for Americans. Grassroots opposition to abortion—supported by such influential institutions as the Catholic Church— was strong from the start. By the early 1980s, the anti-abortion movement had become a powerful political force.

President RONALD REAGAN, who came to office in 1981 and served through 1989, strongly opposed abortion and used his administration to try to change abortion rulings. He appointed a SURGEON GENERAL, Dr. C. EVERETT KOOP, who opposed abortion, and Reagan made it a top priority of his JUSTICE DEPARTMENT to effect a reversal of *Roe.* Reagan even published a book on the subject in 1984, *Abortion and the Conscience of a Nation,* which contains many of the essential positions of the anti-abortion movement. Reagan argued that the fetus has rights equal to those of people who are already born. He also cited figures indicating that 15 million abortions had been performed since 1973, and he stated his belief that the fetus experienced great pain as a result of the abortion procedure. He quoted a statement by Mother Teresa, the famed nun who helped the poor of Calcutta: "The greatest misery of our time is the generalized abortion of children." While abortion rights, or pro-choice, advocates argued that there were public health advantages of the new abortion laws, opponents of abortion, such as Reagan, referred to abortion as a "silent holocaust."

*Supporters of abortion rights at a January 2003 candlelight vigil near the Supreme Court building in Washington, D.C. The Capital dome is illuminated in the background.*

AP/WIDE WORLD PHOTOS

The anti-abortion, or pro-life, movement has challenged abortion in a number of different ways. It has sponsored constitutional amendments that would effectively reverse *Roe,* as well as legislation that would limit and regulate access to abortion, including government financing of abortion procedures. Some anti-abortion groups have practiced civil disobedience, attempting to disrupt and block abortion clinic activities. The most extreme opponents have resorted to violence and even murder in an attempt to eliminate abortion.

All these methods have resulted in a great deal of litigation and added to the complexity of the abortion issue. Many of the subsequent cases have come before the Supreme Court. Observers have often expected the Court to overturn its *Roe* decision, particularly after the Reagan administration appointed three justices to the Court. However, while the Court has allowed increasingly strict state regulation of abortion since *Roe,* it has stuck to the essential finding in the case that women have a limited right to terminate their pregnancies. This entitlement is incorporated in the right of privacy guaranteed by the Fourteenth Amendment.

**Constitutional Amendments** Although amending the Constitution is the most direct way to reverse *Roe v. Wade,* neither Congress nor the states have passed a constitutional amendment related to the issue of abortion. The antiabortion forces have found it extremely difficult to achieve a public consensus on this divisive issue. However, at least 19 state legislatures have passed applications to convene a constitutional convention to propose an amendment that would outlaw abortions. Congressional representatives have also worked to bring such an amendment about. The many dozens of amendments that have been proposed can be grouped into two main categories: STATES' RIGHTS, and the right to life. The former would restore to the states the same control over abortion that they exercised prior to *Roe.* The latter would designate the fetus as a person, entitled to all the privileges and rights guaranteed under the Fourteenth Amendment.

One unsuccessful attempt at changing the Constitution was the Hatch amendment of 1983, sponsored by Senator Orrin G. Hatch (R-Utah), which stated, "A right to abortion is not secured by this Constitution." It did not receive the two-thirds majority necessary in Congress to be submitted to the states for ratification.

Congress has also sponsored legislation that would effectively reverse *Roe.* For example, the Human Life Bill (S. 158), introduced by Senator JESSE HELMS (R-N.C.) in 1981, would have established that the fetus is a person, entitled to the full rights and privileges guaranteed by the Fourteenth Amendment. The bill did not pass, and it is doubtful whether Congress has the constitutional authority to overturn a Supreme Court precedent without violating the SEPARATION OF POWERS.

**Federal Financing** In 1976, Representative Henry J. Hyde (R-Ill.) sponsored an amendment to the FEDERAL BUDGET appropriations bill for the DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS). His amendment denied MEDICAID funding for abortion unless the woman's life is in danger or she is pregnant as a result of rape or incest, but only if the woman reports the incident at the time of its occurrence. Despite opposition from pro-abortion groups, Hyde attached this amendment every year to the same appropriations bill. The Supreme Court has upheld the constitutionality of the Hyde amendment (*Harris v. McRae,* 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 [1980]; *McGowan v. Maryland,* 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 [1961]). Evidence suggests that these federal actions have caused fewer women to have abortions.

In the late 1980s, with its composition having been changed by three Reagan appointees (Justices SANDRA DAY O'CONNOR, ANTONIN SCALIA, and ANTHONY M. KENNEDY), the Court issued a ruling related to federal financing of abortion that many perceived as a dramatic shift against abortion rights. In WEBSTER V. REPRODUCTIVE HEALTH SERVICES, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989), the Supreme Court upheld a Missouri law prohibiting the use of public funds and buildings for abortion procedures and counseling, including a provision that required fetal testing for viability for abortions performed after the twentieth week of pregnancy (Mo. Rev. Stat. §§ 1.205.1, 1.205.2, 188.205, 188.210, 188.215). Scalia, appointed in 1986, argued in his concurring opinion that *Roe v. Wade* should be overruled and that the Court had missed an opportunity in not doing so in this case.

The *Webster* decision resulted in a flood of new state legislation related to abortion. Many states sought to reactivate old abortion laws that had never been taken off the books subsequent to *Roe.* Louisiana, for example, sought to reinstate an 1855 law making all abortions illegal and imposing a ten-year sentence on doctors and women violating it. However, in January 1990, a federal district court ruled that the 1855 law could not be reinstated and that subsequent laws allowing abortions in certain circumstances took precedence (*Weeks v. Connick,* 733 F. Supp. 1036 [E.D. La. 1990]). By mid-1991, Pennsylvania, Guam, Utah, and Louisiana had all enacted laws banning abortions except in limited circumstances. Pennsylvania became the first to approve new abortion restrictions when it amended its Abortion Control Act (Pa. Cons. Stat. Ann. § 3201) to create strict new regulations on abortion procedures (see the discussion of *Planned Parenthood of Southeastern Pennsylvania v. Casey* under "Other Major Abortion Regulations," later in this entry). In other states such as South and North Dakota, legislation that would have sharply restricted abortion was only narrowly defeated. However, some states, including Connecticut and Maryland, reacted to the *Webster* decision by passing legislation protecting women's rights to abortion.

Before the Court ruled on Pennsylvania's Abortion Control Act, it decided a major case relating to federal funding and regulation of family planning clinics. In *Rust v. Sullivan,* 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), the Court upheld a series of regulations issued in 1988 by the Reagan administration's Justice Department affecting family planning clinics that receive funds through title X of the Public Health Service Act of 1970, 42 U.S.C.A. §§ 300–300a-6. The regulations prohibited clinic personnel from providing any information about abortion, including counseling or referral. The regulations also required that the only permissible response to a request for an abortion or referral was to state that the agency "does not consider abortion an appropriate method of planning and therefore does not counsel or refer for abortion." This regulation became known to its detractors as the GAG RULE.

The regulations also prohibited title X-funded family planning clinics from LOBBYING for legislation that advocated or increased access to abortion, and they required that such clinics be "physically and financially separate" from abortion activities. Although a family planning agency could still conduct abortion-related activities, it could not use federal money to fund such activities. Chief Justice WILLIAM H. REHNQUIST, who wrote the Court's opinion, disagreed with the contentions of the plaintiffs—several family planning agencies—that the federal regulations violated a woman's due process right to choose whether to terminate her pregnancy. He pointed out that the Due Process Clause generally confers no affirmative right to government aid. The government has no constitutional duty to subsidize abortion and may validly choose to fund "childbirth over abortion." Rehnquist noted that a woman's right to seek medical advice outside a title X-funded agency remained "unfettered."

Justice Blackmun, author of the *Roe* majority opinion, dissented, arguing that the regulations, because they restricted speech as a condition for accepting public funds, violated the First Amendment's free speech provision. The regulations, he wrote, suppressed "truthful information regarding constitutionally protected conduct of vital importance to the listener." Blackmun saw the regulations as improper government interference in a woman's decision to continue or end a pregnancy, and he claimed that they rendered the landmark *Roe* ruling "technically" intact but of little substance.

On January 22, 1993, shortly after taking office, President BILL CLINTON signed a memorandum that revoked the gag rule, maintaining that it "endangers women's lives by preventing them from receiving complete and accurate medical information." On February 5, 1993, the secretary of HHS complied with the president's decision and declared that the department would return to title X regulations that were in effect before February 1988. Title X-funded clinics would again be able to provide nondirective counseling on all options to a patient and to refer her for abortion services if she chose. However, such clinics would still be prohibited from engaging in pro-choice lobbying or litigation.

### Other Major Abortion Regulations

Among the first abortion regulations to be enacted after *Roe v. Wade* were requirements for the informed consent of the woman seeking an abortion. Although informed consent laws vary from jurisdiction to jurisdiction, it can generally be given only after a woman receives certain information from a doctor, medical professional, or counselor. This information can include the nature and risks of the abortion procedure, the risk of carrying the pregnancy to term, the alternatives to abortion, the probable age of the fetus, and specific government aid available for care of a child. Related to this issue are other types of consent—including parental and spousal consent—that states have sought to require before an abortion can be performed.

In 1976, the Court reviewed a Missouri statute requiring that the following provisions be met for an abortion to be performed: that a woman in the first twelve weeks of her pregnancy give written consent; that a wife obtain her husband's consent; and that a minor obtain her parents' consent, unless a medical necessity exists (Mo. Ann. Stat. § 188.010 et seq.). The statute also required that physicians and clinics performing abortions keep careful records of their procedures and that criminal and civil liability be imposed upon a physician who failed to observe standards of professional care in performing abortions. Planned Parenthood, a family planning organization, initiated a lawsuit to declare the law unconstitutional. The Supreme Court, in *Planned Parenthood v. Danforth,* 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976), upheld the requirement that the woman give

written consent in the first trimester, as well as the requirement that records of abortion procedures be kept. However, the Court ruled that a woman need not inform her husband of an abortion performed in the first trimester, because the state may not interfere in the woman's private decision concerning her pregnancy during that period. For the same reason, the Court struck down the law requiring a minor to obtain parental consent in the first trimester.

The Court clarified its position on parental consent in later rulings. In *Bellotti v. Baird,* 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979), it struck down a state law that required the consent of both parents or judicial approval—commonly called judicial bypass—before an unmarried minor could obtain an abortion. The Court found the law unconstitutional because it gave third parties—the child's parents or the court—absolute VETO power over the minor's ability to choose abortion, regardless of her best interests, maturity, or ability to make informed decisions. In *H.L. v. Matheson,* 450 U.S. 398, 101 S. Ct. 1164, 67 L. Ed. 2d 388 (1981), the Court upheld a Utah statute requiring that a physician notify the parents of a minor before performing an abortion on her (Utah Code Ann. § 76-7-304). Since the law required only notification rather than consent, the Court reasoned that it did not give any party veto power over the minor's decision. In *Hodgson v. Minnesota,* 497 U.S. 417, 110 S. Ct. 2926, 11 L. Ed. 2d 344 (1990), the Court upheld a parental notification statute because the statute's provision for judicial bypass took into account the best interests of the minor, her maturity, and her ability to make an informed decision.

In 1982, Pennsylvania passed the Abortion Control Act, which required that the woman give "voluntary and informed" consent after hearing a number of statements, including declarations of the following: the "fact that there may be detrimental physical and psychological effects" to the abortion; the particular medical risks associated with the abortion method to be employed; the probable gestational age of the fetus; the "fact that medical assistance benefits may be available" for prenatal care and childbirth; and the "fact that the father is liable to assist" in CHILD SUPPORT. The law also required a physician to report the woman's age, race, marital status, and number of previous pregnancies; the probable gestational age of the fetus; the method of payment for the abortion; and the basis of determination that "a child is not viable."

When the Pennsylvania law came before the Court in the 1986 case *Thornburgh v. American College of Obstetricians & Gynecologists,* 476 U.S. 747, 106 S. Ct. 2169, 90 L. Ed. 2d 779, the Reagan administration's Justice Department specifically asked the Court to overturn *Roe.* In its brief, the department argued that the Court should "abandon" *Roe* because its textual and historical basis was "so far flawed" as to be a source of instability in the law. Instead, the brief urged, the Court should leave the state legislatures free to permit or prohibit abortion as they wish. However, by a narrow (5–4) vote the Court found all the provisions of Pennsylvania's Abortion Control Act to be unconstitutional, thereby reaffirming its previous decisions upholding a woman's constitutional right to abortion. "The states," wrote Justice Blackmun in the Court's opinion, "are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." Pennsylvania defended itself by claiming that its procedures gave the pregnant woman information that would better inform her decision regarding abortion. Blackmun, although he agreed in principle with the idea of informed consent, found that the Pennsylvania procedures were designed not so much to inform as to encourage a woman to withhold her consent to an abortion.

The narrow margin of the Court's decision encouraged the anti-abortion movement. By the time the Court reached its next major abortion decision, in 1992—*Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674—many expected it to finally reverse *Roe.* Again, it did not. *Casey,* the most important abortion decision since *Roe,* concerned amendments to the same Pennsylvania Abortion Control Act of 1982. The amendments prohibited abortions after twenty-four weeks except to save the woman's life or to prevent substantial and irreversible impairment of her bodily functions; required a woman to wait twenty-four hours after giving her informed consent before receiving an abortion; allowed only a physician to give informed-consent information; required a woman to notify her spouse; and mandated that minors obtain informed consent from at least one parent or a court before receiving an abor-

tion. The plaintiffs in the case, five family planning clinics and a physician provider of abortion services, asked the Court to declare the statutes invalid.

In a close (5–4) decision, the Court again supported the basic provisions of *Roe* and upheld a woman's right to decide to obtain an abortion. The Court did, however, uphold all the Pennsylvania statutes except for the spousal notification provision, arguing that they did not present an "undue burden" to the woman's reproductive rights. Justices O'Connor, Kennedy, and DAVID H. SOUTER wrote the majority opinion, and Justices JOHN PAUL STEVENS and Blackmun wrote concurring opinions. Chief Justice Rehnquist and Justices Scalia, BYRON R. WHITE, and CLARENCE THOMAS all dissented.

Noting that the case marked the fifth time the Justice Department under the Ronald Reagan and GEORGE H. W. BUSH administrations had filed a report with the Court making known its desire to overturn *Roe,* the Court's opinion defended the reasoning of the *Roe* decision. The Court characterized the *Roe* ruling as having three major provisions:

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the state. . . . Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

In *Casey,* as in *Roe,* the Court found the constitutional basis of a woman's right to terminate her pregnancy in the Due Process Clause of the Fourteenth Amendment. As the Court stated, "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Court also invoked the legal doctrine of STARE DECISIS, the policy of a court to follow previously decided cases rather than overrule them.

However, the Court emphasized, more than it had in *Roe,* "the State's important and legitimate interest in potential life," which is a quote taken directly from *Roe.* The justices also sought to better define the "undue burden" standard, originally developed by Justice O'Connor, that the Court had used to assess the validity of any possible regulations of a woman's reproductive rights. The Court more precisely defined an undue burden as one whose "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."

The dissenting justices in the case restated their opinion that *Roe* was decided wrongly because no fundamental right for a woman to choose to terminate her pregnancy was written into the U.S. Constitution and because U.S. society, in the past, permitted laws that prohibited abortion. They also gave different arguments for upholding the Pennsylvania statute's restrictions. Such provisions had only to show a "rational basis," and using that test, they would have upheld all the challenged portions of the Pennsylvania law. Chief Justice Rehnquist and Justice Scalia both argued that the Court had misused the notion of *stare decisis* in the case, because the Court did not uphold all aspects of *Roe.* Scalia also maintained that although the liberty to terminate a pregnancy may be of great importance to many women, it is not "a liberty protected by the Constitution."

The Court's decision in *Casey* was used to strike down other state laws that sharply restricted women's access to abortion. In September 1992, citing the *Casey* decision in *Sojourner v. Edwards,* 974 F.2d 27, the U.S. Court of Appeals for the Fifth Circuit struck down a Louisiana law that would have imposed stiff sentences on doctors performing abortions for reasons other than saving the life of the mother or in cases of rape or incest if the victim reported the crime (La. Rev. Stat. Ann. 14:87). The appeals court found the statute unconstitutional because it imposed an undue burden on women seeking an abortion before fetal viability. The Supreme Court later upheld this ruling without comment (*Sojourner,* 507 U.S. 972, 113 S. Ct. 1414, 122 L. Ed. 2d 785 [1993]).

### After Planned Parenthood v. Casey

As a result of the Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* the battle over abortion moved beyond the question of whether *Roe v. Wade* would be overturned, to focus on what conditions truly constitute an American woman's right to safe, legal abortion. After a number of incidents of violence at abortion clinics, the abortion rights movement focused on lobbying for legislation and winning court cases guaranteeing access to

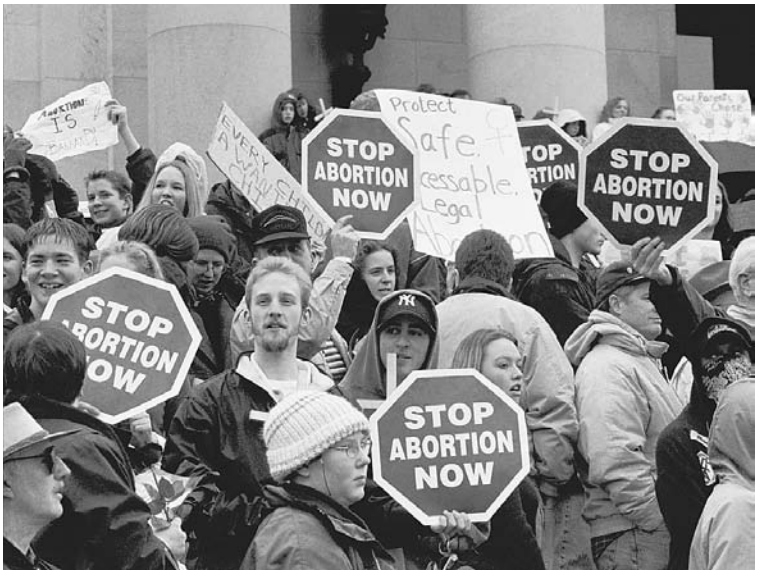


*Abortion foes participating in a "March for Life" rally in Olympia, Washington. Groups on both sides of the abortion debate have staged demonstrations and rallies in order to gain the political and emotional support of lawmakers and the public.*

AP/WIDE WORLD PHOTOS

abortion clinics. The anti-abortion movement, on the other hand, continued to vigorously oppose abortion but became increasingly split between militant and moderate factions. Behind the split was an alarming increase in violent actions by militant anti-abortion protesters. Between 1993 and 1994, five abortion providers were killed by anti-abortion militants. Although such killings undermined public support for the anti-abortion movement, they also damaged the morale of those who staff family planning clinics; some clinics even shut down. As a result, family planning services, including abortion, remain difficult to obtain for women in many parts of the United States, particularly in rural areas.

The Supreme Court decided a number of different cases surrounding the issue of anti-abortion protests, many of which made it more difficult for anti-abortion groups to disrupt the operations of family planning clinics. In *Madsen v. Women's Health Center,* 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994), the Court upheld a regulation barring abortion protesters within 36 feet of a Melbourne, Florida, clinic. In another 1994 decision, *National Organization for Women v. Scheidler,* 510 U.S. 249, 114 S. Ct. 798, 127 L. Ed. 2d 99, the Court upheld the use of the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970 (18 U.S.C.A. §§ 1961–1968) against militant anti-abortion groups. RICO, which was originally designed to combat Mafia crime, gives the government a potent tool to convict those involved in violence against abortion providers and their clinics.

In May 1994, President Clinton signed into law another tool to be used against anti-abortion militants, the Freedom of Access to Clinic Entrances Act (FACE), which allows for federal criminal prosecution of anyone who, "by force or threat of force or by physical obstruction, intentionally injures, intimidates, or interferes . . . with any person . . . obtaining or providing reproductive health services" (18 U.S.C.A. § 248). The law also makes it a federal crime to intentionally damage or destroy the property of any reproductive health facility, and it permits persons harmed by those engaging in prohibited conduct to bring private suits against the wrongdoers. The law imposes stiff penalties as well for those found guilty of violating its provisions.

Ultimately, medical technology may have as much to do with the outcome of the abortion debate as politics. New drugs have been developed that induce abortion without a surgical procedure. The most well known of these is RU-486, or mifepristone, developed by the French pharmaceutical company Roussel Uclaf. The drug blocks the action of the female hormone progesterone, preventing the implantation of a fertilized egg in the wall of the uterus. It is used with a second drug in pill form, prostaglandin, taken 48 hours later, which causes uterine contractions. The uterine lining is then sloughed off, along with any fertilized eggs. Widely used in Europe since the early 1990s, RU-486 is said to be 92 to 95 percent effective. The drug is also being tested as a possible treatment for breast cancer, endometriosis, brain tumors, and depression.

The FOOD AND DRUG ADMINISTRATION (FDA), under the Reagan and Bush administrations, banned the importation of RU-486 into the United States. However, in April 1993, the Clinton administration pressured Roussel Uclaf to license the drug for sale to the U.S. Population Council, a New York-based nonprofit organization, which said it would conduct clinical tests in the United States. In 1994, the pharmaceutical company donated its U.S. patent of the drug to the council. By 1996, the Population Council had filed for FDA approval, and in September 2000, the FDA approved the "abortion pill." Danco Laboratories, a New York-based women's health pharmaceutical company which had been given the rights by the council to manufacture and distribute mifepristone, made the drug

available to U.S. clinics by November. In the two years following its introduction, over one hundred thousand women in the United States opted to use mifepristone as an abortion option. Abortion protesters quickly rallied and began to petition the FDA to rescind their approval of the drug, claiming that mifepristone is harmful to women.

### The Pro-Life Movement and the Courts

Even before the Supreme Court's landmark 1973 abortion ruling in *Roe v. Wade,* pro-life groups were picketing and protesting at family planning clinics that perform abortions. Such groups had formed in response to an abortion reform movement that by 1970 had succeeded in liberalizing abortion laws in many states. From the start, most anti-abortion demonstrators modeled their protests on those of the civil rights movement of the 1950s and 1960s. The anti-abortion movement was led by such people as Joan Andrews, a pacifist and HUMAN RIGHTS advocate who became a hero for the movement after she spent two-and-a-half years in a Florida jail for attempting to disengage a suction machine used in abortions. The movement advocated the nonviolent approach to civil disobedience pioneered by Mohandas K. Gandhi and MARTIN LUTHER KING JR. By 1975, two years after *Roe,* Catholic groups had begun to conduct sit-ins at family planning clinics where abortions were performed. With time, evangelical Protestant groups joined the movement, and by the mid-1990s, they accounted for a majority of anti-abortion activists.

Pro-life groups have come to call their activities direct actions or rescues, believing that they are saving unborn children from murder, and their tactics have grown increasingly complex. Typical stratagems include bringing in dozens or hundreds of volunteers and blocking clinic entrances with their bodies, often chaining themselves to doors; shouting slogans, sometimes with bullhorns; attempting to intercept women leaving or entering the building and plying them with anti-abortion literature; displaying graphic pictures of fetuses; and trailing clinic employees to and from work while shouting such things as "Baby killer!" Besides demonstrating, anti-abortion groups have sponsored pregnancy crisis centers, where they counsel pregnant women, with the intention of persuading them to carry their pregnancies to term. By the mid-1980s, activists had created national organizations and networks that promoted civil disobedience to stop the practice of abortion. The most well known of these is Operation Rescue, which was started in the 1980s by Randall Terry, an evangelical Christian.

The aggressive strategies of the anti-abortion movement prompted legal responses from women's and abortion rights organizations, resulting in a number of cases that have reached the Supreme Court. In several different rulings, the Court has attempted to clarify what is and is not allowed in anti-abortion demonstrations. In making these decisions, the Court has been careful to balance the rights of the demonstrators—particularly their right to free speech—with the rights of women seeking to use family planning clinic services. In 1988, for example, in *Frisby v. Schultz,* 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420, the Court upheld a Brookfield, Wisconsin, city ordinance prohibiting pickets "focused on, and taking place in front of, a particular residence." The ordinance had been created in response to anti-abortion demonstrations targeting the private home of an obstetrician who performed abortions, a tactic assumed by the protesters after picketing at the physician's clinic had not stopped its operation. Justice Sandra Day O'Connor wrote in the Court's opinion, "There is simply no right to force speech into the home of an unwilling listener."

A later Supreme Court decision gave abortion clinics further protection: it supported the constitutionality of a court injunction prohibiting protesters from going within 36 feet of a clinic that had been a regular target of protests. In July 1994, in *Madsen v. Women's Health Center,* 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593, the High Court ruled 6–3 to let stand the 36-foot exclusion zone for the Melbourne, Florida, abortion clinic. However, the Court did strike down other provisions of the injunction, such as a 300-foot exclusion zone and restrictions on carrying banners and pictures. The ruling was considered a major defeat for the anti-abortion movement. Justice Antonin Scalia wrote a sharp dissent in which he claimed that the Supreme Court's position on abortion had claimed "its latest, greatest and most surprising victim: the First Amendment."

### Increased Violence Changes the Debate

Violence has been a part of the heated debate surrounding abortion ever since the 1973 *Roe v. Wade* decision that guaranteed a woman's

limited right to an abortion. Bombings, ARSON, and even murder have been committed by anti-abortion activists in the name of their cause. The National Abortion Federation counted more than three thousand violent or threatening incidents against abortion clinics between 1976 and 1994. In the 1990s, the extremist wing of the anti-abortion movement turned even more violent, including murder as part of its tactics. Some extremists now view killing HEALTH CARE professionals who perform abortions as justifiable HOMICIDE.

Between March 1993 and the end of 1994, five staff workers at abortion clinics were murdered by anti-abortion zealots. Dr. David Gunn was fatally shot on March 10, 1993, outside an abortion clinic in Pensacola, Florida, by Michael Griffin, who was sentenced to life in prison. In August 1994, Dr. John Bayard Britton, age 69, who had replaced Gunn as circuit-riding doctor in northern Florida, and his escort, James Barrett, age 74, were shot repeatedly in the face with a shotgun as their car pulled into the parking lot of the Ladies Clinic of Pensacola. Minutes later, police arrested Paul Hill, an anti-abortion extremist. President Bill Clinton called Britton's and Barrett's killings a case of domestic TERRORISM. Hill was executed in September 2003. In December 1994, in perhaps the most gruesome incident of all, John Salvi killed two people and wounded five more when he opened fire in two Boston-area family planning clinics. Salvi was sentenced to life in prison, where he later committed suicide.

The government and abortion rights groups have responded to the increased violence in two ways: reviewing existing laws to find those that can be used to investigate and prosecute violent groups and individuals, and creating new laws that specifically address access to abortion clinics. In 1993, women's rights groups attempted to use an existing civil rights law as precedence in *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993). They were not successful. The Supreme Court ruled that a nineteenth-century federal civil rights law (42 U.S.C.A. § 1985[3]) aimed at protecting African Americans from the KU KLUX KLAN could not be used to prevent anti-abortion protesters from blockading abortion clinics. Originally enacted as part of the KU KLUX KLAN ACT of 1871, the law was specifically aimed at addressing mob violence and VIGILANTISM against African Americans.

In 1989, a lower-court ruling found that Operation Rescue had violated trespassing and public NUISANCE laws and had conspired to violate the right to interstate travel of women seeking abortions at clinics. The court banned Operation Rescue from trespassing on or obstructing access to abortion clinics (*NOW v. Operation Rescue,* 726 F. Supp. 1483 [E.D. Va. 1989]). This decision was reversed by the Supreme Court in *Bray,* in a 6–3 ruling, when it held that women did not qualify as a class protected from discrimination by the provisions of the Ku Klux Klan Act.

After *Bray,* congressional supporters of abortion rights, Representative Charles E. Schumer (D-N.Y.) and Senator EDWARD M. KENNEDY (D-Mass.), introduced the Freedom of Access to Clinic Entrances Act (FACE), which gives federal courts the authority to issue restraining orders against protesters blockading abortion clinics (18 U.S.C.A. § 248). It was signed into law by President Clinton on May 26, 1994. The law allows for federal criminal prosecution of anyone who, "by force or threat of force or by physical obstruction, intentionally injures, intimidates, or interferes…with any person. . .obtaining or providing reproductive health services." The law also makes it a federal crime to intentionally damage or destroy the property of any reproductive health facility, and it permits persons harmed by those engaging in prohibited conduct to bring private suits against the wrongdoers. The penalties for violation of the act include imprisonment for up to one year and a fine of $10,000 for a first offense; for each subsequent offense, penalties can be up to three years' imprisonment and $25,000. FACE is patterned after existing civil rights laws, including 18 U.S.C.A. § 245(b), which prohibits force or threat of force to willfully injure, intimidate, or interfere with any person who is voting, engaging in activities related to voting, or enjoying the benefits of federal programs. Nevertheless, FACE is not identical to previous federal civil rights laws, particularly where it prohibits acts of physical obstruction.

FACE ignited immediate challenges by anti-abortion groups who claimed that it abridged their FIRST AMENDMENT right to FREEDOM OF SPEECH. Courts were unwilling to invalidate the law on this ground, reasoning that the law prohibits only conduct—as in "force," "threat of force," and "physical obstruction"—rather than speech (see *Council for Life Coalition v. Reno,* 856

F. Supp. 1422, No. 94-0843-1EG[CM], 1994 WL 363132 [S.D. Cal. 1994]).

Since the Freedom of Access to Clinic Entrances Act was passed, the Supreme Court has reviewed several laws restricting protests at clinics, with the goal of **BALANCING** the interests of protecting women seeking abortions with the freedom of speech interests of abortion clinic protesters. The Court has used an "intermediate scrutiny" standard to make their determinations. This standard analyzes the constitutionality of any regulation that infringes on speech to see whether it serves a legitimate **STATE INTEREST**, whether it is narrowly tailored to serve that interest, and whether alternative paths exist for protesters to communicate their message.

For example, in *Schenck v. Pro-Choice Network*, 519 U.S. 357, 117 S.Ct. 855 (1997), by an 8–1 vote, the Court invalidated a New York state court injunction that created a 15-foot "floating" buffer zone around any person or vehicle seeking access to or leaving an abortion clinic. The court majority held that the floating buffer zone burdened "more speech than necessary to serve a relevant government interest." However, by a 6–3 vote, the Court upheld a provision creating a 15-foot "fixed" buffer zone outside of abortion clinic doorways, driveways, and parking lots.

Three years later, the Court issued a more detailed decision involving restrictions on abortion protests. In *Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480 (2000), the Court upheld by a 6–3 majority a Colorado statute that made it unlawful for any person within one hundred feet of the entrance to any abortion clinic (or other health facility) to knowingly approach within eight feet of another person without that person's consent, with the purpose of passing out a leaflet or handbill to, displaying a sign to, engaging in oral protest with, or counseling said individual. The Court reasoned that the states' interest in protecting the health and safety of its citizens justified a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients that could result from confrontational protests. In addition, the statute did not violate the First Amendment because it protected listeners from unwanted communication, was content-neutral, and served as a valid **TIME, PLACE, AND MANNER RESTRICTION**.

Abortion rights supporters suffered a more serious setback with the Court's decision in *Scheidler v. NOW & Operation Rescue v. NOW,* 123 S.Ct. 1057 (U.S. 2003). By a vote of 8–1, the Court determined that federal **RACKETEERING** laws, such as RICO, could not be used as the basis for criminal charges against pro-life protestors who demonstrate outside abortion clinics. The Court further found that the federal Hobbs Act was not violated by protestors who had not obtained property, attempted to obtain property, or conspired to obtain property from the abortion clinics. The Hobbs Act expanded the common-law definition of **EXTORTION** to include acts by private individuals. 18 U.S.C.A. § 1951(b)(2). For purposes of the Hobbs Act requirement that property must be obtained for extortion to occur, word "obtain" means to gain possession of. The extortion provision of the Hobbs Act requires not only the deprivation, but also the acquisition, of property. Women seeking access to the abortion clinic had argued that their right to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to conduct their business—constituted "property" for purposes of the Hobbs Act, and those right had been "extorted" from them by abortion protestors.

The Supreme Court held that by interfering with, disrupting, and in some instances "shutting down" clinics that performed abortions, individual and corporate organizers of antiabortion protest network did *not* "obtain" or attempt to obtain property from women's rights organization or abortion clinics, and so did not commit "extortion" under the Hobbs Act, as required for organization and clinics to establish Racke-

*Protesters were arrested outside of a Buffalo, New York, abortion clinic during April 1992. In a 2003 ruling, the Supreme Court held that federal racketeering laws could not be used as the basis for criminal charges against pro-life protesters who demonstrate outside clinics.*

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teer Influenced and Corrupt Organizations Act (RICO) predicate offense; while organizers may have deprived or sought to deprive organization and clinics of their alleged property right of exclusive control of their business assets, they did not acquire any such property, nor did they pursue or receive something of value from organization or clinics that they could exercise, transfer, or sell. The Court also ruled that an injunction obtained against the abortions protesters litigating this case on the basis of RICO was invalid.

The debate and litigation surrounding the issue of anti-abortion protests show little sign of waning, with pro-choice advocates attempting to limit protesters' efforts to demonstrate at abortion clinics, and anti-abortion protest groups challenging the laws regulating their activities, on the grounds that such laws abridge freedom of speech.

### New Attempts to Restrict Abortion

The Supreme Court also continues to be confronted with ongoing efforts to restrict abortion. In *Mazurek v. Armstrong,* 520 U.S. 968, 117 S. Ct. 1865 (1997), the Court upheld Montana's statute requiring that only licensed physicians perform abortions, ruling that physician-only requirements in general are constitutional. In another decision out of Montana, *Lambert v. Wicklund,* 520 U.S. 292, 117 S.Ct. 1169 (1997), the Court upheld a state statute requiring one-parent notification before a minor can have an abortion. The judicial bypass procedure in this case required a minor to show that parental notification was not in her best interest.

Perhaps the biggest controversy to erupt in the late 1990s involved the debate over what is termed "partial-birth" abortion. Anti-abortion activists succeeded in having legislation passed in twenty-nine states that bans physicians from performing what doctors call dilation and extraction. It is used most commonly in the second trimester, between twenty and twenty-four weeks of pregnancy, when a woman suffers from a life-threatening medical condition or disease. In *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597 (2000), by a vote of 5–4, the Court struck down Nebraska's ban on partial-birth abortion. The Court ruled the statute was invalid because it lacked any exception to protect a woman's health, noting that the state could promote but not endanger a woman's health when it regulates the methods of abortion. It also concluded that terms in the statute were unconstitutionally vague such that it would affect not only partial birth abortion but also other constitutionally protected second-trimester abortion methods.

The importance of this decision lies in the fact that in early 2003 the U.S. Congress passed a nationwide ban on partial-birth abortions similar to the Nebraska law. The Congress had passed this law before, only to have Bill Clinton veto it. President **GEORGE W. BUSH** went on record as saying he would sign the bill if it reached his desk. If he did so, the Supreme Court could be called upon to decide whether *Stenberg* applied.

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## ABRAMS V. UNITED STATES

In *Abrams v. United States,* 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919), the U.S. Supreme Court applied the **CLEAR AND PRESENT DANGER** test in upholding the conviction of five anti-war protestors, who had been charged with **SEDITION** for distributing pamphlets criticizing President **WOODROW WILSON** during **WORLD WAR I.** However, the case is remembered more for the lone dissenting opinion written by Justice **OLIVER WENDELL HOLMES JR.**, architect of the original clear-and-present-danger test just eight months earlier. Holmes's dissent argued that

FREEDOM OF SPEECH cases analyzed under the FIRST AMENDMENT to the U.S Constitution must be subjected to a heightened level of judicial scrutiny before legislation abridging free expression could be upheld, a level of scrutiny that was eventually adopted by a majority of the Court for the balance of the twentieth century.

The case began on August 23, 1918, when Jacob Abrams, a Russian immigrant and a professed anarchist, was arrested in New York City with four others. Abrams and his comrades admitted to writing, printing, and distributing two sets of leaflets, one in English and one in Yiddish, assailing President Woodrow Wilson as a "coward" and a "hypocrite" for sending troops to fight the Soviet Union during World War I. The Yiddish leaflet called for a general strike among all workers to protest against Wilson's policy.

Abrams and the other defendants were charged with violating the Sedition Act. This act made it a crime to "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive" language about the form of government in the United States or language that was intended to bring that form of government "into contempt, scorn, contumely, and disrepute," or language that was "intended to incite, provoke, and encourage resistance to the" U.S. war effort. The act also made it illegal to "willfully urge, incite, or advocate [the] curtailment" of manufacturing and production efforts "necessary and essential to the prosecution of the war."

While the five defendants in *Abrams* were released on bail during March 1919, the Supreme Court issued two decisions upholding the convictions of several other antiwar protestors. In the first case, the Court affirmed the convictions under the 1917 Espionage Act. SCHENCK V. UNITED STATES, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919). In the other case, the Court affirmed the convictions under the 1918 Sedition Act. *Debs v. United States,* 249 U.S. 211, 39 S.Ct. 252, 63 L.Ed. 566 (1919). Both decisions were unanimous, and both decisions were written by Justice Holmes.

In *Schenck,* Holmes articulated what has become known as the "clear-and-present danger" doctrine, a doctrine by which the constitutionality of laws regulating subversive expression are evaluated in light of the First Amendment's guarantee of free speech. "The question in every case," Holmes wrote in *Schenck,* "is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

In *Schenck* Holmes concluded that the government did not run afoul of the Free Speech Clause in suppressing the protestors' antiwar expression, because Holmes said that when "a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right." Nor was Holmes's opinion in *Schenck* influenced by the possibility that the antiwar protests had no practical effect in changing the minds of passersby. "If the act (speaking, or circulating a paper), its tendency and the intent with which it is done are the same," Holmes reasoned in *Schenck,* "we perceive no ground for saying that success alone warrants making the act a crime."

*Defendants in* Abrams v. United States *prior to their 1921 deportation to Russia. Clockwise from center, Molly Steimer, Samuel Lipman, Hyman Lachowsky, and Jacob Abrams.*

Writing for the majority in *Abrams,* Justice JOHN H. CLARKE echoed Holmes's reasoning from *Schenck.* The purpose of the pamphlets written by Abrams and his comrades was to "excite" riots, sedition, and disaffection with the war, Clarke wrote. Distributed at a time when World War I was at a "supreme crisis," Clarke continued, the pamphlets' call for a general strike among munitions workers would necessarily have hindered the U.S. war effort. As a result, Clarke concluded that Abrams's pamphlets created a clear and present danger of "defeating the military plans of the government in Europe."

Holmes dissented from the *Abrams*'s majority's application of the same clear and present danger test Holmes himself had formulated just eight months earlier. Holmes still agreed that the government's power to suppress speech is greater in times of war than in times of peace, "because war opens dangers that do not exist at other times." But "nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so," Holmes cautioned.

"To allow opposition by speech," Holmes now thought, "seems to indicate that you think the speech impotent, as when a man says that he has squared the circle." A Civil War veteran who had joined the Union Army in large part due to his support for the ABOLITION movement, Holmes reminded readers that "time has upset many fighting faiths," and, accordingly, "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."

Holmes then moved to his application of the clear-and-present-danger test. In CIVIL LAW, Holmes observed that defendants may be held liable for all the foreseeable consequences of their negligent behavior. Not so in the CRIMINAL LAW, Holmes said, where a crime is not normally committed unless done "with intent to produce a consequence [and] that consequence is the aim of the deed." But intent alone is not the only factor critical to a court's First Amendment analysis, Holmes observed. Instead, a court must also evaluate the "success" of the speech "upon others." Unless the speech creates a "present danger of immediate evil," Holmes argued that Congress cannot punish the speaker without violating the federal constitution. In concluding that the "silly" leaflets distributed by Abrams and his co-defendants created no clear and present danger, Holmes said that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

Holmes's opinion in *Abrams* cemented his reputation for being one of the Supreme Court's exceptional writers of persuasive dissenting opinions. It also laid the building blocks for his reputation as a great defender of civil liberties. But most importantly, Holmes's dissenting opinion in *Abrams* changed the course of First Amendment law for the remainder of the twentieth century. In *Schenck* the clear-and-present-danger test had been applied with minimal scrutiny as to whether the antiwar pamphlets in question were likely to have any practical impact on those who might read them. Holmes's opinion in *Schenck* focused almost entirely on the gravity of the dangers created by the pamphlets, without paying much attention to whether those dangers were likely to result.

By contrast, Holmes's dissenting opinion in *Abrams* more carefully scrutinized the competing factors at work in evaluating whether the subversive speech sought to be punished does in fact create a clear and present danger of harm that Congress may prohibit. Holmes contended that the *Abrams*'s majority opinion should have more closely examined the intent of the pamphleteers. Additionally, Holmes believed that the majority opinion should not only have attempted to determine whether the pamphlets would have any effect on readers, but also urged the majority to allow the defendants to go unpunished unless by distributing the pamphlets the defendants had created a danger that was both clear and immediate.

Supreme Court scholars have spent much time trying to explain why Holmes modified his view of the Free Speech Clause in the eight months that separated his majority opinion in *Schenck* and his dissenting opinion in *Abrams.* There is evidence to suggest that Holmes was

influenced by the anti-Communist and anti-radical hysteria that was sweeping much of the nation during those months, and the government–instituted repression of radicals that resulted. There is also evidence indicating that Holmes was influenced by correspondence he received from various acquaintances, including Harvard Law School professor ZECHARIAH CHAFEE, federal district judge LEARNED HAND, and political theorist Harold J. Laski, all of whom praised Holmes for articulating the clear-and-present-danger test but also encouraged the associate justice to apply it with more exacting scrutiny.

Some 50 years after Holmes first enunciated the clear-and-present-danger test in *Schenck,* the majority of the Supreme Court reformulated the doctrine in *Brandenburg v. Ohio,* 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). In *Brandenburg,* the Court reversed the conviction of a KU KLUX KLAN leader under a state statute, Ohio Rev. Code Ann. § 2923.13, prohibiting advocacy of crime and violence as a necessary means to accomplish political reform. The Court held that a state could not forbid or proscribe advocacy of the use of force, except where such advocacy is directed toward producing imminent lawless action and is likely to incite or produce such action. Though the Court's opinion fails to use the phrase "clear and present danger," many CONSTITUTIONAL LAW scholars have seen *Brandenburg* as a return to the Holmes immediacy test first set forth in *Abrams.*

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## ABROGATION

*The destruction or annulling of a former law by an act of the legislative power, by constitutional authority, or by usage. It stands opposed to* rogation; *and is distinguished from derogation, which implies the taking away of only some part of a law; from* SUBROGATION, *which denotes the substitution of a clause; from* dispensation, *which only sets it aside in a particular instance; and from* antiquation, *which is the refusing to pass a law.*

For example, the abrogation of the EIGHTEENTH AMENDMENT to the Constitution, which prohibited the manufacture or sale of intoxicating liquors, was accomplished by the enactment of the TWENTY-FIRST AMENDMENT. Implied abrogation takes place when a new law contains provisions that are positively contrary to a former law, without expressly abrogating such laws, or when the order of things for which the law has been made no longer exists.

## ABSCOND

*To go in a clandestine manner out of the jurisdiction of the courts, or to lie concealed, in order to avoid their process. To hide, conceal, or absent oneself clandestinely, with the intent to avoid legal process. To postpone limitations. To flee from arresting or prosecuting officers of the state.*

## ABSCONDING DEBTOR

*One who absconds from creditors to avoid payment of debts. A debtor who has intentionally concealed himself or herself from creditors, or withdrawn from the reach of their suits, with intent to frustrate their just demands. Such act was formerly an* act of bankruptcy.

A person who moves out of the state may be an absconding debtor if it is that person's intention to avoid paying money that he or she owes.

It is difficult or impossible for a creditor to serve an absconding debtor with a summons in order to start a lawsuit and collect his or her money. Where a court is convinced that a debtor has absconded, it may permit the creditor to begin the lawsuit in some way other than PERSONAL SERVICE of a summons.

For example, a franchisee bought a doughnut franchise and opened up a small shop. He also bought a house for his family. Unfortunately, the business failed after a year, and he turned all of the equipment and materials back to the franchisor. The franchisor claimed that additional money was owed to him and decided to sue the former franchisee. A process server was sent to take a summons to the apartment that was listed as the address in the original application for the franchise. The landlord there told the process server that the former franchisee had moved and left no forwarding

address. The franchisor applied to the court for permission to serve him as an absconding debtor. The court allowed the franchisor to publish notice of the lawsuit on three occasions in the legal section of the local newspaper. The franchisee did not see the notice and did not appear in court. The court entered a default judgment against him without hearing his side of the story. After that, the franchisor began searching public records to see if the franchisee owned any property that could be seized to pay off the amount of the judgment. He discovered the recorded deed for the house and went back to court, seeking an order to have the house sold. This time the franchisee, who was served personally with the court papers, appeared with his attorney. He explained at the hearing that he had never intended to conceal himself or to avoid paying the money he owed. The court found that he had never been an absconding debtor who could be served merely by publication. The default judgment, therefore, could not be enforced, and the franchisor could not have the house seized and sold.

## ABSENTEE

*One who has left, either temporarily or permanently, his or her domicile or usual place of residence or business. A person beyond the geographical borders of a state who has not authorized an agent to represent him or her in legal proceedings that may be commenced against him or her within the state.*

An absentee landlord is an individual who leases real estate to another but who does not reside in the leased premises.

An absentee corporation is one that conducts business within a state other than the place of its incorporation but has not designated an agent for purposes of SERVICE OF PROCESS, which might ensue from disputes involving its business transactions there.

## ABSENTEE VOTING

*Participation in an election by qualified voters who are permitted to mail in their ballots.*

The Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C.A. § 1973ff et seq.) covers absentee voting in presidential elections, but the states regulate absentee voting in all other elections. According to Article I, Section 4, of the U.S. Constitution, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may … make or alter such Regulations, except as to the Places of ch[oo]sing Senators."

Originally created to accommodate overseas military service personnel in WORLD WAR I, absentee voting has since expanded to include all those expecting to be absent from their precincts on election day. The right to vote, even by absentee ballot, is no trifling concern. A state may restrict it only to the extent that doing so serves a compelling state interest such as preventing FRAUD.

Although all states allow absentee voting, the procedures and qualifications vary from state to state. For example, the amount of time that an application for an absentee ballot must precede the election can vary. In Minnesota, it is one day (M.S.A. § 203B.04[1]). In Louisiana, it depends on the voter. For example, a voter who goes in person to apply for an absentee ballot must do so between 12 and 6 days before the election (LSA-R.S. 18:1309[a][1]); a voter who registers for an absentee ballot by mail must get the registration form to the registrar not more than 60 days and not less than 96 hours before the election (LSA-R.S. 18:1307[b]); military personnel must return the application not more than 12 months and not less than 7 days before election day (LSA-R.S. 18:1307[c]).

Many states allow absentee voters to vote again on election day if they are present in the state. If voters so choose, they may change their votes. Officials in states that allow this practice count the absentee ballots after the poll ballots have been counted, and any duplicate absentee ballots are simply disregarded. This is the case in Minnesota (M.S.A. § 203B.13[3a]). In Louisiana, however, a person who has voted by absentee ballot may not vote again on election day (LSA-R.S. 18:1305). In 1977, Louisiana amended its law to allow absentee voters to change their votes on election day, but in 1980, it changed the law again to prohibit the practice.

In any state, to cast an absentee ballot, citizens must be eligible voters and have a reason for being unable to vote at the polls. Between August 1, 1991, and November 30, 1992, Minnesota experimented with allowing voters to cast absentee ballots without explanation, but this practice was discontinued on January 1, 1994. All states allow persons with permanent disabilities and military personnel to cast votes by absentee ballot. Other valid reasons for vot-

*A sample absentee voting ballot application*

## Absentee Voting Ballot Application

**Absentee Ballot Application Instructions**

If you would like to have an absentee ballot mailed to you, PRINT legibly on the application below and sign where it says "Signature of Voter." All applications for an absentee ballot submitted by mail (or by a relative or guardian in person at the Election Board office) must be in the office of the Jackson County Board of Election Commissioners by 5:00 P.M. on the Wednesday prior to the election. Pursuant to Missouri law, (115.279) absentee ballots cannot be mailed if the application is received after this deadline.

For your application to be complete, you must have the following:

- The date of the election
- The date of the application
- If it is a primary election you must state which political party ballot you would like
- The applicant's daytime phone number
- The name of the applicant as registered
- The address at which the applicant is registered
- The reason for which an absentee ballot is needed
- The signature of the applicant

If you are going to be away from home and need a ballot mailed to a location other than your home address, fill out the section labeled "Mailing Address if different than Home Address."

Note: An Absentee Ballot Application may be forwarded to us by facsimile but must be followed by a hard copy with an original signature. If the original application is not in our office by 7:00 P.M. CST on the day of the election, the absentee ballot will NOT be counted. This application is good for the Jackson County Board of Election Commissioners only.

**ABSENTEE BALLOT APPLICATION**
**(FOR REGISTERED VOTERS)**

Election Date _____ Date of Application _____

Party Primary Election,
Indicate Party _____ Phone Number _____

Print Name _____
FIRST MIDDLE NAME / INITIAL LAST

Registered
Address _____
NUMBER DIRECTION STREET APT CITY ZIP

OFFICE USE ONLY

Cert. # _____

OFFICE ☐ Township
Precinct _____
Style _____

MAILOUT ☐ Color _____
Ballot # _____

I expect to be prevented from going to the poll on election day due to the following checked reason:

____ Absence on election day from the jurisdiction of the election authority in which I am registered;
____ Incapacity or confinement due to illness or physical disability, including caring for a person who is incapacitated or confined due to illness or disability;
____ Religious belief or practice;
____ Employment as an election authority or by an election authority at a location other than my polling place;
____ Incarceration, although I have retained all the necessary qualifications for voting.

MAILING ADDRESS IF DIFFERENT THAN HOME ADDRESS:

_____

_____

_____
City State Zip

_____
Signature of Voter

Signature of Guardian or relative;
or Witness, If signed with an "X" _____ Relationship to applicant _____

Mail This Application To:
JACKSON COUNTY ELECTION BOARD
INDEPENDENCE SQUARE COURTHOUSE
POST OFFICE BOX 296
INDEPENDENCE, MISSOURI 64051

MISSOURI ELECTION LAW 115.279

No application for an absentee ballot submitted by mail or by a guardian or relative after 5:00 p.m. on the Wednesday immediately prior to the election shall be accepted by any election authority. No application for an absentee ballot submitted by the applicant in person after 5:00 p.m. on the day before the election shall be accepted by any election authority.

ing in absentia include illness, temporary disability, and religious observances or practices. In Louisiana, any person age 65 or older may vote by absentee ballot.

All states require that the application for an absentee ballot be requested before election day, but this rule has some exceptions. In Minnesota, for example, a HEALTH CARE patient who becomes a resident or patient in a health care facility on the day before the election may vote by absentee ballot on election day if she or he telephones the municipal clerk by 5:00 P.M. the day before the election (M.S.A. § 203B.04[2]). Each county enlists election judges to deliver absentee ballots to hospitalized voters (M.S.A. § 203B.11[3]).

Some people have had to fight for the right to vote by absentee ballot. In *Cepulonis v. Secretary of the Commonwealth,* 452 N.E.2d 1137, 389 Mass. 930 (Mass. 1983), Richard Cepulonis and Kevin Murphy, two Massachusetts residents and long-term prisoners in the Walpole Massachusetts Correctional Institution, asserted their right to vote by absentee ballot. Cepulonis, eligible for PAROLE in 1997, and Murphy, eligible for parole in 1985, attempted to vote from prison in 1982. City officials in Worcester told Cepulonis that he could not vote by absentee ballot without registering in person; officials in Boston told Murphy the same.

Cepulonis and Murphy filed suit together in superior court, asking for a CLASS ACTION on behalf of Massachusetts prisoners and a judicial declaration that the class of prisoners be declared eligible to vote by absentee ballot. The judge denied the requests, holding specifically that prisoners who did not register to vote prior to their imprisonment, and prisoners who are not imprisoned in the city of their domicile, may not register to vote by absentee ballot because they must register to vote in person. The absentee voting statutes of Massachusetts contained no provision for voter registration of Massachusetts prisoners through the postal service.

Cepulonis and Murphy asked the Massachusetts Supreme Judicial Court to review the case; on August 15, 1982, the court denied the request. On October 21, Cepulonis and Murphy moved for a court order allowing prisoners to vote in the November 2 elections; the Massachusetts high court denied this request as well. Cepulonis and Murphy then filed a motion for *injunctive relief*—a court order—with the U.S. Supreme Court. Justice WILLIAM J. BRENNAN JR. denied the motion WITHOUT PREJUDICE, which meant that Cepulonis and Murphy were free to bring the matter before the Court in the future. Justice JOHN PAUL STEVENS referred the case to the full bench of the Supreme Court, which, after consideration, refused to command Massachusetts to institute procedures enabling incarcerated residents to vote by absentee ballot.

Undaunted, Cepulonis and Murphy applied directly to the Massachusetts Supreme Judicial Court for review of the case; the court granted the application. On April 4, 1983, Cepulonis and Murphy argued that Massachusetts's failure to install an absentee registration procedure for incarcerated residents deprived those residents of their state the constitutional right to vote in state elections. Although some states had chosen to prohibit convicted criminals from voting in elections, Massachusetts had not.

The court began the analysis in its opinion by discussing the case law of Massachusetts on the subject of voting. Without exception, the precedents held that voting laws should be interpreted to facilitate voting, and not to impair or defeat the right to vote. In light of this principle, the court announced that it agreed with Cepulonis and Murphy: the Massachusetts statutory scheme was denying deserving citizens a state constitutional right.

The court then examined the Massachusetts statutory scheme and observed that some eligible prisoners could vote, whereas others could not. The absentee voting laws of Massachusetts provided that prisoners incarcerated in the municipality of their domicile, if already registered, could vote by absentee ballot. On the other hand, registered voters incarcerated in a municipality other than their own could not register for absentee ballots. Furthermore, prisoners who were adult registered voters before they were incarcerated could vote, but prisoners reaching the age of majority while incarcerated could not vote. These distinctions were ARBITRARY and, according to the court, unconstitutional.

The court then cited relevant case law that held that Massachusetts must prove the existence of a compelling STATE INTEREST when it denies a fundamental right such as voting. The state argued that the registration laws existed in their present form to prevent voter fraud. The court countered by pointing out that Maine, New York, Vermont, Georgia, and Pennsylvania had all seen fit to permit prisoners domiciled in

their states to register as absentee voters. This showed that it was possible to create a system allowing eligible prisoners to vote by absentee ballot.

The state also argued that prisoners not registered to vote had had the opportunity to register before incarceration. Requiring the state to supply special absentee voting procedures to disinterested citizens seemed unnecessary. However, failure to register to vote before incarceration did not mean that prisoners who were otherwise eligible should be denied the right to vote, and, according to the court, no case law supported such a denial.

Ultimately, the court held that Massachusetts prisoners must be given the means to vote in state elections. The Massachusetts absentee voting statutes were unconstitutional to the extent that they prevented incarcerated, eligible Massachusetts voters from registering to vote. The court refrained from giving the vote to Cepulonis and Murphy, and instead left the job of revising the Massachusetts absentee voting laws to the legislature.

The issue of absentee voting became a particularly contested topic during the 2000 presidential election, when every vote was needed to determine the ultimate outcome. The seat of controversy was Florida, where a recount became necessary in several counties because the vote was so close. Between November and December, Democrat **AL GORE** and Republican **GEORGE W. BUSH** appealed to the state Supreme Court and even the U.S. Supreme Court (**BUSH V. GORE**, 531 U.S. 98 [U.S. 2000]) over whether or not ballots should be recounted. For example, lawsuits filed by Florida's **DEMOCRATIC PARTY** involved the counting of absentee ballots in Seminole and Martin Counties (*Taylor v. Martin County Canvassing Board,* 773 So.2d 517 [2000]; *Jacobs v. Seminole County Canvassing Board,* 773 So.2d 519 [2000]). The party alleged that Republicans were allowed to correct mistakes in some voter absentee ballots, while Democrats were not given the same chance. In Seminole County, Republican officials added missing voter identification numbers at the county election office, while in Martin County an election supervisor let Republican workers take home application forms and add missing voter identification numbers. The stakes were high because the 15,000 absentee votes in Seminole County and the 10,000 in Martin County contributed to Bush's razor thin majority over Gore.

The two state circuit judges who reviewed the issues decided that, despite irregularities, the ballots should be counted. On appeal, the Florida Supreme Court upheld these rulings. The court, although acknowledging that there were irregularities in the process, concluded that there was no evidence of fraud, gross negligence, or intentional wrongdoing.

The use of absentee ballots can complicate elections when a candidate resigns or dies during the last days of a campaign. The 2002 U.S. Senate elections in New Jersey and Minnesota illustrated these complications and led to litigation over whether new absentee ballots could be issued to include a substitute candidate.

The New Jersey Republican candidate for the Senate asked the U.S. Supreme Court to overturn a state supreme court ruling that Democrat Frank Lautenberg's name could replace Senator Robert Torricelli on the November ballot. Torricelli, who had admitted to ethical violations and been censured by the Senate, dropped his reelection bid after public opinion polls indicated that he would lose decisively. New Jersey Republicans asked the Supreme Court to keep Torricelli's name on the ballot, arguing that there would be delays in delivering military ballots, which would violate the 1973 Uniformed and Overseas Citizens Absentee Voting Act. In addition, they contended that the state supreme court order violated the **DUE PROCESS** rights of military personnel and citizens who had already received ballots and voted. Unlike the 2000 presidential election controversy, the Supreme Court refused to intervene. Lautenberg went on to win the election.

The Minnesota elections in 2002 were thrown into turmoil when Democratic Senator Paul Wellstone was killed in a plane crash just 10 days before the election. An estimated 104,000 absentee ballots had been distributed and many had already been returned to county election officials before Wellstone's death. In reviewing the state's election laws, the **SECRETARY OF STATE** concluded that county elections could not mail out new absentee ballots. This meant that thousands of absentee ballots that contained votes for Wellstone would not count for the substitute candidate, former vice president Walter Mondale.

The state Democratic Party filed an emergency election appeal with the state supreme court, arguing that new ballots should be issued immediately and that Minnesota voters should

be able to vote absentee using modern means such as fax and E-MAIL. The court held oral argument on the Thursday before the election and issued an order later that day, ruling that voters could request new absentee ballots be mailed to them but they had to be returned to county voting officials by the following Tuesday. The court did not authorize any electronic means as suggested by the Democrats. County officials began to print ballots but the tight deadline made it certain that many voters, such as college students living far away, did not have time to request, receive, and return their ballots. In the end, Republican candidate Norm Coleman beat Mondale by a close but comfortable margin.

The Minnesota absentee ballot case illustrates how absentee voters may risk having their vote not count if an unusual chain of events unfolds before an election. Technology that would enable voters to use the INTERNET to vote could someday be an avenue for modernizing absentee voting.

FURTHER READINGS

Booth, Michael. 2002. "Republicans Sue in N.J. Federal Court to Block Senate Ballot Substitution." *New Jersey Law Journal* (October 7).

Logan, Michele. 1993. "The Right To Write-in: Voting Rights and the First Amendment." *Hastings Law Journal* 44 (March): 727-751.

McCauley, William T. 2000. "Florida Absentee Voter Fraud: Fashioning an Appropriate Judicial Remedy." *University of Miami Law Review* 54 (April).

"No New Lifeline for Gore: Florida High Court Will Not Hear Absentee Cases." December 12, 2000. Available online at <www.abcnews.com> (accessed May 28, 2003).

"Supreme Court Asked to Block Lautenberg: N.J. Republican Candidate Files Appeal." 2002. *Washington Post* (October 5).

CROSS-REFERENCES

Elections; Prisoners' Rights; Voting.

## ABSOLUTE

*Complete; perfect; final; without any condition or incumbrance; as an absolute bond in distinction from a conditional bond. Unconditional; complete and perfect in itself; without relation to or dependence on other things or persons.*

*Free from conditions, limitations or qualifications, not dependent, or modified or affected by circumstances; that is, without any condition or restrictive provisions.*

Absolute can be used to describe DIVORCE, estates, obligation, and title.

## ABSOLUTE DEED

*A document used to transfer unrestricted title to property.*

An absolute deed is different from a mortgage deed, which transfers ownership back to the mortgagee when the terms of the mortgage have been fulfilled.

## ABSTENTION DOCTRINE

*The concept under which a federal court exercises its discretion and equitable powers and declines to decide a legal action over which it has jurisdiction pursuant to the Constitution and statutes where the state judiciary is capable of rendering a definitive ruling in the matter.*

The abstention doctrine was adopted by the Supreme Court to allow the federal judiciary to refrain from ruling on constitutional questions. Because it has no explicit source in federal or state laws, it is the exception to the general rule that a litigant may sue or be sued in federal court if the federal court has *jurisdiction,* or power to hear the case. A federal court has jurisdiction over several species of cases and controversies, such as those involving a federal constitutional question, a federal statute, or litigants of different states in a dispute totaling over $50,000 (in which case, the court's power to hear is called diversity jurisdiction). Federal courts have an obligation to hear the cases properly brought before them, so abstention is an extraordinary judicial maneuver.

Also known as the Pullman doctrine, the abstention doctrine was first fashioned by the Court in *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496 61 S. Ct. 643, 85 L. Ed. 971 (1941). At issue in *Pullman* was a Texas Railroad Commission regulation that prevented the operation of sleeping cars on trains without a Pullman conductor. Before the regulation, Texas trains used only one sleeping car in areas of light passenger traffic. When only one sleeping car was used, the trains had only Pullman porters to watch over the sleepers. When more sleeping cars were used, the trains employed Pullman conductors, who supervised the porters. The regulation eliminated a practice that deprived conductors of wages, but it also effectively decreased the earnings and eliminated the autonomy of porters. This result introduced the

issue of discrimination, since, at the time, Pullman conductors were white and porters were black.

The Pullman Company and Texas railroads objected to the regulation, and together they brought suit in federal district court to keep the commission from enforcing the order. Pullman porters joined the Pullman Company and the railroads as complainants, and Pullman conductors joined the commission as defendants. The federal district court granted the request of the complainants, ruling that the commission did not have the authority to make such an order. The defendants appealed directly to the U.S. Supreme Court.

The complainants argued that the regulation violated constitutional rights, namely the protections provided under the DUE PROCESS and commerce clauses of the U.S. Constitution. The porters specifically asserted that the order was discriminatory against "negroes," and thus violated the FOURTEENTH AMENDMENT to the Constitution. The commission answered that its authority to order such a regulation was created by Texas law. Vernon's Texas Revised Civil Statutes Annotated, article 6445, provided in part that the commission was empowered to prevent "unjust discrimination … and to prevent any and all other abuses" in the Texas railroad industry.

The Supreme Court acknowledged the sensitive nature of the porters' allegation of discrimination, but declared that the fate of the offending law should be decided first by the state courts. The Court then faced the question of whether a state resolution was possible.

The Supreme Court noted that a federal district court in the Fifth Circuit had ruled against the commission, but called the decision nothing more than a "forecast." According to the Court, the Texas state courts were more capable of interpreting Texas laws and determining how they should be applied. Federal courts were simply not competent to define the concept of discrimination and its prevention as understood in Texas.

Furthermore, deciding Texas law in a federal court was of little use when the ruling could later be displaced by the decision of a state court. The Court conceded that federal constitutional claims against state laws or regulations may be appealed to federal courts, but it emphasized the public interest in avoiding "needless friction with state policies." This meant that when a state had the means to resolve a constitutional issue, the first word on the meaning and constitutionality of the challenged law should be left to the state.

Texas law provided for JUDICIAL REVIEW of administrative orders in state court, so the complainants could have filed suit there. Likewise, the defendants could have brought suit in state court to enforce the order in the event of a railroad strike. Because these avenues existed and had not been traveled, the Supreme Court reversed the decision of the lower federal court and ordered the case held in the federal court pending the outcome of state proceedings.

The abstention doctrine has expanded since the *Pullman* case. The Supreme Court has identified three distinct types of cases from which a federal court should abstain: (1) If the meaning of a state law or regulation is claimed to be unconstitutional, and the meaning of the statute or regulation can be discovered in the state's court system, abstention is appropriate. (2) Abstention is also appropriate when a federal suit seeks to delay or upset an ongoing state proceeding, such as a criminal prosecution or the collection of state taxes. (3) Finally, a federal court should yield to state courts when a case presents a difficult policy question of vital importance to the state. This last justification for abstention breeds the most creative arguments.

One difficult issue of vital importance to states is domestic relations. DIVORCE, ALIMONY, and CHILD CUSTODY cases involve legitimate local policies concerning marriage and religion. Until the 1990s, domestic relations abstention has been invoked by federal courts in virtually any case concerning family members. In *Ankenbrandt v. Richards,* 504 U.S. 689, 112 S. Ct. 2206, 119 L. Ed. 2d 468 (1992), the Supreme Court put a stop to this practice.

On September 26, 1989, Carol Ankenbrandt, on behalf of her daughters, sued Jon Richards and Debra Kesler in the U.S. District Court for the Eastern District of Louisiana. Ankenbrandt, a Missouri citizen, had been married to Richards, a Louisiana citizen. After the couple divorced, Richards became romantically involved with Kesler. In her suit, Ankenbrandt claimed that Richards and Kesler had sexually and physically abused Ankenbrandt's daughters. Ankenbrandt filed the suit in federal court under diversity jurisdiction; she was able to do

so because she did not live in the defendants' home state and she was suing for over $50,000.

The federal court decided not to hear the merits of Ankenbrandt's case. The district court granted the defendants' earliest motion to dismiss, ruling that the case belonged in state court under the domestic relations exception to federal jurisdiction based on diversity. As an alternative to that holding, the court declared that its refusal to hear the case was also justified by the abstention doctrine. The court of appeals affirmed these holdings without a published opinion.

On appeal, the Supreme Court reversed the decision. The Court traced the origins of the domestic relations exception to federal diversity jurisdiction and concluded that the exception was valid. Nevertheless, the exception contemplated federal abstention only from cases such as divorce, alimony, and child custody. Ankenbrandt's action was a *tort action,* an action for monetary recovery based on the accusations of one individual against another. Ankenbrandt's previous marriage to Richards did not provide a permissible reason for the federal court to invoke the domestic relations exception.

The federal district court's alternative holding of abstention was equally erroneous. The district court had cited *Younger v. Harris,* 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), as support for its abstention. However, the *Younger* decision simply held that a federal court could not interfere with a pending state criminal prosecution. Here, no state proceeding was pending, and the defense had not alleged that any important STATE INTEREST existed, so reliance on that particular reason for abstention was misplaced.

Although the argument had not been raised by Richards or Kesler, the Supreme Court anticipated another reason for abstention, to foreclose the argument in future cases. The federal district court may have sought to abstain from the *Ankenbrandt* case because the suit seemed to present a difficult state policy question of vital importance to the public. The case seemed to involve a determination of the family status of the litigants, an area of state interest that could bring the case within the domestic relations exception. This basis for abstention was not supportable, though, because the familial status of the parties had already been determined in a divorce proceeding and a parental rights proceeding.

The Supreme Court further warned that the family status of the litigants had no bearing on the underlying case. In a civil action for monetary damages, where sexual and physical abuse is alleged, a federal court could not refuse to hear the case because the litigants had at one time been related. Ultimately, neither the domestic relations exception nor its close relative the abstention doctrine would deprive Ankenbrandt of the right to file her complaint in federal court.

Despite its expansion since *Pullman,* federal court abstention is very rare. A federal court may refuse to hear a case over which it has jurisdiction only in unusual circumstances. When a case poses federal constitutional questions, a federal court may abstain only when the challenged state law or regulation is unclear. In addition, the methods for determining the meaning of the law or regulation must exist in the state's court system, and these methods must not have been used. Then and only then may a federal court refrain from hearing a constitutional question. The boundaries of the abstention doctrine are continually tested and stretched, but in 1992 the Supreme Court sent notice through the *Ankenbrandt* case to the federal courts that its use is limited.

CROSS-REFERENCES

Constitutional Law; Courts; Federal Courts.

## ABSTRACT

*To take or withdraw from; as, to abstract the funds of a bank. To remove or separate. To summarize or abridge.*

An abstract comprises—or concentrates in itself—the essential qualities of a larger thing—or of several things—in a short, abbreviated form. It differs from a transcript, which is a verbatim copy of the thing itself and is more comprehensive.

CROSS-REFERENCES

Abstract of Title.

## ABSTRACT OF TITLE

*A condensed history, taken from public records or documents, of the ownership of a piece of land.*

An abstract of title, or title abstract, briefly summarizes the various activities affecting ownership of a parcel of land. When a person or business agrees to purchase real estate, that person or business arranges for an examination of

the history of the property's title. This examination is known as a title search. A title search is conducted to determine that the seller of the property in fact owns the property and has a *free-and-clear* title. A free-and-clear title has no *clouds* on it, which means that no person or business other than the seller has an interest in, or claim to, the property.

The process of determining the precise ownership of a piece of land by searching an abstract is complex and laborious. Often, the title abstract does not contain every transaction or proceeding that may affect ownership of the land. The search conductor, or *abstractor*, usually a trained professional, must verify that the abstract is complete by reviewing recent certifications that the abstract is correct, checking for gaps in dates and certification numbers, and ensuring that a proper legal description appears with each entry. The abstractor conducts a credit and finances check on all the names appearing in the abstract to see if any of the parties has filed for BANKRUPTCY or has incurred other debts that may have caused a creditor to file a lien against the property toward payment of the debt.

An abstractor must refer to many different sources to verify that the title to a parcel of land is true and correct. The abstractor verifies the original government survey, which should include gaps and overlaps in land ownership. Given improved technology, surveys have a margin of error of less than one foot. The abstractor must understand the various means of describing the exact boundaries of a piece of land and must recognize unacceptable methods.

Claims on the title to a property are subject to time limitations, but the limitations have certain exceptions. For example, the Forty-Year Law holds that no party with a potential claim that arose over 40 years before can claim an interest in a property of which one person or business has been the recorded owner for at least 40 years. Exceptions are made, however, for those holding mortgages or contracts with terms that span more than 40 years and also for prior interests claimed as school or school district lands, parkland dedications, or the property of religious corporations or associations.

To perform a title search, the abstractor must obtain a copy of the abstract from the county recorder in the county in which the land is located. Then it takes time to make sense of the document. The accompanying sample abstract of title illustrates typical entries.

1. Entry 1 identifies the land in question. The sample abstract is for platted land, which is land described by lots and blocks. A platted parcel spans a certain number of feet, on a certain lot, within a certain block, within a certain city. Another method of identifying a parcel of land is by metes and bounds. For metes and bounds land, a parcel is identified by its boundaries according to their terminal points and angles. Platted descriptions are used in urban areas, and metes and bounds descriptions are used mostly in rural areas.
2. Entry 2 is the original entry. It states the time and place that the U.S. government first conveyed this tract of land to a private individual. The description follows a progression from small to large. The parcel is identified first by its location within a certain section, which is located within a certain township, which is located within a certain range. Each range spans six miles and several townships, and each township contains several sections, which in turn are divided into quarters, which can also be divided into quarters. The last two lines of the right-hand column might read, for example, "Land Office Records, page 100. North ¼ of Section 36, T. [Township] 32, R. [Range] 22." The original description of any parcel of land comes from the measurements of the original government survey of the nineteenth century.
3. Entry 3 is the land patent, or John Doe's title defense. The land patent is issued by the government to operate as proof of title for the first governmentally recognized owner of the land. The land patent shows the date of the land transfer, the date the patent was filed with the government, the particular book of deeds containing the patent, and the land parcel as described in the original entry.
4. Entry 4 reveals that John Doe platted his quarter of section 36—that is, he subdivided the land and dedicated it to the public for sale. The beginning of the entry might read, "Plat of Stoneybrook Addition to the City of New Heidelberg." Note that township 36 has become, or has been incorporated into, what is now New Heidelberg. The entry continues with the date John Doe received approval from the city of New Heidelberg, the date the subdivision was filed with the county, the particular book of plats in which the subdivision is entered, and the original description of the land. The subdivision is

*A sample abstract of title*

## Abstract of Title

1. Abstract of Title to north 500 feet, front and rear, of Lot 1, Block 2, in NW Addition to the City of New Heidelberg.

2. United States to John Doe.
   Entry No. 1.
   Dated Jan. 1, 1889.
   Land Office Records, page 100.
   North 1/4 of Section 36, T. 32, R. 22.

3. United States to John Doe
   Patent.
   Dated Jan. 1, 1889.
   Filed Jan. 1, 1889.
   Book 1 of Deeds, Page 100.
   North 1/4 of Section 36, T. 32, R. 22.

4. John Doe et al. to The Public.
   Plat of Stoneybrook E Addition to the City of New Heidelberg.
   Dated Feb. 1, 1889.
   Filed Feb. 1, 1889.
   Book 1 of Plats, page 200.
   North 1/4 of Section 36, T. 32, R. 22.

5. John Doe, unmarried, to Richard Roe.
   Warranty Deed.
   Dated Feb. 1, 1890.
   Filed Feb. 1, 1890.
   Book 3 of Deeds, page 300.
   Lot 1, Block E, Stoneybrook Addition to City of New Heidelberg.

6. Richard Roe and Ruth Roe, his wife, to John Smith.
   Mortgage.
   Dated Feb. 1, 1890.
   Filed Feb. 1, 1890.
   Book 1 of Mortgages, page 10, to secure $10,000, due January 10, 1910.
   Lot 1, Block E, Stoneybrook Addition.

7. John Smith to William White
   Assignment of Mortgage No. 6.
   Dated Jan. 1, 1895.
   Filed Jan. 1, 1895.
   Book 5 of Assignments, page 100.

8. William White to Richard Roe et ux.
   Satisfaction of No. 6.
   Dated Jan. 1, 1910.
   Filed Jan. 1, 1910.
   Book 3 of Satisfactions, page 200.

9. Richard Roe to Ruth Roe
   Will and Probate.
   Dated July 1, 1915.
   Probate July 1, 1915.
   Filed Aug. 1, 1915.
   Book 10 of Miscellaneous, page 100.
   Testator leaves all of his property, real and personal, to his wife, Ruth Roe.

10. Richard Roe to Ruth Roe
    Final Decree.
    Probate Court, Munich County.
    Dated Aug. 1, 1915.
    Filed Aug. 1, 1915.
    Book 10 of Miscellaneous, page 300.
    Adjudged and decreed that Lot 1, Block 2, NW. Addition is hereby assigned to Ruth Roe.

11. Ruth Roe, widow, to Samuel Brown.
    Mortgage.
    Dated Jan. 1, 1920.
    Filed Jan. 1, 1920.
    Book 10 of Mortgages, page 100, to secure $20,000, due Jan. 1, 1930.
    Lot 1, Block 2, NW Addition.

12. Ruth Roe, widow, by Sheriff of County, to Samuel Brown.
    Foreclosure of No. 11.
    Notice of sale, Feb. 1, 1930.
    Affidavit of publication, Feb. 1, 1930
    Proof of service, Feb. 1, 1930.
    Sheriff's certificate of sale, March 1, 1930.
    Filed March 1, 1930.
    Book 15 of Miscellaneous, page 300.
    Lot 1, Block 2, NW Addition, sold March 1, 1930, to Samuel Brown, for $10,000.

[continued]

*A sample abstract of title (continued)*

**Abstract of Title**

| | | |
|---|---|---|
| 13. | Samuel Brown and<br>Sophy Brown, his wife,<br>to<br>James Jones. | Quitclaim Deed.<br>Date April 1, 1940 .<br>Filed April 1, 1940 .<br>Book 27 of Deeds, page 100 .<br>North 250 feet, front and rear, of Lot 1 , Block 2 ,<br>NW Addition. |
| 14. | Taxes paid, except for year 1940, amounting to $15,000. | |
| 15. | In re James Jones<br>Bankruptcy<br>No. | Petition of Debtor for arrangement under Chapter XI of the Bankruptcy Act, as amended (§ 301 et seq.) filed Jan. 1, 1950 in U.S. District Court for the District of New Hampshire. |

entered in the county's book of plats because New Heidelberg has chosen to identify its land parcels by plats, and not metes and bounds. Other means of identifying land parcels are sometimes employed. Land is sometimes identified by acres in rural areas, and by government lots for land adjacent to meandering lakes, but most of the land in the United States is identified by either plats or metes and bounds.

5. Entry 5 shows that John Doe sold a parcel of the subdivision to Richard Roe. Roe received a warranty deed, which serves as evidence of Doe's title. A WARRANTY deed means that Doe has warranted to Roe that Doe is the rightful owner of the land. This type of deed has legal ramifications that benefit the purchaser, here Roe. There are other types of real estate deeds. A purchaser receives a tax deed, for example, when he or she buys real estate sold for nonpayment of taxes, and this purchase involves procedures that differ from those of other land purchases. A sheriff's deed is given to the purchaser of land sold by court order such as in a mortgage foreclosure, and this transaction also has special legal ramifications for the purchaser. Because the land in the sample abstract is platted, the parcel is assigned a lot number, within a certain block, within the city of New Heidelberg—for example, this entry might read, "Lot 1, Block E, Stoneybrook Addition to City of New Heidelberg." The entry also contains information on when the warranty deed was signed and when it was filed with the county.
6. Entry 6 shows that Richard Roe and Ruth Roe have mortgaged their property to John Smith. With an interest in lot 1 of block E as collateral, Smith has paid for the Roes' property, and the Roes have undertaken to repay Smith. The entry shows the date the mortgage agreement was signed and the date the mortgage was filed with the county. The remainder might read, "Book 1 of Mortgages, page 10, to secure $10,000, due January 10, 1910. Lot 1, Block E, Stoneybrook Addition."
7. Entry 7 shows that John Smith has assigned the mortgage on lot 1, block E, to William White. In other words, Smith has sold to White his mortgagee interest in lot 1, block E. An assignment can occur for any number of reasons, but often it is a sale made to satisfy debts. This particular action is entered in the book of assignments in the county seat.
8. Entry 8 shows that Richard Roe and Ruth Roe have paid off, or *satisfied,* the mortgage (*et ux* is Latin for "and wife"). This entry is filed in the book of assignments in the county seat.
9. Entry 9 reveals that Richard Roe has died. This "Will and Probate" entry reports that, upon his death, Roe seeks to transfer ownership of lot 1, block E, in New Heidelberg, to his wife, Ruth Roe.
10. Entry 10 identifies Ruth Roe as the sole owner of the parcel. The probate court, which tends to property matters surrounding the death of an individual, has approved the assignment of lot 1, block E, contained in Richard Roe's will.
11. Entry 11 shows that Ruth Roe has taken out a mortgage on lot 1, block E. She has borrowed money from Samuel Brown, using the real estate as collateral. The entry is identical to the first mortgage agreement with John Smith, entry 6.
12. Entry 12 reveals that Ruth Roe was unable to make her mortgage payments to Samuel

Brown, and Brown has sought payment by exercising his right to force a sale of the property by foreclosing on the mortgage. The forced sale was published in a newspaper. The dates of public notice, the publication AFFIDAVIT, and the service of notice to Roe are all entered in the abstract. The certificate of sale and the date the forced sale was filed with the county are also included. This entry shows that Brown has purchased lot 1 at the resulting sheriff's sale of the property. The amount Brown paid would depend on the value of the real estate and the amount of the mortgage. The "No. 11" following "Foreclosure of" simply refers to the court document number of the foreclosure.

13. Entry 13 shows that Samuel Brown and Sophy Brown have sold a part of lot 1 to James Jones by quitclaim deed. Generally, a quitclaim deed transfers title to property without warranties that the title is free and clear. Owing to Ruth Roe's financial troubles, the Browns are probably uncertain of their title's completeness, so they have chosen to sell parts of their lot by quitclaim deed instead of warranty deed. Jones now owns a northern piece of lot 1, block E, of Stoneybrook Addition.
14. Entry 14 shows the taxes paid on the property, except for the current year. An entry of taxes paid is listed every time a tax assessment is made or paid in relation to the property of the abstract. Taxes listed in the abstract may include estate taxes, inheritance taxes, capital gains taxes, and local government property taxes. The abstract should include the current amount of these taxes and certification that they have been paid.
15. Entry 15 reveals that, to avoid financial disaster, James Jones has filed bankruptcy. The northern piece of lot 1, block E, Stoneybrook Addition, New Heidelberg, is now being used to secure protection from creditors. Jones has given to the bankruptcy court a trust deed, which the court retains until Jones has fulfilled his obligations under the financial rehabilitation plan approved by the court. Should Jones default on this arrangement, the court could order a forced sale of the property, with proceeds going to Jones's creditors. The land covered by this particular abstract has now been defined; it is a certain northern piece of lot 1 of block E in the Stoneybrook Addition of New Heidelberg. The land to the south of this piece would have its own abstract, which would be identical to this abstract up to the point that lot 1 was divided up and part of it sold to Jones. Likewise, the abstract for the adjacent lot 2 on block E would have an abstract identical to this abstract up to the point that John Doe sold to Richard Roe the newly platted land of section 36 in township 32, range 22.

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CROSS-REFERENCES

Deed; Property Law; Real Property; Recording of Land Titles; Torrens Title System.

## ABSTRACTION

*Taking from someone with an intent to injure or defraud.*

Wrongful abstraction is an unauthorized and illegal withdrawing of funds or an appropriation of someone else's funds for the taker's own benefit. It may be a crime under the laws of a state. It is different from EMBEZZLEMENT, which is a crime committed only if the taker had a lawful right to possession of the money when it was first taken.

## ABUSE

*Everything that is contrary to good order established by usage. Departure from reasonable use; immoderate or improper use. Physical or mental maltreatment. Misuse. Deception.*

*To wrong in speech, reproach coarsely, disparage, revile, and malign.*

## ABUSE EXCUSE

*Description of efforts by some criminal defendants to negate criminal responsibility by showing that they could not tell right from wrong due to abuse by their spouses or parents. Although this defense is not specifically recognized in substantive* CRIMINAL LAW, *it has been used successfully in some cases to prove, for example, the* INSANITY DEFENSE.

Using prior sexual or other physical abuse as evidence in a criminal defense is largely a result of research regarding mental disorders caused by such abuse. Psychologists and other researchers have identified disorders, including post-traumatic stress disorder and battered woman syndrome, as causes for severe emotional instability that can lead to violent acts by the victim against his or her abuser. Some writers have advocated more widespread use of such evidence to mitigate the punishment of victims who commit violent acts.

Other scholars and writers disagree, noting that substantive criminal law does not recognize the abuse excuse as a legitimate defense except in some limited circumstances, such as those involving the insanity defense. Harvard law professor ALAN DERSHOWITZ coined the term in his 1994 book, *The Abuse Excuse*, where he deems the studies regarding psychological disorders caused by abuse as "psychobabble." Dershowitz and other critics disagree not only with the use of abuse as mitigating evidence of criminal intent, but also with the results of the studies themselves. According to these critics, especially Dershowitz, the abuse excuse fails to distinguish between the reasons why a person committed a crime and the responsibility for committing the crime.

In a few high profile cases during the late 1980s and 1990s, defendants sought to avoid criminal responsibility for their crimes by introducing evidence of prior abuse. In 1989, Lyle and Erik Menendez, ages 21 and 18 respectively, brutally killed their parents in the family's California home. At their first trial for murder in 1993, the brothers' defense team introduced evidence that the men's father, Jose Menendez, had sexually abused his sons for a number of years. Because of this abuse, Lyle and Eric, according to the defense, killed their parents out of fear. In raising the evidence of abuse, the defense sought to reduce the conviction from murder to voluntary MANSLAUGHTER. The defense won a victory of sorts when the first trial ended in a hung jury because the jurors could not agree whether the brothers were killers or whether they acted out due to the years of alleged abuse they had suffered. In a second trial in 1995, however, the jury convicted the brothers of first-degree murder notwithstanding the evidence of abuse, and the judge sentenced them to life in prison without the possibility of PAROLE.

In 1993, Lorena Bobbitt was indicted for malicious wounding after cutting off her sleeping husband's penis during the middle of the night. At her trial, her defense team introduced evidence of a history of sexual and physical abuse committed by the husband, John, against Lorena. Unlike the Menendez case, where the defense conceded that the brothers were criminally responsible for their actions, Lorena's defense team used the evidence to prove the insanity defense. In 1994, a jury found her not guilty of the crime by reason of insanity.

Scholars have noted that the employment of the abuse excuse as a defense is more viable if it is used to prove insanity, which happened in the Lorena Bobbitt case. Commentators have also noted that evidence of prior abuse, whether substantiated or not, has been used in settings other than criminal defense. For instance, a wife may accuse a husband of SEXUAL ABUSE during DIVORCE proceedings or an adult woman may sue her father for sexual abuse that allegedly occurred when the woman was a child.

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## ABUSE OF DISCRETION

*A failure to take into proper consideration the facts and law relating to a particular matter; an* ARBITRARY *or unreasonable departure from precedent and settled judicial custom.*

Where a trial court must exercise discretion in deciding a question, it must do so in a way that is not clearly against logic and the evidence. An improvident exercise of discretion is an error of law and grounds for reversing a decision on appeal. It does not, however, necessarily amount to bad faith, intentional wrong, or misconduct by the trial judge.

For example, the traditional standard of appellate review for evidence-related questions arising during trial is the "abuse of discretion" standard. Most judicial determinations are made based on evidence introduced at legal proceedings. Evidence may consist of oral testimony, written testimony, videotapes and sound

recordings, documentary evidence such as exhibits and business records, and a host of other materials, including voice exemplars, handwriting samples, and blood tests.

Before such materials may be introduced into the record at a legal proceeding, the trial court must determine that they satisfy certain criteria governing the admissibility of evidence. At a minimum, the court must find that the evidence offered is relevant to the legal proceedings. Evidence that bears on a factual or legal issue at stake in a controversy is considered relevant evidence.

The relevancy of evidence is typically measured by its *probative value.* Evidence is generally deemed PROBATIVE if it has a tendency to make the existence of any material fact more or less probable. Evidence that a murder defendant ate spaghetti on the day of the murder might be relevant at trial if spaghetti sauce was found at the murder scene. Otherwise such evidence would probably be deemed irrelevant and could be excluded from trial if opposing counsel made the proper objection.

During many civil and criminal trials, judges rule on hundreds of evidentiary objections lodged by both parties. These rulings are normally snap judgments made in the heat of battle. Courts must make these decisions quickly to keep the proceedings moving on schedule. For this reason, judges are given wide latitude in making evidentiary rulings and will not be overturned on appeal unless the appellate court finds that the trial judge abused his or her discretion.

For example, in a NEGLIGENCE case, a state appellate court ruled that the trial court did not abuse its discretion by admitting into evidence a posed accident-scene photograph, even though the photograph depicted a model pedestrian blindly walking into the path of the driver's vehicle with the pedestrian's head pointed straight ahead as if she was totally oblivious to the vehicle and other traffic. *Gorman v. Hunt,* 19 S.W.3d 662 (Ky. 2000). In upholding the trial court's decision to admit the evidence, the appellate court observed that the photograph was only used to show the pedestrian's position relative to the vehicle at the time of impact and not to blame the pedestrian for being negligent. The appellate court also noted that the lawyer objecting to the photograph's admissibility was free to remind the jury of its limited relevance during cross-examination and closing arguments.

An appellate court would find that a trial court abused its discretion, however, if it admitted into evidence a photograph without proof that it was authentic. *Apter v. Ross,* 781 N.E.2d 744 (Ind.App. 2003). A photograph's authenticity may be established by a witness's personal observations that the photograph accurately depicts what it purports to depict at the time the photograph was taken. Ordinarily the photographer who took the picture is in the best position to provide such testimony.

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CROSS-REFERENCES

Appeal; Bad Faith; Error; Evidence; Precedent; Probative; Relevancy.

## ABUSE OF POWER

*Improper use of authority by someone who has that authority because he or she holds a public office.*

Abuse of power is different from usurpation of power, which is an exercise of authority that the offender does not actually have.

## ABUSE OF PROCESS

*The use of legal process to accomplish an unlawful purpose; causing a summons, writ, warrant, mandate, or any other process to issue from a court in order to accomplish some purpose not intended by the law.*

For example, a grocer rents a small building but complains to the landlord about the inadequate heating system, leaks in the roof, and potholes in the driveway. When the landlord fails to make the required repairs, the grocer decides the property is worth less and deducts $100 a month from his rent payments. The landlord starts a lawsuit to either recover the full amount of rent due or to oust the grocer and regain possession of the premises. The law in their state is fairly clear on the question: a tenant has no right to

force a landlord to make repairs by withholding a portion of the rent. The landlord knows that she has a good chance of winning her case, but she also wants to teach the grocer a lesson. On the first three occasions that the case comes up on the court calendar, the grocer closes his store and appears in court, but the landlord does not show up. On the fourth occasion, the landlord comes to court and wins her case. The grocer, in a separate action for abuse of process, claims that the landlord is using the court's power to order him to appear simply to harass him. The court agrees and awards him money damages for lost income and inconvenience.

Abuse of process is a wrong committed during the course of litigation. It is a perversion of lawfully issued process and is different from MALICIOUS PROSECUTION, a lawsuit started without any reasonable cause.

*Bella Abzug.*
AP/WIDE WORLD PHOTOS

## ABUSIVE

*Tending to deceive; practicing abuse; prone to ill-treat by coarse, insulting words or harmful acts. Using ill treatment; injurious, improper, hurtful, offensive, reproachful.*

Using abusive language, even though offensive, is not criminal unless it amounts to fighting words that, by their very utterance, tend to incite an immediate breach of the peace.

## ABUT

*To reach; to touch. To touch at the end; be contiguous; join at a border or boundary; terminate on; end at; border on; reach or touch with an end. The term* abutting *implies a closer proximity than the term* adjacent.

When referring to real property, abutting means that there is no intervening land between the abutting parcels. Generally, properties that share a common boundary are abutting. A statute may require abutting owners to pay proportional shares of the cost of a street improvement project.

## ♦ ABZUG, BELLA SAVITSKY

Bella Savitsky Abzug served as a Democratic congresswoman in the 1970s and became one of the most outspoken advocates for WOMEN'S RIGHTS in the United States. After she left Congress in 1976, she remained involved in political and social issues both nationally and internationally. With her raspy voice, New York accent, and trademark floppy hat, Abzug was one of the most recognizable public figures in recent U.S. history.

"WOMEN HAVE BEEN TRAINED TO SPEAK SOFTLY AND CARRY A LIPSTICK. THOSE DAYS ARE OVER."
—BELLA ABZUG

Bella Savitsky was born on July 24, 1920, in New York City and was raised in the Bronx. The daughter of Russian immigrant Jews, her father was a butcher who operated the "Live and Let Live" meat market. As a young girl, she raised and collected money on behalf of Zionism. After she graduated from high school, she attended Hunter College, where she was president of the student government. Following graduation in 1944, she attended Columbia Law School, where she was the editor of the law review and an outstanding student. In 1946, she married Martin Abzug, who would go on to become a successful stockbroker.

After graduating in 1947, Abzug concentrated her legal practice in the fields of LABOR LAW and CIVIL RIGHTS, while also becoming active in left-wing politics. As an attorney for the AMERICAN CIVIL LIBERTIES UNION, Abzug went to Mississippi in 1950 to argue the appeal of Willie McGee, an African-American man who had been convicted of raping a white woman. She also defended individuals whom Senator JOSEPH R. MCCARTHY (R-Wisc.) had accused of Communist subversion. During the 1950s, Abzug managed to juggle her legal and political careers, while being a mother to two daughters.

In the 1960s, Abzug organized opposition to nuclear arms testing by founding Women's Strike for Peace. In 1970, she was elected as a

Democratic congresswoman from New York City. She was an outspoken critic of the VIETNAM WAR and the policies of President RICHARD M. NIXON. After the WATERGATE scandals erupted in 1973, Abzug was the first public official to call for Nixon's IMPEACHMENT.

Although Abzug antagonized many of her male colleagues in Congress by insisting on gender equality inside and outside of the Capitol, in 1974 she served as an assistant whip to House Speaker TIP O'NEILL (D-Mass.). She chaired a subcommittee on government information and individual rights and co-authored the FREEDOM OF INFORMATION ACT and the Privacy Act. Abzug also worked on behalf of the ill-fated EQUAL RIGHTS AMENDMENT, which failed to acquire the necessary number of states for ratification.

A national figure by the mid-1970s, Abzug sought the DEMOCRATIC PARTY nomination for the Senate in 1976. She lost a close race to Daniel Patrick Moynihan (D-N.Y.). Several campaigns for New York City mayor and Congress followed, but Abzug never served in elective office again. Despite these defeats, she remained active in efforts for women's rights. She was president of the National Commission on the Observance of International Women's Year, cofounder of the National Women's Political Caucus, and the founder of the International Women's Environmental and Development Organization. In 1995, she played a major role in a world conference on women's issues, held in Beijing, China.

Abzug remained active in the women's movement despite numerous health problems that began in the mid-1980s. She died on March 31, 1998, in New York City following heart surgery.


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CROSS-REFERENCES

Equal Rights Amendment.

## ACADEMIC FREEDOM

*The right to teach as one sees fit, but not necessarily the right to teach evil. The term encompasses much more than teaching-related speech rights of teachers.*

Educational institutions are communities unto themselves with rules of their own, and when conflicts arise, the most common and compelling arguments involve freedom. As a result, the academic community is famous for blazing new trails of freedom in society at large, and it is often forced to confront its own concepts of freedom in the process.

The American Association of University Professors (AAUP) has long led efforts among educators to define the concept of academic freedom in American COLLEGES AND UNIVERSITIES. In 1940, the AAUP, in conjunction with the Association of American Colleges (now the Association of American Colleges and Universities), drafted and approved the *Statement of Principles on Academic Freedom and Tenure.* The statement's purpose is to "promote public

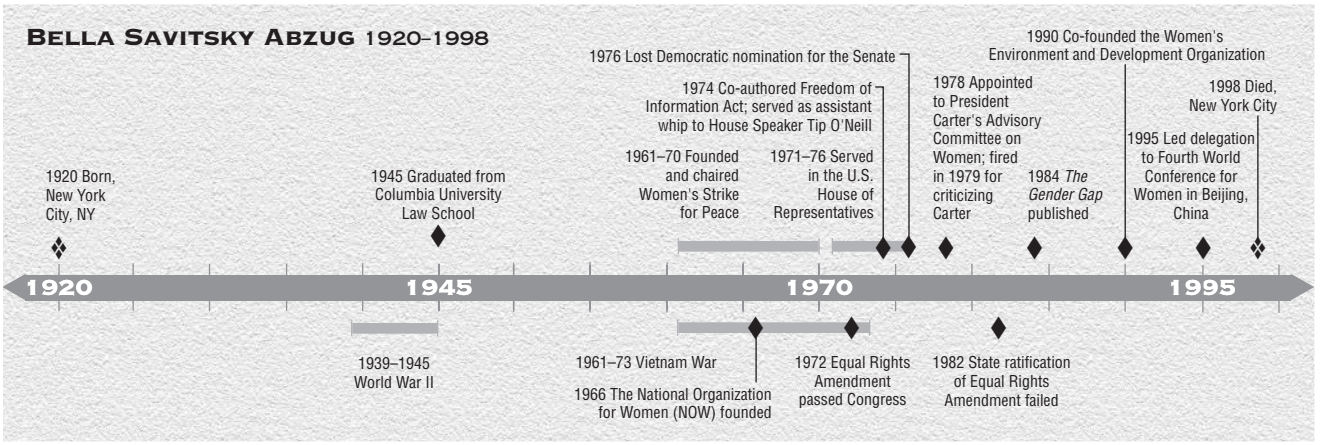

understanding and support of academic freedom and tenure and agreement upon procedures to ensure them in colleges and universities."

According to the statement, educational institutions should afford full freedom for teachers to conduct research and publish their results, subject to their adequate performance in other academic duties. Teachers should also have freedom in the classroom to discuss their subject, but they should be careful not to introduce controversial matter that has no relation to their subject. Institutions may place limitations on academic freedom because of religious or other aims of the institution, though these limitations should be stated clearly in writing at the time of the teacher's appointment.

Although the AAUP's position is not binding upon colleges and universities, it has had an important impact on tenure policies of these institutions. Tenure, according to the AAUP, promotes freedom of teaching, research, and other educational activities, and also provides a "sufficient degree of economic security to make the profession attractive to men and women of ability." Tenure is based upon a contractual relationship between the educational institution and the teacher, and this agreement provides private rights between the two.

Academic freedom was first introduced as a judicial *term of art* (a term with a specific legal meaning) by Supreme Court Justice **WILLIAM O. DOUGLAS**. In *Adler v. Board of Education of City of New York,* 342 U.S. 485, 72 S. Ct. 380, 96 L. Ed. 517 (1952), the Supreme Court upheld a New York law (N.Y. Civ. Service Law § 12-a) that prohibited employment of teachers in public institutions if they were members of "subversive organizations." In a scathing dissent joined by Justice **HUGO L. BLACK**, Douglas argued that such legislation created a police state and ran contrary to the **FIRST AMENDMENT** guarantee of free speech.

Justice Douglas equated academic freedom with the pursuit of truth. If academic freedom is the pursuit of truth and is protected by the First Amendment, reasoned Douglas, then the New York law should be struck down because it produced standardized thought. According to Douglas's dissent, the New York law created an academic atmosphere concerned not with intellectual stimulation but with such questions as "Why was the history teacher so openly hostile to Franco's Spain? Who heard overtones of revolution in the English teacher's discussion of *The Grapes of Wrath*? and What was behind the praise of Soviet progress in metallurgy in the chemistry class?" Douglas conceded that the public school systems need not become "cells for Communist activities," but he reminded the court that the Framers of the Constitution "knew the strength that comes when the mind is free."

*In 1954, Paul M. Sweezy, a New York magazine editor and former Harvard professor, refused to answer questions about his political associations from New Hampshire attorney general Louis C. Wyman. Sweezy was jailed for contempt of court but later won on appeal.*

AP/WIDE WORLD PHOTOS

Shortly after the *Adler* decision, a similar case arose in New Hampshire that received very different treatment by the Supreme Court. On January 5, 1954, Paul M. Sweezy was summoned to appear before New Hampshire attorney general Louis C. Wyman for inquiries into Sweezy's political associations. Under a 1951 New Hampshire statute, the state attorney general was authorized to investigate "subversive activities" and determine whether "subversive persons" were located within the state (*Sweezy v. New Hampshire,* 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 [1957]). Wyman was especially interested in information on members of the **PROGRESSIVE PARTY**, an organization many politicians suspected of nurturing **COMMUNISM** in the United States.

Sweezy said he was unaware of any violations of the statute. He further stated that he would not answer any questions impertinent to the inquiry under the legislation, and that he

would not answer questions that seemed to infringe on his FREEDOM OF SPEECH. Sweezy did answer numerous questions about himself, his views, and his activities, but he refused to answer questions about other people. In a later inquiry by the attorney general, Sweezy refused to comment about an article he had written and about a lecture he had delivered to a humanities class.

When Sweezy persisted in his refusal to talk about others and about his lecture, he was held in CONTEMPT of court and sent to the Merrimack County jail. The Supreme Court of New Hampshire affirmed the conviction, and Sweezy appealed.

The U.S. Supreme Court went on to reverse the decision. The basis for the reversal was the New Hampshire statute's improper grant of broad interrogation powers to the attorney general and its failure to afford sufficient criminal protections to an accused. The Court commented strongly upon the threat such a statute posed to academic freedom.

The principal opinion, written by Chief Justice EARL WARREN, questioned the wisdom of Wyman's legislative inquiry. With regard to the questions on Sweezy's lecture to the humanities class, the Chief Justice stated that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."

Justice FELIX FRANKFURTER wrote a separate concurring opinion. To Frankfurter, the call of the Court was to decide the case by BALANCING the right of the state to self-protection against the right of a citizen to academic freedom and political privacy. Frankfurter concluded that Wyman's reasons for questioning Sweezy on academics were "grossly inadequate" given "the grave harm resulting from governmental intrusion into the intellectual life of a university."

Neither of the plurality opinions in *Sweezy* would have found all congressional inquiries into academia to be unconstitutional. However, both opinions helped free educators in later cases by recognizing and emphasizing the danger of restricting academic thought. In *Keyishian v. Board of Regents of the University of New York,* 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 629 (1967), the Supreme Court finally awarded to teachers and professors the full complement of free speech and political privacy rights afforded other citizens. Political "loyalty oaths" required of New York State employees (including educators) under state civil service laws were declared void, and New York education laws against "treasonable or seditious speech" were found to violate the First Amendment right to free speech. According to the *Keyishian* decision, "[A]cademic freedom . . . is a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

The tension between academic oversight and academic freedom did not end with the *Keyishian* case. The Supreme Court later decided several cases that identified more precisely how much control school authorities may exercise over education. The Court held in *Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico,* 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982), that a school board can control curriculum and book selection, but it may not remove "objectionable" books from public school libraries solely in response to community pressure. Among the books that the Island Trees Union Free School District No. 26 in New York had banned in the mid-1970s were *Slaughterhouse Five,* by Kurt Vonnegut Jr.; *Black Boy,* by Richard Wright; *Naked Ape,* by Desmond Morris; and *The Fixer,* by Bernard Malamud.

School boards and state legislatures generally control public school curriculums, but their control is not complete. For instance, a state statute will be struck down if it requires public schools to teach creationism when they present evolution, and vice versa. According to the Court in *Edwards v. Aguillard,* 482 U.S. 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987), such a law undermines a comprehensive scientific education and impermissibly endorses religion by advancing the religious belief that a supernatural power created human beings. The Supreme Court has also held that if school authorities can show additional independent grounds for discharge, they may terminate a teacher for disruptive speech even if a substantial motivation for the termination was speech on issues of public concern (*Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 [1968]; *Mt. Healthy City Bd. of Ed. v. Doyle,* 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 [1977]). This precedent seemed to give school authorities ample means to elude liability for unconstitutional terminations. However, neither of the principles helped City University of New York (CUNY) when it was sued by the chair of its black studies department.

Professor Leonard Jeffries specialized in black studies and the history of Africa, and his teaching style at CUNY was controversial. Some students felt that Jeffries discouraged classroom debate, whereas others applauded him for verbalizing the frustrations of many African Americans. Jeffries referred to Europeans as "ice people" and as "egotistic, individualistic, and exploitative." Africans, on the other hand, were "sun people" who had "humanistic, spiritualistic value system[s]."

On July 20, 1991, Jeffries spoke at the Empire State Black Arts and Cultural Festival, in Albany, New York. In his speech, he assailed perceived Jewish power, asserting that Jews controlled CUNY and Hollywood and had financed the American slave trade. The speech attracted national attention and placed CUNY on the horns of a dilemma: either it could punish Jeffries and risk running afoul of the First Amendment and of academic freedom principles, or it could do nothing and risk losing expected income from offended school benefactors. For several months, the university wrestled with the problem. Then, in October, the board of trustees voted, without explanation, to limit Jeffries's current appointment as chair to one year instead of the customary three.

At the end of October, Jeffries wrote to Jeffrey Rosen, dean of social sciences, that he was declaring "war" on the faculty. In November, Jeffries scolded President Bernard Harleston as Harleston was leaving the administration building. By December, continuing performance reviews of Jeffries had become increasingly negative. On March 23, 1992, the CUNY Board of Trustees appointed Professor Edmund Gordon to the position of black studies chair. Jeffries filed suit in federal court against the CUNY trustees, Harleston, and Chancellor W. Ann Reynolds, on June 5, 1992.

Jeffries argued that the defendants violated his First Amendment free speech rights and his FOURTEENTH AMENDMENT due process rights when they denied him a full three-year term as chair of black studies. The jury agreed with Jeffries that a substantial motivating factor in his dismissal was his speech in Albany. The jury also found that CUNY had not shown that Jeffries would have lost the chair had Jeffries not delivered the Albany speech. The jury further found that Jeffries had not disrupted the operation of the black studies department, the college, or the university. The jury did find, however, that CUNY had reasonably expected the speech to have a detrimental effect on the school. Despite this seemingly justifiable excuse for the school's action, the jury finally found that CUNY had deprived Jeffries of property (the position of chair) without DUE PROCESS OF LAW.

The district court judge held that Jeffries's First Amendment rights had been violated. On the issue of liability, the jury awarded Jeffries $400,000 in PUNITIVE DAMAGES: $30,000 against President Harleston, $50,000 against Chancellor Reynolds, and $80,000 against each of CUNY's four trustees. After the verdict, Harleston, Reynolds, and each of the trustees moved to overturn the award. They argued that the verdict was inconsistent with the jury's findings and not supported by the evidence. The defendants also maintained that they were immune from individual liability as state officials acting in their official capacity. Jeffries filed a motion requesting a court order reinstating him as chair of CUNY's black studies department.

On August 4, 1993, the district court judge reduced Jeffries's recovery in damages by $40,000 but awarded him the black studies chair. *Jeffries v. Harleston,* 828 F. Supp. 1066 (S.D.N.Y., 1993). According to the judge, it was reasonable for the jury to find that CUNY had terminated Jeffries solely because of the views he expressed in the Albany speech, without constitutional grounds. The school apparently had ample opportunity to gather and present evidence that Jeffries's speech had disrupted the efficient and effective operation of the university but instead chose to argue that Jeffries had been terminated for tardiness, sending grades to the school by mail, and brutish behavior. The lack of evidence to buttress CUNY's defenses supported Jeffries's arguments that his free speech rights had been violated and that he deserved to be reinstated to the position of black studies chair.

Upon appeal, the U.S. Supreme Court remanded the case to the Second Circuit with instructions to consider the Court's ruling in *Waters v. Churchill,* 511 U. S. 661 (1994). The circuit court reversed and remanded the case to the federal district court. Jeffries's occupation does not afford him "greater protection from state interference with his speech than did the nurse in *Waters.*" By taking away Jeffries's position as chair of the department, the university did not infringe on his ability to speak publicly or to teach in his own style, both of which could have

been violations of his First Amendment rights. *Jeffries v. Harleston,* 52 F. 3d 9 (2d Cir. 1995).

Though the concept of academic freedom has traditionally been applied only to teachers, it has begun to creep into lower-court opinions involving the rights of students. Several Supreme Court cases are cited in support of such rights. In *Healy v. James,* 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972), the Supreme Court held that a public university may deny campus access to provably disruptive groups, but it may not deny access based on the views the students wish to express. The Supreme Court ruled in *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988), that a public school may censor the content of a student newspaper if the newspaper is not an entirely public forum and the reason for censure is related to a legitimate educational concern. In *Board of Education of Westside Community Schools (Dist. 66) v. Mergens,* 496 U.S. 226, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990), the Court approved the establishment of a Christian student group in a public school. The Court also held in *Mergens* that a school's refusal to permit a religious student group to meet at school and use its facilities violates the federal Equal Access Act (Education for Economic Security Act § 802, 20 U.S.C.A. § 4071 et seq. [1984]) if the school provides such access to other noncurriculum student groups.

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CROSS-REFERENCES

Censorship; Douglas, William Orville; First Amendment; Frankfurter, Felix; Freedom of Speech; Loyalty Oath; Religion; Schools and School Districts; Tenure; Warren, Earl.

## ACADEMIC YEAR

*That period of time necessary to complete an actual course of study during a school year.*

SOCIAL SECURITY benefits may terminate at the end of an academic year, or a deferment from compulsory military service may continue only during an academic year.

## ACADEMY OF CRIMINAL JUSTICE SCIENCES

The Academy of Criminal Justice Sciences (ACJS) was founded in 1963 to foster professionalism in the criminal justice system by advancing the quality of education and research programs in the field. The academy seeks to enrich education and research programs in institutions of higher learning, criminal justice agencies, and agencies in related fields by improving cooperation and communication, by serving as a clearinghouse for the collection and dissemination of information produced by the programs, and by promoting the highest ethical and personal standards in criminal justice research and education. To that end, the ACJS created an *ad hoc* committee in 1995 to adopt minimum standards for the improvement of quality in criminal justice higher education. The standards, reprinted in 2001, have been widely utilized in the curricular development of associate, undergraduate and graduate degree programs. The academy also presents numerous awards for outstanding contributions by individuals in the field. The members of the academy are individual teachers, administrators, researchers, students, and practitioners.

The academy publishes the *Journal of Criminal Justice* quarterly and a directory annually. It holds annual meetings in March.

FURTHER READINGS

Academy of Criminal Justice Sciences Website. Available online at <www.acjs.org> (accessed March 17, 2003).

## ACCEDE

*To consent or to agree, as to accede to another's point of view. To enter an office or to accept a position, as to accede to the presidency.*

## ACCELERATION

*A hastening; a shortening of the time until some event takes place.*

A person who has the right to take possession of property at some future time may have that right accelerated if the present holder loses his or her legal right to the property. If a life estate fails for any reason, the remainder is accelerated.

The principle of acceleration can be applied when it becomes clear that one party to a contract is not going to perform his or her obligations. ANTICIPATORY REPUDIATION, or the possibility of future breach, makes it possible to

*A sample acceleration clause*

**Acceleration Clause**

PROMISSORY NOTE
INSTALLMENT - WITH ACCELERATION CLAUSE

_____
[city, state, date]

FOR VALUE RECEIVED, WE, THE UNDERSIGNED, jointly and severally promise to pay, in lawful money of the United States of America, to the order of _____ [name of lender] at _____ [address of lender], (_____) [amount] Dollars in installments as follows:

_____ [amount of payment] on _____ [date] , and _____ [number] successive payments of _____ [amount] beginning on _____ [date of payment] together with a delinquency charge on each installment in default for _____ days in an amount equal to _____ percent of such installment but not less than $_____ .

In the event of default in the payment of any of the said installments or said interest when due as herein provided, time being of the essence hereof, the holder of this note may, without notice or demand, declare the entire principal sum then unpaid immediately due and payable.

The holder of this note may, with or without notice to any of us, cause additional parties to be added hereto, or release any party hereto, or revise, extend, or renew the note, or extend the time for making any installment provided for herein, or accept any installment in advance, all without affecting the liability of us, or any of us, hereon.

If suit be commenced on said note, the parties hereto jointly and severally agree to pay to the holder of said note a reasonable attorney fee.

The borrower agrees to pay a reasonable collection charge should collection be referred to a collection agency or to the payee`s collection facilities.

The parties hereto, jointly and severally, hereby waive presentment, demand, protest, notice of dishonor and/or protest and notice of nonpayment; the right, if any, to the benefit of, or to direct the application of, any security hypothecated to the holder until all indebtedness of the borrower to the holder shall have been paid; the right to require the holder to proceed against the borrower, or to pursue any other remedy in the holder's power; and agree that the holder may proceed against us directly and independently of the borrower, and that the cessation of liability of the borrower for any reason, other than full payment, or any revision, renewal, extension, forebearance, change of rate of interest, or acceptance, release or substitution of security, or any impairment or suspension of the holder's remedies or rights against the borrower, shall not in anywise affect the liability of any of the parties hereto.

The parties hereto hereby authorize _____ [payee] to date this note as of the day when the loan evidenced hereby is made and to complete this note in any other particular according to the terms of the said loan.

It is agreed that if the parties hereto, or any of them at any time fail in business or become insolvent, or commit an act of bankruptcy, or if any deposit account or other property of the parties hereto, or any of them, be attempted to be obtained or held by writ of execution, garnishment, attachment, or other legal process, or if any assessment for taxes against the parties hereto, or any of them, other than taxes on real property, is made by the federal or state governemt, or any department thereof, or if the parties hereto fail to notify you of any material change in their financial condition, then, and in such case all of the obligations of the parties hereto to you, or held by you, shall at your option immediately become due and payable without demand or notice.

Signatures Address

_____ _____
Borrower

_____ _____
Co-Maker

move the right to remedies back to the time of repudiation rather than to wait for the time when performance would be due and an actual breach would occur.

## ACCELERATION CLAUSE

*The provision in a credit agreement, such as a mortgage, note, bond, or deed of trust, that allows the lender to require immediate payment of all*

*money due if certain conditions occur before the time that payment would otherwise be due.*

The agreement may call for acceleration whenever there is a default of any important obligation, such as nonpayment of principal or interest, or the failure to pay insurance premiums.

## ACCEPTANCE

*An express act or implication by conduct that manifests assent to the terms of an offer in a manner invited or required by the offer so that a binding contract is formed. The exercise of power conferred by an offer by performance of some act. The act of a person to whom something is offered or tendered by another, whereby the offeree demonstrates through an act invited by the offer an intention of retaining the subject of the offer.*

In the law of contracts, acceptance is one person's compliance with the terms of an offer made by another. Acceptance occurs in the law of insurance when an insurer agrees to receive a person's application for insurance and to issue a policy protecting the person against certain risks, such as fire or theft. When a person who is offered a gift by someone keeps the gift, this indicates his or her acceptance of it.

Acceptance also occurs when a bank pays a check written by a customer who has a checking account with that bank.

In business dealings between merchants, which is governed by the law of sales, a buyer demonstrates his or her acceptance of goods that are not exactly what he or she had ordered from the seller by telling the seller that he or she will keep the goods even though they are not what was ordered; by failing to reject the goods; or by doing something to the goods inconsistent with the seller's ownership of them, such as selling the goods to consumers of the buyer's store.

### Types of Acceptance

An acceptance may be conditional, express, or implied.

**Conditional Acceptance** A conditional acceptance, sometimes called a qualified acceptance, occurs when a person to whom an offer has been made tells the offeror that he or she is willing to agree to the offer provided that some changes are made in its terms or that some condition or event occurs. This type of acceptance operates as a counteroffer. A counteroffer must be accepted by the original offeror before a contract can be established between the parties.

Another type of conditional acceptance occurs when a drawee promises to pay a draft upon the fulfillment of a condition, such as a shipment of goods reaching its destination on the date specified in the contract.

**Express Acceptance** An express acceptance occurs when a person clearly and explicitly agrees to an offer or agrees to pay a draft that is presented for payment.

**Implied Acceptance** An implied acceptance is one that is not directly stated but is demonstrated by any acts indicating a person's assent to the proposed bargain. An implied acceptance occurs when a shopper selects an item in a supermarket and pays the cashier for it. The shopper's conduct indicates that he or she has agreed to the supermarket owner's offer to sell the item for the price stated on it.

FURTHER READINGS

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## ACCESS

*Freedom of approach or communication; or the means, power, or opportunity of approaching, communicating, or passing to and from. Sometimes importing the occurrence of sexual intercourse; otherwise as importing opportunity of communication for that purpose as between* HUSBAND AND WIFE.

*In real property law, the term* access *denotes the right vested in the owner of the land that adjoins a road or other highway to go and return from his own land to the highway without obstruction.* Access *to property does not necessarily carry with it possession.*

*For purposes of establishing element of access by defendant in* COPYRIGHT *infringement action,* access *is ordinarily defined as opportunity to copy.*

Prisoners are entitled to have access to court. Prison officials cannot prevent prisoners from filing papers or appearing in court even if they honestly think that such prevention would help them maintain discipline and good order.

Owners of real property are entitled to some means of access to their property from a road or highway. They do not necessarily need to own a corridor of land from their property to the nearest road, but they may claim an EASEMENT of access.

In a paternity suit, access means the opportunity to have had sexual relations. When there is a question about who is the father of a certain child, it is appropriate for a court to determine which man had access to the mother around the estimated time of conception. A man charged with being the father of an illegitimate child may plead the defense of multiple access—that the mother had several lovers at the time of conception.

## ACCESSION

*Coming into possession of a right or office; increase; augmentation; addition.*

*The right to all that one's own property produces, whether that property be movable or immovable; and the right to that which is united to it by accession, either naturally or artificially. The right to own things that become a part of something already owned.*

*A principle derived from the* CIVIL LAW, *by which the owner of property becomes entitled to all that it produces, and to all that is added or united to it, either naturally or artificially (that is, by the labor or skill of another) even where such addition extends to a change of form or materials; and by which, on the other hand, the possessor of property becomes entitled to it, as against the original owner, where the addition made to it by skill and labor is of greater value than the property itself, or where the change effected in its form is so great as to render it impossible to restore it to its original shape.*

*Generally,* accession *signifies acquisition of title to* PERSONAL PROPERTY *by bestowing labor on it that converts it into an entirely different thing or by incorporation of property into a union with other property.*

*The commencement or inauguration of a sovereign's reign.*

For example, a person who owns property along a river also takes ownership of any additional land that builds up along the riverbank. This right may extend to additions that result from the work or skill of another person. The buyer of a car who fails to make scheduled payments cannot get back his new spark plugs after the car is repossessed because they have become a part of the whole car. The principle of accession does not necessarily apply, however, where the addition has substantially improved the value and changed the character of the property, as when by mistake someone else's grapes were made into wine or someone else's clay made into bricks. In such cases, the original owner might recover only the value of the raw material rather than take ownership of the finished product.

In the context of a treaty, accession may be gained in either of two ways: (1) the new member nation may be formally accepted by all the nations already parties to the treaty; or (2) the new nation may simply bind itself to the obligations already existing in the treaty. Frequently, a treaty will expressly provide that certain nations or categories of nations may accede. In some cases, the parties to a treaty will invite one or more nations to accede to the treaty.

## ACCESSORY

*Aiding or contributing in a secondary way or assisting in or contributing to as a subordinate.*

*In* CRIMINAL LAW, *contributing to or aiding in the commission of a crime. One who, without being present at the commission of an offense, becomes guilty of such offense, not as a chief actor, but as a participant, as by command, advice, instigation, or concealment; either before or after the fact or commission.*

*One who aids, abets, commands, or counsels another in the commission of a crime.*

In common law, an accessory could not be found guilty unless the actual perpetrator was convicted. In most U.S. jurisdictions today, however, an accessory can be convicted even if the principal actor is not arrested or is acquitted. The prosecution must establish that the accessory in some way instigated, furthered, or concealed the crime. Typically, punishment for a convicted accessory is not as severe as that for the perpetrator.

An accessory must knowingly promote or contribute to the crime. In other words, she or he must aid or encourage the offense deliberately, not accidentally. The accessory may withdraw from the crime by denouncing the plans, refusing to assist with the crime, contacting the police, or trying to stop the crime from occurring.

An *accessory before the fact* is someone behind the scenes who orders a crime or helps another person commit it. Many jurisdictions now refer to accessories before the fact as parties to the crime or even accomplices. This substitution of terms can be confusing because accessories are fundamentally different from

accomplices. Strictly speaking, whereas an ACCOMPLICE may be present at the crime scene, an accessory may not. Also, an accomplice generally is considered to be as guilty of the crime as the perpetrator, whereas an accessory has traditionally received a lighter punishment.

An *accessory after the fact* is someone who knows that a crime has occurred but nonetheless helps to conceal it. Today, this action is often termed obstructing justice or harboring a fugitive.

An infamous accessory after the fact was Dr. Samuel A. Mudd, the physician and Confederate sympathizer who set John Wilkes Booth's leg after it was broken when the assassin jumped from President Abraham Lincoln's box at Ford Theater. Despite Mudd's protestation of innocence, he was tried and convicted as an accessory after the fact in Lincoln's murder. He was sentenced to life imprisonment at Fort Jefferson in the Dry Tortugas off Key West, Florida. President ANDREW JOHNSON pardoned Mudd in 1869, and the U.S. Congress gave him an official pardon in 1979.

**10 Leading Causes of Death in the United States in 2000**

Additional facts:
Total number of deaths: 2,403,351
Number of deaths not accounted for in top ten: 499,283
Percentage of deaths not in top ten: 20.7%

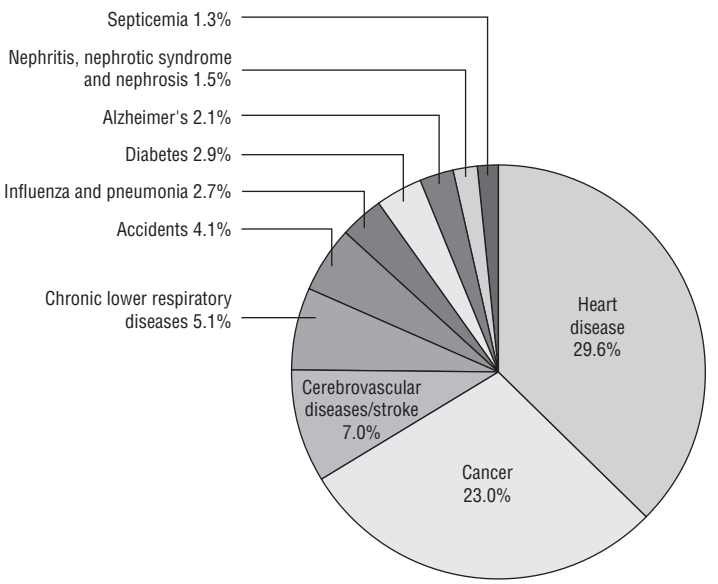


SOURCE: National Center for Health Statistics, *National Vital Statistics Report*, Vol. 50, No. 16, September 16, 2002.

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## ACCIDENT

*The word* accident *is derived from the Latin verb* accidere, *signifying "fall upon, befall, happen, chance." In its most commonly accepted meaning, or in its ordinary or popular sense, the word may be defined as meaning: some sudden and unexpected event taking place without expectation, upon the instant, rather than something that continues, progresses or develops; something happening by chance; something unforeseen, unexpected, unusual, extraordinary, or phenomenal, taking place not according to the usual course of things or events, out of the range of ordinary calculations; that which exists or occurs abnormally, or an uncommon occurrence. The word may be employed as denoting a calamity, casualty, catastrophe, disaster, an undesirable or unfortunate happening; any unexpected personal injury resulting from any unlooked for mishap or occurrence; any unpleasant or unfortunate occurrence that causes injury, loss, suffering, or death; some untoward occurrence aside from the usual course of events. An event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event.*

Accident is not always a precise legal term. It may be used generally in reference to various types of mishaps, or it may be given a technical meaning that applies when used in a certain statute or kind of case. Where it is used in a general sense, no particular significance can be attached to it. Where it is precisely defined, as in a statute, that definition strictly controls any decision about whether a certain event covered by that statute was in fact an accident.

In its most limited sense, the word *accident* is used only for events that occur without the intervention of a human being. This kind of accident also may be called an act of God. It is an event that no person caused or could have prevented—such as a tornado, a tidal wave, or an ice storm. An accident insurance policy can by

its terms be limited to coverage only for this type of accident. Damage by hail to a field of wheat may be considered such an accident.

A policy of insurance, by its very nature, covers only accidents and not intentionally caused injuries. That principle explains why courts will read some exceptions into any insurance policy, whether or not they are expressly stated. For example, life insurance generally will not compensate for a suicide, and ordinary automobile insurance will not cover damages sustained when the owner is drag racing.

Accident insurance policies frequently insure not only against an act of God but also for accidents caused by a person's carelessness. An insured homeowner will expect coverage, for example, if someone drowns in his or her pool, even though the accident might have occurred because someone in the family left the gate open.

Not every unintended event is an accident for which insurance benefits can be paid; all the circumstances in a particular case must first be considered. For example, a policeman who waded into a surging crowd of forty or fifty fighting teenagers and then experienced a heart attack was found to have suffered from an accident. In another case, a man who was shot when he was found in bed with another man's wife was also found to have died in an accident because death is not the usual or expected result of ADULTERY. However, the family of another man was not allowed to collect insurance benefits when he was shot after starting a fight with a knife. In that case, the court ruled that DEADLY FORCE was a predictable response to a life-threatening attack, whether the instigator actually anticipated it or not.

Different states apply different standards when determining if an accident justifies payment of benefits under WORKERS' COMPENSATION. Some states strictly limit benefits to events that clearly are accidents. They will permit payment when a sudden and unexpected strain causes an immediate injury during the course of work but they will not permit payment when an injury gradually results from prolonged assaults on the body. Under this approach, a worker who is asphyxiated by a lethal dose of carbon monoxide when he goes into a blast furnace to make repairs would be deemed to have suffered in an accident. However, a worker who contracts lung cancer after years of exposure to irritating dust in a factory could not claim to have been injured in an accident. Because of the remedial purpose of workers' compensation schemes, many states are liberal in allowing compensation. In one state, a woman whose existing arthritic condition was aggravated when she took a job stuffing giblets into partially frozen chickens on a conveyor belt was allowed to collect workers' compensation benefits.

*Emergency workers attend to a woman involved in a single-car accident. Crashes such as this one are considered accidents unless a driver intentionally causes the crash.*

AP/WIDE WORLD PHOTOS

Insurance policies may set limits to the amount of benefits recoverable for one accident. A certain automobile insurance policy allowed a maximum of only $200 to compensate for damaged clothing or luggage in the event of an accident. When luggage was stolen from the insured automobile, however, a court ruled that the event was not an accident and the maximum did not apply. The owner was allowed to recover the full value of the lost property.

Sometimes the duration of an accident must be determined. For example, if a drunken driver hit one car and then continued driving until he or she collided with a truck, a court might have to determine whether the two victims will share the maximum amount of money payable under the driver's liability insurance policy or whether each will collect the full maximum as a result of a separate accident.

CROSS-REFERENCES

Automobiles "No-Fault Automobile Insurance" (In Focus); Automobiles "What to Do If You Are in an Auto Accident" (Sidebar); Insurance.

## ACCIDENTAL DEATH BENEFIT

*A provision of a life insurance policy stating that if the insured—the person whose life has been insured—dies in an accident, the beneficiary of*

*the policy—the person to whom its proceeds are payable—will receive twice the face value of the policy.*

The insurance company that is liable for the payment of such a benefit will conduct a thorough investigation into the cause of death of the insured person before paying the claim.

Another name for an accidental death benefit is a double indemnity clause.

## ACCIDENTAL KILLING

*A death caused by a lawful act done under the reasonable belief that no harm was likely to result.*

Accidental killing is different from INVOLUNTARY MANSLAUGHTER, which causes death by an unlawful act or a lawful act done in an unlawful way.

The COMMON LAW of crimes distinguished two types of accidental killings: (1) accidental killings resulting from unlawful acts of violence not directed at the victim were punishable as MANSLAUGHTER (killings resulting from unlawful acts directed at the victim were punishable as murder); and (2) accidental killings resulting from lawful acts of violence were excusable as *homicide by misadventure.*

For example, suppose that the defendant killed an innocent bystander while carrying out an assault, BATTERY, or other violent crime against the intended victim. The defendant told police that he intended to injure the victim by hitting him with a club but instead struck the bystander on the skull and killed him. The defendant could be prosecuted for manslaughter under the common law of crimes.

Now suppose that the defendant was lawfully defending himself or his property from attack, and in the process killed an innocent bystander. The defendant told police that lethal force was necessary to thwart an attack upon his person, and he tried to shoot the attacker but instead killed a nearby pedestrian, who had nothing to do with the attack. The common law would have treated the bystander's death as an excusable accidental killing, so long as reasonable grounds existed for the defendant's belief that lethal force was necessary for SELF-DEFENSE.

Although most states have abolished the common law of crimes, some of the concepts underlying the common law distinctions between manslaughter and accidental killings continue to appear in statutory classifications of manslaughter.

Most states recognize at least two classes of manslaughter, voluntary and involuntary. In these states voluntary manslaughter is defined as act of murder reduced to manslaughter because of extenuating circumstances such as adequate provocation (for example, murder committed in the *heat of passion*) or diminished capacity. Involuntary manslaughter is defined in these states as a HOMICIDE that is committed with criminal negligence or during the commission of a crime that is not included within the FELONY-MURDER RULE but for which the prosecution has no proof that the defendant intended to kill the victim or do grievous bodily harm.

Accidental killings that do not result from the defendant's criminal NEGLIGENCE and do not occur during the commission of a crime are not criminal offenses in these jurisdictions. Some jurisdictions expressly classify accidental killings as excusable or justifiable homicides, such as the state of California, which provides that "[h]omicide is excusable . . . [w]hen committed by accident and misfortune, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent." CA PENAL § 195. Other states simply omit this class of homicide from their statutes defining prosecutable offenses.

CROSS-REFERENCES

Common Law; Diminished Capacity; Homicide; Involuntary Manslaughter; Murder.

## ACCIDENTAL VEIN

*An imprecise term that refers generally to a continuous body of a mineral or mineralized rock filling a seam other than the principal vein that led to the discovery of the mining claim or location.*

CROSS-REFERENCES

Mine and Mineral Law.

## ACCIDENTS OF NAVIGATION

*Mishaps that are peculiar to travel by sea or to normal navigation; accidents caused at sea by the action of the elements, rather than by a failure to exercise good handling, working, or navigating of a ship. Such accidents could not have been avoided by the exercise of nautical skill or prudence.*

CROSS-REFERENCES

Admiralty and Maritime Law; Navigable Rivers.

## ACCOMMODATION ENDORSEMENT

*The act of a third person—the accommodation party—in writing his or her name on the back of a* COMMERCIAL PAPER *without any consideration, but merely to benefit the person to whom the paper is payable or to enable the person who made the document—the maker—to obtain money or credit on it.*

An accommodation endorsement is a loan of the endorser's credit up to the face amount of the paper.

## ACCOMMODATION PAPER

*A type of* COMMERCIAL PAPER *(such as a bill or note promising that money will be paid to someone) that is signed by another person—the accommodation party—as a favor to the promisor—the accommodated party—so that credit may be extended to him or her on the basis of the paper.*

Accommodation paper guarantees that the money lent will be repaid by the accommodation party on the date specified in the commercial paper if the accommodated party fails to repay it. A lender often uses an accommodation paper when the person who is seeking a loan is considered a poor credit risk, such as a person who has a history of being delinquent in the payment of installment loans. By having a person who is a good credit risk cosign the promissory note, the lender's financial interests are protected.

An accommodation bill and an accommodation note are two types of commercial papers.

## ACCOMMODATION PARTY

*One who signs a* COMMERCIAL PAPER *for the purpose of lending his or her name and credit to another party to the document—the accommodated party—to help that party obtain a loan or an extension of credit.*

A person wanting to obtain a car loan, for example, may offer a finance company a promissory note for the amount of the requested loan, promising to repay the amount over a number of years. If the company does not consider the person a good credit risk (one who will be able to repay the loan), it will request that someone else sign the note to ensure that the company will be repaid. Such a person may be an accommodation endorser, because he or she endorses the note after it has been completed, or an accommodation maker, because he or she must sign the note with the accommodation party.

An accommodation party is liable to the person or business that extended credit to the

**Accommodation Note**

**Agreement of an Accommodation Party to Modifications in an Accommodation Note**

This agreement is made between _____ [*name of the holder of the note*] ("holder") and _____ [*name of the accommodation party*] ("accommodation party").

On [date of execution], _____ [*name of maker*] ("maker"), of _____ _____ [*address of maker*] executed and issued a promissory note ("note") to the holder as payee, by which the maker promised to pay to the order of the holder _____ [*amount*] [*include any other specific payment terms, including days after the date of execution*].

On [date], the accommodation party signed the note as co-maker in order to accommodate the maker at the request of the maker.

The accommodation party and the holder agree that the holder may modify the terms of the note without notice to or the consent of the accommodation party.

_____
[*Signature of holder*], holder

_____
[*Signature of Accommodation Party*], accommodation party

*A sample accommodation note*

accommodation party, but not to the accommodated party. The accommodation party is liable for the amount specified on the accommodation paper. If an accommodation party repays the debt, he or she can seek reimbursement from the accommodated party.

## ACCOMPANY

*To go along with; to go with or to attend as a companion or associate.*

A motor vehicle statute may require beginning drivers or drivers under a certain age to be accompanied by a licensed adult driver whenever operating an automobile. To comply with such a law, the licensed adult must supervise the beginner and be seated in such a way as to be able to render advice and assistance.

## ACCOMPLICE

*One who knowingly, voluntarily, and with common intent unites with the principal offender in the commission of a crime. One who is in some way concerned or associated in commission of crime; partaker of guilt; one who aids or assists, or is an* ACCESSORY. *One who is guilty of complicity in crime charged, either by being present and aiding or abetting in it, or having advised and encouraged it, though absent from place when it was committed, though mere presence,* ACQUIESCENCE, *or silence, in the absence of a duty to act, is not enough, no matter how reprehensible it may be, to constitute one an accomplice. One is liable as an accomplice to the crime of another if he or she gave assistance or encouragement or failed to perform a legal duty to prevent it with the intent thereby to promote or facilitate commission of the crime.*

An accomplice may assist or encourage the principal offender with the intent to have the crime committed, the same as the chief actor. An accomplice may or may not be present when the crime is actually committed. However, without sharing the criminal intent, one who is merely present when a crime occurs and stands by silently is not an accomplice, no matter how reprehensible his or her inaction.

Some crimes are so defined that certain persons cannot be charged as accomplices even when their conduct significantly aids the chief offender. For example, a businessperson who yields to the EXTORTION demands of a RACKETEER or a parent who pays ransom to a kidnapper may be unwise, but neither is a principal in the commission of the crimes. Even a victim may unwittingly create a perfect opportunity for the commission of a crime but cannot be considered an accomplice because he or she lacks a criminal intent.

An accomplice may supply money, guns, or supplies. In one case, an accomplice provided his own blood to be poured on selective service files. The driver of the getaway car, a lookout, or a person who entices the victim or distracts possible witnesses is an accomplice.

An accomplice can be convicted even if the person that he or she aids or encourages is not. He or she is usually subject to the same degree of punishment as the principal offender. In the 1982 decision of *Enmund v. Florida,* 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140, the SUPREME COURT OF THE UNITED STATES ruled that the death penalty could not be constitutionally imposed upon an accomplice to a felony-murder, a crime leading to murder, if he or she had no intention to, or did not, kill the victim. Earl Enmund drove the getaway car from a ROBBERY that resulted in the murder of its victims, an elderly married couple. Although Enmund remained in the car during the robbery and consequent killings and the trial record did not establish that he intended to facilitate or participate in a murder, the trial court sentenced him to death, along with the persons who actually killed the victims, upon his conviction for robbery in the first degree. In overturning the decision, the Supreme Court reasoned that to condemn such a defendant to death violated the Eighth and Fourteenth Amendments to the Constitution, which prohibited CRUEL AND UNUSUAL PUNISHMENT in state prosecutions. The death penalty was an excessive punishment in light of the "criminal culpability" of this accomplice.

CROSS-REFERENCES

Capital Punishment; Criminal Law; Eighth Amendment; Fourteenth Amendment; Sentencing.

## ACCOMPLICE WITNESS

*A witness to a crime who, either as principal,* ACCOMPLICE, *or* ACCESSORY, *was connected with the crime by unlawful act or omission on his or her part, transpiring either before, at time of, or after commission of the offense, and whether or not he or she was present and participated in the crime.*

Generally, there can be no conviction solely on the basis of what is said by an accomplice

witness; there must be evidence from an unrelated source to corroborate the witness's testimony.

## ACCORD

*An agreement that settles a dispute, generally requiring an obligee to accept a compromise or satisfaction from the obligor with something less than what was originally demanded. Also often used synonymously with treaty.*

## ACCORD AND SATISFACTION

*A method of discharging a claim whereby the parties agree to give and accept something in settlement of the claim and perform the agreement, the* accord *being the agreement and the* satisfaction *its execution or performance, and it is a new contract substituted for an old contract which is thereby discharged, or for an obligation or* CAUSE OF ACTION *which is settled, and must have all of the elements of a valid contract.*

To constitute an ACCORD AND SATISFACTION, there must have been a genuine dispute that is settled by a meeting of the minds with an intent to compromise. Where there is an actual controversy, an accord and satisfaction may be used to settle it. The controversy may be founded on contract or TORT. It can arise from a collision of motor vehicles, a failure to deliver oranges ordered and paid for, or a refusal to finish constructing an office building, etc.

In former times, courts recognized an accord and satisfaction only when the amount of the controversy was not in dispute. Otherwise, the resolution had to be by COMPROMISE AND SETTLEMENT. The technical distinction is no longer made, however, and a compromise of amount can properly be part of an accord and satisfaction. The amount, whether disputed or not, is usually monetary, as when a pedestrian claims $10,000 in damages from the driver who struck him. The amount can be a variety of other things, however, as when a homeowner claims that she ordered a swimming pool thirty-six feet long rather than thirty-five feet or when an employee insists that he is entitled to eleven rather than ten days of vacation during the rest of the calendar year.

An accord and satisfaction can be made only by persons who have the legal capacity to enter into a contract. A settlement is not binding on an insane person, for example; and an infant may have the right to disaffirm the contract. Therefore, a person, such as a guardian, acting on behalf of a person incapable of contracting for himself or herself may make an accord and satisfaction for the person committed to his or her charge, but the law may require that the guardian's actions be supervised by a court. An executor or administrator may bind an estate; a trustee can accept an accord and satisfaction for a trust; and an officer can negotiate a settlement for a corporation.

A third person may give something in satisfaction of a party's debt. In such a case, an accord and satisfaction is effected if the creditor accepts the offer and the debtor authorizes, participates in, or later agrees to, the transaction.

For example, a widower has an automobile accident but is mentally unable to cope with a lawsuit because his wife has just died. He gratefully accepts the offer of a close family friend to talk to the other driver, who has been threatening a lawsuit. The friend convinces the other driver that both drivers are at fault to some extent. The friend offers to pay the other driver $500 in damages in exchange for a written statement that she will not make any claim against the widower for damages resulting from the accident. The family friend and the other driver each sign a copy of the statement for the other, and when the payment is made, the accord and satisfaction is complete. If the other driver then sues the widower for more money on account of the accident, the widower could show that he agreed to let his friend negotiate an accord and satisfaction, and the court would deny relief.

An accord and satisfaction is a contract, and all the essential elements of a contract must be present. The agreement must include a definite offer of settlement and an unconditional acceptance of the offer according to its terms. It must be final and definite, closing the matter it covers and leaving nothing unsettled or open to question. The agreement may call for full payment or some compromise and it need not be based on an earlier agreement of the parties. It does not necessarily have to be in writing unless it comes within the statute of frauds.

Unless there are matters intentionally left outside the accord and satisfaction, it settles the entire controversy between the parties. It extinguishes all the obligations arising out of the underlying contract or tort. Where only one of two or more parties on one side settles, this ordinarily operates to discharge all of them. The reason for this is the rule that there should be only

one satisfaction for a single injury or wrong. This rule does not apply where the satisfaction is neither given nor accepted with the intention that it settle the entire matter.

An accord without satisfaction generally means nothing. With a full satisfaction, the accord can be used to defeat any further claims by either party unless it was reached by FRAUD, duress, or mutual mistake.

An accord and satisfaction can be distinguished from other forms of resolving legal disputes. A payment or performance means that the original obligations were met. A release is a formal relinquishment of the right to enforce the original obligations and not necessarily a compromise, as in accord and satisfaction. An ARBITRATION is a settlement of the dispute by some outside person whose determination of an award is voluntarily accepted by the parties. A COMPOSITION WITH CREDITORS is very much like an accord but has elements not required for an accord and satisfaction. It is used only for disputes between a debtor and a certain number of his or her creditors, while an accord and satisfaction can be used to settle any kind of controversy—whether arising from contract or tort—and ordinarily involves only two parties. Although distinctions have occasionally been drawn between an accord and satisfaction and a compromise and settlement, the two terms are often used interchangeably. A novation is a kind of accord in which the promise alone, rather than full performance, is satisfaction, and is accepted as a binding resolution of the dispute.

**Accouchement: U.S. Births and Birthrates**

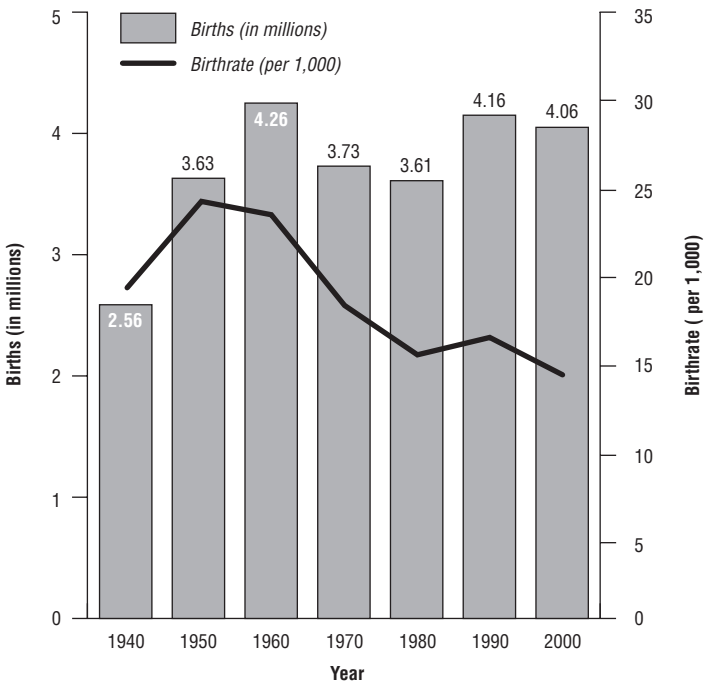


SOURCE: National Center for Health Statistics *National Vital Statistics Report*, Vol. 50, No. 5, February 12, 2002.

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## ACCOUCHEMENT

*The act of giving birth to a child.*

The fact of accouchement may be proved by the direct testimony of someone who was present, such as a midwife or a physician, at the time of birth. It may be significant in proving parentage; for example, where there is some question about who is entitled to inherit property from an elderly person who died leaving only distant relatives.

## ACCOUNT

*A written list of transactions, noting money owed and money paid; a detailed statement of mutual demands arising out of a contract or a fiduciary relationship.*

An account can simply list payments, losses, sales, debits, credits, and other monetary transactions, or it may go further and show a balance or the results of comparing opposite transactions, like purchases and sales. Businesspersons keep accounts; attorneys may keep escrow accounts; and executors must keep accounts that record transactions in administering an estate.

## ACCOUNT, ACTION ON

*A civil lawsuit maintained under the* COMMON LAW *to recover money owed on an account.*

The action on account was one of the ancient FORMS OF ACTION. Dating back to the thirteenth century, it offered a remedy for the breach of obligations owed by fiduciaries. Orig-

inally, the action allowed lords to recover money wrongfully withheld by the bailiffs of their manors, whom they appointed to collect fines and rents. Later, statutes extended the right so that lawsuits could be brought against persons who were required to act primarily for someone else's benefit, such as guardians and partners. Eventually, the action withered away because its procedure was too cumbersome, and fiduciaries came under the jurisdiction of the special court of the king, called the Chancery.

An action on account is different from a modern-day accounting, which is a settling of accounts or a determination of transactions affecting two parties, often when one party asks a court to order the other party to account.

## ACCOUNT PAYABLE

*A debt owed by a business that arises in the normal course of its dealings, that has not been replaced by a note from another debtor, and that is not necessarily due or past due.*

Bills for materials received or obligations on an open account may be accounts payable. This kind of liability usually arises from a purchase of merchandise, materials, or supplies.

## ACCOUNT RECEIVABLE

*A debt owed by a business that arises in the normal course of dealings and is not supported by a negotiable instrument.*

The charge accounts of a department store are accounts receivable, but income from investments usually is not. Accounts receivable generally arise from sales or service transactions. They are not necessarily due or past due. Insurance may be purchased to protect against the risk of being unable to collect on accounts receivable if records are damaged or lost.

## ACCOUNT RENDERED

*A statement of transactions made out by a creditor and presented to the debtor.*

After the debtor has examined the account and accepted it, an account rendered becomes an account stated.

## ACCOUNT STATED

*An amount that accurately states money due to a creditor; a debt arising out of transactions between a debtor and creditor that has been reduced to a balance due for the items of account.*

A creditor agrees to accept and a debtor agrees that a specific sum is a true and exact statement of the amount he or she owes. The debtor may agree in words to pay the amount, or it may be understood that the debtor has accepted the account stated by failing to object within a certain period of time.

## ACCOUNTANT

*A person who has the requisite skill and experience in establishing and maintaining accurate financial records for an individual or a business. The duties of an accountant may include designing and controlling systems of records, auditing books, and preparing financial statements. An accountant may give tax advice and prepare tax returns.*

A *public accountant* renders accounting or auditing services for a number of employees, each of whom pays the accountant a fee for services rendered. He or she does more than just bookkeeping but does not generally have all the qualifications of a certified public accountant.

A *certified public accountant* is one who has earned a license in his or her state that attests to a high degree of skill, training, and experience. In addition to passing an accounting examination, a candidate must have the proper business experience, education, and moral character in order to qualify for the license. The letters CPA are commonly used and generally recognized to be the abbreviation for the title Certified Public Accountant.

The practice of accounting is a highly skilled and technical profession that affects public welfare. It is entirely appropriate for the state to regulate the profession by means of a licensing system for accountants. Some states do not permit anyone to practice accounting except certified public accountants, but other states use the title to recognize the more distinguished skills of a CPA while permitting others to practice as public accountants. All states limit the use of the title and the initials to those who are licensed as certified public accountants.

All accountants are held to high standards of skill in issuing professional opinions. They can be sued for MALPRACTICE if performance of their duties falls below standards for the profession.

## ACCOUNTING

*A system of recording or settling accounts in financial transactions; the methods of determining*

*income and expenses for tax and other financial purposes. Also, one of the remedies available for enforcing a right or redressing a wrong asserted in a lawsuit.*

Various accounting methods may be employed. The *accrual method* shows expenses incurred and income earned for a given period of time whether or not such expenses and income have been actually paid or received by that time. The *cash method* records income and expenses only when monies have actually been received or paid out. The *completed contract method* reports gains or losses on certain long-term contracts. Gross income and expenses are recognized under this method in the tax year the contract is completed. The *installment method* of accounting is a way regulated utilities calculate depreciation for INCOME TAX purposes.

The *cost method* of accounting records the value of assets at their actual cost, and the *fair value method* uses the present market value for the recorded value of assets. *Price level accounting* is a modern method of valuing assets in a financial statement by showing their current value in comparison to the gross national product.

Where a court orders an accounting, the party against whom judgment is entered must file a complete statement with the court that accounts for his or her administration of the affairs at issue in the case. An accounting is proper for showing how an executor has managed the estate of a deceased person or for disclosing how a partner has been handling partnership business.

An accounting was one of the ancient remedies available in courts of EQUITY. The regular officers of the Chancery, who represented the king in hearing disputes that could not be taken to courts of law, were able to serve as auditors and work through complex accounts when necessary. The chancery had the power to discover hidden assets in the hands of the defendant. Later, courts of law began to recognize and enforce regular contract claims, as actions in ASSUMPSIT, and the courts of equity were justified in compelling an accounting only when the courts at law could not give relief. A plaintiff could ask for an accounting in equity when the complexity of the accounts in the case made it too difficult for a jury to resolve or when a trustee or other fiduciary was charged with violating a position of trust.

In the early twenty-first century, courts in the United States generally have jurisdiction both at law and in equity. They have the power to order an accounting when necessary to determine the relative rights of the parties. An accounting may be appropriate whenever the defendant has violated an obligation to protect the plaintiff's interests. For example, an accounting may be ordered to settle disputes when a partnership is breaking up, when an heir believes that the executor of an estate has sold off assets for less than their fair market value, or when shareholders claim that directors of a corporation have appropriated for themselves a business opportunity that should have profited the corporation.

An accounting may also be an appropriate remedy against someone who has committed a wrong against the plaintiff and should not be allowed to profit from it. For example, a bank teller who embezzles money and makes "a killing" by investing it in mutual funds may be ordered to account for all the money taken and the earnings made from it. A businessperson who palms off a product as that of a more popular manufacturer might have to account for the entire profit made from it. A defendant who plagiarizes another author's book can be ordered to give an account and pay over all the profits to the owner of the copyrighted material. An accounting forces the wrongdoer to trace all transactions that flowed from the legal injury, because the plaintiff is in no position to identify the profits.

### Arthur Andersen and Other Accounting Failures

The accounting profession, which is largely self-regulated, has suffered through a series of fiascoes since the late 1990s, resulting in a call for major changes in accounting standards. The Financial Accounting Standards Board (FASB) has served since 1973 as one of the organizations responsible for establishing standards of financial accounting and reporting. Although the FASB is a private organization, its standards are recognized as authoritative by the SECURITIES AND EXCHANGE COMMISSION (SEC) and the American Institute of Certified Public Accountants. In the late 1990s and early 2000s, debacles involving major accounting firms required the FASB and the SEC, as well as other regulatory organizations, to consider new rules designed to improve financial reporting. Between 1996 and

2002, investors lost an estimated $200 billion in earnings restatements and stock meltdowns following failures in auditing processes. A number of high-profile auditing failures decreased confidence in the accounting profession. Among these failures were incidents involving such companies as Bausch and Lomb, Rite Aid, Cendant, Sunbeam, Waste Management, Superior Bank, and Dollar General.

One of the most highly publicized accounting failures in this period involved Houston-based Enron Corporation and its accountant, Arthur Andersen, L.L.P. Enron suffered a collapse in the third quarter of 2001 that resulted in the largest BANKRUPTCY in U.S. history and numerous lawsuits alleging violations of federal SECURITIES laws. Thousands of Enron employees lost 401(k) retirement plans that held company stock. The controversy extended to Arthur Andersen, which was accused of overlooking significant sums of money that had not been represented on Enron's books. Arthur Andersen was later found guilty on federal charges that it obstructed justice by destroying thousands of Enron documents. Enron reported annual revenues of about $101 billion between 1985 and 2000. On December 18, 2000, Enron's stock sold for $84.87 per share. Stock prices fell throughout 2001, however, and on October 16, 2001, the company reported losses of $638 million in the third quarter alone. During the next six weeks, company stock continued to fall, and by December 2, 2001, Enron stock dropped to below $1 per share after the largest single day trading volume for any stock listed on either the New York Stock Exchange or the NASDAQ.

Initial allegations focused upon the role of Arthur Andersen. The company was one of the "Big Five" accounting firms in the United States, and it had served as Enron's auditor for sixteen years. Arthur Andersen also served as a consultant to Enron, thus raising serious questions regarding conflicts of interests between the two companies. According to court documents, Enron and Arthur Andersen had improperly categorized hundreds of millions of dollars as increases in shareholder equity, thereby misrepresenting the true value of the corporation. Arthur Andersen also did not follow generally accepted accounting principles (GAAP) when it considered Enron's dealings with related partnerships. These dealings, in part, allowed Enron to conceal some of its losses.

Arthur Andersen was also accused of destroying thousands of Enron documents that included not only physical documents but also computer files and E-MAIL files. After investigation by the U.S. JUSTICE DEPARTMENT, the firm was indicted on OBSTRUCTION OF JUSTICE charges in March 2002. After a six-week trial, Arthur Andersen was found guilty on June 16, 2002. The company was placed on PROBATION for five years and was required to pay a $500,000 fine. Some analysts also questioned whether the company could survive after this series of incidents.

The accounting issues in the Enron case extended beyond Enron and Arthur Andersen. Prior to this case and since 1977, the accounting field was supervised considerably by the Public Oversight Board (POB). When SEC chairman Harvey L. Pitt in 2002 made a series of inquiries about the system of self-regulation in the accounting profession, he did not consult the POB. The POB voted to disband, effective May 1, 2002. After the Enron case, the FASB emerged in the public spotlight as the leader of the system of self-regulation and has taken a significant role in the reform of accounting rules. In January 2003, the FASB announced new accounting rules designed to force U.S. companies to move billions of dollars from off-balance-sheet entities into the companies' balance sheets. The SEC has also stepped up its oversight of company accounting.

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CROSS-REFERENCES

Accrual Basis; Cash Basis; Income Tax.

## ACCREDIT

*To give official authorization or status. To recognize as having sufficient academic standards to qualify graduates for higher education or for professional practice. In* INTERNATIONAL LAW*: (1) To acknowledge; to receive as an envoy and give that person credit and rank accordingly. (2) To send with credentials as an envoy. This latter use is now the accepted one.*

## ACCREDITED LAW SCHOOL

*A law school that has been approved by the state and the Association of American Law Schools*

*(AALS), the* AMERICAN BAR ASSOCIATION *(ABA), or both.*

In certain states—for example, California—it is acceptable for a law school to be accredited by the state and not by either the AALS or the ABA. In most states, however, only graduates of AALS or ABA accredited law schools are permitted to take the state bar examination.

CROSS-REFERENCES

Legal Education.

## ACCRETION

*The act of adding portions of soil to the soil already in possession of the owner by gradual deposition through the operation of natural causes.*

*The growth of the value of a particular item given to a person as a specific bequest under the provisions of a will between the time the will was written and the time of death of the testator—the person who wrote the will.*

Accretion of land is of two types: (1) by *alluvion,* the washing up of sand or soil so as to form firm ground; and (2) by *dereliction,* as when the sea shrinks below the usual watermark. The terms *alluvion* and *accretion* are often used interchangeably, but alluvion refers to the deposit itself while accretion denotes the act. Land uncovered by a gradual subsidence of water is not an accretion; it is a reliction.

## ACCRUAL BASIS

*A method of accounting that reflects expenses incurred and income earned for* INCOME TAX *purposes for any one year.*

Taxpayers who use the accrual method must include in their taxable income any money that they have the right to receive as payment for services, once it has been earned. Any expenses that they may take as deductions when computing taxable income must be due at the time the deduction is taken. For example, suppose a surgeon performed a tonsillectomy in October 2003, and on December 31, 2003, he received a bill for carpeting installed in the waiting room of his office. He was paid the surgical fee on January 3, 2004, the same day he paid for the carpeting. The surgical fee will be included in his taxable income for 2003, the year in which he earned it, regardless of the fact that he was not paid until the following year.

His expenses for the carpeting can be deducted from his 2003 income because once he received the bill, he was bound to pay it. The fact that he did not pay for the carpeting until the following year does not prevent him from taking the deduction in 2003.

The accrual method of accounting differs from the cash basis method, which treats income as only that which is actually received, and expense as only that which is actually paid out. If the cash method were used in the above example, the payment of the surgical fee would be included as income for the 2004 tax year, the year in which it was received by the surgeon. The surgeon could deduct the cost of the carpeting only when he actually paid for it in 2004, although it had been installed in 2003.

Unearned income, such as interest or rent, is generally taxed in the year in which it is received, regardless of the accounting method that the taxpayer uses.

## ACCRUE

*To increase; to augment; to come to by way of increase; to be added as an increase, profit, or damage. Acquired; falling due; made or executed; matured; occurred; received; vested; was created; was incurred.*

*To attach itself to, as a subordinate or accessory claim or demand arises out of, and is joined to, its principal.*

*The term is also used of independent or original demands, meaning to arise, to happen, to come into force or existence; to vest, as in the phrase, "The right of action did not* accrue *within six years." To become a present right or demand; to come to pass.*

Interest on money that a depositor has in a bank savings account accrues, so that after a certain time the amount will be increased by the amount of interest it has earned.

A CAUSE OF ACTION, the facts that give a person a right to judicial relief, usually accrues on the date that the injury to the plaintiff is sustained. When the injury is not readily discoverable, the cause of action accrues when the plaintiff in fact discovers the injury. This occurs frequently in cases of FRAUD or MALPRACTICE. A woman, for example, has an appendectomy. Three years after the surgery, she still experiences dull pain on her right side. She is examined by another physician who discovers a piece of surgical sponge near the area of the operation. Although the injury had occurred at the time of surgery three years earlier, in this case

the cause of action for MEDICAL MALPRACTICE accrues on the date that the sponge is discovered by the second doctor. This distinction is important for purposes of the running of the STATUTE OF LIMITATIONS, the time set by law within which a lawsuit must be commenced after a cause of action accrues. In cases involving injuries that cannot be readily discovered, it would be unfair to bar a plaintiff from bringing a lawsuit because he or she does not start the suit within the required time from the date of injury.

## ACCUMULATED EARNINGS TAX

*A special tax imposed on corporations that accumulate (rather than distribute via dividends) their earnings beyond the reasonable needs of the business. The accumulated earnings tax is imposed on accumulated taxable income in addition to the corporate* INCOME TAX.

## ACCUMULATION TRUST

*An arrangement whereby property is transferred by its owner—the settlor—with the intention that it be administered by someone else—a trustee—for another person's benefit, with the direction that the trustee gather, rather than distribute, the income of the trust and any profits made from the sale of any of the property making up the trust until the time specified in the document that created the trust.*

Many states have laws governing the time over which accumulations may be made.

## ACCUMULATIVE JUDGMENT

*A second or additional judgment against a person who has already been convicted and sentenced for another crime; the execution of the second judgment is postponed until the person's first sentence has been completed.*

## ACCUMULATIVE SENTENCE

*A sentence—a court's formal pronouncement of the legal consequences of a person's conviction of a crime—additional to others, imposed on a defendant who has been convicted upon an indictment containing several counts, each charging a distinct offense, or who is under conviction at the same time for several distinct offenses; each sentence is to run consecutively, beginning at the expiration of the previous sentence.*

A person must finish one sentence before being allowed to start the next one. Another name for accumulative sentence is *cumulative* or *consecutive sentence.*

The opposite of an accumulative sentence is a *concurrent sentence*—two or more prison sentences that are to be served simultaneously, so that the prisoner is entitled to be released at the end of the longest sentence.

## ACCUSATION

*A formal criminal charge against a person alleged to have committed an offense punishable by law, which is presented before a court or a magistrate having jurisdiction to inquire into the alleged crime.*

The SIXTH AMENDMENT to the Constitution provides in part that a person accused of a crime has the right "to be informed of the nature and cause of the accusation." Thus in any federal criminal prosecution, the statute setting forth the crime in the accusation must define the offense in sufficiently clear terms so that an average person will be informed of the acts that come within its scope. The charge must also inform the accused in clear and unambiguous language of the offense with which he or she is being charged under the statute. An accused has the same rights when charged with violating state CRIMINAL LAW because the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT applies the guarantees of the Sixth Amendment to the states. The paper in which the accusation is set forth—such as an indictment, information, or a complaint—is called an *accusatory instrument.*

Most state constitutions contain language similar to that in the Sixth Amendment. In many state rules of CRIMINAL PROCEDURE, the accusatory instrument serves to protect the state constitutional rights of the accused. In Louisiana, for example, the purpose of a bill of information is to inform a defendant of the nature and cause of the accusation against him or her as required by the Louisiana State Constitution (*State v. Stevenson*, 2003 WL 183998 [La. App. 2003]).

In order to quash a bill of information or other accusatory instrument, the accused must present direct evidence not established by the record, showing the bill was insufficient. The accused generally has the BURDEN OF PROOF to demonstrate that the accusatory instrument was insufficient. The RULES OF EVIDENCE in a particular jurisdiction apply to the evidentiary determination of the sufficiency of the accusatory instrument.

CROSS-REFERENCES

Criminal Law.

## ACCUSATORY BODY

*Body such as a* GRAND JURY *whose duty it is to hear evidence to determine whether a person should be accused of (charged with) a crime; to be distinguished from a traverse or petit jury, which is charged with the duty of determining guilt or innocence.*

## ACCUSED

*The generic name for the defendant in a criminal case. A person becomes* accused *within the meaning of a guarantee of* SPEEDY TRIAL *only at the point at which either formal indictment or information has been returned against him or her, or when he or she becomes subject to actual restraints on liberty imposed by arrest, whichever occurs first.*

## ACKNOWLEDGMENT

*To* acknowledge *is to admit, affirm, declare, testify, avow, confess, or own as genuine. Admission or affirmation of obligation or responsibility. Most states have adopted the Uniform Acknowledgment Act.*

The partial payment of a debt, for example, is considered an acknowledgment of it for purposes of tolling the statute of limitations—the time set by law for bringing a lawsuit—based on a person's failure to repay a debtor. State law usually gives a creditor six years from the date a debt is due, according to the creditor's contract with the debtor, to sue for nonpayment. If, on the last day of the fifth year, the debtor repays any part of the loan, the STATUTE OF LIMITATIONS is tolled or suspended. The creditor then has another six years from the date of partial payment to sue the debtor for the balance of the loan. The debtor's partial payment indicates acceptance of responsibility to pay the loan. If the debtor had not paid anything, he or she would have escaped liability six years after the date the loan was due.

An acknowledgment of PATERNITY means recognition of parental duties—such as financial support of an illegitimate child—by written agreement, verbal declaration, or conduct of the father toward the mother and child that clearly demonstrates recognition of paternity.

The requirement for acknowledgments on certain documents—such as deeds transferring the ownership of real property, wills giving the ownership of property to a decedent's heirs after death, or documentary evidence that is to be admitted in a legal proceeding—is established by state law. If such documents do not contain acknowledgments, they are ineffective and cannot be used in any legal proceedings.

Any or all of the parties to a document may be required to acknowledge it. Only those persons specified by law, a NOTARY PUBLIC, for example, may take an acknowledgment. Usually, a person making an acknowledgment does not have to explain the contents of the document to the person taking the acknowledgment. A person who ordinarily takes an acknowledgment might be disqualified from doing so if that person stands to gain some benefit from or has a financial interest in the outcome of the transaction. For example, state law requires a person making a will, a testator, to make an acknowledgment to a certain number of witnesses that the document is the genuine expression of how that person wants his or her property disposed of upon his or her death. Suppose the state requires two witnesses. If the people selected as witnesses have financial interests in the person's will, they will be disqualified for purposes of acknowledgment. This is done to deter dishonest people from fabricating a document that is beneficial to them. Such a will is legally ineffective; once the testator dies, his or her property will be transferred according to the laws of DESCENT AND DISTRIBUTION.

A certificate of acknowledgment, sometimes referred to as the acknowledgment, is evidence that the acknowledgment has been done properly. Although its contents may vary from state to state, the certificate must recite: (1) that acknowledgment before the proper officer was made by the person who completed the document; (2) the place where the acknowledgment took place; and (3) the name and authority of the officer. The certificate may be on the document itself or may be attached to it as a separate instrument.

## ACQUIESCENCE

*Conduct recognizing the existence of a transaction and intended to permit the transaction to be carried into effect; a tacit agreement; consent inferred from silence.*

For example, a new beer company is concerned that the proposed label for its beer might

*Examples of acknowledgments*

## Acknowledgments

**Short forms of acknowledgment**

The forms of acknowledgment set forth in this section may be used and are sufficient for their respective purposes under any law of this State. The forms shall be known as "Statutory Short Forms of Acknowledgment" and may be referred to by that name. The authorization of the forms in this section does not preclude the use of other forms. [1969, c. 364 (new).]

**1. Individual.** For an individual acting in his own right:

State of

County of

The foregoing instrument was acknowledged before me this (date) by (name of person acknowledged).

(Signature of person taking acknowledgment)

(Title or rank)

(Serial number, if any)

**[1969, c. 364 (new).]**

**2. Corporation.** For a corporation:

State of

County of

The foregoing instrument was acknowledged before me this (date) by (name of officer or agent, title of officer or agent) of (name of corporation acknowledging) a (state or place of incorporation) corporation, on behalf of the corporation.

(Signature of person taking acknowledgment)

(Title or rank)

(Serial number, if any)

**[1969, c. 364 (new).]**

**3. Partnership.** For a partnership:

State of

County of

The foregoing instrument was acknowledged before me this (date) by (name of acknowledging partner or agent), partner (or agent) on behalf of (name of partnership), a partnership.

(Signature of person taking acknowledgment)

(Title or rank)

(Serial number, if any)

**[1969, c. 364 (new).]**

**4. Principal.** For an individual acting as principal by an attorney in fact:

State of

County of

The foregoing instrument was acknowledged before me this (date) by (name of attorney in fact) as attorney in fact on behalf of (name of principal).

(Signature of person taking acknowledgment)

(Title or rank)

(Serial number, if any)

**[1969, c. 364 (new).]**

[continued]

*Examples of acknowledgments (continued)*

**Acknowledgments**

**5. Public officer.** By any public officer, trustee or personal representative:

State of

County of

The foregoing instrument was acknowledged before me this (date) by (name and title of position).

(Signature of person taking acknowledgment)

(Title or rank)

(Serial number, if any)

**[1969, c. 364 (new).]**

Section History:
PL 1969, Ch. 364, § (NEW).

The Revisor's Office cannot provide legal advice or interpretation of Maine law to the public. If you need legal advice, please consult a qualified attorney.

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**This page created on: 2003-03-13**

infringe on the TRADEMARK of its competitor. It submits the label to its competitor's general counsel, who does not object to its use. The new company files an application in the PATENT AND TRADEMARK OFFICE to register the label as its trademark and starts to use the label on the market. The competitor does not file any objection in the Patent Office. Several years later, the competitor sues the new company for infringing on its trademark and demands an accounting of the new company's profits for the years it has been using the label. A court will refuse the accounting, since by its acquiescence the competitor tacitly approved the use of the label. The competitor, however, might be entitled to an INJUNCTION barring the new company from further use of its trademark if it is so similar to the competitor's label as to amount to an infringement.

Similarly, the INTERNAL REVENUE SERVICE (IRS) may acquiesce or refuse to acquiesce to an adverse ruling by the U.S. TAX COURT or another lower federal court. The IRS is not bound to change its policies due to an adverse ruling by a federal court with the exception of the U.S. Supreme Court. The chief counsel of the IRS may determine that the commissioner of the IRS should acquiesce to an adverse decision, however, thus adopting the ruling as the policy of the IRS. The decision whether to acquiesce to an adverse ruling is published by the Internal Revenue Service as an Action on Decision.

Acquiescence is not the same as LACHES, a failure to do what the law requires to protect one's rights, under circumstances misleading or prejudicing the person being sued. Acquiescence relates to inaction during the performance of an act. In the example given above, the failure of the competitor's general counsel to object to the use of the label and to the registration of the label as a trademark in the Patent and Trademark Office is acquiescence. Failure to sue the company until after several years had elapsed from the first time the label had been used is laches.

## ACQUIRED IMMUNE DEFICIENCY SYNDROME

*A disease caused by the human immunodeficiency virus (HIV) that produces disorders and infections that can lead to death.*

Acquired immune deficiency syndrome (AIDS), a fatal disease that attacks the body's immune system making it unable to resist infection, is caused by the human immunodeficiency

# What Causes AIDS—and What Does Not?

Since the first case was identified in 1981, acquired immune deficiency syndrome (AIDS) has grown into an epidemic that has taken approximately 500,000 lives in the United States alone. The Joint **UNITED NATIONS** Programme on HIV/AIDS estimates that at the end of 2002 there were 42 million people living with HIV/AIDS worldwide. During 2002, AIDS caused the deaths of an estimated 3.1 million people. At this time, women were increasingly affected by AIDS; it was estimated that women comprised approximately 50 percent or 19.2 million of the 38.6 million adults living with HIV or AIDS worldwide. No cure has been found, although existing treatment employing multiple drugs has made some gains in prolonging life and reducing pain. Despite the limits of medical science, however, much is known about the disease. It is caused by the human immunodeficiency virus (HIV). Transmitted by bodily fluids from person to person, HIV invades certain key blood cells that are needed to fight off infections. HIV replicates, spreads, and destroys these host cells. When the body's immune system becomes deficient, the person becomes AIDS-symptomatic, which means the person develops infections that the body can no longer ward off. Ultimately, a person with AIDS dies from diseases caused by other infections. The leading killer is a form of pneumonia.

Most of the fear surrounding AIDS has to do with its most common form of transmission: sexual behavior. The virus can be passed through any behavior that involves the exchange of blood, semen, or vaginal secretions. Anal intercourse is the highest-risk activity, but oral or vaginal intercourse is dangerous too. Thus, federal health authorities recommend using a condom—yet they caution that condoms are not 100 percent effective; condoms can leak, and they can break. Highly accurate HIV testing is widely available, and often advisable, since infected people can feel perfectly healthy. Although the virus can be contracted immediately upon exposure to it, symptoms of full-blown AIDS may take up to ten years to appear.

In addition to sexual behavior, only a few other means of HIV transmission exist. Sharing unsterilized needles used in drug injections is one way, owing to the exchange of blood on the needle, and thus intravenous drug users are an extremely high-risk group. Several cities have experimented with programs that offer free, clean needles. These programs have seen up to a 75 percent reduction in new HIV cases. Receipt of donations of blood, semen, organs, and other human tissue can also transmit HIV, although here, at least, screening methods have proved largely successful. Childbirth and breast feeding are also avenues of transmission, and thus children of HIV-positive mothers may be at risk.

The medical facts about HIV and AIDS are especially relevant to the law. Unless exposed in one of a few very specific ways, most people have nothing to fear. Casual contact with people who are infected is safe. Current medical knowledge is quite strong on this point: no one is known to have caught the virus by sitting next to, shaking the hand of, or breathing the same air as an infected person. For this reason, U.S. law has moved to protect the **CIVIL RIGHTS** of HIV-positive and AIDS-symptomatic persons. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994) prohibits discrimination against otherwise qualified disabled individuals, including individuals with a contagious disease or an infection such as HIV or AIDS. The AIDS quilt, on display in Washington, D.C., has become a well-known symbol of support for victims of AIDS and their families. Families and supporters of victims of AIDS create a panel to commemorate that person's life and that panel is joined with others from around the country to create the quilt.

**FURTHER READINGS**

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**CROSS-REFERENCES**

Discrimination.

# Reading, Writing, and AIDS

Teaching young people about AIDS is an enormously popular idea. Since the late 1980s, Gallup Polls have revealed that over 90 percent of respondents think public schools should do so. Agreement ends there, however. In the 1990s, more angry debate focused on AIDS education than on any issue facing schools since court-ordered busing in the 1970s. The core question of the debate is simple: What is the best way to equip students to protect themselves from this fatal disease? The answers may be miles apart. For one side, "equipping" means advocating the only sure means of protection, sexual and drug abstinence. For the other, it means supporting abstinence along with knowledge of sexual practices, the use of clean drug needles, and the use of prophylactics (condoms), which are distributed in some schools. Between these positions lie a great many issues of disagreement that have bitterly divided school districts, provoked lawsuits, and cost high-ranking Washington, D.C., officials their jobs.

Sex is an old battleground in public education. Liberals and conservatives argued over it in the decade following the sexual revolution of the 1960s, initially over whether sexual issues should be discussed in schools. After all, earlier generations who went to public schools learned mainly about reproductive organs. As new classes began appearing in the late 1970s, children learned about the sexual choices people make. If liberals appeared to win the "sex ed." debate, growing social problems helped: rises in teen pregnancies and sexually transmitted diseases secured a place for more explicit school health classes. The much greater threat of AIDS pushed state legislatures into action. By the mid-1990s, AIDS prevention classes had been mandated in at least 34 states and recommended in 14. But the appearance of even more explicit teaching has reinvigorated the sex ed. debate.

Supporters of a comprehensive approach say AIDS demands frankness. Originating in comprehensive sex ed. theory, their ideas also came from pacesetting health authorities such as former surgeon general **C. EVERETT KOOP**. Arguing in the mid-1980s that AIDS classes should be specific and detailed and taught as early as kindergarten, Koop countered conservative arguments by saying, "Those who say 'I don't want my child sexually educated' are hiding their heads in the sand." This position holds that educators are obligated to teach kids everything that can stop the spread of the disease. "What is the moral responsibility?" Jerald Newberry, a health coordinator of Virginia schools, asked the *Washington Times* in 1992. "I think it's gigantic." Abstinence is a part of this approach, but expecting teens to refrain from having sex was considered by many to be unrealistic given some studies that show that nearly three out of four high school students have had sex before graduation. Thus, the comprehensive curriculum might well include explaining the proper use of condoms, discussing homosexual practices, describing the sterilization of drug needles, and so on.

Abstinence-only adherents think being less frank is being more responsible. They view sexuality as a moral issue properly left for parents to discuss with their children and one that lies beyond the responsibilities of schools. The conservative columnist Cal Thomas spoke for this viewpoint when he argued that parents "have lost a significant right to rear their children according to their own moral standards." Other objections come from religious conservatives who oppose any neutral or positive discussion of homosexuality. Koop, for example, was blasted for allegedly "sponsoring homosexually oriented curricula" and "teaching buggery in the 3rd grade." In addition to voicing moral objections, critics say comprehensive sex ed. is generally a failure because it encourages a false sense of security among teens that leads to experimentation with sex or drugs. "We have given children more information presumably because we think it will change their behavior, and yet the behavior has gotten worse, not better," said Gary Bauer, president of the Family Research Council.

Each side accuses the other of deepening the crisis. Comprehensive approach supporters think abstinence-only backers are moral censors, indifferent to pragmatic solutions. The liberal People for the American Way attacked "a growing wave of **CENSORSHIP** ravaging

virus (HIV), which is communicable in some bodily fluids and transmitted primarily through sexual behavior and intravenous drug use.

The United States struggled to cope with AIDS from the early 1980s until the late 1990s, when new drug therapies started to extend the length and quality of life for many people with AIDS. Since the beginning, AIDS and its resulting epidemic in the United States have raised a great number of legal issues, which are made all the more difficult by the nature of the disease. AIDS is a unique killer, but some of its aspects are not: epidemics have been seen before; other sexually transmitted diseases have been fatal. AIDS is different because it was discovered in—and in the United States still predominantly afflicts—unpopular social groups: gay men and drug users. This fact has had a strong impact on the shaping of AIDS law. Law is often shaped by politics, and AIDS is a highly politicized disease.

sexuality education" that promotes only "narrow" curricula. It mocked such abstinence-only programs as Teen Aid and Sex Respect, both of which have brought threats of legal action from the **AMERICAN CIVIL LIBERTIES UNION** and Planned Parenthood. The conservative American Enterprise Institute asserted that liberal programs only prod students toward bad choices: "There has been a transition from protection to preparation." Neither side can agree on any data, other than to point out that the problems of AIDS and teen sexuality have appeared to worsen.

Nowhere are the two sides more split than on the issue of condoms. Schools in at least 23 cities sought to distribute condoms during the mid- to late-1990s. The assumption was that since students will have sex anyway—despite warnings not to—they had better be protected. Conservatives see this position as a cop-out in two ways: it sells values short and it undermines parental authority. In 1992, in Washington, D.C., critics erupted over a decision by the Public Health Commission to hand out condoms in junior and senior high schools without parental consent. William Brown, president of the D.C. Congress of Parents and Teachers, complained: "We are looking to build and reinforce and establish family values where they have been lost, and here we have an agency of our government that totally ignores those things we are working for." Dr. Mary Ellen Bradshaw, the commission's chief, replied: "Our whole focus is to save the lives of these children, stressing abstinence as the only sure way to avoid [AIDS] and making condoms available only after intensive education." In other cities, upset parents simply sued. By 1992, **CLASS ACTION** lawsuits had been brought against school districts in New York City, Seattle, and Falmouth, Massachusetts, arguing that condom distribution violated parents' right to privacy.

AIDS education in schools is not merely a local issue. While most decisions are made by states and school boards the federal government plays two important roles. First, it funds AIDS prevention programs: abstinence-based programs receive funding under the Adolescent Family Life Act of 1981, and programs that promote contraceptive use among teenagers are supported through the Family Planning Act of 1970. How these funds are spent is a matter of local control, but conservatives have sought to put limits on program content. During the early 1990s, Senator **JESSE HELMS** (R-NC) twice tried to ban funding for programs that were perceived to promote homosexuality or that did not continuously teach abstinence as the only effective protection against AIDS. In response, one federal agency, the Center for Disease Control, adopted regulations that prohibited the use of funds on any materials that are found offensive by some members of communities.

The second role of the federal government is largely symbolic but no less controversial. It is to guide school efforts through advice, sponsorship, and public speeches, and primarily involves the offices of the surgeon general and of the federal AIDS policy coordinator. Koop, who was a Reagan appointee, roused a fair degree of controversy, yet it was nothing compared to the upheaval that greeted statements by appointees of the Clinton administration. AIDS policy czar Kristine Gebbie and surgeon general M. Joycelyn Elders were forced from their posts after making statements that conservatives found appalling—Gebbie promoting attitudes toward pleasurable sex and Elders indicating a willingness to have schools talk about masturbation. Thereafter, the administration frequently stressed abstinence as its top priority for school AIDS programs.

Problems surrounding AIDS education are unlikely to go away. Communities frequently disagree on sex education itself, and compromise is often difficult on such a divisive issue of values. As the experience of the Clinton administration suggested, Washington, D.C., could easily exacerbate an already contentious area, with policy coordinators becoming lightning rods for criticism. On the matter of what to say to kids about AIDS, poll data have been misleading. U.S. citizens are of three minds: say a lot, say a little, and do not say what the other side thinks.

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World Health Organization. 1989. *Legislative Responses to AIDS.* Boston: Martinus Nijhoff Publishers.

#### CROSS-REFERENCES

Civil Rights Acts; Schools and School Districts.

The challenge in facing an epidemic that endangers everyone is complicated by the stigma attached to the people most likely to be killed by it.

Epidemics have no single answer beyond a cure. Since no cure for AIDS existed as of the early 2000s, the law continued to grapple with a vast number of problems. The federal government has addressed AIDS in two broad ways: by spending money on research and treatment of the disease and by prohibiting unfairness to people with HIV or AIDS. It has funded medical treatment, research, and public education, and it has passed laws prohibiting discrimination against people who are HIV-positive or who have developed AIDS. States and local municipalities have joined in these efforts, sometimes with federal help. In addition, states have criminalized the act of knowingly transmitting the virus through sexual behavior or blood dona-

tion. The courts, of course, are the decision makers in AIDS law. They have heard a number of cases in areas that range from employment to education and from crimes to TORTS. Although a body of case law has developed, it remains relatively new with respect to most issues and controversial in all.

### AIDS and the Federal Government

Political attitudes toward AIDS have gone through dramatically different phases. In the early 1980s, it was dubbed the gay disease and as such was easy for lawmakers to ignore. No one hurried to fund research into a disease that seemed to be killing only members of a historically unpopular group. When it was not being ignored, some groups dismissed AIDS as a problem that homosexuals deserved, perhaps brought on them by divine intervention. Discriminatory action matched this talk as gay men lost jobs, housing, and medical care. AIDS activists complained bitterly about the failure of most U.S. citizens to be concerned. Public opinion only began to shift in the late 1980s, largely through awareness of highly publicized cases. As soon as AIDS had a familiar or more mainstream face, it became harder to ignore; when it became clear that heterosexuals were also contracting the disease, the epidemic acquired higher priority.

By the late 1980s, much of the harshness in public debate had diminished. Both liberals and conservatives lined up to support legislative solutions. President RONALD REAGAN left office, recommending increases in federal funding for medical research on AIDS. Already the amount spent in this area had risen from $61 million in 1984 to nearly $1.3 billion in 1988. President GEORGE H.W. BUSH took a more active approach, and in 1990 signed two new bills into law. One was the Ryan White Comprehensive AIDS Resources Emergency (CARE) Act (Pub. L. No. 101-381, 104 Stat. 576), which provides much-needed money for states to spend on treatment. The other was the ground-breaking Americans with Disabilities Act (ADA) (42 U.S.C.A. §§ 12112–12117), which has proved to be the most effective weapon against the discrimination that individuals with the disease routinely suffer. Bush also hurried approval by the FOOD AND DRUG ADMINISTRATION for AIDS-related drugs. Though he supported Americans with the disease, Bush agreed to a controversial ban by Congress on travel and immigration to the United States for people with HIV.

Like his predecessors, President BILL CLINTON called for fighting the disease, rather than the people afflicted with it. In 1993, he appointed the first federal AIDS policy coordinator. He fully funded the Ryan White Care Act, increasing government support by 83 percent, to $633 million, and also increased funding for AIDS research, prevention, and treatment by 30 percent. These measures met most of his campaign promises on AIDS. He reneged on one: despite vowing to lift the ban on HIV-positive ALIENS, he signed legislation continuing it. In addition, he met a major obstacle on another proposal: Congress failed to pass his HEALTH CARE reform package, which would have provided health coverage to all U.S. citizens with HIV, delivered drug treatment against AIDS on demand to intravenous drug users, and prohibited health plans from providing lower coverage for AIDS than for other life-threatening diseases.

**New AIDS Cases Reported, 1991 to 2001**

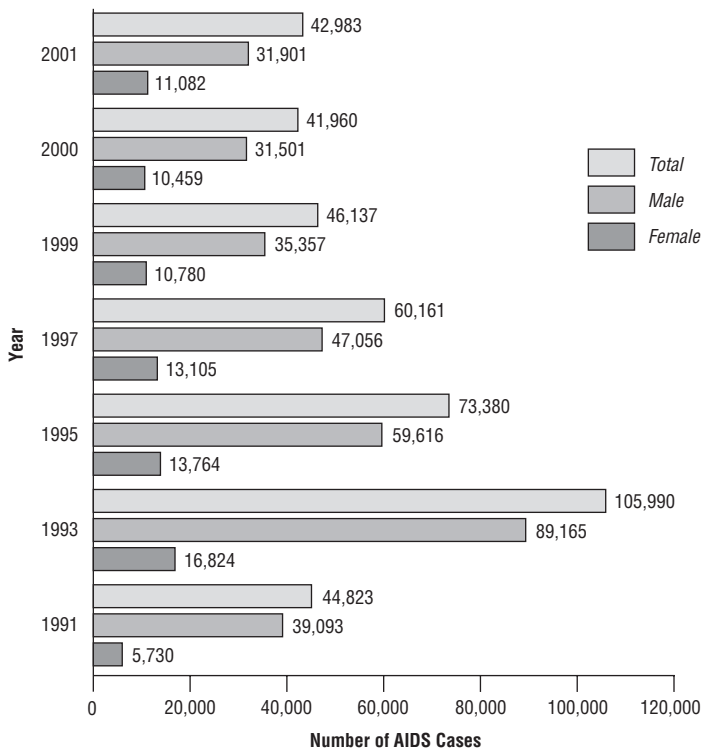


SOURCE: U.S. Centers for Disease Control and Prevention, National Center for HIV, STD, and RB Prevention.

## AIDS and Public Life

Having HIV is not a sentence to remove oneself from society. It does not limit a person's physical or mental abilities. Only later, when symptoms develop—as long as ten years from the time of infection—does the disease become increasingly debilitating. In any event, people who are HIV-positive and AIDS-symptomatic are fully able to work, play, and participate in daily life. Moreover, their rights to do so are the same as anyone else's. The chief barrier to a productive life often comes less from HIV and AIDS than from the fear, suspicion, and open hostility of others. Because HIV cannot be transmitted through casual contact, U.S. law has moved to defend the CIVIL RIGHTS of those individuals with the disease.

**AIDS in the Workplace** The workplace is a common battleground. Many people with AIDS have lost their jobs, been denied promotions, or been reassigned to work duties that remove them from public contact. During the 1980s, this discrimination was fought through lawsuits based on older laws designed to protect the disabled. Plaintiffs primarily used the Rehabilitation Act of 1973 (29 U.S.C.A. § 701 et seq.), the earliest law of this type. But the Rehabilitation Act has a limited scope: it applies only to federally funded workplaces and institutions; it says nothing about those that do not receive government money. Thus, for example, the law was helpful to a California public school teacher with AIDS who sued for the right to resume teaching classes (*Chalk v. United States District Court,* 840 F.2d 701 [9th Cir. 1988]), but it would be of no use to a worker in a private business.

With passage of the ADA in 1990, Congress gave broad protection to people with AIDS who work in the private sector. In general, the ADA is designed to increase access for DISABLED PERSONS, and it also forbids discrimination in hiring or promotion in companies with fifteen or more employees. Specifically, employers may not discriminate if the person in question is otherwise qualified for the job. Moreover, they cannot use tests to screen out disabled persons, and they must provide reasonable accommodation for disabled workers. The ADA, which took effect in 1992, quickly emerged as the primary means for bringing AIDS-related discrimination lawsuits. From 1992 to 1993, more than 330 complaints were filed with the U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC), which investigates charges before they can be filed in court. Given the lag time needed for EEOC investigations, those cases started appearing before federal courts in 1994 and 1995.

**AIDS and Health Care** Closely related to work is the issue of health care. In some cases, the two overlap: HEALTH INSURANCE, SOCIAL SECURITY, and disability benefits for people with AIDS were often hard to obtain during the 1980s. Insurance was particularly difficult because employers feared rising costs, and insurance companies did not want to pay claims. To avoid the costs of AIDS, insurance companies used two traditional industry techniques: they attempted to exclude AIDS coverage from general policies, and they placed caps (limits on benefits payments) on AIDS-related coverage. State regulations largely determine whether these actions were permissible. In New York, for example, companies that sell general health insurance policies are forbidden to exclude coverage for particular diseases. Caps have hurt AIDS patients because their treatment can be as expensive as that for cancer or other life-threatening illnesses. Insurance benefits can be quickly exhausted—in fact, AIDS usually bankrupts people who have the disease. The problem is compounded when employers serve as their own health insurers. In *McGann v. H&H Music Co.,* 946, F.2d 401 (5th Cir. [1991]), a federal court ruled that such employers could legally change their policies to reduce coverage for workers who develop expensive illnesses such as AIDS.

In January 1995, the settlement in a lawsuit brought by a Philadelphia construction worker with AIDS illustrated that the ADA could be used to fight caps on coverage. In 1992, the joint union-management fund for the Laborers' District Council placed a $10,000 limit on AIDS benefits, in stark contrast to the $100,000 allowed for other catastrophic illnesses. At that time, the fund said the cap on AIDS benefits was designed to curb all health costs. In 1993, the EEOC ruled that the fund violated the ADA, and, backed by the AIDS Law Project of Philadelphia, the worker sued. Rather than fight an expensive lawsuit, the insurance fund settled: under the agreement, it extended coverage for all catastrophic illnesses to $100,000. Hailing the settlement as a major blow against widespread discrimination in insurance coverage, the law project's executive director, Nan Feyler, told the

*Philadelphia Inquirer,* "You can't single out someone based on a stereotype."

In other respects, health care is a distinct area of concern for AIDS patients and health professionals alike. Discrimination has often taken place. State and federal statutes, including the Rehabilitation Act, guarantee access to health care for AIDS patients, and courts have upheld that right. In the 1988 case of *Doe v. Centinela Hospital,* 57 U.S.L.W. 2034 (C.D. Cal.), for example, an HIV-infected person with no symptoms was excluded from a federally funded hospital residential program for drug and alcohol treatment because health care providers feared exposure to the virus. The case itself exposed the irrationality of such discrimination. Although its employees had feared HIV, the hospital argued in court that the lack of symptoms meant that the patient was not disabled and thus not protected by the Rehabilitation Act. A federal trial court in California rejected this argument, ruling that a refusal to grant services based solely on fear of contagion is discrimination under the Rehabilitation Act.

Other actions during the 1990s have relied upon the ADA. In 1994, the U.S. Justice Department reached a settlement in a lawsuit with the city of Philadelphia that ensures that city employees will treat patients with AIDS. The first settlement in a health care–related ADA suit, the case grew out of an incident in 1993: when an HIV-positive man collapsed on a Philadelphia street, emergency medical workers not only refused to touch him but told him to get on a stretcher by himself. The man sued. In settling the case, the city agreed to begin an extensive training program for its 900 emergency medical technicians and 1,400 firefighters. In addition, officials paid the man $10,000 in COMPENSATORY DAMAGES and apologized. The JUSTICE DEPARTMENT viewed the suit as an important test of the ADA. Assistant Attorney General James Turner said the settlement would "send a clear message to all cities across the nation that we will not tolerate discrimination against persons with AIDS."

Health care professionals are not the only ones with concerns about HIV transmission. Patients may legitimately wonder if their doctors are infected. During the early 1990s, the medical and legal communities debated whether HIV-positive doctors have a duty to inform their patients of the illness. According to the Centers for Disease Control (CDC), the risk of HIV transmission from health care workers to patients is very small when recommended infection-control procedures are followed, yet this type of transmission has occurred. The first cases of patients contracting HIV during a medical procedure were reported in 1991: Dr. David J. Acer, a Florida dentist with AIDS, apparently transmitted HIV to five patients. One was Kimberly Bergalis, age twenty-three, who died as a result. Before her death, Bergalis brought a claim against the dentist's professional liability insurer, contending that it should have known that Acer had AIDS and effectively barred him from operating by refusing to issue him a MALPRACTICE insurance policy. Bergalis's claim was settled for $1 million. A second claim by Bergalis, against the insurance company that recommended Acer to her, was settled for an undisclosed amount.

Since the Bergalis case, many U.S. dentists, physicians, and surgeons with AIDS have begun disclosing their status to their patients. *Faya v. Almaraz,* 329 Md. 435, 620 A.2d 327 (Md. 1993), illustrates the consequences of not doing so. In *Faya,* the court held that an HIV-positive doctor has the legal duty to disclose this medical condition to patients and that a failure to inform can lead to a NEGLIGENCE action, even if the patients have not been infected by the virus. The doctor's patient did not contract HIV but did suffer emotionally from a fear of having done so. The unanimous decision held that patients can be compensated for their fears. Although this case dealt specifically with doctor-patient relationships, others have concerned a variety of relationships in which the fear of contracting AIDS can be enough for a plaintiff to recover damages.

Routine HIV-testing in healthcare facilities also raises legal issues. Most people who are HIV-positive want this information kept confidential. Facilities are free to use HIV testing to control the infection but in most states only with the patient's informed consent. Some states, such as Illinois, require written consent. The level of protection for medical records varies from state to state. California, for example, has broad protections; under its statutes, no one can be compelled to provide information that would identify anyone who is the subject of an HIV test. However, every state requires that AIDS cases be reported to the CDC, which tracks statistics on the spread of HIV. Whether the name of an HIV-infected person is reported to the CDC depends on state laws and regulations.

**AIDS and Education** Issues in the field of education include the rights of HIV-positive students to attend class and of HIV-positive teachers to teach, the confidentiality of HIV records, and how best to teach young people about AIDS. A few areas have been settled in court: for instance, the right of students to attend classes was of greater concern in the early years of the epidemic and later ceased to be a matter of dispute.

Certain students with AIDS may assert their right to public education under the Education for All Handicapped Children Act of 1975 (EAHCA), but the law is only relevant in cases involving special education programs. More commonly, students' rights are protected by the Rehabilitation Act. Perhaps the most important case in this area is *Thomas v. Atascadero Unified School District,* 662 F. Supp. 376 (C.D. Cal. 1986), which illustrates how far such protections go. *Thomas* involved an elementary school student with AIDS who had bitten another youngster in a fight. Based on careful review of medical evidence, the U.S. District Court for the Central District of California concluded that biting was not proved to transmit AIDS, and it ordered the school district to readmit the girl. Similarly, schools that excluded teachers with AIDS have been successfully sued on the ground that those teachers pose no threat to their students or others and that their right to work is protected by the Rehabilitation Act, as in *Chalk.*

Confidentiality relating to HIV is not uniform in schools. Some school districts require rather broad dissemination of the information; others keep it strictly private. In the mid-1980s, the New York City Board of Education adopted a policy that nobody in any school would be told the identities of children with AIDS or HIV infection; only a few top administrators outside the school would be informed. The policy inspired a lawsuit brought by a local school district, which argued that the identity of a child was necessary for infection control (*District 27 Community School Board v. Board of Education,* 130 Misc. 2d 398, 502 N.Y.S.2d 325 [N.Y. Sup. Ct. 1986]). The trial court rejected the argument on the basis that numerous children with HIV infection might be attending school and instead noted that universal precautions in dealing with blood incidents at school would be more effective than the revelation of confidential information.

Schools play a major role in the effort to educate the public on AIDS. Several states have mandated AIDS prevention instruction in their schools. But the subject is controversial: it evokes personal, political, and moral reactions to sexuality. Responding to parental sensitivities, some states have authorized excused absences from such programs. The New York State Edu-

*The AIDS quilt, on display in Washington, D.C., has become a well known symbol of support for AIDS victims and their families. Families and supporters of AIDS victims create a panel to commemorate a person's life; each panel is then joined with others from around the country.*

LEE SNIDER/CORBIS

cation Department faced a storm of controversy over its policy of not allowing absences at parental discretion. Furthermore, at the local and the federal levels, some conservatives have opposed certain kinds of AIDS education. During the 1980s, those who often criticized liberal approaches to sex education argued that AIDS materials should not be explicit, encourage sexuality, promote the use of contraceptives, or favorably portray gays and lesbians. In Congress, lawmakers attached amendments to appropriations measures (bills that authorize the spending of federal tax dollars) that mandate that no federal funds may be used to "promote homosexuality." In response, the CDC adopted regulations that prohibit spending federal funds on AIDS education materials that might be found offensive by some members of certain communities. Despite the controversy, some communities have taken radical steps to halt the spread of AIDS. In 1991 and 1992, the school boards of New York City, San Francisco, Seattle, and Los Angeles voted to make condoms available to students in their public high school systems.

### AIDS and Private Life

Although epidemics are public crises, they begin with individuals. The rights of people who have AIDS and those who do not are often in contention and seldom more so than in private life. It is no surprise that people with HIV continue having sex, nor is it a surprise that this behavior is, usually, legal. Unfortunately, some do so without knowing they have the virus. Even more unfortunately, others do so in full knowledge that they are HIV-positive but without informing their partners. This dangerous behavior has opened one area of AIDS law that affects individuals: the legal duty to warn a partner before engaging in behavior that can transmit the infection. A similar duty was recognized by courts long before AIDS ever appeared, with regard to other sexually transmitted diseases.

A failure to inform in AIDS cases has given rise to both civil and criminal lawsuits. One such case was brought by Mark Christian, the lover of actor Rock Hudson, against Hudson's estate. Christian won his suit on the ground that Hudson concealed his condition and continued their relationship, and the jury returned a multimillion-dollar verdict despite the fact that there was no evidence that Christian had been infected. Another case was brought in Oregon in 1991, when criminal charges were filed against Alberto Gonzalez for knowingly spreading HIV by having sex with his girlfriend. After Gonzalez pleaded no contest to third-degree assault (a felony) and to two charges of recklessly endangering others, he received an unusual sentence: the court ordered him to abstain from sex for five years and placed him under house arrest for six months. Although such convictions are increasingly common, courts have also recognized that not knowing one has HIV can be a valid defense. In *C. A. U. v. R. L.*, 438 N.W.2d 441 (1989), for example, the Minnesota Court of Appeals affirmed a trial court's finding that the plaintiff could not recover damages from her former fiancé, who had unknowingly given her the virus.

**State Legislation and the Courts** To stem transmission of HIV, states have adopted several legal measures. Two states attempted to head off the virus at the pass: Illinois and Louisiana at one point required HIV blood testing as a prerequisite to getting a marriage license. Both states ultimately repealed these statutes because they were difficult to enforce; couples simply crossed state lines to be married in neighboring states. Several states have taken a less stringent approach, requiring only that applicants for a marriage license must be informed of the availability—and advisability—of HIV tests. More commonly, states criminalize sexual behavior that can spread AIDS. Michigan law makes it a felony for an HIV- or AIDS-infected person to engage in sex without first informing a partner of the infection. Florida law provides for the prosecution of any HIV-positive person committing prostitution, and it permits rape victims to demand that their attackers undergo testing. Indiana imposes penalties on persons who recklessly or knowingly donate blood or semen with the knowledge that they are HIV-infected.

Older state laws have also been applied to AIDS. Several states have statutes that make it a criminal offense for a person with a contagious disease—including a sexually transmitted disease—to willfully or knowingly expose another person to it, and some have amended these laws specifically to include AIDS. In addition, in many states, it has long been a crime to participate in an act of SODOMY. The argument that punishing sodomy can stem HIV transmission was made in a case involving a Missouri sodomy statute specifically limited to homosexual conduct. In *State v. Walsh,* 713 S.W.2d 508 (1986), the Missouri Supreme Court upheld the statute after finding that it was rationally related to the state's legitimate interest in protecting public

health. Other AIDS-related laws have been invalidated in court challenges: for instance, in 1993, a U.S. district judge struck down a 1987 Utah statute that invalidated the marriages of people with AIDS, ruling that it violated the ADA and the Rehabilitation Act.

Sex is only one kind of behavior that has prompted criminal prosecution related to AIDS. Commonly, defendants in AIDS cases have been prosecuted for assault. In *United States v. Moor,* 846 F.2d 1163 (8th Cir., 1988), the Eighth Circuit upheld the conviction of an HIV-infected prisoner found guilty of assault with a deadly weapon—his teeth—for biting two prison guards during a struggle. Teeth were also on trial in *Brock v. State,* 555 So. 2d 285 (1989), but the Alabama Court of Criminal Appeals refused to regard them as a dangerous weapon. In *State v. Haines,* 545 N.E.2d 834 (2d Dist. 1989), the Indiana Court of Appeals affirmed a conviction of attempted murder against a man with AIDS who had slashed his wrists to commit suicide; when police officers and paramedics refused to let him die, he began to spit, bite, scratch, and throw blood.

**Civil Litigation** TORT LAW has seen an explosion of AIDS-related suits. This area of law is used to discourage individuals from subjecting others to unreasonable risks and to compensate those who have been injured by unreasonably risky behavior. The greatest number of AIDS-related liability lawsuits has involved the receipt of HIV-infected blood and blood products. A second group has concerned the sexual transmission of HIV. A third group involves AIDS-related psychic distress. In these cases, plaintiffs have successfully sued and recovered damages for their fear of having contracted HIV.

**Advances in Treatment** Though the search for an AIDS vaccine has consumed many researchers, by 2003 no breakthroughs had appeared. However, other researchers have concentrated on ways of controlling AIDS through drug treatment regimens that require individuals to consume many different types of medications at the same time. These anti-AIDS "cocktails" undergo constant study and modification as researchers learn more about the working of HIV. The medications are from a family of drugs called protease inhibitors.

Survival rates have dramatically improved for those individuals using protease inhibitors, but other problems have also arisen. Some persons do not respond to these medications or the side effects from taking the drugs diminish the quality of life. Protease inhibitors, for many people, are intolerable because of nausea, diarrhea, vomiting, headache, kidney stones, and serious drug interactions with other medications. By 2003 researchers had found that serious side effects include increased risk of heart attack, abnormalities in fat distribution, an increased propensity toward diabetes, and abnormalities in cholesterol metabolism.

Cost is another concern associated with protease inhibitors. To be effective, protease inhibitors must be used in combination with at least two other anti-HIV drugs. Annual costs for this treatment ranges between $12,000-$15,000 per person. Those persons without private health insurance must rely on public programs such as the AIDS Drug Assistance Program (ADAP), a federally funded initiative to provide AIDS-related drugs to people with HIV. Most ADAP programs, which are administered by

**Deaths Caused by AIDS-Related Conditions, 1990 to 2000**

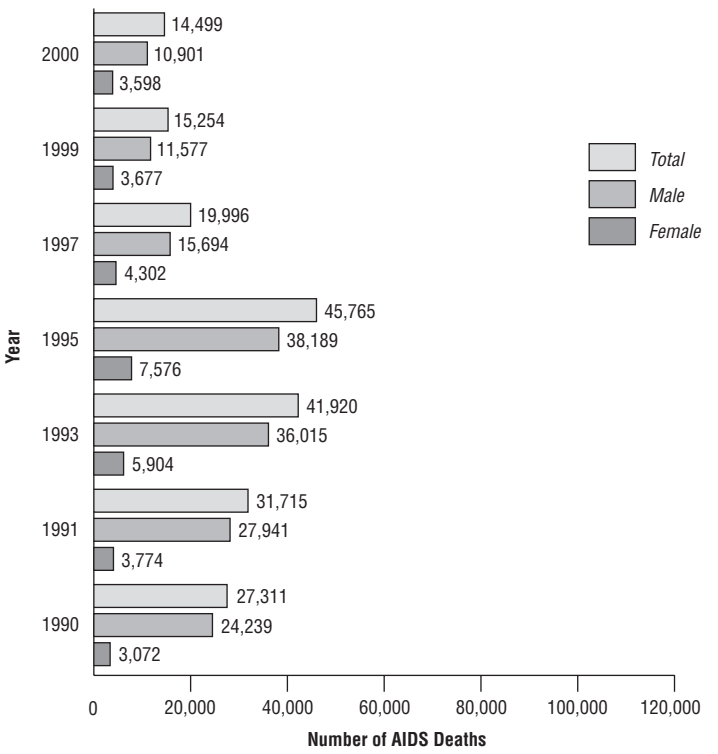


SOURCE: U.S. Centers for Disease Control and Prevention, National Center for HIV, STD, and RB Prevention.

states, have lacked the funding to enroll everyone in need.

**International Issues** By 2003 the international AIDS problem had become a crisis in Africa and parts of Asia. The UNITED NATIONS (UN) and the World Health Organization (WHO) have worked together to address the issues of prevention and treatment, but the statistics reveal grim conditions. In December 2002 a joint UN-WHO report disclosed that 42 million people in the world are living with HIV and AIDS. In 2002 five million people contracted HIV and over three million people died of AIDS. The situation is gravest in sub-Saharan Africa, where over 29 million adults and children are living with HIV and AIDS, contracted mainly through heterosexual contact. These figures stand in stark contrast to North America, where less than one million people are living with HIV and AIDS.

The growth of AIDS in Africa and Asia has raised worries about global political and economic stability. Governments in these ravaged countries have not been able to afford the antiviral drugs. In 2002 pharmaceutical companies agreed to sell these drugs to these countries as generic drugs, dropping the cost from $12,000 to $300 a year per patient; yet even at these prices many governments would be hard pressed to purchase them.

In 2003, President GEORGE W. BUSH proposed spending $15 billion over five years to support international AIDS prevention and the purchase of anti-viral drugs. The largest share of the money would be contributed directly by the United States to other countries, such as through programs sponsored by the U.S. Agency for International Development. The proposal would account for almost half the money in a global fund committed to fight HIV and AIDS.

**Acquittal: State of New York Felony Indictments and Dispositions for 1998**

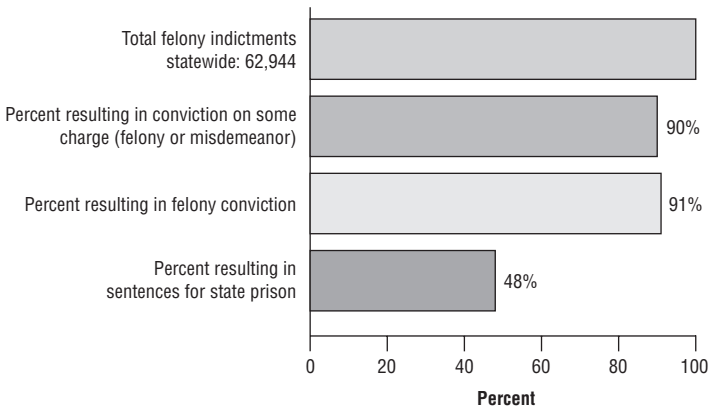


SOURCE: New York State, Division of Criminal Justice Services, *1998 Crime and Justice Annual Report.*

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**CROSS-REFERENCES**

Disability Discrimination; Discrimination; Food and Drug Administration; Gay and Lesbian Rights; Health Care Law; Patients' Rights; Physicians and Surgeons; Privacy.

## ACQUISITION CHARGE

*A fee imposed upon a borrower who satisfies a loan prior to the date of payment specified in the loan agreement.*

Many home mortgages provide that if the persons who borrowed the money want to repay their mortgage within two years, they must pay an acquisition charge of a small percentage of the outstanding balance of the mortgage. *Prepayment penalty* is another name for acquisition charge.

## ACQUIT

*To set free, release or discharge as from an obligation, burden or accusation. To absolve one from an*

**Results of Felony Trials Completed in 1998**

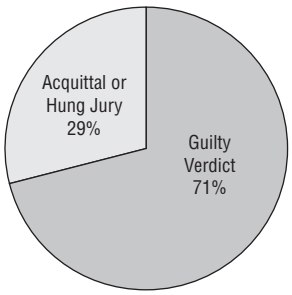


SOURCE: New York State, Division of Criminal Justice Services, *1998 Crime and Justice Annual Report.*

*obligation or a liability; or to legally certify the innocence of one charged with a crime.*

## ACQUITTAL

*The legal and formal certification of the innocence of a person who has been charged with a crime.*

Acquittals *in fact* take place when a jury finds a verdict of not guilty. Acquittals *in law* take place by operation of law such as when a person has been charged as an ACCESSORY to the crime of ROBBERY and the principal has been acquitted.

## ACT

*Something done; usually, something done intentionally or voluntarily or with a purpose.*

The term encompasses not only physical acts—such as turning on the water or purchasing a gun—but also refers to more intangible acts such as adopting a decree, edict, law, judgment, award, or determination. An act may be a private act, done by an individual managing his or her personal affairs, or it may be a public act, done by an official, a council, or a court. When a bill is favorably acted upon in the process of legislation, it becomes an act.

## ACT OF GOD

*An event that directly and exclusively results from the occurrence of natural causes that could not have been prevented by the exercise of foresight or caution; an inevitable accident.*

Courts have recognized various events as acts of God—tornadoes, earthquakes, death, extraordinarily high tides, violent winds, and floods. Many insurance policies for property damage exclude from their protection damage caused by acts of God.

## ACTION

*Conduct; behavior; something done; a series of acts.*

*A case or lawsuit; a legal and formal demand for enforcement of one's rights against another party asserted in a court of justice.*

The term *action* includes all the proceedings attendant upon a legal demand, its adjudication, and its denial or its enforcement by a court. Specifically, it is the legal proceedings, while a

*Acts of God, such as this sinkhole which destroyed homes in the San Francisco area in 1995, are sometimes excluded from insurance policies for property damage.*

AP/WIDE WORLD PHOTOS

CAUSE OF ACTION is the underlying right that gives rise to them. In casual conversation, *action* and *cause of action* may be used interchangeably, but they are more properly distinguished. At one time, it was more correct to speak of actions at law and of proceedings or suits in EQUITY. The distinction is rather technical, however, and not significant since the merger of law and equity. The term *action* is used more often for civil lawsuits than for criminal proceedings.

### Parties in an Action

A person must have some sort of legal right before starting an action. That legal right implies a duty owed to one person by another, whether it is a duty to do something or a duty not to do something. When the other person acts wrongfully or fails to act as the law requires, such behavior is a breach, or violation, of that person's legal duty. If that breach causes harm, it is the basis for a cause of action. The injured person may seek redress by starting an action in court.

The person who starts the action is the plaintiff, and the person sued is the defendant. They are the parties in the action. Frequently, there are multiple parties on a side. The defendant may assert a defense which, if true, will defeat the plaintiff's claim. A counterclaim may be made by the defendant against the plaintiff or a cross-claim against another party on the same side of the lawsuit. The law may permit JOINDER of two or more claims, such as an action for property damage and an action for personal injuries, after one auto accident; or it may require consolidation of actions by an order of the court. Where prejudice or injustice is likely to result, the court may order a severance of actions into different lawsuits for different parties.

### Commencement of an Action

The time when an action may begin depends on the kind of action involved. A plaintiff cannot start a lawsuit until the cause of action has accrued. For example, a man who wants to use a parcel of land for a store where only houses are allowed must begin by applying for a variance from the local ZONING board. He cannot bypass the board and start an action in court. His right to sue does not ACCRUE until the board turns down his request.

Neither can a person begin an action after the time allowed by law. Most causes of action are covered by a STATUTE OF LIMITATIONS, which specifically limits the time within which to begin the action. If the law in a particular state says that an action for LIBEL cannot be brought more than one year after publication of a defamatory statement, then those actions must be initiated within that statutory period. Where there is no statute that limits the time to commence a particular action, a court may nevertheless dismiss the case if the claim is stale and if litigation at that point would not be fair.

A plaintiff must first select the right court, then an action can be commenced by delivery of the formal legal papers to the appropriate person. Statutes that regulate proper procedure for this must be strictly observed. A typical statute specifies that an action may be begun by delivery of a summons, or a writ on the defendant. At one time, common-law actions had to be pleaded according to highly technical FORMS OF ACTION, but now it is generally sufficient simply to serve papers that state facts describing a recognized cause of action. If this SERVICE OF PROCESS is done properly, the defendant has fair notice of the claim made against him or her and the court acquires jurisdiction over him or her. In some cases, the law requires delivery of the summons or writ to a specified public officer such as a U.S. marshal, who becomes responsible for serving it on the defendant.

### Termination of an Action

After an action is commenced, it is said to be pending until termination. While the action is pending, neither party has the right to start another action in a different court over the same dispute or to do any act that would make the court's decision futile.

A lawsuit may be terminated because of dismissal before both sides have fully argued the merits of their cases at trial. It can also be ended because of COMPROMISE AND SETTLEMENT, after which the plaintiff withdraws his or her action from the court.

Actions are terminated by the entry of final judgments by the courts. A judgment may be based on a jury verdict or it may be a JUDGMENT NOTWITHSTANDING THE VERDICT. Where there has been no jury, judgment is based on the judge's decision. Unless one party is given leave—or permission from the court—to do something that might revive the lawsuit, such as amending an insufficient complaint, the action is at an end when judgment is formally entered on the records of the court.

CROSS-REFERENCES

Civil Procedure.

## ACTION ON THE CASE

*One of the old common-law* FORMS OF ACTION *that provided a remedy for the invasion of personal or property interests.*

Action on the case is also called TRESPASS on the case because it developed from the common-law action of trespass during the fifteenth century in England. Often it is simply called case.

Case differs from trespass in that it redresses more indirect injuries than the willful invasion of the plaintiff's property contemplated by trespass. It was designed to supplement the action of trespass. For example, a person struck by a log thrown over a fence could maintain an action in trespass against the thrower. If, instead, the wrongdoer tossed the log into the street and the plaintiff were hurt by stumbling over it, the plaintiff could maintain an action on the case rather than in trespass.

In PLEADING an action on the case, the plaintiff sets forth the circumstances of the entire case. In pleading an action on the case, the complaint differed from the forms used in pleading other actions because other actions generally had highly stylized and rigid forms that had to be followed word for word. The plaintiff in the action on the case alleged facts to show that (1) the defendant had some sort of duty; (2) the defendant had violated that duty; and (3) the result was harm to the plaintiff or the plaintiff's property. Over the years, this action developed into a remedy for a wide variety of wrongs that were not redressed by the other forms of action. For example, a plaintiff could sue a defendant who maintained a NUISANCE in the neighborhood; who violated an EASEMENT or a right of way; or who committed LIBEL, slander, malicious prosecution, fraud, or deceit. Most importantly, the action on the case came into common use as the legal method for compensating victims of NEGLIGENCE. It thus became one of the most widely used forms of action in the common-law system and gave birth to the modern law of TORTS.

When EJECTMENT was still considered a modern improvement on trespass in England, it already had been abandoned in New England because of its complicated technical requirements. One of the reasons for the American experience is that law books were scarce in the colonies, and many judges were laymen. The most rigid applications of technical formalities came during the first half of the nineteenth century after lawyers gained influence in the legal system.

Dissatisfaction with the technicalities of the forms soon began to peak. CODE PLEADING was then introduced to replace the prior forms of action. An attempt was made to reduce the number of writs to some basic few that would be adequate for all of the different requirements of modern litigation. Attention was shifted from the form to the elements of a CAUSE OF ACTION. Courts asked only whether the plaintiff had stated a claim on which relief could be granted. The objective was to decide whether the plaintiff was entitled to a remedy with as little procedural red tape as possible. When code pleading fell short of this goal, the modern law of CIVIL PROCEDURE developed the theory that there should be only one form of action, the civil action.

The old forms of action exist today only as names for procedures based on them and as the foundation of much of the SUBSTANTIVE LAW. In Pennsylvania, for example, the word *trespass* is used for tort actions, and *assumpsit* for lawsuits based upon contracts.

## ACTIONABLE

*Giving sufficient legal grounds for a lawsuit; giving rise to a* CAUSE OF ACTION.

An act, event, or occurrence is said to be actionable when there are legal grounds for basing a lawsuit on it. For example, an assault is an actionable TORT.

## ACTIONABLE PER SE

*Legally sufficient to support a lawsuit in itself.*

Words are actionable per se if they are obviously insulting and injurious to one's reputation. In lawsuits for LIBEL or slander, words that impute the commission of a crime, a loathsome disease, or unchastity, or remarks that affect the plaintiff's business, trade, profession, calling, or office may be actionable per se. No special proof of actual harm done by the words is necessary to win monetary damages when words are actionable per se.

## ACTUAL CASH VALUE

*The fair or reasonable cash price for which a property could be sold in the market in the ordinary course of business, and not at forced sale. The price*

*it will bring in a fair market after reasonable efforts to find a purchaser who will give the highest price. What property is worth in money, allowing for depreciation. Ordinarily,* actual cash value, fair market value, *and* market value *are synonymous terms.*

## ACTUAL NOTICE

*Conveying facts to a person with the intention to apprise that person of a proceeding in which his or her interests are involved, or informing a person of some fact that he or she has a right to know and which the informer has a legal duty to communicate.*

When such notice has been given to someone personally, it is called *express actual notice* or *express notice.* If a tenant notifies a landlord that the elevator is broken, the landlord has express actual notice of the defect. Should the landlord fail to repair the elevator and another tenant is injured while riding it, the landlord would be liable for the tenant's injuries.

Actual notice can be presumed if an average person, having witness of the same evidence, should know that a particular fact exists. This is called implied actual notice or implied notice. If the landlord had been with the tenant when the tenant discovered the broken elevator, the landlord would be considered to have implied notice of the defect.

## ACTUARY

*A statistician who computes insurance and* PENSION *rates and premiums on the basis of the experience of people sharing similar age and health characteristics.*

The profession also includes statisticians who provide expert data analysis on risk assessment and risk management for the financial services sector. Actuaries are most often employed within the insurance industry, but also prepare and assess data for commercial and investment banks, retirement and pension fund administrators, or are self-employed as consultants. Specific data prepared by actuaries is often presented in the form of actuarial tables (mortality tables) that indicate the life expectancy of an individual. Such tables may be used as the bases for calculating estimated insurance premiums or monthly retirement annuities. When utilized by expert witnesses, actuarial tables are admissible in evidence to show life expectancy. Juries may award damages to plaintiffs for compromised life expectancy resulting from the alleged wrongdoing of tortfeasors (wrongdoers).

## ACTUS REUS

*[*Latin, Guilty act.*] As an element of criminal responsibility, the wrongful act or omission that comprises the physical components of a crime. Criminal statutes generally require proof of both* actus reus *and* mens rea *on the part of a defendant in order to establish criminal liability.*

## AD DAMNUM

*[*Latin, To the loss.*] The clause in a complaint that sets a maximum amount of money that the plaintiff can recover under a default judgment if the defendant fails to appear in court.*

It is a fundamental principle of DUE PROCESS that a defendant must be given fair notice of what is demanded of him or her. In a civil action, a plaintiff must include in the complaint served on a defendant a clause that states the amount of the loss or the amount of money damages claimed in the case. This clause is the *ad damnum.* It tells a defendant how much he or she stands to lose in the case.

In some states, the *ad damnum* sets an absolute limit on the amount of damages recoverable in the case, regardless of how much loss the plaintiff is able to prove at trial. The reason for this rule is that a defendant should not be exposed to greater liability than the *ad damnum* just because he or she comes into court and defends himself or herself. In states that follow this rule, a plaintiff may be given leave to increase the amount demanded by amending the complaint if later circumstances can be shown to warrant this. For example, a plaintiff who sues for $5,000 for a broken leg may find out after the action has begun that she will be permanently disabled. At that point, the court may allow the plaintiff to amend her complaint and demand damages of $50,000.

In most states and in the federal courts, a plaintiff can collect money damages in excess of the *ad damnum* if proof can be made at trial to support the higher amount. A defendant may ask for more time to prepare the case in order not to be prejudiced at trial if it begins to look as though the plaintiff is claiming more money than the *ad damnum* demands. However, the defendant cannot prevent judgment for a higher amount.

## AD HOC

*[*Latin, For this; for this special purpose.*] An attorney ad hoc or a guardian or curator ad hoc is one appointed for a special purpose, generally to represent the client, ward, or child in the particular action in which the appointment is made.*

An ADMINISTRATIVE AGENCY, a legislature, or other governmental bodies may establish *ad hoc* committees to study particular problems. For example, a city government may establish an ad hoc committee to investigate and discuss the placement of a new stadium in the city. Likewise, an administrative agency in some jurisdictions may engage in *ad hoc* rulemaking, whereby the agency establishes specific procedures to promulgate a rule without necessarily adhering to formal rulemaking requirements.

## AD HOMINEM

*[*Latin, To the person.*] A term used in debate to denote an argument made personally against an opponent, instead of against the opponent's argument.*

## AD INTERIM

*[*Latin, In the meantime.*] An officer* ad interim *is a person appointed to fill a position that is temporarily open, or to perform the functions of a particular position during the absence or temporary incapacity of the individual who regularly fulfills those duties.*

## AD LITEM

*[*Latin, For the suit; for the purposes of the suit; pending the suit.*] A* GUARDIAN AD LITEM *is a guardian appointed to prosecute or defend a suit on behalf of a party who is legally incapable of doing so, such as an infant or an insane person.*

## AD VALOREM

*According to value.*

The term *ad valorem* is derived from the Latin *ad valentiam,* meaning "to the value." It is commonly applied to a tax imposed on the value of property. Real property taxes that are imposed by the states, counties, and cities are the most common type of *ad valorem* taxes. *ad valorem* taxes can, however, be imposed upon PERSONAL PROPERTY. For example, a motor vehicle tax may be imposed upon personal property such as an automobile.

An article of commerce may be subjected to an *ad valorem* tax in proportion to its value, which is determined by assessment or appraisal.

Duties, taxes on goods imported or brought into this country from a foreign country, are either *ad valorem* or specific. An *ad valorem* duty is one in the form of a percentage on the value of the property, unlike a specific duty that is a fixed sum imposed on each article of a class, such as all Swiss wristwatches, regardless of their individual values.

CROSS-REFERENCES

Taxation.

## ♦ ADAMS, JOHN

John Adams achieved prominence on many levels—as jurist, statesman, and as the second president of the United States. Known for his sharp diplomatic skills, his flair for words, and his spirited activism, he was an instrumental figure in forging the fledgling nation that would become the United States of America.

"FEAR IS THE FOUNDATION OF MOST GOVERNMENTS."
—JOHN ADAMS

Adams was born on October 30, 1735, in Braintree (now Quincy), Massachusetts, the son of a farmer. His parents encouraged him in his studies, and pushed him to enter Harvard College to study for the clergy. Upon graduation in 1755, the strong-willed Adams instead decided to teach and study law. He was admitted to the Boston bar in 1758 and established a prestigious legal practice. During the pre–Revolutionary War years, Adams spoke out strongly against many acts enforced by the British government, including the TOWNSHEND ACTS, which unjustly taxed items such as glass and tea. He also joined the Sons of Liberty—a group of lawyers, merchants, and businessmen who, in 1765, banded together to oppose the STAMP ACT.

From 1774 to 1778 Adams served as the Massachusetts representative to the CONTINENTAL CONGRESS. He entered the judiciary during this period and rendered decisions as chief justice of the Superior Court of Massachusetts from 1775 to 1777. In 1776, he signed the newly created Declaration of Independence.

After the war, Adams entered the field of foreign service, acting as commissioner to France in 1777. In 1783, Adams went to Paris with JOHN JAY and THOMAS JEFFERSON to successfully negotiate the TREATY OF PARIS with Great Britain, which officially ended the Revolutionary War and established the United States as an

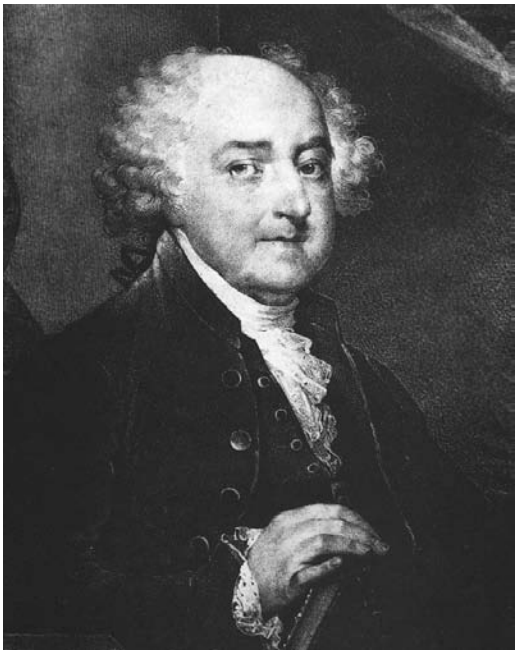

*John Adams.*
LIBRARY OF CONGRESS

independent nation. In 1785, Adams became the first U.S. minister to Great Britain.

Adams returned to the United States in 1788 and began service to the new government with his election to the office of vice president of the United States. He was the first person to serve in this office and was reelected for a second term in 1792. In 1796, Adams was elected president of the United States. He was the second man to hold this position, following the retirement of the first president, GEORGE WASHINGTON. During his term of office, Adams advocated naval strength; approved the ALIEN AND SEDITION ACTS of 1798 (1 Stat. 566, 570, 577, 596), which increased the restrictions concerning ALIENS and imposed harsh penalties on any person who attempted to obstruct the government system; averted war with France; and selected the eminent JOHN MARSHALL as chief justice of the U.S. Supreme Court. In 1800, Adams ran for the presidency for a second term but was defeated by Thomas Jefferson.

Adams's political and personal JURISPRUDENCE was characterized by intense nationalism; some consider him the most influential designer of the new nation's government and identity. A Federalist and a realist who spoke his mind without consideration for political fallout, Adams believed that unchecked power created abuse even in the best of democracies. To that end, he was the most significant advocate for the creation of a balance of powers through a tripartite government: a bicameral legislature, a strong executive, and an independent judiciary. He also authored the state constitution for the Commonwealth of Massachusetts, which remains the oldest functioning written constitution in the world. Adams published a number of political treatises, including *Thoughts on Government* (1776) and *Defense of the Constitutions of the United States of America Against the Attacks of Mr. Turgot* (1787).

John Adams sought a written constitution based on unwritten NATURAL LAW. He believed that the COMMON LAW was the source of unalienable, indefeasible rights of men, the honor and dignity of human nature, the grandeur and glory of the public, and the universal happiness of individuals.

John Adams was also a devoted family man. His wife, Abigail, was a vivacious and witty first lady who openly commented on politics and issues of the day. There were five Adams children, including John Quincy, who served as the sixth president of the United States. John Adams died on July 4, 1826, in Braintree.

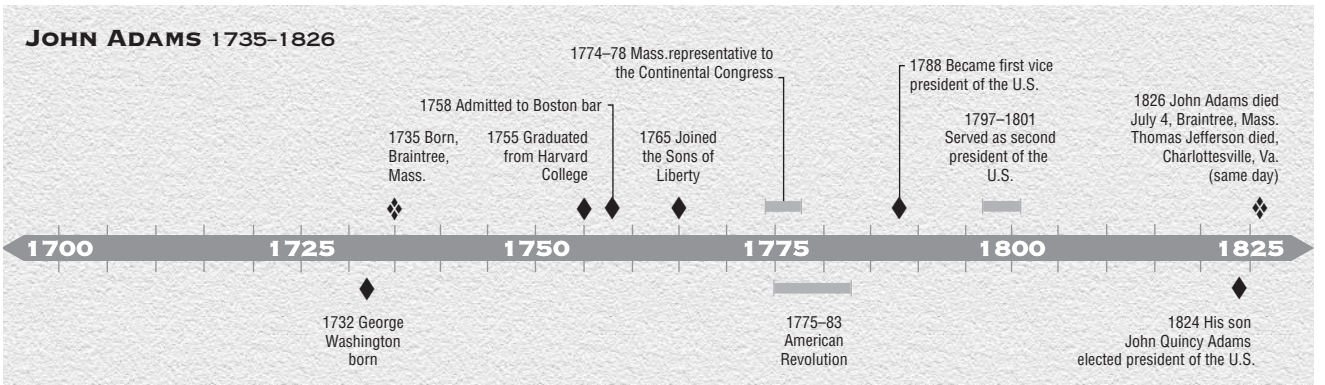

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## ADAMS, JOHN QUINCY

John Quincy Adams was more than just the sixth president of the United States. He was a child of the American Revolution, having witnessed the Battle of Bunker Hill. He was the son of the nation's second president, JOHN ADAMS. And he was a successful diplomat. Chosen president by the House after finishing second in the ELECTORAL COLLEGE, Adams became the first president to wear long trousers, rather than breeches, at his inauguration, on March 4, 1825. After one term as president, he went on to serve with distinction for 17 years in the House of Representatives.

Adams was born on July 11, 1767, in Braintree, Massachusetts (now Quincy, Massachusetts). As the son of one of the nation's founders, he had many opportunities not available to other young men. Before reaching the age when young people today graduate from high school, Adams had established himself as a diplomat. He accompanied his father on diplomatic missions to Europe in 1778 and 1780, where he studied in Paris, France, and in Amsterdam and Leiden, the Netherlands. In 1781, at the age of 14, Adams traveled with Francis Dana, the first American minister to Russia, as Dana's private secretary and French interpreter. In 1783, the young Adams joined his father in Paris, where he served as one of the secretaries to the American commissioners in the negotiations of the peace treaty that concluded the American Revolution. Fearing alienation from his own country, Adams returned home in 1785 and, by virtue of his earlier studies, was able to enroll as a junior at Harvard College, from which he graduated in 1787.

For three years, Adams read law at Newburyport, Massachusetts, under THEOPHILUS PARSONS, and in 1790, he was admitted to the bar. While struggling to find clients, Adams engaged in political journalism. He wrote a series of 11 articles controverting some of the doctrines presented in Thomas Paine's *Rights of Man* (1791–92). In a second series of articles, he defended President GEORGE WASHINGTON's policy of neutrality in the war between France and England in 1793. His third series of articles attacked those who wanted the United States to join France in a war against Britain. These articles impressed Washington so much that he appointed Adams U.S. minister to the Netherlands in May 1794.

President Washington thought Adams one of the ablest officers in the foreign service. In 1796, he appointed Adams minister to Portugal. Before Adams's departure for that new post, however, his father became president. Both Adamses felt that it was undesirable for the son of a president to hold a post in the father's administration, but Washington urged that the younger Adams remain in the diplomatic corps, calling him the most valuable public person abroad. President Adams then appointed his son minister to Prussia.

"TO FURNISH THE MEANS OF ACQUIRING KNOWLEDGE IS . . . THE GREATEST BENEFIT THAT CAN BE CONFERRED UPON MANKIND." —JOHN QUINCY ADAMS

Before taking up his new post in Prussia, Adams was married, in London, to Louisa Catherine Johnson (1775–1852), daughter of the U.S. counsel in London.

In September 1801, with new president THOMAS JEFFERSON in the White House, Adams was called back from Prussia. In 1802, he was elected to the Massachusetts senate. One year later, the state senate elected him to the U.S. Senate. (Prior to the passage of the SEVENTEENTH AMENDMENT in 1913, U.S. senators were elected by the senates of the individual states.)

Adams had always considered himself a political independent, and he was given a chance to prove this in the U.S. Senate. After his election, he was set upon by forces opposed to the FEDERALIST PARTY, of which Adams was considered a member, and political enemies of his father. Instead of accepting his fate as a powerless and unpopular member of an unpopular political minority, Adams asserted his political independence. He began to vote with President Jefferson and the opposition Democratic-Republicans, and broke with his party completely in 1807 by supporting the EMBARGO ACT (46 App. U.S.C.A. § 328). This act, backed by Jefferson, placed an embargo on all foreign commerce. The act was opposed by the Federalists and the New England states, who wanted to encourage trade with the British. They feared that the Embargo Act would stifle New England's economy. Adams voted for the Embargo

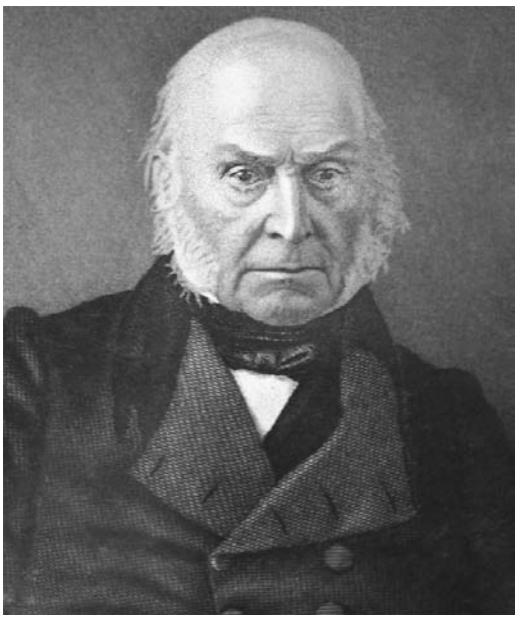

*John Quincy Adams.*
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Act, against the wishes of his party and region, believing that it benefited the nation as a whole.

Adams paid the price for breaking with his party. Federalist leaders in Massachusetts—who felt that Adams had betrayed them—elected another man to the Senate several months before the 1808 elections. Adams resigned, and later that year, in a move indicative of his political independence, attended a Democratic-Republican congressional caucus meeting, where JAMES MADISON was nominated for president, thus allying himself with that party.

Adams attempted to retire from public life and devote himself to a teaching position at Harvard College, but the lure of public service was too strong. In 1809, President Madison persuaded him to accept an appointment as minister to Russia. In 1814 and 1815, Adams played a key role in the negotiations resulting in the Treaty of Ghent, with the British, ending the WAR OF 1812. The negotiations helped Adams gain respect as a diplomat.

In 1817, President JAMES MONROE called Adams back to the United States to serve as his SECRETARY OF STATE. Adams's most important achievement in this office was the development of the MONROE DOCTRINE. It was Adams who made the first declaration of that policy in July 1823, several months before Monroe formally announced it in his annual message to Congress, on December 2, 1823. At that time, the United States feared that Russia intended to establish colonies in Alaska and, more important, that the continental European states would intervene in Central and South America to help Spain recover its former colonies, which had won their independence in a series of wars in the early nineteenth century. Adams believed that the Americas were no longer subject to any European colonial establishment and that they should make their own foreign policies. The Monroe Doctrine set forth three basic policy statements aimed at protecting the Western Hemisphere from European intervention: North and South America were closed to further European colonization; the United States would not intervene in wars in Europe and would not interfere with European colonies and dependencies in the Americas; and the United States would regard any intervention by a European power in the independent states of the Western Hemisphere as the manifestation of an unfriendly disposition toward the United States.

Adams served as secretary of state for the entire eight years under President Monroe. When the presidential election of 1824 came around, Adams was considered a favorite; after all, the previous two presidents, Madison and Monroe, had also served as secretaries of state. But 1824 was no normal year for politics in the United States. All four candidates were members of the same political party, the DEMOCRATIC-REPUBLICAN PARTY, and party affiliation had given way to sectionalism. Secretary of the Treasury William Harris Crawford, of Georgia, who had recently suffered a paralytic stroke, was nominated by a congressional caucus. The Tennessee legislature nominated ANDREW JACKSON, and the Kentucky legislature nominated HENRY CLAY. Adams was nominated by an eastern faction of the party in Boston. On Tuesday, November 9, 1824, voters went to the polls and cast 153,544 votes for Jackson, 108,740 for Adams, 46,618 for Clay, and 47,136 for Crawford. (Figures from Kane, *Facts about the Presidents*; figures in other sources differ.) The electoral vote results were as follows: Jackson, 99; Adams, 84; Crawford, 41; and Clay, 37. As no candidate received a majority of the electoral votes, the House of Representatives was called upon to choose the president, as set forth under Article II, Section 1, Clause 3, of the Constitution. After Clay gave his support to Adams, the House elected Adams the sixth president in February 1825.

For one who had led so accomplished a life, Adams must have viewed his presidency as a

failure. He got off to a rocky start when Jackson's supporters in Congress decried what they called a corrupt bargain between Adams and Clay. Only days after the House selected Adams president, Clay was offered the office of secretary of state, which he accepted. This deal split the Democratic-Republican Party, and Adams's group became known as the National Republicans. Jackson's group fought with Adams for the next four years.

Adams threw all his energies into the presidency. In his inaugural address, he called for an ambitious program of national improvements including the construction of highways, canals, weather stations, and a national university. He urged Congress to use the powers of government for the benefit of all people. Congress disagreed. Many of the programs advocated by Adams were not realized until after his death.

Despite his best efforts, Adams felt worn down by the burdens and demands of the presidency. His personal reserve, austerity, and coolness of manner prevented him from appealing to the imagination and affections of the people. He had not even tried to defend himself against the attacks of Jackson and his followers, feeling that it was below the dignity of the president to engage in political debate. Throughout Adams's presidency, Jackson gained in popularity, so much so that in the elections of 1828, he defeated Adams by 178 electoral votes to 83. Jackson won a popular vote proportionally larger than that of any other presidential candidate during the rest of the 1800s.

Once again, Adams sought to retire from public life, but the people of Massachusetts called him back. In 1830, he defeated two other candidates and was elected to the U.S. House of Representatives, representing a district from Plymouth. When it was suggested to him that his acceptance of this position would degrade a former president, Adams replied that no person could be degraded by serving the people as a representative in Congress, or, he added, as a selectman. Indeed, Adams said that his election as president was not half so gratifying as his election to the House.

Adams shone brightly from 1831 to his death in 1848. He remained independent of party politics, and held important posts in Congress, serving at times as chairman of the Foreign Affairs Committee and of the Committee on Manufactures. Adams was conspicuous as an opponent of the expansion of SLAVERY and was at heart an abolitionist, though he never became one in the political sense of the word. He took center stage during debates over the gag rules, which resulted when abolitionists sent many petitions to Congress urging that slavery be abolished in the District of Columbia and the new territories. Southern members of Congress who did not want to discuss slave issues passed a series of rules, known as the gag rules, that kept the abolitionists' petitions from being read on the House floor, effectively blocking any discussion of slavery. Adams fought the gag rules as violations of the right of free speech and the right of citizens to petition their government as guaranteed in the FIRST AMENDMENT. As the leading opponent of the gag rules, Adams became the person abolitionists sent their petitions to. He, in turn, tried to have the House consider those petitions, only to run up against the gag rules. For several years, Adams tried unsuccessfully to have the rules repealed, but he was able to win supporters to his side each time he tried, and in 1844, he finally succeeded in having the rules abolished.

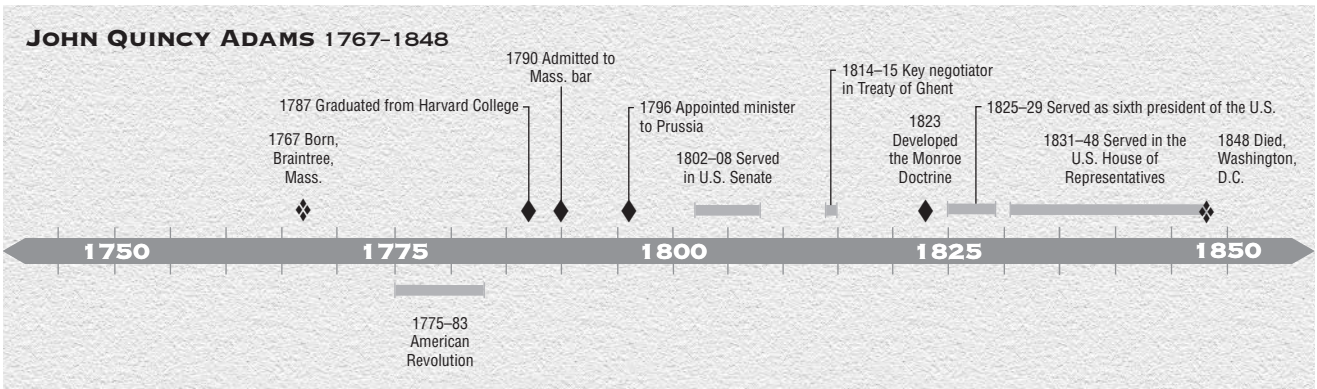

Another contribution of Adams to the antislavery cause was his championing of Africans on the slave ship AMISTAD. The slaves had mutinied off the coast of Cuba, capturing their masters. The slaves, unfamiliar with navigation, asked their captives to help them sail to a country where slave trade was illegal. The former masters took advantage of the slaves' navigational inexperience and directed the ship into U.S. waters near Long Island, hoping to find sympathetic U.S. authorities. Adams was one of two attorneys who argued the case of the Africans before the U.S. Supreme Court, defending the blacks as free people. President MARTIN VAN BUREN had taken the position that the slaves must be returned to their masters and to their inevitable death. Adams helped win their freedom (*United States v. Libellants of Schooner Amistad,* 40 U.S. [15 Pet.] 518, 10 L. Ed. 826 [1841]).

Adams's support of the arts and sciences was evident in his battle to uphold the dying wishes of an eccentric Englishman named James Smithson. Smithson was the illegitimate son of the first duke of Northumberland. At his death in 1829, he bequeathed his entire estate to his nephew. His will further provided that if the nephew were to die without heirs, which he did in 1835, the entire estate was to be given to the U.S. government to found what Smithson asked be called the Smithsonian Institution, an establishment for the increase and diffusion of knowledge. Adams led a ten-year fight for acceptance of the endowment, which was valued at $508,000 in 1835, and the Smithsonian Institution was established on August 10, 1846.

On November 19, 1846, Adams suffered a stroke, from which he never fully recovered. He continued to serve in Congress until he suffered a second stroke and collapsed in the House of Representatives. He was carried from his seat to the Speaker's room, where he lay until his death two days later, on February 23, 1848.

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## ADAPTATION

*The act or process of modifying an object to render it suitable for a particular or new purpose or situation.*

In the law of patents—grants by the government to inventors for the exclusive right to manufacture, use, or market inventions for a term of years—adaptation denotes a category of patentable inventions, which entails the application of an existing product or process to a new use, accompanied by the exercise of inventive faculties. Federal law provides: "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title." 35 U.S.C.A. §101.

The adaptation of a device to a different field can constitute an invention if inventiveness exists in the conception of new use and with modifications necessary to render the device applicable in the new field. The progressive adaptation of well-known devices to new, but similar, uses is merely a display of an expected technical proficiency, which involves only the exercise of common reasoning abilities upon materials furnished by special knowledge ensuing from continual practice. It, therefore, does not represent a patentable invention. Ingenuity beyond the mere adaptation of teachings as could be done by a skilled mechanic is required to achieve a patentable invention; inventive talent, rather than skill in adaptation, must be manifested. To entitle a party to the benefit of the patent statute, the device must not only be new; it must be inventively new. The readaptation of old forms to new roles does not constitute invention where there is no significant alteration in the method of applying it or in the nature of the result obtained. No invention will be recognized if the new form of the result has not previously been contemplated and, irrespective of the remoteness of the new use from the old, if no modifications in the old device are necessary to adapt it to the new use.

Invention is generally not involved where an old process, device, or method is applied to a new subject or use that is analogous to the old or to a new use or the production of a new result in the same or analogous field. If the new use is so comparable to the old that the concept of adapting the device to the new use would occur to a person proficient in the art and interested in devis-

ing a method of changing the intended function, there is no invention even though significant alterations have been made. The application of an old device to a new use is normally patentable only if the new use is in a different field or involves a completely novel function. In addition, the physical modifications need not be extensive, as long as they are essential to the objective.

In the law of copyrights the exclusive right of the author of a literary project to reproduce, publish, and sell his or her work, which is granted by statute, adaptation refers to the creation of a derivative work, which is protected by federal COPYRIGHT laws.

A derivative work involves a recasting or translation process that incorporates preexisting material capable of protection by copyright. An adaptation is copyrighted if it meets the requirement of originality, in the sense that the author has created it by his or her own proficiency, labor, and judgment without directly copying or subtly imitating the preexisting material. Mere minor alterations will not suffice. In addition the adapter must procure the consent of the copyright owner of the underlying work if he or she wants to copy from such work. The copyright in a derivative work, however, extends only to the material contributed by the adapter and does not affect the copyright protection afforded to the preexisting material.

The rise in the use of digital media has caused new dilemmas in the area of copyright law with respect to adaptations. Even average technology users may make copies and adapt the original works to their needs. Recent issues in this area have focused upon intellectual property rights in the context of the INTERNET and computer programs.

Even average computer users are now capable of copying digital music files and modifying them through the use of software. The Internet now allows these users to prepare these modifications and distribute them to a wide audience using the Web, E-MAIL, and other methods of distribution. The Copyright Act of 1976 continues to protect the copyright holders, generally requiring those who prepared derivative works to obtain permission from the copyright holder (17 U.S.C.A. § 114(b) [1996]). However, enforcement of these provisions has proven difficult and led to a number of efforts, including those by the Recording Industry Association of America, to find new methods for protecting the rights of the copyright holders.

A second cause of concern among copyright owners is the ability of computer users to make copies of computer program and adopt these programs to serve the users' purposes. The Copyright Act provides an exclusive right to the copyright holders of computer programs and allows owners of copies of these programs to make additional copies only in limited circumstances (17 U.S.C.A. § 117 [1996]). Like sound recordings, protection of these copyrights has proven difficult, leading lawmakers to consider a number of new options to protect these rights.

In the law of real property, with respect to fixtures (articles that were PERSONAL PROPERTY but became part of the realty through annexation to the premises), adaptation is the relationship between the article and the use that is made of the realty to which the article is annexed.

The prevailing view is that the adaptation or appropriation of an article affixed to real property for the purpose or use to which the premises are devoted is an important consideration in ascertaining its status as a fixture. According to this theory, if the article facilitates the realization of the purpose of the real property, the annexor presumably intends it to be a permanent ACCESSION. Numerous other cases, however, allude to the adaptation of an item to the use to which the premises are designated, as merely one of the tests or factors that should or must be evaluated in determining that it constitutes real property. Other cases view the character of the use of the article annexed as significant.

The special construction or fitting of an article for location and use on certain land or in a particular building, which mitigates against use in another location, indicates that is was intended to constitute a part of the land.

The adaptability of an annexed article for use in another location is sometimes viewed as demonstrating the retention of its character as personalty (personal property), but this characteristic is not conclusive. Articles not designed to comprise the realty retain their character as personalty.

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## ADD-ON

*A purchase of additional goods before payment is made for goods already purchased.*

An add-on may be covered by a clause in an installment payment contract that allows the seller to hold a security interest in the earlier goods until full payment is made on the later goods.

## ♦ ADDAMS, JANE

Jane Addams, a pioneer in social reform, founded Hull House, the first settlement house in the United States, to serve the immigrant families who came to Chicago at the beginning of the industrial revolution. For nearly fifty years, Addams worked relentlessly for improved living and working conditions for America's urban poor, for women's suffrage, and for international PACIFISM.

"PRIVATE BENEFICENCE IS TOTALLY INADEQUATE TO DEAL WITH THE VAST NUMBERS OF THE CITY'S DISINHERITED." —JANE ADDAMS

Addams was the youngest of eight children born to John H. and Sarah Addams. Her mother died when she was two years old, and her teenage sisters, Mary, Martha, and Alice, took over her upbringing. Her family followed the Quaker faith, and valued hard work and change through peaceful efforts. Addams idolized her father, whom she described as a man of great integrity. He remained a pivotal figure in her life until his death in 1881.

Addams's first exposure to urban poverty occurred when she was six years old, during a trip with her father to Freeport, Illinois. Upon seeing the city's garbage-filled streets and slum housing, she asked her father why the people lived in such horrid houses. After her father told her the people were too poor to have nicer homes, she announced that she would buy a big house when she was grown, where poor children could come and play whenever they liked.

Addams suffered throughout her life from a painful curved spine that caused her to walk pigeon-toed. As a result, she was always self-conscious about her appearance. She was a good student and often helped classmates who were having difficulties with their studies. After graduating from high school in 1877, she attended nearby Rockford Female Seminary, one of the oldest institutions for female education in the area. Rockford encouraged its students to become missionaries, but Addams, who struggled with her religious beliefs all her life, refused to consider that vocation. While at Rockford, she met Ellen Gates Starr, who would later help her found Hull House. Reflecting Addams's emerging concern about the place of women in America, she and Starr attempted to convince the seminary to offer coursework equivalent to that of men's colleges. Eventually, the seminary did become Rockford College.

Addams graduated from Rockford in 1881. Several months later, she was devastated when her father died of a ruptured appendix while on a family vacation in Wisconsin. His death left her a wealthy woman, and she decided to fulfill her plan to attend the Women's Medical College of Philadelphia. Addams began her studies that fall, but almost immediately the back pain she had suffered all her life flared up, forcing her to undergo back surgery.

During her lengthy recovery, Addams toured Europe with her stepmother, Anna Haldeman Addams. Throughout her trip, Addams was struck by the poverty of the industrialized countries she visited. At a fruit and vegetable auction in London, she watched as starving men and women fought over decayed and bruised produce. As she wrote in her autobiography, her impression was of "myriads of hands, empty, pathetic, nerveless and workworn, . . . clutching forward for food that was already unfit to eat." She was also appalled at the lack of concern for poor people shown by better-off Europeans.

On her return home in 1885, Addams found herself exhausted, depressed, and unsure of her life's purpose. On a second trip to Europe, she visited Toynbee Hall, an experimental Oxford-based project in London's poverty-stricken East End. Educated young men had moved into the area and were offering literacy classes, art lessons, and other activities to residents. Because the men actually settled in the area and lived with the residents, Toynbee was called a settlement house.

Addams decided to use Toynbee as a model and establish a similar facility in the slums of Chicago. With over a million residents, that city was home to hundreds of thousands of immigrants—from Germany, Ireland, Sweden, Italy, Russia, Greece, and many other countries. These desperate people were a ready source of cheap labor for the Chicago factories, and their poor wages forced them to live in overcrowded, rat-infested tenements, surrounded by filthy, garbage-filled streets. Journalist Lincoln Steffens

described the Chicago of that time as violent, foul smelling, and lawless.

Addams enlisted the aid of her former schoolmate, Starr, in her new venture. The women first had to overcome the adamant objections of friends and relatives who were horrified that two educated, unmarried women would consider living in the city's slums. But Addams and Starr soon found a house where they could begin their work, the former mansion of Charles J. Hull. Once a stately country home, the house was now surrounded by rundown, noisy city tenements. In the beginning, Addams was able to rent only a few rooms in the house, but eventually, Hull's heir, Helen Culver, gave her the entire house and some surrounding land.

After several months of cleaning and refurbishing, Addams and Starr opened Hull House in September 1889. Initially, the two were met with great suspicion by the area's residents. Local priests warned their parishioners the women might try to convert them to a new religion, and street children threw garbage and rocks at the house. But Addams and Starr continued to greet their neighbors in a friendly manner, and the residents soon discovered that the women were concerned about their well-being. They also found that the women would sell them nourishing food for just a few pennies, and they soon came to depend on Hull House.

In the first few years of the settlement house, Addams established a kindergarten, a women's boarding house, the nation's first public playground, and a day care center for mothers forced to leave their children alone for as long as ten hours each day in order to work. Hull House offered evening college extension courses, English and art classes, a theater group, and books and magazines for children and adults. Observing the long hours and dangerous working conditions that the neighborhood children were forced to endure, Addams and her friends soon began working for state regulation of child labor, and went on to lobby in Washington, D.C. At home, when city garbage collectors continually ignored overflowing garbage bins, Addams applied for and was appointed to the position of ward garbage inspector, and forced the trash collectors to remove the filth.

*Jane Addams.*
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Addams described her work at Hull House as an effort to conserve and push forward the best of the community's achievements. She strove to respect and preserve the immigrants' cultures, and the holidays of their various nations were always celebrated at Hull House.

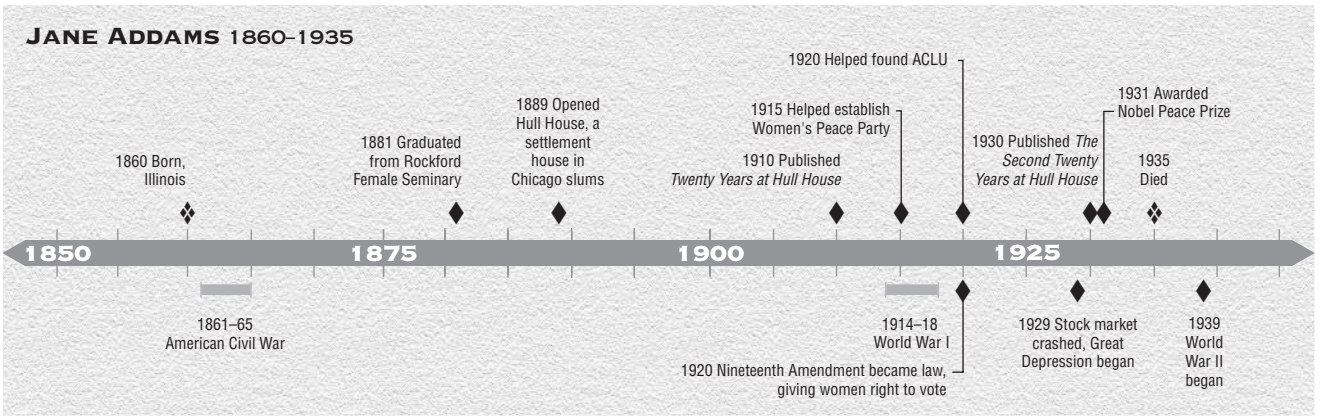

Among the volunteers who flocked to Hull House to work with Addams were several women who later brought about important social reform. Julia C. Lathrop helped establish Chicago's first juvenile court. Dr. Alice Hamilton worked in industrial medicine and conducted studies that helped improve factory conditions. Florence Kelley investigated sweatshops for the Illinois State Bureau of Labor and helped establish CHILD LABOR LAWS. Although Addams developed a wide circle of influential supporters because of her work, such as socialist EUGENE V. DEBS and journalist Steffens, she also occasionally lost admirers for the same reason. Addams never wavered in her belief that the same activities that caused her to lose some supporters would help her to gain others.

In the first decade of the twentieth century, Addams established herself as a prolific writer, publishing *Democracy and Social Ethics* (1902), *Newer Ideals for Peace* (1907), *The Spirit of Youth and the City Streets* (1909), and the best-selling first volume of her autobiography, *Twenty Years at Hull House* (1910). During these years, she began to turn her attention more and more to women's issues—particularly the right to vote. In 1913, seven years before the NINETEENTH AMENDMENT to the U.S. Constitution granted women the right to vote in all elections, she helped secure the vote for women in Chicago.

Addams's work continued to expand beyond Hull House and WOMEN'S RIGHTS. In 1909, she supported the founding of the National Association for the Advancement of Colored People (NAACP) and served on its executive committee. In 1915, she helped establish the Women's Peace Party, and traveled to Europe to attend the International Women's Peace Conference in the Netherlands and carry the message of peace to the countries fighting in WORLD WAR I. Addams continued to hold to her pacifist views even when the United States entered the war in 1917, and she was blacklisted as a result. The Daughters of the American Revolution, a group that had once honored Addams for her colonial ancestry, expelled her, and she was shunned by many other supporters. She continued her humanitarian work during the war, however, helping the U.S. Department of Food Administration to distribute food to European allies.

Following the war, Addams also worked to have food sent to the starving civilians in the defeated countries, setting off yet another round of criticism. In 1920, in response to increasing attempts to stifle unpopular opinion in the United States, Addams helped found the AMERICAN CIVIL LIBERTIES UNION, dedicated to protecting the individual's right to believe, write, and speak whatever he or she chooses.

By the 1930s, the public's bitterness toward Addams had abated. In 1931, she was awarded the Nobel Peace Prize, an achievement that Addams felt justified her pacifist work to the world. Frederick Stang, of the Nobel Committee in Norway, said Addams had clung to her idealism during a difficult time in which peace was overshadowed. Addams went on to receive fourteen honorary degrees, among them one from Yale, the first honorary degree that school had ever awarded to a woman.

In 1930, Addams completed her autobiography with the publication of *The Second Twenty Years at Hull House.* A few years later, surgery revealed that Addams was suffering from advanced cancer. She died in May 1935. Shortly before her death, Addams was honored at an event marking the twentieth anniversary of the Women's International League for Peace and Freedom. In response to the many tributes she received, she said she was driven by the fear that she might give up too soon and fail to make the one effort that might save the world.

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## ADDICT

*Any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so drawn to the use of such narcotic drugs as to have lost the power of self-control with reference to his or her drug use.*

Addiction to narcotics is not a crime in itself, but that does not excuse violation of related statutes. It may be an offense to be under the influence of an illegal drug in a public place, even though being an addict is not illegal. While such a statute is intended to protect society from the dangers of drug abuse and the antisocial

*A man and woman inject themselves with heroin. Though addiction to narcotics is not a crime in itself, addicts are not excused from the violation of narcotics related statutes.* AP/WIDE WORLD PHOTOS

conduct of drug abusers, it generally is not necessary for conviction to prove that the defendant was disturbing the peace when arrested.

**CROSS-REFERENCES**

Drugs and Narcotics.

## ADDITIONAL EXTENDED COVERAGE

*A provision added to an insurance policy to extend the scope of coverage to include further risks to dwellings.*

The provision may cover water damage from the plumbing or heating systems, VANDALISM or malicious mischief, glass breakage, falling trees, damage from ice or snow storms, or additional risks not otherwise covered by the liability policy.

## ADDITIONAL INSTRUCTIONS

*A charge given to a jury by a judge after the original instructions to explain the law and guide the jury in its decision making.*

Additional instructions are frequently needed after the jury has begun deliberations and finds that it has a question concerning the evidence, a point of law, or some part of the original charge.

## ADDITUR

*The power of the trial court to assess damages or increase the amount of an inadequate award made by jury verdict, as a condition of a denial of a motion for a new trial, with the consent of the defendant whether or not the plaintiff consents to such action. This is not allowed in the federal system.*

Damages assessed by a jury may be set aside when the amount is shocking to the judicial conscience—so grossly inadequate that it constitutes a miscarriage of justice—or when it appears that the jury was influenced by prejudice, corruption, passion, or mistake.

For example, a sixty-one-year-old woman was mugged in a hallway of her apartment building after the landlord failed to replace a broken lock on the back service entrance. She sustained a broken shoulder, a broken arm, and numerous cuts and bruises. Her medical bills amounted to more than $2,500. She sued the landlord for his negligent maintenance of the building, and the jury returned a verdict in her favor but awarded damages of only $2,500. Her attorney immediately moved for a new trial on the ground that the verdict was shockingly inadequate. The trial judge ruled that the jury could not possibly have calculated compensation for the woman's pain and suffering, an item that should have been included under state law. The trial judge, therefore, awarded an additur of $15,000. The effect of this order was to put the defendant on notice that he must either pay the $15,000 in addition to the verdict of $2,500 or a new trial would be held. The defendant weighed the disadvantages of investing time and money in a new trial and the risk of an even higher award of monetary damages by a sympathetic jury. He consented to the additur.

An additur is not justified solely because the amount of damages is low. For example, damages of $10,000 certainly will not compensate the family of a forty-four-year-old man who had been steadily employed as a plumber until he was permanently disabled in an auto accident. In such a case, however, the jury could have found that the plaintiff's NEGLIGENCE con-

tributed to the cause of the accident and reduced the damages proportionately, as is permitted in most states.

An award of additur is not permitted in every state, nor is it allowed in the federal courts. Under the rules that govern procedure in the federal courts, a trial judge has the power to set aside a verdict for a plaintiff on the ground that the damages awarded are clearly inadequate, but then the judge's only recourse is to grant a new trial.

CROSS-REFERENCES

Civil Procedure; Trial.

## ADDUCE

*To present, offer, bring forward, or introduce.*

For example, a bill of particulars that lists each of the plaintiff's demands may recite that it contains all the evidence to be adduced at trial.

## ADEMPTION

*The failure of a gift of personal property—a bequest—or of real property—a devise—to be distributed according to the provisions of a decedent's will because the property no longer belongs to the testator at the time of his or her death or because the property has been substantially changed.*

There are two types of ademption: by extinction and by satisfaction.

### Extinction

Ademption by extinction occurs when a particular item of PERSONAL PROPERTY or specially designated real property is substantially changed or not part of the testator's estate when he or she dies. For example, a testator makes a will giving her farm to her nephew and a diamond watch to her niece. Before she dies, she sells the farm and loses the watch. The proceeds of the sale of the farm are traced to a bank account. After the testator's death, the nephew claims the proceeds from the sale and the niece claims that the executor of the estate should pay her the value of the diamond watch. Neither claim will be upheld. Once the farm is sold, the specific devise is adeemed by extinction. The proceeds from its sale are not its equivalent for inheritance purposes. In some states, however, if all of the proceeds had not yet been paid, the nephew would be entitled to receive the unpaid balance.

Since the testator no longer owns the diamond watch when she dies, that specific bequest is also adeemed by extinction.

### Satisfaction

Ademption by satisfaction takes place when the testator, during his or her lifetime, gives to his or her heir all or a part of the gift he or she had intended to give by his or her will. It applies to both specific bequests and devises as well as to a general bequest or legacy payable from the general assets of the testator's estate. If the subject of the gift made while the testator is alive is the same as the subject of a provision of the will, many states presume that it is in place of the testamentary gift if there is a parent-child or grandparent-grandchild relationship. Otherwise, an ademption by satisfaction will not be found unless there is independent evidence, such as express statements or writings, that the testator intended this to occur. A father makes a will leaving his ski house to his daughter and $25,000 to his son. Before death, he gives the daughter the deed to the ski house and he gives the son $15,000 with which to complete medical school. After the father's death, the daughter will get nothing, while the son will get $10,000.

After the son received the $15,000 from his father, there was an ademption by satisfaction of the general legacy of $25,000 to the extent of the size of the lifetime gift, $15,000. The son is entitled to receive the remaining $10,000 of the original general legacy. Since there was a parent-child relationship, there was no need for independent proof that the $15,000 gift was intended to adeem the gift under the will.

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## ADEQUATE

*Sufficient; equal to what is required; suitable to the case or occasion.*

A law that requires PUBLIC UTILITIES to provide adequate service does not create a right for customers to sue the electric company whenever the meat in their freezers spoils because of a power outage in the absence of NEGLIGENCE. Service does not have to be perfect in order to meet a standard of adequacy.

## ADEQUATE REMEDY AT LAW

*Sufficient compensation by way of monetary damages.*

Courts will not grant equitable remedies, such as SPECIFIC PERFORMANCE or injunctions, where monetary damages can afford complete legal relief. An equitable remedy interferes much more with the defendant's freedom of action than an order directing the defendant to pay for the harm he or she has caused, and it is much more difficult for a court to supervise and enforce judgments giving some relief other than money. Courts, therefore, will compensate an injured party whenever possible with monetary damages; this remedy has been called the remedy at law since the days when courts of EQUITY and courts at law were different.

## ADHESION CONTRACT

*A type of contract, a legally binding agreement between two parties to do a certain thing, in which one side has all the bargaining power and uses it to write the contract primarily to his or her advantage.*

An example of an adhesion contract is a standardized contract form that offers goods or services to consumers on essentially a "take it or leave it" basis without giving consumers realistic opportunities to negotiate terms that would benefit their interests. When this occurs, the consumer cannot obtain the desired product or service unless he or she acquiesces to the form contract.

There is nothing unenforceable or even wrong about adhesion contracts. In fact, most businesses would never conclude their volume of transactions if it were necessary to negotiate all the terms of every CONSUMER CREDIT contract. Insurance contracts and residential leases are other kinds of adhesion contracts. This does not mean, however, that all adhesion contracts are valid. Many adhesion contracts are UNCONSCIONABLE; they are so unfair to the weaker party that a court will refuse to enforce them. An example would be severe penalty provisions for failure to pay loan installments promptly that are physically hidden by small print located in the middle of an obscure paragraph of a lengthy loan agreement. In such a case a court can find that there is no meeting of the minds of the parties to the contract and that the weaker party has not accepted the terms of the contract.

## ADJACENT

*Lying near or close to; neighboring.*

Adjacent means that objects or parcels of land are not widely separated, though perhaps they are not actually touching; but adjoining implies that they are united so closely that no other object comes between them.

## ADJECTIVE LAW

*The aggregate of rules of procedure or practice. Also called adjectival law, as opposed to that body of law that the courts are established to administer (called* substantive law*), it means the rules according to which the* SUBSTANTIVE LAW *is administered, e.g., Rules of* CIVIL PROCEDURE. *That part of the law that provides a method for enforcing or maintaining rights, or obtaining redress for their invasion. Pertains to and prescribes the practice, method, procedure, or legal machinery by which substantive law is enforced or made effective.*

CROSS-REFERENCES

Civil Procedure.

## ADJOINING LANDOWNERS

*Those persons, such as next-door and backyard neighbors, who own lands that share common boundaries and therefore have mutual rights, duties, and liabilities.*

The reciprocal rights and obligations of adjoining landowners existed at COMMON LAW but have been modified by various state laws and court decisions.

### Rights, Duties, and Liabilities

Landowners are expected to use their property reasonably without unduly interfering with the rights of the owners of contiguous land. Anything that a person does that appropriates adjoining land or substantially deprives an adjoining owner of the reasonable enjoyment of his or her property is an unlawful use of one's property. A man buys a house in a residentially zoned area and converts it into an office building. He paves the backyard for a parking lot but encroaches two feet beyond his property into the lot of the adjoining landowner. His use of the property is unlawful for a number of reasons. He has appropriated his neighbor's land and substantially interfered with his neighbor's right to use it. His neighbor may sue him in a TORT ACTION for the NUISANCE created and, if successful, the neighbor will be awarded damages and an INJUNCTION to stop the unlawful use of the land. In addition, the purchaser has

violated ZONING laws by using residential property for commercial purposes without seeking a variance.

Property owners have the right to grade or change the level of their land or to build foundations or embankments as long as proper precautions are taken, such as building a retaining wall to prevent soil from spilling upon adjoining land. If permitted by law, landowners may blast on their own property but will be liable for damages caused by debris thrown onto adjoining land.

**Lateral Support** A landowner has a legally enforceable right to lateral support from an adjoining landowner. Lateral support is the right to have one's land in its natural condition held in place from the sides by the neighboring land so that it will not fall away. Land is considered in its natural condition if it has no artificial structures or buildings on it. A landowner can enforce the right to lateral support in court. A lawsuit for the removal of lateral support accrues when the damage occurs, not when the excavation is done.

An adjoining landowner who excavates close to his or her boundary line has a duty to prevent injury arising from the removal of the lateral support of a neighbor's property. Because the right to lateral support is considered an absolute property right, an adjoining landowner will be liable for damages to the natural condition of the land regardless of whether or not he or she acted negligently.

When, however, a landowner has erected buildings on the land, his or her right to recover for deprivation of the lateral support is different. Since additional weight has been placed on the land, thus increasing the burden on the lateral support, the landowner can be awarded damages for injuries to the building caused by excavation only if his or her neighbor has been negligent. Sometimes local ordinances require that persons planning to excavate on their own property give notice to neighboring adjoining landowners so that neighbors may take preventive measures to protect their property. The failure of landowners who receive notice to take precautions does not necessarily absolve the excavator of liability for NEGLIGENCE. If, however, the excavator does not notify neighboring landowners, courts have treated this failure as negligence, and the excavator will be responsible for damages even though the excavating itself was not done negligently.

When evidence establishes that an adjoining landowner has removed the lateral support of a neighbor's land, the neighbor will recover damages in the amount of either the cost of restoring the property to its value before its support was removed or the cost of restoring the land to its former condition, whichever is less. An injunction prohibiting further excavation may be granted if it poses a clear danger to contiguous lands and if it will cause irreparable damage.

**Subjacent Support** A landowner is entitled to subjacent support, the absolute right to have one's land supported from beneath its surface. If one person owns the surface of the land while another owns the subjacent surface, the owner of the surface is entitled to have it remain in its natural condition without subsidence caused by the subsurface owner's withdrawal of subjacent materials. An adjoining landowner who, during excavation, taps a subterranean stream, causing the soil of the neighbor's land to subside, will be liable for any injuries that result. The surface owner's right to sue the subsurface owner for deprivation of subjacent support arises when the land actually subsides, not when the excavation is made.

The construction of buildings on the surface of the land does not lessen a person's right to subjacent support. It does, however, change the circumstances under which that person may recover for the removal of subsurface support. If such buildings are damaged, their owner must show that the removal of the support was done negligently.

**Light, Air, and View** No landowner has an absolute right to light and air from or passing over adjoining property or to a view over adjoining lands. Zoning laws imposed by localities may, however, require that any construction undertaken by an individual not deprive an adjoining landowner of adequate air, light, and view. Similarly, many agreements such as restrictive covenants in deeds or EASEMENTS affect a person's duty toward his or her next-door neighbor's right to air, light, and view. In the absence of zoning laws or agreements, therefore, a person may build on his or her own property without regard to the fact that he or she is depriving the next-door neighbor of the light, air, and view that was enjoyed before the building was erected. An exception is a structure that blocks air, light, and view for the sole purpose of injuring a neighbor—such as a "spite" fence—and which is of no beneficial use or pleasure to the

owner. Courts will generally not permit such structures.

**Encroachments** An encroachment is an intrusion upon the property of another without that person's permission. No person is legally entitled to construct buildings or other structures so that any part, regardless of size, extends beyond that person's property line and intrudes upon adjoining lands. An encroaching owner can be required to remove the eaves of a building that overhang an adjoining lot. If he or she refuses to do so, the owner of the contiguous lot may personally remove as much of the encroachment that deprives him or her of the complete enjoyment of his or her land, but if negligent, he or she will be liable for damages. Should any expenses be incurred in the removal of the encroachment from the adjoining land, the person whose property was encroached upon can sue the owner to recover damages.

The person whose property has been encroached upon may sue the encroacher under either the theory of nuisance or the theory of TRESPASS to obtain monetary damages, or instead, may seek an injunction against continuation of the encroachment or to force its removal.

**Trees and Shrubs** Landowners should not permit trees or hedges on their property to invade the rights of adjoining landowners. If an individual knows, for example, that a tree on his or her property is decayed and may fall and damage the property of another, that individual has a duty to eliminate the danger. A tree on the boundary line of contiguous land belongs to both adjoining landowners. Each owner has an interest identical with the portion standing on his or her land. Each can sever intruding tree branches or roots at the boundary line of his or her property, whether or not any injuries have been sustained by the intrusion, but reasonable care must be exercised so as not to kill the entire tree.

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CROSS-REFERENCES

Land-Use Control.

## ADJOURNED TERM

*A* CONTINUANCE *of a previous or regular court session that results from postponement.*

When a term is adjourned, it is actually prolonged due to a temporary putting off of the business being conducted.

## ADJOURNMENT

*A putting off or postponing of proceedings; an ending or dismissal of further business by a court, legislature, or public official—either temporarily or permanently.*

If an adjournment is final, it is said to be sine die, "without day" or without a time fixed to resume the work. An adjournment is different from a recess, which is only a short break in proceedings.

In legislatures, adjournment officially marks the end of a regular session. Both state and federal lawmakers vote to determine when to adjourn. The exact timing depends upon multiple factors such as work load, election schedules, and the level of comity among lawmakers. Because a session can end with unfinished legislative business, adjournment is commonly used as a means of political leverage in securing or delaying action on important matters. In the U.S. Congress, where the single annual legislative session usually ends in the fall, the president may call an adjournment if the House and Senate cannot agree upon a date.

FURTHER READINGS

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CROSS-REFERENCES

Congress of the United States; Legislature.

## ADJUDGE

*To determine by a judge; to pass on and decide judicially.*

A person adjudged guilty is one who has been convicted in court.

*Justice Charles Tejada listens to arguments during a New York State Supreme Court proceeding. The adjudicative process is governed by formal rules of evidence and procedure.*

AP/WIDE WORLD PHOTOS

## ADJUDICATION

*The legal process of resolving a dispute. The formal giving or pronouncing of a judgment or decree in a court proceeding; also the judgment or decision given. The entry of a decree by a court in respect to the parties in a case. It implies a hearing by a court, after notice, of legal evidence on the factual issue(s) involved. The equivalent of a determination. It indicates that the claims of all the parties thereto have been considered and set at rest.*

Three types of disputes are resolved through adjudication: disputes between private parties, such as individuals or corporations; disputes between private parties and public officials; and disputes between public officials or public bodies. The requirements of full adjudication include notice to all interested parties (all parties with a legal interest in, or legal right affected by, the dispute) and an opportunity for all parties to present evidence and arguments. The adjudicative process is governed by formal RULES OF EVIDENCE and procedure. Its objective is to reach a reasonable settlement of the controversy at hand. A decision is rendered by an impartial, passive fact finder, usually a judge, jury, or administrative tribunal.

The adjudication of a controversy involves the performance of several tasks. The trier must establish the facts in controversy, and define and interpret the applicable law, or, if no relevant law exists, fashion a new law to apply to the situation. Complex evidentiary rules limit the presentation of proofs, and the Anglo-American tradition of STARE DECISIS, or following precedents, controls the outcome. However, the process of applying established RULES OF LAW is neither simple nor automatic. Judges have considerable latitude in interpreting the statutes or case law upon which they base their decisions.

An age-old question that still plagues legal theorists is whether judges "make" law when they adjudicate. SIR WILLIAM BLACKSTONE believed that judges do nothing more than maintain and expound established law (*Commentaries on the Laws of England*); other writers vehemently disagree. Some legal analysts maintain that the law is whatever judges declare it to be. Echoing those sentiments, President THEODORE ROOSEVELT asserted that "the chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret … they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making" (Message to Congress [Dec. 8, 1908]). Supreme Court Justice BENJAMIN N. CARDOZO, writing in *The Nature of the Judicial Process,* argued that the law is evolutionary and that judges, by interpreting and applying it to specific sets of facts, actually fashion new laws.

Whether judges are seen as making law or merely following what came before, they are required to operate within narrow strictures. Even when they are deciding a CASE OF FIRST IMPRESSION (a question that has not previously been adjudicated), they generally try to analogize to some existing precedent. Judges often consider customs of the community; political and social implications; customs of the trade, market, or profession; and history when applying the law. Some, such as Justice OLIVER WENDELL HOLMES and Justice Cardozo, thought that considerations of social and public policy are the most powerful forces behind judicial decisions.

A hearing in which the parties are given an opportunity to present their evidence and arguments is essential to an adjudication. Anglo-American law presumes that the parties to the dispute are in the best position to know the facts of their particular situations and develop their own proofs. If the hearing is before a court, formal rules of procedure and evidence govern; a hearing before an ADMINISTRATIVE AGENCY is generally less structured.

Following the hearing, the decision maker is expected to deliver a reasoned opinion. This opinion is the basis for review if the decision is appealed to a higher tribunal (a court of

appeals). It also helps ensure that decisions are not reached arbitrarily. Finally, a well-reasoned opinion forces the judge to carefully think through his or her decision in order to be able to explain the process followed in reaching it.

Adjudication of a controversy generally ensures a fair and equitable outcome. Because courts are governed by evidentiary and procedural rules, as well as by stare decisis, the adjudicative process assures litigants of some degree of efficiency, uniformity, and predictability of result.

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CROSS-REFERENCES

Blackstone, Sir William; Cardozo, Benjamin Nathan; Holmes, Oliver Wendell, Jr.; Judiciary.

## ADJUDICATIVE FACTS

*Factual matters concerning the parties to an administrative proceeding as contrasted with legislative facts, which are general and usually do not touch individual questions of particular parties to a proceeding. Facts that concern a person's motives and intent, as contrasted with general policy issues. Those facts that must be found* **BEYOND A REASONABLE DOUBT** *by the trier of fact before there can be a conviction.*

Adjudicative facts, *of which a trial court may take notice if a fact is not subject to reasonable dispute, are those to which law is applied in the process of adjudication; they are facts that, in a jury case, normally go to the jury.*

The role of a U.S. court is to resolve the dispute that has brought the parties before it. Determining what happened to whom, when and how it happened, and what the result is or will be, is part of the adjudicative process by which the court reaches that resolution. These determinations establish the adjudicative facts of the dispute.

Adjudicative facts differ from ordinary facts in that they are considered facts only if the court recognizes and accepts them. For example, a witness may testify that she saw the defendant's car parked at a specific place at a specific time. These are the facts as she recalls them. However, the court may reject her account and instead accept another witness's testimony that the defendant was driving that same car in another part of town at the same time. The second witness's account will therefore become part of the adjudicative facts of the case, and the first witness's recollection will be considered immaterial.

Adjudicative facts are specific and unique to a particular controversy. For this reason, the fact determination in one case is not controlling in other similar cases, even if all the cases arose from the same incident. Adjudicative facts differ from legislative facts, which are general and can be applied to any party in a similar situation. For example, the facts used by a court to determine the legality of a tax increase levied against a single taxpayer would be adjudicative facts particular to that taxpayer's case. By contrast, the facts used to determine the legality of a general tax increase levied against all the residents of a city would be legislative in nature. Because facts can be perceived and interpreted differently by different people, the skillful lawyer is careful about what facts to present and how to present them at trial.

Adjudicative facts re-create the course of events that led to the dispute. They may also predict what will happen as a result. For example, where one party is suing another for personal injury, adjudicative facts will determine what happened, who was at fault, and what redress is appropriate for pain and suffering. Adjudicative facts will further establish what lasting consequences, such as lost future wages, the plaintiff is likely to suffer and what compensation is fitting.

Adjudicative facts found by the court are final and will not be reviewed on appeal except in cases where it can be shown that the findings were made on insubstantial evidence or were clearly erroneous.

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## ADJUNCTION

*Attachment or affixing to another. Something attached as a dependent or auxiliary part.*

Under the CIVIL LAW system which prevails in much of Europe and Latin America, adjunction is the permanent union of a thing belonging to one person to something that belongs to someone else.

A branch agency, for example, is an adjunct of the main department or ADMINISTRATIVE AGENCY.

## ADJURATION

*A swearing; taking an oath to be truthful.*

To adjure is to command solemnly, warning that penalties may be invoked.

## ADJUST

*To settle or arrange; to free from differences or discrepancies. To bring to a satisfactory state so that parties are agreed, as to adjust amount of loss by fire or controversy regarding property or estate. To bring to proper relations. To determine and apportion an amount due. The term is sometimes used in the sense of pay, when used in reference to a liquidated claim. Determination of an amount to be paid to insured by insurer to cover loss or damage sustained.*

## ADJUSTED GROSS INCOME

*The term used for* INCOME TAX *purposes to describe gross income less certain allowable deductions such as trade and business deductions, moving expenses,* ALIMONY *paid, and penalties for premature withdrawals from term savings accounts, in order to determine a person's taxable income.*

The rules for computing adjusted gross income for federal income tax may differ from the rules in a state that imposes a state income tax.

## ADJUSTER

*A person appointed or employed to settle or arrange matters that are in dispute; one who determines the amount to be paid on a claim.*

An insurance adjuster determines the extent of the insurance company's liability when a claim is submitted. A public adjuster is a self-employed person who is hired by litigants to determine or settle the amount of a claim or debt.

## ADJUSTMENT SECURITIES

*Stocks and bonds of a new corporation that are issued to stockholders during a corporate reorganization in exchange for stock held in the original corporation before it was reorganized.*

## ADMINISTER

*To give an oath, as to administer the oath of office to the president at the inauguration. To direct the transactions of business or government. Immigration laws are administered largely by the Immigration and Naturalization Service. To take care of affairs, as an executor administers the estate of a deceased person. To directly cause the ingestion of medications or poisons. To apply a court decree, enforce its provisions, or resolve disputes concerning its meaning.*

School teachers generally are not authorized to administer medicines that pupils take to school, for example.

When divorced parents cannot agree on how to administer a visitation provision in a judgment granting CHILD CUSTODY to one of them, they might have to return to court for clarification from the judge.

## ADMINISTRATION

*The performance of executive duties in an institution or business. The* SMALL BUSINESS ADMINISTRATION *is responsible for administration of some disaster-relief loans. In government, the practical management and direction of some department or agency in the* EXECUTIVE BRANCH*; in general, the entire class of public officials and employees managing the executive department. The management and distribution of the estate of a decedent performed under the supervision of the surrogate's or probate court by a person duly qualified and legally appointed. If the decedent made a valid will designating someone called an executor to handle this function, the court will issue that person letters testamentary as authority to do so. If a person dies intestate or did not name an executor in his or her will, the court will appoint an administrator and grant him or her* LETTERS OF ADMINISTRATION *to perform the duties of administration.*

An executor or administrator must carry out the responsibilities of administration, including collection and preservation of the decedent's assets; payment of debts and claims against the estate; payment of estate tax; and distribution of the balance of the estate to the decedent's heirs.

## ADMINISTRATION, OFFICE OF

The Office of Administration was established within the Executive Office of the President

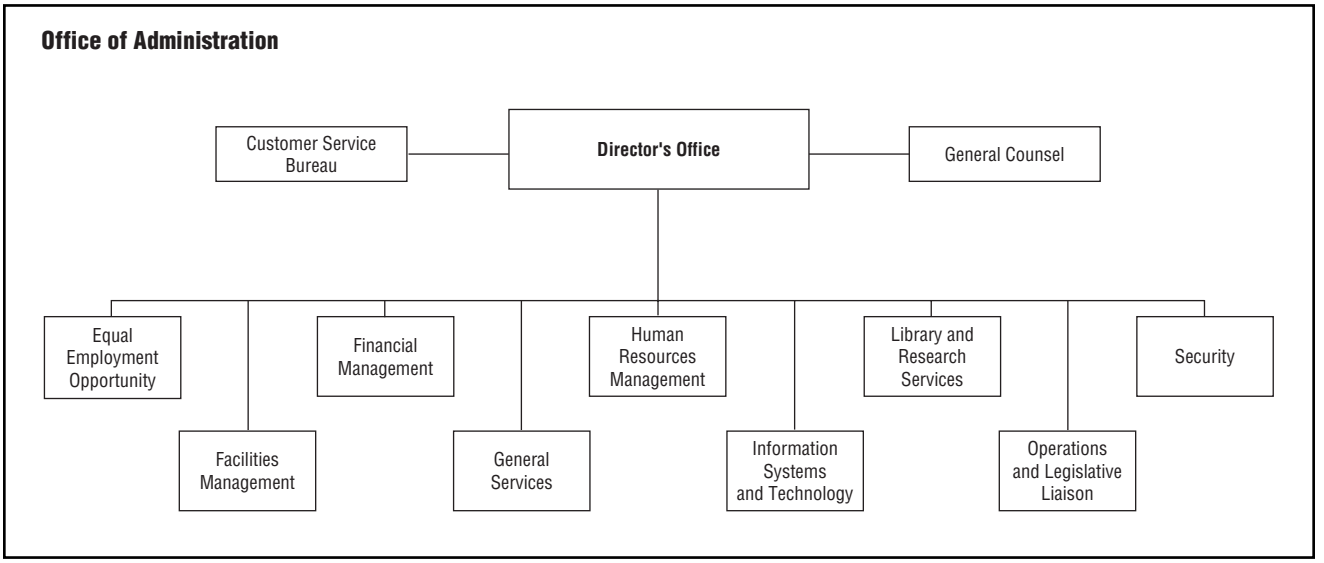


(EOP) by REORGANIZATION PLAN 1 of 1977 (implemented by EXECUTIVE ORDER 12,028, 42 Fed. Reg. 62, 895 [1977], issued on December 12, 1977, by President JIMMY CARTER). The office was created to help centralize the activities of all EOP offices into a single agency. The director of the Office of Administration, who is appointed by and reports directly to the president, is responsible for, according to Executive Order 12,028, "ensuring that the Office of Administration provides units within the Executive Office of the President common administrative support and services."

The Office of Administration provides administrative support services to all EOP offices in the White House, including services that are in direct support of the president. The services provided by the Office of Administration include personnel management; financial management; data processing; and office operations, including the handling of mail (except for presidential mail), messenger service, printing and duplication, graphics, word processing, procurement, and supply. The office also oversees three libraries (not open to the general public): a general reference library located in the New Executive Office Building, and a reference library and a law library in the Old Executive Office Building.

The Office of Administration consists of nearly two hundred full- and part-time employees who maintain accounts for all EOP offices; recruit employees (except for those who will staff the Office of Policy Development and the White House, all of whom are political appointees); and maintain official records, including those of the White House. In addition to the director and an assistant director, the office is managed by three deputy assistant directors, who provide supervision in the areas of general services, information management, and resources management.

Since its creation, the Office of Administration has developed sophisticated computer and communications systems to respond to the increasingly complex needs of the White House and the EOP. Of particular concern is the use of the INTERNET or other mass media to disseminate unauthorized, untruthful, or inaccurate information about the United States or its government. To help address this issue, by Executive Order 13,283 (January 21, 2003), President GEORGE W. BUSH established an Office of Global Communications within the White House Office. Section Four of the Executive Order tasked the Office of Administration with providing administrative and related support to the new unit.

FURTHER READINGS

Administration Office Website. Available online at <www.whitehouse.gov/oa> (accessed November 10, 2003).

CROSS-REFERENCES

President of the United States.

## ADMINISTRATIVE ACTS

*Whatever actions are necessary to carry out the intent of statutes; those acts required by legislative policy as it is expressed in laws enacted by the legislature.*

If a city commission votes to create the position of park superintendent, that is a legislative act that can take effect only if the commission follows all the steps required for formal legislation. When the same commission votes to rezone a parcel of real property from single-family residential to business uses, however, that is an administrative act that does not require the same formality as legislation. It is administrative because it is carrying out the ZONING laws already in effect.

## ADMINISTRATIVE ADJUDICATION

*The process by which an* ADMINISTRATIVE AGENCY *issues an order, such order being affirmative, negative, injunctive, or declaratory in form.*

Most formal proceedings before an administrative agency follow the process of either rule making or adjudication. Rule making formulates policy by setting rules for the future conduct of persons governed by that agency. Adjudication applies the agency's policy to the past actions of a particular party, and it results in an order for or against that party. Both methods are strictly regulated by the law of administrative procedure.

CROSS-REFERENCES

Administrative Law and Procedure.

## ADMINISTRATIVE AGENCY

*An official governmental body empowered with the authority to direct and supervise the implementation of particular legislative acts. In addition to* agency, *such governmental bodies may be called commissions, corporations (e.g.,* FEDERAL DEPOSIT INSURANCE CORPORATION*), boards, departments, or divisions.*

Administrative agencies are created by the federal Constitution, the U.S. Congress, state legislatures, and local lawmaking bodies to manage crises, redress serious social problems, or oversee complex matters of governmental concern beyond the expertise of legislators. Although Article I, Section 1, of the federal Constitution plainly states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," the "necessary-and-proper" clause, in the eighth section of the same article, states that Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers . . . in any Department or Officer thereof." With this language, many have argued that the Framers of the Constitution expected, indeed encouraged, the creation of powerful administrative agencies. This argument prevailed, and courts therefore have allowed the U.S. Congress—and other legislative bodies—to make laws that delegate limited lawmaking authority to administrative agencies. The substance of an administrative agency's powers must be intelligible, and a system of controls must be in place to limit those powers, but courts almost always find that administrative agencies meet these requirements.

Administrative agency rules and regulations often have the force of law against individuals. This tendency has led many critics to charge that the creation of agencies circumvents the constitutional directive that laws are to be created by elected officials. According to these critics, administrative agencies constitute an unconstitutional, bureaucratic fourth branch of government with powers that exceed those of the three recognized branches (the legislative, executive, and judiciary). In response, supporters of administrative agencies note that agencies are created and overseen by elected officials or the president. Agencies are created by an enabling statute, which is a state or federal law that gives birth to the agency and outlines the procedures for the agency's rule making. Furthermore, agencies include the public in their rule-making processes. Thus, by proxy, agencies are the will of the electorate.

Supporters of administrative agencies note also that agencies are able to adjudicate relatively minor or exceedingly complex disputes more quickly or more flexibly than can state and federal courts, which helps preserve judicial resources and promotes swift resolutions. Opponents argue that swiftness and ease at the expense of fairness are no virtues, but while the debate continues, administrative agencies thrive.

Governmental representation in an administrative capacity of any kind can be considered administrative agency. The president is an administrative agent whose enabling statute is the federal Constitution. The thirteen executive departments reporting to the president are administrative agencies. For example, the

**DEPARTMENT OF JUSTICE** is a cabinet-level executive department, but it functions as the administrative agency that addresses the legal concerns of the U.S. government and its people. The departments housed within the Department of Justice, such as the **DRUG ENFORCEMENT ADMINISTRATION** and the **FEDERAL BUREAU OF INVESTIGATION**, are also administrative agencies, and they have procedures and rules of their own.

An administrative agency that falls under the direction of the **EXECUTIVE BRANCH** is referred to as an executive agency. However, an enabling statute may establish an independent agency, commission, or board, which does not fall under the direction of the president. The primary distinction between an executive agency and an independent agency is that the statute creating an independent agency typically precludes the president from removing the head of the agency without cause. By contrast, a head of an executive agency generally serves at the pleasure of the president. The U.S. Supreme Court on several occasions has considered whether independent agencies are constitutional. In *Humphrey's Executor v. United States,* 295 U.S. 602, 55 S. Ct. 869, 79 L. Ed. 1611 (1935), the Court held the President **FRANKLIN D. ROOSEVELT** could not remove the commissioner of the **FEDERAL TRADE COMMISSION** (FTC) without cause. The statute that created the commission permitted removal of the commissioner only for inefficiency, neglect of duty, or malfeasance of office. Roosevelt purported to remove FTC Commissioner William E. Humphrey, who had been nominated by President **HERBERT C. HOOVER** to a seven-year term in 1931, in order to replace Humphrey with an individual of Roosevelt's own selection. The Court held that because Humphrey was not an executive officer, the president could not remove him from office except for the causes set forth in the statute.

Many of the administrative agencies that affect everyday activities are independent agencies. Among the numerous examples of independent agencies are the **CENTRAL INTELLIGENCE AGENCY**, **ENVIRONMENTAL PROTECTION AGENCY**, the **NATIONAL LABOR RELATIONS BOARD**, and the **SECURITIES AND EXCHANGE COMMISSION**. Because the president is generally able to appoint the chairs or fill vacancies within these agencies, the president is often able to influence their activities, notwithstanding the limitation on the removal of the heads of the agencies.

*The National Recovery Administration was created in the 1930s to ensure fair market competition. It was one of numerous agencies created by Congress during the Great Depression in an effort to regulate the production and marketing of goods.*
AP/WIDE WORLD PHOTOS

Administrative agencies are made up of experts in the field in which the agency operates. For example, the Maritime Administration employs experts in the areas of sea commerce and navigation to set its rules on merchant marine activities. Many agencies have the power to assess fines or otherwise deprive persons of liberty in hearings conducted by their own judicial bodies, or administrative boards. Given the specialized knowledge within administrative agencies, **ADMINISTRATIVE LAW** judges (ALJs), who hear agency claims and disputes, are loath to overturn the legal conclusions reached by administrative boards. Determinations and sanctions made by ALJs are subject to review by state or federal courts, but a party must exhaust all appeals within the agency before suing in civil court.

An agency's actions must be in accordance with its enabling statute, and courts will examine the agency records to determine whether the agency exceeded its lawmaking or judicial powers. Rigorous judicial oversight of agencies would defeat a cherished feature of administrative agency by eliminating agency flexibility in resolving conflicts. To avoid this outcome, most enabling statutes are worded vaguely, in such a

way as to allow the agencies broad discretion in determining their rules and procedures. To keep agencies from wielding unbridled power, the ADMINISTRATIVE PROCEDURE ACT OF 1946 (APA) (5 U.S.C.A. § 551 [1982]) sets standards for the activities and rule making of all federal regulatory agencies. The APA provides federal courts with a framework for reviewing the rules made and procedures used by administrative agencies. Individual states have similar statutes to guide their own courts.

### History of Administrative Agency

The first administrative agency was created by Congress in 1789 to provide pensions for wounded Revolutionary War soldiers. Also in the late 1700s, agencies were created to determine the amount of duties charged on imported goods, but it was not until 1887 that the first permanent administrative agency was created. The INTERSTATE COMMERCE COMMISSION (ICC), created by the INTERSTATE COMMERCE ACT (49 U.S.C.A. § 10101 et seq. [1995]), was enacted by Congress to regulate commerce among the states, especially the interstate transportation of persons or property by carriers. The ICC was designed to ensure that carriers involved in interstate commerce provided the public with fair and reasonable rates and services. To buttress the Interstate Commerce Act, the Federal Reserve System was established by the Federal Reserve Act of 1913 (12 U.S.C.A. § 221) to serve as the United States' central bank and execute U.S. monetary policy. One year later, the Federal Trade Commission was established by Congress to promote free and fair competition in interstate commerce by preventing unfair methods of competition.

In 1908, the Federal Bureau of Investigation (FBI) was established to investigate violations of federal laws not assigned to other federal agencies. The FBI is charged with solving crimes such as KIDNAPPING, ESPIONAGE, sabotage, bank ROBBERY, EXTORTION, interstate transportation of stolen property, CIVIL RIGHTS violations, interstate gambling violations, FRAUD against the government, and the assault or killing of a federal officer or the president. As an agency concerned with criminal apprehension, the FBI is considered an arm of the government, and its directorship is subject to presidential approval. However, the FBI carries out its investigations independent of political influence. It can, for example, probe the actions of presidents and legislators, the very persons responsible for its existence.

Administrative agencies are usually created in response to a felt public need. Some older agencies, for example, were created after the Civil War to address economic matters critical to the United States' expanding government. After the STOCK MARKET crash of October 1929, and during the Great Depression of the 1930s, Congress created numerous agencies in an effort to regulate the production and marketing of goods. Agencies such as the SOCIAL SECURITY ADMINISTRATION (created by the SOCIAL SECURITY ACT OF 1935 [42 U.S.C.A. § 301 et seq.]), the Federal Savings and Loan Insurance Corporation (established by a 1933 amendment to the Federal Reserve Act, 12 U.S.C.A. § 264, and now codified at 12 U.S.C.A. §§ 1811–1831) helped provide financial security for many Americans. The NATIONAL INDUSTRIAL RECOVERY ACT (NIRA) (15 15 U.S.C.A. §§ 701 et seq., 40 U.S.C.A. § 401 et seq.) created the NATIONAL RECOVERY ADMINISTRATION to ensure fair market competition. However, the NIRA gave the president limitless authority to impose sanctions, and it was declared invalid by the Supreme Court in the "Sick Chicken" case, SCHECHTER POULTRY CORP. V. UNITED STATES, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935). The National Labor Relations Board (created by the National Labor Relations Act of 1935 [29 U.S.C.A. § 151 et seq.], later amended by acts of 1947 and 1959) also helped to ease the devastating effects of the depression, by protecting employees' rights to organize, preventing UNFAIR LABOR PRACTICES, and promoting COLLECTIVE BARGAINING between employers and LABOR UNIONS.

Congress installed the Federal Radio Commission (FRC) in 1927 after entrepreneurs discovered the commercial potential of radio airwaves. In 1934, the FRC was merged into the FEDERAL COMMUNICATIONS COMMISSION (FCC), which was created by the Communications Act of 1934 (47 U.S.C.A. § 151 et seq.) to tackle the myriad issues presented by the sudden widespread use of radio waves. In the wake of television's popularity, the Communications Satellite Act of 1962 (47 U.S.C.A. §§ 701–744) was enacted by Congress to broaden the FCC's powers to include regulation of television broadcasting; telephone, telegraph, and CABLE TELEVISION operation; two-way radio and radio operation; and satellite communication.

When the United States entered WORLD WAR II, more agencies were created or enlarged to mobilize human resources and production and to administer price controls and rationing. The social upheaval of the 1960s spawned agencies designed to improve urban areas, provide opportunities for people who were historically disadvantaged and marginalized, and promote artistic endeavors. In the 1970s, 1980s, and 1990s, pressing issues such as human and environmental health were addressed through the creation of agencies such as the Environmental Protection Agency and a new, enlarged DEPARTMENT OF ENERGY.

### Federal Administrative Agencies

On the federal level, business and individual matters are addressed by such agencies as the FARM CREDIT ADMINISTRATION, SMALL BUSINESS ADMINISTRATION, COMMODITY FUTURES TRADING COMMISSION, Federal Trade Commission, Federal Deposit Insurance Corporation, OFFICE OF THRIFT SUPERVISION, INTERNAL REVENUE SERVICE, DEPARTMENT OF COMMERCE, Interstate Commerce Commission, and Securities and Exchange Commission.

Governmental money matters are overseen and assisted by the GENERAL ACCOUNTING OFFICE, OFFICE OF MANAGEMENT AND BUDGET, Office of the Comptroller of the Currency, TREASURY DEPARTMENT, GENERAL SERVICES ADMINISTRATION, CONGRESSIONAL BUDGET OFFICE, and FEDERAL RESERVE BOARD.

Public services are handled by administrative agencies that include the DEPARTMENT OF EDUCATION, DEPARTMENT OF TRANSPORTATION, Environmental Protection Agency, FOOD AND DRUG ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Department of Interior, Immigration and Naturalization Service, and National Highway Traffic Safety Administration.

Work-related administrative agencies include the TENNESSEE VALLEY AUTHORITY, Office of Technology Assessment, Occupational Safety and Health Administration, Occupational Safety and Health Review Commission, National Labor Relations Board, Mine Safety and Health Administration, Mine Safety and Health Review Commission, MERIT SYSTEMS PROTECTION BOARD, DEPARTMENT OF LABOR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and Office of Personnel Management.

Police and military functions are served by the Central Intelligence Agency, DEPARTMENT OF DEFENSE, Department of Justice, DEPARTMENT OF VETERANS AFFAIRS, Federal Bureau of Investigation, and NATIONAL SECURITY COUNCIL.

The administrative agency that directly affects the most U.S. citizens is the Social Security Administration (SSA). The SSA collects contributions from workers and pays out cash benefits when a worker retires, dies, or becomes disabled.

As the needs of the nation change, Congress continues to establish new agencies and abolish existing agencies. The Interstate Commerce Commission, for instance, was established in 1887 to regulate carriers engaged in the transportation of interstate and foreign commerce in the United States. Over time, many of the commission's functions were transferred to other agencies or otherwise abandoned, and Congress abolished the commission in 1995. A more recent example of the development of an administrative agency is the creation of the HOMELAND SECURITY DEPARTMENT in 2002 to prevent terrorist attacks in the United States and to reduce the country's vulnerability to TERRORISM in the aftermath of the SEPTEMBER 11TH ATTACKS.

### State and Local Administrative Agencies

State and local administrative agencies often mirror federal agencies. Thus, the individual states have agencies that control transportation, public health, public assistance, education, natural resources, labor, law enforcement, agriculture, commerce, and revenue. Any regulation established by such an agency that conflicts with a federal regulation will not be legally valid, but this fact does not keep state agencies from developing regulations that differ from those promulgated by their federal counterparts. In the spirit of administrative agency, state and local governments also create agencies that help address compelling, peculiarly local concerns.

Just like federal agencies, state and local administrative agencies are often empowered to hold hearings. These hearings are conducted by their administrative boards, which are obligated to represent the public interest. By contrast, courts must remain impartial to the two parties before them. A PAROLE board, for example, holds informal hearings during which prisoners

are allowed to offer evidence of their suitability for early release from incarceration. The strict rules observed in a courtroom do not apply to these hearings, and the board's decisions must account for the public interest as well as the rights of the prisoners.

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CROSS-REFERENCES

Administrative Conference of the United States; Administrative Law and Procedure; Bureaucracy; National Industrial Recovery Act of 1933; *Schechter Poultry Corp. v. United States*. See also entries for specific federal agencies (e.g., Food and Drug Administration).

## ADMINISTRATIVE BOARD

*A comprehensive phrase that can refer to any* ADMINISTRATIVE AGENCY *but usually means a public agency that holds hearings.*

An administrative board is usually obligated to represent the public interest; courts, in contrast, must remain impartial between the two parties before them. A PAROLE board, for example, holds informal hearings where prisoners are allowed to offer evidence of their suitability for early release from prison. The strict rules observed in a courtroom do not apply to board hearings like these, and the board's decision must take into account the public's interest as well as the prisoner's rights.

## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Created in 1968, the Administrative Conference of the United States (ACUS) was a federal independent agency and advisory committee chartered for the purpose of ensuring the fair and efficient administration of various federal agencies. The ACUS studied administrative processes and recommended improvements in the procedures by which federal agencies administered regulatory, benefit, and other government programs. It had no power to enact its recommendations into law, or to enforce them once they were enacted, but it did carry great weight in the formulation of procedures and policies of federal administrative agencies.

The ACUS consisted of heads of administrative agencies, private lawyers, university professors, various federal officials, and other experts in ADMINISTRATIVE LAW and government. These experts collectively conducted continuing studies of selected problems that existed in the procedures of federal administrative agencies. The specific charge of ACUS was to harness the experience and judgment of the ADMINISTRATIVE AGENCY specialists to improve the fairness and effectiveness of administrative procedures and functions.

From 1968 to 1995, the ACUS issued approximately two hundred recommendations, the majority of which were at least partially implemented. In 1995, Congress terminated funding for the ACUS, and it ceased operation.

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CROSS-REFERENCES

Administrative Agency; Administrative Law and Procedure.

## ADMINISTRATIVE DISCRETION

*The exercise of professional expertise and judgment, as opposed to strict adherence to regulations or statutes, in making a decision or performing official acts or duties.*

A discretionary action is informal and, therefore, unprotected by the safeguards inherent in formal procedure. A public official, for example, has administrative discretion when he or she has the freedom to make a choice among potential courses of action. ABUSE OF DISCRETION is the failure to exercise reasonable judgment or discretion. It might provide a CAUSE OF ACTION for an unconstitutional invasion of

rights protected by the DUE PROCESS CLAUSE of the Constitution.

## ADMINISTRATIVE LAW AND PROCEDURE

Administrative law *is the body of law that allows for the creation of public regulatory agencies and contains all of the statutes, judicial decisions, and regulations that govern them. It is created by administrative agencies to implement their powers and duties in the form of rules, regulations, orders, and decisions.* Administrative procedure *constitutes the methods and processes before administrative agencies, as distinguished from judicial procedure, which applies to courts.*

The Administrative Procedure Act (5 U.S.C.A. §§ 551–706 [Supp. 1993]) governs the practice and proceedings before federal administrative agencies. The procedural rules and regulations of most federal agencies are set forth in the CODE OF FEDERAL REGULATIONS (CFR).

The fundamental challenge of administrative law is in designing a system of checks that will minimize the risks of bureaucratic arbitrariness and overreaching, while preserving for the agencies the flexibility that they need in order to act effectively. Administrative law thus seeks to limit the powers and actions of agencies and to fix their place in our scheme of government and law. It contrasts with traditional notions that the three branches of the U.S. government must be kept separate, that they must not delegate their responsibilities to bureaucrats, and that the formalities of due process must be observed.

### Separation of Powers

The U.S. Constitution establishes a three-part system of government consisting of the Legislative Branch, which makes the laws, the EXECUTIVE BRANCH, which carries out or enforces the laws, and the Judicial Branch, which interprets the laws. This system of checks and balances is designed to keep any one branch from exercising too much power. Administrative agencies do not fit neatly into any of the three branches. They are frequently created by the legislature and are sometimes placed in the Executive Branch, but their functions reach into all three areas of government.

For example, the SECURITIES AND EXCHANGE COMMISSION (SEC) administers laws governing the registration, offering, and sale of SECURITIES, like stocks and bonds. The SEC formulates laws like a legislature by writing rules that spell out what disclosures must be made in a prospectus that describes shares of stock that will be offered for sale. The SEC enforces its rules in the way that the Executive Branch of government does, by prosecuting vio-

*The Securities and Exchange Commission administers laws governing the actions of these traders on the floor of the New York Stock Exchange. The SEC is an independent agency that enforces its rules without need for approval from Congress or the executive branch of the government.*

AP/WIDE WORLD PHOTOS

lators. It can bring disciplinary actions against broker-dealers, or it can issue stop orders against corporate issuers of securities. The SEC acts as judge and jury when it conducts adjudicatory hearings to determine violations or to prescribe punishment. Although SEC commissioners are appointed by the president subject to the approval of the Senate, the SEC is an independent agency. It is not part of Congress, nor is it part of any executive department.

Combining the three functions of government allows an agency to tackle a problem and to get the job done most efficiently, but this combination has not been accepted without a struggle. Some observers have taken the position that the basic structure of the administrative law system is an unconstitutional violation of the principle of the SEPARATION OF POWERS.

### Delegation of Authority

The first issue that is encountered in the study of administrative law concerns the way in which Congress can effectively delegate its legislative power to an ADMINISTRATIVE AGENCY. Article I, Section I, of the U.S. Constitution provides that all legislative power is vested in Congress. Despite early resistance, the U.S. Supreme Court gradually accepted the delegation of legislative authority so long as Congress sets clear standards for the administration of the duties in order to limit the scope of agency discretion. With this basic principle as their guide, courts have invalidated laws that grant too much legislative power to an administrative agency. President FRANKLIN D. ROOSEVELT learned just how far the Court would go in allowing the delegation of authority, in two cases that stemmed from his administrative-agency actions to support his NEW DEAL program.

The NATIONAL INDUSTRIAL RECOVERY ACT (15 U.S.C.A. § 701 et seq., 40 U.S.C.A. § 401 et seq. [1933]) authorized the president to prohibit interstate shipments of oil that had been produced in violation of state board rules that attempted to regulate crude-oil production to match consumer demand. The Panama Refining Company sued to prevent federal officials from enforcing the prohibition, known as the "hot oil" law (*Panama Refining Co. v. Ryan,* 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446 [1935]). The U.S. Supreme Court found the law to be unconstitutional. Congress could have passed a law prohibiting interstate shipments of hot oil, but it did not do so; instead, it gave that power to the president. This has been called a case of delegation run amok because the law had no clear standards defining when and how the president should use the authority that the statute delegated to him.

Four months later, the Court invalidated a criminal prosecution for violation of the Live Poultry Code, an unfair-competition law that President Franklin D. Roosevelt had signed in 1934 pursuant to another section of the National Industrial Recovery Act. This was the case of SCHECHTER POULTRY CORP. V. UNITED STATES, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935). The problem in this case was not that the delegation of authority was ill-defined, but that it seemed limitless. The president was given the authority to "formulate codes of fair competition" for any industry if these codes would "tend to effectuate the policy" of the law. Comprehensive codes were created, establishing an elaborate regulation of prices, minimum wages, and maximum hours for different kinds of businesses. But there were no procedural safeguards from arbitrariness or abuses by enforcement agencies. Someone who was charged with a violation was not given the right to notice of the charges, the right to be heard at an agency hearing, or the right to challenge the agency's determination in a lawsuit. The Court struck this law down, stating that the unfair procedures helped strong industrial groups to use these codes to improve their commercial advantage over small producers.

As a result of *Panama Refining* and *Schechter Poultry,* when Congress delegates authority to agencies, it also sets out important provisions detailing procedures that protect against ARBITRARY administrative actions.

### Due Process of Law

The Fifth and Fourteenth Amendments guarantee that the federal government and the state governments, respectively, will not deprive a person of his or her life, liberty, or property without DUE PROCESS OF LAW. An administrative agency thus may not deprive anyone of life, liberty, or property without a reasonable opportunity, appropriate under the circumstances, to challenge the agency's action. People must be given fair warning of the limits that an agency will place on their actions. Federal courts routinely uphold very broad delegations of authority. When reviewing administrative agency actions, courts ask whether the agency afforded those under its jurisdiction due process of law as guaranteed by the U.S. Constitution.

The U.S. Supreme Court has held it improper for a state agency to deny WELFARE benefits to applicants who meet the conditions for entitlement to those benefits as defined by the legislature. The state must afford due process (in these cases, an oral hearing) before it can terminate benefits (*Goldberg v. Kelly,* 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 [1970]). Likewise, when a state grants all children the right to attend public schools, and establishes rules specifying the grounds for suspension, it cannot suspend a given student for alleged misconduct without affording the student at least a limited prior hearing (*Goss v. Lopez,* 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 [1975]).

### Political Controls Over Agency Action—Legislative and Executive Oversight

Government institutions that set and enforce public policy must be politically accountable to the electorate. When the legislature delegates broad lawmaking powers to an administrative agency, the popular control provided by direct election of decision makers is absent—but this does not mean that administrative agencies are free from political accountability. In many areas, policy oversight by elected officials in the legislature or the Executive Branch is a more important check on agency power than is JUDICIAL REVIEW.

Federal agencies are dependent upon Congress and the president for their budgets and operating authority. An agency that loses the support of these bodies or oversteps the bounds of political acceptability may be subjected to radical restructuring. In the 1970s, the Atomic Energy Commission (AEC) took the politically unpopular position of promoting NUCLEAR POWER, while underemphasizing safety and environmental protection. It paid the price when some of its promotional functions were transferred to a newly created DEPARTMENT OF ENERGY, and the AEC was restructured into the NUCLEAR REGULATORY COMMISSION, which was responsible for the former agency's regulatory duties.

Federal administrative agencies must be responsive to legislative and executive oversight mechanisms. During the 1970s, many members of Congress began to feel that the normal process of legislation was too cumbersome for effective control of administrative action. They devised a solution called the legislative VETO. Legislative vetoes took a variety of forms, but most of them directed agencies to transmit final administrative rules to Congress for review before they became effective. Just as this approach was gaining in popularity and use, the U.S. Supreme Court declared the legislative veto unconstitutional. This ruling involved the Immigration and Nationality Act (8 U.S.C.A. § 1101 et seq. [1995]), which allowed either house of Congress to nullify a decision by the attorney general suspending deportation of an alien. Jagdish Rai Chadha brought suit when the House of Representatives exercised this power in his case. The Court held, in *INS v. Chadha,* 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983), that the legislative veto was essentially a one-house veto, and, therefore, it violated Article I, Section 7, of the Constitution, which states that no legislation is valid unless passed by both houses of Congress and signed by the president (or, if the president vetoes it, repassed by two-thirds of each). The Court said that in *Chadha,* the House veto of the attorney general's decision was a legislative action, and therefore Article I, Section 7, applied. The *Chadha* decision invalidated all of the nearly 200 legislative-veto provisions that were on the books.

Another important legislative-oversight mechanism is the annual appropriations process. Congress determines the budget and appropriates money for the various administrative agencies. An administrative agency that angers Congress, or a key member of either house, could find itself with less money to work with in the next year, or could even see certain programs eliminated. A legislature may also enact a SUNSET PROVISION, which provides for automatic termination of an agency after a stated time unless the legislature is convinced that the need for the agency continues. Sometimes, a sunset provision is written into the statute that creates a particular agency, but a general sunset law may terminate any agency that cannot periodically demonstrate its effectiveness. A useful agency can always be revived or retained by the enactment of a new statute.

Like Congress, the president uses a variety of powers and techniques to oversee and influence the operations of administrative agencies. The Appointments Clause of the Constitution (art.II, §2, cl. 2) states that the president may generally appoint all "officers of the United States," with the advice and consent of the Senate. Under the authority of this provision, presidents often appoint agency heads who share their political agenda. The president's power to

remove an agency head depends on whether the agency is an independent agency or a cabinet department. Independent agencies tend to be multimember boards and commissions, like the Securities and Exchange Commission, FEDERAL COMMUNICATIONS COMMISSION (FCC), and NATIONAL LABOR RELATIONS BOARD (NLRB), which are run by officials who are appointed for a fixed period that does not correspond to the president's term of office. There also may be statutes protecting the commissioners from arbitrary removal during their terms of office. The heads of cabinet-level agencies, called secretaries, serve at the pleasure of the president and may be removed at any time. (Appointments of cabinet secretaries must be confirmed by the Senate.)

The president also reviews agency budgets, through the OFFICE OF MANAGEMENT AND BUDGET (OMB). A president's disapproval of agency initiatives can block appropriations in Congress. The president may also use an EXECUTIVE ORDER, a formal directive, to direct federal agencies or officials. One technique that has been used frequently is the president's authority to modify the organizational structure of the bureaucracy. Under the Executive Reorganization Act (5 U.S.C.A. §§ 901–912 [Supp. 1993]), the president may submit a REORGANIZATION PLAN to Congress, transferring functions from one department to another. This law recognizes that although responsibility for the organization and structure of the Executive Branch is vested in Congress, the president needs flexibility to carry out executive duties.

Public opinion is another forceful weapon against unbridled agency action. Some jurisdictions of the United States have created special public offices to investigate complaints about administrative misconduct. Investigators holding these offices, called OMBUDSMEN, usually have broad authority to evaluate individual complaints, to intercede on behalf of beleaguered victims of red tape, and to make reports or recommendations.

## The Development of Administrative Procedure Law

Administrative agencies were established to do the government's work in a simpler and more direct manner than the legislature could do by enacting a law, and than the courts could do by applying that law in various cases. Because they pursue their actions less formally, agencies do not follow the CIVIL PROCEDURE that is set up for courts. Instead, the law of administrative procedure has developed to ensure that agencies do not abuse their authority even though they use simplified procedures.

Although administrative agencies have existed since the founding of the United States, the early twentieth century saw a growth in the number of agencies that were designed to address new problems. During the Great Depression, a host of new agencies sprang up to meet economic challenges. Antagonism toward bureaucracy increased as existing dissatisfactions were multiplied by the number of new bureaucrats. In 1939, President Franklin D. Roosevelt appointed a committee to investigate the need for procedural reform in the field of administrative law. Although the comprehensive and scholarly report of that committee was not enacted into law, a later version of it was enacted in 1946 when Congress unanimously passed the Administrative Procedure Act (5 U.S.C.A. §§ 551–706) (APA). The statute made agencies' methods more fair so that there would be less reason to object to them. It also limited the power of the courts to review agency actions and to overturn them.

Judicial review of agency action furnishes an important set of controls on administrative behavior. Unlike the political oversight controls, which generally influence entire programs or basic policies, judicial review regularly operates to provide relief for the individual person who is harmed by a particular agency decision. Judicial review has evolved over a period of years into a complex system of statutory, constitutional, and judicial doctrines that define the proper boundaries of this system of oversight. The trend of judicial decisions and the Administrative Procedure Act is to make judicial review more widely and easily available.

How far can a court go in examining an agency decision? The reviewing court may be completely precluded from testing the merits of an agency action, or it may be free to decide the issues de novo, that is, without deference to the agency's determination. In general, administrative agencies make either formal or informal decisions, and courts have different standards for reviewing each type.

**Informal Agency Action** Most of the work done by agencies is accomplished with informal procedures. For example, a person who applies for a driver's license does not need or want a full trial in court in order to be found qualified. So

long as the motor vehicle department follows standard, fair procedures, and processes the application promptly, most people will be happy. Agencies take informal action in a variety of settings. The Social Security Administration reviews over four million claims for benefits annually, holding hearings or answering challenges to their decisions in only a small number of cases. Most transmitter applications before the Federal Communications Commission are approved or disapproved without any formal action. The INTERNAL REVENUE SERVICE processes most tax returns without formal proceedings. It also will provide informal opinions to help people avoid making costly mistakes in their financial planning.

Anyone who objects to the informal decisions made by a government agency can invoke more formal procedures. Someone may believe that standards are unclear and that they should be promulgated through formal agency rule making. Or someone may feel that the decision in a particular case is unfair and may demand a formal adjudicatory hearing. If one of these formal procedures does not satisfy a party, the agency's decision may be challenged in court.

**Formal Agency Action** Most formal action taken by administrative agencies consists of rule making or adjudication. Rule making is the agency's formulation of policy that will apply in the future to everyone who is affected by the agency's activities. Adjudication is for the agency what a trial is for the courts: It applies the agency's policies to some act that already has been done, so that an order is issued for or against a party who appears for a decision. Rule making looks to the future; adjudication looks at the past. Where either of these formal procedures is used, the agency will usually give interested or affected persons notice and an opportunity to be heard before a final rule or order is issued.

***Rule making*** Administrative agencies promulgate three types of rules: procedural, interpretative, and legislative. Procedural rules identify the agency's organization and methods of operation. Interpretative rules are issued to show how the agency intends to apply the law. They range from informal policy statements announced in a press release to authoritative rules that bind the agency in the future and are issued only after the agency has given the public an opportunity to be heard on the subject. Legislative rules are like statutes enacted by a legislature. Agencies can promulgate legislative rules only if the legislature has given them this authority.

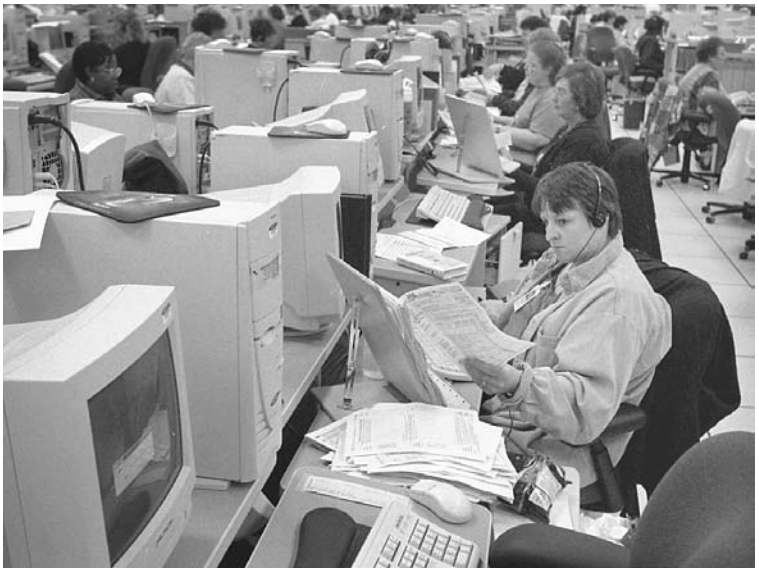

*Employees of the Internal Revenue Service process tax returns using informal procedures that make their jobs easier and less time-consuming. If a taxpayer objects to a decision made in this way, he or she may initiate more formal review procedures.*

AP/WIDE WORLD PHOTOS

The Administrative Procedure Act sets up the procedures to be followed for administrative rule making. Before adopting a rule, an agency generally must publish advance notice in the *Federal Register,* the government's daily publication for federal agencies. This practice gives those who have an interest in, or are affected by, a proposed rule the opportunity to participate in the decision making by submitting written data or by offering views or arguments orally or in writing. Before a rule is adopted in its final form, and 30 days before its effective date, the agency must publish it in the FEDERAL REGISTER. Formally adopted rules are published in the *Code of Federal Regulations,* a set of paperback books that the government publishes each year so that rules are readily available to the public.

***Adjudication*** The procedures that administrative agencies use to adjudicate individual claims or cases are extremely diverse. Like trials, these hearings resolve disputed QUESTIONS OF FACT, determining policy in a specific factual setting and ordering compliance with laws and regulations. Although often not as formal as courtroom trials, administrative hearings are extremely important. Far more hearings are held before agencies every year than are trials in courts. Adjudicative hearings concern a variety of subjects, such as individual claims for worker's compensation, welfare, or SOCIAL SECURITY benefits, in addition to multimillion-

dollar disputes about whether business mergers will violate antitrust rulings. These proceedings may be called hearings, adjudications, or adjudicatory proceedings. Their final disposition is called an administrative order.

Many administrative proceedings appear to be just like courtroom trials. Most are open to the public and are conducted in an orderly and dignified manner. Typically, a proceeding begins with a complaint filed by the agency, much as a civil trial begins with a complaint prepared by the plaintiff. After the respondent answers, each side may conduct discovery of the other's evidence and prehearing conferences. A HEARING EXAMINER, sometimes called an administrative law judge (ALJ), presides over the hearing, giving rulings in response to a party's applications for a particular type of relief. The agency presents its evidence, usually through counsel, either by a written report or in the question-and-answer style of a trial, and then the respondent offers his or her case. Witnesses may be called and cross-examined. The examiner gives a decision, usually with written findings and a written opinion, shortly after the hearing.

The Executive Branch of the federal government employs federal ALJs. When Congress originally enacted the APA, it addressed concerns about the relationship between ALJs and their respective agencies by providing independence to the ALJ. The U.S. Office of Personnel Management (OPM) makes most of the decisions regarding the tenure and compensation of ALJs, and ALJs are exempted from many of the performance reviews that apply to other civil service employees. An agency may remove an ALJ only for cause and after a hearing conducted by the MERIT SYSTEMS PROTECTION BOARD.

Because administrative hearings do not use juries, an ALJ makes both factual determinations and legal decisions based upon the evidence presented and the law governing the dispute. The specific duties of an ALJ in an individual agency depend upon the powers delegated to the agency in the respective enabling statute and procedural regulations promulgated by the agency. For instance, the Office of Inspector General is empowered to impose civil penalties against a person who makes false statements or representations with respect to Social Security benefits. Under regulations promulgated by the Social Security Administration [20 C.F.R. § 498.204 (2002)], the ALJ may make a number of decisions regarding the submission of evidence or the examination of witnesses; rule on motions and other procedural matters; and render a SUMMARY JUDGMENT where appropriate. However, the ALJ may not rule as invalid a federal statutory or regulatory provision, enjoin agency officials, or review discretionary acts by the inspector general. An ALJ's decision is often subject to review by a board or commission of the entire agency before parties may appeal the decision to a federal court. For example, labor disputes governed by the National Labor Relations Act are first heard by ALJs of the National Labor Relations Board (NLRB). The ALJ's decision may be appealed to the five members of the NLRB for review. Only after review by the NLRB, upon which it renders a decision and issues an opinion, may a party appeal the decision to a U.S. court of appeals.

Unlike a trial, an administrative hearing has no jury. The hearing examiner, or administrative law judge, is usually an expert in the field involved and is likely to be more concerned with overall policies than with the particular merits of one party's case. The Administrative Procedure Act affords parties who appear in administrative hearings involving federal agencies the right to notice of the issues and proceedings, the RIGHT TO COUNSEL, and the right to confront and cross-examine witnesses.

### Judicial Review of Agency Actions

When someone believes that she or he has been the victim of administrative error or wrongdoing and seeks to have the actions of the responsible agency reviewed in a court of law, the reviewing court is faced with two questions: Does the court have a right to review the agency action? And if it does, what is the scope of that court's review?

**The Right to Have a Court Review an Agency's Decision** Whether someone has the right to ask a court to review the action taken by an agency depends on the answers to several questions. The first question is whether the person bringing the action has standing, or the legal right to bring the suit. Section 702 of the Administrative Procedure Act allows court review for any person who is adversely affected or aggrieved by agency action within the meaning of a relevant statute. When the U.S. Supreme Court reviewed section 702 in *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970), the Court said that for the plaintiff to have standing to seek judicial review of admin-

istrative action, two questions must be answered affirmatively: (1) Has the complainant alleged an "injury in fact"?; and (2) Is the interest that the complainant seeks to protect "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"?

Even though an agency's decision is reviewable and the plaintiff has standing to litigate, the plaintiff still may be unable to obtain judicial review if he or she has brought the action at the wrong time. The aggrieved person must exhaust all other avenues of relief before the dispute is ripe for judicial determination. The doctrines of EXHAUSTION OF REMEDIES and RIPENESS require a person who deals with an agency to follow patiently all of the available steps within the agency's procedures before resorting to court action. These rules are essential to prevent overloading the courts with questions that might not even be disputes by the time the agencies determine what their final orders or rulings will be.

**The Scope of a Court's Review** If an aggrieved party can convince a court that he or she has standing, that all available administrative remedies have been exhausted, and that the case is ripe for judicial review, the court will hear the case, but the scope of its review is limited. The law seeks to give agencies enough freedom of action to do their work, while ensuring that individual rights will be protected. The Administrative Procedure Act provides that courts may not second-guess agencies when the agencies are exercising discretion that has been granted to them by statute. A court is generally limited to asking whether the agency went outside the authority granted to it; whether it followed proper procedures in reaching its decision; and whether the decision is so clearly wrong that it must be set aside. The court also may set aside an agency decision that is clearly wrong.

The court usually will accept the agency's findings of fact, but it is free to determine how the law will be applied to those facts. It will look at the whole record of the administrative proceeding and will take into account the agency's expertise in the matter. The court will not upset agency decisions for harmless errors that do not change the outcome of the case. If the question at issue has been committed to agency discretion, the court may consider whether the agency has exercised its discretion. If the agency has not done so, then the court may order the agency to look at the situation and make a decision. The Administrative Procedure Act allows courts to overrule an agency action that is found to be "arbitrary, capricious, an ABUSE OF DISCRETION, or otherwise not in accordance with law."

FURTHER READINGS

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Rosenbloom, David H. 1997. *Public Administration and Law.* 2d ed. New York: M. Dekker.

CROSS-REFERENCES

Administrative Conference of the United States; Federal Budget; Veto. See also entries for specific federal agencies (e.g., Food and Drug Administration).

## ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

The Administrative Office of the United States Courts is the administrative headquarters of the federal court system. It was created by congressional act on August 7, 1939 (28 U.S.C.A. § 601), and since November 6, 1939, it has tended to the nonjudicial business of the U.S. courts. The Administrative Office helps Congress monitor the state of affairs within the federal judiciary. It arranges clerical and administrative support to federal district courts and their subdivisions, and it provides for the various benefits available to the federal judiciary. Furthermore, by gathering and analyzing statistics and data and reporting the findings to Congress and the JUDICIAL CONFERENCE OF THE UNITED STATES, the Administrative Office plays an important part in determining the extent and character of the very support it provides.

### The Director

The director of the Administrative Office is the administrative officer of all the federal courts except the Supreme Court. The Judicial Conference of the United States—the federal agency charged with overseeing federal judicial matters—supervises and guides the director's work. The director and the deputy director are appointed by the SUPREME COURT OF THE UNITED STATES.

The director is required to perform a variety of tasks. First and foremost, the director must supervise all administrative matters relating to the offices of clerks and other clerical and administrative personnel of the federal courts.

These administrative matters can range from performance policies and pay scales to guidelines on clerical procedures.

The director is charged with providing many reports to various governmental bodies. With the aid of the deputy director and the Audit Office and other operatives, the director must examine court dockets, determine the needs of the various courts, and report the results four times a year to the chief judges of the circuits. This allows the federal courts to analyze and plan for their own clerical and administrative costs. This information is also used when the director prepares and submits to Congress the budget of the federal courts.

The director must submit a report of the Administrative Office to the annual meeting of the Judicial Conference of the United States. At least two weeks before the conference, the director prepares an overview of the activities of the Administrative Office and the state of the business of the courts, together with certain statistical data submitted to the chief judges of the circuits. This report also contains the director's recommendations on administrative efficiency. The director submits the report, data, and recommendations to Congress, and makes all these materials available to the public.

The director is responsible for many financial matters of the federal courts. The director must fix the compensation of employees of the courts whose compensation is not otherwise fixed by law, regulate and pay annuities to the surviving spouses and dependent children of judges, disburse monies appropriated for the maintenance and operation of the federal courts, examine accounts of court officers, regulate travel of judicial personnel, and provide accommodations and supplies for the courts and their clerical and administrative personnel.

The director must also establish and maintain programs for the certification and utilization of court interpreters and the provision of special interpretation services in the courts. Other duties may be assigned to the director by the Supreme Court or the Judicial Conference of the United States.

### Probation Officers

The Probation Division of the Administrative Office supervises the accounts and practices of the federal PROBATION offices. However, primary control of probation practices and procedures is left to the district courts served by the probation offices. The Probation Division establishes pretrial services in the federal district courts according to the Pretrial Services Act of 1982 (18 U.S.C.A. § 3152). The pretrial service offices report to their respective courts with information on the pretrial release of persons charged with federal offenses. These offices also supervise criminal defendants released to their custody.

With the Bureau of Prisons of the DEPARTMENT OF JUSTICE, the Administrative Office publishes a magazine entitled *Federal Probation.* The magazine, issued four times a year, is a journal "of correctional philosophy and practice."

### Bankruptcy Act

The Administrative Office has special responsibility for BANKRUPTCY courts. The Bankruptcy Amendments and Federal Judgeship Act of 1984 (28 U.S.C.A. § 152) established bankruptcy judges as distinct units of the federal district courts. Under the Bankruptcy Amendments Act, all cases under Title 11 of the United States Code and all proceedings related to federal statute 28 U.S.C.A. § 1334 are to be brought before federal district courts. Such a case arises when a person seeks to discharge his or her debts through judicial proceedings. When a suit is filed under Title 11, the federal district court will refer the case to its bankruptcy judges, as authorized by 28 U.S.C.A. § 157.

The bankruptcy judges are appointed by the federal courts of appeals and serve a 14-year term as judicial officers of the district courts. The number of bankruptcy judges is controlled by Congress, but the bankruptcy courts are overseen by the Administrative Office.

The director of the Administrative Office has specific duties related to the bankruptcy courts. The director must make recommendations to the Judicial Conference on logistical concerns such as the geographic placement of bankruptcy courts. The director must consider whether additional bankruptcy judges should be recommended to Congress; the director is also in charge of determining the staff needs of bankruptcy judges and clerks.

### Federal Magistrates

Under the Federal Magistrates Act as amended in 1979 (28 U.S.C.A. § 631), the director of the Administrative Office must answer to Congress and the Judicial Conference on the affairs of federal magistrates. Federal magistrates are appointed by federal district court

judges, and their job is to whittle each case to its essence before it reaches the district courts. Federal proceedings are expensive; by ruling on pretrial motions and issuing various orders at the pretrial stage, federal magistrates help preserve judicial resources.

Federal magistrates do not have the full range of judicial powers available to other federal judges. For example, they cannot preside over felony trials. Federal magistrates may conduct civil or misdemeanor criminal trials, but they normally conduct pretrial proceedings in both criminal and civil cases. Owing to their special function, federal magistrates operate separately from the district courts and maintain a separate budget.

With the guidance of the Judicial Conference, the director supervises the administrative matters of federal magistrates through the Magistrate Division of the Administrative Office. The director prepares legal and administrative manuals for the use of the magistrates. In addition, the Administrative Office must conduct surveys of the federal judiciary to ask questions on court conditions. With these surveys, the director makes recommendations as to the number, location, and salaries of magistrates. The expansion of magistrate offices depends significantly on the availability of funds appropriated by Congress.

The director of the Administrative Office compiles and evaluates information on the magistrate offices and reports the findings to the Judicial Conference. The director must also report to Congress every year on the general affairs of federal magistrates.

### Federal Defenders

The Administrative Office also assists and oversees the offices of federal public defenders. Under the Criminal Justice Act (18 U.S.C.A. § 3006A [1964]), the federal district courts are required to appoint counsel to criminal defendants who are unable to afford adequate representation. The act also authorizes the district courts to establish federal public defender and federal community defender organizations. This can be done in districts where at least two hundred persons annually require the appointment of counsel. Two adjacent districts may be combined to reach this total.

Each defender organization submits to the director of the Administrative Office an ANNUAL REPORT of its activities along with a proposed budget. Because they rely on grants and not regular funding, community defender organizations submit grant proposals to the Administrative Office for the coming year. The director then submits the proposed budgets and grants to the Judicial Conference of the United States for approval. After budgets are determined, the director pays the defender organizations. The director also compensates private counsel appointed to defend individuals charged in federal court.

In wake of the terrorist attacks of September 11, 2001, the Administrative Office relied on its newly created Office of Emergency Preparedness. This office worked with courts around the United States to develop crisis response plans to deal with emergency evacuations, relocations, and the continuation of court business. The office also arranged for the testing of courthouses for hazardous materials.

#### FURTHER READINGS

Administrative Office of the U.S. Courts Website. Available online at <www.uscourts.gov/adminoff.html> (accessed November 10, 2003).

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#### CROSS-REFERENCES

District Court; Federal Courts; Justice Department; Magistrate.

## ADMINISTRATIVE PROCEDURE ACT OF 1946

Since its original enactment in 1946, the Administrative Procedure Act (APA), 5 U.S.C.A. §§ 501 et seq., has governed the process that federal administrative agencies follow. The statute applies to all federal agencies except for those that are expressly exempted from its provisions. Despite the broad nature of the act, however, it allows flexibility among the various agencies in carrying out their responsibilities.

Although a number of administrative agencies had been created during the nineteenth and early twentieth centuries, no federal law at the time governed the conduct of these agencies. Legislation that was enacted during the NEW DEAL era of the 1930s established a new series of administrative agencies. In 1936, President FRANKLIN D. ROOSEVELT established the President's Committee on Administrative Management. The committee's report found that agencies were "irresponsible" and that they had

been given "uncoordinated powers." Moreover, the report characterized administrative agencies as a "headless 'fourth branch' of government."

The committee found that the laws that created administrative agencies failed to distinguish between the legislative and executive functions of those committees. It recommended that each of the existing administrative agencies should be moved under the EXECUTIVE BRANCH of the government, and that the judicial powers of the agencies should be limited. Members of Congress and many commentators at the time disagreed with the committee's findings. At the center of the debate was the need to maintain a SEPARATION OF POWERS with respect to the work of federal agencies.

In 1939, President Roosevelt established the Attorney General's Committee on Administrative Procedure. The committee was charged with the responsibility of reviewing the criticisms of the federal administrative processes and with formulating recommendations for improvement of these processes. The committee issued its recommendations in 1941 in a detailed report of almost 500 pages. Legislation was drafted based upon the recommendations of the 1941 report, but the United States's entrance into WORLD WAR II interrupted the enactment of the statute. Following the conclusion of the war, the legislation was reintroduced. After a series of compromises, Congress enacted the Administrative Procedure Act in 1946.

In 1947, the DEPARTMENT OF JUSTICE issued the *Attorney General's Manual on the Administrative Procedure Act.* This document provides insight regarding the application of the act and remains valuable as a research tool to this day. Some of the information contained in this manual provides analysis that the courts have not yet considered.

The purpose of the APA is to provide minimum procedural standards that federal administrative agencies must follow. It distinguishes between two major forms of administrative functions: agency rulemaking and agency adjudication. Administrative rulemaking is analogous to the legislative acts, while an administrative adjudication is analogous to a judicial decision. This distinction contained in the APA has long been the subject of scholarly debate. Some argue that such a dichotomy is unnecessarily rigid and that it might not always allow for the most appropriate procedures for a particular agency. Supporters of the distinction between rulemaking and adjudication contained in the APA note that this distinction best represents the basic functions of administrative agencies.

The rulemaking provisions of the APA are more detailed than those governing adjudications. Most agencies engage in notice-and-comment rulemaking, which is required as the minimum rulemaking procedure under the APA. Under notice-and-comment rulemaking, agencies are required to give the public advance notice of the contents of proposed rule and to offer the public an opportunity to express their views of the proposed rule before the agency. Some agencies are required by the statutes that created them to follow more stringent standards, whereby all of the agency's actions during rulemaking are conducted "on the record." This latter type of rulemaking is known as formal rulemaking.

The APA defines and governs only those types of adjudications that are required by statute to be conducted "on the record after opportunity for an agency hearing." If an agency is required to conduct such a formal adjudication under the APA, it must engage in a proceeding resembling a trial. However, if the agency is not required to conduct such a hearing, the APA remains silent. Accordingly, an agency may adopt its own procedure for an informal adjudication, so long as the agency otherwise does not violate the U.S. Constitution or other law.

Other provisions of the APA govern JUDICIAL REVIEW of agency actions and public access to agency-created law and information emanating from agencies. The judicial-review provisions under the APA have given rise to the greatest amount of scholarship regarding federal ADMINISTRATIVE LAW, although these provisions are contained in only six sections of the APA. Courts have similarly grappled with judicial review of agency actions. For instance, the case of *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), has been cited more often than any other decision in the history of the U.S. Supreme Court. In Chevron, the U.S. Supreme Court held that interpretive decisions of administrative agencies are entitled to substantial judicial deference. In doing so, it enhanced the efficacy of administrative bodies in mitigating the transition costs of legislative law.

The APA was designed to increase access to agency law by allowing the public to participate in agencies' decision-making process. In 1966, Congress enacted the FREEDOM OF INFORMATION ACT, Pub. L. No. 89-487, 80 Stat. 250 (codified as amended at 5 U.S.C.A. § 552), which greatly increased the amount of government information that is available to the public. Congress later enacted similar laws designed to make governmental decisions open to the public, including the PRIVACY ACT OF 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C.A. § 552a), the Government in the Sunshine Act of 1976, Pub. L. No. 94-409, 90 Stat. 1241 (codified at 5 U.S.C.A. § 552b), and the Electronic Freedom of Information Act of 1996, Pub. L. No. 104-231, 110 Stat. 2422 (codified as amended at 5 U.S.C.A. § 552).

The amendments allowing for enhanced access to government information represent the majority of revisions to the APA since its original enactment in 1946. Although efforts to revise the APA have been undertaken on a number of occasions, alternatives to the current language of the act have failed to garner sufficient support in Congress to complete a major revision. The act thus remains as the focal point of administrative process in the federal government.

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## ADMINISTRATOR

*A person appointed by the court to manage and take charge of the assets and liabilities of a decedent who has died without making a valid will.*

When such a person is a male, he is called an administrator, while a woman is called an administratrix. An administrator c.t.a. (*cum testamento annexo,* Latin for "with the will annexed") is appointed by the court where the testator had made an incomplete will without naming any executors or had named incapable persons, or where the executors named refuse to act. A public administrator is a public official designated by state law to perform the duties of administration for persons who have died intestate.

An executor differs from an administrator in that he or she is named in the decedent's will to manage the estate. If an executor dies while performing these duties, a court will appoint an administrator *de bonis non cum testamento annexo* (Latin for "of the goods not (already) administered upon with the will annexed") to complete the distribution of the decedent's estate. This term is often abbreviated: administrator d.b.n.c.t.a.

## ADMIRALTY AND MARITIME LAW

*A field of law relating to, and arising from, the practice of the admiralty courts (tribunals that exercise jurisdiction over all contracts,* TORTS, *offenses, or injuries within maritime law) that regulates and settles special problems associated with sea navigation and commerce.*

### History of Admiralty and Maritime Law

The life of the mariner, spent far away from the stability of land, has long been considered an exotic one of travel, romance, and danger. Stories of pirates, mutinies, lashings, and hasty trials—many of them true—illustrate the peculiar, isolated nature of the maritime existence. In modern times, the practice of shipping goods by sea has become more civil, but the law still gives maritime activities special treatment by acknowledging the unique conflicts and difficulties involved in high-seas navigation and commerce.

The roots of maritime law can be traced as far back as 900 B.C., which is when the Rhodian Customary Law is believed to have been shaped by the people of the island of Rhodes. The only concept in the Rhodian Laws that still exists is the law of jettison, which holds that if goods must be thrown overboard *(jettisoned)* for the safety of the ship or the safety of another's property, the owner of the goods is entitled to compensation from the beneficiaries of the jettison.

Codes enacted by medieval port cities and states have formed the current U.S. maritime law. The eleventh-century Amalphitan Code, of the Mediterranean countries; the fourteenth-century Consolato del Mare, of France, Spain, and Italy; the twelfth-century Roll of Oleron, from England; and the thirteenth-century Law of Visby all drew on the customs of mariners and merchants to create the unique SUBSTANTIVE LAW of admiralty that still exists today. Procedural differences existed between maritime cases and other civil proceedings until 1966,

when the U.S. Supreme Court approved amendments to the Federal Rules of Civil Procedure that brought admiralty and maritime procedural rules into accord with those used in other civil suits. The substantive maritime law, however, has remained intact.

### Admiralty and Maritime Law in the Early 2000s

The terms *admiralty* and *maritime law* are sometimes used interchangeably, but *admiralty* originally referred to a specific court in England and the American colonies that had jurisdiction over torts and contracts on the high seas, whereas substantive maritime law developed through the expansion of admiralty court jurisdiction to include all activities on the high seas and similar activities on NAVIGABLE WATERS.

Because water commerce and navigation often involve foreign nations, much of the U.S. maritime law has evolved in concert with the maritime laws of other countries. The federal statutes that address maritime issues are often customized U.S. versions of the convention resolutions or treaties of international maritime law. The UNITED NATIONS organizes and prepares these conventions and treaties through branches such as the International Maritime Organization and the International Labor Organization, which prepares conventions on the health, safety, and well-being of maritime workers.

The substance of maritime law considers the dangerous conditions and unique conflicts involved in navigation and water commerce. Sailors are especially vulnerable to injury and sickness owing to a variety of conditions, such as drastic changes in climate, constant peril, hard labor, and loneliness. Under the Shipowners' Liability Convention (54 Stat. 1693 [1939]), a shipowner may be liable for the maintenance and cure of sailors injured on ship and for injuries occurring on land. Courts have construed accidents occurring during leave as being the responsibility of the shipowner because sailors need land visits in order to endure the long hours of water transportation.

Assigning responsibility for onboard NEGLIGENCE was a long-standing problem, but the JONES ACT of 1920 (46 U.S.C.A. § 688 et seq.) solidifies the right of sailors to recover from an employer for injuries resulting from the negligence of the employer, a master, or another crew member. The 1920 Death on High Seas Act (46 App. U.S.C.A. § 761 et seq.) allows recovery by the beneficiaries of a sailor's estate when the sailor dies by negligence, default, or wrongful act on the high seas "beyond a marine league from the shore of any state [territory or dependency]." A marine league is one-twentieth of a degree of latitude, or three miles.

Accidents suffered by nonmaritime persons on docks, piers, wharfs, or bridges do not qualify for the application of maritime law principles. However, personal injuries suffered while individuals were aboard a ship or as a result of an air-to-water airplane crash are considered within the jurisdiction of admiralty law.

The Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. § 901 et seq. [1927]) sets up a federal system to compensate injured maritime workers who do not sail. Through the Federal Office of Workers' Compensation Programs, employees such as *stevedores* (workers who load and unload ships) and ship service operators can receive compensation for injuries suffered in the course of their employment. U.S. sailors benefit from Title 46 of the U. S. Code, which sets a schedule for sailors' earnings and the conditions of their contracts. Title 46 also lists the qualifications for sailor employment (§§ 7301 et seq.), the hours and conditions of the employment (§§ 8104 et seq.), and the living conditions that must be provided (§§ 11101 et seq.).

Federal laws also address the problems that beset ships and the life-or-death decisions made by carriers. The Carriage of Goods by Sea Act (46 U.S.C.A. §§ 1300–1315 [1936]) regulates the rights, responsibilities, liabilities, and immunities regarding the relationship between shippers and carriers of goods. The Salvage Act (46 U.S.C.A. §§ 727–731 [1912]) provides for compensation to persons who help save a ship or cargo from danger or help recover a ship or cargo from actual loss. To qualify for salvage remuneration, a person must not be acting in service of the ship or in performance of a contract, and the help given must have contributed at least in part to a wholly or partially successful salvage of the ship or goods.

The case law of the United States is rich in the areas of sailors' rights respecting the unseaworthiness of vessels, compensation for vessel suppliers and servicers, and the liabilities arising from collisions, towage, pilotage, and groundings. The Maritime Lien Act (46 U.S.C.A. §§ 31341–31343 [1920]) gives a lien to any person who, upon the order of the shipowner, furnishes

repairs, supplies, towage, use of dry dock or marine railway, or other necessaries to any vessel, without allegation or proof that credit was given. The Ship Mortgage Act (46 U.S.C.A. §§ 31301–31330 [1920]) regulates the mortgages on ships registered in the United States, and also provides for enforcement of the maritime liens obtained through the Maritime Lien Act.

In case of collision or other damage to a vessel, an in rem proceeding is often used to recover damages. An in rem action is a lawsuit brought against an offending thing (in admiralty, usually the ship), whereas an in personam action is a suit brought against a person. Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims (1985) provides necessary details for the seizure of an offending owner's vessel or property if a defendant vessel owner does not live in the state in which a suit is brought. The practical effect of Supplemental Rules B to E is to make it easier for a plaintiff to bring actions against out-of-state and foreign vessel owners and to provide for the attachment and GARNISHMENT of the offending vessel.

An important consideration in any lawsuit is venue. Under Article III, Section 2, of the U.S. Constitution, federal courts have the power to try "all Cases of admiralty and maritime Jurisdiction" (art. III, sec. 2). However, state courts can also hear admiralty and maritime cases by virtue of the "saving-to-suitors" clause of 28 U.S.C.A. § 1333(1). This clause allows a plaintiff to sue in state court through an ordinary civil action when the court's COMMON LAW is competent to give a remedy. In such actions, the state court must apply the federal law of admiralty to the admiralty claims. Nevertheless, if a plaintiff believes he or she will fare better before a local tribunal, the option is available.

When no applicable federal statute exists, the governing law of a maritime case will be the uniform laws as expounded by the U.S. Supreme Court and applicable to all torts and contracts,

*Admiralty law concerns personal injuries or loss of cargo suffered during accidents such as this one, in which the freighter* Republic of Colombia *was struck by the* Trans Hawaii.

BETTMANN/CORBIS

whether the case is tried in federal or state court. Maritime case law—not the general common law—will govern a contract dispute only if the subject matter of the contract pertained to water commerce. Maritime precedents will govern a tort claim only if the negligent or reckless actions involved commercial activity on navigable waters.

Charter parties are often a topic of concern in maritime law. A *charter party,* or *charter,* is an agreement among a shipowner, a crew (the charterer), and the owner of the goods to be transported. Charter parties come in three types: time, voyage, and demise. A *time charter* is the lease of a ship to a charterer for a specified period of time. A *voyage charter* is the lease of a ship for a specific number of voyages. A *demise charter* (so called because the shipowner effectively relinquishes ownership for a certain period, causing a "demise" in ownership interest) is usually a bareboat charter, which means that the charterer supplies the master and crew for the ship. Other demise charters provide that the shipowner's master and crew take charge of the vessel.

In contrast to the usual contract practice of providing risk-of-loss insurance for one party, charters utilize what is called a general average. *General average* is the traditional, primitive form of maritime risk allocation whereby all participants in a charter agree to share any damages resulting from an unsuccessful voyage. Most parties to a charter obtain insurance to cover their portion of risk. However, because a charter involves multiple parties, and because insurance policies are subject to interpretation, insurance coverage does not always prevent disputes over damages.

Risk of loss is sometimes decided according to a bill of lading. This document confirms a carrier's receipt of goods from the owner (*consignor*), verifies the voyage contract, and shows rightful ownership of the goods. In *Lekas & Drivas, Inc. v. Goulandris,* 306 F.2d 426 (2d Cir. 1962), the SS *Ioannis P. Goulandris* had chartered to carry olive oil, cheese, and tobacco from the western Greek port of Piraiévs to the United States via the Strait of Gibraltar. On October 28, 1940, with the *Ioannis* docked in Piraiévs, Italy attacked Greece, and the *Ioannis* was requisitioned by the Greek government for a military mission.

On November 10, 1940, the *Ioannis* finally set sail with its cargo for the United States via the Suez Canal and the Red Sea, and around Cape Horn. After an arduous journey that included two crossings of the equator, hull damage, and lengthy repairs, the *Ioannis* came into port at Norfolk, Virginia, on May 3, 1941. En route, the tobacco had been damaged, much of the olive oil had leaked from its drums, and the cheese was "'[m]elted with a terrible stench, and worthless.'"

Despite the *Ioannis*'s brave participation in wartime activities, the intended recipients (*consignees*) of the tobacco and olive oil sued the *Ioannis* and were able to recover for the losses suffered as a result of the damage. However, on the subject of the cheese, the court refused to allow recovery by Lekas and Drivas, which had consigned the cheese to itself.

Lekas argued that the crew of the *Ioannis* was negligent in storing the cheese in the structure at the stern above the main deck, known as the poop. According to Lekas, it was inappropriate for the cheese to be in the poop. The poop lacked ventilation, and it was not refrigerated. However, according to the bill of lading between Lekas and the *Ioannis,* special cooling was not necessary and had not been contracted for. The cheese was also stored on *lighters* (large, flat-bottomed barges used for loading and unloading ships) during the 35 days needed for repairs of the *Ioannis,* and Lekas claimed that this storage was improper. But because wartime conditions were responsible for the length of repairs and the lack of proper storage space for the cheese, the court ultimately held that the *Ioannis* was not negligent in its handling of the cheese.

In addition to the state and federal governments, municipalities can affect the private enjoyment of maritime activity. In *Beveridge v. Lewis,* 939 F.2d 859 (9th Cir. 1991), appellants Richard Beveridge, Peter Murray, Gregory Davis, and Peter Eastman challenged a Santa Barbara city ordinance (Santa Barbara Municipal Code § 17.13.020) that prohibited the anchoring or mooring of boats within 300 feet of Stearns Wharf from December to March. Santa Barbara had acquired ownership of Stearns Wharf in 1983, passed the ordinance in 1984, and started issuing citations for noncompliance shortly thereafter. Beveridge, Murray, Davis, and Eastman all owned boats moored or anchored within 300 feet of Stearns Wharf, and the four, represented by Eastman, brought suit against the city in 1989, seeking injunctive relief against enforcement of the ordinance.

At trial, Eastman argued that the Santa Barbara ordinance conflicted with the Ports and Waterways Safety Act of 1972 (PWSA) (33 U.S.C.A. §§ 1221 et seq.), a federal act designed to reduce the loss of vessels and cargo, protect marine environment, prevent damage to structures on or adjacent to navigable waters, and ensure compliance with vessel operation and safety standards. The trial court dismissed the case, reasoning that the ordinance was neither preempted by, nor in conflict with, the federal statute.

On appeal, the Ninth Circuit Court of Appeals agreed that the Santa Barbara ordinance was not in conflict with the PWSA, because the federal act was not intended to limit a municipality's control over its local shores. The appeals court also rejected the proposition that the enactment of the PWSA implicitly foreclosed the enactment of similar ordinances by municipalities, and Santa Barbara's control over the Stearns Wharf was complete.

Admiralty and maritime matters will always deserve laws carefully crafted to suit the complexity and urgency of maritime endeavors. The international nature of high-seas navigation and its attendant perils demand no less. Federal, state, and local control of navigable waters can affect everyone from the largest charter party to a private boat owner.

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CROSS-REFERENCES

Carriers; Environmental Law; Navigable Rivers; Piracy; Salvage; Shipping Law; Territorial Waters.

## ADMISSIBLE

*A term used to describe information that is relevant to a determination of issues in any judicial proceeding so that such information can be properly considered by a judge or jury in making a decision.*

Evidence is admissible if it is of such a character that the court is bound to accept it during the trial so that it may be evaluated by the judge or jury. Admissible evidence is the foundation of the deliberation process by which a court or jury decides upon a judgment or verdict.

The FEDERAL RULES OF EVIDENCE regulate the admissibility of evidence in federal courts. State RULES OF EVIDENCE determine evidence that is admissible in state court proceedings.

## ADMISSION

*A voluntary* ACKNOWLEDGMENT *made by a party to a lawsuit or in a criminal prosecution that certain facts that are inconsistent with the party's claims in the controversy are true.*

In a lawsuit over whether a defendant negligently drove a car into the plaintiff pedestrian, the defendant's apology to the plaintiff and payment of the plaintiff's medical bills are admissions that may be introduced as evidence against the defendant.

An admission may be express, such as a written or verbal statement by a person concerning the truth, or it may be implied by a person's conduct. If someone fails to deny certain assertions which, if false, would be denied by any reasonable person, such failure indicates that the person has accepted the truth of the allegations.

An admission is not the same as a confession. A confession is an acknowledgment of guilt in a criminal case. Admissions usually apply to civil matters; in criminal cases they apply only to matters of fact that do not involve criminal intent.

Admissions are used primarily as a method of discovery, as a PLEADING device, and as evidence in a trial.

Once a complaint is filed to commence a lawsuit, the parties can obtain facts and information about the case from each other to assist their preparation for the trial through the use of discovery devices. One type of discovery tool is a request for admission: a written statement submitted to an opposing party before the trial begins, asking that the truth of certain facts or the genuineness of particular documents concerning the case be acknowledged or denied. When the facts or documents are admitted as being true, the court will accept them as such so that they need not be proven at trial. If they are denied, the statements or documents become an issue to be argued during the trial. Should a party refuse to answer the request, the other party can ask the court for an order of preclusion that prohibits denial of these facts and

allows them to be treated as if they had been admitted.

By eliminating undisputed facts as issues in a case, requests for admissions expedite trials. Matters that are admitted are binding only for the pending case and not for any other lawsuit.

Judicial admissions—made in court by a party or the party's attorney as formal acknowledgments of the truth of some matter, or as stipulations—are not considered evidence that may be rebutted but are a type of pleading device. Averments in a pleading to which a responsive pleading is required are admitted if they are not denied in the responsive pleading. If a party has made an admission in a pleading that has subsequently been amended, the pleading containing the admission will be admissible as evidence in the case. In civil actions any offers to settle the case cannot be admitted into evidence.

A plea of guilty in a criminal case may usually be shown as an admission in a later civil or criminal proceeding, but it is not conclusive. The defendant may explain the circumstances that brought it about, such as a PLEA BARGAINING deal. Any admissions or offers to plead guilty during the plea-bargaining process are inadmissible as evidence. Many courts refuse to admit a guilty plea to a traffic offense as evidence since many people plead guilty to avoid wasting their time and money by appearing in traffic court. A guilty plea that has subsequently been withdrawn and followed by a plea of not guilty cannot be used as an admission in either a criminal or civil case. It is considered an unreliable admission that has a potentially prejudicial effect on the opportunity of the defendant to get a fair trial.

Admissions are used as a type of evidence in a trial to bolster the case of one party at the expense of the other, who is compelled to admit the truth of certain facts. They may be made directly by a party to a lawsuit, either in or out of court; or implicitly, by the conduct of a party or the actions of someone else which bind the party to a lawsuit. When an admission is made out of court, it is HEARSAY because it was not made under oath and not subject to cross-examination. Although hearsay cannot be used as evidence in a trial because of its unreliable nature, admissions can be introduced as evidence because they are considered trustworthy. An admission by a party can be used only to prove the existence of the fact admitted and to impeach the credibility of the party. An admission by a witness can be introduced as evidence only to discredit the witness's testimony.

An admission against interest is a statement made by a party to a lawsuit, usually before the suit, that contradicts what he or she is now alleging in the case. Because the statements tend to establish or disprove a material fact in the case, they are considered admissions against interest. The truth of such statements is presumed because people do not make detrimental statements about themselves unless they are true.

Such an admission is considered an exception to the hearsay rule and, therefore, can be used as evidence in a lawsuit.

## ADMISSION TO THE BAR

*The procedure that governs the authorization of attorneys to practice law before the state and federal courts.*

Statutes, rules, and regulations governing admission to practice law have been enacted to protect the public interest, in terms of preventing the victimization of clients by incompetent practitioners. The courts have inherent power to promulgate reasonable rules and regulations for admission to the bar. Although this authority is vested exclusively in the courts, the legislature can, subject to constitutional limitations, issue reasonable rules and regulations governing bar admission provided they do not conflict with judicial pronouncements.

The highest state court administers the admission of applicants to the state bar, usually requiring successful completion of a bar examination and evidence of good moral character. With respect to admission to the federal bar, federal district courts are empowered to issue requirements for admission separately from those of the state courts. If, however, a federal district court, pursuant to a rule, derivatively admits to its bar those admitted to the state bar, it cannot arbitrarily deny admission to an applicant who is a member in good standing of the state bar. In most instances, the federal district courts have considerable latitude in establishing requirements for admission to practice before them, but their rules must not contravene federal law.

In terms of the federal bar, an attorney is also eligible for admission to the bar of a court of appeals, if he or she has been admitted to practice before the Supreme Court or the highest court of a state or another federal court and

if the lawyer is of good moral and professional character. The attorney must comply with the procedural requirements and take and subscribe to the following oath: "I, [name], do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

In order to gain admission to the bar of the Supreme Court, an attorney must have practiced for three years in the highest court of a state, territory, district, commonwealth, or possession. The person must be of good character in terms of both his or her private and professional lives and complete the specified procedures, including taking or subscribing the following oath: "I, [name], do solemnly swear (or affirm) that as an attorney and as a counselor of this court I will conduct myself uprightly, and according to law, and that I will support the Constitution of the United States."

In some instances, a particular board is empowered to promulgate rules pertaining to applicants seeking to practice before it as attorneys. For example, the SECURITIES AND EXCHANGE COMMISSION has implied authority under its general statutory power to determine qualifications for attorneys practicing before it. Under federal law, the Commissioner of Patents and Trademarks, subject to the approval of the secretary of commerce, can promulgate regulations governing the recognition and conduct of attorneys appearing before the PATENT AND TRADEMARK OFFICE.

Qualifications for admission to the bar must be rationally related to the applicant's fitness to practice law; therefore, a state cannot prevent a person from practicing law for racial, political, or religious reasons. Good moral character is a prerequisite to the right to admission to practice law and, at a minimum, consists of honesty. Lack of good moral character is demonstrated by an immutable dishonest and corrupt nature and not in radical political beliefs or membership in lawful but controversial political parties.

In regard to the effect of criminal conduct upon the evaluation of an applicant's character, a conviction for the commission of a felony is not, per se, sufficient to demonstrate a lack of good moral character. It will be incumbent upon the applicant, however, to prove complete rehabilitation. Although a conditional pardon is insufficient to remove objections to bar admission, a felony conviction will not prevent an applicant from practicing law if he or she has received a full pardon and is otherwise qualified.

Misdemeanor convictions do not necessarily result in a finding of lack of good moral character, but mere conduct that does not culminate in a conviction might present an insurmountable obstacle to admission if it indicates a lack of moral fitness. In some cases, an applicant has been rejected for want of good moral character because he or she has made false statements or concealed material facts in the application for admission or in other legal documents. In other cases, the withholding or falsification on the application of minor matters has been viewed as of no effect on an evaluation of character; the same principle applies to unintentional concealment of information.

Admission to the bar cannot be denied because the applicant is not a United States citizen, but the states can impose reasonable residency requirements upon all applicants prior to, or during, the time a license is sought. This requirement enables the state examining authority to investigate the character of the applicant, but it must be rationally related to the attainment of this objective. While a majority of states have some form of residency requirement for admission to the bar, the emerging trend is to nullify durational residency requirements that mandate that an attorney live in a state for a prescribed period as a prerequisite to certification to practice law.

Applicants for admission to practice law must take a bar examination, unless they are

**Admission to the Bar by Examination, 1997 to 2001**

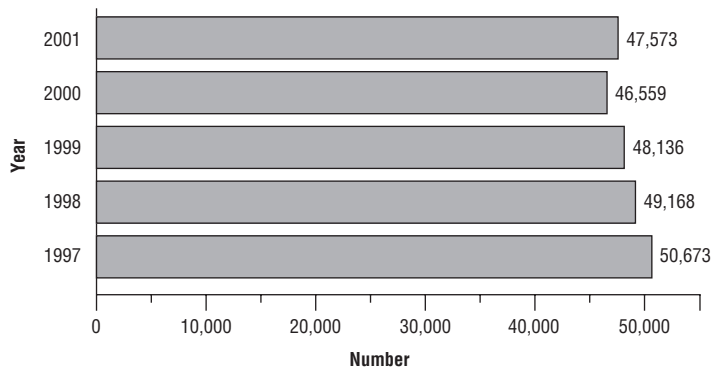


SOURCE: National Conference of Bar Examiners, "2001 Statistics," *The Bar Examiner*, May 2001.

exempted from this requirement by statute or court rule. In 2002, 73,065 applicants took a bar examination; 45,883, or 63 percent, passed. The examination can be taken more than once. In rare cases, an attorney who has been disbarred or suspended can take a special bar examination for reinstatement. In 2002, only 26 disbarred or suspended U.S. attorneys took a reinstatement exam (15 passed).

Attorneys from other states can be admitted to practice in the state without examination upon providing the required proof of practice in another state that has reciprocity provisions, pursuant to which an attorney licensed in one state can be admitted to the bar of another state, if the first state grants reciprocal rights to attorneys admitted to practice in the other state. Under the device of *pro hac vice,* an attorney can be admitted to practice in a jurisdiction without having to take the bar examination, but only on a limited basis and only for a particular case. Such an attorney must be a member of a bar in good standing of other states or countries.

In order to practice law, an attorney must obtain a certificate or license, which is a privilege rather than a property right. Attorneys must also comply with the court rules or statutes governing the registration system, which is used to maintain a current list of all attorneys authorized to practice law in the state. Generally, admission by court order constitutes sufficient registration, but in some states, attorneys sign the roll or file a certificate with the clerk of the court to establish that they have been duly admitted to practice.

An applicant for admission to the bar is entitled to notice of, and a hearing on, the grounds for rejection either before the committee on character and fitness or the court. The courts can review the decision of bar examiners who deny an applicant admission to the bar, and the courts can ascertain whether the examiners acted after a fair investigation and hearing, exercised their discretion impartially and reasonably, and conducted their proceedings in compliance with the requirements of procedural DUE PROCESS.

The legal profession has tried in recent years to diversify the population of attorneys by recruiting more women and minorities. First-year law student statistics compiled by the American Bar Association show that for the 2002–2003 academic year, out of 48,433 students, 23,587 (roughly 49 percent) were women. Minority enrollment is considerably less; first-year enrollment for 2002–2003 of students from *all* racial minorities was 10,229.

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CROSS-REFERENCES

Attorney; Bar Association; Bar Examination; "Bradwell v. Illinois" (Appendix, Primary Document); Courts; Federal Courts; Residency.

## ADMONITION

*Any formal verbal statement made during a trial by a judge to advise and caution the jury on their duty as jurors, on the admissibility or nonadmissibility of evidence, or on the purpose for which any evidence admitted may be considered by them. A reprimand directed by the court to an attorney appearing before it cautioning the attorney about the unacceptability of his or her conduct before the court. If the attorney continues to act in the same way, ignoring the admonition, the judge will find him or her in* CONTEMPT *of court, punishable by a fine, imprisonment, or both. In criminal prosecution, before the court receives and records the plea of the accused, a statement made by a judge informing the accused on the effect and consequences of a plea of guilty to criminal charges.*

## ADOPT

*To accept, appropriate, choose, or select, as to adopt a child. To consent to and put into effect, as to adopt a constitution or a law.*

## ADOPTION

*A two-step judicial process in conformance to state statutory provisions in which the legal obligations and rights of a child toward the biological parents*

*are terminated and new rights and obligations are created between the child and the adoptive parents.*

Adoption involves the creation of the parent-child relationship between individuals who are not naturally so related. The adopted child is given the rights, privileges, and duties of a child and heir by the adoptive family.

Since adoption was not recognized at COMMON LAW, all adoption procedures in the United States are regulated by statute. Adoption statutes prescribe the conditions, manner, means, and consequences of adoption. In addition, they specify the rights and responsibilities of all parties involved.

De facto adoption is a VOIDABLE agreement to adopt a child, based on a statutory proceeding in a particular state, which becomes lawful when the petition to adopt is properly presented.

Equitable adoption, sometimes referred to as *virtual adoption,* is treated by the law as final for certain purposes in spite of the fact that it has not been formally executed. When adoption appears to comply with standards of fairness and justice, some states will grant a child the rights of one who has been adopted even though the adoption procedure is incomplete. An equitable adoption might be enforced by the court for the benefit of a child in order to determine inheritance rights, for example. Similarly, adoption by ESTOPPEL is the equitable adoption of a child by promises and acts that prevent the adoptive parents and their estates from denying the child adoptive status.

### Who May Adopt

To be entitled to adopt a child, an individual must meet the qualifications under the laws of his or her state, since the state has sole power to determine who may become an adoptive parent. Unless otherwise provided by state statute, U.S. citizenship is not a prerequisite for adoption.

A child may be jointly adopted by a HUSBAND AND WIFE. If not contrary to statutory provision, either may adopt without being joined by the other. Unmarried people may adopt unless prohibited by law.

A growing area of controversy by the courts is whether adoption by a child's grandparents is a viable alternative. Such adoption might be considered in the child's best interests if the natural parents die or if the custodial parent is found unfit. A legal guardian may adopt a child but is not ordinarily given preference in the court proceedings.

The best interests of the child are of paramount importance in policy considerations toward adoption. Although legislative policy prefers such conditions as adoption by people of the same religion as the prospective adoptee, an interfaith adoption is allowed when it does not adversely affect the welfare of the child.

Elements in determining who will be suitable adoptive parents include race, religion, economic status, home environment, age, and health. Most of these criteria are taken into consideration in placements by agencies or in private placements where state law requires that adoptive parents be investigated.

### Who May Be Adopted

Since the status of an adopted person is regulated by state statutes that authorize the adoption, state law determines whether an individual is a proper candidate for adoption. In addition, to be subject to adoption in a particular state, the individual must be living within that state.

Children may be adopted in situations where their natural parents are living, dead, or unknown, or where they have been abandoned. An adoption will not be prevented by the fact that a child has a legal guardian.

Some statutes expressly limit adoption to minors, and others expressly provide for adoption of adults. The adoption of adults is regarded by statutes and the courts in a manner similar to the adoption of children. Practically, however, the adoption of adults differs greatly, since it serves different purposes and creates few of the difficulties arising out of the adoption of children. In most cases, the purpose of adult adoption is to facilitate a device for inheritance. One may designate an heir by adopting an adult. Generally, the adoptee would not otherwise be entitled to inherit but for the adoption.

### Social Considerations

In the past, adoption was viewed primarily as a means for a childless married couple to "normalize" their relationship. The focus has switched, however; now, adoption is ordinarily seen as an institution that exists to help place children into improved environments.

A number of states have, in recent years, enacted statutes that permit subsidization of adoptions. The adoption procedure thereby became a social instrument for the improvement of the lives of underprivileged children. Subsidized adoption tends to encourage adoption of children by suitable individuals who would oth-

erwise be unable to afford it. This type of adoption has a significant effect upon placement of children labeled hard-to-place. Such children, who are frequently either physically or mentally handicapped, might have no other alternative except protracted institutionalization.

State law may require that the adopting parent have custody of a child for a certain period before obtaining an adoption decree. This requirement is designed to prevent premature action and to establish whether the best interests of the child will be furthered by the adoption.

**Transracial Adoption** The issue of transracial adoption (adoption of children who are not the same race as the adoptive parents) has come under close scrutiny by courts, legislatures, and the public. Americans are sharply divided on this issue. Is it a positive way to create stable families for needy children and well-meaning adults? Or is it an insidious means of co-opting members of racial minorities and confusing their sense of identity?

In 1972, when the number of African American children adopted annually by white families rose to fifteen thousand, the National Association of Black Social Workers (NABSW) issued its opinion on the subject. Igniting a furious national debate that continued in the mid-1990s, the association equated transracial adoption with cultural GENOCIDE for African Americans.

The NABSW and other minority groups opposed to the adoption of African American children by whites claim that the children are deprived of a true appreciation and understanding of their culture. Their childhood is skewed toward white values and assimilation. Without a sense of racial identity and pride, these children cannot truly belong to the African American community; yet, by the same token, racism prevents their full inclusion in the white world.

Despite these arguments, some African Americans applaud the unconditional love and permanence offered by transracial adoptions. Transracial adoption supporters argue that it is much worse to grow up without any family at all than to be placed with parents of a different race. Because a disproportionate number of African American children are placed in foster care, mixed-race adoptions may be necessary to ensure permanent homes for some African American children. Transracial adoption may also be viewed as an opportunity to achieve INTEGRATION on the most basic level.

Controversies involving transracial adoption soon found their way to the courts. In 1992, the Minnesota Supreme Court upheld a district court's order to transfer a three-year-old African American girl from her suburban Minneapolis foster home to her maternal grandparents' home in Virginia (*In re Welfare of D. L.,* 486 N.W.2d 375 [Minn. 1992]). Referred to as Baby D in court records, the child had been raised since birth by white foster parents who had been married for twenty-four years and had already raised three grown children. Baby D's birth mother placed her in foster care almost immediately after delivery and had not seen the child since. When no relatives could be found to claim the child, the foster parents decided to adopt the girl, whom they had grown to love.

When Baby D's grandparents learned that their daughter had delivered a baby, they set out to find their grandchild and to obtain custody. (The couple was already raising their daughter's three other children.) When the foster parents' petition to adopt Baby D surfaced, the grandparents vigorously opposed it.

The Minnesota Minority Heritage Preservation Act mandated a preference for placing children with relatives and adoptive parents of the same race (Minn. Stat. Ann. § 259.57(2)). An intermediate appeals court and the Minnesota Supreme Court agreed with the lower court that under the law, the Virginia grandparents must be granted custody. Despite the white foster parents' argument that they had provided security and loving care for the child, the grandparents' claim to Baby D was superior. Although many African Americans applauded the decision, some critics questioned the constitutionality of a law favoring same-race adoption.

A similar case in Lexington, Texas, produced a different result in 1995. Two foster parents, Scott Mullen and Lou Ann Mullen, who are white and Native American, respectively, applied to adopt two African American boys in their care. Initially, social workers for the Texas Department of Protective and Regulatory Services denied the Mullens' request, stating that departmental policy required them to seek adoptive parents of the same race as the children.

A civil liberties group called the Institute for Justice filed suit against the department on behalf of the Mullens. The institute also filed suits in other states, arguing that adoption decisions based on race are unconstitutional. The

Texas department reconsidered and allowed the Mullens to adopt the boys despite race differences.

Another statute affecting transracial adoptions is the INDIAN CHILD WELFARE ACT of 1978 (25 U.S.C.A. § 1901 et seq.) (ICWA), a federal law giving special preference to family and tribal adoptions of Native American children. Prior to its enactment, nearly one quarter of all Native American children were removed from their parents' care and placed in foster care, through which some were adopted. ICWA's sponsors argued that the adoption of Native American children by white parents was not necessarily in the children's best interests and was unquestionably harmful to tribal membership. The law was intended to preserve Native American culture and to support an Indian child-rearing philosophy that relies heavily upon the extended family.

Under the 1978 law, tribes have jurisdiction over the proposed adoption of any Native American child living on a reservation. Extended families or tribal placements are given automatic priority over all other applicants.

Another law covering transracial adoptions is the Multiethnic Placement Act of 1994 (42 U.S.C.A. §§ 622, 5115a, 5115a note). Sponsored by Senator Howard M. Metzenbaum (D-Ohio), the law prevents federally assisted child welfare agencies from screening prospective adoptive parents on the basis of race, color, or national origin. Although agencies may still consider the cultural or racial identity of children when making permanent placements, the law is intended to prevent discrimination and to speed the adoption process. The intention of the law is to give thousands of minority foster children who are eligible for adoption a greater chance of finding permanent homes.

**Same Sex Adoption** Several states have laws on the books that permit second-parent adoptions by same-sex couples, including Connecticut, the District of Columbia, Illinois, Massachusetts, New York, New Jersey, and Vermont. In 18 other states, trial courts have granted second-parent adoptions to same-sex couples. In other words, these states do not have laws permitting adoptions statewide, but adoptions may be granted in county family courts on a case-by-case basis. These states are Alabama, Alaska, California, Delaware, Georgia, Hawaii, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Texas, and Washington. In states where there is no statewide law permitting second-parent adoptions, the odds of a trial court granting an adoption vary from county to county. Many of the courts that approve these adoptions are located in metropolitan areas where judges may be more liberal than their rural counterparts.

While the majority of states do not specifically prohibit gays and lesbians from adopting children, three states prohibit the practice. Florida's law is considered the nation's toughest, because it prohibits adoptions not only by gay couples, but also by gay individuals. In 2000, an Arkansas law was passed which prohibited gays and lesbians from becoming foster parents. Mississippi also has legislation barring gay couples from adopting children. The ACLU is challenging that law.

## Consent

Virtually all statutes make parental consent to adoption an indispensable condition. Most statutes set forth detailed requirements for the form and procedure of such consent. Ordinarily, statutes dispense with the parental consent requirement only when a parent has reached a serious level of unfitness that would be so significant as to terminate parental rights, or when such rights have already been judicially terminated.

In addition to parental consent, most states require a child to consent to the adoption if the child has reached a certain age, generally between ten and fourteen years.

The increasing number of divorces has resulted in deemphasis of the necessity of consent to adoption by noncustodial parents, the purpose being to ease integration of children of a former marriage into the family created by a subsequent marriage. Some statutes allow adoption without the consent of the noncustodial parent if that parent has been unable to or has failed to contribute to the support of a child for a certain period of time. Courts are more inclined to find abandonment—a common ground for termination of parental rights—in cases involving noncustodial divorced parents.

**Unmarried Father's Consent** Historically, if a child was illegitimate, most jurisdictions required only the consent of the child's natural mother to the adoption of the child. The right to grant or withhold such consent was not extended to the fathers of illegitimate offspring, since they were not considered to have sufficient

interest in the benefits and obligations of raising a child to determine whether the child should be released for adoption.

In 1979, this trend was reversed in *Caban v. Mohammed,* 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979). The key issue was whether the consent of an unwed biological father need be obtained before an adoption could be finalized.

In *Caban,* a mother of illegitimate children and her husband filed a petition for adoption. The children's natural father filed a cross petition to adopt. The New York Surrogate's Court granted the mother's petition, and the natural father appealed. The decision was affirmed by the Supreme Court, Appellate Division, and subsequently affirmed by the New York Court of Appeals.

On appeal, the U.S. Supreme Court ruled that a law depriving all unwed fathers of the right to decide against adoption, whether or not they actually took care of the children in question, was unconstitutional and a form of SEX DISCRIMINATION. The unwed father in *Caban* had lived with the mother of the children for five years prior to the birth of the children. The Court held that he had the right to block their adoption by a man who subsequently married the mother.

Consents that are signed by the parents either immediately before or after the birth of the child may be particularly subject to challenge by the natural mother. Owing to the mother's weakened physical and mental condition, findings of involuntary consent frequently have been handed down in such cases.

A parent can forfeit the right to give or deny consent for the adoption of his or her child in certain instances. *Abandonment,* the nonperformance of the natural obligations of caring for the child, including support, is one such case. The PARENT AND CHILD will ordinarily be kept together by the courts when the parent exhibits a continuing interest in the child's welfare.

A finding of ABANDONMENT may terminate a parent's rights and free the child for adoption with or without parental consent. A parent's rights may also be severed in cases of serious CHILD ABUSE or neglect. Some statutes provide that a noncustodial parent cannot VETO an adoption; however, that parent is generally entitled to be heard when a court considers the case. This is particularly true when the parent has established some kind of family tie with the child, either by having been married to, or having lived with, the custodial parent or by taking the child into his or her home.

State law may require that if a child has been placed in the custody of an agency, the agency's consent is a prerequisite for an adoption. Similarly, consent of a guardian having custody of a child is necessary. The consent of the natural mother's parents may also be required if she is under eighteen years of age and unwed.

**Invalid Consent** If coercion or deception plays any part in the decision to terminate parental rights, the birth parent's consent may be ruled invalid. In the wake of the highly publicized battle over "Baby Jessica," it appears that regardless of the length of time or quality of a child's placement, the consent rights of the birth parents outweigh the best interests of the child.

In an agonizing case that divided the adoption community, Michigan couple Roberta DeBoers and Jan DeBoers lost custody in 1993 of Jessica, the two-and-a-half-year-old child they had raised from birth (*In re Clausen,* 442 Mich. 648, 502 N.W.2d 649 [1993]). Courts in both Iowa and Michigan concluded that the necessary consent by Iowa birth parents Cara Schmidt and Daniel Schmidt was flawed. After a protracted legal battle, Jessica was ordered to return to Iowa to live with her biological parents.

Shortly after Jessica's birth on February 8, 1991, the DeBoers filed a petition in Iowa juvenile court to adopt her. The couple, who for ten years had tried to conceive or adopt a child, were named her temporary guardians and custodians. When Jessica was less than four weeks old, however, birth mother Cara Clausen sued to have her maternal rights restored. The birth father, Dan Schmidt, also sought custody.

Unmarried at the time, Clausen had signed a release-custody form, terminating her parental rights, approximately forty hours after giving birth to Jessica. (Iowa law requires a seventy-two-hour waiting period before waiving parental rights.) The man Clausen identified as the child's father—not Schmidt—also signed a release form. Seventeen days later, Clausen informed Schmidt that she had lied on the release form and that Schmidt was actually the father.

On March 6, 1991, Clausen sought to revoke the custody agreement, naming Schmidt as the child's father. Upon learning that he was the

baby's father, Schmidt filed an AFFIDAVIT of PATERNITY and asked for a court intervention to prevent the adoption proceedings. Clausen and Schmidt were married shortly thereafter.

The district court and subsequent courts determined that Dan Schmidt was indeed the biological father and that he had not agreed to have his parental rights terminated. Because he had not abandoned the baby, it was not clearly in the best interests of Jessica to remain with the DeBoers. Also, the parental rights waiver signed by Cara Schmidt was invalid because the statutorily imposed waiting period had not been observed. Therefore, early in the legal skirmish, the court ordered the baby returned to the Schmidts.

The DeBoers continued to fight Jessica's removal from their custody. With the legal maneuvering and delays, the case stretched out over a twenty-nine-month period. By the end, the DeBoers had developed a close bond with Jessica, even though they knew from the time Jessica was an infant that their claim to her might not hold up in court. But with the passage of time, the DeBoers could make a powerful claim that Jessica needed them more than the Schmidts. After all, they were the only parents she knew. The DeBoers argued that it was in Jessica's best interests to remain with them, or she could face possible emotional and psychological damage.

After Iowa courts refused to change position on the custody, the DeBoers took their case to Michigan, hoping that the best-interests-of-the-child argument would be persuasive. However, Michigan courts also agreed that Jessica should be returned to her Iowa birth parents. She was delivered to the Schmidts on August 2, 1993, and renamed Anna.

### Methods of Adoption

There are several types of adoption placement procedures. Foreign adoptions are affected by the policies and procedures of the adoptees' countries. Agency placement and independent placement are governed by statute, as is adoption by contract or by deed. Some people adopt through illegal purchase of a child or arrange to have a child by a surrogate mother.

**Foreign Adoption** Because of the scarcity of healthy babies for adoption in the United States, many U.S. citizens are pursuing adoption of orphaned and abandoned babies from foreign countries.

*Many U.S. families pursue the adoption of children from foreign countries. Byron and Cathy Nehls of Wisconsin are pictured with their adopted children, Carissa, from India; Marco Tulio, from Guatemala; Hannah, from South Korea; and Lucas, from Brazil.*

AP/WIDE WORLD PHOTOS

Most U.S. parents with children in foster care do not relinquish their parental rights. Foster children in the U.S. may also be difficult to place because many are older and carry the emotional scars of physical or SEXUAL ABUSE.

Since the 1950s, U.S. couples have adopted thousands of Korean children. The number of Korean adoptions is declining, however, reportedly because the Korean government is uncomfortable with its reputation as a baby exporter. On the other hand, children from South America are being adopted in greater numbers by U.S. citizens, as are children from China, Romania, and Russia. In these countries, poverty, natural disasters, abandonment, war, and collapsed governments have resulted in an increased population of needy children.

Each country has different adoption policies regarding the age, income level, and marital status of prospective parents. Often, foreign adoptions are handled privately. Countries may allow children to be escorted to the United States or may require adoptive parents to come and stay for days or even months to complete the adoption paperwork. The costs of adoption also vary from nation to nation.

**Agency Placement** In agency placement of a child, the arrangements are made by a licensed public or private agency. Such agencies exist solely for the placement of children, and part of their responsibility involves a thorough investigation of the suitability of the potential adoptive parents. Such an investigation is ordinarily quite detailed and takes into consideration the background of both child and prospective parents.

Statutes generally provide for agencies that are operated or licensed by the government to act in an intermediary role between natural and adoptive parents. The method by which a child is transferred to an adoption or placement agency is by the execution of a formal surrender agreement that the natural parents sign. By surrendering a child to an agency, the parent relinquishes all rights to the child. The agency is then given complete authority to arrange for adoption. In arranging for an adoption, agencies must take into consideration such issues as whether a particular child is a proper subject for adoption, whether the proposed home is a suitable one, and whether the adoption is in the child's best interests.

Agency placement has three basic advantages: (1) It minimizes such risks as the adoption of nonhealthy children, the discovery of the adoptive parents' identity by the natural mother, and the natural mother's changing her mind about the adoption. (2) The suitability of adoptive parents is determined by a stringent investigation, which minimizes the risk that a child will be adopted by unfit parents. (3) Adoption through an agency minimizes fees incidental to the adoption.

One essential disadvantage of agency placement is that it involves a long, detailed process. The adoptive parents might be forced to wait for many months while they are being investigated as to their suitability. A second disadvantage of agency placement is that only a limited number of children are available for adoption through agencies.

**Independent Placement** In independent placement, or private adoption, a child is directly transferred from the natural mother, or her representative, to the parents seeking to adopt. This type of placement is ordinarily arranged by the natural mother's family or doctor. Generally, neither the natural nor the adoptive parents are thoroughly investigated. The adoptive parents often arrange to pay all medical bills incidental to the pregnancy and birth, in addition to legal expenses. Private adoptions are lawful in most states.

Like agency placement, independent placement has both advantages and disadvantages. Private placement facilitates the adoption of a child by parents who might otherwise be forced to endure an extended waiting period or who might be unable to find a child through agency channels because of stringent requirements or mere nonavailability of adoptable children. As with all adoptions, there is an inherent risk that the natural mother might change her mind and never complete the adoption procedure. With some private adoptions, the natural mother remains anonymous. With others, her identity is known to the adoptive parents at the outset.

Independent placement aids mothers who do not have financial resources, by arranging for the payment of medical expenses by the adoptive parents. Such a procedure can, however, lead to a black market if not carefully monitored.

Other disadvantages of private placements are the risks of adoption of an unhealthy child or of nonsuitability of the adoptive parents.

Some states prohibit lawyers from obtaining babies for adoption by clients under any circumstances. Attorneys, however, are ordinarily permitted to accept fees for handling the legal aspects of adoption.

**Surrogate Motherhood** During the 1980s, many infertile couples turned to SURROGATE MOTHERHOOD as an alternative to traditional adoption. A surrogate mother was paid a fee to bear a child conceived through ARTIFICIAL INSEMINATION. Once the child was born, the surrogate mother agreed to terminate her parental rights in favor of the sperm donor, typically the husband of the woman unable to have children. For public policy reasons, paid surrogate motherhood has been denounced as an unacceptable means of buying and selling babies.

The wrenching "Baby M" case proved to be the ultimate downfall of surrogate motherhood contracts. In IN RE BABY M, 109 N.J. 396, 537 A.2d 1227 (1988), Mary Beth Whitehead entered a written agreement to bear the child of William Stern, whose wife, Elizabeth Stern, was unable to have children. Whitehead was to be paid $10,000 for her services. When the baby girl was born in 1985, Whitehead refused to give her up and fled with the infant to Florida. Four months later, she was apprehended by authorities, who gave the baby over to the Sterns.

Despite Whitehead's efforts to regain the child, the New Jersey Superior Court stripped her of parental and VISITATION RIGHTS and allowed the Sterns to adopt the baby, whom they had named Melissa. The decision had little to do with adoption policy but centered primarily on contract enforcement. The court ruled that Whitehead was obligated to honor her contract with the Sterns.

The New Jersey Supreme Court reversed the lower-court decision, declaring that surrogate motherhood contracts are unenforceable because they violate public policy. The Sterns were allowed to maintain custody of Baby M, although the adoption was voided and some of Whitehead's parental and visitation rights were restored. After the decision, most states passed legislation to prohibit surrogate motherhood contracts altogether.

**Adoption by Contract or Agreement** Generally, an adoptive relationship cannot be formed by private contract, either express or implied. Although adoption contracts are not usually considered to be injurious to public welfare, they are discouraged on the basis of the principle that a parent should not be permitted to trade away his or her child.

A court may, however, choose to treat a contract of adoption as an agreement to be enforced, with the outcome being equivalent to a formal adoption. The courts have upheld contracts between parents and institutions. In addition, in a number of states, an adoption contract between a natural parent and an institution that provides that the parent is not to be informed of the child's location is enforceable.

Since courts are not eager to deprive natural parents of the right to care for a child, adoption contracts are not enforced when they are in conflict with the welfare of the child. Some states provide that a contract made by one parent alone, absent a showing of clear consent by the other, is not valid. The procedure for adoption by a written declaration or deed is permitted in some states. Ordinarily, it must be properly recorded before the adoption will be valid.

***Revocation*** A court will allow an agreement for the adoption of a child to be broken by a natural parent if the circumstances warrant it, such as when a parent was forced into an adoption agreement.

The court has discretion over whether to permit revocation of an adoption agreement. In such cases, the court will scrutinize the circumstances under which the parent gave consent as well as the parent's reasons for revoking the contract.

## Consequences of Adoption

Adoption ordinarily terminates the rights and responsibilities of the natural parents to the child. The death of an adoptive parent does not restore the rights of the natural parents.

Adoption creates the same rights and responsibilities between a child and adoptive parents as existed between natural parent and child. An adopted child is entitled to the same rights as a natural child. When an adult is adopted, however, the adoptive parent does not assume the usual duty of support.

State law governs whether or not the name of a child will be affected by adoption. When a minor child is adopted, his or her legal residence is changed from that of the natural parent to that of the adoptive parent.

**Inheritance** A state legislature has the authority to impart or remove inheritance rights of adopted children or adoptive parents. Statutes usually provide that adopted children can inherit from adoptive parents in the same capacity as natural children and, conversely, adoptive parents can inherit the property of an adopted child who predeceases them.

## Revocation of Adoption

If an adoption decree is acquired by FRAUD, it may be revoked. In addition, in the absence of the requisite consent of all concerned parties, an order of adoption is void. After a decree is revoked, a child assumes the status she or he had prior to the adoption proceedings.

## Summary of Adoption Procedure

The formal steps in adoption of a child are generally uniform in all states.

**Notice** Notice of adoption proceedings is given to all parties who have a legal interest in the case except the child. In the case of ILLEGITIMACY, both natural parents should be given notice if they can be located.

Some statutes provide that a parent who has failed to support a child is not entitled to notice. Ordinarily, a parent who has lost custody of a child in a DIVORCE or separation case is, however, entitled to notice. Similarly, an adoption agency that has custody of the child is entitled to notice.

**Petition** The parents seeking to adopt must file a petition in court that supplies information about their situation as well as the situation of the child. The filing of a proper petition is ordinarily a prerequisite to the court's jurisdiction.

The petition indicates the names of the adoptive parents, the child, and the natural parents, if known. In addition, the child's gender and age are stated, and some states mandate that

*A sample petition for adoption*

**State of Michigan Petition for Adoption**

Approved, SCAO

| STATE OF MICHIGAN<br>JUDICIAL CIRCUIT–FAMILY DIVISION<br>COUNTY | PETITION FOR ADOPTION<br>❑ Step-Parent<br>❑ Related Within 5th Degree<br>❑ Other (Excluding Direct Adoption) | FILE NO. |
|---|---|---|

In the matter of _____ (Full name of child), adoptee

❑ I, _____ (Name), join with my spouse in this petition for adoption (applicable to step-parent adoption only)

| | Name and Social Security Number | Relationship to Adoptee | Address, City, State, Zip | Date and Place of Birth |
|---|---|---|---|---|
| Adopting Mother | Maiden: | | | |
| Adopting Father | | | | |

Each adopting petitioner states:

❑ 1. An action within the jurisdiction of the family division of circuit court involving the family or family members of the minor has been previously filed in _____ Court, Case Number _____, was assigned to Judge _____, and ❑ remains ❑ is no longer pending.

2. I desire to adopt _____ (Full name of child) _____ (Birth date and time)
_____ (City, county, and state of birth)
_____ (Present residential address (if known))

3. The adoptee will be my heir at law.

4. The adoptee's name will ❑ not be changed. ❑ be changed to _____ (First) (Middle) (Last)

5. The adoptee's property is _____

6. The adoptee's parents are:

_____ (Father's name) _____ (Birth date) | _____ (Mother's name (and maiden name)) _____ (Birth date)
_____ (Address) | _____ (Address)
_____ (City, state, zip) | _____ (City, state, zip)

❑ unknown because the rights of the parents have been terminated by a court of competent jurisdiction and parental rights are vested in

_____ (Name and address of court or agency).

(PLEASE SEE OTHER SIDE)

Do not write below this line– For court use only

**PCA 301** (9/97) **PETITION FOR ADOPTION**

MCL 710.24; MSA 27.3178(555.24), MCL 710.26; MSA 27.3178(555.26), MCL 710.45; MSA 27.3178(555.45), MCL 710.46; MSA 27.3178(555.46), MCL 710.52; MSA 27.3178(555.52), MCL 710.56; MSA 27.3178(555.56)

a medical report on the child must also accompany the petition. An example of such a petition is found on page 98.

**Consent** Written consent of the adoption agency or the child's natural parents accompanies the petition for adoption. Consent of the natural parents is not required if their parental rights have been involuntarily terminated as a result, for example, of abandonment or abuse of the child.

*A sample petition for adoption (continued)*

**State of Michigan Petition for Adoption**

❑ 7. The adoptee's court appointed guardian and/or conservator is (attach copy of letters of authority):

Name _____ Address _____

City, state, zip _____.

❑ 8. The adoptee has been living in the home of and with the petitioners for _____ months before the filing of this petition.

❑ 9. (applies only to step-parent adoptions) The noncustodial parent has failed to provide support or comply with a support order and failed to visit or contact the adoptee for a period of 2 years or more. (Attach form PCA 302, Supplemental Petition and Affidavit to Terminate Parental Rights of Non-Custodial Parent)

❑ 10. I have been unable to obtain the required consent to adopt the child from the court, Michigan Family Independence Agency, or child placing agency having permanent custody or from the persons to whom the child was released. A motion alleging that the decision to withhold consent was arbitrary and capricious is attached.

**I REQUEST:**

11. Termination of all existing parental rights inconsistent with the order of adoption, entry of an order approving placement of the child with me, and entry of an order of adoption with the adoptee's name recorded as _____.

❑ 12. The adoption be completed immediately because: _____

_____

_____

❑ 13. The court to waive the required investigation because the adoptee has been placed in foster care with me for at least 12 months and a foster family study was completed or updated within the last 12 months.

I declare that this petition has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Attorney/Agency signature _____ Date _____

AttorneyAgency name (type or print) _____ Bar no. _____ Signature of petitioner mother _____

Address _____ Signature of petitioner father _____

City, state, zip _____ Telephone no. _____ Petitioner telephone no. _____

**IT IS ORDERED:**

14. _____
Court agent or employee, child placing agency, or Michigan Family Independence Agency

is directed to fully investigate and report its findings in writing to this court, within 3 months of this order, in accordance with the provisions of section 46 of the Michigan Adoption Code.

❑ 15. The full investigation is waived. The petitioner(s) shall file a copy of the most recent foster family study as updated and supplemented.

Date _____ Judge _____ Bar no. _____

**Hearing** A hearing is held so that the court may examine the qualifications of the prospective parents and either grant or deny the petition. There must be an opportunity for the parties to present testimony and to examine witnesses at such a hearing.

Adoption proceedings are confidential, so the hearing is conducted in a closed courtroom.

Ordinarily, the records of an adoption hearing are available for inspection only by court order. Confidentiality is thought to promote a sense of security for the child with his or her new family.

**Probation** Most states require a period of PROBATION in adoption proceedings. During this period, the child lives with the adoptive parents, and the appropriate state agency monitors the development of the relationship. The agency's prime concern is the ability of the adoptive parents to properly care for the child. If the relationship is working well for all concerned parties, the state agency will request that the court issue a permanent decree of adoption.

If the relationship is unsatisfactory, the child is either returned to his or her previous home or is taken care of by the state.

**Decree** An adoption decree is a judgment of the court and is given the same force and effect as any other judgment.

**Birth Certificate** Following the adoption proceedings, a certificate of adoption is issued for the adopted child, to replace the birth certificate. It lists the new family name, the date and place of the child's birth, and the ages of the adoptive parents at the time the child was born.

Generally, the certificate of adoption does not indicate the names of the child's natural parents or the date and place of adoption. A child may never know that he or she was adopted unless the adoptive parents reveal the information, since the old birth certificate is sealed away and may be opened only by court order.

### Right to Information on Natural Parents

Ordinarily, all information concerning an adopted child's origins is sealed, in compliance with the court adoption proceedings, to facilitate development of a relationship between the adoptive parents and child free from the natural parents' influence.

Most state statutes deny adoptees access to records that disclose information about the natural parents. Often, the natural parents make their consent to the adoption contingent upon the condition that no information about them should ever be revealed.

In recent times, because of a growing public interest in tracing ethnic and family backgrounds, many adoptees, as adults, have been calling for the right to obtain access to sealed adoption records.

The adult adoptees recognize that a disclosure of this kind of information could be traumatic to minor adoptees, but they contend that lack of access could cause serious psychological trauma to them as adults. In addition, they cite medical problems or misdiagnoses that could be caused by absence of genetic history, lack of religious identity, and fear of unwitting INCEST.

Adult adoptees contend that most adoption statutes do not make a distinction between adoptees as minors and later as adults, which causes the adults to be deprived of the right to trace their background. In addition, the adults allege that they have been denied EQUAL PROTECTION of law because their status precludes them from receiving medical information readily available to nonadoptees.

Various approaches are being used to resolve this problem. One approach involves the enactment of a legislative requirement that public and private adoption agencies be required to open their records upon request to adults who were adopted as children, with certain limitations. For example, if the child had been placed by the natural parents prior to the effective date of the legislation, the natural parents could prevent the adoptee from seeing the records.

The issue of right to access to adoption records by adoptees when they reach adulthood also encompasses the legal consideration of the natural parents' right to privacy, which could be violated if free access to sealed court records were given to adult adoptees. The adult adoptees' right to know must be balanced against their natural parents' right to privacy. The way to achieve such a balance, however, has never been clearly determined.

In September, 1999, Tennessee's Supreme Court overturned the Tennessee Court of Appeals ruling in *Doe v. Sundquist,* 2 S.W.3d 919 (Tenn., Sep 27, 1999) (NO. 01-S-01-9901-CV00006), which challenged a law passed in 1995 that unsealed both adoption records and original birth certificates to adult adoptees. Earlier, the 6th Circuit Court of Appeals had ruled in favor of the state and opined, much to the dismay of sealed records advocates: "A birth is simultaneously an intimate occasion and a public event—the government has long kept records of when, where, and by whom babies are born. Such records have myriad purposes, such as furthering the interest of children in knowing the circumstances of their birth," *Doe v. Sundquist,* 106 F.3d 702, 65 USLW 2527, 1997 Fed.App. 0051P (6th Cir.(Tenn.) Feb 11, 1997) (NO. 96-6197). The U.S. Supreme Court, however, elected not to hear the Tennessee case.

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#### CROSS-REFERENCES

Child Custody; Child Support; Children's Rights; Family Law; Illegitimacy; Infants; Parent and Child; Surrogate Motherhood.

## ADULT

*A person who by virtue of attaining a certain age, generally eighteen, is regarded in the eyes of the law as being able to manage his or her own affairs.*

The age specified by law, called the legal age of majority, indicates that a person acquires full legal capacity to be bound by various documents, such as contracts and deeds, that he or she makes with others and to commit other legal acts such as voting in elections and entering marriage. The age at which a person becomes an adult varies from state to state and often varies within a state, depending upon the nature of the action taken by the person. Thus, a person wishing to obtain a license to operate a motor vehicle may be considered an adult at age sixteen, but may not reach adulthood until age eighteen for purposes of marriage, or age twenty-one for purposes of purchasing intoxicating liquors.

Anyone who has not reached the age of adulthood is legally considered an INFANT.

## ADULTERATION

*Mixing something impure with something genuine, or an inferior article with a superior one of the same kind.*

Adulteration usually refers to mixing other matter of an inferior and sometimes harmful quality with food or drink intended to be sold. As a result of adulteration, food or drink becomes impure and unfit for human consumption. The federal FOOD AND DRUG ADMINISTRATION prohibits transportation of adulterated foods, drugs, and cosmetics in interstate commerce, as provided under the Food, Drug and Cosmetic Act (21 U.S.C.A. § 301 et seq. [1938]). State and local agencies, acting under the authority of local laws, do the same to ban the use of such impure goods within their borders.

## ADULTERY

*Voluntary sexual relations between an individual who is married and someone who is not the individual's spouse.*

Adultery is viewed by the law in many jurisdictions as an offense injurious to public morals and a mistreatment of the marriage relationship.

Statutes attempt to discourage adultery by making such behavior punishable as a crime and by allowing a blameless party to obtain a DIVORCE against an adulterous spouse.

Although adultery has been historically regarded as a legal wrong, it has not always been considered a crime. In Europe during the fifteenth and sixteenth centuries, adultery was punishable solely in courts created by the church to impose good morals. In the ecclesiastical courts, adultery was any act of sexual intercourse by a married person with someone not his or her spouse. The act was considered wrongful regardless of whether the other person was married. At COMMON LAW, adultery was wrongful intercourse between a married woman and any man other than her husband.

### Criminal Laws

Several state legislatures statutorily prohibit adultery as a crime. Under some statutes, both parties to an adulterous relationship are guilty of a crime if either of them is married to someone else. Other statutes provide that the act is criminal only if the woman is married.

Under the law of many states, a single act of adultery constitutes a crime, whereas in others, there must be an ongoing and notorious relationship. The punishment set by statute may be greater for an individual who engages in repeated acts of adultery than for one who commits an isolated act.

**Defenses** An individual who has been charged with committing adultery may have a valid legal defense, such as the failure or physical incapacity to consummate the sex act.

A woman is not guilty of adultery if the sex act resulted from rape. Some states recognize ignorance of the accused regarding the marital status of his or her sexual partner as a defense. In a few jurisdictions only the married party can be prosecuted for adultery. If the other party to the relationship is not married, he or she may be prosecuted for fornication instead of adultery.

**Initiation of Criminal Proceedings** Under some statutes, a prosecution for adultery can be brought only by the spouse of the accused person although technically the action is initiated in the name of the state. Other states provide that a husband or wife is precluded from commencing prosecution for adultery since those states have laws that prohibit a husband or wife from testifying against his or her spouse. In such states, a complaint can be filed by a husband or wife against the adulterous spouse's lover.

**Evidence** Customary rules prescribe the types of evidence that can be offered to prove guilt or innocence. There must be a showing by the prosecutor that the accused party and another named party had sexual relations.

Depending on state statutes, the prosecutor must show that either one or both parties to the adultery were wed to someone else at the time of their relationship.

Evidence that the defendant had the chance to have sexual relations coupled with a desire, or *opportunity* and *inclination,* might be sufficient to prove guilt. Photographs or testimony of a witness who observed the couple having sexual intercourse is not necessary. The fact that a married woman accused of adultery became pregnant during a time when her husband was absent might be admissible to demonstrate that someone other than her spouse had the opportunity of engaging in illicit sex with her.

Letters in which the accused parties have written about their amorous feelings or clandestine encounters may be introduced in court to support the assertion that the parties had the inclination to engage in sexual relations. Character evidence indicating the good or bad reputation of each party may be brought before the jury. Evidence of a woman's sexual relationships with men other than the party to the adultery generally cannot be used; however, if her reputation as a prostitute can be demonstrated, it may be offered as evidence.

Suspicious activities and incriminating circumstances may be offered as CIRCUMSTANTIAL EVIDENCE.

### Enforcement of Statutes

Although the District of Columbia and approximately half of the states continue to have laws on the books criminalizing adultery, these laws are rarely invoked. Traditionally, states advanced three goals in support of their adultery laws: (1) the prevention of disease and illegitimate children; (2) the preservation of the institution of marriage; and (3) the safeguarding of general community morals.

Courts in the jurisdictions still prohibiting adultery have openly questioned whether adultery laws in fact serve these goals. The Florida Supreme Court, for example, found that adultery statutes bear no rational, much less compelling, relationship to disease prevention. The court said that the risk of contracting disease is already a greater deterrent to extra-marital sex than criminal punishment. The court also noted that the fear of prosecution prevents infected people from voluntarily seeking treatment. *Purvis v. State,* 377 So. 2d 674, 677 (Fla.1979).

At the same time, many prosecutors began to realize that once the act of adultery is committed, the harm to the marriage is for the most part complete, especially if the infidelity is disclosed or discovered. In other words, after a spouse has been unfaithful, there is little the judicial system can offer to undo the act and reverse the damage. Thus, prosecutors have increasingly questioned whether prosecuting the adulterer will do much if anything to preserve the marriage.

Finally, judges, prosecutors, and other state officials have increasingly realized that prosecutions for adultery have had little practical effect in "safeguarding the community morals." Opinion polls consistently show that significant numbers of spouses admit to cheating on their partners during marriage. In light of the growing evidence that adultery laws no longer serve their three underlying purposes, most state prosecutors have made a conscious decision against wasting their scarce resources on prosecuting alleged adulterers.

In states that still have adultery laws on the books, but have failed to prosecute anyone under them recently, courts have ruled that the mere lack of prosecution under the adultery statute does not result in that statute becoming invalid or judicially unenforceable. Courts have also rejected the argument that prosecutions for adultery are inconsistent with the right to privacy guaranteed by state and federal constitutions. *Commonwealth v. Stowell,* 389 Mass 171, 449 NE2d 357 (Mass 1983).

### As a Defense

Occasionally, adultery has been successfully asserted as a defense to the crime of murder by an individual charged with killing his or her spouse's lover. Courts are loath, however, to excuse the heinous crime of murder on the ground that the accused party was agitated about a spouse's adulterous activities. However, individuals who kill their spouse after catching him or her committing adultery may be able to rely on a heat of passion defense, and thereby face prosecution or conviction for MANSLAUGHTER, rather than first degree murder.

### Divorce

Based on the state's interest in the marital status of its residents, all legislatures had traditionally assigned statutes enumerating the grounds on which a divorce would be granted. These grounds, listed separately in the laws of

each jurisdiction, generally included desertion, nonsupport, and adultery.

The basis of adultery as a ground for divorce has been discussed in various cases. There is an overriding public policy in favor of preserving the sanctity of marital relationships and family unity and a fear that adultery will serve to undermine these societal objectives.

Late twentieth-century changes in divorce laws, primarily the enactment of no-fault divorce statutes in many states, have made it easier for couples seeking divorce to end their marriages without having to prove adultery or any other ground. In the past many unhappy couples resorted to trickery to attempt to obtain a divorce through staging the discovery of allegedly adulterous conduct.

Nonetheless, adultery still may be relevant to divorce proceedings in which ALIMONY is an issue. In twenty-seven states plus Puerto Rico and the District of Columbia, fault is one factor which courts will consider in deciding whether to award alimony. If the spouse seeking an alimony award committed adultery, he or she will have a more difficult time convincing the court that he or she is entitled to alimony than if he or she had not been unfaithful.

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CROSS-REFERENCES

Circumstantial Evidence; Common Law; Divorce; Ecclesiastical Courts; Family Law; Fornication; Husband and Wife; Marriage; Privacy; Rape.

## ADVANCE

*To pay money or give something of value before the date designated to do so; to provide capital to help a planned enterprise, expecting a return from it; to give someone an item before payment has been made for it.*

## ADVANCE SHEETS

*Pamphlets containing recently decided opinions of federal courts or state courts of a particular region.*

Cases appearing in advance sheets are subsequently published in bound volumes containing several past pamphlets, usually with the same volume and page numbers as appeared in the advance sheets. Sometimes a court will publish an individual opinion soon after it has been rendered by the court. This is called a slip opinion, which later may appear in an advance sheet.

### Advance Sheets in the National Reporter System

The National Reporter System, published by the West Group, St. Paul, Minnesota, is the most comprehensive collection of the decisions of the appellate courts of the states and each of the courts of the United States. Eighteen reporters comprise the National Reporter System. Eight units cover federal courts, including the *Supreme Court Reporter* (cited as S. Ct.); the *Federal Reporter*, as of 2003 in its third series; the *Federal Supplement*, as of 2003 in its second series; the *Federal Rules Decisions* (cited as F.R.D.); the *Military Justice Reporter* (cited as M.J.); and the *Bankruptcy Reporter*.

Ten reporters cover the 50 states and the District of Columbia. These reporters, each of which is in its second or third series, include the following: *Atlantic Reporter* (A., A.2d); *North Western Reporter* (N.W., N.W.2d); *Pacific Reporter* (P., P.2d, P.3d); *South Eastern Reporter* (S.E., S.E.2d); *Southern Reporter* (So., So.2d); *South Western Reporter* (S.W., S.W.2d, S.W.3d); *California Reporter* (Cal. Rptr.); *Illinois Decisions* (Ill. Dec.); and *New York Supplement* (N.Y.S., N.Y.S.2d).

Advance sheets in the National Reporter System are published 50 times each year (weekly, except for the last week of September and first week of October) for the regional units reporting state cases. Three units report federal cases 52 times per year. The remaining units are published biweekly, monthly, or semi-monthly, depending on how many cases are issued by the courts covered by the various reporters.

CROSS-REFERENCES

Opinion; Reporter.

## ADVANCEMENT

*A gift of money or property made by a person while alive to his or her child or other legally recognized heir, the value of which the person intends to be deducted from the child's or heir's eventual share in the estate after the giver's death.*

An advancement is not the same as a gift or a loan because the person intends that the

# The Adversary System: Who Wins? Who Loses?

The legal system in the United States is known as an adversary system. In this system, the parties to a controversy develop and present their arguments, gather and submit evidence, call and question witnesses, and, within the confines of certain rules, control the process. The fact finder, usually a judge or jury, remains neutral and passive throughout the proceeding.

Critics pose some disturbing questions about the adversary system: Is justice served by a process that is more concerned with resolving controversies than with finding the ultimate truth? Is it possible for people with limited resources to enjoy the same access to legal services as do wealthy people? Does a system that puts a premium on winning encourage chicanery, manipulation, and deception?

The 1995 trial of **O. J. SIMPSON**, an actor, sportscaster, and professional football player accused of murdering his former wife and her friend, cast unprecedented scrutiny on the criminal justice system, and left many people wondering whether truth or justice play any role in its operation. Each day for over a year, the trial was televised in the homes of millions of people, most of whom had never seen the inside of a courtroom. They were fascinated and repelled by prosecutors and defense attorneys who argued relentlessly about seemingly trivial points. Even more disturbing to some viewers was the acrimonious name-calling that went on between the two sides as each attempted to discredit the other's evidence and witnesses. Likewise, the 1994 trials of Eric and Lyle Menendez, wealthy brothers who admitted killing their parents but whose first trials ended in hung juries, left many Americans bewildered and angry at a system that seemed unable to convict confessed murderers. Defense attorneys are quick to point out that the Constitution guarantees that the accused is innocent unless found guilty in a court of law, and it is impossible to protect the innocent without occasionally protecting the guilty. Lawyers are obligated to challenge the evidence against their clients, even if that means impugning the police or attacking a victim's or witness's character. It is their job to win an acquittal by whatever legal and ethical means within their power.

Disparaging the legal system has become something of a national pastime. Indeed, criticism of the system comes from all corners of the landscape, including the top of the system itself. The late Chief Justice **WARREN E. BURGER** was outspoken in his lambasting of the system and of lawyers, asserting that they are too numerous and too zealous, that they file too many frivolous lawsuits and motions, and that there is general failure within the system to encourage out-of-court settlements. Burger was a vocal proponent of **ALTERNATIVE DISPUTE RESOLUTION** (ADR). He advocated the use of nonlitigious solutions such as mediation or **ARBITRATION** as a means of reducing court congestion. Supporters of the adversary system point out that it is not clear that the savings reaped from ADR always outweigh the costs. In situations where the parties are not at equal bargaining strength, questions arise as to whether settlements are extracted through duress. Some attorneys and litigants have noted that ADR is often as adversarial in nature as litigation, with evidence presented and slanted by counsel. They further complain that there is no guarantee that an arbitrator will be informed about the subject matter of the dispute, and therefore no guarantee of a fair outcome.

Without doubt, during the 1980s and 1990s, the United States experienced tremendous growth in the number of civil suits filed. The results were clogged courts, trial delays, and increased legal costs. However, the experts disagree on how to solve these problems. Critics of the system clamor for reforms to address what they perceive as its deficiencies,

"advance" of the heir's share of the estate be applied against what the heir would normally inherit. Although sometimes used to describe situations involving both people who have died intestate (without leaving a valid will) and people who have left a will, the term *advancement* should be used only when there is no valid will. The laws of **DESCENT AND DISTRIBUTION** regulate the distribution of an intestate's property. The term **ADEMPTION** applies to lifetime gifts that reduce a beneficiary's share under a will.

## ADVERSARY PROCEEDING

*Any action, hearing, investigation, inquest, or inquiry brought by one party against another in which the party seeking relief has given legal notice to and provided the other party with an opportunity to contest the claims that have been made against him or her. A court trial is a typical example of an adversary proceeding.*

**CROSS-REFERENCES**

Adjudication.

whereas many commentators, particularly those within the legal profession, feel that the system, although imperfect, is actually working the way it is designed to work and should not be altered.

One criticism of the adversary system is that it is slow and cumbersome. The judge, acting as a neutral fact finder, can do little to accelerate a trial, and procedural and evidentiary rules further slow the process. Likewise, the wide availability of appellate review means that a final determination can take years. However, at least one study has shown that in courts where adversarial trials were discouraged and settlements actively encouraged, litigants still encountered substantial delays in resolution. And supporters of the adversary system maintain that a methodical, albeit cumbersome, system is necessary for protection of individual rights.

It is fair to challenge the ethics of a legal system that places a higher value on winning than on truth seeking. At least one commentator has characterized the system as one in which lawyers spend more time avoiding truth than seeking it. But proponents argue that the vigorous clash of opposing viewpoints eventually yields the truth, and that allowing the sides to fight it out under specific rules that guarantee fair play allows the truth to surface on its own.

Many other complaints have been leveled against the United States' adversary system. Some feel that because the parties control the litigation, they are encouraged to present only the evidence that is favorable to them and to suppress evidence that is unfavorable. Criticism of attorneys abounds. Some feel that the lawyers' ethics code encourages zealous representation at the expense of truth, making attorneys, in the words of Burger, "hired guns" (*In re Griffiths,* 413 U.S. 717, 93 S. Ct. 2851, 37 L. Ed. 2d 910 [1973]). Others complain that lawyers file too many frivolous lawsuits and have become too dominant in the adversary process. Some even say that the **RULES OF EVIDENCE**, designed to guarantee fairness to all parties, actually work against fairness by preventing important information from being presented to the fact finder.

Defenders of the adversary system are quick to refute each criticism lobbed at it. They contend that it is necessary for the parties to control the litigation in order to preserve the neutrality of the judge and jury. They point out that lawyers, although as susceptible to corruption as any other group, are governed by a code of ethical conduct that, when enforced, deals effectively with instances of overreaching. And, while conceding that evidentiary rules may be subject to manipulation, they vigorously maintain that such rules are the only means by which to ensure fairness and prevent judicial abuse.

The criticism of the U.S. legal system that may be most difficult to refute has to do with accessibility. It cannot be plausibly argued that an average criminal defendant has the same access to **LEGAL REPRESENTATION** as O. J. Simpson or the wealthy Menendez brothers, nor can it be argued that an injured plaintiff in a civil suit is in an equal bargaining position with a huge corporation. Yet, supporters of the adversary system counter that unequal access to legal services is the result of economic and social conditions, not the structure of the legal system, and that changing the way legal services are delivered would do nothing to address the root causes of the disparity. They also point out that the much criticized contingency fee arrangement, by which an attorney is paid a percentage of the award her or his client receives, opens the courts to members of the population who could not otherwise afford legal representation.

Most legal experts agree that, in the long run, the adversary system results in societal benefits that outweigh its inherent shortcomings. By allowing all sides of a controversy to be heard, the system protects against abuse of power, and forces those with the most at stake to focus on the issues in dispute. At its worst, it can be manipulated to the benefit of those least deserving, but at its best, it offers every injured party a forum for relief, sometimes against powerful odds. No doubt, the arguments about whether and how to change the system will go on into the twenty-first century. As a system that has evolved over three hundred years, it probably will undergo some changes. But the basic values at its heart, such as **PRESUMPTION OF INNOCENCE**, the right to trial by jury, and protection of individual rights, appear to be firmly cemented as the cornerstones of U.S. **JURISPRUDENCE**.

## ADVERSARY SYSTEM

*The scheme of American* **JURISPRUDENCE** *wherein a judge or jury renders a decision in a controversy between or among parties who assert contradictory positions during a judicial examination such as a trial, hearing, or other adjudication.*

U.S. courtrooms have often been compared to battlefields or playing fields. The adversary system by which legal disputes are settled in the United States promotes the idea that legal controversies are battles or contests to be fought and won using all available resources.

The contemporary Anglo-American adversary system has gradually evolved, over several hundred years. Early English jury trials were unstructured proceedings in which the judge might act as inquisitor, or even prosecutor, as well as fact finder. Criminal defendants were not allowed to have counsel, to call witnesses, to conduct cross-examination, or to offer **AFFIRMATIVE DEFENSES**. All types of evidence were

allowed, and juries, although supposedly neutral and passive, were actually highly influenced by the judge's remarks and instructions. In fact, before 1670, jurors could be fined or jailed for refusing to follow a judge's directions.

The late 1600s saw the advent of a more modern adversarial system in England and its American colonies. Juries took a more neutral stance, and appellate review, previously unavailable, became possible in some cases. By the eighteenth century, juries assumed an even more autonomous position as they began functioning as a restraint on governmental and judicial abuse and corruption. The Framers of the Constitution recognized the importance of the jury trial in a free society by specifically establishing it in the SIXTH AMENDMENT as a right in criminal prosecutions. The Eight Amendment also established the right to a jury in noncriminal cases: "In Suits at COMMON LAW, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The independent judiciary was somewhat slower in developing. Before the 1800s, English judges were still biased by their ties with the Crown, and U.S. judges were often politically partisan. U.S. Supreme Court Chief Justice JOHN MARSHALL, who served from 1801 to 1835, established the preeminence and independence of the high court with his opinion in MARBURY V. MADISON, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803). *Marbury* established "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution" (*Cooper v. Aaron,* 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5 [1958]). By the early 1800s, attorneys had risen to prominence as advocates and presenters of evidence. Procedural and evidentiary rules were developed, and they turned the focus of litigation away from arguments on minute points of law and toward the resolution of disputes. The basic parameters of the United States' modern legal system had been established.

In the Anglo-American adversary system, the parties to a dispute, or their advocates, square off against each other and assume roles that are strictly separate and distinct from that of the decision maker, usually a judge or jury. The decision maker is expected to be objective and free from bias. Rooted in the ideals of the American Revolution, the modern adversary system reflects the conviction that everyone is entitled to a day in court before a free, impartial, and independent judge. Adversary theory holds that requiring each side to develop and to present its own proofs and arguments is the surest way to uncover the information that will enable the judge or jury to resolve the conflict.

In an adversary system, the judge or jury is a neutral and passive fact finder, dispassionately examining the evidence presented by the parties with the objective of resolving the dispute between them. The fact finder must remain uninvolved in the presentation of arguments so as to avoid reaching a premature decision.

The Anglo-American requirement of an impartial and passive fact finder contrasts with the requirements of other legal systems. For example, most European countries employ the INQUISITORIAL SYSTEM, in which a judge investigates the facts, interviews witnesses, and renders a decision. Juries are not favored in an inquisitorial court, and the disputants are minimally involved in the fact-finding process. The main emphasis in a European court is the search for truth, whereas in an Anglo-American courtroom, truth is ancillary to the goal of reaching the fairest resolution of the dispute. It has been suggested that the inquisitorial system, with its goal of finding the truth, is a more just and equitable legal system. However, proponents of the adversary system maintain that the truth is most likely to emerge after all sides of a controversy are vigorously presented. They also point out that the inquisitorial system has its own deficiencies, including abuse and corruption. European judges must assume all roles in a trial, including those of fact finder, evidence gatherer, interrogator, and decision maker. Because of these sometimes conflicting roles, European judges might tend to prejudge a case in an effort to organize and dispose of it. Inquisitorial courts are far less sensitive to individual rights than are adversarial courts, and inquisitorial judges, who are government bureaucrats (rather than part of an independent judicial branch), might identify more with the government than with the parties. Critics of the inquisitorial system argue that it provides little, if any, check on government excess and that invites corruption, BRIBERY, and abuse of power.

The parties to an Anglo-American lawsuit are responsible for gathering and producing all of the evidence in the case. This challenge forces them to develop their arguments and to present

their most compelling evidence, and it also preserves the neutrality and passivity of the fact finder. The adversary process is governed by strict RULES OF EVIDENCE and procedure that allow both sides equal opportunity to argue their cases. These rules also help to ensure that the decision is based solely on the evidence presented. The structure of this legal system naturally encourages zealous advocacy by lawyers on behalf of their clients, but the code of ethics governing the conduct of lawyers is designed to curb the tendency to attempt to win by any means.

The adversary system has staunch defenders as well as severe critics. The image of the courtroom as a battleground or playing field where contestants vie for victory is evident in the news media's preoccupation with who is "winning" or "losing" or "scoring points" in such highly visible cases as the 1995 trial of O. J. SIMPSON, an actor, sportscaster, and former professional football player who was tried for killing his former wife, Nicole Brown Simpson, and her friend Ronald Goldman.

The emphasis on "winning at all costs" without commensurate concern for truth-seeking dismays some U.S. citizens, and a growing number are demanding reforms in the legal system. During the 1980s and 1990s, the use of alternative forms of dispute resolution such as mediation and ARBITRATION grew dramatically. However, defenders of the adversary system note that these alternatives have been used all along, in the form of settlement conferences, minitrials, and summary jury trials, and that the vast majority of lawsuits are already settled before the parties ever appear in court.

When a dispute cannot be resolved without a trial, the adversary system is the established method of adjudication in the United States. Indeed, the organized bar remains committed to the notion that vigorous advocacy by both sides of a legal controversy ultimately leads the judge or jury to the facts needed for a fair resolution and that it is the process that is best calculated to elicit the truth and to protect individual rights. Although many concede that the adversary system is imperfect and that it may be subject to abuse and manipulation, the majority still believe that, by giving all parties and their advocates the opportunity to present evidence and arguments before an impartial judge, it promotes a free and pluralistic society with the best available means of settling disputes.

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CROSS-REFERENCES

Alternative Dispute Resolution; Civil Law; Common Law; Inquisitorial System; Judge; Judiciary; Jury.

## ADVERSE INTEREST

*The legal right or liability of a person called to testify as a witness in a lawsuit that might be lost or impaired if the party who called him or her to testify wins the case.*

This interest against the interest of the party calling a witness to the stand makes him or her an adverse or hostile witness. Although usually the party calling a witness to testify cannot impeach that person's credibility, if the person has an adverse interest, the testimony may be discredited by the party who called that witness to the stand.

## ADVERSE POSSESSION

*A method of gaining legal title to real property by the actual, open, hostile, and continuous possession of it to the exclusion of its true owner for the period prescribed by state law.* PERSONAL PROPERTY *may also be acquired by adverse possession.*

Adverse possession is similar to prescription, another way to acquire title to real property by occupying it for a period of time. Prescription is not the same, however, because title acquired under it is presumed to have resulted from a lost grant, as opposed to the expiration of the statutory time limit in adverse possession.

### Real Property

Title to land is acquired by adverse possession as a result of the lapse of the STATUTE OF LIMITATIONS for EJECTMENT, which bars the commencement of a lawsuit by the true owner to recover possession of the land. Adverse pos-

session depends upon the intent of the occupant to claim and hold real property in opposition to all the world and the demonstration of this intention by visible and hostile possession of the land so that the owner is or should be aware that adverse claims are being made.

The legal theory underlying the vesting of title by adverse possession is that title to land must be certain. Since the owner has, by his or her own fault and neglect, failed to protect the land against the hostile actions of the adverse possessor, an adverse possessor who has treated the land as his or her own for a significant period of time is recognized as its owner.

Title by adverse possession may be acquired against any person or corporation not excepted by statute. Property held by the federal government, a state, or a MUNICIPAL CORPORATION cannot be taken by adverse possession. As long as the property has a public use, as with a highway or school property, its ownership cannot be lost through adverse possession.

Anyone, including corporations, the federal government, states, and municipal corporations, can be an adverse possessor.

**Elements** In order that adverse possession ripen into legal title, nonpermissive use by the adverse claimant that is actual, open and notorious, exclusive, hostile, and continuous for the statutory period must be established. All of these elements must coexist if title is to be acquired by adverse possession. The character, location, present state of the land, and the uses to which it is put are evaluated in each case. The adverse claimant has the burden of proving each element by a PREPONDERANCE OF THE EVIDENCE.

***Actual*** Adverse possession consists of actual occupation of the land with the intent to keep it solely for oneself. Merely claiming the land or paying taxes on it, without actually possessing it, is insufficient. Entry on the land, whether legal or not, is essential. A TRESPASS may commence adverse possession, but there must be more than temporary use of the property by a trespasser for adverse possession to be established. Physical acts must show that the possessor is exercising the dominion over the land that an average owner of similar property would exercise. Ordinary use of the property—for example, planting and harvesting crops or cutting and selling timber—indicates actual possession. In some states acts that constitute actual possession are found in statute.

***Open and Notorious*** An adverse possessor must possess land openly for all the world to see, as a true owner would. Secretly occupying another's land does not give the occupant any legal rights. Clearing, fencing, cultivating, or improving the land demonstrates open and notorious possession, while actual residence on the land is the most open and notorious possession of all. The owner must have actual knowledge of the adverse use, or the claimant's possession must be so notorious that it is generally known by the public or the people in the neighborhood. The notoriety of the possession puts the owner on notice that the land will be lost unless he or she seeks to recover possession of it within a certain time.

***Exclusive*** Adverse possession will not ripen into title unless the claimant has had exclusive possession of the land. Exclusive possession means sole physical occupancy. The claimant must hold the property as his or her own, in opposition to the claims of all others. Physical improvement of the land, as by the construction of fences or houses, is evidence of exclusive possession.

An adverse claimant cannot possess the property jointly with the owner. Two people may, however, claim title by adverse possession as joint tenants if they share occupancy of the land. When others or the general public have regularly used or occupied the land with the adverse claimant, the requirement of exclusive possession is not satisfied. Casual use of the property by others is not, however, inconsistent with exclusive possession. Generally, EASEMENTS do not affect the exclusive possession by an adverse possessor. In some jurisdictions easements exercised by the public or railroad rights of way will destroy exclusive possession.

***Hostile*** Possession must be hostile, sometimes called adverse, if title is to mature from adverse possession. Hostile possession means that the claimant must occupy the land in opposition to the true owner's rights. There need not be a dispute or fighting over title as long as the claimant intends to claim the land and hold it against the interests of the owner and all the world. Possession must be hostile from its commencement and must continue throughout the statutory period.

One type of hostile possession occurs when the claimant enters and remains on land under color of title. Color of title is the appearance of title as a result of a deed that seems by its lan-

guage to give the claimant valid title but, in fact, does not because some aspect of it is defective. If a person, for example, was suffering from a legal disability at the time he or she executed a deed, the grantee-claimant does not receive actual title. But the grantee-claimant does have color of title because it would appear to anyone reading the deed that good title had been conveyed. If a claimant possesses the land in the manner required by law for the full statutory period, his or her color of title will become actual title as a result of adverse possession.

***Continuous*** Adverse possession must be continuous for the full statutory period if title is to vest. Continuity means regular, uninterrupted occupancy of the land. Mere occasional or sporadic use is not enough. Continuity is sometimes explained as the daily control of the land by the adverse claimant for the length of the statutory period. If a person has continuously occupied only a part of all the land claimed under adverse possession, he or she will acquire title only to the occupied portion.

While continuous possession is required for the acquisition of title by adverse possession, it is not necessary that only one person hold the land continuously for the statutory period. The time periods that successive adverse occupants have possessed the land may be added together to meet the continuity requirement if privity exists between the parties. The addition of these different periods is called tacking. Privity refers to the giving of possession of the land from one owner to the next so that it is continuously occupied by a possessor. Privity exists between different persons whose interests are related to each other by a sale or inheritance of the land or by operation of law, as possession by a trustee in BANKRUPTCY.

Tacking is permitted only when the possession by the prior occupant had been adverse or under color of title. If any time lapses between the end of one owner's possession and the start of another's occupation, there is no continuity, so tacking will not be allowed.

Interruption of continuous possession deprives the adverse possessor of the legal effect of his or her prior occupancy. The statute of limitations will begin to run again from the time he or she starts actual, open, hostile, notorious, and exclusive possession. The length of the interruption is insignificant as long as it disturbs continuous possession. At that time the law restores constructive possession of the land to the true owner.

The commencement of a lawsuit by the owner against the occupant over the right of ownership and possession of the land is one way to interrupt continuous possession. It may be an action to quiet title, for trespass, for an INJUNCTION involving possessive rights, or to file a petition for registration of land title. Such lawsuits will destroy the continuity of possession only if successfully pursued to final judgments. If the owner chooses to abandon or settle a suit or if a court dismisses it, the continuity of possession is not breached.

The entry of the owner upon the land with the intent to repossess it is a clear exercise of ownership that disturbs possession. A survey of the land made at the request of the true owner does not interrupt possession unless the purpose is to help the true owner take possession. The owner's actions must be notorious and open so there can be no doubt as to what is intended. An accidental, casual, secret, or permissive entry is ineffective. While the entry must be notorious, it must also be peaceable to prevent violence and warfare, which might otherwise result.

The payment of real estate taxes by the owner, while demonstrating that he or she has not abandoned land, is not considered to have any impact on continuous possession.

The adverse claimant may destroy his or her continuous possession by abandoning the land or giving it to someone else, even the owner, before the time at which title to it would vest. It does not matter how long or brief the ABANDONMENT is as long as it was intentional. A temporary absence from the land is not the same as an abandonment and has no effect on the occupancy, provided it is for a reasonable period of time.

***Statutory Period*** The time period of the statute of limitations that must expire before title can be acquired by adverse possession varies from state to state. No statute will begin to run until the adverse claimant actually possesses the property in question under color of title or claim of right, where necessary. As of that time, the landowner is entitled to bring a lawsuit against the possessor to recover the property.

The adverse possessor must occupy the property for the full statutory period. In jurisdictions that also require color of title, it must coexist with possession for the complete period.

If the statute of limitations has been suspended—for example, because there is a lawsuit

pending between the owner and the claimant or the owner is insane, an infant, or serving in the armed services—that amount of time will not be counted toward the time necessary for the acquisition of title.

### Acquired Title

Once adverse possession is completed, the claimant has full legal title to the property. The expiration of the statutory period eliminates any CAUSE OF ACTION or liability for ejectment or trespass regarding the new owner's prior unlawful possession of the property. Once the time period is satisfied, the adverse possessor is considered the original owner of the land. He or she may use the land any way he or she sees fit provided it is lawful.

### Personal Property

Ownership of personal property may be acquired by adverse possession if the same requisites are met. The claimant must possess the property actually, openly, notoriously, exclusively, hostilely, under claim of right, and uninterrupted for the statutory period.

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CROSS-REFERENCES

Cause of Action; Color of Title; Easement; Real Property; Statute of Limitations; Title; Trespass.

## ADVICE AND CONSENT

*The authority given by the U.S. Constitution to the Senate to ratify treaties and confirm presidential cabinet, ambassadorial, and judicial appointments.*

Article II, Section 2, of the Constitution gives the president the right to negotiate foreign treaties and to nominate individuals to high-ranking government positions, including cabinet members, ambassadors, and federal judges. However, these powers are conditioned upon the advice and consent of the Senate. Section 2 requires the Senate to approve treaties by a two-thirds majority, while presidential appointments require a simple majority. The advice and consent requirement is an example of one of the checks and balances built into the Constitution. The provision seeks to limit PRESIDENTIAL POWER.

The Senate has used the treaty ratification authority to extract changes in negotiated treaties and, in some cases, to reject an international agreement. The most famous rejection involved President WOODROW WILSON's desire to have the United States join the newly created LEAGUE OF NATIONS after WORLD WAR I. The Senate, hostile to the concept of international government, refused to ratify the treaty in 1919, which severely weakened the organization. In contrast, the Senate ratified the UNITED NATIONS charter in 1945.

The advice and consent power has drawn the most public attention when the Senate has rejected presidential nominations to the cabinet and to federal judgeships. The Senate voted down the 1987 Supreme Court nomination of ROBERT BORK by President RONALD REAGAN, leading to charges that the Senate had politicized the confirmation process. CLARENCE THOMAS was confirmed as Supreme Court justice in 1991, but only after a bruising confirmation struggle that was nationally televised. In 2002, the Senate rejected several judicial nominations by President GEORGE W. BUSH, again leading to charges of partisan politics.

## ADVISE

*To give an opinion or recommend a plan or course of action; to give notice; to encourage, inform, or acquaint.*

Advise does not mean the same as instruct or persuade. If a statute authorized a trial court to acquit, the court has no power to instruct the jury to acquit. The court can only counsel, and the jury is not bound by the advice.

## ADVISEMENT

*Deliberation; consultation.*

A court takes a case *under advisement* after it has heard the arguments made by the counsel of opposing sides in the lawsuit but before it renders its decision.

## ADVISORY JURY

*A jury that makes recommendations to a judge but does not render final judgment.*

Advisory juries are authorized by Rule 39(c) of the Federal Rules of Civil Procedure (FRCP). This provision states that in all actions where the plaintiff does not have the right to a jury trial, the court may authorize an advisory jury if a party requests it or the judge concludes independently that it is appropriate. The "verdict" the advisory jury renders is not binding on the judge. Advisory juries are typically used when the federal government is the sole defendant in a civil lawsuit and when the claims at issue are particularly sensitive. In addition, OBSCENITY trials sometimes employ an advisory jury to determine whether the material in question is obscene based on community standards. Because the FRCP serves as the model for state rules of procedure, most states also authorize advisory juries.

The advisory jury originated in English courts of EQUITY, in which the chancellor (the name for an equity court judge) heard cases without a jury but had discretion to appoint a jury to advise him. In modern law a judge has great discretion in determining how much weight an advisory jury verdict will bear on a final judgment. Some judges adopt advisory jury findings unless they are clearly erroneous while other judges consider the findings an additional piece of evidence to be weighed in deciding the case.

After the government siege of the Branch Davidian compound in Waco, Texas, in 1993, an advisory jury was used in a lawsuit against the federal government filed by the survivors of the fire that ended the siege, and relatives of those who died in the fire. The survivors' WRONGFUL DEATH action asked for $675 million in damages. Under the FEDERAL TORT CLAIMS ACT the survivors did not have a right to a jury trial but the federal judge concluded that an advisory jury was needed. In July 2000, the jury ruled in favor of the federal government on all counts and the judge endorsed these findings in a final judgment.

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## ADVISORY OPINION

*An opinion by a court as to the legality of proposed legislation or conduct, given in response to a request by the government, legislature, or some other interested party.*

Advisory opinions are issued in the absence of a case or controversy. Although they are not binding and carry no precedential value, they are sometimes offered as persuasive evidence in cases where no precedent exists.

Federal courts will not issue advisory opinions. This rule, based on the constitutional guarantee of SEPARATION OF POWERS, was established in 1793 when JOHN JAY, the first chief justice of the Supreme Court, refused to provide legal advice in response to requests by President GEORGE WASHINGTON and Treasury Secretary ALEXANDER HAMILTON. Washington asked the Court for advice relating to his Neutrality Proclamation in regard to the French Revolution. Hamilton asked Jay for an opinion on the constitutionality of a resolution passed by the Virginia House of Representatives. In both instances, the Court diplomatically but firmly refused to supply an opinion.

The Supreme Court has steadfastly resisted subsequent efforts to elicit advisory opinions, even when these efforts appear under the guise of an actual lawsuit. Thus, in *Muskrat v. United States,* 219 U.S. 346, 31 S. Ct. 250, 55 L. Ed. 246 (1911), the Court struck down an act of Congress that authorized the plaintiffs to sue the United States to determine the validity of certain laws. The Court found the lawsuits authorized by the act to be thinly veiled attempts to obtain advisory opinions, since the constitutional requirements of justiciability and an actual case or controversy were not satisfied. Justice WILLIAM R. DAY, writing for the Court, predicted that if the justices rendered a judgment in the case,

> the result will be that this court, instead of keeping within the limits of judicial power and deciding cases or controversies arising between opposing parties, as the Constitution intended it should, will be required to

> give opinions in the nature of advice concerning legislative action, a function never conferred upon it by the Constitution.

Echoing the convictions expressed in *Muskrat,* Supreme Court Justice FELIX FRANKFURTER, writing on advisory opinions, stated, "Every tendency to deal with constitutional questions abstractly, to formulate them in terms of barren legal questions, leads to … sterile conclusions unrelated to actualities."

Unlike their federal counterpart, a number of state constitutions authorize their courts to issue advisory opinions. However, even in those states, courts usually restrict advisory opinions to pending legislation and refuse requests for opinions on abstract or theoretical QUESTIONS OF LAW. In any event, the opinions are not binding authority in future cases.

While courts are typically limited in issuing advisory opinions, the attorney general of the United States and state attorneys general frequently issue opinions that are advisory in nature. By statute, the president or head of an executive department may require from the U.S. attorney general an opinion on questions of law arising from the administration of that office or department (28 U.S.C.A. §§ 511-512 [1993]). Most states charge attorneys general with similar responsibilities. Although advisory opinions issued by attorneys general are not typically binding in nature, in some circumstances the opinions may bind the authorities that request them.

Advisory opinions have their greatest effect as guides to policy making for the executive and legislative branches of state government. They are most often sought in the areas of intergovernmental relations, taxation, and finance.

Advisory opinions contrast with declaratory judgments, which determine the rights of litigants in an actual controversy and involve specific individuals who are at least nominally adverse to each other. Declaratory judgments are allowed by courts at both the federal and state levels. Although the line between advisory opinions and declaratory judgments is a fine one, the Supreme Court has consistently reiterated the necessity of keeping it intact. In *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 56 S. Ct. 466, 80 L. Ed. 688 (1936), the justices insisted that the Federal Declaratory Judgment Act, which gives federal courts the power to issue declaratory judgments, "does not attempt to change the essential requisites for the exercise of judicial power." An actual, not theoretical, case or controversy between specific parties must still be shown. In another case, the Court stated specifically that the Declaratory Judgment Act cannot be invoked to "obtain an advisory decree upon a hypothetical state of facts" (*Electric Bond & Share Co. v. Securities & Exchange Commission,* 303 U.S. 419, 58 S. Ct. 678, 82 L. Ed. 936 [1938]).

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#### CROSS-REFERENCES

Attorney General; Declaratory Judgment; Evidence; Hamilton, Alexander; Justiciable; Precedent; Separation of Powers; Washington, George.

## ADVOCACY

*The act of* PLEADING *or arguing a case or a position; forceful persuasion.*

## ADVOCATE

*To support or defend by argument; to recommend publicly. An individual who presents or argues another's case; one who gives legal advice and pleads the cause of another before a court or tribunal; a counselor. A person admitted to the* PRACTICE OF LAW *who advises clients of their legal rights and argues their cases in court.*

## AERONAUTICS

*The science and art of flight, encompassing the functioning and ownership of aircraft vehicles from balloons to those that travel into space.*

*Aviation* is travel by means of an aircraft that is heavier than air. *Aerospace* is a term used in reference to the atmosphere and the area beyond. The *aerospace industry* is involved with the planning and building of vehicles operating in both air and space.

*Airspace* is the region that extends above real property. *Air transportation,* as set forth by federal statute, refers to interstate and distant conveyance of people, cargo, and mail by U.S. and foreign aircraft vehicles.

### Airspace Rights

The federal government has jurisdiction over airspace within its domain, and each state

has authority over the space above the grounds within its borders except in places within the domain of federal regulation. An aircraft is subject to the authority of the federal government and to the authority of a particular state while traveling over it. Landowners have air rights that extend upward beyond their property, the boundaries of which are delineated by local ZONING ordinances. These air rights ordinarily may be used to the extent that they are connected to the enjoyment of the property.

Since the general public has a right to freedom of travel in the navigable airspace of the United States, an aircraft may have legal access to airspace above private property. A landowner might have a civil CAUSE OF ACTION for TRESPASS or NUISANCE, however, where an aircraft enters landowner's airspace in such manner as to constitute an infringement on the landowner's right to the use and possession of the property. In some instances the landowner is entitled to an INJUNCTION to prohibit unlawful intrusion of his or her airspace.

### Air Transportation Regulation

The FEDERAL AVIATION ADMINISTRATION (FAA) is the agency with the authority to govern air commerce. The intent of such regulation is to advance the growth and safety of air travel while simultaneously satisfying national defense needs. The director of the FAA has the power to engage in, or monitor, work and testing that will bring about the production of advanced aircraft; to set forth prescribed rules and regulations for the planning and servicing of airplanes; and to administer stringent sanctions if the regulations are not observed. The FAA is also responsible for air traffic control at airports. The NATIONAL TRANSPORTATION SAFETY BOARD (NTSB) is charged with the responsibility of investigating the circumstances surrounding, and the causes of, accidents involving aircraft.

### Certificate Requirements

An airplane must have a valid airworthiness certificate in order for it to be lawfully operated. The airworthiness of a plane is determined by an inspector authorized by the FAA. The inspector may neither delegate this duty to inspect the aircraft nor depart from procedures for inspection that have been prescribed by the administrator of the FAA.

The FAA administrator is empowered to create minimum standards for the inspection, maintenance, and repair of air carrier equipment as well as for safe operation of the vehicle. Another important function of the administrator is to issue certificates to eligible aeronautical personnel: that includes pilots, navigators, and people who inspect, maintain, overhaul, and repair aircraft. The administrator specifies the particular function that each of these individuals is qualified to perform.

Certain prerequisites exist for an airline pilot rating, including a great degree of technical skill, medical fitness, care, judgment, and emotional stability. If public safety is endangered, the FAA administrator will either revoke or suspend a pilot's license. A pilot is entitled to notice and a fair hearing before the revocation or suspension of his or her certification, absent an emergency that warrants immediate action. The pilot may appeal the order of suspension or revocation to the NTSB, and subsequent appeals may be brought to the usual appellate channels of federal courts ordinarily beginning in a U.S. district court.

### Regulation on the State and Local Level

A state or municipality has the authority to regulate the air traffic that affects it. This power, however, is limited by the condition that the regulation must not interfere or conflict with either interstate commerce or federal restraints. State or municipal regulations on noise precipitated by aircraft engines may not, for example, conflict with federal rules governing noise POLLUTION.

### Airport Operation

The state can give a local legislature the power to regulate airports and their connected facilities. States may join together to form a regional airport authority to operate an airport. An airport may also be built and maintained by a private party or a corporation, subject to the requirement that use and enjoyment of neighboring landowners' property is not unreasonably disrupted.

Airports that are not properly constructed and operated might amount to nuisances. A private homeowner can sue for damages in the event that an improperly run airport constitutes a nuisance, and can attempt to have the court suspend its operation pursuant to the provisions of an injunction. Notice must be given to the municipality before such a cause of action may be commenced against it. In considering the need for intervention concerning the building and operation of airports, courts examine the

interests of the concerned parties in light of prevailing public policy in favor of encouraging quiet use and enjoyment of one's land compared to the interests of society in accessible and convenient air travel.

The creation and maintenance of airports are subject to zoning regulations. In certain jurisdictions a public agency is empowered by the state to adopt zoning laws that limit the use of adjacent property. Such ordinances are designed to reduce interference with the operation of the airport.

The owner of a public airport may arrange leases for its use, and a municipality that owns an airport may charge reasonable fees for the right to do business there. A public airport owner has the power to govern its ground transportation, to give qualified individuals and companies exclusive privileges to transport passengers to and from the airport, and to run an automobile rental company on airport grounds.

### Use and Ownership of Aircraft Vehicles

The legality of the sale or conveyance of an aircraft is regulated by the statute of the jurisdiction where the document of conveyance or sale is transferred.

Federal law mandates the registration of aircraft and the proper recording of any paper that affects its title, such as a mortgage. Such recording must take place at the administration and records branch of the FAA. In addition, documents creating security interests in the aircraft must be recorded to provide notice to prospective purchasers of prior claims to the vehicle.

General principles of contract law govern aircraft rental and parties to the agreement are ordinarily bound by its terms. The renter of a defective vehicle might, however, has the right to terminate the contract since the individual offering the aircraft for rent is obligated to provide a vehicle in satisfactory operating condition.

### Duties in Aircraft Operation

An individual who is injured as a result of the operation of an aircraft usually has a legally enforceable right to damages for any injuries or losses sustained.

**Manufacturers** A manufacturer is under a duty to exercise reasonable care and proficiency in the design, production, and assembly of an aircraft vehicle. Liability for a departure from this duty may be extended to the manufacturer regardless of whether that company was directly involved in the manufacture of the parts. The law will imply a WARRANTY of proper design and manufacture of an aircraft. A manufacturer of parts will also be held responsible for damage caused by the product and must use a high degree of care in their production, although they need not be made accident-proof. A manufacturer is not relieved of a continuing obligation to improve the component parts of an air vehicle when there is continuing risk to safe travel.

**Pilots** The pilot of a private aircraft is subject to ordinary NEGLIGENCE standards in the absence of a special law. The pilot is required to exercise ordinary, but not extreme, care and caution regarding its operation. Negligence rules, however, impose a greater standard of care when applied to aviation, because of the severity and magnitude of potential harm posed by improper operation of an aircraft.

**Owners** Generally ownership of an aircraft vehicle is insufficient to render an owner liable for damage resulting from its unreasonable operation by another. In certain jurisdictions, however, an owner who lends a plane to an individual he or she knows to be reckless or incompetent will be held responsible. Similarly, the federal or state government cannot evade liability for damage arising out of the improper operation of its aircraft by government employees.

**Passengers** Passengers in a private aircraft have the obligation to exercise reasonable care for their own well-being. They must subscribe to the reasonable person standard and refrain from going on a particular flight that would be an obvious danger, such as a flight during a hurricane.

Passengers on airlines and other air common carriers must observe safety precautions by obeying instructions of flight attendants, such as by fastening their seatbelts.

**Operators of Airplanes** An airport operator has the duty to exercise ordinary care in protecting aircraft on its premises and the people who use airport facilities. Neglecting to maintain the airport premises in a reasonably safe condition results in TORT liability for resulting injuries to persons present.

### Air Traffic Control

The federal government has responsibility for air traffic control. Air traffic controllers have a duty to keep aircraft from colliding with each other by guiding their paths. Liability can be

*The Federal Aviation Administration has responsibility for air traffic control. Air traffic controllers have a duty to keep aircraft from colliding with each other by guiding their path.*
AP/WIDE WORLD PHOTOS

extended to the federal government for the negligence of its air traffic controllers. Contributory negligence by the individual harmed might, however, prevent recovery against the United States for damage caused only partially by the negligence of controllers.

### Airlines

An airline has the duty to employ the greatest degree of care possible to protect its passengers. Liability might be imposed for harm to a passenger resulting from wrongful behavior of its employees. It must also take steps to guard passengers against misconduct of fellow passengers.

Companies that accept goods for air transport must exercise a high degree of care to properly handle and deliver such goods. Liability for loss or damage may be restricted to a prearranged amount, which must be listed on the passenger's ticket in the case of baggage or on the bill of lading regarding the goods shipped.

### Flying Schools

A flying school that maintains facilities that interfere with the customary use and enjoyment of property by neighboring landowners can be liable for nuisance or trespass. A student pilot flying with a flight instructor is considered legally to be a passenger, and, therefore, the school owes the same duty of care to the student as a commercial airline owes to its passenger. A trainee, however, assumes certain risks while being taught to fly and the school can successfully assert the defense of ASSUMPTION OF THE RISK in tort cases. A member of a flight club, as an owner of an airplane that belongs to the club, may be held personally liable for accidents that might occur while he or she is piloting the craft. Statutes that govern the liability of a flight club member should be consulted.

Following the SEPTEMBER 11TH TERRORIST ATTACKS, Congress moved to tighten regulations on flying schools. Terrorists who hijacked and crashed airplanes into the World Trade Center and the Pentagon had trained at flying schools in the United States. The goal of the post-September 11 reform is to make information about foreign flight school enrollees more readily accessible to law enforcement agencies.

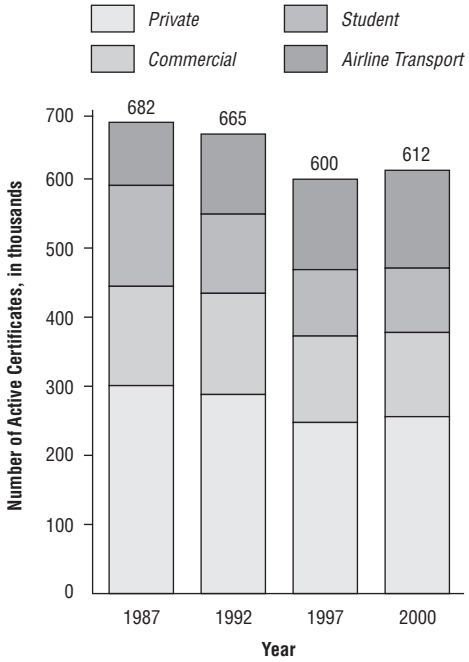


SOURCE: Federal Aviation Administration.

Under the USA PATRIOT ACT OF 2001, flying schools are one of several types of educational institutions required to participate in the Student and Exchange Visitor Information System (SEVIS) implemented by the U.S. Immigration and Naturalization Service. Exempt from federal privacy restrictions, SEVIS is a database of information about foreign students, such as identification, visa status, and criminal data. Flying schools failing to participate in SEVIS may lose their ability to enroll international students. Under broadened powers granted by the PATRIOT Act, the U.S. Attorney General may make use of such information to seize educational records, conduct surveillance, bypass certain SEARCH WARRANT requirements, and take into custody ALIENS whose visa status is in violation.

### Air Piracy

Aircraft PIRACY or an attempt to hijack an airplane is a federal offense, punishable by either death or imprisonment. Airlines can deny an individual passage on an airplane if a magnetometer (an instrument used to measure magnetic intensity) indicates the presence of a metal object, such as a weapon, on that person by registering a positive reading and the person refuses to surrender to the appropriate officials any metal object that might have triggered the instrument.

### Aerospace

The National Aeronautics and Space Administration (NASA) was established by Congress to organize, direct, and carry out research into difficulties attached to flight within and beyond the atmosphere of the earth and to facilitate the development and functioning of aeronautical vehicles.

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CROSS-REFERENCES

Airlines; Carriers; Federal Aviation Administration; Hijacking; National Transportation Safety Board; Pilot; Terrorism.

## AFFIDAVIT

*A written statement of facts voluntarily made by an affiant under an oath or affirmation administered by a person authorized to do so by law.*

### Distinctions

An affidavit is voluntarily made without any cross-examination of the affiant and, therefore, is not the same as a deposition, a record of an examination of a witness or a party made either voluntarily or pursuant to a subpoena, as if the party were testifying in court under cross-examination. A pleading—a request to a court to exercise its judicial power in favor of a party that contains allegations or conclusions of facts that are not necessarily verified—differs from an affidavit, which states facts under oath.

### Basis

An affidavit is based upon either the personal knowledge of the affiant or his or her information and belief. Personal knowledge is the recognition of particular facts by either direct observation or experience. Information

and belief is what the affiant feels he or she can state as true, although not based on firsthand knowledge.

### The Affiant

Any person having the intellectual capacity to take an oath or make an affirmation and who has knowledge of the facts that are in dispute may make an affidavit. There is no age requirement for an affiant. As long as a person is old enough to understand the facts and the significance of the oath or affirmation he or she makes, the affidavit is valid. A criminal conviction does not make a person incapable of making an affidavit, but an adjudication of INCOMPETENCY does.

Someone familiar with the matters in question may make an affidavit on behalf of another, but that person's authority to do so must be clear. A guardian may make an affidavit for a minor or insane person incapable of doing so. An attorney may make an affidavit for a client if it is impossible for the client to do so. When necessary to the performance of duties, a PERSONAL REPRESENTATIVE, agent, or corporate officer or partner may execute an affidavit that indicates the capacity in which the affiant acts.

A court cannot force a person to make an affidavit, since, by definition, an affidavit is a voluntary statement.

### The Taker of the Affidavit

Any public officer authorized by law to administer oaths and affirmations—such as city recorders, court clerks, notaries, county clerks, commissioners of deeds, and court commissioners—may take affidavits. Justices of the peace and magistrates are sometimes authorized to take affidavits. Unless restricted by state law, judges may take affidavits involving controversies before them.

An officer cannot take affidavits outside of the particular jurisdiction in which he or she exercises authority. The source of this authority must appear at the bottom of the affidavit. A notary, for example, would indicate the county in which he or she is commissioned and the expiration date of the commission.

An official seal is not essential to the validity of the affidavit but may be placed on it by the proper official.

**Affidavit**

STATE OF _____ COUNTY OF _____

BEFORE ME, the undersigned authority, _____ [name and capacity of officer before whom affidavit is sworn], on this _____ [day of month] day of _____ [month], 20____, personally appeared _____ [name of affiant], known to me to be a credible person and of lawful age, who being by me first duly sworn, on _____ [his or her] oath, deposes and says: _____ [set forth statement of facts].

_____ [signature of affiant]

_____ [typed name of affiant]

_____ [address of affiant]

Subscribed and sworn to before me, this _____ [day of month] day of _____ [month], 20____.

[Seal] _____ [signature of officer]

_____ [typed name of officer]

_____ [title of officer]

My commission expires: _____, 20____

*A sample affidavit*

### The Oath or Affirmation

Unless otherwise provided by statute, an oath is essential to an affidavit. The statement of the affiant does not become an affidavit unless the proper official administers the oath.

When religious convictions prevent the affiant from taking an oath, he or she may affirm that the statements in the affidavit are true.

### Contents

There is no standard form or language to be used in an affidavit as long as the facts contained within it are stated clearly and definitely. Unnecessary language or legal arguments should not appear. Clerical and grammatical errors, while to be avoided, are inconsequential.

The affidavit usually must contain the address of the affiant and the date that the statement was made, in addition to the affiant's signature or mark. Where the affidavit has been made is also noted. When an affidavit is based on the affiant's information and belief, it must state the source of the affiant's information and

**Affidavit for the Solicitation of Proxies**

**AFFIDAVIT**

**SOLICITATION OF PROXIES**

State of _____

County of _____

I, _____ , being first duly sworn, depose and say:

1. My name is _____.
2. I am engaged in the _____ business and my office address is _____ .
3. I desire to vote proxies for the following claims in the following amounts at the meeting of creditors of _____ _____ , above-named debtor, to be held on _____ (date).
4. A copy of the solicitation of each of the proxies is attached.
5. No consideration has been paid or promised by the affiant proxy holder for the proxies.
6. There is no agreement between the proxy holder and any other person for the payment of any consideration in connection with voting the proxy, or for the sharing of compensation with any person, or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate or, if there is an agreement, other than one to share compensation with a member or regular associate of the proxy holder's law firm, state that there is an agreement and give particulars.
7. _____ (If the proxy was solicited by a person other than the proxy holder: A statement signed and verified by the solicitor that no consideration has been paid or promised by the solicitor for the proxy and a statement _____ (state as in paragraph 6) is attached).
8. _____ (If the solicitor or proxy holder is a committee: A statement signed and verified by each member as to the amount and source of any consideration paid or to be paid to such member in connection with the case other than by way of dividend on each members claim is attached).

Dated: _____.

_____
Signature

_____
Address

(Jurat)

(Attachments)

*A sample affidavit for the solicitation of proxies*

the grounds for the affiant's belief in the accuracy of such information. This permits the court to draw its own conclusions about the information in the affidavit.

An affiant is strictly responsible for the truth and accuracy of the contents of the affidavit. If false statements are made, the affiant can be prosecuted for perjury.

### Functions

Affidavits are used in business and in judicial and administrative proceedings.

**Business** Generally affidavits are used in business whenever an official statement that others might rely upon is needed. Statements of the financial stability of a corporation, the pedigree of animals, and the financial conditions of a person applying for credit are examples of affidavits used in the commercial world.

**Judicial Proceedings** Affidavits serve as evidence in civil actions and criminal prosecutions in certain instances. They are considered a very weak type of evidence because they are not taken in court, and the affiant is not subject to cross-examination. Their use is usually restricted to times when no better evidence can be offered. If a witness who has made an affidavit is not available to testify at a trial, his or her affidavit may be admitted as evidence. If the witness is present, his or her affidavit is inadmissible except when used to impeach the witness's testimony, or to help the witness with past recollection of facts.

Affidavits are also used as evidence in ex parte proceedings such as a hearing for the issuance of a TEMPORARY RESTRAINING ORDER or an order to show cause. The expeditious nature of such proceedings is considered to substantially outweigh the weak PROBATIVE value of the affidavits. In addition, there is normally a subsequent opportunity in the course of litigation for the opposing party to refute the affidavits or cross-examine the affiants.

An affidavit based on the knowledge of the affiant is accorded more weight than one based on information and belief. When admissible, affidavits are not conclusive evidence of the facts stated therein.

**Administrative Proceedings** Affidavits are frequently used in administrative and QUASI-JUDICIAL proceedings as evidence when no objection is made to their admission and there is an opportunity for cross-examination.

## AFFILIATION PROCEEDING

*A court hearing to determine whether a man against whom the action is brought is the father of an illegitimate child and thus legally bound to provide financial support for the child.*

*Formerly referred to as* BASTARDY ACTIONS *or proceedings in many jurisdictions, as of 2003 these were called* PATERNITY *or* FILIATION PROCEEDINGS. *In several states, these proceedings are governed in part by the Uniform Parentage Act, first adopted by the* COMMISSIONERS ON UNIFORM LAWS *in 1973. The purpose of the act is to identify natural fathers through a paternity test so that a court may order* CHILD SUPPORT *obligations against them.*

CROSS-REFERENCES

Commissioners on Uniform Laws; DNA Evidence; Paternity; Paternity Suit.

## AFFINITY

*The relationship that a person has to the blood relatives of a spouse by virtue of the marriage.*

The doctrine of affinity developed from a MAXIM of CANON LAW that a HUSBAND AND WIFE were made one by their marriage. There are three types of affinity. *Direct affinity* exists between the husband and his wife's relations by blood, or between the wife and the husband's relations by blood. *Secondary affinity* is between a spouse and the other spouse's relatives by marriage. *Collateral affinity* exists between a spouse and the relatives of the other spouse's relatives. The determination of affinity is important in various legal matters, such as deciding whether to prosecute a person for INCEST or whether to disqualify a juror for bias.

## AFFIRM

*To ratify, establish, or reassert. To make a solemn and formal declaration, as a substitute for an oath, that the statements contained in an* AFFIDAVIT *are true or that a witness will tell the truth. In the practice of appellate courts, to declare a judgment, decree, or order valid and to concur in its correctness so that it must stand as rendered in the lower court. As a matter of* PLEADING, *to allege or aver a matter of fact.*

A judgment, decree, or order that is not affirmed is either remanded (sent back to the lower court with instructions to correct the irregularities noted in the appellate opinion) or reversed (changed by the appellate court so that the decision of the lower court is overturned).

## AFFIRMANCE

*A declaration by an appellate court that a judgment, order, or decree of a lower court that has been brought before it for review is valid and will be upheld.*

## AFFIRMATION

*A solemn and formal declaration of the truth of a statement, such as an* AFFIDAVIT *or the actual or prospective testimony of a witness or a party that takes the place of an oath. An affirmation is also used when a person cannot take an oath because of religious convictions.*

## AFFIRMATIVE ACTION

*Employment programs required by federal statutes and regulations designed to remedy discriminatory practices in hiring minority group members; i.e., positive steps designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination; commonly based on population percentages of minority groups in a particular area. Factors considered are race, color, sex, creed, and age.*

The idea of affirmative action was foreshadowed as early as the Reconstruction Era, which followed the U.S. CIVIL WAR. When that conflict ended, the former slave population throughout the South owned virtually nothing and had only a limited set of skills with which they could make a living. To help these newly emancipated citizens sustain a minimal economic base, the victorious General William T. Sherman proposed to divide up the land and goods from the sizable plantations of southeastern Georgia that were under his command and grant to each family of color "40 acres and a mule." The proposal ran into powerful political opposition, however, and it was never widely adopted.

Nearly a century later, this idea of assisting whole classes of individuals to gain access to the goods of U.S. life reemerged in U.S. law and society through a series of court decisions and political initiatives interpreting the CIVIL RIGHTS guarantees within the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT. These decisions and initiatives came to be known as affirmative action.

The term itself refers to both mandatory and voluntary programs intended to *affirm* the civil rights of designated classes of individuals by taking positive *action* to protect them from, in the words of Justice WILLIAM J. BRENNAN JR., "the lingering effects of pervasive discrimination" (*Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC,* 478 U.S. 421, 106 S. Ct. 3019, 92 L. Ed. 2d 344 [1986]). A law school, for example, might voluntarily take affirmative action to find and admit qualified students of color. An employer might recruit qualified women where only men have worked before, such as businesses that operate heavy equipment.

Affirmative action developed during the four decades following the decision in BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). In *Brown*, the Supreme Court held that public school SEGREGATION of children by race denied minority children equal educational opportunities, rejecting the doctrine of "separate but equal" in the public education context. During the 1960s and early 1970s, the CIVIL RIGHTS MOVEMENT as well as the VIETNAM WAR inspired members of minorities and women to advocate collectively for increased equality and opportunity within U.S. society. These groups appealed for equal rights under the Fourteenth Amendment, and they sought opportunity in the public arenas of education and employment. In many ways, they were successful. As affirmative action grew, however, it drew increasing criticism, often from men and whites, who opposed what they viewed as "reverse discrimination."

While the *Brown* decision declared segregated schools unlawful, it did not create affirmative action to remedy discriminatory practices. A decade after *Brown,* little had changed to integrate the nation's schools. The Court acted ahead of business executives and legislatures when it mandated, in *Green v. County School Board,* 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968), that positive actions must be taken to integrate schools. There followed the adoption of an array of devices such as redistricting, majority-to-minority transfers, school pairings, magnet schools, busing, new construction, and abandonment of all-black schools.

The first major legal setback for voluntary affirmation action was REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978), in which the Supreme Court struck down an admission plan at the University of California, Davis, medical school. The plan, which had set aside 16

places for minority applicants, was challenged by white applicant Allan Bakke, who had been refused admission even though he had higher test scores than some of the minority applicants. The Court held that by setting aside a specific number, or quota, of places by race, the school had violated Bakke's civil rights. By denying the "set-aside" practice of an affirmative action plan, the decision seemed to threaten the principle underlying affirmative action as well.

The following year, however, the Court found in UNITED STEELWORKERS V. WEBER, 443 U.S. 193, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979), that the voluntary plan of Kaiser Aluminum Company to promote some of its black workers into a special training program ahead of more senior white workers did *not* violate the latter's civil rights when it did not involve quotas. The Court also found in *Local 28 of Sheet Metal Workers' International Ass'n v. EEOC,* 478 U.S. 421, 106 S. Ct. 3019, 92 L. Ed. 2d 344 (1986), that rights were not being violated by a court-ordered membership goal of 29.23 percent minorities. Writing for the plurality, Justice Brennan said Title VII of the Civil Rights Act of 1964 does not prohibit courts from ordering "affirmative race-conscious relief as a remedy for past discrimination" in appropriate circumstances. Such circumstances might include "where an employer or LABOR UNION has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effect of pervasive discrimination."

The Court later found, in *City of Richmond v. J. A. Croson Co.,* 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989), that the Minority Business Utilization Plan of Richmond, Virginia, violated the rights of private contractors. The plan, which required 30 percent of all subcontracts to be awarded to minority-owned companies, was struck down because this municipality had failed to show compelling state interest for such a measure. The Court applied the compelling interest test after holding that race-based action by state and local government was subject to STRICT SCRUTINY. The Court extended this to the federal government in *Adarand Constructors, Inc. v. Pena,* 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

In *Johnson v. Transportation Agency,* 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987), the Court ruled that a county agency had not violated Title VII of the CIVIL RIGHTS ACT when, as part of an affirmative action plan, it took a female employee's gender into account in promoting her ahead of a male employee with a slightly higher test score. The Court held that a "manifest imbalance" existed in this workforce because of an underrepresentation of women, and that the employer had acted properly in using a "moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women."

At issue in affirmative action cases is whether the Equal Protection Clause of the Fourteenth Amendment can be employed to advance the welfare of one class of individuals for compelling social reasons even when that advancement may infringe in some way upon the life or liberty of another. The continuing existence of affirmative action laws and programs suggests that so far, the Supreme Court's answer has been yes.

Affirmative action plans may be undertaken voluntarily, as in the case of a private school's admissions goals; imposed by the courts to protect civil rights; or required by law to qualify for federal contracts. Plans required to qualify for federal contracts are enforced by the Office of Federal Contract Compliance Programs (OFCCP), an agency of the U.S. LABOR DEPARTMENT. The OFCCP defines its mission with its critics in mind: "Affirmative action is not preferential treatment. Nor does it mean that unqualified persons should be hired or promoted over other people. What affirmative action does mean is that positive steps must be taken to provide equal employment opportunity" (EEOC, U.S. Labor Department, Pub. No. 2850, *Making EEO and Affirmative Action Work* 8 [1993]). One ranking OFCCP administrator defended the program even more sharply by saying, "Affirmative action is not about goals and has nothing to do with preferences. It is about inclusion versus exclusion: people who have been excluded from participation in the process for years are now to be included."

Affirmation action plans are subject to mandatory compliance procedures, which may include monitoring by review, conciliation of disputes, exclusion from federal contract work, or even suit by the JUSTICE DEPARTMENT.

Criticism of affirmative action has been constant since the Supreme Court first articulated its views. By the 1990s, opponents began to press the Court to reverse its precedents both in employment and in higher education admission policies. Supporters of affirmative action openly worried

# How Much Affirmative Action Is Enough Affirmative Action?

In the combustive debate over affirmative action, fairness is the hottest issue of all. Most people agree that employers should hire and promote people fairly. Does affirmative action make this happen? Americans disagree sharply: a July 1995 Associated Press poll found that 39 percent think it does, but 48 percent said giving preference to women and minorities produces even greater unfairness. These numbers barely scratch the surface of the antagonisms in a debate now more than thirty years old. Proponents argue that the benefits of affirmative action policies are tangible, deserved, and necessary. Opponents reply that these benefits hide the real harm done by affirmative action: rewarding the wrong people, devaluing the idea of merit, and punishing white men. The two sides disagree on what should be done, yet there is no shortage of ideas. In the 1990s, a flurry of arguments have come from politicians, academics, civil rights leaders, and reformers that are aimed at preserving, modifying, or ending affirmative action.

History has drastically rewritten the terms of this debate. In the years of great advances in federal civil rights, Presidents **JOHN F. KENNEDY** and **LYNDON B. JOHNSON** could easily frame the issue as a purely moral one. Johnson put it this way in 1965:

> Freedom is not enough.... You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race, saying, "you are free to compete with all the others," and still justly believe you have been completely fair. Thus it is not enough to open the gates of opportunity.

Thirty years later, Senate majority leader **BOB DOLE** (R-Kan.) made this widely quoted attack: "The race-counting game has gone too far." Polls indicate that both Johnson and Dole spoke for a majority of citizens of their time. Johnson captured the essence of a nation willing to move beyond the legacy of **JIM CROW LAWS**. Dole summoned the resentment of white males who had seen the affirmative action net expand to hold not only minorities but also women and immigrants. But white men are hardly the only complainers: according to a March 1995 *Washington Post*-ABC News poll, 79 percent of middle-class white women oppose preferences for women.

For affirmative action's strongest supporters, explaining the new harshness in the policy's politics is a matter of going back to the beginning. They point out that affirmative action was never supposed to be painless. Making room for groups that have historically suffered discrimination means that the very group that did not suffer—white males—now has to do so. This can be characterized as the sins-of-the-fathers argument, illustrated in a 1995 briefing paper from the **AMERICAN CIVIL LIBERTIES UNION** (ACLU): "[W]hile it's true that white males in any given era may not all have been responsible for excluding people of color and women, all white males have benefited unjustly from that historical exclusion . . . [thus enjoying] privileged status and an unfair advantage." This position is supported by statistics: in 1995 white males held nearly 95 percent of senior management positions in major corporations, earned 25 to 45 percent more than women and minorities, and held well over 80 percent of the seats in Congress. On the other hand, from 1973 to 1993, black poverty increased from 31.4 to 33.1 percent. Without doubt, discrimination continues; from the perspective of supporters of affirmative action, the sins of the fathers are far from paid for.

that the Court would severely restrict affirmative action. For example, in 1997, the Court was scheduled to hear an appeal involving a New Jersey schoolteacher who claimed she had suffered discrimination because of an improper affirmative action plan (*Taxman v. Piscataway Township Bd. of Educ.*, 91 F.3d 1547 [3d. Cir. 1996]). Weeks before oral argument, supporters of affirmative action made the schoolteacher a financial settlement in return for her dismissing the case. They admitted that this was hardly a victory, but supporters pointed to troubling developments.

One of these developments was the Supreme Court's refusal to review a decision that struck down a university admission plan that used race as one factor for acceptance. In *Hopwood v. Texas*, 78 F. 3d. 932 (5th Cir. 1996), the Fifth Circuit Court of Appeals ruled that the practice of providing preferential treatment to minorities in a public university's admissions policy was repugnant to the Constitution.

The University of Texas Law School implemented an admissions policy in which the standards for admission were lowered for minorities. The school employed an index (called the Texas Index, or TI) that combined standardized test scores with grade point averages. A minimum score for acceptance was ten points higher for whites than for non-whites. The appeals court found problems with the structure of the TI.

Because equality still eludes the beneficiaries of affirmative action, supporters dismiss attacks on the policies as part of a backlash. Three decades of advances for affirmative action's beneficiaries have meant diminished dominance for white men, a group whose income has been falling in real terms since 1973. But, supporters say, the reason white men earn less today than their fathers did is not the fault of affirmative action. They point to long-term changes in the U.S. economy and job market as the real explanations for stagnating incomes, diminishing buying power, and decreasing job security. Yet affirmative action gets the blame. "We are the ultimate scapegoat for whatever goes wrong," Mary Frances Berry, chairwoman of the U.S. **COMMISSION ON CIVIL RIGHTS**, told the *Boston Globe* in 1995. Dwindling support from middle-class white women also draws the ire of affirmative action's advocates. "In the 1970s and 80s, white women had no problem hitching up to the affirmative action banner of 'women and minorities'," journalist Derrick Z. Jackson wrote. "If they now want to rip down the banner, it will confirm the dirtiest little secret of all about affirmative action"—that white women supported it only to the extent that it benefited themselves.

Dismissing these explanations as excuses, critics of affirmative action denounce it as "reverse discrimination." They either reject outright the idea that historical wrongs can be redressed through contemporary means, or believe that the cost to those who must pay for such redress is too high. Conservative think tanks such as the Institute for Justice and the **HERITAGE FOUNDATION** regularly lead this prong of the attack. Clint Bolick, the Institute for Justice's vice president, told *Congressional Quarterly,* "If you add up the number of people who have encountered reverse discrimination in college admissions, scholarships, public school magnet programs, government contracts and jobs in the private and public sectors, you have a pretty sizable population." The charge strikes the strongest advocates of affirmative action as insupportable. According to the research of law professor Alfred Blumrosen, of Rutgers University, only a few dozen such cases reached the federal courts in the early 1990s, and in most, the plaintiff failed. Other advocates see the reverse discrimination argument as sour grapes; the ACLU goes so far as to call it a smoke screen "for retention of white male privilege."

Critics frequently argue that affirmative action does an injustice to the idea of merit. Organizations representing police officers and firefighters, such as the national Fraternal Order of Police, complain that qualifications and standards have fallen to accommodate affirmative action candidates. This criticism is popular not only with whites, who have long claimed that better qualified candidates lose out as a result of affirmative action, but also with two leading conservative African American critics. "What we've had to do for 25 years to pull off affirmative action," the author Shelby Steele said, "is demean the idea of merit." The economist Thomas Sowell advances much the same argument in his claim that the policy hurts African Americans. Like other conservatives, Sowell ties the rise of affirmative action in the 1970s to the development of the black economic underclass. Steele and Sowell have argued that affirmative action sets up its beneficiaries for failure, corrupting the value of achievement for blacks and reinforcing racist stereotypes for whites. Viewing affirmative action as antidemocratic, they conclude that individual qualities alone should determine who is hired or accepted into an academic program.

Advocates are highly suspicious of the merit argument. In the first place, they deny that creating opportunities ignores the value of personal merit. Voluntary affirmative action merely gives people who traditionally have been excluded a leg up, they assert; and when it is court ordered to redress a pattern of workplace discrimination, the question of merit misses the point. More crucially, supporters think the merit line is superficial. Political commentator Michael E. Kinsley quipped that critics "seem to imagine that everyone in America can be ranked with scientific precision, from No. 1 to No. 260,000,000, in terms of his or

*(continued)*

While minorities, specifically African Americans and Mexican Americans, earned scores sufficient to be categorized as "presumptive admits" (certain to be accepted), whites that received the same scores were categorized as "presumptive denials" (certain to be rejected). The court invalidated the admissions policy, concluding that using race as a criteria for admissions is as **ARBITRARY** as using one's blood type.

In *Grutter v. Bollinger*, ___U.S.___, 123 S.Ct. 2325, 156 L.Ed.2d 304, 2003 WL 21433492 (U.S., Jun 23, 2003) (NO. 02-241), the U.S. Supreme Court narrowly endorsed the use of race in choosing students for America's top universities and the concept of racial diversity as a compelling governmental interest. In a landmark decision with wide-ranging implications for affirmative action programs across the United States, the Court ruled that it does not violate the Equal Protection Clause to give some preferential treatment to disadvantaged minorities, calling the diversity that minorities bring to education, business, and the military necessary for the cultivation of "a set of leaders with legitimacy in the eyes of the citizenry." But the victory for affirmative action was conditional, as the Court emphasized that racial preferences should be a temporary rather than permanent fixture in American society, and called for "periodic reviews" and "sunset provisions" for race-conscious admissions.

## How Much Affirmative Action Is Enough Affirmative Action?
(CONTINUED)

her qualification for any desirable career opportunity." He and other supporters consider the argument specious in a society in which merit is often the last reason for success and other variables that give advantages to certain groups are deemed perfectly natural—the children of the rich attend the best schools regardless of their abilities, for example, and military veterans receive preferences whether or not they have personally sacrificed anything for the nation. The United States was never a meritocracy, asserts Laura Murphy Lee, director of the ACLU's national legislative office: "Affirmative action didn't come along to taint a process that never existed."

Proposals for reforming affirmative action became increasingly popular in the mid-1990s. At one extreme, politicians have called for dumping it altogether. This idea has been urged in Congress chiefly by ultraconservative Republicans such as Senators Phil Gramm (R-Tex.) and **JESSE HELMS** (R-N.C.). Although no action has been taken on the congressional level, similar proposals in the states of California and Florida have gained ground. California reformers scored two victories in the mid-1990s: First, in 1995, regents of the University of California dropped gender- and race-based admissions, hiring, and contracting. Then, reformers succeeded in passing an anti-affirmative action **REFERENDUM**—the California Civil Rights Initiative, a measure that would outlaw gender- and race-based preferences in government programs—in 1996. A similar referendum passed in Washington State in 1998.

Less radical and perhaps more politically feasible, another proposal calls for preserving affirmative action while shifting its emphasis. The idea would abandon race and gender as yardsticks and match preferences solely with economic need. Conservatives again lead this campaign, but it draws some support even from moderates: President **BILL CLINTON**, declaring that his administration was against quotas and guaranteed results, ordered a review of federal employment policies in 1995 to ensure that they were being applied fairly. Critics of affirmative action believe that this kind of reform would ensure opportunity for disadvantaged people while ending what they see as egregious abuses, such as the awarding of contracts to rich minority-owned businesses. Traditional supporters agree that affirmative action benefits do not always help the people who most need them. But they believe that substantial gains should not be reversed, and that any need-based measurement should only augment—not replace—existing policies.

The journey of affirmative action from its heyday to the present reflects great changes in the United States. Between the administration of President Johnson and the Republican-controlled Congress elected in 1994 lies a thirty-year experience with **GREAT SOCIETY** initiatives that has left many citizens soured on the idea of government assistance. Radical changes in the nation's economy and workforce have surely not made the journey any easier. Bridging this gap seems unlikely, given the vastly different history of white males on the one hand, and women and people of color on the other. From these two poles of experience, two opposing ideas of necessity emerge. Critics say the time is ripe to overhaul affirmative action, a well-intentioned policy gone bad. Supporters, perceiving a playing field that is still far from level, maintain that the real work of affirmative action has scarcely begun.

In recent years, the battlefield for affirmative action has shifted from the workplace to education. Higher education—the arena that gave birth to **REGENTS OF UNIV. OF CAL. V. BAKKE**,

In the 5-4 decision, written by Justice **SANDRA DAY O'CONNOR** and joined by joined by Justices **JOHN PAUL STEVENS, DAVID SOUTER, RUTH BADER GINSBURG**, and **STEPHEN BREYER**, the Court ruled that attaining a diverse student body is at the heart of a law school's proper institutional mission, and that **GOOD FAITH** on the part of a university in pursuing diversity should be presumed, absent a showing to the contrary.

The Supreme Court emphasized that the law school sought to enroll a "critical mass" of minority students, not simply to assure that its student body had some specified percentage of a particular group. In concluding that the law school's admissions policy was narrowly tailored, the Supreme Court stated that the policy did not operate as a quota, but used race as a "plus" factor, such that the policy was flexible enough to ensure that each applicant was evaluated as an individual.

The plaintiff was a white Michigan resident whose application was rejected by the law school. She alleged that her application was denied because the law school used race as a "predominant factor." A district court agreed with the plaintiff, but the Sixth Circuit Court of Appeals reversed.

In a separate 6-3 decision handed down the same day as *Grutter v. Bollinger*, the Court struck down a separate University of Michigan under-

438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978), the first significant Supreme Court decision endorsing affirmative action—has more recently produced a mishmash of court decisions and laws that have called into question the future of affirmative action. There were arguments not just how *Bakke* should be applied, but whether it should be applied at all.

Higher education has been a particularly contentious area on affirmative action for many reasons. Because many higher education institutions are public, there is an issue of whether taxpayer money should be going to institutions supporting affirmative action. The public status of **COLLEGES AND UNIVERSITIES** also ensures that affirmative action debates will be conducted out in the open. Also, the quality and prestige of a college or university is often seen as determining where someone will end up on the socioeconomic scale after graduation, making the affirmative action stakes at such institutions high.

In a reversal of the way they tolerated discrimination through most of the 20th century, many colleges and universities now seem anxious to employ affirmative action to increase the diversity of their campuses. Court cases litigating affirmative action in higher education are brought by disgruntled white students and parents claiming "reverse discrimination." It has been the courts and the legislatures, not the colleges and the universities, that have shown willingness to put the brakes on affirmative action.

The battle over *Bakke* and its effects on higher education swung into focus in 1996, when the 5th Circuit Court of Appeals struck down affirmative action in college admissions in their decision *Hopwood v. Texas,* 78 F.3d 932, 5th Cir. (Tex. 1996). The decision covered institutions in the states of Texas, Louisiana, and Mississippi. Within a year of that ruling, enrollments by minorities in higher education institutions dropped in all three states.

In response, the state of Texas guaranteed a place in a state university or college to anyone who had graduated in the top 10 percent of their class. This gave more minorities a chance, and as a result minority enrollment at higher education institutions in the state was higher in 2001 than it was in the year before *Hopwood*. Several other states, including California and Florida, have adopted versions of Texas's "10 percent" solution. Critics have charged that these programs are inadequate, failing to ensure that minorities are represented at the most prestigious institutions even when they do boost enrollment in state university systems overall.

In 2002, the affirmative action focus in higher education shifted to the University of Michigan. White applicants to its undergraduate school and its law school sued on reverse discrimination grounds. A U.S. district judge in Michigan upheld the undergraduate procedure, but another struck down the law school process. On appeal, a divided Sixth Circuit Court of Appeals ruled in favor of both admissions polices. The U.S Supreme Court agreed to hear appeals of each decision. The administration of **GEORGE W. BUSH** filed a brief opposing these programs. "The method used by the University of Michigan to achieve this important goal is fundamentally flawed," said the statement from President Bush. Defending the policy, Michigan President Mary Sue Coleman said "[President Bush] misunderstands how our admission process works" and denied it was unconstitutional. On June 23, 2003, the Court ruled 6-3 against the under graduate policy because it made each candidate's race the "deciding" factor but uphead 5-4 the law school's process because a compelling state interest exists for universities to create racially diverse campuses.

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graduate-admissions process based on a point system because the admissions process made race a "decisive" factor, rather than just one of many in determining who was admitted. *Gratz v. Bollinger*, ___U.S.___, 123 S.Ct. 2411, 156 L.Ed.2d 257, 2003 WL 21434002 (U.S. Jun 23, 2003) (NO. 02-516). The opinion was delivered by Chief Justice **WILLIAM REHNQUIST**, who was joined by Justices O'Connor, **ANTONIN SCALIA**, **ANTHONY KENNEDY**, and **CLARENCE THOMAS**.

This point-system ruling is expected to force state schools that use similar numerical methods to revise them, and it could cause companies to rethink their reliance on quantitative evaluations of job applicants and employees. Although Michigan is a public university, the decision is considered likely to apply to selective private universities as well because they receive government funding. It also will affect admission practices at selective public high schools where affirmative action has also been eliminated or besieged.

Distaste for affirmative action also led opponents to attack the policy at the state level through ballot initiatives and referendums. In November 1998, the California electorate passed Proposition 209 (54 to 46 percent), which banned many of the affirmative action programs in California. The **REFERENDUM** was promoted by the nonprofit Center for Individual Rights, which was also instrumental in building opposition to

**Degrees Earned by Women, 1969–1970 and 1999–2000**

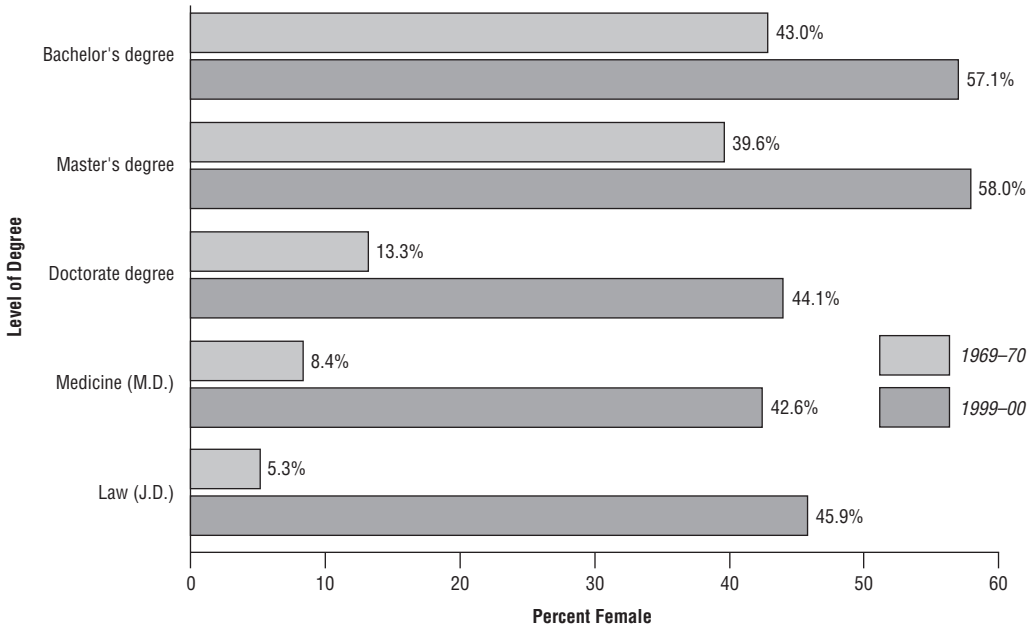


SOURCE: U.S. Department of Education, National Center for Education Statistics.

the University of Texas admissions policy that was struck down in *Hopwood*. The proposition has remained a controversial topic, with supporters arguing that state and local officials have avoided dismantling affirmative action. These same supporters continue to call on state officials to enforce the law. Officials, however, have pointed out that under the proposition, when federal laws mandate affirmative action to qualify for federal monies, the state law must give way.

In 2000, Florida became the first state to voluntarily end affirmative action in higher education and state contracts. Public universities put into place new college admission policies that prohibit affirmative action. One new component was the Talented 20 Plan, which mandates that students who graduate in the top 20 percent of their class and who complete a college preparatory curriculum must be admitted into one of the ten state universities. These changes were designed to increase opportunity and diversity while ending racial preferences and set-asides.

In the face of continuing legal challenges, the fate of U.S. affirmative action programs remained unclear in early 2004. Recent federal court decisions as well as state government actions suggested that affirmative action policies might need to change in order to pass constitutional muster in the future. Commentators speculated that a Supreme Court—after expected retirement of the older justices—might be more likely to signal its rejection of existing affirmative action principles.

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Civil Rights Acts; Equal Employment Opportunity Commission; Seniority; Sex Discrimination.

## AFFIRMATIVE DEFENSE

*A new fact or set of facts that operates to defeat a claim even if the facts supporting that claim are true.*

A plaintiff sets forth a claim in a civil action by making statements in the document called the complaint. These statements must be sufficient to warrant relief from the court. The defendant responds to the plaintiff's claims by preparing an answer in which the defendant may deny the truth of the plaintiff's allegations or assert that there are additional facts that constitute a defense to the plaintiff's action. For example, a plaintiff may demand compensation for damage done to his or her vehicle in an automobile accident. Without denying responsibility for the accident, the defendant may claim to have an affirmative defense, such as the plaintiff's contributory NEGLIGENCE or expiration of the STATUTE OF LIMITATIONS.

An affirmative defense is also allowed under rules of CRIMINAL PROCEDURE. For example, a defendant accused of assault may claim to have been intoxicated or insane, to have struck out in SELF-DEFENSE, or to have had an alibi for the night in question. Any one of these affirmative defenses must be asserted by showing that there are facts in addition to the ones in the indictment or information charging the defendant and that those additional facts are legally sufficient to excuse the defendant.

The rules that govern PLEADING in most courts require a defendant to raise all affirmative defenses when first responding to the civil claim or criminal charges against him or her. Failure to do so may preclude assertion of that kind of defense later in the trial.

## AFFRAY

*A criminal offense generally defined as the fighting of two or more persons in a public place that disturbs others.*

The offense originated under the COMMON LAW and in some jurisdictions has become a statutory crime. Although an agreement to fight is not an element of the crime under the common-law definition, some statutes provide that an affray can occur only when two or more persons agree to fight in a public place.

An affray is a type of DISORDERLY CONDUCT and a breach of the peace since it is conduct that disturbs the peace of the community. It is punishable by a fine, imprisonment, or both.

## AFORESAID

*Before, already said, referred to, or recited.*

This term is used frequently in deeds, leases, and contracts of sale of real property to refer to the property without describing it in detail each time it is mentioned; for example, "the aforesaid premises."

## AFORETHOUGHT

*In* CRIMINAL LAW, *intentional, deliberate, planned, or premeditated.*

Murder in the first degree, for example, requires malice aforethought; that is, the murder must have been planned for a period of time, regardless how short, before it was committed.

## AFTER-ACQUIRED PROPERTY CLAUSE

*A phrase in a mortgage (an interest in land that furnishes security for payment of a debt or per-*

**Security Agreement with an After-Acquired Property Clause**

This Security Agreement is made on this_____day of _____ , 20 _____

between _____ , _____ , _____

[*name and address of the debtor*] ("Debtor"), and _____ , _____ ,

_____ [*name and address of secured party*] "Secured Party").

1. **SECURITY INTEREST**. Debtor grants to Secured Party a security interest in all inventory, equipment, appliances, furnishings, and fixtures placed upon the premises known as _____ , located at _____ , _____ (the "Premises") or used in connection therewith and in which Debtor now has or hereafter acquires any right and the proceeds therefrom. The security interest of Secured Party extends to all collateral of the kind which is the subject of this agreement which the debtor may acquire at any time during the continuation of this agreement. The Security Interest shall secure the payment and performance of Debtor's promissory note of even date herewith in the principal amount of _____ [*amount of payment*] Dollars and the payment and performance of all liabilities and obligations of Debtor to Secured Party of every kind and description, direct or indirect, absolute or contingent, due or to become due now existing or hereafter arising.

[Portions omitted for purposes of illustration]

*An example of how an after-acquired property clause might be used*

*formance of an obligation) that provides that any holdings obtained by the borrower subsequent to the date of the loan and mortgage will automatically constitute additional security for the loan.*

## AFTER-ACQUIRED TITLE

*A legal doctrine under which, if a grantor conveys what is mistakenly believed to be good title to land that he or she did not own, and the grantor later acquires that title, it vests automatically in the grantee.*

## AFTER-BORN CHILD

*A child born after a will has been executed by either parent or after the time in which a class gift made according to a trust arrangement expires.*

The existence of an after-born child has significant legal ramifications upon gifts made under wills and trusts. Under the law of wills, the birth of an after-born child after the parent makes a will does not revoke it but has the effect of modifying its provisions. Generally, the after-born child must be given the share of the parent's estate that the child would have been entitled to if the parent had died without leaving a will, according to the law of DESCENT AND DISTRIBUTION. The beneficiaries of the will must contribute a proportionate share of what they inherited to make up the after-born child's share.

Under the law of trusts, a gift to a class is one in which the creator of the trust, the settlor, directs that the principal of the trust should be distributed to a specifically designated group of persons, such as to grandchildren, who are alive at a certain time, such as at the settlor's death. Any child born after this time would not be entitled to a proportionate share of the trust principal unless conceived before the settlor died. An after-born child born eleven months after the settlor's death, therefore, would not share in the principal, since the class had closed nine months after the settlor's death.

## AGE DISCRIMINATION

*Prejudicial treatment or denial of rights based on age.*

As the baby boom generation, the largest demographic group in U.S. history, reached middle age and looked toward retirement, laws governing the treatment of older U.S. citizens took on greater importance than ever before. Between 1970 and 1991, the number of workers over the age of 40 in the U.S. workforce rose from 39,689,000 to 53,940,000. It is no surprise, then, that major developments, both legislative and judicial, occurred in the area of age discrimination in employment.

Congress outlawed discrimination by employers against employees or applicants over the age of 40, with the Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C.A. § 621 et seq.). Amendments to the act in 1974, 1978, and 1986 (29 U.S.C.A. § 623 et seq.) raised and then eliminated the mandatory retirement age for most workers and extended the act's coverage to most employers. The ADEA does permit employers to set maximum age limits for employees if the employer can show that age is a bona fide occupational qualification (BFOQ) and is reasonably necessary for the operation of the business. Although the ADEA did not originally apply to government employers, Congress extended the act to cover federal, state, and local governments in 1974. However, it no longer applies to state governments.

The EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) is charged with enforcing the ADEA. Complainants must first file a claim with the EEOC or their state's employment or HUMAN RIGHTS commission before pursuing a lawsuit. The EEOC attempts to resolve the dispute through voluntary compliance on the part of the employer, conciliation, or other persuasive measures. If the EEOC decides to bring an action against the employer, the employee's right to sue is extinguished. However, the employee need not exhaust his or her administrative remedies—that is, wait for a final determination from the EEOC—before filing suit.

### Landmark Discrimination Cases

A number of landmark cases have interpreted the ADEA since its passage. *Western Air Lines v. Criswell,* 472 U.S. 400, 105 S. Ct. 2743, 86 L. Ed. 2d 321 (1985), set out the guidelines for defending an age limit based on the BFOQ exception. Western required flight engineers, who are members of the flight crew but generally do not operate flight controls, to retire at age 60. When this policy was challenged, the airline maintained that the age limit was a BFOQ necessary to ensure safety. The Supreme Court disagreed, and in a unanimous decision announced a two-pronged test to be applied when evaluating a BFOQ based on safety: (1) whether the age limit is reasonably necessary to the overriding

interest in public safety; and (2) whether the employer is justified in applying the age limit to all employees rather than deciding each case on an individual basis.

In another case the same year, the Supreme Court found TWA guilty of age discrimination for refusing to transfer pilots to the position of flight engineer after they reached age 60, the Federal Aviation Administration's (FAA's) mandatory retirement age for pilots (*Trans World Airlines v. Thurston,* 469 U.S. 111, 105 S. Ct. 613, 83 L. Ed. 2d 523 [1985]). TWA had allowed younger pilots who had become disabled to transfer automatically to the position of flight engineer, but did not allow pilots and copilots past the age of 60 to do the same. The Court held that the airline must give the same opportunity to retiring pilots and copilots as it had given to younger disabled pilots. However, the Court denied the pilots' request for double damages, which are allowed in cases of "willful violation" of the ADEA, stating that a violation is willful only if the employer knew that its conduct was prohibited by the ADEA or showed a "reckless disregard" for whether the act applied.

Older workers seeking redress under the ADEA received mixed opinions in 1989. *Public Employees Retirement System of Ohio v. Betts,* 492 U.S. 158, 109 S. Ct. 2854, 106 L. Ed. 2d 134 (1989), overturned a series of courts of appeals decisions as well as EEOC and LABOR DEPARTMENT regulations that required employers to justify any age-based distinctions in employee benefit plans by showing a "substantial business purpose." *Betts* shifted the BURDEN OF PROOF to the plaintiff to show that the disputed plan was a "subterfuge" for discrimination.

Congressional response to *Betts* was a compromise between employee advocates and business interests. A 1990 amendment to the ADEA, known as the Older Workers Benefit Protection Act (OWBPA) (29 U.S.C.A. § 626), prohibits discrimination against older employees in the provision of fringe benefits unless the benefit differences are due to age-based differences in cost.

Shortly after the *Betts* decision, the Supreme Court relaxed the procedural rules governing class actions alleging age discrimination, in *Hoffmann-LaRoche v. Sperling,* 493 U.S. 165, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989). The *Sperling* decision made it easier for plaintiffs to join a CLASS ACTION suit against an employer after the suit has been filed.

### Waiver Controversy

During the late 1980s and early 1990s, businesses trying to survive in a sluggish economy began reducing their workforces, a practice known as downsizing. When layoffs or early retirements affected older workers disproportionately, age discrimination claims escalated.

Many companies offered attractive early-retirement packages in return for an employee's waiver of rights to any legal claims. During the 1980s, courts generally allowed such waivers as long as the employee's acceptance was knowing and voluntary and the employee received valuable consideration in return. In *Cirillo v. Arco Chemical Co.,* 862 F.2d 448 (1988), for example, the U.S. Court of Appeals for the Third Circuit held that because the plaintiff had knowingly and voluntarily signed a waiver of his right to sue, and in return had received a higher-than-average severance package, the waiver did not violate the ADEA. Likewise, in *Lancaster v. Buerkle Buick Honda Co.,* 809 F.2d 539, *cert. denied,* 482 U.S. 928, 107 S. Ct. 3212, 96 L. Ed. 2d 699 (1987), the U.S. Court of Appeals for the Eighth Circuit found that the plaintiff, by virtue of his years of business experience, was well equipped to understand the waiver he signed. Similar reasoning prevailed in *Runyan v. National Cash Register Corp.,* 787 F.2d 1039 (6th

**Charges Filed Under the Age Discrimination in Employment Act (ADEA), 1992 to 2002**

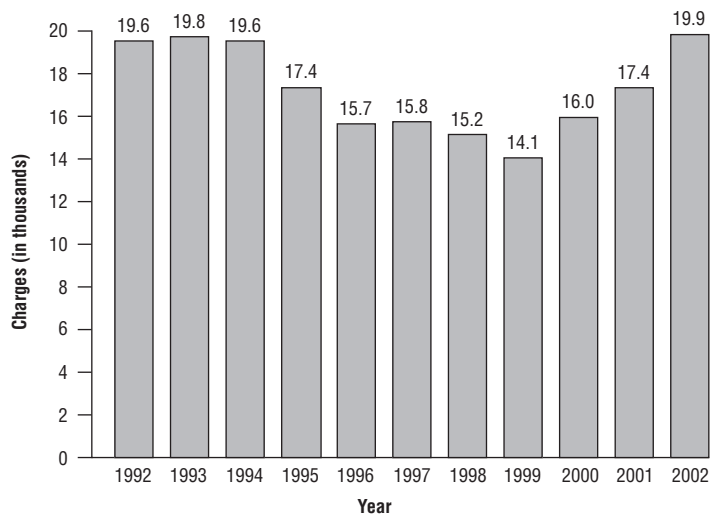


SOURCE: U.S. Equal Employment Opportunity Commission.

# Age Discrimination: Disparate Impact

In 1967 Congress passed the Age Discrimination in Employment Act (ADEA), which protects workers age 40 or older from employment discrimination based on their age. Anyone who employs 20 or more people is subject to ADEA; it covers hiring, firing, compensation and benefits, training, job assignments, promotions, and layoffs.

Since ADEA's passage, however, there has been a difference of opinion among legal experts about exactly what types of action constitute "discrimination."

There are two different approaches that a plaintiff may take when filing an age discrimination suit, "disparate treatment" and "disparate impact." In disparate treatment cases, the plaintiff must prove that there was a **SPECIFIC INTENT** to discriminate based on age. An example would be an employee whose supervisor keeps saying in front of other staffers, "Are you sure you're still able to do this work?" or "Don't you think it's time you retired?" **DISPARATE IMPACT** cases require the plaintiff to prove that an employment decision disproportionately affects members of a protected group (in this case, those over 40). In other words, in a disparate impact case, the discriminatory effect is what matters, even if the employer's intent was not discriminatory. Courts that recognize the disparate impact argument in age discrimination cases often require companies to prove "business necessity." For example, if a disproportionate number of employees affected by a layoff are over 40, the company will have to prove that those people were let go because their salaries were disproportionately high and that the company would face financial hardship if they were allowed to stay on.

In other forms of employment discrimination, the disparate impact argument has been used successfully. For example, employers who require prospective employees to have a certain educational background can be liable for a disparate impact charge if it turns out that those educational requirements rule out certain racial groups. The case of *Griggs v. Duke Power,* 401 U. S. 424, 88 P.U.R. 3d 90, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971) was the first **RACIAL DISCRIMINATION** case to recognize disparate impact. In age discrimination cases, the issue is more vague. It is so vague, in fact, that the U.S. federal circuit courts do not agree about whether disparate impact claims are allowable. The First, Sixth, Seventh, Tenth, and Eleventh Circuits do not allow disparate impact claims; the Second, Eighth, and Ninth do. The Third and Fifth Circuits had not ruled on it as of 2003, and the Fourth Circuit had not addressed it at all. In December 2001 the U.S. Supreme Court heard the case of *Adams v. Florida Power Corp,* 535 U.S. 228, 122 S. Ct. 1290, 152 L. Ed. 2d 345 (2002), in which the Eleventh Circuit Court had ruled against the plaintiffs' disparate impact argument in 255 F. 3rd 1322 (11th Cir. 2001), citing that it was "unavailable" for age discrimination cases. The plaintiffs took the case to the Supreme Court. The Eleventh Circuit Court argued that age discrimination is closer in scope to the Equal Pay Act (for which the Supreme Court has not allowed disparate impact claims) than Title VII of the **CIVIL RIGHTS ACT** (which covered *Griggs* and similar cases).

Cir. 1986) (en banc), *cert. denied,* 479 U.S. 850, 107 S. Ct. 178, 93 L. Ed. 2d 114 (1986), where the court upheld a waiver because the employee who signed it was an experienced labor lawyer.

The ADEA specifically recognizes the validity of waivers in the OWBPA, and establishes strict guidelines for employers to follow in executing them. The waiver must use simple, understandable language that clearly delineates the terms of the agreement and leaves no question that the employee is giving up any right to pursue a lawsuit (29 U.S.C.A. § 626[f]). Several cases in 1993 and 1994 that invalidated waiver agreements illustrate how important it is for an employer to follow the guidelines to the letter. *Oberg v. Allied Van Lines, Inc.,* 11 F. 3d 679 (7th Cir. 1993), held that a waiver agreement that did not meet the requirements of the OWBPA was void and could not be ratified even though the employee accepted and retained the severance package offered in exchange for the waiver. The same reasoning applied to invalidate the waiver agreement in *Soliman v. Digital Equipment Corp.,* 869 F. Supp. 65 (D. Mass. 1994).

The Supreme Court has also upheld that employers must follow the letter of the law when asking employees to waive their rights to file an age discrimination complaint in return for severance pay. In *Oubre v. Entergy Operations, Inc.,* 522 U.S. 422, 118 S.Ct. 838, 139 L.Ed.2d 849 (1998), the worker accepted a severance package and signed a release that stated she would not sue the company for any reason related to her termination. She accepted the severance payments but soon after filed an age discrimination lawsuit. The company argued that the release was valid and that she had not attempted to return her severance payments.

In April 2002 the Supreme Court dismissed the case without discussing its merits, stating only that the writ of certiorari had been "improvidently granted." This outcome left the issue unresolved judicially.

Proponents of disparate impact claims for age discrimination cases argue that employers should not be allowed to make employment decisions that disproportionately affect those over 40. In support of their position they point to employers who try to get around the claims so that they can demote or lay off their older workers. Often, those older workers are among the most highly paid and have the most expensive benefits in the company. From the company's point of view, getting rid of such an expensive workforce in favor of a younger and cheaper staff can generate significant savings, which is the reason the company will give for laying off a disproportionate number of older workers during a round of cost-cutting measures. This, say proponents of disparate impact claims, is clearly age discrimination because it singles out people over a certain age. The fact that a company uses cost savings or some other reason for taking the action does not diminish the adverse impact that action has on older workers.

Opponents of age-based disparate impact claims use the same example to make their case. The employer may indeed have laid off older workers to save money. But saving money is not the same as practicing age discrimination. From a business perspective, the employer has a legitimate financial concern for the future of the company. The fact that a particular action affects one group more than another is not adequate ground for protection in such cases, say those who oppose the disparate impact claim. If a company's only viable options are laying off high-salary employees or closing, it does not have the luxury of protecting workers who are over 40.

It should be noted that opponents of the disparate argument are not necessarily opposed to protection against age discrimination. The **U.S. CHAMBER OF COMMERCE**, which has filed *amicus* briefs in such cases on numerous occasions, has stated its position clearly: "Reliance on age stereotypes about the abilities of older workers should not be tolerated. Due to natural job progression, however, age affects job terms such as compensation, **PENSION**, and seniority. In this context . . . imposing a burden on employers to justify the business necessity of routine and uniform job standards that statistically impact older workers is unjustified." Few would argue that employers should be forced to tolerate poor workers simply because they are past a certain age. The question is whether disparate impact actually forces them to do so.

Both sides of the debate may need to keep in mind that each case is unique. There is no doubt that some companies have legitimate financial difficulties and may be forced to lay off a disproportionate number of older workers. A company that does so and then makes do with fewer staffers is not the same as a company that turns around and hires younger people at salaries comparable to what the older workers were making. Likewise, an employee who is demoted because his or her work has measurably deteriorated in quality is different from an employee who is demoted for some vague reason upon reaching age 40 or 50.

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**CROSS-REFERENCES**

Civil Rights Acts.

The Supreme Court ruled that the company had failed to meet the minimum notice requirements set out in the OWBP. Specifically, the employer had not given the worker enough time to consider her options; it had failed to give her seven days after she signed the release to change her mind; and the release made no specific reference to claims under the ADEA.

### ADEA is Further Clarified

Several cases further clarified the application of the ADEA. In *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991), the Supreme Court upheld compulsory **ARBITRATION** under the ADEA. When Robert Gilmer was hired by Interstate/Johnson Lane Corporation, he was required to register with the New York Stock Exchange, which compelled him to agree to arbitrate any controversy regarding employment or termination. He was fired at age 62 and filed a complaint with the EEOC. He then filed an age discrimination suit against Interstate, which moved to compel arbitration of the dispute.

In a decision that seems to reflect the Court's growing encouragement of **ALTERNATIVE DISPUTE RESOLUTION**, Justice **BYRON R. WHITE** dismissed Gilmer's arguments that compulsory arbitration was inconsistent with the purposes of the ADEA and that he was in an unequal bargaining position with Interstate. The Court held that an ADEA claim can be subjected to compulsory arbitration without triggering any "inherent conflict" with the ADEA's underlying purposes. The Court further pointed out that Gilmer was a professional businessman who signed the arbitration agreement voluntarily and with full knowledge.

**Federal and State Employees** *Stevens v. Department of the Treasury,* 500 U.S. 1, 111 S. Ct. 1562, 114 L. Ed. 2d 1 (1991), clarified the statutory time limits for federal employees to file an age discrimination claim. Charles Z. Stevens III, an INTERNAL REVENUE SERVICE (IRS) employee, filed an age discrimination complaint with the IRS's administrative unit. His complaint was rejected because it had not been filed within 30 days of the alleged discriminatory conduct. His subsequent complaint filed with the TREASURY DEPARTMENT was also dismissed, and the EEOC affirmed that dismissal. Stevens filed suit in U.S. district court, only to have his suit dismissed on the ground that it was not timely, a decision that was affirmed by the U.S. Court of Appeals for the Fifth Circuit. The Supreme Court disagreed with the lower courts' interpretation of the statute and held that the ADEA requires federal employees to give the EEOC notice of intent to sue *not less than* 30 days before the suit is filed, rather than *within* 30 days, and within 180 days of the alleged discriminatory conduct. These small but significant clarifications of statutory interpretation made it easier for federal employees to seek redress under the ADEA.

The legal landscape for age discrimination complaints became more challenging for plaintiffs who work for state government after the Supreme Court decided *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). In this case, a group of Florida university professors and librarians who were over 40 alleged that the university system had failed to adequately compensate them as compared to younger employees. The plaintiffs sued under the ADEA and a state CIVIL RIGHTS ACT.

The state of Florida, instead of litigating the merits of the lawsuit, challenged the constitutionality of the ADEA as applied to state governments. It argued that under the ELEVENTH AMENDMENT it was immune from federal age discrimination lawsuits. Prior court decisions had found that Congress had validly exercised its power under the Constitution's Article I COMMERCE CLAUSE to enact the ADEA. However, this power did not extend to lawsuits filed by private individuals. Instead, Congress could abrogate a state's SOVEREIGN IMMUNITY by invoking the FOURTEENTH AMENDMENT as its authority.

The Supreme Court concluded that Congress had not demonstrated that the Fourteenth Amendment authorized the application of the ADEA to state governments. States could lawfully discriminate on the basis of age if the discrimination is "rationally related to a legitimate state interest." In addition, the Court found no facts in the record to show that Congress needed to act against state governments for age discrimination. In light of this ruling, state employees must use state CIVIL RIGHTS laws involving age discrimination to press their claims.

**Hazen Paper v. Biggins** In 1993, the Supreme Court clarified the standards by which a business decision will be found to be a "pretext" for discrimination, and what conduct constitutes "willful" violation of the ADEA. In *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993), a 62-year-old employee, Walter Biggins, sued his employer and its two owners, alleging age discrimination in the decision to fire him after almost ten years of employment. Biggins sought relief by claiming "disparate treatment" because of his age. In a claim of disparate treatment, the employee must prove that the employer intended to discriminate against the employee based on an impermissible criterion, his or her age. Biggins alleged that, since the firing occurred just weeks before his ten-year anniversary, when he would have been fully vested in the company's PENSION plan, the dismissal was due to his age. The company maintained that Biggins's outside activities created a risk of exposing trade secrets and that his refusal to sign a nondisclosure, noncompetition agreement prompted its decision to fire him.

The Supreme Court attempted to address several questions presented by the case. Did Biggins prove a case of disparate treatment based on age? Is discrimination based on pension status necessarily equivalent to discrimination based on age? What constitutes willfulness under the ADEA?

On the first issue, the Court found that the element of intent to discriminate because of age, necessary to prove a claim of disparate treatment, was absent. A decision to fire Biggins because he was close to vesting in the pension plan did not satisfy the proof requirements because it was not motivated by the prohibited presumptions about older workers, namely, that they are less productive and less competent than younger employees. Biggins failed to show that these stereotypes "had a determinative influence" on Hazen's decision.

*Employers may not require the retirement of a worker unless they can demonstrate that the employee's age is relevant to the operation of the business.*

AP/WIDE WORLD PHOTOS

Next, the Court found that Biggins did not prove that Hazen's reason for terminating him was a pretext for age discrimination. Justice SANDRA DAY O'CONNOR, writing for a unanimous Court, stated that "an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service." The Court found that pension status is not the same as age under the ADEA and that employers may make business decisions based on an employee's years of service without necessarily violating the ADEA. Biggins did prove that his firing was a pretext for discrimination because of his pension status. It did not follow, however, that he was fired because of his age. Age and pension status, according to the Court, are "analytically distinct" factors in determining a claim under the ADEA. The Court concluded that proof of discrimination based on an employee's pension status is not, absent further evidence, the legal equivalent of proof of discrimination based on age.

Addressing the question of whether Hazen acted willfully so as to incur LIQUIDATED DAMAGES under the ADEA, the Court reaffirmed its position that a violation is willful only if the employer knew or showed reckless disregard for whether its actions violated the act. Using this test, the employer will not incur liquidated damages if it makes an age-based decision that it believes, in GOOD FAITH and nonrecklessly, is permitted.

*Biggins* makes it more difficult for an ADEA plaintiff to prevail. The plaintiff must now show direct evidence of age discrimination. Indirect, empirical correlations, such as pensions and seniority, is not enough to prove the claim.

### Reverse Age Discrimination?

Age discrimination is not limited to the workplace, nor is it experienced only by those over age 40. In 1994, the state of New York successfully sued five car rental agencies for refusing to rent vehicles to licensed drivers between the ages of 18 and 25 (*People by Koppell v. Alamo Rent A Car, Inc.,* 162 Misc. 2d 636, 620 N.Y.S.2d 695 [1994]). A few months earlier, New York City had become the first city in the United States to prohibit discrimination against the young in public places; a violation of the new law could bring a fine of up to $100,000.

In January 1994, coverage of the ADEA was extended to tenured faculty at COLLEGES AND UNIVERSITIES. The result was that many tenured professors continued to teach after the age of 70, the typical mandatory retirement age before ADEA. With enrollments shrinking and fewer faculty positions opening up, younger people found it more and more difficult to obtain teaching positions in higher education, raising the specter of a "reverse discrimination" challenge.

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CROSS-REFERENCES

Affirmative Action; Discrimination; Seniority.

## AGE OF CONSENT

*The age at which a person may marry without parental approval. The age at which a female is legally capable of agreeing to sexual intercourse, so that a male who engages in sex with her cannot be prosecuted for* STATUTORY RAPE.

A person below the age of consent is sometimes called an INFANT or minor.

## AGE OF MAJORITY

*The age at which a person, formerly a minor or an* INFANT, *is recognized by law to be an adult, capable of managing his or her own affairs and responsible for any legal obligations created by his or her actions.*

A person who has reached the age of majority is bound by any contracts, deeds, or legal relationships, such as marriage, which he or she undertakes. In most states the age of majority is eighteen, but it may vary depending upon the nature of the activity in which the person is engaged. In the same state the age of majority for driving may be sixteen while that for drinking alcoholic beverages is twenty-one.

Another name for the age of majority is legal age.

## AGE OF REASON

*The age at which a child is considered capable of acting responsibly.*

Under COMMON LAW, seven was the age of reason. Children under the age of seven were conclusively presumed incapable of committing a crime because they did not possess the reasoning ability to understand that their conduct violated the standards of acceptable community behavior. Those between the ages of seven and fourteen were presumed incapable of committing a crime, but this presumption could be overcome by evidence, such as the child having possession of the gun immediately after the shooting. The rebuttable presumption for this age group was based on the assumption that, as the child grew older, he or she learned to differentiate between right and wrong. A child over the age of fourteen was considered to be fully responsible for his or her actions. Many states have modified the age of criminal responsibility by statute.

All states have enacted legislation creating juvenile courts to handle the adjudication of young persons, usually under eighteen, for criminal conduct rather than have them face criminal prosecution as an adult. However, a child of thirteen who commits a violent crime may be tried as an adult in many jurisdictions.

## AGE REQUIREMENT FOR HOLDING OFFICE

The Framers of the CONSTITUTION OF THE UNITED STATES as well as the drafters of constitutions for most of the individual states set a minimum age for a person to be eligible for elective office. As a result, voters may not always be able to evaluate and elect candidates for public office on whatever criteria they choose, or on no criteria at all.

With respect to the states, the minimum age required to serve as a house representative ranges from 18 to 25, with about half the states requiring a minimum age of 21. Only about a third of the states allow 18-year-olds to serve in the state senate, and 20 have set a minimum age of 25. In five states, the minimum age required to serve as a state senator is 30.

For governor, most states require a minimum age of 30. Oklahoma has a minimum age of 31, six states have no age qualification, three allow a minimum age of 18, and six specify a minimum age of 25.

Although many states, over the years, have voluntarily changed their age qualification laws to allow more people to run for elective office, court challenges to these statutes have largely failed. In 1971, the SUPREME COURT OF THE UNITED STATES held that the TWENTY-SIXTH AMENDMENT to the U.S. Constitution, which forbids the states to deny the vote to anyone 18 years or older, had no effect on the constitutionality of age requirements for holding office. Those challenging age restrictions have argued that such laws deny people under the required age EQUAL PROTECTION of the law. These challenges have not been successful. Courts have found that holding office is not a fundamental right that states may not restrict. They have determined that age is a reasonable basis of discrimination to ensure that those serving in government possess the necessary maturity, experience, and competence to perform as effective representatives.

The Framers of the U.S. Constitution set forth a number of reasons for requiring a minimum age for election to office, beliefs that are still held today. JAMES MADISON successfully argued that a minimum age of 30 should be required to serve in the U.S. Senate. He cited as his reason "the Senatorial trust," requiring a "stability of character" that could only be realized with age (*Federalist* No. 62). GEORGE MASON, of Virginia, suggested that 25 be set as the minimum age for the House of Representatives, a proposal that was adopted. He maintained that 21-year-olds did not possess sufficient maturity to serve in the House, as their political beliefs were "too crude and erroneous to merit an influence on public opinions" (1 Records of the Federal Convention of 1787). JAMES WILSON, a drafter from Pennsylvania, countered, unsuccessfully, that age requirements would "damp the effects of genius and of laudable ambition" and added that there was "no more reason for incapacitating youth than age" (1 Records of the Federal Convention of 1787). In the mid-1990s, the average member of Congress was in her or his mid-fifties, but the number of younger members elected to serve was on the increase.

The Framers also considered the minimum age that should be required for individuals seeking the presidency of the United States, and settled on 35—the highest age qualification for any office in the United States. JOHN F. KENNEDY, who became president at the age of 43, was the youngest person to be elected to that office.

Although the Framers of the U.S. Constitution and the individual states were careful to set minimum age requirements for office, upper age limits have not been established. President RONALD REAGAN was the oldest individual to assume the office of president; he was almost 70 when he was sworn in, and served two terms before leaving office at nearly 78.

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CROSS-REFERENCES

Constitution; Constitution of the United States; Discrimination.

## AGENCY

*A consensual relationship created by contract or by law where one party, the principal, grants authority for another party, the agent, to act on behalf of and under the control of the principal to deal with a third party. An agency relationship is fiduciary in nature, and the actions and words of an agent exchanged with a third party bind the principal.*

An agreement creating an agency relationship may be express or implied, and both the agent and principal may be either an individual or an entity, such as a corporation or partnership.

Under the law of agency, if a person is injured in a traffic accident with a delivery truck, the truck driver's employer may be liable to the injured person even if the employer was not directly responsible for the accident. That is because the employer and the driver are in a relationship known as principal-agent, in which the driver, as the agent, is authorized to act on behalf of the employer, who is the principal.

The law of agency allows one person to employ another to do her or his work, sell her or his goods, and acquire property on her or his behalf as if the employer were present and acting in person. The principal may authorize the agent to perform a variety of tasks or may restrict the agent to specific functions, but regardless of the amount, or scope, of authority given to the agent, the agent represents the principal and is subject to the principal's control.

More important, the principal is liable for the consequences of acts that the agent has been directed to perform.

A voluntary, GOOD FAITH relationship of trust, known as a fiduciary relationship, exists between a principal and an agent for the benefit of the principal. This relationship requires the agent to exercise a duty of loyalty to the principal and to use reasonable care to serve and protect the interests of the principal. An agent who acts in his or her own interest violates the fiduciary duty and will be financially liable to the principal for any losses the principal incurs because of that breach of the fiduciary duty. For example, an agent who accepts a bribe to purchase only the goods from a particular seller breaches his fiduciary duty by taking the money, since it is the agent's duty to work only for the best interests of the principal.

An agency relationship is created by the consent of both the agent and the principal; no one can unwittingly become an agent for another. Although a principal-agent relationship can be created by a contract between the parties, a contract is not necessary if it is clear that the parties intend to act as principal and agent. The intent of the parties can be expressed by their words or implied by their conduct.

Perhaps the most important element of a principal-agent relationship is the concept of control: the agent agrees to act under the control or direction of the principal. The extent of the principal's control over the agent distinguishes an agent from an INDEPENDENT CONTRACTOR, over whom control and supervision by the principal may be relatively remote. An independent contractor is subject to the control of an employer only to the extent that she or he must produce the final work product that she or he has agreed to provide. Independent contractors have the freedom to use whatever means they choose to achieve that final product. When the employer provides more specific directions, or exerts more control, as to the means and methods of doing the job—by providing specific instructions as to how goods are to be sold or marketed, for example—then an agency relationship may exist.

The agent's authority may be actual or apparent. If the principal intentionally confers express and implied powers to the agent to act for him or her, the agent possesses *actual authority.* When the agent exercises actual authority, it is as if the principal is acting, and the principal is bound by the agent's acts and is liable for them. For example, if an owner of an apartment building names a person as agent to lease apartments and collect rents, those functions are express powers, since they are specifically stated. To perform these functions, the agent must also be able to issue receipts for rent collected and to show apartments to prospective tenants. These powers, since they are a necessary part of the express duties of the agent, are implied powers. When the agent performs any or all of these duties, whether express or implied, it is as if the owner has done so.

A more complicated situation arises when the agent possesses *apparent authority.* In this case, the principal, either knowingly or even mistakenly, permits the agent or others to assume that the agent possesses authority to carry out certain actions when such authority does not, in fact, exist. If other persons believe in good faith that such authority exists, the principal remains liable for the agent's actions and cannot rely on the defense that no actual authority was granted. For instance, suppose the owner of a building offers it for sale and tells prospective buyers to talk to the rental agent. If a buyer enters into a purchase agreement with the agent, the owner may be liable for breaching that contract if she later agrees to sell the building to someone else. The first purchaser relied on the apparent authority of the agent and will not be penalized even if the owner maintains that no authority was ever given to the agent to enter into the contract. The owner remains responsible for acts done by an agent who was exercising apparent authority.

The scope of an agent's authority, whether apparent or actual, is considered in determining an agent's liability for her or his actions. An agent is not personally liable to a third party for a contract the agent has entered into as a representative of the principal so long as the agent acted within the scope of her or his authority and signed the contract as agent for the principal. If the agent exceeded her or his authority by entering into the contract, however, the agent is financially responsible to the principal for violating her or his fiduciary duty. In addition, the agent may also be sued by the other party to the contract for FRAUD. The principal is generally not bound if the agent was not actually or apparently authorized to enter into the contract.

With respect to liability in TORT (i.e., liability for a civil wrong, such as driving a car in a

negligent manner and causing an accident), the principal is responsible for an act committed by an agent while acting within his or her authority during the course of the agent's employment. This legal rule is based on *respondeat superior,* which is Latin for "let the master answer." The doctrine of **RESPONDEAT SUPERIOR**, first developed in England in the late 1600s and adopted in the United States during the 1840s, was founded on the theory that a master must respond to third persons for losses negligently caused by the master's servants. In more modern terms, the employer is said to be *vicariously liable* for injuries caused by the actions of an employee or agent; in other words, liability for an employee's actions is imputed to the employer. The agent can also be liable to the injured party, but because the principal may be better able financially to pay any judgment rendered against him or her (according to the "deep-pocket" theory), the principal is almost always sued in addition to the agent.

A principal may also be liable for an agent's criminal acts if the principal either authorized or consented to those acts; if the principal directed the commission of a crime, she or he can be prosecuted as an **ACCESSORY** to the crime. Some state and federal laws provide that a corporation may be held criminally liable for the acts of its agents or officers committed in the transaction of corporate business, since by law a corporation can only act through its officers.

An agent's authority can be terminated only in accordance with the agency contract that first created the principal-agent relationship. A principal can revoke an agent's authority at any time but may be liable for damages if the termination violates the contract. Other events—such as the death, insanity, or **BANKRUPTCY** of the principal—end the principal-agent relationship by operation of law. (Operation of law refers to rights granted or taken away without the party's action or cooperation, but instead by the application of law to a specific set of facts.) The rule that death or insanity terminates an agent's authority is based on the policy that the principal's estate should be protected from potential fraudulent activity on the part of the agent. Some states have modified these common-law rules, allowing some acts of the agent to be binding upon other parties who were not aware of the termination.

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CROSS-REFERENCES

Contracts; Fiduciary; Good Faith; Imputed; Liability; Master and Servant; Respondeat Superior; Vicarious Liability.

## AGENT

*One who agrees and is authorized to act on behalf of another, a principal, to legally bind an individual in particular business transactions with third parties pursuant to an agency relationship.*

## AGGRAVATED ASSAULT

*A person is guilty of aggravated assault if he or she attempts to cause serious bodily injury to another or causes such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life; or attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon. In all jurisdictions statutes punish such aggravated assaults as assault with intent to murder (or rob or kill or rape) and assault with a dangerous (or deadly) weapon more severely than "simple" assaults.*

**Number of Aggravated Assaults Committed and Rate per 100,000, 1982 to 2001**

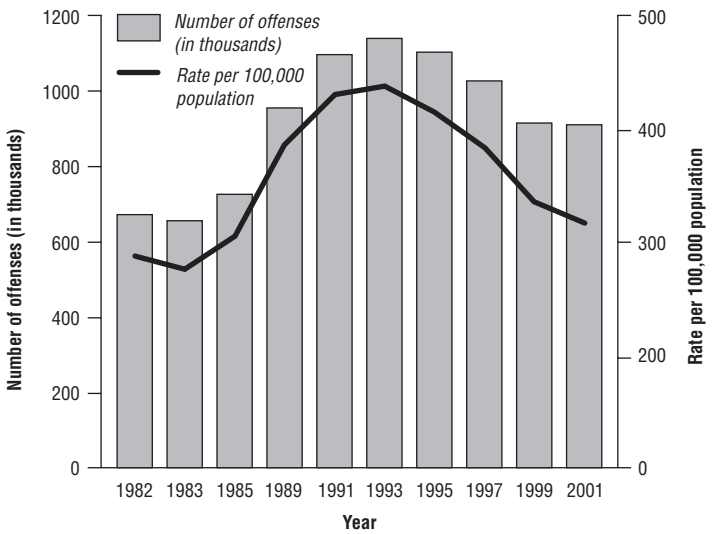


SOURCE: FBI, *Crime in the United States*, 2001.

## AGGRAVATION

*Any circumstances surrounding the commission of a crime that increase its seriousness or add to its injurious consequences.*

Such circumstances are not essential elements of the crime but go above and beyond them. The aggravation of a crime is usually a result of intentional actions of the perpetrator. Such crimes are punished more severely than the crime itself. One of the most common crimes that is caused by aggravation is aggravated assault.

## AGGRESSION

*Unjustified planned, threatened, or carried out use of force by one nation against another.*

The key word in the definition of aggression is "unjustified"—that is, in violation of INTERNATIONAL LAW, treaties, or agreements. It was the basic charge leveled against Nazi Germany at the NUREMBERG TRIALS in 1946.

## AGGRESSIVE COLLECTION

*Various legal methods used by a creditor to force a debtor to repay an outstanding obligation.*

Attachment of the debtor's property and GARNISHMENT of his or her salary are common kinds of aggressive collection.

## AGGRIEVED PARTY

*An individual who is entitled to commence a lawsuit against another because his or her legal rights have been violated.*

A person whose financial interest is directly affected by a decree, judgment, or statute is also considered an aggrieved party entitled to bring an action challenging the legality of the decree, judgment, or statute.

## AGOSTINI V. FELTON

See RELIGION "Agostini v. Felton" (sidebar).

## AGREEMENT

*A meeting of minds with the understanding and acceptance of reciprocal legal rights and duties as to particular actions or obligations, which the parties intend to exchange; a mutual assent to do or refrain from doing something; a contract.*

*The writing or document that records the meeting of the minds of the parties. An oral compact between two parties who join together for a common purpose intending to change their rights and duties.*

An agreement is not always synonymous with a contract because it might lack an essential element of a contract, such as consideration.

## AGRICULTURAL LAW

*The body of law governing the cultivation of various crops and the raising and management of livestock to provide a food and fabric supply for human and animal consumption.*

The law as it relates to agriculture is concerned with farmers, ranchers, and the consuming public. Agricultural law is designed to ensure the continued, efficient production and distribution of foods and fibers. Through a vast system of regulations that control the various aspects of agricultural practice, federal and state governments are able to provide for the needs of both agriculturalists and consumers.

### History of Agricultural Law

Agricultural law is a relatively new phenomenon. Farmers have always been subject to established contract, real property, and estate laws, but it wasn't until the mid-1980s that federal and state governments began treating the production of food and fiber as a calling worthy of special legal treatment.

State regulations concerning the inspection, promotion, and improvement of farm production were in place at the United States's infancy, but the federal government's first foray into the promotion of farming was the **HOMESTEAD ACT OF 1862** (ch. 75, 12 Stat. 392 [repealed 1976]). This act encouraged the westward expansion of European Americans by selling federally owned lands for farming. Another method of sale was *land debt,* a financial arrangement in which farmers agreed to pay the federal government a certain amount from their yearly profits in exchange for the land. Congress passed subsequent legislation concerning land ownership for farming purposes, but federal lands were eventually exhausted, and in 1976, these late-nineteenth- and early-twentieth-century acts became unnecessary and were repealed.

The colonial and pioneer families that practiced farming generally raised a variety of animals and crops, depending on what the soil would yield. This seminal arrangement came to be known as the family farm. The family farm community was rich in resources derived from land, not money, and from this unique prosperity grew a lifestyle with a status all its own.

Expendable income was not a priority for farm families. The values attached to their way of life placed a higher premium on plentiful food, vast land ownership, and a spiritual fulfillment derived from farming. Farmwork was difficult, and the farmer was different from the rest of society; it was against this backdrop that federal and state legislators began to work when addressing the pressing issues that farmers would come to face.

The years following the Civil War were especially fruitful for farming communities. **WORLD WAR I** saw an increase in the value of farm products, and in the Roaring Twenties, robust prices were maintained by a general public capable of buying food and clothing. However, in the months before the **STOCK MARKET** crash of October 1929, the value of farmland and its products began to decrease. This was due in part to high tariffs on manufacturing equipment essential to farming, which allowed U.S. manufacturers to price farming equipment without foreign competition. It was also due in part to a new emphasis on mass productivity inspired by the industrial revolution. The ability of farmers to increase production on less land led to lower prices and, eventually, fewer family farms.

The Great Depression of the 1930s eliminated many family farms. As the general public became less able to buy such basic farm products as food and clothing, food prices dropped drastically, and farmers found themselves without the profits for their mortgage payments. Foreclosures became routine. Farm families considered foreclosures a breach of the government's promise to allow productive farm families to keep their land, and vast numbers of farmers organized to withhold food from their markets in an effort to force product prices higher. A smaller number of farmers resorted to violence to prevent other farmers from delivering their goods to market. Several foreclosures were also prevented by force.

The unrest of the early 1930s in the Great Plains states eventually led to widespread state legislation that limited the rights of banks to foreclose on farms with undue haste. Action was also taken on the federal level. To avoid a national farmers' strike planned for May 13, 1933, President **FRANKLIN D. ROOSEVELT** signed the Agricultural Adjustment Act (7 U.S.C.A. § 601 et seq.) on May 12. This act was the first in a series of federal laws that provided compensation to farmers who voluntarily reduced their

*As farm foreclosures became commonplace during the Great Depression, some farmers resorted to violence to try to keep their property. This image shows Iowa National Guard members, armed with rifles, ready to put down any disturbance during an auction in Crawford County in 1933.*

FDR LIBRARY

output. Parts of the act were declared unconstitutional by the Supreme Court in 1936, in part because the Court considered agriculture a matter of local concern. Congress and President Roosevelt continued to press the issue, with the amended Agricultural Adjustment Act of 1938, which contained more federal control of production, benefit payments, loans, insurance, and soil conservation.

The TEST CASE for the new Agricultural Adjustment Act was *Wickard v. Filburn,* 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942). In *Wickard,* Ohio farmer Roscoe C. Filburn sued Secretary of Agriculture Claude R. Wickard over the part of the act concerning wheat acreage allotment. Under the act, the U.S. DEPARTMENT OF AGRICULTURE (USDA) had designated 11.1 acres of Filburn's land for wheat sowing and established a normal wheat yield for this acreage. Filburn defied the department's directive by sowing wheat on more than 11.1 acres and exceeding his yield. This constituted farm marketing excess, and Filburn was penalized $117.11 by the department. When Filburn refused to pay the fine, the government issued a lien against his wheat and the Agriculture Committee denied him a marketing card. This card was necessary to protect Filburn's buyers from liability for the fine, and to protect buyers from the government's lien on Filburn's wheat.

Filburn sued to invalidate the wheat acreage allotment provision, arguing in part that it was beyond the power of the federal government to enforce such farming limitations. Even though Filburn did not intend to sell much of the wheat, the Supreme Court reasoned that because all farm product surplus had a substantial effect on interstate commerce, it was within the power of the U.S. Congress to control it. This decision affirmed the power of Congress to regulate all things agrarian, and the U.S. farmer, for better or worse, was left with a meddlesome lifetime friend in the federal government.

As the United States enjoyed economic prosperity through the 1950s and 1960s, the number of family farms remained relatively stable. Farm families learned to work with the federal government and its dizzying stream of agencies, regulations, and paperwork. Nevertheless, the mid-1980s saw another farm crisis. Widespread financial difficulty led to the loss of hundreds more family farms and prompted further federal action.

In response to this crisis, Congress passed an extensive credit-relief package in 1985, over the protest of President RONALD REAGAN's agriculture secretary, John R. Block. The several bills in this package provided for additional federal monies for loan guarantees, reduction of lender interest rates, and loan advancements.

This farm crisis was triggered by a combination of natural disasters, market shifts, lower prices, and production improvements. Furthermore, the onset of *corporate farming,* which involves mass production of farm products, forced farm families to consistently reckon with the harsh realities of the financial world.

Dissatisfaction with federal farm laws and policy led Congress in 1996 to pass the Federal Agriculture Improvement and Reform Act, which came to be known as the Freedom to Farm Act (Pub.L. 104–127, Apr. 4, 1996, 110 Stat. 888). The law, which was trumpeted by conservatives as the means to end 60 years of federal farm subsidies and to reinvigorate the free market, reduced regulatory burdens on farmers and ended requirements that farmers idle land to qualify for crop subsidies. However, the central part of the law consisted of "market transition payments"—the USDA paid farmers to compensate them for the possibility that farm subsidies might end in six years. This departed from the traditional federal practice where support payments were inversely related to crop prices—the higher the crop prices, the lower the support payments.

The Freedom to Farm Act gave farmers more than three times as much in cash subsidies in 1996 and 1997 than they would have received under the previous five-year farm bill. Even with these payouts, farm income began to fall in 1998, leading Congress to reverse course and authorize billions of dollars in farm relief. By 2002, Congress had abandoned the idea that the federal government should not subsidize farmers. It passed the Farm Security and Rural Investment Act of 2002 (Farm Bill 2002), Pub.L. 107–171, May 13, 2002, 116 Stat. 134, which set agricultural policy for the next six years. It is estimated that the total subsidies paid out over this period will reach $200 billion.

While government involvement in farming continues, the face of U.S. farming is evolving. Most farmers are now trained in business and keep abreast of farming trends, technological and manufacturing improvements, and the stock market. Many family farms have adapted

by specializing in the mass production of one or two particular foods or fibers, like corporate farms. Other farmers have formed what is called a cooperative, a group of farmers dedicated to the most profitable sale of their products. By pooling their resources and producing a variety of goods, cooperative farmers are able to weather low-price periods and postpone sales until a product price reaches a high level.

Agriculture has become a powerful LOBBYING group in state capitals across the country, and the political issues are myriad. The industry itself is split into competing special interests, according to product. Family farms and cooperatives are often at odds, although sometimes they join forces against massive corporate farming. Farming interests are frequently opposed by advocates for the environment and food purity. The government does not always seem to act in the best interests of farmers, and farmers and their creditors continually struggle for leverage. Federal and state regulations seek to provide some predictability for the players in these struggles.

### Federal Law

According to the *Wickard* case, the U.S. Congress has the power to regulate agricultural production under Article I, Section 8, of the federal Constitution, and Congress has left virtually nothing to chance. The numerous programs and laws that promote and regulate farming are overseen by the secretary of agriculture, who represents the USDA in the president's cabinet. The USDA is the government agency that carries out federal agricultural policy, and it is the most important legal entity to the farmer.

Usually, some two dozen agencies are housed within the USDA, all charged with carrying out the various services and enforcing the numerous regulations necessary for the efficient, safe production of food and fiber. Other administrative agencies can affect a farmer's legal rights, such as the FOOD AND DRUG ADMINISTRATION (FDA), the INTERIOR DEPARTMENT, and the TREASURY DEPARTMENT, but the USDA is the single department to which every farmer must answer.

The Agricultural Adjustment Acts establish and maintain prices for crops by preventing extreme fluctuations in their availability. These acts empower the secretary of agriculture to allot a certain amount of farmland for the production of a specific crop, and to apportion the land among the states capable of producing the crop. State agricultural committees then assign a certain amount of the land to various counties, and the counties in turn assign the land to local farms. This system guards against crop surpluses and shortages, and preserves economic stability by preventing extreme fluctuations in crop prices.

The COMMODITY CREDIT CORPORATION (CCC) exists within the USDA to further the goal of stabilizing food prices and farmers' incomes. The CCC provides DISASTER RELIEF to farmers, and it controls prices through an elaborate system of price support. Loans to farmers and governmental buyouts of farm products allow the CCC to maintain reasonable price levels. The secretary of the CCC is also authorized to issue subsidies, or governmental grants, to farmers as another means of controlling prices by maintaining farmers' incomes. By encouraging or discouraging the production of a particular food or fiber through financial reward, subsidies promote price stability in the markets.

Several federal programs help serve the same purpose of price stability. The secretary of agriculture may set national quotas for the production of a certain farm product. *Set-aside conditions,* also established by the secretary of agriculture, require farmers to withhold production on a certain amount of cropland during a specified year. *Diversion payments* are made to farmers who agree to divert a percentage of their cropland to conservation uses, and the Payment in Kind Program allows farmers to divert farmland from production of a certain commodity in exchange for a number of bushels of the commodity normally produced on the diverted land. Federal crop insurance, emergency programs, and indemnity payment programs protect farmers against unforeseen production shortfalls. The FARM CREDIT ADMINISTRATION, established by Congress as an independent agency in the EXECUTIVE BRANCH of government, provides funds for farmers who are unable to purchase feed for livestock or seed for crops.

Also in place are federal programs and regulations that provide for the coordination of farm cooperatives, standardization of marketing practices, quality and health inspections, the promotion of market expansion, the reporting of farm statistics, and the administration of soil conservation efforts. For example, the Soil Conservation and Domestic Allotment Act (16 U.S.C.A. §§ 590 et seq. [1936]) directs the secre-

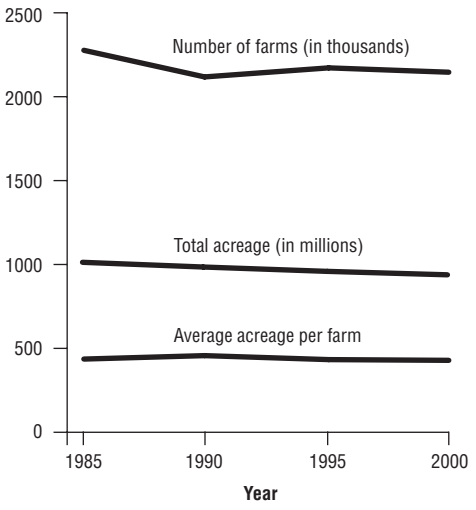


SOURCE: U.S. Department of Agriculture.

tary of agriculture to help farmers and ranchers acquire the knowledge and skill to preserve the quality of their soil. The federal Food Stamp Program helps to support domestic food consumption and economic stability for consumers and farmers alike by subsidizing the food purchases of people with low incomes.

Under Title VII of the United States Code, the secretary of agriculture is charged with coordinating educational outreach services. The Morrill Act (7 U.S.C.A. §§ 301-05, 307, 308), passed by Congress in 1863, granted public land to institutions of higher education for the purpose of teaching agriculture. In 1887, the HATCH ACT (7 U.S.C.A. § 361a et seq.) created agricultural experiment stations for colleges of agriculture, and in 1914, the Smith-Lever Act (7 U.S.C.A. § 341 et seq.) created the Extension Service, which allowed agriculture colleges to educate farmers not enrolled in school.

In the Extension Service, agents are hired by an agriculture college to help farmers address a variety of farming issues, and to promote progress in farming by providing farmers with information on technological advances. Many farm families have been helped by the land-grant programs, but some critics have argued that this college system too often emphasizes increased productivity and frenzied technological advancement at the exclusion of small-scale farm operations. In the mid-1990s, the Extension Service began to branch out. The Minnesota Extension Service, for example, began to address such issues as teen drug abuse and child neglect. This use of agricultural monies for social services has disappointed some and pleased others.

One high-profile controversy involves the Bovine Somatatropin (BST) bovine growth hormone. The BST hormone increases the milk output of dairy cows. The Milk Labeling Act bills passed by Congress in April 1993 regulate the use of the drug by requiring the secretary of agriculture to conduct a study of its economic effect on the dairy industry and on the federal price support program for milk. The act also requires the producers of the milk from cows treated with BST to keep records on its manufacture and sale. Proponents of the drug extol its production benefits, but opponents argue that increasing productivity is less important than ensuring food purity.

Homestead protection is another form of federal relief, which helps keep farms out of foreclosure. To qualify for homestead protection, farmers must show that they have received a gross farm income that is comparable to that of other local farmers, and that at least 60 percent of their income has come from farming. A 1993 case challenged the definition of this type of relief. *Schmidt v. Espy,* 9 F.3d 1352 (8th Cir. 1993), was a suit brought by the Schmidt family to stop the FmHA from calling in the Schmidts' farm loan. The USDA had ruled that because the Schmidt farm had suffered net losses, it could not qualify for homestead protection. The Schmidts took their case to the U.S. district court, which affirmed the USDA's decision.

The Eighth Circuit Court of Appeals reversed the decision. According to the appeals court, the statutory definition of income for purposes of homestead protection is gross income, not gross profits. The court reasoned that because homestead protection is normally sought by financially distressed farmers, limiting the protection to profitable farmers would run contrary to the purpose of homestead protection.

### State Law

The TENTH AMENDMENT grants states the right to pass laws that promote the general safety and well-being of the public. Because courts have found that agricultural production and

consumption directly affect public health and safety, states are free to enact their own agricultural laws, provided those laws do not conflict with federal laws and regulations.

Many state laws provide for financial assistance to farmers. By issuing loans or providing emergency aid, states are able to ensure the survival of family farms and continued agricultural production. The states also have the power to impose agricultural liens, which are claims upon crops for unpaid debts. If a farmer is unable to make timely payments on loans for services or supplies, the state may sue the farmer to gain a security interest in the farmer's crops. States also enact laws to supervise the inspection, grading, sale, and storage of grain, fertilizer, and seed.

Municipalities can also set regulations that ostensibly control agricultural production. The subject of wetlands, for example, is within the jurisdiction of local governing bodies. In *Ruotolo v. Madison Inland Wetlands Agency,* No. CV 93-0433106, 1993 WL 544699 (Conn.Super., Dec. 23, 1993), Michael Ruotolo, a farmer in Madison, Connecticut, challenged a municipal regulation that prevented him from filling in wetlands located on his property. Ruotolo wanted to plant nursery stock on the area after moving earth to raise the ground level, but the Madison Wetlands Regulation precluded the filling in of any wetlands. According to a state statute, however, farming was permitted on some wetlands of less than three acres.

Ruotolo asserted a right to farm, and argued that since the state law and the local regulation were in conflict, the state law should prevail. However, in previous proceedings between Ruotolo and the Madison Inland Wetlands Agency, the agency had found that the wetland on Ruotolo's property had "continual flow," and was therefore subject to more protection than standing-water wetlands. Because the state statute prevented even farmers with less than three acres from filling in wetlands with continual flow, Ruotolo was prevented from farming the wetlands on his property.

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Agriculture Department; Agriculture Subsidies; Environmental Law; Land-Use Control; Zoning.

## AGRICULTURE DEPARTMENT

The U.S. Department of Agriculture (USDA) is an executive, cabinet-level department in the federal government. It is directed by the secretary of agriculture, who reports to the president of the United States. Its primary concern is the nation's agriculture industry, and it addresses this concern through numerous economic, regulatory, environmental, and scientific programs. The USDA provides financial aid to farmers through loans, grants, and a system of price supports that delicately balances the nation's agriculture markets, and its international efforts to promote domestically grown products abroad. It regulates the quality and output of the grain, meat, and poultry industries. Through various conservation programs, the department helps protect soil, water, forests, and other natural resources. The USDA also administers the federal Food Stamp Program, one of the WELFARE system's largest services.

The USDA has a long history. It was created by an act of May 15, 1862 (12 Stat. 387, now codified at 7 U.S.C.A. § 2201), and was administered by a commissioner of agriculture until 1889 (25 Stat. 659). In 1889, Congress enlarged the department's powers and duties (7 U.S.C.A. §§

2202, 2208). It made the USDA the eighth executive department in the federal government, and the commissioner became the secretary of agriculture. Federal lawmakers have tinkered with the department ever since. Notably, programs providing economic aid to farmers were established during the Great Depression, and they have since become a firmly entrenched part of federal law. Important contemporary reforms have included federal welfare services such as the Food Stamp Program, administered through the Food and Nutrition Service since the 1970s, and the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C.A. § 1421 note et seq.), enacted to maintain the income of farmers. The Federal Agriculture Improvement and Reform Act of 1996 (Freedom to Farm Act) (Pub.L. 104–127, Apr. 4, 1996, 110 Stat. 888), and the Farm Security and Rural Investment Act of 2002 (Farm Bill 2002) (Pub.L. 107–171, May 13, 2002, 116 Stat. 134), while promising less reliance on farm subsidies, have continued the department's central role in administering subsidy programs.

The secretary of agriculture sits above an elaborate bureaucracy. The deputy secretary runs day-to-day operations, serving as the secretary's principal adviser. Reporting to the secretary and deputy secretary are six officers: chief financial officer, general counsel, inspector general, executive of operations, director of communications, and chief information officer.

**Department of Agriculture**

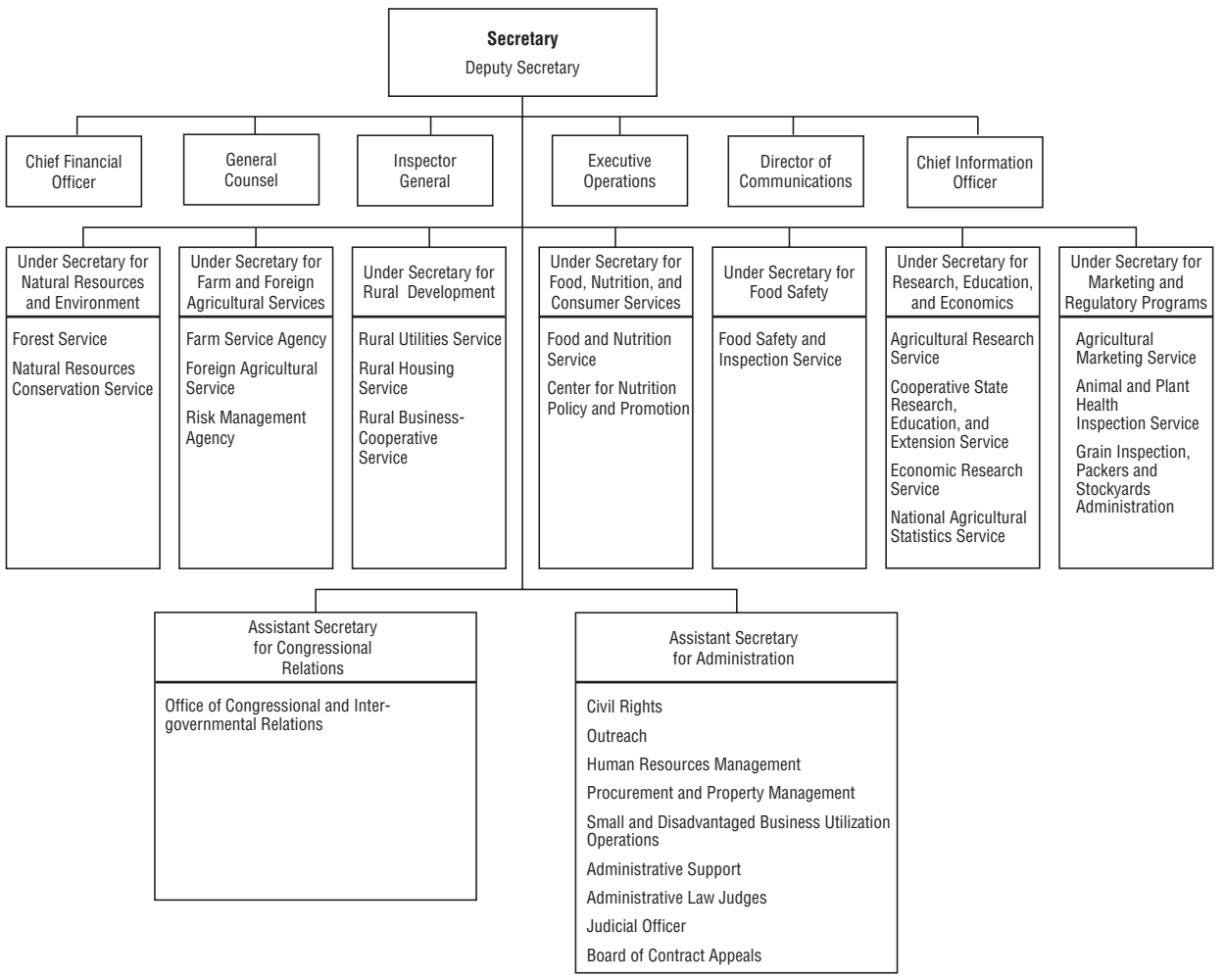

These officers and their staffs coordinate the USDA's personnel management program; equal opportunity and CIVIL RIGHTS activities; safety and health activities; management improvement programs; media relations; accounting, fiscal, and financial activities; automated data processing administration; procurement and contracts; and management of real and PERSONAL PROPERTY.

Legal affairs are handled in various branches of the USDA. The judicial officer serves as the final deciding officer, in the place of the secretary, in regulatory proceedings and appeals of a QUASI-JUDICIAL nature where a hearing is required by law. Two quasi-judicial agencies, the Office of Administrative Law Judges and the Board of Contract Appeals, adjudicate cases and decide contract disputes. Additional input to the secretary comes from the general counsel, who is both the principal legal adviser and the chief law officer of the department. All audits and investigations are conducted by the Office of the Inspector General, established by the Inspector General Act of 1978 (5 U.S.C.A. § 2 et seq.). The Office of Congressional Relations informs Congress of administrative policy.

Also reporting to the secretary and deputy secretary are seven under secretaries who oversee major divisions. These divisions include Rural Development; Marketing and Regulatory Programs; Food, Nutrition, and Consumer Services; Food Safety; Farm and Foreign Agricultural Service; Natural Resources and Environment; and Research, Education, and Economics. The USDA also runs a graduate school.

### Rural Development

The Rural Development division includes three programs that provide financial help to farmers and rural communities. The Rural Business-Cooperative Service (RBS) provides and guarantees loans to public entities and private parties who cannot obtain credit from other sources. Loans are made to help finance industry and business and to provide jobs in rural areas. The Rural Housing Service (RHS) provides affordable rental housing, home ownership opportunities, and essential community facilities. It also provides loans to buy, operate, and improve farms, and guarantees loans from commercial lenders. The Rural Utilities Service (RUS) is a credit agency that helps rural electric and telephone utilities obtain financing.

### Marketing and Regulatory Programs

The Marketing and Regulatory Programs division oversees three major programs. The Agricultural Marketing Service (AMS) administers standardization, grading, inspection, market news, marketing orders, research, promotion, and regulatory programs. The Animal and Plant Health Inspection Service conducts programs pertaining to quarantine, environmental protection, the humane treatment of animals, and the reduction of crop and livestock losses. The Grain Inspection, Packers, and Stockyards Administration regulates grain, meat, poultry industries, and other commodities. It also enforces ANTITRUST LAWS to ensure fair competition in the meat industry.

### Food, Nutrition, and Consumer Services

The Food, Nutrition, and Consumer Services division includes two social welfare programs and one consumer information service. The Food and Nutrition Service administers federal assistance programs to needy people, including the Food Stamp Program, special nutrition programs, and supplemental food programs. The Center for Nutrition Policy and Promotion (CNPP) conducts research to improve professional and public understanding of diets and eating, and develops the national Dietary Guidelines for Americans. The CNPP also focuses on consumer advocacy by helping USDA policy makers, representing the department before Congress, monitoring USDA programs, and conducting consumer outreach.

### Food Safety

The Food Safety division administers the Food Safety Inspection Service (FSIS). Established in 1981, the FSIS conducts federal meat and poultry inspections on cattle, swine, goats, sheep, lambs, horses, chickens, turkeys, ducks, geese, and guineas used for human food. It also inspects the production of egg products. The service monitors meat and poultry products in storage, distribution, and retail channels.

In the wake of the terrorist attacks of September 11, 2001, the USDA emphasized the need to protect the nation's food supply. It primarily focused on bioterrorist threats and worked to establish an infrastructure that will provide better food safety. For example, additional Import Surveillance Liaison (ISL) inspectors were hired to focus on specific points of entry across the United States, and to re-inspect meats and poul-

try that were being imported from other countries. The USDA also increased resources at universities and laboratories where research into biological agents, and food safety analysis were taking place. Such initiatives will ultimately benefit the overall integrity of the nation's food supply.

### Farm and Foreign Agricultural Service

The Farm and Foreign Agricultural Service division administers three programs that help maintain a stable market for farm commodities, thus ensuring a steady income for farmers. The Farm Service Agency (FSA) administers programs of the COMMODITY CREDIT CORPORATION (CCC). These programs include so-called price supports: farmers who agree to limit their production of specially designated crops can sell them to the CCC or borrow money at support prices. The FSA also furnishes emergency financial aid to farmers, operates a grain reserve program, provides milk producers refunds of the reduction in the price received for milk during a calendar year, and provides payments to dairy farmers if their milk is removed from the market because of contamination. It has responsibility for plans relating to food production and conservation in preparation for a national security emergency, and provides incentives for preserving and protecting agricultural resources. The Risk Management Agency (RMA) provides crop insurance to farmers to protect them against unexpected production losses caused by natural causes.

The division also has an international focus. The Foreign Agricultural Service (FAS) has primary responsibility for the USDA's overseas market information, access, and development programs. Maintaining a worldwide agricultural intelligence and reporting system, it also administers the USDA's export assistance and foreign food assistance programs. The Office of International Cooperation and Development (OICD) helps other USDA agencies and U.S. universities enhance U.S. agricultural competitiveness globally. Through utilizing the technical expertise of the U.S. agricultural community, it seeks to increase income and food availability in developing nations.

### Natural Resources and Environment

Two programs in the Natural Resources and Environment division address environmental resources. The Forest Service oversees the national forests. It manages 155 national forests, 20 national grasslands, and 8 land-utilization projects on over 191 million acres in 44 states, the Virgin Islands, and Puerto Rico. It provides national leadership, and financial and technical assistance, to owners and operators of nonfederal forestland, processors of forest products, and urban forestry interests. The Natural Resources Conservation Service has responsibility for developing and carrying out a national soil and water conservation program in cooperation with landowners, developers, communities, and federal, state, and local agencies. It also assists in agricultural POLLUTION control, environmental improvement, and rural community development.

### Research, Education, and Economics

The Research, Education, and Economics division administers four major programs. The Agricultural Research Service (ARS) conducts studies in the United States and overseas to improve farming. The Cooperative State Research, Education, and Extension Service administers acts of Congress that authorize federal appropriations for agricultural research carried out by the State Agricultural Experiment Stations. The Extension Service is the educational agency of the USDA. The National Agricultural Statistics Service provides information services to everyone from research scientists to the general public, and maintains the electronic Agricultural Online Access (AGRICOLA) database, available over the INTERNET and on compact disc. It prepares estimates and reports on production, supply, price, and other economic information. The Economic Research Service (ERS) analyzes economic and other social science data in order to improve agricultural performance and rural living It makes analyses of recommendations by USDA agencies, task forces, and study groups to be used as a basis for short-term agricultural policy.

### USDA Graduate School

The Graduate School, U.S. Department of Agriculture, is a continuing education school offering career-related training to adults. Not directly funded by Congress or the USDA, it is self-supporting, with a mostly part-time faculty drawn from government and industry. The graduate school, administered by a director and governed by a general administration board appointed by the secretary of agriculture, was established on September 2, 1921, pursuant to act of May 15, 1862 (7 U.S.C.A. § 2201); joint

resolution of April 12, 1892 (27 Stat. 395); and the Deficiencies Appropriation Act of March 3, 1901 (20 U.S.C.A. §. 91).

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CROSS-REFERENCES

Agricultural Law; Agriculture Subsidies; Consumer Protection; Environmental Law.

## AGRICULTURE SUBSIDIES

*Payments by the federal government to producers of agricultural products for the purpose of stabilizing food prices, ensuring plentiful food production, guaranteeing farmers' basic incomes, and generally strengthening the agricultural segment of the national economy.*

Proponents of agriculture subsidies point to several reasons why they are necessary. They claim that the country's food supply is too critical to the nation's well-being to be governed by uncontrolled market forces. They also contend that in order to keep a steady food supply, farmers' incomes must be somewhat stable, or many farms would go out of business during difficult economic times. These premises are not accepted by all lawmakers and are the subject of continual debate. Critics argue that the subsidies are exceedingly expensive and do not achieve the desired market stability.

The U.S. government first initiated efforts to control the agriculture economy during the Great Depression of the late 1920s and early 1930s. During this period, farm prices collapsed, and farmers became increasingly desperate in attempts to salvage their livelihood, sometimes staging violent protests. President HERBERT HOOVER made several failed attempts to shore up prices and stabilize the market, including the disastrous Hawley-Smoot Tariff Act of 1930, 6 U.S.C.A. § 1, 19 U.S.C.A. § 6 et seq., which created a limited tariff to protect farmers from competition from foreign products. The tariff set in motion a worldwide wave of protective tariffs, greatly exacerbating the global economic panic and resulting in drastically decreased export markets for U.S. commodities.

After the Hawley-Smoot Tariff Act of 1930, tariffs were not a widely supported method of subsidizing most agricultural products. The model for post–Hawley-Smoot farm subsidies is the Agricultural Adjustment Act of 1933 (AAA), 7 U.S.C.A. § 601 et seq., passed by President FRANKLIN D. ROOSEVELT and the NEW DEAL Congress. The AAA implemented some ideas that became staples of agriculture subsidy programs to the present day, including provisions allowing the government to control production by paying farmers to reduce the number of acres in cultivation; purchase surplus products; regulate the marketing of certain crops; guarantee minimum payments to farmers for some products; and make loans to farmers using only their unharvested crops as collateral.

The government also has attempted to stabilize agricultural markets by subsidizing the export of U.S. agricultural products and by signing international agreements designed to promote agricultural exports. In the 1950s and 1960s, the government took major steps to increase exports, including the adoption of the Agricultural Trade Development and Assistance Act of 1954, 7 U.S.C.A. § 1427 et seq., and the GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT). Such measures resulted in widened markets for U.S. agricultural products.

The GATT, a multination agreement intended to reduce international trade impediments and decrease the potential for tariff-based trade wars, has undergone several revisions during its history. Agriculture subsidies and tariffs have often been a source of great debate in these revisions. During the Uruguay round of modifications, GATT members could not agree on this issue. The stalemate nearly resulted in a renewed tariff war and the ABANDONMENT of the agreement during the 1980s and 1990s. At one point, farmers in France staged violent demonstrations when that country agreed to lower its subsidies and open its markets to imports.

Some export-based policies have had drawbacks. In 1972, the Nixon administration announced a monumental agreement with the Soviet Union whereby the Soviet Union would purchase virtually all surplus grain produced in the United States. U.S. grain and food prices escalated rapidly owing to this new demand, causing great public skepticism about the deal, except in the rural United States, where farm values and incomes escalated.

Another method used by the government to subsidize agricultural products is the combination of target prices, deficiency payments, and mandatory acreage reduction. This approach is used primarily for corn and wheat, the main U.S. grain crops. Under this method, the government sets an ideal price, or *target price,* for a commodity. If the market price falls below that target price, the government pays the farmer the difference—that is, makes a *deficiency payment* to the farmer. This prevents the farmer from being forced to sell the product at a price deemed unfairly low by the government, and supports the farmer's income during difficult economic periods. Programs using this method are not mandatory, so the farmer must enlist in one to be involved. In return for a guaranteed minimum income and price stability, the farmer normally is required to take a specified portion of land out of production—that is, make a *mandatory acreage reduction*—at least for program commodities.

In any given year, it is impossible to predict how expensive the deficiency payment programs will be, because weather conditions and uncontrolled market forces often greatly affect prices. These types of agriculture subsidies often have been quite expensive, especially during years when market prices are low owing to high production and low exports. To reduce the government's cash payments to farmers during one particularly disastrous market swing, the Reagan administration implemented the Payment in Kind (PIK) Program in 1983. Under the PIK Program, instead of paying farmers with cash, the government paid them with certificates good for federal surplus grain. Farmers could then exchange the certificates for actual grain or trade them like stock certificates. PIK, combined with a drought in 1983, succeeded in reducing the cash cost of the deficiency payment programs and the excessive grain surplus.

In the dairy industry, the government subsidizes milk production by agreeing to purchase milk from processors at a predetermined price. Dairy farmers receive no direct deficiency payments; rather, they receive from their processor a milk check that includes the federal money.

The international community often attacks the U.S. dairy subsidy programs as predatory, although similar and even greater subsidies are given to many dairy farmers in European communities. U.S. dairy producers claim that until the other producing nations drop their subsidies, it would be economic suicide for the United States to lower subsidies.

The government also subsidizes agriculture through *nonrecourse loans.* With this type of subsidy, the government loans money to farmers using the farmers' future harvest as collateral. The government sets a per-bushel loan rate at which farmers can borrow money prior to harvest, so that they can hold their crops for later sale when the market price rises. The government determines how much a farmer can borrow by multiplying the loan rate (which is usually equal to the government target price for the crop) by the farmer's base acreage (which is determined by calculating the number of acres the farmer planted of a target crop over several years, and multiplying that total by the farmer's average yield). The crop is the collateral for the loan, and the farmer can either repay the loan in cash and sell the crop, or default and forfeit the crop to the government. If the market price is lower than the loan rate or target price, or if the farmer's actual production rate is below the farmer's base acreage rate, the government's only recourse for recouping part of its loan is to take the collateral crop. This subsidy is used primarily for corn and wheat, with a modified form of the program applying to soybeans, rice, and cotton.

The government still enforces restrictive tariffs to subsidize certain domestic crops, especially sugar, for which the U.S. tariff virtually eliminates all foreign imports. The tariff protects U.S. sugar producers and costs the government little, but opponents argue that the cost of this domestic MONOPOLY is passed on to consumers, who are forced to pay sugar prices almost four times higher than the world market rates, to the benefit of a few large sugar manufacturers.

For peanuts and tobacco, the government allows legal monopolies for a few government-licensed growers, and imposes large tariffs on imports of these products. Also, cigarette companies are allowed to help determine the price of tobacco and the volume of foreign imports, creating a dual-monopoly relationship between tobacco growers and the cigarette industry.

Supporters of subsidies attribute the relatively low cost of food and the stability of food production to the assistance of the federal government. They say that if agriculture subsidies did not exist, food prices would vary wildly from year to year, and that many farmers would be unable to support themselves through market

lows and weather catastrophes. Supporters often state that government support for family farms keeps farm monopolies from dominating production and raising prices. They also cite the great advances in per capita production since the New Deal revisions in farm policy as evidence of the success of agriculture subsidies.

In addition, supporters point out that the government has encouraged soil conservation through subsidies. They point to laws such as the Soil Conservation and Domestic Allotment Act of 1936, 7 U.S.C.A. § 608-1 et seq., 16 U.S.C.A. § 590 et seq., which required that farmers who received income subsidies plant soil-conserving crops like legumes rather than soil-depleting crops such as corn, and that farmers use contour crop-stripping methods to hinder soil erosion resulting from water runoff.

Opponents of agriculture subsidies say the farm economy is overly dependent on government, and that market forces would be a more efficient and inexpensive method of regulating production and market price. They contend that in the 1970s and 1980s, up to 30 percent of farmers' incomes were made up of government payments, primarily during years when guaranteed deficiency payments ballooned, and that farm programs have become the third largest federal program expense, behind SOCIAL SECURITY and MEDICARE.

Another primary criticism of farm commodity programs, especially corn and wheat programs, is that they encourage farmers to expand their operation in order to acquire more base acres and higher guaranteed government payments. Opponents believe that this leads to a concentration of production in the hands of fewer and fewer farm corporations, and actually undermines the concept of family farms. Opponents also state that although a primary goal of agriculture subsidies always has been to control production, most programs have had little success in doing so because farmers who are paid to keep part of their land out of production tend to remove the least productive acres.

The Republican Congress of 1994–95 proposed large cuts in farm subsidies as a means to reduce the federal deficit. In March 1996, Congress passed the Federal Agriculture Improvement and Reform Act, which came to be known as the Freedom to Farm Act (Pub.L. 104–127, Apr. 4, 1996, 110 Stat. 888). This act threatened to spell the end of agriculture subsidies, as it set out a plan to phase out subsidies by 2003. The six-year period, however, contradicted the avowed purpose of the 1996 act. The law sought to soften the blow to farmers by increasing subsidies through the use of *market transition payments.* These payments differed from traditional subsidies because they were not tied to commodity prices, so even if the market price rose the farmers would receive payments. In addition, the payment schedules were almost three times higher than the amounts paid out in previous farm bills.

Advocates of a free market without subsidies were angered as Congress started to back away from the basic concept of the Freedom to Farm Act. As farm incomes started to fall in 1998, members of both political parties agreed to authorize additional funds for farm subsidies. This process continued through 2001 as farmers cited bad weather, natural disasters, and other forces for a decline in farm income.

In addition, the 1996 law authorized a dairy "compact" for six New England states. This provision sets a minimum farm price for milk consumed in the six New England states. When federally regulated milk prices drop below the compact price, processors are required to pay farmers the difference. Midwest dairy farmers have argued this is unfair because the compact erects a trade barrier and encourages New England farmers to overproduce milk.

The Farm Security and Rural Investment Act of 2002 (Farm Bill 2002), Pub.L. 107–171, May 13, 2002, 116 Stat. 134, which sets agriculture policy for six years, made clear that subsidies would not wither away. In fact, subsidies are projected to grow during the six years and could reach $200 billion for the period. Some in Congress lamented the retreat from the Freedom to Farm Act, but others faced the political reality that agribusiness and family farmers are a potent LOBBYING force that few congressional representatives want to frustrate.

Many environmentalists opposed farm subsidies for different reasons. Corn and wheat programs came under attack by environmental groups. These groups claimed that the base acreage and deficiency payment system encouraged farmers to produce soil-depleting and erosion-prone crops such as corn year after year, even if the market offered a better price for a different crop. Soil depletion and the need to increase average yields led to heavy use of chemical fertilizers, which in turn added to soil and WATER POLLUTION.

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CROSS-REFERENCES

Agricultural Law; Agriculture Department; General Agreement on Tariffs and Trade.

## AID AND ABET

*To assist another in the commission of a crime by words or conduct.*

The person who aids and abets participates in the commission of a crime by performing some OVERT ACT or by giving advice or encouragement. He or she must share the criminal intent of the person who actually commits the crime, but it is not necessary for the aider and abettor to be physically present at the scene of the crime.

An aider and abettor is a party to a crime and may be criminally liable as a principal, an ACCESSORY before the fact, or an accessory after the fact.

## AID AND COMFORT

*To render assistance or counsel. Any act that deliberately strengthens or tends to strengthen enemies of the United States, or that weakens or tends to weaken the power of the United States to resist and attack such enemies is characterized as aid and comfort.*

Article 3, section 3, clause 1 of the U.S. Constitution specifies that the giving of aid and comfort to the enemy is an element in the crime of TREASON. Aid and comfort may consist of substantial assistance or the mere attempt to provide some support; actual help or the success of the enterprise is not relevant.

In the wake of the September 11, 2001, terrorist attacks, there was a great deal of concern expressed about terrorist "sleeper cells" in the United States. Sleeper cells can be individual terrorists or groups of terrorists who blend in with society at large; they remain inactive, even for years, until they receive orders to carry out their mission. Some of the perpetrators of the SEPTEMBER 11 ATTACKS belonged to such sleeper cells.

Widespread concern over terrorist sleeper cells fueled suspicion that some U.S. citizens were knowingly providing aid and comfort to terrorist cells located in the United States. Aid and comfort was allegedly provided by shielding the identities of terrorists from U.S. authorities, and providing funds, transportation, and other forms of assistance to terrorists who plotted against U. S. interests.

In the subsequent U.S. military action against the Taliban government in Afghanistan and members of the al Qaeda terrorist organization located there, which started in October 2001, U.S. forces captured John Walker Lindh, a 20-year-old American citizen who was trained by and was fighting for the Taliban against the U.S. government. The Walker Lindh case garnered enormous coverage in the press, with many claiming that Walker Lindh's role as a combatant for the Taliban was tantamount to treason as it gave aid and comfort to enemies of the United States.

## AIDING THE ENEMY ACTS

The outbreak of war normally ends all forms of normal relations between belligerent states. In support of the war effort municipal laws may be implemented to prevent citizens and other persons within a belligerent state's jurisdiction from assisting an enemy state through trade or other forms of contact. In the United States, for example, the Trading with the Enemy Act (40 Stat. 411 as amended [1917]) suspends all forms of trade or communication with persons in enemy territory. The statutory or executive restrictions imposed under the Trading with the Enemy Act are limited to formal periods of war, although other authority exists permitting the president to impose restrictions on trade or communications with a country without a declaration of war.

Because the Trading with the Enemy Act and similar statutes apply specifically to other nations in times of war, their provisions do not apply easily to dealings between citizens of the United States and members of terrorist organizations. After the SEPTEMBER 11TH ATTACKS were perpetrated by terrorist organizations

against the United States, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) (Pub. L. No. 107-56, 115 Stat. 277) in order to strengthen the ability of the United States to protect itself from terrorist activities. The USA Patriot Act amended the existing statutory provisions permitting the president to restrict transactions and other transfers with foreign countries, organizations, and persons in order to respond to unusual and extraordinary threats against the United States.

The current statutory provisions allowing the president to impose economic sanctions against a nation that the president deems to be a threat against the United States are provided by the International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, 91 Stat. 1626 (50 U.S.C.A. §§ 1701-1702). Under this act, the president may, with respect to any person or property subject to the jurisdiction of the United States, investigate, regulate, or prohibit transactions in foreign exchange; transfers of credit or payments by or to any banking institute; or importation or exportation of SECURITIES or currency. The president and the federal government may also confiscate property owned by certain foreign countries, organizations, or nationals.

Violation of an EXECUTIVE ORDER issued pursuant to the IEEPA prohibiting trade with a foreign nation or organization may result in criminal sanctions. During the Gulf War in 1991, President GEORGE HERBERT WALKER BUSH issued an executive order prohibiting citizens of the United States from traveling to or dealing with the government of Iraq. Arch Trading Company, Inc., a corporation based in Virginia, violated this decree by completing a contract with Iraq. The U.S. government brought criminal charges against the company for conspiring to commit an offense against the United States in violation of 18 U.S.C.A. § 371 (2000). Despite arguments by the company that violation of the order was not an "offense" under federal law, the U.S. Court of Appeals for the Fourth Circuit held that the company could be properly charged. *United States v. Arch Trading Co.*, 987 F.2d 1087 (4th Cir. 1993).

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CROSS-REFERENCES

Rules of War; War.

## AIR POLLUTION

Air pollution has plagued communities since the industrial revolution and even before. Airborne pollutants, such as gases, chemicals, smoke particles, and other substances, reduce the value of and ability to enjoy affected property and cause significant health and environmental problems. Despite the long history and significant consequences of this problem, effective legal remedies only began to appear in the late nineteenth and early twentieth centuries. Though some U.S. cities adopted air quality laws as early as 1815, air POLLUTION at that time was seen as a problem best handled by local laws and ordinances. Only as cities continued to grow, and pollution and health concerns with them, did federal standards and a nationwide approach to air quality begin to emerge.

The earliest cases involving air pollution were likely to be brought because of a noxious smell, such as from a slaughterhouse, animal herd, or factory, that interfered with neighboring landowners' ability to enjoy their property. These disputes were handled through the application of the NUISANCE doctrine, which provides that possessors of land have a duty to make a reasonable use of their property in a manner that does not harm other individuals in the area. A person who polluted the air and caused harm to others was liable for breaching this duty and was required to pay damages or was enjoined (stopped through an INJUNCTION issued by a court) from engaging in the activities that created the pollution. In determining whether to enjoin an alleged polluter, courts balanced the damage to the plaintiff landowner's property against the hardship the defendant polluter would incur in trying to eliminate, or abate, the pollution. Courts often denied injunctions because the economic damage suffered by the defendant—and, by extension, the surrounding community if the defendant was essential to the local economy—in trying to eliminate the pollution often outweighed the damage suffered by the plaintiff. Thus, in many cases, the plaintiff was left only with the remedy of money damages—a cash payment equal to the estimated monetary value of the damage caused by the

pollution—and the polluting activities were allowed to continue.

Using a nuisance action to control widespread air pollution proved inadequate in other ways as well. At COMMON LAW, only the attorney general or local prosecutor could sue to abate a *public nuisance* (one that damages a large number of persons) unless a private individual could show "special" damage that was distinct from and more severe than that suffered by the general public. The private plaintiff with special damages had the necessary standing (legally protectible interest) to seek injunctive relief. In some states, the problem of standing has been corrected through laws that allow a private citizen to sue to abate public nuisances such as air pollution, though these laws are by no means the norm. Moreover, with the nuisance doctrine the plaintiff has the burden of showing that the harm she or he has experienced was caused by a particular defendant. However, since pollutants can derive from many sources, it can be difficult, if not impossible, to prove that a particular polluter is responsible for a particular problem. Last, nuisance law was useful only to combat particular polluters; it did not provide an ongoing and systematic mechanism for the regulation and control of pollution.

Early in the nineteenth century, a few U.S. cities recognized the shortcomings of common-law remedies and enacted local laws that attempted to address the problem of air pollution. Pittsburgh, in 1815, was one of the first to institute air quality laws. Others, like Chicago and Cincinnati, passed smoke control ordinances in 1881, and by 1912, twenty-three U.S. cities with populations of over two hundred thousand had passed smoke abatement laws.

Though the early court cases usually addressed polluted air as an interference with the enjoyment of property, scientists quickly discovered that air pollution also poses significant health and environmental risks. It is believed to contribute to the incidence of chronic diseases such as emphysema, bronchitis, and other respiratory illnesses and has been linked to higher mortality rates from other diseases, including cancer and heart disease.

The shortcomings associated with the common-law remedies to control air pollution and increasing alarm over the problem's long-range effects finally resulted in the development of state and federal legislation. The first significant legislation concerning air quality was the Air Pollution Control Act, enacted in 1955 (42 U.S.C.A. § 7401 et seq. [1955]). Also known as the Clean Air Act, it gave the Secretary of Health, Education, and Welfare the power to undertake and recommend research programs for air pollution control. Amendments passed during the 1960s authorized federal agencies to intervene to help abate interstate pollution in limited circumstances, to control emissions from new motor vehicles, and to provide some supervision and enforcement powers to states trying to control pollution. By the end of the 1960s, when it became clear that states had made little progress in combating air pollution, Congress toughened the Clean Air Act through a series of new laws, which were known as the Clean Air Act Amendments of 1970 (Pub. L. No. 91-604, 84 Stat. 1676 [Dec. 31, 1970]).

The 1970 amendments greatly increased federal authority and responsibility for addressing the problem of air pollution. They provided for, among other things, uniform national emissions standards for the hazardous air pollutants most likely to cause an increase in mortality or serious illness. Under the amendments, each state retained some regulatory authority, having "primary responsibility for assuring air quality within the entire geographic area comprising such state." Thus, states could not "opt out" of air pollution regulation and for the first time were required to attain certain air quality standards within a specified period of time. In addition, the amendments directed the administrator of the ENVIRONMENTAL PROTECTION AGENCY (EPA), which was also established in 1970, to institute national standards regarding ambient air quality for air pollutants endangering public health or welfare, in particular sulfur dioxide, carbon monoxide, and photochemical oxidants in the atmosphere. The EPA was also granted the authority to require levels of harmful pollutants to be brought within set standards before further industrial expansion would be permitted.

Despite the ambitious scope of the 1970 legislation, many of its goals were never attained. As a result, the Clean Air Act was extensively revised again in 1977 (Pub. L. No. 95-95, 91 Stat. 685 [Aug. 7, 1977]). One significant component of the 1977 amendments was the formulation of programs designed to inspect, control, and monitor vehicle emissions. The 1977 revisions also sought to regulate parking on the street, discourage automobile use in crowded areas, pro-

**National Air Pollutant Emissions, 1970 to 1998**

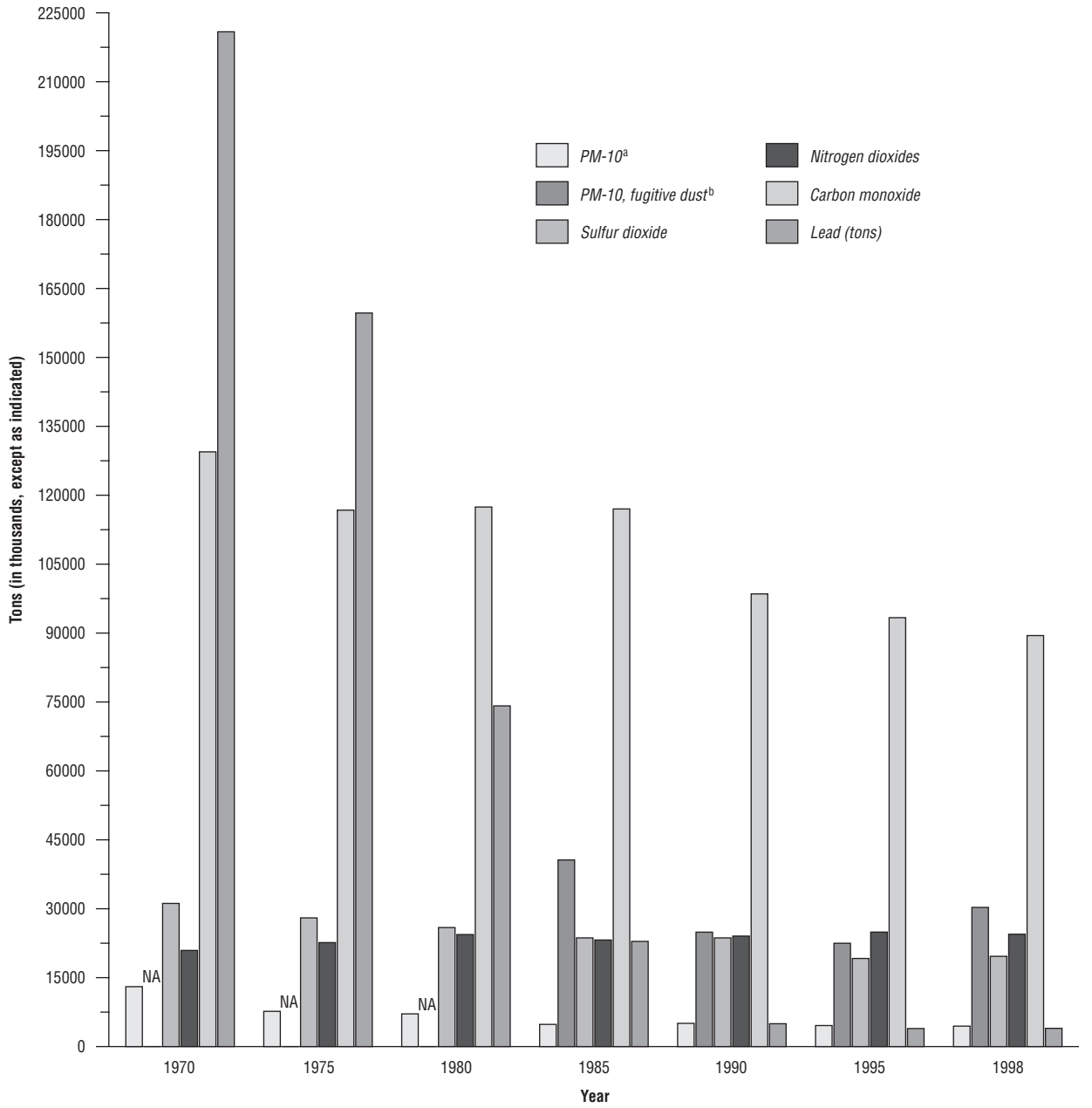


NA Not available

[a]Particulate matter consists of solid particles and liquid droplets; PM-10 is particulate matter of less than 10 microns.

[b]Sources such as agricultural tilling, construction, mining and quarrying, paved roads, unpaved roads, and wind erosion.

SOURCE: Environmental Protection Agency, *National Air Pollutant Emission Trends, 1900–1998*.

mote the use of bicycle lanes, and encourage employer-sponsored carpooling. Unlike the goals of several of the 1970 amendments, many of the 1977 reforms were achieved. Many states, with the help of federal funding, developed programs that require automobiles to be tested regularly for emissions problems before they could be licensed and registered. The 1977 amend-

*Air pollution obscures the skyline of Houston, Texas, in August 1995.*
AP/WIDE WORLD PHOTOS

ments also directed the EPA to issue regulations to reduce "haze" in national parks and other wilderness areas. Under these regulations the agency sought to improve air quality in a number of areas, including the Grand Canyon in Arizona.

During the 1980s and 1990s, several environmental issues, including acid rain, global climate change, and the depletion of the ozone layer, gave rise to further federal regulation. Acid rain, which has caused significant damage to U.S. and Canadian lakes, is created when the sulfur from fossil fuels, such as coal, combines with oxygen in the air to create sulfur dioxide, a pollutant. The sulfur dioxide then combines with oxygen to form sulfate, which, when washed out of the air by fog, clouds, mist, or rain, becomes acid rain, with potentially catastrophic effects on vegetation and ground water. Amendments to the Clean Air Act in 1990 (Pub. L. No. 101-549, 104 Stat. 2399 [Nov. 15, 1990]) sought to address the challenges posed by acid rain by commissioning a number of federally sponsored studies, including an analysis of Canada's approach to dealing with acid rain and an investigation of the use of buffering and neutralizing agents to restore lakes and streams. The 1990 laws also directed the EPA to prepare a report on the feasibility of developing standards related to acid rain that would "protect sensitive and critically sensitive aquatic and terrestrial resources." In addition, the amendments provided for a controversial system of "marketable allowances," which authorize industries to emit certain amounts of sulfate and which can be transferred to other entities or "banked" for future use.

The problem of global climate change is linked to the accumulation of gases, including carbon dioxide and methane, in the atmosphere. Scientists have disagreed over the net effect of this pollution on the global climate: some have argued that it produces global warming; others have maintained that it gradually cools global temperatures. Scientists do agree that a sustained climate change in either direction could significantly affect the environment.

The 1990 amendments implemented a number of strategies to address changes in the global climate, including the commissioning of studies on options for controlling the emission of methane. The amendments also contained provisions to deal with the depletion of the ozone layer, which shields the earth from the harmful effects of the sun's radiation. Though the long-term consequences were hard to determine in the early 2000s, damage had already been seen in the form of a "hole" in the ozone layer over Antarctica. The destruction of the ozone layer was believed to be caused by the release into the atmosphere of chlorofluorocarbons (CFCs) and other similar substances. The 1990 laws included a ban on "nonessential uses" of ozone-depleting chemicals, and the placement of conspicuous warning labels on certain substances, indicating that their use harms public health and the environment by destroying the ozone in the upper atmosphere.

Regulatory interpretation of the Clean Air Act shifted between the late 1990s and early 2000s. Under President WILLIAM J. CLINTON, the Environmental Protection Agency sought to close loopholes in the law's enforcement through the New Source Review (NSR) program. Essentially, these rules used an industrial facility's age to determine when higher pollution emissions would require the facility to go

through a permit process and install pollution control equipment. The agency sued some 50 companies in an effort to hold them to the highest pollution control standards. But the EPA shifted direction under President GEORGE W. BUSH, who favored less stringent regulations. Initially, the EPA announced a review of the Clinton-era policy, before issuing proposed rule changes in December 2002 that would relax requirements governing pollution levels and mandatory equipment upgrades. Under its so-called Clear Skies initiative, the Bush administration proposed issuing individual utilities pollution credits; these credits would allow the utility to lawfully generate a fixed amount of pollution, and if unused, any remaining credits could be sold to other utilities exceeding their permitted limit. Environmentalists criticized the proposals for gutting protections, while industry embraced them as flexible cost-savings measures.

In the 1990s, the battle to control air pollution moved indoors, into homes and businesses. Studies showed that people are exposed to higher concentrations of air pollution for longer periods of time inside buildings than out-of-doors. Furthermore, evidence indicated that this exposure was contributing to a rapidly increasing incidence of illness, thus costing businesses, taxpayers, and the government billions of dollars in HEALTHCARE costs and lost work time. The typical U.S. home contains many hazardous chemicals and substances, including radon, which has been linked to lung cancer and other ailments. Congress responded to public concern about indoor air quality by requiring the EPA, with the Superfund Amendments and Reauthorization Act (SARA), to establish a program to study the problem and make appropriate recommendations (Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 [codified as amended in scattered sections of 10 U.S.C.A., 26 U.S.C.A., 29 U.S.C.A., 33 U.S.C.A., and 42 U.S.C.A.]).

One contentious air pollution issue continued to be the effect of smoking in public places, especially as it concerns the rights and health of nonsmokers. Many states have enacted legislation designed to protect nonsmokers in public places, and the battle between smokers and nonsmokers made its way into the courts. An increasing number of restaurants, airlines, and other public facilities dealt with the problem by banning smoking completely.

While the trend has been toward adoption of smoking bans in the 2000s, advocates and opponents have fought pitched battles. Advocates point to successes such as stringent statewide bans in New York, California, and Delaware, along with an estimated 400 bans in cities such as Boston and Dallas, according to the American Nonsmokers' Rights Foundation. They also cited evidence presented at the American College of Cardiology's annual meeting in 2002 showing that the city of Helena, Montana, enjoyed dramatically reduced heart attack rates the year following enactment of its ban. Ironically, enforcement was subsequently halted while a court battle was waged over the ban.

Opposition to indoor smoking bans has come from the bar, restaurant and tobacco industries. Commercial groups argue that bans result in revenue loss, burdensome compliance regulation, and even a diminished labor force. They have achieved some success. Some city councils rejected proposed ordinances after heavy LOBBYING, such as in Eden Prairie, Minnesota, in 2002, and the city of Pueblo, Colorado, was forced to suspend its ordinances following a successful public signature drive calling for a public REFERENDUM in 2003.

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Automobiles; Environmental Law; Environmental Protection Agency; Pollution; Surgeon General; Tobacco.

## AIRLINES

In 1978, the airline industry, which had been heavily regulated and controlled, was liberated from government oversight and released to the vagaries of the marketplace. As a result, the industry underwent significant change during the 1980s and 1990s. At the same time, several major air disasters took place, including the 1996 Valujet and TWA 800 aircraft crashes. In response to the post-accident events, Congress passed the Aviation Disaster Family Assistance Act (ADFAA) the same year. The terrorist

attacks of September 11, 2001, wrought further change on the airline industry. Just weeks after the attacks, President GEORGE W. BUSH signed the Air Transportation Safety and System Stabilization Act (ATSSSA). According to a statement released by President Bush on September 22, 2001, the act was intended to ensure passenger safety and to "assure the safety and immediate stability of the nation's commercial airline system." It also created financial turmoil for nearly all the major carriers. What followed was a period of evolution and metamorphosis that changed the nature of flying forever.

### Deregulation

When the first commercial airlines appeared after WORLD WAR I, fewer than six thousand passengers a year traveled by air. By the 1930s, the Big Four—Eastern Air Lines, United Air Lines, American Airlines, and Trans World Airlines (TWA)—dominated commercial air transport. These companies had garnered exclusive rights from the federal government to fly domestic airmail routes, and Pan American (Pan Am) held the rights to international routes. The hold of these four airlines on their lucrative contracts went virtually unchallenged until deregulation in 1978. Even after the formation of the Civil Aeronautics Board (CAB) in 1938, formed to license new airlines, grant new routes, approve mergers, and investigate accidents, the Big Four and Pan Am continued to be guaranteed permanent rights to these routes. In fact, no new major scheduled airline was licensed for the next four decades.

In October 1978, Congress passed the Airline Deregulation Act (49 U.S.C.A. § 334 et seq.), ending the virtual MONOPOLY held by the Big

**U.S. Airline Industry, 1994 to 2001**

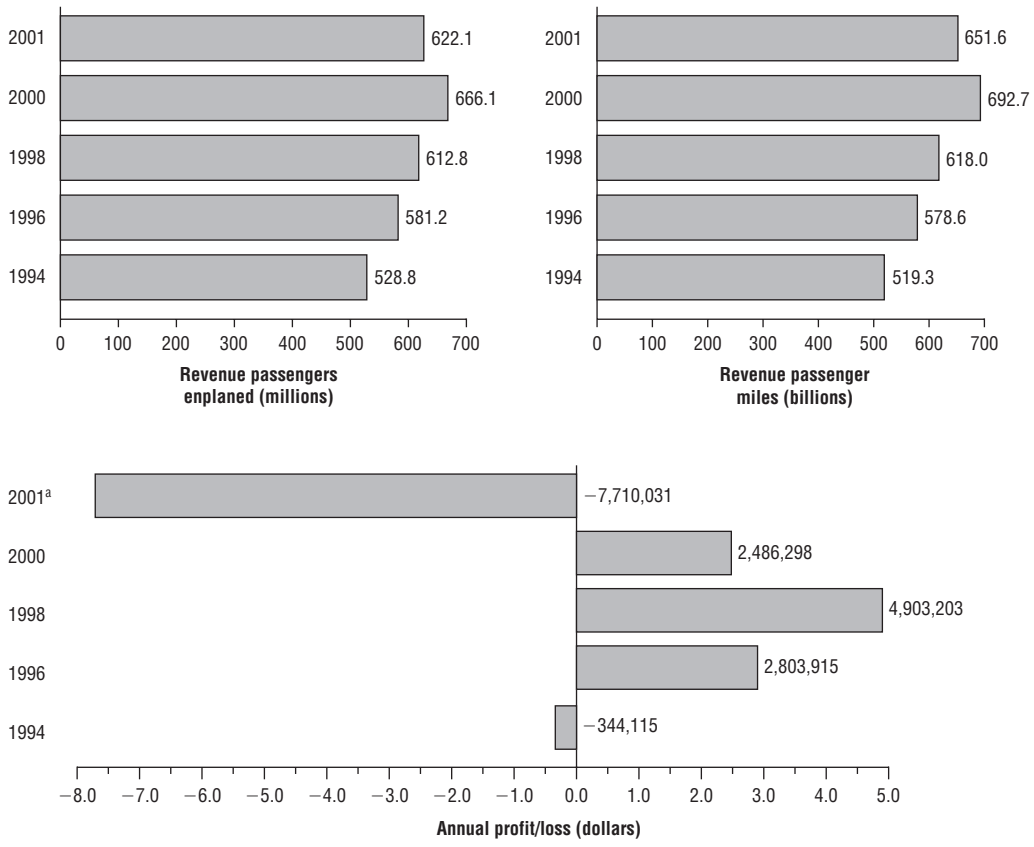


[a]Includes cash compensation remitted to carriers under the Air Transportation Safety and System Stabilization Act.

SOURCE: Air Transport Association of America, *Passenger & Cargo Traffic* and *Airline Earnings*.

Four and Pan Am. The government's goal was to promote competition within the industry. The act gave airlines essentially unrestricted rights to enter new routes without CAB approval. The companies could also exit any market and raise and lower fares at will.

The immediate effect of deregulation was a drop in fares and an increase in passengers. New cut-rate, no-frills airlines, such as People Express Airlines and New York Air, offered travelers the lowest fares ever seen in the industry. Forced to compete to fill their planes, the larger companies lowered their prices as well. Then the oil-producing countries in the Middle East formed a cartel and raised the price of jet fuel 88 percent in 1979 and an additional 23 percent in 1980. Combined with tumbling fares and increased passenger loads, the higher cost of jet fuel caused airline profits to drop.

Labor strife also affected the industry in the early days following deregulation. In 1981, after years of working under stressful conditions made worse by deregulation, the Professional Air Traffic Controllers Organization (PATCO) called a strike, demanding shorter working hours and higher pay. The union expected support and cooperation from the Reagan administration because of a sympathetic letter President RONALD REAGAN had sent to PATCO when he was campaigning for the presidency. In the letter, he pledged to do whatever was necessary to meet PATCO's needs and to ensure the public's safety. But Reagan ordered the strikers to return to work within three days or be fired. Most did not return. The FEDERAL AVIATION ADMINISTRATION (FAA) ordered all carriers to temporarily reduce their number of flights by one-third. Newer and smaller carriers found themselves increasingly unable to gain access to lucrative routes. Rebuilding the air traffic controller force took years, during which landing slots at the largest airports remained restricted, and small carriers, unable to compete, simply abandoned their attempts to break into the larger markets.

To some extent, competitive pricing actually had the opposite effect of what the deregulators intended. When the small "upstart" companies offered extremely low fares, the larger companies responded aggressively. For example, in 1983, People Express announced a $99 round-trip fare between Newark, New Jersey, and Minneapolis–St. Paul. Northwest Airlines, which had always dominated the Twin Cities market, undercut People by instituting a $95 fare for the same destination and scheduling extra departures. As a result, People decided it could not compete and withdrew from the market. Passengers enjoyed the benefit of lower fares, but only for a short time before the competitive effect faded and high fares returned.

When deregulation brought competitive pricing, the large carriers began to realize that it was not profitable for them to do business the way they had in the past. The first major change they made was to abandon the practice of criss-crossing the continent with nonstop flights to many different cities. Instead, the major airlines scheduled most of their flights into and out of a central point, or hub, where passengers might need to change to a different flight to complete their journey. One airline controlled most of the reservation desks and gates at a particular hub—for instance, United in Chicago, Northwest in Minneapolis–St. Paul, American in Dallas–Fort Worth, and Delta in Atlanta. For this reason, and because passengers tend to dislike changing carriers in the middle of a trip, the dominant company in a hub had a tremendous advantage over the competition in influencing what carrier a passenger would choose. By 1990, two-thirds of all domestic passengers traveled through a hub city before arriving at their final destination. Of those passengers, eight out of ten remained on the same airline throughout their journey. By 1992, there were at least twelve "fortress hubs," or airports where one airline controlled more than 60 percent of the traffic. Passengers who flew out of these hubs paid over 20 percent more than they would have for a comparable trip out of an airport that was not a hub.

After deregulation, the airlines also came to realize that they needed a more efficient way to book reservations and issue tickets. It is difficult to imagine, in these days of highly sophisticated computers and split-second communications, that until the late 1970s and early 1980s, airline schedules were contained in large printed volumes, reservations were taken over the telephone and tallied manually at the end of each day, and tickets were written by hand. To streamline this process the large companies initially proposed a joint computer system, listing schedules and fares. The JUSTICE DEPARTMENT objected on the grounds that such a system would be anticompetitive and would violate the SHERMAN ANTI-TRUST ACT (15 U.S.C.A. § 1 et seq. [1890]). Instead, each airline developed its

own computer system and entered data in a manner that unfairly biased travel agents' choices in favor of the carrier that owned the system. Through skillful manipulation of the data, the airlines were able to put competitors at a disadvantage. For example, the airline that owned the system might enter the data so that all its flights to a particular destination appear on the screen before any flights of a competitor.

In a further attempt to win loyalty from passengers, the large airlines instituted frequent-flyer programs, which awarded free tickets to travelers after they logged a certain number of miles flown with the company. The combination of hubs, central computer reservation systems, and frequent-flier programs made the major airlines almost invulnerable in large markets.

Deregulation also brought a period of financial upheaval and an epidemic of "merger fever." A number of companies ceased doing business between 1989 and 1992, and still others merged with stronger, more aggressive companies. Among the companies that disappeared from the skies were Eastern, Pan Am, Piedmont, and Midway Airlines. Continental and TWA sought the shelter of Chapter Eleven BANKRUPTCY reorganization. USAir and Northwest required cash infusions through cooperative arrangements with foreign airlines. Even financially strong carriers such as United and American laid off employees and abandoned plans to purchase new aircraft, which added to the woes of the depressed aerospace industry.

The mergers and buyouts of the 1980s were often accomplished in an atmosphere of hostility and distrust. Charges of predatory pricing and other unfair business practices were leveled by one carrier against another. During the 1980s, the Justice Department's Antitrust Division made a number of GRAND JURY investigations into alleged anticompetitive activity by the major airlines, but no indictments were handed down. However, the companies that survived did not emerge unscathed. Many of the acquisitions were highly leveraged buyouts that left the reconstituted companies heavily in debt. With profits insufficient to cover their enormous debt loads, the companies frantically competed for business, engaging in fare wars that produced a dizzying array of pricing plans with equally numerous and confusing restrictions. Some of the tactics were questionable, but, again, not clearly illegal. In 1993, American Airlines was sued by Continental and Northwest for alleged predatory pricing during a 1992 fare war. The jury took just over two hours to return a verdict in favor of American.

By 1993, the industry began to rebound. Continental Airlines and TWA emerged from bankruptcy, and a few small carriers, such as Kiwi International, formed by former Eastern pilots, responded to the public's demand for low

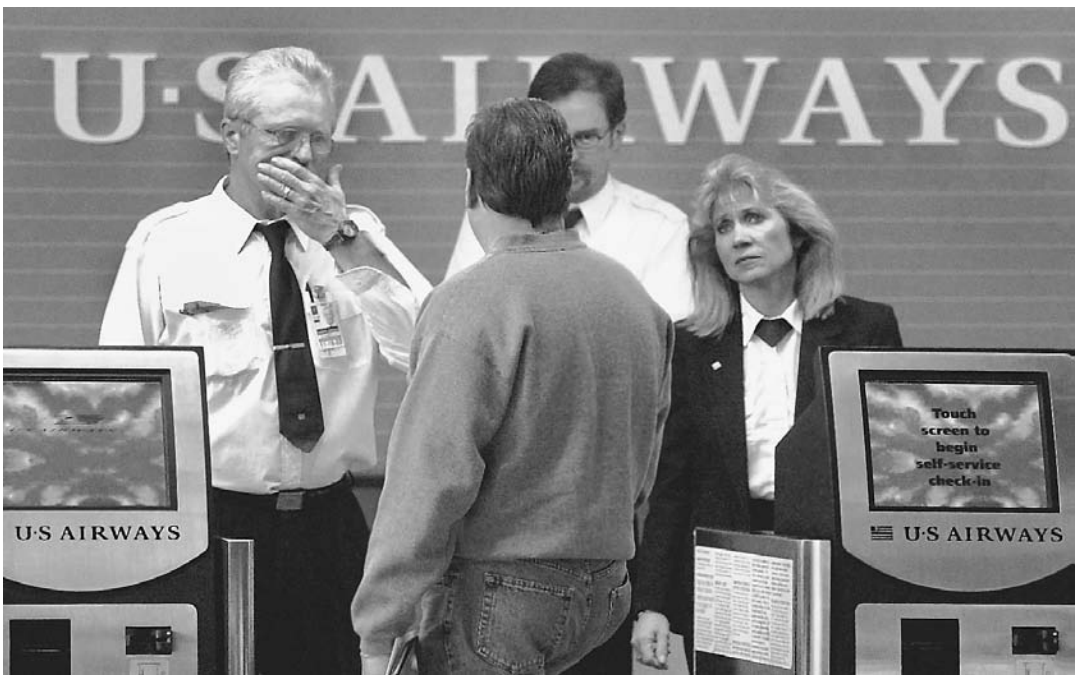


*Despite passage of the Air Transportation Safety and System Stabilization Act, U.S. Airways declared bankruptcy a little over one year after the terrorist attacks of September 11, 2001. In the time between the attacks and November 2002, the airline had cut approximately 15,000 jobs.*

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fares and began to make incursions into the established markets, although they generally shied away from directly challenging the giants. Older carriers for the most part chose to stay with their hub-and-spoke systems, while several, including Northwest and United, came up with a creative new solution to their financial woes.

Northwest avoided bankruptcy when its unions agreed to wage concessions in return for part ownership of the airline. Then, in 1994, after seven years of negotiating, employees of United gained majority control of their company in return for deep pay and benefits cuts. Secretary of Labor Robert B. Reich commented that other financially troubled companies would undoubtedly follow suit: "From here on in, it will be impossible for a board of directors to not consider employee ownership as one potential business strategy." However, some industry analysts doubted that employee ownership would be effective in the long run because of inherent conflicts between labor and management, or between different labor groups. "It can't work," declared former Chrysler chairman Lee A. Iacocca. "What do you think will happen when it's a choice between employee benefits and capital investment?"

### Safety

One troubling criticism of deregulation is that aggressive competition has forced airlines to cut corners, resulting in safety lapses. In 1990, Eastern Airlines was handed a 60-count federal indictment charging it with shoddy and dishonest maintenance practices. The indictments came after years of complaints by the financially troubled airlines' mechanics, who claimed that pressures to cut costs led to maintenance shortcuts and falsification of maintenance records. In January 1991, Eastern ceased operation.

Critics contend that Eastern was hardly alone in its cavalier approach to safety. They charge that the FAA is understaffed and poorly managed and that money shortages have caused all the airlines to relax safety standards. They point not only to increased pressures on the labor force but also to companies' reluctance to replace their aging fleets, the congestion of airspace caused by increased air travel, crowded hub airports that create security risks, and overworked and sometimes poorly trained air traffic controllers. Yet, statistically, passengers are no more likely to die in a plane crash since deregulation than they were before it. Still, critics maintain that, despite the airlines' and the government's efforts to assure the traveling public to the contrary, air safety is in need of substantial improvements.

Many critics feel that at least part of the problem lies in the dual role of the FAA. Charged simultaneously with promoting the economic health of the aviation industry and fostering safety, the agency is often at odds with itself. In addition, the FAA's budget was cut and the number of inspectors reduced in the 1980s, the same period during which the number of passengers multiplied and the number of air traffic controllers was reduced. Furthermore, unions, which stand to benefit from the increased scrutiny and higher standards imposed by the FAA, continue to be major instigators for change. However, even neutral commentators have suggested that it is time to impose some degree of regulation, in the form of stronger FAA oversight, on the industry. In fact, the FAA has been accused of suffering from a "tombstone mentality" that causes the agency to delay acting on safety concerns until negative publicity generated by a crash forces the issue. Even after safety measures are recommended by the NATIONAL TRANSPORTATION SAFETY BOARD (NTSB), the agency charged with investigating accidents, the FAA has been criticized for not always following through.

Aging aircraft became a major concern during the late 1980s and early 1990s. In 1988, an Aloha Airgroup Boeing 737-200, purchased in 1969, lost the top of its fuselage while flying at 24,000 feet. A flight attendant was immediately sucked out of the plane. The plane made a harrowing emergency landing, but not before 65 passengers suffered injuries, some serious. Congress responded in 1991 by passing the Aging Aircraft Safety Act (49 App. U.S.C.A. 1421 note), which requires airlines to demonstrate that their older planes are airworthy. Critics claim that enforcement of the law has been lax and that it ignores other compelling reasons to replace aging aircraft, such as the availability of newer fire-retardant seat materials and of updated seats designed to be more resistant to the impact of a crash.

Concerns over airline safety became even more acute in the early 1990s with a series of fatal crashes. The Boeing Company, a major producer of aircraft, predicts that the number of jet crashes worldwide could double by 2010 if accident rates of the early 1990s continue. Such

a projection strikes fear into the hearts of the flying public. However, according to David R. Hinson, former FAA administrator, flight safety "is not a simplistic science that lends itself to easy solutions." Flight safety experts point out that all the most obvious causes of crashes have been addressed with technological advances that include such safeguards as early warning systems for wind shear.

Many experts feel that not enough research has been devoted to the study of the human elements that contribute to crashes. Boeing reports that flight crews have been the primary cause in more than 73 percent of jet crashes since 1959. In 1990, a federal jury in Minneapolis convicted three Northwest Airlines crewmen—a flight captain, a copilot, and a flight engineer—of flying a jet aircraft while under the influence of alcohol. Although this was the first flying-while-intoxicated conviction involving professional pilots, many claim that the problem of alcohol and drug abuse among flight crews is widespread and well hidden. Yet it is difficult to convince companies to focus on the issue of human elements that contribute to accidents. According to airline industry expert Clay Foushee, "It's a lot easier to convince someone to fund a fancy new piece of technology than research into social sciences."

In 1994, five fatal crashes, three involving commuter airlines, brought safety concerns to light once again. After the fifth crash, Secretary of Transportation Federico Peña ordered a safety audit of the entire airline industry. As a result, commuter airlines, which had previously been held to a lower standard of safety than major carriers, were placed under new operating rules that required them to bring their safety standards up to those of the other companies by the end of 1996. Industry experts said the elimination of the two-tier safety standards was "the most important decision affecting the industry since it was deregulated in 1978."

Several other safety and health issues have been publicized. The quality of air aboard an airplane has been questioned by some. As a result of intense LOBBYING by passenger groups and flight attendants, federal law now prohibits smoking on all domestic flights and on many international flights as well. Air quality was again questioned in 1993 when it was revealed that, as a cost-saving measure, many airlines were circulating fresh air into their aircraft less frequently than they had in the past. This led to complaints by passengers and crew of headaches, nausea, and the transmission of respiratory illnesses. Although the FAA conceded that circulating more fresh air would be beneficial, it backed off from requiring airlines to do so, because of the cost involved.

The safety of babies and toddlers on airplanes was investigated after it was shown that a number of them suffered injuries, some serious or fatal, during incidents that did not injure their parents. Unlike adults and their luggage, children under age two are not required to be secured on an airplane but rather may be held on an adult's lap. These "lap babies" are often ripped from the adult's grasp during turbulence or crashes. In 1994, Representatives Jolene Unsoeld (D-Wash.) and Jim Ross Lightfoot (R-Iowa) introduced a bill that would have required the use of child safety restraints on commercial flights. However, the measure, which was supported by the Association of Flight Attendants, NTSB, Air Transport Association, Aviation Consumer Action Project, and Air Line Pilots Association, was opposed by the FAA and eventually defeated. An FAA spokesperson, testifying in opposition to the bill, said the FAA's research indicated that if all children who needed them were placed in child safety seats, the airlines would save approximately one life over a ten-year period, and families would save $2.5 billion in added fares and costs over the same timespan. In contrast to the FAA's findings, a study conducted at Harvard Medical School estimated that one infant a year could be saved through the use of safety seats. The sponsors of the bill vowed to continue to press for more stringent safety standards for babies.

Safety concerns will continue to plague the airline industry, even though the FAA assures the flying public that, statistically, at least, flying a major airline in the United States is far safer than driving on an interstate highway. Questions persist about the FAA's effectiveness in overseeing air safety. And financially strapped airlines, which posted $12.8 billion in losses from 1990 to 1994, must make difficult risk-benefit analyses when contemplating new safety measures.

Some critics such as RALPH NADER, who initially supported deregulation, are now calling for limited government intervention to ensure safety. However, experts warn that the U.S. airline system, which is already extremely safe, probably can never be completely without risk. According to Stuart Matthews, president of the

Flight Safety Foundation, "If the public absolutely demands that flying be totally safe, you are going to have to ban flying." Given the choice between taking a calculated risk and not flying at all, Americans, who take their lives into their hands each time they drive, will probably continue to trust the statistics and take their chances.

### The ADFAA and September 11

In 1996, to address concerns that the families of airline crash victims were not receiving timely information, Congress passed the Aviation Disaster Family Assistance Act (ADFAA) (49 USCA § 1136; 49 USCA § 41113). The act requires airlines to submit a plan to the National Transportation Safety Board that would address the needs of the families of passengers who are involved in any aircraft accident that results in a major loss of life. Once approved, the carrier must make a GOOD FAITH effort to carry out the plan.

Plans approved under the ADFAA have some minimum requirements for notification and care of families affected by an airline crash. Among them are that the airline carrier must set up, publicize, and staff a toll-free telephone line that passengers' families can call for information. The carrier must also cooperate with the independent, NTSB-appointed nonprofit (i.e, the Red Cross) to provide an appropriate level of aid and support. In addition, the carrier must assist a passenger's family in traveling to the crash site, as well as provide for their physical needs while at the accident location. Finally, the carrier must respect a family's wishes for burial, a memorial, or a religious ceremony, and get the input of all families before any memorial is erected in memory of the passengers.

The ADFAA provides limitations on the liability of airline carriers for passenger lists. The act states that a carrier may not be liable for damages in preparing or providing a passenger list, unless the conduct of the air carrier was grossly negligent or constituted intentional misconduct. Further limiting airline liability, the ADFAA provides that no unsolicited communication concerning a potential action for personal injury or WRONGFUL DEATH may be made by an attorney or any potential party to the litigation to an individual injured in an airplane accident, or to a relative of an individual involved in the accident, before the 45th day following the date of the accident.

The provisions of the ADFAA became crucial on September 11, 2001—the day that four domestic airplanes were hijacked by terrorists and crashed into the World Trade Center in New York City, the Pentagon in Washington, D.C., and a field in Pennsylvania. In the aftermath of that tragedy, the government built on the ADFAA by passing the Air Transportation Safety and System Stabilization Act (ATSSSA) (Pub.L. 107-42, Sept. 22, 2001, 115 Stat. 230). This act took into consideration the devastation wrought on U.S. airlines on September 11 and enacted measures to try to ensure their survival.

In addition to compensating airlines for direct losses incurred as a result of September 11, the ATSSSA established a framework for computing the maximum grant that an airline could claim as compensation. To streamline efforts, it set up the Air Transportation Stabilization Board to review the prospective loan applications. The act attempted to protect the insurance industry, as well as the aviation industry, by limiting the claims that could be made upon them.

The act also established the September 11th Victim Compensation Fund of 2001 to deal directly with the needs of families who were victims of the SEPTEMBER 11TH ATTACKS. The fund provided direct financial assistance to families so they would not have to endure lengthy court battles. Liability for all third-party losses was transferred from the airlines to the U.S. government and a waiver system was established so that families could not sue the airlines for damages as a result of the terrorist attack at any future date.

Security measures for airlines have also been upgraded since September 11. The government took over security at airports from private companies through the creation of the Transportation Security Administration. In addition, cockpit doors were reinforced, passengers were limited in what they could bring on to flights, luggage screening was upgraded, and pilots were allowed to carry guns to protect themselves on flights.

Despite the ATSSSA and the increased security measures, however, the September 11 attacks had a disastrous effect on U.S. airlines. A little over a year later, two major airlines, U.S. Airways and United Airlines were in bankruptcy, with a good chance that others would follow. And the threat of low-cost airlines, such as Southwest, combined with a widespread decline

in flying, made the business plans of most major airlines insupportable. All major airlines except Southwest saw huge losses in 2001 and 2002. As of 2003, it was not clear who would survive this latest shakeout or what the future of the airline industry would be.

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Aeronautics; Carriers; Labor Union; National Transportation Safety Board; Sherman Anti-Trust Act; Unfair Competition.

## ♦ AKERMAN, AMOS TAPPAN

Amos Tappan Akerman, born in 1819 in New Hampshire, served as attorney general of the United States from 1870 to 1872 under President ULYSSES S. GRANT.

A graduate of Dartmouth College, Akerman was admitted to the bar in 1841. He opened his first practice at Elberton, Georgia, in 1850. He was a well-established attorney by the outbreak of the Civil War. Akerman supported Georgia's decision to secede from the Union in 1861, and he served the Confederate government in the quartermaster's department during the war. (A quartermaster is charged with procuring and dispensing uniforms, weapons, and other supplies for the troops.) After the war, Akerman developed ties with the REPUBLICAN PARTY and the Reconstructionists. He was appointed district attorney for Georgia in 1866. Four years later, he was named attorney general of the United States.

Akerman's tenure as attorney general coincided with the Grant administration's early attempts to enforce CIVIL RIGHTS laws in the South during RECONSTRUCTION. Initially, Akerman believed prosecutions for violations of criminal CIVIL RIGHTS ACTS should be left to state and local authorities. However, he soon changed his mind and advocated a more aggressive federal role in the prosecution of crimes related to civil rights.

His change of mind can be attributed to the growth of the KU KLUX KLAN in the South, and the results of a congressional investigation. Investigators found that state and local legal systems in the South were inadequate to protect the rights of free blacks or to prosecute the increasingly violent actions of the Klan.

Akerman agreed that the federal government should step in, and he wrote extensively on the subject. In his opinion, some Southerners would never acknowledge the rights of free blacks and government attempts to "conciliate by kindness" were a waste of time. He noted that Southern klansmen and other malcontents "take all kindness . . . as evidence of timidity, and hence are emboldened to lawlessness by it." He concluded that the federal government should "command their respect by the exercise of its powers."

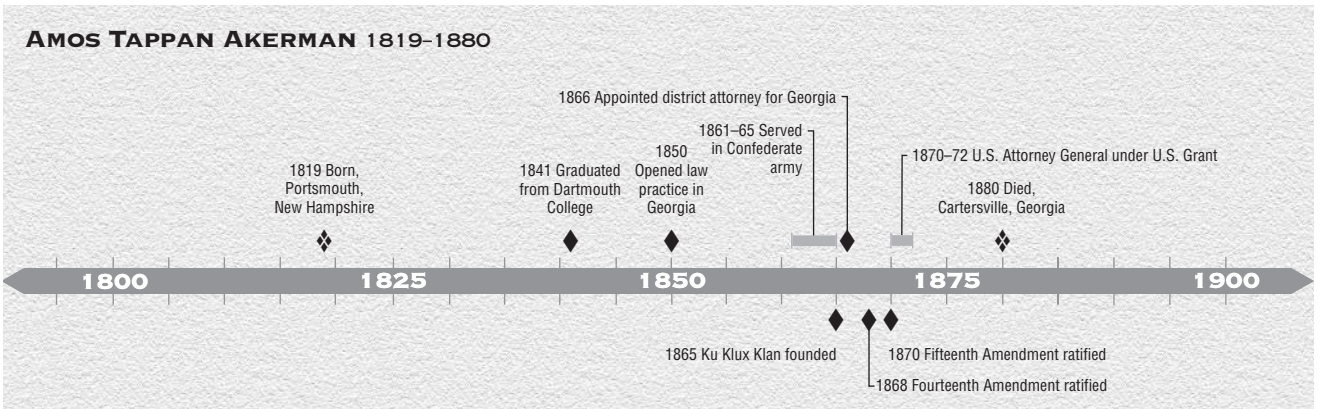

*Amos Tappan Akerman.*

With Akerman's leadership—and his successful effort to obtain a financial commitment from Congress—attorneys from the newly created **DEPARTMENT OF JUSTICE** worked with local U.S. attorneys to bring hundreds of indictments under the Enforcement Act of 1870 (16 Stat. 140 [codified as amended at 42 U.S.C.A. § 1981 et seq.]) and the **KU KLUX KLAN ACT** of 1871 (§ 2, 17 Stat. 13 [current version at 42 U.S.C.A. § 1985(3) (Supp. V 1976)]).

Together, these government officials prosecuted, convicted, and imprisoned hundreds of Klan members from 1870 to 1872, and, for a short time, criminal civil rights acts were successfully enforced in the South. Though he "rejoiced" at the suppression of the Klan, Akerman wrote, "I feel greatly saddened by this business. It has revealed a perversion of moral sentiment among the Southern whites, which bodes ill to that part of the country for this generation."

Akerman was also saddened—and frustrated—by fiscal circumstances that combined to slow his efforts. Concerned by the growing financial burden of the actions, and pressured to allocate funds for other priorities, Congress and the Grant administration eventually brought Akerman's prosecutions to a standstill. The violence resumed, and Akerman resigned.

Akerman's resignation as attorney general can also be attributed to his discouragement with the pace of federal civil rights enforcement, and to political issues as well. Akerman had angered President Grant by refusing to execute a deed conveying western lands to the railroads, and he had antagonized many congressional Republicans with his lack of support for other business and railroad projects.

After his resignation, Akerman returned to private life and the **PRACTICE OF LAW**. He died in 1880.

"IT CONCERNS US MORE TO ASCERTAIN WHAT IS THE CONSTITUTIONAL RULE THAN TO LEARN WHETHER THAT RULE HAS ALWAYS BEEN OBSERVED. NINETEEN VIOLATIONS OF THE CONSTITUTION DO NOT JUSTIFY A TWENTIETH."
—AMOS TAPPAN AKERMAN

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CROSS-REFERENCES

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## ALASKA BOUNDARY DISPUTE

During the late 1800s and early 1900s, a dispute erupted between the United States and Canada regarding the legal boundaries of Alaska, which the United States had purchased from Russia in 1867. The primary point of contention in the dispute related to a several thousand mile long strip to the west of British Columbia and to the southeast of the Alaska territory. Although the dispute was resolved by way of a treaty signed in 1903, it caused a severe threat to U.S.-Canadian relations.

Russia was the first nation to claim the Alaska territory after it was discovered by Vitus Bering, a Danish explorer who received a commission from Peter the Great to lead Russian sailors on a expedition of Siberia on August 20, 1741. Russia named the land Russian-America, and Russian whalers and fur traders established settlements in the region. Russia and Canada, then a colony of Great Britain, disagreed as to the proper boundaries, and, in 1825, Russia and Great Britain signed the Anglo-Russian treaty. Under this treaty, the Russian and Canadian territory was divided by the 141st Meridian, though at the time, much of this land had not been surveyed. Russia lost much of the land it had claimed under the treaty, though the specific boundaries were still unclear.

As fur-trading from Russian-America began to decline, Russia lost interest in the territory. The United States in 1867 agreed to purchase the territory for $7,200,000 and renamed the territory Alaska. The continental nation of Canada formed during the same year, encompassing the Province of Canada, Nova Scotia, and New Brunswick.

The United States maintained that it had taken over the territory that appeared on Russian maps at the time of the purchase. However, the Russian maps indicated that Russia had owned more of the land than had been stipulated in the 1825 treaty. As early as 1872, British Columbia petitioned the United States for an official survey of the boundaries between Alaska and western Canada, but the United States refused due to the costs that would have been involved. Both the United States and Canada conducted surveys of particular areas in the region in the 1870s and 1880s, but no widespread survey was conducted during that time.

The dispute regarding the proper boundaries between Alaska and western Canada heated up during the 1880s after gold was discovered in the area. Between the 1880s and 1890s, an estimated 100,000 fortune seekers moved to the Klondike region in search of gold. Though only a fraction of these miners and prospectors actually discovered gold, more than $100 million was eventually extracted from the region. Although the Klondike gold rush was not a direct factor in the Alaska Boundary Dispute, it almost certainly focused more attention on that region.

In 1898, the United States and Great Britain formed a Joint High Commission to resolve the boundary dispute. The goal of the commission was to order the survey and marking of the 141st Meridian and to reach a compromise between the United States and Canada. The commission agreed to a convention that would have resulted in the survey and marking of the territory, but the western states of the United States objected to the commission's work, and the United States Senate refused to ratify the convention.

Five years later, in January 1903, the United States and Great Britain agreed to appoint an Alaskan Boundary Tribunal, which consisted of six impartial judges, three from each side, to resolve the dispute. U.S. President THEODORE ROOSEVELT appointed Senator HENRY CABOT LODGE, Secretary of War Elihu Root, and former senator George Turner. Great Britain appointed Lord Chief Justice of England Baron Alverstone and two officials from Canada, Sir Louis A. Jette and Allen B. Aylesworth. Although Canada believed that Great Britain would support Canadian interests, Great Britain largely sided with the United States because it needed the latter's assistance in an arms race between Great Britain and Germany. After three weeks of discussion, the panel of judges voted in favor of the United States' position.

The tribunal established an International Boundary Commission to mark the official boundaries between Alaska and Canada. The commission was made permanent by a treaty between the United States and Great Britain in 1908. Another treaty in 1925 required the commission to maintain a 20-foot wide demarcated line along the border. The boundary is several thousand miles long and spread over mountains and through rivers, marshes, and forests.

Although the Alaska Boundary Dispute has fallen beyond the American consciousness, it remains a point of contention among some Canadians. The United States and Canada have had several disagreements regarding the proper land and water division in parts of the area. Moreover, environmentalists decry the clearing of timber along the border because of the potential for destroying biological diversity of plant and animal life. The Alaskan boundary remains, however, exactly how it appeared in the 1903 agreement, and the 1925 treaty remains intact.

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Boundaries; International Law.

## ♦ ALBRIGHT, MADELEINE KORBEL

Madeleine Korbel Albright served from 1997 to 2001 as U.S. SECRETARY OF STATE, the government's highest-ranking foreign relations officer. She has the distinction of being the first woman to serve in this position. Albright, who has also taught international affairs, has had a long association with DEMOCRATIC PARTY presidential candidates, advising them on foreign policy.

Albright was born on May 15, 1937, in Prague, Czechoslovakia, the daughter of a Czech diplomat. In 1939 her family left Czechoslovakia for London, arriving shortly before the outbreak

of WORLD WAR II. After the war ended in 1945, the family returned to their homeland but left again in 1948 following the Communist takeover of the Czech government. The family settled in the United States in 1949.

Albright earned a bachelor's degree in political science from Wellesley College in 1959 and then studied at the School of Advanced International Studies at Johns Hopkins University. She then entered the graduate program at Columbia University, receiving her master's degree and doctorate from the university's Department of Public Law and Government. While working on her advanced degrees, Albright served in the diplomatic corps, acting as counselor for economic affairs at the U.S. embassy in Belgrade, Yugoslavia, from 1969 to 1972. She also worked for the EXPORT-IMPORT BANK.

After receiving her doctorate in 1976, Albright joined the staff of Democratic Senator Edmund S. Muskie of Maine, serving as his chief legislative assistant until 1978. She became a staff member of the NATIONAL SECURITY COUNCIL in 1978, serving President JIMMY CARTER until he left office in 1981.

Albright shifted her focus in 1981 to academia. She was awarded a fellowship at the Woodrow Wilson International Center for Scholars at the Smithsonian (1981-82), following an international competition in which she wrote about the role the press played in the political changes that occurred in Poland during the early 1980s. Her findings were published in *Poland, the Role of the Press in Political Change* (1983). Albright also served as a senior fellow in Soviet and Eastern European Affairs at the Center for Strategic and International Studies, conducting research in developments and trends in the Soviet Union and Eastern Europe. From 1982 to 1993, Albright taught at Georgetown University's School of Foreign Service, lecturing on international affairs, U.S. foreign policy, Russian foreign policy, and Central and Eastern European politics. She was also responsible for developing and implementing programs designed to enhance women's professional opportunities in international affairs. From 1989 to 1993, Albright was president of the Center for National Policy, a nonprofit research organization formed in 1981 by representatives from government, industry, labor, and education to promote the study and discussion of domestic and international issues.

Albright began working with Democratic presidential candidates in 1984 when she advised Walter F. Mondale on foreign policy. She served in a similar role for 1988 nominee Michael Dukakis and did the same for BILL CLINTON in 1992. After he was elected president, Clinton named Albright chief U.S. representative to the UNITED NATIONS, a cabinet-level position.

After President Clinton was reelected in 1996, he made changes in his cabinet. In December 1996 Clinton nominated Albright as secretary of state. After being unanimously confirmed by the U.S. Senate, she was sworn in as secretary of state on January 23, 1997.

The outspoken and dynamic Albright reinforced U.S. alliances, promoted American trade and business, and sought to establish international standards on trade and HUMAN RIGHTS. Albright advocated for the expansion and modernization of NATO and helped coordinate NATO's successful campaign to end ethnic cleansing in Kosovo. She helped to promote

"WE UNDERSTAND THAT TRUE DEMOCRACY IS NEVER ACHIEVED; IT IS ALWAYS A PURSUIT. AND WE KNOW THAT IF WE WHO LOVE LIBERTY GROW WEARY, THOSE WHO LOVE ONLY POWER WILL ONE DAY SWEEP US AWAY."
—MADELEINE ALBRIGHT

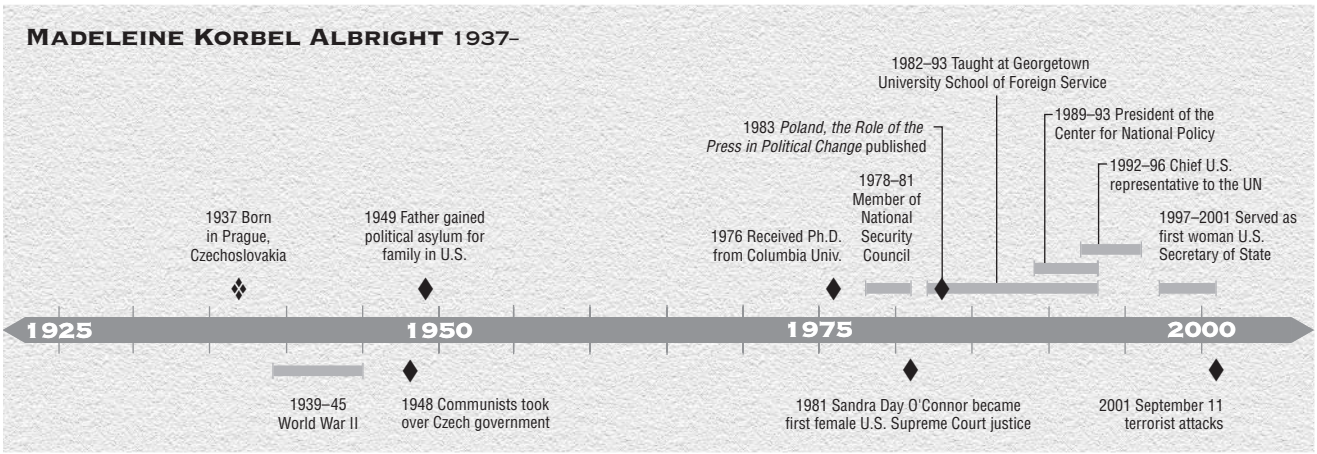

peace in Northern Ireland, the Middle East, and the Balkans.

Albright sought the expansion of democracy in Europe, Africa, Asia, and Latin America; she traveled to China to promote trade with the United States and also to address human rights issues. In June 2000 Albright and representatives from all over the world convened the first ever Conference of the Community of Democracies. Albright also led the fight to reverse a decade-long drop in funding for U.S. embassies and overseas operations by helping to persuade Congress to increase funding by 17 percent.

In May 2001, Albright returned to Georgetown University where she accepted an endowed chair in the School of Foreign Service. She lectures at COLLEGES AND UNIVERSITIES and has appeared on numerous television news commentary programs since leaving the STATE DEPARTMENT.

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## ALCOHOL

*The active principle of intoxicating drinks, produced by the fermentation of sugars.*

> A Congressman was once asked by a constituent to explain his attitude toward whiskey. "If you mean the demon drink that poisons the mind, pollutes the body, desecrates family life, and inflames sinners, then I'm against it," the Congressman said. "But if you mean the elixir of Christmas cheer, the shield against winter chill, the taxable potion that puts needed funds into public coffers to comfort little crippled children, then I'm for it. This is my position, and I will not compromise."

The LEGAL HISTORY of alcohol in the United States closely parallels the economic and social trends that shaped the country. The libertarian philosophy that ignited the WHISKEY REBELLION was born in the American Revolution. Shifting concerns about morality and family harmony that were characteristic of the Industrial Revolution inspired the TEMPERANCE MOVEMENT and brought about PROHIBITION, which began with the passage of the EIGHTEENTH AMENDMENT to the Constitution in 1919 and ended with its repeal in 1933. The return of legalized drinking in the United States led to renewed discussion of the many health and safety issues associated with alcohol consumption. Over the years, the states have addressed these issues through a variety of laws, such as those dealing with a minimum age for the purchase or consumption of alcohol, the labeling of alcoholic beverages, and drunk driving. Private litigants have expanded protections against harm from alcohol through TORT actions, and various groups, both national and local, continue to lobby for increased legislation and higher penalties for alcohol-related acts that lead to injury.

### Historical Background of Alcohol in the United States

> Drink is in itself a good creature of God,
> and to be received with thankfulness,
> but the abuse of drink is from Satan,
> the wine is from God, but the Drunkard is from the Devil.
> (Increase Mather, Puritan clergyman, *Wo to Drunkards* [1673])

Alcoholic beverages have been consumed in the United States since the days of Plymouth Rock. In fact, beer and wine were staples on the ships carrying settlers to the New World. In colonial times, water and milk were scarce and

## Alcoholics Anonymous

The courts have long struggled with the problem of what sanctions to impose on people who violate the law while under the influence of liquor. Punishing these offenders fails to address the root cause of the behaviors, the uncontrolled consumption of alcohol. Many judges order offenders to undergo alcohol-dependency treatment or counseling as part of a sentence or as a condition of **PROBATION**.

One of the most popular programs for treating alcoholism is Alcoholics Anonymous (AA). AA was founded in 1935 by New York stockbroker Bill Wilson and Ohio surgeon Robert Smith. Wilson and Smith recognized their inability to control their drinking and were determined to overcome their problem. They developed the Twelve Steps, on which AA is based and which have become the foundation for similar self-help and recovery programs. AA comprises ninety thousand local groups in 141 countries. Participation is voluntary, and there are no dues or other requirements. Members attend meetings run by nonprofessionals, many of whom are recovering alcoholics. The meetings offer fellowship, support, and education to those with a desire to stop drinking.

Participants in AA declare that they cannot control their drinking alone, and invoke a higher power to help them overcome their dependence on alcohol. AA's Twelve Steps require a fundamental change in personality and outlook. Members admit their powerlessness over alcohol to themselves, to God, and to their friends and families. They attempt to make amends for any wrongs they have committed because of alcohol abuse. Finally, through prayer, meditation, and daily self-evaluation, AA members strive for a radical transformation or spiritual awakening, which results in changed perceptions, thought processes, and actions. Finally, participants share their experiences with others.

Although AA's Twelve Steps speak of God, a higher power, and spiritual awakening, AA maintains that it is not a religious organization. However, the group's religious underpinnings and the tone of its meetings, which may begin with the Serenity Prayer and generally end with group recitation of the Lord's Prayer, are objectionable to some. Courts have split over the issue of whether forced participation in AA violates the **FIRST AMENDMENT** religion clauses.

**CROSS-REFERENCES**

First Amendment; Religion.

susceptible to contamination or spoilage, and tea and coffee were expensive. The Pilgrims turned to such alternatives as cider and beer, and, less frequently, whiskey, rum, and gin. In 1790, per capita consumption of pure alcohol, or absolute alcohol, was just under six gallons a year. (Pure alcohol constitutes only a small percentage of an alcoholic drink. For example, if a beverage contains 10 percent alcohol by volume, one would have to drink ten gallons of it to consume one gallon of pure alcohol.)

Although the majority of the colonists drank alcohol regularly, strong community social strictures curbed any tendency toward immoderation. Drunken behavior was dealt with by emphasizing the need to restore community harmony and stability, rather than by imposing punishment.

Alcohol consumption continued without much controversy until after the Revolutionary War when whiskey and other distilled spirits became valuable commercial commodities. When Congress imposed an excise tax on the farmers who produced liquor in the 1790s, they resisted paying the tax. Their resistance became known as the Whiskey Rebellion, a protest movement of farmers who felt the tax placed an undue burden on their commercial activities.

Before the nineteenth century, farming was the predominant occupation, and, although it involved grueling work, it did not demand precision or speed. The Industrial Revolution brought millions of workers into factories where efficiency, dexterity, and rigid scheduling were necessary. With these economic changes came a shift in societal attitudes toward alcohol. Gone

# Drinking on Campus: A Rite of Passage Out of Control?

Alcohol has had its advocates and its critics, particularly on college campuses, where the desires of students to enjoy the rights and freedoms of adults collide with the concerns of parents, university officials, and the police. Although some widely publicized studies from the late 1980s and early 1990s indicated that student drinking was at an all-time high, threatening students' health and academic careers, others indicated that the problem of student drinking was overblown and on the decline. Those concerned about the problem have proposed a variety of solutions, with some suggesting that lowering the drinking age might diminish the lure of alcohol as a forbidden fruit.

During the 1980s and 1990s, attention focused increasingly on alcohol use by college students. An article published in the December 7, 1994, issue of the *Journal of the American Medical Association* reported the findings of a study conducted by Dr. Henry Wechsler, director of the Alcohol Studies Program at the Harvard School of Public Health. Wechsler and his team surveyed more than 17,000 students, first-year students to seniors, at 140 colleges in 40 states. They concluded that college students were drinking more than ever before.

In Wechsler's study, 44 percent of the students surveyed reported binge drinking, defined as having five consecutive drinks in a row for men or four in a row for women, on at least one occasion in the two weeks before the survey. (Wechsler defined binge drinking at a lower level of consumption for women because women's bodies take longer to metabolize alcohol, causing them to be affected by lesser amounts in a given time period.) Nineteen percent of all the surveyed students were found to be frequent binge drinkers, meaning they had at least three recent binges.

Similar findings were reported in 1994 by the Commission on Substance Abuse at Colleges and Universities, a group established by the Center on Addiction and Substance Abuse at Columbia University. Its report, titled *Rethinking Rites of Passage: Alcohol Abuse on America's Campuses,* stated that white males were the biggest drinkers on campus. However, the commission noted a sharp rise in the percentage of college women who drank to get drunk, from 10 percent in 1977 to 35 percent in 1994. Unlike women students in earlier studies, those in 1994 reported that they felt little or no social stigma attached to their drinking. At the same time, they felt pressure to succeed, and consuming alcohol was one way they chose to relieve some of that pressure.

College administrators were not surprised by the findings of the two studies. The Harvard study reported that an overwhelming majority of the supervisors of security, deans of students, and directors of health services at the colleges surveyed considered heavy alcohol use a problem on their campuses. And a survey by the Carnegie Foundation revealed that college presidents considered alcohol abuse their most pressing challenge.

College presidents and administrators have had practical reasons to be concerned about student drinking. Reports of drunken brawls, sexual assaults, even deaths attributable to alcohol create public relations nightmares for schools competing for students. There has also been the issue of liability: is a college responsible for injuries inflicted by a drunk student? In addition, much of the drinking on campus has been done illegally by students who are under age.

Academic administrators have found particularly disturbing the increases in drinking among women. According to women students, the desire to compete with men in all arenas, including social, is one reason they feel the need to demonstrate their equality by drinking as much as or more than their male peers. A study conducted by Virginia's College of William and Mary indicated that the number of women at the college who had five or more drinks at one sitting increased from 27 percent to 36 percent during the early 1990s.

Both men and women students have cited intense peer pressure to join the partying that takes place on college campuses, which may begin as early as Wednesday or Thursday night and last through the weekend. At some schools, alcohol-centered gatherings can readily be found any night of the week. Administrators acknowledge that partying may have been just as hearty in the past but note that before the late 1980s, it was generally confined to the weekend.

The fallout from uncontrolled drinking has been felt throughout campus life. According to the report issued by the Commission on Substance Abuse at Colleges and Universities, 95 percent of violent crimes and 53 percent of injuries on

was the time when people considered the midday liquor break a benign diversion.

### The Temperance Movement

'Mid pleasures and palaces, though we may
roam,
Be it ever so humble, there's no place like home.
But there is the father lies drunk on the floor,
The table is empty, the wolf's at the door,
And mother sobs loud in her broken-back'd
chair,
Her garments in tatters, her soul in despair.
(Nobil Adkisson, *Ruined by Drink* [c. 1860])

campus are alcohol related. In 90 percent of all campus rapes, the assailant, the victim, or both had been drinking. Sixty percent of college women who acquire sexually transmitted diseases, including herpes and AIDS, report that they were drunk at the time they were infected. The financial costs are high as well. Students spend $5.5 billion on alcohol each year, more than they spend on books, coffee, tea, sodas, and other drinks combined. Although athletes might be expected to take fewer risks with their health than other students, the commission concluded that they were equally affected by alcohol abuse.

The commission also found that students who belong to fraternities and sororities drink three times more than their non-Greek counterparts, averaging fifteen drinks a week. Indeed, fraternity drinking has been blamed in several disciplinary actions and at least one death. In July 1994, the national office of Alpha Tau Omega (ATO) announced it was closing 11 of its chapters for violating rules against hazing and alcohol abuse. ATO had already closed its chapter at Wittenberg University, in Springfield, Ohio, after a newly recruited pledge was hospitalized in January 1994 for alcohol poisoning. Similarly, the national office of Beta Theta Pi (BTP) announced in 1994 that it would intensify enforcement of rules against hazing and alcohol use in its chapters. According to Erv Johnson, director of communications for the national office, BTP was concerned not only about the legal issues involved but also about the image of the fraternity and the national office's desire to emphasize that the primary purpose of going to college is to learn.

Excessive drinking has a direct effect on academic performance. Students with an A average generally have 3.6 drinks a week, C students average 9.5 drinks a week, and D and F students consume almost 18 drinks a week. According to college officials, alcohol is implicated in almost half of all academic problems and is an issue for more than one-fourth of dropouts.

Excessive drinking has obvious negative consequences for the students who engage in it, but it also affects those who do not partake. During the early 1990s, some students and school officials began to speak out against the damage and disorder that binge drinkers cause. Just as nonsmokers brought awareness of the effects of secondhand smoke, moderate and nondrinking students called attention to the results of "secondhand bingeing." Likewise, administrators, who had traditionally tried to downplay the severity of the problem, began to acknowledge it and tried several approaches to controlling it. One method involved having peer counselors educate students about the dangers of excessive drinking and about the effects of their actions on others. Another program provided students with recreational options that did not include alcohol. Some schools offered houses or sections of dorms where residents pledged not to drink or smoke. In 1994, the University of Pittsburgh considered requiring first-year students to take a one-credit course on responsible drinking. The action came after a premed student died after drinking 16 shots of liquor and some beer in less than an hour. However, most administrators stopped short of preaching abstinence, acknowledging that most students have begun to drink before they enter college.

Some college officials advocate lowering the legal drinking age, on the theory that if alcohol is readily available to students it may lose some of its appeal. Susan Vaughn, coordinator of judicial affairs at Miami University, of Ohio, stated that laws setting the minimum drinking age at 21 are unenforceable. She argued that the higher drinking age entices students to drink to excess in order to prove their maturity and that lowering the legal age would bring drinking "out of the closet," where it can be properly supervised.

Others who have studied college drinking vehemently dispute the wisdom of lowering the minimum age. Joseph A. Califano Jr., former health secretary and president of the Center on Addiction and Substance Abuse, asserted that lowering the minimum drinking age would encourage more drinking and that drinking by college students should no longer be thought of as a rite of passage but rather should be considered a stumbling block to success. His sentiments were echoed by the Reverend Edward A. Malloy, president of the University of Notre Dame, who stated that heavy alcohol use is an unhealthy trend that runs counter to the goals of an educational institution. Still, some people believe that learning how to drink is part of the college experience, essential to growing up and breaking away from home and parental control.

Some 1990s evidence suggested that drinking on college campuses was declining. A 1994 survey of 300,000 students nationwide found that nearly half abstained from virtually all alcohol; in 1971, only one in four abstained. Another 1994 study indicated that, although binge drinking remained a problem, light to moderate drinkers were consuming fewer drinks a week than their counterparts in a 1982 survey. Some experts speculated that these students were following the lead of their parents, who drank less in the 1990s than they had in the 1970s and 1980s. Others felt that the trend reflected an increased awareness of health and safety issues.

Additional evidence that student drinking may not be as big a problem as

*(continued)*

As the United States entered the Industrial Age, attitudes about alcohol consumption gradually changed. A moralistic and punitive view of alcohol replaced the laissez-faire attitudes of earlier times. What had been the "good creature of God" in the eighteenth century became the "demon rum" of the nineteenth.

The U.S. temperance movement emerged around 1826 with the formation of the American Society for the Promotion of Temperance, later called the American Temperance Society. In

## Drinking on Campus: A Rite of Passage Out of Control? (continued)

some surveys have suggested appeared in a 1994 study conducted by Dr. David Hanson and Dr. Ruth Engs, of the State University of New York College at Potsdam. The Hanson and Engs study contradicted the findings of the Center on Addiction and Substance Abuse and indicated that student drinking had declined from that in previous years. Furthermore, Hanson questioned the center's statistics on an increase in binge drinking among college women, stating that if such behavior had actually increased 250 percent between 1977 and 1994, other studies conducted during that time would have shown the same rise.

Some who noted a decrease in college drinking speculated that it may have been because college students of the 1990s grew up with a higher minimum drinking age and stricter drunk driving laws. They asserted that it takes a number of years for changes in the law to affect the targeted population. With those changes finally having the desired effect, they maintained, it would be counterproductive to return to a lower minimum age.

Concern over binge drinking on college campuses continued to rise at the beginning of the twenty-first century. In 2002, the Task Force on College Drinking of the National Institute on Alcohol Abuse and Alcoholism (NIAAA) released a study indicating that 1,400 college students died and another 500,000 were injured per year as a result of alcohol abuse. The study also found that more than 600,000 college students were assaulted annually by another student who had been drinking, and more than 70,000 were victims of alcohol-associated sexual assaults or date rapes.

Also in 2002, the Harvard School for Public Health College Alcohol Study issued a report putting the number of binge drinkers on colleges campuses in 2001 at 44 percent—the same amount as in the school's 1994 report. This second report indicated that almost a decade of trying to combat binge drinking by colleges and universities had not succeeded in driving down the number of binge drinkers. Indeed, the 2002 survey found an increase in binge drinking among several groups, including binge drinkers at women's colleges, which rose from 24 percent to 32 percent of the population.

As of 2003, the most recent College Alcohol Study found the number of frequent binge drinkers, defined as students who binged three or more times over a two week period, had also remained steady at 20 percent. These frequent binge drinkers accounted for 70 percent of all alcohol consumption on campus. Drinking rates were highest among incoming freshmen, males, members of fraternities or sororities, and athletes. Students who attended two-year institutions, religious schools, commuter schools, or predominantly or historically black colleges and universities drank the least.

There were some positive aspects of the 2002 College Alcohol Study report, including the fact the number of high school binge drinkers had dropped and a larger number of students reported living in substance-free housing. But the fact that the number of binge drinkers failed to drop despite these positive trends showed colleges and universities what a struggle they had on their hands. Senator Joseph Lieberman (D-CT) held hearings in 2002 shortly after both the College Alcohol Study and the NIAAA study were released in which he said "alcohol abuse on college campuses has reached a point where it is far more destructive than most people realize and today threatens too many of our youth."

In response to the failure to bring down binge drinking rates, colleges and universities tried innovative approaches to tackle the problem. One was the use of "social norms" advertising, telling students that drinking on colleges was less prevalent than they thought, to convince students that most students do not binge drink, and that it is socially acceptable to abstain. Critics pointed out, however, that social norms advertising might simply send the wrong message to administrators and other policy makers—that drinking on campus was no big deal.

Other universities tried harsher enforcement policies, banning alcohol from college-run housing, even eliminating sororities and fraternities. Some colleges also tried to curb alcohol related advertising on campus, refusing to allow sponsorship of university activities by beer producers and asking bars and taverns near campus to limit promotions to college students. Several reinstated Friday and Saturday morning classes as a way to encourage students not to drink on weekends.

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the 1840s, the society began crusading for complete abstinence from alcohol. Dissemination of the temperance message caused a fall in per capita consumption of pure alcohol from a high of over seven gallons a year in 1830 to just over three in 1840, the largest ten-year drop in U.S. history. By the outbreak of the Civil War, 13 states, beginning with Maine in 1851, had adopted some form of prohibition as law.

Other temperance organizations became prominent during the middle to late 1800s. In 1874, the Woman's Christian Temperance Union

(WCTU) was founded. The only temperance organization still in operation, the WCTU has worked continuously since its inception to educate the public and to influence policies that discourage the use of alcohol and other drugs. In 1990, the group was nominated for a Nobel Peace Prize.

In 1869, the anti-alcohol movement created its own political party—the National Prohibition party—devoted to a single goal: to inspire legislation prohibiting the manufacture, transportation, and sale of alcoholic beverages. The party made modest showings in state elections through the 1860s and 1870s, and reached its peak of popular support in 1892 when John Bidwell won almost 265,000 votes in his bid for the presidency. The Prohibition party's main effect was its influence on public policy. It succeeded in placing Prohibition planks into many state party platforms and was a potent impetus behind passage of the Eighteenth Amendment.

One of the most powerful forces in the Prohibition movement was the Anti-Saloon League, a nonpartisan group founded in 1893 by representatives of temperance societies and evangelical Protestant churches. The Anti-Saloon League, unlike the PROHIBITION PARTY, worked within established political parties to support candidates who were sympathetic to the league's goals. By 1916, the league, with the help of the Prohibition party and the WCTU, had sent enough sympathetic candidates to Congress to ensure action on a Prohibition amendment to the Constitution.

### Prohibition

Prohibition is an awful flop.
We like it.
It can't stop what it's meant to stop.
We like it.
It's left a trail of graft and slime
It don't prohibit worth a dime
It's filled our land with vice and crime,
Nevertheless, we're for it.
(Franklin P. Adams, quoted in *Era of Excess*)

In December 1917, the temperance movement achieved its goal when Congress approved the Eighteenth Amendment, which prohibited the manufacture, sale, transportation, importation, or exportation of intoxicating liquors from or to the United States or its territories. The amendment was sent to the states, and, by January 1919, it was ratified. In January 1920, the United States officially became dry.

**U.S. Consumer Spending on Alcoholic Beverages, 1984 to 2000**

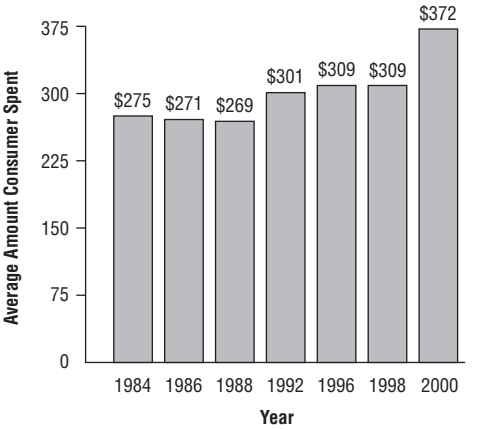


SOURCE: U.S. Department of Labor, Bureau of Labor Statistics.

The demand for liquor did not end with Prohibition, however. Those willing to violate the law saw an opportunity to fill that demand and become wealthy in the process. Illegal stills produced the alcohol needed to make "bathtub gin." Rum and other spirits from abroad were commonly smuggled into the country from the east and northwest coasts, and illegal drinking establishments, known as speakeasies or blind pigs, proliferated. The illicit production and distribution of alcohol, called bootlegging, spawned a multibillion-dollar underworld business run by a syndicate of criminals.

Perhaps the most famous of the bootleggers was AL CAPONE, who ran liquor, prostitution, and RACKETEERING operations in Chicago—one of the wettest of the wet towns. At the height of his power in the mid-1920s, Capone made hundreds of millions of dollars a year. He employed nearly a thousand people and enjoyed the cooperation of numerous police officers and other corrupt public officials who were willing to turn a blind eye in return for a share of his profits. For years, Capone and others like him evaded attempts to shut down their operations. Capone's reign finally ended in 1931 when he was convicted of income TAX EVASION.

Historians differ about the success of Prohibition. Some feel that the effort was a ludicrous failure that resulted in more severe social prob-

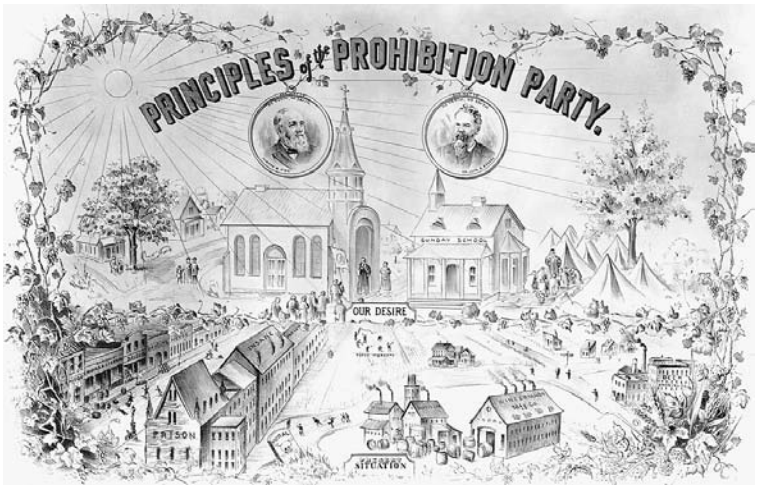


*The 1888 Prohibition Party presidential candidate, Clinton Bowen Fisk, and his running mate, John A. Brooks, received close to 250,000 votes. Despite the party's meager showings in presidential elections, it was successful in influencing public policy and became an important player in the passage of the Eighteenth Amendment.*

CORBIS

lems than had ever been associated with alcohol consumption. Others point to ample evidence that Prohibition, although never succeeding in making the country completely dry, dramatically changed U.S. drinking habits. Per capita consumption at the end of Prohibition had fallen to just under a gallon of pure alcohol a year, and accidents and deaths attributable to alcohol had declined steeply.

Although Prohibition enjoyed widespread popular support, a substantial minority of U.S. citizens simply ignored the law. Also, although Prohibition unquestionably fostered unprecedented criminal activity, many people were concerned that the government's enforcement efforts unduly intruded into personal privacy. In cases such as *Carroll v. United States,* 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), the Supreme Court indicated its willingness to stretch the limits of **POLICE POWER** in order to enforce Prohibition. In *Carroll,* the Court held that federal agents were justified in conducting a warrantless search of an automobile, because they had **PROBABLE CAUSE** to believe it contained illegal liquor.

Concerns over diminished liberties led to feelings that Prohibition was too oppressive a measure to impose upon an entire nation. This sentiment was bolstered by arguments that the production and sale of alcohol were profitable enterprises that could help boost the nation's depressed economy. By the beginning of the 1930s, after little more than a decade as law, Prohibition lost its hold on the U.S. conscience. The promise of jobs and increased tax revenues helped the anti-Prohibition message recapture political favor. The **TWENTY-FIRST AMENDMENT**, repealing Prohibition, swept through the necessary 36-state ratification process, and the "noble experiment" ended on December 5, 1933.

### Post-Prohibition Regulation and Control

The repeal of Prohibition forced states to address once more the dangers posed by excessive alcohol consumption. The risks are well documented. The National Highway Traffic Safety Administration (NHTSA) estimated that, in 2001, alcohol was involved in 41 percent of all fatal crashes (over 17,000 fatalities). NHTSA also estimates that three out of ten Americans will be involved in an alcohol-related crash sometime during their lives. Alcohol is the most widely used drug among teenagers and is linked to juvenile crime, health problems, suicide, date rape, and unwanted pregnancy. Alcohol-related traffic accidents are the leading cause of death among 15- to 24-year-olds.

In the face of rising concerns about liquor consumption and personal injury, many states chose to regulate alcohol through **DRAMSHOP LAWS**. A dramshop is any type of drinking establishment where liquor is sold for consumption on the premises. Dramshop statutes impose liability on sellers of alcoholic beverages for injuries caused by an intoxicated patron. Under such statutes, a person injured by a drunk patron sues the establishment where the patron was served. The purpose of dramshop laws is to hold responsible those who enjoy economic benefit from the sale of liquor, thereby ensuring that a loss is not borne solely by an innocent victim (as when the intoxicated person who caused the injuries has no assets and no insurance).

The first dramshop law, enacted in Wisconsin in 1849, required saloons or taverns to post a bond for expenses that might result from civil lawsuits against their patrons. Many states followed Wisconsin's lead, and dramshop laws were prominent until the 1940s, 1950s, and 1960s, when most were repealed. However, the 1980s brought renewed concern over the consequences of overindulgence in alcohol, and public pressure led to the passage of new dramshop statutes. By 1993, 36 states had imposed some form of liability on purveyors of alcoholic beverages for injuries caused by their customers.

All states and the District of Columbia also regulate the sale of liquor to minors or to indi-

viduals who are intoxicated. Challenges to the age restriction on EQUAL PROTECTION grounds have been unsuccessful.

Along with statutory measures, most courts have also recognized a common-law CAUSE OF ACTION against alcohol vendors for the negligent sale of alcohol. In *Rappaport v. Nichols,* 31 N.J. 188, 156 A.2d 1 (1959), the court held that a tavern could be held liable for the plaintiff's husband's death after the tavern served an intoxicated minor who caused the accident that killed the man. The court relied on the public policy concerns underlying liquor control laws. Such laws are intended to protect the general public as well as minors or intoxicated persons, the court reasoned, and therefore the tavern should be held liable if its NEGLIGENCE was a substantial factor in creating the circumstances that led to the husband's death. Under *Rappaport,* serving as well as consuming alcohol can be construed to be the proximate cause of an injury. A majority of jurisdictions now follow the *Rappaport* court's reasoning.

In determining the extent of an alcohol vendor's liability, a growing number of courts apply comparative negligence principles. Comparative negligence assesses partial liability to a plaintiff whose failure to exercise reasonable care contributes to his or her own injury. In *Lee v. Kiku Restaurant,* 127 N.J. 170, 603 A.2d 503 (1992), and *Baxter v. Noce,* 107 N.M. 48, 752 P.2d 240 (1988), the plaintiffs sued under dramshop statutes for injuries suffered when they rode with drunk drivers. The courts in both cases recognized the importance of dramshop statutes in protecting innocent victims of drunk behavior. However, they also recognized the need to hold individuals responsible to some degree for their own safety. Under comparative negligence, which divides liability among the parties in accordance with each party's degree of fault, both goals are achieved.

A few courts have extended liability for injuries to social hosts who serve a minor or an intoxicated guest. In *Kelly v. Gwinnell,* 96 N.J. 538, 476 A.2d 1219 (1984), the New Jersey Supreme Court found both the host and the guest jointly liable when the guest had an accident after drinking at the host's house. The court based the host's liability on his continuing to serve alcoholic beverages to the guest when he knew the guest was intoxicated and likely to drive a car. Similarly, in *Koback v. Crook,* 123 Wis.2d 259, 366 N.W.2d 857 (1985), the Wisconsin Supreme Court held that a social host was negligent for serving liquor to a minor guest at a graduation party. The guest was later involved in a motorcycle accident in which the plaintiff was injured. However, the Ohio Supreme Court refused to extend liability to the social host in *Settlemyer v. Wilmington Veterans Post No. 49,* 11 Ohio St. 3d 123, 464 N.E.2d 521 (1984). The court in *Settlemyer* held that assigning liability to a social host is a matter better left to the legislature.

All states and many local governments regulate the sale of alcohol through the issuance of licenses. These licenses limit the times and locations where liquor sales can take place. The government also regulates alcohol through taxation. Current taxes on liquor serve the same dual purpose as did the first excise tax on liquor when it was proposed by ALEXANDER HAMILTON in 1791: they provide a source of revenue for the government and, theoretically, discourage overindulgence. Enforcement of the laws regulating alcohol and taxing it is carried out by the Bureau of ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES (ATF), an agency of the U.S. JUSTICE DEPARTMENT, and the Tax and Trade Bureau (TTB), an agency of the TREASURY DEPARTMENT, respectively. The collection of alcohol revenues is important to the federal government: in 2001, liquor taxes exceeded $7.6 billion.

During the 1980s and 1990s, public awareness of the dangers of alcohol led to a number of changes in the law. Specifically, special interest groups such as MOTHERS AGAINST DRUNK DRIVING (MADD) and Students Against Drunk Driving (SADD) pressured state legislatures to greatly increase enforcement and penalties for driving while intoxicated (DWI). Criminal statutes make DWI a misdemeanor offense. Historically, few persons served jail time unless they were repeat offenders. Moreover, prosecutors often reduced DWI charges to lesser charges, such as reckless driving, so defendants could avoid the stain of a DWI conviction on their driving records.

MADD was formed by mothers of children who had been killed by drunk drivers. They were outraged at the way the criminal justice system treated DWI crimes. A major focus in the 1990s for MADD was convincing state legislatures to reduce the blood alcohol count needed to constitute a DWI offense. Specific blood-alcohol concentration (BAC) limits varied from state to

state, but .10 percent BAC usually qualified as driving while intoxicated. MADD sought to reduce the BAC to .08 percent and successfully lobbied many state legislatures. However, alcohol wholesalers, retailers, and the hospitality industry fought a lowered BAC, arguing that it would hurt business and unfairly penalize drivers.

The debate moved to the national level in 1998 when Congress first rejected and then enacted legislation that requires all states to lower the drunken driving arrest threshold to .08 percent. States that failed to change their laws would forfeit millions of dollars in federal highway construction funds. By the end of 2002, one-third of the states had not complied with the law, arguing that studies did not show that a reduction from .10 to .08 BAC saved many lives. Opponents of the law contended that a .08 BOC merely led to thousands of additional arrests of casual drinkers who did not pose a serious safety risk. The additional arrests absorbed more police and prosecutorial resources, which would not be offset by the federal highway funds.

An increased knowledge about the consequences of alcohol consumption also had an effect on the makers of alcohol. Concerned individuals felt that liquor manufacturers had the duty to warn consumers that their product may be hazardous. Before 1987, manufacturers of alcoholic beverages were immune from civil liability for injuries resulting from the use of liquor. *Garrison v. Heublein, Inc.,* 673 F.2d 189 (7th Cir. 1982), held that the defendant did not have a duty to warn the plaintiff of the dangers of its product. The court stated that the dangers inherent in the use of alcohol are "common knowledge to such an extent that the product cannot objectively be considered to be unreasonably dangerous."

*Garrison* was followed by other jurisdictions until 1987 when *Hon v. Stroh Brewery,* 835 F.2d 510 (3d Cir. 1987), signaled a shift in judicial sentiment. In *Hon,* the plaintiff's 26-year-old husband died of pancreatitis attributable to his moderate consumption of alcohol over a six-year period. The plaintiff alleged that the defendant's products were "unreasonably dangerous" because consumers were not warned of the lesser-known dangers of consumption. The court, relying on the Restatement (Second) of Torts § 402A, held that a product is defective if it lacks a warning sufficient to make it safe for its intended purpose. Since the general public is unaware of all the health risks associated with liquor consumption, the court found the defendant liable for failing to warn the plaintiff.

The reasoning in *Hon* has been followed in other cases, including *Brune v. Brown-Forman Corp.,* 758 S.W.2d 827 (Tex. Ct. App. 1988), where the court found that the defendant's product was unreasonably dangerous because it bore no warning about the dangers of excessive consumption. The plaintiff's daughter, a college student, died after consuming 15 shots of tequila over a short period of time.

The duty of liquor manufacturers to warn consumers of the hazards of drinking was codified when Congress passed the Alcoholic Beverage Labeling Act of 1988 (27 U.S.C.A. § 215). The act requires all alcoholic beverage containers to bear a clear and conspicuous label warning of the dangers of alcohol consumption.

The United States's long history of ambivalence toward the consumption of alcoholic beverages shows no sign of abating. At the same time that manufacturers are required to warn consumers about the health risks inherent in liquor, some medical studies indicate that certain health benefits may be associated with moderate imbibing.

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Alcohol, Tobacco, Firearms, and Explosives, Bureau of; Automobile Searches; Blue Laws; Organized Crime; Product Liability.

## ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, BUREAU OF

For more than 80 years, the Bureau of Alcohol, Tobacco, and Firearms was an agency of the U.S. Department of the Treasury. The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, divided the agency into two bureaus: the Bureau of Alcohol, Tobacco, Firearms, and Explosives (still referred to as ATF) and the Tax and Trade Bureau (TTB). Effective January 24, 2003, the ATF became part of the **JUSTICE DEPARTMENT**, while the TTB remained part of the **TREASURY DEPARTMENT**. The move of the ATF to the Justice Department would allow ATF agents and inspectors to partner with traditional law enforcement agencies, such as the **FEDERAL BUREAU OF INVESTIGATION**. With this change, the TTB became responsible for revenue collection and regulation of legitimate alcohol and tobacco industries.

The ATF itself was established on July 1, 1972, but it traces its roots to the days of **PROHIBITION**. The legendary Eliot Ness and his Untouchables, famous U.S. revenue agents remembered for their dramatic surprise raids on illegal alcohol operations, were predecessors of twenty-first century ATF agents. The Untouchables earned their name because of their reputation for high moral integrity and resistance to corruption.

Before the division of the bureau in 2002, the ATF had a long and somewhat complex history. With the passage of the **EIGHTEENTH AMENDMENT**, the manufacture, sale, transportation, importation, and exportation of "intoxicating liquors" from or to the United States or its territories became illegal. This amendment ushered in Prohibition, an era of **ORGANIZED CRIME** and underworld syndicates that controlled an illicit liquor business with violence and intimidation. In an attempt to stanch the flow of weapons to these criminals, Congress passed several laws to regulate the firearms and ammunition industries. Originally, the Bureau of Prohibition was responsible for administering these laws. In 1942, the Alcohol Tax Unit (ATU), a forerunner of the ATF, formally took over the bureau's job when the bureau was disbanded following repeal of the Eighteenth Amendment. In 1952, the ATU added enforcement of tobacco tax laws to its list of responsibilities and changed its title to the Alcohol and Tobacco Tax Division (ATTD) of the **INTERNAL REVENUE SERVICE** (IRS).

During the 1960s, Congress recognized the need to control destructive devices other than firearms. The Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968, 18 U.S.C.A. § 921 et seq., superseded earlier firearms control laws and placed bombs and other explosives as well as firearms under the strict control of the government. The ATTD was given jurisdiction over the criminal use of explosives and was renamed the Alcohol, Tobacco, and Firearms Division (ATFD) of the IRS.

In 1970, the Organized Crime Control Act, 18 U.S.C.A. 841-848, which included the Explosives Control Act, 18 U.S.C.A. § 842, provided for close regulation of the explosives industry and designated certain arsons and bombings as federal crimes. With the additional responsibility of enforcing these new laws, the ATFD redefined its mission in order to distinguish itself from the IRS. On July 1, 1972, the ATFD was given full bureau status within the Treasury Department and acquired the name, the Bureau of Alcohol, Tobacco and Firearms.

The ATF and TTB are responsible for enforcing and ensuring compliance with the following laws.

- Federal Alcohol Administration Act, 27 U.S.C.A. § 201 et seq. (1935);
- Internal Revenue Code of 1954, as it relates to distilled spirits, tobacco products, and firearms (26 U.S.C.A. §5001 et seq.);
- Gun Control Act of 1968, as amended, 18 App. 26 U.S.C.A. § 5801 et seq.;
- Title XI of the Organized Crime Control Act (1970) (Explosives Control Act) (22 U.S.C. §2778);

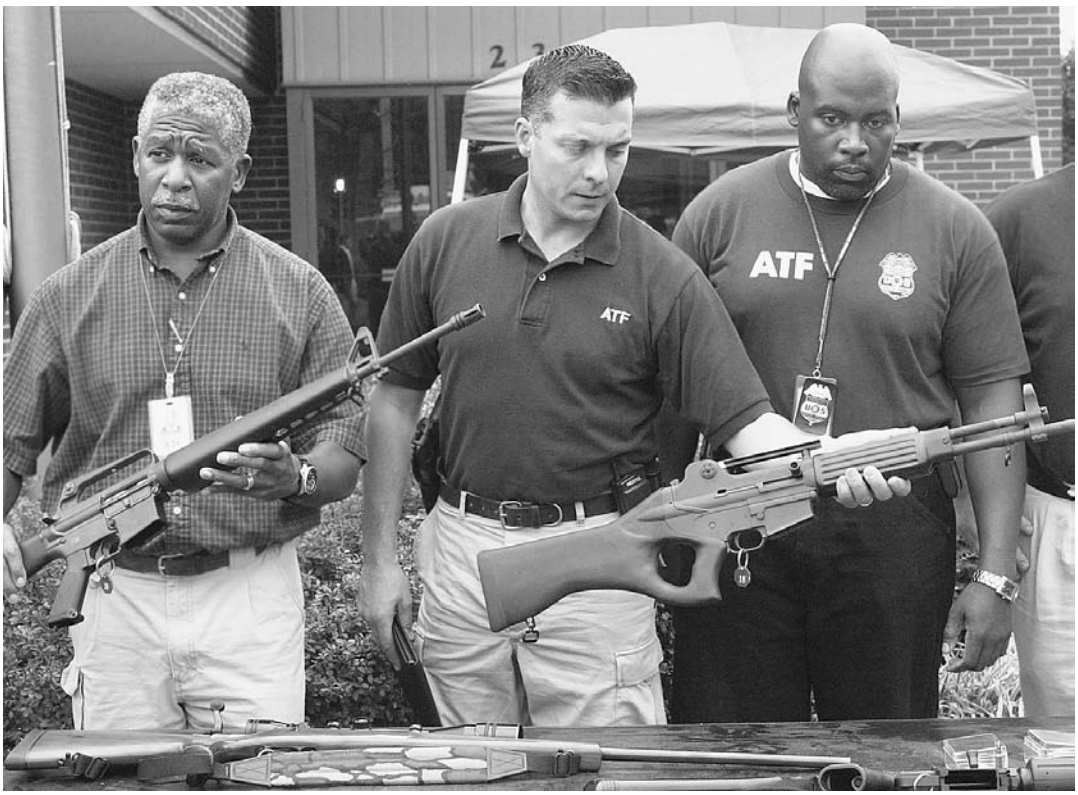


*Three Bureau of ATF agents display firearms outside an ATF office in Maryland. The ATF is an agency of the U.S. Justice Department.*

AP/WIDE WORLD PHOTOS

- Portions of the Arms Export Control Act (1976);
- Trafficking in Contraband Cigarettes Act (1978) 18 U.S.C.A. 2341–2346;
- Anti-Arson Act of 1982 (amended title XI of the Organized Crime Control Act), 18 U.S.C.A. §§ 841 note, 844;
- Armed Career Criminal Act of 1984, 18 App. U.S.C.A. §§ 1201, 1202

In the area of alcohol and tobacco regulation, as of 2003, the TTB controls production, labeling, advertising, and the relationships between producers, wholesalers, and retailers. The responsibility was previously under the purview of the ATF. TTB efforts are directed mainly at protecting consumers against products that are impure or mislabeled or otherwise potentially harmful.

During the 1980s, alcohol-related activities of the ATF focused on the promulgation and enforcement of labeling regulations. For example, in March 1994, the Miller Brewing Company replaced an advertisement for one of its beers in response to concerns raised by ATF officials. The advertisement showed the beer's label, which listed the product's alcohol content, a violation of the Federal Alcohol Administration Act (FAAA), 27 U.S.C.A. § 201 et seq., one of the laws the ATF enforces. However, the strength of that act was diluted later by a 1995 Supreme Court decision declaring the restriction unconstitutional. In *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995), the Court held that the subsection of the act that prohibits brewers from advertising the alcohol content of their beers was unnecessarily broad and violated the FIRST AMENDMENT. The Court stated further that the government's legitimate interest in preventing manufacturers from competing by increasing the alcohol content of their beers could be accomplished through less restrictive means, such as by directly limiting the alcohol content of beer or by banning the advertisement of alcohol content of high-alcohol brews.

During the 1980s and 1990s, ATF enforcement duties were increasingly focused on firearms as alcohol and tobacco regulation became mainly a matter of taxation. As of 1991, an estimated 270,000 dealers, importers, and manufacturers of firearms, ammunition, and explosives were licensed in the United States. Approximately 140 million to 200 million firearms were in circulation. The ATF must

oversee enforcement of the laws regulating these items.

The ATF functioned with relative anonymity until February 28, 1993, when it became involved in an ill-fated raid that tainted its reputation and called its future into question. Acting on reports of stockpiled weapons and explosives at the headquarters of a religious sect, the Branch Davidians of Waco, Texas, ATF agents executed a military-style raid of the compound. The agents proceeded with the raid even after discovering that the Branch Davidians had been tipped off by an informant. In the ensuing gunfight, four ATF agents were killed and fifteen wounded. The Davidians refused to surrender, and the agents refused to back down. The standoff continued until April 19, when ATF agents again moved to take the compound by force. The raid turned into a shoot-out and conflagration in which 85 members of the cult, including 17 children, perished.

The bureau was widely criticized for its actions at Waco. A report on the incident issued by the Treasury Department concluded that the decision to proceed was wrong and that those in charge of the operation knew it was a mistake to proceed with the raid because the element of surprise was missing. The report found that bureau officials unwisely insisted on carrying out the February 28 raid even though the critical element of surprise had been lost. The bureau's director, Stephen E. Higgins, retired early from his position, and two agents, Phillip J. Chojnacki and Charles D. Sarabyn, were suspended for their roles in the botched raid. Chojnacki and Sarabyn appealed their suspensions, and, in December 1994, they were reinstated with full back pay and benefits, although they were demoted. In addition, the incident was removed from their personnel files.

The incident at Waco aroused the ire of many U.S. citizens, particularly right-wing militia groups who saw the raid as an example of government intrusion upon their right to keep and bear arms. The NATIONAL RIFLE ASSOCIATION sent out membership solicitation letters in 1995 described ATF agents as "jack-booted government thugs." Some believe that an April 1995 bombing of a federal building in Oklahoma City, which took place exactly two years after Waco, was planned in retaliation for the ATF raid on the Branch Davidians.

Controversy continues to surround the ATF. Some critics say that its agents are not sufficiently trained to carry out the types of operations its administrators seem to favor. Others contend that it lacks a coherent mission and that many of its duties, such as enforcement of alcohol regulations, are better suited to other agencies. The move toward a complete split between the agencies was expected to take some time.

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CROSS-REFERENCES

Alcohol; Branch Davidian Raid; Explosives; Gun Control; Weapons.

## ALDERMAN OR ALDERWOMAN

*A public officer of a town or city council or a local legislative body who is elected to the position by the persons he or she represents.*

## ALEATORY CONTRACT

*A mutual agreement between two parties in which the performance of the contractual obligations of one or both parties depends upon a fortuitous event.*

The most common type of aleatory contract is an insurance policy in which an insured pays a premium in exchange for an insurance company's promise to pay damages up to the face amount of the policy in the event that one's house is destroyed by fire. The insurance company must perform its obligation only after the fortuitous event, the fire, occurs.

## ♦ ALEXANDER, JAMES

James Alexander, born in 1691 in Scotland, was an eminent lawyer who became famous for his support of FREEDOM OF THE PRESS.

In 1715, Alexander immigrated to America, and began a career of public service to New York and New Jersey. He performed the duties of surveyor general for the Province of New Jersey in 1715, and three years later served as recorder of Perth Amboy.

Alexander participated in the Council of New York from 1721 to 1732 but continued to

"... I THINK IT ABSOLUTELY NECESSARY THAT SOME PERSON BE HERE TO DEFEND ZENGER."
—JAMES ALEXANDER

be active in New Jersey. He was admitted to the New Jersey Provincial bar in 1723, and joined the Council of New Jersey in that same year, serving until 1735. From 1723 to 1727 Alexander performed the duties of New Jersey attorney general.

In 1735, journalist JOHN PETER ZENGER was on trial, accused of libelous attacks on the administration of New York Governor William Cosby. Alexander served as codefense lawyer at this trial, and ALEXANDER HAMILTON pleaded the case. Zenger was acquitted, and the success of this defense was a triumph for the principles of a free press.

Alexander died in Albany, New York, on April 12, 1756.

## ALIAS

*[*Latin, Otherwise called.*] A term used to indicate that a person is known by more than one name.*

Alias is a short and more popular phrase for *alias dictus.* The abbreviation a.k.a., *also known as,* is frequently used in connection with the description of a person sought by law enforcement officers to disclose the names that the person has been known to use. A fictitious name assumed by a person is popularly termed an alias.

## ALIAS WRIT

*A second writ, or court order, issued in the same case after an earlier writ of that kind has been issued but has not been effective.*

## ALIEN AND SEDITION ACTS

In 1798, the Federalist-controlled Congress passed four acts to empower the president of the United States to expel *dangerous* ALIENS from the country; to give the president authority to arrest, detain, and deport resident aliens hailing from enemy countries during times of war; to lengthen the period of naturalization for immigrants, and to silence Republican criticism of the FEDERALIST PARTY. Also an act passed by Congress in 1918 during WORLD WAR I that made it a crime to disrupt military recruiting or enlistments, to encourage support for Germany and its allies or disrespect for American war efforts, or to otherwise bring the U.S. government, its leaders, or its symbols into disrepute.

### The Alien and Sedition Acts of 1798

Passions over the French Revolution split early American politics. Having endured SHAYS'S REBELLION and the WHISKEY REBELLION, Federalists saw much to fear in the French Revolution. On the other hand, Democratic-Republicans, led by THOMAS JEFFERSON, proudly supported the French Revolution as the progeny of the American Revolution. Democratic-Republicans still viewed Britain as an enemy, while the Federalists regarded Britain as a bulwark against French militancy.

In early 1798, JOHN QUINCY ADAMS, son of President JOHN ADAMS and the U.S. ambassador to Prussia, advised his father that France intended to invade America's western frontier. Jonathon Dayton, speaker of the U.S. House of Representatives, speculated publicly that troops already massed in French ports were destined for North America. Federal officials feared parts of America were rife with French agents and sympathizers who might rise up in support of an invasion. George Tucker, professor of Law at the College of William and Mary, predicted that 100,000 U.S. inhabitants, including himself, would join a French invading army. Former president GEORGE WASHINGTON, summoned

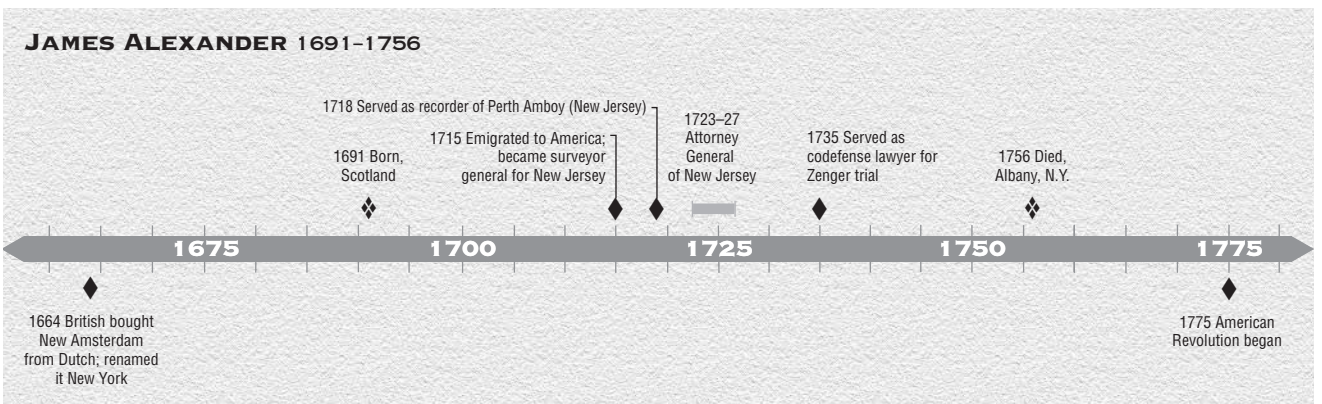

from retirement to lead the U.S. Army against a possible French invasion, expressed concerns that France would invade the southern states first, "because the French will expect from the tenor of the debates in Congress to find more friends there."

Congress responded to these concerns by enacting the ALIEN AND SEDITION ACTS, the popular names for four laws passed in 1798. On June 18, Congress passed the Naturalization Act, which extended from five to 14 years the period of residence required for alien immigrants to become full U.S. citizens (1 Stat. 566). On June 25, Congress passed the Alien Act, which authorized the president to expel, without a hearing, any alien the president deemed "dangerous to the peace and safety" of the United States or whom the president suspected of "treasonable or secret" inclinations (1 Stat. 570). On July 6, Congress passed the Alien Enemy Act, which authorized the president to arrest, imprison, or banish any resident alien hailing from a country against which the United States had declared war (1 Stat. 577).

None of these first three acts had much practical impact. The Naturalization Act contained a built-in window period that allowed resident aliens to become U.S. citizens before the fourteen-year requirement went into effect. President Adams never invoked the Alien Act, and the passing of the war scare in 1789 rendered the Alien Enemies Act meaningless.

However, the Sedition Act deepened partisan political positions between the Federalist Party and the DEMOCRATIC-REPUBLICAN PARTY. The Sedition Act made it a high misdemeanor, punishable by fine, imprisonment, or both, for citizens or aliens (1) to oppose the execution of federal laws; (2) to prevent a federal officer from performing his or her duties; (3) to aid "any insurrection, riot, UNLAWFUL ASSEMBLY, or combination"; or (4) to make any defamatory statement about the federal government or the president (1 Stat. 596).

Because the Federalists controlled Congress and the White House, Republicans believed these laws were aimed at silencing Jeffersonian critics of the Adams administration and its laws and policies. Eighteen people were indicted under the Sedition Act of 1798; 14 were prosecuted, and 10 convicted, some of whom received prison sentences.

The validity of the Sedition Act was never tested in the U.S. Supreme Court before it expired in 1801. But Congress later passed a law that repaid all fines collected under it, and Jefferson, after becoming president in 1801, pardoned all those convicted under the act.

Before becoming president, Jefferson joined Madison in voicing opposition to the Sedition Act by drafting the VIRGINIA AND KENTUCKY RESOLUTIONS. Jefferson was responsible for drafting the two Kentucky Resolutions, while Madison penned the one Virginia Resolution. The Virginia and Kentucky Resolutions condemned the Sedition Act as a violation of the Free Speech Clause to the FIRST AMENDMENT of the U.S. Constitution. The resolutions also argued that Congress had exceeded its powers by passing the law in the first place, since Congress may only exercise those powers specifically delegated to it, and nowhere in Article I of the Constitution is authority given to the legislative branch to regulate political speech. The Kentucky state legislature passed its two resolutions on November 16, 1798, and November 22, 1999, while Virginia passed its one resolution on December 24, 1798.

### Sedition Act of 1918

Concern over disloyalty during wartime provided the backdrop for the second Sedition Act in U.S. history. In April 1917, the United States entered World War I when Congress declared war against Germany and its allies. A month later, the Selective Service Act reinstated the military draft. Both the draft and U.S. entry into the war were met with protest at home. Worried that anti-war protestors might interfere with the prosecution of the war, Congress passed the Sedition Act of 1918.

An amendment to the ESPIONAGE ACT OF 1917, the Sedition Act of 1918 made it a felony (1) to convey false statements interfering with American war efforts; (2) to willfully employ "disloyal, profane, scurrilous, or abusive language" about the U.S. form of government, the Constitution, the flag, or U.S. military or naval forces; (3) to urge the curtailed production of necessary war materials; or (4) to advocate, teach, defend, or suggest the doing of any such acts. Violations were punishable by fine, imprisonment, or both. The law was aimed at curbing political dissent expressed by socialists, anarchists, pacifists, and certain labor leaders.

The U.S. Supreme Court upheld the Sedition Act of 1918 over free speech objections made by civil libertarians. However, in a famous

dissenting opinion that shaped First Amendment law for the rest of the twentieth century, Associate Justice **OLIVER WENDELL HOLMES JR.** encouraged courts to closely scrutinize prosecutions under the Sedition Act to make sure that only those individuals who created a **CLEAR AND PRESENT DANGER** of immediate criminal activity were convicted (**ABRAMS V. UNITED STATES**, 250 U.S. 616, 1180, 40 S. Ct. 17, 63 L. Ed. 1173 [1919]).

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**CROSS-REFERENCES**

Aliens "Aliens and Civil Rights" (Sidebar); Espionage; Freedom of Speech.

## ALIEN ENEMY

*In* **INTERNATIONAL LAW**, *a foreign born citizen or subject of a nation or power that is hostile to the United States.*

An alien enemy is an individual who, due to permanent or temporary allegiance to a hostile power, is regarded as an enemy in wartime. Under federal law, an alien enemy is a native, citizen, or subject of a foreign nation, state, or sovereign with which the United States is at war. Such a person is considered an alien enemy as long as the United States remains at war as determined through proclamation by the president or resolution by Congress. 8 C.F.R. § 331.1 (2002). During times of declared war, Congress has permitted the president to order the apprehension, restraint, and deportation of alien enemies. 50 U.S.C.A. § 21 (2003).

The term *alien enemy*, as it is defined by federal law, does apply easily to individuals who belong to organizations that are not affiliated with a foreign sovereign. Nevertheless, the treatment of such **ALIENS** mirrors treatment permitted by federal law for aliens who are citizens of foreign nations. In the wake of the **SEPTEMBER 11TH ATTACKS**, Congress passed the Authorization for the Use of Military Force Joint Resolution, Pub. L. No. 107-40, 115 Stat. 224, permitting the president to use force to detain and try non-citizens in the **WAR ON TERRORISM**. On November 13, 2001, President **GEORGE W. BUSH** issued a military order [66 Fed. Reg. 57,831–57,836 (2001)] setting forth the military's policy for the treatment of non-citizens in the war against **TERRORISM**. The order applies to individuals who are or were members of the terrorist organization al Qaeda; have engaged in, aided or abetted, or conspired to commit acts of international terrorism; or has harbored such a non-citizen.

*During World War II, the U.S. government moved thousands of Japanese Americans to detention camps because it considered them alien enemies while the country was at war with Japan.*

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

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## ALIENABLE

*The character of property that makes it capable of sale or transfer.*

*Absent a restriction in the owner's right, interests in real property and tangible* **PERSONAL PROPERTY** *are generally freely and fully alienable by their nature. Likewise, many types of intangible personal property, such as a patent or* **TRADEMARK**, *are alienable forms of property. By comparison, constitutional rights of life, liberty, and property are not transferable and, thus, are termed inalienable. Similarly, certain forms of property, such as employee security benefits, are typically not subject to transfer on the part of the owner and are inalienable forms of property.*

## ALIENATE

*To voluntarily convey or transfer title to real property by gift, disposition by will or the laws of* **DESCENT AND DISTRIBUTION**, *or by sale.*

For example, a seller may alienate property by transferring to a buyer a parcel of the seller's land containing a house, in exchange for cash. The seller is said to have alienated her rights in that parcel, such as the right to modify or even demolish the house on the parcel of land, to the buyer. Those rights now belong to the buyer.

## ALIENATION CLAUSE

*A provision in a document permitting or forbidding a person from transferring property that is the subject of the document.*

In a fire insurance policy, an alienation clause prohibits the alienation of the insured premises while the policy is in effect. If the insured violates this provision, the policy is void.

## ALIENATION OF AFFECTION

*The removal of love, companionship, or aid of an individual's spouse.*

Historically, alienation of affection furnished grounds for an action against the individual who interloped in a marital relationship. The harm caused was viewed as a deprivation of an individual's rights of consortium.

The elements of the action generally included wrongful conduct by the interfering party with the complainant's spouse, the loss of affection or consortium, and a nexus between the conduct of the defendant and the impairment or loss of consortium, which included a deprivation of such rights as services, assistance, and sexual relations.

Today, the action has fallen into disuse and no longer constitutes a ground for a lawsuit in most states.

## ALIENS

*Foreign-born persons who have not been naturalized to become U.S. citizens under federal law and the Constitution.*

The federal immigration laws determine whether a person is an alien. Generally, a person born in a foreign country is an alien, but a child born in a foreign nation to parents who are U.S. citizens is a U.S. citizen. The term *alien* also refers to a native-born U.S. citizen who has relinquished U.S. citizenship by living and acquiring citizenship in another country. Aliens are categorized in several ways: resident and nonresident, immigrant and nonimmigrant, documented and undocumented ("illegal").

### Overview

The United States welcomes a large number of aliens every year. Millions of foreign-born persons travel, work, and study in the country, and hundreds of thousands more choose to immigrate and become U.S. citizens. All of them are subject to federal immigration law. At the simplest level, the law serves as a gatekeeper for the nation's borders: it determines who may enter, how long they may stay, and when they must leave. In totality, of course, its scope far exceeds this simple purpose. Immigration law is concerned not only with borders but with what goes on inside them. It has much to say about the legal rights, duties, and obligations of aliens in the United States, which, in some respects, are different from those of citizens. Ultimately, it also provides the means by which certain aliens are naturalized as new citizens with all the rights of citizenship.

Congress has total authority over immigration. In the legislative branch of government, this power has no equal. The U.S. Supreme

# Aliens and Civil Rights

Since the **SEPTEMBER 11TH ATTACKS** on the United States in 2001, the status of aliens physically within the United States or its territories has been decidedly more tenuous. Aliens (non–citizens owing political allegiance to another country) are generally afforded certain fundamental rights and protections under the U.S. Constitution. For example, the **DUE PROCESS CLAUSE** of the **FOURTEENTH AMENDMENT** states, in relevant part, that "no person shall be deprived of life or liberty without due process of law." But other constitutional provisions reserve certain fundamental rights to citizens only; for example, the **FIFTEENTH** and **NINETEENTH AMENDMENTS** guarantee the right "of citizens of the United States" to vote.

**INTERNATIONAL LAW** uses the term "alien enemy" to indicate a person who is the subject or citizen of a nation hostile to, or at war with, the nation in which the alien is found. The significance is that the person becomes, in time of war, impressed with the character of the enemy. However, the problem for many aliens in the United States is that, while their homeland may not be in a declared war with the United States, it may harbor terrorists or contribute to **TERRORISM** in a manner that renders the distinction moot. How, then, does the United States treat aliens from those countries? As author Roberta Smith noted in her 1997 law journal article, "America Tries to Come to Terms With Terrorism: The United States Anti-Terrorism and Effective Death Penalty Act of 1996 v. British Anti-Terrorism Law and International Response":

> "The Fundamental question facing the United States, a democratic society . . . is how can they constrain terrorism without jeopardizing their value systems (e.g., protecting constitutional and **CIVIL RIGHTS** such as prohibitions against unreasonable **SEARCHES AND SEIZURES**, and protection of free speech)."

Prior to 2001, alleged terrorist attacks on the United States or on U.S. property included the 1993 bombing of the World Trade Center in New York City; the 1995 bombing of the Murrah Federal Building in Oklahoma City; the 1998 bombings of U.S. embassies in Kenya and Tanzania; the 1999 rocket shelling of U.S. buildings in Islamabad, Pakistan; and the 2000 attack on the U.S.S. *Cole.* Mostly in response to the Oklahoma bombing, Congress in 1996 passed the Antiterrorism and Effective Death Penalty Act (AEDPA), P.L. 104-132 (codified in scattered sections of 18 U.S.C.), and the Illegal Immigration and Reform and Immigration Responsibility Act (IIRIRA), P.L. 104-208 (codified as amended at 8 U.S.C. 1101). The AEDPA amended immigration laws and streamlined deportation procedures for aliens charged with terrorism.

Before these acts were passed, excludable aliens (those whose right to enter the United States was questioned by the Immigration and Naturalization Service [INS] prior to entry) were distinguished from deportable aliens (those whose entry into the United States was found to be illegal, or whose right to stay in the United States had terminated), and different correlative rights were attached to each. That distinction closely paralleled the terms of distinction between nonimmigrant aliens and illegal aliens. However, the AEDPA and IIRIRA muddied those distinctions, granting power to act against both illegal and immigrant aliens who fell under the acts' criteria.

For aliens, the distinction between punishable acts of terrorism and the constitutionally protected rights of association with, or support for, groups that historically advocate or engage in violence, was becoming increasingly nebulous. The AEDPA and IIRIRA permitted terrorism charges to be brought against an alien for any alleged association with an organization designated as terrorist by the **SECRETARY OF STATE**. Moreover, charges of terrorism could rest entirely on confidential reports not disclosed to the subject alien. Likewise, the IIRIRA limited **JUDICIAL REVIEW** in deportation cases, even when the challenge to deportation rested on First or Fourteenth Amendment constitutional grounds.

Nonetheless, the U.S. Supreme Court, in *Reno v. Arab Anti-discrimination Committee,* 525 U.S. 471, 119 S.Ct. 936, 142 L.Ed.2d. 940 (US 1999), allowed the challenged AEDPA to stand. The Court again confronted AEDPA issues in *Zadvydas v. Davis,* 533 U.S. 678, 121 S. Ct. 249, 150 L.Ed.2d. 653 (US 2001), where a narrow majority ruled that deportable aliens with criminal records could not be detained indefinitely when their countries of nationality refused their return. The decision reaffirmed that Due Process Clause protections

still existed for this narrowly defined class of persons who faced deportation.

In the wake of the September 2001 attacks, Congress passed the all-encompassing **USA PATRIOT ACT** (formally, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act), H.R. 3162 (October 2001). The act, like the AEDPA, affects and amends several other provisions in the U.S. Code. Over 100 pages long, the act contains over 150 sections under ten titles. Of significance to aliens, Section 412 of the act provides for mandatory detention of suspected aliens. Aliens are suspect under the act for any of seven enumerated causes for detention. Further, certain aliens may be held for seven days without being charged and might possibly be detained indefinitely if deemed not removable. The section provides for limited judicial review of such detentions.

The act also required enhanced communications and sharing of data between the FBI, the **JUSTICE DEPARTMENT**, and the **STATE DEPARTMENT**, making it easier to watch and track individuals. The Immigration and Naturalization Service (INS) feeds information into the FBI's crime database, particularly concerning aliens who have received final deportation orders but failed to show for their exit trip. Any subsequent entry of that person's name or data in any other legal system, even for minor traffic offenses, will trigger arrest and deportation. In 2002, the Justice Department announced that younger Middle Eastern men from nations with active al Qaida cells who have ignored deportation orders would be expelled first.

Another key provision of the act was the implementation of an electronic tracking system affecting foreign students. It also began intense review of visa applications of scientists, engineers, and students in technical fields. Many foreign students accepted into scientific or academic programs were ultimately denied visas. The Patriot Act also prohibited illegal aliens, among others, from having access to "select agents" that could be used for harmful purposes.

Following the release of information that seven of the 19 terrorists who boarded planes on September 11, 2001, held drivers' licenses from the Commonwealth of Virginia (although they were illegal aliens), many states began enacting laws to limit the issuance of drivers' licenses to those aliens whose immigration status was legal. Approximately 12 states had similar laws by the end of 2002 (California, Colorado, Florida, Iowa, Kentucky, Louisiana, Minnesota, New Jersey, Ohio, Pennsylvania, South Carolina, and Virginia).

In June 2003, an official U.S. Justice Department report from its inspector general was critical of the detainment of several aliens in the wake of the September 2001 attacks. The 198-page report cited major delays in informing the detainees of the reasons for their detention and criticized the unwritten "no bond" policy of detention. The report also mentioned harsh conditions of confinement and instances of verbal and physical abuse.

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Court has determined that "over no conceivable subject is the legislative power of Congress more complete" (*Fiallo v. Bell*, 430 U.S. 787, 97 S. Ct. 1473, 52 L. Ed. 2d 50 [1977]). With a few notable exceptions concerning the right of aliens to constitutional protections, the courts have rarely intruded. Presidents have no inherent say; their influence is limited to policies on **REFUGEES**. Moreover, congressional authority preempts all state laws and regulations and even addresses

the rights of aliens during wartime. In practical terms, these circumstances mean that immigration law is entirely the domain of federal lawmakers, whose say is usually final. Congress alone decides who will be welcomed or turned away, as well as what aliens may and may not do in the United States.

This authority has a long and controversial past. The first laws date to 1875, and their history is rife with discrimination. Lawmakers have always created barriers that favor some aliens over others. At one time, Chinese were not wanted; at others, Japanese; the list goes on and on. Only in the last half of the twentieth century were these widely divergent policies codified under a primary federal statute, the Immigration and Nationality Act (INA) (Pub. L. No. 414, ch. 477, 66 Stat. 163, codified as amended in scattered sections of 8 U.S.C.A., 18 U.S.C.A., 22 U.S.C.A., 49 U.S.C.A., 50 App. U.S.C.A.), since 1952 the basic source of immigration law. For decades, the INA was easily tinkered with through amendments and bills. A dazzling number of political reasons made Congress create a patchwork of preferences, exceptions, and quotas, each reflecting who was wanted and who was not. Although somewhat less frequently toward the end of the twentieth century, national origin has often decided whether the United States admitted an alien.

Modern legislation has introduced significant changes. Reform has followed two distinct lines of thought: the need to stem illegal immigration, and the desire to make the law more fair for legal immigrants. Congress tackled the first issue in the Immigration Reform and Control Act of 1986 (IRCA) (Pub. L. No. 99-603, 100 Stat. 3359, codified as amended in scattered sections of the U.S.C.A.). The IRCA toughened criminal sanctions for employers who hire illegal aliens, denied these aliens federally funded WELFARE benefits, and legitimized some aliens through an AMNESTY program. Related legislation, the Immigration Marriage Fraud Amendments of 1986, 8 U.S.C.A. § 1101 note et seq., cracked down on the popular illegal practice of marrying to obtain citizenship. Fairness issues helped influence the second major reform, the

**Immigration to the United States, 1820 to 2000**

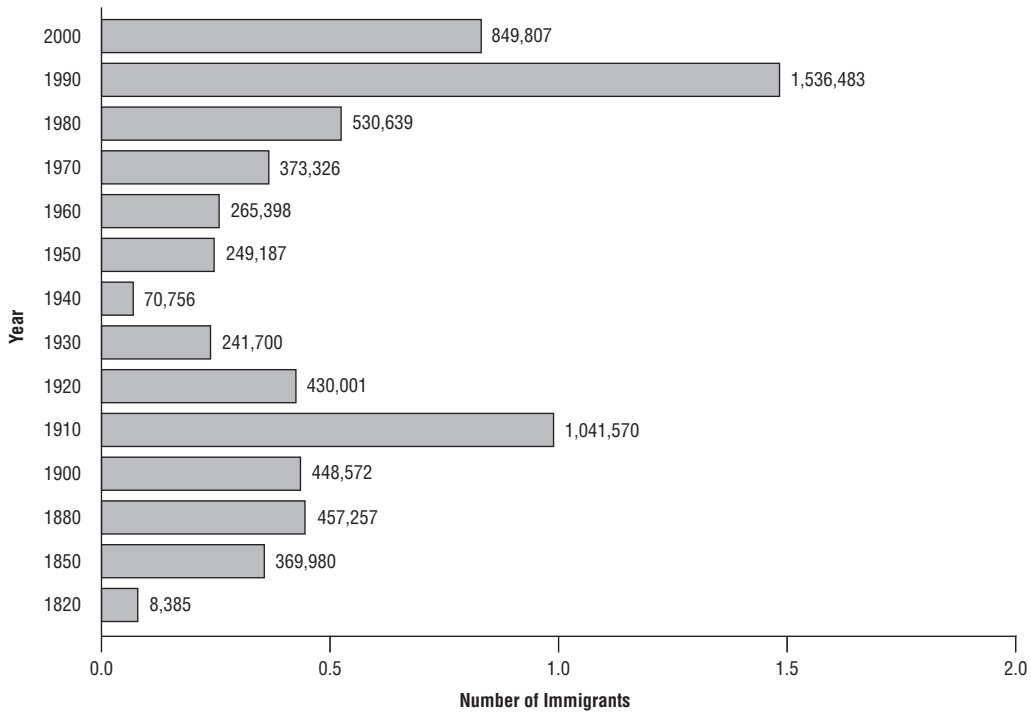


SOURCE: U.S. Immigration and Naturalization Service, *2001 Fiscal Year Statistical Yearbook*.

Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified in scattered sections of the U.S.C.A.). Thoroughly revamping the INA, the 1990 act allocated visas more evenly among foreign nations, eliminated archaic rules, and increased the level of worldwide immigration by 35 percent, to an annual level of 675,000.

The SEPTEMBER 11TH TERRORISTS ATTACKS on the United States led to a reorganization of the agencies responsible for carrying out the nation's immigration laws, as well as to several revisions in the immigration laws themselves. In 2002, Congress abolished the Immigration and Naturalization Service (INS), replacing it with the Bureau of Citizenship and Immigration Services (BCIS), a part of the HOMELAND SECURITY DEPARTMENT (DHS). The move became effective March 1, 2003. The attacks also led to the enactment of a number of statutes that seek both to improve the immigration system and to help protect the United States from illegal aliens who may engage in terrorist activities on its soil. The goals of the new statutes were to accelerate immigration processes related to citizenship and benefits, to strengthen border patrol and enforcement, and to ensure detention and removal of illegal aliens.

### Administrative Implementation of Immigration and Naturalization Laws

For many years, the INS was responsible for implementing many of the nation's immigration and naturalization laws. The terrorist attacks on September 11, 2001, along with a number of other incidents, led to harsh criticism of the agency. According to a number of lawmakers and other commentators, the INS was the worst managed agency in the federal government. Calls for reforming the agency led in 2002 to a call to abolish the agency. When Congress passed the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.A.), it eliminated the agency and created the BCIS. The primary mission of the DHS is to prevent terrorist attacks, reduce the vulnerability of the United States to TERRORISM, and minimize any damage and assist in any recovery should terrorist attacks occur in the country.

The BCIS does not possess all of the powers that the INS once had. It focuses exclusively on immigration and citizenship issues regarding aliens in the United States. Among the agency's primary responsibilities are the review of petitions by aliens for entry or retention in the country, adjudication of ASYLUM and processing of refugees, implementation of naturalization procedures, and issuance and renewal of documents. Many of the law enforcement powers that the INS held have been removed from the BCIS, however.

Under the Homeland Security Act, a number of new agencies were created to carry out several other functions. Many of the responsibilities for preventing entry of terrorists into the United States, carrying out immigration enforcement functions, and other issues relating to the protection of U.S. borders were delegated to the Undersecretary for Border and Transportation Services. Other enforcement powers were given to the Bureau of Border Security Enforcement, which is responsible for the detention, investigation, and inspection of aliens under federal law.

### Admission Procedures

Normally, aliens wishing to enter the United States first apply for a visa at one of the over two hundred U.S. consulates and embassies abroad. Visas are documents required for travel to most nations in the world. For example, U.S. citizens may not simply cross the borders of Germany or Zaire without a visa. Aliens, likewise, may not simply cross the borders into the United States; they have no inherent right to enter the country. A visa is the only legal means of entry. In a larger sense, it is the key to understanding the goals and practices of immigration law.

Two types of visas exist: immigrant visas and nonimmigrant visas. It is much easier to obtain nonimmigrant visas, which are primarily issued to tourists and temporary business visitors. In 1993, the INS admitted 21,447,000 nonimmigrants to the United States. Nonimmigrant visas are divided into eighteen main categories ranging from vacationers and diplomatic personnel to athletes, temporary workers, and students. Most categories do not have any numerical limitation. The reasoning is simple: nonimmigrants generally spend a short time and a lot of money in the United States, with obvious benefits for the nation's economic, social, and cultural life, and relatively few demands on its resources. The most significant issue in nonimmigrant visas is whether the alien may work in the United States without violating the terms of the visa.

Immigrants find visas much harder to obtain. Millions of aliens want to live and work

# Welfare and Immigration

In 1875, the United States passed the first of many restrictive laws intended to keep out certain aliens. A powerful force behind federal legislation has always been widespread hostility toward some new arrivals. Disliking everything from skin color to habits of speech, appearance, and worship, citizens have consistently opposed certain immigrants: the Irish in the 1800s, Jews and Slavs in the early twentieth century, and Southeast Asians subsequently. Illegal aliens have upset many U.S. citizens for decades. Since the late 1980s, a new theme has entered public discussion: opposing **WELFARE** benefits to legal immigrants.

Opponents of providing welfare for immigrants usually voiced such opposition within a general context of opposition to the welfare system. The influential conservative author George Will argued that aliens are brainwashed in much the same way as poor U.S. citizens—into believing that welfare is a normal way of life. "Today immigrants are received in a welfare culture that encourages an entitlement mentality," Will wrote. The notion of an "entitlement mentality" is well-established in the anti-welfare camp, where it is believed that government has erred by creating a mindset of casual acceptance among recipients of benefits. This view does not discriminate between citizens and aliens. It holds that welfare is equally wrong for both because it creates dependence over several generations and leads, as the prominent critic Charles Murray has asserted, to social ills such as crime, drug addiction, and illegitimate children. Moderates, such as President **BILL CLINTON**, embrace this analysis to a degree, yet remain less inclined than conservatives to support eliminating welfare completely.

Welfare is a jumping-off point for a broader attack on federal immigration law. If welfare is a mistaken policy, it follows that any immigration policy that creates new dependents is itself flawed. Does U.S. policy create new dependents? The major emphasis of the 1990 Immigration Act (Pub. L. 101–649, Nov. 29, 1990, 104 Stat. 4978) was on family unification: it stressed immigration by relatives of U.S. citizens and resident aliens, the majority of whom were generally granted visas as long as they did not become "public charges," that is, welfare recipients. Immigrants were supposed to meet this requirement by having a sponsor family that would help feed, clothe, and care for them. Despite this requirement, federal data suggested that many immigrants became public charges anyway. In early 1995, the **GENERAL ACCOUNTING OFFICE** (GAO) reported that 6 percent of legal immigrants were receiving assistance, as opposed to only 3.4 percent of citizens.

To the most outspoken critics, the United States was clearly welcoming the wrong immigrants. Instead of opening its doors to just anyone, they argued, the nation should be more selective. "Today's laws," *Investor's Business Daily* editorialized in 1995, ". . . perversely favor immigrants from the Third World over others with higher skills and greater understanding of Western culture." The newspaper bemoaned this "low-skilled tide" for "push[ing] down the wages of poorer Americans." Not only did the conservative financial press make this argument; the left-wing magazine of opinion, *The Nation*, also repeated it, with a slightly different emphasis on race. Immigrants have "pushed blacks out of the marketplace altogether," the writer Wanda Coleman asserted in 1993. The economist Simon Kuznets and the author Peter Brimelow have tied the relative economic progress of African Americans to the dramatic decline in immigration between 1920 and 1965.

Some advocates of immigration reform went farther. The American Enterprise Institute, a neo-conservative think tank, called for dumping the family-reunification goal for a system based on "designer immigration": admitting better-educated immigrants. This case is made in detail in a 1995 book called *The Immigration Wave: A Plea to Hold It Back,* by Brimelow, himself an immigrant from England. Brimelow contended that the future is bleak: by the year

in the United States and enjoy the benefits of U.S. citizenship, but only a fraction of them can. Congress sets numerical limits on most types of immigrant visas, under the theory that the country can realistically absorb only so many new people. The 1995 annual ceiling was 675,000, with flexibility for some categories. In addition, many immigrant visas are subject to per-country caps—roughly 25,000 per country, though some countries receive special allowances.

In law, aliens granted visas are said to have obtained entry. The term *entry* has a special meaning that is different from a mere "physical presence in the United States." An alien might cross the border but still be determined by authorities not to have entered the country. Entry means legal admittance and the freedom from official restraint. Its benefits are tangible: generally, aliens recognized by law to have gained entry have more rights than those who have not gained entry.

Denial of entry is called *exclusion.* Dating from the earliest attempts to control immigration, this controversial concept holds that it is not in the national interest to admit some per-

2050, the U.S. population will be nearly 400 million, and over one-third of it will be low-skilled immigrants who arrived after 1970. Unlike the one-third of the immigrant population that came during the great wave between 1890 and 1920 and then returned home, these men, women, and children will have stayed because of the welfare system. "The failures are no longer winnowed out," Brimelow wrote. "Instead, they are encouraged to stay—at the expense of the American taxpayer." Only a designer approach can prevent a "bureaucratically-regulated racial spoils system."

Of course, there was another side to the debate. Reviewing *The Immigration Wave,* the author Richard Bernstein criticized Brimelow for ignoring "the genuinely moving spectacle of millions of people making better lives for themselves in this country than they could in the countries they came from." Writing in the *New York Times,* Nathan Glazer expressed regret over an increasingly agitated tone in the debate: "[W]e will all have to keep our heads and remember that we all came from someplace else." Such sentiments have long informed arguments in favor of immigration—namely, that it is generous and humanitarian.

Sharper attacks on the reformers came from the political left. In 1993, the *New Left Review* defended immigration by blasting public selfishness in the form of "the fiscal constraints on public spending imposed by conservative, suburban voters." Instead of restricting immigration, the *Progressive* magazine urged President Clinton to "try to ease the economic deprivations and political persecutions the United States has fostered around the globe, which themselves have propelled much of the immigration to this country."

This debate set the stage for the changes in welfare for legal immigrants that were made in the 1990s. The reform efforts began in California: in 1994, nearly two-thirds of the state's voters passed Proposition 187 (CA Prop. 187 [1994], 1994 Cal. Legis. Serv. Prop. 187 [WEST]), a law intended to deny education and public assistance to illegal aliens. The biggest appeal of Proposition 187 was saving tax dollars. Concerns about heavy state expenditures prompted California and Florida to bring unsuccessful lawsuits in the early 1990s, demanding reimbursement from the federal government, alleging that the federal failure to enforce immigration laws had saddled the states with incredible debts. Although the proposition was not aimed at legal immigrants, its success with voters prompted some observers to regard it as a symptom of increasing intolerance toward immigration in general. However, a federal district court decision in 1995, *League of United Latin American Citizens v. Wilson,* 908 F.Supp. 755, C.D.Cal (1995), prevented it from going into effect, by ruling that most of the law was preempted by federal immigration law.

In 1996, the federal government passed the far-reaching welfare reform act known as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) (Pub. L. 104–193 Aug. 22, 1996, 110 Stat. 2105). The new welfare law particularly affected immigrants. Under the law, immigrants who entered the United States legally after August 22, 1996, were prohibited for at least five years from receiving federal, non-emergency, means-tested benefits, including **MEDICAID** and the services funded by federal block grants. Additionally, immigrants were barred from two other programs, Supplemental Security Income (SSI) and food stamps, until they either became United States citizens or worked in the country for 40 qualifying quarters (8 USCA § 1601 et. seq.).

The reforms did not stop there. After the five-year ban expired, it was up to the states to determine what welfare to give new immigrants. States had the option of denying non-emergency Medicaid to most new arrivals even after the five-year ban was over. States could also bar immigrants from participating in any of the benefit programs financed by Title XX block grants, such as **CHILD CARE**, in-home assistance for **DISABLED PERSONS**, and support services for abused and neglected children. Finally, states could exclude most current and future immigrants from other state-funded benefits, including Temporary Assistance for Needy Families.

Three groups of noncitizens were exempted from disqualification: (1) **REFUGEES**, **ASYLUM** seekers, and aliens granted withholding of deportation during the first five years after receiving the immigration benefit; (2) permanent resident aliens if they have worked 40 qualifying quarters as defined by the **SOCIAL SECURITY ACT**; and (3) an alien and his

sons. Far-reaching grounds bar applicants for reasons related to health, crime, national security, and other variables. As part of the process for reviewing visa applications, consular officials decide whether any ground for exclusion applies. If the officials decide that none does, a visa may be granted, but entry is still not certain. The Bureau of Border Security Enforcement can decide otherwise when the alien actually attempts to cross the border. In practice, exclusion occurs every day.

Excluded aliens can argue their case in an *exclusion hearing.* This procedure differs greatly from a *deportation hearing,* which involves an alien who has already entered the United States. Deportation hearings are actually more advantageous: unlike exclusion proceedings, deportation hearings only follow from specific allegations and aliens subject to deportation have more forms of legal relief. In an exclusion hearing, the burden is always on the alien to prove his or her right to enter the United States. The alien is entitled to many attributes of procedural **DUE PROCESS**, and aliens who lose may also seek asylum (refuge or protection, usually for political reasons) in some instances.

## Welfare and Immigration (continued)

or her family if the alien lawfully resides in the United States and is on active duty in the military or has received an honorable discharge. Proponents suggested a variety of reasons for enacting these reforms, most embodied in the arguments against welfare for immigrants listed above. Some also alluded to a monetary factor: the immigrant restrictions accounted for almost half the total federal savings from the welfare reform law.

The provisions of the PRWORA that deal with immigrants were generally seen as the harshest part of the act and were opposed by a wide variety of groups. President Bill Clinton, who signed the PRWORA into law, made it clear he disagreed with its provisions for cutting immigrant benefits and campaigned against them in the 1996 election. Immigrant rights groups filed **CLASS ACTION** lawsuits, and the state of Florida filed its own lawsuit, worried that its taxpayers would end up supporting immigrants who had been cut off from federal benefits.

As a result, Congress modified some of the harsher aspects of the law. As part of the Balanced Budget Act of 1997, the law restored SSI to those immigrants who were receiving SSI as of August 22, 1996. It also allowed immigrants residing in the United States on August 22, 1996, to be eligible for SSI if they became disabled in the future. New immigrants were still not eligible for SSI, nor would earlier immigrants be eligible in the future based on their age.

Then, in 1998, Congress decided to partially restore food stamps by reinstating eligibility for legal immigrant children and elderly persons who were legal immigrants as of August 22, 1996. This action readmitted approximately 250,000 immigrants who were excluded under the 1996 law. In addition, some states, such as Washington, have attempted to restore at least partial food stamp benefits to immigrants who were not covered by the 1998 legislation.

But other attempts to restore benefits at the federal level have failed, for example one in 2002. Interestingly, at least one study released by the Center for Immigrant Studies in 2003 claimed that the welfare reform act had failed to reduce immigrant usage of welfare programs. The study found that while immigrant usage of programs such as food stamps and Temporary Assistance for Needy Families had fallen, this had been offset by increased use of **MEDICARE** by immigrants, with the net percentage of immigrants using welfare programs remaining the same as it was before welfare reforms were passed in 1996.

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Excluded applicants seeking to cross the border may be kept in detention facilities until their hearings have been held. In some cases, officers may choose to release an alien on **PAROLE** pending further review. Parole allows an alien to travel away from the border and detention facilities temporarily, for reasons such as preventing the separation of families. As a limited right, parole is not equivalent to entry.

### Nonimmigrant Visas

Each applicant for a nonimmigrant visa must demonstrate that she or he has no intention of immigrating. Generally, the application requires detailed information about the alien's native residence, place of employment, reason for traveling to the United States, and destination. Most nonimmigrant visas do not have annual numerical limits, but the INA does restrict those for professionals to 65,000; temporary agricultural workers to 66,000; and performing athletes, artists, and entertainers to 25,000.

Nonimmigrant aliens apply for a visa from one of 18 categories, each assigned a letter, as follows:

A. Career diplomats;
B. Temporary visitors for business and pleasure;
C. Aliens in transit;
D. Crew members;
E. Treaty traders and investors;
F. Students;
G. International organization representatives;
H. Temporary workers;
I. Foreign media representatives;
J. Exchange program visitors;
K. Fiancées, fiancés, or children of U.S. citizens;
L. Intracompany transferees;
M. Students in nonacademic institutions;
N. Parents and children of special immigrants;
O. Aliens with extraordinary abilities;
P. Entertainers;
Q. Participants in cultural exchange programs;
R. Religious workers.

**Nonimmigrant Aliens Admitted into the United States, 1985 to 2000**

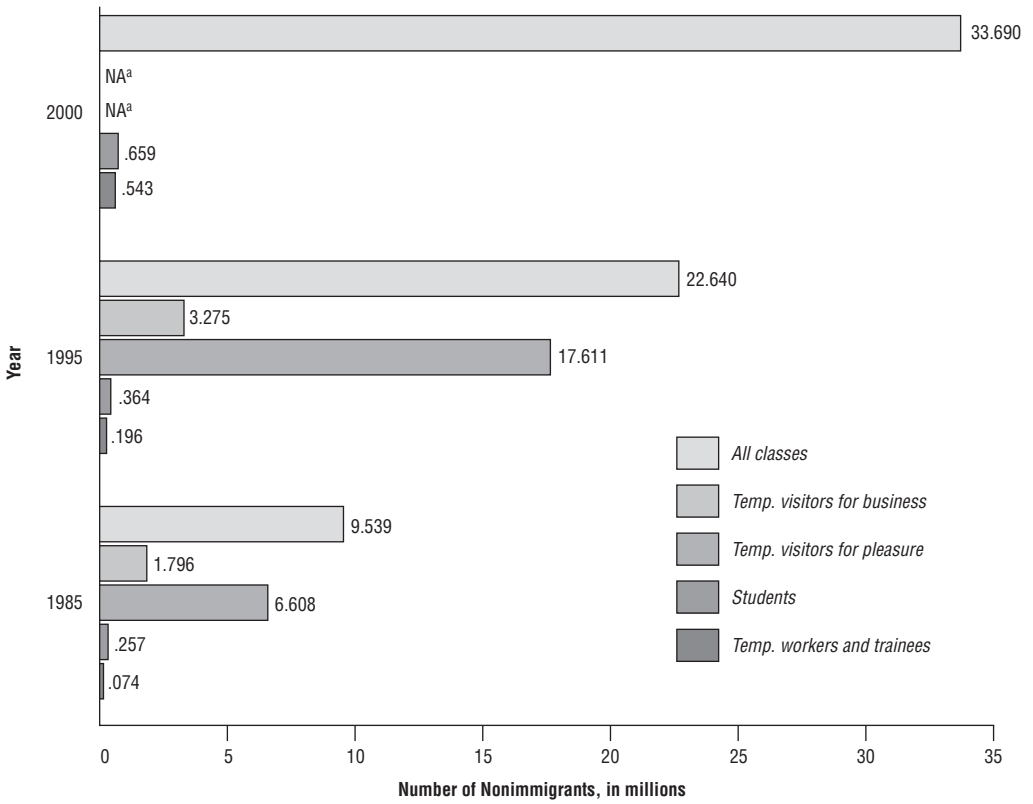


[a]Data for business and pleasure not available separately due to temporary expiration of the Visa Waiver Program from May through October.

SOURCE: U.S. Immigration and Naturalization Service, *2001 Fiscal Year Statistical Yearbook*.

The visas are further categorized by numbers—for example, A-1, A-2, and so forth.

Aliens use specific procedures for the particular visa sought. Broadly speaking, these fall into three classes: (1) applications that do not require contact with anyone in the United States (visas A, B, C, D, E, G, I, and O); (2) applications that require proof of acceptance in an authorized program (visas F, J, M, and Q, and visas for special education trainees); and (3) applications that require approved petitions which provide the basis for the alien's presence in the United States (visas H, K, L, P, and R). Over half of all visas require supporting documents at the time of application. For example, an alien hoping to work temporarily in the United States as a registered nurse needs an employer's petition to obtain an H-1A visa. Similarly, an alien planning to study at a university must present proof of acceptance at the university for an F-1 visa. An alien engaged to a U.S. citizen will never see a K visa—let alone get married—unless the citizen has filed a petition. In all cases, consular officials make the final decision. Generally, no JUDICIAL REVIEW is available.

Once admitted into the United States, aliens are inspected by Bureau of Border Security Enforcement officers, who give them a form I-94 indicating the length and terms of their stay. Most aliens ultimately return to their country of origin. Some wish to stay and immigrate. Generally, all nonimmigrant visa holders who are in the United States may apply to have their visa status adjusted to permanent-resident status, with the exception of crew member visa (visa D) holders. To qualify, the alien must have been inspected and admitted or paroled into the United States and must meet standard eligibility requirements for obtaining an immigrant visa, and an immigrant visa must be immediately

available at the time the application is filed. In addition, the alien must not have been in an unlawful status or, with few exceptions, have accepted any unauthorized employment.

### Immigrant Visas

Immigrant visas come in two main categories: visas subject to numerical limitation and visas not subject to numerical limitation. The term *numerical limitation* means several things. First, it refers to the overall limits set by Congress on immigrants. Second, it involves the use of per-country caps. Third, and most important, numerically limited visas are organized along a system of preferences that favors certain aliens over others. Every immigrant wants the best shot at a visa, but qualifying for the easiest category—visas not subject to numerical limitation—is quite difficult. Congress has reserved this category for immediate relatives of U.S. citizens, resident aliens returning from temporary visits abroad, and former U.S. citizens. Consequently, for the vast majority of aliens who want to immigrate, demand is much higher than the relatively short supply prescribed by law.

Though having no numerical limitation makes it easier to obtain, the immediate-relative visa still carries strict limitations. Generally, the term *immediate relatives* means children, spouses, and parents, but unique rules apply to children and spouses. To qualify as a child, the person must be unmarried and under 21 years of age. The law is also concerned with how the parent came to have the child, and it applies special age restrictions to legitimate and illegitimate children, stepchildren, adopted children, and orphans. Spouses of U.S. citizens must pass the most demanding tests. The law requires the alien to have a "valid and subsisting marriage" with the citizen under the laws of the country where the marriage took place and considers a wide variety of marriages insufficient for granting the visa. This severity is an answer to the common abuse of marriage to obtain citizenship. The Immigration Marriage Fraud Amendments of 1986 impose criminal penalties for violations. The Fraud Amendments also impose a two-year conditional residency requirement before alien spouses and their sons and daughters may petition for permanent-resident status.

Three categories exist for visas subject to numerical limitation: family sponsored, employment related, and so-called diversity immigration. The last is a special category created to reverse the drastic reductions in immigration from European countries, particularly Ireland. Effective after 1995, a formula was used to determine whether in the previous five years a country had been "underrepresented." If so, an alien from that country is eligible for one of 55,000 visas annually allocated to diversity immigrants. Aliens may apply once a year in a lottery, making this a highly uncertain way to obtain a visa. Not everyone is eligible; applicants must generally have a high school education and two years of work experience. Different goals make more visas available to Hong Kong: because of uncertainty over the transfer of the country to China, the law allotted 20,000 visas annually to certain Hong Kong citizens who were employees of U.S. businesses, their spouses, and their children.

The primary types of numerically limited visas—family sponsored and employment related—are organized into preference categories. Preference means that the law allocates visas to certain aliens over others in order to promote such goals as preserving families, protecting U.S. jobs, and admitting immigrants most likely to benefit the nation. How the law ranks aliens can be seen from the numerical limits on each category. Families are allotted 226,000 visas annually, with a somewhat flexible maximum of 465,000 in four preference categories. Only 140,000 employment-related visas are allotted, in five preference categories. Unused visas from higher preference categories are reallocated to the lower categories.

Preference in family-sponsored visas is decided by the nature of an alien's relationship to the petitioner:

*First preference*: Unmarried sons and daughters of U.S. citizens, who are too old to qualify (age 21 or older) for the nonnumerically limited immediate-relative visa: 23,400 visas plus any unused visas from the other family-sponsored preference classes.

*Second preference*: Spouses, children, and unmarried sons and daughters of aliens who are lawful permanent residents: minimum of 114,200 visas. Spouses and children are allocated 77 percent of the visas; unmarried sons and daughters (at least 21 years old), 23 percent.

*Third preference*: Married sons and daughters of U.S. citizens: 23,400 plus any unused visas from the first- and second-preference classes.

*Fourth preference*: Brothers and sisters of U.S. citizens, if the citizen is at least 21 years old: 65,000 plus any unused visas from the three higher classes.

Employment-related preferences are not based on any familial relationship. They focus on educational attainment and stress occupations that are highly specialized. Their levels are set as percentages of the worldwide maximum of 140,000.

*First preference*: Priority workers are allotted 28.6 percent. These are persons of "extraordinary ability" in the sciences, arts, education, business, or athletics; outstanding professors and researchers; and multinational executives and managers.

*Second preference*: Professionals holding advanced degrees or persons of exceptional ability in the sciences, arts, or business are allotted 28.6 percent.

*Third preference*: Skilled workers in short supply, professionals holding baccalaureate degrees, and other workers in short supply are allotted 28.6 percent.

*Fourth preference*: Certain special immigrants: 7.1 percent. These are mainly religious workers, as well as former employees of the U.S. government and international organizations.

*Fifth preference*: Employment creation immigrants are allotted 7.1 percent. These are investors who will create at least ten U.S. jobs by investing in a new commercial enterprise benefiting the U.S. economy, especially in areas of low employment. Generally, the minimum required investment is $1 million.

Though all potential immigrants face rigorous application requirements, certain categories are more exacting. Petitions are needed for visas based on the immediate-relative, family-sponsored, and employment-related preference categories. These must be filed in the United States by citizens or resident aliens on behalf of the applicant and then approved by the BCIS. (Under a significant exception, anyone may petition on behalf of Amerasian children of U.S. service members.) Many of the employment-related preference categories also need an employer's petition. As a safeguard intended to protect U.S. jobs, the employer is first required to seek an official form of permission called *labor certification*. This is approved only if (a) sufficient qualified workers are not available and (b) employment of the alien will not adversely affect wages or working conditions of similarly employed U.S. workers. The DEPARTMENT OF LABOR defines the occupations for which employers may seek certification in two groups: the professions and unskilled labor. Only rarely is an unskilled labor application approved. Furthermore, the job for which the employer seeks labor certification must also be permanent in nature.

After approval of the labor certification or preference petition, or both, the actual visa application process begins for an alien who resides outside the United States. This process takes place at the appropriate U.S. consulate, where authority to approve or deny an application belongs exclusively to consular officials. If eligible, the alien must submit considerable documentation. The required documents include biographical reports; police, court, prison, and military records; birth and marriage certificates; passports; photographs; and evidence that the alien will not become a public charge while in the United States. The alien gives the consul these documents and the results of a medical examination. If all is in order, the applicant signs a formal application under oath.

The consul usually rules on the application the same day. The principal consular officer reviews any refusal to issue a visa, but no formal review is available after that. The STATE DEPARTMENT has only limited authority over visa denials. The applicant has one year to overcome the objection to the visa on which a refusal was based, or the entire visa application process must be started anew. The BURDEN OF PROOF is always on the applicant to establish eligibility. If the applicant passes, the consul issues an immigrant visa. Under certain circumstances, immigrants unable to travel immediately may receive new visas later.

Once the immigrant actually arrives in the United States, an immigration officer again independently examines the alien's visa eligibility. This officer may exclude the alien in spite of the visa. In that case, the alien may be temporarily detained, either aboard the vessel of arrival or in the United States pending a ruling. If the officer finds the visa in order and admits the alien, the visa is retained by the BCIS as a permanent record of admission. The alien is then issued a form I-151, commonly known as a green card (even though its color is now off-white), and becomes a permanent-resident alien. Although

it is most often thought of as an employment permit, the green card was originally designed to serve as evidence of the alien's status as a permanent resident of the United States.

### Rights of Aliens

Aliens enjoy many of the rights afforded to citizens. They can claim general protections under the Constitution and the BILL OF RIGHTS. On the other hand, aliens cannot vote or hold federal elective office— rights belonging solely to citizens. Further legal rights depend on an alien's status: use of the courts, ownership of land, obtaining a public education, and qualifying for federal welfare benefits are each to a varying degree restricted to lawful resident aliens. Similarly, the liability of an alien to pay taxes depends on resident or nonresident status. Resident aliens pay taxes in much the same way that citizens do; nonresident aliens may qualify for special exemptions. Aliens can also be required to obtain a so-called exit permit to ensure that all taxes owed are paid before leaving the country.

In addition to following laws generally, aliens also have special duties. Some visas impose additional requirements such as notifying the BCIS of changes of address and refraining from engaging in paid employment. Criminal penalties apply to some misconduct of aliens and citizens who abet them, including MISREPRESENTATION or fraud in obtaining immigration status, unlawful entry, and transporting or concealing an undocumented alien. For aliens who violate the law, the penalty is commonly deportation. Citizens who bring aliens into the country illegally may face a fine, imprisonment for up to five years, or both, for each alien they have illegally transported.

Although the Supreme Court has held that Congress alone makes immigration law, historically, states have placed harsh restrictions on aliens. In 1886, the Supreme Court struck down a San Francisco ordinance effectively banning Chinese laundries, in the landmark case YICK WO V. HOPKINS, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220. *Yick Wo* established that the Fourteenth Amendment's Equal Protection Clause applied to aliens. But states simply ignored it, and, for decades, the Supreme Court found numerous ways to uphold discriminatory restrictions.

In state cases, a turning point came in 1971. In *Graham v. Richardson,* 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534, the Supreme Court held that aliens could not be denied state welfare benefits. Most important, the *Graham* decision struck a blow against state discrimination in general: it said that EQUAL PROTECTION cases involving aliens would be subject to the same STRICT SCRUTINY applied in RACIAL DISCRIMINATION cases. In a series of decisions that followed, the Court removed numerous state barriers—laws that barred all aliens from competitive civil service employment, engineering licenses, and licenses to practice law. Nonetheless, through the late 1970s and 1980s, it backed away from the strict scrutiny standard: it upheld New York's limitations on the certification of alien public school teachers (*Ambach v. Norwick,* 441 U.S. 68, 99 S. Ct. 1589, 60 L. Ed. 2d 49 [1979]), for example, and California's restriction of peace officer jobs to citizens (*Cabell v. Chavez-Salido,* 454 U.S. 432, 102 S. Ct. 735, 70 L. Ed. 2d 225 [1982]). One key exception was *Plyler v. Doe,* 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982), granting the children of undocumented aliens the right to attend public schools.

### Naturalization and Citizenship

Resident aliens become citizens through naturalization. To apply for naturalization, most aliens must meet several requirements. They must (1) reside continuously in the United States for five years as lawfully admitted permanent residents; (2) be physically present in the United States for at least half of the time before filing the petition for naturalization; and (3) reside for at least three months within the district in which the petition is filed. Aliens must generally be at least 18 years of age, although parents who are citizens can file on behalf of younger children. Literacy and educational standards must be met: unless physically unable to do so, aliens must be able to speak, understand, read, and write simple English. They have to show "good moral character"—an ambiguous term that includes not being a drunkard, gambler, or convict jailed for 180 days or more. They must exhibit an attachment to constitutional principles, essentially proved through a belief in representative democracy, the Bill of Rights, and political processes.

To ascertain an applicant's fitness for naturalization, a naturalization examiner conducts an informal hearing. The examiner questions the applicant and witnesses who can testify on her or his behalf and then renders a decision. If denied, the applicant may reapply with LEGAL REPRESENTATION; in some cases, federal district

courts may determine naturalization or remand the matter to the BCIS with instructions. Finally, if approved, the applicant is granted citizenship at a hearing in open court after taking an oath of allegiance to the United States.

**Deportation**

Deportation is the expulsion of an alien from the United States. In theory, it is a civil proceeding rather than a punishment, though those who are deported may certainly see it as a punishment. It is designed to remove undesirables as defined under the INA. As in most aspects of immigration law, the Supreme Court has left total authority over deportation to Congress. Merely allowing aliens to enter the country "is a matter of permission and tolerance," the Court has said, leaving the government free rein "to terminate hospitality" (*Harisiades v. Shaughnessy,* 343 U.S. 580, 72 S. Ct. 512, 96 L. Ed. 586 [1952]). Deportation provisions apply to all aliens whether they have legally or illegally entered the country, with several specific exceptions ranging from ambassadors to employees of international organizations such as the UNITED NATIONS. Citizens cannot be deported, but denaturalization proceedings can be brought against a naturalized citizen and can then lead to deportation.

Five major broad categories of grounds for deportation cover (1) being excludable at the time of entry or adjustment of status; (2) committing criminal offenses; (3) failing to register and falsifying documents; (4) posing a security risk and related grounds; and (5) becoming a public charge of the state. Many more grounds for deportation follow from these; the first category alone establishes nine classes of aliens excludable at the time of entry. Since the Technical Amendments Act of 1991, these grounds have expanded with the addition of attempting or conspiring to commit a crime. Deportation is far-reaching in additional ways: frequently, the BCIS applies the statutes retroactively, so that aliens may be deported for conduct that was not a ground for deportation at the time they committed the act. Many of the provisions also depend on when the alien entered the United States, and still others make aliens deportable for acts they committed prior to entry.

The mechanism of deportation involves broad official powers. Officers of the Bureau of Border Security Enforcement have considerable power to investigate without search warrants, arrest, and detain suspects within one hundred miles of the U.S. border. Aliens then receive a deportation hearing conducted by an immigration judge. They are entitled to legal counsel—though not at government expense—and the basic rights of due process, as well as the rights to examine evidence, present new evidence, and cross-examine witnesses. If the judge finds an alien deportable, various avenues of relief are available, including administrative and judicial appeals. Furthermore, several forms of discretionary relief may entitle the alien to leave voluntarily, claim suspension of deportation, apply for an adjustment of status, seek asylum as a refugee, or pursue numerous other options.

Deportation often causes the U.S. citizen children of aliens to leave the United States. These children are not technically deported and may ultimately choose to return.

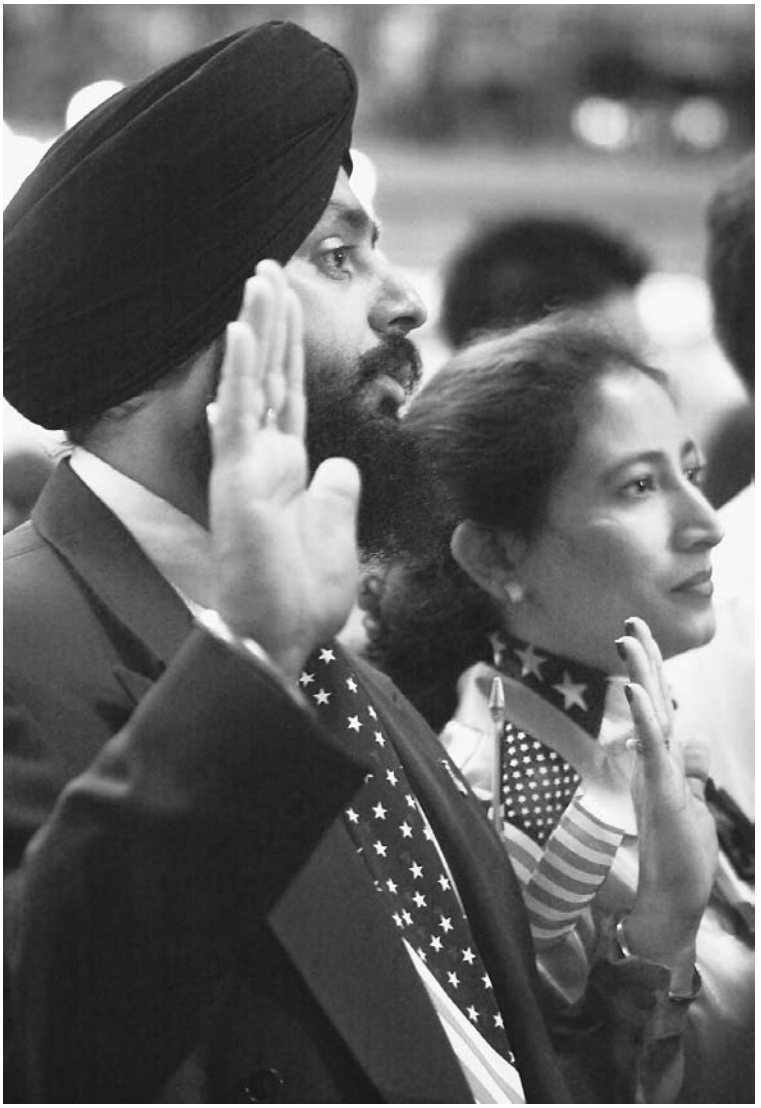

*Resident aliens become citizens through naturalization. Karwinder Singh (left) and Ranjit Kaur take an oath of citizenship during a naturalization ceremony in Seattle in July 2002.*

AP/WIDE WORLD PHOTOS

### Deportation Remedies

Aliens generally want to avoid deportation at all costs. Even if an immigration judge rules that an alien is deportable, the alien may still fight the deportation order. This is called seeking relief from deportation. Broadly speaking, two kinds of options exist: filing an appeal and seeking "discretionary" relief. Whichever method the alien chooses, time is of the essence. She or he usually must seek relief before the BCIS begins executing the deportation order.

Appeals from deportation rulings operate on three levels. First, the alien's attorney may file a *motion to reopen* the case, also called a motion to reconsider. It is used chiefly to present new evidence, and strict rules govern its usage. Courts frown on such motions because of the potential for unnecessarily delaying deportation, and the judge may deny the motion if the alien has previously failed to establish a sufficient case. In any event, the motion will not stop a pending deportation order. Second, aliens may go to the higher authority of the Board of Immigration Appeals (BIA). Filing a so-called *administrative appeal* with the BIA automatically delays the execution of a pending deportation order. The BIA decision to uphold the deportation order, throw it out, or send the case back to the immigration judge is final. Within six months, however, the alien may appeal a decision of the BIA to a federal court for *judicial review*. Courts may hear the case if there have been violations of the alien's constitutional rights.

As the name implies, discretionary relief is granted at the discretion of a judge. If granted, it will eliminate or postpone the execution of a deportation order. Generally, the alien must apply for discretionary relief during the deportation hearing, although some forms of relief may be sought before the hearing begins. In a two-part process, the judge first determines whether the alien is eligible under statutory requirements and then at the judge's discretion decides whether to grant it. Mere eligibility is not a guarantee of relief.

Several forms of discretionary relief exist. One very popular form is *voluntary departure*, which permits the alien to leave the United States under his or her own power, seek a destination, and even return to the selected country immediately, thus avoiding the stigma and penalties of deportation. *Suspension of deportation* helps the alien who has been in the United States for a long period of time and for whom deportation would result in harsh consequences. Qualifying for suspension relief is difficult: the alien must have been continuously present in the United States for seven to ten years, depending on the nature of the conduct that rendered the alien deportable—for example, overstaying a visa versus committing a felony; must have been a person of good moral character during that time; and must demonstrate that he or she or the alien's U.S. citizen spouse, parent, or child would suffer extreme hardship (under the seven-year rule) or exceptional and extremely unusual hardship (under the ten-year rule) if the alien were deported. Another form of relief, *adjustment of status*, is available to an alien whose status would otherwise let him or her remain in the United States: if an alien is admissible for permanent residence, he or she may seek this relief to avoid having to go abroad while an immigrant visa is processed.

*Asylum,* available only to aliens who qualify as refugees, differs from other forms of discretionary relief. First, it does not guarantee an alien permanent residence but merely grants the right to reside and work in the United States temporarily, for as long as the alien is entitled to refugee status. Under the INA, a refugee is an alien unwilling or unable to return to her or his nation because of a well-founded fear of persecution on the ground of race, religion, nationality, membership in a particular social group, or political opinion, or an alien whose nationality has been given refugee status by the president of the United States. Asylum may be sought at any time during a deportation or exclusion hearing and can sometimes lead within one year to the granting of permanent residence.

Closely related to asylum is *withholding of deportation.* Although the grounds for withholding are similar to those for asylum, this form of relief may only be sought during a deportation hearing, and its duration is always temporary. Aliens granted asylum or withholding of deportation may qualify for adjustment of status and thereby become lawful permanent residents or citizens.

Finally, a few kinds of discretionary relief are used in exceptional circumstances. A *stay of deportation* is a temporary hold on a deportation order, commonly used in connection with a motion to reopen a case or pending an application for permanent residence. *Registry*, available only to aliens who entered the United States before January 1, 1972, is used to create a lawful

record of admission when no record is available. Further relief includes *deferred action status*, a nonstatutory guideline contained within BCIS instructions to district directors; it amounts to an indefinite hold on any deportation action based on sympathetic factors. Rarely used is *estoppel*, in which courts stop deportation orders because of government misconduct.

### Treatment of Aliens after September 11, 2001

Since the September 11th attacks, reforms in the immigration system have sought to accomplish two broad, yet competing, goals. On the one hand, many of the new laws relating to aliens have sought to accelerate the processes pertaining to the citizenship and naturalization benefits. The former INS was heavily criticized for its inefficiency in carrying out the provisions of the IRA, and the new agencies that replaced the INS have been charged with the responsibility of improving this system.

On the other hand, the new laws have sought to improve immigration procedures to identify potential terrorists and other illegal aliens. The first statute among several that enhanced law enforcement procedures for dealing with terrorist attacks was the USA PATRIOT ACT OF 2001, Pub. L. No. 107-56, 115 Stat. 272. This legislation and subsequent revisions through statute and regulation have sought to improve procedures for identifying known terrorists and suspected criminals at the various ports of entry.

The dual concerns of immigration policy—that is, expediting the applications of aliens who wish to enter the United States lawfully versus the protection of the country from those who wish to inflict harm—were also present when the INS possessed powers both to implement immigration services and to enforce the immigration policies. The extensive background checks of aliens caused a backlog of applications, slowing the process that was perceived to be inaccurate and inefficient even prior to the attacks. Processing of immigrant applications took as long as three years in some cases. The administration of President GEORGE W. BUSH has sought to mandate a six-month standard for the processing of these applications.

The detention of aliens under the new laws has also caused concerns about the protection of the CIVIL RIGHTS of legal aliens. In the months that followed the September 11th attacks, thousands of suspect aliens were detained by the INS and officials of the JUSTICE DEPARTMENT. Nevertheless, protection of U.S. citizens and land within the country has been a primary concern under the Bush administration, and many observers have noted that improved screening of aliens could have prevented the terrorist attacks in 2001.

*The terrorist attacks of September 11, 2001, sparked many changes within the immigration system. Nonimmigrant alien men from 13—predominantly Middle East—nations were required to register with the government or face deportation. Men line up outside of an Immigration and Naturalization Service office in Detroit, Michigan, on January 10, 2003, the deadline for registration.*

AP/WIDE WORLD PHOTOS

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CROSS-REFERENCES

Amnesty; Asylum; Citizens; Deportation; Immigration and Naturalization; Parole; Refugees; Visa.

## ALIMONY

*Payment that a family court may order one person in a couple to make to the other person when that couple separates or divorces.*

The purpose of alimony is to avoid any unfair economic consequences of a DIVORCE, even after property is divided and CHILD SUPPORT, if any, is awarded. Courts set few specific guidelines to attaining this broad goal: instead of telling judges how and when to award alimony, most courts simply grant them broad discretion to decide what is fair in each case.

For example, suppose two individuals who married in 1985 agree in 1995 to divorce. At the time of the divorce, the husband earns $63,000 a year, after seven years at a large company where the top pay for his specialty is $80,000. When the couple married, he was in graduate school and the wife was earning $22,000. The wife worked for three more years, supporting the husband while he completed his coursework and graduated.

When their first child was born, they agreed that the wife would care for the child at home. At the time of divorce, the wife had been working full-time for one year since the couple's children, ages seven and six, had entered school. She was earning $23,000 a year and would have custody of the children.

A judge in this case would certainly award child support and would probably divide marital property equally between the couple. But it might not seem fair to the judge to allow the husband to leave the marriage with the sole possession of the couple's most valuable asset— his earning potential—when the wife contributed to his education by supporting him.

Unlike the family's home or station wagon, the husband's earning power has not yet reached its full value, but it promises to grow. It seems especially unfair for the wife not to receive a share of it since after helping the husband attain his education she agreed to forfeit her earning power to invest time in the family. The several years she spent out of the workforce continue to handicap her earnings. Alimony is the only means available to the court to avoid a potentially unjust division of assets.

The judge in this case may award alimony or may award a token amount—such as $1 a year—so that the wife has the option to request an increase later on (modifying an award is easier than winning one after the divorce). Or the judge may award no alimony; judges are not required to award alimony.

The HUSBAND AND WIFE in this example are unlikely to find a single solution they both consider equitable. In trying to reach an order that is fair, judges must balance spouses' contributions and sacrifices during the marriage with their needs after the divorce. Although the result may not match both spouses' ideas of what is fair, one of alimony's biggest virtues is its flexibility: it can always be changed.

Alimony can be modified or eliminated as the former spouses' needs change, if those needs are the result of decisions they made as a married unit. Awards and increases in alimony are meant to address only needs that are caused by the divorce itself, not unrelated needs. If the wife's elderly mother becomes ill and dependent on her after the divorce, for example, the wife's need increases, but the increase is unrelated to the divorce and will not increase her eligibility for alimony. However, a significant change in circumstances—such as a rise in the recipient's income or a drop in the payer's income—can cause the court to reduce or end alimony. Occasionally, courts increase alimony to keep up with inflation.

Many courts have indicated that situations such as maltreatment are not valid triggers for alimony. Courts have clarified that allegations of physical or other harm done by one spouse must be brought in a civil lawsuit, to be heard and decided by a jury. In successful cases, compensatory and PUNITIVE DAMAGES would be awarded, not alimony.

Even in less egregious cases, alimony is not awarded as a punishment, especially in states that have adopted no-fault divorce laws—that is, laws providing that neither spouse has to prove wrongdoing on the part of the other.

Gaps in earning power that tend in general to favor men over women create another situation that many courts believe they cannot resolve using alimony. Such gaps are often the reason married couples decide that if it is appropriate for only one spouse to be the wage earner, it should be the husband. But courts do not base individual alimony awards on this trend alone, in part because an individual spouse cannot be held responsible for social injustices.

In fact, state laws specifying the gender of the paying spouse and of the receiving spouse have been ruled unconstitutional. In deciding *Orr v. Orr* 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979), the U.S. Supreme Court ruled that Alabama state law, which specified that husbands may be ordered to pay support to wives, but not vice versa, violated the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT. The case arose when William Orr, who had been ordered to pay alimony, was taken to court by his ex-wife for failure to pay. Orr's defense included a motion requesting that the Alabama alimony statute be declared unconstitutional. Although Orr was not seeking alimony from his ex-wife, he argued that the award to her would decrease if his circumstances were considered in addition to hers. The Supreme Court decision supporting Orr meant that gender could not be considered in awarding

alimony (although even in the 1990s very few alimony awards are made in favor of men).

Modern underpinnings for alimony have little to do with gender, but this was not always so. The U.S. model of alimony is based on ecclesiastical law (guidelines of the Christian religion), dating from a time in England's history when divorce did not exist. Unhappily married couples could live separately, but the husband was still obliged to support the wife financially. This arrangement was known as a divorce *a mensa et thoro* ("from bed and board," in Latin), and was not really a termination of the marriage. This limited divorce did not allow the parties to remarry, for example, and did not affect inheritance rules. The wife remained her husband's dependent, and alimony was seen as his ongoing marital obligation to her.

When full divorce became available, the idea of alimony continued, but with some important differences. In the early 2000s, alimony awards were being made based not on men's and women's roles, but on relative needs arising from decisions made during the marriage. Alimony is not an aspect of marriage, as it was in divorce *a mensa et thoro,* but only becomes necessary—and available—from the time of divorce. Because the considerations that enter into a divorce award are sometimes complex, courts usually clarify the award's purpose and may place a time limit on it.

No mathematical guidelines exist to tell courts how to calculate alimony. In addition, each state legislature sets its own policy regarding whether and when alimony may be awarded. The Uniform Marriage and Divorce Act (UMDA), which many states use as a model, recommends that courts consider the following factors: the financial condition of the person requesting alimony; the time the recipient would need for education or job training; the standard of living the couple had during the marriage; the length of the marriage; the age, physical condition, and emotional state of the person requesting alimony; and the ability of the other person to support the recipient and still support himself or herself.

Courts have at times awarded alimony when an unmarried couple separates, if the relationship closely resembled marriage or in other circumstances, such as in keeping with the couple's intentions and verbal agreements. Awards of this type are informally called palimony. Private separation agreements negotiated between divorcing individuals also can contain alimony provisions. For these reasons, it is difficult to estimate accurately the size and frequency of awards through the most common method, U.S. census data.

If awards are hard to estimate, compliance with awards is nearly impossible to gauge. Alimony enforcement is unlike child support enforcement, which has the "teeth" of wage GARNISHMENT, liens, and other mechanisms. Returning to court with contempt-of-court charges is usually the only option a would-be recipient has to enforce an existing alimony order.

If the divorce decree does not specify an ending date, an order to pay alimony usually remains effective until the court that awarded it changes or ends it. Alimony usually ends when the recipient remarries; this is known as terminable alimony. In the case of the recipient's remarriage, the payer sometimes must return to court to have the court change the alimony order, but often the termination is automatic.

The payer's death is not necessarily enough to end payments: some orders allow the recipient to inherit funds from the payer's estate or require the payer to maintain a life insurance policy that will continue to support the recipient after the payer's death. These provisions, when made, often involve a recipient whose age or health makes it too difficult for the recipient to enter or reenter the workforce.

On September 1, 1995, Texas became the last state in the country to authorize the award of alimony payments in divorce proceedings. TX FAMILY § 8.001. Until then, Texas courts had ruled that the state constitution prohibited alimony awards because alimony was not marital property existing at the time of the divorce. Instead, Texas courts said that alimony awards necessarily involved calculations based solely on the future, post-divorce earnings of the ex-spouse who would be making the alimony payments.

Texas courts also observed that spouses who sacrificed educational or career opportunities during the marriage to raise children so their spouses could pursue educational or career opportunities of their own could be adequately compensated for their sacrifice by receiving a larger share of the marital property than spouses who had not made such a sacrifice. In other words, Texas courts believed that since they had the power to give one spouse a larger share of the marital property to compensate for any

career or educational sacrifices that spouse made during the marriage, there was no need to award alimony too. Courts also questioned why ex-spouses should be under any obligation to support each other after divorce, when the whole purpose of divorce is to end the costs and benefits of marriage.

But judges, lawyers, and scholars increasingly criticized the Texas statutory scheme as being unrealistic. For example, before 1995 Texas courts routinely ordered ex-spouses to pay child support from their so-called post-divorce "future earnings," and these orders survived scrutiny under the state constitution. Critics of Texas law saw no reason why state courts could not order ex-spouses to also pay alimony out of wages and salary they earned after the marriage terminated.

Additionally, critics assailed the absence of alimony provisions in Texas FAMILY LAW as being unduly harsh. In a large number of divorces where neither spouse had acquired substantial assets during the marriage, Texas courts were powerless to compensate spouses who had sacrificed educational and career opportunities, since in such situations there were essentially no assets to divide in the first place. As a result, spouses who successfully pursued educational or career opportunities at the expense of their partner were allowed to walk away from the marriage "scot-free."

Despite the late twentieth-century universality of alimony laws in the all 50 states, lawmakers in some jurisdictions continued to propose legislation that would abolish it. In 1999 several Iowa legislators proposed a bill to abolish alimony, arguing that alimony laws provide incentive to get divorced. The bill never passed.

Since alimony is an award for support and maintenance that one spouse may be compelled to pay to another after dissolution of the marriage, it would seem to follow that no alimony could be awarded to a spouse following an ANNULMENT, which treats the marriage relationship as if it had never existed. In fact, alimony is not awarded to spouses under any conditions following the annulment of a marriage in most jurisdictions. However, in some jurisdictions the enforcement of a flat prohibition of alimony awards to spouses whose marriages have been annulled has sometimes been found to impose unnecessary hardship on a spouse, usually the wife, especially where the parties have lived together for a considerable period of time. Consequently, judicial and legislative exceptions have been created to the basic rule of treating an annulled marriage as if it had never existed, for the purposes of determining whether an alimony award is appropriate. Under these exceptions, temporary as well as permanent alimony have been awarded.

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CROSS-REFERENCES

Child Support; Damages; Divorce; Family Law; Husband and Wife; Marriage; No Fault Divorce; Sex Discrimination.

## ALL FOURS

*Identical; similar.*

*All fours* specifically refers to two cases or decisions that have similar fact patterns and raise identical legal issues. Since the circumstances leading to their individual determinations are virtually the same, the decision rendered by the court in each case will be similar. Such cases or decisions are said to be on *all fours* with each other.

## ALLEGATION

*The assertion, claim, declaration, or statement of a party to an action, setting out what he or she expects to prove.*

If the allegations in a plaintiff's complaint are insufficient to establish that the person's legal rights have been violated, the defendant can make a motion to the court to dismiss the complaint for failure to state a CAUSE OF ACTION. If the allegations in the defendant's answer do not contradict the allegations in the complaint, the plaintiff can make a motion for SUMMARY JUDGMENT.

## ALLEGE

*To state, recite, assert, or charge the existence of particular facts in a* PLEADING *or an indictment; to make an allegation.*

## ALLEGIANCE

*In* ENGLISH LAW, *the duty of loyalty and obedience owed by all persons born within the king's realm that attaches immediately upon their birth and that they cannot be relieved of by their own actions.*

*In U.S. law, the obligation of fidelity and obedience that is owed by native born and naturalized American citizens to the United States that cannot be relinquished without the consent of the government expressed by a statutory enactment.*

The act of swearing allegiance to the country, its laws, and its government is a bedrock requirement of U.S. citizenship reflected in both state and federal law. Before foreign citizens may lawfully immigrate to the United States, they must take an oath renouncing their allegiance to all foreign sovereigns and swearing their allegiance to the laws and constitution of the U.S. government. 8 USCA § 1448. The U.S. Constitution itself requires state and federal legislators, judicial officers, and EXECUTIVE BRANCH officials to take an oath or affirmation to support its provisions. USCA CONST Art. VI cl. 3.

Public school children in many states learn to recite the Pledge of Allegiance from a young age. Twenty-five states plus the territory of Guam require public school teachers to recite the Pledge of Allegiance in class. Seven states leave it up to the individual school districts within their jurisdiction, while three states give individual teachers or administrators the discretion to post or read the pledge.

But swearing allegiance to the government is not always the most important value recognized by U.S. law. Having won its independence and liberty from England through a bloody revolution, the United States has a long and proud history of respecting FREEDOM OF SPEECH, freedom of religion, and the right to dissent in its participatory democracy. In fact, one reason many Americans have remained steadfastly loyal to their country is that U.S. laws protect their right to dissent, protest, demonstrate, and criticize the government.

The U.S. Supreme Court, in striking down a state law that compelled public school students to recite the Pledge of Allegiance, drew upon this history when it wrote that if "there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (See FLAG SALUTE CASES).

After the Supreme Court announced its decision in *Barnette,* neither the state nor federal governments could lawfully compel public school children to recite the pledge, though they could require school teachers and administrators to lead the pledge, so long as they allowed students the right to abstain from reciting it themselves. But the *Barnette* decision did not end the controversy over the Pledge of Allegiance. In 1954 Congress changed the official version of the pledge to include a statement that the United States is "one nation under God." 4 USCA § 4.

The reference to a deity in the pledge has prompted several constitutional challenges since Congress amended the official version. Most often these challenges are raised under the Establishment Clause of the FIRST AMENDMENT, which generally forbids the state and federal governments from "establishing" an official religion within their jurisdiction. But like U.S. currency that carries the motto "In God we Trust," Congressional sessions that open with prayers led by paid chaplains, and court sessions that begin by asking that "God save this honorable court," nearly every court reviewing the "under God" reference in the Pledge of Allegiance has found the reference to raise only trifling or *de minimus* Establishment Clause concerns. e.g., *Sherman v. Community Consol. School District,* 980 F.2d 437 (7th Cir. 1992).

The one exception to the de minimus holdings came when the U.S. Court of Appeals for the Ninth Circuit addressed the issue. In holding that the "under God" language violated Establishment Clause principles, the Ninth Circuit relied heavily on two U.S. Supreme court cases, *Lynch v. Donnelly,* 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) and LEE V. WEISMAN, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).

In *Lynch* the Supreme Court applied what it called the *endorsement* test, under which alleged Establishment Clause violations are evaluated to determine whether the government has endorsed religion by sending a message to nonbelievers that they are outsiders and not full members of the political community and an accompanying message to believers that they are insiders and favored members of the political community. In *Lee* the Supreme Court applied what it called the *coercion test* to strike down invocations of non-sectarian prayers at public

*Children in a California elementary school recite the Pledge of Allegiance. In June 2002, a Ninth Circuit U.S. Court of Appeals panel ruled the phrase "under God," as contained in the pledge, violated the Establishment Clause.*

AP/WIDE WORLD PHOTOS

school graduation ceremonies, finding that the school district's supervision and control of the graduation ceremony put impermissible pressure on students to participate in or at least show respect during the prayer.

The Ninth Circuit concluded that the "under God" reference in the Pledge of Allegiance similarly had a coercive effect on young and impressionable school children who are forced to watch their peers stand and recite the pledge. It placed the school children in an "untenable position of choosing between participating in an exercise with religious content or protesting," the court wrote.

To recite the pledge "is not to describe the United States," the Ninth Circuit continued. Instead, "it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism." According to the Ninth Circuit, "a profession that we are a nation 'under God' is identical, for Establishment Clause purposes, to a profession that we are a nation 'under Jesus' . . . a nation 'under Zeus' or a nation 'under no god.'" None of these statements, the court argued, is neutral with respect to religion. "The school district's practice of teacher-led recitation of the Pledge aims to inculcate in students a respect for the ideals set forth in the Pledge, including the religious values it incorporates." Thus, the Ninth Circuit declared that the "under God" reference in the Pledge of Allegiance violated the Establishment Clause.

Coming less than a year after the **SEPTEMBER 11, 2001, TERRORIST ATTACKS** in New York City and Washington, D.C., the Ninth Circuit's decision generated a maelstrom of disapproval across the country. The U.S. Senate condemned the decision 99-0 on the day the court released its opinion. The U.S. House of Representatives passed a similar resolution by a 416-3 vote. President **GEORGE W. BUSH** declared that the Ninth Circuit was "out of step" with the rest of the country.

On June 27, 2002, one day after a three-judge panel released the decision for the Ninth Circuit Court of Appeals, the full court voted to stay the decision pending further consideration. The stay led many observers to speculate that the Ninth Circuit might reverse itself. However, on February 28, 2003, the full court reinstated its holding that the school district's policy of requiring teacher-led recitations of the Pledge of Allegiance violated the Establishment Clause of the First Amendment by impermissibly coercing a religious act, *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2003). However, in its new amended opinion, the Ninth Circuit declined to rule on the constitutionality of the "under God" language in the federal statute. U.S. **SOLICITOR GENERAL** Theodore Olson filed a petition for writ of certiorari on April 30, 2003, asking the U.S. Supreme Court to overturn the Ninth Circuit's decision.

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#### CROSS-REFERENCES

Citizens; Dissent; Establishment Clause; First Amendment; Freedom of Speech; Immigration and Naturalization.

## ALLOCATION

*The apportionment or designation of an item for a specific purpose or to a particular place.*

In the law of trusts, the allocation of cash dividends earned by a stock that makes up the principal of a trust for a beneficiary usually means that the dividends will be treated as income to be paid to the beneficiary. The allocation of stock dividends generally means that such dividends will be added to the shares of stock held as principal, thereby increasing its size.

## ALLOCUTION

*The formal inquiry by a judge of an accused person, convicted of a crime, as to whether the person has any legal cause to show why judgment should not be pronounced against him or her or as to whether the person has anything to say to the court before being sentenced.*

## ALLODIAL

*Free; not subject to the rights of any lord or superior; owned without obligation of vassalage or fealty; the opposite of feudal.*

*A description given to the outright ownership of land that did not impose upon its owner the performance of feudal duties.*

CROSS-REFERENCES

Feudalism.

## ALLOGRAPH

*A writing or signature made by one person for another.*

When a principal gives his or her agent the power to pay creditors, the checks written by the agent are allographs for the principal.

An autograph is the opposite of an allograph.

## ALLONGE

*Additional paper firmly attached to* COMMERCIAL PAPER, *such as a promissory note, to provide room to write endorsements.*

An allonge is necessary when there is insufficient space on the document itself for the endorsements. It is considered part of the commercial paper as long as the allonge remains affixed thereto.

## ALLOTMENT

*A portion, share, or division. The proportionate distribution of shares of stock in a corporation. The partition and distribution of land.*

## ♦ ALLRED, GLORIA

Gloria Allred, born July 3, 1941, in Philadelphia, is a flamboyant, widely recognized lawyer, feminist, activist, and radio talk show host. Though her critics dismiss her as a publicity monger and a dilettante, Allred has received praise from others who believe that she is a master at using the power of the news media to draw attention to the day-to-day struggles of ordinary people.

Born Gloria Rachel Bloom, Allred grew up in Philadelphia with her parents, Morris Bloom, a door-to-door salesman, and Stella Davidson Bloom, a homemaker. Her conventional middle-class childhood gave no hint of the outspoken activist to come. Allred graduated with honors from the University of Pennsylvania in 1963 with a bachelor's degree in English. She moved to New York to pursue a master's degree in teaching at New York University. While there, she became interested in the CIVIL RIGHTS MOVEMENT, which was beginning to gain momentum. After earning her master's degree in 1966, she returned to Philadelphia to teach at a high school with a predominantly black enrollment.

"THERE ARE ENOUGH HIGH HURDLES TO CLIMB, AS ONE TRAVELS THROUGH LIFE, WITHOUT HAVING TO SCALE ARTIFICIAL BARRIERS CREATED BY LAW OR SILLY REGULATIONS."
—GLORIA ALLRED

Allred says her interest in the struggle for equal rights arose from personal experiences. While she was in college, she married, gave birth to a daughter, and divorced. Unable to collect CHILD SUPPORT from her former husband, she was forced to return to her parents' home. She also recalls being paid less than a man for what she considered equal work. The reason given was that the man had a family to support, but at the time, Allred as the single mother also had a dependent to support. Perhaps the experience that most galvanized her commitment to equal rights was being raped and then having to undergo an ABORTION at a time when the operation could not legally be performed by a doctor. She nearly died after the operation. According to Allred, the experience made her realize the need for safe and legal abortions and precipitated her lifelong commitment to the fight for reproductive freedom.

Allred moved to Los Angeles and married again in 1968, this time to Raymond Allred; they were divorced in 1987. Allred taught in the turbulent Watts section of Los Angeles and became the first full-time female staff member in United Teachers of Los Angeles, the union representing Los Angeles's teachers. The experience stirred her interest in CIVIL RIGHTS and COLLECTIVE BARGAINING and prompted her to go to law

school. She received her law degree, with honors, from Loyola Marymount University, Los Angeles, Law School in 1974. Soon after, she entered a law firm partnership with her classmates Nathan Goldberg and Michael Maroko. Allred, Maroko, Goldberg, and Ribakoff grew during the 1970s and 1980s into a thirteen-lawyer firm with annual revenues exceeding $2.5 million. The firm's caseload has ranged from family and CONSTITUTIONAL LAW to business litigation and personal injury suits.

Allred has been perhaps the most flamboyant and well known member of her firm. She has achieved notoriety and name recognition through staged press conferences and demonstrations publicizing and dramatizing the causes she has championed at various times. She has also accepted controversial cases that naturally attract media attention. During her years in practice, she has successfully sued Los Angeles County to stop the practice of shackling and chaining pregnant inmates during labor and delivery; put a halt on the practice by the city of El Segundo of quizzing job applicants about their sexual histories (*Thorne v. City of El Segundo,* 802 F.2d 1131 [9th Cir. 1986]); represented a client who was turned down for a job as a police officer after a six-hour lie detector exam that included questions about her sex life; and sued a dry cleaning establishment for discrimination because it charged more to launder women's shirts than men's. Allred also successfully sued on behalf of two lesbians who had been denied entrance to the "romance booth" at a Los Angeles restaurant (*Rolon v. Kulwitsky,* 153 Cal. App. 3d 289, 200 Cal. Rptr. 217 [Cal. App. 2 Dist. 1984]). The owner of the restaurant vowed to close the booth if Allred's clients won. They did, and he made good on his promise.

Allred relishes confrontation, and her showy tactics have earned her both praise and criticism. Defending what many have called self-promoting publicity stunts, Allred says she is aware of the impression she makes and contends that it is exactly the effect she wants. She tries to use the few moments she is in the spotlight to make her point as forcefully as possible. Her detractors say that she wastes her time and energy on trivial issues that do not advance any worthwhile cause and deflect attention away from serious issues. Yet, she points out, she is often stopped on the street by people who recognize her and want to thank her for taking on the small fights that no one else wants. Allred contends that what she is really doing is tackling issues that are symbolic of the day-to-day struggles people face. It is her way of educating the public and the legal establishment to move beyond stereotypes.

Asked whether she is an activist or a lawyer, Allred replied that she is an "activist lawyer." She added that she believes in seeking change and winning rights through the legal process but that she does not shrink from utilizing the political process when legal remedies prove inadequate. She once held a press conference in the office of California governor Jerry Brown to cast media attention on his threat to VETO a bill authorizing payroll deductions for child support payments. When the news media arrived, Allred and a group of women and children had hung diapers across the governor's office. Brown reversed his position and signed the bill. In another case that drew media attention, Allred held a press conference at the door of the all-

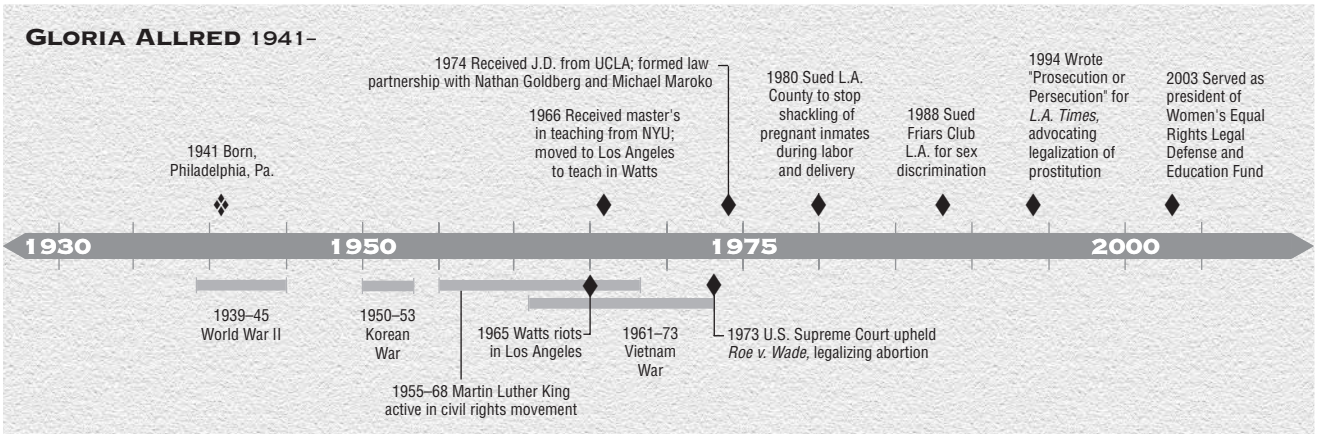

male Friars Club of New York to dramatize her lawsuit challenging the club's policy of not allowing women members and not allowing women to enter, even as guests, before 4:00 P.M. She won her suit on the grounds that the club did not meet the "substantially private" requirement under New York law that would have allowed it to legally exclude women. Possibly her most famous politically motivated demonstration was presenting California state senator John Schmitz (R-Corona del Mar) with a chastity belt at a hearing on a bill to limit abortion and BIRTH CONTROL. Schmitz retaliated in a press release in which he called Allred "a slick butch lawyeress." Allred sued for LIBEL and won a damage award and an apology.

Allred has earned a reputation as a champion of those who have been sexually victimized. She represented a woman who won a $5 million civil suit against an accused rapist the district attorney declined to prosecute; represented a boy who claimed to have been sexually abused by a famous rock singer (although she abruptly and without explanation withdrew from the case before it was settled); and tackled the thorny issue of clergy SEXUAL ABUSE. She says she wants people to know that, even if the criminal justice system fails them, they are entitled to file a civil suit.

Allred is an ardent feminist who believes that all attorneys and all judges should be feminists, because she feels anyone who is not a feminist is a bigot. Some critics say she is all show and no substance. She has been compared to legal showmen such as Melvin M. Belli ("the King of Torts") and Marvin Mitchelson, who gained notoriety through a series of celebrity palimony suits. However, even Mitchelson, not one to shrink from publicity himself, describes her style as rough. But Allred has many supporters as well. Among them is Justice Joan Dempsey Klein of the California Court of Appeal who credits Allred with moving women's issues forward. Klein also points out that Allred saves her dramatics for outside the courtroom and always observes proper decorum while before the bench. According to Klein, Allred is always well-prepared and, for that reason, is quite successful.

In 1994, Allred wrote an editorial for the December 6 issue of the *Los Angeles Times,* titled "Prosecution or Persecution," in which she asserted that laws prohibiting prostitution are sexist and victimize women. She advocated legalization and regulation of the sex trade in order to reduce sexually transmitted diseases and drug abuse. According to Allred, "Unprotected, uninsured sex workers are the real victims who deserve legal status and an end to government-funded harassment."

*Gloria Allred.*
AP/WIDE WORLD PHOTOS

In the 1990s, Allred, whose law firm partners were both the children of Holocaust survivors, sued an organization that had promised a monetary award to an Auschwitz survivor for proving the existence of the Holocaust and then reneged on the award. Allred won a six-figure judgment that ultimately bankrupted the organization. In 1995, Allred sued the Boy Scouts of America (BSA) over the organization's refusal to let a girl join the troop to which her twin brother belonged. The trial judge's decision that the BSA was not a business organization and was not subject to the state Civil Rights Act was upheld by the Court of Appeals. The case was appealed to California's Supreme Court, but, when that court upheld two similar cases, the plaintiff withdrew her appeal.

In early 2003, Allred served as president of the Women's Equal Rights Legal Defense and Education Fund, an organization she founded. She hosted her own radio talk show on a Los Angeles radio station and was selected as one of the 25 most important talk show hosts by *USA Today*. She has also been a columnist for the *National Law Journal.* She has been nominated three times for television's Emmy award for her commentaries on KABC-TV.

Dressed in her trademark reds and electric blues, Allred is a combination of scholarship and theatrics. Her intelligence and shrewd understanding of the power of the media have made her a contemporary success story in the world of law and politics. Gloria Allred has her own web site: www.gloriaallred.com (accessed May 29, 2003).

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## ALLUVION

See TERRITORY.

## ALTER EGO

*A doctrine used by the courts to ignore the corporate status of a group of stockholders, officers, and directors of a corporation in reference to their limited liability so that they may be held personally liable for their actions when they have acted fraudulently or unjustly or when to refuse to do so would deprive an innocent victim of redress for an injury caused by them.*

A corporation is considered the alter ego of its stockholders, directors, or officers when it is used merely for the transaction of their personal business for which they want IMMUNITY from individual liability. A parent corporation is the alter ego of a subsidiary corporation if it controls and directs its activities so that it will have limited liability for its wrongful acts.

The alter ego doctrine is also known as the instrumentality rule because the corporation becomes an instrument for the personal advantage of its parent corporation, stockholders, directors, or officers. When a court applies it, the court is said to pierce the corporate veil.

Courts have not traditionally applied the alter ego doctrine to other business forms, such as partnerships and limited partnerships, because partners generally do not enjoy the same form of limited liability as corporate stockholders, officers, and directors. By comparison, however, owners of limited liability companies may structure their business in a manner similar to a corporation so that members and managers are shielded from personal liability for the debts of the LIMITED LIABILITY COMPANY (LLC). Several courts have determined that the alter ego doctrine may also apply to LLCs. For instance, in *Kaycee Land & Livestock v. Flahive*, 46 P.3d 323 (Wyo. 2002), the Wyoming Supreme Court held that the equitable doctrine of piercing the veil was an available remedy under the Wyoming Limited Liability Company Act.

CROSS-REFERENCES

Corporations; Immunity; Liability.

## ALTERATION

*Modification; changing a thing without obliterating it.*

An alteration is a variation made in the language or terms of a legal document that affects the rights and obligations of the parties to it. When this occurs, the alteration is material and the party who did not consent to the change can be released from his or her duties under the document by a court.

When an essential part of a writing has been cut, torn, burned, or erased, the alteration is also known as a mutilation.

The alteration of a document by someone other than a party to it is called a spoliation.

## ALTERATION OF INSTRUMENTS

*A change in the meaning or language of a legal document, such as a contract, deed, lease, or* COMMERCIAL PAPER, *that is made by one party to the document without the consent of the other after it has been signed or completed.*

If such a change is made by a third party without the consent of either party to the instrument, it is called a spoliation or mutilation.

### Method

The face of an instrument is changed by its alteration. A difference in handwriting, a change in words or figures, an erasure, and the striking out of particular words are some methods used to alter an instrument. Since there must be a change in the meaning or language of a document, retracing an original writing—as when a figure written in pencil is retraced in ink—is not an alteration.

### Material Changes

The alteration of an instrument materially changes it. The document no longer reflects the terms that the parties originally intended to

serve as the basis of their legal obligation to each other. To be material, the change must affect an important part of the instrument and the rights of the parties to it. Any material alteration relieves the nonconsenting party of any obligation to perform according to the terms of the instrument. If the altered instrument is a contract, then the original contract is void. The nonconsenting party cannot be legally obligated by the new contract since he or she never agreed to it. A document that has been materially altered does not regain its original validity if it is restored to its original form by erasing or deleting unauthorized words.

The date of an instrument is often considered a material provision when it establishes the time within which the parties to a document must perform their obligations under it. An unauthorized change of date that shortens the time of payment or extends the time of performance so that more interest will become due is a material alteration.

An alteration of a signature that changes the legal effect of an instrument is material. Erasing words that show that the signer is acting as an agent, for example, changes the signer's liability under the instrument and, therefore, is a material alteration. However, when a signature that was improperly placed on a document is erased, there is no material alteration since the legal meaning of the document is not changed.

Any change in the terms of the instrument that affects the obligations of the parties is material. In a contract to sell land on commission, a change in the rate of commission is material. A change in a description in a deed so that it transfers a smaller piece of land, a change in the name of a purchaser in a sales contract, or an alteration in the terms of financing set forth in a mortgage is also material.

### Time of Alteration

A modification in a document before its completion is not an alteration. The parties are bound to review the document and to have agreed upon its terms before executing it. In order for an alteration to nullify the legal effect of an instrument, the change must be made after its completion.

### Intention

A material change must be intentionally made. The motive behind the alteration is unimportant. If a mistake or accident causes a change, this is not considered a material alteration, but the document may be reformed or rescinded.

### The Person Making the Change

The change to the instrument must be made by a party or someone authorized by him or her to do so. No change made by a third person without the consent of either party to the document will invalidate it if its original terms can be learned. When a material alteration is made by a party to commercial paper, such as a check or promissory note, the paper will be enforced as originally written against the party who made the changes.

### Consensual Alteration

A change in an instrument made with the consent of the parties is binding upon them. Such consensual alteration is usually evidenced by the signing by each party of his or her initials and the date that the agreement to the changes to the instrument was reached.

## ALTERNATIVE DISPUTE RESOLUTION

*Procedures for settling disputes by means other than litigation; e.g., by* ARBITRATION*, mediation, or minitrials. Such procedures, which are usually less costly and more expeditious than litigation, are increasingly being used in commercial and labor disputes,* DIVORCE *actions, in resolving motor vehicle and* MEDICAL MALPRACTICE *tort claims, and in other disputes that would likely otherwise involve court litigation.*

In the late 1980s and early 1990s, many people became increasingly concerned that the traditional method of resolving legal disputes in the United States, through conventional litigation, had become too expensive, too slow, and too cumbersome for many civil lawsuits (cases between private parties). This concern led to the growing use of ways other than litigation to resolve disputes. These other methods are commonly known collectively as alternative dispute resolution (ADR).

As of the early 2000s, ADR techniques were being used more and more, as parties and lawyers and courts realized that these techniques could often help them resolve legal disputes quickly and cheaply and more privately than could conventional litigation. Moreover, many people preferred ADR approaches because they saw these methods as being more creative and more focused on problem solving than litigation, which has always been based on an adversarial model.

The term *alternative dispute resolution* is to some degree a misnomer. In reality, fewer than 5 percent of all lawsuits filed go to trial; the other 95 percent are settled or otherwise concluded before trial. Thus, it is more accurate to think of *litigation* as the alternative and ADR as the norm. Despite this fact, the term *alternative dispute resolution* has become such a well-accepted shorthand for the vast array of nonlitigation processes that its continued use seems assured.

Although certain ADR techniques are well established and frequently used—for example, mediation and arbitration—alternative dispute resolution has no fixed definition. The term alternative dispute resolution includes a wide range of processes, many with little in common except that each is an alternative to full-blown litigation. Litigants, lawyers, and judges are constantly adapting existing ADR processes or devising new ones to meet the unique needs of their legal disputes. The definition of alternative dispute resolution is constantly expanding to include new techniques.

ADR techniques have not been created to undercut the traditional U.S. court system. Certainly, ADR options can be used in cases where litigation is not the most appropriate route. However, they can also be used in conjunction with litigation when the parties want to explore other options but also want to remain free to return to the traditional court process at any point.

Of the many ways to resolve a legal dispute other than formal litigation, mediation, arbitration, mediation-arbitration, MINITRIAL, early neutral evaluation, and summary jury trial are the most common.

### Mediation

Mediation—also known as conciliation—is the fastest growing ADR method. Unlike litigation, mediation provides a forum in which parties can resolve their own disputes, with the help of a neutral third party.

Mediation depends upon the commitment of the disputants to solve their own problems. The mediator, also known as a facilitator, never imposes a decision upon the parties. Rather, the mediator's job is to keep the parties talking and to help move them through the more difficult points of contention. To do this, the mediator typically takes the parties through five stages.

First, the mediator gets the parties to agree on procedural matters, such as by stating that they are participating in the mediation voluntarily, setting the time and place for future sessions, and executing a formal confidentiality agreement. One valuable aspect of this stage is that the parties, who often have been unable to agree on anything, begin a pattern of saying yes.

Second, the parties exchange initial positions, not by way of lecturing the mediator but in a face-to-face exchange with each other. Often, this is the first time each party hears the other's complete and uninterrupted version. The parties may begin to see that the story has two sides and that it may not be so unreasonable to compromise their initial positions.

Third, if the parties have agreed to what is called a caucusing procedure, the mediator meets with each side separately in a series of confidential, private meetings and begins exploring settlement alternatives, perhaps by engaging the parties in some "reality testing" of their initial proposals. This process, sometimes called *shuttle diplomacy,* often uncovers areas of flexibility that the parties could not see or would have been uncomfortable putting forward officially.

Fourth, when the gap between the parties begins to close, the mediator may carry offers and counteroffers back and forth between them, or the parties may elect to return to a joint session to exchange their offers.

Finally, when the parties agree upon the broad terms of a settlement, they formally reaffirm their understanding of that settlement, complete the final details, and sign a settlement agreement.

Mediation permits the parties to design and retain control of the process at all times and, ideally, eventually strike their own bargain. Evidence suggests that parties are more willing to comply with their own agreements, achieved through mediation, than with adjudicated decisions, imposed upon them by an outside party such as a judge.

An additional advantage is that when the parties reach agreement in mediation, the dispute is over—they face no appeals, delays, continuing expenses, or unknown risks. The parties can begin to move forward again. Unlike litigation, which focuses on the past, mediation looks to the future. Thus, a mediated agreement is particularly valuable to parties who have an ongoing relationship, such as a commercial or employment relationship.

**Alternative Dispute Resolution Information Form**

NAME OF COURT: _____

***ADR Information Form***

*This form should be filled out and returned, within 10 days of the resolution of the dispute, to:*

1. Case name: _____ No. _____
2. Type of civil case: ☐ PI/PD-Auto ☐ PI/PD-Other ☐ Contract ☐ Other (*specify*): _____
3. Date complaint filed _____ Date case resolved _____
4. Date of ADR conference _____ 5. Number of parties _____
6. Amount in controversy: ☐ $0–$25,000 ☐ $25,000–$50,000 ☐ $50,000–$100,000 ☐ over $100,000 (*specify*)_____
7. ☐ Plaintiff's Attorney ☐ Cross Complainant's Attorney 8. ☐ Defendant's Attorney ☐ Cross Defendant's Attorney

| | |
|---|---|
| _____ NAME | _____ NAME |
| _____ ADDRESS | _____ ADDRESS |
| (____)_____ TELEPHONE NUMBER | (____)_____ TELEPHONE NUMBER |

9. Please indicate your relationship to the case:
   ☐ Plaintiff ☐ Plaintiff's attorney ☐ Defendant ☐ Defendant's attorney
   ☐ 3rd party defendant ☐ 3rd party defendant's attorney ☐ Other (*specify*): _____
10. Dispute resolution process:
    ☐ Mediation ☐ Arbitration ☐ Neutral case evaluation ☐ Other (*specify*): _____
11. How was case resolved?
    a. ☐ As a direct result of the ADR process.
    b. ☐ As an indirect result of the ADR process. c. ☐ Resolution was unrelated to ADR process.
12. Check the closest dollar amount that you estimate you saved (attorneys fees, expert witness fees, and other costs) by using this dispute resolution process compared to resolving this case through litigation, whether by settlement or trial.
    ☐ $0 ☐ $250 ☐ $500 ☐ $750 ☐ $1,000 ☐ more than $1,000 (*specify*): $ _____
13. If the dispute resolution process caused a net increase in your costs in this case, check the closest dollar amount of the *additional* cost:
    ☐ $0 ☐ $250 ☐ $500 ☐ $750 ☐ $1,000 ☐ more than $1,000 (*specify*): $ _____
14. Check the closest number of court days that you estimate the court saved (motions, hearings, conferences, trial, etc.) as a result of this case being referred to this dispute resolution process:
    ☐ 0 ☐ 1 day ☐ more than 1 day (*specify*): _____
15. If the dispute resolution process caused a net increase in court time for this case, check the closest number of *additional* court days:
    ☐ 0 ☐ 1 day ☐ more than 1 day (*specify*): _____
16. Would you be willing to consider using this dispute resolution process again? ☐ Yes ☐ No

Form Adopted by the Judicial Council of California ADR-101 [New March 1, 1994]

**WEST GROUP** Official Publisher

*A sample form used in alternative dispute resolution*

## Arbitration

Arbitration more closely resembles traditional litigation in that a neutral third party hears the disputants' arguments and imposes a final and binding decision that is enforceable by the courts. The difference is that in arbitration, the disputants generally agreed to the procedure before the dispute arose; the disputants mutually decide who will hear their case; and the proceedings are typically less formal than in a court of law. One extremely important difference is that, unlike court decisions, arbitration offers

almost no effective appeal process. Thus, when an arbitration decision is issued, the case is ended.

Final and binding arbitration has long been used in labor-management disputes. For decades, unions and employers have found it mutually advantageous to have a knowledgeable arbitrator—whom they have chosen—resolve their disputes in this cheaper and faster fashion. One primary advantage for both sides has been that taking disputes to arbitration has kept everyone working by providing an alternative to strikes and lockouts and has kept everyone out of the courts. Given this very successful track record, the commercial world has become enthusiastic about arbitration for other types of disputes as well.

Now a new form of arbitration, known as court-annexed arbitration, has emerged. Many variations of court-annexed arbitration have developed throughout the United States. One can be found in Minnesota, where, in the mid-1990s, the Hennepin County District Court adopted a program making civil cases involving less than $50,000 subject to mandatory nonbinding arbitration. The results of that experimental program were so encouraging that legislation was later enacted expanding the arbitration program statewide. As of 2003, most cases were channeled through an ADR process before they could be heard in the courts. A growing number of other federal and state courts were adopting this or similar approaches.

### Mediation-Arbitration

As its name suggests, mediation-arbitration, or med-arb, combines mediation and arbitration. First, a mediator tries to bring the parties closer together and help them reach their own agreement. If the parties cannot compromise, they proceed to arbitration—before that same third party or before a different arbitrator—for a final and binding decision.

### Minitrial

The minitrial, a development in ADR, is finding its greatest use in resolving large-scale disputes involving complex questions of mixed law and fact, such as PRODUCT LIABILITY, massive construction, and antitrust cases. In a minitrial, each party presents its case as in a regular trial, but with the notable difference that the case is "tried" by the parties themselves, and the presentations are dramatically abbreviated.

In a minitrial, lawyers and experts present a condensed version of the case to top management of both parties. Often, a neutral adviser—sometimes an expert in the subject area—sits with management and conducts the hearing. After these presentations, top management representatives—by now more aware of the strengths and weaknesses of each side—try to negotiate a resolution of the problem. If they are unable to do so, they often ask for the neutral adviser's best guess as to the probable outcome of the case. They then resume negotiations.

The key to the success of this approach is the presence of both sides' top officials and the exchange of information that takes place during the minitrial. Too often, prelitigation work has insulated top management from the true strengths and weaknesses of their cases. Minitrial presentations allow them to see the dispute as it would appear to an outsider and set the stage for a cooperative settlement.

### Early Neutral Evaluation

An early neutral evaluation (ENE) is used when one or both parties to a dispute seek the advice of an experienced individual, usually an attorney, concerning the strength of their cases. An objective evaluation by a knowledgeable outsider can sometimes move parties away from unrealistic positions, or at least provide them with more insight into their cases' strengths and weaknesses. Of course, the success of this technique depends upon the parties' faith in the fairness and objectivity of the neutral third-party, and their willingness to compromise.

### Summary Jury Trial

Summary jury trials have been used primarily in the federal courts, where they provide parties with the opportunity to "try" their cases in an abbreviated fashion before a group of jurors, who then deliberate and render an ADVISORY OPINION.

Like an early neutral evaluation, an advisory opinion from a summary jury trial can help the parties assess the strengths and weaknesses of their cases and sometimes can facilitate the settlement of the dispute. Another advantage of the summary jury trial, which it has in common with the minitrial, is that it can be scheduled much sooner than a trial. When early evaluations help the parties settle their cases, the parties typically avoid much of the delay, expense, and anxiety that occurs in litigation.

### ADR by Statute and Regulation

Since the late 1980s, Congress has recognized that ADR provides a cost-efficient alternative to traditional methods for dispute resolution. In 1988, Congress enacted the Judicial Improvements and Access to Justice Act, 28 U.S.C.A. § 652 (1993 & Supp. 2003), which permitted U.S. district courts to submit disputes to arbitration. Congress amended this statute with the enactment of the Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2994 (28 U.S.C.A. § 652), which requires each district court to require, by local rule, that litigants in all civil cases consider using an ADR process at the appropriate state of litigation.

Local rules of U.S. district courts typically provide a wide array of ADR methods. For example, the U.S. District Court for the Western District of Texas recognizes early neutral evaluation, mediation, minitrial, moderated settlement conference, summary jury trial, and arbitration as acceptable forms of ADR. W.D. Tex. Loc. R. CV-88. According to these rules, the court may order ADR on the motion of a party, on agreement of both parties, or on its own motion. Most other district courts have adopted similar rules. Congress has also included ADR provisions in a number of statutes to resolve a variety of disputes. For instance, the Board of Directors of the Office of Compliance, which reviews complaints brought by employees of Congress, may order counseling or mediation, in addition to holding a board hearing or initiating a civil action in federal court. 2 U.S.C.A. § 1401 (1997). Similar statutes apply to such conflicts as labor disputes and claims by individuals with disabilities.

State legislatures have similarly provided for ADR in many of their statutes. Judges in Florida, for example, possess authority to submit most types of cases to mediation or arbitration in lieu of litigation. Fla. Stat. § 44.1011 (1997). The COMMISSIONERS ON UNIFORM LAWS have approved several uniform laws, which may be adopted by the various states, related to ADR proceedings. Versions of the Uniform Arbitration Act, first approved in 1956, have been adopted by 49 states. Likewise, the Uniform Mediation Act, drafted in conjunction with the American Bar Association's Section on Dispute Resolution in 2001, provides rules on the issues of confidentiality and privileges in mediation.

ADR has had an impact on administrative agencies as well. Congress amended the Administrative Procedure Act in 1990 to authorize and encourage administrative agencies to submit administrative disputes to ADR. 5 U.S.C.A. § 572 (1996). ADR often takes the form of mediation in disputes involving labor and employment relations and equal employment opportunity. Several federal agencies provide guides about ADR proceedings to prospective complainants and other constituents.

Courts frequently uphold decisions made during ADR proceedings. In *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001), the U.S. Supreme Court reviewed a decision in which the Ninth Circuit Court of Appeals had reversed a decision of an arbitration panel regarding a complaint by former BASEBALL player Steve Garvey about a contract dispute. The Ninth Circuit then remanded the case to the arbitration panel with instructions to enter an award in favor of the player for the amount he claimed. Noting that JUDICIAL REVIEW of labor arbitration decisions is limited, the Supreme Court reversed the Ninth Circuit's decision, holding that it was not the place of a court of appeals to resolve the dispute on its merits.

FURTHER READINGS

Meek, Susan B. 1996. *Alternative Dispute Resolution*. Tucson, Az.: Lawyers and Judges.

Ware, Stephen J. 2001. *Alternative Dispute Resolution.* St. Paul, Minn.: West Group.

## ALTERNATIVE RELIEF

*Remedies sought in a lawsuit in various forms or in the alternative, such as a demand for* SPECIFIC PERFORMANCE *of a contract or monetary damages to compensate for the failure to perform the obligation, or both.*

Modern rules governing PLEADING in courts now specifically permit a party to demand relief in the alternative. This eliminates the harsh consequences of the rule of COMMON-LAW PLEADING that required a party to make one demand for one type of relief and to lose the case if a different remedy were more appropriate. Today, a party can ask for alternative forms of relief and recover what is later proved to be most appropriate at trial.

## ALTERNATIVE WRIT

*An order, issued originally by the king in England but more recently by a court, commanding a per-*

*son to do a specific thing or to appear and explain why he or she should not be compelled to do it.*

Under the COMMON LAW, the writs of prohibition and MANDAMUS were alternative writs. In modern systems of court procedure, an order to show cause serves the same purpose. It commands a person to do something or come into court and show cause why he or she should not be made to do it.

## AMBASSADORS AND CONSULS

*An* ambassador *is the foreign diplomatic representative of a nation who is authorized to handle political negotiations between his or her country and the country where the ambassador has been assigned. A* consul *is the commercial agent of a nation, who is empowered only to engage in business transactions, and not political matters in the country where he or she is stationed.*

The president with the consent of the Senate appoints ambassadors and consuls whereas the SECRETARY OF STATE appoints staff officers and other subordinate employees.

### Powers and Duties

The powers of an ambassador are specified in his or her credentials, or documents of introduction, which the ambassador submits to the foreign government. In addition to responsibility for political negotiations, an American ambassador may initiate legal proceedings on behalf of the United States and defend suits instituted against it. A foreign ambassador in the United States has similar duties regarding his or her government.

In general, a consul is authorized to safeguard the legal rights and property interests of the citizens of his or her country and to appear in court to ascertain that the laws of the nation where he or she is assigned are administered impartially to all of the ambassador's compatriots. A U.S. citizen who has legal difficulties in a foreign country should consult the United States consul.

Consuls are also empowered and obligated to protect the estates of their countrymen and -women who die within their consular districts. This duty terminates when the decedent's heirs are represented by an attorney.

### Diplomatic Immunity

The development of harmonious international relations and protection against arrest, harassment, or other unjustified actions taken against diplomatic representatives constitute the objectives of DIPLOMATIC IMMUNITY. The Vienna Convention on Diplomatic Relations, which became effective as part of the federal law in 1972, governs diplomatic immunity by granting various degrees of immunity from civil and criminal liability to the members of diplomatic missions.

**Diplomatic Agents** The supervisor of a mission, such as an ambassador, and members of the mission staff who possess diplomatic rank are DIPLOMATIC AGENTS. Such an agent is immune from criminal liability in the nation in which he or she serves, but the commission of a crime may result in a recall request to the ambassador's country. His or her expulsion may ensue upon the refusal of any such request.

In addition, a diplomatic agent is immune from civil lawsuits, except for actions involving estates, when he or she is the executor, administrator, or beneficiary; actions concerning real property held by the diplomatic agent for personal, not official functions; and actions relating to professional or business activities that are beyond the scope of diplomatic duties. A diplomatic agent is not required to testify as a witness; and the family members living in the agent's household enjoy the same immunities.

Due to the hardship imposed on the victims of motor vehicle accidents in the United States caused by foreign diplomats who have diplomatic immunity, federal law mandates that mission members and their families insure their personal motor vehicles, boats, and airplanes. If the mission has similar vehicles registered in its name, it also must purchase liability insurance. An action for damages for property loss, personal injuries, or WRONGFUL DEATH can be maintained directly against the diplomat's insurance company and is tried by the court, presiding without a jury.

**Staff Members** The administrative and technical staffs and families and household members of the mission are completely immune from criminal liability, but are immune from civil liability only for official acts. Similar rules apply to members of the service staff employed as domestics, but their families and private servants employed by staff members are not so protected against liability.

**Consuls** Consuls are not diplomatic agents and, therefore, they are usually amenable to civil lawsuits and criminal prosecution in the coun-

*Pete Peterson, the first U.S. ambassador to Vietnam since the end of the Vietnam War, presents his diplomatic credentials to the vice president of Vietnam, Nguyen Thi Binh, in Hanoi on May 14, 1997.* AP/WIDE WORLD PHOTOS

try where they are assigned. Federal law, however, extends immunity to consuls from all suits and proceedings in state courts. This prevents any embarrassment to foreign nations that might ensue from such proceedings.

**Other Exemptions** Diplomatic agents in the United States and the members of their households are generally exempt from federal, state, and municipal taxes. They are responsible, however, for indirect taxes that are part of the price of goods, taxes on property inherited from a citizen, taxes on any real property they own privately, or capital gains taxes on profits from personal investments. Diplomatic agents have no obligation to serve in the U.S. armed forces. These exemptions also apply to the administrative and technical staffs of the mission and their families. The service staff and private servants are exempt from taxes on wages received from their employment with the mission or its members.

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Pittman, Andrew B. 2001. "Ambassadorial Waiver of Foreign State Sovereign Immunity to Domestic Adjudication in United States Courts." *Washington and Lee Law Review* 58 (spring): 645–88.

CROSS-REFERENCES

Diplomatic Agents; Diplomatic Immunity; International Law; State Department.

## AMBIGUITY

*Uncertainty or doubtfulness of the meaning of language.*

When language is capable of being understood in more than one way by a reasonable person, ambiguity exists. It is not the use of peculiar words or of common words used in a peculiar sense. Words are ambiguous when their significance is unclear to persons with competent knowledge and skill to understand them.

There are two categories of ambiguity: latent and patent. Latent ambiguity exists when the language used is clear and intelligible so that it suggests one meaning but some extrinsic fact or evidence creates a need for interpretation or a choice among two or more possible meanings. In a classic case, *Raffles v. Wichelhaus,* 159 Eng. Rep. 375 (Ex. 1864), a contract was made to sell 125 bales of cotton that were to arrive on a ship called Peerless that sailed from Bombay, India. Unknown to the parties to the contract, two ships of the same name were to arrive from the same port during different months of the same year. This extraneous fact necessitated the interpretation of an otherwise clear and definite term of the contract. In such cases, extrinsic or **PAROL EVIDENCE** may be admitted to explain what was meant or to identify the property referred to in the writing.

A patent ambiguity is one that appears on the face of a document or writing because uncertain or obscure language has been used.

In the law of contracts, ambiguity means more than that the language has more than one meaning upon which reasonable persons could differ. It means that after a court has applied rules of interpretation, such as the **PLAIN MEANING**, course of dealing, **COURSE OF PERFORMANCE**, or **TRADE USAGE** rules to the unclear terms, the court still cannot say with certainty what meaning was intended by the parties to the contract. When this occurs, the court will admit as evidence extraneous proof of prior or con-

temporaneous agreements to determine the meaning of the ambiguous language. Parol evidence may be used to explain the meaning of a writing as long as its use does not vary the terms of the writing. If there is no such evidence, the court may hear evidence of the subjective intention or understanding of the parties to clarify the ambiguity.

Sometimes, courts decide the meaning of ambiguous language on the basis of who was responsible or at fault for the ambiguity. When only one party knew or should have known of the ambiguity, the unsuspecting party's subjective knowledge of the meaning will control. If both parties knew or should have known of the uncertainty, the court will look to the subjective understanding of both. The ambiguity no longer exists if the parties agree upon its meaning. If the parties disagree and the ambiguous provisions are material, no contract is formed because of lack of mutual assent.

Courts frequently interpret an ambiguous contract term against the interests of the party who prepared the contract and created the ambiguity. This is common in cases of adhesion contracts and insurance contracts. A drafter of a document should not benefit at the expense of an innocent party because the drafter was careless in drafting the agreement.

In CONSTITUTIONAL LAW, statutes that contain ambiguous language are VOID FOR VAGUENESS. The language of such laws is considered so obscure and uncertain that a reasonable person cannot determine from a reading what the law purports to command or prohibit. This statutory ambiguity deprives a person of the notice requirement of DUE PROCESS OF LAW, and, therefore, renders the statute unconstitutional.

## AMBIT

*A boundary line that indicates ownership of a parcel of land as opposed to other parcels; an exterior or enclosing line. The limits of a power or jurisdiction. The delineation of the scope of a particular subject matter.*

## AMBULANCE CHASER

*A colloquial phrase that is used derisively for a person who is hired by an attorney to seek out* NEGLIGENCE *cases at the scenes of accidents or in hospitals where injured parties are treated, in exchange for a percentage of the damages that will be recovered in the case.*

*Also used to describe attorneys who, upon learning of a personal injury that might have been caused by the negligence or the wrongful act of another, immediately contact the victim for consent to represent him or her in a lawsuit in exchange for a* CONTINGENT FEE, *a percentage of the judgment recovered.*

## AMBULATORY

*Movable; revocable; subject to change; capable of alteration.*

An *ambulatory court* was the former name of the Court of King's Bench in England. It would convene wherever the king who presided over it could be found, moving its location as the king moved.

An *ambulatory disposition* is a judgment, decree, or sentence that is subject to change, amendment, or revocation.

A will is considered ambulatory because as long as the person who made it lives, it can always be changed or revoked.

## AMENDMENT

*The modification of materials by the addition of supplemental information; the deletion of unnecessary, undesirable, or outdated information; or the correction of errors existing in the text.*

In practice, a change in the pleadings—statements of the allegations of the parties in a lawsuit—may be achieved if the parties agree to the amendment or if the court in which the proceeding is pending grants a motion for the amendment made by one party. A judgment may be altered by an amendment if a motion to do so is made within a certain time after its entry and granted by the court. The amendment of pleadings and judgments is regulated by state codes of CIVIL PROCEDURE and the rules of federal civil procedure.

A constitution or a statute may be changed by an amendment.

A will, trust, corporate charter, and other legal documents are also subject to amendment.

CROSS-REFERENCES

Constitutional Amendment.

## AMERICAN ASSOCIATION OF RETIRED PERSONS

The American Association of Retired Persons (AARP) is a nonprofit, nonpartisan organiza-

tion dedicated to helping older Americans achieve lives of independence, dignity, and purpose. The AARP, which was founded in 1958 by Dr. Ethel Percy Andrus, is the oldest and largest organization of older Americans, with a membership of more than 33 million. The National Retired Teachers Association (NTRA), which was founded in 1947, is a division of AARP. Membership in AARP is open to anyone age 50 or older, working or retired. More than one-third of the association's membership is in the workforce. The AARP's headquarters are in Washington, D.C. By the early 2000s, AARP had fulfilled its goal of having staffed offices in all 50 states, as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. AARP utilizes an extensive network of local AARP chapters, its National Community Service Programs and NTRA members to involve members, volunteers, the media, community partners, and policy-makers in carrying out its objectives. The organization is led by a 21-member board of directors and has an administrative staff that carries out the group's day-to-day activities. The organization is funded almost entirely by annual membership dues.

The AARP has been an effective advocate regarding issues involving older persons, in part because of its large membership and its ability to mobilize its members to lobby for its positions before Congress and government agencies. The organization has concentrated much of its LOBBYING effort on SOCIAL SECURITY, MEDICARE, and long-term care issues. The AARP has fought zealously to protect the Social Security benefits of retired citizens and has resisted efforts by Congress to change the system itself. Its Advocacy Center for Social Security develops policy proposals and lobbies Congress.

The AARP Advocacy Center for Medicare seeks to ensure the availability of affordable, quality HEALTH CARE for older individuals and persons with disabilities. In the early 2000s it was working to develop ways of maintaining the short-term solvency of the Hospital Insurance Trust Fund and was preparing for the needs of the baby boomers in the longer term. With the dramatic growth in managed health care plans, the AARP has sought to educate its members about this new way of providing services and to empower older people by telling them what their rights are under this system.

The association also has been actively involved in voter education. A major, nonpartisan component of the association's legislative program is AARP/VOTE, a voter education program that is charged with informing the public about important public policy issues and the positions of candidates for public office. Through issue and candidate forums and voter guides, AARP/VOTE works to promote issue-centered campaigns and a more informed electorate.

The organization also provides many benefits to its members. The AARP licenses the use of its name for selected services of chosen providers. For example, it offers members a choice of insurance plans. Because most of the plans are neither age-rated nor medically underwritten, the association can make HEALTH INSURANCE available to many of its members who otherwise would be unable to obtain insurance coverage because of pre-existing conditions. The association receives an administrative allowance or a royalty from the providers and the income realized from these services is used for the general purposes of the association and its members.

The AARP also operates a nationwide volunteer network that helps older citizens. Programs include information and support for grandparents who are raising their grandchildren, legal hotlines, and INCOME TAX preparation. These and other programs are funded, in part, by federal grants.

The association produces two national radio network series and publishes a monthly magazine, *AARP The Magazine*, a monthly newspaper, the *AARP Bulletin* and a quarterly Spanish-language newspaper, *Segunda Juventud*. As older adults have gained computer skills, the organization's Web site has become increasingly popular.

Recent outreach programs launched by AARP include a collaborative national effort to help prepare people for independent living, long-term care and end-of-life care as well as a pilot program to promote physical activities for healthy aging.

**FURTHER READINGS**

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CROSS-REFERENCES

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## AMERICAN BANKERS ASSOCIATION

The American Bankers Association (ABA) is comprised of banks and other financial institutions. It seeks to promote the strength and profitability of the banking industry by LOBBYING federal and state governments, building industry consensus on key issues, and providing products and services, including public affairs support and legal services, to its member banks. Membership in the ABA includes community, regional, and money-center banks (the nation's major banks) and holding companies, as well as savings associations, trust companies, and savings banks. The ABA, which was founded in 1875, is the largest banking trade association in the United States, with 95 percent of the commercial banking industry as members. Its headquarters are in Washington, D.C.

The ABA places great emphasis on representing the interests of banks before Congress and state legislatures. It takes stands on banking and bank-related bills as they move through Congress, attempts to influence the interpretations of laws and regulations by banking regulators, and is actively involved in state litigation that has implications for the banking industry. Throughout the 1990s and into the early 2000s, ABA representatives frequently testified before Congress, filed official letters of comment, and sponsored trips by state associations to the nation's capital. During this time, BankPac, the banking industry's POLITICAL ACTION COMMITTEE and one of the strongest committees nationwide, raised and distributed millions of dollars for congressional elections. ABA fought legislative efforts to regulate the fees banks charge customers to use automated teller machines (ATM) and has challenged in court the membership policies used by credit unions to gain customers. ABA also became involved in such issues as ATM accessibility for blind persons, predatory lending practices, SOCIAL SECURITY reform, and MONEY LAUNDERING.

The ABA operates the American Institute for Banking (AIB), which is the largest provider of banking education. The AIB teaches more than 100,000 students annually. In addition, the ABA sponsors approximately 24 residential schools with 3,700 students covering specialty areas within banking and the prestigious Stonier Graduate School of Banking. New technology has provided new opportunities as well. American Financial Skylink is a satellite TELECOMMUNICATIONS network that delivers news, information, and training directly to banks through regular telecasts.

Other ABA affiliates include the following: ABA eCom, which facilitates electronic banking and commerce over the INTERNET; the ABA Education Foundation, which provides resources for consumer education; and the ABA Marketing Network (ABAMN), which informs and educates banks in the marketing of their products and services. The ABA Securities Association assists sections of the banking industry that are competing in the securities business.

Though the ABA is a nonprofit organization, it operates the for-profit Corporation for American Banking (CAB). CAB was created to facilitate group buying of services, allowing participating banks to receive CAB-arranged discounts on long-distance telephone service, overnight package delivery, office products, and copying products.

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## AMERICAN BAR ASSOCIATION

The American Bar Association (ABA) is a nationwide organization to which qualified attorneys voluntarily belong. With over 400,000 members the ABA is the largest voluntary professional organization in the world.

The American Bar Association was founded in 1878 to improve LEGAL EDUCATION, to set requirements to be satisfied to gain admittance to the bar, and to facilitate the exchange of ideas and information among its members. Over the years, the ABA has been largely responsible for the further development of American JURISPRUDENCE, the establishment of formal education requirements for persons seeking to become attorneys, the formulation of ethical principles that govern the PRACTICE OF LAW, and the creation of the American Law Institute (ALI) and the Conference of Commissioners on Uniform

State Laws, which advance the fair administration of justice through encouraging uniformity of statutes and judicial decisions whenever practicable. In recent years, the ABA has been prominently involved in the recommendation and selection of candidates for the federal judiciary, the accreditation of law schools, and the refinement of rules of legal and judicial ethics.

Applicants for membership in the ABA must meet certain criteria. They must be members in good standing of the bar of a state, territory, or possession of the United States. They must also have good moral character and pay the designated dues. Law students qualify to be members of the Law Student Division of the ABA if they attend an ABA-approved law school and pay the specified dues.

The ABA continues to put great emphasis on promoting diversity within its membership and has initiated several programs designed to bring more women and racial and ethnic minorities into the profession.

The ABA provides various forums through which attorneys continue their legal education during their careers. Its national institutes are held frequently in areas of law that have become topical or have undergone sweeping reform. In conjunction with the ALI, the ABA holds seminars in order to continue the professional education of interested members.

Within the ABA, members may participate in the activities of numerous sections, which range in size from about 3,600 members to more than 60,000 and are organized according to specialized areas of law. Various committees exist that deal with such topics as judicial selection, PROFESSIONAL RESPONSIBILITY and discipline, lawyer referral services, and the UNAUTHORIZED PRACTICE of law. Other committees are concerned with topical areas, such as prepaid legal services, MALPRACTICE, legal problems of the elderly, and public-interest law.

The ABA is involved in the political process through its seven-person Governmental Affairs Office (GAO), a LOBBYING effort that serves as the "eyes, ears and voice" of the organized bar at the seat of the national government in Washington, D.C. The GAO staff is housed with about 170 other ABA staffers in the ABA's District of Columbia office. (The ABA's main offices are in Chicago, with more than 500 staff members.) The lobbying group in Washington, D.C., headed by the ABA's associate executive director, testifies on Capitol Hill more often than any other trade association. The ABA's lobbyists offer detailed information and analysis on various technical issues, such as tax or antitrust legislation. Moreover, on issues such as ABORTION, which many ABA members and leaders consider as having an effect on the legal system, the ABA offers its voice along with those of other interested groups.

Equal access for all to the justice system has become an increasingly important theme in the ABA's mission. The association has sought for a number of years to increase and improve free legal services to needy persons by practicing lawyers. These lawyers donate some of their work *pro bono publico* ("for the good of the public"). In 1981, the ABA created the Private Bar Involvement Project, now called the Pro Bono Project, which acts as a national clearinghouse of information and resources for various pro bono programs around the United States. When it began, there were 66 organized projects nationwide; by 1995, there were more than 950.

The ABA actively supports several major legislative priorities on topics that have been in the forefront of American political and governmental affairs. The ABA has called for a MORATORIUM on the death penalty until certain procedures and policies are put into effect that mandate fair and impartial administration of CAPITAL PUNISHMENT. Since the SEPTEMBER 11TH ATTACKS in 2001, the ABA has stepped up its opposition to laws requiring extra verification of citizenship for immigrants. Additionally, the ABA has urged that U.S. citizens and legal residents detained as "enemy combatants" be afforded DUE PROCESS rights and that military tribunals authorized to conduct trials of suspected terrorists be used in limited circumstances. Finally, the ABA has announced its opposition to the incommunicado detention of nationals held in undisclosed locations by immigration officials or the HOMELAND SECURITY DEPARTMENT.

The ABA holds annual conventions and midyear meetings to discuss designated legal topics and ABA matters. It publishes the monthly *American Bar Association Journal,* an annual directory, and various journals and newsletters reporting the work of its sections and committees. The ABA also supports the activities of affiliated organizations—such as the American Bar Foundation, which sponsors research activities in law.

The ABA also provides a social outlet for its members through which members meet to freely exchange ideas and experiences that add to the human dimension in the practice of law.

The ABA has eleven goals:

1. Promote improvement in the U.S. system of justice;
2. Promote meaningful access to LEGAL REPRESENTATION and the U.S. system of justice for all persons regardless of their economic or social condition;
3. Provide ongoing leadership in improving the law to serve the changing needs of society;
4. Increase public understanding of and respect for the law, the legal process, and the role of the legal profession;
5. Achieve the highest standards of professionalism, competence, and ethical conduct;
6. Serve as the national representative of the legal profession;
7. Provide benefits, programs, and services that promote professional growth and enhance the quality of life of the members;
8. Advance the RULE OF LAW in the world;
9. Promote full and equal participation in the legal profession by members of minorities and women;
10. Preserve and enhance the ideals of the legal profession as a common calling and its dedication to public service;
11. Preserve the independence of the legal profession and the judiciary as fundamental to a free society.

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## AMERICAN CIVIL LIBERTIES UNION

Since 1920, the American Civil Liberties Union (ACLU) has fought energetically for the rights of individuals. This private, nonprofit organization is a multipurpose legal group with 300,000 members committed to the freedoms in the BILL OF RIGHTS. Although these liberties—free speech, equality, DUE PROCESS, privacy, etc.—are guaranteed to each citizen, they are never completely secure. Governments and majorities can easily weaken them or even take them away. The ACLU has had enormous success fighting such cases: many of the most important Supreme Court decisions have been won with its involvement, and continues to fight thousands of lawsuits in state and federal courts each year. The ACLU also lobbies lawmakers and speaks out on a wide variety of civil liberties and CIVIL RIGHTS issues. Its passionate devotion to these concerns makes it highly controversial.

The origins of the ACLU date to WORLD WAR I, a dark era for civil liberties. War fever gripped the United States, and official hostility toward dissent ran high. Attorney General A. MITCHELL PALMER orchestrated much of this hostility from Washington, D.C., by ordering crackdowns on protesters, breaking strikes, prosecuting conscientious objectors, and deporting thousands of immigrants. One group in particular stood up to him: the American Union against Militarism (AUAM), led by social reformers and radicals. Among its founders was the pacifist ROGER BALDWIN, a former sociology teacher. In 1917, as the United States prepared to enter the war, Baldwin gave the group a broader mission by transforming it into the Civil Liberties Bureau, dedicated to the defense of those the government saw fit to crush and corral. Anti-Communist hysteria worsened the civil liberties picture between 1919 and 1920, and the upstart bureau had its hands full as Palmer, and his assistant, J. EDGAR HOOVER, staged massive police raids that netted thousands of alleged subversives at a time.

In 1920, the Civil Liberties Bureau became the ACLU. Joining Baldwin in launching the new organization were several distinguished social leaders, including the author Helen A. Keller, the attorney and future Supreme Court justice FELIX FRANKFURTER, and the socialist clergyman Norman Thomas. The ACLU quickly joined the U.S. Congress and the AMERICAN BAR ASSOCIATION in denouncing Attorney General Palmer for his raids—and the outcry helped end his tyrannical career. In the first annual ACLU report, Baldwin weighed the effectiveness of public activism, noting, "[T]he mere public assertion of the principle of freedom . . . helps win it recognition, and in the long run makes for tolerance and against resort to violence." In its weekly "Report on Civil Liberties Situation," the group watched over a torrent of abuses: a mob forcing a Farmer-Labor party delegation in

Washington State to salute the U.S. flag; a Russian chemist being arrested in Illinois for distributing "inflammatory" handbills; and the LYNCHING and burning of six black men in Florida after a black man attempted to vote.

From the beginning, strict political neutrality was the ACLU's rule. The group did not oppose political candidates and declared itself neither liberal nor conservative. This position had an important consequence: the ACLU would defend the civil liberties of all people—including those who were weak, unpopular, and despised—without respect to their views. This principle made for strange bedfellows. As the *Boston Globe* recalled in its eulogy for Baldwin,

> [A]t one point Mr. Baldwin was engaged simultaneously in defending the rights of the KU KLUX KLAN to hold meetings in Boston, despite the orders of a Catholic mayor; of Catholic teachers to teach in the schools of Akron, despite the opposition of the Ku Klux Klan; and of Communists to exhibit their film, "The Fifth Year," in Providence, despite the opposition of both the Catholics and the Ku Klux Klan.

Consequently, while carving out a unique place for the ACLU in U.S. law, these defenses also won the organization enemies.

Within a few years, the ACLU was widely known. Its first victory before the Supreme Court came in the landmark 1925 case GITLOW V. NEW YORK, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138, in which the Court threw out the defendant's conviction under New York's "criminal anarchy" statute (N.Y.Penal Law §§ 160, 161, Laws 1909, ch. 88; Consol. Laws 1909, ch. 40), for advocating the overthrow of the U.S. government in a printed flyer. *Gitlow* established that the FOURTEENTH AMENDMENT, which applies to the states, includes FREEDOM OF SPEECH in its liberty guarantee. By 1926, the ACLU was involved in the debate over church-state separation. It joined the so-called SCOPES MONKEY TRIAL, arguing against a Tennessee law that forbade teaching the theory of evolution in public schools (*Scopes v. State,* 152 Tenn. 424, 278 S.W. 57 [1925]; 154 Tenn. 105, 289 S.W. 363 [1927]). Besides bringing the group to national and worldwide attention, *Scopes* set it on a course from which it never veered: fighting government interference in religious matters. It staged this fight with equanimity, opposing official help and hindrance to religion, and it soon backed the Jehovah's Witnesses in a series of key Supreme Court cases. This involvement laid the groundwork for the Supreme Court's ruling, in a 1962 challenge originally brought by the ACLU, that school prayer is unconstitutional (ENGEL V. VITALE, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601).

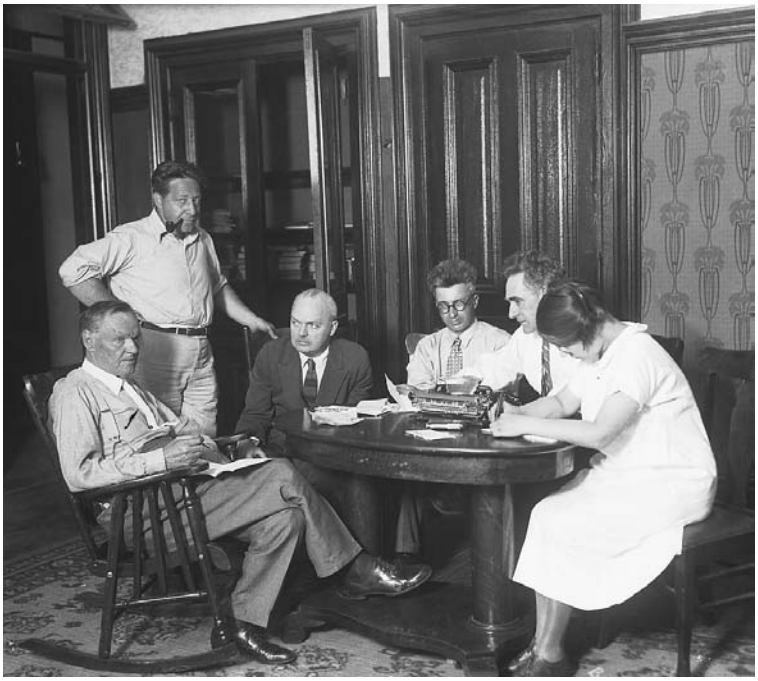

*The ACLU's involvement in the 1925 Scopes Monkey Trial brought the organization national attention. Pictured is the Scopes defense team: (l-r) Clarence Darrow, Arthur Garfield Hays, Dudley Field Malone, George Rappelyea, John Neal, and Miss McClosky.*

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Between the 1930s and the mid-1990s, the ACLU won (as counsel) or helped to win (through amicus briefs) several Supreme Court cases that profoundly changed U.S. law and life. Among these were BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (declaring racially segregated schools unconstitutional); MAPP V. OHIO, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) (severely limiting the power of police officers and prosecutors to use illegally obtained evidence); GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (invalidating a state law that banned contraceptives and, for the first time, recognizing the concept of privacy in the Bill of Rights); MIRANDA V. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (requiring the police to advise suspects of their rights before interrogation); *Loving v. Virginia,* 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (striking down the laws of Virginia and fifteen other states that made interracial marriage a criminal offense); *Brandenburg v. Ohio,* 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (invalidating state SEDITION laws aimed at radical groups); and ROE V. WADE, 410 U.S.

# Whose Civil Liberties, Anyway? The ACLU and Its Critics

Since 1920, the American Civil Liberties Union (ACLU) has stood at the forefront of nearly every great legal battle over personal freedom in the United States. The *C* in *ACLU* might easily stand for *Controversial.* Although the ACLU's role as a major institution in U.S. law is indisputable, its effect on the law and on the lives of citizens is frequently in dispute. Political debate over the group yields very little middle ground and a great amount of passionate disagreement. Supporters agree with its self-styled epithet, "the guardian of liberty." To them, the ACLU is often all that stands between freedom and tyranny. Opponents think the organization is simply a liberal establishment bent on imposing its views on society. They fault its reading of the law, despise its methods, and rue its results. At the heart of this debate is a fascinating ironic question: how does an organization that fights for the very foundations of the nation's commitment to liberty inspire so much conflict?

Even from the start, the idea of a group devoted to defending liberty (the right of each person to be free from the despotism of governments or majorities) made some observers angry. In 1917, members of the Civil Liberties Bureau, which was soon renamed the ACLU, got this welcome from the *New York Times* editorial page: "Jails Are Waiting for Them." Although **WORLD WAR I** was a period of governmental heavy-handedness, the *Times* proved to be both right and wrong. In the next three-quarters of a century, the ACLU became a vastly powerful force in shaping law, and it won many more enemies than friends. By the 1988 presidential election, candidate **GEORGE H. W. BUSH** could make political hay in campaign speeches by attacking the ACLU as "the criminal's lobby." Other critics said the ACLU was anti-God, anti-American, anti-life, and so on. In the end, no jails held ACLU members (at least not for long), but no small number of people would have liked to lock them away.

The case against the ACLU is actually many cases. Every time the organization goes into court, it naturally has to displease someone; litigation is hardly about making friends. Although the organization has one mandate, the abstract ideal of freedom, it must oppose the will of specific individuals if this mandate is to be carried out. Take, for example, one of the ACLU's civil liberties battles: religious freedom. For some, religious freedom means the First Amendment's guarantee that "Congress shall make no law respecting an establishment of religion"; in other words, that people will be free from government-imposed religious worship. For many others, religious freedom implies just the opposite **FIRST AMENDMENT** assurance, that Congress shall not prohibit the free exercise of religion. In a 1962 court battle, the ACLU won a point for the former, an end to prayer in public schools, a victory that polls indicate was unwanted and unsupported by most U.S. citizens (**ENGEL V. VITALE**, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601). Equally stymied by ACLU activism are people who want to display Christian crèches on government property at Christmastime. They have their holiday hopes dashed every time the ACLU wins a court order blocking such a display on First Amendment grounds. Each victory for the organization in such cases may be another disaster in local public relations.

In response, scorn heaped on the ACLU seldom fails to question its motives. The ACLU's "yuletide work" was attacked by the conservative commentator John Leo in an essay in the *Washington Times* entitled "Crushing the Public

113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (recognizing a woman's constitutional right to an **ABORTION**).

Rarely did these victories endear the ACLU to its opponents. Liberals often—though not always—applauded the effort and the result. They praised, for instance, the ACLU fight against the Customs Bureau for banning James Joyce's novel *Ulysses,* and its battle to secure publication of the Pentagon Papers during the **VIETNAM WAR**. Conservatives often found the ACLU meddlesome and the results of its meddling ruinous. Southerners denounced its war on **SEGREGATION**, antiabortion groups blamed it for legal abortion, and Vice President **GEORGE H.W. BUSH** even labeled it "the criminal's lobby" for its insistence on combating police illegality. At times, the organization outraged nearly everyone, as when it went to court to win the right of Nazis to march in public in Skokie, Illinois. Yet throughout its many controversies, the ACLU seldom seemed to go against its charter. Especially in the early 1990s, it did not avoid cases even when taking them on meant clashing with such traditional allies as feminists and university professors over its support of the freedom to publish **PORNOGRAPHY** and opposition to campus speech codes.

The ACLU is often called the nation's foremost advocate of individual rights. With dozens of Supreme Court cases and thousands of state and federal rulings behind it, the organization is

Crèche:" "While others frolic, the grinches of the ACLU tirelessly trudge out each year on yet another crèche-patrol, snatching Nativity scenes from public parks and rubbing out religious symbols." Leo's point is shared by many conservatives: the government, far from remaining neutral in religious matters, is actually engaging in hostility toward religion, at the behest of ACLU "zealots." In this view, the defense of an abstract principle has taken hold of the senses of its defenders; they have become inflexible absolutists. The conservative attorney and author Bruce Fein took this complaint much further, discovering something insidious: "A partial sketch of the ACLU's vision of America reveals a contempt for individual responsibility, economic justice and prosperity and moral decency." Fein meant that the ACLU defends **WELFARE**.

Ascribing suspicious aims to the ACLU moves the debate into a more complicated area. The ACLU is not opposed simply because it has fought to block government-sanctioned religious displays, causing local upset and anger.

Similarly, it is not opposed merely because it defends the rights of some of society's most unpopular groups, Nazis, for example. The deeper issue is civil liberties themselves. Here we have a new question: why does an organization that fights for the very foundations of the nation's commitment to liberty even have to exist?

The ACLU's answer is rather simple. Civil liberties, it argues, exist only when everyone enjoys them. In other words, there is no such thing as freedom for some without freedom for all, including those individuals whom the majority may hate or whom the government seeks to silence. Loren Siegel, ACLU director of public education, wrote that the United States

> was founded upon not one, but two great principles. The first, democracy, is the more familiar: The majority rules. The second principle, liberty, is not as well understood. Even in our democracy, the majority's rule is not unlimited. There are certain individual rights and liberties, enshrined in the **BILL OF RIGHTS**, that are protected from the "tyranny of the majority." Just because there are more whites than blacks in this country does not, for example, mean that whites can vote to take the vote away from blacks. And just because there are more heterosexuals than homosexuals should not mean that the majority can discriminate with impunity against the minority.

But civil liberties "are not self-enforcing," Siegel adds. Moreover, **NADINE STROSSEN**, ACLU president, points out that victories in civil liberties need to be continually re-won. It is not the habit of enemies to grant their opponents the same constitutional rights that they themselves enjoy; plainly, it is the habit of enemies to ignore, restrict, or even crush those rights. Not by accident, the government or a majority of voters can do this; the weak and the few cannot. Thus, the ACLU's commitment is precisely to those whose purchase on freedom is slim—not because the ACLU is necessarily in favor of their cause, but because it is in favor of upholding their rights.

That argument sounds nice on paper, opponents say, but it is neither practical nor sensible at all times in real life. Indeed, they ask, what about the majority—why must it suffer to please the few in its midst who cause trouble, such as criminals? This is the point that Bush wanted to make with his famous "criminal's lobby" blast: the civil liberties of criminals should not be upheld at the expense of the civil liberties of law-abiding citizens. Bush, like other critics, turned this charge into a broader indictment of the ACLU: in his 1988 campaign for the presidency, he accused Democratic presidential candidate Michael Dukakis of being a "card-carrying member of the ACLU." The term *card-carrying* resonates in U.S. political history; it comes from the era of anti-Communist witch hunts and implies anti-Americanism. Ira Glasser, the ACLU's executive director at the time, indignantly replied to Bush in the *Boston Globe*: "The vice president feels it is politically expedient

a firmly established force in U.S. law. Its reach goes beyond the courts. Watchful of lawmakers, it frequently issues public statements on pending national, state, and local legislation, campaigning for and against laws. It also pursues special projects on **WOMEN'S RIGHTS**, reproductive freedom, **CHILDREN'S RIGHTS**, **CAPITAL PUNISHMENT**, **PRISONERS' RIGHTS**, national security, and civil liberties. In these areas, its goal is both to defend existing liberties and to expand them into quarters where they are not generally enjoyed.

The election of **GEORGE W. BUSH** as president in 2000 and the gain of Republican seats in both the House and Senate in 2002 gave increased urgency to the ACLU's advocacy for civil liberties. In addition to supporting the right to partial-birth abortion, the ACLU has fought for **GAY AND LESBIAN RIGHTS**, the rights of library patrons to view unrestricted **INTERNET** sites, and **AFFIRMATIVE ACTION** programs for **COLLEGES AND UNIVERSITIES** throughout the country. The ACLU has opposed numerous initiatives of the Bush administration, in particular, federal funding for faith-based drug treatment programs and the attempts to give sweeping new powers to domestic law enforcement and intelligence agencies after the September 11th attacks in 2001.

The ACLU's national headquarters is in New York City. The group maintains a legislative office in Washington, D.C., and a regional office in Atlanta, along with chapters in each state.

## WHOSE CIVIL LIBERTIES, ANYWAY? THE ACLU AND ITS CRITICS (CONTINUED)

to beat up on us, and if the only way that he can carry it off is by engaging in McCarthyism and distorting our record, then he is willing to do it."

Despite the conservative claim that the ACLU is a liberal group, the political left also has taken shots at it. In the 1980s and 1990s, some feminists opposed the ACLU's absolute defense of free speech. These critics were particularly distressed by the organization's support of the speech rights of pornographers. Others on the left, notably academics, resent the ACLU's opposition to so-called hate-speech codes that **COLLEGES AND UNIVERSITIES** have imposed on campuses to protect members of minorities from others' abusive expression. Such issues have caused dissent even among the ranks of the ACLU itself, leading some to argue that the organization should emphasize **CIVIL RIGHTS** over civil liberties, that is, jettison its traditional mission in order to focus more specifically on the rights of women and racial minorities. In the ACLU's 1992–93 **ANNUAL REPORT**, Strossen dismissed this argument. Liberty and equality, she wrote, are not mutually exclusive. "How can individual liberty be secure if some individuals are denied their rights because they belong to certain societal groups? How, on the other hand, can equality for all groups be secure if that equality does not include the exercise of individual liberty?"

Critics contend, however, that making individual rights paramount can produce results that clash with community values. They note that the ACLU has fought the implementation of the Children's Internet Protection Act, including a provision that requires public libraries receiving federal technology funds to install filters on their computers or risk losing aid. With the First Amendment seemingly protecting most forms of Internet **PORNOGRAPHY**, the act seeks to prevent access on public library computers, so as to prevent children from seeing disturbing images as they walk by. The act even permits adults to ask the librarians to turn off the filters. Nevertheless, the ACLU persuaded a federal court in 2002 that the law violated the First Amendment. Critics of the ACLU cite this as just one more example of blind devotion to an absolutist view of free expression.

In the aftermath of the **SEPTEMBER 11TH ATTACKS** of 2001, the ACLU has exposed itself to more criticism over its objections to new federal laws and orders. It objected to proposed provisions of the **USA PATRIOT ACT** in October 2001, at a time when very few voices were raised about protecting the right to privacy and preventing the government from gaining more **POLICE POWERS**. It has also challenged the indefinite detention of **ALIENS** who are suspected of terrorist activities and ties.

The ACLU promises to remain on the forefront of the debate over the scope of the Bill of Rights and the desire of citizens to be protected by their government. The **WAR ON TERRORISM** that began in September 2001 was expected to generate many legal challenges by the ACLU as the federal government asserted new found powers to monitor, investigate, and detain suspected terrorists. It was expected that the ACLU would continue to find itself isolated at times as it battled for its vision of a free society.

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## AMERICAN FARM BUREAU FEDERATION

The American Farm Bureau Federation (AFBF) is a nonprofit, nonpartisan organization dedicated to promoting, protecting, and representing the interests of U.S. farmers. More than five million members in 50 states and Puerto Rico belong to the AFBF, making it the largest U.S. farm organization. The AFBF is a federation of 2,800 county farm organizations, which elect representatives to state farm bureaus. The organization maintains its general headquarters

in Park Ridge, Illinois, and has an office in Washington, D.C. From these offices the AFBF staff offers many services and programs for state and county farm bureaus and members.

The first county farm bureau was formed in Broome County, New York, in 1911. The word *bureau* in farm bureau is used because the first organization was formed as a "bureau" of the local CHAMBER OF COMMERCE. Missouri was the first state to form a statewide organization of farm bureaus in 1915. The AFBF was founded in 1919 when a small group of farmers from 30 state bureaus gathered in Chicago, Illinois. The AFBF soon became a voice for agriculture at the national level, LOBBYING Congress for passage of legislation favorable to farmers.

The AFBF relies on its 2,800 county bureaus for direction and support. Thousands of volunteer leaders serve on county farm bureau boards and committees. Members organize social outings, educational workshops, political action and community forums, and other programs and services for farm families.

State bureaus adopt policies and name delegates to represent them at the AFBF annual meeting. Policies adopted by voting delegates govern the federation. These policies deal with many issues, including the use of natural resources, taxation, property rights, services to the farm community, trade, food safety and quality, and other issues that affect rural America.

The AFBF has historically been a conservative organization, favoring flexible price supports for crops and a minimum of government regulation and oversight. Its government relations division employs a number of registered lobbyists who are specialists on farm policy, trade, budget and taxes, farm credit, labor, transportation, conservation, and the environment. These individuals maintain daily contact with Congress and regulatory agencies and appear before congressional committees.

The AFBF's public policy division is responsible for research, education, and policy support for AFBF and the state farm bureaus. Staff members provide analysis and information on current issues, including property rights, HEALTH CARE, clean water, endangered species, animal welfare, farm programs, and dairy policy. One of the hottest issues in the late 1990s and early 2000s has concerned the current and future role of biotechnology in agriculture. Biotechnology and other technological developments including computers, lasers, and robots are also issues being closely followed by AFBF and the county and state farm bureaus. Additionally, the AFBF has sought to play a major role in such areas as the continuing development of renewable fuels and international trade. The division also coordinates several special farm bureau activities, including commodity advisory committees, annual crop surveys, and various national seminars and conferences on policy issues.

The federation's communication division operates a computerized marketing, news, and weather system, which delivers the latest news, market information, U.S. DEPARTMENT OF AGRICULTURE news, and agricultural weather reports to subscribers by satellite.

The American Farm Bureau Foundation for Agriculture, founded in 1967, funds research on agricultural issues. The foundation is funded by gifts from individuals, county and state farm bureaus, corporations, and foundations. The foundation has funded research on animal waste management, pesticide use, new methods of helping endangered species, and animal welfare education. The foundation has also been active in numerous educational outreach programs including "Agriculture in the Classroom," awards and contests, farm tours and field days, garden and planting projects, mobile classroom units, and newsletters, books, and videos.

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## AMERICAN FEDERATION OF LABOR—CONGRESS OF INDUSTRIAL ORGANIZATIONS

The American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) is a voluntary federation of 65 national and international LABOR UNIONS. It comprises 65 national union affiliates, 45,000 local unions, 51 state federations (including Puerto Rico), 570 central labor councils, and a membership of more than 13 million workers. The organization, which has

had enormous political influence since the 1930s, is headquartered in Washington, D.C.

The AFL was formed in 1886 as a loose confederation of 25 autonomous national trade unions with more than 316,000 members. The AFL, renouncing identification with any political party or movement, concentrated on pursuing achievable goals such as higher wages and shorter work hours. Members were encouraged to support politicians who were friendly to labor, no matter their party affiliation.

During the 1930s, the AFL became embroiled in internal conflict. The trade unions that dominated the AFL were composed of skilled workers who opposed organizing the unskilled or semiskilled workers on the manufacturing production line. Several unions rebelled at this refusal to organize and formed the Committee for Industrial Organization (CIO). The CIO aggressively organized millions of workers who labored in automobile, steel, and rubber plants. In 1938, unhappy with this effort, the AFL expelled the unions that formed the CIO. The CIO then formed its own organization and changed its name to the Congress of Industrial Organizations. By the 1950s, the leadership of both the AFL and CIO realized that a unified labor movement was a necessity. In 1955, the AFL and the CIO merged into a single organization, the AFL-CIO.

The AFL-CIO is primarily concerned with influencing legislative policies that affect unions. Its staff members conduct research, set policy, and testify before congressional and state legislative committees. More importantly, the organization provides funds and volunteers to labor-endorsed political candidates. Alhough the AFL-CIO is a nonpartisan organization, it traditionally has supported DEMOCRATIC PARTY candidates.

With the 1995 election of John J. Sweeney as president, the AFL-CIO has made increased union membership its highest priority. Despite Sweeney's most recent reelection in 2001, membership in U.S. trade unions has continued to fall over the last several decades, as the manufacturing sector of the U.S. economy has steadily declined. Union membership in 2001 comprised just 13.5 percent of the workforce, compared with a high of 34.7 percent in 1954. Sweeney has pushed the organization to recruit women, minorities, low-paid workers, and white-collar workers. In an effort to strengthen local unions, the AFL-CIO launched the New Alliance initiative in 2001. The purpose of the initiative is to restructure unions at the state and local levels.

The day-to-day work of the federation is carried out by 11 programmatic departments including the Organizing Department; the Field Mobilization Department; the Civil, Human and Women's Rights Department; and the International Affairs Department. Topics of major importance to the AFL-CIO include manufacturing, CIVIL RIGHTS, the global economy, HEALTH CARE, immigrant workers, minimum-wage issues, pensions, and SOCIAL SECURITY.

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## AMERICAN INDIAN MOVEMENT

Founded in 1968, the American Indian Movement (AIM) is an organization dedicated to the Native American civil rights movement. Its main objectives are the sovereignty of Native American lands and peoples; preservation of their culture and traditions; and enforcement of all treaties with the United States.

Despite the straightforwardness of its stated objectives, AIM's reputation had been seriously harmed by well-publicized and controversial incidents of law-breaking, VANDALISM, and violence, resulting in the organization's peak and decline within a few years. Significant historical events include AIM's hostile occupation of Alcatraz Island (1969); the "Trail of Broken Treaties" march on Washington, D.C. (1971); occupation of Wounded Knee (1973); and the Pine Ridge shootout of 1975, which resulted in the controversial arrest and imprisonment of the most famous AIM member, Leonard Peltier. Following these events, the organization's visibility and viability as a political force greatly declined.

### History

Prior to the formation of AIM, issues involving U.S. Indian–non-Indian relations had largely faded away. Starting in the 1950s, the U.S. government had embarked on a serious policy plan to terminate its responsibilities to Native Americans pursuant to extant treaties and agreements. This action included the relocation of thousands of reservation Indians to urban areas and the termination of federal duties to two major tribes, the Menominee of Wisconsin and the Klamath of Oregon. (Federal rights were restored to both a few years later.) However, by

the 1970s, relocation as well as termination policies were all but abandoned.

A number of problems arose when Native Americans left the reservations and intermingled with local towns, where Native Americans allegedly caused and/or became parties to local disturbances or crimes. Moreover, after WORLD WAR II and the KOREAN WAR, many Native Americans who had served in the armed forces no longer wanted to return to stereotypical Indian lifestyles. As more intermingling and merging occurred, other Native Americans became increasingly intent on searching for their cultural roots and maintaining their ethnic identities. They vowed not to be assimilated and thus their views paralleled the ideals of other CIVIL RIGHTS MOVEMENTS of the era. The most radical elements to emerge from these militant Native American groups ultimately formed the AIM, which was intended as an indigenous version of the BLACK PANTHER PARTY.

During the summer of 1968, about 200 members of the Native American community in urban Minneapolis, Minnesota, met to discuss various issues, including slum housing, alleged police brutality, unemployment, and alleged discriminatory policies involving the local county's WELFARE system. The group had been impressed with media coverage of the Black Panther policy of monitoring routine police interrogations or arrests and adopted similar tactics.

From the beginning, the group stirred controversy in seeking attention. Mobilizing in different cities and gaining momentum, it employed increasingly negative tactics such as holding an "anti-birthday party" for the United States atop Mt. Rushmore on the Fourth of July, painting Plymouth Rock bright red on Thanksgiving Day 1970, and seizing the Mayflower replica. All of these actions served to alienate many would-be sympathizers. However, AIM did get the media attention it desired, which seemed only to spawn further controversy. When the group organized a hostile occupation of Alcatraz Island off the coast of California, AIM finally became a force to be reckoned with, however so briefly.

### Alcatraz

On November 9, 1969, a group of Native American supporters, led by Mohawk Richard Oakes, chartered a boat and set out to symbolically claim the island of Alcatraz for "Indians of all tribes." By November 20, the gesture had turned into a full-scale occupation that ultimately became the longest prolonged occupation by Native Americans of a federal facility or federal property.

Early use of Alcatraz Island by indigenous peoples is difficult to reconstruct. Ancient oral histories seem to support the view that at one time Alcatraz was used as a place of isolation for tribal members who had violated some tribal law or taboo and were exiled or ostracized for punishment. Earlier or concurrently, the island changed hands several times during Spanish and Portuguese explorations, but ultimately it became federal property and in time became the site of the infamous federal prison once operated there.

Many of the Indian occupiers of November 1969 were students recruited by Oakes from UCLA, who returned with Oakes to Alcatraz and began to live on the island in old federal buildings. They ran a school and daycare center, and began delivering local radio broadcasts that could be heard in the San Francisco Bay area.

Initially, the federal government placed an effective barricade around the island and insisted that the group leave; it did, however, agree to an Indian demand for formal negotiations. The talks accomplished nothing, however, as the Indian group insisted on a deed and clear title to the island. The group continued occupation and the federal government insisted they depart but took no aggressive action to remove them. Officially, the government adopted a position of non-interference and hoped that support for the occupation would fade. The FBI and Coast Guard were under strict orders to remain clear of the island and media attention began to dwindle.

The occupation continued all through 1970, but by this time, internal problems among the indigenous group caused the occupation to lose momentum. Student recruits left to return to classes at UCLA and were replaced by urban recruits, many of whom had been part of the San Francisco drug and hippie culture of the time. Several rose in opposition to Oakes's leadership on the island, and Oakes ultimately left after his teenaged stepdaughter fell to her death in a building stairwell.

After several months of hostile occupation, the federal government shut off electric power to the island and removed the water barge that had been supplying fresh water to the occupiers. A fire broke out, and both sides blamed the other for the loss of several historic buildings.

Splintered leadership on the island resulted in the loss of a common voice with which to negotiate with the government. When the occupiers began stripping the remaining buildings of copper wiring and tubing, the press turned on them and began publishing stories of assaults, drugs, violence, and the trial of three Indians found guilty of selling 600 pounds of copper.

With government patience growing thin, then-president RICHARD NIXON finally approved a peaceful removal plan, to be conducted with as little force as possible and when the least number of people were on the island. On June 10, 1971, FBA agents, armed federal marshals, and special forces police removed five women, four children, and six unarmed men from the island.

### Trail of Broken Treaties

In November 1971, AIM organized what it called the Trail of Broken Treaties, a march on Washington, D.C., involving approximately 1,000 angry Native Americans. It ended with the occupation of the Bureau of Indian Affairs (BIA) headquarters. After taking over the offices, AIM protesters seized large numbers of files from the BIA offices and caused over $2 million in damages to the trashed building. They also presented President Nixon with 20 demands for immediate action. The Nixon administration provided $66,000 in transportation monies in return for a peaceful end to the takeover. It also agreed to appoint a Native American to a BIA post. Again, the real success for AIM was in getting some media attention and in heightening public awareness of unresolved Indian issues.

### Wounded Knee

The tiny village of Wounded Knee, South Dakota, is the historic site of an infamous 1890 massacre of Native Americans (the last) by the U.S. Cavalry. The original site and burial ground became part of the Pine Ridge Indian reservation in that state.

In 1973, about 200 members of the local Oglala Lakota Indians, led by AIM members, seized the village of Wounded Knee (a Catholic church, trading post, and post office) and declared it to be an independent nation. Their single demand was the return of the Great Sioux Nation (a sovereign parcel of real estate comprising the entire western half of South Dakota) allegedly promised to them by the United States in the Fort Laramie Treaty of 1868.

Just prior to this development, on the nearby Pine Ridge reservation, tribal council president Dick Wilson (a Native American) had secured a tribal council order prohibiting AIM members from attending or speaking at reservation meetings or public gatherings. He considered AIM members to be lawless misfits bent on agitating the populace. AIM members, in return, accused Wilson of nepotism, corruption, and mismanagement of tribal monies. A group of Wilson supporters, locally referred to as the "goon squad," began harassing and threatening AIM members. The Lakota Indians invited AIM to meet with their group, and both decided to take a stand at Wounded Knee. At this point, the federal government, including the BIA, remained neutral, claiming the stand-off was an internal tribal dispute.

However, when AIM occupiers built fortifications and took up arms and munitions, both Wilson and the federal government (FBI, U.S. MARSHALS, and BIA police) moved in. In the well-publicized 71-day occupation that followed, two AIM members were killed. Ultimately, AIM leaders negotiated a "peace pact" with the government stipulating that the activists would be treated fairly and that the federal government would conduct a fair review of several treaties.

Although the immediate stand-off was defused, tensions between Wilson's goon squad and AIM members continued over the next several years. Dozens of AIM members, including early founding members Russell Means and DENNIS BANKS, were indicted on dozens of charges related to the Wounded Knee standoff, but the charges were ultimately dropped when a federal judge acknowledged spurious activity and involvement by the FBI.

### Pine Ridge

Wilson's tribal leadership at the Pine Ridge reservation was reportedly federally sanctioned and supported. Allegations arose at the trials of AIM members that goon squad members were paid with BIA monies and that many of the members were in fact off-duty BIA police. Several murders occurred on the reservation and were never fully investigated. For its part, the FBI maintained that it was an investigatory rather than enforcement agency, a position that further exacerbated the regional tension and fear.

In June 1975, two FBI agents in an unmarked car and clad in civilian clothes chased a pickup truck into an isolated area near an AIM encampment. During the resulting shootout, the two FBI

*American Indian Movement members met with Kent Frizzell, assistant U.S. attorney general, in an April 5, 1973, ceremony ending the standoff at Wounded Knee, South Dakota. Kneeling is Wallace Black Elk, immediately to his right are Russell Means and Dennis Banks (wearing headband).*

AP/WIDE WORLD PHOTOS

agents were shot and killed, along with one Indian activist. Over the next several days, over 300 FBI agents swarmed the reservation, followed by officers making dozens of arrests and prosecutions. Ultimately, AIM activist Leonard Peltier was tried and convicted for his role in the FBI killings, receiving two life sentences. His trial and conviction remained shrouded with allegations of suppressed evidence, coerced witnesses, and a fabricated murder weapon.

### Later Years

Following the Pine Knee incident, AIM declined rapidly in both leadership and momentum. It held its last national unified event in 1978 and the following year dismantled as a national organization, in favor of independent regional chapters. Russell Means and Dennis Banks were in and out of court for years defending their leadership roles in the 1973 and 1975 shootouts. Eventually, both were acquitted of all significant charges. Dennis Banks went on to found another Indian organization, the Sacred Run, devoted to spiritual renewal and environmental issues. As of 2003, Russell Means was campaigning for governor of New Mexico on an independent party ticket. Leonard Peltier remained in prison; his next **PAROLE** review was scheduled for 2008. The FBI still refused to release nearly 6,000 pages of documents on Peltier, being withheld on grounds of "national security."

In 1978, Congress passed the American Indian Religious Freedom Act (AIRFA)(42 U.S.C.A. § 1996), designed to review and update federal policies regarding such matters as Native Americans' right to access sacred grounds and legal rights to practice their traditional religions. Reviews and recommendations were made. Pursuant to this action, Congress in 1990 passed the **NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT**, Public L. No. 101-601, 104 Stat. 3048, but in that same year, the U.S. Supreme Court reiterated its 1988 ruling that AIRFA was a policy statement and not law, and as such, there was no legal right to the protection of sacred sites or the religious use of peyote in the Native American religion. *Lyng v. Northwest Indian Cemetery Protection Association,* 483 U.S. 439, 107 S. Ct. 2924, 97 L. Ed. 2d 364 (1988). New sacred land protection legislation was again introduced in 2002 and was still pending in early 2003.

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Native American Graves Protection and Repatriation Act of 1990; Native American Rights.

## AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE

The American Israel Public Affairs Committee (AIPAC) is a national advocacy group that lobbies for U.S. support to the nation of Israel. Founded in 1951, AIPAC has grown into a 65,000-member organization that is recognized as one of the most influential foreign policy groups in the United States. AIPAC has lobbied Congress for U.S. foreign aid to Israel since 1951, when it helped defeat several efforts to cut aid for the resettling of hundreds of thousands of Holocaust REFUGEES in Israel. In addition, it has lobbied for U.S. military aid to Israel and has helped preserve the special relationship that has existed between the United States and Israel since the United States recognized the nation of Israel in 1948.

AIPAC has its headquarters in Washington, D.C. Members of its staff maintain an active presence in the halls of Congress, attending committee sessions and reviewing legislation that may affect the relationship between the United States and Israel. AIPAC estimates that it monitors 2,000 hours of congressional hearings annually. Its research staff members analyze periodicals and documents in five different languages, amassing a large archive of information on hundreds of issues, including foreign aid, antiterrorism initiatives, and programs that promote United States-Israel strategic cooperation. AIPAC staff members also work with key officials in developing legislation and policy, presenting concepts and information that are moved into the legislative process. AIPAC lobbyists hold one thousand meetings annually with congressional offices.

AIPAC also works with aspiring politicians. During the 1994 elections, representatives of AIPAC met with 600 congressional candidates. As of the early 2000s, nearly half of the members of Congress had been elected since 1990, and AIPAC had worked to educate these new legislators about the relationship between the United State and Israel and the key issues critical to maintaining that relationship. After the 1994 election, AIPAC staff met with every freshman representative.

AIPAC regional staff members travel to more than 600 communities a year to train AIPAC members to be effective advocates for United States-Israel relations. AIPAC works in every congressional district, especially those districts with little or no Jewish population. AIPAC conducts small meetings and statewide workshops, giving its members the opportunity to become involved in grassroots LOBBYING.

The influence of AIPAC remains strong. The 1998 foreign aid appropriation bill contained $3 billion for Israel. Of that amount, $1.8 billion was for military aid and $1.2 billion was for economic aid. An additional $80 million was appropriated to help settle Jewish refugees in Israel. AIPAC has also maintained congressional support for Israel's position in the Middle East peace process, arguing that attempts to distance the United States from Israel's position only encourage its Arab neighbors to ask for unilateral concessions. AIPAC believes that the peace process will only achieve results if the close working relationship between the United States and Israel continues.

Following the SEPTEMBER 11TH ATTACKS in 2001, AIPAC has stepped up its agenda to make sure that the United States continues to ensure Israel's security by working with Congress to isolate and financially constrict such groups as Hamas, Hezbollah, and Palestinian Islamic Jihad. AIPAC has continued to support U.S. efforts to isolate and pressure Palestinian authority chairman Yasir Afarat to stop bombings and suicide missions within Israel. Through its Web site, the organization also kept its members updated on protective measures taken by the Israeli people as the United States initiated war with Iraq in 2003.

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## AMERICAN LEGION

The American Legion is a wartime veterans' organization that was chartered by Congress in 1919. The American Legion has almost three

million members in nearly 15,000 American Legion posts worldwide. These posts are organized into 55 departments, one each for the 50 states, the District of Columbia, Puerto Rico, France, Mexico, and the Philippines. The American Legion's national headquarters is in Indianapolis, Indiana, with additional offices in Washington, D.C. Though volunteer members do most of the work of the American Legion, the national organization has a regular full-time staff of about 300 employees.

Eligibility in the American Legion is based on honorable service in the U.S. armed forces during WORLD WAR I, WORLD WAR II, the KOREAN WAR, the VIETNAM WAR, and military operations in Lebanon (1982–84), Grenada (1982–84), Panama (1989–90) and the Persian Gulf (1990 to the early 2000s). Because membership is based on the period of service, not the place of service, an individual does not have to be stationed in a combat zone to be eligible. Members may participate in a low-cost life insurance program and may receive discounts on moving expenses, car rentals, hotel and motel rentals, eyewear, and prescription drugs. American Legion service officers provide free advice and guidance to veterans who need to deal with the DEPARTMENT OF VETERANS AFFAIRS (VA) about benefits and other issues.

The American Legion sponsors many community activities and programs. Students showing the highest qualities of citizenship are recognized with an American Legion School Medal Award. In 1996 more than 33,000 students in elementary, junior high, and senior high schools were recognized for their commitment to honor, courage, scholarship, leadership, and service. The organization also awards ten national college scholarships each year. At the state level, 49 departments host Boys State programs each summer for outstanding high school juniors. Local posts sponsor nearly 28,000 young men each year to attend the week-long government education program. Two outstanding leaders from each of these Boys State programs are selected to attend the American Legion Boys Nation in Washington, D.C. The American Legion Auxiliary conducts parallel programs for young women through Girls State and Girls Nation.

Many local posts sponsor Junior Shooting Clubs, which provide training in gun safety and marksmanship for students ages 14 though 20. However, the American Legion is probably best known for its sponsorship of youth BASEBALL programs. In 1996 legion posts spent more than $16 million to sponsor 4,800 baseball teams representing more than 89,000 players. Champions from the state level meet on the national level in the American Legion World Series tournament.

The American Legion has always been a strong advocate for U.S. veterans, appearing before congressional committees to submit information and viewpoints on pending legislation. The Veterans Affairs and Rehabilitation Commission (VAR) is a cornerstone of the American Legion, overseeing federally mandated programs provided by the VA for veterans and their dependents. VAR services include assistance with medical care, claims and appeals, insurance programs, burial benefits, and veterans' employment. Staff members also communicate with administrators of state veterans' affairs programs.

American Legion volunteers give more than one million hours of service to disabled veterans annually. Field representatives from the American Legion's Washington office systematically visit VA medical centers, nursing homecare units, and outpatient clinics to evaluate their programs and facilities. The field representatives report resource needs and areas for improvement to the VA headquarters in Washington, D.C.

For a number of years the Legion and other members of the Citizens Flag Alliance have continued to lobby Congress for a Constitutional amendment that would impose penalties for desecration of the U.S. flag. The Legion has also been active in LOBBYING for mandatory recitation of the Pledge of Allegiance in public schools. After the SEPTEMBER 11TH ATTACKS in 2001, the Legion established the American Legion September 11 Memorial Scholarship to help defray college costs for children of deceased military personnel.

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## AMERICAN MEDICAL ASSOCIATION

The American Medical Association (AMA) is a federation of state and territorial medical associations. The AMA seeks to promote the art and science of medicine, the medical profession, and

the betterment of public health. Its purposes include obtaining, synthesizing, integrating, and disseminating information about health and medical practice; setting standards for medical ethics, practice, and education; and being an influential advocate for physicians and their patients.

The AMA was founded in 1847. At its organizing convention, the AMA adopted the first code of ethics in the United States, a detailed document that addressed the obligations of physicians to patients and to each other and the duties of the profession to the public at large. The delegates also adopted the first national standards for medical education through a resolution establishing prerequisites for the study of medicine. Since that time, the AMA has grown into a large organization, with great influence over issues involving HEALTH CARE and medicine. Its headquarters is in Chicago, Illinois.

The AMA speaks out on issues important to the medical community. AMA policy on such issues is decided through a democratic process, at the center of which is the AMA House of Delegates. The house is comprised of physician delegates from every state, the national medical specialty societies, the SURGEON GENERAL of the United States, and sections representing organized medical staffs, young physicians, resident physicians, medical students, and medical schools.

Before the opening of the House of Delegates, which meets twice a year, individual committees consider resolutions and reports in hearings open to all AMA members. Each committee prepares recommendations for the delegates. The house then votes on these recommendations, deciding the AMA's formal position and future action on an issue.

The AMA has been active in numerous healthcare initiatives that affect the U.S. populace as a whole. In the 1990s the AMA launched a campaign against family violence and violence in schools and called on tobacco companies to refrain from engaging in advertising practices that target children. The AMA also launched a national campaign against so-called "drive-through" baby deliveries that ended with the passing of legislation requiring insurance companies to provide appropriate hospitalization and maternity stays. In 2000 the AMA announced the first stage of its health literacy campaign that was aimed at increasing patient comprehension of basic healthcare communications such as prescription instructions and insurance forms. The AMA also began an initiative to reduce under-age drinking.

The AMA opposed the creation of MEDICARE in the 1960s and in the early 2000s has remained opposed to national healthcare insurance. It has sought, however, to extend access to the healthcare system and to contain its costs while improving its quality. The AMA has maintained the position that the problems of rising healthcare costs are due to the costs of MEDICAL MALPRACTICE suits and has vigorously supported medical liability reform legislation.

The AMA is the world's largest publisher of scientific medical information. The *Journal of the American Medical Association* (JAMA) is printed in 12 languages and reaches physicians in 42 countries worldwide, making it the world's most widely read medical journal. The AMA also publishes nine monthly medical specialty journals as well as a newspaper of social and economic health news, *American Medical News*.

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Health Care Law; Medicare.

## AMERICAN PARTY

See KNOW-NOTHING PARTY.

## AMERICANS WITH DISABILITIES ACT

See DISABILITY DISCRIMINATION.

## ♦ AMES, JAMES BARR

James Barr Ames was born June 22, 1846, in Boston. He achieved prominence as an educator and concentrated his career efforts at Harvard.

A graduate of Harvard College in 1868, Ames earned a master of arts degree in 1871 and attended Harvard Law School in 1872. He received several doctor of laws degrees from various universities, including the University of Pennsylvania in 1899, Northwestern University in 1903, and Harvard in 1904.

In 1868, Ames began his teaching career as an instructor for a private school in Boston. Three years later he began his professional asso-

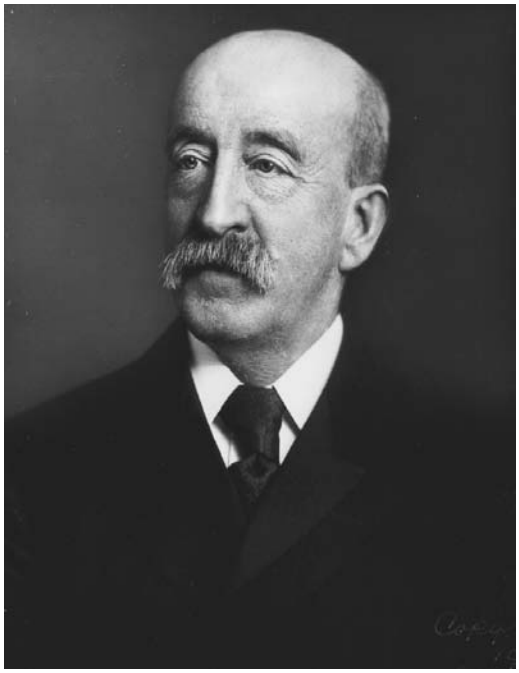

*James Barr Ames.* LIBRARY OF CONGRESS

ciation with Harvard, acting as a tutor in French and German until 1872 and continuing as an instructor in medieval history for the next year. From 1873 to 1877 he was an associate professor of law; in 1877, he became a professor of law. From 1895 to 1910 he performed the duties of dean of the law school. In 1897, he participated in the establishment of the *Harvard Law Review.*

Ames distinguished himself as a teacher of law by utilizing the CASE METHOD introduced by legal educator and former Harvard Dean CHRISTOPHER COLUMBUS LANGDELL. Langdell's approach presented principles of law in relation to actual cases to which they were applied. By studying the cases, a student of law was given an accurate example of the law at work.

Ames extended his talents to the field of legal literature. He is the author of *Lectures on Legal History,* which was published in 1913. He died January 8, 1910, in Wilton, New Hampshire.

CROSS-REFERENCES

Legal Education.

"AN IMMORTAL RIGHT TO BRING AN ETERNALLY PROHIBITED ACTION IS A METAPHYSICAL SUBTLETY THAT THE PRESENT WRITER CANNOT PRETEND TO UNDERSTAND." —JAMES BARR AMES

## ◆ AMES, SAMUEL

Samuel Ames was born September 6, 1806. He graduated from Brown University in 1823 and was admitted to the Rhode Island bar in 1826.

From 1841 to 1851 Ames represented Providence in the Rhode Island general assembly. During his tenure, he was a prominent supporter of state authority in the "Dorr Rebellion." This insurrection occurred in 1842 as a protest against the limited VOTING RIGHTS that existed in Rhode Island. The protest resulted in a more liberal interpretation of the right to suffrage.

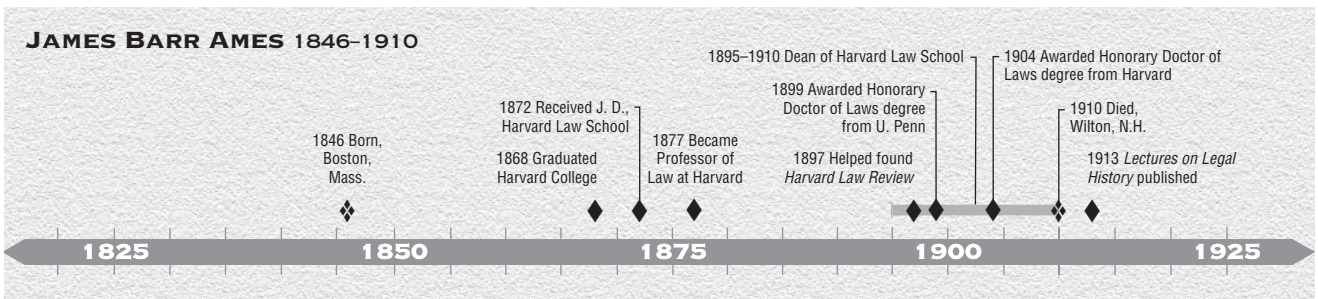


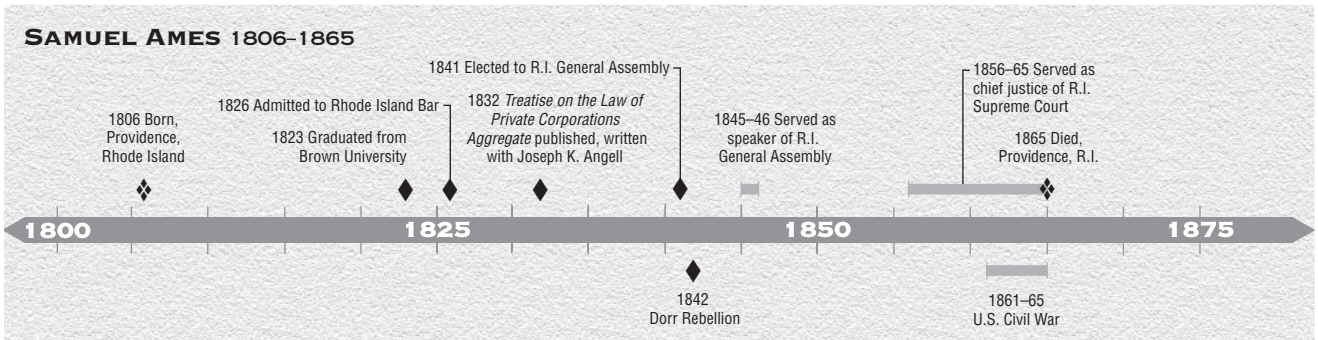

*Samuel Ames.*
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"IT IS DIFFICULT TO DRAW AND APPLY THE PRECISE LINE SEPARATING THE DIFFERENT POWERS OF GOVERNMENT."
—SAMUEL AMES

Beginning in 1856 Ames served as chief justice of the Rhode Island Supreme Court. In 1861, he was the representative from Rhode Island during a series of unsuccessful negotiations to effect a peace between the North and South during the Civil War. Ames died December 20, 1865, in Providence, Rhode Island.

CROSS-REFERENCES

Dorr, Thomas Wilson.

## AMICABLE ACTION

*An action commenced and maintained by the mutual consent and arrangement of the parties to obtain a judgment of a court on a doubtful* QUESTION OF LAW *that is based upon facts that both parties accept as being correct and complete.*

The action is considered amicable because there is no dispute as to the facts but only as to the conclusions of law that a judge can reach from consideration of the facts. An amicable action is considered a JUSTICIABLE controversy because there is a real and substantive disagreement between the parties as to the appropriate relief to be granted by the court.

Other names for an amicable action are a case agreed on, a case stated, or a friendly suit.

## AMICUS CURIAE

*Literally, friend of the court. A person with strong interest in or views on the subject matter of an action, but not a party to the action, may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views. Such amicus curiae briefs are commonly filed in appeals concerning matters of a broad public interest; e.g., civil rights cases. They may be filed by private persons or the government. In appeals to the U.S. courts of appeals, an amicus brief may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof.*

An amicus curiae educates the court on points of law that are in doubt, gathers or organizes information, or raises awareness about some aspect of the case that the court might otherwise miss. The person is usually, but not necessarily, an attorney, and is usually not paid for her or his expertise. An amicus curiae must not be a party to the case, nor an attorney in the case, but must have some knowledge or perspective that makes her or his views valuable to the court.

The most common arena for amici curiae is in cases that are under appeal (are being reconsidered by the court) and where issues of public interest—such as social questions or civil liberties—are being debated. Cases that have drawn participation from amici curiae are those involving CIVIL RIGHTS (such as 1952's BROWN V. BOARD OF EDUCATION), CAPITAL PUNISHMENT, environmental protection, gender equality, infant ADOPTION, and AFFIRMATIVE ACTION. Amici curiae have also informed the court about narrower issues, such as the competency of a juror; or the correct procedure for completing a deed or will; or evidence that a case is collusive or fictitious—that is, that the parties are not being honest with the court about their reasons for being there.

The privilege that friends of the court are granted to express their views in a case is just that: amici curiae have no right to appear or to file briefs. Unless they represent the government, amici curiae must obtain leave (permission) to do so from the court, or consent of all parties in the case, before filing. No court is obligated to follow or even to consider the advice of an amicus curiae, even one it has invited.

The principle that guides the appropriate role of a friend of the court is that he or she

should serve the court without also acting as "friend" to either of the parties. Rules of court and case law (past court decisions) have attempted to spell out the sometimes tricky specifics of how an amicus curiae should—and should not—participate in a case.

For example, Missouri's supreme court in 1969 distinguished the role of amicus curiae from the normal role of the attorney in assisting the court. In this case, the court requested the attorney who had formerly represented the parties in the case to help elicit testimony and cross-examine witnesses. The lawyer also made objections and argued objections against the city, which was defending the lawsuit over ZONING. In seeking the payment of attorney fees for his services, the attorney argued that he had served as amicus curiae due to his acting at the court's request. The supreme court found that "in the orderly and intelligent presentation of the case, he rendered assistance to the court, the same as any attorney who contributes to the orderly presentation of a case. He was appearing, however, not as an adviser to the court but as a representative of private litigants . . . advancing their partisan interests . . . and is not entitled to have the fee for his admittedly valuable and competent professional services taxed as costs" (*Kansas City v. Kindle,* 446 S.W.2d 807 [Mo. 1969]).

The amicus curiae walks a fine line between providing added information and advancing the cause of one of the parties. For instance, she or he cannot raise issues that the parties themselves do not raise, since that is the task of the parties and their attorneys. If allowed by the court, amici curiae can file briefs (called *briefs amicus curiae* or *amicus briefs*), argue the case, and introduce evidence. However, they may not make most motions, file pleadings, or manage the case.

Whether participating by leave or by invitation, in an appearance or with a brief amicus curiae, a friend of the court is a resource person who has limited capacity to act.

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## AMISTAD MUTINY

In 1839 a group of Africans were KIDNAPPED from their homeland and transported to Cuba as slaves. While being transported from one port in Cuba to another, the Africans revolted, killed the captain and cook, and steered for the coast of Africa. The ship was eventually boarded by U.S. authorities in U.S. waters, and the Africans were imprisoned. Fierce legal battles ensued regarding entitlement to the Africans and the ship's cargo. In 1997 Steven Spielberg's company, DreamWorks, released a movie based upon the uprising. The movie *Amistad* engendered its own legal furor amid charges that the screenplay plagiarized a 1989 novel.

### The Ship and Slavery

In April 1839 a Spanish slaving brig with kidnapped Africans aboard sailed from the West African coast to Havana, Cuba. Jose Ruiz, a Spaniard living in Puerto Principe, Cuba, bought 49 males for $450 each. Another Spanish planter living nearby, Pedro Montes, bought four children, including three girls. In late June 1839 the ship *Amistad* sailed from Havana to Puerto Principe. On the third night out, two Africans named Cinque and Grabeau managed to free and arm themselves. During the uprising, the captain and cook were killed, but Ruiz and Montes were spared and forced to assist in navigation. The *Amistad* sailed east toward Africa by day, but at night Montes and Ruiz steered the ship north.

On August 26, 1839, the ship anchored off Long Island and was discovered by the U.S. brig *Washington.* The vessel, the cargo, and the Africans were taken into the District of Connecticut.

Montes and Ruiz filed suit in federal court to recover some of the cargo and the Africans, asserting ownership of the Africans as their slaves. The U.S. district attorney for the District of Connecticut appeared on behalf of the Spanish government and demanded that the Africans be handed over for trial in Cuba on murder and PIRACY charges.

Rallying on behalf of the Africans, New York abolitionists hired attorney Roger Sherman Baldwin. Baldwin argued that because Spain had outlawed the African slave trade, the Africans

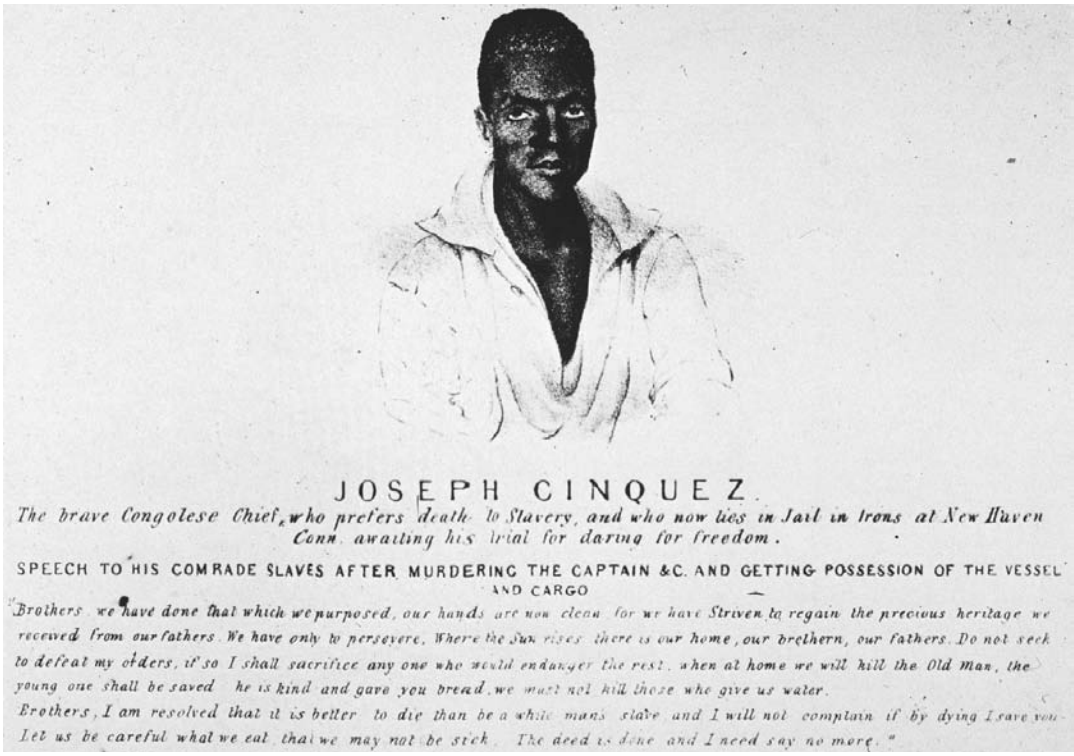


*This portrait of Joseph Cinque, one of the leaders of the slave revolt on board the* Amistad, *appeared in an 1839 edition of the* New York Sun *newspaper.*
ARCHIVE PHOTOS, INC.

could use whatever means possible to attain freedom after their illegal kidnapping and enslavement. The abolitionists sought a writ of **HABEAS CORPUS** relief to free the Africans pending charges of piracy or murder that might be brought. The writ was denied and the Africans remained in custody but were not indicted on any criminal charges.

The trial proceeded in the U.S. district court of New Haven, Connecticut, with the litigants disputing what should be done with the Africans, the cargo, and the ship. Anticipating that U.S. District Judge Andrew Judson would order the Africans turned over for criminal proceedings in Cuba, President **MARTIN VAN BUREN** ordered that the *U.S.S. Grampus* wait in the New Haven harbor to transport the Africans to Cuba immediately upon such a ruling.

The *U.S.S. Grampus* waited in vain. Judge Judson ordered that the kidnapping and enslavement had been illegal and that the United States must return the Africans to their homeland. The United States, now acting on behalf of the Spanish government and the claims of Montes and Ruiz, appealed to the U.S. circuit court, where Judge Judson's ruling was upheld. The United States appealed again, to the U.S. Supreme Court.

**JOHN QUINCY ADAMS**, a member of the U.S. House of Representatives on behalf of Massachusetts, former U.S. president, and sympathetic to the abolitionist movement, joined Baldwin in representing the Africans before the Supreme Court. Adams and Baldwin contended that the Africans should be granted their freedom because they had exercised their natural rights in fighting to escape illegal enslavement. The U.S. Supreme Court opinion, delivered by Justice **JOSEPH STORY**, affirmed the rulings by the lower courts, but instead of ordering the United States to return the Africans to Africa, declared them to be free and ordered them to be immediately discharged from custody (*United States v. Amistad*, 40 U.S. [15 Pet.] 518, 10 L. Ed. 826 [1841]).

While the *Amistad* case essentially presented questions of **INTERNATIONAL LAW** and did not involve any legal attacks on U.S. **SLAVERY**, it was important in U.S. history because of the attention and support it garnered for the abolitionist movement.

### The Movie and Plagiarism

The 1997 movie by Steven Spielberg and his company, DreamWorks SKG, is a fictitious rendering of the real events that ensued between

1839 and 1841. But before the movie was released, an author who had written a historical novel about the uprising attempted to halt the film's release, charging the moviemakers with COPYRIGHT infringement. Filing suit in October 1997, Barbara Chase-Riboud sought $10 million in damages and screenwriting ACKNOWLEDGMENT, based upon alleged PLAGIARISM of her novel, *Echo of Lions*. In December, a federal district judge declined to delay the movie's opening, ruling that the similarities between the movie and the novel did not establish a probability of success for Chase-Riboud but did raise serious questions for trial.

The plagiarism suit took a strange turn in December 1997 when the *New York Times* reported that Chase-Riboud had plagiarized several passages of her 1986 book, *Valide: A Novel of the Harem*, from a nonfiction book published 50 years earlier. Chase-Riboud admitted to the *New York Times* that she had used material for *Valide* without attribution. DreamWorks also charged that Chase-Riboud had taken passages for *Echo of Lions* from a 1953 novel, *Slave Rebellion*, by William A. Owens, the book optioned by *Amistad* producers for the movie.

In early 1998 Chase-Riboud and DreamWorks settled the lawsuit for an undisclosed amount. In dropping the lawsuit, Chase-Riboud stated that she and her attorneys had concluded that neither Spielberg nor DreamWorks had done anything improper.

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## AMNESTY

*The action of a government by which all persons or certain groups of persons who have committed a criminal offense—usually of a political nature that threatens the sovereignty of the government (such as* SEDITION *or treason)—are granted* IMMUNITY *from prosecution.*

Amnesty allows the government of a nation or state to "forget" criminal acts, usually before prosecution has occurred. Amnesty has traditionally been used as a political tool of compromise and reunion following a war. An act of amnesty is generally granted to a group of people who have committed crimes against the state, such as TREASON, rebellion, or desertion from the military. The first amnesty in U.S. history was offered by President GEORGE WASHINGTON, in 1795, to participants in the WHISKEY REBELLION, a series of riots caused by an unpopular excise tax on liquor; a conditional amnesty, it allowed the U.S. government to forget the crimes of those involved, in exchange for their signatures on an oath of loyalty to the United States. Other significant amnesties in U.S. history were granted on account of the Civil and Vietnam Wars.

Because there is no specific legislative or constitutional mention of amnesty, its nature is somewhat ambiguous. Its legal justification is drawn from Article 2, Section 2, of the Constitution, which states, "The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." Because of their common basis, the difference between amnesty and pardon has been particularly vexing. In theory, an amnesty is granted before prosecution takes place, and a pardon after. However, even this basic distinction is blurry—President GERALD R. FORD, for example, granted a pardon to President RICHARD M. NIXON before Nixon was charged with any crime. Courts have allowed the two terms to be used interchangeably.

The earliest examples of amnesty are in Greek and ROMAN LAW. The best documented case of amnesty in the ancient world occurred in 403 B.C. A long-term civil war in Athens was ended after a group dedicated to reuniting the city took over the government and arranged a general political amnesty. Effected by LOYALTY OATHS taken by all Athenians, and only later made into law, the amnesty proclaimed the acts of both warring factions officially forgotten.

In other nations in which amnesties are accepted parts of the governing process, the power to grant amnesty sometimes lies with legislative bodies. In the United States, granting amnesties is primarily a power of the EXECUTIVE BRANCH, though on some occasions Congress may also initiate amnesties as part of legislation. The Immigration Reform and Con-

*With a portrait of Abraham Lincoln as a background, President Gerald Ford announces his order of conditional amnesty for thousands of Vietnam era draft evaders and military deserters.*

BETTMANN/CORBIS

trol Act of 1986 (100 Stat. 3359, 8 U.S.C.A. § 1101) attempted to reduce the number of ALIENS illegally entering the United States by punishing employers who knowingly hired them. However, because of concerns voiced by both employers and immigrant community leaders, the act compromised: it contained provisions for an amnesty giving citizenship to illegal immigrants who had been residents for a set period of time.

Though the Supreme Court has given the opinion that Congress can grant an independent amnesty, it has never expressly ruled on the issue. However, the president's power to grant amnesty autonomously has never been in serious question. The president always has recourse to the pardoning powers granted the office by the Constitution.

During the Civil War period, President ABRAHAM LINCOLN offered a series of amnesties without congressional assent to Union deserters, on the condition that they willingly rejoin their regiments. After the war, Lincoln issued a proclamation of amnesty for those who had participated in the rebellion. Though Congress protested the leniency of the plan, it was helpless to alter or halt it. Lincoln's amnesty was limited, requiring a loyalty oath and excluding high-ranking Confederate officers and political leaders. Lincoln hinted at but never offered a broader amnesty. It was not until President ANDREW JOHNSON's Christmas amnesty proclamation of 1868 that an unconditional amnesty was granted to all participants in the Civil War. Amnesty used in this way fosters reconciliation—in this case, by fully relinquishing the Union's criminal complaints against those participating in the rebellion.

Amnesty was used for a similar purpose at the conclusion of the VIETNAM WAR. In 1974, President Ford attempted reconciliation by declaring a conditional amnesty for those who had evaded the draft or deserted the armed forces. The terms of the amnesty required two years of public service (the length of a draft term), and gave evaders and deserters only five months to return to the fold. Many of those whom the amnesty was designed to benefit were dissatisfied, viewing the required service as punishment. On the other hand, many U.S. citizens agreed with President Nixon that *any* amnesty was out of the question. It was left to President JIMMY CARTER, in 1977, to issue a broad amnesty to draft evaders. Carter argued the distinction that their crimes were forgotten, not forgiven. This qualification makes clear the purpose of an amnesty: not to erase a criminal act, nor to condone or forgive it, but simply to facilitate political reconciliation.

Though an amnesty can be broad or narrow, covering one person or many, and can be seriously qualified (as long as the conditions are not unconstitutional), it cannot grant a license to commit future crimes. Nor can it forgive crimes not yet committed.

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## AMNESTY INTERNATIONAL

Amnesty International (AI) is a nonprofit, independent international organization that works zealously to protect HUMAN RIGHTS around the world. Since its inception in 1961, Amnesty International has coordinated research, information, and education campaigns in order to focus world attention on such issues as freedom of conscience and expression, freedom from discrimination, and the cessation of physical and mental abuse and torture suffered by the victims of human rights violations.

With a membership of more than one million people and supporters and donors in more than 140 countries and territories, Amnesty International is the world's largest grassroots human rights organization. The organization was started by a British lawyer, Peter Benenson, who in an article he wrote in 1961 in *The Observer* posited that the pressure of public opinion could be brought to bear on those who were imprisoning, torturing, and killing people based on their political opinions. Benenson wrote in support of several political prisoners whom he termed "prisoners of conscience" because they had been imprisoned for expressing their beliefs in a peaceful manner. The term came to encompass all men, women, and children who have been imprisoned because of their political or religious beliefs.

Amnesty International carries out its struggle for human dignity for all human rights victims by mobilizing public opinion throughout the world to pressure government officials and other influential persons to stop human rights abuses. Violations of human rights include the following: torture of a person and/or his or her family members by mental or physical means, the "disappearance" of persons considered to be enemies of the state, the imposition by governments of the death penalty, the death of those held in custody or being detained, and the forcible return of persons to countries where they face torture or death. Amnesty International describes "disappeared persons" as persons who are taken into custody, kept hidden and unable to communicate with others, and whose whereabouts are denied by the government agents who arrested them. The prisoners are often tortured. If they are not murdered, they can be held incommunicado for years while the government agents responsible routinely deny that they have custody of these prisoners or knowledge of their fates and often suggest that the prisoners have "disappeared" of their own volition.

Amnesty International's primary goals include the following: (1)freeing all prisoners of conscience; (2)ensuring prompt and fair trials for all political prisoners; (3)abolition of the death penalty, torture, and other degrading punishment; (4)ending extrajudicial executions and "disappearances"; and (5) working to ensure that the perpetrators of human rights abuses are brought to justice in accordance with international standards. Over time Amnesty International has expanded its scope to cover human rights abuses committed by non-governmental bodies and private individuals, including armed political groups. The organization has also begun to focus on human rights abuses in homes or communities where governments have permitted such abuses or failed to take action to stop them.

Amnesty International does not accept government funding and remains independent of governmental, economic, or political interests. It has no religious affiliations. Members include people of various religious, political, and societal points of view who share the common goals mentioned above. Financial support for the organization comes from individual members and groups as well as trusts, foundations, and companies that are committed to support the cause of human rights worldwide.

The central body of Amnesty International is the International Secretariat, which is located in London. The organization has more than 350 staff members and over 100 volunteers from more than 50 countries around the world. Amnesty International is a democratic, self-governing body that is led by a nine-member International Executive Committee (EIC). The International Council that represents the sections elects committee members every two years. The organization consists of more than 7,800 groups representing local activists, youths, specialists, and professionals in more than 100 countries and territories. The organization has nationally organized sections in 56 countries; as of 2003, another 24 countries and territories had developmental organizations that were working on creating sections.

Amnesty International members and supporters "wage peace" in numerous ways ranging from writing individual letters of support to participating in public demonstrations. The organization raises public awareness through

educational information for school children and other groups, training programs for teachers, the encouragement of training programs for government officials and security personnel, INTERNET communications, and fund-raising concerts. In addition to reporting on human rights issues and LOBBYING members of government both privately and publicly, the organization works with other nongovernmental organizations (NGOs) as well as community organizations and human rights activists to secure its goals. Advocacy efforts range from targeted appeals for support of a single individual to worldwide campaigns concerning specific countries or issues. Each year the organization highlights a particular country or human rights issue and mobilizes its members and supporters to focus global opinion to achieve change.

In over 40 years of work, Amnesty International delegates have visited numerous countries and territories and met with human rights victims, observed trials, and interviewed local activists and officials.

Under the auspices of Amnesty International, research teams focus on particular countries in which they investigate reports of human rights abuses. The organization strives to be rigorous in its investigations, checking and cross-checking information and trying to get corroboration from as many sources as possible. Information comes from interviews and meetings with prisoners and their families, lawyers and journalists, as well as persons working for other human rights organizations, humanitarian agencies, and local community groups. Investigators also monitor the information contained in newspapers, journals, and Web sites. In addition, whenever possible, investigators observe trial proceedings and meet with government officials. Where reports of abuses arise in countries that deny access to Amnesty International, the organization relies on outside sources such as reports from news media and interviews with REFUGEES, diplomats, and other sources.

To ensure accuracy and impartiality, the organization's International Secretariat approves the text of all organization statements or reports. If information is alleged rather than based on observable facts, the organization notes that the statements are based on allegations. If a statement or report contains errors, Amnesty International is quick to acknowledge its mistakes. As a result, the organization has a worldwide reputation for accuracy and reliability. In 1977, Amnesty International was awarded the Nobel Peace Prize, and in 1978 the organization received a UNITED NATIONS Human Rights Award.

The organization's specialist networks include the following: Lawyers' Network, which helped with ratification of legislation to establish the INTERNATIONAL CRIMINAL COURT; the Military Security and Police Network, which continues to campaign for the control of electro-shock weapons and other arms used to commit human rights abuses; the Company Approaches Network, which works with companies to help them develop policies that are compatible with human rights standards; the Children's Network, which lobbies states to help prohibit the involvement of "children soldiers" in armed conflicts; the Women's Network and the Lesbian, Gay, Bisexual, and Transgender Network, which have campaigned on numerous issues concerning torture and ill-treatment based on gender and/or sexual orientation; and the Medical Network, which consists of doctors, nurses, psychologists, and other health professionals who have provided aid to victims of torture and other types of abuse.

The organization developed its first global campaign against torture in 1973, and in 1984 the United Nations (UN) passed the Convention Against Torture, which called for governments to punish those who committed torture within their jurisdictions and which took effect in June of 1987. As of February 2001, 123 of the 192 UN member nations have ratified the Convention.

In 2001, Amnesty International continued its focus on the torture and abuse of women, children, ethnic minorities, and persons discriminated against based on sexual orientation including homosexual, bisexual, and transgendered persons. At year's end, more than 35,000 persons from 188 countries had signed up at AI's Web site, <www.stoptorture.org>, indicating their willingness to send E-MAIL appeals regarding urgent cases. In the same year, Amnesty International supporters took action on behalf of more than 2,813 persons who were identified as being the victims of human rights abuses.

The Internet has been extremely useful to Amnesty International in reaching members to quickly organize campaigns and to mobilize for other purposes. Via its Web site, E-mail, and other methods of communication, the organization issues "Urgent Actions," Rapid Response

Actions, and special campaign appeals. Over time, Amnesty International has proven that a steady stream of letters, faxes, e-mails, and other communications sent to government officials and others regarding the fate of a particular person or group of persons, has a tangible effect. Torture and mistreatment has been stopped and, in a number of cases, the subjects of the letter campaigns have been released. AI members and supporters are also encouraged to send positive letters and other communications to governments that have released prisoners or taken other steps to alleviate human rights abuses in order to reinforce the importance to the global community of these cases.

Amnesty International has been a major factor in a number of victories including an international agreement to ban torture, an increasing number of countries that reject CAPITAL PUNISHMENT, and, in 2003, the inauguration of the International Criminal Court in the Hague, Netherlands.

Yet the organization continues to face many obstacles. Although torture has been banned by international agreement, it continues secretly in many countries. Moreover, the governments and political organizations of numerous countries still permit or participate in the wrongful imprisonment and the disappearance of political prisoners as well as other human rights abuses.

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CROSS-REFERENCES

International Court of Justice; International Law; Prisoner of War; Prisoners' Rights.

## AMORTIZATION

*The reduction of a debt incurred, for example, in the purchase of stocks or bonds, by regular payments consisting of interest and part of the principal made over a specified time period upon the expiration of which the entire debt is repaid. A mortgage is amortized when it is repaid with periodic payments over a particular term. After a certain portion of each payment is applied to the interest on the debt, any balance reduces the principal.*

*The allocation of the cost of an intangible asset, for example, a patent or* COPYRIGHT*, over its estimated useful life that is considered an expense of doing business and is used to offset the earnings of the asset by its declining value. If an intangible asset has an indefinite life, such as good will, it cannot be amortized.*

Amortization is not the same as depreciation, which is the allocation of the original cost of a tangible asset computed over its anticipated useful life, based on its physical wear and tear and the passage of time. Amortization of intangible assets and depreciation of tangible assets are used for tax purposes to reduce the yearly income generated by the assets by their decreasing values so that the tax imposed upon the earnings of assets is less. Amortization differs from depletion, which is a reduction in the book value of a natural resource, such as a mineral, resulting from its conversion into a marketable product. Depletion is used for a similar tax purpose as amortization and depreciation—to reduce the yearly income generated by the asset by the expenses involved in its sale so that less tax will be due.

## AMOTION

*Putting out; removal; taking away; dispossession of lands.*

Amotion essentially means the deprivation of possession. The term has been used to describe a wrongful seizure of personal chattels.

The most common legal use of the word is in corporation law. In that context, amotion is the ousting of an officer from his or her post in the corporation prior to the end of the term for which the officer was appointed or elected, without taking away the person's right to be a member of the corporation. It can be distinguished from DISFRANCHISEMENT, which is the total expulsion of a corporation's officer or official representative.

## AMOUNT IN CONTROVERSY

*The value of the relief demanded or the amount of monetary damages claimed in a lawsuit.*

Some courts have jurisdiction, or the power to hear cases, only if the amount in controversy is more or less than an amount specified by law. For example, federal district courts can hear lawsuits concerning questions of federal law and

*A sample legal form involving amortization*

**Amortization Provision with an Acceleration Clause**

**MORTGAGE**

THIS INDENTURE, made as of the _____ day of _____, 20__, by and between _____, (Mortgagor), and _____, (Mortgagee).

AMOUNT OF LIEN:

WHEREAS, Mortgagor is justly indebted to Mortgagee in the sum of _____ dollars ($ ____) and has agreed to pay the same, with interest thereon, according to the terms of a certain note (Note) given by Mortgagor to Mortgagee, which is attached hereto as Exhibit A.

DESCRIPTION OF PROPERTY SUBJECT TO LIEN:

NOW, THEREFORE, in consideration of the premises and the sum set forth above, and to secure the payment of the Secured Indebtedness as defined herein, Mortgagor by these presents does grant, bargain, sell and convey unto Mortgagee the property located at _____, more particularly described as:

Together with all buildings, structures and other improvements now or hereafter located on, above or below the surface of the property; and,

Together with all the common elements appurtenant to any parcel, unit or lot which is all or part of the Premises; and,

ALL the foregoing encumbered by this Mortgage being collectively referred to herein as the Premises;

TO HAVE AND TO HOLD the Premises hereby granted to the use, benefit and behalf of the Mortgagee, forever. Conditioned, however, that if Mortgagor shall promptly pay or cause to be paid to Mortgagee, at its address listed in the Note, or at such other place, which may hereafter be designated by Mortgagee, its successors or assigns, with interest, the principal sum of _____ dollars ($_____) with final maturity, if not sooner paid, as stated in said Note unless amended or extended according to the terms of the Note executed by Mortgagor and payable to the order of Mortgagee, then these presents shall cease and be void, otherwise these presents shall remain in full force and effect.

COVENANTS OF MORTGAGOR

Mortgagor covenants and agrees with Mortgagee as follows:

Secured Indebtedness. This Mortgage is given as security for the Note and also as security for any and all other sums, indebtedness, obligations and liabilities of any and every kind arising, under the Note or this Mortgage, as amended or modified or supplemented from time to time, and any and all renewals, modifications or extensions of any or all of the foregoing (all of which are collectively referred to herein as the Secured Indebtedness), the entire Secured Indebtedness being equally secured with and having the same priority as any amounts owed at the date hereof.

Performance of Note, Mortgage, Etc. Mortgagor shall perform, observe and comply with all provisions hereof and of the Note and shall promptly pay, in lawful money of the United States of America, to Mortgagee the Secured Indebtedness with interest thereon as provided in the Note, this Mortgage and all other documents constituting the Secured Indebtedness.

Extent Of Payment Other Than Principal And Interest. Mortgagor shall pay, when due and payable, (1) all taxes, assessments, general or special, and other charges levied on, or assessed, placed or made against the Premises, this instrument or the Secured Indebtedness or any interest of the Mortgagee in the Premises or the obligations secured hereby; (2) premiums on policies of fire and other hazard insurance covering the Premises, as required herein; (3) ground rents or other lease rentals; and (4) other sums related to the Premises or the indebtedness secured hereby, if any, payable by Mortgagor.

Care of Property. Mortgagor shall maintain the Premises in good condition and repair and shall not commit or suffer any material waste to the Premises.

Prior Mortgage. With regard to the Prior Mortgage, Mortgagor hereby agrees to: (1) Pay promptly, when due, all installments of principal and interest and all other sums and charges made payable by the Prior Mortgage; (2) Promptly perform and observe all of the terms, covenants and conditions required to be performed and observed by Mortgagor under the Prior Mortgage, within the period provided in said Prior Mortgage; (3) Promptly notify Mortgagee of any default, or notice claiming any event of default by Mortgagor in the performance or observance of any term, covenant or condition to be performed or observed by Mortgagor under any such Prior Mortgage. (4) Mortgagor will not request nor will it accept any voluntary future advances under the Prior

Mortgage without Mortgagee's prior written consent, which consent shall not be unreasonably withheld.

[continued]

*A sample legal form involving amortization (continued)*

**Amortization Provision with an Acceleration Clause**

DEFAULTS

Default. The occurrence of any one of the following events which shall not be cured within _____ days after written notice of the occurrence of the event, if the default is monetary, or which shall not be cured within _____ days after written notice, if the default is non-monetary, shall constitute an Event of Default: (1) Mortgagor fails to pay the Secured Indebtedness, or any part thereof, or the taxes, insurance and other charges, as herein before provided, when and as the same shall become due and payable; (2) Any material warranty of Mortgagor herein contained, or contained in the Note, proves untrue or misleading in any material respect; (3) Mortgagor materially fails to keep, observe, perform, carry out and execute the covenants, agreements, obligations and conditions set out in this Mortgage, or in the Note; (4) Foreclosure proceedings (whether judicial or otherwise) are instituted on any mortgage or any lien of any kind secured by any portion of the Premises and affecting the priority of this Mortgage.

Upon the occurrence of any Event of Default, the Mortgagee may immediately do any one or more of the following: (1) Declare the total Secured Indebtedness, including without limitation all payments for taxes, assessments, insurance premiums, liens, costs, expenses and attorney's fees herein specified, without notice to Mortgagor (such notice being hereby expressly waived), to be due and payable at once, by foreclosure or otherwise; (2) In the event that Mortgagee elects to accelerate the maturity of the Secured Indebtedness and declares the Secured Indebtedness to be due and payable in full at once as provided for herein, or as may be provided for in the Note, then Mortgagee shall have the right to pursue all of Mortgagee's rights and remedies for the collection of such Secured Indebtedness, whether such rights and remedies are granted by this Mortgage, any other agreement, law, equity or otherwise, to include, without limitation, the institution of foreclosure proceedings against the Premises under the terms of this Mortgage and any applicable state or federal law.

MISCELLANEOUS PROVISIONS

Prior Liens. Mortgagor shall keep the Premises free from all prior liens (except for those consented to by Mortgagee).

Notice, Demand and Request. Every provision for notice and demand or request shall be deemed fulfilled by written notice and demand or request delivered in accordance with the provisions of the Note relating to notice.

Severability. If any provision of this Mortgage shall, for any reason and to any extent, be invalid or unenforceable, the remainder of the instrument in which such provision is contained, shall be enforced to the maximum extent permitted by law.

Governing Law. The terms and provisions of this Mortgage are to be governed by the laws of the State of _____. No payment of interest or in the nature of interest for any debt secured in part by this Mortgage shall exceed the maximum amount permitted by law.

Descriptive Headings. The descriptive headings used herein are for convenience of reference only, and they are not intended to have any effect whatsoever in determining the rights or obligations of the Mortgagor or Mortgagee and they shall not be used in the interpretation or construction hereof.

Attorney's Fees. As used in this Mortgage, attorneys' fees shall include, but not be limited to, fees incurred in all matters of collection and enforcement, construction and interpretation, before, during and after suit, trial, proceedings and appeals. Attorneys' fees shall also include hourly charges for paralegals, law clerks and other staff members operating under the supervision of an attorney.

Exculpation. Notwithstanding anything contained herein to the contrary, the Note which this Mortgage secures is a non-recourse Note and such Note shall be enforced against Mortgagor only to the extent of Mortgagor's interest in the Premises as described herein and to the extent of Mortgagor's interest in any personalty as may be described herein.

IN WITNESS WHEREOF, the Mortgagor has caused this instrument to be duly executed as of the day and year first above written.

_____
**Mortgagor**

STATE OF )
COUNTY OF )

Subscribed and sworn before me this the _____ day of _____, 20_____.

Witness my hand and seal.

_____ My commission expires:
**Notary Public**

**Warning:**

**These forms are provided AS IS. They may not be any good. Even if they are good in one jurisdiction, they may not work in another. And the facts of your situation may make these forms inappropriate for you. They are for informational purposes only, and you should consult an attorney before using them.**

controversies between citizens of different states, but they can do this only if the amount in controversy is more than $50,000. Some lower-level state courts, such as those that hear small claims, have no authority to hear controversies involving more than certain maximum amounts.

When the amount in controversy determines the court's authority to hear a particular case, it may also be called the jurisdictional amount.

## ANALOGY

*The inference that two or more things that are similar to each other in some respects are also similar in other respects.*

An analogy denotes that similarity exists in some characteristics of things that are otherwise not alike.

In a legal argument, an analogy may be used when there is no precedent (prior case law close in facts and legal principles) in point. Reasoning by analogy involves referring to a case that concerns unrelated subject matter but is governed by the same general principles and applying those principles to the case at hand.

## ANARCHISM

*The theory espousing a societal state in which there is no structured government or law or in which there is resistance to all current forms of government.*

Anarchists promote the absence of rules, which leads to the absence of any identifiable social structure beyond that of personal autonomy. When ANARCHY becomes defined by one anarchist, other anarchists may feel bound to change it.

Anarchism thus means different things to different believers. Anarchists do not hold common views on subjects such as desirable levels of community cooperation and the role of large industry in society. Another matter of continuing debate is whether anarchy is an end unto itself or simply the best means to a better government. To all anarchists, though, anarchy is the best refuge from political dogma and authority. Moreover, many anarchists agree that anarchism begins with the notion that people are inherently good, or even perfect, and that external authority—laws, governments, institutions, and so forth—limits human potential. External authority, they suggest, brings a corruption of the innocent human spirit and a ceiling on achievement.

Commentators on anarchism differentiate between "classical" theories of anarchy and more modern movements. Classical anarchists focused more heavily on the opposition to state control and capitalist society. Their strongest opposition was directed at government and the church. Many of the early anarchists were essentially socialists, and anarchist theories played a significant part in the socialist movements during the early twentieth century.

Beginning in about the 1960s, anarchism shifted its focus to a more general opposition to public and private hierarchy and domination of the working class. Modern anarchists tend to focus upon such issues as those related to patriarchy, racism, nature, and technology, and the effects these concepts have on society. One camp of anarchist theorists advocates a theory of anarcho-syndicalism, and those that subscribe to this theory promote a massive, leaderless movement of the working class intended to take control from those with public and private authority.

Modern anarchists directed their opposition against such pro-capitalist and quasi-governmental entities as the World Trade Organization, the WORLD BANK, and the INTERNATIONAL MONETARY FUND. Anarchists became the focus of national attention in the late 1990s and early 2000s when they staged massive protests against World Trade Organization meetings in such U.S. cities as Seattle, Washington, and Eugene, Oregon. Although anarchists claim these protests were peaceful until law enforcement officers disrupted them, others consider these anarchists to be violent and unruly revolutionaries.

William Godwin (1756–1836) is widely regarded as the first to give anarchy a comprehensive intellectual foundation. Godwin, the son of a Calvinist minister, argued that the state and its laws were enslaving people instead of freeing them. According to Godwin, government was necessary only to prevent injustice and external invasion. With every person educated in sincerity, independence, self-restraint, and seriousness, any more governmental activity would be unnecessary.

Godwin opposed the rise of liberal democracy in the late 1700s. In the wake of the American and French Revolutions, he observed, "electioneering is a trade so despicably degrading, so eternally incompatible with moral and mental dignity that I can scarcely believe a truly great mind capable of the dirty drudgery of such vice." Godwin's observations and proposals were

largely ignored during his lifetime, but they informed anarchists several decades later, when the brutal working conditions and "wage slavery" of industrialism began to present new reasons for revolt.

Two well-known anarchists, EMMA GOLDMAN (1869–1940) and Alexander Berkman (1870–1936), gained recognition in the 1890s. Goldman, the daughter of Jewish merchants, immigrated to the United States from Russia in 1885 at the age of 16. In Rochester, New York, Goldman worked in a sweat shop—a large, unsafe factory that paid low wages and demanded long hours. The experience radicalized Goldman, and with her natural flair for public speaking, she soon became a spokeswoman for anarchism. Goldman worked extensively for the INDUSTRIAL WORKERS OF THE WORLD (IWW), an organization dedicated to *anarcho-syndicalism,* which seeks to use the industrial union as the basis for a reorganization of society. Goldman's cross-country lecture tours, in which she addressed a broad range of social topics in German and English, earned her a reputation as a witty speaker and provocative thinker. A voracious reader and a magazine publisher, Goldman gave voice to ideas on sexuality, free love, BIRTH CONTROL, and family structures that shocked members of her generation, including fellow anarchists.

Like many devout anarchists, Goldman had trouble with the law. She was imprisoned for a year for allegedly inciting a riot during a New York City hunger demonstration in 1893. Goldman also served a two-week sentence for distributing illegal birth control information. She was jailed on suspicion of complicity in the assassination of President WILLIAM MCKINLEY, in 1901. In 1917, she was arrested with Berkman for participating in antiwar protests, and both were charged with violating the Selective Service Act of 1917 (40 Stat. 76) by inducing young men to resist the draft. Goldman and Berkman were convicted, and, despite appeals to the U.S. Supreme Court, both served prison terms. Upon release in 1919, they were deported to Russia.

Berkman, Goldman's ally, shared Goldman's passion for breaking social barriers and inspiring creative thought. He also possessed a violent streak. In 1892, he was arrested for attempting to assassinate steel magnate Henry Clay Frick during a steel strike. After serving a 14-year prison sentence, Berkman devoted the rest of his life to freeing imprisoned political radicals and promoting workers' rights. He remained a close companion of Goldman until his death in 1936.

*On July 9, 1917, Emma Goldman and Alexander Berkman were sentenced to two-year prison terms for violating the Selective Service Act of 1917.*

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Goldman and Berkman cut dashing figures as romantic, intellectual anarchists, and they played no small part in a modest rise of anarchism in the early 1900s. Although anarchism still gains followers in COLLEGES AND UNIVERSITIES and among self-styled intellectuals, it has been mostly dormant as a social force since the Great Depression of the 1930s.

Many anarchists have suffered the bemusing fate of being convicted for breaking laws in which they do not believe. However, the justice system does occasionally protect the anarchist. In *Fiske v. Kansas,* 274 U.S. 380, 47 S. Ct. 655, 71 L. Ed. 1108 (1927), Harold B. Fiske was charged in Rice County, Kansas, with violating the Kansas Criminal Syndicalism Act (Laws Sp. Sess. 1920, c. 37). Fiske had been arrested for promoting the Workers' Industrial Union (WIU), an organization devoted in part to establishing worker control of industry and the abolition of the wage system.

Under the syndicalism statute in Kansas, any person advocating "the duty, necessity, propriety or expediency of crime, criminal syndicalism, or sabotage … is guilty of a felony" (1920 Kan. Sess. Laws ch. 37, § 3). Criminal syndicalism was defined as the advocation of crime, physical violence, or destruction of property "as a means of effecting industrial or political revolution, or for profit" (§ 1). Kansas authorities charged Fiske with criminal syndicalism, citing only the preamble to the constitution of the IWW, the par-

ent organization of Fiske's WIU. This preamble stated, in part, that "a struggle must go on until the workers of the World organize as a class, take possession of the earth, and the machinery of production and abolish the wage system" (*Fiske*).

The U.S. Supreme Court found insufficient evidence against Fiske to warrant conviction of criminal syndicalism. According to the Court, there was no suggestion that "getting possession of the machinery of production and abolishing the wage system, was to be accomplished by other than lawful means." The Court confirmed that a state may enact legislation to protect its government from insurrection, but it may not be ARBITRARY or unreasonable in policing its citizens who advocate changes in the social order.

FURTHER READINGS

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Joll, James. 1964 *The Anarchists.* Boston: Little, Brown.

Nozick, Robert. 1975. *Anarchy, State and Utopia.* New York: Basic Books.

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CROSS-REFERENCES

Chicago Eight; Freedom of Speech; Goldman, Emma; Industrial Workers of the World; Rousseau, Jean Jacques.

## ANCIENT LIGHTS

*A doctrine of English* COMMON LAW *that gives a landowner an* EASEMENT *or right by prescription to the unobstructed passage of light and air from adjoining land if the landowner has had uninterrupted use of the lights for twenty years.*

Once a person gains the right to ancient lights, the owner of the adjoining land cannot obscure them, such as by erecting a building. If the neighbor does so, he or she can be sued under a theory of NUISANCE, and damages could be awarded.

The doctrine of ancient lights has not been adopted in the United States since it would greatly hinder commercial and residential growth and the expansion of towns and cities.

## ANCIENT WRITING

*An original document affecting the transfer of real property, which can be admitted as evidence in a lawsuit because its aged condition and its location upon discovery sufficiently establish its authenticity.*

Under COMMON LAW, an ancient writing, sometimes called an ancient document, could be offered as evidence only if certain conditions were met. The document had to be at least thirty years old, the equivalent of a generation. It had to appear genuine and free from suspicion. For example, if the date of the document or the signatures of the parties to it appeared to have been altered, it was not considered genuine. When found, the document must have been in a likely location or in the possession of a person who would logically have had access to it, such as a deed found in the office of the county clerk or in the custody of the attorney for one of the parties to the writing. An ancient writing must also have related to the transfer of real property, for example, a will, a deed, or a mortgage. When all these requirements were met, an ancient writing was presumed to be genuine upon its presentation for admission as evidence without any additional proof.

Today various state RULES OF EVIDENCE and the FEDERAL RULES OF EVIDENCE have expanded the admissibility of ancient writings. An ancient writing can now be offered as evidence if its condition does not suggest doubt as to its authenticity, if it is found in a likely place, and if it is at least twenty years old at the time it is presented for admission into evidence.

Some states still adhere to the requirement that a document be at least thirty years old before it comes within the ancient writing exception to the HEARSAY rule. A few states recognize ancient documents only if, in addition to these basic requirements, the person seeking the admission of the ancient writing has taken possession of the property in question.

An ancient writing is admissible in a trial as an exception to the rule that prohibits hearsay from being used as evidence in a trial. In a case where no other evidence exists, the legitimacy of the writing must be considered if the case is to be determined on its merits. The probability that such a document is trustworthy is determined by its condition and location upon discovery. These factors permit a court and a jury to presume the authenticity of an ancient writing.

## ANCILLARY

*Subordinate; aiding. A legal proceeding that is not the primary dispute but which aids the judgment rendered in or the outcome of the main action. A descriptive term that denotes a legal claim, the*

*existence of which is dependent upon or reasonably linked to a main claim.*

For example, a plaintiff wins a judgment for a specified sum of money against a defendant in a NEGLIGENCE action. The defendant refuses to pay the judgment. The plaintiff begins another proceeding for a writ of attachment so that the judgment will be satisfied by the sale of the defendant's property seized under the writ. The attachment proceeding is ancillary, or subordinate, to the negligence suit. An ancillary proceeding is sometimes called an ancillary suit or bill.

A claim for ALIMONY is an ancillary claim dependent upon the primary claim that there are sufficient legal grounds for a court to grant a DIVORCE.

## ANCILLARY ADMINISTRATION

*The settlement and distribution of a decedent's property in the state where it is located and which is other than the state in which the decedent was domiciled.*

Ancillary administration occurs in a state to enable an executor or administrator to collect assets or to commence litigation on behalf of the estate in that jurisdiction.

## ANIMAL RIGHTS

*Protection of animals from cruelty through requirements of humane treatment. Laws protecting animal rights proscribe certain forms of brutal and merciless treatment of animals in medical and scientific research and in the handling of and slaughter of animals for human consumption.*

By the end of the 1980s, membership in animal advocacy organizations had reached 10 million people in the United States and opposition to the use of animals in laboratory experiments was rapidly growing. By 1990, some 76 medical schools claimed that demonstrations and break-ins by animal rights advocates had cost them more than $4.5 million, according to a report from the Association of American Medical Colleges.

As the conflict between animal rights activists and medical and scientific researchers has grown, federal and state regulation of activities involving animal research has also expanded. At the federal level, the Animal Welfare Act (7 U.S.C.A. § 2131 et seq. [1994]) regulates the treatment of animals used in federally funded research. Under amendments added to the act in 1985, the secretary of agriculture was required to promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors. These standards were to include minimum requirements for housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperature, adequate veterinary care, and separation by species where necessary; for exercise of dogs, as determined by an attending veterinarian; and for a physical environment adequate to promote the psychological well-being of primates. In addition, the standards were to include requirements for animal care, treatment, and practices in experimental procedures in research facilities.

In February 1991, the secretary of agriculture issued final regulations under the act (56 Fed. Reg. 6426; 9 C.F.R. § 3). Shortly thereafter, two animal rights organizations, the Animal Legal Defense Fund and the Society for Animal Protective Legislation, along with several individuals, sued the U.S. DEPARTMENT OF AGRICULTURE (USDA), claiming that the final regulations were ARBITRARY and capricious, in violation of the Administrative Procedure Act (APA) (5 U.S.C.A. § 551 et seq. [1994]). Under the APA, a court can compel agency action that is unlawfully withheld or unreasonably delayed and can set aside agency action that is arbitrary and capricious, an ABUSE OF DISCRETION, or otherwise in violation of the law.

The plaintiffs challenged the USDA on several grounds, including the lack of minimum requirements regarding exercise for dogs and the psychological well-being of primates; the amount of delay permitted under the regulations in complying with new cage requirements; and the loophole in the regulations' provision for special cage designs, which permitted facilities to evade the existing minimum requirements for cage sizes.

In February 1993, a federal district court found that the USDA's treatment of laboratory animals waiting to be used in biomedical experiments violated federal statutes providing for the humane treatment of such animals. In *Animal Legal Defense Fund v. Secretary of Agriculture,* 813 F. Supp. 882 (1993), the U.S. District Court for the District of Columbia ruled that the regulations enacted by the secretary of agriculture and the USDA failed to comply with the mandate of Congress to ensure the well-being and humane treatment of animals, notwithstanding the importance of research.

# Welcome to the Monkey Lab: The Battle over Animal Research

In May 1981, Alex Pacheco, cofounder of an animal rights organization called **PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS** (PETA), went to work as a volunteer at the Institute for Behavioral Research, a private research center in Silver Spring, Maryland. Pacheco told the institute's chief research scientist, Edward Taub, that he was fascinated by animal research. Taub's research involved the surgical crippling of monkeys using a procedure called deafferentation, in which the spinal cord is opened and various nerves leading to arms and legs are sliced away, causing numbness.

At the time Pacheco joined his lab, Taub had performed the procedure on 17 macaques, attempting to show that function could be restored to limbs by forcing new nerve growth. He had destroyed the nerves to only one arm on some of the monkeys, and then used straitjackets, binding up the good arms to force the animals to use their damaged arms, and had also applied electric shock to restrained monkeys if they did not move their numbed limbs. Taub planned to kill the monkeys after a year in order to determine whether this forced movement had stimulated nerve growth.

After receiving permission from Taub to work at night, Pacheco set to work documenting the filthy, cramped conditions of the lab, and the stressed behavior of the monkeys, many of which were chewing their numbed limbs open. With his PETA cofounder, Ingrid Newkirk, stationed outside with a walkie-talkie, Pacheco took photographs and brought in sympathetic veterinarians and scientists to provide affidavits about the lab conditions. Several months later, he took his documentation to the local police department, which seized the lab's monkeys and filed 17 charges of animal cruelty against Taub, under state law. The scientist was convicted on all the charges, but an appellate court decided that a federally-funded researcher was not required to comply with state laws. Eventually, Taub's lab lost its federal funding and discontinued animal research.

Many participants in the debate over animal rights view the 1981 seizure of the Silver Spring monkeys as a turning point for the animal rights movement in the United States, heading it in a more combative and less compromising direction.

Animal welfare has long been an issue in the United States. As early as the mid-1600s, the Puritans prohibited cruelty toward animals, and by the nineteenth century, groups such as the American Society for the Prevention of Cruelty to Animals and the American Anti-Vivisection Society had been organized. Animal experimentation has been controversial not only between the animal rights movement and the scientific and medical research communities but also between the activist groups themselves.

Supporters of the use of animals in research are as adamant in their advocacy of the use of animals in research as animal rights activists are in their opposition to such use. Supporters of the use of animals in research point out that virtually every major advancement in medicine during the past century has been made possible by the use of animals in research. Researchers point out that, with the use of animals as subjects, scientists may be capable of curing or reducing the death and disability rates caused by such diseases as kidney and liver failure, birth defects, cancer, and AIDS. Former U.S. **SURGEON GENERAL** Joycelyn Elders said, "The use of animals in biomedical research and testing has been, and will continue to be, absolutely critical to the progress against AIDS and a wide range of other applications in both humans and animals."

The defendants appealed the district court's decision. In *Animal Legal Defense Fund v. Espy,* 29 F.3d 720 (1994), the U.S. Court of Appeals for the District of Columbia Circuit ruled that the animal rights organizations and other plaintiffs did not have standing to challenge the USDA. (*Standing* is a legal requirement that the plaintiff must have been injured or threatened with injury by the action complained of and focuses on the question of whether the plaintiff is the proper party to bring the lawsuit.) Because the plaintiffs lacked standing, the court ordered that the case be dismissed.

Whereas the Animal Welfare Act governs the general treatment of research animals, other federal statutes govern the testing procedures that may be used on animals in the course of scientific and commercial research and in product testing. The Toxic Substances Control Act (15 U.S.C.A. § 2601 et seq. [1994]) authorizes the use of two procedures that have been particularly controversial: the Draize test and the lethal dose 50 (LD50) test.

The Draize test measures the irritancy of a substance such as a cosmetic or pesticide by applying it to the eyes of live rabbits for twenty-four hours. The LD50 test is used to calculate the median lethal dose of a substance by feeding it to a defined population of animals until 50 per-

The biomedical research industry has responded vigorously to criticisms of animal research. A 1988 study by the National Research Council, the research arm of the National Academy of Sciences, acknowledged the controversy over animal testing, stating that although animal research has saved human lives, it has caused suffering and death for the animals involved. Nevertheless, the study concluded that such experimentation has contributed significantly to the increase in human life expectancy since 1900 and that animals have been critical to research on most antibiotics and other drugs. Frankie Trull, executive director of the National Association for Biomedical Research, has argued that animal testing is necessary to sustain the human race.

Supporters of animal research frequently direct attack towards animal rights activists, often labeling animal rights groups as "extremists." Joseph Murray, who in 1990 won the Nobel Prize for medicine in recognition of his work on organ transplants, said, "None of this could have been done without animal experimentation. It's a tragedy and a waste of resources that scientists have to combat the anti-vivisectionists," referring to animal rights groups. Animal research supporters often argue that the tactics employed by animal rights groups impede the progress being made in the medical community through the use of animals in research.

The supporters of animal research and the animal rights activists have clashed in both the courts and in the legislatures. Concerned that animal rights activists would cause the dismantling of all animal research, the biomedical research community lobbied successfully for years against the passage of all legislation restricting such research. But in the early 1950s, Christine Stevens founded the Animal Welfare Institute and the Society for Animal Protective Legislation, which successfully worked against passage of state laws that would require pounds to turn their dogs and cats over to researchers. Stevens then began working for passage of federal legislation that would also protect laboratory animals. In 1966, Congress enacted the Animal Welfare Act (7 U.S.C.A. § 2131 et seq. [1994]), which regulates the treatment of animals in federally funded research. Congress charged the **U.S. DEPARTMENT OF AGRICULTURE** (USDA) with overseeing the inspection of laboratories for compliance.

In 1985, after Stevens documented continuing inhumane laboratory conditions, the Animal Welfare Act was amended to strengthen standards for the humane handling, treatment, and transportation of animals by dealers, research facilities, and exhibitors. In 1991, the secretary of agriculture issued regulations implementing the amended act.

During this period, the animal protection movement continued to expand. By the early 1990s, PETA had grown to more than 400,000 members and had an annual budget of nearly $10 million. Over 400 animal rights groups had been organized in the United States, claiming a total membership of 10 million. Although each of these groups can be said to support the humane treatment of animals, their philosophies vary dramatically.

The most radical group is the Animal Liberation Front (ALF), an underground organization formed in 1982 with an estimated worldwide membership of several hundred as of the mid-1990s. ALF opposes the use of all animals in medical and scientific research, including psychological and surgical experimentation on living animals; ALF also opposes using animals for testing new drugs and cosmetics, for instructional purposes in biology and medical school classes, and for food, clothing, sports, circuses, and pets. ALF claimed responsibility for more than 75 attacks in the United States between 1979 and 1995, including stealing animals from labs in Arizona, California, Florida, Maryland, Oregon, Pennsylvania, and Washington, D.C.; burning and vandalizing the University of Arizona's veterinary lab and a new $3 million veterinary diagnostic center for farm animals at the University of California, Davis; vandalizing offices of researchers and stealing their research animals in Michigan and Texas; and starting small fires in four of Chicago's largest department stores to protest the sale of furs. Although most of ALF's targets have been scientific research labs, the group claimed

*(continued)*

cent of them die. Some product manufacturers, such as Avon Products, Revlon, Faberge, Amway Corporation, Mary Kay Cosmetics, and Noxell Corporation, have discontinued some or all animal testing as a result of continued protests over the use of these tests.

During the late 1980s, the **FEDERAL BUREAU OF INVESTIGATION** reported more than fifty incidents of **VANDALISM** annually at research facilities and attacks on researchers themselves. In response, the U.S. Congress and numerous state legislatures enacted protective legislation. In August 1992, Congress passed the Animal Enterprise Protection Act (18 U.S.C.A. § 43 [1994]), which provides, in part, that anyone who "intentionally causes physical disruption to the functioning of an animal enterprise by intentionally stealing, damaging, or causing the loss of any property (including animals or records) used by the animal enterprise, and thereby causes economic damage exceeding $10,000 to that enterprise, or conspires to do so shall be fined under this title or imprisoned not more than one year, or both."

If serious bodily injury or death to another person occurs in the course of the prohibited activity, the statute provides for imprisonment up to a life term. The act defines an animal

## WELCOME TO THE MONKEY LAB: THE BATTLE OVER ANIMAL RESEARCH (CONTINUED)

responsibility for bombing the cars of two research scientists in England in June 1990. ALF has also conducted raids in more than a dozen other countries.

By 1988, in response to raids by ALF and other groups, more than 20 states had enacted protective legislation prohibiting interference with animal research and agricultural facilities. In August 1992, citing the inability of state and local law enforcement agencies to conduct interstate or international investigations, Congress passed comparable federal legislation. The Animal Enterprise Protection Act of 1992 (18 U.S.C.A. § 43 [1994]) prohibits the disruption of "animal enterprises" such as research facilities and zoos by intentionally stealing or damaging property including animals or records.

Many scientists believe that ALF is a thinly disguised division of PETA. PETA denies any connection between the two groups but has expressed its admiration for ALF's activities and often publicizes the group's raids. Both ALF and PETA share a common goal of ending all animal research, a philosophy that represents a fundamental split from other animal rights organizations such as Stevens's Animal Welfare Institute and the Humane Society of the United States, which accept animal experimentation but work for the humane treatment of animals in that and other contexts.

Supporters of animal research debunk many of the claims of animal rights activities as pure myths. For instance, animal rights activists often direct their attention towards the use of such animals as dogs, cats, and nonhuman primates in medical research, but scientists point out that the use of such animals accounts for less than 1 percent of the total number of animals used in research. The vast majority of animals used in research, according to these scientists, are rodents, including mice and rats bred specifically for the purpose of testing them. Similarly, these scientists refute animal rights advocates' claims that alternatives to animal research exist in the form of computer models and tissue cultures but that the scientific community refuses to accept them. Scientists claim that even the most sophisticated technological model cannot replicate the genetic and physiological systems of humans as those found in live animals. According to the Foundation for Biomedical Research, the limitations in the use of computer models and other alternatives may overcome the need for animals in research, but these alternative methods serve only as adjuncts to basic animal research.

In a nationwide survey conducted in December 1993 by the *Los Angeles Times,* respondents were asked whether they agreed with the following statement by PETA's Newkirk: "Animals are like us in all important things—they feel pain, act with altruism, they talk and suffer fear. They value their lives, even if we don't understand those lives." Of the 1,612 adults polled, 47 percent agreed with Newkirk's statement and 51 percent disagreed. The survey also found that 54 percent opposed hunting for sport and 50 percent opposed the wearing of fur. Forty-six percent said the laws protecting animals from inhumane treatment were satisfactory, whereas 30 percent said the laws did not go far enough, and 17 percent said the laws went too far. Animal rights leaders expressed surprise that so many Americans agreed with some of

enterprise as "(A) a commercial or academic enterprise that uses animals for food or fiber production, agriculture, research, or testing; (B) a zoo, aquarium, circus, rodeo, or lawful competitive animal event; or (C) any fair or similar event intended to advance agricultural arts and sciences."

By 1995, more than 20 states had passed similar legislation, including Alabama, Arizona, Arkansas, Colorado, Georgia, Idaho, Illinois, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New York, North Carolina, North Dakota, Oregon, South Carolina, Tennessee, Virginia, Washington, and Wisconsin.

Several states also regulate the use of animals kept in pounds for use in research. Maine prohibits the use of pound animals for any research (Me. Rev. Stat. Ann. tit. 17, § 1025 [West 1994]). California requires that any pound or animal regulation department where animals are turned over to a research facility post a sign stating "Animals Turned in to This Shelter May Be Used for Research Purposes," in a clearly visible place (Cal. Civ. Code § 1834.7 [West 1994]). In Oklahoma, pounds are required to supply unclaimed animals to research institutions, unless the owner of an animal bringing it to the pound specifies it is not to be used in research (Okla. Stat. Ann. tit. 4, § 394 [West 1994]).

At least three states regulate the sale of animals to research facilities. Minnesota law prohibits the transfer of a dog or cat by a person other than the owner to a research animal dealer, the possession of a dog or cat by a dealer without the owner's permission, or the transfer of a dog or cat by a dealer to an institution with-

the principle tenets of the animal protection movement.

A new wrinkle in the Animal Rights movement has been the attempt to gain the recognition of legal rights for animals. Animal rights advocates in both PETA and ALF had spoken for years about the need for animals to have legal rights under U.S. law. But this theory remained abstract until the end of the twentieth century.

Then in 2000, Stephen Wise published an influential animal rights book. *Rattling the Cage: Toward Legal Rights for Animals* took a legalistic approach in arguing that at least two human-like species, chimpanzees and bonobos, and perhaps other species that were similarly developed, should be considered "persons". The book was reviewed in such noted publications as the *Yale Law Journal* and the *Harvard Law Review.* Among those legal scholars discussing the book were **RICHARD POSNER**, eminent professor at the University of Chicago law school and judge for the U.S. Court of Appeals for the Ninth Circuit, and Lawrence Tribe, professor of **CONSTITUTIONAL LAW** at Harvard University.

Tribe seemed especially taken with the book's arguments. "Broadening the circle of rights-holders, or even broadening the definition of persons, I submit, is largely a matter of acculturation," said Tribe in a speech in Boston in support of the book. "It is not a matter of breaking through something, like a conceptual sound barrier. With the aid of statutes like those creating corporate persons, our legal system could surely recognize the personhood of chimpanzees, bonobos, and maybe someday of computers that are capable not just of beating Gary Kasparov but feeling sorry for him when he loses."

In 2002, Wise published a book called *Drawing the Line: Science and the Case for Animal Rights*, in which he expanded his rights arguments to include other species. But the arguments remained very similar. "On what nonarbitrary ground," he asks, "could a judge find [that a] little girl has a common-law right to bodily integrity that forbids her use in terminal biomedical research but that Koko [a gorilla with an IQ equal to that of a 4- or 5-year-old child] shouldn't have that right, without violating basic notions of equality?" What influence this nascent movement for the legal rights of animals has on the general animal rights movement promised to be interesting to observe.

Many legal commentators have been supportive or, at least, sympathetic toward the views of Wise and writers with similar opinions. Other legal scholars, on the other hand, have pointed out that granting broad rights to animals conflicts with some of the basic assumptions of the U.S. legal system, as well as the legal system elsewhere. Even where laws provide heightened protection for animals against abuse, the animals are still treated as a special form of property. If the law were to extend recognition of animals as holders of certain legal rights, their status as something greater than property raises difficult questions. For instance, when would these rights conflict with recognized **HUMAN RIGHTS**, and could the right of an animal in a certain case be greater than a right enjoyed by a human? Likewise, how can society merge the recognition of animal rights with the traditional, and in some cases, fundamental uses of animals, including their functions as sources of food and as goods and services that may be bartered? Scholarship and debate by legal experts continues to grow regarding these questions.

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out the owner's permission (Minn. Stat. Ann. § 346.55 [West 1994]). California law provides that anyone who steals an animal for purposes of sale, medical research, or other commercial use, or who knowingly defrauds another person of any animal for purposes of medical research or slaughter, may be imprisoned for up to one year (Cal. Penal Code § 487g [West 1994]). New York law prohibits the selling or giving away of a dog to a research institution without the written permission of its owner (N.Y. Agric. & Mkts. Law § 366-a [McKinney 1994]).

On the federal level, the Animal Welfare Act was amended in 1990 to regulate the use of pound animals in research. A new section titled "Protection of pets" provides that dogs and cats acquired by a pound, humane society, or similar entity or research facility must be held for not less than five days before being sold to dealers, so as to allow their recovery by their owners or their adoption by other individuals (7 U.S.C.A. § 2158 [1994]).

The use of animals in scientific, medical, and commercial research is expected to remain controversial. In her book *The Monkey Wars,* Deborah Blum advocated that animal rights activists and researchers share their viewpoints together in education programs to achieve a realistic understanding of the issues. According to Blum, such an understanding could end the two sides' long and bitter standoff.

The largest and most active animal rights group is **PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS** (PETA), originally founded in 1980 in Norfolk, Virginia. Since its founding, PETA has claimed a certain level of success in curbing

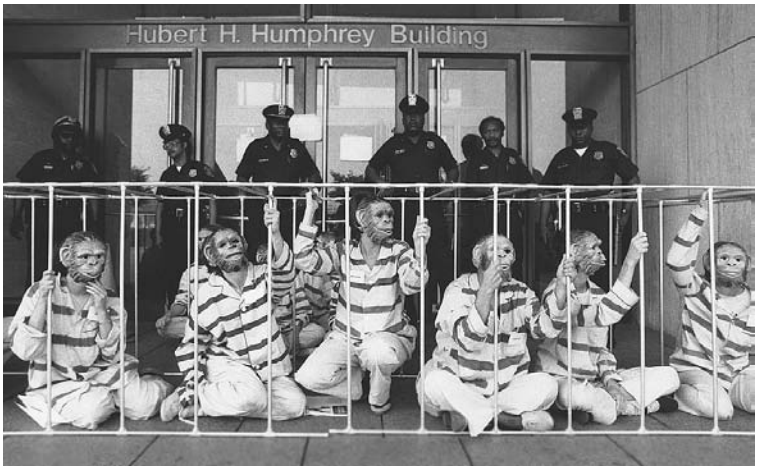


*Members of PETA stage a protest in front of the Hubert H. Humphrey Building in Washington, D.C. The group has had a significant impact on the use of animals in medical and scientific research.*

CORBIS-BETTMANN

unethical treatment of animals. Its self-proclaimed successes include the closing of the largest horse slaughterhouse in the United States, the closing of a military laboratory where animals were shot, and the end of the use of cats and dogs in wound laboratories. PETA not only details its "victories" on its web site, it also provides "action alerts" that identify instances that the group believes constitute animal cruelty.

Although PETA has had a significant impact on the use of animals in medical and scientific research, as well as other uses, its tactics have created an equal level of controversy. For instance, according to PETA president Ingrid Newkirk, human beings should not drink milk produced by cows, eat turkey meat, or wear fur because of the practices involved in preparing these goods. PETA's protests have ranged from vandalizing fur coats sold at a Macy's outlet in Boston to advocating the bombing of a New Jersey laboratory that uses animals for research. PETA claims that it does not support TERRORISM, but it has funded, for example, the legal defense of an arsonist that set fire to a Michigan research lab.

PETA has been active in the court system, with various levels of success. In one case, PETA sought entry into a public art event held in 2000 in New York City called "CowParade." One of PETA's entries showed a cow divided into sections that resembled a butcher's chart. On each of the sections was a statement or quotation "concerning the health and ethical problems associated with the killing of cows for food." The committee responsible for the parade rejected the entry as too harsh and inappropriate for the parade. PETA brought suit in the U.S. District Court for the Southern District of New York, but the trial court granted SUMMARY JUDGMENT in favor of the parade organizers, and the U.S. Court of Appeals for the Second Circuit affirmed the summary judgment. *People for the Ethical Treatment of Animals v. Giuliani*, 18 Fed. App. 35 (2d Cir. 2001).

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CROSS-REFERENCES

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## ANIMUS

*[*Latin, Mind, soul, or intention.*] A tendency or an inclination toward a definite, sometimes unavoidable, goal; an aim, objective, or purpose.*

When *animus* is used in conjunction with other words of Latin origin, its most common meaning is "the intention of." For example, *animus revocandi* is the intention of revoking; *animus possidendi* is the intention of possessing.

*Animo,* meaning "with intent," may be employed in a manner similar to *animus.* For example, *animo felonico* means with felonious intent.

## ANNEXATION

*The act of attaching, uniting, or joining together in a physical sense; consolidating.*

The term is generally used to signify the connection of a smaller or subordinate unit to a larger or principal unit. For example, a smaller piece of land may be annexed to a larger one. Similarly, a smaller document may be annexed to a larger one, such as a codicil to a will.

Although physical joining is implied, actual contact is not always necessary. For example, an annexation occurs when a country acquires new territory even though the new territory is not immediately adjacent to the existing country.

In the law of real property, annexation is used to describe the manner in which a chattel is joined to property.

CROSS-REFERENCES

Fixture.

## ANNOTATION

*A note, summary, or commentary on some section of a book or a statute that is intended to explain or illustrate its meaning.*

An annotation serves as a brief summary of the law and the facts of a case and demonstrates how a particular law enacted by Congress or a state legislature is interpreted and applied. Annotations usually follow the text of the statute they interpret in annotated statutes.

## ANNUAL PERCENTAGE RATE

*The actual cost of borrowing money, expressed in the form of a yearly measure to allow consumers to compare the cost of borrowing money among several lenders.*

The Federal Truth-in-Lending Act (15 U.S.C.A. § 1601 et seq. [1968]) mandates the complete disclosure of this rate in addition to other credit terms.

CROSS-REFERENCES

Truth in Lending Act.

## ANNUAL REPORT

*A document published by public corporations on a yearly basis to provide stockholders, the public, and the government with financial data, a summary of ownership, and the accounting practices used to prepare the report.*

Annual reports measure a corporation's financial health. They focus on past and present financial performance, and make predictions about future prospects. By law, any corporation that holds an annual meeting for stockholders or security holders is required to issue an annual report. Regulations set down by the SECURITIES AND EXCHANGE COMMISSION (SEC) specify in detail what information the report must include about the corporation's finances, markets, and management. The rules are strict: the SEC can levy stiff penalties if corporations fail to comply.

Traditionally a rather dry and factual document, the annual report has acquired a larger audience in recent years as corporations increasingly treat it as not merely a legal obligation but also a public relations opportunity. Yet, even as annual reports take on the appearance of glossy magazines, promote corporate public relations, and make political arguments, they remain bound by legal concerns about completeness and accuracy, and sometimes expose corporations to lawsuits when they fall short.

Although federal law governing the financial industry is quite old, its application to annual reports grew in complexity from the mid-1970s to the mid-1990s. This authority derives from two laws: the Securities Act of 1933 (15 U.S.C.A. § 77a et seq.) and the Securities Exchange Act of 1934 (15 U.S.C.A. § 78a–78jj). The 1933 law requires issuers of securities to file financial information with the federal government; the 1934 law authorizes the SEC to act as a regulatory body over the financial industry. In 1974, the SEC tightened requirements on annual reports by specifying a broad range of information that must be provided, and it frequently amended them in subsequent years. Corporations have consequently made greater efforts to scrutinize their reports for compliance with the law, increasing the role of lawyers in producing what was once the work of accountants.

These requirements address financial and general information. An annual report must include a balance sheet reflecting changes in the corporation's financial worth, an income and cash flow statement, and other relevant documentation, all of which must be reviewed first by outside auditors. A statement by management must analyze past performance as well as discuss prospects for the following years; if circumstances change, corporations have a duty to issue corrected information. In addition, they must make public details about products and services, domestic and foreign markets, and the backgrounds of directors and executive officers.

Corporations that fail to comply with all the requirements can face enforcement proceedings. In such cases, the commission has the power to invalidate the election of directors and decisions made at the shareholders' meeting, which can necessitate issuing a revised annual report. Administrative remedies also exist. Under the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (15 U.S.C.A. § 77g et seq.), the SEC can use violations of any securities laws to force corporations to make full disclosures in their reports. Corporations that are in the process of registering for the first time with the SEC are particularly scrutinized for overly optimistic projections.

Besides federal penalties, wishful thinking in annual reports can lead to lawsuits. Hoping to put the best spin possible on their achievements

and prospects, corporations sometimes attract CLASS ACTION suits from shareholders who allege that the corporations have exaggerated or misled the public. One of many examples is a suit brought against Pizza Time Theatre (*In re Pizza Time Theatre,* 112 F.R.D. 15 [N.D. Cal. 1986]). Its 1982 annual report had cartoon characters bragging, "We're going full speed ahead!" And so they were: nine months later, Pizza Time Theatre declared BANKRUPTCY. Shareholders brought a class action suit against the corporation and its directors, citing the report's overly optimistic tone, but the suit was discharged in bankruptcy.

Beyond requiring that annual reports meet financial and general information regulations, the law says nothing about the rest of their contents. Corporations are free to package their reports as they please, and the form itself is constantly evolving: current annual reports borrow from the flashy graphic styles of magazines, can be released on videodisc and computer disk, and sometimes even include gifts. Particularly interesting is a trend toward using these reports—usually via the president's letter—to address political issues. As powerful forces in the body politic, corporations rarely refuse an opportunity to make their influence felt on government, especially when pending legislation may affect their interests. In the early 1990s, for example, some annual reports from the medical industry targeted the ill-fated HEALTH CARE reform proposals of the Clinton administration.

Annual reports became a source of widespread public interest after the sudden collapse in 2002 of Enron, the seventh largest U.S. corporation. Within a few months other major corporations disclosed major financial difficulties, which came as a surprise to shareholders and regulators that had relied on upbeat financial information contained in these corporations' annual reports. The credibility and legitimacy of corporate financial data quickly became a topic of political debate.

The collapse of Enron was predicated on fraudulent accounting practices that concealed the amount of debt the corporation had accumulated. Federal prosecutors accused the major accounting firm of Arthur Andersen of aiding Enron's corporate officers in this enterprise and successfully won a conviction against the firm for its actions, including the destruction of documents. A careful review of Enron's annual reports revealed that certain transactions were buried in obscure footnotes or were not reported at all.

During 2002, the SEC and Congress examined the shortcomings of annual reports and other corporate reporting practices. In a bipartisan effort, Congress passed and President GEORGE W. BUSH signed the SARBANES-OXLEY ACT, also known as the Accounting Industry Reform Act, in July 2002 (Pub.L. 107-204, 116 Stat. 745, [2002]). The act seeks to address CORPORATE FRAUD by, among other things, requiring chief executive and chief financial officers to personally certify the accuracy of the financial information contained in quarterly and annual reports. The certification must state that the officers have read the report, and must confirm it contains no misstatements or omissions and that it is a fair presentation. An officer who knowingly makes a false certification will be subject to fines of up to $5 million and a prison sentence of up to 20 years. In addition, officers will be forced to repay bonuses that were based on inaccurate financial earnings.

The SEC also responded by demanding that all major U.S. corporations recertify the accuracy of their 2002 annual reports or risk prosecution. A number of corporations took the opportunity to change their financial statements. In the wake of the 2002 scandals, the expectation is that annual reports will be more accurate in detailing the financial health of corporations.

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CROSS-REFERENCES

Board of Directors; Financial Statement.

## ANNUITY

*A right to receive periodic payments, usually fixed in size, for life or a term of years that is created by a contract or other legal document.*

The most common form of an annuity is akin to a savings account. The annuitant, the person who creates an annuity for his or her own benefit, deposits a sum of money, the principal, with an individual, business, or insurance company to be invested so that the principal will earn income at a certain percentage, usually specified by the terms of the annuity. This income is used by the company to pay the annuitant. Each payment received by the annuitant, sometimes called the primary beneficiary, represents a partial return of the principal and a portion of the income generated by its investment. Such annuities are employed frequently to provide a source of income to persons upon their retirement. A group annuity contract supplies periodic payments to a retired individual member of a group of employees covered by their employer's master contract. A retirement annuity is a policy paid to the annuitant after retirement. If the annuitant dies prior to the expiration of the annuity or wants to surrender the policy, an amount specified in the terms of the annuity is returned to the annuitant's estate or designated beneficiary.

### Classification

Annuities are classified according to the nature of the payment and the duration of time for payment. A *fixed annuity* requires payment in a specified amount to be made for the term of the annuity regardless of economic changes due to inflation or the fluctuation of the ventures in which the principal is invested. A *variable annuity* provides for payments that fluctuate in size contingent upon the success of the investment of the principal. Such variation offsets the effect of inflation upon the annuitant. If, however, the investment has fared poorly, the size of the payments decreases.

A *straight annuity* is a contract by an insurance company to make variable payments at monthly or yearly intervals. A *life* or *straight life annuity* is payable to an annuitant only during the annuitant's lifetime and ceases upon his or her death. The size of the periodic payment is usually fixed based upon actuarial charts that project the expected life span of a person based upon age and physical condition. This type of annuity often contains provisions that promise payment to be made to a secondary beneficiary, named by the annuitant to receive benefits in case of the annuitant's death, or to the annuitant's heirs for a period of time even if the annuitant has died before the expiration of the designated period. A *deferred annuity* is one in which payments start at a stipulated future date only if the annuitant is alive at that time. Payment of the INCOME TAX due on the income generated is delayed until payments start. A deferred annuity is used primarily by a person who does not want to receive payments until he or she is in a lower tax bracket, such as upon retirement.

A *refund annuity,* sometimes called a *cash refund annuity,* is a policy that promises to pay a set amount annually during the annuitant's life. In case the annuitant dies before receiving payments for the full amount of the annuity, his or her estate will receive a sum that is the difference between the purchase price and the sum paid during the annuitant's lifetime.

A *joint annuity* is one that is payable to two named persons but upon the death of one, the annuity terminates. A *joint and survivorship annuity* is a policy payable to the named annuitants during their lives and continues for the benefit of the surviving annuitant upon the death of the other.

### Tax Aspects

When an annuity is paid to an annuitant, he or she receives a portion of the principal and part of the return it has earned. For federal and state income tax purposes, only the amount attributable to the income generated by the principal, not the principal itself, is considered taxable income. The INTERNAL REVENUE CODE provides an exclusion ratio to determine the amount of taxable income paid to the annuitant. Special tax rules apply to annuities that are qualified employee retirement plans.

The annuity payments made to the estate of a decedent might be subject to estate and gift tax as an asset of the decedent's gross estate. Federal and state laws governing estate tax must be consulted to determine the liability for such taxes.

CROSS-REFERENCES

Pension.

## ANNULMENT

*A judgment by a court that retroactively invalidates a marriage to the date of its formation.*

An annulment differs from a DIVORCE, a court order that terminates a marriage, since it is a judicial statement that there was never a marriage. A divorce, which can only take place where there has been a valid marriage, means that the

two parties are no longer HUSBAND AND WIFE once the decree is issued. An annulment means that the individuals were never united in marriage as husband and wife.

Various religions have different methods for obtaining a church divorce, or annulment, but these procedures have no legal force or effect upon a marriage that complied with the requirements of law. Such a marriage must be legally annulled.

## History

English COMMON LAW did not provide for annulment. Prior to the mid-nineteenth century, the only courts in England with the power to annul an invalid marriage, when fairness mandated it, were the ecclesiastical courts. There was no statute that provided relief of this kind.

Northeastern American colonies passed laws enabling courts or legislatures to grant annulments, while other colonies adhered more closely to English traditions. The American tradition of keeping church and state separate precluded the establishment of ecclesiastical courts in the United States. Following the American Revolution, the civil courts in a majority of states never assumed that they had the authority to hear annulment cases.

A number of states eventually enacted laws authorizing annulment in recognition of the belief that it is unfair to require people to fulfill marital duties when a marriage is invalid.

Currently, most states have annulment statutes. In states that do not, courts declare that no marriage exists if the laws regulating marriage have not been observed.

An annulment declares that a marriage, which appears to be valid, is actually invalid. Two kinds of invalid marriages exist: *void marriages* and *voidable marriages.* A void marriage is one that was invalid from its very beginning and, therefore, could never lawfully exist in any way. The major grounds for a void marriage are INCEST, bigamy, and lack of consent. Once these grounds are established, the court will grant a decree of annulment.

A VOIDABLE marriage is one that can be declared illegal but that continues as valid until an annulment is sought. The annulment takes effect only from the time a court renders its decision.

## Grounds

State law governs the grounds for annulling a voidable marriage. Couples should not be obligated by the serious duties incident to marriage if both parties did not genuinely intend to be married.

FRAUD is the most prevalent ground for annulment. The MISREPRESENTATION, whether by lies or concealment of the truth, must encompass something directly pertinent to the marriage, such as religion, children, or sex, which society considers the foundation of a marital relationship.

Physical or emotional conditions may also be grounds for annulment, particularly when they interfere with sexual relations or procreation.

Other health conditions providing grounds for annulment include alcoholism, incurable insanity, and epilepsy. The mere existence of one of these conditions is a sufficient ground for an annulment in some states, whereas in others, an annulment may be obtained for fraud if such a condition was concealed.

Courts may also annul marriages that involved lack of consent, mistake, or duress. Lack of consent might arise if one party were senile, drunk, underage, or suffering from serious mental illness, or if there was no genuine intent to marry. A mistake as to some essential element of the marriage may also justify an annulment, for example, if the couple mistakenly believed that one party's insanity or impotence had been cured. Duress arises when one party compels the other to marry against his or her will.

## Consequences

State law governs the consequences of an annulment. Customarily, an annulment was a court declaration that no marriage had ever existed, but this created various problems. If a marriage was dissolved by divorce, the children of the marriage were legitimate and the parent awarded custody could be awarded ALIMONY. No such provisions, however, were made in an annulment. A majority of states have rectified this situation by statutory provisions. In most states, children of voidable, and sometimes void, marriages are legitimate. In addition, some states provide for alimony and property settlements upon the granting of an annulment. Several other jurisdictions allow their courts to devise a fair allocation of property where necessary and equitable.

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## ANON.

*An abbreviation for anonymous, nameless, or name unknown.*

## ANSWER

*The first responsive pleading filed by the defendant in a civil action; a formal written statement that admits or denies the allegations in the complaint and sets forth any available* AFFIRMATIVE DEFENSES.

The answer gives the plaintiff notice of the issues the defendant will raise as the case progresses and enables the plaintiff to adequately prepare a case. In most jurisdictions, the answer must be filed within twenty days after receipt of the summons and complaint, although local rules and customs may dictate different filing times.

The answer begins with a caption, which identifies the location of the action, the court, the docket or file number (assigned by the court), and the title of the case (comprising the names of the parties, e.g., *Smith v. Jones*). Following the caption, the main body of the answer sets forth admissions or denials that respond to each allegation made in the complaint. In federal court and in jurisdictions that follow the Federal Rules of Civil Procedure, denials must be unambiguous and stated in concise language that clearly identifies the allegations being denied (Fed. R. Civ. P. 8(b)). For example, if the complaint alleges that the defendant was driving an automobile that struck the plaintiff on Addison Street in Chicago on March 11, an answer stating that the defendant was in Milwaukee on March 11 is unclear and ambiguous because it avoids the question of whether the defendant was also in Chicago at a different time on the same day.

The answer may plead any form of denial that is truthful and made in GOOD FAITH. Although general denials that deny the truth of every fact in the complaint or of every element of a charge are sometimes used, they are not considered a sufficient response. Courts discourage general denials because they fail to respond to specific allegations and do not give the plaintiff sufficient basis to prepare a case. If the defendant lacks the knowledge or information needed to respond to the truth or falsity of a charge, rule 8(b) and similar rules in other jurisdictions allow the defendant to state such in the answer. This has the effect of a denial (rule 8(b)). If the defendant fails to respond to an allegation by either denying it or by stating he or she does not have the information necessary to admit or deny it, it is considered admitted under rule 8(d).

Following the admissions and denials, the answer outlines any affirmative defenses available to the defendant. Affirmative defenses, which are grounded in SUBSTANTIVE LAW, state that an allegation may or may not be true, but that even if it is true, the law provides a legal defense that defeats the plaintiff's claim. The defendant must determine if the law allows an affirmative defense to a charge, and must allege sufficient facts to support the defense. For example, in a NEGLIGENCE action, the defendant might respond to an allegation that a duty of care was owed to the plaintiff by stating that, even if the allegation is true, the plaintiff assumed the risk of the activity that led to the injury. The defendant must then state the facts that support the defense. It is critical to the defendant's case that all applicable affirmative defenses are asserted. In most jurisdictions, affirmative defenses not raised in a timely manner in the defendant's responsive PLEADING are deemed to have been waived.

The answer, like the complaint, ends with a "wherefore" clause that summarizes the defendant's demands, such as demands for a jury trial and judgment in the defendant's favor. Only one wherefore clause is generally needed, although local practice may dictate that each denial and each affirmative defense have its own wherefore clause.

Counterclaims and cross-claims sometimes appear in the answer. A counterclaim arises when the defendant's response includes a claim against the plaintiff. A counterclaim may come from the same circumstances as the plaintiff's claim or from a different set of facts. A cross-claim may be filed when one party to a suit charges another party with responsibility for the plaintiff's injuries or damages. Under Federal Rules of Civil Procedure rule 13(g), a cross-claim must arise out of "the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action." A cross-claim may also be filed separately from the answer. Because counterclaims

*A sample answer and counterclaim*

## Answer and Counterclaim

**United States District Court**
**Southern District of Texas**
**Corpus Christi Division**

DirecTV, Inc.

vs.

John Bettiga, et al.

No. C-02-507
[Jury Requested]

**Answer and Counterclaim**

TO THE HONORABLE COURT:
John Bettiga ("Bettiga") respectfully files this Answer and Counterclaim.

**Admissions and Denials**

**Preliminary Statement**

1. **Paragraph 1.** Denied.
   - Bettiga purchased **standard electronic components** useful for a wide variety of lawful purposes. The components are not illegal. The components are not designed to intercept and decrypt protected satellite communications.
   - Bettiga never used any illegal device for any illegal purpose.
   - Bettiga never possessed any illegal device.
   - Bettiga never viewed Satellite TV for free.
   - Bettiga never distributed any illegal device.

**DirecTV's Business Operations**

2. **Paragraph 2.** Admit
3. **Paragraph 3.** Admit all except final sentence which is denied.
   - The primary basis of this dispute is DirecTV is on a fishing expedition harassing the purchasers of **standard electronic components** based on a mere possibility that the standard electronic components were used for an unlawful purpose.
4. **Paragraph 4.** Admit.
5. **Paragraph 5.** Admit.
6. **Paragraph 6.** Denied except Betigga is a resident of Texas.
   - Betigga never purchased or used any illegal pirate device. He purchased **standard electronic components** useful for a wide variety of lawful purposes.
   - Bettiga never purchased or used any device designed to permit viewing of DirecTV's programming without authorization or payment to DirecTV.

**DirecTV Obtained Evidence**

7. **Paragraphs 7-10.** Bettiga does not have sufficient information to form a belief as to the truth of most of these paragraphs. However, Bettiga denies that DirecTV obtained evidence that he purchase an unlawful pirate device. At most, it obtained evidence of his purchase of lawful **standard electronic components** usable for a wide variety of lawful purposes. Further, Bettiga never possessed or used any pirate device. Further, he never manufactured, assembled, or used any pirate device. He merely purchased **standard electronic components**. He merely tinkered and experimented with these components. His tinkering did not result in a device capable of decrypting anything. It was capable only of converting a signal from one form to another.

**DirecTV Obtained Records**

8. **Paragraph 11.** Denied. Bettiga did not violate any federal or state statute or common law. He merely purchased **standard electronic components.** Bettiga never manufactured or assembled or obtained or possessed or purchased any unlawful pirate device. His tinkering did not result in a device capable of decrypting anything. It was capable only of converting a signal from one form to another. The device could not accomplish and was not designed to accomplish decryption of DirecTV's signal without additional components and decryption software or device.

**Jurisdiction, Venue, and Parties**

9. **Paragraphs 12-16.** Denied except subject matter jurisdiction, personal jurisdiction, and venue are all admitted. Bettiga never violated any right of DirecTV anywhere.
10. **Paragraph 17.** Admit except Bettiga does not have sufficient information to admit or deny the State of Incorporation of DirecTV.
11. **Paragraph 18.**
    - Admit that Bettiga resides in Corpus Christi, Texas.
    - Denied that Bettiga purchased any Pirate Access Device. He purchased **standard electronic components** useful for a wide variety of lawful purposes.
    - Bettiga did not purchase anything designed specifically to permit the surreptitious interception of DirecTV Satellite Programming.
    - Bettiga purchased capacitors, transisters, and an RS-232 Transceiver. These are all electronic components with completely lawful uses. These components are not sufficient without more to create any Pirate Access or Decryption Device.
12. **Paragraphs 19-21.** Bettiga does not have sufficient information to admit or deny any of the allegations relative to the other Defendants.
13. **Paragraphs 22-24.** Denied. Bettiga did not import any illegal device. He merely purchased standard electronic components useful for a wide variety of lawful purposes. Bettiga never viewed DirecTV programming without authorization or without payment. Bettiga was never capable of viewing DirecTV programming without authorization or without payment.
14. **Paragraph 25.** Denied. Bettiga never engaged in an enterprise to distribute or resell illegal pirate devices whether for profit or not. He never even possessed such a device. His tinkering and experimentation did not result in a device capable of decrypting anything. It was capable only of converting a signal from one form to another.

[continued]

*A sample answer and counterclaim (continued)*

## Answer and Counterclaim

**Discovery**

15. **Paragraph 26.** Denied. DirecTV never discovered Bettiga's involvement in pirating Satellite Programming because he is and never was involved in that. He merely purchased completely lawful **standard electronic components** and engaged in some tinkering and experimentation. His tinkering and experimentation did not result in a device capable of decrypting anything. It was capable only of converting a signal from one form to another.

**47 U.S.C. 605(e)(3)(C)**

16. **Paragraphs 27-28.** Denied
    - Bettiga did not effect unauthorized interception and receipt of Satellite Programming through the use of an illegal Satellite decoding device or otherwise.
17. **Paragraph 29.** Denied.
    - Bettiga did not violate federal law.
    - Bettiga did not intercept, receive, or exhibit DirecTV without authorization.
    - Bettiga did not publish or divulge the existence, substance, etc. of the contents of DirecTV programming without authorization.
    - Bettiga did not use DirecTV programming for his own benefit or the benefit of others without authorization.
18. **Paragraphs 30-32.** Denied.
19. In general, Bettiga did not intercept or receive DirecTV's programming without authorization. He did not assemble a device primarily of assistance in unauthroized decryption of satellite programming. Thus, he did not violate 47 U.S.C. 605.
20. Bettiga did engage in experimentation and tinkering. The device he constructed was not capable of unauthorized decryption of satellite programming at all. It was merely capable of converting a signal into a different form (not decrypting the signal).

**18 U.S.C. 2511**

22. **Paragraphs 33-36.** Denied. Bettiga did not intercept, endeavor to intercept, or procure or otherwise to intercept electronic communications. He did not disclose or endeavor to disclose to others the contents of intercepted electronic communications. He did not use or endeavor to use intercepted communications. Further, the statute does not apply in some respects as DirecTV asserts because the statute in some respects is limited to "oral" communications.

**18 U.S.C. 2512**

23. **Paragraphs 37-40.** Denied. Bettiga did not assemble or possess any device primarily useful for surreptitous interception of DirecTV's programming. Bettiga did not assemble a device capable of doing that. The device was not capable of decrypting the DirecTV signal. It was merely a device built from standard components capable of transforming the signal from one form to another (not decrypting it). The device was never sent through the mail and never was going to be sent through the mail. It was not received by mail (**standard electronic components** were).

**47 U.S.C. 605(e)(4)**

24. **Paragraphs 41-44.** Denied. The device constructed by Bettiga was not capable of decrypting anything. It merely transformed a signal from one form to another (not decrypted it). Bettiga did not program or reprogram access cards. There is not even a place to put a card. The device was not capable of unlawful interception or receiving of DirecTV's signal. It was capable only of transforming a signal from one electronic form to another (not decrypting it).

**Conversion**

25. **Paragraphs 45-48.** Denied. Bettiga never viewed DirecTV programming without authorization. He did not convert anything.

**Tex. Civ. P. Rem. Code 123.001, et seq.**

26. **Paragraphs 49-51.** Denied. Bettiga did not intercept or attempt to intercept DirecTV's programming. He did not divulge intercepted programming.

**Injunction**

27. **Paragraphs 53-56.** Denied. There has been no illegal conduct to restrain. There is no showing of imminent irreparable injury or even any probability at all of illegal conduct to restrain.

**Counterclaim**

**Factual Background**

28. Bettiga has on more than one occasion been working on his computer when an advertisement for DirecTV appeared or "popped up" on his screen without his consent or request. In fact, this DirecTV advertisement "popped up" on the screen of his attorney's computer while working on this answer and counterclaim. This consumes computer resources and more importantly the time of the computer user to delete the unauthorized "pop up." No consent was ever given to these pop-up advertisements whether express or implicit.
29. This amounts to an unauthorized "trespass" on the computer. **See America Online vs. IMS**, 46 F.Supp. 444 (E.D. Va. October 29, 1998) (Court awards AOL summary judgment against a spammer finding that the sending of unauthroized junk e-mail to AOL subscribers constituted an actionable trespass to AOL's computer network); **CompuServe Incorporated v. Cyber Promotions, Inc. and Sanford Wallace**, Case No. C2-96-1070 (S.D. Ohio, Feb. 3, 1997) (Graham, J.) (Court issued preliminary injunction enjoining the defendants from sending unsolicited advertisements via E-mail to any CompuServe subscribers. The court held that by sending junk e-mail, defendants had committed the tort of trespass on personal property by utilizing without permission the computer system which supports CompuServe's e-mail facilities).
30. On information and belief, DirecTV commits this trespass through a third-party service provider not directly. However, DirecTV knows what its agent is doing and thus is responsible for the spam by its agent. Bettiga is entitled to actual and exemplary damages.
31. Further, DirecTV violated 18 U.S.C. 1030. Bettiga's computer is a "protected" computer in that it is used in interstate commerce and communication. 18 U.S.C. 1030)(e)(2)(B). DirecTV knowingly and with intent to defraud accessed this protected computer without authorization or exceeded authorized access and by means of such access defrauded him by appropriating his time and attention without authorization and use of his computer resources (not only this).
32. As a result, Bettiga has suffered loss. DirecTV intentionally accessed a protected computer without authorization and as a result recklessly caused damage. 18 U.S.C. 1030(a)(5)(ii). Bettiga has a private right of action. 18 U.S.C. 1030(g) for damages and "loss." Further, he has an action for injunctive and other equitable relief. Each pop-up causes distraction of work in process and attention. Bettiga is entitled to recover his attorneys' fees.

[continued]

*A sample answer and counterclaim (continued)*

**Answer and Counterclaim**

33. Even computer users who have successfully installed an effective "popup killer" program are damaged by illegal popups, because they have generally spent money for the "popup killer" program and have always expended time and effect directly or indirectly to find and install the "popup killer" program. Further, the "popup killer" program consumes computer resources.
34. Further, on information and belief, all prerequisites to a class action exist. The Court should promptly after appropriate discovery certify both a Plaintiff class and a Defendant Class. The Plaintiff class consists of all users of "protected" computers anywhere who have been victimized by an unauthorized "popup advertisement" within the last 2 years and the Defendant Class consists of all Corporations and other business entities who have either directly or indirectly caused "popup" advertisements to appear on "protected" computers. The Court should award appropriate relief to all Plaintiff Class Members against all Defendant Class Members. The Court should allow appropriate discovery on the identities of all Defendant Class Members and Plaintiff Class Members. It should award appropriate compensation to the class attorney.

**Conditions Precedent**

35. All conditions precedent have been performed or have occurred.

**Conclusions**

36. The Court should deny DirecTV damages. The Court should certify a class. The Court should grant actual and exemplary damages for trespass and for violation of 18 U.S.C. 1030.

Respectfully submitted,

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**Certificate of Service**

On Sunday, January 5, 2002, I served this as follows:

**Via Telecopier**
Joe C. Fulcher
Attorney At Law

_____

David A. Sibley

and cross-claims raise new issues and initiate a separate CAUSE OF ACTION, they must meet the procedural requirements of a complaint.

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## ANTARCTIC TREATY OF 1959

According to this treaty, Dec. 1, 1959, 12 U.S. T. 794, 402 U.N.T.S. 71. Antarctica—the land adjacent to the South Pole—is considered "international" territory, like that of the high seas; it is not under the jurisdiction of any single nation. Its legal status, therefore, is governed by INTERNATIONAL LAW.

## ANTE

*[*Latin, Before.*] A reference to a previous portion of a report or textbook.*

*Ante* is synonymous with *supra.*

## ANTECEDENT DEBT

*A legally enforceable obligation, which has been in existence prior to the time in question, to reimburse another with money or property.*

Principles of contract law vary from jurisdiction to jurisdiction regarding whether an antecedent debt constitutes good consideration since the debtor does not incur any new detriment at the time that he or she enters a contract

with another party. COMMERCIAL PAPER that has been given in exchange for an antecedent debt is deemed by the UNIFORM COMMERCIAL CODE to be supported by adequate consideration.

Under statutes governing BANKRUPTCY, a transfer of property made by a debtor because of an antecedent debt might be considered a VOIDABLE preference, depending upon the length of time between the creation of the debt and the filing of the petition for bankruptcy. A bankruptcy court may set aside a voidable preference since it gives one creditor a better right to payment than other creditors who are similarly situated.

## ♦ ANTHONY, SUSAN BROWNELL

People no longer are surprised when an American woman works outside the home, keeps her own bank account, maintains custody of her children after a DIVORCE, or votes in a presidential election. Yet, not too long ago, these practices were uncommon, if not illegal, in the United States. Due in large part to the efforts of the remarkable Susan Brownell Anthony and other pioneers of feminism, women in the United States enjoy rights and opportunities that are simply taken for granted today.

Anthony was born in 1820, during an era when most women got married, produced children, and deferred completely to their husbands. Daniel Anthony, her father, belonged to the Society of Friends (better known as Quakers), a religious group that recognized the equality of men and women. Daniel encouraged his daughter to think independently and to speak her mind. He supported her educational pursuits and emphasized self-sufficiency.

Although Anthony's father was an admirable man and progressive for his time, her mother, Lucy Anthony, found little pleasure in her restricted, duty-bound life. She appeared overwhelmed by eight pregnancies and exhausted from running the household while keeping boarders and raising six surviving children. Historians believe that the withdrawn, careworn Lucy became a symbol to Anthony of the unfair burdens of marriage. The institution seemed weighted against women, even those with kind and liberal-minded husbands. Anthony concluded that marriage was necessary only when a strong emotional bond existed between two people. This view put her at odds with most women of her generation, who considered matrimony a requirement for social and economic security. True to her principles, Anthony— who once referred to marriage as SLAVERY and "a blot on civilization"—rejected several suitors' offers and remained single throughout her long life.

Anthony was an intelligent young girl who received the best education available at the time. Although she attended a well-regarded boarding school in Philadelphia, she did not enroll in college. In the 1830s, only one college in the United States, Ohio's Oberlin College, accepted women. Even with a college education, Anthony would have faced a limited number of employment opportunities. As a woman, her only options were to become a seamstress, a domestic, or a teacher. Anthony chose teaching and, in 1938, began the first of several teaching jobs. In 1846, she became headmistress at Canajoharie Academy in New York. There, she discovered that male teachers were paid $10.00 a week, whereas she received $2.50. Frustrated with the low pay and a lack of respect for her work, Anthony decided to devote her energies to social reform.

"MEN THEIR RIGHTS AND NOTHING MORE; WOMEN THEIR RIGHTS AND NOTHING LESS."
—SUSAN B. ANTHONY

Although Anthony is best known for her fight for women's suffrage, she also crusaded for other causes. In 1852, Anthony became active in the TEMPERANCE MOVEMENT, a national campaign to ban the sale and consumption of alcohol. When it became clear that women were not allowed full leadership in the existing temperance organizations, Anthony helped form the Woman's State Temperance Society of New York.

Like her father, Anthony also was a fervent abolitionist. She became friends with FREDERICK DOUGLASS and attended her father's antislavery meetings in the family home. Before and during the U.S. CIVIL WAR, Anthony devoted her organizational skills to the cause. As head of the Anti-Slavery Society of New York, she planned lecture schedules and spoke publicly against the evils of the Southern system and of the discriminatory practices in the North. During this time, she joined forces with another abolitionist, ELIZABETH CADY STANTON, who was the acknowledged leader of the fledgling WOMEN'S RIGHTS movement.

After the war, Anthony and Stanton continued to work together for social reform. They were bitterly disappointed when their fellow abolitionists refused to support their strategy for constitutionally mandating VOTING RIGHTS for

*Susan B. Anthony.*
LIBRARY OF CONGRESS

women. A golden opportunity for female suffrage had arisen with the drafting of the FIFTEENTH AMENDMENT to the U.S. Constitution. This amendment was necessary to grant voting rights to the former slaves who were liberated by President ABRAHAM LINCOLN'S EMANCIPATION PROCLAMATION. However, the abolitionists supported the Fifteenth Amendment only to the extent that it gave African American males the right to vote. They were not concerned about the amendment's exclusion of women. With that defeat, Anthony focused her sights on a separate constitutional amendment to grant women the franchise.

In 1868, Anthony began publishing *The Revolution,* a weekly newsletter advocating suffrage and equal rights for women. In 1869, Anthony and Stanton formed the National Woman's Suffrage Association. An indefatigable worker, Anthony became a fixture on the lecture circuit and headed national petition drives to establish support for female voting rights.

In 1872, Anthony decided to test the legality of voting laws that allowed only white and African American males to go to the polls. She registered and voted in the 1872 presidential election in Rochester, New York. Anthony was prosecuted for the offense and fined $100, but she refused to pay. Her defiance rallied supporters of women's rights across the nation. In time, Anthony merged her suffrage organization with another one, to form the National American Woman Suffrage Association. She served as president of this association from 1892 to 1900.

Not surprisingly, Anthony fought hard for the liberalization of laws for married women. During most of the nineteenth century, a wife had very little protection under the law. Any income she produced automatically belonged to her husband, as did any inheritance she received. Her husband could apprentice their children without her permission and was designated sole guardian of their children, no matter how unfit he might be. A husband even had the right to pass on his guardianship of the children by will. In Anthony's home state of New York, her petition drives and lectures were instrumental in convincing the legislature to pass laws giving married women power over their incomes and guardianship of their children.

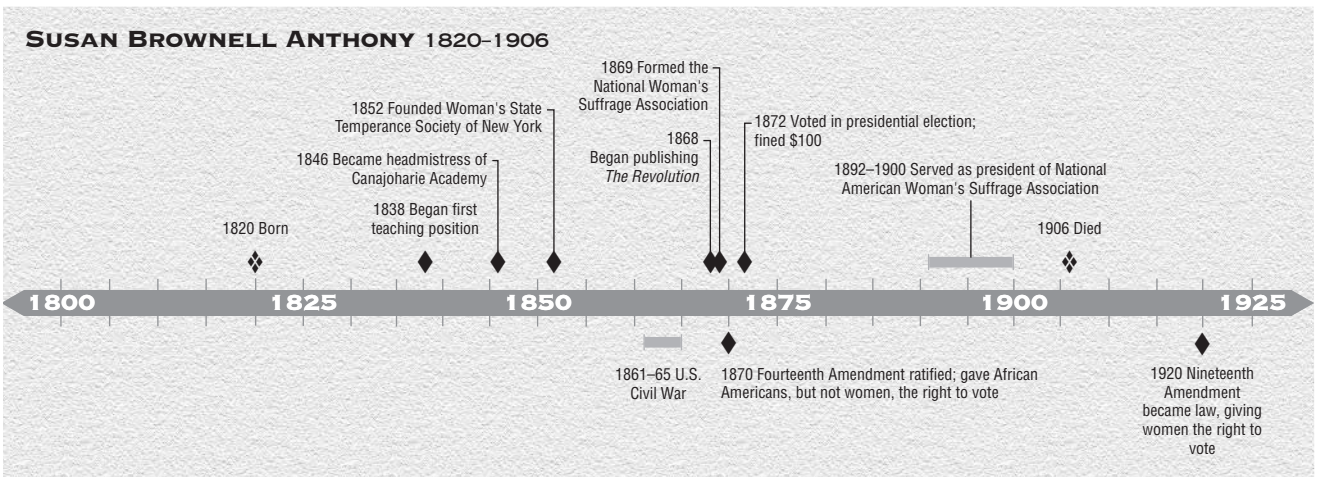

Anthony was not afraid to flout social conventions to achieve her goals. For a time, she wore bloomers, a controversial garment named after Amelia Jenks Bloomer, the woman who popularized it. Bloomers were loose-fitting trousers gathered at the ankle and worn underneath a knee-length skirt. The costume was intended as a protest against the tight-fitting corsets and unwieldy petticoats popularly worn by women at the time. Although she withstood ridicule to make her point, Anthony stopped wearing bloomers when she concluded that they were diverting attention from the more serious issues facing women.

Anthony's message of equality often met resistance, and not just from men. Many women in the nineteenth century were frightened by or skeptical of change. In 1870, Anthony lamented their wariness when she wrote, "The fact is, women are in chains, and their servitude is all the more debasing because they do not realize it." She urged women to recognize the inequities they faced and to speak and act for their own freedom.

When Anthony died in 1906, women did not yet have the right to vote in presidential elections. When the NINETEENTH AMENDMENT to the U.S. Constitution finally became law in 1920, it was called the Anthony amendment in recognition of her valiant efforts to gain suffrage.

Anthony was also honored in 1979 and 1980, when the U.S. Mint issued one dollar coins bearing her likeness. She became the first woman to be pictured on a U.S. coin in general circulation.

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CROSS-REFERENCES

Fifteenth Amendment; Nineteenth Amendment; Stanton, Elizabeth Cady; Temperance Movement; Women's Rights.

## ANTI-BALLISTIC-MISSILE TREATY OF 1972

The Anti-Ballistic-Missile Treaty of 1972 (ABM Treaty) limited the number of defensive antiballistic missile (ABM) systems that the United States and the former Soviet Union could use in preparation for nuclear war (23 UST 3435: TIAS 7503; 944 UNTS 13, U.S. DEPARTMENT OF STATE, *Treaties in Force,* 1993). Restrictions on ballistic missile defenses (BMDs), military warning systems designed to alert and protect a nation, composed the bulk of the treaty's articles. The treaty limited each country's supply of remote-controlled, long-range nuclear rockets, or intercontinental ballistic missiles (ICBMs). Following the breakup of the Soviet Union in 1991, the Russian Federation continued to adhere to the agreement. In 2001, however, the United States announced that it would no longer abide by the pact.

On May 26, 1972, at the U.S.-Soviet summit in Moscow, President RICHARD M. NIXON of the United States and President Leonid Brezhnev of the Soviet Union signed, in conjunction with the STRATEGIC ARMS LIMITATION TALKS of 1969–72 (SALT I), the ABM Treaty. The treaty limited each party to two ABM sites, with no more than one hundred ABM launchers and interceptors at each site. One of these sites could protect an ICBM silo deployment area, and the second could protect the national capital. The treaty prohibited the development, testing, or deployment of sea-based, air-based, space-based, or mobile land-based ABM systems. Furthermore, it excluded the transfer or deployment of ABM systems to or in other nations. The 15 articles of the treaty were of unlimited duration and would come up for renewal every five years.

The principles of the treaty explicitly reflected the policy of mutual assured destruction (MAD)—the belief that the best way to control nuclear arms is to allow both sides enough power to ensure the destruction of both nations in the event of war. As stated in Article I of the treaty, each side agreed "not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense, and not to deploy ABM systems for defense of an individual region" (Durch 1988). Article II defines an ABM system as "a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of ABM interceptor missiles . . . ABM launchers [and] . . . ABM radars." Article III reiterates the ban on ABM deployment, excepting, for each side, one deployment area around the national capital and one around an ICBM launcher deployment area. This provision was later

*U.S. President Richard Nixon and Soviet President Leonid Brezhnev sign the Anti-Ballistic-Missile Treaty in Moscow on May 26, 1972.*

AP/WIDE WORLD PHOTOS

reduced, in 1974, to just one deployment area for each country, allowing "no more than 100 ABM interceptor missiles at launch sites." Articles IV to XV outline provisions for, among other issues, nuclear testing, radar deployment, amendments to the treaty, and the terms of treaty withdrawal.

After the ABM Treaty was ratified by the U.S. Congress, legislators refused to authorize funds for building an ABM site outside Washington, D.C. In early 1975, the United States deployed its single permitted system near the Minuteman Fields at Grand Forks Air Force Base in North Dakota. Within a year, however, the system was deactivated by Congress on the ground that it was not very cost-effective. The Soviets, meanwhile, used their ABM deployments to protect Moscow.

Despite attempts to follow the principles of SALT I, continued limitations on strategic arms fell apart with the SALT II Treaty of 1979. The U.S. Congress refused to ratify the treaty, which had been signed by Presidents JIMMY CARTER and Leonid Brezhnev. SALT II went on to draw heavy fire in the 1980s from the newly empowered Reagan administration. Whereas the Soviets generally adhered to a strict interpretation of the ABM Treaty, President RONALD REAGAN advocated "peace through strength" and pushed for new weapons programs and policies. Reagan reinterpreted the treaty liberally, putting it to its most serious test. His proposal to render nuclear ballistic missiles ineffective and obsolete, with the Strategic Defense Initiative (SDI), a space-based BMD system popularly known as Star Wars, caused great debate at home and considerable alarm in the Soviet Union.

Like Reagan, opponents of the ABM Treaty believed that its limits were based on one-way accommodation, that is, allowing the Soviets to retain their numerical superiority, as seen in SALT II. The Soviets had previously established numerical superiority in ICBM deployment, and the ABM Treaty supposedly held back the development of further U.S. weapons technology. Especially troublesome to some was the Soviet's Krasnoyarsk radar system in western Siberia. According to Article VI of the ABM Treaty, an early warning radar with this orientation should have been located on the Pacific

coast or in the outer Arctic reaches of Siberia. Many believed that Moscow was cheating on its end of the deal, hence the treaty should go.

In the 1980s, tensions between the United States and the Soviet Union flared. In October 1985, the Reagan administration announced a new interpretation of the ABM Treaty, under which the development and testing of "exotic" ABM systems (those not spelled out in the treaty itself, e.g., Star Wars) would have no limit. In 1986, with the Strategic Arms Reduction Treaty (START) talks in full swing, the United States and the Soviet Union treated the ABM Treaty as a central bargaining chip. Moscow looked to maintain the treaty for at least another decade, with tight constraints on space testing. Washington, meanwhile, looked to abide by the treaty for at most another decade and expected lessened constraints on the space testing of exotic technologies.

The ensuing events of the late 1980s and early 1990s caught everyone by surprise. Although the United States's interest in the SDI continued into the GEORGE H. W. BUSH administration years, and persisted through the eventual breakup of the Soviet Union, both the United States and the Soviet Union showed interest in pursuing at least the spirit of the ABM Treaty. True arms reductions talks developed with the Soviet demise. In 1991, Soviet nuclear forces were split up between four countries—Russia, Ukraine, Belarus, and Kazakhstan—and spokespersons on both sides saw revision of the ABM Treaty as necessary. The START agreements of 1992 shed new light on older concessions. As the chief U.S. architect of the original ABM Treaty, HENRY KISSINGER now joined others in declaring it obsolete in the new era of disarmament. As a gesture of GOOD FAITH, the Soviets demolished their controversial Krasnoyarsk radar system; a shoe factory now occupies the site.

In the years that followed, the United States and Russia both worked together and strayed from the MAD doctrine. They also turned their attention elsewhere, mainly to the developing world. New nations on the list of nuclear powers included Israel, India, Pakistan, Algeria, Egypt, Iran, Iraq, Libya, North Korea, and Syria, none of which had any formal attachment to the ABM Treaty. U.S. and former Soviet strategists went from analyzing BMD research provisions set forth in the ABM Treaty to setting up safeguards against attack from other powers.

In December 2001, however, the United States announced that it would no longer follow the ABM treaty. The formal announcement by President GEORGE W. BUSH set in motion a six-month period for ending the pact. He stated that the ABM Treaty "hinders our government's ability to develop ways to protect our people from future terrorist or rogue state missile attacks."

The United States's withdrawal from the treaty was motivated by the desire to build and deploy a long-range missile defense system that would protect the nation from attacks by rogue nations such as North Korea. The deployment of the missile shield system was set for 2004. The withdrawal came after months of failed negotiations with Russia to jointly abandon the ABM treaty and to craft a new pact based on the current world situation. Russian president Vladimir Putin expressed regret at the decision but did not signal a move to build a competing system.

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## ANTICIPATION

*The performance of an act or obligation before it is legally due. In patent law, the publication of the existence of an invention that has already been*

*patented or has a* PATENT PENDING, *which are grounds for denying a patent to an invention that has substantially the same structure and function as the earlier invention.*

In the law of NEGLIGENCE, anticipation refers to the knowledge that there is a reasonable probability that the consequences of particular conduct of one individual will result in injury to others.

The anticipation of an invention also occurs if the later invention is merely an ADAPTATION of an earlier patent, which would be obvious to a skilled person who need only exercise some mechanical skill to develop the same adaptation.

## ANTICIPATORY REPUDIATION

*The unjustifiable denial by a party to a contract of any intention to perform contractual duties, which occurs prior to the time performance is due.*

This form of breach, also known as anticipatory breach of contract, occurs when one party positively states that he or she will not substantially perform a contract. The mere assertion that the party is encountering difficulties in preparing to perform, is dissatisfied with the bargain, or is otherwise uncertain whether performance will be rendered when due is insufficient to constitute a repudiation. Another type of anticipatory breach consists of any VOLUNTARY ACT by a party that destroys, or seriously impairs, that party's ability to perform the contract.

The remedies available to the nonrepudiating party upon an anticipatory repudiation entail certain obligations. If the nonrepudiating party chooses to ignore the repudiation and proceeds with his or her performance, the duty to mitigate damages—which imposes on the injured party an obligation to exercise reasonable effort to minimize losses—mandates that the nonrepudiating party not perform if the consequence of performance would be to increase the damages. In addition, this duty requires, where applicable, the procurement of a substitute performance.

If the nonrepudiating party implores or insists that the other party perform, this demand, in and of itself, does not divest the nonrepudiating party's right to damages. The presence or absence of a breach of contract depends solely upon the repudiating party's actions. The prevailing view is that the nonrepudiating party may pursue any remedy for breach of contract, even though he or she has informed the repudiating party that he would await the latter's performance.

The nonrepudiating party also possesses the option to do nothing and to commence an action for breach after the time for performance. Under the majority view, such an action can be instituted without tendering the nonrepudiating party's performance or even alleging or proving that the party was ready, willing, and able to perform. The nonrepudiating party must demonstrate, however, that he or she would have been ready, willing, and able to perform but for the repudiation.

In regard to the law of sales, the UNIFORM COMMERCIAL CODE (UCC), a body of law governing commercial transactions by the states, provides that anticipatory repudiation entails the right of one party to a contract to sue for breach before the performance date when the other party communicates the intention not to perform. The repudiation can, however, be retracted before the performance date if the nonrepudiating party has not acted on the basis of the repudiation. Some jurisdictions direct the injured party to await the performance date before instituting an action.

## ANTI-DEFAMATION LEAGUE

The Anti-Defamation League (ADL) is an agency of B'nai B'rith, an international Jewish service organization. The ADL combats anti-Semitism, religious and racial intolerance, and all forms of organized discrimination based on stereotypical beliefs. The ADL also is a strong advocate of the state of Israel, LOBBYING Congress in support of legislation that benefits the Jewish State. It has its headquarters in New York City and has regional and satellite offices throughout the United States. The ADL also has offices in Jerusalem and Vienna.

Sigmound Livingston founded the ADL in 1913 with the support of B'nai B'rith. Livingston, a Chicago attorney, stated that the mission of the league was "to stop, by appeals to reason and conscience, and if necessary, by appeals to law, the DEFAMATION of the Jewish people ... to secure justice and fair treatment to all citizens alike ... [and] put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens."

The ADL first gained recognition by taking steps to eradicate negative stereotypes of Jews in

print and their stereotyping on stage and in film. By the early 1920s, objectionable references to Jews in the national press had virtually disappeared. However, popular culture was filled with negative stereotypes of Jews. The rise of the KU KLUX KLAN in the 1920s was based as much on anti-Semitism as racial intolerance. The ADL responded by circulating pamphlets that challenged hatred of Jews and demanded apologies from prominent citizens, such as automobile manufacturer Henry Ford, for endorsing anti-Semitic views.

With the rise of Nazism in the 1930s, the ADL fought U.S. supporters of Hitler who endorsed his anti-Semitic policies. During this decade, the ADL began to collect information on extremist individuals and organizations and to monitor and investigate fascist groups in the United States. These fact-finding and monitoring activities have remained a central part of the ADL's work.

Since the 1940s, the ADL has lobbied for CIVIL RIGHTS legislation, filed briefs in courts supporting the separation of church and state, and educated succeeding generations in religious tolerance. Since the creation of Israel in 1948, the ADL has also defended Israel's right to exist and has fought against anti-Zionism. In the 1990s, the organization began monitoring the INTERNET for evidence of anti-Semitism and right-wing extremism. In 2000 the ADL issued a report titled "Combating Extremism in Cyberspace", a review of legal issues raised by hate groups using the Internet. The ADL's monitoring of the Internet and other forms of communication took on new urgency in light of the events surrounding the SEPTEMBER 11TH ATTACKS of 2001 on the United States. In addition to the many other issues concerning the ADL including school VOUCHERS and President GEORGE W. BUSH's "Faith Based Initiative" to allow certain charities to receive federal funds, the ADL Internet site features a "Terrorism Update". The ADL has also created a handbook with suggestions for keeping Jewish institutions safe from terrorist attacks.

The ADL is divided into numerous groups and departments. The Civil Rights Division is the most prominent wing of the organization, as it has investigated and exposed anti-Semitism and bigotry. The division's research department has become a central source of information on organized bigotry, collecting and analyzing racist, anti-Semitic, terrorist, and extremist literature. The department issues an annual *Audit of Anti-Semitic Incidents* that serves as a reliable measurement tool of anti-Semitic trends. The Civil Rights Division's fact-finding department uses investigative journalists to track the activities of extremist groups. For example, this department tracked neo-Nazi skinhead activity in 33 countries and issued the first major survey on this movement.

The Civil Rights Division's legal affairs department serves as the ADL's advocate in court and before legislatures. The department's attorneys file briefs, analyze proposed bills and regulations, draft model laws, and prepare testimony and legal reports for ADL staff. The department's model HATE CRIMES law has been adopted by almost four-fifths of the states and has been upheld as constitutional by the U.S. Supreme Court in *State v. Mitchell,* 508 U.S. 476, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993). In addition, the department works with local attorneys in the ADL's thirty regional offices.

The ADL's Braun Holocaust Institute, established in 1977, serves as a centralized information center on the Holocaust. The institute encourages public and religious schools to teach about the Holocaust by providing curricula for elementary and high school students. It has also organized teacher-training workshops and seminars to help teachers incorporate Holocaust studies into mainstream disciplines. The institute's collection of Holocaust-related materials is recognized as one of the best in the world. In addition, the institute publishes *Dimensions: A Journal of Holocaust Studies*, a general interest magazine on the Holocaust, and resource guides, catalogs, and background primers.

The Government and National Affairs Office in Washington, D.C., serves as the ADL's lobbyist, promoting the legislative agenda of the organization. The office worked with Congress to establish a congressional task force against anti-Semitism. The ADL has also led a broad coalition of civil rights, religious, and law enforcement groups in support of federal hate crime initiatives. In addition, the ADL has fought against federal school voucher programs and has sought to increase workplace protection for employees who wish to observe their religious duties.

The ADL's commitment to the state of Israel includes maintaining an office in Jerusalem. This office provides information on current issues to ADL staff and members, and it com-

municates the U.S. Jewish community's concerns to the Israeli government. The Jerusalem office also introduces visiting Americans, such as government officials and journalists, to the people and politics of Israel. The ADL has endorsed the need for a just peace between Israelis and Palestinians but has been an adamant defender of Israel and opponent of TERRORISM.

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## ANTILAWYER MOVEMENT

Throughout early U.S. history, legal practitioners were the subject of ambivalence on the part of the general public. The attitude against lawyers reached its peak after the Revolutionary War and remained hostile until the beginning of the nineteenth century.

During the early days of the colonies, the system for the administration of justice was based on ARBITRATION and religious principles, and lawyers specially educated and skilled in the law were presumably not needed and were often restricted or prohibited from practicing. Judges were ordinary men who used unpolished methods of questioning to determine the facts of each case; defendants were their own lawyers. This system remained successful as long as the population of each community remained small and manageable, and the people were clear about their rights and obligations to their neighbors and the community.

By the end of the seventeenth century, the colonies experienced a period of growth, and the original judicial system became unsatisfactory. Formal PLEADING and skilled lawyers began to replace the primitive methods of earlier colonial times.

After the Revolutionary War, Americans sought a new form of JURISPRUDENCE to interact with their newly gained freedoms. Laws were less confining, due to the belief that moral fiber was more important to satisfactory conduct than legislation.

During this period, the antilawyer movement gained momentum. Historians speculate that it evolved as a result of former prejudices and conflicts toward the legal profession. Although lawyers in the past had not been viewed favorably, they achieved prominence and esteem as strong proponents of freedom from England during the Revolutionary War. After the war, lawyers were once again an important part of the legal system but were used primarily by the wealthy. As a result, they were often in conflict with those who were poor and could not pay their debts, which led to a resurrection of the old negative attitudes against them.

Lawyers were regarded with suspicion. They were accused of initiating unnecessary lawsuits, impeding the justice system, and prolonging trials to secure additional fees from unsuspecting clients. They were also criticized for the use of legal jargon, causing simple matters to seem complicated.

Despite these attacks, lawyers managed to attain political power. They were regarded as conspirators, however, for people could not accept the idea that lawyers who served as politicians made the laws by which they secured a living as legal practitioners. It was also feared that lawyers, judges, and legislators would band together to control society, depriving the common people of some of their hard-won freedoms. Although the fears were exaggerated, they were true to some degree, for lawyers did earn a living from the ramifications that legislation had upon the general public.

Two remedies were recommended to reconcile the proponents of the antilawyer sentiment and lawyers. The first suggestion was an updated version of the early colonial justice system, which prohibited lawyers from practicing. A judge representing the interests of the community would preside over the court and instruct the jury. Judges were educated aristocrats who could be impeached if their conduct so warranted. If a legal representative was deemed necessary, a friend of the defendant could participate in the arbitration.

The second suggestion provided for a small group of professional lawyers to practice as public servants. Their salaries and actions would be controlled by the state, and their chief function would be to clarify legal principles of each case for the jury.

The conflicting feelings toward lawyers culminated in several incidents, the most noteworthy of which was known as **SHAYS'S REBELLION.** The rebellion began in 1786 when Massachusetts voters elected a majority of nonlawyers to the General Court. This action led to a riot, and hostile agrarian mobs overran the courthouses, closing them down. The governor dispatched the state army, which successfully quelled the agitators.

Shays's Rebellion did not stop the people of Massachusetts from electing lawyers to political positions. The very tactics they feared in the courtroom were highly desirable in politics to control government officials; in spite of their conflicting feelings, voters were still attracted to legal skills.

The new methods of justice proved to be inefficient. Arbitration was fruitless, and laymen were fallible as lawyers. By 1790, most cases were again tried by lawyers, and the antilawyer movement began to wane.

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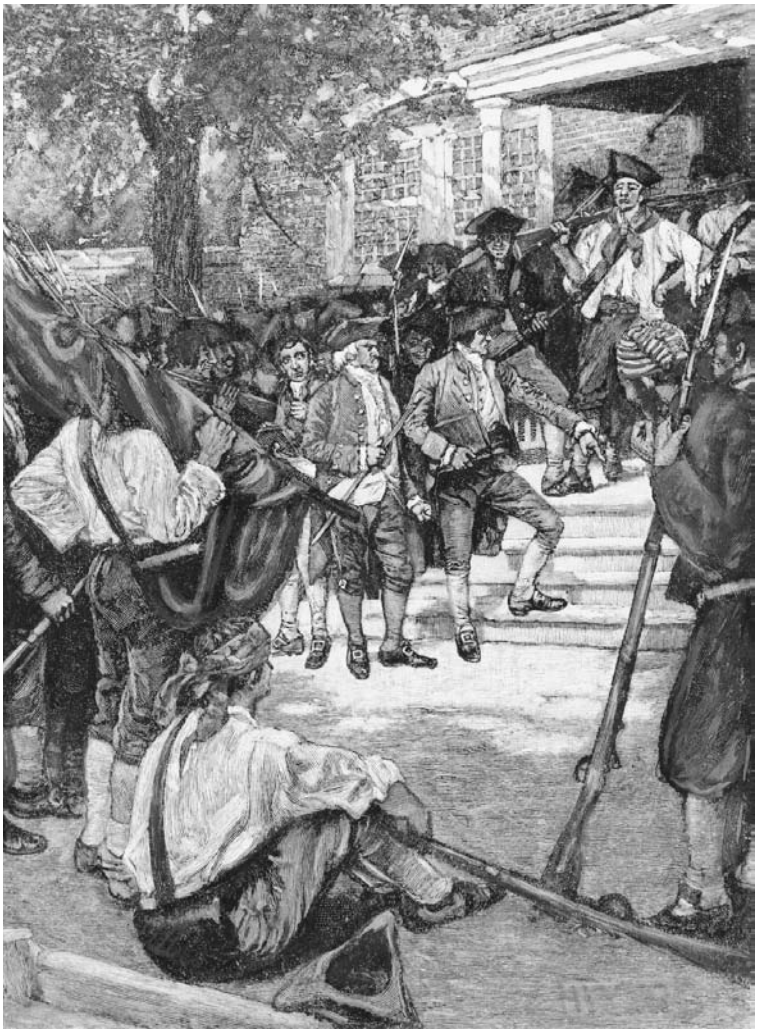

*A wood engraving from an 1884* Harper's Monthly *shows Daniel Shays and his comrades occupying a Massachusetts courthouse to prevent the court from directing legal action at debt-ridden farmers in 1786.*

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## ANTINOMY

*An expression in law and logic to indicate that two authorities, laws, or propositions are inconsistent with each other.*

## ANTITRUST LAW

*Legislation enacted by the federal and various state governments to regulate trade and commerce by preventing unlawful restraints, price-fixing, and monopolies; to promote competition; and to encourage the production of quality goods and services at the lowest prices, with the primary goal of safeguarding public welfare by ensuring that consumer demands will be met by the manufacture and sale of goods at reasonable prices.*

Antitrust law seeks to make enterprises compete fairly. It has had a serious effect on business practices and the organization of U.S. industry. Premised on the belief that free trade benefits the economy, businesses, and consumers alike, the law forbids several types of restraint of trade and monopolization. These fall into four main areas: agreements between or among competitors, contractual arrangements between sellers and buyers, the pursuit or maintenance of **MONOPOLY** power, and mergers.

The Sherman Anti-Trust Act of 1890 (15 U.S.C.A. § 1 et seq.) is the basis for U.S. antitrust law, and many states have modeled their own statutes upon it. As weaknesses in the Sherman Act became evident, Congress added amendments to it at various times through 1950. The most important are the **CLAYTON ACT** of 1914 (15 U.S.C.A. § 12 et seq.) and the **ROBINSON-PATMAN ACT** of 1936 (15 U.S.C.A. § 13 et seq.). Congress also created a regulatory agency to administrate and enforce the law, under the Federal Trade Commission Act of 1914 (15 U.S.C.A. §§ 41–58). In an ongoing analysis influenced by economic, intellectual, and political changes, the U.S. Supreme Court has played the leading role in shaping the ways in which these laws are applied.

Enforcement of antitrust law depends largely on two agencies: the **FEDERAL TRADE COMMISSION** (FTC), which may issue cease-

and-desist orders to violators, and the Antitrust Division of the U.S. DEPARTMENT OF JUSTICE (DOJ), which can litigate. Private parties may also bring civil suits. Violations of the Sherman Act are felonies carrying fines of up to $10 million for corporations, and fines of up to $350,000 and prison sentences of up to three years for persons. The federal government, states, and individuals may collect treble (i.e., triple) the amount of damages that they have suffered as a result of injuries.

### Origins

Antitrust law originated in reaction to a public outcry over *trusts,* which were late-nineteenth-century corporate monopolies that dominated U.S. manufacturing and mining. Trusts took their name from the legal device of business incorporation called trusteeship, which consolidated control of industries by transferring stock in exchange for trust certificates. The practice grew out of necessity. Twenty-five years after the Civil War, rapid industrialization had blessed and cursed business. Markets expanded and productivity grew, but output exceeded demand, and competition sharpened. Rivals sought greater security and profits in cartels (mutual agreements to fix prices and control output). Out of these arrangements sprang the trusts. From sugar to whiskey to beef to tobacco, the process of merger and consolidation brought entire industries under the control of just a few powerful people. Oil and steel, the backbone of the nation's heavy industries, lay in the hands of the corporate giants John D. Rockefeller and J.P. Morgan. The trusts could fix prices at any level. If a competitor entered the market, the trusts would sell their goods at a loss until the competitor went out of business, and then they wold raise prices again. By the 1880s, abuses by the trusts brought demands for reform.

History gave only contradictory direction to the reformers. Before the eighteenth century, COMMON LAW concerned itself with contracts, combinations, and conspiracies that resulted in restraint of free trade, but it did little about them. English courts generally let restrictive contracts stand because they did not consider themselves to be suited to judging adequacy or fairness. Over time, courts looked more closely into both the purpose and the effect of any restraint of trade. The turning point came in 1711 with the establishment of the basic standard for judging close cases, "the rule of reason." Courts asked whether the goal of a contract was a general restraint of competition (a *naked restraint*) or particularly limited in time and geography (an *ancillary restraint*). Naked restraints were unreasonable, but ancillary restraints were often acceptable. Exceptions to the rule grew as the economic philosophy of *laissez-faire* economics (meaning "let the people do what they please") spread its doctrine of non-interference in business. As rival businesses formed cartels to fix prices and to control output, the late-eighteenth-century English courts often nodded in approval.

By the time the U.S. public was complaining about the trusts, common law in U.S. courts was somewhat tougher on restraint of trade. Yet it was still contradictory. The courts took two basic views of cartels: tolerant and condemning. The first view accepted cartels as long as they did not stop other merchants from entering the market. It used the rule of reason to determine this, and it put a high premium on the freedom to enter into contracts. Businesses and contracts mattered. Consumers, who suffered from price-fixing, were irrelevant; the wisdom of the market would protect them from exploitation. The second view was that cartels are thoroughly bad. It reserved the rule of reason only for judging more limited ancillary restrictions. Given these competing views, which varied from state to state, no comprehensive common law could be said to exist. But one approach was destined to win.

### The Sherman Act and Early Enforcement

In 1890, Congress took aim at the trusts with passage of the SHERMAN ANTI-TRUST ACT, named for Senator JOHN SHERMAN (R-Ohio). It went far beyond the common law's refusal to enforce certain offensive contracts. Clearly persuaded by the more restrictive view that saw great harm in restraint of trade, the Sherman Act outlawed trusts altogether. The landmark law had two sections. Section 1 broadly banned group action in agreements, forbidding "every contract, combination in the form of trust or otherwise, or conspiracy," that restrained interstate or foreign trade. Section 2 barred individuals from monopolizing or trying to monopolize. Violations of either section were punishable by a maximum fine of $50,000 and up to one year in jail. The Sherman Act passed by nearly unanimous votes in both houses of Congress.

Although sweeping in its language, the Sherman Act soon revealed its limitations. Congress had wanted action even though it did not know what steps to take. Historians would later dispute what its precise aims had been, but clearly the lawmakers intended for the courts to play the leading role in promoting competition and attacking monopolization: Judges would make decisions as cases arose, slowly developing a body of opinions that would replace the confusing precedents of state courts. For a public that expected overnight change, the process worked all too slowly. President GROVER CLEVELAND's Department of Justice, which disliked the Sherman Act, made little effort to enforce it.

Initial setbacks also came from the U.S. Supreme Court's first consideration of the statute, in *United States v. E. C. Knight Co.,* 156 U.S. 1, 15 S. Ct. 249, 39 L. Ed. 325 (1895). Rejecting a challenge to a sugar trust that controlled over 98 percent of the nation's sugar-refining capacity, the Court held that manufacturing was not interstate commerce. This was good news for trusts. If manufacturers were exempt from the Sherman Act, then they would have little to worry about from federal antitrust regulators. The Court only began strongly supporting the use of the law in the late 1890s, starting with cases against railroad cartels. By 1904, some 300 large companies still controlled nearly 40 percent of the nation's manufacturing assets and influenced at least 80 percent of its vital industries.

After the turn of the twentieth century, federal enforcement picked up speed. President THEODORE ROOSEVELT's announcement that he was a "trustbuster" foreshadowed one important aspect of the future of antitrust enforcement: It would depend largely on political will from the EXECUTIVE BRANCH of government. Roosevelt and his successor, President WILLIAM HOWARD TAFT, responded to public criticism over the rapid merger of even more industries by pursuing more vigorous legal action. Steady prosecution in the first decade of the twentieth century brought the downfall of trusts.

In 1911, the U.S. Supreme Court ordered the dissolution of the Standard Oil Company and the American Tobacco Company in landmark rulings that brought down two of the most powerful industrial trusts. But these were ambiguous victories. In *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619, for example, the Court dissolved the trust into 33 companies, but held that the Sherman Act outlawed only restraints that were anticompetitive—subject, furthermore, to a rule of reason. Critics of all stripes jumped on this decision. Some feared that conservative judges would now gut the Sherman Act; others predicted a return to lax enforcement; and businesses worried that in the absence of specific unlawful restraints, the rule of reason gave courts too much freedom to read the law subjectively.

*This 1907 political cartoon by Clifford Berryman humorously depicts President Theodore Roosevelt in his roles of "trustbuster" and sportsman. His administration filed 44 antitrust lawsuits in eight years.*

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### Congressional Reform up to 1950

Dissatisfaction brought new federal laws in 1914. The first of these was the Clayton Act, which answered the criticism that the Sherman Act was too general. It declared four practices to be illegal but not criminal: (1) price discrimination—selling a product at different prices to similarly situated buyers; (2) tying and exclu-

sive-dealing contracts—sales on condition that the buyer stop dealing with the seller's competitors; (3) corporate mergers—acquisitions of competing companies; and (4) interlocking directorates—boards of competing companies, with common members.

Quick to hedge its bets, the Clayton Act qualified each of these prohibited activities. They were only illegal where the effect "may be substantially to lessen competition" or "might tend to create a monopoly." This language was intentionally vague. Despite specifying different tests for violations, Congress still wanted the courts to make the difficult decisions. One important limitation was added: The Clayton Act exempted unions from the scope of antitrust law, refusing to treat human labor as a commodity.

The second piece of federal legislation in 1914 was the Federal Trade Commission Act. Without attaching criminal penalties, the law provided that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are hereby declared illegal." This was more than a symbolic attempt to buttress the Sherman Act. The law also created a regulatory agency, the Federal Trade Commission (FTC), to interpret and enforce it. Lawmakers who feared judicial hostility to the Sherman Act saw the FTC as a body that would more closely follow their preferences. Originally, the commission was designed to issue prospective decrees and to share responsibilities with the Antitrust Division of the Department of Justice. Later court rulings would allow it greater latitude in attacking Sherman Act violations.

These laws helped to satisfy the short-term demand for tougher, more explicit action from Congress. Before long, antitrust enforcement would shift with the mood of the country. As WORLD WAR I and the 1920s reversed the outlook of previous years, antitrust policy was characterized by the hands-off policies of President CALVIN COOLIDGE, who declared, "The chief business of the American people is business." Economic trends created and supported this attitude; prosperity seemed a worthwhile reward. In this era, DOJ gave more attention to promoting fairness than it did to attacking restrictive practices and monopoly power. Although activities such as price-fixing still came under attack, other kinds of business cooperation flourished and even received official encouragement during the early years of the NEW DEAL. This pattern lasted for a good 15 years, intensifying after the STOCK MARKET crash of 1929.

Following what historians called the era of neglect, antitrust made a resurgence. In 1935, the U.S. Supreme Court struck down President FRANKLIN D. ROOSEVELT'S NATIONAL INDUSTRIAL RECOVERY ACT, which coordinated industrywide output and pricing, in SCHECHTER POULTRY CORP. V. UNITED STATES, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570. The decision radically affected New Deal–era policy. The following year, Congress passed the Robinson-Patman Act in an attempt to make sense of the Clayton Act's bans on price discrimination. The Robinson-Patman Act explicitly forbade forms of price discrimination, in order to protect small producers from extinction at the hands of larger competitors. By 1937, economic decline brought federal antitrust enforcement back with a vengeance, as Roosevelt's administration began an extensive investigation into monopolies. The effort resulted in more than 80 antitrust suits in 1940 alone.

One federal court case in this period, *United States v. Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945) (hereinafter *Alcoa*), changed antimonopoly law for years to come. Since the 1920s, the U.S. Supreme Court had looked skeptically on the role of a business's size in judging monopoly cases. In *United States v. United States Steel Corp.,* 251 U.S. 417, 40 S. Ct. 293, 64 L. Ed. 343 (1920), it said, "[T]he law does not make mere size an offense, or the existence of unexerted power an offense. It, we repeat, requires overt acts." The decision weakened the monopoly ban of the Sherman Act. Rather than focus on abusive business conduct, *Alcoa* emphasized the role of market power. Judge LEARNED HAND wrote for the court, "Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that IMMUNITY from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone." The standard that emerged from this decision applied a two-part test for determining illegal monopolization: The defendant (1) must possess monopoly power in a relevant market; and (2) must have improperly used exclusionary acts to gain or protect that power.

Congress added its last piece of important legislation in 1950 with the Celler-Kefauver Antimerger Act, addressing a weakness in the Clayton Act. Because only anticompetitive stock purchases had been forbidden, businesses would circumvent the Clayton Act by targeting the assets of their rivals. U.S. Supreme Court decisions had also undermined the law by allowing businesses to transfer stock purchases into assets before the government filed a complaint. The Celler-Kefauver amendment closed these loopholes.

### The U.S. Supreme Court and Evolving Doctrine

Vigorous enforcement of antitrust legislation created an immense body of case law. After 1950, U.S. Supreme Court decisions did more than anything else to shape antitrust doctrine. Two competing outlooks emerged. One regarded markets as fragile, easily distorted by private firms, and readily correctable through public intervention. Economic efficiency mattered less, in this view, than the belief in the antitrust doctrine's ability to meet social and political goals. Opponents saw business rivalry as being generally healthy. They doubted that public intervention could cure defects, and they emphasized the self-correcting ability of markets to erode private restraints and private power. This outlook opposed the use of antitrust measures except to stop behavior that clearly harms the efficiency of business.

The most aggressive doctrine was developed under Chief Justice EARL WARREN. The WARREN COURT often saw the need for decentralized social, political, and economic power, a goal that it put ahead of the ideal of economic efficiency. In 1962, its first ruling on the Celler-Kefauver Act, *Brown Shoe Co. v. United States,* 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510, held that a merger between two firms that accounted for only five percent of total industry output violated the principal antimerger provision of the antitrust laws. *Brown Shoe* also reflected the Court's hostility toward *vertical restraints* (i.e., restrictions imposed in contracts by the seller on the buyer, or vice versa) at that time.

This aggressive approach peaked in 1967 in *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249. *Arnold* concerned *nonprice vertical restraints* (i.e., territorial or customer restrictions on the resale of goods). The majority ruled that such restraints were per se illegal—in other words, so harmful to competition that they need not be evaluated. In ensuing years, respected antitrust experts, such as Chief Judge RICHARD POSNER of the U.S. Court of Appeals for the 7th Circuit, criticized the Court's use of "per se" tests to invalidate vertical price agreements between competitors or between sellers and buyers, arguing that such agreements can be efficient.

The U.S. Supreme Court heeded this criticism in *State Oil Co. v. Khan*, 522 U.S. 3, 118 S.Ct. 275, 139 L.Ed.2d 199 (U.S. 1997). Relying heavily on an appellate opinion penned by Judge Posner, the high court overruled a 29-year-old precedent that declared all vertical maximum price-fixing arrangements to be per se violations of the Sherman Act. Vertical maximum price-fixing arrangements, like the majority of commercial arrangements that are subject to antitrust laws, should be evaluated under the rule of reason, the Court wrote. The rule-of-reason analysis will effectively identify those situations in which vertical maximum price-fixing amounts to anticompetitive conduct, by allowing courts to evaluate a variety of factors, according to the Court. These factors include specific information about the relevant business; the condition of the business before and after the restraint was imposed; and the history, nature, and effect of the restraint.

By the mid 1970s, the U.S. Court backed off its robust interventionism. Two pivotal decisions came in 1977, including the most important since WORLD WAR II, *Continental TV v. GTE Sylvania,* 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568. In a decisive departure from the previous decade's rulings, the Court abandoned its hostility toward efficiency. Now, for evaluating nonprice vertical restraints, it returned to the use of a rule of reason. Per se rules would remain influential, but economic analysis would be the primary tool in formulating and applying antitrust rules. The second powerful change in doctrine was *Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701. In the *Brunswick* decision, the Court wrote that antitrust laws "were enacted for the 'protection of competition, not competitors.' " The irony was addressed to private antitrust litigants. If they wanted to sue, the Court wrote, they would have to prove "antitrust injury." This decision discarded the old view that the demise of individual firms was plainly bad for competition. Replacing it was the view that adverse effects to businesses are sometimes offset by gains in

reduced costs and increased output. Increasingly, after *Brunswick,* the U.S. Supreme Court and lower courts would accept economic efficiency as a justification for dominant firms to defend their market positions. By 1986, efficiency-based analysis was widely accepted in federal courts.

Even against this restrictive background, explosive change occurred. The early 1980s saw the dramatic conclusion of a historic monopoly case against the telephone giant American Telephone and Telegraph (AT&T) (*United States v. American Telephone & Telegraph Co.,* 552 F. Supp. 131 [D.D.C. 1982], *aff'd in Maryland v. United States,* 460 U.S. 1001, 103 S. Ct. 1240, 75 L. Ed. 2d 472 [1983]). DOJ settled claims that AT&T had impeded competition in long-distance telephone service and TELECOMMUNICATIONS equipment. The result was the largest divestiture in history: A federal court severed the Bell System's operating companies and manufacturing arm (Western Electric) from AT&T, thus transforming the nation's telephone services. But the historic settlement was an exception to the political philosophy and the level of enforcement that characterized the decade. As the 1980s were ending, the Department of Justice dropped its 13-year suit against International Business Machines (IBM). This lengthy battle had sought to end IBM's dominance by breaking it up into four computer companies. Convinced that market forces had done the work for them, prosecutors gave up.

Throughout the 1980s, political conservatism in federal enforcement complemented the U.S. Supreme Court's doctrine of non-intervention. The administration of President RONALD REAGAN reduced the budgets of the FTC and the DOJ, leaving them with limited resources for enforcement. Enforcement efforts followed a restrictive agenda of prosecuting cases of output restrictions and large mergers of a *horizontal* nature (i.e., those involving firms within the same industry and at the same level of production). Mergers of companies into conglomerates, on the other hand, were looked on favorably, and the years 1984 and 1985 produced the greatest increase in corporate acquisitions in the nation's history.

As the U.S. Supreme Court strengthened requirements for evidence, injury, and the right to bring suit, antitrust cases became harder for plaintiffs to win. Most decisions during this period narrowed the reach of antitrust. A few rare exceptions, such as *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985), which condemned a monopolist's unjustified refusal to deal with a rival, faintly recalled the tough outlook of the Warren Court. Non-intervention, however, took precedence. In the strongest example, *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), the majority dismissed allegations that Japanese television manufacturers had engaged in a 20-year pricing conspiracy that was designed to drive U.S. electronics equipment manufacturers out of business. The Court discouraged claims that rested on ambiguous CIRCUMSTANTIAL EVIDENCE or lacked "economic rationality," suggesting that lower courts settle these by SUMMARY JUDGMENT.

### The 1990s

Once again proving that antitrust law never remains static, the late 1980s and early 1990s brought more changes in enforcement, economic analysis, and court doctrine. At the state level in the late 1980s, governments attacked mergers and restraints. The U.S. Supreme Court gave these efforts support in *California v. American Stores Co.,* 495 U.S. 271, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990), upholding the ability of state governments to break up illegal mergers. Another trend came again from academia, where, for years, critics of the CHICAGO SCHOOL had been re-evaluating its highly influential efficiency model. They concluded that a proper analysis of efficiency goals showed that efficiency demanded tighter antitrust controls, not stubborn non-intervention.

An important 1992 U.S. Supreme Court case seemed to support this view. *Eastman Kodak Co. v. Image Technical Services,* 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (hereinafter *Kodak*), concerned *tying arrangements* (i.e., contracts between buyer and seller that restrict competition) in the sale and service of photocopiers. Kodak sold replacement parts only to buyers who agreed to have Kodak exclusively service the machines, and the restriction prompted a lawsuit from 18 independent service organizations (ISOs). The company defended itself by arguing that even if it did monopolize the market, it lacked the necessary market power for a Sherman Act violation. The Court rejected the idea that this was enough to create a legal rule that equipment competition precluded any finding of monopoly power in the parts and services

industry. In declaring Kodak's arrangement to be illegal, Justice HARRY A. BLACKMUN warned about the dangers of relying on economic theory as a substitute for "actual market realities"—in this case, the harm done to ISOs who were shut out of the service market.

After the Reagan years, antitrust attitudes sharpened in Washington, D.C. The administration of President GEORGE H. W. BUSH adopted a slightly more activist approach, which was reflected in joint guidelines on mergers, issued in 1992 by the FTC and DOJ. In following the trend away from strict Chicago School efficiency standards, the guidelines looked more closely at competitive effects and tightened requirements. But understaffed government attorneys generally lost court cases. President BILL CLINTON took this activism further. Anne K. Bingaman, his appointee to head DOJ's Antitrust Division, beefed up the division's staff with 61 new attorneys, declaring her organization to be the competition agency. The Antitrust Division filed 33 civil suits in 1994, roughly three times the annual number that had been brought under Reagan and Bush. It won some victories without going to court, in one instance compelling AT&T to keep a subsidiary private, but it lost a major lawsuit in which it had claimed that General Electric had conspired with the South African firm of DeBeers to fix industrial diamond prices.

Under President Clinton, the most important antitrust actions involved federal probes of the computer microprocessor giant Intel Corporation and the computer software giant Microsoft Corporation. In 1999, the FTC settled a year-old lawsuit against Intel by entering a CONSENT DECREE under which Intel agreed to cease retaliating against customers during INTELLECTUAL PROPERTY disputes over microprocessor technology. In its 1998 lawsuit, the FTC claimed that Intel had illegally cut off shipments of its microprocessor chips and withheld technical information regarding microprocessors, to coerce its competitors (Intergraph Corp., the former Digital Equipment Corp., and Compaq Computer Corp., which acquired Digital in 1998) to give up their microprocessor technology. Intel did not dispute most of the facts underlying the allegations, but it insisted that it had acted legally.

However, the Microsoft probe, in its potential for far-reaching action, was the biggest antitrust case since those involving AT&T and IBM. Competitors complained that Microsoft had been using illegal arrangements with buyers to ensure that its Windows operating system would be installed in nearly 80 percent of the world's computers. In-depth investigations by the FTC and DOJ followed. In July 1994, under threat of a federal lawsuit, Microsoft entered a consent decree that was designed to increase competitors' access to the market. The following year, Microsoft launched its popular Windows 95 operating system with an upgraded version of its Internet Explorer Web browser, two products that the software maker said were integrally related.

*During a December 1998 news conference in Washington, D.C., Bill Gates, founder of Microsoft, answers questions, via closed-circuit television, about the antitrust lawsuit filed against the company.*

AP/WIDE WORLD PHOTOS

Over the next two years, the federal government received fresh complaints that Microsoft was again resorting to anti-competitive practices. DOJ responded by suing Microsoft in the U.S District Court for the District of Columbia, alleging that the software maker had violated the 1994 consent decree by forcing computer makers to install its Internet Explorer Web browser as a pre-condition to the computer makers having the right to sell their PCs with the Windows 95 operating system included. Two months later U.S. District Judge Thomas Penfield Jackson issued a preliminary injunction forcing Microsoft to stop, at least temporarily, requiring

manufacturers who sell the Windows operating system to install Microsoft's Internet Explorer, an arrangement that he called an illegal tying agreement. *United States. v. Microsoft Corp.*, 980 F.Supp. 537 (D.D.C. 1997). Fueled in part by Jackson's ruling, DOJ joined 20 state attorneys general in May 1998 to bring suit against Microsoft, charging that the software maker's illegal bundling of Internet Explorer with Windows 95 violated federal antitrust laws and state unfair-competition statutes. The following month, a three-judge panel for the U.S Court of Appeals for the District of Columbia overturned the preliminary INJUNCTION that Judge Jackson had issued to enforce the consent decree, thus making way for the parties to resolve their dispute in the joint suit brought by DOJ and the state attorneys general. *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998).

On October 19, 1998, trial began in the antitrust suit against Microsoft. Less than a month later, Judge Jackson had issued a preliminary finding that Microsoft was exercising illegal monopoly power in the operating-system market, and that the software maker had been using that power to promote its web browser and to stifle competition through illegal bundling of the two products. *United States v. Microsoft Corp.*, 84 F.Supp.2d 9 (D.D.C. 1999). Jackson issued his final decision in April of 2000. The judge not only reiterated his preliminary findings, but also concluded that the same facts that demonstrated that Microsoft had unlawfully leveraged its operating-system monopoly to push rival web browsers out of the market in violation of federal law also established Microsoft's liability under analogous state antitrust provisions. *United States v. Microsoft Corp.*, 97 F.Supp.2d 59 (D.D.C.2000).

Later that month, the court proceeded to the remedy phase of the trial. DOJ and 18 state attorneys general (two attorneys general had since dropped out of the suit) asked the judge to break the company into two parts: one company to develop and market the Windows operating system, and the other to develop Microsoft's software, including its web browser. On June 7, 2000, Judge Jackson granted the requested remedy, and Microsoft appealed. The court of appeals reversed, finding that Jackson had erroneously applied a *per se* analyses in making his findings instead of the appropriate "rule of reason" standard. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir., 2001). The appellate court then remanded the matter for further proceedings, but ordered Judge Jackson removed from the case after he made extra-judicial comments to the press in violation of ethical canons forbidding judges from commenting on the merits of a pending case. Upon remand, Judge Colleen Kollar-Kotelly was selected to replace Jackson.

In September 2001, DOJ announced that it would no longer seek a breakup of Microsoft, and agreed to commence negotiations to settle the lawsuit. Those negotiations bore fruit in October 2001, when DOJ and nine states announced that they had reached a tentative settlement with Microsoft. Ultimately approved by Judge Kollar-Kotelly on November 1, 2002, the settlement prevents Microsoft from participating in exclusive deals that could hurt competitors; requires Microsoft to offer uniform contract terms to PC makers; and obliges the software giant to release some technical information so that software developers can write programs for Windows that work as well as Microsoft's own products do. The settlement agreement also compels Microsoft to give manufacturers and customers a way to remove certain Microsoft icons from the Windows desktop. In the court's order approving the settlement, the judge expressly reserved the right to reopen the case herself if she ever suspects Microsoft of violating the settlement's terms. *United States v. Microsoft*, 231 F.Supp.2d 144 (D.D.C., Nov 01, 2002). To demonstrate its GOOD FAITH, Microsoft immediately unveiled several business and product changes to comply with the settlement, including Windows functionality that gives users the ability to hide Microsoft programs like its Web browser and only see competing products.

After the court approved the settlement, seven of the nine remaining non-settling states agreed to drop their lawsuits when Microsoft offered to pay them $25 million in attorney's fees. Two states, Massachusetts and West Virginia, are continuing to fight, asking the court to impose tougher sanctions. They want Microsoft to put Internet Explorer into the public domain, to translate its Office productivity suite to other operating systems, and to let computer makers remove some Windows features.

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CROSS-REFERENCES

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## APPARENT

*That which is clear, plain, and evident.*

In the law of agency, an agent has *apparent authority* to represent the person, or principal, for whom he or she acts, when the principal acts in such a manner toward the agent that a reasonable person would plainly assume that the agent was acting for the principal.

## APPEAL

*Timely resort by an unsuccessful party in a lawsuit or administrative proceeding to an appropriate superior court empowered to review a final decision on the ground that it was based upon an erroneous application of law.*

A person who initiates an appeal—the appellant, sometimes called the plaintiff in error, must file a notice of appeal, along with the necessary documents, to commence appellate review. The person against whom the appeal is brought, the appellee, then files a brief in response to the appellant's allegations.

There are usually two stages of review in the federal court and in many state court systems: an appeal from a trial court to an intermediate appellate court and thereafter to the highest appellate court in the jurisdiction. Within the appellate rules of administrative procedure, there might be several levels of appeals from a determination made by an ADMINISTRATIVE AGENCY. For example, an appeal of the decision of an ADMINISTRATIVE LAW judge may be heard by a reviewing body within the agency, and from that body, the appeal may go to a trial court, such as a federal district court. Thereafter, the appeal might travel the same route as an appeal taken from a judicial decision, going from an intermediate to a superior appellate court, or it might go directly to a superior appellate court for review, bypassing the intermediate stage. The rules of appellate procedure applicable to a particular court govern its review of cases.

**Criminal Appeals from U.S. District Courts Filed in U.S. Court of Appeals, 1992 to 2001**

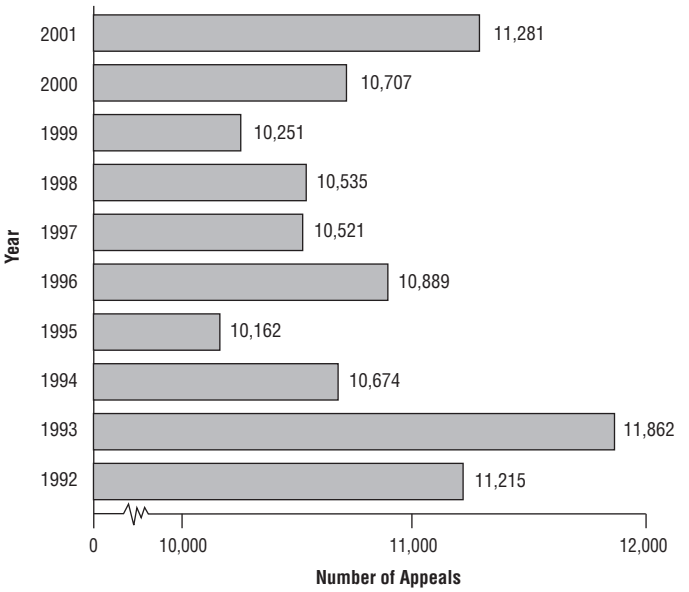


SOURCE: U.S. Court of Appeals, *Appellate Judicial Caseload Profile Report,* 2001.

### Right to Appeal

There is no absolute right of appeal for all decisions rendered by a lower court or administrative agency. Federal and state constitutions and statutory provisions create appellate courts and prescribe the types of cases that are within their jurisdiction. An appeal may be granted as a matter of right, such as from a trial court to an intermediate appellate court or only at the discretion of a superior appellate court, for example, by a grant of certiorari by the Supreme Court. If the decision presented does not meet the statutory requirements for review, the appellate court is powerless to hear the appeal and review is denied.

The right to appeal a decision is limited to those parties to the proceeding who are aggrieved by the decision because it has a direct and adverse effect upon their persons or property. In addition, an actual case or controversy must exist at the time of review. Issues that have become moot while the appeal is pending and cases that have been settled during that time are not reviewable.

### Final Decision

A final judgment or order must have been reached by the trial court in order for a case to be appealable. A judgment is considered final for purposes of appeal when it ends the action in the court in which it was brought and nothing more is to be decided. This rule is intended to prevent the piecemeal litigation of a lawsuit, to avoid delay resulting from INTERLOCUTORY appeals, and to give the trial court the opportunity to render a decision in the case to the satisfaction of both parties, thereby obviating the need for appeal. The consideration of incidental matters, such as the computation of interest, attorneys' fees, or court costs, does not prevent a judgment or order from being appealed.

### Grounds

Error is the basis for review of a final decision rendered by a court or administrative agency. Error is called to the attention of a court through the use of objections, protests made during the course of a proceeding that an action taken by the opposing side in a controversy is unfair or illegal. Decisions rendered in favor of one party at trial level are presumed by an appellate court to be correct unless objections have been made to the issues in question during the trial. Failure to do so will preclude their review on appeal. An objection must be made as promptly and specifically as possible for each act to which it is directed so that the court may make an intelligent decision regarding its merits. The trial judge rules on the objection, and the decision is included in the trial record. If the attorney for either party disagrees with the ruling, he or she may take an exception, an objection taken to a decision of a court on a MATTER OF LAW, which is noted in the trial record to be preserved for purposes of appeal. Appellate jurisdiction is limited only to a review of actions taken by an inferior court. No new objections can be raised before an appellate court for its consideration unless exceptional circumstances exist to justify the appellate court raising the issues sua sponte, on its own motion. Exceptional circumstances mean the presence at trial of PLAIN ERROR, a mistake in the proceedings that substantially affects the rights of the party against whom the decision has been made and undermines the fairness and integrity of the judicial system, causing a miscarriage of justice.

### Time of Appeal

Appeals must be made within the time prescribed by statute or by the governing rules of the appellate court. Such statutes begin to run only after a final decision has been made. The timely filing of the notice of appeal with the clerk of the appellate court and the appellee completes, or perfects, the procedure. If the appeal is not taken and perfected within the time set by statute, the right to appeal is foreclosed. Extensions of time for the filing of an appeal may be granted, however, if extenuating circumstances exist, such as if either party is adjudicated incompetent or dies.

### Notice of Appeal

A notice of appeal—a written document filed by the appellant with the court and a copy of which is sent to the appellee—is the initial step in the appeals process. It informs the court and the party in whose favor a judgment or order has been made that the unsuccessful party seeks a review of the case. Failure to file a notice of appeal according to the statutory requirements will preclude appeal.

### Bonds

An appeal bond, a promise to pay a sum of money, must often be posted by an appellant to secure the appellee against the costs of the appeal, if the appellee is successful and the appellant fails to pay. Its amount is determined by the court itself or by statute. The imposition of such a bond discourages frivolous appeals. If successive appeals are taken from an intermediate appellate court to a superior one, a new bond is usually required.

### Record on Appeal

The function of the appellate court is limited to a review of the trial record sent up from the lower court and the briefs filed by the appellant and appellee. AMICUS CURIAE briefs, if permitted by the appellate court, also become part of the record on appeal. The trial record, sometimes called the record proper, must show the pleadings that initiated the case, the complete transcript (in cases of jury trial) of lower court proceedings, the verdict, and the entry of the final judgment or order. The appellant must clearly demonstrate that the grounds for review had been raised and unsuccessfully decided upon at the trial level and, therefore, prejudicial error exists to warrant the reversal of the decision of the lower court.

In some jurisdictions, a bill of exceptions—a written statement of the objections made by a party to the ruling, decision, charge, or opinion of the trial judge—must be submitted to the

appellate court to provide a history of the trial proceedings. It should not include matters that belong in the record proper but, instead, should state those points concerning QUESTIONS OF LAW raised by the exceptions taken during the trial. The appellant's attorney prepares the bill and presents it to the trial judge for settlement, an agreement between the trial judge and the appellant that the bill contains a truthful account of the events of the trial. If there is disagreement, the judge returns the bill to the appellant with an explanation. The appellee must be given notice of the time and place of the settlement of the bill of exceptions in order to object to or approve its contents. The settled bill of exceptions becomes part of the trial transcript, which is part of the record on appeal. The appellant must submit a complete unabridged transcript of the trial that is prepared by the clerk of the trial court.

The entire trial record is printed and filed with the appellate court, and a copy is also sent to the appellee.

### Assignment of Errors

A statement by the appellant of the errors alleged to have been committed in the lower court is an assignment of errors, a type of appellate PLEADING used to point out to the appellate court the grounds for review. It controls the scope of an appeal because if a ground for review is not contained in it, it will not ordinarily be considered by the court. The assignment of errors is usually part of the notice of appeal, the bill of exceptions, the transcript of the record, or the brief, although in some jurisdictions, it is a separate document.

### Appellate Brief

The appellant and appellee must file individual briefs to aid the appellate court in its consideration of the issues presented. Failure to do so results in a dismissal of the appeal. The facts of the case, the grounds for review, and the arguments relating to those questions must be concisely stated. Any statements referring to the trial record must be supported by an appropriate reference to it.

The appellant's brief must specifically discuss the alleged errors that entitle the appellant to a reversal and discuss why each ruling of the lower court was wrong, citing authority, such as a case in which a similar point of law has been decided or a statute that applies to the particular point in issue. Disrespectful or abusive language directed against the lower court, the appellate court, the parties, witnesses, or opposing counsel cannot be used. If it is, it will be stricken from the brief, and the costs of the brief that might have been awarded are disallowed.

### Review

Appellate courts have jurisdiction to decide only issues actually before them on appeal and nothing else. They cannot render opinions on controversies or declare principles of law that have no practical effect in settling the rights of the litigants.

Only conclusions of law, not findings of fact made by a lower court, are reviewable.

**Harmless Error** The appellate court must decide whether the errors alleged to have been made by the trial court are harmless or prejudicial. An error that substantially injures the rights of one party is called a prejudicial or reversible error and warrants the reversal of the final judgment or order. However, an error that is technical or minimally affects the rights of the parties or the outcome of the lawsuit is considered a HARMLESS ERROR, insufficient to require a reversal or modification of the decision of the lower court.

### Hearing

The clerk of the appellate court schedules on the court calendar the date of the hearing on which each side may present an oral argument. Oral arguments, usually ten to fifteen minutes for each side, help the court understand the issues argued in the brief and persuade the court to rule in favor of the arguing party. During the arguments of appellant and appellee, it is not unusual for the appellate judge to interrupt with questions on particular issues or points of law.

The appellant's argument briefly discusses the facts on which the CAUSE OF ACTION is based and traces the history of the case through the lower courts. It includes the legal issues raised by the exceptions taken to the allegedly erroneous rulings of the trial judge. Thereafter, the appellee's counsel presents arguments in favor of affirming the original decision.

### Determination

An appellate court has broad powers over the scope of its decision and the relief to be granted. After reviewing the controlling issues in an action, it may affirm the decision of the inferior tribunal, modify it, reverse it, or remand the case for a new trial in the lower court pursuant to its order.

When a decision is affirmed, the appellate court accepts the decision of the lower court and rejects the appellant's contention that it was erroneously made. The modification of a decision by an appellate court means that, while it accepts part of the trial court's decision, the appellant was correct that the decision was partly erroneous. The trial court's decision is then modified accordingly.

A reversal of a decision means that the appellate court agrees with the appellant that the decision was erroneously made. The party who lost the case at the trial level becomes the winning party in appellate court.

In some cases, a decision might be reversed but the lawsuit is still unresolved. The appellate court then orders the reversal with the direction that the case be remanded to a lower court for the determination of the issues that remain unsettled.

If a judgment or order is reversed in an intermediate appellate court, the losing party may file an appeal with a superior appellate court for relief, and the appellate process begins again. The decision rendered by a superior appellate court cannot ordinarily be reviewed. In state cases involving issues based on federal statutes or the Constitution, however, an appeal may be brought in the federal court system on those questions that are within its jurisdiction.

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CROSS-REFERENCES

Appellate Advocacy; Appellate Court; Federal Courts; Remand.

## APPEAR

*To come before a court as a party or a witness in a lawsuit.*

## APPEARANCE

*A coming into court by a party to a suit, either in person or through an attorney, whether as plaintiff or defendant. The formal proceeding by which a defendant submits to the jurisdiction of the court. The voluntary submission to a court's jurisdiction.*

In a criminal prosecution, an appearance is the initial court proceeding in which a defendant is first brought before a judge. The conduct of an appearance is governed by state and federal rules of CRIMINAL PROCEDURE. The rules vary from state to state, but they are generally consistent. During an appearance, the judge advises the defendant of the charges and of the defendant's rights, considers bail or other conditions of release, and schedules a PRELIMINARY HEARING. If the crime charged is a misdemeanor, the defendant may sometimes, depending on the local rules of court, enter a plea of guilty or not guilty at the initial appearance; if the crime is a felony, the defendant usually enters the plea at a later court proceeding. A criminal defendant may have an attorney present and may confer with the attorney during the appearance.

In some situations, a defendant may not need to appear in court in person and may even make an appearance by mail. For example, when individuals receive traffic tickets they may choose to send in a check for the amount of the fine.

Many state statutes permit appearances to be made by two-way, closed-circuit television. For instance, North Carolina's rule on video appearances reads:

> A first appearance in a noncapital case may be conducted by an audio and video transmission between the judge and defendant in which the parties can see and hear each other. If the defendant has counsel, the defendant shall be allowed to communicate fully and confidentially with his attorney during the proceeding (N.C. Gen. Stat. § 15A-601(a1) [1994]).

An appearance is also a coming into court as a party to a civil lawsuit. Although an appearance can be made by either the *plaintiff* (the one who has sued) or the *defendant* (the one being sued), the term most often refers to the action of the defendant.

The subject of appearance is closely related to the subject of PERSONAL JURISDICTION, which is the court's authority over an individual party. An appearance is some OVERT ACT by which the defendant comes before the court to either submit to or challenge the court's jurisdiction.

Any party can appear either in person or through an attorney or a duly authorized repre-

sentative; the party need not be physically present. In most instances, an attorney makes the appearance. An appearance can also be made by filing a notice of appearance with the clerk of the court and the plaintiff, which states that the defendant will either submit to the authority of the court or challenge its jurisdiction. In a lawsuit involving multiple defendants, an appearance by one is not an appearance for the others. Valid SERVICE OF PROCESS is not required before an appearance can be made.

Historically, appearances have been classified with a variety of names indicating their manner or significance. A *compulsory* appearance is compelled by process served on the party. A *conditional* appearance is coupled with conditions as to its becoming or being taken as a general appearance (defined later in this article). A *corporal* appearance indicates that the person is physically present in court. A *de bene esse* (Latin, "of well being," sufficient for the present) appearance is provisional and will remain good only upon a future contingency. A *gratis* (Latin, "free" or "freely") appearance is made by a party to the action before the service of any process or legal notice to appear. An *optional* appearance is entered by a person who is intervening in the action to protect his or her own interests, though not joined as a party. A *subsequent* appearance is made by a defendant after an appearance has already been entered for him or her by the plaintiff. Finally, a *voluntary* appearance is entered by a party's own will or consent, without service of process, although process might be outstanding.

The two most common categories of appearances are general and special.

### General Appearance

Any action by which the defendant recognizes the jurisdiction of the court constitutes a general appearance. This is an unqualified submission to the court's personal jurisdiction over the defendant and is treated as the equivalent of a valid service of process.

By making a general appearance, the defendant agrees that the court has the power to bind her or him by its actions and waives the right to raise any jurisdictional defects (e.g., by claiming that the service of process was improper). The defendant also waives the objection that the case is brought in the wrong venue. The defendant does not, however, waive any substantive rights or defenses, such as the claim that the court lacks jurisdiction over the subject matter of the case or authority to hear the particular type of case (e.g., a BANKRUPTCY court will not hear personal injury cases).

*A defendant, accompanied by his court appointed lawyer, appears before the judge in a Tacoma, Washington, courtroom. In a criminal prosecution, an appearance is the initial court proceeding in which the defendant is advised of the charges, bail is considered, and a preliminary hearing is set.*

AP/WIDE WORLD PHOTOS

### Special Appearance

A special appearance is one made for a limited purpose. It can be made, for example, to challenge the sufficiency of the service of process. But most often, a special appearance is made to challenge the court's personal jurisdiction over the defendant. It prevents a default judgment from being rendered against the defendant for failing to file a PLEADING. (A default judgment is an automatic loss for failing to answer the complaint properly.)

When a defendant makes a special appearance, no other issues may be raised without that appearance's becoming a general appearance. If a party takes any action dealing with the merits of the case, the party is deemed to have made a general appearance and submitted to the jurisdiction of the court.

If a challenge is successful and the court agrees that it does not have personal jurisdiction over the defendant, it will dismiss the action. If the court finds against the defendant on that issue, that decision can later be appealed.

The right to make a special appearance is almost universally recognized, except where abolished by statute. As a rule, leave of court (permission) must be obtained before a special appearance can be made, but this is not always the case.

### Federal Rules

Federal courts and states that have adopted the Federal Rules of Civil Procedure have eliminated the distinction between a general and a special appearance. Instead of challenging the court's personal jurisdiction in a special appearance, a defendant can do so by use of a pretrial motion to dismiss the CAUSE OF ACTION, or in an answer to the complaint. A removal proceeding, in which a defendant asks to have the case moved from state court to federal court, is regarded as a special appearance.

### Limited Appearance

In a number of states, a defendant in a lawsuit based on QUASI IN REM JURISDICTION may make a *limited* appearance. *Quasi in rem* is a Latin phrase for a type of jurisdiction in which the court has power over the defendant's property because it lies within the geographic boundaries of the court's jurisdiction. The presence of the property gives the court jurisdiction over the person of the defendant. To invoke *quasi in rem* jurisdiction, the court must find some connection between the property and the subject matter of the lawsuit.

A limited appearance enables a defendant to defend the action on the merits, but should the defendant lose, he or she will be held liable only up to the value of the identified property and not for all possible damages. A defendant who makes a limited appearance and wins the case can be sued again by the same plaintiff in a different court.

In states that have no provision for a limited appearance, a defendant can avoid being subject to the personal jurisdiction of the court by refusing to appear, thereby causing a default and a consequent FORFEITURE of the property. Or the defendant can submit to the court's personal jurisdiction, defend the case on its merits, and face the possibility of full liability. The defendant must decide which course of action is best, after comparing the value of the seized property with the damages being sought by the plaintiff and considering the likelihood of winning the case at trial.

The Federal Rules of Civil Procedure do not provide for limited appearances in federal court but instead defer to state law on that issue. A slightly greater number of courts permit limited appearances than do not. The law of the jurisdiction in which the action is brought must be consulted to determine whether limited appearances are permitted.

### Withdrawal

If an appearance has been entered through FRAUD or mistake or after the plaintiff's complaint has been materially amended, the discretion of the court may permit the appearance to be withdrawn. A proper withdrawal is treated as if no appearance at all had been entered in the case. A defendant who has withdrawn a general appearance may ask the court for leave to file a special appearance to challenge the court's jurisdiction.

If someone makes an unauthorized appearance on behalf of the defendant, it may be stricken or set aside by a motion of any party with an interest in the proceeding.

### Delay or Failure to Appear

A defendant who fails to appear in court pursuant to a service of process might have a default judgment entered against her or him and be held in CONTEMPT of court. A failure to appear does not, however, result in a waiver of objections to the court's jurisdiction.

If a defendant fails to make an appearance in the time allotted by statute or court rules, he or she may lose certain rights. But if the circumstances warrant it, a court may extend the time of appearance.

FURTHER READINGS

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CROSS-REFERENCES

Civil Procedure.

## APPELLANT

*A person who, dissatisfied with the judgment rendered in a lawsuit decided in a lower court or the findings from a proceeding before an* ADMINISTRATIVE AGENCY, *asks a superior court to review the decision.*

An appellant, sometimes called the petitioner, must demonstrate sufficient grounds for appeal, which are usually specified by statute, in order to challenge the judgment or findings.

Whether a party was a plaintiff or defendant in the lower court has no bearing on his or her status as an appellant.

## APPELLATE

*Relating to appeals; reviews by superior courts of decisions of inferior courts or administrative agencies and other proceedings.*

## APPELLATE ADVOCACY

*Legal representation by an attorney before any state or federal court of intermediate or final appeal.*

The U.S. COURTS OF APPEALS were created by the Evarts Act of 1891 (28 U.S.C.A. § 43) and are divided into 13 judicial circuits. The central location of each court is determined by statute (28 U.S.C.A. § 41 [1995]). In addition, a court may sit any place within its circuit, and is required by statute to sit in certain locations other than its central location (28 U.S.C.A. § 44 [1995]). Appeals are heard and decided by panels of three judges that are selected randomly, by the circuit court en banc (in its entirety), or by a division established to perform the court's *en banc* function in larger circuits.

The circuit courts' original jurisdiction included all matters not exclusively reserved for the district trial courts. The circuit courts also had appellate jurisdiction to review district trial court decisions in civil cases in which the amount in controversy exceeded $50 and in ADMIRALTY cases in which the amount in controversy exceeded $300. They have jurisdiction to review final decisions of the federal district trial courts, both civil and criminal. Their jurisdiction extends only to matters authorized by Congress. An appellate court has no discretion in deciding whether to consider the merits of an appeal over which it has no jurisdiction. The most common basis for appellate jurisdiction is an appeal from a final district court judgment (324 U.S. 229, 28 U.S.C.A. § 1291 [1995]). When a judgment is entered that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," a case is completed (*Catlin v. United States,* 65 S. Ct. 631 [1945]).

Congress has progressively limited the Supreme Court's power to directly review trial

*The interior chambers of the U.S. Supreme Court, the last forum for appeals of lower court decisions.*

AP/WIDE WORLD PHOTOS

court decisions without a hearing in the courts of appeals. Because Supreme Court review is usually discretionary in the overwhelming majority of cases, a court of appeals is the highest federal tribunal where a litigant or defendant can receive a hearing on the merits.

### The Appeals Process

An unsuccessful party in a lawsuit or administrative proceeding may file a timely appeal to an appropriate superior court empowered to review a final decision, on the ground that it was based upon an erroneous application of law. The person who initiates the appeal, called the appellant, must file a notice of appeal, along with other necessary documents, to commence appellate review. The person against whom the appeal is brought, the appellee, then files a brief in response to the appellant's allegations.

Usually, review in the federal and state courts goes through two stages: an appeal from a trial court to an intermediate appellate court, and then to the highest appellate court in the jurisdiction. An appeal may be granted as a matter of right or as a matter of certiorari (at the discretion of a superior appellate court). For example, a party may appeal from a federal district trial court to a U.S. court of appeals as a matter of right, but may appeal to the U.S. Supreme Court only by a grant of *certiorari.* An appellate court may hear an appeal only if the decision presented meets the statutory requirements for review.

The right to appeal is limited to the parties to the proceedings who are aggrieved by the decision because it has a direct and adverse effect upon them or their property. Also, an actual case or controversy must exist at the time of review. Issues that have become moot while the appeal is pending and cases that have been settled are not reviewable.

For a case to be appealable, a final judgment or order must have been reached by a trial court. A judgment is considered final for purposes of appeal when the action is ended in the court where it was brought and nothing more is to be decided.

An appeal must be made within the time prescribed by statute or by the rules governing the appellate court. The time for filing an appeal begins to run once a final decision has been made by the trial court. The appellant must file a notice of appeal with the clerk of the appellate court in order to begin the appeal, and send a copy to the appellee. If the appeal process is not begun within the time set by statute, any right to appeal is lost. If extenuating circumstances exist, an extension of time for filing the appeal may be granted.

The appellate court can review only the trial court record and the briefs filed by the appellant and appellee. If permitted by the appellate court, AMICUS CURIAE briefs may also become part of the record on appeal. (Amicus curiae means "friend of the court." A person who is not a party to the action may petition the court for permission to file such a brief.) The briefs must contain the facts of the case, the grounds for review, and arguments relating to the issues raised.

The appellant's brief must specifically discuss the alleged errors that entitle the appellant to a reversal of the trial court's decision and discuss why each ruling was wrong, citing authority such as a case or statute that applies to the particular point at issue. The appellee may file a brief containing arguments against reversal, discussing why the trial court's ruling was correct. Only conclusions of law, not findings of fact, made by a lower court are reviewable. Appellate courts can decide only issues actually before them on appeal.

The appellate court must decide whether the errors alleged to have been made by the trial court are harmless or prejudicial. If an error substantially injures the rights of the appellant, it is called a *prejudicial error,* or reversible error, and warrants the reversal of the final judgment or order. If the appeals court determines that the error is technical or minimally affects the rights of the parties or the outcome of the lawsuit, it is considered a HARMLESS ERROR and insufficient to require a reversal or modification of the decision of the trial court.

The appellate court may hear oral arguments from each side. These arguments, which usually last 10 to 15 minutes for each side, are intended to help the court understand the issues and to persuade the court to rule in favor of the arguing party. During the arguments, the appellate judge or judges may interrupt with questions on particular issues or points of law.

After reviewing the appeal, the appellate court may affirm the decision of the lower court, modify it, reverse it, or remand the case for a new trial in the lower court. When a decision is *affirmed,* the appellate court accepts the decision of the lower court and rejects the appellant's contention that the decision was erroneous. When the appellate court *modifies* the lower

court's decision, it accepts part of the trial court's decision and determines that the appellant was partly correct in saying that the decision was erroneous. The trial court's decision is then modified accordingly. In *reversing* a decision, the appellate court indicates that it agrees with the appellant that the lower court's decision was erroneous. The party who lost the case at the trial court level then becomes the winning party in appellate court. Occasionally, a decision will be reversed but the lawsuit is still unresolved. Then, the appellate court orders that the case be *remanded* (returned) to the lower court for the determination of issues that remain unresolved.

### Federal Criminal Appellate Advocacy

The SIXTH AMENDMENT to the U.S. Constitution guarantees a criminal defendant the right to a jury trial and the right to an attorney. The FOURTEENTH AMENDMENT says states must provide criminal defendants with these same guarantees. The U.S. Supreme Court has repeatedly held that a person found guilty in a criminal proceeding has no constitutional right to appeal. A federal criminal defendant's right to appeal, therefore, is based on an act of Congress.

Prior to the nation's founding, many colonial legislatures allowed, by special act, new trials of criminal defendants. But generally, criminal appeals did not exist when the U.S. Constitution was drafted, and the JUDICIARY ACT OF 1789 (ch. 20, 1 Stat. 73) did not provide for appellate review of criminal cases. Thus, history does not support a constitutional right to criminal appeal. The issue was left to Congress.

Between 1855 and 1860, Congress refused to provide for federal criminal appellate jurisdiction, although several bills were introduced. Finally, in 1879, Congress authorized the federal circuit courts to issue writs of error in criminal cases on a discretionary basis. In 1889, Congress gave defendants sentenced to death the right of direct appeal to the U.S. Supreme Court. In 1891, it extended the Supreme Court's jurisdiction for review to all "cases of conviction of a capital or otherwise infamous crime" (26 Stat. 827, quoted in 775 S. Ct. 1332 [1957]). Because of the burden on the Supreme Court of hearing a large number of criminal appeals, in 1897, Congress transferred jurisdiction over noncapital appeals to the circuit courts of appeals. In 1911, Congress abolished the right of direct appeal to the Supreme Court in capital cases, and the circuit courts became the appellate courts for all criminal cases.

In 1894, in *McKane v. Durston,* 153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867, a unanimous Supreme Court determined that no matter how serious the offense, a criminal defendant had no constitutional right to appeal her or his conviction.

The Criminal Justice Act (18 U.S.C.A. § 3006A [1995]) is an outgrowth of the Sixth Amendment RIGHT TO COUNSEL. The act requires courts to develop and implement plans to furnish representation for defendants charged with felonies or misdemeanors, other than petty offenses, who are financially unable to obtain an attorney. Although the act is directed primarily to proceedings at the trial court level, it provides that any person for whom counsel is appointed shall be represented at every stage of the criminal proceedings, from the defendant's initial appearance through the appeal process.

### State Criminal Appellate Advocacy

All 50 states provide defendants some form of appeal from a criminal conviction. Appeals were well-established elements of state criminal proceedings throughout the nineteenth century. They probably developed earlier in state court systems because state governments had primary responsibility for enforcing criminal laws from the founding of the nation through the 1800s, since very few federal statutory offenses existed during this period.

Because states decided that criminal appeals were necessary to protect the innocent, the Supreme Court determined that appellate procedures must comply with the federal constitutional guarantees of DUE PROCESS and EQUAL PROTECTION (*Griffin v. Illinois,* 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 [1956]). In *Douglas v. California,* 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963), the Supreme Court held that a state violates a defendant's constitutional protections when it forces an indigent, who has a statutory right to appeal, to attempt the appeal without the assistance of an attorney. The Supreme Court reasoned that without an attorney, an appeal constituted nothing more than a "meaningless ritual." Therefore, a state must provide counsel to a defendant who wants to exercise the right to appeal but cannot afford to hire a lawyer.

In 1985, the Supreme Court held that a defendant has the right to the effective assistance

of appellate counsel. The Court concluded that a defendant whose counsel does not provide effective representation is "in no better position than one who has no counsel at all" (*Evitts v. Lucey,* 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 [1985]). However, in *Ross v. Moffitt,* 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974), the Supreme Court held that a criminal defendant does not have a constitutional right to appointed counsel on a discretionary review.

In *Roe v. Flores-Ortega* , 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), the Court considered whether a defense lawyer must always consult with a defendant regarding an appeal of the conviction. In this case, the defendant (Flores-Ortega) alleged ineffective counsel because his attorney did not file an appeal within the 60-day time period dictated by the judge in his original case. The Court rejected a bright-line rule (a strict rule with no ability to use discretion) that would have mandated such a consultation, ruling that each case must be analyzed using a set of standards.

The Court in *Roe* held that a defendant claiming ineffective assistance of counsel must show that the attorney's representation "fell below an objective standard of reasonableness" and that the attorney's deficient performance prejudiced the defendant. The Court used a test set out in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 205, 80 L.Ed.2d 674 (1984), to determine if Flores-Ortega's attorney was constitutionally ineffective for failing to file a notice of appeal. It directed that an inquiry should begin by asking whether the attorney in fact consulted with the defendant about the appeal. Such a consultation meant advising the defendant on the pros and cons of taking an appeal and making a reasonable effort to discover the defendant's wishes. However, the defendant would still have to show that there was a reasonable probability that, but for his attorney's conduct, he would have filed a timely appeal.

In *Glover v. United States,* 531 U.S. 198, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001), the Supreme Court ruled that defendants are entitled to a hearing to prove that they received ineffective counsel on an appeal. In this case, the defendant argued that his appellate attorney failed to appeal his sentence, which he claimed had been miscalculated under federal sentencing guidelines. This failure would mean serving between six and 21 months longer in prison. An appeals court held that the increase in his sentence was not serious enough to merit a review of his ineffective counsel claim. The Supreme Court disagreed, ruling that any amount of jail time justified a hearing into the issue.

The Supreme Court considered another claim of ineffective appellate counsel in *Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002), but this one involved trial counsel. However, the rule announced in *Mickens*, could be made applicable to claims of ineffective appellate counsel. The defendant had been convicted of murder and sentenced to death. During the course of his death penalty appeals his appellate attorney discovered that the defendant's trial attorney had represented the murder victim shortly before his murder. This was not disclosed to the defendant during his trial. The defendant argued that this tainted his trial, as there was no way the defense attorney could have been objective.

The Supreme Court disagreed, in a decision that signaled a departure from its death penalty JURISPRUDENCE. Because of the finality of a death sentence, the Court previously required less hard evidence of prejudice from ineffective counsel. In *Mickens,* the Court stated that the general rule for ineffective counsel should also be applied to capital murder cases. Under this standard the defendant must show that "but for" the lawyer's conduct, the result of the trial would have been different. The Court will presume an adverse effect "where assistance of counsel has been denied entirely or during a critical stage of the proceeding." In *Mickens,* however, the Court found that the trial attorney had done an acceptable job in representing the defendant, so no adverse effect could be presumed. Because the defendant could not show that the outcome of his trial would have been any different but for the actions of his attorney, his appeal was rejected.

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**CROSS-REFERENCES**

Criminal Law; Federal Courts; Supreme Court of the United States.

## APPELLATE COURT

*A court having jurisdiction to review decisions of a trial-level or other lower court.*

An unsuccessful party in a lawsuit must file an appeal with an appellate court in order to have the decision reviewed. In the United States, appellate courts exist at both the federal and the state levels. On the federal level, decisions of the U.S. district courts, where civil and criminal matters are tried, can be appealed to the U.S. court of appeals for the circuit covering the district court. Eleven numbered federal judicial circuits have been established. Each circuit comprises a number of states that are usually, though not always, in close geographic proximity. For example, the Eighth Circuit includes Arkansas, Iowa, Minnesota, Missouri, Nebraska, and North and South Dakota, and the Sixth Circuit is made up of Kentucky, Michigan, Ohio, and Tennessee. Washington, D.C., has two U.S. COURTS OF APPEALS: the District of Columbia Circuit Court of Appeals, which hears appeals arising out of decisions of the Federal District Court for the District of Columbia, and the U.S. Court of Appeals for the Federal Circuit, which has exclusive and nationwide jurisdiction in appeals from U.S. District Court decisions in patent, COPYRIGHT, TRADEMARK, and other specialized areas.

A decision of a U.S. court of appeals may be appealed to yet another appellate court, the SUPREME COURT OF THE UNITED STATES. An appeal to the Supreme Court is made by filing a *petition for certiorari* (a document requesting a review of court records). The Supreme Court has broad discretion in determining whether to review decisions. The Court receives thousands of petitions a year, but can only review about one hundred cases in that span of time. It most often denies certiorari and hears only cases that raise important and unsettled constitutional questions or in which the federal appellate courts have reached conflicting decisions on the same issue.

On the state level, a decision of a state trial court—usually a district or other local court—can be appealed to a state appellate court for review. In most states, a case must first be appealed to an intermediate appellate court. If it receives an unfavorable ruling at the intermediate level, the case can then be appealed to the highest appellate court in the state, usually the state supreme court. Like the Supreme Court of the United States, a state's highest court usually has the discretion to decide whether to review a decision reached by the intermediate court. Some cases decided by the highest court in a state also can be appealed to the Supreme Court, though again the U.S. Supreme Court will hear only appeals of major significance.

In both state and federal matters, in general, an appeal can be brought only after a final decision, or final judgment, in the action has been entered. A judgment is final for the purposes of an appeal when nothing more is to be decided in the action, and it concludes all rights that were subject to litigation. This rule is based in part on the desire for judicial economy: it is more efficient for all matters to be heard in one appeal than for a case to be conducted "piecemeal" (in several appeals) before it is finally resolved. However, both state and federal courts will in some instances hear an INTERLOCUTORY appeal, which is an appeal of a matter that does not decide the entire case but must be addressed before the case can be decided on its merits. In other instances, whether an interlocutory appeal will be granted depends on the issue at hand. If the issue concerns whether the lawsuit should go forward at the trial level, it is more likely to be heard, since it may avoid an unnecessary trial. For example, an interlocutory appeal may be permitted from an order granting or denying an INJUNCTION even though the main issues in the case have yet to be tried.

The proceedings in the federal and state appellate courts are quite different from those that take place in a trial court. At the trial level, witnesses are called to testify and a jury is often present to hear evidence and reach a verdict. At the appellate level, the trial court record and briefs prepared by both parties are reviewed, and oral arguments may be heard; witnesses are not called and no jury is convened. The *trial court record* usually contains the pleadings that first initiated the case, a complete transcript of the court proceedings, materials admitted into evidence, and documents indicating the final judgment.

An appellate court differs from a trial court in another important respect: only the trial court determines the factual issues in a case. In its review, the appellate court does not try factual issues. Instead, it determines only whether there is sufficient evidence to support the findings of the trial court and whether the trial court correctly applied the law.

Both the appellant (the party appealing the lower-court ruling) and the appellee (the party against whom the appeal has been brought) file written briefs with the appellate court. The *briefs*—which recite the facts of the case, the arguments being raised on appeal, and the applicable law—help the court decide whether the trial court erred in its decision.

The appellate court may also hear *oral arguments* in the case. During oral argument, each party has ten to fifteen minutes to persuade the appellate court to rule in its favor. If numerous issues have been raised, a party may choose to use most of this time to cover the issues that are most crucial to the decision to be made. The court is free to interrupt an oral argument with questions concerning the facts of the case or the particular areas of law involved. The appellate court, at its discretion, may determine that oral argument is not necessary and may decide the case based only on the trial court record and the written briefs.

In making its decision, the appellate court may *affirm* the trial court, meaning that it accepts the decision of the lower court, or may *reverse* it, thus agreeing with the appellant's contention that the trial court's decision was erroneous. It may also *modify* the decision; in this instance, the court may accept part of the trial court's decision while ruling that other issues were erroneously decided.

The appellate court usually issues its decision in the form of a written opinion stating its reasons for the decision. The opinion will discuss the relevant facts, and apply the law to those facts. Appellate court opinions are usually published, thus forming a body of law, known as precedent, that attorneys and judges can consult for guidance in resolving similar legal questions.

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CROSS-REFERENCES

Appeal; Appellate Advocacy; Courts; Federal Courts.

## APPELLEE

*A party who has won a judgment in a lawsuit or favorable findings in an administrative proceeding, which judgment or findings the losing party, the appellant, seeks to have a higher court reverse or set aside.*

The designation as appellee is not related to a person's status as plaintiff or defendant in the lower court.

Another name for *appellee* is respondent.

CROSS-REFERENCES

Appeal.

## ❖ APPLETON, JOHN

JOHN APPLETON was a prominent nineteenth-century Maine lawyer and judge. He served as a justice and chief justice of the Maine Supreme Judicial Court from 1852 to 1883. During his long tenure he came to be recognized for his opposition to state laws that granted loans or tax exemptions to businesses. His belief in free market capitalism translated into minimal government regulation of business and no government breaks for business. In addition Appleton concerned himself with rethinking COMMON LAW RULES OF EVIDENCE.

Appleton was born on July 12, 1804, in New Ipswich, New Hampshire. He graduated from Bowdoin College—where his uncle, Jesse Appleton, was president—in 1822 and then apprenticed himself to a New Hampshire lawyer to gain the knowledge needed to become a member of the bar. Appleton was admitted to the bar in 1826 and moved to Sebec, Maine, to start a private practice. Maine had been admitted to the Union in 1820 and was a growing, prosperous state. Appleton moved again to Bangor in 1838 and continued his private law practice. A great reader of philosophy and law, Appleton was attracted to the UTILITARIAN philosophy of JEREMY BENTHAM. An interest in the law from a purely intellectual viewpoint led him to pursue a judgeship.

In 1841 he was appointed the reporter of decisions for the Maine Supreme Judicial Court, the state's highest court. In this capacity Appleton edited the opinions of the justices, which gave him valuable insights into the workings of an appellate court. His diligence and intellectual

esteem led to his appointment as a justice of the court in 1852. Eleven years later he was elevated to chief justice, a position he held for the next 31 years. Apart from his judicial opinions, Appleton published in 1860 a treatise entitled *The Rules of Evidence, Stated and Discussed.*

Appleton's opinions from the early 1870s on the proper relationship between government and business have come to be regarded as groundbreaking expressions of laissez-faire constitutionalism. After the Civil War state governments had rushed to give railroads and other businesses tax exemptions, loans, and property EASEMENTS. When the town of Jay sought legislative authority to lend $10,000 to private entrepreneurs to move their mill and factory to the town, the legislature sought an ADVISORY OPINION from Maine's supreme court. In a bluntly worded opinion, Appleton declared that the legislature had no authority to help private businesses through gifts or loans. When the legislature ignored this opinion and authorized the funding, Appleton issued an opinion ruling the act unconstitutional. Appleton's analysis foreshadowed the SUBSTANTIVE DUE PROCESS doctrine that the U.S. Supreme Court employed to strike down government regulations of business.

Appleton finally retired in 1883. He died on February 7, 1891, in Bangor, Maine.

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## APPOINT

*To designate, select, or assign authority to a position or an office.*

Although sometimes used interchangeably, elect and appoint do not have the same meaning. Election refers to the selection of a public officer by the qualified voters of the community, and *appointment* refers to the selection of a public officer by one authorized by law to do so.

## APPOINTMENT, POWER OF

*A power that is conferred upon a donee to dispose of the donor's property by nominating and selecting one or more third-parties to receive it. The property may consist of tangible items like cars, boats, and household items, or it may consist of an intangible interest in property, such as the right to receive dividend income from stocks.*

A power of appointment may be transferred only in writing, such as by deed, trust, or will. Donees who receive an oral promise to be given a power of appointment, however, may bring an action for PROMISSORY ESTOPPEL if they have relied to their detriment on that promise. In no case will a court find that a power of appointment had been created unless the donor's intent to create the power is demonstrated; the person who would hold the power is indicated; the circumstances under which the power could be exercised are identified; and the property that is subject to the power is specified.

No particular semantic formula is necessary for the creation of a power of appointment. Any

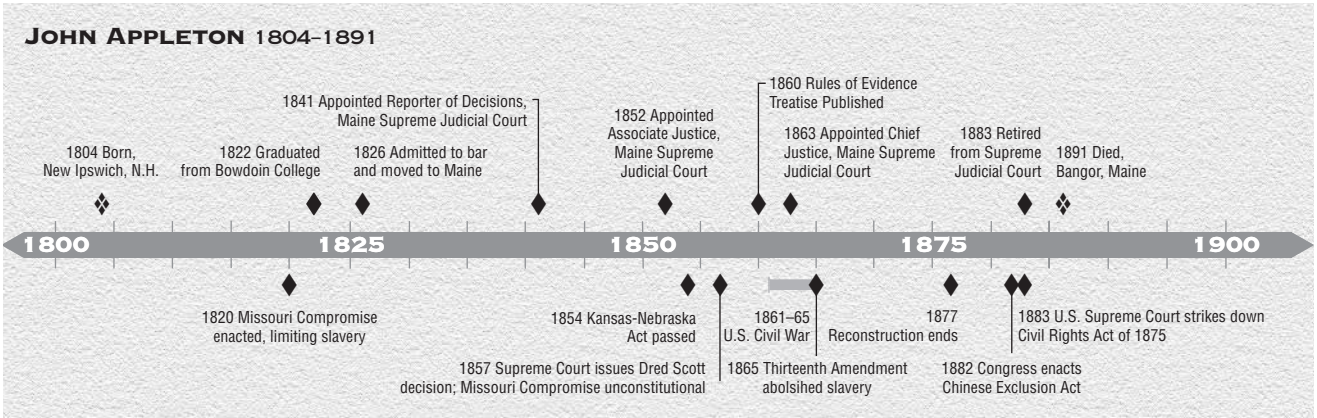

written expression, however informal, will suffice so long as it clearly indicates an intention to create such a power. Thus, a power of appointment may be created by implication. For example, a devise or bequest of property to a person as he or she may designate to receive it or subsequently transfer it gives that person a power of appointment. A testamentary gift to a donee for life, to be at his or her disposal, or with a right to dispose of it at the donor's death, confers a power of appointment. For example, if a donor gives the donee an automobile to use as the donee sees fit during the donee's lifetime, the donor has given the donee a power of appointment over the automobile. Similarly, if a donor gives the donee authority to dispose of the automobile upon the donor's death, the donor has given the donee a power of appointment over the automobile.

There are three classes of powers of appointment. General powers of appointment give donees the power to dispose of the property in any way they see fit. Limited powers of appointment, also known as special powers of appointment, give donees the power to transfer the property to a specified class of persons identified in the instrument creating the power. Testamentary powers of appointment are powers of appointment that typically are created by wills.

## APPORTIONMENT

*The process by which legislative seats are distributed among units entitled to representation; determination of the number of representatives that a state, county, or other subdivision may send to a legislative body. The U.S. Constitution provides for a census every ten years, on the basis of which Congress apportions representatives according to population; each state, however, must have at least one representative. Districting is the establishment of the precise geographical boundaries of each such unit or constituency. Apportionment by state statute that denies the rule of* ONE-PERSON, ONE-VOTE *is violative of* EQUAL PROTECTION OF LAWS.

*Also, the allocation of a charge or cost such as real estate taxes between two parties, often in the same ratio as the respective times that the parties are in possession or ownership of property during the fiscal period for which the charge is made or assessed.*

> Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States (JAMES MADISON, *The Federalist No. 57*).
>
> The difference most relied upon, between American and other republics, consists in the principle of representation (James Madison, *The Federalist No. 63)*.

James Madison and his fellow founders of the United States of America sought many objectives as they framed the U.S. Constitution. Among the goals these champions of democracy fought for was the notion of equal representation in government, by congresspeople, for citizens of the United States. To ensure that equal representation occurred, the founders proposed that the U.S. population be counted at regular intervals with a census. They later agreed, in the Great Compromise of 1787, that congressional representation should be assigned—in other words, *apportioned*—to various regions of the country based on a total population standard.

Both Article 1, Section 2, Clause 3, and Amendment 14, Section 2, of the Constitution provide that representatives shall be apportioned among the states according to their respective numbers and that a population count will be taken by census every ten years. Apportionment requires that each state's total population be divided by the population of "the ideal district" to determine the appropriate number of representatives. The population of an ideal district, for purposes of federal apportionment, is defined as the total population of the state (as determined by census) divided by one hundred (for the House of Representatives), or by 50 (for the Senate).

In the centuries that followed the United States's adoption of the Constitution, apportionment for the federal Congress has been based on total population—with the exception that a slave, until the Civil War, was considered property and thus counted only as three-fifths of a white person. Efforts to limit federal congressional apportionment to only people who are citizens or voters have been defeated, because the exclusion of groups such as illegal ALIENS, nonvoters, and children could significantly affect some areas of the country, since some states have large populations of these groups. Shifting political power away from an area means fewer legislators to demand a fair share of government resources for that area.

One such effort to exclude these groups, which occurred during the 1866 debates over the passage of the FOURTEENTH AMENDMENT, ultimately led to Congress's voting to continue basing apportionment on total population and to count the "whole number of persons in each state." In contrast, state legislatures have only been required to be based substantially on population since 1964 (REYNOLDS V. SIMS, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506). In 1968, the U.S. Supreme Court extended this requirement to municipal governments as well (*Avery v. Midland County,* 390 U.S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45).

Apportionment is related to, but is not the same as, the electoral system and the districting process: *apportionment* is the manner in which representation is distributed; the *electoral system* is the way an individual representative is elected; and the *districting process* establishes the precise electoral boundaries of a representative's district. Apportionment for the U.S. Congress, which consists of the Senate and the House of Representatives, has always been determined by the Constitution. Each state is assigned two senators, who were originally elected by state legislatures but since the adoption of the SEVENTEENTH AMENDMENT in 1913 have been chosen by direct voter election.

Membership in the House of Representatives is also assigned to the states and is apportioned according to population, with each state being constitutionally guaranteed at least one representative. The House of Representatives grew proportionally with the population of the United States until 1912, when the House froze its size at 435 members. Since 1941, the CENSUS BUREAU has used the system of equal proportions to determine how many of the 435 representatives each state is entitled to have. This

**U.S. House of Representatives Membership in 2000**

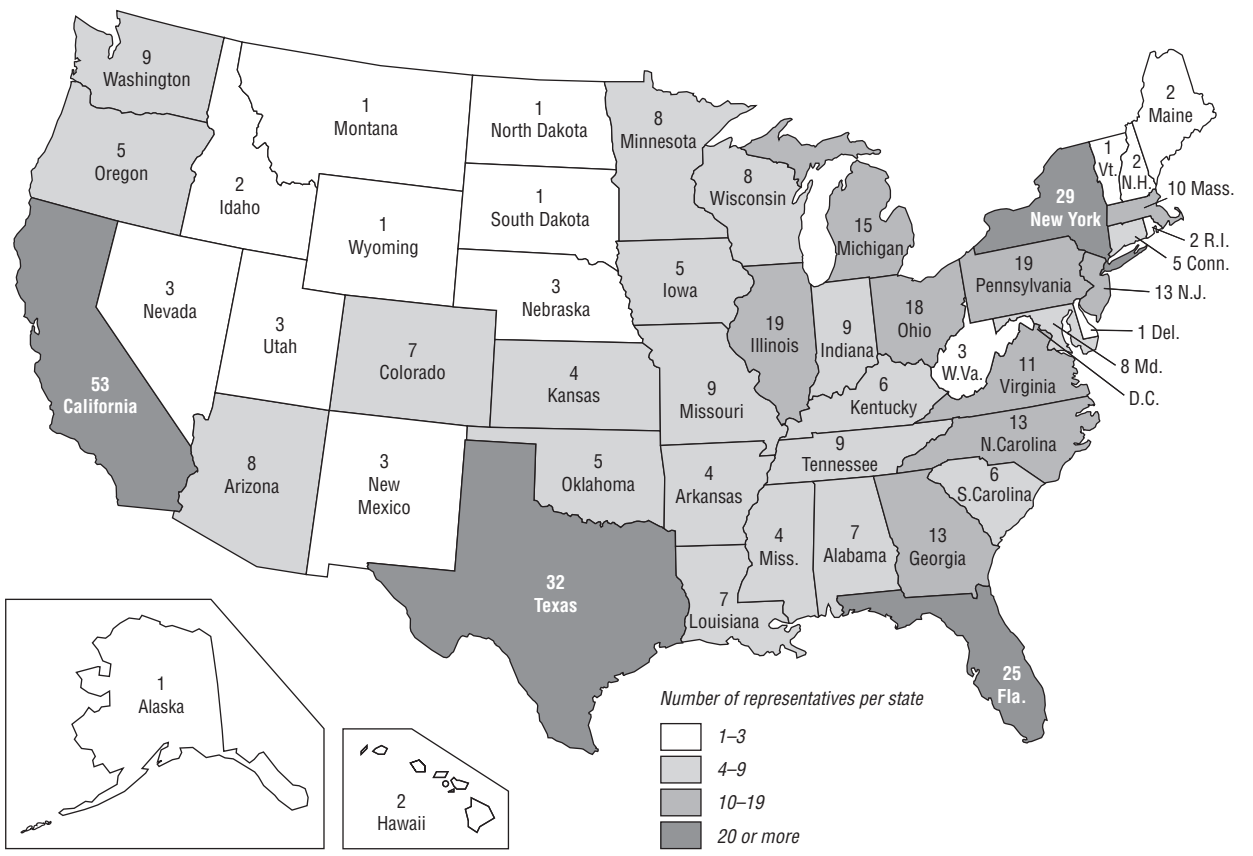


SOURCE: U.S. Census Bureau.

method, developed in 1920 by Professor Edward V. Huntington, of Harvard University, establishes the smallest possible difference between the representation of any two states, since a state's fair share of representatives will rarely be a whole number. The 1941 federal statute 2 U.S.C.A. §§ 2a and 2b provides that

> under the equal proportions method, the priority list of states or counties among which Representatives in excess of one per state or county are to be allocated is obtained by dividing the population of each state or county by the geometric mean of successive numbers of Representatives.

Congress must decide how to treat the fractional components whenever it reapportions congressional seats based on new census data. This decision affects the distribution of only a few seats in Congress and the ELECTORAL COLLEGE, but in closely contested matters, such as the presidential election of 1876, those seats could mean the difference between victory and defeat. (The electoral college is the body of electors of each state chosen to elect the president and vice president. Apportionment affects the electoral college because it influences the number of electoral votes coming from various areas of the country.) Each state legislature is responsible for establishing the district boundaries of the congressional seats apportioned to the state by the federal government.

From 1842 to 1911, Congress required that all congressional districts be of compact and connecting territory. That stipulation was not continued after 1912, and by the 1960s, the districts within some states differed greatly in size. These disparities were caused in some cases by gerrymandering, which is the process of drawing boundaries for election districts so as to give one party a greater political advantage. Large disparities led a group of urban Tennessee voters to bring suit against their state's electoral commission on the ground that the apportionment of the legislature was unfair. The Supreme Court's March 1962 decision in favor of the voters in BAKER V. CARR, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, established the rule that a citizen may bring suit against legislative malapportionment when it deprives that citizen of equal protection under the law as guaranteed by the Fourteenth Amendment. Previously, in *Colegrove v. Green,* 328 U.S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946), the Court had refused to accept jurisdiction in apportionment cases.

Although the Supreme Court's decision in *Baker* was limited, it did rule that if a system other than one based on population is used for apportionment, the resulting districts must not be ARBITRARY or irrational in nature. In 1964, the Supreme Court extended *Baker* by ruling in *Wesberry v. Sanders,* 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481, that legislative districts for the House of Representatives must be drawn so as to provide "equal representation for equal numbers of people," a concept often referred to as the one-person, one-vote standard. Later that same year, in lawsuits directly involving 15 states, the Supreme Court ruled in *Reynolds v. Sims,* 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506, that districts for state legislatures must also be substantially equal in population. Further extending the principle, the Court ruled in *Avery v. Midland County,* 390 U.S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45 (1968), that if county, city, and town governments elect their representatives from individual districts, the districts must be substantially equal in population.

Other individuals and states have subsequently challenged the method of apportionment used in the United States when that method has proved unfavorable for them. For example, in *Franklin v. Massachusetts,* 505 U.S. 788, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992), Massachusetts and two of its registered voters filed an action against Secretary of Commerce Barbara B. Franklin, alleging, among other things, that the decision to allocate overseas employees was inconsistent with the Constitution. In June 1992, the Court reversed a federal district court decision in favor of Massachusetts, ruling that the allocation of overseas federal employees to their designated home states was consistent with the usual-residence standard used in early censuses and served the purpose of making representation in Congress more equal.

The state of Montana sued the U.S. COMMERCE DEPARTMENT, following the 1990 census, when it and 11 other states each lost one House seat. In seeking to keep the two seats it had held since 1910, Montana argued that the method of equal proportions was unconstitutional because it left the state with a single congressional district of 803,655 people—a number almost 40 percent larger than "ideal district size," which is a national average of 572,466 people. Montana also alleged that the variance between the single district's population and that of an ideal district could not be justified under the one-person,

one-vote standard developed in *Wesberry.* The Montana case was appealed to the U.S. Supreme Court, which in March 1992 unanimously upheld the method Congress uses to reallocate congressional seats among the states after a census (*United States Department of Commerce v. Montana,* 503 U.S. 442, 112 S. Ct. 1415, 118 L. Ed. 2d 87).

The political impact of the census on congressional apportionment was made apparent when the Commerce Department proposed that statistical sampling be used for the 2000 census. (Statistical sampling is a method of surveying a subset of a larger population and applying the findings to the larger group.) Republicans in Congress reacted hostilely to this proposal from the Democratic administration of President BILL CLINTON, fearing that the proposed statistical sampling of hard-to-count persons (racial and ethnic minorities, poor persons, children, illegal aliens, renters, etc.) would favor large urban areas that were aligned with the DEMOCRATIC PARTY. Members of Congress filed suit to block the use of sampling and the Supreme Court agreed with their position in *Commerce Dept. v. U.S. House of Representatives*, 525 U.S. 316, 119 S.Ct.765, 142 L.Ed.2d 797 (1999). The Court held that the Census Act, which was first enacted in 1954 (and amended a number of times since then), expressly prohibited the use of sampling to determine populations for congressional apportionment purposes.

This ruling did not end the controversy over what constituted sampling. Following the 2000 census, the state of Utah filed suit against the Commerce Department, alleging that it should have increased its congressional representation from three seats to four. According to the census, the state had achieved a dramatic 30 percent population growth in ten years. Despite this growth, the number of representatives in the state did not increase. North Carolina, however, did pick up an additional seat through a statistical method called imputation. This method permits the Census Bureau to *impute,* or estimate, the number of members in a household after census takers make repeated efforts to make direct contact. Comparing the numbers of imputed residents of Utah and North Carolina, Utah realized that if it could have these numbers thrown out by a federal court, the North Carolina seat would shift to Utah.

A three-judge panel rejected Utah's arguments that imputed numbers amounted to statistical sampling as prohibited by the 1999 Supreme Court decision. The panel concluded that it was common sense to realize that census takers would not be able to count every person and that reasonable alternatives needed to be employed to fill in the missing numbers. The actual enumeration required by the Census Clause did not mean that the court should reduce the number of persons imputed to households to zero. The imputation method was on the whole fair because it was adjusted for local neighborhood demographics and it was employed only after census takers failed on repeated attempts to contact the households in question. Therefore, the panel ruled that reducing the number to zero would be "inconsistent with the constitutional imperative of actual enumeration," for actual residents would not be counted.

In *Utah v. Evans*, 536 U.S. 452, 122 S.Ct. 2191, 153 L.Ed.2d 453 (2002), the Supreme Court affirmed the lower court ruling. The Court, in a 5–4 decision, rejected the idea that actual enumeration under the Census Clause was intended as a description of the only methodology for counting U.S. citizens. The Court pointed out that an interest in accuracy was favored by the Census Bureau, which used imputation as a last resort only after other methods had failed The majority also decided that this method, used as a last resort, was not the same as sampling. Justice STEPHEN BREYER noted that "sampling seeks to extrapolate the features of a large population from a small one, but the Bureau's imputation process sought simply to fill in missing data as part of an effort to count individuals one by one." Moreover, the imputation method was not the equivalent of statistical sampling because the two methods were viewed as distinctly different when an amendment to the Census Act was passed in 1958.

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CROSS-REFERENCES

Congress of the United States; Voting.

## APPRAISAL

*A valuation or an approximation of value by impartial, properly qualified persons; the process of determining the value of an asset or liability, which entails expert opinion rather than express commercial transactions.*

## APPRAISER

*A person selected or appointed by a competent authority or an interested party to evaluate the financial worth of property.*

Appraisers are frequently appointed in probate and condemnation proceedings and are also used by banks and real estate concerns to determine the market value of real property.

## APPRECIATION

*The fair and reasonable estimation of the value of an item. The increase in the financial worth of an asset as compared to its value at a particular earlier date as a result of inflation or greater market demand.*

## APPREHENSION

*The seizure and arrest of a person who is suspected of having committed a crime.*

*A reasonable belief of the possibility of imminent injury or death at the hands of another that justifies a person acting in* SELF-DEFENSE *against the potential attack.*

An apprehension of attack is an element of the defense of self-defense that can be used in a criminal prosecution for ASSAULT AND BATTERY, MANSLAUGHTER, or murder. An individual who acts under apprehension of attack does not have to fear injury. It is sufficient that there is a likelihood of actual injury to justify the person's taking steps to protect himself or herself.

## APPRENTICE

*A person who agrees to work for a specified time in order to learn a trade, craft, or profession in which the employer, traditionally called the master, assents to instruct him or her.*

Both minors and adults can be legally obligated under the terms of an apprenticeship contract, and any person who has the capacity to manage his or her own affairs may engage an apprentice. In some states, a minor may void a contract of apprenticeship, but in cases where the contract is beneficial to the minor, other jurisdictions do not permit the minor to void it. There must be strict compliance with statutes that govern a minor's actions concerning an apprenticeship.

An apprenticeship must arise from an agreement, sometimes labeled an INDENTURE, which possesses all the requisites of a valid contract. If the contract cannot be performed within a year, it must be in writing, in order to satisfy the STATUTE OF FRAUDS, an old ENGLISH LAW adopted in the United States, which requires certain agreements to be in writing. The apprentice, the employer, and, if the apprentice is a minor, his or her parents or guardians must sign the apprenticeship agreement. Some jurisdictions require explicit consensual language in addition to the signature or signatures of one or both parents, depending upon the applicable statute. The contract must include the provisions required by law and drafted for the benefit of the minor such as those relating to his or her education and training. A breach of apprenticeship contract might justify an award of damages, and, unless authorized by statute, there can be no assignment, or transfer, of the contract of apprenticeship to another that would bind the apprentice to a new service.

A person who lures an apprentice from his or her employer may be sued by the employer, but the employer cannot recover unless the defendant knew of the apprentice relationship.

The apprenticeship may be concluded by either party for good cause, where no definite term of service is specified, by mutual consent, or by a dismissal of the apprentice. Automatic termination ensues from the expiration of the term of service, involuntary removal of the apprentice from the jurisdiction where he or she was bound, or service in the armed forces even though voluntary and without the consent of the employer. The death of either party terminates the relationship, as does the attainment of the age of majority by the apprentice, in most instances. Courts may terminate such contracts when they violate statutes. The master's cruelty, immorality, interference with the apprentice's religious beliefs or duties, or other misconduct and the misbehavior of the apprentice also constitute grounds for termination.

## APPROPRIATION

*The designation by the government or an individual of the use to which a fund of money is to be applied. The selection and setting apart of privately owned land by the government for public use, such as a military reservation or public building. The diversion of water flowing on public domain from its natural course by means of a canal or ditch for a private beneficial use of the appropriator.*

An *appropriation bill* is a proposal placed before the legislative branch of the government by one or a group of its members to earmark a particular portion of general revenue or treasury funds for use for a governmental objective. Federal appropriation bills can originate only in the House of Representatives as mandated by Article I, Section 7 of the Constitution. Once an appropriation law is enacted, a definite amount of money is set aside so that public officials can pay incurred or anticipated expenditures. When a law authorizes funds to be used for a particular purpose, it is known as a *specific appropriation.*

The appropriation of money by an individual occurs within the context of a debtor-creditor relationship. If a creditor is owed two separate debts by the same debtor who makes a payment without specifying the debt to which it is to be applied, the creditor can appropriate the payment to either debt.

Appropriation also refers to the physical taking and occupation of property by the government or its actual, substantial interference with the owner's right to use the land according to personal wishes by virtue of the government's power of EMINENT DOMAIN.

This right of an individual to use water that belongs to the public is embodied in the *prior appropriation doctrine* applied in arid western states where water supplies are not available in sufficient quantity to all who might need them. An individual landowner who first diverts water for personal benefit is entitled to its continued use as long as there is a reasonable need and the water is actually used.

CROSS-REFERENCES

Federal Budget; Water Rights.

## APPROVAL

*The present confirmation, ratification, or assent to some action or thing done by another, which is submitted to an individual, group, or governmental body for judgment. The acceptance by a judge of a bond, security, or other document that is required by law to meet with the judge's satisfaction before it becomes legally effective.*

## APPURTENANCE

*An* ACCESSORY *or adjunct that is attached and incidental to something that has greater importance or value. As applied to real property, an object attached to or a right to be used with land as an incidental benefit but which is necessary to the complete use and enjoyment of the property.*

When a landowner has been given an EASEMENT for the passage of light and air over an adjoining lot, the easement is an appurtenance to the land. Other common appurtenances to land include barns, outhouses, fences, drainage and irrigation ditches, and rights of way.

## ARBITER

*[*Latin, One who attends something to view it as a spectator or witness.*] Any person who is given an absolute power to judge and rule on a matter in dispute.*

An arbiter is usually chosen or appointed by parties or by a court on their behalf. The decision of an arbiter is made according to the RULES OF LAW and EQUITY. The arbiter is distinguished from the arbitrator, who proceeds at his or her own discretion, so that the decision is made according to the judgment of a reasonable person.

An arbiter may perform the same function as an umpire, a person who decides a controversy when arbitrators cannot agree.

CROSS-REFERENCES

Alternative Dispute Resolution; Arbitration.

## ARBITRAGE

*The simultaneous purchase in one market and sale in another of a security or commodity in hope of making a profit on price differences in the different markets.*

In its simplest form, arbitrage is "buying low and selling high." In this sense, any trader who buys something in one market—whether it is a commodity like grain, financial SECURITIES such as stock in a company, or a currency such as the Japanese yen—and sells it in another market at a higher price is engaged in arbitrage. That trader is called an arbitrageur. In economic theory, arbitrage is a necessary activity in any market, helping to reduce price disparities between different markets and to increase a market's liquidity (ability to buy and sell).

Arbitrage can be divided into the categories of riskless and risk. As an example of riskless arbitrage, imagine that the price of Microsoft Corporation common stock on the Pacific Coast Stock Exchange is less than the price of the same stock on the New York Stock Exchange. A trader who buys Microsoft stock at the lower price on the Pacific Coast exchange and *simultaneously* sells it for a higher price on the New York exchange is engaging in an essentially riskless transaction. Aided by the speed of modern communications, the buying and selling occur at virtually the same time. This type of exchange occurs daily in the currency market, where a trader may buy French francs at a lower price in London and sell them at a higher price in Singapore.

Much arbitrage falls into the risk category. This type of arbitrage is not always completed with a sale at a higher price; it involves a risk that the price of the item being traded will fall before the trader can sell it. RISK ARBITRAGE came into prominence during the 1980s, when investors began to take advantage of a business atmosphere encompassing a large number of company MERGERS AND ACQUISITIONS. In a merger or acquisition, one company buys or takes over another company. When the management of the targeted company does not want to be acquired by a particular investor or group of investors, the merger is called a hostile takeover. Quite often, the aggressors in such takeovers are smaller in terms of assets than their targets. A hostile takeover is usually initiated when someone believes that the stock of a particular company is lower than its potential value, whether because of poor management or because of a lack of information about the true value of that company.

One way that hostile takeovers are initiated is through a device called the cash tender offer. The party attempting to initiate the takeover announces that it will pay cash for the target company's stock at a price well above the current market value. At this point, risk arbitrageurs become involved in the game. They buy stock from shareholders in the target company, then attempt to sell that stock at the higher price to the party attempting the takeover. If the takeover succeeds and the arbitrageurs receive a higher price for their stock, they profit; if the takeover fails or the arbitrageurs receive a lower price for their stock, they lose. Gauging the risk of a takeover's failure is therefore crucial to an arbitrageur's success.

An arbitrageur who purchases securities on the basis of inside information—that is, information about a pending takeover that is not available to the general public—violates the Securities Exchange Act of 1934 (§ 10[b], as amended, 15 U.S.C.A. § 78j[b]). However, purchasing securities on the basis of rumors about an imminent takeover is not illegal.

Ivan F. Boesky was one example of a risk arbitrageur who was found guilty of engaging in insider trading. Boesky profited enormously from the many corporate takeovers of the mid-1980s. By 1985, he had become famous in financial circles and had published a book, *Merger Mania: Arbitrage: Wall Street's Best Kept Money-Making Secret,* that extolled the opportunities in risk arbitrage and the benefits the practice gave to the market. In 1986, only one year later, Boesky admitted that he had illegally traded on insider information obtained from Drexel Burnham Lambert, the securities firm that arranged the financing of many of the takeovers of the era. In return for a reduced sentence of three years in prison, Boesky agreed to pay a $100 million penalty and to cooperate with the government's continuing investigation. Boesky named Drexel employee Michael R. Milken as a member of the insider trading network. In 1990, Boesky was released from prison after serving two years.

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CROSS-REFERENCES

Bonds "Michael R. Milken" (sidebar); Corporations; Securities; Securities and Exchange Commission.

## ARBITRARY

*Irrational; capricious.*

The term *arbitrary* describes a course of action or a decision that is not based on reason or judgment but on personal will or discretion without regard to rules or standards.

An arbitrary decision is one made without regard for the facts and circumstances presented, and it connotes a disregard of the evidence.

In many instances, the term implies an element of bad faith, and it may be used synonymously with tyrannical or despotic.

The term *arbitrary* refers to the standard of review used by courts when reviewing a variety of decisions on appeal. For example, the *arbitrary and capricious* standard of review is the principle standard of review used by judicial courts hearing appeals that challenge decisions issued by administrative bodies.

At the federal level and in most states, ADMINISTRATIVE LAW is a body of law made by EXECUTIVE BRANCH agencies that have been delegated power to promulgate rules, regulations, and orders, render decisions, and otherwise decide miscellaneous disputes. Non-elected officials in administrative agencies are delegated this authority in order to streamline the often lengthy and more deliberative process of legislative lawmaking that frequently grinds to a halt amid partisan gridlock. Although administrative agencies are generally designed to make lawmaking and regulation simpler, more direct, and less formal, they still must provide DUE PROCESS to affected parties. They must also comply with administrative procedures created by popularly elected state and federal legislatures.

One important right recognized in most administrative proceedings is the right of JUDICIAL REVIEW. Citizens aggrieved by the actions of an administrative body may typically ask a judicial court to review those actions for error. In establishing the standard by which judicial courts will review the actions of an administrative body, state and federal legislatures seek to provide agencies with enough freedom to do their work effectively and efficiently, while ensuring that individual rights are protected.

Congress tried to maintain this delicate balance in the ADMINISTRATIVE PROCEDURE ACT (APA). The APA limits the scope of a reviewing court's authority to determining whether the agency acted arbitrarily and capriciously in exercising its discretion. 5 USCA § 701. In making this determination, the reviewing court will not find that the administrative body acted arbitrarily unless the agency failed to follow proper procedures or rendered a decision that is so clearly erroneous that it must be set aside to avoid doing an injustice to the parties.

Specifically, a reviewing court must determine whether the agency articulated a rational connection between the factual findings it made and the decision it rendered. The reviewing court must also examine the record to ensure that the agency decision was founded on a reasoned evaluation of the relevant factors. Although agencies are given wide latitude, reviewing courts must be careful not to rubber-stamp administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.

Typically, reviewing courts look at the whole record in making this determination, take into account the agency's expertise on any particular matters, and accept any factual findings made by the agency. However, the reviewing court is free to determine how the law should apply to those facts. If the reviewing court concludes that the agency's actions were so arbitrary as to be outside any reasonable interpretation of the law, the court may overturn the agency's decision or remand the case back to the agency for further proceedings in accordance with the court's decision.

A reviewing court's determination that an agency acted in an arbitrary manner will often depend on the technical requirements of the governing law. For example, courts are often asked to determine whether a federal agency has acted arbitrarily under the NATIONAL ENVIRONMENTAL POLICY ACT (NEPA). Pub.L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852, as amended, 42 U.S.C.A. §§ 4321 et seq. In one case the Ninth

Circuit ruled that the TRANSPORTATION DEPARTMENT acted arbitrarily under NEPA, when it failed to prepare an environmental impact statement, failed to consider whether its regulations would have violated air quality limits, and failed to perform localized analyses for areas most likely to be affected by increased truck traffic. *Public Citizen v. Department of Transportation,* 316 F. 3d 1002 (9th Cir. 2003).

CROSS-REFERENCES

Administrative Procedure Act of 1946; Due Process of Law; Judicial Review.

## ARBITRATION

*The submission of a dispute to an unbiased third person designated by the parties to the controversy, who agree in advance to comply with the award—a decision to be issued after a hearing at which both parties have an opportunity to be heard.*

Arbitration is a well-established and widely used means to end disputes. It is one of several kinds of ALTERNATIVE DISPUTE RESOLUTION, which provide parties to a controversy with a choice other than litigation. Unlike litigation, arbitration takes place out of court: the two sides select an impartial third party, known as an arbitrator; agree in advance to comply with the arbitrator's award; and then participate in a hearing at which both sides can present evidence and testimony. The arbitrator's decision is usually final, and courts rarely reexamine it.

Traditionally, labor and commerce were the two largest areas of arbitration. However, since the mid-1970s, the technique has seen great expansion. Some states have mandated arbitration for certain disputes such as auto insurance claims, and court decisions have broadened into areas such as SECURITIES, antitrust, and even employment discrimination. International business issues are also frequently resolved using arbitration.

Arbitration in the United States dates to the eighteenth century. Courts frowned on it, though, until attitudes started to change in 1920 with the passage of the first state arbitration law, in New York. This statute served as a model for other state and federal laws, including, in 1925, the U.S. Arbitration Act, later known as the Federal Arbitration Act (FAA) (9 U.S.C.A. § 1 et seq.). The FAA was intended to give arbitration equal status with litigation, and, in effect, created a body of federal law. After WORLD WAR II, arbitration grew increasingly important to labor-management relations. Congress helped this growth with passage of the TAFT-HARTLEY ACT (29 U.S.C.A. § 141 et seq.) in 1947, and over the next decade, the U.S. Supreme Court firmly cemented arbitration as the favored means for resolving labor issues, by limiting the judiciary's role. In the 1970s, arbitration began expanding into a wide range of issues that eventually included PRISONERS' RIGHTS, MEDICAL MALPRACTICE, and consumer rights. In 2003, all 50 states had modern arbitration statutes.

Arbitration can be voluntary or required. The traditional model is voluntary, and closely linked to contract law: parties often stipulate in contracts that they will arbitrate, rather than litigate, when disputes arise. For example, unions and employers almost always put an arbitration clause in their formal negotiations, known as collective bargaining agreements. By doing so, they agree to arbitrate any future employee grievances over wages, hours, working conditions, or job security—in essence, they agree not to sue if disagreements occur. Similarly, a purchaser and a provider of services who disagree over the result of a business deal may submit the problem to an arbitrator instead of a court. Mandatory arbitration is a more recent phenomenon. States such as Minnesota, New York, and New Jersey have enacted statutes that force disputes over automobile insurance claims into this forum. In addition, courts sometimes order disputants into arbitration.

In theory, arbitration has many advantages over litigation. Efficiency is perhaps the greatest. Proponents say arbitration is easier, cheaper, and faster. Proponents also point to the greater flexibility with which parties in arbitration can fashion the terms and rules of the process. Furthermore, although arbitrators can be lawyers, they do not need to be. They are often selected for their expertise in a particular area of business, and may be drawn from private practice or from organizations such as the American Arbitration Association (AAA), a national nonprofit group founded in 1926. Significantly, arbitrators are freer than judges to make decisions, because they do not have to abide by the principle of *stare decisis* (the policy of courts to follow principles established by legal precedent) and do not have to give reasons to support their awards (although they are expected to adhere to the Code of Ethics for Arbitrators in Commercial Disputes, established in 1977 by the AAA and the AMERICAN BAR ASSOCIATION).

*A sample arbitration clause*

**Arbitration Clause**

**Contractual Arbitration Clause**

**Standard Business**

ARBITRATION. The Parties agree that any claim or dispute between them or against any agent, employee, successor, or assign of the other, whether related to this agreement or otherwise, and any claim or dispute related to this agreement or the relationship or duties contemplated under this contract, including the validity of this arbitration clause, shall be resolved by binding arbitration by the American Arbitration Association (or name other firm providing arbitration services, i.e., National Arbitration Forum), under the Arbitration Rules then in effect. Any award of the arbitrator(s) may be entered as a judgment in any court of competent jurisdiction.

These theoretical advantages do not always hold up in practice. Even when efficiency is achieved, some critics argue, the price is a lower quality of justice, and it can be made worse by the difficulty of appealing an award. The charge is frequently made that arbitration only results in "splitting the baby"—dividing awards evenly among the parties. The AAA roundly rejects this claim. Yet even arbitrators agree that as arbitration has become increasingly formal, it sometimes resembles litigation in its complexity. This may not be an inherent problem with the process as much as a result of flawed use of it. Parties may undermine arbitration by acting as lawyers do in a lawsuit: excessively demanding discovery (evidence from the other side), calling witnesses, and filing motions.

Ultimately, the decision to use arbitration cannot be made lightly. Most arbitration is considered *binding*: parties who agree to arbitration are bound to that agreement and also bound to satisfy any award determined by the arbitrator. Courts in most jurisdictions enforce awards. Moreover, they allow little or no option for appeal, expecting parties who arbitrate to assume the risks of the process. In addition, arbitration is subject to the legal doctrines of **RES JUDICATA** and **COLLATERAL ESTOPPEL**, which together strictly curtail the option of bringing suits based on issues that were or could have been raised initially.

*Res judicata* means that a final judgment on the merits is conclusive as to the rights of the parties and their privies, and, as to them, operates as an absolute bar to a subsequent action involving the same claim, demand, or **CAUSE OF ACTION**. *Collateral estoppel* means that when an issue of ultimate fact has been determined by a valid judgment, that issue cannot be relitigated between the same parties in future litigation. Thus, often the end is truly in sight at the conclusion of an arbitration hearing and the granting of an award.

The FAA gives only four grounds on which a court may vacate, or overturn, an award: (1) where the award is the result of corruption, **FRAUD**, or undue means; (2) where the arbitrators were evidently partial or corrupt; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing or hear pertinent evidence, or where their misbehavior prejudiced the rights of any party; and (4) where the arbitrators exceeded their powers or imperfectly executed them so that a mutual, final, and definite award was not made. In the 1953 case *Wilko v. Swan,* 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168, the U.S. Supreme Court suggested, in passing, that an award may be set aside if it is in "manifest disregard of the law," and federal courts have sometimes followed this principle. Public policy can also be grounds for vacating, but this recourse is severely limited to well-defined policy based on legal precedent, a rule emphasized by the Supreme Court in the 1987 case *United Paperworkers International Union v. Misco,* 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286.

The growth of arbitration is taken as a healthy sign by many legal commentators. It eases the load on a constantly overworked judicial system, while providing disputants with a relatively informal, inexpensive means to solve their problems. One major boost to arbitration came from the U.S. Supreme Court, which held in 1991 that **AGE DISCRIMINATION** claims in employment are arbitrable (*Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26). Writing for the majority, Justice **BYRON R. WHITE** concluded that arbitration is as effective as a trial for resolving employment disputes. *Gilmer* led several major

employers to treat all employment claims through binding arbitration, sometimes as a condition of employment.

Arbitration clauses have become a standard feature of many employment contracts. This has led to conflicts concerning the applicability of these clauses when an employee seeks to sue an employer for a **CIVIL RIGHTS** violation under Title VII of the Civil Rights Act of 1964, as amended by the **CIVIL RIGHTS ACT** of 1991. A provision of this law addressed, for the first time, the arbitration of Title VII claims. Section 118 of the act states that the parties could, "where appropriate and to the extent authorized by law," choose to pursue alternative dispute resolution, including arbitration, to resolve their Title VII disputes. Since its enactment, the federal courts have been required to determine what this clause means in practice. For example, in the securities industry disputes arose over whether employers could require their employees to waive their right to bring a Title VII claim in court. The circuit courts of appeal have uniformly ruled that Congress did not mean to preclude compulsory arbitration of Title VII claims.

The **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION** (EEOC) has contended that employment arbitration clauses do not prohibit the EEOC from filing an action against an employer for a civil rights violation. The Supreme Court agreed in *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002), holding that the EEOC could seek damages on behalf of an employee. The commission could also seek injunctive relief to change a company's discriminatory methods. In so ruling, the Court resolved an issue that had divided the circuit courts of appeal.

The employee in question was fired from his job at the Waffle House after he suffered a seizure. He filed a claim with the EEOC, arguing that his rights under Title I of the Americans with Disabilities Act (ADA) had been violated. Under this act, the EEOC has the authority to bring its own enforcement actions against employers and to seek reinstatement, backpay, and compensatory and **PUNITIVE DAMAGES** on behalf of an employee. Moreover, the ADA makes no exception for arbitration agreements, nor does it even mention arbitration. Therefore, the EEOC, which had not signed an arbitration agreement with the employer, was free to pursue its claims in court. The Court also concluded that the general policies surrounding the ADA, and the EEOC's enforcement arm, justified the pursuit by the EEOC of victim-specific relief. It stated that punitive damages "may often have a greater impact on the behavior of other employers than the threat of an injunction."

The Supreme Court also has validated the enforceability of arbitration awards relating to **COLLECTIVE BARGAINING** agreements. In *Eastern Associated Coal Corporation v. United Mine Workers of American, District 17*, 531 U.S. 57, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000), the issue involved a labor arbitrator who ordered an employer to reinstate an employee who had twice tested positive for marijuana use. The employer filed a lawsuit in federal court seeking to have the arbitrator's decision vacated, arguing that the award went against a public policy against the operation of dangerous machinery by workers who test positive for drugs.

The Court unanimously agreed that the employee should be reinstated. The Court made it clear that the question was not whether the employee's drug use itself violated public policy, but whether the agreement to reinstate him did so. However, the Court also pointed out that the public policy exception is a narrow one. Based on these principles, the Court ruled that the reinstatement did not violate public policy, as the award did not condone drug use or its impact on public safety. In addition, the arbitrator placed conditions on the employee's reinstatement, which included suspension of work for three months without pay, participation in a substance abuse program, and continued random drug testing. The fact that the employee was a recidivist did not tip the balance in favor of discharge.

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**CROSS-REFERENCES**

Alternative Dispute Resolution.

## ARCHITECT

*A person who prepares the plan and design of a building or other structure and sometimes supervises its construction.*

A landscape architect is responsible for the arrangement of scenery over a tract of land for natural or aesthetic purposes in order to enhance or preserve the property.

### Regulation

The practice of planning and designing a building requires the application of specialized skill and knowledge. Because the product of an architect's work is used by members of the general public, the legislature of a state may regulate the practice of those engaged in the profession. Regulatory statutes designed to protect public health and safety are created under the inherent authority of a state to protect the welfare of its citizens. As a general rule, regulatory statutes are valid, provided they are not unreasonable.

Statutes requiring that architects must be registered and licensed are based on public policy aimed at protecting citizens from unqualified practitioners. In many states, statutes call for the revocation of a license for such conduct as FRAUD, dishonesty, recklessness, incompetence, or MISREPRESENTATION when an architect acts in his or her professional capacity.

The power to revoke a license is commonly given by the legislature to a state board of architects who must act in a manner prescribed by statute. Generally, an architect is entitled to notice and a hearing when the board seeks to revoke his or her license. The architect can appeal a revocation.

### Qualifications

Statutes setting forth the requirements for obtaining a license or registration generally require that the applicants be of legal age and of good moral character, have completed a certain course of study, and have a certain amount of practical experience. Many states have an additional requirement that applicants must pass an examination. A legislature may provide that certain persons who have practiced architecture for a period of time prior to legislation requiring an examination may register as architects without an examination. Such a statutory provision is called a GRANDFATHER CLAUSE.

Persons who present themselves to the public as architects must comply with the statutory registration and licensing requirements. The failure to do so is unlawful. In most states, persons who falsely hold themselves out as licensed architects are guilty of a misdemeanor, and contracts rendered by them with others are void and unenforceable.

### Employment

The terms and conditions of an architect's employment are designated in a contract and are governed by general rules of contract law. Ordinarily, the person who employs the architect becomes the owner of the plans, unless the employment contract states otherwise. Customarily, the architect retains the plans after they have been paid for and the builder may possess and use them while constructing the building.

### Authority and Powers

The power and authority of architects are determined by general rules of agency law. In most cases, unless the employment contract states otherwise, architects are held to be agents with limited authority. An employer is liable for acts of an architect when they are within the scope of the architect's agency, although the contracting parties may further restrict the powers if they so desire.

Architects have a duty to exercise their personal skill and judgment in the performance of their work, and they may not delegate this duty without express authority to do so. They may, however, delegate responsibility to subordinates while performing their duties as agents.

A supervising architect does not have implied authority to perform work that has been assigned to a contractor or to employ or discharge workers. The supervising architect does, however, have authority to make decisions concerning proper workmanship, fitness of materials, and the manner of work.

### Duties and Liabilities

Although the duties of architects generally depend on what is designated in the employment contract, some duties are carried out as a matter of custom, such as the duty to supervise construction.

Architects are in a fiduciary relationship with their employers, and as such they must exercise GOOD FAITH and loyalty toward them. As professionals, they are held to a standard of reasonable and ordinary care and skill in applying their knowledge and must conform to accepted architectural practices. The failure to exercise reasonable care and skill can result in liability for damages and the loss of the right to recover compensation for their services.

### Compensation

Architects have a right to compensation for their services unless there is an agreement that they shall work gratuitously. To be entitled to compensation, they must carry out their contract with reasonable skill and care and without any substantial omissions or imperfections in performance. The employment contract usually fixes the amount of compensation. A standard payment scale created by the American Institute of Architects is customarily used to determine the amount of compensation.

In the event that an architect is refused payment for services, he or she may sue for the amount of compensation agreed upon in the employment contract or, in the absence of an agreement, for the reasonable value of the services under the theory of QUANTUM MERUIT.

## ARCHITECT OF THE CAPITOL

Established as a permanent office in 1876 (40 U.S.C.A. §§ 162, 163), the architect of the capitol oversees the mechanical and structural maintenance of the Capitol, the conservation and care of works of art in the building, the upkeep and improvement of the Capitol grounds, and the arrangement of inaugural and other ceremonies held in the building or on the grounds. In addition, the architect is responsible for the upkeep of all the congressional office buildings, the LIBRARY OF CONGRESS buildings, the U.S. Supreme Court building, the Federal Judiciary Building, the Capitol Power Plant, the Capitol Police headquarters, and the Robert A. Taft Memorial. The architect also serves as the acting director of the U.S. Botanic Garden.

The functions of the architect have become increasingly administrative, and the architectural or engineering dimensions less important. Special projects carried out by the architect include building renovation and restoration, including installation of broadcasting and security equipment in the Capitol.

Before 1989, the position of architect of the capitol was filled for an indefinite term by presidential appointment. Legislation enacted in 1989 (Pub. L. No. 101-163, 103 Stat. 1068 [codified at 40 U.S.C.A. § 162–1]) provided that the architect be appointed for a ten-year term by the president, with the advice and consent of the Senate, from a list of three candidates recommended by a congressional commission. Upon confirmation by the Senate, the architect becomes an official of the legislative branch as an officer and agent of Congress and is eligible for reappointment after completion of a term.

FURTHER READINGS

*U.S. Government Manual* Website. Available online at <www.gpoaccess.gov/gmanual> (accessed November 10, 2003).

## ARCHITECTURAL BARRIERS ACT OF 1968

See DISABILITY DISCRIMINATION.

## ARCTIC, LEGAL STATUS OF

Establishment of territorial sovereignty over portions of the Arctic and its seabed has become increasingly attractive to many nations for military purposes or as a source of minerals. Under INTERNATIONAL LAW, national claims of sovereignty over the Arctic traditionally were recognized only if accompanied by physical occupation. Consequently, two competing theories developed: (1) that no nation could achieve sovereignty over the Arctic (*res nullius*) and (2) that every nation shared in undivided sovereignty over the area (*res communes*). According to international law sovereignty is considered to be a derivative of the exercise of government functions and of notoriety over new territory. Therefore, national claims of sovereignty over portions of the Arctic that are supported by such governmental activity have become more plausible. Many such claims have rested on the sector principle, a version of the doctrine of contiguity, to define the area included in the claim. The sector principle traces longitudinal parallels from borders of countries adjacent to the Arctic Circle to the North Pole, assigning the sectors so formed to the neighboring nations. Claims resting solely on the sector principle have been denied legal force by many nations, including the United States, and it appears that only those claims of sovereignty accompanied by government control may be eventually accepted under international law.

CROSS-REFERENCES

Boundaries; Territory.

## ARGUENDO

*In the course of the argument.*

When the phrase *in arguendo* is used by a judge during the course of a trial, it indicates that his or her comment is made as a matter of

argument or illustration only. The statement does not bear directly upon the remainder of the discussion.

## ARGUMENT

*A form of expression consisting of a coherent set of reasons presenting or supporting a point of view; a series of reasons given for or against a matter under discussion that is intended to convince or persuade the listener.*

For example, an argument by counsel consists of a presentation of the facts or evidence and the inferences that may be drawn therefrom, which are aimed at persuading a judge or jury to render a verdict in favor of the attorney's client.

An attorney may begin to develop an argument in the OPENING STATEMENT, the initial discussion of the case in which the facts and the pertinent law are stated. In most cases, however, an attorney sets forth the main points of an argument in the closing argument, which is the attorney's final opportunity to comment on the case before a judge or jury retires to begin deliberation on a verdict.

## ARGUMENTATIVE

*Controversial; subject to argument.*

PLEADING in which a point relied upon is not set out, but merely implied, is often labeled argumentative. Pleading that contains arguments that should be saved for trial, in addition to allegations establishing a CAUSE OF ACTION or defense, is also called argumentative.

## ♦ ARISTOTLE

Aristotle was born in 384 B.C., in Stagira, Greece. He achieved prominence as an eminent philosopher who greatly influenced the basic principles of philosophy and whose ideologies are still practiced today.

Aristotle was a student of the renowned philosopher Plato and tutored Alexander the Great, who became King of Macedonia in 336 B.C.

Aristotle established his own school in the Lyceum, near Athens, in 335 B.C. He often lectured his students in the portico, or walking place, of the Lyceum. The school was subsequently called Peripatetic, after the Greek word *peripatos* for "walking place."

In 323 B.C. the reign of Alexander ended with his death, and Aristotle sought refuge at Chalcis.

Aristotle formulated numerous beliefs about the reasoning power of humans and the essence of being. He stressed the importance of nature and instructed his pupils to closely study natural phenomena. When teaching science, he believed that all ideas must be supported by explanations based upon facts.

Concerning the realm of politics, Aristotle propounded that humans are inherently political and demonstrate an essential part of their humanity when participating in civic affairs.

Philosophy was a subject of great interest to Aristotle, and he theorized that philosophy was the foundation of the ability to understand the basic axioms that comprise knowledge. In order to study and question completely, Aristotle viewed logic as the basic means of reasoning. To think logically, one had to apply the syllogism, which was a form of thought comprised of two premises that led to a conclusion; Aristotle taught that this form can be applied to all logical reasoning.

To understand reality, Aristotle theorized that it must be categorized as substance, quality, quantity, relation, determination in time and space, action, passion or passivity, position, and condition. To know and understand the reality of an object required an explanation of its material cause, which is why it exists or its composi-

"MAN IS BY NATURE A POLITICAL ANIMAL."
—ARISTOTLE

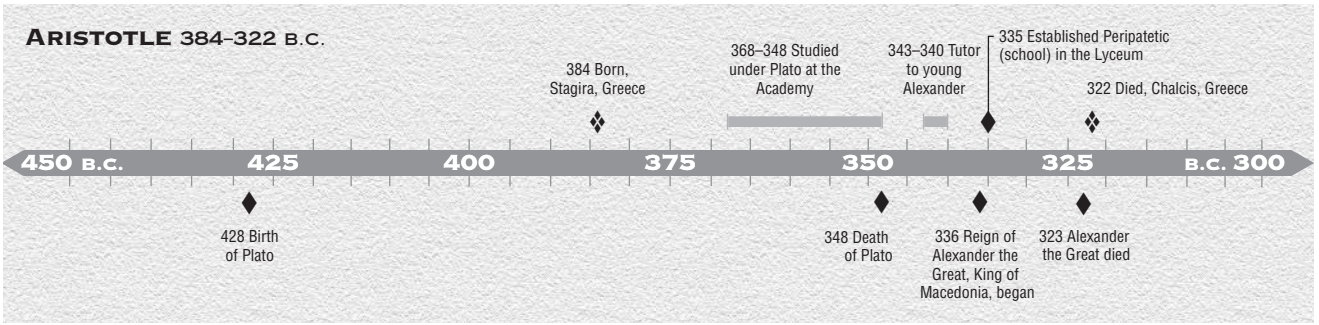

*Aristotle.*
LIBRARY OF CONGRESS

tion; its formal cause, or its design; its efficient cause, or its creator; and its final cause, or its reason for being.

Aristotle agreed with his mentor, Plato, concerning the field of ethics. The goodness of a being depended upon the extent to which that being achieved its highest potential. For humans, the ultimate good is the continual use and development of their reasoning powers to fullest capacity. To effect fulfillment and contentment, humans must follow a life of contemplation, rather than pleasure.

The fundamental source of Aristotle's theories were his lectures to his students, which were compiled into several volumes. They include *Organum,* which discusses logic; *Physics; Metaphysics; De Anima,* concerning the soul; *Rhetoric; Politics; Nichomachean Ethics and Eudemian Ethics,* involving principles of conduct; and *De Poetica,* or poetics.

He also wrote *Constitution of Athens,* a description of the foundations of the government of Athens. The work was discovered in the late nineteenth century.

Aristotle died in 322 B.C., in Chalcis, Greece.

## ARMED SERVICES

The Constitution authorizes Congress to raise, support, and regulate armed services for the national defense. The President of the United States is commander in chief of all the branches of the services and has ultimate control over most military matters.

The United States has always been wary of maintaining a strong military force. This concern was shown by the Framers of the Constitution when they finally allowed the creation of a standing army but at the same time limited the process by which money could be raised to support the military, by requiring that Congress review the appropriations every two years. In this way, the Framers ensured that members of each new Congress had the opportunity to address their lingering concerns about domestic tyranny with a fresh perspective. Furthermore, the Framers ensured that the states could maintain their own militias and protect themselves from federal military domination, by recognizing "the right of the people to keep and bear Arms" (U.S. Const. amend. 2).

The various branches of the armed services were created at different times to serve different purposes. The earliest branch was the Army, instituted on July 14, 1775, followed closely by the Navy and the Marine Corps in the same year. All three were established to respond to the needs of the revolutionary forces fighting the British. The Navy and the Marine Corps were disbanded after the Revolutionary War but were reestablished in 1798. The Coast Guard traces its origins to 1790 but was officially created in 1915. Finally, the Air Force had its genesis in the Signal Corps of the Army and was formally established as the Army Air Service in 1920.

Military personnel are governed by a set of laws that is separate from and independent of CIVIL LAW. The UNIFORM CODE OF MILITARY JUSTICE (10 U.S.C.A. § 801 et seq.) outlines the basic laws and procedures governing members of the armed services. MILITARY LAW is mainly concerned with maintaining order and discipline within the ranks. It is unrelated to MARTIAL LAW, which is the temporary imposition of military rule during a national or regional crisis. Offenses committed by members of the armed services are tried by a COURT-MARTIAL, a special tribunal created specifically to hear a military case and then disbanded once judgment and punishment are pronounced.

The constitutionality of the military legal system has been challenged several times, without success. In 1994, the Supreme Court reaffirmed the constitutionality of the system with a unanimous decision in *Weiss v. United States,*

510 U.S. 163, 114 S. Ct. 752, 127 L. Ed. 2d 1. At issue were the selection process and tenure of military judges, who are chosen by their branch's JUDGE ADVOCATE general. The plaintiffs claimed that because the judges could be removed at any time by the judge advocate general, they were biased toward the prosecution and could not be impartial. The Court held that sufficient safeguards were in place to protect against improper influence by the judge advocate general and that the defendants' FIFTH AMENDMENT DUE PROCESS rights had not been violated.

### Military Ban on Homosexuality

One controversial and divisive issue facing the military is the inclusion of homosexuals. For more than fifty years, the U.S. armed services prohibited gay men and lesbians from serving in the military. In the past, members who disclosed that they were homosexual were subject to immediate discharge. That policy was challenged in several prominent cases during the late 1980s and early 1990s, and the Clinton administration addressed the issue with a new approach that ultimately led to more confusion and controversy.

The federal courts tackled the question of whether the military's automatic ouster of homosexual personnel is constitutional, in *Meinhold v. United States Department of Defense,* 34 F.3d 1469 (9th Cir. 1994). The plaintiff, Petty Officer Keith Meinhold, of the Navy, announced on a national television broadcast in May 1992 that he is gay. As a result, discharge proceedings were begun against him. Meinhold was dismissed solely on the basis of his televised statement. He sued the Navy and the DEPARTMENT OF DEFENSE, claiming that their policy was unconstitutional. The district court agreed, holding that the Navy's actions denied gay men and lesbians EQUAL PROTECTION under the law. In August 1994, the Court of Appeals for the Ninth Circuit agreed that Meinhold could not be discharged merely for stating that he was gay. However, the appeals court disagreed with the district court's finding that the military's policy was unconstitutional and instead found that by discharging Meinhold because of his status as a homosexual and not because of any actions on his part, the Navy was equating status with prohibited conduct. The court conceded that the Navy could legally discharge someone who manifested a "fixed or expressed desire to commit a prohibited act," such as engaging in homosexual sex but found that Meinhold had not manifested any such desire and therefore must be reinstated. In November 1994, the Clinton administration announced it was dropping its efforts to bar Meinhold from serving and would not appeal the Ninth Circuit's ruling.

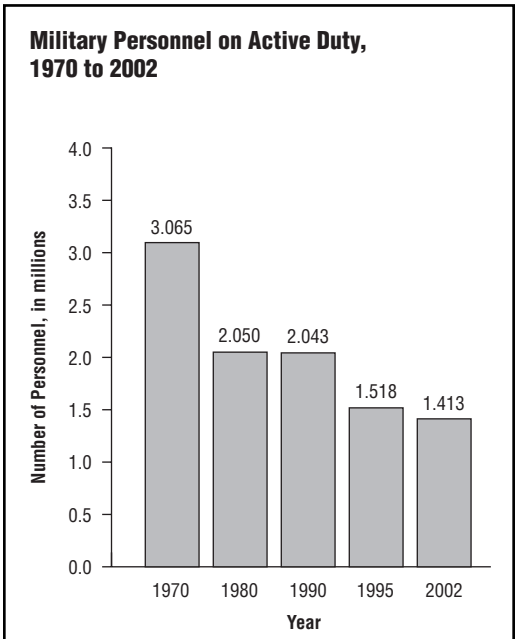

SOURCE: U.S. Department of Defense, DefenseLINK.

Another challenge to the military ban on homosexuals occurred in *Steffan v. Aspin,* 8 F.3d 57 (D.C. Cir. 1993). The plaintiff, Joseph Steffan, admitted to being a homosexual just six weeks before his expected graduation from the U.S. Naval Academy, at Annapolis, Maryland, in 1987. Steffan was one of the top ten students in his class. He had consistently received outstanding marks for leadership and military performance. In his junior year, he was named a battalion commander in charge of one-sixth of the academy's 4,500 students. After Steffan acknowledged his homosexuality to a classmate and a chaplain, he was brought before a disciplinary board, which recommended that he be discharged. Rather than face dismissal, he resigned. Sometime later, he asked to be reinstated. His request was denied, and he then sued for reinstatement to his commission, claiming that he was forced to resign because of his status as a homosexual, not because of any conduct—in violation of the Constitution's equal protection guarantee.

# The Branches of the Armed Services

The five branches of the U.S. armed services are staffed by volunteer enlisted men and women who hold various ranks. Military personnel are no longer conscripted, or drafted, into service.

### Army

The Army was the first branch of the armed services established by Congress. The U.S. Army evolved from the Continental Army, created on July 14, 1775, by the **CONTINENTAL CONGRESS** to fight the Revolutionary War against the British.

The three segments of the Army are the Army Reserve, the Army National Guard, and the Active Army. The Army Reserve provides training and combat support to the Active Army in times of emergency. The Army National Guard, the oldest military force in the United States, began in the Massachusetts Bay Colony in 1636. During peacetime, the National Guard unit in each state is commanded by the state governor. The National Guard often assists in natural disasters, such as earthquakes or floods, or in civil unrest, such as riots. The president has the authority to call the Guard to federal duty when necessary. For example, President **DWIGHT D. EISENHOWER** federalized the Arkansas National Guard in 1957 and assigned them to control angry mobs protesting the enrollment of African American students in a previously segregated Little Rock high school. Similarly, President **GEORGE H.W. BUSH** assigned Guard units to duty with the Active Army during the Persian Gulf War of 1991.

The Army's many responsibilities include combat, combat support, and combat service support arms. The combat arms, including the infantry, armored divisions, air defense artillery, field artillery, and aviation, are directly involved in fighting. The combat support arms include the Corps of Engineers, the Signal Corps, the Military Police Corps, the Chemical Corps, and military intelligence. The combat service support arms provide logistical and administrative assistance to the other arms.

Women were originally restricted to the Women's Army Corps (WAC) but now serve alongside men in almost all capacities. Their roles have been gradually expanded, and they now serve in combat units, which gives them equal opportunities with men for higher pay and advancement in rank.

The U.S. Military Academy, the oldest of the service academies, was established at West Point, New York, in 1802. It was originally charged with training army engineers, but evolved into the training ground for those wishing to become officers in the Army. West Point has been coeducational since 1976.

### Navy

The Navy traces its origins to 1775 and the American Revolution. A fleet established to fight the British was disbanded after the war, but the need for a naval force was again recognized in 1798, when Congress established the **NAVY DEPARTMENT**. The Navy was a separate branch of the government until the National Security Act of 1947 (5 U.S.C.A. § 101 et seq., 10 U.S.C.A. § 101 et seq., 50 U.S.C.A. § 401 et seq.) created the Department of Defense with a cabinet-level secretary to oversee all branches of the military.

The Navy's forces are grouped into various fleets that serve in different areas of the world. Traditionally, odd-numbered fleets, such as the Third and Seventh Fleets, have served in the Pacific Ocean. Even-numbered fleets, like the Second and Sixth Fleets, have served in the Atlantic Ocean. Over the years, U.S. Navy fleets have been disestablished (removed from service) and reconstituted (restored to service) as the distribution of military power throughout the world has changed.

A naval reserve force is made up of civilians who train regularly and stand ready to be called in times of need.

Although women originally could only join the Women Accepted for Voluntary Emergency Service (WAVES), they now serve alongside men, drawing equal pay and attaining equivalent rank.

The Naval Academy, at Annapolis, Maryland, was established in 1845 to train young men to be officers in the Navy and the Marine Corps. Women have been admitted since 1976.

### Air Force

The Aeronautical Division of the Army Signal Corps, the precursor to the U.S. Air Force, was established on August 1, 1907. The First Aero Squadron was organized in 1914 and served with the Mexican Border Expedition in 1916. The Air Force remained a division of the Army until 1947.

The Air Force is responsible for domestic security in such areas as the Strategic Air Command (SAC), which plays a major role in deterring air and missile attacks as well as conducting space surveillance. Other responsibilities of the Air Force include maintaining a combat-ready mobile strike force and operating air bases in key areas around the world.

The Air Force's chief of staff, along with the chiefs of staff of the Army and the Navy, is a member of the Joint Chiefs of Staff, which advises the president and the secretary of defense.

The Air Force Academy, authorized in 1954 and located in Colorado Springs, Colorado, prepares college students to become officers in the Air Force. Women were admitted beginning in 1976.

### Marine Corps

Steeped in history, tradition, and folklore, the Marine Corps, a self-contained amphibious combat force within the Department of the Navy, traces its roots to the Revolutionary War. During its two hundred-year history, the U.S. Marines has fulfilled its obligation to provide air, land, and sea support for naval forces, establish beachheads during war, and protect U.S. lives and interests at foreign embassies and legations.

The Marines maintain a large reserve unit, which, when mobilized in times of crisis, can increase the corps strength by 25 percent within weeks.

The Marine Corps Women's Reserve, established in 1942, provides support in the mainland United States and in Hawaii so that men are available for combat.

Marine Corps officers are trained mainly at the U.S. Naval Academy, at Annapolis.

### Coast Guard

The U.S. Coast Guard was first established in 1790 as the U.S. Lighthouse Service under the **DEPARTMENT OF THE TREASURY**. It later moved to the **DEPARTMENT OF TRANSPORTATION**, where it remained for 36 years. On February 25, 2003, the Coast Guard officially transferred to the **DEPARTMENT OF HOMELAND SECURITY**, where it comprises about one-fourth of the new department. The move was part of the largest government reorganization since the **DEFENSE DEPARTMENT** was established in 1947.

The Coast Guard is charged with guarding the country's coasts against **SMUGGLING**, enforcing customs laws, and responding to emergencies along the coasts. The move to the Department of Homeland Security did not change the Coast Guard's mission significantly, although it is now responsible for securing the nation's ports and has been prepared to be involved with international conflicts in the **WAR ON TERRORISM**.

The Coast Guard provides officer training for college students at the Coast Guard Academy, at New London, Connecticut, which began admitting women in 1976.

**CROSS-REFERENCES**

Homeland Security Department; Military Law.

The district court granted SUMMARY JUDGMENT for the government (*Steffan v. Cheney*, 780 F. Supp. 1 [D.D.C. 1991]). A three-judge panel for the court of appeals reversed, stating that the dismissal policy had no rational basis and that it violated the Equal Protection Clause of the Fifth Amendment. The appeals court ordered the academy to award Steffan his diploma and reinstate him to his commission.

The government petitioned the court for a rehearing on whether the three-judge panel had exceeded its authority. The full court of appeals vacated the decision of the panel and ordered a rehearing before the full court on the constitutionality question. In November 1994, the full court reversed the decision of the three-judge panel and held that Steffan's dismissal did not violate the Constitution. The court said that the Navy's ban on homosexuals, like its height or eyesight requirements, did have a rational basis. The court also dismissed Steffan's argument that the ban punished status rather than conduct. Judge Laurence H. Silberman, writing for the majority, said, "Steffan's claim that the Government cannot rationally infer that one who states he or she is a homosexual is a practicing homosexual, or is at least likely to engage in homosexual acts, is so strained a constitutional argument

as to amount to a basic attack on the policy itself" (*Steffan v. Perry,* 41 F.3d 677, 693 [D.C. Cir. 1994]). In an impassioned dissent, Judge PATRICIA M. WALD wrote, "In years to come, we will look back with dismay at these unconstitutional attempts to enforce silence upon individuals of homosexual orientation, in the military and out. Pragmatism should not be allowed to trump principle, or the soul of a nation will wither" (41 F.3d 677, 721).

In January 1995, Steffan announced that for tactical reasons, he would not appeal the decision to the Supreme Court. Steffan's case was brought under the old policy, and he and his attorneys felt that the best case to have the Supreme Court address was one involving the new policy, which they believed was more vulnerable to constitutional attack. After his discharge from the naval academy, Steffan became a lawyer.

The case of Colonel Margarethe Cammermeyer further clouded official policy on homosexuals in the military (*Cammermeyer v. Aspin,* 850 F. Supp. 910 [W.D. Wash. 1994]). Cammermeyer was dismissed from the Washington State National Guard in June 1992 when she acknowledged in a security-clearance interview that she is a lesbian. Under the rules in effect at the time, her statement was grounds for dismissal, and Cammermeyer was given an honorable discharge. She was the highest-ranking officer to be discharged solely because of homosexual orientation.

Cammermeyer, a highly respected nurse who was awarded the Bronze Star for her service with the Army in Vietnam, appealed the dismissal. In June 1994, Judge Thomas Zilly, of the Federal District Court for the District of Washington, ordered the military to reinstate Cammermeyer, holding that the policy in effect at the time of her dismissal violated the Equal Protection Clause. Zilly's decision dismantled the assumptions that form the basis for both the old and the new government policies regarding homosexuals in the military. Zilly held that "there is no rational basis for the Government's underlying contention that homosexual orientation equals 'desire or propensity to engage" in homosexual conduct (850 F. Supp. at 920). The judge was direct and harsh in his criticism of the government's policy. He wrote, "The Government has discriminated against Colonel Cammermeyer solely on the basis of her status as a homosexual and has failed to demonstrate a rational basis for doing so" (850 F. Supp. at 926). Noting that military experts "conceded that their justifications for the policy are based on heterosexual members' fear and dislike of homosexuals," Zilly went on to say, "[m]ere negative attitudes, or fear, are constitutionally impermissible bases for discriminatory governmental policies" (850 F. Supp at 925).

The JUSTICE DEPARTMENT moved to delay Cammermeyer's reinstatement, but the U.S. Court of Appeals for the Ninth Circuit refused the request. Cammermeyer returned to her position as chief of nursing services for the 164th Mobile Army Surgical Hospital in July 1994.

At the same time that *Meinhold, Steffan,* and *Cammermeyer* were being decided, the Clinton administration was formulating and implementing a new policy that it hoped would deal with the issue of homosexuals in the military and put the controversies surrounding the old policy to rest. Before he was elected, BILL CLINTON had promised that as president, he would lift the ban on gay men and lesbians in the armed services. However, after taking office, Clinton faced strenuous opposition from the Joint Chiefs of Staff and the heads of the service branches, who argued that summarily eliminating the ban on homosexuals would lead to dissension among the troops and diminished military readiness. In December 1993, the Pentagon announced a compromise plan, which came to be known as the "don't ask, don't tell, don't pursue" policy (Policy Concerning Homosexuality in the Armed Forces, Pub. L. No. 103-160, 1993 H. R. 2401 § 571(a) [amending 10 U.S.C.A. § 654]). Under the new rules, gay men and lesbians could serve in the military as long as they kept their sexual orientation private and did not engage in homosexual activity. The policy stated that sexual orientation is a "personal and private matter" about which recruits and members of the armed forces would no longer be required to answer questions. Criminal investigations and security checks conducted solely to determine sexual orientation would be eliminated. Homosexual orientation alone would not be a bar to service. However, homosexual conduct, which could take the form of "a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage" would subject the individ-

ual to dismissal. An acknowledgement of homosexual orientation would not be sufficient grounds for expulsion but could be the basis for an investigation into whether the individual engaged in homosexual acts.

Gay rights advocates immediately and vigorously criticized the new policy, saying it infringed on the free speech rights of gay service members and vowed to challenge it in court. In the months following implementation of the new rules, it became clear that, far from easing the plight of homosexual service members, "don't ask, don't tell, don't pursue" was actually making life worse for many of them. Some commanding officers were overly aggressive in implementing the new rules, and many critics felt that the policy further polarized attitudes among service members. Furthermore, the policy shifted the **BURDEN OF PROOF** to the individual to show that she or he had not engaged in homosexual acts.

The first legal challenge to the "don't ask, don't tell, don't pursue" policy was filed in March 1994 by the **AMERICAN CIVIL LIBERTIES UNION** and the Lambda Legal Defense and Education Fund. Six service members who had declared their homosexuality filed suit in the U.S. District Court for the Eastern District of New York, asking for injunctive relief and a declaration that the policy was unconstitutional. The case was heard by Judge Eugene H. Nickerson who issued orders on April 4, 1994, and June 3, 1994, enjoining the Army from pursuing discharge proceedings against the plaintiffs. Nickerson based his decision on the plaintiffs' showing that they would suffer irreparable harm if the **INJUNCTION** were not granted and that the case involved "sufficiently serious questions" that would warrant its going forward for a decision on its merits.

The U.S. Court of Appeals for the Second Circuit found that Nickerson had used an incorrect standard in determining whether the injunction should be granted. It held that in a case such as this, where an injunction is sought against a "government action taken in the public interest pursuant to a statutory or regulatory scheme," a more rigorous showing that the case has a "likelihood of success" must be made (*Able v. United States,* 44 F.3d 128 [1995] [per curiam]). The court allowed the injunctions to stand but remanded the case to the district court for a decision on the plaintiffs' constitutional claims within three months.

*Col. Margarethe Cammermeyer was dismissed from the Washington State National Guard in 1992 after acknowledging that she was a lesbian. She was reinstated two years later and, in 1997, retired with full military privileges.*

AP/WIDE WORLD PHOTOS

On March 30, 1995, Judge Nickerson delivered the decision the plaintiffs had hoped for. He held that the "don't ask, don't tell, don't pursue" policy violated the First and Fifth Amendments, and enjoined the government from enforcing the policy against the plaintiffs (*Able,* 880 F. Supp. 968 [E.D.N.Y.]). The court found that the **FIRST AMENDMENT** prohibits a restraint on the right of a serviceperson to declare his or her homosexuality. According to the court, "Plaintiffs have done no more than acknowledge who they are, that is, their status. The speech at issue in this case implicates the First Amendment value of promoting individual dignity and integrity and thus is protected by the First Amendment from efforts to prohibit it because of its content." The court further found that to regulate speech content, even in the military context, the government must show a "compelling interest" and prove that it has chosen the "least restrictive means" to further that interest. Nickerson criticized the legal hairsplitting in the policy directives, which purported to differentiate between a homosexual "orientation" and a homosexual "propensity." Once a member of the armed services has admitted or acknowledged being a homosexual, he or she has only a "hypothetical" chance of escaping discharge. "Thus, the policy treats a statement of homosexual orientation as proof of the case," said Nickerson. "Once such a statement is made, the speaker is judged guilty until proven innocent of commit-

ting misconduct the government considers so threatening to the military mission that a member may be discharged for it. This seems to the court a rather draconian consequence of merely admitting to an orientation that Congress has determined to be innocuous."

Turning to the government's argument that the presence of openly homosexual members would be detrimental to morale and troop cohesion, the court found that sufficient sanctions were available for dealing with "inappropriate behavior by a homosexual, whether in the closet or not." Nickerson further stated his belief that the policy may actually be detrimental to the military because "secrecy and deception invite suspicion, which in turn erodes trust, the rock on which cohesion is built." He noted that a 1993 study conducted by the RAND Corporation found that in countries that have nondiscrimination policies, "no serious problems were reported concerning the presence of homosexuals in the force."

Finally, on the Fifth Amendment equal protection question, the court found that the government had failed to show that the policy, which denied to homosexuals the same free speech rights guaranteed to heterosexuals, was "tailored to serve a substantial governmental interest." The policy therefore violated the Fifth Amendment as well as the First, and the court enjoined the government from enforcing it.

The military policy of "don't ask, don't tell" has remained intact since 1993. Despite calls for repeal of the policy and return to the former policy of excluding homosexuals from service, President GEORGE W. BUSH has not changed the policy, and EXECUTIVE BRANCH officials have stated that the administration does not plan to change the policy. The controversy has nevertheless remained heated. Commentators have noted that the ban on homosexuals does not apply to such governmental agencies as the CENTRAL INTELLIGENCE AGENCY, which often engages in quasi-military activities. Moreover, evidence suggests that during times of war in the past, the military has allowed gays to remain in the service.

### Sexual Harassment in the Armed Services

The inclusion of women in virtually all aspects of military life has changed the service from a male-dominated enterprise, strictly segregated by gender, into a microcosm of modern society. Although most men and women serve side by side without incident, charges of SEXUAL HARASSMENT in the military became increasingly numerous in the 1980s and early 1990s.

Perhaps the most explosive and far-reaching incidence of this problem took place at the Tailhook Association convention in Las Vegas in September 1991. The Tailhook Association—named for the hook on a Navy jet that catches on the cables that stop it as it lands on an aircraft carrier—is a private group of active and retired Navy and Marine Corps pilots. After its 1991 meeting, Navy lieutenant Paula A. Coughlin charged that she and other women who unwittingly stumbled upon the Tailhook hospitality suites at the Las Vegas Hilton were forced to go through a "gauntlet" of drunken Navy and Marine officers who assaulted them, tore at their clothing, and grabbed at their bodies as they were propelled down the hallway. Coughlin's allegations launched an investigation that revealed drunken, lewd, and out-of-control behavior by the officers. In the ensuing months, the Navy severed its ties to the Tailhook Association and submitted the names of more than 60 officers for possible disciplinary action. Nevertheless, a conspiracy of silence among the aviators hampered the investigation. In September 1992, the Pentagon's inspector general issued a report criticizing the Navy's inquiry into the incident and suggesting that top Navy officials deliberately undermined the investigation to avoid negative publicity. The commander of the Naval Investigative Service and the Navy's judge advocate general were relieved of their commands. The following April, the inspector general accused 140 aviators of indecent exposure, assault, and lying under oath in the incident. However, no one was ever court-martialed as a result of the charges, and those who were disciplined received only small fines or reprimands.

The Tailhook scandal set off a tidal wave within the upper echelons of the Navy. Navy Secretary H. Lawrence Garrett III resigned in June 1992, accepting full responsibility for the failure of leadership that allowed the incident to occur. In October 1993, his replacement, John H. Dalton, asked for the removal of Admiral Frank B. Kelso II, chief of naval operations, who was present at the convention but denied any knowledge of the debauchery. Dalton's request was overruled by Secretary of Defense Les Aspin. In February 1994, a military judge cited Kelso for using "unlawful command influence" to "manipulate the initial investigative process"

and the Navy's disciplinary procedures "to shield his personal involvement" in Tailhook. Kelso, who was to retire on June 30, 1994, angrily denied any wrongdoing and declared that he would not resign early. In the end, however, he was persuaded to step down two months ahead of schedule in exchange for a tribute from Defense Secretary William J. Perry that would clear his name. After a bitter debate, the U.S. Senate voted 54 to 43 to allow Kelso, the Navy's top admiral and a 38-year veteran, to retire at his full four-star rank and with a full PENSION. The women in the Senate, along with many of their male colleagues, vehemently opposed the arrangement, but they were ultimately overruled.

Coughlin resigned from the Navy in February 1994, stating that the assault and "the covert attacks on me that followed have stripped me of my ability to serve." Coughlin was successful in a civil suit against the Tailhook Association, with whom she settled for an undisclosed amount. She also won a civil suit against the Hilton Hotels Corporation, parent company of the Las Vegas Hilton, which she accused of lax security; in October 1994, a jury awarded her $1.7 million in COMPENSATORY DAMAGES and an additional $5 million in PUNITIVE DAMAGES. Still suffering depression and post-traumatic stress from the incident, Coughlin expressed satisfaction with the award but uncertainty about her future, saying, "I'm hoping to slip into obscurity. I want to paint my house. I just want to go home."

Anxious to restore the Navy's tarnished image after the sordid series of events, top officials vowed to handle sexual harassment charges swiftly and sensitively. The Navy's new "zero-tolerance" policy on sexual harassment required automatic dismissal for aggravated sexual harassment or repeat offenses. Under the policy, about 90 officers and sailors had been dismissed by the end of 1994.

In spite of the publicity generated by Tailhook and other scandals, and the efforts of the military to clamp down on sexual harassment, charges continued to come to light. In one 1994 case that tested the resolve of Admiral Jeremy M. Boorda, Admiral Kelso's successor as chief of naval operations, two officers were reprimanded for failing to act properly on complaints by Lieutenant Darlene Simmons. Simmons charged that her commanding officer, Lieutenant Commander Arthur Catullo, had offered to advance her career in exchange for sexual favors. Catullo was censured. Simmons, who had an impeccable record before she brought the charges but received an "adverse" evaluation afterward, received an apology from Navy Secretary Dalton. Dalton also cleared her record and offered to extend her active-duty Navy service by two years.

Another egregious incident, again involving the Navy, occurred in 1994 when four male instructors were court-martialed and six others punished for sexually harassing 16 women students at the Naval Training Center in San Diego. The women, who were learning to operate the Navy's computer and telephone networks, claimed that the male instructors made unwanted verbal and physical advances. After a seven-month investigation, the Navy found all but one of the instructors guilty of the charges and imposed various sanctions, from a criminal conviction and $1,000 fine, to a loss in pay, required counseling, and inclusion of punitive letters in their files.

Sexual harassment was also found among the ranks at the U.S. Military Academy, at West Point, New York. In October 1994, female cadets complained that they had been groped at a pep rally by members of the West Point football team as the players ran past them in a regimental "spirit run." Lieutenant General Howard D. Graves, superintendent of West Point, launched an immediate investigation that resulted in three players being suspended from the team for the rest of the season, restricted to academy grounds for 90 days, and given 80 hours of marching discipline. Representative Patricia Schroeder (D-Colo.), a member of the House Armed Services Committee, criticized the punishment as too lenient, saying, "[I]t looks like [the incident] was treated as a prank and not as a serious violation of the code of conduct."

Sexual misconduct by servicemen is not limited to sexual harassment. The Army acknowledged in 1992 that soldiers committed at least 34 sex crimes during the Gulf War in 1991, including rape and assault against fellow U.S. soldiers. One sergeant was charged with rape, indecent assault, and ADULTERY after he allegedly raped several female soldiers in the port of Al Jubayl in Saudi Arabia in 1991. Some of the crimes reported by the Army at that time included consensual sexual activities, including adultery and homosexual conduct. Army records disclosed few records regarding actions taken against the soldiers for their misconduct.

Four years later, three U.S. soldiers, two marines, and a sailor stationed near Japan, abducted and raped a 12-year-old Okinawa schoolgirl, in part prompting Okinawa citizens to call for the closing of U.S. military bases on the island. The incident likewise enraged citizens of Japan. According to a study of records in 1988, Navy and Marine bases in Japan held 169 courts martial for sexual assaults, far exceeding the number at any U.S. base elsewhere in the world. Statistics regarding Air Force courts martial likewise showed a significant number of assault charges on bases in Japan.

Prior to 2000, many criminal activities by military employees went unpunished because the host country in which the crime occurred failed to prosecute the action or the military courts of the United States did not have jurisdiction to try the case. In 2000, Congress enacted the Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (18 U.S.C.A. §§ 3261-3267), which extends federal criminal jurisdiction over crimes committed by military personnel and their dependents stationed abroad. The statute allows the U.S. DEFENSE DEPARTMENT to order the arrest, detention, and removal of military employees for crimes that would constitute an offense punishable for more than one year if the conduct had been engaged in within the jurisdiction of the United States.

### Base Closures and Troop Reductions

With the breakup of the Soviet Union and the end of the COLD WAR, the U.S. government began the politically charged task of reducing military budgets and closing or shrinking unnecessary military installations. The Defense Base Closure and Realignment Act (10 U.S.C.A. § 2687), passed by Congress in 1990, set off a firestorm of controversy over which bases should be closed and whether the country's military readiness was being compromised. The act created a presidential commission to decide which bases to close based on Pentagon recommendations. The commission's decisions are sent to the president, who accepts or rejects them in their entirety. If accepted, the recommendations are sent to Congress, which can only block the closings if both houses pass a resolution of disapproval within 45 days. Commissions meeting in 1988, 1991, and 1993 decided to close a total of 70 major installations.

The base closures came under immediate fire as senators and representatives tried to prevent bases in their home states or districts from being shut down. One group of elected officials, including the four senators from Pennsylvania and New Jersey, brought suit in federal court to challenge the procedures under the Defense Base Closure and Realignment Act and to block the closing of the Philadelphia Naval Shipyard, one of the region's biggest employers. The case never went to trial. Instead, the U. S. Supreme Court agreed to hear the Clinton administration's appeal on the question of whether the suit could be brought at all. The Court held that the government's choice of which bases to close under the act could not be challenged in federal court (*Dalton v. Specter,* 511 U.S. 462, 114 S. Ct. 1719, 128 L. Ed. 2d 497 [1994]).

At about the same time as the *Dalton* decision was announced, the Defense Department, concerned about the effect of base closings on surrounding communities, began planning to postpone the final round of shutdowns scheduled to follow the commission's 1995 meeting. A senior Pentagon official defended the delays, saying, "As the defense budget goes down and we close bases, the issue now is the pace of closures so people and communities can adjust." Some critics claimed that the delays were a political move designed to take pressure off the president and Congress until after the 1996 election.

The issue of cost and the shrinking military budget loomed large in the debate. The purpose of closing the bases was to eliminate unnecessary costs, but the process of preparing a base for nonmilitary use was itself expensive. Military bases are exempt from federal environmental regulations, but when they are converted to private use, all the stockpiled weaponry and toxic waste must be disposed of in order to avoid liability. The government had set aside $3 billion a year to cover environmental cleanup plus construction and repair of buildings and roads. Still, the projected savings by the end of the 1990s was $4.6 billion a year.

The Joint Chiefs of Staff were adamant that the base closings continue apace. "We really need this," said Admiral Boorda. "There's not enough money to maintain infrastructure we no longer need." But the base shutdowns exacted a heavy human toll. Communities surrounding the closed bases suffered dire economic consequences. In 1993, for example, the states where base closings were concentrated—Florida, Virginia, California, and South Carolina—lost a total of over 50,000 civilian jobs. In addition,

many industries that depended on military contracts cut their workforces in response to reduced orders. For example, in September 1994, Northrop Grumman Corporation, which built B-2 and FA-18 fighter jets, announced it would cut its staff by 18 percent by the end of 1995. McDonnell Douglas Corporation shaved its workforce from 132,900 to 80,000 between 1990 and 1994. The layoffs left many educated, formerly well-paid professionals without work in a stubbornly sluggish economy. Many were forced to take temporary or part-time jobs at salaries far below what they had previously been paid.

Shrinking military budgets and closing bases inevitably led to questions about combat readiness among the services. Conservative members of Congress, traditional supporters of military spending, disputed the Pentagon's assurances that equipment and troop levels remained at the optimal "two-war" level, that is, at a level where the country could fight two regional wars nearly simultaneously. Liberals, on the other hand, argued that the military exaggerated its needs. Sweeping Republican victories in both the House and the Senate in 1994 seemed to embolden the branches of the service in their long-standing rivalry for funds. Critics claimed that the Army created an unduly bleak picture of its combat readiness. Admiral Boorda, who had previously supported spending reductions, changed his position and began **LOBBYING** for increases in the Navy's fleet. For his part, President Clinton responded to criticisms that the military was underfunded with a request for a $25 billion increase in the Pentagon's budget between 1995 and 2001. Not surprisingly, the move was criticized both by liberals who felt it was an unnecessary political maneuver and by conservatives who felt that it hardly went far enough.

### Foreign Policy after September 11 Terrorist Attacks

The terrorist attacks perpetrated on the United States on September 11, 2001, required the country to reevaluate its military policies. President George W. Bush announced immediately that the U.S. would wage an unprecedented **WAR ON TERRORISM** and focused his attention initially on the Taliban regime of Afghanistan for allegedly harboring Osama bin Laden, who led the terrorist organization al Qaida. Within months, the military began an aggressive operation in Afghanistan, which led quickly to the dismantling of the Taliban regime.

*Members of the Army, one of the branches of the armed services, train for urban warfare before the invasion of Iraq in March 2003.*

AP/WIDE WORLD PHOTOS

Military operations against terrorist groups differ from those against foreign nations because the terrorist groups are, by their nature, mobile "armies." The United States has focused much of its attention on the use of military intelligence, as well as intelligence from such civil agencies as the Central Intelligence Agency. Accordingly, much of the deployment of military personnel in this war was covert in specific regions.

Another military target in the war on **TERRORISM** is any country that has harbored or supported terrorists. When George W. Bush took office in January 2001, his foreign policy goals included restraint in military intervention in overseas conflicts, rather than expansion. However, the new foreign policy in the aftermath of the **SEPTEMBER 11 ATTACKS** included preemptive strikes on countries that deploy weapons of mass destruction, including nuclear, biological, and chemical weapons. Under the so-called "Bush Doctrine," the United States would strike such countries proven to deploy such weapons and would also supply aid to countries that joined in the fight against terrorists. In 2003, the United States built up significant forces in the Middle East to prepare for a potential conflict with Iraq, which the Bush administration maintained continued a program to develop these types of weapons. On March 19, 2003, the United States attacked Iraq in the second major armed conflict between the countries in twelve years.

**FURTHER READINGS**

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**CROSS-REFERENCES**

Court-Martial; Defense Department; Gay and Lesbian Rights; Military Law; National Guard; Uniform Code of Military Justice; U.S. Court of Appeals for Veterans Claims; Veterans Affairs Department; War.

## ARMISTICE

*A suspending or cessation of hostilities between belligerent nations or forces for a considerable time. An armistice differs from a mere "suspension of arms" in that the latter is concluded for very brief periods and for local military purposes only, whereas an armistice not only covers a longer period, but is agreed upon for political purposes. It is said to be* general *if it relates to the whole area of the war, and* partial *if it relates to only a portion of that area. Partial armistices are sometimes called truces but there is no hard and fast distinction.*

*General Douglas MacArthur (top) signs the Japanese armistice documents on the USS Missouri on September 2, 1945. Mamoru Shigemitsu and General Yoshijiro Umezu, with delegation, witness.*

(TOP) NATIONAL ARCHIVES AND RECORDS ADMINISTRATION. (BOTTOM) LIB. OF CONG.

Armistice Day originated as a day set aside by the United States, Great Britain, and France to commemorate the signing of the armistice on November 11, 1918, that brought an end to WORLD WAR I. After WORLD WAR II, it became a day for tribute to those who lost their lives in that conflict as well. In Canada, it became known as Remembrance Day, and in Britain the Sunday closest to November 11 was declared Remembrance Sunday to honor the dead of both world wars. In 1938, the day was made a federal holiday in the United States.

In 1954, after the KOREAN WAR, President DWIGHT D. EISENHOWER signed an act of Congress (5 U.S.C.A. § 6103 (a) [1995]) to change the name of the holiday to Veterans Day "to honor veterans on the eleventh day of November of each year . . . a day dedicated to world peace." Thus, Veterans Day now honors all U.S. veterans of all wars. From 1971 to 1977, the holiday was celebrated on the fourth Monday in October, but in 1978, the traditional date of November 11 was restored.

Veterans Day celebrations in towns and cities in the United States usually include parades, speeches, and floral tributes placed on soldiers' graves or memorials, with special services held at the Tomb of the Unknown Soldier in Arlington National Cemetery, in Arlington, Virginia, outside Washington, D.C. Group naturalization ceremonies, in which individuals are made citizens of the United States, have also become part of Veterans Day celebrations.

## ARMS CONTROL AND DISARMAMENT

One of the major efforts to preserve international peace and security in the twenty-first century has been to control or limit the number of weapons and the ways in which weapons can be used. Two different means to achieve this goal have been disarmament and arms control. *Disarmament* is the reduction of the number of weapons and troops maintained by a state. *Arms control* refers to treaties made between potential adversaries that reduce the likelihood and scope of war, usually imposing limitations on military

capability. Although disarmament always involves the reduction of military forces or weapons, arms control does not. In fact, arms control agreements sometimes allow for the increase of weapons by one or more parties to a treaty.

### History

Arms control developed both in theory and in practice during the COLD WAR, a period between the late 1940s and 1991 when the two military superpowers, the United States and the Union of Soviet Socialist Republics (USSR), dealt with one another from a position of mutual mistrust. Arms control was devised consciously during the postwar period as an alternative to disarmament, which for many had fallen into discredit as a means of reducing the likelihood of war. Germany had been forced to disarm following WORLD WAR I but became belligerent again during the 1930s, resulting in WORLD WAR II. Although Germany's weapons had been largely eliminated, the underlying causes of conflict had not. Germany's experience thus illustrated that no simple cause-and-effect relationship existed between the possession of weapons and a tendency to create war.

Following World War II, advocates of arms control as a new approach to limiting hostility between nations emphasized that military weapons and power would continue to remain a part of modern life. It was unrealistic and even dangerous, they felt, for a country to seek complete elimination of weapons, and it would not necessarily reduce the likelihood of war. Whereas disarmament had formerly been seen as an alternative to military strength, arms control was now viewed as an integral part of it. Arms control proponents sought to create a stable balance of power in which the forces that cause states to go to war could be controlled and regulated. The emphasis in arms control is thus upon overall stability rather than elimination of arms, and proponents recognize that an increase in weaponry is sometimes required to preserve a balance of power.

The development of arms control owes a great deal to the existence of NUCLEAR WEAPONS as well. By the 1950s, when both the United States and the Soviet Union possessed nuclear weapons, the superpowers became convinced that they could not safely disarm themselves of those weapons. In the absence of guaranteed verification—the process whereby participants in a treaty monitor each other's adherence to the agreement—neither side could disarm without making itself vulnerable to cheating by the other side. The goal of the superpowers and other nations possessing nuclear weapons therefore became not total elimination of those weapons, but control of them so that a stable nuclear deterrent might be maintained. According to the idea of *nuclear deterrence,* a state possessing nuclear weapons is deterred, or prevented, from using them against another nuclear power because of the threat of retaliation. No state is willing to attempt a first strike because it cannot prevent the other side from striking back. Nuclear deterrence is therefore predicated upon a mutual abhorrence of the destructive power of nuclear weapons. This idea has come to be called *mutual assured destruction (MAD).* Many experts see deterrence as the ultimate goal of nuclear arms control.

Because many civilians generally assume that arms control and disarmament are the same thing, there has often been public disappointment when treaties have resulted in an increase in the number or power of weapons. An advantage of arms control over disarmament, however, is that even states with a high degree of suspicion or hostility toward each other can still negotiate agreements. Disarmament agreements, on the other hand, require a high degree of trust, and their formation is unlikely between hostile nations.

Arms control is often used as a means to avoid an *arms race*—a competitive buildup of weapons between two or more powers. Such a race can be costly for both sides, and arms control treaties serve the useful purpose of limiting weapons stockpiles to a level that preserves deterrence while conserving the economic and social resources of a state for other uses.

### Modern Arms Control

Although disarmament and arms control agreements were forged prior to World War II (1939–45), the modern arms control effort began in earnest after the CUBAN MISSILE CRISIS of 1962. That situation erupted when the United States discovered that the Soviet Union was constructing launch sites for nuclear missiles on the island of Cuba, thereby threatening to put nuclear weapons very close to U.S. soil. Presi-

dent JOHN F. KENNEDY declared a naval blockade of the island, and for two weeks, the United States and the USSR existed in a state of heightened tension. Finally, the USSR and the USSR faced off in what became a white-hot international drama of brinksmanship, each side waiting to see who would blink first. With the United States' promise not to overthrow Fidel Castro's government in Cuba, the Soviets canceled plans to install the missiles. After the crisis, Kennedy wrote to Khrushchev, "I agree with you that we must devote urgent attention to the problem of disarmament. . . . Perhaps . . . we can together make real progress in this vital field."

Among the earliest arms control treaties were the LIMITED TEST BAN TREATY (LTBT), an agreement that prohibited nuclear test explosions in the atmosphere, under water, or in space, which was signed in 1963 by the United States, Britain, and the USSR, and the 1972 Biological Weapons Convention, a superpower treaty that banned biological weapons and provided for the destruction of existing stockpiles. The 1972 convention was the first and only example, since 1945, of true disarmament of an entire weapons category. Although negotiation on a comprehensive test ban—an agreement that would prohibit all nuclear testing—continued, this solution remained elusive. Nevertheless, in 1974, the superpowers signed the Threshold Test Ban Treaty (TTBT), which limits nuclear tests to explosive yields of less than 150 kilotons. (A kiloton represents the explosive force of one thousand tons of TNT). But the TTBT did not prevent the superpowers from developing nuclear warheads (the bomb-carrying segments of a nuclear missile) with power exceeding 150 kilotons; warheads on the Soviet SS-17 missile possess as much as a 3.6-megaton capacity. (A megaton equals 1 million tons of TNT.) In 1976, the superpowers signed the Peaceful Nuclear Explosions Treaty (PNET), which banned so-called peaceful nuclear testing.

Numerous arms control agreements have been designed to improve communications between the superpowers. The first of these, coming just after the Cuban Missile Crisis, was the 1963 HOT LINE AGREEMENT, setting up a special telegraph line between Moscow and Washington. In 1978, the hot line was updated by a satellite link between the two superpowers. The United States and the USSR also sought to create protocols designed to prevent an accidental nuclear war. This effort led to the 1971 agreement, Measures to Reduce the Risk of Outbreak of Nuclear War, which required advance warning for any missile tests and immediate notification of any accidents or missile warning alerts.

One highly celebrated arms control agreement is the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, or Non-Proliferation Treaty, designed to prevent the spread of nuclear weapons to other countries. The agreement involves well over one hundred states. Under it, countries not possessing nuclear weapons give up their right to acquire such weapons, and countries with nuclear weapons waive their rights to export nuclear weapons technology to countries lacking that technology.

Another class of arms control treaties seeks to ban weapons from as-yet-unmilitarized areas. These include the 1959 ANTARCTIC TREATY, which prohibits military bases, maneuvers, and tests on the Antarctic Continent; the 1967 Outer Space Treaty, a ban on the testing or deployment of "weapons of mass destruction" in Earth's orbit or on other bodies in the solar system; the 1967 Tlatelolco Treaty, prohibiting nuclear weapons in Latin America; and the 1971 Seabed Treaty, banning the placement of weapons of mass destruction on or below the seabed.

### SALT I and After

The STRATEGIC ARMS LIMITATION TALKS (SALT I and SALT II) were first undertaken in the era of détente in the early 1970s, when relations between the United States and the USSR became more amicable. SALT I led to two agreements: the ANTI-BALLISTIC-MISSILE TREATY OF 1972 (ABM Treaty), which eventually limited each superpower to one site for antiballistic missiles (ABMs), the missiles designed to intercept and destroy incoming missiles; and an "interim" arms agreement limiting the number of intercontinental ballistic missile (ICBM) launchers and submarine-launched ballistic missiles (SLBMs) to those already deployed by specific dates in 1972. It also required that any modernization and replacement of ICBMs and SLBMs be on a one-for-one basis and prohibited any development of new, more powerful ICBMs. The agreement was meant to set limits before a more definitive SALT II treaty could be negotiated. When the SALT II Treaty was signed in 1979, it set a limit of 2,400 strategic missiles and bombers for each side. Although the U.S. Senate did not ratify this treaty, the United States abided by it for several years.

*U.S. president Jimmy Carter and Soviet president Leonid Brezhnev shake hands after signing SALT II in June 1979.*
AP/WIDE WORLD PHOTOS

The ABM Treaty of SALT I was much more successful than the interim ICBM-SLBM agreement. Because the SALT agreements limited only the number of ICBM launchers, or missiles, both superpowers went on in the 1970s to develop missiles with multiple warheads, called multiple independently targetable reentry vehicles (MIRVs). Launcher totals thus remained constant, but the number of warheads increased dramatically. Adding warheads to missiles also made nuclear deterrence more unpredictable; a superpower with MIRVs could have enough warheads to destroy the opponent's retaliatory capability, thereby making MAD ineffective. Both superpowers felt that their land-based missile forces had become vulnerable to a first strike from the other side.

Compliance with the SALT treaties became a contentious issue in the 1980s when the United States accused the USSR of violating treaty provisions on the development of new missiles. The administration of President RONALD REAGAN decided that alleged Soviet violations made it necessary to end U.S. compliance with the agreements. In 1986, the United States exceeded limits set by SALT II when a B-52 bomber equipped with cruise missiles (nuclear missiles that fly at a low altitude) entered active service. Another U.S. military proposal, the Strategic Defense Initiative (SDI), also complicated the ABM Treaty. In 1983, Reagan made a televised speech in which he announced plans to develop a space-based missile defense system. He presented SDI as an alternative to MAD. SDI would, he claimed, effectively shield the United States from a Soviet missile launch, including an accidental or third-party attack. SDI would also protect the land-based leg of the United States' nuclear triad, the other two legs of which are aircraft bombers and submarine-launched missiles. Many doubted whether such a missile defense system could actually be created, and others criticized SDI as a dangerous upset in the nuclear balance. A debate also arose as to whether SDI was in violation of the ABM Treaty.

Relations between the superpowers eventually warmed when Mikhail Gorbachev emerged as leader of the Soviet Union in the mid-1980s.

Relatively young and dynamic compared with his predecessors, Gorbachev initiated reforms for increased openness in the Soviet Union that facilitated arms control agreements. In 1987, President Reagan and Soviet General Secretary Gorbachev signed the Intermediate-Range Nuclear Forces (INF) Treaty, another major step in arms control. The INF Treaty called for the elimination of an entire class of short- and intermediate-range (300- to 3,400-mile) nuclear missiles. These included 1,752 Soviet and 859 U.S. missiles. It was the first treaty to result in a reduction in the number of nuclear weapons. The agreement also involved the most complete verification procedures ever for an arms control treaty. These included data exchanges, on-site inspections, and monitoring by surveillance satellites.

After the INF Treaty, the superpowers continued to try to work out a strategic arms reduction treaty that would cut the number of long-range missiles by 50 percent. By that time the superpowers each had nuclear arsenals that could destroy the other many times over, and a 50 percent reduction would still leave nuclear deterrence well intact.

### A New World Order

Between 1989 and 1991, a number of significant events brought about the end of the Cold War. In 1989, Gorbachev surprised the world when he led the Soviet Union in its decision to give up its control over Eastern Europe. By the summer of 1991, not only had the Warsaw Pact—a unified group consisting of the Soviet Union and its allies in Eastern Europe—dissolved, but so had the Soviet Union itself. Soviet COMMUNISM, one-half of the superpower equation for over 40 years, had imploded.

During this time of increasingly warm relations between the superpowers, a number of major arms control treaties were created. On November 19, 1990, the United States, the USSR, and 20 other countries signed the CONVENTIONAL FORCES IN EUROPE TREATY (CFE Treaty), which President GEORGE H. W. BUSH called "the farthest-reaching arms agreement in history," an accord that "signals the new world order that is emerging." The treaty grew out of a 1989 proposal by Bush that the superpowers each be limited to 275,000 troops in Europe. As events unfolded in Eastern Europe, however, and the countries of the former Eastern Bloc became independent from the USSR, that number of troops began to seem high. Under the CFE Treaty, each side was allowed to deploy, in the area between the Atlantic Ocean and the Ural Mountains, no more than 20,000 tanks, 30,000 armored troop carriers, 20,000 artillery pieces, 6,800 combat airplanes, and 2,000 attack helicopters. The treaty required the Soviet Union to disarm or destroy nearly 20,000 tanks, artillery pieces, and other weapons, to give a 27 percent reduction in Soviet armaments west of the Urals. That decrease was small, however, compared with the 59,000 weapons the USSR shipped east of the Urals to central Asia between 1989 and 1990 as it sought to realign its forces in response to world events. On the other side, the NORTH ATLANTIC TREATY ORGANIZATION (NATO) forces—the postwar alliance of Western European and North American states, including the United States—were required to destroy fewer than 3,000 pieces of military equipment. In May 1991, NATO decided to reduce its forces even further. The United States, for its part, reduced the 320,000 troops it had in Europe by at least 50 percent.

Arms agreements on nuclear weapons were also reached during this period. On July 31, 1991, Bush and Gorbachev signed the first Strategic Arms Reduction Treaty (START I). Negotiations on the technically complex accord had begun as early as 1982. The agreement required the USSR to reduce its nuclear arsenal by roughly 25 percent and the United States to reduce its arsenal by 15 percent, within seven years after ratification by both nations. Numerically speaking, the USSR would reduce its nuclear warheads from 10,841 to 8,040, and the United States would reduce its warheads from 12,081 to 10,395. These amounts would bring the nuclear arsenals of each nation roughly back to levels that existed in 1982, when START negotiations began. The agreement also limited the development of new missiles and required a number of verification procedures, including on-site inspections with spot checks, monitoring of missile production plants, and exchange of data tapes from missile tests.

### Arms Control in the Post-Cold War Era

In June 1992, President George H. W. Bush met with Russian president Boris Yeltsin. In a "joint understanding," the two sides agreed to reductions of nuclear weapons beyond the levels provided for in the 1991 START agreement, with the ultimate goal of decreasing the total number

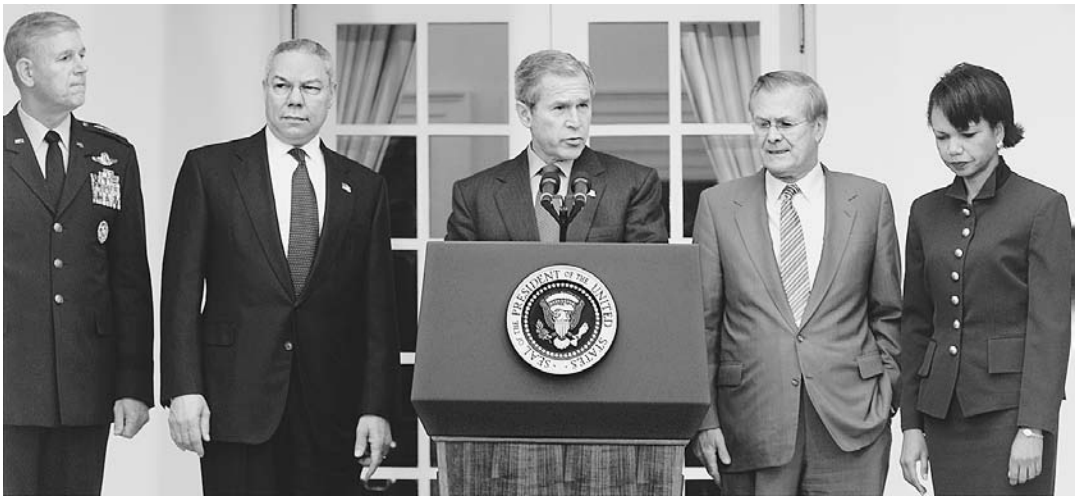

*On December 13, 2001, President George W. Bush, shown with General Richard Myers, Colin Powell, Donald Rumsfeld, and Condoleezza Rice, announces that the United States would withdraw from the Anti-Ballistic-Missile Treaty of 1972.*

AP/WIDE WORLD PHOTOS

of warheads on each side to between 3,000 and 3,500 by the year 2003. The two presidents also agreed to eliminate MIRVs by 2003. This agreement was signed, as START II, in early 1993.

The administration of President **BILL CLINTON**, who became president of the United States in 1993, revived the debate surrounding missile defense systems—and created fears that a new arms race might begin—when it developed proposals for the Theater High-Altitude Area-Defense System (THAAD). THAAD would be an elaborate missile defense system aimed at protecting allied nations from short-range missile attacks launched by countries such as North Korea. Critics maintained that THAAD would violate the ABM provisions of SALT I, widely believed to be the most successful arms control provisions ever; upset the nuclear balance; and possibly lead to an arms race. Proponents of THAAD maintained that the ABM Treaty was a relic of the Cold War and that missile defenses could protect against accidental nuclear launches.

As for Europe, the new structure of power there would also create new challenges for arms control. Agreements such as the CFE were made when the Soviet Union still existed, and did not necessarily conform to current realities. As the war in the former Yugoslavia demonstrated during the early 1990s, a new political situation posed new risks. Would certain states become regional powers and upset the balance of power? Would agreements that were stabilizing for the Soviet Union turn out to be destabilizing for Russia and other states of the former USSR? Would nationalism rise as a destructive force, as it had before and during previous wars?

Some experts were proposing that the Conference on Security and Cooperation in Europe (CSCE) develop conventional arms control agreements to replace the CFE Treaty. The CSCE was formed in 1973 in an attempt to promote détente between the United States and the USSR. It includes 52 countries—50 European nations plus the United States and Canada. European leaders hoped the CSCE would play a greater role in determining a peaceful, stable future for Europe, with efforts in arms control being one of its major goals. Formally declaring this goal, European leaders signed the Pact of Paris in November 1990. Some leaders were proposing that the CSCE replace NATO as the chief military and political organization in Europe.

During the early 2000s, U.S. defense policy changed dramatically. The election of President **GEORGE W. BUSH** signaled the rise of neo-conservative policy thinking about post-Cold War security, a framework that no longer prioritized defense against nuclear attack from Russia or the states of the former Soviet Union. Instead, **TERRORISM** and so-called rogue states were said to pose the greatest danger.

In a profound departure from the superpower analysis that had formed the basis of Cold War planning, the threat was now said to come from smaller, weaker nations. Defense planners identified potential threats from North Korea, Iraq, and Iran, which were said to be developing—or as in the case of Pakistan, had already developed—nuclear weapons. They pointed to the failure of international non-proliferation agreements as reasons for the United States to reconfigure its defenses and rethink its previous agreements.

Accordingly, the Bush administration moved swiftly on both fronts. In 1999, Bush had campaigned on the promise of reviving the Reagan-era SDI project to provide an anti-missile defense system. In 2001, the president unilaterally withdrew from the ABM Treaty of 1972 in order to remove any legal hindrance from testing and development of missile defense.

The end of the ABM Treaty proved controversial. Advocates of preserving the treaty praised it for preserving strategic stability, allowing for easy verification of each side's nuclear capacity, and maintaining the concept of deterrence. Sharply critical of U.S. unilateral withdrawal, both the Russians and Chinese announced they would respond by increasing their nuclear arsenals. Downplaying this threat, critics of the ABM Treaty doubted that either nation could afford to do so.

Great uncertainties began to cloud the future of arms control. Following the SEPTEMBER 11TH TERRORIST ATTACKS on the United States, the White House announced its radical new doctrine of preemptive attack: departing from historical tradition, the Bush administration declared its intention of attacking enemy nations first. Accordingly, despite global objection to the doctrine, the Bush administration ordered the invasion of Iraq in 2003. Meanwhile, the risks of nuclear proliferation were starkly demonstrated in 2002 when Pakistan and India came to the brink of nuclear war, and again that year when North Korea, abrogating its non-proliferation agreement, defied the United States to stop it from developing nuclear weapons. With Washington laying out its largest defense spending in a quarter century, arms control and disarmament were clearly perceived to not be a priority of the Bush administration.

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CROSS-REFERENCES

Anti-Ballistic-Missile Treaty of 1972; Blockade; Hot Line Agreement, 1971; Intermediate-Range Nuclear Forces Treaty; International Law; NATO; Nixon, Richard Milhous; Nuclear Nonproliferation Treaty; Nuclear Weapons; Terrorism; War.

## ARRAIGNMENT

*A criminal proceeding at which the defendant is officially called before a court of competent jurisdiction, informed of the offense charged in the complaint, information, indictment, or other charging document, and asked to enter a plea of guilty, not guilty, or as otherwise permitted by law. Depending on the jurisdiction, arraignment may also be the proceeding at which the court determines whether to set bail for the defendant or release the defendant on his or her own recognizance.*

Although the initial appearance of the arrested person before a magistrate is sometimes referred to as an *arraignment,* it is not a true arraignment, which only comes after the defendant has been both arrested and formally charged. In all but extremely rare cases, arraignment also takes place before any suppression hearings and the trial itself. The interests at issue in an arraignment are the defendant's right to know of the charges against him or her and the defendant's right to have adequate information from which to prepare a defense. The state also has an interest in having the defendant make a plea so it can prepare accordingly.

The SIXTH AMENDMENT to U.S. Constitution guarantees that defendants shall "be informed of the nature and cause of the accusation against them." But the Sixth Amendment does not guarantee defendants the right to be informed of the charged offense at an arraignment. Although the Supreme Court has ruled that arraignments are a necessary pre-condition to trial under federal law, the Court has also ruled that failure to arraign a defendant is not a reversible error where the failure is inadvertent, the defendant knows that he is the accused, the defendant is apprised of the charged offense, the defendant is able to assist in preparing a defense, and the defendant is not otherwise prejudiced by the lack of an arraignment. Thus the importance and necessity of being arraigned before trial varies from case to case and from jurisdiction to jurisdiction. The law governing arraignment procedures is spelled out by statutes and court rules at both the state and federal levels.

The Federal Rules of Criminal Procedure provide that during the arraignment federal courts must read the indictment or information

to the defendant or state the substance of the charge to the defendant and ask him or her to enter a plea thereto. FR Crim P, Rule 10. The defendant must also be given a copy of the indictment or information before he or she is called upon to plead. Generally speaking, the federal rules require defendants to be present at the arraignment. However, in prosecutions for offenses punishable by fine or imprisonment for not more than one year, the court, with the written consent of the defendant, may permit arraignment in the defendant's absence.

The court rules in some states only require that arraignments be held for felony-level charges, but not for misdemeanor-level offenses. Other states require arraignments for felonies, gross misdemeanors, and misdemeanors punishable by incarceration or a fine greater than a certain amount. In addition to requiring that defendants be called before the court, informed of the charged offense, and asked to enter a plea, several state jurisdictions also require that defendants be informed of certain constitutional rights during arraignment, including the right to trial by jury, the right to assistance of counsel, and the PRIVILEGE AGAINST SELF-INCRIMINATION. If the law of a particular state makes the arraignment a *critical stage* of the prosecution, such as when the court rules require the defendant to raise any defenses to the charged offense at the arraignment or waive them, then the defendant must be afforded the RIGHT TO COUNSEL under the Sixth Amendment. *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (U.S.Ala. 1961).

Defendants in both state and federal courts must be arraigned in a timely fashion. Ordinarily the accused must be arraigned before the impaneling of the jury or at least before the introduction of evidence. If an unreasonable delay occurs between the time a defendant is arrested and charged with an offense and the time the defendant is arraigned, state and federal courts will dismiss the criminal proceedings as having violated the defendant's Sixth Amendment right to a *speedy trial.*

Many jurisdictions require that defendants be arraigned within seventy-two hours of arrest. As a result, defendants arrested over the weekend are usually arraigned on Mondays, which can make for a packed courtroom. To speed up the arraignment process on busy days, defendants are often arraigned in groups, which is constitutionally permissible so long as each person being arraigned identifies himself or herself to the court and the court advises all defendants in attendance that the remarks of the court apply to each person individually. Courts conducting group arraignments must also ascertain on the record that each defendant was present throughout the entire course of the arraignment, heard the remarks, and understood them.

The right to be arraigned may ordinarily be waived, even when the charge is for a felony-level offense, provided the accused knows the nature of the charge offense and has a full opportunity to present a defense. The power to waive an arraignment must usually be exercised by the accused in person. Where the right of the accused to waive an arraignment is recognized, an express waiver in open court is sufficient. An arraignment may also be waived in a less formal manner, such as by the voluntary entry of a plea, by failing to call the court's attention to a defect in the proceedings at the proper time, by announcing readiness for trial, by going to trial without objection, or by filing motions and obtaining rulings on issues of law in the case.

CROSS-REFERENCES

Hearing; Incarceration; Sixth Amendment; Trial.

## ARRAY

*The entire group of jurors selected for a trial from which a smaller group is subsequently chosen to form a petit jury or a* GRAND JURY*; the list of potential jurors.*

Virtually all states have enacted statutes delineating requirements for jury service. In most states, convicted felons and insane persons cannot be jurors. Professional persons such as judicial and government officials, lawyers, ministers, and medical personnel may be exempted by statute from jury service.

As a general rule, a group of local officials acting within the statutory framework select the persons who will make up the array.

## ARREARS

*A sum of money that has not been paid or has only been paid in part at the time it is due.*

A person who is "in arrears" is behind in payments due and thus has outstanding debts or liabilities. For example, a tenant who has not paid rent on the day it is due is in arrears.

Arrears may also refer to the late distribution of the dividends of cumulative preferred stock.

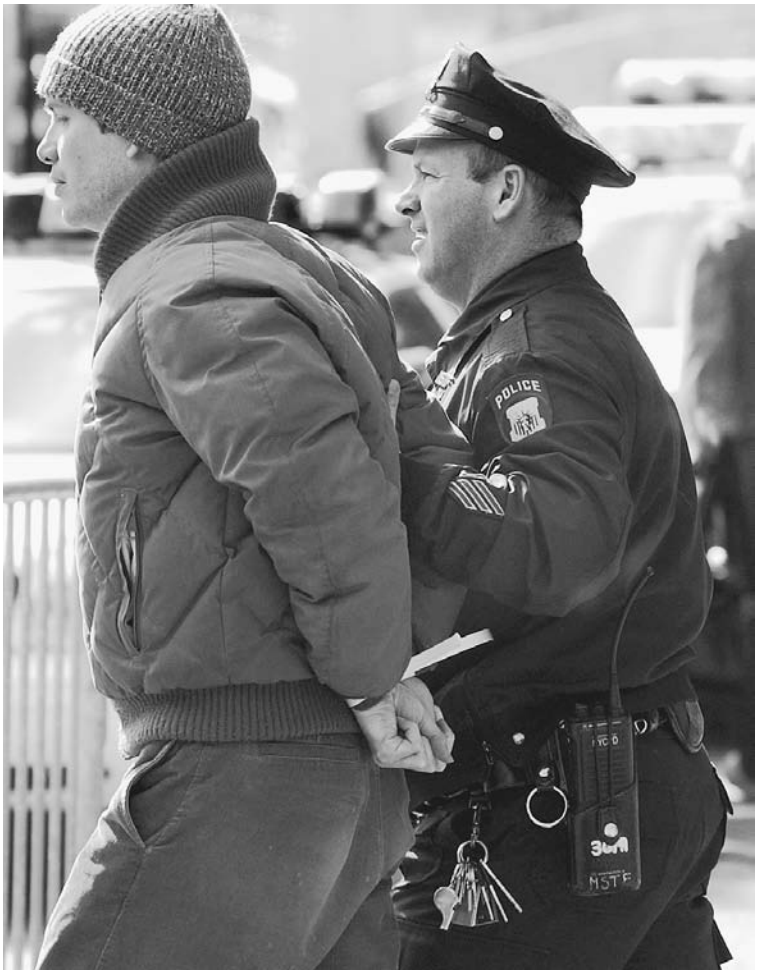


*An anti-war protester is arrested on charges of disorderly conduct and obstruction of government administration by a New York City police officer in October 2002. The procedures by which a person is arrested must comply with the protections guaranteed by the Fourth Amendment.*

AP/WIDE WORLD PHOTOS

## ARREST

*A seizure or forcible restraint; an exercise of the power to deprive a person of his or her liberty; the taking or keeping of a person in custody by legal authority, especially, in response to a criminal charge.*

The purpose of an arrest is to bring the arrestee before a court or otherwise secure the administration of the law. An arrest serves the function of notifying the community that an individual has been accused of a crime and also may admonish and deter the arrested individual from committing other crimes. Arrests can be made on both criminal charges and civil charges, although civil arrest is a drastic measure that is not looked upon with favor by the courts. The federal Constitution imposes limits on both civil and criminal arrests.

An arrest may occur (1) by the touching or putting hands on the arrestee; (2) by any act that indicates an intention to take the arrestee into custody and that subjects the arrestee to the actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested. There is no arrest where there is no restraint, and the restraint must be under real or pretended legal authority. However, the detention of a person need not be accompanied by formal words of arrest or a station house booking to constitute an arrest.

The test used to determine whether an arrest took place in a particular case is objective, and it turns on whether a reasonable person under these circumstances would believe he or she was restrained or free to go. A reasonable person is one who is not guilty of criminal conduct, overly apprehensive, or insensitive to the seriousness of the circumstances. Reasonableness is not determined in light of a defendant's subjective knowledge or fears. The subjective intent of the police is also normally irrelevant to a court's determination whether an arrest occurred, unless the officer makes that intent known. Thus, a defendant's presence at a police station by consent does not become an arrest solely by virtue of an officer's subjective view that the defendant is not free to leave, absent an act indicating an intention to take the defendant into custody.

An arrest constitutes a seizure under the FOURTH AMENDMENT to the U.S. Constitution, and thus the procedures by which a person is arrested must comply with the protections guaranteed by the Fourth Amendment or the arrest will be invalidated and any evidence seized during the arrest or confessions made after the arrest will typically be suppressed. The U.S. Supreme Court has ruled that arrests made without a valid arrest warrant based on PROBABLE CAUSE are presumptively invalid under the Fourth Amendment. Similarly, arrests made pursuant to a warrant that is later ruled defective may also be declared invalid, unless the officer in procuring the warrant and making the arrest acted in GOOD FAITH.

However, warrantless arrests do pass constitutional muster under some circumstances. The Supreme Court has ruled that warrantless arrests can be made when the circumstances make it reasonable to do so. For example, no warrant is required for a felony arrest in a public place, even if the arresting officer had ample time to procure a warrant, so long as the officer possessed probable cause that the suspect committed the crime. Felony arrests in places not open to

*A sample arrest warrant*

**Arrest Warrant**

F.C.A. §§153, 153-a

General Form 3
(Warrant of Arrest)
1/2001

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF
.....
In the Matter of

Docket No. _____

WARRANT OF ARREST

Petitioner(s)

against

Respondent(s)

.....
IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK
TO ANY (POLICE)(PEACE) OFFICER IN THE STATE OF NEW YORK

A petition under Article _____ of the Family Court Act having been filed in this Court, a copy of which is annexed hereto, and it appearing that one of the grounds for issuance of a warrant as specified in the Family Court Act exists,

YOU ARE THEREFORE COMMANDED forthwith to arrest [specify name(s)]:

and bring said person(s) before this Court to be dealt with according to law.

YOU ARE FURTHER COMMANDED, under the Family Court Act, to bring before this Court the following child or children:

Name(s) Date(s) of Birth

THIS WARRANT [check applicable box(es)]:

☐ may ☐ may not be executed on Sunday.

☐ may ☐ may not be executed at night.

☐ is subject to the following restriction(s) [specify]:

Dated: _____ , ____.

[continued]

*A sample arrest warrant (continued)*

**Arrest Warrant**

_____
FAMILY COURT JUDGE

**BAIL IN THE SUM OF** **($ )** **DOLLARS IS RECOMMENDED.**

_____
FAMILY COURT JUDGE

**NOTICE TO RESPONDENT PARENT(S) IN CHILD ABUSE OR NEGLECT CASES:**
**PLACEMENT OF YOUR CHILD IN FOSTER CARE MAY RESULT IN YOUR LOSS OF YOUR RIGHTS TO YOUR CHILD. IF YOUR CHILD STAYS IN FOSTER CARE FOR 15 OF THE MOST RECENT 22 MONTHS, THE AGENCY MAY BE REQUIRED BY LAW TO FILE A PETITION TO TERMINATE YOUR PARENTAL RIGHTS AND MAY FILE BEFORE THE END OF THE 15 MONTH PERIOD. IF SEVERE OR REPEATED ABUSE IS PROVEN BY CLEAR AND CONVINCING EVIDENCE, THIS FINDING MAY CONSTITUTE THE BASIS TO TERMINATE YOUR PARENTAL RIGHTS.**

**Family Court Act §155(1) provides that:** " If an adult respondent is arrested under this act when the family court is not in session, he or she shall be taken to the most accessible magistrate and arraigned. The production of a warrant issued by the family court, a certificate of warrant, a copy or a certificate of the order of protection or temporary order of protection, an order of protection or temporary order of protection, or a record of such warrant or order from the statewide computer registry established pursuant to section 221-a of the executive law shall be evidence of the filing of an information, petition or sworn affidavit, as provided in section 154-d of this article. Upon consideration of the bail recommendation, if any, made by the family court and indicated on the warrant or certificate of warrant, the magistrate shall thereupon commit such respondent to the custody of the sheriff, as defined in subdivision 35 of section 1.20 of the criminal procedure law, admit to, fix or accept bail, or parole him or her for hearing before the family court, subject to the provisions of subdivision four of section 530.11 of the criminal procedure law concerning arrests upon a violation of an order of protection."

**Family Court Act §155-a provides that:** "A desk officer in charge at a police station, county jail or police headquarters, or any of his or her superior officers, may, in such place, take cash bail for his or her appearance before the appropriate court the next morning from any person arrested pursuant to a warrant issued by the family court; provided that such arrest occurs between eleven o'clock in the morning and eight o'clock the next morning, except that in the city of New York bail shall be taken between two o'clock in the afternoon and eight o'clock the next morning. The amount of such cash bail shall be the amount fixed in the warrant of arrest."

the public generally do require a warrant, unless the officer is in HOT PURSUIT of a fleeing felon. *Warden v. Hayden,* 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). The Fourth Amendment also allows warrantless arrests for misdemeanors committed in an officer's presence.

The exceptions to the Fourth Amendment's warrant requirement are based on the court's reluctance to unduly impede the job of law enforcement officials. Courts attempt to strike a balance between the practical realities of daily police work and the privacy and freedom interests of the public. Always requiring police officers to take the time to obtain an arrest warrant could result in the destruction of evidence, the disappearance of suspects, or both.

When an officer does seek an arrest warrant, the officer must present evidence to a neutral judge or magistrate sufficient to establish probable cause that a crime has been committed. The Supreme Court has said that probable cause exists when the facts within an officer's knowledge provide a reasonably trustworthy basis for a person of reasonable caution to believe that an offense has been committed or is about to be committed. Courts will deny requests when the warrant fails to describe in particularized detail the person to be arrested. The evidence upon which a warrant is based need not be ultimately admissible at trial, but it cannot be based on knowingly or intentionally false statements, or statements made in reckless disregard of the truth. However, inaccuracies found in a warrant due to ordinary NEGLIGENCE will not typically jeopardize a warrant's validity.

Police officers need no justification to stop someone on a public street and ask questions, and individuals are completely entitled to refuse to answer any such questions and go about their business. However, the Fourth Amendment prohibits police officers from detaining pedestrians and conducting any kind of search of their clothing without first possessing a reasonable and articulable suspicion that the pedestrians are engaged in criminal activity. TERRY V. OHIO, 392 U.S. 1, 88 S. Ct. 1868, 21 L. Ed. 889 (1968). Police

may not even compel a pedestrian to produce identification without first meeting this standard. Similarly, police may not stop motorists without first having a reasonable and articulable suspicion that the driver has violated a traffic law. If a police officer has satisfied this standard in stopping a motorist, the officer may conduct a search of the vehicle's interior, including the glove compartment, but not the trunk, unless the officer has probable cause to believe that it contains contraband or the instruments for criminal activity.

Investigatory stops or detentions must be limited and temporary, lasting no longer than necessary to carry out the purpose of the stop or detention. An investigatory stop that lasts too long turns into a de facto arrest that must comply with the warrant requirements of the Fourth Amendment. But no bright line exists for determining when an investigatory stop becomes a de facto arrest, as courts are reluctant to hamstring the flexibility and discretion of police officers by placing artificial time limitations on the fluid and dynamic nature of their investigations. Rather, the test is whether the detention is temporary and whether the police acted with reasonable dispatch to quickly confirm or dispel the suspicions that initially induced the investigative detention.

Not all arrests are made by members of law enforcement. Many jurisdictions permit private citizens to make arrests. Popularly known as *citizen's arrests,* the circumstances under which private citizens may place each other under arrest are normally very limited. All jurisdictions that authorize citizen's arrests prohibit citizens from making arrests for unlawful acts committed outside their presence. Most jurisdictions that authorize citizen's arrests also allow citizens to make arrests only for serious crimes, such as felonies and gross misdemeanors, and then only when the arresting citizen has probable cause to believe the arrestee committed the serious crime. Witnessing the crime in person will normally establish probable cause for making an arrest.

Both private citizens and law enforcement officers may be held liable for the TORT of false arrest in civil court. An action for false arrest requires proof that the process used for the arrest was void on its face. In other words, one who confines another, while purporting to act by authority of law which does not in fact exist, makes a false arrest and may be required to pay money damages to the victim. To make out a claim for false arrest, the plaintiff must show that the charges on which he or she was arrested ultimately lacked justification. That is, the plaintiff in a false arrest action must show that the arrest was made without probable cause and for an improper purpose.

CROSS-REFERENCES

Accusation; Charge; Civil Procedure; Contraband; Criminal Action; Criminal Law; Criminal Procedure; De Facto; Evidence; Felony; Fourth Amendment; Hot Pursuit; Liability; Probable Cause; Seizure; Tort Law.

## ARREST OF JUDGMENT

*The postponement or stay of an official decision of a court, or the refusal to render such a determination, after a verdict has been reached in an action at law or a criminal prosecution, because some defect appears on the face of the record that, if a decision is made, would make it erroneous or reversible.*

Although the Federal Rules of Civil Procedure make no such provision, state codes of civil procedure should be consulted concerning the issuance of an arrest of judgment in actions at law.

In criminal proceedings, a defendant must make a motion for an arrest of judgment when the indictment or information fails to charge the accused with an offense or if the court lacks jurisdiction over the offense charged. State and federal rules of CRIMINAL PROCEDURE govern an arrest of judgment in criminal prosecutions.

## ARREST WARRANT

*A written order issued by authority of the state and commanding the seizure of the person named.*

An arrest warrant must be based on a complaint that alleges PROBABLE CAUSE that the person named has committed a specific offense, and it must be issued according to the formalities required by the rules of the court. The Federal Rules of Criminal Procedure specify that the warrant must be signed by the magistrate and must describe the offense charged. The defendant must be named or described in such a way that he or she can be identified with reasonable certainty. The warrant must also command that the defendant be arrested and brought before the nearest available magistrate.

## ARROGATION

*Claiming or seizing something without justification; claiming something on behalf of another. In* CIVIL LAW, *the* ADOPTION *of an adult who was legally capable of acting for himself or herself.*

**Number of Incendiary or Suspicious Fires, 1995 to 1998**

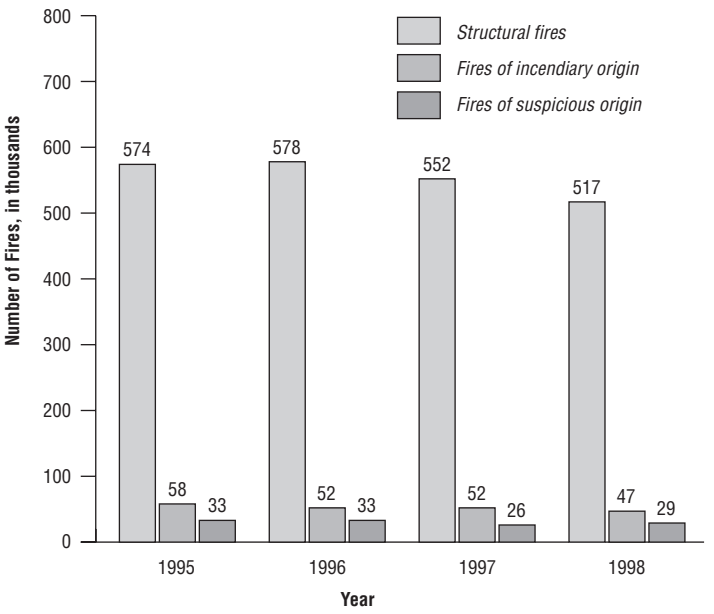


SOURCE: U.S. Census Bureau, *Statistical Abstract of the United States*, 2000 and National Fire Protection Association, "1998 U.S. Fire Loss," *NFPA Journal*, September 1999, and prior issues.

**Property Loss in Incendiary or Suspicious Fires, 1995 to 1998**

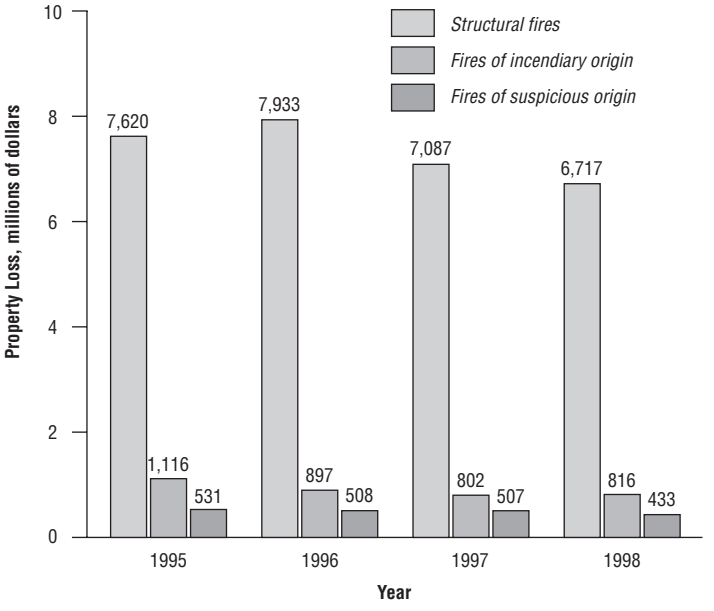


SOURCE: U.S. Census Bureau, *Statistical Abstract of the United States*, 2000 and National Fire Protection Association, "1998 U.S. Fire Loss," *NFPA Journal*, September 1999, and prior issues.

## ARSON

*At* COMMON LAW, *the malicious burning or exploding of the dwelling house of another, or the burning of a building within the curtilage, the immediate surrounding space, of the dwelling of another.*

Modern legislation has extended the definition of arson to include the burning or exploding of commercial and public buildings—such as restaurants and schools—and structures—such as bridges. In many states, the act of burning any insured dwelling, regardless of whether it belongs to another, constitutes arson if it is done with an intent to defraud the insurer. Finally, the common-law rule that the property burned must belong to another person has been completely eliminated by statute in some states.

### Elements

The main elements necessary to prove arson are evidence of a burning and evidence that a criminal act caused the fire. The accused must intend to burn a building or other structure. Absent a statutory description of the conduct required for arson, the conduct must be malicious, and not accidental. Malice, however, does not mean ill will. Intentional or outrageously reckless conduct is sufficient to constitute malice. Motive, on the other hand, is not an essential element of arson.

Unless a statute extends the crime to other property, only a house used as a residence, or buildings immediately surrounding it, can be the subject of arson. If a house is vacated, is closed up, or becomes unfit for human habitation, its burning will not constitute arson. A temporary absence from a dwelling will not negate its character as a residence.

Generally, the actual presence of a person within a dwelling at the moment it is burned is not necessary. It may, however, be required for a particular degree of the crime. The fact, and not the knowledge, of human occupancy is what is essential. If a dwelling is burned under the impression that it is uninhabited when people actually live in it, the crime is committed.

Absent a statute to the contrary, a person is innocent of arson if that individual burns his or her own property while living there. The common exception to this rule is the burning of one's own property with an intent to defraud or prejudice the property insurer. In addition, under statutes that punish the burning of a

dwelling house without expressly requiring it to be the property of another, a person who burns his or her own property might be guilty of arson. An owner, for purposes of arson, is the person who possesses the house and has the care, control, and management of it. In those states that have maintained the common-law rule that the property burned must belong to another person, an owner who burns his or her house while it is in the possession of a lawful tenant is guilty of arson.

### Degrees

In many states arson is divided into degrees, depending sometimes on the value of the property but more commonly on its use and whether the crime was committed in the day or night. A typical statute might make the burning of an inhabited dwelling house at night first-degree arson, the burning of a building close enough to a dwelling so as to endanger it second-degree arson, and the burning of any structure with an intent to defraud an insurer thereof, third-degree arson. Many statutes vary the degree of the crime according to the criminal intent of the accused.

### Punishment

Arson is a serious crime that was punishable by death under the common law. Presently, it is classified as a felony under most statutes, punishable by either imprisonment or death. Many jurisdictions impose prison sentences commensurate with the seriousness of the criminal intent of the accused. A finding, therefore, that the offense was committed intentionally will result in a longer prison sentence than a finding that it was done recklessly. When a human life is endangered, the penalty is most severe.

## ART LAW

The Framers of the Constitution acknowledged the importance of the arts when they wrote that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (Art. I, § 8). Despite this provision, or perhaps because of its very limited nature, the federal government offered little assistance to artists until the 1930s. Early unsuccessful attempts to aid the arts included an effort by President JAMES BUCHANAN to establish the National Commission of Fine Arts, a project that failed within a year when Congress did not appropriate funds. President THEODORE ROOSEVELT also encountered a reluctant Congress half a century later when he proposed the Council of Fine Arts, but success came when his successor, WILLIAM HOWARD TAFT, persuaded Congress to create the National Commission of Fine Arts.

Even after the National Commission of Fine Arts was established, the federal government continued to play a minor role in funding the arts, but several municipal programs attempted to fill the void. In New York City, the Civil Works Administration (CWA) sponsored paintings, murals, and art education. The primary goal of the CWA was to create employment for artists receiving government relief. With the only requirement for employment being an assertion that the applicant was an artist, the art produced under the CWA was often the work of unskilled amateurs.

Federal funding for the arts took off during the Great Depression with the creation of the Federal Art Project, a branch of the Works Progress Administration (WPA). The Federal Art Project was modeled on some of the earlier municipal attempts but avoided their problems by emphasizing the production of works of high technical competence, utilizing defined hiring guidelines, and encouraging creativity and experimentation. The Federal Art Project paid a *security wage,* an amount that was calculated to fall between the prevailing wage and the relief grants of the region involved and was graduated according to skill level. The WPA spent $35 million on the Federal Art Project and supported the production of approximately 1,500 murals, 18,800 sculptures, and 108,000 paintings as well as other works of art. The onset of WORLD WAR II effectively ended the WPA.

In the COLD WAR era following World War II, the federal government funded cultural exchanges to promote diplomatic ends. The major cultural institutions were located primarily in large cities, such as New York, Los Angeles, Chicago, and Boston. In 1965, only five state arts agencies existed. The quality of performances and exhibitions was inconsistent, and support for the best art depended on the discretion and charity of a few patrons. As a result, opportunities for artists were limited, and rural audiences had few chances to see the best productions or visit outstanding exhibitions.

*Lucile Lloyd puts the finishing touches on a new mural in the California State Building in Los Angeles in December 1936. The work was completed under the auspices of the Federal Art Project.*

BETTMANN/CORBIS

In the mid-1990s, federal financial support for the arts and humanities was provided through several distinct agencies: the National Commission of Fine Arts, the National Endowment for the Arts (NEA), and the National Endowment for the Humanities (NEH). The Commission of Fine Arts, established in 1910, advises the president, Congress, and government department heads on matters of architecture, sculpture, painting, and other fine arts. The commission's primary function is to preserve and enhance the appearance of the nation's capital, Washington, D.C. (40 U.S.C.A. § 104 [1986]).

The National Foundation for the Arts and Humanities Act of 1965 (20 U.S.C.A. §§ 951–968 [West Supp. 1990]) established the NEA and the NEH. The NEA provides grants to, or contracts with, groups and individuals of exceptional talent, and state or regional organizations engaged in or concerned with the arts. NEA programs encourage individual and institutional development of the arts, preservation of the American artistic heritage, wider availability of the arts, leadership in the arts, and the stimulation of nonfederal sources of support for the nation's artistic activities. The goal of the NEA is not to provide employment, as the WPA did, but rather to make the arts more widely available to U.S. citizens, to preserve the nation's rich cultural heritage, and to encourage the creative development of the nation's finest artistic talent. By 2003 the NEA had made more than 120,000 grants for theater, dance, symphonic music, painting, and poetry.

As a major financier of the arts, the NEA has been a significant influence on much of the publicly exhibited art in the United States. For many years, it led a quiet administrative existence, and, although it was a force in the artistic community, the general public knew little about it. In late 1989, however, the organization became the center of controversy when some members of Congress questioned whether some works of art and performances funded by the NEA were obscene. The NEA had provided funding for exhibits featuring the works of artists including Robert Mapplethorpe and Andres Serrano. Mapplethorpe's exhibit included sexually explicit photographs of men, and Serrano's exhibit included a jar of urine into which a photograph of a crucifix had been placed. The uproar from the public, and from members of Congress, was so strong that in 1990 Congress enacted a law that required the NEA to take into consideration "general standards of decency and respect for the diverse beliefs and values of the American public." This became known as the *decency test.*

Over the next several years other controversial grants were awarded and challenged, culminating in a case that went to the U.S. Supreme Court. The case, *National Endowment for the Arts v. Finley* 524 U.S. 569, 118 S. Ct. 2168, 141 L.Ed. 2d 500 (1998), was brought by four artists including Karen Finley. Finley became infamous for a performance art piece in which she would remove her clothing and smear chocolate on her body. The work, she explained, symbolized the way women were exploited in society. Finley and her fellow plaintiffs argued that the 1990 statute was unconstitutional and that the decency test was a violation of the rights of free speech and due process.

A district court agreed and the U.S. Court of Appeals upheld the district court's decision in 1996 100 F. 3d 671 (9th Cir.) In 1998 the Supreme Court ruled 8 to 1 that the law was constitutional, and that it violated no rights. Grant-seekers, the court noted, were required to submit their proposals to a panel representing diverse points of view; as such, the risk that an ARBITRARY ruling of indecency would be reached was minimal. In his dissent, however, Justice DAVID H. SOUTER warned that the law could force artists to censor their own work to ensure that it would not offend anyone in a position to approve a grant.

The NEH funds activities are designed to improve the quality of education and teaching in the humanities, strengthen the scholarly foundation for humanities study and research, and advance understanding of the humanities among general audiences. The NEH provides support through outright grants, matching grants, and a combination of the two. Schools, higher education institutions, libraries, museums, historical organizations, professional associations, other cultural institutions, and individuals are eligible to apply for NEH grants.

One avenue members of Congress use to support the arts is the Congressional Arts Caucus. This bipartisan group, composed of nearly 250 members of Congress who recognize and support the arts, acts as an information clearinghouse on arts issues. The caucus reports on legislation affecting artists and arts institutions, both commercial and nonprofit. It helps members of Congress prepare testimony and speeches on the arts.

The government also provides indirect aid designed to create a heightened public awareness of art and to provide artists with new outlets for their work. Among the effective means of indirect aid are the regulations adopted by many state and municipal governments, which require a percentage of the cost of building new government structures to be spent on art.

Federal, state, and local governments indirectly promote a heightened public awareness of the arts in the community through ZONING. Zoning laws divide a city into districts and set forth the types of structural and architectural designs of buildings in those districts, and the uses that buildings may serve. Some zoning regulations and laws are designed to preserve the aesthetic features or values of an area. As of 2003, most state courts allowed the use of zoning laws for solely aesthetic purposes. These laws may, for example, restrict the placement of billboards or television satellite dishes or may require that junkyards be screened or fenced.

State and local governments have become involved in improving the appearance of publicly funded buildings, or any building built on public land, by requiring that new building designs and locations be approved by the local government. Local control over design was held constitutional in *Walnut & Quince Streets Corp. v. Mills,* 303 Pa. 25, 154 A. 29, *appeal dismissed,*

284 U.S. 573, 52 S. Ct. 16, 76 L. Ed 498 (1931). In *Walnut & Quince Streets,* a municipal arts panel refused to permit a theater owner to construct a large marquee extending over the sidewalk. The owner unsuccessfully argued that a local statute permitted the jury to act in an arbitrary fashion that deprived him of DUE PROCESS OF LAW and, furthermore, that the legislature did not have the authority to regulate aesthetics and thus could not delegate such authority to an "arts jury." The court upheld the statute as a legitimate legislative regulation of public property.

Many governments have enacted statutes and regulations prohibiting the destruction and alteration of historic landmarks. Landmark preservation laws indirectly aid the arts by increasing the public's awareness of the need for beautification and for preserving the work of past generations of artists. The earliest efforts to preserve the nation's heritage focused on particular buildings or national monuments. The application of historic preservation laws to limit a property owner's right to her or his property was declared constitutional in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). In *Penn Central,* the U.S. Supreme Court held that the New City Landmarks Preservation Commission's failure to approve plans for construction of a 50-story office building over Grand Central Terminal, a designated landmark, was not an unconstitutional taking of property.

"MEN MAY DIE, BUT THE FABRIC OF FREE INSTITUTIONS REMAINS UNSHAKEN."
—CHESTER A. ARTHUR

Historic preservation law is an active and expansive area of zoning and planning law. According to the National Trust for Historic Preservation, over 1,700 communities have enacted preservation laws. Federal efforts to encourage preservation include the enactment of laws providing some tax credits for the protection and restoration of old buildings (26 U.S.C.A. § 48 (g)(3)(A) [1986]) and for the protection of archaeological sites (16 U.S.C.A. § 461[1986]).

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## ♦ ARTHUR, CHESTER ALAN

Chester Alan Arthur was born October 5, 1830, in Fairfield, Vermont. He achieved prominence as a politician and as president of the United States.

An 1848 graduate of Union College, Arthur was admitted to the New York City bar in 1851, and he established a legal practice in New York City that same year.

With the onset of the Civil War, Arthur served as quartermaster general and inspector general of New York. After the war, from 1871 to 1878, he performed the duties of collector for the Port of New York. Although Arthur was a believer in the spoils system, a practice that rewards loyal political party members with jobs that require official appointment, he served his office as an honest administrator. President

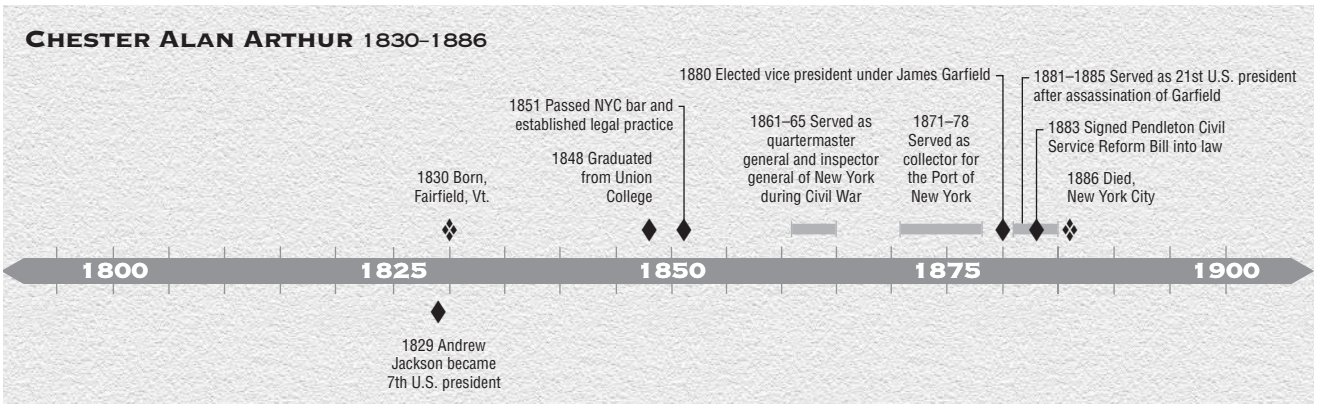

*Chester A. Arthur.* LIBRARY OF CONGRESS

**RUTHERFORD B. HAYES** was, however, an advocate of the civil service system, which provided that qualified people receive employment fairly based upon their qualifications, and removed Arthur from the office of collector.

Arthur returned to politics with his election as vice president of the United States in March of 1880. In September 1881, he assumed the duties of president, after the assassination of President **JAMES GARFIELD**.

As president, Arthur advocated the passage of the Pendleton Civil Service Reform Bill in 1883, adopting a view that was contrary to his previous support of the spoils system. He also signed laws allowing for the modernization of the United States Navy and supported the prosecution of the Star Route Trials, which exposed fraudulent activities in the United States Post Office Department. He also vetoed a Congressional bill, the Rivers and Harbours Bill of 1882, charging that the allotment of funds was too extravagant.

Arthur's presidential term ended in 1885; due to ill health, he did not seek renomination. He died November 18, 1886, in New York, New York.

## ARTICLES

*Series or subdivisions of individual and distinct sections of a document, statute, or other writing, such as the* **ARTICLES OF CONFEDERATION**. *Codes or systems of rules created by written agreements of parties or by statute that establish standards of legally acceptable behavior in a business relationship, such as articles of incorporation or articles of partnership. Writings that embody contractual terms of agreements between parties.*

## ARTICLES OF CONFEDERATION

*The document that set forth the terms under which the original thirteen states agreed to participate in a centralized form of government, in addition to their self-rule, and that was in effect from March 1, 1781, to March 4, 1789, prior to the adoption of the Constitution.*

The Articles of Confederation served as the first constitution of the newly formed United States. As it was originally drafted in 1776, the document provided for a strong central government. However, by the time it was ratified in 1781, advocates of **STATES' RIGHTS** had greatly weakened its provisions. Many of these advocates feared a centralization of power and wished to preserve a great degree of independence and sovereignty for each state. Accordingly, the Articles as they were ratified provided only for a "firm league of friendship," in which, according to article II of the document, "[e]ach State retains its sovereignty, freedom and independence."

The Articles included provisions for military cooperation between the states, freedom of travel, **EXTRADITION** of criminal suspects, and equal **PRIVILEGES AND IMMUNITIES** for citizens. They also created a national legislature called the Congress. Each state had one vote in this body, that vote to be determined by a delegation of from two to seven representatives. The Articles called for Congress to conduct foreign relations, maintain a national army and navy, establish and maintain a postal service, and perform a number of other duties. The Articles did not create, as the Constitution later did, executive and judicial branches of government.

The Congress created by the Articles was successful on a number of fronts. In 1783, it negotiated with Great Britain a peace treaty that officially ended the Revolutionary War; it arranged to pay war debts; and it passed the **NORTHWEST ORDINANCE**, which allowed for settlement and statehood in new regions in the western part of the United States. However, with time, it became apparent that the Articles had

created an unsatisfactory union of the states, chiefly because they established a weak central government. For example, under the Articles of Confederation, Congress did not have the power to tax or to effectively regulate commerce. The resulting national government did not prove competent at such tasks as raising a military or creating a stable currency. In addition, because amendments to the Articles required a unanimous vote of all thirteen states, the Articles proved to be too inflexible to last.

A series of incidents in the 1780s made it clear to many early U.S. leaders that the Articles of Confederation would not serve as an effective constitution. Among these incidents was SHAYS'S REBELLION, in 1786–87, an insurrection in which economically depressed farmers demanded debt relief and closed courts of law in western Massachusetts. The Congress of the Confederation was not able to raise a force to respond to this civil unrest, which was later put down by a state militia. GEORGE WASHINGTON and other leaders perceived this as a grievous failure. Therefore, when a constitutional convention assembled in 1787 to amend the Articles, it quickly decided to abandon them altogether in favor of a new constitution. By June 21, 1788, nine states had ratified the new U.S. Constitution and made it effective. It has survived as the basis of U.S. government for over two hundred years.

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CROSS-REFERENCES

"Articles of Confederation" (Appendix, Primary Document); Constitution; Constitution of the United States; Federalism; Shays's Rebellion; Washington, George.

## ARTICLES OF IMPEACHMENT

*Formal written allegations of the causes that warrant the criminal trial of a public official before a quasi-political court.*

In cases of IMPEACHMENT, involving the president, vice president, or other federal officers, the House of Representatives prepares the articles of impeachment, since it is endowed with the "sole Power of Impeachment," under Article I, Section 2, Clause 5 of the Constitution. The articles are sent to the Senate, which has the exclusive power to "try all Impeachments" by virtue of Article I, Section 3, Clause 6.

The use of articles of impeachment against state officials is governed by state constitutions and statutes.

Articles of impeachment are analogous to an indictment that initiates criminal prosecutions of private persons.

### Articles of Impeachment and the U.S. Presidency

Articles of impeachment have been drafted against three U.S presidents, ANDREW JOHNSON, RICHARD M. NIXON, and WILLIAM JEFFERSON CLINTON. Nixon resigned before the full House could vote to approve the articles of impeachment prepared by the judiciary committee, while Johnson and Clinton were both acquitted during Senate trials that were bitterly divided along party lines.

On February 24, 1868, the U.S House of Representatives voted to impeach President Andrew Johnson. A week later the House approved 11 articles of impeachment, accusing the president of OBSTRUCTION OF JUSTICE, thwarting duly enacted federal laws, improvidently removing military governors from the southern states, and attempting to bring into disgrace, ridicule, hatred, contempt, and reproach the CONGRESS OF THE UNITED STATES. Most historians consider all of the charges against Johnson to have been politically motivated, as the House of Representatives was controlled by radical Republicans who favored Reconstruction Era legislation that Johnson opposed.

In August 1867, Johnson tried to remove the last staunch Reconstructionist from his cabinet by dismissing Secretary of War EDWIN STANTON and replacing him with General ULYSSES S. GRANT. The Senate refused to approve the dismissal, so Johnson replaced Stanton with another general. One article of impeachment charged that Stanton's dismissal violated the TENURE OF OFFICE ACT, which prohibited the president from dismissing cabinet members without the Senate's approval.

Johnson's trial in the Senate commenced March 13, 1868, and lasted until May 26, 1868. Supreme Court Justice SALMON CHASE presided. The Senate consisted of 45 Republicans and only nine Democrats. Thirty-six votes were required

for conviction, so a party-line vote would easily have removed Johnson. After voting on the first three articles of impeachment and failing to convict by a single vote on each of them (7 Republicans sided with 12 Democrats), the Senate adjourned without considering the other eight articles.

On July 27, 1974, the House Judiciary Committee approved three articles of impeachment against President Richard M. Nixon. The articles charged the president with obstruction of justice in trying to cover up the BURGLARY of DEMOCRATIC PARTY offices at the WATERGATE complex in Washington, D.C., abuse of power for ordering the INTERNAL REVENUE SERVICE (IRS) to audit the taxes of political adversaries, and refusal to obey a subpoena from the Judiciary Committee. A week later Nixon complied with a Supreme Court order compelling him to release the transcripts of three tape-recorded conversations of June 23, 1972, which demonstrated his involvement in, and knowledge of, the Watergate cover-up.

For example, the transcript of June 23, 1972, tape showed H. R. Haldeman, White House Chief of Staff, telling Nixon that campaign money had financed the Watergate burglary and Nixon telling Haldeman to use the CENTRAL INTELLIGENCE AGENCY (CIA) to curb a FEDERAL BUREAU OF INVESTIGATION (FBI) investigation of the money trail. This transcript was widely referred to as the "the smoking gun" tape because some Republicans had said they would not support impeachment until they found evidence of Nixon holding a "smoking gun" of guilt in his hand. With the public turning against Nixon and his approval rating hovering around twenty-five percent, Republican congressional leaders and some of the president's own aides put him under enormous pressure to resign. Three days after the tapes were released to the public, on August 8, 1974, President Nixon resigned. Nixon's resignation ended the impeachment inquiry, and following his resignation, President GERALD FORD pardoned Nixon for all crimes he may have committed as the nation's chief executive.

On December 19, 1998, the U.S. House of Representatives approved two articles of impeachment against Democratic president Clinton, accusing the president of having committed the crimes of perjury and obstruction of justice to conceal his relationship with former White-House intern Monica Lewinsky. The impeachment trial before the Senate began on January 7, 1999, and ended on February 12, 1999. Chief Justice WILLIAM REHNQUIST presided.

Like the impeachment trial of Andrew Johnson, the Clinton impeachment trial was also bitterly divided along party lines. The Senate was comprised of 55 Republicans and 45 Democrats. However, several moderate Republicans privately questioned the propriety of impeaching a president whose job-approval ratings were at approximately 70 percent during a period when the STOCK MARKET was experiencing strong growth. Enough Republicans eventually joined all 45 Democrats in voting to acquit the president on both articles of impeachment, neither article being supported by even a majority of votes, far short of the 67 votes required to convict.

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## ARTICLES OF INCORPORATION

*The document that must be filed with an appropriate government agency, commonly the office of the* SECRETARY OF STATE*, if the owners of a business want it to be given legal recognition as a corporation.*

Articles of incorporation, sometimes called a certificate of incorporation, must set forth certain information as mandated by statute. Although laws vary from state to state, the purposes of the corporation and the rights and liabilities of shareholders and directors are typical provisions required in the document. Official forms are prescribed in many states.

Once the articles of incorporation are filed with the secretary of state, corporate existence begins. In some jurisdictions, a formal certificate of incorporation attached to a duplicate of the articles must be issued to the applicant before the business will be given legal status as a corporation.

*An example of general articles of incorporation*

## Articles of Incorporation (General)

**ARTICLE I**
CORPORATE NAME

The name of the Corporation is _____.

**ARTICLE II**
PURPOSE

The purpose of the Corporation is to engage in any lawful act or activity for which a corporation may be organized under the _____ Law of the State of _____ other than the banking business, the trust company business or the practice of a profession permitted to be incorporated by the State of _____ Corporations Code.

**ARTICLE III**
REGISTERED OFFICE/AGENT

The street address of the Corporation's initial registered office in the State of _____ is _____; and the name of its initial registered agent at such address is _____.

**ARTICLE IV**
AUTHORIZED CAPITAL STOCK

The total number of shares of which the Corporation shall have the authority to issue is _____, and the par value of each share shall be _____.

**ARTICLE V**
PROVISIONS

The provisions for the regulations of the internal affairs of the Corporation shall be as set forth in the bylaws.

**ARTICLE VI**
DURATION

The duration of the Corporation shall be _____.

**ARTICLE VII**
BOARD OF DIRECTORS

The number of directors constituting the initial Board of Directors of the Corporation is _____.

The name and address of each person who is to serve as members of the initial Board of Directors of the Corporation is:

_____
_____
_____
_____

IN WITNESS THEREOF, the undersigned incorporator has executed these Articles of Incorporation on this, the _____ day of _____, _____.

_____
Incorporator 1

_____
Incorporator 2

_____
Incorporator 3

_____
Incorporator 4

## ARTICLES OF ORGANIZATION

*A document required to be filed with an appropriate state or local government agency, in order to establish legal recognition of a* **LIMITED LIABILITY COMPANY** *(LLC). Articles of organization closely parallel articles of incorporation needed for legal creation and recognition of corporations.*

Limited liability companies and corporations are creatures of statute. They do not exist, in the eyes of the law, until articles of organization or incorporation have been properly filed and accepted by the designated governmental agency—commonly the office of the **SECRETARY OF STATE**. A business owner is free to set up a LLC in any state; however, the state chosen becomes the state of *domicile* for such purposes as jurisdiction, employee and withholding taxes, and required annual filings.

Prior to filing articles of organization, a business owner must check with the state in which the articles will be filed to determine the availability of the chosen name for the new business entity. Most states do not require a specific format for the articles of organization. All states, however, do require specific minimum information to be contained within the articles. The required information includes the name of the new entity; the business form (e.g., LLC); a statement of general purpose; the name and address of an agent for **SERVICE OF PROCESS**; the form(s) of ownership interest (e.g., equitable and non-equitable ownership, voting and non-voting ownership, and other forms of ownership having different preferences, limitations, rights, or duties); and the name(s) of initial owner(s) and manager(s). Standard forms are available in many states, which need to be completed and filed along with the corresponding administrative fee.

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**CROSS-REFERENCES**

Articles of Incorporation; Jurisdiction.

## ARTICLES OF PARTNERSHIP

*A written compact by which parties agree to pool their money, labor, and/or skill to carry on a business for profit. The parties sign the compact with the understanding that they will share proportionally the losses and profits according to the provisions and conditions that they have mutually assented would govern their business relationship.*

**CROSS-REFERENCES**

Partnership.

## ARTICLES OF WAR

*Codes created to prescribe the manner in which the* **ARMED SERVICES** *of a nation are to be governed.*

For example, the **UNIFORM CODE OF MILITARY JUSTICE** is an article of war applied to the Army, the Navy, the Coast Guard, and the Air Force of the United States.

**CROSS-REFERENCES**

Military Law.

## ARTIFICIAL INSEMINATION

*The process by which a woman is medically impregnated using semen from her husband or from a third-party donor.*

Artificial insemination is employed in cases of infertility or impotence, or as a means by which an unmarried woman may become pregnant. The procedure, which has been used since the 1940s, involves injecting collected semen into the woman's uterus and is performed under a physician's supervision.

Artificial insemination raises a number of legal concerns. Most states' laws provide that a child born as a result of artificial insemination using the husband's sperm, referred to as AIH, is presumed to be the husband's legal child. When a child is born after artificial insemination using the sperm of a third-party donor, referred to as AID, the law is less clear. Some states stipulate that the child is presumed to be the legal child of the mother and her husband, whereas others leave open the possibility that the child could be declared illegitimate.

Artificial insemination has grown in popularity as infertility becomes more prevalent and as more women opt to become single mothers. Eighty thousand such procedures using donor sperm are performed each year, resulting in the births of thirty thousand babies. By 1990 artificial insemination was a $164 million industry involving eleven thousand private physicians, four hundred sperm banks, and more than two hundred fertility centers.

The practice of artificial insemination is largely unregulated, and secrecy surrounding the identity of donors and recipients is the norm. Surveys of parents indicate that most do not plan to tell their children the circumstances of their births. This raises ethical questions about the right of an individual to be informed about his or her heritage. People who inadvertently discover they were conceived through artificial insemination often experience distress and feelings of confused identity. Many doctors compound the problem by failing to keep records on the identities and medical histories of donors.

The legal minefield created by artificial insemination continues to erupt with new and unprecedented issues. In 1990, Julia Skolnick sued a fertility clinic and a sperm bank for NEGLIGENCE and MEDICAL MALPRACTICE, charging that they mistakenly substituted another man's sperm for that of her late husband. The woman, who is white, gave birth to a child with African American features, and DNA analysis confirmed that her husband, who was also white, could not have been the child's father. In another case, Junior Lewis Davis sued to prevent his ex-wife, Mary Sue Davis Stowe, from using or donating fertilized embryos the couple had frozen for later use. The Tennessee Supreme Court held that individuals have "procreational autonomy" and have the right to choose whether to have a child (*Davis v. Davis,* 842 S.W.2d 588 (Tenn. June 1992). Arthur L. Caplan, former director of the Center for Biomedical Ethics at the University of Minnesota, commented, "In this case, the court said that a man cannot be made to become a parent against his will." The *Davis* case raises the question of the right of a sperm donor to prevent the use of his sperm by specific individuals.

Serious health questions also surround the issue of artificial insemination. AIDS, hepatitis, and other infectious diseases pose risks to women undergoing the procedure and their potential children. Although the American Fertility Society recommends that donors be tested for infectious diseases, the guidelines are not binding. In fact, some doctors merely request that donors answer questions about their health history and sex life, and only a handful of states require testing. This casual approach to donor screening can lead to disaster. In 1994, Mary Orsak, of Downey, California, sued the Tyler Medical Clinic, in Westwood, California, for negligence when she discovered she was HIV-positive as a result of artificial insemination with donor sperm. In at least six other cases, HIV transmission through artificial insemination has been confirmed.

Other legal pitfalls open up as technology makes artificial insemination more sophisticated and more available. Now that sperm can be frozen for future use, a woman can be impregnated at any time, even after her husband's death. In 1990, Nancy Hart and Edward Hart, of Covington, Louisiana, anticipating that Edward might not survive his bout with cancer and knowing that chemotherapy might leave him sterile, decided to place a sample of his sperm in a New Orleans sperm bank. Edward died in June 1990. Three months later, Nancy underwent artificial insemination using his sperm, and on June 4, 1991, their daughter Judith was born. Under Louisiana law (L.S.A.-C.C. Art. 185), the state would not acknowledge Edward as the child's father because she had been born more than three hundred days after his death. As a result, Nancy was unable to receive SOCIAL SECURITY survivors benefits for her daughter. She sued both the state of Louisiana and the federal government. In June 1995 Administrative Law Judge Elving Torres ruled that the Social Security Administration (SSA) must pay Judith a $10,000 lump sum and $700 per month in survivor's benefits. According to Torres, the DNA EVIDENCE presented to him proved that Judith is Nancy and Edward Hart's child.

Medical technology now allows recipients of artificial insemination to select the sex of their offspring, which raises still more ethical questions. Some religions condemn this practice as unnatural, although other theologians disagree. Some commentators have even suggested that it is unethical and exploitative to offer expensive, difficult, painful, and frustrating fertility procedures to desperate people when there may be little chance that a successful pregnancy will result.

The legal, ethical, and medical quagmires created by artificial insemination have not deterred thousands of couples and single women from seeking the procedure. Artificial insemination is sometimes the best, if not the only, solution for a person determined to achieve pregnancy.

**FURTHER READINGS**

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CROSS-REFERENCES

Family Law; Illegitimacy; Parent and Child; Reproduction.

## ARTIFICIAL PERSON

*A legal entity that is not a human being but for certain purposes is considered by virtue of statute to be a natural person.*

A corporation is considered an artificial person for SERVICE OF PROCESS.

## AS IS

*A term used to describe a sales transaction in which the seller offers goods in their present, existing condition to prospective buyers.*

The term *as is* gives notice to buyers that they are taking a risk on the quality of the goods. The buyer is free to inspect the goods before purchase; but if any hidden defects are discovered after purchase, the buyer has no recourse against the seller. Any implied or express warranties that usually accompany goods for sale are excluded in an "as is" sale.

Contract law and the UNIFORM COMMERCIAL CODE regulate "as is" sales.

## AS PER

*A phrase commonly recognized to mean "in accordance with the terms of" a particular document—such as a contract, deed, or affidavit—or "as authorized by the contract."*

## ♦ ASHCROFT, JOHN DAVID

In 25 years, John Ashcroft ascended from assistant state attorney general for the state of Missouri to U.S. attorney general. The political road to the JUSTICE DEPARTMENT was paved by this conservative right-wing Republican with his hard work and strong ethics.

John David Ashcroft was born on May 9, 1942, in Chicago, Illinois. His family moved to rural Springfield, Missouri, when he was just a young boy. Springfield is the home of the Pentecostal Assembly of God Church, and since Ashcroft's father and grandfather were Pentecostal ministers, it seemed only natural that the family would make Springfield their home. While the church forbids smoking, drinking, and dancing, it does promote gospel singing. Ashcroft took up playing the guitar and singing gospel when he was young, and it was a passion of his ever after.

After high school, Ashcroft headed east to Yale where he received a degree in history in 1964. He then returned to the Midwest and studied at the University of Chicago Law School. There he met his later wife, Janet. They both graduated from the University of Chicago in 1967 and went on to teach business law at Southwest Missouri State University.

In 1972 Ashcroft decided to run for a spot in the U.S. House of Representatives. While he lost the race, he still found his way into politics when he was named assistant attorney general for the state of Missouri in 1975 under then-attorney general, John Danforth. While working there, Ashcroft met future U.S. Supreme Court Justice CLARENCE THOMAS.

In 1976 Danforth decided to run for the U.S. Senate, giving Ashcroft the opportunity to campaign for the soon-to-be vacated state attorney general position. Ashcroft won the election and, in this new role, established his conservative reputation when he vehemently opposed court-ordered SCHOOL DESEGREGATION in St. Louis and Kansas City. While he could not please everybody, he managed to please many, and he was elected for another term, before then becoming the 50th governor of Missouri in 1984.

"OUR [ANTI-TERRORIST] EFFORTS HAVE BEEN CRAFTED CAREFULLY TO AVOID INFRINGING ON CONSTITUTIONAL RIGHTS, WHILE SAVING AMERICAN LIVES."
—JOHN ASHCROFT

Ashcroft accomplished a great deal for the state of Missouri. He balanced budgets without increasing taxes. He also focused on WELFARE reform and education by imposing tougher testing requirements for student advancement. As a validation of these efforts, Ashcroft was re-elected to a second term as governor with an impressive 65 percent of the vote. State law did not allow him to run for a third term.

In 1994 Ashcroft again followed in the footsteps of John Danforth, who was retiring from the Senate. Ashcroft was elected to the U.S. Senate and sworn in at the beginning of 1995. While in Congress, Ashcroft proposed and supported very conservative legislation, most of which did not become law. He was pro-life, against GUN CONTROL, and against AFFIRMATIVE ACTION. He sponsored the Human Life Amendment, which defined life to begin at conception and

*John Ashcroft.*
AP/WIDE WORLD PHOTOS

banned all ABORTIONS, including those involving INCEST or rape, except when needed to save the life of the mother. The legislation did not become law. He was also unsuccessful in his support for term limits for congressmen and prayer in schools. Ashcroft was, however, successful with his Charitable Choice provision, a component of the welfare reform legislation in 1996. The provision granted funding to religious organizations in order to provide social welfare programs.

In 1998 Ashcroft published a book, *Lessons from a Father to His Son,* about his father's preachings, his Christian faith, and how it influenced his life. Also in 1998 the Ronnie White confirmation hearings branded him by some as a racist. White was the first African American Missouri Supreme Court Justice. Then-president BILL CLINTON nominated him to the federal bench. During White's confirmation hearings, Ashcroft focused on a dissent that White made in a CAPITAL PUNISHMENT case and argued that White was soft on crime. Yet, White had actually voted to uphold the death penalty in 41 of the 59 cases that he heard on the bench, and some argued that Ashcroft attacked White because of his race. Ultimately, the Senate voted down White, making him the first federal judicial nominee to be defeated since ROBERT BORK. That same year, Ashcroft seriously considered running for the REPUBLICAN PARTY nomination for U.S. president. After a short-lived campaign, however, he withdrew his name and supported GEORGE W. BUSH.

In 2000 Ashcroft ran once again for his Senate position, this time against Missouri governor MEL CARNAHAN. Carnahan died with his son in a plane crash three weeks *before* the election but still won the vote by a slim margin. Ashcroft was a gracious loser, and Carnahan's widow was appointed to replace her deceased husband in the Senate.

In 2001 Ashcroft was appointed by President Bush and confirmed by Congress for the position of U.S. attorney general, one of the most powerful positions in the country. As attorney general, Ashcroft became head of the Justice Department and would oversee many powerful segments of the federal government, including the DRUG ENFORCEMENT ADMINISTRATION, the FEDERAL BUREAU OF INVESTIGATION, and the U.S. MARSHALS.

The SEPTEMBER 11TH ATTACKS in 2001 caused an enormous change in the way Americans viewed the responsibilities of the nation's top law enforcement officials. In the aftermath of the attacks, Congress passed the Homeland Security Act and the USA PATRIOT ACT, legisla-

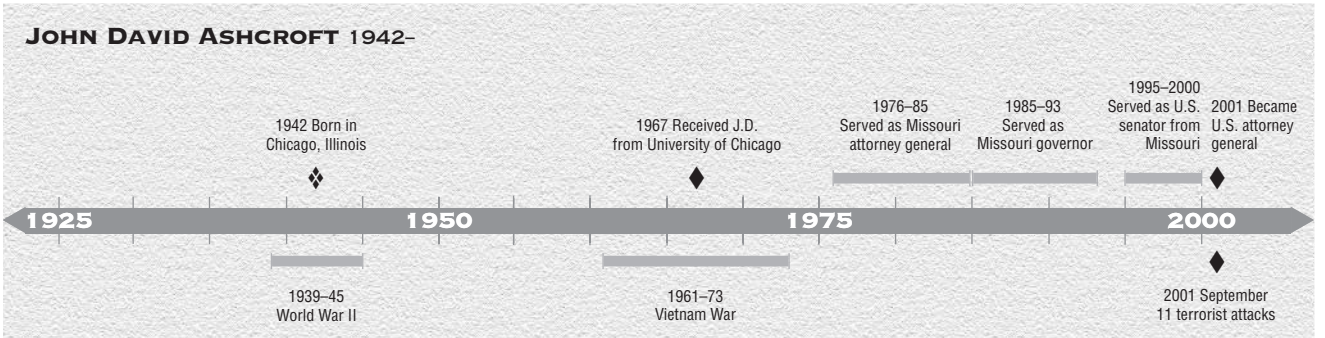

tion that gave the Justice Department unprecedented latitude in dealing with suspected terrorists. In 2002 and early 2003, Ashcroft has issued numerous regulations dealing with the issue of domestic security and the tracking of foreign nationals including orders that give FBI agents and U.S. marshals permission to arrest such persons for immigration violations when there is not sufficient evidence to hold them on criminal charges. The Justice Department has stepped-up surveillance methods including the issuance of "national security letters" that mandate businesses to turn over electronic records of finances and other information. Ashcroft has also signed more than 170 classified "emergency foreign intelligence warrants" which allow 72 hours of wiretaps and searches of persons viewed as national security threats before they need to be reviewed and approved by the Foreign Intelligence Surveillance Court.

Groups representing Muslim immigrants, numerous civil liberties advocates, religious groups, and others have protested much of the DOJ activity. One program that did not pass muster with Congress was the Terrorism Information and Prevention System to be known by its acronym as "Operation TIPS." The program was planned to train millions of American workers including truck drivers, mail carriers, train conductors, and employees of utilities to look for and report any suspicious material or activity to a new FBI database.

Other Ashcroft initiatives that have provoked controversy include the DOJ's challenge to an Oregon law that permits physician-assisted suicide and a California law that permits the possession of marijuana for medicinal use. In addition, Ashcroft filed a brief with the Supreme Court in support of ending the University of Michigan's affirmative action admission program. Ashcroft has continued to advocate protection for the rights of gun owners while pressing for more severe punishments of those who commit capital crimes using guns or other weapons. Despite recent state moratoriums on capital punishment, exonerations of death row defendants in over 100 cases, and recent Supreme Court decisions which banned execution of mentally retarded inmates and which overturned cases where judges rather than juries had imposed the death penalty, Attorney General Ashcroft has overruled U.S. attorneys who had decided not to seek the death penalty, and he has approved death penalty prosecutions in nearly half of all federal cases where capital punishment might be applicable.

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## ASPORTATION

*The removal of items from one place to another, such as carrying things away illegally.*

Asportation is one of the elements required to establish the crime of LARCENY. In order to prove that asportation has occurred, it is not necessary to show that the goods were moved a substantial distance, but only that they were moved.

Asportation was one of the elements necessary to establish common-law KIDNAPPING, and in many states it remains as an element of statutory kidnapping.

## ASSASSINATION

*Murder committed by a perpetrator without the personal provocation of the victim, who is usually a government official.*

First used in medieval times to describe the murders of prominent Christians by the Hashshashin, a secret Islamic sect, the word *assassination* is used in the twenty-first century to describe murders committed for political reasons, especially against government officials. Assassination may be used as a political weapon by a state as well as by an individual; it may be directed at the establishment or used by it.

The term *assassination* is generally applied only to political murders—in the United States, most commonly to attempts on the life of the president. However, the classification of any one incident as an assassination may be in part a matter of perception. The "assassination" of the outlaw Jesse James, in 1882, provides an example of the difficulties. Thomas T. Crittenden, governor of Missouri, assumed that being seen as responsible for the death of the notorious outlaw would be good for his political career. For

this reason, Crittenden granted each of the killers a pardon in addition to a $10,000 reward. But the American public spoke vehemently against James's killers, dubbing them assassins and his death an assassination. Crittenden was vilified by the American people, and his political career was destroyed.

It is not always easy to guess the motivations of those who attempt assassinations or to understand the historical and legal implications of their actions. The anti-constitutional nature of assassination has made it a focal point for conspiracies and conspiracy theories from the beginning. The first attempt at the assassination of a U.S. president was Richard Lawrence's attack on ANDREW JACKSON in 1835. Although a jury acquitted Lawrence on the ground of insanity, Jackson was convinced that the attack was part of a WHIG PARTY conspiracy.

The 1865 assassination of President ABRAHAM LINCOLN by John Wilkes Booth prompted its own set of theories. In a controversial decision, a military tribunal convicted nine people of conspiring in Lincoln's assassination. In the case of one of those hanged for the crime, Mary E. Surratt, all that could be proved was that she owned the rooming house in which the conspirators plotted. Nonetheless, high emotions at the end of the Civil War resulted in her execution. After sentiments cooled and talk of conspiracies calmed, the two surviving conspirators imprisoned for Lincoln's death gained pardons from President ANDREW JOHNSON.

Even greater controversy was caused when the public was deprived of the opportunity to see Lee Harvey Oswald tried for the assassination, in 1963, of President JOHN F. KENNEDY. Oswald's death at the hands of JACK RUBY sparked theories of conspiracy that ranged from Communist plots to Mafia hits to cover-ups by U.S. officials. President LYNDON B. JOHNSON appointed a group of national figures, led by Supreme Court Chief Justice EARL WARREN, to investigate the assassination and issue a report. The WARREN COMMISSION concluded that Oswald had acted alone.

Despite this, conspiracy theories remained widespread in books and in films like Oliver Stone's *JFK: The Untold Story* (released in 1991). In an attempt to calm public suspicions surrounding the Kennedy assassination, the President John F. Kennedy Assassination Records Collection Act of 1992 (44 U.S.C.A. § 2107) was passed by Congress. The act released much of

*President William McKinley was shot by Leon F. Czolgosz, on September 6, 1901, at the Pan-American Exposition in Buffalo, New York. McKinley died on September 14.*

LIBRARY OF CONGRESS

the Kennedy assassination material in government files. As of 2003, its effectiveness at stilling concern over a possible conspiracy remained to be seen.

It has become clear that the public demands a thorough investigation of any attempt on a president's life. Because it is a crime to advocate the assassination of any U.S. president, even threats are carefully investigated. In U.S. history, four presidents have lost their lives to assassins: Abraham Lincoln, JAMES GARFIELD, WILLIAM MCKINLEY, and John F. Kennedy.

### Political Assassination by U.S Government Employees

In 1974 the Congress established a committee to investigate possible U.S. involvement in plots to assassinate foreign leaders deemed hostile to U.S. interests. Specifically, the committee investigated the alleged involvement of the CENTRAL INTELLIGENCE AGENCY (CIA) in plots to kill Patrice Lumumba of the Congo, Fidel Castro of Cuba, Rafael Trujillo of the Dominican Republic, General Rene Schneider of Chile, and Ngo Dinh Diem of South Vietnam. The absence of a written record and the failing memories of principal witnesses prevented the committee from conclusively demonstrating that presidents Eisenhower, Kennedy, or Nixon personally authorized the assassination of any foreign leader. However, the evidence did show that between 1960 and 1970, the CIA was involved in several assassination plots.

The committee reported its findings in 1975 to a dismayed Congress. Public outcry was loud and immediate. At the urging of both the House of Representatives and the Senate, President GERALD R. FORD signed an EXECUTIVE ORDER banning all federal employees from committing assassination as a tool of U.S foreign policy or for any other reason. Exec. Order No. 11905. The order was extended by President RONALD REAGAN 15 years later to also preclude hired assassins.

Since the September 11, 2001, terrorist attacks in New York City and Washington, D.C., Congress and the White House have been revisiting the propriety of political assassinations committed by members of the U.S. government. In December 2002, according to a *Globe and Mail* news story, President GEORGE W. BUSH gave the CIA written authority to kill about two dozen terrorist leaders if capturing them proved to be impractical and civilian casualties could not be minimized. The CIA relied on that authority in using a pilotless Predator aircraft to fire a Hellfire antitank missile at a car in Yemen carrying an al-Qaeda operative. The al-Qaeda operative and five other people died in the attack.

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## ASSAULT

*At* COMMON LAW*, an intentional act by one person that creates an apprehension in another of an imminent harmful or offensive contact.*

An assault is carried out by a threat of bodily harm coupled with an apparent, present ability to cause the harm. It is both a crime and a TORT and, therefore, may result in either criminal or civil liability. Generally, the common law definition is the same in criminal and TORT LAW. There is, however, an additional CRIMINAL LAW category of assault consisting of an attempted but unsuccessful BATTERY.

Statutory definitions of assault in the various jurisdictions throughout the United States are not substantially different from the common-law definition.

### Elements

Generally, the essential elements of assault consist of an act intended to cause an apprehension of harmful or offensive contact that causes apprehension of such contact in the victim.

The act required for an assault must be overt. Although words alone are insufficient, they might create an assault when coupled with some action that indicates the ability to carry out the threat. A mere threat to harm is not an assault; however, a threat combined with a raised fist might be sufficient if it causes a reasonable apprehension of harm in the victim.

Intent is an essential element of assault. In tort law, it can be specific intent—if the assailant intends to cause the apprehension of harmful or offensive contact in the victim—or general intent—if he or she intends to do the act that causes such apprehension. In addition, the intent element is satisfied if it is substantially certain, to a reasonable person, that the act will cause the result. A defendant who holds a gun to a victim's head possesses the requisite intent, since it is substantially certain that this act will produce an apprehension in the victim. In all cases, intent to kill or harm is irrelevant.

In criminal law, the attempted battery type of assault requires a SPECIFIC INTENT to commit battery. An intent to frighten will not suffice for this form of assault.

There can be no assault if the act does not produce a true apprehension of harm in the victim. There must be a reasonable fear of injury. The usual test applied is whether the act would induce such apprehension in the mind of a reasonable person. The status of the victim is taken into account. A threat made to a child might be sufficient to constitute an assault, while an identical threat made to an adult might not.

Virtually all jurisdictions agree that the victim must be aware of the danger. This element is not required, however, for the attempted battery type of assault. A defendant who throws a rock at a sleeping victim can only be guilty of the attempted battery assault, since the victim would not be aware of the possible harm.

### Aggravated Assault

An aggravated assault, punishable in all states as a felony, is committed when a defendant intends to do more than merely frighten the victim. Common types of aggravated assaults are those accompanied by an intent to kill, rob, or rape. An assault with a dangerous weapon is aggravated if there is an intent to cause serious harm. Pointing an unloaded gun at a victim to frighten the individual is not considered an aggravated assault.

### Punishment

A defendant adjudged to have committed civil assault is liable for damages. The question of the amount that should be awarded to the victim is determined by a jury. COMPENSATORY DAMAGES, which are aimed at compensating the victim for the injury, are common. Nominal damages, a small sum awarded for the invasion of a right even though there has been no substantial injury, may be awarded. In some cases, courts allow PUNITIVE DAMAGES, which are designed to punish the defendant for the wrongful conduct.

The punishment for criminal assault is a fine, imprisonment, or both. Penalties are more severe when the assault is aggravated. Many states have statutes dividing criminal assault into various degrees. As in aggravated assault, the severity of the crime, the extent of violence and harm, and the criminal intent of the defendant are all factors considered in determining the sentence imposed.

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## ASSAULT AND BATTERY

*Two separate offenses against the person that when used in one expression may be defined as any unlawful and unpermitted touching of another. Assault is an act that creates an apprehension in another of an imminent, harmful, or offensive contact. The act consists of a threat of harm accompanied by an apparent, present ability to carry out the threat.* BATTERY *is a harmful or offensive touching of another.*

The main distinction between the two offenses is the existence or nonexistence of a touching or contact. While contact is an essential element of battery, there must be an absence of contact for assault. Sometimes assault is defined loosely to include battery.

Assault and battery are offenses in both criminal and TORT LAW; therefore, they can give rise to criminal or civil liability. In CRIMINAL LAW, an assault may additionally be defined as any attempt to commit a battery.

At COMMON LAW, both offenses were misdemeanors. As of the early 2000s, under virtually all criminal codes, they are either misdemeanors or felonies. They are characterized as felonious when accompanied by a criminal intent, such as an intent to kill, rob, or rape, or when they are committed with a dangerous weapon.

### Intent

Intent is an essential element of both offenses. Generally, it is only necessary for the defendant to have an intent to do the act that causes the harm. In other words, the act must be done voluntarily. Although an intent to harm the victim is likely to exist, it is not a required

element of either offense. There is an exception to this rule for the attempted battery type of criminal assault. If a defendant who commits this crime does not have an intent to harm the victim, the individual cannot be guilty of the offense.

### Defenses

**Consent** In almost all states, consent is a defense to civil assault and battery. Some jurisdictions hold that in the case of mutual combat, consent will not suffice and either party may sue the other. Jurisdictions also differ on the question of whether consent is a defense to criminal assault and battery.

Consent must be given voluntarily in order to constitute a defense. If it is obtained by FRAUD or duress or is otherwise unlawful, it will not suffice. When an act exceeds the scope of the given consent, the defense is not available. A person who participates in a football game implies consent to a certain amount of physical contact; however, the individual is not deemed to consent to contact beyond what is commonly permitted in the sport.

**Self-Defense** Generally, a person may use whatever degree of force is reasonably necessary for protection from bodily harm. Whether this defense is valid is usually determined by a jury. A person who initiates a fight cannot claim SELF-DEFENSE unless the opponent responded with a greater and unforeseeable degree of force. When an aggressor retreats and is later attacked by the same opponent, the defense may be asserted.

The use of DEADLY FORCE in response may be justified if it is initially used by the aggressor. The situation must be such that a reasonable person would be likely to fear for his or her life. In some states, a person must retreat prior to using deadly force if the individual can do so in complete safety. A majority of states, however, allow a person to stand his or her ground even though there is a means of safe escape.

Whether the degree of force used is reasonable depends upon the circumstances. The usual test applied involves determining whether a reasonable person in a similar circumstance would respond with a similar amount of force. Factors such as age, size, and strength of the parties are also considered.

**Defense of Others** Going to the aid of a person in distress is a valid defense, provided the defender is free from fault. In some states, the defender is treated as though he or she stands in the shoes of the person protected. The defender's right to claim defense of others depends upon whether the person protected had a justified claim of self-defense. In a minority of jurisdictions, the defense may be asserted if the defender reasonably believed the third party was in need of aid.

**Defense of Property** Individuals may use a reasonable amount of force to protect their property. The privilege to defend one's property is more limited than that of self-defense because society places a lesser value on property than on the integrity of human beings. Deadly force is usually not permitted. In most states, however, deadly force might be justified if it is used to prevent or stop a felony. An owner of real property or a person who rightfully possesses it, such as a tenant, may use force against a trespasser. Generally, a request to leave the property must be made before the application of force, unless the request would be futile. The amount of force used must be reasonable, and, unless it is necessary for self-defense, the infliction of bodily harm upon an intruder is improper. Courts have traditionally been more liberal in allowing the use of force to protect one's dwelling. Subsequent cases, however, indicated that there must be a threat to the personal safety of the occupants.

**Victimization Rates for Assaults by Crime and Characteristic, 2000**

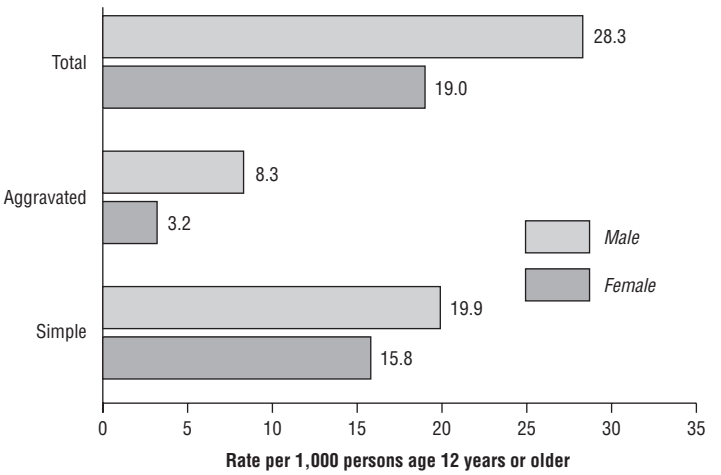


SOURCE: U.S. Bureau of Justice Statistics, *Criminal Victimization in the United States*, annual.

The states are divided on the question of whether a person who is legally entitled to property may use force to recover possession of it. In most jurisdictions, a landowner is not liable for assault and battery if the owner forcibly expels someone who is wrongfully on the property. The owner must not, however, use excessive force, and the fact that the person may not be held civilly liable does not relieve the owner of criminal liability. In some states, the use of force against a person wrongfully in possession of land is not permitted unless such person has tortiously dispossessed the actor or the actor's predecessor in title.

If possession of real or PERSONAL PROPERTY is in dispute, the universal rule is that force cannot be used. The dispute must be settled by a court.

With respect to personal property, the general view is that an owner may not commit an assault or battery upon the wrongdoer in order to recover property. A majority of jurisdictions recognize the right of an owner in HOT PURSUIT of stolen property to use a reasonable amount of force to retrieve it. In some states, stolen property may be taken back peaceably wherever it is found, even if it is necessary to enter another's premises. In all cases, the infliction of an unreasonable amount of harm will vitiate the defense.

**Performance of Duty and Authority** A person may use reasonable force when it becomes necessary in the course of performing a duty. A police officer, for example, may use force when apprehending a criminal. In some jurisdictions, private citizens may also use reasonable force to stop a crime being committed in their presence. Certain businesses, such as restaurants or nightclubs, are authorized to hire employees who may use reasonable force to remove persons who disturb other patrons. Court officers, such as judges, may order the removal of disruptive persons who interfere with their duties.

Persons with authority in certain relationships, such as parents or teachers, may use force as a disciplinary measure, provided they do not exceed the scope of their authority. Punishment may not be cruel or excessive.

### Punishment

The law considers an assault and battery to be an invasion of the personal security of the victim for which the wrongdoer is required to pay for damages. The determination of the amount of damages to which a victim might be entitled if a defendant is found civilly liable is usually made by a jury. Generally, a plaintiff is entitled to COMPENSATORY DAMAGES that compensate for injuries that are both directly and indirectly related to the wrong. Examples of compensatory damages include damages for pain and suffering, damages for medical expenses, and damages for lost earnings resulting from the victim's inability to work. Nominal damages, given although there is no harm at all, or merely a slight one, may also be awarded in an assault and battery action. Some jurisdictions allow the award of PUNITIVE DAMAGES. They are often given when the offense was committed wantonly or maliciously to punish the defendant for the wrongful act and to deter others from engaging in similar acts in the future. The defendant might additionally be subject to criminal liability.

If a defendant is found criminally liable, the punishment is imprisonment, a fine, or both. The amount of time a defendant must serve in prison depends upon the statute in the particular jurisdiction. When the offense is committed with an intent to murder or do serious harm, it is called aggravated assault and battery. An aggravated assault and battery is often committed with a dangerous weapon, and it is punishable as a felony in all states.

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#### CROSS-REFERENCES

Hot Pursuit; Nominal Damages; Personal Property; Punitive Damages; Real Property.

## ASSEMBLY

*The congregation of a number of persons at the same location.*

Popularly-elected Political assemblies are those mandated by the Constitution and laws, such as the general assembly.

The lower, or more populous, arm of the legislature in several states is also known as the *House of Assembly* or the *Assembly.*

Under the FIRST AMENDMENT to the United States Constitution, "Congress shall make no law … abridging … the right of the people peaceably to assemble." When a governmental unit sets aside property for the public use, the property is designed as a "public forum" for First Amendment purposes, and the governmental

unit must properly allow the exercise by the public of constitutional rights, including freedom of assembly. Examples of public forums include sidewalks, parks, and libraries. The right to assemble includes the right to protest, although rights of assembly are generally balanced with the need for public order. The Supreme Court has held that local governments may constitutionally require those participating in public parades first to obtain a permit to do so. However, the Court has held that an organizer of a parade cannot constitutionally examine the content of a message of a parade applicant in determining whether to grant to parade permit. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992).

CROSS-REFERENCES

First Amendment; Freedom of Speech; Public Lands.

## ASSENT

*An intentional approval of known facts that are offered by another for acceptance; agreement; consent.*

*Express assent* is manifest confirmation of a position for approval. *Implied assent* is that which the law presumes to exist because the conduct of the parties demonstrates their intentions. *Mutual assent,* sometimes called the meeting of the minds of the parties, is the reciprocal agreement of each party to accept all the terms and conditions in a contract.

## ASSESS

*To determine financial worth. To ascertain the amount of damages. To fix and adjust the individual shares to be contributed by several persons toward a common beneficial objective in proportion to the benefit each person will receive. To tax by having qualified experts estimate the value of property by considering the nature of the property, its size, the value of other comparable property, and the proportionate share of services that is used by that property. To levy a charge on the owner of property that has been improved at the expense of the local government unit, such as when sewers or sidewalks are installed.*

## ASSESSED VALUATION

*The financial worth assigned to property by taxing authorities that is used as a basis or factor against which the tax rate is applied.*

A prescribed amount of the value of each unit must be paid as taxes in the future. In most cases, the assessed value is not representative of the fair market value of the property.

## ASSESSMENT

*The process by which the financial worth of property is determined. The amount at which an item is valued. A demand by the board of directors of a corporation for the payment of any money that is still owed on the purchase of capital stock. The determination of the amount of damages to be awarded to a plaintiff who has been successful in a lawsuit. The ascertainment of the pro rata share of taxes to be paid by members of a group of taxpayers who have directly benefited from a particular common goal or project according to the benefit conferred upon the individual or his or her property. This is known as a special assessment. The listing and valuation of property for purposes of fixing a tax upon it for which its owner will be liable. The procedure by which the* INTERNAL REVENUE SERVICE*, or other government department of taxation, declares that a taxpayer owes additional tax because, for example, the individual has understated personal gross income or has taken deductions to which he or she is not entitled. This process is also known as a* deficiency assessment.

## ASSET

*Real or* PERSONAL PROPERTY*, whether tangible or intangible, that has financial value and can be used for the payment of its owner's debts.*

An *accrued asset* is one that arises from revenue earned but not yet due. For example, an accrued dividend is a share of the net earnings of a corporation that has been declared but has not yet been paid out to its shareholder(s).

In BANKRUPTCY, an asset is any form of property owned by a debtor who is insolvent that is not exempt from being used to repay debts.

For INCOME TAX purposes, a *capital asset* is property held by a taxpayer for personal enjoyment or investment, such as a home, furniture, stocks and bonds, or an automobile, but does not include inventory, commercial accounts, and notes receivable, depreciable property, commercial property, copyrights, and short-term government obligations. When a capital asset is sold, any gain received is given preferential tax treatment.

A *current, liquid,* or *quick asset* is an item that can be readily converted to cash, such as stocks and bonds.

A *fixed asset* is one of a permanent or long-term nature used in the operation of a business and not intended for sale.

A *frozen asset* is one that cannot be easily converted into cash, such as real estate when there is no market, or that cannot be used because of a legal restriction, such as a SPENDTHRIFT TRUST.

An intangible asset is one to which an ARBITRARY dollar value is attached because it has no intrinsic market value but represents financial value, such as the good will of a business, TRADEMARKS, or PATENTS.

## ASSIGN

*To transfer to another, as to assign one's right to receive rental income from property to another. To designate for a particular function, as to assign an attorney to defend an indigent in a criminal prosecution. To specify or point out, as to assign errors in a lower court proceeding on a writ of error that is submitted to request a court to reverse the judgment of the lower court.*

## ASSIGNED ACCOUNT

*A type of secured transaction whereby an account receivable is pledged to a bank, factor, or other lender to secure the repayment of a loan.*

It is common commercial practice for a manufacturer or wholesaler to sell inventory on open account, a debt owed to the seller of inventory that is to be repaid by its buyer as the merchandise is sold. This arrangement creates an account receivable that the seller uses as collateral for a loan.

## ASSIGNED RISK

*A danger or hazard of loss or injury that an insurer will not normally accept for coverage under a policy issued by the insurer, but that the insurance company is required by state law to offer protection against by participating in a pool of insurers who are also compelled to provide coverage.*

## ASSIGNED RISK PLAN

*An insurance plan created and imposed by state statute under which persons who normally would be denied insurance coverage as bad risks are permitted to purchase insurance from a pool of insurers who must offer coverage to such individuals.*

## ASSIGNMENT

*A transfer of rights in real property or* PERSONAL PROPERTY *to another that gives the recipient—the transferee—the rights that the owner or holder of the property—the transferor—had prior to the transfer.*

An *assignment of wages* is the transfer of the right to collect wages from the wage earner to his or her creditor. Statutes regulate the extent to which an assignment may be made.

## ASSIGNMENT FOR BENEFIT OF CREDITORS

*The voluntary transfer of all or most of a debtor's property to another person in trust so that he or she will collect any money that is owed to the debtor, sell the debtor's property, and apply the money received to the payment of the debts, returning any surplus to the debtor.*

The debtor is the assignor, the transferor; and the person who takes legal title to the property is the assignee.

### Types

There are three types of assignments that are categorized according to the limitations imposed upon the arrangement. A general assignment is one involving the transfer of all the debtor's property for the benefit of all his or her creditors. A partial assignment is one in which only part of a debtor's property is transferred to benefit all the creditors. When property is assigned to benefit only designated creditors, it is a special assignment.

The assignment results in the property being beyond the control of the debtor. It is different from agency arrangements, pledges, or mortgages.

### Trust Law

Unless otherwise expressly provided, trust law governs assignments for the benefit of creditors. The assignee is considered a trustee and his or her duties and responsibilities to the debtor's creditors are the same as a trustee's to the beneficiaries of a trust. The document that embodies the terms of the assignment authorizes the assignee to liquidate the debtor's property in satisfaction of the creditors' claims against the debtor as quickly as possible. Under COMMON

**Assignment for the Benefit of Creditors**

This agreement is made between _____ [*name of assignor*] ("Assignor"),

residing at _____ [*address*], and

_____[*name of assignee(s)*] ("Assignee(s)"),

residing at _____[*address*].

The Assignor is unable to pay in full and desires to assign all of [*his/her*] property to Assignee for the purpose of the payment of this debt. Therefore, the Assignor hereby assigns, conveys, grants, and transfers to Assignee all of Assignor's property and interests in property, whether real or personal, tangible or intangible (except property exempt by law from levy and sale under execution) wherever situated, in trust for the benefit of the Assignee.

[*Include description of the property and assets conveyed to the Assignee*]

DATED on _____ _____, 20_____ at:

_____
Assignor

ACCEPTED BY:

_____
Assignee

*A sample assigment for the benefit of creditors*

LAW, this was the assignee's chief function. Even if the assignment instrument does not expressly empower an assignee to sell the property, the assignee still has the power to do so in order to pay the creditors.

## Creation

It is not necessary for a debtor to obtain the consent of creditors before making an assignment for their benefit. An owner of property has a right to transfer legal title to it by virtue of ownership. The limitation derived from common law that is placed upon its creation is that it cannot be done to dishonestly deprive a debtor's creditors of their rights to have property sold to repay debts. When an assignment for the benefit of creditors is intended by the debtor to place his or her property beyond the legal reach of creditors, it is called a FRAUDULENT CONVEYANCE. This type of assignment is void, or legally ineffective, under statutes that prohibit such arrangements. An assignment by which the assignor-debtor retains any interest, benefit, or advantage from the conveyance, such as keeping the right to revoke the assignment, made to defraud creditors is also a fraudulent conveyance, as is an assignment by which the assignee is required to delay liquidation of the assets.

In some jurisdictions, a partial assignment is considered a fraudulent conveyance because the creditors are hindered and delayed in receiving payment if they must seek payment from the debtor after first being referred to the assignee. Other jurisdictions treat any assignment by a solvent debtor as fraudulent on the theory that such an arrangement prevents the immediate sale of the property so that creditors are delayed and hindered.

## Deficiency

A debtor is still liable to pay his or her creditors if the proceeds from the sale of personal and real property pursuant to an assignment for the benefit of creditors are not sufficient to completely repay the debts. When, however, creditors agree to accept the proceeds in satisfaction of the debtor's obligations, such an agreement is called a COMPOSITION WITH CREDITORS. For this reason, assignments for the benefit of creditors are used by corporate, rather than individual, debtors.

Since preferences are permissible under common law, a common-law assignment for the benefit of creditors that provides for preferential payments to designated creditors is not a fraudulent conveyance. Most courts have held that debtors cannot use preferences to obtain discharges from creditors by conditioning preferences on their release from unpaid portions of their debts. To do so is considered a fraudulent conveyance, since a creditor would have to accept virtually any condition that the debtor decided upon if the creditor were to receive any money from the assignee.

### Legality of Assignments

Most states have enacted statutes that regulate assignments for the benefit of creditors. Some states require that an assignment must comply with statutory requirements or be invalid, while in others the debtor may make a common-law assignment, which is regulated by common law, or a statutory assignment, which is controlled by applicable statutes.

The state statutes require that the assignment be recorded, schedules of assets and liabilities be filed, notice be given to the creditors, the assignee be bonded, and the assignor be supervised by the court. Almost every jurisdiction prohibits the granting of a preference. All creditors except those with liens or statutorily created priorities are treated equally. Some statutes empower an assignee to set aside prior fraudulent conveyances, and others authorize the assignee to set aside preferences made before the assignment.

If a debtor has made substantial preferences, fraudulent conveyances, or allowed liens VOIDABLE in BANKRUPTCY to attach to his or her property, then creditors might be able to force the debtor into bankruptcy if they decide that the assignment does not adequately protect their rights. An efficiently handled assignment for benefit of creditors is frequently more advantageous to creditors than bankruptcy because it usually brings about better liquidation prices and its less rigid and formal structure saves time and money.

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## ASSIGNS

*Individuals to whom property is, will, or may be transferred by conveyance, will,* DESCENT AND DISTRIBUTION, *or statute; assignees.*

The term *assigns* is often found in deeds; for example, "heirs, administrators, and assigns to denote the assignable nature of the interest or right created."

## ASSISTANCE, WRIT OF

*A court order issued to enforce an existing judgment.*

## ASSISTED SUICIDE

See EUTHANASIA.

## ASSIZE, OR ASSISE

*A judicial procedure in early England whereby a certain number of men in a community were called together to hear and decide a dispute; a type of court. A type of writ, commanding the convening of such a tribunal in order to determine disputed rights to possess land. An edict or statute issued by an ancient assembly.*

For example, the Assize of Clarendon was a statute, or ordinance, passed in the tenth year of the reign of King HENRY II (1164). It proclaimed that those who were accused of a heinous crime and were unable to exonerate themselves had forty days to gather provisions from friends to provide for their sustenance before they were sent into exile.

The word *assize* comes from the Latin *assideo,* which describes the fact that the men taking action sat together. An assize could be a number of citizens, eventually settled at the number twelve, called to hear cases. They decided on the basis of information they had or could gather in the community. This group of neighbors was presumed to know the facts well enough to determine who was entitled to possession of disputed lands. A writ of assize could be issued on behalf of the king to commission this body of twelve to hear a dispute.

Eventually, the writs gave birth to FORMS OF ACTION for lawsuits concerning real property. For example, the assize of novel disseisin was a form of action for the recovery of lands after the claimant had been wrongfully dispossessed (disseised). The assize of NUISANCE was proper to secure the abatement of a nuisance or for monetary damages to compensate for the harm done by the nuisance.

CROSS-REFERENCES

Clarendon, Constitutions of; Henry II of England.

## ASSOCIATE JUSTICE

*The designation given to a judge who is not the chief or presiding justice of the court on which he or she sits.*

An associate judge is usually a member of an appellate court.

## ASSOCIATION, FREEDOM OF

See FREEDOM OF ASSOCIATION.

## ASSOCIATION OF TRIAL LAWYERS OF AMERICA

The Association of Trial Lawyers of America (ATLA) is a nonprofit organization that represents the interests of personal injury attorneys. The ATLA is the world's largest trial bar organization, with about 60,000 members worldwide. ATLA's goals are to safeguard the interests of people who seek redress for injury and to protect individuals from abuses of power. Any person who is licensed to practice law in any country, state, or jurisdiction, who is committed to the ADVERSARY SYSTEM, and who, for the most part, does not represent the defense in personal injury litigation is eligible for membership. In 1946, a group of plaintiffs' attorneys involved in workers' compensations litigation founded the National Association of Claimants' Compensation Attorneys (NCACCA). In 1972 NACCA became ATLA, and in 1977, the organization moved its headquarters from Boston to Washington, D.C.

ATLA is comprised of a network of U.S. and Canadian affiliates involved in diverse areas of trial advocacy. It provides lawyers with the information and professional assistance needed to serve clients successfully and protect the civil justice system. The ATLA is governed by its membership through a board of governors and national officers, who are elected at the organization's annual convention. ATLA committees help to set policies in critical areas, make recommendations to the board of governors, and oversee staff implementation of ATLA objectives. The ATLA has 155 staff members, including approximately 30 attorneys. It publishes the monthly magazine *Trial*, the *ATLA Law Reporter*, and the *ATLA Advocate*.

The ATLA's sections, each of which encompasses an area of litigation practice, include ADMIRALTY, aviation, CIVIL RIGHTS, products liability, insurance, FAMILY LAW, and WORKERS' COMPENSATION law. Services of the sections include the publication of annual directories and periodic newsletters and information exchange. The ATLA also has organized litigation groups, which are voluntary networks of ATLA members sharing an interest in a particular type of case, many of which involve hazardous products. The groups share timely documents and information, much of it obtained from discovery in similar cases. The litigation groups also organize programs that educate members about recent developments in their special areas.

The ATLA has been a leading opponent of state and federal legislative efforts to restrict the amount of damages a plaintiff can recover for MEDICAL MALPRACTICE or for injuries caused by a defective product. Two of the major areas of litigation to emerge in the early 2000s are related to asbestos and toxic mold. For many years, the organization has lobbied against TORT reform bills, rebutting arguments that too many lawsuits have led to excessive costs and delays and that juries can no longer be trusted to render fair verdicts. The election of GEORGE W. BUSH as president in 2000 and the gain of Republican seats in both the House and Senate in 2002 brought the issue to the forefront. Despite vigorous LOBBYING on the part of ATLA and the launching in early 2003 of "Friends of ATLA," an organization of groups that support the ATLA's position, commentators expected that some form of "tort reform," such as the capping of non-economic damages at $250,000, would prevail.

In addition to its lobbying efforts, the ATLA provides a specialization certification program for trial skills and statistical compilation, as well as a placement service. It also conducts seminars and conferences across the country.

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## ASSUMPSIT

*[*Latin, He undertook or he promised.*] A promise by which someone assumes or undertakes an obligation to another person. The promise may be oral or in writing, but it is not under seal. It is express when the person making the promise puts it into distinct and specific language, but it may also be implied because the law sometimes imposes obligations based on the conduct of the parties or the circumstances of their dealings.*

*Assumpsit* was one of the common-law FORMS OF ACTION. It determined the right to sue and the relief available for someone who claimed that a contract had been breached.

When the COMMON LAW was developing in England, there was no legal remedy for the breach of a contract. RANULF GLANVILL, a famous legal scholar, wrote just before the year 1200 that "[i]t is not the custom of the court of the lord king to protect private agreements, nor does it concern itself with such contracts as can be considered private agreements." Ordinary lawsuits could be heard in local courts, but the king was primarily interested in royal rights and the disputes of his noblemen. As commerce began to develop, the king's courts did allow two forms of action for breach of contract—the actions of COVENANT and debt. Covenant could be maintained only if the agreement had been made in writing and under seal and only if the action of debt was not available. One could sue on the debt only if the obligations in the contract had been fully performed and the breach was no more than a failure to pay a specific sum of money.

Finally, in 1370, a plaintiff sought to sue a defendant who had undertaken to cure the plaintiff's horse but treated it so negligently that the horse died, and the action was allowed. In 1375, another man was permitted to sue a surgeon who had maimed him while trying to cure him. These cases showed a new willingness to permit a lawsuit for monetary damages arising directly from the failure to live up to an agreement. For the next hundred years the courts began to allow lawsuits for badly performed obligations but not for a complete failure to perform what was required by contract. Unexpectedly, this restriction was abandoned also, and a new form of action was recognized by the courts, an action in *special assumpsit* for breach of an express agreement.

*Special assumpsit* gave a new legal right to parties who could not sue on a debt. Gradually, it became possible to sue in *assumpsit* if the defendant owed a debt and then violated a fresh promise to pay it. This action came to be known as *indebitatus assumpsit,* which means "being indebted, he promised."

As time passed, courts were willing to assume that the fresh promise had been made and to impose obligations as if it had. This allowed lawsuits for a whole range of contract breaches, not just those recognized by an action on the debt or in *special assumpsit.* If the plaintiff could claim that services had been performed or goods had been delivered to the defendant, then the law would assume that the defendant had promised to pay for them. Any failure to do so gave the plaintiff the right to sue in *assumpsit.* This development allowed such a wide range of lawsuits based on promises to private parties that it came to be known as *general assumpsit.*

Eventually, the right to sue was extended even to situations where the defendant had no intention to pay but it was only fair that he or she be made to do so. This form was called *assumpsit on quantum meruit. Special assumpsit, general assumpsit* (or *indebitatus assumpsit*), and *quantum meruit* are all *ex contractu,* arising out of a contract. Their development is the foundation of our modern law of contracts.

**CROSS-REFERENCES**

Quantum Meruit.

## ASSUMPTION

*The undertaking of the repayment of a debt or the performance of an obligation owed by another.*

When a purchaser of real property assumes the mortgage of the seller, he or she agrees to adopt the mortgage debt, becoming personally liable for its full repayment in case of default. If a foreclosure sale of the mortgaged property does not satisfy the debt, the purchaser remains financially responsible for the outstanding balance.

In contrast, a purchaser who takes subject to the seller's mortgage agrees to repay the mortgage debt, but that person's liability is limited only to the amount that the mortgaged property is sold for in the case of foreclosure. If the property is sold for less than the mortgage debt, the mortgagee must seek the remaining balance due from the seller, the original mortgagor.

## ASSUMPTION OF RISK

*A defense, facts offered by a party against whom proceedings have been instituted to diminish a plaintiff's* CAUSE OF ACTION *or defeat recovery to an action in* NEGLIGENCE*, which entails proving that the plaintiff knew of a dangerous condition and voluntarily exposed himself or herself to it.*

Under the federal rules of CIVIL PROCEDURE, assumption of the risk is an AFFIRMATIVE DEFENSE that the defendant in a negligence action must plead and prove. The doctrine of assumption of risk is also known as *volenti non fit injuria.*

Situations that encompass assumption of the risk have been classified in three broad categories. In its principal sense, assumption of the risk signifies that the plaintiff, in advance, has consented to relieve the defendant of an obligation of conduct toward him or her and to take a chance of injury from a known risk ensuing from what the defendant is to do or leave undone. The consequence is that the defendant is unburdened of all legal duty to the plaintiff and, therefore, cannot be held liable in negligence.

A second situation occurs when the plaintiff voluntarily enters into some relation with the defendant, knowing that the defendant will not safeguard the plaintiff against the risk. The plaintiff can then be viewed as tacitly or implicitly consenting to the negligence, as in the case of riding in a car with knowledge that the steering apparatus is defective, which relieves the defendant of the duty that would ordinarily exist.

In the third type of situation, the plaintiff, cognizant of a risk previously created by the negligence of the defendant, proceeds voluntarily to confront it, as when he or she has been provided with an article that the plaintiff knows to be hazardous and continues to use after the danger has been detected. If this is a voluntary choice, the plaintiff is deemed to have accepted the situation and assented to free the defendant of all obligations.

In all three situations, the plaintiff might be acting in a reasonable manner and not be negligent in the venture, because the advantages of his or her conduct outweigh the peril. The plaintiff's decision might be correct, and he or she might even act with unusual circumspection because he or she is cognizant of the danger that will be encountered. If that is the case, the defense operates to refute the defendant's negligence by denying the duty of care that would invoke this liability, and the plaintiff does not recover because the defendant's conduct was not wrongful toward the plaintiff.

With respect to the second and third situations, however, the plaintiff's conduct in confronting a known risk might be in itself unreasonable, because the danger is disproportionate to the advantage the plaintiff is pursuing, as when, with other transportation available, the individual chooses to ride with an intoxicated driver. If this occurs, the plaintiff's conduct is a type of contributory negligence, an act or omission by the plaintiff that constitutes a deficiency in ordinary care, which concurs with the defendant's negligence to comprise the direct or proximate cause of injury. In such cases, the defenses of assumption of risk and contributory negligence overlap.

In this area of intersection, the courts have held that the defendant can employ either defense or both. Since ordinarily either is sufficient to bar the action, the defenses have been distinguished on the theory that assumption of risk consists of awareness of the peril and intelligent submission to it, while contributory negligence entails some deviation from the standard of conduct of a reasonable person, irrespective of any remonstration or unawareness displayed by the plaintiff. The two concepts can coexist when the plaintiff unreasonably decides to incur the risk or can exist independently of each other. The distinction, when one exists, is likely to be one between risks that were in fact known to the plaintiff and risks that the individual merely might have discovered by the exercise of ordinary care.

### Express Agreement

The parties can enter into a written agreement absolving the defendant from any obligation of care for the benefit of the plaintiff and liability for the consequence of conduct that would otherwise constitute negligence. In the ordinary case, public policy does not prevent the parties from contracting in regard to whether the plaintiff will be responsible for the maintenance of personal safety. A person who enters into a lease or rents an animal, or enters into a variety of similar relations entailing free and open bargaining between the parties, can assent to relieving the defendant of the obligation to take precautions and thereby render the defendant free from liability for negligence.

The courts have refused to uphold such agreements, however, if one party possesses a patent disadvantage in bargaining power. For example, a contract exempting an employer from all liability for negligence toward employees is void as against public policy. A carrier transporting cargo or passengers for hire cannot evade its public responsibility in this manner, even though the agreement limits recovery to an amount less than the probable damages. The contract has been upheld, however, when it represents a realistic attempt to assess a value as liquidated or ascertained damages in advance, and the carrier graduates its rates in accordance with such value, so that complete protection would be available to the plaintiff upon paying a higher rate. The same principles apply to innkeepers, public warehousemen, and other professional bailees—such as garage, parking lot, and checkroom attendants—on the basis that the indispensable necessity for their services deprives the customer of all meaningful equal bargaining power.

An express agreement can relieve the defendant from liability for negligence only if the plaintiff comprehends its terms. If the plaintiff is not cognizant of the provision in his or her contract, and a reasonable person in the same position would not have known of it, it is not binding upon the individual, and the agreement fails for lack of mutual assent. The expressed terms of the agreement must apply to the particular misconduct of the defendant. Such contracts generally do not encompass gross, willful, wanton, or reckless negligence or any conduct that constitutes an intentional TORT.

### Implied Acceptance of Risk

In a majority of cases, the consent to assume the risk is implied from the conduct of the plaintiff under the circumstances. The basis of the defense is not contract, but consent, and it is available in many cases in which no express agreement exists.

By entering voluntarily into any relationship or transaction in which the negligence of the defendant is evident, the plaintiff is deemed to accept and consent to it, to assume responsibility for personal safety, and to unburden the defendant of the obligation. Spectators at certain sports events assume all the known risks of injury from flying objects. Plaintiffs who enter business premises as invitees and detect dangerous conditions can be deemed to assume the risks when they continue voluntarily to encounter them.

### Knowledge of Risk

The plaintiff will not normally be regarded as assuming any risk of either conditions or activities of which he or she has no knowledge. The plaintiff must not merely create the danger but must comprehend and appreciate the danger itself.

The applicable standard is basically subjective in nature, tailored to the particular plaintiff and his or her situation, as opposed to the objective standard of the reasonable person of ordinary prudence, which is employed in contributory negligence. If because of age, lack of information, or experience, the plaintiff does not comprehend the risk entailed in a known situation, the individual will not be regarded as consenting to assume it. Failure to exercise ordinary care to discover the danger is not encompassed within assumption of risk, but in the defense of contributory negligence.

An entirely subjective standard, however, allows the plaintiff considerable latitude in testifying that he or she did not know or comprehend the risk. To counteract the adverse effects of the application of this liberal standard, courts have interjected an objective element by holding that a plaintiff cannot evade responsibility by alleging that he or she did not comprehend a risk that must have been obvious.

A denial of cognizance of certain matters that are common knowledge in the community is not credible, unless a satisfactory explanation exists. As in the case of negligence itself, there are particular risks that any adult must appreciate, such as falling on ice, lifting heavy objects, and driving a defective vehicle. In addition, a plaintiff situated for a considerable length of time in the immediate vicinity of a hazardous condition is deemed to have detected and to comprehend the ordinary risks entailed in that situation. If the person completely understands the risk, the fact that he or she has temporarily forgotten it does not provide protection.

Even when there is knowledge and appreciation of a risk, the plaintiff might not be prohibited from recovery when the circumstances introduce a new factor. The fact that the plaintiff is totally cognizant of one risk, such as the speed of a vehicle, does not signify that he or she assumes another of which he or she is unaware, such as the intoxication of the driver.

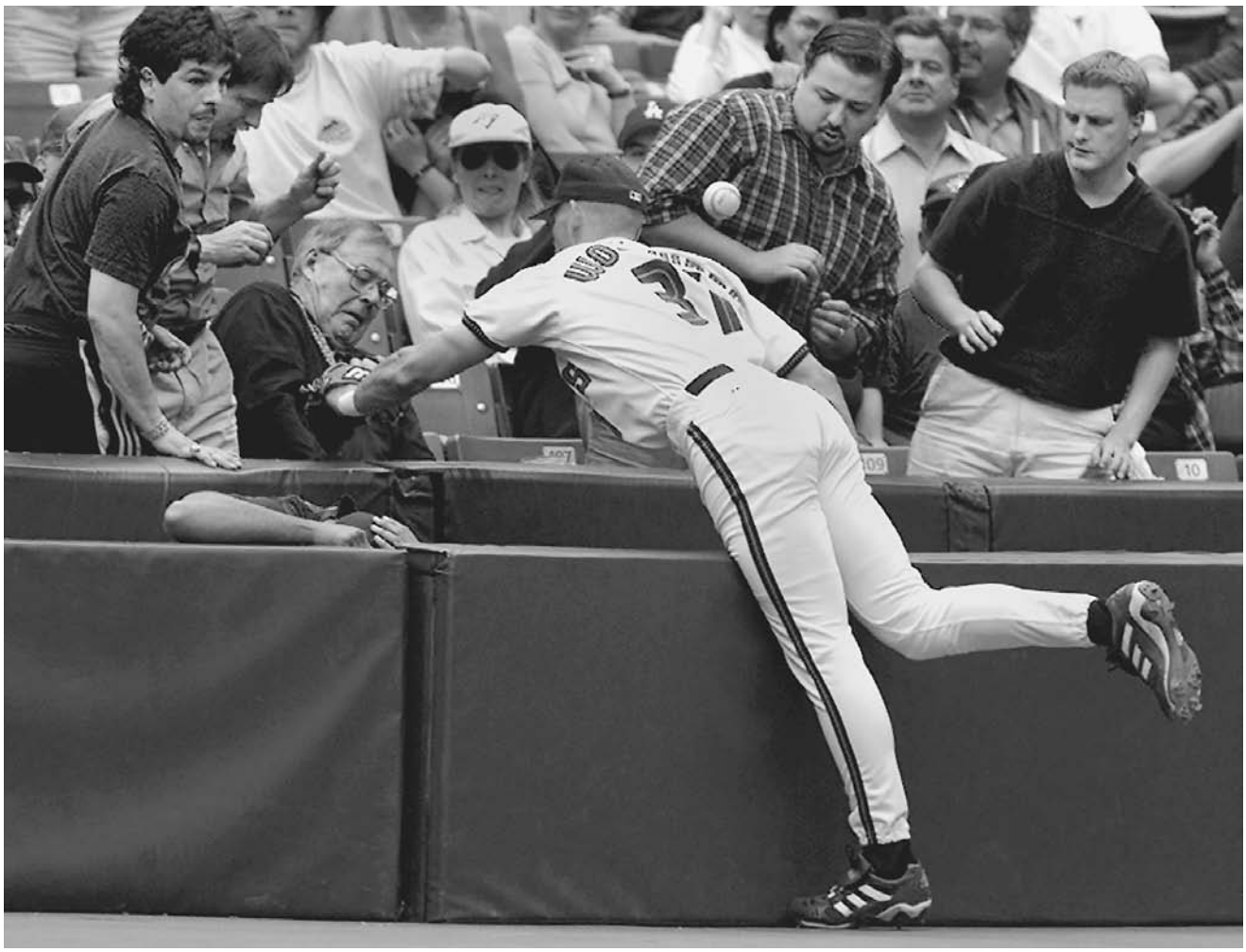

*Visitors to professional sporting events assume the risk that they may be injured by competitors or game paraphernalia during the contest.*

REUTERS NEWMEDIA INC./CORBIS

Although knowledge and understanding of the risk incurred are encompassed within the concept of assumption of the risk, it is possible for the plaintiff to assume risks of whose specific existence he or she is unaware—to consent to venture into unknown conditions. In a majority of instances, the undertaking is express, although it can arise by implication in a few cases. A guest who accepts a gratuitous ride in an automobile has been regarded as assuming the risk of defects in the vehicle, unknown to the driver.

### Voluntary Assumption

The doctrine of assumption of risk does not bar the plaintiff from recovery unless the individual's decision is free and voluntary. There must be some manifestation of consent to relieve the defendant of the obligation of reasonable conduct. A risk is not viewed as assumed if it appears from the plaintiff's words or from the circumstances, that he or she does not actually consent. If the plaintiff relinquishes his or her better judgment upon assurances that the situation is safe or that it will be remedied or upon a promise of protection, the plaintiff does not assume the risk, unless the danger is so patent and so extreme that there can be no reasonable reliance upon the assurance.

Even when the plaintiff does not protest, the risk is not assumed when the conduct of the defendant has provided the individual with no reasonable alternative, causing him or her to act under duress. When the defendant creates a peril, such as a burning building, those who dash into it to save their own property or the lives or property of others do not assume the risk when the alternative is to permit the threatened injury to occur. If, however, the danger is disproportionate to the value of the interest to be protected, the plaintiff might be charged with contributory negligence in regard to his or her

own unreasonable conduct. When a reasonably safe alternative exists, the plaintiff's selection of the hazardous route is free and can constitute both contributory negligence and assumption of risk.

The defendant has a legal duty, which he or she is not at liberty to refuse to perform, to exercise reasonable care for the plaintiff's safety, so that the plaintiff has a parallel legal right to demand that care. The plaintiff does not assume the risk while using the defendant's services or facilities, notwithstanding knowledge of the peril, when he or she acts reasonably, and the defendant has provided no reasonable alternative other than to refrain completely from exercising the right. A common carrier or other public utility which has negligently furnished a dangerously defective set of steps cannot assert assumption of risk against a patron who uses the steps as the sole convenient means of access to the company's premises. The same principle applies to a city maintaining a public roadway or sidewalk or other public area that the plaintiff has a right to use and premises onto which the plaintiff has a contractual right to enter. When a reasonable alternative is available, the plaintiff's recalcitrance in unreasonably encountering danger constitutes contributory negligence, as well as assumption of risk.

### Violation of Statute

The plaintiff still assumes the risk where the defendant's negligence consists of the violation of a statute. A guest who accepts a nighttime ride in a vehicle with inoperative lights has been regarded as consenting to relieve the defendant of the duty of complying with the standard established by the statute for protection and cannot recover for injuries. Particular statutes, however, such as child labor acts and safety statutes for the benefit of employees, safeguard the plaintiff against personal inability to protect himself or herself due to improvident judgment or incapability to resist certain pressures. Since the basic objective of such statutes would be frustrated if the plaintiff were allowed to assume the risk, it is generally held that the plaintiff cannot do so, either expressly or impliedly.

### Abolition of the Defense

Numerous states have abrogated the defense of assumption of risk in automobile cases through the enactment of no-fault insurance legislation or comparative negligence acts. The theories underlying its ABOLITION are that it serves no purpose that is not completely disposed of by the other doctrines, it increases the likelihood of confusion, and it bars recovery in meritorious cases.

Assumption of risk is not a defense under state WORKERS' COMPENSATION laws or in federal EMPLOYER'S LIABILITY ACT actions. The workers' compensation laws abolished the defense in recognition of the severe economic pressure a threatened loss of employment exerted upon workers. A worker was deemed to have assumed the risk even when acting under a direct order that conveyed an explicit or implicit threat of discharge for insubordination.

The federal Employers' Liability Act (45 U.S.C.A. § 51 et seq. [1908]) was intended to furnish an equitable method of compensation for railroad workers injured within the scope of their employment. The act provides that an employee is not deemed to have assumed the risks of employment when injury or death ensued totally or partially from the negligence of the carrier's officers, agents, or employees, or from the carrier's violation of any statute enacted for the safety of employees, where the infraction contributed to the employee's injury or death. This doctrine was abolished because of the extreme hardship it imposed on workers in this dangerous line of employment.

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#### CROSS-REFERENCES

Cognizance; Consent; Insurance; Public Utilities; Reasonable Person.

## ASSURED

*A person protected by insurance coverage against loss or damage stipulated by the provisions of a policy purchased from an insurance company or an underwriter.*

Assured is synonymous with insured.

## ASYLUM

*Protection granted to* ALIENS *who cannot return to their homeland.*

Asylum is not to be confused with *refuge,* although the terms are sometimes used interchangeably. An alien who wishes to emigrate to another country is granted refugee status before leaving his or her native country. An asylum seeker (or *asylee*) seeks that status after arriving in the new country.

People who live in fear of being tortured or killed by their government often seek asylum, as do people who are persecuted for their religious or political beliefs. The United States has long been a haven for asylum seekers; in colonial days people came to America to escape religions persecution, and in later years people in danger of political torture have seen the United States as a place of hope and safety. In times of crisis, the United States has sometimes placed restrictions on who can enter the country. Immigration restrictions were enacted immediately after World Wars I and II. The SEPTEMBER 11TH TERRORIST ATTACKS on New York City and Washington, D.C., likewise changed the picture for immigration. Nonetheless, the United States remains committed to providing a safe haven for people whose governments intend to do them harm.

Asylum in the United States is regulated under Section 208 of the Immigration and Nationality Act (INA), which was passed in 1952 and amended periodically afterward. Previously, asylum matters were handled by the Immigration and Naturalization Service (INS). The Homeland Security Act of 2002 created three new agencies to handle all matters formerly handled by the INS. These new agencies, the Bureau of Citizenship and Immigration Services (BCIS); the Bureau of Customs and Border Protection; and the Bureau of Immigration and Customs Enforcement were made part of the HOMELAND SECURITY DEPARTMENT that became operational in March 2003. Information about the new organizations and its structure was available online at <uscis.gov> (accessed December 5, 2003). Although the BCIS was technically a new agency, it was to continue to conduct all business, including processing applications and requests, as the INS had.

### Eligibility for Asylum

People who can prove that they will be persecuted if they are returned to their home country can apply for asylum in the United States. Much persecution is based on race, religion, and politics, but there are other reasons as well. Students are frequently targeted for persecution, particularly if they choose to engage in social or political activism. Women in some countries may be subject to severe punishment (including execution) simply for having a baby out of wedlock. Homosexuals are persecuted in a number of countries, especially those in which religion is an integral part of the government.

People with a criminal record including *aggravated felonies* (serious crimes such as rape and murder) are generally not eligible for asylum, nor are those who have been found guilty of subversive activity against government agencies. Waivers are difficult to obtain; a person would need to provide substantive and irrefutable proof that he or she had been wrongfully or falsely charged by his or her government. Those who have communicable diseases or who have physical or mental disorders are ineligible for asylum unless they can provide proof that their condition is either cured or under control. Some people come to the United States to seek better job opportunities. Those people are not candidates for asylum; they are required to follow standard immigration procedures.

A person can seek asylum in the United States either through *affirmative asylum* or *defensive asylum.* In affirmative asylum, the person applying submits the proper paperwork (known as Form I-589) to the BCIS and is called to appear before an asylum officer for an interview. In defensive asylum, the person in question has been placed in removal proceedings by the Immigration Court and has to appear before an immigration judge from the Executive Office for Immigration Review (EOIR). Those who seek defensive asylum include undocumented aliens who have been caught entering the country illegally, but who also may be genuinely afraid of being persecuted if they are sent home. (Asylum officers often refer undocumented aliens to EOIR for a defensive hearing if they feel that the fear of persecution is credible.)

Article 3 of the United Nations Convention Against Torture (1999) states that no asylum seeker can be returned home if the threat of torture is strong enough. The BCIS does have the option, however, of sending an unsuccessful asylum seeker to a third country in which there is no danger of torture or persecution.

### Derivative Asylum

Often asylum seekers want protection not just for themselves but for their families. Anyone seeking asylum may include a spouse and children under the age of 21 on the I-589 form. *Derivative asylum* is designed to give that same option to people who have already been granted asylum. Stepchildren are eligible if the applicant and spouse married before the child's eighteenth birthday; adopted children must have been adopted before their sixteenth birthday and the applicant must have been a legal parent for at least two years. Asylum seekers have two years from the date they are granted asylum to apply for derivative asylum.

### Temporary Protected Status

In some cases, an alien in the United States may choose to obtain "Temporary Protected Status" (TPS). Typically, TPS is granted by the JUSTICE DEPARTMENT to aliens whose home country is unsafe due to such causes as armed conflict or natural disaster. TPS generally lasts from six to 18 months; when TPS status terminates, the aliens generally return to the same immigration status they held before the status was granted.

### The R-A Rule

In 1999, the Bureau of Immigration Affairs (BIA) ruled against an asylum seeker in *In re R-A-, RESPONDENT,* 22 I. & N. Dec. 906, Interim Decision (BIA) 3403, 2001 WL 1744475 (BIA, Jan 19, 2001), ruled against granting asylum in part because it saw DOMESTIC VIOLENCE as a private matter within her own family. When the woman countered that she was in fact a member of a persecuted group (she belonged to a support group for abused women), the BIA was still not convinced. The woman appealed the case to the Ninth Circuit Court of Appeals, where as of early 2003 it was under review by the Justice Department. The Justice Department consulted with experts in domestic violence and noted that it feels certain forms of domestic violence may indeed constitute persecution. For example, if a country's domestic violence laws are weak or ineffective against protecting abused spouses, that could be construed as a public issue, not merely a private one within individual families.

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CROSS-REFERENCES

Aggravation; Aliens; Homeland Security Department; Felony; Refugees.

## ASYLUMS

*Establishments that exist for the aid and protection of individuals in need of assistance due to disability, such as insane persons, those who are physically handicapped, or persons who are unable to properly care for themselves, such as orphans.*

The term *asylum* has been used, in constitutional and legislative provisions, to encompass all institutions that are established and supported by the general public.

An *insane asylum* is one in which custody and care is provided for people with mental problems. An orphanage is an asylum set up as a shelter or refuge for INFANTS and children who do not have parents or guardians.

### Establishment and Maintenance

In the absence of constitutional restrictions, the state is permitted to fulfill its obligation to aid or support individuals in need of care by contributions to care facilities established or maintained by political subdivisions and private charity. In addition, the state may inaugurate a state asylum, delegating the management responsibility thereof to a private corporation. Some authorities view contributions to asylums of religious organizations or private enterprises as violative of constitutional prohibitions of government aid to parochial institutions or individuals. Express exceptions can be made by state statute or constitution for the payment of funds for designated purposes to specific types of asylums. In situations that are embraced by such exceptions, the contribution that the state makes to the maintenance of the asylum is not regarded as a charity but as part of the state's duty to aid its citizens who cannot do so themselves.

### Public Asylums Ownership and Status

An asylum founded and supported by the state has the status of a public institution. The state has the true ownership of the property that a state asylum occupies, and the character of the state's interest in such property is dependent upon the terms of the deed or contract under which it is held for the institution.

When a county conveys property to a board of directors of an insane asylum acting as trustees, title is not vested in the state to the extent that the power to reconvey the land to the county is restricted. In a situation in which property has been conveyed for a particular purpose connected to the operation of the asylum, it has been held that the trustees are permitted to reconvey the property to the county for the establishment of a general hospital.

**Location and Support** When no constitutional provision prescribing the location of public institutions exists, the state may designate a location or arrange for a place to be found by a specially appointed committee or commission.

A state asylum may be funded either by general state taxation or through an allocation of a portion or all of the costs among political subdivisions or to the inmates of the asylum.

**Regulation** Under the POLICE POWER of the state, the establishment and regulation of private asylums are subject to the state legislative authority. Such powers may be delegated to political subdivisions and administrative agencies. If legislative authority is delegated in such situations, guidelines and standards for regulatory enforcement must be present.

In order for a regulation to be valid, it must be reasonable, applied uniformly, and it must not infringe upon constitutional rights. A state or political subdivision cannot proscribe the lawful operation of an asylum or care facility or create or enforce unreasonable or ARBITRARY requirements regarding its construction or physical location. Similarly, it cannot make capricious requirements relating to the classification and nature of individuals to be admitted. Regulations and practices must comply with constitutional and statutory provisions.

The governing board of an asylum or institutional care facility is empowered to create all necessary rules and bylaws and is responsible for its policies and general administration. The courts will neither prescribe rules nor alter those created by the authorities, unless they are unreasonable or inappropriate.

**Investigation and Inspection** The legislature has the exclusive power to order an investigation of the management of an asylum or care facility. Private individuals may not conduct an investigation. When an investigation is initiated, the institution's governing board has the power to set forth regulations regarding relations with employees and patients and access to the records. A nursing home operator must make records kept pursuant to a public health statute available for inspection by authorized public officials. In addition, a private facility can be required to turn over annual fiscal reports to a regulatory agency.

Statutory requirements for the safety of individuals in institutions are imposed and must be observed. Similarly, standards concerning the type of personnel needed to care for the patients are usually set forth, but they must not be unreasonable.

**Licenses** Ordinarily, a license is required to operate an asylum or institutional care facility in order to ensure that minimal health and safety requirements imposed by law are observed. When a license is necessary, operation of a facility without one may be enjoined and, under certain statutes, a contract made by an unlicensed person is void, which would bar recovery for necessaries provided for individuals. The procedure for procuring a license is governed by statute, and the state licensing authorities have the discretion concerning whether it should be granted. When there is a final decision, determinations in licensing proceedings may be subject to JUDICIAL REVIEW. The proceedings on judicial review are generally regulated by statutory

**Asylums**

**NUMBER OF MENTAL HEALTH FACILITIES, IN 1998**

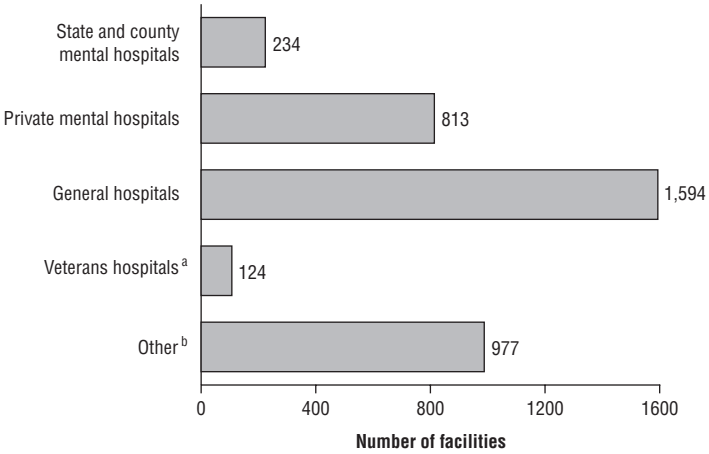


[a] Includes U.S. Department of Veterans Affairs (VA) neuropsychiatric hospitals, VA general hospitals with separate psychiatric settings, and VA freestanding psychiatric outpatient clinics.

[b] Includes freestanding outpatient facilities that provide full or partial services, and other multiservice mental health facilities with two or more settings.

SOURCE: U.S. Census Bureau, *Statistical Abstract of the United States*, 2000.

provisions that limit the proceedings to those initiated by aggrieved individuals.

Under some statutes, before an institutional care facility can be built, a certificate of need, which establishes approval of its construction by a public agency, is required.

### Officers and Employees

The rules that generally apply to public service employees govern the status of officers and employees of institutions. Statutory provisions may provide for the termination of such officers and employees.

### Inmates, Patients, and Residents

Statutory provisions, administrative regulations, and discretion of its administrator govern the admission of inmates or patients to a public institution. When a public asylum is founded for the reception of a specific class of individuals, anyone in the designated class may be admitted.

A constitutional provision that requires the advancement and support of certain specified institutions does not mandate that the state incur the total cost of maintaining institutionalized individuals. The expedience of soliciting repayment from responsible people for the expense of care, support, and maintenance of a patient cannot be based exclusively upon whether the commitment is voluntary or involuntary. In addition, recovery might be permitted for services actually rendered.

The individual in charge of an asylum that stands IN LOCO PARENTIS to infants upon their admission has custody of the children who are committed to its care. Unless otherwise prohibited by statute, qualified people may examine the records of children in private institutions when so authorized by its administrators. When a statute exists that guarantees the adult residents of proprietary adult homes the right to manage their own financial affairs, their handling of such matters cannot be subject to judicial challenge. An institution may be mandated to meet the individual needs of its patients under rules that monitor the operation of private care facilities for the purpose of the MEDICAID program.

Appropriate regulations may govern the VISITATION RIGHTS of individuals in an asylum.

An individual may be dismissed from the institution for conduct proscribed by the bylaws under penalty of expulsion, provided the person is first afforded notice and an opportunity to be heard.

### Contracts for Care and Occupancy

The admission of an individual to a public institution for care can be the subject of a contract between the patient and the institution concerning the transfer of property to the institution. Even without an express agreement, however, the circumstances may bring about a QUASI CONTRACT to provide for services rendered.

An individual may not rescind an occupancy agreement and regain an admission fee without proof of a breach of contract by the institution.

### Management

The management of public institutions is usually entrusted to specific governing bodies or officers. The appropriate body can hire employees to operate the asylum but cannot relinquish its management responsibilities. Physicians who wish to visit patients in private nursing homes can be excluded. If an institution does not provide reasons at the time of the exclusion, it does not preclude the institution from excluding the physician, provided that valid reasons exist and are communicated upon request.

Generally, the governing body of an asylum has the power to decide how funds appropriated for its support shall be spent, in the absence of contrary legislative provision. Funds appropriated by a legislature for specific purposes cannot, however, be diverted, and the governing body of the asylum does not have the power to compel the state to provide funding for services other than those for which the money was appropriated. Similarly, they are not empowered to borrow money or incur debts beyond allotments made for the support of institutions.

It is proper procedure to make a provision that an asylum may only accept as many inmates for admission as the facilities can adequately accommodate.

An institution may not initiate a visitation plan that limits a patient's right to allocate his or her visiting time among particular people, unless such limitation bears a rational relationship to the patient's treatment or security.

### Liabilities

An asylum or institutional care facility has the obligation to exercise reasonable care toward patients and can be held liable for a breach of this duty of care. The care taken toward inmates should be in the light of their mental and physical condition.

Recovery for injuries precipitated by an institution's NEGLIGENCE can be barred or limited by the contributory negligence of the injured party. The defense of contributory negligence cannot, however, be used when an individual is physically or mentally incapable of self-care.

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CROSS-REFERENCES

Disability Discrimination; Establishment Clause; Health Care Law; Patients' Rights.

## AT ISSUE

*A phrase that describes the status of parties in a lawsuit when they make contradictory statements about a point specified in their pleadings.*

## AT LARGE

*Not limited to any place, person, or topic; for example, a representative at large is elected by the voters of the state as a whole rather than voters of a particular district. Free from control or restraint, such as a criminal at large.*

## AT LAW

*According to law; by, for, or in the law, as in the professional title* attorney at law. *Within or arising from the traditions of the* COMMON LAW *as opposed to* EQUITY*, the system of law that developed alongside the common law and emphasized fairness and justice rather than enforcement of technical rules.*

## ATKINS V. VIRGINIA

In a landmark 6–3 ruling, the U.S. Supreme Court barred the execution of mentally retarded people, ruling that it constituted "cruel and unusual punishment" prohibited by the EIGHTH AMENDMENT. However, the Court left to the states to determine the definition of mental retardation. The decision affected as many as 300 mentally retarded death row inmates in 20 states.

The case involved Daryl Renard Atkins, who was convicted of capital murder and sentenced to death for abducting, robbing, and killing 21-year-old airman, Eric Michael Nesbitt. The evidence introduced at trial showed that at approximately midnight on August 16, 1996, Atkins and William Jones, both armed with semiautomatic weapons, abducted Nesbitt, robbed him, drove him to an automated teller machine, forced him to withdraw additional cash, and then took him to an isolated location where they shot him eight times at close range.

Initially, both Jones and Atkins were indicted for capital murder. The prosecution ultimately permitted Jones to plead guilty to first-degree murder in exchange for his testimony against Atkins. As a result of the plea, Jones became ineligible to receive the death penalty.

Jones and Atkins both testified in the guilt phase of Atkins's trial. Each confirmed most of the details in the other's account of the incident, except that each blamed the other for killing Nesbitt. Jones's testimony, which was both more coherent and credible than Atkins's testimony, was apparently credited by the jury in establishing Atkins's guilt. Highly damaging to the credibility of Atkins's testimony was its substantial inconsistency with the statement he gave to the police upon his arrest. Jones, in contrast, had declined to make an initial statement to the authorities.

At the penalty phase of the trial, the state introduced victim impact evidence and proved two aggravating circumstances: future dangerousness and "vileness of the offense." To prove future dangerousness, the state relied on Atkins's prior felony convictions as well as the testimony of four victims of earlier robberies and assaults. To prove the second aggravating circumstance, the prosecution relied upon pictures of the murdered man's body and the autopsy report.

The defense relied on one witness during the penalty phase, Dr. Evan Nelson, a forensic psychologist who had evaluated Atkins before trial and concluded that he was "mildly mentally retarded." His conclusion was based on interviews with people who knew Atkins, a review of school and court records, and the administration of a standard intelligence test, which indicated that Atkins had a full scale IQ of 59. Generally, IQs below 70 are considered in the retarded range. The state presented Dr. Stanton Samenow as an expert rebuttal witness. He testified that Atkins was not mentally retarded but rather was of "average intelligence, at least," and diagnosable as having antisocial personality disorder. A jury sentenced Atkins to death and the

Virginia Supreme Court affirmed the sentence on appeal, saying it was "not willing to commute Atkins's sentence of death to life imprisonment merely because of his IQ score." *Atkins v. Commonwealth*, 260 Va. 375, 534 S.E.2d 312 (Va. 2000).

When the case was appealed, most observers expected the U.S. Supreme Court to affirm the sentence as well. In 1989 the Supreme Court had upheld the execution of a mentally retarded death row inmate, notwithstanding objections that such executions violate the Eighth Amendment's ban on CRUEL AND UNUSUAL PUNISHMENT. *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). But Justice JOHN PAUL STEVENS, writing for the majority in *Atkins*, concluded that times had changed in the thirteen years since the *Penry* decision was handed down.

When *Penry* was decided, Stevens observed, only two of the 38 states allowing CAPITAL PUNISHMENT barred execution of mentally retarded inmates. However, at the time *Atkins* came before the Court, that number had risen to 18. Noting the "procession" of states in which executing the mentally retarded had been deemed illegal, Justice Stevens stated that it was not so much the number of states that was significant, but the consistency of the direction of change. "Given the well-known fact that anti-crime legislation is far more popular than legislation providing protections for persons guilty of violent crime," he stated, "the large number of states prohibiting the execution of mentally retarded persons (and the complete absence of states passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." Thus, Stevens concluded that the Eighth Amendment now prohibited executing mentally retarded persons under the "evolving standards of decency" test by which punishments are evaluated to determine whether they are cruel and unusual.

Chief Justice WILLIAM REHNQUIST and Justices ANTONIN SCALIA and CLARENCE THOMAS dissented. Chief Justice Rehnquist criticized the majority for basing its decision on the fact that 18 states have laws barring execution of mentally retarded defendants, since the laws of 20 states would have otherwise continued to leave the question of proper punishment to the individuated consideration of sentencing judges or juries familiar with the particular offender and his or her crime. Chief Justice Rehnquist agreed with Justice Scalia's opinion that the majority's assessment of the current legislative judgment more resembled a post hoc rationalization for the majority's "subjectively preferred result" than "any objective effort to ascertain the content of an evolving standard of decency."

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Velasquez, Eli. 2003. "The Shaping of an American Consensus against the Execution of Mentally Retarded Criminals." *Whittier Law Review* 24 (summer): 955–83.

**CROSS-REFERENCES**

Eighth Amendment; Felony; Forensic Science; Murder; Plea; Rebut; Victims of Crime.

## ATTACHMENT

*The legal process of seizing property to ensure satisfaction of a judgment.*

The document by which a court orders such a seizure may be called a writ of attachment or an order of attachment.

Originally, the main purpose of attachment was to coerce a defendant into appearing in court and answering the plaintiff's claim. The court's order pressured the sheriff to take the defendant's property into custody, depriving the individual of the right to use or sell it. If the defendant obstinately refused to appear, the property could be sold by the court to pay off any monetary judgment entered against him or her. Today, the process of attachment has two functions, as a jurisdictional predicate and as a provisional remedy.

Attachment of property within reach of the court's jurisdiction gives the court authority over the defendant to the extent of that property's value even if the court cannot reach the defendant personally. For example, a court must have some connection with the defendant in order to require that person to appear and defend himself or herself in an action before that court.

A variety of different facts are sufficient to give the court jurisdiction over the defendant's

*A sample order of attachment*

**Order of Attachment (State of NY)**

ORDERED that the plaintiff's motion for an order of attachment is granted, and it is further

ORDERED that the amount to be secured by this order of attachment, inclusive of probable interest, costs and Sheriff's fees and expenses, shall be $ _____ , and it is further

ORDERED that the plaintiff's undertaking be and the same is hereby fixed in the sum of $ _____ conditioned that the plaintiff shall pay to the defendant an amount not exceeding $ _____ for legal costs and damages which may be sustained by reason of the attachment, and up to and not exceeding $ _____ to the Sheriff for allowable fees, if the defendant recovers judgment or if it is decided that the plaintiff is not entitled to an attachment of the property of the defendant, and it is further

ORDERED that the Sheriff of the City of New York, or the Sheriff of any County of the State of New York, levy within his jurisdiction on the amount held by the law firm of _____, New York, New York, in an interest bearing account of the _____Bank, New York, New York, Account Number _____ entitled _____for the purpose of securing and satisfying any judgment recovered by the plaintiff herein, together with interest from _____ , 200___, costs, disbursements and reasonable Sheriff's fees, and that the Sheriff proceed herein in the manner and make his return within the time prescribed by law.

Dated: _____

ENTER:

_____
J.S.C.

person; for example, the defendant's residence within the state, the defendant's commission of a wrongful act within the state, or the defendant's doing business within the state.

If none of these kinds of facts exist to give the court jurisdiction over the defendant's person, the court may nevertheless assert its authority over property that the defendant owns within the state. In such a case, the plaintiff cannot recover a monetary judgment for an amount larger than the value of the property nor can the individual reach the defendant's property outside the state, but this sort of jurisdiction, called jurisdiction in rem or quasi in rem, may be the best the plaintiff can get. Before the court can exercise jurisdiction over the property, the plaintiff must obtain a writ of attachment to bring it into custody of the court.

Attachment may also be a provisional remedy, that is, relief that temporarily offers the plaintiff some security while pursuing a final judgment in the lawsuit. For example, a plaintiff who has good reason to believe that the person he or she is suing is about to pack up and leave the state will want the court to prevent this until the plaintiff has a chance to win the action and collect on the judgment. The plaintiff can apply for an order of attachment that brings the property into the custody of the court and takes away the defendant's right to remove it or dispose of it.

Attachment is considered a very harsh remedy because it substantially interferes with the defendant's property rights before final resolution of the overall dispute. For this reason, there have been a number of challenges to the attachment procedures in different states, and the Supreme Court has established standards that are the least that DUE PROCESS requires. For example, for centuries attachment of a defendant's property was granted ex parte, that is, without first allowing the defendant to argue against it. The theory was that any defendant was likely to leave the state if he or she knew beforehand that his or her property was about to be attached. This collides with the individual's right to be free of interference with his or her rights unless the individual is given notice and an opportunity to be heard in the matter. States, therefore, now generally provide that notice must be given to the defendant before the seizure of property whenever practical, and the

defendant must be given a hearing promptly after the seizure. Furthermore, a court cannot sanction a seizure that is made without a court order of attachment. To obtain the order, the plaintiff must swear to a set of facts that justify such a drastic interference with the defendant's property.

The process of attachment varies in detail from state to state, but it is not overly complicated. The plaintiff submits an application to the court describing the CAUSE OF ACTION against the defendant and the grounds for seeking an attachment. The plaintiff may have to include documents or other evidence to support the claim that he or she will probably win the lawsuit, and the individual usually is required to make the application under oath. States generally require that the plaintiff post a bond or undertaking in an amount sufficient to secure payment of damages to the defendant if it turns out that the plaintiff was not in fact entitled to the attachment.

The court issues a writ of attachment directing the sheriff or other law enforcement officer to serve a copy of the order on the defendant and to seize property equal in value to the sum specified in the writ. This is called a levy of attachment. The defendant then has a right to challenge the seizure or to post bond for the release of the property, in effect substituting the bond for the property in the court's custody. The order of attachment is effective only for a limited period, the time necessary to wind up the lawsuit between plaintiff and defendant or a specified period intended to permit resolution of the controversy. Provisions are usually made for special circumstances or extreme hardship.

Not every kind of property owned by the defendant is subject to attachment. The laws of a state may provide exemptions for certain household items, clothing, tools, and other essentials. The defendant's salary may be subject to attachment, but a certain amount is exempt in order to allow for personal support or for family support. Property belonging to the defendant but in the hands of someone else, such as salary owed or a debt not yet paid, may also be seized, but this procedure is usually called GARNISHMENT rather than attachment.

Courts always have the discretion to exempt more property than that specified in a statute or to deny the attachment altogether under the proper circumstances. This may be done, for example, when the court believes that the property sought to be attached is worth much more than any judgment the plaintiff could hope to win, or where the property is an ongoing business that would be destroyed by attachment.

FURTHER READINGS

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CROSS-REFERENCES

Search and Seizure.

## ATTAINDER

*At* COMMON LAW, *that extinction of* CIVIL RIGHTS *and capacities that took place whenever a person who had committed* TREASON *or a felony received a sentence of death for the crime.*

*The effect of* attainder *upon a felon was, in general terms, that all estate, real and personal, was forfeited. In common law, attainder resulted in three ways:* by confession, by verdict, *and* by process *or* outlawry. *The first case was where the prisoner pleaded guilty at the bar, or having fled, confessed guilt and abjured the realm to save his or her life. The second was where the prisoner pleaded not guilty at the bar, and the jury brought in a verdict against him or her. The third, when the person accused made his or her escape and was outlawed.*

*In England, by statute 33 & 34 Vict. c. 23, attainder upon conviction, with consequent corruption of blood,* FORFEITURE, *or* ESCHEAT, *was abolished. In the United States, the doctrine of attainder is now scarcely known, although during and shortly after the Revolution acts of attainder were passed by several of the states. The passage of such bills is expressly forbidden by the Constitution (Art. I, Sec. 9).*

Bills of attainder *are special acts of the legislature that inflict capital punishments upon persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a* bill of pains and penalties, *but both are included in the prohibition in the Constitution (Art. I, Sec. 9).*

The term *attainder* is derived from *attincta,* Latin for stained or blackened. When attainder occurred, the condemned person was considered to bear a mark of infamy that corrupted his or her blood. Attainder was eventually abolished in England by statute.

In the United States, attainder is scarcely known today, although several states enacted acts of attainder during the Revolutionary War period. A few states consider the disqualification of a person impeached and convicted to hold any government office to be a type of attainder. Attainder is akin to the concept of civil death, the forefeiture of certain rights and privileges upon conviction of a serious crime.

## ATTEMPT

*An undertaking to do an act that entails more than mere preparation but does not result in the successful completion of the act.*

In CRIMINAL LAW, an attempt to commit a crime is an offense when an accused makes a substantial but unsuccessful effort to commit a crime. The elements of attempt vary, although generally, there must be an intent to commit the crime, an OVERT ACT beyond mere preparation, and an apparent ability to complete the crime.

Generally, attempts are punishable by imprisonment, with sentence lengths that vary in time, depending upon the severity of the offense attempted.

## ATTENUATE

*To reduce the force or severity; to lessen a relationship or connection between two objects.*

In CRIMINAL PROCEDURE, the relationship between an illegal search and a confession may be sufficiently attenuated as to remove the confession from the protection afforded by the FRUIT OF THE POISONOUS TREE doctrine, thereby making it admissible as evidence in a criminal prosecution depending upon the facts of the case.

## ATTEST

*To solemnly declare verbally or in writing that a particular document or testimony about an event is a true and accurate representation of the facts; to bear witness to. To formally certify by a signature that the signer has been present at the execution of a particular writing so as to rebut any potential challenges to its authenticity.*

## ATTESTATION

*The act of attending the execution of a document and bearing witness to its authenticity, by signing one's name to it to affirm that it is genuine. The certification by a custodian of records that a copy of an original document is a true copy that is demonstrated by his or her signature on a certificate.*

An attestation is a declaration by a witness that an instrument has been executed in his or her presence according to the formalities required by law. It is not the same as an ACKNOWLEDGMENT, a statement by the maker of a document that verifies its authenticity.

An attestation clause is frequently found in legal documents that must be witnessed if they are to be valid, for example, a will or a deed. It states that the instrument has been completed in the manner required by law in the presence of the witness who places his or her signature in the designated space.

## ATTICA PRISON RIOT

See PRISON "1971 Attica Prison Riot" (Sidebar).

## ATTORN

*To turn over money, rent, or goods to another. To assign to a specific function or service.*

## ATTORNEY

*A person admitted to practice law in at least one jurisdiction and authorized to perform criminal and civil legal functions on behalf of clients. These functions include providing legal counsel, drafting legal documents, and representing clients before courts, administrative agencies, and other tribunals.*

Unless a contrary meaning is plainly indicated this term is synonymous with "attorney at law," "lawyer," or "counselor at law."

In order to become an attorney, a person must obtain a Juris Doctor degree from an accredited law school, although this requirement may vary in some states. Attendance at law school usually entails three years of full-time study, or four years of study in evening classes, where available. A bachelor's degree is generally a prerequisite to admission to law school.

With few exceptions, a person must pass the bar examination of that state in order to be admitted to practice law there. After passing a bar examination and practicing law for a specified period, a person may be admitted to the bars of other states, pursuant to their own court rules.

Although an attorney might be required by law to render some services PRO BONO (free of

charge), the individual is ordinarily entitled to compensation for the reasonable value of services performed. He or she has a right, called an attorney's lien, to retain the property or money of a client until payment has been received for all services. An attorney must generally obtain court permission to discontinue representation of a client during the course of a trial or criminal proceedings.

Certain discourse between attorney and client is protected by the ATTORNEY-CLIENT PRIVILEGE. In the law of evidence, the client can refuse to divulge and prohibit anyone else from disclosing confidential communications transmitted to and from the attorney. Notwithstanding, attorneys are permitted to make general (non-privileged) pre-trial statements to the press if there is a "reasonable likelihood" that the statements will not interfere with a fair trial or otherwise prejudice the due administration of justice (*In re Morrissey,* 168 F.3d 134 [4th Cir. 1999]).

CROSS-REFERENCES

Attorney-Client Privilege; Attorney Misconduct; Continuing Legal Education; Legal Education; Legal Representation; Right to Counsel.

## ATTORNEY-CLIENT PRIVILEGE

*In the law of evidence, a client's privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications between the client and his or her attorney. Such privilege protects communications between attorney and client that are made for the purpose of furnishing or obtaining professional legal advice or assistance. That privilege that permits an attorney to refuse to testify as to communications from the client. It belongs to the client, not the attorney, and hence only the client may waive it. In federal courts, state law is applied with respect to such privilege.*

The attorney-client privilege encourages clients to disclose to their attorneys all pertinent information in legal matters by protecting such disclosures from discovery at trial. The privileged information, held strictly between the attorney and the client, may remain private as long as a court does not force disclosure. The privilege does not apply to communications between an attorney and a client that are made in furtherance of a FRAUD or other crime. The responsibility for designating which information should remain confidential rests with the client. In its most common use, however, the attorney claims the privilege on behalf of the client in refusing to disclose to the court, or to any other party, requested information about the client's case.

As a basic construction in the judicial system, the privilege is an ancient device. It can be found even in Roman law—for example, Marcus Tullius Cicero, while prosecuting the governor of Sicily, could not call the governor's advocate as a witness, because if he were to have done so, the governor would have lost confidence in his own defender. Over the years, the close tie between attorney and client developed further with reforms in English COMMON LAW.

Because the attorney-client privilege often balances competing interests, it defies a rigid definition. However, one often-cited characterization was set forth in *United States v. United Shoe Machinery Corp.,* 89 F. Supp. 357 (D. Mass. 1950). The court articulated five requirements: first, the person asserting the privilege must be a client, or must have sought to become a client at the time of disclosure; second, the person connected to the communication must be acting as a lawyer; third, the communication must be between the lawyer and the client exclusively—no non-clients may be included in the communication; fourth, the communication must have occurred for the purpose of securing a legal opinion, legal services, or assistance in some legal proceeding, and not for the purpose of committing a crime; fifth, the privilege may be claimed or waived by the client only (usually, as stated above, through counsel).

Sometimes, even when all five of the *United Shoe* requirements have been met, courts will compel disclosure of the information sought. They base exceptions to the privilege on Rule 501 of the FEDERAL RULES OF EVIDENCE, which states that "the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis." Courts weigh the benefits to be gained by upholding the privilege (that is, preserving the confidence between attorney and client) against the harms that might be caused if they deny it (that is, the loss of information that would be valuable to the opposing party).

Courts have declared that the fact of an attorney-client relationship itself need not always remain privileged information (*National Union Fire Insurance Co. of Pittsburgh v. Aetna Casualty & Surety Co.,* 384 F.2d 316 [5th Cir. 1967]); the privilege may be upheld, however, if

the very existence of an attorney-client relationship could prove to be incriminating to the client (*In re Michaelson,* 511 F.2d 882 [9th Cir. 1975], *cert. denied,* 421 U.S. 978, 95 S. Ct. 1979, 44 L. Ed. 2d 469 [1975]). The attorney-client privilege does not always protect the client's name or the amount paid to an attorney (*Wirtz v. Fowler,* 372 F.2d 315 [5th Cir. 1966]). Further, the attorney's perception of the client's mental competency will not always be protected (*United States v. Kendrick,* 331 F.2d 110 [4th Cir. 1964] [holding that attorney's testimony that client was responsive, and logical in conversation and reasoning, and that he understood that the proceedings, did not address confidential matters]).

In general, exceptions to the attorney-client privilege can prove problematic to criminal defense attorneys, who try to keep a client's potentially incriminating disclosures confidential. One exception, however, is intended to protect attorneys: *Meyerhofer v. Empire Fire & Marine Insurance Co.,* 497 F.2d 1190 (2d Cir. 1974), *cert. denied,* 419 U.S. 998, 95 S. Ct. 314, 42 L. Ed. 2d 272 (1974), held that an attorney may circumvent the privilege if revealing information would relieve him or her of accusations of wrongdoing.

A client is not always a person; a corporation can be a client and can have a right to the attorney-client privilege. The U.S. Supreme Court's decision in *Upjohn Co. v. United States,* 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981), ensured greater protection for confidential information between a corporation and its lawyers. In the mid-1970s, Upjohn Company faced accusations of making questionable payments to officials of foreign governments in order to secure business from those governments. In response to those accusations, Upjohn authorized its corporate attorneys to conduct investigations of foreign payments. When the INTERNAL REVENUE SERVICE (IRS) issued a summons for the investigative documents that Upjohn had left to its lawyers, Upjohn refused to comply with the request. Upjohn argued that the documents were privileged. The U.S. Supreme Court ruled in favor of Upjohn, and this decision became the standard for determining the nature of services—either legal or business—provided by the corporate attorney.

By the early 1990s, the attorney-client privilege was narrowed by federal guidelines that were intended to combat MONEY LAUNDERING. The federal government, in conjunction with President GEORGE H.W. BUSH'S crackdown on drug trafficking, pressed an IRS policy that would deter drug dealers and other criminals from disguising profits. The law required attorneys to disclose to the government any cash payment in excess of $10,000, as well as the name of the client making the payment (26 U.S.C.A. § 6050 I).

In *United States v. Leventhal,* 961 F.2d 936 (11th Cir. 1992), Robert Leventhal, an attorney in Florida, refused to disclose to the IRS the names of clients who had paid him over $10,000 in cash. Leventhal's clients had wished to remain anonymous, and Leventhal argued that the attorney-client privilege gave them that right. Leventhal cited the Florida Rules of Professional Conduct, which require disclosure of confidential client information only in rare circumstances. The federal government sued Leventhal. The court ruled that disclosing the clients' identities revealed only the existence of an attorney-client relationship, a simple factual matter that is not within the scope of the privilege. Therefore, Leventhal was compelled to reveal the sources of the payments.

The U.S. Court of Appeals for the Sixth Circuit followed *Leventhal* in *United States v. Ritchie,* 15 F.3d 592 (1994), *cert. denied,* 513 U.S. 868, 115 S. Ct. 188, 130 L. Ed. 2d 121 (1994). Attorney Robert Ritchie had challenged the same IRS policy, but the court noted that Congress gave the IRS broad powers to ensure compliance with the tax code. Appeals court judge Alice M. Batchelder held that there was no "constitutionally protected liberty interest in spending large amounts of cash without having to account for it."

Attorneys have decried the federal government's position in such cases, but the attorney-client privilege remains useful as a defensive measure in more general circumstances. The privilege remains an exception to the general rule that individuals must testify to all facts within their knowledge. Rooted in ancient principles, it fosters trust within this important relationship and helps attorneys to develop fully their clients' cases by encouraging complete disclosure of relevant information.

The U.S. Supreme Court declined the opportunity to further narrow the attorney-client privilege in *Swidler & Berlin v. U.S.,* 524 U.S. 399, 118 S.Ct. 2081, 141 L.Ed.2d 379 (U.S. 1998), which raised the question of whether the

attorney-client privilege survived the death of the client, and thus whether following the client's death the attorney could be compelled to disclose information that was protected as confidential while the client was still alive.

The dispute arose from the investigation conducted by the Office of the Independent Counsel into the 1992 firing of several White House Travel Office employees, amid allegations of theft and kickbacks from air-charter companies. Deputy White House counsel Vincent Foster had met with a private attorney to seek LEGAL REPRESENTATION concerning the travel-office controversy, which the American press had since branded *Travelgate*. The attorney took handwritten notes at the meeting. Nine days later, Foster committed suicide.

Subsequently, a federal GRAND JURY, at the request of the Office of the Independent Counsel, issued subpoenas for the handwritten notes as part of a new investigation into whether crimes had been committed in obstructing the earlier investigations into the travel-office firings. Foster's attorneys moved to quash the subpoena on the grounds that they were protected from disclosure by the attorney-client privilege.

The federal district court ruled that the notes were still protected by privilege, and it denied enforcement of the subpoenas. In reversing that ruling, the Court of Appeals recognized that most courts assume that the privilege survives death, but noted that such references usually occur in the context of the well-recognized testamentary exception to the privilege allowing disclosure for disputes among the client's heirs. *In re Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997). The court said that the risk of posthumous revelation, when confined to the criminal context, would have little or no chilling effect on client communication, but that the costs of protecting communications after death would be high. Concluding that the privilege is not absolute under such circumstances, and that a BALANCING test should apply instead, the appeals court recognized a posthumous exception to the attorney-client privilege for communications in which the relative importance to particular criminal litigation is substantial.

The U.S. Supreme Court reversed, noting that courts generally presume that the attorney-client privilege extends beyond the death of the client, even in the criminal context, and that, at the very least, the burden was on the Office of the Independent Counsel to show that reason and experience required a departure from that rule. The Office of the Independent Counsel had failed to make a sufficient showing to overturn the common law rule that is embodied in the prevailing case law.

"Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel," the Court wrote. "While the fear of disclosure … may be reduced if disclosure is limited to posthumous disclosure in a criminal context," the Court continued, "it seems unreasonable to assume that it vanishes altogether." The Court emphasized that "[c]lients may be concerned about reputation, civil liability, or possible harm to friends or family," and thus "[p]osthumous disclosure of such communications may be as feared as disclosure during the client's lifetime."

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CROSS-REFERENCES

Attorney Misconduct; Drugs and Narcotics; Ethics, Legal; Legal Representation; Model Rules of Professional Conduct.

## ATTORNEY GENERAL

*The chief law enforcement officer of the United States or of a state government, typically serving in an* EXECUTIVE BRANCH *position. The individual represents the government in litigation and serves as the principal advisor to government officials and agencies in legal matters.*

The attorney general is head of the U.S. JUSTICE DEPARTMENT and chief law officer of the federal government. He or she represents the United States in legal matters generally and gives advice and opinions to the president and to other heads of executive departments as requested. In cases of exceptional gravity or spe-

cial importance, the attorney general may appear in person before the U.S. Supreme Court to represent the interests of the government.

As head of the Justice Department, the attorney general is charged with enforcing federal laws, furnishing legal counsel in federal cases, construing the laws under which other executive departments act, supervising federal penal institutions, and investigating violations of federal laws. The attorney general also supervises and directs the activities of the U.S. attorneys and U.S. MARSHALS in the various judicial districts. (U.S. attorneys prosecute all offenses against the United States and prosecute or defend for the government all civil actions, suits, or proceedings in which the United States is concerned; U.S. marshals execute all lawful writs, processes, and orders issued under authority of the United States.)

The office of the attorney general was created by the First Congress in the JUDICIARY ACT OF 1789 (An Act to Establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 73, 92–93). The First Congress did not expect the attorney general—a part-time employee with scant pay, no staff, and little power—to play a major role in the emerging federal government. As the members of the First Congress established a system for the enforcement of federal laws, their primary concern was to protect state and individual freedoms and to avoid the creation of a central legal system that would allow the tyrannies they had experienced as American colonists under George III. Therefore, the Judiciary Act gave the attorney general just two principal duties: (1) to prosecute and conduct all suits in the SUPREME COURT OF THE UNITED STATES that concerned the United States and (2) to give an opinion on QUESTIONS OF LAW when asked to do so by the president or heads of other executive departments.

The early attorneys general spent little time arguing before the Supreme Court because few cases had traveled through the nation's developing court system and even fewer warranted Supreme Court review. Together, the first three attorneys general—Edmund Randolph, WILLIAM BRADFORD, and Charles Lee—represented the United States in the Supreme Court only six times in their collective years in office.

Furthermore, early attorneys general were specifically restricted by the Judiciary Act from participating in lower-court actions. District attorneys (known in the early 2000s as U.S.

**U.S. Attorneys General**

| Name | Term | President |
|---|---|---|
| Edmund Randolph | 1789-1794 | Washington |
| William Bradford | 1794-1795 | Washington |
| Charles Lee | 1795-1801 | Washington & John Adams |
| Levi Lincoln | 1801-1805 | Jefferson |
| John Breckenridge | 1805-1806 | Jefferson |
| Caesar A. Rodney | 1807-1811 | Jefferson & Madison |
| William Pinkney | 1811-1814 | Madison |
| Richard Rush | 1814-1817 | Madison |
| William Wirt | 1817-1829 | Monroe & John Q. Adams |
| John M. Berrien | 1829-1831 | Jackson |
| Roger B. Taney | 1831-1833 | Jackson |
| Benjamin F. Butler | 1833-1838 | Jackson & Van Buren |
| Felix Grundy | 1838-1839 | Van Buren |
| Henry D. Gilpin | 1840-1841 | Van Buren |
| John J. Crittenden | 1841 | Harrison & Tyler |
| Hugh S. Legare | 1841-1843 | Tyler |
| John Nelson | 1843-1845 | Tyler |
| John Y. Mason | 1845-1846 | Polk |
| Nathan Clifford | 1846-1848 | Polk |
| Issac Toucey | 1848-1849 | Polk |
| Reverdy Johnson | 1849-1850 | Taylor |
| John J. Crittenden | 1850-1853 | Fillmore |
| Caleb Cushing | 1853-1857 | Pierce |
| Jeremiah S. Black | 1857-1860 | Buchanan |
| Edwin M. Stanton | 1860-1861 | Buchanan |
| Edward Bates | 1861-1864 | Lincoln |
| James Speed | 1864-1866 | Lincoln & Johnson |
| Henry Stanberry | 1866-1868 | Johnson |
| William M. Evarts | 1868-1869 | Johnson |
| Ebenezer R. Hoar | 1869-1870 | Grant |
| Amos T. Akerman | 1870-1872 | Grant |
| George H. Williams | 1871-1875 | Grant |
| Edwards Pierrepont | 1875-1876 | Grant |
| Alphonso Taft | 1876-1877 | Grant |
| Charles Devens | 1877-1881 | Hayes |
| Wayne MacVeagh | 1881 | Garfield |
| Benjamin H. Brewster | 1881-1885 | Arthur |
| Augustus H. Garland | 1885-1889 | Cleveland |
| William H.H. Miller | 1889-1893 | Harrison |
| Richard Olney | 1893-1895 | Cleveland |
| Judson Harmon | 1895-1897 | Cleveland |
| Joseph McKenna | 1897-1898 | McKinley |
| John W. Griggs | 1898-1901 | McKinley |
| Philander C. Knox | 1901-1904 | McKinley |
| William H. Moody | 1904-1906 | Roosevelt |
| Charles J. Bonaparte | 1906-1909 | Roosevelt |
| George W. Wickersham | 1909-1913 | Taft |
| James C. McReynolds | 1913-1914 | Wilson |
| Thomas Watt Gregory | 1914-1919 | Wilson |
| A. Mitchell Palmer | 1919-1921 | Wilson |
| Harry M. Daugherty | 1921-1924 | Harding |
| Harlan Fiske Stone | 1924-1925 | Coolidge |
| John G. Sargent | 1925-1929 | Coolidge |
| William D. Mitchell | 1929-1933 | Hoover |
| Homer S. Cummings | 1933-1939 | Roosevelt |
| Frank Murphy | 1939-1940 | Roosevelt |
| Robert H. Jackson | 1940-1941 | Roosevelt |
| Francis Biddle | 1941-1945 | Roosevelt |
| Tom C. Clark | 1945-1949 | Truman |
| J. Howard McGrath | 1949-1952 | Truman |
| James P. McGranery | 1952-1953 | Truman |
| Herbert Brownell Jr. | 1953-1957 | Eisenhower |
| William P. Rogers | 1957-1961 | Eisenhower |

[CONTINUED]

**U.S. Attorneys General**

| Name | Term | President |
|---|---|---|
| Robert F. Kennedy | 1961-1964 | Kennedy |
| Nicholas deB. Katzenbach | 1965-1966 | Johnson |
| Ramsey Clark | 1967-1969 | Johnson |
| John N. Mitchell | 1969-1972 | Nixon |
| Richard G. Kleindienst | 1972-1973 | Nixon |
| Elliot L. Richardson | 1973 | Nixon |
| William B. Saxbe | 1974-1975 | Nixon |
| Edward H. Levi | 1975-1977 | Ford |
| Griffin B. Bell | 1977-1979 | Carter |
| Benjamin R. Civiletti | 1979-1981 | Carter |
| William French Smith | 1981-1985 | Reagan |
| Edwin Meese III | 1985-1988 | Reagan |
| Richard Thornburgh | 1988-1991 | Reagan & George Bush |
| William Barr | 1991-1993 | George Bush |
| Janet Reno | 1993-2001 | Clinton |
| John Ashcroft | 2001- | George W. Bush |

SOURCE: U.S. Department of Justice.

attorneys) held the authority to represent the United States in district and circuit courts. Each district attorney could independently decide which cases to pursue and on what grounds—a situation that soon resulted in a number of contradictory legal positions for the federal government. Because the attorney general had no power to direct district attorneys in their lower-court litigation, the officeholder was often unaware of litigation that concerned the interests of the United States.

In a letter to President GEORGE WASHINGTON dated December 26, 1791, Attorney General Randolph expressed concern about the limitations of his office and complained specifically about the lack of a defined relationship with the district attorneys. Randolph was the first of many attorneys general to point out that their prescribed duties did not allow them to fully look after the interests of the United States, and he was the first to propose an expansion of the office's duties and jurisdiction.

Ignoring complaints and proposals, Congress remained reluctant to expand the duties of the attorney general and often passed legislation that assigned special legal functions to officials in other government departments. For example, in the early 1800s, Congress created a solicitor of the treasury to handle all suits for the recovery of money or property in the United States—a move that further complicated the attorney general's efforts to fully look after the interests of the government.

With court appearances limited by the lack of both cases before the Supreme Court and jurisdiction to oversee lower-court cases, opinion writing consumed most of the time of early attorneys general. Together, Attorneys General Randolph, Bradford, and Lee wrote more than 40 formal opinions on such diverse issues as IMMUNITY for diplomats, applications for PATENTS, and the choice of directors for the nation's first federal bank. However, early attorneys general were not required to provide the government with written records of their opinions. When WILLIAM WIRT, the eleventh attorney general, took office in 1817, he found that his predecessors had provided no record of their past opinions to guide his deliberations. Understandably, early attorneys general, who received only a small stipend for their services and relied on the private PRACTICE OF LAW for their personal income, spent little money to hire clerks to transcribe and preserve their work. They simply relied on the recipients of their opinions to retain them for future reference. Still, legislative attempts to provide the attorney general with an office, a clerk, and supplies continually failed to win support.

The limited duties outlined for the attorney general by the First Congress, along with the lack of perquisites for the office, made it hard for presidents to attract qualified appointees and keep them in office. Even President Washington had difficulty convincing his personal attorney and long-time friend, Randolph, to take the job. Washington finally won Randolph over by pointing out that service as attorney general might enhance his earning opportunities in private practice. In fact, Randolph did not profit much from the prestige of the office during or after his tenure. Subsequent attorneys general did profit handsomely from the experience, but early officeholders often had difficulty BALANCING the dual commitments to private practice and public service.

The commitment to public service for early attorneys general was further complicated by institutional tensions between the executive, legislative, and judicial branches of government, which all claimed the officeholder's time, services, and allegiance. It has been said that the attorney general serves "three masters": the president, the Congress, and the courts (American Enterprise Institute for Public Policy Research 1968). Although the attorney general advises the president, the basic authority of the office is

derived from Congress and the functions of the office are subject to congressional control. In addition, the attorney general is a member of the bar and therefore an officer of the court subject to the directives of the judicial branch.

Although the First Congress defined the relationship between the attorney general and the president, it did not define the relationship between the attorney general and Congress. And it was notably silent regarding who was ultimately to decide when and whether the interests of the United States were "concerned": nothing in the Judiciary Act of 1789 specified who should control the attorney general or to whom she or he should report. Early attorneys general took orders from the Congress as well as from the president and the heads of other executive departments. Attorneys general were often asked to deliver opinions to Congress on legislative proposals, and they came to be viewed as authorities on constitutional issues—much to the chagrin of both legislators, who frequently disagreed with their interpretations, and members of the judiciary, who assumed that they themselves were the final arbiters in constitutional matters.

The attorney general has also been said to straddle the legal and political worlds. When Congress created the executive departments, it did not specify who should or should not be members of the president's cabinet, and it could not predict the level of influence held by any one individual. In the early years, the attorney general did not have cabinet rank but served as counsel to those who did. However, as Washington's personal legal adviser, Randolph participated in cabinet meetings as early as 1792, establishing the precedent for attorneys general to have a hand in making policy as well as in interpreting and enforcing the laws. The attorney general's role in policy making soon brought into question the extent to which party lines and presidential preferences influenced his or her legal advice. Over time, some attorneys general handled the dilemma with more integrity and less partisanship than others.

The lack of centralized authority and the lack of basic institutional support for the office of the attorney general began to be remedied by Congress in the early nineteenth century. Subsequently, many of the issues caused or influenced by conflicting allegiances were dissolved or clarified through administrative policy and legislation.

In 1814, during the term of Attorney General RICHARD RUSH, President JAMES MADISON made the first move to expand formally the presence (if not the duties) of the attorney general, by proposing a requirement that the attorney general reside in or near Washington, D.C., while Congress was in session. The residency requirement had previously been resisted by some attorneys general. Although it made the officeholder available to the president and Congress when the attorney general was most needed, it also made the private practice of law more inconvenient to an attorney general who lived far from the Capitol.

Attorney General Wirt (1817–29), under Presidents JAMES MONROE and JOHN QUINCY ADAMS, was the first to comprehend fully the officeholder's need for administrative structure. During his tenure, the attorney general was finally given government office space, a transcribing clerk, and a small fund for office supplies. The practice of providing opinions to Congress was also curtailed during this period, when Wirt presented a paper to President Monroe outlining the extent of his congressional workload and his objections. Wirt told the president that opinions had been provided to Congress in the past as a courtesy—not as a MATTER OF LAW. Wirt told the president the practice would not continue unless Congress revised the law and made it mandatory.

By 1853, when CALEB CUSHING became attorney general under President FRANKLIN PIERCE, the officeholder had four clerks and—for the first time—a salary comparable to those of other cabinet officers. Also in 1853, Cushing decided it was no longer appropriate to continue the private practice of law while in office. He was the nation's first full-time attorney general.

Recommendations that a department of law be created by Congress were discussed as early as 1830 and were championed by numerous presidents and attorneys general. A department of justice was first suggested in 1851 by Alex H. H. Stuart, secretary of the newly established DEPARTMENT OF THE INTERIOR.

No action was taken by Congress until February 25, 1870, when the Joint Committee on Retrenchments (appointed to find ways of reducing government expenditures) drafted a bill to consolidate legal functions and create a department of justice. The bill was made into law four months later, and the Justice Department officially came into existence on July 1,

1870 (An Act to Establish the Department of Justice, §17, 16 Stat. 162 [June 22, 1870]).

The June 22, 1870, law created a new position, that of SOLICITOR GENERAL, whose holder is in charge of representing the government in suits and appeals in the Supreme Court and in lower federal trial and appellate courts, in cases involving the interests of the United States. The law also provided for two assistant attorneys general. It gave the attorney general complete direction and control of the U.S. attorneys and all other counsel employed on behalf of the United States. And it finally gave the attorney general supervisory powers over the accounts of district attorneys, marshals, clerks, and other officers of the court involved in federal matters.

The first attorney general to head the new department was AMOS T. AKERMAN, of Georgia, appointed by President ULYSSES S. GRANT in 1870. So, 81 years after the creation of the office of the attorney general, the nation finally had a full-fledged organization to administer and enforce its laws. Evolution in the position of attorney general culminated in the formation of the Justice Department.

In the late twentieth and early twenty-first centuries, U.S. attorneys general, including JANET RENO and JOHN DAVID ASHCROFT, have been at the center of extensive media attention. Reno, for example, was the subject of intense scrutiny for her role in the deaths of about 80 members of the Branch Davidians, an armed religious sect, near Waco, Texas in 1993. The deaths occurred when the FEDERAL BUREAU OF INVESTIGATION, following a long standoff, set fire to the group's compound during an attempted raid. Reno later took responsibility for the FBI actions. Subsequently, Reno was involved in the return to Cuba of a refugee child named Elian Gonzalez in April 2000. Reno ordered officers of the Immigration and Naturalization Service to raid the home of the child's relatives in Miami in order to return the child to his father, who remained in Cuba. Ashcroft, a former U.S. senator and governor of Missouri, was at the center of attention throughout the investigation of terrorists following the SEPTEMBER 11TH ATTACKS on the United States.

The growth of the office of the attorney general from a part-time, one-person operation into a vast and complex law enforcement organization is an inseparable part of the story of the United States and the development of its institutions. As the role of government has expanded, so too has the role of the nation's attorney general. Moreover, though the attorney general's role continues to grow and evolve, the basic duties of the office and the structure of its supporting organization have been in place since the Civil War.

### State Attorneys General

State attorneys general possess many of the same powers and responsibilities as their counterpart in the federal government. A state attorney general's office is typically a part of the executive branch of the state government. He or she is generally entrusted with the duties of prosecuting suits and proceedings involving state government and advising the governor and other administrative officers of the state government. Many state statutes also establish the state attorney general as the official legal advisor or representative of various departments and agencies.

In some states, the power of the attorney general is limited to those specified by statute. The powers of most attorneys general are subject to the desires of the legislature, although powers in some states are prescribed by statute. In fulfilling the advisory function of the office, attorneys general are often requested to draft ADVISORY OPINIONS related to the application of the law to a particular agency or official. These opinions are generally not considered binding on the general public, though in some instances they may be binding upon the officials that request them.

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#### CROSS-REFERENCES

Justice Department; Officers of the Court; Supreme Court of the United States; Question of Law; Washington, George.

## ATTORNEY MISCONDUCT

*Behavior by an attorney that conflicts with established rules of professional conduct and is punishable by disciplinary measures.*

More than any other profession, the legal profession is self-governing. That is, it is largely regulated by lawyers and judges themselves rather than by the government or outside agencies. In particular, the AMERICAN BAR ASSOCIATION (ABA), the largest professional association for attorneys, governs the PRACTICE OF LAW through its establishment of rules of conduct. These rules are then adopted, sometimes in a modified form, by state courts and enforced by court-appointed disciplinary committees or bar associations. Attorneys found to be in violation of professional standards are guilty of misconduct and subject to disciplinary procedures. Disciplinary action by a state bar association or other authority may include private reprimands; public censure; suspension of the ability to practice law; and, most severe of all, disbarment—permanent denial of the ability to practice law in that jurisdiction. The state supreme court is the final arbiter in questions of professional conduct in most jurisdictions.

Since 1908, the ABA has been responsible for defining the standards of proper conduct for the legal profession. These standards, many of them established by the ABA Standing Committee on Ethics and Professional Responsibility, are continuously evolving as society and the practice of law change over time. In 1969, the ABA passed its Model Code of Professional Responsibility, guidelines for proper legal conduct that were eventually adopted by all jurisdictions. The ABA modified the code by adopting the Model Rules of Professional Conduct in 1983. The model rules have been used by 40 states to create official guidelines for professional conduct; 11 states or jurisdictions, including Washington, D.C., and the Virgin Islands, have continued to base their ethical codes on the earlier model code. California has developed its own rules of professional conduct. Whatever their basis, these codes or rules define the lawyer's proper role and relationship to the client. It is essential that lawyers understand the ethical codes under which they must operate. Failure to do so may result in not only disciplinary action by the relevant professional authorities but also MALPRACTICE suits against the lawyer. A malpractice suit may result in loss of money or the ability to work with specific clients.

Rule 8.4 of the Model Rules of Professional Conduct contains the following statements on attorney misconduct:

> It is professional misconduct for a lawyer to:
>
> (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) Engage in conduct involving dishonesty, FRAUD, deceit or misrepresentation;
>
> (d) Engage in conduct that is prejudicial to the administration of justice;
>
> (e) State or imply an ability to influence improperly a government agency or official;
>
> (f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Besides issuing these general statements, the model rules set down many specific requirements for attorney conduct in different situations.

Because of an attorney's special relationship to the law, he or she is held to a special standard of conduct before the law, as the ABA asserts in its *Lawyers' Manual on Professional Conduct*:

> As members of the bar and officers of the court, lawyers are beneficiaries of the privilege of the practice of law and also are subject to higher duties and responsibilities than are non-lawyers. A lawyer's fiduciary duties arise from his status as a member of the legal profession and are expressed, at least in part, by the applicable rules of professional conduct.

The word *fiduciary* in this quotation comes from the Latin word *fiducia,* meaning "trust"; as a fiduciary, then, the attorney acts as the trusted representative of the client. Trust is thus a defining element of the legal profession, and without it, the practice of law could not exist. For that reason, the legal profession has created strict rules of conduct regarding the attorney's relationship with the client.

### Attorney-Client Relationship

The model rules set forth specific guidelines defining the attorney-client relationship. An attorney will be guilty of misconduct, for example, if she or he fails to provide competent representation to a client, to act with diligence and promptness regarding a client's legal concerns, or to keep a client informed of legal proceedings. Charging exorbitant fees or overbilling is also considered misconduct, as is counseling a client to commit a crime. For example, trial lawyer Harvey Myerson was suspended in 1992 from the practice of law by the New York Supreme Court after he was convicted of over-

# Attorney-Client Sexual Relations

The **AMERICAN BAR ASSOCIATION** (ABA) has recognized sexual relations between attorneys and their clients as a significant ethical problem for the legal profession. The ABA's Standing Committee on Ethics and Professional Responsibility addressed this issue in 1992 by issuing a formal opinion (no. 92-364). Although the opinion acknowledged that the Model Rules of Professional Conduct do not specifically address the issue of attorney-client sex, it argued that an attorney's sexual relationship with a current client "may involve unfair exploitation of the lawyer's fiduciary position and presents a significant danger that the lawyer's ability to represent the client adequately may be impaired, and that as a consequence the lawyer may violate both the Model Rules and the Model Code." Becoming sexually intimate with a client, the opinion adds, undermines the "objective detachment" necessary for **LEGAL REPRESENTATION** because "[t]he roles of lover and lawyer are potentially conflicting ones." In addition, the opinion argued, attorney-client sex introduces a clear conflict of interest into a case, and it may also compromise **ATTORNEY-CLIENT PRIVILEGE**, the principle that ensures the confidentiality of lawyer-client communication. Any secrets revealed to an attorney by a client outside of their legal relationship may not be protected by attorney-client privilege.

Proponents of professional rules against attorney-client sexual contact argue that the legal profession should follow the example of other professions such as psychology and psychiatry, and create strict sanctions against sex with clients. Legal clients, these proponents say, are often vulnerable when dealing with attorneys, particularly in such areas of legal practice as **FAMILY LAW**. A lawyer who becomes sexually involved with a client in a **DIVORCE** proceeding can take advantage of the client undergoing emotional trauma. That lawyer may hinder any attempts at reconciliation between a couple and complicate matters for any children involved. Sexual relationships between lawyer and client may also affect custody and child visitation decisions in the case. The American Academy of Matrimonial Lawyers, in its Standards of Conduct in Family Law Litigation, specifically prohibits attorney-client sex: "An attorney should never have a sexual relationship with a client or opposing counsel during the time of the representation" (§ 2.16 [1991]).

Some attorneys object to such rules, arguing that they interfere with their **FIRST AMENDMENT** rights to **FREEDOM OF ASSOCIATION**. They bristle at the notion of state bar associations regulating the private affairs of consenting adults. Nevertheless, attorneys are increasingly being disciplined for becoming sexually involved with clients, and state bar associations are drafting clearer and more stringent rules against attorney-client sexual contact. Wisconsin's Supreme Court, for example, in 1987, revoked the license of an attorney in part because he had sex with a client (*In re Hallows,* 136 Wis. 2d 72, 401 N.W.2d 557). The attorney, the court argued, was "placing his interests above" those of his client. In 1990, the same court for the first time suspended the license of a criminal lawyer who had sex with a client (*In re Ridgeway,* 158 Wis. 2d 452, 462 N.W.2d 671). Oregon and Minnesota have adopted outright bans on attorney-client sexual contact. Rule 1.8(k) of the Minnesota Rules of Professional Conduct, which became effective July 1, 1994, forbids attorney-client sexual contact during the conduct of a professional legal relationship. It allows exceptions to the rule only for relationships beginning before legal representation has commenced or after it has ended. In the case of clients that are organizations rather than individuals, an attorney may not have sexual contact with any member of the client organization directly overseeing the case.

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billing by millions of dollars (*In re Myerson,* 182 A.D. 2d 242, 588 N.Y.S.2d 142 [N.Y. App. Div. 1992]).

Many types of attorney misconduct involve a conflict of interest on the part of the attorney. A conflict of interest arises when an attorney puts personal interests ahead of professional responsibilities to the client. The model rules specify the potential for conflict of interest in many different situations. Thus, for example, an attorney who by representing one client adversely affects another client has a conflict of interest and is guilty of misconduct. Conflict of interest rules also forbid an attorney to enter into a business transaction with a client unless the client is fully aware of how the transaction will affect his or her LEGAL REPRESENTATION and agrees to the transaction in writing. Similarly, an attorney is guilty of misconduct if he or she makes a deal with the client for acquisition of the book, film, or media rights to the client's story. Providing a client with financial assistance also introduces a conflict of interest into the attorney-client relationship.

If an attorney is related to another attorney as parent, child, sibling, or spouse, that attorney may not represent a client in opposition to the related attorney except when given consent to do so by the client. This type of conflict of interest has become increasingly common as more women enter the legal profession and the number of marriages between attorneys grows. State bar associations, such as that of Michigan, have held that these guidelines also apply to lawyers who are living together or dating but are not married. The potential for conflict of interest when the opposing attorneys are married or romantically involved is clear. Imagine a woman representing a client in a personal injury lawsuit seeking millions of dollars worth of damages from a manufacturer, with her husband representing the manufacturer. As a couple, they have a monetary interest in gaining a large settlement from the manufacturer, thereby giving the husband an incentive to lose his case. Given this conflict of interest, the couple is obligated to reveal to their clients the fact that they are married. If the clients agree to go ahead with the case regardless of the conflict of interest, then the attorneys may decide to continue their representation.

Special examples of conflict of interest have arisen in cases involving indigent defendants who must use publicly provided defense attorneys. In many jurisdictions, it is considered misconduct for an attorney to refuse court appointment as a public service defender for a poor client, even when a spouse's legal associate or firm is involved on the opposing side of the case. Normally, for example, state bar associations allow a district attorney to prosecute persons defended by partners or associates of the district attorney's spouse as long as the client is notified of the situation; similarly, they will allow a district attorney's spouse to defend persons prosecuted by other members of the district attorney's staff. Nevertheless, in a 1992 case, *Haley v. Boles,* 824 S.W.2d 796, the Texas Court of Appeals found that a conflict of interest gave a court-appointed attorney grounds to refuse appointment as a public defender for a poor client. The prosecutor was married to the court-appointed counsel's law partner, creating a potential conflict of interest. According to the court's decision, a poor defendant who must rely on a public defender has fewer choices for legal representation than a defendant who can afford to employ her or his own attorney. Therefore, an attorney who has a conflict of interest must be able to refuse to represent a client as a public defender without being charged with misconduct, thereby ensuring that the client receives legal representation free of a conflict of interest.

Any breach of the trust by the attorney that underlies the relationship between that attorney and the client can be considered misconduct. For example, an attorney is often called upon to hold or transfer money for a client, and in this situation, the client places an extraordinary amount of trust in the lawyer. Any misuse of the client's money by the attorney—called misappropriation of client funds—constitutes a serious breach of trust and a gross example of misconduct. This offense includes stealing from the client, mingling the attorney's money with that of the client, and controlling client funds without authorization. The model rules require that funds given to a lawyer by a client be kept in an account separate from the lawyer's own account.

To encourage clients to inform their attorneys of all details relevant to a case, ethical codes also entrust attorneys with preserving the confidentiality of the information their clients give them; any failure to do so constitutes misconduct on the part of the attorney. The law protects attorney-client confidentiality with the principle of ATTORNEY-CLIENT PRIVILEGE, and

under very few circumstances is it lawful to breach this privilege of confidentiality. The privilege may be revoked to prevent the client from "committing a criminal act that . . . is likely to result in imminent death or substantial bodily harm" (*Model Rules of Professional Conduct,* Rule 1.6 1983), or to respond to civil or criminal proceedings made by the client against the attorney. Except for these rare cases, only the client may waive the attorney-client privilege of confidentiality.

Sexual contact between an attorney and a client is almost always considered a breach of conduct. Sexual contact represents a clear breach of attorney-client trust. It is also a clear conflict of interest because it can easily result in the attorney's placing his or her own needs above those of the client, and it makes it difficult for the attorney to argue the client's case dispassionately.

### Other Types of Misconduct

As the model rules indicate, an attorney may be charged with misconduct if she or he commits a criminal act. However, not all violations of the law may result in professional censure. According to the ABA, a lawyer is professionally responsible "only for offenses that indicate lack of those characteristics relevant to law practice." These include violations involving "violence, dishonesty, breach of trust, or interference with the administration of justice" (*Model Rules of Professional Conduct,* Rule 3). Nevertheless, violations of the law may seriously impair an attorney's professional standing.

Ethical rules also govern the conduct of attorneys before courts. Thus, an attorney is guilty of misconduct toward the court if he or she brings a frivolous, or unnecessary, proceeding to court; makes false statements to the court; offers false evidence; or unlawfully obstructs another party's access to evidence. It is also considered misconduct if an attorney attempts to influence a judge or juror by illegal means, such as **BRIBERY** or intimidation, or states personal opinions regarding the justness of a cause or the credibility of a witness. Special rules govern trial publicity as well. These forbid an attorney to make statements outside of court that will influence a court proceeding. For example, an attorney may not make statements related to the character, credibility, guilt, or innocence of a suspect or witness in a court proceeding. Attorneys are forbidden to communicate directly or indirectly with a party represented by another lawyer in the same matter, unless they receive permission from the other attorney. This law is designed to protect laypersons involved in legal proceedings from possibly hurting their cases by speaking with the opposing lawyer.

Federal and state laws also define attorney misconduct and empower judges to discipline wayward attorneys. Rule 11 of the Federal Rules of Civil Procedure (28 U.S.C.A.), for example, requires sanctions for lawyers and clients who file frivolous or abusive claims in court. In a 1989 case, *Nasco, Inc. v. Calcasieu Television & Radio,* 124 F.R.D. 120 (W.D. La.), a federal district judge suspended two lawyers and disbarred another for "illegal and fraudulent schemes and conspiracies" designed to slow a case in court for the benefit of their client.

Beginning in the late 1980s, attorneys have been required to report the misconduct of other lawyers, with failure to do so considered to be misconduct in itself and resulting in serious disciplinary measures. A 1989 Illinois Supreme Court ruling, *In re Himmel,* 125 Ill. 2d 531, 533 N.E.2d 790, found that attorneys have a duty to report other lawyers' misconduct even when a client has instructed them not to do so. The Illinois Supreme Court suspended James H. Himmel from the practice of law for one year after he failed to report a misappropriation of client funds by another lawyer, a violation of rule 1-103(a) of the Illinois Code of Professional Responsibility. Himmel's failure to report, the court found, had allowed the offending attorney to bilk other clients as well. The attorney guilty of misappropriating funds was disbarred.

Lawyers have also been found guilty of misconduct with regard to the advertising of their services. It is legal and ethical for attorneys to advertise, but if that advertising is false, deceptive, or misleading, makes unsubstantiated comparisons to another lawyer's services, or proposes means contrary to rules of professional conduct, the attorney can be charged with misconduct. For example, an attorney was disbarred in Maryland for publishing misleading advertisements soliciting customers for "quickie" foreign divorces and misrepresenting his competence and knowledge of the law (*Attorney Grievance Committee v. McCloskey,* 306 Md. 677, 511 A.2d 56 [1986]).

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CROSS-REFERENCES

American Bar Association; Attorney-Client Privilege; Civil Procedure; Ethics, Legal; Legal Advertising; Legal Representation; Malpractice; Model Rules of Professional Conduct; Public Defender; Trial.

## ATTORNEY'S LIEN

*The right of a lawyer to hold a client's property or money until payment has been made for legal aid and advice given.*

In general, a lien is a security interest used by a creditor to ensure payment by a debtor for money owed. Since an attorney is entitled to payment for services performed, the attorney has a claim on a client's property until compensation is duly made.

A *charging lien* is an attorney's right to a portion of the judgment that was won for the client through professional services. It is a specific lien and only covers a lawyer's claim on money obtained in a particular action.

A *retaining lien* is more general in its scope. It extends to all of a client's property that an attorney might come into possession of during the course of a lawsuit. Until an attorney is compensated for services, he or she has a claim or interest in such property.

## AUCTIONS

*A sale open to the general public and conducted by an auctioneer, a person empowered to conduct such a sale, at which property is sold to the highest bidder.*

A *bid* is an offer by a *bidder,* a prospective purchaser, to pay a designated amount for the property on sale.

A Dutch auction is a method of sale that entails the public offer of the property at a price in excess of its value, accompanied by a gradual reduction in price until the item is purchased.

According to the UNIFORM COMMERCIAL CODE (UCC), a body of law governing commercial transactions that has been adopted by the states, the auction sale of any item concludes with the fall of the hammer or in any other customary manner. Such a sale is "with reserve," which denotes that the goods can be withdrawn at any time, until the auctioneer announces the completion of the sale, unless the goods are explicitly put up "without reserve," which signifies that the article cannot be withdrawn after the call for bids unless no bid is made within a reasonable time. In both types of auctions, the bidder can withdraw a bid prior to the auctioneer's announcement that the sale has been completed.

### Regulation

As a legitimate business enterprise, auctions cannot be proscribed. They are not above reasonable regulation by both state and local authorities. Some states subject auction sales to taxation.

In the absence of statutes, any person can act as an auctioneer, but a license, which usually restricts his or her authority to a certain region, is often required. Licensing officers can refuse to issue a license, but only if done reasonably, impartially, and to promote the interest of the community.

### Agency of Auctioneer

An auctioneer serves as the agent of the seller who employs him or her, and the auctioneer must act in GOOD FAITH, advance the interest of the seller, and conduct the sale in accordance with the seller's instructions. If real property or goods priced at $500 or more are sold at auction, a written agreement is necessary to satisfy the STATUTE OF FRAUDS, an old ENGLISH LAW adopted in the United States that requires certain contracts to be in writing. The auctioneer is authorized to sign a memorandum of sale on behalf of both parties, but this authority is limited and expires shortly after the sale has been concluded. Both the buyer and the

seller are bound by the announcement of the auctioneer concerning the identity of the property and the terms and conditions of the sale.

In the absence of a statutory provision requiring authority to be in writing, an agent, pursuant to oral authorization, can execute any contract required to be in writing. The statutory provisions vary, however, in regard to the execution of contracts to purchase real property.

Because of the trust and confidence the seller reposes in an auctioneer, the individual cannot delegate the power to sell without special authority from the seller. The delegation of insignificant duties, such as the striking of the hammer and the announcement of the sale, is allowable if conducted pursuant to the auctioneer's immediate supervision and direction.

An auctioneer's authority normally terminates upon the completion of the sale and the collection of the purchase price, but the seller can revoke the authority at any time prior to the sale. According to some authorities, the buyer or seller can end the auctioneer's authority to sign a memorandum on his or her behalf between the time of the fall of the hammer and the signing of the memorandum, but the prevailing view deems the auctioneer's authority to be irrevocable. Private sales by an auctioneer are generally impermissible.

### Conduct and Validity of Sale

The owner of the property has the right to control the sale until its conclusion. Unless conditions are imposed by the seller, the auctioneer is free to conduct the sale in any manner chosen, in order to bar fraudulent bidders and to earn the confidence of honest purchasers. The auctioneer cannot amend the printed terms and conditions of the auction, but he or she is empowered to postpone the sale, if that is the desire. The auctioneer can modify the sale terms of goods advertised in a catalog at any time during the sale, if announced publicly and all of the bidders present are cognizant of it. The auctioneer may also retain the right to resell should there be an error or a dispute concerning the sale property. The description of the property in the catalog must be unambiguous. A significant error in a description might cause the cancellation of the sale, although trivial discrepancies between the property and the description are not problematic. The seller can withdraw property until the acceptance of a bid by an auctioneer.

A bid is an offer to purchase, and no obligations are imposed upon the seller until the bid is accepted. It can be made in any manner that demonstrates the bidder's willingness to pay a particular price for the auctioned property, whether orally, in writing, or through bodily movements, such as a wave of the hand. Secret signals between the bidder and the auctioneer militate against equality in bidding and are thereby prohibited. The auctioneer accepts a bid by the fall of the hammer or by any other perceptible method that advises the bidder that the property is his or hers upon tendering the amount of the bid in accordance with the terms of the sale. An auctioneer can reject a bid on various grounds, such as when it is combined with terms or conditions other than those of the sale, or is below the minimum price acceptable to the owner.

As a general rule, any act of the auctioneer, seller, or buyer that prevents an impartial, free, and open sale or that reduces competition in the bidding is contrary to public policy. An agreement among prospective buyers not to bid has been held to void the sale to any buyer within this group. A purchase by a person who has not participated in the illegal agreement remains in effect. A *puffer* or *shill* is a person who has no intention of buying but is hired by the seller to place fictitious bids in order to raise the bidding of genuine purchasers. In general, if a purchaser at an auction can prove that a puffer was employed, he or she can void the sale. Some jurisdictions require the buyer to have been financially hurt by the puffer, but others permit an individual to void a sale even if no harm occurred. Puffing and *by-bidding* are synonymous.

A deposit is not a pledge but a partial payment of the purchase price, usually made payable to the auctioneer who retains it until the completion of the sale.

The property of one person should not be commingled and sold with the property of another by the auctioneer unless notice is furnished to all interested parties, or it might constitute FRAUD.

An auctioneer is not entitled to bid on property that he or she has been hired to sell, but the auctioneer can, however, bid a particular sum for a purchaser without violating any duties to the seller or even to other prospective bidders.

An auctioneer who does not have the required license but who executes a sale can be

*Paul Gaugin's* Pont Aven Landscape *was sold in an auction held by Christie's in May 1998.*

AP/WIDE WORLD PHOTOS

penalized, but the sale remains valid; an auction is void, however, when it is conducted without the owner's consent.

### Rights and Liabilities of Buyer and Seller

In an unconditional sale, title passes to the bidder when the auctioneer's hammer falls. If conditions exist, title passes upon their fulfillment or through their waiver, the intentional relinquishment of a known right. The bidder is ordinarily entitled to possession when he or she pays the amount bid.

A person who bids on behalf of another is personally liable for the bid unless the person discloses this relationship to the auctioneer.

Fraud, or a MISREPRESENTATION of a material fact on which the buyer detrimentally relied, or the seller's failure to provide good title furnishes a basis for setting aside the sale.

The seller has a lien, a security interest, on the property until the price is paid. If the purchaser fails to comply with the conditions of a sale, the seller can regard the sale as abandoned and sue for damages. Where a resale occurs, and the price is lower than the contract price, the defaulting buyer in some jurisdictions is liable to the seller for the difference between what he or she had agreed to pay and what the seller received on the resale. In general, whether a deposit or a partial payment must be repaid depends upon which party was responsible for the uncompleted sale. If the buyer is responsible, he or she cannot recover either the deposit or partial payment.

### Compensation

The party employing the auctioneer pays a commission regardless of whether he or she procures a sale, unless the auctioneer is responsible for the failure of the sale. The auctioneer is entitled to a reasonable sum unless a statute or contract provision determines the amount.

### Liabilities of Auctioneer

An auctioneer is usually liable to the seller for monetary losses attributable to his or her NEGLIGENCE in failing to follow the seller's instructions. The auctioneer can also be responsible to the buyer for fraud, conduct in excess of authority, and failure to deliver the goods. Since the auctioneer is a stakeholder, a third party designated by two or more persons to retain on deposit money or property that is the subject of a dispute, the auctioneer is liable to the buyer in

those instances where the buyer is entitled to the return of the deposit. An auctioneer who sells property on behalf of one who does not own it and delivers the proceeds to that person is personally liable to the rightful owner even though the auctioneer acted in good faith and without knowledge of the absence of title. He or she can recover his or her losses from the person who received the proceeds in the form of damages that he or she was ordered to pay to the actual owner.

### Online Auctions

With its ability to connect potential buyers and sellers from anywhere in the world, the INTERNET has become an increasingly important player in auctions. The first online auctions appeared on the Internet in 1995, and according to the FEDERAL TRADE COMMISSION (FTC) these auctions have become "perhaps the hottest phenomenon on the Web." Large organizations can participate in online auctions but so can individual sellers and small businesses.

The rules for online auctions are fairly straightforward. For a typical person-to-person site, the sellers will open an account and are assigned an on-screen name. They must pay a fee whenever they conduct an auction. The seller can set a time limit on the bidding, as well as a minimum price. If a buyer puts in a bid that the seller accepts, they complete the transaction, often via email, arranging for payment and delivery of the goods. Many sites allow buyers to pay by credit card (which protects the buyer in case merchandise is not delivered); some individual sellers require payment by cashier's check or money order (to protect against bounced checks). Some buyers and sellers conduct their money transactions through online payment or online escrow services, which serve as a secure site for sending and receiving payment information. These payment arrangements are more a matter of caution than lack of trust. In fact, auction sites usually offer some form of insurance or guarantees to ensure that merchandise is both paid for and delivered as agreed by the buyer and the seller.

Although online auctions are generally safe for both buyers and sellers, auction fraud does occur. Buyers who report online auction fraud to the FTC commonly complain that merchandise never arrives or that it arrives late or that the merchandise that does arrive is not what was advertised. There are other more problematic types of fraud. In "bid siphoning," a bidder is lured off a legitimate auction site by a phony seller who promises to sell the same item as that being auctioned for a lower price. The buyer sends money to this "seller," who offers no guarantees—and usually no merchandise. Fraudulent online sellers, like their "live" counterparts, may also employ puffers to bid up the price of an item, or they may engage in "bid shielding," in which extremely high bids are submitted and then retracted so that a preferred bidder can put in a lower bid and obtain the item.

Both buyers and sellers who engage in online auctions are advised to take common-sense precautions. First, people should deal with legitimate auction sites whose reputations are established. They should determine that terms of bidding, payment, and delivery are spelled out ahead of time. Also it is a good idea to check out online payment or escrow services, particularly if the buyer or seller insists on using a particular one whose reputation is not known. Buyers and sellers can contact their local branch of the Better Business Bureau to find out whether complaints have been lodged against a particular service or site.

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Internet; Sales Law; Uniform Commercial Code.

## AUDI ALTERAM PARTEM

*[*Latin, hear the other side.*] It embodies the concept in* CRIMINAL LAW *that no person should be condemned unheard; it is akin to* DUE PROCESS. *The notion that an individual, whose life, liberty, or property are in legal jeopardy, has the right to confront the evidence against him or her in a fair hearing is one of the fundamental principles of*

CONSTITUTIONAL LAW *in the United States and England.*

CROSS-REFERENCES

Habeas Corpus.

## AUDIT

*A systematic examination of financial or accounting records by a specialized inspector, called an auditor, to verify their accuracy and truthfulness. A hearing during which financial data are investigated for purposes of authentication.*

The INTERNAL REVENUE SERVICE (IRS) conducts two types of audits, called examination of taxpayer returns, and they are typically conducted using one of two types of procedures. The most common auditing procedure involves correspondence between the service and the taxpayer or interviews with the taxpayer in a local IRS office. A less common method involves field audits whereby IRS officials conduct the audit at the taxpayer's home or place of business. Treas. Reg. § 601.105(b)(1). The service determines which audit procedure should be followed in a particular case. During an audit, an IRS official may question the taxpayer about a particular transaction or transactions that appear on the taxpayer's return or may conduct a thorough investigation of the taxpayer's entire tax return.

Although many people fear audits by the IRS, the percentage of returns examined by the IRS is relatively low. For example, of 108,034,700 returns filed by taxpayers in 1997, the IRS examined 1,662,641, or about 1.5 percent of the total number of returns. Despite this low number, several stories surfaced in the 1980s and 1990s regarding abuses by IRS officials, many of which occurred during the audit process. Congress responded by enacting two "Taxpayer Bill of Rights," first in 1989 and again in 1996. The second act, the TAXPAYER BILL OF RIGHTS 2, Pub. L. No. 104-168, 110 Stat. 1452, established and delegated authority to the Office of Taxpayer Advocate. This office is responsible for assisting taxpayers in resolving problems with the IRS, identifying areas where taxpayers have had problems with the service, and identifying potential legislative and regulatory changes that could mitigate problems between the IRS and taxpayers.

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Internal Revenue Service.

## ♦ AUGUSTUS, JOHN

During the nineteenth century CRIMINAL LAW, in particular, was slowly evolving toward a more humanistic and equitable approach than had previously been taken. One man in Massachusetts, through an act of compassion, initiated a procedure that was the forerunner of the PROBATION system.

John Augustus, born 1785, was a cobbler in Boston during the 1840s. He was interested in the legal process and often visited the criminal courts in Boston. In 1841, he was especially touched by the plight of a person convicted of public intoxication who begged the court not to incarcerate him and promised to give up alcohol in return for his freedom. Augustus, sensing hope for the man's rehabilitation, paid the man's bail; three weeks later, Augustus returned to court with his sober charge. The judge was favorably moved, and the man was allowed to go free.

After his initial success, John Augustus continued to take custody of convicted criminals. By the time he died in 1859, he had helped nearly

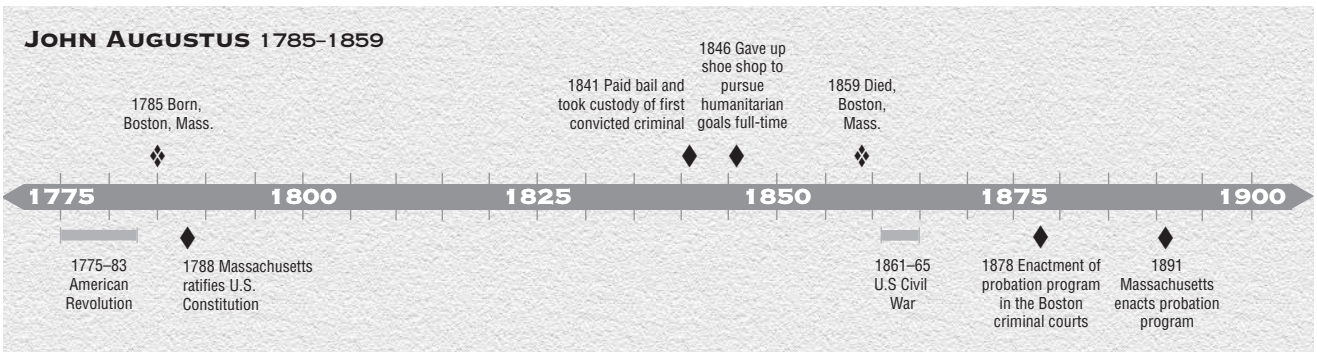

2,000 prisoners. He used his own money for bail or received financial aid from other residents of Boston who believed in his cause; several of these followers continued the program after his death.

Augustus's benevolence was made an official practice in 1878 when a law was enacted assigning a regular probation officer to the Boston criminal courts. In 1891, the commonwealth of Massachusetts adopted a similar program, and during the next nine years, other states began to provide for probationary programs based on the humanitarian actions of John Augustus.

Augustus died June 21, 1859, in Boston, Massachusetts.

## ♦ AUSTIN, JOHN

John Austin was a nineteenth-century legal theorist and reformer who achieved fame posthumously for his published work on *analytical jurisprudence,* the legal philosophy that separates positive law from moral principles.

According to Austin, positive law is a series of both explicit and implicit commands from a higher authority. The law reflects the sovereign's wishes and is based on the sovereign's power. Backed by sanctions and punishment, it is not the same as divine law or human-inspired moral precepts. Viewing the law in this way, Austin did not so much question what it ought to be but revealed it for what he thought it was. Analytical JURISPRUDENCE sought to consider law in the abstract, outside of its ethical or daily applications. In Austin's view, religious or moral principles should not affect the operation of law.

"A LAW . . . IN ITS LITERAL MEANING . . . MAY BE SAID TO BE A RULE LAID DOWN FOR THE GUIDANCE OF AN INTELLIGENT BEING BY AN INTELLIGENT BEING HAVING POWER OVER HIM."
—JOHN AUSTIN

Austin was not as influential in his lifetime as his fellow Utilitarians JEREMY BENTHAM, James Mill, and JOHN STUART MILL. His intellectual output did not match his potential, owing in part to poor health and a self-defeating attitude. Yet Austin is regarded by legal historians as a significant figure in the development of modern English jurisprudence.

Austin was born in England in 1790, the son of a prosperous miller. After a stint in the army, he studied law but was not an enthusiastic or especially capable practitioner. Reflecting a keen, analytical mind, Austin's skills lay in writing and theory rather than in EQUITY pleadings. Austin gave up his law practice in 1825 and, in 1826, was named the first professor of jurisprudence at the University of London. To strengthen his academic credentials, Austin studied ROMAN LAW and German CIVIL LAW in Heidelberg and Bonn from 1827 to 1828.

Austin's professional pursuits were undermined by his ill health and self-doubt. In 1832, he resigned from teaching because his lectures were poorly attended. During the same year, Austin published the barely noticed *The Province of Jurisprudence Determined,* a collection of his university lectures. Shortly thereafter, he accepted a post on the Criminal Law Commission, but he resigned from that when his suggestions were not followed. Austin's attempt, in 1834, to resume his legal lectures for the Society of the Inner Temple failed.

In 1838 Austin served on a commission investigating complaints about the management of Malta, a British colony. This time, his efforts were successful, as his work led to tariff reform and improvements in the Maltese government.

The following decade, Austin lived abroad with his wife, Sarah Taylor Austin. In 1848, the couple returned to England, where Austin died on December 1, 1859. In 1863, his widow republished *The Province of Jurisprudence Determined* under the new title *Lectures on Jurisprudence.* This single volume received the widespread acclaim that had eluded Austin during his lifetime.

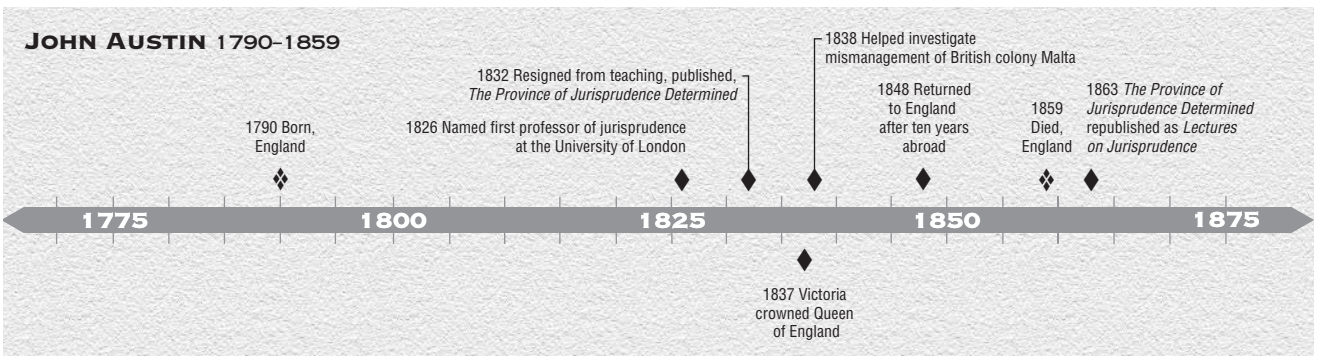

Although critics of analytical jurisprudence do not accept Austin's separation of social and moral considerations from the law, they value his contributions to the discussion. Austin's writings influenced other prominent legal theorists, including U.S. Supreme Court justice **OLIVER WENDELL HOLMES JR.**

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**CROSS-REFERENCES**

Jurisprudence; Utilitarianism.

## AUTHENTICATION

*The confirmation rendered by an officer of a court that a certified copy of a judgment is what it purports to be, an accurate duplicate of the original judgment. In the law of evidence, the act of establishing a statute, record, or other document, or a certified copy of such an instrument as genuine and official so that it can be used in a lawsuit to prove an issue in dispute.*

Self-authentication of particular categories of documents is provided by federal and state **RULES OF EVIDENCE**. A deed or conveyance that has been acknowledged by its signers before a **NOTARY PUBLIC**, a certified copy of a public record, or an official publication of the government are examples of self-authenticating documents.

## AUTHORITIES

*Governmental entities that have been created and delegated with official responsibilities, such as a county highway authority. In legal research and citation, entities cited as sources of law, such as statutes, judicial decisions, and legal textbooks. Parties support their positions in a lawsuit by citing authorities in briefs, motions, and other documents submitted to the court.*

Primary authorities are citations to statutes, court decisions, and government regulations that, if having the force of law, must be applied by the court to dispose of the issue in dispute if they are relevant to the matter. Secondary authorities are references to treatises, textbooks, or restatements that explain and review general principles of law that buttress a party's position in a lawsuit. Such authorities have no legal effect and can be disregarded by the court.

Authorities are also cited by scholars in legal treatises, hornbooks and restatements to establish the bases of the statements and conclusions contained in the works.

**CROSS-REFERENCES**

Primary Authority; Secondary Authority.

## AUTHORIZE

*To empower another with the legal right to perform an action.*

The Constitution authorizes Congress to regulate interstate commerce.

## AUTOMATISM

*An involuntary act such as sleepwalking that is performed in a state of unconsciousness. The subject does not act voluntarily and is not fully aware of his or her actions while in a state of automatism. Automatism has been used as a defense to show that a defendant lacked the requisite mental state for the commission of a crime. A defense based on automatism asserts that there was no* act *in the legal sense because at the time of the alleged crime, the defendant had no psychic awareness or volition. Some American jurisdictions have recognized automatism as a complete,* **AFFIRMATIVE DEFENSE** *to most criminal charges. An* **INSANITY DEFENSE**, *by comparison, asserts that the accused possessed psychic awareness or volition, but at the time of the offense, the accused possessed a mental disorder or defect that caused them to commit the offense or prevented them from understanding the wrongness of the offense.*

## AUTOMOBILE SEARCHES

The **FOURTH AMENDMENT** to the U.S. Constitution guarantees U.S. citizens freedom from "unreasonable searches and seizures." In *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), the U.S. Supreme Court established the principle that a warrant issued by a "neutral and detached magistrate" must be obtained before a government authority may breach the individual privacy that the Fourth Amendment secures. The *Katz* decision held that "searches that are conducted outside the

# Automobile Searches: Is the Fourth Amendment in Jeopardy?

The right to move about freely without fear of governmental interference is one of the cornerstones of democracy in America. Likewise, freedom from governmental intrusions into personal privacy is a cherished U.S. right. Automobiles have come to symbolize these rights in the United States, but freedom and autonomy often conflict with law enforcement's interest in preserving domestic order.

The **FOURTH AMENDMENT** to the Constitution guarantees U.S. citizens freedom from "unreasonable searches and seizures." The Supreme Court, in *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), interpreted the Fourth Amendment to mean that a warrant issued by a "neutral and detached magistrate" must be obtained before police officers may lawfully search **PERSONAL PROPERTY**. The Court in *Katz* held that "searches conducted outside the judicial process, without prior approval by a judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."

In its struggle to balance the Fourth Amendment's personal privacy guarantees with the government's interest in effective law enforcement, the Court has allowed numerous exceptions to the warrant requirement, prompting debate over the amendment's continued viability. A particularly tricky area involves decisions regarding warrantless automobile searches.

Beginning with its decision in *Carroll v. United States,* 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), the Court has granted law enforcement personnel substantial latitude when searching automobiles and their contents. *Carroll* and its progeny established that automobiles constitute a distinct class of personal property that deserves less privacy protection than other types of property. The Court has consistently held that because a car and its contents are easily and quickly moved, police officers need not obtain a warrant to search them if they reasonably believe that doing so would result in lost evidence.

Since its decision in *Carroll,* the Supreme Court has articulated several rationales for allowing warrantless vehicle searches. First, the Court followed *Carroll* and held that a warrantless search of an automobile is valid because of the exigent circumstances involved (see, e.g., *Chambers v. Maroney,* 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 [1970]). Next, the Court found that warrantless automobile searches are justified because individuals have a lower expectation of privacy in their automobiles than in their homes (see, e.g., *Cardwell v. Lewis,* 417 U.S. 583, 94 S. Ct. 2464, 41 L. Ed. 2d 325 [1974] [plurality opinion]). Finally, the Court extended the warrant exception to containers found inside a vehicle, reasoning that if the police could legally search an automobile, they could also legally search containers found in the automobile (see *United States v. Ross,* 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 [1982]). However, the Court had previously ruled that where a vehicle search was illegal, a subsequent search of a suitcase found inside the trunk of the vehicle was also illegal (*Arkansas v. Sanders,* 442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 [1979]). The need to distinguish between a *Sanders* situation and a *Ross* situation caused some confusion, both for the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Over the years, the Court has recognized a number of exceptions to this rule that allow the police to conduct a legal search without a warrant in certain situations. One of these exceptions is for automobile searches.

## Warrantless Searches

The automobile exception was first announced in *Carroll v. United States,* 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), where the Court held that federal **PROHIBITION** agents had been justified in searching, without a warrant, an automobile that they had stopped on a public highway, because the agents had had **PROBABLE CAUSE** to believe that it contained contraband. The Court found that the search had been justified by the exigency of the circumstances, noting that, unlike a dwelling, store, or other structure, an automobile can be "quickly moved out of the locality or jurisdiction in which the warrant must be sought."

After the *Carroll* decision, the Court embarked on a long, and often confusing, line of decisions that interpreted the automobile exception as it applied not only to automobiles but also to containers found in automobiles; to mobile homes; and to sobriety checkpoints. For several decades, the Court rarely cited *Carroll* in vehicle-search cases. Instead, it relied on the "search incident to arrest" doctrine, which allowed the police to search, without a warrant,

police and for the courts. This need was finally addressed by the Court in 1991.

Underlying all the exceptions to the warrant requirement is the need to assist law enforcement personnel without unduly trampling on the Constitution. However, some have argued that the pendulum has swung too far in favor of **POLICE POWER**. In 1991, the Court extended the permissible scope of the warrant exception with its decision in *California v. Acevedo,* 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619, which upheld the warrantless search of a bag found inside the defendant's vehicle. In an attempt to clarify the law regarding warrantless searches of containers found in automobiles, the justices announced that the Fourth Amendment does not require a distinction between **PROBABLE CAUSE** to search an entire vehicle, including containers found inside (as in *Ross*), and probable cause to search only a container found inside an automobile (as in *Sanders*). The Court announced a new and succinct rule regarding automobile searches: "The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained."

The *Acevedo* decision provides what is known as a bright-line rule, that is, a **RULE OF LAW** that is clear and unequivocal. But bright-line rules can obscure the important nuances that surround an issue. The *Acevedo* decision left little doubt in the minds of law enforcement personnel that they could, with probable cause, search not only an automobile but also any containers found inside. But that clarity and the unfettered discretion it gives the police trouble some legal analysts. They assert that the ruling effectively guts the Fourth Amendment as it applies to automobile searches and, perhaps more disturbing, that its reasoning could and probably will be applied to searches of other types of personal property.

Justice **JOHN PAUL STEVENS** noted in his dissent to *Acevedo* that the majority's ruling creates the paradoxical situation in which a container, such as a briefcase, is not subject to a warrantless search when it is carried in full view on a public street but becomes subject to such a search upon being placed inside an automobile.

Critics of *Acevedo* also argue that it contradicts earlier rationales established to support exceptions to the warrant requirement. In *Acevedo,* the Court found no exigent circumstances to justify the search, as it had in *Carroll,* since the police could have legally seized the bag and obtained a warrant for a later search. Neither, assert critics, would the defendant's expectation of privacy in the bag be diminished by virtue of his placing it into the automobile.

Lacking both exigency and the lesser expectation of privacy justifications, the Court turned to policy considerations to support its decision in *Acevedo.* The majority stated that law enforcement personnel were unnecessarily impeded by the Court's previous rulings on this issue. The Court dismissed privacy concerns by stating that protection of privacy is minimal anyway, since in many automobile search cases the police may legally search a container under the "search-incident-to-arrest" justification. Critics respond that the policy underlying that exception is that the police should be able to secure the arrest site in order to protect their safety; it does not follow that the police should be allowed to search containers even when they are not in danger.

Critics assert that by giving the police the discretion to determine what is a reasonable search, the Court ignored established precedent governing Fourth Amendment cases. Justice **ROBERT H. JACKSON** wrote in *Johnson v. United States,* 333 U.S. 10 (1948),

> The point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those

*continued*

the areas surrounding an arrest site. Originally, the police could search areas that were outside the control of the arrested person. (See, e.g., *Harris v. Stephens,* 361 F.2d 888 [8th Cir. 1966], *cert. denied,* 386 U.S. 964 [1967], in which the Court let stand a ruling by the Eighth Circuit Court of Appeals that the search of a car parked in a driveway, while the suspect was arrested at the front door of his house, was valid). However, the Court restricted the "search incident to arrest" standard in *Chimel v. California,* 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), which held that a warrantless search must be limited to the area within the immediate control of the arrestee.

After the *Chimel* decision, the Court abandoned this line of reasoning and returned to the "probable cause accompanied by exigent circumstances" rationale in *Carroll.* In *Chambers v. Maroney,* 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970), the justices found that *Carroll* supported a warrantless search of an impounded car. They based this finding on the theory that had the search been conducted at the time of the arrest, it would have been valid because of the exigent circumstances that existed at that time. The fact that the car was impounded, and therefore immobile, by the time the search was conducted did not affect the Court's decision. A year later, in *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) (plurality opinion), the Court held that a search conducted with a warrant that was later found to be invalid fell outside of the automobile exception.

## AUTOMOBILE SEARCHES: IS THE FOURTH AMENDMENT IN JEOPARDY? (CONTINUED)

> inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

According to Justice Stevens, the majority in *Acevedo* rejected this precedent without justification.

Justice **ANTONIN SCALIA** took a different approach. He suggested in his concurrence to *Acevedo* that the Fourth Amendment does not proscribe *warrantless* searches but rather prohibits *unreasonable* searches. Scalia argued that "the supposed 'general rule' that a warrant is always required does not appear to have any basis in the common law."

Lower federal courts and state courts of appeals have struggled with the question of whether *Acevedo* effectively expands law enforcement officers' ability to search automobiles without a warrant. For example, in *United States v. Brooks*, 838 F. Supp. 58 (W.D.N.Y. 1993), the U.S. District Court for the Western District of New York upheld the conviction of an individual for distribution and conspiracy to distribute cocaine after officers conducted a warrantless search of the defendant's automobile. The officer, an undercover police agent, knew that a package contained cocaine, and the agent and other officers observed the defendant place the package in the front seat of the car. Noting Scalia's concurrence, the Court distinguished between a warrantless search and an unreasonable search. Because the officer knew that the package contained cocaine, the search of the automobile for the package was reasonable.

Some state courts have invalidated warrantless searches notwithstanding the *Acevedo* decision, though even these courts have struggled with the application of the decision. In *Green v. Indiana*, 647 N.E.2d 694 (Ind. Ct. App. 1995), officers conducted surveillance of the defendant at his home in Indiana based upon reliable tips. The officers knew that the defendant and another individual planned to deliver cocaine from Texas to Indiana after making a trip to Texas. The officers anticipated that the defendant would return in two days and reestablished surveillance at a state highway in Indiana. The officers did not obtain a **SEARCH WARRANT** for the automobile, though they had discussed the idea. The officers stopped Green's car upon his return, arrested him, and conducted a warrantless search of his automobile. The officers discovered the cocaine during their search. The court held that though the officers had probable cause to conduct the search, it was not impracticable to secure a warrant, relying in part on the *Acevedo* decision, the court held that though the officer had probable cause to conduct the search, it would not have been impracticable for them to secure a warrant, thus their failure to do so rendered the search illegal.

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#### CROSS-REFERENCES

Privacy; Search and Seizure; Search Warrant.

The Court stated that the police in *Coolidge* could not have legally conducted a warrantless search at the arrest scene because no exigent circumstances existed: At the time of arrest, the arrestee had not had access to the car and therefore could not have moved it. The *Coolidge* decision firmly established that the police must show both probable cause and exigent circumstances in order for a warrantless search to be valid.

The Court then added an alternative rationale to support automobile searches, with its decision in *Cardwell v. Lewis,* 417 U.S. 583, 94 S. Ct. 2464, 41 L. Ed. 2d 325 (1974) (plurality opinion). In *Cardwell,* the police had made an impression of the tires of the suspect's car and had taken paint samples from the car, without a warrant. The Court held that the search had been permissible because the police had had probable cause and the search had been conducted in a reasonable manner. No exigency had existed in this case, but the Court found justification in the principle that individuals have a "lower expectation of privacy" in their automobiles. Writing for the plurality, Justice **HARRY A. BLACKMUN** stated, "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects."

The same rationale supported the Court's determination that police officers do not violate the Fourth Amendment when they search a passenger's personal belongings inside an automobile that they have probable cause to believe contains contraband. Officers with probable cause to search a car may inspect passengers' belongings that are capable of concealing the

object of the search. If probable cause justifies the search of a lawfully stopped vehicle, including every part of the vehicle and its contents that may conceal the object of the search, then this rule extends to passengers' property as well, the Supreme Court wrote in *Wyoming v. Houghton*, 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed.2d 408 (U.S. 1999). The BALANCING of the relative interests weighs in favor of allowing searches of a passenger's belongings, because passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars.

This "lesser expectation of privacy" rationale was not sufficient to support a warrantless search in *United States v. Chadwick,* 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977). In *Chadwick,* the defendants were arrested immediately after they had placed a footlocker in their trunk. Federal agents, who had probable cause to believe that the footlocker contained marijuana, impounded the car and opened the footlocker without a warrant. The Court found that although the agents did have probable cause to search the footlocker, they had not proved that they had probable cause to search the car in order to find the footlocker. Since the car was impounded, no exigent circumstances existed. Furthermore, the Court held that the defendants had a greater expectation of privacy in the closed footlocker than in an automobile, which is open to public view. "The factors which diminish the privacy aspects of an automobile do not apply to the (defendants') footlocker," the Court concluded. Therefore, the "lesser expectation of privacy" rationale did not support an extension of the automobile exception to the closed footlocker.

Armed with the *Carroll-Chambers* line of cases (the "probable cause accompanied by exigent circumstances" rationale) and the *Chadwick* decision (the "lower expectation of privacy" rationale), the Court tackled the question of whether a warrantless search of a suitcase found in the trunk of a taxi fell under either justification. In *Arkansas v. Sanders,* 442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979), the police had probable cause to believe that a suitcase picked up by the defendant at an airport contained contraband. After the defendant placed the suitcase in the trunk of a taxi and left the airport, the police stopped the taxi, opened the trunk, and searched the suitcase, which contained the contraband that they expected to find. The Court evaluated the facts under each rationale and found that (a) once the taxi had been stopped, no exigency existed; and, (b) an individual's privacy expectations in a suitcase, which "serve[s] as a repository for personal items," are greater than his or her privacy expectations in an automobile. For these reasons, the Court held that the search had violated the Fourth Amendment.

Later cases, however, extended the automobile exception to containers located in an automobile, where authorities have probable cause to search the automobile. For example, in *United States v. Ross,* 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982), the police stopped a car that they had probable cause to believe contained contraband. Without a warrant, they opened a closed paper bag that they found inside the car's trunk, and discovered heroin. The Court held that the search was valid, reasoning that if the police had probable cause to conduct a warrantless search of the vehicle, they also had justification to search the bag.

However, the Court retreated from this holding in *Knowles v. Iowa*, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (U.S. 1998), where it held that a Fourth Amendment violation had occurred when a police officer had conducted a full search of a car, including the trunk, after the driver had been stopped for speeding. The officer had issued the driver a citation, rather than arresting him, although Iowa law would have permitted an arrest. The U.S. Supreme Court held that the search could not be sustained under the "search incident to arrest" exception to the warrant requirement, as the underlying rationales for the exception, including the need to disarm the suspect and to preserve evidence, did not justify the search of the car's trunk. While the concern for officer safety in the context of a routine traffic stop might justify the *minimal* additional intrusion of ordering a driver and passengers out of the car, the Court said, it does not, by itself, justify the often considerably greater intrusion attending a full field-type search.

The automobile exception was also extended to searches of some mobile homes, in *California v. Carney,* 471 U.S. 386, 105 S. Ct. 2066, 85 L. Ed. 2d 406 (1985). In *Carney,* the police had searched a motor home that was parked in a public lot. The Court found the search to be valid, stating that the mobile home was being used for transportation and that it therefore was as readily

movable as an automobile. In addition, the Court noted a reduced expectation of privacy in a mobile home, as contrasted with an ordinary residence, as mobile homes, like cars, are regulated by the state. In this case, where the mobile home was parked in a public parking lot, rather than a mobile home park, and was not anchored in any way, it resembled a vehicle more than a residence. Therefore, the automobile exception applied. *Carney* established not only that the automobile exception applies to some mobile homes but also that it applies to parked vehicles.

Another extension of the automobile exception, called the inventory exception, was recognized by the Court in *South Dakota v. Opperman,* 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976). Donald Opperman's illegally parked vehicle was ticketed and towed to an impound lot, where the police inventoried its contents. In an unlocked glove compartment, they found marijuana. The Court held that once a vehicle has been legally impounded, its contents may be inventoried. Three justifications were given: protection of the owner's property while it is in police custody; protection of the police against claims; and protection of the police against danger. Likewise, in *Colorado v. Bertine,* 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987), the Court found that marijuana discovered in a closed backpack during an inventory of an impounded vehicle had been legally seized because there was no showing that "the police, who had followed standardized procedures, had acted in bad faith or for the sole purpose of investigation." The Court concluded that "reasonable police regulations relating to inventory procedures administered in GOOD FAITH satisfy the Fourth Amendment."

This patchwork of decisions led many, including Justice LEWIS F. POWELL JR., to conclude that "the law of SEARCH AND SEIZURE with respect to automobiles is intolerably confusing" (*Robbins v. California,* 453 U.S. 420, 101 S. Ct. 2841, 69 L. Ed. 2d 744 [1981] [Powell, J., concurring]). The Court attempted to put the confusion to rest with its decision in *California v. Acevedo,* 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991). In *Acevedo,* federal drug agents tracked a bag that they knew contained marijuana, as it was in transit to the defendant. They then notified police officers, who watched as the defendant put the bag into the trunk of a car and drove away. The police officers stopped the car, opened the trunk, and searched the bag, finding the marijuana. The Court held that the search was legal, stating that it is not necessary for an officer to obtain a warrant before searching a container located in an automobile when the officer has probable cause to believe that the container holds contraband or evidence. After analyzing the long and ambiguous line of automobile exception cases, the Court decided that the distinction between the *Ross* situation (where the police had probable cause to search the car) and the *Sanders* situation (where the police had probable cause only to search the container) was not supported by the requirements of the Fourth Amendment. Discarding the reasoning in *Sanders* as unworkable and an unjustified impingement on legitimate police activity, the justices announced a new and unequivocal rule: "The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained."

The *Acevedo* decision was met with harsh criticism by some legal analysts, who saw it as an excessive retreat from Fourth Amendment guarantees. Supporters, however, pointed out that the police still must establish that they have probable cause to conduct a warrantless search before such a search will be found valid. Probable cause can be shown in a variety of ways, but generally it follows from a chain of events that raise police suspicions from the level of mere conjecture to the level of reasonable grounds. For example, in *Acevedo,* federal drug enforcement agents had previously seized and inspected the package that was eventually delivered to the defendant, and they knew that it contained marijuana. In *Sanders,* a reliable informant had told the police that the defendant would arrive at the airport carrying a green suitcase containing marijuana. And in *Ross,* an informant had told the police that someone known as Bandit was selling drugs from the trunk of his car; when the police located the car described by the informant, they discovered through a computer check that the driver, the defendant, Albert Ross Jr., used the alias Bandit. From these cases, the Court has shown that ARBITRARY searches or searches based on mere suspicion will not be supported by a spurious claim of probable cause.

### Warrantless Seizures of Automobile as Forfeitable Contraband

The Fourth Amendment does not require the police to obtain a warrant before seizing an

*A California Highway Patrolman searches a car allegedly used to smuggle drugs. In* California v. Acevedo *(1990), the U.S. Supreme Court held that police officers may search a car if there is probable cause to believe it contains evidence or contraband.*

AP/WIDE WORLD PHOTOS

automobile from a public place when they have probable cause to believe that it is forfeitable contraband. The U.S. Supreme Court thus reversed a decision in which the Supreme Court of Florida had held that the warrantless seizure of an automobile, pursuant to the Florida Contraband Forfeiture Act, violated the Fourth Amendment in the absence of exigent circumstances. *Florida v. White*, 526 U.S. 559, 119 S. Ct. 1555, 143 L. Ed. 2d 748 (1999).

The case involved a defendant who had been convicted of possession of cocaine, which had been found during a police inventory search of his automobile following its warrantless seizure from a public parking lot pursuant to the Florida Contraband Forfeiture Act. Fla. Stat. 932.701. Although the police lacked probable cause to believe that the defendant's car contained contraband, they did have probable cause to believe that the vehicle itself was contraband under the Florida law.

Fourth Amendment JURISPRUDENCE recognizes the need to seize readily movable contraband before it is spirited away, and this need is equally weighty when the automobile, as distinguished from its contents, is the very contraband that the police seek to secure, the Court observed. In addition to the special considerations recognized in the context of movable items, the Court continued, Fourth Amendment jurisprudence has consistently afforded law enforcement officials greater latitude in exercising their duties in public places. Because the police had seized defendant's vehicle from a public area, the Court concluded that the warrantless seizure had not involved any invasion of the defendant's privacy.

### Sobriety Checkpoints

During the 1980s and 1990s, the Court dealt with a new line of cases in which the automobile exception has been used to justify sobriety-checkpoint programs. Under such programs, police stop motorists, typically along an interstate highway, for the purpose of apprehending drivers who are impaired by alcohol. One such program was challenged and found to be constitutional in *Michigan Department of State Police v. Sitz,* 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990). The Court applied a somewhat more stringent test than that used in automobile search cases, citing as relevant authority a line of cases involving highway checkpoints for discovering illegal ALIENS (see, e.g., *United States v. Martinez,* 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 [1976]; *Brown v. Texas,* 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 [1979]). *Brown*

required "a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." Applying that balancing test, the majority in *Sitz* found that the intrusion on individual liberty imposed by Michigan's sobriety checkpoint program was outweighed by the advancement of the state's interest in preventing drunk driving. Therefore, it concluded that the program did not violate the Fourth Amendment.

Similar sobriety-checkpoint programs have been used in other states. Since the *Sitz* decision, all have passed constitutional muster. Less certain is the constitutionality of narcotics checkpoints. In 1992, Minnesota instituted a random narcotics checkpoint on an interstate highway's exit ramp. The police stopped every third or fourth car and asked several questions of the occupants. If the answers or demeanor of the occupants aroused suspicion, the car was diverted for further investigation. A number of individuals were cited when police found marijuana, either in plain view or after a consensual search of the vehicle.

The Minnesota scheme raises serious constitutional questions. The state has a legitimate interest in curbing the use of illegal drugs. However, it is not clear that a narcotics-checkpoint program is a valid means of promoting this interest, in light of the privacy interest violated by random questioning for investigation of drug possession or use. Similarly, it is unclear whether the Minnesota scheme is the type of minimal intrusion that the Court sanctioned in *Sitz.* Still, the *Sitz* and *Acevedo* decisions, both of which have been criticized as giving too much discretion to the police, indicate that the Court intends to allow a great deal of latitude to law enforcement officials in stopping and searching automobiles under most conditions.

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Privacy; Drugs and Narcotics; Fourth Amendment; Probable Cause; Search and Seizure; Search Warrant.

## AUTOMOBILES

No invention has so transformed the landscape of the United States as the automobile, and no other country has so thoroughly adopted the automobile as its favorite means of transportation. Automobiles are used both for pleasure and for commerce and are typically the most valuable type of PERSONAL PROPERTY owned by U.S. citizens. Because autos are expensive to acquire and maintain, heavily taxed, favorite targets of thieves, a major cause of air and noise POLLUTION, and capable of causing tremendous personal injuries and property damage, the body of law surrounding them is quite large. Automobile law covers the four general phases in the life cycle of an automobile: its manufacture, sale, operation, and disposal.

### Brief History of the Automobile

The first automobile powered by an internal combustion engine was invented and designed in Germany during the 1880s. In 1903, Henry Ford founded the Ford Motor Company and started an era of U.S. leadership in auto production that lasted for most of the twentieth century. In 1908, Ford introduced the highly popular Model T, which by 1913 was being manufactured through assembly line techniques. Innovations by Ford, General Motors, and other manufacturers near Detroit, Michigan, made that city the manufacturing center for the U.S. car industry. By the 1920s, General Motors had become the world's largest auto manufacturer, a

## What to Do If You Are in an Auto Accident

Sooner or later, you are likely to have an accident. Fortunately, it will probably be a minor collision that damages only the vehicles involved. However, whether you are in a minor or major accident, behaving coolly, calmly, and properly after it occurs could save you a lot of money and trouble.

Some suggestions on what to do if you are in an auto accident:

1. If possible, move your car to the side of the road or out of the way of traffic.
2. Turn on your car flashers or set up flares to warn other motorists of the accident.
3. Do not make any statements concerning who was at fault, or assign blame to anyone involved.
4. Help any persons who are injured. Most states have laws requiring you to render aid to anyone injured in the accident. Call an ambulance if necessary.
5. Write down the name, address, license plate number, and driver's license number of the other driver and ask to see his or her vehicle registration certificate and proof of insurance. Write down the insurance company name and policy number of the other driver. If asked, do the same for the other driver. Do not reveal the amount of your insurance coverage.
6. Write down the names and addresses of all passengers involved and of any witnesses to the accident.
7. Notify the police, particularly if anyone is hurt or injured at the scene.
8. Write down the names and badge numbers of any police officers at the scene.
9. If possible, take a picture of the scene of the accident, including damage to cars and skid marks.
10. Draw a rough diagram of what happened in the accident, noting road conditions, weather, and lighting.
11. If you suspect you have any injuries, obtain medical care.
12. Talk to a lawyer if you intend to file a lawsuit regarding the accident.

All states require those involved in an accident to file a report with the police or bureau of motor vehicles if the accident involves a death, a personal injury, or property damage above a certain amount, such as $500. Some states require that the report be made immediately; others allow five to thirty days. Failure to file a report is a misdemeanor in most states and could result in the suspension of your driver's license.

Some insurance companies provide their policyholders with accident report forms. Such forms make it easier to obtain the necessary information if you are in an accident. If you have them, keep them handy in your vehicle.

distinction it still held into 2004. Over time, the auto industry in all countries became increasingly concentrated in the hands of a few companies, and by 1939, the Big Three—Ford, General Motors, and DaimlerChrysler—had 90 percent of the U.S. market. As of 2003, Ford is the world's second-largest auto manufacturer after General Motors Corporation.

In 1929, there were roughly 5 million autos in the United States. All those cars required an infrastructure of roads, and by the end of WORLD WAR II, the federal government had begun aggressively to fund highway development. With the intention of improving the nation's ability to defend itself, Congress passed the Federal-Aid Highway Act of 1944 (58 Stat. 838). It authorized construction of a system of multiple-lane, limited-access freeways, officially called the National System of Interstate and Defense Highways, designed to connect 90 percent of all U.S. cities of 50,000 or more people. In 1956, the Federal-Aid Highway Act (23 U.S.C.A. § 103 [West 1995]) established the Federal Highway Trust Fund, which as of the early 2000s continued to provide 90 percent of the financing for interstate highways. By 1990, the

# Unsafe at Any Speed

For over half a century the automobile has brought death, injury, and the most inestimable sorrow and deprivation to millions of people." So **RALPH NADER** began his 1965 book *Unsafe at Any Speed: The Designed-in Dangers of the American Automobile,* a landmark in the history of U.S. **CONSUMER PROTECTION**.

Nader's book recounts how U.S. automobile manufacturers resisted attempts to improve auto safety in the 1950s and 1960s. Even when makers of other vehicles such as planes, boats, and trains were forced to adhere to safety regulations, automakers were still largely uncontrolled in the area of safety. "The gap between existing design and attainable safety," Nader wrote, "has widened enormously in the postwar period."

Nader examined how auto companies lobbied against safety regulation and organized public relations campaigns that asserted over and over again that most injuries were the result of driver error. He argued that the best and most cost-effective way to reduce auto injuries is not to try to alter driver behavior—as honorable a goal as that might be— but to require automakers to design cars that better prevent accidents from occurring and better protect passengers if accidents do occur.

In telling his story, Nader cited sobering statistics on traffic injuries and fatalities, including the fact that auto accidents caused the deaths of 47,700 in 1964—"the extinguishment of about one and three-quarter million years of expected lifetimes," he noted—and one-third of all hospitalizations for injuries and 25 percent of all cases of partial and complete paralysis due to injury. Borrowing the zeal and spirit of the **CIVIL RIGHTS** reform movement and the faith in technology of the space program, Nader looked at traffic fatalities as a public health issue that can be resolved through public action and technological innovation. Quoting Walt Whitman's epigram "If anything is sacred, the human body is sacred," Nader asserted that he was attempting to protect the "body rights" of U.S. citizens.

To protect those rights, Nader used his book to call for a number of different strategies to reduce traffic fatalities and injuries: federal safety standards; a federal facility for auto safety research, design, and testing; increased manufacturer research and development for safety technology; improved consumer information with regard to auto safety; better disclosure of auto manufacturers' safety engineering efforts; and the creation of a **DEPARTMENT OF TRANSPORTATION**. It is a mark of Nader's foresight and determination that all of those goals were achieved in the decades following the publishing of *Unsafe at Any Speed.*

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interstate highway system was 99.2 percent complete and had cost $125 billion.

During the 1970s, the U.S. auto industry began to lose ground to Japanese and European automakers, and U.S. citizens relied to an increasing degree on imported autos. Japan, for example, surpassed the United States in auto production in the 1970s. Oil shortages and embargoes during the 1970s caused the price of gasoline to rise and put a premium on smaller autos, most of which were produced by foreign companies. Foreign cars also earned a reputation for higher quality during this period. The share of foreign cars in the U.S. market rose from 7.6 percent in 1960 to 24.9 percent in 1984.

In the early 1980s, the U.S. auto companies were suffering greatly, and the U.S. government bailed out the nearly bankrupt Chrysler Corporation. The U.S. government also negotiated a quota system with Japan that called for limits on Japanese autos imported into the United States, thereby raising the prices of Japanese cars. By the 1990s, the U.S. auto companies had regained much of the ground lost to foreign companies. In the mid-1990s, however, international manufacturing agreements meant that few cars, U.S. or foreign, were made entirely in one country.

### Manufacture

Throughout the twentieth century, automakers were required to conform to ever stricter

standards regarding the manufacture of their vehicles. These rules were designed to improve the safety, fuel consumption, and emissions of the auto.

**Safety Standards** As autos increased in number and became larger and faster, and people traveled more miles a year in them, the number of motor vehicle deaths and injuries rose. By 1965, some 50,000 people were being killed in motor vehicle accidents every year, making automobiles the leading cause of accidental death for all age groups and the overall leading cause of death for the population below age 44. Between 1945 and 1995, 2 million people died and about 200 million were injured in auto accidents—many more than were wounded and injured in all the wars in the nation's history combined.

Beginning in the 1960s, consumer and automobile safety advocates began to press for federal safety standards for the manufacture of automobiles that would reduce such harrowing statistics. The most famous of these advocates was RALPH NADER, who published a 1965 book on the deficiencies of auto safety, called *Unsafe at Any Speed: The Designed-in Dangers of the American Automobile.* From 1965 to 1995, more than 50 safety standards were imposed on vehicle manufacturers, regulating the construction of windshields, safety belts, head restraints, brakes, tires, lighting, door strength, roof strength, and bumper strength.

In 1966, Congress passed the National Traffic and Motor Vehicle Act (15 U.S.C.A. § 1381 note, 1391 et seq. [1995]), which established a new federal regulatory agency, the National Highway Safety Bureau, later renamed the National Highway Traffic Safety Administration (NHTSA). NHTSA was given a mandate to establish and enforce rules that would force manufacturers to build vehicles that could better avoid and withstand accidents. It was also given the power to require manufacturers to recall and repair defects in their motor vehicles and the authority to coordinate state programs aimed at improving driver behavior. Also in 1966, Congress passed the Highway Safety Act (23 U.S.C.A. §§ 105, 303 note, et seq. [1995]), which provided for federal guidance and funding to states for the creation of highway safety programs.

As a result of these new laws, 19 federal safety regulations came into effect on January 1, 1968. The regulations specified accident avoidance standards governing such vehicle features as brakes, tires, windshields, lights, and transmission controls. They also mandated more costly crash-protection standards. These included occupant-protection requirements for SEAT BELTS, energy-absorbing steering wheels and bumpers, head restraints, padded instrument panels, and stronger side doors. These auto safety standards significantly reduced traffic fatalities. Between 1968 and 1979, the annual motor vehicle death rate decreased 35.2 percent, from 5.4 to 3.5 deaths per 100 million vehicle miles.

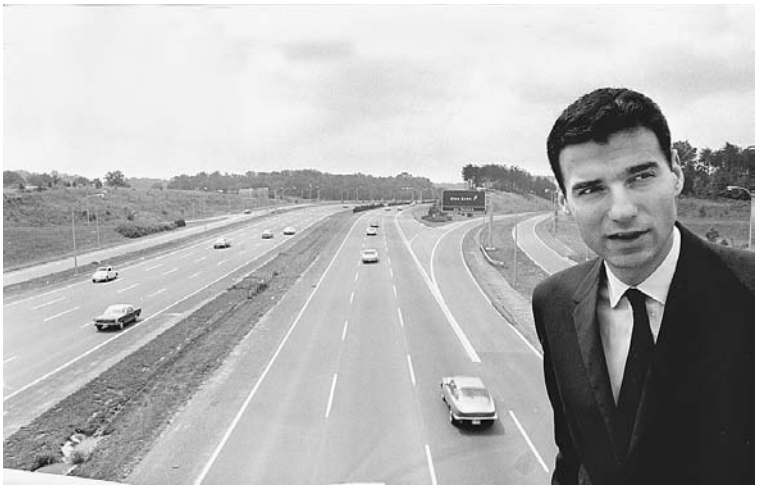

*Ralph Nader, author of* Unsafe at Any Speed, *in 1967. In his book, Nader documents the resistance of the automobile industry to the implementation of safety features.*
AP/WIDE WORLD PHOTOS

The seat belt requirement is usually considered the most important and effective safety standard. According to one study, seat belts that attach across both the lap and the shoulder reduce the probability of serious injury in an accident by 64 percent and of fatalities by 32 percent for front-seat occupants. However, because people do not always use restraints that require their active participation, autos began to be required to have passive restraint systems such as automatic seat belts and air bags. Air bags pop out instantly in a crash and form a cushion that prevents the occupants from hitting the windshield or dashboard. These devices can substantially reduce the motor vehicle death rate. Cars made after 1990 must have either automatic seat belts or air bags, for front-seat occupants.

However, many auto safety experts point out that regulations on the manufacture of automobiles can only go so far in reducing injuries. Studies indicate that only 13 percent of auto accidents result from mechanical failure, and of those that do, most are caused by poor maintenance, not inadequate design or construction. Other analysts assert that safety regulations cause a phenomenon known as offsetting behavior. According to this theory, people will

# No-Fault Automobile Insurance

Ever since the invention of automobiles, there have been automobile accidents. And with those accidents have come legal disputes about who was most at fault in causing them—and who should be forced to pay damages. The U.S. legal and political systems have struggled to determine the best way to handle the large number of legal disputes related to automobile accidents. Although the states vary in their procedures, two basic approaches have evolved. The first and older approach is the traditional liability litigation system, which attempts to determine, usually through jury trials, who is more liable, or more at fault, and must pay damages. The second and more recent approach is no-fault insurance, which simply allows each party to be compensated, regardless of fault, by its own insurance company for accident damages. Both approaches have their advantages and disadvantages, and the debate about which is better continues.

The traditional liability litigation system developed out of the English COMMON LAW. Under this system, anyone who suffers an injury from a wrong or negligent act of another is free to sue the other party for damages. For example, someone who is paralyzed in an automobile accident and becomes confined to a wheelchair may sue the other driver or drivers involved in the accident. Whether or not the injured person receives payment for those damages is largely dependent on a determination of who was more at fault in causing the accident. If, in a court of law, it is determined that the other driver is at fault, then the injured person may collect a large sum from the other driver or, if the other driver has liability insurance, from the other driver's insurance company; if it is determined that the other driver is not at fault, the injured person may not receive any payments beyond those from her or his own insurance company.

This system of resolving disputes is also called the TORT litigation process. In relation to automobile accidents, a tort is a civil (as opposed to criminal) wrong that causes an accident—for example, failure to practice caution while driving, thus causing a collision with another car and injuries to its passengers.

As time passed and auto accidents became more frequent, some people began to point out problems in the liability litigation system for resolving accident disputes. They noted that, owing to the complicated nature of many automobile accidents, it often took a great deal of time to determine who was at fault. As a result, many accident victims had to wait a considerable period before they could receive adequate compensation for their injuries. Other victims who may have been unable to work because of injuries, frequently settled for smaller amounts or even waived their right to a trial, in order to receive faster payment from insurance companies. Other critics of the liability litigation process claimed that the awards granted in auto accident cases varied greatly. Some people were overpaid, and others underpaid, for their damages. A better system, critics maintained, would make all drivers share in the cost of accidents. These critics began to press for a no-fault insurance system as an alternative to liability litigation.

As early as 1946, the Province of Saskatchewan, Canada, enacted no-fault auto insurance. Under a no-fault system, those involved in an accident are compensated for their physical injuries up to a certain limit; even the driver who causes the accident is paid for damages. In its purest form, no-fault automobile insurance does not allow those involved in an accident to sue each other, nor can any party recover damages for pain and suffering. However, no-fault plans are often combined with traditional liability systems to allow accident victims to sue when damages exceed a certain threshold. For example, in New York, it is possible to sue to recover for economic damages greater than $50,000 or for pain and suffering because of death or serious injury. No-fault insurance plans are always compulsory, and every driver who wishes to register a vehicle must obtain at least the minimum standard of no-fault insurance.

In the United States, no-fault automobile insurance was first enacted by Massachusetts in 1971 (Mass. Gen. Laws Ann. ch. 90 § 34A et seq. [West 1995]) in response to public dissatisfaction with long, drawn-out, and expensive court

drive more dangerously because they know their risk of injury is lower, putting themselves, their passengers, and other drivers, passengers, and pedestrians at greater risk and thereby offsetting the gain in safety caused by stricter manufacturing standards.

The NHTSA may also authorize recalls of cars on the road that it deems are safety hazards. In a recall, the federal government mandates that a manufacturer must repair all the vehicles that it has made that have a specific problem. Between 1976 and 1980, the NHTSA authorized the recall of over 39 million vehicles. Recall is a controversial policy. One problem with it is that, typically, only 50 percent of auto owners respond to recall notices.

**Emissions Standards** Emissions standards are intended to reduce the amount of pollution coming from a car's exhaust system. Autos are major contributors to AIR POLLUTION. Some cities, such as Los Angeles, have notorious problems with smog, a situation that can cause seri-

cases for compensation of losses suffered in traffic accidents. In the same year, Congress considered no-fault as a comprehensive national automobile insurance plan, but the proposal never became law. That unsuccessful bill evolved into the National Standards for No-Fault Insurance Plans Act, which would have set federal standards for state no-fault insurance laws. It too did not pass. Opponents of the bill claimed that the states should be allowed to experiment with this new approach before a national plan was adopted. By the mid-1990s, roughly half the states had enacted no-fault insurance plans.

In arguing for no-fault insurance, advocates pointed out a number of advantages, including faster benefits payment and more equal damages awards to accident victims. They claimed that no-fault insurance would reduce the number of traffic-related court cases, thereby freeing up the courts to consider other cases. No-fault, they argued, would also reduce the cost of car insurance premiums as the legal costs associated with settling auto-related cases decreased. Since the establishment of no-fault insurance in many states, no-fault advocates have bolstered their cause even more by pointing to statistics showing that no-fault plans increase the percentage of insurance benefits payments that go to victims rather than to lawyers and court costs. According to those statistics, in states without no-fault insurance, only forty-eight cents of each dollar spent for insurance premiums goes to those injured in accidents, whereas thirty-two cents goes to court costs and lawyers' fees. However, under the no-fault system in force in Michigan, for example, seventy-three cents of each insurance premium dollar goes to accident victims and four cents goes to court costs and lawyers' fees (Carper 1992).

On the other side of the issue, critics make a number of different points against no-fault insurance. Many, including trial lawyers and some consumer advocates, object to no-fault insurance's elimination of or substantial restrictions on the right to sue for damages. Many states, for example, allow injured parties to sue for "pain and suffering" only if they have sustained specific injuries such as dismemberment, disfigurement, or fracture. Often, "soft-tissue" injuries like whiplash are not allowed as adequate grounds for a lawsuit. Critics also maintain that no-fault insurance takes away the incentive to drive safely. Under the system of no-fault insurance, careless, negligent drivers are entitled to the same compensation in an accident as are careful, responsible drivers. In addition, critics of no-fault insurance cite evidence that the system has *not* reduced insurance premiums. Under no-fault plans, they argue, the number of persons receiving benefits payments has increased, thus offsetting the reduction in legal costs.

It remains to be seen whether no-fault insurance will continue to spread to other states. Nevada and Pennsylvania have tried no-fault insurance plans and repealed them, with Nevada returning to a financial responsibility law and mandatory liability and property damage insurance. California has considered no-fault insurance for many years but has never adopted it. Some states are looking at compromise plans that preserve elements of both the traditional liability litigation system and the no-fault system. These plans, such as the one in New York, compensate all accident victims, regardless of fault, for basic economic losses—including medical and hospital expenses and lost wages or services—and in the process eliminate small cases where litigation is least cost-effective. At the same time, such plans preserve the right to sue for damages in cases of death or serious injury or when damages exceed a certain amount.

In the end, the question of how to handle auto accident disputes will be decided on the basis of which system—liability litigation, no-fault insurance, or a compromise between the two—is deemed better at limiting costs and at the same time preserving the value of fairness that underlies the U.S. system of justice.

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Insurance; Tort Law.

ous health problems for those with respiratory problems such as asthma and bronchitis. Air pollution also damages plants, reduces crop yields, lowers visibility, and causes acid rain. In 1970, Congress passed the Clean Air Act Amendments (Pub. L. No. 91-604, 84 Stat. 1676–1713 [42 U.S.C.A. § 7403 et seq. (1995)]), which set an ambitious goal of eliminating, by 1975, 90 to 95 percent of the emissions of hydrocarbons, carbon monoxide, and oxides of nitrogen as measured in 1968 automobiles. Manufacturers did not meet the target date for achieving this goal, and the deadline was extended. Also, the new emissions standards caused problems because they reduced fuel economy and vehicle performance.

Congress modified emissions standards in the 1977 Clean Air Act Amendments (42 U.S.C.A. § 7401 et seq.) and in the Clean Air Act Amendments of 1990 (Pub. L. No. 101-549, 104 Stat. 2399 [42 U.S.C.A. § 7401 et seq. (1995)]). The modified standards, as defined and moni-

tored by the ENVIRONMENTAL PROTECTION AGENCY (EPA), included new requirements for states with low air quality to implement inspection and maintenance programs for all cars. These inspections were designed to ensure that vehicle emissions systems were working properly. In 1992, the EPA implemented strict emissions testing requirements for 18 states and 33 cities with excessive levels of carbon monoxide and ozone.

California has been a leader in setting air quality standards. In 1989, it announced new guidelines that called for the phasing out of gas-fueled cars in southern California by the year 2010.

Critics maintain that federal emissions regulations have been too costly and that regulators should focus on reducing the emissions of more significant polluters, such as power plants and factories.

**Fuel Efficiency Standards** In the 1975 Energy Policy and Conservation Act (Pub. L. No. 94-163, 89 Stat. 871 [codified as amended in scattered sections of 12 U.S.C.A., 15 U.S.C.A., and 42 U.S.C.A.]), Congress created a set of corporate average fuel economy (CAFE) standards for new cars manufactured in the United States. The secretary of transportation was empowered with overseeing these standards. The standards mandated that each car manufacturer achieve an average fuel economy of 27.5 miles per gallon (mpg) for its entire fleet of cars by 1985. Manufacturers that did not achieve these standards were to be fined. In 1980, an additional sales tax at purchase was placed upon "gas guzzlers" (cars that fail to achieve certain levels of fuel economy). The more a car's gas mileage is below a set standard—which was 22.5 mpg in 1986—the greater the tax. For example, a 1986 car that achieved less than 12.5 mpg was charged an additional sales tax of $3,850. Some members of Congress have lobbied for fuel efficiency standards as high as a 40 mpg fleet average for auto manufacturers.

The fleet-average fuel efficiency of cars nearly doubled between 1973 and 1984. However, detractors of fuel efficiency standards maintain that the increase in efficiency was not entirely due to federal standards. They argue that fuel efficiency would have risen without regulation, in response to higher gas prices and consumer demand for more efficient cars.

**Import Quotas** Faced with increasingly stiff competition from Japan and Europe, U.S. car manufacturers in the early 1980s pressed the federal government to limit the number of foreign cars imported into the United States. The administration of President RONALD REAGAN responded by negotiating quotas, or limits, on Japanese car imports from 1981 to 1985. The Japanese voluntarily continued quotas on their car exports through the late 1980s, and quotas on pickup trucks from Japan remained in effect through the mid-1990s.

**Tort Law and Automobile Manufacturing** Courts have established that manufacturers may be held liable and sued for property damage and personal suffering caused by the products they have manufactured. Automobile manufacturers, like all manufacturers, are thus subject to PRODUCT LIABILITY LAW. Anyone who suffers harm, injury, or property damage from an improperly made auto may sue for damages. Actions that involve a breach of the manufacturer's responsibility to provide a reasonably safe vehicle are called TORTS.

Courts have found that auto manufacturers have a duty to reasonably design their vehicle against foreseeable accidents. The most important legal concept in this area is *crashworthiness*—a manufacturer's responsibility to make the car reasonably safe in the event of a crash. The standard of crashworthiness makes it possible to hold manufacturers liable for a defect that causes or enhances injuries suffered in a crash, even if that defect did not cause the crash itself. Auto injuries are often the result of a "second collision," when the occupant's body strikes the interior of the car or strikes an exterior object after being thrown from the vehicle. Second collisions can occur when the seat belt fails, for example. Other examples of failures in crashworthiness include instruments that protrude on a dashboard or a fuel tank that explodes after impact. A landmark case in this area of manufacturer liability is *Larsen v. General Motors Corp.,* 391 F.2d 495 (8th Cir. 1968), in which an individual was compensated for injuries suffered when his head struck a steering wheel in an accident. In another significant case, *Grimshaw v. Ford Motor Co.,* 119 Cal. App. Ct. 3d 757, 174 Cal. Rptr. 348 (1981), a California jury required Ford Motor Company to pay $125 million in PUNITIVE DAMAGES (later lowered to $3.5 million) to a teenager who was severely burned in a fire that resulted when his Ford Pinto was rear-ended and the fuel tank exploded.

Automakers may also be held liable for failure to warn of a product's dangerous tendencies. Manufacturers have, for example, been sued for failing to warn drivers that certain vehicles had a tendency to roll over in some conditions.

One of the more high-profile cases involving defects in automobiles and their parts involved Ford Motor Company and the tire manufacturer Bridgestone/Firestone. On May 2, 2000, the NHTSA began an investigation involving Firestone tires. By that time, the agency had received 90 complaints from consumers who had suffered accidents because the tread on the tires of their Ford Explorers had allegedly caused their vehicles to roll over. These accidents had resulted in at least 27 injuries and four deaths. On August 9, 2000, Bridgestone/Firestone announced the recall of 6.5 million tires, many of which were standard equipment on Explorers.

Ford and Bridgestone/Firestone eventually faced more than 1,000 lawsuits in state and federal court. Many of these cases were settled, including several cases that had been followed closely by the national media. In one case, Marisa Rodriguez of Texas suffered permanent paralysis in 1998 when a faulty tire in the Ford Explorer in which she was riding caused the vehicle to roll over. Rodriguez sought damages of $1 billion when she brought suit in the U.S. District Court for the Southern District of Texas, though she eventually settled the case for a reported $6 million.

By 2002, the total number of fatalities had increased to more than 271, with more than 1,000 injuries. By February 2003, several CLASS ACTION and other suits were pending against Bridgestone/Firestone. In 2001, Congress conducted a series of hearings investigating the Ford and Bridgestone/Firestone fiasco. Congress eventually enacted the Transportation Recall Enhancement, Accountability, and Documentation Act, Pub. L. No. 106-414, 114 Stat. 1800 (49 U.S.C.A. §§ 30101 et seq.). It provides criminal penalties for misleading the Secretary of Transportation with respect to vehicle and equipment-related safety defects. Although the provisions of the statute do not apply to the Firestone/Ford cases.

**Number of Motor Vehicle Sales in the United States, 1980 to 1999**

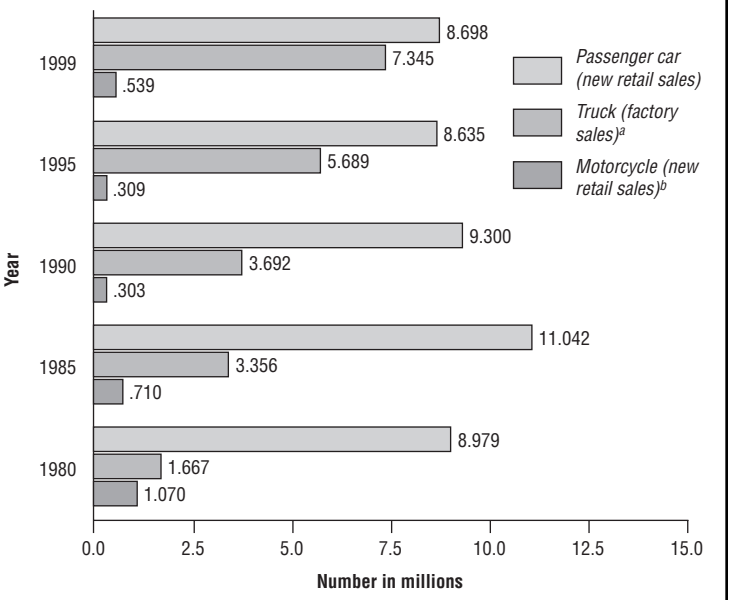


[a]Includes large passenger or utility vehicles.
[b]Includes domestic and imported vehicles. Prior to 1985, all terrain vehicles (ATVs) were included in the motorcycle total. In 1995, the Motorcycle Industry Council revised its data for the years 1985 to present to exclude ATVs from its totals.

SOURCE: American Automobile Manufacturers Association, Inc., Detroit, Mich., *Motor Vehicle Facts and Figures*, 2000.

### Sale, Lease, and Rental

When shopping for a car, consumers generally receive their first information through advertising. States regulate automobile ads in different ways. In some states, an ad must state the number of advertised vehicles available for sale, the price, the dealer, and the factory-installed options and WARRANTY terms. Car buyers should beware of bait-and-switch advertising, in which a dealer advertises a specific car for sale without the intention of actually selling it. The ad lures the customer into the showroom so that she or he may be persuaded to buy a higher-priced, unadvertised vehicle. When buyers encounter this type of FRAUD, or any other type of CONSUMER FRAUD, they should contact the CONSUMER PROTECTION division of their state attorney general's office.

The STATUTE OF FRAUDS of the UNIFORM COMMERCIAL CODE (UCC) governs the sale of autos in every state except Louisiana. According to the UCC, an auto contract must be in writing in order to be considered valid in court. The purchaser and an agent of the seller—an authorized salesperson, supervisor, or manager— must sign the contract. Buyers should read all terms of the contract before signing. The contract should specify whether the car is new or used and include a description of the car, the car's vehicle

identification number (VIN) (on the driver's side of the dashboard near the window), details of any trade-in, and the terms of financing, including the annual percentage rate.

In most states, the title for a new or used car passes to the buyer when the seller endorses the certificate of title. If the buyer does not maintain payments according to the finance agreement, the creditor can repossess the car as collateral for the loan. The debtor has the right to buy back the car (redeem the collateral) and can do so by paying the entire balance due plus repossession costs. Eventually, the creditor may sell the car to another party. If the profit from the sale does not satisfy the debt, the debtor is liable for the difference. If the profit from the sale is greater than the debt, the creditor must pay the difference to the debtor. In some states, the creditor is required by the UCC to notify the debtor of the time, place, and manner of any sale of the car.

All used-car dealers must attach a buyer's guide to the side window of any car they are selling. It must state whether the car comes with a warranty; outline the specific coverage of any warranty; recommend that an independent mechanic inspect the car; state that all promises should be put in writing; and provide a list of potential problems with the car. The buyer's guide becomes part of any contract with the seller. The seller must be truthful about the car and should provide the buyer with the car's complete service records and a signed, written statement of the odometer reading and its accuracy. If the car does not perform as promised, a breach of warranty may have occurred. If an individual pays more than $500 for a used car, he or she should have a written contract and a bill of sale. The latter is required in many states to register a car and should include the date of sale; the year, make, and model of the car; the VIN; the odometer reading; the amount paid for the car and what form it took; the buyer's and seller's names, addresses, and phone numbers; and the seller's signature.

The sale of new automobiles is subject to what are popularly called **LEMON LAWS**. *Lemon* is the slang term for a car that just does not work right. Lemon laws, in force in all states as of 2003, entitle a car buyer to a replacement car or a refund if the purchased car cannot be satisfactorily repaired by the dealer. States vary in their requirements for determining whether a car is a lemon. Most define a lemon as a vehicle that has been taken in at least four times for the same repair or is out of service for a total of 30 days during the coverage period. The coverage period is usually one year from delivery or the duration of the written warranty, whichever is shorter. The owner must keep careful records of repairs and submit a written notice to the manufacturer stating the problems with the car and an intention to declare it unfit for use. Many states require that the buyer and the manufacturer or dealer submit to private **ARBITRATION**, a system of negotiating differences out of court. Increasingly, states are passing lemon laws for used as well as new cars.

A popular method of purchasing the use of a car is leasing. Leasing is essentially long-term rental. For persons who drive few miles a year, like to change cars often, or use their cars for business, leasing is an attractive option. A lease contract may or may not include other expenses such as sales tax, license fee, and insurance. In a closed-end, or "walkaway," lease contract, the car is returned at the end of the contract period and the lessee is free to "walk away" regardless of the value of the car. In an open-end lease, the lessee gambles that the car will be worth a stated price at the end of the lease. If the car is worth more than that price, the lessee may owe nothing or may be refunded the difference; if the car is worth less, the lessee will pay some or all of the difference. Payments are usually higher under a closed-end lease than under an open-end lease. Open-end leases more commonly have a purchase option at the end of the lease term.

To lease or rent an auto, an individual must show a valid driver's license and, usually, a major credit card. A rental business may require that a customer have a good driving record and be of a certain age, sometimes 25 years old or older. An auto rental, as opposed to a lease, may be as short as one day. A rental company may offer a collision damage waiver (CDW) option, which provides insurance coverage for damages to the rented car. The CDW option does not cover personal injuries or personal property damage.

### Operation and Maintenance

The operation of an automobile on a public street or highway is a privilege that can be regulated by motor vehicle laws. The individual states derive authority to control traffic from their **POLICE POWER**, but often they delegate this authority to a local police force. On the national level, Congress is empowered to regulate motor vehicles that are engaged in interstate commerce.

Automobile regulations are provided for the safety and protection of the public. The laws must be reasonable and should not impose an extraordinary burden on the owners or operators. Such laws also provide a means of identifying vehicles involved in an accident or a theft and of raising revenue for the state by fees imposed on the owner or operator.

**Registration and Licensing** Every state requires the owner of a vehicle to possess two documents: a certificate of ownership, or title, and a certificate of registration. Through registration, the owner's name, the type of vehicle, the vehicle's license plate number, and the VIN are all registered with the state in a central government office. On payment of a fee, a certificate of registration and license plates are given to the owner as evidence of compliance with the law. The operator is required to display the license plates appropriately on the car—one on the back of the vehicle and sometimes one on the front and the back—and have the certificate of registration and license in possession while driving and ready to display when in an accident or requested to do so by a police officer. If a driver moves to another state, she or he must register the vehicle in that state within a certain amount of time, either immediately or within 20 to 30 days.

A driver's license is also mandatory in every state. The age at which a state allows a person to drive varies, though it is usually sixteen. Other qualifications for a driver's license include physical and mental fitness, comprehension of traffic regulations, and ability to operate a vehicle competently. Most states require a person to pass a written examination, an eye test, and a driving test before being issued a license. States generally allow an individual with a learner's permit or temporary license to operate a vehicle when accompanied by a licensed driver. This arrangement enables a person to develop the driving skills needed to qualify for a license. A license can be revoked or suspended when the motorist disregards the safety of people and property, when a physical or mental disability impairs driving ability, or if the motorist fails to accurately disclose information on the license application. When the state revokes a person's license, it permanently denies that person the right to drive; when it suspends a license, it temporarily denies the right to drive.

Because teenaged drivers are more likely to cause traffic accidents, several states have adopted systems of graduated driver licensing (GDL). Under this system, teenaged drivers typically first receive a learner's permit for about six months, during which time all driving must be supervised by an adult. During the next stage, an intermediate level, teen drivers may drive without the supervision of an adult during the daytime but cannot drive at night without an adult until the age of 18, and cannot have more than one teenaged passenger in the car during unsupervised driving times. More than 30 states and the District of Columbia have adopted a GDL system.

**Traffic Laws** Dozens of laws are related to the operation of an automobile, a large number of which vary by state. Minor traffic offenses include parking and speeding violations. More serious traffic offenses are reckless driving, leaving the scene of an accident, and driving without a license. Most states require motorists to file reports with the proper authorities when they are involved in accidents.

Speed limits vary by state. In 1973, during the height of the energy crisis, Congress defined a national speed limit of 55 mph in order to reduce gasoline consumption; the 55-mph limit also had the unintended effect of lowering the traffic fatality rate. Since then, most states have returned to an upper limit of 65 mph. Two types of speed limits are imposed: fixed maximum and PRIMA FACIE. Under fixed maximum limits, it is unlawful to exceed the stated limit anywhere and at any time. Under prima facie limits, it is possible for a driver to prove in certain cases that a speed in excess of the limit was not unsafe and therefore not unlawful, given the condition of the highway, amount of traffic, and other circumstances.

All states require children riding in automobiles to be restrained using safety belts or safety seats. Most states require adults to wear belts as well, though some require belts only for adults in the front seat. Violation of such laws results in a fine. In 1984, New York became the first state to pass a law making seat belts mandatory for adults.

**Driving under the Influence** Driving under the influence of alcohol and other drugs is the major cause of traffic deaths in the United States. Drunk drivers kill an estimated 25,000 people a year. States use different terms to describe driving under the influence of mind-altering chemicals, or what is popularly known as drunk driving. These include *driving under*

*the influence (DUI), operating under the influence (OUI),* and *driving while intoxicated (DWI).* To arrest someone for drunk driving, the state must have proof that the person is under the influence of alcohol or other drugs, and the person must be in actual physical control of a vehicle and impaired in the ability to operate it safely. Every state has "implied consent" laws that require those with a driver's license to submit to sobriety tests if a police officer suspects they are intoxicated. These tests may include a field sobriety test (a test at the scene, such as walking a straight line), or blood, breath, or urine tests, usually administered at a police station. Refusal to take a sobriety test can result in suspension of the driver's license. Most states have "per se" laws that prohibit persons from driving if they have a blood-alcohol reading above a certain level. Several states have lowered their per se blood-alcohol limits to 0.08 percent. Penalties vary by state but can be particularly severe for repeat offenders, often involving jail sentences and revocation of driving privileges.

DRAMSHOP ACTS make those who sell liquor for consumption on their premises, such as bars and restaurants, liable for damages caused by an intoxicated patron's subsequent actions. In some states, individuals injured by a drunk driver have used such laws to sue bars and restaurants that served liquor to the driver. "Social host" statutes make hosts of parties who serve alcohol and other drugs liable for any damages or injuries caused by guests who subsequently drive while under the influence.

Several national organizations have been formed to combat drunk driving. These include MOTHERS AGAINST DRUNK DRIVING (MADD) and Students Against Drunk Driving (SADD). The legal drinking age has been raised to 21 in every state, largely in an attempt to reduce drunk driving. Most states also make it illegal to transport an open alcoholic beverage container in a vehicle. Alcohol-related deaths as a proportion of all traffic deaths decreased from about 56 percent in 1982 to 47 percent in 1991.

**Other Crimes** Criminals both target and use automobiles in a number of different types of crime. Cars have been a favorite object of theft ever since their invention. As early as 1919, the DYER ACT, or National Motor Vehicle Theft Act (18 U.S.C.A. § 2311 et seq.), imposed harsh sentences on those who transported stolen vehicles across state lines. Car theft remains a serious problem in many areas of the country and is a major contributor to high insurance premiums in many urban areas. In 1994, Congress passed the Motor Vehicle Theft Prevention Act (18 U.S.C.A. § 511 et seq.; 42 U.S.C.A. § 13701 note, § 14171 [West 1995]), which established a program whereby owners can register their cars with the government, provide information on where their vehicles are usually driven, and affix a decal or marker to the cars. Owners who register their cars in the program authorize the police to stop the cars and question the occupants when the vehicles are out of their normal areas of operation.

Autos are also frequently used to commit crimes. Drivers whose NEGLIGENCE causes accidents that result in the death of other human beings may be found guilty of MANSLAUGHTER (the unlawful killing of another without malice aforethought, that is, without the intention of causing harm through an illegal act), including criminally negligent manslaughter, a crime punishable by imprisonment. Two types of crime that have received a great deal of public attention are drive-by shootings, in which occupants of a vehicle fire guns at pedestrians or at people in other cars, and car-jackings, in which criminals hijack, or take over, cars from their owners or operators, often robbing and sometimes killing the victims in the process. Because of the usually random nature of such crimes, the public has called for severe penalties for them. The VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994 (Pub. L. No. 103-322, 108 Stat. 1796) made killings caused by drive-by shootings or car-jackings punishable by death.

**Insurance** Most states require the owner to acquire auto insurance or deposit a bond before a vehicle can be properly registered. Insurance provides compensation for innocent people who suffer injuries resulting from the negligent operation of a vehicle. Other states have liability, or financial responsibility, statutes that require a motorist to pay for damages suffered in an accident resulting from his or her negligence and to furnish proof of financial capability to cover damages that he or she may cause in the future. These statutes do not necessarily require vehicle liability insurance.

About half of all states require that licensed drivers carry automobile insurance with liability, medical, and physical damage coverage. Liability insurance protects a vehicle owner against financial responsibility for damages caused by the negligence of the insured or other covered

*Highway patrol officers, checking for drunk drivers, examine drivers' licenses at a roadblock on a North Carolina highway.*
AP/WIDE WORLD PHOTOS

drivers. It consists of bodily injury, or personal liability protection and property damage protection. Medical payments insurance covers the insured's household for medical and funeral expenses that result from an auto accident. Physical damage insurance consists of collision coverage, which pays for damage to a car resulting from collision, regardless of fault, and comprehensive coverage, which pays for damage from theft, fire, or VANDALISM. Over 20 states also require that drivers carry coverage to protect against uninsured motorists. Such coverage allows insured drivers to receive payments from their own insurer should they suffer injuries caused by an uninsured driver. Most insurance policies offer a choice of deductible, which is the portion of an insurance claim that the insured must pay. The higher the deductible, the lower the annual insurance premium or payment.

Many states have laws requiring no-fault automobile insurance. Under no-fault insurance, each person's own insurance company pays for injury or damage in an auto accident, up to a certain limit, irrespective of whose fault the accident is. Each person is entitled to payment for loss of wages or salary, not exceeding a certain percentage of the value of such loss or a fixed weekly amount.

No-fault statutes provide that every person who receives personal injury benefits gives up the right to sue for damages. However, a person who is licensed to drive in a state that requires no-fault insurance may sue someone who has caused an accident and who is licensed in another state that does not require no-fault insurance. In some states, a person who has not obtained no-fault auto insurance is personally liable to pay damages. Some states do not abolish liability arising from the ownership, maintenance, or operation of a motor vehicle in certain circumstances, such as those in which the harm was intentionally caused, the injured person has suffered death or serious injuries, or medical expenses exceed a certain limit.

States that do not have compulsory automobile insurance typically have financial responsibility acts. These laws are designed to ensure that negligent drivers who injure others will pay any resulting claims. They require a proof of financial responsibility from drivers involved in an accident. After reporting the accident to a state agency, drivers who do not have adequate insurance coverage must post a cash deposit or equivalent bond of up to $60,000, unless the other driver provides a written release from liability.

### Disposal

The last stage in the life cycle of an automobile is its disposal and recycling. In the United States, between 10 and 12 million cars are disposed of each year. In most cases, the first stage of disposal is handled by a wrecking or salvage yard. Most states require the salvage yard to have the title to an auto before the vehicle can be destroyed and to contact a state agency regard-

ing its destruction. This step helps to prevent the destruction of cars used in crimes. Salvage yards typically must be licensed with a state pollution control agency for hazardous waste disposal. Salvage yards remove parts and items of value that can be recycled from the vehicle, such as batteries and fluids. What is left of the automobile is then sold to a shredder, a business that breaks the car up into small parts and separates the metal from the nonmetal parts. Roughly 25 percent of the auto cannot be recycled and must be disposed of in a landfill. Auto residue to be disposed of in a landfill typically must be tested to see that it meets the standards for disposal of hazardous waste.

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CROSS-REFERENCES

Alcohol; Automobile Searches; Collision; Consumer Protection; Environmental Law; Highway; Import Quotas; Personal Property; Product Liability; Punitive Damages; Title; Transportation Department.

## AUTOPSY

*The dissection of a dead body by a medical examiner or physician authorized by law to do so in order to determine the cause and time of a death that appears to have resulted from other than natural causes.*

This postmortem examination, required by law, is ordered by the local CORONER when a person is suspected to have died by violent or unnatural means. The consent of the decedent's next of kin is not necessary for an authorized autopsy to be held. The medical findings must be presented at an inquest and might be used as evidence in a police investigation and a subsequent criminal prosecution.

CROSS-REFERENCES

Forensic Science.

## AUXILIARY

*Aiding; ancillary; subordinate; subsidiary.*

Auxiliary or ancillary administration is the management and settlement of property belonging to a decedent that is not located where he or she was domiciled. It is subordinate to the principal or domiciliary administration of the decedent's property that occurs in the state where the individual was domiciled. Auxiliary administration ensures that any local creditors will be paid before the out-of-state property will be transferred for distribution under domiciliary administration.

CROSS-REFERENCES

Estate.

## AVER

*To specifically allege certain facts or claims in a* PLEADING.

## AVERMENT

*The allegation of facts or claims in a* PLEADING.

The Federal Rules of Civil Procedure require that averments be simple, concise, and direct.

## AVOIDABLE CONSEQUENCES

*The doctrine that places the responsibility of minimizing damages upon the person who has been injured.*

The major function of the doctrine is to reduce the damages brought about by the defendant's misconduct. Ordinarily, an individual cannot recover for losses that might have been prevented through reasonable effort by the person, particularly where the conduct causing the loss or injury is not willful, intentional, or perpetuated in bad faith. The rule of avoidable consequences applies to both contract and TORT actions, but is not applicable in cases involving willful injury or where the plaintiff could not possibly have circumvented any of the harm for which he or she claims damages.

The efforts that the person who has been injured must take to avoid the consequences of the misconduct are required to be reasonable, based upon the circumstances of the particular case, and subject to the rules of common sense and fair dealing. That which is reasonably required is contingent upon the extent of the potential injury as compared with the cost of rectifying the situation, and the realistic likelihood of success in the protective effort. A plaintiff who neglects to mitigate damages will not be entirely barred from recovering such damages that he or she might have circumvented through reasonable efforts.

Included in the effort that the law requires is the payment of reasonable expenditures. The injured party need not, however, make extraordinary payments to prevent the consequences of the wrongdoer's conduct. The plaintiff's inability to produce funds to meet the situation presented can excuse efforts to reduce the injury.

### Breach of Contract

A party injured by the breach of contract generally must exercise reasonable efforts to lessen the damages. This rule has no application in an action on a contract for an agreed compensation. Upon the breach of a contract to supply PERSONAL SERVICE or the use of some type of specific equipment or instrumentality, the individual who agrees to furnish such service or items must attempt to acquire a replacement contract if one can reasonably be found. The defendant can then prove, in attempting to reduce damages, that the plaintiff has procured other employment as well as the amount he or she earned or might have earned by exercising reasonable care and diligence. The test of the applicability of this rule is whether the employment or services of the plaintiff were personal in nature. The rule is not applicable in contracts that do not require all, or a significant portion, of the plaintiff's time, or those that do not preclude the plaintiff from becoming engaged in simultaneous performance of other contracts.

### Torts

A party who suffers a personal injury is required to exercise ordinary care and perseverance to find a cure, thereby reducing the damages to the most practicable extent. Such an individual should seek reasonable medical care if so required by the injury. It is not necessary for the person to undergo excessively painful treatment or that which involves a significant hazard of death or injury or offers a mere possibility of a cure. The pain inherent in the necessary medical care and treatment may be taken into consideration in assessing whether the plaintiff acted reasonably in declining to submit to it. Although submission to treatment is not a prerequisite to an award of damages, recovery cannot be obtained for increased damages that stem from the failure to submit to necessary medical treatment. Conversely, the mere fact that medical attention was not sought immediately, or at all, will not proscribe an award of damages where the circumstances did not reasonably indicate that medical aid and attention was necessary.

In addition, an injured party has no absolute duty to subscribe to a physician's advice to mitigate damages. The party might, however, under some circumstances, be under an obligation to exercise ordinary care in following such advice.

CROSS-REFERENCES

Mitigation of Damages.

## AVOIDANCE

*An escape from the consequences of a specific course of action through the use of legally acceptable means. Cancellation; the act of rendering something useless or legally ineffective.*

A taxpayer may take all legally recognized deductions in order to minimize the INCOME TAX liability. This conduct is called tax avoidance and is legal. If, however, a taxpayer claims deductions to which he or she is not entitled so that the individual pays less income tax than is actually owed, then the taxpayer has committed TAX EVASION, a crime punishable by a fine, imprisonment, or both.

A plea in confession and avoidance is one that admits the truth of allegations made in former PLEADING but presents new information that neutralizes or avoids the legal ramifications of those admitted facts.

## AVOWAL

*An open declaration by an attorney representing a party in a lawsuit, made after the jury has been removed from the courtroom, that requests the admission of particular testimony from a witness that would otherwise be inadmissible because it has been successfully objected to during the trial.*

An avowal serves two purposes. It enables an attorney to have the court learn what a witness

would have replied to a question had opposing counsel not made an objection to the question sustained by the court. It also provides the interrogator with an opportunity to offer evidence that contradicts the disputed testimony. If, upon appeal, an appellate court decides that a witness should have been allowed to respond to such questions before a jury, an avowal will be a record of the witness's response.

## AVULSION

*The immediate and noticeable addition to land caused by its removal from the property of another, by a sudden change in a water bed or in the course of a stream.*

When a stream that is a boundary suddenly abandons its bed and seeks a new bed, the boundary line does not change. It remains in the center of the original bed even if water no longer flows through it. This is known as the *rule of avulsion.*

Avulsion is not the same as accretion or alluvion, the gradual and imperceptible buildup of land by the continuous activity of the sea, a river, or by other natural causes.

## AWARD

*To concede; to give by judicial determination; to rule in favor of after an evaluation of the facts, evidence, or merits. The decision made by a panel of arbitrators or commissioners, a jury, or other authorized individuals in a controversy that has been presented for resolution. A document that memorializes the determination reached in a dispute.*

A jury awards damages; a MUNICIPAL CORPORATION awards a PUBLIC CONTRACT to a bidder.

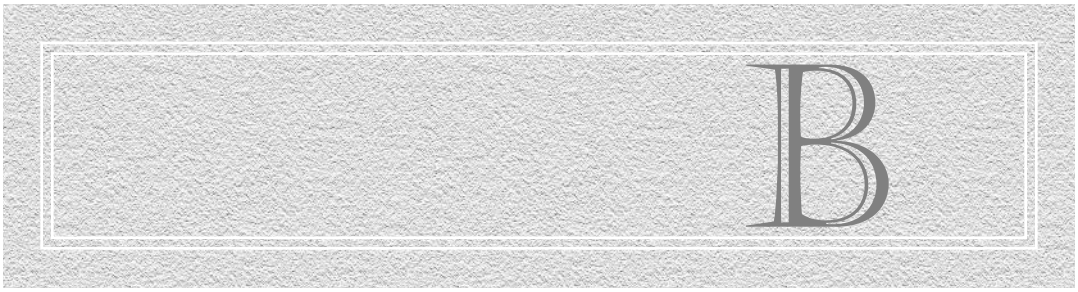

## BABY M, IN RE

In 1988 the New Jersey Supreme Court declared surrogacy contracts void against state public policy but then determined that the best interests of the child born to the surrogate mother required that custody of that child be awarded to the biological father and his wife, with liberal VISITATION RIGHTS later being granted to the biological mother. *In the Matter of Baby M*, 109 N.J. 396, 537 A.2d 1227 (N.J. 1988).

Mary Beth Whitehead entered into a contract with William Stern in which she agreed to be artificially inseminated with Stern's sperm. At the time, Mary Beth was married to Richard Whitehead, with whom she had two children. In the *Surrogate Parenting Agreement* Mary Beth agreed that after the baby was born she would relinquish the baby to Stern and his wife Elizabeth and would permit the termination of her parental rights so that the Sterns could adopt the baby. In return the Sterns would pay Whitehead the sum of $10,000, plus expenses. Elizabeth Stern was not a party to the contract.

Richard Whitehead did not object to the contract and acknowledged that his wife would be artificially inseminated by Stern's sperm. Prior to the *Baby M* case, surrogacy agreements had been most often used when the wife of the adopting couple was infertile. But in the *Baby M* case Elizabeth Stern was not infertile. Instead the Sterns decided not to have Elizabeth bear a child due to the possibility that being pregnant would exacerbate her multiple sclerosis.

Under the Surrogate Parenting Agreement, Mary Beth was not entitled to payment of her $10,000 fee until after the child was born, surrendered to the Sterns, and her parental rights had been terminated. The contract also provided that the Whiteheads would receive no compensation if the child was miscarried prior to the fifth month of pregnancy and would receive only $1,000 if the child was miscarried after that time. Additionally, Whitehead renounced her right to have an ABORTION, unless it was medically necessary.

Whitehead gave birth to a baby girl named Melissa on March 27, 1986. She turned custody of the child over to the Sterns on March 30, 1986, but immediately regretted doing so. Alarmed by Whitehead's anxieties and fearing that she might commit suicide, the Sterns allowed her to have temporary custody of the child. After Whitehead refused to return the baby to the Sterns, William Stern filed an ex-parte application for an order to show cause why the Superior Court of New Jersey should not issue an order for SUMMARY JUDGMENT to enforce the surrogacy contract and a verified complaint seeking specific enforcement of the contract. The complaint sought injunctive relief to obtain custody, termination of Whitehead's parental rights, and an order allowing the Sterns to adopt Melissa.

The trial court issued a TEMPORARY RESTRAINING ORDER and an order requiring the Whiteheads to surrender Melissa to William Stern. The

Whiteheads refused to surrender the child, instead removing her from the state of New Jersey and taking her to Florida. While in Florida, Mary Beth Whitehead threatened to kill the child if Stern did not drop his case to enforce the surrogacy contract. She also threatened to accuse William Stern of sexually abusing Whitehead's other daughter. Melissa was later recovered by law enforcement officials in Florida and returned to New Jersey, where the Sterns assumed custody under the New Jersey court order.

The case then proceeded to a trial on the merits. During trial Mary Beth stressed the bond that had developed between her and Melissa, especially after the child's birth. Whitehead testified that she intended to turn over Melissa to the Sterns but that after the child was born she was emotionally unable to do so. She testified that she felt an obligation to the Sterns but said that the "the obligation [she] felt to [her] child was stronger." Whitehead also offered testimony by child development experts who testified as to the important and the unique role played by the biological mother in a child's early development and the harm that can result to both the child and the biological mother when the two are separated immediately after birth.

The EXPERT TESTIMONY offered by the Sterns at trial focused on the best interests of the child. For example, one doctor focused on the question of whether the Sterns or the Whiteheads would be better suited to meet the needs of the child, concluding that the Sterns would be able to make the child feel more wanted, provide more emotional stability for the child, provide more educational support, offer greater capacity to explain to the child what happened in the circumstances of her conception and birth, and better assist the child in reaching maturity. Another doctor testified that the Sterns could provide a stable and financially secure household, while the Whitehead household was dominated by Mary Beth Whitehead, who had established a pattern of dealing with her children by "inhibiting their development of independence."

The trial lasted 32 days and consisted of testimony from 23 lay witnesses and 15 expert witnesses. Ultimately, the trial judge declared the surrogacy contract valid and enforceable, awarded custody of Melissa to William and Elizabeth Stern, and terminated Mary Beth Whitehead's parental rights, although the judge permitted Mary Beth limited visitation rights pending her direct appeal to the New Jersey Supreme Court.

The New Jersey Supreme Court affirmed in part, reversed in part, and remanded the case to the trial court for further proceedings. Specifically, the state supreme court reversed the trial court's ruling that the surrogacy contract was valid and enforceable. The supreme court said the surrogacy contract was unlawful on two different bases: (1) it conflicted with existing New Jersey statutes and (2) it violated public policy.

The high court ruled that the surrogacy contract conflicted with state laws prohibiting the use of money in connection with adoptions, state laws requiring proof of parental unfitness or ABANDONMENT prior to the termination of parental rights, and state laws affording a parent the right to revoke a prior consent to ADOPTION. The contract also violated important principles of New Jersey public policy. Among these principles were the preference for retaining children with their natural parents; the equal status of mothers and fathers in custody determinations; the right of a parent to be fully informed prior to consenting to the relinquishment of a child; and the pre-eminence of the child's best interests in any custodial placement.

Once the surrogacy contract was declared illegal and unenforceable, the court said, the issue of custody over a child born pursuant to an invalid surrogate contract would be decided by determining the *best interests* of the child. In making this determination, the court said it was required to consider that Mary Beth had acted improvidently in violating the trial court's order by removing Melissa to Florida, threatening to kill Melissa, threatening to lodge phony sexual-abuse accusations against William Stern if he failed to drop his lawsuit, and her overall propensity to manipulate the system and use Melissa to achieve her own aims. The court also said it had to take into account the testimony of the expert witnesses who testified that stability in the Whitehead household was at best doubtful, while the Sterns were much more likely to provide Melissa with a strong foundation upon which to grow and thrive. Accordingly, the court ordered that custody of Melissa be awarded to William and Elizabeth Stern. The New Jersey Supreme Court also ordered the trial court, on remand, to award Mary Beth Whitehead visitation rights as the trial court deemed appropriate. Following remand and after conducting a further hearing, the trial court granted Mary

Beth Whitehead *unsupervised, uninterrupted, liberal visitation* with Melissa.

*Baby M* was the first case decided by a state court of final jurisdiction in which the lawfulness of a surrogacy contract was addressed. States responded to the *Baby M* decision by passing a flurry of legislation, which fell into four classes.

The first class of legislation declares all surrogacy agreements void and/or unenforceable in that jurisdiction. Such legislation has been enacted in Arizona, the District of Columbia, Indiana, Michigan, New York, North Dakota, and Utah. The second class of legislation prohibits only surrogacy agreements in which the surrogate is compensated with something of value over the expenses incurred as a result of the pregnancy. Such legislation has been adopted in Kentucky, Louisiana, Maryland, Nebraska, and Washington. A third class of legislation addresses one particular aspect of surrogacy contracts. For example, Alabama, Iowa, and West Virginia have exempted surrogacy agreements from statutory provisions making it a crime to "sell babies."

The fourth class of legislation provides for the enforceability of surrogacy contracts but at the same time establishes significant safeguards for parties desiring to enter such contracts. For example, Illinois, Florida, Nevada, New Hampshire, and Virginia make surrogacy contracts enforceable so long as the parties to the contract (1) provide proof that the intended parents are medically unable to conceive or bear their own children; (2) obtain judicial preauthorization to enter the agreement; (3) participate in complete medical and psychological examinations; and (4) sign an informed consent notice acknowledging that they have entered the contract after having been apprised of all the risks in doing so.

In states that have not addressed the subject by statute, issues regarding the lawfulness and enforceability surrogacy contracts are resolved by courts in a manner similar to how the *Baby M* case was resolved, that is, by determining the best interests of the child and weighing any competing public policy concerns. However, disputes over the lawfulness and enforceability of surrogacy contracts would only come before the courts in these states if a dispute arose between the parties to the contract. According to some figures, as many as 1,000 babies are born each year to surrogate mothers without any judicial interference or oversight.

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CROSS-REFERENCES

Adoption; Artificial Insemination; Custody; Parent and Child; Surrogate Motherhood; Visitation Rights.

## BACK PAY AWARD

*A legally enforceable decree ordering an employer to pay to an employee retroactively a designated increase in his or her salary that occurred during a particular period of employment. A decision rendered by a judicial or* QUASI-JUDICIAL *body that an employee has a legal right to collect accrued salary that has not been paid out to him or her.*

Back pay awards ensue from litigation involving employment discrimination and issues regarding labor-management relations. Federal CIVIL RIGHTS legislation provides for back pay awards to compensate the victim for economic losses suffered as a result of discrimination.

## BACK TO WORK AGREEMENT

*The accord reached between an employer and a union to which his or her employees belong that establishes the terms and conditions governing the return of striking employees to work.*

Disputes involving back to work agreements are subject to applicable federal and state laws governing labor-management relations.

CROSS-REFERENCES

Labor Union; Strike.

## BACKDATING

*Predating a document or instrument prior to the date it was actually drawn. The negotiability of an instrument is not affected by the fact that it is backdated.*

## ♦ BACON, SIR FRANCIS

Sir Francis Bacon was an English lawyer and statesman whose philosophical theories and writings influenced the development of scien-

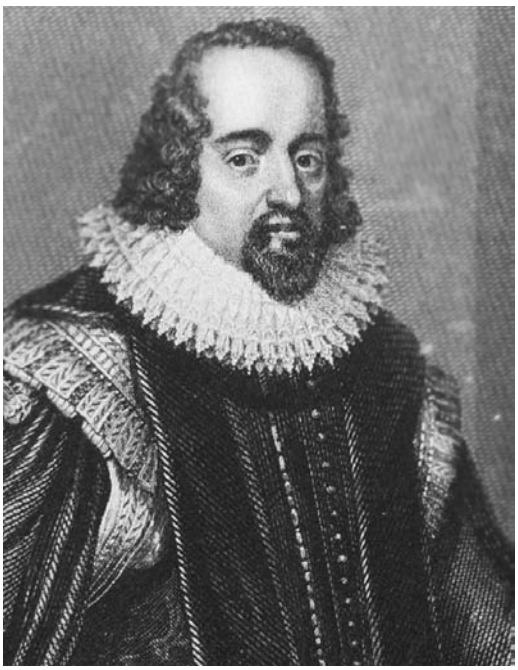

*Sir Francis Bacon.*
LIBRARY OF CONGRESS

"JUDGES MUST BE AWARE OF HARD CONSTRUCTIONS AND STRAINED INFERENCES, FOR THERE IS NO WORSE TORTURE THAN THE TORTURE OF LAWS."
—SIR FRANCIS BACON

tific and legal thought in Great Britain and the United States.

Bacon was born in 1561, the second son of Sir Nicholas Bacon, the lord keeper of the great seal, and Lady Ann, whose brother-in-law was Baron Burghley (William Cecil), the first minister to Queen Elizabeth I. Bacon, like his father, was educated at Trinity College, Cambridge, where he enrolled at the age of twelve. In 1576 he was admitted to Gray's Inn, one of the four Inns of Court in London, which were institutions established for **LEGAL EDUCATION**. He also spent time in France as a member of the English ambassador's staff, before his father's sudden death required him to return to England and resume his legal education so that he could support his family. After completing his studies, Bacon became a barrister in 1582 and then attained the posts of reader (lecturer at the Inn) and bencher (senior member of the Inn).

In 1584, at the age of twenty-three, Bacon was elected to the House of Commons, representing Taunton, Liverpool, the county of Middlesex, Southampton, Ipswich, and the University of Cambridge. In 1594, he argued his first major case, *Chudleigh's Case* (1 Co. Rep. 1136, 76 Eng. Rep. 261 [K.B. 1594]), which involved the interpretation of complex inheritance statutes. He also began writing about science and philosophy and started work on his first major volume, *Temporis Partus Maximus* (The greatest part of time), though the book, along with many of his earliest works, was never published and so disappeared.

Through his friendship with Robert Devereux, the Earl of Essex, Bacon became acquainted with Queen Elizabeth I and he eventually became her counsel around 1600. As counsel, Bacon later took part in the prosecution of Essex, from whom he had become estranged, for **TREASON**, and for these efforts Bacon was knighted in 1603. In 1605, he published his first book, *The Advancement of Learning,* a collection of essays on philosophy that he dedicated to King James I. Later the same year, he married Alice Barnham, the daughter of a wealthy London politician.

Bacon continued to curry the king's favor by assisting James in his plans to unite Scotland with England, and was named to the post of **SOLICITOR GENERAL** in 1607. He also continued to write, publishing in 1609 *The Wisdom of the Ancients,* in which he analyzed the meaning of ancient myths. Seeking promotion to attorney general, Bacon advised the king concerning affairs of state and the relationship between the Crown and Parliament. He successfully engineered the ouster of the chief justice of the **COMMON PLEAS, SIR EDWARD COKE**, a longtime rival who had earlier occupied solicitor and attorney general posts that Bacon had sought. Bacon finally became attorney general in 1613, which enabled him to continue his feud with Coke. He eventually prosecuted Coke for his role in the case of Edmond Peacham, a clergyman charged with treason for advocating rebellion against oppression in an unpublished treatise, leading to Coke's dismissal in 1616. Bacon continued his service to the king and was appointed lord keeper of the great seal in 1617. A year later, he became lord chancellor of England, a post he held until 1621.

Bacon, a man of great intellect and energy, was often torn between his ambitions for higher office and his keen interest in science and philosophy. Though he was primarily concerned with his service to the Crown during most of his adult life, he did devote time to the study of philosophy. He was an early proponent of inductive reasoning, the theory that by analyzing observed facts, one can establish general laws or principles about how the world works. This theory is the opposite of deductive reasoning, which holds that one can draw specific conclusions by reasoning from more general premises. Bacon

believed inductive reasoning to be more useful because it permitted the development of new theories that could be more generally and widely applied to a variety of situations. The legal systems of many countries, including the United States, were eventually grounded on the application of general laws derived from specific fact situations to govern conduct.

Bacon was likewise a strong believer in empiricism, the belief that experience is the most important source of knowledge. According to Bacon, scientists should try to learn about the world by using information gathered through the senses rather than by using reason or rules set forth by religious or political authority. Empiricism, like inductive reasoning, also influenced the development of later legal philosophies, in this case theories that viewed the law and justice as emerging from social life and experience.

Bacon was a prolific writer throughout his life, authoring a number of works expounding his theories. The *Novum Organum,* his most well known and widely read philosophical work, was published in 1620. The *Instauratio Magna* (Great instauration, from the Latin word *instaurare,* "to renew or begin afresh") was a comprehensive plan in which Bacon attempted to reorganize and redefine the sciences; it also contained his views concerning logic and scientific experimentation. In his philosophical writings, Bacon argued that the mind should be purged of what he termed idols, or tendencies to err. These idols, he maintained, arose from human nature, individual experience, and language. In addition, Bacon kept an extensive diary, which was discovered after his death. The notebook, known as the *Commentarius Solutus* (Loose commentary), contained his notes about, among other things, his debts, his garden, and his health.

Later in his life, Bacon began to fall out of favor with the Crown. In 1618, the king criticized him for interfering in the marriage of Coke's daughter. In 1621, Bacon was charged with accepting a bribe concerning a grievance committee over which he had presided. Bacon admitted in a full confession that he had received gifts, but denied that they had influenced his judgment. Though he begged for mercy, Bacon found the king unsympathetic to his case and was forced to resign his office. Bacon was sentenced to a stiff fine (which was later suspended), imprisonment in the Tower of London (which actually lasted only four days), exclusion from holding any state office, and prohibition from coming within the vicinity of the Court of King's Bench.

Following his ouster from the court, Bacon returned to his large estate at Gorhambury, in rural England, to devote all of his energies to research and writing. He prepared digests of the laws and wrote a history of Great Britain and its monarchs. He planned to write six separate natural histories, but only two were completed: *Historia Ventorum* (History of the winds), which was published in 1622, and *Historia Vitae et Mortis* (History of life and death), which appeared the following year. He also wrote the *History of Henry VII,* published in 1622. In 1621, he enlarged his volume of *Essays,* which he had first published in 1597, and in 1627, he published *The New Atlantis.* He also corresponded with Italian philosophers and sent his work to them. Over the years, some writers have suggested that Bacon may have been the true author of William Shakespeare's plays, but because no concrete proof has been offered, the theory has been discounted by most scholars.

Sometime around 1623, Bacon, in ill health, was finally granted an audience with the king,

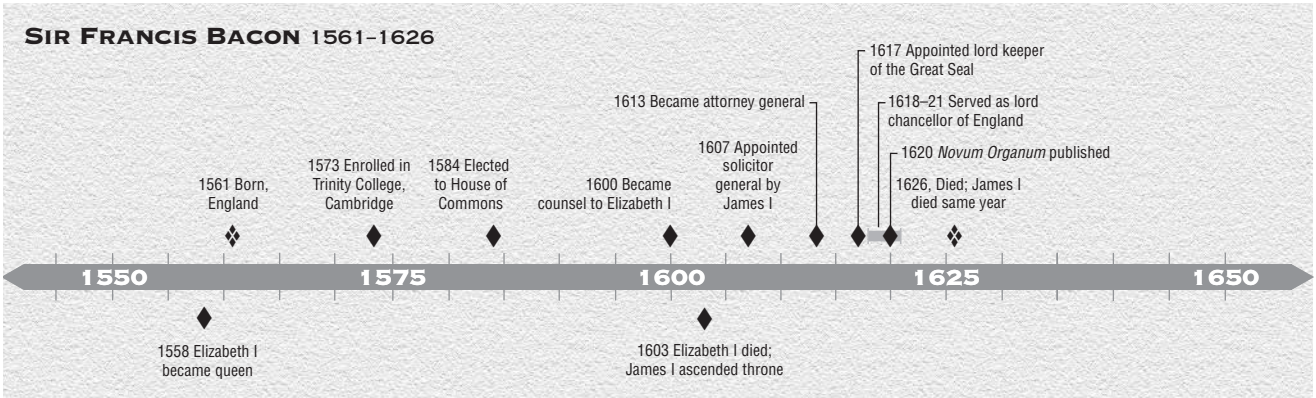

but he was not granted a pardon for his offenses. In London, on April 9, 1626, he died of bronchitis he contracted while conducting experiments on the effects of refrigeration on poultry.

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## BAD FAITH

*The fraudulent deception of another person; the intentional or malicious refusal to perform some duty or contractual obligation.*

Bad faith is not the same as prior judgment or NEGLIGENCE. One can make an honest mistake about one's own rights and duties, but when the rights of someone else are intentionally or maliciously infringed upon, such conduct demonstrates bad faith.

The existence of bad faith can minimize or nullify any claims that a person alleges in a lawsuit. PUNITIVE DAMAGES, attorney's fees, or both, may be awarded to a party who must defend himself or herself in an action brought in bad faith.

Bad faith is a term commonly used in the law of contracts and other commercial dealings, such as COMMERCIAL PAPER, and in SECURED TRANSACTIONS. It is the opposite of GOOD FAITH, the observance of reasonable standards of fair dealings in trade that is required of every merchant.

A government official who selectively enforces a nondiscriminatory law against the members of a particular group or race, thereby violating the CIVIL RIGHTS of those individuals, is acting in bad faith.

## BADGER, GEORGE EDMUND

George Edmund Badger was a lawyer, judge, and politician, and the subject of a U.S. Supreme Court confirmation battle in 1853.

The only son of a lawyer who died prematurely and a daughter of a Revolutionary War leader, Badger was born on April 17, 1795, in New Bern, North Carolina. He was first educated at a local academy and then attended Yale College. Because of poverty, he was forced to leave the college after only two years. He then returned home to North Carolina to study law. In 1814, he served for a short time as a major in a militia called out to repel a threatened British invasion. A year later, he was admitted to the North Carolina bar. He quickly built a reputation as a brilliant and persuasive trial and appellate lawyer. In 1820, after four years of representing New Bern in the state house of commons, he was elected a judge of the superior court, where he served five years before resigning to practice law in Raleigh.

Initially a strong supporter of ANDREW JACKSON, Badger became a Whig in the mid-1830s and was appointed secretary of the Navy in 1841 by President WILLIAM H. HARRISON. He served for less than a year in this position and thus had little opportunity to have a lasting effect. However, during his tenure, he did recommend a home squadron to patrol the Caribbean and the Gulf of Mexico. He also authorized the construction of two steam vessels.

In 1846, Badger was elected to the U.S. Senate. As a senator, he strongly opposed the poli-

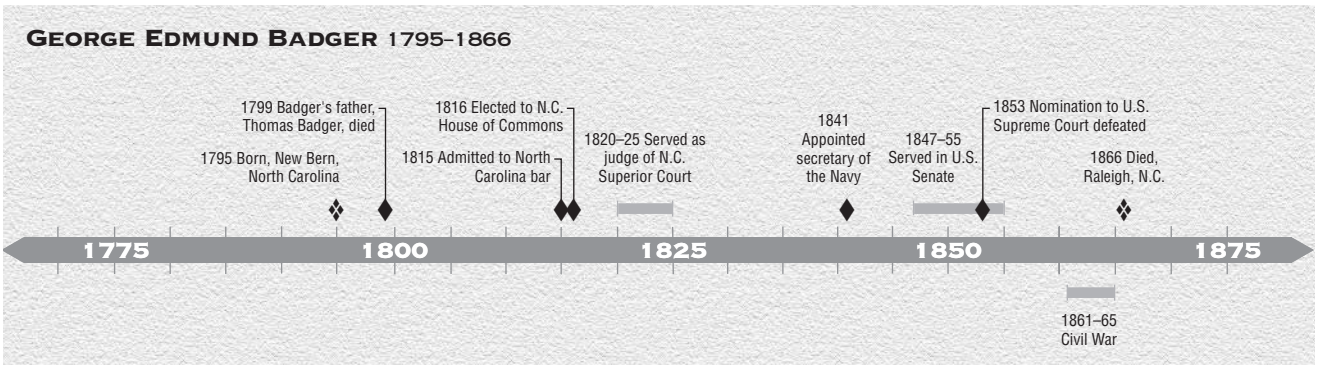

cies of the Polk administration. He also proposed reform of the Supreme Court's docket and advocated salary increases for the justices. In January 1853, President MILLARD FILLMORE, who had lost the 1852 election to FRANKLIN PIERCE, nominated Badger for a vacancy on the Court. Badger's nomination was met with widespread criticism from the Democratic papers of the South. Senators from Alabama, Louisiana, and Mississippi opposed his nomination because he resided outside the Fifth Circuit, where the vacancy on the Court arose. Even the Whig press, though it supported the proposed appointment, stated that "as a statesman, [Badger] is of no account, and as a politician detestable."

On previous occasions, the Senate had usually granted quick confirmation to a senator nominated for the Court, with little debate. But it postponed consideration of Badger's nomination until March 1853, so that Pierce could fill the vacancy with his own nominee—effectively defeating Badger's nomination. The same tactic would also be used to defeat later Supreme Court nominees.

Badger served in the Senate until 1855. After his retirement, he continued to practice law and took an active role in politics, helping to organize the Constitutional Union party in 1861. This party was made up of conservative Whigs who had been alienated by the emergence of ABRAHAM LINCOLN as the leader of the Republican party during the presidential election of 1860. In its platform, the Constitutional Union party took no stand on the issue of SLAVERY and strongly advocated preservation of the Union. Badger was elected as a Union candidate, but a convention was never held.

Though he was widely known as a nationalist, when the Civil War broke out, Badger was elected to the North Carolina secession convention. At first, he argued against secession, contending that it was unconstitutional. Instead, he offered a declaration of independence, which was rejected. As a result, he reluctantly voted for secession.

Badger continued to practice law in North Carolina until his death in 1866.

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Fillmore, Millard; Slavery.

## ♦ BAER, GEORGE FREDERICK

George Frederick Baer was born September 26, 1842, near Lavansville, Pennsylvania. Baer was educated at Franklin and Marshall College, where he received an honorary master of arts degree in 1875 and a doctor of laws degree in 1886.

During the Civil War, Baer fought on the side of the Union at Bull Run, Antietam, Chancellorsville, and Fredericksburg.

He was admitted to the bar in 1864, moved to Reading, Pennsylvania, in 1868, and in 1870 performed the duties of counselor for the Philadelphia and Reading Railroad Company. He became a director of the railroad, acted as legal advisor to magnate J. P. Morgan, and was instrumental in the restructuring of the railroad in 1893. In 1901, he was president of the Philadelphia and Reading Railway Company, the Philadelphia and Reading Coal & Iron Company, and the Central Railroad Company of New Jersey.

When the United Mine Workers went on strike in Pennsylvania in 1902, Baer gained

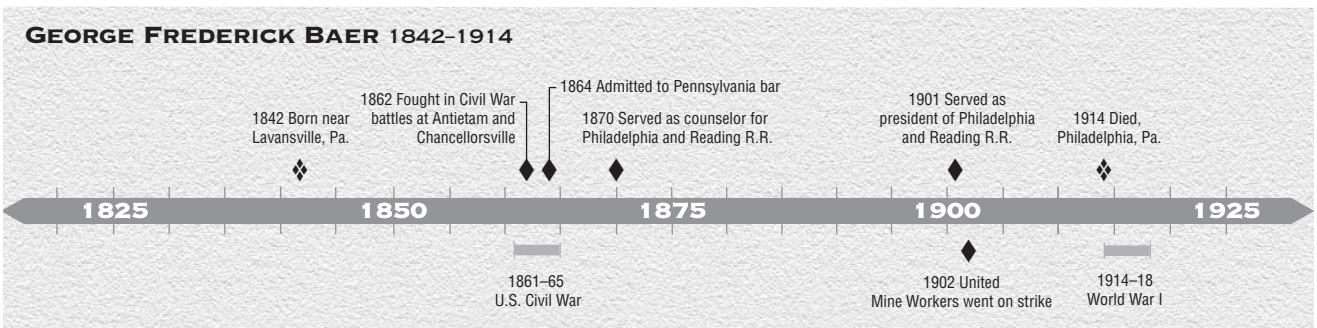

notoriety for his lack of sympathy for the plight of the miners.

Baer died April 26, 1914, in Philadelphia, Pennsylvania.

## BAIL

*The system that governs the status of individuals charged with committing crimes, from the time of their arrest to the time of their trial, and pending appeal, with the major purpose of ensuring their presence at trial.*

In general, an individual accused of a crime must be held in the custody of the court until his or her guilt or innocence is determined. However, the court has the option of releasing the individual before that determination is made, and this option is called bail. Bail is set by the judge during the defendant's first appearance. For many misdemeanors, bail need not be set. For example, the defendant may be released on the issuance of a citation such as a ticket for a driving violation or when booked for a minor misdemeanor at a police station or jail. But for major misdemeanors and felonies, the defendant must appear before a judge before bail is determined.

The courts have several methods available for releasing defendants on bail. The judge determines which of these methods is used. One alternative is for the defendant to post a bail bond or pledge of money. The bond can be signed by a professional surety holder, the accused, or the family and friends of the accused. Signing the bail bond is a promise that the defendant will appear in the specified criminal proceeding. The defendant's failure to appear will cause the signers of the bond to pay to the court the amount designated. The amount of bail is generally an amount determined in light of the seriousness of the alleged offense.

A defendant can also be released upon her or his own recognizance, which is the defendant's written, uninsured promise to return for trial. Such a release occurs only if the suspect has steady employment, stable family ties, and a history of residence in the community. Willful violation of the terms of a personal recognizance constitutes a crime.

Other conditions may also be set regarding the release of the defendant. The Bail Reform Act of 1984 (18 U.S.C.A. §§ 3141–3150) provided for many additional conditions that do not rely upon finances and that reflected current trends to move away from financial requirements for freedom. These conditions came about, in part, owing to concerns regarding the discriminatory nature of bail toward the poor. The Bail Reform Act allows for conditional releases dependent upon such circumstances as maintaining employment, meeting curfews, and receiving medical or psychiatric treatment.

### Civil Actions

A defendant in a civil action can be arrested to ensure that he or she will appear in court to respond to the plaintiff's claims. Civil arrest prevents a defendant from leaving the jurisdiction to evade the litigation, and from attempting to conceal or dispose of assets in order to keep the plaintiff from collecting on the judgment if the plaintiff prevails. Since civil arrest is a drastic remedy, state laws must be consulted to determine when it may be used. The purpose of bail in a civil action is to ensure the presence of the defendant at trial and to guarantee the payment of a debt or the fulfillment of some civil duty, as ordered by the court.

The court sets the amount of bail, which is generally based on the probable amount of damage against the defendant. In some instances, if informed of changed circumstances, the court might increase or reduce bail. Cash, as opposed to a bail bond, may be deposited with the court only when authorized by statute. The purpose of the arrest and the statutory provisions determine whether this deposit may be used to pay the judgment awarded to the plaintiff.

### Criminal Prosecutions

The objective of bail in criminal actions is to prevent the imprisonment of the accused prior to trial while ensuring her or his appearance at trial. Constitutional and statutory rights to bail prior to conviction exist for most offenses, but state constitutional provisions and statutes must be consulted to determine the offenses to which bail applies. The Bail Reform Act of 1984 governs bail in federal offenses. It provides the federal magistrate with alternatives to the incarceration of the defendant. If the charge is a noncapital offense (an offense not punishable by death), the defendant may be released on her or his own recognizance. If there is a reasonable likelihood that the defendant will not return for trial, the judge may impose bail. The judge may also release the defendant into the custody of a

**Jail Inmate Population in the U.S., 1990 to 1998**

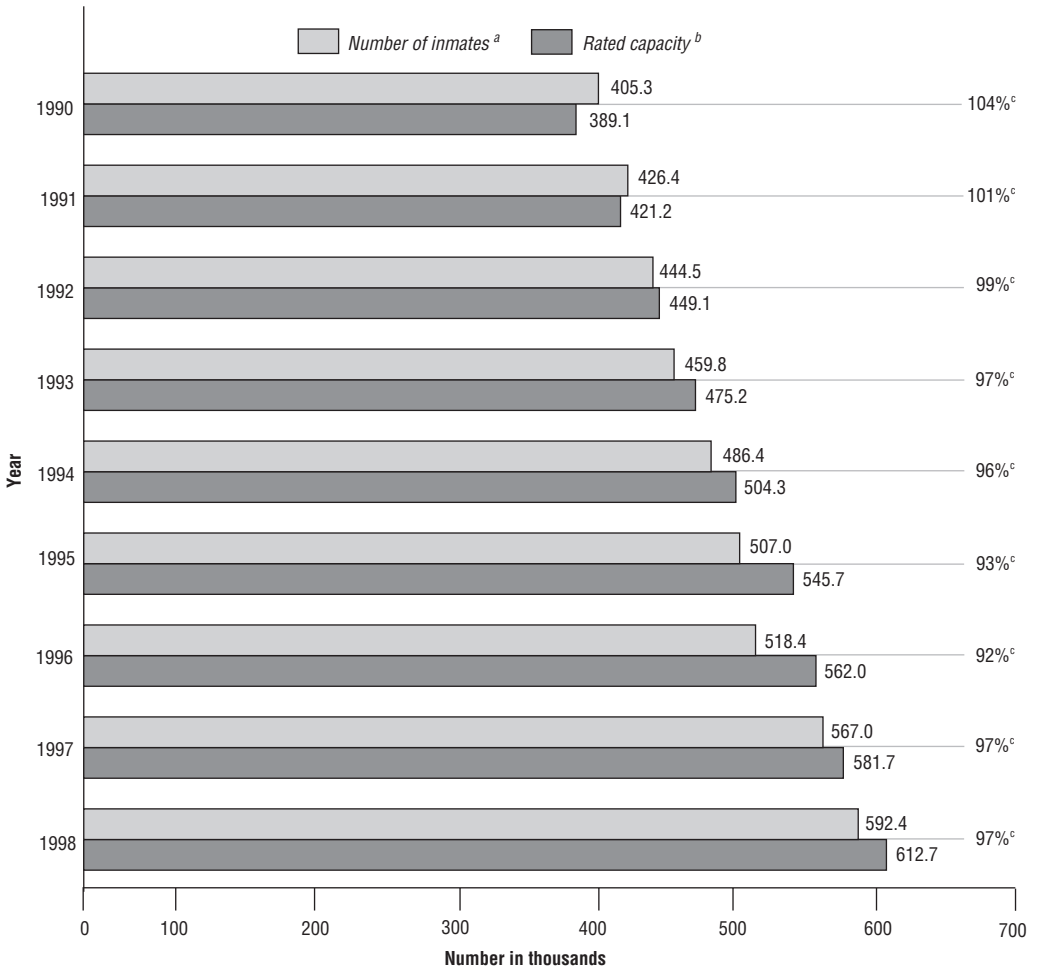


[a]Population counts for 1990–93 could include persons supervised outside of jail facilities. Population counts for 1994 through 1996 are for custody only.

[b]Rated capacity is the number of beds or inmates assigned to facilities within each jurisdiction.

[c]Percent of rated capacity occupied is based on the 1-day count of inmates. This count for 1990–1993 may include some inmates not in physical custody but under the jurisdiction of a local jail, such as inmates on electronic monitoring, under house arrest, or in day reporting or other community service supervision programs.

SOURCE: U.S. Bureau of Justice Statistics, *Correctional Populations in the U.S.*

designated person or organization for supervision. Restricting the residence, extent of travel, and personal associations of the accused are other options.

### Discretion of the Court

A court exercises its discretion with respect to the allowance of bail. In reaching its decision, it evaluates the circumstances of the particular case, including the existence of doubt as to the accused person's appearance at trial. Unreasonable delay or postponement in the proceeding, which is not attributable to the accused, usually constitutes a ground for bail—in some jurisdictions, by absolute right; more frequently, at the discretion of the court.

In jurisdictions in which it is neither proscribed nor regarded as an absolute right, the grant of bail pending a motion for a new trial, a review, or an appeal is also discretionary. The grant of bail is then determined in light of the

probability of reversal, the nature of the crime, the likelihood of the defendant's escape, and the character of the defendant.

The decision to grant or deny bail is reviewable, but the scope of the review is limited to whether the court abused its discretion in its determination.

The amount of bail set is within the discretion of the court. Once fixed, it should not be modified, except for good cause. An increase cannot be authorized when the arrest warrant specifies the amount of the bail. An application for a change in bail is presented to the court by a motion based on an AFFIDAVIT (a voluntary written statement of facts) confirmed by the oath of the person making it. The affidavit must be taken before a person authorized to administer such an oath and must contain the facts justifying the change. The EIGHTH AMENDMENT to the Constitution and the provisions of most state constitutions prohibit excessive bail, meaning bail in an amount greater than that necessary to ensure the defendant's appearance at trial.

The Bail Reform Act of 1984 helped to set guidelines allowing courts to consider the danger a defendant might present if released on bail. This response to the problem of crimes committed by individuals who had been released on bail marked a significant departure from earlier philosophies surrounding bail. Bail laws took on a new importance; they would ensure the appearance of the defendant in proceedings, and they would see to the safety of the community into which the defendant was released.

Pursuant to the 1984 act, if the court deems that the accused may, in fact, pose a threat to the safety of the community, the accused may be held without bail. In 1987, *United States v. Salerno,* 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697, addressed the constitutionality of holding an individual without bail while awaiting criminal trial. The Supreme Court held that DUE PROCESS was not violated by the detention of individuals without bail.

### Breach and Forfeiture

A breach of the bail bond occurs in both civil and criminal actions when the defendant "jumps bail" or "skips bail"—that is, deliberately fails to return to court on the specified date, thereby forfeiting the amount of the bond. The act of jumping bail is either a misdemeanor or a felony, depending upon statute. The mandatory appearance required in a bail arrangement consists not merely of responding to the charges but also of attendance by the defendant at the trial and sentencing by the court. Appearance by counsel ordinarily does not prevent a breach, although under some statutes, where the offense is a misdemeanor, such an appearance might be sufficient.

When a bond is breached, the court enters a judgment of FORFEITURE of the bail. In some jurisdictions, the judgment is appealable, but only if the failure to comply with the conditions of the bond was excusable and the state suffered no loss of rights against the defendant.

A final judgment normally cannot be entered on recognizance or bail bond without additional proceedings. Such proceedings are usually of a civil nature and follow the forfeiture of bail. These proceedings can be commenced by a writ (a court order) of *scire facias* (a judicial writ requiring the person against whom it is brought to show cause why the party bringing it should not have advantage of such record) or by an independent action.

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#### CROSS-REFERENCES

Due Process of Law; Eighth Amendment; Recognizance.

## BAIL BOND

*A written promise signed by a defendant or a surety (one who promises to act in place of another) to pay an amount fixed by a court should the defendant named in the document fail to appear in court for the designated criminal proceeding at the date and time specified.*

A bail bond is one method used to obtain the release of a defendant awaiting trial upon criminal charges from the custody of law enforcement officials. The defendant, the defendant's family and friends, or a professional bail bond agent (or bail agent) executes a document that promises to forfeit the sum of money determined by the court to be commensurate with the gravity of the alleged offense if the defendant fails to return for the trial date.

Most defendants are financially unable to post their own bail, so they seek help from a bail agent, who, for a nonrefundable fee of 10 to 20 percent of the amount of the bail, posts bail. A bail agent becomes liable to the court for the full amount of bail if the defendant fails to appear for the court date. Before agreeing to assume the risk of posting bail, the bail agent requires collateral from the defendant, such as jewelry, SECURITIES, or written guaranties by creditworthy friends or relatives of the defendant. This collateral acts as security to ensure repayment for any losses the bail agent might incur. If the defendant appears to be a "poor risk," and unlikely to return to court for trial, the bail agent will refuse to post bail. A defendant who has a record of steady employment, has resided in the community for a reasonable length of time, and has no prior criminal record is considered to be a good risk.

The bail agent, the defendant, or another interested party posts bail in the form of the bail bond at the court where the defendant is required to return for the proceeding. The court clerk issues a bail ticket or similar document, which is sent to the police to notify them that bail has been met. The defendant is released from custody when the bail ticket is received by the police. Liability under the bail bond ends when the defendant fulfills the conditions of the bond by appearing in court on the specified date, or if the terms of the bond become impossible to execute, such as by the death of the defendant or by his or her arrest, detention, or imprisonment on another offense in the same or different jurisdiction.

If a defendant fails to appear for trial on the date specified in the bail bond, the court will issue a warrant for the defendant's arrest for "jumping bail," and the amount of the bond will be forfeited to the court. The bail agent is generally authorized by statute to arrest the defendant and bring him or her back for criminal proceedings.

Kentucky, Illinois, Wisconsin, Nebraska, and Oregon have enacted laws making it illegal to post bail for profit, thereby outlawing the occupation of bail bond agent.

A bail bond may be similarly used in cases of civil arrest to prevent a defendant from fleeing a jurisdiction to avoid litigation or fraudulently concealing or disposing of assets in order to become judgment proof (incapable of satisfying an award made against him or her if the plaintiff is successful).

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CROSS-REFERENCES

Asset; Collateral; Judgment Proof.

## BAILEE

*One to whom* PERSONAL PROPERTY *is entrusted for a particular purpose by another, the bailor, according to the terms of an express or implied agreement.*

CROSS-REFERENCES

Bailment.

## ♦ BAILEY, FRANCIS LEE

The career of attorney F. Lee Bailey is a celebrated one. Few criminal defense lawyers have earned as much success or notoriety as the tough-talking former Marine lieutenant, known for winning what have often been considered hopeless cases. Early in his career, Bailey built a reputation for fastidious attention to detail as an investigator who could ferret out the minutiae needed to acquit his clients. His cross-examination style—long on hard-hitting machismo—earned him comparisons to some of the twentieth century's most noted lawyers. By his mid-30s, he had won a string of victories in

*F. Lee Bailey.* AP/WIDE WORLD PHOTOS

"THOSE WHO THINK THE INFORMATION BROUGHT OUT AT A CRIMINAL TRIAL IS THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH ARE FOOLS."
—F. LEE BAILEY

shocking, nationally publicized cases, including an important U.S. Supreme Court ruling on **PRETRIAL PUBLICITY**. His books on law became bestsellers, but controversy followed his criticisms of the legal system and his sometimes risky defense strategies. In 1994, he joined the defense team in the trial of **O. J. SIMPSON** for the murder of Nicole Brown Simpson and her friend Ronald Lyle Goldman.

Bailey might never have become a lawyer if he had not dropped out of college. Born in the Boston suburb of Waltham, Massachusetts, on June 10, 1933, he was the son of an advertising man and a schoolteacher who founded a large nursery school. In his teens, Bailey excelled at Kimball Union Academy, a prep school, and won a scholarship to attend Harvard in 1950. His goal was to study English. Yet academia could not hold him for long; he wanted adventure. Dropping out of Harvard at the end of his sophomore year, he enrolled in the Navy flight-training program and eventually joined the Marines, where he at first flew jet fighters. Soon Bailey had switched gears and was defending accused service members as part of the legal staff at the Cherry Point Marine Corps Air Station in North Carolina. Military life would leave its mark on him. More than forty years later, he would write articles about jets for *Flying* magazine and, while defending Simpson, would say that he had spoken with a witness who was a veteran, as one Marine to another.

The experience of fighting courts-martial convinced Bailey to become a lawyer in civilian life. Leaving the service with the rank of second lieutenant, he entered Boston University Law School, which admitted him on the strength of his considerable **MILITARY LAW** practice. Once again, his ambition could scarcely be satisfied in books, and the precocious student founded a private detective agency. The firm did fieldwork to help attorneys prepare their cases, and Bailey claimed to devote sixty hours a week to this endeavor alone. It paid off: he handled some two thousand cases, honed his skills as an investigator, and later sold the agency. The long extracurricular hours did not stop him from finishing, in 1960, at the top of his class with the highest grade point average in the school's history.

Bailey next studied the lie detector at the Keeler Polygraph Institute in Chicago, a tool much used in the courtrooms of the era. The skill he acquired there led to his first job, at age 27, as a polygraph expert hired by the defense in a highly publicized Boston trial, the *Torso Murder* case—so named because prosecutors charged the defendant, George Edgerly, with dismembering his wife and dumping the pieces of her body in the Merrimack River. Edgerly had failed a lie detector test, making the case difficult for the defense. Bailey was hired to help turn the case around. When the lead attorney suffered a heart attack, Bailey took over the case and won an acquittal for the defendant. His victory in the Edgerly case was the first of several in high profile cases over the next decade. Most notable was Bailey's role in the murder appeal of Dr. **SAMUEL H. SHEPPARD**, who had been convicted of second-degree murder in the bludgeoning death of his wife, Marilyn Sheppard. In 1966, Bailey helped convince the U.S. Supreme Court that the trial judge had erred in not shielding Sheppard from pretrial publicity, thus denying him a fair trial—establishing an important new standard for defendants' rights (*Sheppard v. Maxwell,* 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600). He subsequently cleared Sheppard.

The *Sheppard* case launched Bailey's career. Not only was he now proven in court, he was also attaining celebrity status. News magazines extolled his skills at cross-examination, with *Life Magazine* saying in 1967 that he was "methodical and relentless, boring in and tunneling under his prey like a determined badger." Frequently, comparisons to the fictional television character Perry Mason cropped up, which Bailey resented;

just as often came comparisons to the great criminal defense lawyer CLARENCE DARROW, which he did nothing to discourage. Preparation and analysis were Bailey's most renowned legal skills, yet what brought him public attention was his talent for theatrics. His style was swaggering: he could thunderously tell a courtroom that the charges against his client were "10 pounds of hogwash in a five-pound bag" or declare that he had just won a "thumping acquittal." He viewed litigation as "the true substitute for gladiatorial combat." By the time the ABC television network gave him a slot in 1967 on the program *Good Company,* where he chatted up celebrities, he was himself a household name. His 1971 book, *The Defense Never Rests: The Art of Cross-Examination,* became a bestseller. Several legal, nonfiction, and fiction books followed.

For Bailey, fame was a double-edged sword that brought both attention and criticism. Often sought out by the news media for his opinions, he used their interviews as soapboxes from which to call for legal reforms. He argued that criminal defense attorneys needed several additional years of training; held that fewer frivolous lawsuits would tie up the courts if the U.S. legal system were to imitate the more rigorous British one; and, on the lecture circuit, even suggested that crime could be prevented by making it illegal for people to carry more than $500 at a time. He also simply liked the limelight: as the equally famous attorney Melvin M. Belli recalled, he and Bailey once stood at a bar betting each other $5 over who would be recognized first. Not all of Bailey's pronouncements met with praise; his outspokenness was sometimes seen as grandstanding. Ironically, for the attorney who had won *Sheppard,* he was criticized by the Massachusetts Bar Association for saying too much outside of court, and in 1971, the Supreme Court of New Jersey barred him for a year from practicing law there for similar reasons.

In 1974, Bailey faced his Waterloo when he unsuccessfully defended the publishing heiress Patricia Hearst. Hearst had stunned U.S. citizens when, after being KIDNAPPED, she was photographed carrying an automatic weapon in a San Francisco bank heist. On trial for ROBBERY, she claimed to have been brainwashed by her abductors, a terrorist group known as the Symbionese Liberation Army (SLA). In orchestrating her defense, Bailey was widely criticized for the risky strategy of putting her on the witness stand, where she took the FIFTH AMENDMENT 42 times to avoid answering questions. Years after her conviction, Hearst herself blamed Bailey, arguing in a 1980 appeal that the attorney had been less interested in her defense than in writing a book about the case. The U.S. Ninth Circuit Court of Appeals ruled that "Bailey's potential conflict of interest is virtually admitted," and granted Hearst a new hearing (*United States v. Hearst,* 638 F.2d 1190 [9th Cir. 1980]).

After the Hearst trial, Bailey disappeared from public view for a time. Nevertheless, his reputation as "flamboyant" and a "legend" persisted and he continued to win cases. In 1982, he attracted national attention again when he beat a drunk driving charge with LEGAL REPRESENTATION from his friend, ROBERT L. SHAPIRO. Bailey complained that the police had picked on him because he was famous. Soon he was campaigning publicly against what he saw as police harassment, warning, "The cops have decided to set some fierce public examples of their new hard line, probably to scare drivers into going easy on the booze." He promptly wrote a legal SELF-HELP book titled *How to Protect Yourself*

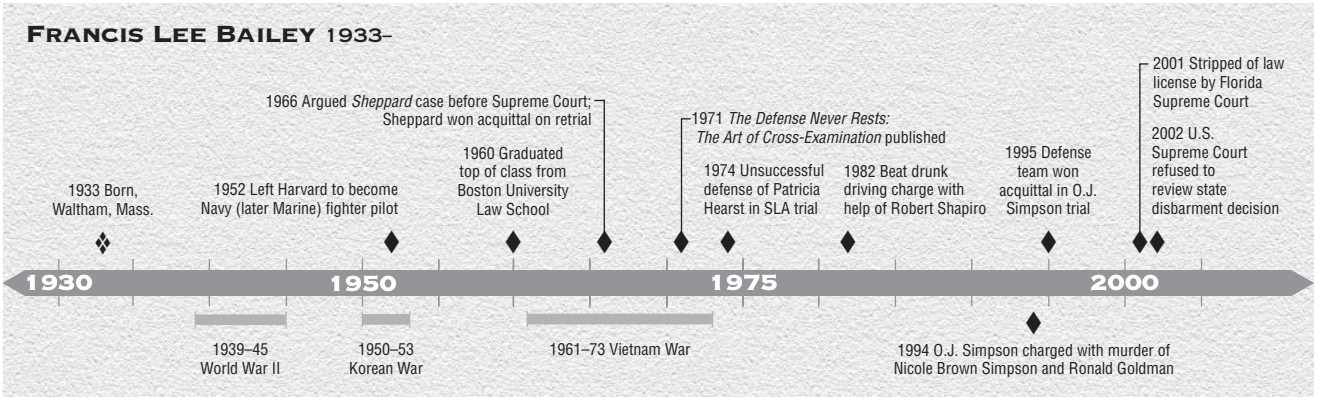

*against Cops in California and Other Strange Places,* purporting to be a guide to avoiding unfair drunk driving convictions.

In 1994, the trial of Simpson returned Bailey to the spotlight when he and Shapiro were hired for the defense team. However, before the trial even began, the old friends engaged in a public feud. Shapiro accused Bailey of trying to destroy his credibility by leaking information to the press, comparing Bailey to a snake and demanding his removal from the case. In reply, Bailey criticized his colleague's "public outburst." According to *Newsweek,* Simpson admonished the two bickering attorneys, reminding them that his life was at stake. The spat died down, and, in March of 1995, Bailey cross-examined a key prosecution witness, police detective Mark Fuhrman.

Surrounded by high expectations, the cross-examination was widely portrayed as a comeback attempt for the sixty-two-year-old Bailey. He rose to the occasion with high expectations of his own, promising to "dismantle" Fuhrman. The defense had branded the detective a racist and alleged that he had planted a key piece of evidence at Simpson's estate: a bloody glove. Bailey's difficult job was to prove that Fuhrman had planted evidence and had once used the pejorative *nigger;* Fuhrman never conceded either point, despite several days of grilling on the stand. Prosecutor MARCIA CLARK attacked Bailey on several points, arguing that he had misrepresented what a Marine sergeant would testify to as to Fuhrman's language in the Marines and that he was manufacturing evidence with his conjecture that Fuhrman had sneaked the bloody glove to the crime scene in a plastic bag in his sock.

After Bailey's questioning of Fuhrman, several prominent legal analysts argued that he had flopped. He defended his performance in *Time* magazine using a comparison that recalled the earliest praises of his career: "I'm not Perry Mason; nobody is. Other lawyers whom I respect told me that given what I had to work with, it was good. Norman Mailer called me and said it was flawless. So I feel good."

In March of 1996 Bailey himself became the subject of criminal prosecution after he and the United States government had a disagreement over who was entitled to millions of dollars of stock formerly held by Claude Duboc, a drug dealer and client of Bailey. The government demanded FORFEITURE of the stock, but Bailey said a plea bargain he had negotiated with the government on behalf of Duboc allowed Bailey to keep it. When Bailey refused to surrender 2.3 million dollars to the federal district court in Tallahassee, Florida, he was sentenced to six months in jail for CONTEMPT. In August of 2000, a federal judge held Bailey in contempt of court for failing to turn over the Duboc moneys. However, the judge declined to jail or fine Bailey on the grounds that federal prosecutors failed to properly trace the money or to recover assets from Bailey. In November of 2001, the Florida Supreme Court issued a decision based on Bailey's mishandling of the Duboc stock funds that ordered Bailey to be disbarred from practicing law in Florida. In April of 2003, the Supreme Judicial Court of Massachusetts issued a unanimous decision upholding the decision to disbar Bailey on the grounds that he deliberately broke ethics rules.

In mid-2003 Bailey was traveling the country giving lectures on his career and cases. He appeared as a legal commentator on television shows such as *Larry King Live, Today,* and *Good Morning America.*

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CROSS-REFERENCES

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## BAILIFF

*An individual who is entrusted with some authority, care, guardianship, or jurisdiction over designated persons or property. One who acts in a managerial or ministerial capacity or takes care of land, goods, and chattels of another in order to make the best profit for the owner. A minor officer of a court serving primarily as a messenger or usher. A low-level court official or sheriff's deputy whose duty is to preserve and protect orderly conduct in court proceedings.*

## BAILMENT

*The temporary placement of control over, or possession of,* PERSONAL PROPERTY *by one person, the bailor, into the hands of another, the bailee, for a designated purpose upon which the parties have agreed.*

The term *bailment* is derived from the French *bailor,* "to deliver." It is generally considered to be a contractual relationship since the bailor and bailee, either expressly or impliedly, bind themselves to act according to particular terms. The bailee receives only control or possession of the property while the bailor retains the ownership interests in it. During the specific period a bailment exists, the bailee's interest in the property is superior to that of all others, including the bailor, unless the bailee violates some term of the agreement. Once the purpose for which the property has been delivered has been accomplished, the property will be returned to the bailor or otherwise disposed of pursuant to the bailor's directions.

A bailment is not the same as a sale, which is an intentional transfer of ownership of personal property in exchange for something of value. A bailment involves only a transfer of possession or custody, not of ownership. A rental or lease of personal property might be a bailment, depending upon the agreement of the parties. A bailment is created when a parking garage attendant, the bailee, is given the keys to a motor vehicle by its owner, the bailor. The owner, in addition to renting the space, has transferred possession and control of the vehicle by relinquishing its keys to the attendant. If the keys were not made available and the vehicle was locked, the arrangement would be strictly a rental or lease, since there was no transfer of possession.

A gratuitous loan and the delivery of property for repair or safekeeping are also typical situations in which a bailment is created.

## Categories

There are three types of bailments: (1) for the benefit of the bailor and bailee; (2) for the sole benefit of the bailor; and (3) for the sole benefit of the bailee.

A bailment for the mutual benefit of the parties is created when there is an exchange of performances between the parties. A bailment for the repair of an item is a bailment for mutual benefit when the bailee receives a fee in exchange for his or her work.

A bailor receives the sole benefit from a bailment when a bailee acts gratuitously—for example, if a restaurant, a bailee, provides an attended coatroom free of charge to its customers, the bailors. By virtue of the terms of the bailment, the bailee agrees to act without any expectation of compensation.

*A library patron's use of library books and materials is an example of a bailment for the sole benefit of the bailee.*
AP/WIDE WORLD PHOTOS

A bailment is created for the sole benefit of the bailee when both parties agree the property temporarily in the bailee's custody is to be used to his or her own advantage without giving anything to the bailor in return. The loan of a book from a library is a bailment for the sole benefit of the bailee.

## Elements

Three elements are generally necessary for the existence of a bailment: delivery, acceptance, and consideration.

Actual possession of or control over property must be delivered to a bailee in order to create a bailment. The delivery of actual possession of an item allows the bailee to accomplish his or her duties toward the property without the interference of others. Control over property is not necessarily the same as physical custody of it but, rather, is a type of constructive delivery. The bailor gives the bailee the means of access to taking custody of it, without its actual delivery. The law construes such action as the equivalent of the physical transfer of the item. The delivery of the keys to a safe-deposit box is constructive delivery of its contents.

A requisite to the creation of a bailment is the express or implied acceptance of possession of or control over the property by the bailee. A person cannot unwittingly become a bailee. Because a bailment is a contract, knowledge and acceptance of its terms are essential to its enforcement.

Consideration, the exchange of something of value, must be present for a bailment to exist. Unlike the consideration required for most contracts, as long as one party gives up something of

value, such action is regarded as good consideration. It is sufficient that the bailor suffer loss of use of the property by relinquishing its control to the bailee; the bailor has given up something of value—the immediate right to control the property.

### Rights and Liabilities

The bailment contract embodying general principles of the law of bailments governs the rights and duties of the bailor and bailee. The duty of care that must be exercised by a bailee varies, depending on the type of bailment.

In a bailment for mutual benefit, the bailee must take reasonable care of the bailed property. A bailee who fails to do so may be held liable for any damages incurred from his or her NEGLIGENCE. When a bailor receives the sole benefit from the bailment, the bailee has a lesser duty to care for the property and is financially responsible only if he or she has been grossly negligent or has acted in bad faith in taking care of the property. In contrast, a bailee for whose sole benefit property has been bailed must exercise extraordinary care for the property. The bailee can use the property only in the manner authorized by the terms of the bailment. The bailee is liable for all injuries to the property from failure to properly care for or use it.

Once the purpose of the bailment has been completed, the bailee usually must return the property to the bailor, or account for it, depending upon the terms of the contract. If, through no fault of his or her own, the return of the property is delayed or becomes impossible—for example, when it is lost during the course of the bailment or when a hurricane blows the property into the ocean—the bailee will not be held liable for nondelivery on demand. In all other situations, however, the bailee will be responsible for the TORT of conversion for unjustifiable failure to redeliver the property as well as its unauthorized use.

The provisions of the bailment contract may restrict the liability of a bailee for negligent care or unauthorized use of the property. Such terms may not, however, absolve the bailee from all liability for the consequences of his or her own FRAUD or negligence. The bailor must have notice of all such limitations on liability. The restrictions will be enforced in any action brought for damages as long as the contract does not violate the law or public policy. Similarly, a bailee may extend his or her liability to the bailor by contract provision.

### Termination

A bailment is ended when its purpose has been achieved, when the parties agree that it is terminated, or when the bailed property is destroyed. A bailment created for an indefinite period is terminable at will by either party, as long as the other party receives due notice of the intended termination. Once a bailment ends, the bailee must return the property to the bailor or possibly be liable for conversion.

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CROSS-REFERENCES

Bad Faith; Conversion; Damages; Negligence.

## BAILOR

*One who places control over or possession of* PERSONAL PROPERTY *in the hands of another, a bailee, for its care, safekeeping, or use, in accordance to the terms of a mutual agreement.*

CROSS-REFERENCES

Bailment.

## BAIT AND SWITCH

*A deceptive sales technique that involves advertising a low-priced item to attract customers to a store, then persuading them to buy more expensive goods by failing to have a sufficient supply of the advertised item on hand or by disparaging its quality.*

This practice is illegal in many states under their CONSUMER PROTECTION laws.

## ♦ BAKER, ELLA JOSEPHINE

Ella Josephine Baker helped found the U.S. CIVIL RIGHTS MOVEMENT and organize three national CIVIL RIGHTS organizations.

Baker was born in Norfolk, Virginia, on December 13, 1903, the second of three children of Georgianna Ross Baker and Blake Baker. Baker's mother insisted that her children do well in school, because she felt that they needed an education in order to live a full life. Baker was sent to a private boarding school from ninth grade to twelfth grade, after her mother decided that she and her siblings were not receiving high-quality instruction in the public school

they had been attending. In 1918, Baker began studying at Shaw University, an all-black school in Raleigh, North Carolina, that offered high school and college-level instruction.

Baker graduated from Shaw University in 1927, ranked first in her class. However, she did not have enough money for further schooling to become either a medical missionary or a social worker, occupations to which she had aspired. Her college degree in hand, she went to New York City.

While living in New York, Baker wrote articles for Harlem newspapers, including the *West Indian Review.* Living and working in Harlem during the mid- to late 1920s, she became a part of the Harlem Renaissance, a period of high artistic achievement and greater awareness of the possibilities for equality, justice, and true freedom. Baker participated in political discussions with many people, all over New York City. She later recalled, "Wherever there was a discussion, I'd go. It didn't matter if it was all men, and maybe I was the only woman … it didn't matter."

In the early days of the Great Depression, Baker was working for a Harlem newspaper along with George Samuel Schuyler, who was well known in the black community for his writing and who frequently railed against racial prejudice. In one article, Schuyler proposed that African Americans set up cooperatives to purchase goods in larger quantities, at lower prices than they could get otherwise. The response to this article was so positive that Schuyler decided to set up a cooperative on his own with Baker's help. Baker learned a great deal in this experience, and became an acknowledged expert on consumer affairs, a new idea that she helped introduce to the black community nationwide. In 1935, she was hired by the Works Progress Administration (WPA), a group of programs set up by President **FRANKLIN D. ROOSEVELT'S NEW DEAL**, to teach people living in Harlem how to purchase the most for the little money they had.

Baker worked for the WPA until 1938, when she left to become an assistant field secretary for the National Association for the Advancement of Colored People (**NAACP**), the first civil rights organization established in the United States.

At that time the NAACP had fewer members in the South than in any other part of the United States, and most of its members were professionals—doctors, lawyers, and teachers. Baker believed that the organization had to reach the larger population of working people in order to accomplish its tasks. She targeted factory workers, household workers, and construction workers and tried to get them to support the NAACP. By 1941, thanks to Baker and the other NAACP field staffers, the NAACP's southern membership rolls had increased significantly.

*Ella Baker.*
PHOTOGRAPH FROM/BY NAACP COLLECTION, PRINTS AND PHOTOGRAPHS DIVISION, LIBRARY OF CONGRESS

"STRONG PEOPLE DON'T NEED STRONG LEADERS."
—ELLA BAKER

In 1942 Baker was promoted to director of branches for the organization. In that position, she helped branch offices organize fund-raising and membership drives and encouraged them to become involved in local affairs to improve the lot of black people in their communities. Through her contact with the branch offices, the organization became aware of court cases they could bring on behalf of blacks who were denied their civil rights, such as access to public institutions of higher education.

In 1954 Baker was named as president of the New York City branch of the NAACP. In May of that year, the U.S. Supreme Court issued its landmark decision in **BROWN V. BOARD OF EDUCATION**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873. The Court ruled in *Brown* that "separate but equal" schools for blacks and whites were unconstitutional. As a result, school districts in cities across the nation had to make sure they were not violating the law. Based on her experience raising her niece, Jackie, Baker believed that New York City schools were segregated, and she and other community leaders pressured city hall to examine the school system more closely for

evidence of illegal SEGREGATION. The next year, the mayor of New York City asked Baker to join his newly created Commission on School Integration.

To present the commission's findings to parents of schoolchildren, Baker set up meetings around New York City. When she found that many parents were deeply concerned over the quality of their neighborhood schools, Baker encouraged them to petition the school board to allow their children to attend schools of their own choosing. In response to the petitions, New York developed one of the first open-enrollment plans for public schools. Open enrollment allowed public school students to attend schools outside their own neighborhoods, without requiring them to change their residency or pay extra tuition or transportation costs.

A new chapter in the civil rights movement began when ROSA PARKS refused to give up her seat on a Montgomery, Alabama, bus on December 1, 1955. In Montgomery, black passengers could sit only in the back of the bus, behind the first ten rows of seats. Whites could sit in the black section of the bus, but when they did, a black person could not sit next to or in front of a white person. And black people could be forced to give up their seats if a white person had no place to sit.

Parks was an officer of the NAACP's Montgomery branch and had worked with Baker on the NAACP's Leadership Conference, a program designed to help local members develop their leadership skills. In support of Parks, leaders of Montgomery's black community, including Dr. MARTIN LUTHER KING JR., organized a boycott of the Montgomery bus system. The boycott lasted from December 1, 1955, until December 20, 1956, when blacks in Montgomery heard that the U.S. Supreme Court had ruled on December 17 that Montgomery's bus segregation laws were unconstitutional (*Gayle v. Browder,* 352 U.S. 903, 77 S. Ct. 145, 1 L. Ed. 2d 114 [Nov. 13, 1956], *reh'g denied,* 352 U.S. 950, 77 S. Ct. 323, 1 L. Ed. 2d 245).

After the success of the MONTGOMERY BUS BOYCOTT, Baker and others eventually convinced King to call a meeting of southern black leaders to plan to extend the battle. The meeting King called was to take place in Atlanta on January 11, 1957. The evening before, several locations in Montgomery were bombed, including homes of white and black supporters of the civil rights movement. King and the Rev. Ralph D. Abernathy, whose home was one of those bombed, left the meeting to investigate the incidents. Baker and an associate stayed in Atlanta to manage the conference with Coretta Scott King and the Rev. Fred L. Shuttlesworth. This meeting was the beginning of the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (SCLC), an umbrella organization for groups fighting for civil rights.

One of the SCLC's first nationwide efforts was the Crusade for Citizenship, a voter registration program. By September 1959, when the organization had not motivated masses of African Americans to register, Baker proposed three changes that she believed would result in a stronger organization. The first suggestion was to create an overarching plan to coordinate the activities of SCLC member groups. The second was to actively develop the leadership skills of people in the member organizations who had demonstrated abilities in that area. The third was to organize black southerners to fight every form of discrimination by using mass action and nonviolent resistance.

One method of nonviolent resistance, the sit-in, was used as early as 1942 by a civil rights organization called the CONGRESS OF RACIAL EQUALITY (CORE) to protest RACIAL DISCRIMINATION. Not until 1960, however, were sit-ins widely used as a form of protest. In February 1960, four black students sat at the lunch counter in a Woolworth's store in Greensboro, North Carolina. They were refused service, because it was a "whites-only" lunch counter, but remained seated until the store closed for the day. News of the incident spread quickly, and area high school and college students joined them in the following days. By the end of March, students had staged sit-ins in many other southern cities. Baker realized that although the sit-ins were generating publicity for the civil rights movement, their influence would be greater if they were better coordinated, so in April 1960 Baker organized a conference for student civil rights activists at Shaw University. Over three hundred students attended the meeting, which was the genesis of the STUDENT NONVIOLENT COORDINATING COMMITTEE (SNCC). Among those attending were Marion Barry, future mayor and future city council member of Washington, D.C., and JULIAN BOND, future Georgia legislator.

Baker resigned from the SCLC and became SNCC's adviser and organized its main office. SNCC developed a unique, separate identity

within the civil rights movement because of Baker's style of leadership. Baker believed that everyone in an organization should lead it, so she made sure that everyone in attendance at meetings stated an opinion, and that no other single civil rights leader or organization, including the NAACP and King, directed the activities of the committee. When SNCC nearly split apart over whether to pursue direct action (such as the Montgomery bus boycott and the Greensboro sit-ins) or voter registration, Baker suggested that the organization could do both, setting the stage for the 1961 Freedom Rides.

The Freedom Rides were begun in 1961 as a response to a 1960 ruling, *Boynton v. Virginia,* 364 U.S. 206, 81 S. Ct. 182, 5 L. Ed. 2d 206, in which the Supreme Court decided that interstate buses and trains, and the facilities in the terminals that served them, could not constitutionally remain segregated. The ruling was flagrantly ignored throughout the South. The Freedom Riders, who were both black and white, intended to stop the segregation by traveling together along the routes where segregated facilities were located. The Freedom Rides drew the attention of the Congress, which began debate on a civil rights bill in the summer of 1963. The 1964 **CIVIL RIGHTS ACT**, as the bill was called, was finally passed on July 2, 1964, guaranteeing African Americans **EQUAL PROTECTION** in the use of hotels, restaurants, and other public establishments; in job opportunities, raises, and promotions; and in the use of public schools (Pub. L. No. 88-352, 78 Stat. 241).

While the Freedom Riders traveled across the South, SNCC also pursued voter registration. In 1963, Baker went to Mississippi to help with the Freedom Vote, a project of CORE and SNCC. The Freedom Vote was a mock election intended to demonstrate that, contrary to the opinions held by many white southerners, blacks were interested in voting. Baker assisted the project by speaking at rallies, setting up polling places, and collecting and counting the ballots on voting day. The Freedom Vote was a big success: more than 80,000 of the 90,000 people who cast ballots that day were black, even though only around 20,000 blacks were registered for real elections. Two years later, in August 1965, the efforts of Baker and thousands of other activists bore fruit when the **VOTING RIGHTS ACT** (Pub. L. No. 89-110, 79 Stat. 437) was passed. The Voting Rights Act nearly eliminated one of the last ways that had been used to prevent African Americans from voting—the literacy test—by prohibiting its use in states where fewer than 50 percent of eligible voters were registered.

In 1964 Baker again helped organize a civil rights group. The group was the Mississippi Freedom **DEMOCRATIC PARTY** (MFDP), begun in response to an established political party, the Mississippi Democratic party. The MFDP attempted to represent the state of Mississippi at the 1964 Democratic National Convention in Atlantic City, New Jersey, by claiming that, as an interracial group, it was better able to do so than the all-white Mississippi Democratic party. **HUBERT H. HUMPHREY**, vice president of the United States, and Walter F. Mondale, Minnesota attorney general, suggested a compromise: two MFDP members could be named as

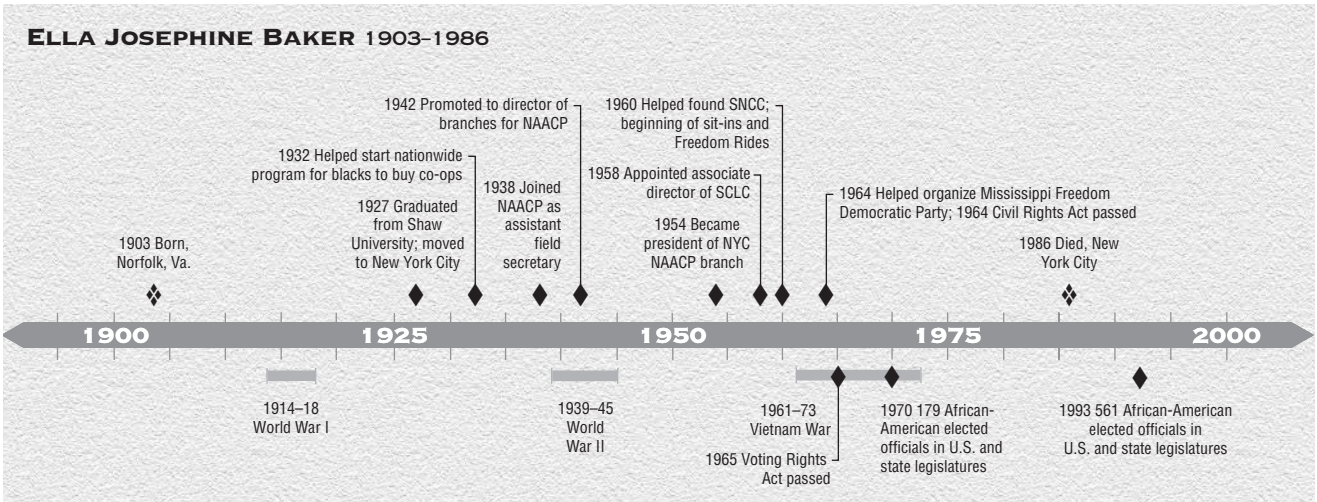

delegates to the convention, but would not be part of Mississippi's delegation. The MFDP refused this offer, but its request was the catalyst for a new rule passed by the national Democratic party, that all state delegations would have to be racially mixed.

After achieving notable successes in the U.S. civil rights movement, Baker continued to serve as SNCC's mentor as the organization became involved in protests against the VIETNAM WAR, and as an advocate for the free speech movement and WOMEN'S RIGHTS. She also worked toward increased civil rights for blacks in other countries, including the former Southern Rhodesia, now Zimbabwe; South Africa; and Puerto Rico.

Baker died in New York City on December 13, 1986, her eighty-third birthday. By that time, some of the organizations she had been involved with no longer existed. SNCC fell apart after dissension developed over black power, or black independence from white America. The MFDP lasted through the 1967 elections, winning offices in local races, but was no longer needed after African Americans were allowed to join the state Democratic party. Baker's work, however, lives on in a generation of black U.S. leaders she nurtured and encouraged, who are able to carry on the struggle for civil and HUMAN RIGHTS worldwide.

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CROSS-REFERENCES

School Desegregation; Voting.

## BAKER V. CARR

The ideal of one person, one vote motivated the founders of the United States of America to establish a census when they drafted the U.S. Constitution in 1787. Although that ideal has not yet been fully realized—because the census still undercounts racial and ethnic minorities, among others—the country took a giant step closer to equal representation for every citizen nearly two centuries later, during the era of the CIVIL RIGHTS MOVEMENT. On March 26, 1962, the U.S. Supreme Court ruled in the landmark case of *Baker v. Carr,* 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), that state congressional districts of unequal size were unconstitutional. In a ruling that Chief Justice EARL WARREN later called the most important of his tenure on the Court, Justice WILLIAM J. BRENNAN JR. wrote: "A citizen's right to vote free of ARBITRARY impairment by STATE ACTION has been judicially recognized as a right secured by the Constitution."

Also significant because it examined the notion of "political questions" and whether courts could address them, the *Baker* case became a springboard for future APPORTIONMENT lawsuits. In June 1964, the Supreme Court ruled on appeals from 15 states that had used *Baker* as a precedent, holding that both houses of a state legislature must be apportioned substantially on the basis of population. Within two years, every state had taken some type of apportionment action. By the late 1960s, congressional districts around the country had been redrawn to meet the Supreme Court's call for equal representation, and after the 1970 census, underrepresented urban areas were finally given an equal voice in Congress.

Every decade since 1790, U.S. citizens have complied with the Constitution and counted themselves. Whereas on its simplest level the census is a means to document historical changes in the U.S. population, it also determines how federal funds, power, political clout, and representation are divided, or apportioned, among the people of the United States. It was the notion of representation, more specifically equal representation, that compelled Charles W. Baker and other qualified voters in Tennessee to bring a lawsuit against Tennessee's secretary of state Joe C. Carr, on the grounds that the state's 1901 apportionment statute (Acts Tenn. 1901, c. 122) violated the FOURTEENTH AMENDMENT of the Constitution. The plaintiffs argued that Tennessee's method of unequally apportioning the members of the general assembly among the state's 95 counties unconstitutionally deprived people in the state of EQUAL PROTECTION of the laws and was obsolete because of a significant growth and population shift since 1900.

The plaintiffs' first round in court brought failure when a three-judge panel of the U.S. District Court for the Middle District of Tennessee dismissed their complaint on December 21, 1959 (Baker, 179 F. Supp. 824). The panel dismissed the complaint on two grounds: (1) that the court lacked jurisdiction of the subject matter because it was a POLITICAL QUESTION and (2) that the complaint failed to state a claim upon which relief could be granted.

**State Legislative Apportionment Before *Baker v. Carr*[a]**

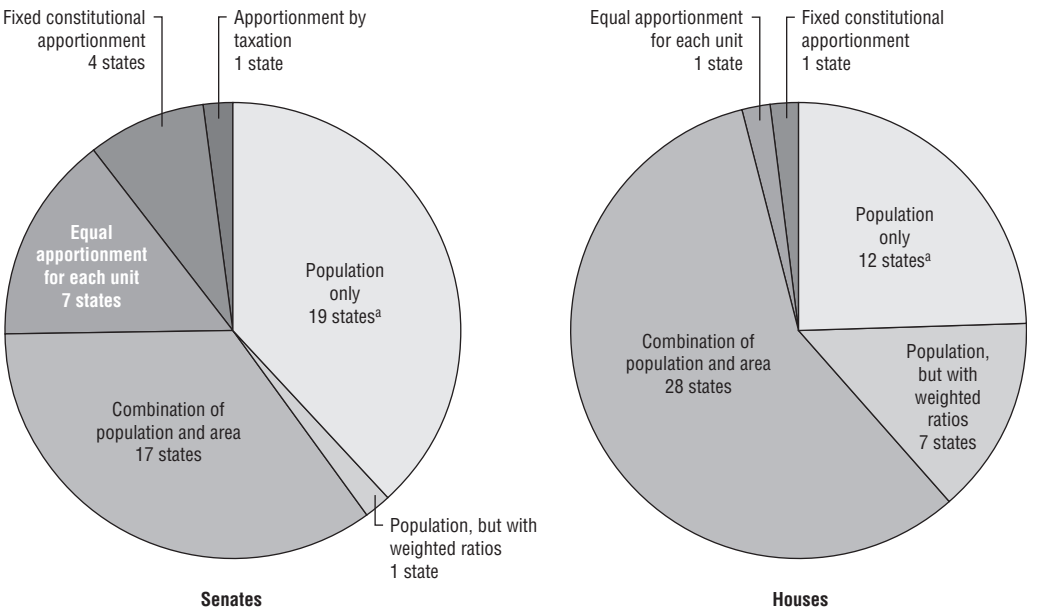


[a]Nebraska has a unicameral legislature (only one legislative chamber), and, therefore, is not represented on this graph. Nebraska's legislature was apportioned by population.

SOURCE: Gordon E. Baker, *State Constitutions: Reapportionment* (New York: National Municipal League, 1960), 5.

The plaintiffs appealed, and on November 21, 1964, the U.S. Supreme Court ruled that it had probable jurisdiction in the matter. This decision was significant because before the Supreme Court heard the *Baker* case, courts had abstained from addressing apportionment issues because they were considered political in nature. In the 1946 Supreme Court case *Colegrove v. Green,* 328 U.S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946), Justice FELIX FRANKFURTER called apportionment a "political thicket" into which the judiciary should not venture. The subsequent ruling in *Baker* changed that interpretation, stating that federal courts possessed jurisdiction of the subject, that the citizens in Tennessee were entitled to relief, and that the federal district court in the state could settle the challenge to the apportionment statute of Tennessee.

In addressing the concern of some of his fellow Supreme Court justices, who warned that the matter before them was a political question and therefore not appropriately dealt with in a court of law, Justice Brennan carefully wrote—and rewrote, ten times—his opinion in the 1962 decision. Brennan stated: "The mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection is little more than a play upon words." He added that the plaintiffs' complaint did present a JUSTICIABLE constitutional CAUSE OF ACTION and that the Fourteenth Amendment did provide judicial protection to the right asserted. Justices Frankfurter and JOHN MARSHALL HARLAN dissented, stating that Brennan should not inject the Court "into the clash of political forces and political settlements." The Court's 6–2 ruling in favor of the plaintiffs forced state legislatures to reapportion their seats to reflect population shifts before the elections that were to occur in the fall of 1962. It also decreed one person, one vote as part of the United States' constitutional heritage and opened the door to challenging state voting procedures and malapportionment on constitutional grounds.

In his book *Turning Point: A Candidate, a State, and a Nation Come of Age,* former president JIMMY CARTER described how revolutionary the *Baker* decision was in the 1960s and how it

transformed state politics, especially southern politics. Carter wrote that the Georgia state government, like many others, proposed a number of stalling ploys, fake reapportionment plans, and other ways to avoid the shift in political power that the ONE-PERSON, ONE-VOTE ruling had been designed to cause. "The beneficiaries of the [old] system were the ones now charged with . . . changing it," he wrote. "At the same time, they would be reducing drastically the relative voting strength of their own constituents. It was understandable that [they] would do everything possible to circumvent or postpone the effect of the court's mandate." Federal judges rejected the bogus plans, however, and by late summer 1962, the state's political process had been thrown wide open. Incumbent politicians were suddenly without districts, and new seats had opened up. In these circumstances, a few weeks before the election, Carter decided to run for the Georgia State Senate.

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Apportionment; Brennan, William Joseph, Jr.; Equal Protection; Failure to State a Claim; Fourteenth Amendment; Frankfurter, Felix; Political Question; *Reynolds v. Sims*; Voting.

## BAKKE AFFIRMATIVE ACTION CASE

See REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE.

## BALANCE SHEET

*A comprehensive financial statement that is a summarized assessment of a company's accounts specifying its assets and liabilities. A report, usually prepared by independent auditors or accountants, which includes a full and complete statement of all receipts and disbursements of a particular business. A review that shows a general balance or summation of all accounts without showing the particular items that make up the several accounts.*

## BALANCING

*A process sometimes used by state and federal courts in deciding between the competing interests represented in a case.*

Used frequently to decide constitutional cases, balancing is one of two main legal decision-making methods, the other being categorization or STRICT CONSTRUCTION. Balancing involves weighing competing rights against each other and analyzing the relative strengths of many factors. A balancing decision is dependent upon the circumstances of each case. Therefore, the outcome is difficult to predict. By contrast, categorization is a classification and labeling process. It involves identifying a right and how it was infringed upon and analogizing these findings to a previously decided case or precedent. Hence, the outcome is more predictable.

### Balancing of Competing Interests in the U.S. Supreme Court

Balancing may take one of two forms in cases before the U.S. Supreme Court. In the first, the Court may measure competing interests against each other and determine which carries the most weight. For example, in *New York v. Ferber,* 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982), the Court upheld a statute criminalizing distribution of CHILD PORNOGRAPHY because the evil eliminated by the statute far outweighed any infringement on free speech interests. In the second form of balancing, the Court attempts to "strike a balance" between competing interests. Thus, in *Tennessee v. Garner,* 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), the Court held that a police officer may use DEADLY FORCE to stop a fleeing felon if the officer has PROBABLE CAUSE to believe that the

suspect poses a threat of serious physical harm to others. In *Garner,* the Court did not find that one interest clearly outweighed the other. Instead, both the state's interest in law enforcement and the individual's interest in being free from harm were weighed in the analysis and given due recognition.

Balancing was first used by the U.S. Supreme Court as one of its principal modes of judicial analysis in the late 1930s and early 1940s when the judiciary began to reject the rigid formalism and mechanical JURISPRUDENCE characteristic of the nineteenth and early twentieth centuries. Before the balancing era began in earnest with LOCHNER V. NEW YORK, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), the Court held that a New York statute setting maximum work hours was constitutional because such regulation was within the state's POLICE POWER. In reaching this decision, the Court did not attempt to balance the rights of the individuals against the state's interests, but it took a straightforward look at the language of the statute and found it valid. This earlier Court stated: "The purpose of a statute must be determined from the natural and legal effect of the language employed. . . . It seems to us that the real object and purpose [of the statute] were simply to regulate the hours of labor between the master and his employees."

Early proponents of balancing included such prominent Supreme Court justices as OLIVER WENDELL HOLMES JR., LOUIS D. BRANDEIS, and HARLAN F. STONE, all of whom sat on the Court in the early to middle 1900s. Holmes, sometimes called the patron saint of the anti-formalist movement, was one of the first to espouse the idea that the law is and should be an evolving product of social experience. He assailed the notion that rigid formulas could be applied to all situations before the Court. "[T]he law is a logical development, like everything else," he wrote. In a similar vein, Brandeis criticized the Court for ignoring contemporary social, political, and economic problems. He said, "[W]hether a measure relating to the public welfare is ARBITRARY or unreasonable . . . should be based upon a consideration of relevant facts, actual or possible" (*Adams v. Tanner,* 244 U.S. 590, 37 S. Ct. 662, 61 L. Ed. 1336 [1917] [Brandeis, J., dissenting]). In another case, he wrote: "Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial, and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed" (*Truax v. Corrigan,* 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254 [1921] [Brandeis, J., dissenting]). Similarly, Stone forcefully advocated "consideration of all the facts and circumstances" in a case, including societal conditions that affected the parties, the controversy, and the outcome (*DiSanto v. Pennsylvania,* 273 U.S. 34, 47 S. Ct. 267, 71 L. Ed. 524 [1927] [Stone, J., dissenting]).

The Court uses a balancing approach most often to decide cases where constitutionally protected individual rights conflict with governmental interests. Many of the landmark constitutional cases of the 1960s, 1970s, and 1980s were decided in this manner, including ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 47 (1973), which legalized ABORTION. In reaching its decision in *Roe,* the Court found that in the first trimester of pregnancy, a woman's right to privacy outweighed the state's interest in protecting health, but in the later stages of pregnancy, the state's interest gradually outweighed the woman's.

Contrary to popular belief, however, the Court has not used balancing as its primary method of deciding constitutional cases. In fact, some of the most important constitutional cases of the twentieth century were decided without any balancing of competing interests. For example, balancing was not used to decide BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (outlawing segregated public schools); GIDEON V. WAINWRIGHT, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (guaranteeing indigent defendants appointed counsel in felony cases); and GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (outlawing state laws prohibiting contraceptives).

Balancing has always aroused controversy among legal scholars and judges. Critics contend that it gives too much discretion to judges and amounts to a usurpation of the legislative function. They maintain that it is a vague and arbitrary method of measuring unequal interests against each other and that it results in unpredictable decision making. One vocal critic of balancing is Justice ANTONIN SCALIA. In his dissenting opinion in *Bendix Autolite Corp. v. Midwesco Enterprises,* 486 U.S. 888, 108 S. Ct. 2218,

100 L. Ed. 2d 896 (1988), he characterized the balancing of competing interests as an illusion. "[T]he scale analogy is not really appropriate," he wrote, "since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy."

Scalia's frontal attack on balancing gained force in the 1990s when Scalia was joined on the Court by other justices who shared his philosophy that the Constitution should be construed strictly and literally. Evidence that Scalia's view was held by others on the Court can be found in the 1995 decision *Vernonia School District 47J v. Acton,* 515 U.S.646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (U.S. 1995), which held that schools could legally perform random drug tests on student athletes. The decision employed a straightforward analysis of the rationality of the school's policy to conduct random drug tests and dismissed concerns about infringement of the students' FOURTH AMENDMENT right to be free from unreasonable searches. Writing for the majority, Scalia stated: "The most significant element in this case is . . . that the policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care." The Court held that the testing was a type of search that "a reasonable guardian and tutor might undertake."

Three justices disagreed vehemently. Writing for the dissent, Justice SANDRA DAY O'CONNOR emphasized her belief that the decision did not give due recognition to the students' constitutional rights and went too far in its broad approval of "intrusive, blanket searches of school children, most of whom are innocent, for evidence of serious wrongdoing." Under the ruling, she said, students no longer enjoyed "the Fourth Amendment's . . . most basic . . . protection: its strong preference for an individualized suspicion requirement."

Justice O'Connor's dissent in *Acton* echoed her strong approval of balancing competing interests and assessing a statute's intrusion on individual rights. O'Connor expressed her belief that balancing is an essential step in the Court's decision-making process, in *Employment Division, Department of Human Resources v. Smith,* 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). The respondents in *Smith* were Native Americans who were fired from their jobs because they ingested peyote as part of a religious ceremony. The Court held that the state could deny them unemployment benefits without violating the Free Exercise Clause of the FIRST AMENDMENT. O'Connor concurred with the result but took issue with the majority's failure to consider the effect the disputed statute had on the free exercise of religion. "To me," O'Connor wrote, "the sounder approach—the approach more consistent with our role as judges to decide each case on its individual merits—is to apply [a] test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular . . . interest asserted by the State before us is compelling."

### Balancing of Competing Interests in Other State and Federal Courts

Although the U.S. Supreme Court generates close scrutiny of its decisions when it applies a balancing test to resolve high-profile or controversial issues before it, it is not the only court that resolves issues by balancing competing interests at stake in a legal dispute. Indeed, every day across the country state and federal courts are asked to balance the competing interests of litigants in determining the admissibility of evidence, the appropriateness of a sentence, or the viability of an appeal.

For example, state and FEDERAL RULES OF EVIDENCE call for the exclusion of relevant evidence when its PROBATIVE value is substantially outweighed by the danger of unfair prejudice or by considerations of undue delay, waste of time, or the needless presentation of cumulative or confusing evidence. Consequently, before one party may introduce relevant evidence over another party's objection, the judge must balance the competing interests that would be served by excluding or admitting the evidence in question.

State and federal sentencing guidelines also generally require judges to balance the aggravating and MITIGATING CIRCUMSTANCES underlying a criminal offense before imposing a particular sentence on a defendant. Aggravating factors are those factors that justify a more severe punishment and are typically introduced by the prosecution, victim, or victim's family. Mitigating factors are those factors that justify a less severe sentence and are typically introduced by the defendant, the defendant's attorney, or witnesses speaking on behalf of the defendant.

Finally, appellate courts often engage in some form of balancing to review the lawfulness of a lower court decision. In addition, to the

above examples from the U.S. Supreme Court, appellate courts employ a variety of standards of review by which they evaluate the record for error using some form of balancing analysis. For example, the *substantial* evidence standard of review requires appellate courts to determine if a lower court's decision was supported by sufficient evidence to avoid being overturned, meaning that the appellate court must weigh the evidence offered by the parties to some extent. Appellate courts applying the *arbitrary and capricious* standard of review must not only examine the gravity of the alleged arbitrary or capricious conduct in the lower court, but they must also take into consideration any evidence that makes the lower court's decision reasonable or justifiable.

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Child Pornography; Deadly Force; Fourth Amendment; Judicial Review; Jurisprudence; Police Power; Precedent; Probable Cause; Strict Construction.

## ♦ BALDWIN, HENRY

Henry Baldwin was a prominent Pennsylvania attorney and politician who later became an associate justice of the U.S. Supreme Court, where he served for fourteen years.

Descended from an aristocratic British family dating back to the seventeenth century, Baldwin was born January 14, 1780, in New Haven, Connecticut. He grew up on a farm near New Haven and later moved to the city to attend Yale College. After graduating with honors in 1797, he studied law in Philadelphia with ALEXANDER J. DALLAS, a noted attorney. Admitted to the bar a short time later, Baldwin originally planned to establish a practice in Ohio, but instead settled in Pittsburgh. He then established a successful law firm with two other young attorneys. By his mid-twenties, Baldwin had established a reputation as a legal scholar, in part because of his thorough and well-researched law briefs. He had also developed an extensive personal law library, which contained a large collection of valuable English case reports and was among the finest and largest in the Northeast. Furthermore, Baldwin and his law partners were known for their political and civic leadership. The three published a newspaper, the *Tree of Liberty*, which supported the DEMOCRATIC-REPUBLICAN PARTY of western Pennsylvania. In addition to his political activities and his law practice, Baldwin found time for business, acting as part-owner of several mills in Pennsylvania and Ohio.

*Henry Baldwin.*
CORBIS

"WORDS ARE BUT THE EVIDENCE OF INTENTION; THEIR IMPORT IS THEIR MEANING, TO BE GATHERED FROM THE CONTEXT, AND THEIR CONNECTION WITH THE SUBJECT MATTER."
—HENRY BALDWIN

After the death of his first wife, Baldwin married Sally Ellicott, and they established a residence in Crawford County, Pennsylvania. In 1816, Baldwin was elected representative to the U.S. Congress for that area. As a congressman, Baldwin was active in trade issues and was a strong advocate of tariff protection. He was also involved in mediating boundary disputes between northern and southern states and their representatives. He was twice reelected to the House. In 1822, he was forced to resign his seat because of illness. He returned home to Pennsylvania, where he once again practiced law and was active in local political affairs.

Baldwin soon became an avid supporter of ANDREW JACKSON and was a trusted adviser to Jackson concerning Pennsylvania politics. After Jackson was elected president in 1828, Baldwin hoped to become secretary of the treasury, but the appointment instead went to Samuel D.

Ingham. The following year, after the death of Justice BUSHROD WASHINGTON, Jackson nominated Baldwin to the U.S. Supreme Court, against the wishes of his vice president, JOHN C. CALHOUN, who preferred another candidate. Though Baldwin's protectionist views created some controversy, he was confirmed by the Senate with only two dissenting votes from southern senators who opposed his policies on tariffs.

On the bench, Baldwin was at first a strong supporter of the liberal views of Chief Justice JOHN MARSHALL but gradually moved toward a more moderate interpretation of the Constitution, favoring neither state sovereignty nor federal supremacy. In 1837, he published a pamphlet, *A General View of the Origin and Nature of the Constitution and Government of the United States,* in which he set forth what he termed his "peculiar views of the Constitution." In this work, he emphasized his position as a moderate on the Court, stating that he tended to take the Constitution "as it is, and to expound it by the accepted rules of interpretation." Baldwin also believed that the Court must be politically sensitive when determining which powers belonged to the federal government and which remained with the states.

One of Baldwin's most influential majority opinions was *United States v. Arredondo,* 31 U.S. 691, 6 Pet. 691, 8 L. Ed. 547 (1832), in which the Court held that public policy prevented the government from violating federal land treaties. With respect to the issue of SLAVERY, however, Baldwin's views were considered to be much more radical than those held by other members of the Court. In *Groves v. Slaughter,* 40 U.S. 449, 15 Pet. 449, 10 L. Ed. 800 (1841), the Court considered the constitutionality of a Mississippi provision that prevented the importation of slaves into the state. The Court ultimately struck down the statute on technical reasons, but Baldwin, in a separate opinion, argued that slaves were property as well as persons and viewed the prohibition as an obstruction of interstate commerce. He was the sole dissenter in *United States v. The Schooner Armistead,* 40 U.S. 518, 15 Pet. 518, 10 L. Ed. 826 (1841), in which the Court held that slaves who had mutinied and taken over the slave ship transporting them from Africa should be set free. Though he did not write an opinion, Baldwin had earlier maintained that the slaves should be returned to the custody of the slave traders.

As was the practice in the Court at the time, Baldwin traveled the circuit he represented, which included Pennsylvania and New Jersey, to hear cases. He heard important cases involving the construction of a will that made a bequest for charitable purposes and also presided over the trial of John F. Braddel, who in 1840 was accused of robbing the mails.

In his later years, Baldwin was plagued by financial and personal difficulties. He never fully recovered from losing a great deal of money during the depression of 1820. He also suffered from the failure of several speculative businesses, and he had to support some of his adult children when they got into financial trouble. He was eventually forced to sell his renowned personal law library to the LIBRARY OF CONGRESS to raise money. He also published and sold volumes of the opinions he decided while traveling the circuit.

At the same time, Baldwin's behavior became erratic and he was widely reported to be suffering from mental illness. While on the bench, he was often restless, inattentive, and abusive to litigants and his fellow justices. While

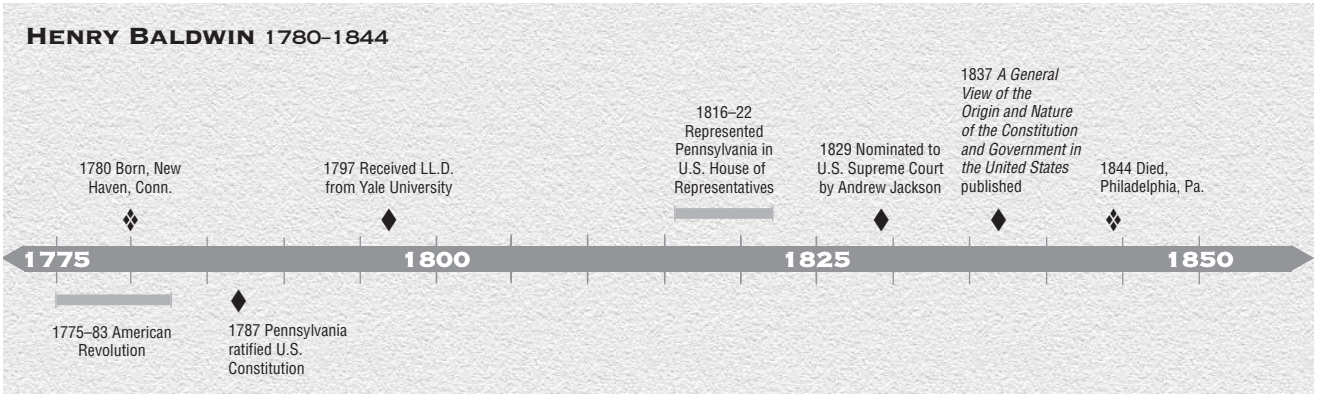

on the circuit, he also exhibited bizarre behavior at times, often having coffee and cakes brought to him while he heard cases. Chief Justice ROGER B. TANEY was reported to be so concerned about Baldwin's unpredictable behavior that he advised President Jackson not to take action against the BANK OF THE UNITED STATES because Baldwin, as presiding judge over the case in Philadelphia, would be unreliable.

Baldwin's tenure on the Court ended on April 21, 1844, when he died of paralysis at the age of sixty-four. He was deeply in debt at the time of his death, and friends and family took up a collection to pay for his funeral expenses.

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## ♦ BALDWIN, JOSEPH GLOVER

Joseph Glover Baldwin achieved prominence as a jurist and author despite his lack of formal education.

Baldwin was born in January, 1815, near Winchester, Virginia. After establishing a legal practice in 1836 in DeKalb, Mississippi, he relocated to Alabama and entered the legislature of the state in 1844, serving for five years.

In 1854 Baldwin moved again, this time to San Francisco. He maintained a successful practice and was involved in the formulation of the judicial system of San Francisco. He officially entered the judiciary in 1858, presiding as associate justice of the California Supreme Court until 1862.

As an author, Baldwin is famous for *The Flush Times of Alabama and Mississippi* (1853) and *Party Leaders* (1855). He died September 30, 1864, in San Francisco, California.

## ♦ BALDWIN, ROGER NASH

Roger Nash Baldwin spent his life crusading for CIVIL RIGHTS and liberties and was one of the principal founders of the AMERICAN CIVIL LIBERTIES UNION (ACLU).

Baldwin was born January 21, 1884, in Wellesley, Massachusetts, into a comfortably well-to-do Boston Brahmin family. His ancestral roots reached back to what he once referred to as "the inescapable Mayflower." His father, Frank Fenno Baldwin, was a conservative businessman. His mother, Lucy Cushing Nash, instilled in her children a love of art, literature, and music. Baldwin's parents raised their six children with all the privileges and advantages their wealth could provide, but they also emphasized service to others. The family attended the Unitarian Church, where an emphasis on helping others sowed in Baldwin the seeds of a social work career.

Baldwin was an unconventional boy who was not interested in competitive endeavors and shared his mother's interest in literature and art. He was a nonconformist who was influenced by Henry David Thoreau's philosophy of individualism and self-reliance. Although his parents were conservative, the young Baldwin was introduced to many progressive leaders at the home of his uncle and aunt, William Baldwin and Ruth Standish Bowles Baldwin. His uncle was president of the Long Island Railroad, director of the National Child Labor Committee, and a trustee of Tuskegee Institute. He also worked to end prostitution. His aunt supported the fledgling labor movement and was a founder of the

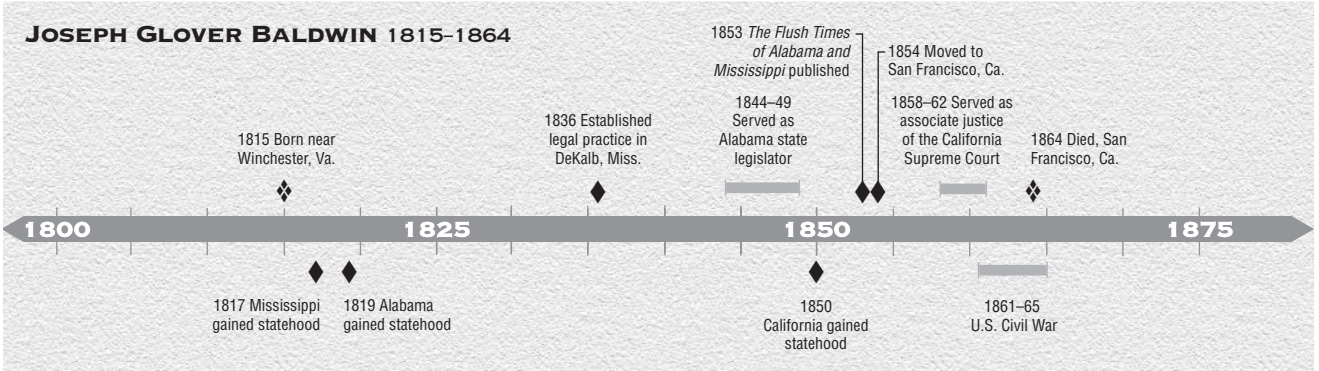

"[OUR GOAL IS] A SOCIETY WITH A MINIMUM OF COMPULSION, A MAXIMUM OF INDIVIDUAL FREEDOM AND OF VOLUNTARY ASSOCIATION, AND THE ABOLITION OF EXPLOITATION AND POVERTY."
—ROGER NASH BALDWIN

NATIONAL URBAN LEAGUE, a trustee of Smith College, and a member of the Socialist party. The couple often entertained the social reformers of the day, and Baldwin was influenced by his exposure to their somewhat radical ideas.

Baldwin was educated at Harvard, earning both a bachelor's degree and a master's degree there. In 1906, he left the East and headed for St. Louis to be a social worker. He directed a social settlement house for poor people and taught the first sociology courses offered at Washington University, in St. Louis. He became the chief PROBATION officer of the St. Louis Juvenile Court in 1908. While in that position, he and Bernard Flexner coauthored the first textbook on the juvenile courts. Their book, *Juvenile Courts and Probation,* set out professional standards for juvenile practice and was the standard text in the field until the 1960s. In 1910, Baldwin became the secretary of the St. Louis Civic League, an urban reform agency supporting civic causes.

While working in St. Louis, Baldwin met and became friends with the anarchist EMMA GOLDMAN. His first defense of free speech came in 1912 when he spoke in support of MARGARET SANGER, an early crusader for BIRTH CONTROL and reproductive rights, whose lecture was shut down by the police. Through the social work profession he was attracted to the reform movement and the labor movement. He organized the Division on Industrial and Economic Problems at the 1916 meeting of the National Conference of Social Work, and wrote a report calling for cooperative production and distribution systems to replace competitive labor systems.

In 1917, when the United States entered WORLD WAR I, Baldwin organized the American Union against Militarism (AUAM), which was later replaced by the National Civil Liberties Bureau (NCLB). In its early days, the AUAM was concerned with defending those who refused to be drafted to serve in the war. Baldwin was among the conscientious objectors opposed to the draft, and he was sentenced to a year in jail for his refusal to register. In a speech to the court before he was sentenced, he explained that his reason for opposing the draft was his "uncompromising opposition to the principle of CONSCRIPTION of life by the state for any purpose whatever, in time of war or peace."

After his release from prison, Baldwin worked as a common laborer around the Midwest and joined the radical International Workers of the World (IWW) union. He returned to New York in 1920 to help reorganize and reconstitute the NCLB with two conservative lawyers, Albert DeSilver and Walter Nelles, who shared his passion for championing the rights of the oppressed. Baldwin agreed to head the new organization, named the American Civil Liberties Union, and carry out its unique mission to impartially defend the civil liberties of all U.S. citizens, regardless of their affiliation or activities. Baldwin was launched in what would be a long and vigorous struggle to create "a society with a minimum of compulsion, a maximum of individual freedom and of voluntary association, and the ABOLITION of exploitation and poverty."

Perhaps it was inevitable that Baldwin would become associated with leftist causes, since the people most in need of free speech protection during the 1920s and 1930s were often political liberals and radicals. He once told an interviewer that during this time he was heavily influenced

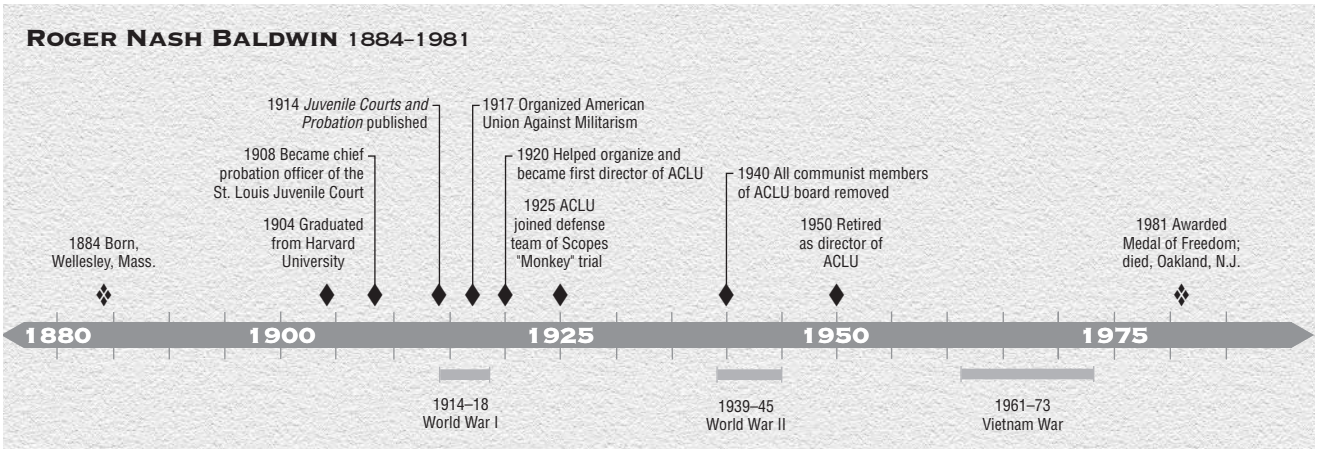

by the Marxist theory that "the real center in society was the organized underdog in the trade unions," which he believed was true although only part of the whole picture.

Baldwin came to realize that the civil liberties of right-wing groups were just as likely to be infringed as those of left-wingers. Bewildered and frustrated by liberal groups who opposed the ACLU's support of free speech rights for the American Nazi party or the KU KLUX KLAN, Baldwin said, "[T]hese people can be just as great tyrants as the other side . . . helping them get freedom didn't help the cause of freedom." Referring to the wide variety of causes the ACLU defended over the years, Baldwin said, "I always felt from the beginning that you had to defend people you disliked and feared as well as those you admired." Although not a member of any party, he supported the causes of Communists, Socialists, and other leftist organizations during the 1920s and 1930s. However, in 1940, when he began to realize that the Communist label was being used by totalitarian governments, he wrote a resolution that resulted in the removal of all the Communist members of the ACLU board. Ironically, Baldwin's resolution became the model for government LOYALTY OATHS, which the ACLU later attacked in court.

Although he was a card-carrying Wobbly, as members of the IWW were called, Baldwin could not be categorized as liberal or conservative. He was active in the National Audubon Society, the American Political Science Association, and a number of other organizations on both ends of the political spectrum. The only label Baldwin accepted for himself was that of reformer: "I am dead certain that human progress depends on those heretics, rebels and dreamers who have been my kin in spirit and whose 'holy discontent' has challenged established authority and created the expanding visions mankind may yet realize."

During the years of Baldwin's leadership, the ACLU, using volunteer lawyers, was involved in a wide variety of civil liberties cases, especially involving free speech and assembly. One concerned a 1925 Tennessee law forbidding the teaching of evolution in public schools. The ACLU defended a science teacher, John Thomas Scopes, charged with violating the law (*Scopes v. State,* 152 Tenn. 424, 278 S.W. 57 [1925]; 154 Tenn. 105, 289 S.W. 363 [1927]). WILLIAM JENNINGS BRYAN, a three-time presidential candidate and well-known fundamentalist, helped the state attorney general prosecute the case, and the notorious CLARENCE DARROW, a self-proclaimed atheist, defended Scopes. The trial ended with Scopes being convicted, although the verdict was later overturned because of a judicial error. The trial brought the issue of ACADEMIC FREEDOM to the public's attention and probably helped stunt the growth of the antievolution movement.

The ACLU was involved in the Sacco-Vanzetti murder case, in which it was widely believed that the two defendants, Nicolo Sacco and BARTOLOMEO VANZETTI, were scapegoated because they were Italian anarchists and draft resisters. Baldwin led the ACLU into the anticensorship arena in the fight to lift the importation ban on such books as James Joyce's *Ulysses.* In 1938, the ACLU obtained an INJUNCTION against Mayor Frank Hague of Jersey City, ordering him to cease antiunion activities. ACLU lawyers defended the free expression and free press rights of the Jehovah's Witnesses, whose anti-Catholic rhetoric and aggressive canvassing tactics came under attack. They successfully argued that Henry Ford had a FIRST AMENDMENT right to express his antiunion views as long as he did not threaten workers. Possibly the most controversial cases accepted by the ACLU were those that defended the free speech rights of unpopular groups such as the Ku Klux Klan, the German-American Bund, and the American Nazi party.

During WORLD WAR II, Baldwin and the ACLU opposed the movement of Japanese Americans from their homes on the West Coast to relocation camps. After the war, he helped General Douglas MacArthur set up a civil liberties policy for the occupation forces in Japan. He also consulted on civil liberties issues in the U.S. zone of occupied Germany.

Baldwin, always a nonconformist, lived an ascetic lifestyle, wearing the same ill-fitting suit for years at a time and accepting a subsistence salary from the ACLU. He was married for fifteen years to Madeleine Z. Doty, a reformist lawyer. They divorced in 1934, and in 1936 he married another reformer, Evelyn Preston, whose two sons he adopted. The couple had one child, Helen Baldwin Mannoni.

Baldwin retired as head of the ACLU in 1950, but he never retired from the causes to which he was committed. He continued working until the day he died, August 26, 1981, at age ninety-seven. A few months before his death,

President JIMMY CARTER awarded him the Medal of Freedom, the United States' highest civilian tribute. Reflecting on that honor, Baldwin expressed the philosophy he had lived by all his life: "Never yield your courage—your courage to live, your courage to fight, to resist, to develop your own lives, to be free." It is clear that Baldwin never yielded his courage, and that he remained to the end a dauntless crusader for freedom and liberty for all U.S. citizens.

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CROSS-REFERENCES

Communism; First Amendment; Freedom of Speech; Japanese American Evacuation Cases; Sacco and Vanzetti; Scopes Monkey Trial.

## ♦ BALDWIN, SIMEON EBEN

Simeon Eben Baldwin was born February 5, 1840. He earned a bachelor of arts degree from Yale in 1861, received a master of arts degree in 1864, and then pursued legal studies at Yale and Harvard. Four honorary doctor of laws degrees were bestowed upon him: by Harvard in 1891; Columbia, in 1911; Wesleyan, in 1912; and Yale, in 1916.

Baldwin was admitted to the bar in 1863. In 1869 he returned to Yale to teach at the Yale Law School until 1919, when he became professor emeritus.

"EDUCATION, IF IT BE REAL, IS ONE OF THE GREAT GIFTS OF LIFE."
—SIMEON BALDWIN

In 1893, Baldwin entered the judiciary, presiding as associate justice of the Supreme Court of Errors of Connecticut until 1907 and as chief justice until 1910. From 1910 to 1914, Baldwin was governor of Connecticut.

Baldwin contributed to the formulation of many areas of Connecticut law. He was instrumental in amending the general statutes of Connecticut as well as the system of taxation.

Baldwin wrote numerous publications, including *A Digest of All the Reported Cases of Connecticut* (1871–72); *Modern Political Institutions* (1898); *American Railroad Law* (1904); *The American Judiciary* (1905); *The Relations of Education to Citizenship* (1912); and *The Young Man and the Law* (1919).

He died January 30, 1927, in New Haven, Connecticut.

## ♦ BALLINGER, WILLIAM PITT

William Pitt Ballinger achieved prominence as a distinguished Texas lawyer, which earned him the name the "Nestor of the Texas bar."

Ballinger was born in 1825 in Barbourville, Kentucky. From 1840 to 1841 Ballinger attended St. Mary's College, then began to study law on his own. His father was clerk of the courts of Knox County and hired the young Ballinger to work as a deputy clerk and gain more legal background.

In 1843 Ballinger moved to Texas and resided with an uncle who was a practitioner. Ballinger acted as his uncle's apprentice before serving a tour of military duty in the Mexican War. After Texas was admitted to the Union in 1845, and Ballinger returned from the war in 1846, he was one of the first to be licensed to practice law in the new state.

Ballinger married into a prominent Texas family in 1850 and in 1854 formed a law firm in Galveston with his new brother-in-law, Thomas M. Jack. Their partnership, which ended in 1880, the year of Jack's death, was highly

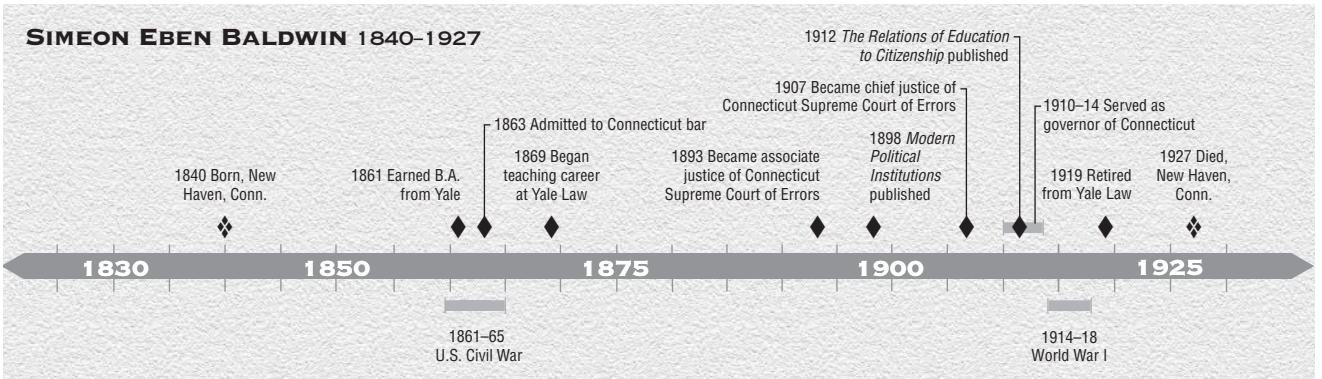

regarded throughout the South, particularly in cases dealing with land claims.

In 1854 Ballinger sought interstate business for his firm, and traveled to New York, Boston, and Philadelphia. The trip was successful, and the firm began to specialize and earn a reputation in corporate law.

As hostilities increased in the South during the pre-Civil War days, Ballinger proclaimed his support of the Union; he favored SLAVERY, but not secession. When Texas seceded, however, Ballinger supported his state.

Ballinger served the Confederacy as a lawyer as well as a receiver of enemy property. The Sequestration Act provided for the seizure and sale of such property, the proceeds of which were deposited into a special Confederate treasury.

After the war, Ballinger reached the peak of his success as an eminent corporate lawyer and was considered for a seat on the United States Supreme Court. He died January 20, 1888, in Galveston, Texas.

"THE NATIONAL GOVERNMENT MAY BE REESTABLISHED—THE POLITICAL UNION MAY BE PERPETUATED, BUT IF SO, IT WILL BE BY FORCE."
—WILLIAM BALLINGER

## BALLOON PAYMENT

*The final installment of a loan to be paid in an amount that is disproportionately larger than the regular installment.*

When a loan is made, repayment of the principal, which is the amount of the loan, plus the interest that is owed on it, is divided into installments due at regular intervals—for example, every month. The earlier installments are usually payment of interest and a minimal amount of principal, while the later installments are primarily principal. When a balloon payment is provided in a loan agreement there are a number of installments for the same small amount prior to the balloon payment.

People with irregular or seasonal sources of income find a balloon payment provision in a loan useful for budgeting their expenses. This is not the case, however, for the average consumer. Frequently, a consumer is persuaded to enter a loan agreement providing a balloon payment that otherwise would be unwise for her or him. The consumer underestimates the full effect that the balloon payment will have on his or her budget by focusing on the small amounts to be repaid during the early stages of the loan. It is not uncommon for a consumer to be unable to pay the balloon payment when it is due. The consumer is presented with a dilemma: either the consumer must return the item bought with the loan to the lender, thereby losing the money paid out in earlier installments, or the consumer can refinance by taking out an additional loan to use its proceeds to pay the balloon payment.

A balloon payment provision in a loan is not illegal per se. Federal and state legislatures have enacted various laws designed to protect consumers from being victimized by such a loan. The Federal TRUTH IN LENDING ACT (15 U.S.C.A. § 1601 et seq.) requires that a balloon payment—defined as an amount more than twice the size of a regularly scheduled equal installment—must be disclosed to the consumer. The consumer must be informed if refinancing is permitted and, if so, under what conditions. A creditor who fails to disclose such information can be held liable to the consumer for twice the amount of the finance charge, in addition to the costs incurred by the consumer in bringing a lawsuit. He or she can also be prosecuted and subject to a fine of up to $5,000, one year's imprisonment, or both.

Some states restrict the use of balloon payments to loans involving consumers with irregular or seasonal incomes. Those states that have enacted the provisions of the UNIFORM CONSUMER CREDIT CODE do not limit the use of balloon payments, but they give the consumer the

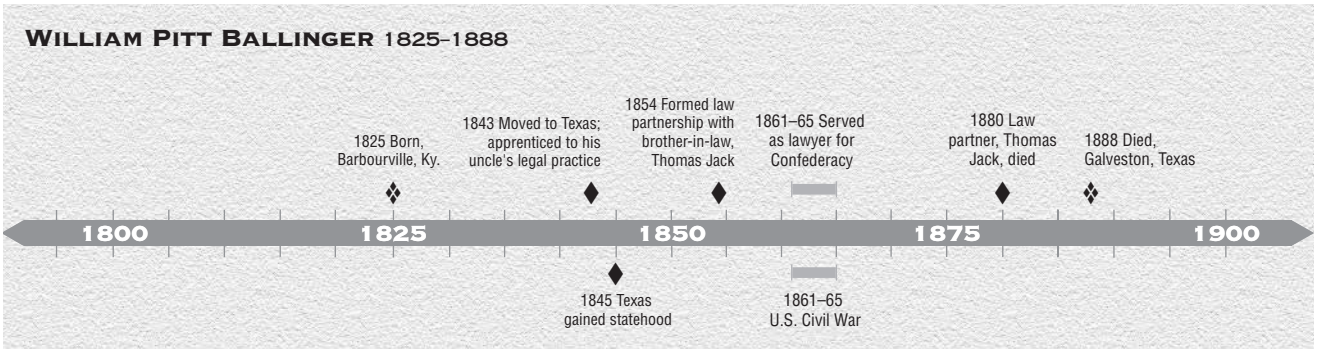

right to refinance the amount of such payment without penalty at terms no more than those in the original loan agreement.

A *balloon note* is the name given to a promissory note in which repayment involves a balloon payment. A *balloon mortgage* is a written instrument that exchanges real property as security for the repayment of a debt, the last installment of which is a balloon payment, frequently all the principal of the debt. Mortgages with balloon payment provisions are prohibited in some states.

CROSS-REFERENCES

Consumer Credit Protection Act; Consumer Protection; Truth in Lending Act.

## BANC

*[*French, Bench.*] The location where a court customarily or permanently sits.*

When a court is sitting in banc (or en banc), it means that a meeting or session of all the judges of a court is taking place. The usual purpose of sitting in banc is to hear arguments on demurrers or motions for a new trial.

## BANISHMENT

*A form of punishment imposed on an individual, usually by a country or state, in which the individual is forced to remain outside of that country or state.*

Although it is decidedly archaic in contemporary criminal justice systems, banishment enjoys continued existence and periodic resurgence in application. Its use is hard for legal scholars to track, but banishment is still employed in at least a handful of states, particularly in the South, as a viable alternative to incarceration.

Banishment—also known as exile or deportation—has its origins in Greek and Roman times and in worldwide histories of other kingdoms and countries such as China, Russia, and England. In ancient times, banishment was an effective punishment because it contemplated that offenders leaving a settled community would necessarily wander in the wilderness, shamed by their loved ones and unwelcome in other settlements. During England's colonial times, banishment and "transportation" were common forms of punishment. Transportation involved the relocation of criminals to one of the colonies. In colonial America, Englishmen who married African American or Native American women were banished from their colony.

In its original form, banishment had a twofold efficacy. Not only was physical survival a challenge outside of one's protected community, but the psychological and emotional damage from the scourge and condemnation of family, neighbors, and community was equally dreaded. However, as settlements and communities grew closer together, banishment meant the freedom to move to another location and to perpetrate the same crimes against an unknowing and unsuspecting community.

In contemporary populous societies, the effect is lost. One community's exile becomes the neighboring community's problem. In the 1980s, California "banished" a parolee, giving him a one-way bus ticket to Florida, where he later murdered a woman. Cuba exiled much of its criminal prison population to the United States, where many of the exiles were imprisoned because of crimes committed there.

The U.S. Constitution does not prohibit banishment, as long as the punishment and sentencing meet the substantive and procedural requirements of DUE PROCESS OF LAW. Banishment is not considered "cruel and unusual punishment." As recently as 2000, the Court of Appeals for the State of Mississippi addressed banishment in *Hamm v. Mississippi*, 758 So. 2d 1042 (Miss App. 2000), referring to it as an "outmoded form of punishment." Nevertheless, the court went on to address the limited circumstances under which the punishment may be used. The court insisted that the purpose of banishing someone must reasonably resemble the goals of probation—including that of rehabilitation of the offender—that both the person being sentenced and the general populace must be served, and that the defendant's FIRST AMENDMENT, FIFTH AMENDMENT, and FOURTEENTH AMENDMENT rights not be violated.

Other states have been known to make at least limited use of the punishment in recent years. Section I of the Bill of Rights of the Constitution of the State of Georgia states that "Neither banishment beyond the limits of the state nor whipping shall be allowed as punishment for a crime." *Intrastate* banishment, on the other hand, is permitted in Georgia. Georgia prosecutors find banishment particularly effective in drug cases because it removes the offenders from the community that most likely contains their customers and suppliers. In 1974, the

Georgia Supreme Court upheld prosecutors' use of banishment from seven Georgia counties against a woman who had challenged the punishment on constitutional grounds.

Kentucky and Arkansas also continue to use banishment for certain crimes. Arkansas's constitution prohibits banishment "from the state," but it allows intrastate banishment. In 2000, a Corbin, Kentucky, judge exiled from the entire state a person who had been convicted of DOMESTIC VIOLENCE. Florida judges have been known to address prostitution by meting out a five-year banishment sentence and buying the convicted prostitute a one-way ticket out of town.

Perhaps nowhere is the punishment of banishment still employed in the continental United States as much as on Indian reservations. Tribes administering their own justice to their own members often employ the use of banishment as the ultimate humiliation. When two teenagers robbed and beat a pizza delivery man with a baseball bat in the state of Washington, the Tlingit nation banished them to separate islands for one year. In 1994, the Council of Chiefs of the Onondaga Nation in New York formally banished three members for gross violations of tribal laws. The men were formally stripped of their citizenship in the Onondaga Nation; were severed from their community and families; and had their rights, property, and protection under the ancient Iroquois Law of Onondaga territory extinguished. The Native Village of Venetie Tribal Government near Fairbanks, Alaska, punishes offenders who are caught drinking alcohol with a $50 fine. Repeat offenders are subject to banishment from the village.

An interesting case of tribal banishment occurred in 1998, in *Penn v. United States*. Margaret Penn, a non-Indian tribal prosecutor and part-time grantwriter on the Standing Rock Reservation of the Sioux Tribe in South Dakota, brought charges against a tribal court chief judge for unethical conduct. She was terminated from her employment, and she then sued for wrongful termination. During the pendency of that suit, she was served an ex parte order from the tribal judge, banishing her from the reservation on false charges. She was given 45 minutes to gather her personal belongings and was escorted off the reservation within two hours.

Despite $17 million in 1998 federal funding for the tribal court, reservation, and tribal council, Penn was constrained in her ability to effectively sue the Standing Rock tribe by limited federal jurisdiction in the face of SOVEREIGN IMMUNITY. Relying on a HABEAS CORPUS remedy afforded by the Indian Civil Rights Act, she filed suit in U.S. district court, expressly requesting that the federal court find that it had jurisdiction to hear "any CAUSE OF ACTION arising out of . . . the banishment order."

The tribe responded by vacating the banishment order. In January 1999, the federal district court dismissed Penn's case as moot because the banishment order had been canceled. In March 2002, the court ruled on Penn's suit against the Bureau of Indian Affairs (BIA) and the County Sheriff who has effected service of the facially invalid banishment order. *Penn v. United States*, Case No. A1–00–93. The court ruled in Penn's favor, defeating the defendants' claims of sovereign or qualified IMMUNITY. The two key issues involved were the "routine denial of fundamental constitutional rights by tribal governments and courts" and "holding the BIA and County Sheriff responsible for enforcing an [ex-parte] order that violated constitutional protections and issued by a [tribal] court with no jurisdiction over Maggie Penn." An appeal to the Eighth Circuit Court of Appeals was expected.

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## BANK FOR INTERNATIONAL SETTLEMENT

The Bank for International Settlement was established under the law of Switzerland. It also has legal capacity pursuant to the municipal law of each of its member states, but it lacks international legal capacity. It was denied a specific international personality. The bank is, therefore, solely in the control of its members.

## BANK OF THE UNITED STATES

The American Revolutionary War resulted in the emergence of a new country faced with the task of establishing a fundamental basis for government embodying the principles of freedom for which the colonists had fought. The need for a sound financial system was most urgent, and this was remedied by the creation of the First Bank of the United States in 1791.

ALEXANDER HAMILTON, first U.S. secretary of the treasury, devised the original plan for the bank. It was argued that the Constitution did not empower Congress to institute such a bank, and that the bank was partial to commercial interests as opposed to those of farmers. Congress, nonetheless, endorsed the passage of the bank's charter.

The bank, located in Philadelphia, began with assets of $10 million, one-fifth of this money furnished by the federal government, the remainder provided by outside investors. Its affairs were administered by twenty-five directors. The bank's powers were limited to commercial enterprises, and loans were processed at six percent interest. The first bank performed well, but renewal of its charter in 1811 was thwarted by the argument against its constitutionality and by the opposition of agricultural workers. The First Bank of the United States closed for business in 1811 with a profit.

The need for a second national bank became apparent in 1816, after the WAR OF 1812 catapulted the country into a financial crisis. However, the constitutionality of such a bank was still in dispute. In MCCULLOCH V. MARYLAND, the Supreme Court, in an opinion by Chief Justice JOHN MARSHALL, held that Congress possessed the authority to create a national bank and that the states lacked the power to tax it (17 U.S. [4 Wheat.] 316, 4 L. Ed. 579 [1819]).

The new bank began on a grander scale, with capital amounting to $35 million. For the first three years it tottered on the verge of disaster under the mismanagement of its chief administrator, William Jones. When Jones left the bank in 1819, Langdon Cheeves assumed his duties, and the bank became sound. By the time Nicholas Biddle became president in 1823, the bank was functioning efficiently, and it remained a reliable system of finance for the next ten years.

In 1832, Biddle requested renewal of the charter, which was due to expire in 1836. The bank again met opposition by those who believed it had become too powerful. President ANDREW JACKSON led the opposition, and the controversy became an issue in his presidential election campaign in 1832 against HENRY CLAY. Clay, an advocate of the bank, had encouraged Biddle to apply for the charter renewal earlier than necessary.

The reelection of Andrew Jackson sounded the death knell for the Second Bank of the United States. He rejected the renewal of the charter and in 1833 deposited federal monies into selected state banks, termed "pet banks." The loss of federal funds greatly crippled the effectiveness of the bank, and it closed in 1836, the year its charter expired.

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### CROSS-REFERENCES

Banks and Banking.

## BANKER'S LIEN

*An enforceable right of a bank to hold in its possession any money or property belonging to a customer and to apply it to the repayment of any outstanding debt owed to the bank, provided that, to the bank's knowledge, such property is not part of a trust fund or is not already burdened with other debts.*

## BANKRUPTCY

*A federally authorized procedure by which a debtor—an individual, corporation, or munici-*

*pality—is relieved of total liability for its debts by making court-approved arrangements for their partial repayment.*

Once considered a shameful last resort, bankruptcy in the United States is emerging as an acceptable method of resolving serious financial troubles. A record one million individuals filed for bankruptcy protection in the United States in the peak year of 1992, and between 1984 and 1994 the number of personal bankruptcy filings doubled. Corporate bankruptcies are commonplace, particularly when corporations are the target of lawsuits, and even local governments seek debt relief through bankruptcy laws.

The goal of modern bankruptcy is to allow the debtor to have a "fresh start," and the creditor to be repaid. Through bankruptcy, debtors liquidate their assets or restructure their finances to fund their debts. Bankruptcy law provides that individual debtors may keep certain exempt assets, such as a home, a car, and common household goods, thus maintaining a basic standard of living while working to repay creditors. Debtors are then better able to emerge as productive members of society, albeit with significantly flawed credit records.

### History of U.S. Bankruptcy Laws

U.S. bankruptcy laws have their roots in English laws dating from the sixteenth century. Early English laws punished debtors who sought to avoid their financial responsibilities, usually by imprisonment. Beginning in the eighteenth century, changing attitudes inspired the development of debt discharge. Courts began to nullify debts as a reward for the debtor's cooperation in trying to reduce them. The public increasingly viewed debtors with pity, as well as with a realization that punishments such as imprisonment often were useless to creditors. Thus, a law that was first designed to punish the debtor evolved into a law that protected the debtor while encouraging the resolution of outstanding monetary obligations.

England's eighteenth-century insight did not find its way into the first U.S. bankruptcy statutes; instead, laws based largely on England's earlier punitive bankruptcy statutes governed U.S. colonies. After the signing of the Declaration of Independence, individual states had their own laws addressing disputes between debtors and creditors, and these laws varied widely.

In 1789, the U.S. Constitution granted Congress the power to establish uniformity with a federal bankruptcy law, but more than a decade passed before Congress finally adopted the Bankruptcy Act of 1800. This act, like the early bankruptcy laws in England, emphasized creditor relief and did not allow debtors to file for relief voluntarily. Great public dissatisfaction prompted the act's repeal three years after its enactment.

Philosophical debates over whom bankruptcy laws should protect (i.e., debtor or creditor) had Congress struggling for the next forty years to pass uniform federal bankruptcy legislation. The passage of the Bankruptcy Act of 1841 offered debtors greater protections and for the first time allowed them the option of voluntarily seeking bankruptcy relief. This act lasted eighteen months. A third bankruptcy act passed in 1867 and was repealed in 1878.

The Bankruptcy Act of 1898 endured for eighty years, thanks in part to numerous amendments, and became the basis for current bankruptcy laws. The 1898 act established bankruptcy courts and provided for bankruptcy trustees. Congress replaced this act with the Bankruptcy Reform Act of 1978 (11 U.S.C.A. § 101 et seq.), which, along with major amendments passed in 1984, 1986, and 1994, is known as the Bankruptcy Code.

### Federal versus State Bankruptcy Laws

In general, state laws govern financial obligations such as those involving debts created by contracts—rental leases, telephone service, and medical bills, for example. But once a debtor or creditor seeks bankruptcy relief, federal law applies, overriding state law. This is because the U.S. Constitution grants Congress the power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States" (U.S. Const. art. I, § 8). Federal bankruptcy power maintains uniformity among the states, encouraging interstate commerce and promoting the country's economic stability. States retain jurisdiction over certain debtor-creditor issues that do not conflict with, or are not addressed by, federal bankruptcy law.

### Types of Federal Bankruptcy Proceedings

Federal bankruptcy law provides two distinct forms of relief: liquidation and rehabilitation, also known as reorganization. The vast majority of bankruptcy filings in the United

# Gambling with Bankruptcy Exemptions

In bankruptcy cases, individual debtors have the privilege of retaining certain amounts or types of property that otherwise would be subject to liquidation or seizure by creditors in order to satisfy debts. Laws protecting these forms of property are called exemptions.

Consistent with the goal of allowing the debtor a "fresh start," exemptions in bankruptcy cases help ensure that the debtor, upon emerging from bankruptcy, is not destitute. Exemption statutes generally permit the debtor to keep such things as a home, a car, and personal goods like clothes. Although exemptions inhibit the creditor's ability to collect debts, they relieve the state of the burden of providing the debtor's basic needs.

The bankruptcy code provides a list of uniform exemptions but also allows individual states to *opt out of* (override) these exemptions (11 U.S.C.A. § 522 [1993 & Supp. 2003]). Thus, the types and amounts of property exemptions differ greatly and depend upon the debtor's state of residence.

A debtor residing in a state that has not opted out is entitled to the exemptions described in the bankruptcy code. Examples of code exemptions are the debtor's aggregate interest of up to $15,000 in a home; up to $2,400 in a motor vehicle; up to $8,000 in household furnishings, household goods, clothes, appliances, books, animals, crops, and musical instruments; up to $1,000 in jewelry; up to $1,500 in professional books or tools of the debtor's trade; and certain unmatured life insurance policies owned by the debtor. The debtor also may claim an exemption for professionally prescribed health aids, such as electric wheel-chairs.

The majority of states have chosen to opt out of the uniform federal exemptions, replacing them with exemptions created by their own legislatures. *Homestead exemptions*, which excuse all or part of the value in the debtor's home, are the most common state-mandated exemptions. These are not uniform across states. For instance, Missouri mimics the federal government by placing a dollar limit on the exemption, but at $8,000, its cap is meager in comparison (Mo. Ann. Stat. § 513.475 [Vernon 2002]). The bordering state of Iowa limits the homestead exemption by acreage rather than dollar amount (Iowa Code Ann. §§ 561.1, 561.2 [West 1992]). Florida allows a homestead exemption without limits (Fla. Const. art. X, § 4(a)(1)). This lack of uniformity raises the question of fairness: bankruptcy laws are federal in nature, yet a debtor in Florida may have a significant financial advantage over a debtor in Missouri, owing to different exemption laws.

Despite the broad variance among states when it comes to bankruptcy exemptions, critics charge that even the uniform federal system can be grossly unfair. For example, assume two debtors, Arlene and Ben, each have estates valued at $28,000. Arlene, a dentist, has $15,000 of EQUITY in her home. She has $8,000 worth of furniture and household goods. Her car is worth $4,000, and she owns dental tools valued at $1,000.

Ben is an art lover. He owns no car, no furniture, and no house, having chosen instead to spend his money on paintings and sculptures that are now worth $26,000. His clothes, musical instruments, and other household goods are worth $2,000.

Arlene and Ben have states of equal value, but when the federal exemption statute is followed, Arlene can claim $27,200 in exemptions, whereas Ben can claim only $16,300. Arlene receives exemptions worth $15,000 for her homestead, $8,000 for her household goods, $2,400 for her car, and $1,000 for her dental tools, and an $800 general exemption for property not covered by other exemptions. Ben may claim an $8,000 exemption for his art and other household goods, as well as a general exemption worth $8,300, which replaces his unused homestead exemption.

Critics suggest that one problem with exemption laws is that legislators must determine the property that will best enable the average debtor to remain self-sufficient following a bankruptcy. Unconventional debtors, such as Ben, frequently are penalized as a result. In addition, laws that place monetary limits on exemptions often do nothing to help the debtor achieve a fresh start. When the value of certain property is worth more than the exemption, it is said to be only partially exempt and must be completely liquidated. Following liquidation, the debtor receives the value of the exemption in cash from the liquidation proceeds. Thus, in the case of Arlene's $4,000 car, the bankruptcy trustee would sell the car and from the sale proceeds give Arlene $2,400, the amount of the exemption. Arlene could then spend the money on a tropical vacation instead of a replacement car, rendering the vehicle exemption law virtually meaningless.

Debtors may also take advantage of exemption laws by transferring assets before filing for bankruptcy protection.

States involve liquidation, governed by chapter 7 of the Bankruptcy Code. In a chapter 7 liquidation case, a trustee collects the debtor's nonexempt assets and converts them into cash. The trustee then distributes the resulting fund to the creditors in order of priority described in the Bankruptcy Code. Creditors frequently receive only a portion, and sometimes none, of the money owed to them by the bankrupt debtor.

When the debtor is an individual, once the liquidation and distribution are complete, the

For example, Ben could sell nonexempt artwork and, with the proceeds, purchase a small condominium. He could then file for bankruptcy and claim a homestead exemption, increasing by $7,500 his post-bankruptcy estate.

Congress actually supports this type of pre-bankruptcy planning, permitting the debtor "to make full use of the exemptions to which he is entitled under the law" (S. Rep. No. 989, 95th Cong., 2d Sess. [1978]). Still, courts view some pre-bankruptcy asset transfers as fraudulent, particularly when they involve large dollar amounts and there is evidence of intention to hinder, delay, or defraud creditors. Upon a finding of **FRAUD**, the bankruptcy court may deny discharge of the debtor's debts. But what constitutes a fraudulent transfer is often unclear and seemingly **ARBITRARY**.

Two bankruptcy cases from Minnesota exemplify the confusion surrounding fraudulent and nonfraudulent pre-bankruptcy transfers. The debtors in both cases were doctors who lost money in the same investment and who hired the same attorney to help them with their pre-bankruptcy planning. The outcomes of the cases differed significantly.

Before filing for bankruptcy, Omar Tveten liquidated most of his nonexempt assets, including his home. With the proceeds, he purchased life insurance and annuities valued at almost $700,000. Both the life insurance and the annuities were considered exempt under Minnesota law; however, the bankruptcy court held that the large amount converted was an indication of fraud and therefore refused to discharge Tveten's bankruptcy debts (*Norwest Bank Nebraska v. Tveten*, 848 F.2d 871 [8th Cir. 1988]).

Robert J. Johnson also transferred assets before filing for bankruptcy. Johnson converted nonexempt property into property exempt under Minnesota law: he purchased $8,000 in musical instruments, $4,000 in life insurance, and $250,000 in annuities from fraternal organizations, and he retired (paid off) $175,000 of the debt on his $285,000 home. The court focused on Johnson's claim for homestead exemption and in particular on the $175,000 mortgage payment made just before filing for bankruptcy. As the court in *Tveten* demonstrated, an unusually large asset transfer can indicate fraud. But in *Johnson*, the court held that the homestead exemption was valid, stating that the value of an asset transfer to homestead property, unlike the value of an asset transfer to property in another exemption category, is of little relevance because "no exemption is more central to the legitimate aims of state lawmakers than a homestead exemption" (*Panuska v. Johnson*, 880 F.2d 78 [8th Cir. 1989]).

Legal commentators have criticized the *Tveten* and *Johnson* decisions as being arbitrary and as providing no clear lines to assist debtors in pre-bankruptcy planning. Critics charge that the different outcomes are simply a result of different judges presiding at the initial bankruptcy court level, because the facts of the cases were so similar. Bankruptcy attorneys are frustrated by a lack of uniformity among court decisions that apply similar principles but reach different results, and also a lack of uniformity in exemption laws among states.

Indeed, *forum shopping* (searching for the most advantageous jurisdiction in which to file bankruptcy) is prevalent because of the wide diversity of state exemption laws. *In re Coplan*, 156 B.R. 88 (Bankr. M.D. Fla. 1993), illustrates the problem. The debtors, Lee Coplan and Rebecca Coplan, incurred substantial debt in their home state of Wisconsin before moving to Florida. After residing in Florida for one year and purchasing a house for $228,000, they sought bankruptcy relief and a homestead exemption under Florida law (West's F.S.A. Const. Art. 10, § 4(a)(1)), which allows an exemption for the full value of the homestead. The court found that the Coplans had engaged in a systematic conversion of assets by selling their home in Wisconsin and paying cash for their new home in Florida. This action was conducted, according to the court, solely for the purpose of placing the assets out of the reach of creditors. As a result, the bankruptcy court in Florida allowed a homestead exemption of only $40,000, the extent provided by Wisconsin law (W.S.A. § 815.20(1)). Yet other bankruptcy decisions have held that a conversion of nonexempt property to exempt property for the purpose of placing such property out of reach of creditors will not alone deprive the debtor of the exemption (see, e.g., *In re Levine*, 139 B.R. 551 [Bankr. M.D. Fla. 1992]).

Exemption is an integral part of bankruptcy law but a difficult area to navigate. Courts and legislatures must constantly determine whether exemptions constitute fair and just vehicles by which debtors can achieve a fresh start without getting a head start at the expense of creditors. Unfortunately for attorneys, debtors, creditors, and trustees, the laws regarding exemptions are inconsistent. Attempting to maximize the benefits granted by bankruptcy exemptions can be more of a gamble than a science.

**FURTHER READINGS**

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Resnick, Alan N. 2002. *Bankruptcy Law Manual.* Eagan, Minn.: Thompson West.

**CROSS-REFERENCES**

Creditor.

bankruptcy court may discharge any remaining debt. When the debtor is a corporation, upon liquidation and distribution, the corporation becomes defunct. Remaining corporate debts are not formally discharged, as they are with individuals. Instead, creditors face the impossibility of pursuing debts against a corporation that no longer exists, making formal discharge unnecessary.

Rehabilitation, or reorganization, of debt is an option that courts usually favor because it provides creditors with a better opportunity to

recoup what is owed to them. Rehabilitative bankruptcies are governed most often by chapter 11 or chapter 13 of the Bankruptcy Code. Chapter 11 typically applies to individuals with excessive or complex debts, or to large commercial entities such as corporations. Chapter 13 typically applies to individual consumers with smaller debts.

Unlike liquidation, rehabilitation provides the debtor with an opportunity to retain nonexempt assets. In return, the debtor must agree to pay debts in strict accordance with a REORGANIZATION PLAN approved by the bankruptcy court. During this repayment period, creditors are unable to pursue debts beyond the provisions of the reorganization plan. This gives the debtor the chance to restructure affairs in the effort to meet financial obligations.

To be eligible for rehabilitative bankruptcy, the debtor must have sufficient income to make a reorganization plan feasible. If the debtor fails to comply with the reorganization plan, the bankruptcy court may order liquidation. A debtor who successfully completes the reorganization plan is entitled to a discharge of remaining debts. In keeping with the general preference for bankruptcy rehabilitation rather than liquidation, the goal of this policy is to reward the conscientious debtor who works to help creditors by resolving his or her debts.

Farmers and municipalities may seek reorganization through the Bankruptcy Code's special chapters. Chapter 12 assists debt-ridden family farmers, who also may be entitled to relief under chapters 11 or 13. When a local government seeks bankruptcy protection, it must turn to the debt reorganization provisions of chapter 9.

**Orange County Bankruptcy and Chapter 9**

Seldom used, chapter 9 attained notoriety in late 1994 following the bankruptcy of Orange County, California, the largest municipal bankruptcy in history. A county of 2.6 million people with one of the highest per capita incomes in the United States, Orange County held an investment fund that was composed largely of derivatives that were based on speculation on the direction of interest rates. The problem was made worse because the county had borrowed the money it was investing. When interest rates began to climb in 1994, Orange County's leveraged investments drained the investment fund's value, prompting lenders to require additional collateral. The only way to raise the collateral was to sell the investments at the worst possible time. The result was a $1.7 billion loss. After consulting with finance experts and reviewing alternatives, county officials filed for chapter 9 protection on December 6, 1994.

Residents of the affluent county faced immediate repercussions. Close to 10 percent of the fifteen thousand Orange County employees lost their jobs. School budgets were slashed, infrastructure improvements were put on hold, and experts predicted that property values in Orange County would decline. Legal fees involved in a bankruptcy of this complexity are extensive, and officials did not expect Orange County to emerge from bankruptcy for several years.

Critics of current bankruptcy law argue that irresponsible debtors too frequently receive protection at the expense of noncreditors, such as the residents of Orange County. Victims who allege corporate NEGLIGENCE and sue for injuries from dangerous products also become unwilling creditors when a corporation files for

**Bankruptcy petitions filed and pending, 1996 to 2002**

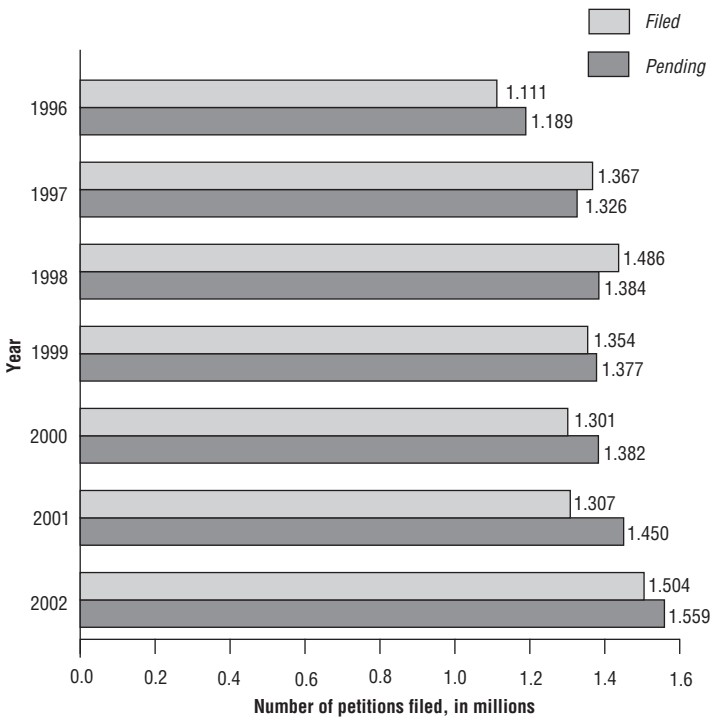


SOURCE: Administrative Office of the U.S. Courts, *Annual Report of the Director*.

bankruptcy. But negligent or not, corporations battling multiple lawsuits often rely on the traditional rationale supporting bankruptcy: that it offers an opportunity to pay debts that otherwise might go unpaid.

**Dow Corning Corporation and Chapter 11** Dow Corning Corporation was a major manufacturer of silicone breast implants used in reconstructive and plastic surgeries. In 1991, after receiving thousands of complaints of health problems from women with silicone implants, the U.S. FOOD AND DRUG ADMINISTRATION banned the devices from widespread use. Women who had obtained the silicone implants in breast reconstruction or breast enlargement surgeries complained that the implants leaked, causing a variety of adverse conditions such as crippling pain, memory loss, lupus, and connective tissue disease. Dow Corning soon became a defendant in a worldwide PRODUCT LIABILITY CLASS ACTION suit as well as at least nineteen thousand individual lawsuits.

Citing an inability to contribute $2 billion to a $4.2 billion settlement fund and pay for the defense of thousands of individual lawsuits, Dow Corning filed for chapter 11 bankruptcy protection in May 1995. The bankruptcy move halted new lawsuits and enabled the company to consolidate existing claims while preserving business operations. As a result of the filing, Dow Corning stalled its obligation to contribute to the settlement fund.

The Dow Corning strategy was similar to that employed in the mid–1980s by A.H. Robins Company, distributor of the Dalkon Shield intrauterine device for BIRTH CONTROL. Like Dow Corning, A.H. Robins faced financial ruin owing to thousands of product liability lawsuits filed at the same time. Also like Dow Corning, A.H. Robins sought relief under chapter 11 of the Bankruptcy Code, which allowed the company time to formulate a plan to pay the many outstanding claims. A reorganization plan approved by the courts involved the merger of A.H. Robins with American Home Products Corporation, which agreed to establish a $2.5 billion trust fund to pay outstanding product liability claims (*In re A.H. Robins Co.,* 880 F.2d 694 [4th Cir. 1989]).

On May 22, 1995, Dow Corning filed a request to stay all litigation against its parent companies, Dow Chemical Company and Corning Incorporated, so that company lawyers could concentrate on the bankruptcy reorganization. That move further threatened the chance of recovery for the plaintiffs seeking compensation for injury.

**Family Farmers and Chapter 12** In 1986, responding to an economic farm crisis in the United States, Congress designed chapter 12 to apply to family farmers whose aggregate debts did not exceed $1.5 million. Congress passed the law to help farmers attain a financial fresh start through reorganization rather than liquidation. Before chapter 12's existence, family farmers found it difficult to meet the prerequisites of bankruptcy reorganization under chapters 11 or 13, often because they were unable to demonstrate sufficient income to make a reorganization plan feasible. Chapter 12 eased some requirements for qualifying farmers.

Congress created chapter 12 as an experiment, and scheduled its automatic repeal for 1993. Determining that additional time was necessary to evaluate the effectiveness of the law, Congress in 1993 voted to extend it until 1998. It was either extended or allowed to expire—then restored—eight times between November 1998 and January 1, 2004, when it expired again.

## Federal Bankruptcy Jurisdiction and Procedure

Regardless of the type of bankruptcy and the parties involved, basic key jurisdictional and procedural issues affect every bankruptcy case. Procedural uniformity makes bankruptcies more consistent, predictable, efficient, and fair.

**Judges and Trustees** Pursuant to federal statute, U.S. COURTS OF APPEALS appoint bankruptcy judges to preside over bankruptcy cases (28 U.S.C.A. § 152 [1995]). Bankruptcy judges make up a unit of the federal district courts called bankruptcy court. Actual jurisdiction over bankruptcy matters lies with the district court judges, who then refer the matters to the bankruptcy court unit and to the bankruptcy judges.

A trustee is appointed to conduct an impartial administration of the bankrupt's nonexempt assets, known as the bankruptcy estate. The trustee represents the bankruptcy estate, which upon the filing of bankruptcy becomes a legal entity separate from the debtor. The trustee may sue or be sued on behalf of the estate. Other trustee powers vary depending on the type of bankruptcy, and can include challenging transfers of estate assets, selling or liquidating assets, objecting to the claims of creditors, and object-

*A sample involuntary petition for bankruptcy*

## Involuntary Petition for Bankruptcy

**FORM 5. INVOLUNTARY PETITION**

| **United States Bankruptcy Court** _____ **District of** _____ | **INVOLUNTARY PETITION** |
|---|---|
| IN RE (Name of Debtor - If Individual: Last, First, Middle) | ALL OTHER NAMES used by debtor in the last 6 years (Include married, maiden, and trade names.) |
| SOC. SEC./TAX I.D. NO. (If more than one, state all.) | |
| STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code) | MAILING ADDRESS OF DEBTOR (If different from street address) |
| COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS | |
| LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different from previously listed addresses) | |

CHAPTER OF BANKRUPTCY CODE UNDER WHICH PETITION IS FILED

☐ Chapter 7 ☐ Chapter 11

**INFORMATION REGARDING DEBTOR (Check applicable boxes)**

Petitioners believe:

☐ Debts are primarily consumer debts
☐ Debts are primarily business debts (complete sections A and B)

TYPE OF DEBTOR

☐ Individual ☐ Corporation Publicly Held
☐ Partnership ☐ Corporation Not Publicly Held
☐ Other: _____

A. TYPE OF BUSINESS (Check one)

☐ Professional ☐ Transportation ☐ Commodity Broker
☐ Retail/Wholesale ☐ Manufacturing/ ☐ Construction
☐ Railroad ☐ Mining ☐ Real Estate
☐ Stockbroker ☐ Other

B. BRIEFLY DESCRIBE NATURE OF BUSINESS

**VENUE**

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in the District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ A bankruptcy case concerning debtor's affiliate, general partner or partnership is pending in this District.

**PENDING BANKRUPTCY CASE FILED BY OR AGAINST ANY PARTNER OR AFFILIATE OF THIS DEBTOR** (Report information for any additional cases on attached sheets.)

| Name of Debtor | Case Number | Date |
|---|---|---|
| Relationship | District | Judge |

**ALLEGATIONS**
**(Check applicable boxes)**

1. ☐ Petitioner(s) are eligible to file this petition pursuant to 11 U.S.C. § 303(b).
2. ☐ The debtor is a person against whom an order for relief may be entered under title 11 of the United States Code.
3.a. ☐ The debtor is generally not paying such debtor's debts as they become due, unless such debts are the subject of a bona fide dispute;

or

3b. ☐ Within 120 days preceding the filing of this petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property was appointed or took possession.

**COURT USE ONLY**

**FORM B5.**
**(6/90)**

*A sample involuntary petition for bankruptcy (continued)*

## Involuntary Petition for Bankruptcy

Name of Debtor _____

Case No. _____ (court use only)

**TRANSFER OF CLAIM**

☐ Check this box if there has been a transfer of any claim against the debtor by or to any petitioner. Attach all documents evidencing the transfer and any statements that are required under Bankruptcy Rule 1003(a).

**REQUEST FOR RELIEF**

Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition.

Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.

| | |
|---|---|
| X_____<br>Signature of Petitioner or Representative (State title) | X_____<br>Signature of Attorney Date |
| _____<br>Name of Petitioner Date Signed | _____<br>Name of Attorney Firm (If any) |
| Name & Mailing Address of Individual _____ | _____<br>Address |
| Signing in Representative Capacity _____ | _____<br>Telephone No. |
| X_____<br>Signature of Petitioner or Representative (State title) | X _____<br>Signature of Attorney Date |
| _____<br>Name of Petitioner Date Signed | _____<br>Name of Attorney Firm (If any) |
| Name & Mailing Address of Individual _____ | _____<br>Address |
| Signing in Representative Capacity _____ | _____<br>Telephone No. |
| X_____<br>Signature of Petitioner or Representative (State title) | X _____<br>Signature of Attorney Date |
| _____<br>Name of Petitioner Date Signed | _____<br>Name of Attorney Firm (If any) |
| Name & Mailing Address of Individual _____ | _____<br>Address |
| Signing in Representative Capacity _____ | _____<br>Telephone No. |

**PETITIONING CREDITORS**

| Name and Address of Petitioner | Nature of Claim | Amount of Claim |
|---|---|---|
| Name and Address of Petitioner | Nature of Claim | Amount of Claim |
| Name and Address of Petitioner | Nature of Claim | Amount of Claim |
| Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's signature under the statement and the name of attorney and petitioning creditor information in the format above. | | Total Amount of Petitioners' Claims |

FORM 5 Involuntary Petition (6/92)

_____continuation sheets attached

ing to the discharge of debts. All bankruptcy cases except chapter 11 cases require trustees, who are most commonly private citizens elected by creditors or appointed by the U.S. trustee.

The office of the U.S. trustee, permanently established in 1986, is responsible for overseeing the administration of bankruptcy cases. The U.S. Attorney General appoints a U.S. trustee to each bankruptcy region. It is the job of the U.S. trustee in some cases to appoint trustees, and in all cases to ensure that trustees administer bankruptcy estates competently and honestly. U.S. trustees also monitor and report debtor abuse and FRAUD, and oversee certain debtor activity such as the filing of fees and reports.

**Procedures** Today, debtors file the vast majority of bankruptcy cases. A bankruptcy filing by a debtor is known as *voluntary bankruptcy.* The mere filing of a voluntary petition for bankruptcy operates as a judicial order for relief, and allows the debtor immediate protection from creditors without the necessity of a hearing or other formal adjudication.

Chapters 7 and 11 of the Bankruptcy Code allow creditors the option of filing for relief against the debtor, also known as involuntary bankruptcy. The law requires that before a debtor can be subjected to involuntary bankruptcy, there must be a minimum number of creditors or a minimum amount of debt. Further protecting the debtor is the right to file a response, or answer, to the allegations in the creditors' petition for involuntary bankruptcy. Unlike voluntary bankruptcies, which allow relief immediately upon the filing of the petition, involuntary bankruptcies do not provide creditors with relief until the debtor has had an opportunity to respond and the court has determined that relief is appropriate.

When the debtor timely responds to an involuntary bankruptcy filing, the court will grant relief to the creditors and formally place the debtor in bankruptcy only under certain circumstances, such as when the debtor generally is failing to pay debts on time. When, after litigation, the court dismisses an involuntary bankruptcy filing, it may order the creditors to pay the debtor's attorney fees, COMPENSATORY DAMAGES for loss of property or loss of business, or PUNITIVE DAMAGES. This reduces the likelihood that creditors will file involuntary bankruptcy petitions frivolously or abusively.

One of the most important rights that a debtor in bankruptcy receives is called the automatic stay. The *automatic stay* essentially freezes all debt-collection activity, forcing creditors and other interested parties to wait for the bankruptcy court to resolve the case equitably and evenhandedly. The relief is automatic, taking effect as soon as a party files a bankruptcy petition. In a voluntary chapter 7 case, the automatic stay gives the trustee time to collect, and then distribute to creditors, property in the bankruptcy estate. In voluntary chapter 11 and chapter 13 cases, the automatic stay gives the debtor time to establish a plan of financial reorganization. In involuntary bankruptcy cases, the automatic stay gives the debtor time to respond to the petition. The automatic stay terminates once the bankruptcy court dismisses, discharges, or otherwise terminates the bankruptcy case, but a *party in interest* (a party with a valid claim against the bankruptcy estate) may petition the court for relief from the automatic stay by showing good cause.

The Bankruptcy Code allows bankruptcy judges to dismiss bankruptcy cases when certain conditions exist. The debtor, the creditor, or another interested party may ask the court to dismiss the case. Petitioners—debtors in a voluntary case, or creditors in an involuntary case—may seek to withdraw their petitions. In some types of bankruptcy cases, a petitioner's right to dismissal is absolute; other types of bankruptcy cases require a hearing and judicial approval before the case is dismissed. Particularly with voluntary bankruptcies, creditors, the court, or the U.S. trustee has the power to terminate bankruptcy cases when the debtor engages in dilatory or uncooperative behavior, or when the debtor substantially abuses the rights granted under bankruptcy laws.

## Recent Developments in Federal Bankruptcy Law

Brought about by a surge in bankruptcy filings and public concern over inequities in the system, the Bankruptcy Reform Act of 1994 is one illustration of Congress's continuing effort to protect the rights of debtors and creditors. Consistent with Congress's goal of promoting reorganization over liquidation, the legislation made it easier for individual debtors to qualify for chapter 13 reorganization. Previously, individuals with more than $450,000 in debt were not eligible to file under chapter 13, and instead were forced to reorganize under the more complex and expensive chapter 11 or to liquidate under chapter 7. The 1994 amendments allow

debtors with up to $1 million in outstanding financial obligations to reorganize under chapter 13.

The new law helps creditors by prohibiting the discharge of credit card debts used to pay federal taxes, or those exceeding $1,000 incurred within sixty days before the bankruptcy filing. In this way, the law deters debtors from shopping sprees and other abuses just before filing for bankruptcy. Creditors also benefit from new provisions that set forth additional grounds for obtaining relief from the automatic stay, and require speedier adjudication of requests for relief from the stay.

It looked as though the bankruptcy system would see more reform with the introduction of the Bankruptcy Reform Act of 1998. The act was a response to a report issued by the National Bankruptcy Review Commission, which recommended that the existing code be fine-tuned in order to provide incentives to debtors to file chapter 13 reorganization and to increase debt repayment. The report was issued in response to concern that debtors were taking advantage of the bankruptcy system, evidenced by the fact that a record number of consumers filed for bankruptcy during a time of economic prosperity.

But the Bankruptcy Reform Act of 1998 was never enacted, and it turned out to be only the beginning volley in one of the most tortuous paths any legislation has seen. The House of Representatives has passed a bankruptcy reform bill no fewer than seven times since 1998, with the Senate close behind, and yet bankruptcy reform has yet to be passed into law as of the time of this writing, despite the fact that President **GEORGE W. BUSH** and the majorities in the current House and Senate all currently favor some sort of bankruptcy reform.

All of the bankruptcy reform legislation introduced since 1997 shares the same main thrust. Individual debtors would be discouraged from filing under chapter 7, which allows them to liquidate their debts, and would be encouraged to file under chapter 13 instead. The filing under chapter 7 will be presumed abusive if the debtor is deemed able to pay a portion of his debts under a formula set forth in the Reform Act. Debtors who have an ability to repay a portion of their debts out of future income will be forced to reorganize under chapter 13.

The main criticism of all the bankruptcy reform acts that have been passed since 1997 is that they favor creditors at the expense of debtors who truly might not be able to pay, but who technically fail the means test that is used to determine whether they can make some form of repayment. But this criticism has not been the only reason why bankruptcy reform has not passed. For example, the Bankruptcy Reform Act of 2001 failed because a provision was included to prevent anti-abortion protesters from avoiding criminal fines by claiming bankruptcy. Anti-abortion legislators who otherwise would have supported the bill joined forces with opponents of the bill to defeat it. Another bankruptcy reform act passed in the House of Representatives by a vote of 315–113 in March 2003.

While Congress was considering bankruptcy reform, the U.S. Supreme Court handed down two decisions that further defined the limits of bankruptcy law. In *Cohen v. De La Cruz* 523 U.S. 213, 118 S. Ct. 1212, 140 L. Ed. 2d 341, a unanimous court held that where a debtor committed actual fraud and was assessed punitive damages, the debt would be not dischargeable because the Bankruptcy Code's prohibition against the discharge of fraudulently incurred debts is not restricted to the value of the money, property, or services received by the debtor. In *Young v. U.S.,* 535 U.S. 43, 122 S. Ct. 1036, 152 L. Ed. 2d 79. The court held that three-year lookback period allowing IRS to collect taxes against a debtor was tolled during pendency of a debtor's earlier chapter 13 proceeding.

Apart from developments in the law, bankruptcy was much in the news during the opening years of the twenty-first century as an economic downturn forced many of American's most prominent companies into chapter 11 bankruptcy. In 2001, the energy-trading firm Enron filed for the biggest corporate bankruptcy in history, with $64 billion in assets. Less than a year later, **TELECOMMUNICATIONS** firm WorldCom topped that record when it listed $104 billion in assets in its bankruptcy filing. Other prominent American companies filing for bankruptcy included retailer K-Mart, financial services firm Conseco, and United Airlines parent company UAL.

**FURTHER READINGS**

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Jewell, Mark. 2002. "Conseco Bankruptcy Ranks Third in U.S." *Associated Press* (December 19).

Reid, Linda. 2001. "Bankruptcy Reform Legislation" *Arkansas Lawyer* (fall).

**CROSS-REFERENCES**

Petition in Bankruptcy.

## BANKS AND BANKING

*Authorized financial institutions and the business in which they engage, which encompasses the receipt of money for deposit, to be payable according to the terms of the account; collection of checks presented for payment; issuance of loans to individuals who meet certain requirements; discount of* **COMMERCIAL PAPER***; and other money-related functions.*

Banks have existed since the founding of the United States, and their operation has been shaped and refined by major events in U.S. history. Banking was a rocky and fickle enterprise, with periods of economic fortune and peril, between the 1830s and the early twentieth century. In the late nineteenth century, the restrained money policies of the U.S. **TREASURY DEPARTMENT**, namely an unwillingness to issue more bank notes to eastern-based national banks, contributed to a scarcity of cash in many Midwestern states. A few states went so far as to charter local banks and authorize them to print their own money. The collateral or capital that backed these local banks was often of only nominal value. By the 1890s, there was a full-fledged bank panic. Depositors rushed to banks to withdraw their money, only to find in many cases that the banks did not have the money on hand. This experience prompted insurance reforms that developed during the next fifty years. The lack of a regulated money supply led to the passage of the Federal Reserve Act in 1913 (found in scattered sections of 12 U.S.C.A.), creating the Federal Reserve Bank System.

Even as the banks sometimes suffered, there were stories of economic gain and wealth made through their operation. Industrial enterprises were sweeping the country, and their need for financing was seized upon by men like J.P. Morgan (1837–1913). Morgan made his fortune as a banker and financier of various projects. His House of Morgan was one of the most powerful financial institutions in the world. Morgan's holdings and interests included railroads, coal, steel, and steamships. His involvement in what we now consider commercial banking and **SECURITIES** would later raise concern over the appropriateness of mixing these two industries, especially after the **STOCK MARKET** crash of 1929 and the ensuing instability in banking. Between 1929 and 1933, thousands of banks failed. By 1933, President **FRANKLIN D. ROOSEVELT** temporarily closed all U.S. banks because of a widespread lack of confidence in the institutions. These events played a major role in the Great Depression and in the future reform of banking.

In 1933, Congress held hearings on the commingling of the banking and securities industries. Out of these hearings, a reform act that strictly separated commercial banking from securities banking was created (12 U.S.C.A. §§ 347a, 347b, 412). The act became known as the **GLASS-STEAGALL ACT**, after the two senators who sponsored it, **CARTER GLASS** (D-VA) and Henry B. Steagall (D-AL). The Glass-Steagall Act also created the **FEDERAL DEPOSIT INSURANCE CORPORATION** (FDIC), which insures money deposited at member banks against loss. Since its passage, Glass-Steagall has been the law of the land, with minor fine-tuning on several occasions.

Despite the Glass-Steagall reforms, periods of instability have continued to reappear in the banking industry. Between 1982 and 1987, about 600 banks failed in the United States. Over one-third of the closures occurred in Texas. Many of the failed banks closed permanently, with their customers' deposits compensated by the FDIC; others were taken over by the FDIC and reorganized and eventually reopened.

In 1999, Congress addressed many concerns on many involved in the financial industries with the passage of the Financial Services Modernization Act, Pub. L. No. 106-102, 113 Stat. 1338, also known as the Gramm-Leach Act. The act rewrote the banking laws from the 1930s and 1950s, including the Glass-Steagall Act, which had prevented commercial banks, securities firms, and insurance companies from merging their businesses. Under the act, banks, brokers, and insurance companies are able to combine and share consumer transaction records as well as other sensitive records. The act went into effect on November 12, 2000, though several of its provisions did not take effect until July 1, 2001. Seven federal agencies were responsible for rewriting regulations that implemented the new law.

*Between 1929 and 1933, thousands of banks failed. In this image, a crowd gathers before the United States National Bank in Los Angeles one day after its closing on August 23, 1931.*

AP/WIDE WORLD PHOTOS

Gramm-Leach goes beyond the repeal of the Glass-Steagall Act and similar laws. One section streamlines the supervision of banks. It directs the **FEDERAL RESERVE BOARD** to accept existing reports that a bank has filed with other federal and state regulators, thus reducing time and expenses for the bank. Moreover, the Federal Reserve Board may examine the insurance and brokerage subsidiaries of a bank only if reasonable cause exists to believe the subsidiary is engaged in activities posing a material risk to bank depositors. The new law contains many more similar provisions that restrict the ability of the Federal Reserve Board to regulate the new type of bank that the law contemplates. The Gramm-Leach Act also breaks down barriers of foreign banks wishing to operate in the United States by allowing foreign banks to purchase U.S. banks.

### Categories of Banks

There are two main categories of banks: federally chartered national banks and state-chartered banks.

A national bank is incorporated and operates under the laws of the United States, subject to the approval and oversight of the comptroller of the currency, an office established as a part of the Treasury Department in 1863 by the National Bank Act (12 U.S.C.A. §§ 21, 24, 38, 105, 121, 141 note).

All national banks are required to become members of the Federal Reserve System. The Federal Reserve, established in 1913, is a central bank with 12 regional district banks in the United States. The Federal Reserve creates and implements national fiscal policies affecting nearly every facet of banking. The system assists in the transfer of funds, handles government

deposits and debt issues, and regulates member banks to achieve uniform commercial procedure. The Federal Reserve regulates the availability and cost of credit, through the buying and selling of securities, mainly government bonds. It also issues Federal Reserve notes, which account for almost all the paper money in the United States.

A board of governors oversees the work of the Federal Reserve. This board was approved in 1935 and replaced the Federal Reserve Board. The seven-member board of governors is appointed to 14-year terms by the President of the United States with Senate approval.

Each district reserve bank has a board of directors with nine members. Three nonbankers and three bankers are elected to each board of directors by the member bank, and three directors are named by the Federal Reserve Board of Governors.

A member bank must keep a reserve (a specific amount of funds) deposited with one of the district reserve banks. The reserve bank then issues Federal Reserve notes to the member bank or credits its account. Both methods provide stability in meeting customers' needs in the member bank. One major benefit of belonging to the Federal Reserve System is that deposits in member banks are automatically insured by the FDIC. The FDIC protects each account in a member bank for up to $100,000 should the bank become insolvent.

A state-chartered bank is granted authority by the state in which it operates and is under the regulation of an appropriate state agency. Many state-chartered banks also choose to belong to the Federal Reserve System, thus ensuring coverage by the FDIC. Banks that are not members of the Federal Reserve System can still be protected by the FDIC if they can meet certain requirements and if they submit an application.

The Interstate Banking and Branching Efficiency Act of 1994 (scattered sections of 12 U.S.C.A.) elevated banking from a regional enterprise to a more national pursuit. Previously, a nationally chartered bank had to obtain a charter and set up a separate institution in each state where it wished to do business; the 1994 legislation removed this requirement. Also, throughout the 1980s and the early 1990s, a number of states passed laws that allowed for reciprocal interstate banking. This trend resulted in a patchwork of regional compacts between various states, most heavily concentrated in the New England states.

### Types of Banks

The term *bank* is generally used to refer to commercial banks; however, it can also be used to refer to savings institutions, savings and loan associations, and building and loan associations.

A commercial bank is authorized to receive demand deposits (payable on order) and time deposits (payable on a specific date), lend money, provide services for fiduciary funds, issue letters of credit, and accept and pay drafts. A commercial bank not only serves its depositors but also can offer installment loans, commercial long-term loans, and credit cards.

A savings bank does not offer as wide a range of services. Its primary goal is to serve its depositors through providing loans for purposes such as home improvement, mortgages, and education. By law, a savings bank can offer a higher interest rate to its depositors than can a commercial bank.

A **SAVINGS AND LOAN ASSOCIATION** (S&L) is similar to a savings bank in offering savings accounts. It traditionally restricts the loans it makes to housing-related purposes including mortgages, home improvement, and construction, although, some S&Ls have entered into educational loans for their customers. An S&L can be granted its charter by either a state or the federal government; in the case of a federal charter, the organization is known as a federal savings and loan. Federally chartered S&Ls have their own system, which functions in a manner similar to that of the Federal Reserve System, called the Federal Home Loan Banks System. Like the Federal Reserve System, the Federal Home Loan Banks System provides an insurance program of up to $100,000 for each account; this program is called the Federal Savings and Loan Insurance Corporation (FSLIC). The Federal Home Loan Banks System also provides membership options for state-chartered S&Ls and an option for just FSLIC coverage for S&Ls that can satisfy certain requirements.

A building and loan association is a special type of S&L that restricts its lending to home mortgages.

The distinctions between these financial organizations has become narrower as federal legislation has expanded the range of services that can be offered by each type of institution.

### Bank Financial Structure

Banks are usually incorporated, and like any corporation must be backed by a certain amount of capital (money or other assets). Banking laws specify that banks must maintain a minimum amount of capital. Banks acquire capital by selling capital stock to shareholders. The money shareholders pay for the capital stock becomes the working capital of the bank. The working capital is put in a trust fund to protect the bank's depositors. In turn, shareholders receive certificates that prove their ownership of stock in the bank. The working capital of a bank cannot be diminished. Dividends to shareholders must be paid only from the profits or surplus of the bank.

Shareholders have their legal relationship with a bank defined by the terms outlined in the contract to purchase capital stock. With the investment in a bank comes certain rights, such as the right to inspect the bank's books and records and the right to vote at shareholders' meetings. Shareholders may not personally sue a bank, but they can, under appropriate circumstances, bring a stockholder's derivative suit on behalf of the bank (sue a third party for injury done to the bank when the bank fails to sue on its own). Shareholders also are not usually personally liable for the debts and acts of a bank, because the corporate form limits their liability. However, if shareholders have consented to or accepted benefits of unauthorized banking practices or illegal acts of the board of directors, they are not immune from liability.

### Bank Officials

The election and term of office of a bank's board of directors are governed by statute or by the charter of the bank. The liabilities and duties of bank officials are prescribed by statute, charter, bylaws, customary banking practices, and employment contracts. Directors and bank officers are both responsible for the conduct and honorable management of a bank's affairs, although their duties and liabilities are not the same.

Officers and directors are liable to a bank for losses it incurs as a result of their illegal, fraudulent, or wrongful conduct. Liability is imposed for EMBEZZLEMENT, illegal use of funds or other assets, false representation about the bank's condition made to deceive others, or fraudulent purchases or loans. The failure to exercise reasonable care in the execution of their duties also renders officials liable if such failure brings about bank losses. If such losses result from an error in judgment, liability will not be imposed so long as the officials acted in GOOD FAITH with reasonable skill and care. Officers and directors will not be held liable for the acts of their employees if they exercise caution in hiring qualified personnel and supervise them carefully. Civil actions against bank officials are maintained in the form of stockholders' derivative suits. Criminal statutes determine the liability of officers and directors for illegal acts against their bank.

### Bank Duties

The powers and duties of a bank are determined by the terms of its charter and the legislation under which it was created (either federal or state regulations). A bank can, through its governing board, enact reasonable rules and regulations for the efficient operation of its business.

**Deposits** A deposit is a sum of money placed in an account to be held by a bank for the depositor. A customer can deposit money by cash or by a check or other document that represents cash. Deposits are how banks survive. The deposited money establishes a debtor and creditor relationship between the bank and the depositor. Most often, the bank pays the depositing customer interest for its use of the money until the customer withdraws the funds. The bank has the right to impose rules and regulations managing the deposit, such as restrictions governing the rate of interest the deposited money will earn and guidelines for its withdrawal.

**Collections** A primary function of a bank is to make collections of items such as checks and drafts deposited by customers. The bank acts as an agent for the customer. Collection occurs when the drawee bank (the bank ordered by the check to make payment) takes funds from the account of the drawer (its customer who has written the check) and presents it to the collecting bank.

**Checks** A check is a written order made by a drawer to her or his bank to pay a designated person or organization (the payee) the amount specified on the check. Payment pursuant to the check must be made in strict compliance with its terms. The drawer's account must be reduced by the amount specified on the check. A check is a demand instrument, which means it must be

paid by the drawee bank on the demand of, or when presented by, the payee or the agent of the payee, the collecting bank.

A payee usually receives payment of a check upon endorsing it and presenting it to a bank in which the payee has an account. The bank can require the payee to present identification to prove a relationship with the bank, before cashing the check. It has no obligation to cash a check for a person who is not a depositor, since it can refuse payment to a stranger. However, it must honor (pay) a check if the payee has sufficient funds on deposit with the bank to cover the amount paid if the drawer of the check does not have adequate funds in his or her account to pay it.

A certified check is guaranteed by a bank, at the request of its drawer or endorser, to be cashable by the payee or succeeding holder. A bank is not obligated to certify a check, but it usually will do so for a customer who has sufficient funds to pay it, in exchange for a nominal fee. A certified check is considered the same as cash because any bank must honor it when the payee presents it for payment.

A drawer can revoke a check unless it has been certified or has been paid to the payee. The notice of revocation is often called a stop payment order. A check is automatically revoked if the drawer dies before it is paid or certified, since the drawer's bank has no authority to complete the transaction under that circumstance. However, if the drawer's bank does not receive notice of the drawer's death, it is not held liable for the payment or certification of that drawer's checks.

Upon request, a bank must return to the drawer all the checks it has paid, so that the drawer can inspect the canceled checks to ensure that no forgeries or errors have occurred, in adjusting the balance of her or his checking account. This review of checks is usually completed through the monthly statement. If the drawer finds an error or forgery, it is her or his obligation to notify the bank promptly or to accept full responsibility for whatever loss has been incurred.

***Bank liabilities*** A bank has a duty to know a customer's signature and therefore is generally liable for charging the customer's account with a forged check. A bank can recover the loss from the forger but not from the person who in good faith and without knowledge of the crime gave something in exchange for the forged check. If the depositor's NEGLIGENCE was a factor in the forgery, the bank can be excused from the liability.

A bank is also responsible for determining the genuineness of the endorsement when a depositor presents a check for payment. A bank is liable if it pays a check that has been materially altered, unless the alteration was due to the drawer's fault or negligence. If a bank pays a check that has a forged endorsement, it is liable for the loss if it is promptly notified by the customer. In both cases, the bank is entitled to recover the amount of its loss from the thief or forger.

A drawee bank that is ordered to pay a check drawn on it is usually not entitled to recover payment it has made on a forged check. If, however, the drawee bank can demonstrate that the collecting bank was negligent in its collection duties, the drawee bank may be able to establish a right of recovery.

A bank can also be liable for the wrongful dishonor or refusal to pay of a check that it has certified, since by definition of certification it has agreed to become absolutely liable to the payee or holder of the check.

If a bank has paid a check that has been properly revoked by its drawer, it must reimburse the drawer for the loss.

***Drawer liabilities*** A drawer who writes a check for an amount greater than the funds on deposit in his or her checking account is liable to the bank. Such a check, called an overdraft, sometimes results in a loan from the bank to the drawer's account for the amount by which the account is deficient, depending on the terms of the account. In this case, the drawer must repay the bank the amount lent plus interest. The bank can also decide not to provide the deficient funds and can refuse to pay the check, in which case the check is considered "bounced." The drawer then becomes liable to the bank for a handling fee for the check, as well as remaining liable to the payee or subsequent holder of the check for the amount due. Many times, the holder of a returned, or bounced, check will impose another fee on the drawer.

**Loans and Discounts** A major function of a bank is the issuance of loans to applicants who meet certain qualifications. In a loan transaction, the bank and the debtor execute a promissory note and a separate agreement in which the terms and conditions of the loan are detailed. The interest charged on the amount lent can

differ based on many variables. One variable is a benchmark interest rate established by the Federal Reserve Bank Board of Governors, also known as the prime rate, at the time the loan is made. Another variable is the length of repayment. The collateral provided to secure the loan, in case the borrower defaults, can also affect the interest rate. In any case, the interest rate must not exceed that permitted by law. The loan must be repaid according to the terms specified in the loan agreement. In case of default, the agreement determines the procedures to be followed.

Banks also purchase commercial papers, which are commercial loans, at a discount from creditors who have entered into long-term contracts with debtors. A creditor sells a commercial paper to a bank for less than its face value because it seeks immediate payment. The bank profits from the difference between the discount price it paid and the face value of the bond, which it will receive when the debtor has finished repaying the loan. Types of commercial paper are educational loans and home mortgages.

### Electronic Banking

Many banks are replacing traditional checks and deposit slips with electronic fund transfer (EFT) systems, which utilize sophisticated computer technology to facilitate banking and payment needs. Routine banking by means of EFT is considered safer, easier, and more convenient for customers.

Many types of EFT systems are available, including automated teller machines; pay-by-phone systems; automatic deposits of regularly received checks, such as paychecks; automated payment of recurring bills; point-of-sale transfers or debit cards, where a customer gives a merchant a card and the amount is automatically transferred from the customer's account; and transfer and payment by customers' home computers.

*Electronic banking has replaced many traditional banking methods.*

AP/WIDE WORLD PHOTOS

When an EFT service is arranged, the customer receives an EFT card that will activate the system and the bank is legally required to disclose the terms and conditions of the account. These terms and conditions include the customer's liability and the notification process to follow if an EFT card is lost or stolen; the type of transactions in which a customer can take part; the procedure for correction of errors; and the extent of information that can be disclosed to a third party without improper infringement on the customer's privacy. If a bank is planning to change the terms of an account—for example, by imposing a fee for transactions previously conducted free of charge—the customer must receive written notice before the change will be effective.

Banks must send account statements for EFT transactions on a monthly basis. The statements must have the amount, date, and type of transaction; the customer's account number; the account's opening and closing balances; charges for the transfers or for continuation of the service; and an address and telephone number for referral of account questions or mistakes.

EFT transactions have become a highly competitive area of banking, with banks offering various bonuses such as no fee for the use of a card when the account holder meets certain provisions such as maintaining a minimum balance. Also, the rapid growth of personal and home office computing has increased pressure on banks to provide services on-line. Several computer software companies produce technology that can complete many routine banking services, like automatic bill paying, at a customer's home.

Banks have a wide range of options available for notifying a customer that a check has been directly deposited into her or his account.

If a customer has arranged for automatic payment of regularly recurring bills, like mortgage or utility bills, the customer has a limited period of time, usually up to three days before the payment is made, in which to order the bank to stop payment. When the amounts of such bills vary, as with utility bills, the bank must notify the customer of the payment date in sufficient time so that there will be enough funds in the account to cover the debt.

If the customer discovers a mistake in an account, the bank must be notified orally or in writing after the erroneous statement is received. The bank must investigate the claim. Often, after several days, the customer's account will be temporarily recredited with the disputed amount. After the investigation is complete, the bank is required to notify the customer in writing if it concludes that no error occurred. It must provide copies of its decision and explain how it reached its findings. Then the customer must return the amount of the error if it was recredited to his or her account.

A customer is liable if an unauthorized transfer is made because an EFT card or other device is stolen, lost, or used without permission. This liability can be limited if the customer notifies the bank within two business days of the discovery of the misdeed; it is extended to $500 if the customer fails to comply with the notice requirement. A customer can assume unlimited liability if she or he fails to report any unauthorized charges to an account within a specified period after receiving the monthly statement.

A customer is entitled to sue a bank for COMPENSATORY DAMAGES caused by the bank's wrongful failure to perform the terms and conditions of an EFT account, such as refusing to pay a charge if the customer's account has more than adequate funds to do so. The customer can also recover a maximum penalty of $1,000, attorneys' fees, and costs in an action based upon violation of this law.

The expansion of the INTERNET in the mid 1990s allowed banks to offer many more electronic services to their customers. Although this form of business with banks is certainly convenient, it has also caused a considerable amount of concern regarding the security of transactions conducted in this manner. Although laws designed to prevent FRAUD in traditional banking also apply to electronic banking, identifying individuals engaged in fraud can be more difficult when electronic transactions are concerned. On the federal level, the Electronic Funds Transfers Act, 15 U.S.C.A. §§ 1693a et seq., provides protection to consumers who are the subject of an unauthorized electronic funds transfer.

The Gramm-Leach-Bliley Financial Modernization Act, PL 106-102 (S 900) November 12, 1999. also modified federal statutory provisions related to electronic banking. Under this act, banks must now disclose the fees they charge for use of their automated teller machines. If the consumer is not provided with proper fee disclosure, an ATM operator cannot impose a service fee concerning any electronic fund transfer initiated by the consumer. Fur-

thermore, the act requires that possible fees be disclosed to a consumer when an ATM card is issued.

### Interstate Banking and Branching

In late 1994, the 103d Congress authorized significant reforms to interstate banking and branching law. The Interstate Banking Law (Pub. L. No. 103-328), also referred to as the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, provided the banking industry with major legislative changes. The Interstate Banking Act was expected to accelerate the trend of bank mergers. These mergers are a benefit to the nation's largest banks, which will likely see savings of millions of dollars resulting from streamlining.

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Bank of the United States; Federal Deposit Insurance Corporation; Federal Reserve Board; Glass-Steagall Act; Securities.

## ♦ BANKS, DENNIS J.

Native American activist, organizer, and protest leader Dennis Banks (Nowacumig) helped found the influential AMERICAN INDIAN MOVEMENT (AIM). Under his passionate leadership in the late 1960s and early 1970s, AIM championed Native American self-sufficiency, traditions, and values. However, its demand for federal recognition of century-old treaty rights led to violent clashes with authorities, and the FEDERAL BUREAU OF INVESTIGATION (FBI) branded AIM an extremist group. In turn, illegal actions by the FBI led to Banks's acquittal on charges stemming from his role in AIM's occupation of Wounded Knee, South Dakota, in 1973. While heightening national awareness of Native American issues, Banks faced prosecution several times. He spent nearly a decade as a criminal fugitive, receiving a form of political ASYLUM in California from then governor Jerry Brown before surrendering in 1984 and serving a shortened prison term. Since 1978, Banks has led a Native American spiritual organization in Kentucky called Sacred Run.

Banks was born April 12, 1937, in Leech Lake, Minnesota. His difficult early life began during one of many periods of upheaval in federal policy regarding Native Americans. Like many Anishinabe Ojibwa, or Chippewa, children, he was sent at the age of five to schools operated by the federal Bureau of Indian Affairs (BIA), and he spent part of his childhood being shuttled between boarding schools in North and South Dakota. The BIA managed such schools in accordance with a landmark change in federal policy known as the Indian Reorganization Act of 1934 (25 U.S.C.A. § 461 et seq.). Under the terms of this so-called new deal for Indians—a plan for tribal government that many traditional Native Americans had resisted—schools were to have been improved over those in previous decades that sought to Christianize or "civilize" their pupils. But the schools still deemphasized Native American culture by forbidding the speaking of the Ojibwa language, Lakota. Thus, like many of his generation, Banks lost his native tongue.

"WHAT WE HAVE DONE, WE DID FOR THE SEVENTH GENERATION TO COME. . . . WE DID NOT DO THESE THINGS FOR OURSELVES . . . [BUT] SO THAT THE SEVENTH GENERATION MAY BE BORN FREE."
—DENNIS BANKS

At the age of 19, Banks joined the U.S. Air Force and served in Japan. Discharged in the late 1950s, he returned to Minnesota, where he faced the same problems as young Native American men continued to face in the 1990s and the 2000s: alienation from his culture, unemployment, poverty, alcoholism, and crime. "I was heading down a road that was filled with wine, whiskey and booze," Banks later recalled. "Then I landed in prison." In 1966, he was convicted for burglarizing a grocery store and began serving thirty-one months of a three-and-a-half-year sentence in Stillwater State Penitentiary, in Minnesota. In prison, Banks met fellow convict Clyde Bellecourt, also an Ojibwa. The two men and others founded AIM in July 1968 with several goals in mind. They wanted to address the problems that beset their people and find solutions to basic needs such as housing and employment. To help Native Americans live successfully off reservations, they would start so-called survival schools. But fundamentally, they wanted to preserve their vanishing culture. AIM's emblem was an upside-down U.S. flag, what Banks called the international distress signal for people in trouble.

When the first AIM chapter started in Minneapolis in 1968, Banks would often use a police radio to guide him to the scene when officers

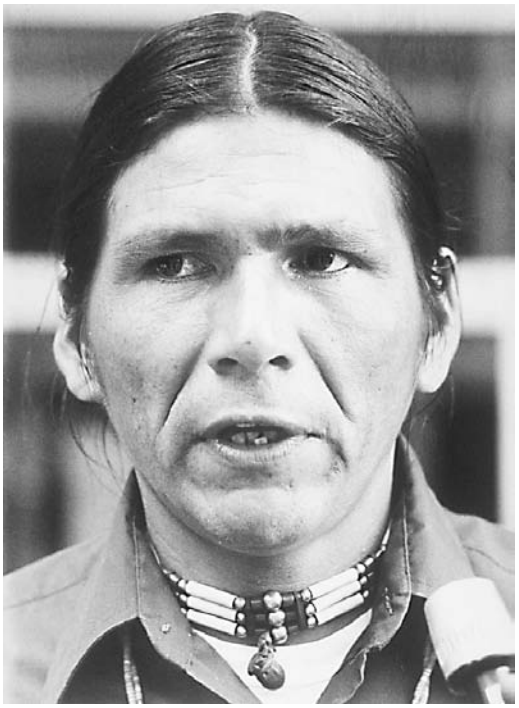

*Dennis Banks.*
AP/WIDE WORLD PHOTOS

were arresting Native Americans. Intending to prevent police abuses, he was frequently arrested on charges of interference. This kind of tough, streetwise advocacy helped spread the movement, making Banks, Bellecourt, and another AIM leader, Russell Means, heroes to many of their generation.

Over the next four years, the movement spread to all 50 states and to Canada. The organization's political message had widespread appeal for Native Americans who felt betrayed by the federal government's Indian Reorganization Act. Not only was this new deal perceived as no deal, but many believed that it opened the way for massive federal land grabs of Indian territory on which valuable minerals were located. Banks and his fellow leaders decided to reclaim former Indian territory, announcing that they would symbolically "retake the country from west to east" like the "wagon train in reverse."

The militancy of their claims was soon demonstrated. In its first act of protest, on November 4, 1969, AIM seized the abandoned federal prison on Alcatraz Island, in San Francisco Bay, California. Two hundred activists claimed the island as free Indian land and demanded that an educational and cultural center be established there. In ironic press statements, they announced the establishment of a Bureau of Caucasian Affairs and offered to pay the U.S. government $24, in mockery of the 1626 purchase of Manhattan Island from Indians by Dutch settlers. The occupation, which lasted nineteen months, stirred up considerable publicity. The U.S. House of Representatives passed a joint resolution directing President RICHARD M. NIXON to negotiate with the activists, but his administration's offer to build a park on the island was laughed off. U.S. MARSHALS ultimately arrested the activists still on the island in June 1971.

In April 1971, Banks led several AIM members in a week-long takeover of the Fort Snelling Military Base, in St. Paul. Seizing an abandoned building, the group announced that it intended to start an Indian survival school there. Senator Walter F. Mondale agreed to negotiate with Banks, but before he could, a federal Special Weapons and Tactics (SWAT) unit arrested the protesters. Around the United States, other occupations of government property took place as AIM chapters demonstrated against broken treaties. As a white backlash against the protests began, several Indians were beaten or shot. Charges of MANSLAUGHTER brought against white attackers usually ended in acquittal, inflaming the Indian movement. It maintained that little or no help was forthcoming from the BIA or the FBI.

In response, car caravans converged on Washington, D.C., on November 2, 1972, in a protest rally dubbed the Trail of Broken Treaties. AIM presented a 20-point proposal demanding that the government revamp the BIA, recognize Indian sovereignty, restore the power of Indians to negotiate treaties, and create a review board to study treaty violations. A group of 400 protesters seized the BIA building; clashed with riot squads; and, renaming the facility the Native American Embassy, ransacked files that Banks said contained evidence of federal mistreatment of Indians. Banks told reporters, "We are trying to bring about some meaningful change for the Indian community. If this is the only action that will bring change, then you can count on demonstrations like this 365 days a year." On November 6, the Nixon White House agreed to negotiate. After two days, Banks's followers departed in return for the appointment of a special panel to investigate conditions on Indian reservations. But within a week after the takeover, federal funding was cut off for three of AIM's survival schools.

In early 1973, a turning point occurred in Banks's life and the direction of AIM. On February 6, he led an AIM protest 200 strong in Custer, South Dakota, after a white man accused of killing an Indian in a barroom brawl was charged with INVOLUNTARY MANSLAUGHTER. Banks met with local officials, but when the slain man's mother, Sarah Bad Heart Bull, tried to enter the courthouse, she and other Native Americans were beaten by the police. A riot ensued, in which AIM members set fire to police cars and the CHAMBER OF COMMERCE office. For his role in the Custer incident, Banks was charged with ARSON, BURGLARY, and malicious damage to a public building, all of which he denied. But his radicalization was complete. "We had reached a point in history where we could not tolerate the abuse any longer," Banks later explained, "where mothers could not tolerate the mistreatment that goes on on the reservations any longer, they could not see another Indian youngster die."

Three weeks later, Banks, Means, and other AIM members took over the town of Wounded Knee on the Pine Ridge Reservation in South Dakota. For Native Americans, the town has a bitter place in history: it is the site where, in 1890, 300 unarmed Sioux men, women, and children were massacred by the Seventh Cavalry of the U.S. Army. Banks and Means hoped to invoke this symbolism by seizing the town by armed force and issuing new demands. They wanted the federal government to investigate the BIA and to address treaty violations, and they denounced recent tribal elections as corrupt manipulations by white U.S. citizens. As national attention focused on the growing army of some three hundred FBI agents and U.S. marshals, and the armored personnel carriers surrounding the militants' fortifications, gunfire was frequently exchanged. Over 71 days, while the government ordered surrender without AMNESTY, the town was held. "We laid down our weapons at Wounded Knee," Banks told the press from within the stronghold, recalling the 1890 massacre. "Those weapons weren't just bows and guns, but also a sense of pride."

The takeover ended on May 9, 1973. Pentagon documents later revealed that the U.S. Army had readied a vast military arsenal to clear out AIM members, including more than 170,000 rounds of ammunition, grenade launchers, explosives, gas, helicopters, and jets. In the end, however, casualties were limited: two Native Americans were killed and several wounded; three members of the government forces were wounded, including one agent who was paralyzed. As a condition of surrendering, AIM was once again promised a federal investigation of its demands, but none was forthcoming.

Banks and Means were prosecuted on ten felony counts each in a dramatic eight-month trial in St. Paul, during which federal marshals used mace on courtroom spectators. The defendants alleged that their takeover of Wounded Knee was justified by the government's violations of the 1868 Treaty of Fort Laramie—a pact in which the Sioux Indians had been promised government protection for ending their armed resistance. But the case against Means and Banks foundered on revelations that the FBI had used illegal wiretaps and had changed documents, among other illegalities, in mounting its prosecution. On September 16, 1974, all charges were dismissed.

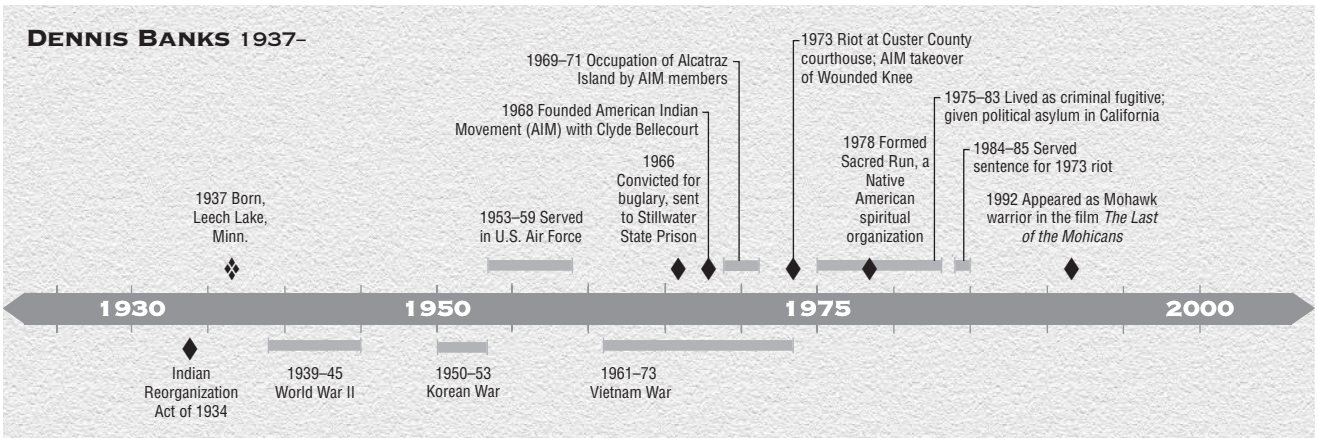

Although Banks acted as a negotiator during the mid-1970s, settling disputes between Native Americans and authorities, other aspects of his life soon changed for the worse. In July 1975, a South Dakota jury convicted him on charges of riot and assault with a deadly weapon for his role in the 1973 riot at the Custer County Courthouse. The conviction carried a maximum sentence of 15 years in prison. Before sentencing, Banks heard prison guards say he would not last 20 minutes in the South Dakota State Penitentiary. He fled, only to be arrested by FBI agents on January 23, 1976, in northern California. A massive petition movement supported by the actors Jane Fonda and Marlon Brando appealed to Governor Brown on Banks's behalf. Brown reduced Banks's bail, refused EXTRADITION requests from South Dakota, and informed authorities there that he was protecting Banks because of sworn statements that Banks's life would be endangered if he were imprisoned. Banks lived freely in California, serving as chancellor of the two-year Indian college Deganawidah-Quetzalcoatl University, until the 1983 inauguration of Republican governor George Deukmejian ended his asylum.

Banks then took sanctuary on the Onondaga Reservation in New York. Because reservations in the state are not under federal jurisdiction, the FBI chose not to arrest him as long as he remained there.

After nine years as a fugitive, Banks gave himself up to state authorities in South Dakota in fall 1984. His request for clemency was denied, and he was sentenced to three years in prison. After his PAROLE on December 9, 1985, he spent time on the Pine Ridge Reservation, where, through his success at persuading Honeywell and other companies to locate factories there, employment doubled. But his legal troubles continued. Banks had been charged with illegal possession of dynamite stemming from the 1975 arrest of his wife, Kamook Nichols. A lower court dismissed the charges in 1983 on the ground that Banks and three other defendants had been denied their SIXTH AMENDMENT right to a SPEEDY TRIAL, and a second federal court upheld the ruling. But on January 21, 1986, the members of the U.S. Supreme Court, in a 5–4 vote, held that their rights had not been violated, because they were free without bail and not under indictment during the 90-month delay in their prosecution. Banks pleaded guilty on March 8, 1988, and received five years' PROBATION. Also, in 1988, Banks's autobiography *Sacred Soul* was published.

In 1994, Banks led the four-month "Walk for Justice." The purpose of the trek from Alcatraz Island in San Francisco to Washington, D.C., was to publicize current issues regarding Native Americans.

Banks continued to serve as director of Sacred Run, an organization he founded in 1978 to address Native American spiritual concerns. Since then the Run has become an international, multicultural event that carries the message of the sacredness of life and of humankind's relationship to the earth. By 1996, Banks had led runners over 58,000 miles through the United States, Canada, Europe, Japan, Australia, and New Zealand.

Banks has had roles in movies including *War Party, The Last of the Mohicans,* and *Thunderheart.* A musical cassette, *Still Strong,* featuring Banks's original work as well as traditional Native American songs, was completed in 1993 and a music video with the same name was released in 1995.

In the early 2000s Banks continued working toward the release of Leonard Peltier. Peltier, an Ojibwa whom Banks considers to be a political prisoner, was convicted in 1977 of the murder of two FBI agents during a gunfight in Oglala, North Dakota. In addition to supporting the Peltier defense and other issues concerning Native Americans, Banks traveled and lectured in the United States and abroad.

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Native American Rights.

## BAR ASSOCIATION

*An organization of lawyers established to promote professional competence, enforce standards of eth-*

*ical conduct, and encourage a spirit of public service among members of the legal profession.*

The mission of a bar association is frequently described in the words of ROSCOE POUND, legal scholar and dean of Harvard Law School from 1916 to 1936: "[To] promote and maintain the PRACTICE OF LAW as a profession, that is, as a learned art pursued in the spirit of a public service—in the spirit of a service of furthering the administration of justice through and according to law."

Bar associations accomplish these objectives by offering continuing education for lawyers in the form of publications and seminars. This education includes instruction on recent developments in the law and in managing a law practice successfully as a business. Bar associations encourage members to offer PRO BONO legal services (to provide legal services at no cost to members of society who cannot afford them). Bar associations develop guidelines and rules relating to ethics and PROFESSIONAL RESPONSIBILITY and enforce sanctions for violation of rules governing lawyer conduct. Bar associations also offer attorneys the opportunity to meet socially to discuss employment prospects and legal theories.

The International Bar Association, based in London, is for lawyers and law firms involved in the practice of INTERNATIONAL LAW. In the United States, bar associations exist on the national, state, and local levels. Examples are the AMERICAN BAR ASSOCIATION (ABA) and the FEDERAL BAR ASSOCIATION on the national level, the New Jersey State Bar Association and the Florida Bar Association on the state level, and the New York City Bar Association on the local level. Some law schools have what they call student bar associations for the student body as a whole, and distinct, smaller bar associations for students with a common ethnic background or an interest in a specific area of practice.

In a majority of states, membership in the state bar association is mandatory for those licensed to practice law. When lawyers are required to join the bar in order to practice law, the bar is said to be integrated, or unified. Integration is generally accomplished by the enactment of a statute giving the highest court of the state the authority to integrate the bar, or by rule of that court in the exercise of its inherent power. In effect, lawyers are not free to resign from an integrated bar, because by doing so, they lose the privilege to practice law.

The modern U.S. bar association traces its beginnings to the mid nineteenth century. At that time, the practice of law was largely unregulated. People in need of legal services had no assurance that the lawyers they hired had had even minimum legal training. To address this situation, leaders of the legal profession began to organize self-governing bar associations to establish standards of education and of professional conduct. The first Code of Professional Ethics was formulated by the Alabama State Bar Association in 1887. The ABA Canons of Professional Ethics followed, in 1908, and were subsequently adopted in whole or in part throughout the United States. These canons were revised and expanded in 1969, as the Model Code of Professional Ethics, and again in 1983, as the Model Rules of Professional Conduct.

In early 2003, the American Bar Association again decided to amend its Model Rules to permit certain forms of multijurisdictional practice for lawyers, i.e., to ease certain restrictions on the ability of lawyers licensed in one state to practice law in another state without formal admission to the latter state's bar association. Among the major issues of concern to bar associations in the early millennium were the following:

- A perceived decline in professionalism among lawyers, manifested by a decline in civility and professional courtesy.
- The preservation of DUE PROCESS and other constitutional rights in light of the wave of international anti-terrorism sentiment.
- A conflict between lawyers' ethical responsibilities and their business interests. Critics within and outside the legal profession complain that some lawyers seek out clients using unethical methods, and engage in litigation of questionable merit in the pursuit of personal profit rather than in the interests of justice.
- The politicization of bar associations and the preservation of judicial independence. On some occasions, bar associations have taken positions on hotly contested social and political issues. Critics argue that the conflict within the membership over these issues distracts bar associations from their primary duty of regulating the practice of law.
- TORT LAW reform. Bar associations continued to oppose any enactment of federal legislation that would PREEMPT state TORT law in such areas as PRODUCT LIABILITY, med-

ical liability, and automobile liability, including federal initiatives aimed at creating maximum allowable damages in tort cases.

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Continuing Legal Education.

## BAR EXAMINATION

*A written test that an individual must pass before becoming licensed to practice law as an attorney.*

Bar examinations are regulated by states, and their specific requirements vary from state to state. Generally, they cover numerous legal topics and consist of multiple-choice questions or essay questions, or a combination. Most states administer a standardized multiple-choice test known as the *Multistate Bar Examination* as at least part of the bar examination requirement.

Each state has an interest in protecting its citizens by ensuring the quality and competency of lawyers who receive licenses to practice there. In addition to requiring bar candidates to pass a difficult and comprehensive test of substantive legal knowledge, most jurisdictions also require proof of graduation from an accredited law school and successful completion of a character background review. With few exceptions, only people who satisfy these strict requirements and are licensed by a state bar may practice law in that state. Critics of this system of attorney licensure argue that its true purpose is to reduce competition between lawyers by regulating the number of lawyers admitted to the bar.

Historically, lawyers have played an active role in determining who, and how many, would join their ranks as members of the bar. This tradition predates the U.S. Constitution by more than six centuries, when English courts governed who would be allowed to practice law. Courts have long relied on the rationale that the integrity and competency of practicing attorneys directly affect the quality of justice dispensed.

The U.S. legal system has adopted this rationale. Before 1828, states allowed practicing attorneys to determine the competency of prospective attorneys. Strict rules developed by lawyers at that time typically required an individual to obtain a college degree and work several years as an attorney's apprentice before being admitted to the PRACTICE OF LAW. Because attorneys controlled who would get apprenticeships, the general public perceived the system as catering to the elite.

A decline of elitist attitudes surrounding the election of President ANDREW JACKSON in 1828 prompted a change in the attorney licensing system. State legislatures divested the authority granted attorneys and reclaimed control of bar admission standards, which became far less stringent and far less exclusive. Apprenticeships remained the most common form of legal study, but by 1860, only nine states required any form of LEGAL EDUCATION for ADMISSION TO THE BAR. Written bar examinations, when required, were cursory.

By the late 1800s, a surge in formal law schools spurred a decline in legal apprenticeship programs. A new wave of interest in improving standards of legal education and bar admission prompted the founding of the AMERICAN BAR ASSOCIATION in 1878 and the American Association of Law Schools in 1900. These groups encouraged tougher bar admission standards, including the requirement that all bar candidates complete a written examination used to assess their fitness to practice law. Today, every state offers a bar examination.

Administrative bodies established in each state generally govern the standards and particularities of the bar examination. In keeping with the tradition of attorney self-regulation, these boards usually are made up, at least in part, of licensed attorneys. The boards determine what legal topics will be covered; what types of questions will be asked; what grading methods will be applied; and the locations, dates, and times of examinations. Nearly every state requires, as one component of the examination, the *Multistate Bar Examination.*

The *Multistate Bar Examination* contains two hundred multiple-choice questions cover-

ing six legal topics: contracts, CONSTITUTIONAL LAW, CRIMINAL LAW and procedure, evidence, real property, and TORTS. Examinees have six hours to complete the exam, or 1.8 minutes for each question. This computer-graded test is offered twice a year, usually in July and February. Indiana, Iowa, Louisiana, Washington, and Puerto Rico are the only United States jurisdictions that have not adopted the *Multistate Bar Examination.*

Most states also require bar candidates to complete a test of their knowledge of state laws. Examinees usually take this portion of the exam on the day before or after the *Multistate Bar Examination.* This state-specific examination often contains essay questions or multiple-choice questions, or a combination. It may cover a different range of legal topics than does the *Multistate Bar Examination,* although some topics are duplicated by the two tests.

More than half the states require, in addition, a passing score on the standardized multiple-choice test of legal and professional ethics called the *Multistate Professional Responsibility Examination.* Bar applicants normally take this two-hour test several weeks before or after they take the bar examination. The *Multistate Professional Responsibility Examination* tests the applicants' knowledge of the American Bar Association's Model Rules of Professional Conduct. Topics include attorney-client confidentiality, conflicts of interest, and attorney advertising.

In a few states, an attorney may be licensed to practice law without taking the state's bar examination. Wisconsin permits graduates of accredited Wisconsin law schools to become licensed attorneys without taking any bar examination. Other states offer reciprocity, by accepting *Multistate Bar Examination* scores attained in other jurisdictions or by waiving the bar examination requirement for experienced attorneys licensed in other jurisdictions.

Jurisdictions also differ in their approach to legal education requirements. Most states require bar applicants to graduate from law schools accredited by the American Bar Association. Some states, such as California and Georgia, will admit bar candidates who received law degrees from unaccredited law schools under certain circumstances. California, Maine, New York, Vermont, Virginia, Washington, and Wyoming do not require law degrees at all, but alternatively require several years of legal study—also known as reading law—with a licensed attorney. Whatever the legal education requirements, all members of the bar must pass the bar examination.

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## ♦ BARBOUR, PHILIP PENDLETON

Philip Pendleton Barbour, an associate justice of the U.S. Supreme Court, was a strong advocate of STATES' RIGHTS and the STRICT CONSTRUCTION of the Constitution.

The son of a wealthy planter from one of Virginia's oldest families, Barbour was born May 25, 1783, in Orange County, Virginia. He was educated locally and excelled in languages and classical literature. At seventeen, he became an apprentice to an Orange County lawyer. After less than a year clerking and studying law, Barbour left Virginia for Kentucky, where he practiced law for a short time. In 1801, he returned to Virginia to attend the College of William and Mary, in Williamsburg, where he briefly studied law. A year later, he established a law practice in Orange County, and quickly gained a reputation for his outstanding oratorical abilities in the courtroom. In 1804, he married Frances Johnson, the daughter of a local planter, with whom he had seven children.

"WHAT IS SETTLED BY THE CONSTITUTION CANNOT BE ALTERED BY LAW."
—PHILIP PENDLETON BARBOUR

*Philip Pendleton Barbour.*
ARCHIVE PHOTOS, INC.

Barbour's family was both socially prominent and politically active. His father, Thomas Barbour, was a member of the Virginia House of Burgesses for many years, and his older brother became a Virginia governor, U.S. senator, and secretary of war under President JOHN QUINCY ADAMS, whose administration Barbour would eventually oppose. Encouraged by his father's and brother's successes, in 1812 Barbour ran for and won a seat in the Virginia House of Delegates. Two years later, he won a seat in the U.S. Congress and aligned himself with a group of older Republicans who favored strict construction of the Constitution and a limited federal government. Barbour served as Speaker of the House from 1821 until 1823, when he was defeated by HENRY CLAY. In 1824, Barbour chose not to run for reelection to Congress, and returned to Virginia to resume his law practice.

During his career as a practicing attorney, Barbour was involved in a number of important cases. He argued the state's position before the U.S. Supreme Court in *Cohen v. Virginia,* 19 U.S. 264, 6 Wheat. 264, 5 L. Ed. 257 (1821), a landmark suit that helped to clarify the role of the federal courts in reviewing state court decisions. In *Cohen* the Court held that the federal judiciary could review cases arising in the state courts that involved constitutional issues. Though Barbour lost the case, his vigorous representation helped to further establish his reputation as a strong defender of the states against what he often saw as the growing encroachment of the federal government.

In 1825, after considering and then declining an offer from THOMAS JEFFERSON to join the law faculty at the University of Virginia, Barbour was appointed to the General Court for the Eastern District of Virginia, a state trial court, where he served for almost two years. In 1827, at the urging of his constituents, Barbour ran unopposed for Congress, though he lost the Speaker's race to fellow Virginian Andrew Stevenson. During his second stint in Congress, Barbour was a vocal opponent of President Adams, even though Barbour's brother James Barbour was a member of the Adams cabinet. Barbour objected to the administration's spending policies and to the imposition of a tariff in 1828. He also continued his relentless advocacy of states' rights and the narrow construction of the Constitution, introducing an unsuccessful bill in 1829 requiring that five of the seven justices on the U.S. Supreme Court concur in any decision involving a constitutional question.

In the late 1820s, Barbour became a strong supporter of ANDREW JACKSON, who defeated

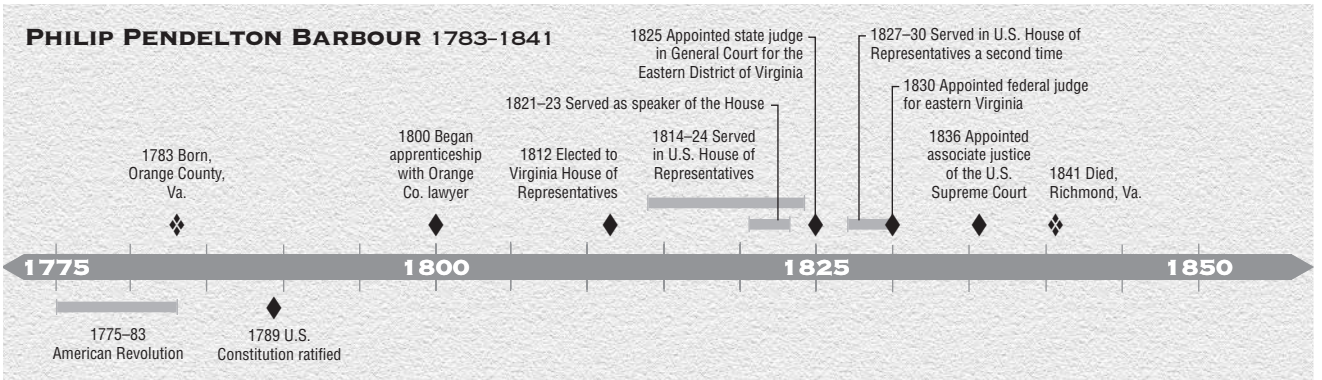

the incumbent Adams in 1828. Barbour was considered for a position in the Jackson cabinet but was not appointed. In 1829, Barbour was chosen president of the Virginia Constitutional Convention, replacing the ailing JAMES MONROE. During the sometimes tumultuous convention, Barbour argued for APPORTIONMENT of representation based on both white population and property ownership, and argued that the latter should be a qualification for the right to vote. Barbour also sided with the conservative slaveholders in the eastern part of the state against citizens in the western part of the state who, opposed to SLAVERY, eventually formed a separate state, West Virginia.

Barbour's unwavering support of Jackson and his policies earned him an appointment as a federal judge for eastern Virginia in 1830. In 1832, he was briefly a candidate for vice president against MARTIN VAN BUREN, even though Van Buren was Jackson's choice in his reelection bid. Barbour soon withdrew his candidacy to preserve party unity, and threw his support to Van Buren.

As early as 1831, Barbour was rumored to be next in line for a seat on the U.S. Supreme Court as soon as Jackson, now in his second term, had an opportunity to make an appointment. Nationalists, who disagreed with Barbour's states' rights and strict constructionist views, opposed Barbour as a possible candidate for the Court. In 1836 Barbour was nominated to succeed retiring justice Gabriel Duval, at the same time that ROGER B. TANEY was nominated as chief justice and confirmed to succeed JOHN MARSHALL, also retiring. As expected, Barbour's nomination drew criticism, but he was nevertheless confirmed by a vote of 30–11.

Barbour wrote only a dozen opinions for the Court. His most important majority opinion was in *City of New York v. Miln,* 36 U.S. 102, 11 Pet. 102, 9 L. Ed. 648 (1837). At issue in *Miln* was a New York state law requiring captains of vessels arriving at ports to provide harbor authorities with the names, ages, birthplaces, and occupations of arriving passengers. The Court considered whether the law was an unconstitutional invasion of the exclusive federal right to regulate interstate and international trade. The Court ruled that the law was a legitimate exercise of the state's "police power" to protect the health and welfare of its citizens. The decision provided the perfect opportunity for Barbour to expound upon his states' rights views. He wrote that the state not only had the right to impose such laws but also the "solemn duty . . . to advance the safety, happiness and prosperity of its people, and to provide for the GENERAL WELFARE, by any and every act of legislation, which it may deem to be conducive to these ends." The decision marked a significant departure from the philosophy of the previous Court, headed by Marshall, which had emphasized the importance of federal authority in matters that even indirectly involved interstate and international commerce. Though influential, *Miln* was criticized and limited by subsequent decisions of the Court.

In February 1841, at age fifty-eight, Barbour died suddenly of a heart attack. He thus served only five years on the Court, completing one of the shortest terms in its history.

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## BARGAIN

*A reciprocal understanding, contract, or agreement of any sort usually pertaining to the loan, sale, or exchange of property between two parties, one of whom wants to dispose of an item that the other wants to obtain. To work out the terms of an agreement; to negotiate in* GOOD FAITH *for the purpose of entering into an agreement.*

A union engages in COLLECTIVE BARGAINING on proposed contract terms.

## BARGAINING AGENT

*A union that possesses the sole authority to act on behalf of all the employees of a particular type in a company.*

A bargaining agent is certified by the NATIONAL LABOR RELATIONS BOARD (NLRB) as the exclusive representative of a certain type of employee. The International Garment Workers Union, for example, might act as the bargaining agent for all seamstresses employed at a particular dress factory.

CROSS-REFERENCES

Labor Law; Labor Union.

## ♦ BARLOW, FRANCIS CHANNING

Francis Channing Barlow achieved prominence as a lawyer and a soldier. Barlow was born Octo-

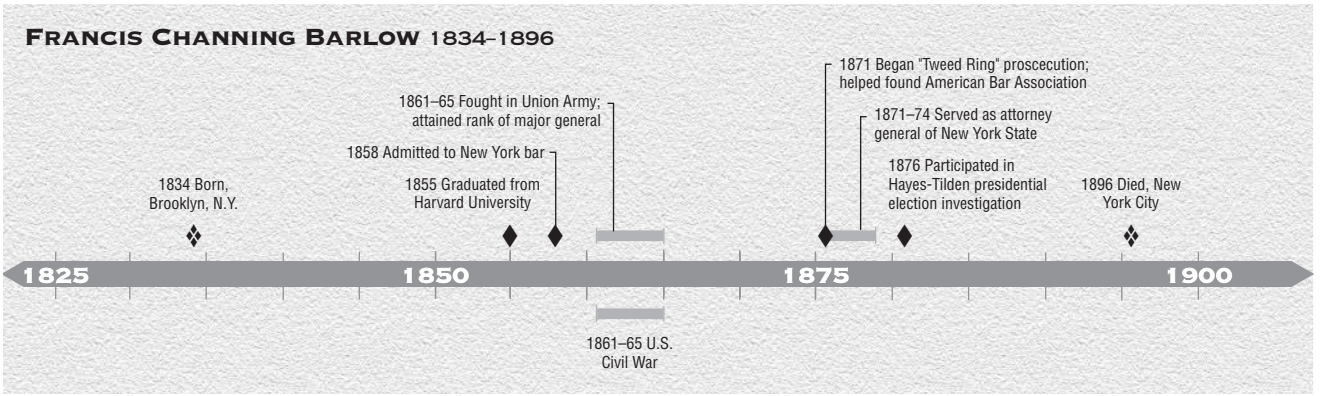


ber 19, 1834, in Brooklyn, New York. He graduated from Harvard in 1855, and was admitted to the New York bar in 1858. From 1859 to 1861, and also in 1866, Barlow practiced law.

At the onset of the Civil War in 1861, Barlow joined the Union Army and fought at various battles, including Fair Oaks, Antietam, Chancellorsville, and Spottsylvania. He was wounded at Gettysburg in 1863 but returned to service, and by the end of the war he had earned the rank of major general.

After the Civil War Barlow became SECRETARY OF STATE of New York, serving from 1865 to 1867, and 1869 to 1870. In 1869, he was U.S. marshal for the southern district of New York. He performed the duties of New York attorney general from 1871 to 1873, and was instrumental in the early proceedings concerning the prosecution of the Tweed Ring, a group of corrupt New York politicians.

Barlow returned to his law practice in 1874. In 1876, he participated in the investigation of the controversial Hayes-Tilden presidential election results. He died January 11, 1896, in New York City.

CROSS-REFERENCES

Tammany Hall.

## ♦ BARR, WILLIAM PELHAM

William Pelham Barr served as attorney general of the United States from 1991 to 1993 under President GEORGE H.W. BUSH.

The son of Donald Barr and Mary Ahern Barr, William Barr was born May 23, 1950, in New York City, and was schooled there. He completed an undergraduate degree at New York's Columbia University in 1971 and began a two-year master's program in Chinese studies. Armed with his graduate degree, he moved to Washington, D.C., in 1973 and went to work as a staff officer with the CENTRAL INTELLIGENCE AGENCY (CIA). He was accompanied by his wife, Christine Moynihan, to whom he was married on June 23, 1973.

While working at the CIA, Barr enrolled in the night program at George Washington University Law School. He earned his law degree in 1977, graduating second in his class. After law school, he clerked for one year with the presiding judge of the District of Columbia Circuit Court. He was admitted to the Virginia bar in 1977 and to the District of Columbia bar in 1978. Also in 1978, Barr accepted an associate position at the Washington, D.C., law firm of Shaw, Pittman, Potts, and Trowbridge. There, he concentrated on civil litigation and federal administrative practice.

In 1982, Barr was named to President Ronald Reagan's Domestic Policy Council. During his two years of service, he became well known and respected by the administration and leaders in the REPUBLICAN PARTY. Barr returned to Shaw, Pittman in 1984, to resume his legal career. He was made a partner of the firm in 1985.

After several years in private practice, Barr reentered public service in 1989, when he was named assistant attorney general by the George H. W. Bush administration. He took over the Justice Department's Office of Legal Counsel, where his role was to advise the White House and the attorney general and other administration officials. Historically, the Office of Legal Counsel has been called upon to reassure presidents that their intended actions are within the law.

As assistant attorney general, Barr authored two controversial ADVISORY OPINIONS that

allowed President Bush to expand his war on drugs and to apprehend Panamanian drug lord Manuel Noriega. One opinion (13 U.S. Op. Off. Legal Counsel 387) held that U.S. military forces could be assigned to law enforcement operations abroad, and the other (13 U.S. Op. Off. Legal Counsel 195) that the president had authority to order the FEDERAL BUREAU OF INVESTIGATION (FBI) to arrest fugitives overseas without consent of the local government.

Barr was named deputy attorney general in 1990. He became acting attorney general in June 1991 when RICHARD THORNBURGH resigned to enter the race for a U.S. Senate seat in Pennsylvania. Barr was nominated and confirmed as attorney general in the fall of 1991, becoming, at age forty-one, the youngest person to hold that post since RAMSEY CLARK, who was appointed in 1967.

After years of unpleasant and adversarial relationships with Attorneys General EDWIN MEESE III and Thornburgh, Congress welcomed Barr's appointment. Members of Congress praised his candor and cooperation, and they supported his decision to launch internal investigations into the Justice Department's handling of the Bank of Credit and Commerce International (BCCI) scandal and the Inslaw computer scandal. BCCI was shut down by bank regulators in 1991 for massive FRAUD, theft, MONEY LAUNDERING, and the financing of arms deals and terrorist activities. Depositors lost billions when the bank's assets were seized. Inslaw, Inc., accused the JUSTICE DEPARTMENT of conspiring to steal its proprietary software after the company's government contract had been revoked.

The AMERICAN BAR ASSOCIATION was encouraged by Barr's willingness to reconsider a Thornburgh decision that prevented local bar associations from interviewing judicial nominees, and an editorial in the November 25, 1991, issue of *National Law Journal* praised the department planned by the new attorney general as less political, more open, and more "inclined toward integrity" than the departments run by his immediate predecessors in the RONALD REAGAN and George H. W. Bush administrations.

However, Barr's honeymoon with the Democratic Congress and the nation's legal press did not last. Barr was soon criticized for his inability to obtain CIA cooperation in the BCCI and Banca Nationale del Lavoro (BNL) investigations and for delays in closing down the BCCI. A CIA investigation revealed that an Atlanta,

*William Pelham Barr.*
AP/WIDE WORLD PHOTOS

"I DON'T CARE HOW MUCH POLITICAL PRESSURE IS BROUGHT TO BEAR . . . [OR THAT] THE OP-EDS [AND] JOURNALISTS ARE SAYING . . . IT'S NOT FAST ENOUGH FOR THEM. THE STANDARD WILL STAY WHERE IT IS."
—WILLIAM BARR

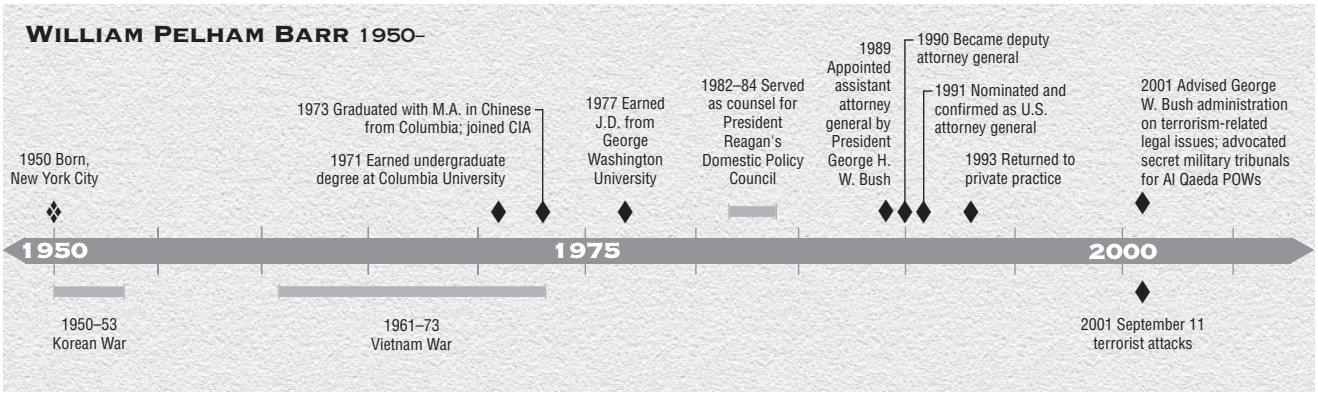

Georgia, branch of the BNL had provided fraudulent loans to Iraq—loans that helped Saddam Hussein to build his military strength. Barr's internal investigation of the theft of an Inslaw-developed computer program by government officials was tagged a whitewash. He angered Japanese officials when he announced a change in antitrust policy that allowed the Justice Department to bring cases against Japanese cartels that restricted U.S. exports. Moreover, Barr fought popular opinion and strong evidence of improprieties by the Justice Department when he continued to support the deportation of John Demjanjuk—wrongly accused of being the infamous Nazi death camp guard who was called Ivan the Terrible.

Finally, Barr took the unprecedented step of denying a congressional request for an independent investigation into the events known as Iraqgate. Barr said he and the Justice Department would conduct their own investigation to determine whether anyone in the Bush administration had committed a crime by giving aid to Saddam Hussein prior to the Iraqi invasion of Kuwait and the resulting Persian Gulf War.

Ongoing questions about the administration's knowledge of, and involvement in, Iraqgate contributed to Bush's defeat in the presidential election of 1992 and ended Barr's tenure as the nation's attorney general.

In spite of his bright beginning, Barr was unable to depart significantly from the agendas and operational styles of his predecessors and the presidents they served. According to the December 7, 1992 issue of *National Law Journal,* "Under Presidents Reagan and Bush and their Attorneys General Ed Meese, Dick Thornburgh and William P. Barr, the nation witnessed the politicization of the [Justice D]epartment beyond anything that has gone before".

In 1993, Barr returned to Shaw, Pittman and resumed the PRACTICE OF LAW. At the time, he was a member of the American Bar Association, the Virginia State Bar Association, and the District of Columbia Bar Association.

Barr later joined Verizon Communications, a provider of phone services as head of its legal department. Under his leadership, the department developed a high percentage of minority and women attorneys and employees. The legal department of New York-based Verizon Communications was named the 2002 Northeast Region Employer of Choice by the Minority Corporate Counsel Association (MCCA).

In 2001 as the competition between local phone companies and other digital subscriber line (DSL) providers grew, Barr instituted a lawsuit against DSL provider Covad Communications. The suit, which claimed that Covad employees had made false reports that Verizon had obstructed Covad's installation services, was dismissed by a federal district court judge in November 2002.

In addition to his work as general counsel for Verizon, Barr has lectured to groups such as the Federalist Society and has offered advice to the administration of GEORGE W. BUSH concerning legal measures that should be taken to fight TERRORISM.

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## BARRATRY

*In* CRIMINAL LAW, *the frequent incitement of lawsuits and quarrels that is a punishable offense.*

Barratry is most commonly applied to an attorney who attempts to bring about a lawsuit that will be profitable to her or him. Barratry is an offense both at COMMON LAW and under some state statutes. The broader common-law crime has been limited by certain statutes. An attorney who is overly officious in instigating or encouraging prosecution of groundless litigation might be guilty of common barratry under a particular statute. The requirement for the crime of barratry is that repeated or persistent acts of litigation are performed by the accused. Barratry is generally a misdemeanor punishable by fine or imprisonment. In the case of an attorney, disbarment is the usual punishment. Since few cases have been prosecuted, barratry is considered by the legal community at large to be an archaic crime. This is particularly true today due to a highly litigious atmosphere.

In maritime law, barratry is the commission of an act by the master or mariners of a vessel

for an unlawful or fraudulent purpose that is contrary to the duty owed to the owners, by which act the owners sustain injury.

A form of barratry is misconduct of the master of a ship in taking commodities on board that subject the ship to seizure for SMUGGLING. It is essential in barratry that a criminal act or intent exist on the part of the master or mariners which inures to their own benefit and causes injury to the owners of the ship.

## BARRISTER

*In* ENGLISH LAW*, an attorney who has an exclusive right of argument in all the superior courts.*

A barrister is a counselor who is learned in law and who has been admitted to plead at the bar. A barrister drafts the pleadings in all cases, with the exception of the simplest ones. Distinguished from an attorney, which is an English lawyer who conducts matters out of court, a barrister engages in the actual argument of cases or the conduct of the trial.

## BARRON V. BALTIMORE

In *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (U.S. 1833), the U.S. Supreme Court ruled that the FIFTH AMENDMENT to the U.S. Constitution bound only the federal government and was thus inapplicable to actions taken by state and local governments. In 1868 the states ratified the FOURTEENTH AMENDMENT in part to nullify the Supreme Court's holding in *Barron v. Baltimore*. However, it was not until the twentieth century when the Supreme Court made most of the federal BILL OF RIGHTS applicable to the states.

The case arose when John Barron, owner of the largest and most profitable wharf in the eastern section of Baltimore, Maryland, sued the city for losses his wharf had allegedly suffered as a result of silting. When Barron had originally purchased the wharf, the wharf enjoyed the deepest waters in the area. However, in 1815 Baltimore had undertaken a major plan to renovate and modernize the city by building embankments, grading roads, and paving streets.

To facilitate this plan, the city began diverting water streams from a range of hills around the city into the wharf. In the seven years leading up to Barron's lawsuit, Baltimore experienced a number of violent rainstorms, causing the streams to fill with sand, mud, and earth from the newly graded roads and abutting embankments. The silt eventually poured into Barron's wharf, making the water so shallow that it was no longer accessible by larger ships. By 1822, the year Barron filed suit, the harbor had lost almost its entire value as a commercial wharf.

At trial in the Baltimore County Courthouse, Barron claimed that the city appropriated his private property for a public use without providing him just compensation, as he said was required by the Takings Clause of Fifth Amendment to the U.S. Constitution. The trial court agreed and awarded Barron $4,500 in damages. The city appealed, and a Maryland appellate court reversed. Barron then petitioned the U.S. Supreme Court by writ of error and review was granted. Chief Justice JOHN MARSHALL delivered the Court's unanimous opinion.

The sole issue before the Court was whether the Fifth Amendment to the federal Constitution applied to actions taken by state and local governmental entities. The federal Constitution "was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states," Marshall wrote. When the Founding Fathers made an exception to this rule in particular provisions of the U.S. Constitution, Marshall said, they made clear that those provisions were in fact applicable to the states. For example, Marshall observed that section 10 of Article I provides that "No State shall … pass any Bill of Attainder." Yet none of the first Ten Amendments to the U.S. Constitution makes any similar reference to STATE ACTION, Marshall reasoned, evincing the Founding Fathers clear intent to make the Bill of Rights applicable only against the federal government.

"Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated," the chief justice continued. If Barron's property interests were harmed by the city, then he was required to rely on state or local law to vindicate his rights. Neither the Fifth Amendment nor any other provision in the Bill of Rights was applicable to his lawsuit, Marshall concluded, and U.S. Supreme Court lacked jurisdiction to take any further action. Accordingly, Marshall dismissed the suit.

*Barron v. Baltimore* signaled a retreat from Marshall's earlier opinions that had expanded the scope and application of the federal Constitution, a change that reflected the growing

STATES' RIGHTS movement over the issue of SLAVERY. Although *Barron v. Baltimore* was reaffirmed 12 years later in *Permoli v. New Orleans*, 44 U.S. (3 How.) 589, 11 L.Ed. 739 (1845), the Union's victory in the Civil War marked the beginning of the end for *Barron* as a valid and binding precedent.

In 1868 the states ratified the Fourteenth Amendment, which provides that no state shall "deprive any person of . . . DUE PROCESS OF LAW . . . [or] EQUAL PROTECTION of the laws." During the Congressional debates, JOHN BINGHAM, a Republican representative from Ohio and the primary architect of the Fourteenth Amendment, argued that enacting the Fourteenth Amendment was necessary to nullify the Supreme Court's holding in *Barron v. Baltimore*.

Despite Bingham's stated intentions, the Bill of Rights was not made applicable to the states through the doctrine of selective incorporation until the twentieth century. Under this doctrine, the Supreme Court has ruled that every protection contained in the Bill of Rights—except for the right to bear arms, the right to an indictment by a GRAND JURY, the right to trial by jury in civil cases, and the right against quartering soldiers—must be protected by state governments under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

The Supreme Court has explained that each of the incorporated rights is "deeply rooted in the nation's history," and is "fundamental" to the concept of "ordered liberty" embodied in the Due Process Clause. *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L.Ed. 288 (1937). Any state that denies one of these rights to its residents violates its duty to provide "equal protection of the laws" guaranteed to the residents of every state. States may provide their residents with more constitutional protection than is afforded by the U.S. Bill of Rights, but the Fourteenth Amendment prohibits any state from providing its residents with less protection.

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## BARTER

*The exchange of goods or services without the use of money as currency.*

Barter is a contract wherein parties trade goods or commodities for other goods, as opposed to sale or exchange of goods for money. Barter is not applicable to contracts involving land, but solely to contracts relating to goods and services. For example, when a tenant exchanges the performance of various maintenance tasks around a house for free room and board, a barter has taken place.

## BASE FEE

*An interest in real property that has the potential to last forever, provided a specific contingency does not occur.*

For example, a grantee might be given an estate in blackacre, "provided the land is not used for illegal purposes."

This type of fee is also known as a *conditional, determinable,* or *qualified fee.*

## BASE LINE

*Survey line used in the government survey to establish township lines. Horizontal elevation line used as a centerline in a highway survey.*

## BASEBALL

Although certain laws have protected citizens from various forms of monopolistic practices for decades, the legal decisions surrounding "America's favorite pastime" have allowed it to remain exempt from most forms of government intervention. Through the years, Major League Baseball (MLB) has escaped measures that would have ended its exclusive control over contracts and copyrights and its all-around MONOPOLY on professional U.S. baseball. Meanwhile, as contracts and team expenditures have come to run well into the millions of dollars, many have come to see baseball as less of a sport than a business—and a business that should be regulated. The United States still reveres baseball, but fans, players, and owners all hope that government decisions will save it from labor strikes and a host of other ills. The government, however, continues to do little other than let baseball remain a special, nationally protected institution.

The professional growth of baseball—and some of its headaches—followed a natural economic progression. Much of the sport's origin is shrouded in myth, but it is thought that it got off to its humble start sometime in the nineteenth

century. The first organized contest probably happened on June 19, 1846, between two amateur teams: the New York Nine and the Knickerbockers. In 1869, the Cincinnati Red Stockings, a professional team, paved the way for other franchises to come into existence. In 1871, the National Association of Professional Baseball Players was born. The ensuing days belong to popular remembrance. Abner Doubleday formed the National League in 1876, and baseball has existed somewhere between game and profitable enterprise ever since.

From its early days, the courts have failed to see baseball as posing a threat to the laws of business. The monumental **SHERMAN ANTITRUST ACT OF** 1890 (15 U.S.C.A. § 1 et seq.)—a statute prohibiting monopolies—forbids undue restraint of trade on commerce between states. In 1920, an appeals court ruled that the fact that baseball operates on an interstate level was part of its unobjectionable nature as a sport (*National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore,* 50 App. D.C. 165, 269 F. 681). It stated, in general reference to other forms of trade and commerce, that "the Sherman Anti-Trust Act . . . does not apply, unless the effect of the act complained of on interstate commerce is direct, not merely indirect or incidental." Baseball, the court found, did not pose a threat to the economy of the world of sports.

The *National League* case stemmed from allegations made by the Federal League's Baltimore Terrapins. In the early 1900s, the struggling Federal League had sought to become a venture of the major leagues and had competed with other major league franchises. But the National and American Leagues bought out many of the Federal teams, sometimes player by player, with offers they could not refuse. The Terrapins, one of the last surviving vestiges of the Federal League, sued the National League. Representatives of the Terrapins argued that MLB owners had treated the Terrapins with scorn, offering them only $50,000 in settlement for damages incurred by the buyouts. In court, the Terrapins argued that MLB had violated **ANTITRUST LAWS** and had participated in monopolizing ventures.

The case made it all the way to the U.S. Supreme Court (*National League,* 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898 [1922]). In 1922, the Court made a classic decision. In an opinion written by Justice **OLIVER WENDELL HOLMES JR.**, the Supreme Court declared baseball to be, first and foremost, a sport and not a business. In Holmes's words, baseball activities were "purely state affairs." The decision gave baseball the unique status of being the only official professional sports organization to be exempt from antimonopoly laws. In effect, the decision protected baseball as a national treasure.

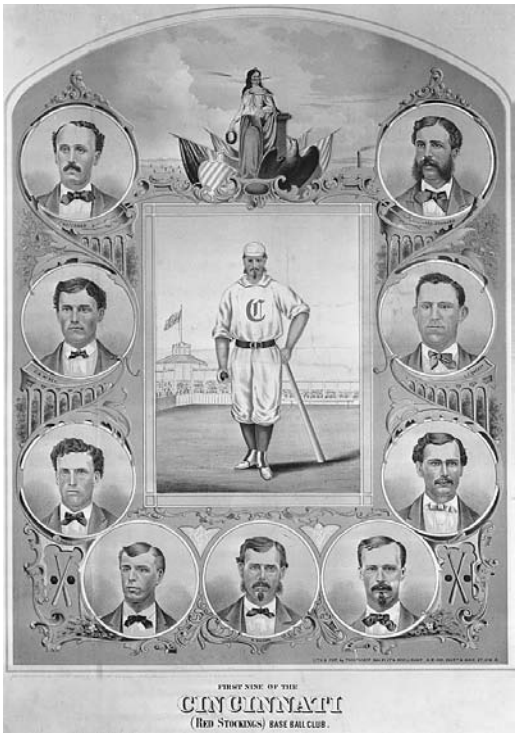


*With a payroll of approximately $11,000, the 1869 Cincinnati Red Stockings were the first professional baseball team.*
LIBRARY OF CONGRESS

The *National League* decision was reaffirmed in 1953 with *Toolson v. New York Yankees,* 346 U.S. 356, 74 S. Ct. 78, 98 L. Ed. 64. In a brief statement, the Court ruled against the plaintiff, minor league player George Toolson. Toolson's arguments were based on the complaint that baseball was a monopoly that offered him unfair contract deals. The Court said Congress alone had been given the right to exercise powers that could break up the structure of baseball's professional organization.

The controversial issue in *Toolson* was baseball's reserve clause. This clause stood as the earliest symbol of the sport's underlying business nature. It stated that once a player had accepted a contract to play for a certain team, the player was bound to serve that team for one year and must enter into a new contract with the same team "for the succeeding season at a salary to be determined by the parties to such contract." It

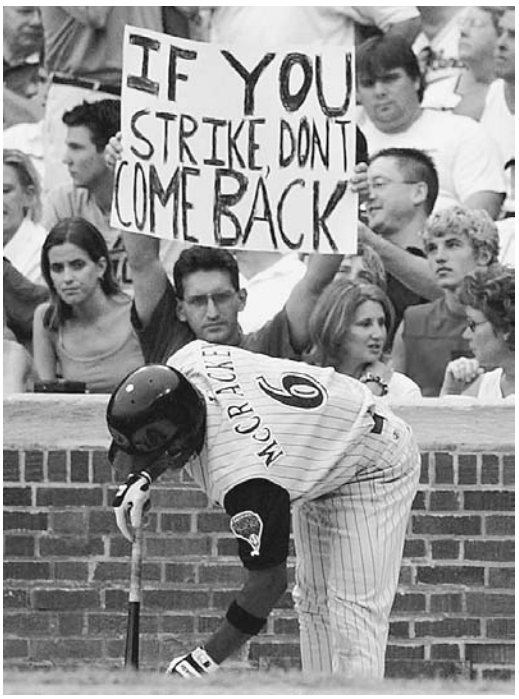


*A 1994-95 Major League Baseball players strike led to cancellation of over 900 games. When the possibility of another strike loomed during the summer of 2002, many fans voiced their dismay.*

AP/WIDE WORLD PHOTOS

was agreed that if a player violated the reserve clause, the athlete would be guilty of "contract jumping" and would be ineligible to serve in any club of the leagues until formally reinstated.

The reserve clause guaranteed players little more than an income. Players attacked it. In the 1970s, Curtis C. Flood, center fielder for the St. Louis Cardinals, brought charges against Bowie K. Kuhn, acting commissioner of baseball. The issue was a player's **FREE AGENCY**, which Flood had requested and Kuhn had denied. Free agency is the freedom to negotiate a contract with any team, basically a release from the reserve clause. Taking his case to the Supreme Court, Flood argued that the reserve clause unfairly prevented him from striking deals with other teams that would pay him more for his services. The Supreme Court decided on June 19, 1972, that it did not have the authority to act (*Flood v. Kuhn,* 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728). Only baseball's acting commissioner could designate free agency.

Player discontent, as a reaction to the decision, set the stage for more free agency bids, and **ARBITRATION** between players and owners began in 1973. In January 1976, Andy Messersmith's success in obtaining free agency ushered in a new era of high stakes: players could now dictate certain terms of employment, and hence came the dawn of multimillion-dollar contracts.

Money was also at issue in a case related to another aspect of the game. After more than a century of professional play, in 1986, televised broadcasts of baseball and the **COPYRIGHT** laws surrounding them came into question. Players felt that the terms of their employment did not include their performances for television audiences. They insisted that the telecasts and the profits being derived from them were being made without their consent. In *Baltimore Orioles v. Major League Baseball Players Ass'n,* 805 F.2d 663 (7th Cir. 1986), major league clubs sought a **DECLARATORY JUDGMENT** that they possessed an exclusive right to broadcast games. The major league players argued that their performances were not copyrightable works because they lacked sufficient artistic merit. Refusing to cut into the control of MLB over the airwaves, the federal appellate court ruled that the telecasts were indeed copyrightable works and that clubs were entitled to the revenues derived from them.

Throughout these cases, decisions about the economy of baseball have been left to the players and owners. For this reason, baseball has been referred to as an anomaly in relation to the nation's antitrust laws, and its exemption has been called "an aberration confined to baseball" (Flood). The push for congressional action to eliminate this exemption reached a fever pitch with the baseball players' strike of 1994–95. The strike left many in baseball, including fans, disenfranchised. Senator Howard M. Metzenbaum, an Ohio Democrat who headed the subcommittee on antitrust laws, led the fight to remove the antitrust exemption from baseball. However, the 234-day strike ended in an agreement between owners and players, in which owners promised to pay "luxury taxes" on clubs with high payrolls. Congress was spared the necessity of acting.

Local communities, however, faced the possibility of losing their MLB franchises as the economics of baseball changed dramatically in the late 1990s. Major market teams, many of them now owned by corporations rather than wealthy individuals, drove up player payrolls. This hurt smaller market teams and teams owned by individuals who either lacked resources or the desire to match salaries. The Minnesota Twins, unable to secure a new, publicly funded baseball stadium, threatened to move to another state in 1997. The state of Minnesota sought unsuccessfully to probe the team's finances and that of

MLB, but in the end the Twins could not secure a sale or move of the team.

Unable to stem rising costs, the baseball league proposed contracting two teams before the 2002 season. Under contraction, MLB would buy out the owners and distribute the players to other teams through a draft. The league argued that contraction would strengthen the financial well-being of the sport. The owners, however, needed to move quickly if contraction was to happen before the 2002 season.

The Montreal Expos and the Minnesota Twins were rumored to be the teams selected for contraction. In Minnesota, the operators of the Metrodome, where the Twins play their home games, sued the Twins and MLB, asking a state court to order the Twins to play the 2002 season. They sought to either win on the merits or delay contraction for a year. The judge issued a preliminary injunction and the Twins appealed, arguing that they did have an obligation to pay the rent for the season, but they could choose whether or not to play the season. The Minnesota Court of Appeals, in *Metropolitan Sports Facilities Commission v. Minnesota Twins Partnership*, 638 N.W.2d 214 (2002), upheld the INJUNCTION, which meant that contraction became impossible for the 2002 season. The baseball league later abandoned the concept of contraction, at least for the near future.

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## BASIC BOOKS V. KINKO'S GRAPHICS CORP.

See COPYRIGHT "Copyright Law in Action" (Sidebar).

## BASIS

*The minimum, fundamental constituents, foundation, or support of a thing or a system without which the thing or system would cease to exist. In accounting, the value assigned to an asset that is sold or transferred so that it can be determined whether a gain or loss has resulted from the transaction. The amount that property is estimated to be worth at the time it is purchased, acquired, and received for tax purposes.*

In a simple case, the basis of property for tax purposes under the INTERNAL REVENUE CODE is the purchase price of a piece of property. For example, if a taxpayer purchases a parcel of land for $500,000, and no deductions apply to that parcel of land, the taxpayer's basis is $500,000. If the taxpayer later sells the property for $550,000, the amount of gain realized by the transaction is the sale price ($550,000) less the adjusted basis ($500,000), or $50,000.

Where a taxpayer is allowed to depreciate property with a limited useful life, such as an automobile used primarily for business purposes, the taxpayer's adjusted basis is reduced. Assume a taxpayer purchases an automobile for $30,000, and then claims deductions for $5,000. The adjusted basis of the automobile is then reduced to $25,000. When the taxpayer sells the automobile for $26,000, the amount of gain realized is $1,000 (the sale price of $26,000 minus the adjusted basis of $25,000).

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CROSS-REFERENCES

Internal Revenue Code; Profit.

## BASTARDY ACTION

*An archaic name given to a court proceeding in which the* PATERNITY *of an illegitimate child is determined in order to impose and enforce support obligations upon the father.*

The term *bastardy action* is derived from the early common-law use of the word *bastard* to describe a child born out of wedlock. Modern

legislation refers to such proceedings as FILIATION PROCEEDINGS or paternity suits because of the derogatory connotation of the term *bastard.*

Although such proceedings are typically civil actions, a few states have established such actions as criminal proceedings.

CROSS-REFERENCES

Illegitimacy.

## ♦ BATES, DAISY LEE GATSON

Daisy Lee Gatson Bates, a CIVIL RIGHTS activist and newspaper publisher, was a key figure in the INTEGRATION of public schools in Little Rock, Arkansas, in the late 1950s. When a storm of violent public protest swept Little Rock, Bates orchestrated the strategies that would reverse 200 years of state-sanctioned SEGREGATION.

"WE'VE GOT TO DECIDE IF IT'S GOING TO BE THIS GENERATION OR NEVER."
—DAISY BATES

Bates was born in 1920 in Huttig, in the lumbering region of southeast Arkansas. When she was a baby, her mother was raped and murdered. No one was prosecuted for the crime, but suspicion in the town centered on three white men. After her mother's death, her father fled, leaving Bates with his best friends, Orlee Smith and Susie Smith, who adopted her and raised her as their only child. They were kind and indulgent parents and Bates grew to be a strong-willed and determined child. When she was eight, she learned of the circumstances of her birth and ADOPTION. The painful knowledge of her parents' suffering and the harsh realities of life in the rural south became driving forces in Bates's life.

Although she grew up during difficult economic times, Bates's childhood was relatively comfortable. Her relationship with her adoptive parents was warm and loving, and she was especially close to her father. Nevertheless, Bates's childhood was not easy. Like other black children, she experienced the sting of RACIAL DISCRIMINATION from an early age. She attended a segregated public school, using worn textbooks handed down from the white children's school. Her school was little more than a room with a potbellied stove that gave so little heat she and her classmates often kept their coats on all day.

In 1941 Orlee Smith became gravely ill. When he knew he was going to die, he called his daughter to his side. He was aware of the anger and pain she carried because of her mother's death and her father's disappearance and because of the bigotry that was a part of their everyday life. He counseled her not to let hatred and hostility control her but rather to use her strong feelings as a catalyst to work for change. He said:

> Don't hate white people just because they're white. If you hate, make it count for something. Hate the humiliations we are living under in the South. Hate the discrimination that eats away at the soul of every black man and woman. Hate the insults hurled at us by white scum—then try to do something about it, or your hate won't spell a thing.

Smith's death became a kind of rebirth for Bates. She did not know it then, but his words would strengthen and sustain her resolve during the difficult struggles she was to face.

In 1942 Bates married Lucius Christopher Bates, an insurance agent and friend of her late father, and settled in Little Rock. Her husband had majored in journalism at Wilberforce College, in Ohio, and the young couple pooled their savings and began publishing the Arkansas *State Press.* While writing and publishing the fledgling paper, Bates also enrolled in business administration and public relations courses at Shorter College, in Rome, Georgia. The *State Press* quickly became the largest and most influential black paper in Arkansas.

With the entry of the United States into WORLD WAR II, Camp Robinson, near Little Rock, was reopened. The influx of soldiers, many of whom were black men from northern cities, caused racial tensions to rise in the city. The *State Press* had gained a reputation as an independent "voice of the people" and regularly attacked police brutality, segregation, and inequities in the criminal justice system. When the paper reported a particularly gruesome incident in which a black soldier was killed by a white policeman, many advertisers who were wary of antagonizing their white patrons withdrew their support, and circulation of the paper dropped. However, the Bateses were able to stay afloat and eventually regain their advertisers and rebuild the paper's circulation. Their tenacity paid off in changes in working and living conditions for blacks in Arkansas. For example, as a result of their reporting on police brutality in black neighborhoods, black police officers were hired to patrol those areas.

From their earliest days in Little Rock, Bates and her husband were active in the local branch of the National Association for the Advancement of Colored People (NAACP). In 1952, Bates was elected president of the Arkansas State Con-

ference of NAACP branches. In 1954 when the Supreme Court handed down its historic decision in **BROWN V. BOARD OF EDUCATION** 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), declaring that segregated schools are "inherently unequal," she and her colleagues began pressing for implementation of the Court's mandate to desegregate the schools "with all deliberate speed" (*Brown v. Board of Education,* 349 U.S. 294 at 301, 75 S. Ct. 753 at 756, 99 L. Ed. 1083 [1955]). Because of her prominent position with the NAACP, Bates found herself a central character in the integration battle that soon erupted in Little Rock.

The Little Rock School Board chose nine black students to be the first to integrate Little Rock Central High School. Planning and coordination of the activities of the group, which came to be known as the Little Rock Nine, fell to Bates. By September 1, 1957, angry crowds had begun milling around Central High to protest and try to prevent the enrollment of the black students. On September 2, the day before school was to open, Governor Orval Faubus dispatched the Arkansas National Guard and ordered it to surround Central. Claiming that he was protecting Little Rock's citizens from possible mob violence, he declared that no black students would be allowed to enter the school and that "blood [would] run in the streets" if any attempted to do so.

NAACP lawyers Wiley Branton and **THURGOOD MARSHALL** (later a U.S. Supreme Court justice) promptly obtained an **INJUNCTION** against Faubus for his interference, but Faubus refused to withdraw the troops. Bates decided to have the students enter the school in a group. She contacted eight of them and told them to assemble at a designated intersection the morning of September 4 and travel to school together. The ninth student, Elizabeth Eckford, did not receive word of the plan. Unaware of the maelstrom awaiting her, Eckford arrived at Central High alone and was taunted, jeered, and accosted by hundreds of white people as reporters and photographers from around the world observed and recorded the scene. The National Guard did not attempt to help Eckford but instead blocked her entrance to the school. Neither she nor any of the other members of the Little Rock Nine—who arrived later in a group, as arranged—were allowed to pass

*Daisy Bates.*
AP/WIDE WORLD PHOTOS

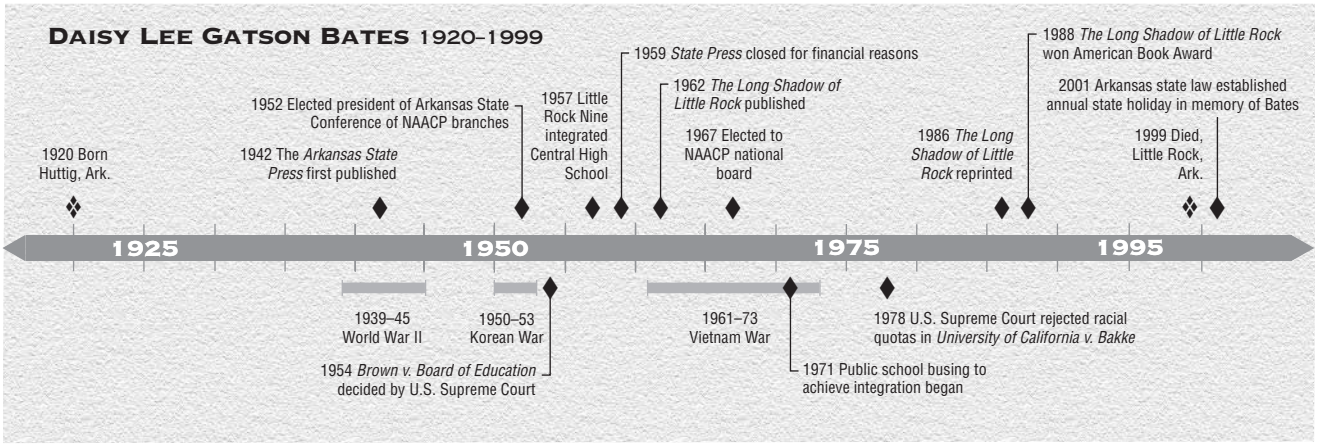

through the line of Guard members surrounding the school.

The attempt by Bates and the nine students to enter Central set off a series of violent incidents that continued for 17 days. On September 20, attorneys Branton and Marshall obtained an injunction barring the use of the National Guard to interfere with integration at Central High. By this time, the Bateses' home had become the unofficial center of activity and communication for the integration effort. Reporters from all over the United States came and went, some staying days or weeks.

On September 23 all the Little Rock Nine met at the Bates home to try again to exercise their right to enter Central High. Traveling in two cars they drove to a side entrance of the building, away from the persistent throng, and were escorted into the school by police officers. Again mob violence spread through the city. Later in the day the students were secretly removed from the school through a delivery entrance, and the chief of police declared that Little Rock was under a reign of terror.

The next day the black students remained at home. The mayor and the chief of police appealed to the U.S. **DEPARTMENT OF JUSTICE** for assistance. In response, President **DWIGHT D. EISENHOWER** federalized the Arkansas National Guard and ordered Secretary of Defense Charles E. Wilson to enforce the integration order. Wilson ordered 1,000 paratroopers from the 101st Airborne ("Screaming Eagles") Division of the 327th Infantry Regiment into Little Rock to restore order.

On September 25 the Little Rock Nine assembled again at the Bates home. Under the protection of the paratroopers they were taken to Central High, where they entered under the watchful eyes of hundreds of reporters, photographers, and news camera operators. The paratroopers remained at Central until September 30, when they withdrew to Camp Robinson, 12 miles away. The federalized Arkansas National Guard remained on patrol at Central until the end of the school year. Although it was not necessary to recall the paratroopers, and the number of minority students in Little Rock's formerly white schools steadily increased, violence, hatred, and acrimony continued to plague the city for many years.

Bates endured many attempts to harass and intimidate her, including rocks thrown through her window, gunshots fired at her house, dynamite exploded near her house, and crosses burned on her lawn. In late October 1957 she was arrested under a newly enacted ordinance that required officials of organizations to supply information regarding membership, donors, amounts of contributions, and expenditures. Although she was found guilty under the ordinance, the conviction was later overturned by the Supreme Court on grounds that the ordinance requirement interfered with the members' **FREEDOM OF ASSOCIATION** (*Bates v. City of Little Rock*, 361 U.S. 516, 80 S. Ct. 412, 4 L. Ed. 480 [1960]). In 1959 Bates and her husband were forced to close the *State Press* for financial reasons.

Through all the harassment Bates remained determined to keep the wheels of the integration movement going forward. After closing the newspaper she traveled throughout the United States working on behalf of the Democratic National Committee and the Johnson administration's antipoverty programs. In 1965 she suffered a stroke and returned to Little Rock, but she continued to be active in the NAACP and in 1967 was elected to its national board. In 1968 she moved to Mitchellville, Arkansas, to organize the Mitchellville Office of Economic Opportunity Self-Help Project. The project was responsible for new water and sewer systems, paved streets, a community center, and a swimming pool.

In 1984 Bates revived the *State Press* and was awarded honorary degrees by the University of Arkansas and Washington University. In 1986 the University of Arkansas Press published a reprint edition of her autobiography, *The Long Shadow of Little Rock,* and in 1988 the book received the American Book Award, the first reprint edition to be given that honor.

In 1987 Bates sold the *State Press* but she remained a consultant for the paper. In the same year Little Rock named a new facility the "Daisy Bates Elementary School". Bates continued her involvement in community activities until shortly before her death on November 4, 1999, in Little Rock. President **BILL CLINTON** honored her by allowing her body to lie in state at the Capitol.

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**CROSS-REFERENCES**

*Brown v. Board of Education of Topeka, Kansas*; Civil Rights Movement; NAACP; School Desegregation.

## ♦ BATES, EDWARD

Edward Bates served as U.S. attorney general in the cabinet of President ABRAHAM LINCOLN from 1861 to 1864.

Bates was born September 4, 1793, in Belmont, Virginia. He left his native Virginia at the age of twenty-one and settled in Missouri, where he concentrated his career efforts.

Bates was admitted to the Missouri bar in 1816 and was attorney general from 1820 to 1822. He was also a member of the Missouri Constitutional Convention in 1820.

In 1822 Bates began the legislative phase of his career as a member of the Missouri House of Representatives. In 1827 he became a representative for Missouri in the U.S. House of Representatives, serving for two years, and then returned to state government as a member of the Missouri Senate, serving from 1830 to 1834. In 1834 he became a member of the Missouri House of Representatives for a second time. Bates was also a U.S. district attorney from 1821 to 1826.

Bates was an unsuccessful presidential nominee at the Republican National Convention of 1860. He died March 25, 1869, in St. Louis, Missouri.

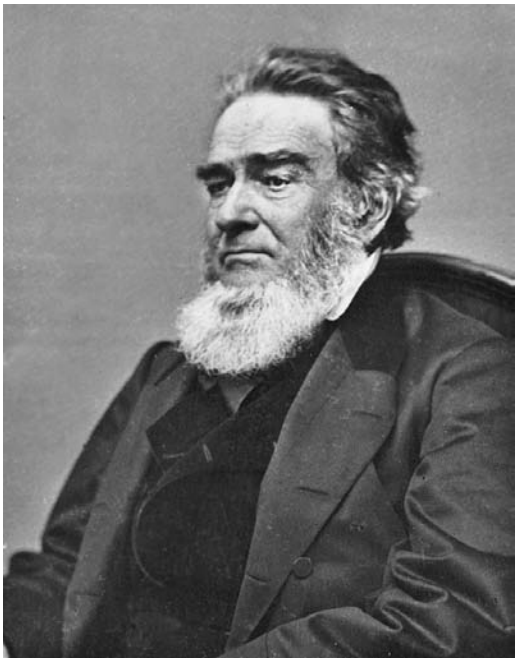

*Edward Bates.*
LIBRARY OF CONGRESS

"LIBERTY CANNOT EXIST EXCEPT UNDER GOVERNMENT OF LAW."
—EDWARD BATES

## BATTEL

*Physical combat engaged in by an accuser and accused to resolve their differences, usually involving a serious crime or ownership of land. It was recognized by the English king from the eleventh to seventeenth centuries.*

Trial by battel was introduced into England by William the Conqueror. It was based upon the belief that the winner of the battle, which was tried by God, was the party who was in the right in the dispute.

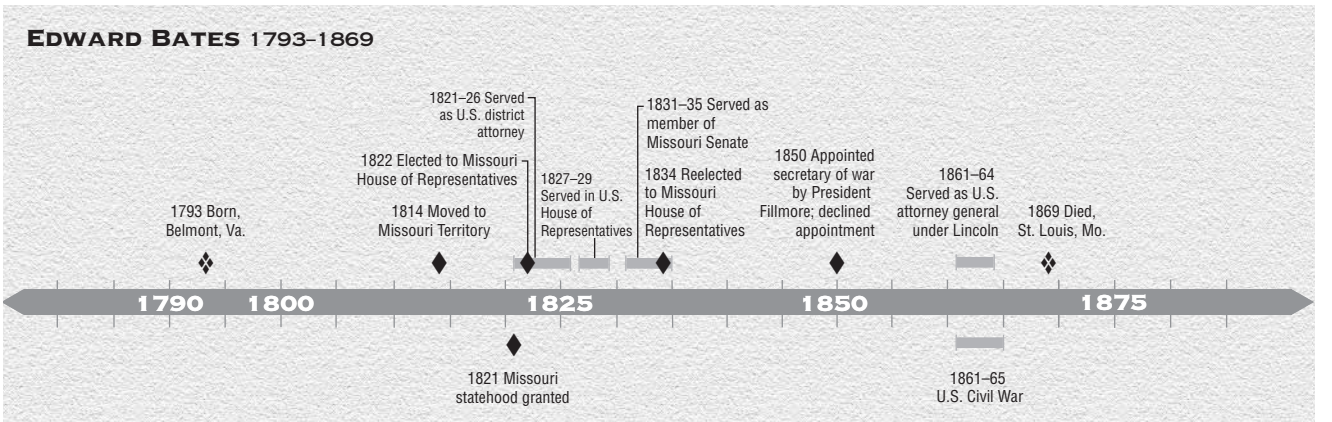

## BATTERED CHILD/SPOUSE SYNDROME

*A condition created by sustained physical, sexual, and/or emotional abuse, which creates a variety of physical and emotional symptoms.*

Violence of any kind is traumatic to victims, and the thought that someone could exert extreme violence against a loved one or a child is repulsive. Battered-child syndrome and battered-spouse syndrome are both the result of repeated violence—beatings, choking, sexual assault, verbal abuse, or any combination. The resulting trauma leaves its victims with physical and emotional scars, which can show up in a variety of symptoms that can come on gradually or suddenly. Often the symptoms are similar to other, less dangerous conditions. Sometimes there are no visible symptoms. From a legal perspective, this makes both syndromes difficult to prove. The fact that there is heated disagreement about these syndromes, what they represent, and in fact whether they are true syndromes at all, only adds to the difficulty.

Although both syndromes stem from the same violent behavior (and in some cases, the same perpetrator), they need to be treated separately.

### Battered-Child Syndrome

Children can be subjected to violence at the hands of any adult with whom they have contact. It could be a parent, an older sibling, a babysitter, a day-care provider, a family friend, a parent's romantic partner—in short, anyone. Some children are victimized by several people.

The victimization can come in the form of physical violence, SEXUAL ABUSE, or verbal abuse. If one of these factors is present, chances are that others are present as well. Physical abuse can go undetected for a long time. A child who suffers repeated falls or broken bones might be considered "clumsy", or the injuries might be brushed off as the kind of bumps and bruises all children get. Sexual abuse might have no outward signs, or the victim might be unusually forward or inappropriately flirtatious with adults.

Even INFANTS are not immune to abuse. In *shaken-baby syndrome,* a baby is shaken so violently that brain injury can occur; repeated shaking episodes or even just one particularly severe episode can result in death.

A child suffering from BATTERED CHILD SYNDROME might be quiet and withdrawn, lethargic, depressed, or violent. Someone who does not know the particular child might not immediately spot emotional symptoms, but if the child displays unchildlike behavior, coupled with unexplained chronic physical bruising, chances are the child is a victim of abuse.

Those who investigate child-abuse crimes must be extremely thorough, especially if the child is very young and thus unable to corroborate what the evidence shows. Sometimes a physician will spot signs of abuse or battered-child syndrome when a child is brought into an emergency room for treatment of some injury. A full investigation requires interviews with anyone who has access to the child, including parents, siblings, other relatives, neighbors, day-care providers or babysitters, teachers, and doctors. Even those who are not involved in abuse might have valuable information to provide. Often, those who have committed the abuse will offer vague or conflicting information about what led to a particular injury. If warranted, a child could be placed in temporary PROTECTIVE CUSTODY while an investigation proceeds. Depending on the extent and severity of abuse, those who have committed the abuse might benefit from counseling or other forms of treatment (e.g., substance or they might face criminal charges and serve a prison sentence.

### Battered-Spouse Syndrome

Battered-spouse syndrome is more commonly called "battered-women's syndrome" because most of the victims are women, either wives or girlfriends of the perpetrators. In recent years, however, abused husbands and boyfriends have gained increased attention, as have same-sex abuse by gay and lesbian partners. With CHILD ABUSE, investigators are often at a loss because the child is too young to testify. In cases of battered-spouse syndrome, however, the problem is that often the victim refuses to testify. Guilt and shame are primary reasons, particularly for men who expect they will be ridiculed for being abused by a woman. Fear is an even stronger factor in abuse victims' silence.

Typical symptoms of a battered-spouse syndrome victim include the openly physical ones—bruises, black eyes, broken bones, cuts and scratches. The emotional symptoms include depression, lack of self-esteem, and hopelessness. Sufferers might be "hypervigilant" to any signs of conflict on the part of the spouse.

Denial that a problem exists is a common response to questions from concerned friends, loved ones, or even medical professionals.

The phrase "battered-women's syndrome" was first used in the early 1980s; in ensuing years, lawyers began using the "battered woman" defense in HOMICIDE cases in which women killed their husbands or boyfriends. Many women claimed SELF-DEFENSE, explaining that the murder victim had been physically abusive for years. As the concept of battered-spouse syndrome became more clearly articulated in the 1980s and 1990s, the syndrome as a self-defense argument gained strength. In fact, it played into the clemency decisions of several governors, beginning with Governor Richard Celeste of Ohio, who in 1990, granted clemency to 25 women who had murdered their spouses. Their trials had been unfair, he concluded, because testimony about their abuse had not been allowed as evidence. Other governors followed suit in the ensuing years, including Maryland governor Donald Schaefer, Massachusetts governor William Weld, and California governors Pete Wilson and Gray Davis. Experts in DOMESTIC VIOLENCE explained to skeptics the reason why many battered women did not simply leave their husbands, either to stay with friends or go to a women's shelter. In some cases, they said, these women had been so emotionally broken that they were too frightened to leave. Some had been abused for so long that they had actually come to believe that they were responsible for their own abuse.

In the 1990s, a new movement emerged to point out that abuse can happen to men as well as women. The number of abused men was estimated at no higher than five percent of the abuse cases, and to a large extent it was not taken seriously. Advocacy groups for women claimed that for a man to claim that his wife or girlfriend physically terrorized him were absurd. Law enforcement officials often took abuse charges less seriously when the complainant was a man. In recent years, statistical evidence about male abuse has been gaining credibility. Moreover, gay and lesbian partner abuse has also begun to be taken more seriously. In 1999, a Brooklyn, N.Y. Supreme Court judge ruled that a gay man who had stabbed his partner to death could invoke battered-spouse syndrome at his trial.

The bottom line from a legal standpoint is that battered-spouse syndrome, like battered-child syndrome, requires solid and substantive evidence if it is to be used as a defense in a murder trial. A woman who has no visible physical signs of abuse might have been abused, but simply claiming to have been abused with no evidence at all at least warrants a thorough investigation. Cases in which women—and men—have claimed that an estranged spouse has been violent, simply to gain custody of their children, are not uncommon. The issue of battered spouses may be clearer in the first years of the twenty-first century than it was in the 1970s and 1980s, but it continues to evolve.

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CROSS-REFERENCES

Domestic Violence; Child Abuse; Women's Rights.

## BATTERY

*At common law, an intentional unpermitted act causing harmful or offensive contact with the "person" of another.*

Battery is concerned with the right to have one's body left alone by others.

Battery is both a tort and a crime. Its essential element, harmful or offensive contact, is the same in both areas of the law. The main distinction between the two categories lies in the penalty imposed. A defendant sued for a tort is civilly liable to the plaintiff for damages. The punishment for criminal battery is a fine, imprisonment, or both. Usually battery is prosecuted as a crime only in cases involving serious harm to the victim.

### Elements

The following elements must be proven to establish a case for battery: (1) an act by a defendant; (2) an intent to cause harmful or offensive contact on the part of the defendant; and (3) harmful or offensive contact to the plaintiff.

**The Act** The act must result in one of two forms of contact. Causing any physical harm or injury to the victim—such as a cut, a burn, or a bullet wound—could constitute battery, but actual injury is not required. Even though there is no apparent bruise following harmful contact,

the defendant can still be guilty of battery; occurrence of a physical illness subsequent to the contact may also be actionable. The second type of contact that may constitute battery causes no actual physical harm but is, instead, offensive or insulting to the victim. Examples include spitting in someone's face or offensively touching someone against his or her will.

Touching the person of someone is defined as including not only contacts with the body, but also with anything closely connected with the body, such as clothing or an item carried in the person's hand. For example, a battery may be committed by intentionally knocking a hat off someone's head or knocking a glass out of someone's hand.

**Intent** Although the contact must be intended, there is no requirement that the defendant intend to harm or injure the victim. In TORT LAW, the intent must be either specific intent—the contact was specifically intended—or general intent—the defendant was substantially certain that the act would cause the contact. The intent element is satisfied in CRIMINAL LAW when the act is done with an intent to injure or with criminal negligence—failure to use care to avoid criminal consequences. The intent for criminal law is also present when the defendant's conduct is unlawful even though it does not amount to criminal negligence.

Intent is not negated if the aim of the contact was a joke. As with all torts, however, consent is a defense. Under certain circumstances consent to a battery is assumed. A person who walks in a crowded area impliedly consents to a degree of contact that is inevitable and reasonable. Consent may also be assumed if the parties had a prior relationship unless the victim gave the defendant a previous warning.

There is no requirement that the plaintiff be aware of a battery at the time it is committed. The gist of the action is the lack of consent to contact. It is no defense that the victim was sleeping or unconscious at the time.

**Harmful or Offensive Conduct** It is not necessary for the defendant's wrongful act to result in direct contact with the victim. It is sufficient if the act sets in motion a force that results in the contact. A defendant who whipped a horse on which a plaintiff was riding, causing the plaintiff to fall and be injured, was found guilty of battery. Provided all other elements of the offense are present, the offense may also be committed by causing the victim to harm himself. A defendant who fails to act when he or she has a duty to do so is guilty—as where a nurse fails to warn a blind patient that he is headed toward an open window, causing him to fall and injure himself.

### Aggravated Battery

When a battery is committed with intent to do serious harm or murder, or when it is done with a dangerous weapon, it is described as aggravated. A weapon is considered dangerous whenever the purpose for using it is to cause death or serious harm. State statutes define aggravated battery in various ways—such as assault with intent to kill. Under such statutes, assault means both battery and assault. It is punishable as a felony in all states.

### Punishment

In a civil action for tortious battery, the penalty is damages. A jury determines the amount to be awarded, which in most cases is based on the harm done to the plaintiff. Even though a plaintiff suffers no actual injury, nominal damages (a small sum) may still be awarded on the theory that there has been an invasion of a right. Also, a court may award PUNITIVE DAMAGES aimed at punishing the defendant for the wrongful act.

Criminal battery is punishable by a fine, imprisonment, or both. If it is considered aggravated the penalties are greater.

## ♦ BAYLOR, ROBERT EMMETT BLEDSOE

Robert Emmett Bledsoe Baylor achieved prominence as a jurist, a Baptist preacher, and a law professor. He was instrumental in the founding of the first Baptist college in Texas, which was named Baylor University in his honor.

Baylor was born May 10, 1793, in Lincoln County, Kentucky. He began his political career in 1819 with service in the Kentucky legislature, moving to the Alabama legislature in 1824. He represented Alabama in the U.S. House of Representatives from 1829 to 1831.

In 1839 Baylor settled in Texas and began a judicial career. He was appointed to a Texas district court in 1841 and also served as associate judge of the Supreme Court of the Republic of Texas from 1841 to 1845. Following the annexation of Texas by the United States, he rendered decisions as a U.S. district judge from 1845 to 1861. He was also instrumental in the formation of the Texas state constitution in 1845.

As a Baptist preacher, Baylor helped to procure a charter for a Baptist college that would come to be named Baylor University. The university was originally located in Independence, Texas, but later moved to Waco in 1886, where it remained. Baylor began teaching courses in the science of law at the new university in 1849. In 1857, Baylor University established its original school of law, and Baylor served on the original faculty. With the exception of the period of the Civil War, when the school of law did not offer classes, Baylor taught courses in CONSTITUTIONAL LAW and JURISPRUDENCE until 1873. He died on December 30, 1873, in Washington County, Texas.

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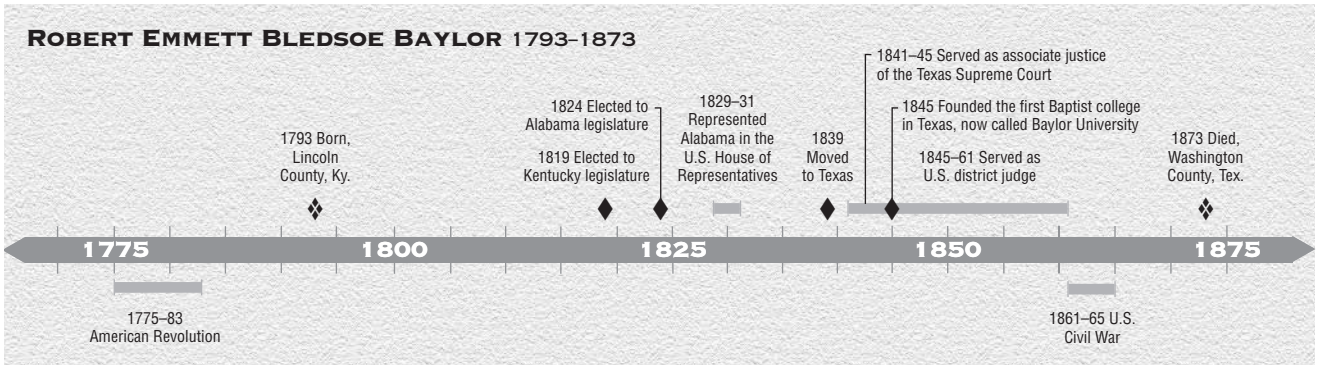

# Abbreviations

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| A. | Atlantic Reporter |
| A. 2d | Atlantic Reporter, Second Series |
| AA | Alcoholics Anonymous |
| AAA | American Arbitration Association; Agricultural Adjustment Act of 1933 |
| AALS | Association of American Law Schools |
| AAPRP | All African People's Revolutionary Party |
| AARP | American Association of Retired Persons |
| AAS | American Anti-Slavery Society |
| ABA | American Bar Association; Architectural Barriers Act of 1968; American Bankers Association |
| ABC | American Broadcasting Companies, Inc. (formerly American Broadcasting Corporation) |
| ABM | Antiballistic missile |
| ABM Treaty | Anti-Ballistic Missile Treaty of 1972 |
| ABVP | Anti-Biased Violence Project |
| A/C | Account |
| A.C. | Appeal cases |
| ACAA | Air Carrier Access Act |
| ACCA | Armed Career Criminal Act of 1984 |
| ACF | Administration for Children and Families |
| ACLU | American Civil Liberties Union |
| ACRS | Accelerated Cost Recovery System |
| ACS | Agricultural Cooperative Service |
| ACT | American College Test |
| Act'g Legal Adv. | Acting Legal Advisor |
| ACUS | Administrative Conference of the United States |
| ACYF | Administration on Children, Youth, and Families |
| A.D. 2d | Appellate Division, Second Series, N.Y. |
| ADA | Americans with Disabilities Act of 1990 |
| ADAMHA | Alcohol, Drug Abuse, and Mental Health Administration |
| ADC | Aid to Dependent Children |
| ADD | Administration on Developmental Disabilities |
| ADEA | Age Discrimination in Employment Act of 1967 |
| ADL | Anti-Defamation League |
| ADR | Alternative dispute resolution |
| AEC | Atomic Energy Commission |
| AECB | Arms Export Control Board |
| AEDPA | Antiterrorism and Effective Death Penalty Act |
| A.E.R. | All England Law Reports |
| AFA | American Family Association; Alabama Freethought Association |
| AFB | American Farm Bureau |
| AFBF | American Farm Bureau Federation |
| AFDC | Aid to Families with Dependent Children |
| aff'd per cur. | Affirmed by the court |
| AFIS | Automated fingerprint identification system |
| AFL | American Federation of Labor |

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| AFL-CIO | American Federation of Labor and Congress of Industrial Organizations |
| AFRes | Air Force Reserve |
| AFSC | American Friends Service Committee |
| AFSCME | American Federation of State, County, and Municipal Employees |
| AGRICOLA | Agricultural Online Access |
| AIA | Association of Insurance Attorneys |
| AIB | American Institute for Banking |
| AID | Artificial insemination using a third-party donor's sperm; Agency for International Development |
| AIDS | Acquired immune deficiency syndrome |
| AIH | Artificial insemination using the husband's sperm |
| AIM | American Indian Movement |
| AIPAC | American Israel Public Affairs Committee |
| AIUSA | Amnesty International, U.S.A. Affiliate |
| AJS | American Judicature Society |
| ALA | American Library Association |
| Alcoa | Aluminum Company of America |
| ALEC | American Legislative Exchange Council |
| ALF | Animal Liberation Front |
| ALI | American Law Institute |
| ALJ | Administrative law judge |
| All E.R. | All England Law Reports |
| ALO | Agency Liaison |
| A.L.R. | American Law Reports |
| ALY | *American Law Yearbook* |
| AMA | American Medical Association |
| AMAA | Agricultural Marketing Agreement Act |
| Am. Dec. | American Decisions |
| amdt. | Amendment |
| Amer. St. Papers, For. Rels. | American State Papers, Legislative and Executive Documents of the Congress of the U.S., Class I, Foreign Relations, 1832–1859 |
| AMS | Agricultural Marketing Service |
| AMVETS | American Veterans (of World War II) |
| ANA | Administration for Native Americans |
| Ann. Dig. | Annual Digest of Public International Law Cases |
| ANPA | American Newspaper Publishers Association |
| ANSCA | Alaska Native Claims Act |
| ANZUS | Australia-New Zealand-United States Security Treaty Organization |
| AOA | Administration on Aging |
| AOE | Arizonans for Official English |
| AOL | America Online |
| AP | Associated Press |
| APA | Administrative Procedure Act of 1946 |
| APHIS | Animal and Plant Health Inspection Service |
| App. Div. | Appellate Division Reports, N.Y. Supreme Court |
| Arb. Trib., U.S.-British | Arbitration Tribunal, Claim Convention of 1853, United States and Great Britain Convention of 1853 |
| Ardcor | American Roller Die Corporation |
| ARPA | Advanced Research Projects Agency |
| ARPANET | Advanced Research Projects Agency Network |
| ARS | Advanced Record System |
| Art. | Article |
| ARU | American Railway Union |
| ASCME | American Federation of State, County, and Municipal Employees |
| ASCS | Agriculture Stabilization and Conservation Service |
| ASM | Available Seatmile |
| ASPCA | American Society for the Prevention of Cruelty to Animals |
| Asst. Att. Gen. | Assistant Attorney General |
| AT&T | American Telephone and Telegraph |
| ATFD | Alcohol, Tobacco and Firearms Division |
| ATLA | Association of Trial Lawyers of America |
| ATO | Alpha Tau Omega |
| ATTD | Alcohol and Tobacco Tax Division |
| ATU | Alcohol Tax Unit |
| AUAM | American Union against Militarism |
| AUM | Animal Unit Month |
| AZT | Azidothymidine |

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|---|---|
| BAC | Blood alcohol concentration |
| BALSA | Black-American Law Student Association |
| BATF | Bureau of Alcohol, Tobacco and Firearms |
| BBS | Bulletin Board System |
| BCCI | Bank of Credit and Commerce International |
| BEA | Bureau of Economic Analysis |
| Bell's Cr. C. | Bell's English Crown Cases |
| Bevans | United States Treaties, etc. *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled under the direction of Charles I. Bevans, 1968–76) |
| BFOQ | Bona fide occupational qualification |
| BI | Bureau of Investigation |
| BIA | Bureau of Indian Affairs; Board of Immigration Appeals |
| BID | Business improvement district |
| BJS | Bureau of Justice Statistics |
| Black. | Black's United States Supreme Court Reports |
| Blatchf. | Blatchford's United States Circuit Court Reports |
| BLM | Bureau of Land Management |
| BLS | Bureau of Labor Statistics |
| BMD | Ballistic missile defense |
| BNA | Bureau of National Affairs |
| BOCA | Building Officials and Code Administrators International |
| BOP | Bureau of Prisons |
| BPP | Black Panther Party for Self-defense |
| Brit. and For. | British and Foreign State Papers |
| BSA | Boy Scouts of America |
| BTP | Beta Theta Pi |
| Burr. | James Burrows, *Report of Cases Argued and Determined in the Court of King's Bench during the Time of Lord Mansfield* (1766–1780) |
| BVA | Board of Veterans Appeals |
| c. | Chapter |
| $C^3I$ | Command, Control, Communications, and Intelligence |
| C.A. | Court of Appeals |
| CAA | Clean Air Act |
| CAB | Civil Aeronautics Board; Corporation for American Banking |
| CAFE | Corporate average fuel economy |
| Cal. 2d | California Reports, Second Series |
| Cal. 3d | California Reports, Third Series |
| CALR | Computer-assisted legal research |
| Cal. Rptr. | California Reporter |
| CAP | Common Agricultural Policy |
| CARA | Classification and Ratings Administration |
| CATV | Community antenna television |
| CBO | Congressional Budget Office |
| CBS | Columbia Broadcasting System |
| CBOEC | Chicago Board of Election Commissioners |
| CCC | Commodity Credit Corporation |
| CCDBG | Child Care and Development Block Grant of 1990 |
| C.C.D. Pa. | Circuit Court Decisions, Pennsylvania |
| C.C.D. Va. | Circuit Court Decisions, Virginia |
| CCEA | Cabinet Council on Economic Affairs |
| CCP | Chinese Communist Party |
| CCR | Center for Constitutional Rights |
| C.C.R.I. | Circuit Court, Rhode Island |
| CD | Certificate of deposit; compact disc |
| CDA | Communications Decency Act |
| CDBG | Community Development Block Grant Program |
| CDC | Centers for Disease Control and Prevention; Community Development Corporation |
| CDF | Children's Defense Fund |
| CDL | Citizens for Decency through Law |
| CD-ROM | Compact disc read-only memory |
| CDS | Community Dispute Services |
| CDW | Collision damage waiver |
| CENTO | Central Treaty Organization |
| CEO | Chief executive officer |
| CEQ | Council on Environmental Quality |

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|---|---|
| CERCLA | Comprehensive Environmental Response, Compensation, and Liability Act of 1980 |
| cert. | *Certiorari* |
| CETA | Comprehensive Employment and Training Act |
| C & F | Cost and freight |
| CFC | Chlorofluorocarbon |
| CFE Treaty | Conventional Forces in Europe Treaty of 1990 |
| C.F. & I. | Cost, freight, and insurance |
| C.F.R | Code of Federal Regulations |
| CFNP | Community Food and Nutrition Program |
| CFTA | Canadian Free Trade Agreement |
| CFTC | Commodity Futures Trading Commission |
| Ch. | Chancery Division, English Law Reports |
| CHAMPVA | Civilian Health and Medical Program at the Veterans Administration |
| CHEP | Cuban/Haitian Entrant Program |
| CHINS | Children in need of supervision |
| CHIPS | Child in need of protective services |
| Ch.N.Y. | Chancery Reports, New York |
| Chr. Rob. | Christopher Robinson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (1801–1808) |
| CIA | Central Intelligence Agency |
| CID | Commercial Item Descriptions |
| C.I.F. | Cost, insurance, and freight |
| CINCNORAD | Commander in Chief, North American Air Defense Command |
| C.I.O. | Congress of Industrial Organizations |
| CIPE | Center for International Private Enterprise |
| C.J. | Chief justice |
| CJIS | Criminal Justice Information Services |
| C.J.S. | Corpus Juris Secundum |
| Claims Arb. under Spec. Conv., Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| CLASP | Center for Law and Social Policy |
| CLE | Center for Law and Education; Continuing Legal Education |
| CLEO | Council on Legal Education Opportunity; Chief Law Enforcement Officer |
| CLP | Communist Labor Party of America |
| CLS | Christian Legal Society; critical legal studies (movement); Critical Legal Studies (membership organization) |
| C.M.A. | Court of Military Appeals |
| CMEA | Council for Mutual Economic Assistance |
| CMHS | Center for Mental Health Services |
| C.M.R. | Court of Military Review |
| CNN | Cable News Network |
| CNO | Chief of Naval Operations |
| CNOL | Consolidated net operating loss |
| CNR | Chicago and Northwestern Railway |
| CO | Conscientious Objector |
| C.O.D. | Cash on delivery |
| COGP | Commission on Government Procurement |
| COINTELPRO | Counterintelligence Program |
| Coke Rep. | Coke's English King's Bench Reports |
| COLA | Cost-of-living adjustment |
| COMCEN | Federal Communications Center |
| Comp. | Compilation |
| Conn. | Connecticut Reports |
| CONTU | National Commission on New Technological Uses of Copyrighted Works |
| Conv. | Convention |
| COPA | Child Online Protection Act (1998) |
| COPS | Community Oriented Policing Services |
| Corbin | Arthur L. Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (1950) |
| CORE | Congress on Racial Equality |
| Cox's Crim. Cases | Cox's Criminal Cases (England) |
| COYOTE | Call Off Your Old Tired Ethics |

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| CPA | Certified public accountant |
| CPB | Corporation for Public Broadcasting, the |
| CPI | Consumer Price Index |
| CPPA | Child Pornography Prevention Act |
| CPSC | Consumer Product Safety Commission |
| Cranch | Cranch's United States Supreme Court Reports |
| CRF | Constitutional Rights Foundation |
| CRR | Center for Constitutional Rights |
| CRS | Congressional Research Service; Community Relations Service |
| CRT | Critical race theory |
| CSA | Community Services Administration |
| CSAP | Center for Substance Abuse Prevention |
| CSAT | Center for Substance Abuse Treatment |
| CSC | Civil Service Commission |
| CSCE | Conference on Security and Cooperation in Europe |
| CSG | Council of State Governments |
| CSO | Community Service Organization |
| CSP | Center for the Study of the Presidency |
| C-SPAN | Cable-Satellite Public Affairs Network |
| CSRS | Cooperative State Research Service |
| CSWPL | Center on Social Welfare Policy and Law |
| CTA | *Cum testamento annexo* (with the will attached) |
| Ct. Ap. D.C. | Court of Appeals, District of Columbia |
| Ct. App. No. Ireland | Court of Appeals, Northern Ireland |
| Ct. Cl. | Court of Claims, United States |
| Ct. Crim. Apps. | Court of Criminal Appeals (England) |
| CTI | Consolidated taxable income |
| Ct. of Sess., Scot. | Court of Sessions, Scotland |
| CU | Credit union |
| CUNY | City University of New York |
| Cush. | Cushing's Massachusetts Reports |
| CWA | Civil Works Administration; Clean Water Act |
| DACORB | Department of the Army Conscientious Objector Review Board |
| Dall. | Dallas's Pennsylvania and United States Reports |
| DAR | Daughters of the American Revolution |
| DARPA | Defense Advanced Research Projects Agency |
| DAVA | Defense Audiovisual Agency |
| D.C. | United States District Court; District of Columbia |
| D.C. Del. | United States District Court, Delaware |
| D.C. Mass. | United States District Court, Massachusetts |
| D.C. Md. | United States District Court, Maryland |
| D.C.N.D.Cal. | United States District Court, Northern District, California |
| D.C.N.Y. | United States District Court, New York |
| D.C.Pa. | United States District Court, Pennsylvania |
| DCS | Deputy Chiefs of Staff |
| DCZ | District of the Canal Zone |
| DDT | Dichlorodiphenyltricloro-ethane |
| DEA | Drug Enforcement Administration |
| Decl. Lond. | Declaration of London, February 26, 1909 |
| Dev. & B. | Devereux & Battle's North Carolina Reports |
| DFL | Minnesota Democratic-Farmer-Labor |
| DFTA | Department for the Aging |
| Dig. U.S. Practice in Intl. Law | Digest of U.S. Practice in International Law |
| Dist. Ct. | D.C. United States District Court, District of Columbia |
| D.L.R. | Dominion Law Reports (Canada) |
| DMCA | Digital Millennium Copyright Act |
| DNA | Deoxyribonucleic acid |
| Dnase | Deoxyribonuclease |
| DNC | Democratic National Committee |
| DOC | Department of Commerce |
| DOD | Department of Defense |
| DODEA | Department of Defense Education Activity |
| Dodson | Dodson's Reports, English Admiralty Courts |
| DOE | Department of Energy |

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|---|---|
| DOER | Department of Employee Relations |
| DOJ | Department of Justice |
| DOL | Department of Labor |
| DOMA | Defense of Marriage Act of 1996 |
| DOS | Disk operating system |
| DOT | Department of Transportation |
| DPT | Diphtheria, pertussis, and tetanus |
| DRI | Defense Research Institute |
| DSAA | Defense Security Assistance Agency |
| DUI | Driving under the influence; driving under intoxication |
| DVD | Digital versatile disc |
| DWI | Driving while intoxicated |
| EAHCA | Education for All Handicapped Children Act of 1975 |
| EBT | Examination before trial |
| E.coli | Escherichia coli |
| ECPA | Electronic Communications Privacy Act of 1986 |
| ECSC | Treaty of the European Coal and Steel Community |
| EDA | Economic Development Administration |
| EDF | Environmental Defense Fund |
| E.D.N.Y. | Eastern District, New York |
| EDP | Electronic data processing |
| E.D. Pa. | Eastern-District, Pennsylvania |
| EDSC | Eastern District, South Carolina |
| EDT | Eastern daylight time |
| E.D. Va. | Eastern District, Virginia |
| EEC | European Economic Community; European Economic Community Treaty |
| EEOC | Equal Employment Opportunity Commission |
| EFF | Electronic Frontier Foundation |
| EFT | Electronic funds transfer |
| Eliz. | Queen Elizabeth (Great Britain) |
| Em. App. | Temporary Emergency Court of Appeals |
| ENE | Early neutral evaluation |
| Eng. Rep. | English Reports |
| EOP | Executive Office of the President |
| EPA | Environmental Protection Agency; Equal Pay Act of 1963 |
| ERA | Equal Rights Amendment |
| ERDC | Energy Research and Development Commission |
| ERISA | Employee Retirement Income Security Act of 1974 |
| ERS | Economic Research Service |
| ERTA | Economic Recovery Tax Act of 1981 |
| ESA | Endangered Species Act of 1973 |
| ESF | Emergency support function; Economic Support Fund |
| ESRD | End-Stage Renal Disease Program |
| ETA | Employment and Training Administration |
| ETS | Environmental tobacco smoke |
| et seq. | *Et sequentes* or *et sequentia* (“and the following”) |
| EU | European Union |
| Euratom | European Atomic Energy Community |
| Eur. Ct. H.R. | European Court of Human Rights |
| Ex. | English Exchequer Reports, Welsby, Hurlstone & Gordon |
| Exch. | Exchequer Reports (Welsby, Hurlstone & Gordon) |
| Ex Com | Executive Committee of the National Security Council |
| Eximbank | Export-Import Bank of the United States |
| F. | Federal Reporter |
| F. 2d | Federal Reporter, Second Series |
| FAA | Federal Aviation Administration; Federal Arbitration Act |
| FAAA | Federal Alcohol Administration Act |
| FACE | Freedom of Access to Clinic Entrances Act of 1994 |
| FACT | Feminist Anti-Censorship Task Force |
| FAIRA | Federal Agriculture Improvement and Reform Act of 1996 |
| FAMLA | Family and Medical Leave Act of 1993 |
| Fannie Mae | Federal National Mortgage Association |
| FAO | Food and Agriculture Organization of the United Nations |
| FAR | Federal Acquisition Regulations |

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| FAS | Foreign Agricultural Service |
| FBA | Federal Bar Association |
| FBI | Federal Bureau of Investigation |
| FCA | Farm Credit Administration |
| F. Cas. | Federal Cases |
| FCC | Federal Communications Commission |
| FCIA | Foreign Credit Insurance Association |
| FCIC | Federal Crop Insurance Corporation |
| FCLAA | Federal Cigarette Labeling and Advertising Act |
| FCRA | Fair Credit Reporting Act |
| FCU | Federal credit unions |
| FCUA | Federal Credit Union Act |
| FCZ | Fishery Conservation Zone |
| FDA | Food and Drug Administration |
| FDIC | Federal Deposit Insurance Corporation |
| FDPC | Federal Data Processing Center |
| FEC | Federal Election Commission |
| FECA | Federal Election Campaign Act of 1971 |
| Fed. Cas. | Federal Cases |
| FEHA | Fair Employment and Housing Act |
| FEHBA | Federal Employees Health Benefit Act |
| FEMA | Federal Emergency Management Agency |
| FERC | Federal Energy Regulatory Commission |
| FFB | Federal Financing Bank |
| FFDC | Federal Food, Drug, and Cosmetics Act |
| FGIS | Federal Grain Inspection Service |
| FHA | Federal Housing Administration |
| FHAA | Fair Housing Amendments Act of 1998 |
| FHWA | Federal Highway Administration |
| FIA | Federal Insurance Administration |
| FIC | Federal Information Centers; Federation of Insurance Counsel |
| FICA | Federal Insurance Contributions Act |
| FIFRA | Federal Insecticide, Fungicide, and Rodenticide Act |
| FIP | Forestry Incentives Program |
| FIRREA | Financial Institutions Reform, Recovery, and Enforcement Act of 1989 |
| FISA | Foreign Intelligence Surveillance Act of 1978 |
| FISC | Foreign Intelligence Surveillance Court of Review |
| FJC | Federal Judicial Center |
| FLSA | Fair Labor Standards Act |
| FMC | Federal Maritime Commission |
| FMCS | Federal Mediation and Conciliation Service |
| FmHA | Farmers Home Administration |
| FMLA | Family and Medical Leave Act of 1993 |
| FNMA | Federal National Mortgage Association, "Fannie Mae" |
| F.O.B. | Free on board |
| FOIA | Freedom of Information Act |
| FOMC | Federal Open Market Committee |
| FPA | Federal Power Act of 1935 |
| FPC | Federal Power Commission |
| FPMR | Federal Property Management Regulations |
| FPRS | Federal Property Resources Service |
| FR | Federal Register |
| FRA | Federal Railroad Administration |
| FRB | Federal Reserve Board |
| FRC | Federal Radio Commission |
| F.R.D. | Federal Rules Decisions |
| FSA | Family Support Act |
| FSB | Federal'naya Sluzhba Bezopasnosti (the Federal Security Service of Russia) |
| FSLIC | Federal Savings and Loan Insurance Corporation |
| FSQS | Food Safety and Quality Service |
| FSS | Federal Supply Service |
| F. Supp. | Federal Supplement |
| FTA | U.S.-Canada Free Trade Agreement of 1988 |
| FTC | Federal Trade Commission |
| FTCA | Federal Tort Claims Act |
| FTS | Federal Telecommunications System |
| FTS2000 | Federal Telecommunications System 2000 |
| FUCA | Federal Unemployment Compensation Act of 1988 |

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| FUTA | Federal Unemployment Tax Act |
| FWPCA | Federal Water Pollution Control Act of 1948 |
| FWS | Fish and Wildlife Service |
| GAL | Guardian ad litem |
| GAO | General Accounting Office; Governmental Affairs Office |
| GAOR | General Assembly Official Records, United Nations |
| GAAP | Generally accepted accounting principles |
| GA Res. | General Assembly Resolution (United Nations) |
| GATT | General Agreement on Tariffs and Trade |
| GCA | Gun Control Act |
| Gen. Cls. Comm. | General Claims Commission, United States and Panama; General Claims United States and Mexico |
| Geo. II | King George II (Great Britain) |
| Geo. III | King George III (Great Britain) |
| GHB | Gamma-hydroxybutrate |
| GI | Government Issue |
| GID | General Intelligence Division |
| GM | General Motors |
| GNMA | Government National Mortgage Association, "Ginnie Mae' |
| GNP | Gross national product |
| GOP | Grand Old Party (Republican Party) |
| GOPAC | Grand Old Party Action Committee |
| GPA | Office of Governmental and Public Affairs |
| GPO | Government Printing Office |
| GRAS | Generally recognized as safe |
| Gr. Br., Crim. Ct. App. | Great Britain, Court of Criminal Appeals |
| GRNL | Gay Rights-National Lobby |
| GSA | General Services Administration |
| Hackworth | Green Haywood Hackworth, *Digest of International Law* (1940–1944) |
| Hay and Marriott | Great Britain. High Court of Admiralty, *Decisions in the High Court of Admiralty during the Time of Sir George Hay and of Sir James Marriott, Late Judges of That Court* (1801) |
| HBO | Home Box Office |
| HCFA | Health Care Financing Administration |
| H.Ct. | High Court |
| HDS | Office of Human Development Services |
| Hen. & M. | Hening & Munford's Virginia Reports |
| HEW | Department of Health, Education, and Welfare |
| HFCA | Health Care Financing Administration |
| HGI | Handgun Control, Incorporated |
| HHS | Department of Health and Human Services |
| Hill | Hill's New York Reports |
| HIRE | Help through Industry Retraining and Employment |
| HIV | Human immunodeficiency virus |
| H.L. | House of Lords Cases (England) |
| H. Lords | House of Lords (England) |
| HMO | Health Maintenance Organization |
| HNIS | Human Nutrition Information Service |
| Hong Kong L.R. | Hong Kong Law Reports |
| How. | Howard's United States Supreme Court Reports |
| How. St. Trials | Howell's English State Trials |
| HUAC | House Un-American Activities Committee |
| HUD | Department of Housing and Urban Development |
| Hudson, Internatl. Legis. | Manley Ottmer Hudson, ed., *International Legislation: A Collection of the Texts of Multipartite International Instruments of General Interest Beginning with the Covenant of the League of Nations* (1931) |
| Hudson, World Court Reps. | Manley Ottmer Hudson, ea., *World Court Reports* (1934– ) |
| Hun | Hun's New York Supreme Court Reports |
| Hunt's Rept. | Bert L. Hunt, *Report of the American and Panamanian General Claims Arbitration* (1934) |
| IAEA | International Atomic Energy Agency |
| IALL | International Association of Law Libraries |

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| IBA | International Bar Association |
| IBM | International Business Machines |
| ICA | Interstate Commerce Act |
| ICBM | Intercontinental ballistic missile |
| ICC | Interstate Commerce Commission; International Criminal Court |
| ICJ | International Court of Justice |
| ICM | Institute for Court Management |
| IDEA | Individuals with Disabilities Education Act of 1975 |
| IDOP | International Dolphin Conservation Program |
| IEP | Individualized educational program |
| IFC | International Finance Corporation |
| IGRA | Indian Gaming Regulatory Act of 1988 |
| IJA | Institute of Judicial Administration |
| IJC | International Joint Commission |
| ILC | International Law Commission |
| ILD | International Labor Defense |
| Ill. Dec. | Illinois Decisions |
| ILO | International Labor Organization |
| IMF | International Monetary Fund |
| INA | Immigration and Nationality Act |
| IND | Investigational new drug |
| INF Treaty | Intermediate-Range Nuclear Forces Treaty of 1987 |
| INS | Immigration and Naturalization Service |
| INTELSAT | International Telecommunications Satellite Organization |
| Interpol | International Criminal Police Organization |
| Int'l. Law Reps. | International Law Reports |
| Intl. Legal Mats. | International Legal Materials |
| IOC | International Olympic Committee |
| IPDC | International Program for the Development of Communication |
| IPO | Intellectual Property Owners |
| IPP | Independent power producer |
| IQ | Intelligence quotient |
| I.R. | Irish Reports |
| IRA | Individual retirement account; Irish Republican Army |
| IRC | Internal Revenue Code |
| IRCA | Immigration Reform and Control Act of 1986 |
| IRS | Internal Revenue Service |
| ISO | Independent service organization |
| ISP | Internet service provider |
| ISSN | International Standard Serial Numbers |
| ITA | International Trade Administration |
| ITI | Information Technology Integration |
| ITO | International Trade Organization |
| ITS | Information Technology Service |
| ITT | International Telephone and Telegraph Corporation |
| ITU | International Telecommunication Union |
| IUD | Intrauterine device |
| IWC | International Whaling Commission |
| IWW | Industrial Workers of the World |
| JAGC | Judge Advocate General's Corps |
| JCS | Joint Chiefs of Staff |
| JDL | Jewish Defense League |
| JNOV | Judgment *non obstante veredicto* ("judgment nothing to recommend it" or "judgment notwithstanding the verdict") |
| JOBS | Jobs Opportunity and Basic Skills |
| John. Ch. | Johnson's New York Chancery Reports |
| Johns. | Johnson's Reports (New York) |
| JP | Justice of the peace |
| K.B. | King's Bench Reports (England) |
| KFC | Kentucky Fried Chicken |
| KGB | Komitet Gosudarstvennoi Bezopasnosti (the State Security Committee for countries in the former Soviet Union) |
| KKK | Ku Klux Klan |
| KMT | Kuomintang (Chinese, "national people's party") |
| LAD | Law Against Discrimination |

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| LAPD | Los Angeles Police Department |
| LC | Library of Congress |
| LCHA | Longshoremen's and Harbor Workers Compensation Act of 1927 |
| LD50 | Lethal dose 50 |
| LDEF | Legal Defense and Education Fund (NOW) |
| LDF | Legal Defense Fund, Legal Defense and Educational Fund of the NAACP |
| LEAA | Law Enforcement Assistance Administration |
| L.Ed. | Lawyers' Edition Supreme Court Reports |
| LI | Letter of interpretation |
| LLC | Limited Liability Company |
| LLP | Limited Liability Partnership |
| LMSA | Labor-Management Services Administration |
| LNTS | League of Nations Treaty Series |
| Lofft's Rep. | Lofft's English King's Bench Reports |
| L.R. | Law Reports (English) |
| LSAC | Law School Admission Council |
| LSAS | Law School Admission Service |
| LSAT | Law School Aptitude Test |
| LSC | Legal Services Corporation; Legal Services for Children |
| LSD | Lysergic acid diethylamide |
| LSDAS | Law School Data Assembly Service |
| LTBT | Limited Test Ban Treaty |
| LTC | Long Term Care |
| MAD | Mutual assured destruction |
| MADD | Mothers against Drunk Driving |
| MALDEF | Mexican American Legal Defense and Educational Fund |
| Malloy | William M. Malloy, ed., *Treaties, Conventions International Acts, Protocols, and Agreements between the United States of America and Other Powers* (1910–1938) |
| Martens | Georg Friedrich von Martens, ea., *Noveau recueil général de traités et autres actes relatifs aux rapports de droit international* (Series I, 20 vols. [1843–1875]; Series II, 35 vols. [1876–1908]; Series III [1909– ]) |
| Mass. | Massachusetts Reports |
| MCC | Metropolitan Correctional Center |
| MCCA | Medicare Catastrophic Coverage Act of 1988 |
| MCH | Maternal and Child Health Bureau |
| MCRA | Medical Care Recovery Act of 1962 |
| MDA | Medical Devices Amendments of 1976 |
| Md. App. | Maryland, Appeal Cases |
| M.D. Ga. | Middle District, Georgia |
| Mercy | Movement Ensuring the Right to Choose for Yourself |
| Metc. | Metcalf's Massachusetts Reports |
| MFDP | Mississippi Freedom Democratic party |
| MGT | Management |
| MHSS | Military Health Services System |
| Miller | David Hunter Miller, ea., *Treaties and Other International Acts of the United States of America* (1931–1948) |
| Minn. | Minnesota Reports |
| MINS | Minors in need of supervision |
| MIRV | Multiple independently targetable reentry vehicle |
| MIRVed ICBM | Multiple independently targetable reentry vehicled intercontinental ballistic missile |
| Misc. | Miscellaneous Reports, New York |
| Mixed Claims Comm., Report of Decs | Mixed Claims Commission, United States and Germany, Report of Decisions |
| M.J. | Military Justice Reporter |
| MLAP | Migrant Legal Action Program |
| MLB | Major League Baseball |
| MLDP | Mississippi Loyalist Democratic Party |
| MMI | Moslem Mosque, Incorporated |
| MMPA | Marine Mammal Protection Act of 1972 |
| Mo. | Missouri Reports |
| MOD | Masters of Deception |
| Mod. | Modern Reports, English King's Bench, etc. |

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| Moore, Dig. Intl. Law | John Bassett Moore, *A Digest of International Law,* 8 vols. (1906) |
| Moore, Intl. Arbs. | John Bassett Moore, *History and Digest of the International Arbitrations to Which United States Has Been a Party,* 6 vols. (1898) |
| Morison | William Maxwell Morison, *The Scots Revised Report: Morison's Dictionary of Decisions* (1908–09) |
| M.P. | Member of Parliament |
| MP3 | MPEG Audio Layer 3 |
| MPAA | Motion Picture Association of America |
| MPAS | Michigan Protection and Advocacy Service |
| MPEG | Motion Picture Experts Group |
| mpg | Miles per gallon |
| MPPDA | Motion Picture Producers and Distributors of America |
| MPRSA | Marine Protection, Research, and Sanctuaries Act of 1972 |
| M.R. | Master of the Rolls |
| MS-DOS | Microsoft Disk Operating System |
| MSHA | Mine Safety and Health Administration |
| MSPB | Merit Systems Protection Board |
| MSSA | Military Selective Service Act |
| N/A | Not Available |
| NAACP | National Association for the Advancement of Colored People |
| NAAQS | National Ambient Air Quality Standards |
| NAB | National Association of Broadcasters |
| NABSW | National Association of Black Social Workers |
| NACDL | National Association of Criminal Defense Lawyers |
| NAFTA | North American Free Trade Agreement of 1993 |
| NAGHSR | National Association of Governors' Highway Safety Representatives |
| NALA | National Association of Legal Assistants |
| NAM | National Association of Manufacturers |
| NAR | National Association of Realtors |
| NARAL | National Abortion and Reproductive Rights Action League |
| NARF | Native American Rights Fund |
| NARS | National Archives and Record Service |
| NASA | National Aeronautics and Space Administration |
| NASD | National Association of Securities Dealers |
| NATO | North Atlantic Treaty Organization |
| NAVINFO | Navy Information Offices |
| NAWSA | National American Woman's Suffrage Association |
| NBA | National Bar Association; National Basketball Association |
| NBC | National Broadcasting Company |
| NBLSA | National Black Law Student Association |
| NBS | National Bureau of Standards |
| NCA | Noise Control Act; National Command Authorities |
| NCAA | National Collegiate Athletic Association |
| NCAC | National Coalition against Censorship |
| NCCB | National Consumer Cooperative Bank |
| NCE | Northwest Community Exchange |
| NCF | National Chamber Foundation |
| NCIP | National Crime Insurance Program |
| NCJA | National Criminal Justice Association |
| NCLB | National Civil Liberties Bureau |
| NCP | National contingency plan |
| NCSC | National Center for State Courts |
| NCUA | National Credit Union Administration |
| NDA | New drug application |
| N.D. Ill. | Northern District, Illinois |
| NDU | National Defense University |
| N.D. Wash. | Northern District, Washington |
| N.E. | North Eastern Reporter |
| N.E. 2d | North Eastern Reporter, Second Series |
| NEA | National Endowment for the Arts; National Education Association |

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| NEH | National Endowment for the Humanities |
| NEPA | National Environmental Protection Act; National Endowment Policy Act |
| NET Act | No Electronic Theft Act |
| NFIB | National Federation of Independent Businesses |
| NFIP | National Flood Insurance Program |
| NFL | National Football League |
| NFPA | National Federation of Paralegal Associations |
| NGLTF | National Gay and Lesbian Task Force |
| NHL | National Hockey League |
| NHRA | Nursing Home Reform Act of 1987 |
| NHTSA | National Highway Traffic Safety Administration |
| Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| NIEO | New International Economic Order |
| NIGC | National Indian Gaming Commission |
| NIH | National Institutes of Health |
| NIJ | National Institute of Justice |
| NIRA | National Industrial Recovery Act of 1933; National Industrial Recovery Administration |
| NIST | National Institute of Standards and Technology |
| N.J. | New Jersey Reports |
| N.J. Super. | New Jersey Superior Court Reports |
| NLEA | Nutrition Labeling and Education Act of 1990 |
| NLRA | National Labor Relations Act |
| NLRB | National Labor Relations Board |
| NMFS | National Marine Fisheries Service |
| No. | Number |
| NOAA | National Oceanic and Atmospheric Administration |
| NOC | National Olympic Committee |
| NOI | Nation of Islam |
| NOL | Net operating loss |
| NORML | National Organization for the Reform of Marijuana Laws |
| NOW | National Organization for Women |
| NOW LDEF | National Organization for Women Legal Defense and Education Fund |
| NOW/PAC | National Organization for Women Political Action Committee |
| NPDES | National Pollutant Discharge Elimination System |
| NPL | National priorities list |
| NPR | National Public Radio |
| NPT | Nuclear Non-Proliferation Treaty of 1970 |
| NRA | National Rifle Association; National Recovery Act |
| NRC | Nuclear Regulatory Commission |
| NRLC | National Right to Life Committee |
| NRTA | National Retired Teachers Association |
| NSA | National Security Agency |
| NSC | National Security Council |
| NSCLC | National Senior Citizens Law Center |
| NSF | National Science Foundation |
| NSFNET | National Science Foundation Network |
| NSI | Network Solutions, Inc. |
| NTIA | National Telecommunications and Information Administration |
| NTID | National Technical Institute for the Deaf |
| NTIS | National Technical Information Service |
| NTS | Naval Telecommunications System |
| NTSB | National Transportation Safety Board |
| NVRA | National Voter Registration Act |
| N.W. | North Western Reporter |
| N.W. 2d | North Western Reporter, Second Series |
| NWSA | National Woman Suffrage Association |
| N.Y. | New York Court of Appeals Reports |
| N.Y. 2d | New York Court of Appeals Reports, Second Series |
| N.Y.S. | New York Supplement Reporter |

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| N.Y.S. 2d | New York Supplement Reporter, Second Series |
| NYSE | New York Stock Exchange |
| NYSLA | New York State Liquor Authority |
| N.Y. Sup. | New York Supreme Court Reports |
| NYU | New York University |
| OAAU | Organization of Afro American Unity |
| OAP | Office of Administrative Procedure |
| OAS | Organization of American States |
| OASDI | Old-age, Survivors, and Disability Insurance Benefits |
| OASHDS | Office of the Assistant Secretary for Human Development Services |
| OCC | Office of Comptroller of the Currency |
| OCED | Office of Comprehensive Employment Development |
| OCHAMPUS | Office of Civilian Health and Medical Program of the Uniformed Services |
| OCSE | Office of Child Support Enforcement |
| OEA | Organización de los Estados Americanos |
| OEM | Original Equipment Manufacturer |
| OFCCP | Office of Federal Contract Compliance Programs |
| OFPP | Office of Federal Procurement Policy |
| OIC | Office of the Independent Counsel |
| OICD | Office of International Cooperation and Development |
| OIG | Office of the Inspector General |
| OJARS | Office of Justice Assistance, Research, and Statistics |
| OMB | Office of Management and Budget |
| OMPC | Office of Management, Planning, and Communications |
| ONP | Office of National Programs |
| OPD | Office of Policy Development |
| OPEC | Organization of Petroleum Exporting Countries |
| OPIC | Overseas Private Investment Corporation |
| Ops. Atts. Gen. | Opinions of the Attorneys-General of the United States |
| Ops. Comms. | Opinions of the Commissioners |
| OPSP | Office of Product Standards Policy |
| O.R. | Ontario Reports |
| OR | Official Records |
| OSHA | Occupational Safety and Health Act |
| OSHRC | Occupational Safety and Health Review Commission |
| OSM | Office of Surface Mining |
| OSS | Office of Strategic Services |
| OST | Office of the Secretary |
| OT | Office of Transportation |
| OTA | Office of Technology Assessment |
| OTC | Over-the-counter |
| OTS | Office of Thrift Supervisors |
| OUI | Operating under the influence |
| OVCI | Offshore Voluntary Compliance Initiative |
| OWBPA | Older Workers Benefit Protection Act |
| OWRT | Office of Water Research and Technology |
| P. | Pacific Reporter |
| P. 2d | Pacific Reporter, Second Series |
| PAC | Political action committee |
| Pa. Oyer and Terminer | Pennsylvania Oyer and Terminer Reports |
| PATCO | Professional Air Traffic Controllers Organization |
| PBGC | Pension Benefit Guaranty Corporation |
| PBS | Public Broadcasting Service; Public Buildings Service |
| P.C. | Privy Council (English Law Reports) |
| PC | Personal computer; politically correct |
| PCBs | Polychlorinated biphenyls |
| PCIJ | Permanent Court of International Justice<br>Series A-Judgments and Orders (1922–30)<br>Series B-Advisory Opinions (1922–30)<br>Series A/B-Judgments, Orders, and Advisory Opinions (1931–40) |

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| PCIJ (cont'd.) | Series C-Pleadings, Oral Statements, and Documents relating to Judgments and Advisory Opinions (1923–42) |
| | Series D-Acts and Documents concerning the Organization of the World Court (1922 –47) |
| | Series E-Annual Reports (1925–45) |
| PCP | Phencyclidine |
| P.D. | Probate Division, English Law Reports (1876–1890) |
| PDA | Pregnancy Discrimination Act of 1978 |
| PD & R | Policy Development and Research |
| Pepco | Potomac Electric Power Company |
| Perm. Ct. of Arb. | Permanent Court of Arbitration |
| PES | Post-Enumeration Survey |
| Pet. | Peters' United States Supreme Court Reports |
| PETA | People for the Ethical Treatment of Animals |
| PGA | Professional Golfers Association |
| PGM | Program |
| PHA | Public Housing Agency |
| Phila. Ct. of Oyer and Terminer | Philadelphia Court of Oyer and Terminer |
| PhRMA | Pharmaceutical Research and Manufacturers of America |
| PHS | Public Health Service |
| PIC | Private Industry Council |
| PICJ | Permanent International Court of Justice |
| Pick. | Pickering's Massachusetts Reports |
| PIK | Payment in Kind |
| PINS | Persons in need of supervision |
| PIRG | Public Interest Research Group |
| P.L. | Public Laws |
| PLAN | Pro-Life Action Network |
| PLC | Plaintiffs' Legal Committee |
| PLE | Product liability expenses |
| PLI | Practicing Law Institute |
| PLL | Product liability loss |
| PLLP | Professional Limited Liability Partnership |
| PLO | Palestine Liberation Organization |
| PLRA | Prison Litigation Reform Act of 1995 |
| PNET | Peaceful Nuclear Explosions Treaty |
| PONY | Prostitutes of New York |
| POW-MIA | Prisoner of war-missing in action |
| Pratt | Frederic Thomas Pratt, *Law of Contraband of War, with a Selection of Cases from Papers of the Right Honourable Sir George Lee* (1856) |
| PRIDE | Prostitution to Independence, Dignity, and Equality |
| Proc. | Proceedings |
| PRP | Potentially responsible party |
| PSRO | Professional Standards Review Organization |
| PTO | Patents and Trademark Office |
| PURPA | Public Utilities Regulatory Policies Act |
| PUSH | People United to Serve Humanity |
| PUSH-Excel | PUSH for Excellence |
| PWA | Public Works Administration |
| PWSA | Ports and Waterways Safety Act of 1972 |
| Q.B. | Queen's Bench (England) |
| QTIP | Qualified Terminable Interest Property |
| Ralston's Rept. | Jackson Harvey Ralston, ed., *Venezuelan Arbitrations of 1903* (1904) |
| RC | Regional Commissioner |
| RCRA | Resource Conservation and Recovery Act |
| RCWP | Rural Clean Water Program |
| RDA | Rural Development Administration |
| REA | Rural Electrification Administration |
| Rec. des Decs. des Trib. Arb. Mixtes | G. Gidel, ed., *Recueil des décisions des tribunaux arbitraux mixtes, institués par les traités de paix* (1922–30) |
| Redmond | Vol. 3 of Charles I. Bevans, *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled by C. F. Redmond) (1969) |
| RESPA | Real Estate Settlement Procedure Act of 1974 |
| RFC | Reconstruction Finance Corporation |

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| RFRA | Religious Freedom Restoration Act of 1993 |
| RIAA | Recording Industry Association of America |
| RICO | Racketeer Influenced and Corrupt Organizations |
| RLUIPA | Religious Land Use and Institutionalized Persons Act |
| RNC | Republican National Committee |
| Roscoe | Edward Stanley Roscoe, ed., *Reports of Prize Cases Determined in the High Court Admiralty before the Lords Commissioners of Appeals in Prize Causes and before the judicial Committee of the Privy Council from 1745 to 1859* (1905) |
| ROTC | Reserve Officers' Training Corps |
| RPP | Representative Payee Program |
| R.S. | Revised Statutes |
| RTC | Resolution Trust Corp. |
| RUDs | Reservations, understandings, and declarations |
| Ryan White CARE Act | Ryan White Comprehensive AIDS Research Emergency Act of 1990 |
| SAC | Strategic Air Command |
| SACB | Subversive Activities Control Board |
| SADD | Students against Drunk Driving |
| SAF | Student Activities Fund |
| SAIF | Savings Association Insurance Fund |
| SALT | Strategic Arms Limitation Talks |
| SALT I | Strategic Arms Limitation Talks of 1969–72 |
| SAMHSA | Substance Abuse and Mental Health Services Administration |
| Sandf. | Sandford's New York Superior Court Reports |
| S and L | Savings and loan |
| SARA | Superfund Amendment and Reauthorization Act |
| SAT | Scholastic Aptitude Test |
| Sawy. | Sawyer's United States Circuit Court Reports |
| SBA | Small Business Administration |
| SBI | Small Business Institute |
| SCCC | South Central Correctional Center |
| SCLC | Southern Christian Leadership Conference |
| Scott's Repts. | James Brown Scott, ed., *The Hague Court Reports,* 2 vols. (1916–32) |
| SCS | Soil Conservation Service; Social Conservative Service |
| SCSEP | Senior Community Service Employment Program |
| S.Ct. | Supreme Court Reporter |
| S.D. Cal. | Southern District, California |
| S.D. Fla. | Southern District, Florida |
| S.D. Ga. | Southern District, Georgia |
| SDI | Strategic Defense Initiative |
| S.D. Me. | Southern District, Maine |
| S.D.N.Y. | Southern District, New York |
| SDS | Students for a Democratic Society |
| S.E. | South Eastern Reporter |
| S.E. 2d | South Eastern Reporter, Second Series |
| SEA | Science and Education Administration |
| SEATO | Southeast Asia Treaty Organization |
| SEC | Securities and Exchange Commission |
| Sec. | Section |
| SEEK | Search for Elevation, Education and Knowledge |
| SEOO | State Economic Opportunity Office |
| SEP | Simplified employee pension plan |
| Ser. | Series |
| Sess. | Session |
| SGLI | Servicemen's Group Life Insurance |
| SIP | State implementation plan |
| SLA | Symbionese Liberation Army |
| SLAPPs | Strategic Lawsuits Against Public Participation |
| SLBM | Submarine-launched ballistic missile |
| SNCC | Student Nonviolent Coordinating Committee |
| So. | Southern Reporter |
| So. 2d | Southern Reporter, Second Series |
| SPA | Software Publisher's Association |
| Spec. Sess. | Special Session |
| SPLC | Southern Poverty Law Center |
| SRA | Sentencing Reform Act of 1984 |

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| SS | *Schutzstaffel* (German, "Protection Echelon") |
| SSA | Social Security Administration |
| SSI | Supplemental Security Income |
| START I | Strategic Arms Reduction Treaty of 1991 |
| START II | Strategic Arms Reduction Treaty of 1993 |
| Stat. | United States Statutes at Large |
| STS | Space Transportation Systems |
| St. Tr. | State Trials, English |
| STURAA | Surface Transportation and Uniform Relocation Assistance Act of 1987 |
| Sup. Ct. of Justice, Mexico | Supreme Court of Justice, Mexico |
| Supp. | Supplement |
| S.W. | South Western Reporter |
| S.W. 2d | South Western Reporter, Second Series |
| SWAPO | South-West Africa People's Organization |
| SWAT | Special Weapons and Tactics |
| SWP | Socialist Workers Party |
| TDP | Trade and Development Program |
| Tex. Sup. | Texas Supreme Court Reports |
| THAAD | Theater High-Altitude Area Defense System |
| THC | Tetrahydrocannabinol |
| TI | Tobacco Institute |
| TIA | Trust Indenture Act of 1939 |
| TIAS | Treaties and Other International Acts Series (United States) |
| TNT | Trinitrotoluene |
| TOP | Targeted Outreach Program |
| TPUS | Transportation and Public Utilities Service |
| TQM | Total Quality Management |
| Tripartite Claims Comm., Decs. and Ops. | Tripartite Claims Commission (United States, Austria, and Hungary), Decisions and Opinions |
| TRI-TAC | Joint Tactical Communications |
| TRO | Temporary restraining order |
| TS | Treaty Series, United States |
| TSCA | Toxic Substance Control Act |
| TSDs | Transporters, storers, and disposers |
| TSU | Texas Southern University |
| TTBT | Threshold Test Ban Treaty |
| TV | Television |
| TVA | Tennessee Valley Authority |
| TWA | Trans World Airlines |
| UAW | United Auto Workers; United Automobile, Aerospace, and Agricultural Implements Workers of America |
| U.C.C. | Uniform Commercial Code; Universal Copyright Convention |
| U.C.C.C. | Uniform Consumer Credit Code |
| UCCJA | Uniform Child Custody Jurisdiction Act |
| UCMJ | Uniform Code of Military Justice |
| UCPP | Urban Crime Prevention Program |
| UCS | United Counseling Service |
| UDC | United Daughters of the Confederacy |
| UFW | United Farm Workers |
| UHF | Ultrahigh frequency |
| UIFSA | Uniform Interstate Family Support Act |
| UIS | Unemployment Insurance Service |
| UMDA | Uniform Marriage and Divorce Act |
| UMTA | Urban Mass Transportation Administration |
| U.N. | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCTAD | United Nations Conference on Trade and Development |
| UN Doc. | United Nations Documents |
| UNDP | United Nations Development Program |
| UNEF | United Nations Emergency Force |
| UNESCO | United Nations Educational, Scientific, and Cultural Organization |
| UNICEF | United Nations Children's Fund (formerly United Nations International Children's Emergency Fund) |
| UNIDO | United Nations Industrial and Development Organization |
| Unif. L. Ann. | Uniform Laws Annotated |
| UN Repts. Intl. Arb. Awards | United Nations Reports of International Arbitral Awards |

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| UNTS | United Nations Treaty Series |
| UPI | United Press International |
| URESA | Uniform Reciprocal Enforcement of Support Act |
| U.S. | United States Reports |
| U.S.A. | United States of America |
| USAF | United States Air Force |
| USA PATRIOT Act | Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act |
| U.S. App. D.C. | United States Court of Appeals for the District of Columbia |
| U.S.C. | United States Code; University of Southern California |
| U.S.C.A. | United States Code Annotated |
| U.S.C.C.A.N. | United States Code Congressional and Administrative News |
| USCMA | United States Court of Military Appeals |
| USDA | U.S. Department of Agriculture |
| USES | United States Employment Service |
| USF | U.S. Forestry Service |
| USFA | United States Fire Administration |
| USGA | United States Golf Association |
| USICA | International Communication Agency, United States |
| USMS | U.S. Marshals Service |
| USOC | U.S. Olympic Committee |
| USSC | U.S. Sentencing Commission |
| USSG | United States Sentencing Guidelines |
| U.S.S.R. | Union of Soviet Socialist Republics |
| UST | United States Treaties |
| USTS | United States Travel Service |
| v. | *Versus* |
| VA | Veterans Administration |
| VAR | Veterans Affairs and Rehabilitation Commission |
| VAWA | Violence against Women Act |
| VFW | Veterans of Foreign Wars |
| VGLI | Veterans Group Life Insurance |
| Vict. | Queen Victoria (Great Britain) |
| VIN | Vehicle identification number |
| VISTA | Volunteers in Service to America |
| VJRA | Veterans Judicial Review Act of 1988 |
| V.L.A. | Volunteer Lawyers for the Arts |
| VMI | Virginia Military Institute |
| VMLI | Veterans Mortgage Life Insurance |
| VOCAL | Victims of Child Abuse Laws |
| VRA | Voting Rights Act |
| WAC | Women's Army Corps |
| Wall. | Wallace's United States Supreme Court Reports |
| Wash. 2d | Washington Reports, Second Series |
| WAVES | Women Accepted for Volunteer Service |
| WCTU | Women's Christian Temperance Union |
| W.D. Wash. | Western District, Washington |
| W.D. Wis. | Western District, Wisconsin |
| WEAL | *West's Encyclopedia of American Law,* Women's Equity Action League |
| Wend. | Wendell's New York Reports |
| WFSE | Washington Federation of State Employees |
| Wheat. | Wheaton's United States Supreme Court Reports |
| Wheel. Cr. Cases | Wheeler's New York Criminal Cases |
| WHISPER | Women Hurt in Systems of Prostitution Engaged in Revolt |
| Whiteman | Marjorie Millace Whiteman, *Digest of International Law,* 15 vols. (1963–73) |
| WHO | World Health Organization |
| WIC | Women, Infants, and Children program |
| Will. and Mar. | King William and Queen Mary (Great Britain) |
| WIN | WESTLAW Is Natural; Whip Inflation Now; Work Incentive Program |
| WIPO | World Intellectual Property Organization |
| WIU | Workers' Industrial Union |
| W.L.R. | Weekly Law Reports, England |
| WPA | Works Progress Administration |
| WPPDA | Welfare and Pension Plans Disclosure Act |

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| WTO | World Trade Organization |
| WWI | World War I |
| WWII | World War II |
| Yates Sel. Cas. | Yates's New York Select Cases |
| YMCA | Young Men's Christian Association |
| YWCA | Young Women's Christian Association |

# WEST'S ENCYCLOPEDIA *of* AMERICAN LAW

2ND EDITION

# How to Use This Book

❚1❚ Article Title

❚2❚ Definition in italics with Latin translation provided

❚3❚ First-level subhead

❚4❚ Timeline for subject of biography, including general historical events and life events

❚5❚ Sidebar expands upon an issue addressed briefly in the article

❚6❚ Quotation from subject of biography

❚7❚ Biography of contributor to American law

❚8❚ Internal cross-reference to entry within WEAL

❚9❚ In Focus article examines a controversial or complex aspect of the article topic

❚10❚ Cross-references at end of article

❚11❚ Full cite for case

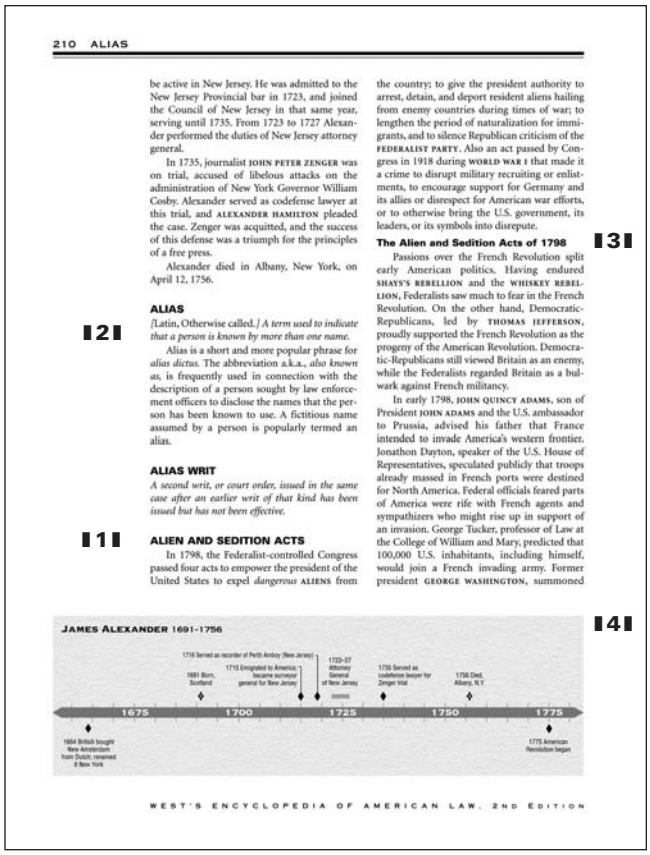



be active in New Jersey. He was admitted to the New Jersey Provincial bar in 1723, and joined the Council of New Jersey in that same year, serving until 1735. From 1723 to 1727 Alexander performed the duties of New Jersey attorney general.

In 1735, journalist JOHN PETER ZENGER was on trial, accused of libelous attacks on the administration of New York Governor William Cosby. Alexander served as codefense lawyer at this trial, and ALEXANDER HAMILTON pleaded the case. Zenger was acquitted, and the success of this defense was a triumph for the principles of a free press.

Alexander died in Albany, New York, on April 12, 1756.

**ALIAS**

❚2❚ *[Latin, Otherwise called.] A term used to indicate that a person is known by more than one name.*

Alias is a short and more popular phrase for *alias dictus.* The abbreviation a.k.a., *also known as,* is frequently used in connection with the description of a person sought by law enforcement officers to disclose the names that the person has been known to use. A fictitious name assumed by a person is popularly termed an alias.

**ALIAS WRIT**

*A second writ, or court order, issued in the same case after an earlier writ of that kind has been issued but has not been effective.*

❚1❚ **ALIEN AND SEDITION ACTS**

In 1798, the Federalist-controlled Congress passed four acts to empower the president of the United States to expel *dangerous* ALIENS from the country; to give the president authority to arrest, detain, and deport resident aliens hailing from enemy countries during times of war; to lengthen the period of naturalization for immigrants, and to silence Republican criticism of the FEDERALIST PARTY. Also an act passed by Congress in 1918 during WORLD WAR I that made it a crime to disrupt military recruiting or enlistments, to encourage support for Germany and its allies or disrespect for American war efforts, or to otherwise bring the U.S. government, its leaders, or its symbols into disrepute.

❚3❚ **The Alien and Sedition Acts of 1798**

Passions over the French Revolution split early American politics. Having endured SHAYS'S REBELLION and the WHISKEY REBELLION, Federalists saw much to fear in the French Revolution. On the other hand, Democratic-Republicans, led by THOMAS JEFFERSON, proudly supported the French Revolution as the progeny of the American Revolution. Democratic-Republicans still viewed Britain as an enemy, while the Federalists regarded Britain as a bulwark against French militancy.

In early 1798, JOHN QUINCY ADAMS, son of President JOHN ADAMS and the U.S. ambassador to Prussia, advised his father that France intended to invade America's western frontier. Jonathon Dayton, speaker of the U.S. House of Representatives, speculated publicly that troops already massed in French ports were destined for North America. Federal officials feared parts of America were rife with French agents and sympathizers who might rise up in support of an invasion. George Tucker, professor of Law at the College of William and Mary, predicted that 100,000 U.S. inhabitants, including himself, would join a French invading army. Former president GEORGE WASHINGTON, summoned

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## The First Payments of Social Security

After the enactment of the Social Security Act of 1935 (42 U.S.C.A. § 301 et seq.) and the creation of the Social Security Administration (SSA), the federal government had a short time to establish the program before beginning to pay benefits. Monthly benefits were to begin in 1940. The period from 1937 to 1940 was to be used both to build up the trust funds and to provide a minimum period for participation for persons to qualify for monthly benefits.

From 1937 until 1940, however, Social Security paid benefits in the form of a single, lump-sum payment. The purpose of these one-time payments was to provide some compensation to people who contributed to the program but would not participate long enough to be vested for monthly benefits.

The first applicant for a lump-sum benefit was Ernest Ackerman, a Cleveland motorman who retired one day after the Social Security Program began. During his one day of participation in the program, five cents was withheld from Ackerman's pay for Social Security, and upon retiring, he received a lump-sum payment of seventeen cents.

Payments of monthly benefits began in January 1940. On January 31, 1940, the first monthly retirement check was issued to Ida May Fuller of Ludlow, Vermont, in the amount of $22.54. Fuller died in January 1975 at the age of one hundred. During her thirty-five years as a beneficiary, she received more than $20,000 in benefits.

tions to Social Security. There is no financial need requirement to be satisfied. Once a worker qualifies for protection, his family is also entitled to protection. The entire program is geared toward helping families as a matter of social policy.

Two large funds of money are held in trust to pay benefits earned by people under OASDI: the Old Age and Survivors Trust Fund and the Disability Insurance Trust Fund. As workers and employers make payroll contributions to these funds, money is paid out in benefits to people currently qualified to receive monthly checks.

The OASDI program is funded by payroll taxes levied on employees and their employers and on the self-employed. The tax is imposed upon the employee's taxable income, up to a maximum taxable amount, with the employer contributing an equal amount. The self-employed person contributes twice the amount levied on an employee. In 2003 the rate was 6.2 percent, levied on earned income up to a maximum of $87,000.

**Old Age Benefits** A person becomes eligible for Social Security old age benefits by working a minimum number of calendar quarters. The number of quarters required for full insurance increases with the worker's age. Forty quarters is the maximum requirement. The individual is credited for income up to the maximum amount of money covered by Social Security for those years. This amount is adjusted to reflect the impact of inflation on normal earnings and ensure that a worker who pays increasing Social Security contributions during his or her work life will receive retirement benefits that keep pace with inflation.

Persons born before 1950 can retire at age 65 with full benefits based on their average income during their working years. For those born between 1950 and 1960, the retirement age for full benefits has increased to age 66. Persons born in 1960 or later will not receive full retirement benefits until age 67. Any person, however, may retire at age 62 and receive less than full benefits. At age 65, a worker's spouse who has not contributed to Social Security receives 50 percent of the amount paid to the worker.

Since 1975 Social Security benefits have increased annually to offset the corrosive effects of inflation on fixed incomes. These increases, known as cost of living allowances (COLAs), are based on the annual increase in consumer prices. Allowing benefits to increase automatically ended the need for special acts of Congress, but it has also steadily increased the cost of the Social Security Program.

have the same inheritance rights as other children. The ruling was believed to be the first on the controversial issue by any state supreme court.

Also in January 2002, Marshall addressed the Massachusetts Bar Association Conference, where she called for "a revolution in the administration of justice" stating that the court system needed to improve its management system as well as its staffing and budget controls. In March 2002, her discussion of the court system's problems were amplified in a 52-page report that was published by a blue-ribbon panel appointed by Marshall.

FURTHER READINGS

Teicher, Stacy A. 2000." A Subtle Revolution as Women Lead the Bench." *Christian Science Monitor* (January 5).

Lavoie, Denise. 2002. "Court Rules on Posthumous Conception." *Associated Press* (January 2)

**16**

*THE GOVERNMENT [THAT THE FRAMERS OF THE CONSTITUTION] DEVISED REQUIRED SEVERAL AMENDMENTS, A CIVIL WAR, AND MOMENTOUS SOCIAL TRANSFORMATION TO ATTAIN THE SYSTEM OF CONSTITUTIONAL GOVERNMENT, AND ITS RESPECT FOR THE INDIVIDUAL FREEDOMS AND HUMAN RIGHTS, THAT WE HOLD AS FUNDAMENTAL TODAY.*
*THURGOOD MARSHALL*

## MARSHALL PLAN

After **WORLD WAR II**, Europe was devastated and urgently needed an organized plan for reconstruction and economic and technical aid. The Marshall Plan was initiated in 1947 to meet this need.

The originator of the plan, U.S. Secretary of State George C. Marshall, introduced it in a speech at Harvard University on June 5, 1947. He pointed out two basic reasons for providing aid to Europe: the United States sought the reestablishment of the European countries as independent nations capable of conducting valuable trade with the United States; and the threat of a Communist takeover was more prevalent in countries that were suffering economic depression.

In 1947 a preliminary conference to discuss the terms of the program convened in Paris. The Soviet Union was invited to attend but subsequently withdrew from the program, as did other Soviet countries.

Sixteen European countries eventually participated, and, in July 1947, the Committee for European Economic Cooperation was established to allow representatives from member countries to draft a report that listed their requirements for food, supplies, and technical assistance for a four-year period.

The Committee for European Economic Cooperation subsequently became the Organization of European Economic Cooperation, an expanded and permanent organization that was responsible for submitting petitions for aid. In 1948, Congress passed the Economic Cooperation Act (62 Stat. 137), establishing funds for the Marshall Plan to be administered under the Economic Cooperation Administration, which was directed by Paul G. Hoffman.

Between 1948 and 1952, the sixteen-member countries received more than $13 billion dollars in aid under the Marshall Plan. The plan was generally regarded as a success that led to industrial and agricultural production, while stifling the Communist movement. The plan was not without its critics, however, and many Europeans believed the **COLD WAR** hostilities between the Soviet nations and the free world were aggravated by it.

**17**

## ◊ MARSHALL, THURGOOD

Thurgood Marshall, the first African American to serve on the U.S. Supreme Court, saw law as a catalyst for social change. For nearly 60 years, as both a lawyer and a jurist, Marshall worked to dismantle the system of **SEGREGATION** and improve the legal and social position of minorities.

Marshall was born July 2, 1908, in Baltimore, the son of a Pullman porter and a schoolteacher. He was a graduate of Lincoln University, a small, all-black college in Pennsylvania, and Howard University Law School in Washington, D.C. At Howard, Marshall excelled under the guidance of Vice Dean **CHARLES HAMILTON HOUSTON**, the first African American to win a case before the U.S. Supreme Court. Houston encouraged his students to become not just lawyers but "social engineers" who could use the legal system to improve society. Marshall graduated first in his law class in 1933.

Marshall's attendance at predominantly black Howard University illustrates the barriers faced by African Americans during the early twentieth century. Although Marshall wished to attend law school at the University of Maryland (a public institution in his home town of Baltimore), he was prohibited by law from doing so because of his race. This injustice helped set Marshall on a course of opposing all forms of official segregation that denied equal opportunities to African Americans.

After law school, Marshall set up a practice in Baltimore, representing indigent clients in civil rights cases. In 1936, his mentor Houston offered him a position with the National Association for the Advancement of Colored People (**NAACP**),





and in 1940, Marshall became director of the **NAACP LEGAL DEFENSE AND EDUCATIONAL FUND**, a position he held until 1961. Determined to eliminate segregation, Marshall coordinated a nationwide campaign to integrate higher education. He filed several successful lawsuits against public graduate and professional schools that refused to accept African-American students. These suits paved the way for similar cases at the high school and elementary school levels. Marshall also journeyed throughout the deep South, traveling fifty thousand miles a year to fight **JIM CROW LAWS** (a series of laws that provided for racial segregation in the South) and to represent criminal defendants.

Marshall argued 32 cases before the U.S. Supreme Court and won 29 of them. No doubt his most famous and far-reaching triumph before the High Court was **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). In that case, the father of African-American student Linda Brown sued the school board of Topeka, Kansas, over its segregation policy. Brown was required by law to attend an all African-American school several blocks from her home even though an all white public school was located in her own neighborhood. Under Kansas law, cities of more than 15,000 people, such as Topeka, could choose to operate segregated schools. Marshall argued that these segregated schools, defended by officials as "separate but equal," were unconstitutional.

**18**

The **SEPARATE-BUT-EQUAL** doctrine originated in **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), a case allowing segregated public accommodations for whites

*Thurgood Marshall.*
LIBRARY OF CONGRESS

and blacks. In a plainspoken argument, Marshall dismissed as fallacy the notion that segregated schools offered the same educational experiences to black and white students. Sociological and psychological studies demonstrated that black children were in fact harmed by the policy of school segregation. The students' self-esteem was damaged and their future diminished when they were forced to accept inadequate facilities, equipment, and educational opportunities. Marshall argued that the only purpose segregation served was to perpetuate the myth of African-Americans' inferiority. A unanimous Court agreed and struck down the separate-but-equal doctrine, a

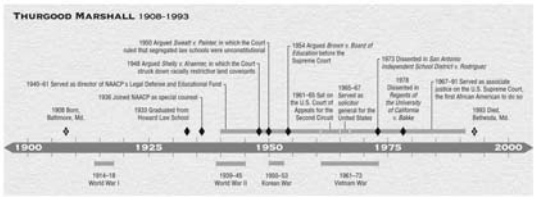






# THE FUTURE OF SOCIAL SECURITY

**19**

The payment of **OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE** (OASDI) benefits has been a cornerstone of U.S. social welfare policy since the establishment of the **SOCIAL SECURITY ADMINISTRATION** in 1935. At the same time, the long-term financial stability of OASDI has been a constant worry. In the early years of the twenty-first century, concerns about Social Security mounted as policy makers assessed the impact of the retirement of the "Baby Boom" generation. Many younger people raised the issue of "generation equity." They express doubt that Social Security benefits will be available when they retire, and anger that they will be forced to pay, through payroll taxes, for the baby boomers' retirement benefits.

Reform of the Social Security system has always been a political hot potato. Retirees and those approaching retirement form a strong **LOBBYING** force, and they zealously protect their benefits. Employers and employees are equally vocal in their opposition to higher payroll taxes to fund OASDI. Thus, changes in Social Security required bipartisan support, which materialized in the face of an impending Social Security crisis. The 1982–83 National Commission on Social Security Reform successfully secured from Congress the short-term financing of OASDI. As a result, Congress passed a series of laws meant to accumulate surpluses as a hedge against future burdens. The Social Security surplus is the amount by which revenue from the federal payroll tax exceeds the amount of Social Security benefits paid out.

IN FOCUS

Shortly after these new laws went into effect, Social Security began running a surplus. Surplus Social Security revenue can be used to fund other government programs and to help retire the national debt. During the favorable economic climate of the late 1990s, Congress began to use the surplus to pay down the federal debt, hoping to better position the government to meet its obligations to future retirees. And, in 2000, the federal government generated enough revenue so that the entire Social Security surplus was available for paying off debt.

The state of Social Security became a major campaign issue in the 2000 elections, with both Republicans and Democrats attempting to appear as though they were guardians of Social Security assets. Candidates from both parties promised to create a "lockbox," meaning that the Social Security surplus would be spent entirely on debt retirement. With the advent of fiscally lean years in the early 2000s, the lockbox approach was largely disregarded by politicians who advanced other ideas about what to do with Social Security surpluses. These ideas included using the surplus to help offset decreases in revenues brought about by tax cuts and using the surplus to fund new or expanded spending initiatives.

Analysts argue that the real issue often is clouded. It is not how to spend the surplus now, but how to maintain the long-term solvency of the Social Security trust fund. Planners estimate that the income from the trust fund will exceed expenses each year until 2020. The trust fund balances will then start to decline as investments are redeemed to meet the increased expenses from a swelling retired workforce. Although it is estimated that 75 percent of the costs would continue to be met from current payroll and income taxes, in the absence of any changes, full benefits could not be paid beginning in 2030.

In its 1996 report, the Social Security Administration's Advisory Council looked at various long-term financing options for OASDI. The council could not reach consensus on a specific long-term plan, but it did suggest several types of financing that represent a marked departure from previous efforts to fund Social Security. The council noted that past efforts have generally featured cutting benefits and raising tax rates on a "pay-as-you-go" basis. The council agreed that this approach must be changed and offered three ways of restoring financial solvency.

One approach, called Maintenance of Benefits (MB), calls for an increase in income taxes on OASDI benefits, a redirection of some revenue from other trust funds, and, most importantly, the adoption of a plan allowing the federal government to invest a portion of the trust fund assets directly in common stocks. Rates of returns on stocks have historically exceeded those on federal government bonds, where all Social Security

A person who continues to work past the retirement age may lose some benefits because Social Security is designed to replace lost earnings. If earnings from employment do not exceed the amount specified by law, the person receives the full benefits. If earnings are greater than that amount, one dollar of benefit is withheld for every two dollars in wages earned above the exempt amount. Once a person reaches age 70, however, he does not have to report earnings to the SSA, and the benefit is not reduced.

**Survivors' Benefits** Survivors' benefits are paid to family members when a worker dies. Survivors can receive benefits if the deceased worker was employed and contributed to Social





momentous victory for Marshall, affecting public schools in twenty-one states.

Marshall was appointed to the U.S. Court of Appeals for the Second Circuit in 1961, and served there until 1965 when he was named **SOLICITOR GENERAL** for the United States. He was appointed to the U.S. Supreme Court in 1967 by President **LYNDON B. JOHNSON** and served as an associate justice for 24 years.

While on the Court, Marshall was known more for his impassioned dissents than for his majority opinions. In particular, as a staunch opponent of **CAPITAL PUNISHMENT**, he regularly voiced his disagreement with the majority in death penalty cases. He was also a firm backer of **AFFIRMATIVE ACTION** and contributed one of his most famous dissents in **REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE**, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In that case, Marshall criticized the high court's ruling that a public medical school's policy of reserving 16 of 100 spots for minority students was unconstitutional. Marshall also dissented in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), disagreeing with the majority view that a Texas property tax system used to fund public education was acceptable, even though it allowed wealthier districts to provide a better school system for students in those districts than less wealthy districts could provide. Marshall objected strongly to the property tax arrangement, claiming that it deprived poor children of an equal education.

Marshall wrote the majority opinion in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968), in which the Court declared that a shopping center was a public forum from which picketers could not be barred by private owners.

Marshall retired from the Court in 1991, but continued his criticism of government policies that were detrimental to African Americans or other disenfranchised groups.

Marshall died on January 24, 1993, in Bethesda, Maryland. Upon Marshall's death, nearly 20,000 mourners filed by his casket during the 12 hours it lay in state in the Great Hall of the U.S. Supreme Court.

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CROSS-REFERENCES

**10**

*Civil Rights Movement; Integration; School Desegregation.*

## MARTIAL LAW

*The exercise of government and control by military authorities over the civilian population of a designated territory.*

**11**

Martial law is an extreme and rare measure used to control society during war or periods of civil unrest or chaos. According to the Supreme Court, the term *martial law* carries no precise meaning (*Duncan v. Kahanamoku*, 327 U.S. 304, 66 S. Ct. 606, 90 L. Ed. 688 [1946]). However, most declarations of martial law have some common features. Generally, the institution of martial law contemplates some use of military force. To a varying extent, depending on the martial law order, government military personnel have the authority to make and enforce civil and criminal laws. Certain civil liberties may be suspended, such as the right to be free from unreasonable **SEARCHES AND SEIZURES**, **FREEDOM OF ASSOCIATION**, and freedom of movement. And the writ of **HABEAS CORPUS** may be suspended (this writ allows persons who are unlawfully imprisoned to gain freedom through a court proceeding).

In the United States, martial law has been instituted on the national level only once, during the Civil War, and on a regional level only once, during **WORLD WAR II**. Otherwise, it has been limited to the states. Uprisings, political protests, labor strikes, and riots have, at various times, caused several state governors to declare some measure of martial law.

Martial law on the national level may be declared by Congress or the president. Under

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2ND EDITION

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**General Index**

# PREFACE

The U.S. legal system is admired around the world for the freedoms it allows the individual and the fairness with which it attempts to treat all persons. On the surface, it may seem simple, yet those who have delved into it know that this system of federal and state constitutions, statutes, regulations, and common-law decisions is elaborate and complex. It derives from the English common law, but includes principles older than England, along with some principles from other lands. The U.S. legal system, like many others, has a language all its own, but too often it is an unfamiliar language: many concepts are still phrased in Latin. The second edition of *West's Encyclopedia of American Law (WEAL)* explains legal terms and concepts in everyday language, however. It covers a wide variety of persons, entities, and events that have shaped the U.S. legal system and influenced public perceptions of it.

## MAIN FEATURES OF THIS SET

### Entries

This encyclopedia contains nearly 5,000 entries devoted to terms, concepts, events, movements, cases, and persons significant to U.S. law. Entries on legal terms contain a definition of the term, followed by explanatory text if necessary. Entries are arranged alphabetically in standard encyclopedia format for ease of use. A wide variety of additional features, listed later in this preface, provide interesting background and supplemental information.

**Definitions** Every entry on a legal term is followed by a definition, which appears at the beginning of the entry and is italicized. The Dictionary and Indexes volume includes a glossary containing all the definitions from *WEAL*.

**Further Readings** To facilitate further research, a list of Further Readings is included at the end of a majority of the main entries.

**Cross-References** *WEAL* provides two types of cross-references, within and following entries. Within the entries, terms are set in small capital letters—for example, LIEN—to indicate that they have their own entry in the encyclopedia. At the end of the entries, related entries the reader may wish to explore are listed alphabetically by title.

Blind cross-reference entries are also included to direct the user to other entries throughout the set.

### In Focus Essays

In Focus essays accompany related entries and provide additional facts, details, and arguments on particularly interesting, important, or controversial issues raised by those entries. The subjects covered include hotly contested issues, such as abortion, capital punishment, and gay rights; detailed processes, such as the Food and Drug Administration's approval process for new drugs; and important historical or social issues, such as debates over the formation of the U.S. Constitution.

### Sidebars

Sidebars provide brief highlights of some interesting facet of accompanying entries. They

complement regular entries and In Focus essays by adding informative details. Sidebar topics include the Million Man March and the branches of the U.S. armed services. Sidebars appear at the top of a text page and are set in a box.

### Biographies

*WEAL* profiles a wide variety of interesting and influential people—including lawyers, judges, government and civic leaders, and historical and modern figures—who have played a part in creating or shaping U.S. law. Each biography includes a timeline, which shows important moments in the subject's life as well as important historical events of the period. Biographies appear alphabetically by the subject's last name.

## ADDITIONAL FEATURES OF THIS SET

**Enhancements** Throughout *WEAL*, readers will find a broad array of photographs, charts, graphs, manuscripts, legal forms, and other visual aids enhancing the ideas presented in the text.

**Indexes** *WEAL* features a cases index and a cumulative index in a separate volume.

### Appendixes

Three appendix volumes are included with *WEAL*, containing hundreds of pages of documents, laws, manuscripts, and forms fundamental to and characteristic of U.S. law.

### Milestone Cases in the Law

A special Appendix volume entitled Milestones in the Law, allows readers to take a close look at landmark cases in U.S. law. Readers can explore the reasoning of the judges and the arguments of the attorneys that produced major decisions on important legal and social issues. Included in each Milestone are the opinions of the lower courts; the briefs presented by the parties to the U.S. Supreme Court; and the decision of the Supreme Court, including the majority opinion and all concurring and dissenting opinions for each case.

### Primary Documents

There is also an Appendix volume containing more than 60 primary documents, such as the English Bill of Rights, Martin Luther King Jr.'s Letter from Brimingham Jail, and several presidential speeches.

### Citations

Wherever possible, *WEAL* entries include citations for cases and statutes mentioned in the text. These allow readers wishing to do additional research to find the opinions and statutes cited. Two sample citations, with explanations of common citation terms, can be seen below and opposite.

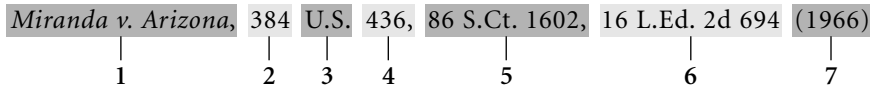


1. *Case title.* The title of the case is set in i and indicates the names of the parties. The suit in this sample citation was between Ernesto A. Miranda and the state of Arizona.
2. *Reporter volume number.* The number preceding the reporter name indicates the reporter volume containing the case. (The volume number appears on the spine of the reporter, along with the reporter name).
3. *Reporter name.* The reporter name is abbreviated. The suit in the sample citation is from the reporter, or series of books, called *U.S. Reports,* which contains cases from the U.S. Supreme Court. (Numerous reporters publish cases from the federal and state courts.)
4. *Reporter page.* The number following the reporter name indicates the reporter page on which the case begins.
5. *Additional reporter page.* Many cases may be found in more than one reporter. The suit in the sample citation also appears in volume 86 of the *Supreme Court Reporter*, beginning on page 1602.
6. *Additional reporter citation.* The suit in the sample citation is also reported in volume 16 of the *Lawyer's Edition*, second series, beginning on page 694.
7. *Year of decision.* The year the court issued its decision in the case appears in parentheses at the end of the cite.

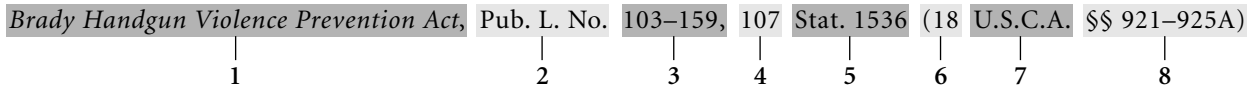


1. *Statute title.*
2. *Public law number.* In the sample citation, the number 103 indicates this law was passed by the 103d Congress, and the number 159 indicates it was the 159th law passed by that Congress.
3. *Reporter volume number.* The number preceding the reporter abbreviation indicates the reporter volume containing the statute.
4. *Reporter name.* The reporter name is abbreviated. The statute in the sample citation is from *Statutes at Large.*
5. *Reporter page.* The number following the reporter abbreviation indicates the reporter page on which the statute begins.
6. *Title number.* Federal laws are divided into major sections with specific titles. The number preceding a reference to the U.S. Code stands for the section called Crimes and Criminal Procedure.
7. *Additional reporter.* The statute in the sample citation may also be found in the *U.S. Code Annotated.*
8. *Section numbers.* The section numbers following a reference to the *U.S. Code Annotated* indicate where the statute appears in that reporter.

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# B (cont.)

## ♦ BEAN, ROY

Roy Bean achieved prominence for his unconventional law enforcement procedures. His methods for enforcing the law were questionable and unorthodox.

Bean was born circa 1825, in Mason County, Kentucky. His career included many undertakings, not always legal. In 1847, he was in charge of a trading post in Mexico. Accused of cattle rustling in 1849, he was forced back to the United States. He was a member of a group of vigilantes who fought for the Confederacy during the Civil War. Bean was a saloonkeeper and a gambler in the postwar years. In 1882 Bean settled in Texas.

He changed the name of the Texas camp where he lived from Vinegaroon to Langtry and established himself as JUSTICE OF THE PEACE. His saloon was the courthouse where Bean presided as judge, using a law book, a gun, his sense of humor, and practical thinking as his guides to making judicial decisions.

Bean died March 16, 1903, in Langtry.

## ♦ BEARD, CHARLES AUSTIN

Few academicians achieve the public recognition and professional respect accorded to historian Charles Austin Beard. His polemic *An Economic Interpretation of the Constitution of the United States* stirred debate among fellow scholars and the U.S. public by contradicting the popular understanding of how and why the United States was founded. A brilliant, original thinker, Beard achieved a unique prominence among twentieth-century historians and political scientists.

Beard was born to well-to-do parents in Knightstown, Indiana, on November 27, 1874. After graduating from Indiana's DePauw University in 1898, he sailed to England to attend

"THAT'S MY RULIN'."
—ROY BEAN

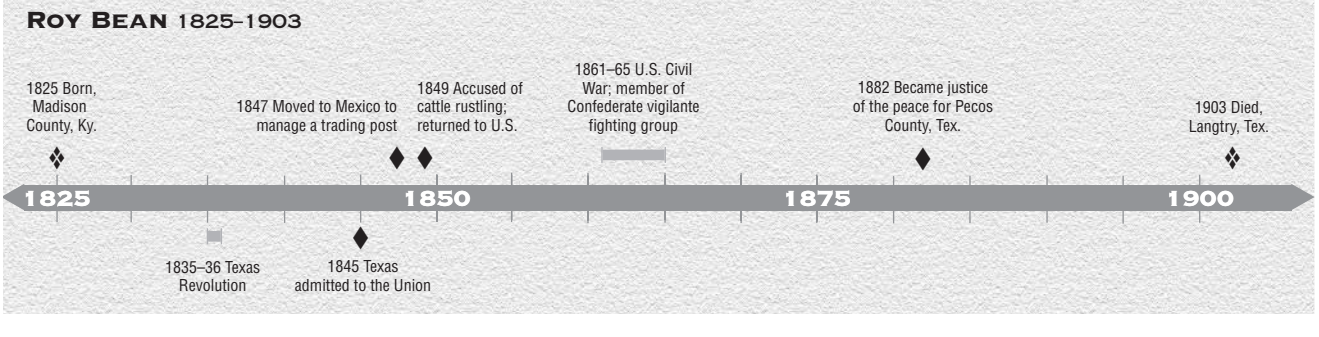

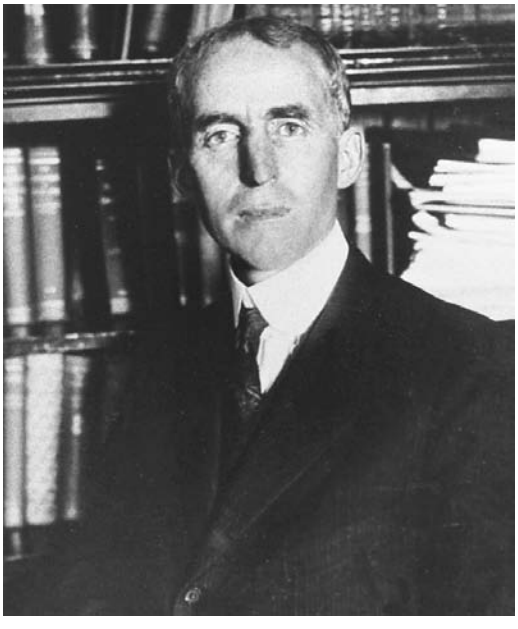

*Charles Austin Beard.*
LIBRARY OF CONGRESS

the University of Oxford. While at Oxford, he helped establish Ruskin Hall, a college for British working men that represented to Beard the liberation of the English masses from upper-class domination. In Beard's mind, Ruskin Hall was a symbol and precursor of the true political democracy that would be ushered in by the industrial revolution.

In 1900 Beard returned briefly to the United States to marry Mary Ritter. An intellectual in her own right, Mary Ritter Beard became an invaluable critic and collaborator in the more than fifty books produced during Beard's prolific career. After his marriage, Beard resumed his studies in England, then returned permanently to the United States. He earned his doctor's degree from New York City's Columbia University and in 1904 accepted a teaching position in political science at Columbia.

In 1913, Beard published *An Economic Interpretation of the Constitution of the United States.* The book created a mild sensation because it suggested that the United States was not yet a true democracy. Even more disturbing to some U.S. citizens was Beard's argument that the U.S. Constitution was designed primarily to protect the property rights of the wealthy capitalists attending the Constitutional Convention. He insisted that self-interest, not democratic principles, motivated the Founding Fathers. To Beard, the Constitution was a tribute to the power of class, not democracy.

Although several U.S. politicians criticized Beard's unorthodox view of U.S. history, many of his colleagues praised his innovative approach. They understood how the private economic interests of the colonial ruling class could have had a far-reaching effect on the nascent U.S. government.

In 1917 Beard protested the firing of several Columbia University faculty members by resigning his own position. Beard had been outraged when the university dismissed his colleagues for their refusal to support the United States' involvement in **WORLD WAR I.** In 1919 he helped found the New School for Social Research in New York City.

In 1927 Beard produced another remarkable tome, *The Rise of American Civilization.* Coauthored by his wife, it provided an overview of U.S. history with further insights into the government's origins. This sprawling, two-volume set was followed by *America in Midpassage,* in 1939, and *The American Spirit,* in 1942.

During the early 1930s, Beard wrote extensively about the nature of historical knowledge. He was particularly interested in historians' personal biases and the effect of those biases on the presentation of historical facts.

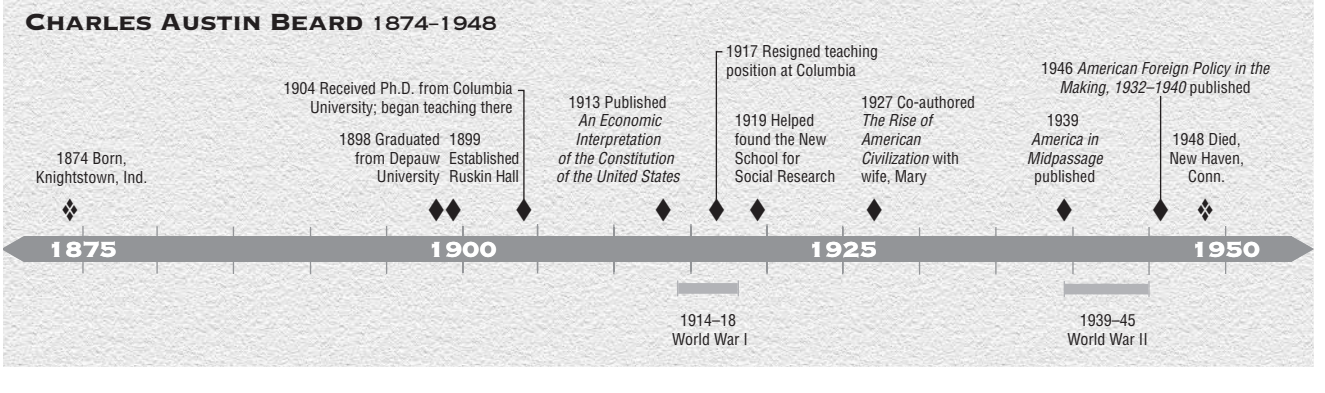

Although Beard was closely associated with the U.S. progressive movement and social reforms, he disagreed with several aspects of FRANKLIN D. ROOSEVELT'S NEW DEAL programs. In 1934 he began an acrimonious, decade-long campaign against Roosevelt's foreign policy. In *American Foreign Policy in the Making, 1932–1940* (1946) and *President Roosevelt and the Coming of War* (1948), Beard maintained that the United States had backed Japan into a corner and had forced the country into a war. His extreme isolationist views damaged his professional reputation to some extent.

Beard died in 1948, at the age of seventy-three. He is remembered as an accomplished historian who influenced the way U.S. citizens view their own history.

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CROSS-REFERENCES

Constitution of the United States; Constitution of the United States "Constitutional Convention of 1787" (Sidebar); Constitution of the United States "Federalists vs. Anti-Federalists" (In Focus).

## BEARER

*One who is the holder or possessor of an instrument that is negotiable—for example, a check, a draft, or a note—and upon which a specific payee is not designated.*

A negotiable instrument that is payable to "bearer" or to "cash" or to "the order of cash," that is, not naming a payee, is a bearer instrument, and is called "bearer" paper.

## BEASLEY, MERCER

Mercer Beasley was an eminent New Jersey jurist. He was born March 27, 1815, in Philadelphia, Pennsylvania, to Frederick and Maria Beasley. He studied at the College of New Jersey (now Princeton) but only for a year, after which he studied the law. He was admitted to the bar in 1838 and established a successful legal practice in Trenton, New Jersey. He became active in local politics, first as a Whig and later as a Democrat, before pursuing a career in the judicial system.

On March 8, 1864, the governor appointed Beasley to a seven-year term as the New Jersey high court's chief justice. Four succeeding governors retained him, allowing Beasley to serve on the bench for almost 33 years. He gained prominence for his equitable decisions, particularly those concerning political dissent.

Beasley died from pneumonia on February 19, 1897, in Trenton.

## BECCARIA, CESARE BONESANO, MARCHESE DI

Cesare Bonesano Beccaria was an expert in law and economics and put forth new principles in both fields which were widely accepted throughout Europe.

Beccaria was born March 15, 1738. He taught law and economics in Milan. He vehemently opposed CAPITAL PUNISHMENT and cruel treatment of prisoners. His economic theories concerned wages and labor and influenced such eminent economists as Adam Smith and Thomas Robert Malthus.

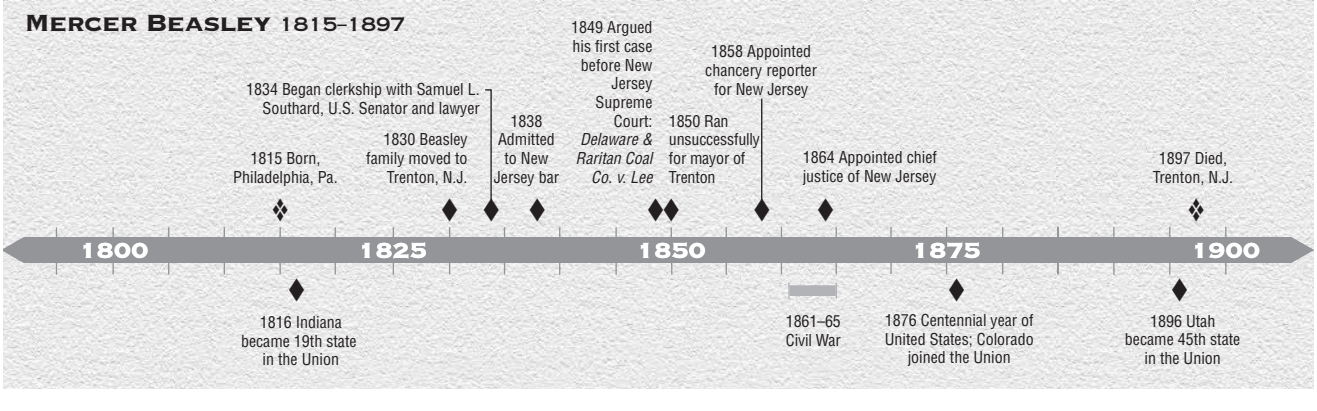

In 1771 Beccaria served as councilor of state and magistrate; in 1790, he was a member of a committee that advocated reform of criminal and CIVIL LAW in Lombardy.

Beccaria's ideas were published in 1764 in his *Essay on Crimes and Punishments.* The book was well received throughout Europe and greatly influenced changes in European economic and legal systems.

He died November 8, 1794, in Milan.

## BECKET, SAINT THOMAS

Saint Thomas Becket was chancellor of England and archbishop of Canterbury during the reign of HENRY II and was martyred following a bitter battle with the monarchy over royal control of church law.

Becket was born around 1118 in London, England, the son of a prosperous London merchant and his wife who were of Norman ancestry. He was first educated at a monastery in Merton, just outside London, and then in London grammar schools. In his late teens, he was sent to Paris for further schooling, including the study of logic, rhetoric, and philosophy. At age twenty-one, after his mother had died and his father had lost his fortune, Becket returned to London and became a city clerk to three sheriffs. Three years later, in about 1143, his father introduced him to Theobald, archbishop of Canterbury. Becket soon joined Theobald's household, becoming a clerk and later a close adviser to the archbishop. In about 1150, Theobald sent Becket to Italy and France to study civil and CANON LAW. Upon his return to Theobald's court in 1152, Becket was able to secure the papal letters that prevented the English king Stephen from crowning his son to be successor to the throne. Becket's intervention permitted Henry II, in 1154, to become the king of England.

In the same year, Theobald appointed Becket archdeacon of Canterbury. Less than three months later, on Theobald's recommendation and in gratitude for Becket's role in helping him to gain the throne, Henry II named Becket chancellor of England.

Becket became the king's most trusted adviser and a constant and devoted companion. He was an effective chancellor, leading troops into war, repairing castles, conducting foreign policy, and negotiating a marriage between Prince Henry, son of the king, and the daughter of King Louis VII of France. Becket lived luxuriously, holding extravagant receptions and dressing in splendid clothes. Theobald disapproved of his protégé's lavish lifestyle. To Theobald, it was inappropriate for Becket, who still remained archdeacon while serving as chancellor, to surround himself with worldly things. Becket ignored the concerns of his mentor and even refused to visit Theobald on his deathbed.

After Theobald died in 1161, Henry appointed Becket archbishop of Canterbury in 1162. Becket, aware of the influence he now wielded as a religious leader, promptly abandoned the trappings of his previous life as chancellor. He devoted himself to the study of canon law and to the spiritual obligations of his new role. He also became involved in a series of clashes between the church and the state that put him at odds with King Henry, his closest friend and confidant.

In late 1163 Henry decided to abolish certain privileges enjoyed by the clergy, which exempted them, when they were accused of crimes, from the jurisdiction of the civil courts. Criminous clerks, as they were known, were instead allowed

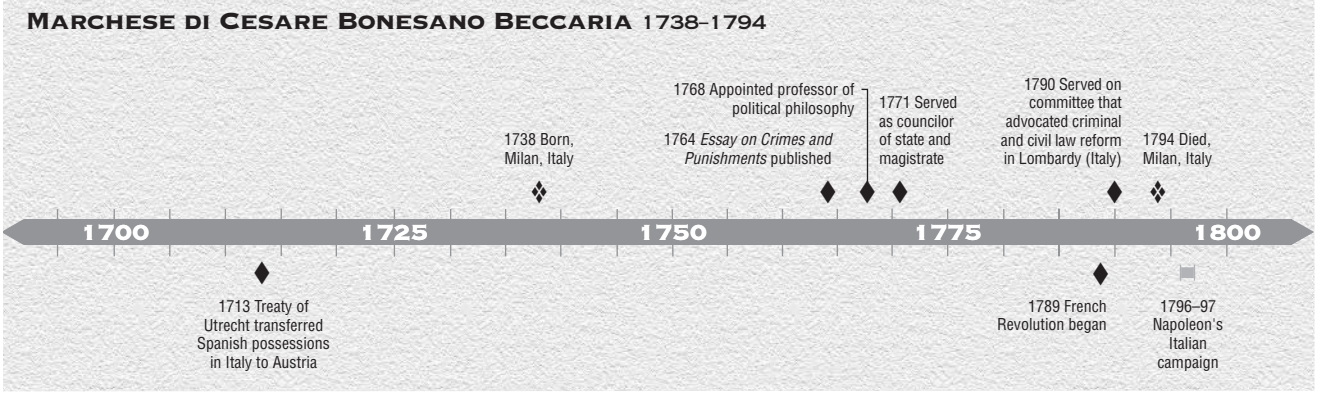

to stand trial before a bishop in the ecclesiastical (church) courts, which usually resulted in much milder punishments. Under Henry's reforms, an accused clerk would be required to appear first in a civil court to answer the charges. If the clerk denied the offense and asked to be heard in an ecclesiastical court, the clerk would then appear before a bishop. If convicted by the ecclesiastical court, the clerk would return to the civil court to face charges as a layperson.

Becket vehemently opposed Henry's measures. He maintained that they subjected the clergy to be punished twice for the same offense: the clergy, he argued, would lose their clerical status in the ecclesiastical courts and would also face secular penalties imposed by the civil courts. However, under intense pressure from the monarchy, Becket eventually relented and agreed verbally to Henry's proposals.

In January 1164 Henry summoned a convocation at Clarendon, where he planned to put his reforms into a document known as the CONSTITUTIONS OF CLARENDON, and to secure Becket's signature. But at the last minute, Becket repudiated his previous verbal agreement to the measures and refused to sign the documents, on the grounds that they violated canon law. Becket's defiance incurred the wrath of the king, who denounced him as a traitor to the throne. Henry then threatened to imprison Becket or at least force him to resign as archbishop. Becket, fearing for his safety, fled to France in late 1164 and remained in exile at Flanders for the next six years. In France, Becket struck back at Henry by excommunicating several of his councilors and threatening to excommunicate the king as well.

In 1169 Henry and Becket attempted a reconciliation, but Henry soon incensed Becket by having Roger, the archbishop of York and a rival of Becket's, crown Prince Henry as his successor. Such coronations were traditionally undertaken by the archbishop of Canterbury. Becket retaliated by suspending Roger and the other bishops who participated in the coronation.

In late 1170 Henry and Becket briefly resolved their differences and Becket returned to Canterbury amid great fanfare. Almost immediately, however, officers of the king demanded that Becket absolve the suspended bishops involved in Prince Henry's coronation. Becket steadfastly refused, maintaining that only the pope had the authority to give absolution.

The king, by now exasperated with Becket, is said to have uttered, in a fit of anger, "Will nobody rid me of this turbulent priest?" Four of his knights took his plea literally and on December 29, 1170, went to Canterbury, where they confronted Becket in the cathedral and again demanded that he absolve the suspended bishops. Becket refused. The knights beat him over the head repeatedly with their swords until he died.

Word of Becket's murder spread quickly, and his tomb soon became a shrine visited by thousands of pilgrims. Becket, in his early fifties at the time of his death, was canonized by Pope Alexander II in 1173. Henry II did penance at Canterbury and was absolved of the murder. The four assassins did fourteen years' service in the Holy Land as penance for the crime. A later English king, Henry III, had Becket's remains placed in a more elaborate tomb at Canterbury, which remained a popular place of pilgrimage. The religious journeys to Becket's tomb became the basis for Chaucer's masterpiece *Canterbury Tales,* which was written almost two hundred years after Becket's death.

"IF IT BE A QUESTION OF TEMPORAL MATTERS, WE SHOULD RATHER FEAR THE LOSS OF SOULS THAN OF TEMPORALITIES."
—THOMAS BECKET

**SAINT THOMAS BECKET** c. 1118–1170

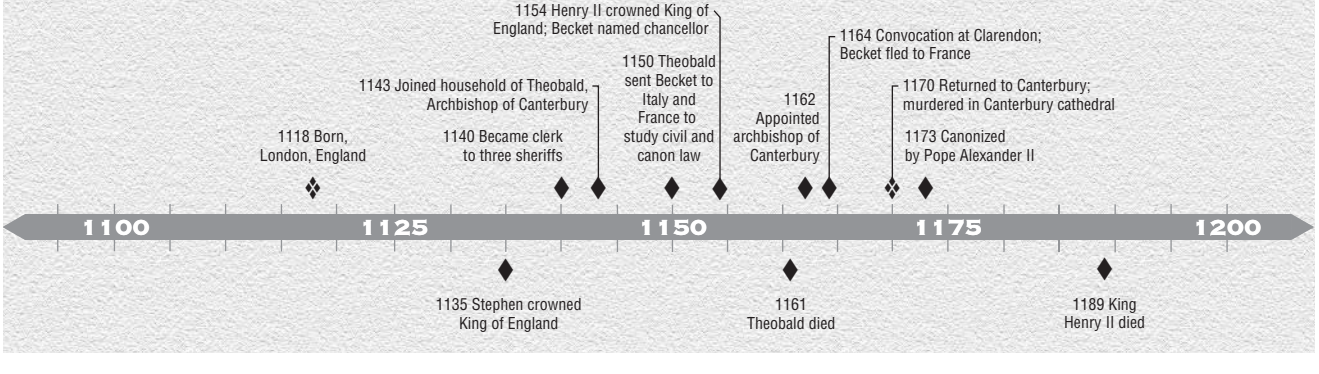

In 1538 Henry VIII became embroiled in his own struggles with the church and viewed the pilgrimages to Becket's tomb with increasing hostility. As a result, he had the shrine destroyed and reportedly had Becket's bones burned.

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## ♦ BEECHER, HENRY WARD

Henry Ward Beecher was one of the most prominent U.S. ministers of the nineteenth century as well as an active participant in various reform movements.

Beecher was born June 24, 1813, in Litchfield, Connecticut. He was the son of preacher Lyman Beecher and the brother of HARRIET BEECHER STOWE, author of *Uncle Tom's Cabin.* He studied at Amherst College and Lane Theological Seminary and served as a novice minister in Indiana before becoming minister at the Plymouth Congregational Church in Brooklyn, New York, in 1847. A liberal thinker, Beecher was in favor of such principles as women's suffrage, ABOLITION of SLAVERY, and acceptance of the theory of evolution and often lectured on these and other controversial ideas from the pulpit.

"IT USUALLY TAKES A HUNDRED YEARS TO MAKE A LAW, AND THEN, AFTER IT HAS DONE ITS WORK, IT USUALLY TAKES A HUNDRED YEARS TO GET RID OF IT."
—HENRY BEECHER

Beecher excelled as a speaker and in 1863 he went on a lecture tour throughout England and spoke in support of the Union position in the Civil War.

In 1875, Beecher, regarded as one of the United States' foremost preachers, was involved in a sensational trial that damaged his honor. Journalist Theodore Tilton accused the minister of committing ADULTERY with Mrs. Tilton. Beecher was expertly defended by his attorney, WILLIAM M. EVARTS, and, after a lengthy trial, the jury could not agree on a verdict. Beecher's church proclaimed him the victor and officially cleared him of the charges. In spite of the scandal, Beecher continued to be an influential force in the U.S. ministry until his death on March 8, 1887, in Brooklyn.

*Henry Ward Beecher.* LIBRARY OF CONGRESS

### BELIEF

*Mental reliance on or acceptance of a particular concept, which is arrived at by weighing external evidence, facts, and personal observation and experience.*

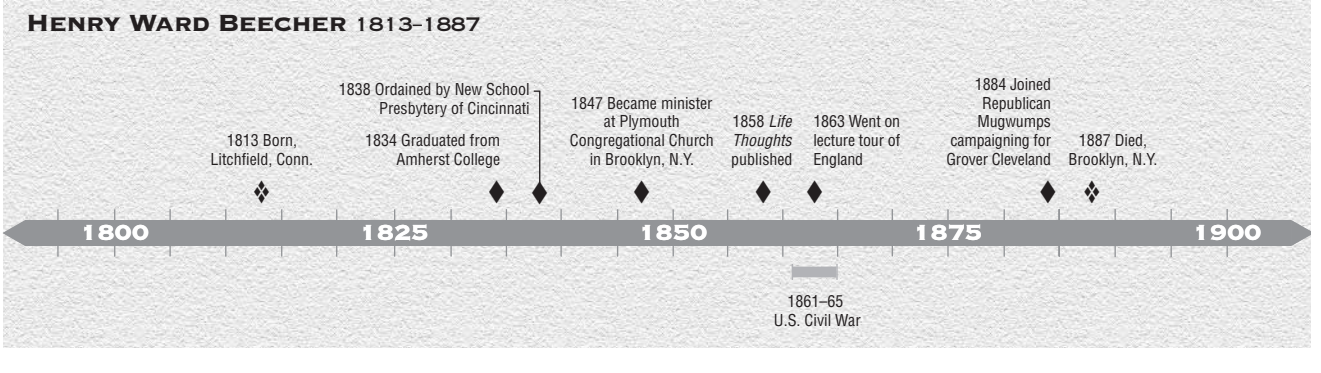

Belief is essentially a subjective feeling about the validity of an idea or set of facts. It is more than a mere suspicion and less than concrete knowledge. Unlike suspicion, which is based primarily on inner personal conviction, belief is founded upon assurance gained by empirical evidence and from other people. Positive knowledge, as contrasted with belief, is the clear perception of existing facts.

Belief has been defined as having faith in an idea or formulating a conclusion as the result of considering information. Information and belief is a legal term that is used to describe an allegation based upon GOOD FAITH rather than firsthand knowledge.

## ♦ BELL, DERRICK ALBERT, JR.

Derrick Albert Bell Jr. was the first tenured black law professor at Harvard Law School, a renegade CIVIL RIGHTS scholar and proponent and a prolific author of civil rights-related works, including the critically acclaimed books *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987) and *Faces at the Bottom of the Well: The Permanence of Racism* (1992).

Bell was born November 6, 1930, in Pittsburgh. The seeds of his views on racial injustice—and his response to racial bigotry and prejudice—were sown in the Great Depression. When he was five years old, he watched his mother, Ada Elizabeth Bell, demand that the family's landlord fix the rotted stairs behind their apartment. His mother finally told the landlord, who had ignored her requests for months, that she refused to pay the rent unless he fixed the stairs. A few days later, the landlord fixed their steps—and all the other broken steps on their road. Bell's interpretation of the event? "Good things happen when you push." Bell has also said that he carries his father's "dignified suspicion" of whites in hard-time Pittsburgh and his mother's homespun conception of a rights-based economy of self-respecting agitation.

The eldest of four children, Bell earned a bachelor of arts degree and an Air Force commission when he graduated from Duquesne University in 1952, and then he served in the KOREAN WAR. While in the Air Force, Bell made his first discreet push for racial equality: he complained to the commanding officer at a base in Louisiana about black soldiers having to sit in the back of the bus whenever they left base. After his military stint, he attended the University of Pittsburgh School of Law, lived at home, and kept the books for his father, Derrick Bell Sr., who ran a trash-collection business. Bell was elected as the associate editor-in-chief for the *Pittsburgh Law Review,* a prestigious position for a student to hold at any law school. He competed strenuously in law school and has admitted to being "a little obnoxious" in his attempt to succeed in an otherwise all-white class: in the yearbook, underneath his picture, the following description is given: "Knows everything and wants others to know he knows everything."

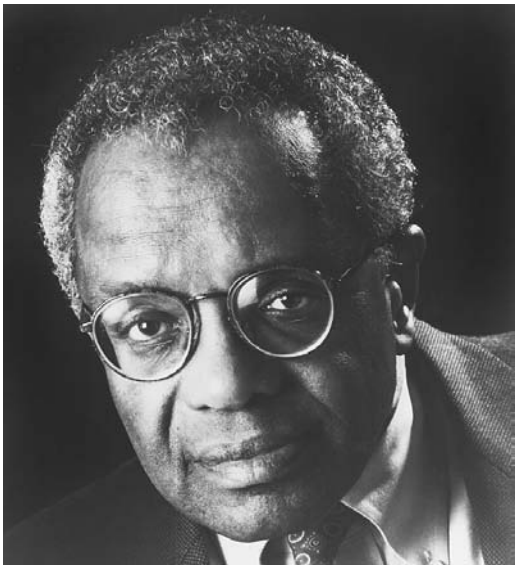

*Derrick A. Bell Jr.*
COURTESY OF DERRICK BELL

"CIVIL RIGHTS CAMPAIGNS AIMED AT CHANGING THE RULES WITHOUT AFFECTING THE UNDERLYING STATUS QUO."
—DERRICK BELL JR.

After graduating fourth in his class and being admitted to the District of Columbia bar in 1957, Bell applied to a top local law firm, which had asked the law school to send over its best students. "When I walked in, there were all these gasps," he said. "It was like a line of heart attacks down the hall." Bell did not get the job, but he did go on to become one of only three black attorneys at the U.S. DEPARTMENT OF JUSTICE after being assigned to the Civil Rights Division. His first professional act of defiance came in 1959, when he quit his job at the Justice Department in protest after being told to give up his membership in the National Association for the Advancement of Colored People (NAACP), which the Justice Department considered a conflict of interest.

Bell returned to Pittsburgh and although he had passed the Pennsylvania bar, he accepted the position of executive secretary of the NAACP's Pittsburgh branch. A year later he was recruited

by its then-director, THURGOOD MARSHALL, to join the staff of the NAACP LEGAL DEFENSE AND EDUCATIONAL FUND to champion the cause of racial equality. After starting as the executive secretary for the Pittsburgh branch of the Defense Fund, Bell was promoted to first assistant counsel at the New York City branch, where he remained from 1960 to 1966. While working as a civil rights lawyer, he confronted many difficult people and situations—from judges predisposed to ruling against his black clients to segregated public buildings. During this time, Bell spent a night in jail in Mississippi for refusing to leave a train station's "whites-only" waiting room. He oversaw 300 SCHOOL DESEGREGATION cases and played a central role in getting JAMES MEREDITH, a black student, admitted to the all-white University of Mississippi, despite the resistance of Governor Ross Barnett. "Down South, I learned a lot.... It just seems that unless something's pushed, unless you litigate or protest, nothing happens," Bell said.

In 1966 Bell was admitted to the New York bar. From 1966 to 1968, he served as deputy director of the U.S. Department of Health, Education, and Welfare's Office for Civil Rights. In 1968 he moved to California and became the executive director of the Western Center of Law and Poverty, at the University of Southern California (USC). He passed the California bar in 1969 and taught law as an adjunct professor at USC's law center.

After the 1968 assassination of Dr. MARTIN LUTHER KING JR. and inner-city riots, Bell received a number of offers to teach law, including one from Harvard. He accepted Harvard's offer and lectured there from 1969 to 1971, after telling the school that he was willing to be the first black there but not the last. In 1971, after Bell challenged the school to vote on his tenure, he became the law school's first tenured African American faculty member, a position he kept until December 1980. During his tenure, he wrote several articles and the text, *Race, Racism and American Law* (1973; 4th ed. in 2000).

Bell left Harvard in January 1981 to become a professor and the dean of the University of Oregon School of Law. He resigned from there in 1985, when the school refused to back his decision to offer a tenure-line position to an Asian American woman. The same year, he published the foreword in the *Harvard Law Review*, "The Civil Rights Chronicles." In 1996 the Society of American Law Teachers named him Teacher of the Year.

After leaving Oregon, Bell spent a semester the next year as a visiting professor at Stanford Law School, where, once again, he found himself mired in controversy—this time for his revisionist teaching of CONSTITUTIONAL LAW. Some Stanford law students, who disliked Bell's interpretation of the Constitution, pressured the faculty into offering supplemental lectures from other professors. Shortly before the first of these additional lectures, Stanford's Black Law Student Association staged a protest, and the administration made a formal apology to Bell.

In the fall of 1986 Bell returned to Harvard to teach law. He soon was caught up—yet again—in racial discord. During commencement exercises in May of 1987, he staged a four-day round-the-clock sit-in inside his office to protest the denial of tenure to two members of the CRITICAL LEGAL STUDIES movement, a left-

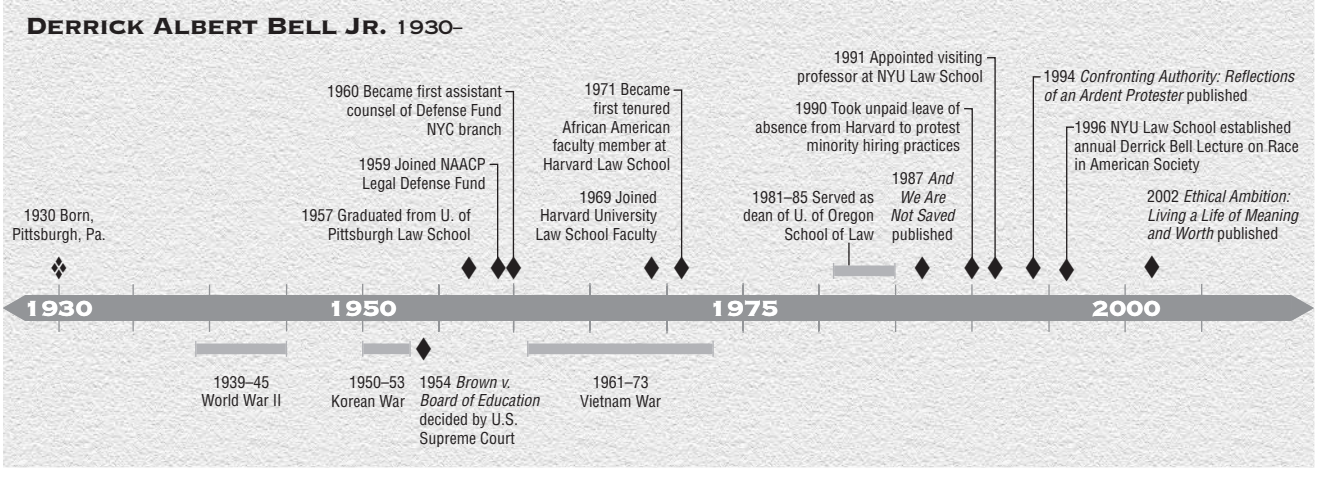

ist movement that challenges the basic tenets of LEGAL EDUCATION and scholarship. Also in 1987, Bell's alter ego, Geneva Crenshaw, who had first come to life in his Harvard Law School foreword, became the heroine in the pages of his book *And We Are Not Saved.* At the fulcrum of this collection of ten allegorical tales was the contention that racism is an immutable, permanent problem in U.S. society; Bell used Socratic dialogues between himself, as narrator, and Crenshaw, a black civil rights lawyer, to measure the "progress" of blacks since BROWN V. BOARD OF EDUCATION, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955). Further, in 1987, Bell spoke out in support of Justice Thurgood Marshall, whose minority report that year had criticized the Constitution and blacks' "token presence" in the bicentennial celebrations: "We need . . . more candor about why the *Constitution* was written the way it was and what still needs to be done to insure individual rights," said Bell.

The following year, Bell wrote *Civil Rights in Two Thousand Four: Where Will We Be?* Also in 1988, he wrote a scathing indictment of Harvard Law's AFFIRMATIVE ACTION performance; his article, published in 1989 by the *Michigan Law Review,* gave a fictional account of how Harvard came to hire more minorities only after the school's black faculty and the university president were killed in a terrorist bombing. Bell was privately criticized for having dared to paint a grisly portrait of the president of Harvard being blown to pieces. Robert C. Clark, a professor at Harvard and a future dean of the school, objected to Bell's many protests, saying, "This is a university, not a lunch counter in the Deep South." "In its own way, this law school is as much in need of reform as the lunch counters of the South, although in a far more subtle way," said Bell. Clark later apologized and spoke of sharing Bell's goal of building a diverse faculty.

Bell's dissension at Harvard came to a head in the spring of 1990, when Professor Regina Austin was denied tenure at the law school. In early April, students on 50 law campuses boycotted classes in a call for more minority teachers; later that month, Bell announced that he would step down—and forgo his $100,000 annual salary—until a black or other minority woman was considered for tenure. Of the school's sixty-five full-time professors at the time, five were white women and five were black men.

Bell's position was that qualified persons of color were not getting through an obsolete and irrelevant tenure-granting process, despite their qualifications and the valuable perspective they could provide law students. He said the traditional checklist for tenure—Was the candidate at the top of his or her law class? an editor on law review? someone with prestigious clerkships?—must be made more flexible when considering minority professors. "The traditional way of doing legal scholarship doesn't do justice to our experience," said Bell. "But minorities who are trying to blaze new trails in legal academia are meeting opposition and silencing." Comparing Bell to Rosa Parks—a black woman who refused to sit in the back of the bus in Montgomery, Alabama, in 1955—the Reverend JESSE JACKSON offered in May 1990 to mediate between the school and Bell. Harvard turned down the offer.

Many observers marveled at the public attention attracted by Bell's dramatic move at Harvard—among them, Richard H. Chused, professor of the Georgetown University Law Center, who in 1989 published an empirical study demonstrating the lack of diversity within law school faculties, and Nathaniel R. Jones, judge for the federal Ninth Circuit Court of Appeals and a part-time Harvard Law instructor. Not all of Bell's colleagues agreed with this form of protest, however. Professor Charles Fried, of Harvard Law, called Bell "off his head," and others termed him "counterproductive." Dean Clark continued to assert that Harvard should make appointments based on merits and not because of protests.

Bell's struggle with Harvard may not have been entirely for naught: in September 1992, Dean Clark acknowledged bitter divisions within the school and created a working group of faculty, students, and staff to improve the level of civility and community and to foster discussion of issues that had shaken the institution. And in June 1993, Harvard granted tenure to its seventh black law professor, Charles Ogletree.

In the early 2000s, Bell was continued to be a prolific writer. In addition to publishing other books such as *Confronting Authority: Reflections of An Ardent Protestor* (1996), *Constitutional Conflicts* (1997), *Afrolantica Legacies* (1998), and *Ethical Ambition: Living a Life of Meaning and Worth* (2002), he is also the author of a foreword in *Critical Race Feminism: A Reader.* Bell's articles have appeared in the *New York Times Magazine*, the *Boston Globe*, the *Los Angeles Times,* and

the *Christian Science Monitor* as well as *Essence*, and *Mother Jones* magazine.

Since 1991 Bell has been a visiting professor at New York University Law School. He has written commentary for a number of legal journals including those of Harvard, Yale, Columbia, and the University of Michigan. Bell continues to lecture around the country and to comment on legal issues on radio and television programs. He anticipated that New York University Press would publish his book critiquing the 1954 decision in *Brown v. Board of Education* in early 2004.

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CROSS-REFERENCES

Civil Rights; Discrimination; Legal Education.

"IF YOU BELIEVE IN EXALTING THE BILL OF RIGHTS . . . YOU HAVE TO BE FOR THE INDIVIDUAL, EVEN IF IT MEANS BEING AGAINST THE GOVERNMENT."
—GRIFFIN BELL

## ♦ BELL, GRIFFIN BOYETTE

Griffin Boyette Bell served as U.S. attorney general from 1977 to 1979 under President JIMMY CARTER and before that from 1961 to 1976 as a judge on the U.S. Court of Appeals for the Fifth Circuit. He is also nationally recognized for his skills as a corporate lawyer.

Bell was born October 31, 1918, in Americus, Georgia, only 12 miles from Plains, Georgia, the boyhood home of Carter. (In fact, Carter and Bell knew each other as children.) Bell served in the U.S. Army during WORLD WAR II. After the war, he studied at Mercer University Law School, graduating cum laude in 1948. He gained admission to the Georgia bar in 1947.

Bell practiced law in Savannah, Georgia, and Rome, Georgia, from 1947 to 1953, after which he moved to Atlanta to work in the prestigious firm of King and Spalding, where he eventually earned the position of managing partner. Bell also became involved in politics, serving from 1959 to 1961 as chief of staff to Governor S. Ernest Vandiver, of Georgia.

SCHOOL DESEGREGATION was a heated issue at the time. Governor Vandiver vigorously opposed desegregation, inventing the slogan "No, Not One" to symbolize his goal of keeping Georgia's schools completely segregated. Bell acted as a moderating influence on Vandiver, working behind the scenes to ease tensions with African American leaders. Eventually, Vandiver and the Georgia legislature agreed to conditional desegregation.

Bell served as cochairman of the Georgia election campaign in 1960 for JOHN F. KENNEDY. His success at that task won him an appointment as judge to the U.S. Court of Appeals for the Fifth Circuit in 1961, a position he held through 1976. During his 15 years on the bench, he took part in over 3,000 cases, 141 of them involving school desegregation.

Observers have categorized Bell's judicial decisions as moderate to conservative. He generally supported CIVIL RIGHTS advocates in employment and VOTING RIGHTS cases, but he opposed busing as a means to achieve school desegregation. At times, his decisions could have been described as liberal, as when he supported attempts to place more African Americans on juries and approved AFFIRMATIVE ACTION hiring for the Mississippi Highway Patrol. His most influential work was the initiation of a reform scheme that improved the efficiency of the court system.

Bell also served as cochairman of the Atlanta Commission on Crime and Delinquency from 1965 to 1966. He resigned from the appeals court in 1976, resumed private practice, and served as legal adviser to Carter during Carter's presidential campaign that year. Once elected as president, Carter named Bell attorney general, a move that disappointed those who had hoped Carter would appoint an African American or a woman to the office. Bell's nomination ran into trouble when it was revealed that he belonged to three clubs that were in effect racially segregated. Bell agreed to quit the clubs and was nominated to the post of attorney general on January 25, 1977.

Upon taking office, Bell defused some of the opposition to his appointment by naming African Americans to the posts of SOLICITOR

GENERAL and assistant attorney general. He also appointed women to other key positions in the department and to federal judgeships. Later, Bell proudly pointed out that 41 women were appointed and confirmed to the federal bench during the Carter administration, producing an eightfold increase in the number of federal judgeships occupied by women. As attorney general, Bell again championed court reform and also pushed for greater FEDERAL BUREAU OF INVESTIGATION involvement in pursuing white-collar, narcotics, and antitrust violations.

Bell resigned as attorney general in 1979 and resumed his work in private practice as senior partner at King and Spalding. Bell has been called on frequently by Fortune 500 corporations for advice on difficult legal issues. He led independent investigations of Exxon Corporation's actions following a 1989 oil spill in Prince William Sound, off the coast of Alaska, and, in 1992, Dow Corning Corporation's handling of lawsuits resulting from its silicone breast implants. In the early 2000s Bell continued to focus on giving advice and counsel on matters relating to corporate crime. His organization of the firm's Special Matters Group assembled lawyers with a wide variety of experience in representing corporations charged with civil or corporate wrongdoing. He served as an arbitrator on two international ARBITRATION panels as well as an advisor on several major corporate litigation cases.

Bell served as cochairman of the National Task Force on Violent Crime in 1981 and cochairman of the Committee on Federal Ethics in 1989. He has also served as president of the American College of Trial Lawyers. Bell received an honorary doctor of laws degree from Mercer University in 1967 and the ORDER OF THE COIF from Vanderbilt Law School. In 1982, he published *Taking Care of the Law,* which relates his experiences as attorney general and sets forth his recommendations for legal reform and the reduction of government bureaucracy.

After the SEPTEMBER 11TH ATTACKS of 2001, Bell wrote an editorial for the *Wall Street Journal* addressing the issue of the curtailment of civil liberties. In November 2001 he testified on the

*Griffin Boyette Bell.*
AP/WIDE WORLD PHOTOS

**GRIFFIN BOYETTE BELL** 1918–

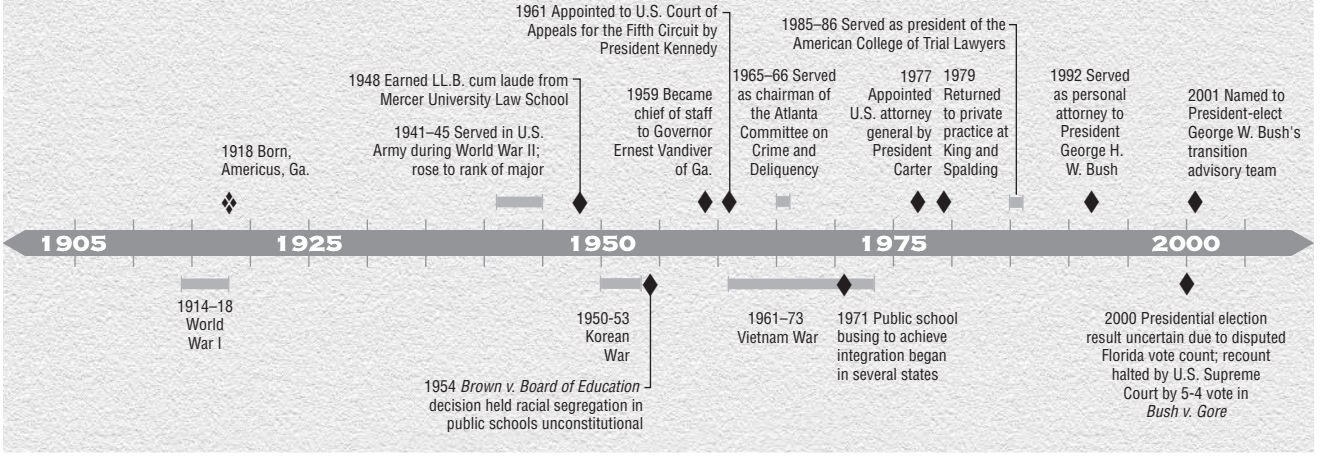

same issue before the SENATE JUDICIARY COMMITTEE. In February 2003, the *Washington Post* reported that the Pentagon, in response to complaints from some lawmakers and civil liberties groups, planned to create an oversight board and outside advisory committee to track the activity of a global data-surveillance research program known as the Total Information Awareness Project. Griffin Bell was named to the advisory committee that would advise the secretary of defense on the social and legal implications of the new surveillance technology.

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"IT FOLLOWS THAT POPULARITY IS NOT ALWAYS THE BEST TEST OF MERIT, OR OF GENERAL PROPRIETY."
—JOHN BELL

## ◆ BELL, JOHN

John Bell was born February 15, 1797, near Nashville, Tennessee. He graduated from Cumberland College in Nashville in 1817 and was admitted to the bar in the same year. He practiced law in Franklin and Nashville, Tennessee, before entering politics.

*John Bell.* LIBRARY OF CONGRESS

From 1827 to 1841, Bell served as a congressman for Tennessee in the U.S. House of Representatives. He voiced strong opposition to Andrew Jackson's program for the deposit of federal funds into state banks and to the elimination of the BANK OF THE UNITED STATES.

Bell was secretary of war in 1841 and then U.S. senator for Tennessee for twelve years beginning in 1847.

In 1860 Bell was the unsuccessful presidential candidate of a small party known as the Constitutional Union Party. He favored a cautious policy concerning SLAVERY and opposed

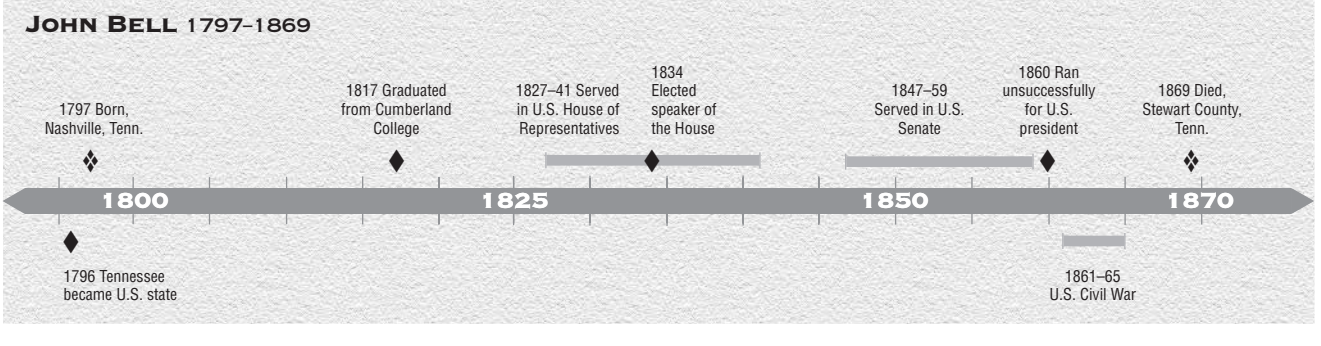

the South's secession from the Union until the battle of Fort Sumter signaled the outbreak of the Civil War; he then encouraged Tennessee to join the Confederacy.

Bell died September 10, 1869, in Stewart County, Tennessee.

## BELOW

*In an inferior, subordinate, or lower place in regard to any entity.*

A court below is a lower court through which a case has passed. A case is removed for review from the court below to the court above, or a higher court. The forum where a lawsuit is initially brought is called an inferior court, or the court below.

## BENCH

*A forum of justice comprised of the judge or judges of a court. The seat of the court occupied by the judges.*

The bench is used to refer to a group of judges as a collective whole. It is a tribunal or place where justice is administered. To appear before the full bench means to appear before the entire group of judges of the court.

## BENCH TRIAL

*A trial conducted before a judge presiding without a jury.*

## BENCH WARRANT

*A process that is initiated by the court pro se in order to attach or arrest a person. An order that a judge, or group of judges, issues directly to the police with the purpose of directing a person's arrest.*

A bench warrant is used for attachment or arrest in a case of CONTEMPT, which is the willful disregard or disobedience of an authority such as the court. A bench warrant is also issued when an indictment, which is a written accusation of a person's guilt for an act or omission, is handed down. A third instance where a bench warrant is issued is to obtain a witness who disobeys a subpoena, which is a command to appear at a specified time and place to present testimony upon a certain matter.

## BENEFICIAL ASSOCIATION

*An incorporated or voluntary nonprofit organization that has been created primarily to protect and aid its members and their dependents.*

*Beneficial association* is an all-inclusive term that refers to an organization that exists for the mutual assistance of its members or its members' families, relatives, or designated beneficiaries, during times of hardship, such as illness or financial need. The assistance provided by a beneficial association can take the form of life, accident, health, or burial insurance. Beneficial associations may also be called benevolent associations, fraternal societies, fraternal orders, or friendly associations or societies.

### History

Early beneficial associations were similar to the English friendly societies, which first appeared in the 1500s. Working people organized these clubs to provide sickness and death benefits for members. Several fraternal societies established branches in the United States and Canada in the early 1800s.

The Ancient Order of United Workmen, founded in 1868, was the first beneficial association to pay substantial death benefits. Other groups that followed its model were soon created. These early associations and societies furnished life insurance to members whose income was so low they could not have otherwise obtained insurance benefits. In addition, many of these associations provided companionship and social activities for their members.

The National Fraternal Congress was formed in 1886 to provide state regulation and uniform legislation for beneficial associations. In 1901, a group of associations and societies formed the Associated Fraternities of America. In 1913, the two groups merged to form the National Fraternal Congress of America.

Beneficial associations include the Police Benevolent Association, Loyal Order of the Moose, Knights of Columbus, Independent Order of Odd Fellows, and Benevolent and Protective Order of Elks. Many of these associations are secret lodges, with passwords, ceremonies, and initiation rites.

### Organization and Incorporation

The common-law right of contract authorizes the formation of a beneficial association through the voluntary association of its members. Incorporation of a beneficial association may occur either by a specific legislative act or under general statutes that expressly authorize such incorporation. Some states codify laws pertaining to the formation and incorporation of beneficial associations in their nonprofit corpo-

*A sample bench warrant*

## Bench Warrant

STATE OF NEW MEXICO COUNTY OF _____ _____ JUDICIAL DISTRICT

STATE OF NEW MEXICO v. No. _____ _____, Defendant

**BENCH WARRANT**

THE STATE OF NEW MEXICO TO ANY OFFICER AUTHORIZED TO EXECUTE THIS WARRANT:

YOU ARE HEREBY COMMANDED to arrest _____ and bring (him) (her) forthwith before this court to answer the following charges:
*(check appropriate box or boxes)*

[ ] grand jury indictment filed on _____ (date) on the following charges: _____
_____.

[ ] failure to appear at the time and place ordered by this court.

[ ] failure to appear as required by a subpoena issued by this court.

[ ] failure to appear in accordance with the conditions of release imposed by this court.

[ ] conditions of release previously imposed should be revoked or reviewed.

[ ] contempt of court.

[ ] failure to pay fines or costs previously imposed.

[ ] failure to comply with conditions of probation.

[ ] Other: _____.

**Bond provisions:**

Bond is set in the amount of $_____. (cash bond 10% of bond) (surety) (property bond).

_____
Judge

**Description of defendant:**

Name _____ Alias _____

Date of birth _____ Social Security No. _____

Address _____

Sex (male) (female) Height _____ Weight _____

Hair color _____ Eyes _____

Scars, marks and tattoos: _____

Vehicle (*make, model, year and color, if known*) _____

**Extradition Information:**

The State will extradite the defendant from:
*(check and complete)*

[ ] any contiguous State.

[ ] anywhere in the continental United States.

[ ] any other State.

[ ] anywhere.

Prosecuting attorney: _____ By: _____

Date: _____

Originating officer: _____ Originating agency: _____

**RETURN**

I arrested the above-named person on the _____ day of _____, _____, by taking such person into custody.

_____ _____
Signature Title

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ration law; they do so because beneficial associations may not be formed with the purpose of bringing a financial benefit to their founders.

A beneficial association is organized through its charter, constitution, and bylaws.

**Charter** The charter of a benevolent association is the basis of its legal existence and the source of its power to carry out the objects of its creation. A charter is analogous to articles of incorporation and becomes part of the contract of membership when one joins the beneficial association. For beneficial associations that elect to incorporate, the charter will be embodied in the articles of incorporation. Regardless of whether the association is incorporated, the charter incorporates by reference the general laws of the state in which the association is formed.

**Constitution and Bylaws** The constitution of a benevolent association defines the fundamental principles that will govern the duties of the association and its officers and the regulation of its membership. Unless the constitution is expressly embodied in the charter, it is regarded as a code of laws similar in effect to bylaws. A constitutional provision will prevail over a provision of a conflicting bylaw because it is viewed as a fundamental rule for the government of the association.

Beneficial associations may adopt bylaws that will determine all questions of discipline, doctrine, and internal policy and will regulate the association's general business activities. The enactment of a bylaw is governed by provisions contained in either the charter or the constitution. Bylaws must be in accordance with the law and public policy, must be reasonable, and must apply to all members uniformly. The constitution and the bylaws form a binding contract between and upon all the organization's members. Finally, bylaws also provide for the dissolution of a beneficial association.

### Rights, Powers, and Liabilities

The authority and powers of beneficial associations are subject to the statutes under which the associations are formed and organized. An incorporated association may not enlarge the powers granted to it by the statute under which it was created. Certain powers, such as the power to enter into contractual relations, may be implied when they are essential to the accomplishment of the association's objectives. Contracts are binding upon the association when they have been executed by the appropriate officers of the association. Through its proper committees or officers, a beneficial association may enter into a lease.

Generally, a beneficial association has no power to borrow money. However, some states permit proper officers or committees to execute bonds and mortgages in order to secure building loans.

Ordinarily, beneficial associations can transact business in places other than the state within which they have been organized.

Because beneficial associations are founded on the principle of mutuality, in which each member shares all the benefits as well as all the burdens, they do not have capital stock, nor do all associations maintain a fund for paying benefits. If a fund is not maintained, each member promises to contribute an equal share with every other member as the association's need for funds arises.

Unless a statute makes a distinction, courts generally recognize a beneficial association certificate containing insurance features to be the same as any other similar insurance contract. If the certificate indemnifies a member in case of disability or death, the association will be regarded as a mutual insurance company. However, beneficial associations are not the same as insurance companies. First, beneficial associations do not have as a purpose the goal of indemnifying or securing against loss; rather, they create a trust fund with their members' dues, from which they may provide relief to their members. Second, beneficial associations are not created for profit. Third, these associations do not advertise for business but limit their clientele to their members. Finally, whereas an insurance company fixes a beneficiary's rights with the terms of the insurance policy, a beneficial association member's rights to receive benefits depend on both the certificate and the constitution and bylaws of the association.

**Power to Acquire Funds and Property** A beneficial association may acquire and dispose of property in a proper manner and for proper purposes, whether by sale, deed, lease, mortgage, or other document. A valid bequest of property for charitable purposes may be made to an association that has been incorporated and authorized by its charter to hold property for such purposes.

The funds of a beneficial association should be spent according to the association's purpose as defined by its charter, articles of incorporation, constitution, or bylaws.

**Benefits** A beneficial association's bylaws and controlling statutes specifically designate which benefits are payable to its members, and the types of benefits provided are restricted to those specified.

Beneficial associations may make payments in two ways. The first is based on the contractual agreement between the association and its members. As with an insurance policy, the members' dues are a contribution to a fund from which specified benefits are paid upon a proper claim. Disputes arising from this contractual relationship may ultimately be resolved in a court of law.

The second way a beneficial association confers payments is through an act of benevolence. The term *benevolence* means the doing of a kind or helpful action towards another, under no obligation except possibly an ethical one. A beneficial association may appoint a board to review applications for benefits not based on the contractual relationship. This board could, for example, extend additional financial benefits to a disabled member who has exhausted the benefits specified in the bylaws. If such a benefit is given as a matter of benevolence, it may not be claimed as a right, and it is not enforceable in court. Likewise, a beneficial association could donate money to a civic activity as an act of benevolence.

An association may set forth certain conditions precedent to the receipt of benefits by its members. Such conditions must be met before the right to receive benefits may be enforced.

If a member of a beneficial association defaults on the payment of dues, the member might lose the right to receive benefits.

In general, one claiming benefits from an association must exhaust all remedies within the organization before seeking judicial relief.

**Liabilities** A beneficial association may not ordinarily be held liable in TORT or contract for unauthorized acts of its members or agents. A voluntary unincorporated beneficial association is considered to be a joint enterprise, and no liability for tort exists between those engaged therein. An unincorporated association, may, however, be held responsible for damages resulting from the NEGLIGENCE of its employees in work of a noncharitable character.

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CROSS-REFERENCES

Bylaws; Insurance.

## BENEFICIAL INTEREST

*Profits or advantages from property derived from the terms of a trust agreement.*

A beneficiary of a trust has a beneficial interest in the trust property, the legal title of which is held by the trustee. The beneficiary receives the advantages of ownership of the property which the trustee holds and distributes according to the terms of the trust agreement.

## BENEFICIAL USE

*A right to utilize real property, including light, air, and access to it, in any lawful manner to gain a profit, advantage, or enjoyment from it. A right to enjoy real or* PERSONAL PROPERTY *held by a person who has equitable title to it while legal title is held by another.*

A beneficial use involves greater rights than a mere right to possession of land, since it extends to the light and air over the land and access to it, which can be infringed by the beneficial use of other property by another owner. If a dispute arises from the conflicting ways in which two ADJOINING LANDOWNERS exercise their respective beneficial uses of their property, a court, exercising its discretion, may adjudicate those rights.

A beneficiary of a trust has beneficial use of the trust property, the legal title to which is held by the trustee.

## BENEFICIARY

*An organization or a person for whom a trust is created and who thereby receives the benefits of the trust. One who inherits under a will. A person entitled to a beneficial interest or a right to profits, benefit, or advantage from a contract.*

## BENEFIT OF CLERGY

*In old England, the privilege of clergy that allowed them to avoid trial by all courts of the civil government.*

Originally members of the clergy were exempted from CAPITAL PUNISHMENT upon conviction of particular crimes based on this

privilege, but it did not encompass crimes of either high TREASON or misdemeanors.

Benefit of clergy existed to alleviate the severity of criminal laws as applied to the clergy. It was, however, found to promote such extensive abuses that it was ultimately eliminated. Benefit of clergy does not exist in the United States today.

The phrase "without the benefit of clergy" is used colloquially to describe a couple living together outside a legal marriage.

## ♦ BENJAMIN, JUDAH PHILIP

Judah Philip Benjamin was attorney general of the Confederate States of America under President Jefferson Davis. Though described by many as a brilliant, self-made man, he was also characterized as the "dark prince of the Confederacy" in Robert W. Service's poem "John Brown's Body."

Benjamin was born August 6, 1811, on St. Croix Island, in the British West Indies. His parents, Philip Benjamin and Rebecca de Mendes Benjamin, were Sephardic Jews who had immigrated to the West Indies from Spain. Hearing that Jews were tolerated and allowed to prosper in the U.S. Carolinas, the family moved to the United States in 1813, settling in Charleston, South Carolina. Young Benjamin attended the Fayetteville Academy, in Fayetteville, North Carolina, and entered Yale in 1825 at the age of fourteen. He was the top student in his class when he was expelled in 1827. He was charged with stealing from a fellow student, but the allegations were never proved. Though Benjamin was not an observant Jew, historians acknowledge that anti-Semitism was probably at the heart of the charges and his dismissal from school.

Following his expulsion, Benjamin moved to New Orleans, where he clerked in a commercial house and studied law until he was admitted to the bar in 1832. (A commercial house of the early 1800s was usually involved in the financial transactions around the movement of goods, i.e., lending, bonding, insuring, fees for transport, rent for storage, and contracts of sales.) While studying, he supplemented his income by giving English lessons to the French Creole aristocracy. One of his pupils, Natalie St. Martin, became his wife in a Roman Catholic ceremony in 1833. Though his wife was extravagant and notoriously promiscuous, Benjamin indulged her. Many of his peers commented that Benjamin's wealth could be attributed more to the demands of his wife than to his personal ambitions. For her, he acquired the Belle Chase sugar plantation and an elegant townhouse on Bourbon Street in New Orleans.

*Judah Philip Benjamin.*
PUBLIC DOMAIN

His real estate purchases were made possible by a growing and successful law practice. By 1834 he had secured his place in the local legal community through a joint publishing venture with Thomas Slidell. Their *Digest of the Reported Decisions of the Superior Court of the Late Territory of Orleans and of the Supreme Court of Louisiana* was widely used. Benjamin's national reputation as a lawyer was established by his participation in a case involving the brig *Creole.* His brief—which reviewed the status of SLAVERY under both INTERNATIONAL LAW and U.S. domestic law—was printed as a pamphlet and widely circulated. In this more liberal period of his life, he believed and argued that slavery was against the laws of humans and nature. He would later reverse his position.

"THE NATION WHICH PRESENTS ITSELF WITH AN ORGANIZED GOVERNMENT AND . . . INSTITUTIONS CREATED BY THE FREE WILL OF THE CITIZENS . . . [MAY] DEMAND ITS RIGHT RECOGNITION."
—JUDAH BENJAMIN

Benjamin began his political career in 1842 when he was elected as the Whig candidate to the lower house of the Louisiana Legislature. He attended the Louisiana Constitutional Convention from 1844 to 1845. Benjamin's wife was not supportive of his interest in politics, or tolerant of his absences. In 1845, after eleven years of marriage, she moved to Paris. The couple rarely

lived together again as HUSBAND AND WIFE, but they never divorced—and Benjamin's lifelong devotion to his wife has been well documented.

After his wife's departure, Benjamin retreated to his plantation, from 1845 to 1848, and began to experiment with sugar chemistry and processing. Ultimately, he lost the plantation when a friend defaulted on a note that Benjamin had signed.

Despite his business reversals, Benjamin had "great dreams about the future development of American commerce" and found himself with a renewed commitment to political service. He shared a growing belief in the South that foreign commerce would strengthen the region and restore the balance of power lost by the COMPROMISE OF 1850. In 1852 Benjamin ran as a WHIG PARTY candidate for one of Louisiana's U.S. Senate seats.

His successful bid for office made him the nation's first Jewish U.S. senator. Also in 1852, Benjamin was nominated to the U.S. Supreme Court by President MILLARD FILLMORE. Preferring to take his seat in the Senate, Benjamin declined Fillmore's offer and thereby missed the opportunity to be the first Jewish Supreme Court justice. Benjamin also turned down an appointment as ambassador to Spain, in 1853. Mindful of the escalating national conflict between North and South, he wanted to stay in the United States. In 1854 he wrote, "[A] gulf . . . is already opened between the Northern and Southern Whigs. . . . God knows what awaits us. The future looks full of gloom to me."

In 1856 Benjamin left the Whig party and joined the more conservative southern Democrats. He was reelected to the Senate and continued to serve Louisiana there until the Civil War. Following the election of ABRAHAM LINCOLN in 1860, Benjamin advised secession; he resigned his Senate seat when Louisiana voted to leave the Union.

Benjamin was named attorney general of the Confederate States of America in early 1861. He served as attorney general until November 21, 1861, when he became secretary of war. He inherited a war department that was disorganized and deeply in debt. Throughout 1862, the Confederacy suffered both human resource and equipment shortages, and severe casualties.

A plan by Benjamin to build troop strength by drafting slaves—with the promise of emancipation for service—was prepared and sent to the Confederate congress. Seeing the initiative as a threat to the principle of slavery, the congress failed to pass the measure. Benjamin was eventually charged with inefficiency, and a motion to remove him from his post was drafted.

President Davis, still confident in Benjamin's abilities, stepped in and appointed him SECRETARY OF STATE on March 18, 1862. Benjamin served in that capacity until the fall of the Confederacy, but he never fully regained his popularity with the Southern people. Viewed in a historical context, Benjamin's service and loyalty to the Confederacy are extraordinary and commendable—especially in light of the extreme anti-Semitism and hatred that pervaded the South throughout the war years.

After Robert E. Lee's surrender to ULYSSES S. GRANT at Appomattox Courthouse on April 9, 1865, U.S. agents targeted Benjamin for capture because it was assumed, falsely, that he knew the location of large sums of money. After a brief stop in North Carolina, Benjamin headed south to Florida. Garbed as a Frenchman and speaking fluent French, he passed himself off as a journalist, Monsieur Bonfals (which translates as Mr. Good Disguise). Because Benjamin was too fat to ride a horse, he traveled by cart in the com-

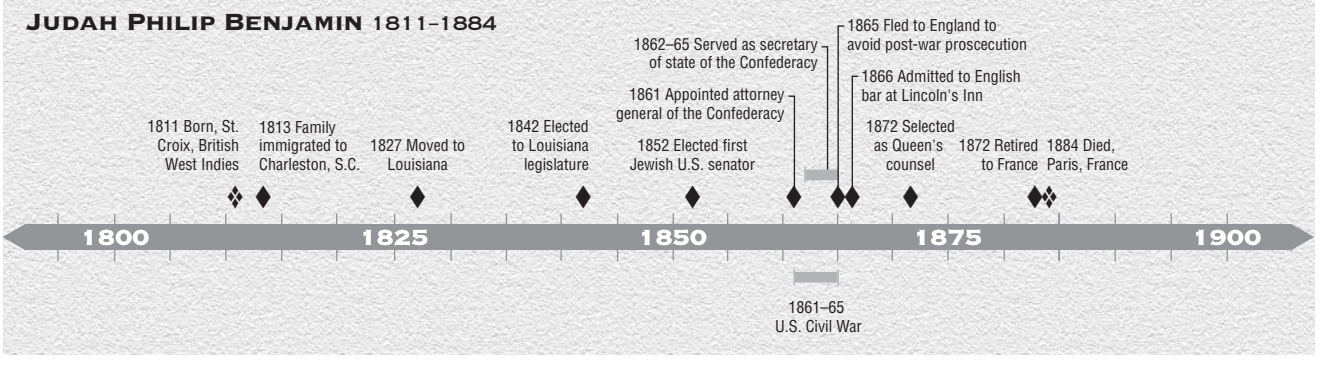

pany of a former Confederate officer from New Orleans who pretended to be his interpreter.

On May 1, 1865, federal agents increased their efforts to locate all Confederate fugitives, and the *New York Times* called for Jefferson Davis, Judah Benjamin, and Confederate secretary of war John C. Breckenridge to die "the most disgraceful death on the gallows." The price on Benjamin's head was $40,000, dead or alive. But by May, Benjamin had already made it to Tampa.

With the help of Confederate sympathizers and former Confederate soldiers, Benjamin traveled from Tampa to the Gamble Mansion on Florida's southwest coast. En route, he presented himself as Mr. Howard, a farmer and cattle buyer. With federal troops closing in, he was twice forced to hide in a canebrake near the mansion to avoid capture. Eventually, Benjamin was moved to Sarasota Bay, where he sailed down the coast to Knight's Key with Captain Frederick Tresca, a former blockade runner, and H. A. McLeod, an experienced sailor for hire. The trio reached Knight's Key on July 7, 1865. From there, Benjamin boarded a boat for Bimini, in the Bahamas. After this vessel was shipwrecked, he was rescued and returned to Florida, where he again faced capture by federal agents. Benjamin eventually reached Bimini, and then set sail for England. He arrived in England on August 30, 1865, after almost five months of dangerous and grueling travel.

Without funds, Benjamin made the necessary arrangements to practice law in England. He was admitted to the bar at Lincoln's Inn in 1866, and he was soon a respected member of the British bar. Most of his cases focused on corporate law. He also wrote about matters pertaining to business and corporate law. His *Treatise on the Law and Sale of Personal Property: With Special Reference to the American Decisions and the French Code and Civil Law* was published in 1868. Commonly known as *Benjamin on Sales,* the book was a definitive source on commercial matters on both sides of the Atlantic for the next twenty-five years. In 1872, Benjamin was selected Queen's Counsel. He practiced law in England until 1883, when he retired to France. He is credited with making major contributions to the British Empire's dominance of world trade in the last half of the nineteenth century.

Benjamin died May 6, 1884, in Paris. He was buried at the Pere Lachaise Cemetery under a headstone marked Philippe Benjamin.

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"EVERY LAW IS AN INFRACTION OF LIBERTY."
—JEREMY BENTHAM

## ♦ BENJAMIN, PARK

Park Benjamin was an eminent patent lawyer and author.

Benjamin was born May 11, 1849. A graduate of the U.S. Naval Academy in 1867, he left the Navy in 1869 and earned a bachelor of laws degree from Albany Law School in 1870.

From 1872 to 1878, Benjamin was associate editor of the *Scientific American* and became editor-in-chief of *Appleton's Cyclopaedia of Applied Mechanics* in 1893.

Benjamin wrote *The United States Naval Academy* (1900) and numerous essays and naval articles for various periodicals.

He died August 21, 1922, in New York City.

## ♦ BENTHAM, JEREMY

Described as a philosopher, jurist, and reformer, Jeremy Bentham is possibly best known as one of the leading proponents of UTILITARIANISM. Although he was a devoted scholar who spent much of his life writing about legal reform, he published little. Regardless, Bentham had a profound effect on the politics of his day, influenced many of his contemporaries (including eminent

British philosopher JOHN STUART MILL), and introduced a number of terms and definitions, which are still used today in the study of philosophy, economics, and politics.

Bentham was born February 15, 1748, in Houndsditch, near London, into a family of attorneys. He was educated at Oxford and admitted to the bar, but decided not to follow in the footsteps of his father and grandfather. Instead of practicing law, Bentham chose to pursue a career in legal, political, and social reform, applying principles of ethical philosophy to these endeavors.

He was greatly influenced by the work of Claude-Adrien Helvétius, a French philosopher who believed that all persons are intellectually equal and that differences arise solely from educational opportunities. Helvetius also formulated a theory that good is measured by the degree of self-contentment experienced by a person, and that self-interest is the compelling force for all action. This latter belief had a profound effect on Bentham, who incorporated the idea in the formulation of the basic principles of utilitarianism.

In 1789, Bentham gained public attention with the publication of his *Introduction to the Principles of Morals and Legislation,* which set forth his fundamental principles. He believed that the greatest happiness for the greatest number is the basis of morality. Happiness and pleasure were the same, and included social, intellectual, and moral as well as physical pleasures. According to Bentham, each pleasure has certain characteristics, including intensity and duration, and he established a scale of measurement to judge the worth of a pleasure or a pain. Bentham further opined that each person strives to do what makes him or her happiest. The happiness of an individual and the GENERAL WELFARE are complementary; the achievement of the greatest amount of happiness is the goal of morality.

Bentham applied his views to reform legislation, feeling that the purpose of the law was to maximize total happiness within the limitations of government. As a result, he achieved great advances in prison reform, CRIMINAL LAW, civil service, and insurance and was active in the compilation of laws into comprehensible text.

Bentham is particularly noted for his theories of punishment. He claimed that all punishment required justification, because he believed that all punishment is inherently evil. Bentham also believed that to a utilitarian such as himself, real justice is less important than apparent justice. In other words, Bentham believed that seeing justice done is more important than justice actually being done.

Influenced by the work of Italian philosopher CESARE BECCARIA, Bentham formed some harsh notions of punishment, such as his belief that in certain cases torture could be justified. He wrote that punishment was a relatively weak disincentive against RECIDIVISM, and that there is always a risk that an offender will commit another offense. He suggested that torture removes this risk because torture ceases immediately when a subject complies with the demands of authority. Of course, this idea discounts the question of whether the subject can in fact comply.

As a theorist of punishment, Bentham was naturally interested in the English penal system.

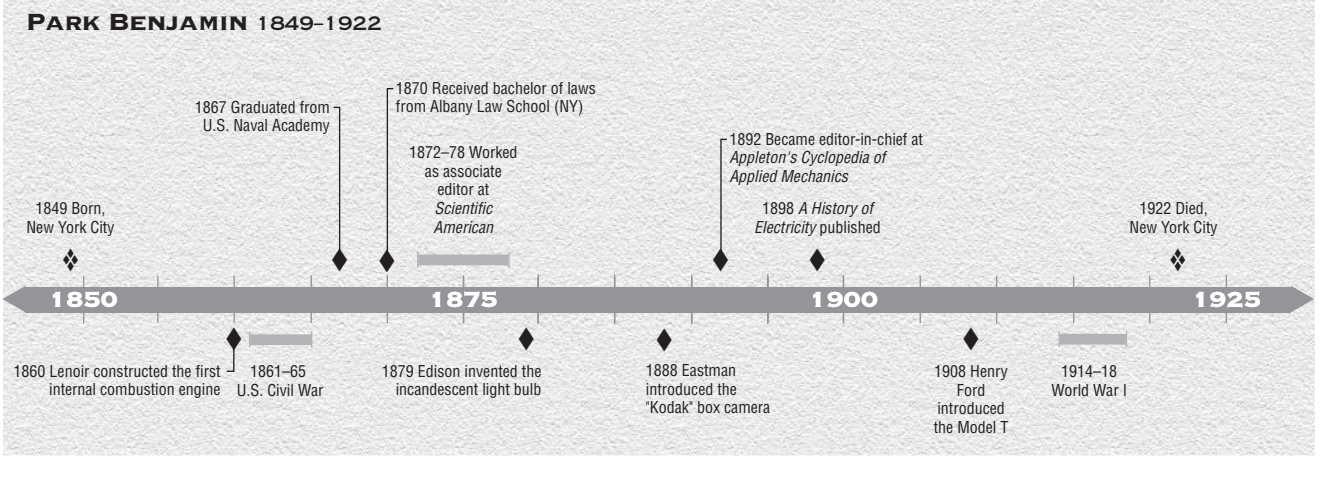

His studies led him to develop a model of an English prison that applied his theories of punishment to incarceration. He called his model the "Panopticon." The Panopticon was a prison building—and a whole system of incarceration—that allowed guards total surveillance and physical control over prison inmates. Writing of the Panopticon, Bentham claimed that hard labor, constant surveillance and monitoring, and solitary confinement (for purposes of reflection and repentance) were fundamental requirements needed to reform and rehabilitate criminal offenders. This theory builds upon the notion that punishment can be the means to make an offender lead a life of moral and civil rectitude.

Bentham attempted to persuade President JAMES MADISON to adopt a code of laws that he himself had devised. The philosopher was careful to cite existing rules and previous cases to illustrate that his legal theories were sound. Madison rejected Bentham's idea in 1811, but in the 1830s, a group of U.S. reformers adopted several of his policies with the objective of formulating a simplified code of law.

When Bentham died June 6, 1832, he left behind a vast number of manuscript pages, as well as a large estate. Funds from the estate were used to help launch University College, London, an institution which was established to educate students excluded from universities of the day. In accordance with Bentham's instructions, upon his death his body was dissected, embalmed, dressed, and seated in a chair. The seated Bentham is housed in a cabinet in the main building of University College.

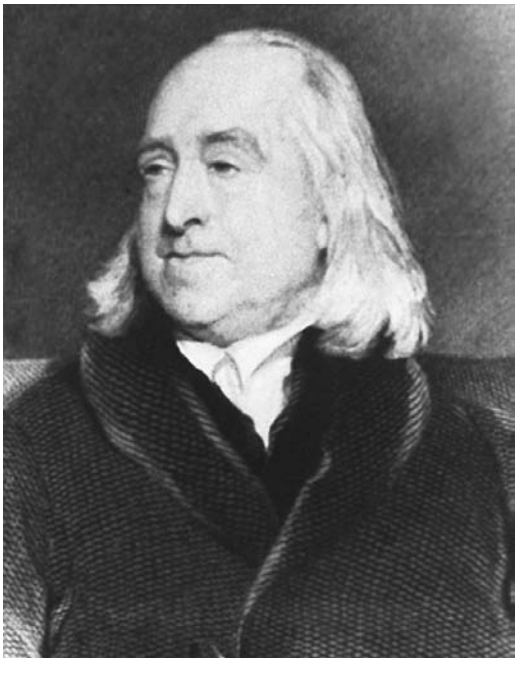

*Jeremy Bentham.*
LIBRARY OF CONGRESS


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## BEQUEATH

*To dispose of* PERSONAL PROPERTY *owned by a decedent at the time of death as a gift under the provisions of the decedent's will.*

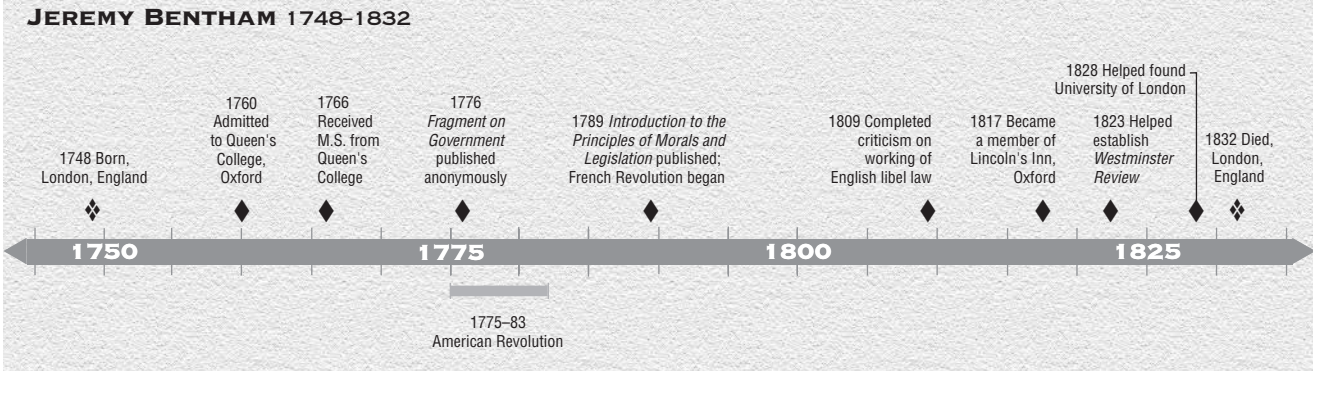

The term *bequeath* applies only to personal property. A testator, to give real property to someone in a testamentary provision, devises it. *Bequeath* is sometimes used as a synonym for *devise.*

## BEQUEST

*A gift of* PERSONAL PROPERTY, *such as money, stock, bonds, or jewelry, owned by a decedent at the time of death which is directed by the provisions of the decedent's will; a legacy.*

A bequest is not the same as a devise (a testamentary gift of real property) although the terms are often used interchangeably. When this occurs, a bequest can be a gift of real property if the testator's intention to dispose of real property is clearly demonstrated in the will.

There are different types of bequests. A *charitable bequest* is a gift intended to serve a religious, educational, political, or general social purpose to benefit mankind, aimed at the community or a particular segment of it. Charitable bequests also reduce the estate taxes that might be owed on the estate left by a decedent.

A *demonstrative bequest* is a gift of money that must be paid from a particular source, such as a designated bank account or the sale of stock in a designated corporation.

A *general bequest* is a gift of money or other property that can be paid or taken from the decedent's general assets and not from a specific fund designated by the terms of the will.

## BERING SEA DISPUTE

The Bering Sea Dispute involved a late nineteenth-century controversy between the United States on one side and Great Britain and Canada on the other side over the international status of the Bering Sea. The dispute was generated over the U.S. assertion that it controlled the Bering Sea and all seal hunting off the coast of Alaska. The dispute, which led to the seizure of a number of Canadian ships by the United States, was finally resolved by an international ARBITRATION in 1893.

The Bering Sea is the northernmost part of the Pacific Ocean. After the United States purchased Alaska from Russia in 1867, it assumed the right of control over the Bering Sea that had been held by Russia. The dispute arose after the Alaska Commercial Company, a U.S. business that had a MONOPOLY on killing seals for their furs, found that Canadian hunters were killing seals as they swam through the ocean each spring toward their summer homes in the Pribilof Islands. The Pribilof Islands were part of the U.S. Alaskan territories. Fearing that the herds would be killed off by pelagic (open-sea) sealing, the U.S. government seized several Canadian sealing vessels in 1886 and instituted condemnation proceedings in an Alaskan court. The proceeds were given to the Alaskan Commercial Company as compensation.

These actions outraged the Canadian and British governments, who disputed the U.S. claim that it controlled not just the three-miles of sea bordering the Pribilof Islands but the entire Bering Sea. After several years of tensions and additional vessel seizures, the three countries agreed to arbitration by an international tribunal in Paris. The tribunal issued its decision in 1893. It rejected the U.S. claim of total control of the Bering Sea and awarded the Canadian own-

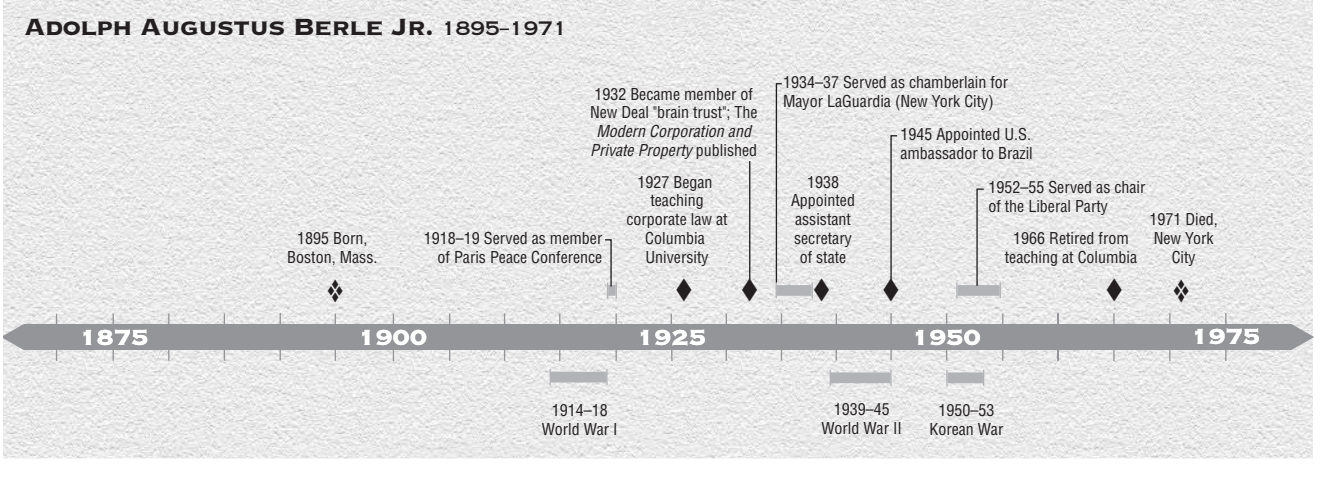

ers of the seized ships $473,000 in damages. The tribunal also imposed restrictions on pelagic sealing, but it failed to control the problem. In 1911 the United States, Great Britain, Russia, and Japan signed a treaty that prohibited pelagic sealing for a period of time and then placed limits on how many seals could be hunted. The agreement was an important step in seeking international consensus on environmental matters.

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CROSS-REFERENCES

Boundaries; International Law.

## ♦ BERLE, ADOLPH AUGUSTUS, JR.

Adolph Augustus Berle Jr. was a diplomat, teacher, and writer. He was born January 29, 1895, in Boston, Massachusetts. He was educated at Harvard, receiving a bachelor of arts degree in 1913, a master of arts degree in 1914, and a bachelor of laws degree in 1916, in which year he was also admitted to the bar.

After military duty in WORLD WAR I, Berle served as a U.S. representative at the Paris Peace Conference during 1918 and 1919. He opposed the conditions of the Versailles Treaty and resigned from the delegation. He returned to the United States and established his legal practice in New York City.

Berle began teaching corporate law at Columbia University in 1927. During the 1930s, he assisted the administration of President FRANKLIN DELANO ROOSEVELT in the formulation of NEW DEAL legislation concerning SECURITIES and banking.

From 1938 to 1944, Berle was assistant SECRETARY OF STATE; in 1945 he was U.S. ambassador to Brazil; and in 1946 he returned to Columbia University to continue his teaching career. He helped establish the Liberal party and acted as its chairman from 1952 to 1955.

One of Berle's several publications was *The Modern Corporation and Private Property* (1932), written with coauthor G. C. Means.

Berle died February 17, 1971, in New York City.

"ALL POWERS GRANTED TO A CORPORATION . . . WHETHER DERIVED FROM STATUTE OR CHARTER . . . [ARE] EXERCISABLE ONLY FOR THE RATABLE BENEFIT OF ALL THE SHAREHOLDERS AS THEIR INTEREST APPEARS."
—ADOLPH BERLE JR.

## ♦ BERRIEN, JOHN MACPHERSON

John Macpherson Berrien served as U.S. attorney general under President ANDREW JACKSON.

Berrien was born August 23, 1781, in New Jersey. He graduated from Princeton in 1796 and was admitted to the Georgia bar in 1799. He began his judicial career in Georgia as a circuit court judge in 1810 and remained on the bench until 1821.

Berrien sat in the Georgia Senate from 1822 to 1823. From 1824 to 1829, he represented Georgia in the U.S. Senate, as a member of the DEMOCRATIC PARTY.

He served as U.S. attorney general from 1829 to 1831. He again served as senator from Georgia from 1841 to 1845 and from 1845 to 1852 as a member of the WHIG PARTY.

"IF THIS POWER IS NOT GRANTED BY THE CONSTITUTION, IT IS VERY CERTAIN, THAT NO SERIES OF USURPATION CAN GIVE IT A LEGITIMATE EXISTENCE IN THAT INSTRUMENT."
—JOHN BERRIEN

## BEST EVIDENCE

*An original document or object offered as proof of a fact in a lawsuit as opposed to a photocopy of, or other substitute for, the item or the testimony of a witness describing it.*

Best evidence, also known as primary evidence, usually denotes an original writing, which is considered the most reliable proof of its existence and its contents. If it is available to,

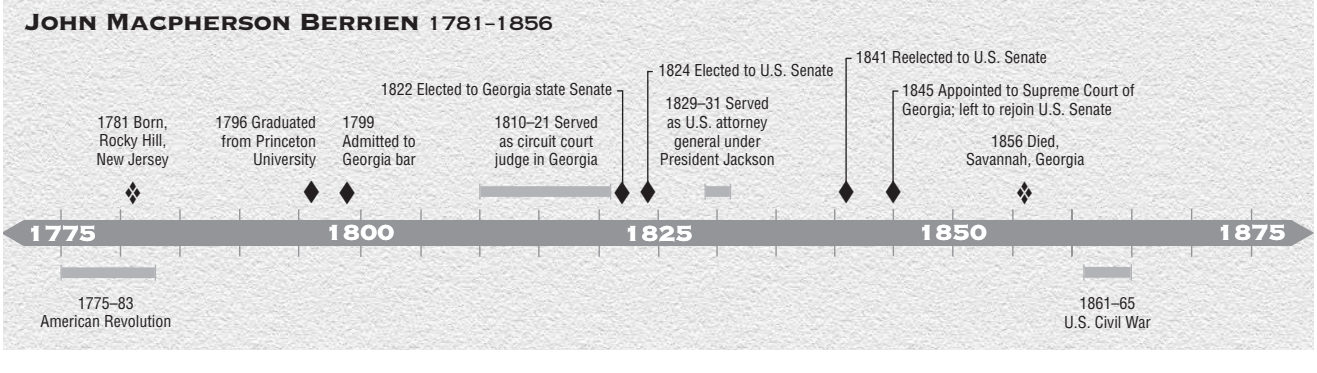

and obtainable by, a party, it must be offered into evidence at a trial. Best evidence is distinguishable from secondary evidence, a reproduction of an original or testimony establishing its existence, which will be admissible as proof only if the best evidence cannot be obtained, and ensuring no fault of the party seeking to present it.

The principle that the best available evidence must be presented as proof in a lawsuit is embodied in the best-evidence rule.

## BESTIALITY

*Sexual relations between a human being and an animal.*

At COMMON LAW, bestiality was considered a crime against nature and was punishable by death.

Today, it is prohibited by statutes in most states as a form of SODOMY. The penalty for committing the offense is a fine, imprisonment, or both.

## BEYOND A REASONABLE DOUBT

*The standard that must be met by the prosecution's evidence in a criminal prosecution: that no other logical explanation can be derived from the facts except that the defendant committed the crime, thereby overcoming the presumption that a person is innocent until proven guilty.*

If the jurors or judge have no doubt as to the defendant's guilt, or if their only doubts are unreasonable doubts, then the prosecutor has proven the defendant's guilt beyond a reasonable doubt and the defendant should be pronounced guilty.

The term connotes that evidence establishes a particular point to a moral certainty and that it is beyond dispute that any reasonable alternative is possible. It does not mean that no doubt exists as to the accused's guilt, but only that no REASONABLE DOUBT is possible from the evidence presented.

*Beyond a reasonable doubt* is the highest standard of proof that must be met in any trial. In civil litigation, the standard of proof is either proof by a PREPONDERANCE OF THE EVIDENCE or proof by clear and convincing evidence. These are lower burdens of proof. A preponderance of the evidence simply means that one side has more evidence in its favor than the other, even by the smallest degree. CLEAR AND CONVINCING PROOF is evidence that establishes a high probability that the fact sought to be proved is true. The main reason that the high proof standard of reasonable doubt is used in criminal trials is that such proceedings can result in the deprivation of a defendant's liberty or even in his or her death. These outcomes are far more severe than in civil trials, in which money damages are the common remedy.

CROSS-REFERENCES

Clear and Convincing Proof; Due Process of Law; Preponderance of Evidence; Reasonable Doubt.

## BIAS

*A predisposition or a preconceived opinion that prevents a person from impartially evaluating facts that have been presented for determination; a prejudice.*

A judge who demonstrates bias in a hearing over which he or she presides has a mental attitude toward a party to the litigation that hinders the judge from supervising fairly the course of the trial, thereby depriving the party of the right to a fair trial. A judge may RECUSE himself or herself to avoid the appearance of bias.

If, during the VOIR DIRE, a prospective juror indicates bias toward either party in a lawsuit, the juror can be successfully challenged for cause and denied a seat on the jury.

## BICAMERAL

*The division of a legislative or judicial body into two components or chambers.*

The CONGRESS OF THE UNITED STATES is a bicameral legislature, since it is divided into two houses, the Senate and the House of Representatives.

## ♦ BICKEL, ALEXANDER MORDECAI

Alexander Mordecai Bickel was a noted legal scholar, law professor, and essayist who wrote extensively about CONSTITUTIONAL LAW issues and the U.S. Supreme Court.

Bickel was born December 17, 1924, in Bucharest, Romania, and immigrated to the United States with his parents in 1939. He attended the City College of New York, graduating Phi Beta Kappa in 1947, and Harvard Law School, where he served as editor of the *Harvard Law Review* and graduated summa cum laude in 1949.

Following law school, Bickel clerked for Judge Calvert Magruder of the U.S. Court of

Appeals in Boston. From 1950 to 1952 he was a STATE DEPARTMENT law officer in Frankfurt, Germany, and he was a member of the European Defense Community Observer Delegation in Paris. He returned to the United States to become law clerk to Justice FELIX FRANKFURTER during the U.S. Supreme Court's 1952–53 term.

Bickel assisted Justice Frankfurter in the Court's consideration of the landmark desegregation decision in BROWN V. BOARD OF EDUCATION, 349 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). The plaintiffs in *Brown* challenged the assignment of black and white students to separate public schools. The Court held that such racial SEGREGATION in public education was unconstitutional. During his clerkship with Frankfurter, Bickel studied the FOURTEENTH AMENDMENT extensively and concluded that the Constitution did provide that congressional or judicial action could be used to abolish school segregation.

After completing his clerkship with Justice Frankfurter, Bickel joined the faculty of Yale Law School, in 1956. He was named Chancellor Kent Professor of Law and Legal History in 1966, and Sterling Professor of Law in 1974, the year of his death.

Bickel wrote a number of influential books and essays. In addition to longer works, he published more than a hundred articles in newspapers and magazines. He edited *The Unpublished Opinions of Mr. Justice Brandeis,* a volume of eleven Brandeis draft opinions concerning the issue of judicial restraint, a major theme in much of Bickel's later writings. In his most influential work, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1963), Bickel argued that courts should make decisions that are grounded in history and in the values found in the Constitution, and should not make decisions that cannot gain public support. He believed that judges should exercise care to avoid deciding constitutional issues if other grounds for a ruling are available, such as grounds for refusing to hear the case or grounds for using doctrines like statutory construction to decide the case.

"[THE JUDICIARY IS] THE LEAST DANGEROUS BRANCH OF OUR GOVERNMENT."
—ALEXANDER BICKEL

In *The Supreme Court and the Idea of Progress* (1970), another work advocating judicial restraint, Bickel criticized the activism of the WARREN COURT in tackling social issues. He noted that "history has little tolerance for … [the Court's] reasonable judgments that turn out to be wrong." Bickel also argued for judicial restraint in the so-called *Pentagon Papers* case, *New York Times Co. v. United States,* 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971), in which he represented the *New York Times* before the Supreme Court. In *Pentagon Papers,* the government sought to prevent the *New York Times* and the *Washington Post* from publishing the contents of a classified study titled *History of U.S. Decision-Making Process on Viet Nam Policy.* Rather than arguing that PRIOR RESTRAINT of the publication of the classified material was unconstitutional, Bickel instead maintained that the government had been unable to rebut the heavy presumption against prior restraint and that such restraint was to be found in congressional legislation rather than in assertions of governmental power. The Court ultimately rejected the government's claim that the papers should not be published, and several of the justices adopted Bickel's analysis in their opinions.

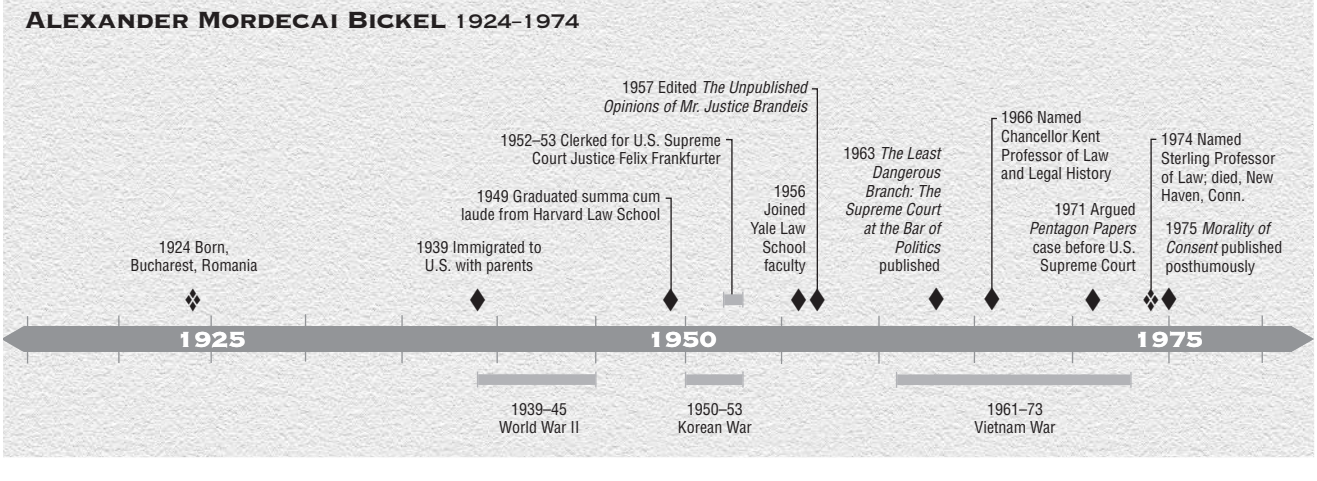

A recognized expert on the SUPREME COURT OF THE UNITED STATES, Bickel served as a member of the Study Group on the Caseload of the Supreme Court. In 1973, he authored *The Caseload of the Supreme Court, and What, If Anything, to Do about It,* in which he concluded that the Court's caseload should be reduced. Easing the Court's workload is critical, he argued, to ensure careful deliberation of important issues and to avoid transforming the Court "into a high-speed, high-volume enterprise" that would "mock the idea of justice and mock the substantive reforms of a generation."

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*Francis Beverly Biddle.* AP/WIDE WORLD PHOTOS

## ♦ BIDDLE, FRANCIS BEVERLY

Francis Beverly Biddle achieved prominence as a jurist.

"TO BLAME THE PUBLIC IS BUT THE EXCUSE OF THOSE WHO HAVE BEEN UNABLE TO INFLUENCE THE PUBLIC."
—FRANCIS BIDDLE

Biddle was born May 9, 1886, in Paris, France. He was a graduate of Harvard, class of 1909, and earned a bachelor of laws degree from his alma mater in 1911. From 1911 to 1912, he was private secretary to OLIVER WENDELL HOLMES JR., an eminent U.S. Supreme Court justice.

In 1912, Biddle was admitted to the Pennsylvania bar and from 1915 to 1939, practiced with two successful Philadelphia law firms—Biddle, Paul and Jayne, and Barnes, Biddle and Myers—specializing in corporation law.

Biddle served as special assistant U.S. attorney from 1922 to 1926 and as chairman of the NATIONAL LABOR RELATIONS BOARD from 1934 to 1935. In 1939, he presided for one year as a justice of the U.S. Circuit Court of Appeals.

Biddle was SOLICITOR GENERAL of the United States in 1940, and the following year he became U.S. attorney general for a three-year period. From 1945 to 1946, he presided as a U.S. judge at the NUREMBERG TRIALS of Nazi war criminals.

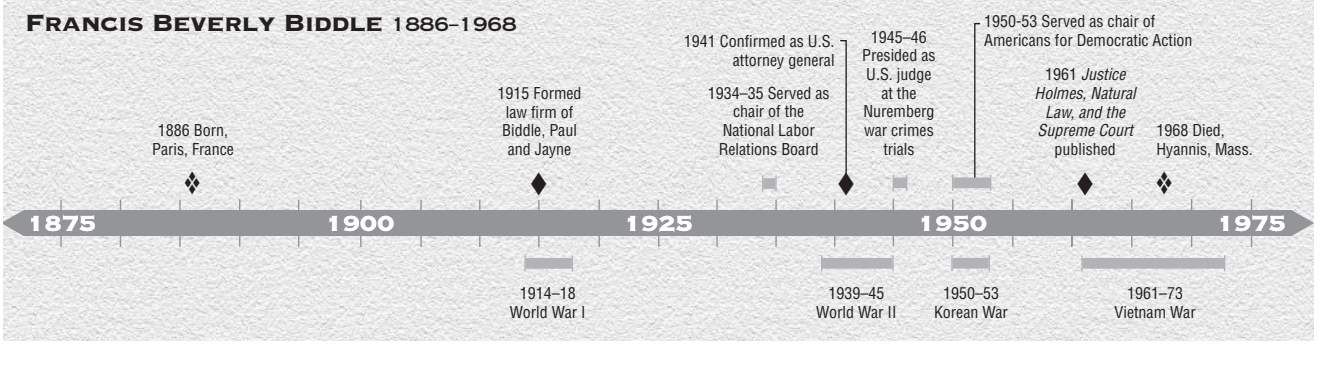

He died October 4, 1968, in Hyannis, Massachusetts.

CROSS-REFERENCES

Nuremberg Trials.

## BIFURCATED TRIAL

*One judicial proceeding that is divided into two stages in which different issues are addressed separately by the court.*

A common example of a bifurcated trial is one in which the question of liability in a personal injury case is tried separately from and prior to a trial on the amount of damages to be awarded if liability is found. A bifurcated trial in such a case is advantageous because if the defendant is not found liable, there is no need to spend the money or time in the presentation of proof and witnesses on the issue of damages.

In CRIMINAL PROCEDURE, a bifurcated trial is useful where the issues of sanity and guilt or guilt and punishment must be decided.

## BIGAMY

See POLYGAMY.

## ♦ BIGELOW, MELVILLE MADISON

Melville Madison Bigelow achieved prominence as an author, legal historian, and a founder of Boston University Law School.

Bigelow was born August 2, 1846, in Eaton Rapids, Michigan. He was educated at the University of Michigan, where he earned a bachelor of arts degree in 1866, a bachelor of laws degree in 1868, and a master of arts degree in 1871. He also received a master of arts degree and a doctor of philosophy degree from Harvard in 1879. Two doctor of laws degrees were bestowed upon him, from Northwestern University in 1896, and the University of Michigan in 1912.

Bigelow taught law at the University of Michigan and the Northwestern University Law School and also held a professorship at Boston University Law School.

Bigelow's *Elements of the Law of Torts* (1878) was used as a basic legal textbook. His numerous other publications included *Law of Fraud on its Civil Side* (1888–1890); *The Law of Estoppel and its Application in Practice* (1872); and *History of Procedure in England from the Norman Conquests: The Norman Period* 1066–1204 (1880).

He died May 4, 1921, in Boston.

## BILATERAL CONTRACT

*An agreement formed by an exchange of a promise in which the promise of one party is consideration supporting the promise of the other party.*

A bilateral contract is distinguishable from a unilateral contract, a promise made by one party in exchange for the performance of some act by the other party. The party to a unilateral contract whose performance is sought is not obligated to act, but if he or she does, the party that made the promise is bound to comply with the terms of the agreement. In a bilateral contract both parties are bound by their exchange of promises.

Both parties to a bilateral contract make promises. With respect to the promise in issue, the party making the promise is the promisor and the other party is the promisee. The legal detriment incurred by the promisee consists of a different promise by him or her to do something or refrain from doing something that he or she was not previously legally obligated to do or to refrain from doing. This legal detriment constitutes consideration, the cause, motive, or benefit that induces one to enter into a contract. Consideration is an essential component of a contract.

"GOVERNMENT FROM THE TOP IS RIGHT ONLY WHEN IT PROCEEDS FROM BELOW, WITH SUPPORT ALL THE WAY UP."
—MELVILLE BIGELOW

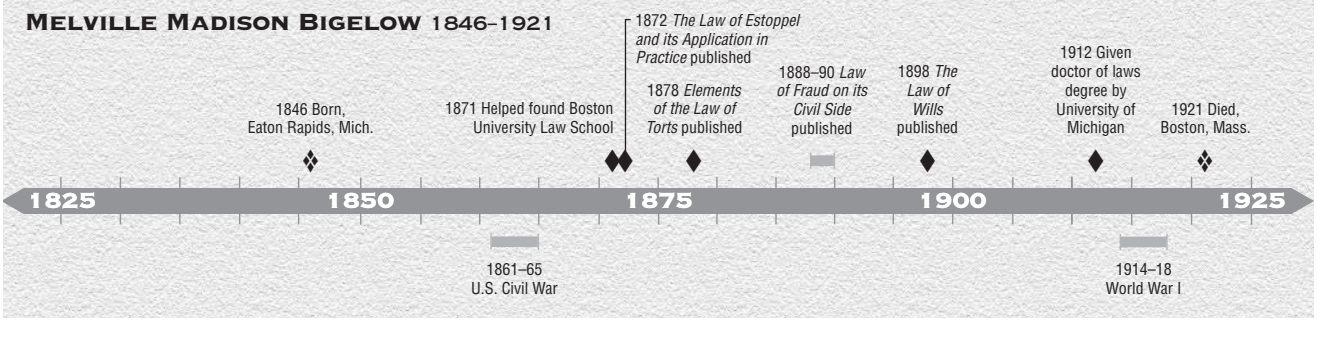

Traditionally, courts have distinguished between unilateral and bilateral contracts by determining whether one or both parties provided consideration and at what point they provided the consideration. Bilateral contracts were said to bind both parties the minute the parties exchange promises, as each promise is deemed sufficient consideration in itself. Unilateral contracts are said to bind only the promisor and do not bind the promisee unless the promisee accepts by performing the obligations specified in the promisor's offer. Until the promisee performs, he or she has provided no consideration under the law.

For example, if someone offered to drive you to work on Mondays and Tuesdays in exchange for your promise to return the favor on Wednesdays and Thursdays, a bilateral contract would be formed binding both of you once you provided consideration by accepting those terms. But if that same person offered to pay you $10 each day you drove him to work, a unilateral contract would be formed, binding only upon the promisor until you provided consideration by driving him to work on a particular day.

Modern courts have de-emphasized the distinction between unilateral and bilateral contracts. These courts have found that an offer may be accepted either by a promise to perform or by actual performance. An increasing number of courts have concluded that the traditional distinction between unilateral and bilateral contracts fails to significantly advance legal analysis in a growing number of cases where performance is provided over an extended period of time.

Suppose you promise to pay someone $500.00 to paint your house. The promise sounds like an offer to enter a unilateral contract that binds only you until the promisee accepts by painting your house. But what constitutes lawful "performance" under these circumstances? The act of beginning to paint your house or completely finishing the job to your satisfaction?

Most courts would rule that the act of beginning performance under these circumstances converts a unilateral contract into a bilateral contract, requiring both parties to fulfill the obligations contemplated by the contract. However, other courts would analyze the facts of each case so as not to frustrate the reasonable expectations of the parties. In neither of these cases are the legal rights of the parties ultimately determined by the courts by applying the concepts of unilateral and bilateral contracts.

In still other jurisdictions, courts have simply expressed a preference for interpreting contracts as creating bilateral obligations in all cases where there is no clear evidence that a unilateral contract was intended. The rule has been stated that in case of doubt an offer will be presumed to invite the formation of a bilateral contract by a promise to perform what the offer requests, rather than the formation of a unilateral contract commencing at the time of actual performance. The bottom line across most jurisdictions is that as courts have been confronted by a growing variety of fact patterns involving complicated contract disputes, courts have shifted from rigidly applying the concepts of unilateral and bilateral contracts to a more ad hoc approach.

Mutuality of obligation must exist in an enforceable bilateral contract, and this involves the concept of reciprocity. *A* cannot enforce *B*'s promise unless *A*'s promise entails a legal detriment, and *B* can enforce *A*'s promise only if *B*'s promise involves a legal detriment.

If a minor enters a bilateral contract with an adult that is unenforceable due to the minor's age, the adult party cannot assert absence of mutuality as a defense if the minor sues to enforce the contract. This principle applies to any situation where the law grants a particular party a privilege to avoid a contract because of his or her status.

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**CROSS-REFERENCES**

Performance; Promise; Reciprocal; Unilateral Contract.

## BILL

*A declaration in writing. A document listing separate items. An itemized account of charges or costs. In* EQUITY *practice, the first* PLEADING *in the action, the paper in which the plaintiff sets out his or her case and demands relief from the defendant.*

Many states require that laws must be passed by their state legislatures in the form of a bill. For example, the Texas Constitution requires that "no law shall be passed, except by bill, and no bill shall be so amended in its passage

through either House, as to violent change its original purpose." Tex. Const. art. III, § 30. Likewise, the California Constitution may not make any law except by statute and may not make any statute except by bill. Cal. Const. art. IV, § 8(b). In some instances, however, a joint resolution that is enacted in the same manner as a bill may have the same force of law as a statute enacted through the passage of a bill.

A bill of indictment is a formal written document accusing someone of having committed a crime. It is presented to a GRAND JURY for its consideration and decision whether to act on it. A BILL OF RIGHTS is a formal declaration that the people have certain rights and liberties. Rights are often asserted when there is a change in government, and a bill of rights has been included in the federal and many state constitutions in the United States.

A bill of particulars itemizes all the facts making up a claim asserted in a lawsuit. It is delivered to the opposing party in order to sharpen the issues in dispute. A bill of review lists errors alleged to have been made by a trial court. It is presented to a court that has jurisdiction to correct those errors or reverse the decision.

A bill of costs is a certified, itemized statement of expenses incurred by the successful party in a lawsuit. Courts are generally empowered to order the losing party to reimburse the winning party for some or all of these expenses. A bill of sale is a writing that lists property exchanged in a bargain for money or something else of value.

A bill corresponds to the declaration made by the plaintiff when beginning a common-law action. Modern rules of pleading have merged the procedures for handling cases at law and in equity, and the modern equivalent of both the bill in equity and the declaration at law is the complaint.

## BILL OF ATTAINDER

*A special legislative enactment that imposes a death sentence without a judicial trial upon a particular person or class of persons suspected of committing serious offenses, such as* TREASON *or a felony.*

A bill of attainder is prohibited by Article I, Section 9, Clause 3 of the Constitution because it deprives the person or persons singled out for punishment of the safeguards of a trial by jury.

## BILL OF EXCHANGE

*A three-party negotiable instrument in which the first party, the drawer, presents an order for the payment of a sum certain on a second party, the drawee, for payment to a third party, the payee, on demand or at a fixed future date.*

A bill of exchange is distinguishable from a promissory note, since it does not contain a promise and the drawer does not expressly pledge to pay it. It is similar to a note, however, since it is payable either on demand or at a specific time.

The terms *bill of exchange* and draft are synonymous; however, the former is generally used in INTERNATIONAL LAW, whereas the latter is used in the UNIFORM COMMERCIAL CODE.

## BILL OF INDICTMENT

*A formal written document that is drawn up by a government prosecutor accusing a designated person of having committed a felony or misdemeanor and which is presented to a* GRAND JURY *so that it may take action upon it.*

## BILL OF LADING

*A document signed by a carrier (a transporter of goods) or the carrier's representative and issued to a consignor (the shipper of goods) that evidences the receipt of goods for shipment to a specified designation and person.*

Carriers using all modes of transportation issue bills of lading when they undertake the transportation of cargo. A bill of lading is, in addition to a receipt for the delivery of goods, a contract for their carriage and a document of title to them. Its terms describe the freight for identification purposes; state the name of the consignor and the provisions of the contract for shipment; and direct the cargo to be delivered to the order or assigns of a particular person, the consignee, at a designated location.

There are two basic types of bills of lading. A straight bill of lading is one in which the goods are consigned to a designated party. An order bill is one in which the goods are consigned to the order of a named party. This distinction is important in determining whether a bill of lading is negotiable (capable of transferring title to the goods covered under it by its delivery or endorsement). If its terms provide that the freight is to be delivered to the bearer (or possessor) of the bill, to the order of a named party, or, as recognized in overseas trade, to a named

*A sample bill of lading*

**Bill of Lading**

BILL OF LADING

ORIGINAL

Shipper's number: _____ _____ (Name of issuing carrier)

Agent's number: _____

Received, subject to the classifications and tariffs in effect on the date of the issue of this bill of lading at _____ (place of issue) on _____ (date), from _____ (shipper), the property described below, in apparent good order, except as noted contents and condition of contents of packages unknown, marked, consigned, and destined as indicated below. Each person or corporation in possession of the property under the contract, here referred to as carrier, agrees to carry such property to its usual place of delivery at such destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to such destination. It is mutually agreed, by each carrier of all or any of such property over all or any portion of such route to destination, and by shipper and any other party at any time interested in all or any of such property, that every service to be performed under this bill of lading shall be subject to all the conditions, whether printed or written, not prohibited by law, that are contained in this bill of lading, including the terms and conditions on the reverse of the document. The surrender of this original ORDER bill of lading properly endorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is endorsed on this original bill of lading or given in writing by shipper.

Consigned to ORDER of _____ (consignee).

Destination: _____ (address), _____ (city), _____ County, _____ (state), .

Notify: _____ (designate), at _____ (address), _____ (city), _____County, _____ (state), .

Route: _____ (describe).

Delivering carrier: _____ (designate). Car _____. Car No. _____:

| Special Mark | Weight | Subject | Check No. | Rate |
|---|---|---|---|---|
| _____ | _____ | _____ | _____ | _____ |
| _____ | _____ | _____ | _____ | _____ |
| _____ | _____ | _____ | _____ | _____ |

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is carrier's or shipper's weight.

Subject to paragraph 7 of the terms and conditions on the reverse of this bill of lading, if this shipment is to be delivered to consignee without recourse on consignor, consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

_____
(Signature of shipper, if desired)

if charges are to be prepaid, write or stamp here, To Be Prepaid: _____.

Received _____ Dollars ($_____) to apply in prepayment of the charges on the property described in this bill of lading.

_____, Agent or Cashier

Per _____ (signature, if desired) (The signature here acknowledges only the amount prepaid.)

Charges advanced: _____ Dollars ($_____).

Note where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by shipper to not exceed _____ Dollars ($_____)

per _____ (article, unit of weight, or the like).

_____, Shipper _____, Agent

Per _____

1Signature Per _____

Permanent post office address of shipper: _____

CONTRACT TERMS AND CONDITIONS

Set forth general terms and conditions:

_____

_____

_____

person or assigns, a bill, as a document of title, is negotiable. In contrast, a straight bill is not negotiable.

State laws, which often include provisions from the UNIFORM COMMERCIAL CODE, regulate the duties and liabilities imposed by bills of lading covering goods shipped within state boundaries. Federal law, embodied in the INTERSTATE COMMERCE ACT (49 U.S.C. [1976 Ed.] § 1 et seq.) apply to bills of lading covering goods traveling in interstate commerce.

CROSS-REFERENCES

Consignment; Shipping Law.

## BILL OF PARTICULARS

*A written statement used in both civil and criminal actions that is submitted by a plaintiff or a prosecutor at the request of a defendant, giving the defendant detailed information concerning the claims or charges made against him or her.*

In civil actions a bill of particulars is a written demand for the specifics of why an action at law was brought. Although usually requested by a defendant, it can be demanded by a plaintiff if the defendant makes a counterclaim for a setoff or asserts a defense against him or her. A bill can be submitted either voluntarily or pursuant to a court order for compliance with the demand. Its function is to give the party who requests it knowledge of what the opposing party has alleged in order to protect the party requesting the bill from surprise and in order to establish the real issues of the action. It also serves to expedite the orderly progress of judicial proceedings by reducing, if not eliminating, the need for the amendment of ambiguous or vague pleadings. A bill of particulars is neither a PLEADING nor proof of the facts it states, but, rather, an elucidation of a pleading. It is not to be used as a discovery device to learn the evidence or strategy to be used at trial by the opposing party.

State codes of CIVIL PROCEDURE impose rules that govern the use of bills of particulars in civil actions brought in state court. In federal courts the Federal Rules of Civil Procedure have replaced the use of a bill of particulars with a motion for a more definite statement. If, however, the information sought by such a motion is obtainable by use of discovery mechanisms, the motion will be denied.

In CRIMINAL LAW, a bill of particulars serves the same purpose. It is submitted by the prosecution to the defendant, at the defendant's demand, to provide the facts alleged in the complaint or the indictment that related to the commission of the crime. The defendant is given notice of the offenses with which he or she is charged so that a defense may be prepared and the possibility of surprise or DOUBLE JEOPARDY avoided. As in civil procedure, a bill of particulars is not intended to serve as a discovery device.

State codes of CRIMINAL PROCEDURE and the Federal Rules of Criminal Procedure regulate the use of bills of particulars in criminal prosecutions in their respective courts.

## BILL OF REVIEW

*In the practice of* EQUITY *courts, a paper filed with a court after expiration of the time for filing a petition for a rehearing in order to request, due to exceptional circumstances, the correction or reversal of a final judgment or decree.*

The use of a bill of review is limited to three situations: (1) the correction of a judgment that has incorporated errors found in the record of the case; (2) the reversal of a judgment because of recent discovery of evidence that is decisive on the issues of the case but that could not have been found in time for the trial; and (3) the setting aside of a judgment based upon proceedings that were tainted by FRAUD, such as perjured testimony.

In states where courts of equity and law have merged, a bill of review has been replaced by a motion for relief from a judgment or decree, governed by state rules of CIVIL PROCEDURE. A motion for relief from a judgment or order serves the same function in federal courts as provided by Rule 60 of the Federal Rules of Civil Procedure, which abolished bills of review.

## BILL OF RIGHTS

*A declaration of individual rights and freedoms, usually issued by a national government.*

*A list of fundamental rights included in each state constitution.*

*The first ten amendments to the U.S. Constitution, ratified in 1791, which set forth and guarantee certain fundamental rights and privileges of individuals, including freedom of religion, speech, press, and assembly; guarantee of a speedy jury trial in criminal cases; and protection against excessive bail and* CRUEL AND UNUSUAL PUNISHMENT.

*A sample motion for bill of particulars*

**Motion for Bill of Particulars**

Jul 31 1984

CLERK. U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 84-00255
Judge Joyce Hens Green
Trial Date: 9/17/84

UNITED STATES OF AMERICA:

v.

WILLIAM THOMAS
CONCEPCION PICCIOTTO, et. al

MOTION FOR BILL OF PARTICULARS

Concepcion Picciotto, through her council, respectfully requests this Court, pursuant to Federal Rules of Criminal Procedure 7(f) and 76, to direct the filling of a bill of particulars.

In, support thereof, Ms. Picciotto states as follows:

1. Ms. Picciotto was arraigned in the instant case on July 13, 1984. She is charged with violation of 36 C.F.R. §50.5 and 50.27 (camping/sleeping and storage of property).

2. The information Fails to specifically state the time this alleged offense occurred.

3. The information fails to specify the exact location on the South sidewalk of Lafayette Park where Ms. Picciotto is alleged to have camped.

4. The information fails to specify what activities Ms. Picciotto is alleged to have engaged in. (See Information Line 6 ". . . including activities and making preparations to sleep . . .")

5. The information fails to specify what property Ms. Picciotto allegedly stored.

6. An informal discovery conference with Assistant United States Attorney Pamela Stuart was held on July 5, 1983. At that time defense counsel made a bona fide attempt, pursuant to Fed. R. Cr. P. 16 to ascertain the particulars of the crime charged with respect to Ms. Picciotto. Specifically, counsel requested the exact time and location of the alleged occurrence. The government was either unable or unwilling to comply with this request. Indeed, Assistant United States Attorney Stuart refused to even release the United States Park Police Incident Report, a document which certainly should provide this information.

7. At the discovery conference counsel also asked about the property allegedly stored by Ms. Picciotto. In response to this inquiry a list of over sixty (60) assorted items seized pursuant to the arrest of the defendants was orally read to counsel. The government was either unable or unwilling to specify what items were allegedly stored by defendant Picciotto.

8. Because Ms. Picciotto has been engaged in a round-the-clock vigil in the White House vicinity since 1981, and because she preparations been arrested previous to and subsequent to June 6, 1984, read is crucial that she be apprised of the exact time of day or night on June 6, 1984 when she is alleged to have camped. Further, preparations because other persons, including the co-defendants are similarly engaged, and because "stored Property' has been seized from Ms. Picciotto and other persons on numerous occasions, she must be apprised of exactly what "stored property" the government attributes to her in this case and what illegal "activities" she allegedly personally performed. In order to conduct her own investigation, to prepare an adequate defense, and to avoid danger of surprise at trial, Ms. Picciotto preparations needs to be apprised of these aforementioned particulars.

WHEREFORE, Ms. Picciotto respectfully requests that this Court grant her Motion for Bill of Particulars and order the government to disclose the time and exact location of the alleged camping, the "activities" Ms. Picciotto engaged in, and what property she allegedly stored.

Respectfully submitted.

/s/ Phyllis B. Tatik

PHYLLIS B. TATIK

[continued]

*A sample motion for bill of particulars (continued)*

**Motion for Bill of Particulars**

GEORGETOWN CRIMINAL JUSTICE CLINIC
605 G Street, N.W.
Third Floor
Washington, D.C. 20001
(202) 624-8380

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion for Bill of Particulars and attached Points and Authorities has been personally delivered to Assistant United States Attorney Pamela Stuart, Room 3836, United States Courthouse, 3rd and Constitution Avenue, N.W., Washington, D.C. 20001 on this 31st day of July 1984.

/s/ Phyllis B. Tatik

PHYLLIS B. TATIK

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA:

v.: Criminal No. 84-00255

: Judge Joyce Hens Green

:Trial Date: 9/17/84

WILLIAM THOMAS:

CONCEPCION PICCIOTTO, et. al.

ORDER

This matter having come before the Court on Defendant Picciotto's Motion for Bill of Particulars, and the Court having considered the Motion and Memorandum In Support Thereof and the government's Opposition, now this _____ day of_____ 1984, IT IS HEREBY ORDERED

Defendant Picciotto's Motion for Bill of Particulars is GRANTED.

**/s/ Judge Joyce Green**
United States District Court Judge

As a fundamental guarantee of individual liberty, the U.S. Bill of Rights (see appendix volume for primary document) forms a vital aspect of American law and government. It establishes many legal principles that have had a decisive effect upon law and society, including the functioning of the criminal justice system, the separation of church and state, and the exercise of FREEDOM OF SPEECH.

The concept of a bill of rights as a statement of basic individual freedoms derives in part from the English Bill of Rights, passed in 1689 (see appendix volume for primary document). This document, which was created after the Glorious Revolution of 1688, established the terms by which William and Mary were accepted as king and queen of England. It forbade the monarchy to suspend laws, raise taxes, or maintain an army without consent of Parliament. It also declared that freedom of speech in Parliament could not be challenged, protected those accused of crimes from "excessive bail" and "cruel and unusual punishments," and provided a number of other privileges and freedoms (1 Will. & Mar., Sess. 2, C. 2).

Nearly a century later, seven of the 13 states of the newly independent United States of America adopted a bill of rights as part of their state constitutions, and the remaining six included elements of the English Bill of Rights in the bodies of their constitutions. Virginia, the first state to adopt a bill of rights, passed the VIRGINIA DECLARATION OF RIGHTS in 1776. Drafted largely by GEORGE MASON, Virginia's declaration became a model for later state bills of rights and ultimately for the federal Bill of Rights, and it remains a part of that state's constitution.

At the Constitutional Convention of 1787, the Framers of the U.S. Constitution used the English Bill of Rights and state bills of rights as resources as they sought to define the fundamental principles and institutions of U.S. government. However, they declined to add a bill of rights to the Constitution, on the grounds that the Constitution itself provided adequate protection from intrusive government. Indeed, the Constitution contained some elements of the English Bill of Rights, including Congress's exclusive power to maintain armed forces and, on the federal level, to pass laws and impose taxes. The Constitution also incorporated other specific rights traditional in ENGLISH LAW, including that of HABEAS CORPUS, which protects against unlawful imprisonment. However, the Constitution made no mention of other basic rights of constitutional government such as freedom of speech, press, and religion, and the rights of those accused of crimes.

During the Constitution's ratification process, from 1787 to 1789, state ratifying conventions pointed out the lack of such fundamental guarantees in the Constitution and submitted lists of proposed constitutional amendments. The Federalists, who supported ratification of the Constitution, eventually conceded and promised to attach a bill of rights to the document. The leading contributors to the creation of these amendments—which came collectively to be called the Bill of Rights—were George Mason, THOMAS JEFFERSON, and JAMES MADISON, with Madison serving as their principal author and sponsor on the floor of the U.S. House during the First Congress.

On September 25, 1789, 12 amendments to the Constitution were submitted to the states by the required two-thirds majority of Congress. Two of the amendments—which dealt with congressional pay and the APPORTIONMENT, or assignment, of congressional seats to the states—were voted down by the states. The other ten amendments were ratified by December 15, 1791.

Scholars have described the Bill of Rights as protecting three different types of HUMAN RIGHTS: (1) rights of conscience, including the First Amendment's freedom of speech and religion; (2) rights of those accused of crimes, such as the Eighth Amendment's protection against excessive bail and fines; and (3) rights of property, such as the Fifth Amendment's provision that no one may be deprived of property without DUE PROCESS OF LAW.

One vital issue in the history of the interpretation of the Bill of Rights has concerned its application to the states. In the case of *Barron ex rel. Tiernan v. Mayor of Baltimore,* 32 U.S. (7 Pet.) 243, 8 L. Ed. 672 (1833), the Supreme Court ruled that the Bill of Rights applied only to the federal government. However, by the 1920s, the Court, using a principle known as the INCORPORATION DOCTRINE, had begun to apply selected elements of the first ten amendments to the states. According to this doctrine, elements of the Bill of Rights may be applied to the states through the Due Process Clause of the FOURTEENTH AMENDMENT, which holds that no state shall "deprive any person of life, liberty, or property, without due process of law." Thus in 1925 the Supreme Court ruled that the FIRST AMENDMENT protections of freedom of speech applied to the states as well as the federal government (GITLOW V. NEW YORK, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138). Incorporation gave the Supreme Court wide power to strike down state laws that it deemed to be in violation of the Constitution's Bill of Rights.

By the end of the twentieth century, nearly all provisions of the Bill of Rights had been declared binding on the states. Only five provisions of the Bill of Rights had not been applied to the states: (1) the Second Amendment's right to bear arms; (2) the Third Amendment's prohibition against involuntary quartering of troops; (3) the Fifth Amendment's requirement of GRAND JURY indictment in capital cases; (4) the Seventh Amendment's provision for trial by jury in civil cases; and (5) the Eighth Amendment's prohibition of excessive bail and fines.

States are free to provide additional protections beyond those offered in the federal Bill of Rights, but they may not reduce CIVIL RIGHTS or liberties to standards lower than those of the federal Constitution.

Other countries have passed bills of rights that differ from those of England and the United States. In 1789 the Constituent Assembly of France passed the Declaration of the Rights of Man, a document that stated the philosophical principles of the French Revolution. Canada adopted the Act for the Recognition and Protection of Human Rights and Fundamental Freedoms in 1960 (8-9 Eliz. II, ch. 44, § 1[c]-[f] [Can.]) and the Charter of Rights and Freedoms in 1982 (Can. Const. [Constitution Act, 1982] pt. I).

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Lewis, Thomas T., ed. 2002. *The Bill of Rights.* Pasadena, Calif.: Salem Press.

Monk, Linda R. 2000. *The Bill of Rights: A User's Guide.* Alexandria, Va.: Close Up Pub.

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CROSS-REFERENCES

Constitutional Amendment; Eminent Domain; English Bill of Rights (Appendix, Primary Document); Equal Protection; Freedom of Association and Assembly; Freedom of the Press; Privilege Against Self-Incrimination; Religion; Right to Counsel; Search and Seizure; Speedy Trial; U.S. Bill of Rights (Appendix, Primary Document). See also entries on each amendment to the U.S. Constitution (e.g., First Amendment).

## BILL OF SALE

*In the law of contracts, a written agreement, previously required to be under seal, by which one person transfers to another a right to, or interest in,* **PERSONAL PROPERTY** *and goods, a legal instrument that conveys title in property from seller to purchaser.*

## BILLS AND NOTES

*An archaic term that designated the body of law currently known as the law of* **COMMERCIAL PAPER**, *which governs the methods by which commercial transactions are financed and facilitated by the execution and transfer of documents that contain promises to repay debts according to the terms specified in the documents.*

## BILLS OF CREDIT

*Non-interest-bearing promissory notes issued by the government and backed by its faith and credit to be paid when presented by their holders, which are in the form of currency and are intended to be circulated and exchanged in the community as money.*

The federal government, acting through the **FEDERAL RESERVE** banks, issues bills of credit in the form of dollar bills that are promises to pay the specific denominations indicated on them to the bearer of such paper on demand. Article I, Section 10 of the Constitution, in order to provide a uniform standard of money throughout the United States, prohibits states from issuing their own bills of credit for circulation as currency.

*A sample bill of sale*

**Bill of Sale**

Dated: [*date*]
[*seller*], referred to as "SELLER", sells, bargains and conveys all of SELLER'S right, title and interest in:

[*describe goods*]

to [*buyer*], referred to as "BUYER", his heirs and assigns.

[*seller*] acknowledges receipt of a total of $ [*price, e.g. $5000*] from [*buyer*], BUYER, in full payment of the purchase price of the goods conveyed hereby.

[*seller*] warrants that there are no liens or encumbrances on the goods sold, and the [*seller*]'s title to the goods is clear and merchantable. [*seller*] shall defend [*buyer*] from any adverse claims to SELLER's title to the goods sold.

*The BUYER, [buyer], acknowledges examining the goods sold herein. The goods sold herein are used and sold "as is", "where is", "with all faults." These goods are sold without UCC warranty of any kind, including fitness for a particular purpose or merchantability. The goods herein are not sold by a merchant in the field.*

The parties agree to the terms and conditions stated herein:

_____
[*seller*], SELLER

_____
[*buyer*], BUYER

## BINDER

*A written document that records the essential provisions of a contract of insurance and temporarily protects the insured until an insurance company has investigated the risks to be covered, or until a formal policy is issued.*

*A receipt for cash or for a check that is deposited by a prospective buyer with the seller to secure the right to purchase real estate at terms that have been agreed upon by both buyer and seller.*

## BINDING AUTHORITY

*Source of law that a judge must evaluate when making a decision in a case. For example, statutes from the same state where a case is being brought, or higher court decisions, are binding authority for a judge.*

According to Article VI of the Constitution—the Supremacy Clause—all laws made pursuant to the Constitution are considered the supreme law of the land. They are entitled to legal superiority over any conflicting state law or constitutional provision.

CROSS-REFERENCES

Primary Authority.

## BINDING OVER

*The requirement imposed by a court or a magistrate upon a person to enter into a recognizance or to post bail to ensure that he or she will appear for trial. The transfer of a case from a lower court to a higher court or to a* GRAND JURY *after* PROBABLE CAUSE *to believe that the defendant committed the crime has been established.*

"IT IS CLEARLY THE RIGHT OF THE REPUBLIC TO LIVE AND TO DEFEND ITS LIFE . . . [JUST] AS IT IS THE RIGHT OF THE INDIVIDUAL TO LIVE SO LONG AS GOD GIVES HIM LIFE."
—JOHN BINGHAM

## ♦ BINGHAM, JOHN ARMOR

John Armor Bingham was born January 21, 1815, at Mercer, Pennsylvania. He attended Franklin College and pursued legal studies before establishing a successful legal practice in Cadiz in 1840.

*John Armor Bingham.* LIBRARY OF CONGRESS

In 1854, Bingham became an Ohio representative to Congress, serving until 1873, with the exception of one session in 1864. In 1864, he became JUDGE ADVOCATE and, subsequently, solicitor of the court of claims. After his congressional tenure, he was minister to Japan until 1885.

Bingham gained fame for his participation in three significant historical events. He presided as special judge advocate at the proceedings

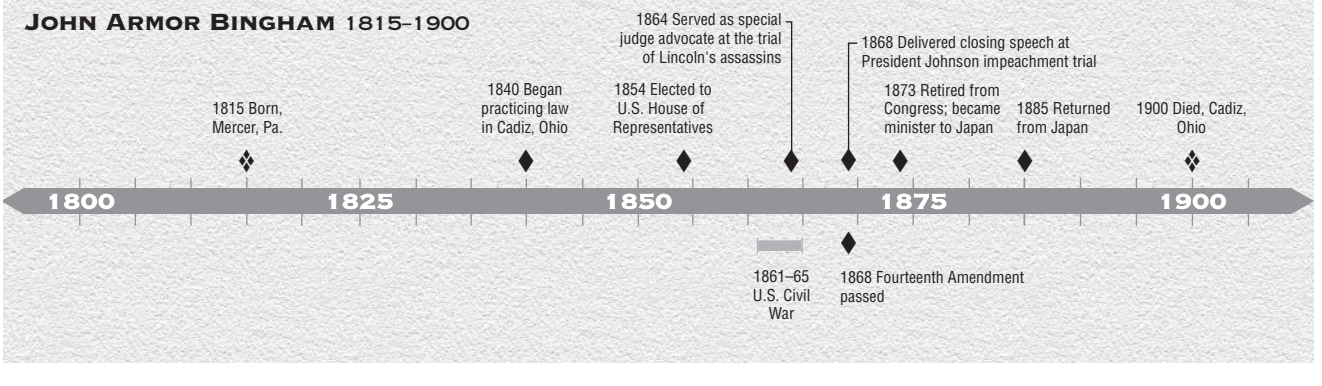

against the assassins of ABRAHAM LINCOLN; he delivered the closing speech at the IMPEACHMENT trial of President ANDREW JOHNSON; and he was instrumental in shaping the Privileges and Immunities Clause added to the FOURTEENTH AMENDMENT. In the last-mentioned endeavor Bingham worked with Senators Thaddeus Stevens of Pennsylvania, Jacob Howard of Michigan, and Lyman Trumbull of Illinois. The clause prohibited a state from abridging the PRIVILEGES AND IMMUNITIES guaranteed to a citizen of the United States.

Bingham died March 19, 1900, in Cadiz, Ohio.

## ♦ BINNEY, HORACE

Horace Binney was born January 4, 1780. He graduated from Harvard in 1797 and was admitted to the Philadelphia bar in 1800.

In 1806, Binney became a member of the Pennsylvania legislature, serving until 1807. In 1808 he became a director of the first BANK OF THE UNITED STATES, then returned to his political career in 1810 as a member of the Philadelphia Common Council and, from 1816 to 1819, the Philadelphia Select Council.

As a counselor, Binney displayed his legal expertise in cases concerning land titles. He won a famous victory in the Girard Trust Case of 1844, which involved the legality of a charitable legacy left to Philadelphia by philanthropist Stephen Girard. Binney defended the validity of this gift and set a precedent for interpretation of the law in regard to charitable bequests.

Binney was a representative for Pennsylvania in the U.S. House of Representatives from 1833 to 1835. He opposed the views of ANDREW JACKSON on the Second Bank of the United States: Binney favored the federal bank, while Jackson preferred the use of state banks for federal deposits.

Binney wrote several biographies and case reports, including *Leaders of the Old Bar of Philadelphia* (1859). He died August 12, 1875, in Philadelphia.

"THE BAR IS A LARGE AND DIVERSIFIED BODY. LIKE THE WEB OF OUR LIFE, IT IS A MINGLED YARN, GOOD AND ILL TOGETHER."
—HORACE BINNEY

## ♦ BIRD, ROSE ELIZABETH

Rose Elizabeth Bird served as the first woman on the California Supreme Court, becoming the chief justice of one of the most prominent appellate courts in the United States. Bird became a controversial figure during the 1980s, as her adamant opposition to CAPITAL PUNISHMENT drew fire from political conservatives. In 1986, these views led voters to remove her from office. In her nine years on the court, however, Bird led a liberal majority that strengthened environmental laws, consumer rights, and WOMEN'S RIGHTS.

Bird was born on November 2, 1936, in Tucson, Arizona. She spent her childhood in Arizona and New York, where she graduated from Long Island University in 1958. She attended graduate school in political science at the University of California at Berkeley in 1960 but switched her career path to law when she entered Berkeley's Boalt Hall School of Law in 1962. After graduation in 1965, Bird was admitted to the PRACTICE OF LAW in California.

Following graduation, Bird served a one-year term as a law clerk for the chief justice of the Nevada Supreme Court. In 1966 she joined the Santa Clara County, California, public defenders office. Bird remained in the public defenders office until 1974, serving successively as deputy public defender, senior trial deputy, and chief

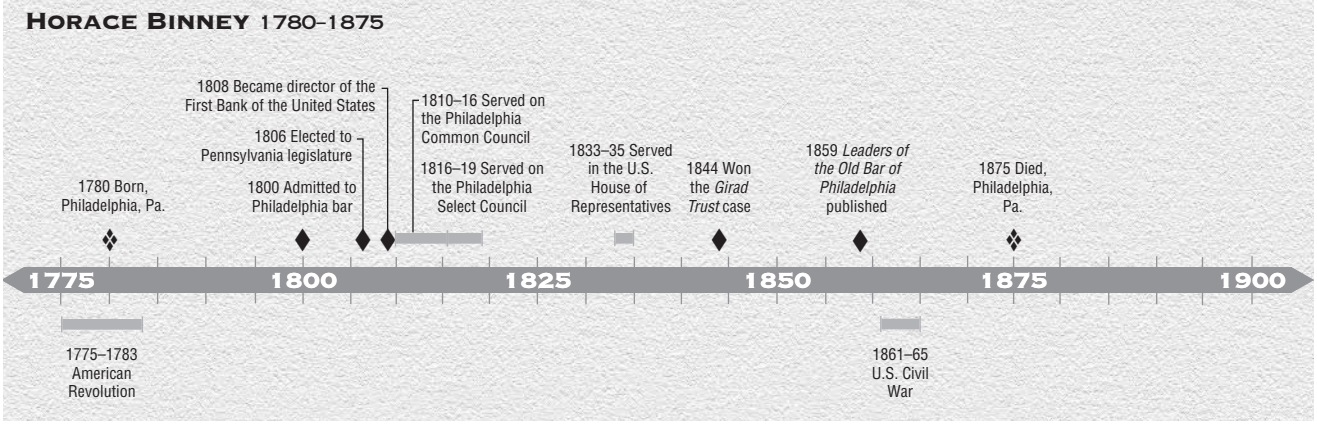

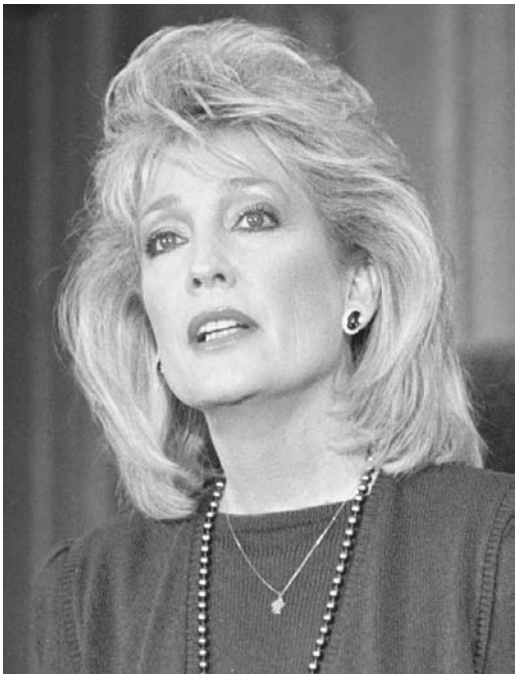

*Rose Bird.* AP/WIDE WORLD PHOTOS

"MY ROLE ISN'T TO BE POLITICALLY SMART. MY ROLE IS TO DO WHAT'S RIGHT UNDER THE CONSTITUTION. AND IF THAT'S POLITICALLY UNPOPULAR, SO BE IT."
—ROSE BIRD

public defender of the appellate division. As head of the appellate division, Bird oversaw all public defender criminal appeals to the California Courts of Appeal and the California Supreme Court. In addition to these duties, Bird served as an adjunct professor of law at Stanford University Law School from 1972 to 1974.

Bird's eventual rise to the California Supreme Court began when she became the chauffeur during Democrat Jerry Brown's campaign for the governorship in 1974. Following his election, Brown appointed Bird to his cabinet as secretary of agriculture. She spent most of her time in that office working to settle a series of ongoing disputes between growers and farm unions. Moreover, she drafted reforms to the state's farm LABOR LAW and to consumer legislation.

In 1977, after twenty-two months in the cabinet, Governor Brown appointed Bird, then age 40, as chief justice of the California Supreme Court. She gained immediate national prominence because she was the first woman to serve on the state's high court. As a member of a liberal majority, Bird established herself as a brilliant and combative judge. During her tenure, the court issued decisions that promoted environmental regulation and CIVIL RIGHTS for racial minorities and women. Other decisions gave tenants more rights and poor women the right to have a state-funded ABORTION.

Coming from the public defenders office, the large corporate law firms and influential bar associations viewed her as an outsider. Bird signaled her disdain for the "old boys" system of privilege by selling the chief justice's Cadillac and by staying at inexpensive motels rather than at expensive hotels while on state business. She also exercised strong leadership over the administration of the courts. Bird promoted racial and gender diversity on the bench. During her tenure, more than one-thousand judges were appointed who were either persons of color or female. In addition, she led the court system to change its rules to allow cameras in the courtroom. Finally, she initiated a study of gender bias in the courts, a groundbreaking effort that was adopted by many other state courts during the 1980s and 1990s.

It was Bird's opposition to the death penalty, however, that had the greatest effect on her judi-

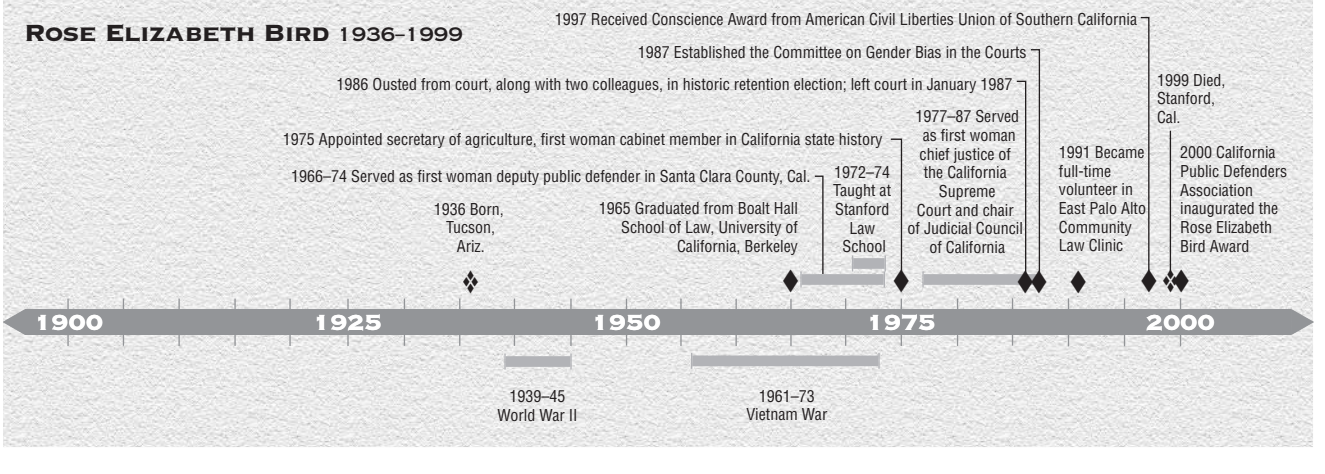

cial career. California reinstated the death penalty in 1977 over the VETO of Governor Brown. Thus, Bird took the bench at the same time that death penalty appeals would return to the state supreme court. Although Bird never discussed her personal views while on the court, she voted to overturn all sixty-four death sentences under her consideration.

By the mid-1980s, conservative political leaders began attacking Bird and members of the liberal majority who regularly voted against the death sentence. In 1986, Republican Governor George Deukmejian, along with local prosecutors, led a hard-hitting campaign to remove Bird and fellow justices Cruz Reynoso and Joseph Grodin from the court. They became the first judges in state history to be removed from office in a retention election. A retention election allows citizens to vote to retain or oust the judge in which there are no opposing candidates. Governor Deukmejian then appointed three justices to fill the vacancies.

Following her defeat, Bird dropped from the public scene. She volunteered at a Palo Alto legal aid office, doing clerical work because she let her bar registration dues lapse. She also worked at a local food bank, taught for a short time in Australia at the University of Sydney, and lectured occasionally around the country. She died on December 4, 1999, in Palo Alto from complications related to breast cancer.

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Beck, Susan. 1998. "Justice on the Run." *American Lawyer* (September): 76.

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*The birth control pill is one of the most widely used forms of birth control. In the 1950s, birth control advocate Margaret Sanger raised $150,000 to pay for research into the development of the birth control pill by Dr. Gregory Pincus.*

AP/WIDE WORLD PHOTOS

## BIRTH CONTROL

*A measure or measures undertaken to prevent conception.*

In the 1800s, temperance unions and antivice societies headed efforts to prohibit birth control in the United States. Anthony Comstock, the secretary of the Society for the Suppression of Vice, advocated a highly influential law passed by Congress in 1873. It was titled the Act for the Suppression of Trade in, and Circulation of Obscene Literature and Articles of Immoral Use, but known popularly as the COMSTOCK LAW or Comstock Act (18 U.S.C.A. § 1416-62 [1964]; 19 U.S.C.A. § 1305 [1964]). The Comstock Act prohibited the use of the mail system to transmit obscene materials or articles addressing or for use in the prevention of conception, including information on birth control methods or birth control devices themselves.

Soon after the federal government passed the Comstock Act, over half of the states passed similar laws. All but two of the rest of the states already had laws banning the sale, distribution, or advertising of contraceptives. Connecticut had a law that prohibited even the *use* of contraceptives; it was passed with little or no consideration for its enforceability.

Despite popular opposition, birth control had its advocates, including MARGARET SANGER. In 1916, Sanger opened in New York City the first birth control clinic in the United States. For

doing so, she and her sister Ethel Byrne, who worked with her, were prosecuted under the state's version of the Comstock law (*People v. Byrne,* 99 Misc. 1, 163 N.Y.S. 682 [1917]; *People v. Sanger,* 179 A.D. 939, 166 N.Y.S. 1107 [1917]). Both were convicted and sentenced to thirty days in a workhouse.

After serving her sentence, Sanger continued to attack the Comstock Act. She established the National Committee for Federal Legislation for Birth Control, headquartered in Washington, D.C., and proposed the "doctor's bill." This bill advocated change in the government's policy toward birth control, citing the numerous instances in which women had died owing to illegal ABORTIONS and unwanted pregnancies. The bill was defeated, due, in part, to opposition from the Catholic Church and other religious groups.

But when the issue of Sanger's sending birth control devices through the mail to a doctor was pressed in *United States v. One Package,* 13 F. Supp. 334 (S.D.N.Y. 1936), the court ruled that the Comstock Act was not concerned with preventing distribution of items that might save the life or promote the well-being of a doctor's patients. Sanger had sought to challenge the Comstock Act by breaking it and sending contraception in the mail. Her efforts were victorious and the exception was made. The doctor to whom Sanger had sent the device was granted its possession.

Sanger furthered her role in reforming attitudes toward birth control by founding the Planned Parenthood Federation of America in 1942. Planned Parenthood merged previously existing birth control federations and promoted a range of birth control options. In the 1950s, Sanger went on to support the work of Dr. Gregory Pincus, whose research eventually produced the revolutionary birth control pill.

By the 1960s, partly as a result of Sanger's efforts, popular and legal attitudes toward birth control began to change. The case of GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), loosened the restrictions of the Comstock Act. When the Planned Parenthood League of Connecticut opened in 1961, its executive director, Estelle Griswold, faced charges of violating Connecticut's ban on the use of contraceptives (Conn. Gen. Stat. Ann. §§ 53-32, 54-196 [1958]).

A divided Supreme Court overturned Griswold's conviction with a ground-breaking opinion that established a constitutional right to marital privacy. The Court threw out the underlying Connecticut statute, which prohibited both using contraception and assisting or counseling others in its use. The majority opinion, authored by Justice WILLIAM O. DOUGLAS, looked briefly at a series of prior cases in which the Court had found rights not specifically enumerated in the Constitution—for example, the right of FREEDOM OF ASSOCIATION, which the Court has said is protected by the FIRST AMENDMENT, even though that phrase is not used there (*NAACP v. Alabama,* 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 [1958]). Douglas concluded that various guarantees contained in the Bill of Rights' Amendments One, Three, Four, Five, Nine, along with Amendment Fourteen, create "zones of privacy," which include a right of marital privacy. The Connecticut statute, which could allow police officers to search a marital bedroom for evidence of contraception, was held unconstitutional; the government did not have a right to make such intrusions into the marital relationship.

The other branches of the government followed the Court's lead. President LYNDON B. JOHNSON endorsed public funding for family planning services in 1966, and the federal government began to subsidize birth control services for low-income families. In 1970 President RICHARD M. NIXON signed the Family Planning Services and Population Research Act (42 U.S.C.A. § 201 et seq.). This act supported activities related to population research and family planning.

More and more, the Comstock Act came to be seen as part of a former era, until, in 1971, the essential components of it were repealed. But this repeal was not necessarily followed in all the states. In the 1972 case of *Eisenstad v. Baird,* 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349, the Court struck down a Massachusetts law still on the books that allowed distribution of contraceptives to married couples only. The Court held that the Massachusetts law denied single persons EQUAL PROTECTION, in violation of the FOURTEENTH AMENDMENT.

In the 1977 case of *Carey v. Population Services International,* 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675, the Supreme Court continued to expand constitutional protections in the area of birth control. The Court imposed a strict standard of review for a New York law that it labeled "defective." The law had prohibited any-

## Birth Control

**CONTRACEPTIVE USE BY WOMEN OF CHILDBEARING AGE, 15 TO 44 YEARS OLD, IN 1995**

**All women age 15–44**[a]

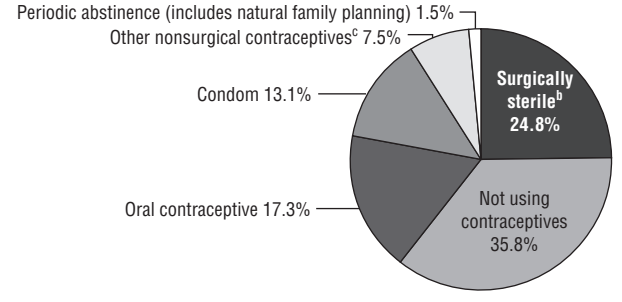


**Age 15–19**[a]

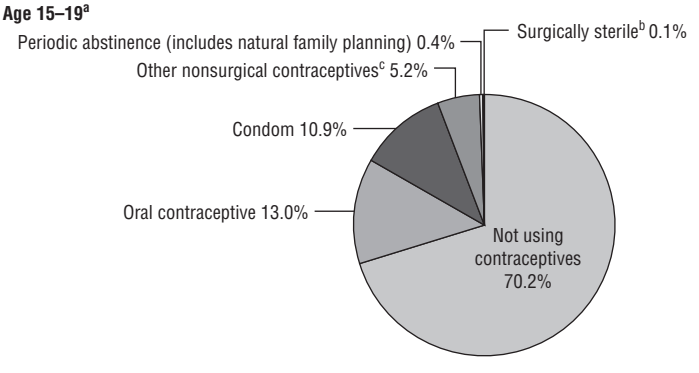


**Age 30–34**[a]

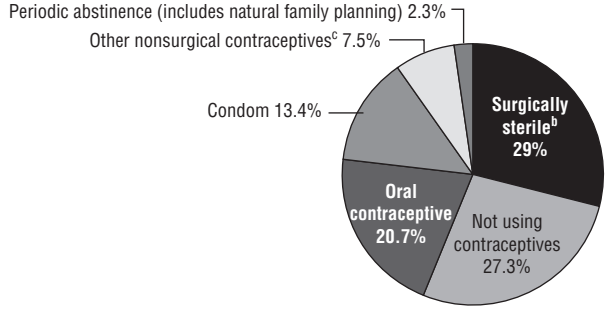


**Age 40–44**[a]

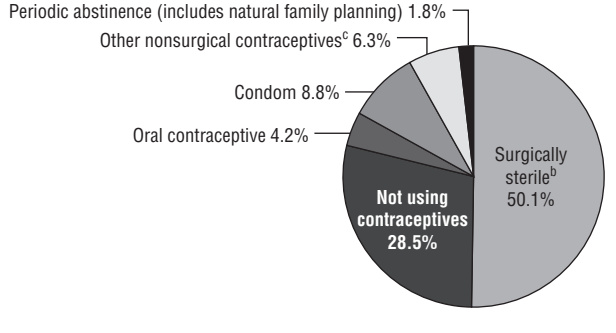


[a] Numbers may not add up to 100 due to rounding.
[b] Includes sterilizations performed on woman for contraceptive or medical reasons, as well as sterilization performed on husband or partner.
[c] Includes IUD, diaphragm, withdrawal, and other methods.

SOURCE: U.S. National Center for Health Statistics, *Vital Health Statistics*, vol. 23, no. 19, 1997.

one but physicians from distributing contraceptives to minors under sixteen years of age. The law had also prohibited anyone but licensed pharmacists from distributing contraceptives to persons over sixteen. *Carey* allowed makers of contraceptives more freedom to distribute and sell their products to teens.

Throughout the 1990s, cases were brought in a number of jurisdictions in which parents sought to prohibit the distribution of condoms and other forms of birth control in schools to unemancipated minor students without the consent of a parent or guardian. Although some jurisdictions held that such birth control distribution programs violated the parents' DUE PROCESS rights, other jurisdictions upheld the privacy rights of such minors and found the programs to be constitutional.

More controversy arose after women gained access to RU-486, the so-called "morning-after" pill and later generations of emergency contraceptives, which are high-dosage birth control pills designed to be taken shortly after unprotected intercourse has taken place. Emergency contraception continues to be opposed by antiabortion groups on the ground that it is another form of abortion.

Since 2000, the election of Republican majorities in various state legislatures has strengthened the position of groups opposing abortion and reproductive rights. In addition to continuing to battle for the right to require parental consent for contraceptive services to minors both in schools and community health clinics, a number of conservative groups support "abstinence-only" sexuality education classes in schools. While some proponents want to make such classes optional and are willing to have them taught alongside traditional courses that discuss various methods of birth control, other adherents seek to have these classes taught in place of the traditional courses.

President GEORGE W. BUSH's election in 2000 as well as the Republican gains in the House in 2002, further strengthened the efforts of those who seek to restrict access to birth control education and methods.

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Family Law; *Griswold v. Connecticut* (Appendix, Primary Document); Parent and Child; Privacy; Reproduction; Schools and School Districts.

## ❖ BISSELL, WILSON SHANNON

Wilson Shannon Bissell was born December 31, 1847, in New London, New York. He graduated from Yale in 1869 and received a doctor of laws degree in 1893. In 1872 he established a legal practice with Lyman K. Bass and in 1873 GROVER CLEVELAND joined the firm, forming Bass, Cleveland and Bissell.

In 1888 Bissell acted as a presidential elector and in 1890, served on a commission to amend the judicial articles of the New York Constitution.

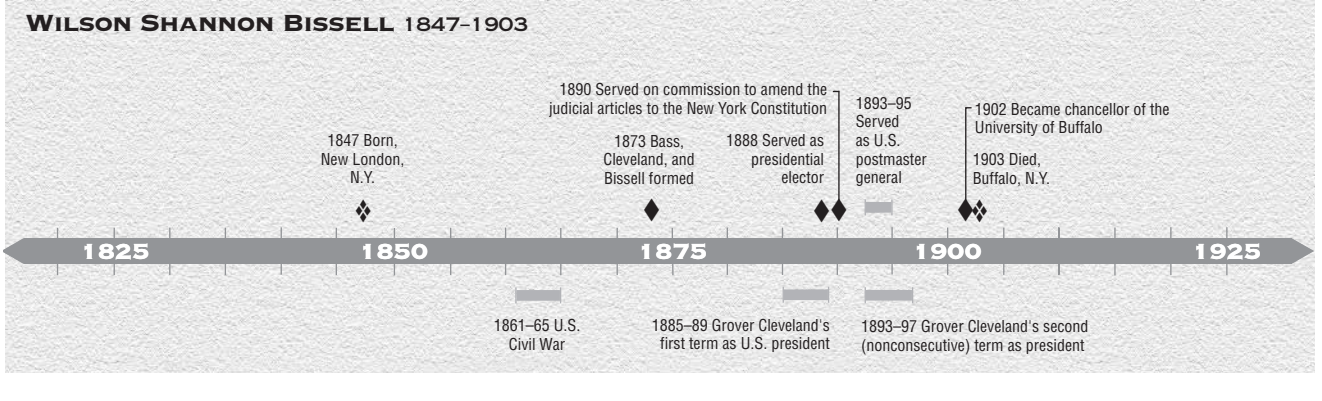

Grover Cleveland, as president of the United States in 1893, selected his former law partner to serve as U.S. postmaster general, which post Bissell held until 1895.

Extending his career to the field of education, Bissell became chancellor of the University of Buffalo in 1902. He died October 6, 1903, in Buffalo.

## BLACK CODES

*A body of laws, statutes, and rules enacted by southern states immediately after the Civil War to regain control over the freed slaves, maintain white supremacy, and ensure the continued supply of cheap labor.*

The Union's victory over the South in the Civil War signaled the end for the institution of SLAVERY in the United States. Ratified in 1865, the THIRTEENTH AMENDMENT to the U.S. Constitution formalized this result in U.S. law, abolishing slavery throughout the country and every territory subject to its jurisdiction.

For the next several months, southern states sought a way to restore for the white majority what the Civil War and the Thirteenth Amendment had tried to deny them, supremacy, control, and economic power over the fate of African Americans. Under slavery, whites had disciplined the blacks largely outside the law, through extralegal whippings administered by slave owners and their overseers. After the slaves were emancipated, panicky whites feared that blacks would seek revenge against them for their harsh and inhumane treatment on the southern plantations. Former slave owners feared for themselves, their families, and their property.

While some white southerners thought that African-Americans were best controlled through VIGILANTISM, Mississippi whites began passing laws to take away the former slaves' new found freedom. The first such law was enacted on November 22, 1865. It directed civil officers to hire orphaned African Americans and forbade the orphans to leave their place of employment for any reason. Orphans were typically compensated with a free place to live, free meals, and some type of nominal wage. Other white employers were prohibited from offering any enticement to blacks "employed" by someone else.

The Mississippi legislature next passed a VAGRANCY law, defining vagrants as workers who "neglected their calling or employment or misspent what they earned." Another Mississippi law required African Americans to carry with them written evidence of their present employment at all times, a practice that was hauntingly reminiscent of the old pass system under slavery. The final piece to the puzzle came when Mississippi established a system of special county courts to punish blacks charged with violating one of the new state employment laws. The law imposed draconian punishments, including "corporal chastisement" for blacks who refused to work or otherwise tried to frustrate the system. African Americans who committed real crimes, such as stealing, could be hung by their thumbs.

Widely considered to be the first set of *Black Codes* passed in the south after the Civil War, these Mississippi laws represented a concerted effort by white lawmakers to restore the master-slave relationship under a new name. Within a few months after Mississippi passed its first such law, Alabama, Georgia, Louisiana, Florida, Tennessee, Virginia, and North Carolina followed suit by enacting similar laws of their own.

Congress quickly responded to the Black Codes by passing the CIVIL RIGHTS ACT of 1866, which made it illegal to discriminate against blacks by assigning them an inferior legal and economic status. Two years later the states ratified the FOURTEENTH AMENDMENT, which guaranteed "equal protection of the laws" to the residents of every state.

But the southern states were not deterred. They soon passed a new set of laws that permitted local officials to informally discriminate against blacks, without specific statutory authority. The thrust-and-parry exchanges between Congress and the southern states continued throughout the period Reconstruction (1865-77) and through the first half of the twentieth century.

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Civil Rights Acts; Civil Rights Cases; Civil Rights Movement; Corporal Punishment; Fourteenth Amendment; Jim Crow Laws; Reconstruction; Segregation; Thirteenth Amendment.

## ♦ BLACK, HUGO LAFAYETTE

Hugo LaFayette Black was an associate justice on the U.S. Supreme Court for nearly thirty-four years, serving one of the longest and most influential terms in the history of the Court.

Black was born February 27, 1886, in Harlan, Alabama, the eighth child of a storekeeper and farmer. He was raised in rural Alabama and attended local schools. At the age of seventeen, Black entered Birmingham Medical College. He decided that he was more suited to the study of law, however, and left the college after one year to attend the University of Alabama Law School, where he received his bachelor of laws degree in 1906. In the same year, Black was admitted to the Alabama bar. He practiced briefly in Ashland, Alabama, near his childhood home. He then moved to Birmingham, where he quickly developed a successful practice in TORT, labor, and contract law. In 1911, he was appointed as judge on the Birmingham Police Court, but he resigned eighteen months later to return to private practice. In 1914, Black was elected county prosecutor for Jefferson County, Alabama, and gained local prominence for his investigation of brutal police tactics used to question suspects at the county jail. In 1917 Black resigned his position as prosecutor and enlisted in the Army. He remained in the United States and served as a captain of the artillery for a year. Then he resumed his private practice in Birmingham, where he frequently represented local workers in personal injury suits and served as an attorney for the local chapter of the United Mine Workers. In 1921 he married Josephine Foster, with whom he had three children.

"THE LAYMAN'S CONSTITUTIONAL VIEW IS THAT WHAT HE LIKES IS CONSTITUTIONAL AND THAT WHICH HE DOESN'T LIKE IS UNCONSTITUTIONAL."
—HUGO BLACK

In 1923 Black joined the Birmingham chapter of the KU KLUX KLAN (KKK). He remained a member for two years. He commented later that, at the time, he believed joining the group could further his political and professional career.

In 1926, Black, a Democrat, won a seat in the U.S. Senate, overcoming four other Democrats in the race. Black served in the Senate for nearly ten years and gained prominence as a tenacious and sometimes relentless investigator into the activities of Washington, D.C. lobbyists for PUBLIC UTILITIES. He was also a member of the SENATE JUDICIARY COMMITTEE and a staunch supporter of President FRANKLIN D. ROOSEVELT's NEW DEAL legislation. A longtime supporter of organized labor, Black helped secure passage of the FAIR LABOR STANDARDS ACT of 1938 (29 U.S.C.A. § 201 et seq.), which established a MINIMUM WAGE and a forty-hour workweek for enterprises in interstate commerce.

In August 1937, Black became Roosevelt's first appointee to the U.S. Supreme Court, nominated to replace retiring justice WILLIS VAN DEVANTER. Initially, Black's nomination was met with some opposition. Some critics cited his relative lack of judicial experience; others expressed concern about his "judicial temperament," given the aggressive and even abrasive manner that he was said to display when interrogating witnesses while a senator. Black was nevertheless confirmed in October 1937, by a vote of 63–16. Shortly afterward came confirmation of rumors that had been circulating throughout Washington, D.C., about Black's KKK ties in the mid-1920s. The controversy died quickly after Black spoke about the matter in a radio address. He admitted that he had once been a member but maintained that he had resigned many years earlier and had disavowed any further association with the organization.

Throughout his long career on the Court, Black wrote a number of landmark decisions concerning CIVIL RIGHTS, free speech, and other important constitutional issues. In *Chambers v. Florida,* 309 U.S. 227, 60 S. Ct. 472, 84 L. Ed. 716 (1940), he wrote the majority opinion overturning the death sentences of several blacks who had been coerced, through many hours of POLICE INTERROGATION, into confessing to murder. The *Chambers* decision, which came early in Black's tenure on the Court and was the first major civil rights decision he wrote, did much to alleviate the fears of civil libertarians about his earlier KKK involvement. In another civil rights case, *Boynton v. Virginia,* 364 U.S. 454, 81 S. Ct. 182, 5 L. Ed. 2d 206 (1960), Black wrote the majority opinion holding that racial SEGREGATION in facilities for travelers violated the INTERSTATE COMMERCE ACT (49 U.S.C.A. § 501 et seq.).

Black had represented many labor organizations while a practicing attorney, and he continued his strong pro-labor stance throughout his career on the Court. In *National Labor Relations Board v. Waterman Steamship Corp.,* 309 U.S. 206, 60 S. Ct. 493, 84 L. Ed. 704 (1940), which involved a dispute over UNFAIR LABOR PRACTICES, Black wrote for the majority that the court of appeals could not substitute its judgment for that of the NATIONAL LABOR RELATIONS BOARD. In his dissent in *United Public Workers v. Mitchell,* 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754 (1947), he opposed restrictions that

prohibited federal government workers from participating in political campaigns. In YOUNGSTOWN SHEET & TUBE CO. V. SAWYER, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952), the Court, with Black writing the majority opinion, held that President HARRY S. TRUMAN did not have the authority to seize most of the United States' steel mills to avert a threatened strike.

Black strongly believed that the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT to the Constitution—which provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"—means that the first eight amendments of the BILL OF RIGHTS must be applied to the states as well as to the federal government. Eventually, a majority of the Court agreed with him. In GIDEON V. WAINWRIGHT, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), Black wrote for the majority that states must provide defense counsel to indigent defendants accused of a felony, at any "critical stage" of the criminal proceedings. In *Pointer v. Texas,* 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), in another majority opinion, Black wrote that the SIXTH AMENDMENT right of an accused to confront witnesses extends to defendants in state cases.

Black always carried a copy of the Constitution in his pocket. He was a staunch defender of the FIRST AMENDMENT and vehemently opposed any restrictions on the FREEDOM OF SPEECH. He dissented in DENNIS V. UNITED STATES, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951), which upheld a federal statute making it a crime to advocate the overthrow of the government by force. Black rejected the Court's reliance on the "clear-and-present-danger" test, in which the Court considered whether such a serious danger existed that the restriction of speech was justified. Black wrote, "There is hope . . . that in calmer times, when present pressures, passions and fears subside, this or some other Court will restore the First Amendment liberties to the high preferred place where they belong in society." He joined Justice William O. Douglas's dissent in the OBSCENITY case ROTH V. UNITED STATES, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), in which Douglas maintained that even "prurient" material was entitled to absolute First Amendment protection. In the First Amendment case ENGEL V. VITALE, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962), he wrote the majority opinion holding that voluntary prayers sponsored by public schools are unconstitutional. He stated,

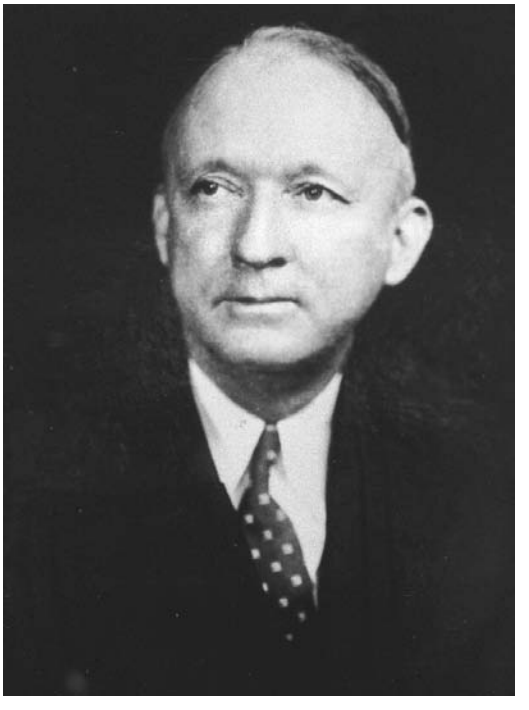

*Hugo L. Black.*
LIBRARY OF CONGRESS

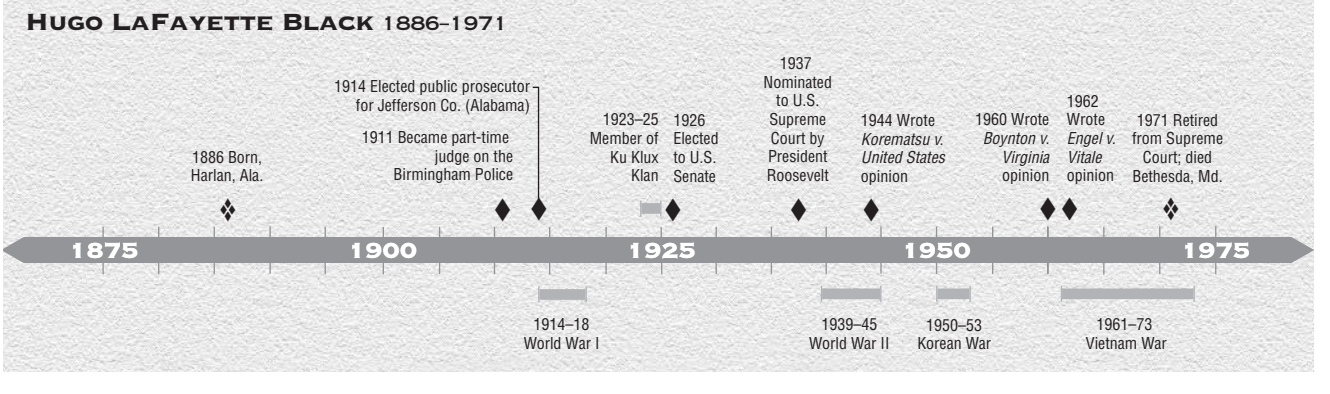

"It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of … sanctioning … prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." One of Black's last opinions before leaving the Court was for the *Pentagon Papers* case, NEW YORK TIMES CO. V. UNITED STATES, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971), in which he concurred in the Court's holding that the government could not prevent publication of a classified study on the VIETNAM WAR.

Black departed from his liberal views in KOREMATSU V. UNITED STATES, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944), a widely criticized decision, for which he wrote the majority opinion upholding the internment of Japanese Americans during WORLD WAR II. Despite the condemnation of *Korematsu* in the years following the war, Black stood by the decision, maintaining that it was justified by the climate of fear that existed at the time. In addition, his STRICT CONSTRUCTION of the Constitution led him to write other opinions that sometimes seem inconsistent with his liberal views. He dissented in GRISWOLD V. CONNECTICUT, 381 U.S. 469, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), in which the Court struck down, on privacy grounds, a state law that prohibited the sale of contraceptives. Black maintained that no right of privacy could be found to emanate "from one or more constitutional provisions."

While on the Court, Black was known for being sometimes antagonistic toward other justices with whom he disagreed. The Court's tradition of keeping private its inner workings and the nature of the personal relationships between the justices was broken when Black became engaged in an unusually public feud with Justice ROBERT H. JACKSON in 1946. The dispute began when Jackson, in a letter to the Senate and House Judiciary Committees, accused Black of a conflict of interest for participating in two labor decisions that were argued by a former law partner of Black's. Jackson failed to mention that Black and the attorney had dissolved their partnership nineteen years earlier and had hardly seen each other since. Black, in turn, publicly criticized Jackson's leave of absence from the Court from 1945 to 1946 to serve as the U.S. prosecutor at the NUREMBERG TRIALS, calling those proceedings a "high grade lynching party." Jackson was in line for the chief justice seat, which had been vacated in 1946, and he blamed Black when the appointment went to FRED M. VINSON, selected by President Truman to restore peace among the members of the Court. Following Vinson's appointment, Black and Jackson were outwardly cordial to each other, though Jackson was reported to have remained resentful, believing that Black's actions had denied him the post of chief justice.

Healthy and vigorous well into his later life, Black was an avid tennis player who often shared the court with his law clerks. On September 17, 1971, Black resigned from the Court at the age of eighty-five. He died just eight days later after suffering a massive stroke.

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#### CROSS-REFERENCES

Freedom of the Press; Incorporation Doctrine; Japanese American Evacuation Cases; Right to Counsel; School Prayer.

## ♦ BLACK, JEREMIAH SULLIVAN

Jeremiah Sullivan Black was a prominent lawyer, judge, and U.S. attorney general, and also an unsuccessful nominee for the U.S. Supreme Court.

Black was born January 10, 1810, in Stony Creek, Pennsylvania. He was raised in rural Pennsylvania and was largely self-educated through his own reading and study of Shakespeare, the Bible, and other works of literature. He originally planned a career in medicine, but his father arranged for him to study law with Chauncey Forward, a prominent local attorney and politician. After three years with Forward, Black was admitted to the Pennsylvania bar, in late 1830. Forward then left his practice to take a seat in the U.S. Congress and turned over his clients to Black, enabling Black to develop a lucrative law practice of his own. Black married Forward's daughter in 1836, and they had two children.

Black soon became active in Democratic politics and was appointed deputy attorney general for his county. In 1842 he was appointed judge of the district court, and nine years later, he was elected to the state supreme court. He won reelection to the state high court in 1854, and served as chief justice for three years. While an appellate judge, Black was best known for his opinions defining and construing the meaning of corporate charters.

A longtime supporter of President **JAMES BUCHANAN**, Black was appointed U.S. attorney general by Buchanan in 1857. While attorney general, Black gained recognition for launching a vigorous prosecution of fraudulent land schemes in California. The investigation, headed by **EDWIN M. STANTON**, Black's eventual successor, resulted in the U.S. Supreme Court's reversing many district court cases involving land **FRAUD**. Black also enforced federal laws concerning the slave trade and the return of fugitive slaves. In addition, Black helped establish the Buchanan administration's position on secession, urging the president to maintain a strong Unionist stance.

In a shuffle of cabinet offices in December 1860, Black served for a short time as **SECRETARY OF STATE**. During his brief tenure, South Carolina became the first state to secede from the Union, and Black was a key adviser to Buchanan in handling the crisis.

In January 1861, with only a few weeks left in his own term as president, Buchanan named Black to a seat on the U.S. Supreme Court that had been vacant for eight months. Republican senators, anxious to give the incoming president, **ABRAHAM LINCOLN**, his first appointment to the Court, opposed Black. Furthermore, although Black was a strong supporter of the Union, he was not an abolitionist. As a result, his nomination was harshly criticized by the Northern antislavery press and by Democrat **STEPHEN A. DOUGLAS**, who had just lost the election to Lincoln. Also, Southern senators who might have supported Black were resigning from the Senate to join the Confederacy. Had Buchanan acted earlier to fill the seat, Black could have been easily confirmed. Instead, he was rejected 26–25.

*Jeremiah Sullivan Black.*
LIBRARY OF CONGRESS

"JUSTICE TRAVELS WITH A LEADEN HEEL, BUT STRIKES WITH AN IRON HAND."
—JEREMIAH BLACK

Deeply disappointed at his narrow defeat, Black returned to his home in York, Pennsylvania. He then suffered a number of personal setbacks, including the loss of his life savings, which he had entrusted to a relative for investment, and a rapid decline in health. In late 1861, Black's health gradually started to improve and he resumed practicing law. In December of that

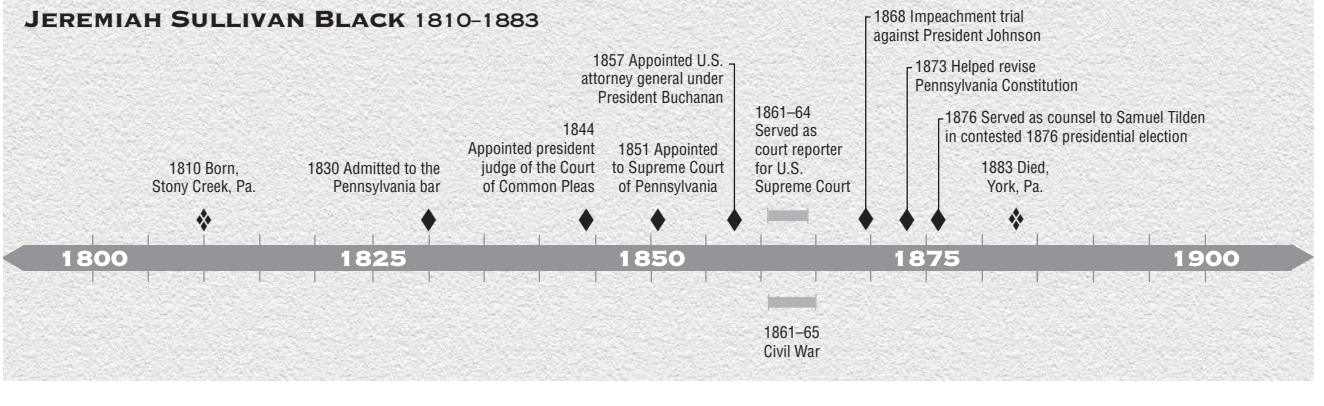

year, he was appointed reporter of decisions for the U.S. Supreme Court, a position created by Congress in 1816. As reporter, Black was primarily responsible for editing, publishing, and distributing the Court's opinions. The reporter was paid a modest yearly salary and usually earned additional income selling copies of the bound volume in which an important case appeared or printing and selling a significant opinion separately in a pamphlet. In those days, the volumes produced by a particular reporter usually bore the reporter's name on the spine. Black served as reporter for three years and produced *Black's Reports,* two volumes of opinions that earned him high praise.

In 1864, Black left the Court and returned to private practice in Pennsylvania. He handled several important cases before the U.S. Supreme Court, including **EX PARTE MILLIGAN**, 71 U.S. (4 Wall.) 2, 18 L. Ed. 281 (1866). In *Milligan,* the Court held that the president lacked the power to authorize military tribunals to try civilians when they could be tried in civil courts. Black also remained involved in the continuing litigation over California land titles, and earned high fees for his services.

Black was a close friend of President **ANDREW JOHNSON**, who assumed the presidency after Lincoln was assassinated. Black was initially engaged to represent Johnson in his **IMPEACHMENT** trial but withdrew after disagreements with Johnson's other lawyers arose. He also served as counsel to **SAMUEL J. TILDEN**, an unsuccessful Democratic presidential candidate, in an investigation of the disputed results of the 1876 presidential election.

Black continued to practice law and remain active in civic affairs until 1883, when he died at the age of seventy-three.

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## BLACK LETTER LAW

*A term used to describe basic principles of law that are accepted by a majority of judges in most states.*

The term probably derives from the practice of publishers of encyclopedias and legal treatises to highlight principles of law by printing them in boldface type.

## BLACK MONDAY

See **STOCK MARKET**.

## BLACK PANTHER PARTY

No group better dramatized the anger that fueled the 1960s **BLACK POWER MOVEMENT** than the Black Panther Party for Self-Defense (BPP). For five tumultuous years, the Panthers brought a fierce cry for justice and equality to the streets of the largest U.S. cities. Its members flashed across TV screens in black berets and leather coats, shotguns and law books in hand, confronting the police or storming the California Legislature. Political demands issued from the party's newspaper; loudspeakers boomed at rallies for jailed Panther leaders. Behind the scenes, the **FEDERAL BUREAU OF INVESTIGATION** (FBI) spent millions of dollars in a secret counterintelligence program aimed at destroying the group. By the time a 1976 congressional report revealed the extent of the FBI's efforts, it was too late. Shoot-outs with police officers, conflicts with other groups, murder, prison sentences, and internal dissent had destroyed the Black Panthers. The details surrounding the 1969 shooting deaths of two party leaders by Chicago police remain unclear. The other party leaders split in 1972 and one of them, **BOBBY SEALE**, ran for mayor of Oakland in 1973, losing in a runoff. By 1975, the last of the group, a splinter faction under **ELDRIDGE CLEAVER**, had disappeared.

Before the advent of the Panthers, the mid-1960s saw gradual progress in the struggle for **CIVIL RIGHTS**. This progress was too slow for many African Americans. Traditional civil rights groups such as Martin Luther King Jr's **SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE** (SCLC) were focusing their efforts on ending **SEGREGATION** in the South, but conditions in urban areas were reaching a boiling point. Younger activists increasingly turned away from these older groups and toward leaders such as **STOKELY CARMICHAEL**, whose **STUDENT NONVIOLENT COORDINATING COMMITTEE** (SNCC) demanded not merely **INTEGRATION** but economic and social liberation for African Americans. Black power was Carmichael's message, and in Mississippi, he had organized an all-black political party that took as its symbol a snarling black panther. The ethos of black power spread quickly to urban areas in the North, East, and West, where integration alone had not soothed the problems of racism, poverty, and violence.

Police violence against African Americans was a common complaint in impoverished Oakland, California. By 1966, two young men had had enough. One was **HUEY P. NEWTON**, age 23, a first-year law student. With his friend Bobby Seale, age 30, Newton founded the BPP, with the intent of monitoring police officers when they made arrests. This bold tactic—already being employed in Minneapolis by the nascent **AMERICAN INDIAN MOVEMENT** (AIM)—was entirely legal. Also legal under California state law was the practice of carrying a loaded weapon, as long as it was visible. But legal or not, the sight of Newton and Seale bearing shotguns as they rushed to the scene of an arrest had enormous shock value. To police officers and citizens alike, this represented a huge change from the previously nonviolent demonstrations of civil rights activists. Although they did not use the guns and maintained the legally required eight to ten feet from officers, the Panthers inspired fear. They also quickly won respect from neighbors who saw them as standing up to the predominantly white police force. The law books they carried—and from which they read criminal suspects their rights—appeared to many in the community to give the Panthers a kind of legitimacy.

Attracting new members through their high visibility, the Panthers sprang to national attention in 1967. Antagonism toward the party by law enforcement officials had prompted California lawmakers to consider **GUN CONTROL**. In May 1967, legislators met in Sacramento, the state capital, to discuss a bill that would criminalize the carrying of loaded weapons within city limits. To Seale and Newton, chairman and minister of defense of the BPP, respectively, the proposed law was unjust. Governor **RONALD REAGAN** was on the lawn of the state legislature as 30 armed Black Panthers arrived and entered

*On May 2, 1967, armed members of the Black Panther Party enter the California state capital to protest a bill restricting the carrying of arms in public.*

AP/WIDE WORLD PHOTOS

the building. TV cameras followed the group's progress to the legislative chambers, where they were stopped by police officers, Seale shouting, "Is this the way the racist government works—[you] won't let a man exercise his constitutional rights?" He then read a prepared statement:

> The Black Panther Party calls upon American people in general and black people in particular to take full note of the racist California legislature which is now considering legislation aimed at keeping the black people disarmed and powerless, at the very same time that racist police agencies throughout the country are intensifying the terror, brutality, murder and repression of black people.

The Panthers kept their guns, left the building, and were subsequently disarmed by the police.

No sooner had the demonstration ended than the national media denounced the Panthers as antiwhite radicals. For many white U.S. citizens, the Panthers symbolized terror. The party denied being antiwhite, but a new political focus now superseded its original goal of SELF-DEFENSE. In a ten-point program, the Panthers called for full employment, better housing and education, and juries composed of African Americans. It denounced the war in Vietnam and the military draft. Some of its demands went further. Point 3 said the group wanted an end to the robbing of the black community by the whites. Another point called for the release of all African American men from prison. The group's major political objective was self-determination. It demanded United Nations–supervised elections in the black community, which it dubbed the black colony, for blacks only, so that "black colonials" could determine their own national destiny.

To advance its cause, the party published the *Black Panther* newspaper. Its articles, cartoons, and imagery reflected a hardening stance. The police were caricatured as pigs—introducing a term of condemnation that would enter the national vernacular—and a recurring image was that of a Black Panther holding a gun to the head of a pig in a police uniform. However extreme such rhetoric may sound today, it galvanized young African Americans coming of age in the Vietnam era. BPP chapters sprang up nationwide, and by 1968 as many as five thousand members worked from BPP offices in 25 major U.S. cities. Prominent activists, including Stokely Carmichael and Eldridge Cleaver, joined the party. Cleaver had achieved national prominence for his 1967 essay collection *Soul on Ice.* As the BPP's minister of information, he had a voice that struck exactly the tone the Panthers wanted, a blend of determination, outrage, and threat. "These racist Gestapo pigs," Cleaver told reporters, "have to stop brutalizing our community or we are going to take up arms and we are going to drive them out."

On another front, the Panthers proceeded with charitable services to African American communities, called Serve the People programs. They organized health clinics and schools. Holding food drives, they rounded up groceries and distributed them for free. Morning breakfast programs for African American children served food and spirituals, as kids sang "Black Is Beautiful." White liberals supported the Panthers, writing supportive articles in intellectual journals such as the *New York Review of Books;* writing books that showed admiration for their style, like Norman Mailer's *The White Negro;* and inviting them to fashionable fund-raising parties, as did composer and conductor Leonard Bernstein. But this support was far from unanimous; the author Thomas C. Wolfe coined the phrase *radical chic* to satirize it.

The successes achieved by the Panthers in Oakland and beyond were soon overshadowed by violence as tense confrontations between the police and Panther members erupted in gunfire. In October 1967, after a gun battle left one officer wounded and another dead, Newton was arrested. "Free Huey!" became a cry at protests across the United States while Newton remained in jail. From his cell, he told national TV audiences that the plight of African Americans was similar to that of the Vietnamese. "The police occupy our community," he said, "as a foreign troop occupies territory." Convicted of murder, he remained in prison until August 1970. An appeals court later threw out the conviction.

The violence continued, as the police began raiding BPP offices. In 1968, a confrontation in West Oakland left three officers and two Panther members wounded. A 17-year-old Panther was killed. Seale announced on television that black people should organize so that they could retaliate against racist police brutality and attacks.

In 1969, Seale too was in court. The police had arrested him at an antiwar demonstration outside the 1968 Democratic National Convention in Chicago. He was charged with rioting. During the trial of Seale and other demonstrators—dubbed the Chicago Eight—federal dis-

*Eldridge Cleaver, the Black Panther Party's (BPP) minister of information, outside of BPP headquarters in Oakland in September 1968 after two of the city's police officers fired shots into the building.*

AP/WIDE WORLD PHOTOS

trict court judge Julius J. Hoffman ordered the vociferous Seale handcuffed to a chair and gagged, a move that inspired such public revulsion that a mistrial was declared.

However, in 1970, Seale and several other Panthers were back in court, in New Haven, Connecticut. The charge was the 1969 alleged murder of suspected Panther police informant Alex Rackley. Seale and fellow Panther Erica Huggins were ultimately acquitted, but two other Panthers, including Warren Kimbro (who plea-bargained), were sentenced to prison. Seale's controversial trial inspired a "May Day" riot at Yale University in New Haven, prompting the federal government to send in 2,500 **NATIONAL GUARD** members after a substantial amount of mercury (a bomb-making ingredient) was taken from a Yale chemistry lab and several rifles were discovered missing.

The Panthers affected the highest circles of federal law enforcement. **J. EDGAR HOOVER**, director of the FBI, considered them a black nationalist hate group. In November 1968, he ordered FBI field agents to begin destabilizing the group by exploiting dissension within its ranks. This end was to be achieved through the FBI's Counterintelligence Program (**COINTELPRO**), a surveillance and misinformation program widely used in the late 1960s against civil rights, black power, and various leftist groups. The FBI infiltrated the Panther membership with informants, wiretapped telephones, mailed fake letters to leaders, and spread innuendo both inside and outside the party. Documentation of the counterintelligence campaign would emerge in a report issued in 1976 by the U.S. Senate Select Committee to Study Government Operations, titled *The FBI's Covert Program to Destroy the Black Panther Party.* The report revealed that the FBI had gone to great lengths, some of them illegal, to pit the Panthers against themselves and other groups.

The destabilization worked. The FBI managed to exacerbate a bloody feud between the Panthers and another California-based group, United Slaves (US). It poured resources into making leaders suspicious of each other, notably aggravating a rift between Newton and Cleaver. Perhaps its most egregious involvement came during a 1969 operation against Fred Hampton,

the Chicago-based chairman of the Illinois BPP. In late 1967, the FBI launched a disinformation campaign against the 19-year-old, and his file in the FBI's Racial Matters Squad soon swelled to over four thousand pages. When Hampton fell under suspicion in the murder of two Chicago police officers, an FBI informant provided authorities with a detailed floor plan of his apartment. On December 4, 1969, police officers raided the apartment. Hampton and another Panther member were killed; four others were wounded. The Panthers alleged that the incident was an assassination.

Several official and private inquiries were conducted, including one led by ROY WILKINS, executive director of the NAACP, and RAMSEY CLARK, former U.S. attorney general. Lawsuits brought against the FBI by the victims' survivors dragged through the courts until 1983, when the federal government agreed to pay them a $1.85 million settlement. U.S. district court judge John F. Grady imposed sanctions on the FBI for having covered up facts in the case. For the Illinois Panther chapter, however, the raid in 1969 had signaled the beginning of the end.

In disarray in 1972, the Panthers soon collapsed. Its leadership feuded, police and FBI harassment took a heavy toll, and the black power movement had nearly expired. Charged with murder, Cleaver had fled to Cuba and Algeria, where he continued to urge African Americans on to revolution. Cleaver maintained his Black Panther faction in exile until 1975.

Seale and Newton preferred nonviolent solutions. After the Panthers disbanded, Seale ran for mayor of Oakland in 1973, winning a third of the vote. He later became a public speaker and a community liaison on behalf of Temple University's African American studies program. Newton earned a doctor's degree from the University of California, Santa Cruz, but his legal problems continued. In March 1987, he was convicted for being a felon in possession of a firearm—despite the overturning of his original murder conviction—and sentenced to three years' imprisonment. In 1989, he was again in prison, serving time for a PAROLE violation for possessing cocaine. He died in August 1989, after being shot during a drug deal in the neighborhood where he began the Panthers.

Conversely, fellow Panther Kimbro was accepted into a graduate program at Harvard while still in prison, and was released after serving little more than four years of his sentence. He became an assistant dean at a local university and later served as director of Project More, a halfway house and prison-alternative program in New Haven. He was quoted in a 2000 issue of the *Christian Science Monitor* as wanting to be known as "a guy who made some mistakes, turned his life around, and learned to help other people."

The legacy of Newton and Seale's party is debatable. Its alliance with international revolutionary leaders—Mao Tse-tung, Fidel Castro, and Ho Chi Minh, to name a few—cost it credibility in the eyes of mainstream U.S. citizens. An organization devoted originally to the aim of self-defense for beleaguered urban African Americans, it nose-dived into violence and terror. For this reason, the BPP is customarily dismissed as an extremist, self-destructive exponent of the black power movement. But this transformation owed something to the harassment of the Panthers by law enforcement agencies. In turn, the calculated federal and local campaigns against the Panthers initiated the group's most tangible effect on U.S. law: highlighting FBI counterintelligence against U.S. citizens was a noteworthy gain. In the years following the death of FBI director Hoover, pressure for reforms dismantled the apparatus he single-handedly used against his political enemies.

Drawing attention to the issue of urban police brutality was another major Panther contribution, one that grew as a concern in subsequent years. In addition, the group's focus on the questionable number of African American men fighting the U.S. war in Vietnam inspired black intellectuals to criticize the role of race in the U.S. military. Moreover, in the party's passionate ten-point program were the seeds of ideas that eventually took root in the U.S. legal system: by the 1990s, juries increasingly reflected the racial composition of the communities in which defendants lived. As the history of the CIVIL RIGHTS MOVEMENT demonstrates, such change came slowly, begrudgingly, and often at great personal cost to the men and women who fought for it.

The original Black Panther Party for Self-Defense is not to be confused with an entity that emerged in the late 1990s, calling itself the New Black Panther Party for Self-Defense and adopting the original STALKING panther logo. The newer group allegedly violated a 1997 Texas state court order prohibiting them from "referring to themselves … by any name containing the words

Panther, Black Panthers, or Black Panther Party." In 2003, lawyers representing some of the original Panthers, e.g., The Black Panther Party, Inc. (which brought the Texas action) and the Huey P. Newton Foundation, contemplated filing a federal TRADEMARK infringement suit after an August 2002 cease and desist letter apparently went unheeded.

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CROSS-REFERENCES

Black Power Movement; Civil Rights Movement; Vietnam War.

## BLACK POWER MOVEMENT

The Black Power movement grew out of the CIVIL RIGHTS MOVEMENT that had steadily gained momentum through the 1950s and 1960s. Although not a formal movement, the Black Power movement marked a turning point in black-white relations in the United States and also in how blacks saw themselves. The movement was hailed by some as a positive and proactive force aimed at helping blacks achieve full equality with whites, but it was reviled by others as a militant, sometimes violent faction whose primary goal was to drive a wedge between whites and blacks. In truth, the Black Power movement was a complex event that took place at a time when society and culture was being transformed throughout the United States, and its legacy reflects that complexity.

In the 1950s and early 1960s, groups such as the National Association for the Advancement of Colored People (NAACP) and the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (SCLC) worked with blacks and whites to create a desegregated society and eliminate RACIAL DISCRIMINATION. Their efforts generated positive responses from a broad spectrum of people across the country. Rev. MARTIN LUTHER KING JR., who headed the SCLC, made significant headway with his adherence to nonviolent tactics. In 1964, President LYNDON B. JOHNSON signed the CIVIL RIGHTS ACT and a year later he signed the VOTING RIGHTS ACT.

CIVIL RIGHTS legislation was an earnest and effective step toward eliminating inequality between blacks and whites. Even with the obvious progress, however, the reality was that prejudice could not be legislated away. Blacks still faced lower wages than whites, higher crime rates in their neighborhoods, and unspoken but palpable racial discrimination. Young blacks in particular saw the civil rights movement as too mainstream to generate real social change. What they wanted was something that would accelerate the process and give blacks the same opportunities as whites, not just socially but also economically and politically. Perhaps more important, they felt that the civil rights movement was based more on white perceptions of civil rights than black perceptions.

Not all blacks had been equally impressed with the civil rights movement. MALCOLM X and the NATION OF ISLAM, for example, felt that racial self-determination was a critical and neglected element of true equality. By the mid-1960s, dissatisfaction with the pace of change was growing among blacks. The term "black power" had been around since the 1950s, but it was STOKELY CARMICHAEL, head of the STUDENT NONVIOLENT COORDINATING COMMITTEE (SNCC), who popularized the term in 1966.

Carmichael led a push to transform SNCC from a multiracial community activist organization into an all-black social change organization. Late in 1966, two young men, HUEY NEWTON and BOBBY SEALE, formed the BLACK PANTHER PARTY FOR SELF-DEFENSE (BPP), initially as a group to track incidents of police violence. Within a short time groups such as SNCC and BPP gained momentum, and by the late 1960s the Black Power movement had made a definite mark on American culture and society.

The Black Power movement instilled a sense of racial pride and self-esteem in blacks. Blacks were told that it was up to them to improve their lives. Black Power advocates encouraged blacks to form or join all-black political parties that could provide a formidable power base and offer a foundation for real socioeconomic progress. For years, the movement's leaders said, blacks had been trying to aspire to white ideals of what they should be. Now it was time for blacks to set their own agenda, putting their needs and aspirations first. An early step, in fact, was the

replacement of the word "Negro" (a word associated with the years of SLAVERY) with "black."

The movement generated a number of positive developments. Probably the most noteworthy of these was its influence on black culture. For the first time, blacks in the United States were encouraged to acknowledge their African heritage. COLLEGES AND UNIVERSITIES established black studies programs and black studies departments. Blacks who had grown up believing that they were descended from a backwards people now found out that African culture was as rich and diverse as any other, and they were encouraged to take pride in that heritage. The Black Arts movement, seen by some as connected to the Black Power movement flourished in the 1960s and 1970s. Young black poets, authors, and visual artists found their voices and shared those voices with others. Unlike earlier black arts movements such as the Harlem Renaissance, the new movement primarily sought out a black audience.

The same spirit of racial unity and pride that made the Black Power movement so dynamic also made it problematic—and to some, dangerous. Many whites, and a number of blacks, saw the movement as a black separatist organization bent on segregating blacks and whites and undoing the important work of the civil rights movement. There is no question that Black Power advocates had valid and pressing concerns. Blacks were still victims of racism, whether they were being charged a higher rate for a mortgage, getting paid less than a white coworker doing the same work, or facing violence at the hands of white racists. But the solutions that some Black Power leaders advocated seemed only to create new problems. Some, for example, suggested that blacks receive paramilitary training and carry guns to protect themselves. Though these individuals insisted this device was solely a means of SELF-DEFENSE and not a call to violence, it was still unnerving to think of armed civilians walking the streets.

Also, because the Black Power movement was never a formally organized movement, it had no central leadership, which meant that different organizations with divergent agendas often could not agree on the best course of action. The more radical groups accused the more mainstream groups of capitulating to whites, and the more mainstream accused the more radical of becoming too ready to use violence. By the 1970s, most of the formal organizations that had come into prominence with the Black Power movement, such as the SNCC and the Black Panthers, had all but disappeared.

The Black Power movement did not succeed in getting blacks to break away from white society and create a separate society. Nor did it help end discrimination or racism. It did, however, help provide some of the elements that were ultimately necessary for blacks and whites to gain a fuller understanding of each other.

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## BLACKACRE

*A fictitious designation that legal writers use to describe a piece of land.*

The term *Blackacre* is often used in comparison with *Whiteacre* in order to distinguish one parcel of land from another.

## ❖ BLACKFORD, ISAAC NEWTON

Isaac Newton Blackford achieved prominence as a jurist. He was born November 6, 1786, in Bound Brook, New Jersey. A graduate of the College of New Jersey (later Princeton University), Blackford served as clerk and recorder of Washington County, Indiana, in 1813. The following year he became a territorial court judge.

Blackford served as a member of the Indiana state house of representatives from 1816–1817. He was also a candidate for Presidential Elector for Indiana in 1824. The following year he ran unsuccessfully for the U.S. Senate seat for Indiana.

Blackford participated in state politics as a county delegate to the Indiana legislature, serving as speaker of the state's house of representatives in 1816.

In 1817 Blackford returned to the judiciary and sat as a justice of the Indiana Supreme Court until 1853. He subsequently served as a U.S. Court of Claims judge from 1855 to 1859.

Blackford died on December 31, 1859, in Washington, D.C., and was buried at Crown Hill Cemetery in Indianapolis.

## BLACKLIST

*A list of individuals or organizations designated for special discrimination or boycott; also to put a person or organization on such a list.*

Blacklists have been used for centuries as a means to identify and discriminate against undesirable individuals or organizations. A blacklist might consist, for example, of a list of names developed by a company that refuses to hire individuals who have been identified as union organizers; a country that seeks to boycott trade with other countries for political reasons; a LABOR UNION that identifies firms with which it will not work; or a government that wishes to specify who will not be allowed entry into the country.

Many types of blacklists are legal. For example, a store may maintain a list of individuals who have not paid their bills and deny them credit privileges. Similarly, credit reports can effectively function as blacklists by identifying individuals who are poor credit risks.

Because the purpose of blacklists is to exclude and discriminate, they can also result in unfair and illegal discrimination. In some cases, blacklists have done great damage to people's lives, locking them out of employment in their chosen careers or denying them access to influential organizations. For example, if a labor union makes a blacklist of workers who refuse to become members or conform to its rules, it has committed an UNFAIR LABOR PRACTICE in violation of federal laws. Blacklists may also necessitate disclosure laws. State and federal fair credit reporting acts, for example, require that access to information in a credit report must be given, upon request, to the person to whom the information applies.

The most famous instance of blacklisting in U.S. history occurred in the entertainment industry during the 1940s and 1950s. Motion picture companies, radio and television broadcasters, and other firms in that industry developed blacklists of individuals accused of being Communist sympathizers. Those firms then denied employment to those who were named on the blacklists.

Blacklisting in Hollywood came about largely through the work of the House Un-American Activities Committee (HUAC), which was formed to investigate the activities of Communist, fascist, or other supposedly subversive and "un-American" political groups. Though the committee purported to be concerned with all types of potential subversion, after WORLD WAR II ended in 1945 and relations with the Soviet Union subsequently deteriorated, it focused largely on COMMUNISM as a threat to the internal stability of the United States. In highly publicized hearings in 1947, 1951–52, and 1953–55 the committee sought to ferret out Communist sympathizers, conspiracies, and propaganda in the entertainment industry.

The HUAC hearings produced lists of individuals who either had been identified by witnesses as Communists or had refused to answer questions in appearances before the committee on the grounds of the FIRST AMENDMENT, which protects free speech and free association, or the FIFTH AMENDMENT, which protects against SELF-INCRIMINATION. Entertainment industry companies, fearing that they would be perceived by the public as pro-Communist if they employed people named in the hearings,

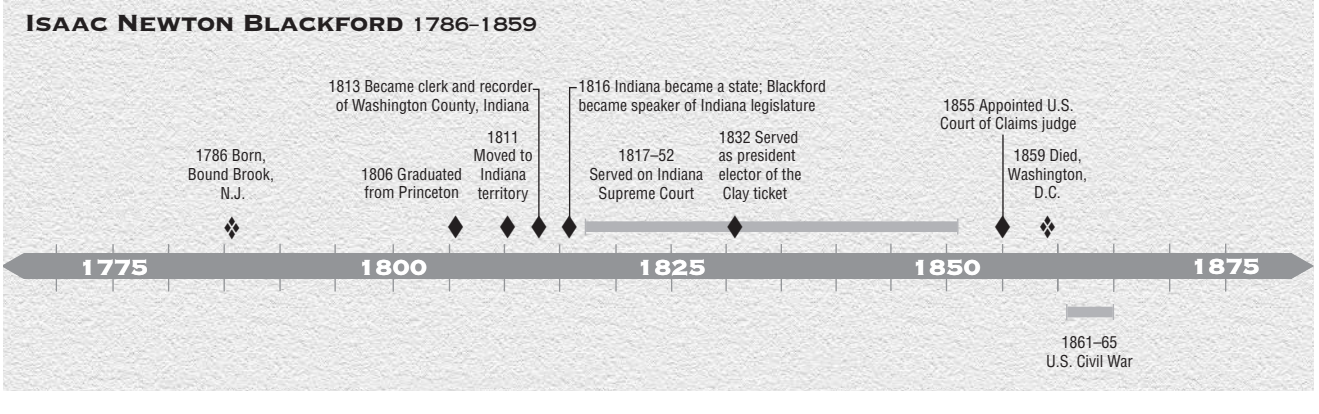

*The Hollywood Ten were photographed in January 1948, before their arraignment on charges of contempt of Congress. Nine of the ten were later blacklisted in the film industry.*

AP/WIDE WORLD PHOTOS

then used these lists as blacklists. They refused to hire hundreds of actors, writers, and other entertainment professionals named in the HUAC hearings. Many promising careers were thus ended and much potentially edifying art was lost.

Some of the first victims of Hollywood blacklisting were known as the Hollywood Ten. In the October 1947 HUAC Hearings Regarding Communist Infiltration of the Motion Picture Industry, ten Hollywood screenwriters and directors—Alvah Bessie, Herbert Biberman, Lester Cole, Edward Dmytryk, Ring Lardner Jr., John Howard Lawson, Albert Maltz, Samuel Ornitz, Adrian Scott, and Dalton Trumbo—appeared under subpoena, or court order, before the committee. Each of them refused to answer questions regarding affiliation with the Communist party on the grounds that such questions violated their First Amendment right to privacy, or a right to remain silent, regarding their political beliefs or affiliations. The courts rejected this argument, found the Hollywood Ten guilty of **CONTEMPT** of Congress, and gave them prison sentences lasting from six months to one year.

Nine of the ten were blacklisted in the film industry. (Ironically, the man conducting the 1947 HUAC hearings, Representative J. Parnell Thomas (R-N.J.), joined Lardner in federal prison in 1950 after Thomas was convicted of stealing government funds.)

Subpoenaed witnesses in these hearings faced a dilemma: on the one hand, they could invoke constitutional protection such as the Fifth Amendment, thereby implying current or former membership in the Communist party, putting themselves on the blacklist, and ending their chances of ever working in the entertainment industry again; on the other hand, they could "name names," or identify their friends as Communists, thereby betraying those close to them. In many cases, people were blacklisted for past political affiliations that they had abandoned. During the anti-Communist hysteria that gripped the nation in the 1950s, Congress's investigations into the Hollywood film industry went unchecked and the resulting blacklists destroyed numerous promising careers.

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**CROSS-REFERENCES**

Communism "House Un-American Activities Committee" (In Focus); Entertainment Law; Freedom of Association and Assembly; Freedom of Speech.

## BLACKMAIL

*The crime involving a threat for purposes of compelling a person to do an act against his or her will, or for purposes of taking the person's money or property.*

The term *blackmail* originally denoted a payment made by English persons residing along the border of Scotland to influential Scottish chieftains in exchange for protection from thieves and marauders.

In blackmail the threat might consist of physical injury to the threatened person or to someone loved by that person, or injury to a person's reputation. In some cases the victim is told that an illegal act he or she had previously committed will be exposed if the victim fails to comply with the demand.

Although blackmail is generally synonymous with EXTORTION, some states distinguish the offenses by requiring that the former be in writing.

Blackmail is punishable by a fine, imprisonment, or both.

CROSS-REFERENCES

Threats.

## ♦ BLACKMUN, HARRY ANDREW

Harry Andrew Blackmun, associate justice of the U.S. Supreme Court from 1970 to 1994, stepped into a political maelstrom when he authored the much-lauded, much-reviled 1973 opinion ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147. *Roe* guaranteed access to safe, legal ABORTIONS for women in the first trimester of pregnancy. Depending on one's viewpoint, Blackmun was considered either a public hero or a Supreme Court villain, for authoring the opinion upholding a woman's right to privacy in the matter of abortion.

An unassuming and highly intelligent man, Blackmun seemed an unlikely symbol for an explosive social and political issue. Born November 12, 1908, in Nashville, Illinois, he spent his childhood in St. Paul, Minnesota, where his father ran a hardware and grocery store. Blackmun was an outstanding student and received a scholarship to Harvard University, where he graduated summa cum laude with a mathematics degree in 1929. He went on to earn a law degree from Harvard Law School in 1932.

Blackmun's first job out of law school was a federal clerkship for Judge John B. Sanborn, of the U.S. Court of Appeals for the Eighth Circuit. After his clerkship, Blackmun spent 16 years practicing law in Minneapolis as a tax and trust specialist at a large, prestigious firm. In 1941, Blackmun and Dorothy E. Clark married; they later raised three children.

Blackmun also taught at the St. Paul College of Law (later renamed the William Mitchell College of Law) and at the University of Minnesota Law School. In 1950, he became head counsel at the Mayo Clinic, in Rochester, Minnesota, a position he particularly enjoyed because of a lifelong interest in medicine.

In 1959 President DWIGHT D. EISENHOWER appointed Blackmun to the U.S. Court of Appeals for the Eighth Circuit to replace his former boss, Judge Sanborn. While on the appeals court, Blackmun was a diligent and fair-minded judge, with a conservative outlook. A significant portion of his decisions involved tax issues.

Blackmun sat on the Eighth Circuit until 1970 when President RICHARD M. NIXON appointed him to the U.S. Supreme Court.

"ABORTION RAISES MORAL AND SPIRITUAL QUESTIONS OVER WHICH HONORABLE PERSONS CAN DISAGREE SINCERELY AND PROFOUNDLY. BUT THOSE DISAGREEMENTS . . . DO NOT NOW RELIEVE US OF OUR DUTY TO APPLY THE CONSTITUTION FAITHFULLY."
—HARRY BLACKMUN

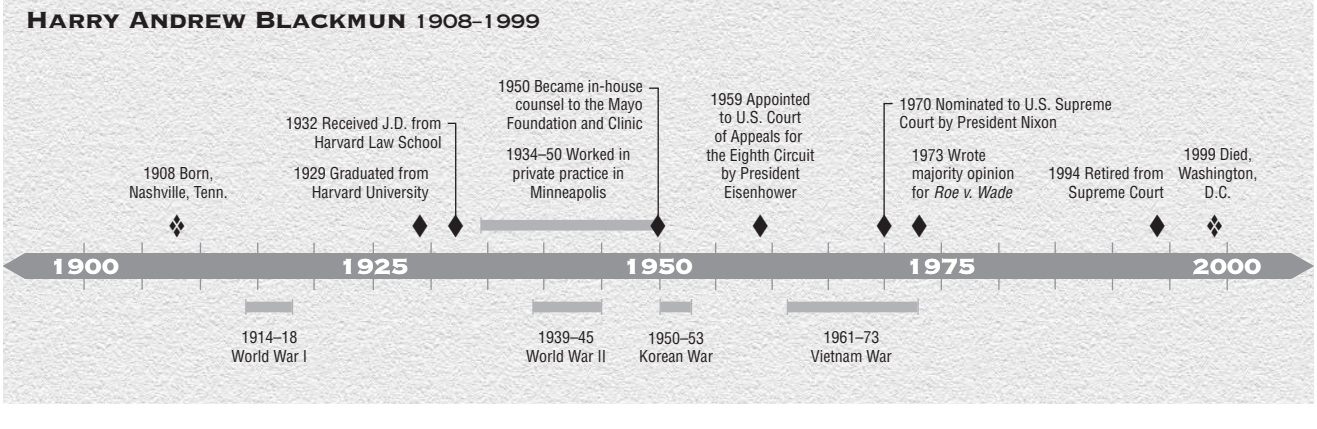

*Harry Blackmun.* PHOTOGRAPH BY RON SACHS. ARCHIVE PHOTOS, INC.

Blackmun was Nixon's third choice for the Supreme Court seat formerly held by Associate Justice **ABE FORTAS**. Earlier, Nixon had nominated **CLEMENT F. HAYNSWORTH JR.** and **G. HARROLD CARSWELL**, two candidates with unconvincing qualifications. After the Senate refused to confirm either Haynsworth or Carswell, Nixon turned to Blackmun as a candidate with sterling legal credentials and a fine personal reputation. Unlike the rancorous Senate proceedings for the two failed candidates, Blackmun's confirmation hearing was quick and congenial. He was approved unanimously by the Senate on May 12, 1970.

When Blackmun joined the Supreme Court, he teamed up with his boyhood friend **WARREN E. BURGER**, who was chief justice. Years before, Blackmun had been best man at Burger's wedding. The two St. Paul natives were immediately dubbed the Minnesota Twins.

Blackmun entered the Court with the reputation of being a hardworking, irreproachable, and conservative jurist. During his quarter century on the Supreme Court, his reputation changed in one significant way: although he continued to be seen as hardworking and irreproachable, he was perceived less and less as a conservative.

Court observers noted that Blackmun's voting record indicated a swing to the political left. His support for civil liberties in the areas of commercial speech and the rights of **ALIENS**, as well as his acceptance of a broadened judicial role, resulted in an alliance with liberal justices **THURGOOD MARSHALL** and **WILLIAM J. BRENNAN JR.**

Blackmun insisted that he was merely taking a central ground on the issues before the Court. Nevertheless, in 1991, he acknowledged the change in public perception, saying, "having been appointed by a Republican president and being accused now of being a flaming liberal, the Republicans think I'm a traitor and the Democrats don't trust me. And so I twist in the wind, I hope, beholden to no one, and that's just exactly where I want to be."

*Roe* is Blackmun's most famous contribution as a Supreme Court justice. Writing for the seven-member majority, Blackmun ruled that women could obtain abortions without interference from the state as a matter of right under the **FOURTEENTH AMENDMENT** to the U.S. Constitution. The case came about as a challenge to a Texas law (Tex. Rev. Civ. Stats. arts.1191–1194, 1196) that made abortion illegal unless performed to save the life of the mother. The law was challenged by a pregnant woman as a violation of her right to privacy.

Blackmun held that the privacy rights of the pregnant woman outweighed the state's interest. His knowledge of medical issues is evident in the case. Blackmun based his ruling on a three-part division of pregnancy: the first trimester, when a woman can obtain an abortion and the state has no interest; the second trimester, when the state has an interest in the licensing of the performing physician; and the last trimester, when the fetus is considered viable, or capable of living outside the mother's womb, and the state's interest reaches a level where the state may restrict access to abortion. Although Blackmun earned praise for this ruling, he also became the target of protests and death threats.

In another indication of his more liberal leanings, Blackmun publicly denounced **CAPITAL PUNISHMENT** in 1994. Two months before his retirement from the Court, Blackmun, who had been a strong and consistent supporter of the death penalty, announced that he had come to believe that the system for capital punishment was so riddled with bias and error as to be unworkable. "From this day forward," he stated, "I no longer shall tinker with the machinery of death." After his retirement in April 1994, Blackmun continued to come daily to the court and go to the cafeteria for breakfast with his clerks. Blackmun died in Washington, D.C., on March 4, 1999, at the age of 90.

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CROSS-REFERENCES

Abortion; Privacy.

## ♦ BLACKSTONE, SIR WILLIAM

The groundwork for U.S. **JURISPRUDENCE** lies in a four-volume eighteenth-century publication by British legal commentator Sir William Blackstone. Blackstone's *Commentaries on the Laws of England* provided a systematic analysis of English **COMMON LAW**. Published between 1765 and 1769, the treatise was an exhaustive compilation of Blackstone's Oxford University lectures on law. *Commentaries* was unprecedented in scope and purpose, and profoundly influenced the development of common law and **LEGAL EDUCATION** in England and the United States.

Born July 10, 1723, Blackstone was the son of Mary Blackstone and Charles Blackstone, of London. Blackstone's father, a silk merchant, died before Blackstone was born; his mother died while he was a young boy. Raised by an older brother and tutored by an uncle, Blackstone attended Charterhouse and Pembroke College, at Oxford University, where his education included a thorough exposure to mathematics and logic. Blackstone entered All Souls College, Oxford, in 1743, and became a fellow in 1744.

In preparation for a law practice, Blackstone received a **CIVIL LAW** degree in 1745, and became a barrister in 1746. In 1750, he became a doctor of civil law. One year later, he was selected as an assessor (judge) of Chancellor's Court.

In 1755, after three years of a lusterless law practice, Blackstone decided to devote all of his time to teaching law at Oxford. His first book, published in 1757, was titled *An Analysis of the Laws of England.* In 1758, Blackstone was named Oxford's Vinerian Professor of **ENGLISH LAW**, receiving the first chair of common law ever established at the university. Blackstone's lectures were well received, providing students with a comprehensive introduction to the laws of England.

The success of his lectures enhanced Blackstone's career. In 1761 he became a bencher (supervisor and lecturer) at Oxford's Middle Temple. The same year, he was elected to Parliament, where he served for seven years—although, according to most historians, he was not an especially ambitious or effective politician. Also in 1761, Blackstone married Sarah Clitherow, with whom he had nine children.

In 1765, Blackstone published the first of his four volumes of *Commentaries.* The treatise discussed the cases, rules, and legal principles outlined in his popular Oxford lectures. Each volume concentrated on a particular area of law—personal rights, property rights, **TORTS**, or **CRIMINAL LAW**. As Blackstone analyzed the laws,

"IT IS BETTER THAT TEN GUILTY PERSONS ESCAPE THAN ONE INNOCENT SUFFER."
—SIR WILLIAM BLACKSTONE

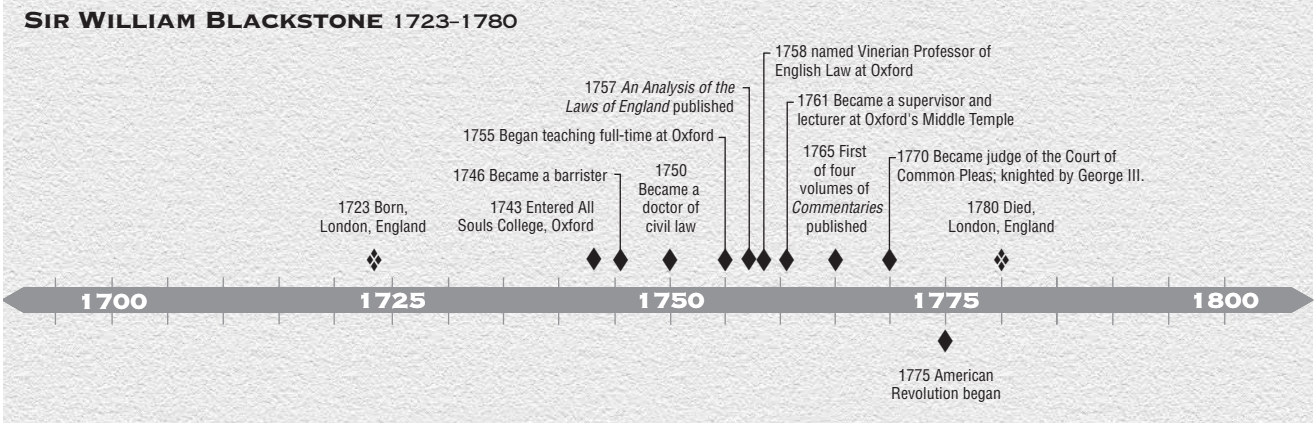

*Sir William Blackstone.*
LIBRARY OF CONGRESS

he also revealed their relationship to a higher power. Throughout his *Commentaries,* Blackstone wove the concept of "natural law," or God's laws imposed on humankind.

Some critics maintain that Blackstone's view of British law was misleading because a logical, cohesive legal system simply did not exist at the time he was writing. Also, they argue that although Blackstone's writing style was graceful, he sometimes treated legal terms loosely. Yet even his harshest critics concede that Blackstone's effort to synthesize English law was indeed impressive, as was the effect of his treatise in his country and beyond.

Blackstone's *Commentaries* was particularly influential in the United States as the new nation sought to establish its own laws and legal system. Although Blackstone is no longer cited by practicing attorneys—his importance in the United States decreased dramatically during the twentieth century—he remains a revered figure in U.S. law. Over thirty editions of *Commentaries* have been printed in the United States and England.

In 1770, Blackstone became judge of the Court of COMMON PLEAS and was knighted. He died on February 14, 1780, at age fifty-seven.

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Blackstone's Commentaries.

## BLACKSTONE'S COMMENTARIES

*A series of lectures delivered by the English jurist* SIR WILLIAM BLACKSTONE *at Oxford in 1753 and published as* Commentaries on the Laws of England *in four volumes between 1765 and 1769, which systematized and clarified the amorphous body of* ENGLISH LAW.

The *Commentaries* are the first attempt to state the entire corpus of the COMMON LAW. They were acclaimed internationally and their precepts were applied to the study and PRACTICE OF LAW in England and the United States. They exerted a tremendous influence on the American bar, both because of their intrinsic value and because they were the only treatises readily available during that period of U.S. history. The *Commentaries* were the primary reference tools for lawyers and judges until the nineteenth century because the appellate courts in America did not regularly submit their opinions for publication in bound volumes. Although there were court reporters, their records of decisions were incomplete and sporadic; and few attorneys could afford a comprehensive library.

Since the common law of England was incorporated into the legal systems of the colonies, Blackstone's summaries rendered the legal system accessible to the entire educated class of the colonies. Dissatisfaction with the common-law restrictions on FREEDOM OF SPEECH and the press was an important aspect of the burgeoning resentment of English rule; and the knowledge and intellectual stimulation provided by Blackstone thereby played a role in causing the American Revolution. Blackstone's books, which were periodically updated by American editors, constituted a major source of law for approximately fifty years after the American Revolution.

The *Commentaries* are viewed as the most comprehensive summary of the entire body of English law ever compiled by a single author. Their clarity, sophistication, and formality have caused them to be highly regarded. While studying to be a lawyer, ABRAHAM LINCOLN reportedly read Blackstone by candlelight.

Blackstone did have detractors, however, most notably THOMAS JEFFERSON and JEREMY BENTHAM, the English Utilitarian philosopher. Jefferson believed that Blackstone and his followers were "Tories" and that he was a negative

influence on America in the sense that more attention needed to be devoted to "whiggism" or "republicanism." Bentham criticized Blackstone for his perception that English law needed no improvement and for his imprecise analysis of the historical and social factors underlying systems of justice.

Although the *Commentaries* might seem antiquated by current standards, Blackstone's work represented a tremendous advance in the study of law and played a significant role in the development of the American legal system.

## ♦ BLAIR, JOHN, JR.

John Blair Jr., was among the original members of the U.S. Supreme Court. Nominated by President GEORGE WASHINGTON, Blair began his term as an associate justice shortly after the Court's establishment on February 2, 1790. Considered a fair-minded, incorruptible jurist, he remained on the bench for six years.

Blair was born in 1732 into a wealthy, well-established Virginia family. His parents were John Blair Sr., a public official with important political connections, and Mary Munro (or Monro) Blair, whose father was a rector in Virginia's St. John's Parish. In 1754, Blair graduated from the College of William and Mary (founded by his great-uncle), and he then studied law at Oxford's Middle Temple, in London.

In 1756 Blair returned to Virginia with his Scottish wife, Jean Balfour, and began a successful law practice in Williamsburg. He served in the House of Burgesses as a representative of William and Mary from 1766 to 1770. (The House of Burgesses was a colonial assembly of elected officials and the governor.) He served as clerk of the governor's council from 1770 to 1775. Blair attended the Virginia Constitutional Convention and the Virginia PRIVY COUNCIL in 1776. (The Privy Council was an advisory group to the English monarchy.)

Before his ascension to the U.S. Supreme Court, Blair performed judicial duties for various state courts. He became a judge on the newly established Virginia General Court in 1778. In 1780, he became chancellor of the high court of chancery and was appointed to Virginia's first court of appeals.

In the 1782 chancery case *Commonwealth v. Caton,* 8 Va. (4 Call) 5, Blair concluded that courts were entitled to review state legislation and to invalidate any laws found unconstitutional. The legal concept of judicial review—whereby the courts examine legislative acts and determine their constitutionality—was later embraced fully by the U.S. Supreme Court, in the landmark case MARBURY V. MADISON, 5 U.S. 137, 2 L. Ed. 60 (1803).

In 1787 Blair served as a delegate to the Constitutional Convention in Philadelphia. Soon afterward he was appointed to the Virginia Court of Appeals. Blair received his greatest judicial honor when President Washington nominated him, along with five other men, to the first High Court on September 24, 1789. (At the time, only six justices sat on the Supreme Court. By 1869 the number had risen to nine.) Blair was confirmed by the U.S. Senate on September 26, 1789.

As an associate justice, Blair took part in CHISHOLM V. GEORGIA, 2 U.S. 419, 1 L. Ed. 440 (1793), the Supreme Court's first major opinion. The issue before the Court was state sovereignty and whether a citizen of one state could sue

"BEING CALLED UPON FOR AN ACCOUNT OF WHAT MONEY I MAY HAVE IN HAND BELONGING TO HIS MAJESTY, I HAVE ONLY TO SAY THAT I HAVE NOT ANY."
—JOHN BLAIR JR.

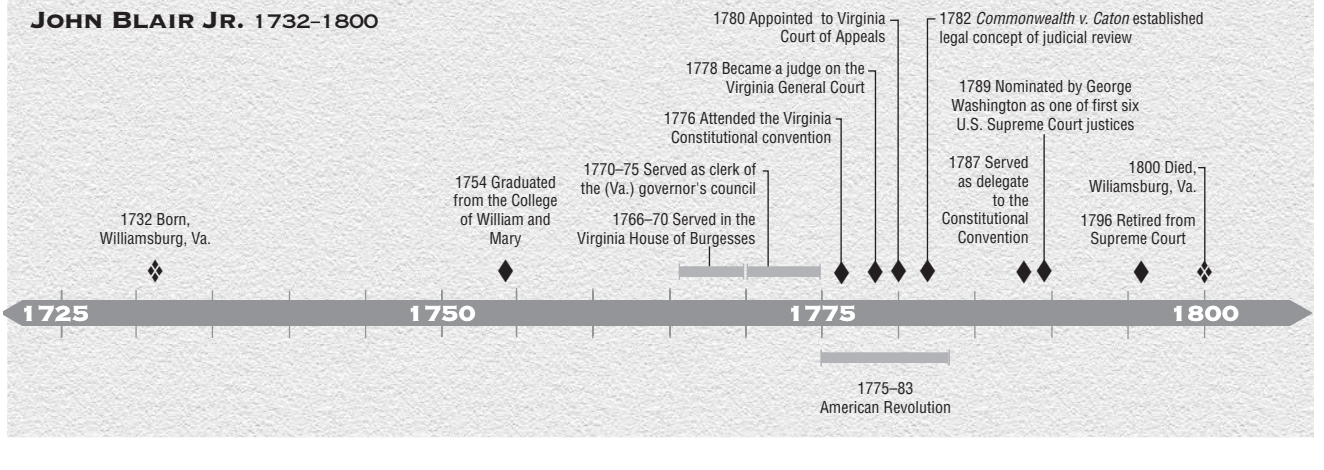

*John Blair Jr.*
CORBIS

another state in federal court over a disputed claim. The Supreme Court ruled that under Article III, Section 2, of the U.S. Constitution, a citizen of one state could indeed sue another state in federal court.

Many states decried the outcome of *Chisholm,* fearing lawsuits that would lead to economic disaster. Four years after the decision was handed down, Congress ratified the ELEVENTH AMENDMENT to the U.S. Constitution, which prohibited citizens of one state from suing another state without the consent of the defendant state. The amendment in effect overturned *Chisholm.*

Until the 1860s, U.S. Supreme Court justices sat on a circuit court as well as the High Court. In *Hayburn's Case,* 2 U.S. 408, 1 L. Ed. 436 (1792), Blair broke new ground as a federal appeals judge by ruling that a congressional act ordering circuit judges to serve as PENSION commissioners was unconstitutional. Blair noted that the supervision of a federal pension plan was not a judicial duty. He ruled that the designation of circuit judges as administrators violated the SEPARATION-OF-POWERS doctrine.

Blair retired from the High Court on January 27, 1796, citing the stress of serving on both the Supreme Court and the circuit court, which in Blair's case stretched from New Jersey to Virginia. He died in his native Williamsburg at age sixty-eight, in 1800.

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## BLANK

*Lacking something essential to fulfillment or completeness; unrestricted or open. A space left empty for the insertion of one or more words or marks in a written document that will effectuate its meaning or make it legally operative. A printed legal form in which the standard or necessary words are printed in their proper order with spaces left open, to be filled with names, dates, figures, and additional clauses.*

A blank check is one that is unrestricted as to the amount to be paid.

## BLANK ENDORSEMENT

*The writing of the name of a person who holds a negotiable instrument on the back of the document without specifically designating to whom the paper is to be paid, which transfers the rights that the signer had in the instrument to the person who presents it for payment.*

When a person endorses a paycheck, for example, with just a signature, such as "John Jones," then the bank is authorized to pay the check to anyone who presents it for payment, since there is no specification or restriction as to whom the check can be paid. Such a signature is a blank endorsement. A negotiable instrument that has a blank endorsement is called bearer paper.

## BLASPHEMY

*The malicious or wanton reproach of God, either written or oral. In* ENGLISH LAW, *the offense of speaking disparaging words about God, Jesus Christ, the Bible, or the Book of Common Prayer with the intent to undermine religious beliefs and promote* CONTEMPT *and hatred for the church as well as general immorality. In U.S. law, any maliciously intended written or oral accusation made against God or religion with the purpose of dishonoring the divine majesty and alienating mankind from the love and reverence of God.*

Blasphemy is a common-law offense and also an offense by statute in certain jurisdictions. It must be uttered in the presence of another person or persons or published in order to be an offense. Mere use of profanity is not considered blasphemy.

Blasphemy statutes are rarely, if ever, enforced today.

## ♦ BLATCHFORD, SAMUEL

Samuel Blatchford was an astute and conscientious jurist who served on the U.S. Supreme Court from 1882 to 1893. He was known primarily for his maritime and patent expertise and for his remarkable productivity. During his eleven-year tenure on the High Court he wrote 430 opinions and two dissents. His most noteworthy opinions, *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota,* 134 U.S. 418, 10 S. Ct. 462, 33 L. Ed. 970 (1890), and *Budd v. People of New York,* 143 U.S. 517, 12 S. Ct. 468, 36 L. Ed. 247 (1892), were roundly criticized for their apparently contradictory conclusions about DUE PROCESS under the FOURTEENTH AMENDMENT of the U.S. Constitution.

Blatchford was born in New York City on March 9, 1820, the son of Richard Blatchford, a lawyer, and Julia Ann Mumford. He attended Columbia College (renamed Columbia University), and graduated with honors at age seventeen in 1837. Blatchford served as a trustee of Columbia from 1867 to 1893.

After graduation Blatchford became the private secretary of Governor William H. Seward of New York, a family friend. Blatchford studied law, was admitted to the New York bar in 1842, and practiced for three years with his father in Manhattan. Blatchford then joined Seward's law firm in Auburn, New York. He married Caroline Appleton in 1844.

In 1854 Blatchford started his own law firm and he eventually became a respected authority on international, maritime, and patent law. Because of his extensive knowledge of patent law he was asked by lawmakers to help write key federal statutes governing patent infringement.

Blatchford made a significant contribution to the legal profession by organizing a reporting system for federal case law. During much of the nineteenth century federal opinions were not compiled or readily accessible to practicing lawyers. In 1852 Blatchford collected and published federal court ADMIRALTY decisions in *Blatchford's Circuit Court Reports,* a series that grew to twenty-four volumes. He also produced *Blatchford's and Howland's Reports,* a volume of admiralty cases from the District Court for the Southern District of New York, and *Blatchford's Prize Cases,* a collection of cases from circuit and district courts. His case reporting is credited with improving legal research.

Although Blatchford turned down an opportunity to sit on the New York Supreme Court in 1855, he eventually accepted another court appointment and rose through the ranks of the judiciary. In 1867 he was appointed by President ANDREW JOHNSON as district judge of the Southern District of New York. Nine years later President RUTHERFORD B. HAYES named him circuit judge for the second judicial circuit.

Blatchford reached the pinnacle of his career in 1882, when President CHESTER A. ARTHUR nominated him to the U.S. Supreme Court. Blatchford was Arthur's third choice for the seat vacated by WARD HUNT. Although the U.S. Senate had already confirmed New York politician ROSCOE CONKLING, Arthur's first choice, Conkling declined to serve. Arthur's second choice, Senator George F. Edmunds, of Vermont, also turned down the honor. Known as a hardworking and

"THE IMPORTANCE OF A LEARNED, [AND] HIGH-TONED BAR, TO THE PROPER DISCHARGE OF THE FUNCTIONS OF THE BENCH, CANNOT BE TOO HIGHLY ESTIMATED. THE STREAM CAN NEVER RISE HIGHER THAN THE FOUNTAIN."
—SAMUEL BLATCHFORD

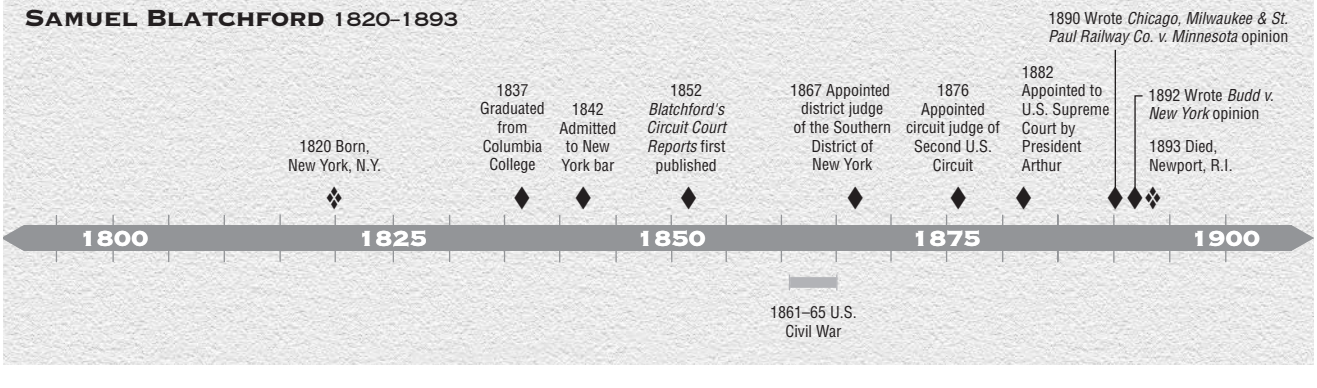

*Samuel Blatchford.*
SUPREME COURT OF THE UNITED STATES

capable lawyer and judge, Blatchford accepted the nomination and was easily confirmed.

In 1890, Blatchford wrote *Chicago, Milwaukee,* an opinion that shielded business from public regulation. The Court ruled that the reasonableness of railroad rates could not be decided by an independent commission established by the Minnesota Legislature. The state law establishing the commission was ruled unconstitutional because it did not allow for court review and therefore violated the railway's right to due process. Two years later, in *Budd,* Blatchford changed course and the Court held that the state legislature could determine business rates affecting the public interest. The inconsistency between the two cases produced widespread criticism.

Blatchford wrote one significant civil liberties opinion, *Counselman v. Hitchcock,* 142 U.S. 547, 12 S. Ct. 195, 35 L. Ed. 1110 (1892), a case that strengthened the constitutional right against SELF-INCRIMINATION. Blatchford held that under the FIFTH AMENDMENT of the U.S. Constitution, a witness could not be ordered to testify unless the state promised never to use the information against her or him.

Blatchford died in 1893 in Newport, Rhode Island, at age seventy-three.

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## BLOCK

*A segment of a town or city surrounded by streets and avenues on at least three sides and usually occupied by buildings, though it may be composed solely of vacant lots. The section of a city enclosed by streets that is described by a map which indicates how a portion of land will be subdivided.*

## BLOCKADE

See NEUTRALITY.

## BLOCKBUSTING

*The practice of illegally frightening homeowners by telling them that people who are members of a particular race, religion, or national origin are moving into their neighborhood and that they should expect a decline in the value of their property. The purpose of this scheme is to get the homeowners to sell out at a deflated price.*

An unscrupulous real estate agent will subsequently sell the vacated homes to minority group members at an inflated price, thereby obtaining a large profit. Fair access to housing is defeated by blockbusting.

## BLOOD FEUD

*Avenging the* WRONGFUL DEATH *of a person's kin by killing the murderer or by receiving compensation from the murderer's possessions.*

During the Middle Ages all European nations had similar customs concerning the murder of their inhabitants. The closest next of kin to a person who had wrongfully died at the hands of another had the primary duty to retaliate against the killer. This obligation was subject to certain laws and customs concerning the type of permissible vengeance, the amount of compensation that could be exacted, the location at which the compensation was to be made, and the circumstances in which compensation was not required. For example, a blood feud was not sanctioned if the person killed was a convicted thief or if the person who did the killing did so to defend his lord or a close female family member. The idea of the imprisonment of a person who had committed a HOMICIDE was unknown during this period of history.

There is dispute over whether the blood feud was legal under Teutonic or Anglo-Saxon law.

*"Devil Anse" Hatfield, pictured with members of his family. The Hatfield-McCoy feud, which lasted almost 30 years, is perhaps the most infamous example of a blood feud.*

BETTMANN/CORBIS

During the ninth-century reign of Alfred, a feud could lawfully commence only after an attempt was made to exact the price of a life. The price, called *weregild,* also applied when other atrocious personal offenses were committed and was paid partly to the monarch for the loss of a subject, partly to the lord for the loss of a vassal, and partly to the next of kin of the injured person. In Anglo-Saxon law, the amount of compensation, called *angylde,* was fixed at law and varied with the status of the person killed.

The Catholic Church exerted much influence to have a death avenged through the payment of compensation, not further violence, but the blood feud continued throughout England until after the Norman Conquest (1066).

## BLOTTER

*A written record of arrests and other occurrences maintained by the police. The report kept by the police when a suspect is booked, which involves the written recording of facts about the person's arrest and the charges against him or her.*

## BLUE BOOK

*A publication that establishes the correct form of case citations or of references to a legal authority showing where information can be found. A volume that explains the organization of a state government and provides the names of state officials. The proper title is "The Bluebook: A Uniform System of Citation." In a generic sense, this term also refers to a report issued by the Joint Committee on Taxation regarding recent tax legislation.*

The Blue Book is published by the Harvard Law Review Association in conjunction with law review journals in Yale University, Columbia University, and the University of Pennsylvania. It has been the preeminent authority on proper citation form for more than 70 years.

CROSS-REFERENCES

Citation.

## BLUE LAWS

*A state or local law that prohibits commercial activities on Sunday.*

Blue laws have been part of U.S. LEGAL HISTORY since the colonial period. These laws, which today are usually referred to as Sunday closing laws, prohibit certain types of commercial activity on Sundays. Originally these laws were directed at personal activities regarded as moral offenses, such as gambling or the consumption of alcohol. In the nineteenth century, however, state and local governments passed laws that forbade businesses from operating on Sunday. Although these laws were clearly based on Christian beliefs, the U.S. Supreme Court has ruled that they do not violate the First Amendment's Establishment Clause. Many blue laws have been repealed since the 1960s, but some laws that ban the sale of alcohol on Sunday remain in force.

In 1781, the Reverend Samuel Peters published *A General History of Connecticut,* in which he used the term *blue laws* to refer to a set of laws that the Puritans had enacted in the 1600s to control morality. He claimed that the laws were printed on blue paper, hence the terminology. Historians, however, have concluded that this claim was false, as were many of the laws he purported to have discovered. Some have speculated that the use of the word *blue* came from a connotation that suggested a rigidly moral position, akin to the term *bluenose* that refers to a prudish, moralistic person.

The decline of Puritanism and religious-based governments in the 1700s signaled a decline in laws that banned personal activities on Sunday. Many states and towns, however, passed laws to forbid merchants and laborers from working on Sunday. These laws were not based on concerns that workers deserved a day of rest. Instead, they were meant to respect the Christian Sabbath. In the nineteenth century, the enactment of these laws proceeded west with the expansion of the United States. By the late 1850s, the courts had been called upon to analyze the effect of blue laws on liability issues. For example, in *Philadelphia, Wilmington, and Baltimore Railroad Co. v. Philadelphia and Havre de Grace Steam Towboat Co.*, 64 U.S. (23 How.) 209 (1859), the U.S. Supreme Court held that a railroad that left debris in the water is not excused for damage to a commercial boat that sailed on Sunday. The Court reasoned that boats are works of necessity that are not bound by Sunday closing laws.

The rise of the TEMPERANCE MOVEMENT after the Civil War led to the passage of many blue laws that forbade the sale of liquor on Sunday, whether in a bar or in a retail store. These prohibitions sometimes banned the sale of tobacco products and by the late nineteenth century, certain public entertainments were not allowed on Sunday. After the failure of PROHIBITION and the legalization of alcoholic beverages in 1933, many states and localities used their blue laws to prevent the operation of liquor stores and bars on Sunday.

Between 1859 and 1900, the Supreme Court heard eight cases involving blue laws. In *Soon Hing v. Crowley*, 113 U.S. 703, 5 S. Ct. 730. 28 L.Ed. 1145 (1885), the Court upheld a law that barred physical labor on Sunday. The Court concluded that the law was intended to prevent undue physical labor rather than promote religion. This was the first decision that examined whether a Sunday closing law was based on religious grounds. Other decisions during this period found the court validating jury verdicts made on Sunday and determining that the operation of a barber shop on Sunday was not a "work of necessity" that exempted the shop from a blue law.

During the early twentieth century many blue laws were amended to permit exemptions. Over time these exemptions produced a bewildering set of rules that appeared ARBITRARY and at times absurd. For example, a hardware store could be open on Sundays, and the proprietor could sell nails, but not hammers. After WORLD WAR II and expansion of U.S. consumer culture, Sunday closing laws were repealed, or were not enforced for commerce that did not involve the sale of alcohol. Nevertheless, non-Christians and some business owners chafed under the restrictions that remained in force.

The Supreme Court resolved the constitutionality of blue laws in *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). The state of Maryland mandated that many businesses must be closed on Sunday. Occupations of necessity or charity were exempted from the law, which included hospitals. Department stores could open on Sunday, but only certain retail items could be sold on that day: tobacco products, candy, milk, bread, fruit, gasoline, oils, greases, drugs, medicines, newspapers, and magazines. Maryland fined the employees of a department store for selling items not on the exempted list. These items included a notebook, a can of floor wax, a stapler and staples, and a toy submarine. The

employees appealed their convictions all the way to the Supreme Court, arguing that the Maryland blue law violated the EQUAL PROTECTION and DUE PROCESS clauses of the FOURTEENTH AMENDMENT as well as the First Amendment's Establishment Clause. They contended that the law was based on specific religious beliefs and compelled all persons to minimally observe the Christian day of worship.

The Court rejected these arguments and upheld the law. Chief Justice EARL WARREN, writing for the majority, acknowledged that the law and other similar laws had originally been enacted for religious purposes. He concluded, however, that the Sunday closing laws had evolved into further secular ends and that this defeated an Establishment Clause claim. The Court, in reviewing the history of blue laws, ruled that nonreligious reasons for the laws had been propounded since the 1700s. Secular argument for blue laws included the idea that it was good for the government to encourage people to take a day off work for rest and relaxation. In addition, the Court ruled that the employees could not make an Establishment Clause claim because they did not allege that their religious freedom had been infringed. They had only claimed the law had caused them economic harm. The Court, however, did not address how the secular goals it described were achieved when the law merely banned the sale of certain retail items. Justice WILLIAM O. DOUGLAS filed a dissenting opinion in which he argued that the state had no business restricting innocent acts because they offended the "sentiments of their Christian neighbors." In his view the law violated the Establishment Clause.

Since this decision the Supreme Court has not revisited blue laws. As long as these laws can be supported by a secular purpose they will be viewed as constitutional. In the 40 years since *McGowan,* however, most states and localities have abandoned enforcement of blue laws. The one exception remains the sale of alcohol on Sundays by liquor stores.

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## BLUE RIBBON JURY

*A group of highly qualified persons selected by a court on the request of either party to a lawsuit to decide complex and specialized disputes.*

A blue ribbon jury is also known as a special jury. From the earliest period of COMMON LAW, such juries were used to try cases beyond the understanding of the average person so that justice could be administered as fairly as possible. A number of states still provide for blue ribbon juries by statute. It is not an absolute right in all jurisdictions, however, but rather a matter wherein the court can exercise its discretion.

The use of a blue ribbon jury does not violate the constitutional guarantees of trial by a fair and impartial jury or EQUAL PROTECTION OF LAWS if the process by which its jurors are selected is neither ARBITRARY nor invidiously discriminatory.

CROSS-REFERENCES

Due Process of Law.

## BLUE SKY LAW

*A popular name for state statutes providing for the regulation and supervision of* SECURITIES *offerings and sales, to protect citizen-investors from investing in fraudulent companies. Most blue sky laws require the registration of new issues of securities with a state agency that reviews selling documents for accuracy and completeness. Blue sky laws also often regulate securities brokers and salespeople.*

Almost all states have adopted blue sky laws, regulating the sale of securities—investments in bonds, mutual funds, limited partnerships, and so forth. These laws acquired their name as early as 1917, when the Supreme Court issued a decision on "speculative schemes which have no more basis than so many feet of 'blue sky'" (*Hall v. Geiger-Jones Co.,* 242 U.S. 539, 37 S. Ct. 217, 61 L. Ed. 480).

Blue sky laws place requirements on corporations and securities dealerships that offer investments for sale to the public in a particular state. These laws are in many cases adopted from the Uniform Securities Act, and are usually enforced primarily by the state's attorney general's office. The federal SECURITIES AND EXCHANGE COMMISSION (SEC) enforces federal laws that concern foreign and interstate transactions.

State blue sky laws require corporations to register securities before selling them so that

regulators can check their marketing information for accuracy. National on-line computer networks that became widely available in the mid-1990s posed new problems for states trying to enforce these requirements. Texas, Ohio, and New Jersey were among states that by 1995 had begun prosecuting some of the thousands of dealers who were offering unregistered investment opportunities to small investors on computer bulletin boards.

State laws usually require corporations to file financial information, and can deny corporations the privilege of doing business if their profile or history is risky. State investigators can determine whether a corporation's financial structure allows it to sell certain securities.

The laws also spell out the qualifications of brokers, dealers, salespeople, investment advisers, and others who work in the securities business. They require dealers to identify the type of investments they are planning to sell and where.

Among the activities blue sky laws seek to prevent are hard-sell tactics. Telephone "stock-peddling" techniques that are high-pressure and misleading can result in the suspension of a broker's license. A 1992 survey by Louis Harris and Associates indicated that more than one-third of all U.S. citizens had received a phone call about investing, and five percent had made a purchase. Many states now require that brokerages and corporations selling on the public market also provide a printed prospectus that describes the risks of investing.

What happens when blue sky laws do not work? States often provide an avenue for victims of illegally sold securities to try to recover their money, sometimes in addition to criminal prosecution. Investors can charge **MISREPRESENTATION** or lack of suitability and can demand restitution from the **BROKER** in **ARBITRATION**. **CLASS ACTION** suits can also be filed against a fraudulent brokerage or corporation.

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**CROSS-REFERENCES**

Securities; Stock.

## BOARD OF DIRECTORS

*A group of people comprising the governing body of a corporation.*

The shareholders of a corporation hold an election to choose people who have been nominated to direct or manage the corporation as a board. In the past nearly all states required that at least three directors run a corporation. The laws have changed, however, since many corporations have only one or two shareholders and therefore require only one or two directors to serve on the board.

Directors are elected at the first annual meeting of shareholders and at each successive annual meeting for one-year terms, unless they are divided into classes. In a corporation that divides its directors into classes, called a classified board, conditions are often imposed concerning the minimum size of the board, the minimum number of directors to be elected annually, and the maximum number of classes or maximum terms. The purpose of a classified board, which is expressly permitted by most statutes, is to make takeover attempts more difficult by staggering the terms of the directors.

Removal of a director during the course of his or her term may occur for cause by shareholders or by the board itself if there is a provision in the bylaws or articles of incorporation that confers such power upon them. The removal of a director for cause is reviewable by a court. Many jurisdictions have put into effect statutes that concern the removal of directors with or without cause.

The functions of directors involve a fiduciary duty to the corporation. Directors are in control of others' property and their powers are derived primarily from statute.

Directors are responsible for determining and executing corporate policy. For example, they make decisions regarding supervision of the entire enterprise and regarding products and services.

Liabilities of directors extend to both their individual and joint actions. A director who commits a **TORT** against his or her corporation can be held personally liable.

Directors are bound by certain duties such as the duty to act within the scope of their

authority and to exercise due care in the performance of their corporate tasks.

## BOARD OF PARDONS

*Part of the executive branch of state government authorized to grant pardons, and restore civil and political rights, to individuals convicted of crimes. A pardon, in the legal sense, releases an individual from punishment or penalty, but does not necessarily exonerate them of guilt.*

Unlike the federal government, where the president possesses the power to pardon persons convicted of felonies, many states have delegated this executive branch function to boards of pardons. These boards review pardon applications and determine if individuals have demonstrated that they have acted constructively. Pardon applicants who have been law-abiding citizens and who have stable work and family histories have the best chance of receiving pardons. Review boards are empowered through state constitutions to issue pardons or, in some cases, to recommend pardons to the governor.

The membership of boards of pardons varies from state to state. For example, in Georgia the governor appoints those who sit on the five-member board, while in Minnesota the board is composed of the governor, chief justice of the state supreme court, and the state attorney general. Where a statute does not designate constitutional officers (e.g., governor or SECRETARY OF STATE) pardon boards generally consist of individuals with experience or an interest in the criminal justice system. Members may be current or former law enforcement officers, correctional officials, lawyers, educators, and business people. Board members usually serve four- or five-year terms. In many states the board also reviews applications for PAROLE (early and conditional release) from prison, but the popularity of mandatory sentencing has greatly reduced the need for these boards to conduct parole reviews.

Eligibility for pardons is governed by statute. Generally, a person convicted of a crime of violence must wait ten years since the discharge of the sentence and cannot be on parole or PROBATION. A person convicted of a nonviolent crime generally must wait five years before applying for a pardon. Some pardon boards also allow an applicant to seek relief earlier for good cause. However, these pardons are difficult to obtain because pardon boards usually must vote unanimously to grant them.

An applicant must file the appropriate paperwork with the board of pardons. The board then notifies the sentencing judge and prosecutor of the hearing date and time. Many states also notify crime victims of the hearing date and publish notices in local newspapers where the crime occurred. At the hearing, the applicant explains to the board why he or she is deserving of a pardon and presents character witnesses. Judges, prosecutors, and victims may also testify.

The pardon board considers all testimony and any written submissions before voting. Boards of pardon may grant an absolute pardon, which is also called a full or unconditional pardon. In contrast, the board may grant a conditional pardon, which must state the terms and conditions on which it was granted. A person who receives an absolute or conditional pardon still bears a criminal record and is required to disclose this information on employment applications and similar forms. However, pardon boards may issue a *pardon extraordinary* that sets aside the conviction and effectively erases the person's criminal record. With a pardon extraordinary the recipient does not have to disclose the conviction except in a judicial proceeding.

Pardon board decisions are not appealable to a court of law. A person who is denied a pardon usually will face an uphill battle to secure it at a future time. For example, in Minnesota two of the three pardon board members must grant permission for the filing of a second application.

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## BOARD OF REGENTS

*An independent governing body that oversees a state's public* COLLEGES AND UNIVERSITIES.

All 50 states have governing bodies that oversee the administration of public education. A number of states call the body that administers the state college and university system the board of regents. The word *regent* is an English term that originally meant ruler. In the British

university system, a regent presided over academic debates; this association with higher education increased over time. Some states refer to their educational bodies as boards of trustees, which suggests the type of role such boards play in education. In a few states, including New York, the board of regents also oversees elementary and secondary education. Most boards of regents, however, deal only with post-secondary education institutions.

Boards of regents gain their authority from either state constitutional provisions or statutes. States that create a board of regents through constitutional means grant these boards great political independence. For many states such a provision creates a "fourth branch of government," insulated from direct interference by a governor or legislature. Board members, however, are selected by these branches. They are either nominated by the governor and confirmed by the legislature, or elected directly by the legislature. Regents serve for specified terms of office and are selected as at-large members or drawn from particular regions of the state.

A board of regents has a number of duties it must perform. It must do short-range and long-range planning, develop and articulate the vision and mission of the university system, hire and oversee the university chief executive and other top leadership, and make broad policy decisions. Regents are not expected to be involved in day-to-day administration, but they do serve on standing committees that review all aspects of university life. In addition, they are often called on to lobby the governor and legislature for funding. Though these boards meet monthly or bimonthly, the work is constant. This is not surprising, as the annual budgets of state college systems rival those of midsize corporations. Unlike corporate directors, regents do not receive compensation for their service.

Boards of regents approve policies that may be challenged in court. For example, numerous university systems have implemented student codes of conduct, which ban certain types of speech and behavior because they are considered to be "hate crimes." These policies sometimes result in lawsuits alleging the restriction of FIRST AMENDMENT rights (*UWM Post, Inc. v. Board of Regents of University of Wisconsin*, 774 F.Supp. 1163 [E.D.Wis.1991]). Boards of regents also have been involved in controversy over AFFIRMATIVE ACTION admission policies. Some policies have generated litigation that has reached the Supreme Court (*Gratz v. Bollinger*, __U.S.__, 123 S.Ct. 2411, __L.Ed.2d__ [2003]).

Because of such high profile issues, boards of regents have been attacked by those who have opposing viewpoints. In some cases, a new governor or a displeased legislature will replace regents with whom they disagree. In general, however, boards are usually diverse bodies, composed of business executives, doctors, labor leaders, farmers, lawyers and, in some cases, a member of the student body. Historically, the independence of boards of regents has been respected.

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## BODY

*The principal part of anything as distinguished from its subordinate parts, as in the main part of an instrument. An individual, an organization, or an entity given legal recognition, such as a corporation or "body corporate." A compilation of laws known as a "body of laws."*

## BODY EXECUTION

*An arrest; a seizure of a defendant.*

A sheriff or other public officer can be ordered by a court to arrest a defendant and the officer executes the order by taking the body of the defendant into custody. The order itself may be called a capias, or *capias ad satisfaciendum* (Latin for "that you take him in order to satisfy it").

## ♦ BOGGS, CORINNE CLAIBORNE

Corinne Claiborne ("Lindy") Boggs was a Democratic representative from New Orleans, the first woman from Louisiana elected to the U.S. Congress. During her 17 years in Congress her political acumen and experience made her a popular and effective politician.

Boggs was born March 13, 1916, on Brunswick Plantation, in Louisiana. Her father owned a successful sugar plantation. She received her bachelor's degree in 1935 from Sophie Newcomb College at Tulane University and taught

history in Romeville, Louisiana. Her 1938 marriage to Hale Boggs marked the beginning of an enduring and formidable political dynasty.

Boggs and her husband first went to Washington in 1940 when he was a first-year representative from New Orleans. Then only 24 and 26 years old, respectively, the young couple devoted themselves to the DEMOCRATIC PARTY. Boggs's husband lost his bid for reelection in 1942 but regained his seat in 1946, beginning a string of 22 consecutive victories by him or Boggs. During the years that her husband was in Congress, Boggs, in addition to raising their three children, worked as his campaign manager, did community work in New Orleans, organized social events, and devised an innovative bill-tracking system for her husband at a time when no such system existed. When her husband was killed in an airplane crash in 1972 Boggs ran in the special election to fill his seat. She won easily, becoming Louisiana's first woman—and one of only 14 women—in Congress.

Although Boggs took her seat in 1973 as a first-year representative, her three decades as a congressional wife had given her the types of contacts enjoyed only by senior members. The friendships and alliances she had developed with prominent Democrats helped her gain an appointment to the House Appropriations Committee. There she used her influence to deliver many important appropriations to her home district, including money for colleges, hospitals, housing projects; a $10 million energy research center at the University of New Orleans; and numerous navigational and hurricane protection projects.

Boggs built a reputation as a compassionate, even-tempered lawmaker who quietly worked long hours in the nitty-gritty, behind-the-scenes operation of the Appropriations Committee.

Boggs's other "firsts" included being the first woman to chair the Democratic National Convention, in 1976, and the first female regent of the Smithsonian Institution. At the time of her retirement, she was the only white congressperson representing a district where most of the voters were African American, defying the conventional wisdom that voters prefer candidates of their own race.

In addition to her work on the Appropriations Committee, Boggs served on the Banking, Currency, and Housing Committee, where she worked to pass legislation aimed at solving the housing problems of elderly people and members of other low- and middle-income groups. A strong supporter of equal opportunities for women, she helped pass legislation that guarantees equal access to credit and prohibits discrimination on the basis of sex in the granting of small-business loans.

During her many years in Washington, D.C., Boggs acted as an unofficial hostess for the Democratic party, presiding over parties and receptions attended by most of the Democrats in the nation's capital. In looking back on her career, Boggs expressed pride in having played a "small role in opening doors for blacks and women," in helping to fund Head Start, and in securing money for businesses owned by minorities and women. She stressed that leaving public office would not mean the end of her career.

Since leaving the House, Boggs has lectured at Tulane University and the University of New Orleans and established the Hale and Lindy Boggs Center for Legislative Affairs, at George-

"I CAME TO REALIZE THAT THERE IS NO TRUE DEMOCRACY UNLESS ALL ITS CITIZENS HAVE EQUAL OPPORTUNITY, AND THAT ALL PEOPLE SHOULD BE ABLE TO PARTICIPATE IN THEIR GOVERNMENT."
—CORINNE "LINDY" BOGGS

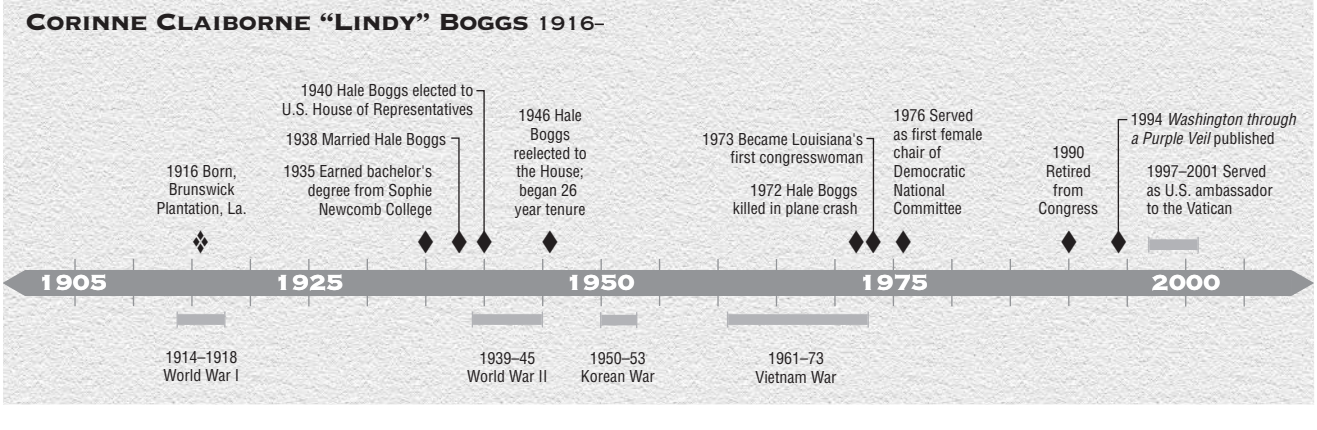

town University Law School. In January 1991 she attended the dedication of the Lindy Claiborne Boggs Room, a reading room for congresswomen at the U.S. Capitol.

In 1997 Boggs was confirmed by the Senate as U.S. ambassador to the Vatican, a position she held until March 2001. Since that time she has spoken on the topics of HEALTH CARE advocacy and other health issues.

She has also spoken of her political and personal experiences including raising two politically active daughters. Her older daughter, Barbara Boggs Sigmund, was the mayor of Princeton, New Jersey, when she became terminally ill with cancer. Boggs cited Sigmund's illness as one of the reasons she did not run for reelection in 1990; Sigmund died later that year. Boggs's younger daughter, Corinne "Cokie" Roberts, worked as a journalist and congressional reporter for National Public Radio and ABC News in the early 2000s.

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## BOILERPLATE

*A description of uniform language used normally in legal documents that has a definite, unvarying meaning in the same context that denotes that the words have not been individually fashioned to address the legal issue presented.*

## ❖ BOLIN, JANE MATILDA

Jane Matilda Bolin was the first black woman judge in the United States.

Bolin was born April 11, 1908, in Poughkeepsie, New York, to Gaius C. Bolin and Matilda Emery Bolin. Her father, who was born to a Native American mother and a black father, was the first African American graduate of Williams College. He went on to become a lawyer and practiced law in Poughkeepsie for more than 50 years. Bolin's mother was born in England and immigrated to the United States with her parents.

Bolin was raised in a middle-class family. She attended public elementary and secondary schools. After graduation from high school she entered Wellesley College and soon was named a Wellesley scholar, one of the top 20 women in her class. She received her bachelor of arts degree, with honors, in 1928.

Shortly after her graduation from college Bolin announced her intention to attend Yale Law School. Her father was at first opposed to the idea because he felt that the law was a profession unsuited to women. He let his daughter know he would prefer her to pursue teaching, but she was determined to become a lawyer. Bolin graduated from Yale Law School in 1931, the first African American woman to do so.

Bolin was admitted to the New York bar in 1932 and began her legal career with her father and brother's law firm in Poughkeepsie. In 1933 she married Ralph E. Mizelle, also an attorney, and they settled in New York City.

Bolin's judicial career commenced just a few years after she and her husband began practicing law together. On April 7, 1937, she was named assistant corporate counsel in New York City's law department. She served two years in that position before being summoned, to her complete surprise, to the office of Mayor Fiorello La Guardia. On July 22, 1939, La Guardia appointed Bolin justice of the Domestic Relations Court of the City of New York (later called the family court), making her the first black woman judge in the United States. She presided over family court cases for four consecutive ten-year terms, until she reached the mandatory retirement age of 70.

In her many years on the bench Bolin saw the full spectrum of domestic cases: serious crimes, including homicides, committed by juveniles; nonpayment of family support; spouse battering; child neglect; lack of supervision for children; ADOPTION; and PATERNITY. Upon her retirement in 1978 she noted that during her years as a judge, she had viewed a steady increase in violent behavior among young people. Asked if she could suggest solutions to the problem, Bolin responded that the answers were

very complex and that she could not accept the "easy answers" psychiatrists and social workers were handing out, "saying it's because of the wars . . . or the violent programs on television"

From the beginning of her career Bolin was determined to fight racial prejudice in any way she could. She worked to bring about changes in the way PROBATION officers were assigned to cases in family court. When she became a judge black probation officers were assigned exclusively to cases involving black families; through Bolin's efforts, probation officers were eventually assigned without regard to race or religion. She also instituted a requirement that private social service agencies receiving public funds accept children without regard to ethnic background. "They used to put a big N or PR on the front of every [file], to indicate if the family was black or Puerto Rican," she recalled, because the agencies were segregated.

Bolin has been described as a militant, but quiet, fighter for justice. She earned a reputation as a courageous, no-nonsense, hard worker who never shirked an assignment. In addition to being a committed professional, Bolin served on the boards of a number of organizations: the New York Urban League, the National Association for the Advancement of Colored People (NAACP) and its New York chapter, the Harlem Tuberculosis Committee, the legislative committee of the United Neighborhood Houses, the Wiltwick School for Boys, the Dalton School, and the Harlem Lawyers' Association. She was a member of the Committee on Children of New York City, the Scholarship Service and Fund for Negro Students, and the Committee against Discrimination in Housing.

Bolin and her first husband had one child, Yorke Bolin Mizelle, who was born in 1941 and became a New York businessman. Asked how she combined motherhood, community activities, and a high-pressure career, Bolin said, "I didn't get all the sleep I needed, and I didn't get to travel as much as I would have liked, because I felt my first obligation was to my child." Bolin's first husband died in 1943. In 1950, she married Walter P. Offutt Jr., a minister, who died in 1974.

In recognition of her many accomplishments and contributions to the field of FAMILY LAW, Bolin has received many awards, including honorary doctor of law degrees from Morgan State University, Western College for Women, Tuskegee University, Hampton University, and Williams College. However, asked to recount her

*Jane Matilda Bolin.*
FISK UNIVERSITY LIBRARY

"I'D RATHER SEE IF I CAN HELP A CHILD THAN SETTLE AN ARGUMENT BETWEEN ADULTS OVER MONEY."
—JANE BOLIN

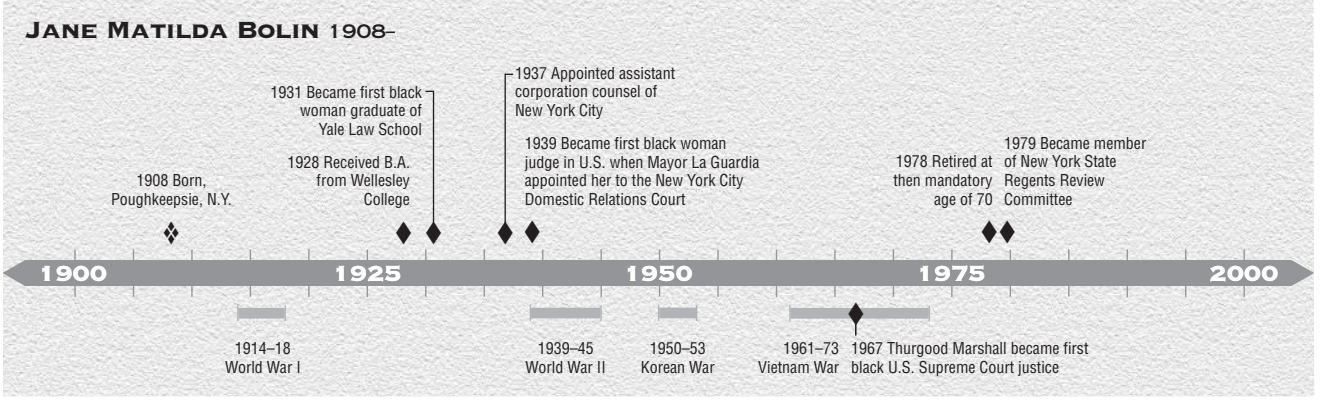

most memorable experience, she did not speak of her many achievements. Rather, she told the story of a child who was in trouble and whose mother asked Bolin to send the child to the same institution where she had spent some time. When Bolin said she preferred to help the mother keep her child at home, the woman told her the institution had helped her, and she wanted the same help for her child. Bolin listened to the mother's reasoning and complied with her wishes.

After her retirement, Bolin worked as a family law consultant and did volunteer tutoring in math and reading with public school children.

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## BONA FIDE

*[*Latin, In good faith.*]* *Honest; genuine; actual; authentic; acting without the intention of defrauding.*

A bona fide purchaser is one who purchases property for a valuable consideration that is inducement for entering into a contract and without suspicion of being defrauded or deceived by the seller. He or she has no notice of any defects of the title. A bona fide purchaser pays in GOOD FAITH full value for the property and, without any FRAUD, goes into possession.

"TO HAVE A POPULAR GOVERNMENT WE MUST, FIRST OF ALL, AND BEFORE ALL ELSE, HAVE GOOD CITIZENS."
—CHARLES JOSEPH BONAPARTE

## ♦ BONAPARTE, CHARLES JOSEPH

Charles Joseph Bonaparte, who served as U.S. attorney general under president THEODORE ROOSEVELT, was one of the organizers of the Civic Reform League and the National Municipal League, and he helped to found a Special Agents Force within the JUSTICE DEPARTMENT that was the forerunner of the FEDERAL BUREAU OF INVESTIGATION (FBI).

A grandson of Jerome Bonaparte, who was Napoleon's youngest brother, Charles Joseph Bonaparte was born in Baltimore, Maryland, on July 9, 1851. After graduating from Harvard College in 1871, he attended Harvard Law School, graduating in 1874. Bonaparte returned to Baltimore and established a private practice. At the time, public corruption of elected officials was widespread in the United States and the political situation in Maryland was considered to be the worst in the country. Bonaparte, of Italian-American descent, became interested in civic reform, commenting in an article published in *Forum* magazine that the politicians of that period if not technically criminals themselves, were the "allies and patrons of habitual lawbreakers."

In 1881, Bonaparte became one of the founders of the National Civil Service Reform League. Along with other political reformers he sought to raise the awareness of the electorate regarding crimes such as BRIBERY and UNDUE INFLUENCE and the need for fair and impartial administration of the government. The reformers were known in the popular parlance as "goo-goos" because they sought good government. Bonaparte also helped to found the National Municipal League in 1894. The organization, an amalgamation of various citywide reform groups throughout the United States, elected Bonaparte its president in 1905.

Bonaparte was a member of the REPUBLICAN PARTY although not a particularly active one. In 1892, Bonaparte and Theodore Roosevelt met in Baltimore when they both spoke to a local civil service reform organization. In 1902,

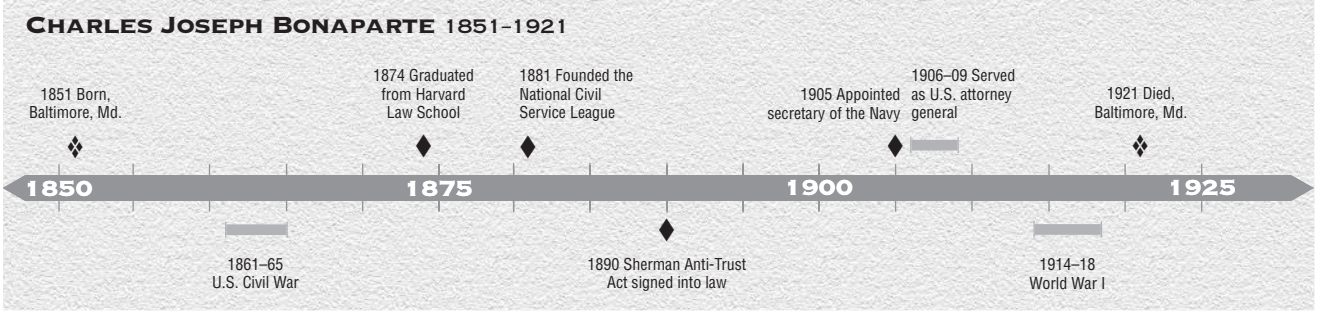

President Roosevelt appointed Bonaparte to the Board of Indian Commissioners. In 1905, Roosevelt named Bonaparte secretary of the United States Navy.

In his second term of office, Roosevelt found it necessary to name a replacement for Attorney General **WILLIAM HENRY MOODY**, who left in December 1906 to become an associate justice on the U. S. Supreme Court. Because of his reformer passions, Bonaparte was chosen by Roosevelt to be Moody's successor. Roosevelt, who had first begun his political career in New York City by campaigning for municipal reform, was now seeking reform on a national basis by going after corrupt businesses and corporations that had formed "trusts" aimed at stifling competition and keeping wages low. Roosevelt had become the nation's "trust-buster," and Bonaparte joined the pursuit, launching antitrust investigations aimed at corporations such as Standard Oil and the American Tobacco Company, and railroads including the Union Pacific. During his tenure in office, Bonaparte argued over 50 cases before the Supreme Court.

While pursuing his various antitrust investigations, Bonaparte found himself hindered by the lack of a permanent investigative staff within the Justice Department. Temporary investigators, who were private detectives or **SECRET SERVICE** operatives on loan from the **TREASURY DEPARTMENT** carried out the investigations. Congress, under pressure from corporations to end the investigations, enacted a law that prohibited the Justice Department from using members of the Secret Service for the Department's investigations.

In 1908, Roosevelt directed Bonaparte to create an investigative force that would be a subdivision of the Justice Department. Before he left office, Bonaparte suggested making the division permanent. His suggestion was upheld by his successor, **GEORGE WICKERSHAM**, who called the group the Bureau of Investigation. The 23-member unit developed by Bonaparte was renamed the Federal Bureau of Investigation (FBI) in 1935.

After leaving office in March 1909, Bonaparte continued to pursue his advocacy of civil reform. He died on June 28, 1921, at his estate, Bella Vista, located outside Baltimore.

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Federal Bureau of Investigation; Justice Department; Roosevelt, Theodore.

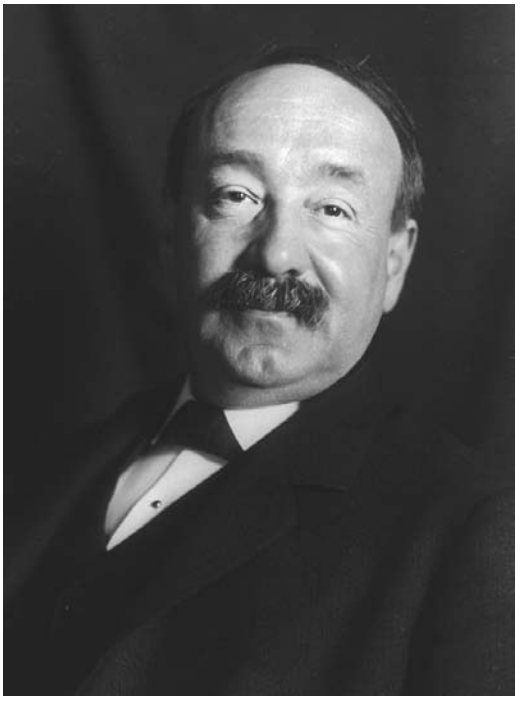

*Charles Joseph Bonaparte.*
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## ♦ BOND, HORACE JULIAN

In the annals of the **CIVIL RIGHTS MOVEMENT**, the career of the politician, activist, and educator Julian Bond holds a unique place. Bond's work on behalf of social justice spans the period from the 1960s to the early 2000s. As a college organizer in 1960, he helped found the **STUDENT NON-VIOLENT COORDINATING COMMITTEE** (SNCC), arguably the most important group channel for the young people who expanded and radicalized the movement. In 1965, he became one of the first members of his generation to make the transition from activism to political office, subsequently serving for nearly two decades in Georgia state government. Through his legislation, writing, teaching, and planning for legal affairs groups, Bond is widely recognized as an intellectual leader of the contemporary **CIVIL RIGHTS** movement.

Born on January 14, 1940, in Nashville, Tennessee, Bond was the son of black educators. His

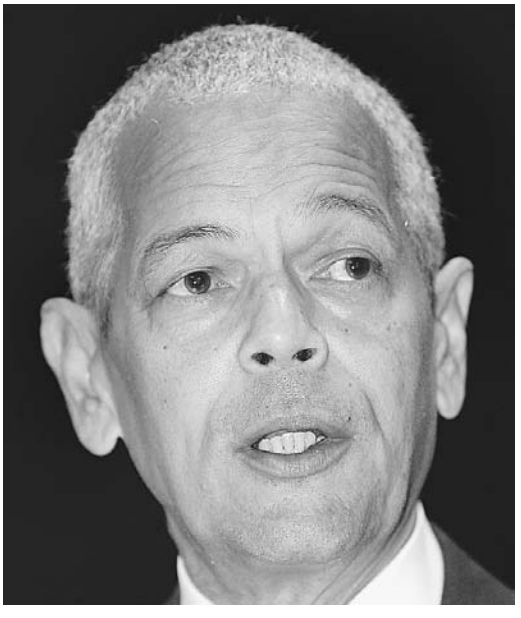

*Julian Bond.*
AP/WIDE WORLD PHOTOS

childhood was steeped in the intellectual life of Lincoln University in Pennsylvania, where his father, Horace Mann Bond, served as president. The family's accomplishments—Bond was the descendant of a freed slave—did not insulate him from prejudice. While at the George School, a Quaker prep school at which he was the only black student in the 1950s, Bond was told by the headmaster not to wear his school jacket on dates with white girls. The experience scarred him yet awakened him politically. At that time he also began developing a philosophy of racial awareness and **PACIFISM**, along with the witty, penetrating style for which he later became known.

"WE ARE A FORCE TO BE RECKONED WITH: WELL-EDUCATED, WELL-INFORMED AND STRONGLY COMMITTED TO SOCIAL JUSTICE. . . . AND WE VOTE."
—JULIAN BOND

In 1957, Bond entered Morehouse College in Atlanta, Georgia. He did not receive his bachelor of arts degree in English until 14 years later, but in the interim, he made history. Bond was inspired by the civil rights movement and particularly the philosophy of nonviolent change espoused by **MARTIN LUTHER KING JR.** In 1960, Bond helped found two influential student groups. The first of these, the Committee on Appeal for Human Rights, succeeded in integrating Atlanta businesses and public places. The second group, the Student Non-violent Coordinating Committee (SNCC), grew into a national phenomenon, becoming the leading civil rights organization among young people in the mid-1960s. SNCC activities ranged from voter registration drives in the South to opposition to the **VIETNAM WAR**, and Bond, in addition to joining SNCC in the field, edited its newsletter.

Dropping out of college in 1961 to become a full-time activist, Bond soon established himself as a national figure through this work and his subsequent political career. In 1965, he won election to the Georgia House of Representatives. But lawmakers voted not to seat him, ostensibly because of his anti-war activities, particularly his signing of a SNCC statement that supported men who chose not to respond to their draft summons. Bond's supporters argued that the real reason he was not seated was racism. After the legislature called a new election, Bond won again, but he was still refused office. His lawsuit claiming the right to be seated went to the U.S. Supreme Court, which ruled unanimously in December 1966 that the legislature's actions violated the **FIRST AMENDMENT** (*Bond v. Floyd*, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235). Bond took office in January 1967.

Bond's success led to his name being placed in nomination for vice president at the 1968 Democratic Convention, a first for a black man. The nomination was symbolic; he was too young to serve and so withdrew his name. In Georgia, he served as a state representative until 1974 and as a state senator from 1974 to 1987. During this

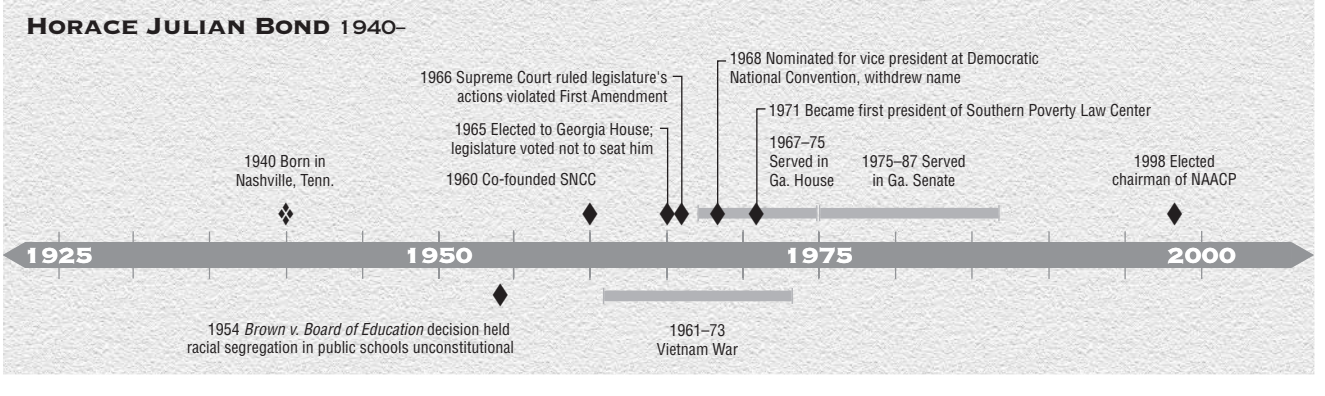

period, he introduced some 60 bills aimed at helping minorities and low-income citizens; he also led a successful drive to create a new congressional district in Atlanta representing a black majority. He made an unsuccessful bid for the U.S. House of Representatives in 1987.

During his career, Bond has written about and taught civil rights and has served in many civil rights organizations. In 1971, he became the first president of the SOUTHERN POVERTY LAW CENTER, a nonprofit legal organization based in Montgomery, Alabama, devoted to ending discrimination. In the 1990s Bond served four terms on the board of the National Association for the Advancement of Colored Persons (NAACP). Bond has served since 1998 as national board chairman of the NAACP.

A holder of 23 honorary degrees, Bond has taught at Drexel University, Harvard University, the University of Pennsylvania, and Williams College. In 2003 he served as a distinguished professor at American University in Washington, D.C. and a professor of history at the University of Virginia.

In the early 2000s Bond continued to be a prolific writer. His articles and poems have appeared in numerous magazines and newspapers including *The Nation*, *Playboy*, *Ramparts*, the *New York Times*, and the *Los Angeles Times*. Bond has also continued his work as a narrator and commentator and has made appearances on television and in the movies. In 2002 he received the EUGENE V. DEBS Award for his work with social justice issues and also the prestigious National Freedom Award.

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Civil Rights Movement.

## BONDS

*Written documents by which a government, corporation, or individual—the obligor—promises to perform a certain act, usually the payment of a definite sum of money, to another—the obligee—on a certain date.*

In most cases, a bond is issued by a public or private entity to an investor who, by purchasing the bond, lends the issuer money. Governments and corporations issue bonds to investors in order to raise capital. Each bond has a *par value,* or face value, and is issued at a fixed or variable interest rate; however, bonds often can be purchased for less or more than their par value. This means that the yield, or total return on a bond, varies based on the price the investor pays for the bond and its interest rate. Generally, the more secure a bond is (i.e., the stronger the assurance that the bond will be paid in full upon maturity), the less the bond will yield to the investor. Bonds that are not very secure investments tend to have higher returns. Junk bonds, for example, are high-risk, high-yield bonds. Except for the high-risk variety, bonds tend to be relatively solid, predictable investments, with prices that vary less than those of those of stocks on the STOCK MARKET. As a result, litigation because of unpaid bond agreements has rarely proved necessary.

The most common type of bond is the *simple bond.* This bond is sold with a fixed interest rate and is then redeemed at a set time. Several varieties of simple bonds exist. Municipal governments issue simple bonds to pay for public projects such as schools, highways, or stadiums. The U.S. Treasury issues simple bonds to finance federal activities. Foreign governments issue simple bonds, known as Yankee bonds, to U.S. investors. Corporations issue simple bonds to raise capital for modernization, expansion, and operating expenses.

*Conditional bonds* do not involve capital loans. Most of these bonds are obtained from persons or corporations that promise to pay, should they become liable. The payment is usually a nonrefundable fee or a percentage of the face value of the bond. A bail bond is a common type of conditional bond. The person who posts a bail bond promises to pay the court a particular sum if the accused person fails to return to court for further proceedings on the date specified. Once a bond payer satisfies the terms of a conditional bond, the liability is discharged. If the bond goes into default (i.e., if the obligations specified are not met) the amount becomes immediately due. Parties also can mutually decide to cancel a conditional bond.

The emergence of simple government and corporate bonds into the modern marketplace began with the economic boom of the 1920s.

# Michael R. Milken: Genius, Villain, or Scapegoat?

Few business personalities have attracted as much attention—both negative and positive—as bond market financier Michael R. Milken. After earning an estimated $1.1 billion in the 1980s as the head of Drexel Burnham Lambert's **SECURITIES** branch, Milken fell from grace in the press and in the eyes of many investors. In 1990 the Securities Exchange Commission charged Milken with securities **FRAUD**. In U.S. district court, Milken was fined $600 million, permanently barred from engaging in the securities business, and sentenced to ten years behind bars. Some of Milken's associates believed that he had been made a scapegoat; Milken's prosecution, they argued, was little more than an attempt to pass judgment on the 1980s, sometimes cast as the decade of greed.

Milken had formerly been heralded by the *Wall Street Journal* as one of the century's most important financial thinkers. In the 1970s, after finishing studies at the University of Pennsylvania's Wharton Business School, Milken was early in anticipating the boom of the **JUNK BOND** market. He used his understanding of trends in investment activity, along with innovative approaches, to capitalize on what he called high-reward bonds. The junk bond boom led to both Milken's ascent and his incrimination. Milken's correct assessment of the junk bond boom paid off for him. While he worked for the powerful Drexel Burnham Lambert firm, his profits made him a billionaire. But how he made those profits also led to his downfall. The government held evidence implicating Milken in manipulation of stocks, insider trading, and **BRIBERY** of investment managers.

With fines and damages in civil lawsuits totaling $1 billion, Milken became one of several news-making, white-collar criminals of the 1980s. After his sentencing, the *Wall Street Journal* retracted its praise of the man, saying that "evidence now suggests that Mr. Milken's theory was wrong—and that he was far from the genius he seemed to be about junk bonds." (*National Review,* August 31, 1992). Milken's theory held that the high yields of junk bonds would draw investors to purchase many of them and that defaults on these securities would be few. The intense corporate competition of the 1980s waned; however, and in later years, investors moved away from junk bonds in search of other investment opportunities. Following his release from prison, after serving two years of his ten-year sentence, Milken was invited to lecture on ethics in business at the University of California, Los Angeles. To critics, however, Milken remained an icon of the money-mad 1980s, a financial wizard driven by the promise of vast wealth to push the limits of **SECURITIES LAW**. The one-time billionaire reemerged from prison with $300 million from his days as the king of junk bonds, which he used entrepreneurially in the education market, most notably as the brainchild behind Knowledge Universe, a company that owned several other education training and consulting companies, including the popular Leapfrog Enterprises (makers of LeapPad learning aids). Additionally, Milken became more visible in his philanthropic endeavors, particularly favoring prostate cancer research and Milken creations such as the Milken Family Foundation, the Milken Institute, and Mike's Math Club.

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**CROSS-REFERENCES**

Investment; Stock; Stock Market.

Immediately after **WORLD WAR I**, the U.S. economy rewarded investors who were eager to see expansions in industrial growth. For most of the 1920s, until just before the Great Depression, interest rates remained low. The bond market became sophisticated enough to raise funds for the U.S. Treasury, domestic corporations, and foreign borrowers. It also proved useful during

WORLD WAR II, when the federal government depended on the sale of war bonds to finance its military efforts.

During the 1980s, a different kind of boom in the U.S. economy sent the bond market in a more problematic direction. Even though high-yielding bonds tend to be less reliable investments than low-yielding ones, the rapidly increasing business activity in the 1980s led to large-scale buying of these high-risk investments. Corporations successfully bought out the stock of other corporations by raising money through the sale of millions of dollars of junk bonds. (Junk bonds have been given low ratings when measured by standard investment criteria—hence the pejorative name.)

Troubles soon arose from the shaky foundation of the JUNK BOND market. One of the country's leading figures in fostering junk bond investments, Michael R. Milken, faced criminal charges that he had manipulated bond prices, traded on inside information, and bribed investment managers. Milken's image was further complicated by his having worked with the stock baron Ivan F. Boesky, who had been convicted of insider trading. In April 1990, in *Securities & Exchange Commission v. Milken,* 1990 WL 455346, Fed. Sec. L. Rep. ¶ 95,200 (S.D.N.Y. April 24, 1990), Milken pleaded guilty to six felonies, including conspiracy, SECURITIES FRAUD, and aiding and abetting the filing of a false document with the SECURITIES AND EXCHANGE COMMISSION. At the time of the initial settlement, Milken agreed to pay $600 million in fines and reparations. In November 1990, federal judge Kimba M. Wood sentenced Milken to ten years in prison. Milken served only two years of his sentence behind bars.

Problems have also arisen with bonds issued by governments. For example, when California's Orange County issued $169 million in municipal bonds in June 1994, future taxes and other general revenues were expected to pay for the interest and principal of the bonds. But on December 6, 1994, the county filed Chapter Nine petitions in BANKRUPTCY court. The county could not pay the bondholders, since the money that had been set aside for them had been depleted. By 1995, losses in the Orange County investment pools approached $1.7 billion. Representatives of the county found themselves in court, being sued by the company that represented investors. In *In re County of Orange,* 179 B.R. 185, 26 Bankr. Ct. Dec. 1050 (Bankr. C.D. Cal. 1995), the bankruptcy court denied bondholders' claims to county revenues derived after the Chapter Nine filing. The interests of bondholders were seriously injured.

Nevertheless, bonds continue as popular investments. Junk bonds, especially, have regained favor as a means for earning considerable returns. The relatively high interest rates of junk bonds have entailed risks for buyers, but Wall Street analysts have argued that the rewards of these investment vehicles outweigh the dangers. Indeed, the bond market in general has even thrived in times of economic crisis.

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Securities.

## BONHAM'S CASE

See ENGLISH LAW "Dr. Bonham's Case" (In Focus).

## BOOK VALUE

*The current value of an asset. The book value of an asset at any time is its cost minus its accumulated depreciation. (Depreciation reflects the decrease in the useful life of an asset due to use of the asset.) Companies use book value to determine the point at which they have recovered the cost of an asset.*

*The net asset value of a company's* SECURITIES. *This is calculated by subtracting from the company's total assets the following items: intangible assets (such as goodwill), current liabilities, and long-term liabilities and* EQUITY *issues. This figure, divided by the total number of bonds or of shares of stock, is the book value per bond or per share of stock.*

The calculation of book value is important in determining the value of a company that is being liquidated. For example, if a corporation has 100,000 shares of stock issued and outstanding and its assets total $5 million and its intangible assets and all liabilities total $1.6 million, its net asset value is $3.4 million and its book value per share is $34.

## BOOKING

*The procedure by which law enforcement officials record facts about the arrest of and charges against a suspect such as the crime for which the arrest was made, together with information concerning the identification of the suspect and other pertinent facts.*

This information is written down on the police blotter in the police station. The process of booking may also include photographing and fingerprinting.

## BOOKKEEPING

*The process of systematically and methodically recording the financial accounts and transactions of an entity.*

Double-entry bookkeeping is an accounting system that requires that for every financial transaction there must be a debit and a credit. When merchandise is sold for cost, there is a debit to cash and a credit to sales.

## BOOTSTRAP DOCTRINE

*A principle in the resolution of conflict of laws that prevents a party from bringing an action in one state's court in an attempt to collaterally attack the final judgment from another state's court. The doctrine is based upon the principle of* RES JUDICATA*, which prevents a party from litigating a jurisdictional claim that has already been resolved by a prior, final decision, or if the litigants had an opportunity to raise the issue and challenge the other court's lack of jurisdiction and failed to do so.*

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Res Judicata.

## ♦ BORDEN, LIZZIE

The trial of Lizzie Borden shows the effect that public opinion can have on the life of an accused person, regardless of the outcome of a fair trial.

Lizzie Borden was born July 19, 1860. She was a plain, outspoken woman who lived with her father, stepmother, and sister in a house on Second Street in Fall River, a small industrial city located in southeastern Massachusetts.

According to local rumors, the Borden family was not noted for its harmonious relationships. Andrew Borden was a quiet, unpleasant man who had two daughters, Lizzie and Emma, by a previous marriage, and who had married his present wife in 1865. Neither Lizzie nor Emma favored the union and animosity existed among the three Borden women.

On August 4, 1892, the residents of Fall River were shocked and frightened by the brutal ax murders of Andrew Borden and his wife. The killings were committed at the Borden home in daylight. Emma Borden was out of town, but Lizzie discovered her father's body on the couch in the living room; she immediately sent a servant, Bridget, for help. Upon their return, Bridget and a neighbor found the body of Lizzie's stepmother in an upstairs bedroom.

The town was in an uproar and the newspapers seized the opportunity to sensationalize an already lurid story. Lizzie became the prime suspect, and throughout Fall River, speculation spread about her actions on that fatal day, suggesting that Lizzie attacked her stepmother and afterward carefully cleaned the ax and changed her clothes. She then did her normal housework until her father returned from town to take a nap on the couch. While he slept, Lizzie killed him, and again cleaned the ax and her clothing. Chemical tests did not provide any substantial evidence because the alleged murder weapon, the ax, was cleaned so thoroughly.

The story of the murders was embellished with continued fragmented reports of Lizzie's behavior. One source claimed that Lizzie was devoid of any emotion when the corpses were found; another witnessed Lizzie in the act of burning a dress shortly after the murders were committed; still another stated that the suspect had attempted to purchase poison as recently as one day before the killings. The condemning public showed Lizzie no mercy, and some unknown rhymer composed a grotesque verse relating the events. The still familiar rhyme reads as follows:

> Lizzie Borden took an ax
> And gave her mother forty whacks;
> When she saw what she had done
> She gave her father forty-one.

An inquest was held five days after the discovery of the murders, and Lizzie was subsequently arrested. The trial began in New Bedford, Massachusetts, in June 1893, and lasted thirteen days. Those days were filled with con-

*Lizzie Borden (c.1890) was accused of the murder of her parents. She was acquitted in 1893.* AP/WIDE WORLD PHOTOS

tradictory accounts of the crime, but the main point of contention concerned Lizzie's assertion that she was in the barn at the time the murders were committed, between 11:00 A.M. and 11:15 A.M. An ice cream vendor corroborated Lizzie's story by testifying that he had seen the defendant leaving the barn at the aforementioned time. The defense attorney argued brilliantly on his client's behalf—the evidence was mostly circumstantial—and the jury found Lizzie Borden not guilty of the murder of her parents.

Lizzie Borden was acquitted by the jury but not by the public. After her death on June 1, 1927, in Fall River, she was still not exonerated in the public mind; she is famous only in connection with the bloody events of August 4, 1892.

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## ♦ BORK, ROBERT HERON

Robert Heron Bork, conservative legal scholar, author, and former federal appellate judge, was one of President Ronald Reagan's most controversial nominees for the U.S. Supreme Court.

When Bork was nominated to the Supreme Court in July 1987 his opponents ridiculed him as an archconservative who wanted to take away the rights and freedoms enjoyed by the political mainstream. They may have been surprised to learn that Bork began his career at the other end of the political spectrum. Born March 1, 1927, in Pittsburgh, Bork spent his high school and college years as a socialist. He attended the University of Chicago, where he received his bachelor's degree in 1948. In 1952, as a University of Chicago law student, Bork was a **NEW DEAL** liberal supporting **ADLAI STEVENSON** for president. Eventually, however, his political philosophy changed to embrace free-market **LIBERTARIANISM**: the law and economics program at the University of Chicago, a bastion of free enterprise research and laissez-faire economic theory, convinced Bork that government should not intervene in the economy.

"[LAW IS] VULNERABLE TO THE WINDS OF INTELLECTUAL OR MORAL FASHION, WHICH IT THEN VALIDATES AS THE COMMANDS OF OUR MOST BASIC CONCEPT."
—ROBERT BORK

Bork received his law degree in 1953. After serving two hitches in the U.S. Marine Corps he practiced for a large law firm in Chicago, where he specialized in **ANTITRUST LAW**. In 1962, Bork accepted a position teaching antitrust and **CONSTITUTIONAL LAW** at Yale University. At Yale, he developed his doctrine of "original intent and judicial restraint," which stated that courts can protect only the rights that are guaranteed in the Constitution; all other rights are subject to limitation by Congress and the legislatures. In deciding which rights are to be afforded constitutional protection, courts must be guided by the **ORIGINAL INTENT** of the Constitution's Framers. For example, the **FOURTEENTH AMENDMENT** was intended to grant **EQUAL PROTECTION** under the laws to black citizens; therefore, Bork argued, it cannot be used to approve or mandate **AFFIRMATIVE ACTION** for women.

President **RICHARD M. NIXON** appointed Bork **SOLICITOR GENERAL** in 1973. Later that year, by order of Nixon and at the request of the attorney general, who had resigned in protest against the order, Bork fired Special Prosecutor **ARCHIBALD COX** at a crucial stage of the **WATERGATE** investiga-

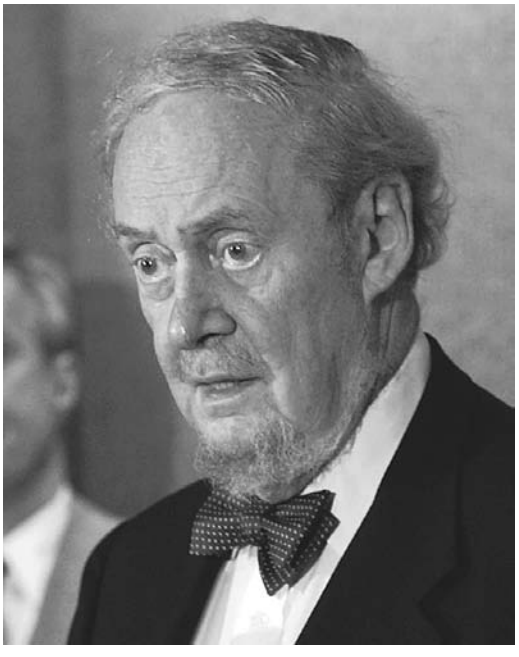

*Robert Bork.*
AP/WIDE WORLD PHOTOS

tion. Those events came to be known as the Saturday Night Massacre. In 1977 Bork returned to Yale, and in 1981 he left Yale for private practice in Washington, D.C. The following year President Reagan appointed him to the U.S. Court of Appeals, District of Columbia Circuit. On July 1, 1987, Bork was nominated to the Supreme Court to replace retiring associate justice **LEWIS F. POWELL JR.**

Over the years, Bork criticized many Supreme Court decisions. In a 1963 article in *The New Republic,* Bork attacked the proposed Public Accommodations Act—which became title II of the **CIVIL RIGHTS ACT OF 1964** (78 Stat. 2441, 42 U.S.C.A. § 2000a)—as an infringement of the right of free association. Eight years later, in an article in the *Indiana Law Journal,* Bork summarized his view of the Constitution and pointed out Court decisions that, in his opinion, were unconstitutional. He declared that the Constitution provided no unwritten protections and therefore guaranteed no right to privacy, contrary to what the Court had established in **GRISWOLD V. CONNECTICUT,** 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). Privacy, Bork said, was a free-floating right not derived in a principled fashion from the Constitution. If no right of privacy existed in *Griswold,* then, according to Bork, the landmark **ABORTION** case **ROE V. WADE** 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) was wrongly decided.

Similarly unprincipled, said Bork, were the decisions of the **WARREN COURT** that affected voting practices and established the principle of "one person, one vote." Bork also said **POLL TAXES** (devices often used to keep poor blacks from voting in the South) were not necessarily unconstitutional. In addition, according to Bork, the **FIRST AMENDMENT** should protect only political speech. When he was solicitor general, Bork criticized *Shelley v. Kraemer,* 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), a landmark **CIVIL RIGHTS** decision that outlawed the enforcement of restrictive covenants in the courts. Finally, Bork publicly expressed his belief that it would be healthy to reintroduce religion into the public schools.

In the summer of 1987 the United States witnessed the most contentious Supreme Court confirmation battle in the 200-year history of the Constitution. The battle over Bork's confirmation turned into a fight-to-the-finish for ide-

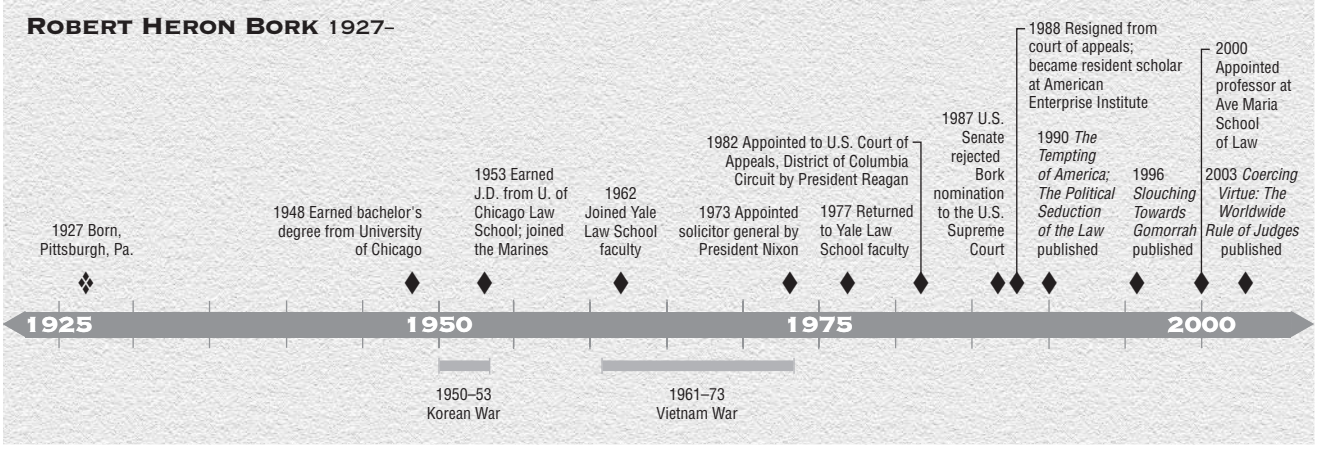

ological control of the Court and in a very real sense for the Constitution itself. Bork was a prolific legal scholar who had left a vast "paper trail" for his opponents to pore over in the search for ammunition to block his appointment to the Court. While leaders of the political right such as the Reverend Jerry L. Falwell and Pat Robertson praised Bork as a savior for a "morally misguided" Court, a coalition of prominent civil rights and other organizations, including the National Association for the Advancement of Colored People (NAACP), Common Cause, People for the American Way, the NATIONAL ORGANIZATION FOR WOMEN, the National Abortion Rights Action League, and the AMERICAN CIVIL LIBERTIES UNION, came together quickly to fight the nomination. LOBBYING efforts on both sides of the struggle were aggressive. Clearly, both liberals and conservatives saw the Bork nomination as the culmination of all previous showdowns between the left and the right throughout the Reagan administration. Liberals were particularly determined to stop the nomination. Despite evidence to the contrary, the White House continued to insist that Bork was a moderate conservative like Justice Powell and a model practitioner of judicial restraint.

Bork's confirmation hearing before the SENATE JUDICIARY COMMITTEE in September 1987 seemed to hurt his appointment more than any criticisms since the announcement of his nomination. His testimony further stirred his critics to label Bork as much further to the right on the political and legal spectrum than many Americans. In addition, during the hearings, Bork revised or backed down from some of his previous positions, which seemed to indicate that he was willing to change his mind in order to gain the nomination. Commentators believe that this helped convince many undecided senators to vote against him. On October 6 the Senate Judiciary Committee rejected Bork's nomination by a vote of 9–5. In a vote by the full Senate on October 23, Bork's nomination to the Supreme Court was rejected by a margin of 58 to 42.

Critics of original intent saw Bork's rejection as a victory for the perception of the Constitution as a "living" instrument, to be adapted to human needs by a judiciary with sufficient discretion to decide what public values are important enough to protect from majority rule. Bork's supporters called him a victim of liberal attacks.

Bork resigned from the court of appeals in 1988 and joined the American Enterprise Institute for Public Policy Research, a prominent Washington-based think tank. As a senior fellow at the Institute, Bork continued to write and comment on U.S. law and society. Bork published numerous articles and has been a frequent legal commentator on various television shows.

In books such as *The Tempting of America: The Political Seduction of the Law* (1989), *The Antitrust Paradox: A Policy at War with Itself* (2d ed. 1993), and *Slouching Toward Gomorrah: Modern Liberalism and American Decline* (1996), Bork espoused his strongly conservative views. He advocated CENSORSHIP of certain rap lyrics as well as explicit sexual material found on the INTERNET. He has written that liberals and feminists have helped to destroy the morality of the United States and that there is a relationship between illegitimate births and crime rates.

"IF A LEGISLATOR . . . IS A WEAKLING WHO SUCCUMBS TO THE LUSH CROONING OF CERTAIN LOBBYISTS, BLAME THE CONSTITUENCY, WHICH SHOULD HAVE BEEN MORE INTERESTED IN SENDING A QUALIFIED CANDIDATE."
—REVA BOSONE

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## ♦ BOSONE, REVA BECK

Reva Beck Bosone was Utah's first woman judge and the first woman elected to the House of Representatives from that state.

Bosone was born April 2, 1895, in American Fork, Utah, the only daughter among the four children of Christian M. Beck and Zilpha Chipman Beck. Her father was of Danish extraction, and her mother was a descendant of the 1847 Mormon pioneers and of the Mayflower pilgrims. After attending elementary and high schools in American Fork, Bosone went to Westminster Junior College, in Salt Lake City, and in 1919 received her bachelor of arts degree from the University of California at Berkeley. She married Harold G. Cutler in 1920. They were divorced one year later. From 1920 to 1927 she taught in several Utah high schools.

Inspired by her mother's admonition that a country is no better than its laws, Bosone decided that the best way to serve all the people was to become a lawmaker. Bosone was one of two women who entered the University of Utah College of Law in 1927 to "read law." While she was studying law, Bosone married fellow law school classmate Joseph P. Bosone in 1929. In 1930 she became the fourth woman to graduate from the University of Utah law school. In the same year she gave birth to a daughter and opened her own law practice.

In 1931, after her husband graduated from law school, the couple established the law firm of Bosone and Bosone in Helper, Utah. In 1932 Bosone became a candidate for the state legislature. After conducting a door-to-door campaign with her two-year-old daughter in her arms, she was elected to the Utah House of Representatives from Carbon County. Bosone was reelected in 1934 and in 1935 was elected majority leader. She became the first woman member of the influential Sifting (Rules) Committee, as well as its chairman. As a member of a group known as the "Progressive Bloc" Bosone played an integral role in the passage of a minimum wage-and-hour law for women and children and of the Utah child labor constitutional amendment. Her efforts in these areas were aided by FRANCES PERKINS, labor reformer and U.S. secretary of labor, and from ELEANOR ROOSEVELT, wife of President FRANKLIN D. ROOSEVELT.

After leaving the Utah Legislature in 1936, Bosone returned to private practice for a short time before being elected a Salt Lake City judge in police and traffic court. In her judicial position, to which she was reelected until 1948, she instituted what were then extraordinary traffic fines: $300 for drunken driving and $200 for reckless driving. During her tenure on the bench traffic cases more than tripled but only three appeals from her judgments were sustained. At the same time Bosone, theorizing that alcoholism was an illness rather than a moral failing, began to refer offenders to Alcoholics Anonymous and to make efforts to institute a government program for treating alcoholics.

Bosone, who divorced her husband in 1940, remained active touring a number of states as chair of a WORLD WAR II Civilian Advisory Committee and serving on the Salt Lake County Welfare Commission. In 1945 she was an "official observer" at the founding conference of the UNITED NATIONS in San Francisco.

In 1948 Bosone defeated incumbent William A. Dawson and became the U.S. representative from the Second Congressional District of Utah. At the time there were eight other women in the House of Representatives and one in the Senate. While serving in the House, Bosone was the first woman appointed to the Interior Committee. In 1950, Bosone was reelected after defeating Ivy Baker Priest a Republican who later became the second woman to hold the position of U. S. Treasurer. After her reelection Bosone pushed for legislation to remove Native Americans from government guardianship and sponsored water and soil conservation initiatives for the West.

Bosone ran for reelection in 1952 and in 1954 but was defeated both times by former incumbent Dawson. The campaigns, conducted in the nervous atmosphere of the COLD WAR, were hard-fought with Bosone facing charges of accepting kickbacks and being a Communist sympathizer. After her loss in 1954 she returned to private law practice until 1958, when she became legal counsel for the Subcommittee of Safety and Compensation of the House Com-

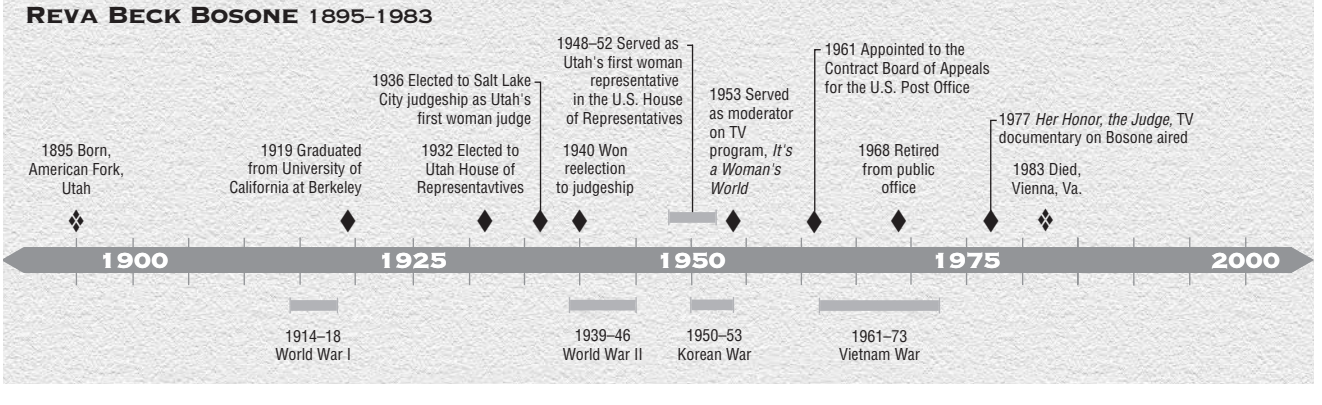

mittee on Education. In 1961 Postmaster General J. Edward Day appointed her a judicial officer and chairwoman of the Contract Board of Appeals for the U.S. Post Office Department. In this position, which she held until her retirement in 1968, Bosone was authorized to make final decisions for the department in OBSCENITY cases and FRAUD cases.

Throughout her professional life Bosone had a special interest in the problems of alcoholism and juvenile delinquency. Her work in these areas resulted in her being elected to Utah's Hall of Fame in 1943. In 1947 and 1948 she was director of the Utah State Board for Education on Alcoholism. Previously, during World War II, she was an active member of the United War Fund Committee of Utah and of the Veterans Central Welfare Committee.

Bosone was a pioneer in the use of television as a communication medium. In 1953 she moderated a program called *It's a Woman's World,* which received the Zenith Television Award for excellence in local programming. Her long and distinguished career was highlighted in a 1977 television documentary, *Her Honor, the Judge.*

Bosone received numerous recognitions and awards for her contributions to the worlds of law and politics. In 1965 her name was on the list of possible nominees for the U.S. Supreme Court. The University of California at Berkeley conferred on her the Distinguished Service in Government Award in 1970 and Westminster College awarded her an honorary doctor of humanities degree in 1973. Also in 1973 she received an award for her efforts to raise the status of women in Utah. In 1977 she received an honorary doctorate from the University of Utah. Bosone died in Vienna, Virginia, on July 21, 1983.

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## BOSTON MASSACRE SOLDIERS

The Boston Massacre, March 5, 1770, was an event that exemplified the growing tension between the American colonies and England which would subsequently result in the outbreak of the Revolutionary War.

In 1767 the English Parliament had levied an import tax on tea, glass, paper, and lead. The duties were labeled the Townshend Acts—part of a series of unpopular taxes directed at the colonists without their representation. The colonists retaliated with attacks on English representatives and officials, and troops were dispatched to America to restore order. The agitation between the colonists and the English soldiers increased, reaching a climax on the evening of March 5.

An apprentice antagonized an English soldier on guard duty and the soldier cuffed the boy on the ear with his firearm. The incident drew a gathering of hostile colonists, and the guard, alarmed at the size of the mob, called for help. The chief officer of the unit, Captain Thomas Preston, arrived with seven men. In an instant several shots were fired into the crowd of colonists: three men were killed at once; two more died later.

The city of Boston braced itself for more violence; Lieutenant Governor Thomas Hutchinson calmed the crowd by promising the incarceration of the guilty soldiers to be followed by a trial for murder.

Political leader Samuel Adams was influential in building a public case against the soldiers through his bombastic speeches and newspaper articles. He published a pamphlet that related the events of the violent evening as told by eyewitnesses; all the reports were decidedly in support of the colonists. The pamphlet, however, was not distributed in Boston, due to the belief that it might interfere with the fairness of the trial.

The trial became a controversial issue with political aspects. In addition to the murder charge, the legal action intensified the struggle between the King's men, who desired a verdict in their favor to counteract the tactics of Samuel Adams, and the colonists, who wanted the trial to be an example to Parliament against

*On March 5, 1770, English soldiers fired into a crowd of angry colonists, killing five. Two of the soldiers were later found guilty of manslaughter.*

LIBRARY OF CONGRESS

further use of the militia to restrain their freedom.

Lieutenant Governor Hutchinson believed that an immediate court hearing would be detrimental and unfair to the King's men; he advocated a series of postponements and the trial finally began in the fall of 1770. **ROBERT TREAT PAINE** served as prosecutor, and **JOHN ADAMS** (cousin to Samuel Adams) and Josiah Quincy were the defense counselors.

The trial progressed and arguments were presented for both sides. The defense was determined to prove that the soldiers were acting in **SELF-DEFENSE**. The prosecution attempted to show that the soldiers were guilty of malice with intent to kill.

"... THERE ARE NO EXPRESS WORDS; AND THIS IS THE CASE WITH MOST OF THE POWERS EXERCISED BY CONGRESS."
—ELIAS BOUDINOT

Captain Preston was tried separately (there is evidence that the jury was packed in his favor). He was acquitted and he hastily left Boston.

Eight soldiers were next brought to trial and six were acquitted. The remaining two soldiers were found guilty of **MANSLAUGHTER** (as opposed to murder). The method of punishment was branding on the thumb. The two soldiers, Matthew Killroy and Hugh Montgomery, received their penalty and were discharged from the military.

The irony of the Boston tragedy is that it need never have occurred. Shortly before the night of the bloodshed Parliament had decided to repeal the **TOWNSHEND ACTS** that had so greatly agitated the colonists. Word of this decision did not reach Boston until later.

The acts were revoked later in 1770, after the Boston Massacre; one tax remained, however, and that was a minimal tax on tea. This tea tax would later precipitate the Boston Tea Party.

## BOTTOMRY

*A contract, in maritime law, by which money is borrowed for a specified term by the owner of a ship for its use, equipment, or repair for which the ship is pledged as collateral. If the ship is lost in the specified voyage or during the limited time, the lender will lose his or her money according to the provisions of the contract. A contract by which a ship or its freight is pledged as security for a loan, which is to be repaid only in the event that the ship survives a specific risk, voyage, or period.*

A bottomry bond is the instrument that embodies the contract or agreement of bottomry.

## ♦ BOUDINOT, ELIAS

The first lawyer admitted to practice before the U.S. Supreme Court was New Jersey patriot Elias Boudinot. A good friend of President George Washington, Boudinot was a prominent public official who strongly supported the American Revolution. Boudinot held several key positions in the **CONTINENTAL CONGRESS** and signed the 1783 peace treaty with England after the United States' victory in the **WAR OF INDEPENDENCE**.

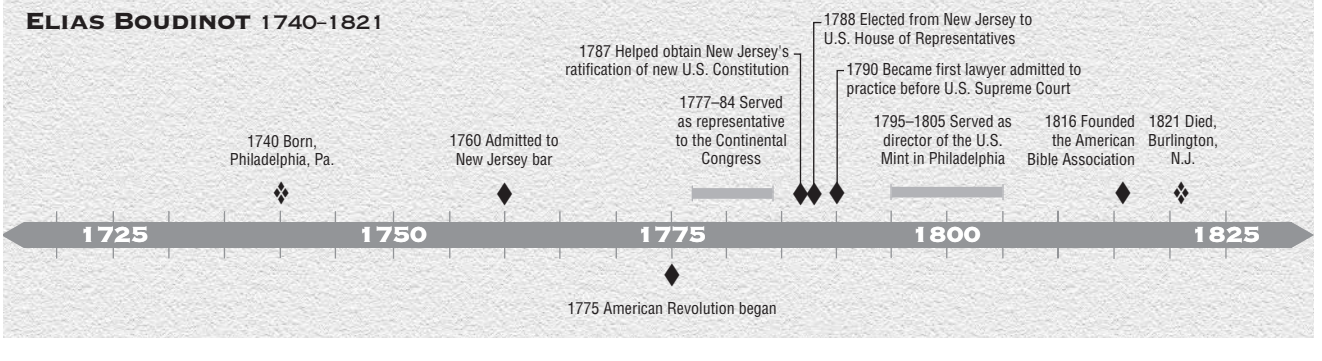

After the war he aligned himself with Federalists JOHN ADAMS and ALEXANDER HAMILTON. Like them, Boudinot supported a strong, centralized national government and distrusted many of the principles of participatory democracy.

Born May 2, 1740, in Philadelphia, Boudinot studied law and was admitted to the New Jersey bar in 1760. By 1770 he had risen to the prestigious level of SERJEANT AT LAW. Although Boudinot began his career as a political conservative, he eventually supported the colonies' efforts to break away from English domination. He joined the Revolutionary party after the U.S. War of Independence erupted and served as deputy of New Jersey's provincial assembly.

Boudinot was a representative to the Continental Congress from 1777 to 1784. He was president of the Congress from 1782 to 1784 and was named secretary of foreign affairs. He became commissary general of prisoners in 1777 and donated a large sum of his own money to help improve prison conditions. In 1787 Boudinot played a key role in obtaining New Jersey's ratification of the new U.S. Constitution.

In 1789 Boudinot became a member of the House of Representatives from New Jersey, holding office during the first three sessions of Congress. Once the U.S. Supreme Court was officially established, Boudinot became the first lawyer admitted to practice before it, on February 5, 1790. He also served as a trustee of Princeton University and was director of the U.S. Mint in Philadelphia from 1795 to 1805.

In the later years of his life, Boudinot's interests turned from politics to evangelical theology. Founder and president of the American Bible Association, Boudinot proposed a universal acceptance of religion as a cure for society's ills.

Boudinot died in New Jersey on October 24, 1821, at age eighty-one.

## BOUNDARIES

*Natural or artificial separations or divisions between adjoining properties that show their limits.*

Boundaries are used to establish private and public ownership by determining the exact location of the points at which one piece of land is distinguishable from another. They are also used to mark the functional and jurisdictional limits of political subdivisions. For example, in the United States, boundaries are used to define villages, towns, cities, counties, and states.

The setting of boundaries is a characteristic of the modern era of history during which centralized states emerged that required both protection against attacks and definition of their populations. Historically, natural objects such as rivers and mountains served this purpose. Accurate determination of boundaries requires surveying and cartography, which were not widely used until the early nineteenth century. But even in the late twentieth century, with scientific information methods available, mapmakers occasionally are forced to turn to ancient landmarks and memories when attempting to set boundaries. For example, for centuries the borders within the Arabian peninsula had been loosely defined by tribes' grazing patterns. Following Saddam Hussein's invasion of Kuwait and subsequent defeat in 1991, UNITED NATIONS mapmakers attempted to determine the exact border between Iraq and Kuwait. The United Nations enlisted the help of British border expert Julian Walker, who sought out elderly guides who could describe the locations of landmarks referred to in earlier records and provide a starting place for demarcation of the border.

Boundary disputes can last for centuries, undermining efforts to end long-standing animosities. In May 1994, at the signing of the historic self-rule accord for Palestinians in the Israeli-occupied West Bank and Gaza Strip, the chairman of the Palestinian Liberation Organization, Yasir Arafat, suddenly refused to sign six maps appended to the agreement. After much discussion with his advisers, Arafat added an Arabic disclaimer to the maps which made the point that the boundaries of the ancient West Bank town of Jericho were still in dispute, and then he signed the accord.

Several types of maritime boundaries exist, such as the territorial sea, which is a belt of coastal waters—controlled by the adjacent state and subject to rights such as those of foreign ships to passage—whose boundary is a line measured three miles from the low-water mark along the shore; contiguous zones, which extend beyond the territorial sea to a maximum of twelve miles, within which the controlling state may act to prevent or punish violations of its regulations; and a two-hundred-mile exclusive economic zone, subject to a nation's rights of exploration, exploitation, conservation, and management of marine life, which was authorized by the Third United Nations Conference on the Law of the Sea.

*Within the boundaries of an exclusive economic zone, a nation has the right to drill for oil, explore, and manage marine life.*

AP/WIDE WORLD PHOTOS

Marine boundaries provide fertile ground for international conflict. In June 1990, the United States and the Soviet Union signed an agreement resolving a 1,600-mile-long maritime boundary dispute that began in 1977. The area at issue, some 21,000 square nautical miles, contained valuable fishing grounds and possible oil and gas fields. The conflict had its origins in 1867, when czarist Russia sold Alaska to the United States. It was not until more than 100 years later, while establishing their respective 200-mile fisheries zones off the coasts of Alaska and Siberia in the Bering Sea, Chukchi Sea, and Arctic Ocean, that the two countries realized they had each set a different boundary for Alaska.

Even marine boundaries that have been widely accepted for years can be suddenly ignored. For example, in March 1995, Canada seized a Spanish trawler fishing for halibut in international waters just beyond Canada's 200-mile boundary. Foreign Affairs Minister Andre Ouellet of Canada claimed that a catastrophic decline in fishing stock in recent years gave Canada moral authority to extend its jurisdiction beyond the internationally recognized 200-mile maritime limit.

Boundaries in inland waters, such as the Canadian-U.S. boundary through the Great Lakes, follow a median line equidistant from the opposite shores. Boundaries in navigable rivers are set at the middle of the *thalweg,* which is the deepest or most navigable channel, as distinguished from the geographic center or a line midway between the banks (*United States v. Louisiana,* 470 U.S. 93, 105 S. Ct. 1074, 84 L. Ed. 2d 73 [1985]). As the thalweg shifts owing to the accumulation of sediment in the river, the geographic boundary also shifts. The island exception to the rule of thalweg provides that if there is a divided river flow around an island, a boundary once established on one side of the island remains there, even if the main downstream navigation channel shifts to the island's other side (*Louisiana v. Mississippi,* 516 U.S. 22, 116 S. Ct. 290, 133 L. Ed. 2d 265 [1995]).

Boundary disputes between states often attract attention from the media and from legal scholars because they invoke the U. S. Supreme Court's seldom-used original jurisdiction. The most typical path to the nation's high court is by appeal, either from a federal court of appeals or a state supreme court. Article III, Section 2 gives the Court original jurisdiction to try cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party."

In 1993, the state of New Jersey filed a complaint in the Supreme Court against the state of New York, alleging that filled portions of Ellis Island belonged to New Jersey. In 1834, a compact between New York and New Jersey, approved by Congress, established the boundary line between the states as the middle of the Hudson River. Ellis Island, then only three acres, became part of New York according to the compact. The United States in 1891 decided to use Ellis Island as a port to receive immigrants. Over the next 42 years, the federal government added 24.5 acres to the island to facilitate its use as a portal for the more than 100 million immigrants who passed through the island facilities.

Although the Ellis Island Immigration Center closed in 1954, the site has remained an important historical landmark. The Supreme Court in 1994 appointed a SPECIAL MASTER, Paul Verkuil, to determine whether the filled portion of the island belonged to New York or to New Jersey. *New Jersey v. New York*, 513 U.S. 924, 115 S. Ct. 309, 130 L. Ed. 2d 273 (1994). Verkuil found that although the original 1834 compact designated the island as the property of New Jersey, the compact did not establish boundaries for the filled portions of the island. In a report filed with the Court in 1997 (520 U.S. 1273, 117 S. Ct. 2451, 138 L. Ed. 2d 209 [1997]), Verkuil concluded the filled portions belonged to New York according to the original compact, which set the boundary line as the middle of the Hudson River. The Supreme Court concurred with the Special Master in its final order and degree in 1999 (526 U.S. 589, 119 S. Ct. 1743, 143 L. Ed. 2d 774 [1999]).

The Supreme Court heard another boundary dispute in 2000 involving the states of New Hampshire and Maine. New Hampshire officials filed a lawsuit asking the Supreme Court to decide whether the Portsmouth Naval Shipyard is located in one state or the other. At stake in the case was approximately $3 million per year in income taxes that Maine assesses against the nearly 1,400 New Hampshire residents who work at the shipyard. New Hampshire has no state INCOME TAX, and its residents who work at the shipyard asserted that the assessment constituted taxation without representation.

The shipyard sits on Seavey Island, a 272-acre tract in the Piscataqua River between Kittery, Maine, and Portsmouth, New Hampshire. New Hampshire contended that the island's border lies along the Main bank of the river, putting the shipyard in Maine. In 1976, the U.S. Supreme Court set the ocean boundary between the two states at a point in the mouth of the Piscataqua (*New Hampshire v. Maine*, 426 U.S. 363, 371, 96 S. Ct. 2113, 2118, 48 L. Ed. 2d 701 [1976]). The 1976 decision left unclear how that boundary extends up river to Seavey Island. The Court nevertheless decided that the doctrine of judicial ESTOPPEL precluded New Hampshire from asserting a position that contradicted its position in the 1976 case (*New Hampshire v. Maine*, 532 U.S. 742, 121 S. Ct. 1808, 149 L. Ed. 2d 968 [2001]). The Court's decision brought a conclusion to a controversy that began heating up in the early 1990s and that had involved a series of hearings in the Senate Governmental Affairs Committee in 1997.

On June 14, 2003, in Pikeville, Kentucky, representatives of the Hatfield and McCoy families signed a truce officially ending the most famous mountain clan feud of them all. Some 60-plus descendants of the two families, which engaged in a bloody dispute that claimed at least a dozen lives at its height in the 1870s and 1880s, signed a peace proclamation to put the feud in the history books once and for all. The Hatfields and McCoys belonged to a single rural community that was artificially separated by the boundary line between Kentucky and West Virginia. The interfamilial dispute escalated over competing claims to timber rights on both sides of a meandering body of water.

Some observers believe that the traditional role of boundaries as buffer regions protecting the national security of nations began to change in the 1950s. Lawrence Herzog, professor of Mexican-American studies at San Diego State University, described the evolution of large-scale cities along the borders of nations, which he called transfrontier metropolises, that share ecological resources such as water and environmental problems such as sewage control and AIR POLLUTION. Traditionally, divergent laws and customs in boundary areas have discouraged economic development by interfering with the movement of labor and commodities across borders. But with the emergence of two important world regions—Western Europe and the United States-Mexico border zone—economic development in cities along borders has become intertwined.

According to Herzog, such border urbanization has generated legal and political concerns not previously addressed by INTERNATIONAL LAW. The emerging need for transborder cooperation in the areas of transportation, land use, and environmental regulation requires the development of new planning and policy guidelines that address the changing role of boundaries.

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# Bounty Hunter: Legitimate Law Enforcement or Dangerous Anachronism?

Most citizens do not realize bounty hunters still exist in modern society and that these agents have few limitations placed on them by state laws. Concerns have been raised about the failure of many states to regulate the actions of bounty hunters. In general, bounty hunters are not subject to civil liability for the injuries they may cause in recapturing a person who has been released on bond and fled. Critics contend that the legal privileges granted to bounty hunters in the nineteenth century make no sense today, and that it might be prudent to outlaw bounty hunters. Defenders reply that bounty hunters serve an important role in the criminal justice system and should not be forced to follow regulations that will prevent them from carrying out their responsibilities.

Defenders of bounty hunters note that the **COMMON LAW** right of recapture dates back to the constitutional beginnings of the United States. They contend that critics have ignored the underlying legal relationship between the bail bonding company and the principal, the person who is bailed out of jail. When the bonding company bails a defendant out of jail, the defendant waives his rights when he signs the bail bond contract. Then, if a defendant fails to appear in court, the bail bond company may have to forfeit the bond it posted with the court. If this system was not available, many defendants would not be able to post bond themselves, and they would have to remain in jail, which would drive up the cost for local governments to house defendants awaiting trial. In addition, the bail bonding company serves as guarantor that the defendant will appear in court. This system also removes from public law enforcement the responsibility of tracking down many defendants who fail to appear in court.

Defenders also point out the significant difference between free-lance bounty hunters and agents who work directly for the bail bonding company. These agents, commonly known as bail agents, are involved from just after arrest to the disposition of the case. They are familiar with the workings of the local criminal courts and are trained by the bail bonding company. In contrast, free-lance bounty hunters cause most of the problems. Defenders of bounty hunting believe that the occasional public outcries over violent recapture of a bail-skipper are the result of a few irresponsible free-lancers.

Finally, defenders rely on the U.S. Supreme Court decision in *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 21 L. Ed. 287 (1872). The *Taylor* ruling, which remains good law, gives bounty hunters authority to seize and imprison a principal at any

Spranking, John G. 2000. *Understanding Property Law.* New York: Lexis.

**CROSS-REFERENCES**

Estoppel; Fish and Fishing; International Waterways; Territorial Waters.

## BOUNTY HUNTER

*Name for a category of persons who are offered a promised gratuity in return for "hunting" down and capturing or killing a designated target, usually a person or animal.*

Bounty hunters can be defined broadly as a category of persons who track down someone or something for money. A bounty is a subsidy that is paid to a category of persons who have performed a public service. Bounty is the proper term to be applied when the services of several persons are sought, and each person who fulfills the offer is entitled to the promised compensation. By contrast, a reward compensates a single service to be performed only once, such as in the capture of a fugitive. Therefore, it will be earned solely by the person who succeeds in this regard.

In practice, bounty hunters usually track down criminal defendants who skip bail and fail to appear for court appointments. Bail skipping is a constant in the American criminal justice system. In 1994, the **DEPARTMENT OF JUSTICE** reported that 25 percent of felony defendants who had been released on their own recognizance had failed to appear at their trials. Over the past decade, bounty hunters have apprehended about 25,000 fugitives in the United States each year. It has been estimated that they return to custody over 99 percent of the criminal defendants who skip bail.

Courts have granted bounty hunters extensive powers for the purposes of returning fugitives to justice. These include the powers to pursue a fugitive into another state, to arrest

time. The decision also allows bounty hunters to pursue a person to another state and arrest the pursued person without legal process. *Taylor* concludes that the bail bonding company has the "principal on a string," and "may pull the string" whenever it pleases. Defenders conclude, therefore, that the Court has given bounty hunters authority under the U.S. Constitution to practice their trade. This authority has never been revoked.

Finally, defenders point out that defendants who skip bail do not want to be found and do not want to surrender, if discovered. Bounty hunters do not seek to inflict injuries on principals or damage property, but in many situations surprise entry into a dwelling is required to effect the arrest. Physical resistance by the principal leads to most of the violence associated with bounty hunters.

Critics of bounty hunters contend that the time has long passed for bounty hunters. The *Taylor* decision was rendered a few years after the Civil War, at a time when the United States was relatively unpopulated and the West was just beginning to be settled. Moreover, police departments in urban areas were inadequate, ill-equipped, and ill-trained. Cooperation between jurisdictions was minimal, and there was no organization similar to the **FEDERAL BUREAU OF INVESTIGATION** (FBI) with the power to cross state borders in pursuit of escaped felons. In addition communication between points separated by great distances was poor. At that time, therefore, it made sense to allow bounty hunters to track down persons who jumped bail. The critics argue that these considerations no longer make sense, when modern law enforcement has the benefit of the FBI, electronic communication, and cooperation between jurisdictions.

Critics believe that allowing bounty hunters to use questionable, and often violent, methods to recapture principals does not promote respect for the administration of justice. In addition, since the 1960s the Supreme Court has recognized that criminal defendants are entitled to numerous constitutional rights. The "due process revolution" runs counter to the methods of bounty hunters, who can commit acts that law enforcement officers are prohibited from committing. Critics contend that it is unwise to allow private law enforcement to run roughshod over the rights of persons, merely because they have entered into a contractual relationship.

While some critics believe bounty hunters should be banned, others believe that states should regulate bail agents. Some states, such as Florida, require bounty hunters to be licensed and to be employed by only one bail bonding company that will supervise and be responsible for the agents. Florida imposes age and residence requirements on licensed bounty hunters, who must also demonstrate they are of high moral character. Some states also require bounty hunters to complete a certification course in criminal justice within a few years of obtaining their license. Some jurisdictions mandate that bounty hunters take continuing education courses in their field every year. Many of these reforms have been proposed by the National Institute of Bail Enforcement, which seeks to professionalize its membership and enhance its public reputation.

Critics also believe it essential that bounty hunters be held liable for injuries to persons and property. State laws must, they argue, be amended to impose civil liability. Such legislation would deter bounty hunters from taking dangerous actions that may injure innocent people.

him or her at any time, and to break into a fugitive's house in order to capture him or her. The powers of a **BOUNTY HUNTER** are usually received vicariously, through powers that already are invested in a bail bondsman.

Bounty hunters have existed since medieval times—the notion of bail predates written **ENGLISH LAW**. The foundation for bounty-hunter rights in the United States was laid down in the 1872 case of *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 21 L.Ed. 287 (1872). "Where one charged with crime is released upon bail, he is regarded as being delivered to custody of his sureties. Their dominion is a **CONTINUANCE** of the original imprisonment," wrote the U.S. Supreme Court, in a decision that has never been overruled.

There has been increasing controversy in the United States over bounty hunters, with concern voiced over the lack of control that a state has over their behavior. In response, some states have taken to curbing the bounty hunter's activities. For, example, in 1998, Arizona passed a bill restricting bounty hunters from entering a residence without the consent of an occupant, as well as prohibiting bounty hunters from misrepresenting themselves as law enforcement agents or from working as a bounty hunter if convicted of certain crimes.

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## BOY SCOUTS OF AMERICA V. DALE

In *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (U.S. 2000), the U.S. Supreme Court ruled that a New Jersey anti-discrimination law that required the Boy Scouts of America (BSA) to admit an openly gay man as a scoutmaster violated the Boy Scouts' FIRST AMENDMENT right of expressive association.

James Dale joined the Cub Scouts in 1978 at the age of eight. Three years later he became a Boy Scout and remained one until he turned 18. By all accounts, Dale was an exemplary scout, eventually achieving the status of Eagle Scout, the highest rank to which a scout can aspire. In 1989 Dale applied for adult membership and was approved. He then served as an assistant troop scoutmaster in Matawan, New Jersey during the periods he was not away at Rutgers University attending college. On August 5, 1990, Dale received a letter from the Monmouth Scout Council, informing him that his registration had been revoked. Registration was a prerequisite for service as an adult volunteer.

Asked to identify the grounds for the decision, Monmouth Council Executive James Kay told Dale that the BSA forbids "membership to homosexuals." Kay noted that Dale had been in a newspaper photograph taken at Rutgers, where he was co-president of the university's gay and lesbian campus organization. The accompanying newspaper story reported that Dale "admitt[ed] his homosexuality during his second year at Rutgers." According to Kay, Dale had demonstrated his inability to live by the Scout Oath and Law by publicly avowing his homosexuality.

Dale filed suit against the BSA in New Jersey state court, charging that his expulsion as an assistant scoutmaster violated New Jersey's Law Against Discrimination (LAD). N.J.S.A. 10:5-1 et seq. LAD prohibits discrimination based on several categories, including affectional or sexual orientation, which encompasses male or female heterosexuality, homosexuality, or bisexuality. The suit sought money damages and a court order reinstating him as assistant scoutmaster.

The trial court dismissed his suit, ruling that the BSA had consistently excluded any self-declared homosexuals. The court found that homosexuality, from a Biblical and historical perspective, was both morally wrong and criminal. The BSA had implicitly subscribed to this historical view since its inception, the court said. The LAD did not apply in Dale's case because the BSA was not a place of public accommodation and because the BSA, as a private association, could not be compelled to accept a gay scoutmaster because this would violate the FREEDOM OF ASSOCIATION guaranteed by the First Amendment to the U.S. Constitution.

The trial court's decision was overturned on appeal by New Jersey Superior Court, which concluded that the BSA was a "place of public accommodation" under the LAD. There were more than 100,000 BSA members in New Jersey alone, the appeals court said, demonstrating the public nature of the organization. The New Jersey Supreme Court affirmed the Superior Court's decision in *Dale v. Boy Scouts of America,* 160 N.J. 562, 734 A.2d 1196 (1999). The court found BSA had not demonstrated that it was a sufficiently private organization to warrant constitutional protection under the freedom of expression and association guarantees of the First Amendment.

The U.S. Supreme Court disagreed. In a 5–4 opinion written by Chief Justice WILLIAM REHNQUIST, the Court said that BSA enjoys a constitutionally protected right of "expressive association" that would be undermined if the organization were forced to accept the plaintiff as an assistant scoutmaster. Describing the Boy Scouts as a private organization that "believes homosexual conduct is inconsistent with the values it seeks to instill in its youth members," Rehnquist wrote that "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."

As a basic principle, Rehnquist stressed, the forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints. First, the Court said that the BSA engages in expressive activity by seeking to instill values in young people, and its expressive freedom would be curtailed if it had to accept avowed homosexuals as members despite the organization's policy to the contrary. Second, Rehnquist stated that the forced inclusion of an avowed gay rights activist as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints, since application of the LAD in this manner would significantly burden the organization's right to oppose or disfavor homosexual conduct.

In a lengthy and spirited dissent, Justice JOHN PAUL STEVENS said the Boy Scouts had offered no evidence that it had any policy on homosexuality and that the absence of such a policy meant that the organization's shared goals could not be undermined by the acceptance of gay members and leaders. "The evidence before this court makes it exceptionally clear that BSA has, at most, simply adopted an exclusionary membership policy and has no shared goal of disapproving of homosexuality," Stevens wrote. Stevens also chided the court majority for what he said was its willingness to simply accept the BSA's own claims about the organization's views on homosexuality. "Unless one is prepared to turn the right to associate into a free pass out of discrimination laws, an independent inquiry is a necessity," he wrote.

Rehnquist was joined in the majority opinion by Justices SANDRA DAY O'CONNOR, ANTONIN SCALIA, ANTHONY M. KENNEDY, and CLARENCE THOMAS. Justices DAVID H. SOUTER, RUTH BADER GINSBURG, and STEPHEN G. BREYER joined Stevens in the dissent.

The ruling spurred many community organizations and governments to examine their relationships with the Boy Scouts. The Episcopal Diocese of Newark, New Jersey, which has 117 congregations, adopted a resolution deploring the scout policy. In Montclair, Cub Scout Pack 5 circulated petitions rejecting the BSA's anti-gay stance. A Princeton scout troop was denied permission to use a borough parking lot for its Christmas tree sale, and numerous companies and charities, including more than two dozen local United Ways, cut back or eliminated funding for the organization. Nonetheless, the BSA reported that revenues for the national operation rose from $91 million to $93 million in the year after the Supreme Court's decision.

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CROSS-REFERENCES

Discrimination; First Amendment; Freedom of Association and Assembly; Gay and Lesbian Rights.

## BOYCOTT

*A lawful concerted attempt by a group of people to express displeasure with, or obtain concessions from, a particular person or company by refusing to do business with them. An unlawful attempt that is prohibited by the* SHERMAN ANTI-TRUST ACT *(15 U.S.C.A. § 1 et seq.), to adversely affect a company through threat, coercion, or intimidation of its employees, or to prevent others from doing business with said company. A practice utilized in labor disputes whereby an organized group of employees bands together and refrains from dealing with an employer, the legality of which is determined by applicable provisions of statutes governing labor-management relations.*

A classic example of this is a consumer boycott whereby a group of customers refuses to purchase a particular product in order to indicate their dissatisfaction with excessive prices or the offensive actions of a particular manufacturer or producer.

CROSS-REFERENCES

Labor Law.

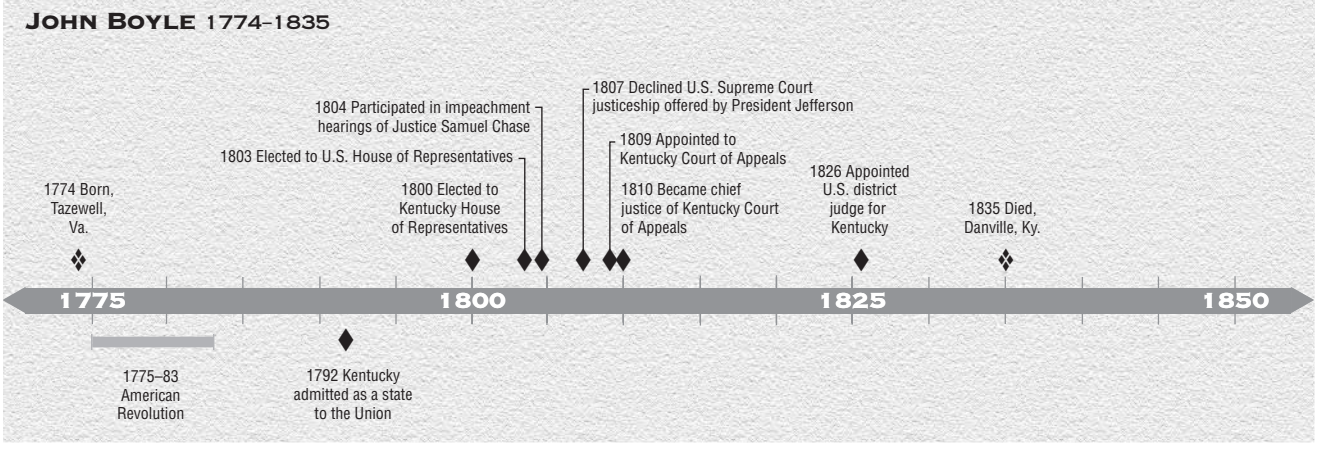

## ♦ BOYLE, JOHN

John Boyle was born October 28, 1774, near Tazewell in Botetourt County, Virginia. He was admitted to the Kentucky bar in 1797 and established a legal practice in Lancaster, Kentucky, before entering government service.

In 1800 Boyle participated in the Kentucky House of Representatives. He served in the U.S. House of Representatives as a member from Kentucky from 1803 to 1809 and participated in the IMPEACHMENT hearings of Justice SAMUEL CHASE, who was accused but found not guilty of prejudice in certain rulings.

Boyle presided over the Kentucky Court of Appeals from 1809 to 1810, acting as chief justice from 1810 to 1826. In that same year he became U.S. district judge for Kentucky and remained in that position until his death January 28, 1835, near Danville, Kentucky.

## ♦ BRACKENRIDGE, HENRY MARIE

Henry Marie Brackenridge was an eminent lawyer, statesman, and author.

Brackenridge was born May 11, 1786. His LEGAL EDUCATION was varied, including the study of law in Pittsburgh, Pennsylvania, ADMIRALTY LAW in Baltimore, Maryland, and Spanish law in New Orleans, Louisiana. He was admitted to the Pennsylvania bar in 1806 and practiced law in Pennsylvania as well as Missouri and Louisiana from 1810 to 1814, and in Baltimore from 1814 to 1817.

After serving as deputy attorney general and district judge in Louisiana, Brackenridge was a member of the Maryland legislature from 1814 to 1817 and from 1819 to 1821. He was a strong supporter of the South American nations, and in 1817 was sent to South America as part of a commission to study the political conditions of the area. Subsequently, he relocated to Florida where he worked for Governor ANDREW JACKSON from 1821 to 1832, serving as secretary and judge of the Florida Territory.

As an author, Brackenridge wrote many publications, including *Views of Louisiana* (1814); *History of the Late War* (1816); *Voyage to South America* (1819); *Letters to the Public,* (1832); and *History of the Western Insurrection in Western Pennsylvania* (1859).

Brackenridge died January 18, 1871, in Pittsburgh.

## BRACKET

*The category of the percentage of* INCOME TAX *found on the tax tables set by the* INTERNAL REVENUE CODE*, within which a taxpayer falls based upon his or her taxable income.*

## ♦ BRACTON, HENRY DE

Henry de Bracton was a medieval jurist and priest whose masterful treatise on COMMON LAW and procedure provided a framework for the early English legal system.

Bracton's famous *De legibus et consuetudinibus Angliae* (On the laws and customs of England) was a systematic explanation of ENGLISH LAW for judges and practitioners during the reign of King Henry III. *De legibus* and another of Bracton's works, *Note-Book,* helped shape the system of case law and pleadings that began during the monarchy of King HENRY II. Although reliance on Bracton's works declined as English statutory law grew, historians consider *De legibus* the high point of medieval legal scholarship.

Bracton's exact date of birth early in the thirteenth century is unknown. His family, whose

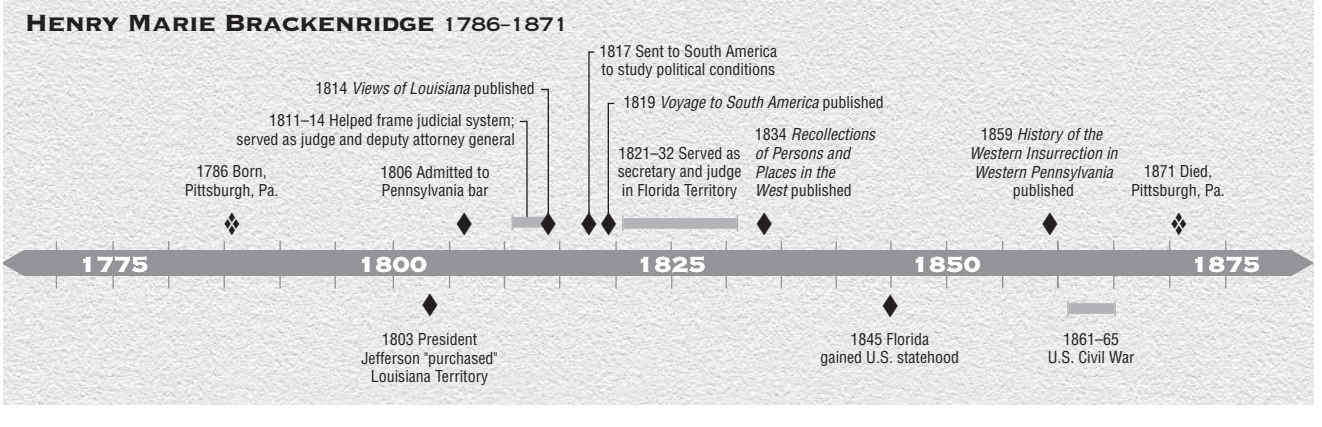

name sometimes appears as Bratton or Bretton, owned land near Devon, England. Richard, Earl of Cornwall, the brother of King Henry III, and William de Raleigh, a prominent common-law judge, were important benefactors who helped advance Bracton's legal career.

By 1240 Bracton had the job of civil servant, a relatively lucrative position during the Middle Ages. In 1245 he was appointed to the judiciary. In 1247 he became a member of the King's Bench, where he served for ten years. After 1257 he held several assignments, including that of chancellor of Exeter Cathedral. During the Middle Ages it was not unusual for a priest to serve also as a judge.

*De legibus* first appeared after Bracton's death in 1268. Although the original manuscript is lost, approximately three hundred reedited and hand copied manuscripts circulated during the thirteenth and fourteenth centuries. Intended as a guide to English law and procedure, *De legibus* combines aspects of Roman and CANON LAW. Bracton was influenced by the *Institutes* of JUSTINIAN I and by medieval textbooks of Axo, Tancred, and Raymond of Penafort. His treatise includes a section of basic principles and a section of writs and commentary. It emphasizes the development and application of case law as written by judges grappling with medieval legal questions.

Bracton's *Note-Book* is a compendium of two thousand judicial opinions. Some historians believe that other medieval jurists contributed to the work, which was discovered in 1884. *Note-Book* was edited by FREDERIC W. MAITLAND and published in 1887.

## ❖ BRADFORD, WILLIAM

William Bradford, born November 4, 1729, in Plympton, Massachusetts, was a student of both law and medicine. After practicing medicine in

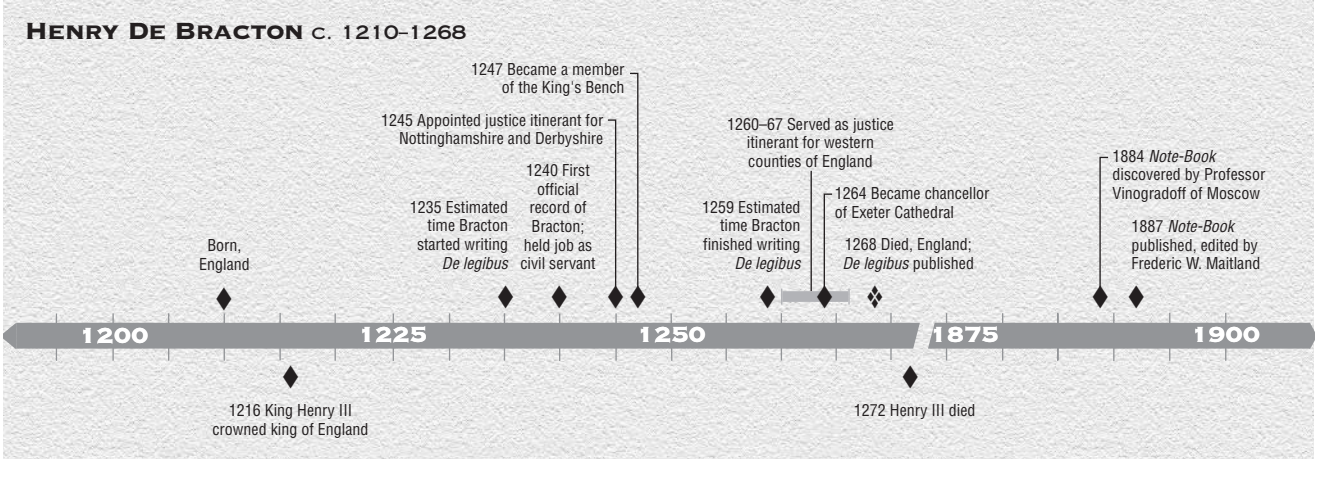


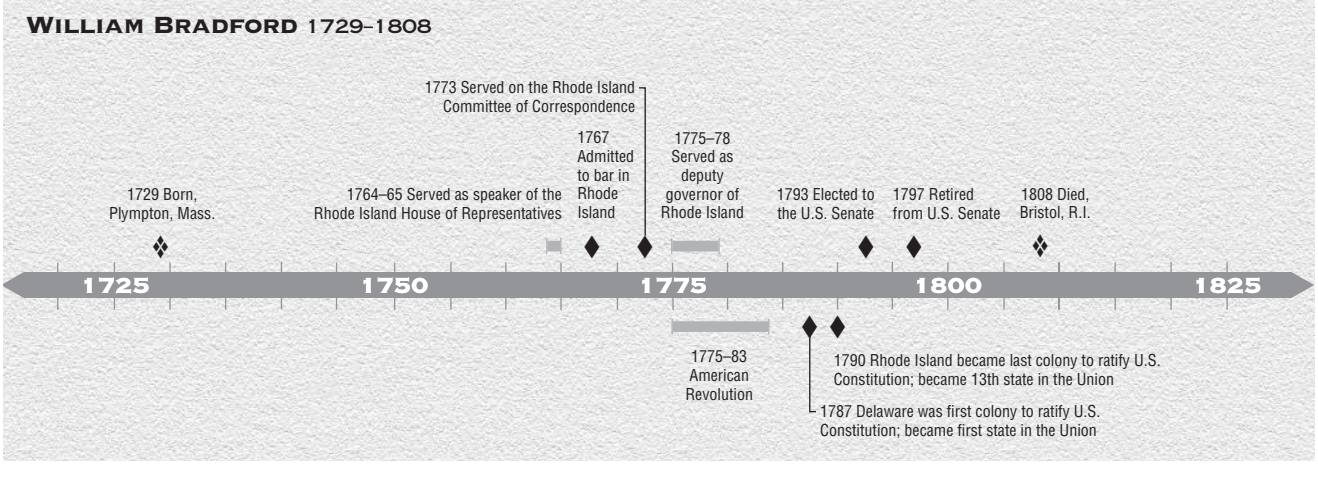

Warren, Rhode Island, Bradford was admitted to the bar in 1767 and established his legal practice in Bristol, Rhode Island.

From 1764 to 1765 Bradford was a member of the Rhode Island House of Representatives, and served as speaker. He continued his career in that state, serving on the Rhode Island Committee of Correspondence in 1773, and acting as deputy governor of Rhode Island from 1775 to 1778.

Bradford was elected senator from Rhode Island in 1793, serving in the U.S. Senate until 1797, and acting as president pro tem in that same year.

He died July 6, 1808, in Bristol.

## BRADFORD, WILLIAM

William Bradford was born September 14, 1755, in Philadelphia. He graduated from Princeton University with a bachelor of arts degree in 1772 and a master of arts degree in 1775.

Before beginning his legal career Bradford served in the Revolutionary War from 1776 to 1779, fought in numerous battles, including Valley Forge, and emerged with the rank of colonel in the Continental army. After his tour of duty, he was admitted to the Pennsylvania bar and established a legal practice in Yorktown, Pennsylvania.

Bradford served as Pennsylvania attorney general for an eleven-year period, from 1780 to 1791. He entered the judiciary in the latter year and presided as judge of the Pennsylvania Supreme Court for three years.

In 1794 Bradford was selected by President GEORGE WASHINGTON to serve as U.S. Attorney General for one year, the second man to hold this post. He died August 23, 1795, and was buried in Burlington, New Jersey.

## BRADLEY, JOSEPH P.

Joseph P. Bradley was appointed to the U.S. Supreme Court in 1870 in a successful move by President ULYSSES S. GRANT to *pack the court,* or fill vacancies on the bench with jurists who supported the president's actions. Grant nominated Bradley and fellow Republican WILLIAM STRONG with the almost public understanding that they would save the invalidated Legal Tender Act (12 Stat. 345, 532, 709). As expected, Bradley and Strong voted to uphold the constitutionality of the act. Bradley went on to serve as an associate justice for 22 years and, as was the custom, as a traveling circuit judge for the Fifth (Southern) Circuit.

The eldest of 11 children, JOSEPH BRADLEY was born March 14, 1813, in Berne, New York, and raised on a farm. He was given no middle name at birth; his middle initial was likely an expansion he made of his name to honor his father. He relied on his intelligence, ambition, and strong work ethic to make a name for himself in the legal profession. An 1836 graduate of New Jersey's Rutgers College, Bradley was a self-taught lawyer who was admitted to the New Jersey bar in 1839. In 1859, he received an honorary law degree from Lafayette College, in Easton, Pennsylvania.

Bradley's marriage to Mary Hornblower helped to open doors in the legal community. His wife's father, WILLIAM HORNBLOWER, was chief justice of the New Jersey Supreme Court. Bradley built a successful law practice with a large business clientele that included the troubled Camden and Amboy Railroad. His expertise was in patent and COMMERCIAL LAW.

Bradley's appointment to the Supreme Court on February 7, 1870 came shortly after the Court ruled that the Legal Tender Act was unconstitutional. In 1862, Congress had used

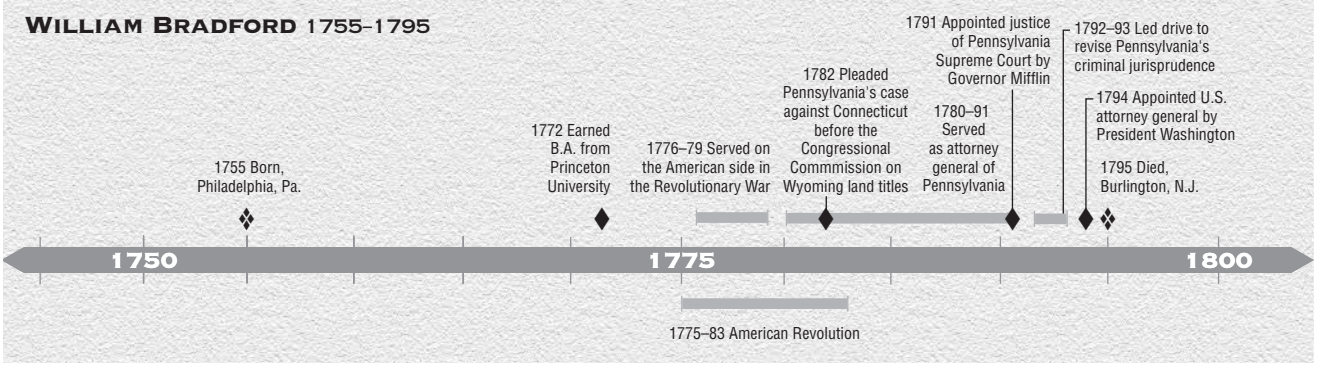

the act to issue treasury notes as a substitute for gold in its efforts to pay off Civil War debts. Upon reviewing the legislation, the Supreme Court invalidated the issuance of the paper money, in *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 19 L. Ed. 513 (1870) (the first of what became known as the *Legal Tender Cases*).

Court observers predicted that Grant's new appointees would agree to reverse *Hepburn* because of their long-standing ties to commercial interests. They were right: Bradley and Strong did vote to overturn, thereby upholding the legality of the notes (*Knox v. Lee,* and *Parker v. Davis*, 79 U.S. [12 Wall.] 457, 20 L. Ed. 287 [1871], heard concurrently).

Bradley's Supreme Court and circuit court opinions often fail the test of time. Although his contemporaries praised him for his keen intellect and legal acumen, many of his decisions are, by today's standards, objectionable in outcome and reasoning.

For example, Bradley wrote the majority opinion in the infamous **CIVIL RIGHTS CASES**, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883), which declared the **CIVIL RIGHTS ACT** of 1875 (18 Stat. 336) unconstitutional. The Civil Rights Act was established to ensure the equal treatment of African-Americans in public facilities and accommodations. In effect, that decision sanctioned racial **SEGREGATION** and paved the way for discriminatory **JIM CROW LAWS**.

According to the Court, civil rights legislation could not prevent discrimination by private individuals. Although the **THIRTEENTH AMENDMENT** of the U.S. Constitution outlawed **SLAVERY**, and the **FOURTEENTH AMENDMENT** barred **RACIAL DISCRIMINATION** by states, discrimination by private citizens was allowable, according to the Court. Bradley argued that prejudice was not amenable to legislation. If private business owners refused to serve or accommodate African-Americans, Congress could not force them to do so. In this view, purely private conduct was not covered by the post-Civil War constitutional amendments.

In a famous dissent, Associate Justice **JOHN MARSHALL HARLAN** pointed out that because the restaurants, inns, theaters, and hotels owned by private citizens are actually quite public, discrimination against African-Americans in these places should not be tolerated. Harlan's dissent was later used to bolster support for the **CIVIL RIGHTS ACT OF 1964** (42 U.S.C.A. §§ 2000 et seq.).

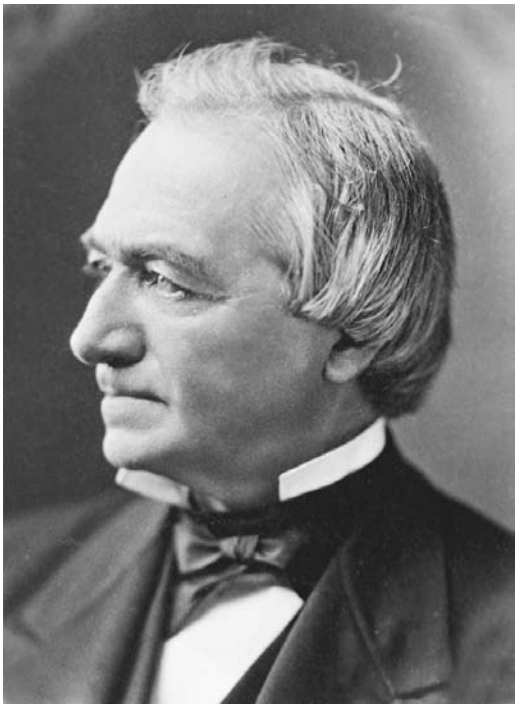

*Joseph P. Bradley.*
LIBRARY OF CONGRESS

"THE STUDY OF LAW [IS] A SUBJECT OF LIVING INTEREST AND IMPORTANCE, INDEPENDENT OF ITS ATTRACTIONS AS A PROFESSIONAL CALLING."
—JOSEPH P. BRADLEY

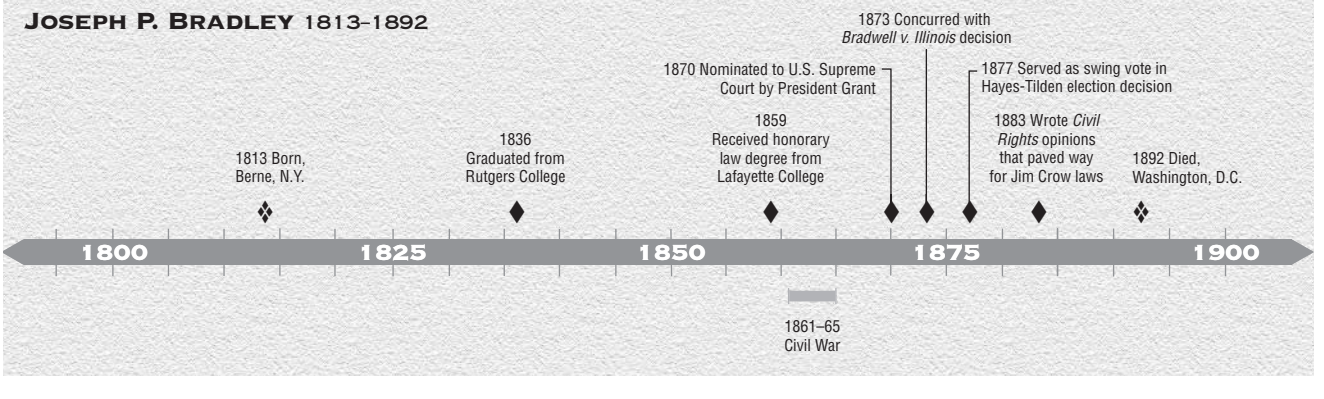

In *Bradwell v. Illinois,* 83 U.S. (16 Wall.) 130, 21 L. Ed. 442 (1872), Bradley concurred in the decision to reject Myra Bradwell's bid to practice law in Illinois. Bradwell had studied law with her husband and had passed the Illinois bar examination. However, Illinois denied her ADMISSION TO THE BAR because she was female. Bradwell appealed her case to the U.S. Supreme Court, claiming that the Fourteenth Amendment to the U.S. Constitution protected her right to practice in her chosen profession. The Supreme Court ruled otherwise. Bradley wrote in concurring dicta that God had created woman to be wife and mother, not lawyer.

In the SLAUGHTER-HOUSE CASES, 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1873), Bradley's dissent foretold the Court's changing philosophy on DUE PROCESS for businesses. In those cases, Louisiana butchers objected to a state law that allowed only one company to slaughter cattle in New Orleans. The Court sided with the state, but Bradley's dissent was later used to argue for the protection of commercial enterprises from state government intrusion.

Bradley was chosen in 1877 to sit on the Hayes-Tilden Electoral Commission to determine the results of the presidential election between Republican candidate RUTHERFORD B. HAYES and his Democratic opponent, SAMUEL J. TILDEN. Bradley was the swing vote; he replaced Justice DAVID DAVIS, a political independent who could not fulfill his term on the electoral commission. Bradley had voted for Hayes, his fellow Republican.

Bradley died in Washington, D.C., on January 22, 1892, at the age of 79.

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## ❖ BRADWELL, MYRA COLBY

Myra Bradwell was a legal editor and an early leader in the struggle for WOMEN'S RIGHTS, especially in the legal profession.

Bradwell was born February 12, 1831, in Manchester, Vermont. After an early childhood in Portage, New York, she moved with her family to Illinois and attended the ladies seminary in Elgin, where she subsequently became a teacher. In 1852 she married James B. Bradwell, an Englishman who had immigrated to the United States and studied law in Memphis, Tennessee. The Bradwells established a private school in Memphis but moved to Chicago in 1854. There James Bradwell opened a law office and eventually became a judge of the Cook County Court.

After the move to Chicago Bradwell began to study law with her husband with the intention of becoming his assistant; she later decided to establish a practice of her own. In 1868 she founded the *Chicago Legal News,* a weekly legal newspaper. With Bradwell serving as both editor and business manager, the *News* quickly became a success. It was chartered by the Illinois legislature, which also passed legislation establishing the paper as a valid place for the publication of legal notices and allowing state laws and opinions published in the paper to be offered as evidence in court. Under her editorial leadership, the *News* called for the regulation of corporations, the enactment of ZONING ordinances, and

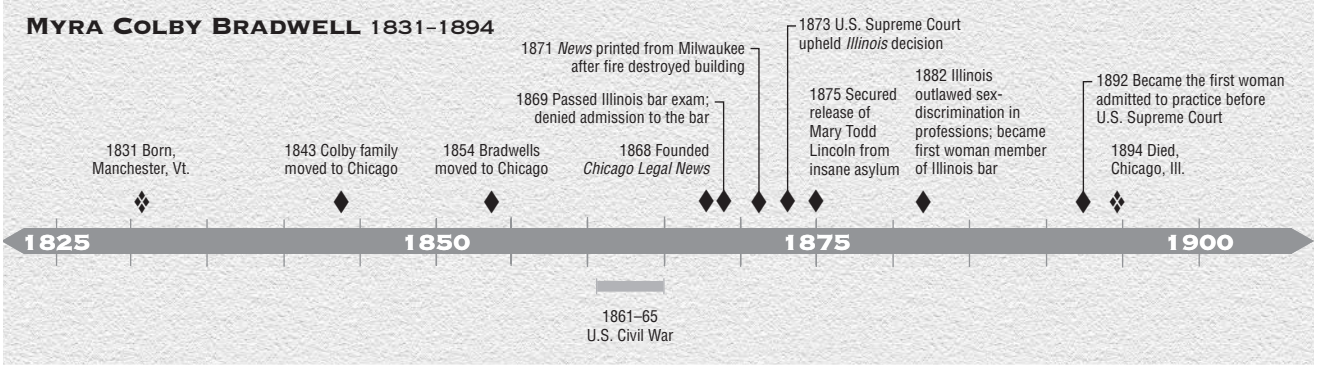

the establishment of professional standards for the legal profession. The *News* building was destroyed in the Chicago fire of 1871 but Bradwell quickly arranged to have the paper printed in Milwaukee, Wisconsin, and published the next issue on schedule.

In 1869, after passing the state bar examination, Bradwell applied to the Illinois Supreme Court for ADMISSION TO THE BAR. The court rejected her application on the ground that as a married woman she "would be bound neither by her express contracts nor by those implied contracts which it is the policy of the law to create between attorney and client." She reapplied, but the court rejected her again, this time because she was a woman, regardless of her marital status. The court said that if it were to admit women to the bar, it would be exercising its authority in a manner "never contemplated" by the state legislature when it granted that authority (*In re Bradwell,* 55 Ill. 535 [1870]). She appealed to the U.S. Supreme Court, which upheld the Illinois decision, saying that it could not interfere with each state's right to regulate the granting of licenses within its borders (*Bradwell v. People,* 16 Wall [83 U.S.] 130, 21 L. Ed. 442 [1872]).

In 1882, however, the Illinois legislature passed a law guaranteeing all persons, regardless of sex, the right to select a profession as they wished. Although Bradwell never reapplied for admission to the bar, the Illinois Supreme Court informed her that her original application had been accepted. As a result, she became the first woman member of the Illinois State Bar Association; she was also the first woman member of the Illinois Press Association. On March 28, 1892, she was admitted to practice before the U.S. Supreme Court.

In addition to her efforts to win admission to the bar, Bradwell played a role in the broader women's rights movement. She was active in the Illinois Woman Suffrage Association and helped form the American Woman Suffrage Association. She was also influential in the passage of laws by the Illinois legislature that gave married women the right to keep wages they earned and protected the rights of widows.

During the latter years of her life, Bradwell was one of a number of Chicago citizens who worked to secure the World's Fair for their city. When the fair was held in 1893 she chaired the committee on law reform of its auxiliary congress.

Bradwell died February 14, 1894, in Chicago, Illinois.

"ONE THING WE CLAIM—THAT WOMAN HAS THE RIGHT TO THINK AND ACT AS AN INDIVIDUAL—BELIEVING IF THE GREAT FATHER HAD INTENDED IT TO BE OTHERWISE, HE WOULD HAVE PLACED EVE IN A CAGE AND GIVEN ADAM THE KEY."
—MYRA BRADWELL

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## BRADY CENTER TO PREVENT GUN VIOLENCE

The Brady Center to Prevent Gun Violence and its sister organization the Brady Campaign to Prevent Gun Violence are dedicated to reducing gun deaths and injuries through education, legislative reform, and litigation. The history of the organizations can be traced back to 1974 when Dr. Mark Borinsky, a victim of gun violence, established Handgun Control, Inc. (HCI), a grassroots organization. Borinsky's goal was to create common sense gun laws. He was joined in 1975 by Nelson "Pete" Shields, who had lost a

son to a serial killer. In 1983, the Center to Prevent Handgun Violence (CPHV) was formed by Shields to focus on education and research in GUN CONTROL while the HCI remained a LOBBYING group.

In 1985, current chairperson Sarah Brady joined the group after her husband, Jim Brady, was shot and seriously wounded during the 1981 assassination attempt on President RONALD REAGAN. In 2001, Handgun Control was renamed the Brady Campaign to Prevent Gun Violence and the Center to Prevent Handgun Violence was renamed the Brady Center to Prevent Gun Violence. According to the Brady Campaign website, its mission remains the same: to "work to enact and enforce sensible gun laws, regulations and public policies through grassroots activism, electing pro-gun control public officials and increasing public awareness of gun violence."

The legal arm of the Brady Center is the Legal Action Project (LAP). Its goal is to "represent gun violence victims and the public interest in the courts." For example, LAP provides free legal assistance to victims in lawsuits against gun manufacturers, dealers, and owners. And it pushes for legislation that will force the gun industry to improve the safety in gun design and to change negligent methods of marketing, sales, and distribution. Until LAP became involved in several landmark civil cases gun makers and sellers were not held responsible for gun-related deaths and injuries. The logic was that only the individual shooter was responsible.

In *Merrill v. Navegar, Inc.*, 89 Cal.Rptr.2d. 146 (Cal. App. 1999), LAP helped obtain the first appellate court decision to hold that a gun manufacturer can be held liable for its NEGLIGENCE in designing and selling a gun for use in crime, and promoting it so that it would appeal to individuals with violent intentions. On July 1, 1993, Gian Luigi Ferri entered a high rise office building in San Francisco, California, with two semi-automatic assault weapons manufactured and sold by Navegar, Inc., plus one other gun. He opened fire in the hallways and offices of the lower floors of the building, killing eight people and wounding six others before he shot and killed himself.

The survivors and relatives of the deceased brought suit against Navegar, Inc., on three legal theories: COMMON LAW negligence, negligence per se, and STRICT LIABILITY for engaging in an ultrahazardous activity. The trial court dismissed the case, holding that the victims could not sue the gun manufacturer for the actions of the gunman Ferri.

The case was then brought before the Court of Appeals of California. The court reversed on the single issue of common law negligence. Judge J. Anthony Kline, writing for the court, held that, "Fundamental fairness requires that those who create and profit from commerce in a potentially dangerous instrumentality should be liable for conduct that unreasonably increases the risk of injury above and beyond that necessarily presented by their enterprise." The court referred to Navegar's manufacture and marketing of the TEC-9 semi-automatic weapons used in the killings. It found that the gun had no legitimate civilian purpose; it was a weapon designed solely for the efficient killing of large numbers of people. The court also held that the TEC-9 was advertised in a manner to appeal to persons with violent or criminal tendencies. Navegar advertised the TEC-9 as being "tough as your toughest customer," "paramilitary," and providing "excellent resistance to fingerprints."

In August 2001, Navegar appealed to the Supreme Court of California to reverse the decision of the appellate court. The court ruled in favor of the gun manufacturer, but declined to address the broader issues concerning negligent business practices of the gun industry. Instead, the court pointed to a state statute that precluded the particular type of claim brought against the gun manufacturer. In response to this ruling, the California Legislature, in September 2002, became the first state to repeal a statute that gave special legal IMMUNITY to the gun industry. The repeal was part of a group of far-reaching gun laws that were passed by the California Assembly and signed by Governor Gray Davis.

In addition to supporting negligence lawsuits against gun manufacturers, the Brady Center attempts to ensure that gun legislation is fairly interpreted. An example is *United States v. Emerson,* 46 F. Supp. 2d 598 (N.D.Tex.1999). Timothy Joe Emerson was under a domestic RESTRAINING ORDER, which prohibited him from coming into contact with his estranged wife and her daughter. As such, he was not allowed to posses a firearm, since federal law 18 U.S.C. § 922(g)(8) prohibits firearm possession while under a civil protective order. Emerson was indicted for violation of the law when he allegedly waved a weapon in front of his wife,

and then threatened to shoot his wife and her boyfriend. The federal judge dismissed the indictment against Emerson because it violated the "right to bear arms" provision of the SECOND AMENDMENT.

The United States appealed the decision and the center filed an AMICUS CURIAE brief in support of the government's position. In October 2001, the Fifth Circuit Court of Appeals reversed the trial court's ruling. In February 2002, Emerson petitioned the U.S. Supreme Court to rehear the case.

The Brady Center is also integral in shaping new gun policy. Perhaps its biggest success came with the 1993 passage of the Brady Bill, which went into effect on February 28, 1994. The law requires a background check on any individual who attempts to purchase a handgun and a five-day waiting period for handgun purchases. In 1998, the law was extended to included long guns (i.e., rifles and shotguns). In 2001, the Brady Center announced that in the eight years since the law was in effect, gun deaths in the United States dropped from 39,595 in 1993 to 28,874 in 1999, a 27 percent decline.

With the election of GEORGE W. BUSH as president in 2002, and the gain of Republican seats in both the House and Senate in 2002, opponents of gun control gained ground. In early 2003, legislation to give the gun industry legal immunity from lawsuits brought by the victims of gun violence was introduced in Congress. The Brady Campaign and the Brady Center were at the center of the debate, fighting to prevent the "weakening of our nation's gun laws."

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## BRAGG, THOMAS

See CONFEDERATE ATTORNEYS GENERAL.

## BRANCH DAVIDIAN RAID

On February 28, 1993, agents from the ALCOHOL, TOBACCO AND FIREARMS BUREAU (ATF) were met with gunfire when they tried to serve search and arrest warrants on members of the Branch Davidian religious cult at the apocalyptic sect's compound near Waco, Texas. Four ATF agents and six Davidians died of gunshot wounds that day. A 51-day standoff ensued between more than 100 Davidians inside the compound and 76 federal agents outside the compound.

*On April 19, 1995, following a 51-day standoff, federal agents raided the Branch Davidian compound near Waco, Texas. A fire, later determined to have been set by the Davidians, destroyed the compound and killed 57 of its residents.*

AP/WIDE WORLD PHOTOS

On the morning of April 19, the FEDERAL BUREAU OF INVESTIGATION (FBI) ordered tanks to break through the compound's walls, knock open holes, and pour tear gas inside. Around noon fires erupted, burning the compound to the ground. Approximately 80 Branch Davidians died, including their leader, 34-year-old David Koresh. In all, 57 Davidians died in the fire, while 23 died from gunshot wounds. Of these dead, 17 were children, some of whom died from gunshot wounds and some in the fire. Eighteen children and 22 adults left the compound unharmed during the seven-week standoff.

On the two-year anniversary of the Waco siege, Timothy McVeigh detonated a rental truck full of explosives outside the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, killing 168 people. McVeigh later admitted that the Oklahoma City bombing was carried out in part to exact revenge against the federal government for the Branch Davidian raid. McVeigh was eventually convicted on various charges, including first degree murder, and sentenced to die. He was executed in June 2001.

The case began in the spring of 1992 when the FBI received information that Koresh was running a methamphetamine lab at a religious

compound near Waco. While investigating Koresh on possible drug charges, the FBI and ATF learned that the cult leader was possibly breaking federal firearms laws as well, allegedly converting semiautomatic weapons into unlawful machine guns. Federal agents also learned that United Parcel Service (UPS) had been regularly delivering firearms components and explosive materials to the Davidian compound over a period of several years. Using UPS invoices, federal agents tracked down serial numbers on weapons as well as explosives that had been delivered to Koresh. One invoice indicated that Koresh had received a shipment containing ammunition magazines for automatic AR-15 rifles, plus a large quantity of powdered aluminum metal, a common ingredient in explosives.

In obtaining the search and arrest warrants, federal authorities provided the issuing magistrate with evidence indicating that Koresh had spent $199,715 in the previous year to buy illegal guns, gun parts, and other components, enough to build a fearsome arsenal. Koresh supporters claimed that the Davidians' leader was a gun dealer who had lawfully acquired the weapons. However, after the siege ended, federal authorities found 156 assault rifles, a heavy machine gun, several boxes of grenades, and grenade launchers, all of which Koresh had obtained and possessed in violation of federal weapons laws.

On February 26, 1994, almost a year to the day after the siege began, a federal jury in San Antonio, Texas, acquitted 11 cult members of murder and murder-conspiracy charges in the deaths of the four ATF agents. However, five Davidians were convicted of voluntary MANSLAUGHTER, and two were convicted on weapons charges. U.S. District Judge Walter Smith sentenced the defendants to serve ten to 15 years in prison, after the much stiffer sentences he initially handed down were overturned on appeal. Following the trial the jury foreperson said that the wrong people had been prosecuted. "The federal government was absolutely out of control there," she said. "[T]he ones who planned the raid and orchestrated it and insisted on carrying out the plan … should have been on trial."

The FBI blamed the Davidians for igniting the fire. But on August 25, 1999, the FBI conceded that it had used "pyrotechnic" tear-gas canisters during the siege. The Waco controversy had been gathering momentum ever since a 1997 documentary film, "Waco: The Rules of Engagement," uncovered evidence that the FBI had fired flammable tear gas into the Davidians' prairie bunker, sometimes known as Mount Carmel. Attorney General JANET RENO denied knowing about the canisters' flammability but ordered a complete investigation of the raid. On September 9, 1999, Reno named former Republican Senator John C. Danforth of Missouri as special counsel to lead the investigation.

The FBI told investigators that many of the Davidians who died during the conflagration were victims of mass suicide orchestrated by Koresh. But the nine Davidians who escaped the fire denied that any such suicide took place. They claimed that the FBI's tank crushed several fuel containers and that a grenade or some other projectile set off the fire. Before the fire started, however, the FBI intercepted troubling conversations coming from unidentified Branch Davidians inside Mount Carmel: "I already poured it.… It's already poured. Don't pour it all out, we might need some later. So we only light 'em at first if they come in with that tank, right?" Additionally, FBI snipers said they saw a Davidian start a fire and infrared pictures taken from a plane overhead detected three fires burning in separate parts of the compound before the tanks entered.

On July 21, 2000, Danforth released his findings. Danforth first reported that he "had a lot of difficulty" getting relevant documents from the FBI. Although he was eventually given the documents he requested, Danforth reported that he felt that "there was a spirit of resistance … in the FBI" against his investigation. Nonetheless, Danforth's investigation concluded that the canisters fired by the FBI did not start any of the fires that consumed the compound, since all available evidence demonstrated that the canisters landed 75 feet from the main building hours before the fires started. Instead, Danforth placed sole blame for the conflagration on Koresh. After reviewing two million pages of documents, 849 interviews, and thousands of pounds of physical evidence, Danforth said it was clear that the only persons who had started any fires at the Branch Davidian compound near Waco, Texas, were the Davidians themselves, probably at the direction of their leader David Koresh.

Survivors of the Branch Davidian raid and family members of those who died during the siege filed a series of WRONGFUL DEATH civil

lawsuits against the federal government. The suits were subsequently consolidated into one proceeding before Judge Walter Smith, sitting in the U.S. District Court at Waco. However, Smith dismissed the lawsuit in September 2000, concurring with Danforth's findings that federal agents had not used excessive force in their tear-gas assault on the cult's compound. Smith found that the Davidians themselves had started the fire. Attorneys for the plaintiffs filed an appeal that as of 2003 was pending before the U.S. Court of Appeals for the Fifth Circuit. The attorneys represent the estates of 14 children who died in the fire, a 15-year-old girl who was badly burned, and three parents whose children died in the blaze.

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CROSS-REFERENCES

Conspiracy; Federal Bureau of Investigation; Oklahoma City Bombing; Wrongful Death.

## ♦ BRANDEIS, LOUIS DEMBITZ

Louis Dembitz Brandeis's lifelong commitment to public service and social reform earned him the epithet the People's Lawyer. His twenty-three years on the Supreme Court were characterized by a deep respect for civil liberties and by an abiding distrust of centralized power in the hands of business and government.

Brandeis was famous for his prodigious intellect and his well-crafted, detailed dissents. He was a man of principle who enhanced the image of the legal profession by living up to his belief that lawyers should possess "the moral courage in the face of financial loss and personal ill-will to stand for right and justice."

Brandeis was born November 13, 1856, in Louisville, Kentucky, the youngest of four children of Adolph Brandeis and Fredericka Dembitz Brandeis. His parents were refined and well-to-do immigrants who left Prague, then part of Bohemia, in 1849. A brilliant student, Brandeis excelled in the public schools in Louisville. He also attended the Annen-Realschule, in Dresden, Germany, during his family's 1873–75 pilgrimage to Europe.

Although Brandeis did not have a college degree, he was admitted into Harvard Law School and graduated at the top of his class in 1877. Brandeis had an obvious passion for law and he considered the years at Harvard among the happiest in his life. His ties to the university were strengthened further in 1886 when he became one of the founders of the influential *Harvard Law Review.* Brandeis and Samuel D. Warren wrote a legendary article, "The Right to Privacy," in the December 1890 issue of the *Review.* It previewed Brandeis's Supreme Court opinions asserting privacy as a constitutionally guaranteed right.

After a year of graduate work Brandeis moved to St. Louis in 1878 to begin a law practice. He soon missed the intellectual stimulation of the East Coast and moved back to Boston, where he began a successful law practice with Warren. Their large firm had an impressive clientele and made Brandeis wealthy, although money held little interest for him. As he established himself professionally, Brandeis socialized with Boston's intellectual elite. In 1891, he married Alice Goldmark, a distant cousin, with whom he had two daughters.

"EXPERIENCE SHOULD TEACH US TO BE MOST ON OUR GUARD TO PROTECT LIBERTY WHEN THE GOVERNMENT'S PURPOSES ARE BENEFICIENT."
—LOUIS BRANDEIS

Brandeis zealously embraced the ideals of the Progressive movement of the early twentieth century. He proved his dedication to social reform by serving as unpaid counsel in several public interest cases. Brandeis was one of the first U.S. lawyers to offer *pro bono services* (free legal services for people unable to afford an attorney). Along with a passionate belief in the virtue of volunteer legal work, Brandeis had a sense of fairness that compelled him to compensate his firm for any time spent in public service.

Brandeis worked without a fee to fight monopolistic streetcar franchises in Boston and to improve the questionable practices of life insurance companies. One of his most satisfying achievements was the creation of a savings bank plan that enabled people to obtain life insurance at reasonable rates. Brandeis also argued for the constitutionality of maximum hour and MINIMUM WAGE laws.

In 1914, Brandeis published *Other People's Money—and How the Bankers Use It,* a denunciation of trusts and investment banking. The book helped inspire important antitrust legislation and earned the antipathy of many U.S. bankers and businesspeople.

Brandeis also created a new style of legal writing, appropriately called the Brandeis brief.

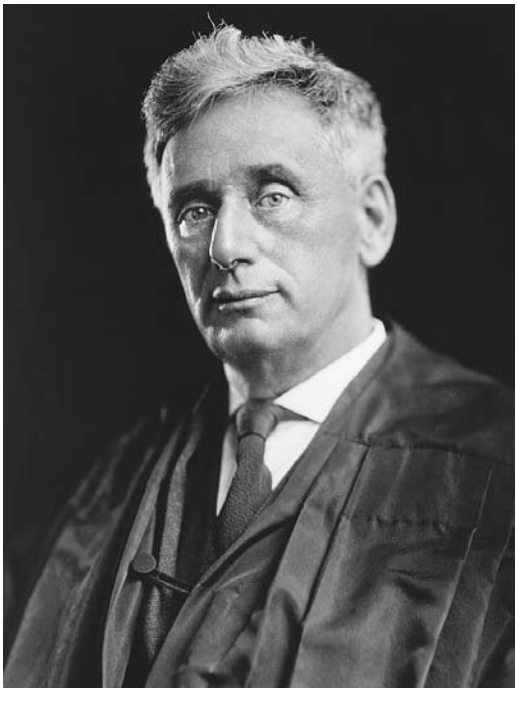

*Louis Brandeis.*
LIBRARY OF CONGRESS

With his sister-in-law Josephine Goldmark, of the National Consumer's League, Brandeis produced the first legal brief to include copious supporting data. For *Muller v. State of Oregon,* 208 U.S. 412, 28 S. Ct. 324, 52 L. Ed. 551 (1908), Brandeis wrote more than one hundred pages in favor of an Oregon state law mandating a maximum ten-hour workday for women. Later, when asked for an appropriate title for the seminal *Muller* brief, Brandeis replied, *What Any Fool Knows.* In the document, he described the deleterious physical and mental effects on women of extended periods of manual labor. He included references to sociology, psychology, history, politics, employment statistics, and economics; this method of amassing data from several different disciplines to persuade the court became popular with other lawyers. The legal principles of the case were discussed in about two pages.

In 1916 Brandeis was appointed by President WOODROW WILSON to fill the associate justice seat vacated by Joseph R. Lamar. Brandeis thus became the first Jewish American to be nominated for the High Court. His Senate confirmation hearing was a bitter, drawn-out affair because of business's fierce opposition to him and his progressive politics. Anti-Semitism was also an element in the extended, four-month proceedings. Despite virulent criticism from insurance and banking officials, Brandeis was confirmed by the Senate, 47–22.

As a Supreme Court justice, Brandeis is remembered for his eloquent dissents, often joined by colleague OLIVER WENDELL HOLMES JR. Brandeis's dissents frequently signaled how the Court would rule in future cases. For example, his 1928 dissent in OLMSTEAD V. UNITED STATES, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944, anticipated the reasoning and outcome of a Supreme Court case heard years later.

In *Olmstead,* Brandeis objected to the nearly unrestricted use of government wiretaps. Although the *Olmstead* majority approved state WIRETAPPING unless a physical TRESPASS was involved, Brandeis considered wholesale eavesdropping unconstitutional. In his view it violated the FOURTH AMENDMENT, prohibiting unreasonable government searches, and the FIFTH AMENDMENT, forbidding the deprivation of liberty without DUE PROCESS. Brandeis argued that the right to be left alone was guaranteed by the Constitution.

Almost forty years later, his views on privacy were adopted in *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). In *Katz,* relying heavily on Brandeis's reasoning, the Court overturned *Olmstead,* ruling that gov-

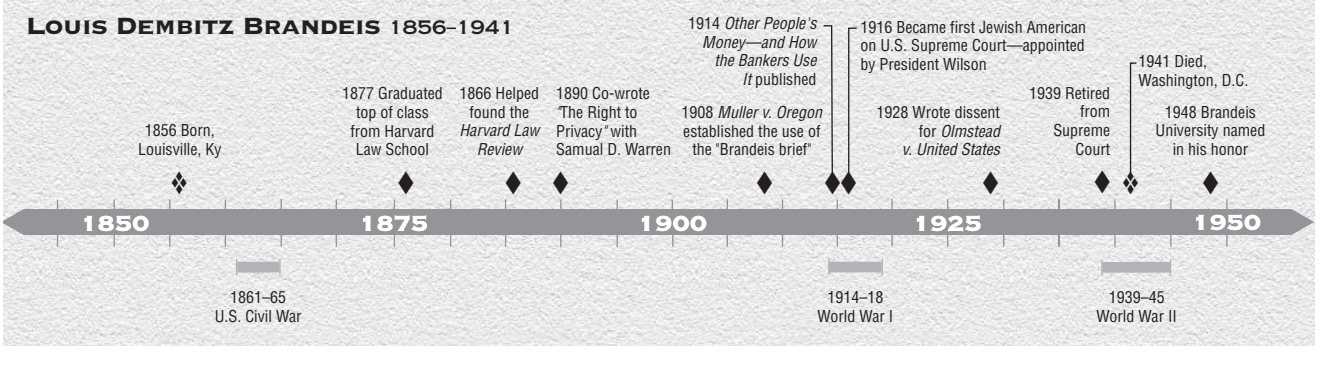

ernment wiretaps were permissible only if they met procedural requirements of the Fourth Amendment.

Despite his own clear convictions, Brandeis refused to declare a law unconstitutional simply because he disagreed with it. Particularly in economic matters, Brandeis exercised judicial restraint by deferring to Congress and its legislative power.

Brandeis was an ardent defender of civil liberties. Throughout his career, he strongly urged the Court to use the FOURTEENTH AMENDMENT to apply the BILL OF RIGHTS to the states. In particular, Brandeis declared that laws abridging free speech and assembly must be challenged if no emergency exists to justify them. Unless speech causes clear and imminent danger, it is unreservedly protected.

Although Brandeis was a nonobservant Jew, he was a respected leader of the American Zionist movement. From 1914 to 1921, Brandeis gave his name and public support to the movement to create a Jewish state in Palestine. In his later years Brandeis advised President FRANKLIN D. ROOSEVELT on the establishment of a Jewish homeland and the boycott of German products.

Brandeis retired from the Court on February 13, 1939. He died at age eighty-four, on October 5, 1941.

Brandeis was honored in 1948 when a new institution of higher learning was named after him. Brandeis University is a private, Jewish-sponsored, coeducational college in Waltham, Massachusetts. The nonsectarian school offers both undergraduate and graduate degrees.

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CROSS-REFERENCES

Antitrust Law; "Brief for the Defendant in Error, *Muller v. Oregon*" (Appendix, Primary Document); Electronic Surveillance; *Olmstead v. United States*; Privacy; Wiretapping.

## BREACH OF MARRIAGE PROMISE

*A common-law right of action for breaking a commitment to enter into matrimony.*

The right of action for breach of a marriage promise has been abolished in a majority of states.

### Agreement to Marry

An agreement to marry is different from all other contractual relations. The reason for this is that both its object and the relationship created between the parties are completely different from those of any other contract. In order to recover for breach of promise, the plaintiff must establish that the two parties had a valid existing contract to marry. This can be accomplished by a showing that both parties had a clear intent for the agreement to be binding.

If the parties to a contract to marry are incapable of creating a valid agreement due to a legal disability, a lawsuit for breach of marriage promise cannot be sustained. Generally, a valid defense to such an action is the infancy of the promisor at the time of the agreement. The infancy of the promisee, however, is not a valid defense. Statutes provide the ages of infancy.

An individual who is incapable of making a contract due to incompetence will not be held liable for breach of promise. Similarly, a promise to marry someone who is already married is invalid, provided the promisee knew this fact. When the plaintiff was unaware that the promisor was already married, however, he or she may recover. Upon the legal termination of the marriage by DIVORCE, ANNULMENT, or death of the former spouse, a defendant who breaches a promise to marry the plaintiff may be held liable.

A breach of contract action cannot be maintained when a marriage would be unlawful due to INCEST.

### Offer and Acceptance

Fundamental elements to the creation of a marriage contract are an offer and acceptance. It is not necessary that the offer be in formal language. The key requirement is that both parties comprehend that there was a clearly intended offer of marriage. A statement of the intention to marry to a third person, absent any other indicated intent, is not enough.

An acceptance of an offer to marry must be given within a reasonable period of time. Such acceptance need not be formal but may be implied from the promisee's behavior.

For a marriage contract to be enforceable, there must be a showing that there has been a meeting of the minds of the individuals to the agreement. A promise to marry induced by duress is invalid. Similarly, a promise to marry made by fraudulent inducement—or fraudulent concealment of facts that would prevent the making of the agreement if revealed or disclosed—will render the promise invalid and relieve the innocent party from all liability.

A promise to marry must be based upon legal consideration. Generally, one individual's promise is adequate consideration for the promise of the other party. A promise to marry must not be based solely upon illegal or immoral consideration, such as sexual relations between the parties. A promise based upon legal consideration will not, however, be vitiated merely because unlawful sexual intercourse took place between the parties either prior to or following the promise.

If a promise to marry is conditional, liability for its breach will arise only following the performance or occurrence of the agreed condition.

A contract to marry may be manifested by many promises made at different times; however, there is only a single contract, and only a single breach can take place.

A contract to marry can be rescinded either by mutual consent of the parties or in instances of FRAUD or duress. The consent to postpone a marriage alone does not constitute a release of the obligation to perform it.

## Breach

Unless there is a legally justifiable reason, an unwillingness to perform one's promise to marry creates a breach of promise to marry. Mere postponement of the wedding does not constitute a breach unless it is done arbitrarily and for no good reason. In such case, the postponement can be regarded as equivalent to a refusal to comply with the marital promise.

## Defenses

Defenses exist other than the invalidity or termination of the marriage contract and lack of capacity.

The invalidity of the plaintiff's divorce from a former spouse may be used as a defense only if the issue of the divorce is raised on the ground that there was a lack of jurisdiction on the part of the court to permit the divorce. If the plaintiff had an invalid divorce, the defendant cannot be held liable for breach of the marriage promise because the plaintiff was still lawfully married to his or her former mate and, therefore, could not validly contract a marriage with the defendant.

A valid defense to a breach of marriage promise is the plaintiff's refusal to marry the defendant. The defendant cannot later defend himself or herself on the basis of the fact that he or she subsequently offered to marry the plaintiff. The engagement of the plaintiff to another individual at the time of entering into a contract with the defendant is not a defense. Similarly, the marriage of the plaintiff to another party subsequent to the defendant's breach does not excuse the defendant of liability for a breach. Unattractive personality traits, or offensive conduct, such as drunkenness, cannot be used as a defense. When the objectionable behavior amounts to a felony, however, it can be used as a defense against the plaintiff in a breach of marriage promise action.

Generally, a defendant will successfully defeat an action by alleging physical incapacity or disease that makes it either unsafe or improper to enter into marriage. If a defendant has knowledge of the disability when he or she promises to marry the plaintiff there is no defense. A disability on the part of the defendant that would not interfere with the marital relationship is insufficient to relieve a defendant of his promise.

## Damages

The nature and form of an action for breach of marriage promise is contractual. Recoverable damages include COMPENSATORY DAMAGES for injury to the feelings and health of the plaintiff as well as to his or her reputation. A plaintiff may also recover damages for any financial loss resulting from the breach, comparable to the recovery in a breach of any other contract action, in addition to compensation for loss of advantages that would have stemmed from a marital relationship with the defendant.

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### CROSS-REFERENCES

Divorce; Irretrievable Breakdown of Marriage; Marriage.

## BREACH OF THE PEACE

*A comprehensive term encompassing acts or conduct that seriously endanger or disturb public peace and order.*

A breach of the peace was a common-law offense, but is presently governed by statute in many states. It is frequently defined as constituting a form of DISORDERLY CONDUCT. Examples include using abusive or obscene language in a public place, resisting a lawful arrest, and trespassing or damaging property when accompanied by violence.

Statutes commonly require that conduct constituting a breach of the peace must be clearly a type of misbehavior resulting in public unrest or disturbance. As an example, a prostitute who solicited men walking by on a public street from her window was found guilty of breaching the peace, but a man who raised his voice to a police officer while the officer was issuing a ticket to him was not guilty of the same offense.

A breach of the peace is synonymous with a disturbance of the peace. Jurisdictions that do not have a specific statutory provision for the offense may punish it as a form of disorderly conduct. The usual penalty imposed is either a fine, imprisonment, or both.

## BREAKING

*To use physical force to separate or damage a solid object.*

When used in criminal statutes as an element of BURGLARY or housebreaking, to forcibly remove any part of a house that protects it from unauthorized entry such as locks, latches, windows, or doors, to gain access to the house with the intent to commit a crime; to use force or violence in escaping from a house after a felony has been committed or attempted therein.

The slightest physical force—for example, lifting a latch, releasing a bolt, or opening an unlocked door or window—is enough to constitute breaking.

## ♦ BRECKENRIDGE, JOHN

John Breckenridge served as the fifth attorney general of the United States and was the second of three attorneys general who served under President THOMAS JEFFERSON. Breckenridge was born on December 2, 1760, in Augusta County near Staunton, Virginia. He attended Augusta Academy, now known as Washington and Lee University, and later transferred to the College of William and Mary located in Williamsburg, Virginia. One of his professors at William and Mary was GEORGE WYTHE, a distinguished teacher and scholar who counted JOHN MARSHALL, HENRY CLAY, and Thomas Jefferson among his students.

At age 19, the ambitious Breckenridge was elected to the Virginia House of Delegates in 1780 but was not permitted to take the position because of his youth. Breckenridge served in the Virginia militia during the Revolutionary War. Afterwards he studied law under the tutelage of a Virginia lawyer, and he was admitted to the Virginia bar in 1785.

Breckenridge established a law practice in Charlotte, Virginia, and re-entered the political arena. In 1792, he was elected to the U.S. House of Representatives of the Third Congress. Before his congressional term commenced, he resigned his seat in order to move to Lexington, Kentucky. The following year, Breckenridge established a law practice in Lexington and once again turned to politics. He ran for a U.S. Senate seat in 1794 and was defeated, but he was appointed attorney general for the state of Kentucky in 1795. He served until 1797, when he

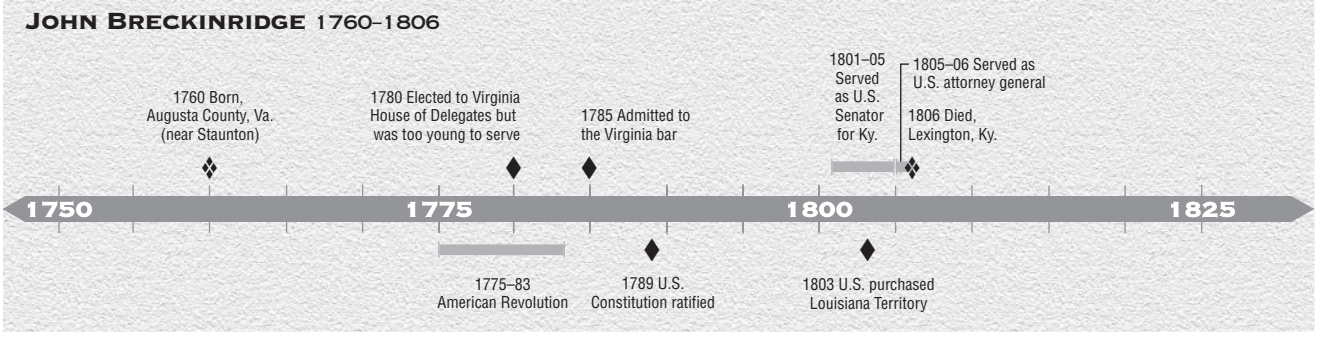

resigned his position to make a successful run for the U.S. House of Representatives. Breckenridge was elected to Congress in 1798 and became speaker of the house in 1799.

Breckenridge, a Republican, ran for the senate and was elected in 1800. Taking office in 1801, Breckenridge strongly supported President Thomas Jefferson. Several times Breckenridge introduced as his own legislation bills that Jefferson had drafted, a maneuver that did not always meet with success. One bill, which was rejected by some who viewed Breckenridge as a mouthpiece for the president, would have allowed Jefferson and the territorial governor to rule the newly purchased Louisiana Territory by EXECUTIVE ORDER.

Breckenridge also advocated the IMPEACHMENT of John Pickering and SAMUEL CHASE, two federal district court judges who had ties to the rival FEDERALIST PARTY. Pickering, who had alcohol and mental problems, was removed. The move to impeach Chase was more patently political: Chase had cast accusations that the supporters of Jefferson were atheists and had made other anti-Republican remarks from the bench. Though the House voted to impeach Chase, the Senate voted by a narrow margin to acquit him. By refusing to allow political statements to be considered within the rubric of *high crimes and misdemeanors*, the Senate strengthened the concept of an independent judiciary.

Jefferson ran again for president in 1804. After rejecting the bid of AARON BURR for a second term as vice-president, the Republicans briefly considered Breckenridge for the position. He lost to Democrat George Clinton.

Breckenridge's ardent support of Jefferson and his political ambitions were rewarded when Jefferson appointed Breckenridge U.S. attorney general. At the time, the position was part-time, and Breckenridge was able to continue spending many of his days in Lexington, Kentucky. Breckenridge held the position of attorney general until his death in Lexington on December 14, 1806.

"WITH NATIONS, MIGHT IS TOO COMMONLY REGARDED AS RIGHT."
—SIDNEY BREESE

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CROSS-REFERENCES

Attorney General; Jefferson, Thomas; Republican Party.

## ♦ BREESE, SIDNEY

Sidney Breese was born July 15, 1800, in Whitesboro, New York. He graduated from Union College in Schenectady, New York, in 1818. Breese was admitted to the Illinois bar in 1820 and concentrated his career efforts in that state.

In 1821, Breese was appointed postmaster of Kaskasia, Illinois. From 1822 to 1826, he served as prosecuting attorney for the Illinois Circuit Court, and from 1827 to 1829, he performed the duties of federal district attorney. In 1831, he published *Breese's Reports,* a compilation of the decisions of the Illinois Supreme Court from 1820 to 1831.

In 1832, Breese fought in the Black Hawk War, which was a conflict between the white settlers of Illinois and the Sac and Fox Indians. After the war Breese resumed his legal career.

In 1835 Breese was selected as a judge for the Illinois Circuit Court and he remained on the bench until 1841. From 1841 to 1842, he served as justice of the Supreme Court of Illinois.

Breese's career continued to be varied during the latter part of his life. He was elected to the United States Senate in 1843, and represented Illinois until 1849. During his senatorial term,

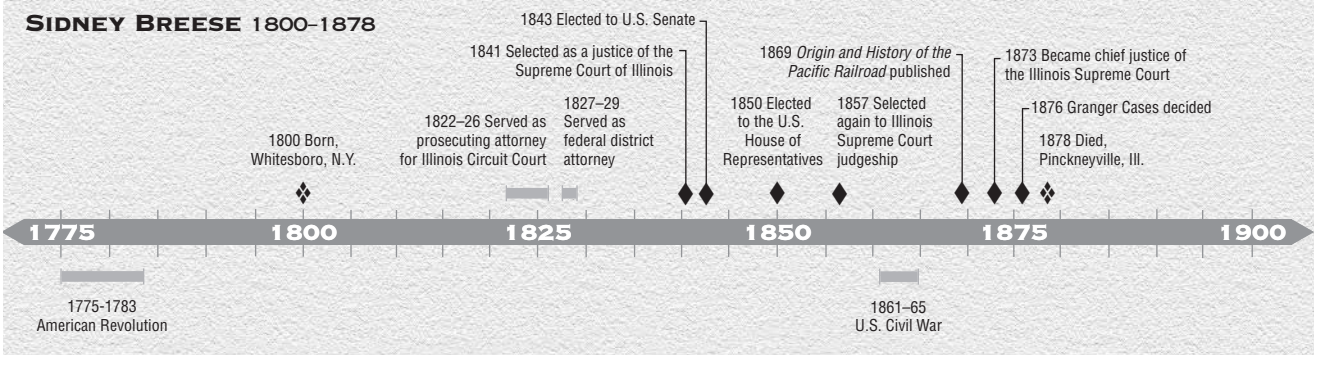

from 1845 to 1849, he also acted as administrator of the Smithsonian Institution. In 1850, he became a member of the House of Representatives of Illinois. In 1857, he was again selected to act as justice of the Supreme Court of Illinois. He served on the bench until 1878, becoming chief justice of this court in 1873. In 1873, Breese was responsible for the noteworthy court decision in the so-called Granger Cases, specifically *Munn v. Illinois,* 69 Ill. 80, by deciding in favor of STATES' RIGHTS in the regulation of grain elevators. This ruling was upheld by the U.S. Supreme Court the following year. 94 U.S. 113 (1877).

As an author, Breese gained prominence with the publication in 1869 of *Origin and History of the Pacific Railroad.*

He died June 27, 1878, in Pinckneyville, Illinois.

## ♦ BRENNAN, WILLIAM JOSEPH, JR.

William Joseph Brennan Jr. was the first Roman Catholic appointed to the Supreme Court; he served as associate justice of the Court from 1956 to 1990. His unshakable belief in the Constitution as the guardian of individual rights and liberties garnered both respect and criticism.

Brennan was born April 25, 1906, in Newark, New Jersey. He was the second of eight children of William Joseph Brennan and Agnes McDermott Brennan, Irish immigrants who settled in Newark in the 1890s. His father worked as a coal shoveler in a brewery and, according to Brennan, was the most influential person in Brennan's life. He was also a labor leader and municipal reformer who imbued Brennan with a profound social conscience and an affinity for activism.

Brennan received his early education in Newark public schools, and attended the Wharton School of Finance and Commerce, at the University of Pennsylvania, where he received his bachelor of science degree, cum laude, in 1928. He earned a scholarship to Harvard University Law School, where he studied under FELIX FRANKFURTER, who would later be his colleague on the Supreme Court. Brennan graduated near the top of his class in 1931.

He began his legal career in 1932 with the Newark law firm of Pitney, Hardin, and Skinner. The firm later added Brennan as a partner and became Pitney, Hardin, Ward, and Brennan. He specialized in LABOR LAW and showed a unique talent for successfully negotiating employer-employee disputes. During WORLD WAR II, Brennan served in the U.S. Army and eventually became the labor branch chief, Civilian Personnel Division of Army Ordnance. He rose to the rank of colonel and was awarded the Legion of Merit for services to the Army and Army Air Forces procurement programs.

After his army service, Brennan returned to private practice, counseling large manufacturing corporations on labor matters. In 1949, he was tapped by New Jersey's Republican governor to serve on the state's superior court. Assigned to the appellate division, he distinguished himself by implementing reforms that relieved congestion in the court calendar. He was appointed to the New Jersey Supreme Court, and took his seat on March 24, 1952. While there, he helped institute a PRETRIAL CONFERENCE system that shortened and simplified trials and encouraged settlements, resulting in fewer and speedier trials.

Brennan had served only four years on the New Jersey Supreme Court when, to the surprise of everyone, including Brennan, President DWIGHT D. EISENHOWER nominated him to serve on the U.S. Supreme Court. Eisenhower, a Republican, would later regard his appointment of the liberal Democrat as one of his worst mistakes, along with his earlier appointment of Chief Justice EARL WARREN. Together, Brennan and Warren led the Court into an unprecedented era of judicial activism that was anathema to conservatives like Eisenhower.

"LAW CANNOT STAND APART FROM THE SOCIAL CHANGES AROUND IT."
—WILLIAM BRENNAN JR.

Brennan quickly established himself as a staunch supporter of the rights and liberties guaranteed by the Constitution. He insisted that the BILL OF RIGHTS applies to all U.S. citizens, whether of the lowest or the highest stature. Brennan invited controversy with his view that the Constitution's guarantees must be constantly evolving. Said Brennan, "The genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems."

Brennan's broad interpretation of the Constitution put him at odds with more conservative court members who construe the Constitution as narrowly as possible and attempted to ascertain the ORIGINAL INTENT of the drafters. Conservatives believe that if a right or freedom is not clearly conferred by the Constitution or by judicial precedent, it is not the job of the Court

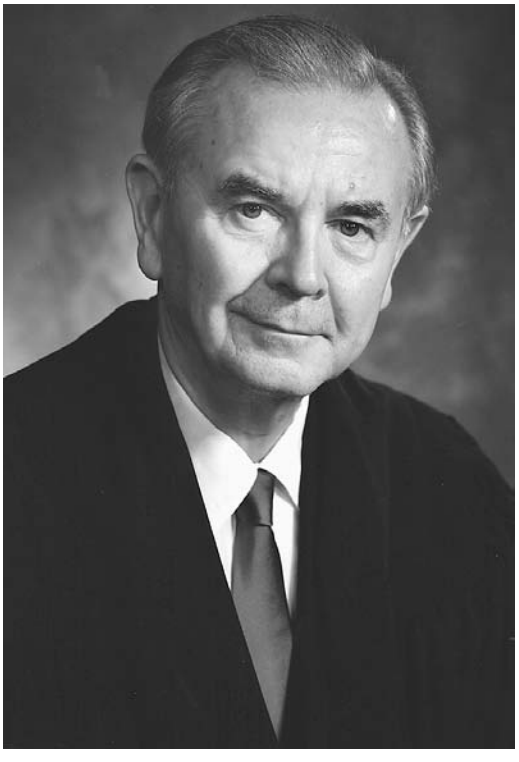

*William J. Brennan Jr.*
PHOTOGRAPH BY ROBERT S. OAKES. COLLECTION OF U.S. SUPREME COURT

to try to find it there. They place the burden on the individual to show that the right or protection sought exists. Conversely, like-minded liberals (and Brennan was one) approach a case by asking whether anything in the Bill of Rights explicitly prevents the Court from finding that the right or protection exists, and they look to the government to prove that the right does not exist. Ironically, when a case involves the use of government power, the opposing groups tend to adopt each other's philosophy: conservatives ask whether anything in the law prevents the exercise of the power, and liberals ask whether the power is explicitly allowed by the Constitution or some other statute.

In spite of his single-minded determination to read the Constitution as broadly as possible, Brennan often acted as a mediator between the liberal and conservative wings of the Court. A warm and charming man who was universally well liked, he used his formidable intellectual and technical skills in tandem with his innate diplomacy to build coalitions on some of the most divisive issues of the time. "You cannot dislike this man on a personal level, no matter how destructive he's been to the values you hold dear," declared Charles J. Cooper, assistant attorney general under President **RONALD REAGAN** and an ideological archenemy of Brennan. Brennan was respected by friends and adversaries alike. In fact, although he was a lifelong Democrat, his appointments to the judiciary were recommended by conservative Republicans.

It is impossible to overstate the effect Brennan had on the law of the land from 1960 to 1990. He was the architect of pivotal decisions that shaped U.S. life during those years, including *Eisenstadt v. Baird,* 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349, a 1972 decision that struck down a law prohibiting the distribution of contraceptives to unmarried women. Brennan recognized a constitutional "right to privacy" protecting "the decision whether to bear or beget a child." His reasoning in *Eisenstadt* became the foundation for **ROE V. WADE,** 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, the 1973 decision that removed many barriers to legal **ABORTIONS.**

Early in his career Brennan wrote the majority opinion in **BAKER V. CARR,** 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), which allowed federal courts to hear challenges to legislative **APPORTIONMENT** and paved the way for later Supreme Court cases establishing the concept of one person, one vote. In **NEW YORK TIMES V. SULLIVAN,** 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), Brennan wrote that the **FIRST AMENDMENT** protects the press from **LIBEL** suits brought by public officials, unless actual malice is proved. He extended the **FIFTH AMENDMENT** right against **SELF-INCRIMINATION** to prohibit mandatory registration of Communist party members in *Albertson v. Subversive Activities Control Board* (382 U.S. 70, 86 S. Ct. 194, 15 L. Ed. 2d 165 [1965]).

Brennan found that the Constitution prohibits unequal treatment based on race, age, or gender, in a number of decisions, including **IN RE WINSHIP** (establishing use of the **REASONABLE DOUBT STANDARD** for juveniles); **FRONTIERO V. RICHARDSON** (extending constitutional scrutiny to gender-based classifications); and *Craig v. Boren* (declaring that gender-based classifications are unconstitutional unless they are substantially related to the achievement of an important government objective) (*In re Winship,* 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 [1970]; *Frontiero v. Richardson,* 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 [1973]; and *Craig v. Boren,* 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 [1976]).

Brennan was a strong believer that **AFFIRMATIVE ACTION** was a way to remedy past discrim-

ination, and he wrote numerous opinions on the subject. In *United States v. Weber Aircraft Corp.,* 465 U.S. 792, 104 S. Ct. 1488, 79 L. Ed. 2d 814 (1984), the Court held that it is lawful for employers to adopt voluntary affirmative action programs that are race conscious. Brennan wrote the opinion that upheld limited preferential treatment on the job for women and minorities in *Johnson v. Transportation Agency of Santa Clara County,* 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987), and found in *United States v. Paradise,* 480 U.S. 149, 107 S. Ct. 1053, 94 L. Ed. 2d 203 (1987), that a one-black-for-one-white promotions quota did not violate the Constitution. Finally, in one of his last opinions on affirmative action, Brennan wrote that the Constitution permits preferential treatment of minorities in the awarding of FCC broadcast licenses (*Metro Broadcasting v. FCC,* 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445 [1990]).

Brennan was an adamant defender of free expression even for the most reprehensible words or acts. In TEXAS V. JOHNSON (491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 [1989]) and in *United States v. Eichman* (496 U.S. 310, 110 S. Ct. 2404, 110 L. Ed. 2d 287 [1990]), he wrote opinions invalidating statutes that banned flag desecration, on the grounds that they violated the First Amendment. Although recognizing the "special place reserved for the flag in this Nation," he stated, "we do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents" (*Johnson*).

He was also an ardent defender of the rights of children, declaring that we must teach young people "that our Constitution is a living reality, not parchment preserved under glass." He was appalled by cases in which the Court seemed to hold that the Bill of Rights does not apply to schoolchildren, and wrote in one dissent that the majority's decision had given school officials the license to act as "thought police" and taught the students "to discount important principles of our government as mere platitudes" (*Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 285, 290, 108 S. Ct. 562, 577, 580, 98 L. Ed. 2d 592 [1988]).

Brennan earned the highest praise as well as the harshest criticism from his opinions in cases involving the rights of the accused. He steadfastly opposed the use of CAPITAL PUNISHMENT, labeling it state-sanctioned killing, and in one of his final decisions on the Court, he voted against an execution by the state of Virginia. Taking human life, he said, "is God's work, not man's." When that statement was dismissed as mere sentimentality, he replied, "The most vile murder does not, in my view, release the state from constitutional restraints on the destruction of human dignity.... The fatal constitutional infirmity of capital punishment is that it treats members of the human race as nonhuman, as objects to be toyed with and discarded." Brennan's critics pointed out that his opposition to the death penalty did not seem in harmony with his support of women's right to abortion, which some consider "state-sanctioned killing."

Brennan passionately defended the protections afforded by the Fourth Amendment's prohibition of unreasonable SEARCHES AND SEIZURES. His interpretation of the amendment helped establish the EXCLUSIONARY RULE, which holds that any evidence obtained illegally is tainted and cannot be used against the accused. During the 1980s, the Supreme Court recognized a growing number of exceptions to the

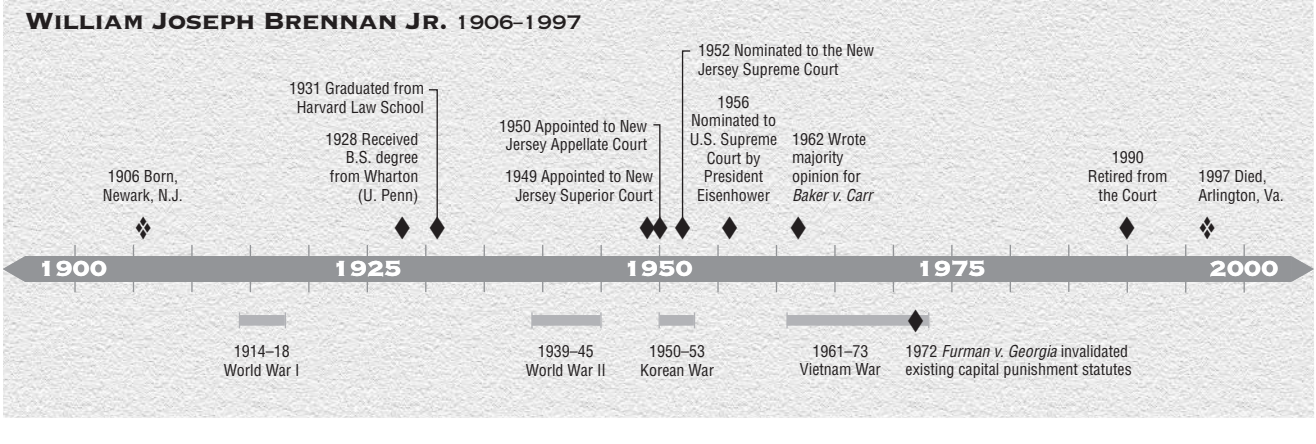

rule, prompting Brennan to redouble his efforts to bolster its strength. His advocacy of the rights of criminal defendants brought him sharp criticism, particularly from the media, which often portrayed him as a libertarian who supported the rights of criminals while ignoring those of victims. In a radio interview in 1987, Brennan became uncharacteristically agitated when asked, "Why do you let some of those creeps go? They do such bad things, and on a technicality, you let them go." Brennan replied sharply,

> You and the media ought to be ashamed of yourself to call the provisions and the guarantees of the Bill of Rights technicalities. They're not. We are what we are *because* we have those guarantees, and this Court exists to see that they are faithfully enforced. These guarantees have to be sustained—even though the immediate result is to help out some very unpleasant person. They're there to protect all of us.

Citing advancing age and health concerns, Brennan retired from the Court in July 1990, after 34 years as an associate justice. He was replaced by Associate Justice DAVID H. SOUTER. Although he eventually slowed his pace considerably, he continued to be sought as a speaker and used every opportunity to carry on his campaign for individual rights and liberties.

During his tenure on the Supreme Court, Brennan wrote almost 1,600 opinions, many of which have had a significant impact on the American justice system. In 1995, as a tribute to Brennan's legacy, a number of former law clerks, along with family and friends created the Brennan Center. The center, which is housed at New York University's School of Law, pursues an ambitious agenda of litigation, teaching, research, and advocacy in public policy areas, including democracy, poverty, and criminal justice. Brennan died on July 24, 1997, in Arlington, Virginia.

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CROSS-REFERENCES

Freedom of the Press; Freedom of Speech; Judicial Review; Warren Court.

## ♦ BREWER, DAVID JOSIAH

David Josiah Brewer was an associate justice of the Supreme Court from 1890 to 1910. A defender of personal liberty and property rights, he also supported STATES' RIGHTS and was opposed to centralization of power in the federal government.

Brewer was born June 20, 1837, in Smyrna, Asia Minor (now Turkey). His father, Josiah Brewer, was a Yale graduate who worked in Turkey as a missionary. His mother, Emilia Field, was the sister of Supreme Court justice STEPHEN J. FIELD, with whom Brewer eventually served. After returning to the United States from their missionary work, the Brewers settled in Wethersfield, Connecticut. Brewer attended Wesleyan University for two years before transferring to Yale, where he graduated with honors in 1856. He studied law for a year with an uncle and then enrolled in Albany Law School. He received his law degree in 1858 and was admitted to the New York bar the same year.

Brewer decided to stake his future on the frontier West. He settled in Leavenworth, Kansas, and almost immediately began his long judicial career. He was appointed commissioner of the U.S. Circuit Court for the District of Kansas in 1861 and was elected judge of the probate and criminal courts of Leavenworth County in 1862. Brewer served as a judge of the first judicial district of Kansas from 1865 to 1869. He briefly left the judiciary in 1869 to become Leavenworth's city attorney, but returned in 1870 when, at the age of thirty-three, he was elected to the Kansas Supreme Court. He sat on the Kansas bench until 1884 when President CHESTER ARTHUR named him to the federal circuit court for the eighth circuit. Five years later, President WILLIAM H. HARRISON appointed him to the U.S. Supreme Court, where he remained until his death.

As a Supreme Court justice, Brewer was known for his ardent support of individual rights against the tyranny of the majority. "Here there is no monarch threatening TRESPASS upon an individual," he once said. "The danger is from the multitude—the majority with whom lies the power." Brewer had great compassion for the marginalized members of U.S. society. In 1908, he wrote the opinion for a unanimous Court in *Muller v. Oregon,* 208 U.S. 412, 28 S. Ct. 324, 52 L. Ed. 551, upholding a statute that established maximum work hours for women toiling in laundries. Although he had in 1905 voted to invalidate a similar statute that applied to bakers, in LOCHNER V. NEW YORK (198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 [1905]), Brewer was convinced that the particular statute at issue in *Muller* did not unnecessarily limit an individual's contract liberty.

Brewer also wrote strong dissents in several cases limiting the rights of Chinese and Japanese immigrants (see *Fong v. United States,* 149 U.S. 698, 13 S. Ct. 1016, 37 L. Ed. 905 [1893]; *United States v. Sing Tuck*, 194 U.S. 161, 24 S. Ct. 621, 48 L. Ed. 917 [1904]; *United States v. Ju Toy*, 198 U.S. 253, 25 S. Ct. 644, 49 L. Ed. 1040 [1905]; the *Japanese Immigrant* case, 189 U.S. 86, 23 S. Ct. 611, 47 L. Ed. 721 [1903]). His dissent in *Fong,* in which the Court found that the power of Congress to deport ALIENS was inherent in national sovereignty, included this sarcastic indictment of what he considered Congress's ARBITRARY denial of plaintiffs' rights: "In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius ask, Why do they send missionaries here?"

Brewer was, in most cases, a moderate conservative. He spoke out against racial DISFRANCHISEMENT in *Giles v. Harris,* 189 U.S. 475, 23 S. Ct. 639, 47 L. Ed. 909 (1903). However, reflecting his belief in states' rights, he held that a state had the right to prohibit INTEGRATION in an institution it had created (*Berea College v. Kentucky,* 211 U.S. 45, 29 S. Ct. 33, 53 L. Ed. 81 [1908]) and that the federal government lacked power to prosecute a case of racially motivated harassment (*Hodges v. United States,* 203 U.S. 1, 27 S. Ct. 6, 51 L. Ed. 65 [1906]). A lifelong advocate of international peace, Brewer served as president of a congressional commission investigating a border dispute between Venezuela and British Guyana, and later served on the tribunal that ended the controversy. Brewer advocated women's suffrage and restrictions on immigration. He was a vigorous anti-imperialist who believed that the Philippines should be given independence with guaranteed neutrality.

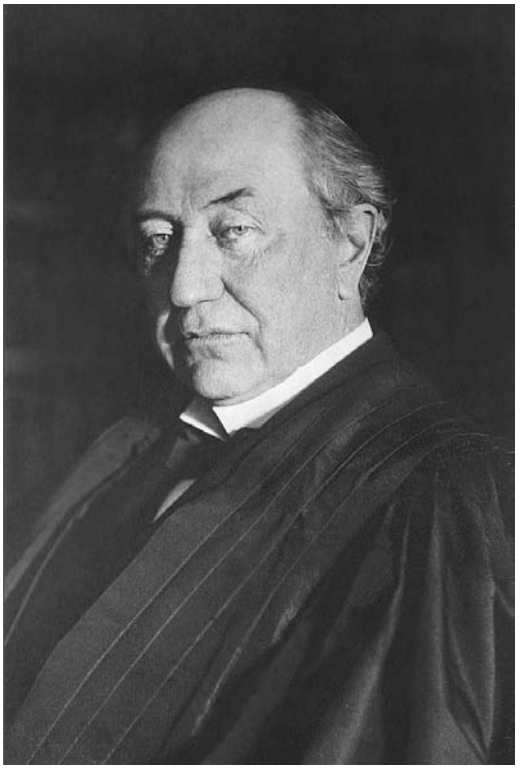

*David J. Brewer.*
LIBRARY OF CONGRESS

Brewer was an unusually outgoing justice who lectured frequently and wrote several books, including *The Pew to the Pulpit, The Twentieth Century from Another Viewpoint, American Citizenship,* and *The United States: A Christian Nation.* He felt strongly that judges have a moral obligation to use their lofty position to lead rather than simply observe. "It is one thing," he once said, "to fail of reaching your ideal. It is an entirely different thing to deliberately turn your back on it."

Brewer died in Washington, D.C., on March 28, 1910.

"YOU CANNOT DISASSOCIATE THE CHARACTER OF THE NATION AND THAT OF ITS CITIZENS."
—DAVID BREWER

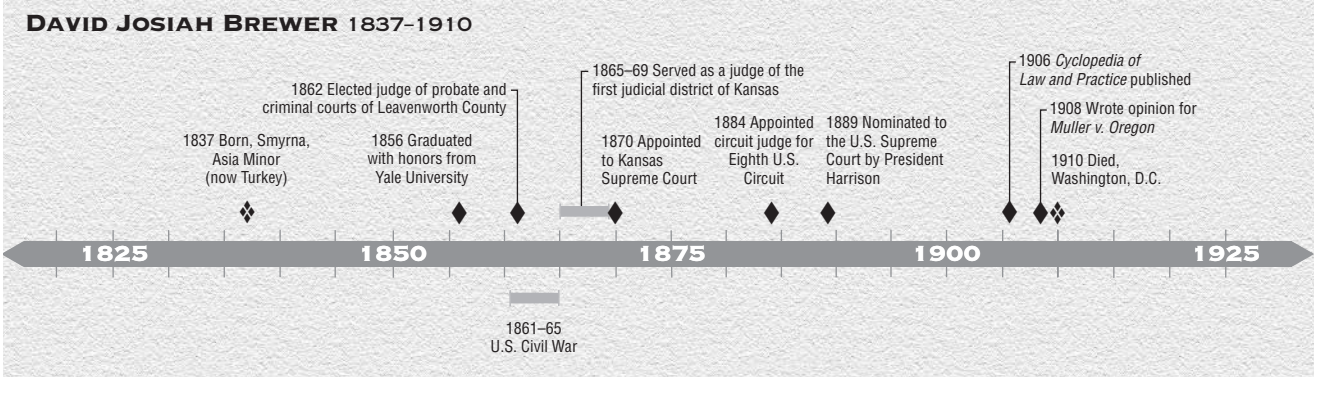

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## ♦ BREWSTER, BENJAMIN HARRIS

Benjamin Harris Brewster was the 37th attorney general of the United States, serving from 1881 to 1885 in the administration of President CHESTER ARTHUR. Previously, Brewster was appointed by President JAMES POLK as a special commissioner for the adjudication of claims by the members of the Cherokee Indian tribe against the U. S. government.

Brewster was born in Salem County, New Jersey, on October 13, 1816. In 1834 he graduated from Princeton College. Like many other aspiring lawyers of the period, Brewster did not attend law school. Instead these aspirants "read law" by performing various clerical and administrative duties for a lawyer who had already been admitted to the bar. Brewster studied under a Philadelphia attorney named Eli Price.

After mastering the necessary requirements, Brewster took and passed the bar exam in 1838. After his admittance to the Pennsylvania bar, he continued to practice law in Philadelphia.

Although he had established a lucrative law practice, Brewster, like many other ambitious young lawyers his age, became interested in politics and government service. Brewster had a personal connection, his father-in-law, Robert J. Walker. In the decade between 1835 and 1845, Walker had served as the U.S. senator from Mississippi. In 1845, Walker was appointed by President James Polk to be secretary of the Treasury. Twelve years later, Walker would serve as governor of the Territory of Kansas.

It was through Walker that Brewster became a special commissioner for the adjudication of claims by the Cherokee Indians against the federal government. In 1846 Walker convinced President Polk to appoint his son-in-law to the position. The Cherokee had established a republican form of government called the Cherokee Nation. In the years leading up to the early nineteenth century, the Cherokee tribe was one of the most progressive and well-to-do tribes in North America. The Cherokee lived in the southeastern part of the country on lands that subsequently whites came to define as the states of North Carolina, Tennessee, Georgia and Alabama. As time went on, more and more white settlers moved into the area claiming land that belonged to the Cherokee Nation.

Some Cherokee leaders signed the Treaty of New Enchola in 1835 that agreed to their removal to land west of the Mississippi River. A number of Cherokee opposed the relocation and under the leadership of Chief JOHN ROSS tried to resist. In 1838 President ANDREW JACKSON sent U.S. troops to forcibly move the Indians to the new land, the dry plains of the area that later became Oklahoma. The brutal relocation journey of between 13,000 and 17,000 people that became known as the *Trail of Tears* took place over winter and resulted in the deaths of thousands of Cherokee.

The leaders of those who survived regrouped as the Cherokee Nation and sought to make claims against the federal government concerning the forced relocation and their losses. As special commissioner in 1846, Brewster reviewed the claims and granted some relief before returning to his law practice in Philadelphia.

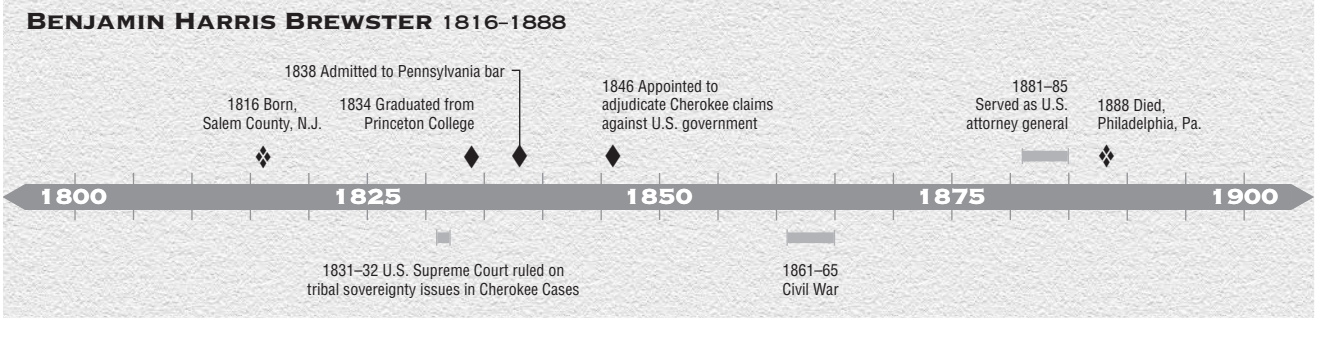

By now a prominent Pennsylvania attorney with strong connections to the REPUBLICAN PARTY, Brewster once again pursued political aspirations. In 1867, he was appointed by Governor Geary to be attorney general for the state of Pennsylvania. After a brief tenure, Brewster returned to private practice.

In September of 1881, following the assassination of JAMES GARFIELD, Vice-President Chester Arthur succeeded Garfield as president. In December of that year, Garfield's attorney general, ISAAC MACVEAGH, resigned so that the new president could make his own appointment. Arthur, who had practiced law in New York, appointed Brewster.

Many had anticipated that Arthur would continue as a supporter of the *spoils* system, whereby loyal party workers were given appointive office without attention to merit. Arthur surprised the analysts and the electorate by promoting government reform. Brewster backed the president, and in 1883, Congress enacted the Pendleton Act, which provided for civil service reform and helped to reduce the primacy of the spoils system.

Brewster also vigorously prosecuted the Star Route Trials, a group of cases involving several prominent Republicans who were found guilty of fraudulent activities concerning the United States Post Office Department.

Brewster continued his work as attorney general until GROVER CLEVELAND was elected president in 1884. In 1885 Brewster returned to Pennsylvania. He died in Philadelphia on April 4, 1888.

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CROSS-REFERENCES

Attorney General; Cherokee Cases; Native American Rights.

## ♦ BREYER, STEPHEN GERALD

As an associate justice of the U.S. Supreme Court, Stephen Breyer is regarded as a judicial moderate. The former law professor and Senate counsel locates his approach to the law in a deep pragmatism: He distrusts broad legal theory, endorses judicial restraint, and wants his legal opinions to be clear enough for a high-school student to read. His reputation for forging consensus earned him a nomination to the U.S. Court of Appeals for the First Circuit in 1980, on which he later served as chief of the court from 1990 to 1994. During the 1980s, he also helped to shape a far-reaching and controversial revision of criminal sentencing guidelines. In April 1994, President BILL CLINTON nominated Breyer to replace the outgoing U.S. Supreme Court associate justice HARRY A. BLACKMUN, and his appointment was confirmed in July 1994.

Breyer was born on August 15, 1938, in San Francisco. His attorney father and politically active mother set him on a course for achievement. He earned an A.B. from Stanford University in 1959, followed by a B.A. in philosophy and economics at Oxford University in England. He received a law degree from Harvard Law School in 1964, graduating magna cum laude. Breyer clerked for U.S. Supreme Court Justice ARTHUR J. GOLDBERG during the 1964–65 term and helped to write the justice's opinion in the landmark right-to-privacy case, GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

"AS AN APPELLATE JUDGE, I SET . . . A GOAL OF TRYING TO WRITE MY OPINIONS SO THAT A HIGH SCHOOL STUDENT . . . [CAN] UNDERSTAND THE LAW, AS REVEALED IN THAT OPINION—BOTH IN TERMS OF BASIC FAIRNESS AND IN TERMS OF HELPING PEOPLE LEAD DECENT, PRODUCTIVE LIVES."
—STEPHEN G. BREYER

In 1967, Breyer embarked on dual careers in academia and government. He taught courses in antitrust, ADMINISTRATIVE LAW, and economic regulation at his alma mater, Harvard Law School. In the same year, he was appointed to the office of the Assistant U.S. Attorney General. He gained further prominence in 1974 by serving on the Watergate Special Prosecution Force, which pursued the possibility of impeaching President RICHARD M. NIXON. As a senior aide to Senator EDWARD M. KENNEDY (D-Mass.) in the 1970s and chief counsel to the SENATE JUDICIARY COMMITTEE from 1979 to 1980, Breyer crafted deregulation of the airline and trucking industries while also working on prison reform, judicial confirmations, and fair-housing law. He became known for an empirical approach to law, one that was less swayed by ideology than by careful balancing of facts.

By 1980, Breyer was well respected by liberals, moderates, and conservatives. Although he had been an aide to the liberal Senator Kennedy, he was adept at promoting agreement between such political opposites as Kennedy and Senator Orrin G. Hatch (R-Utah). This record served Breyer well when President JIMMY CARTER

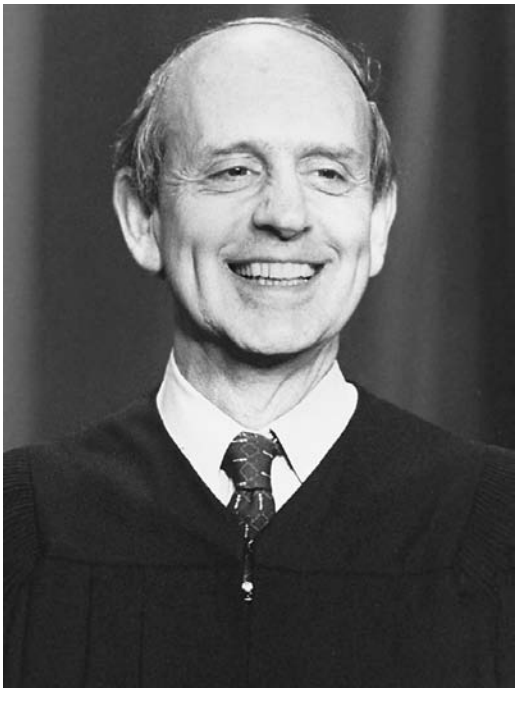

*Stephen G. Breyer.* REUTERS/ARCHIVE PHOTOS

nominated him to the U.S. Court of Appeals for the First Circuit. After Carter lost the 1980 election to **RONALD REAGAN**, the Republicans scrapped all but one of Carter's pending judicial appointments, as is common in an incoming administration. Breyer's appointment was allowed to go through.

Breyer's record on the Court of Appeals was generally moderate. In a 1983 environmental regulatory case, he blocked the **INTERIOR DEPARTMENT** from auctioning oil-drilling rights in the North Atlantic without giving ample consideration to alternative proposals (*Commonwealth of Massachusetts v. Watt,* 716 F. 2d 946 [1st Cir. 1983]). In the area of **ABORTION**, he voted to uphold a Massachusetts parental-notification law (*Planned Parenthood of Massachusetts v. Bellotti,* 868 F. 2d 459 [1st Cir. 1983]). But he joined the majority on the First Circuit in striking down the **GEORGE H.W. BUSH** Administration's ban on abortion counseling at family planning clinics funded by the federal government (*Commonwealth of Massachusetts v. Secretary of Health and Human Services,* 899 F. 2d 53 [1st Cir. 1990]).

Appointed to the **U.S. SENTENCING COMMISSION** in 1985, Breyer undertook the job of revising criminal-sentencing guidelines. Against strong opposition, he persuaded the other seven judges on the panel to base the guidelines on national averages. The changes, which took effect in 1987, have proven controversial. Critics charge that they have too tightly bound judges and produced inequitable results for minority defendants. In response, Breyer has argued that the guidelines have built-in flexibility that allows judges to influence the Sentencing Commission in future revisions.

President Clinton twice sought Breyer for appointment to the U.S. Supreme Court. Although close to choosing him in 1993, Clinton instead selected **RUTH BADER GINSBURG** after Breyer became the target of criticism for late payments on **SOCIAL SECURITY** taxes for a part-time housekeeper. When a second vacancy on the Court opened in 1994, Clinton returned to Breyer. The president compared his intellectual vigor to that of Judge **LEARNED HAND**, the renowned appellate judge of the 1920s and 1930s. Minor opposition met the nomination. Critics questioned whether Breyer's 1993 book *Breaking the Vicious Circle: Toward Effective Risk Regulation* went too far in attacking government regulation. Others raised doubts about his investment judgment in losing money in the early 1990s in the Lloyd's of London scandal, Britain's largest insurance disaster ever. At the same time, however, he received praise for his past achievements and for a strong commitment to **FIRST AMENDMENT** rights. The Senate easily confirmed his appointment on July 29, 1994, by a vote of 87–9.

After two years on the Court, Breyer had aligned himself with the Court's moderates. He dissented when the majority struck down a 1990 federal law that prohibited the carrying of handguns outside schools, arguing that protecting schools should fall under Congress's power to regulate interstate commerce (*United States v. Lopez,* 514 U.S. 549. 115 S. Ct. 1624, 131 L. Ed. 2d 626 [1995]). He also dissented from the Court's ruling in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996), which struck down the 1988 Indian Gaming Regulatory Act for violating **STATES' RIGHTS.** In a major victory for **GAY AND LESBIAN RIGHTS**, Breyer joined the majority in overturning Colorado's Amendment 2, which would have removed all legal protection for homosexuals against discrimination (**ROMER V. EVANS**, 116 S. Ct. 1620, 134 L. Ed. 2d 855 [1996]). And in a significant First Amendment decision, Breyer wrote the plurality opinion declaring that the government may not require

cable TV operators to segregate and block leased access channels that feature offensive or indecent programming (*Denver Area Consortium v. Federal Communications Commission,* 116 S. Ct. 2374 [1996]).

### Recent Opinions

Justice Breyer's opinions have defied labels such as "conservative" or "liberal." Instead, his opinions continue to reflect his rather centrist approach to most issues. In fact, some observers believe that Breyer represents the ideological center of the court, notwithstanding statistics showing that Breyer tends to side most often with the more "liberal" members of the Court (associate justices JOHN PAUL STEVENS, RUTH BADER GINSBURG, and DAVID SOUTER) and least often with the more "conservative" members of the Court (Chief Justice WILLIAM REHNQUIST and associate justices ANTONIN SCALIA, SANDRA DAY O'CONNOR, and ANTHONY KENNEDY).

Breyer's dissenting opinion in *Bond v. United States*, 529 U.S. 334, 120 S.Ct. 1462, 146 L. Ed. 2d 365 (2000), surprised many observers who tend to classify Breyer as "liberal" justice who consistently votes in favor of criminal defendants' rights. In *Bond* the Court examined the issue of whether the Fourth Amendment's protection against unreasonable searches was violated when a Border Patrol agent, while checking the immigration status of passengers on a bus, squeezed a canvas bag that was located in the compartment above a bus passenger's seat. The passenger admitted that the bag was his and allowed the agent to open it, revealing a "brick" of methamphetamine.

A majority of the court ruled that the search was illegal, noting that the traveler's luggage was a personal "effect" as defined in the FOURTH AMENDMENT, and that the passenger exhibited an actual expectation of privacy in that "effect" by using an opaque bag and placing the bag directly over his seat. In his dissent, Justice Breyer criticized what he perceived as the shortsightedness of the majority's opinion, arguing that the court's ruling would lead to a constitutional JURISPRUDENCE of "squeezes," thereby complicating further already complex Fourth Amendment law.

A few days later, Breyer wrote a 5–4 majority opinion that overturned a Nebraska statute criminalizing "partial birth abortions," a second-trimester procedure in which, according to the statute, a physician "partially delivers vaginally a living unborn child before killing it." *Stenberg v. Carhart*, 530 U.S. 914, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000). The Nebraska statute violated the Constitution for at least two independent reasons, Breyer wrote.

First, the statute lacked any exception for the preservation of the health of the mother. The Court had previously made clear that a state may promote, but not endanger, a woman's health when it regulates the methods of abortion. Second, Justice Breyer stated, the statute imposed an undue burden on a woman's ability to have an abortion, finding that the Nebraska statute banned an abortion procedure that was used as many as 5,000 times per year in the United States. (Breyer made no finding as to how often the procedure is used in Nebraska.) Breyer refused to revisit the Court's earlier

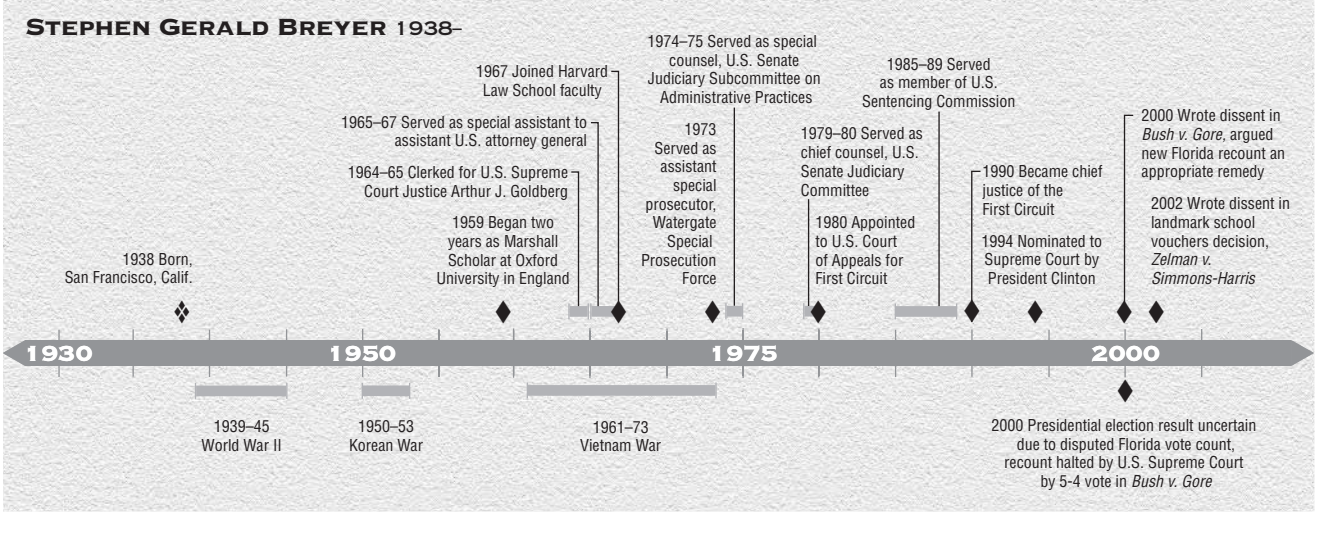

determinations and redeterminations that the federal Constitution offers basic protection guaranteeing women's right to procreative freedom.

In 2002, Breyer wrote a majority opinion clarifying an earlier U.S. Supreme Court decision concerning the constitutionality of civil-commitment procedures for so-called "sexual predators." In *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997), the Court had ruled that a convicted sex offender who satisfies the statutory definition of a sexual predator could be involuntarily committed to a mental-health institution following his or her release from prison for the SEX OFFENSE without violating the DOUBLE JEOPARDY Clause to the FIFTH AMENDMENT of the U.S. Constitution, even if the sex offender is committed based on some of the same evidence that was used earlier to convict him or her. In *Hendricks,* the Court wrote that the Double Jeopardy Clause applies only to subsequent prosecutions or punishments in criminal proceedings, and the sexual-predator law contemplated commitment by civil proceedings.

In *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002), Breyer wrote a majority opinion that qualified *Hendricks* by ruling that before a convicted sex offender may be civilly committed as a sexual predator following his or her release from prison, the state must prove that the sex offender lacks some control over his or her behavior. The lack-of-control element, Breyer said, would allow the state to better distinguish between dangerous sexual offenders, whom it seeks to commit through civil proceedings, and other dangerous persons who are more appropriately dealt with through criminal proceedings. The federal Constitution prohibits civil commitment proceedings from becoming a "mechanism" for retribution or general deterrence, Breyer emphasized.

Breyer's most well-known opinion during the last nine years came in a dissenting role in one of the most controversial cases in the history of the U.S. Supreme Court. In BUSH V. GORE, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000), seven justices (including Breyer) concluded that the process devised by the Florida Supreme Court to recount the popular vote in the 2000 presidential election violated the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT. However, only five justices agreed that there was insufficient time to fashion a remedy that would fairly and lawfully allow the votes of Florida residents to be accurately counted for either Republican Presidential candidate GEORGE W. BUSH of Texas and Democratic candidate ALBERT GORE of Tennessee. As a result, the nation's high court effectively ordered the Florida recount to stop, which meant that Bush would be become the forty-third President of the United States, as he was leading in Florida when the U.S. Supreme Court issued its opinion, and Florida's 25 electoral votes were enough for him to win in the ELECTORAL COLLEGE.

In his dissenting opinion, Justice Breyer proposed sending the case back to Florida's Supreme Court so that it could devise an order for "a constitutionally proper contest" by which to decide the winner. The majority's opinion, Breyer wrote, placed too much emphasis on equal protection and not enough emphasis on the right to vote. Breyer chastised the majority for finding an equal protection violation but offering no remedy to correct it. "An appropriate remedy," Breyer wrote, "would be to remand this case with instructions that, even at this late date, would permit the Florida Supreme Court to require recounting all undercounted votes in Florida . . . and to do so in accordance with a single uniform standard."

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## BRIBERY

*The offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of an official in the discharge of his or her public or legal duties.*

The expectation of a particular voluntary action in return is what makes the difference between a bribe and a private demonstration of goodwill. To offer or provide payment in order to persuade someone with a responsibility to betray that responsibility is known as seeking UNDUE INFLUENCE over that person's actions. When someone with power seeks payment in exchange for certain actions, that person is said to be *peddling influence*. Regardless of who initiates the deal, either party to an act of bribery can be found guilty of the crime independently of the other.

A bribe can consist of immediate cash or of personal favors, a promise of later payment, or anything else the recipient views as valuable. When the U.S. military threatened to cancel a Texas relocation company's contracts to move families to and from military bases, the company allegedly gave four representatives in Congress an all-expenses-paid weekend in Las Vegas in January 1989, and $2,500 in speaking fees. The former president of the company was indicted by a federal GRAND JURY in 1994 on bribery charges for both gifts.

No written agreement is necessary to prove the crime of bribery, but usually a prosecutor must show corrupt intent. Bribery charges may involve public officials or private individuals. In the world of professional sports, for example, one boxer might offer another a payoff to "throw" (deliberately lose) an important fight. In the corporate arena, a company could bribe employees of a rival company for recruitment services or other actions at odds with their employer's interests. Even when public officials are involved, a bribe does not need to be harmful to the public interest in order to be illegal.

When a public official accepts a bribe, he or she creates a conflict of interest. That is, the official cannot accommodate the interests of another party without compromising the responsibilities of her or his position.

There is not always consensus over what counts as a bribe. For instance, in many states and at the federal level, certain gifts and campaign contributions are not considered bribes and do not draw prosecution unless they can be linked to evidence of undue influence. In this regard, negative public perception of private contributions to elected officials as payola has caused most states to establish legislative ethics committees to review the public-private relationships of house and senate members. Furthermore, both houses of the U.S. Congress passed legislation in 1994 restricting gifts to no more than $20 in value.

The Supreme Court further clarified the law by setting standards for federal bribery statutes in *United States v. Sun Diamond Growers*, 526 U.S. 398, 119 S.Ct. 1402, 143 L.Ed.2d 576 (1999). This case grew out of the prosecution of Mike Espy, secretary of agriculture in the Clinton administration, for allegedly accepting bribes. After Espy was acquitted of all charges, the INDEPENDENT COUNSEL charged Sun Diamond Growers, a trade association for a large agricultural cooperative, with violating a federal gratuities law that prohibits giving gifts to public officials in exchange for favorable government actions.

After Sun Diamond was convicted of the charges it took its case to the Supreme Court. The Court concluded that a person did not violate the law merely by giving a gift to a public official. Prosecutors must show that there was a connection between a specific official act in the past or future and the gift. Justice ANTONIN SCALIA noted that if the government did not have to prove this linkage then a token gift such as the presentation of a sports jersey by a championship team to the president could be regarded as a criminal act.

The Court also noted differences in various federal bribery statutes, which included broad prohibitions. In the present case, the language of the gratuities statute did not reveal a similar intent by Congress; instead, the Court viewed this law as one strand of a complicated web of laws and regulations addressing official behavior.

It is common for both the recipient and the provider of a bribe to be accused, although bribery is not a joint offense—that is, one person's guilt does not affect the other's. Such was the case when a popular Massachusetts state senator allegedly accepted monthly payments from an investment BROKER in exchange for trying to persuade state officials to send state PENSION business to the broker. The legislator and the broker were both indicted on misdemeanor charges in early 1995.

U.S. companies that engage in international bribery can become targets of investigation at home. In January 1995, a former sales director of Lockheed Corporation pleaded guilty to violating the federal Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 et seq., Allen R. Love told a U.S.

district court that he had paid and helped to cover up a bribe to an Egyptian politician for arranging Egypt's 1989 purchase of three Lockheed transport planes.

Congress adopted the Foreign Corrupt Practices Act in 1977 to outlaw payments that are intended to win contracts from foreign officials. Ironically, the law's passage was triggered by testimony from a former vice president of the same Lockheed Corporation at a U.S. congressional hearing in 1976. In that case, the company's vice president admitted to bribing the prime minister of Japan with more than $1.9 million in the early 1970s, so that Japan would buy Lockheed's TriStar wide-body jets.

The severity of bribery can reach the felony level, punishable by a fine or imprisonment, or both. However, charges are sometimes reduced in exchange for helping to convict accomplices. For instance, in June 1994, Love pleaded innocent to felony charges of bribery and conspiracy. Later, he pleaded guilty to one misdemeanor count of "indirectly" conspiring, as part of a plea agreement in which he agreed to testify against the corporation itself, which was also a defendant.

The international sports community was rocked by a bribery scandal involving the 2002 Winter Olympic Games in Salt Lake City, Utah. Two officials of the Utah committee that secured the games were indicted in 2000 on charges of wire and MAIL FRAUD, conspiracy, and interstate travel in aid of RACKETEERING. They were charged with paying an official of the U.S. Olympic Committee (USOC) to help influence the selection of Salt Lake City by the International Olympic Committee (IOC). The USOC official who received the bribes later pleaded guilty to several criminal charges including the accepting of a bribe.

Federal prosecutors contended that the two officials had paid $1 million to influence votes of several IOC members. In addition, they had allegedly diverted some $130,000 of the bid committee's income, and had altered books and created false contracts to conceal their actions. The two officials denied that they had done anything wrong, contending that the payments were intended as grants and scholarships for poor athletes. Following the indictments, ten members of the IOC either resigned or were expelled from the organization, and many reforms were undertaken to prevent bribery. The USOC also authorized an independent review of its practices.

However, the two Utah officials successfully challenged the bribery charges. In July 2001, a federal judge dismissed the bribery charges, finding that a Utah bribery statute could not be applied to the defendants' actions. In December 2001, the judge dismissed the remaining criminal counts.

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## ♦ BRICKELL, ROBERT COMAN

Robert Coman Brickell was born April 4, 1824, in Tuscumbia, Alabama. He was admitted to the bar in 1843, began his law practice in Huntsville, Alabama, in 1851, and soon became a respected name in the legal system of that state. He gained a reputation as a supporter of STATES' RIGHTS

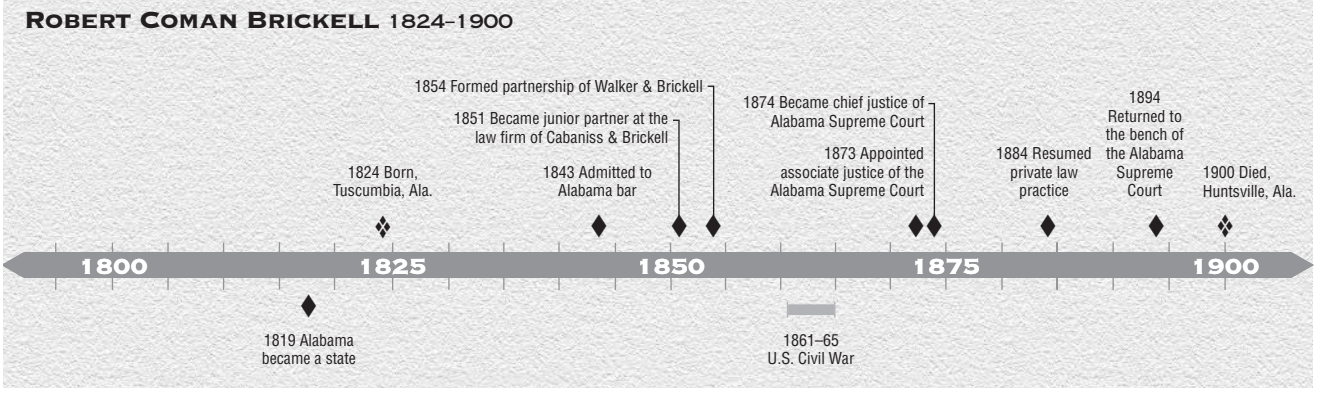

and believed in secession from the Union prior to the onset of the Civil War.

In 1873, Brickell served as associate justice of the Supreme Court of Alabama. He was selected to act as chief justice of the Alabama Supreme Court in 1874, an appointment he again accepted in 1880. He held this office until 1884.

Brickell resumed his law practice in Alabama in 1884 but in 1894 returned to the bench of the Alabama Supreme Court. He died November 20, 1900, in Huntsville.

## BRIDGES

*Structures constructed over obstructions to highways or waterways, such as canals or rivers, in order to provide continuous and convenient passages for purposes of transportation. A bridge includes the necessary abutments and approaches that make it accessible. A public bridge that spans obstructions to a public highway is built on land owned by the state government for public use, while a private bridge is built on private property for the use of particular individuals who own it.*

The construction of public bridges is a function of the state government by virtue of statute and is limited only by contractual or constitutional provisions. A state may exercise its power directly or delegate it to governmental agencies, such as a state highway commission. Cities and municipalities may erect bridges within their borders if authorized to do so by the state legislature. If a bridge is to be built within the borders of a state, the state has control of the project; but if the bridge connects two states, both states share involvement in the venture but must yield to the power of the federal government to supervise matters that have an effect on interstate commerce.

The state determines the location of a bridge subject to public safety and convenience considerations. It may grant a franchise (special privilege) to erect the bridge to a private bridge company that is chartered to build and maintain bridges. Such a corporation is considered a business affected with a public interest. A state agency may be organized to receive a franchise to construct a bridge.

The money needed to finance the construction of a bridge is usually raised by appropriations designed for the project—the sale of bonds pursuant to statute, special assessments, or taxation. The legislature decides whether construction expenses will be borne by the entire state or apportioned among its various subdivisions. It may create special taxing districts to finance the project as long as the district receives a proportional benefit from the bridge. State taxes cannot be used to defray the expense of purely local bridge obligations.

A reasonable toll may be charged for using the bridge when authorized by statute. The revenue collected can be used for governmental purposes as well as for the operating and maintenance expenses of the bridge.

The duty to maintain and repair bridges rests with the government agency or private company charged with their operation and maintenance. Statutes frequently require warning signs on guardrails and bridge approaches to caution drivers against known dangers. Civil or criminal liability may be imposed for damages resulting from the failure to maintain a bridge properly. No liability generally, exists, however, for any damages incurred by an adjoining landowner from NEGLIGENCE or other wrongful conduct in the construction or maintenance of a bridge by a municipality or government agency unless provided by statute.

A government entity is often shielded from liability for general harm to persons or property caused by negligent construction, repair, or maintenance of bridges under the theory of SOVEREIGN IMMUNITY pursuant to statute. For example, in the case of *Hansen v. State Dept. of Transportation,* 1998 S.D. 109 (1998), plaintiff Hansen was seriously injured after driving her vehicle into an unmarked construction hole on an interstate highway bridge. The South Dakota Supreme Court affirmed a lower court's decision to dismiss the case on the basis that sovereign immunity barred Hansen from suing the state's department of transportation. Many states have modified their immunity statutes to permit claims premised on gross negligence; others draw a distinction between ministerial (bound by judicial command) and discretionary duties, allowing claims only for negligence in the performance of ministerial duties or functions.

Private companies may be liable for harm if the law in the jurisdiction so provides. When a pedestrian bridge over Interstate Highway 29 in North Carolina collapsed in May 2000 at Lowe's Motor Speedway, 107 persons were injured. More than half filed suits, many naming as defendants the speedway, the bridge builder (a private corporation), and the maker of a grout substance that corroded the steel supporting the

bridge. As of early 2003, none of the cases had yet completed trial.

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## BRIEF

*A summary of the important points of a longer document. An abstract of a published judicial opinion prepared by a law student as part of an assignment in the* CASE METHOD *study of law. A written document drawn up by an attorney for a party in a lawsuit or by a party himself or herself appearing pro se that concisely states the following: (1) issues of a lawsuit; (2) facts that bring the parties to court; (3) relevant laws that can affect the subject of the dispute; and (4) arguments that explain how the law applies to the particular facts so that the case will be decided in the party's favor.*

A brief may also contain a synopsis of the evidence and name the witnesses to be presented during the trial. Copies of briefs must be submitted to the court where the case will be heard and to the opposing party.

"THE OPINION THAT 'POLITICAL' TREATIES SHOULD NOT BE SUBJECT TO RIGID JUDICIAL ANALYSIS RESTS UPON MISCONCEPTION AND IS BELIED BY PRACTICE."
—HERBERT BRIGGS

An appellate brief is a writing that must be filed with an appellate court so that the court may evaluate whether the decision of the lower court should be reversed because of some error or impropriety that occurred during the trial. A statement of the issues presented for review, a summary of how pertinent laws affect the facts, and a statement of the relief being requested are essential elements of an appellate brief. The appellee's brief will argue that the lower court acted properly in its judgment and request its affirmance, while the appellant's brief will attempt to convince the court to reverse or vacate the lower court's judgment because it acted improperly.

See also the *Milestones in the Law* and *Appendix* volumes for examples.

## BRIGGS, HERBERT WHITTAKER

Herbert Whittaker Briggs was a prominent figure in the field of INTERNATIONAL LAW where he made important contributions as a scholar and educator and served on the UNITED NATIONS International Law Commission.

Born in Wilmington, Delaware, in 1900, Briggs was one of a small group of American international lawyers in the twentieth century who did not hold a law degree. He received an A.B. from West Virginia University in Morgantown, West Virginia, in 1921 and a Ph.D. from Johns Hopkins University in Baltimore, Maryland, in 1925. Over the next four years, he studied international law in Brussels, Belgium, and at the Hague Academy of International Law; served as a research associate at the Foreign Policy Association; and taught at Oberlin College in Oberlin, Ohio, and at Johns Hopkins. In 1929, he joined the faculty at Cornell University in Ithaca, New York, where he remained until his retirement in 1969. At Cornell, Briggs taught international law, international organization, and international politics as a member of both the Department of Government and the law faculty.

Briggs had a distinguished career as a scholar and editor. His best-known work was *The Law of Nations: Cases, Documents and Notes* (first published in 1938), which became a standard text in international law courses throughout the country. In addition, he was the author of *The Doctrine of Continuous Voyage* (1926), *The*

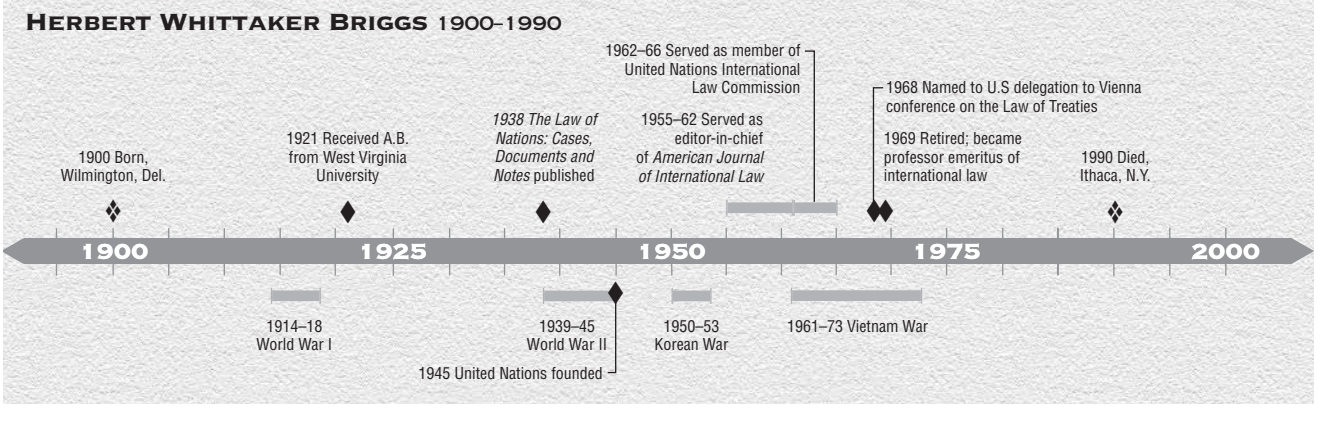

*International Law Commission* (1965), two sets of lectures at the Hague Academy, and more than eighty articles on international law topics. Throughout most of his career, Briggs was closely associated with the *American Journal of International Law,* serving on the journal's board of editors from 1939 until his death and as editor in chief from 1955 to 1962. He was president of the American Society of International Law in 1959 and 1960.

In addition to his work as an educator and scholar, Briggs also had an active career as an international lawyer. From 1962 to 1966, he was a member of the United Nations International Law Commission. In 1968, he was named to the U.S. delegation to the Vienna Conference on the Law of Treaties. In addition, he served as counsel for Honduras, Spain, and Libya in four cases before the INTERNATIONAL COURT OF JUSTICE. He also served as counsel for Canada and Chile in international arbitral proceedings. In 1975, he was one of five persons appointed by the governments of Great Britain and France to serve as a court of ARBITRATION to delimit a portion of the continental shelf in the English Channel. Commenting on Brigg's career, Judge Stephen M. Schwebel of the International Court of Justice said that in all these activities "he was very much the advocate and architect of a more effective international law."

Briggs died January 6, 1990, in Ithaca.

## BRIGHT LINE RULE

*A judicial rule that helps resolve ambiguous issues by setting a basic standard that clarifies the* AMBIGUITY *and establishes a simple response.*

*The bright line rule exists to bring clarity to a law or regulation that could be read in two (or more) ways. Often a bright line is established when the need for a simple decision outweighs the need to weigh both sides of a particular issue.*

In the case of *Knight v. Avon Products* 2003, SJC 08876, the Massachusetts Supreme Judicial Court established a bright line rule for AGE DISCRIMINATION. The plaintiff, who was over 40 years of age, was terminated from her position and claimed that her termination was the result of discrimination based on her age. The person who was hired to replace the plaintiff, however, was only 28 months younger. The defendant argued that the plaintiff's age played no role in the termination decision, adding that 28 months is an insignificant difference. A trial court disagreed, but the high court agreed with the defendant. The court then went on to establish a bright line figure of five years or more for a valid age discrimination suit to be launched.

The court arrived at this figure because it realized that to do otherwise could leave employers open to lawsuits if they replaced a worker with someone who was only two years younger. To avoid endless argument, the five-year figure was established. If there was a pattern of discriminatory behavior toward an employee, it might be possible to see a two- or three-year difference as enough to tip the balance against that employee. In the general course of employment issues, however, the court felt that this particular bright line would set a useful guideline for both employees and employers.

In *Ohio v. Robinette* 519 U.S. 33, 117 S.Ct. 417, 136 L. Ed. 2d 347, 1996, the U.S. Supreme Court reversed a bright line rule established by the Ohio State Supreme Court. Robinette was stopped by a deputy sheriff for speeding. He complied with the deputy's instructions; he handed over his driver's license and stepped out of the car. A computer check of the license came up clean, and the deputy merely warned him not to speed again. Then he asked Robinette whether he had any drugs in his car. Robinette replied no and the deputy asked if he could search the car. Robinette agreed. The deputy found some marijuana and a pill that appeared to be a controlled substance, and he arrested Robinette.

Robinette pleaded no contest and was found guilty, but the Ohio Court of Appeals reversed his conviction because he had been unlawfully detained. The Ohio Supreme Court, citing the FOURTH AMENDMENT, agreed and established the bright line rule that claimed the police were required to tell a citizen he was free to go before they could obtain a voluntary search consent.

The U.S. Supreme Court reversed the decision, concluding that the Fourth Amendment had not been violated. Robinette had been lawfully detained for speeding, and the deputy had the right to ask him out of the car. As for the bright line rule, the Court rejected that as well. Under the Fourth Amendment, consent to a search must be voluntary, but being told one is free to go is not the sole criterion for determining whether the search is voluntary. Thus, the bright line established by the state court was not valid. Interestingly, one justice noted that the state court might have been able to establish a valid bright line rule if it had based the rule on state rather

than federal law, since states have the freedom to impose stricter restrictions on police activity than the federal government's restrictions.

The case of *Federal Election Commission v. Christian Action Network* 110 F. 3d. 1049 (4th Circuit 1997) upheld a bright line rule established earlier that protects free speech. The FEDERAL ELECTION COMMISSION sued the Christian Action Network for using its corporate funds to pay for a television commercial that attacked President BILL CLINTON and Vice President AL GORE for their support of GAY AND LESBIAN RIGHTS. Under the Federal Election Campaign Act of 1971, it is illegal for a corporation to use treasury funds to campaign for or against a specific presidential candidate. The U.S. Supreme Court later stated that to ensure the law did not violate free speech, it had to follow a bright line: As long as a corporation did not use certain words in its communications, those communications, were protected and lawful. The words include "vote for," " vote against," "cast your ballot," "defeat, reject," and "support."

None of the bright line words appeared in the Christian Action Network's commercial. It may have been unwelcome and, for many, offensive, but it did not violate any election campaign regulations. The bright line rules in this case were established to ensure that there would be no political CENSORSHIP. The Supreme Court differentiated between speech that advocated issues and speech that advocated election results.

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## BRING SUIT

*To initiate legal proceedings; to start an action for judicial relief.*

Under federal and most state law, a suit is commenced upon the filing of the first paper, which is the complaint, with the court. STATUTES OF LIMITATIONS set forth time boundaries within which an action must be brought.

## BROADCASTING

*As a verb, to transmit programs or signals intended to be received by the public through radio, television, or similar means. As a noun, the radio, television, or other program received by the public through the transmission.*

In 1898 Guglielmo Marconi, a 24-year-old Italian, began the world's first commercial radio service. For citizens of the United States, radio—and later television—not only introduced an abundance of entertainment and information, it also raised many legal questions surrounding its implementation and regulation. In radio's earliest days, stations all broadcast at the same frequency; this situation posed problems because although some stations agreed to share their time, others attempted to broadcast stronger signals over those of their competitors. Problems continued even when stations began to broadcast on separate frequencies. Because broadcasting requires use of the airwaves for the transmission of its signals, and because the airwaves can carry only a limited number of signals, it soon became apparent that some form of regulation was necessary. In 1927, the Radio Act (47 U.S.C.A § 81 et seq.) became law and the Federal Radio Commission (FRC) was created to police the broadcasting industry. Two important tenets of broadcasting were introduced by the law. The first was that stations must broadcast "in the public interest, convenience, or necessity." The second was that the people, not the radio stations, owned the airwaves. In its efforts to see that the airwaves were used in the appropriate manner, government regulation faced obstacles as it attempted to ensure suitable government-funded programming, appropriate programming for children, and equal access to broadcasting for minorities. Additional challenges were created by changing technology as CABLE TELEVISION went underground and satellite television took to outer space.

### The History of Radio

In its infancy, broadcasting was much less controversial. Experimental radio broadcasting began in 1910 when Lee De Forest produced a program from the Metropolitan Opera House in New York City. Other experimental radio stations were started at the University of Wisconsin in Madison in 1915 and another in Wilkinsburg, Pennsylvania, a suburban of Pittsburgh, in 1916.

Detroit radio station WWJ is considered the first commercial radio station in the United States. It began broadcasting on August 20, 1920. Pittsburgh station KDKA grew out of the Wilkinsburg experimental station. Its broadcast of the 1920 presidential election results on November 2, 1920, is generally considered to be

the beginning of professional broadcasting. Although fewer than one thousand receivers were tuned in, the excitement of the event created great publicity.

Stations soon started appearing in all parts of the United States. By the end of 1924, 583 radio stations were transmitting and more than 3 million receivers were tuned in. These stations transmitted radio signals using *amplitude modulation*, the abbreviation of the term becoming the general category AM radio. AM broadcasts can be received at great distances because the radio transmissions bounce off the atmosphere and reach beyond the curve of the earth. However, AM signals are affected by static, thus reducing sound fidelity.

Radio established itself as a national medium with the creation of the first radio network in 1926. In that year the National Broadcasting Company (NBC), led by David Sarnoff, head of its parent company, Radio Corporation of America, presented its first national broadcast. Radio stations around the country entered into contracts with NBC that allowed them to receive an audio feed through a telephone line, which was then broadcast by the station's radio transmitter. Apart from creating a national radio audience, NBC also introduced the financial cornerstone of commercial radio: networks and local stations would support themselves by selling advertising time. The success of NBC led to the creation of the Columbia Broadcasting System (CBS), led by William Paley.

The success of radio produced problems as well. There was competition for frequencies and increased transmission power. The strongest AM stations have a power of 50,000 watts. At this strength, a station can be heard at night up to 1,000 miles away. The least powerful AM stations operate at 250 watts, which usually limits their range to one or two towns. Unregulated growth of the radio industry led in 1934 to the passage of the Communications Act (40 U.S.C.A. § 791). This act created the **FEDERAL COMMUNICATIONS COMMISSION** (FCC), which replaced the FRC. The FCC began regulating broadcasting content. In the 1930s it banned over-the-air advertisement of hard liquor and lotteries.

The period from 1925 to 1950 has been called the "Golden Age of Radio." During this period radio was a major source of family entertainment. Every night families would gather around the radio and listen to news, music, comedies, and adventure dramas. Serialized stories aimed mainly at women, dubbed "soap operas," became popular. They were called soap operas because they were initially sponsored by soap companies. President **FRANKLIN ROOSEVELT** became the first president to understand the power of radio. He regularly conducted "fireside chats" over the radio between 1933 and 1945. These informal talks helped Roosevelt gain support for his policies.

*President Franklin Delano Roosevelt delivers a 1942 radio address, one of his numerous "fireside chats." The term was first used by a reporter to describe a Roosevelt radio address on May 7, 1933.*

BETTMANN/CORBIS

The importance of radio as a national medium was reinforced during **WORLD WAR II**. Edward R. Murrow became a national figure when he broadcast from London during the early years of the war. Following the U.S. entrance into the war in December 1941, millions of Americans turned to the radio every day to hear the latest war news.

The popularity of radio continued into the late 1940s until the beginning of television signaled radio's rapid demise as the major source of home entertainment. The popularity of television was so great and so sudden that the FCC had to put a temporary freeze on the granting of licenses, as the number of available broadcast channels was limited. As soon as the freeze was lifted, radio began to lose advertisers to the new medium. Network radio was nearly dead by the early 1950s because all of its greatest stars had moved their programs to television. NBC and CBS quickly shifted their focus to the creation of television networks.

Faced with this sudden change, AM radio developed new formats. Music stations began to specialize in top 40 hits in popular music, country music, and rhythm and blues music. By the 1990s, talk radio had become a popular and profitable format, making national celebrities of political commentator Rush Limbaugh and "shock jocks" Howard Stern and Don Imus. Stern and Imus received the shock jock designation as a result of their raunchy and outrageous behavior on the air. Pacifica challenged the FCC's actions.

Radio broadcasting experienced new growth in the 1960s and 1970s with the licensing of many FM radio stations. FM stations transmit radio signals by *frequency modulation*, hence the initials, FM. FM waves do not travel as far as AM waves, but FM waves are not affected by static as much as AM waves. In addition, FM signals produce a much truer reproduction of sound. Since the late 1960s FM stations have had the ability of broadcasting in stereo. This development was a factor in the growth of the popularity of FM stations. Music from records and compact disks can be transmitted in high fidelity.

Despite the dominance of television, radio continues to play a major role in broadcasting. More than 10,000 radio stations were broadcasting in the United States in 1995.

As of 2003, the FCC was continuing to serve numerous roles in the radio broadcasting industry. It processes license applications, assigns frequencies and call signs, conducts hearings, enforces regulations, licenses radio operators, and carries out the provisions of the Communications Act.

The U.S. Supreme Court has upheld the FCC's right to police the airwaves for obscene material. In *Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726, 98 S. Ct. 3026, L. Ed. 2d 1073 (1978), a New York radio station owned by the Pacifica Foundation broadcast comedian George Carlin's monologue on the "seven dirty words you can't say on the radio." When a listener complained to the FCC that he had heard the monologue in his car while his young son was present, the FCC investigated. Although it imposed no formal sanction, the FCC indicated that the complaint would be placed in the station's license file. If any subsequent complaints were received, the commission stated that it would then decide whether any sanctions would be applied. One potential sanction was the loss of the station's license, when it came up for renewal in three years.

Justice JOHN PAUL STEVENS, writing for the majority, noted that the "broadcast media have established a uniquely pervasive presence in the lives of all Americans." Offensive material over the airwaves "confronts the citizen, not only in public, but also in the privacy of the home, where individuals' right to be left alone plainly outweighs the FIRST AMENDMENT rights of an intruder." In addition, broadcasting is "uniquely accessible to children, even those too young to read." Thus, the Court ruled that the FCC had the constitutional right to take the action it did.

In 1987 the FCC demonstrated its continuing interest in preventing the radio broadcast of indecent or obscene language when it threatened not to renew the licenses of several radio stations in New York and California that were engaged in "shock radio." The talk programs, including one by Howard Stern, were intentionally controversial and given to large doses of profanity and sexual innuendo. Although the FCC's threats made headlines, there was little talk of challenging the agency's regulations.

The FCC had a hand in the growth of political talk radio shows such as Rush Limbaugh's when it repealed the "fairness doctrine" in 1987. Since 1934, the FCC had required broadcasters to devote a reasonable proportion of their airtime to discussion of important public issues. Until 1987, the FCC had interpreted this doctrine to require broadcasters who ran editorials that criticized specific persons to provide notice to the persons involved and airtime for rebuttal.

The Supreme Court upheld the FAIRNESS DOCTRINE as a reasonable balance between the public interest in hearing various points of view and the broadcaster's interests in free expression. *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969). Nevertheless, the doctrine remained controversial until its repeal. Freed from this doctrine, radio show hosts such as Limbaugh were free to criticize public figures without having to give the person airtime to respond.

Although a radio license is considered property, a license does not have a constitutional right to a radio license, nor does a licensee obtain a vested interest in any frequency. The FCC continues to consider all applications for a licensee to use a radio frequency. Both new

applicants and applicants seeking to renew their licenses must demonstrate to the FCC that the issuance or renewal of the license will serve the public interest.

Congress has retained the right, through the FCC, to deny licenses or to eliminate existing radio stations. The FCC may eliminate a station upon a showing that the station engaged in misconduct, such as attempts to bribe an official of the FCC. The commission may also eliminate stations in order to allocate licenses fairly and equitably, as well as for considerations related to wavelengths, times of operation, and the relative power of stations among various states.

### The History of Television

In 1928, General Electric (GE) displayed the first presentation on a television, but it was quite some time before the invention became a practical reality. The 1930s brought an excitement to those conducting experiments on the new technology. They predicted that television would be as much a part of the life of the United States as radio had become.

In 1939, the National Broadcasting Company (NBC) brought television to the world during the New York World's Fair, and on February 1, 1940, it conducted the first official network television broadcast in the United States. In 1941, the FCC officially authorized commercial television, transferred television sound from AM to FM, and increased the resolution standards for broadcasts. By 1948, a total of 36 television stations were broadcasting and over 1 million television sets were receiving. So many applications for new stations were coming in to the FCC that a freeze on requests was instituted. In 1952, the freeze was lifted and 70 *ultrahigh-frequency* (UHF) channels were added to those already available. By 1953, nearly 400 stations were providing coverage to nearly 90 percent of the United States; no medium in history could compare to television in its record-breaking implementation.

### The Future of Radio and Television

As the popularity of television and radio continues to grow, controversy and concern continue to surround their implementation and worth. Issues range from government regulation to suitable or ethical content. The future of the broadcast industry is in the hands of the courts and the government as they seek to determine the best possible means of making the broadcast media serve the needs of the society that has grown to depend on them.

**Broadcasting**

**USE OF BROADCAST MEDIA, 1970 TO 2000**

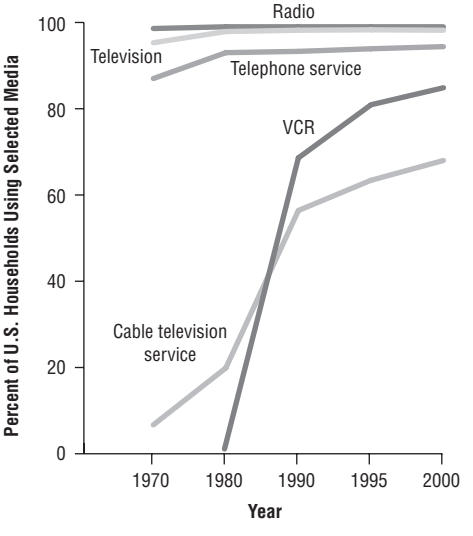


SOURCE: U.S. Bureau of the Census, *Statistical Abstract of the United States*, 2002.

### Cable Television

Communications technology advanced again when cable television joined traditional broadcast radio and television. Cable television, or community antenna television (CATV), provides a means for otherwise inaccessible areas to receive broadcast signals that are in some way impeded. The FCC claimed authority over the regulation of cable television in 1966. The claim of this authority was challenged, but in 1968, it was upheld by the Supreme Court (*United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S. Ct. 1994, 20 L. Ed. 2d 1001).

Dealing with cable television has proved to be controversial. The standards that were originally established in the Communications Act apply to broadcast television; cable television is not broadcast across the airwaves—it is transmitted through coaxial cable that may be able to carry over 200 channels. Because of this fact, some argue that cable television should be treated more like print media such as newspapers and magazines, than like broadcast television. Since cable operators select the channels that they carry, they argue that they should be treated as "electronic publishers."

Such distinctions are significant because the U.S. Supreme Court has held that the First Amendment will tolerate more government regulation of the broadcast media than of the print media because the physical capacity of the airwaves is limited and cannot accommodate all the existing demand (*FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775, 98 S. Ct. 2096, 56 L. Ed. 2d 697 [1978]). In other words, without regulation, the competing voices on the airwaves would drown each other out.

In one form or another, government regulation is involved in two issues concerning cable television. One issue is whether cities may limit access to all or part of their territory to a single cable supplier. Many cities have granted what are essentially MONOPOLY franchises, and this practice has been challenged by cable suppliers who argue that disallowing them a franchise interferes with their free speech rights.

The cable franchise system that exists for cable operators was approved by Congress in 1984 in the Cable Communications Policy Act (15 U.S.C.A. § 21; 18 U.S.C.A. § 2511; 46 U.S.C.A. §§ 484–487; 47 U.S.C.A. § 35 et seq.). This act attempted to balance the interests of cable operators, who wanted less regulation, with the public-policy concerns of the cities, which wanted guarantees that poorer neighborhoods would be wired for cable and that educational and government programming would not be neglected.

Under 47 U.S.C.A. §§ 541–543, a franchising authority—usually a city or county—may award one or more franchises within its jurisdiction; in practice, most have chosen one. Franchising authorities are authorized to require cable operators to reserve channel space for public, educational, and government use. Operators may also be required to make space available for lease for commercial use by persons not affiliated with the operator.

This system of franchising has been attacked from both sides. Some operators have become upset when their applications for franchises were denied in areas where other operators had established franchises. The public has also been concerned over the monopolistic nature of cable operators. Arguments often revolve around the issue of cable rates; competition among cable operators, it is argued, would also lead to competitive pricing of services. Despite this argument, very few franchising authorities choose to offer more than a single cable operator to an area's residents.

The second issue surrounding the regulation of cable television is whether the FCC's "must-carry" rules, which require a cable operator to carry all local television stations, violate the First Amendment. The must-carry rules were instituted in an effort to ensure that cable television would not undermine the financial viability of free community-oriented television by attracting so many viewers away from local broadcast television stations that the advertising revenues of those stations would plummet. In 1984, a federal appeals court held that the must-carry rules violated the First Amendment (*Quincy Cable TV v. FCC,* 768 F. 2d 1434 [D.C. Cir. 1985]). The Supreme Court denied review of the case, and the FCC eliminated the must-carry rules.

The must-carry rules were problematic for one main reason: although most cable operators have the ability to carry many hundreds of channels, some can carry only a dozen. Requiring the latter to carry all local stations severely limited their ability to attract subscribers. Operators also argued that being forced to carry all local broadcasts caused cable systems to become saturated and deprived cable programmers of opportunities to sell their services.

### Satellite Broadcasting

The new technology of direct-broadcast satellite television is replacing transmission over the airwaves with transmission by satellite signals beamed to the home from space. Like cable television, despite its separation from conventional airwave broadcasting, the new technology has generated legal controversy.

To maintain constant, direct contact between itself and the recipients of its signals, a satellite must hold a *geostationary orbit* directly above Earth's equator at an altitude of 22,300 miles. (A geostationary orbit is an orbit that keeps the satellite's position fixed with respect to Earth.) The controversy surrounding satellite broadcasting comes not from any limit on the number of signals it can send but instead from the physical limitation of these geostationary orbits.

The world saw its first geostationary satellite launched by the United States in 1963; as of 1992, the United States had 30 geostationary satellites orbiting Earth. By the mid-1980s, the United States and other developed countries were quickly filling the equatorial orbit with satellites. Many developing countries feared that by the time they had developed the technology

to put up their own satellites, the zone of geostationary orbit in space would be filled and they would be forced to buy broadcast time from countries owning satellites that were already in orbit. In 1985, the International Telecommunication Union (ITU), an agency of the UNITED NATIONS, established new procedures that would represent the interests of these developing countries.

The ITU originally established a first-come, first-serve policy regarding the assignment of geostationary orbits. The World Administrative Radio Conference of 1985 upheld the continuation of this policy but also voted to guarantee at least one geostationary orbit to each country that was a member of the ITU. The decisions of the 1985 conference were finalized by another session in 1988. Although these decisions supported the interests of the United States in part—it could continue filling geostationary orbits—they caused concern for the FCC. The satellite technology of the United States would not, after all, be allowed to grow unchecked. Orbits that the United States had once assumed would be its to use were reallocated to other countries. The decisions of the World Administrative Radio Conferences of the 1980s gave the FCC even greater cause for regulating the broadcast industry within the United States and for being more selective about who is granted geostationary orbits and a piece of a broadcast industry that by the year 2000 was expected to bring in more than $10 billion annually.

### Public Broadcasting

Besides investigating developing technologies, the government and the FCC find themselves revisiting issues that have received attention from Congress, the broadcasting industry, and the public. One such issue is public television.

The Corporation for Public Broadcasting (CPB) was established in 1967 as the official, nongovernment allocator of federal money to public television and radio stations across the United States. In 1992, less than 30 years after its creation, the corporation became a political issue for conservatives who objected to the content and perceived philosophy of public programming and to its partial reliance on U.S. tax dollars.

The attacks began after the House of Representatives approved a bill in December 1991 that would increase spending for the corporation from $825 million to $1.1 billion in a three-year period (H.R. Res. 2977, 102d Congress, 1st Sess. [1991]). (The bill was also passed by the Senate and signed into law in August 1992.) Political conservatives claimed that public broadcasting had a liberal bias, a bloated budget, and offensive programming. Complaints ranged from protests about two frank Public Broadcasting Service (PBS) specials on homosexuality, *Tongues Untied* and *The Lost Language of the Cranes,* to a claim that the Children's Television Network program *Sesame Street* was educationally ineffective and no better than network cartoons.

Public broadcasting claimed that without federal funding through the CPB, its more than 1,000 television and radio stations would cease to exist. Most experts agree that this is not true. Only 14 percent of the operating costs for public broadcasting is supplied by the federal government; the remainder comes from corporations, member donations, and other sources. In 1995, the CPB allocated $285.6 million to public broadcasting, and since 1968, Congress has budgeted more than $4 billion to that concern. Yet, if these funds were cut off, public broadcasting, although wounded, probably would survive. Polls showed that most people like public television and want it to continue, but as opposition gathers in Congress and the Senate, it appears that if public broadcasting is to continue, it may have to do so without federal funding.

### Children

There are other concerns surrounding children and television than whether Big Bird can make it without federal support. Radio and television reach no audience more impressionable than a country's youth, and many controversies surround the exposure of children to sex and violence on television.

Another perennial issue of concern for parents and others is the amount of exposure children have to television; time spent in front of the television might be better spent exercising the body and the mind. It is frequently argued that not enough educational programming is available to children. Since the inception of broadcast programming, education has always been considered an important aspect of it. The Children's Television Act (47 U.S.C.A. § 303a et seq.) was enacted in 1990 in an effort to put more educational programming on television. The response of broadcasters has been sluggish, prompting a

harsh hearing before Congress in 1993. Despite this legislation, some maintain that next to nothing has been done to remedy the quality of children's television, which House Telecommunications Subcommittee chairman Edward J. Markey (D-MA) referred to as "the video equivalent of a Twinkie."

### Minorities

As of 1978, only one percent of all radio and television stations in the United States were run by minorities. In an attempt to diversify broadcasting, the FCC adopted rules that year giving preferential treatment to minorities regarding applications for new station licenses and in taking over failed stations (47 U.S.C.A. § 309). During the Reagan administration, this reform was nearly killed, but Congress saved it. Again, during the GEORGE H. W. BUSH administration, an attempt to stop the FCC was launched, this time when the JUSTICE DEPARTMENT asked the Supreme Court to rule against the new FCC guidelines. The effort to block reform met its final failure in 1990, when the Supreme Court ruled 5 to 4 to uphold the constitutionality of race-based licensing. The Court held that such AFFIRMATIVE ACTION is allowable in the broadcasting market if its purpose is to "serve important governmental objectives" (*Metro Broadcasting, Inc. v. F.C.C.,* 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445). Still, in 1990, fewer than five percent of all radio and television licenses were held by minorities.

Equal opportunity employment has also become a very important consideration in the process of renewing broadcasting licenses. The National Association for the Advancement of Colored People (NAACP) reviews all applications closely to ensure that radio and television stations have provided an opportunity for the employment of minority groups. If any party, such as the NAACP, calls into question the practices of a station, a petition to deny can be filed. If the station cannot provide proof of compliance with equal opportunity standards, it can be denied renewal of its license.

### Telecommunications Act of 1996

Congress overhauled the telecommunications industry in 1996 with the enactment of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (47 U.S.C.A. §§151 et seq.). This statute made a number of major changes to laws governing the telecommunications industry. Among these were deregulatory measures, including provisions allowing local phone companies, long-distance companies, and cable companies to compete over the same services. Another provision requires television manufacturers to include circuitry that allows parents to screen out programming they do not wish their children to view, such as programs featuring violence.

Congress intended for the act to facilitate competition in a variety of areas of the telecommunications market. Several of its provisions have failed. Rival telecommunications companies did not immediately enter each other's markets, so consumers did not receive cost-savings benefits caused by the competition. FCC deregulation rules, according to many commentators, have been obscure and ineffective, leading to several court challenges. Many of the problems have involved local and long-distance telephone companies, some of which have begun to offer "package" deals with local telephone use, long-distance plans, and INTERNET access. Nevertheless, the telecommunications industry between 2000 and 2003 has been in economic turmoil, with several companies ordering massive layoffs or filing for BANKRUPTCY.

The Telecommunications Act of 1996 has also been the subject of several court challenges. Title V of the Telecommunications Act, the Communications Decency Act of 1996, sought to protect minors from exposure to indecent materials transmitted over the Internet. The Supreme Court, in a highly debated case, struck down most of those provisions on First Amendment grounds in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997). The Telecommunications Act also included so-called "signal bleed" provisions, requiring cable operators either to scramble channels containing sexually explicit materials or to limit programming on these channels to certain hours. The Supreme Court likewise struck down these requirements as impermissible content-based restrictions in violation of the First Amendment in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).

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American Civil Liberties Union; Cable Television; Censorship; Courtroom Television Network; Fairness Doctrine; Federal Communications Commission; First Amendment; Freedom of Speech; Mass Communications Law; Telecommunications; Television.

## ♦ BROADHEAD, JAMES OVERTON

James Overton Broadhead was born May 29, 1819, in Charlottesville, Virginia. He attended the University of Virginia from 1835 to 1836, studied law in St. Louis, Missouri, and received his license and established his law practice in Bowling Green, Missouri, in 1842.

In 1845, Broadhead began his political career as a member of the Missouri Constitutional Convention. In the following year he participated in the Missouri House of Representatives, and in 1850 became a member of the Missouri Senate, serving until 1853.

Broadhead returned to the PRACTICE OF LAW, becoming a partner in a St. Louis firm in 1859.

During the pre-Civil War era, Broadhead participated in activities that opposed the Southern cause. He was instrumental in the formation of the Committee of Safety, which restricted the influence of pro-Southern factions in St. Louis, and in 1861 was a member of the Missouri Constitutional Convention, which declared the loyalty of Missouri to the Union.

In 1875, Broadhead attended the Missouri State Constitutional Convention, and in 1876, he gained prominence as government counsel for the Whiskey Ring cases, which involved BRIBERY and dishonesty in the collection of exorbitant liquor taxes.

From 1883 to 1885, Broadhead represented Missouri in the United States House of Representatives, and was a member of the Judiciary Committee. During his later years, he served abroad, acting first as special commissioner to France in 1885, and later as minister to Switzerland for a two-year period.

Broadhead died August 7, 1898, in St. Louis.

"IF EVERY . . . AMERICAN CITIZEN WOULD PERFORM THE DUTIES OF A CITIZEN . . . THERE WOULD BE NO OCCASION OF INVOKING THE STRONG ARM OF ARBITRARY POWER TO PROTECT A PERSON OR HIS PROPERTY."
—JAMES BROADHEAD

## BROKER

*An individual or firm employed by others to plan and organize sales or negotiate contracts for a commission.*

A broker's function is to arrange contracts for property in which he or she has no personal interest, possession, or concern. The broker is an intermediary or negotiator in the contracting of any type of bargain, acting as an agent for parties who wish to buy or sell stocks, bonds, real or PERSONAL PROPERTY, commodities, or services. Rules applicable to agency are generally relevant to most transactions involving brokers. The client is considered the principal and the broker acts as the client's agent. An agent's powers generally extend beyond those of a broker. A distinguishing feature between an agent and a broker is that a broker acts as a middleperson. When a

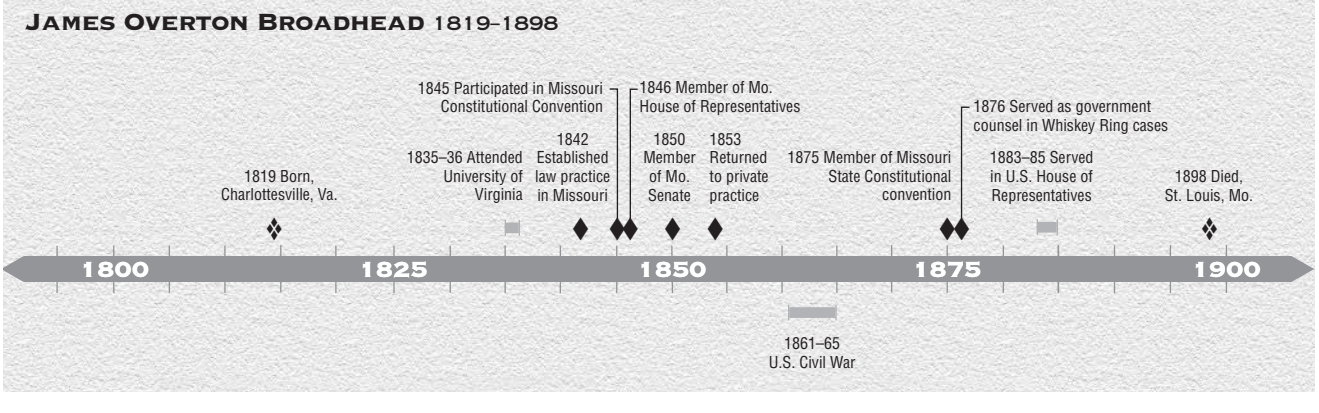

broker arranges a sale, he or she is an agent of both parties.

In order to determine whether or not an individual is acting as a broker in a transaction, the type of services that are performed must be examined.

### Types of Brokers

There are several kinds of brokers, each of whom deals in specific types of transactions.

A bill-and-note broker negotiates the buying and selling of bills of exchange and promissory notes.

A commercial or merchandise broker is an individual who works with buyers and sellers by negotiating between them in the buying and selling of goods, without having personal custody of the property. He or she offers services on a commission basis to manufacturers as a sales representative for their product. Such a broker has no control or possession of the product that is sent directly to the buyer; he or she merely acts as a middleperson in all transactions.

An insurance broker acts as an intermediary between the insurer and the insured and is distinguishable from an insurance agent. While an insurance agent is employed by, and represents, a particular insurance company, an insurance broker is a representative of the insured only. An insurance agent is bound by company rules and responsibilities, whereas an insurance broker's only duty is to aid a client. He or she owes no obligation to any company.

Real estate brokers or agents are hired to transact the buying and selling, lease, or rental of real property on a commission basis. They can also be involved with the purchase and sale of lands, and the acquisition of mortgages for others. They may also counsel and advise people who wish to buy or sell real estate.

Stockbrokers buy and sell shares in corporations and deal in corporation stock and in other SECURITIES. A stockbroker's functions are generally broader than those of other brokers. As more than a mere negotiator, he or she makes a purchase in his or her own name and ordinarily pays the purchase price. A stockbroker is often responsible for the possession of the securities with which he or she deals. Conversely, an ordinary broker neither has title to, nor possession of, property that is being purchased or sold. As stockbrokers serve in a greater capacity, their responsibilities also extend beyond those of ordinary brokers.

### Regulation and Conduct of Business

The business or occupation of a broker may be regulated by the state under its POLICE POWER. A MUNICIPAL CORPORATION has the power to regulate brokers who function within its boundaries if authority to do so is granted by the state.

In order for a broker to engage in business, he or she is generally required to acquire a license and pay a fee. Brokers who conduct business without a license can be fined by state licensing authorities. In some states it is illegal for any person other than a licensed broker to be paid for services concerning real estate transactions.

Laws exist that impose a license tax on brokers. Within the meaning of such laws, any individual who regularly works as a middleperson or negotiates business transactions for the benefit of others is ordinarily considered a broker. It has been held by a federal court that a statute requiring brokers to obtain a license was only applicable to those people regularly employed as brokers. An individual only casually involved in brokerage through the arrangement of only a few sales would not be considered to be engaged in the business of brokerage.

**Revocation of License** The state's concerns regarding brokers extend beyond initial licensing to the establishment of conditions for the maintenance of a license. The state may provide for the revocation or suspension of brokers' licenses for reasonable grounds.

The power to revoke a license may be vested in a specially designated commission that exists primarily to hear complaints about the fraudulent practices of brokers. Such proceedings are ordinarily informal, and technical court rules generally are not observed.

During a hearing, the commission is presented with evidence relating to the broker's conduct and must consider whether such conduct warrants denial of the privilege to engage freely in business.

Grounds for revocation of a license are generally based upon FRAUD, dishonesty, incompetence, or bad faith in dealing with the public. A real estate broker's license may be revoked or suspended because of MISREPRESENTATION used to effect a purchase or sale. Generally, the conduct of a broker in negotiating a real estate transaction on behalf of his or her principal is subject to strict fraud and deceit standards, equal to those imposed on his or her principal. It has been held by some courts that the failure

of a broker to disclose material facts within his or her knowledge will create liability. Within the meaning of fraud is the pretense of knowledge on the part of the broker while executing a real estate transaction where no knowledge actually exists—for example, while selling a house a broker states that there are no concealed defects in the house, although he or she does not actually know if such defects exist.

A real estate broker's license may be suspended or revoked if duties are performed unlawfully. In addition, a broker's license can be revoked or suspended if a broker is guilty of RACIAL DISCRIMINATION in the selling and leasing of property.

Stockbrokers may be liable for various unethical activities, such as churning, which is the unnecessary trading of stocks to gain additional commissions. A CONSUMER PROTECTION organization, the Securities Investor Protection Corporation (SIPC), has been established by Congress to aid customers of securities concerns that go out of business.

**Bonds** State regulations usually require that brokers, especially those engaged in the real estate business, deliver a bond to insure faithful performance of their duties. The liability of the surety guaranteeing such a bond extends only to transactions that arise during the normal course of the broker's business and that are intended to be included in the bond.

**Commissions** A broker is ordinarily compensated for services by the payment of a commission, based upon a portion of the value of the property in a particular transaction.

Generally, a commission is earned when negotiations between a buyer and seller are completed, and an agreement is reached. It is customary for a broker to deduct and reserve the amount of commission from funds obtained by him or her for a client. The ordinary basis for the calculation of a percentage commission is the total sale price of whatever is sold.

In order for a broker to be entitled to a commission, a sale must be completed for which the broker has been employed.

The broker's right to a commission is not dependent upon the finalization of the transaction unless otherwise agreed upon by the broker and by his or her client.

The compensation of a broker is based upon procurement of a client who is willing and able to purchase. The specific terms of the transaction must be satisfactory to the broker's client. Of paramount importance is the prospective buyer's ability to provide the required funds at the suitable time. A broker who has properly performed his or her duties should not be denied a commission due to a failure by the parties to consummate the deal.

In the absence of any agreement to be employed by a client, a broker is not to be compensated for voluntary services. Similarly, compensation is not due a broker when a sale is made by an owner after the broker-client relationship has been terminated. A common type of termination is the expiration of a real estate listing. This rule against the payment of a commission is absolute—regardless of whether or not the sale is made to an individual whom the broker initially produced—provided the broker was given ample opportunity to complete the

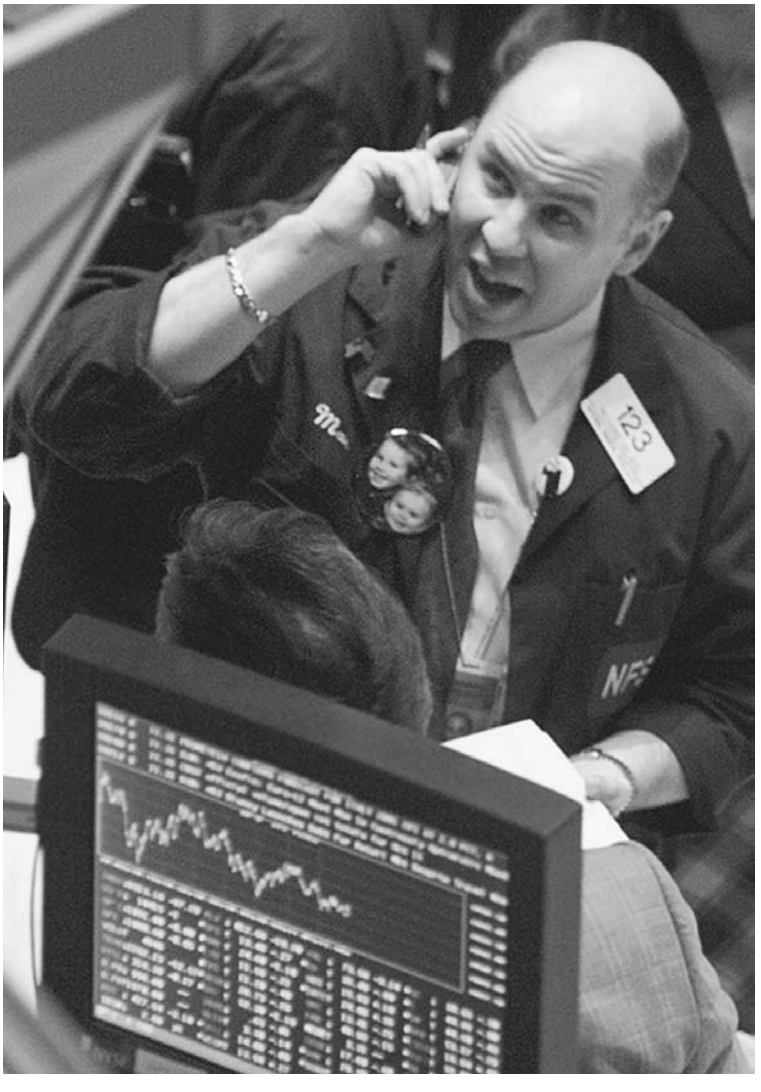


*A broker, such as this man buying and selling stocks on the New York Stock Exchange trading floor, acts as an intermediary in the contracting of any type of bargain.*
AP/WIDE WORLD PHOTOS

transaction and failed to do so. Once a broker has earned his or her commission, a client may not terminate the relationship and complete the transaction himself or herself in order to avoid paying the broker.

Any fraudulent misrepresentations or evidence of bad faith on the part of the broker will defeat his or her right to a commission. Mere NEGLIGENCE in the execution of duties, in the absence of bad faith, does not automatically defeat a broker's right to compensation.

### Future Roles of Brokers

Technology affected the roles of practically all types of brokers. Probably the most significant developments have been related to communications, as new technologies have allowed brokers to communicate with their clients in a variety of means, thus enhancing the ability of the brokers to serve their clients' interests. Some changes were different methods in day-to-day communications, such as the common use of E-MAIL and fax machines. The rise in INTERNET usage in the 1990s also caused a number of changes, as registered brokers began to serve as online customer service representatives for prospective buyers. Economic problems in the early 2000s slowed the development of the role of the broker, but as new technologies continue to develop, the role of the broker was expected to continue to evolve.

"ALTHOUGH THE PEOPLE MUST BE THE SOURCE OF THEIR OWN IMPROVEMENT, THEY MAY BE AIDED IN THEIR EFFORTS TO INSTRUCT THEMSELVES."
—HENRY BROUGHAM

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Contracts; Fraud; Insured; Insurer; License; Principal; Securities.

## BROOKINGS INSTITUTION

Founded in 1927, the Brookings Institution is a nonpartisan organization dedicated to research, education, and publication in the fields of economics, foreign policy, and government. It states as its principal purposes: "to aid in the development of sound public policies and to promote public understanding of issues of national importance."

Brookings maintains a 55,000-volume library. It is organized into the following divisions: Advanced Study, Economic Studies, Foreign Policy Studies, Governmental Studies (which includes some legal studies), Foreign Policy Studies, Governmental Studies, Publications, and a Social Science Computation Center.

The institution publishes the *Brookings Bulletin* (quarterly), the *Brookings Papers on Economic Activity* (twice a year), and an *Annual Report.* It also publishes its extensive research in books and reprints.

## ♦ BROUGHAM, HENRY PETER

Henry Peter Brougham, also known as Baron Brougham and Vaux, achieved prominence as a lawyer and statesman.

Brougham was born September 18, 1778, in Edinburgh, Scotland. In 1802, Brougham was instrumental in the creation of the publication the *Edinburgh Review.* He subsequently relocated to London and was admitted to the English bar in 1808. He became a member of Parliament in 1810, where he voiced his opposition to SLAVERY and trade restrictions.

Brougham gained fame in 1820 as chief attorney for Queen Caroline, also known as Caroline of Brunswick. Caroline had married George, Prince of Wales, in 1795, and after giv-

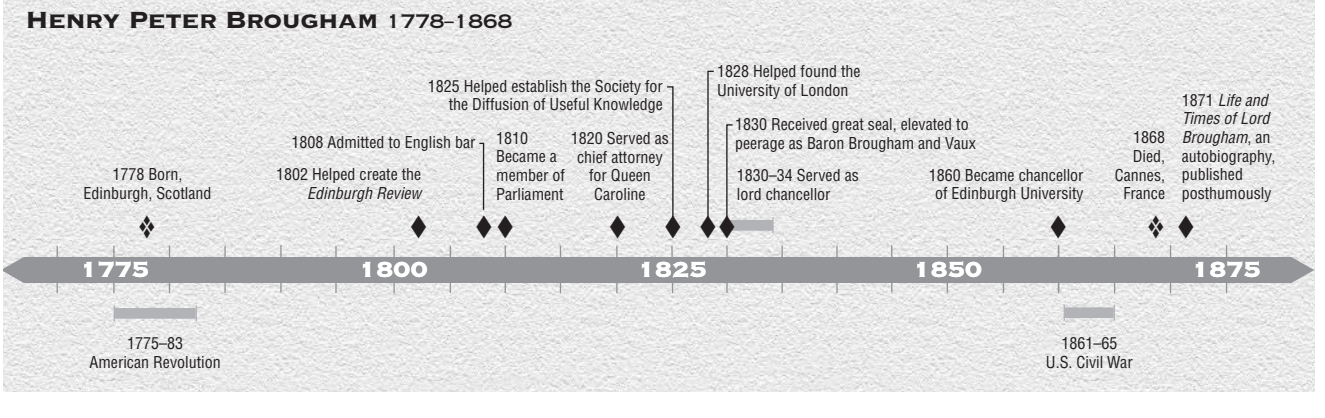

*Henry Peter Brougham.* LIBRARY OF CONGRESS

ing birth to a daughter, they separated, and Caroline lived alone. In 1806, she was accused of giving birth to an illegitimate child, but was found innocent by an inquiry commission. George became king in 1820, and Caroline demanded her place as his queen. Caroline was sued for **DIVORCE** on grounds of **ADULTERY**, and the case was taken to the House of Lords; Brougham served as her attorney, and the charges were eventually dropped.

A leader in the field of educational reform, Brougham participated in the establishment of the Society for the Diffusion of Useful Knowledge in 1825, and of the University of London in 1828.

From 1830 to 1834, Brougham served as Lord Chancellor and drafted numerous legal reforms and helped to institute the central criminal court. He died May 7, 1868, in Cannes, France.

## ♦ BROWN, ADDISON

Addison Brown gained prominence as a jurist, botanist, and author.

He was born February 21, 1830, in West Newbury, Massachusetts. In 1855, Brown was admitted to the New York bar. From 1881 to 1901, he performed the duties of district judge for the Southern District of New York.

A respected name in the field of botany, Brown acted as one of the founders of the New York Botanical Garden in 1891.

From 1896 to 1898, Brown co-authored three volumes of botanical research with Nathaniel L. Britton. The series was titled *Illustrated Flora of the Northern United States, Canada and the British Possessions.*

Brown died April 9, 1913, in New York City.

## ♦ BROWN, HENRY BILLINGS

Henry Billings Brown was an associate justice of the Supreme Court from 1890 to 1906.

Born to a wealthy family on March 2, 1836, at South Lee, Massachusetts, Brown attended private schools as a child. His father, a prosperous merchant and manufacturer, saw to it that Brown attended Yale University, where he graduated in 1856. After graduation, Brown traveled in Europe for a year, then returned to study law at Yale and Harvard. In 1859 he moved to Detroit and in 1860 he was admitted to the Wayne County bar in Michigan.

Brown was appointed deputy U.S. marshal in 1861. Detroit at that time was a bustling Great Lakes port, and he became involved in the many commercial and maritime legal disputes that arose. Two years later, he was named assistant U.S. attorney for the Eastern District of Michigan. He held this post until May 1868 when he was appointed to fill a short-term vacancy on the Wayne County Circuit Court.

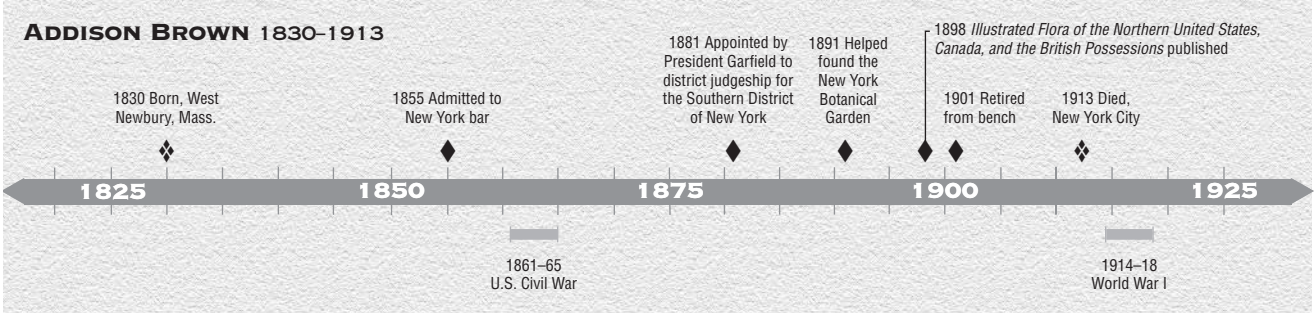

*Henry Billings Brown.*
THE GRANGER COLLECTION, NEW YORK

"THE UNDERLYING FALLACY OF THE PLAINTIFF'S ARGUMENT [RESTS] IN THE ASSUMPTION THAT THE ENFORCED SEPARATION OF THE TWO RACES STAMPS THE COLORED RACE WITH A BADGE OF INFERIORITY."
—HENRY BROWN

Recognized as the leading authority on **ADMIRALTY LAW** and maritime law, Brown lectured on the subjects at the University of Michigan Law School, and compiled and published *Brown's Admiralty Reports.* In 1890 President **BENJAMIN H. HARRISON** appointed him to the U.S. Supreme Court. As a Court member, Brown gained a reputation as a moderate but was a staunch defender of property rights. He was reluctant to extend constitutional protection in **CRIMINAL PROCEDURE** and civil liberties disputes, and concurred with the majority in **LOCHNER V. NEW YORK**, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), which struck down a statute calling for maximum work hours for bakers. *Lochner* was consistent with Brown's unwillingness to allow governmental interference with contractual freedom.

Brown also concurred in the so-called *Insular* cases, which held that residents of U.S. territories such as Puerto Rico are not entitled to constitutional protections. However, he departed somewhat from his usual strict adherence to judicial precedence when he voted to uphold the federal **INCOME TAX** in **POLLOCK V. FARMERS' LOAN & TRUST CO.**, 158 U.S. 601, 15 S. Ct. 912, 39 L. Ed. 1108 (1895).

Brown is perhaps best remembered as the author of the Court's opinion in **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, the 1896 decision upholding state-mandated racial **SEGREGATION** in railway cars as long as the accommodations were equal. The "separate-but-equal" doctrine pronounced in *Plessy* became the constitutional foundation for **JIM CROW LAWS** and **RACIAL DISCRIMINATION**, particularly in the South. Later opinion condemned the *Plessy* decision, and indeed Brown has often been criticized for his role in it; however, the decision must be viewed in the historical context in which it was written. Also, the language in *Plessy,* requiring equality of treatment, later became the basis of legal challenges to segregation laws.

Failing eyesight forced Brown to retire from the bench in 1906. He died in 1913.

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Labor Law; *Brown v. Board of Education of Topeka, Kansas*; Equal Protection.

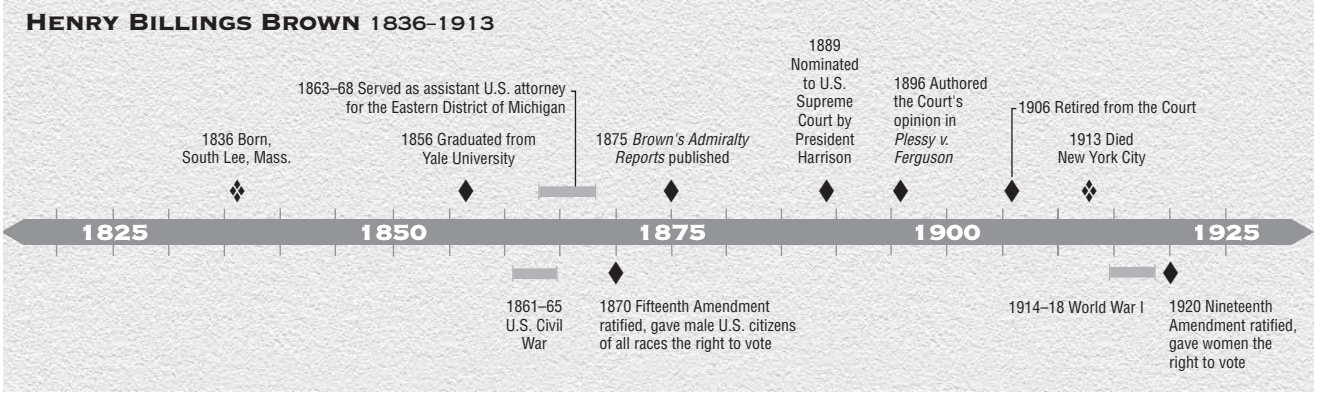

## ❖ BROWN, JOHN

John Brown was a charismatic, stubborn abolitionist who failed at numerous business and commercial enterprises, yet succeeded in convincing men to join him in a cause for which they were willing to die. His abolitionist beliefs translated into violent actions in Kansas and Harpers Ferry, Virginia. Convicted of murder and TREASON for his raid on military facilities at Harpers Ferry, Brown was hanged for his crimes. Nevertheless, he galvanized the abolitionist cause, becoming a martyr in the fight against SLAVERY.

Brown was born in Torrington, Connecticut, on May 9, 1800, to Owen and Ruth Brown. His father, a strict Calvinist, despised slavery. When Brown was five years old, the family moved to Hudson, Ohio, a locale that was steeped in anti-slavery sentiment. Brown's fervor for the anti-slavery movement never waned and grew more vehement as he got older.

In 1820, Brown married Dianthe Lusk and six years later, they moved to Pennsylvania where he started a tannery. Lusk died in 1832, leaving Brown with five children. In 1833, he married 16-year-old Mary Ann Day who bore him seven more children. Brown and his growing family moved around the country while he tried his hand at a number of occupations, including tanner, farmer, cattle broker, and wool merchant.

In 1835, Brown's attempts to support his family and to repay money he had borrowed led to a disastrous "get rich quick" scheme. He convinced family members and friends to loan him money that he used to buy property where a canal was to be built. His timing proved unfortunate. In the wake of the Panic of 1837, plans for the proposed canal were changed and the properties bought up by Brown and his associates were rendered nearly worthless. Brown made numerous other attempts to reach financial solvency, but ultimately was forced to declare BANKRUPTCY in 1842.

Throughout his life Brown remained committed to the anti-slavery cause. Brown met the great abolitionist leader FREDERICK DOUGLASS in 1847 and impressed Douglass with his sympathy for African Americans—both slaves and freemen. In 1849, Brown moved his family to the black community of North Elba, New York. Brown proposed to show the residents of North Elba how to farm and to act as a mentor to them.

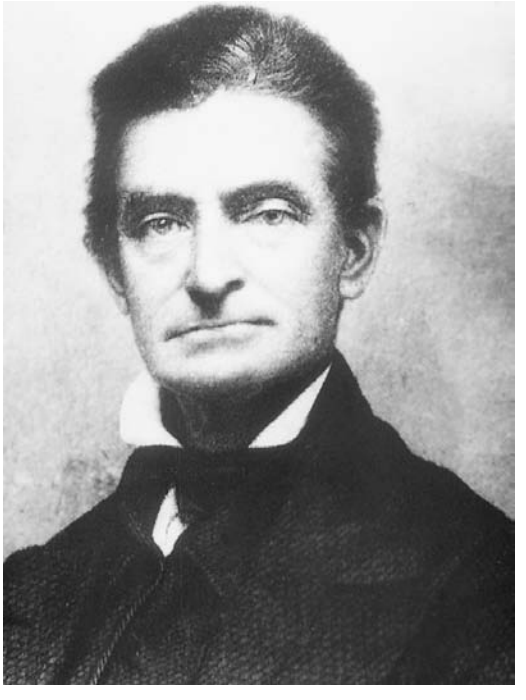

*John Brown.*
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Brown was a participant in the Underground Railroad, an informal network of ex-slaves and sympathetic whites that helped slaves escape their masters and travel north to freedom. In 1851, he proposed the establishment of the League of Gileadites, an organization that would be used to protect escaped slaves.

In 1854, Congress passed the KANSAS-NEBRASKA ACT, which called for the residents of the new territories to decide the issue of slavery by popular vote. The area became known as "bloody Kansas" as competing groups fought violent skirmishes aimed at securing the territories for their side. Many pro-slavery residents of Missouri moved across the border in hopes of securing a victory at the election.

Five of Brown's sons had moved to Kansas and they entreated their father to join them. In 1855, Brown moved to Kansas and began to plan for the armed conflict he felt was inevitable. In 1856, in response to escalating incidents including the sacking of the anti-slavery town of Lawrence, Kansas, and the near-fatal beating of U.S. Senator CHARLES SUMNER who was attacked on the Senate floor by a pro-slavery congressman, Brown led a small band of men to Pottawatomie Creek, Kansas, where they killed five pro-slavery settlers. This violent action by Brown was hailed by a number of anti-slavery groups and universally reviled by pro-slavery forces.

"I BELIEVE TO HAVE INTERFERED AS I HAVE DONE . . . IN BEHALF OF HIS DESPISED POOR, WAS NOT WRONG, BUT RIGHT. NOW, IF IT BE DEEMED NECESSARY THAT I SHOULD FORFEIT MY LIFE FOR THE FURTHERANCE OF THE ENDS OF JUSTICE . . . I SUBMIT: SO LET IT BE DONE"
—JOHN BROWN

In December 1858, Brown and a small group of followers staged a raid on two pro-slavery homesteads in Missouri where they succeeded in confiscating property and freeing 11 slaves. Brown and his group then traveled more than a thousand miles to deliver the former slaves to a boat that would carry them to freedom in Canada.

Although many abolitionists were opposed to violence, others had begun to adopt Brown's view that armed conflict was necessary in order to achieve the ABOLITION of slavery. Between 1857 and 1859, Brown crisscrossed New England, giving rousing speeches to anti-slavery groups and raising money for the abolitionist cause. Among those who gave money were the Secret Six, a group of wealthy benefactors from Boston who helped Brown by funding the army he sought to lead in order to further conduct his war against slavery.

On October 16, 1859, the 59-year-old Brown led his Provisional Army, consisting of five black men and 21 whites (three of them his sons) in a nighttime raid on the town of Harpers Ferry, Virginia. Brown and his men cut telephone wires, took several hostages and gained control of the federal armory and arsenal. Brown's plan was to arm slaves with weapons from the arsenal, thus enabling them to fight for their freedom. However, he and his group found themselves pinned down by a group of local citizens and nearby militia groups who killed a number of his men including two of his sons.

On the morning of October 18, a contingent of U.S. marines led by Colonel Robert E. Lee joined the battle. Brown refused a chance to surrender and 36 hours after the raid had started, Brown and his remaining companions were captured. Brown was taken to Charles Town, Virginia, (now West Virginia) to be tried. In a trial that lasted for nearly a month, Brown was charged with murder, conspiracy, and treason against the state. He was found guilty of all three charges. Before hearing his sentence, Brown gave a brief but passionate statement to the court:

> . . . I believe to have interfered as I have done . . . in behalf of His despised poor, was not wrong, but right. Now, if it be deemed necessary that I should forfeit my life to the furtherance of the ends of justice, and mingle my blood further with the blood of my children, and with the blood of millions in this slave country whose rights are disregarded by wicked, cruel, and unjust enactments, I submit: so let it be done.

Brown was hanged in Charles Town on December 2, 1859. On the day of his execution, guns were fired and bells tolled in many northern cities. Brown was hailed as a martyr of the abolitionist movement, which concluded that a peaceful solution could not be found. In April 1861, Confederate forces fired on Fort Sumter, an action that marked the beginning of the Civil War. In 1865, Congress passed the THIRTEENTH AMENDMENT, which abolished slavery throughout the United States.

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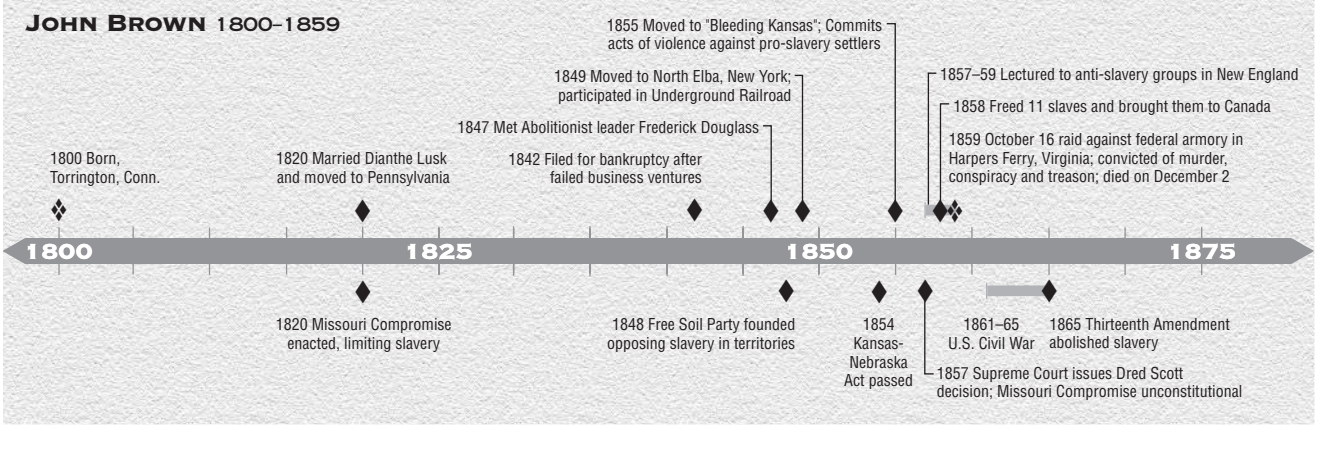

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Abolition.

## ◆ BROWN, JOSEPH EMERSON

Joseph Emerson Brown was born April 15, 1821, in Pickens District, South Carolina. He was a graduate of the Yale Law School class of 1846, and was admitted to the Georgia bar.

In 1849 Brown entered politics and served in the Georgia Senate. In 1852 he was a presidential elector and in 1855 he served as a circuit judge.

Brown became governor of Georgia in 1857 and, for the next eight years, voiced his opposition to Jefferson Davis, president of the Confederacy, concerning involuntary service in the ARMED SERVICES and the elimination of the writ of HABEAS CORPUS. He was a strong supporter of STATES' RIGHTS and often spoke out against the authority of a centralized government. In 1865 he was imprisoned but was released by President ANDREW JOHNSON shortly afterwards.

From 1868 to 1870 Brown again served in the judiciary, presiding as chief justice of the Georgia Supreme Court.

Brown entered federal government service in 1880, representing Georgia in the U.S. Senate for an eleven-year period, retiring in 1891. He died November 30, 1894, in Atlanta.

## ◆ BROWN, RONALD HARMON

The career of Ronald Harmon Brown is a portrait of a consummate Washington, D.C., insider. As an African American attorney, Brown broke several color barriers during his rapid rise in politics from the 1970s to the early 1990s. He first entered the public eye as a CIVIL RIGHTS leader for the NATIONAL URBAN LEAGUE. Soon his reputation for persuasiveness and ingenuity led to a variety of assignments: political strategist to Senator EDWARD M. KENNEDY (D-Mass.) and JESSE JACKSON, chief counsel of the U.S. SENATE JUDICIARY COMMITTEE, and lobbyist for foreign governments. In the 1980s, Brown became the first black chairman of the Democratic National Committee (DNC). He steered the DEMOCRATIC PARTY toward a more centrist position, thus helping prepare the way for President Bill Clinton's election in 1992. Clinton picked him to head the DEPARTMENT OF COMMERCE. Although Brown had some notable successes in reviving the lifeless bureaucracy, allegations of corruption damaged his tenure.

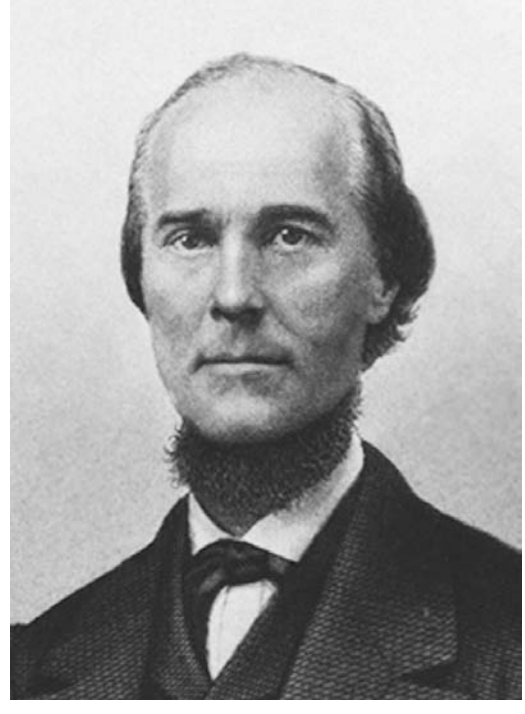

*Joseph Emerson Brown.*

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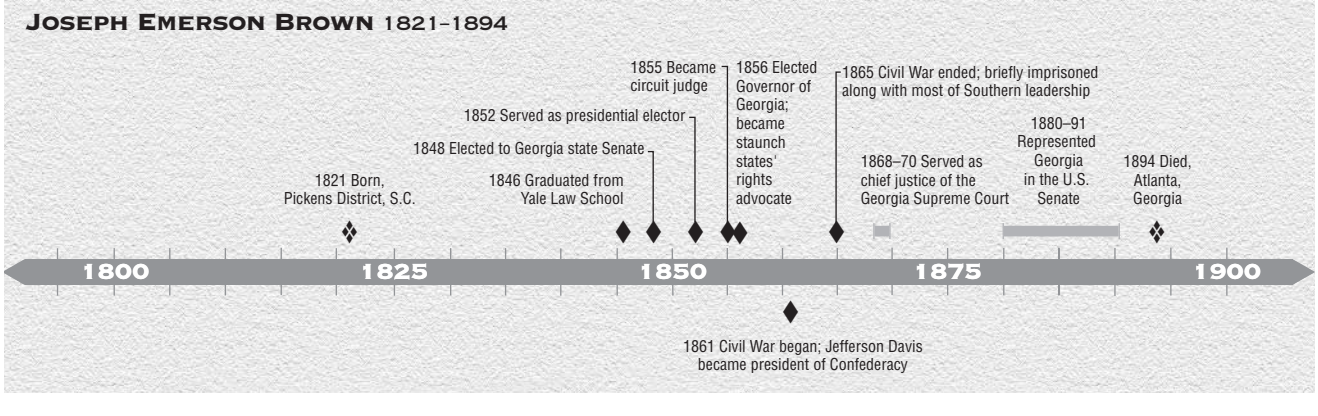

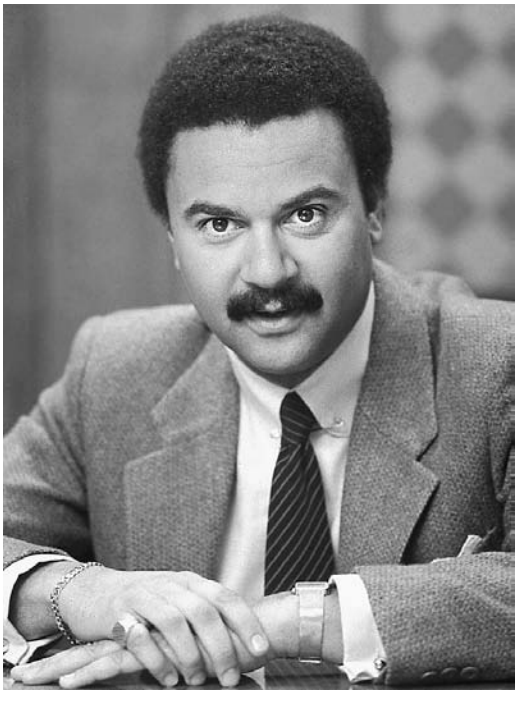

*Ron Brown.*
LIBRARY OF CONGRESS

Born on August 1, 1941, in Washington, D.C., Brown was raised in the company of successful role models. His parents, William Brown and Gloria Brown-Carter, were both graduates of Howard University, and they moved the family to Harlem, where William managed the Hotel Theresa. Brown grew up in the hotel, surrounded by famous black entertainers and celebrities: it was a stopover for them after playing Harlem's Apollo Theater. As a young man, he attended Middlebury College, where he was the school's first black fraternity pledge. He married Alma Arrington in 1962, and then served in the Army from 1963 to 1967, attaining the rank of captain. Leaving the service, he joined the National Urban League as a WELFARE caseworker. Brown did not toil in the trenches for long. His skill at negotiation stood out, and, after adding a law degree from St. John's University, he became the organization's Washington, D.C., vice president and assumed the role of spokesman.

"WE'RE COMPETING EVERYWHERE FOR CONTRACTS BECAUSE THAT MEANS JOBS AND A STRONG ECONOMY, AND WE INTEND TO WIN."
—RONALD BROWN

The give-and-take of politics suited Brown. "What I love most," he said, "is changing minds." In 1979 Brown's association with the Democratic party got a boost when Senator Kennedy named Brown his deputy campaign manager in an unsuccessful run at the presidency. The job marked the beginning of a stellar ascent through party politics. Kennedy chose Brown as chief counsel of the Senate Judiciary Committee—and that position led to a stint as chief counsel of the DNC, the party's steering council. By the mid-1980s, Brown was an insider, well-known and highly regarded in the nation's capital.

Politics offers alluring choices to its best-connected practitioners, liberal and conservative, and Brown's next career move was perfectly in step with the ethos of Washington, D.C. Brown became a lobbyist. He joined the Washington, D.C., firm of Patton, Boggs, and Blow, known for its high-profile clients. The attorney had no shortage of these: the businesses he represented included the financial giant American Express and twenty-one different Japanese electronics firms. Yet what gained him notoriety was his representation of foreign nations. He worked for the interests of Zaire, Guatemala, and Haiti, and the last two affiliations, in particular, hurt him. While he lobbied on behalf of Haitian strongman Jean-Claude ("Baby Doc") Duvalier, Haitian citizens suffered political repression and saw their national treasury pillaged. Guatemalans were tortured and murdered. Later, when Brown prepared to assume the high position of secretary of commerce, critics would be quick to recall that he had supported dictators.

Democrats wanted Brown back, and he left LOBBYING to become chairman of the DNC. The job demanded much: Democrats, after all, had failed to capture the White House since 1976. He had to unify a party that had lost three consecutive presidential elections, seen massive defections of its traditional voters, and suffered from an identity crisis that split its moderate and left-wing members. He also had to soothe fears that he was too closely allied with one of the party's most liberal leaders, Jesse Jackson. "My chairmanship won't be about race," he told critics. "It will be about the races we win over the next four years." As it happened, Brown was everything the ailing party hoped for. He helped orchestrate a shift to the center in the Democrats' national agenda—abandoning traditional bullishness on taxation and welfare, for instance, and asserting a pro-business outlook—which paved the way for the centrist candidacy of Clinton. And as a party boss, he was decisive. Once Clinton emerged as the front-runner, Brown curtailed the primary process; he even secured Jackson's endorsement. "This party was ready," Mickey Kantor, Clinton's campaign manager, said after the election, "and it was because of Ron Brown . . . the best chairman we've ever had."

As a reward, Clinton nominated Brown for the cabinet role of secretary of the Department of Commerce. Originally conceived as a regulatory agency, Commerce had seen better days; by the 1990s, both liberal and conservative critics considered it to be an ineffective bureaucracy tied up in red tape. Despite his credentials and the reform-minded talk of the Clinton administration, Brown's nomination faced some fears and objections. Business worried about his being too tough on it with new regulations. Some critics, such as the Center for Public Integrity, worried about the opposite. This nonpartisan watchdog group argued that Brown was too well connected to avoid potential conflicts of interest: he would have to regulate industries and foreign countries that he had once represented, seemingly in contradiction to Clinton's promise to clamp down on the selling of influence by political appointees. The group's December 1992 report, *The Torturer's Lobby,* hammered Brown for representing repressive governments. Brown called the Center's charges an attempt at implying "guilt by association." The Senate confirmed him with little difficulty.

As commerce secretary, Brown won praise for breathing new life into the department. He revived its export programs, winning lucrative multibillion-dollar contracts for U.S. aircraft and TELECOMMUNICATIONS firms. He also presided over a $900 million annual budget for promoting high technology in small and medium-sized business, nearly double the amount spent during the administration of GEORGE H. W. BUSH. The *New Republic* called him "the most formidable Commerce secretary since Herbert Hoover" (1 May 1995). Business fears about his being too liberal proved to be wrong; he was utterly pro-business, even to the point of attracting criticism for helping McDonnell Douglas Corporation secure contracts to build aircraft in China. The liberal Committee for Economic Organizing complained that he was "promoting companies, not jobs."

But scandals nearly sank Brown. In 1993, during Brown's first year as secretary of commerce, a Vietnamese businessman alleged that Brown had accepted a $700,000 bribe from the government of Vietnam to remove a long-standing trade embargo. Brown denied the charge; the FEDERAL BUREAU OF INVESTIGATION conducted a year-long probe, and he was ultimately cleared. By late 1994, rumors spread in the press that he would resign to run Clinton's reelection campaign. In February 1995, new allegations emerged. U.S. attorney general JANET RENO opened another criminal probe into Brown's personal finances. This time, congressional Republicans accused him of violating disclosure requirements and evading taxes. Brown again denied any violation of law, but Republican critics began calling for his dismissal—as well as the elimination of the Department of Commerce itself, which they called irrelevant and outdated. In May 1995, fourteen Republican senators told Attorney General Reno that fairness required that the probe be conducted outside of the Clinton administration. Reno agreed; she requested the appointment of an INDEPENDENT COUNSEL to examine Brown's finances. Particularly troubling was one odd-looking business deal: Brown had earned nearly $500,000 from selling his interest in a firm in which he had never invested.

Brown won high regard for his work in the law. He was the recipient of two American JURISPRUDENCE awards for outstanding achievement in jurisprudence and for outstanding scholastic achievement in poverty law. He

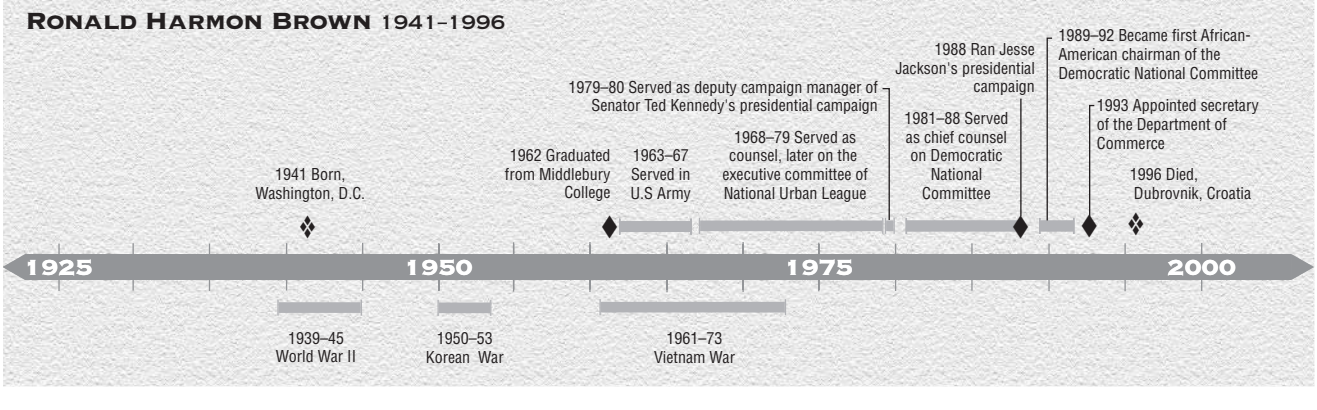

served as a trustee of Middlebury College, and as a board member of both the United Negro College Fund and the University of the District of Columbia. He was a fellow of the Institute of Politics, at the JOHN F. KENNEDY School of Government, at Harvard University.

On April 3, 1996, Brown was killed in a plane crash near the city of Dubrovnik, Croatia, with thirty-two other Commerce Department officials and U.S. business executives. They had planned to explore investment opportunities for the reconstruction of Croatia and Bosnia-Herzegovina.

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## BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS

*Brown v. Board of Education,* 347 U.S. 483, 47 S. Ct. 686, 98 L. Ed. 873, was the most significant of a series of judicial decisions overturning segregation laws—laws that separate whites and blacks. Reversing its 1896 decision in PLESSY V. FERGUSON, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, which established the "separate-but-equal" doctrine that found racial segregation to be constitutional, the Court unanimously decided in *Brown* that laws separating children by race in different schools violated the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT, which provides that "[n]o state shall . . . deny to any person . . . the equal protection of the laws." In making its decision, the Court declared that "separate educational facilities are inherently unequal." Moreover, the Court found that segregated schools promote in African American children a harmful and irreparable sense of inferiority that damages not only their lives but the welfare of U.S. society as a whole.

The principle expressed in *Brown* was used in later decisions of the Supreme Court and lower federal courts to reverse segregation in other fields as well. By the end of the 1960s, laws that had required racial segregation in buses, trains, bathrooms, and other public places had been overturned, as had many other laws that obstructed the rights of African Americans. *Brown* thus served as a milestone in the struggle of African Americans to gain equal CIVIL RIGHTS in U.S. society. It also symbolized the judicial activism of the Supreme Court under Chief Justice EARL WARREN, who would go on to lead the Court until 1969 in a remarkable era of change with regard to civil rights.

*Brown* was actually the culmination of a decades-long struggle by both African Americans and sympathetic whites against segregation and other discriminatory laws. Though it is a given in the early 2000s that persons of all races should enjoy equality under the law in the United States, that has not been the case for most of the country's history. Even after the Civil War had ended and the Thirteenth and Fourteenth Amendments had outlawed SLAVERY and guaranteed the civil rights of "all persons born or naturalized in the United States" (U.S. Const. amend. XIV), southern states and localities established the racially discriminatory Jim Crow laws—also known as the Black Codes—to keep African Americans from enjoying legal equality with whites. The term *Jim Crow* derives from a popular minstrel song of the nineteenth century. These laws made it difficult or impossible for African Americans to vote, made it illegal for them to use the same public facilities as whites, restricted their travel, forbade interracial marriage, and otherwise attempted to keep African Americans in a state of dependence and inferiority with regard to whites. Most of these laws were passed after the Reconstruction period following the Civil War, when the military occupation of the South had ended and the radical wing of the REPUBLICAN PARTY, which under President ABRAHAM LINCOLN had been instrumental in dismantling slavery, had declined in power. By the mid-1870s, southern whites were again in political control of their region, and many quickly sought to return blacks to a position of legal inferiority through passage of discriminatory laws.

In 1896 the legal standing of the JIM CROW LAWS was strengthened when, in *Plessy v. Ferguson,* the Supreme Court upheld the constitutionality of a Louisiana statute requiring blacks and whites to occupy separate railway cars. The law in question, according to the Court, was not a violation of the Equal Protection Clause of the Fourteenth Amendment as long as the facilities provided for each race were separate but equal. Moreover, the Court voiced its disagreement with attempts to challenge segregation laws and with the ideas critics of segregation used to sup-

port those challenges. For example, in its opinion, the Court considered it a "fallacy" that "the enforced separation of the two races stamps the colored race with a badge of inferiority," and it scoffed at the notion that "social prejudices may be overcome by legislation." Ironically, the Court reinforced its decision to uphold the legality of segregation on rail cars by noting the existence of laws "requiring separate schools for colored children." The *Plessy* decision and its **SEPARATE-BUT-EQUAL** doctrine were later used to uphold segregation in public schools and other public facilities.

African Americans and others who sympathized with their cause were bitterly disappointed by the *Plessy* decision. Over a decade later, in 1909, some blacks and whites joined together to form the National Association for the Advancement of Colored People (**NAACP**), which would eventually coordinate a successful legal challenge to the *Plessy* ruling. The NAACP brought together people of all races in an effort to improve the situation of people of color. Although the NAACP achieved some victories in the fight against Jim Crow laws in the first two decades of its existence, it was not until 1935 that the organization began actively to mount a campaign against segregation in schools. It did so assisted by legal counsels **CHARLES HOUSTON** and **WILLIAM H. HASTIE**, and a young assistant, **THURGOOD MARSHALL**, who would go on to be a member of the Supreme Court from 1967 to 1991.

By 1939, Marshall had become head of the NAACP legal branch, the NAACP Legal Defense Fund, and by the early 1950s, he and his organization had argued and secured significant legal victories before the Supreme Court that helped set the stage for *Brown.* In *Sweatt v. Painter,* 339 U.S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 (1950), the Court sided with the NAACP Legal Defense Fund when it ruled that a separate law school for blacks in Texas could not provide an education equal to that available to whites at the more established University of Texas Law School. And in another case brought by Marshall's organization, *McLaurin v. Oklahoma State Regents,* 339 U.S. 637, 70 S. Ct. 851, 94 L. Ed. 1149 (1950), the Court ruled that separate library and lecture hall seats for a single black graduate student were a violation of the Fourteenth Amendment. However, neither case addressed the separate-but-equal doctrine of *Plessy.*

In 1952 Marshall and the NAACP Legal Defense Fund brought two more significant cases

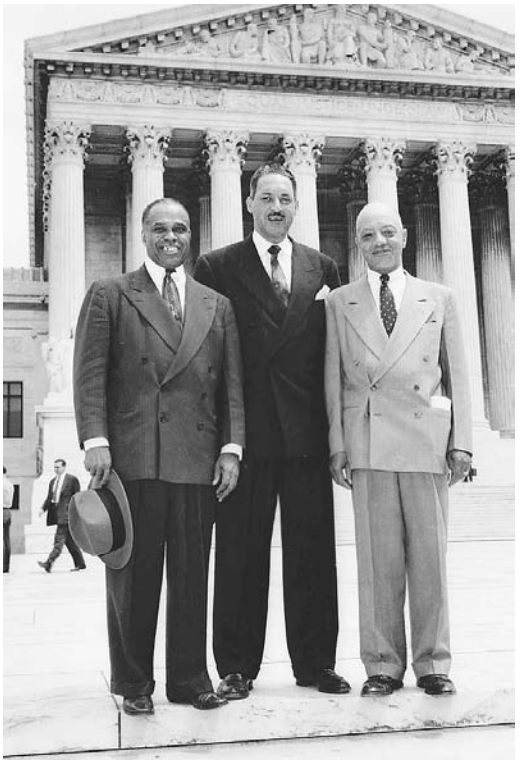

*Three attorneys in* Brown v. Board of Ed.*: (l-r) George E.C. Hayes, Thurgood Marshall, and James M. Nabrit, on May 17, 1954, the day the Court issued its ruling.*

AP/WIDE WORLD PHOTOS

to the Supreme Court: *Bolling v. Sharpe,* 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954), which dealt with racial segregation of schools in the District of Columbia, and *Brown,* which was actually a consolidation of four **CLASS ACTION** suits (suits brought to court on behalf of a group of people) from federal district courts in Delaware, Kansas, South Carolina, and Virginia. The NAACP Legal Defense Fund brought the cases to court on behalf of African American children who were refused admission to schools attended by white children as a result of laws allowing or requiring racial segregation in schools. The plaintiff named in the case, Oliver Brown, had a daughter, Linda Brown, who had been denied admission to an all-white elementary school in Topeka, Kansas, because she was black. In all but the Delaware case, a three-judge federal district court had decided against the African American children and in favor of the school districts, citing as precedent the *Plessy* separate-but-equal doctrine. In the Delaware case, the state supreme court also upheld this doctrine but ordered that black children be sent to superior white schools until schools provided for blacks could be improved to an equal condition.

*Brown* was argued before the Court in 1952 and reargued in 1953. Marshall, in making his

## Oliver Brown and the NAACP

As the man whose name appeared in the title of perhaps the most influential U.S. Supreme Court decision ever, *Brown v. Board of Education,* 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), Oliver Brown was an unlikely hero for the **CIVIL RIGHTS MOVEMENT**. The African American welder, war veteran, and assistant pastor was a quiet, upstanding citizen of Topeka, Kansas, who had never been known to publicly oppose discrimination against his race. However, he took a decisive stand against **RACIAL DISCRIMINATION** when he joined one dozen other African American parents in filing suit for the right of their children to attend the elementary schools of Topeka alongside white children.

Brown's participation in the lawsuit was encouraged by the National Association for the Advancement of Colored People (**NAACP**), which provided necessary legal expertise and organization for the case. Long familiar with the practice of school **SEGREGATION** in Topeka and many other school districts, NAACP lawyers approached Brown and other parents in the summer of 1950 to see if they would join them in a case that challenged that practice.

It was precisely Oliver Brown's modest qualities that made the NAACP choose him as a plaintiff. His reputation for integrity could help mute criticism in a controversial case that stirred up angry emotions in both the white and black communities of Topeka. The city's white majority was largely content to remain with a school system that maintained eighteen all-white elementary schools and four all-black elementary schools. African Americans, meanwhile, feared the case would cause the white community to attack what few **CIVIL RIGHTS** they already possessed. Others could not become involved in such a controversy without the fear of losing their jobs with white employers. For that reason, very few African Americans in Topeka actually belonged to the NAACP.

Like many other African American parents, Brown was upset that his daughter had to travel a long distance to an all-black school when an all-white school was located much nearer their home. He also could not help but notice that the all-white schools were in better repair than the all-black schools. Brown agreed to join in the NAACP's case, and in September 1950, he tried unsuccessfully to register one of his three daughters, Linda Brown, in an all-white school only seven blocks from their house. When the case first came to the U.S. District Court for Kansas in June 1951, Brown testified that his daughter had to travel twenty-one blocks to an all-black school, part of the way through a dangerous railroad switching yard.

In the end, African Americans did not seek to end the system of segregation in public schools merely to have their children travel fewer miles to class or sit in nicer buildings. At stake were much more important issues that affected their status in U.S. society. As expressed by NAACP attorneys in later testimony before the Supreme Court, African Americans had come to see segregated schools as inherently unequal. These schools relegated African Americans to an inferior class, instilled feelings of insecurity, diminished their opportunities, and retarded their mental development. The victory eventually achieved in *Brown* would go a long way toward eliminating those harmful effects of segregation and guaranteeing African Americans their full constitutional rights.

statement before the Court, argued that the statutes in question in this case were equivalent to the BLACK CODES. He pointed out the contradictions in allowing blacks and whites to vote in the same places and attend the same COLLEGES AND UNIVERSITIES, but not allowing black and white children to attend the same elementary schools. He also maintained that a decision in favor of segregation would effectively be a decision to keep African Americans as near as possible to their former state of slavery. According to Marshall, such a decision would be equivalent to saying that "Negroes are inferior to all other human beings."

JOHN W. DAVIS, who was legal counsel for the state of South Carolina, argued in his closing remarks that the state had honored *Plessy*'s separate-but-equal doctrine through large investments in schools for black students. He claimed that the state had the intention of creating a

condition of equality for children of all races and that "the happiness, the progress and the welfare of these children is best promoted in segregated schools." He also maintained that it was not within the jurisdiction of the U.S. Supreme Court to decide how the state of South Carolina conducted its school system. He told the Court:

> Your Honors do not sit, and cannot sit as a glorified Board of Education for the State of South Carolina or any other state. . . .
>
> . . . Neither this Court nor any other court . . . can sit in the chairs of the legislature of South Carolina and mold its educational system, and if it is found to be in its present form unacceptable, the State of South Carolina must devise the alternative.

On the same day that the Court handed down its decision in *Brown,* it decided the related case of *Bolling.* Applying the same principles that it had used in *Brown,* the Court ruled in *Bolling* that racial segregation of schoolchildren in the District of Columbia was unconstitutional.

In the following year, the Supreme Court on reargument made another decision in *Brown* that was designed to establish the methodology by which to enforce desegregation of public schools. *Brown II,* 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), as it has come to be called, determined that school authorities had the principal responsibility for evaluating and solving local educational problems, including those resulting from segregation. The Court decided to remand (send back) the individual cases in *Brown* to lower courts in order that those courts might better assess the efforts of school authorities to desegregate the public schools and thereby provide to African American children their equal protection under the laws as promised by the Fourteenth Amendment. The lower courts were directed to take into account any problems concerning school administration, facilities, transportation, and personnel, and to consider any revision of local laws necessary to resolve the problems and achieve desegregation.

*Brown v. Board of Education* dealt only with government-mandated or government-authorized segregation. It did not apply to racial segregation or discrimination related to restaurants, theaters, employment, country clubs, or other parts of the private sector. However, *Brown* fostered changes in the legal and moral outlook of the country that greatly aided future efforts to end **RACIAL DISCRIMINATION** as related to employment, housing, and places of public accommodation, and thus greatly affected U.S. race relations.

*Spottswood Bolling and his mother, Sarah, read the newspaper report of the ruling in* Bolling v. Sharpe *(1954), which declared school segregation in the District of Columbia unconstitutional.*

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Despite the promise of *Brown,* desegregation of U.S. schools proceeded slowly. In the years immediately following the decision, many southern school districts resisted or delayed implementation of its desegregation requirements, thereby forcing the Supreme Court and other lower courts to oversee and supervise school administrative functions in many localities. As time went on and southern schools became more integrated, the Court shifted its focus to school districts all over the country, particularly those in cities. In the second half of the twentieth century, many African Americans moved from rural to urban areas, often in the northern states. School districts in many of those urban areas became separated into suburban white districts and urban black districts. In response to this challenge, courts imposed busing requirements during the 1970s: in the interest of creating more racially balanced schools, children were bused to different schools that were sometimes far from their home neighborhoods. In many cities, busing became highly controversial.

By the late 1980s, legal battles surrounding the legacy of the *Brown* decision changed when some school districts began to request that they be released from the court supervision of their operations that had been required by *Brown.* Accordingly, the Supreme Court began to focus

on the issue of when a court order to desegregate a school district should be dissolved and autonomy returned to the local school officials and community. In *Board of Education v. Dowell,* 498 U.S. 237, 111 S. Ct. 630, 112 L. Ed. 2d 715 (1991), which dealt with a court-imposed desegregation plan in Oklahoma City, the Court ruled that a court-ordered desegregation decree may be dissolved when a school district shows that it has taken all "practicable" steps to end a state-imposed dual school system and demonstrates that it is unlikely to revert to its former ways. The ability to dissolve a court-ordered desegregation plan, the Court's opinion stated, would enable a school district that had attempted to achieve the goal of desegregation to avoid "judicial tutelage for the indefinite future."

Justice Marshall, now near the end of his career on the Court, dissented from the majority opinion in *Dowell.* He argued that, given the long history of segregation, it was too early to leave the Oklahoma City school district to its own devices. Though he agreed that perpetual federal judicial supervision of local schools had never been envisioned by the Court, he feared that the Court's decision in this case would simply perpetuate an already unsatisfactory standard of INTEGRATION in the Oklahoma City school district and in other school districts.

In another case, *Freeman v. Pitts,* 503 U.S. 467, 112 S. Ct. 1430, 118 L. Ed. 2d 108 (1992), the Supreme Court held that district courts may relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every facet of school operations. The Court also ruled that once a school district corrects any racial imbalance that violates the Equal Protection Clause of the Fourteenth Amendment, the district has no obligation to remedy a later imbalance caused by population shifts.

As these cases indicate, the issue of desegregation of public schools remained a vital public issue even several decades after the Supreme Court's decision in *Brown.* As a means of both training and socialization, education is still a necessity for U.S. society as a whole and for any individual in particular, and it is expected to remain so in the future. Guided by *Brown,* the U.S. judicial system has decisively concluded that the constitutional provision of equal protection under the laws guarantees that children be entitled to an equal, not a separate, public education.

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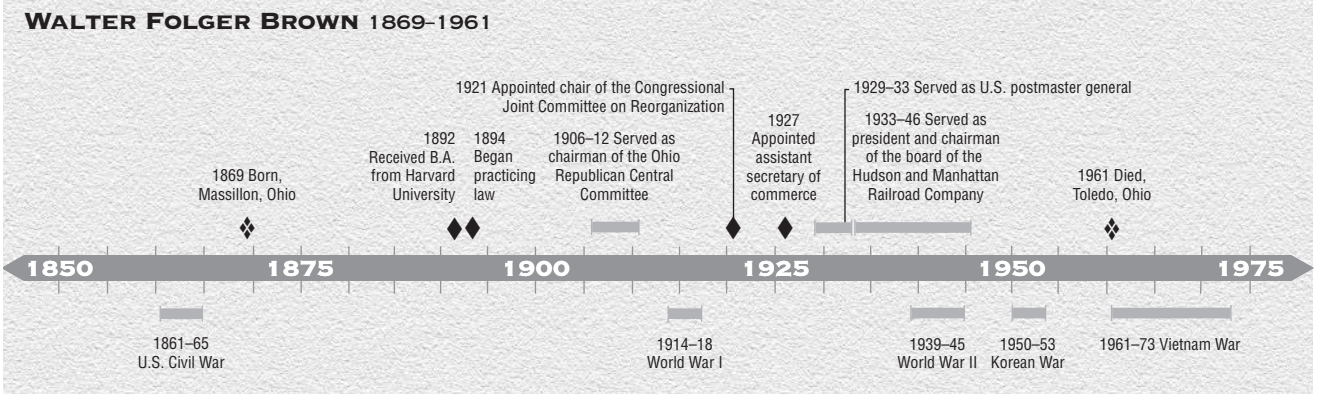

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"Brown v. Board of Education of Topeka, Kansas" (Appendix, Primary Document); Civil Rights; Discrimination; Equal Protection; Jim Crow Laws; Marshall, Thurgood; NAACP; Republican Party; School Desegregation; Warren, Earl; Warren Court.

## ♦ BROWN, WALTER FOLGER

Walter Folger Brown was born May 31, 1869, in Massillon, Ohio. He received a bachelor of arts degree from Harvard University in 1892 and attended Harvard Law School from 1893 to 1894.

Brown practiced law from 1894 to 1927 and entered politics in 1921, serving for three years as chairman of the Congressional Joint Committee on Reorganization. In 1927 he became assistant secretary of commerce, and two years later performed the duties of U.S. postmaster general, acting in this capacity until 1933.

Brown's interests and activities in business were numerous and included service as president and chairman of the board of the Hudson and Manhattan Railroad Company.

Brown died January 26, 1961, in Toledo, Ohio.

## ♦ BROWNELL, HERBERT, JR.

Herbert Brownell Jr. was the 65th attorney general of the United States. He served from 1953 to 1957 in the administration of President **DWIGHT D. EISENHOWER**. Brownell's tenure as attorney general was marked by his advocacy of **CIVIL RIGHTS**, particularly concerning the enforcement of the landmark case **BROWN V. BOARD OF EDUCATION**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) in which the U.S. Supreme Court ruled in favor of desegregation of public schools. Brownell also proposed landmark civil rights legislation.

Brownell was born in Peru, Nebraska, on February 20, 1904. In 1924, he graduated from the University of Nebraska and then attended Yale Law School. After receiving his law degree in 1927, Brownell was admitted to the New York State bar and worked for the noted law firm of Root, Clark, Buckner, Howland & Ballentine for two years. In 1929, he joined the law firm of Lord, Day & Lord.

Brownell served as a member of the New York State Assembly from 1933 to 1937, becoming an advisor to **THOMAS E. DEWEY**, a New York district attorney who had successfully prosecuted organized-crime syndicates. Dewey had run for governor in 1938 but lost to incumbent Herbert Lehman. Dewey also made an unsuccessful bid for the Republican presidential nomination in 1940. Brownell urged Dewey to run again for governor in 1942. With Brownell as his campaign manager and chief political strategist, Dewey was elected governor of New York.

With Brownell managing his campaign, Dewey ran again for president in 1944, only to lose to **FRANKLIN ROOSEVELT**. Having gained national prominence, Brownell served as chairman of the Republican National Committee from 1944 to 1946. He also functioned once more as the presidential campaign manager for Dewey, who had been re-elected governor in 1946. In 1948, **HARRY TRUMAN** narrowly defeated Dewey.

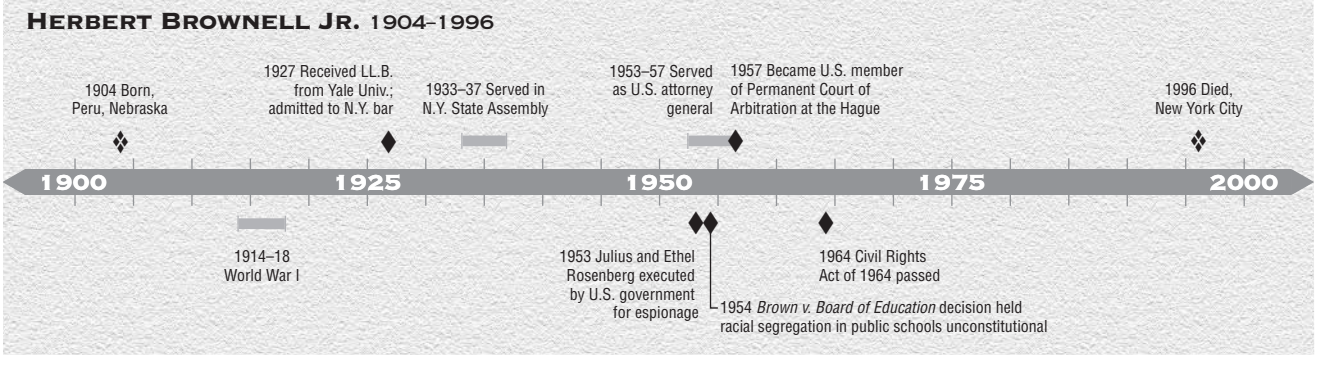

*Herbert Brownell Jr., 1952, New York.*
UPI/CORBIS-BETTMANN

In 1952, Brownell encouraged WORLD WAR II hero General Dwight D. Eisenhower to run for president. Brownell helped the general to secure the Republican nomination and then worked closely with him in his successful run for the presidency. In 1953, a grateful Eisenhower appointed Brownell as U.S. attorney general.

Brownell was an influential advisor to the president and was involved in numerous controversial situations. Shortly after his appointment as attorney general, Brownell became involved in the case of JULIUS AND ETHEL ROSENBERG, who had been convicted of ESPIONAGE and sentenced to death. Supporters of the Rosenbergs, who had exhausted all their appeals, petitioned the president to commute their sentences to life imprisonment. In June 1953, U.S. Supreme Court Justice WILLIAM O. DOUGLAS granted the Rosenbergs a stay of execution in order to consider new evidence. Although the U.S. Supreme Court was recessed for the summer, Brownell convinced the justices to come back and hear the matter. The Court, in a special session on June 19, 1953, dissolved the stay, and the Rosenbergs were executed that same day.

Brownell raised the ire of many Southerners (as well as anti-integration forces throughout the country) when he used the JUSTICE DEPARTMENT to enforce the mandate of the *Brown* case in desegregating public schools in the South. The climax came when Arkansas Governor Orville Faubus ordered the state's NATIONAL GUARD to bar black students who were seeking admittance to a high school in Little Rock. Eisenhower, at Brownell's urging, federalized the troops and used them to escort the students to and from the school.

Brownell, who had been a civil rights supporter since his days in the New York State legislature, drafted legislation that would give the U.S. attorney general unprecedented power to institute suits in the name of the United States to enforce civil rights in many public accommodations including housing, parks, theaters, restaurants, and hotels. The legislation, called the Brownell Bill, also sought the power to enforce injunctions to stop violations of civil rights in the same areas. The bill went through numerous permutations and ended up being greatly weakened in its enforcement efforts. Nevertheless, it was passed as the CIVIL RIGHTS ACT of 1957—the first civil rights legislation passed in 82 years.

After leaving his post as attorney general in 1957, Brownell served as the United States' member to the Permanent Court of ARBITRATION at the Hague. He remained associated with of the Lord law firm from 1977 to 1989. From 1985 to 1989, he served as a member of the U.S. Bicentennial Commission for the U.S. Constitution. In 1993, he published *Advising Ike: The Memoirs of Attorney General Herbert Brownell.* Brownell died in New York City on May 1, 1996.

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## ♦ BROWNING, JAMES ROBERT

James Robert Browning, a federal judge, is credited with holding the U.S. Court of Appeals for the Ninth Circuit together at a time when there was enormous pressure to split the nation's largest and busiest circuit into smaller, more manageable units. Browning's innovations in JUDICIAL ADMINISTRATION demonstrated that the federal courts, despite ever-increasing caseloads, could continue to provide speedy and effective justice. During his tenure, the Ninth Circuit court, which oversees justice in nine western states and two Pacific territories, grew

from a nine-judge panel, to a 28-judge tribunal that managed more than 5,500 appeals a year in the late 1980s.

Browning was born in Great Falls, Montana, on October 1, 1918. He grew up in and attended the public schools of Belt, Montana, a small town east of Great Falls, where his father was a blacksmith and, later, owner of the town's Ford dealership. Browning completed his undergraduate work at the University of Montana and entered that university's law school in 1938, becoming editor in chief of the law review and graduating with honors in 1941. After graduation, he joined the Antitrust Division of the JUSTICE DEPARTMENT in Washington, D.C. Two years later, he was inducted as a private into the U.S. Army Infantry. He served in military intelligence in the Pacific theater for three years, attaining the rank of first lieutenant and winning a Bronze Star.

Following WORLD WAR II, Browning returned to the Justice Department's Antitrust Division, first in Washington, D.C., and then in Seattle, Washington. In 1948, at the age of 30, he was named chief of the Northwest Regional Office of the division. Before long, he was called back to Washington, D.C., and named assistant chief, General Litigation Section, Antitrust Division. By 1951, he had joined the Civil Division as first assistant. In 1952, he was named executive assistant to the attorney general of the United States. Later that year, he organized the Executive Office of U.S. Attorneys and became its first chief.

Browning left the Justice Department in 1953 to enter private practice. For the next five years, he was a partner at Perlman, Lyons, and Browning, in Washington, D.C. In 1958, he was named clerk of the U.S. Supreme Court. From this position, he was appointed as a circuit judge to the U.S. Court of Appeals for the Ninth Circuit, by President JOHN F. KENNEDY, on September 18, 1961.

As a circuit judge, Browning became involved with the JUDICIAL CONFERENCE OF THE UNITED STATES and started exploring the field of judicial administration. (The Judicial Conference is the principal machinery through which the federal courts operate and is responsible for establishing the standards and shaping the policies that govern the federal judiciary.)

In the mid-1970s, there was no guarantee of speedy disposition of litigation in the federal courts. The courts of appeals, in particular, faced widespread crises because the volume of appeals far exceeded the capacity of the courts to decide them. The Ninth Circuit court was no exception, and, because of its enormous backlog of cases, was the subject of much discussion among scholars, Congress, and the judiciary. Studies to examine the problems of the Ninth Circuit usually presented one of two conclusions: reduce the size of the circuit, or add more judges to the court. There was strong opposition to dividing the circuit, but there was equally strong opinion that adding more judges would make the circuit even more unmanageable.

Browning was named chief judge of the Ninth Circuit on July 1, 1976, and found himself in a position to experiment with his ideas on judicial administration. As the new chief judge, Browning was instrumental in convincing Congress to give the judges of the Ninth Circuit an opportunity to demonstrate that a large circuit with a large court of appeals could perform effectively.

Under Browning's leadership, that challenge was met with remarkable success. Foremost among the innovations initiated by Browning

"THE NINTH CIRCUIT IS THE ONLY COURT IN WHICH, WITHIN OUR BOUNDARIES, IS REPRESENTED ALL THE POINTS OF VIEW, BASICALLY ALL THE PROBLEMS, SOCIAL AND ECONOMIC, OF THE WHOLE NATION. THAT KIND OF COURT CAN MAKE A VERY POSITIVE CONTRIBUTION TO THE DEVELOPMENT OF THE FEDERAL LAW AT THE NATIONAL LEVEL."
—JAMES BROWNING

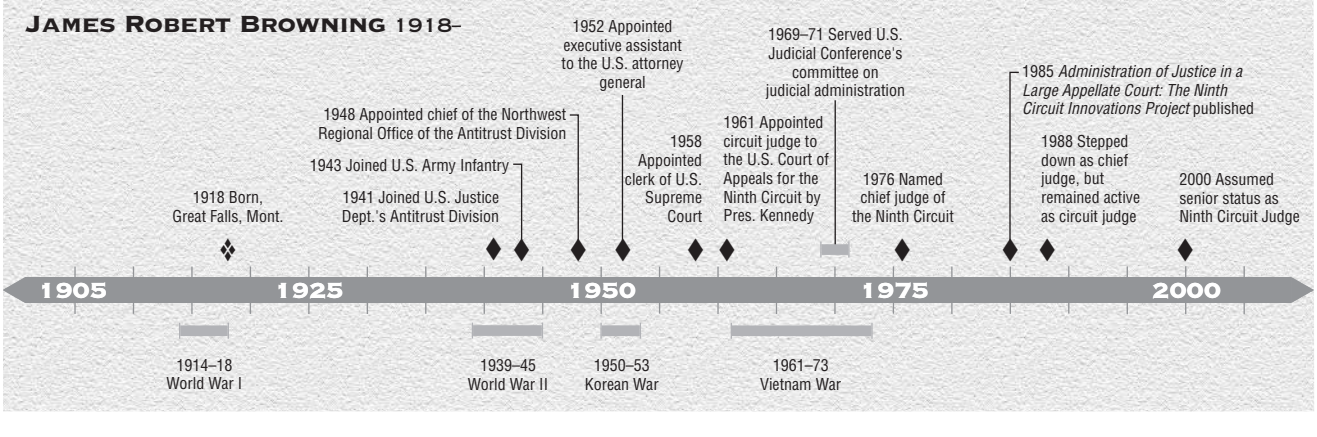

and his colleagues were new methods of case processing and control, including the installation of the first completely computerized docketing (scheduling) system in a federal appellate court. Browning's innovations were later chronicled in a study published by the FEDERAL JUDICIAL CENTER (*Administration of Justice in a Large Appellate Court—The Ninth Circuit Innovations Project* [1985]). The court also created an executive committee to facilitate administrative decision making, assigned similar cases to the same three-judge panel, resolved panel conflicts with a "mini" en banc court of 11 judges (rather than with all 28 judges assigned to the circuit), and created a BANKRUPTCY panel to hear bankruptcy appeals exclusively.

These modifications and more, from decentralized staffing to fundamental changes in the way the court deliberates, turned the Ninth Circuit into a model for other courts around the country. In addition to speeding up justice, Browning's innovations also improved the Ninth Circuit's judicial record over time. In 1984, the Supreme Court reversed 27 of 28 decisions from the Ninth Circuit. By 1987, the circuit's reversal rate was down to 47 percent—and was the third lowest in the country.

On June 15, 1988, after a dozen years as chief judge, Browning stepped down, but remained an active circuit judge handling a full caseload. In September 2000, Browning took senior status. He retained his chambers in San Francisco and continued to hear court cases. As of 2002, Browning's 40-year tenure on the court was the second longest of any federal judge in the United States.

Browning helped establish the Ninth Judicial Circuit Historical Society in 1985 and in 1987 he became one of the founders and current board members of the Western Regional Justice Center, a nonprofit group that focuses on the improvement of the judicial system. In 1991, he was awarded the prestigious Edward J. Devitt Award for Distinguished Service to Justice and in 2001, he received the Montana State Bar Association's William J. Jameson award. Also, in 2001, U.S. Senator Barbara Boxer (D-Calif.) introduced a bill calling for the Ninth Circuit Court's San Francisco headquarters to be named after Judge James R. Browning.

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## ♦ BROWNING, ORVILLE HICKMAN

Orville Hickman Browning was born February 10, 1806, in Harrison County, Kentucky. He was educated at Augusta College and admitted to the Kentucky bar in 1831. In that same year, he relocated to Illinois and established his legal practice.

In 1836 Browning served as a member of the Illinois Senate, and in 1842 participated in the Illinois General Assembly. He entered the United States Senate in 1861, replacing STEPHEN A. DOUGLAS as senator from Illinois, and remained at this post until 1862. He gained a reputation for his adversity to several policies of ABRAHAM LINCOLN, including the emancipation of slaves.

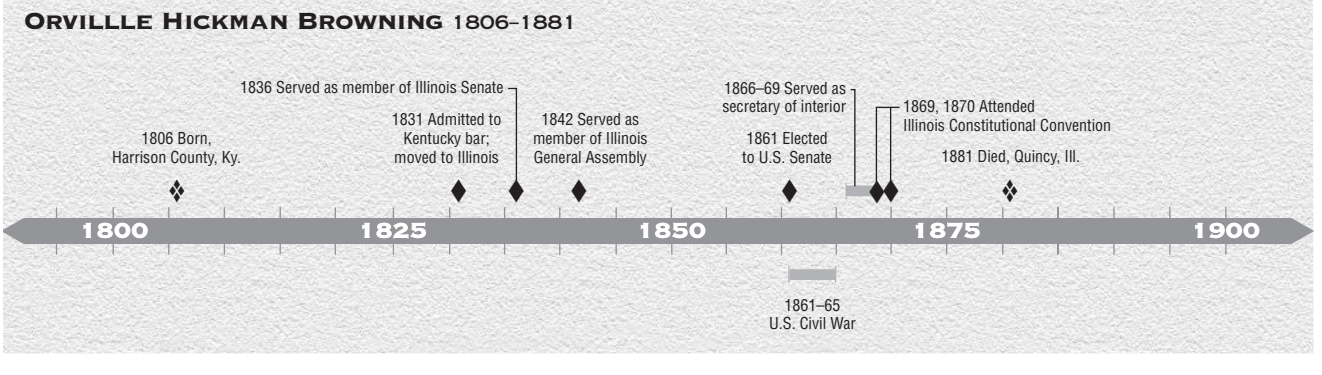

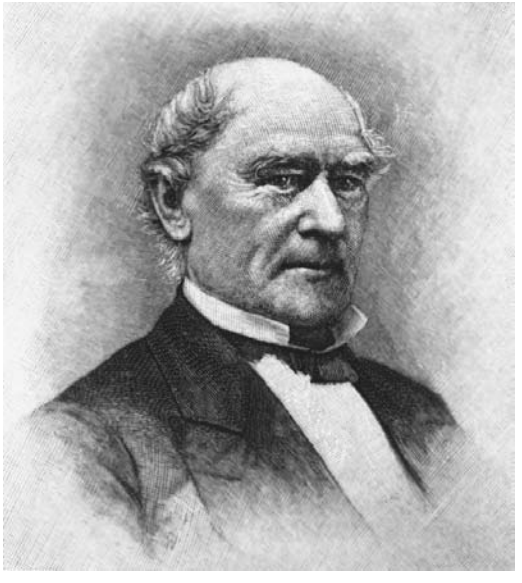

*Orville Hickman Browning.* LIBRARY OF CONGRESS

From 1866 to 1869 Browning served as U.S. secretary of the interior and also acted as attorney general for a short period in 1868. He attended the Illinois Constitutional Convention during 1869 and 1870.

As a lawyer, Browning specialized in cases involving the Midwestern railroad system.

Browning died August 10, 1881, in Quincy, Illinois.

## BRYAN TREATIES

Beginning in 1913, U.S. Secretary of State WILLIAM JENNINGS BRYAN negotiated a number of bilateral treaties for the "Advancement of Peace." The basic aim of these bilateral treaties was to prevent war by interjecting a conciliation process into a dispute between parties to the treaty. Each signatory nominated two members, one a national and one a foreign citizen, to a permanent commission. These four would then choose a fifth member who could not be a national of either state. The commission would review the underlying facts to the dispute and issue a report on the controversy within one year. Until the report was issued the parties agreed to refrain from resorting to hostilities. It was hoped that this process and the inherent delay in issuing a report would lessen tension and preclude resort to armed force to settle the dispute, although each was free to do so after the report was issued. Eventually forty-eight of these treaties were concluded, but few disputes were ever submitted to any of the commissions.

## ♦ BRYAN, WILLIAM JENNINGS

William Jennings Bryan was a prominent figure in U.S. politics during the late nineteenth and early twentieth centuries, and is perhaps best known for his role as assistant to the prosecution in the famous SCOPES MONKEY TRIAL of 1925.

Bryan was born March 19, 1860, in Salem, Illinois. His was a devoutly religious family that prayed together three times a day and stressed strict adherence to a literal interpretation of the Bible. His parents, Silas Lilliard Bryan and Mariah Elizabeth Jennings Bryan, were firm believers in education. His mother schooled Bryan and his siblings in their home until they were old enough to be sent away to school. Bryan was an obedient and well disciplined child who was also idealistic. His favorite subject was math because of its orderly reason and logic. He showed early interest in politics and public speaking, and at the age of twelve delivered a campaign speech for his father, who ran unsuccessfully for Congress. It was the beginning of a distinguished career as an orator for Bryan.

"THE HUMBLEST CITIZEN OF ALL THE LAND, WHEN CLAD IN THE ARMOR OF A RIGHTEOUS CAUSE, IS STRONGER THAN ALL THE HOSTS OF ERROR."
—WILLIAM JENNINGS BRYAN

In 1875, Bryan was sent to live in Jacksonville, Illinois, to attend the Whipple Academy and Illinois College. During college, he participated in debate and declamation and excelled at long jumping. He graduated from college in 1881 and went on to Union College of Law, in Chicago. In 1883 he returned to Jacksonville and on July 4 opened a law practice. He married his sweetheart of five years, Mary Elizabeth Baird, on October 1, 1884. Bryan's young wife proved to be an intellectual match for her husband. After the couple settled in Jacksonville, she took classes at Illinois College, a practice unheard of for a married woman at the time. She later studied law under Bryan's instruction, and was admitted to the bar in Nebraska in 1888.

Bryan had always yearned to go west, to test himself against the frontier. In 1887, he and his wife moved to Lincoln, Nebraska, where he entered a law partnership with a friend. The Bryans became active in civic affairs, and started separate discussion groups for men and women where the subject was often politics. Bryan also began lecturing on religious topics. In 1890, he succumbed to his interest in politics and entered his first campaign for public office. He was the

*William Jennings Bryan.*
LIBRARY OF CONGRESS

Democratic candidate for Congress from a staunchly Republican district in Nebraska, but he won the election by a comfortable margin and was reelected in 1892. He made a bid for the Senate in 1894 but was defeated. He then turned to journalism and became editor in chief of the *Omaha World-Herald.* By this time, he had developed a reputation as a compelling speaker and was in demand for the popular Chautauqua lecture circuit. (The Chautauqua movement combined education with entertainment, often offered outdoors or in a tent; it took its name from the Chautauqua Lake region in New York, where it originated.)

During his campaign for the Senate, Bryan took up the free silver cause, a political movement that advocated the free coinage of silver. Free silver advocates, mainly indebted farmers in the West and South, wanted the government to issue more money, backed by silver, to ease the debts they were unable to repay because of declining farm prices. The money interests in the East favored sound money and the gold standard. These opposing forces clashed in the 1896 presidential campaign. Bryan emerged as the nominee of four parties: the Democratic, Populist, Silver Republican, and National Silver parties. At the Democratic National Convention in Chicago, he made his famous "Cross of Gold" speech, in which he cast himself as a champion of the common person against the forces of the powerful and privileged. He passionately declared that those he referred to as the idle holders of money in Wall Street were responsible for the United States' financial woes.

Bryan campaigned tirelessly, traveling over eighteen thousand miles to deliver his electrifying speeches. In the end, he lost to WILLIAM MCKINLEY by less than five percent of the popular vote. But the foundation had been laid for his lifelong themes: the people versus the power of wealth, the workers versus the powerful money holders, the farmers versus the industrial interests. These themes echoed throughout his later attempts to win the presidency.

After serving as a colonel in a noncombat position during the SPANISH-AMERICAN WAR, Bryan ran for president again in 1900, this time on an anti-expansion theme that was rejected by voters. By 1904, he was falling out of favor with Democrats. He waged a long and exhausting fight to be nominated for president that year,

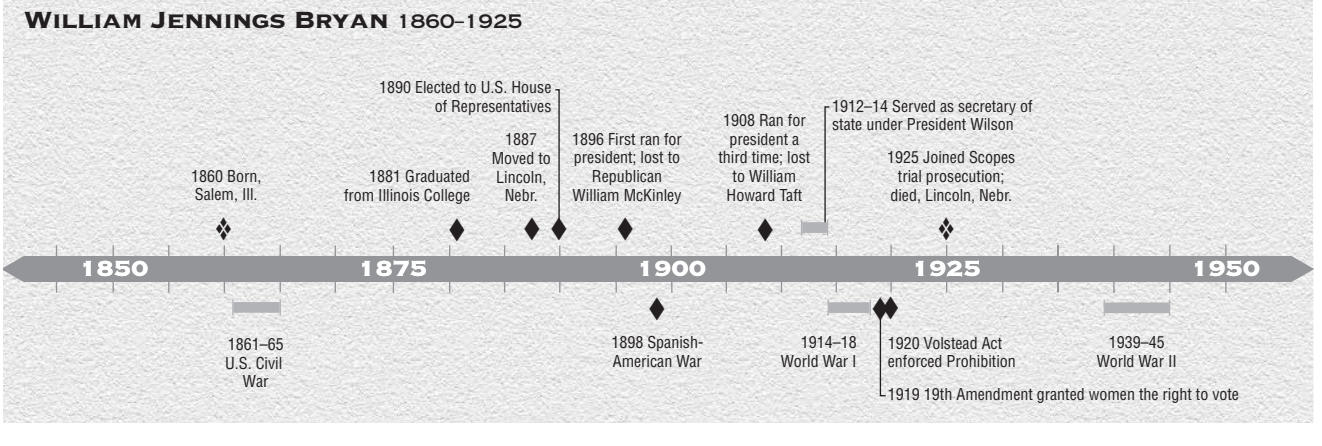

but in the end was content that he had at least influenced the party platform enough so that it included nothing he found objectionable. Then the party nominated Alton B. Parker, who promptly announced that he was in favor of a gold standard. Parker lost the election to THEODORE ROOSEVELT. Bryan was bruised by the party's renunciation of his free silver position, but he rebounded and was nominated for president a third time, in 1908. He ran a strong campaign but lost to WILLIAM HOWARD TAFT.

After the 1908 election, Bryan realized he would never be president. Nevertheless, he continued to influence DEMOCRATIC PARTY policies, and in 1912 he supported Woodrow Wilson's candidacy for president. After Wilson was elected, he selected Bryan as his SECRETARY OF STATE, a position Bryan resigned after two years when his pacifist ideas conflicted with Wilson's policies on U.S. involvement in WORLD WAR I. After Bryan left the cabinet, his political influence declined rapidly.

During his later years Bryan continued his work in the newspaper business and was a popular lecturer on the Chautauqua circuit. He helped gain passage of the EIGHTEENTH AMENDMENT, which ushered in PROHIBITION, and helped the suffragette movement win the vote for women with passage of the NINETEENTH AMENDMENT.

During the last few years of his life, Bryan wrote numerous articles on religious topics. He felt that World War I was at least partly caused by a pervasive "godlessness" sweeping the world. To Bryan, this godlessness was nowhere more clearly reflected than in Darwin's theory of the evolution of the species. Bryan traveled around the United States preaching a literal interpretation of the Bible and campaigning for laws that banned the teaching of evolution. One such law, passed in Tennessee, prohibited teachers in state-supported schools and universities from teaching any theory of the origin of human life other than the creation story contained in the Bible. In 1925, a science teacher named John Thomas Scopes violated the law and was brought to trial. Hoping for publicity, the state asked Bryan to join the prosecution. He agreed, and found himself facing CLARENCE DARROW, a famous defense attorney who was a self-proclaimed atheist, an opponent of CAPITAL PUNISHMENT, and a defender of unpopular causes. The trial quickly took on the air of a circus, with reporters and photographers from all over the world and the first live radio coverage of such an event broadcast by WGN in Chicago. The media cast the proceeding as a contest between science and the Bible. The defense tried to frame the issue as tolerance for new ideas. Ultimately, however, the prosecution persuaded the judge to confine the case to a question of the state's right to control public education.

Sensing that he was losing control of the trial, Darrow decided to try to unravel the state's case by calling Bryan as a witness. He intended to lead Bryan away from the prosecution's carefully framed issue into a defense of fundamental biblical interpretation. Bryan, whose trial experience had been limited, and who was feeling tired and ill, fell into Darrow's trap and was ridiculed and humiliated by the flamboyant attorney's searing and skillful questions. After Bryan's testimony, the trial was abruptly ended, depriving Bryan of the opportunity to answer Darrow's stinging offense. Nevertheless, the jury deliberated a mere eight minutes before returning a guilty verdict.

The Scopes trial was a victory for Bryan and his supporters, but he had been devastated by Darrow. He stayed in Tennessee to finalize and print the speech he had planned to use in closing argument before the court. Five days after the trial ended, on July 26, 1925, while still in Tennessee, Bryan died in his sleep. As a train bearing his body passed through the countryside on its way to Washington, D.C., thousands of the "common people" Bryan had championed gathered to pay their respects. The nation's capital was in official mourning as Bryan lay in state. At his request, he was buried with full military honors at Arlington National Cemetery, an ironic footnote to the life of a fervent pacifist.

Although Bryan never won the country's top office, he exerted a strong influence during his long career in public service. Many of the reforms he advocated were eventually adopted, such as INCOME TAX, prohibition, women's suffrage, public disclosure of newspaper ownership, and the election of Senators by popular rather than electoral vote. Although he is most often associated with the Scopes trial, his diligent devotion to the causes in which he believed is his most significant legacy.

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## ◆ BRYANT, WILLIAM BENSON

William Benson Bryant is a federal judge whose decisions influenced the outcomes of several famous legal battles of the 1970s.

Bryant was born September 18, 1911, in Wetumpka, Alabama. He moved to Washington, D.C., with his family when he was a child and attended District of Columbia public schools. He graduated from Howard University with a bachelor of arts degree in 1932, and went on to earn his bachelor of laws degree from Howard University Law School in 1936. After law school, Bryant worked for the Works Progress Administration (WPA) and later for the Bureau of Intelligence at the Office of War Information. He joined the U.S. Army in 1943, and attained the rank of lieutenant colonel before his discharge in 1947.

"I DO NOT BELIEVE THAT TESTING VIRTUE IS A FUNCTION OF LAW ENFORCEMENT . . . IF, AFTER AN ILLEGAL OFFER IS MADE, THE SUBJECT REJECTS IT . . . THE GOVERNMENT CANNOT PRESS ON."
—WILLIAM BENSON BRYANT

Bryant started a law practice in Washington, D.C., in 1948. He left private practice to become an assistant in the office of the U.S. attorney for the District of Columbia from 1951 to 1954. After resigning that post, he joined the law firm of Houston, Bryant, and Gardner, in Washington, D.C., where he worked from 1954 to 1965. As a criminal defense attorney, Bryant argued and won the Supreme Court case of *Mallory v. United States,* 354 U.S. 449, 77 S. Ct. 1356 (1957). Following *Mallory,* police could no longer use confessions of criminal defendants that were secured during long and unnecessary delays between arrest and ARRAIGNMENT.

Bryant became a law professor at Howard University in 1965, the same year President LYNDON B. JOHNSON appointed him to the federal bench. With his appointment, Bryant became the first African American to serve as a judge at the federal district court level.

During his tenure on the bench, Bryant presided over several high-profile trials. In May 1972, he overturned the election of W. A. ("Tony") Boyle as president of the United Mine Workers (*Hodgson v. United Mine Workers of America,* 344 F. Supp. 17 [D.D.C.]). Boyle's election was challenged by supporters of his opponent, Joseph A. Yablonski, who had been found murdered along with his wife and daughter three weeks after he lost the 1969 election to Boyle. Bryant found sufficient evidence of wrongdoing by Boyle and his supporters to nullify the election. He ordered the union to hold another election, to be conducted under court supervision. Boyle was subsequently defeated by Arnold Miller, a Yablonski supporter, and in 1974, was convicted of murder for having ordered Yablonski's killing.

Bryant also made several key decisions regarding participants in the scandals that devastated the administration of President RICHARD M. NIXON. In April 1974, he sentenced Herbert L. Porter, a former aide in Nixon's reelection campaign, to 15 months in prison for lying to the FEDERAL BUREAU OF INVESTIGATION (FBI) during its investigation of the WATERGATE break-in and subsequent cover-up. In November 1974, he ordered White House counsel Philip W. Bucher to produce audiotapes of Oval Office meetings that took place May 1–5, 1971. The order was part of a CLASS ACTION suit brought against the U.S. government on

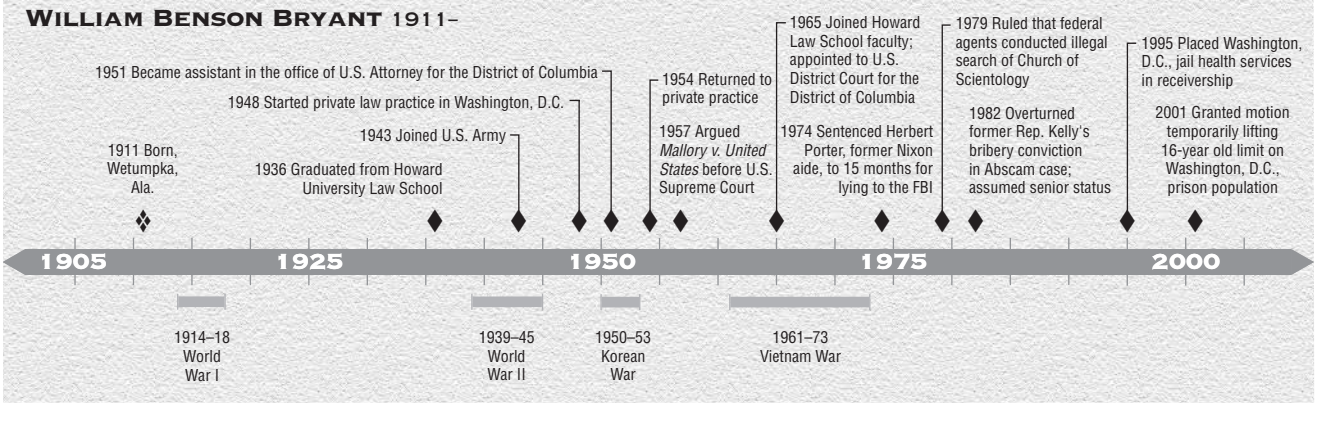

behalf of eight hundred antiwar protesters. The plaintiffs alleged that government officials violated their civil liberties and suspended DUE PROCESS when they ordered the arrest of nearly 12,000 protesters who marched on the White House on May 1. Most of the arrests in the so-called Mayday Rally were later found to be unlawful.

In 1982, after a long and distinguished career on the federal bench, Bryant attained the rank of senior judge. One of his best-known decisions since then was his 1989 ruling upholding a federal BANKRUPTCY judge's decision in a case involving the U.S. JUSTICE DEPARTMENT. The case centered on INSLAW, a software company that had contracted with the department to provide a case-management software program. INSLAW claimed that the department was using the software even though it had not paid for it—a situation that had forced the company into bankruptcy. A federal bankruptcy judge agreed and ordered the Justice Department to pay INSLAW $8 million in damages. Bryant upheld this ruling on appeal; the ruling was also upheld by higher courts (although the Justice Department did get the $8 million judgment set aside).

In the 2000s, Bryant continued to preside over noteworthy cases. In March 2003, he issued a ruling that ended the U.S. District Court's 32-year oversight of the D.C. jail. Overcrowding, building safety issues, and problems with the quality of medical services for inmates led to the filing of two cases that compelled the court to assume oversight in the 1970s: *Campbell v. McGruder,* 416 F.Supp. 106 (D.D.C., Nov. 5, 1975) (No. CIV. 1462-71; 2) and *Inmates of D.C. Jail v. Jackson,* 416 F.Supp. 119 (D.D.C. May 24, 1976) (No. CIV. 75-1668). The D.C. Department of Corrections worked to reverse problems at the jail by launching comprehensive programs to improve environmental and safety conditions and raise the standards of medical and mental HEALTH CARE services. By 2002, conditions at the jail had improved significantly, and its medical and psychiatric services had achieved national accreditation. Bryant's ruling, noted D.C. mayor Anthony Williams, was proof that the jail had passed "the toughest muster of the federal court system."

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## ♦ BRYCE, JAMES

James Bryce, also known as the Viscount Bryce of Dechmont, was born May 10, 1838, in Belfast, Ireland. He attended Glasgow and Heidelberg Universities and received a bachelor of arts degree from Oxford University in 1862.

After his ADMISSION TO THE BAR in 1867, Bryce practiced law for the next fifteen years. He accepted a professorship at Oxford in 1870, where he taught CIVIL LAW until 1893.

Bryce entered Parliament in 1880 and remained a member until 1907. During this time, he also performed diplomatic duties—serving as undersecretary of foreign affairs in 1886 and chief secretary for Ireland from 1905 to 1906. From 1907 to 1913, he acted as ambassador to the United States.

In 1913, Bryce participated at the HAGUE TRIBUNAL, the international court of ARBITRATION established in the Netherlands. After WORLD WAR I, he was active in the formation of the LEAGUE OF NATIONS.

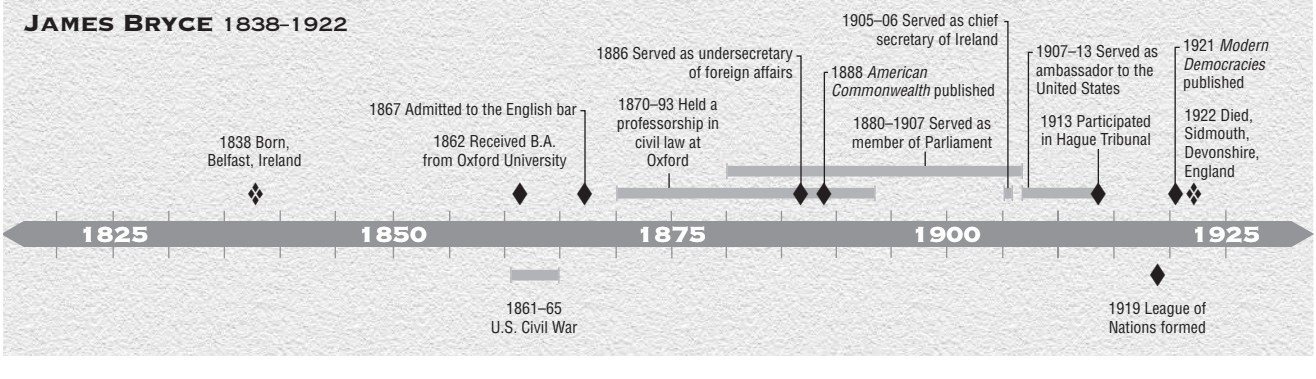

Bryce gained fame for his numerous publications, including *The Holy Roman Empire: The American Commonwealth,* which was published in 1888 and was an important work concerning American government; and *Modern Democracies,* published in 1921.

He died January 22, 1922, in Sidmouth, Devonshire, England.

## ♦ BUCHANAN, JAMES

James Buchanan achieved prominence as a statesman and as the fifteenth president of the United States.

Buchanan was born April 23, 1791, near Mercersburg, Pennsylvania. A graduate of Dickinson College in 1809, Buchanan was admitted to the Pennsylvania bar in 1812 before serving a tour of duty in the militia during the WAR OF 1812. After the war, he entered politics and joined the Pennsylvania House of Representatives in 1814.

In 1821 Buchanan began his career in federal politics, representing Pennsylvania in the U.S. House of Representatives until 1831. Later that year, he extended his interests to the field of foreign service and performed the duties of U.S. minister to Russia for a two-year period. He returned to Congress in 1834 and represented Pennsylvania in the U.S. Senate for the next eleven years. From 1845 to 1849, he served as U.S. SECRETARY OF STATE and reentered foreign service in 1853 as U.S. minister to Great Britain until 1856.

"WHAT IS RIGHT AND WHAT IS PRACTICABLE ARE TWO DIFFERENT THINGS."
—JAMES BUCHANAN

Buchanan became unpopular in 1854 with his involvement in the creation of the Ostend Manifesto, which provided for the purchase by the United States of Cuba from Spain; if Spain refused to sell, the manifesto gave the United States the right to seize the country forcibly. Cuba would then become a slave state, which was viewed favorably by Southerners, but which met with vehement opposition by abolitionists. The manifesto was eventually rejected by the U.S. DEPARTMENT OF STATE.

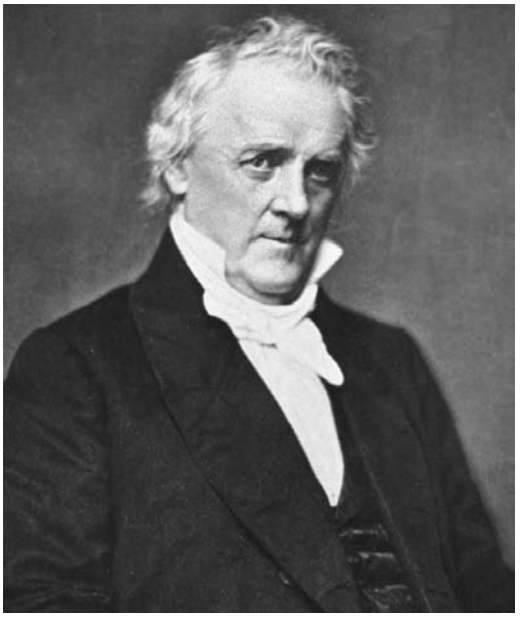

*James Buchanan.* LIBRARY OF CONGRESS

As a presidential candidate in 1857, Buchanan adopted a moderate attitude toward SLAVERY and worked to establish a balance between the proslavery forces and the abolitionists. He believed that slavery was immoral, but that the Constitution provided for the protection of the practice in areas where it already existed. New states, he believed, should have the right to choose whether to be free or slave.

He won great support from the South, and after his election in 1857, Buchanan unsuccessfully attempted to reconcile the strife between the warring factions. He again advocated the

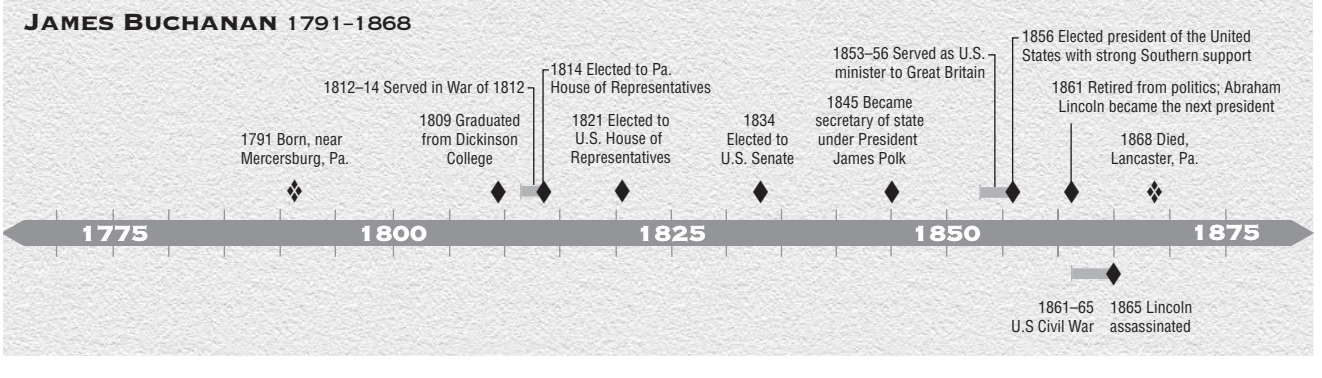

acquisition of Cuba and favored the admission of Kansas as a slave state, which earned him disfavor with the northern free states. The strife between North and South continued, and Buchanan was unable to prevent the secession of South Carolina that led to the outbreak of the Civil War. He opposed secession but believed that he did not possess the power to compel states to remain faithful to the Union. When ABRAHAM LINCOLN succeeded Buchanan as president in 1861 the country was ready for civil war. Buchanan retired to Pennsylvania where he died June 1, 1868, in Lancaster.

## ♦ BUCHANAN, PATRICK JOSEPH

Political commentator, White House appointee, and presidential candidate Patrick Joseph Buchanan is a leader of far-right conservatism. From modest beginnings as a journalist in the early 1960s, Buchanan became an influential voice in the REPUBLICAN PARTY. He served in a public relations capacity under three presidents—Richard M. Nixon, GERALD R. FORD, and Ronald Reagan—before running for president himself in 1992. His hard-line positions on ABORTION, immigration, and foreign aid, as well as his battle cry for waging a "cultural war" in the United States, failed to wrest the nomination from George H. W. Bush. Buchanan tried for the presidency twice more, in 1996 and 2000, but again failed to gain support of his party. Often the subject of controversy for his writings and speeches, Buchanan is the founder of a political organization called the American Cause, whose slogan is America First.

Born November 2, 1938, in the nation's capital, Buchanan was the third of nine children of William Baldwin Buchanan and Catherine E. Crum Buchanan. He grew up under the resolute influences of Catholicism and conservatism, both the hallmarks of his father, a certified public accountant. Buchanan's brilliance at the Jesuit Gonzaga College High School earned him the honor of class valedictorian and a scholarship to Georgetown University. In his senior year of college, the English and philosophy major was already developing the sharp, confrontational style that would mark his professional life. He broke his hand scuffling with police officers over a traffic incident and was suspended from Georgetown for a year. He nonetheless finished third in his class in 1961. He received a master's degree in journalism from Columbia University in 1962.

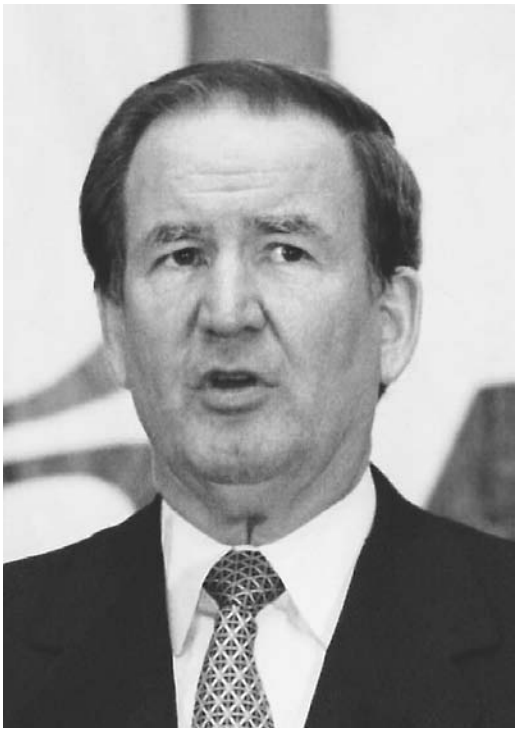

*Pat Buchanan.*
AP/WIDE WORLD PHOTOS

Like other conservative politicians of his generation, notably Senator JESSE HELMS (R-N.C.) and President Reagan, Buchanan began with a career in the media, which led into politics. He spent three years writing conservative editorials for the *St. Louis Globe-Democrat* before being introduced to Nixon at a dinner party. The politician soon hired the 28-year-old as an assistant in his law firm. Buchanan wrote speeches for Nixon's 1968 presidential campaign, worked as his press secretary, urged him to choose Spiro T. Agnew as a running mate, and, after the election, became his special assistant. This last position involved reporting on what the news media said about the administration. It was an increasingly thankless job. Buchanan believed that bad news about the VIETNAM WAR, youth protest, and the WATERGATE scandal was the work of a biased liberal media. He fought back, and is widely thought to have written Vice President Agnew's famous antipress speech in 1969 attacking the "small and unelected elite" whose opinions were critical of the president.

Buchanan escaped the taint that brought down Nixon, in part because he refused to help Nixon aides in their so-called dirty tricks campaign. Buchanan declined to smear Daniel Ellsberg—the former defense analyst who leaked

"IF WE CAN SEND AN ARMY HALFWAY AROUND THE WORLD TO DEFEND THE BORDERS OF KUWAIT, CAN'T WE DEFEND THE NATIONAL BORDERS OF THE UNITED STATES OF AMERICA?"
—PATRICK BUCHANAN

the classified documents known as the Pentagon Papers to the *New York Times,* and whose psychiatrist's office Nixon aides broke into, helping to set in motion the Watergate scandal. In fact, Buchanan later strongly defended the president and denounced the conspirators at U.S. Senate hearings. This testimony saved his career: he was seen as loyal and, more important, as evidently knowing little about the vast extent of the administration's illegalities. Unlike other Nixon insiders, he did not need to rehabilitate his reputation after Nixon left office. He remained in the White House under President Ford until 1975.

Between 1975 and 1985, Buchanan established a national reputation. He wrote a syndicated column that criticized liberals, gays, feminists, and particularly the administration of President JAMES (JIMMY) CARTER. He also made forays into radio and television broadcasting, founding what would later become the political debate program *Crossfire* on the Cable News Network (CNN). He rarely pulled punches; liberals and even some conservatives regarded him as a reactionary, but he won an audience with his appeals to traditional values.

Although he was earning a reported annual income of $400,000 for his writing and work in radio and television, Buchanan jumped at the offer to serve as director of communications during the second term of President Reagan. The job was a conservative activist's dream: besides shaping Reagan's public image, Buchanan had constant access to the president's ear. Buchanan reportedly used this access to spur Reagan on to taking tougher positions—such as vetoing a farm bailout bill and lavishly praising the anti-Sandinista Contra rebels fighting in Nicaragua as "the moral equal of our Founding Fathers."

Presidential aspirations drew Buchanan into the 1992 race. He was even better known than in the 1980s as the result of his nightly appearances on CNN's *Crossfire,* where he sparred with his liberal colleague Michael E. Kinsley. President George H. W. Bush's popularity among Republicans was waning, especially in light of a sluggish economy. Moreover, Buchanan offered a clearly tougher platform than Bush, whom he considered a tepid moderate. "It seemed to me that if we're going to stand for anything," he told the *Washington Times,* "conservative leaders had to at least raise the banner and say, 'This is not conservatism.'"

Buchanan's campaign combined populism, nationalism, and social conservatism: he advocated limits on immigration, restrictions on trade, and isolationism in foreign policy, while opposing abortion rights, GAY AND LESBIAN RIGHTS, and federal arts funding. As he always had in his role as a pundit, the candidate provoked. He ran TV ads featuring gay dancers, and he toured the South criticizing the VOTING RIGHTS ACT (42 U.S.C.A. § 1971 et. seq. [1965]) and reassuring southerners that hanging the Confederate flag from public buildings was acceptable free expression.

Buchanan's critics did not pull their punches. Liberals accused him of xenophobia, racism, and homophobia. Conservatives sometimes came to his defense, but not always. Michael Lind, editor of the conservative journal

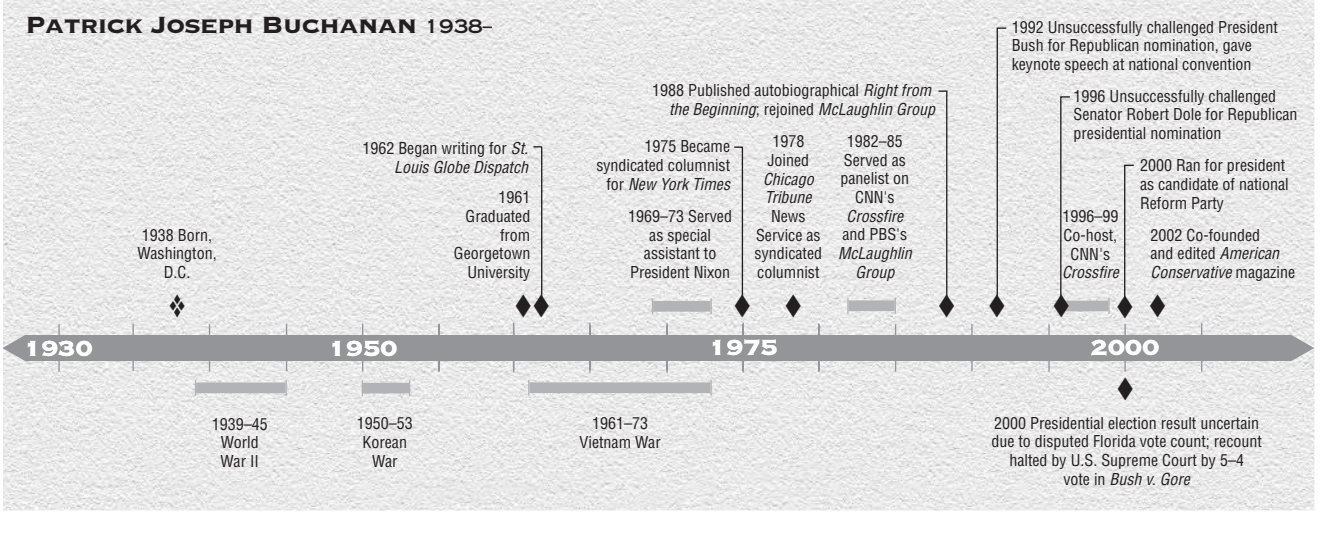

the *National Interest,* wrote that Buchanan represented "conservatism's ugly face." Charges of anti-Semitism followed Buchanan's use of the phrase "Israel and its amen corner" in attacking U.S. intervention in the Persian Gulf War, and among those critical of him was the prominent conservative author and Catholic William F. Buckley Jr. Buchanan denied the charges: he said he was being tarred for supporting John Demjanjuk, who was accused, then later cleared, of being the Nazi war criminal Ivan the Terrible.

Small flaps attended the Buchanan campaign regularly—one day he was announcing that English immigrants would assimilate better than Zulus, and the next calling for beggars to be removed from the streets. The most severe criticism came in August 1992 after his speech at the GOP national convention. First he knocked the Democratic Party's convention as a gathering of "cross-dressers." Then he called for a "cultural war" in which U.S. citizens, like the NATIONAL GUARD putting down the Los Angeles riots, "must take back our cities, and take back our culture, and take back our country."

Typical of the liberal response was an editorial in the *New Republic* criticizing Buchanan for advocating "militarized race war" (*Washington Times* 19 July 1993). Mario M. Cuomo, former governor of New York, confronted Buchanan on the CBS program *Face the Nation,* asking, "What do you mean by 'culture'? That's a word they used in Nazi Germany." William J. Bennett, former secretary of education, accused him of "flirting with fascism." Buchanan defended himself, blaming secular humanism, Hollywood, the National Endowment for the Arts, and public schools for creating an "adversary culture" contrary to traditional values.

Despite Bush's winning the nomination handily, Buchanan's influence did not wane. Two years later, the themes of his candidacy found expression in the Contract with America's insistence on a constitutional amendment allowing school prayer and in a call for a crackdown on immigration. Moreover, in 1995, his "cultural war" message could be heard from nearly every Republican presidential candidate, especially BOB DOLE. Meanwhile, Buchanan announced a second run for the White House campaigning on the same strong conservative positions he had advanced in his campaign in 1992. Though he stayed in the race until the end, Buchanan lost the Republican nomination for president to Dole by a large margin.

In 2000, Buchanan made a third run for the presidency running on the Reform ticket with Ezola Foster, an African American woman. Buchanan's capture of the REFORM PARTY nomination caused a split with supporters of party founder Ross Perot who then ran their own candidate. Both candidates did poorly at the polls winning less than one percent of the votes.

Buchanan continues to be a prolific writer. He has written numerous articles and writes a nationally syndicated newspaper column. His books include *Right from the Beginning* (1988), *A Republic Not an Empire: Reclaiming America's Destiny* (1999), and *The Death of the West: How Dying Populations and Immigrant Invasions Imperil Our Country and Civilization* (2001). Buchanan also remains a prominent figure in the media as a commentator, and as a cohost with liberal reporter Bill Press on their daily program, which airs on MSNBC.

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## BUCK V. BELL

In *Buck v. Bell,* 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927), the U.S. Supreme Court upheld a Virginia state law that authorized the forced sterilization of "feeble-minded" persons at certain state institutions. The case has been all but expressly abrogated by later Supreme Court opinions. Justice OLIVER WENDELL HOLMES JR., considered by many to be a champion of civil liberties, wrote the majority opinion for the court.

In 1924 the state of Virginia passed a law that provided for the sterilization of "mental defectives" and "feeble-minded" persons who were confined to certain state institutions, when, in the judgment of the superintendents of those institutions, "the best interests of the patients and of society" would be served by their being made incapable of producing offspring. On January 23, 1924, a Virginia state court adjudged 18-year-old Carrie Buck to be "feeble-minded" within the meaning of the Virginia law and committed her to the Virginia State Colony for Epileptics and Feeble-Minded.

Nine months later, A.S. Priddy, then superintendent of the Virginia institution, petitioned the institution's board of directors for an order

compelling Buck to be sterilized by a surgical operation known as salpingectomy (the cutting of the fallopian tubes between the ovaries and the womb, and the tying of the ends next to the womb). After giving Buck notice and the opportunity to be heard at a hearing in which evidence was presented supporting the requested order, the board of directors approved the superintendent's petition.

Buck, her guardian, and her attorney challenged the Virginia sterilization law in the Circuit Court of Amherst County, Virginia. Their lawsuit was filed against Dr. J.H. Bell, who had succeeded Priddy as superintendent of the institution. The lawsuit raised two principle arguments.

First, the suit maintained that the sterilization law violated Buck's SUBSTANTIVE DUE PROCESS rights guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution. The suit did not challenge the procedures by which Buck was ordered sterilized. Instead, Buck and her representatives contended that the DUE PROCESS CLAUSE guarantees all adults the constitutional right to procreate and that the Virginia law violated this right.

Second, Buck's representatives argued that the Virginia law violated the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT, which guarantees that the law treat similarly situated people alike. The sterilization law failed to provide equal protection, they argued, because it singled out "feeble-minded" patients at only certain state institutions identified in the statute, while having no application to "feeble-minded" persons at other state institutions or to "feeble-minded" persons who were not committed or confined.

The county court upheld the Virginia law and affirmed the sterilization order, and Buck and her representatives appealed to the Virginia Supreme Court of Appeals, which also affirmed. *Buck v. Bell,* 143 Va. 310, 130 S.E. 516 (Va. 1925). In affirming the lower court, the Virginia Supreme Court of Appeals said that neither the Equal Protection Clause nor the Due Process Clause were designed to interfere with the state's POLICE POWER to prescribe regulations that promote the health, peace, morals, education, and good order of the people. The state's police power, said the Virginia high court, gives the state legislature authority to make laws that spur industrial growth, develop resources, and add to Virginia's wealth and prosperity.

When the case reached the U.S. Supreme Court, Chief Justice WILLIAM HOWARD TAFT assigned the job of writing the opinion to Associate Justice Oliver Wendell Holmes Jr., then 86-years old. Holmes began his opinion by detailing the procedural safeguards that were afforded Buck, though neither Buck nor her representative had taken issue with them. Holmes noted that Buck had received notice of the superintendent's petition for sterilization, Buck was given the opportunity to appear at a hearing where the propriety of her sterilization was determined based on the evidence presented, and Buck had the right to appeal all the way to the highest court in the United States. "There can be no doubt," Holmes concluded, "that so far as procedure is concerned, the rights of the patient [we]re most carefully considered."

Holmes next addressed Buck's substantive due process claim that she had a constitutional liberty to procreate. "Carrie Buck is a feeble-minded white woman.... She is the daughter of a feeble-minded mother ... and the mother of an illegitimate feeble-minded child," Holmes wrote. Then Holmes, a Civil War veteran, compared Buck's sacrifice of procreative freedom to the sacrifice other U.S. citizens make when called into military duty for their county: "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence."

Noting that once sterilized, Buck could be released from the institution to become a productive member of society, Holmes reflected on what he thought to be the wider benefits of the Virginia sterilization law: "It is better for the entire world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.... Three generations of imbeciles are enough."

As to the equal protection argument, Holmes said that "so far as the [institution's] operations enable those who otherwise must be kept confined to be returned to the world, and thus open the ASYLUM to others, the equality aimed at will be more nearly reached."

Seven justices joined Holmes's majority opinion upholding the Virginia sterilization law. Only Associate Justice **PIERCE BUTLER** dissented, but he did so without filing an opinion. The dissenting voices of history have been much louder.

Historians and legal scholars have criticized Holmes's opinion for being unenlightened and unduly harsh, pointing to portions of the opinion where Holmes assumed that **DISABLED PERSONS** were not among the "best citizens," that the "degenerate offspring" of "feeble-minded" persons would either become criminals or starve, and that unless such persons were sterilized society would become swamped by incompetence. The Supreme Court itself has since rendered several opinions that have all but expressly abrogated Holmes's opinion in *Buck,* including one opinion that overturned a forced sterilization law on grounds that "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).

In Holmes's defense, other historians and scholars have pointed out that the Virginia sterilization law was written by a democratically elected state legislature and upheld by three separate courts. They also note that compulsory sterilization was part of the Eugenics Movement, a popular but paternalistic reform movement that was based on the premise that the "lower classes" were too ignorant to practice **BIRTH CONTROL** or otherwise take care of themselves and that eradicating "feeble-minded" persons from the population was humane.

Scholars on both sides of the historical debate acknowledge that Holmes personally was an enthusiast for population control devices but question why Holmes's opinion in *Buck v. Bell* could not have been as prescient as his opinions on other subjects like the **FIRST AMENDMENT,** where his articulation and application of the "clear-and-present-danger" test revolutionized free speech **JURISPRUDENCE.** In the final analysis, *Buck v. Bell* serves as a striking counter example to Holmes's supporters who like to remember the former associate justice as an unyielding liberal champion of individual rights.

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**CROSS-REFERENCES**

Civil Rights; Due Process of Law; Equal Protection; Fourteenth Amendment; Police Power; Sterilization.

## BUGGERY

*The criminal offense of anal or oral copulation by penetration of the male organ into the anus or mouth of another person of either sex or copulation between members of either sex with an animal.*

Buggery is historically referred to as a "crime against nature." It is an offense under both **COMMON LAW** and statutes. Although prosecution for buggery is rare, the punishment upon conviction can be a fine, imprisonment, or both. The term is often used interchangeably with **SODOMY.**

## BUILDING AND LOAN ASSOCIATION

*An organization that exists to accumulate a fund, composed of subscriptions and savings of its members, to help facilitate the purchase or construction of real estate by such members by lending them the necessary funds.*

**CROSS-REFERENCES**

Savings and Loan Association.

## BUILDING CODES

*A series of ordinances enacted by a state or local governmental entity, establishing minimum requirements that must be met in the construction and maintenance of buildings.*

Building codes have been used by governmental units for centuries to ensure that buildings remain safe and sanitary. Early settlements in the United States drafted codes for such purposes

as restrictions on the use of wooden chimneys to prevent fire. The early codes were usually only a few sentences in length, specifying narrow restrictions in construction.

Today, home and business construction has become process governed by a complex series of rules. A building code is usually not one document, but rather it is usually a series of documents setting forth requirements for several aspects of construction, such as gas, mechanics, electricity, fire-alarm systems, and plumbing. Building codes generally regulate all aspects of a construction project, including the structural design of a building, sanitation facilities, environmental control, fire prevention, ventilation, light, materials used for the building, and conservation measures. State and local governmental entities are empowered to enact building codes as part of their POLICE POWERS under the TENTH AMENDMENT to the federal Constitution. That amendment has been interpreted to allow the states to enact legislation designed to protect public health, welfare, and safety.

The development of modern building codes began in the early twentieth century. Residents who lived in tenement houses during that time began a movement that demanded basic sanitation in their housing. Insurance companies also advocated the use of safety standards, due to the potential limitations on the liability of these companies. In 1905, the National Board of Fire Examiners, the predecessor to the American Insurance Association, approved the first National Building Code. It was designed to be used as a model by state and local governmental units when drafting their own building codes. This model code proved very popular among legislators because it provided a respected and comprehensive source for technical construction requirements without the burden and expense of researching and drafting a building code from scratch.

During the NEW DEAL era of the 1930s, the federal government sought to modernize the system of housing in the United States, and the use of building codes to ensure safety and sanitation became widespread. Studies during the late 1960s and early 1970s indicated that the vast majority of cities had adopted a building code of some form. As the use of building codes became more prevalent, the actual codes themselves became much more comprehensive and complex. Through the 1970s, the majority of building codes were enacted at the local level.

A number of model building codes were developed during the second half of the twentieth century. By the 1990s, four major building codes were produced, including the National Building Code, by the American Insurance Association (AIA); the Basic/National Building Code (sometimes called the BOCA Code), by the Building Officials Conference of America (BOCA); the Southern Standards Building Code, by the Southern Building Code Congress International, Inc. (SBCCI); and the Uniform Building Code, by the International Congress of Building Officials (ICBO). Most of these various organizations were formed during the first half of the twentieth century by code enforcement officials who wanted to provide a forum whereby they could exchange ideas about the implementation of building codes.

During the past 20 years, roughly half of the states have enacted legislation providing construction standards on a statewide basis. The states that enacted these laws generally have done so in order to provide uniformity in building regulations across the state, and also to ensure that building laws protected all of the citizens in the state equally. Local governments have retained much of the responsibility for the actual implementation of building regulations in these states. It is not uncommon for a state to draft statutes that govern buildings on a general level, while the local units of the state enact more specific regulations to apply to that locality. Local building codes often remain uniform because these local governments typically rely upon one of the available model building codes.

The various associations representing code enforcement officials have formed broader associations for the purposes of collaboration. In 1972, BOCA, SBCII, and ICBO formed the Council of American Building Officials (CABO), which has successfully drafted such model codes as the CABO One and Two Family Dwelling Code and the CABO Model Energy Code. In 1994, the three major model code organizations formed the International Code Council (ICC), which has produced several international model codes. As of 2003, the ICC had developed more than a dozen international model codes, including the International Building Code. The ICC estimates that 46 states, plus the District of Columbia, Puerto Rico, and some federal agencies, enforce or have adopted at least one of the international codes.

Building codes are directly affected by ongoing research regarding the performance of products, materials, or construction methods. Industry experts develop standards, which are documents that contain industry consensus regarding the methods by which the products, materials, or methods should be designed or employed. When an organization drafts a model building code, it typically refers to these standards in the text of the code. Since the standards are national in scope, the reference of these standards ensures that a local building code requires constructors to meet minimum national standards concerning details like safety and performance.

Few question that houses and other buildings are now designed to be much safer and more sanitary than were buildings constructed a century or longer ago, primarily as a result of the implementation of the various building codes throughout the United States. However, some commentators have noted that the requirements of these codes have caused construction prices to rise steadily, which in turn causes the costs of housing and other building usage to rise as well. Moreover, some critics maintain that the process of developing building codes is often as much of a process of negotiation between trade groups who are protecting their own interests as it is a completely scientific process.

Those who are involved in the drafting and implementation of building codes counter that building codes are designed with the health and safety of the public in mind. Results of testing performed during the development of standards are often readily available for inspection, so if questions of reliability arise, they often can be answered through a review of these testing procedures. Moreover, supporters note that state and local governmental entities are not bound to adopt the model building codes, and if a governmental unit disagrees with a provision in a model code, it is free to replace that provision with a requirement of its own creation. Accordingly, if a member of the public disagrees with a particular requirement, he or she generally may raise this issue with the appropriate governing body that decides whether a code or code provision should be adopted.

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## BUILDING LINE

*A line that a* MUNICIPAL CORPORATION *establishes, beyond which no building may extend to ensure that its streets will appear uniform.*

A building line is also known as the "set back" requirement.

## BUILDING OFFICIALS AND CODE ADMINISTRATORS INTERNATIONAL

The Building Officials and Code Administrators International (BOCA) is an association of professionals employed in the establishment and enforcement of BUILDING CODES, which are the rules and regulations that govern the design and construction of buildings. BOCA encourages cities and states to adopt uniform building codes, and promotes competence and professionalism in the enforcement of those codes.

The organization was established in 1915 by building officials from nine states and Canada. Their purpose was to provide a forum for the exchange of knowledge and ideas about building safety and construction regulation. In 1950, BOCA published the *BOCA Basic Building Code.* This was the organization's first model code. Within one year, the BOCA code had been adopted by fifty cities.

BOCA currently publishes a series of books called the *BOCA National Codes,* which contain detailed standards for all aspects of building construction. The section on stairways, for example, precisely describes the acceptable height, depth, and width of steps, and the proper placement and configuration of handrails necessary to ensure safety and ease of use. Separate volumes cover general construction, mechanical systems, plumbing, fire prevention, energy conservation, and other areas.

The codes published by BOCA do not in themselves have the force of law. They can be enforced only when they have been adopted by cities, states, or other government bodies with the authority to issue or withhold building permits. A city or state is free to adopt the BOCA codes in whole or in part.

BOCA's codes have been adopted by many states and cities in the eastern and midwestern

*Contractors, manufacturers, architects, and engineers must follow the recommendations of BOCA when building in a municipality that has adopted BOCA's codes.*

AP/WIDE WORLD PHOTOS

United States. Other professional associations perform a similar function in other parts of the country, and publish their own building codes: the International Conference of Building Officials serves western states and publishes the *Uniform Building Code,* and the Southern Building Code Congress serves southern states and publishes the *Standard Building Code.* The three regional organizations are working together toward creating a single model code for the United States.

The publication of the codes is BOCA's most important function. The organization also publishes manuals, textbooks, and periodicals for its members. In addition, BOCA continually develops its model code to keep it up-to-date. It conducts regular training and education programs for its members and provides consultation services for local governments. BOCA disseminates information on the quality and acceptability of building materials and systems as well as on new construction techniques.

BOCA's membership consists largely of cities, towns, and government agencies. These "government members" are represented by individual officials who administer rules and regulations on construction, fire safety, property maintenance, development, and land use. A typical official of this kind is a building inspector with duties to examine building plans and make on-site inspections during construction. Contractors, manufacturers, and people in the architectural and engineering professions may also be members of BOCA.

BOCA is funded by the annual dues of its members and through the sale of its publications. It is based in Country Club Hills, Illinois, a suburb of Chicago.

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## BULK TRANSFER

*A sale of all or most of the materials, supplies, merchandise, or other inventory of a business at one time that is not normally done in the ordinary course of the seller's business.*

Bulk transfers, commonly called bulk sales, have, in the past, been governed by individual state laws, generally called Bulk Sales Acts, which imposed certain requirements on such transfers. These acts were aimed at preventing a seller from secretly selling his or her business and absconding with the proceeds in order to avoid the repayment of any outstanding debts. These laws have been superseded in most states by Article 6 of the UNIFORM COMMERCIAL CODE (UCC), which shares the same purpose but establishes uniform requirements to simplify commercial transactions. A prospective buyer of a business must obtain a list of the creditors of the seller and notify them in advance of the sale so they can take steps to protect themselves against the seller's possible default on his or her debts. Failure of a bulk transfer to comply with the UCC neither makes the transfer void nor destroys the creditors' rights to repayment. Depending upon the jurisdiction, the buyer may become personally liable to the seller's creditors up to the value of the assets purchased or the property sold may be levied upon by the creditors for the outstanding debts.

A bulk transfer is not the same as a secured transaction.

## BULLETIN

*A printing of public notices and announcements that discloses the progress of matters affecting the general public and which usually includes provisions for public comment. A summarized report of a newsworthy item for immediate release to the public. The official publication of an association, business, or institution.*

## BURDEN OF GOING FORWARD

*The onus on a party to refute or to explain evidence presented in a case.*

The burden of going forward, also called the burden of producing evidence, burden of production, or the burden of proceeding, requires a party in a lawsuit to refute or explain each item of evidence introduced that damages or discredits his or her position in the action, as a trial progresses. Suppose a person is charged with the possession of stolen goods. After the prosecution has introduced evidence of the defendant's possession of such goods, the defense bears the burden of refuting or explaining the evidence. If the evidence appears unfavorable for the prosecution, it has the burden of going forward to produce more evidence to bolster its claim that the defendant committed the crime. The failure to produce more evidence may result in the judge's dismissing the charges against the defendant. If the prosecution produces such evidence, it shifts the burden of production back to the defendant, who then must refute the additional evidence.

The burden of going forward also shifts during a civil proceeding. It shifts to the defendant after the plaintiff rests its case, but it may shift even before that time. In a **WRONGFUL DEATH** case, for example, the plaintiff may, at a certain point in the trial, file a motion asking for a ruling (sometimes a motion for **SUMMARY JUDGMENT** or a motion for a directed verdict) in his or her favor by maintaining that he or she has presented sufficient evidence to show that the defendant's actions resulted in the victim's death. The burden then shifts to the defendant to produce additional evidence to refute the plaintiff's claim; otherwise, the judge may grant the plaintiff's motion, thus concluding the case in the plaintiff's favor.

## BURDEN OF PERSUASION

*The onus on the party with the* **BURDEN OF PROOF** *to convince the trier of fact of all elements of his or her case. In a criminal case the burden of the government to produce evidence of all the necessary elements of the crime* **BEYOND A REASONABLE DOUBT**.

The burden of persuasion is the affirmative duty of a party to establish his or her right to judicial relief by convincing the trier of fact, the judge or the jury, that the facts asserted are true and support the allegations. Whereas the **BURDEN OF GOING FORWARD** shifts from the prosecution to the defense in a criminal case, or from the plaintiff to the defendant in a civil case, as evidence is presented and disproved, the burden of persuasion remains with the plaintiff or the prosecution until the case is concluded. The phrase *burden of persuasion* is often used interchangeably with the phrase *burden of proof.*

The burden of proof varies depending on whether the proceeding is criminal or civil. In a criminal case, the burden of proof required of the state or government will be satisfied by evidence that demonstrates "beyond a reasonable doubt" that the defendant has committed the crime. Proof beyond a reasonable doubt does not require that the proof be so clear that no possibility of error can exist; no criminal prosecution would ever prevail if that were the standard. On the other hand, reasonable doubt will be found to exist (and the defendant found not guilty) if the evidence produced only demonstrates that it is slightly more probable that the defendant committed the crime than that she or he did not. The **REASONABLE DOUBT STANDARD** has been defined to mean that the evidence must be so conclusive and complete that all reasonable doubts are removed.

In a civil matter, a plaintiff is required to establish his or her case by "a preponderance of the evidence." A **PREPONDERANCE OF THE EVIDENCE** is a body of evidence that is of greater weight or is more convincing than the evidence offered in opposition—evidence that as a whole shows that the facts asserted by the plaintiff and sought to be proved are more probable than not.

Another burden of proof applied in some matters is that the evidence must be "clear and convincing." This standard of proof falls somewhere between the civil preponderance-of-the-evidence standard and the criminal beyond-a-reasonable-doubt standard. Clear and convincing evidence requires the trier of fact to have a "firm belief" that the facts have been established. The clear-and-convincing standard, though not used nearly as often as the other two standards, has been applied to some civil cases, including suits seeking the reformation of a contract. In addition, the **SUPREME COURT OF THE UNITED STATES** has held that the clear-and-convincing standard is the constitutionally required burden of proof in a civil commitment proceeding (*Addington v. Texas,* 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 [1979]).

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## BURDEN OF PLEADING

*The duty of a party to plead a matter to be heard in a lawsuit. The onus on the defendant to introduce or raise the defense for consideration in the lawsuit. This concept is also referred to as* burden of allegation.

The PLEADING burden concerns what a party must put in his or her pleading when a legal proceeding is first instituted. In a criminal proceeding, this initial pleading is an indictment or information, which alleges that a crime was committed. In a murder case, for instance, the prosecutor must plead that the defendant killed the victim. The prosecution thus has the burden of pleading on the issue of whether the defendant killed the victim. On other issues in the case, the burden of pleading may shift to the defendant. For example, if the defendant claims that she or he is insane and thus not responsible for the crime, the defendant has the burden of pleading insanity.

In a civil matter, the initial pleading is a complaint, which initiates a lawsuit. For instance, in a NEGLIGENCE action, the plaintiff has the burden of pleading that the defendant was negligent and that the plaintiff has been injured or damaged by the actions of the defendant. Likewise, in a contract claim, the plaintiff must allege that a contract existed and that the defendant breached the contract. Failure to meet the pleading burden can result in dismissal of the claim.

CROSS-REFERENCES

Burden of Proof; Insanity Defense.

## BURDEN OF PROOF

*A duty placed upon a civil or criminal defendant to prove or disprove a disputed fact.*

Burden of proof can define the duty placed upon a party to prove or disprove a disputed fact, or it can define which party bears this burden. In criminal cases, the burden of proof is placed on the prosecution, who must demonstrate that the defendant is guilty before a jury may convict him or her. But in some jurisdiction, the defendant has the burden of establishing the existence of certain facts that give rise to a defense, such as the insanity plea. In civil cases, the plaintiff is normally charged with the burden of proof, but the defendant can be required to establish certain defenses.

Burden of proof can also define the *burden of persuasion*, or the quantum of proof by which the party with the burden of proof must establish or refute a disputed factual issue. In criminal cases, the prosecution must prove the defendant's guilt BEYOND A REASONABLE DOUBT.

Judges explain the REASONABLE DOUBT STANDARD to jurors in a number of ways. Federal jury instructions provide that proof beyond a reasonable doubt is "proof of such a convincing character that a reasonable person would not hesitate to act upon it in the most important of his own affairs." State judges typically describe the standard by telling jurors that they possess a reasonable doubt as to the defendant's guilt if, based on all the evidence in the case, they would be uncomfortable with a criminal conviction. In giving the reasonable doubt instruction, judges regularly remind jurors that a criminal conviction imposes a variety of hardships on a defendant, including public humiliation, incarceration, fines, and occasionally the FORFEITURE of property. Reasonable doubt is the highest standard of proof used in any judicial proceeding.

Reasonable doubt is also a constitutionally mandated burden of proof in criminal proceedings. The U.S. Supreme Court has ruled that the DUE PROCESS CLAUSE of the FIFTH AMENDMENT and Fourteenth Amendments to the federal constitution prohibit criminal defendants from being convicted on any quantum of evidence less than proof beyond a reasonable doubt. IN RE WINSHIP, 397 U.S. 358, 90 S. Ct. 1068, 23 L. Ed. 2D 368 (1970). Although the reasonable doubt standard is not specifically mentioned anywhere in the Constitution, the Court observed that the standard is so deeply rooted in the nation's history as to reflect the fundamental value that "it is far worse to convict an innocent man than to let a guilty man go free."

In civil litigation the standard of proof is either proof by a PREPONDERANCE OF THE EVIDENCE or proof by clear and convincing evi-

dence. Both are lower burdens of proof than beyond a reasonable doubt. A preponderance of the evidence simply means that one side has more evidence in its favor than the other, even by the smallest degree. Clear and convincing evidence is evidence that establishes the truth of a disputed fact by a high probability. Criminal trials employ a higher standard of proof because criminal defendants often face the deprivation of life or liberty if convicted while civil defendants generally only face an order to pay money damages if the plaintiff prevails.

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CROSS-REFERENCES

Burden of Persuasion; Due Process of Law; Evidence; Fifth Amendment; Fourteenth Amendment; Proof; Reasonable Doubt.

## BUREAU OF INDIAN AFFAIRS

See INTERIOR DEPARTMENT.

## BUREAUCRACY

*A system of administration wherein there is a specialization of functions, objective qualifications for office, action according to the adherence to fixed rules, and a hierarchy of authority and delegated power.*

Organizations such as the armed forces or administrative agencies are common examples of bureaucracies.

## ♦ BURGER, WARREN EARL

Warren Earl Burger was a self-made man who rose from modest origins to become the fifteenth chief justice of the U. S. Supreme Court.

Burger was born September 17, 1907, in St. Paul, Minnestota, the fourth of seven children of Charles Burger and Katharine Schnittger Burger. His father worked as a railroad cargo inspector and traveling salesman, and the family lived on his limited income. Burger began delivering newspapers at the age of nine to help with family finances. At Johnson High School in St. Paul, he participated in music, sports, student government, and the student newspaper. Princeton University offered him a partial scholarship, but because of his family's limited resources, he was unable to accept it. Instead, he took extension courses through the University of Minnesota from 1925 to 1927 and then attended night classes at St. Paul College of Law (now WILLIAM MITCHELL College of Law). Throughout college and law school, Burger supported himself by working as an insurance agent. He earned his bachelor of laws degree, magna cum laude, in 1931.

Burger was admitted to the Minnesota bar in 1931, then entered private practice in St. Paul with Boyesen, Otis, and Faricy. He became a partner in 1935, and the firm was renamed Faricy, Burger, Moore, and Costello. Burger concentrated his practice in corporate law, real estate, and probate law. At the same time, he became involved in politics, and in 1934 he helped organize the Minnesota Young Republicans.

Burger was rejected for military service in WORLD WAR II because of a spinal injury and instead served on the Minnesota Emergency War Labor Board. After the war he returned to his law practice and became more active in politics. He had played an important part in Harold E. Stassen's successful campaigns for governor of Minnesota in 1938, 1940, and 1942, and acted as floor manager for Stassen's presidential bids at the 1948 and 1952 Republican conventions. These activities brought him to the attention of prominent Republicans. In 1952 he was named assistant attorney general in charge of the Justice Department's Civil Division, which handled all civil cases except antitrust and land litigation.

"FREEDOM OF SPEECH CARRIES WITH IT SOME FREEDOM TO LISTEN."
—WARREN BURGER

Burger's career as a jurist began when he was appointed to the U.S. Court of Appeals for the District of Columbia Circuit in 1956. He quickly established his credentials as a law-and-order judge, leading the conservative faction of the court to numerous decisions that favored police officers and prosecutors and curbed the rights of criminal defendants.

Burger served on the D.C. Circuit court until 1969 when President RICHARD M. NIXON appointed him chief justice of the Supreme Court. In choosing Burger to replace EARL WARREN, Nixon was fulfilling a campaign promise to restrain the Court, which was, according to him, favoring the criminals in U.S. society. Burger's ethical record was a major consideration in his nomination, and his opposition to judicial activism (a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decision, usually with the suggestion

*Warren Burger.*
PHOTOGRAPH BY JOSEPH LAVENBURG, NATIONAL GEOGRAPHIC. COLLECTION OF U.S. SUPREME COURT

that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent), and the expansion of CIVIL RIGHTS and liberties made him what Nixon was looking for, a conservative antidote to the activist liberalism of the WARREN COURT.

However, the swift and certain counterrevolution that Nixon and others expected from the Burger Court never materialized. Although the Court diluted some earlier liberal decisions, particularly in the area of CRIMINAL PROCEDURE, it stopped far short of overruling them. And although the Burger Court was far less sympathetic to the rights of criminal defendants than the Warren Court had been, it established no clear pattern of repudiating the earlier doctrines. In some areas, such as AFFIRMATIVE ACTION and desegregation, the Burger Court continued in the direction set by the Warren Court, and Burger often cast the swing vote that tipped the balance in favor of the liberals' position. The Burger Court's decision in ROE V. WADE (410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 [1973]) established a constitutional right to privacy and made ABORTION legal. Yet Burger refused to support a movement to give gender classifications the same level of scrutiny used for RACIAL DISCRIMINATION. When viewed as a whole, the record shows that Burger was an enigmatic and unpredictable justice but that he generally stayed the course set by his predecessor. In fact, the Burger Court never directly overruled any major doctrine of the Warren years.

Burger was satisfied with his reputation as a centrist. "It's always been somewhat comforting to know," he once told an interviewer, "that I have been castigated by so-called liberals for being too conservative and castigated by so-called conservatives for being too liberal. Pretty safe position to be in."

Burger left his personal imprint on several important areas of the law. His 1973 opinion in MILLER V. CALIFORNIA (413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 [1973]) established the use of "contemporary community standards" in determining whether material is obscene. He authored key decisions interpreting the free speech and free press guarantees of the FIRST AMENDMENT, including *Nebraska Press Ass'n v.*

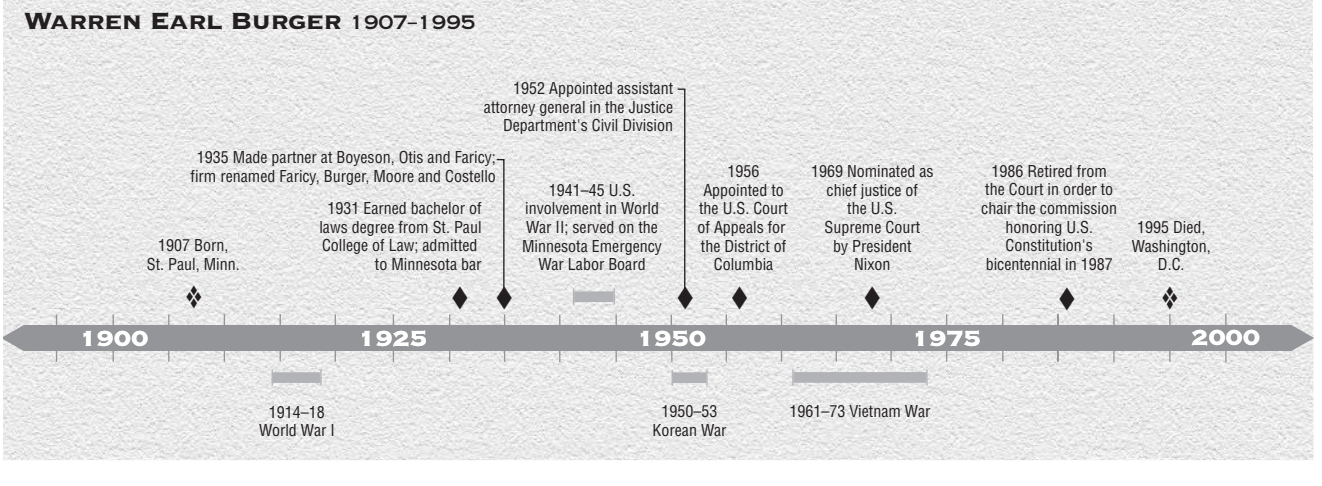

*Stuart,* 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976), a 1976 decision prohibiting prepublication restraints to protect criminal defendants from negative PRETRIAL PUBLICITY. Writing for the majority, Burger declared that "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." Burger also delivered the opinion invalidating the legislative VETO (*I.N.S. v. Chadha,* 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 [1983]), thus preventing Congress from blocking presidential action without passing a law.

Burger's most famous criminal opinion was UNITED STATES V. NIXON, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), in which he ordered the embattled president, then deeply enmeshed in the WATERGATE scandal, to release to Special Prosecutor LEON JAWORSKI the tape recordings that implicated the president in the Watergate cover-up. Nixon's resignation was a direct result of Burger's ruling.

One of Burger's goals as chief justice was to modernize and streamline the courts to make them more accessible and functional, and he worked tirelessly toward that end. Burger originated the idea of employing professional court administrators, implemented continuing education for judges, and improved coordination between federal and state courts. In addition, he was noted for his outspoken criticism of ill-prepared litigators who use the courts for what he called on-the-job training.

Burger retired from the bench in 1986 to chair the commission honoring the two hundredth anniversary of the signing of the Constitution, which occurred on his eightieth birthday, September 17, 1987. He ended his last day on the bench without fanfare, simply announcing that the Court had completed its term and would recess until the first Monday in October. Asked about his future plans, he said, "I have a lot of other things I want to do. . . . I never had any ambition to be a judge. I loved practicing law. If tradition didn't prohibit it, I'd love to go back to practicing law." Upon his retirement, one of his law clerks commented that Burger's most important legacy may be that "he kept most of society's problems truly in balance."

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CROSS-REFERENCES

Criminal Procedure; Freedom of Speech; Freedom of the Press; Obscenity.

## BURGLARY

*The criminal offense of breaking and entering a building illegally for the purpose of committing a crime.*

Burglary, at COMMON LAW, was the trespassory breaking and entering of the dwelling of another at night with an intent to commit a felony therein. It is an offense against possession and habitation. The common-law elements of the offense have been modified in most jurisdictions by statutes that tend to make the crime less restrictive.

### Elements of the Offense

**Trespass** The TRESPASS element of the offense signifies that it must occur without the consent of the victim. If the thief gains entry by misrepresenting his or her identity, the element of trespass is satisfied, as there is no consent to entry.

**Breaking** Breaking consists of creating an opening for entry into the building. It can be accomplished by removing an object that is blocking an entry or by blasting open a wall. The use of force is not required. The breaking element is satisfied if access is obtained by opening a closed door or window, regardless of whether these are locked.

At common law, entering through a preexisting opening did not constitute breaking. If one gained access through an open door or window, burglary was not committed. The same rule applied when a door or window was partially open even though it was necessary to open it further in order to enter. The rationale underlying this rule was that one who failed to secure his or her dwelling was not entitled to the protection of the law. A majority of states no longer follow this rule and consider breaking to be the slightest application of force to gain entry through a partially accessible opening.

When entry is gained by a MISREPRESENTATION of identity or by any other trick, it is called constructive breaking, which satisfies the breaking requirement of burglary. On the other hand,

**Persons Arrested for Burglary,[a] by Sex and Age, in 2001[b]**

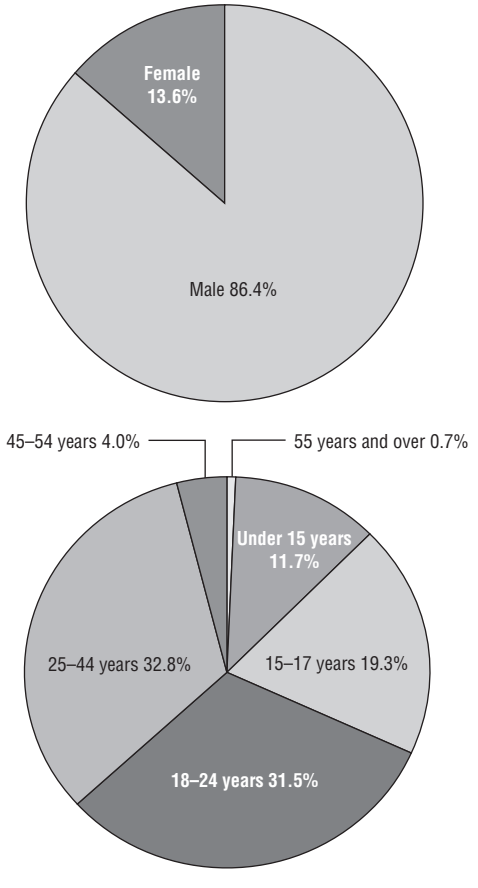


**Total: 198,883**

[a] Defined as "breaking and entering" in many jurisdictions.
[b] Numbers may not add up to 100 due to rounding.

SOURCE: FBI, *Crime in the United States* annual, 2001.

if a person, such as a servant, has authority to enter, there is no breaking unless he or she breaks into and enters an unauthorized area.

Under the common law, the breaking had to occur immediately before the time of entry. Most jurisdictions that retain the breaking element are in agreement; in others, the breaking can occur during a reasonable time before the entry. Some jurisdictions have completely eliminated the element of breaking from the statutory definition of burglary, while others require it for one degree of burglary but not another.

**Entry** In the course of a burglary, entry is the act that follows the breaking. Literally, it occurs when there is physical intrusion into another's dwelling or building by any part of the intruder's body. A momentary intrusion will suffice. When a thief kicks open a window to gain access to a dwelling, the momentary insertion of the foot constitutes an entry.

When an instrument is used to gain access to a dwelling, the intrusion of the instrument is not an entry unless it is used to accomplish the intended felony. If the instrument is used to take something from inside the building, there is an entry sufficient for burglary.

An entry may be constructive. In other words, it is not always required that the thief enter the dwelling. If he or she directs another person not legally capable of committing the offense, such as a child, to enter, then the entry is imputed to the thief.

In jurisdictions where breaking is an element of burglary, there must be causation between the breaking and entry. Although the acts may occur at separate times depending upon statute, the entry must follow from the breaking. Where a hole is drilled into a wall on one day and entry occurs a few days later, there is a causal link between the breaking and entry.

**Dwelling** At common law, the entry had to be into the dwelling of another to constitute the offense. A dwelling was defined as a house or mansion where one normally sleeps, although it was not necessary that it be occupied at the time of entry. Structures and premises immediately surrounding the dwelling, such as an outhouse or a yard, were also protected since they were considered part of the dwelling.

A dwelling had to be a place of human habitation and occupancy. A storehouse protected by a nightwatchman was not a dwelling even if he occasionally slept in it. If, however, it was within the immediate surroundings of a dwelling, it would be treated as a dwelling for purposes of burglary.

Today, most jurisdictions have expanded the common-law requirement that the offense take place in a dwelling. There is no jurisdiction that retains this requirement for all degrees of burglary. Under modern statutes, the offense can occur in any enclosed structure, regardless of whether it is used for habitation.

**Nighttime** The requirement that the breaking and entering occur at night was an essential element of the offense at common law. Sunrise and sunset were not the means of determining night and day. The proper test was whether the

countenance of a human could be discerned by natural light.

Many jurisdictions no longer require that the offense occur at night. Some states have retained it for higher degrees of the offense, but do not require it for all degrees. Under statutes retaining the nighttime element, it is defined as occurring 30 minutes before sunrise or 30 minutes after sunset. It is not necessary that all acts be done on the same night. If the breaking and entering is done one night and the felony is committed a few nights later, the offense is committed.

**Intent** Under the common law, an intent to commit a felony at the time of breaking and entering into the dwelling was an essential element of burglary. Since LARCENY was a felony at common law, an intent to commit a larceny would suffice. Statutes vary from one jurisdiction to another. An intent to commit a felony is no longer required for all grades of the offense. In some states an intent to commit any crime will suffice. Many states have retained the felony requirement for higher grades of the offense. Absent this intent element, a breaking and entry might be a trespass, but not be a burglary.

If a defense to the underlying crime or felony is sufficiently established, there can be no conviction for burglary. For example, if a person charged with burglary is accused of larceny and has a sufficient defense to the larceny charge, then there is no burglary.

### Degrees of the Offense

Some jurisdictions have a statutory scheme under which the offense is divided into degrees. These types of statutes frequently impose heavier penalties when the offense involves the use of force or weapons. Under one such statute, burglary in the third degree is committed by a person knowingly entering or remaining unlawfully in a building with an intent to commit a crime therein. When the same offense is committed with explosives or deadly weapons, or when it results in physical injury to a person who is not a participant in the crime, it is burglary in the first degree, for which there is a greater penalty.

Imprisonment is the usual punishment for burglary. Under statutes in many states, the severity of the sentence is determined by the degree of the burglary.

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## ♦ BURKE, EDMUND

Edmund Burke was an orator, philosophical writer, political theorist, and member of Parliament who helped shape political thought in England and the United States during the late eighteenth and early nineteenth centuries.

Burke was born January 12, 1729, in Dublin, Ireland, to a Protestant father and a Roman Catholic mother. His father, a prosperous Dublin attorney, was cold and authoritarian, and the two did not enjoy a close relationship. After graduating from Trinity College, Dublin, in 1750, Burke traveled to England to study law in accord with his father's wishes. However, he did not progress in his legal studies, and he eventually abandoned the law in favor of a literary career.

In 1756 Burke published two philosophical treatises, *A Vindication of Natural Society* and *A Philosophical Enquiry into the Origin of Our Ideas of the Sublime and Beautiful.* These and other works launched Burke's career as a critic of social and political issues. Burke became a member of the literary circle headed by Samuel Johnson, the English author, scholar, and critic. In 1759, Burke founded the *Annual Register,* a yearly survey of world affairs to which he contributed until 1788.

"ALL GOVERNMENT—INDEED, EVERY HUMAN BENEFIT AND ENJOYMENT, EVERY VIRTUE AND EVERY PRUDENT ACT—IS FOUNDED ON COMPROMISE AND BARTER."
—EDMUND BURKE

Realizing that the literary life would not pay enough to support a family, Burke entered politics. In 1765, he was appointed private secretary to the Marquis of Rockingham, England's prime minister and a member of the WHIG PARTY, marking the beginning of a lifelong alliance between Burke and Rockingham and the Whigs. Burke was also elected to Parliament in 1765. In 1766, Rockingham lost the premiership. Burke was offered employment with the new administration, but chose to remain with the Whig opposition. "I believe in any body of men in England I should have been in the minority," he said. "I have always been in the minority."

Burke believed strongly in opposition politics. Having a party that acts as a watchdog for the incumbent party is the best way, he felt, to avoid corruption and abuse of power. As a member of the opposition, Burke could do what he did best: criticize the government for what he considered unjust or unwise policies. He disagreed with England's policies in North America and urged the government to abolish the tea

*Edmund Burke.*
LIBRARY OF CONGRESS

duty imposed on the colonies. "All government—indeed every human benefit and enjoyment, every virtue and every prudent act—is founded on compromise and barter," he said in 1775, in his *Speech on Conciliation with America.* However, despite his dissatisfaction with English policy, he did not support the American revolutionaries. Although he believed that the British had been overly harsh and tyrannical, he also believed in the legislative superiority of the British Parliament over the colonies. In August, 1776, he expressed his despair over the conflict between England and its North American colonies: "I do not know how to wish success to those whose victory is to separate us from a large and noble part of our empire," he wrote. "Still less do I wish success to injustice, oppression, and absurdity. . . . No good can come of any event in this war to any virtuous interest."

Burke vociferously criticized the British government's policies in Ireland as well, and decried the poverty and persecution of Catholics there. Yet, although his sympathies were clearly with the oppressed and powerless in Ireland, he again opposed revolution and urged moderation on both sides. "I believe there are very few cases which will justify a revolt against the established government of a country, let its constitution be what it will, " he said.

Burke's support for established order, even where it meant support for inequalities, was most evident in his harsh criticism of the French Revolution. "[T]he age of chivalry is gone," he wrote in *Reflections on the Revolution in France.* "That of sophisters, economists and calculators has succeeded; and the glory of Europe is gone forever." According to Burke, the French revolutionaries' only purpose was to destroy all traditional authority and property rights. The result, he predicted, would be ANARCHY and the emergence of an autocratic ruler whose reign would be worse than any the revolutionaries had seen before. Burke's prediction proved accurate: the revolution in France led to the Reign of Terror and the regime of Napoleon.

In his condemnation of the French Revolution, Burke presaged American thought on the importance of private property to the preservation of societal harmony. Stephen B. Presser, associate dean and professor at Northwestern University School of Law, wrote that

> Burke's attacks on the French, and his spirited defense of private property as a guarantee of order, stability, and prosperity have echoed through the arguments of American judges and statesmen.

Burke's strongest criticism of British policy came in the 1780s when he instigated IMPEACHMENT proceedings against Warren Hastings, governor-general of India. Burke attacked the

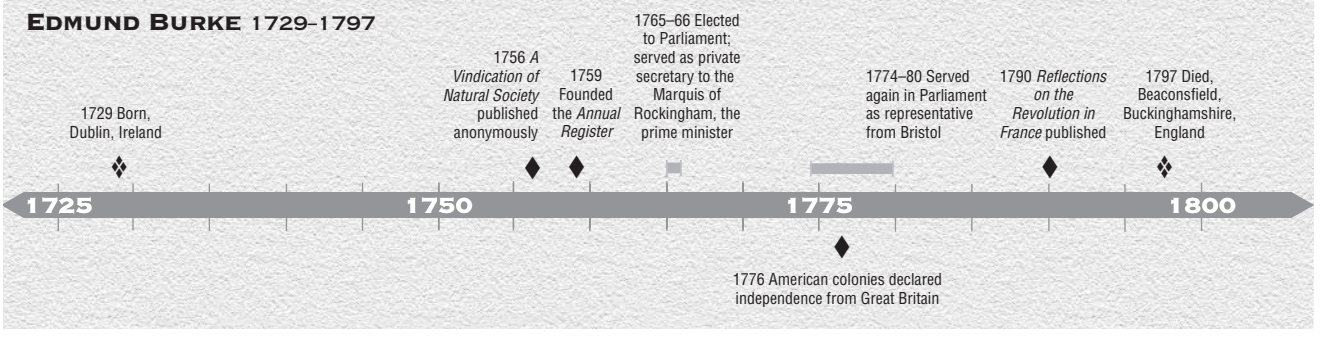

British East India Company as unjust and oppressive in its treatment of the Indian people. In his *Speech on Opening the Articles of Impeachment of Warren Hastings* (1788), Burke asserted his belief that the exercise of ARBITRARY political power is never justified. "My Lords . . . the King has no arbitrary power to give him [Hastings], your Lordships have not, nor the commons, nor the whole Legislature. We have no arbitrary power to give, because arbitrary power is a thing, which neither any man can hold nor any man can give." Burke's view that political power is held in trust for the benefit of the people is reflected in the basic tenets of U.S. democracy and is at the core of the United States' republican form of government.

Burke has been claimed as a champion of both liberals and conservatives. His denunciation of oppression in India, Ireland, and North America and his staunch opposition to the exercise of arbitrary power endeared him to libertarians and proponents of individual rights. However, his strong faith in established political, religious, and social institutions, and his fear of reform beyond limitations on sovereign power, reverberate in contemporary conservatism. Likewise, his support for CIVIL RIGHTS was tempered with a strong belief in the necessity of individual responsibility. In 1791, he wrote, in *A Letter to a Member of the National Assembly,*

> Men are qualified for civil liberty in exact proportion to their disposition to put moral chains upon their own appetites; in proportion as their love to justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the counsels of the wise and good, in preference to the flattery of knaves.

Burke was firmly opposed to the substitution of government assistance for individual initiative. In *Thoughts and Details on Scarcity* (1795), he cautioned against "attempts to feed the people out of the hands of the magistrates." He seemed to predict the modern quagmire of WELFARE dependency when he wrote, "and having looked to government for bread, on the very first scarcity they will turn and bite the hand that fed them. To avoid that evil, government will redouble the causes of it; and then it will become inveterate and incurable."

The last few years of Burke's life were marred by the death of his only son, Richard Burke, in 1794. With his wife, Jane Nugent Burke, whom he had married in 1757, Burke had established the harmonious family life he had never known as a child. The premature loss of his son, and the concomitant demise of Burke's dreams and plans for the young man's future, left Burke disconsolate. Although he continued his activities in politics, particularly in the formation of the Irish government, his personal life was clouded with disappointment and bitterness. Burke died three years after his son, on July 9, 1797; yet two hundred years after his death, his philosophies continued to resonate on both sides of the Atlantic.

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## ❖ BURLAMAQUI, JEAN JACQUES

Jean Jacques Burlamaqui achieved prominence as a Swiss jurist and legal author.

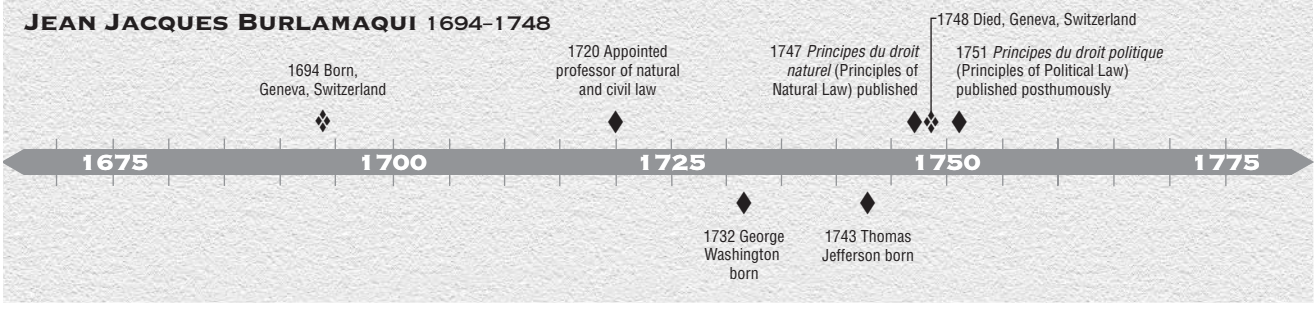

Burlamaqui was born July 24, 1694. As an educator, Burlamaqui taught legal studies at Geneva; however, his fame is based primarily on his two publications relating to the law: *Principes du droit naturel,* translated as "Principles of natural law," in 1747; and *Principes au droit politique,* or "Principles of political law," in 1751. He believed in NATURAL LAW and its relationship to God, human intellect, and innate moral responses, and he viewed natural law as the foundation of domestic and INTERNATIONAL LAW.

Burlamaqui died April 3, 1748, in Geneva, Switzerland.

## BURNET, DAVID GOUVERNEUR

David Gouverneur Burnet centered his career efforts in Texas.

Burnet was born April 4, 1788, in Newark, New Jersey. Before entering politics, Burnet served under Francisco de Miranda in 1806 in an endeavor to liberate Venezuela from Spain. He also studied law and pursued careers in business and speculation.

Burnet relocated to Texas and presided as a Texas district judge in 1834. In 1836 he participated at the Washington-on-the-Brazos Convention, where he drafted the Texas Declaration of Independence; in 1836 he served as the president *ad interim* of the Republic of Texas. He subsequently resigned, but returned to perform the duties of vice president. From 1846 to 1847 he acted as the secretary of state of Texas, the first person to hold such a position in the newly formed state.

Burnet died December 5, 1870, in Galveston, Texas.

## BURR, AARON

Aaron Burr was a soldier, lawyer, and politician and the third vice president of the United States.

Burr was born February 6, 1756, in Newark, New Jersey. His family traced its ancestry to the Pilgrims and through hundreds of years of English gentry with many members who were prominent in government and politics. Both his parents died when he was young and he and his sister were raised in comfortable circumstances by their maternal uncle. Burr was a bright, charming, handsome, and witty boy who was gifted intellectually but decidedly mischievous and difficult to control. From earliest childhood he showed ambition, determination, and leadership.

Burr entered the College of New Jersey (now Princeton University) as a sophomore in 1769 at the age of thirteen and graduated summa cum laude three years later. He then enrolled in LITCHFIELD LAW SCHOOL (Connecticut), which was run by his brother-in-law and former tutor, Tapping Reeve. However, the Revolutionary War and his desire to be a part of it interrupted his studies.

Burr rose swiftly through the ranks of the revolutionary army, displaying daring, energy, courage, and imagination. His small stature and pampered upbringing belied an internal strength that surprised many who knew him. Accompanying Colonel Benedict Arnold's troops in their expedition to Quebec, he

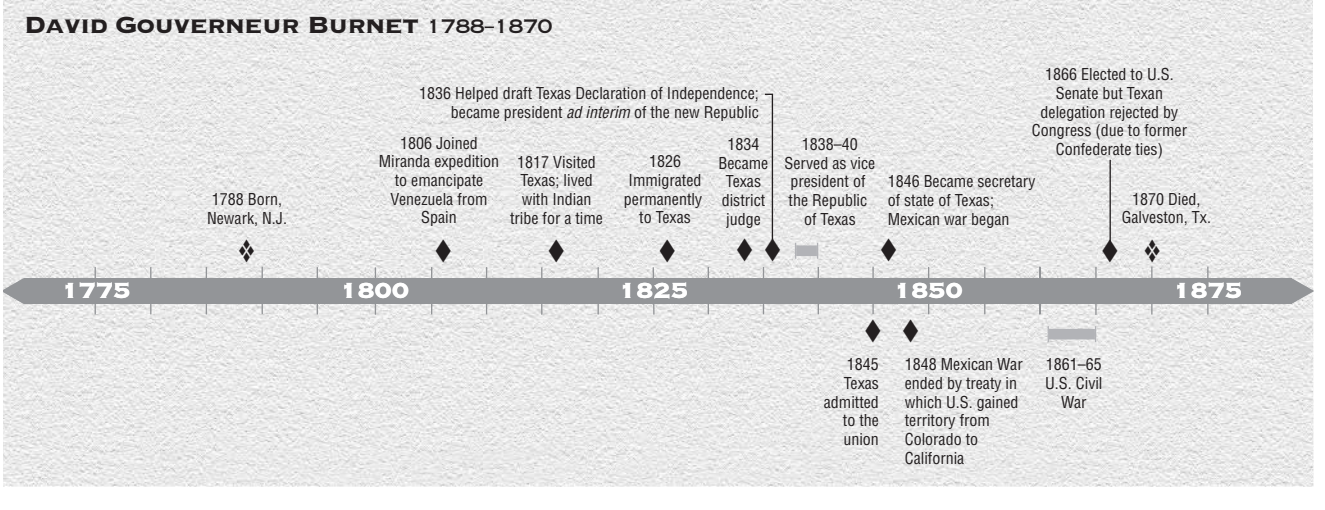

endured cold, hunger, and illness. He was made an officer in the Continental Army and soon served with General GEORGE WASHINGTON.

Burr resigned his Army commission in 1779. He resumed the study of law in 1780 and was admitted to the bar in 1782. Later in 1782 he married Theodosia Prevost, a widow ten years his senior, and the following year their only child, a daughter also named Theodosia, was born.

In 1789 Burr was appointed attorney general of the state of New York and in 1791 he was elected a U.S. senator, defeating General Philip Schuyler, the father-in-law of ALEXANDER HAMILTON. This was the beginning of a bitter rivalry with Hamilton that would come to a ruinous conclusion years later.

Burr served in the Senate for six years. In 1797, the voters turned against him and elected his former antagonist, General Schuyler. Burr attributed his loss to Hamilton's assiduous efforts to undermine his support and reputation.

After losing his Senate seat, Burr served a short time in the New York assembly, before entering the presidential race of 1800. He and his opponent, THOMAS JEFFERSON, received the same number of votes in the ELECTORAL COLLEGE, and the election went to the House of Representatives for resolution. Burr and his supporters were unabashedly ambitious in their zeal to win the office. Burr's nemesis Hamilton stepped into the fray, announcing his support for Jefferson and criticizing Burr. Finally, through clever manipulation of the voting process, Hamilton secured the presidency for Jefferson and Burr automatically became vice president. As a result of this peculiar election Congress passed the TWELFTH AMENDMENT, which mandated separate balloting for president and vice president.

*Aaron Burr.*
LIBRARY OF CONGRESS

Burr's ruthless and opportunistic ambition caused many of his colleagues to shun him both professionally and socially. President Jefferson held him at arm's length, and others in the administration treated him like an outsider. Burr blamed his failure to secure the top office largely on Hamilton and he brooded over perceived injustices. Having lost his beloved wife in 1794, Burr was left with only his daughter, whom he idolized. He devoted as much time and energy as possible to her education and her grooming. However, the young lady was moving into adulthood and a life of her own. In 1801,

"LAW IS WHATEVER IS BOLDLY ASSERTED AND PLAUSIBLY MAINTAINED."
—AARON BURR

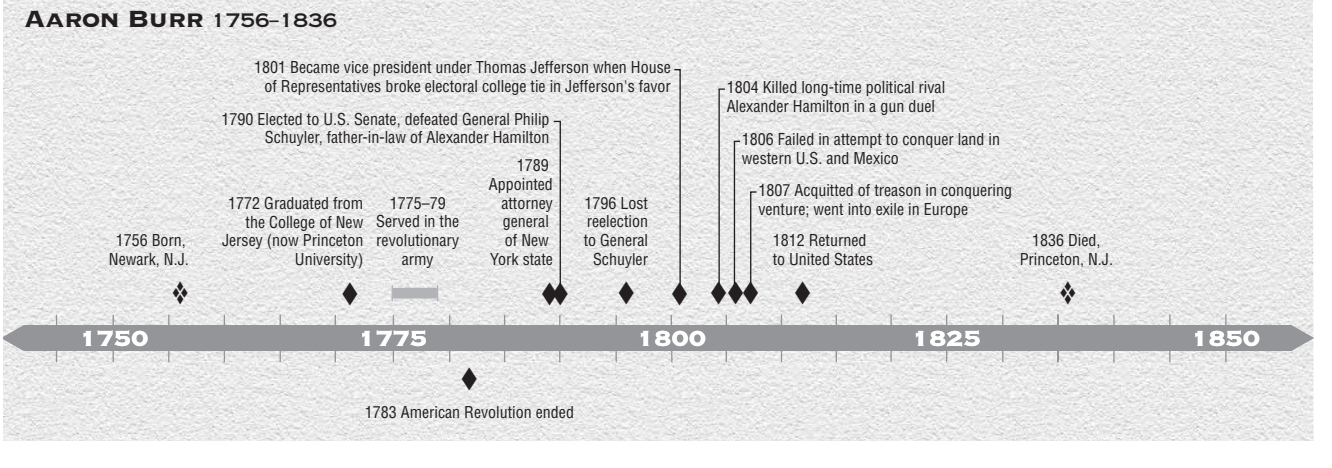

# United States v. Aaron Burr

In 1807 Aaron Burr was prosecuted for **TREASON** and high misdemeanor in the federal circuit court in Richmond, Virginia, with U.S. Supreme Court Chief Justice **JOHN MARSHALL** presiding as a trial judge. Despite evidence that Burr had been plotting to raise a rebellion and overtake a portion of the western territories in the United States and other evidence that Burr was planning to lead an unauthorized invasion of Mexico, the defendant was acquitted by a jury on both the treason and high misdemeanor charges.

Aaron Burr served as the nation's third vice president from 1801–1805, having lost the 1800 presidential election after the U.S. House of Representatives broke an electoral deadlock by naming **THOMAS JEFFERSON** president and Burr vice president. Although Burr contemplated running for president again four years later, those ambitions came to an end when he was indicted for murdering **ALEXANDER HAMILTON** in a duel on July 11, 1804.

Later that same month, Burr, now disaffected with American politics, met with Britain's minister to the United States, Anthony Merry, who subsequently reported to his government that Burr "was endeavoring to effect a separation of the western part of the United States" via military action. In early 1805 Burr, while still acting as the vice president of the United States, contacted Spanish minister, Marques de Casa Yrujo, to discuss the same subject. The governments of both Great Britain and Spain declined to offer Burr any financial or military assistance.

When his term as vice president expired, Burr headed west to raise a military force that would either invade Mexico or forcefully sever the southwestern United States into an independent nation led by Burr himself. The former vice president first met with another malcontent, Herman Blennerhassett, on Blennerhassett Island, located in the Ohio River, then part of Virginia. A year later Burr joined forces with General James Wilkinson on Blennerhassett Island, where they assembled a force of unknown size to carry out Burr's plan. Burr left the island before any actions were taken to implement the plan.

After Burr departed, Wilkinson had second thoughts about the plan and informed President Jefferson of their rebellious preparations. Jefferson issued a proclamation calling for the suppression of the conspiracy. Federal authorities arrested Burr in March 1807 while he was trying to flee into Spanish Florida. The former vice president was brought back to Virginia where he stood trial before Chief Justice John Marshall (early Supreme Court justices performed double duty as appellate judges on the nation's high court and as trial judges in their designated circuit court) and state trial judge Cyrus Griffin. Bail was set at $5,000.

After hearing testimony from Wilkinson, the **GRAND JURY** for the Virginia federal circuit court indicted Burr on June 24, 1807. The indictment charged him with one count of treason and one count of high misdemeanor for "unlawfully, falsely, maliciously, and traitorously … intending to raise and levy war" against the United States.

The trial began on August 10, 1807, and ended less than a month later, on September 1, 1807. Jefferson, motivated in part by personal vindictiveness against Burr, declared in a special message to Congress during the trial that Burr's guilt had been "placed beyond question." Jefferson then gave George Hay, the U.S. attorney in charge of the prosecution, incriminating evidence to offer against Burr. Jefferson also dangled pardons as enticements to any co-conspirators who agreed to turn state's evidence.

But the prosecution had two major problems. First, the linchpin of the treason charge was the alleged **OVERT ACT** of assembling a military force on Blennerhassett Island for the purpose of waging war against the United States. The indictment said this act occurred on December 10, 1806, a date on which all defense and prosecution witnesses agreed that Burr was not on the island, but instead hundreds of miles away.

Second, Chief Justice Marshall instructed the jurors that they could still convict Burr of treason for being a co-conspirator to the crime, so long as at least two witnesses provided testimony that some overt act was committed in furtherance of the conspiracy. But General Wilkinson was the only witness who testified as to Burr's involvement in the alleged crime. The jury returned a verdict of "not guilty" after deliberating for only 25 minutes.

On September 9, 1807, the trial for the high misdemeanor began, again with Chief Justice Marshall and

Cyrus Griffin presiding. Prosecutor Hay called more than 50 witnesses to testify against the defendant. But the jury again acquitted Burr. Hay then filed a motion to prosecute Burr for treason in Ohio, alleging that the defendant conspired to levy war against the U.S. government in that jurisdiction as well. Marshall listened to five weeks of testimony concerning the motion and then on October 20 ruled that Burr could only be tried for misdemeanor charges in Ohio. Finally, Hay ceased efforts at prosecuting Burr any further.

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Treason.

against her father's wishes, she married Joseph Alston, of South Carolina, and moved to the Palmetto State, leaving Burr alone in Washington, D.C.

Toward the end of his term as vice president, Burr ran for governor of New York but was defeated. During the campaign Hamilton again expressed his distrust of Burr and made other disparaging comments about him. Feeling that his honor had been impugned, Burr challenged Hamilton to a duel. Although Hamilton tried to defuse the conflict, Burr was determined to force a confrontation. The two men met at 7:00 A.M. on July 7, 1804. Burr was an excellent marksman, and he killed Hamilton with the first shot. In an ensuing public outcry, Burr was indicted for murder. He escaped to his daughter's home in South Carolina until the furor died down and eventually returned to Washington, D.C., to complete his term as vice president.

Burr came to realize that his aspirations to the presidency had been destroyed. His political career in ruins, he left Washington, D.C., and traveled west to explore frontier territory. He also concocted an elaborate conspiracy that was to be his final political undoing. Though complete details of the scheme have never been fully discovered, Burr apparently intended to lead the western states in an insurrection against the federal government. After the states seceded, he planned to install himself as the head of a newly created republic. He then intended to conquer Texas and Mexico. In October 1806, President Jefferson issued a proclamation denouncing Burr's venture. On January 14, 1807, Burr was arrested in Mississippi on a charge of TREASON. He escaped, but was later apprehended in Alabama. Burr's trial began in May 1807, and lasted six months. He was eventually acquitted but his political life was over.

Burr spent the next several years in exile in Europe, where he endured poverty, humiliation, and degradation. In 1812, he quietly returned to the United States, slipping into Boston wearing a disguise and using an assumed name. After a time he resumed a somewhat normal life and opened a law office in New York. Burr's prospects seemed to be brightening when he was dealt two crushing personal blows. First, he learned that his only grandchild, Aaron Burr Alston, had died before Burr returned to the United States. A few months later his beloved daughter perished in a shipwreck while traveling from South Carolina to New York to visit Burr.

Burr was devastated by these losses. A wave of sympathy tempered public opinion toward him, but he was still shunned by those in prominence. He continued his law practice, enjoyed a small circle of supportive friends, and even remarried, though the union was short-lived and unhappy. He quietly and unobtrusively engaged in numerous altruistic and philanthropic ventures, including providing for the education of young men and women of limited resources and adopting an orphan who lived with him until late adolescence.

During the last few years of his life, Burr suffered a series of strokes. At first, he rebounded completely, but each successive episode left him weaker. He died September 14, 1836, and was buried beside his parents and grandfather in Princeton, New Jersey.

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## ♦ BURTON, HAROLD HITZ

Harold Hitz Burton served as a Supreme Court justice during the years the Court outlawed **SEGREGATION.**

Burton was born June 22, 1888, in Jamaica Plain, Massachusetts. He attended Bowdoin College, where he was elected Phi Beta Kappa, and graduated summa cum laude in 1909. He then entered Harvard Law School where he received his bachelor of laws degree in 1912. He married Selma Florence Smith and the couple set out to take advantage of opportunity in the burgeoning Midwest. They settled in Cleveland where Burton established a successful law practice.

Burton served in the infantry in France during **WORLD WAR I.** He rose to the rank of captain and was awarded the Purple Heart. In 1923 he began teaching law at Western Reserve University (now Case Western Reserve University) and he remained on the faculty there until 1925.

"THE CONSTITUTION WAS BUILT FOR ROUGH AS WELL AS SMOOTH ROADS."
—HAROLD BURTON

Burton's political career began to take shape when he was elected to the Ohio legislature in 1929. He also acted as chief legal official of Cleveland from 1929 to 1932. In 1935 he was elected mayor of Cleveland and he was returned to office twice. By 1940 Burton's name and reputation for integrity were well established and he easily won election to the U.S. Senate. He became known in Washington, D.C., as a moderate conservative who advocated U.S. membership in the newly formed **UNITED NATIONS.**

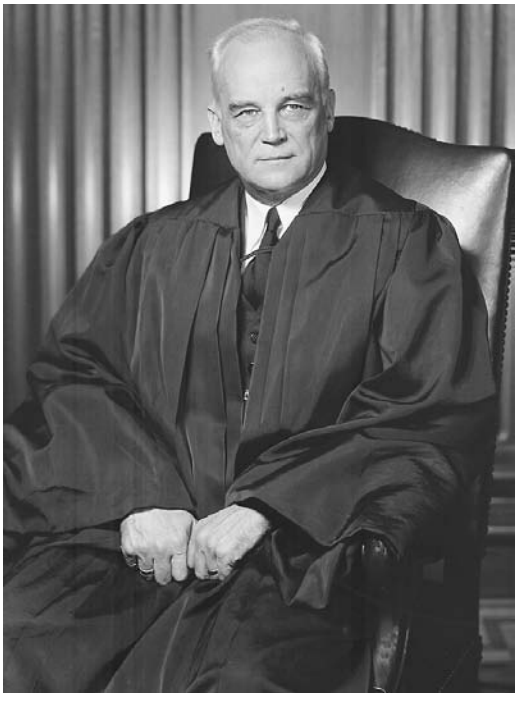

*Harold Hitz Burton.* PHOTOGRAPH BY OSCAR WHITE. CORBIS

When a vacancy occurred on the Supreme Court in 1944, President **HARRY S. TRUMAN**, a Democrat, was under pressure to name a Republican to fill the slot. Truman did the politically expedient thing: he named Burton, a moderate Republican whom he admired and who would likely be replaced in the Senate by a

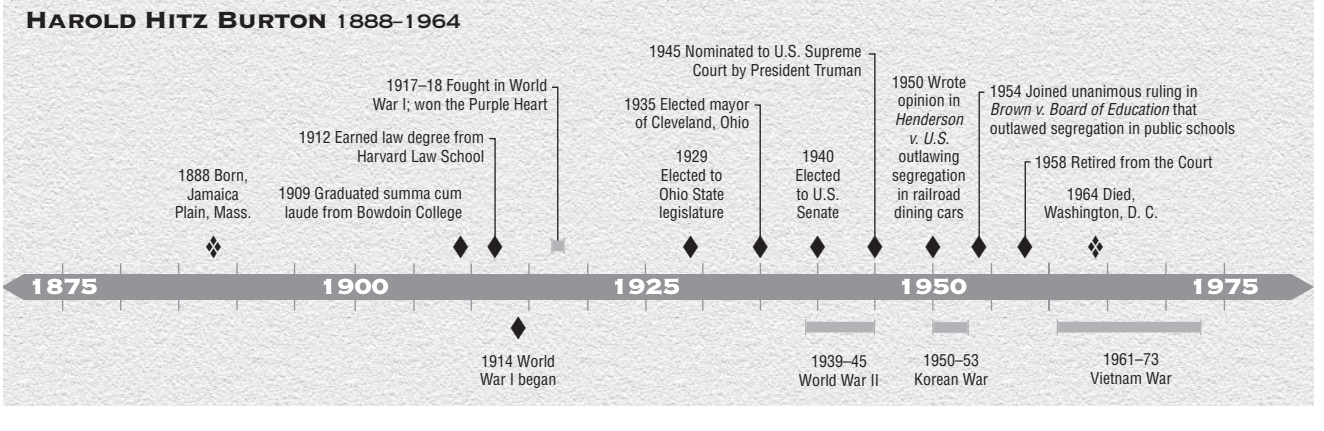

Democrat. Burton was a popular choice. He was confirmed within a day of his nomination with no testimony heard by the SENATE JUDICIARY COMMITTEE and unanimous approval by the full Senate.

Burton was a hardworking, conscientious, dispassionate, and open-minded justice. His moderate conservatism was a unifying influence on a highly fractious court. He was noted for his ability to bridge conflicting factions with narrowly written opinions that settled an issue without taking a philosophical stand. He generally supported STATES' RIGHTS against interference by the federal government, except where his sensitivity to human suffering was aroused. In 1947 he wrote a vigorous dissent from the Court's decision to allow Louisiana to execute a prisoner after several previous attempts to execute him had failed. The Court held that the state's continued efforts to execute the man did not constitute "cruel and unusual" punishment. Burton wrote, "It is unthinkable that any state legislature in modern times would enact a statute expressly authorizing CAPITAL PUNISHMENT by repeated applications of an electric current separated by intervals of days or hours until finally death shall result" (*Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 422 [1947]).

Burton's decisions in antitrust and labor disputes tended to favor corporations and management over unions. He was generally opposed to extending individual rights beyond the letter of the Constitution, but he digressed from that stance in matters of racial segregation and discrimination. A decision he authored in 1950 struck down the practice of confining black passengers in railway dining cars to a separate area. "The curtains, partitions and signs [used to mark that area]," he wrote, "emphasize the artificiality of a difference in treatment which serves only to call attention to racial classifications of passengers holding identical tickets and using the same public dining facility" (*Henderson v. U.S.,* 339 U.S. 816, 70 S. Ct. 843, 94 L. Ed. 1302 [1950]). Burton was also a member of the 1954 Court that unanimously declared that segregation in public schools is unconstitutional (**BROWN V. BOARD OF EDUCATION**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873).

Burton was compelled to retire in 1958 because of deteriorating health due to Parkinson's disease. He died October 28, 1964, in Washington, D.C.

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## ♦ BUSH, GEORGE HERBERT WALKER

George Herbert Walker Bush capped a full and distinguished political career with his election in 1988 as President of the United States. Bush became the forty-first chief executive after serving for eight years as the nation's vice president under RONALD REAGAN. The most memorable events of his one-term presidency were the Desert Shield and Desert Storm Operations in the Persian Gulf in 1991.

Although Bush was enormously popular in the aftermath of the Persian Gulf War, his standing with the U.S. public plummeted as domestic problems and a sour economy took their toll. In 1992, Bush lost the presidential election to Democratic challenger BILL CLINTON, the governor of Arkansas. Clinton's campaign offered a promise of change and a "new covenant" between citizens and government.

"A FREE ECONOMY DEMANDS ENGAGEMENT IN THE ECONOMIC MAINSTREAM. ISOLATION AND PROTECTIONISM DOOM [THEIR] PRACTITIONERS TO DEGRADATION AND WANT."
—GEORGE H.W. BUSH

Born June 12, 1924, in Milton, Massachusetts, Bush was the son of Prescott Sheldon Bush, an international banker and U.S. senator from Connecticut, and Dorothy Walker Bush, the daughter of a wealthy St. Louis businessman. Both parents had a tremendous influence on Bush, who was unpretentious and hardworking despite his privileged background.

As a young boy, Bush attended Greenwich Country Day School, in Greenwich, Connecticut, and Phillips Academy, an elite prep school in Andover, Massachusetts. At Andover, Bush excelled academically and athletically. Nicknamed Poppy after his grandfather Walker, Bush was a popular student, serving as class president and captain of the basketball and soccer teams.

When WORLD WAR II broke out, Bush was determined to see military action. On June 12, 1942, shortly after graduation from Andover, he enlisted in the U.S. Navy. At the age of 20, he became the youngest commissioned pilot in Navy history. Bush was stationed in the Pacific theater and flew dozens of dangerous missions. On September 2, 1944, while Bush was assigned to the *USS Jacinto,* his plane was shot down near a Japanese island. Bush bailed out of the aircraft

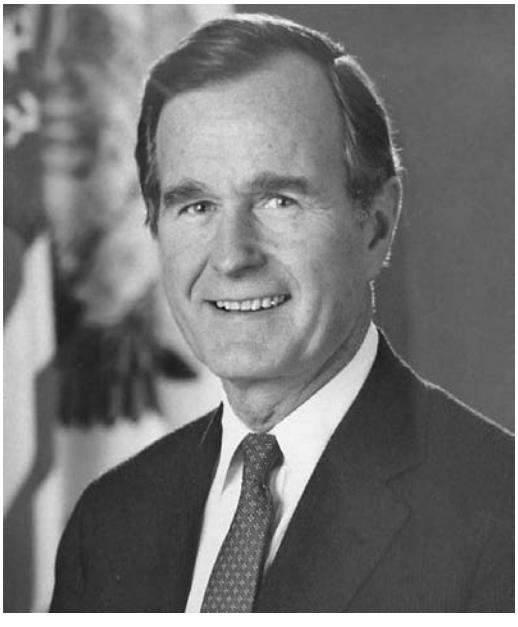

*George H.W. Bush.*
LIBRARY OF CONGRESS

and was rescued at sea; his crewmen did not survive.

Bush returned to the United States after his tour of duty and entered Yale University, in New Haven, Connecticut. Not surprisingly, Bush had an outstanding college career. He played varsity baseball, was inducted into the Skull and Crossbones secret society, and in 1948 graduated Phi Beta Kappa with a degree in economics.

Before entering Yale in 1945, Bush married Barbara Pierce, the daughter of the publisher of *McCall's* and *Redbook*. Their first child, future President **GEORGE WALKER BUSH**, was born during Bush's senior year of college. The couple eventually had six children, including John (Jeb), Neil, Marvin, and Dorothy. Their second child, Robin, died of leukemia in 1953.

After graduating from Yale, Bush and his young family headed for Texas, determined to make their fortune in the oil business. In 1951, Bush started Bush-Overby Oil Development Company, and in 1954, he created Zapata Offshore Company, which designed and built offshore drilling platforms.

Bush's success in the oil business kindled his political ambitions. In 1964, Bush entered the race for U.S. senator from Texas but lost to Democrat Ralph Yarborough. Two years later, Bush made it to Washington, D.C., as a member of the U.S. House of Representatives from the Seventh District of Texas. Reelected to the House in 1968, Bush was a member of the influential House Ways and Means Committee. In 1970, he again ran for the Texas Senate seat, this time losing to Democrat Lloyd Bentsen.

Despite his defeat Bush's career in public service was far from over. During the 1970s he held a wide range of appointive posts and built up an impressive résumé. From 1971 to 1973 Bush served as the U.S. ambassador to the **UNITED NATIONS**. In 1974 he was the chair of the Republican National Committee. In 1974 and 1975 Bush traveled to the People's Republic of China as the U.S. liaison officer. And from 1976 to 1977 he was the head of the **CENTRAL INTELLIGENCE AGENCY**.

Confident in his experience and abilities, Bush announced his intention to run for president. From 1977 to 1980 he actively campaigned for the Republican nomination. Although he lost the 1980 GOP nod to Reagan, the conservative governor of California, Bush was chosen by Reagan as his vice presidential candidate. The Reagan-Bush ticket reached the White House easily in 1980, defeating incumbent president **JIMMY CARTER** and vice president Walter F. Mondale.

Bush was a late convert to Reagan's conservatism. As a U.S. representative in the 1960s Bush had been a political moderate, voting in favor of open housing, the abolishment of the military draft, and the vote for 18-year-olds. As vice president under Reagan, Bush became more conservative.

Bush was a loyal vice president and basked in the reflected glory of Reagan, a popular president. When Reagan and Bush ran again in 1984, they won in a landslide victory against Democratic candidate Mondale and his running mate, **GERALDINE FERRARO**.

In 1988 the **REPUBLICAN PARTY** rewarded Bush for his loyal service as vice president. Despite an early defeat in the Iowa caucuses, Bush won the GOP nomination for president. To the surprise of many, Bush chose Dan Quayle, a relatively unknown and inexperienced senator from Indiana, as his running mate. The choice puzzled many political experts who felt that Quayle's credentials were meager.

Bush and Quayle ran against Governor Michael Dukakis of Massachusetts and Bush's old nemesis from Texas, Senator Bentsen. During the campaign Bush resorted to some tactics that seemed out of keeping with his congenial personality. One Bush TV commercial focused on Willie Horton, an African American felon who committed additional crimes upon his release from prison in Massachusetts. Suggesting

that Dukakis was soft on crime, the ad capitalized on racial fears and prejudice. Also, despite the soaring deficit, Bush promised to give U.S. citizens a financial break, in the campaign pledge, "Read My Lips: No New Taxes." After the election Bush's pledge came back to haunt him: once in office, he agreed to tax increases to combat a $140 billion budget deficit.

Bush and Quayle captured the vote in 40 states to win the 1988 election. At his inauguration Bush made an appeal for a "kinder, gentler nation" and shared his vision of volunteers, like "a thousand points of light," helping to solve problems.

The height of Bush's popularity came during Operation Desert Storm, a six-week display of technological warfare against Sadam Hussein in Kuwait and Iraq.

In 1992 Bush and Quayle squared off against Democratic challengers Clinton and AL GORE, a senator from Tennessee. The GOP incumbents won their party's endorsement after a bruising primary fight with conservative columnist PATRICK BUCHANAN. Independent candidate H. Ross Perot, a Texas multimillionaire businessman, also threw his hat into the ring, to further muddle the election scene. Despite Clinton's liabilities—rumors of infidelity, avoidance of the draft, and a "slick" image—Clinton was able to defeat Bush.

Commentators often argue over the reasons one politician wins or loses, but many agree that a sluggish economy and Bush's broken promise of no new taxes hurt his chances for reelection. Clinton and Gore, a generation younger than Bush, won the election with a promise of change and new beginnings.

Bush reentered the public consciousness as two of his sons pursued their own political careers. George W. Bush was elected governor of the state of Texas in 1995, a position he held until 2000. Younger son Jeb Bush served as governor of the state of Florida in 1998. George W. Bush ran for president in 2000 against then-Vice-President Al Gore in one of the most hotly contested races in U.S. history. The younger Bush's running mate was Richard B. (Dick) Cheney, who had served as secretary of defense under the elder Bush.

Although George H.W. Bush remained in the background of the 2000 presidential election, several of George W. Bush's advisors had ties to his father. For several weeks following the election, the country focused much of its attention on the election returns in the state of Florida. James A. Baker III, the former SECRETARY OF STATE under the elder Bush, served as an advisor and spokesperson for the younger Bush during the controversy. When George W. Bush assembled his cabinet after the election results had been resolved, several names tied to the elder Bush were nominated for positions. The most notable of these officials, Colin L. Powell, former chairman of the Joint Chiefs of Staff, was eventually nominated and sworn in as the secretary of state.

George H.W. Bush and George W. Bush are the first father and son to serve as presidents of the United States since JOHN ADAMS (1797–1801) and JOHN QUINCY ADAMS (1825–29). The elder Bush has largely remained in the background of his son's presidency. Naturally, the American press focused considerable attention on him during his son's candidacy and eventual

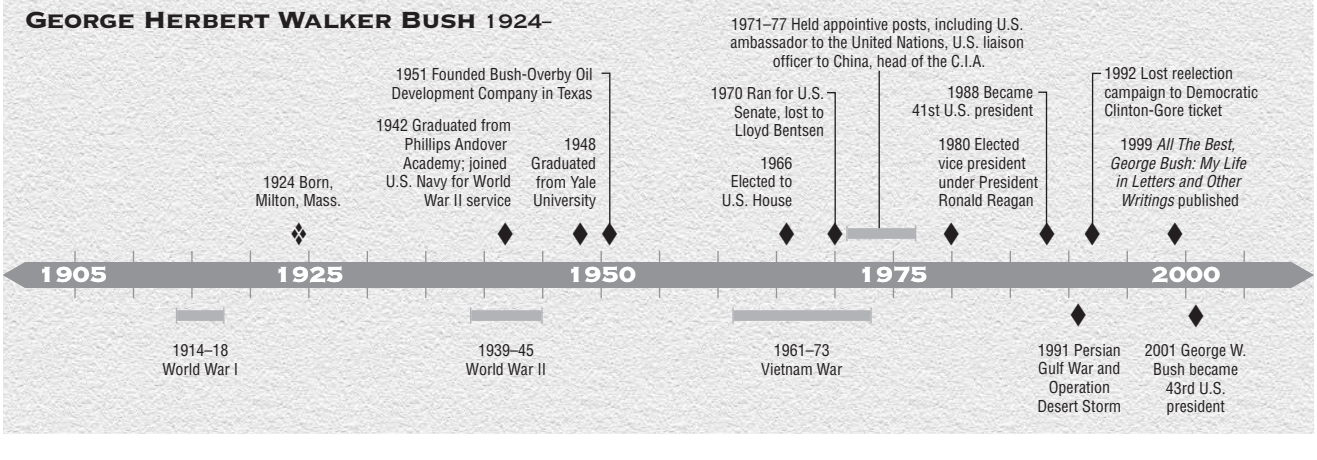

election. Bush's policies while he was in office also came into question once again because many viewed the election in 2000 as a repeat of the election between George H.W. Bush and Clinton in 1992. Several commentators agree that a sluggish economy and Bush's broken promise of no new taxes hurt his chances for reelection, and many have compared the policies of father and son as the economy slowed under the younger Bush.

The George Bush Presidential Library and Museum is located in College Station, Texas, on the campus of Texas A&M University. In addition to several speaking engagements, Bush and his wife divide their time between Texas and Kennebunkport, Maine, spending time with their children and 14 grandchildren.

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"FREEDOM AND FEAR, JUSTICE AND CRUELTY, HAVE ALWAYS BEEN AT WAR, AND WE KNOW THAT GOD IS NOT NEUTRAL BETWEEN THEM."
—GEORGE W. BUSH

## ♦ BUSH, GEORGE WALKER

The administration of George Walker Bush, the forty-third president of the United States, has been a study in contrasts. On the one hand, he has shown a fierce determination to protect the interests of the United States and its citizens following the SEPTEMBER 11TH ATTACKS, in which terrorists destroyed the World Trade Center in New York City and seriously damaged the Pentagon in Washington, D.C. On the other hand, his administration has been shrouded in controversy, beginning from the day of his election on November 7, 2000, and he has been heavily criticized for a slow economy in the early 2000s.

For years, Bush's public identity was inextricably tied to his famous father, GEORGE H.W. BUSH. They are the first father and son to be elected presidents since JOHN ADAMS and JOHN QUINCY ADAMS. In 1994, the son of the former Republican president established an identity of his own when he defeated incumbent Ann Richards in a hotly contested political race to become the forty-sixth governor of Texas. Convincing Texas voters that he was a strong politician in his own right, Bush claimed a victory that he could call his own. Six years later, he was part of an extremely controversial presidential election when he defeated then-Vice-President ALBERT GORE to win the presidency.

Born in Connecticut on July 6, 1946, and raised in Texas, George Walker Bush has a well-documented lineage. His grandfather, Prescott Bush, a Connecticut resident who worked on Wall Street, was elected to the Senate. His father, George H.W. Bush, earned his fortune as an oilman in Texas, entered politics, became director of the CENTRAL INTELLIGENCE AGENCY, and eventually achieved the country's highest office as president. George W. Bush, the oldest of five Bush children, retraced his father's early career. Like his father, he attended Phillips Academy in Andover, Massachusetts, and Yale University.

After graduating from Yale, the young Bush continued to be his father's shadow. He learned how to fly a combat aircraft and then became an oilman. He completed a 53-week program with the Texas Air NATIONAL GUARD, learning to fly F-102s and earning the rank of lieutenant, and then he returned home looking for a new challenge when he was not called to fight in Vietnam. He spent time in Houston holding various short-term jobs, including a stint at a program called Pull for Youth for underprivileged kids. Possessing his father's drive and fierce determination to make something of himself, Bush attended Harvard Business School, returned to Texas with an M.B.A., became an oilman, and ventured into politics. At age 32, he ran for Congress in west Texas but was defeated by six points. He was successful in the oil business, however, and within ten years of working in the industry earned his first million dollars.

Bush's biggest oil venture, however, proved controversial. During the late 1970s, he built a small, thriving company called Bush Exploration. When the energy market turned soft in the early 1980s, Bush Exploration, like many oil enterprises, floundered. In 1983, Bush merged his outfit with Spectrum 7; three years later Spectrum 7 was bought by Harken Energy. Bush's supporters said the sale was the work of a shrewd dealmaker, while others—including journalists from conservative and liberal publications—suspected that the deal came about because of Bush's father's political contacts. "Many oil companies went belly-up during that time," reported Stephen Pizzo of *Mother Jones.* "But Spectrum 7 had one asset the others lacked—the son of the vice-president. Rescue

came in 1986 in the form of Harken Energy. Harken absorbed Spectrum, and, in the process, Bush got $600,000 worth of Harken stock in return for his Spectrum shares. He also won a lucrative consulting contract and stock options. In all, the deal would put well more than $1 million in his pocket over the next few years—even though Harken itself lost millions." Bush came under fire again in 1990. *Time* reported, "about a month before Iraq invaded Kuwait, young Bush sold 66 percent of his Harken stake (or 212,140 shares) at the top of the market for nearly $850,000, which represented a 200 percent profit on his original stake." President Bush balked at the allegations of impropriety. "The media ought to be ashamed of itself for what they're doing," he said. Meanwhile, the younger Bush dismissed the criticism "claiming something close to penury," according to *Newsweek*.

While speculation swirled in the media about his oil dealings, Bush left business for politics. He helped manage his father's 1988 presidential campaign, moving with his wife and twin daughters to Washington, where he worked closely with Lee Atwater. By all accounts, Bush did not enjoy the experience. "He remembers finding Washington a 'hostile environment,'" reported *Time*. "The campaign operation was often a mud wrestle among contending egos." Confessed the young Bush, "I was the loyalty thermometer." But he gained respect for handling volatile diplomatic matters, such as the firing of chief of staff John Sununu, and for swiftly taking care of business.

After the election, Bush wasted no time getting back to Texas, where he promptly found a new venture—BASEBALL. The sport offered Bush the first honest chance at independence. In a matter of months, he successfully organized a coalition of wealthy investors to purchase American League's Texas Rangers, and he assumed a role as managing partner. Not only did Bush rally support to bring major league baseball to Dallas, but he helped to promote the team and boost attendance. Riding the wave of popularity that arose from his success with the Rangers, Bush decided it was an ideal time to try his hand at local politics.

George H.W. and Barbara had both discouraged their oldest son from entering politics as a full-time career until he had first secured his financial future. Even after Bush earned a small fortune in the oil industry, and with the promise

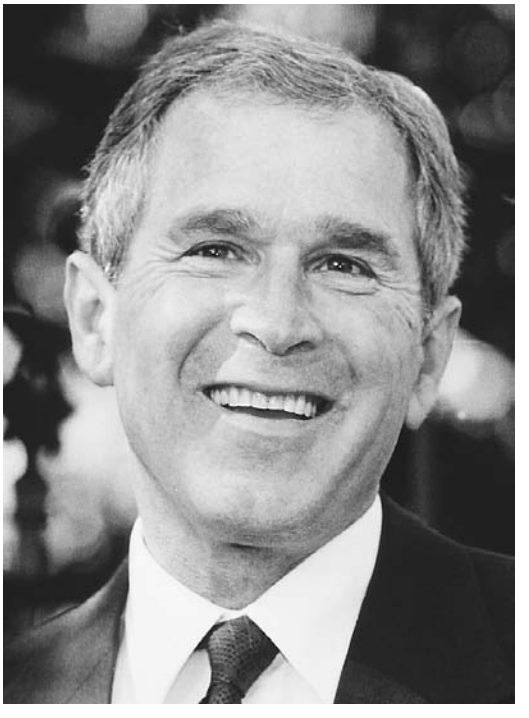

*George W. Bush.*
PHOTOGRAPH BY ADREES LATIF. REUTERS/ARCHIVE PHOTOS

of more to come from his baseball investments, his mother remained wary of his chances in the 1994 gubernatorial race. Like other political observers, Barbara Bush believed that Texans were not ready to retire their quick-witted Democratic governor Ann Richards. Nevertheless, Bush jumped into the race, while his younger brother, Jeb, did the same in Florida. The brothers were, of course, highly skilled campaigners, having served as aides to their father since the age of 18.

Bush's strategy was to run an intensely focused and positive, issue-oriented campaign. When Richards attacked his credibility with barbs like "If he didn't have his daddy's name, he wouldn't amount to anything," Bush countered with pleasantries. "I don't have to erode her likability," he told the *New York Times*. "I have to erode her electability." And when Richards called him "some jerk," Bush replied, "The last time I was called a jerk was at Sam Houston Elementary School in Midland, Texas. I'm not going to call the Governor names. I'm going to elevate this debate to a level where Texans want it." That debate focused on WELFARE reform, a crackdown on crime (especially concerning juveniles), increased autonomy and state financing for local school districts, and personal responsibility. As he campaigned, it was clear to observers that he was not the spitting political

image of his father. As he told local audiences, "Let Texans run Texas." It was a message that appealed to the proud Texans. And despite the popularity Ann Richards had enjoyed during her reign as governor, Bush, to the surprise of many, won with 53.5 percent of the vote. Twenty thousand people attended Bush's inauguration in Austin, including the famous preacher Billy Graham, legendary baseball pitcher Nolan Ryan, movie star Chuck Norris, and, of course, George H.W. and Barbara Bush.

After only a year in office, Bush was hailed as the most popular big-state governor in the country. In 1998 he won reelection in a landslide. His vote-getting among minorities impressed national Republicans. Bush entered the 2000 presidential election race in 1999, eventually raising the largest amount of money—more than $100 million—for any presidential race in U.S. history. His support largely demoralized the field of potential Republican candidates. He later defeated Senator JOHN MCCAIN in a series of primary elections and became the GOP's candidate in 2000.

The race pitted Bush against Al Gore, who had served as vice president for two terms under WILLIAM JEFFERSON CLINTON. Bush, who did not have extensive experience in foreign policy, chose former Secretary of Defense Richard Cheney as his running mate. Despite early leads for the Bush camp, the race was largely deadlocked as the November 7 election date approached. On the day of the election, early results supported Gore, and late in the afternoon several media outlets pronounced Gore the probable victor. Late returns, however, supported Bush, and by the end of the day he had apparently won the election through the ELECTORAL COLLEGE, despite the fact that Gore had won a majority of the popular vote.

Gore immediately contested the results, requesting a recount of votes in the state of Florida, where voting procedures caused a great deal of controversy. For a month after the elections, the nation observed high profile wrangling from both sides as politicians and the courts sought to sort out the election fiasco. The U.S. Supreme Court in BUSH V. GORE, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000) overturned an order by the Florida Supreme Court requiring a recounting of ballots in several counties. The ruling, one of the most controversial ever, allowed Bush to be certified as the winner.

Bush's first nine months in office were largely unremarkable as he sought to pass education reform bills and new tax legislation. The events of September 11, 2001, however, irrevocably changed the Bush administration and the public's perceptions of him. On September 20, 2001, he delivered a speech to Congress regarding the U.S. response to the terrorist attacks, and several commentators likened the speech to President Franklin D. Roosevelt's speech following the Japanese attack on Pearl Harbor in 1941.

Months after the attack, U.S. forces, in conjunction with U.S. allies, toppled the Taliban regime in Afghanistan, which had been suspected of harboring terrorists. Bush initiated the largest reorganization of the federal government since WORLD WAR II in an effort to allow the United States to defend itself against terrorist attacks. In 2002, Congress approved the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.A.), which created the HOME-

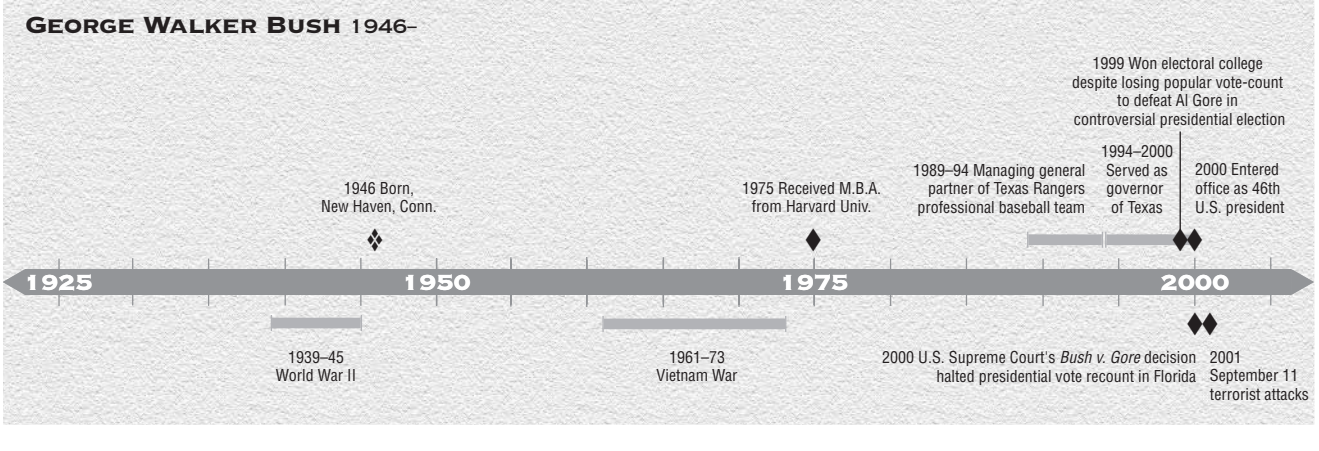

LAND SECURITY DEPARTMENT and reorganized several existing agencies. Throughout 2002 and 2003, the Bush administration focused much of its attention on Iraq, which was also at the center of attention under the administration of the elder Bush. More than 250,000 troops had been amassed in the Persian Gulf by March 2003 in preparation with a possible showdown with Iraqi president Saddam Hussein. The United States attacked Iraq on March 19, 2003.

Bush has had less success addressing domestic issues. The United States had experienced economic growth under former President Clinton, but this trend came to an end during the Bush administration. Whether or not the cause of the economic problems were his administration's problems—his father's administration also suffered from a sluggish economy—the economic outlook of the nation throughout the early twenty-first century was bleak. Bush announced in 2003 a FEDERAL BUDGET deficit of $304 billion, an all-time high. Moreover, he anticipated a deficit for 2004 of $307 billion.

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## BUSH V. GORE

### Introduction

In *Bush v. Gore* 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (U.S. 2000), the U.S Supreme Court ruled that the system devised by the Florida Supreme Court to recount the votes cast in the state during the 2000 U.S. presidential election violated the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT to the federal Constitution. Because there was no time to create a system that was fair to both candidates, the Supreme Court effectively stopped the recount process in its tracks, allowing GEORGE W. BUSH of Texas to become the 43rd president of the United States.

*Bush v. Gore* was more than just a lawsuit or a series of lawsuits about technical areas of Florida election law. Instead, *Bush v. Gore* represented a 36-day American drama of the highest order, captivating the world's attention as the U.S. judicial system was ensnared by a whirlwind of power politics that saw the Republican presidential candidate clinging to a slim lead that seemed to dwindle by the day, if not by the hour, while the Democratic candidate kept forging ahead, trying to build momentum to eclipse his rival. At the same time, the nation witnessed the Bush and Gore legal teams doing whatever they could to secure what each candidate felt rightly belonged to him. Having lost the nationwide popular vote by approximately 500,000 votes, Bush defeated Gore in Florida by a mere 537 votes to capture that state's 25 electors, enough to win the ELECTORAL COLLEGE and the presidency.

### Election Night

As daylight turned to twilight on the East Coast of the United States, it became evident that Florida's 25 electoral votes held the key to victory in the November 7, 2000, U.S. presidential race. Early returns combined with exit polling results indicated that Gore had a commanding lead in the state. By 8:00 P.M. EST, all of the major television networks projected that Gore had defeated Bush to become the nation's next president.

However, the polls had not yet closed in the Florida's panhandle, which is in the Central time zone. A few hours later, the lead swung to Bush, forcing the networks to retract their projections. By 2:15 EST, Bush appeared to have a decisive lead of about 50,000 votes, and all of the major networks were declaring Bush the winner. Gore even called Bush privately to concede. But while Gore was en route to Nashville, Tennessee, to make his public concession speech, Gore's aides informed him that Bush's lead had shrunk to a few thousands votes, at best. Gore immediately withdrew his concession, and the embarrassed networks announced the race was too close to call.

When the votes were finally tallied on November 8, minus the late-arriving overseas ballots, Bush was ahead of Gore by 1,784 votes, or less than .5 percent of the total number of votes tabulated for the U.S. presidency in Florida. Under Florida Election Law, a recount was automatic in these circumstances, unless Gore refused, which he did not. The recount was performed by machine and was designed to correct any errors in the first machine tabulation of the vote. On November 10 the first recount was complete. Bush's lead had dwindled to 327 votes.

**Presidential General Election Results, 2000**

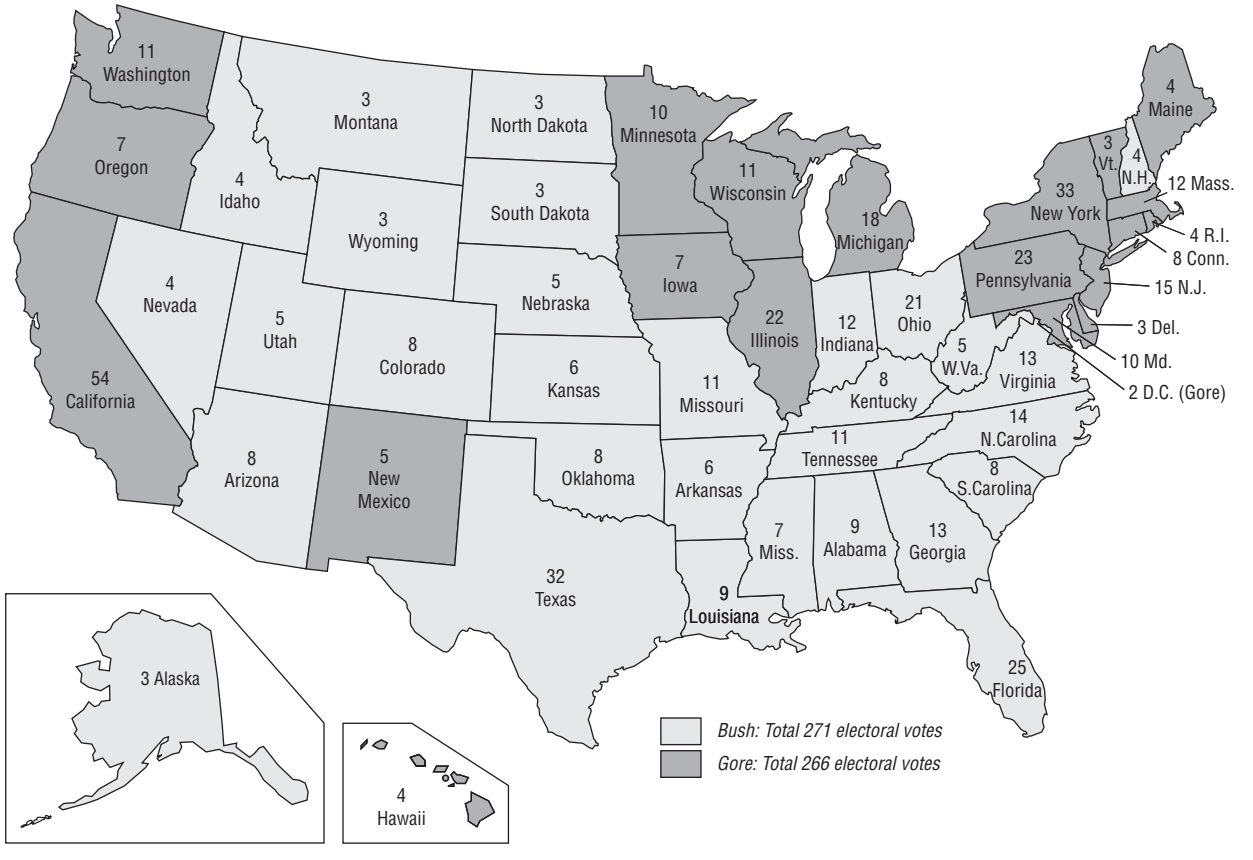


SOURCE: U.S. Federal Election Commission web page.

### The Controversy Begins

Before the results of the first recount were announced, two controversies had arisen. First, all Palm Beach County voters had cast their votes on confusing ballots known as "butterfly ballots", which displayed candidates' names on both sides of the ballot, one pair of candidates' names on top of the other, with arrows pointing toward the middle of the ballot, where voters were required to mark their vote by using a stylus to punch through a small circular or rectangular "chad" (a perforated punchhole used to record votes). The poorly configured ballot had caused hundreds or more of elderly Jewish voters to mistakenly cast their vote for PAT BUCHANAN, a right-wing candidate for the REFORM PARTY, someone whom such voters are demographically unlikely to support.

Second, Gore's legal team had discovered an unusually high number of "undervotes" (ballots that the tabulating machines had not counted as a vote for any presidential candidate) in counties that used punchcard voting. Florida's election law allows both candidates to "protest" an election by requesting a manual recount within seven days of the election, and the county canvassing boards "may" agree to authorize one, Fla. Stat. sections 102.112, 102.166. On November 9 Gore invoked these statutory provisions, asking the canvassing boards of Broward, Miami-Dade, Palm Beach, and Volusia Counties to authorize a manual recount. Gore had carried each of those counties by wide margins and expected to benefit from a manual recount of the ballots in those heavily Democratic counties.

Notwithstanding Republican opposition, all four counties authorized a manual recount of several "sample" precincts. Once the sample precincts had been manually recounted, state law authorized the canvassing boards to order a

full recount of all ballots cast in the county if the results from the sample precincts indicated "an error in the vote tabulation which could affect the outcome of the election," Fla. Stat. section 102.166.

The problem was that Florida law required all counties in the state to submit their final counts by November 14, again minus the overseas votes, which could be submitted until November 18. Only Volusia County met the November 14 deadline, and Florida SECRETARY OF STATE Katherine Harris, the state's highest election official, refused to extend the deadline so the manual recount could be completed in the other three counties. In making her decision, Harris was accused of being influenced by Republican Florida governor Jeb Bush, brother of presidential candidate George W. Bush, even though Harris was a prominent member of the state REPUBLICAN PARTY who had been elected to office and not appointed by the governor. On November 18 Harris announced that the overseas votes had increased Bush's lead from 327 to 930 votes.

The Broward, Palm Beach, and Miami-Dade canvassing boards sued Harris to extend the deadline on which they had to submit their final counts, and though they lost in trial court, the Florida Supreme Court overruled the trial court and extended the deadline to November 26. The state high court authorized the canvassing boards to order countywide manual recounts if they concluded that the results from their sample precincts revealed "an error in the vote tabulation which could affect the outcome of the election." Republicans had argued that "an error in vote tabulation" meant a machine error in tabulating the vote. But the Florida Supreme Court ruled that this phrase also included voter error in failing to fully dislodge the chad from the ballot, such that the chad was left "hanging" by one corner, "swinging" by two corners, attached by three corners (a "tri-chad"), or otherwise "dimpled" or "pregnant" (dimpled and pregnant chads referred to bulging, indented, or marked chads that remain attached to the ballot by all four corners).

On remand all three canvassing boards concluded that "an error in vote tabulation" had occurred and ordered countywide manual recounts of hundreds of thousands of votes across several hundred precincts. Only Broward County completed its recount by the newly extended deadline, and the Florida Supreme Court refused to extend the deadline further for Palm Beach and Miami-Dade Counties. With Bush holding a lead of 537 votes after factoring in the manually recounted ballots from Broward County, Katherine Harris certified Bush the winner on November 27. Gore then sued Harris to contest the certification, again losing in the trial court but prevailing on appeal, where the Florida Supreme Court ruled that Harris had to include in her certified totals the untimely recounted votes from Palm Beach and Miami-Dade Counties, which whittled down Bush's lead to 154 votes. The court also ordered a manual recount for all the 60,000 undervotes cast in the state but failed to specify the criteria by which those votes would be counted as having been made for Bush or Gore. The canvassing boards of each county were free to determine their own criteria.

### The U.S. Supreme Court Steps In

Meanwhile, Bush had asked the U.S. Supreme Court to review the Florida Supreme Court's decision extending the deadline by which the counties had to submit their final counts. On December 4 the U.S. Supreme Court vacated the state supreme court's decision, remanding the case so the Florida high court could clarify the grounds of its decision. The U.S. Supreme Court expressed concerns that the Florida Supreme Court had usurped the state legislature's authority to determine the manner in which a state's presidential electors are appointed for the electoral college, an authority conferred by Article II of the federal Constitution. Five days later the U.S. Supreme Court, again at Bush's request, stayed the Florida State Supreme Court's decision ordering a statewide hand recount of the undervote, pending further review of that decision by the nation's high court.

After further review, the U.S. Supreme Court announced its decision on December 12, 2000. The Court reversed the Florida Supreme Court's decision ordering a statewide hand recount, declaring that the order violated Florida voters' right to equal protection of the laws guaranteed by the Fourteenth Amendment. "When a court orders a statewide remedy," the Supreme Court said in a per curiam opinion, "there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." The Court said that these requirements were missing from the process by which the court-ordered manual recount was being conducted.

The Florida Supreme Court had provided the canvassing boards with no uniform standards to evaluate the ballots cast by Florida voters. To the contrary, the U.S. Supreme Court observed, "standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another." For example, the Court noted that Palm Beach County changed its standards three times during the manual recounting process, fluctuating from more strict standards that precluded counting pregnant chads to more relaxed standards that allowed hanging, swinging, or trichads to be counted. Broward County, by contrast, used a more forgiving standard throughout its entire recount process and uncovered almost three times as many new votes as Palm Beach County, a result "markedly disproportionate" to the difference in population between the counties," the Court said.

The equal protection problems arising from the absence of uniform standards in evaluating a chad's status primarily affected the undervotes, or those ballots in which the vote tabulating machines detected that no vote for the presidency had been cast. But the Court said there was also an equal protection problem with the overvotes, or those votes in which the ballot reflected more than one vote for the presidency. Voters who marked their ballot in a way that was not readable by the machine (the undervotes) stood to have their votes counted through the manual recount process, while those who marked two candidates in a way that was discernable by the machine would not have had their votes counted, even if a manual examination of the ballot would reveal the voter's intent, because the Florida Supreme Court excluded the overvote from the statewide recount it had ordered.

While seven justices agreed that the court-ordered, statewide recount violated the Equal Protection Clause, only five justices agreed on the remedy. Chief Justice **WILLIAM REHNQUIST** and Associate Justices **SANDRA DAY O'CONNOR**, **ANTONIN SCALIA**, **CLARENCE THOMAS**, and **ANTHONY KENNEDY** noted that Florida law required the state to select its electors for the electoral college by December 12, which was the day the Court announced its decision in *Bush v. Gore*. Rehnquist, O'Connor, Scalia, Thomas, and Kennedy concluded that it was thus impossible to complete a statewide recount by day's end. For all intents and purposes, then, a majority of the Court ruled that the 2000 U.S. presidential election was over and George W. Bush had won.

Justices **JOHN PAUL STEVENS**, **DAVID SOUTER**, **STEPHEN BREYER**, and **RUTH BADER GINSBURG** dissented, with Stevens, Breyer, and Ginsburg each writing their own dissenting opinion. The December 12 deadline chosen by the majority was misleading, the dissenting justices asserted, since under federal law the electors had until December 18 to deliver their votes to Congress and until December 28 before Congress could request the electors to deliver their votes had they not already done so. "By halting the Florida recount in the interest of finality," Justice Stevens wrote, "the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent—and are therefore legal votes under state law—but were for some reason rejected by ballot-counting machines." In addition, Breyer stated: "An appropriate remedy would be to remand this case with instructions that, even at this late date, would permit the Florida Supreme Court to require recounting all undercounted votes in Florida … and to do so in accordance with a single uniform standard."

### The Legacy of *Bush v. Gore*

On January 6, 2001, Congress met to count the electoral college votes. Bush was declared the winner by a 271-266 margin, with one of Gore's electors abstaining in protest over the District of Columbia not having statehood. Fourteen days later George W. Bush was inaugurated as the 43rd president of the United States.

Following the inauguration, several news services set out to determine who "really" won the 2000 presidential race, attempting to conduct their own manual recounts of the ballots cast in the four contested counties. Most of the news agencies reported that Gore would not have picked up enough additional undervotes to have won the election. However, the *Palm Beach Post* reported that its examination of approximately 19,000 overvotes cast on the Palm Beach County "butterfly ballot" indicated that Gore lost as many as 6,600 votes.

In early 2003 it was probably too early to fully assess the legacy of *Bush v. Gore*. Immediately after the U.S Supreme Court announced its decision stopping the recounts and effectively ending the election, liberal commentators condemned the five unelected conservative justices for having "hijacked" U.S. democracy by judicial

fiat. Earlier Florida Supreme Court decisions in the *Bush v. Gore* saga had been assailed by conservative commentators on similar grounds.

Even more temperate Americans were forced to confront the fact that the personal politics of court members may have influenced the outcome of a high-stakes legal controversy: five politically conservative justices on the U.S. Supreme Court issued a decision in favor of the Republican Party's presidential candidate, which overturned a decision made by the predominantly liberal judges on the Florida Supreme Court in favor of the Democratic Party's presidential candidate, demonstrating that the judiciary's ability to remain independent of partisan politics is compromised when the subject matter of the "legal" controversy involves a cutthroat political battle for the nation's highest office.

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## BUSINESS AFFECTED WITH A PUBLIC INTEREST

*A commercial venture or an occupation that has become subject to governmental regulation by virtue of its offering essential services or products to the community at large.*

A business affected with a public interest is subject to regulation by the POLICE POWER of the state to protect and to promote the GENERAL WELFARE of the community which it serves. Such a designation does not arise from the fact that the business is large, or that the public receives a benefit or enjoyment from its operation. The enterprise, as a result of its integral participation in the life of the community or by the privilege it has been granted by the state to serve the needs of the public, is regulated more strictly by the state than other businesses.

What constitutes a business affected with a public interest varies from state to state. Three classes of businesses have been traditionally regarded as affected with a public interest: (1) those carried on pursuant to a public grant or privilege imposing a duty of making available essential services demanded by the public, such as common carriers and PUBLIC UTILITIES; (2) occupations considered from the earliest times in common law to be exceptional, such as the operation of inns or cabs; and (3) businesses that although not public at their inception have become such by devoting their activities to a public use, such as insurance companies and banks.

A business affected with a public interest remains the property of its owner, but the community is considered to have such a stake in its operation that it becomes subject to public regulation to the extent of that interest.

CROSS-REFERENCES

Regulation.

## BUSINESS CLOSINGS

After advocating such measures for fifteen years, proponents of mandatory plant closing notification secured federal legislation in August 1988 with the Worker Adjustment and Retraining Notification Act, 100 P.L. 379. The measures were initially part of the Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, 102 Stat. 1159, which President RONALD REAGAN had vetoed. After failing to garner the two-thirds majority required for an override, Congress chose to make the plant closing notification provisions into a separate act. In July, the Senate approved the plant closing legislation by a vote of 72 to 23, and the House of Representatives passed it by a vote of 286 to 136. On August 2, 1988, perhaps sensing the popularity of the bill, President Reagan announced his intent to permit the bill to become law without his signature. The bill became automatically effective at midnight, August 3, 1988.

The law requires employers with one hundred or more employees to provide their workers with sixty days' layoff notice when fifty or more workers at a single site will lose their jobs and when affected workers will constitute at least one-third of that site's work force. If 500 or more employees are laid off, however, such notice is required regardless of the percentage of site workers involved. Companies failing to provide the requisite warning face penalties of compensating each dismissed employee for wages and fringe benefits for every day the notice should have been given. Additionally, a $500

payment per day, up to a maximum of $30,000, must be made to local communities when the act's provisions have not been met.

Analogous requirements exist in thirty-eight other countries and in five states. At least twenty other states have proposed such legislation. According to the federal government's GENERAL ACCOUNTING OFFICE (GAO) survey, prior to this legislation, the national median length of advance notice for the closing of large establishments was seven days. White collar and union blue collar workers averaged as much as fourteen days' termination notice while non-union blue collar workers only received two days' notice. Since 1981 more than five million Americans have lost their jobs because plants were shut down or their positions were eliminated.

Along lines similar to President Reagan's reservations, NATIONAL ASSOCIATION OF MANUFACTURERS president Alexander B. Trowbridge maintained that the legislation "damages the flexibility essential to run a successful business." Moreover, Trowbridge noted that advance notice was not always possible as financially troubled businesses may not be able to predict their status with the precision that the legislation required. To salvage their troubled businesses, these companies might find themselves in the midst of difficult debt financing, merging with another company, selling off assets, or bidding on a major contract, all of which could be hampered by the new law's requirements. He claimed that the required closing notices would discourage customers and jeopardize credit arrangements. A report compiled by the Congressional Office of Technology Assessment titled "Plant Closing: Advance Notice and Rapid Response" (DTA-ITE-321) found contentions such as Trowbridge's to be highly exaggerated because financial emergencies are rarely a factor in plant closings.

Other critics of the legislation cited an R. Nathan Associates study which claimed that the total annual costs for notification would run as high as $1.8 billion, due to lost profits, penalties, and additional administrative costs. The Nathan study found further that about 460,000 lost jobs would be triggered by unnecessary closings as a direct result of the act.

The GAO, however, seriously questioned the Nathan report on the basis of what it claimed was inadequate and flawed analysis and methodology. The DEPARTMENT OF LABOR also stated in 1986 that "many of the fears regarding advance notification have not been realized in practice." The National Science Foundation claimed to have found proof that, in most labor groups, advance notice significantly shortens joblessness, which in turn translates into better earnings for displaced workers and substantial savings in unemployment insurance. LABOR UNIONS, such as the AFL-CIO, uniformly acclaimed the Worker Adjustment and Retraining Notification Act, 29 U.S.C.A. § 2101 et seq., claiming that when advance notice is combined with severance pay, it improves morale and actually increases worker productivity.

CROSS-REFERENCES

Corporations; Employment Law; Labor Law; Unemployment Compensation.

## BUSINESS JUDGMENT RULE

*A legal principle that makes officers, directors, managers, and other agents of a corporation immune from liability to the corporation for loss incurred in corporate transactions that are within their authority and power to make when sufficient evidence demonstrates that the transactions were made in* GOOD FAITH.

The directors and officers of a corporation are responsible for managing and directing the business and affairs of the corporation. They often face difficult questions concerning whether to acquire other businesses, sell assets, expand into other areas of business, or issue stocks and dividends. They may also face potential hostile takeovers by other businesses. To help directors and officers meet these challenges without fear of liability, courts have given substantial deference to the decisions the directors and officers must make. Under the business judgment rule, the officers and directors of a corporation are immune from liability to the corporation for losses incurred in corporate transactions within their authority, so long as the transactions are made in good faith and with reasonable skill and prudence.

The rule originated in *Otis & Co. v. Pennsylvania R. Co.,* 61 F. Supp. 905 (D.C. Pa. 1945). In *Otis,* a shareholder's derivative action alleged that corporate directors failed to obtain the best price available in the sale of SECURITIES by dealing with only one investment house and by generally neglecting to "shop around" for the best possible price, resulting in a loss of nearly half a million dollars. The federal district court ruled that although the directors chose the wrong

course of action, they acted in good faith and therefore were not liable to the shareholders. The court reasoned that "mistakes or errors in the exercise of honest business judgment do not subject the officers and directors to liability for NEGLIGENCE in the discharge of their appointed duties."

Subsequently, the business judgment rule was applied to directors' actions when corporations were faced with a hostile takeover. In *Unocal Corp. v. Mesa Petroleum Co.,* 493 A.2d 946 (Del. Super. 1985), the Delaware Supreme Court upheld the defensive actions taken by a board of directors during a takeover struggle with a minority shareholder. In this case Mesa Petroleum Company made an offer that would have made it the majority shareholder in Unocal Corporation. Under the offer, shareholders who sold their Unocal stock would receive $54 a share until Mesa acquired the 37 percent it sought and then would receive highly speculative Mesa securities instead of cash for any stock sold beyond that 37 percent. To counteract the takeover bid Unocal's directors announced that if Mesa obtained 51 percent of its shares, Unocal would purchase the remaining 49 percent for an exchange of debt securities (securities reflected as debt on the books of the corporation) with an aggregate par (or face) value of $72 a share, but the offer would not be extended to the 51 percent of stock held by Mesa. Mesa filed suit, alleging that the directors had violated their fiduciary duty by excluding Mesa from the exchange. The court concluded that the directors' actions were protected by the business judgment rule. The court recognized that in responding to hostile takeover bids the directors of a corporation can face a conflict between their own interests and the interests of the corporation and its shareholders. The court stated that the Unocal directors had reasonable grounds to believe that a danger to the corporation existed because of Mesa's actions and that the defensive actions they took were reasonable in relation to the threat they "rationally and reasonably" believed the offer posed.

Despite the seemingly broad scope of the business judgment rule, corporate directors have not always been able to rely upon it as a way to escape liability for their actions. In *Smith v. Van Gorkom,* 488 A.2d 858 (Del. 1985), the Supreme Court of Delaware held that the directors of a corporation failed to exercise informed business judgment and instead acted in a grossly negligent manner by agreeing to sell the company for only $55 a share. The court looked to evidence indicating that the directors reached their decision to sell at that price after hearing only a 20-minute oral presentation concerning the sale. The court also noted that the directors had received no documentation indicating that the sale price was adequate and had not requested a study to help them determine whether the price was fair. Although the directors were not accused of acting in bad faith, the court stated that the directors' fiduciary duty toward their shareholders required more than merely an absence of bad faith. The directors, according to the court, had an affirmative duty to protect the shareholders by obtaining and reviewing information necessary to help the directors make sound business decisions. By failing to inform themselves they were therefore liable to the shareholders for their bad business decision.

Even when a corporation faces a hostile takeover, the business judgment rule may not insulate its directors from liability. In *Revlon v. MacAndrews & Forbes Holdings,* 506 A.2d 173 (Del. 1985), the company attempting a takeover sought a preliminary injunction to prevent the corporation that was the target of the takeover from granting a lockup option, which gives a friendly third party the right to purchase part of the target company to help thwart a takeover. The Delaware Supreme Court held that the directors failed to fulfill their duty to preserve the company by not maximizing the sale value of the company for the benefit of its shareholders. According to the court, by instituting the lockup option and halting the bidding, the directors allowed "considerations other than the maximization of shareholder profits to affect their judgment" and thus acted to the detriment of the shareholders. Once the directors determined to sell the corporation, the court held, their role changed from that of "defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at the sale of the company." As a result, the court held that the directors were not entitled to the protection of the business judgment rule.

Courts have further held that the business judgment rule will cover the actions of directors only when the directors are disinterested and independent with respect to the action that is at issue. A director is independent when she or he is "in a position to base [her or his] decision on

the merits of the issue rather than being governed by extraneous considerations or influences"; conversely, a director is considered to be interested if she or he appears to be on both sides of a transaction or expects to derive personal financial benefit from it, as opposed to a benefit to be realized by the corporation or all shareholders generally (*Aronson v. Lewis,* 473 A.2d 805 [Del. 1984]). Thus, if one director stands to receive a substantial financial benefit from the issuance of stock nonetheless designed to counteract a takeover threat, the business judgment rule may not apply to the board of directors' actions. Such allegations of bias, lack of independence, or disinterest must be supported by tangible evidence.

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CROSS-REFERENCES

Immunity; Negligence.

## BUSINESS RECORD EXCEPTION

*A rule of evidence that allows routine entries made customarily in financial records, or business logs or files kept in the regular course of business, to be introduced as proof in a lawsuit when the person who made such notations is not available to testify.*

This rule, also called the business entry rule, is an exception to the HEARSAY rule. Business records are considered to have a greater degree of reliability and trustworthiness than personal records because of the regular and systematic way in which they are kept and the reliance that a business places on them.

State and FEDERAL RULES OF EVIDENCE specify what records qualify for this exception to the hearsay rule.

## BUSINESS ROUNDTABLE

The Business Roundtable is an association of chief executive officers (CEOs) representing the top corporations in the United States, joined together to examine and advocate for public policy that will "foster vigorous economic growth and a dynamic global economy." Established in 1972 by 200 leading executives from major U.S. corporations, the Roundtable was founded upon the idea that business executives should take an increased role in public policy that affects the economics of the American people. The belief is that the basic interests of business closely parallel the interests of average citizens, who are directly involved in the economy as consumers, employees, investors, and suppliers. Thus, business leaders have a responsibility to actively influence the economic well-being of the country.

As the Roundtable sees it, one of its principal strengths "is the extent of participation by the chief executive officers of the member companies." CEOs work in task forces on specific topics and issues that currently impact the social and economic well-being of the United States. For example, in 2003, task forces were in place to focus on such issues as civil justice reform, the digital economy, the environment, and security. Each task force is headed by a chief executive, and is assisted by a support staff composed of employees from task force member companies who are experts in the field. Task force members conduct research, craft policy recommendations, and create action plans. They also draft position papers on major issues, which are used in a variety of ways, including congressional testimony.

Activities of the task forces are reviewed by the Roundtable Policy Committee, which is the governing body of the organization. The Policy Committee is composed of all Roundtable CEOs. At the helm of the Roundtable is a chief executive who serves as chairman. The chairman is elected for a one-year term. He or she is assisted by between two to four cochairmen. These executive chairmen, combined with the task force chairmen make up the Planning Committee for the organization. The Planning Committee provides general strategy and guidance.

In an effort to ensure that a broad base of information is represented in all decision making, membership in the organization is diversified. Thus, CEOs come from all areas of business and all areas of the United States. Such diversity ensures a cross section of thinking on national issues. Roundtable members also have a continuing liaison with other organizations that are directly involved with the concerns at hand.

Since the millennium, the Roundtable carried out significant LOBBYING efforts before the U.S. Congress for passage of the presidential trade negotiating authority (2001); proposed to the GEORGE W. BUSH administration a $300 billion incentive package for economic growth (2002); and announced an unprecedented Climate RESOLVE initiative calling for voluntary action by all businesses to reduce greenhouse gas emissions (2003).

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## BUSINESS TRUST

*An unincorporated business organization created by a legal document, a declaration of trust, and used in place of a corporation or partnership for the transaction of various kinds of business with limited liability.*

The use of a business trust, also called a Massachusetts trust or a common-law trust, originated years ago to circumvent restrictions imposed upon corporate acquisition and development of real estate while achieving the limited liability aspect of a corporation. A business trust differs from a corporation in that it does not receive a charter from the state giving it legal recognition; it derives its status from the voluntary action of the individuals who form it. Its use has been expanded to include the purchase of SECURITIES and commodities.

A business trust is similar to a traditional trust in that its trustees are given legal title to the trust property to administer it for the advantage of its beneficiaries who hold equitable title to it. A written declaration of trust specifying the terms of the trust, its duration, the powers and duties of the trustees, and the interests of the beneficiaries is essential for the creation of a business trust. The beneficiaries receive certificates of beneficial interest as evidence of their interest in the trust, which is freely transferable.

In some states, a business trust is subject to the laws of trusts while, in others, the laws of corporations or partnerships govern its existence. The laws of each state in which a business trust is involved in transactions must be consulted to ensure that the trust is treated as an entity whose members have limited liability. If the laws of a particular state consider a business trust to be a partnership, the beneficiaries may be fully liable for any judgments rendered against it. The trustees of a business trust are liable to third parties who deal with the trust unless there is a contract provision to the contrary, since they hold legal title to the trust property and may sue and be sued in actions involving the trust. They may, however, seek indemnity from the trust property and possibly from the beneficiaries.

The property of a business trust is managed and controlled by trustees who have a fiduciary duty to the beneficiaries to act in their best interests. In many states, the participation of the beneficiaries in the management of the property destroys their limited liability, and the arrangement will usually be treated as a partnership.

Profits and losses resulting from the use and investment of the trust property are shared proportionally by the beneficiaries according to their interests in the trusts.

A business trust is considered a corporation for purposes of federal INCOME TAX and similarly under various state income tax laws.

## BUSING

See SCHOOL DESEGREGATION.

## "BUT FOR" RULE

*In the law of* NEGLIGENCE*, a principle that provides that the defendant's conduct is not the cause of an injury to the plaintiff, unless that injury would not have occurred except for ("but for") the defendant's conduct.*

In order to be liable in negligence, the defendant's conduct must constitute the proximate cause, or direct cause, of the plaintiff's injury. The concept of proximate cause encompasses

both legal cause and factual cause, and the "but for" rule pertains to the latter. It is also referred to as the sine qua non rule, which means "without which not," or an indispensable requirement or condition. The "but for" rule is a rule of exclusion, in that the defendant's conduct is not a cause of the event, if the event would have occurred without it.

The "but for" rule explains most cases when limited solely to the issue of causation, but it does not resolve one type of situation: if two causes concur to bring about an event, and either one of them, operating independently, would have been sufficient to cause the identical result, some other test is required. This situation arises, for example, when the defendant sets a fire that unites with a fire from some other source, and the combined fires burn the plaintiff's property, although either fire alone would have been sufficient to do so. In such cases, each cause has actually played so significant a role in achieving the result that responsibility must attach to it. Neither may be relieved from that responsibility on the basis that identical harm would have occurred without it, or no liability at all would ensue.

In order to rectify the frequently problematic application of the "but for" rule, some jurisdictions have applied a broader rule, which provides that the defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing about the event. The jury ascertains whether such conduct constitutes a substantial factor, unless the issue is so unambiguous that it is appropriate for judicial determination. The prevailing view is that "substantial factor" is a phrase sufficiently comprehensible to the layperson to supply an adequate guide in instructions to the jury, and that it is neither possible nor beneficial to simplify it.

In addition to resolving the aforementioned case, the substantial factor test resolves two other types of situations that have proved troublesome, where a similar, but not identical, result would have followed the defendant's act or where one defendant has made an obvious but insignificant contribution to the result. The application of the two rules can achieve the same result in some instances, since, except as indicated, no case has been encountered where the defendant's act could be deemed a substantial factor when the event would have transpired without it. In addition, cases seldom arise where the defendant's conduct would not be such a substantial factor yet was so indispensable a cause that the result would not have ensued without it.

If the defendant's conduct was a substantial factor in causing the plaintiff's injury, he or she will not be absolved from liability simply because other causes have contributed to the result, since such causes are always present. However, a defendant is not necessarily relieved of liability because the negligence of another person is also a contributing cause, and that person, too, is to be held liable for the harm inflicted. The principle of joint tortfeasors is based primarily upon recognition of the fact that each of two or more causes may be charged with a single result.

## ♦ BUTLER, BENJAMIN FRANKLIN

Benjamin Franklin Butler was born December 14, 1795, in Kinderhook Landing, New York. He was admitted to the New York bar in 1817, and established a legal practice with MARTIN VAN

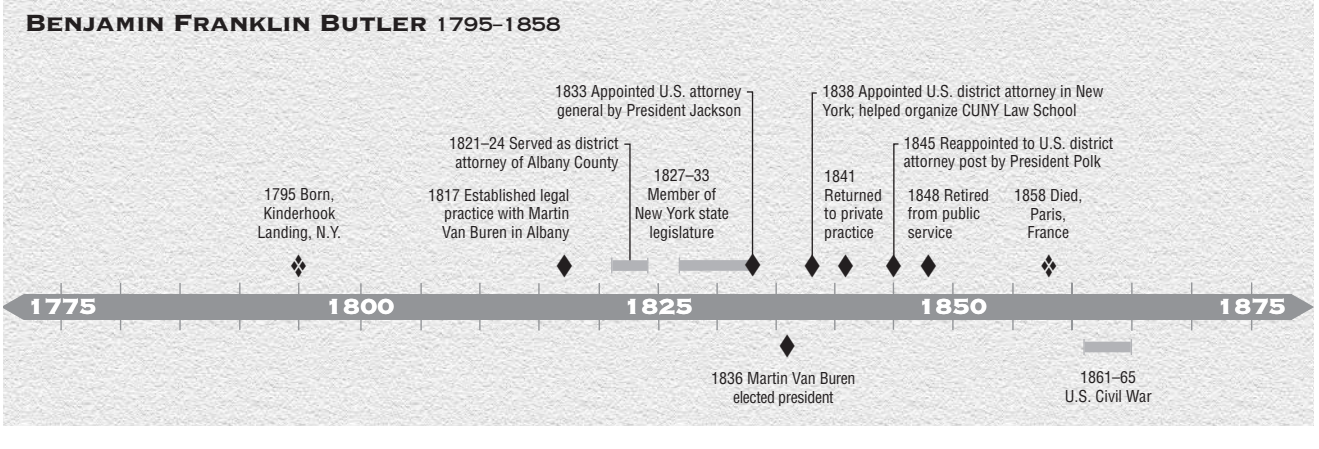

BUREN in Albany, New York. From 1821 to 1824 Butler performed the duties of district attorney for Albany County.

Butler entered politics in 1827, serving in the New York State Legislature for six years. He subsequently acted as U.S. attorney general from 1833 to 1838; during this time he also fulfilled the duties of secretary of war from 1836 to 1837.

In 1838, Butler returned to New York and served as U.S. district attorney from 1838 to 1841 and from 1845 to 1848.

Butler died November 8, 1858, in Paris, France.

### ♦ BUTLER, BENJAMIN FRANKLIN

Benjamin Franklin Butler achieved prominence as a politician and military officer.

Butler was born November 5, 1818, in Deerfield, New Hampshire. After graduating in 1838 from Waterbury College, now known as Colby College, Butler was admitted to the Massachusetts bar in 1840. Elected to the Massachusetts House of Representatives in 1853 and the Massachusetts Senate in 1859, he also served a tour of military duty during the Civil War.

At the outbreak of the war, Butler entered the Massachusetts militia as a brigadier general. He participated in the capture of Baltimore, Maryland, in 1861 and led forces against New Orleans, Louisiana, in 1862. After the conquest of New Orleans, Butler became military governor of that city, but his administration was charged with severity, corruption, and graft. After six months, Butler was reassigned to the Eastern Virginia-North Carolina area and commanded the Army of the James in 1863.

Butler acted as administrator for the return of prisoners in 1864, and was assigned to New York to enforce order during the election held in that same year.

*Benjamin Franklin Butler (the younger).*
BRADY NATIONAL PHOTOGRAPHIC ART GALLERY. LIBRARY OF CONGRESS

After the war, Butler served in the federal government, representing Massachusetts in the U.S. House of Representatives from 1867 to 1875, and from 1877 to 1879. He returned to Massachusetts in 1882 to perform the duties of governor and in 1884 was an unsuccessful nominee for the U.S. presidency, representing two independent parties—the Anti-Monopoly party and the Greenback party.

Butler died January 11, 1893, in Washington, D.C.

"NEVER HOLD OFFICE. HOLD YOURSELF ABOVE IT [BECAUSE] AN OFFICER IS A SERVANT."
—BENJAMIN FRANKLIN BUTLER (B.1818)

### ♦ BUTLER, CHARLES HENRY

Charles Henry Butler served as the Supreme Court reporter of decisions from 1902 to 1916.

Butler was born June 18, 1859, in New York City. He was the son of William Allen Butler, a lawyer, and the grandson of BENJAMIN F. BUTLER, U.S. attorney general during the administration of MARTIN VAN BUREN. Butler attended

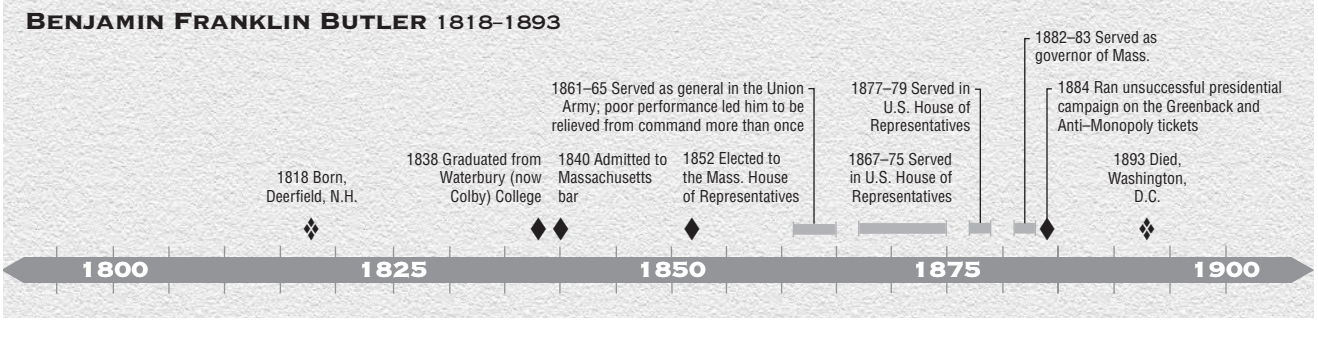

"CITIZENS OF THIS COUNTRY ARE ESSENTIALLY LOYAL; BUT THEY ARE MORE LOYAL TO PRINCIPLES THAN THEY ARE TO MEN."
—CHARLES BUTLER

Princeton University but left school before graduating. He then studied law in his father's New York office for several years, and often accompanied his father to Washington, D.C., when the elder Butler appeared before the U.S. Supreme Court to argue cases. Butler was admitted to the New York state bar in 1882 and subsequently practiced law in New York City. In 1898, he served as the legal expert for the Fairbanks-Herschell Commission, which was convened to adjust the boundary of Alaska and Canada.

In December 1902, Butler left the **PRACTICE OF LAW** to accept an appointment as reporter of decisions for the U.S. Supreme Court, a position created by Congress in 1816. In the early days of the Court, the reporter had been primarily responsible for editing, publishing, and distributing the Court's opinions; beginning in 1874, however, Congress provided money for the government to publish the Court's opinions, and thus by the time Butler became reporter, his role was limited to editorial tasks.

While reporter, Butler edited and published volumes 187 to 241 of the *United States Reports,* the official publication of the opinions of the U.S. Supreme Court. During his tenure with the Court, he also was a delegate to the Hague Peace Conference in 1907. He later authored *A Century at the Bar of the Supreme Court of the United States* (1942), a sometimes lighthearted account of the Court's inner workings and his experiences as reporter. In the book, published two years after his death, Butler described his dealings with the justices as "delightful and congenial." He wrote that the work was "very interesting. It was not difficult and did not take all of my time. The salary … afforded me a comfortable income." Butler also described in some detail the various rules and customs of the Court, including the writ of certiorari and the social etiquette of the Court, and shared anecdotes about lawyers who had argued before the Court. With respect to the reporter's position, Butler discussed the process of preparing headnotes, the paragraphs that appear at the beginning of opinions to summarize the major points of law contained in the opinions. During Butler's tenure, the Court made clear that headnotes were not to be construed as part of the opinions and were instead only the expressions of the reporter about the holdings of the Court.

Butler eventually found his position to be "somewhat monotonous" and noted that "[t]here was nothing constructive about it so far as my part was concerned." In addition, Butler was frustrated by the anonymity of the post and by frequent misunderstandings about his role and duties; he wrote that he was once introduced as the "Head Stenographer of the United States Supreme Court." As a result, Butler resigned from the Court in October 1916, to return to private practice in Washington, D.C. He also wrote extensively about **INTERNATIONAL LAW**, including several works on U.S. relations with Spain and Cuba. He died in 1940, at the age of eighty-one.

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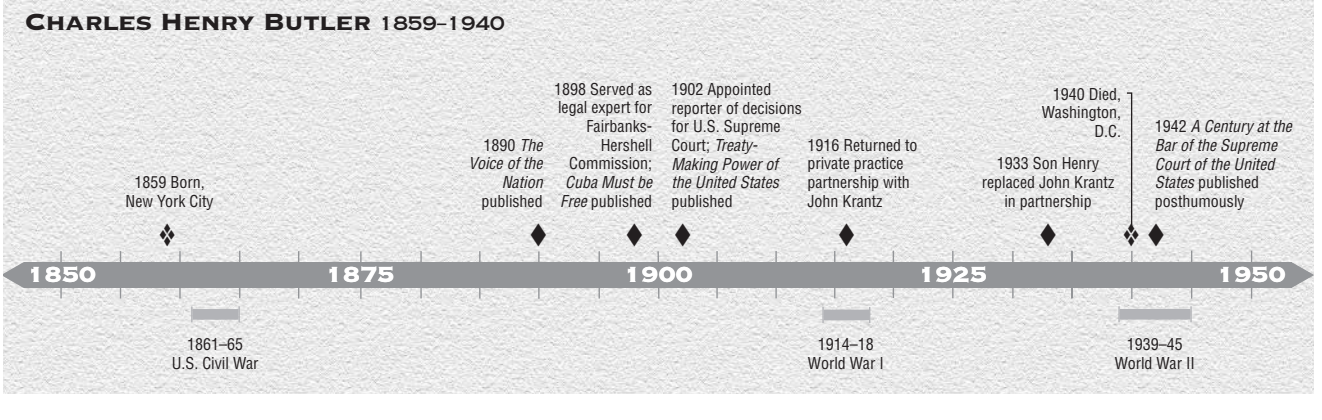

## ♦ BUTLER, PIERCE

Pierce Butler served as associate justice of the Supreme Court from 1923 to 1939. Known for his conservative views, Butler advocated a *laissez-faire* (French for "let [people] do [as they choose])" philosophy that sought to minimize government interference in the economy. In the 1930s, when FRANKLIN D. ROOSEVELT'S NEW DEAL policies sought to increase the power of government in U.S. life, Butler voted against the constitutionality of every New Deal measure that came before the Court. By the end of his tenure, Butler was one of the few conservatives on an increasingly liberal Supreme Court, and he became distraught by changes in the Court's interpretation of the Constitution. "This is not government by law, but by caprice," he wrote in a 1939 dissent. "Whimseys may displace deliberate action by chosen representatives and become rules of conduct. To us the outcome seems wholly incompatible with the system under which we are supposed to live" (*United States v. Rock Royal Co-op,* 307 U.S. 533, 59 S. Ct. 993, 83 L. Ed. 1446). Butler dissented in several Supreme Court decisions that overturned laws discriminating against African Americans, and he rarely supported the rights of those with dissenting or radical opinions in society. He did, however, argue consistently for the rights of those accused of crimes.

Those who knew him commented on Butler's stubbornness and occasional bullying, traits that often made his relations with others on the Court less than amicable. Once, after persuading all on the Court but Justice OLIVER WENDELL HOLMES JR., of the rightness of his opinion on a particular matter, Butler said to Holmes, "I am glad we have finally arrived at a just decision." "Hell is paved with *just* decisions," Holmes responded. Commenting on Butler's conservatism, Holmes characterized Butler as a "monolith" with "no seams the frost can get through." Butler resolutely stuck to his conservative principles even in the depths of the Depression. Something of those views is found in remarks he made in 1916: "Too much paternalism, too much wet-nursing by the state, is destructive of individual initiative and development. An Athlete should not be fed on predigested food nor should the citizens of tomorrow be so trained that they will expect sustenance from the public 'pap.' "

Many of Butler's later views were shaped by his frontier childhood. Butler was born on St. Patrick's Day, March 17, 1866, in a log cabin in Dakota County, Minnesota. His parents had emigrated from County Wicklow, Ireland, to escape the potato famine of 1848, and eventually established their farm only a few miles from Carleton College, in Northfield, Minnesota, where Butler was admitted in 1883. To help pay his college expenses, he worked in a local dairy. He graduated from Carleton in 1887 with both a bachelor of arts degree and a bachelor of science degree.

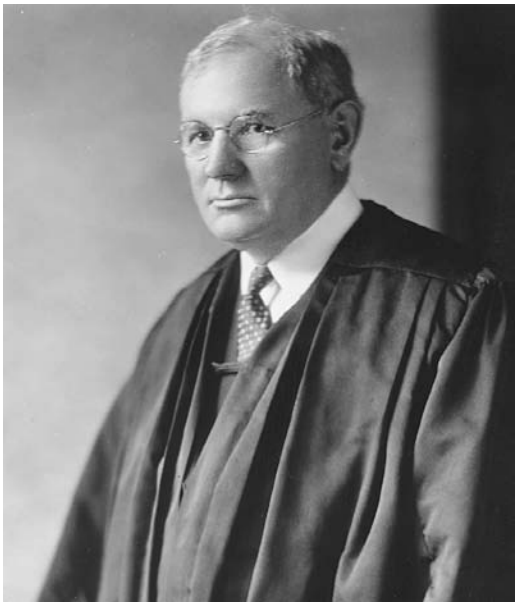

*Pierce Butler.*
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"ABHORRENCE, HOWEVER GREAT, OF PERSISTENT AND MENACING CRIME WILL NOT EXCUSE TRANSGRESSION IN THE COURTS OF THE LEGAL RIGHTS OF THE WORST OFFENDERS."
—PIERCE BUTLER

After college, Butler moved to St. Paul and studied law at the firm of Pinch and Twohy. He passed the Minnesota bar in 1888 and established a law practice with an associate, Stan Donnelly. In 1891, Butler became assistant to the county attorney for Ramsey County, and in 1893 and 1895 he was elected, as a Democrat, to the office of county attorney, the only elective public office he ever held. While in office, he secured more criminal convictions than any county attorney had done before. Butler ran for the state senate in 1906 but was narrowly defeated. In 1908, he was elected president of the Minnesota State Bar Association. In St. Paul, Butler also met his future wife, Annie Cronin, whom he married in 1891. The couple had eight children.

In 1893, Butler helped establish a St. Paul law firm that evolved into Butler, Mitchell, and Doherty, one of the most successful corporate law firms of its time in what was then called the Northwest. The firm had several railroads as its major clients, including those of James J. Hill,

one of the great rail barons. During his career, Butler earned a reputation as the foremost railroad lawyer in the Northwest. His work in railroad litigation eventually brought him to national attention, and allowed him to become friendly with President WILLIAM HOWARD TAFT, who served on the Supreme Court as chief justice from 1921 to 1930 and was later instrumental in securing Butler's nomination to the Court.

On November 23, 1922, President WARREN G. HARDING nominated Butler to succeed retiring justice WILLIAM R. DAY on the Supreme Court. Although Butler was a Democrat, the Republican Harding approved of his laissez-faire economic philosophy and conservative social views. Harding also believed that it would be politically astute to nominate the Roman Catholic Butler to the Court. The last Roman Catholic to serve on the Court had been replaced by Taft in 1921.

Butler's nomination caused a great outcry in liberal circles, particularly from Senators GEORGE W. NORRIS and ROBERT M. LA FOLLETTE, and senator-elect Henrik Shipstead, of Minnesota. They pointed to Butler's ties to big business during his legal career, claiming that these would bias his decisions on the bench. They also objected to Butler's actions as a regent of the University of Minnesota, a position he held from 1907 to 1924. Butler, they argued, had used his influence to have several faculty members dismissed. Despite the objections of La Follette and others, the SENATE JUDICIARY COMMITTEE unanimously confirmed Butler's nomination on December 13, 1922. On January 2, 1923, the Senate appointed Butler to the Court by a vote of 61–8.

While serving on the Court, Butler fulfilled predictions that he would become a pillar of conservatism. Butler often voted with three other conservatives, Justices JAMES C. MCREYNOLDS, GEORGE SUTHERLAND, and WILLIS VAN DEVANTER, himself a former railroad lawyer. Because they consistently voted as a conservative bloc, observers nicknamed this group the Four Horsemen.

Butler's conservatism manifested itself particularly in his emphasis on limiting the power of government. For example, he voted whenever possible against state and federal taxes. In *Coolidge v. Long,* 282 U.S. 582, 51 S. Ct. 306, 75 L. Ed. 562 (1931), writing the Court's opinion, Butler argued that a state inheritance tax was unconstitutional because it violated the Due Process Clause of the FOURTEENTH AMENDMENT, which proclaims that the state shall not deprive a person of liberty without DUE PROCESS OF LAW.

Butler also consistently argued against the rights of government to regulate prices, particularly through his narrow interpretation of the phrase "business affected with a public interest." At the time, it was common for governments, when they sought to regulate prices charged by businesses, to argue that certain industries had more of the public interest involved in their affairs than others; businesses that were affected with a public interest could therefore be regulated by the government. In *Wolff Packing Co. v. Court of Industrial Relations,* 262 U.S. 522, 43 S. Ct. 630, 67 L. Ed. 1103 (1923), Butler voted with the Court in deciding that the packing industry was not affected with a public interest and therefore could not be made subject to price-control legislation. Butler and the Court made the same decision with regard to employment agencies in *Ribnik v. McBride,* 277 U.S. 350, 48 S. Ct. 545, 72 L. Ed. 913 (1928). In both *Wolff* and *Ribnik,* the Court found that the laws under consideration violated the Due Process Clause of the Fourteenth Amendment. In *Nebbia v. New York,* 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934), when an increasingly liberal Court decided to do without the phrase "affected with a public interest" in making its decision and ruled that the state may regulate milk prices, Butler, along with the rest of the Four Horsemen, dissented. This was just one of many dissents Butler and his conservative colleagues would make during the 1930s.

Butler's opinions in the area of civil liberties are less easy to categorize. He argued persuasively for the rights of those accused of crimes, arguing in one opinion, "Abhorrence, however great, of persistent and menacing crime will not excuse transgression in the courts of the legal rights of the worst offenders." He opposed national PROHIBITION and criticized federal agents several times for violating the FOURTH AMENDMENT in their SEARCHES AND SEIZURES. In a case involving WIRE TAPPING by Prohibition agents, OLMSTEAD V. UNITED STATES, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928), Butler found himself in the unusual company of the more liberal justices LOUIS D. BRANDEIS, HARLAN F. STONE, and Holmes. In his dissenting opinion, Butler argued that during the transmission of messages, the exclusive use of any wire

belonged to the persons served by it. Law enforcement wiretapping therefore constituted an illegal search for evidence. In *Aldridge v. United States,* 283 U.S. 308, 51 S. Ct. 470, 75 L. Ed. 1054 (1931), Butler voted with the majority in holding that an African American being tried for the murder of a white man was entitled to have the prospective jurors asked whether they had a racial prejudice that would prevent a fair trial. Butler also supported the rights of DISABLED PERSONS, casting a lone dissenting vote, without opinion, in BUCK V. BELL, 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1000 (1927), which upheld a 1924 Virginia law allowing for the sterilization of mentally handicapped individuals.

When it came to the civil liberties and FREEDOM OF SPEECH of those in society with radical or dissenting opinions, Butler was less understanding. Ironically, Butler's dissenting opinions in many of these matters undermined the rights for dissent in the larger society. In his dissent against the majority opinion in *Stromberg v. California,* 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931), Butler considered lawful the conviction of a young woman found guilty of displaying a red flag in public. The California law under consideration, Cal. Penal Code § 403a, made it a felony to display a red flag as "an emblem of opposition to organized government" or "an invitation . . . to anarchistic action." In *United States v. Schwimmer,* 279 U.S. 644, 49 S. Ct. 448, 73 L. Ed. 889 (1929), Butler wrote the opinion for a majority of six upholding the denial of citizenship to the sixty-year-old Rosika Schwimmer. In her petition for citizenship, Schwimmer had specifically stated that she would refuse to take up arms for the state in any possible circumstances. Writing the Court's opinion, Butler interpreted her statement as opposition to the entire Constitution and therefore the laws of the country: "Taken as a whole it shows that her objection to military service rests on reasons other than mere inability because of her sex and age personally to bear arms . . . [S]he may be opposed to the use of military force as contemplated by our Constitution and laws." Butler dissented from the Court's decision again in *Hague v. Committee of Industrial Organizations,* 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939), where he argued for the legality of a city ordinance regulating labor meetings in city parks.

In CIVIL RIGHTS and racial issues, Butler resisted changes in established interpretations of the Constitution. In the 1930s, when the Court became more liberal and more actively sought to strike down state laws—particularly racially discriminatory laws—it considered unconstitutional, Butler argued that the Court had overstepped its bounds and that state legislatures were the best judges of what was best for their citizens. In the 1932 decision POWELL V. ALABAMA, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, the High Court dealt with the *Scottsboro* case, involving African American men who had been convicted in 1931 in Scottsboro, Alabama, of raping two white women. The Court held that the accused men had been deprived of the right of counsel and had therefore been denied due process as guaranteed by the Fourteenth Amendment. Butler's dissenting opinion argued that no denial of due process had occurred and that the Court's decision was an unwarranted "extension of federal authority in a field hitherto occupied exclusively by the several states." In a 1938 case involving an African American denied access to law school by the state of Missouri,

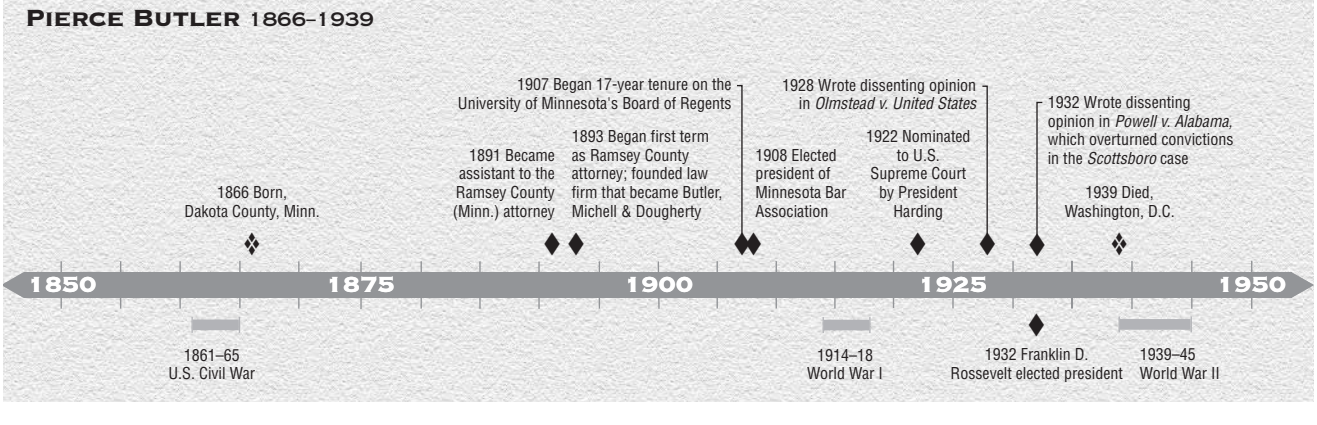

Butler's dissenting opinion argued for the constitutionality of the state's action (*Missouri ex rel. Gaines v. Canada,* 305 U.S. 337, 59 S. Ct. 232, 83 L. Ed. 208).

Butler also dissented in several decisions in the 1930s in which the Court struck down JIM CROW LAWS that kept African Americans from voting. In *Breedlove v. Suttles,* 302 U.S. 277, 58 S. Ct. 205, 82 L. Ed. 252 (1937), Butler argued that a poll tax (a tax charged to voters at the time they cast their votes) did not violate the Fourteenth Amendment, and in *Lane v. Wilson,* 307 U.S. 268, 59 S. Ct. 872, 83 L. Ed. 1281 (1939), Butler disagreed with the majority's decision to strike down an Oklahoma law that made it difficult for African Americans to register to vote.

Butler and his conservative colleagues also opposed Franklin D. Roosevelt's New Deal social WELFARE legislation. In his last three terms in office, Butler dissented in seventy-three cases—constituting more than half of the total dissents in his seventeen-year career on the Supreme Court. He dissented in *Helvering v. Davis,* 301 U.S. 619, 57 S. Ct. 904, 81 L. Ed. 1307 (1937), in which the Court upheld the government's right to tax employers and employees to create pensions through the SOCIAL SECURITY ACT OF 1935, 42 U.S.C.A. § 401 et seq. "The Constitution," Butler wrote in his dissent, "grants to the United States no power to pay unemployed persons or to require the states to enact laws . . . for that purpose." Butler wrote the Court's opinion in *Morehead v. New York ex rel. Tipaldo,* 299 U.S. 619, 57 S. Ct. 4, 81 L. Ed. 456 (1936), which supported an earlier decision to strike down a MINIMUM WAGE law for women.

Butler died of a bladder ailment on November 16, 1939, in Washington, D.C., at age seventy-three. During his tenure, he wrote 323 majority opinions, forty-four dissenting opinions, and three concurring opinions. Butler clung to his dated ideals, even in a world that was fast finding fault with them. As one observer wrote after Butler's death, "he did not change as the frontiers changed; and perhaps this quality of steadfast resistance to a different world was what Justice Holmes had in mind when he spoke of him as a 'monolith.' "

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## BYLAWS

*The rules and regulations enacted by an association or a corporation to provide a framework for its operation and management.*

Bylaws may specify the qualifications, rights, and liabilities of membership, and the powers, duties, and grounds for the dissolution of an organization.

## ♦ BYRNES, JAMES FRANCIS

James Francis Byrnes, a self-taught lawyer, was briefly an associate justice of the U.S. Supreme Court during the 1940s and also served as SECRETARY OF STATE, the governor of South Carolina, a U.S. senator, and an influential member of President Franklin D. Roosevelt's cabinet.

Byrnes was born May 2, 1879, in Charleston, South Carolina. Economic circumstances forced him to quit parochial school at the age of 14 and go to work as a clerk in a Charleston law firm for $2 a week to help support his family. He learned shorthand and eventually obtained a job in Aiken, South Carolina, as the official court reporter for the Second Judicial Circuit, a state court. He studied law in his spare time and was admitted to the South Carolina bar in 1903. He then purchased a newspaper in Aiken, the *Journal and Review,* and served as its editor for five years. Active in the DEMOCRATIC PARTY, Byrnes was elected district attorney for the Second Judicial Circuit in 1908, and two years later won a seat in the U.S. House of Representatives, where he served for 15 years. Following an unsuccessful bid for the U.S. Senate, he returned to South Carolina in 1925 to practice law in Spartanburg. In 1930, he again ran for the Senate, and this time he won election.

*An example of bylaws*

## Bylaws

A set of bylaws that will adequately manage most **profit** corporations is presented on the following pages.

BYLAWS OF

_____

ARTICLE I
OFFICES

Section 1. REGISTERED OFFICE

The corporation shall maintain a registered office in the State of Alaska, as required by law.

Section 2. OTHER OFFICES

The corporation may have offices at such other places both within or without the State of Alaska as the Board of Directors may from time to time designate, or the business of the corporation may require.

ARTICLE II
SHAREHOLDERS: MEETINGS AND VOTING

Section 1. PLACE OF MEETINGS

Meetings of the shareholders shall be held at the principal office and place of business of the corporation or at such other place, either within or without the State of Alaska, as the Board of Directors may designate.

Section 2. ANNUAL MEETING

The annual meeting of the shareholders shall be held on the first Monday in June of each year, if not a legal holiday then on the next succeeding business day, at the principal office of the corporation, or at such other place that the President of the corporation may reasonably designate. At the annual meeting, the shareholders shall elect by vote a Board of Directors, consider reports of the affairs of the corporation and transact such other business as may be properly brought before the meeting. In the event that the annual meeting is not held on the date herein provided for such meeting, the Directors shall cause a meeting in lieu thereof to be held as soon thereafter as may be convenient. Such meeting shall be called in the same manner as the annual meeting, and any business transacted or elections held at such meeting shall be as valid as if transacted or held at the annual meeting.

Section 3. SPECIAL MEETINGS

Special meetings of the shareholders may be called by the President or the Board of Directors and shall be called by the Secretary at the request in writing of holders of not less than one tenth of all the shares entitled to vote at such meeting. Such request shall state the purpose of the proposed meeting.

Section 4. NOTICE OF MEETINGS

(a) Written or printed notice stating the place, day and hour of the meeting and, in the case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than ten (10) nor more than fifty (50) days before the date of the meeting, either personally or by mail, by or at the direction of the President, the Secretary or the officer or persons calling the meeting, to each shareholder of record entitled to vote at such meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the shareholder at his address as it appears on the stock transfer books of the corporation, with postage thereon prepaid.

(b) Notice of any regular or special meeting may be waived by written consent whether executed before or subsequent to such meetings. The attendance of any stockholder in person or his representation by proxy at any regular or special meetings shall be deemed a waiver of the notice hereby prescribed except where a stockholder attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened.

(c) When a meeting is adjourned for thirty (30) days or more, or when a redetermination of the persons entitled to receive notice of the adjourned meeting is required by law, notice of the adjourned meeting shall be given as for an original meeting. In all other cases no notice of the adjournment or of the business to be transacted at the adjourned meeting need be given other than by announcement at the meeting at which such adjournment is taken.

Section 5. QUORUM

(a) At any meeting of the shareholders the holders of a majority of the shares entitled to vote being present in person or represented by proxy shall constitute a quorum for the transaction of business. The shareholders present at a duly organized meeting may continue to transact business until adjournment, notwithstanding the withdrawal of enough shareholders to leave less than a quorum.

(b) In the absence of a quorum a majority of those present in person or represented by proxy may adjourn the meeting from time to time until a quorum shall attend. Any business which might have been transacted at the original meeting may be transacted at the adjourned meeting if a quorum exists.

(c) If a quorum is present, the affirmative vote of a majority of the shares represented at the meeting shall be the act of the shareholders unless the vote of a greater number of shares is required by law or by the Articles of Incorporation.

Section 6. VOTING OF SHARES

(a) Each outstanding share is entitled to one vote on each matter submitted to a vote at a meeting of shareholders, except to the extent that the voting rights of the shares of a class are limited or denied by the Articles of Incorporation.

(b) A shareholder may vote his shares either in person or by proxy executed in writing by the shareholder or by his duly authorized attorney-in-fact and filed with the Secretary before being voted. No proxy shall be valid after eleven (11) months from the date of its execution, unless otherwise provided in the proxy.

[continued]

*An example of bylaws (continued)*

**Bylaws**

(c) At all elections of Directors, each shareholder shall be entitled to cumulate as many votes as shall equal the number of shares of his stock, multiplied by the number of Directors to be elected and for which he is entitled to vote, and he may cast all of such votes for a single Director or he may distribute them among the candidates as he may see fit.

Section 7. VOTING RIGHTS

The persons entitled to receive a notice of and to vote at any shareholders' meeting shall be determined from the records of the corporation on the date of mailing of the notice or on such other date not more than fifty (50) nor less than ten (10) days before such meeting as shall be fixed in advance by the Board of Directors.

Section 8. VOTING OF SHARES BY CERTAIN HOLDERS

(a) Shares standing in the name of another corporation may be voted by such officer, agent or proxy as the Bylaws of such corporation may prescribe, or, in the absence of such provision, as the Board of Directors of such corporation may determine.

(b) Shares held by any administrator, executor, guardian or conservator may be voted by him, either in person or by proxy, without a transfer of such shares into his name. Shares standing in the name of a trustee may be voted by him, either in person or by proxy, but no trustee shall be entitled to vote shares held by him without a transfer of such shares into his name.

(c) Shares standing in the name of a receiver may be voted by such receiver, and shares held by or under the control of a receiver may be voted by such receiver without the transfer thereof into his name if authority to do so be contained in an appropriate order of the court by which such receiver was appointed.

(d) A shareholder whose shares are pledged shall be entitled to vote such share until the shares have been transferred into the name of the pledgee, and thereafter the pledgee shall be entitled to vote the shares so transferred.

(e) Neither treasury shares, nor shares of its own stock held by a corporation in a fiduciary capacity, nor shares held by another corporation if a majority of the shares entitled to vote for the election of Directors of such other corporation is held by the corporation shall be voted at any meeting or counted in determining the total number of outstanding shares at any given time.

Section 9. VOTING LISTS

The officer or agent having charge of the stock transfer books for shares of the corporation shall make, at least ten days before each meeting of shareholders, a complete list of the shareholders entitled to vote at such meeting, or any adjournment thereof, arranged in alphabetical order, with the address of and the number of shares held by each, which list, for a period of ten days prior to such meeting, shall be kept on file at the registered office of the corporation and shall be subject to inspection by any shareholder during the whole time of the meeting. The original stock transfer book shall be prima facie evidence as to who are the shareholders entitled to examine such list or transfer books or to vote at any meeting of shareholders. Failure to comply with the requirements of this section shall not affect the validity of any action taken at such meeting.

Section 10. ACTION WITHOUT A MEETING

Any action which the law, the Articles of Incorporation, or the Bylaws require or permit the shareholders to take at a meeting may be taken without a meeting if a consent in writing setting forth the action so taken is signed by all of the shareholders entitled to vote on the matter. The consent which shall have the same effect as a unanimous vote of the shareholders shall be filed in the records of minutes of the corporation.

ARTICLE III
DIRECTORS: MANAGEMENT

Section 1. POWERS

The business and affairs of the corporation shall be managed by a Board of Directors who shall exercise or direct the exercise of all corporate powers except to the extent shareholder authorization is required by law, the Articles of Incorporation or these Bylaws.

Section 2. NUMBER

The Board of Directors shall consist of three members until the number be changed by the Board of Directors by amendment of these Bylaws. No reduction of the number of Directors shall have the effect of removing any director prior to the expiration of his term of office. Directors need not be residents of the State of Alaska nor shareholders of the corporation.

Section 3. ELECTION AND TENURE OF OFFICE

The Directors shall be elected at the annual meeting of the shareholders to serve for one year or until their successors are elected and qualified. Their term of office shall begin immediately after election.

The Directors may be removed at any time and without cause by a majority vote of the shareholders; provided, however, that no such removal shall be effective if the votes cast against such removal would have been sufficient to elect such Director if then cumulatively voted at an election of the entire Board of Directors.

Section 4. VACANCIES

(a) A vacancy in the Board of Directors shall exist upon the death, resignation or removal of any Director.

(b) Vacancies in the Board of Directors may be filled by a majority of the remaining Directors, though less than a quorum, or by a sole remaining Director. Each Director so elected shall hold office for the balance of the unexpired term of his predecessor and until his successor is elected and qualified.

(c) The shareholders may at any time elect a Director to fill any vacancy not filled by the Directors, and shall elect the additional Directors in the event an amendment of the Bylaws is adopted increasing the number of Directors.

(d) If the Board of Directors accepts the resignation of a Director tendered to take effect at a future time, a successor may be elected to take office when the resignation becomes effective.

[continued]

*An example of bylaws (continued)*

**Bylaws**

Section 5. MEETINGS

(a) Meetings of the Board of Directors shall be held at such place as may be designated from time to time by the Board of Directors or other such persons calling the meeting.

(b) Annual meetings of the Board of Directors shall be held without notice immediately following the adjournment of the annual meetings of the shareholders.

(c) Special meetings of the Board of Directors for any purpose or purposes may be called at any time by the President, or in his absence by the Vice President, or by any two Directors.

Section 6. NOTICE OF SPECIAL MEETINGS

(a) Notice of the time and place of special meetings shall be given orally or delivered in writing personally or by mail or telegram at least 24 hours before the meeting. Notice shall be sufficient if actually received at the required time or if mailed or telegraphed not less than three (3) days before the meeting. Notice mailed or telegraphed shall be directed to the Director's actual address ascertained by the person giving the notice.

(b) Notice of the time and place of holding an adjourned meeting need not be given if such time and place be fixed at the meeting adjourned.

(c) Notice of any special meeting may be waived by written consent, whether executed before or subsequent to such meeting. Attendance of a Director at a meeting shall constitute a waiver of notice of such meeting except where a Director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened.

Section 7. QUORUM AND VOTE

(a) A majority of the Directors shall constitute a quorum for the transaction of business. A minority of the Directors, in the absence of a quorum, may adjourn from time to time but may not transact any business.

(b) The action of a majority of the Directors present at any meeting at which there is a quorum shall be the act of the Board of Directors, unless the act of a greater number is required by law, by the Articles of Incorporation or these bylaws.

ARTICLE IV
OFFICERS

Section 1. DESIGNATION ELECTION QUALIFICATION

(a) The officers of the corporation shall be a President, a Vice President, a Secretary and a Treasurer and such other officers as the Board of Directors shall from time to time appoint. The officers shall be elected by and serve at the pleasure of the Board of Directors. Two or more offices except the offices of President and Secretary, may be held by the same person.

(b) The Board of Directors at its first meeting after each annual meeting shall elect a President from among the Directors, and shall choose a Vice President, a Secretary and a Treasurer, none of whom need be a member of the Board. No officer need be a stockholder.

(c) The Board of Directors in its discretion may elect from among its members a chairman of the Board of Directors who, when present, shall preside at all meetings of the Board of Directors and who shall have such other powers as the Board may prescribe.

(d) Any vacancy occurring in any office of the corporation shall be filled by the Board of Directors.

Section 2. COMPENSATION AND TERM OF OFFICE

(a) The compensation and term of office of all the officers of the corporation shall be fixed by the Board of Directors.

(b) Any officer may be removed, either with or without cause, by action of the Board of Directors.

(c) Any officer may resign at any time by giving written notice to the Board of Directors, the President or the Secretary of the corporation. Any such resignation shall take effect upon receipt of such notice or at any later time specified therein. Unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective provided that the Board of Directors may reject any post-dated resignation by notice in writing to the resigning officer

(d) This section shall not affect the rights of the corporation or any officer under any express contract of employment.

Section 3. PRESIDENT

(a) The President shall be the chief executive officer of the corporation and shall, subject to the control of the Board of Directors, have general supervision, direction and control of the business and affairs of the corporation. He shall preside at all meetings of the shareholders and, unless a chairman of the Board of Directors has been elected and is present, shall preside at the meetings of the Board of Directors. He shall be ex officio a member of all the standing committees, including an executive committee, if any, shall have the general powers and duties of management usually vested in the office of President of a corporation, and shall have such other powers and duties as may be prescribed by the Board of Directors or the Bylaws.

(b) The President shall execute bonds, mortgages and other contracts requiring a seal, except where required or permitted by law to be otherwise signed and executed or where the signing and execution thereof shall be expressly delegated by the Board of Directors to some other officer or agent of the corporation.

Section 4. VICE PRESIDENTS

The Vice President, or if there shall be more than one, the Vice Presidents in the order determined by the Board of Directors, shall, in the absence or disability of the President and except as specially limited by vote of the Board of Directors, perform the duties and exercise the powers of the President. They shall perform such other duties and shall have such other powers as prescribed by the Board of Directors.

[continued]

*An example of bylaws (continued)*

**Bylaws**

Section 5. SECRETARY

(a) The Secretary shall attend all meetings of Directors and shareholders and shall keep or cause to be kept a book of minutes of all meetings of Directors and shareholders showing the time and place of the meeting, whether it was regular or special, and if special, how authorized, the notice given, the names of those present at Directors' meetings, the number of shares present or represented at shareholders' meetings and the proceedings thereof.

(b) The Secretary shall keep or cause to be kept a share register, or a duplicate share register, showing the names of the shareholders and their addresses, the number and classes of shares held by each, the number and date of certificates issued for such shares, and the number and date of cancellation of certificates surrendered for cancellation.

(c) The Secretary shall give or cause to be given such notice of the meetings of the shareholders and of the Board of Directors as is required by the Bylaws. He shall keep the seal of the corporation and affix it to all documents requiring a seal, and shall have such other powers and perform such other duties as may be prescribed by the Board of Directors or by Bylaws.

Section 6. TREASURER

(a) The Treasurer shall have the custody of the corporate funds, shall keep full and accurate accounts of receipts and disbursements in books belonging to the corporation and shall deposit all moneys and other valuable effects in the name and to the credit of the corporation in such depositories as may be designated by the Board of Directors.

(b) The Treasurer shall disburse the funds of the corporation as may be ordered by the Board of Directors, taking proper vouchers for such disbursements, and shall render the President and the Board of Directors, at its regular meetings, or when the Board of Directors so requires, an account of all his transactions as Treasurer and of the financial condition of the corporation.

Section 7. ASSISTANTS

The Board of Directors may appoint or authorize the appointment of assistants to the Secretary or Treasurer or both. Such assistants may exercise the power of the Secretary or Treasurer, as the case may be, and shall perform such duties as are prescribed by the Board of Directors.

Section 8. GENERAL MANAGER

The Board of Directors may also appoint or authorize the appointment of a General Manager, who shall hold office at the pleasure of the Board. The Board of Directors may delegate to the General Manager such executive powers and authority as they may deem necessary to facilitate the handling and management of the corporation's property and interests.

ARTICLE V
EXECUTIVE AND OTHER COMMITTEES

Subject to law, the provisions of the Articles of Incorporation and the Bylaws, the Board of Directors may appoint an executive committee and such other committees as may be necessary from time to time, consisting of such number of its members and having such powers as it may designate. Such committees shall hold office at the pleasure of the Board.

ARTICLE VI
CORPORATE RECORDS AND REPORTS

Section 1. RECORDS

The corporation shall maintain adequate and correct books, records and accounts of its business and properties. All of such books, records and accounts shall be kept at its place of business as fixed by the Board of Directors, except as otherwise provided by law.

Section 2. INSPECTION

All books and accounts of the corporation shall be open to inspection by the shareholders in the manner and to the extent required by law.

Section 3. CERTIFICATION AND INSPECTION OF BYLAWS

The original or a copy of the Bylaws and any amendments thereto, certified by the Secretary, shall be open to inspection by the shareholders and Directors in the manner and to the extent required by law.

Section 4. CHECKS, DRAFTS, ETC.

All checks, drafts or other orders for payment of money, notes or other evidences of indebtedness, issued in the name of or payable to the corporation shall be signed or endorsed by such person or persons and in such manner as shall be determined by resolution of the Board of Directors.

ARTICLE VII
CERTIFICATES AND TRANSFER OF SHARES

Section 1. CERTIFICATES FOR SHARES

(a) Certificates for shares shall be in such form as the Board of Directors may determine. The certificates shall designate the state in which the corporation was incorporated, the name of the record holder of the shares represented thereby, the number of the certificate, the date of issuance, the number of shares for which it is issued, the par value of such shares, if any, or that such shares are without par value, the rights, privileges, preferences and restrictions of the stock, if any, the provisions as to redemption or conversion, if any, and shall make reference to any liens or restrictions upon transfer or voting.

[continued]

*An example of bylaws (continued)*

**Bylaws**

(b) Every certificate for shares must be signed by the President or a Vice President and the Secretary or an Assistant Secretary and may be sealed with the seal of the corporation or a facsimile thereof. If the certificate is countersigned by a transfer agent or registered by a registrar other than the corporation itself or an employee of the corporation, it may be authenticated by facsimiles of the signatures of such officers.

Section 2. REGISTERED SHAREHOLDERS

The corporation shall be entitled to recognize the exclusive right of a person registered on its books as the owner of shares for all purposes, including distribution of dividends, voting and liability for assessments. The corporation shall not be bound to recognize any equitable or other claim to or interest in such shares on the part of any other person, whether or not it shall have express or other notice thereof, except as otherwise provided by law.

Section 3. TRANSFER ON BOOKS

Upon surrender to the corporation or the transfer agent of the corporation of a certificate for shares duly endorsed or accompanied by proper evidence of succession, assignment or authority to transfer, the corporation or transfer agent shall issue a new certificate to the person entitled thereto, cancel the old certificate and record the transaction on its books.

Section 4. RESTRICTIONS ON TRANSFER

No securities of this corporation or certificates representing such securities shall be transferred in violation of any law or of any restriction on such transfer set forth in the Articles of Incorporation or amendments thereto, the Bylaws or any buy and sell agreement, right of first refusal, or other agreement restricting such transfer which has been filed with the corporation if reference to any such restrictions is made on the certificates representing such securities. The corporation shall not be bound by any restriction not so filed and noted. The corporation may rely in good faith upon the opinion of its counsel as to such legal or contractual violation with respect to any such restrictions unless the issue has been finally determined by a court of competent jurisdiction. The corporation and any party to any such agreement shall have the right to have a restrictive legend imprinted upon any such certificate and any certificates issued in replacement or exchange therefore or with respect thereto.

Section 5. LOST, STOLEN OR DESTROYED CERTIFICATES

In the event a certificate is represented to be lost, stolen or destroyed, a new certificate shall be issued in place thereof upon proof of the loss, theft or destruction and upon the giving of such bond or other security as may be required by the Board of Directors.

Section 6. TRANSFER AGENTS AND REGISTRARS

The Board of Directors may from time to time appoint one or more transfer agents and one or more registrars for the shares of the corporation who shall have such powers and duties as the Board of Directors shall specify.

Section 7. CLOSING STOCK TRANSFER BOOKS

(a) The Board of Directors may close the transfer books for a stated period not exceeding fifty (50) days to determine the shareholders entitled to notice of or to vote at a meeting of shareholders, or entitled to receive payment of a dividend, or in order to make a determination of shareholders for any proper purpose. If the stock transfer books are closed to determine shareholders entitled to notice of or to vote at a meeting of shareholders, they shall be closed for at least ten (10) days immediately preceding the meeting.

(b) In lieu of closing the stock transfer books, the Board of Directors may fix in advance a date as the record date for the determination of shareholders. This record date shall not be more than fifty (50) days and, in case of a meeting of shareholders, not less than ten (10) days before the date on which the particular action requiring the determination of shareholders is to be taken. If the stock transfer books are not closed and no record date is fixed for the determination of shareholders entitled to notice of or to vote at a meeting of shareholders, or shareholders entitled to receive payment of a dividend, the date on which notice of the meeting is mailed or the date on which the resolution of the Board of Directors declaring the dividend is adopted is, as the case may be, the record date for the determination of shareholders.

Section 8. CORPORATIONS OPTION TO PURCHASE STOCK OF TRANSFERING SHAREHOLDER

No stock in the corporation shall be transferred to a person who is not already a stockholder unless the stocks shall have first been offered for sale to the other shareholders of the corporation on a pro rata basis so as to maintain the proportionate ownership of the nonselling shareholders, at the same price and on the same terms as would govern upon a transfer to a person and not a stockholder. The offer shall be made in writing, and shall set forth the price and terms and shall be sent by registered mail to each shareholder of the corporation at the address listed on the corporate books. The right to transfer this stock to a person not a stockholder shall not exist until the other shareholders refuse the offer made as provided above, or until the shareholders fail for a period of thirty (30) days after receipt of the written offer to the shareholders to accept same by compliance with the terms therein set forth. If the shareholders refuse to exercise this option, the shares shall then be offered to the corporation in the same manner as offered to the shareholders, and the right to transfer the stock shall not exist until the corporation, through its Board of Directors, have rejected the offer or failed to accept within the time limit above set forth. No sale for less than that amount set forth in the offer to the shareholders and the corporation shall be permitted until such time as the offer for this lower amount has been received and rejected in accordance with the provisions of this Bylaw.

ARTICLE VIII
DIVIDENDS AND WORKING CAPITAL

Section 1. DIVIDENDS
Dividends may be declared by the Board of Directors from time to time out of the surplus or net profits of the corporation and shall be payable at such time or times as the Board of Directors shall determine, subject to preferences and provisions set forth in the Articles of Incorporation and statutes.

[continued]

*An example of bylaws (continued)*

**Bylaws**

Section 2. WORKING CAPITAL
Before the payment of any dividends or the making of any distributions of the net profits, there may be set aside out of the net profits of the company such sum or sums as the Directors may from time to time in their discretion think proper, as a working capital or as a reserve fund to meet contingencies. The Board of Directors may from time to time increase, diminish or vary such capital or such reserve fund in their judgment and discretion.

ARTICLE IX
GENERAL PROVISIONS

Section 1. FISCAL YEAR

The fiscal year of the corporation shall be fixed by resolution of the Board of Directors.

Section 2. SEAL

The corporate seal shall be circular in form, and shall have inscribed thereon the name of the corporation and the words "Corporate Seal" and "State of Alaska."

Section 3. AMENDMENT OF BYLAWS

(a) Except as otherwise provided by law, the Board of Directors may amend or repeal these Bylaws or adopt new Bylaws.

(b) Whenever an amendment or new bylaw is adopted, it shall be copied in the minute book with the original Bylaws in the appropriate place. If any bylaw is repealed, the fact of repeal and the date on which the repeal occurred shall be stated in such book and place.

Section 4. INDEMNIFICATION

The Board of Directors may provide generally or specifically for the indemnification, exoneration, reimbursement or defense of any present or former Director, officer, employee, affiliate agent or contractor of this corporation for expenses, claims, liabilities, indebtedness, penalties, damage or injury incurred by or caused by them in such capacity except for their ownnegligence, knowing unauthorized acts, or defalcations not ratified, confirmed or adopted or the benefit thereof received by this corporation.

Section 5. CONTRACTS

No contract or other transaction between this corporation and any other corporation or concern shall be invalid or avoidable merely by reason of the fact that one or more shareholders, Directors or officers of this corporation are interested in or are Directors or officers of such other corporation or concern, and any shareholder, Director or officer of this corporation may be a party to, interested in or profit from any contract or transaction with this corporation, provided that the relationship, interest or profit is disclosed to the Board of Directors of this corporation and the contract or transaction is duly approved by action of a majority of the Directors present when such action is taken, or consented to by a majority of the Directors (without counting the vote of any Directors intenterested or related if a vote is cast provided, that such Director may be counted for the purposes of determining the existence of a quorum); no such shareholder, acting as such, nor be liable for any loss incurred under or by reason of such contract or transaction, merely by reason of such relationship or interest. Where such Director's vote is necessary to the entering of such contract or transaction, the contract or transaction shall not be void or viodable if it is fair to this corporation or its shareholders at the time it is authorized or approved.

DATED this _____day of _____.

Initially, Byrnes was a strong advocate of Franklin D. Roosevelt's NEW DEAL legislation and served as Roosevelt's legislative adviser, thus playing a crucial role in securing support in the Senate for Roosevelt's policies. Byrnes also helped the president successfully manage the furor surrounding the chief executive's "court-packing" plan, a bill proposed by Roosevelt to expand the Supreme Court so that he could nominate justices who would uphold New Deal legislation. Roosevelt heeded Byrnes's advice not to seek a vote on the bill after several 1937 decisions indicated that the Court would be more inclined than its members previously had been to hold Roosevelt's programs to be constitutional. Later in his second Senate term, Byrnes joined the Democratic opposition to pro-union New Deal legislation. Nevertheless, he remained close to Roosevelt and helped secure the repeal of the Neutrality Act of 1935, 49 Stat. 1081, and the passage of the LEND-LEASE ACT of 1941, 22 U.S.C.A. § 411 et seq.

In June 1941, Roosevelt nominated Byrnes to fill the seat on the U.S. Supreme Court vacated by the resignation of Associate Justice JAMES C. MCREYNOLDS. Byrnes won confirmation easily but served on the Court for little more than a year, completing the shortest tenure in the history of the Court.

Byrnes wrote only 16 majority opinions, including *Edwards v. California,* 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119 (1941), in which the Court struck down a California law that made bringing indigents into the state a crime. In his opinion, Byrnes argued that the law posed an unacceptable burden upon interstate commerce. He also wrote the majority opinion in *Taylor v. Georgia,* 315 U.S. 25, 62 S. Ct. 415, 86 L. Ed. 615

(1942), where the Court held that a state penal law that required workers receiving advances to remain at their jobs until the advances were paid back violated the THIRTEENTH AMENDMENT prohibition against INVOLUNTARY SERVITUDE.

Despite these significant contributions, Byrnes was not happy on the Court. He wanted to be more actively involved in the country's war effort. In October 1942, after only sixteen months on the Court, Byrnes resigned his seat. He left the Court at the request of President Roosevelt to become director of the newly created Office of Economic Stabilization, established to help prevent wartime inflation. Less than a year later, Byrnes became head of the Office of War Mobilization, an agency created to manage the production of war and civilian goods. The range of authority and influence Byrnes wielded in both posts led Roosevelt to refer to him publicly as "assistant president."

In Roosevelt's 1944 campaign for a fourth term, Byrnes was considered for the vice presidential nomination when opposition to Henry A. Wallace, the current vice president, surfaced. But Byrnes's pro-management views proved to be unacceptable to labor leaders, and the nomination instead went to HARRY S. TRUMAN. Byrnes nevertheless remained a close adviser to Roosevelt, accompanying him in 1945 to the YALTA AGREEMENT with JOSEPH STALIN and Winston Churchill.

Byrnes continued to play a major role in government after Roosevelt's death, when President Truman, a longtime friend, appointed Byrnes secretary of state. Byrnes's service in the STATE DEPARTMENT was controversial. He took criticism for his recommendation that the atomic bomb be used to end the war with Japan. As secretary of state, Byrnes was the chief representative for the United States in a number of high-level international conferences held following the war, including the Potsdam Conference. In negotiations with the Soviet Union, Byrnes favored a settlement that greatly weakened Russia's control over Eastern Europe and increased the United States' MONOPOLY on atomic weapons. He also argued for the reunification of Germany. The Soviets strongly resisted

*James Francis Byrnes.*
ARCHIVE PHOTOS, INC.

"POVERTY AND IMMORALITY ARE NOT SYNONYMOUS."
—JAMES BYRNES

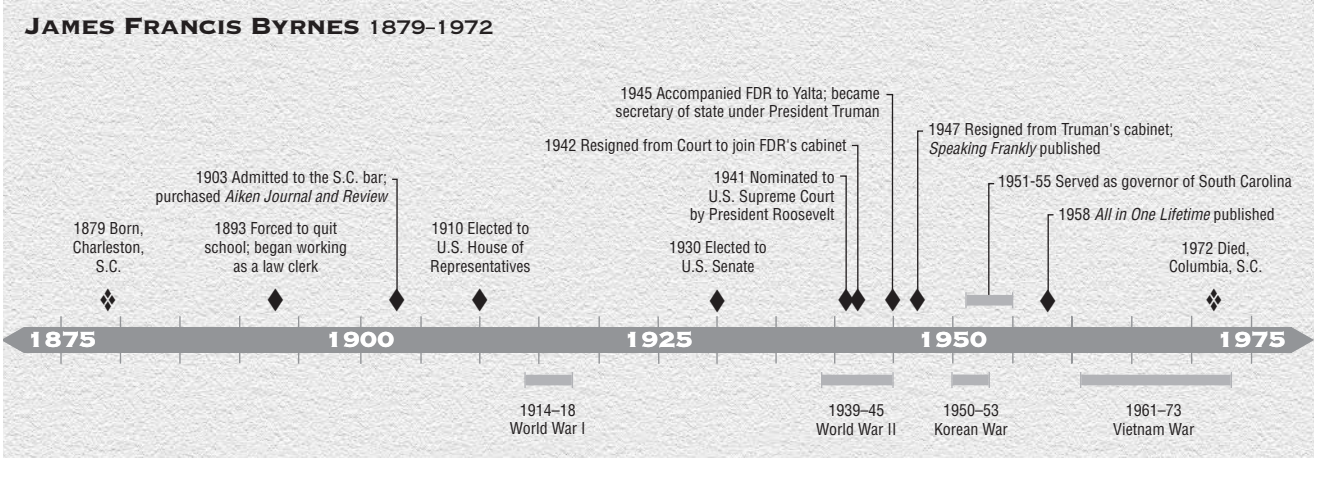

both proposals, and the failure of these negotiations helped to launch the COLD WAR.

Byrnes resigned from the cabinet in 1947 after a disagreement with Truman over his Fair Deal programs, which Byrnes saw as socialistic. After leaving the Truman administration, Byrnes practiced law in Washington, D.C., for several years. In 1947, he published *Speaking Frankly,* an account of his experiences with postwar diplomacy, which became a best-seller.

Byrnes returned to politics in 1950 when he was elected governor of South Carolina. He served for one term, during which he compiled a somewhat mixed record with respect to CIVIL RIGHTS. His administration suppressed the activities of the KU KLUX KLAN in the state, but Byrnes was a vocal opponent of SCHOOL DESEGREGATION.

After leaving office in 1955, Byrnes retired to Columbia, South Carolina, where he died in 1972. Byrnes was the only U.S. citizen in the twentieth century to have served in prominent roles in all three branches of the government—legislative, judicial, and executive. His autobiography, which was published in 1958, is titled *All in One Lifetime.*

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**CROSS-REFERENCES**

New Deal; Roosevelt, Franklin Delano.

## CABINET

*The counsel or group of advisers of a king or other chief executive of a government. A group of individuals who advise the president of the United States.*

The president's cabinet was created by custom and tradition and was instituted by the first president. The heads of each of the executive departments of the government, including the SECRETARY OF STATE, the secretary of the treasury, the secretary of defense, the attorney general, the secretary of the interior, the secretary of agriculture, the secretary of commerce, the secretary of labor, the secretary of HEALTH AND HUMAN SERVICES, the secretary of education, the secretary of HOUSING AND URBAN DEVELOPMENT, and the secretary of transportation, comprise the cabinet.

CROSS-REFERENCES

Executive Branch.

## CABLE TELEVISION

The cable TV industry exploded from modest beginnings in the 1950s into a service that by 2003 reached 69 percent of all U.S. households that had television. Cable was initially a response to a need for improved transmission in areas where signals were weak or nonexistent. By the 1960s, consumers began to demand not only better reception but also more signals. This demand fueled the exponential growth of the industry. In 2003, almost ten thousand cable systems provided services to 73 million household subscribers in the United States. The industry has faced many legal issues, including programming and rate regulation, lack of competition, and customer service complaints. In addition, deregulation of the industry in the late 1990s has led to the consolidation of major cable companies.

The most contentious issue in cable television arises from FEDERAL COMMUNICATIONS COMMISSION (FCC) regulations that require cable operators to allot up to one-third of their channels to local broadcast stations. Known as must-carry rules, these were first enacted in the 1960s in an effort to protect the interests of local broadcasters. In 1985 and 1987, the Court of Appeals for the District of Columbia Circuit held that must-carry rules, as promulgated at the time, violated the FIRST AMENDMENT (see *Quincy Cable TV v. FCC,* 768 F.2d 1434 [1985], *cert. denied,* 476 U.S. 1169, 106 S. Ct. 2889, 90 L. Ed. 2d 977 [1986]; *Century Communications Corp. v. FCC,* 835 F.2d 292 [1987], *cert. denied sub nom. Office of Communication of the United Church of Christ v. FCC,* 486 U.S. 1032, 108 S. Ct. 2014, 129 L. Ed. 2d 497 [1988]).

Congress addressed the must-carry issue in the Cable Television CONSUMER PROTECTION and Competition Act of 1992 (47 U.S.C.A. § 325 et seq.). The 1992 Cable Act, passed over President GEORGE H.W. BUSH's VETO, required cable systems to carry most local broadcast channels and prohibited cable operators from charging

**Cable Television**

**NUMBER OF SUBSCRIBERS AND MONTHLY BASIC RATES, 1975 TO 2000**

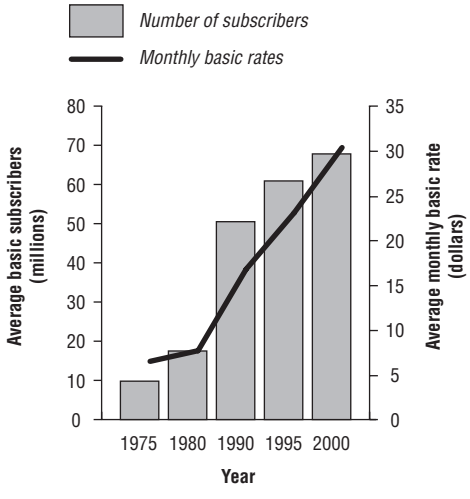


SOURCE: U.S. Census Bureau, *Statistical Abstract of the United States*, 2002.

local broadcasters to carry their signal. These requirements were challenged on First Amendment grounds in *Turner Broadcasting System v. FCC,* 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994). Turner Broadcasting asked the Supreme Court to apply a STRICT SCRUTINY test, similar to the one used to evaluate the constitutionality of restrictions on printed material, to determine whether the FCC's regulations infringed the industry's FREEDOM OF SPEECH. The FCC urged the Court to apply the same relaxed standard it had applied to broadcast media in *Red Lion Broadcasting v. FCC,* 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969).

The Court took a middle ground on cable communications. Noting that cable television is neither strictly a broadcast medium nor a print medium, the Court held that the relaxed scrutiny test adopted in *Red Lion* was inappropriate, but declined to adopt the strict scrutiny protection given to print publications. The Court held that any regulations that are content neutral—in other words, that do not dictate the content of programming and that have an incidental burden on free speech—will be judged by an "intermediate level of scrutiny." Any regulations found to be content based—in other words, that attempt to restrict programming based on its content—will receive the strict scrutiny applied to print media. It returned the case to the district court for a full hearing under this ruling.

The case returned to the Supreme Court in 1997. In *Turner Broadcasting System v. Federal Communications Commission*, 520 U.S. 180, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997), the Court upheld the statute and rejected the cable operators' First Amendment claims. The court found that the law served an important and legitimate legislative purpose because it protected noncable households from losing regular local broadcasting service due to competition from cable companies. In addition, there was a legitimate governmental purpose in seeking to ensure public access to a variety of information sources. Finally, the government had an interest in eliminating restraints on fair competition even when the regulated parties were engaged in protective expressive activity.

The regulation of the rates charged by cable companies is another area of contention between the industry and the government. Before 1984, local franchising authorities regulated the rates charged by franchisees. The 1984 Cable Communications Policy Act (46 U.S.C.A. §§ 484-487, 47 U.S.C.A. § 35, 152 et seq.), which was designed to promote competition and allow competitive market forces to determine rates, deregulated rates for almost all franchisees. Although industry representatives had argued that competition would keep rates reasonable, after deregulation, average monthly cable rates increased far faster than the rate of inflation, in some cases as much as three times faster. During the same period, the average cable subscriber received only six additional channels, and competition from other operators was almost nonexistent. In 1991, only 53 of the more than 9,600 cable systems in the United States had a direct competitor in their service area.

The 1992 Cable Act provided a regulatory structure for basic and expanded programming, but exempted individually sold premium channels, such as HBO and the Disney Channel, and pay-per-view programming. The 1992 act authorized local governments to regulate programming, equipment, and service rates charged by companies in areas where there is no competition. Basic rates could be regulated but only under prescribed circumstances that indicate a lack of competition in the area. According to figures gathered in 1994, the new regulations led to average rate reductions of more than eight percent.

When Congress deregulated the cable industry with the 1984 Cable Act, its primary intent was to promote competition. The 1984 act sought to balance the government's dual goals of providing cable access to all areas and deregulating rates. The industry had argued that competitive market forces would produce competition and stabilize rates. However, competition did not occur in the ensuing years, and cable operators continued to enjoy a MONOPOLY in virtually all service areas. Before 1992, exclusive cable franchises were granted to the bidders who promised the widest access and most balanced programming. The government felt that this was the best way to ensure that cable's new and expensive technology was available to people in poor and rural areas as well as more affluent areas. As a result, bidders who promised more than they delivered were protected from competition. The 1992 Cable Act eliminated many of the barriers to competition that existed before. Most important, it abolished the exclusive franchise agreement, which had been a powerful monopolistic tool.

Although the 1992 act did much to encourage competition, it did not address the 1984 act's ban on ownership of cable companies by local telephone utilities. This ban was challenged in *Chesapeake & Potomac Telephone Co. v. United States,* 42 F.3d 181 (1994), in which the Fourth Circuit Court of Appeals held that it violated the telephone companies' First Amendment right to free speech. The ban was removed by the Telecommunications Act of 1996 (110 Stat. 56), which President BILL CLINTON signed in February 1996.

The 1996 act signaled a return to the pre-1992 act philosophy, as the FCC was again directed to deregulate the cable television industry. The industry, which lobbied hard for the changes, contended that deregulation would produce more competition and lower prices. In addition, cable operators believed they could move into the areas of broadband INTERNET service and local phone service. Critics raised concerns that deregulation would produce less competition, high prices, and the consolidation of cable services into the hands of a few powerful companies.

By 2002, the cable landscape had changed, with four companies controlling 80 percent of the national cable market. In addition, cable subscriber costs rose steadily. The FCC continued to advocate for a deregulated cable market and has permitted companies to pass on external costs (those unrelated to the delivery of programming and maintenance of infrastructure) to their subscribers. Competition from satellite television providers also grew, but not enough to pose a serious threat to the cable industry.

The growth of cable television led to other issues, including litigation over the distribution of sexually explicit content on cable systems. For example, *United States v. Playboy Entertainment Group Inc.*, 529 U.S. 803, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000), involved a provision in the 1996 Cable Act that required cable TV systems to restrict sexually-oriented channels to overnight hours if they did not fully scramble their signal to nonsubscribers.

Even before the enactment of the 1996 provision, cable TV operators scrambled the signals of their programming so nonsubscribers could not view the channels. In addition, "premium" channels are scrambled so only those cable subscribers who pay an additional fee will gain access to the programming. However, scrambling technology is imperfect. A phenomenon known as "signal bleed" allows audio and video portions of scrambled programs to be heard and seen for brief periods. The federal law sought to prevent children from hearing or seeing sexually explicit content because of signal bleed. If a cable operator could not completely scramble the signal, it could only transmit sexually explicit programming between 10 P.M. and 6 A.M.

Playboy Entertainment Group, which owns and prepares programming for adult television networks, filed a lawsuit alleging the law was unconstitutional. The Supreme Court, although it acknowledged that many adults would find the material offensive, ruled that the law did violate the First Amendment because it sought to ban indecent rather than obscene material. Adults had a right to view such material. Moreover, the law only restricted signal bleed to sexually explicit content. This meant that the law was not content neutral and had to be judged using the strict scrutiny test. Although Congress had a compelling interest in preventing children from viewing sexually explicit cable programming, the method it had prescribed was too restrictive to the rights of adult subscribers. Therefore, the government had failed to justify a nationwide daytime speech ban. In so ruling, the Court found that another provision of the act, which permits cable customers to request

complete channel blocking, was a better and legal alternative.

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"IN EVERY MATURE SOCIETY, THERE IS CONSIDERABLE OVERLAP BETWEEN LEGAL QUESTIONS AND MORAL QUESTIONS."
—EDMOND CAHN

## ♦ CAHN, EDMOND NATHANIEL

Edmond Nathaniel Cahn was the author of numerous publications including *The Sense of Injustice* (1949), *The Moral Decision* (1955), and *The Edmond Cahn Reader* (1966).

Cahn was born January 17, 1906, in New Orleans, Louisiana. He received a bachelor of arts degree in 1925 and a doctor of JURISPRUDENCE degree in 1927 from Tulane University. He also received a doctor of laws degree from the Jewish Theological Seminary of America, located in New York City, in 1962.

After his admission to the Louisiana bar in 1927 and the New York bar in 1928, Cahn established a law firm in New York City where he practiced law from 1927 to 1950. He extended his career interests to the field of education and taught at New York University in 1945, accepting a professorship of law in 1948. In 1958 and 1962 he lectured on the philosophy of law at the Hebrew University in Jerusalem and on ethics at the Jewish Theological Seminary of America in New York City in 1961.

From 1948 to 1951 he was the director of the Conference on Social Meaning of Legal Concepts. He was awarded the Phillips Prize in Jurisprudence by the American Philosophical Society in 1955.

Cahn died August 9, 1964, in New York City.

## CALENDAR

*A list of cases that are awaiting trial or other settlement, often called a trial list or docket.*

A *special calendar* is an all-inclusive listing of cases awaiting trial; it contains dates for trial, names of counsel, and the estimated time required for trial. It is maintained by a trial judge in some states and by a court clerk in others.

*Calendar call* is a court session during which the cases that await trial are called in order to determine the current status of each case and to assign a trial date.

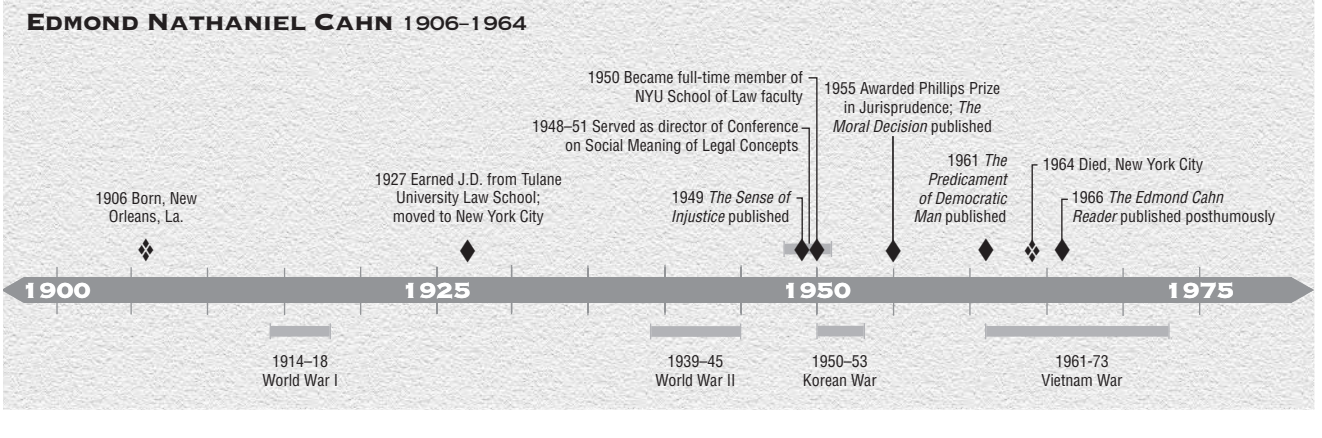

## ♦ CALHOUN, JOHN CALDWELL

John Caldwell Calhoun achieved prominence as a U.S. vice president, Southern politician, and a staunch defender of STATES' RIGHTS.

Calhoun was born March 18, 1782, in Abbeville County, South Carolina. After graduating from Yale University in 1804 and LITCHFIELD LAW SCHOOL in 1806, Calhoun was admitted to the South Carolina bar in 1807 and established a successful legal practice there.

In 1808, Calhoun entered politics, beginning as a member of the South Carolina legislature. Three years later, he began his career in federal government, representing South Carolina in the House of Representatives until 1817. During his tenure, he performed the duties of acting chairman of the Committee on Foreign Affairs and in 1811 was a member of the War Hawks, a group that advocated war with England in 1812.

Calhoun resigned from the House in 1817 and assumed the duties of secretary of war for the next eight years. In 1825, he began his first term as vice president of the United States, serving under President JOHN QUINCY ADAMS for four years. He remained in this office during the presidency of ANDREW JACKSON, but relinquished his post in 1832 after a disagreement with Jackson concerning states' rights. The dispute between Jackson and Calhoun resulted in the Nullification Controversy of 1832 and 1833. Calhoun was a proponent of the right of a state to declare a federal law null and void if the state deemed such a law unconstitutional. His attitude was a result of the passage of protective tariffs that Calhoun believed favored the interests of the North over those of the South. Calhoun expressed his beliefs in his work, *South Carolina Exposition,* in which he discussed his views of sovereignty of the states. He believed that a state had the right to secede from the Union in order to keep the powers of the federal government in check. The Nullification Controversy finally ended with a compromise, and Calhoun emerged as the foremost speaker for the South during that era.

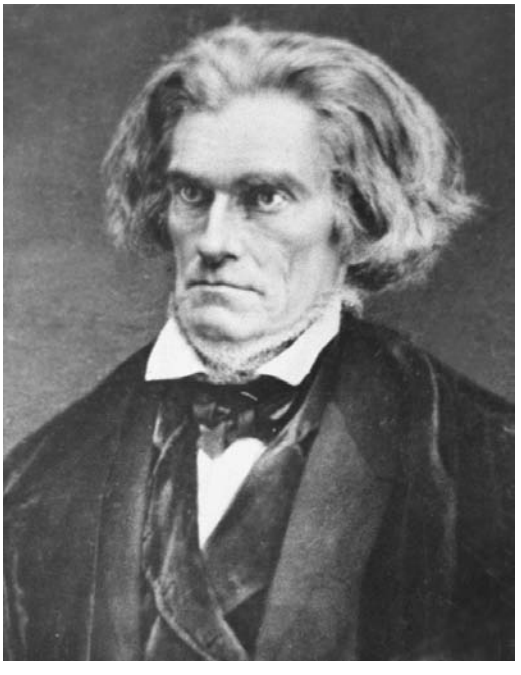

*John Caldwell Calhoun.*
LIBRARY OF CONGRESS

Calhoun represented South Carolina in the U.S. Senate from 1832 to 1843, and again from 1845 to 1850. He continued his campaign for states' rights, supported SLAVERY, and introduced a policy of "concurrent majorities," wherein every area of the United States would participate equally in the exercise of federal power. During the period between his two sena-

"THE RIGHT OF SUFFRAGE IS THE INDISPENSABLE AND PRIMARY PRINCIPLE IN THE FOUNDATION OF A CONSTITUTIONAL GOVERNMENT."
—JOHN CALHOUN

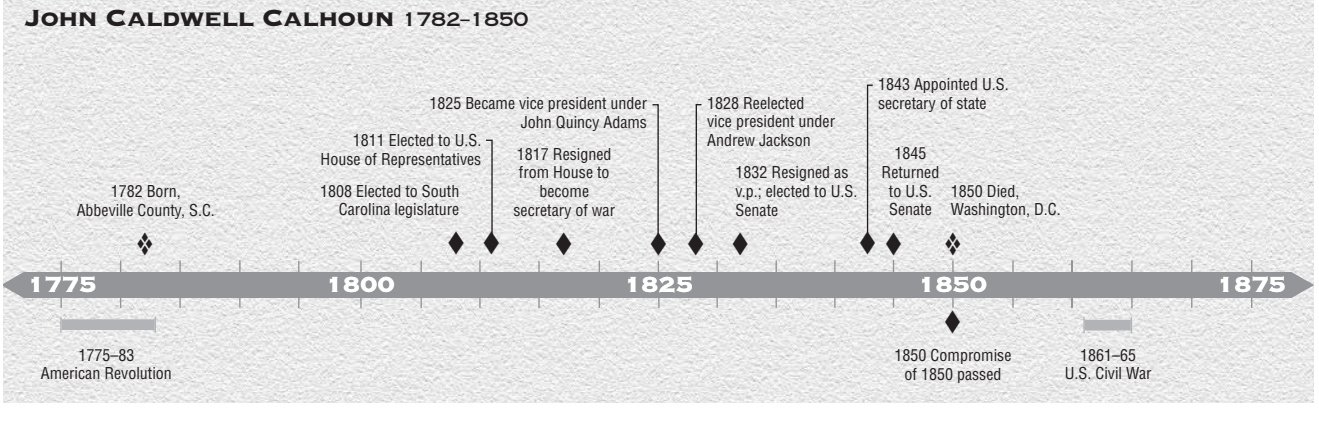

torial terms, Calhoun served as U.S. SECRETARY OF STATE from 1843 to 1845. Calhoun died March 31, 1850, in Washington, D.C.

As an author, Calhoun wrote many publications, including *Disquisition on Government* and *Discourse on the Constitution and Government of the United States.* A compilation of his works from 1851 to 1855 was published posthumously by R. K. Crallé in a six-volume set.

## CALL

*To convoke or summon by public announcement; to request the appearance and participation of several people—such as a call of a jury to serve, a roll call, a call of public election, or a call of names of the members of a legislative body.*

*In contract law, the demand for the payment of money according to the contract terms, usually by formal notice.*

*As applied to corporation law, the demand of the board of directors that subscribers pay an installment or portion of the amount that is still owed on shares that they have agreed to buy. A* call price *is the price paid by a corporation for the redemption of its own* SECURITIES.

*In securities, a contract that gives a person the right to demand payment of a certain specified number of shares of stock at a stated price or upon a fixed date.*

## CALVO CLAUSE

*A provision in an agreement between a private individual and a foreign state that says, in effect, that "aliens are not entitled to rights and privileges not accorded to nationals, and that, therefore, they may seek redress for grievances only before local authorities."*

Under the Calvo Clause, a claimant waives the right to apply to his or her government or to another forum for protection if a claim is denied by local authorities.

## CALVO DOCTRINE

*The principle set forth by an Argentine jurist, Carlos Calvo, that a government has no duty to compensate* ALIENS *for losses or injuries that they incur as a result of domestic disturbances or a civil war, in cases where the state is not at fault, and, therefore, no justification exists for foreign nations to intervene to secure the settlements of the claims made by their citizens due to such losses or injuries.*

## CAMERA

*A chamber, room, or apartment in old* ENGLISH LAW. *A judge's chamber. Treasury, chest, or coffer.*

To be in camera is to be in private or in chambers.

## CAMERAS IN COURT

Cameras and courtrooms have long had an uneasy relationship. Blaming cameras for disrupting trials, the AMERICAN BAR ASSOCIATION (ABA) led the drive for their removal in the mid-1930s. The effort succeeded: all but two state courts banned them, and Congress prohibited them from all federal trials. But the television era ushered in new problems, and courts eventually were forced to grapple with the constitutional question of whether TV cameras are injurious to a defendant's right to a fair trial. In 1965, the U.S. Supreme Court appeared to say they are, in *Estes v. Texas,* 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543, overturning a conviction because cameras had denied a defendant his DUE PROCESS rights. But the Court changed its mind in the 1981 case of *Chandler v. Florida,* 449 U.S. 560, 101 S. Ct. 802, 66 L. Ed. 2d 740. Reacting to the permissiveness of *Chandler,* many states passed legislation allowing televised trials. And from 1991 to 1994 some federal courts conducted an experiment with cameras.

Photographers lost their place in court in the early 1930s thanks to a highly sensational trial, and it would take four decades for them to regain it. In 1934, nearly 700 reporters and photographers descended on the New Jersey town where Bruno Hauptmann was on trial for KIDNAPPING and murdering the baby of famous aviator Charles A. Lindbergh and author Anne Morrow Lindbergh. The trial judge allowed still photography, but was unprepared for the barrage of flashbulbs and the presence of a newsreel camera that was smuggled inside the court. Decrying the media circus that resulted, the ABA in 1937 called for prohibiting photography in its Canons of Professional and Judicial Ethics. At the same time the U.S. Congress amended the Federal Rules of CRIMINAL PROCEDURE to ban cameras and any form of broadcasting from federal courts. All but two states—Texas and Colorado—gradually adopted the ABA ban. Later, Texas permitted television cameras and it was a Texas criminal case that led to the next stage of development in this area of U.S. law.

In 1965, the U.S. Supreme Court took up the constitutional issue in *Estes.* This case involved a

claim by a convicted swindler that the televising of his heavily publicized trial had deprived him of his right to due process under the FOURTEENTH AMENDMENT. The counterargument advanced by the state of Texas is still the one most pro-camera supporters continued to make into the early 2000s: cameras neither caused distractions nor prejudiced the trial and in fact served the public's right to know in a manner both educational and likely to promote respect for the courts. The Supreme Court sided with the defendant. Emphasizing the obtrusive technology used in the courtroom, from fat cables to the red light on cameras, the Court decided that the trial had not been fair and overturned the conviction. Yet, to many observers, *Estes* appeared to stop short of announcing that all photographic or broadcast coverage of criminal trials is inherently a denial of due process; it focused narrowly on the particulars in Billie Sol Estes's case. More important, observers noted, the decision looked to the future. "When the advances in these arts permit reporting by … television without their present hazards to a fair trial," Justice TOM C. CLARK wrote for the majority in *Estes,* "we will have another case."

Developments in the 1970s changed the picture. Technology had improved, making TV cameras far less disruptive, and the electronic media was demanding the same access to trials enjoyed by the print media. The ABA became much more tentative about its hard-line position. Its Committee on Fair Trial-Free Press recommended that the ABA revise its standards. Encouraged to experiment, a number of states tried short-term pilot programs as a first step toward changing their laws. Then, in 1978, the Conference of State Chief Justices voted 44–1 to approve a resolution allowing the highest court of each state to set its own guidelines for radio, TV, and other photographic coverage. By 1980, 19 states permitted coverage of trial and appellate courts, three permitted coverage of trial courts only, six permitted coverage of appellate courts only, and 12 others were considering the issue.

The U.S. Supreme Court provided the decisive push with its ruling in *Chandler* in 1981. *Chandler* revisited the *Estes* decision of 16 years earlier and on quite similar terms: in Florida, two men convicted of BURGLARY claimed that televising their trial over their objections was a denial of due process. At the time Florida was following a pilot program for televising and permitting still photography at state trials under canon 3A(7) of the Florida CODE OF JUDICIAL CONDUCT. The parties in *Chandler* read *Estes* differently: the appellants argued that *Estes* meant that the televising of criminal trials is inherently a denial of due process, whereas the state claimed that *Estes* did not establish any such constitutional rule. Seeking to clarify the earlier ruling, which had comprised no less than six opinions, the Supreme Court agreed with Florida. It held that states could provide access to the electronic media regardless of whether defendants wanted it. Moreover, the burden of showing how cameras have a prejudicial effect on a given trial would fall on the defendant. Chief Justice Warren E. Burger's majority opinion cautioned, "Dangers lurk in this, as in most experiments, but unless we were to conclude that television coverage under all conditions is prohibited by the Constitution, the states must be free to experiment."

*The sensational 1934 trial of Bruno Hauptmann (center) for the Lindbergh kidnapping created such a disruption that cameras were banned from nearly all U.S. courtrooms in 1937.*

AP/WIDE WORLD PHOTOS

The freedom to experiment brought cameras firmly into state courts. The ABA abandoned its prohibitive stance and more states began conducting experiments of their own. The launch on July 1, 1991 of COURT TV, a cable channel that provided televised trial coverage of newsworthy cases, sought to further legitimatize the use of cameras in the courtroom. By 1995, 47 states permitted some form of televising of state trials. But in 1994, the federal court system chose otherwise. The federal JUDICIAL CONFERENCE OF THE UNITED STATES authorized a three-year experiment in 1991 that permitted camera coverage of federal civil trials. Most judges who participated in the experiment, which involved

# Judge Wapner and *The People's Court*

Before televised trials became commonplace, there was *The People's Court.* This highly popular syndicated TV program ran from 1981 through 1993 and featured retired judge Joseph A. Wapner, of the California Superior Court. Millions of viewers tuned in daily to watch Wapner hear actual cases from small-claims court. The parties agreed to submit to his judgment of their sometimes petty, and often quite funny, disputes, which included claims for fender benders, complaints about plumbing jobs, and even a plaintiff who sued when a liquor store that had sold him a flat can of beer refused to give him a fresh one. The ground-breaking *The People's Court* probably did more than any other program before it to open the way for the reality programming tide that swept civil and criminal trials onto television. It also popularized understanding of at least one kind of courtroom process, that of small claims.

The genius of *The People's Court* was its verisimilitude. The program operated by the rules of California's small-claims courts: no lawyers were allowed, aggrieved parties represented themselves, and the damage limit was $1,500. To find participants for the show, Ralph Edwards Productions combed court dockets for cases that were essentially matters of principle and then invited the parties to appear on the program. On the show, as in real life, both parties told their sides of the story to the judge, whose decision was final. The show's 12-year run featured more than 5,000 cases.

The affably grumpy, no-nonsense Wapner certainly knew his profession. The former president of the California Judges Association had earned degrees in philosophy and the law from the University of Southern California in the late 1940s, had practiced law for a decade, and had tried civil and criminal cases for twenty years before retiring from the bench in 1979. His TV rulings were commonsensical, swift, and just. The victim of a bum can of beer, for instance, was awarded eighty cents. In another case, one man in a romantic love triangle had bitten off the ear of another rather than give up the woman in question; Wapner awarded the one-eared man $1,500 for pain and suffering. As part of the show's terms, the production company paid all awards, and the aggrieved parties merely agreed to call it a day after the judge passed sentence.

The effect of *The People's Court* has often been debated. The show may have encouraged litigiousness, according to such critics as noted attorney **ALAN M. DERSHOWITZ** and Judge Abner J. Mikva, of the U.S. Circuit Court of Appeals for the District of Columbia. It is undoubtedly true that the use of small-claims courts increased in the 1980s after the show began airing. Others found in Wapner a traditional model of fairness: in a 1989 essay in the *University of Chicago Law Review,* Justice **ANTONIN SCALIA**, of the U.S. Supreme Court, described Wapner as a descendant of Solomon and Louis IX of France. Wapner himself saw the program as educational.

To the public, which made *The People's Court* the fifth-highest-rated syndicated show in the mid-1980s, Wapner became the best-known judge in the United States. A 1989 *Washington Post* poll found that fewer than 10 percent of respondents knew the name of Justice **WILLIAM H. REHNQUIST**, of the U.S. Supreme Court, but more than half could identify Wapner. Wapner published the book *A View from the Bench* in 1987. After the show's cancellation in 1992, he served as president of the board of directors of the Brandeis-Bardin Institute, a Jewish cultural organization in California.

As tastes in daytime television changed in the 1990s, Wapner's descendants reflected the times. The era of no-holds-barred reality TV had dawned, and into it in 1996 barreled *Judge Judy.* If the betrayed and the broken-hearted went on *The Jerry Springer Show* to smash chairs, *Judge Judy* was where they settled their legal differences for the price of a tongue-lashing from retired New York City judge Judy Sheindlin. Averaging 9 million viewers per day, Sheindlin rarely failed to remind disputing parties of their shortcomings.

The huge success of *Judge Judy* spawned competition. In fact, a brief revival of *The People's Court* between 1998 and 1999 featured former New York City mayor Ed Koch hamming it up at the gavel. Similarly, *Divorce Court,* originally a 1960s show with actors, reappeared with real couples ready to untie

the knot on camera. Other shows, such as *Judge Mills Lane*, covered the familiar territory of small claims cases being tried by humorous grumps.

The 2000s breathed fresh air into the format with African American judges and new thematic approaches. *Divorce Court* and *Judge Mathis* featured attorney Mablean Ephriam and former state judge Greg Mathis, respectively. As a former teenage dropout and gang member who became a Michigan judge, Mathis promoted the theme of self-redemption while citing his life as an example for young offenders. Following their lead was noted former Georgia juvenile court judge Glenda Hatchett, whose *Judge Hatchett* also sought to balance entertainment with a social message.

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Small Claims Court; Television.

six trial court districts and two appellate districts, viewed the experience favorably; in fact, a report prepared by the Judicial Conference recommended extending camera coverage to all federal district and appellate courts. But in 1994, the conference voted to end the experiment without explanation. Many advocates of televising federal trials blamed this decision on the excessive publicity from the 1994 pretrial hearings in the case of O. J. SIMPSON, a popular sports and entertainment personality who was accused and later acquitted of murdering his former wife Nicole Brown Simpson and her friend Ronald Lyle Goldman.

By the beginning of the twenty-first century, all 50 states allowed some level of camera presence in their courts (only the District of Columbia prohibited cameras in trial and appellate proceedings), but the rules governing when and where cameras are allowed varied enormously. In New York, for example, cameras have been banned from criminal trials since 1952 under Section 52 of the state's CIVIL RIGHTS Law. A 2001 challenge to the law by Court TV argued that Section 52 was unconstitutional because it violates the FIRST AMENDMENT. But in 2003, Manhattan Supreme Court Justice Shirley Werner Kornreich upheld the ban on cameras, noting that televising trials could disrupt the proceedings enough to have an impact on the fairness of those trials.

In 2001 the U.S. Senate and House of Representatives examined the issue of whether cameras should be allowed in federal court. An effort to enact legislation had failed in Congress a year earlier. In November 2001 the SENATE JUDICIARY COMMITTEE voted 12–7 to bring a proposed bill to the full Senate; action on that legislation, as well as similar legislation in the House, is pending.

The U.S. Supreme Court does not allow cameras in its proceedings; transcripts are made available, but not immediately. In a move that surprised many, the Court allowed the release of audiotapes of its proceedings in the Florida presidential election results late in 2000. The Court deemed those hearings to be important enough to warrant a special dispensation of its normal procedures. In 2003, the Court again allowed audiotapes to be released in the University of Michigan Law School's AFFIRMATIVE ACTION case, as well as the hearings on the constitutionality of the McCain-Feingold campaign finance reform law. The Court has emphasized that such access will only be allowed in rare instances and only for cases it deems crucial enough. As for televised Supreme Court proceedings, Chief Justice WILLIAM REHNQUIST wrote to Senator Arlen Spector of Pennsylvania, a proponent of television coverage, that "a majority [of the Justices] are of the view that it would be unwise to depart from our current practice." Rehnquist has stated that

# "Raise Your Right Hand and Try to Look Natural": The Courtroom Camera Debate

Is allowing television cameras in courtrooms a good idea? U.S. law never tires of debating the question. Widely banned after the sensational 1934 Bruno Hauptmann **KIDNAPPING** and murder trial, cameras in the courtroom have fluctuated for decades in their acceptability. The courts, the media, lawyers, and scholars have often heralded the camera as if it were democracy's own eye—or railed at it as a leering Peeping Tom. Supporters claim that cameras enlighten the public, while opponents counter that cameras corrupt the trial process and yield bad journalism. Only since the mid-1970s has the pro-camera lobby been ascendant. By 1995, with 47 states leaving the decision to permit cameras up to judges, and the **CABLE TELEVISION** network **COURT TV** broadcasting nearly as fast as courts can be called to session, televised trials were routine affairs. But despite complaints, federal trials remained largely off-limits. Moreover, controversy over the media's treatment of the **O. J. SIMPSON** murder trial brought new calls for pulling the plug altogether.

In 1934, Hauptmann was tried for kidnapping and murdering the young son of aviator Charles A. Lindbergh and author Anne Morrow Lindbergh. The trial excited the nation, obsessed the news media, and created a circus atmosphere of "expert" commentators, tabloid interviews, souvenir hawkers, and courtroom grandstanding. In 1995, the trial of Simpson, who was accused and ultimately acquitted of the murders of his former wife Nicole Brown Simpson and her friend Ronald Lyle Goldman, caused similar excitement, obsession, and atmospherics. Of course, the camera's role in each case was quite different. One 145 journalists crammed into the *Hauptmann* courtroom, and flashbulbs popped and a smuggled newsreel camera turned, all in violation of the trial judge's orders. Afterward, critics deplored the media's behavior. Sixty-one years later, a single television camera was permitted to follow the *Simpson* trial. Critics decried the media "circus," "frenzy," "orgy," and so forth. In both instances, it was said that cameras skewed the proceedings and gave a distorted view of the justice system. Some said the media got Hauptmann convicted; some believe the media got Simpson off.

On the simplest level, then, the debate is about the press. Critics believe journalists are only barely capable of behaving themselves in court. After the *Hauptmann* experience, the **AMERICAN BAR ASSOCIATION** (ABA) reacted furiously. It swiftly passed judicial canon 35 of its Canons of Professional and Judicial Ethics:

> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.

This 1937 rule led the majority of states to ban still cameras and was amended in 1952 to include TV cameras. Although the ABA has long since changed its views, distrust of the media's intentions survives in the early 2000s in state rules governing courtroom proceedings. These guidelines strictly dictate how many cameras are allowed (usually, one), what they may do (remain stationary), whom they may film (never jurors and sometimes not witnesses), who may operate them (one person), what that operator may wear (appropriate dress), and when she or he may leave the courtroom (only during recess). It is hardly accidental that the guidelines resemble a teacher's orders to a class.

While generally accepting limits as necessary to the proper administration of justice, supporters of courtroom journalism chafe at the idea that cameras get in the way. In the *Simpson* trial, for example, when Judge Lance Ito threatened to have the camera removed, Floyd Abrams, a he would not allow camera coverage if even one justice was opposed.

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noted **FIRST AMENDMENT** attorney, entered a plea to have it remain: the camera, Abrams said, was "absolutely, positively, 100 percent not guilty." Not surprisingly, this is also the view of Court TV. In its 1995 report called *Facts and Opinions about Cameras in the Courtrooms,* the network noted approvingly that states require shielding witnesses, children, and others from the camera. Exactly, respond opponents. "The first thing to note about such options is that their very existence affirms the adverse effects of cameras on witnesses," wrote Professor Rory K. Little, of the Hastings College of the Law.

This aspect of the debate—the effect on a witness of being filmed—is contentious. Few people are perfectly comfortable on television; even actors and reporters are prone to stage fright. But trials themselves can be tense events. One view is Court TV's, which attributes nervousness to publicity and speaking in front of a group: "There is no evidence that it is related to the camera, or that [witnesses] would be less nervous in the presence of the judge, jury, defendant and three dozen furiously-scribbling reporters." The network backs up its claim with state court research. But even if the majority of states are satisfied, not every observer is. In 1993, the Washington, D.C., Public Defender Service noted that a substantial percentage of witnesses feel uncomfortable on camera, and the district's U.S. attorney's office has expressed fears about cameras' chilling witness cooperation and even endangering witnesses. The media and tourists may hound witnesses who have appeared on television, and so may others with frightening motives. After Pablo Fenjves testified in the *Simpson* case about noises made by Nicole Brown Simpson's dog, he told *Time* magazine that he received death threats.

Lawyers and judges can also be affected by the camera. Critics say the temptation to grandstand is overwhelming—lawyers will show off, aware that their reputation can be bolstered by flights of impressive speech. Supporters respond that lawyers had big egos long before cameras were there to record them. Yet, can judges keep order, let alone resist the temptation themselves? This old question in the debate drew comment by the U.S. Supreme Court in *Estes v. Texas* (381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 [1965]). In his concurring opinion in that case, Chief Justice **EARL WARREN** looked scathingly on a Texas trial judge who said that he had sworn to uphold the state constitution—not the federal Constitution. (Of course, state judges must uphold both.) "One is entitled to wonder," Warren wrote, "if such a statement would be made in a court of justice by any state trial judge except as an appeal calculated to gain the favor of his viewing audience." And, in 1995, much commentary in the *Simpson* case asked whether Judge Ito had succumbed to the allure of the camera when he allowed prosecutors and defense attorneys to bicker endlessly. No, said supporters, cameras can actually be a corrective for these problems. As attorney Abrams put it, "A single, silent courtroom camera serves as an antidote to such behavior by truthfully showing the public how attorneys and judges actually behave."

The effect on juries concerns critics in a special way. Since juries are not televised, there would seem to be little reason to worry about what they will do in the jury box. Not so. It is what they may do afterward—especially in high-profile cases—and how that may affect their performance in the box that bothers critics. "[W]orst of all," wrote attorney, author, and camera-opponent Wendy Kaminer, "juries will play to the prospect of appearing on talk shows when the trial is over . . . we can't expect jurors not to be corrupted by publicity." Book deals present another problem. There is the real possibility that people will try to get on juries simply to turn a buck; in fact, one person was dismissed from the *Simpson* jury for allegedly taking notes for this very reason. Thus, opponents argue, cameras can jeopardize the quality of justice: not only can they result in bad juries, but the dismissal of jurors can threaten to sink an entire trial. Against this argument, supporters can say little except words of regret about human nature. "Maybe we should, at long last, learn a lesson from Snow White's stepmother," Abrams advised. "Our mirrors are not our problem."

Given its length, notoriety, and multiple problems, the *Simpson* case produced a backlash against televising trials. Afterward, some judges barred cameras, and others put new restrictions on them. Vowing that "nothing like the O.J. Simpson case is going to happen in my courtroom," Judge Lawrence Antolini of the California Superior Court limited filming to five minutes a day. Critics mocked supporters' claims that cameras help educate the public. As attorney Kaminer quipped in the *ABA Journal,* "People who claim they watch the *Simpson* case to educate themselves remind me of people who say they buy Playboy for the articles." Court TV took much of the blame for its choice of what to broadcast—not only the *Simpson* case, but the previous trials of Lorena

*(continued)*

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**CROSS-REFERENCES**

Courtroom Television Network; Freedom of the Press; Lindbergh Kidnapping.

## CAMPAIGN FINANCE REFORM

See **ELECTION CAMPAIGN FINANCING.**

## ♦ CAMPBELL, BEN NIGHTHORSE

In 1992, Ben Nighthorse Campbell, a rancher, teacher, judo champion, and jewelry designer became the first Native American to serve in the U.S. Senate in more than 60 years.

## "Raise Your Right Hand and Try to Look Natural": The Courtroom Camera Debate (continued)

Bobbitt for the castration of her husband and of brothers Erik Menendez and Lyle Menendez for the murder of their parents. One of the network's sharpest scourges, attorney **ALAN M. DERSHOWITZ**, proposed an alternative: a nonprofit channel to be modeled on the cable network **C-SPAN** that would broadcast trials of a more illuminating nature. News programs were criticized, too, for carrying too little footage during a brief experiment in broadcasting federal trials; the **FEDERAL JUDICIAL CENTER** determined that the average length of coverage in a newscast was only 17 seconds.

In the wake of the backlash, supporters backpedaled as quickly as possible. "The obsession with this particular television trial [Simpson's] should not lead to a rejection of televised trials," the *New York Times* declared in an editorial (June 11, 1995). *USA Today* editorialized, "As aberrant as the *Simpson* case is, it has become a civics lesson in the rights against **SEARCH AND SEIZURE**, the role of judges and the duties of jurors" (May 5, 1995). Trotting out statistics that showed that its viewers come away with greater understanding and respect for the courts, Court TV argued that "in-court camera coverage is, by definition, as dignified as the process and arguably more 'tasteful' than out-of-court tabloid coverage." And when confronted with the charge that cameras had dragged out the length of the *Simpson* trial, supporters pointed to earlier trials that had lasted much longer without cameras.

One venue in which there seems virtually no chance of televised court proceedings any time soon is the U.S. Supreme Court. Supreme Court justices have assiduously shunned publicity surrounding the cases they hear. Over the years, justices have felt that such publicity could detract from the serious nature of the Court's business. The common practice is for transcripts of proceedings to be issued after a case has been decided. On rare occasions, the Supreme Court has allowed audiotapes of proceedings to be released to the public. The hearings surrounding the 2000 presidential contest between **GEORGE W. BUSH** and **AL GORE** were deemed sufficiently important by the Court to warrant this, as were the 2003 hearings for the University of Michigan Law School **AFFIRMATIVE ACTION** case and the constitutionality of the McCain-Feingold campaign finance reform law. Chief Justice **WILLIAM REHNQUIST** stated that he would not allow cameras in the Supreme Court if even one justice objects. Judging from the comments of Justice **DAVID SOUTER**, who has testified before Congress twice in opposition of cameras in the court—and who has said that

> cameras will come in over my dead body—

chances are the Supreme Court will be camera-free for quite some time.

The future of cameras in courtrooms is anyone's guess. Eager to expand its business, Court TV invites its viewers to help it lobby states for greater access. The network and other supporters especially want the Federal Judicial Conference to reopen federal trials to cameras. Critics shudder at the thought, and after *Simpson,* many proponents concede that this is unlikely. Also unlikely is that camera opponents will get their way in state courtrooms, unless the effect of *Simpson* is so great that it can undo fifty years of legal reforms. As for federal trials, as of the early 2000s cameras are permitted in only two federal courts, the Second U.S. Circuit Court of Appeals in New York and the Ninth Circuit Court of Appeals in San Francisco. Legislation is pending in both houses of Congress that would give all federal judges the option of allowing television cameras to broadcast trials. Despite continued strong opposition, the camera fought a long battle to become a fixture in court, and it will be quite difficult to send the camera away.

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Campbell was born April 13, 1933, in Auburn, California, the son of Albert Valdez Campbell, who was part Northern Cheyenne Indian, and Mary Vierra, a Portuguese immigrant. His mother was a patient and occasional employee at a tuberculosis sanitorium when she met his father, who also worked there. They were married in 1929 and had two children, Campbell and his sister, Alberta Campbell, who died at the age of 44, an apparent suicide.

Campbell's father was an alcoholic who frequently disappeared, leaving Campbell's mother to support and care for the children. Campbell and his sister spent time in orphanages and foster homes when their mother was too sick to work and provide for them. Eventually, his father was able to work and the family opened a small grocery store, which prospered later when a freeway was built with an exit ramp at the location of the store.

When Campbell entered high school he had little sense of enthusiasm or direction concerning his education. In 1950, he dropped out and joined the U.S. Air Force. He served in the KOREAN WAR and was discharged from the service with the rank of airman, second class. He passed the high school equivalency test to receive his general equivalency diploma, and in 1957 graduated from San Jose State University with a bachelor's degree in physical education and fine arts.

When he was a teenager Campbell became interested in judo and it became a driving force in his life. "Judo teaches you to persevere, to never give up," he said. "That skill is transferable to business, to school, to politics." Campbell continued to develop his judo skill while he was in the service, and after completing college, he moved to Tokyo, where he lived for four years, studying at Meiji University and perfecting his abilities. In 1963, he won a gold medal at the Pan-American Games and, in 1964, he was captain of the U.S. Olympic Judo Team at the Tokyo Olympic Games.

Campbell's interest in judo continued throughout his life. After the 1964 Olympics he returned to California to teach high school physical education. During the summers he conducted judo camps for children. He also pioneered judo instruction in physical education programs at California high schools. During this period he met Linda Price—they were married in 1966 and had two children, Shanan, also known as Sweet Medicine Woman, and Colin, whose Indian name is Takes Arrows.

Eventually, Campbell left his job as a physical education teacher and set up an industrial arts program at an alternative high school for troubled students. He also developed a jewelry-making class for adult Native American students, which fueled his interest in his Native American heritage. When Campbell was growing up, his father hesitated to talk about his ancestry because of his fear that the family would be subjected to discrimination. But Campbell persisted, and his father finally gave him information that led him to relatives on the Northern Cheyenne reservation in Montana. There, in 1980, he was officially enrolled as a member of the Black Horse family and of the Northern Cheyenne tribe. Currently he is one of 44 chiefs of the Northern Cheyenne.

Campbell entered the world of politics by chance. He attended a Colorado DEMOCRATIC PARTY meeting in May 1982 hoping to see a friend whom he thought might be there. Party officials were trying to find someone willing to run for state representative from Campbell's district against a Republican who was considered a certain winner. No one but Campbell was willing to take on the challenge. To everyone's great surprise, he not only won but carried 57 percent of the vote, including 15 percent of the crossover vote from the Republican side.

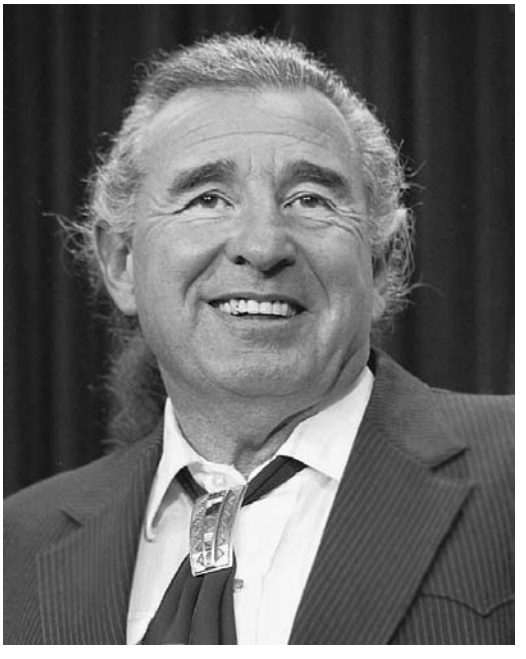

*Ben Nighthorse Campbell.*
AP/WIDE WORLD PHOTOS

"MY GRANDFATHER TOLD ME THAT AT THE LITTLE BIG HORN CUSTER DROPPED THE FLAG AND THE CHEYENNES PICKED IT UP . . . NOW THE FLAG UNITES ALL OF US IN THIS GREAT COUNTRY."
—BEN CAMPBELL

Campbell was a Democrat whose blend of fiscal conservatism and social liberalism made him an enigma. During his two terms in the Colorado legislature he was instrumental in the passage of landmark legislation to settle disputes over Native American WATER RIGHTS. Early in his political career, he learned that his positions angered extremists on both ends of the political spectrum. He has little tolerance for single-issue zealots. "I learned early on that the more extreme their position or ideology, the less they have in common with the majority of the electorate," he said. "[They] reduce everything in America to a single issue. They do not judge a legislator on total performance, on what that representative is doing for everybody. They are concerned only with what a legislator does for them on that one single issue."

In 1986, Campbell decided to run for the U.S. House of Representatives from Colorado's third district. Since Native Americans constitute only two percent of the population of the dis-

trict, Campbell and his campaign manager decided to downplay his heritage. However, his Native American background along with his diverse credentials—high school dropout, Korean War veteran, small-business owner, Olympic athlete, artist, truck driver, teacher, rancher, and state legislator—was a potent and irresistibly novel combination for both voters and the media. Ordinary people could identify with him as "one of them." The result was a 52–48 percent win for Campbell, making him one of only six challengers nationwide to unseat an incumbent in 1986. On January 6, 1987, he stood proudly between Joseph P. Kennedy II, son of the late ROBERT F. KENNEDY, and JOHN LEWIS, son of an African American Georgia sharecropper, to be sworn in and take his seat in the One Hundredth Congress.

During his three terms as a U.S. representative, Campbell acted as a spokesman for all Native Americans, not just those he represented from Colorado. He cosponsored legislation to establish the Museum of the American Indian at the Smithsonian Institution. He also fought to have the Custer National Battlefield Monument renamed the Little Big Horn National Battlefield Monument. The Montana monument, which honors the 1876 battle between General George Armstrong Custer's Seventh Cavalry and a group of Sioux, Cheyenne, and Arapaho Indians camped on the banks of the Little Big Horn River, memorialized and glorified the two hundred soldiers, including General Custer, who perished there. Until 1991 only a wooden marker commemorated the loss of Indian lives. In 1991, largely through Campbell's efforts, Congress changed the monument's name and authorized a more prominent memorial to the Indians who fought and died there.

Toward the end of his third term as a U.S. representative, Campbell expected to retire from politics. However, in April 1992, when Senator Timothy E. Wirth (D-Colo.) unexpectedly announced he would not run for reelection, Campbell decided to run for Wirth's seat. He defeated three-term governor Richard D. Lamm to gain the Democratic Party nomination, but the campaign turned out to be an uphill struggle. Campbell at one point had a ten-point lead over his Republican opponent, but it began to slip. He became discouraged and turned to friends for advice. Their prescription was unorthodox: they prayed for him and performed rituals on his behalf, and advised him to paint his body with red war paint and carry an eagle feather at all times. Campbell did not question their wisdom; he did as they advised, and almost immediately his ratings in the polls improved. Campbell won the election by nearly ten percent and returned to Washington to become the first Native American senator in over 60 years.

During his first term in the Senate, Campbell was appointed to five key committees: Energy and Natural Resources; Banking, Housing and Urban Affairs; Democratic Policy; Veterans Affairs; and Indian Affairs.

In March 1995, barely two years into his Senate term, Campbell surprised and angered the Democratic Party by announcing that he was switching affiliation and aligning himself with the Republicans. The Democratic Party responded by calling Campbell a turncoat and Benedict Campbell, and demanding the return of $255,000 in donated funds used to help elect him to the Senate. Campbell replied that his record of voting with the Democratic leadership on most issues should be repayment for the party's support.

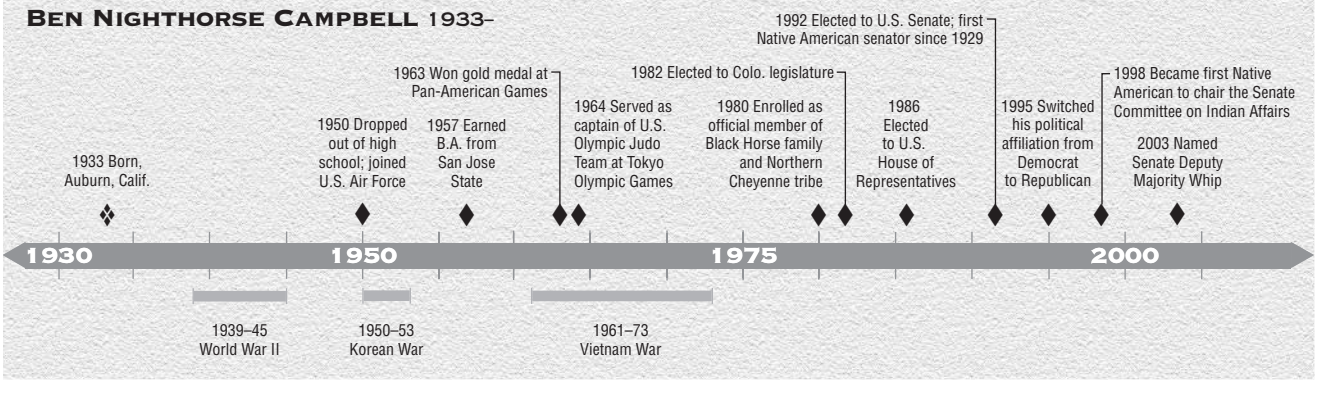

In the 1998 elections, Campbell was reelected by a wide margin over long-time ABORTION rights supporter Dottie Lamm who, like Campbell, described herself as a fiscal conservative who is socially progressive. Campbell is a member of four major Senate committees: the Appropriations Committee, the Energy and Natural Resources Committee, the Veterans' Affairs Committee; and the Senate Indian Affairs Committee. He also chaired the Commission on Security and Cooperation in Europe (Helsinki Commission).

Campbell has continued to portray himself as a jewelry-making, Harley-riding, maverick member of Congress, but his legislative agenda has become increasingly aligned with big business. Environmentalists have criticized Campbell for taking campaign contributions from groups that are financed by timber, mining, gas, and oil companies. Campbell also generated controversy after sponsoring legislation to transfer a federally-owned dam and reservoir to a privately owned land consortium. He failed to disclose that he was one of the group's largest landholders.

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## ◆ CAMPBELL, JOHN

John Campbell, also known as First Baron Campbell, was born September 15, 1779, in Scotland. He was admitted to the bar in 1806 and pursued a career in British law and politics.

In 1830, Campbell entered Parliament and advocated legal reforms in real property and local government. Two years later he served as SOLICITOR GENERAL, and from 1834 to 1841, he was attorney general. In 1850 he performed the duties of Chief Justice of the Queen's Bench and in 1859 became Lord Chancellor.

Campbell is credited with the passage of three important pieces of legislation: the LIBEL Act, in 1843; the Copyright Act, in 1846; and the Obscene Publications Act, in 1857.

As an author, Campbell is famous for *Lives of the Lord Chancellors,* published from 1845 to 1847, and for *Lives of the Chief Justices,* published from 1849 to 1857.

Campbell died June 23, 1861, in London, England.

## ◆ CAMPBELL, JOHN ARCHIBALD

John Archibald Campbell was a politician, a statesman, and an associate justice on the U.S. Supreme Court during the turbulent years preceding the outbreak of the Civil War.

Born June 24, 1811, in Washington, Georgia, the son of a prominent landowner and lawyer, Campbell was a child of exceptional intellectual ability. He entered Franklin College (now the University of Georgia) at the age of eleven and graduated at fourteen with high honors. He then entered West Point but he withdrew after three years to return home and support his family following the death of his father. He also studied law privately and in 1828, at the age of eighteen, he was admitted to the Georgia bar by a special act of the Georgia legislature. He then moved to Alabama, married, and practiced law, first in Montgomery and then in Mobile.

Widely known for his skilled arguments and his extensive knowledge of the law, Campbell quickly became a leading lawyer in Alabama. He turned down two appointments to the state supreme court, the first one offered to him when

"THE SUPREME COURT IS A VENERABLE TRIBUNAL THAT DESERVES WELL OF THE COUNTRY. IT OUGHT NOT . . . BE AFFECTED BY REVOLUTIONARY POLITICS AND I SHALL TAKE CARE THAT THROUGH ME THIS SHALL NOT BE DONE."
—JOHN CAMPBELL

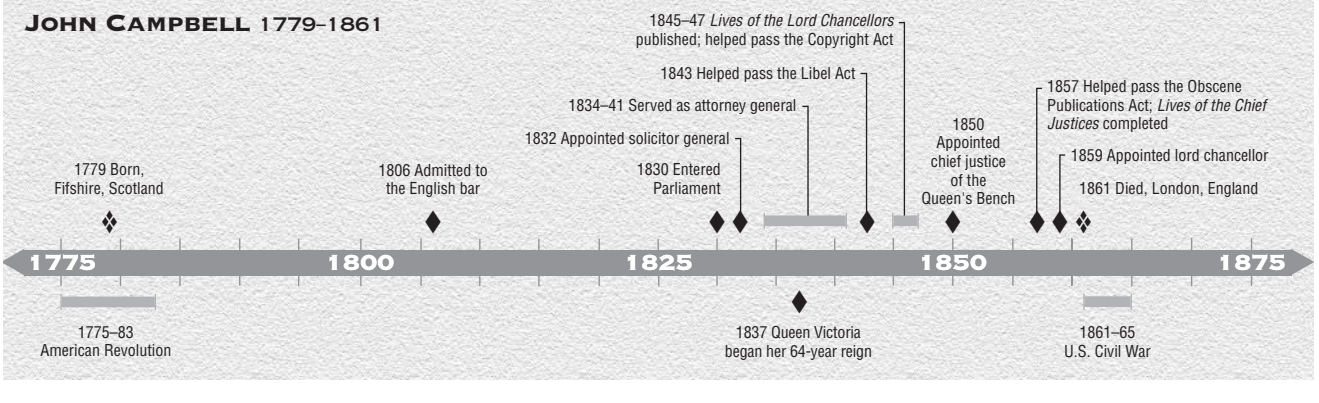

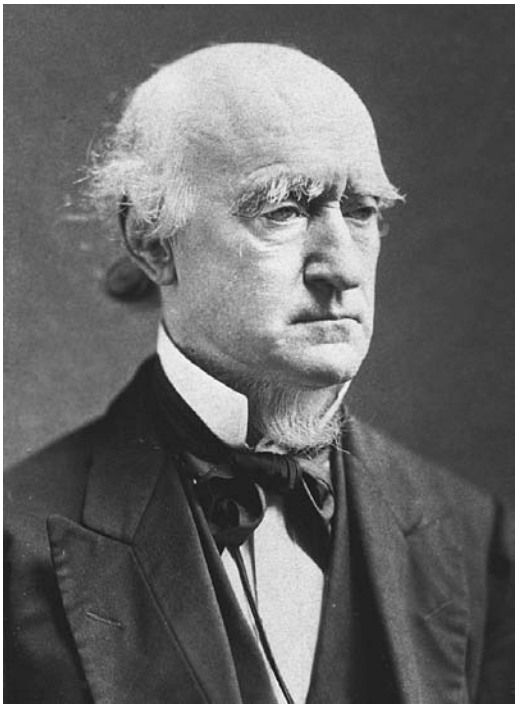

*John Archibald Campbell.*
ETCHING BY MAX ROSENTHAL. THE GRANGER COLLECTION, NEW YORK

he was only twenty-four. An active Democrat, Campbell also found time for politics and, in 1836, he was elected to the first of two terms in the Alabama state legislature. He was a delegate to the Nashville Convention of 1850 which was convened to protect southern rights against what was viewed as the growing encroachment of the North, especially with respect to SLAVERY. Campbell, known for his moderate views, prepared many of the resolutions adopted by the convention, which were conciliatory in nature and designed to avoid inflaming passions on the slavery issue.

Campbell was nominated to the U.S. Supreme Court in March 1853 by President FRANKLIN PIERCE, the new Democratic president, after the Senate had previously refused to act on three candidates offered by the lame-duck president MILLARD FILLMORE. The sitting justices of the Court had taken the unprecedented step of sending a delegation to the president to request that Campbell be nominated to the Court. Campbell, only forty-one at the time, was confirmed unanimously.

Campbell was, for the most part, a vigorous STATES' RIGHTS advocate while on the Court. In his dissent in *Dodge v. Woolsey,* 59 U.S. 331, 18 How. 331, 15 L. Ed. 401 (1855), for example, he argued against the Court's extension of federal jurisdiction over state-chartered corporations. Campbell believed that state legislatures should regulate such matters. However, Campbell displayed somewhat more moderate views with respect to slavery. He opposed secession and argued that slavery would eventually disappear on its own and be replaced by free labor if the South were left undisturbed. Upon his appointment to the Court, he freed all his own slaves and then hired only free blacks as servants. But Campbell was nevertheless widely criticized for his views, especially by northern abolitionists, when he joined the majority of the Court in the controversial *Dred Scott* decision. In DRED SCOTT V. SANDFORD, 60 U.S. 393, 19 How. 393, 15 L. Ed. 691 (U.S. Mo. Dec. Term 1856), the Court held that blacks were not citizens of the United States, with the right to sue in federal court. In his concurring opinion, Campbell contended that the federal government had no choice but to recognize as property whatever the

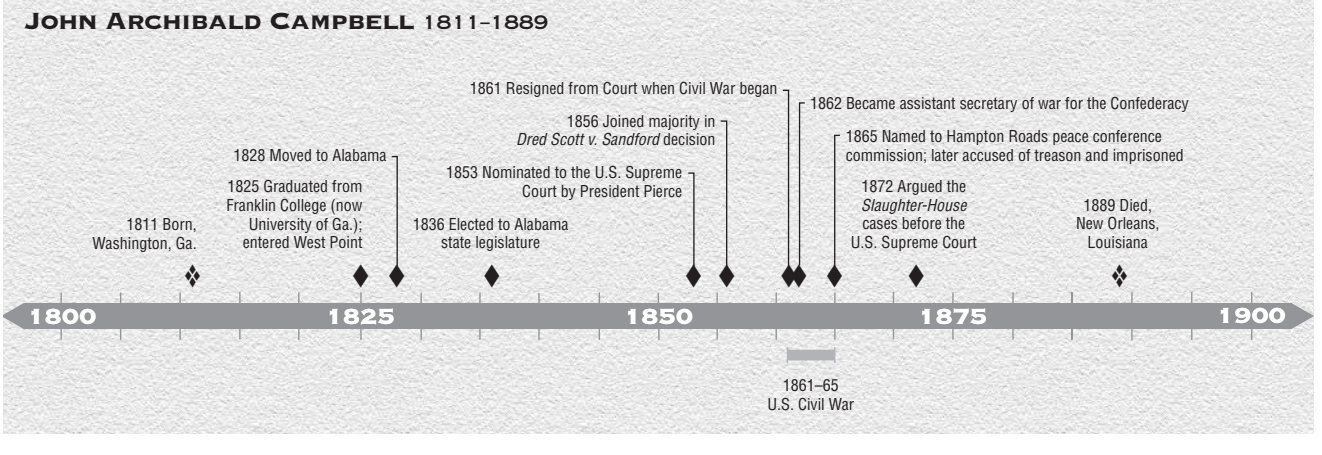

laws of the individual states determined to be property, including slaves.

In 1861, Campbell served as an unofficial mediator between the federal government and southern commissioners seeking a resolution to the conflict over secession and slavery. SECRETARY OF STATE William H. Seward, acting through Campbell but without the authority of the president, promised that Fort Sumter, South Carolina, then occupied by federal troops, would be evacuated. When it was instead reinforced, Campbell was accused of treachery by the southern commissioners.

When the Civil War later broke out and Alabama seceded from the union, Campbell remained loyal to his home state and resigned from the Court in April 1861. After returning to the South, he was appointed assistant secretary of war for the Confederacy. When the Confederacy collapsed in 1865, he was named to the commission at the Hampton Roads peace conference, which was convened to help bring about peace between the North and South. The commission failed to reach any agreement. Campbell again attempted to intervene to bring about peace, this time through a private meeting with President ABRAHAM LINCOLN, which resulted in an order allowing the Virginia legislature to convene to consider Lincoln's terms for reconstruction. Within a few days the South surrendered and Lincoln withdrew his approval of the meeting, claiming that Campbell had misconstrued the terms of the plan. After Lincoln's assassination Campbell was accused of TREASON and imprisoned for several months.

Virtually all Campbell's property and belongings in Alabama were destroyed during the war and after his release from prison he faced the prospect of starting over. He decided to settle in New Orleans, where he soon established another successful law practice along with a nationally renowned private law library. He appeared before the U.S. Supreme Court in a number of significant cases, including the SLAUGHTER-HOUSE CASES, 83 U.S. 36, 16 Wall. 36, 21 L. Ed. 394 (1872). In the *Slaughter-House cases*, the Court considered the legality of a statute that granted a corporation chartered by the state of Louisiana the exclusive right to maintain within New Orleans all butcher shops, slaughter pens, stockyards, and stables. Campbell, though previously known for favoring the rights of states, argued that the law created a MONOPOLY in violation of the recently adopted Fourteenth and Fifteenth Amendments of the Constitution. The Court, in construing the FOURTEENTH AMENDMENT for the first time in its history, narrowly rejected Campbell's argument in a 5–4 decision that would be reversed twenty years later.

Campbell continued to practice law for another quarter century before withdrawing to a reclusive retirement in New Orleans. He died in 1889 at the age of seventy-seven.

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## ♦ CAMPBELL, WILLIAM JOSEPH

When he was named to the federal bench at age thirty-five in 1940, William J. Campbell was the youngest judge ever appointed; at the time of his death, he was the longest-tenured federal judge in the United States, with almost fifty years of service to his credit.

William Joseph Campbell was born in Chicago on March 19, 1905. The son of a Scottish wool merchant, he grew up in a middle-class neighborhood on the city's west side. There, he attended St. Rita High School and St. Rita College. After graduation, he worked as an insurance claims adjuster while enrolled in a night program at Chicago's Loyola University law school. Campbell earned his doctor of JURISPRUDENCE degree in 1926 and was admitted to the Illinois bar in 1927. He returned to Loyola in 1928 to complete a master of laws degree.

Shortly after passing the bar in 1927, Campbell partnered with a longtime friend to open the law firm of Campbell and Burns. The new firm's first major client, the Roman Catholic Archdiocese of Chicago, would have a profound influence on Campbell's professional life, introducing him to the world of Chicago Democratic politics.

With the help of church leaders and prominent Chicago Catholics, Campbell formed the

"THE CRIME OF TREASON . . . IS THE ONLY CRIME DEFINED BY THE CONSTITUTION. . . . THE REASON FOR THIS, NO DOUBT, WAS THAT ITS AUTHORS AND ADOPTERS CONSIDERED TREASON THE HIGHEST OF ALL CRIMES."
—WILLIAM CAMPBELL

Young Democrats for Roosevelt in 1932, when FRANKLIN D. ROOSEVELT was governor of New York and a presidential hopeful. The powerful Chicago Democratic political machine shunned Roosevelt and used its power to thwart Roosevelt's efforts to secure permits for his campaign events. Undaunted, Campbell put a bishop in front of a Catholic Youth Organization band and had them march through the streets of Chicago in an "illegal parade" that brought considerable attention to the candidate. Years later, Campbell said, "Naturally, when all those Irish policemen saw the bishop, they weren't about to do anything but say hello and salute."

After Roosevelt's election, Campbell continued to be an outsider in Chicago Democratic politics, but he had clearly earned Roosevelt's attention and admiration. In 1935 Campbell was named Illinois administrator for the president's National Youth Administration.

In 1938 Campbell was named U.S. attorney for the Northern District of Illinois. Appointed by Roosevelt to fight the Chicago Democratic political machine, Campbell made the most of the job. As a young federal prosecutor, he crossed paths with many of the city's more colorful citizens, including notorious gangster AL CAPONE, and he continually challenged the city's political leaders and their system of influence.

Two years later, in an effort to appease those leaders during an election year, Roosevelt removed Campbell as prosecutor—and appointed him to a federal judgeship. "I got kicked upstairs," Campbell said. "[Roosevelt] needed the machine for the election." Campbell was appointed U.S. district judge for the Northern District of Illinois on October 10, 1940, and he began his long judicial career on October 22.

As a prosecutor, Campbell had been part of the team that convicted Capone of TAX EVASION; in his early years as a judge, he supervised Capone's PAROLE. "I insisted that . . . he never set foot in Cook County [Illinois], and he agreed to it," said Campbell. "I also insisted that he pay every last nickel in taxes he owed the government." Capone protested by paying his millions of dollars in back taxes in pennies. Though a Chicago bank actually counted and verified the amount in a day, Campbell initially threatened to do the job himself, one penny at a time—and to make Capone sit in jail until he had finished.

Only two years into his federal judgeship, Campbell conducted one of the few TREASON trials ever held in the United States (*United States v. Haupt,* 47 F. Supp. 832 [N.D. Ill. 1942], *opinion supplemented by* 47 F. Supp. 836 [N.D. Ill. 1942]). He sentenced three men to death after they had been convicted in a Nazi plot to poison Chicago's water supply. "We had to blaze a trail" in that case, he said, because there were no statutes governing such matters. Campbell said the only guidelines available were in the U.S. Constitution. Though an appellate court later overturned the death sentences (*United States v. Haupt,* 136 F.2d 661 [7th Cir. 1943]), Campbell often called the case a highlight of his career.

Campbell was named chief judge of the U.S. District Court in Chicago on April 6, 1959. In his years on the federal bench, he earned a reputation as an innovative, courageous, and practical jurist. Fellow U.S. district judge James C. Paine said Campbell was "the kind of judge each of us would like to be."

When asked to hear politically charged Illinois reapportionment cases in the late 1950s, Campbell called a historic joint session between the federal court and the Illinois Supreme Court to resolve the issues. Even though the state legislature had been unwilling or unable to act, Campbell's unique team was able to reapportion Illinois's state and federal legislative districts to the satisfaction of most parties.

In the early 1960s, Campbell summoned a group of private attorneys to a luncheon. There, he pointed out the financial benefit they were realizing from U.S. BANKRUPTCY court case assignments. He asked the group to return the favor by contributing money so that the city might provide lawyers for indigent defendants. They did. "A word from the chief judge went a long way," said HUBERT WILL, another federal district judge in Chicago. Campbell also had a knack for appropriating money for the federal judiciary. Owing in large part to his efforts, the budget for the judiciary between 1960 and 1970 increased from $51 million to $117 million.

Chicago's federal defender program, resulting from Campbell's luncheon and gentle arm-twisting, was launched in 1965. It became a model for the nation long before programs offering free representation for indigent clients accused of committing federal crimes were mandated and funded by Congress. Also in 1965, Campbell set up an internship program for law school students. A novel idea in 1965, it is now commonplace.

Campbell was equally committed to the continuing professional education of judges and supporting personnel. He was a force in the establishment of the FEDERAL JUDICIAL CENTER, which is the federal courts' agency for research and continuing education. It was established by statute in 1967 as a separate organization within the federal judicial system (28 U.S.C.A. 620-629). Through the Federal Judicial Center, Campbell participated in hundreds of seminars and workshops in all parts of the United States in order to give new district judges, magistrates, bankruptcy judges, clerks of court, PROBATION officers, and other judicial personnel the benefit of his wisdom and experience.

Campbell served as First District judge representative of the Seventh Circuit on the JUDICIAL CONFERENCE OF THE UNITED STATES (1958–1962); member of the Committee on Pretrial and Protracted Case Procedures (1941–1960); and chairman of the Judicial Conference Committee on the Budget (1960–1970). He was the author of numerous publications, including the first manual on protracted case procedures. Among the many honors accorded him were degrees from Loyola University (doctor of laws, 1955), Lincoln College (doctor of laws, 1960), Duquesne College (doctor of letters, 1965), and Barat College (doctor of CANON LAW, 1966).

Twice during Campbell's first thirty years as a federal judge, he turned down an offer to sit on an appellate court as well as an offer to return to a lucrative private law practice. The appellate court was, for him, too far removed from the daily hustle of trial court.

When Supreme Court justice FELIX FRANKFURTER died in 1965, many thought Campbell was certain to be appointed to the Court by President LYNDON B. JOHNSON. But Johnson chose ABE FORTAS, who resigned under pressure four years later. When asked about the missed opportunity many years later, Campbell said, "Although I knew Johnson intimately and personally, he was bigoted enough not to want two Catholics on the Supreme Court." Justice WILLIAM J. BRENNAN JR. was the one Catholic already on the Court.

Campbell spent little time lamenting the lost Supreme Court nomination. Late in 1965, he decided to take on Chicago syndicate kingpin Sam Giancana. When Giancana was asked to testify before a Chicago GRAND JURY, he invoked his FIFTH AMENDMENT right to remain silent. Campbell did something never done before: he gave Giancana IMMUNITY from prosecution and ordered him to testify. After Giancana refused, he spent the next year in jail on CONTEMPT charges.

In spite of his toughness on ORGANIZED CRIME and career criminals, Campbell showed compassion for men who refused to fight in the nation's wars. When handing out sentences for draft cases during WORLD WAR II and the VIETNAM WAR, he often ordered the defendants to perform community service. He did not see draft evaders as criminals and refused to treat them as such.

Campbell became a senior judge on March 19, 1970, his sixty-fifth birthday. Though he was eligible to retire with full pay for the rest of his life, he could not accept the thought of leaving the workforce. As a senior judge, he heard cases first in Chicago, and then in the Southern District of Florida, following a move to West Palm Beach in the mid-1970s. In his last years, he devoted his time to writing opinions for the

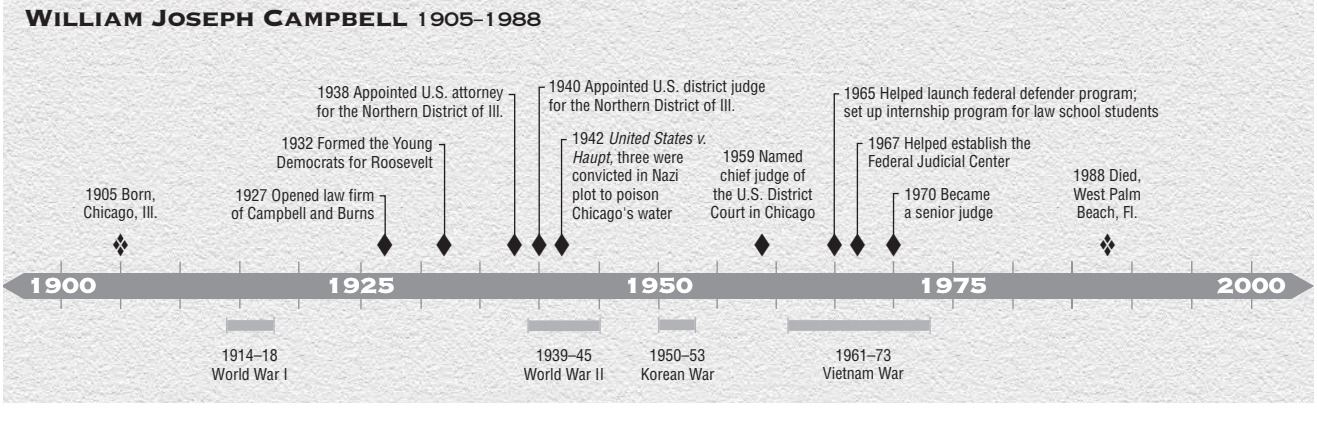

Chicago-based U.S. Seventh Circuit Court of Appeals. He traveled to Chicago from West Palm Beach twice a year to sit on cases there.

Campbell, who was seen pushing a wheelchair full of legal briefs and court opinions into his chambers well into his eighty-second year, died on October 19, 1988, in West Palm Beach, at the age of eighty-three.

## CANADA AND THE UNITED STATES

The United States and Canada share a unique legal relationship. U.S. law looks northward with a mixture of optimism and cooperation, viewing Canada as an integral part of U.S. economic and environmental policy. The two nations' mutual, largely unguarded 5,000-mile border does much to explain why: each is the other's largest trading partner, amassing $218 billion in trade in 1992; cross-border travel is easy; and they work together on common concerns about the quality of water and air. However, the relationship has not always been so cooperative. Although environmental treaties date to 1902, economic pacts have taken nearly a century to come to fruition. Traditionally, both countries warily put protectionism ahead of mutual interest, and they have retaliated in kind against tariffs, duties, and other barriers to free trade. Only in 1988 did the two enter into the U.S.-Canada Free Trade Agreement (FTA) (Pub. L. No. 100-449, 102 Stat. 1851), a groundbreaking pact designed to eliminate these barriers. It paved the way for the historic NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) in 1993.

Early relations between the two countries were rocky. In the mid-nineteenth century, trade foundered on stubborn protectionist policies; each country feared the economic success of the other at its own expense. The 1854 Elgin-Marcy Reciprocity Treaty (10 Stat. 1089) was intended to open up trade in natural resources but it barely lasted a decade. Its failure prompted Canada to spend fruitless years trying to loosen U.S. trade restrictions before formulating, in 1879, a national policy of high tariffs by which it hoped to force the United States back to the negotiating table. But the table remained empty for nearly a century. The only trade agreement between the two nations was the GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT), a 100-nation agreement first reached in 1947. The generality of the GATT accords did little to address the specific issues facing these two trading partners and it caused Canada, in particular, frustration. But U.S. prosperity throughout the mid-twentieth century meant it could afford to ignore Canadian complaints.

The two were more willing to negotiate on environmental concerns. The landmark agreement in this area is the Boundary Waters Treaty of 1909. It established the International Joint Commission (IJC) to deal with the issues of water resource management, a set of concerns referred to as transboundary issues because of the two nations' common border. Made up of technical specialists from various federal, state, and provincial governments of the United States and Canada, the IJC has authority to approve joint projects and to investigate complaints. Since the 1970s its duties have expanded as the result of the Great Lakes Water Quality Agreements that established goals for restoring the damaged ecosystem of the Great Lakes. Contemporary concerns facing the IJC include water levels, POLLUTION, acid rain, and climate changes, with a growing emphasis on the use and maintenance of river systems. Critics generally agree that the success and innovation of this commission represent a model for international cooperation.

Despite progressive solutions to environmental problems, it took the United States and Canada until the late 1980s to forge better economic ties. The slow progress toward open trade was due to mutual suspicions, greed, and a long history of retaliatory actions. This hindrance stood in stark contrast to the countries' cultural similarities and cooperation in other areas. They had been allies in both world wars and both remained key members of the NORTH ATLANTIC TREATY ORGANIZATION (NATO). But war is an unusual circumstance; military allies can still be less than friends in trade. Then, the last half of the twentieth century unexpectedly changed everything—domestic industrial decline, brought on by a rise in international competition, toppled the United States from a position of preeminence and made Canada more important to its plans for long-range prosperity. Canada underwent a great change in its historically isolationist outlook as it too suffered economically. The 1984 election of a conservative Canadian government led by Prime Minister Brian Mulroney was a watershed event. Mulroney's victory was based on promises of opening U.S. markets to Canadian business. Both sides wanted to remove the barriers of high tar-

iffs, antidumping fees, and countervailing duties (forms of protectionism that limited the expansion of each nation's markets) in order to create new jobs and wealth.

On January 2, 1988, negotiations between the administrations of President RONALD REAGAN and Prime Minister Mulroney resulted in the signing of the FTA. In succeeding where previous generations had failed or not even tried, Reagan declared that the FTA would remove an "invisible barrier of economic suspicion and fear." The pact had five broad goals: (1) eliminate barriers to trade in goods and services, (2) improve fair competition, (3) liberalize investment conditions, (4) establish procedures for a joint administration of the agreement, and (5) lay the foundation for future cooperation. The FTA also relaxed U.S. immigration rules for Canadians, allowing freer travel across the border for businesspersons.

On the administrative level it created a temporary body for resolving disputes, the binational Extraordinary Challenge Committee, which was given a seven-year commission to hear appeals. Not surprisingly, this issue had been the most troublesome during the negotiations preceding the FTA; it proved slightly problematic in practice, too, with the United States generally losing its complaints. Nonetheless, the FTA was seen as a boon for U.S. business as a whole, removing Canadian restrictions that had long been a sore point and emphasizing the resolution of disputes outside courtrooms.

The FTA's success laid the groundwork for an even more ambitious trade agreement between the United States, Canada, and Mexico, the much-anticipated NAFTA, enacted in 1993. NAFTA's changes were to be phased in over 15 years, and its purpose is to liberalize trade between the three countries in hopes of emulating the economic cooperation long enjoyed by European nations. In practice, its broad aims proved highly controversial.

Just looking at the numbers, however, suggests that NAFTA has been an unqualified success in expanding trade between the United States, Canada, and Mexico. The United States has nearly doubled its trade to its NAFTA partners in the time since the agreement was signed. As for Canada, its merchandise exports to its NAFTA partners since the implementation of NAFTA increased 95 percent, from $117 billion to $229 billion.

This is not to say that NAFTA has resolved all trade issues between the United States and Canada. A good example is a recent dispute over softwood lumber. U.S. lumber producers claim Canadian softwood lumber is subsidized by Canada illegally and that companies sell at below production costs. Because of these complaints, the United States placed a tariff of up to

*On December 12, 2001, the Canada-U.S. Smart Border Declaration was signed with the intention of addressing security risks at crossings along the 5,525 mile border.*

AP/WIDE WORLD PHOTOS

29 percent on Canadian softwood lumber exports. The results have costs jobs in Canada and driven up home building prices in the United States. As of 2003, it was expected that only the World Trade Organization could resolve the dispute.

Relationships between the United States and Canada are not just about trade. Particularly in the days since September 11, 2001, they have been about security issues as well. After the attack on the United States, many Americans expressed concern about what they viewed as the lax security and border enforcement on the Canadian side of the border. At the same time, Americans recognized the immediate assistance Canada provided the United States during the post-attack period when the area of the continental states constituted a no-fly zone and many planes were rerouted to Canadian airports.

In response to those concerns, in December of 2001 the Canadian and United States governments signed a "smart border" accord. The accord featured an action plan with 30 points designed to secure the cross-border flow of goods and people, protect infrastructure, and improve information sharing and coordination to enhance these objectives. Among other items, the accord includes development of a system for pre-approving goods, factories, carriers, drivers and trucks for electronic pass-through clearance at border checkpoints. While the accord has not succeeded in quieting all security complaints from the United States, it has helped smooth things out.

Security is not the only concern regarding cross border traffic. In mid-2003 Canada was considering the decriminalization of marijuana which caused American law officials to worry about whether the drug trade would increase as a result on the Canadian side of the border. U.S. Drug czar John Walters has warned that Canadian laxity on marijuana could lead to tighter control being placed on the cross-border flow of people and goods.

There have been other tensions over the Canadian government's refusal to support the war in Iraq. Yet despite these problems it seems clear that Canada and the United States have more common interests than disputes. At the beginning of the twenty-first century, Canada and the United States continued the economic integration that NAFTA put on the fast track, and seemed likely in the future to become more interdependent than ever.

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**CROSS-REFERENCES**

General Agreement on Tariffs and Trade; North Atlantic Treaty Organization.

## CANALS

*Artificial channels for the conveyance of water, used for navigation, transportation, drainage, or irrigation of land.*

As a general rule, states supervise the construction and operation of canals by private canal companies. The site of the canal is selected by the state. State law determines the manner of acquiring property used for construction or maintenance of canals. Condemnation or appropriation and contract or grant are the usual methods of acquisition. Additional methods include accretion—the gradual accumulation of land by natural causes—and dedication—the gift of land to the government by its owner for public use.

The state has authority to supervise the construction of bridges over public canals. A city may build bridges over canals within its limits, but it cannot interfere with one constructed and managed by the state on its own property.

State law can confer the power to charge tolls for use of a canal. Rates can be neither discriminatory nor in excess of the amount authorized by law.

*A ship travels through the Gatun Locks of the Panama Canal. Completed in 1914, the Panama Canal connects the Atlantic and Pacific oceans.* AP/WIDE WORLD PHOTOS

## CANCELLATION OF AN INSTRUMENT

*An equitable remedy by which a court relieves both parties to a legal document of their obligations under it due to* FRAUD*, duress, or other grounds.*

*Cancellation* is a term often used interchangeably with RESCISSION, but whereas only a document can be canceled, any agreement—whether oral or written—can be rescinded. Cancellation is distinguishable from reformation, which is an action by a court to enforce a document after its terms have been reframed in accordance with the intent of the parties, in that cancellation abrogates the duties of the parties under the instrument.

Any instrument by which two or more parties agree to exchange designated performances, such as a contract, deed, lease, insurance policy, COMMERCIAL PAPER, or a mortgage, may be canceled if the circumstances of the case warrant it.

The judicial remedy of the cancellation of an instrument is granted by a court in its sound discretion exercising its EQUITY powers to do justice. If it is apparent that no injustice will result from restoring both parties to the positions they had prior to the execution of the instrument, an instrument may be set aside.

If the party seeking the cancellation has an adequate remedy at law, for example, and can recover damages that will give complete relief, cancellation will be denied. It is available, however, if the defendant is judgment-proof or financially unable to pay damages awarded against him or her. Statutes, too, may provide this equitable remedy as concurrent relief, in addition to damages, in particular cases. The UNIFORM COMMERCIAL CODE permits merchants in sales transactions to seek the cancellation of a contract, in addition to an award of damages in a breach of contract suit.

A plaintiff is entitled to have an instrument canceled only if he or she has acted equitably in dealings with the defendant. The principles of equity apply to any case in which this equitable remedy is sought.

### Grounds

The cancellation of an instrument must be based upon appropriate grounds, the gist of which makes the enforcement of the instrument inequitable. Such grounds must be proven by a PREPONDERANCE OF THE EVIDENCE presented in the civil action. A term of a document may provide for its cancellation, and courts will usually act accordingly when the facts warrant it. The setting aside of an instrument that appears to record the agreement of the parties to it is considered a significant intervention by a court, which will not be done for a trivial reason or merely because of a change of mind by one party. The primary grounds for cancellation involve the validity of the instrument itself and the agreement that it embodies.

**Duress** An instrument that was obtained by duress, the use of threats or physical harm to compel one party to enter an agreement that he or she would not have made otherwise, can be canceled at the request of the victimized party. If duress was present at the time the contract was entered, the agreement of the parties is a sham, as the victim was forced to act against his or her will. It would be inequitable for a court to enforce such an agreement.

**Fraud** An instrument may be set aside if it was induced by fraud—an intentional deception of another—to gain an advantage over him or her. To justify cancellation, it must be clearly established that the representations made to the victim were untrue and of such a material nature that without them the victim would not have agreed to the transaction. In addition, it must be shown that such statements were made intentionally to defraud the victim and that the statements were relied upon by him or her in the decision to enter the agreement. Fraud vitiates an agreement, which makes it unjust to enforce a document embodying its terms.

If, however, a material MISREPRESENTATION is made innocently by one party, the victim is still entitled to have the instrument set aside, as

it does not reflect the mutual assent of the parties.

**Mental Incapacity** If an agreement has been made by one party who, at the time of its execution, was mentally incapable of understanding the nature of the transaction, it may be canceled at the request of the victim or the victim's legal representative. This is particularly true when the other party has taken advantage of the victim's incompetence in drawing the terms of the agreement.

Courts frequently cancel an instrument entered by a person so intoxicated at the time of executing the document that he or she does not comprehend its legal ramifications. Cancellation is justified particularly when the intoxication is brought about by the other party in order to deceive the victim about the nature of their agreement.

**Mistake** When the parties have both made a mutual MISTAKE OF FACT concerning the agreement entered, an instrument may be canceled, since there is no real agreement between them. If a unilateral mistake exists, that is, a mistake by one party, a court may set aside the document and restore the parties to their position prior to its execution. In order to justify cancellation, a mistake must be material and involve a significant part of the agreement without which the contract would not have been entered into. If the mistake is the result of the carelessness of one or both parties, a court may deny a request for cancellation.

**Undue Influence** UNDUE INFLUENCE, which is the unfair use of pressure on the will of another to gain an advantage over him or her, is a ground for the cancellation of an instrument because one party's will is so overcome by pressure that the person is effectively deprived of freedom of choice. Undue influence is usually established when there is a confidential relationship between the parties and one of them has a greater bargaining power or influence on the other.

**Forgery or Alteration** The cancellation of an instrument is justified when it has been forged. Moreover, if an instrument has been materially altered without the consent or knowledge of the party against whom the change is effective, the instrument may be set aside.

### Preclusion of Relief

A person seeking the equitable relief of the cancellation of an instrument might be precluded from it by waiver or ESTOPPEL. The right to such relief may be waived or relinquished by a plaintiff's conduct, such as by failing to pursue a remedy within a reasonable time from the execution of the document, a form of LACHES. The doctrine of equitable estoppel—by which a person is precluded by conduct from asserting his or her rights because another has relied on that conduct and will be injured if the relief is not precluded—may also operate in a case in which cancellation of an instrument is sought.

The ratification of a document by a party prevents its subsequent abrogation. If a party knowingly affirms or ratifies an instrument—whether by stating so, or by using the property received under it—he or she is precluded from having it set aside.

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CROSS-REFERENCES

Duress; Fraud; Sham.

## CANON LAW

*Any church's or religion's laws, rules, and regulations; more commonly, the written policies that guide the administration and religious ceremonies of the Roman Catholic Church.*

Since the fourth century, the Roman Catholic Church has been developing regulations that have had some influence on secular (non-church-related) legal procedures. These regulations are called canons and are codified in the Code of Canon Law (in Latin, *Codex juris canonici*).

The law of England, which inspired much of the law formed in the United States, was a mixture of canon law and COMMON LAW (principles and rules of action embodied in case law rather than legislative enactments). Canon law and English common law borrowed heavily from each other throughout medieval times and together formed the basis for many of the legal procedures used in the United States. For example, canon law's influence is still visible in the concepts of the GRAND JURY, presentment (a description of a criminal offense that is based on the jury's own knowledge), and some characteristics of U.S. marriage law.

Canon law has its origins in ancient church writings, decisions made by the general councils of local bishops, and rulings issued by the pope. These ideas were organized in the mid–twelfth

century by an Italian law teacher, Gratian. He sorted the collection into religious law, penal law, sacramental law, and other categories. Along with a set of decisions by the pope called Decretals of Gregory IX, Gratian's work formed the main body of canon law for nearly eight hundred years. In 1917, Pope Benedict XV recodified (revised) the canons. Pope John Paul II reissued the Code of Canon Law in 1983—authorizing increased participation of laity in the church, recognizing the needs of disabled people, and making other changes. A related text, the Code of Canons of the Eastern Churches, was reissued by the Holy See (the seat of papal government) in 1990.

In the Middle Ages, canon law was used in ecclesiastical courts (church) to decide many types of cases that in modern times are decided by civil courts, including criminal offenses. This was because most English Christians did not make a great distinction between secular and spiritual offenses. Crimes that were tried by the church included ADULTERY, blasphemy, slander, heresy (opposition to official religious views), money lending, and gambling. From the late fourteenth to the early sixteenth centuries church courts also heard many breach-of-faith cases concerning contracts, as well as inheritance and marriage-related cases.

Criminal trial procedures in medieval church courts were the source of some features that found their way into common law. Although witnesses were considered the best source of proof of a crime under canon law, suspected offenders could also be tried because of public fame (suspicion in the community that they had committed a crime). An inquest made up of twelve men—a forerunner of royal courts' grand juries—said under oath whether public suspicion existed. If none did, then a judge had no authority to proceed. After establishing public fame, the court's next step was canonical purgation, in which the accused person swore an oath that she or he was innocent. Proof of innocence was accomplished by compurgation, in which several oath helpers would swear that they believed the oath was true. People who objected to the purgation of an accused person had the chance to prove their accusation of guilt.

The use of canon law in governmental decisions is not well documented. In the early fifteenth century, commissions of the English Parliament made use of canonical procedures and canon law experts to decide issues involving laws of war, diplomacy, and other questions. For example, Parliament's justification for deposing King Richard II seems to have been based on papal bulls (decrees).

In modern times, the creation, interpretation, and use of the canons closely resemble those of secular law. The Episcopal Conference of Local Bishops and the National Conference of Catholic Bishops are voting bodies that set policy for the church. When policy has been codified, it is used by judges in Catholic tribunals in determining whether certain practices or requests are acceptable according to the canons. (Catholic tribunals make up the Church's own court system, which interprets canonical policy to resolve questions of church practice.) Case law (previous rulings) is published in *Roman Replies* and has precedential value. Judges may also request assistance from the CANON LAW SOCIETY OF AMERICA, a research organization, in interpreting the canons.

Catholics who appear before a tribunal may consult canon lawyers, who are not usually secular lawyers. A canon lawyer typically completes at least two years' worth of course work in the canons. North American canon lawyers receive their degree in canon law from one of two institutions: the Catholic University of America, in Washington, D.C., or St. Paul University, in Ottawa, Ontario, Canada.

By the end of the twentieth century secular law had eclipsed canon law in most aspects of public life. Interbody disagreements within the church are now often handled administratively rather than by a tribunal, but within the confines of canon law. However, the tribunal is still the only place where Catholics can secure a marriage ANNULMENT, and each diocese must maintain a tribunal for this purpose. Divorced Catholics who have been denied an annulment can appeal as far as the Sacred Roman Rota, whose international membership is selected by the pope.

In the 1990s, some dioceses—notably the Archdiocese of Denver—have sought to reduce involvement by civil courts in church disputes by creating dispute resolution mechanisms and other internal mechanisms that make use of the written policies of canon law.

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## CANON LAW SOCIETY OF AMERICA

The Canon Law Society of America is a nonprofit research association of canon lawyers that helps the Roman Catholic Church to address contemporary issues and internal conflicts within the framework of the church's system of CANON LAW. The society drafts opinions on topics at the request of bishops and other persons within the church.

Canon law is the set of rules a church or religion establishes for itself in order to make administrative and ecclesiastical (religious) decisions. The Roman Catholic Church has an elaborate body of canon law that has been evolving since the fourth century and which has played a historical role in the development of public law.

The Canon Law Society of America helps Catholic decision makers, especially bishops and tribunal judges, to evaluate and set policy. The church's tribunal courts were the model for secular court systems and operate similarly. Tribunal judges decide cases such as marriage ANNULMENTS based on the facts of each case. When a tribunal judge wants more information before ruling on an unusual or difficult case the judge may request research or an ADVISORY OPINION from the Canon Law Society.

The society's written opinions are advisory only and carry no authority in the church. However, the society's position has influenced the church's stand on such controversial topics as whether females may serve as altar attendants (now they may). Other issues addressed by the society in the 1990s include questions about the scope of ordained ministers' duties, the role of lay ministers, and how Mass should be celebrated.

Another activity of the society is to promote the use of codes of canon law issued by the Vatican (the seat of Roman Catholic administration) in 1983 and 1990.

Periodicals produced by the society include the *Canon Law Digest; Proceedings,* which recaps the society's annual meeting; and *Roman Replies and CLSA Advisory Opinions,* which tracks tribunal case law. The society also has published studies on marriage annulment, confidentiality, and DUE PROCESS for persons in the church, a procedural handbook for the clergy, and other materials.

Established in 1939 and based at the Catholic University of America, in Washington, D.C., the society is supported by annual membership dues. In 1995, it consisted of 1,550 members internationally. Membership is open to non-Catholics. Institutions and interested individuals may join as associate members.

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## CANONS OF CONSTRUCTION

*The system of basic rules and maxims applied by a court to aid in its interpretation of a written document, such as a statute or contract.*

In the case of a statute, certain canons of construction can help a court ascertain what the drafters of the statute—usually Congress or a state legislature—meant by the language used in the law. When a dispute involves a contract, a court will apply other canons of interpretation, or construction, to help determine what the parties to the agreement intended at the time they made the contract.

### Statutory Construction

When considering a statute, a court will apply rules of construction only when the language contained in the statute is ambiguous. Under the "plain-meaning" rule, if the intention of the legislature is "so apparent from the face of the statute that there can be no question as to its meaning, there is no need for the court to apply canons of construction" (*Overseas Education Ass'n v. Federal Labor Relations Authority,* 876 F.2d 960 [D.C. Cir. 1989]). Thus, before even considering what canons to apply, the court must first determine whether the statute in question is ambiguous. Courts have generally held that a statute is ambiguous when reason-

ably well-informed persons could understand the language in either of two or more senses (*State ex rel. Neelen v. Lucas,* 24 Wis. 2d 262, 128 N.W.2d 425 [1964]).

If a statute is found to be ambiguous, the court then applies a variety of canons, or rules, to help it determine the meaning of the statute. Issues of statutory construction are generally decided by the judge and not by the jury. In interpreting statutes, a judge tries to ascertain the intent of the legislature in enacting the law. By looking to legislative intent, the court attempts to carry out the will of the lawmaking branch of the government. This philosophy has its origins in the English COMMON LAW first established over four hundred years ago. As the legal philosopher SIR EDWARD COKE wrote in 1584, "[T]he office of all judges is always to make such construction as shall suppress the mischief, advance the remedy, and to suppress subtle invention and evasions for CONTINUANCE of the mischief … according to the true intent of the makers of the act" (*Heydon's Case,* 3 Co. Rep. 7a, 76 Eng. Rep. 637 [King's Bench 1584]). In more contemporary terms, courts consider the history and nature of the subject matter of the statute; the end to be attained by the law; the "mischief," or wrong, sought to be remedied; and the purpose to be accomplished by the law (*Crowder v. First Federal Savings & Loan Ass'n of Dallas,* 567 S.W.2d 550, Tex. App. 1978). In determining legislative intent courts usually turn to a variety of sources: the language of the statute itself; the LEGISLATIVE HISTORY of prior enactments on a similar subject; the proceedings surrounding the passage of the law, including debates and committee reports; and, if they are available, interpretations of the law by administrative officials.

To aid in the interpretation of an ambiguous law, a court may also look to more "intrinsic" rules not related to the activities preceding the passage of the statute. These rules are applied to help the court analyze the internal structure of the text and the conventional meanings of the terms used in the law. In addition, intrinsic rules may be used when the court has little or no existing legislative history, such as that provided by committee reports or records of other proceedings, to draw on in interpreting the statute.

Some of these canons of construction are expressed in well-known Latin phrases or maxims. Under *ejusdem generis* (of the same kind, class, or nature), when general words follow specific words in a statute in which several items have been enumerated, the general words are construed to embrace only objects similar in nature to the objects enumerated by the preceding specific words of the statute. *Ejusdem generis* saves the legislature from having to spell out in advance every contingency to which the statute could apply. For example, in a statute granting a department of conservation the authority to sell "gravel, sand, earth or other material," a court held that "other material" could only be interpreted to include materials of the same general type and did not include commercial timber (*Sierra Club v. Kenney,* 88 Ill. 2d 110, 57 Ill. Dec. 851, 429 N.E.2d 1214 [1981]). In the opposite situation, where specific words follow general ones, *ejusdem generis* is also applied; again, the general term embraces only things that are similar to those specifically enumerated.

Another MAXIM of statutory construction is *expressio unius est exclusio alterius.* Roughly translated, this phrase means that whatever is omitted is understood to be excluded. Thus, if a statute provides for a specific sanction for noncompliance with the statute, other sanctions are excluded and cannot be applied (*Sprague v. State,* 590 P.2d 410 [Alaska 1979]). The maxim is based on the rationale that if the legislature had intended to accommodate a particular remedy or allowance, it would have done so expressly; if the legislature did not provide for such an allowance or event, it should be assumed that it meant not to. The maxim has wide application and has been used by courts to interpret constitutions, treaties, wills, and contracts as well as statutes. Nevertheless, *expressio unius est exclusio alterius* does have its limitations. Courts have held that the maxim should be disregarded in cases in which an expanded interpretation of a statute will lead to beneficial results or will serve the purpose for which the statute was enacted.

### Contract Construction

Judges face different challenges when interpreting the terms of a contract. As a result, different canons exist to aid a court in resolving a dispute between the parties to a contract.

As in statutory construction, in a contract dispute the court gives contract terms their plain and ordinary meaning, interpreting them as ordinary, average, or reasonable persons would understand them (*Rains v. Becton, Dickinson & Co.,* 246 Neb. 746, 523 N.W.2d 506 [Neb. 1994]). If the language of the contract is clear and

unambiguous, there is no room for further interpretation and the court will enforce the contract as written. By doing so, the court gives effect to the parties' intentions in making the contract and avoids adding its own interpretation to the agreement.

If the contract contains ambiguous terms, however, they are strictly construed against the party who drafted the contract. This rule of **STRICT CONSTRUCTION** is often applied in contracts containing *exculpatory clauses,* or provisions that attempt to insulate a party, usually the party who drafted the contract, from liability. Thus, when a clause in a contract between a health club and a member, in which the member waived her right to bring legal action for injuries she suffered at the health club, was held to be ambiguous, it was construed strictly against the health club and it was found to be invalid (*Nimis v. St. Paul Turners,* 521 N.W.2d 54 [Minn. App. 1994]).

A court may look to other canons of construction or interpretation if it determines that the terms of a contract are ambiguous. In business situations, the court may consider the course of dealing or **COURSE OF PERFORMANCE**, that is, the pattern of conduct observed in previous transactions between the parties. Such evidence can help the court determine the intent of the parties at the time they entered the contract and provides additional terms that, though they are not expressly contained in the agreement, the court can use to interpret the contract. Thus, where one party to the contract alleges that the other breached the contract by failing to make payment in the proper manner, and the contract contains no express provisions concerning payment, the court can consider how the parties handled the issue of payment in previous transactions to resolve the issue (*AROK Construction Co. v. Indian Construction Services,* 174 Ariz. 291, 848 P.2d 870 [Ariz. App. 1993]).

A court can also look to usage of trade to aid its interpretation of an ambiguous agreement. A *usage of trade* is a commercial practice or industry custom "having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement" (Restatement [Second] of Contracts § 222 [1981]). As a result, if a contract is unclear about how shipment of a specific type of goods is to be handled, the court can consider evidence of general industry practice in the area to help determine what the parties intended with respect to shipment.

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**CROSS-REFERENCES**

Course of Dealing; Course of Performance; Exculpate; Strict Construction; Trade Usage.

## CANONS OF ETHICS

*Rules that govern the* **PRACTICE OF LAW**.

The canons of ethics have been replaced by the code of Professional Responsibility which sets forth the standards of professional conduct prescribed for lawyers in their professional dealings.

## CANONS OF JUDICIAL ETHICS

See **CODE OF JUDICIAL CONDUCT**.

## CAPACITY

*The ability, capability, or fitness to do something; a legal right, power, or competency to perform some act. An ability to comprehend both the nature and consequences of one's acts.*

Capacity relates to soundness of mind and to an intelligent understanding and perception of one's actions. It is the power either to create or to enter into a legal relation under the same conditions or circumstances as a person of sound mind or normal intelligence would have the power to create or to enter.

A person of normal intelligence and sound mind has the capacity to dispose of his or her property by will as he or she sees fit.

A *capacity defense* is used in both criminal and civil actions to describe a lack of fundamental ability to be accountable for one's action that nullifies the element of intent when intent is essential to the action, thereby relieving a person of responsibility for it.

An individual under duress lacks the capacity to contract; a child under the age of seven accused of committing a crime lacks criminal capacity.

## CAPIAS

*[*Latin, That you take.*] The name for several different kinds of writs, or court orders, all of which require an officer to take the defendant into custody.*

For example, a *capias ad audiendum judicium* is a writ that orders the defendant brought back before the court after an appearance in which the person has been found guilty of a misdemeanor. A *capias ad satisfaciendum* orders the sheriff to take the defendant into custody until a judgment is paid or a discharge is granted on the ground that the defendant is an insolvent debtor. This is a body execution.

## CAPITAL ASSET

*Property held by a taxpayer, such as houses, cars, stocks, bonds, and jewelry, or a building owned by a corporation to furnish facilities for its employees.*

Excluded from capital assets are certain items stated in the INTERNAL REVENUE CODE, for example (1) trade or business property subject to depreciation allowance under the tax laws; (2) real property used in trade or business; (3) certain categories of copyrighted materials and LITERARY PROPERTY; and (4) accounts or notes receivable acquired in the ordinary course of business.

The determination of what constitutes a capital asset is essential to the tax treatment of the profits from the sale of property as capital gains, which are taxed at a lower rate than ordinary income.

## CAPITAL PUNISHMENT

*The lawful infliction of death as a punishment; the death penalty.*

Capital punishment continues to be used in the United States despite controversy over its merits and over its effectiveness as a deterrent to serious crime. A sentence of death may be carried out by one of five lawful means: electrocution, hanging, lethal injection, gas chamber, and firing squad. As of 2003, 38 states employed capital punishment as a sentence; 12 states—Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin—and the District of Columbia did not.

The first known infliction of the death penalty in the American colonies occurred in Jamestown Colony in 1608. During the period of the Revolutionary War, capital punishment apparently was widely accepted—162 documented executions took place in the eighteenth century. At the end of the war, 11 colonies wrote new constitutions, and, although nine of them did not allow CRUEL AND UNUSUAL PUNISHMENT, all authorized capital punishment. In 1790, the First Congress enacted legislation that implemented capital punishment for the crimes of ROBBERY, rape, murder, and forgery of public SECURITIES. The nineteenth century saw a dramatic increase in the use of capital punishment with 1,391 documented executions. The death penalty continued as an acceptable practice in the United States for some time.

In 1967, a national MORATORIUM was placed on capital punishment while the U.S. Supreme Court considered its constitutionality. In 1972, it appeared that the Court had put an end to the death penalty in the case of FURMAN V. GEORGIA, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed 2d 346, declaring certain capital punishment laws to be unconstitutionally cruel and unusual because juries were applying them arbitrarily and capriciously. It seemed as if *Furman* would mark the passing into history of capital punishment in the United States.

By 1976, Georgia, Florida, and Texas had drafted new death penalty laws, however, and the U.S. Supreme Court upheld them. Of the nine justices, only two, WILLIAM J. BRENNAN JR. and THURGOOD MARSHALL, persisted in the belief that capital punishment is unconstitutional per se. Capital punishment had survived, and so had the controversies surrounding it.

Although the U.S. Supreme Court has held that the Constitution permits the use of capital

**Capital Punishment**

**PRISONERS EXECUTED UNDER CIVIL AUTHORITY IN THE UNITED STATES, 1977 TO 2001**

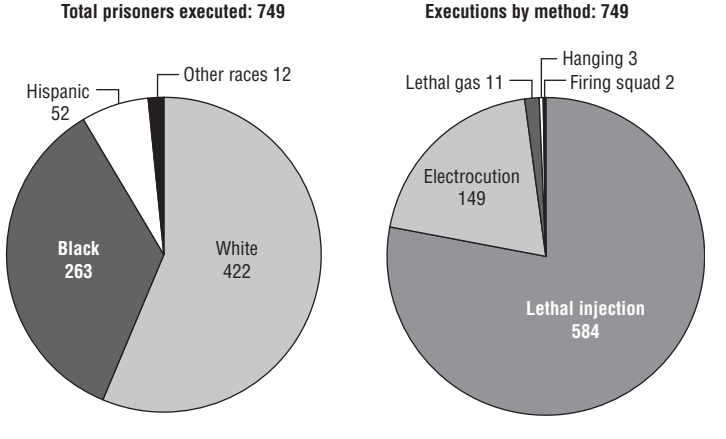


SOURCE: U.S. Bureau of Justice, *Capital Punishment*, 2001.

# The Costs of Capital Punishment

In 1989, the state of Florida executed 42-year-old Ted Bundy. Bundy confessed to 28 murders in four states. During his nine years on death row, he received three stays of execution. Before he was put to death in the electric chair, Bundy cost taxpayers more than $5 million.

In a country where some 70 percent of the population favors the death penalty, many people may feel that Bundy got what he deserved. A further question, however, is whether U.S. taxpayers got their money's worth. When a single sentence of death can cost millions of dollars to carry out, does it make economic sense to retain the death penalty?

At first glance, the costs involved in the execution of an inmate appear simple and minuscule. As of 2003, the state of Florida paid $150 to the executioner, $20 for the last meal, $150 for a new suit for the inmate's burial, and $525 for the undertaker's services and a coffin. In Florida, the cost of an execution is less than $1,000.

The actual execution of an inmate is quick and simple; the capital punishment system is far more complex. To resolve issues of unconstitutionality that the Supreme Court found in **FURMAN V. GEORGIA**, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), states found it necessary to introduce a complex appeals process that would guarantee the rights of death row inmates. Capital trials are much more expensive to carry out than are their noncapital counterparts because of the price at stake, the life of the accused. Evidence gathering is also more expensive: evidence must be collected not only to determine the guilt or innocence of the accused but also to support or contradict a sentence of death. All sentences of death face a mandatory review by the state supreme court, at an additional cost of at least $70,000. If a case advances further in the state or federal appeals process, the costs are likely to jump to $275,000 or more for each appeal.

Appeals of a death sentence guarantee great expense to the taxpayer, as the state pays both to defend and to prosecute death row inmates. Public defenders in such appeals openly admit that their goal is delay, and prosecutors and state attorneys slow the process by fighting access to public records and allowing death row defendants to sweat out their cases until the last minute.

Abolitionists believe that the existing system cannot be repaired and must be abandoned. The alternative sentence, life imprisonment without **PAROLE**, achieves the same result as capital punishment, they argue. Like the death penalty, a life sentence permanently removes the convict from the community against which he or she committed crimes. And it is far less expensive.

According to a 1990 study, the total cost to build a maximum-security prison cell is $63,000, which breaks down to approximately $5,000 a year in principal and interest. The annual cost to maintain an inmate in this cell is approximately $20,000 a year. Together, these costs mean an annual expenditure of $25,000 to incarcerate an inmate. Based on a sentence term of 40 to 45 years, one inmate would cost the taxpayer only slightly more than $1 million—less than a third of what it would take to pay for the process that culminates in execution. A twenty-five-year-old woman convicted of first-degree murder would need to serve a life term to the age of 145 before the costs of incarcerating her would surpass those of executing her.

punishment, decisions on this issue have divided the Court and have done little to convince opponents of the death penalty that it is fair. Critics have argued that the death penalty is a form of cruel and unusual punishment, that it is applied in a racially discriminatory manner, that it lacks a deterrent effect, and that it is wrong.

### Cruel and Unusual Punishment

The **EIGHTH AMENDMENT** of the U.S. Constitution prohibits the government from inflicting "cruel and unusual punishments." The controversy over the constitutionality of the death penalty lies in the **AMBIGUITY** of the phrase "cruel and unusual." The first meeting of Congress addressed the phrase for only a few minutes. Congressman **WILLIAM SMITH** of South Carolina foreshadowed the controversy to come when he stated that the wording of the Eighth Amendment was "too indefinite."

Whereas some argue that the phrase "cruel and unusual" refers to the type of punishment inflicted (such punishments as the severing of limbs, for example, would almost certainly be considered cruel and unusual), others feel that the phrase refers to the degree and duration of the punishment. The U.S. Supreme Court has rejected both interpretations, leaving the death penalty a legal means of punishing certain criminals.

The **FIFTH AMENDMENT** seems to supply a clearer basis for assuming the constitutionality of the death penalty. This amendment states that no one shall be "deprived of life, liberty, or property, without due process of law." From this lan-

Other studies have reached similar conclusions. According to a study by the Indiana Criminal Law Study Commission released in 2002, executions cost the state 38 percent more than the costs of keeping an inmate incarcerated for life. Similarly, a 1993 study at Duke University showed that between 1976 and 1992, the state of North Carolina spent in excess of $1 billion on executions or $2.16 million per execution. Moreover, in January 2003, the California governor approved the construction of a $220 million state-of-the-art death row.

Not only are the costs of execution excessive but so too are the time delays. It is not unusual for an individual to wait on death row for more than ten years. In the 1995 case *Lackey v. Texas,* 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304, Clarence Allen Lackey, who had been on death row for seventeen years, claimed that such a duration constituted **CRUEL AND UNUSUAL PUNISHMENT**. Although his motion was denied, Justices **JOHN PAUL STEVENS** and **STEPHEN BREYER** admitted that the concern was not without warrant.

Opponents of capital punishment point out that abandoning the death penalty would make available many millions of dollars as well as thousands of hours that the courts could allocate to other aspects of the criminal justice system. The amount of money necessary to execute a single inmate might be used to put several criminals behind bars for the remainder of their lives.

Supporters of capital punishment agree with detractors on one issue: the death row appeals process is far too complex and expensive. However, while opponents of the death penalty use this as a reason to reform sentencing, supporters use it as a reason to reform the system of appeals. Supporters argue that thorough reform of the appeals process would free up as much money as abolishing the death penalty; expenses could be cut while capital punishment is retained.

Immediately following the execution of Bundy, Chief Justice **WILLIAM H. REHNQUIST** called for changes in the procedure for appealing death sentences. Noting that the Supreme Court had turned down three emergency appeals by Bundy in the hours just prior to his execution, the chief justice said, "Surely it would be a bold person to say that this system could not be improved."

In a 1995 interview, President **BILL CLINTON**, a staunch supporter of capital punishment, called the appeals process ridiculous and in need of reform. Clinton, like other supporters of the death penalty, saw appeals reform as paramount if capital punishment is to be efficiently and effectively carried out.

Supporters also argue that too many rights are provided to death row inmates. The appeals process is too kind to convicts, they argue, and ignores the pain that persists in the aftermath of the criminals' actions. Family members of victims of capital crimes are expected to wait years, while perpetrators abuse the system to forestall execution of the sentence imposed.

In addition to the president, the nation's highest court sides with those who support capital punishment. Under the leadership of Chief Justice Rehnquist, the Supreme Court has moved to limit the number of appeals a death row inmate may file, arguing that endless appeals serve only to undermine the ability of the state to carry out its constitutionally sanctioned punishment.

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**CROSS-REFERENCES**

Cruel and Unusual Punishment; Due Process.

guage, one can conclude that with **DUE PROCESS OF LAW**, capital punishment may be imposed.

In *Furman,* the justices who found the death penalty to be unconstitutional pointed to the language of the Eighth Amendment as the basis of their decision. Chief Justice **WARREN E. BURGER**, who filed a dissenting opinion, relied heavily upon the language of the Fifth Amendment to support his argument that the death penalty was constitutional.

### Evolving Standards of Decency

However, administration of capital punishment is not necessarily constitutional under all circumstances, against all classes of defendants, or for all types of crimes. The U.S. Supreme Court has recognized that what may have been constitutionally permissible when the Eighth Amendment was ratified in 1791 might be cruel and unusual now, if application of the death penalty in particular cases offends the "evolving standards of decency" test. Under this test, courts will examine prevailing opinions among state legislatures, sentencing juries, judges, scholars, the American public, and the international community to determine whether a particular application of the death penalty is cruel and unusual. For example, in *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), the Court examined many of these factors and determined that there was no clear consensus against executing mentally retarded defendants who had been convicted of murder.

However, just 13 years later, the Court found that "standards of decency" had evolved to a

point where mentally retarded defendants could no longer be made subject to capital punishment without violating the Cruel and Unusual Punishment Clause of the Eighth Amendment. ATKINS V. VIRGINIA, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (U.S. 2002). The Court emphasized the fact that since *Penry* 18 states had passed legislation excluding the mentally retarded from the class of defendants who are eligible for capital punishment. Applying the same type of analysis in *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989), the Court found that there was no national consensus prohibiting the execution of juvenile offenders over age 15. But the Court did find sufficient proof of consensus against making rape defendants as a class that was eligible for capital punishment, stressing that only one jurisdiction in the country at the time of its decision allowed capital punishment for the rape of an adult woman. *Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (2002).

Death by electrocution has been challenged several times as being inconsistent with "evolving standards of decency". In a series of Florida cases, the U.S. Supreme Court denied certiorari in appeals where the petitioner offered proof that during the execution the electric chair was engulfed by flames and that smoke had emanated from the inmate's head. But the Florida Supreme Court ruled that death by electrocution does not violate the Eighth Amendment's prohibition of cruel and unusual, citing evidence that execution by electrocution renders an inmate instantaneously unconscious, thereby making it impossible to feel pain when the electrical current is properly maintained. *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999), *cert denied*, 528 U.S. 1182, 120 S. Ct. 1222, 145 L. Ed. 2d 1122 (2000).

### Capital Punishment for DWI-Related Offenses

Many observers expected the "evolving standards of decency" test to be invoked by a North Carolina defendant when prosecutors sought to impose the death penalty for crimes he committed during a 1996 drunk-driving incident that left two college students dead. Thomas Richard Jones was charged and convicted on one count of driving while impaired, one count of assault with a deadly weapon, three counts of assault with a deadly weapon inflicting serious injury, and two counts of first-degree murder under the FELONY-MURDER RULE. During the penalty phase, the jury rejected the prosecution's arguments for capital punishment, instead sentencing Jones to life in prison.

When Jones appealed his conviction, the North Carolina Supreme Court did not review his sentence under an Eighth Amendment analysis. Rather, the state's high court ruled that any sentence that Jones might have received for first-degree murder would not have been justified, because a first-degree murder charge can only be supported by proof that the defendant possessed a "specific intent" to commit the crime. At a minimum, the court said, proof of SPECIFIC INTENT requires evidence that the defendant had "an actual intent to undertake the conduct resulting in death; thus, even if the killing itself was not intended, the actual intent to torture, poison, starve, or imprison the victim must be present . . . for the killing to qualify as first-degree murder." The North Carolina Supreme Court rejected the state's argument that specific intent could be "implied" from the defendant's reckless conduct. *State v. Jones*, 538 S.E. 2d 917 (N.C. 2000). No state court since *State v. Jones* has successfully prosecuted a defendant for first-degree murder arising out of a drunk-driving-related offense.

### Racial Bias

In 1983, Professor David C. Baldus, of the University of Iowa College of Law, published a study on the capital punishment system in the state of Georgia. The figures he assembled showed that between 1973 and 1979, killers whose victims were white were 11 times more likely to be sentenced to death than were killers whose victims were black.

Baldus's study was used by death row inmate Warren McClesky in an appeal that came before the U.S. Supreme Court (*McClesky v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262). Although the Court accepted the validity of the study, it found the statistics "insufficient to demonstrate unconstitutional discrimination" or "to show irrationality, arbitrariness, and capriciousness."

Other studies have yielded equally staggering numbers regarding the statistical differences between the system's treatment of blacks and whites. For example, between 1976 and 1995, a total of 245 convicts were executed; 84 percent of their victims were white, although fewer than 50 percent of all murder victims are white. Many

critics argue that statistics demonstrating racial bias in the administration of capital punishment prove that the death penalty, even if constitutional in concept, is unconstitutional as applied in the United States—violating at least the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT.

Justice LEWIS F. POWELL JR., who voted with the majority in *McClesky* to deny a racial-bias challenge to the capital punishment system, later informed a biographer that he since had come to regret his vote.

### Consideration of Mitigating Factors

In general, the jury may not be precluded from considering, and may not refuse to consider, any relevant mitigating evidence in determining whether capital punishment is the appropriate sentence for a particular defendant. However, the Eighth Amendment does not require courts to instruct a jury during the penalty phase that it has both an obligation and the authority to consider the mitigating factors deemed relevant by state law. *Buchanan v. Angelone*, 522 U.S. 269, 118 S. Ct. 757, 139 L. Ed. 2d 702 (1998). Instead, it is sufficient for a court to instruct the jury that it must impose a life sentence if, after considering "all the evidence," the jury does not believe that capital punishment is justified.

Once convicted and sentenced to death, death row inmates may again cite mitigating factors in making an appeal for leniency or clemency from the state's PAROLE board or another EXECUTIVE BRANCH department. Such appeals often cite mitigating factors that existed either before, after, or at the time the crime was committed. However, parole boards and related executive branch departments are under no obligation to give mitigating evidence any weight, and may typically reject a death row inmate's request for clemency without providing any reason for doing so.

For example, the Texas Parole Board was flooded with requests to grant clemency to Karla Faye Tucker, a death row inmate who had been convicted of brutally killing two people with a pickax during a 1983 robbery. Despite evidence that Tucker was 23 years old and high on drugs at the time of the crime, that she had been addicted to drugs since she was eight years old, and that she had been a prostitute since age 14, the sentencing jury found more compelling other evidence showing that Tucker had a history of violent behavior, that she had received sexual gratification every time she struck one of the victims with the pickax, that she had talked of killing two others to prevent them from telling police about the murders, and that she had planned future crime sprees to raid drug labs, kill the people who worked there, and steal their property.

During her 14 years on death row, however, Faye underwent a religious conversion to Christianity that many people believed was sincere. In fact, religious leaders from around the world, including Pope John Paul II, made personal appeals to have Tucker's sentence commuted to life in prison. The European Parliament and the UNITED NATIONS also publicly sought clemency for Tucker. The Karla Faye Tucker who was on death row, they all said, was not the same person who had committed the gruesome murders more than a decade earlier.

The Texas BOARD OF PARDONS & Paroles refused to stay the execution, finding that neither Tucker's gender nor her religious conversion were sufficient grounds to commute her sentence. "Mercy was already considered by the jurors when they sentenced her to die," the chairman of the pardons and parole board said. Then-Texas Governor GEORGE W. BUSH also rejected Tucker's requests for clemency. Tucker challenged the adequacy of the Texas executive-clemency procedures, but the Texas Court of Criminal Appeals concluded that "[a]n inmate has no constitutional or inherent right to commutation of her sentence." *Ex parte Tucker*, 973 S.W. 2d 950 (Tex. Crim. App. 1998). Clemency, the court wrote, is a matter that rests solely within the "unfettered discretion" of the executive branch of the state government. On February 3, 1998, Tucker became the first woman to be executed in Texas since the Civil War.

### Deterrent Effect

Since the turn of the twentieth century, many studies have been conducted on the deterrent effect of capital punishment. More often than not, the results have proved inconclusive; no hard evidence exists to verify the theory that the threat of such a harsh punishment will sway criminals from their actions. In fact, some statistics indicate that the opposite is true; in some instances, states that employ capital punishment have a higher incidence of HOMICIDE than neighboring states that do not employ the death penalty.

*The execution chamber at California's San Quentin State Prison.*
AP/WIDE WORLD PHOTOS

The U.S. Supreme Court justices in the *Furman* case, both concurring and dissenting, often referred to studies that showed no conclusive correspondence between capital punishment and the frequency with which capital crimes were committed. A later accounting revealed that during the moratorium on capital punishment, from 1967 to 1976, the national homicide rate nearly doubled. Since then, depending on the study conducted, evidence has been presented to show that capital punishment has no deterrent effect; that the implementation of the death penalty is directly related to a decrease in capital crime; and that the implementation of the death penalty is directly related to an increase in capital crime.

Although some opponents of the death penalty are quick to argue that capital punishment has no deterrent effect, many supporters feel that the purpose of capital punishment is retribution, not deterrence. Many individuals, especially those with close ties to the victims, are more often concerned that the particular convicted criminal pay for the crime than that other persons be deterred through punishment of the perpetrator.

## Morality and Emotion

Emotions might have played a part in the *Furman* decision. Burger, in his dissent, warned that the Court's "constitutional inquiry . . . must be divorced from personal feelings as to the morality and efficacy of the death penalty." Justice HARRY A. BLACKMUN, who joined Burger in his dissent, later renounced his belief in the death penalty for reasons that another justice saw as partly personal.

In 1994, in *Callins v. Collins,* 510 U.S. 1141, 114 S. Ct. 1127, 127 L. Ed. 2d 435, Blackmun wrote a dissenting opinion in which he condemned the practice of capital punishment in the United States. He argued that "no combination of procedural rules or substantive regulations ever [could] save the death penalty from its inherent constitutional deficiencies"—"arbitrariness, discrimination, caprice, and mistake." Justice ANTONIN SCALIA criticized Blackmun's position, writing that Blackmun had based his dissent on intellectual, moral, and personal reasons, rather than on the authority of the Constitution.

## Other Issues

Other controversial aspects of capital punishment disturb the public. Between 1976, when the moratorium on capital punishment was lifted, and 1995,

- More than 50 mentally ill or mentally impaired individuals were put to death
- Nine juveniles were executed
- The cost of executing a death row inmate was three to six times as high as incarcerating him or her for life without parole.

Despite the controversy, the constitutionality of capital punishment has been upheld and continues to be an acceptable practice in thirty-eight states, where nearly 3,500 inmates waited on death row throughout the United States by the end of 2001.

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## CAPITAL STOCK

*All shares constituting ownership of a business, including common stock and preferred stock. The amount of shares that a corporate charter requires to be subscribed and paid, or secured to be paid, by shareholders. The amount of stock that a corporation may issue; the amount actually contributed, subscribed, or secured to be paid on. The liability of the corporation to its shareholders after creditors' claims have been settled. The valuation of the corporation as a business enterprise.*

Capital stock is distinguishable from the property and assets of the corporation. The property of a corporation fluctuates and may be greater or less than the original capital invested, but the capital stock remains intact and unaffected by the vicissitudes of business.

Undivided profits, or surplus, are not part of the capital stock, although they are included in the general capital or assets of the corporation.

The capital stock of a corporation serves only corporate purposes. It functions as security for the creditors of the corporation who have relied on its existence, since it cannot be diverted or withdrawn to the detriment of corporate creditors. Capital stock is sometimes regarded as a trust fund.

## CAPITALIZE

*To regard the cost of an improvement or other purchase as a capital asset for purposes of determining* INCOME TAX *liability. To calculate the net worth upon which an investment is based. To issue company stocks or bonds to finance an investment.*

The owner of a business may capitalize the expense of renovating a factory to maximize his or her after-tax profits, since such expenses may be used to decrease the pretax profits, thereby reducing the amount of profits subject to taxation.

An individual may compute the net worth of shares of stock, in order to treat them as capital assets for income tax purposes. Such treatment often results in more favorable rates of taxation on the profits made when assets are sold because they are considered capital gains.

## CAPITATION TAX

*An assessment levied by the government upon a person at a fixed rate regardless of income or worth.*

Since it is a tax upon the individual, and not upon merchandise, a capitation tax is frequently labeled a *head tax*. A poll tax is a capitation tax.

## ♦ CAPONE, ALPHONSE

AL CAPONE was a gangster leader who controlled much of Chicago from 1920 to 1931. Chicago in the 1920s was a city of vice, corruption, and gangland killings, and synonymous with the evildoings of this era is the name of Al Capone.

Capone was born January 17, 1899, in Naples, Italy. His family emigrated from Naples, Italy, to New York and Capone was raised in the Brooklyn slums. During his early years in New York he made strong gangland contacts and in 1920, he became a member of the John Torrio gang. Torrio, originally from New York, relocated his operation to Chicago, with Capone at his side.

The passage of the VOLSTEAD ACT in 1919 (41 Stat. 305), which prohibited the manufacture, sale, or transportation of liquor, ushered in an era of big business for gangsters. Capone and Torrio were no exception; they operated and organized speakeasies, secret nightclubs that sold the banned liquor. Capone began to gain more power and by the time Torrio retired in 1925, Capone's control had extended to gambling, brothels, and politics. He was responsible for the gangland murders of his rivals and for forcibly controlling election results in certain precincts of Chicago; through these maneuvers, he increased his power and received protection and political favors.

Capone was at the peak of his power in 1931, when he was arrested—ironically—for income TAX EVASION. The INTERNAL REVENUE SERVICE succeeded where other authorities had failed: uncovering concrete evidence against Capone for tax evasion. It investigated Capone's earnings and discovered that—despite his huge income, which was judged to be approximately $105 million in 1927—Capone had never filed an income tax return. In October 1931 Capone was tried in a federal court and found guilty. He was required to pay a penalty of $50,000 and to serve eleven years in jail.

An appeal was pursued and Capone spent his first days of captivity in Chicago's Cook County Jail. There he was still awarded the privileges of an underworld king. Warden David Moneypenny allowed him to visit with his gangland associates, including Salvatore "Lucky" Luciano. Capone had requested and was given an isolated place—the death chamber of the Cook County Jail—to meet and conduct business with fellow mobsters.

*Al Capone was fined $50,000 and sentenced to 11 years in prison for income tax evasion in 1931.*

AP/WIDE WORLD PHOTOS

The appeal was denied, and Capone was sent to a federal jail in Atlanta, Georgia. There he performed the duties of a shoemaker until 1934, at which time he was transferred to Alcatraz in California.

At Alcatraz Capone was not treated with the respect and fear to which he was accustomed. He spent his days as a laundry worker and was harassed by inmates who took pleasure in persecuting the once powerful mob king. Capone's mental capacities dwindled due to an untreated attack of syphilis and in 1939 he was released to the care of his wife and brother. He died January 25, 1947, in Miami Beach, Florida.

## CAPTION

*The standardized heading of a legal instrument, such as a motion or a complaint, which sets forth the names of the parties in controversy, the name of the court, the docket number, and the name of the action.*

"THE GREAT TIDES AND CURRENTS WHICH ENGULF THE REST OF MEN DO NOT TURN ASIDE IN THEIR COURSE AND PASS THE JUDGES BY."
—BENJAMIN CARDOZO

## ♦ CARDOZO, BENJAMIN NATHAN

Benjamin Nathan Cardozo was a New York state court judge, an associate justice on the U.S. Supreme Court, and an influential legal scholar.

Cardozo was born May 24, 1870, in New York City, the youngest son in a family of six children. His parents were descendants of Portuguese and Spanish Jews who had settled in New York before the Revolutionary War. His father, ALBERT CARDOZO, was a trial court judge who was forced to resign his seat because of allegations, which were never proved, of improper conduct involving the then corrupt New York City government. Cardozo was tutored during his early life by well known clergyman and teacher Horatio Alger and entered Columbia College at the age of fifteen. He earned a bachelor's degree in 1889 and a master's degree in 1890, then enrolled at Columbia Law School. He was granted admission to the New York state bar in 1891 without having received his law degree.

After completing his legal training and passing the bar examination, Cardozo began practicing appellate law with his brother. He soon became a prominent practitioner in his own right in the fields of corporate and COMMERCIAL LAW. He often acted as consultant to other law firms, writing appeal briefs for other lawyers and appearing frequently before the New York Court of Appeals, the state's highest court. His extensive appellate experience led him to write his first book, *Jurisdiction of the Court of Appeals of the State of New York,* published in 1903. In addition, judges often appointed him to act as referee in complicated matters of commercial law, one of his areas of specialty.

In 1913, after twenty-three years in private practice, Cardozo was nominated and elected as a judge on the New York Supreme Court, the state's trial-level bench. Only six weeks later, he was designated to serve temporarily as an associate judge on the Court of Appeals. He remained a temporary judge of the Court of Appeals until 1917, when he was appointed to fill a vacant and permanent seat, and in 1926 he was elected chief judge.

During his tenure on the Court of Appeals, Cardozo made his mark as an influential and celebrated jurist and moved the New York court to the forefront of the nation's state courts. With respect to TORT LAW, the court under Cardozo greatly expanded the protection offered to individuals injured by the NEGLIGENCE of others. In MACPHERSON V. BUICK MOTOR CO., 217 N.Y. 382, 111 N.E. 1050 (1916), perhaps Cardozo's most influential tort opinion, the court held Buick liable for the negligent construction of a defective wheel that injured a purchaser who had bought the car not from Buick but from an automobile dealer. Cardozo's decision to look beyond the contractual relationship between the buyer and seller to the manufacturer for redress

helped lay the groundwork for the development of **PRODUCT LIABILITY**, now a common feature of the law, which allows for recovery for injuries even if the consumer had no contractual relationship with the manufacturer. But Cardozo was also willing to impose some commonsense limits on tort liability. In the classic decision **PALSGRAF V. LONG ISLAND RAILROAD**, 248 N.Y. 339, 162 N.E. 99 (1928), he authored the majority opinion establishing that a person can be held negligent only for a harm or injury that is foreseeable and not for every injury that follows from the negligence. As Cardozo put it, "[T]he orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of duty."

Cardozo's influence was also strongly felt in the law of contracts. He wrote the majority opinion in *Wood v. Duff-Gordon,* 222 N.Y. 88, 118 N.E. 214 (1917), perhaps his best known and most widely quoted decision concerning the implied elements of a contract. In *Wood* and his other contract law decisions, Cardozo made clear his views that, whenever possible, courts should attempt to instill fairness in an ambiguous contract by analyzing and interpreting its implicit terms to cover situations that the parties may not have provided for explicitly.

In 1932, when ninety-year-old **OLIVER WENDELL HOLMES JR.**, announced his retirement from the U.S. Supreme Court, politicians, lawyers, and legal scholars publicly campaigned for Cardozo to succeed him. President **HERBERT HOOVER**, though impressed with Cardozo's credentials and intellect, was initially lukewarm about nominating him to the Court. Two other New Yorkers, Chief Justice **CHARLES E. HUGHES** and Justice **HARLAN F. STONE**, were already on the Court and others in Hoover's administration were concerned about appointing a second Jewish justice to serve in addition to Justice **LOUIS D. BRANDEIS**. After Stone offered his resignation (which was not accepted) to make room for Cardozo, Hoover was eventually persuaded to ignore the politics of geography and anti-Semitism and named Cardozo to the Court. On February 24, 1932, Cardozo was confirmed unanimously by a voice vote of the Senate, though he was said to be reluctant to leave his family and friends in New York and move to Washington, D.C., to accept the seat.

*Benjamin N. Cardozo.*
PHOTOGRAPH BY HARRIS & EWING. COLLECTION OF U.S. SUPREME COURT

Though he served on the Court for only six years, Cardozo authored a number of significant decisions. He authored the majority opinion in the **CIVIL RIGHTS** case *Nixon v. Condon,* 286 U.S. 73, 52 S. Ct. 484, 76 L. Ed. 984 (1932). *Condon* held that a resolution by a state party executive committee, under purported authority of a Texas statute (Vernon's Ann. Civ. St. Tex. art.

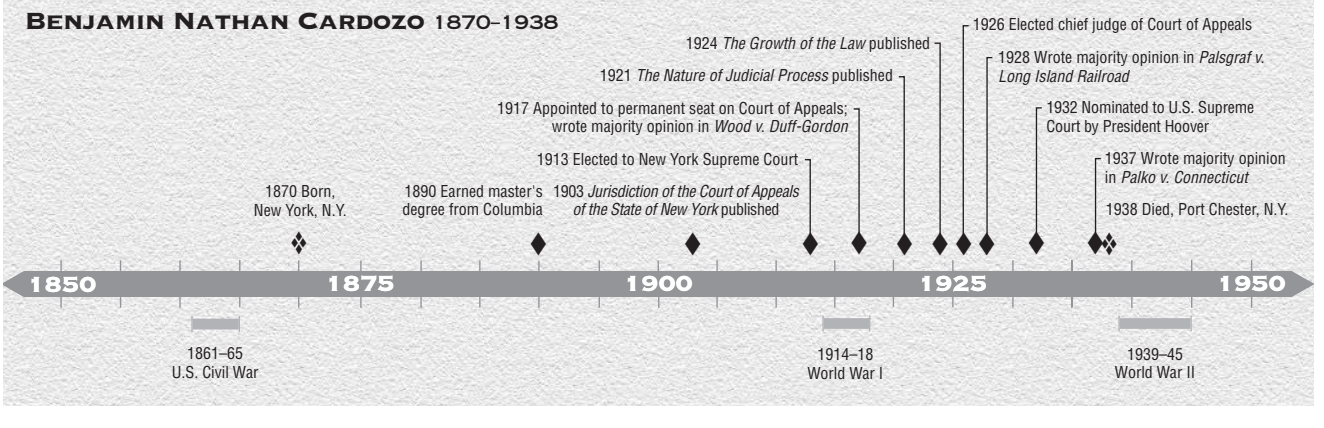

3107), which excluded blacks from primary elections, violated the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT. Cardozo, for the most part, supported President FRANKLIN D. ROOSEVELT'S NEW DEAL legislation, writing the majority opinions in *Helvering v. Davis,* 301 U.S. 619, 57 S. Ct. 904, 81 L. Ed. 307 (1937), and *Steward Machine Co. v. Davis,* 301 U.S. 548, 57 S. Ct. 883, 81 L. Ed. 1279 (1937), which upheld the constitutionality of the UNEMPLOYMENT COMPENSATION (Social Security Act § 901–910, 42 U.S.C.A. § 1101–1110) and old-age benefits programs (Social Security Act § 201 et seq., 42 U.S.C.A. § 401 et seq.) of the SOCIAL SECURITY ACT OF 1935. Cardozo also authored a number of significant CRIMINAL LAW decisions while on the Court, including *Palko v. Connecticut,* 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937). In *Palko,* the Court held that the DUE PROCESS CLAUSE of the Fourteenth Amendment of the Constitution did not require that the DOUBLE JEOPARDY Clause contained in the FIFTH AMENDMENT be applied to the states. Cardozo favored a "selective incorporation" approach to the Fourteenth Amendment, writing that only select protections of the first eight amendments that "represented the very essence of a scheme of ordered liberty, . . . principles of justice so rooted in the traditions and conscience of our people as to be ranked fundamental," should be imposed upon the states. *Palko* represented the beginning of the Supreme Court's long struggle to formulate a test for applying the Due Process Clause of the Fourteenth Amendment as a limit on states' powers.

Cardozo, though remembered for his majority opinions, was not afraid to disagree with the majority and wrote some equally significant and stirring dissents while on the Court. In *Carter v. Carter Coal Co.,* 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936), one of many cases arising out of constitutional challenges to Roosevelt's New Deal legislation, the Court in a 6–3 vote struck down the 1935 Bituminous Coal Conservation Act (15 U.S.C.A. §§ 801–827), which authorized fixed prices to help stabilize the coal industry. Cardozo maintained that the law was constitutional and necessary to combat the economic problems created by the Great Depression. He wrote that "[a]fter making every allowance for differen[ces] of opinion as to the most efficient cure, the student of the subject is confronted with the indisputable truth that there are ills to be corrected, and ills that had a direct relation to the maintenance of commerce among the states. . . . An evil existing, and also the power to correct it, the lawmakers were at liberty to use their own discretion in the selection of the means."

Cardozo's body of legal scholarship is not limited to the many important judicial opinions he authored as a state court judge and U.S. Supreme Court justice. He also wrote a number of books which have become classics of legal thought and judicial philosophy. His lectures on the decision-making process that he delivered at Yale Law School and Columbia University early in his career were published in 1921 as a group of essays in *The Nature of the Judicial Process,* which is still widely used as a textbook for first-year law students. He also wrote *The Growth of the Law* (1924), *The Paradox of Legal Science* (1928), and *Law and Literature* (1931). In all his books, Cardozo sought to define the difficult issues faced by a judge in deciding cases, as well as his beliefs about how the entire legal system could function most effectively.

Cardozo, who never married and remained close to his family throughout his life, was a shy and reclusive man described in one book about the history of the Court as "the hermit philosopher." He remained on the Supreme Court until 1938 when he died of heart trouble at the age of sixty-eight. He is buried in the Cardozo family plot in the cemetery of Shearith Israel congregation at Cypress Hills, Long Island.

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## CARE

*Watchful attention; custody; diligence; concern; caution; as opposed to* NEGLIGENCE *or carelessness.*

In the law of negligence, the standard of reasonable conduct determines the amount of care

to be exercised in a situation. The care taken must be proportional to the apparent risk. As danger increases, commensurate caution must be observed.

*Slight care* is the care persons of ordinary prudence generally exercise in regard to their personal affairs of minimal importance.

*Reasonable care,* also known as ordinary care, is the degree of care, diligence, or precaution that may fairly, ordinarily, and properly be expected or required in consideration of the nature of the action, the subject matter, and the surrounding circumstances.

*Great care* is the degree of care that persons of ordinary prudence usually exercise with respect to their personal affairs of great importance.

Another type of care is that which a fiduciary—a person having a duty, created by his or her undertaking, to act primarily for another's benefit—exercises in regard to valuable possessions entrusted to him or her by another.

## CARJACKING

*The criminal taking of a motor vehicle from its driver by force, violence, or intimidation.*

The U.S. JUSTICE DEPARTMENT categorizes the crime of carjacking as a "completed or attempted ROBBERY of a motor vehicle by a stranger to a victim." Carjacking incidents emerged in increasing numbers in the 1980s and 1990s, after their initial appearances in Detroit. According to a report filed with the Bureau of Justice Statistics in 1999, an average of 49,000 carjackings occurred in the United States each year between 1992 and 1996. During this time, about half of all attempted carjackings were successful, though the most carjackings (84 percent) did not result in injuries to the victims.

Carjackers are often thought by the public to target older persons, women, and tourists—groups of conspicuous vulnerability. However, statistics from 1992 to 1996 show that individuals between the ages of 25 and 49 were more likely to be the victims of such a crime (3.6 out of every 10,000 persons) than individuals ages 50 or older (0.9 out of every 10,000 persons). Moreover, males during this time span were more likely to be victims (3.1 out of every 10,000 persons) than females (1.9 out of every 10,000 persons).

The makes and models of the cars targeted for carjacking vary from city to city, and it is not only the expensive, top-of-the-line cars that are taken but also older and less pricey automobiles. This may be because carjackings are more crimes of opportunity than of premeditation. Carjackers simply wait for an unaware driver, an open window, or an unlocked door. According to the Bureau of Justice Statistics report in 1999, persons with an average annual income of between $35,000 and $49,999 were more likely to be victims (3.2 out of every 10,000) than those who made $50,000 or more per year (2.4 out of every 10,000).

Carjacking was formally introduced to Congress during its spring 1992 session by Representative Charles E. Schumer (D-NY). Over the next several months, a new law involving the crime was discussed and developed into the Anti-Car Theft Act of 1992 (18 U.S.C.A. § 2119). The focus was not entirely on carjacking, but rather on car theft, which had become the number one property crime in the United States, with automobiles constituting more than 50 percent of the property U.S. citizens lost to theft.

**Carjacking**

**U.S. HOUSEHOLDS TOUCHED BY MOTOR VEHICLE THEFT, 1992 TO 1996[a]**

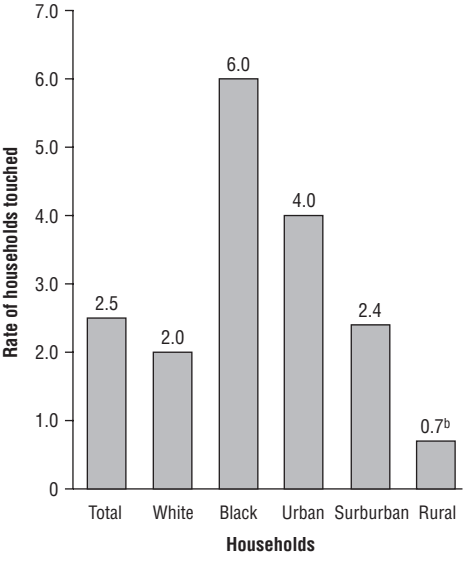


[a]Average number of crimes reported per year: 48,787
[b]Based on fewer than 10 sample cases.
Note: Based on National Crime Victimization Survey data. Does not include carjackings involving murder.

SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, *Carjacking in the United States, 1992–96*.

In the fall of 1992, Pamela Basu and her 22-month-old daughter were carjacked in Maryland. Basu was forced from her car by two men and, in a struggle to keep her daughter from being hurt, became caught in the seat belt outside the car. She was dragged almost two miles before she was freed from the seat belt; her daughter, still in her car seat, was thrown from the vehicle a short time later. Basu died of massive internal injuries; her daughter was physically unharmed. The publicity surrounding this crime helped fuel the movement that led to the passage of a provision in the Anti-Car Theft Act of 1992 that made carjacking a federal offense.

President GEORGE HERBERT WALKER BUSH signed the act into law on October 25, 1992. The statute's provision regarding carjacking was as follows:

> Whoever, possessing a firearm, as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—1) be fined under this title or imprisoned not more than 15 years, or both. 2) If serious bodily injury . . . results, be fined under this title or be imprisoned not more than 25 years, or both, and 3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

Within a few months of its passage, the federal carjacking statute was challenged under the DOUBLE JEOPARDY Clause of the U.S. Constitution. According to the FIFTH AMENDMENT, no person shall "be subject for the same offence to be twice put in jeopardy of life or limb," meaning that no one can be tried twice for the same crime. After the carjacking statute was passed, people who used a firearm during the commission of a carjacking were not only subject to punishment under that statute but also faced mandatory punishment under 18 U.S.C.A. § 924(c), which outlaws the use or carrying of a firearm in relation to a violent crime. The issue came to a head in *United States v. Singleton,* 16 F.3d 1419 (5th Cir. 1994), when the presiding judge ruled that both the firearm portion of the carjacking statute and the gun statute proscribed the same conduct, and Congress had not shown that it would impose cumulative punishment under these two statutes. Therefore, the gun count in the carjacking statute violated the Double Jeopardy Clause.

Within several months of *Singleton,* amendments to the carjacking portion of the Anti-Car Theft Statute were debated in the House of Representatives and Senate. The result was a provision in the VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994, Pub. L. No. 103-322, 108 Stat. 2119, which was signed by President BILL CLINTON. The provision made two significant amendments to 18 U.S.C.A. § 2119. The first was that a death sentence can be handed down in cases in which a carjacking victim is killed. The second was that "possessing a firearm, as defined under section 921 of this title" was deleted and replaced with "with the intent to cause death or serious bodily harm." This removed the double jeopardy problem identified in *Singleton.*

Although carjacking has been made a federal crime, several states also have legislation on the subject. One is Florida, which has a big tourist industry. In the late 1980s and early 1990s, an increasing number of tourists, most of them foreign, were victims of carjackings in Florida. Because tourists in well-marked rental cars were common carjacking victims, Florida passed legislation in 1993 (F.S.A. § 320.0601) that outlawed company logos and license plates that made rental and leased cars obvious. Florida's legislators felt that tourists warranted this extra protection for three main reasons. First, tourists are, more often than not, unfamiliar with the area and are more likely to become lost or end up in a high-crime area. Second, tourists often carry more cash than natives, which makes them prime robbery targets. And finally, fewer tourists are likely to return and testify in court about a crime. By granting tourists the right to drive unmarked rental cars, Florida made them less vulnerable to the crime of carjacking.

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Automobiles; Double Jeopardy.

## ♦ CARMICHAEL, STOKELY

African American activist, leader, and militant STOKELY CARMICHAEL is known for the galvanizing cry "Black Power!" which helped transform the later years of the CIVIL RIGHTS MOVEMENT. The raised fist that accompanied the slogan was a rallying point for many young African Americans in the late 1960s. Carmichael's forceful presence and organizing skill were compelling reasons to join. In 1966, he was elected chairman of the STUDENT NONVIOLENT COORDINATING COMMITTEE (SNCC), a CIVIL RIGHTS organization popularly called Snick. Leaving Atlanta-based SNCC in 1967 with a more radical vision, Carmichael became prime minister of the Oakland-based BLACK PANTHER PARTY FOR SELF-DEFENSE (BPP), perhaps the most militant of 1960s African American groups. Members of Congress denounced him for allegedly seditious speeches, other politicians and civic leaders blamed him for causing riots, and the FEDERAL BUREAU OF INVESTIGATION (FBI) matched this fervor with counterintelligence activities. Bitterly severing his ties with the BLACK POWER MOVEMENT in 1969, Carmichael announced that he would work on behalf of Pan-Africanism, a socialist vision of a united Africa. He moved to Guinea, West Africa, where he lived and worked until his death in 1998.

Carmichael was born in Port of Spain, Trinidad, on June 29, 1941. Two years later, he was placed in a private school, as his father, mother, and two sisters immigrated to the United States. At school he earned the nickname Little Man for his quick intelligence and precocious awareness, traits that had him urging his aunt to vote when he was turned away from polling booths at the age of seven. He received a British education at the Tranquillity Boys School, a segregated institution, from the age of ten to eleven, before nearly dying of pneumonia. As an adult, he would recall the Tranquillity School experience with bitterness for "drugging" him with white European views. His parents brought him and three sisters to live with them in Harlem in June 1952.

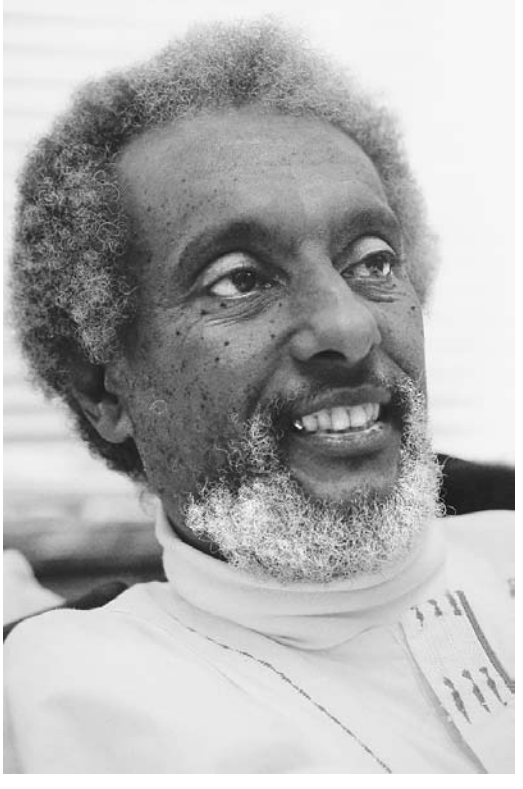

*Stokely Carmichael (Kwame Toure).*
AP/WIDE WORLD PHOTOS

In Harlem, he found conditions disappointingly different from those in Trinidad, where the black majority had found access to positions in elective government and professional employment. His mother, Mabel Carmichael, worked as a maid. His father, Adolphus Carmichael, who had been successful enough as a skilled carpenter to build a large house in Port of Spain, struggled at driving a cab to make ends meet but remained optimistic about the United States. For this dream, Carmichael later said, his father paid a high price, working himself to death, and dying the same way he began, poor and black.

By junior high school, Carmichael's disillusionment revolved around a life of marijuana, alcohol, theft, and a street gang of which he was the only nonwhite member. However, when he entered the respected Bronx High School of Science, his scholastic interests blossomed, and he began to read widely in politics and history. Social opportunities began to appear for him,

"AN ORGANIZATION WHICH CLAIMS TO SPEAK FOR THE NEEDS OF A COMMUNITY . . . MUST SPEAK IN THE TONE OF THAT COMMUNITY."
—STOKELY CARMICHAEL

too. Yet, later, he could not dispel a sense of alienation and anger. "I made the scene in Park Avenue apartments," he recalled in a 1967 interview. "I was the good little nigger and everybody was nice to me. Now that I realize how phony they all were, how I hate myself for it."

Social and political change were in the air as Carmichael was finishing high school. The civil rights movement was in full swing and a new generation of young African Americans began holding lunch counter sit-ins in segregated cafés and restaurants in the South. At first skeptical about these "publicity hounds," Carmichael changed his mind when he saw televised images of white students pouring sugar and ketchup on the heads of the peaceful protesters. By mid-1960 he was in Virginia taking part in a sit-in organized by the CONGRESS OF RACIAL EQUALITY (CORE), a civil rights group founded nearly two decades earlier. Beaten up during his first demonstration, Carmichael was undeterred. He attended more sit-ins and pickets, notably against the F.W. Woolworth Company in New York, as such demonstrations spread widely across the country, resulting in integrated businesses in several states.

Several scholarship offers awaited Carmichael, including one from Harvard. His decision to reject them in favor of attending Howard University in Washington, DC, marked a turning point in his life. In 1961, CORE sponsored trips by young activists to the South. Known as the Freedom Rides, these journeys were intended to fight SEGREGATION. As a freshman, Carmichael went along. He escaped the violent mob beatings that many of the activists suffered while white police officers watched and did nothing, but he and several other CORE activists were arrested in Mississippi, jailed for 53 days, zapped with cattle prods, and forced to sleep on hard cell floors. Such treatment was not the worst inflicted on the Freedom Riders: three were murdered. Released finally, he returned to the university and changed his major from medicine to philosophy, in which he took a bachelor's degree upon graduation in 1964.

Leaving Howard, Carmichael became an organizer with SNCC. Founded during his final year in high school, the group had emerged from meetings organized by ELLA J. BAKER, the associate executive director of the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (SCLC)—the civil rights organization of which MARTIN LUTHER KING JR. was president. SNCC contained the seeds of a major change in direction for the civil rights movement. As it grew in the early 1960s, SNCC attracted young volunteers who were impatient with the progress of older organizations such as CORE and the SCLC. It sent black and white young people from predominantly northern, middle-class backgrounds into rural areas of the Deep South, their goal being to educate illiterate farmers, increase voter registration, and set up health clinics. A field organizer for a SNCC task force in Lowndes County, Mississippi, Carmichael brought about noteworthy successes: the number of registered black voters increased from 70 to 2,600, a dramatic rise for a county in which African Americans outnumbered whites but had no share in political power.

In 1966, Carmichael was elected chairman of SNCC. The group's goal was evolving from INTEGRATION to liberation. In Mississippi, he had organized a political party called the Lowndes County Freedom Organization. Its symbol, a black panther leaping with a snarl, would become nationally recognized in the years to follow. So would the words Black Power! that Carmichael shouted to black sharecroppers as he and other participants in the JAMES MEREDITH Freedom March passed them in June 1966. The cross-state march was a project launched by Meredith, who had been the first African American to attend Mississippi University, to prove that black citizens could enjoy their rights in the state without fear. Such fear was well placed. On the second day, shotgun blasts badly wounded Meredith. As another march took place and more violence followed, "Black Power!" became the marchers' chant.

In Carmichael's view, black power meant several things: political power, economic power, and legal power. It was both local and international in scope. "We want control of the institutions of the communities where we live, and we want control of the land, and we want to stop the exploitation of non-white people around the world," he said. This control would be achieved by any means necessary, he promised, drawing on the famous words of the activist MALCOLM X. SNCC members carried guns for SELF-DEFENSE, a practice defended by Carmichael this way: "We are not [Martin Luther] King or SCLC. They don't do the kind of work we do nor do they live in the same areas we live in." In contrast to the harmonious message of King, Carmichael's rhetoric stirred fear and antagonism in many

members of the mass media, who quickly accused him of reverse racism. *Time* magazine dubbed him a black powermonger. As riots tore through major U.S. cities in the summers of 1966 and 1967, Carmichael was condemned for making inflammatory speeches that his critics said sparked them.

Within SNCC, more than rhetoric was changing. As the organization began to speak of oppressors and the oppressed, it also took practical steps that distanced it from older civil rights groups. Carmichael had SNCC pull out of the White House Conference on Civil Rights, a move that brought condemnation from the SCLC, the National Association for the Advancement of Colored People (NAACP), and the Urban League; CORE, however, was moving in the same direction. Support for SNCC began to dry up. Older black activists deserted the organization; white supporters withdrew funding. In late 1966, SNCC purged all white members from its ranks.

Law enforcement agencies turned their sights on the increasingly militant group. Fights between the group's members and police officers broke out in several cities. In August 1966, a raid by 80 Philadelphia police officers on a SNCC office resulted in several arrests and charges that dynamite was stored there. As a result, the city's mayor and chief of police tried to bar Carmichael from speaking in Philadelphia. He was soon arrested and convicted in Atlanta of inciting a riot. Federal authorities also became concerned. The FBI had begun surveillance of SNCC in 1960; now it stepped up the supervision. In the summer of 1967, COINTELPRO, the FBI's Counterintelligence Program, officially added SNCC to its list of revolutionary groups to monitor, infiltrate, and, if possible, discredit.

Stepping down from the SNCC chairmanship, Carmichael gave lectures on college campuses and traveled worldwide. To an international audience that viewed him as a revolutionary leader, he gave speeches in Europe, Africa, and North Vietnam. In a talk given in London in July 1967, he so enraged British political leaders that he was barred from entering more than 30 countries in the British Commonwealth. Harsh criticism in the U.S. press followed an appearance in Havana where he said, "We are preparing groups of urban guerrillas for our defense in the cities. . . . It is going to be a fight to the death." President Fidel Castro of Cuba offered Carmichael political ASYLUM, which he declined. Upon Carmichael's return to the United States on December 12, 1967, U.S. MARSHALS seized his passport. Lawmakers in Congress denounced him for TREASON and SEDITION, and, as a result, considered legislation favoring bans on travel by U.S. citizens to countries deemed enemies of the United States.

Overseas, Carmichael had espoused his view of Pan-Africanism. This political movement favored uniting African countries under a common socialist leadership. SNCC expelled Carmichael in August 1968, disagreeing with his political turn, but by this time he had already joined the BPP. Organized to prevent police brutality toward African Americans, the Black Panthers had adopted the symbol Carmichael popularized in Lowndes County, a leaping, snarling black panther. The BPP's members carried guns, demanded equality and justice, and occasionally exchanged gunfire with police officers, leading to the conviction of one of its

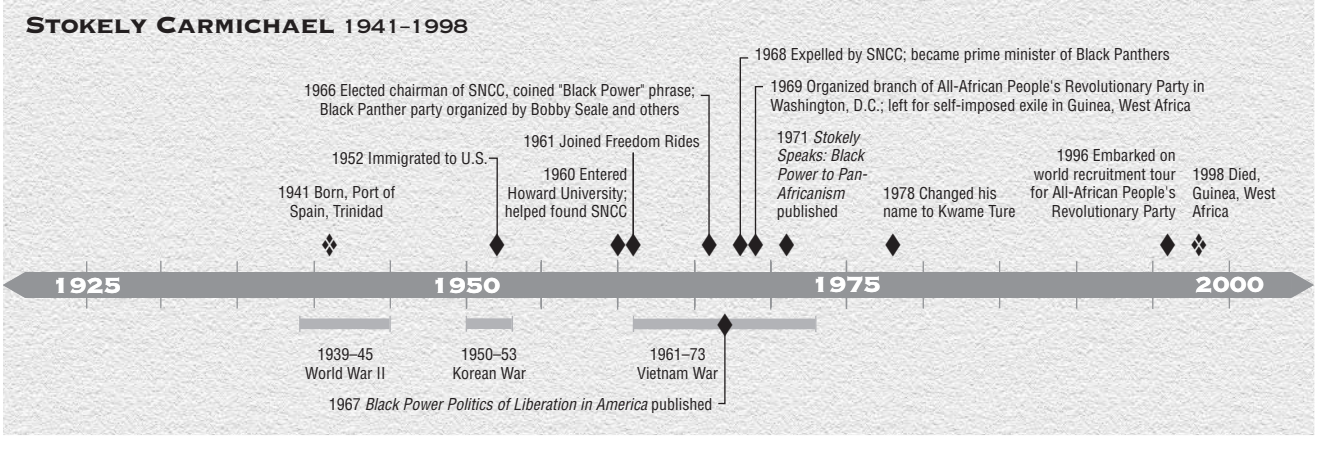

founders, HUEY P. NEWTON. As honorary prime minister of the BPP, Carmichael organized over two dozen chapters across the country.

Black power's growing appeal—and, in the eyes of many white U.S. citizens, its danger—seemed to reach a symbolic height at the 1968 Olympics. There, two medal-winning members of the U.S. Olympic Team raised their fists in expression of their solidarity with the movement, a protest that ended in U.S. officials stripping them of their medals.

Events during this period increased Carmichael's sense of alienation from the United States. He alleged that the FBI harassed him and his wife, Miriam Makeba, a South African–born singer, by following them wherever they went. Carmichael and Makeba felt that Makeba lost singing jobs and recording contracts because of Carmichael's notoriety. When the Black Panthers allied themselves with white radicals he broke with the organization. "The history of Africans living in the U.S. has shown that any premature alliance with white radicals has led to complete subversion of the blacks by the whites," he said in July 1969. He called upon all Africans "as one cohesive force to wage an unrelenting armed struggle against the white Western empire for the liberation of our people." His departure sounded a death knell for the black power movement; by the early 1970s it had all but vanished.

In 1969, Carmichael prepared to leave for self-imposed exile in Africa. Before going, he organized a branch of the All-African People's Revolutionary Party (AAPRP) in Washington, DC, a Pan-Africanist group established the previous year in Guinea, West Africa. After settling in Africa, he briefly returned to the United States in March 1970, and appeared before a congressional subcommittee on national security matters. Questioned about revolutionary groups in the United States, he pleaded the FIFTH AMENDMENT throughout the hearing. Back in Guinea, he worked for the AAPRP, taught at the university in Conakry, and, in 1978, changed his name to Kwame Ture, partly in honor of Sékou Touré, former president of Guinea, who was his friend and benefactor. Following the death of President Touré and the rise of the MILITARY GOVERNMENT in Guinea, he was jailed several times for unknown reasons.

Carmichael traveled and spoke in a number of countries since the 1980s. In 1982, the British Commonwealth briefly lifted its ban on his crossing its borders, but it quickly renewed the prohibition after he made a 1983 visit to Britain advocating international black solidarity and the overthrow of capitalism. British officials claimed that he urged black lawyers to throw bombs. Later, he paid several visits to the United States. In 1989, looking back on the accomplishments of the civil rights and black power movements, he expressed skepticism. Citing the 304 African American mayors then in office in the United States, he dismissed them as impotent to effect real change. "All of them singularly and in block are powerless inside the racist political structure of the U.S.A.," he said. "These African mayors represent the biggest cities . . . yet the conditions of the masses of our people are worse today in these very cities than before the advent of African mayors."

Carmichael and Makeba divorced in 1978 and he later remarried. He received an honorary doctor of law degree from Shaw University, in North Carolina, and authored two books, *Black Power: Politics of Liberation in America* (1967) and *Stokely Speaks: Black Power to Pan-Africanism* (1971).

In June 1998, Carmichael donated his papers to the Moorland-Spingarn Research Center of Howard University. He died on November 15, 1998, at the age of 57, of prostate cancer. In May 1999, Carmichael was posthumously awarded an honorary doctorate by Howard University and his friends and supporters began a drive to establish the Kwame Toure Work-Study Institute and Library in Conakry, Guinea.

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## CARNAL KNOWLEDGE

*Copulation; the act of a man having sexual relations with a woman.*

Penetration is an essential element of sexual intercourse, and there is carnal knowledge if even the slightest penetration of the female by the male organ takes place. It is not required that the hymen be ruptured or the vagina entered.

## CAROLENE PRODUCTS FOOTNOTE

See FOOTNOTE 4.

## ♦ CARPENTER, MATTHEW HALE

Matthew Hale Carpenter was born December 22, 1824, in Moretown, Vermont. He attended the U.S. Military Academy from 1843 to 1845 and was admitted to the Vermont bar in 1847. His real name was Decatur Merritt Hammond Carpenter and although he was educated in Vermont, he established his public career in Wisconsin.

In 1861 Carpenter served as JUDGE ADVOCATE general. He participated in the U.S. Senate, serving as senator from Wisconsin during the years 1869 to 1875 and 1879 to 1881.

His legal skills were displayed in his representation of Secretary of War William W. Belknap at the latter's IMPEACHMENT trial. In 1877 Carpenter acted as legal counsel to Democratic presidential candidate SAMUEL TILDEN during an inquiry held by the electoral commission concerning the contested election results. Tilden lost to RUTHERFORD B. HAYES by one electoral vote.

Carpenter died February 24, 1881, in Washington, D.C.

## CARPETBAG JUDGES

*Colloquial term used to describe northern judges during the post-Civil War era who traveled to the South to serve on southern courts, typically for personal gain. "Carpetbag" refers to the judges's practice of carrying their possessions with them in carpetbags.*

During the mid-1800s, judges were elected, and IMPEACHMENT proceedings were at that time an increasingly popular method for their removal. After the Civil War and the Reconstruction period, many judges—both black and white—served on the judiciary in the South. A large number of these judges were known as "carpetbagging" judges because they were northerners who had relocated to the South for personal gain, carrying all their possessions in a carpetbag. They were reputed to be dishonest and incompetent.

Threatened with impeachment, many of these judges left the bench. Not all the charges against the carpetbag judges were accurate, however, and a good number were not any worse than the judges who lived in the area. Several earned prominence, such as Moses Walker—a transient from Ohio—who contributed to the prestige of the Texas Supreme Court. Albion W. Tourgee, another carpetbagger, wrote several books about his years in the South. His most popular book was *A Fool's Errand,* published in 1879. Tourgee was highly regarded for his presentation of liberal opinions concerning interrelationships between blacks and whites.

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### CROSS-REFERENCES

Elections; Impeachment; Reconstruction.

## CARRIERS

*Individuals or businesses that are employed to deliver people or property to an agreed destination.*

The two main types of carriers are common carriers and private carriers. A *common carrier,* such as a railroad, airline, or business that offers public transportation, customarily transports property and individuals from one location to another, thus offering its services for the hire of the general population. A *private carrier* is employed by special agreement only and

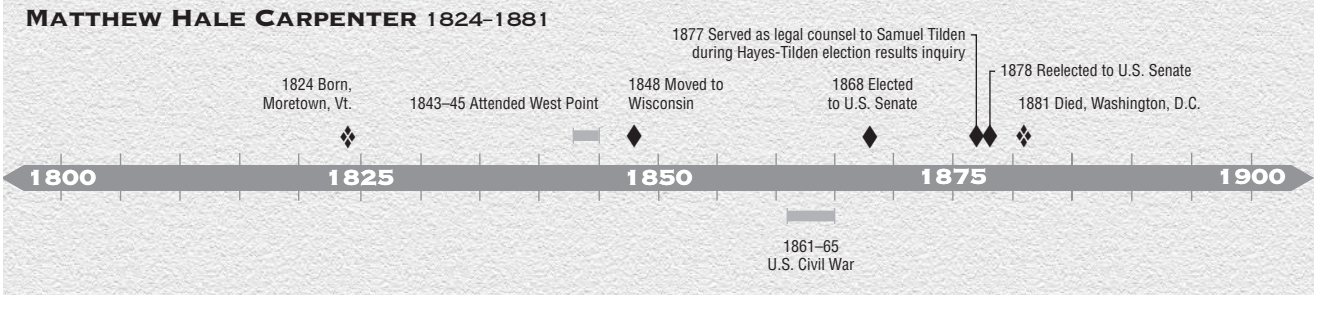

reserves the right to accept or reject employment as a carrier. Private carriers include chartered cargo planes, ships, and buses and are generally not subject to the same regulatory restrictions as common carriers.

Common carriers engaged in interstate transportation are regulated on the federal level pursuant to the COMMERCE CLAUSE of the U.S. Constitution, which provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce … among the several States" (art. I, § 8, cl. 3). The government, through the INTERSTATE COMMERCE ACT (49 U.S.C.A. § 10101 et seq.), traditionally regulated charges for interstate transportation by common carriers. Beginning in the late 1970s and early 1980s, however, deregulation of the trucking industry reduced government involvement in establishing rates. Unless a statute states otherwise, a common carrier has broad authority to fix transportation rates so long as the rates are reasonable. In determining whether a rate is reasonable, a number of elements are considered. The most essential is the cost of transportation to the carrier, and others include the character and value of the items to be shipped; their weight, bulk, and ability to be handled; and the mileage to be covered. Though common carriers have a great deal of freedom to set interstate rates, they must follow procedures set forth by the INTERSTATE COMMERCE COMMISSION, including filing rates with the commission and publishing them.

A state possesses the authority to monitor and control the management and functions of common carriers operating within its borders and may set the prices charged by carriers doing business within the state. Most state laws require common carriers to file rate schedules with a state regulatory commission.

A common carrier is obligated to provide the necessary facilities to transport the volume of goods expected and to exercise the reasonable care needed to transport the goods safely. In the case of perishable goods, such as frozen or fresh foods, the common carrier must provide refrigerated or ventilated cars to ensure their safe transportation. Likewise, when transporting livestock, a common carrier is required to provide adequate ventilation, bedding, and partitions. The common carrier may be liable for loss or injury to the livestock resulting from defects in the cars it uses to transport the animals.

The carrier must follow any specific shipping directives provided by the shipper and if any instructions are ambiguous, the carrier must hold the goods until the shipper provides clarification. The shipper can select the route and manner by which the goods can be transported, but if no route is specified, the carrier is free to choose any convenient route that does not result in delay to the shipper.

Subject to some exceptions, a common carrier is absolutely liable for loss or damage to the goods it receives for shipment. A common carrier is not liable for loss or injury to goods brought about by an act of God, an event such as an unforeseeable flood that could be neither caused nor prevented through the exercise of proper care on the part of the carrier. A carrier could, however, be liable for an act of God if it is guilty of NEGLIGENCE after the discovery of an accident. For example, a fire started by lightning would ordinarily be considered an act of God, but if the carrier discovered it early and did nothing to abate it, the carrier could still be liable for failing to exercise due diligence.

In addition, a common carrier is not liable for a loss of goods when the loss is caused by the destruction or appropriation of the goods by the military forces of a "public enemy" at war with the domestic government. However, merely a declaration of MARTIAL LAW will not relieve the common carrier of liability, and groups who are not functioning as military forces against the government are not considered public enemies. Thus, a common carrier remains liable for a loss of goods resulting from the acts of a mob, rioters, and strikers, even if the carrier was not negligent and took all possible precautions to prevent the loss.

A carrier will not be held liable for injuries to goods that occur as a result of the shipper's negligence or misconduct. Furthermore, when the nature or value of the goods to be shipped is fraudulently concealed or misrepresented by the shipper, whether to obtain a lower shipping rate or for any other purpose, the carrier is not liable for any losses incurred. FRAUD can be established by the shipper's silence regarding the value of the goods or by untruthful statements made by the shipper. If the shipper failed to notify the carrier about the nature of the contents of a particular shipment, the carrier is ordinarily exempt from liability if a loss occurs, even if the loss is due to negligence on the part of the carrier.

A common carrier can restrict its liability for damages by clear and unambiguous terms con-

tained in its contract with the shipper. Questions concerning the validity of such agreements are resolved by state law when shipments within a state are involved and federal law is applied to contractual disputes concerning interstate shipments. A contractual provision releasing the carrier from liability must not contravene public policy and a carrier that departs from the usual method or route for shipment may not rely upon any limitations on liability contained in the contract.

Some common carriers, like public buses and taxis, transport people from one place to another. A common carrier of passengers, also known as a *public carrier,* transports for hire all persons (within certain limitations) as a regular business and represents itself as being engaged in such a business. A public carrier can deny carriage to people who refuse to comply with its reasonable regulations, who are likely to present danger to other passengers, or who in some way interfere with the safe carriage of passengers.

Common carriers of passengers are subject to extensive regulation by state and federal governments. Many states, for example, require by law that common carriers be inspected annually in order to protect people from the hazards of riding in vehicles that are poorly maintained. A common carrier that transports passengers may also make its own rules and regulations provided they are reasonable and will protect the interests of both the carrier and the passengers.

A carrier of passengers is liable for injuries suffered by passengers as a result of its negligence but is not an insurer of its passengers' safety. Instead, a common carrier is required to act with the utmost care, skill, and diligence to protect the safety of its passengers as may be mandated by the type of transportation provided and the risk of danger inherent in it. Conversely, a private carrier of passengers must act with only reasonable care and diligence unless the contract for carriage provides otherwise, though some jurisdictions hold a private carrier to the same duty as that applied to common carriers.

Determining whether a carrier is a common carrier, and thus subject to a higher standard of care, was the subject of some litigation in the late 1990s. For example, a California federal district court held in early 1995 that Disneyland, as the operator of an amusement park ride, qualified as a common carrier and thus should be held to a duty of utmost care and diligence for the safety of its passengers even though the chief purpose of the ride was to entertain and not transport travelers (*Neubauer v. Disneyland,* 875 F. Supp. 672 [C.D. Cal. 1995]). As a result, Disneyland was held liable for injuries the plaintiffs suffered when their boat on an amusement ride was rammed from behind by another boat. The court looked to the broad definition of a common carrier contained in state law and held that any narrowing of the term *carrier* should take place in the legislature and not in the court.

Some courts have considered whether the age of the passenger affects the duty owed by a common carrier. The Iowa Supreme Court, for example, in 1995 considered whether a school bus owed an additional duty to a child injured as he was struck by a car after safely alighting the bus (*Burton ex rel. Hawkeye Bank of Des Moines v. Des Moines Metropolitan Transit,* 530 N.W.2d 696 [Iowa]). The court declined to extend the duty owed by drivers of school buses to ensure the safety of children alighting the vehicles, holding that the bus company had no duty beyond that owed by a common carrier to protect child passengers from dangers that may reasonably and naturally be anticipated. According to the court, once a passenger alights safely, the passenger (even when he or she is a child) is better able to guard against the danger of moving vehicles; thus, public policy did not support extending a carrier's duty of care to include ensuring that the passenger safely crosses the street.

Unless the carrier is negligent, it is not responsible to a passenger for injuries due to natural causes and due to causes beyond the carrier's control. A common carrier of passengers cannot ordinarily release itself from liability for injuries to a passenger caused by either willful, wrongful conduct or negligence on the part of the carrier. In some jurisdictions, though, a carrier can limit its liability for negligence in exchange for providing a reduced fare or free pass. However, such limitations on liability may be invalid if the reduced fare is not made optional and if passengers are not permitted to buy tickets that provide that the carrier's liability is not limited.

Like common carriers that transport goods, carriers of passengers have also been subject to deregulation by the federal government. The Airline Deregulation Act of 1978 (49 U.S.C.A. § 334, 1301 et seq.) gave airlines almost complete discretion over rates, routes, and services

offered. Prior to passage of the act, the Civil AERONAUTICS Board, a federal agency, exercised exclusive control over pricing in the airline industry.

Subsequent federal legislation also affected the responsibilities of carriers to their employees and passengers. In 1990 Congress enacted the Americans with Disabilities Act (ADA) (42 U.S.C.A. § 12201 et seq.), which prohibits employment discrimination against a qualified individual with a disability. The ADA further prohibits a carrier covered by the act from discriminating against a qualified individual with a disability because of that disability in regard to job application procedures, hiring, advancement, discharge, compensation, training, and other terms and conditions of employment. The ADA then sets forth in some detail the procedures that the carrier must follow in screening, interviewing, and hiring employees to ensure that individuals with disabilities are not subject to discrimination. In particular, the ADA requires that a carrier provide "reasonable accommodation" for the physical or mental limitations of a qualified applicant or employee with a disability unless the carrier can show that the accommodation would impose an "undue hardship" on business. According to the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, a reasonable accommodation is a modification or adjustment to a job, practice, or work environment that makes it possible for an individual with a disability to enjoy an equal employment opportunity. An undue hardship has been defined as an action that is unduly costly, extensive, substantial, or disruptive or that would fundamentally alter the nature or operation of the carrier's business.

The ADA has also affected the scope of a carrier's responsibility to its passengers. Under the ADA, carriers of passengers such as buses and rail systems must ensure that their facilities are readily accessible to and usable by individuals with disabilities by providing lifts, ramps, or other mechanisms. Airlines, which are not specifically covered by the ADA, are prohibited from discriminating against disabled individuals under the Air Carrier Access Act (ACAA), 49 U.S.C.A. § 1301 note, 1374, 1374 note, which was enacted in 1986. The ACAA provides that "[n]o air carrier may discriminate against any … handicapped individual, by reason of such handicap, in the provision of air transportation" (42 U.S.C.A. § 1374). Like the ADA, it further provides that air carriers must make "reasonable accommodations" for disabled individuals traveling by air.

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CROSS-REFERENCES

Airlines; Diligence; Disability Discrimination; Negligence; Railroad; Shipping Law.

## CARRIER'S LIEN

*The right of an individual or organization that publicly advertises itself for hire for the transportation of goods to keep possession of the cargo it has delivered to a destination until the person who is liable to pay the freight charges plus any other expenses incurred by its shipment has done so.*

Not all carriers are automatically entitled to have a lien for nonpayment of freight charges. A private carrier, one that does not offer its services to the public but transports goods pursuant to a special agreement, does not have a lien on property shipped unless provided by statute or under the terms of the carriage contract.

When a carrier retains goods under a lien it must exercise reasonable care to protect the cargo. It will be liable for any damage to such property that might have been avoided if ordinary precautions had been taken. Damages resulting solely from the detention of the property are the responsibility of the person who has failed to pay the freight charges; he or she must absorb that loss.

## ❖ CARRINGTON, EDWARD CODRINGTON

Edward Codrington Carrington was born April 10, 1872, in Washington, D.C. He was admitted to the Maryland bar in 1894 and established his legal practice in Baltimore, specializing in corporation law.

A supporter of the Progressive faction of the REPUBLICAN PARTY, Carrington served as campaign manager in Maryland for THEODORE

ROOSEVELT in the primary election of 1912 while a member of the Republican National Convention. During the same year, he advocated a Progressive National Convention and acted as a delegate to this convention. Carrington also served on the Progressive National Committee and headed the Progressive State Committee of Maryland.

Carrington initiated proceedings in Maryland to combine the Progressives once again with the Republicans, and in 1914 he was nominated by the Republicans for a seat in the U.S. Senate, but was defeated. He spent the remainder of his life as a participant in business activities, which included his service as president of the Hudson River Navigation Corporation.

On December 30, 1938, Carrington died in Baltimore.

## CARRINGTON REPORT

*A report delineating proposed changes in* LEGAL EDUCATION *submitted by Professor Paul D. Carrington of the University of Michigan School of Law, chairman of the Curriculum Study Project Committee of the Association of American Law Schools (AALS), to the AALS on September 7, 1971.*

The Carrington Report represented the combined efforts of a committee of legal scholars, but Professor Carrington, due to his role as chairperson, was instrumental in compiling the report. It aroused some controversy among legal educators and commentators at the time of its publication because of the extensiveness of its proposed changes in legal education, particularly in terms of revisions of law school curricula.

The Carrington Report challenges the traditional requirements for a law degree: four years of undergraduate study and three years of law school. The report indicates that the contents and length of the traditional program inhibit the prompt, competent, and efficient delivery of necessary legal services to society.

## CARRY-BACK

*The name given to the method provided under federal tax law that allows a taxpayer to apply net operating losses incurred during one year to the recomputation of* INCOME TAX *owed to the government for three preceding taxable years.*

## CARRY-OVER

*The designation of the process by which net operating loss for one year may be applied, as provided by federal tax law, to each of several taxable years following the taxable year of such loss.*

## CARRYING CHARGES

*Payments made to satisfy expenses incurred as a result of ownership of property, such as land taxes and mortgage payments. Disbursements paid to creditors, in addition to interest, for extending credit.*

CONSUMER PROTECTION laws require full disclosure of all carrying charges.

## ◆ CARSWELL, GEORGE HARROLD

Through an unexpected appointment, G. Harrold Carswell secured nomination on January 19, 1970, to serve on the U.S. Supreme Court. The appointment by President RICHARD M. NIXON came a mere six months after Carswell was named to the federal appeals court. During highly politicized Senate confirmation hearings, the Republican nominee faced skepticism and concern over his qualifications for the Supreme

"I AM A SOUTHERNER BY ANCESTRY, BIRTH, TRAINING, INCLINATION, BELIEF, AND PRACTICE."
—GEORGE CARSWELL

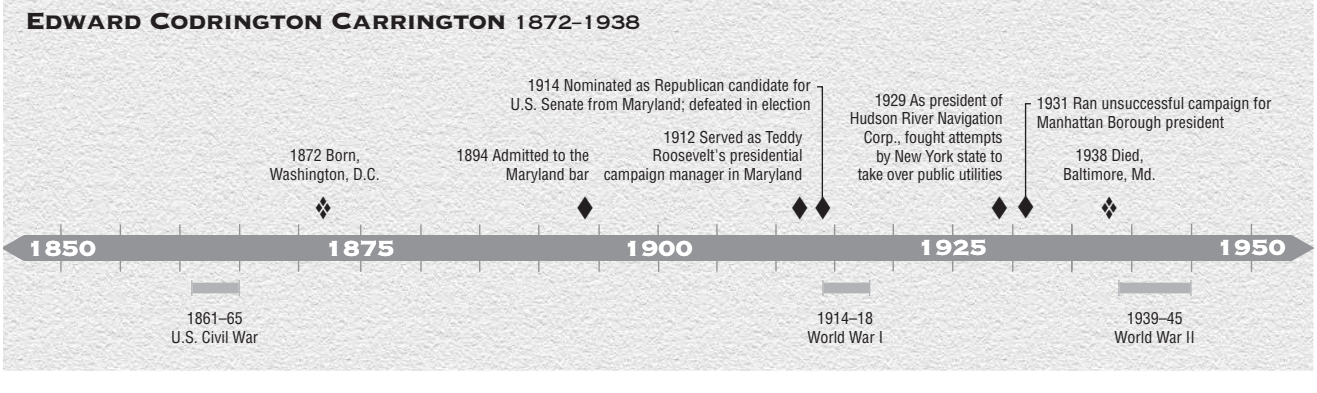

Court. In the end, Carswell was unable to overcome the opposition to his appointment. On April 8, 1970, he became the second Nixon-appointed candidate to be rejected for the U.S. Supreme Court by the U.S. Senate.

Carswell was born December 22, 1919, to a prominent family in Irwinton, Georgia. After graduating from Duke University in 1941 and from Mercer Law School in 1948, Carswell became a trial attorney in private practice. In 1953, he was appointed by President DWIGHT D. EISENHOWER as U.S. attorney for northern Florida. Carswell held that post until 1958 when he was appointed by Eisenhower to the U.S. District Court for the Northern District of Florida. At age thirty-eight, he was the nation's youngest federal judge. In 1969 Carswell was appointed by Nixon to the U.S. Court of Appeals for the Fifth Circuit.

Carswell's ascent to the U.S. Supreme Court came on the heels of Nixon's ill-fated nomination of CLEMENT F. HAYNSWORTH JR. of South Carolina. Nixon had nominated Haynsworth to fill the associate justice seat vacated by ABE FORTAS, who had resigned from the High Court in 1969 under a cloud of ethical violations. Haynsworth, a conservative southerner and a judge on the U.S. Court of Appeals for the Fourth Circuit, had failed to win Senate confirmation by ten votes.

By most standards Carswell was a jurist of marginal talents. In addition, evidence of racist conduct during the 1940s and 1950s brought Carswell's fitness for the bench into serious question. His critics noted that as a lower-court judge Carswell had demonstrated a marked bias against African Americans. In addition, Carswell had made white supremacist comments during a 1948 campaign speech and had attempted as a U.S. attorney to prevent the INTEGRATION of a public golf course. Although Carswell renounced the bigotry of his past, the damage to his reputation was irreparable.

Carswell also suffered a reputation as a legal lightweight. His opponents noted that a dismal 58 percent of Carswell's judicial decisions had been overruled by higher courts. In a vote of no confidence, the Ripon Society, a Republican group, rated Carswell's performance as a federal judge well below the average level of competence.

Carswell performed poorly during the SENATE JUDICIARY COMMITTEE hearings, reinforcing the assertion of his critics that he was an inept nominee. His confirmation chances were further weakened by a much-quoted observation offered in his support by Republican senator Roman Hruska, of Nebraska. The Midwestern politician argued that even if Carswell was mediocre, there were lots of mediocre judges, lawyers, and citizens who were entitled to some representation. Hruska went on to note that not all Supreme Court judges could be Brandeises, Frankfurters, and Cardozos.

A slim majority of senators refused to support a jurist who failed to meet high standards. On April 8, 1970, the Senate voted 51–48 to reject Carswell's nomination. Despite Nixon's dogged insistence that Carswell was a qualified candidate, thirteen Republican senators voted against his confirmation.

Nixon defended his unsuccessful nominee. Refusing to admit his candidate's shortcomings, the president claimed that Carswell was opposed by the Senate because he was a conservative southerner and a believer in the "strict construction," or literal interpretation, of the U.S. Constitution. Nixon's third nominee, HARRY A.

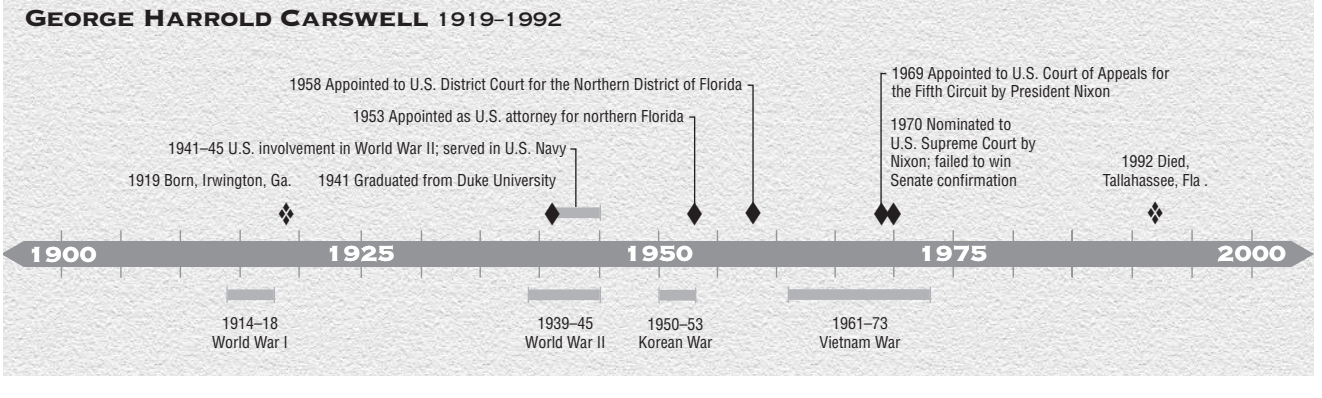

BLACKMUN, of Minnesota, met with Senate approval and was confirmed without major incident.

Shortly after his defeat Carswell resigned from the federal appeals court and announced his candidacy for U.S. senator from Florida. Carswell's senatorial bid did not succeed and he returned to private law practice in Tallahassee.

Carswell died in 1992.

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## CARTEL

*A combination of producers of any product joined together to control its production, sale, and price, so as to obtain a* MONOPOLY *and restrict competition in any particular industry or commodity. Cartels exist primarily in Europe, being illegal in the United States under* ANTITRUST LAWS. *Also, an association by agreement of companies or sections of companies having common interests, designed to prevent extreme or* UNFAIR COMPETITION *and allocate markets, and to promote the interchange of knowledge resulting from scientific and technical research, exchange of patent rights, and standardization of products.*

*In war, an agreement between two hostile powers for the delivery of prisoners or deserters, or authorizing certain nonhostile intercourse between each other that would otherwise be prevented by the state of war, for example, agreements between enemies for intercommunication by post, telegraph, telephone, or railway.*

Although illegal in the United States, foreign cartels influence prices within the United States on imported and smuggled goods that they control. The United States has sued the De Beers diamond cartel several times, and works to stop the flow of illegal narcotics, whose production and distribution are largely controlled by drug cartels.

## CARTER, JAMES COOLIDGE

James Coolidge Carter was a lawyer and leading legal scholar and philosopher of the late nineteenth century.

Born into a poor family on October 14, 1827, in Lancaster, Massachusetts, Carter attended Derby Academy in Hingham, Massachusetts. In 1846 he entered Harvard College. An outstanding student, he graduated fourth in his class in 1850. He then moved to New York City to work as a private tutor and to study law. He returned to Cambridge a year later and enrolled in what was then known as the Dane Law School at Harvard, graduating in 1853. Carter was then admitted to the New York state bar and clerked briefly before founding the firm of Scudder and Carter. He remained associated with the firm for the next fifty-two years.

Carter quickly emerged as a highly skilled and sought-after lawyer. He also became a prominent leader of the New York bar, helping to form the Association of the Bar of the City of New York and serving as the association's president for five terms. He had a strong interest in municipal reform and in 1875 he was appointed by the governor to a commission charged with devising a plan of government for the cities of New York State. He also helped found the National Municipal League and was its president for nine years. Later in his career Carter achieved national prominence as president of the AMERICAN BAR ASSOCIATION from 1894 to 1895 and for his appearance as counsel for the United States before the Bering Sea Fur-Seal Tribunal of

"THE FUNCTION OF LAW [IS] THE MARKING OUT OF THE LARGEST AREA WITHIN WHICH EACH INDIVIDUAL COULD MOVE FREELY AND ACT WITHOUT INVADING THE LIKE FREEDOM IN EVERY OTHER—THAT IS, TO INSURE THE LARGEST POSSIBLE FREEDOM."
—JAMES COOLIDGE CARTER

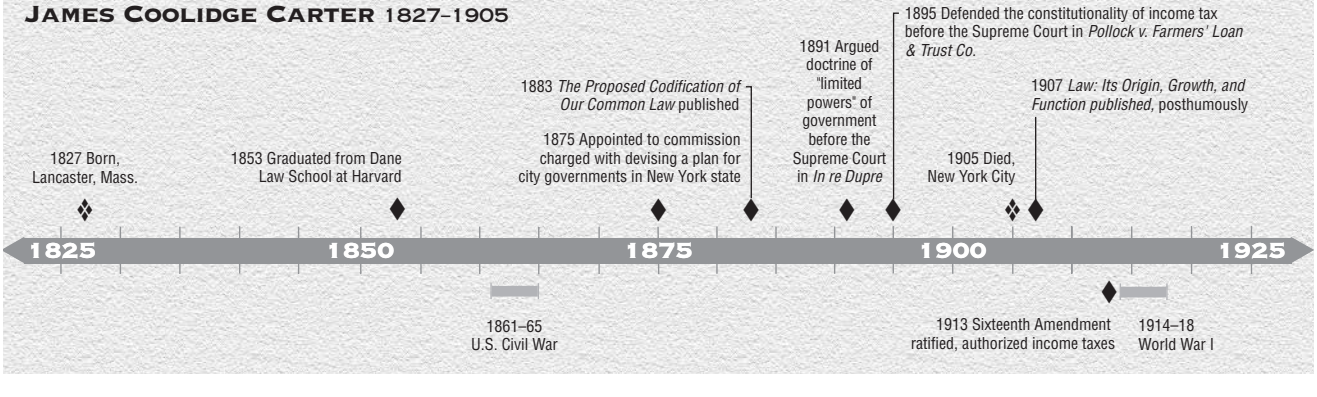

Arbitration in 1893. Carter's opening argument before the tribunal in Paris reportedly lasted seven days.

In addition to his involvement in municipal affairs, Carter devoted his energies to organizing opposition to a proposed civil code for the state of New York. Carter had long been an opponent of the code of procedure, which had been part of the law since 1846, calling it an embarrassment to the practicing bar. In 1883, he authored *The Proposed Codification of Our Common Law,* a widely distributed pamphlet outlining his views, which was influential in the code's eventual defeat in the state legislature. Carter believed that any scheme to reduce the law to statutes was fundamentally unsound and simply could not be carried out. Even if it could be accomplished, he argued, CODIFICATION was undesirable because "[l]aw is not a command or body of commands, but consists of rules springing from the social standard of justice or from the habits and customs from which that standard has itself been derived." He went on to write and speak extensively on the issue of codification throughout his life and his lectures were published after his death as *Law: Its Origin, Growth, and Function* (1907).

Carter strongly believed in restraints on legislative powers and he applied his legal philosophy to important cases he argued before the U.S. Supreme Court. In *In re Dupre,* 143 U.S. 110, 12 S. Ct. 374, 36 L. Ed. 93 (1891), Carter argued that Congress lacked the authority to prohibit as criminal the use of the mails for the circulation of lottery tickets. According to Carter, the federal government could use the powers granted to it by the Constitution for only limited purposes, and to exceed such limits through the law in question usurped the powers reserved to the states under the TENTH AMENDMENT. Carter's doctrine of "limited powers" would be used by other lawyers and scholars to restrict congressional control over interstate commerce and taxes.

Carter again argued for a limited government role in *Smyth v. Ames,* 169 U.S. 466, 18 S. Ct. 418, 42 L. Ed. 819 (1898), in which the U.S. Supreme Court considered whether Nebraska could force its railroads to lower their shipping rates in an attempt to ease economic conditions for farmers. Carter, one of several prominent lawyers representing the railroads, maintained that the shipping charges should be determined not by the state but by "laissez-faire" economics and free competition, which would prevent the imposition of high rates. The Court struck down the law at issue as unconstitutional, but also set guidelines for rate regulation by the states so that future court challenges could be avoided.

Carter created somewhat of a stir among his fellow legal scholars when, in what initially appeared to be a drastic departure from his usual views, he joined a team of other prominent lawyers to defend the constitutionality of an INCOME TAX before the U.S. Supreme Court in POLLOCK V. FARMERS' LOAN & TRUST CO., 158 U.S. 601, 15 S. Ct. 912, 39 L. Ed. 1108 (1895). Carter argued that the legislature's action in passing the tax must be given due weight and should not be subject to review by a judicial tribunal. Just as government should play a limited role, he contended, the courts' role should be likewise restricted. He argued that the courts should refrain from engaging in "judicial lawmaking" and said, "nothing could be more unwise and dangerous—nothing more foreign to the spirit of the Constitution—than an attempt to baffle and defeat a popular determination by a judgment in a lawsuit . . . the only path to safety is to accept the voice of the majority as final." The Supreme Court went on to strike down the general income tax enacted by Congress and held that taxes on income derived from real estate and PERSONAL PROPERTY constituted direct taxes and thus must be apportioned among the states according to population. The decision was effectively negated by the adoption and ratification in 1913 of the SIXTEENTH AMENDMENT, which exempted income taxes from the Constitution's APPORTIONMENT requirement, but *Pollock* was nevertheless long remembered because of the fervor with which it was argued by Carter and the other attorneys involved.

After his retirement from the PRACTICE OF LAW, Carter devoted his time to writing and studying and remained a popular lecturer until his death in 1905 at the age of seventy-eight.

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## ♦ CARTER, JAMES EARL, JR.

As the 39th president of the United States, Jimmy Carter represented a historical change in national politics. He was the first modern president to be elected from the Deep South. Following a successful career in Georgia—where he was a peanut farmer, state senator, and then governor—Carter entered the White House in January 1977 as a political outsider at a time of distrust in elected officials. His Baptist upbringing guided him in his vision of the office as a post to be used for the nation's moral leadership. However, his presidency was one of only limited success in both its domestic and international endeavors, and voters rejected him for a second term in 1980 by electing RONALD REAGAN in a landslide that marked a new era of Republican control of the EXECUTIVE BRANCH. After leaving Washington, D.C., Carter began a revitalized public life as a prominent HUMAN RIGHTS activist and diplomat, addressing problems of war, famine, and repression around the globe.

The small farming town of Plains, Georgia, was Carter's birthplace on October 1, 1924. James Earl Carter Sr., a veteran of WORLD WAR I, farmed cotton and had a general store. He was conservative, strict, and a firm believer in his son, whom he nicknamed "Hot," for Hotshot—because, Carter said, "Daddy never assumed I would fail at anything." Lillian Gordy Carter was a registered nurse. As devout Baptists, the parents expected much from Carter and their three other children. Religion meant steadfastness and a call to charity, as Carter's mother demonstrated by caring for patients without charge. Archery, their community, was predominantly African American. The young Carter worked and played with his black neighbors and, like them, lived without household plumbing or electricity. The experience, along with the virtues of hard work, frugality, and aspiration taught by his parents, shaped the politician he later became. After graduating at the top of his high school class, Carter paid for college with money he had earned and invested by selling peanuts as a boy.

Carter's ambition was naval service. Preparing to enter the U.S. Naval Academy at Annapolis, Maryland, he studied mathematics at Georgia Southwestern College and then the Georgia Institute of Technology. In 1943, he entered Annapolis; he graduated in the top tenth of his class with a bachelor of sciences degree. Soon he married a long-time acquaintance, Rosalynn Smith, and began in earnest to pursue his career in the U.S. Navy. He worked as an instructor, saw battleship and submarine duty, and ultimately qualified as a sub commander. He served as senior officer aboard the *Sea Wolf,* the navy's second atomic submarine. He left the service in 1953 after attaining the rank of lieutenant.

*Jimmy Carter.*
LIBRARY OF CONGRESS

"AMERICA DID NOT INVENT HUMAN RIGHTS. IN A VERY REAL SENSE . . . HUMAN RIGHTS INVENTED AMERICA."
—JIMMY CARTER

The decision to walk away from a promising career came when Carter faced a personal crossroads. His father had died, leaving a powerful legacy: the one-time cotton farmer had become a successful warehouse operator, peanut seed seller, and, finally, member of the Georgia House of Representatives. Carter now followed his father's example in business and politics. In his first year as a peanut farmer, he scratched out an income of $200, yet soon the business flourished. Success in political life took longer. Carter quickly became active in civic affairs. He opposed SEGREGATION, scorned the local White Citizen's Council, and tried to integrate his church. In the 1950s South, such views spelled trouble. When he ran for the Democratic nomination for the state senate in 1962 his opponents stuffed ballot boxes to defeat him. Only after a long legal fight did a court invalidate the nomination because of FRAUD and turn it over to Carter. He won the election.

State politics established Carter nationally. In two terms as a state senator, from 1962 to 1966, his political philosophy was traditionally liberal yet also bore the mark of a technocrat: he advocated CIVIL RIGHTS, WELFARE, and open government, while insisting on careful budgeting to ensure fiscal responsibility. In 1966, his first run for the governor's office failed but he won the election in 1971. Representing broad political and social changes shaping the region, Carter's governorship helped shake Georgia out of its segregationist past; he appointed African Americans to state government and fostered biracial cooperation through citizens groups. As an administrator he specialized in micromanagement, ordering frequent, strict review of all publicly funded programs. By 1974 Carter was rising within the national DEMOCRATIC PARTY. His exposure grew as he served as chairman of its campaign committee, and, fulfilling an ambition that began with his election as governor, announced his candidacy for president.

Carter's campaign message was integrity. The United States had just suffered through the VIETNAM WAR and the WATERGATE scandal, producing widespread cynicism concerning elected officials. Carter's opponent, GERALD R. FORD, had pardoned Nixon, the man behind Watergate. Carter positioned himself as an honest, openly religious man beyond the political intrigues of Washington. The peanut-farmer-turned-governor seemed to promise a new voice in government and a new set of ideals. At the start of the campaign voters responded eagerly: Carter and his running mate, Walter F. Mondale, led the incumbent, Gerald Ford, and his running mate, BOB DOLE, by 30 percentage points. By election day, however, the race was a dead heat. Carter won by the smallest margin since the first World War—57 ELECTORAL COLLEGE votes. The new president walked along Pennsylvania Avenue in his inaugural parade, making a symbolic gesture that would be repeated in the thoroughly populist trappings of the Carter White House—fireside chats and radio call-in shows, simple furnishings, and fewer limousines. "We must adjust to changing times," he said in his inaugural speech, "and still hold to unchanging principles."

Carter's domestic policies focused on civil rights, welfare, tax reform, and budgetary control. Almost immediately, however, two major domestic concerns began to dictate his agenda. One was the nation's energy supply. In the late 1970s a severe energy crisis produced the worst fuel shortage in U.S. history coupled with rising international prices for oil. Congress cooperated with Carter's remedies by approving fuel conservation policies, deregulating natural gas prices, and passing a windfall tax on oil company profits. He did not get everything he wanted: a federal court blocked his attempt to decontrol domestic oil prices and Congress denied him authority for gasoline rationing. The second major problem was the economy, which worsened over the course of his term. His efforts to fight inflation—especially controls on consumer credit—produced a recession. Voters grew disgruntled. His approval rating fell and a July 1979 speech in which he blamed the nation's problems on a spiritual "malaise" was disastrous: afterward, a *New York Times* poll showed that for the first time ever, U.S. citizens, who traditionally had responded 2–1 that they were optimistic about the future, now said nearly 2–1 that they were pessimistic.

Foreign policy gave Carter triumphs and failures. He made human rights a top priority in the relationships between the United States and foreign nations, directing SECRETARY OF STATE Cyrus R. Vance to set a new standard: social and economic rights were to be as important as political and civil rights. Liberals praised the policy; conservatives attacked it as muddled and inconsistently applied. Critics were divided over a controversial treaty with Panama to relinquish control of the Panama Canal by 2000, a move the U.S. Senate barely approved. Carter's indisputable triumph was a peace treaty he secured between long-time enemies Israel and Egypt. But he took much of the blame for a seizure of the U.S. Embassy in Tehran by Iranian militants in November 1979. A military rescue mission in 1980 failed and the 52 U.S. hostages were released only after Carter left office.

Further weakening the presidency were scandals within the administration. Andrew Young, his ambassador to the UNITED NATIONS, resigned amid revelations that he had secretly met members of the Palestine Liberation Organization, in violation of U.S. policy. Bert Lance, director of the OFFICE OF MANAGEMENT AND BUDGET, also resigned in disgrace; he was charged with unethical conduct in his former banking career. And Carter's brother, Billy Carter, caused the president embarrassment. Often seen as a comical figure who had cashed

in on Carter's fame by lending his name to a drink called "Billy Beer," Billy was revealed to have conducted business with Libya, an enemy nation. A Senate subcommittee report on the incident blamed Carter for not reining in his brother.

By late 1980, Carter had the lowest approval rating of any U.S. president in modern history. Even after an extensive cabinet shake-up, his administration was in disarray. Critics lambasted his policies and, particularly, his methods: he was considered to be too mired in details to execute bold decisions. Editorial cartoonists frequently lampooned him as either a country bumpkin or a hapless, childlike figure, echoing the prevailing sentiment that Carter was incapable of running the country. To make matters worse the Democratic Party effectively deserted him. Senator **EDWARD M. KENNEDY** (D-Mass.) nearly captured the party's presidential nomination and his supporters gained control of the party's platform over Carter's objections. Republicans sensed a bloodbath, and they got it in Ronald Reagan's landslide victory.

Typical of the post-Carter-era assessments was that of historian Burton I. Kaufman, whose 1993 book, *The Presidency of James Earl Carter,* scathingly judged Carter as "lacking in leadership, ineffective in dealing with Congress, incapable of defending America's honor abroad, and uncertain about its purpose, priorities and sense of direction." Carter's defenders have largely chosen to blame his 1980 loss on intractable national problems that he did not create as well as on the overwhelming popularity of his opponent. "He didn't have the charisma of a Reagan," **THOMAS P. "TIP" O'NEILL JR.**, former Democratic Speaker of the House, observed. "He couldn't pull it off." Some inside observers saw Carter's presidency as less a failure than a poor match of his abilities. The author Hendrik Hertzberg, a former Carter speechwriter, argued, "He was, and is, more of a moral leader than a political leader."

Although Carter's return to Georgia after his 1980 defeat might have been ignominious, it proved otherwise. After his departure from Washington, Carter immersed himself in scholarly and humanitarian pursuits. He worked at Emory University as a professor and later as a visiting lecturer. In conjunction with Emory he established the Carter Center which is a nonprofit organization dedicated to advocating for human rights, conflict resolution, and the enhancement of democracy, along with the creation of initiatives to improve health.

Carter and his wife, Rosalynn, are particularly committed to providing housing for those who are in need, both in the United States and abroad. They work closely with the nonprofit group Habitat for Humanity, and they established the Jimmy Carter Work Project, which has built homes in the United States as well as in the Philippines, South Korea, and South Africa. "This is the kind of thing I enjoy doing. The alternative is to loaf around the house and spend my time playing golf or fishing," Carter told a Canadian newsweekly.

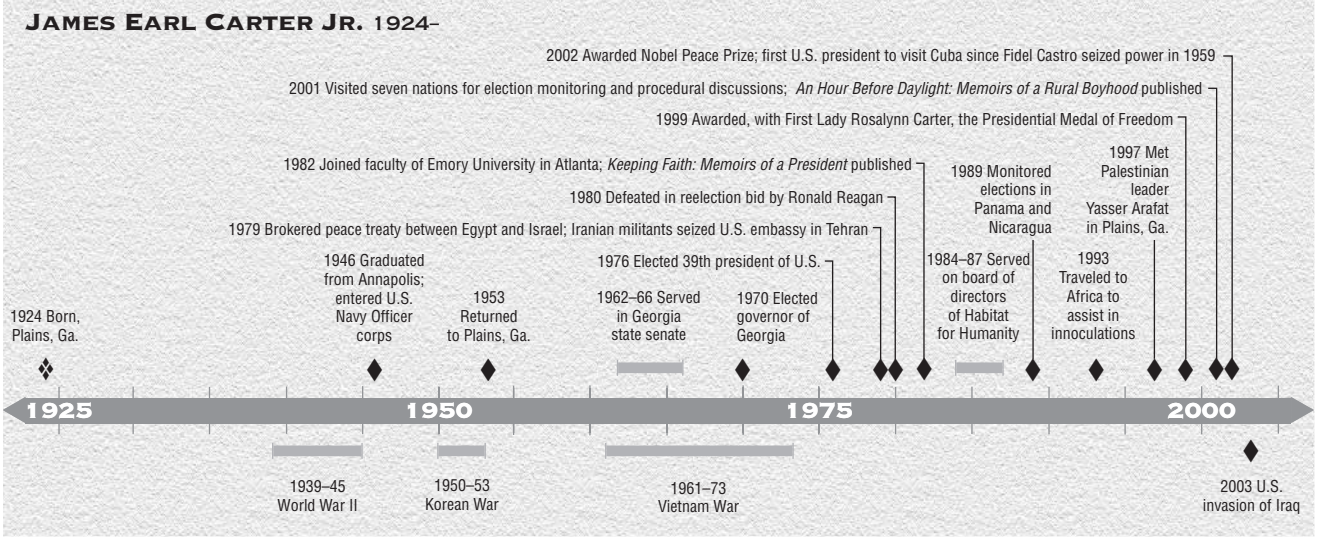

Always the diplomat, Carter remained a force in world affairs with human rights as his focal point. He monitored elections in Central America; negotiated further peace in the Middle East; supervised inoculation programs for children in Africa and elsewhere; and traveled on diplomatic missions to North Korea, Bosnia, Haiti, and the Sudan. In 1999, President BILL CLINTON presented Carter and former first lady Rosalynn Carter with the nation's highest civilian award, the Presidential Medal of Freedom.

Traveling as a private citizen, Carter visited Cuba in May 2002 and met with President Fidel Castro. Carter, who had voiced his opposition to the continuing embargo of Cuba by the United States, expressed his interest in meeting with religious groups and human rights activists. His efforts to mend relations with Cuba did not prevent Carter from criticizing Cuba's communist system. He openly promoted the Valera Project, a reform movement proposed by Cuban dissidents calling for social change and such basic rights as free speech.

Carter also continues to be a prolific author. While teaching at Emory, he wrote several books whose topics ranged from politics to poetry. In 2001, Carter published a well-received autobiography titled *An Hour Before Daylight: Memories of a Rural Boyhood,* which was nominated for the Pulitzer Prize. With the release of his historical novel *The Hornet's Nest,* in 2003, Carter became the first president to publish a work of fiction.

In December 2002, Carter was presented with the Nobel Peace Prize. The selection committee noted Carter's tireless efforts to help bring about the 1979 Camp David peace accord between Israel and Egypt as well as his consistent attempts to mediate and ameliorate international problems. In his acceptance speech, Carter explained that he has come to see the concept of peace as one that embraces the need for shelter, food, HEALTH CARE, and the opportunity for economic development.

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## CARTER, ROBERT LEE

Robert Lee Carter is a federal district court judge who, as counsel for the National Association for the Advancement of Colored People (NAACP), played a pivotal role in the SCHOOL DESEGREGATION cases of the 1950s. Carter argued BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), before the U.S. Supreme Court.

Carter was born March 11, 1917, in Careyville, Florida. As a child he moved to New Jersey, where he attended public schools in Newark and East Orange. He received his bachelor of arts degree from Lincoln University, in Pennsylvania, in 1937, then went on to earn a bachelor of laws degree from Howard University Law School, graduating magna cum laude in 1940. He also earned a master of laws degree from Columbia University in 1941.

With WORLD WAR II heating up, Carter entered the Army Air Force where he encountered racism and SEGREGATION. During his time in the army he pressed charges against two white soldiers who had harassed him with racial slurs. He also refused to live off base as black soldiers were required to do. Because of his outspoken defiance of segregation he was transferred to a different base. Later he successfully defended a black soldier charged with raping a white woman. In retaliation for his participation in the case he was given an administrative discharge, which is neither honorable nor dishonorable and leaves the recipient open to being drafted. He enlisted the help of his mentor and former law professor, WILLIAM H. HASTIE, who would later become the first African American to sit as a lifetime federal judge outside the Virgin Islands. Hastie represented Carter in a petition before the discharge review board, which finally granted Carter an honorable discharge. When Carter left the army, he had achieved the rank of second lieutenant.

After leaving military service, Carter became assistant special counsel with the NAACP Legal Defense Fund (LDF), a position he held from 1945 to 1946. In 1948, he became director of veterans' affairs for American Veterans (AMVETS), where he served until 1949.

In 1950, Carter returned to the NAACP and joined the fight for CIVIL RIGHTS. In 1951, he brought an innovative challenge to the SEPARATE-BUT-EQUAL doctrine when he summoned social scientist Kenneth B. Clark as a witness for the plaintiffs in *Briggs v. Elliott* (98 F. Supp. 529

[E.D.S.C. 1951]). Clark testified that his research with black children indicated that their self-image and self-esteem were damaged by any system that separated them from their white peers, whether the system was equal or not. At the time, this was highly unorthodox evidence to present at trial. Although the court ruled against the plaintiffs in *Briggs,* "by holding that segregation of the races in the public schools, as required by the federal constitution and South Carolina state law, was not of itself a denial of the EQUAL PROTECTION of the laws guaranteed by the Fourteenth Amendment," Clark's testimony had set the stage for the arguments that would be presented in *Brown* and other school desegregation cases. *Briggs* was later appealed with several other cases, including *Brown,* which Carter argued and won. His victory in *Brown* established him as a preeminent civil rights attorney and he went on to participate in the appeals of scores of other cases.

Carter continued as an assistant special counsel with the NAACP until becoming general counsel in 1956. He remained with the NAACP for 13 more years before leaving to enter private practice. During his years of practice Carter argued 22 cases before the Supreme Court, winning all but one.

In 1972, President RICHARD M. NIXON appointed Carter to be a U.S. district judge for the Southern District of New York. During his long and distinguished career, Carter has received numerous awards and recognitions. He was named a Columbia University Urban Fellow (1968–69) and has served as an adjunct professor at New York University Law School (1965–70), Yale University (1975–77), and the University of Michigan Law School (1977). In 1991, he served as a Shikes Fellow at Harvard University. He holds honorary degrees from numerous institutions including Howard University School of Law; Lincoln University, in Pennsylvania; Northeastern University; and the College of the Holy Cross. Carter was a recipient of Howard University's Alumni Award for Distinguished Postgraduate Achievement. In 1995, the Federal Bar Council awarded its Emory Bucknor Medal for Outstanding Public Service to Judge Carter.

In December 1986, Carter became a senior judge on the court and since then, has continued to be actively involved in a number of important cases. One example included a 25-year-old discrimination case where a New York City sheet metal workers union was ordered to make millions of dollars in back pay to minority workers who claimed that they were denied work opportunities. In 2001, Carter presided over the four-week trial of former Teamster president Ron Carey on federal perjury charges. The trial, which was interrupted by the September 11, 2001, attack on the World Trade Center, ended in an acquittal for Carey.

Along with his work on the bench, Carter also continued to lecture in the United States and abroad, publish articles and essays in numerous publications, and sit on boards, committees, and task forces devoted to ending discrimination and furthering social justice.

"THE *BROWN* DECISION WAS HISTORIC, NOT BECAUSE OF WHAT IT HAS ACCOMPLISHED IN THE FIELD OF EDUCATION, BUT BECAUSE OF THE TRANSFORMATION IT HAS MADE IN THE WHOLE COMPLEX OF RACE RELATIONS IN THIS COUNTRY."
—ROBERT CARTER

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Marshall, Thurgood; Warren Court.

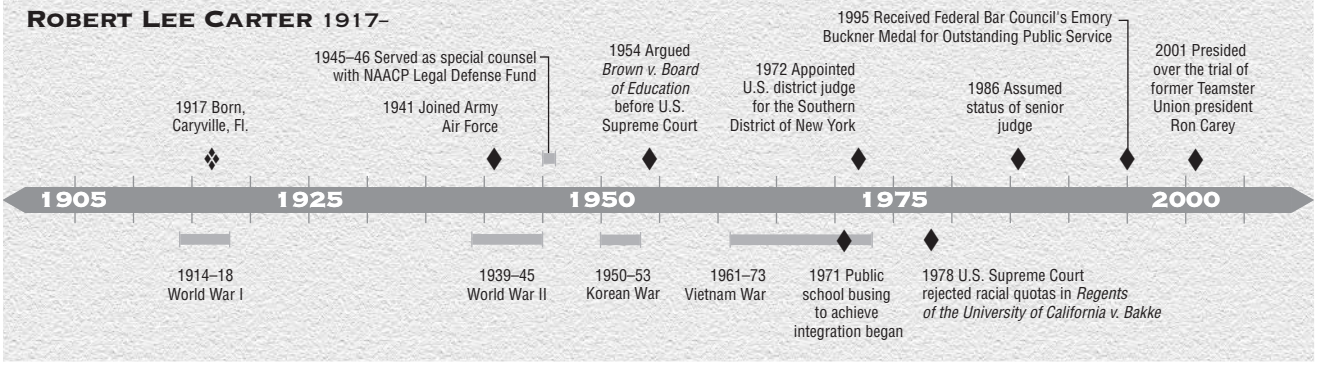

## ♦ CARTER, THOMAS HENRY

Thomas Henry Carter, born October 30, 1854, in Scioto County, Ohio, concentrated his career efforts in Montana. He pursued legal studies and relocated to Helena in 1882 where he established a successful law practice.

In 1889 Montana was admitted as a state to the United States, and Carter became its first representative to participate in Congress. In this capacity he favored less stringent laws concerning homesteaders. In 1890 he became commissioner of the general land office and was able to put his views into effect, to the advantage of the Western settlers. In 1892 he was the presiding officer of the Republican National Committee and directed the unsuccessful reelection campaign of President BENJAMIN HARRISON.

Carter entered a new phase of his career in 1895 when he became a U.S. senator. He represented Montana until 1901 and again from 1905 to 1911. During his tenure he supported various policies, including bimetallism—the use of both gold and silver as the foundation of the currency system; civil service legislation; a protective tariff on raw materials—such as wool, lumber, and lead; and a postal savings system. He also worked extensively in the field of conservation and was instrumental in the establishment of Glacier National Park.

Carter died September 17, 1911, in Helena.

"OUR CONSTITUENTS ARE NOT CHILDREN. YOU ARE DEALING WITH A GOOD, HUSKY, LUSTY, VIGOROUS BODY OF PEOPLE, WHO KNOW SOMETHING ABOUT THEIR OWN BUSINESS AND ARE DETERMINED TO HAVE THEIR RIGHTS."
—THOMAS CARTER

## CASE

*A general term for any action,* CAUSE OF ACTION, *lawsuit, or controversy. All the evidence and testimony compiled and organized by one party in a lawsuit to prove that party's version of the controversy at a trial in court.*

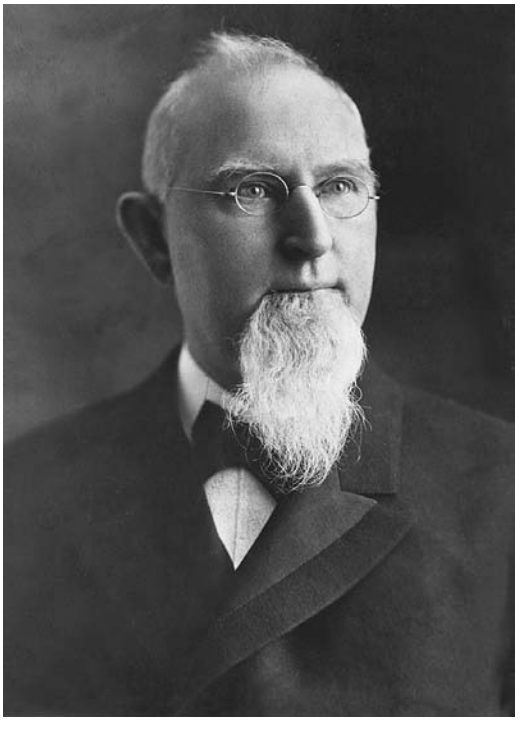

*Thomas Henry Carter.* LIBRARY OF CONGRESS

## CASE AGREED ON

*An action in which the parties submit a formal written enumeration of facts that they both accept as correct and complete so that a judge can render a decision based upon conclusions of law that can be drawn from the stated facts.*

The parties must agree on all material facts upon which their rights are to be determined. They do not, however, agree upon the legal effects of those facts; therefore, the action presents a JUSTICIABLE controversy, which makes it a matter for judicial determination. The need for

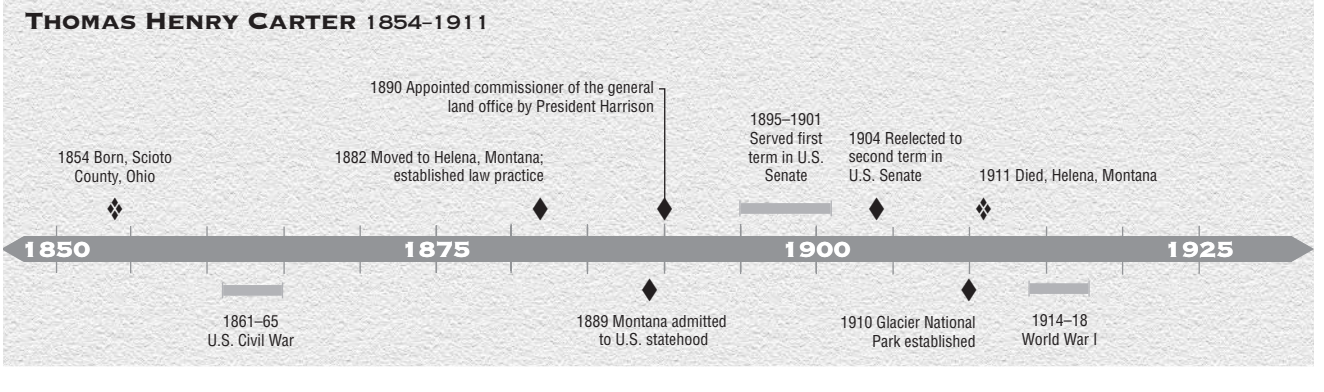

a jury trial is obviated because there are no QUESTIONS OF FACT presented for resolution.

A case agreed on is also known as an amicable action, a case stated, or a friendly suit.

## CASE IN CHIEF

*The portion of a trial whereby the party with the* BURDEN OF PROOF *in the case presents its evidence. The term differs from a rebuttal, whereby a party seeks to contradict the other party's evidence. Case in chief differs from "case" in that the latter term encompasses the evidence presented by both the party with the burden of proof and the party with the burden of rebutting that evidence.*

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CROSS-REFERENCES

Burden of Proof; Rebut.

## CASE LAW

*Legal principles enunciated and embodied in judicial decisions that are derived from the application of particular areas of law to the facts of individual cases.*

As opposed to statutes—legislative acts that proscribe certain conduct by demanding or prohibiting something or that declare the legality of particular acts—case law is a dynamic and constantly developing body of law. Each case contains a portion wherein the facts of the controversy are set forth as well as the holding and dicta—an explanation of how the judge arrived at a particular conclusion. In addition, a case might contain concurring and dissenting opinions of other judges.

Since the U.S. legal system has a common-law system, higher court decisions are binding on lower courts in cases with similar facts that raise similar issues. The concept of precedent, or STARE DECISIS, means to follow or adhere to previously decided cases in judging the case at bar. It means that appellate case law should be considered as binding upon lower courts.

## CASE METHOD

*A system of instruction or study of law focused upon the analysis of court opinions rather than lectures and textbooks; the predominant method of teaching in U.S. law schools today.*

CHRISTOPHER COLUMBUS LANGDELL, a law professor, often receives credit for inventing the case method although historians have found evidence that others were teaching by this method before him. Regardless, Langdell by all accounts popularized the case method.

Langdell viewed the law as a science and believed that it should be studied as a science. Law, he said,

> consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.

Each doctrine, Langdell said, arrived at its present state by slow degrees, growing and extending through centuries. Langdell's beliefs differed from those of his law professor colleagues. Throughout the 1800s, the prevalent approach for teaching law school classes was the lecture method. Although professors and textbooks interpreted the meaning of various court decisions, they did not offer a significant opportunity for students to do so on their own. The case method, on the other hand, forced students to read, analyze, and interpret cases themselves. It was Langdell's opinion that law students would be better educated if they were asked to reach their own conclusions about the meaning of judicial decisions.

Langdell's ideas were, at first, overwhelmingly rejected by students, other law professors, and attorneys alike. These critics viewed the case method as chaotic compared with organized lectures. They believed that instead of soliciting law students' opinions regarding cases, professors should simply state their own interpretations. Law students, afraid that they were not learning from Langdell's method, dropped out of his class, leaving him with only a few pupils. Enrollment in the Harvard Law School decreased dramatically because of concern over Langdell's case method and alumni called for his dismissal.

But the president of Harvard University, Charles W. Eliot, supported Langdell and his case method. This backing allowed Langdell to withstand the criticism long enough to prove the case method's success: Langdell's students were becoming capable, skilled attorneys. In 1870 Langdell became law school dean. As time passed he replaced his critics on the Harvard faculty with professors who believed in his sys-

tem of teaching and the case method soon became the dominant teaching method at Harvard. Other U.S. law schools took note. By the early 1900s, most had adopted the case method, and it remained the primary method of legal instruction throughout the twentieth century and beyond.

The case method is usually coupled with a type of classroom teaching called the Socratic method. Through the Socratic method students orally respond to an often difficult series of questions designed to help them gain further insight into the meaning of the law. Students learn the skill of critical analysis this way: they learn to discern relevant from irrelevant facts; they learn to distinguish between seemingly similar facts and issues; and they learn to analogize between dissimilar facts and issues.

The case method offers certain benefits. For one, cases are usually interesting. They involve real parties with real problems and therefore tend to stimulate students more than do textbooks with only hypothetical problems.

The case method also helps students develop the ability to read and analyze cases, which is a crucial skill for attorneys. Students learn to reduce cases to four basic components: the *facts* of the controversy; the legal *issue* that the court decides; the *holding,* or legal resolution, that the court reaches; and the *reasoning* that the court uses to explain its decision. Students, especially in their first year of legal study, often outline these components in written case briefs, to which they can refer during classes and while they prepare for exams.

Another advantage of the case method is that it teaches, by example, the system of legal precedence. By reading cases, students learn how and why judges adhere, or do not adhere, to law developed in previous cases. Students also learn how judges have the discretion to create law by construing statutes or constitutions.

The case method continues to have critics. One criticism focuses on law school examinations. Typically, law students are tested only once in each class. They face enormous pressure to perform well on this examination since their single score on it usually constitutes their entire grade for the class. It is difficult to test analysis skills, so often these examinations test the students' ability to spot legal issues and apply legal rules. Therefore, although professors try to teach case analysis skills, students tend to focus on simply learning RULES OF LAW in the hope of getting good grades. This diminishes the case method's intended result.

The case method may be unpopular with law students owing to the amount of reading it requires. It is not uncommon for law professors to assign twenty to thirty pages of reading, containing excerpts from four or five cases, each night for each class. Some law professors have argued that pupils learn to analyze cases within the first few months of law school, and that thereafter the case method becomes ineffective because students lose enthusiasm and interest in reading cases.

Another complaint concerns the role of casebooks. Casebooks commonly contain cases or case excerpts as well as some explanatory text. They are most often compiled by law professors, who arrange the cases to show legal development or illustrate the meaning of legal principles. These casebooks provide only a small sample of cases, the vast majority of them appellate-level decisions. Thus, law students usually receive little or no exposure to decisions of trial courts. Some commentators suggest that students therefore miss critical elements of a lawyer's initial role: discovering and shaping facts and determining legal strategies to present to the court at the trial level.

Frequently, students do not see legal conflicts in their undeveloped form until they graduate and begin practicing law. Law schools increasingly are trying to remedy that problem by offering instruction in basic lawyering skills. For example, classes in trial advocacy allow students to conduct mock jury trials. Other courses teach client-counseling skills, document-drafting skills, and oral argument skills. The idea is not to abandon the case method entirely but to balance it with other teaching methods.

FURTHER READINGS

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CROSS-REFERENCES

Case Law; Court Opinion; Legal Education; Precedent.

## CASE OR CONTROVERSY

*A term used in Article III, Section 2, of the Constitution to describe the structure by which actual,*

*conflicting claims of individuals must be brought before a federal court for resolution if the court is to exercise its jurisdiction to consider the questions and provide relief.*

A case or controversy, also referred to as a **JUSTICIABLE** controversy, must consist of an actual dispute between parties over their legal rights that remain in conflict at the time the case is presented and must be a proper matter for judicial determination. A dispute between parties that is moot is not a case or controversy because it no longer involves an actual conflict.

## CASE STATED

*An action that is brought upon the agreement of the parties who submit a statement of undisputed facts to the court but who take adversary positions as to the legal ramifications of the facts, thereby requiring a judge to decide the* **QUESTION OF LAW** *presented.*

A case stated is also called an amicable action, a case agreed on, or a friendly suit.

## CASEBOOK

*A printed compilation of judicial decisions illustrating the application of particular principles of a specific field of law, such as* **TORTS**, *that is used in* **LEGAL EDUCATION** *to teach students under the* **CASE METHOD** *system.*

## ♦ CASEMENT, SIR ROGER DAVID

Sir Roger David Casement pursued an illustrious career in the British Foreign Service. His achievements were overshadowed by his campaign for Irish nationalism, which eventually led to his trial and execution.

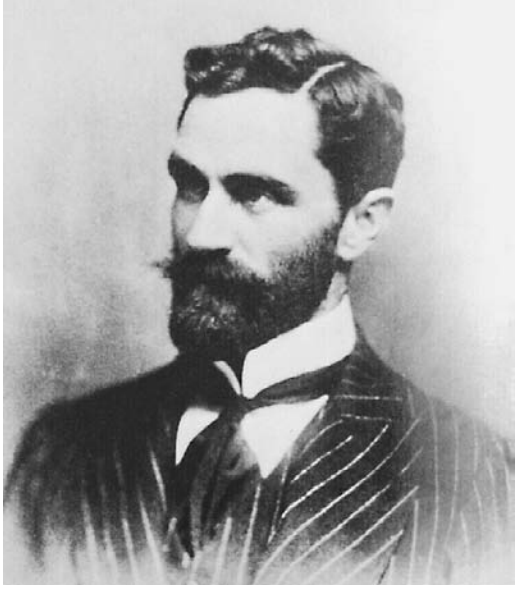

*Sir Roger Casement.*

Casement was born September 1, 1864, in Dublin, Ireland. From 1892 to 1904 and from 1906 to 1911, Casement made several noteworthy contributions to the field of British consular service. His investigation of the brutal working conditions of the Congolese on rubber plantations owned by Belgium led to drastic reforms in Africa. He subsequently performed a similar service for workers on British rubber plantations in South America. In 1911 he was knighted for his humanitarian efforts and in 1912 he resigned from foreign service due to illnesses contracted during his work in foreign countries.

"LOYALTY IS A SENTIMENT, NOT A LAW."
—SIR ROGER CASEMENT

Casement returned to Ireland and became interested in the movement for Irish freedom from British rule. He journeyed to Germany and the United States seeking support for an Irish insurrection. In April 1916 Casement received a

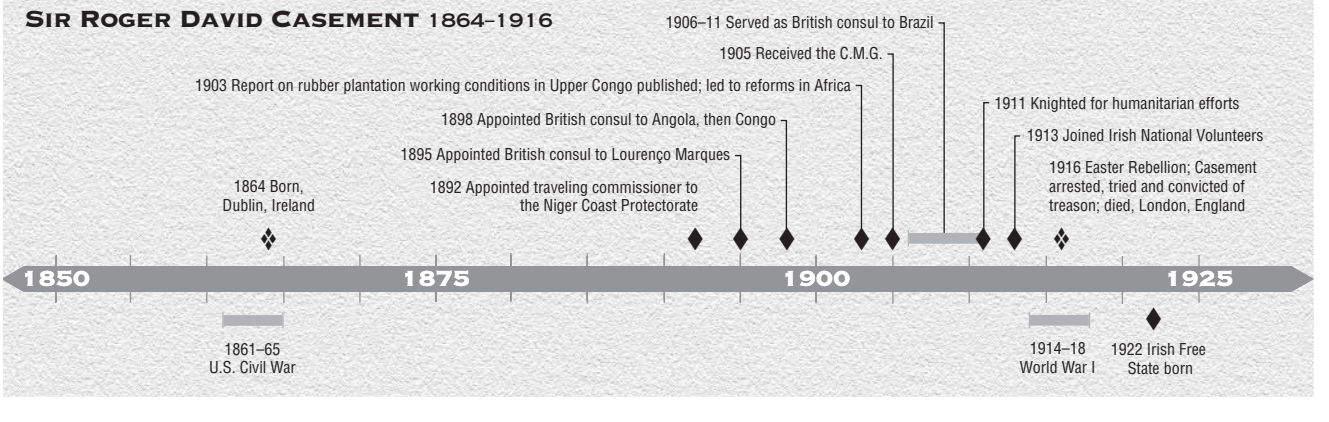

pledge of aid from Germany but it proved inadequate. He returned to Ireland hoping to curtail the planned Easter Rebellion, but British authorities apprehended him upon his arrival.

Accused of TREASON, Casement was put on trial. To add to the sensationalism of the proceedings and the case against him, several of Casement's diaries were publicly distributed. These diaries contained accounts of practices considered to be homosexual in nature. Casement was not given the opportunity to confirm or deny the validity of the diaries and the genuineness of the papers is still in question today.

The evidence against Casement was sufficient for a conviction and he was sentenced to be executed. Originally a Protestant, Casement converted to Roman Catholicism shortly before his death. On August 3, 1916, he was hanged in Pentonville Jail in London, England.

"AFFINITIES BETWEEN THE PROFESSION OF LAW AND INTELLIGENCE-GATHERING [INCLUDE] CONFRONTING THE PARADOX OF BEING AT THE SAME TIME SEEKERS OF TRUTH AND PARTISANS IN A CAUSE."
—WILLIAM CASEY

## ♦ CASEY, WILLIAM JOSEPH

William Joseph Casey was a lawyer with a long and distinguished career in business and public service who later became the controversial director of the CENTRAL INTELLIGENCE AGENCY (CIA) during the Reagan administration.

Casey was born March 13, 1913, in Elmhurst, New York. He received his bachelor's degree from Fordham University in 1934, did graduate work at the Catholic University of America, and then entered St. John's University Law School, graduating with a bachelor of laws degree in 1937. Following his admission to the New York state bar he moved to Washington, D.C., to work for the Research Institute of America, a private organization involved in analyzing economic and political data concerning the NEW DEAL.

During WORLD WAR II Casey served with Army Intelligence and the Office of Strategic Services (OSS) and, from London, directed the activities of OSS spies. After the war Casey returned to Washington, D.C., and served for two years as special counsel to the Small Business Committee of the U.S. Senate. He remained interested in international relations as a result of his wartime activities, however, and in 1948 he returned to Europe to become associate general counsel for the MARSHALL PLAN. Following his war-related service, he started practicing law and became a partner in a large New York law firm. He also began teaching at New York University, where he lectured on tax law from 1948 to 1962, and taught periodically at the Practicing Law Institute. While practicing and teaching, he wrote a number of highly successful books on taxes, real estate, and investments, including *Tax Shelter Investments* (1952) and *Accounting Desk Book* (1956), and a book on U.S. history titled *Where and How the War Was Won: An Armchair Guide to the American Revolution* (1976). The profits from his books, in addition to his income from his law practice and his investments, helped to make him a multimillionaire.

In the 1960s, Casey moved from business to politics, running in 1966 for a seat in the U.S. House of Representatives. Though he lost the primary to a more conservative Republican opponent, Casey remained active in the REPUBLICAN PARTY, writing and conducting research for Richard M. Nixon's 1968 presidential campaign. In 1969 he helped the new president set up the Citizens Committee for Peace with Security, which was organized to back Nixon's policy on antimissile weapons, and served on the advisory council of the ARMS CONTROL AND DISARMAMENT Agency.

In 1971 Nixon appointed Casey chairman of the SECURITIES AND EXCHANGE COMMISSION (SEC), where he quickly became known as a tough administrator who favored strict regulation of stockbrokers. Casey also became unpopular with his fellow SECURITIES lawyers when he named them as defendants in connection with their clients' alleged frauds. While head of the SEC, he persuaded Congress to increase the agency's budget by $1.5 million, which he used to hire more lawyers, accountants, and other specialists to improve the agency's efficiency. In 1974, Casey moved from the SEC to the STATE DEPARTMENT, where he served as undersecretary of state for economic affairs for two years. He then became president and chairman of the EXPORT-IMPORT BANK, an independent government agency charged with facilitating the export of U.S. goods and services. In 1976 he left government to return to private law practice in New York and Washington, D.C., though he did return to accept an appointment to President Gerald R. Ford's Foreign Intelligence Advisory Board.

In 1981 Casey embarked on what was to be the final and most controversial chapter of his career when President RONALD REAGAN appointed him director of the CIA. The nomination was criticized by some members of Congress as blatantly political because Casey had

run Reagan's 1980 presidential campaign. Nevertheless, Casey eventually won congressional approval and became the first director of the agency to be given cabinet-level rank.

Known for his hard-driving and sometimes confrontational management style, Casey won early praise for improving the CIA's analytical work. But he also drew heavy criticism for the agency's political activity outside the United States when the CIA stepped up its support for anti-Communist organizations in developing countries. Under Casey the agency engaged in intelligence operations in Central America, where it mined Nicaraguan harbors and provided textbooks for the Nicaraguan contras (the rebels fighting the Marxist government of Nicaragua) on how to use violence against civilian officials.

Congress, angered by reports of the operations, voted in 1984 to make aid to the contras illegal. When a diversion of funds to the contras from arms sales to Iran came to light—in a scandal that became known as the **IRAN-CONTRA AFFAIR**—Casey denied that he had any knowledge or involvement of such sales. Critics charged that as CIA director, Casey should have known about the affair, and suspected that Casey had played a larger role than he acknowledged. In addition, members of Congress criticized Casey for allowing CIA staff members wide latitude to circumvent the prohibition against giving aid to the contras.

Casey was to testify before a Senate panel about the CIA's role in the sale of arms to Iran in December 1986 but became ill and was hospitalized the day before he was to appear. He then underwent surgery for removal of a malignant brain tumor and it was also reported that he was suffering from prostate cancer. In February 1987, after several weeks in the hospital, Casey resigned his post at the CIA. Later that spring congressional hearings on the Iran-Contra Affair commenced. The first witness, retired Air Force major general Richard V. Secord, testified that Casey was involved in providing arms to the Nicaraguan rebels after Congress had outlawed such activity. However, the nature and extent of any involvement by Casey remained unclear. On May 7, 1987, Casey died of pneumonia.

Casey's death left many unanswered questions about the Iran-Contra Affair. However, both Republicans and Democrats praised Casey for his patriotism, intellect, and commitment to public service.

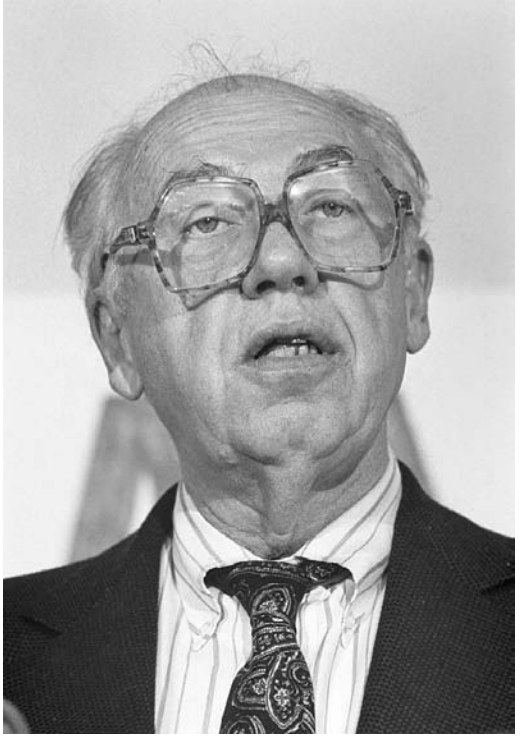

*William Joseph Casey.*
LIBRARY OF CONGRESS

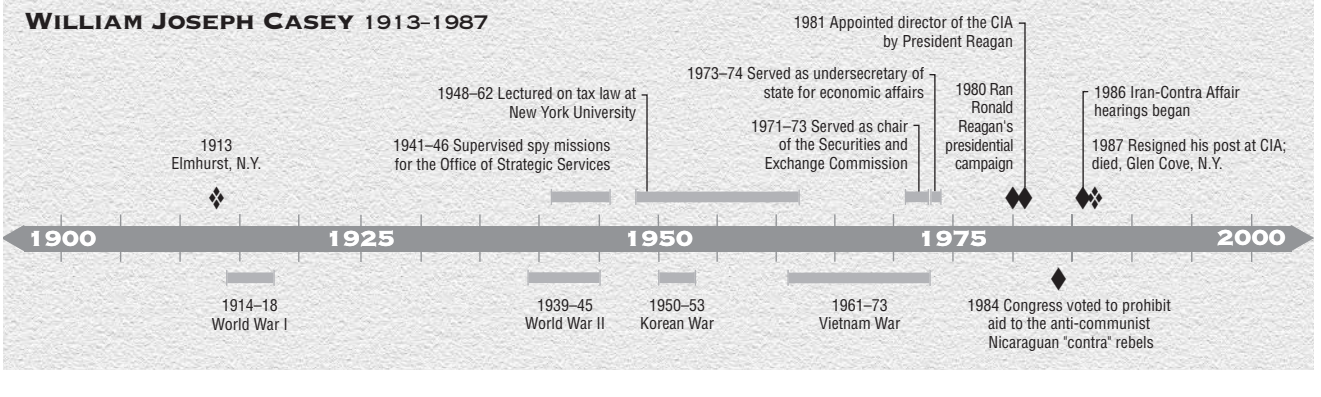

## CASH BASIS

*A method of accounting that considers only money actually received as income and only money actually paid out as expense.*

For INCOME TAX purposes, taxable income is computed under cash basis accounting as the difference between income received and expenses paid out within the tax year.

Cash basis accounting is not the same as ACCRUAL BASIS accounting.

## CASH SURRENDER VALUE

*The amount of money that an insurance company pays the insured upon cancellation of a life insurance policy before death and which is a specific figure assigned to the policy at that particular time, reduced by a charge for administrative expenses.*

The cash surrender value of an insurance policy is not based upon its actual value, but upon its reserve value—the face amount of the contract discounted at a specific rate of interest according to the insured's life expectancy. Not all life insurance policies have cash surrender values; the terms of the policy must so provide.

## CASUAL

*Irregular, occasional, or accidental; happening without being planned or foreseen.*

The term is used to describe an event that is unanticipated or unusual. A *casual sale* is one that is not customary, or done in the usual course of business—such as a jeweler occasionally selling vacuum cleaners.

Casual employment is irregular, periodic, or seasonal employment, such as someone selling ice cream only during the summer. WORKERS' COMPENSATION laws in many states do not apply to casual employment.

## CASUAL EJECTOR

*A fictitious and nominal defendant in an action of* EJECTMENT.

Ejectment was one of the old common-law FORMS OF ACTION. It could be used to oust an intruder on the plaintiff's land, such as a holdover tenant. It could also be used when there was no intruder, but the owner wished to remove any doubt about his or her right to the land without waiting for someone to sue him or her. In such a case, the strict form of procedure required that the plaintiff name a defendant even when none actually existed. The action was brought against a fictitious person called the casual ejector. The name JOHN DOE was used often for this nonexistent defendant.

## CASUALTY

*A serious or fatal accident. A person or thing injured, lost, or destroyed. A disastrous occurrence due to sudden, unexpected, or unusual cause. Accident; misfortune or mishap; that which comes by chance or without design. A loss from such an event or cause, as by fire, shipwreck, lightning, etc.*

An *inevitable casualty* is one that occurs through no fault of anyone. It happens totally without design, as in the case of an accident resulting from an act of God, such as a house struck by lightning or flooded by a storm.

A *casualty loss* is a tax deduction that can be taken for an accident that is incurred in a trade or business, in a transaction entered into for profit, or for the complete or partial loss or destruction of property owned by the taxpayer. It arises from certain specific events such as a fire, an auto accident, or a flood. Casualty losses are computed subject to special rules and are treated as itemized deductions.

Many people purchase *casualty insurance* so that they will be protected or covered in the event of specific misfortune or accident. It is a type of insurance that covers losses resulting from injuries to people.

## CASUS BELLI

*[*Latin, Cause of war.*] A term used in* INTERNATIONAL LAW *to describe an event or occurrence giving rise to or justifying war.*

CROSS-REFERENCES

War.

## CATEGORICAL

*That which is unqualified or unconditional.*

A *categorical imperative* is a rule, command, or moral obligation that is absolutely and universally binding.

Categorical is also used to describe programs limited to or designed for certain classes of people. Categorical assistance plans are social WELFARE programs extending benefits to members of a particular group, such as Aid to the Elderly, Aid to the Blind, or Aid to Families with Dependent Children.

## ♦ CATON, JOHN DEAN

John Dean Caton was born March 19, 1812, in Monroe, New York. He was admitted to the Illinois bar in 1835. He achieved success in various fields of public service and received an honorary doctor of laws degree from Hamilton College in 1866.

In 1834 the first political convention was held in Illinois and Caton participated as its secretary as well as a member. He served on the Illinois Supreme Court, beginning as an associate justice from 1842 to 1864, and acting as chief justice in 1855 and again from 1857 to 1864.

In addition to his legal and political careers, Caton served as president of the Illinois and Mississippi Telegraphic Company from 1852 to 1867, performed the duties of JUSTICE OF THE PEACE in Ottawa, and gained recognition as an author. His most famous works are *A Summer in Norway,* written in 1875, and *The Antelope and Deer of America,* published in 1877. Caton also contributed numerous articles on nature to the Ottawa Academy of Science.

Caton died July 30, 1895, in Chicago, Illinois.

## ♦ CATRON, JOHN

John Catron served as an associate justice of the U.S. Supreme Court from 1836 to 1865. During his career on the Court, Catron was a staunch defender of STATES' RIGHTS and the institution of SLAVERY. He participated in the landmark decisions upholding the power of state governments to regulate local aspects of interstate commerce and, in DRED SCOTT V. SANDFORD, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1856), he voted with the Court in deciding that an ex-slave had no rights as a citizen. Despite personal Southern affiliations and his own support of slavery, Catron backed the Union during the Civil War. A close friend of Andrew Jackson's as early as the WAR OF 1812 and a fellow resident of Nashville, Catron was a true Jacksonian in his outlook. His judicial career and opinions—from a suspicion of large corporations to a fervent support of states' rights—bear all the marks of Jacksonian democracy.

Catron was the descendant of poor, German immigrants. He was probably born in Pennsylvania around 1786—some sources cite his birth as early as 1779, however. His father, Peter Catron, worked with horses in Pennsylvania and Virginia, and moved to Kentucky in 1804, hoping to establish his own horse farm. Catron grew up with little formal education. He supported himself and his family by herding cattle and grooming horses, but he found time to read the classics as well. Around 1812, Catron moved to Sparta, in Tennessee's Cumberland Mountains region. At about the same time, he married Matilda Childress; the couple had no children.

Catron read law briefly in Sparta and then joined the Second Tennessee Regiment, a group of local volunteers who sought to avenge the massacre of Fort Mims by the Creek Indians. This unit eventually joined General Andrew Jackson's army in Alabama and fought in the War of 1812. Catron became friendly with Jackson, who had passed the bar exam and served as a judge, and the two corresponded frequently in subsequent years.

After the war, Catron returned to the Cumberland Mountains and resumed his legal studies. He was admitted to the Tennessee bar in 1815 and worked both as an attorney in a general legal practice and as a prosecutor in a circuit court. In 1818, Jackson suggested that Catron move to Nashville, then a growing frontier town, where Jackson himself lived and had a plantation. Catron took his advice and developed a

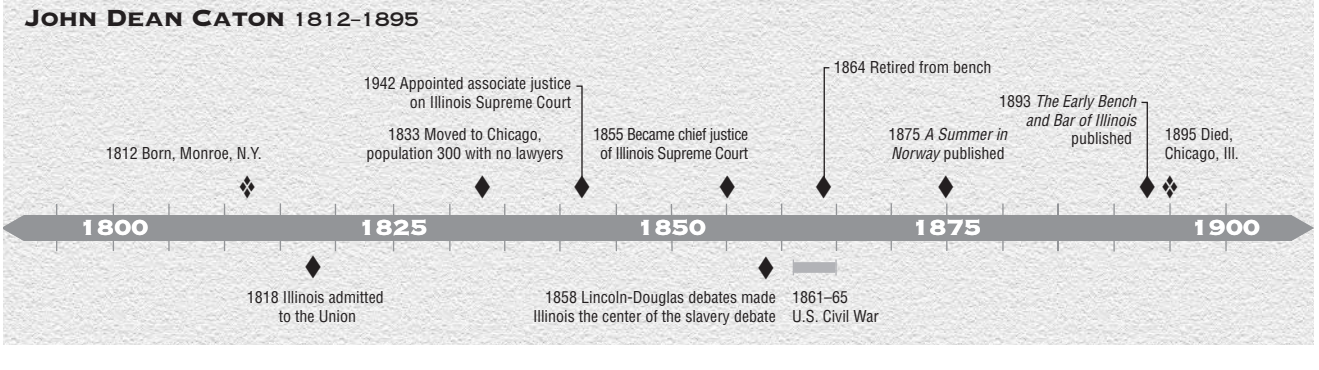

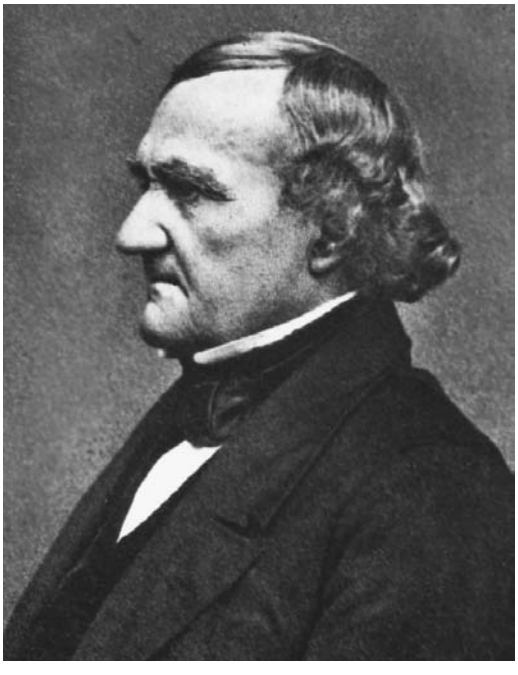

*John Catron.*
ETCHING BY ALBERT ROSENTHAL. THE GRANGER COLLECTION, NEW YORK

"POLITICAL SOVEREIGNTY, IN ITS TRUE SENSE, EXISTS ONLY WITH THE PEOPLE. . . . AND IS [THE] POLITICAL AXIOM UPON WHICH THE AMERICAN GOVERNMENT [HAS] BEEN BASED."
—JOHN CATRON

lucrative practice in Nashville, with much of his work involving land titles, a busy area of the law on the rapidly growing frontier. By 1824, he was elected to the bench of Tennessee's highest court, the Court of Errors and Appeals. In 1831, the Tennessee legislature created the office of chief justice of the Supreme Court of Errors and Appeals and elected Catron to serve in it. Catron held the position until 1834.

As a judge, Catron worked principally to resolve the morass of conflicting land claims then before the courts, but he addressed other issues as well. In separate 1829 rulings, Catron denounced both gambling and DUELING, calling the latter no more than "honorable homicide." "The law knows it as a wicked and willful murder, and it is our duty to treat it as such," wrote Catron in his decision for *Smith v. State,* 9 Tenn. 228. "We are placed here firmly and fearlessly to execute the laws of the land, not visionary codes of honor, framed to subserve the purposes of destruction." In an 1834 case, *Fisher's Negroes v. Dabbs,* 14 Tenn. 119, Catron ruled on the issue of freeing slaves. Slave owners would often grant manumission, or freedom, to their slaves through their wills. Catron argued that the state must approve such instruments before they can be valid, because, he wrote, "free negroes are a very dangerous and most objectionable population where slaves are numerous." Nor would it do to send freed slaves to states where slavery was not practiced, according to Catron. Whether in a slaveholding or nonslaveholding society, the freed African-American is "a degraded outcast, and his fancied freedom a delusion." Slaves could only be freed, Catron wrote, if they were sent to the African nation of Liberia.

American Indian affairs, particularly relating to the Cherokee nation, were also were pressing issues during Catron's tenure on the Tennessee high court. In 1833, the state legislature, following the earlier example of Georgia's general assembly, passed laws giving itself jurisdiction over Cherokee land within its boundaries. In *State v. Foreman,* 16 Tenn. 256, it was charged that these laws were unconstitutional. Catron upheld the state laws in a long opinion that is notable for its brutal attitude toward the Indians. "It was more just," Catron wrote, "that the country should be peopled by Europeans, than continue the haunts of savage beasts, and of men yet more fierce and savage." The Indians were, in his mind, "mere wandering tribes of savages" who "deserve to be exterminated as savage and pernicious beasts." Furthermore, it was simply by right of power that whites could exert their dominance: "Our claim is based on the right to coerce obedience. The claim may be denounced by the moralist. We answer, it is the law of the land. Without its assertion and vigorous execution, this continent never could have been inhabited by our ancestors." The issue resurfaced a few years later during Martin Van Buren's presidency when the Cherokee were forced to give up their land and make a long march on what was called the Trail of Tears to land west of the Mississippi.

In 1836, Catron directed Van Buren's presidential campaign in Tennessee. Van Buren won the election, succeeding fellow Democrat Jackson. On his last day in office, March 3, 1837, Jackson appointed two new members—Catron and John McKinley—to the U.S. Supreme Court as required by the JUDICIARY ACT OF 1837, which increased the size of the Court from seven to nine members. Catron was confirmed five days later, and at age fifty-one he became a sitting justice with ROGER B. TANEY serving as chief justice.

Catron was a strong advocate of states' rights during his tenure on the Court. In the cases considered in *Thurlow v. Commonwealth of Massachusetts,* 46 U.S. (5 How.) 504, 12 L. Ed. 256 (1847), Catron wrote two opinions upholding the rights of states to regulate the importation of

liquor from other states and countries. The cases touched on interpretation of the **COMMERCE CLAUSE**, the part of the Constitution—Article I, Section 8, Clause 3—that gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Catron argued that the federal government does not have exclusive power to regulate interstate commerce and that where it does not act to regulate commerce, the states are free to do so. The state laws in question had encroached on no laws passed by Congress and were therefore valid. According to Catron, "the **POLICE POWER** was not touched by the Constitution, but left to the States as the Constitution found it." Catron and the Court ruled similarly in *Cooley v. Board of Wardens,* 53 U.S. (12 How.) 299, 13 L. Ed. 996 (1851), again upholding the ability of states to regulate local aspects of interstate commerce.

Catron dissented from the Court's opinion in several cases involving the states' ability to regulate corporations. In one case in which the Court had ruled in favor of a large corporation, Catron expressed concern regarding "the unparalleled increase of corporations throughout the Union . . . ; the ease with which charters containing exclusive privileges and exemptions are obtained; the vast amount of property, power, and exclusive benefits, prejudicial to other classes of society that are vested in and held by these numerous bodies of associated wealth" (*Ohio Life Insurance & Trust Co. v. Debolt,* 57 U.S. [16 How.] 416, 14 L. Ed. 997 [1853]).

Catron played an important role in the famous *Dred Scott* case, which concerned the highly controversial issue of slavery in the territories. Dred Scott was a slave from Missouri whose owner took him into Illinois, where slavery had been outlawed, and the Louisiana Territory, where it had been forbidden as well by the Missouri Compromise, the 1820 agreement that attempted to resolve the dispute as to whether new states would be admitted to the Union as free or slave states. When Scott returned to Missouri, he brought suit against his owner, claiming that he was free because he had resided in free territory. In its decision, the Court, with Catron writing a concurring opinion, held that a slave could not become a citizen under the U.S. Constitution. Scott, the Court wrote, was not a citizen and therefore could not sue in federal courts. Chief Justice Taney went further and declared the Missouri Compromise unconstitutional, denying the authority of Congress to exclude slavery from the territories. This was only the second time the U.S. Supreme Court had found an act of Congress unconstitutional, the first having been the 1803 decision **MARBURY V. MADISON** 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 [1803]. Many viewed *Dred Scott* as a pro-slavery ruling from a Court dominated by a Southern majority. The ruling may very well have hastened the coming of the Civil War.

In his concurring opinion, Catron emphasized that Congress could not abridge the property rights of slave-owning citizens in the Louisiana Territory by outlawing slavery. He also argued that the Missouri Compromise violated the constitutional guarantee of equal **PRIVILEGES AND IMMUNITIES** to citizens of all states, a guarantee that was, Catron wrote, a "leading feature of the constitution—a feature on which the Union depends, and which secures to the respective States and their citizens an entire equality of rights" (60 U.S. at 529). Three of the seven concurring justices argued that an African-American descended from slaves had no

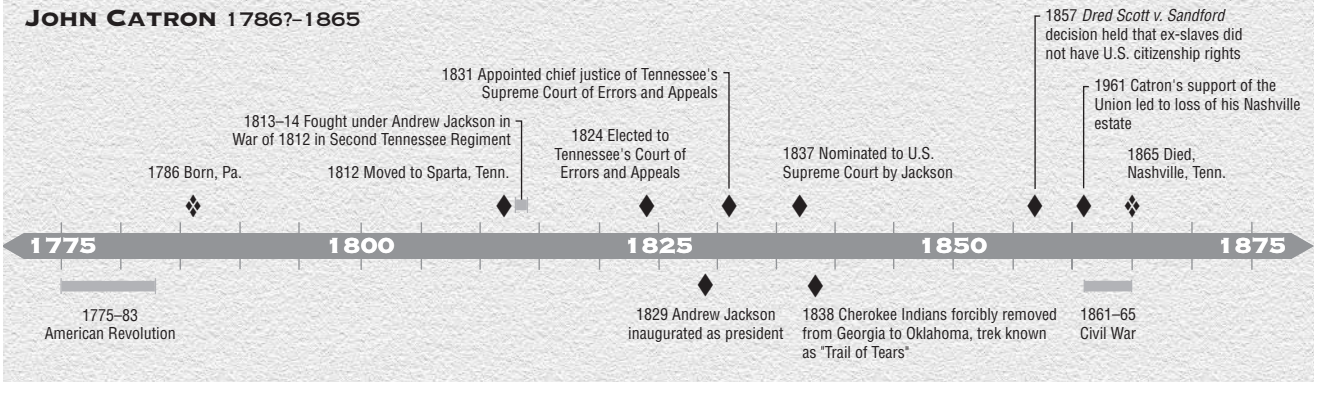

rights as a U.S. citizen and no standing in court. Catron was one of four justices who did not address this last question of whether a freed slave was a citizen or not.

Despite his pro-Southern leanings and the subsequent loss of his estate, Catron supported the Union during the Civil War. As hostilities began to mount and war neared in March 1861, Catron returned to Nashville to try to keep the border states of his judicial circuit—Tennessee, Kentucky, and Missouri—in the Union. Of these, only Tennessee would eventually join the Confederacy. After an angry mob confronted him when he tried to hold federal court in Nashville, Catron was forced to leave for Washington, D.C., accompanied by a military escort, leaving behind an estate worth more than $100,000. During the war, Catron continued to support the Union by broadly interpreting the federal government's war powers. In one case, he wrote an opinion refusing to release a prisoner if evidence showed that he was a Confederate sympathizer. After 1862, Catron also worked hard to keep order in the states forming his new circuit: Tennessee, Arkansas, Louisiana, Texas, and Kentucky. He stayed in close touch with President ABRAHAM LINCOLN and worked hard to keep the federal judiciary effective during the war.

On May 30, 1865, Catron, one of the last embodiments of Jacksonian democracy to leave the national scene, died in his adopted city of Nashville.

FURTHER READINGS

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Gatell, Frank O. 1969. *The Justices of the United States Supreme Court, 1789–1969: Their Lives and Major Opinions,* Vol. 1. ed. Leon Friedman and Fred L. Israel. New York: Chelsea House.

CROSS-REFERENCES

Judicial Review; Native American Rights.

## CAUSA MORTIS

*[*Latin, In contemplation of approaching death.*]* *A phrase sometimes used in reference to a deathbed gift, or a gift* causa mortis, *since the giving of the gift is made in expectation of approaching death. A gift causa mortis is distinguishable from a gift inter vivos, which is a gift made during the donor's (the giver's) lifetime.*

The donor of the gift of PERSONAL PROPERTY must expect to die imminently from a particular ailment or event. This has important consequences in terms of the donor's ability to revoke the gift.

For example, an elderly man is suffering from pneumonia and believes he is going to die as a result of the sickness. He tells his grandson that if he dies, he will give the grandson his pocket watch. If the man recovers and wants to retain his watch, he will be able to do so, because a gift *causa mortis* is effective only if made in contemplation of death due to a known condition and the donor actually dies as a result of that condition.

A gift *causa mortis* is taxed under federal estate tax law in the same way as a gift bequeathed by a will.

## CAUSE

*Each separate antecedent of an event. Something that precedes and brings about an effect or a result. A reason for an action or condition. A ground of a legal action. An agent that brings something about. That which in some manner is accountable for a condition that brings about an effect or that produces a cause for the resultant action or state.*

*A suit, litigation, or action. Any question, civil or criminal, litigated or contested before a court of justice.*

### Cause and Causality in American Law

If an individual is fired from a job at the bank for EMBEZZLEMENT, he or she is fired *for cause*—as distinguished from decisions or actions considered to be ARBITRARY or capricious.

In CRIMINAL PROCEDURE, PROBABLE CAUSE is the reasonable basis for the belief that someone has committed a particular crime. Before someone may be arrested or searched by a police officer without a warrant, probable cause must exist. This requirement is imposed to protect people from unreasonable or unrestricted invasions or intrusions by the government.

In the law of TORTS, the concept of causality is essential to a person's ability to successfully bring an action for injury against another person. The injured party must establish that the other person brought about the alleged harm. A defendant's liability is contingent upon the connection between his or her conduct and the

injury to the plaintiff. The plaintiff must prove that his or her injury would not have occurred but for the defendant's NEGLIGENCE or intentional conduct.

### Actual, Concurrent, and Intervening Cause

The *actual cause* is the event directly responsible for an injury. If one person shoves another, thereby knocking the other person out an open window and he or she breaks a leg as a result of the fall, the shove is the actual cause of the injury. The immediate cause of the injury in this case would be the fall, since it is the cause that came right before the injury, with no intermediate causes. In some cases the actual cause and the immediate cause of an injury may be the same.

*Concurrent causes* are events occurring simultaneously to produce a given result. They are contemporaneous, but either event alone would bring about the effect that occurs. If one person stabs another person who is simultaneously being shot by a third person, either act alone could cause the person's injury.

An INTERVENING CAUSE is one that interrupts the normal flow of events between the wrong and the injury. It comes between an expected sequence of occurrences to produce an unanticipated result. If someone driving under the influence of alcohol grazes a telephone pole that is rotted and thus knocks it down, the condition of the pole would be the intervening cause of its collapse. This is important in determining the liability of the intoxicated driver. If the telephone company knew or should have known about the unsafe condition of the pole and negligently failed to replace it, the telephone company would be responsible for the harm caused by the falling pole. Depending upon how hard the driver hit the pole, the driver may be held contributorily negligent, or partially liable, for the accident that took place.

An *intervening efficient cause* is one that totally supersedes the original wrongful act or omission. For example, an intoxicated cabdriver transports a person in a cab with faulty brakes. An accident occurs, which is a direct result of the intoxication rather than the faulty brakes. The injury resulting to the passenger is attributable to the driver's condition. The intervening efficient cause thereby broke the causal connection between the original wrong of the faulty brakes and the injury.

### Proximate, Unforeseeable, and Remote Cause

The proximate cause of an injury is the act or omission of an act without which the harm would not have occurred. This is a concept in the law of torts and involves the question of whether a defendant's conduct is so significant as to make him or her liable for a resulting injury. For example, a person throws a lighted match into a wastepaper basket that starts a fire that burns down a building. The wind carries the flames to the building next door. The act of throwing the match would be the proximate cause of the fire and the resulting damage; however, the person may not be held fully liable for all resulting consequences.

An *unforeseeable cause* is one that unexpectedly and unpredictably results from the proximate cause. The degree of injury sustained is unanticipated or far removed from the negligent or intentional conduct that took place. For example, if a customer in a supermarket irritates a clerk and the clerk pushes the customer out of the way, which results in prolonged bleeding because the person is a hemophiliac, the bleeding is an unforeseeable consequence of the clerk's action. Even if the clerk intentionally pushed the customer, the resulting injury is clearly far removed from the conduct.

A *remote cause* is one that is removed or separate from the proximate cause of an injury. If the injuries suffered by a person admitted to a hospital after being hit by a truck are aggravated by MALPRACTICE, the malpractice is a remote cause of injury to that person. The fact that the cause of an injury is remote does not relieve a defendant of liability for the act or omission, but there may be an APPORTIONMENT of liability between the defendants.

CROSS-REFERENCES

Action; Arbitrary; Arrest; "But For" Rule; Criminal Procedure; Probable Cause; Search and Seizure; Tort Law; Warrant.

## CAUSE CÉLÈBRE

*[*French, famous case.*] A trial or lawsuit in which the subject matter or a participant is particularly newsworthy, unusual, or sensational and that typically attracts a great deal of media attention. For example, the case of Scott Peterson, accused of the murder of his pregnant wife, Laci Peterson, was a cause célèbre in 2003.*

## CAUSE OF ACTION

*The fact or combination of facts that gives a person the right to seek judicial redress or relief against another. Also, the legal theory forming the basis of a lawsuit.*

The cause of action is the heart of the complaint, which is the PLEADING that initiates a lawsuit. Without an adequately stated cause of action the plaintiff's case can be dismissed at the outset. It is not sufficient merely to state that certain events occurred that entitle the plaintiff to relief. All the elements of each cause of action must be detailed in the complaint. The claims must be supported by the facts, the law, and a conclusion that flows from the application of the law to those facts.

The cause of action is often stated in the form of a syllogism, a form of deductive reasoning that begins with a major premise (the applicable RULE OF LAW), proceeds to a minor premise (the facts that gave rise to the claim), and ends with a conclusion. In a cause of action for BATTERY, the rule of law is that any intentional, unpermitted act that causes a harmful or offensive touching of another is a battery. This is the major premise and is stated first. Supporting facts, constituting the minor premise, appear after the rule of law. For example, a statement of facts for a case of battery might be "The plaintiff, while walking through ABC Store on the afternoon of March 11, 1998, was tackled by the defendant, a security guard for the store, who knocked the plaintiff to the floor and held her there by kneeling on her back and holding her arms behind her, while screaming in her ear to open her shopping bag. These actions caused the plaintiff to suffer injuries to her head, chest, shoulders, neck, and back." The cause of action concludes with a statement that the defendant is responsible for the plaintiff's injuries and that the plaintiff is entitled to compensation from the defendant.

The facts or circumstances that entitle a person to seek judicial relief may create more than one cause of action. For example, in the preceding example, the plaintiff might assert claims for assault, battery, intentional infliction of emotional distress, and violation of CIVIL RIGHTS. She might also bring claims for negligent hiring (if the guard had a history of violent behavior which the store failed to discover) or negligent supervision. (When damages are caused by an employee it is common to sue both the employee and the employer.) All these causes of action arise from the same set of facts and circumstances but are supported by different rules of law and constitute separate claims for relief.

A cause of action can arise from an act, a failure to perform a legal obligation, a breach of duty, or a violation or invasion of a right. The importance of the act, failure, breach, or violation lies in its legal effect or characterization and in how the facts and circumstances, considered as a whole, relate to applicable law. A set of facts may have no legal effect in one situation, whereas the same or similar facts may have significant legal implications in another situation. For example, tackling a shoplifting suspect who is brandishing a gun is a legitimate action by a security guard and probably would not support a claim for relief if the suspect were injured in the fracas. On the other hand, tackling a shopper who merely acts in a suspicious manner while carrying a shopping bag is a questionable exercise of a guard's duty and may well give rise to JUSTICIABLE causes of action.

FURTHER READINGS

McCord, James W.H. "Drafting the Complaint: Defending and Testing the Lawsuit." *Practicing Law Institute* 447.

## CAVEAT

*[*Latin, Let him beware.*] A warning; admonition. A formal notice or warning given by an interested party to a court, judge, or ministerial officer in opposition to certain acts within his or her power and jurisdiction.*

Originally, a *caveat* was a document that could be served on either a judge or a public official to give him or her notice that he or she should discontinue a certain proceeding until an opposing party was given an opportunity to be heard.

Used in the past by someone objecting to the appointment of an executor or administrator of an estate or to the granting of a patent for an invention, the term *caveat* is rarely used by modern attorneys.

## CAVEAT EMPTOR

*[*Latin, Let the buyer beware.*] A warning that notifies a buyer that the goods he or she is buying are "as is," or subject to all defects.*

When a sale is subject to this warning the purchaser assumes the risk that the product might be either defective or unsuitable to his or her needs.

This rule is not designed to shield sellers who engage in FRAUD or bad faith dealing by making false or misleading representations about the quality or condition of a particular product. It merely summarizes the concept that a purchaser must examine, judge, and test a product considered for purchase himself or herself.

The modern trend in laws protecting consumers, however, has minimized the importance of this rule. Although the buyer is still required to make a reasonable inspection of goods upon purchase, increased responsibilities have been placed upon the seller, and the doctrine of *caveat venditor* (Latin for "let the seller beware") has become more prevalent. Generally, there is a legal presumption that a seller makes certain warranties unless the buyer and the seller agree otherwise. One such WARRANTY is the IMPLIED WARRANTY of merchantability. If a person buys soap, for example, there is an implied warranty that it will clean; if a person buys skis, there is an implied warranty that they will be safe to use on the slopes.

A seller who is in the business of regularly selling a particular type of goods has still greater responsibilities in dealing with an average customer. A person purchasing antiques from an antique dealer, or jewelry from a jeweler, is justified in his or her reliance on the expertise of the seller.

If both the buyer and the seller are negotiating from equal bargaining positions, however, the doctrine of *caveat emptor* would apply.

CROSS-REFERENCES

Consumer Protection; Sales Law.

## CEASE AND DESIST ORDER

*An order issued by an* ADMINISTRATIVE AGENCY *or a court proscribing a person or a business entity from continuing a particular course of conduct.*

The force and effect of a cease and desist order are similar to those of an INJUNCTION issued by a court.

## CEDE

*To yield up; to assign; to grant; to surrender; to withdraw. Generally used to designate the transfer of territory from one government to another.*

## CELEBRATION OF MARRIAGE

*A colloquial phrase that refers to the solemnization or formalization of a marriage.*

In a number of states there must be a celebration of a marriage through some type of official government ceremony before a marriage will be legally recognized.

Some statutes provide that every JUSTICE OF THE PEACE of a particular state, every minister, and every religious society be empowered to solemnize marriage. The type of celebration required varies according to state law and religious custom.

## CELIA, A SLAVE

Celia, a slave, was probably born in Missouri in 1836. No documentation of her birth date, birthplace, or parentage exists. Her recorded history begins in the summer of 1850 when she was purchased by Robert Newsom, of Fulton Township, Calloway County, Missouri; at the time of the transaction she was about fourteen years old. Celia's recorded history ends five and a half years later when she was tried and hanged for the murder of her owner; she was nineteen years old and the mother of at least two children at the time of her death. Her final resting place and the fate of her children are unknown.

The circumstances of Celia's short life—and the events that led to her hanging—illustrate the realities of slave life in the South and the personal choices the institution of SLAVERY forced upon slaves and slaveholders. The course and outcome of Celia's trial were influenced by individuals and a court system that were trying to reconcile the personal consequences of slavery with existing moral codes, politics, and economics—at a time when nationwide struggles over the same issues were increasingly heated and often violent.

By 1850, when knowledge of Celia begins, Missouri had already been at the center of the national slavery debate for more than a quarter of a century. The U.S. Congress had confronted the dilemma presented by the existence of slavery in a free society in 1819 when Missouri petitioned for statehood. Angry and emotional debates considered whether a territory should be asked to abandon slavery as a condition of statehood. Congress preempted the debate by passing the Missouri Compromise, under which it preserved the nation's balance by admitting Maine as a free state in 1820 and Missouri as a slave state in 1821. The Missouri Compromise also drew a line between North and South by limiting the expansion of slavery in the Louisiana Territory to areas south of Missouri.

During this volatile time, Newsom left Virginia and brought his wife and children to the Missouri Territory. In the fall of 1822, with statehood granted and slavery assured for his new home, Newsom settled in southern Calloway County. Hard work and slave labor made him a prosperous farmer—and Calloway County went on to become a large slave-holding county.

Because many core issues of the slave debate were unresolved by the Missouri Compromise, leaders on both sides of the issue knew that it was only a matter of time before the nation's expansion would force another confrontation. That confrontation came in 1850 when Congress found itself waging a battle over the expansion of slavery in territories gained as a result of the Mexican War. Northern politicians wanted to stop the expansion of slavery and assure the admission of California to the Union as a free state. Their Southern counterparts did not want slavery prohibited in territories for which Southern soldiers had fought and died. Missouri, with roughly equal numbers of citizens supporting each side of the issue, was as deeply divided as the nation.

The residents of agriculture-based, slave-holding Calloway County—including Newsom—probably favored the pro-slavery rhetoric and politics described in the papers of the day. The 1850 census for Calloway County, which shows that Newsom owned five male slaves, supports this assumption, as does Newsom's decision to purchase Celia even while the controversy over slavery was escalating to its ultimate conclusion—civil war.

In all likelihood, however, Newsom did not purchase Celia as a political statement. His reasons for buying Celia were much more personal. Newsom's wife had died in 1849. Following her death, his household comprised a widowed daughter named Virginia Waynescot; her children, James Coffee Waynescot, Amelia Waynescot, and Thomas Waynescot; and an unmarried daughter, Mary Newsom. Two sons, Harry Newsom and David Newsom, were married and living nearby.

When Newsom went to purchase Celia, outward appearances suggested that he was looking for a domestic servant to assist his daughters with cooking and household work. Subsequent trial testimony and transcripts indicate otherwise. At any rate, in the spring of 1850 Newsom traveled by wagon to Audrain County, a day's ride to the north of his home, to buy his new slave. On the return trip, Newsom raped the young girl and established the true nature of her future role in the Newsom household.

Over the next four years Celia's life revolved around her role as Newsom's conjugal partner. He provided her with a brick cabin near the main house and other material possessions indicating both her status and his affection for her. He visited her often and he was most likely the father of her first two children.

The kind of relationship Newsom had with Celia was fairly widespread in the South but seldom acknowledged or publicly condoned. Given the daily rhythms and routines of rural life in 1850 Missouri, Newsom's adult daughters were most likely aware of their father's intimate relationship with Celia; because of their economic dependence on their father they also likely did not make an issue of his relationship with the slave. Though not much is known about the details of Celia's interaction with members of the Newsom household, one author concluded from court documents that she must have been a disturbing presence on the Newsom farm.

By 1854, Celia had tired of Newsom's attentions and begun a forbidden relationship with a Newsom slave named George. Sometime in early 1855 George started staying in Celia's cabin when Newsom was not there. Within months, Celia was pregnant and uncertain of the child's father. George, believing the child to be his, pressured Celia to end her physical relationship with their owner. Newsom, believing the child to be his, and unaware of Celia's intimate friendship with George, saw no reason to change the established pattern of their relationship.

Caught in the middle, Celia was forced to make a choice that would eventually cost her her life. At some point in June of 1855, Celia made an attempt to satisfy George's demands and to stop Newsom's sexual advances by appealing to Newsom's daughters. She threatened to hurt Newsom if he did not stop forcing his attentions on her while she was ill (court documents indicate that the early stages of Celia's third pregnancy were difficult, causing her to be sick much of the time). It is not known if his daughters spoke to Newsom on Celia's behalf but it is clear that Newsom's sexual demands on her did not stop. On Saturday, June 23, Celia confronted her master directly, asking him to leave her alone. He ignored her request and told her he would visit her cabin that evening.

Newsom went to Celia's cabin later that evening and was never seen again. When he did not appear for breakfast on Sunday morning his children and neighbors began to search for him and to question the slaves. A statement from Celia's lover, George, led the family to suspect her involvement in Newsom's disappearance. George told the search party that they were not likely to find anything unless they searched near Celia's cabin.

Celia initially denied any involvement in Newsom's disappearance. But worn down by questioning, she finally confessed to his murder. She admitted that Newsom had come to her cabin the night before. She described how she struck him twice with a large stick to stop his advances. Realizing she had killed him, she decided to burn his body in the fireplace to cover her crime. She buried the bones that did not burn under the hearth and she enlisted the help of Newsom's own grandson, James Coffee Waynescot, to carry the ashes out of the cabin on Sunday morning. A buckle and buttons retrieved from the ashes and bone fragments found under the hearth confirmed her story.

On Monday, June 25, *State v. Celia, a Slave,* Celia File No. 4496, began. Two local justices, D. M. Whyte and Isaac P. Howe, and a jury of six men—George Thomas, Daniel Robinson, John Wells, Simpson Hyton, George Brown, and John Carrington—considered an **AFFIDAVIT** filed by David Newsom accusing Celia of murder. They found **PROBABLE CAUSE** to charge her with murder and she was arrested and taken to the Fulton County jail. An October trial date was set and Judge William Augustus Hall was named to preside.

Newspaper accounts of the murder at the Newsom farm fueled local fears by reporting that the crime was committed without sufficient cause (no mention was made of Celia's intimate relationship with the victim or her reasons for attacking him). These fears, along with Celia's physical condition and the belief that her two children were in the cabin at the time of the murder, led the community to believe that Celia did not commit the crime on her own.

Acts of violence by slaves and the possibility of conspiracy and organized slave rebellion were very much on the minds of Calloway County residents in the spring of 1855. A free-slave conflict in neighboring Kansas Territory had moved from debate to bloodshed. Passage of the **KANSAS-NEBRASKA ACT**, which called for "popular sovereignty" in the territories, along with a threatened repeal of the Missouri Compromise, made Kansas Territory a national battleground. Northern activists channeled antislavery settlers into the territory hoping they would eventually vote against slavery. Slaves themselves were encouraged to commit violent acts as a means of asserting their rights and winning their freedom. Missouri residents poured across the Kansas-Missouri border to antagonize Northern settlers, support pro-slavery residents, and keep the slaves in submission.

With supporters on both sides of the slavery issue watching the proceedings, Judge Hall was under pressure to see that Celia received credible representation at her trial. On August 16 he appointed John Jameson and his associates to defend her. Jameson was a popular citizen in Fulton Township. He was a slave owner but he was not personally involved in the ongoing slavery debates. He had practiced law in the community for three decades and had represented Missouri for three terms in the U.S. Congress. With political savvy and a reputation as an excellent trial lawyer, Jameson was acceptable to those on both sides of the conflict.

On October 9 Celia entered the Calloway County Courthouse for trial. After dealing with numerous preliminary and procedural matters, including jury selection, Celia's attorneys entered a plea of not guilty to the charge of murdering Newsom. Like the inquest jury, Celia's trial jury was made up of male residents of the county: all were married and had children, all but one were farmers, about half were slave owners, and none were as prosperous as Newsom. Though certainly not Celia's peers, they were as good a jury as could be expected for the time.

The next day testimony began. The prosecution stressed the facts of the case and reminded the jury that Celia had confessed to the murder.

The defense focused on Celia's sexual exploitation and the motive for her actions. Jameson argued that Celia was entitled, by law, to use **DEADLY FORCE** to protect herself from rape, regardless of her previous sexual relationship with the victim. His argument was unconventional and bold because it was based on a Missouri statute that had been created to protect white women; in most of the South sexual assault on a slave was considered **TRESPASS**, and owners could not be accused of trespass on their own property.

After concluding their arguments, both sides were allowed to propose jury instructions for Judge Hall's consideration. Jameson requested several instructions that would have allowed Celia to be acquitted if the jury found from the evidence that she had killed Newsom in an effort to prevent his sexual advances. The prosecution objected to Jameson's instructions and Hall ultimately refused to deliver them to the jury. Denied any grounds for acquitting her, the jury found Celia guilty of murder.

On October 11 Celia's attorneys filed a motion to set aside the jury verdict and grant a new trial. Judge Hall's prejudicial rulings and his refusal to issue critical jury instructions were cited as grounds for the motion. On October 13 Hall denied the defense motion and Celia was sentenced to death by hanging on November 16. This execution date may have been set to allow for delivery of Celia's expected child; under Missouri law a pregnant woman could not be executed. Court records indicate she delivered a stillborn baby while in custody.

After the sentencing, Judge Hall was asked to issue a stay of execution while Celia's case was appealed to the Missouri Supreme Court. He refused. Though no record of the appeals document exists, Jameson probably included many of the same arguments and issues outlined in his motion for a new trial. By early November the Missouri Supreme Court had not considered the appeal. When it looked as though Celia would be executed before her appeal was heard, her supporters took drastic measures. On the night of November 11 she was helped to "escape" from jail. She was not returned to custody until after her original execution date had passed. Upon her return a new execution date of December 21 was set.

On December 6 Jameson wrote a letter to Judge Abiel Leonard asking the Missouri Supreme Court to issue a stay of execution until the case could be heard. On December 14 the court ruled that it found no probable cause for an appeal. Accordingly, the stay of execution was refused. Celia's fate was sealed by the same court that had earlier exhibited its pro-slavery leanings in the famous *Dred Scott* decision, in which a majority of the court ruled that a slave remained a slave—even if he traveled and lived in free territory (DRED SCOTT V. SANDFORD, 60 U.S. (19 How.) 393, 15 L. Ed. 691 [1857]).

The Missouri Supreme Court's ruling in Celia's case was filed in the circuit court of Calloway County on December 18. On the afternoon of Friday, December 21, Celia was hanged for the murder of Newsom. In a final statement, she repeated her story: she had acted alone, she had struck Newsom to stop his advances, and she had not intended to kill him. Unable, or unwilling, to challenge the underlying beliefs and behaviors that allowed slavery to exist, Missouri's pre–Civil War supreme court failed to extend the protection of an existing law to a slave.

FURTHER READINGS

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McLaurin, Melton A. 1991. *Celia, A Slave: A True Story.* Athens, Ga.: Univ. of Georgia Press; and New York: Avon Books.

## CEMETERIES

*Areas that are set aside by public authority or private persons for the burial of the dead.*

A *public cemetery* is open for use by the community at large while a *private cemetery* is used only by a small segment of a community or by a family.

A cemetery includes not only the actual grave sites but also surrounding areas such as avenues, walks, and grounds.

Cemeteries are not governed by laws that apply to real property or corporations due to their inherently different nature. Most states have established laws that specifically apply to cemeteries.

### Establishment and Regulation

The establishment of a cemetery involves the process of formally designating a tract of land for use for the burial of the dead. It must be set apart, marked, and distinguished from adjoining ground as a graveyard.

The state, in the exercise of its POLICE POWER, has the right to regulate the creation of cemeteries by providing for their establishment and discontinuance as well as to monitor their use. Private interests in the place of burial are subject to the control of public authorities, which have the right to require the disinterment of bodies if deemed necessary.

Burial sites may not be absolutely prohibited by legislative action inasmuch as they are considered indispensable and directly related to the public health. Provisions in corporate charters cannot prevent the exercise of POLICE POWERS

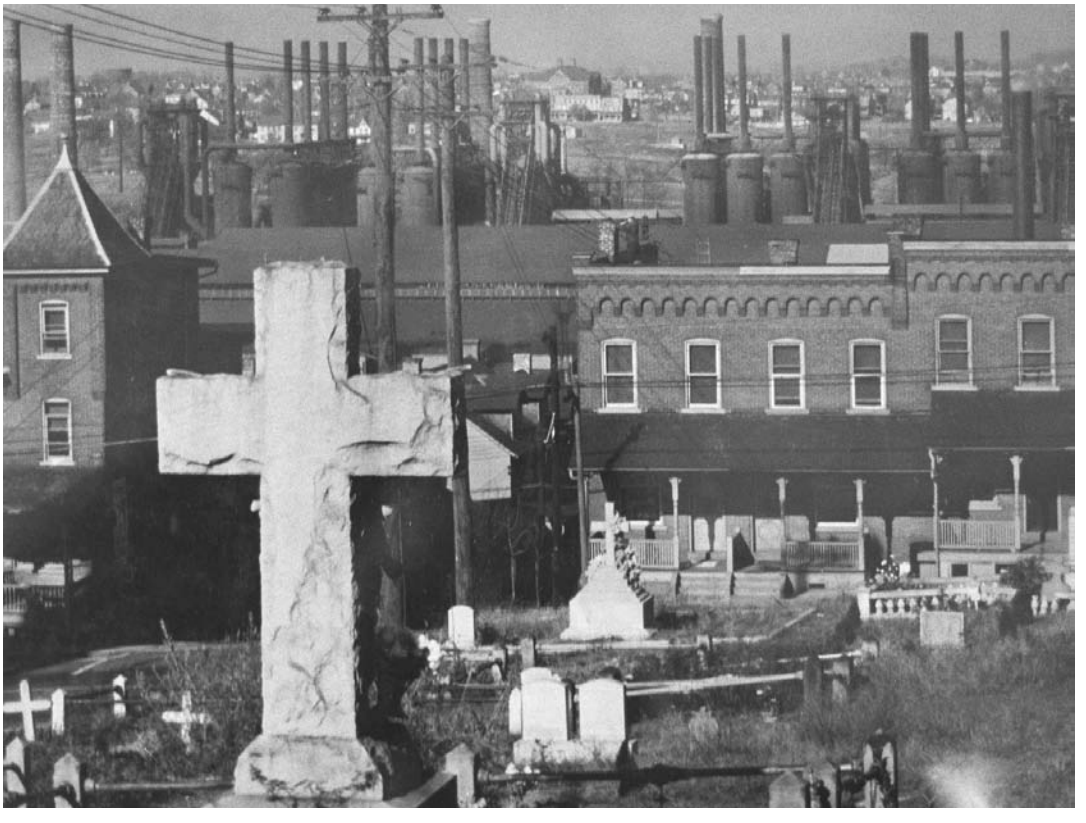

*The establishment of cemeteries, such as the one pictured, may be prohibited by state or local legislative bodies but only under certain circumstances.*

LIBRARY OF CONGRESS

with regard to which lands may be used for burial purposes, since burial in certain places might create a public NUISANCE.

**Regulation by Municipal Corporations** Subject to express legislative authority, and by virtue of its general police powers, a municipality may reasonably regulate places of burial within its borders. The key requirement is that a municipality may not act arbitrarily with regard to the regulations it adopts.

The power of a municipality to regulate cemeteries is an ongoing one that may be exercised as required by considerations of public health and welfare. Regulations may prohibit such actions as future burials in existing cemeteries, the enlargement of existing cemeteries, or the establishment of new ones.

A municipality may own and maintain a cemetery when it is expressly authorized to do so. General control may be exercised over a cemetery that a municipality owns, but control may not be exercised arbitrarily, capriciously, or unreasonably.

**Corporations and Associations** A cemetery corporation, as defined expressly by statute, is any corporation formed for the burial of the dead in a receptacle or vault. Such a corporation may or may not be organized for pecuniary profit and may or may not be organized under the general corporate law.

The members of a cemetery corporation are those people who own plots according to express statutory provisions. They cannot make a profit out of the sales of lots if the corporation is not for profit. Nor can they make a gift of their plot to another independent corporation.

If statute permits, cemetery corporations may issue stock and pay dividends to stockholders. Stockholders may enact bylaws.

Some statutes provide that a cemetery may give land shares, which are certificates entitling the holder to receive a portion of the profit from the subsequent sales of plots, in exchange for payment for the land purchased. This type of certificate is not a stock certificate but is in the nature of a nonnegotiable promise to pay money.

## Location

The establishment of cemeteries may be prohibited by state or local legislative bodies, but only under certain circumstances. The interment of dead bodies is necessary and proper and

therefore the prohibition of the establishment of a cemetery must be based on the potential danger to human life or health. State and municipal organizations are not permitted to prohibit burial for such reasons as the value of adjoining land being lessened or because a cemetery might be a source of annoyance to inhabitants of the surrounding community.

Under some statutory provisions a cemetery cannot be established within a certain distance of a private residence, store, or other place of business without the owner's consent. Similarly, certain statutes provide that, prior to the establishment of a cemetery, consent must be obtained from the county or municipal authorities within whose limits the cemetery will be located.

### Title and Rights of Owners of Plots, Grounds, or Graves

The purchaser of a plot in a cemetery is generally regarded as having obtained only a limited property right. He or she acquires a privilege, EASEMENT, or license to make burials in the purchased plot, exclusive of all other people, provided that the land remains a cemetery.

The plot owner's interest is a property right entitled to protection from invasion and the title is a legal estate. The owner's rights are subject to the police power of the state as well as the rules of the cemetery and any restrictions made in the contract of sale.

A cemetery corporation may cancel the contract of sale of a plot where regulations of the corporation that are part of the contract are violated by the sale due to a MISTAKE OF FACT. A purchaser may, in turn, rescind the contract where substantial misrepresentations have been made by the corporation.

Plot holders cannot be prevented by cemetery owners from erecting markers, entering the grounds, or interring family members in the plots they own. If a plot owner dies intestate, the rights to the plot pass to the heirs in the same manner that PERSONAL PROPERTY passes in the absence of a will. A gravestone or marker is the personal property of the person who places it near a grave and its ownership is passed to this person's heirs.

ABANDONMENT is the only way in which the use of land as a cemetery may cease. It takes place either by removal of all the interred bodies or by neglect to such a degree that the property is no longer identifiable as a cemetery. The removal of bodies may be ordered by public authorities when necessitated by the public health. The owner of a cemetery may opt to discontinue the sale of plots as initially planned, but permission to do so from government officials might be a prerequisite.

### Duties as to Care and Maintenance

The owner of a plot has the duty to care for and maintain the plot either personally or through an agent. A cemetery's trustees may supervise plots to prevent them from disintegrating to the point of unsightliness.

If a statute so requires, a cemetery association must care for its plots. If a charter imposes a duty upon the association to keep the grounds in repair, this obligation does not encompass plots sold to individuals.

A cemetery association has the duty to maintain the premises in a reasonably safe condition. Doing so includes the proper maintenance of portions of the cemetery used for travel or occupation by attendants of burials.

Uniform and reasonable rules and regulations may be made for the care and management of lots by the proprietors of a cemetery. Such rules must be equal in their operation. An unreasonable rule would be to prohibit the owner of a lot from hiring his own caretaker; however, a rule requiring that such work be done by competent persons would be reasonable.

### Right of Burial

Everyone is entitled to a decent burial in a suitable place. The right to be interred in a particular cemetery is an easement, license, or privilege. An element of this right is the privilege to be buried according to the usual custom in the community and pursuant to the rules and regulations set forth by the proprietor of the cemetery. When an individual does not purchase a plot subject to any restrictions on burial, the proprietors have no subsequent power to limit such right unreasonably.

An individual who obtains the right to be buried in a cemetery subject to the control of a religious organization takes the plot subject to the organization's rules. This may limit the burial right to its members or to those in communion with such organizations. The church has exclusive jurisdiction over the question of whether a person is in communion with a religious organization and thereby entitled to burial in its cemetery.

### Interference with Owner's Rights

A CAUSE OF ACTION may be based upon the interference with the rights of a plot owner. An unlawful and unwarranted interference with an individual's exercise of the right of burial in a cemetery lot is a TORT. An infringement of the rights of a plot owner may be prevented by an INJUNCTION if an injury is threatened.

Either criminal or civil liability, or both, exist for TRESPASS or other types of injuries to a cemetery or to individual burial plots. If a burial ground or plot is wrongfully invaded or desecrated, an action of trespass may be brought against the wrongdoer. VANDALISM and destruction of tombstones are criminal offenses. The person who erects a tombstone may maintain an action for injury to it. After that person's death, his or her heirs may prosecute such an action. Generally, the measure of damages for trespass is the cost of restoration. Since there is a strong public policy against injury to gravesites due to the indignity of the act, punitive damages—intended to deter future acts of desecration—may be awarded.

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CROSS-REFERENCES

Corpse; Easement; Property Law.

## CENSORSHIP

*The suppression or proscription of speech or writing that is deemed obscene, indecent, or unduly controversial.*

The term *censorship* derives from the official duties of the Roman censor who, beginning in 443 B.C., conducted the census by counting, assessing, and evaluating the populace. Originally neutral in tone, the term has come to mean the suppression of ideas or images by the government or others with authority.

Throughout history, societies practiced various forms of censorship in the belief that the community, as represented by the government, was responsible for molding the individual. For example, the ancient Greek philosopher Plato advocated various degrees of censorship in *The Republic*; the content of important texts and the dissemination of knowledge were tightly controlled in ancient Chinese society as is much information in modern China; and for centuries the Roman Catholic Church's *Index Librorum Prohibitorum* proscribed much literature as contrary to the church's teachings.

The English-speaking world began wrestling with issues of censorship in the seventeenth century. In his *Areopagitica* (1644), John Milton argued in favor of the right to publish, free from government restraint. In the United States, the FIRST AMENDMENT to the Constitution (1787) guarantees FREEDOM OF SPEECH and FREEDOM OF THE PRESS. When a U.S. government agency attempts to prohibit speech or writing, the party being censored frequently raises these First Amendment rights. Such cases usually involve communication that the government perceives as harmful to itself or the public.

### Abortion

In some cases, the government can constitutionally censor the speech of those who receive federal funding. For example, the Supreme Court ruled in *Rust v. Sullivan,* 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), that, without restricting First Amendment rights, the government can ban ABORTION counseling in federally funded health clinics.

### Prisoners' Mail

If the government's interest is penological it also has broader rights to censor speech. Prisoners' outgoing mail can be censored in order to thwart escape plans, shield the recipients from obscene or menacing letters, or circumvent inaccurate or adverse reports about prison conditions. Under the Supreme Court ruling in *Procunier v. Martinez,* 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974), prison administrators can censor prisoners' personal corre-

spondence only if it is necessary to maintain security, order, or rehabilitation efforts. Such censorship can be neither random nor excessively troublesome.

### Entertainment

Perhaps the most visible form of censorship is that affecting the entertainment industry. Theater and film, as types of public entertainment, affect the common interest and can hence be subjected to certain types of governmental regulation. But attempts to regulate or censor often risk obstructing the free speech rights of playwrights, screenwriters, filmmakers, performers, and distributors.

The U.S. Supreme Court has ruled that it is lawful to censor obscene entertainment to safeguard children from PORNOGRAPHY and to protect adults from unknowingly or involuntarily viewing indecent materials (*Ginsberg v. New York,* 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 [1968]). Although Supreme Court interpretation permits individuals to view OBSCENITY in the privacy of their homes (*Stanley v. Georgia,* 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 [1969]), theaters and movie houses are public places and therefore subject to regulation (*Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 [1973]). The difficulty with such censorship is in trying to determine what is "obscene."

In MILLER V. CALIFORNIA, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), the Supreme Court concluded that a work is obscene and can be regulated if it appeals to a viewer's prurient interest; portrays sexual conduct in a patently offensive way; and lacks serious literary, artistic, political, or scientific value. The Court further ruled that interpretations of this definition may vary across the United States and that communities may apply their own local standards to determine obscenity.

To avoid government censorship, the Motion Picture Association of America (MPAA) regulates itself through a voluntary rating system. The system does not have statutory authority but is used to help the industry conform with statutes designed to protect children. Recognizing a 1968 Supreme Court decision that favored limited censorship for minors (*Ginsberg v. New York,* 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195), the MPAA devised a rating system based on the viewer's age. A G rating signals that subject matter is suitable for general audiences; PG stands for Parental Guidance Suggested; PG-13 strongly advises guidance for children under age 13 because of possibly inappropriate material; R requires accompaniment by an adult for children under age 17, or 18 in some states; and NC-17 or X prohibit anyone under age 17, or 18 in some states, from entering the theater.

Radio and television have also met with governmental pressure to control the content of their broadcasts. Spurred by the belief that violence on television adversely affects children's behavior and attitudes, Congress has attempted several times to encourage the media to adopt voluntary guidelines in the hope that less violence on television will lead to a less violent society. Although none of Congress's acts have been deemed outright censorship, government intrusion into broadcasting to discourage certain types of speech has not been welcomed by all. The various pieces of legislation raise questions about media self-censorship and the role of the FEDERAL COMMUNICATIONS COMMISSION (FCC) in regulating freedom of expression.

In response to congressional pressure the NATIONAL ASSOCIATION OF BROADCASTERS adopted the Family Viewing Policy in 1974 to limit the first hour of prime-time programming to material suitable for families. The policy was found unconstitutional in 1976 (*Writers Guild of America, West, Inc. v. F.C.C.,* 423 F. Supp. 1064 [C.D. Cal., 1976]).

Congress addressed the content of children's television with the Children's Television Act of 1990 (47 U.S.C.A. §§ 303a–303b [Supp. III 1991]), which limits the amount of advertising on children's television and compels broadcasters to air educational programs. Failure to comply with the act could jeopardize renewal of a station's license. Critics point out that the act has not improved children's programming because of its vague standards and the FCC's disinclination to enforce it.

The Television Violence Act (47 U.S.C.A. § 303c [Supp. III 1991]), proposed in 1986 by Senator Paul Simon (D-Ill.), was signed into law by President GEORGE H.W. BUSH in December 1990. This act, which expired in 1993, was intended to prompt the networks, cable industry, and independent stations to decrease the amount of violence shown on television. Although it did not constitute direct government regulation, the act was criticized as a governmental attempt to impose its values on society by discouraging, if not suppressing, unpopular ideas.

The Telecommunications Act of 1996, 110 Stat. 56, required television manufacturers to create a chip, known as the V-chip, which allows users, presumably parents, to block out programs based on their sexual or violent content. The chip, which has been installed in television sets manufactured since 1999, operates in conjunction with a voluntary rating system implemented by TV broadcasters that rates programs for violence and sexual content.

Radio broadcasts have also come under scrutiny. In *FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978), the Supreme Court ruled that a daytime broadcast of George Carlin's "Seven Dirty Words" monologue violated the prohibition of indecency in 18 U.S.C.A. § 1464 (1948) and was therefore subject to regulation. To many, this ruling gave the FCC further authority to censor speech and dictate values.

### Music

Just as the entertainment industry has faced regulation or censorship for allegedly violent, obscene, or indecent material, so has the recording industry. Claiming that some popular music erodes morals by encouraging violence, drug abuse, and sexual promiscuity, the Parents' Music Resource Center, founded in 1985 by Tipper Gore, the wife of the future vice president, ALBERT GORE, successfully lobbied the music industry to place warning labels on records that may feature lyrics inappropriate for children.

Concerned about the rising rate of violent crime against law enforcement officers, the assistant director of public affairs for the FEDERAL BUREAU OF INVESTIGATION (FBI) sent a letter in August 1989 to Priority Records to protest a rap group's lyrics. N.W.A., a Los Angeles-based rap group, recorded on its album *Straight Outta Compton* the song "Fuck tha Police," which violently protested police brutality. Although the letter from the FBI was a protest, not an attempt at regulation, many in the music industry interpreted it as an example of indirect censorship through intimidation.

Perhaps the most famous legal proceedings to censor music involved the rap group 2 Live Crew. In early 1990, a Florida circuit judge banned all sales of the group's album *As Nasty As They Wanna Be* on the grounds that the lyrics of several of its songs, including "Me So Horny," violated community standards for obscenity. The group brought suit to have the ban lifted in *Skyywalker Records v. Navarro,* 742 F. Supp. 638 (S.D. Fla. 1990), but the judge upheld the obscenity ruling. A record store owner was arrested for continuing to sell the album and two members of 2 Live Crew were arrested on obscenity charges after a performance. The band members were acquitted of all charges in October 1990, but the debate continues between those demanding free expression in music and those seeking to censor allegedly obscene material.

### Art

For almost as long as artists have been creating art, governments have both supported and censored artists' work. Ancient Athens, the Roman Empire, and the medieval Catholic Church financed many projects, whereas totalitarian regimes, for example, banned many works and repressed artists. The U.S. Congress was reluctant to fund art that might subsequently be construed as national art, or as government-approved art until 1960s activism encouraged it to do so. In 1965, the National Foundation on the Arts and the Humanities was established to foster excellence in the arts. It is composed of two divisions, the National Endowment for the Arts (NEA) and the National Endowment for the Humanities (NEH). Among its many interests, the NEA provides stipends to deserving artists.

Controversy over the role of government support of the arts arose in the late 1980s with two artists who received NEA funding. In 1988, the photographer Andres Serrano received harsh condemnation for his photograph titled *Piss Christ,* which depicted a plastic crucifix floating in a jar of Serrano's urine. Numerous senators sent letters of protest to the NEA, insisting that the agency cease underwriting vulgar art. A second furor arose in 1989 over the work of another photographer, Robert Mapplethorpe, who received NEA support for his work, which depicted flowers, nude children, and homosexuality and sadomasochism.

Senator JESSE HELMS (R-N.C.) argued the most vociferously against the NEA's choices and introduced legislation to ban funding of "obscene or indecent art" (1989 H.R. 2788 [codified at 20 U.S.C.A. § 953 et seq. (1989)]). The Helms Amendment, adopted in October 1989, gave the NEA great power and latitude to define obscenity and quash alternative artistic visions. To enforce the new amendment, the NEA estab-

*Demonstrators outside the Brooklyn Museum of Art protest Mayor Rudolph Giuliani's threat to withdraw the museum's city funding based on what he felt were offensive works of art in the 1999* Sensation *exhibit.*

ROMMEL PECSON/CORBIS

lished an "obscenity pledge," which required artists to promise they would not use government money to create works of an obscene nature. The art world strongly resisted this measure: many museum directors resigned in protest and several well-known artists returned their NEA grants.

Two important cases tested the power of the NEA to censor artistic production. In *Bella Lewitsky Dance Foundation v. Frohnmayer,* 754 F. Supp. 774 (C.D. Cal. 1991), a dance company refused to sign the obscenity pledge and sued on the ground that the pledge was unconstitutional. A California district court agreed that the pledge violated the First Amendment right to free speech and that its vagueness denied the dance company DUE PROCESS under the FIFTH AMENDMENT.

In *New School v. Frohnmayer,* No. 90-3510 (S.D.N.Y. 1990), the New School for Social Research, in New York City, turned down a grant, claiming that the obscenity pledge acted as PRIOR RESTRAINT and therefore breached the school's First Amendment rights. Before the constitutionality of the prior restraint argument was decided, the NEA released the school from its obligation to sign the pledge.

The NEA abolished the obscenity pledge in November 1990, but in its place instituted a "decency clause" (1990 Amendments, Pub. L. No. 101-512, § 103(b), 104 Stat. 1963 [codified at 20 U.S.C.A. § 954(d)(1990)]), which required award recipients to ensure that their works met certain standards of decency. Failure to comply with this demand could mean suspension of grant payments.

Again the art world protested. In *Finley v. NEA,* 795 F. Supp. 1457 (C.D. Cal. 1992), artists known as the NEA Four—Karen Finley, John Fleck, Holly Hughes, and Tim Miller—sued the NEA over the decency clause. A California district court agreed with the artists. The *Finley* court held that the decency clause, like the obscenity pledge, was unconstitutional because its vagueness denied the artists the due process guaranteed by the Fifth Amendment and because its too-general restriction suppressed speech.

### Books

U.S. parents send their children to public schools to receive an education and to learn the fundamental values on which their democratic society is based. Conflict ensues when parents believe that certain schoolbooks contain material that is objectionable on political, moral, or religious grounds and should be banned in order to protect their children from exposure to allegedly harmful ideas. In some instances school boards have responded by physically removing books from school library shelves. In general, advocates of book banning maintain that censorship is warranted to redress social ills, whereas critics believe that freedom of speech is more important and useful to society than imposing values through censorship.

Book banning as a way to remedy social problems was first tested by the Supreme Court in *Board of Education v. Pico,* 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982). In *Pico,* parents objected to nine books in the high school library, most of which were subsequently removed by the school board. The nine books were *Slaughterhouse Five,* by Kurt Vonnegut Jr.; *Naked Ape,* by Desmond Morris; *Down These Mean Streets,* by Piri Thomas; *Best Short Stories of Negro Writers,* edited by Langston Hughes; *Laughing Boy,* by Oliver LaFarge; *Black Boy,* by Richard Wright; *A Hero Ain't Nothin' But a Sandwich,* by Alice Childress; *Soul on Ice,* by ELDRIDGE CLEAVER; and *Go Ask Alice,* by an anonymous author.

*Pico* debated the authority of local school boards to censor material in the interest of protecting students. The case reached the Supreme Court because lower courts were unable to devise standards for testing the constitutionality of book removal. The Supreme Court ruled that it is unconstitutional for public school boards to abridge students' First Amendment rights by

banning books. Although school boards have the power to determine which books should sit on library shelves, they do not have the authority to censor.

Books published by commercial presses for sale to the general public sometimes meet with harsh condemnation and subsequent action that could be tantamount to censorship. In November 1990, Simon and Schuster canceled its contract with author Bret E. Ellis to publish his novel *American Psycho,* citing the work's graphic violence and sexual brutality. The National Writers Union decried the cancellation as contrary to free speech and artistic expression and as censorship. The publishing house defended its editorial judgment by claiming it did not want to put its imprint on a book of questionable taste and value. Vintage Books, a division of Random House, soon acquired the novel, and published it in March 1991.

### Students' Speech

Students' free speech rights sometimes clash with schools' interest in maintaining control of public education. Students' First Amendment liberties were affirmed by the landmark TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), which ruled that public school students could not be penalized for wearing symbols, such as black armbands, to protest the VIETNAM WAR.

Two subsequent cases dealing with issues of censorship in school newspapers pointed to a more restrictive judicial view of students' right to free expression. In *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988), the Supreme Court ruled in favor of a Hazelwood, Missouri, school principal who removed several articles from a student newspaper. The articles dealt with teen pregnancy and a student's feelings about her parents' DIVORCE. The court in *Hazelwood* held that a school newspaper is not a public forum, and thus granted school officials the right to determine what type of student speech is appropriate and to regulate such speech.

Three years later, the ruling in *Planned Parenthood v. Clark County School District,* 941 F.2d 817 (9th Cir. 1991), was based on *Hazelwood.* In *Planned Parenthood,* a public high school newspaper solicited advertisements from local businesses, including Planned Parenthood. The principal refused to allow Planned Parenthood to place an advertisement in school publications and Planned Parenthood sued the school district. The Ninth Circuit Court of Appeals upheld a district court decision that a public high school publication is not a public forum and that the school could therefore accept or reject advertisements. Both *Hazelwood* and *Planned Parenthood* concluded that because public high schools are nonpublic forums, school districts can apply a limited degree of censorship.

Hundreds of public universities in the United States have speech codes to regulate students' choice of words. Speech can be constitutionally curtailed in some circumstances. For example, public COLLEGES AND UNIVERSITIES can forbid threats of violence, prohibit obscene language and conduct (although it is extremely difficult to define or prove obscenity), and punish students for using defamatory speech against each other, all without violating the First Amendment. Numerous cases have successfully contested free speech limitations on campus, suggesting that a majority of these codes are unconstitutional.

In *Doe v. University of Michigan,* 721 F. Supp. 852 (E.D. Mich. 1989), a biopsychology student maintained that the university's speech code prevented him from freely discussing controversial ideas about biologically based differences between the sexes and races. A district court ruled that the university's code proscribed too great a range of speech and therefore was an unconstitutional infringement on the plaintiff's First Amendment rights. The court also held that the overbroad nature of the code denied his due process rights.

A University of Wisconsin student was accused of violating the university's speech codes by yelling rude comments at a woman. In *U.W.M. Post, Inc. v. Board of Regents,* 774 F. Supp. 1163 (E.D. Wis. 1991), the university's speech code was also struck down as overbroad. Two years later school officials punished fraternity brothers at GEORGE MASON University for dressing in drag and staging an "ugly woman contest." In *Iota X Chapter v. George Mason University,* 993 F.2d 386 (1993), the Fourth Circuit found that the university had violated the First Amendment because it did not sanction the fraternity merely for its conduct, but rather for the message conveyed by the "ugly woman contest," which ran counter to the views the university sought to foster.

### Internet

Computer-mediated communication grows explosively every year and in some ways outpaces and obviates current legal principles. The prevailing concept of law applies to real-world events and transactions, and, as those in the legal field are realizing, may unravel when exercised in cyberspace. As more and more people transmit widely divergent messages on the electronic highway, issues of free speech and censorship become increasingly complicated and regulations difficult to enforce.

The first case of criminal prosecution of electronic communication involved the distribution of pornography over an electronic bulletin board system (BBS). In *United States v. Thomas,* No. CR-94-20019-G (W.D. Tenn. 1994), Robert Thomas and Carleen Thomas were found guilty of disseminating obscene materials by interstate telephone lines and computer. From their home in California, the Thomases ran an adults-only private BBS from which subscribers could download computer graphics files and order sexually explicit photographs and videotapes while on-line. To gather evidence against the couple, a Memphis postal inspector, under an assumed name, downloaded to his computer many of the pornographic electronic files and ordered tapes.

The Thomases were charged with, among other things, transporting obscene materials across state lines. The couple attempted to transfer their case to the Northern District of California, so that their materials would be measured against that community's standards of obscenity, rather than the obscenity standards of the Western District of Tennessee. The district judge denied their request, noting that in obscenity prosecutions the trial can be held either in the district from which the material was sent or where it was received.

The "virtual" nature of cyberspace poses a number of problems for courts and legislatures on the issue of obscenity. Among the most difficult of these is the issue of community standards. Because the INTERNET brings together people from all over the United States and all over the world, it defies identification with any particular community. Other difficulties are the criminal element of knowledge and the issue of dissemination. Persons may post and receive information on Internet bulletin boards without the knowledge of those who maintain the BBS, making it difficult to determine whether the BBS operators "knowingly disseminated" obscene materials.

In 1996, Congress passed the Communications Decency Act (CDA), which punished disseminating "indecent" material over the Internet. The Supreme Court struck down the law in *Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). Although the Court recognized the "legitimacy and importance of the congressional goal of protecting children from harmful materials," it ruled that the CDA abridged freedom of speech and therefore was unconstitutional. The Court also noted that its previous decisions limiting free speech out of concern for the protection of children were inapplicable in this case, and that the CDA differed from the laws and orders upheld in previous cases in significant ways. For example, the CDA did not allow parents to consent to their children's use of restricted materials; it was not limited to commercial transactions; it failed to provide a definition of "indecent"; and its broad prohibitions were not limited to particular times of the day. Finally, the act's restrictions could not be analyzed as a form of time, place, and manner regulation because it was a content-based blanket restriction on speech.

Congress lost little time in responding to this decision. In 1998, it quickly passed the Child Online Protection Act (COPA), which would make it illegal to use the World Wide Web to communicate "for commercial purposes" any material considered to be "harmful to minors." The law also incorporated the three-part obscenity test that the Supreme Court formulated in *Miller v. California.* The AMERICAN CIVIL LIBERTIES UNION (ACLU) and a group of on-line website operators challenged the constitutionality of COPA, arguing that it was overbroad. In addition, the plaintiffs contended that the use of the community standards test would give any community in the United States the ability to file civil and criminal lawsuits under COPA. This meant that the most conservative community in the country could dictate the content of the Internet. A federal appeals court in Philadelphia agreed with these arguments and the government appealed again to the Supreme Court.

The Supreme Court, in *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002), produced a decision that failed to give a clear direction. The use

of community standards did not by itself make the statute overbroad and unconstitutional under the First Amendment. Apart from that conclusion, the Court could not agree, with five of the justices producing separate opinions. A majority, however, had reservations about the COPA. A number of the justices expressed concern that without a national standard it would be difficult for operators of Internet services to know when they had crossed a line and had subjected themselves to liability. The case was remanded to the lower courts for a full examination of the law on all issues. The fate of COPA is likely to be decided by the Court in a future decision.

As the popularity of the Internet continues to grow, more issues involving censorship are likely to appear. And with the advancement of high-speed Internet access, movies, videos, text, and pictures can now be downloaded with greater ease, creating even more opportunities for legal debate.

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CROSS-REFERENCES

Art Law; Entertainment Law; Movie Rating; Schools and School Districts.

## CENSURE

*A formal, public reprimand for an infraction or violation.*

From time to time deliberative bodies are forced to take action against members whose actions or behavior runs counter to the group's acceptable standards for individual behavior. In the U.S. Congress, that action can come in the form of censure. Censure is a formal and public condemnation of an individual's transgressions. It is stronger than a simple rebuke, but not as strong as expulsion. Members of Congress who have been censured are required to give up any committee chairs they hold, but they are not removed from their elected position. Not surprisingly, however, few censured politicians are re-elected.

While *censure* is not specifically mentioned in the U.S. Constitution, Congress has the right to adopt resolutions, and a resolution to invoke censure falls into this category. The first use of censure was actually directed not at a member of Congress but at a member of George Washington's cabinet. ALEXANDER HAMILTON, Washington's treasury secretary, was accused of mishandling two congressionally authorized loans. Congress voted a censure resolution against Hamilton. The vote fell short, but it established censure as a precedent. In general, each house of Congress is responsible for invoking censure against its own members; censure against other government officials is not common, and censure against the president is rarer still.

Because censure is not specifically mentioned as the accepted form of reprimand, many censure actions against members of Congress may be listed officially as rebuke, condemnation, or denouncement. The end result, however, is the same, and to all intents and purposes these are censure measures. At the same time, each censure case is different, and those delivering censure like to have enough leeway to tailor the level of severity. Still, the prospect of an open, public rebuke by one's peers is painful even for the most thick-skinned politician.

### Noteworthy Censure Cases

Among the best known censure cases in Congress were the 1811 censure of Massachu-

setts senator Timothy Pickering for reading confidential documents in Senate sessions and the 1844 censure of Ohio senator Benjamin Tappan for releasing a confidential document to a major newspaper. Perhaps one of the more colorful censure motions was the 1902 censure of South Carolina's two senators, Benjamin R. Tillman and John L. McLaurin. On February 22, 1902, they began fighting in the Senate chamber. Both men were censured and suspended for six days (retroactively).

Probably the most infamous censure case was the condemnation of Senator JOSEPH R. MCCARTHY (R-WI) in 1954. McCarthy took the national stage at the height of the anti-Communist movement following WORLD WAR II. McCarthy spent several years making claims that known Communists had infiltrated the U.S. government, and although he never offered proof of even one claim, his crusade was popular and powerful. Many Americans from all walks of life saw their lives destroyed in the early 1950s by groundless accusations of communist sympathies. His power unchecked, McCarthy became even more relentless, and in 1954 he openly attacked members of the Eisenhower administration in televised hearings. His colleagues realized they had no choice but to act. A censure committee was formed, and McCarthy as much as accused its members of being Communists. The vote to condemn McCarthy passed 65 to 22 on December 2, 1954.

Robert Torricelli (D-NJ) was found guilty in 2002 of taking illegal gifts and cash payments from a businessman and not reporting them. The businessman got help from the senator in LOBBYING the government. Although Torricelli denied the charges, his colleagues found the evidence compelling enough to "severely admonish" him. While not called a "censure," this reprimand clearly had the same effect. Torricelli, who was up for reelection, saw his popularity plunge in a matter of weeks, and on September 30, 2002, he withdrew from the race.

### Presidential Censure

Congress rarely acts against the president with a formal reprimand. ANDREW JACKSON was the first president to be thus reprimanded, by the Senate in 1834, after he removed the secretary of the treasury (a responsibility that Congress believed rested with the legislature). Jackson was a Democrat, but the Senate was controlled by the rival WHIG PARTY. Three years later, when the Democrats took control of the Senate, Jackson's censure was expunged from the records.

President JOHN TYLER was reprimanded in 1842 by the House of Representatives, which accused him of abusing his powers. Apparently Tyler had promised representatives on several occasions that he would support certain bills, only to VETO them when they arrived at his desk. In 1848, President JAMES K. POLK was reprimanded by the House for starting the Mexican War without first obtaining Congressional approval. In 1864, President ABRAHAM LINCOLN and his secretary of war, EDWIN STANTON, were condemned by the Senate for allowing an elected member of the House to hold commissions in the Army. The Senate voted for the reprimand 24 to 12, but it was referred to a special committee and no further action was taken.

In 1998, during the IMPEACHMENT trial of President BILL CLINTON, several members of Congress attempted to have him censured instead, believing that while his behavior warranted rebuke it did not merit a full impeachment. The move for censure failed, and Clinton was impeached.

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#### CROSS-REFERENCES

Congress of the United States; Impeachment.

## CENSUS

*An official count of the population of a particular area, such as a district, state, or nation.*

The U.S. Constitution requires that a census of the entire population, citizens and noncitizens alike, be made every ten years (Article I, Section 2, Clause 3). The FOURTEENTH AMENDMENT to the Constitution directs that the census will be used to determine the number of members of the U.S. House of Representatives from each state. The census is conducted by the U.S. CENSUS BUREAU, an agency established in 1899 within the U.S. COMMERCE DEPARTMENT. The data gathered by the U.S. Census Bureau are used by the states to draw boundaries for congressional and state legislative districts, and by local governments to establish districts for other representative bodies such as county legislatures, city councils, and boards of supervisors.

Census data are also used to allocate federal and state funding and services. By the mid-1990s, more than $50 billion in federal aid for education, housing, and health programs to states and cities was distributed annually based on census numbers. In addition, census information is used in academic research and is sought by product manufacturers and marketers who want to know the demographics of potential consumers.

The first U.S. census took place in 1790 when some six hundred U.S. MARSHALS went door-to-door counting approximately 3.9 million people. The 1790 census consisted of fewer than ten questions, which for each household included the name of the head of the family, the number of free white males over and under 16 years of age, the number of free white females, the number of all other free persons, and the number of slaves.

The 1890 census counted 63 million U.S. citizens and reflected a dramatic increase in immigration, urbanization, and industrialization. That census showed that for the first time fewer than half of all U.S. workers were employed on farms. The 1890 census included questions regarding military service during the Civil War, number of years in the United States, naturalization status, reading and writing ability, and mental and physical disabilities.

By 1980, the Census Bureau conceded that the decennial censuses were undercounting portions of the population, usually low-income and minority groups in the inner cities. In follow-up surveys after the 1980 census the bureau determined that it had missed some 3.2 million persons, or 1.4 percent of the population. For example, a 1986 post-census survey of East Los Angeles estimated that the 1980 census missed about ten percent of the Latino community, seven percent of the Asian community, and nine percent of the black community. Census officials determined that overall, nearly six percent of the black and Hispanic populations were uncounted

**Census**

**RESIDENT POPULATION OF THE UNITED STATES, BY RACE AND REGION[a]**

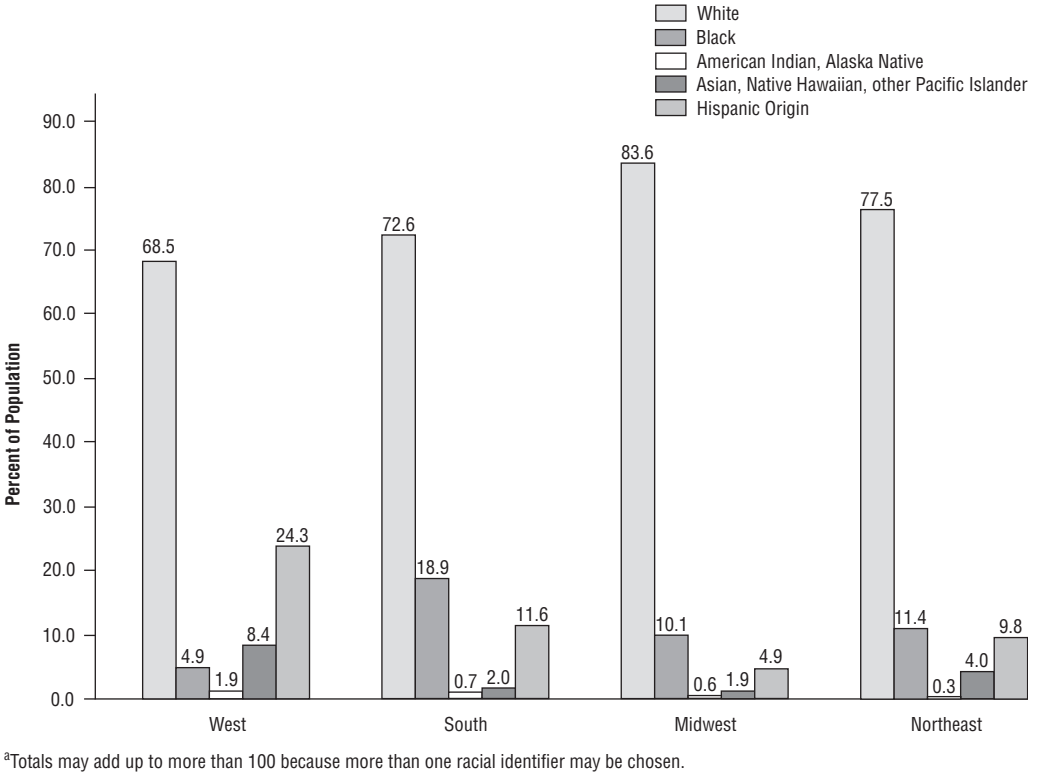


[a]Totals may add up to more than 100 because more than one racial identifier may be chosen.

SOURCE: U.S. Bureau of Census, *Census 2000.*

and less than one percent of the white population.

By May 1987, the Census Bureau had determined that the 1990 census could be adjusted for undercounting by using a technique called a post-enumeration survey (PES). The PES would allow the census to be checked for accuracy by sending census takers back to a given number of households that would be representative of the entire U.S. population and comparing the information gathered with the initial head count. If discrepancies arose, the bureau could make corrections and project them to neighborhoods with similar demographic characteristics.

But in October 1987, officials from the Commerce Department, which oversees the Census Bureau, decided against making any statistical adjustment to the 1990 census. As a result, in 1988, New York, Los Angeles, and several other cities, as well as a number of states and organizations, brought suit in federal district court. They claimed that the secretary's decision not to adjust the 1990 census violated their right to EQUAL PROTECTION under the FIFTH AMENDMENT to the Constitution and asked the court to enjoin the census. They also argued that the Commerce Department's actions were politically motivated by a Republican administration that realized that the undercounted population is historically Democratic. The defendants moved to dismiss the complaint, contending that the secretary's decision was not subject to JUDICIAL REVIEW. In *City of New York v. United States Department of Commerce,* 713 F. Supp. 48 (E.D.N.Y. 1989), the district court denied the motion to dismiss, holding that the plaintiffs had standing (the legal right) to challenge the census on constitutional grounds and that the court could review the secretary's decision.

Following the district court's decision the parties entered into a stipulation in July 1989 by which plaintiffs would withdraw their motion to enjoin the census and the Commerce Department would reconsider its 1987 decision not to adjust the 1990 census. The agreement required the Commerce Department to conduct a PES of not fewer than 150,000 households as part of the 1990 census in order to produce corrected counts usable for congressional and legislative reapportionment and redistricting. The agreement also required the department to develop guidelines under which the secretary would assess any proposed adjustment. In March 1990 the Commerce Department issued final guidelines. The plaintiffs challenged them in court on the grounds that they were impermissibly vague and were biased against any adjustment to the 1990 census. In *City of New York,* 739 F. Supp. 761 (E.D.N.Y. 1990), the district court held that the guidelines satisfied the defendants' obligations under the 1989 stipulation. The Census Bureau then began the 1990 census.

The 1990 census employed more than 425,000 workers who gathered information on an estimated 250 million people in 106 million households. For the first time, the Census Bureau combined technology with traditional door knocking, using coast-to-coast computerized maps of all 7.5 million census tracts in the United States. The bureau predicted that these maps would reduce the number of errors caused by census workers' reliance on outdated state and local maps. The census cost some $2.6 billion—65 percent more than the 1980 census—making it the most expensive count ever conducted.

In March 1990, the bureau mailed or hand delivered more than 106 million questionnaires, one to every household in the United States. Most households received a short form consisting of 14 questions covering personal characteristics and housing. One in six U.S. households received a long form with 45 additional questions on topics such as utilities, tax, mortgage, and rent payments; place of birth; ethnic origin; and work habits. From March to June 1990 census workers continued the data collection. The bureau set aside March 20, 1990, as "homeless night." On that night, census takers, many hired from among the homeless population or those who worked with them, visited shelters and low-cost motels from 6:00 P.M. to midnight; counted homeless people on the streets from 2:00 A.M. to 4:00 A.M.; and from 4:00 A.M. to 6:30 A.M. stood outside abandoned buildings, counting those who emerged.

The homeless count caused a great deal of controversy. The 1990 census reported 228,600 HOMELESS PERSONS in the United States, compared with earlier estimates of 500,000 to 3 million. Advocates for homeless persons argued that the Census Bureau had surveyed only a third of the country's cities and counties and had visited only a limited number of locations. The bureau acknowledged that its workers had avoided actually going into hideaways such as abandoned buildings and dumpsters because of safety concerns and admitted that many winter

shelters had closed by the time the census was taken in late March. The bureau maintained that its homeless survey was not intended to produce a definitive count of the homeless population.

In October 1990, the Census Bureau issued estimated U.S. population figures of approximately 254 million, based on a tracking of birth, death, and immigration records. In December, the bureau released a final U.S. population tally of some 249 million, based on the actual mailed census questionnaires and house-to-house interviews. The discrepancy between the two sets of numbers indicated that the 1990 census missed some five million U.S. residents.

By December 31, 1990, the bureau reported to the president population figures for each state as well as the number of seats in the U.S. House of Representatives that each state would receive. Between January and March 1991, states with early deadlines for redrawing legislative districts received totals of all persons of voting age, broken down by race. By April 1, 1991, most other states received the voting age and race data. Between April 1991 and 1993, the Census Bureau released statistics compiled from the long forms, including information on income, marital status, disabilities, types of housing, and education.

In April 1991, the bureau announced the results of its PES. Estimates drawn from the PES revealed that the census had resulted in a national undercount of 2.1 percent, or approximately 5.3 million persons out of a total population of approximately 255 million, the largest undercounting in the history of the census. For example, in one south central Los Angeles neighborhood, officials determined that census takers had underreported the number of occupants in 38 percent of 5,800 households. As expected, the undercount was greater for members of racial and ethnic minorities. Hispanics were undercounted by 5.2 percent, Native Americans by 5.0 percent, African Americans by 4.8 percent, and Asian Pacific Islanders by 3.1 percent. The PES-calculated undercount for non-African Americans was 1.7 percent and for non-Hispanic whites, 1.2 percent. Among major cities with high undercounts were Los Angeles (5.1 percent), Houston (5 percent), Washington, D.C. (5 percent), Dallas (4.8 percent), Miami (4.6 percent), Detroit (3.5 percent), and New York (3 percent).

Among the reasons given for the low counts were that certain segments of the population did not believe the Census Bureau's promise that information is confidential and will not be shared with other government agencies such as the Immigration and Naturalization Service (INS), the local housing authority, or the police; did not have addresses and thus were missed because the 1990 census was conducted primarily by mail; lived in urban high-crime areas where census takers were afraid to go door-to-door; were illegal immigrants; feared the government in general; or lacked proficiency in English.

According to the bureau, if the adjusted count were adopted, Arizona and California would each gain a seat in the House of Representatives and Wisconsin and Pennsylvania would each lose one seat. These discrepancies led state officials to renew their plea for an adjustment of the census using the PES.

In July 1991, Secretary of Commerce Robert A. Mosbacher announced his decision not to adjust the 1990 census to account for the estimated five million people undercounted by the census. Mosbacher said that although he was troubled by the undercount of minorities, his decision supported the integrity of the census and that the resulting disadvantage to minorities should not be remedied in the official census. He also expressed concern that adjustment might not improve distribution of representatives among the states and that uncertainty as to the methods of adjustment and assumptions behind them might cause even more dispute about the accuracy of the census.

The plaintiffs in *Wisconsin v. City of New York* 517 U.S. 1, 116 S.Ct. 1091, 134 L.Ed.2d 167 (1996), attacked the secretary's decision, contending that it was tainted by partisan political influence and violated the Constitution, the **ADMINISTRATIVE PROCEDURE ACT OF 1946**, and the 1989 stipulation agreed to by both parties in the case. After a 13-day bench (non-jury) trial, the district court concluded that it could not overturn the secretary's decision (*City of New York,* 822 F. Supp. 906 [E.D.N.Y. 1993]). On appeal, the court of appeals concluded that, given the admittedly greater accuracy of the adjusted count, the secretary's decision was not entitled to be upheld without a showing by the secretary that the refusal to adjust the census was essential to the achievement of a legitimate government objective (*City of New York,* 34 F.3d 1114 [2d Cir. 1994]). On appeal, the Supreme Court reversed the decision of the Second Cir-

*Census workers in a Phoenix, Arizona, data capture center. For the 2000 Census, the bureau planned to hire 850,000 temporary employees to assist its 6,000 permanent employees.*

U.S. CENSUS BUREAU

cuit, holding that the secretary's decision not to adjust the census was within the government's discretion (___ U.S. ___, 134 L. Ed. 2d 167, 116 S. Ct. 1091 [1996]).

By October 1991, at least five state legislatures had filed requests under the **FREEDOM OF INFORMATION ACT** (FOIA) (5 U.S.C.A. § 552 et seq.) to see the adjusted census figures in order to decide which set of numbers should be used to redraw state political boundaries. Secretary Mosbacher refused to make the adjusted numbers public, claiming they were flawed and their release could disrupt the redistricting process. In *Assembly of California v. United States Department of Commerce,* 797 F. Supp. 1554 (E.D. Cal. 1992), California state officials brought an action under the FOIA to enjoin the Commerce Department from withholding computer tapes containing statistically adjusted census data for California. The department claimed that the information was protected from disclosure under an exemption to the FOIA. But the district court said the exemption did not apply to the census data and ordered the Commerce Department to release the tapes. The court of appeals affirmed the district court's order to release the tapes (*Assembly of California,* 968 F.2d 916 [9th Cir. 1992]).

In a similar case, the U.S. Court of Appeals for the Eleventh Circuit reached the opposite result. In *Florida House of Representatives v. United States Department of Commerce,* 961 F.2d 941 (11th Cir. 1992), the Florida House of Representatives brought a FOIA action to compel the Commerce Department to release all the adjusted census data for Florida. The district court granted **SUMMARY JUDGMENT** for Florida and the Commerce Department appealed (*Florida House of Representatives,* No. TCA 91-40387-WS [N.D. Fla. 1992]). The Eleventh Circuit reversed, finding that the census data were exempted from disclosure under the FOIA. The U.S. Supreme Court declined to review the case (*Florida House of Representatives,* 506 U.S. 969, 113 S. Ct. 446, 121 L. Ed. 2d 363 [1992]).

In light of the controversy over the 1990 census, government officials and demographers debated how best to conduct the census in 2000 and later. Many demographers argued that the U.S. population had become too mobile and too uncooperative to allow reliance on mail-in-surveys and door-to-door interviews. An increase in the number of non-English speakers, undocumented immigrants, and homeless persons makes census taking more difficult and residents will become more diverse and less tolerant of government intrusion in the future. The American Statistical Association urged the government to use scientific sampling surveys to estimate the population that has been the most difficult to count.

In preparation for the 2000 census the bureau conducted a test census in the spring of 1995 at three sites—Paterson, New Jersey; Oakland, California; and six parishes in northwestern Louisiana. The sites were selected because of their ethnic diversity and their large number of multidwelling housing units. In Paterson the bureau experimented with a multimedia kiosk, which allowed residents to answer census questions by touching a screen. In Oakland all identified households were sent a census form and blank forms were also made available at libraries, post offices, and the **STATE DEPARTMENT** of motor vehicles. The bureau also experimented with using statistical samples from random surveys to estimate total population.

From these test projects the Census Bureau announced that it would use statistical sampling to take into account historically undercounted populations. These populations included minorities, renters, children, poor persons, and illegal **ALIENS**. Although the American Statistical Association supported this approach as a valid methodology, the announcement set off a political firestorm. Congressional Republicans, worried that sampling would lead to congressional **APPORTIONMENT** that favored the **DEMOCRATIC PARTY**, filed a lawsuit challenging the constitutionality of the proposed practice.

The Supreme Court, in *Commerce Dept. v. U.S. House of Representatives*, 525 U.S. 316, 119 S.Ct.765, 142 L.Ed.2d 797 (1999), ruled, in a 5–4 decision, against the use of statistical sampling, holding that the 1976 amendments to the Census Act (1954) prohibit the use of statistical sampling for purposes of population head counts. Justice SANDRA DAY O'CONNOR, writing for the majority, stated that there had been over two hundred years of history "during which federal census statutes have uniformly prohibited using statistical sampling for congressional apportionment."

The 2000 census revealed that the U.S. population had grown to approximately 281 million. There was little public controversy over the results, a sharp contrast to the 1990 census. However, one state did file suit in an attempt to throw out census figures derived from a method the state considered impermissible sampling. Utah, noting that its population grew by 30 percent in ten years, was disappointed it did not gain another seat in the U.S. House of Representatives. In reviewing the census data it noted that the Census Bureau had relied on a statistical method called imputation to estimate the number of members of a household that census takers could not contact after repeated efforts. Utah discovered that if it could have these imputed numbers removed from the population count it would gain a House seat that had been awarded to North Carolina.

A three-judge panel heard Utah's lawsuit but dismissed it at the urging of the Commerce Department. The panel ruled that the imputation method was not impermissible under the 1999 Supreme Court decision and that it did not violate the Constitution's Census Clause. The Supreme Court, in *Utah v. Evans*, 536 U.S. 452, 122 S.Ct. 2191, 153 L.Ed.2d 453 (2002), upheld the lower court ruling. The Court, in a 5–4 decision, dismissed Utah's contention that *actual enumeration* under the Census Clause was intended as a description of the only methodology for counting U.S. citizens. As for the imputation method, the Court saw it as different from sampling: "sampling seeks to extrapolate the features of a large population from a small one, but the Bureau's imputation process sought simply to fill in missing data as part of an effort to count individuals one by one."

The Census Bureau has established at its website (<http://www.census.gov>) a portal for accessing all 2000 census data. The site provides researchers with tables of data while also providing the public with breakdowns of data in easily searchable formats.

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CROSS-REFERENCES

Apportionment.

## CENTER FOR CONSTITUTIONAL RIGHTS

The Center for Constitutional Rights (CCR) is a nonprofit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the U.S. Constitution and the Declaration of Human Rights. Since its formation in 1966 by attorneys working for CIVIL RIGHTS demonstrators in the South, the CCR has been a forceful advocate of civil rights for all people. The New York City-based organization seeks to halt what it describes as a steady erosion of civil liberties in the United States and elsewhere. The group addresses such areas as international human rights, government misconduct, sexual politics, indigenous peoples' rights, nuclear and environmental hazards, WOMEN'S RIGHTS, civil rights, FREEDOM OF THE PRESS, racism, ELECTRONIC SURVEILLANCE, criminal trials, AFFIRMATIVE ACTION, and abuse of the GRAND JURY process.

Cofounded by attorneys WILLIAM M. KUNSTLER, Morton Stavis, and others in the heady days of 1960s social activism, the left-leaning CCR describes itself as "committed to the creative use of law as a positive force for social change." As such, throughout its history, the CCR has consistently generated legal and political controversy. African American civil rights leader MARTIN LUTHER KING JR. was one of the group's first clients. And, since then, the CCR has won favorable decisions for such diverse figures as antinuclear leaders in the Micronesian republic of Belau and Native American protesters at Wounded Knee, South Dakota.

Much of the center's work has involved international causes and foreign clients. In the early 1970s, the CCR sued the U.S. government to discover answers regarding U.S. citizens missing in Chile and U.S. involvement in the support

of Chilean leader Salvador Allende. The group has broken ground in the battle to establish the right to sue foreign governments or individuals in U.S. courts. In 1986, the CCR represented the government of President Corazon Aquino, of the Philippines, in its fight to recover millions of dollars in assets taken by former dictator Ferdinand Marcos. In another case, *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980), the organization won a settlement of $10.4 million for a Paraguayan boy who brought suit against an exiled dictator of Paraguay who had ordered the boy's torture.

In 1998, the CCR joined forces with Greenpeace USA and other organizations to block the Japanese corporate giant Shintech from constructing the largest PVC plant in the world in St. James Parish, Louisiana. The local community surrounding the site of the proposed plant had a population consisting of more than 80 percent minorities, 40 percent of whom lived below the poverty level. It also was known for its high degree of chemical POLLUTION, so much so that it was dubbed "Cancer Alley." The CCR accused the company of, among other things, environmental racism. Shintech abandoned its plans in late 1998. The CCR also played an important role in the 2000 release of Palestinian immigrant Hany Kiareldeen, who was detained by the Immigration and Naturalization Service (INS) for 19 months solely on the basis of secret evidence that neither he nor his lawyers were permitted to review.

The CCR also conducts a number of programs. Its Movement Support Network, started in 1984, provides aid to social activist groups, including legal protection for groups experiencing harassment by the FEDERAL BUREAU OF INVESTIGATION (FBI) and other government law enforcement agencies. The Anti-Biased Violence Project (ABVP), established in 1991, uses litigation and education to oppose violence against individuals because of their race, ethnicity, religion, gender, or sexual orientation, and has defended ordinances that curtail hate speech. The CCR's ELLA BAKER Student Program provides internships to law students. In Greenville, Mississippi, the CCR operates the Voting Rights Project, a community-based voting rights litigation group that works in Mississippi, Arkansas, and Tennessee. The CCR also maintains a speakers' bureau and publishes books, pamphlets, and periodicals, the last including *Docket* and the *MSN News.*

The CCR maintains its own staff, but also works with many lawyers who donate their time PRO BONO (for free). The group has previously been called the Civil Rights Legal Defense Fund and the Law Center for Constitutional Rights.

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## CENTERS FOR LAW AND LEGAL STUDIES

### Center for Law and Education

The Center for Law and Education (CLE) offers support services on educational issues for advocates working on behalf of low-income students and parents. It seeks to take a leadership role in both improving the quality of public education for low-income students in the United States and enabling low-income communities to address their own public education problems effectively. As part of the nationwide network of support centers funded by the LEGAL SERVICES CORPORATION (LSC), it provides specialized legal assistance to staff members of legal services programs and to members of approved panels representing eligible clients. The center has been at the fulcrum of reforms in education policy.

Founded in 1969, the Cambridge, Massachusetts, and Washington, D.C., branches of the center offer advice and collaboration on cases, publications, training, federal program advocacy, and litigation and assist parent and student involvement in education. The center publishes the *NEWSNOTES* periodical on a quarterly basis, as well as a host of other manuals, monographs, and reports. Its staff includes attorneys, an editor, and administrative support personnel. The center conducts training workshops, usually in conjunction with local legal services programs.

The CLE has been a part of significant lawsuits dealing with the enforcement of federal and state constitutional rights and of federal laws. It focuses on issues such as students' rights, federally funded programs, special education, sex and race discrimination, vocational education, bilingual-bicultural education, and Native-American education. Its staff has pressed significant litigation on the fairness of state programs for competency testing, the right of

pupils with limited proficiency in English to understand instruction, the rights of students with disabilities, and RACIAL DISCRIMINATION in education—among other issues. Whenever feasible, the center encourages the development of local lay advocacy resources to avoid costly and time-consuming litigation. A significant portion of the center's work is supported by grants from private funding.

### Center for Law and Social Policy

As a national public interest organization, the Center for Law and Social Policy (CLASP) seeks to improve the economic conditions of low-income families with children. The Washington, D.C.–based center also attempts to secure access for poor people to the nation's civil justice system through education, policy research, and advocacy. CLASP has worked closely with the Center on Budget Policies and Priorities, the CHILDREN'S DEFENSE FUND, the American Public Welfare Association, and hundreds of other federal and state advocacy organizations. The center helps develop new strategies to fight poverty and stimulates new approaches in the delivery of legal services.

Since its founding in 1969, CLASP has been involved in important court decisions related to welfare distribution. The center headed efforts to preserve professional legal services for poor people. It also organized the first clinical program for law school externs and initiated the National Women's Law Center and the Mental Health Law Project. In the 1990s CLASP got involved in a debate over proposed changes in the welfare system: the center issued a number of publications and began a process of information dissemination that created a conduit so that commissions on welfare could obtain information about each other's activities. As part of its ongoing mission the center has committed itself to the continuing review and analysis of developments in federal and state welfare reform.

CLASP advocates streamlined enforcement of CHILD SUPPORT. In the 1990s it initiated the ChildNet campaign which was designed to increase public awareness of the need for reform of the enforcement system for child support. In addition, the center attempted to expand the access of teen parents and impoverished adults to education and training programs. As to legislative issues, the Child Care and Development Block Grant, vocally supported by the center, tempers proposed limitations on welfare recipients that would make affordable child care less feasible. Generally, the center has promoted income support policies that enhance work, reduce poverty, and promote the well-being of families.

CLASP maintains a network of state and local advocates who provide training and technical assistance to other advocates and officials. It produces the quarterly *Family Matters* periodical, newsletters, and periodic updates on new policy developments. It serves as counsel to the hundreds of legal services programs across the United States and their national organizations.

### Center for Oceans Law and Policy

The Center for Oceans Law and Policy concerns itself with the future of the oceans and of the coastal and polar areas of the earth. The center has contributed to decisions made on the protection and use of these areas. It supports research, education, and discussion on legal and public issues surrounding oceans policy. It promotes interdisciplinary interaction at all levels—international, national, regional, and state—by conducting conferences and lectures. The center has dedicated itself to education in areas of oceans law and serves as a primary source for ongoing efforts in international research.

In 1976 the center was founded as a part of the University of Virginia, in Charlottesville. Since its founding the center has established a number of programs to promote discussion of oceans issues. In one such measure it established a teaching program in oceans law at the University of Virginia School of Law, along with the first master of law degree program with specialization in oceans law and policy. In addition, a basic course on oceans law and policy is taught by center personnel at American University, Georgetown University Law Center, and George Washington University Law School. Also working with the University of Virginia's law library, the center established the Newlin Collection on Oceans Law and Policy, believed to be the largest collection of formal and informal materials in oceans law anywhere in the world.

The center's activities include advocacy in five different areas: publications and research (the biennial *Director's Report* and the Oceans Policy Study Series); international associateships and fellowships; curriculum and teaching programs in oceans law and policy; conferences and seminars; and the Newlin Collection. Through

teaching, research, and the dissemination of information, the center seeks to help promote rational choices for maintaining a vital part of the earth's well-being. The center is supported by the Henry L. and Grace Doherty Charitable Foundation.

### Center on Social Welfare Policy and Law

The Center on Social Welfare Policy and Law (CSWPL) seeks an income support system that provides an adequate standard of living for people in the United States. In attempting to achieve this goal it respects individual rights of privacy, independence, self-determination, and fair treatment. It works as a nonprofit legal and policy organization providing assistance to advocates and poor people's organizations on welfare policy issues in Washington, D.C., and in the rest of the United States.

Since 1965 the CSWPL has pursued an aggressive policy of advocacy for poor people. Its work concentrates on public assistance programs that provide cash subsistence benefits to millions of economically disadvantaged people. The center works to facilitate programs such as Aid to Families with Dependent Children and general assistance programs at the state and local levels, which together provide services to over 15 million adults and children.

A professional staff of seven attorneys and policy analysts contributes to the center's understanding of welfare policy and law. First, welfare recipients and poor people receive direct representation in federal litigation before appropriate administrative and legislative bodies; this includes litigation before the U.S. Supreme Court, which has established basic DUE PROCESS rights for welfare recipients and ended discriminatory practices of welfare agencies. Second, the center seeks nonpartisan policy analysis designed to identify objective welfare policy issues. Third, by means of public education, the center attempts to increase popular understanding—and dispel myths—about public assistance programs. Fourth, the center disseminates legal analyses of developments in welfare law and policy to more than fourteen hundred welfare specialists in every state and to the poverty law journal *Clearinghouse Review.* Finally, it provides specialized case assistance with training and training materials for local lawyers, paralegals, and other advocates throughout the United States who are engaged in work that coincides with the center's mission. In the 1990s the center focused on welfare reform proposals.

The center receives financial support from foundations, corporations, the Legal Services Corporation, the Interest on Lawyer Account Fund of the State of New York, law firms, church groups, community organizations, and individuals. Under section 501(c)(3) of the INTERNAL REVENUE CODE, the center is a nonprofit corporation with tax exempt status.

### Center for the Study of the Presidency

The New York City–based Center for the Study of the Presidency (CSP) promotes citizenship education, especially for youth. It seeks an understanding of U.S. political and economic systems and relies on a network of college and university faculty and students for its intellectual support. The center conducts high-profile roundtable discussions with political leaders as well as special studies of U.S. political policies. It also maintains a research clearinghouse on the presidency.

The founding of the CSP in 1968 received support from former President DWIGHT D. EISENHOWER who said, "The result [of the center] cannot fail to be good . . . for the Nation." The New York State Board of Regents chartered the center. Since the center's founding, Dr. R. Gordon Hoxie, a former chancellor of Long Island University, has served as its president and chief executive. Its board of trustees, pursuant to the EDUCATION LAW of the state of New York, is limited to twenty-five members. In 1995, membership in the center as a whole reached five thousand business, professional, and government leaders as well as contributors in academia. Corporations and foundations assist in the center's $1 million budget. The center has remained a nonpartisan, nonprofit educational corporation.

The CSP has several objectives. Primarily, it focuses on securing an understanding of the U.S. constitutional system of government. The center also seeks to make itself an objective, nonpartisan body for public policy research. It provides educational programs for college and university students. It seeks to strengthen democratic institutions both at home and abroad: as part of its comprehensive mission and international scope, the center attempts to build a sense of interdependence and understanding between peoples and nations, while recognizing and respecting cultural differences.

The initiation of most of the center's basic programs occurred before the end of 1970. The Annual Leadership Conference, the Annual Student Symposium, the Fellowship Program, the Annual Lecture Series, and the center's publications (ANNUAL REPORTS and the *Center House Bulletin*) date to its early days. In 1974, the Annual Awards Program was added to its activities. In the 1990s, the Annual Business Leaders Symposium and a program for White House interns joined its offerings.

The center is exempt from federal INCOME TAX. The INTERNAL REVENUE SERVICE has also determined that the center is not a private foundation, making it eligible for "distributions" from foundations.

### Jerry Lee Center of Criminology (formerly the Sellin Center)

Founded in 1960 and located in Philadelphia, the Jerry Lee Center of Criminology (formerly the Sellin Center for Studies in Criminology and Criminal Law, which closed in 1998 and was rededicated and renamed in 2001) researches crime, delinquency, the police, judicial systems, prisons, social control, and social deviance. Housed in the Wharton School, at the University of Pennsylvania, the center also trains graduate students toward master's and doctor's degrees. Studies at the center have produced numerous professional presentations and government reports, books, articles, and monographs.

The Jerry Lee Center views criminology as the scientific study of crime and criminals and society's reaction to both. The center emphasizes the contributions of different disciplines—the behavioral sciences, psychology, anthropology, legal studies, psychiatry, neurology, biology, and the criminal justice system—to criminology.

The center has worked on one of its primary projects since the early 1970s. *Delinquency in a Birth Cohort* analyzes the largest population of delinquents ever studied in the United States. The project has had a major effect on criminal justice thought throughout the world and has become a frequently cited publication in the field of criminology. Another project focuses on delinquency in the People's Republic of China. Students in both the center and China have participated in this extensive project. Many of the center's studies—of both national and international scope—have been cited in testimony before the U.S. Senate and House Judiciary Committees.

The Jerry Lee Center has worked with officials in Pennsylvania and throughout the nation. It has provided technical assistance to the mayor's and district attorney's offices and to judges and other officials in Philadelphia. The center has also worked with the New Jersey Public Defender's Office in using an extensive database to assess possible discriminatory practices in the imposition of CAPITAL PUNISHMENT.

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#### CROSS-REFERENCES

Schools and School Districts; Environmental Law.

## CENTERS FOR MEDICARE & MEDICAID SERVICES

On July 1, 2001, the Health Care Financing Administration was reorganized and changed its name to the Centers for Medicare & Medicaid Services (CMS). CMS is an operating division of the HEALTH AND HUMAN SERVICES DEPARTMENT. It was established in 1977 to combine under one administration the oversight of the MEDICARE Program and the federal portion of the MEDICAID Program (Reorg. Order of Mar. 9, 1977, 42 Fed. Reg. 13262).

As part of the 2001 reorganization, three new business centers were developed: the Center for Beneficiary Choices, the Center for Medicare Management, and the Center for Medicaid and State Operations. The Center for Beneficiary Choices provides beneficiaries with information about Medicare, Medicare Select, Medicare+Choice, and Medigap options. It also manages the Medicare+Choice plans, consumer research and demonstrations, and grievances and appeals. The Center for Medicare Management oversees the traditional fee-for-service Medicare program. This entails developing payment policies

and managing Medicare fee-for-service contractors. The Center for Medicaid and State Operations oversees programs administered by the states, including Medicaid, the State Children's Health Insurance Program (SCHIP), insurance regulation functions, survey and certification, and the Clinical Laboratory Improvements Act (CLIA).

Medicare provides health insurance coverage for U.S. citizens age 65 or older, for younger people receiving SOCIAL SECURITY benefits, and for persons needing dialysis or kidney transplants for the treatment of end-stage renal disease (42 U.S.C.A. § 1395 et seq.). Medicare beneficiaries may receive medical care through physicians of their own choosing or through health maintenance organizations and other medical plans that have contracts with Medicare.

Medicaid is a medical assistance program jointly financed by state and federal governments for low-income individuals (42 U.S.C.A. § 1396 et seq.). Medicaid covers HEALTH CARE expenses for recipients of Temporary Assistance for Needy Families (formerly Aid to Families with Dependent Children), as well as for low-income pregnant women and other individuals whose medical bills qualify them as medically needy. Most states also cover medical expenses for older U.S. citizens who are needy, as well as for individuals who are blind and disabled who receive assistance under the Supplemental Security Income Program. Coverage is further extended to some INFANTS and low-income pregnant women and, depending on the state, to other low-income individuals with medical bills that qualify them as medically needy.

The mission of the CMS is to promote the timely delivery of quality health care to Medicare and Medicaid beneficiaries and to ensure that the Medicare and Medicaid Programs are administered in an efficient manner. The agency must also ensure that program beneficiaries are aware of the services for which they are eligible, that those services are accessible and of high quality, and that agency policies and actions promote efficiency and quality within the total health care delivery system. A quality assurance program administered by the CMS is responsible for developing health and safety standards for providers of health care services authorized by Medicare and Medicaid legislation. This program helps to ensure that Medicare and Medicaid beneficiaries receive quality health care services at a reasonable cost.

**FURTHER READINGS**

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## CENTRAL INTELLIGENCE AGENCY

The Central Intelligence Agency (CIA) was established following WORLD WAR II, from which the United States and the Soviet Union emerged as superpowers with vast military might and sharply conflicting world views. To protect the nation's security in all international matters and to ensure continued democracy and freedom for the United States, Congress created the CIA with the National Security Act of 1947 (ch. 343, 61 Stat. 495 [1947]). Gathering information from other countries relevant to national security is a sensitive task requiring considerable secrecy and covert activity. Unlike most other organizations, the CIA receives comparatively little media coverage when it is doing its job well. For this reason, most of the information that reaches the media concerning the CIA is negative.

All intelligence information collected by the CIA is reported to the NATIONAL SECURITY COUNCIL, under whose direction the CIA acts. The CIA is headed by the director of central intelligence, who is a member of the president's cabinet and the presidential spokesperson for the agency and the intelligence community. The director and deputy director of the CIA are appointed by the president with the advice and consent of the Senate.

The CIA is headquartered at a 258-acre compound in Langley, Virginia, and maintains twenty-two other offices in the Washington, D.C., area. The main compound includes a printing plant that produces phony documents, such as birth certificates, passports, and driver's licenses, for use by its agents. The plant also produces the *President's Daily Brief,* an eight-page CIA document that is presented to the president every morning. Another facility is used exclusively for recruiting spies to work for the CIA; another houses the Foreign Broadcast Information Service, which monitors and translates broadcasts from forty-seven countries. Several

other facilities recruit officers of the former Komitet Gosudarstvennoi Bezopasnosti (KGB)—the State Security Committee for countries in the former Soviet Union, now known as the Russian Federal Security Service—to spy on their own countries. The agency also maintains facilities in 130 countries throughout the world. Of the $28 billion that is budgeted annually to the U.S. Intelligence Committee, $3 billion goes to the CIA. The official number of individuals employed by the CIA is sixteen thousand, but many believe the actual number to be closer to twenty-two thousand.

Although all aspects of the CIA revolve around gathering intelligence and maintaining the security of the nation, the actual responsibilities of the agency are many and varied; they include

- Advising the National Security Council in matters concerning national security
- Gathering and disseminating foreign intelligence (The CIA coordinates with the FEDERAL BUREAU OF INVESTIGATION (FBI) to gather intelligence within the United States.)
- Conducting counterintelligence activities outside of the United States (The CIA coordinates with the FBI to conduct intelligence and counterintelligence activities within the United States.)
- Gathering and disseminating intelligence on the foreign aspects of narcotics production and trafficking
- Conducting other special activities approved by the president.

In its earliest days the CIA operated in a shroud of secrecy. In recent years, however, increased media attention has made the country more aware of CIA activities. Since the mid 1970s, the CIA has received more attention for breaking the law than it has for upholding national security. Four events focused unwanted attention to the CIA: the Church committee hearings, the IRAN-CONTRA AFFAIR, the Aldrich Ames scandal, and the end of the COLD WAR.

### The Church Committee Hearings

In 1974, the *New York Times* broke a story that the CIA had violated its charter by spying on U.S. citizens who openly opposed the VIETNAM WAR. An investigation followed, headed by Senator Frank Church (D-ID). Church and his committee uncovered a wealth of damaging information about the agency that went far beyond the issue of the Vietnam War. The Church committee hearings changed the way the public looked at the agency that is responsible for the security of its country.

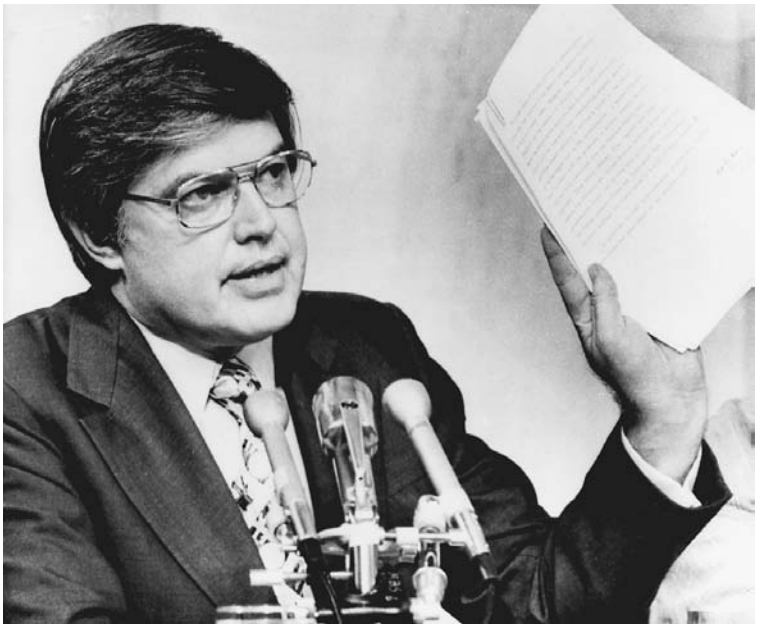

*During the mid-1970s, Senator Frank Church headed a Senate Intelligence Committee investigation into abuses committed by the CIA, including monitoring of U.S. citizens with no intelligence ties, the testing of LSD on unsuspecting participants, and numerous assassination attempts on the lives of foreign leaders.*
AP/WIDE WORLD PHOTOS

The Church committee found that the CIA had been intercepting and reading mail exchanged between the United States and the Soviet bloc. The CIA had records on more than three hundred thousand U.S. citizens who had no ties with ESPIONAGE or intelligence. The CIA had also conducted LSD tests on unknowing participants, one of whom was driven to suicide. Through the CIA, the United States had tried to assassinate at least five foreign leaders, including Cuban premier Fidel Castro. The CIA had first decided to embarrass the Cuban leader and thereby damage his popularity. To accomplish this, the agency plotted to make Castro's beard fall off by placing thallium salts in his shoes. The agency had a second plot: to give Castro a personality disorder by contaminating his cigars. The agency had even enlisted the help of the mafia in its attempt to assassinate Castro. These shocking disclosures brought demands for closer scrutiny of CIA activities.

Following the Church committee hearings, Congress amended the National Security Act of 1947 in 1980 to require the CIA to inform the House and Senate Intelligence Committees of "significant anticipated intelligence activity." Within six years, however, the CIA found itself in trouble once more for failing to inform Congress of its activities.

### The Iran-Contra Affair

On November 3, 1986, the Lebanese magazine *Shiraa* reported that Robert McFarland, U.S. national security adviser, had come to Iran with a shipment of arms from the United States. This revelation spurred what was ultimately termed the Iran-Contra affair and spoiled an otherwise secret operation.

The CIA had involved itself in a covert action in which arms were shipped to Iran in exchange for the release of hostages. The payments that were received from the Iranians were, in turn, diverted to the Nicaraguan Contra rebels who were fighting the Communist Sandanista regime, at a time when U.S. military aid to the Contras was prohibited by federal law. All of this was done without the knowledge of Congress; the CIA informed neither the House Intelligence Committee nor the Senate Intelligence Committee of its actions. President RONALD REAGAN had not approved the agency's covert activity.

One year after the arms had been sold, WILLIAM J. CASEY, director of central intelligence and a cabinet member, asked the president to approve the transaction retroactively. Reagan signed an agreement to that effect, which specified that Congress was not to be told of the approval. John Poindexter, the national security adviser at the time, later testified that he destroyed the only copy of the agreement in order to save President Reagan from political embarrassment.

Despite great media attention and congressional finger-pointing, actual punishments for the Iran-Contra affair were few and lenient. Casey was never indicted in the scandal. McFarland and Secretary of Defense Caspar W. Weinberger were brought up on criminal charges, but both were pardoned on Christmas Eve 1992 by president GEORGE H.W. BUSH. All other persons linked to the scandal either were also pardoned by Bush or were punished with small fines, PROBATION, or both, or had their convictions overturned on appeal.

### The Ames Scandal

It did not take the CIA long to make its way back into the spotlight. This time, it was not the agency that broke the law, but an individual. On February 21, 1994, Agent Aldrich Ames became the highest-ranking CIA official ever arrested. Ames had been selling U.S. secrets to the Soviet Union.

Ames's responsibilities as a CIA agent included directing the analysis of Soviet intelligence operations and recruiting Soviet agents who would betray those operations. This position put Ames in frequent contact with Soviet officials at the Soviet Embassy in Washington, D.C. Ultimately, Ames began selling U.S. security secrets to the Soviets, a venture that earned him more than $2.5 million before his arrest. Some of this information involved betraying double agents, disclosures that led to the death of at least twelve Soviet and Eastern European spies.

The CIA began to search for a mole (a double agent) in 1986, after two intelligence officers at the Soviet Embassy who had been recruited as double agents by the FBI were recalled to Moscow, arrested, tried, and executed. The CIA was jolted again in 1989 when three more of its most valued Soviet double agents met their deaths by firing squad in Russia.

In 1991 the CIA began to work with the FBI in investigating East Germany and other former Warsaw Pact countries for leads to possible moles in the U.S. government. Ames became one of the suspects and was quietly transferred to the CIA's counternarcotics center. Since the FBI was in charge of counterintelligence domestically, Ames fell under its jurisdiction of investigation. CIA officials played down the possibility of one of its key employees being a spy and blocked independent scrutiny by the FBI. Ames continued to betray the CIA and the country.

The CIA was sharply criticized for its unwillingness to consider one of its own a double agent and for its refusal to allow the FBI to investigate the situation. For years, the agency failed to monitor Ames's overseas travel, to question his personal finances, or to detect unauthorized contacts between Ames and Soviet officials. As early as 1989, the CIA had been warned that Ames appeared to colleagues and neighbors to have accumulated sudden wealth. Ames was questioned about the source of the money during a routine 1991 background check. He said he had inherited money from his father-in-law.

From 1985 onward, Ames and his wife Rosario bought a $540,000 house for cash, put $99,000 worth of improvements into the house, purchased a Jaguar, bought a farm and condominium in Colombia, and invested $165,000 in stocks. In one year, they charged more than $100,000 on their credit cards. According to

court documents, the Ameses spent nearly $1.4 million from April 1985 to November 1993. All of this took place while Ames's annual CIA salary never exceeded $70,000. According to CIA officials, indications of wrongdoing by CIA employees were often overlooked because supervisors were far too trusting of employees, whom they treated as family.

When Ames got a call to go to his CIA office in the morning of February 21, 1994, he had no inkling that after almost nine years his career of selling secrets to Moscow was about to end. With Ames planning to travel to Russia the next day on CIA business, the FBI believed that it had to act. A block and a half from Ames's house, his Jaguar was forced to the curb, and Ames was arrested by FBI agents.

On April 28, 1994, Ames pleaded guilty to the criminal charges of espionage and TAX EVASION. He received a sentence of life imprisonment without PAROLE, the maximum sentence he could have expected if convicted after trial.

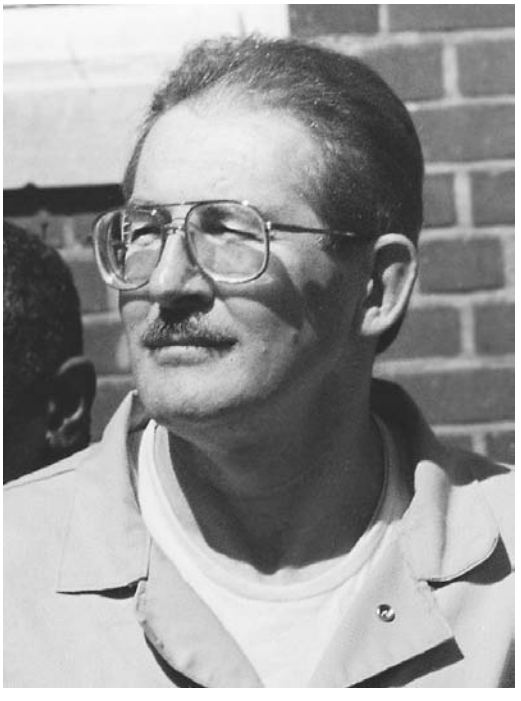

*Aldrich Ames was arrested in February 1994, for selling U.S. secrets to the Soviet Union. His betrayal of double agents led to the death of at least 12 Soviet and Eastern European spies. Ames was sentenced to life imprisonment.*

AP/WIDE WORLD PHOTOS

### The End of the Cold War

The importance of the threat imposed by Ames's dealings with the Soviet Union was seemingly diminished with that country's dissolution. But despite the apparent end of the cold war and the break-up of the former Soviet Union, the United States continues to spy on the Russian Republic. The former Soviet Union also continues its own covert activities within the United States.

Some question the continued need for the CIA in the post-cold war era. But supporters need point no further than the war with Iraq to justify continued backing for the agency. The CIA was responsible for supplying intelligence reports that allowed the United States to cripple the Iraqi efforts in the Gulf War with an initial air strike. Without the assistance of the CIA, the war might not have reached such a swift ending. Supporters also argue that it is unfair to criticize a covert organization for its failures when so little attention is given to its successes. When the CIA is functioning efficiently and effectively, its operation is invisible to the country's citizens; it is only in failure that the secrecy of the agency is betrayed to scrutinizing eyes.

Since the end of the cold war, some members of Congress have called for severe cuts in the CIA's budget or dissolution of the agency. President BILL CLINTON said that such ideas are "profoundly wrong," and that the United States still faces many threats and challenges, including TERRORISM, drug trafficking, and nuclear proliferation. "I believe making deep cuts in intelligence during peacetime is comparable to canceling your HEALTH INSURANCE when you're feeling fine," he said.

### September 11th and The Aftermath

Having seemingly lost some of its purpose with the end of the Cold War, the CIA found a new purpose in the aftermath of the terrorist attacks on the World Trade Center and Pentagon on September 11, 2001. However, this new purpose came with both criticism and concern as to whether the CIA was up to the challenge of tackling terrorism. There was strong debate after September 11th as to what role the CIA should play, and how it fit in to the new security paradigm.

Like every other domestic and foreign intelligence service in the United States, the CIA was apparently caught by surprise on Sept. 11th. However, there were some who argued that it should not have been. It was shown that the CIA had tracked two of the terrorists from that day at an al Qaeda summit in January 2000. But the CIA did nothing to share the information with other agencies, and both men were allowed to enter the United States. The CIA also told President GEORGE W. BUSH at a brief-

ing in August 2001 that terrorists associated with Osama bin Laden might be planning to hijack a plane. Again, nothing was done with this information.

Although President Bush defended the agency and refused to fire its director, George Tenet, he conceded that the cooperation between the CIA and the FBI could have been better: "In terms of whether the FBI and CIA communicated properly, I think it's clear that they weren't."

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## CENTURY DIGEST®

*A volume of the American Digest System that arranges by subject summaries of court opinions reported chronologically in the various units of the National Reporter System during the period from 1658 to 1896.*

There are over four hundred subject classifications within the digest, each corresponding to a legal concept, such as evidence. All the cases for the period covered in the Century Digest that discuss similar points of law can be found under a specific topic designation.

CROSS-REFERENCES

Legal Publishing.

## CERTIFICATE

*A written document that is official verification that a condition or requirement has, or has not, been met.*

*A written assurance issued from a court that is notification to another officer, judge, or court of procedures practiced therein.*

*A document (such as a birth certificate) prepared by an official during the course of his or her*

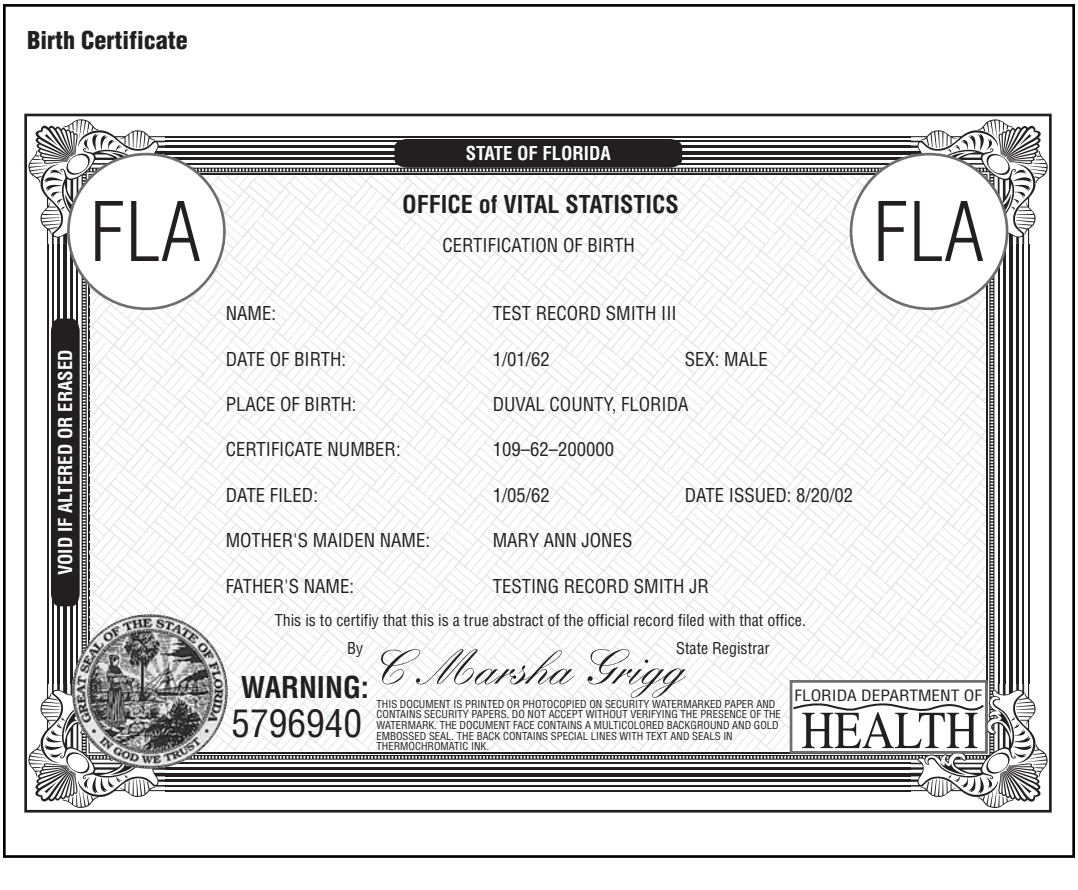


*A sample birth certificate*

*regular duties, and which may be used as evidence for certain purposes.*

*A document certifying that one has fulfilled certain requirements and may practice in a field.*

A *stock certificate* is a paper representing a share of stock in a corporation that has been purchased by its holder.

A *certificate of acknowledgment* is the written statement by a NOTARY PUBLIC, JUSTICE OF THE PEACE, or other authorized officer that sets forth that a person or persons appeared before him or her on a particular date and declared an instrument to be their VOLUNTARY ACT and deed.

A *certificate of deposit* is prepared by a bank as a receipt for money deposited by a customer that the bank promises to repay to the depositor after certain conditions have been fulfilled.

## CERTIFICATE OF DEPOSIT

*A written recognition by a bank of a deposit, coupled with a pledge to pay the deposited amount plus interest, if any, to the depositor or to his or her order, or to another individual or to his or her order.*

*A form of* COMMERCIAL PAPER *that serves as documentary evidence that a savings account exists.*

## CERTIFICATE OF OCCUPANCY

*A document issued by a local building or* ZONING *authority to the owner of premises attesting that the premises have been built and maintained according to the provisions of building or zoning ordinances, such as those that govern the number of fire exits or the safety of electrical wiring.*

**Certificate of Deposit**

XYZ SAVINGS BANK

1 YEAR CERTIFICATE OF DEPOSIT

*Rate information*

The interest rate for your account is 5.20 % with an annual percentage yield of 5.34 %. You will be paid this rate until the maturity date of the certificate. Your certificate will mature on September 30, 1993. The annual percentage yield assumes interest remains on deposit until maturity. A withdrawal will reduce earnings.

Interest for your account will be compounded daily and credited to your account on the last day of each month.

Interest begins to accrue on the business day you deposit any noncash item (for example, checks).

*Minimum balance requirements*

You must deposit $1,000 to open this account.

You must maintain a minimum balance of $1,000 in your account every day to obtain the annual percentage yield listed above.

*Balance computation method*

We use the daily balance method to calculate the interest on your account. This method applies a daily periodic rate to the principal in the account each day.

*Transaction limitations*

After the account is opened, you may not make deposits into or withdrawals from the account until the maturity date.

*Early withdrawal penalty*

If you withdraw any principal before the maturity date, a penalty equal to three months interest will be charged to your account.

*Renewal policy*

This account will be automatically renewed at maturity. You have a grace period of ten (10) calendar days after the maturity date to withdraw the funds without being charged a penalty.

*A sample certificate of deposit*

A certificate of occupancy is evidence that the building complies substantially with the plans and specifications that have been submitted to, and approved by, the local authority. It complements a building permit—a document that must be filed by the applicant with the local authority before construction to indicate that the proposed construction will adhere to zoning laws.

In legal practice, the requirement that a certificate of occupancy be presented on the day of closing is usually attached as a rider to a contract for the sale of a house or building. If the seller is unable to present the certificate of occupancy the buyer may refuse to complete the sale.

Some cities require that a landlord file a certificate of occupancy for apartments to be leased. This requirement is designed to prevent a building's deterioration to such an extent that it could expose its tenants to risks to their health and lives. Each time an apartment is vacated, an inspector from an appropriate government agency—such as the housing authority—inspects the apartment to make sure that it meets minimum standards of habitability. If the apartment does not, the inspector may issue a warning to the landlord to correct the violation within a certain period of time or the landlord will be prevented from leasing the apartment.

## CERTIFICATION PROCEEDING

*An administrative hearing before the* NATIONAL LABOR RELATIONS BOARD *(NLRB), pursuant to the federal* WAGNER ACT *(29 U.S.C.A. § 151 et seq. [1935]) to determine whether a group of employees is an appropriate bargaining unit, and if so, to decide whether a particular union should be declared its bargaining agent.*

Employers and employees frequently negotiate and agree upon the terms and conditions of employment through COLLECTIVE BARGAINING, in which a representative of a particular group of employees presents the employees' demands to the employer so that a mutually advantageous accord can be reached. Before such bargaining can occur, it must be decided what group of employees will be served by the representative who will legally bind the group by his or her acceptance or rejection of the employer's terms. Once the group—the bargaining unit—is established the identity of its representative must be determined. Employers often willingly recognize a cohesive, homogeneous group of employees as a bargaining unit, thus acknowledging a particular union that claims to be its representative or bargaining agent. Disputes occasionally arise, however, over (1) the control of the union by the employer, thereby conflicting with the union's position as a representative of the employees; (2) the failure of a majority of the unit to select the union; (3) the wrongful action of a union that has usurped the rightful status of another union as the bargaining agent of the unit; and (4) situations in which the employer refuses to recognize the unit or its union.

A certification proceeding is the statutorily prescribed method of resolving such difficulties. The NLRB investigates a petition filed by the employees concerning a union acting in behalf of the employees, which the employer refuses to recognize or a petition by an employer who has received a claim of representation by the union. The NLRB holds a nonadversarial fact-finding hearing to determine whether a valid question concerning representation exists. The hearing officer forwards the transcript containing evidence to the regional director of the NLRB. The regional director can dismiss the petition or decide to hold a secret ballot election for the bargaining agent and certify the result. Prior to the election, the director determines which employees are within the unit for purposes of voter eligibility. The NLRB will review a regional director's decision only if a statutorily determined, compelling reason exists, for instance, if his or her decision on a substantial issue of fact is clearly erroneous and adversely affects the rights of one party. An NLRB certification proceeding decision is subject to JUDICIAL REVIEW only if there is evidence of ABUSE OF DISCRETION. The court of appeals, as a rule, defers to the NLRB because of its presumed expertise in the labor area. An aggrieved employer dissatisfied with a certification proceeding can obtain review by refusing to bargain with the agent, thereby committing an UNFAIR LABOR PRACTICE. Such a practice would probably result in an unfair labor practice proceeding and the final order that is made by the NLRB in such an action is reviewable by the court of appeals.

CROSS-REFERENCES

Labor Law; Labor Union.

## CERTIFIED CHECK

*A written order made by a depositor to a bank to pay a certain sum to the person designated—the payee—which is marked by the bank as*

**Certification Note**

**Certified Check**

This certified check, on behalf of Developer/Owner Name, assures the approval and faithful payment of Amount Determined by County Staff to the Board of Commissioners of Lee County, Georgia in the event that Developer/Owner defaults on fulfilling their agreement to complete all site work on approved plan of Lot #, Street address, City, State. The work shall be completed by Date Agreed Upon. This certified check will be refunded upon issuance of Certificate of Occupancy.

Date: _____

_____
Owner

*A sample certified check*

*"accepted" or "certified," thereby unconditionally promising that the bank will pay the order upon its presentation by the payee.*

A certified check is considered the equivalent of cash since the bank, by its certification, guarantees it to be cashable. No bank is under a duty to its depositors or anyone else to certify checks since it involves the assumption of a new obligation for which it is primarily responsible. It is a commonplace practice, however, and there is usually a small fee for this service. A certified check is often required by a payee who does not want to rely only upon the credit of the drawer, the person who wrote the check.

A payee who requires a drawer's check to be certified ensures his or her right to payment. Not only can the payee seek payment from the certified bank, but if for some reason the bank refuses to pay, the payee retains the right to enforce payment from the drawer. In this situation the bank is primarily liable while the drawer is secondarily liable.

Occasionally the payee or subsequent holder of the check—a person who has been legally given possession and the right to payment—will present the check to the drawer's bank for certification. Although the bank is obligated to cash the check, it need not certify the check because only it, not the drawer or any subsequent endorsers, would be liable for its payment. Some banks will certify a check in such instances only with the approval of the drawer.

If a bank refuses to pay a check that it has certified, its drawer or holder may sue the bank for its wrongful conduct, called dishonor. A certified check, a type of COMMERCIAL PAPER or negotiable instrument, is governed by Article 3 of the UNIFORM COMMERCIAL CODE.

## CERTIFIED COPY

*A photocopy of a document, judgment, or record that is signed and attested to as an accurate and a complete reproduction of the original document by a public official in whose custody the original has been placed for safekeeping.*

A certified copy is admissible as evidence in a lawsuit when the original document cannot be produced because it has been lost or destroyed. This rule, which considers a certified copy to be secondary evidence unless circumstances of loss or destruction warrant its treatment as primary evidence, is known as the best evidence rule. State and FEDERAL RULES OF EVIDENCE govern the use of a certified copy in their respective judicial proceedings.

## CERTIORARI

*[*Latin, To be informed of.*] At* COMMON LAW, *an original writ or order issued by the Chancery or King's Bench, commanding officers of inferior courts to submit the record of a cause pending before them to give the party more certain and speedy justice.*

*A writ that a superior appellate court issues in its discretion to an inferior court, ordering it to produce a certified record of a particular case it has tried, in order to determine whether any irregularities or errors occurred that justify review of the case.*

*A sample writ of certiorari*

## Writ of Certiorari

**No. 01-1425**

**In the**
**Supreme Court of the United States**

_____

Washington Legal Foundation; Allen D. Brown;
Dennis H. Daugs; Greg Hayes; and L. Dian Maxwell,
*Petitioners,*
v.
Legal Foundation of Washington; Katrin E. Frank, in her
official capacity as President of the Legal Foundation of Washington;
and Gerry L. Alexander, Bobbe J. Bridge, Thomas Chambers,
Faith Ireland, Charles W. Johnson, Barbara A. Madsen,
Susan Owens, and Charles Z. Smith, in their official capacities as
Justices of the Supreme Court of Washington,
*Respondents.*

_____

**On Petition for Writ of Certiorari to the**
**United States Court of Appeals**
**for the Ninth Circuit**

_____

**BRIEF IN OPPOSITION FOR LEGAL FOUNDATION**
**OF WASHINGTON AND ITS PRESIDENT**

_____

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**QUESTIONS PRESENTED**

1. Does *per se* takings analysis apply to a regulation that requires legal professionals to place clients' small or short-term deposits of principal, incapable of providing a positive net return to the client, in pooled trust accounts with banks that agree to pay some interest on the accounts to a state-created foundation for access to justice?

2. Does the Just Compensation Clause of the Fifth Amendment require that compensation be paid for a taking that does not result in any financial loss to the owner?

**PARTIES TO THE PROCEEDING**

In addition to the current parties named in the caption, the following were previously parties in this action.

1. During the course of this case, the following successively have been presidents of the Legal Foundation of Washington, and thus technically were defendants themselves in their respective official capacities: Kevin F. Kelly (during 1997), Bradley C. Diggs (1998), Dwight S. Williams (1999), the Honorable Gregory J. Tripp (2000), and the Honorable Cynthia Imbrogno (2001).

2. When Petitioners commenced this case, they named all the then-Justices to the Supreme Court of Washington as defendants in their official capacities. Petitioners then voluntarily dismissed their claims against Justice Richard B. Sanders. The following former Justices were parties, but have been replaced by the Justices that are named in the caption: Barbara Durham, James M. Dolliver, Richard P. Guy, and Philip A. Talmadge.

Respondent Legal Foundation of Washington has no parent corporation and no publicly owned company owns any stock in it.

*A device by which the* SUPREME COURT OF THE UNITED STATES *exercises its discretion in selecting the cases it will review.*

Certiorari is an extraordinary prerogative writ granted in cases that otherwise would not be entitled to review. A petition for certiorari is made to a superior appellate court, which may exercise its discretion in accepting a case for review, while an appeal of a case from a lower court to an intermediate appellate court, or from an intermediate appellate court to a superior appellate court, is regulated by statute. Appellate review of a case that is granted by the issuance of certiorari is sometimes called an appeal, although such review is at the discretion of the appellate court.

A party, the petitioner, files a petition for certiorari with the appellate court after a judgment has been rendered against him in the inferior court. The petition must specifically state why the relief sought is unavailable in any other court or through any other appellate process, along with information clearly identifying the case and the questions to be reviewed, the relevant provisions of law to be applied, a concise statement of facts relating to the issues, and any other materials required by statute. The rules of practice of the appellate court to which the petitioner has applied for relief govern the procedure to be observed. For example, a petition for statutory certiorari made to the Supreme Court of the United States must be prefaced by a motion for leave, or permission, to file such a petition. If a common-law writ is sought, however, the petitioner need only file a petition for certiorari.

After evaluating the petition, the appellate court will decide whether to grant or deny certiorari. Certiorari is issued, designated as "cert. granted," when the case presents an issue that is appropriate for resolution by the court and it is in the public interest to do so, such as when the issue has been decided differently by a variety of lower courts, thereby creating confusion and necessitating a uniform interpretation of the law. Certiorari is denied when the appellate court decides that the case does not present an appropriate matter for its consideration. In the practice of the Supreme Court, if a petition has been granted certiorari as a result of a mistake, such as where the petitioner misrepresents the case or the case has become moot, the Court will dismiss the petition as "having been improvidently granted," which has the same effect as an initial denial of the petition. Practically speaking, this rarely occurs.

Some states have abolished writs of certiorari under their rules of appellate practice.

FURTHER READINGS

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## CESSION

*The act of relinquishing one's right.*

*A surrender, relinquishment, or assignment of territory by one state or government to another.*

*The territory of a foreign government gained by the transfer of sovereignty.*

## CESTUI QUE

*[*French, He or she who.*]* *The person for whom a benefit exists.*

A *cestui que trust* is a person for whose benefit a trust is created; a beneficiary. Although legal title of the trust is vested in the trustee, the *cestui que trust* is the beneficiary who is entitled to all benefits from a trust.

A *cestui que use* is an archaic term of PROPERTY LAW that describes one who has a beneficial interest in land held by someone else. Title and possession as well as the duty to defend the land is held by another, but the *cestui que use* has the right to rents, profits, and other benefits from the land.

A *cestui que vie* is the person whose life is used to measure various things, such as the duration of a trust, a gift, or an insurance contract. It can also be used to mean the person upon whose life a policy of life insurance is drawn.

## CF.

*An abbreviation for the Latin word* confer, *meaning "compare."*

The use of this abbreviation indicates that another section of a particular work or another case or volume contains contrasting, comparable, or explanatory opinions and text.

## C.F.&I.

*An abbreviation for cost, freight, and insurance that is used in a sales contract to indicate that the purchase price quoted for the goods by the seller includes the expense incurred by the seller for shipment of such goods and for insurance of the goods against loss or destruction until their arrival at the destination named by the buyer.*

The abbreviation C.F.&I. is synonymous with the abbreviation C.I.F. commonly found in contracts for foreign shipments. A seller who has entered a sales contract with a C.F.&I. provision agrees to accept the expense of placing the goods into the custody of a carrier for shipment from their port of origin to their designated location and to obtain a negotiable bill of lading, which will be endorsed by the buyer upon receipt of payment for the goods. The seller has the responsibility of loading the cargo and obtaining a receipt from the carrier, which might be incorporated into the bill of lading to show that freight has been paid by him or her. The seller must also purchase insurance against the loss, damage, or destruction of such goods and have the buyer designated as the beneficiary. The seller prepares an invoice of the goods to be shipped and sends the necessary documents to both the shipper and the buyer so that the buyer can take delivery of the goods upon arrival at their destination.

CROSS-REFERENCES

Shipping Law.

"NOTHING ADDS MORE TO MEN'S HATRED FOR GOVERNMENT THAN ITS REFUSAL TO LET THEM TALK, ESPECIALLY IF THEY ARE THE TYPE OF PERSON ANARCHISTS ARE, TO WHOM TALKING A LITTLE WILDLY IS THE GREATEST JOY OF LIFE."
—ZECHARIAH CHAFEE JR.

## ❖ CHAFEE, ZECHARIAH, JR.

As a leading U.S. legal scholar and educator, Zechariah Chafee Jr. did more than anyone else in the early twentieth century to shape the debate surrounding FREEDOM OF SPEECH and the Constitution's FIRST AMENDMENT. In his most influential book, *Freedom of Speech* (1920), Chafee argued for the importance of protecting free speech even in wartime. His ideas later guided the Supreme Court in liberalizing its approach to free speech.

Chafee was born on December 7, 1885, in Providence, Rhode Island, to a wealthy family. He attended Brown University, graduating with a bachelor's degree in 1907. He helped manage his family's iron foundry for three years and then left to attend Harvard Law School in 1910. He remained on the family firm's board of directors for the rest of his life. He married Bess Frank Searle in 1912 and they had four children. While at Harvard he was influenced by the theories of sociological JURISPRUDENCE presented by ROSCOE POUND and others. At Harvard, he also met Harold J. Laski, a political scientist and later a leader of England's Labour party, who became a lifelong friend. Chafee graduated from law school with a bachelor of laws degree in 1913 and practiced law for three years in Providence. In 1916 he began teaching at Harvard Law School as an assistant professor of law. He accepted a full professorship three years later and remained at Harvard for the rest of his life.

Chafee was a professor at Harvard Law School for nearly forty years. His writings and public service influenced many different areas of civil liberties, from conditions for mine workers to international HUMAN RIGHTS to the system for apportioning U.S. House seats among the states. His other books include *America Now* (1938), *Freedom of Speech in the United States* (1941), *Government and Mass Communications* (1947), *Documents on Fundamental Human Rights* (1951), *Freedom of Speech and Press* (1955), and *Blessings of Liberty* (1956). Justice FELIX FRANKFURTER wrote of Chafee, "The extent to which . . . he influenced the thought and temper of public opinion and action in that pervasive aspect of national life known as CIVIL RIGHTS has no match in the legal professoriate."

Chafee's goal in his legal writings was to "master the law and reduce it to reason." In the area of free speech, this meant replacing intuition with reason and producing a rational interpretation of the First Amendment, which states that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The notion of balance was a crucial element in his legal philosophy. According to Chafee, most legal problems could be solved by BALANCING competing interests. In the case of free speech, that meant balancing society's competing interests in the benefits of security and in the benefits of unlimited discussion.

Chafee's interest in free speech and civil liberties began while he was teaching a course on EQUITY at Harvard Law School during WORLD WAR I. He became interested in the history of LIBEL law and free speech, particularly as judges across the United States began making ARBITRARY and often conflicting decisions regarding SEDITION (the act of urging others to rebel against authority) and free speech during wartime. In many cases, people who spoke out or demonstrated against the wartime policies of

the U.S. government were imprisoned for their views. Such cases often involved two laws passed by Congress, the **ESPIONAGE ACT OF 1917** (ch. 30, 40 Stat. 217) and the Sedition Act of 1918 (ch. 75, 40 Stat. 553). Looking closely at the judicial decisions regarding such cases, Chafee began to see that laws regarding freedom of speech were in great need of modernization.

Between 1918 and 1920 Chafee published two articles—"Freedom of Speech" in the *New Republic* (Nov. 16, 1918) and "Freedom of Speech in Wartime" in the *Harvard Law Review* (747 [June 1919])—and the book *Freedom of Speech* (1920), which caused great controversy and also made his reputation, associating him for the rest of his career with free speech issues. In these writings Chafee took aim against contemporary interpretations of the First Amendment. "Nearly every free speech decision," Chafee wrote in his law review article, "appears to have been decided largely by intuition." Chafee sought to replace that intuition with more informed legal reasoning.

In his articles and book, Chafee set forth his views regarding the need to balance the competing interests involved in speech issues. In the following passage from *Freedom of Speech,* which he described as the key passage of the book, he defined the meaning of freedom of speech:

> The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for . . . once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest. Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom.

Chafee gave an indication of just how "heavily" freedom of speech weighed in the scale by arguing in his law review article that free speech should be tightly protected even in wartime:

> Even after war has been declared there is bound to be a confused mixture of good and bad arguments in its support, and a wide difference of opinion as to its objects. Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined. . . . Legal proceedings prove that an opponent makes the best cross-examiner. Consequently it is a disastrous mistake to limit criticism to those who favor the war.

Chafee put his case more succinctly when he wrote, "In wartime, speech should be free, unless it is clearly liable to cause direct and dangerous interference with the conduct of the war."

Chafee's views influenced the Supreme Court in significant ways. In particular, Justices **OLIVER WENDELL HOLMES JR.**, and **LOUIS D. BRANDEIS** closely studied Chafee's ideas and gradually liberalized their views on free speech. For example, Chafee found fault with Holmes's opinion in **SCHENCK V. UNITED STATES**, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919), upholding the conviction of Charles T. Schenck, a secretary of the Socialist party who had distributed leaflets urging men to disobey the draft. Schenck had been convicted under the Espionage Act. In his famous opinion Holmes wrote that Congress may restrict freedom of speech when there is a "clear and present danger" that such speech will bring about "substantive evils that Congress has a right to prevent." Chafee argued that Schenck's actions had not presented a direct danger and that Holmes had not adequately defined what exactly were the "substantive evils" society had to be protected from. Chafee maintained that only sedition that came dangerously close to succeeding might be punished and that a better test of free speech was whether it could gain acceptance in the marketplace of free ideas.

Holmes later used Chafee's ideas in his dissent to **ABRAMS V. UNITED STATES**, 250 U.S. 616, 40 S. Ct. 17, 63 L. Ed. 1173 (1919), in which the Court upheld the conviction of Jacob Abrams, who had been sentenced to twenty years in prison for distributing leaflets opposing U.S. involvement in Russia. Chafee's ideas also influenced other Holmes and Brandeis dissents, including those in **GITLOW V. NEW YORK**, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925). The majority in *Gitlow* determined that the Constitution did not bar the conviction under New York's criminal **ANARCHY** statute (Laws 1909, c. 88; Consol. Laws 1909, c. 40) of a socialist who distributed a paper advocating that the government be overthrown, even though no effect whatsoever resulted from circulation of the manifesto. And in another influential case, **NEAR V. MINNESOTA**, 283 U.S. 697, 51 S. Ct. 625,

75 L. Ed. 1357 (1931), Chief Justice CHARLES E. HUGHES used Chafee's ideas in an opinion that voided a Minnesota law (Minn. St. 1927, § 10123–1) calling for the suppression of "malicious, scandalous, and defamatory" publications.

Chafee's views were not popular ones at the time and he nearly lost his job because of them. In 1921, he was brought before the Board of Overseers of Harvard University on a charge of radicalism for his questioning of the sentence handed down in *Abrams.* Chafee defended himself eloquently in a speech before a special committee in the Boston Harvard Club and he was allowed to remain at Harvard.

Chafee viewed himself as a reformer rather than an activist. Although he often embraced causes considered radical, he also was skeptical of big government and described himself as a "conservative . . . Rhode Islander steeped in the Roger Williams tradition." Speaking in the early 1920s of his interest in civil liberties, Chafee commented;

> I see no reason why I should be out mountain climbing and enjoying life while some other chap who started life with less money and gets a little angrier and a little more extreme should be shut up in a prison for five or ten years. . . . When I am loafing around on my boat, or taking an inordinately large number of strokes on the golf course, I occasionally think of these poor devils who won't be out for five or ten years and want to do a bit to make the weight of society less heavy on them.

Chafee never became an active member of the AMERICAN CIVIL LIBERTIES UNION or that organization's National Advisory Committee. Nor did he appear often in court. He did harbor ambitions to become a Supreme Court justice but was never nominated for the position.

Chafee wrote on many aspects of the law besides free speech. In 1936 he drafted what he considered to be his foremost professional accomplishment, the Federal Interpleader Act (May 8, 1926, ch. 273, 44 Stat. 416). This was a highly specialized law designed to resolve multiple claims for the same debt against insurance companies, banks, and other businesses. Chafee also became an authority on the mathematical methods for reapportioning among the states the seats in the U.S. House of Representatives. His advocacy of the equal proportions method for allotting House seats eventually led to changes in federal law regarding APPORTIONMENT after the 1940 census.

During his career Chafee served on a number of committees that made important reforms in U.S. law and society. Beginning in 1923 he was chairman of the Committee of Inquiry on Coal and Civil Liberties. This group produced a report criticizing mine operators, their private police, and their company towns, taking a position that, like Chafee's views on free speech, outraged some influential Harvard law alumni. From 1928 to 1932 Chafee was president of the Massachusetts Council for the Abolition of the Death Penalty. Between 1929 and 1931 he worked for the National Commission on Law Enforcement and Observance, also called the WICKERSHAM COMMISSION, which looked into POLICE MISCONDUCT during the era of PROHIBITION.

Some of Chafee's more important work occurred through his membership on the American Bar Association's Bill of Rights Committee from 1938 to 1947. In this capacity he submitted

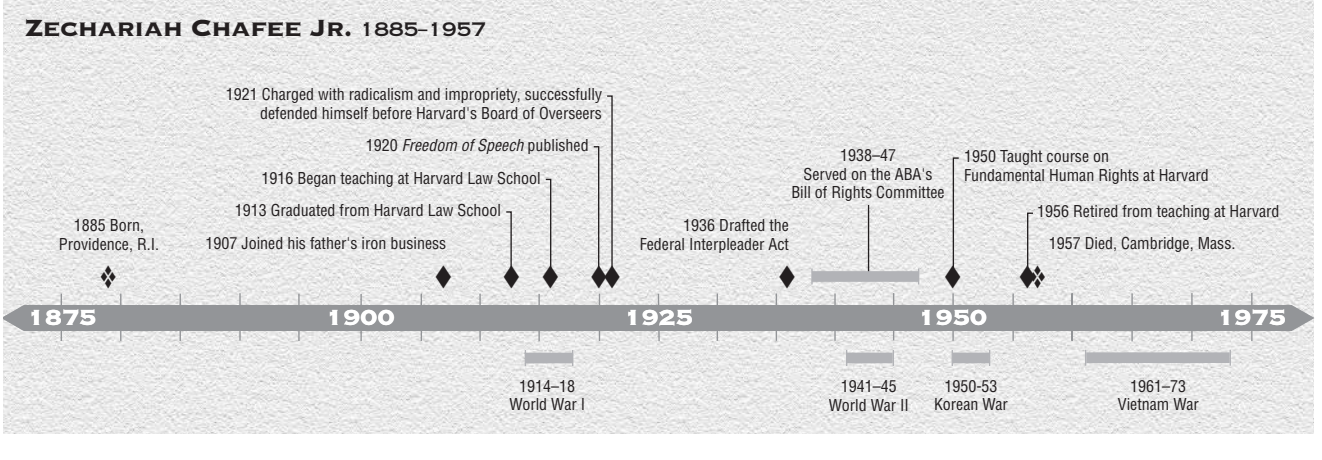

advisory briefs in several Supreme Court cases. In a case involving the refusal of Jehovah's Witnesses to have their children salute the flag in school (*West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 [1943]), Chafee wrote a brief hoping to persuade the Court to reverse an earlier decision upholding a state law requiring a flag salute. In his brief he made an eloquent case for freedom of religion and freedom of expression.

Chafee became an advocate for international human rights later in his career through his work as a representative on the UNITED NATIONS Subcommission on Freedom of Information and the Press in 1947. In 1950, when Chafee's prestige and seniority at Harvard enabled him to teach whatever course he wished, he chose to offer a course called "Fundamental Human Rights." He hoped to have students realize "how dearly these rights were bought and … what they meant to the men who put them forever into our fundamental law."

Chafee received honorary doctor of law degrees from St. John's University, New York, in 1936, Brown University in 1937, and the University of Chicago in 1953. He also received an honorary doctor of CIVIL LAW degree from Boston University in 1941 and a doctor of letters degree from Colby College in 1944.

He died February 8, 1957, in Cambridge, Massachusetts.

FURTHER READINGS

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CROSS-REFERENCES

Interpleader.

## CHAIN OF CUSTODY

*The movement and location of physical evidence from the time it is obtained until the time it is presented in court.*

Judges in bench trials and jurors in jury trials are obligated to decide cases on the evidence that is presented to them in court. Neither judges nor jurors may conduct their own investigations into the underlying facts of a given case. In fact, state and federal court rules prohibit judges and jurors from being swayed by, or even taking into consideration, extrajudicial evidence—that is, evidence that is not properly admitted into the record pursuant to the rules of evidence—in rendering their decisions.

Similarly, parties to civil and criminal litigation depend on judges and juries to impartially weigh the evidence, and only the evidence, that is properly admitted into the record. Every day, across the United States, litigants stake their reputations, livelihoods, bank accounts, homes, PERSONAL PROPERTY, and freedom on the premise that the outcome to their judicial proceedings will be one that is reached fairly and justly, according to the evidence.

Court-rendered judgments and jury verdicts that are based on tainted, unreliable, or compromised evidence would undermine the integrity of the entire legal system if such outcomes became commonplace. One way in which the law tries to ensure the integrity of evidence is by requiring proof of the chain of custody by the party who is seeking to introduce a particular piece of evidence.

Proof of a chain of custody is required when the evidence that is sought to be introduced at trial is not unique or where the relevance of the evidence depends on its analysis after seizure. A proper chain of custody requires three types of testimony: (1) testimony that a piece of evidence is what it purports to be (for example, a litigant's blood sample); (2) testimony of continuous possession by each individual who has had possession of the evidence from the time it is seized until the time it is presented in court; and (3) testimony by each person who has had possession that the particular piece of evidence remained in substantially the same condition from the moment one person took possession until the moment that person released the evidence into the custody of another (for example, testimony that the evidence was stored in a secure location where no one but the person in custody had access to it).

Proving chain of custody is necessary to "lay a foundation" for the evidence in question, by showing the absence of alteration, substitution, or change of condition. Specifically, foundation testimony for tangible evidence requires that exhibits be identified as being in substantially the same condition as they were at the time the evidence was seized, and that the exhibit has remained in that condition through an unbroken chain of custody. For example, suppose that in a prosecution for possession of illegal narcotics, police sergeant A recovers drugs from the

defendant; A gives police officer B the drugs; B then gives the drugs to police scientist C, who conducts an analysis of the drugs; C gives the drugs to police detective D, who brings the drugs to court. The testimony of A, B, C, and D constitute a "chain of custody" for the drugs, and the prosecution would need to offer testimony by each person in the chain to establish both the condition and identification of the evidence, unless the defendant stipulated as to the chain of custody in order to save time.

Chain of custody need not be demonstrated for every piece of tangible evidence that is accepted into the trial court's record. Physical evidence that is readily identifiable by the witness might not need to be supported by chain-of-custody proof. For example, no chain-of-custody foundation is required for items that are imprinted with a serial number or inscribed with initials by an officer who collected the evidence. Similarly, items that are inherently distinctive or memorable (for example, a holdup note written in purple crayon) might be sufficiently unique and identifiable that they establish the integrity of the evidence.

Whether the requisite foundation has been laid to establish chain of custody for an exhibit is a matter of discretion on the part of the trial judge. Possibilities of misidentification and adulteration must be eliminated, not absolutely, but as a matter of reasonable probability. Where there is sufficient testimony that the evidence is what it purports to be, and that testimony is offered by each responsible person in the chain of custody, discrepancies as to accuracy or reliability of testimony regarding the chain of custody go to the weight of the evidence and not to its admissibility, meaning that the evidence would be admitted into the record for the judge or jury to evaluate in light of any conflicting testimony that the chain of custody somehow had been compromised. While the party who offers the evidence has the burden of demonstrating the chain of custody, the party against whom the evidence is offered must timely object to the evidence when it is first introduced at trial, or the party will waive any objections as to its integrity based on a compromised chain of custody.

FURTHER READINGS

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## CHAIN OF TITLE

*A list of successive owners of a parcel of land, beginning from the government, or original owner, to the person who currently owns the land.*

To show that a title to a piece of land is a marketable title and is free to transfer, a person must know who had ownership of the land at any point in time. In addition, the seller should be able to trace the way in which each person came into the chain of title. An ABSTRACT OF TITLE contains a condensed history of the title to a piece of land in addition to a summary of conveyances. This history appears on public record so that title to land can be checked.

## CHAIN REFERRAL

*A type of sales plan that convinces individuals to make purchases based upon the promise that their payment will be reduced for each new purchaser they recommend to the seller.*

Referral sales in general are under close scrutiny by CONSUMER PROTECTION laws and are illegal in many states due to their fraudulent and misleading nature. A chain referral is a type of pyramid sales scheme whereby an innocent consumer is lulled into investing money based on the promise that he will eventually make money, which is usually highly unlikely, if not impossible.

CROSS-REFERENCES

Ponzi Scheme.

## CHAMBERS

*A judge's private room or office wherein he or she hears motions, signs papers, and performs other tasks pertaining to his or her office when a session of the court, such as a trial, is not being held.*

Business transacted in a private setting is said to be done "in chambers."

## CHAMIZAL TRACT

*A description of the 1895 title dispute between the United States and Mexico that arose over a tract of land in El Paso, Texas, known as "El Chamizal."*

The Boundary Commission was unable to agree on a boundary line and a convention was signed by the two governments on June 24, 1910, establishing another commission to decide the issue. Because the new commission departed from the terms of submission and because of disturbed conditions in Mexico, no further action was taken until the conclusion of a treaty

in 1963 that divided the disputed territory between the two countries.

## CHAMPERTY AND MAINTENANCE

*Champerty is the process whereby one person bargains with a party to a lawsuit to obtain a share in the proceeds of the suit. Maintenance is the support or promotion of another person's suit initiated by intermeddling for personal gain.*

Both champerty and maintenance have been illegal for two basic public policy reasons since early COMMON LAW: (1) It is considered desirable to curb excess litigation for the operation of an efficient judicial system. The reasons for this are numerous and include problems of overcrowding on court calendars, economic considerations, and the desirability of promoting a society that is not excessively litigious. Champerty and maintenance work contrary to this societal goal by stirring up litigation. (2) Champerty and maintenance bring money to an individual who was not personally harmed by the defendant. An attorney found guilty of either champerty or maintenance will be subject to the payment of any damages that may have been incurred by the parties to the lawsuit and to disciplinary proceedings, which can result in his or her disbarment.

Whether or not champerty and maintenance exist in a particular instance depends upon the facts and circumstances of the case. They apply specifically to cases wherein one person profits from another person's recovery in a lawsuit. If a licensed collection agency purchases a group of bad accounts from a store, the agency is buying the right to collect on the accounts rather than on a particular lawsuit and is therefore not guilty of champerty. An attorney who buys a chose in action with the sole, SPECIFIC INTENT to initiate an action for his or her own benefit would be guilty of champerty provided the purchase was made with that intent.

To lend money to an individual who would not otherwise be able to afford to bring a lawsuit is not maintenance unless the lender intends to gain substantially from his loan by being compensated with a portion of the recovery.

Today, some states still recognize champerty and maintenance as offenses but in most states they have been replaced with the civil actions of ABUSE OF PROCESS and MALICIOUS PROSECUTION, both of which deal with the wrongful initiation of litigation and perversion of legal process.

## CHANCELLOR

*A secretary, secretary of state, or minister of a king or other high nobleman.*

The king's chancellor in England during the Middle Ages was given a variety of duties, including drawing up writs that permitted the initiation of a lawsuit in one of the common-law courts and deciding disputes in a way that gave birth to the system of law called EQUITY. His governmental department was called the Chancery.

The Chancellor of the Exchequer in England is like the secretary of the U.S. treasury, but in former times he also presided over a court called the Court of Exchequer, which at first heard disputes over money owed to the king but eventually heard a wide variety of cases involving money. This jurisdiction was founded on the theory that a creditor who could not collect a debt would later be less able to pay whatever he owed to the king.

Chancellor has also been used as the title for a judge who sits in a court of equity, for the president of a university, or for the public official in charge of higher education in some states.

## CHANCERY

*The old English court in which the monarch's secretary, or Chancellor, began hearing lawsuits during the fourteenth century.*

The decisions rendered there were based on conscience and fairness rather than on the strict common-law FORMS OF ACTION. In the United States, courts like the old chancery have been called courts of chancery or courts of EQUITY.

## CHARACTER EVIDENCE

*Proof or attestations about an individual's moral standing, general nature, traits, and reputation in the general community.*

A *character witness* is an individual who testifies as to the habits and reputation of another person. In criminal cases, a defendant might attempt to reduce the possibility that he or she will be convicted of committing the crime as charged by exhibiting his or her good character or propensity for not committing the offense. Ordinarily, this is limited to testimony concerning the particular character trait that is in issue. For example, evidence concerning the defendant's trustworthiness with property might be relevant in an EMBEZZLEMENT case. The character witness must be a person who is familiar

with the defendant's reputation in the community fairly close to the time the crime was committed.

In federal trials the admissibility of character evidence and the use of character witnesses are governed by the FEDERAL RULES OF EVIDENCE.

## CHARGE

*To impose a burden, duty, obligation, or lien; to create a claim against property; to assess; to demand; to accuse; to instruct a jury on matters of law. To impose a tax, duty, or trust. To entrust with responsibilities and duties (e.g., care of another). In commercial transactions, to bill or invoice; to purchase on credit. In* CRIMINAL LAW, *to indict or formally accuse.*

*An encumbrance, lien, or claim; a burden or load; an obligation or duty; a liability; an accusation. A person or thing committed to the care of another. The price of, or rate for, something.*

A retail store may attach a finance charge to money owed by a customer on a store account.

A *charge to the jury* is the process whereby a judge addresses the jury before the verdict. During the charge, the judge summarizes the case and gives instructions to the jury concerning such matters as the RULES OF LAW that are applicable to various issues in the case.

A *public charge* is a person who has been made a ward of the state who requires public support due to illness or poverty.

## CHARGE-OFF

*Eliminate or write off.*

The term *charge-off* is used to describe the process of removing from the records of a company something that was once regarded as an asset but has subsequently become worthless.

A classic case is the bad debt, which is an uncollectible debt. A *bad debt* is a permissible business tax deduction, and a *non-business bad debt* may also be claimed as a charge-off in the year the debt becomes entirely worthless. Charge-off is generally used in reference to a charge or debt that is not paid when due.

## CHARITABLE TRUST

*The arrangement by which real or* PERSONAL PROPERTY *given by one person is held by another to be used for the benefit of a class of persons or the general public.*

The law favors charitable trusts, sometimes called public trusts, by according them certain privileges, such as an advantageous tax status. Before a court will enforce a charitable trust, however, it must examine the charity and evaluate its social benefits. The court cannot rely on the view of the settlor, the one who establishes the trust, that the trust is charitable.

In order to be valid, a charitable trust must fulfill certain requirements. The settlor must intend to create this type of trust. There must be a trustee to administer the trust, which must consist of some res or trust property. The charitable purpose must be expressly designated. A definite class of persons comprised of indefinite beneficiaries within it must actually receive the benefit. The requirements of intention, the trustee, and the res are the same in a charitable trust as they are in any other trust.

### Charitable Purposes

A charitable purpose is one designed to benefit, ameliorate, or uplift mankind mentally, morally, or physically. The relief of poverty, the improvement of government, and the advancement of religion, education, and health are some examples of charitable purposes. Trusts to prevent cruelty to animals, to erect a monument in honor of a famous historical figure, and to beautify a designated village are charitable purposes aimed, respectively, at fostering kindness to animals, patriotism, and community well-being.

The definition of charitable purposes is derived from an old ENGLISH LAW, the Statute of Charitable Uses, but has been expanded throughout the years as new public needs developed.

### Beneficiaries

The class to be benefited in a charitable trust must be a definite segment of the public. It must be large enough so that the community in general is affected by, and interested in, the enforcement of the trust, yet it cannot encompass the entire human race. Within the class, however, the specific persons to benefit from the trust must be indefinite. A trust "for the benefit of the orphans of American veterans of the Vietnam conflict" is charitable. The orphans of such veterans constitute a definite class. The indefinite persons within the class are the ones who are ultimately chosen by the trustee to be paid the benefits. The class is large enough so that the community is interested in the enforcement of the trust.

A trust for named persons or a trust for profit cannot be a charitable trust. A trust "to construct and maintain a hospital" might be charitable, even though the hospital charges the patients who are treated, provided that any profits realized are used solely to continue the charitable services rendered and are not paid to private persons.

A trust that serves both charitable and noncharitable purposes will fail if the two are inseparable. For example, suppose a settlor bequeaths $500,000 to a trustee "to hold in trust for the benefit of all the schools in a particular town." The settlor's daughter is the residuary legatee of the estate, who will inherit the remainder of the estate after the testamentary dispositions are satisfied. Some of the schools in the town are public and charitable institutions and some are private and operated for profit. The settlor has not apportioned the $500,000 between the public schools and the private schools. The valid part—to be given to public schools and charitable institutions—cannot be separated from the invalid part—the disposition to private or profit making institutions; therefore, the trust fails as a charitable trust. The trustee holds the $500,000 in a RESULTING TRUST for the settlor's daughter, since the settlor's disposition cannot be valid as a charitable trust because there is no indefinite beneficiary.

If a trust has both charitable and noncharitable purposes and if the maximum amount to be used for noncharitable purposes can be determined, the trust fails only with respect to that amount pertaining to noncharitable purposes, which will be held in a resulting trust by the trustee for the settlor's statutory heir or residuary legatee. The remainder is a valid charitable trust.

As a general rule, a charitable trust can be eternal, unlike a private trust, which must comply with the RULE AGAINST PERPETUITIES, a principle limiting the duration of a trust. With respect to a private trust, the designated beneficiary is the proper person to enforce the trust, but in a charitable trust, the state attorney general is the one to enforce it. The settlor, his or her heirs or personal representatives, the members of the general public, and possible beneficiaries cannot maintain a lawsuit for the enforcement of the trust.

Charitable trusts yield substantial tax benefits to donors, whether in the form of INCOME TAX deductions, tax shelters, or reduced inheritance taxes. Typically under *charitable remainder trusts*, immediate income tax deductions can also be matched with avoidance of capital gains taxes if the donor funds the trust using certain types of assets. The *charitable lead trust*, which is often used in estate planning, commonly benefits heirs. After its duration, the principal assets return to the donor's heirs subject to reduced gift and estate tax.

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CROSS-REFERENCES

Charities; Estate and Gift Taxes; Heir; Taxation.

## CHARITIES

*Organizations created for the purpose of philanthropic rather than pecuniary pursuits.*

A charity is a group designed to benefit society or a specific group of people. Its purpose may be educational, humanitarian, or religious. A charity goes beyond giving relief to the indigent, extending to the promotion of happiness and the support of many worthy causes.

The law favors charities because they promote goodwill and lessen the government's burdens. They are therefore ordinarily exempt from paying income or property taxes.

### Charitable Gifts and Trusts

A *charitable* gift is something that is donated by an individual or organization with the intent to benefit the public or some segment of it as a whole. It is meant for use by an indefinite number of people. Similarly, charitable trusts or *public trusts* are trusts of religious, political, or general social interests, or for the relief of poverty or the advancement of education.

Charities are ordinarily supported by gifts from donors and most states have set forth statutes controlling the manner in which funds are solicited for charities. In addition, the state will generally require charities to disclose their financial structure and condition.

Charitable gifts are often testamentary, or created by will. If there is a problem in determining the actual donative intent of the testator, the court might have to pass on his or her intent. CY PRES is a doctrine applied by a court so that

**Charities**

**PRIVATE PHILANTHROPY IN THE UNITED STATES IN 2001**

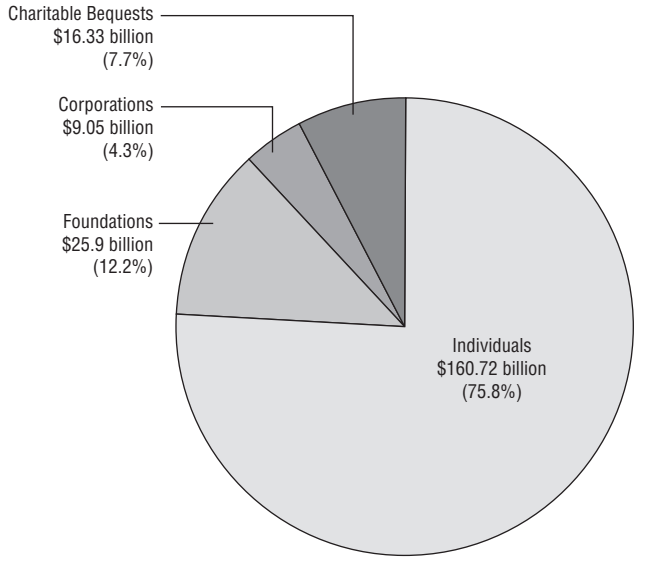


SOURCE: AAFRC Trust for Philanthropy, Indianapolis, IN, *Giving USA*, 2002.

it can carry out a trust made by will for charitable purposes even when the testator's charitable purpose can not be accomplished in the precise manner specified by the testator. For example, if a testator wished to donate money to a certain hospital whose name had changed, for example, this would not defeat the gift. With cy-pres the court would interpret the donor's intent to be to give money to the hospital in spite of the change of name.

### Charitable Societies and Institutions

To determine whether an institution is charitable, the test is whether its major purpose is to aid others or to make a profit.

*Charitable corporations* are nonprofit corporations that have been created to minister to the physical needs of the indigent or to advance a particular goal, such as the aid of a particular religious group or country. In order to receive a tax-exempt status, such organizations must meet certain criteria.

Ordinarily, charitable corporations have no capital stock and they obtain their funds primarily from private and public charity. These funds are held in trust to serve the charitable objects of the institutions.

Beneficial associations also exist mainly for a charitable purpose and not for financial gain.

*Religious organizations,* such as the Young Men's and Women's Christian Associations and the Salvation Army, are also considered to be charitable societies.

The test for determining whether or not an educational institution is a charitable organization is the question of whether it exists for a public purpose or for a private gain.

While charities may charge a nominal fee for some of their services and still be considered charitable societies, they are organized primarily for the public good and not for profit.

## CHARLES RIVER BRIDGE V. WARREN BRIDGE

The 1837 landmark U.S. Supreme Court decision *Charles River Bridge v. Warren Bridge,* 36 U.S. (11 Pet.) 420, 9 L. Ed. 773, illustrated the shift in politics brought about by the presidency of ANDREW JACKSON. Nineteenth-century FEDERALISM, a dominant political doctrine from the time of the drafting of the U.S. Constitution, favored the protection of private investments. The *Charles River Bridge* decision espoused newly popular Jacksonian political beliefs, which favored free enterprise. Arguably, the case altered the course of economic JURISPRUDENCE in the United States.

The facts of *Charles River Bridge* began in 1650 when the state of Massachusetts granted a charter to Harvard College (now Harvard University) to operate for profit a ferry over the Charles River between Boston and Charlestown. Later, in 1785, the Massachusetts Legislature granted a charter to a group of Charlestown businessmen to build the Charles River Bridge. These entrepreneurs were to fund the bridge's construction and in return the state would allow them to collect revenue from a specified toll for the next forty years. As part of the agreement, the entrepreneurs were to pay an ANNUITY to Harvard College to replace ferry profits lost by the building of the new bridge.

The bridge was immediately successful and immensely profitable. Prompted by its popularity, the Massachusetts Legislature in 1792 chartered the building of a second bridge, known as the West Boston Bridge. To appease the proprietors of the Charles River Bridge, who faced competition from the West Boston Bridge, the state of Massachusetts extended the Charles

River Bridge charter from forty to seventy years.

In 1828 Massachusetts chartered a third bridge, the Warren Bridge, which was to be constructed within a few rods of the Charles River Bridge. The Charles River Bridge proprietors strongly objected to this third bridge because the competition would diminish their profits. But Massachusetts citizens viewed the Charles River Bridge as monopolistic and welcomed competition and reduced tolls. The Warren Bridge was completed as planned.

Within a year the Charles River Bridge suffered a 40 percent drop in revenues. The bridge's proprietors, represented by DANIEL WEBSTER and LEMUEL SHAW, went to court, seeking an INJUNCTION against the Warren Bridge. Webster and Shaw argued that the Warren Bridge's charter with the state violated the Contracts Clause of the U.S. Constitution by interfering with the state's separate obligations under its charter with the Charles River Bridge proprietors. They maintained that as successors to the original ferry service charter held by Harvard College, the Charles River Bridge proprietors had an implied exclusive right to tolls charged for crossing the Charles River. Moreover, they said that judicial policy should protect investments; without security in investments, entrepreneurs would not be willing to take risks in technological developments such as bridges and railroads. And this reluctance to take risks would only prove detrimental to the public.

Lawyers for the Warren Bridge proprietors countered that no exclusive rights existed for transportation over the Charles River and that judicial policy should favor technological progress and free enterprise over the rights of those investing in private property. After hearing oral arguments in October 1829, the Supreme Judicial Court of Massachusetts ruled in favor of the Warren Bridge proprietors. The Charles River Bridge group appealed the case to the U.S. Supreme Court.

In March 1831, the Supreme Court first heard arguments in the case. At that time JOHN MARSHALL was chief justice and the Court was dominated by Federalists. But several justices were absent during that argument, so the Court scheduled a second argument. This action had a significant consequence: several justices resigned or died prior to the second argument, and, taking advantage of his privilege of appointing new justices, President Jackson changed the membership of the Court to primarily Democratic.

Following a second argument in 1837 the Court held that the Warren Bridge charter did not violate the Contracts Clause of the Constitution. Chief Justice ROGER B. TANEY, who authored the opinion, held that any state legislation that chartered a private entity to provide a public service, such as a bridge, turnpike, or ferry, was to be strictly construed (interpreted) in favor of the state and against the private entity. The Court found that no implied rights had passed from the Harvard College ferry charter to the Charles River Bridge charter.

Chief Justice Taney further observed the harm in ruling for the Charles River Bridge proprietors simply because they faced competition and reduced profits owing to the Warren Bridge. He suggested that such a holding would encourage turnpike proprietors to sue the railroads for destroying turnpike profits. In Taney's view, economic development was better served by public improvements than by protections for monopolies.

The *Charles River Bridge* decision received widespread attention. Hard-line Federalists disputed the Court's rationale, insisting that only by protecting vested property rights would future financing for transportation technology be ensured. And although railroads were not at issue in *Charles River Bridge,* many historians believe that the Taney Court placed great faith in the future of railroads in the United States, and in rendering its opinion was attempting to facilitate their growth. There is little doubt among legal scholars that *Charles River Bridge* signified the introduction of Jacksonian politics into U.S. jurisprudence.

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## CHARTER

*A grant from the government of ownership rights in land to a person, a group of people, or an organization such as a corporation.*

*A basic document of law of a* MUNICIPAL CORPORATION *granted by the state, defining its rights, liabilities, and responsibilities of self-government.*

*A document embodying a grant of authority from the legislature or the authority itself, such as a corporate charter.*

*The leasing of a mode of transportation, such as a bus, ship, or plane. A* charter-party *is a contract formed to lease a ship to a merchant in order to facilitate the conveyance of goods.*

## ❖ CHASE, SALMON PORTLAND

Salmon Portland Chase served from 1864 to 1873 as the sixth chief justice of the SUPREME COURT OF THE UNITED STATES. He was also a distinguished lawyer and politician, serving as U.S. senator from Ohio (1849–55 and 1860–61), governor of Ohio (1855–59), and secretary of the treasury (1861–64). Chase also sought the presidential nomination in every election between 1856 and 1872, even while sitting as chief justice. As a result, many criticized him for neglecting his judicial responsibilities in favor of his political ambitions. Despite his extrajudicial activities, Chase helped to navigate the Supreme Court through the dangerous political waters of Reconstruction, the period following the Civil War when the country attempted to rebuild itself and readmit the Southern states to the Union, preserving the Court's powers when a Republican-dominated Congress sought to control both the presidency and the Supreme Court. As chief justice, Chase presided over the 1868 IMPEACHMENT trial of President ANDREW JOHNSON. Chase was an ardent opponent of SLAVERY his entire life, and in his last years on the Court he fought against a narrow interpretation of the FOURTEENTH AMENDMENT, an interpretation that he surmised would allow future state legislatures to rescind the newly won rights of African Americans.

"NO MORE SLAVE STATES, AND NO MORE SLAVE TERRITORY. LET THE SOIL OF OUR EXTENSIVE DOMAIN BE KEPT FREE."
—SALMON PORTLAND CHASE

Chase was born January 13, 1808, in Cornish, New Hampshire, the eighth of 11 children in a family that had lived in New England since the 1600s. His father operated a tavern as well as a glass factory and distillery near Keene, New Hampshire, and died when Chase was nine years old. Chase had two prominent uncles who aided him in his father's absence: Dudley Chase, who served two terms as U.S. senator from Vermont (1813–17 and 1825–31), and Philander Chase, who became bishop of Ohio for the Episcopal Church and president of Cincinnati College. When he was 12 years old, Chase moved to Ohio to help on Philander Chase's farm. In return for his work, his uncle taught him Greek, Latin, and mathematics in his church school. Chase attended Cincinnati College for a year then eventually returned to his family in New Hampshire and entered Dartmouth College, graduating Phi Beta Kappa in 1826.

After college, Chase moved to Washington, D.C., where he studied law under Attorney General WILLIAM WIRT. He passed the bar exam and returned to Cincinnati to set up a legal practice. In Cincinnati, Chase's personal life was clouded by tragedy. He lost three wives between 1835 and 1852. He had one daughter by each of his last two wives. He remained single for the last part of his life and was a devoted father to his two daughters.

Chase strongly opposed slavery from his early years, a position that owed much to his deeply religious outlook. In Ohio, he was nicknamed the Attorney General for Runaway Negroes for his LEGAL REPRESENTATION of abolitionists who had aided runaway slaves from Kentucky. He even took two of these cases to the U.S. Supreme Court—*Jones v. Van Zandt,* 46 U.S. (5 How.) 215, 12 L. Ed. 122 (1847), and *Moore v. Illinois,* 55 U.S. (14 How.) 13, 14 L. Ed. 306 (1852)—both of which he lost. About his nickname, Chase commented that he "never refused . . . help to any person black or white, and that he liked the office nonetheless because there were neither fees nor salary connected with it."

In 1849 Chase was elected to the U.S. Senate as a member of the Free-Soil party, which sought to keep new states in the west free of slavery. In the Senate, he and CHARLES SUMNER became leading spokesmen for the antislavery movement. He gained renown through his opposition to the 1854 KANSAS-NEBRASKA ACT, which allowed each territory to conduct a popular vote deciding whether it would permit slavery. Shortly thereafter, he helped to found the antislavery REPUBLICAN PARTY, and in 1855 he was elected governor of Ohio. He was considered for the 1856 Republican presidential nomination but was passed over, and in February 1860 he was reelected to the U.S. Senate. In May of the same year, he sought the presidential nomination at the Republican convention in Chicago. Chase and William H. Seward were considered the chief contenders for the nomination, but on the third ballot Chase's supporters gave their votes to ABRAHAM LINCOLN, thus giving the man from Illinois the nomination. After his election, Lincoln offered Chase and Seward the respective posts of secretary of the treasury and SECRETARY OF STATE. Chase then gave up his seat as U.S. senator.

At the Treasury, Chase faced the difficult task of financing a government that was engaged in a civil war. As part of this effort, he helped to establish a national banking system that gave the federal government its first effective national paper currency. Early in the war, Chase also advised military leaders who sought guidance from Washington, D.C. Chase was often unhappy with the decisions of Lincoln and other members of the cabinet and resolved that he could do better as president. He therefore opposed Lincoln for the Republican presidential nomination in 1864. Chase had the support of the more liberal wing of the Republican Party but he eventually withdrew his name from consideration, conceding to the more popular Lincoln. In June 1864, after several disagreements with Lincoln, Chase resigned from the cabinet.

Despite their differences, Lincoln admired Chase, and in December 1864 he nominated Chase to succeed **ROGER B. TANEY** as chief justice of the U.S. Supreme Court. He nominated Chase with the expectation that Chase would sustain two extraordinary measures taken by the Union during the war—the emancipation of the slaves and the issuance of paper money to repay debt. Both measures had caused great controversy, and as a result many Americans had lost confidence in the federal government.

Chase joined a Court with only three other justices who consistently supported Republican positions, Justices **DAVID DAVIS**, **NOAH H. SWAYNE**, and **SAMUEL F. MILLER**, all appointed by Lincoln. The Court was sharply divided over the various issues surrounding Reconstruction. The post–Civil War crisis deepened when Lincoln was assassinated on April 14, 1865, and Vice President Andrew Johnson became president.

Chase urged a moderate, conciliatory stance toward the defeated South, a stance that eventually alienated him from the Radical Republicans, a faction of the Republican party that sought to impose strict military measures and punitive new laws on the states of the former Confederacy. Like the Radical Republicans, Chase supported expanded freedoms for African Americans. Unlike them, however, he also supported such measures as ending **MILITARY GOVERNMENT** in the South, pardoning Confederate leaders, and quickly restoring Southern states to the Union. Chase's moderation helped to spare Jefferson Davis, president of the former Confederacy. After the war, Davis had been imprisoned in Virginia, part of Chase's circuit, where the government hoped to try him for **TREASON**. Chase refused to hold a civil trial while the area was still under military rule. Although a **GRAND JURY** indicted Davis for treason, no action was taken against him, and eventually the government's case was dismissed.

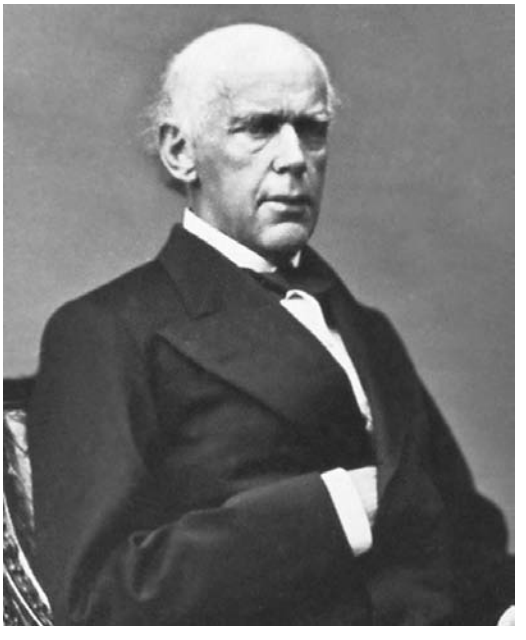

*Salmon P. Chase.*
LIBRARY OF CONGRESS

Many of the U.S. Supreme Court's decisions during Chase's tenure involved the thorny issue of Reconstruction. In March 1867, Congress passed the Reconstruction Acts, which divided the South into five districts and imposed military rule. Reconstruction involved new problems of constitutional interpretation as to the federal government's powers over the states. At issue were questions not only of **STATES' RIGHTS** but also of the status of freed slaves. In one early decision, **EX PARTE MILLIGAN**, 71 U.S. (4 Wall.) 2, 18 L. Ed. 284 (1866), Chase voted with the Court in challenging Congress over Reconstruction. The Court held that Congress could not authorize military trials where civil courts were still operating. The majority opinion warned of the military's "gross usurpation of power"—a direct challenge to the Reconstruction Acts passed by Congress. However, in later decisions Chase voted to uphold congressional laws pertaining to Reconstruction. In the 1867 *Test Oath* cases—*Cummings v. Missouri,* 71 U.S. (4 Wall.) 277, 18 L. Ed. 356, and *Ex parte Garland,* 71 U.S. (4 Wall.) 333, 18 L. Ed. 366—Chase disagreed with the Court's decision to strike down laws requiring that priests and lawyers swear oaths of

loyalty to the Union. In his dissenting opinion, joined by Chase, Justice Miller declared that no punishment was inflicted by requiring such an oath and that Congress could impose such requirements. Chase considered TEXAS V. WHITE, 74 U.S. (7 Wall.) 700, 19 L. Ed. 227 (1868) to be the most important case of his Supreme Court career. Chase, writing the Court's opinion, upheld the general principles of Reconstruction, asserting that Congress, and not the Supreme Court, possessed the authority to recognize state governments as legitimate.

When Southern states sought to make cases in court against executives of the federal government—including President Johnson and Secretary of War Edwin M. Stanton—Chase joined the majority in dismissing those cases, thereby aiding Congress in its Reconstruction fervor. In *Mississippi v. Johnson,* 71 U.S. (4 Wall.) 475, 18 L. Ed. 437 (1867), Mississippi, in the first court case ever to name the president of the United States as an individual party, attempted to prevent President Johnson from enforcing certain provisions of the Reconstruction Acts. Chase dismissed the case, holding that preventing the president from acting on congressional legislation would cause a "collision . . . between the executive and legislative departments of the government." This, in turn, would give the House grounds to sue for the president's impeachment. This opinion proved prophetic, of course, when Congress did attempt to impeach President Johnson.

Chase's public standing improved when he ably handled the impeachment trial of President Johnson in March 1868. The Radical Republican–dominated Congress had voted to bring impeachment proceedings against Johnson after he dismissed one of their favorite members of his cabinet, Secretary of War Stanton. The Senate sat as a court of impeachment with Chase presiding as judge. Chase frustrated Radical Republican aims by sticking to procedural rules and helping to bring about Johnson's acquittal, which passed the Senate by one vote. The public acclaim occasioned by his handling of the impeachment trial led Chase to make another try at the presidency in 1868. That time, however, Chase made known his desire to run as a Democratic candidate, largely because his moderate positions toward the South had endeared him to Democrats. His efforts failed.

Although the Supreme Court under Chase's leadership rarely questioned congressional Reconstruction measures after 1867, it did declare other federal legislation unconstitutional. Whereas before 1864 the Court had overturned acts of Congress only twice—in MARBURY V. MADISON, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), and DRED SCOTT V. SANDFORD, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857)—between 1864 and 1873 it voided ten pieces of congressional legislation. These decisions included the first of the *Legal Tender Cases, Hepburn v. Griswold,* 75 U.S. (8 Wall.) 603, 19 L. Ed. 513 (1870)—but reversed later by *Knox v. Lee* and *Parker v. Davis*, 79 U.S. (12 Wall.) 457, 20 L. Ed. 287 (1871), heard concurrently—in which Chase questioned much of his earlier work for the Treasury when he declared the Legal Tender Acts (12 Stat. 345, 532, 709) unconstitutional. This decision created a temporary crisis of confidence in the national currency. The Court reversed this decision in 1871 after a change in membership, with Chase sticking to his views of two years earlier. Despite his participation in

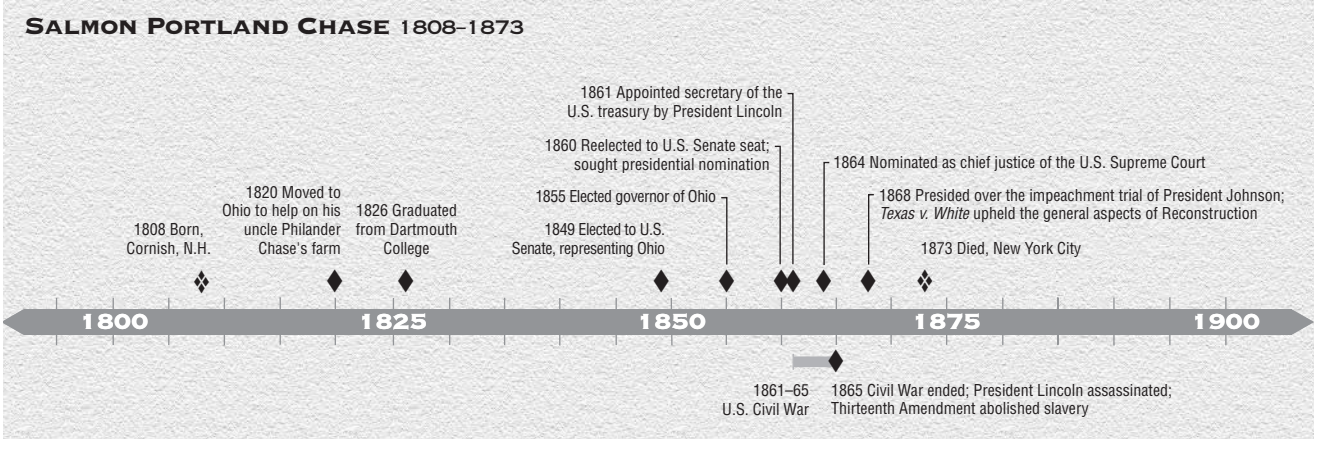

such judicial activism, Chase at other times advocated judicial restraint. In his opinion for the *Licence Tax Cases,* 72 U.S. (5 Wall.) 462, 18 L. Ed. 497 (1868), in which he upheld a law that taxed the sale of lottery tickets throughout the United States, Chase wrote:

> This court can know nothing of public policy except from the Constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. Questions of policy determined there are concluded here.

**ULYSSES S. GRANT** won the presidential election of 1868, and from that time onward, the power of Radical Republicanism began to wane. Grant's appointments made the Court a more conservative body. In the **SLAUGHTER-HOUSE CASES**, 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1873), Chase dissented from the Court's narrow interpretation of the Fourteenth Amendment, which was passed in 1868 and sought to protect the rights of African-Americans against infringements by state legislation. In its *Slaughter-House* decision, the Court held that the Fourteenth Amendment's **PRIVILEGES AND IMMUNITIES CLAUSE** protected only a few select rights of national citizenship, such as the right to travel. The Court did not interpret the amendment as guaranteeing more fundamental rights, such as the right to vote. Chase objected that the Court's opinion jeopardized newly won freedoms for African Americans. It would take another century before the Court would reverse this narrow interpretation of the Fourteenth Amendment.

Chase suffered a series of crippling strokes beginning in 1870. Despite his failing health, his daughter Catherine Chase and other admirers put forth his name for the 1872 presidential nomination. As had happened each time before, his nomination came to nothing. He died May 7, 1873, after suffering a stroke while visiting his daughter in New York City, and he was interred in Spring Grove Cemetary in Cincinnati. Although Chase did not achieve his highest goal of becoming president, he nevertheless held more high offices during his life than did any other Supreme Court justice besides James F. Byrnes and **WILLIAM H. TAFT**. More importantly, Chase successfully guided the Court through some of the most tumultuous years in the history of the nation. His actions as chief justice helped to preserve the powers of the Supreme Court in the face of serious congressional challenges during the extraordinary years following the Civil War.

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## ♦ CHASE, SAMUEL

"I CANNOT SUBSCRIBE TO THE OMNIPOTENCE OF A STATE LEGISLATURE."
—SAMUEL CHASE

Samuel Chase served as a justice of the U.S. Supreme Court from 1796 to 1811. In 1804 the U.S. House of Representatives voted to impeach Chase. However, the Senate did not uphold the House's action and Chase continued to serve on the Court until his death. Chase remains the only justice who has been the subject of **IMPEACHMENT** proceedings. Chase's decisions set several precedents for the Supreme Court, among them opinions establishing the supremacy of federal treaties over state laws and the establishment of **JUDICIAL REVIEW**, which is the Court's power to void legislation it deems unconstitutional, a power that makes the judiciary one of the three primary branches of the federal government (the other two branches being Congress and the president).

Known for his fiery and partisan manner, Chase was an active politician for most of his life. Before his career as a judge Chase served in the Maryland colonial and state legislatures. As a member of the **CONTINENTAL CONGRESS** in the 1770s, Chase was an outspoken advocate of American independence from Britain. He signed the Declaration of Independence in 1776. He opposed the Constitution as an Anti-Federalist (an opponent of federal government powers over the states) in the 1780s. Later, however, he became a member of the **FEDERALIST PARTY** and as a Supreme Court justice helped establish the powers of the federal judiciary. Chase generally

# The Samuel Chase Impeachment Trial

Originally an anti-Federalist opposed to the ratification of the U.S. Constitution on grounds that it deprived the states of their independence and sovereignty, Supreme Court Justice Samuel Chase changed his tune about the propriety of a strong central government once he saw the **ANARCHY** and madness wrought by the French Revolution. By the time he was seated on the nation's high court, Chase had earned a reputation for his zealous defense of the **FEDERALIST PARTY** and his harsh criticism of the **DEMOCRATIC-REPUBLICAN PARTY**.

Generally speaking, the Federalist Party favored a strong national government, promoted legislation that advanced mercantile interests, supported the creation of a national bank, and believed that the federal government should be run by the most well-educated and affluent Americans. The Democratic-Republican Party generally favored stronger and more independent state governments, promoted legislation that advanced agricultural interests, opposed the creation of a national bank, and believed that the federal government should be run as a popular democracy, with its power being directly and closely derived from everyday, average Americans.

Chase's political beliefs endeared him to the White House while Federalist **JOHN ADAMS** was in office. But in 1800 Democratic-Republican **THOMAS JEFFERSON** defeated Adams to become the third president of the United States, and his Democratic-Republican Party took control of both houses of Congress. Chase had rankled Democratic-Republicans even before Jefferson took office. The beginning of the fall term of the Supreme Court in 1800 had to be postponed several weeks until Chase finished campaigning for John Adams in Maryland.

After Jefferson took office, Chase began openly assailing the president and his policies. Chase even took to condemning the Democratic-Republicans from the bench. In reading a charge to a Baltimore **GRAND JURY** in May 1803, Chase unleashed what one contemporary observer called "a tirade against Democratic-Republican legislation." Dismayed that Jeffersonians in Maryland had established universal male suffrage, Chase suggested to the grand jurors that "the country . . . [was] headed down the road to mobocracy, the worst of all popular governments" and that, if left in power, Jeffersonian Democratic-Republicans would eliminate "all security for property, and personal liberty." The "modern doctrine . . . that all men in a state of society are entitled to equal liberty and equal rights," Chase warned, will bring "mighty mischief upon us." Finally, Chase said that congressional Democratic-Republicans had gravely compromised the independence of the judiciary by repealing the Judiciary Act of 1801, which lame-duck Federalist lawmakers had passed to create extra federal judgeships for President Adams to fill.

When Jefferson learned of Chase's grand jury charge on May 13, 1803, he immediately wrote Joseph Nicholson, one of his party leaders in the House of Representatives, suggesting action against Chase: "Ought this seditious and official act on the principles of our Constitution, and on the proceedings of a State, to go unpunished? And to whom so pointedly as yourself will the public look for the necessary measures? I ask these questions for your consideration, for myself it is better that I should not interfere." Nicholson quietly alerted his Democratic-Republican colleagues as to Jefferson's suggestion. Less than a year later, on March 12, 1804, the U.S. House of Representatives voted to impeach Chase by a 73 to 32 margin, naming John Randolph, a cousin of Jefferson and a mercurial politician in his own right, to head the House Managers responsible for prosecuting Chase in his trial before the Senate.

The eight **ARTICLES OF IMPEACHMENT** centered on three charges. The first charge arose from Chase's remarks before the Baltimore grand jury. The second charge stemmed from his conduct in the 1800 **TREASON** trial of John Fries. The third charge focused on Chase's conduct in the 1800 **SEDITION** trial of James Callender. Together, the House managers argued, these three charges represented judicial misconduct amounting to impeachable **HIGH CRIMES AND MISDEMEANORS**. Article II, Section 4 of the U.S Constitution provides that the federal judges "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

The least serious of the charges concerned Chase's conduct in the Fries trial. Fries was accused of treason for leading a riot over a dwelling tax in Pennsylvania in 1799. At the outset of the Fries trial, Chase had delivered a written opinion in which he

defined the meaning of treason as a **MATTER OF LAW**, without ever hearing argument from the lawyers in the case. Fries' attorneys were flabbergasted. They withdrew from the case because, they contended, Chase's conduct had irrevocably tainted the jury pool and made a fair trial impossible. Without counsel, Fries was easily convicted. In defense of his actions, Chase told the Senate that before the jury began deliberating in the Fries case, he had instructed the jurors that they had the final word on the definition of treason and the final say on how that definition would be applied to the facts of the case.

The most serious charge concerned Chase's conduct at the Callender trial. Callender had been indicted under the provisions of the Sedition Act for publishing a book accusing John Adams of being a British toady and a monarchist. Passed in 1798 by a Federalist Congress, the Sedition Act made it a crime to speak or write in such a way as to bring the president or Congress "into contempt or disrepute." Jeffersonians viewed the act as a political tool that the Adams administration used to muzzle its opponents.

During the impeachment trial, the House Managers presented evidence that Chase had prejudged the Callender case. They offered testimony that Chase, upon first reading Callender's book, had expressed the intent to present the offending passages to a grand jury himself and obtain an indictment against the defendant. Chase admitted threatening such action but denied following through on the threat and argued that the threat by itself did not constitute a high crime or misdemeanor. The House Managers also presented evidence that Chase failed to exclude a juror from sitting on the jury, even though the juror had formed an unfavorable opinion about Callender. Chase admitted that one juror indicated having formed such an opinion, but Chase said that the same juror also said he had not formed an opinion about the specific charges against the defendant.

The trial began on February 9, 1805, and the House Managers took ten full days to present the testimony of more than 50 witnesses. Chase did not testify during the proceedings but instead read a prepared statement that attempted to refute the charges. Closing arguments started on February 20 and lasted several days. Martin Luther, one the country's most able and respected lawyers, represented Chase. Seven House Managers, led by Randolph, spoke for the prosecution. Thirty-Four senators weighed the evidence, 25 Democratic-Republicans and 9 Federalists. **AARON BURR**, Jefferson's vice president, presided over the proceedings. Twenty-two votes, or two-thirds of the Senate, were necessary for conviction.

On March 1, 1805, the Senate announced its verdicts. Chase was acquitted on all counts. The closest vote was 19–15 in favor of convicting Chase for his anti–Democratic-Republican remarks to the Baltimore grand jury. Contemporary observers and historians have given Martin Luther a lion's share of the credit for the acquittals. His closing argument deeply impressed the Senate with ideas that Chase was a wronged man and that the integrity and independence of the federal judiciary would be imperiled by conviction. John Randolph's closing argument, by contrast, was described as so ineffective, disorganized, shrill, and blatantly partisan that even Thomas Jefferson was alienated.

The failure of the Senate to convict allowed Chase to return to the Supreme Court and serve 6 more years as an associate justice. More importantly, the acquittal deterred the House of Representatives from using impeachment as a partisan political tool. Some historians have suggested that the Chase impeachment trial was just a **TEST CASE** for House Democratic-Republicans who would have pursued other impeachments more aggressively.

The Chase impeachment is also said to have left a lasting impression on Chase's friend, Chief Justice **JOHN MARSHALL**, who spent much of his later career attempting to demonstrate that the nation's high court was separate from and even above party politics. In the final analysis, these two results represent flip sides of the same coin: one result increased the independence of the federal judiciary from interference by the legislative and executive branches, while the other result revealed the danger to that independence created by unelected federal judges who publicly attack the popular policies of democratically elected lawmakers.

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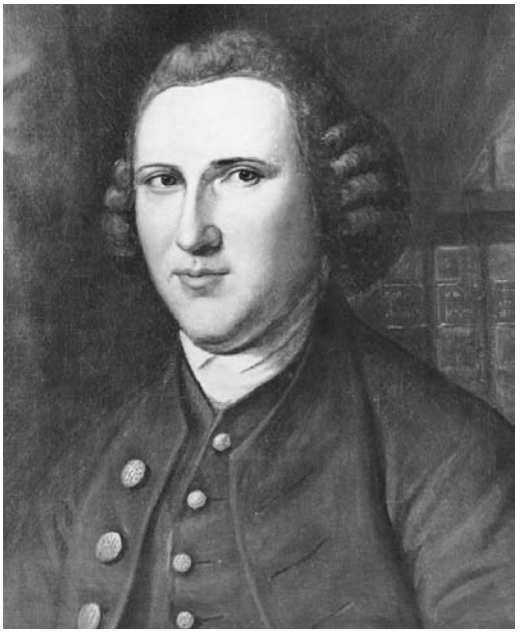

*Samuel Chase.*
INDEPENDENCE NATIONAL HISTORICAL PARK COLLECTION

favored a strong government ruled by an elite and he opposed the radical ideas of the French Revolution.

Chase was born April 17, 1741, in Somerset County, Maryland. His father, Thomas Chase, was a British-born clergyman of the Church of England. His mother, Matilda Walker Chase, died at Chase's birth. In 1744 the family moved to Baltimore where Chase grew up and received a classical education under his father's supervision. Chase studied law in Annapolis, Maryland, at the office of Attorney John Hall from 1759 until he was admitted to the bar in 1763. In 1762 Chase married Ann Baldwin. They had seven children, three of them dying in infancy. Ann died sometime between 1776 and 1779 and in 1784 Chase married Hannah Kitty Giles, with whom he had two daughters.

Chase established a successful law practice in Annapolis, the colonial capital and later the state capital of Maryland. He also became prominent in colonial politics. In 1764 he was elected to the lower house of Maryland's colonial legislature as a representative of Annapolis and by the early 1770s he had become well-known as a skillful legislator and outstanding leader, earning the nickname the Maryland Demosthenes after the ancient Greek orator and politician. He represented Maryland in the Continental Congresses from 1774 to 1778 and 1784 to 1785 and in 1778 served on as many as thirty committees in his tireless efforts to advance the cause of independence from Britain. He advocated a boycott of Britain and a political confederation of the colonies. He denounced those who opposed such policies as "despicable tools of power, emerged from obscurity and basking in proprietary sunshine." Together with **BENJAMIN FRANKLIN** and Charles Carroll, Chase traveled in 1776 to Montreal in an unsuccessful attempt to persuade Canada to join the American colonies in their revolt against England. He signed the Declaration of Independence in 1776 and worked for its acceptance in Maryland.

Chase helped draft the Maryland Constitution in 1776. He served in the Maryland House of Delegates for all but a year and a half between 1777 and 1788. When the U.S. Constitution came before the Maryland Convention for ratification Chase was in the minority of delegates who voted against it. He was an ardent Anti-Federalist at the time and argued that the Constitution concentrated power in the hands of the central government at the expense of the common individual. "I consider the Constitution," he wrote to a friend, "as radically defective in this essential: the bulk of the people can have nothing to say to it. The government is *not* a government of the people." He also argued that the Constitution failed to protect the **FREEDOM OF THE PRESS** and the right to trial by jury.

His opposition to the Constitution cost him his state legislative seat in 1788. The same year, Chase also went bankrupt after several of his speculative business ventures failed. These business risks had also damaged his political career, which had been plagued with charges that he used his office for personal gain. In 1778 he had been dismissed from the Continental Congress for two years for allegedly attempting to corner the flour market and profit from speculation on prices.

Dogged by **BANKRUPTCY** and charges of corruption, Chase sought refuge in the position of a local judge in Baltimore County in 1788. In 1791 he was concurrently appointed chief judge of the Maryland General Court. The state assembly, upset with his behavior on the bench and his holding two positions as judge, tried unsuccessfully to remove him from both positions.

Chase might seem to have been an unlikely choice for a Supreme Court justice. However, President **GEORGE WASHINGTON** nominated him to the Supreme Court on January 26, 1796. Over the years Washington had been impressed

by Chase's legal skills; he also admired the zeal with which Chase had worked for American independence during the Revolutionary War as well as Chase's efforts in support of Washington in the Continental Congress. James McHenry of Maryland, the secretary of war and a friend of Washington's, strongly recommended Chase to Washington. Moreover, the Supreme Court was not very powerful or prestigious at the time and it was difficult to find a lawyer who would accept a position on it. The job did not pay well and justices had to travel long distances to preside over circuit courts.

Chase took his seat on the Court on February 4, 1796. He was an Anti-Federalist at the time of the Constitution's ratification but during his tenure on the Court he became a persuasive advocate for the federal judiciary's power to review legislation. Two cases from Chase's first session on the Supreme Court—*Hylton v. United States,* 3 U.S. (Dall.) 171, 1 L. Ed. 556, and *Ware v. Hylton,* 3 U.S. (Dall.) 199, 1 L. Ed. 568, both decided in March 1796—stand out. In *Hylton v. United States,* the Court for the first time reviewed a law passed by Congress. Although the Court refrained from declaring its ability to void acts of Congress on constitutional grounds, its review nevertheless paved the way for MARBURY V. MADISON, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), which established the right of the Court to declare laws unconstitutional. At issue in *Ware v. Hylton* was whether a treaty decided by the federal government could take precedence over state laws. The U.S. government had made a treaty with Great Britain following the Revolutionary War that provided for the payment of debts owed to Great Britain. The states, meanwhile, had passed their own laws on this issue, many of which enabled U.S. citizens to forgo repaying their debts to British citizens. JOHN MARSHALL, future chief justice of the Court, argued the case before the Court for the debtors. The Court ruled that the national treaty had precedent over state law. Of Chase's opinion in this case, constitutional scholar EDWARD S. CORWIN wrote in 1930 that it "remains to this day the most impressive assertion of the supremacy of national treaties over State laws."

In *Calder v. Bull,* 3 U.S. (Dall.) 386, 1 L. Ed. 648 (1798), Chase wrote a highly influential opinion for the Court. He defined a constitutional interpretation of EX POST FACTO laws—that is, retroactive laws, or laws that affect matters occurring before their enactment. Chase decided that the Constitution's prohibition of such laws extended only to criminal statutes that make prior conduct a crime, not to civil statutes. Chase also set a precedent by arguing that any law "contrary to the *great first principles* of the *social compact*" must be declared void. In his opinion, Chase emphasized that the Constitution limits the ability of legislators to disturb established property rights even when it does not expressly set forth such rights. Described by Presser as the natural-law basis of the Constitution, this argument broadened the Court's ability to test the constitutionality of legislation.

In *United States v. Callender,* Chase's Trial 65, Whart. St. Tr. 668, 25 F. Cas. 239, No. 14, 709 (C.C. Va.) (1800), Chase further defined the powers of the Court when he ruled that a jury could not decide the constitutionality of a law:

> [T]he judicial power of the United States is the only proper and competent authority to decide whether any statute made by congress

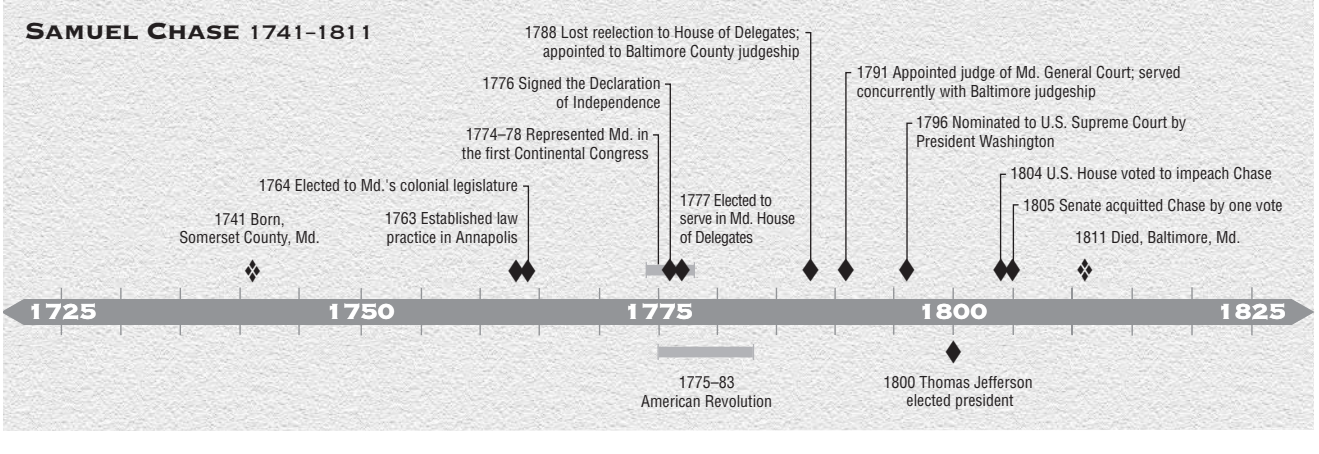

> (or any of the state legislatures) is contrary to, or in violation of, the federal constitution. . . . I believe that it has been the general and prevailing opinion in all the Union, that the power now wished to be exercised by a jury, belongs properly to the Federal Courts.

Chase also found himself embroiled in highly publicized political controversy for his actions both on and off the bench. For example, he made partisan speeches in 1796 for **JOHN ADAMS**, the Federalist party candidate for president, even after he had taken the position of Supreme Court justice. He also pushed for passage of the **ALIEN AND SEDITION ACT**, 1 Stat. 596 (1798), which outlawed "false, scandalous, and malicious" attacks on the government, the president, or Congress. The law was designed largely to discourage criticism of President Adams by the rival **DEMOCRATIC-REPUBLICAN PARTY**, whose most well-known leader was **THOMAS JEFFERSON**. In circuit court decisions in 1799 and 1800 Chase imposed harsh sentences on Democratic-Republicans who had published opinions critical of Adams's Federalist administration. In several cases Chase worked to keep Anti-Federalists off juries. In the case of John Fries of Pennsylvania, a strong supporter of Jefferson who had led rebellions against federal excise taxes, Chase sentenced the accused to death. President Adams subsequently set aside the sentence.

In 1800 the political atmosphere in Washington, D.C., changed when Jefferson defeated Adams for the presidency of the United States. In 1803 Chase got into trouble with the Jeffersonian Democratic-Republicans when he severely criticized their policies in front of a Baltimore **GRAND JURY**. Chase explained that he objected to recent changes in Maryland law that gave more men the privilege of voting. Such changes as these advanced by Democratic-Republicans, Chase exclaimed, would

> rapidly destroy all protection to property, and all security to personal liberty, and our Republican Constitution [would] sink into mobocracy, the worst of all possible governments. . . . The modern doctrines by our late reformers, that all men in a state of society are entitled to enjoy equal liberty and equal rights, have brought this mighty mischief upon us, and I fear that it will rapidly destroy progress, until peace and order, freedom and property shall be destroyed.

This angered Jefferson and other Democratic-Republicans and in 1804 the U.S. House of Representatives voted to impeach Chase on charges of misconduct and bias in the **SEDITION** cases and of seditious criticism of Jefferson in the 1803 Baltimore grand jury charge. In 1805, the Democratic-Republican–controlled U.S. Senate moved to impeach Chase. Democratic-Republican senators charged that Chase had been guilty of judicial misconduct and that his partisan acts showed that he lacked political objectivity. Federalists defending Chase argued that he had committed no crime and that he could not be convicted under the constitutional definition of **HIGH CRIMES AND MISDEMEANORS**. The Senate failed to achieve the two-thirds majority necessary to impeach Chase and he remained on the Court until his death.

Chase's acquittal set an important precedent for the Court—no Supreme Court justice could be removed simply because of his or her political beliefs. The failure to impeach Chase allowed Chief Justice Marshall to assert and define the powers of the Court in future decisions with more confidence. It was thus a step in the process of defining the independence of the Supreme Court as one of the three primary branches of U.S. government.

Chase avoided controversy in his subsequent work on the Court. His near impeachment served as a warning both to him and to other justices to be careful in their choice of words while in office. As Chase suffered in later years from declining health, Marshall became the most vocal justice and assumed Chase's position as the lightning rod for the Court.

Chase died June 19, 1811, in Baltimore. He was interred in St. Paul's Cemetery.

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Constitution of the United States "Federalists vs. Anti-Federalists" (In Focus); Fries's Rebellion.

## CHATTEL

*An item of* **PERSONAL PROPERTY** *that is movable; it may be animate or inanimate.*

Chattels are synonymous with goods or personalty.

*A sample chattel mortgage*

## Chattel Mortgage

PROMISSORY NOTE

This document is to be used as a guideline only. HowStuffWorks does not guarantee that this document is suitable, or legally accurate, for all situations, and is not liable for any deficiencies in the document's content.

**Borrower Information:**

Name: Date:

Street Address: Date of Birth:

City: Area code/Telephone Number:

State: Driver's License Number:

Zip: Social Security Number:

**Lender Information:**

Name: Area code/Telephone number:

Street Address: If paying by check, make check payable to:

City: Send payments to:

State:

Zip:

**Loan Information:**

Loan Amount: Loan Period:

Interest Rate: Payment Schedule:

1. **Promise to Pay.** For value received, _____ (Borrower) promises to pay _____ (Lender) $ _____ and interest at the yearly rate of _____% on the unpaid balance as specified below.
2. **Installments.**
   - ☐ Borrower will pay _____ payments of $ _____ each at monthly/yearly/ _____ intervals on the _____ day of the month.
   - ☐ Borrower will pay one lump payment on _____ date.
   - ☐ Borrower will pay _____ payments of $ _____ each at monthly/yearly/ _____ intervals with a final balloon payment of _____ at the end of the loan term on _____ date.
3. **Application of Payments.** Payments will be applied first to interest and then to principal.
4. **Prepayment.** Borrower may prepay all or any part of the principal without penalty.
5. **Loan Acceleration.** If Borrower is more than _____ days late in making any payment, Lender may declare that the entire balance of unpaid principal is due immediately, together with the interest that has accrued.
6. **Security.**
   - ☐ This is an unsecured note.
   - ☐ Borrower agrees that until the principal and interest owed under this promissory note are paid in full, this note will be secured by a security agreement and Uniform Commercial Code Financing statement giving Lender a security interest in the equipment, fixtures, inventory and accounts receivable of the business known as _____.
   - ☐ Borrower agrees that until the principal and interest owed under this promissory note are paid in full, this note will be secured by the
     - ☐ mortgage
     - ☐ deed of trust covering the real estate commonly known as _____ and more fully described as follows: _____
7. **Collection Costs.** If Lender prevails in a lawsuit to collect on this note, Borrower will pay Lender's costs and lawyer's fees in an amount the court finds to be reasonable.

[continued]

*A sample chattel mortgage (continued)*

**Chattel Mortgage**

The undersigned and all other parties to this note, whether as endorsers, guarantors or sureties, agree to remain fully bound until this note shall be fully paid and waive demand, presentment and protest and all notices hereto and further agree to remain bound notwithstanding any extension, modification, waiver, or other indulgence or discharge or release of any obligor hereunder or exchange, substitution, or release of any collateral granted as security for this note. No modification or indulgence by any holder hereof shall be binding unless in writing; and any indulgence on any one occasion shall not be an indulgence for any other or future occasion. Any modification or change in terms, hereunder granted by any holder hereof, shall be valid and binding upon each of the undersigned, notwithstanding the acknowledgement of any of the undersigned, and each of the undersigned does hereby irrevocably grant to each of the others a power of attorney to enter into any such modification on their behalf. The rights of any holder hereof shall be cumulative and not necessarily successive. This note shall take effect as a sealed instrument and shall be construed, governed and enforced in accordance with the laws of the State of _____.

Witnessed:_____ Date: _____

Witnessed:_____ Date: _____

Witnessed:_____ Date: _____

Witnessed:_____ Date: _____

## CHATTEL MORTGAGE

*A transfer of some legal or equitable right in* **PERSONAL PROPERTY** *as security for the payment of money or performance of some other act. Chattel mortgages have generally been superseded by other types of* **SECURED TRANSACTIONS** *under the* **UNIFORM COMMERCIAL CODE** *(UCC), a body of law adopted by the states that governs commercial transactions.*

The rights of the lender who gives a chattel mortgage are valid only against others who know or should know of the lender's security interest in the property. Since the borrower possesses the property, others cannot realize that a chattel mortgage exists without notice. Each state, therefore, has developed a system for recording instruments showing the existence of chattel mortgages for particular items of property; these records are usually located in the county clerk's office.

If a recording system is in existence a buyer is presumed to know about a mortgage. Once, therefore, the mortgage is properly recorded, the buyer obtains the debt in addition to the property.

**CROSS-REFERENCES**

Recording of Land Titles.

## CHATTEL PAPER

*A writing or writings that evidence both a monetary obligation and a security interest in or a lease of specific goods. In many instances chattel paper will consist of a negotiable instrument coupled with a security agreement. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper.*

**CROSS-REFERENCES**

Secured Transactions.

## ♦ CHÁVEZ, CÉSAR ESTRADA

César Estrada Chávez, the son of Mexican American farm workers, became a well-known labor leader, founding the **UNITED FARM WORKERS** (UFW) union, which led a massive grape boycott across the United States during the 1960s. Chávez won wage increases, benefits, and legal protections for migrant farm workers in the western United States and fought to have dangerous pesticides outlawed.

Chávez was born March 31, 1927, in Yuma, Arizona, one of five children in a family that lived on a small farm for a time. When he was a child, the family was pushed onto the road as migrant laborers when Chávez's parents lost the family farm during the Great Depression. Later, he often spoke of what he felt was the unjust way in which his family had lost their property through foreclosure. Chávez never went beyond the eighth grade, and he once said that he had attended over 60 elementary schools because of his family's constant search for work in the fields.

Chávez was exposed to labor organizing as a young boy, when his father and uncle joined a dried-fruit industry union during the late 1930s. The young Chávez was deeply impressed when the workers later went on strike. At age 19, Chávez himself picketed cotton fields but watched the union fail in its efforts to organize the workers.

After serving in the U.S. Navy during **WORLD WAR II**, he returned to California, where he married a woman named Helen Fabela. In 1952, the Los Angeles headquarters of organizer Saul Alinsky's Community Service Organization (CSO) decided to set up a chapter in San Jose, California, to work for **CIVIL RIGHTS** for the area's Mexican-Americans and Mexican immigrants. A parish priest supplied several names to CSO organizer Fred Ross, including that of Chávez, who was then living in one of San Jose's poorest and toughest neighborhoods—*Sal Si Puedes* (leave, if you can). Ross believed that Chávez could be the best grassroots leader he had ever encountered, so he sought Chávez out and eventually convinced him to join the group's efforts. Chávez began as a volunteer in a CSO voter registration drive and a few months later was hired as a staff member. He spent the next ten years leading voter registration drives throughout the San Joaquin Valley and advocating for Mexican immigrants who complained of mistreatment by police officers, immigration authorities, and **WELFARE** officials.

Chávez believed that unionizing was the only chance for farm workers to improve their working conditions. He resigned in 1962, increasingly frustrated because the CSO would not become involved in forming a farm workers' union. He immediately established the National Farm Workers Association, which later became the UFW, an affiliate of the **AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS** (AFL-CIO). At the UFW's first meeting in September 1962, in Fresno, California, Chávez's cousin, Manuel Chávez, unveiled the flag that he and Chávez had designed for the new union—a black Aztec eagle in a white circle on a bold red background. The banner soon became the symbol of the farm workers' struggle.

When Chávez founded the UFW, field workers in California averaged $1.50 per hour, received no benefits, and had no methods by which to challenge their employers. Under Chávez's leadership, the UFW won tremendous wage increases and extensive benefits for farm workers, including medical and unemployment insurance and **WORKERS' COMPENSATION**. A strict believer in nonviolence, Chávez used marches, boycotts, strikes, fasts, and civil disobedience to force growers in California's agricultural valleys to the bargaining table. In 1968, Filipino grape pickers in Delano, California, struck for higher wages; several days later, the UFW joined the strike and initiated a boycott of California grapes. More than 200 union supporters traveled across the United States and into Canada, urging consumers not to buy California grapes. The mayors of New York, Boston, Detroit, and St. Louis announced that their cities would not buy nonunion grapes. By August 1968, California grape growers estimated that the boycott had cost them about 20 percent of their expected revenue. The boycott brought Chávez to the attention of national political leaders, including U.S. Senator **ROBERT F. KENNEDY**, who sought the **DEMOCRATIC PARTY** nomination for president before his assassination in 1968. Kennedy described Chávez as a heroic figure. In 1970, after its successful boycott, the UFW signed contracts with the grape growers.

In 1975, Chávez had a great success when the strongest law ever enacted to protect farm workers, the Agricultural Labor Relations Act (Cal. Lab. Code § 1140 et seq. [West]), was passed by the California Legislature. This law gave workers the right to bargain collectively and the right to

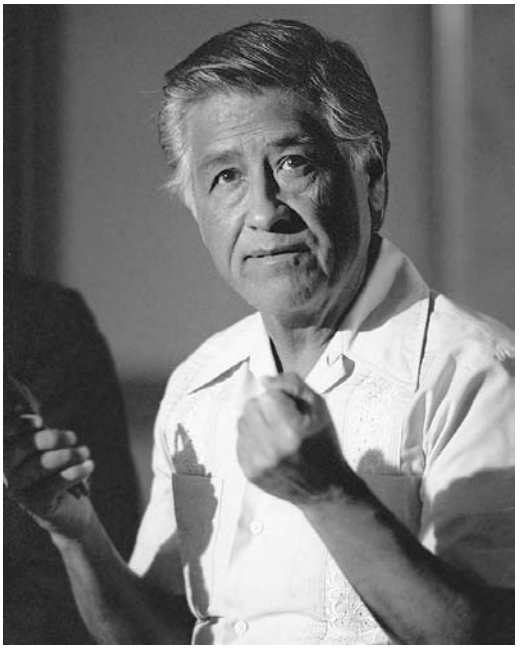

*César Chávez.*
AP/WIDE WORLD PHOTOS

"OUR STRUGGLE IS NOT EASY . . . BUT WE HAVE SOMETHING THE RICH DO NOT OWN. WE HAVE OUR BODIES AND SPIRITS AND THE JUSTICE OF OUR CAUSE AS OUR WEAPONS."
—CÉSAR CHÁVEZ

seek redress for UNFAIR LABOR PRACTICES. Other regulations banned the use of tools that caused crippling back injuries, such as the short-handled hoe, and required growers to give workers breaks and to provide toilets and fresh water in the fields. Chávez was among the first to link workers' health problems to pesticides. He negotiated union contracts that prohibited growers from using DDT, and he targeted five leading pesticides that cause birth defects or kill upon contact.

At its peak during the 1970s the UFW had over 70,000 members. During the early 1980s, the UFW's influence began to wane and union membership dipped below ten thousand. Chávez blamed the decline in part on the election of Republican governors, who sided with the growers. In addition, Chávez decided to turn his efforts toward conducting boycotts rather than organizing workers, a move that was widely criticized and caused a split among the union's members. Chávez was also forced to defend himself against lawsuits stemming from UFW actions taken years before. In 1991, the union lost a $2.4 million case when the U.S. Supreme Court declined to hear its appeal. The case stemmed from a 1979 Imperial Valley strike in which a farm worker was shot and killed (*Maggio, Inc. v. United Farm Workers of America,* 227 Cal. App. 3d 847, 278 Cal. Rptr. 250 [Cal. App. 1991], *cert. denied,* 502 U.S. 863, 112 S. Ct. 187, 116 L. Ed. 2d 148 [1991]).

In April 1993, Chávez returned to San Luis, a small town near his native Yuma, Arizona, to testify in the retrial of a lawsuit brought by Bruce Church, Inc., a large Salinas, California–based producer of iceberg lettuce. At the time Chávez testified, Bruce Church had extensive landholdings in Arizona and California, including the acreage east of Yuma that Chávez's parents had once owned. The company had won a $5.4 million judgment for alleged damage caused by union boycotts, but an appellate court overturned the judgment and sent the case back to the trial court (*Bruce Church, Inc. v. United Farm Workers of America,* 816 P. 2d 919 [Ariz. App. 1991]). On April 22, Chávez finished his second day of testimony in Yuma County Superior Court. He returned to spend the night at the home of a family friend and died in his sleep.

Following Chávez's death, Lane Kirkland, president of the AFL-CIO, described the leader as instrumental in organized labor's efforts to improve the lot of the worker. "Always, César had conveyed hope and determination, especially to minority workers, in the daily struggle against injustice and hardship," Kirkland said. "The improved lives of millions of farm workers and their families will endure as a testimonial to César and his life's work."

In a 1984 speech to the Commonwealth Club in San Francisco, Chávez said, "Regardless of what the future holds for our union, regardless of what the future holds for farm workers, our accomplishment cannot be undone. The consciousness and pride that were raised by our union are alive and thriving inside millions of young Hispanics who will never work on a farm."

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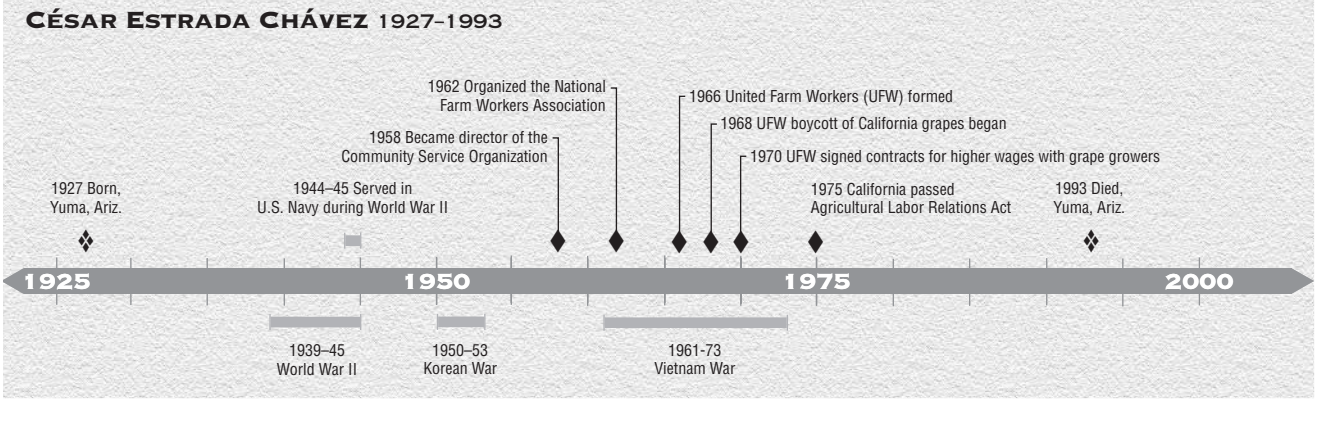

CROSS-REFERENCES

Agricultural Law; Labor Union.

## CHECK

*A written order instructing a bank to pay upon its presentation to the person designated in it, or to the person possessing it, a certain sum of money from the account of the person who draws it.*

A check must contain the phrase "pay to the order of." A check differs from a draft in that a check is always drawn on a bank, while a draft is an order for payment drawn on anyone, including a bank, a person, or a trading account with a company.

A *blank check* is one that the drawer signs but omits filling in the space for the name of the payee, the person in whose favor a check is drawn, or neglects to fill in the space for the amount to be paid.

A *cashier's check* is one that the bank draws on itself and is signed by an authorized bank official. The bank lends its credit to the purchaser of the check in order to facilitate its immediate use in commercial transactions. It is a direct obligation of the bank.

A *personal check* is one that the individual draws on his or her own account.

A *postdated check* is one that bears a date after its date of issuance, and is payable on the stated date.

A *traveler's check* is one purchased from a bank, express company, or other financial institution in various denominations, and is signed immediately by the purchaser in order to establish the form of his or her signature. The check cannot be treated as cash because of this first signature, but it is treated as cash upon the purchaser's second signature when he or she uses it. The genuineness of the second signature is established by comparing it to the initial signature. A traveler's check is similar to a cashier's check of the issuer.

## CHECKOFF

*A system whereby an employer regularly deducts a portion of an employee's wages to pay union dues or initiation fees.*

The checkoff system is very attractive to a union since the collection of dues can be costly and time-consuming. It prescribes the manner in which dues are paid by deductions in earnings rather than through individual checks sent directly to the union. Unions are thereby assured of the regular receipt of their dues.

A dues checkoff system is only lawful when voluntarily authorized by an employee. Unions have attempted to make alternatives to checkoff more onerous by requiring such practices as in-person delivery of dues checks to out-of-state locations. The NATIONAL LABOR RELATIONS BOARD has held that this type of inducement to checkoff is unlawful, however, as is the attempt by a union to collect assessments extending beyond periodic dues.

CROSS-REFERENCES

Labor Law; Labor Union.

## CHEROKEE CASES

With the creation of the U.S. Constitution and a national government, political and legal policymakers had to determine how to deal with Native American tribes that resided on lands granted to them by treaties. By the 1820s, U.S. policy toward what was regarded as the "Indian problem" was one of forced removal and resettlement to lands to the west. In 1830, Congress passed the Indian Removal Act (4 Stat. 411) and appropriated $500,000 for that purpose, signaling a determination to affect great changes.

The Cherokee, faced with growing hostility to their presence in the state of Georgia, were the first group of Native Americans to press their legal rights all the way to the U.S. Supreme Court. The Court issued decisions in two cases that are commonly known as the *Cherokee Cases*: *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831), and *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832). These are landmark cases that have continued to shape judicial analysis of disputes between tribal governments and state and federal governments. A key issue in both cases was the legal and political status of Native American tribes. The Cherokee claimed they were an independent, sovereign state, akin to a nation such as France or Great Britain. The Supreme Court rejected this claim in the first case but developed a different theory of sovereignty in the second decision.

In *Cherokee Nation,* the Cherokee asked the Court for an INJUNCTION that would prevent Georgia from executing laws that the tribe contended were being used to drive them off their land and to "annihilate" their existence as a political society. Chief Justice JOHN MARSHALL,

writing for the Court, acknowledged that the plight of the Cherokee and other Native American tribes was real: they were "gradually sinking beneath our superior policy." The Court, however, could not base its analysis on sympathy.

Marshall concluded that before the merits of the Cherokee case could be considered, the Court had to determine whether it had jurisdiction to hear the case at all. The Cherokee argued they were a foreign state, pointing out that the tribe was a distinct political society that managed its own affairs, and that both the colonial and U.S. governments had regarded them as a state. The fact that the federal government negotiated treaties with the Cherokee seemed to be good evidence that the tribe was regarded as a foreign state.

The Court rejected these claims. Marshall stated that the Cherokee tribe was not a foreign state "in the sense of the Constitution" since the Indian Territory was located inside the geographical and jurisdictional boundaries of the United States. Moreover, the Cherokee had acknowledged, in the very treaties in question, that they were under the protection of the United States. Therefore, a better classification for the Cherokee and other Native American tribes was that of "domestic dependent nations."

The Court noted that the Constitution was silent on the issue of permitting the federal courts to hear disputes between states and Indian nations. Chief Justice Marshall found that the COMMERCE CLAUSE empowers Congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This clause clearly distinguished between foreign nations and Native American tribes, making them distinct entities. The relation between the tribes and the United States resembled that of a ward and his guardian rather than of coequal states. Based on this analysis the Supreme Court dismissed the case for lack of jurisdiction.

The Cherokee returned to the Supreme Court the following year in *Worcester,* and this time had the opportunity of arguing the merits of the case. The issue in question involved Georgia legislation, which made it a crime for white persons to live in Cherokee country without first obtaining a license from the state. The state of Georgia indicted Samuel A. Worcester, a missionary of the American Board of Commissioners for Foreign Missions, and six other white persons for the offense of "residing within the limits of the Cherokee nation without a license." All seven defendants were convicted and sentenced to four years in prison.

Worcester and the other defendants appealed to the Supreme Court, arguing that Georgia had no jurisdiction over Cherokee sovereign territory. Under the Constitution, Congress has the power to regulate commerce with Native American tribes. The Indian Commerce Clause (Article I, Section 8, Clause 3) is the main source of federal power over Native American tribes. Worcester contended that this clause demonstrated that the federal government had exclusive jurisdiction over the establishment and regulation of intercourse with Native Americans. In addition, Worcester pointed to treaties between the United States and the Cherokee nation. No state could interfere with these agreements, which were the supreme law of the land.

Chief Justice Marshall, writing for the majority, agreed with Worcester's legal position and found that the relationship between the existing treaties and the constitutionality of the state law were the paramount issues. Marshall reviewed the colonizing of the continent and noted that the colonists' legal basis for claiming the land as their own was questionable:

> It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

Marshall analyzed two treaties negotiated between the United States and the Cherokee. He found that these agreements recognized the national character of the Cherokee and their right of self-government. In addition, the treaties guaranteed their lands, and the federal government assumed the duty of protecting the integrity of the agreement.

Marshall then pointed out that from the beginning of the Republic, Congress had enacted a series of laws to regulate trade and intercourse with Native American tribes. These laws treated the tribes as nations, respected their rights, and sought to give the tribes the protection that the treaties stipulated. He concluded that "Indian nations are distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a

right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States."

In light of *Cherokee Nation,* a key question was whether a treaty negotiated with Native Americans should be treated differently than one negotiated with a foreign nation. Marshall concluded that it should not:

> The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Therefore, Marshall ruled that the Cherokee nation was a "distinct community occupying its own territory," where the laws of Georgia had no force. The Cherokee were vested with the power to determine whether the citizens of Georgia could enter their territory, subject to treaty provisions and acts of Congress. He concluded that "the whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States."

The decisions involving the Cherokee nation established the basic principles of Native American sovereignty. Native American tribes, by occupying North America, possessed some elements of preexisting sovereignty. This sovereignty could be diminished or eliminated by the United States, but not by the individual states. Finally, because the tribes had limited sovereignty and were dependent on the United States for protection, the United States had a trust responsibility. This meant that the U.S. government was a trustee with the duty of looking after the best interests of Native Americans, who were wards of the government.

The legal victory proved of little benefit to the Cherokee nation, however. The demand for land in Georgia grew more intense after gold was discovered on Cherokee land. More ominously, President ANDREW JACKSON, who favored the removal of the Cherokee nation and other Native American tribes, refused to enforce the Court's decision. His refusal illustrated the problem that occurs when one branch of government refuses to honor the decision of another branch. During Jackson's term of office (1829–37), 94 removal treaties were negotiated, demonstrating his resolve to move Native American tribes westward.

In December 1835, the Treaty of New Echota, signed by a small minority of the Cherokee, ceded to the United States all their land east of the Mississippi River for $5 million. Though the tribe sought to repudiate the treaty, they were unsuccessful. Under the Indian Removal Act, the Cherokee were forced to leave Georgia beginning in 1838. Nearly a quarter of the 15,000 Cherokee died during the relocation. The Cherokee called the western trek to Oklahoma and Indian Territory the Trail of Tears.

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## ♦ CHESSMAN, CARYL

The execution of Caryl Chessman in the gas chamber of San Quentin Prison on May 3, 1960, ended a twelve-year struggle between Chessman and the justice system that culminated in international rage at the treatment of the prisoner.

Caryl Whittier Chessman was born May 27, 1921, in St. Joseph, Michigan. In 1948, Chessman was a 27-year-old parolee from Folsom Prison in California when he was arrested in Los Angeles as the prime suspect in the "red light bandit" incidents. The MODUS OPERANDI of the bandit was distinctive: he stalked desolate areas known to be popular with couples seeking a place to park and be alone. The bandit would walk toward a parked car carrying a red light similar to that used by police, and then assault the unsuspecting occupants of the car.

Chessman initially confessed to the crimes but later claimed that he was tortured into confessing. He professed his innocence but was indicted on eighteen separate counts, including KIDNAPPING, ROBBERY, sexual mistreatment, and attempted rape. Two of the charges carried a mandatory death sentence in California, based on the passage of the "Little Lindbergh" law in 1933 in response to the heinous kidnapping and murder of the infant son of aviator Charles Lindbergh and poet Anne Morrow Lindbergh. The law required CAPITAL PUNISHMENT for a kidnapping in which the victim was inflicted with physical harm.

*Caryl Chessman appealed his conviction 42 times, but it was never overturned. He was executed in 1960 after 12 years on death row.*
AP/WIDE WORLD PHOTOS

The trial lasted two weeks, and Chessman served as his own counsel, aided by an attorney provided by the court. The jury returned a verdict of guilty on seventeen of the charges, including those imparting the death sentence.

Chessman was transferred to San Quentin Prison in California pending an appeal to the state supreme court. The court affirmed the decision, and Chessman was sent to cell 2455 on death row to await his execution scheduled for March 28, 1952.

Chessman appealed his case on the grounds that he was not granted DUE PROCESS OF LAW. He based his appeal on the fact that the transcript of his trial was inaccurate. The original court reporter had died suddenly, leaving two-thirds of the testimony to be transcribed. Chessman argued that the new reporter did not accurately decipher the old-style shorthand used by his predecessor. Chessman had also requested daily transcripts of the testimony, but this request was denied.

Chessman's plea was rejected, and during the next twelve years he submitted his appeal forty-two times before various federal and state appellate courts, including the SUPREME COURT OF THE UNITED STATES. He remained on death row for twelve years, during which he wrote several books describing his life there. He was scheduled to face the gas chamber on nine separate occasions, but he always received a reprieve before the execution.

Chessman argued that his predicament was an example of CRUEL AND UNUSUAL PUNISHMENT, which violated his constitutional rights. The case began to attract international and political attention and at one point, Governor Edmund Brown of California called for a stay of execution by order of the STATE DEPARTMENT to ensure a peaceful tour of South America by President DWIGHT D. EISENHOWER.

Time was running out for Chessman by 1960. Although his lawyers claimed to have found new evidence in favor of their client, the courts denied a plea for a writ of HABEAS CORPUS. He was again scheduled for execution in May 1960. Protests were heard from several countries and famous people, including Aldous Huxley and Albert Schweitzer. Despite these efforts, Chessman was executed on May 3, 1960.

The death of Caryl Chessman incited a wave of anti-American sentiment with protests in several countries.

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## CHICAGO EIGHT

The trial of the Chicago Eight exemplified the state of turmoil that existed in the United States in 1968. Because the Chicago conspiracy trial opened with eight defendants, this group of radical leaders is sometimes referred to as the Chicago Eight. The trial of one defendant, BOBBY SEALE, was severed from that of the other seven; hence the name Chicago Seven is a name also used to refer to this trial.

The assassinations of Senator ROBERT F. KENNEDY and Dr. MARTIN LUTHER KING JR., occurred within months of each other. The escalation of the VIETNAM WAR was unpopular with many U.S. citizens and a number of young men of draft age burned their draft registration cards or fled to Canada rather than risk their lives for a cause in which they did not believe. Protest demonstrations were prevalent. The turbulence in the United States culminated in events at the Democratic Presidential Convention in Chicago, Illinois, which led to a sensational courtroom trial.

Chicago was controlled politically by Mayor Richard J. Daley and his Democratic followers. When Chicago was chosen as the site for the Democratic Convention, groups of protestors decided to seize the opportunity to converge on

that city to stage demonstrations and publicly espouse their views against U.S. participation in the Vietnam War. The protestors arrived from all over the nation, establishing a camp at Lincoln Park.

Mayor Daley was opposed to any incident that might cause a disturbance of the convention proceedings and taint the reputation of the city of Chicago. The demonstrators were denied a permit to assemble in Lincoln Park and were told to disband. When they refused the Chicago police tried to forcibly eject them from the park. When these efforts failed the police used tear gas and billy clubs. A riot resulted, and as news of the Chicago violence reached the nation, other groups went to Chicago to join the protestors. When the number of demonstrators reached 20,000, the NATIONAL GUARD was enlisted to quell the violence. Eight radical leaders emerged as the organizers of the demonstration movement: Tom Hayden and Rennie Davis, who had established the group known as Students for a Democratic Society, or SDS; Abbie Hoffman and Jerry Rubin, founders of the Youth International Party, or "Yippies"; Bobby Seale, leader of the BLACK PANTHER PARTY; David Dellinger, staunch opponent of the Vietnam War and renowned pacifist; and John Froines and Lee Weiner, two teachers.

In 1968 Congress enacted legislation prohibiting conspiracies to cross state boundaries with the intent of inciting a riot. The eight men were brought to trial at the Federal Court Building in Chicago in 1969 and were accused of breaking this new law.

The trial evoked a number of controversial issues. The purpose of the protest was to air the views of the participants against the Vietnam War. The blame for the ensuing riots, however, could not be clearly placed on the demonstrators or on the actions of the police to disband them. While the Constitution provides for the basic freedoms of speech, protest, and assemblage, the terms of the new law—particularly concerning the actual act of conspiring to riot—were not clearly defined in relation to these rights.

Federal district court judge Julius J. Hoffman was selected to try the case. The U.S. attorney for the prosecution for Illinois was Thomas Foran. A number of defense lawyers were retained, but the two most prominent were WILLIAM KUNSTLER and Leonard Weinglass. Armed protection was provided at the court building to discourage disturbances.

Judge Hoffman proved to be a difficult man. Four defense lawyers notified the judge by telegram that they had decided to withdraw from the case; Hoffman charged them with CONTEMPT of court for not informing him personally of their intentions. The charges were eventually dropped but not before protests from lawyers all over the nation were filed. Bobby Seale's lawyer became ill, and Seale asked for either a delay of his trial until his lawyer could participate or permission to defend himself. Hoffman denied both requests.

The prosecution began by stating three charges against the Chicago Eight: (1) they had persuaded people to travel to Chicago for the purpose of joining protest demonstrations;

*Six members of the Chicago Eight at a 1970 press conference: (seated, l-r) Rennie Davis, Jerry Rubin, and Abbie Hoffman; (standing, l-r) Lee Weiner, Bob Lamb, and Thomas Hayden.*

AP/WIDE WORLD PHOTOS

(2) they had influenced their followers to defy law enforcement officials; and (3) they had encouraged a riot. The defense attorneys countered that the actions of the demonstrators were in accordance with the basic freedoms granted by the Constitution.

Police informants were called as witnesses for the prosecution. Bobby Seale asked to be allowed to cross-examine the witnesses, and again the argument flared between Seale and Hoffman as to Seale's rights to representation by counsel. The other defendants voiced agitation during the early days of the trial, but exchanges between Bobby Seale and Judge Hoffman were particularly vehement, and Hoffman had Seale handcuffed to a chair and gagged. Hoffman claimed that the court had the right to employ this tactic, but it was the first time it had been utilized during a trial of any consequence in the United States. Seale still found ways to interrupt the proceedings, and Hoffman declared a mistrial in Seale's case and imposed on Seale sentence of four years for contempt of court.

The seven remaining defendants and their lawyers became enraged; the trial became a shouting match between all involved, with insults being flung at the judge by the defendants. Hoffman began ruling in favor of motions presented by the prosecution and against those for the defense.

The trial came to a close on February 14, 1970. As the jury deliberated, Hoffman charged all the defendants and attorneys Kunstler and Weinglass with contempt of court and passed sentences ranging from 2 months 8 days, to 29 months 13 days. Kunstler, however, received the longest sentence of 4 years 13 days. Judge Hoffman also refused to permit bail.

The jury finally reached a verdict. The seven defendants were cleared of conspiracy charges, but five of them were found guilty of crossing state boundaries to incite a riot and were given prison sentences of five years and fined $5,000. Defendants Froines and Weiner were acquitted of all charges.

The Chicago Eight appealed to higher courts, which resulted in granting of bail, a reversal of all contempt charges—including those of the two lawyers—and a new trial for the convicted five. The proceedings of the new trial were private and lacked the sensationalism of the earlier hearings, and although the defendants were again found guilty, their sentences were suspended.

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**CROSS-REFERENCES**

Freedom of Association and Assembly; Freedom of Speech; Right to Counsel.

## CHICAGO JURY PROJECT

The Chicago Jury Project was an investigation of the role and functions of the jury in the U.S. legal system. The inquiry was conducted by the University of Chicago Law School with funding from the Ford Foundation. Its primary goal was to join the social scientist and the lawyer in a working relationship in which they could share their unique skills and experiences with each other, along with amassing pertinent data to answer some interdisciplinary questions, in order to create new ideas and theories in their respective fields.

The topics to be studied included the differences between the roles of the judge and the jury; the jury's determination of the issue of insanity when it is asserted as a defense; the influence of the existence of insurance upon the minds of the jurors when deciding a case; and the jury's comprehension of, and attitude toward, the concept of contributory NEGLIGENCE in jurisdictions where it was law. The methodology by which such information was gleaned included personal conversations with jurors after the conclusion of trials as well as questionnaires. The rationales underlying the processes by which jurors were selected and examined on VOIR DIRE were additional subjects of study. The views of the general public and members of the legal profession regarding juries were solicited. There was also an examination of the costs inherent in the operation of the jury system.

The Chicago Jury Project encountered one problem as a result of the techniques used in collecting data. With the permission of the pre-

siding judge and counsel, the staff made recordings of the deliberation of jurors in five civil cases brought to trial before the federal district court sitting in Wichita, Kansas. Such recordings were to be used in determining whether interviews conducted with jurors after a trial accurately described the events occurring in the jury room. The jurors were not, however, informed of the recordings. When it was revealed that such recordings were made, the attorney general of the United States publicly censured the project and the SENATE JUDICIARY COMMITTEE convened a special hearing to investigate such unorthodox and questionable research methods. State legislatures responded to such disclosures by enacting statutes proscribing the recording of jury deliberations.

The findings of the Chicago Jury Project are discussed in the books *Delay in the Court* and *The American Jury,* published in 1959 and 1966, respectively.

## CHICAGO SCHOOL

Among contemporary movements in U.S. law, few have had as much influence as the Chicago school. This school of thought helped revolutionize legal thinking on economics from the 1970s to the 1980s. At the heart of its philosophy is the idea that economic efficiency should be the goal of national policy and law. This argument left its mark, in particular, in the area of antitrust, where the Chicago school swayed the U.S. Supreme Court for more than a decade. Although they received less attention in the 1990s than they had earlier, the school's leaders continued to rank among the preeminent—and more controversial—figures on the legal landscape.

The Chicago school takes its name from the University of Chicago, with which most of its core proponents were all affiliated at one time. These include Professor Ronald H. Coase, Judge Frank H. Easterbrook, Professor Richard A. Epstein, Professor Daniel R. Fischel, Judge RICHARD A. POSNER, and Judge Ralph K. Winter Jr. ROBERT H. BORK, another prominent member, was a professor at Yale. The early work of the Chicago school, produced in the 1960s, built on scholarship by Professor Aaron Director. Director's specialty had been antitrust, the area of law that addresses UNFAIR COMPETITION in business. Antitrust has a long history, in which ideas have come and gone. Through the late 1960s, the U.S. Supreme Court took a harsh view of restraints on trade. The Court ruled that certain anticompetitive practices were per se illegal—so harmful to competition that they need not even be evaluated on a case-by-case basis.

The Chicago school urged the Court to take another look. Scholars of the school praised economic efficiency. If they could show, for instance, that certain restraints on trade were actually a result of efficient competition, then why should these practices be considered illegal by courts? Underlying this view was the contention that markets could take care of themselves without the need for heavy regulation. It was not long before the Chicago school's ideas began to influence the Supreme Court. In 1977, the Court abandoned its reliance on per se rules in *Continental T.V. v. GTE Sylvania,* 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed 2d 568, and turned instead to a rule of "reason," opening a new era in ANTITRUST LAW.

Throughout the 1970s, the Chicago school continued to refine its economic theory in numerous essays and treatises such as Posner's *Antitrust Law* (1976) and Robert H. Bork's *The Antitrust Paradox* (1978), both of which attacked the idea that big business is necessarily bad. The school argued that an unrestricted market, in which producers and consumers acted freely, will operate rationally and efficiently all by itself. The hands-off implications of this picture had broad significance for corporate law and national policy. Chicago school theory influenced the Reagan administration's attack on government regulation.

President RONALD REAGAN appointed several Chicago school members to the federal bench: Posner in 1981 to the Seventh Circuit, Winter in 1982 to the Second Circuit, and Easterbrook in 1985 to the Seventh Circuit. Bork, a judge on the U.S. Court of Appeals for the District of Columbia Circuit, was nominated to the U.S. Supreme Court in 1987. However, widespread protest over his views led the U.S. Senate to block his confirmation.

In the 1990s the Chicago school continued to provoke lively debate. Bork, despite resigning from the judiciary in 1988 following his failed nomination to the Supreme Court, attracted attention with publications such as his 1990 book *The Tempting of America: The Political Seduction of the Law.* But in the area of antitrust, at least, the heyday of the school's influence was over. For years, the Chicago school's theory had been undergoing a reevaluation, with critics

questioning its faith in government nonintervention.

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## CHIEF JUSTICE

*The presiding, most senior, or principal judge of a court.*

Although the office of the chief justice of the SUPREME COURT OF THE UNITED STATES is a prestigious position, the functions and powers of the chief justice are not well-defined. The U.S. Constitution contains only one mention of the chief justice, in Article I, Section 3, and it concerns the IMPEACHMENT of the president: "When the President of the United States is tried, the Chief Justice shall preside." The JUDICIARY ACT OF 1789, which created the Supreme Court, specified only "[t]hat the supreme court of the United States shall consist of a chief justice and five associate justices" (1 Stat. 73). As a result, each individual who has occupied the post has had the freedom to shape and define the role.

Like the associate justices of the Supreme Court, the chief justice is appointed for life by the president but must first be confirmed by the Senate. Prior service on the Court is not required, though several chief justices, including HARLAN F. STONE and WILLIAM H. REHNQUIST, served as associate justices before becoming chief justice. Many chief justices served in other branches of government before joining the Court: JOHN MARSHALL and ROGER B. TANEY were cabinet members, EDWARD D. WHITE was a U.S. senator, and EARL WARREN was governor of California. Other chief justices came to the Court as judges from lower federal and state courts or practiced law prior to their appointments.

The chief justice's primary duty is to preside over all Supreme Court proceedings, both those open to the public and those held in private. The chief justice traditionally opens and closes the public sessions in which the Court hears oral arguments. He or she wields the most influence in closed-door proceedings. The chief justice determines which decisions the Court will discuss in conferences where the justices choose the cases they will accept for review. The chief justice also leads the private discussions on cases recently argued. After presenting the facts and issues in such a case and the relevant law, the chief justice states her or his conclusions and casts a vote. The discussion continues in order of seniority, with each associate justice presenting her or his views and vote.

If the chief justice is in the majority after voting has concluded, he or she assigns the writing of the opinion in the case. This critical responsibility provides the chief justice with an important opportunity to influence the outcome of the case, since he or she can assign the case to a justice who he or she believes has similar views. The chief justice may also assign the authorship of the opinion to himself or herself, as many chief justices have done in cases involving far-reaching constitutional issues. If the chief justice is not in the majority, the senior justice in the majority has the power of assignment.

The chief justice is also responsible for the overall management of the Supreme Court, including the oversight and supervision of the Court's clerks, marshal, reporter of decisions, librarian, and other officers, and the handling of various personnel management issues. The chief justice estimates the Court's budget and designates the officials to present it to the appropriate congressional committees. Although the chief justice is expected to avoid overt participation in political activities, many have acted as public advocates for the Court before Congress. WILLIAM H. TAFT, the only chief justice to have also served as president, actively promoted the Judiciary Act of 1925. That landmark legislation, designed to help the Court manage its large backlog of cases, gave the Court almost unlimited discretion to decide the cases it would accept for review. WARREN E. BURGER, chief justice from 1969 to 1986, lobbied for the establishment of a national court of appeals to help alleviate the backlog of federal cases and actively promoted other judicial reform proposals. In 1988, Rehnquist, appointed to succeed Burger,

### Succession of Supreme Court Justices

This table is designed to aid the user in identifying the succession of justices on the Supreme Court. Read vertically, the table lists the succession of justices in each position of the Court and the years served by each.

The number of justices constituting the Supreme Court has varied. Initially, the Court comprised six justices, but Congress increased the number to seven in 1807, to nine in 1837, and then to ten in 1863. In 1866, Congress reduced the number of justices to eight in an effort to prevent President Andrew Johnson from making any appointments to the Court. As a result, the positions of John Catron, who died in 1865, and James M. Wayne, who died in 1867, were abolished. In 1869, Congress raised the number of justices to nine, where it has remained. William Strong, the first justice appointed under the new statute, has generally been considered to have succeeded Wayne. Thus, Catron is the only person who has held the tenth seat on the Court.

| Chief Justices | Associate Justices | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| Jay 1789–1795 | J. Rutledge 1789–1791 | Cushing 1789–1810 | Wilson 1789–1798 | Harrison[f] 1789 | Iredell 1790–1798 | Todd 1807–1826 | Field 1863–1897 | McKinley 1837–1852 | Catron 1837–1865 |
| J. Rutledge[a] 1795 | T. Johnson 1791–1793 | Story 1811–1845 | Washington 1798–1829 | Blair 1789–1796 | Moore 1799–1804 | Trimble 1826–1828 | McKenna 1898–1925 | Campbell 1853–1861 | |
| Ellsworth 1796–1799 | Paterson 1793–1806 | Woodbury 1845–1851 | Baldwin 1830–1844 | S. Chase 1796–1811 | W. Johnson 1804–1834 | McLean 1829–1861 | Stone[h] 1925–1941 | Davis 1862–1877 | |
| J. Marshall 1801–1835 | Livingston 1806–1823 | Curtis 1851–1857 | Grier 1846–1870 | Duvall 1812–1835 | Wayne 1835–1867 | Swayne 1862–1881 | R. Jackson 1941–1954 | Harlan 1877–1911 | |
| Taney 1836–1864 | Thomson 1823–1843 | Clifford 1858–1881 | Bradley 1870–1892 | Barbour 1836–1841 | Strong 1870–1880 | Matthews 1881–1889 | Harlan 1955–1971 | Pitney 1912–1922 | |
| S. P. Chase 1864–1873 | Nelson 1845–1872 | Gray 1882–1902 | Woods 1881–1887 | Daniel 1841–1860 | Shiras 1892–1903 | Brewer 1889–1910 | Rehnquist[i] 1971–1986 | Sanford 1923–1930 | |
| Waite 1874–1888 | Hunt 1873–1882 | Holmes 1902–1932 | L. Lamar 1888–1893 | Miller 1862–1890 | Day 1903–1922 | Hughes 1910–1916 | Scalia 1986– | Roberts 1930–1945 | |
| Fuller 1888–1910 | Blatchford 1882–1893 | Cardozo 1932–1938 | H. Jackson 1893–1895 | Brown 1891–1906 | Butler 1922–1939 | Clarke 1916–1922 | | Burton 1945–1958 | |
| E. White[b] 1910–1921 | E. White[d] 1894–1910 | Frankfurter 1939–1962 | Peckham 1895–1909 | Moody 1906–1910 | Murphy 1940–1949 | Sutherland 1922–1938 | | Stewart 1958–1981 | |
| Taft 1921–1930 | Van Devanter 1911–1937 | Goldberg 1962–1965 | Lurton 1910–1914 | J. Lamar 1911–1916 | Clark 1949–1967 | Reed 1938–1957 | | O'Connor 1981– | |
| Hughes 1930–1941 | Black 1937–1971 | Fortas[e] 1965–1969 | McReynolds 1914–1941 | Brandeis 1916–1939 | T. Marshall 1967–1991 | Whittaker 1957–1962 | | | |
| Stone[c] 1941–1946 | Powell 1971–1988 | Blackmun 1970–1994 | Byrnes 1941–1942 | Douglas 1939–1975 | Thomas 1991– | B. White 1962–1993 | | | |
| Vinson 1946–1953 | Kennedy 1988– | Breyer 1994– | W. Rutledge 1943–1949 | Stevens 1976– | | Ginsburg 1993– | | | |
| Warren 1953–1969 | | | Minton 1949–1956 | | | | | | |
| Burger 1969–1986 | | | Brennan 1956–1990 | | | | | | |
| Rehnquist[g] 1986– | | | Souter 1990– | | | | | | |

[a]Appointment not confirmed.
[b]Associate justice, 1894–1910.
[c]Associate justice, 1925–1941.
[d]Later chief justice, 1910–1921.
[e]Appointment as chief justice but not confirmed; resigned.
[f]Declined appointment.
[g]Associate justice, 1971–1986.
[h]Later chief justice, 1941–1946.
[i]Later chief justice, 1986–.

was instrumental in the passage of the Judicial Improvements and Access to Justice Act (Pub. L. 100–702, Nov. 19, 1988, 102 Stat. 4642), which was intended to make the appeal process more efficient by reducing the Supreme Court's mandatory appeal jurisdiction.

Another responsibility of the chief justice is to oversee the administration of the entire federal judiciary. In 1922, Congress established the JUDICIAL CONFERENCE OF THE UNITED STATES, the governing body for the administration of the federal judicial system. As chair of the confer-

ence, the chief justice presides over the conference's biannual meeting, manages the agenda, and appoints committees. The chief justice also chairs the ADMINISTRATIVE OFFICE OF THE U.S. COURTS, created in 1939 during Taft's term as chief justice, and the FEDERAL JUDICIAL CENTER, established in 1967 under Warren. Like the Judicial Conference, these organizations are also involved in the administration and management of the federal judiciary with the chief justice playing a major role in the selection of directors and other personnel to run them.

Congress has also provided chief justices with a number of duties not specially related to the judiciary. The chief justice traditionally serves as a member of the Board of Regents of the Smithsonian Institution and sits on the Board of Trustees of the National Gallery of Art, both located in Washington, D.C.

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## CHILD ABUSE

*Physical, sexual, or emotional mistreatment or neglect of a child.*

CHILD ABUSE has been defined as an act, or failure to act, on the part of a parent or caretaker that results in the death, serious physical or emotional harm, SEXUAL ABUSE, or exploitation of a child, or which places the child in an imminent risk of serious harm (42 U.S.C.A. § 5106g). Child-abuse laws raise difficult legal and political issues, pitting the right of children to be free from harm, on the one hand, against the right of families to privacy and the rights of parents to raise and discipline their children without government interference, on the other.

The mistreatment of children at the hands of parents or caretakers has a long history. For centuries, this behavior was shielded by a system of laws that gave children few, if any, rights. Under English COMMON LAW, children were treated as property owned by the parents. Parents, particularly fathers, had great latitude over the treatment and discipline of children. This outlook was carried to the American colonies and incorporated into early laws in the United States.

One of the first cases to bring national attention to child abuse arose in the early 1870s. An eight-year-old New York orphan named Mary Ellen Wilson complained of being whipped and beaten nearly every day by her foster family. Her case captured the attention of the American Society for the Prevention of Cruelty to Animals (ASPCA). An attorney for the ASPCA took Wilson's case, arguing that as members of the animal kingdom, children are entitled to the same legal protections from cruelty as are animals. A judge heard evidence that Wilson's foster family, the Connollys, routinely beat her, locked her in a bedroom, and made her sleep on the floor. Charged with ASSAULT AND BATTERY, Wilson's foster mother was convicted and sentenced to one year of hard labor. Even more significantly, publicity surrounding Wilson's case led to the establishment, in 1874, of the New York Society for the Prevention of Cruelty to Children. The following year, the New York Legislature passed a statute that authorized such societies to file complaints of child abuse with law enforcement agencies.

In 1962, an article in a major medical journal again brought national attention to the issue by identifying the symptoms that can indicate child abuse. The article, by Dr. Henry Kempe, appeared in the *Journal of the American Medical Association* (JAMA) and discussed a diagnosis for child abuse. The article resulted in widespread awareness of child abuse and prompted further public discussion on ways to address the problem. By 1970, every state had enacted laws requiring certain professionals, such as teachers and doctors, to report incidents of suspected child abuse to law enforcement agencies. In 1974, the Federal Child Abuse Prevention and Treatment Act (42 U.S.C.A. §§ 5105–5106) became law, authorizing federal funding for states to identify child abuse and to offer protective services for abused children.

Statutes make up one component of a state's child-protective services; another component, the child-protective services agency, implements the statutes. Reporting statutes, which vary from state to state, require that certain professionals report suspected child abuse, whereas others, such as neighbors, are entitled but not required to do so. Other statutes define child abuse. For example, in some states, officially recognized physical abuse occurs only when a child suffers a specified type of injury, whereas in other states,

any serious injury that is not accidental in nature is considered abuse. Sexual abuse of children generally need not cause injury; any sexual act performed on a child can be considered abuse. Similarly, state statutes categorize as child abuse any neglect of a child that places the child at risk, regardless of whether the child is actually injured. Before substantiating a report of emotional abuse of a child, state statutes generally require a finding of actual harm. Still other statutes specify procedures for investigating child abuse, determining whether a report of abuse is substantiated, intervening to protect an abused child from further harm, and maintaining records of child abuse reports.

When allegations of abuse meet the statutory definitions, the state's child-protective services agency or a law enforcement agency steps in to investigate. Child-protective services agencies generally investigate allegations only when the child's parent or guardian is suspected of causing the abuse or of allowing it to occur. FAMILY LAW presumes that the parent or guardian will protect the child from abuse by other parties and that he or she will contact law enforcement agencies to investigate incidents of abuse by other parties when the parent is not causing or allowing the abuse.

Caseworkers for child-protective services investigate abuse allegations most commonly by interviewing or visiting with the child, the child's parents or guardians, and other sources such as physicians and teachers. If an agent finds evidence that supports a conclusion that the child has been abused, the agency deems the allegations substantiated. The next step is intervention.

Intervention can mean many different things. Frequently, when the risk of further abuse is immediate and significant, child-protective services agents will place the child temporarily in a foster home. Alternatively, agents may monitor the family or may provide counseling in order to curb the threat of abuse. If a family does not cooperate with the intervention efforts of child-protective services, the agency may take the case before a judge, who may determine that abuse or neglect has occurred. He or she may issue a court order mandating the agency's intervention. In extreme cases, agents may remove the child from the home permanently; following a judicial termination of parental rights, the child is then placed for ADOPTION.

**Number of Child Abuse and Neglect Victims Reported in 2000, by Race/Ethnicity**

The total number of reports was 676,396.

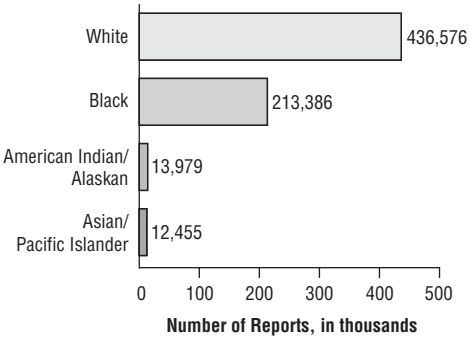


SOURCE: U.S. Department of Health and Human Services, *Child Maltreatment 2000: Reports from the States to the National Child Abuse and Neglect Data System.*

Another function of state child-protective services is record keeping, which is accomplished through a system known as the central registry. The central registry contains information about child abuse reports—both substantiated and unsubstantiated—such as the names of the child and of the suspected abuser and the final determination made by the child-protective services worker. This system helps agents in investigating current reports of abuse because it allows them to compare any previous accusations, particularly within the same family. The registry also supplies statistics about child abuse, which help the agency and the state legislature to enact appropriate laws and policies and to provide adequate funding for child-protective services. In some states, other parties may have access to the registry. For example, a day-care center may check the registry before hiring employees, or an adoption agency may check the registry before placing an infant with a family.

Few doubt that state child-protective services agencies provide a valuable service by responding to allegations of child abuse. But such agencies also have their critics. Many people who have been accused of child abuse, particularly parents, object to the way in which these agencies routinely remove children from their homes when child abuse is suspected. Children are traumatized by being taken from their parents, and allegations of abuse are frequently

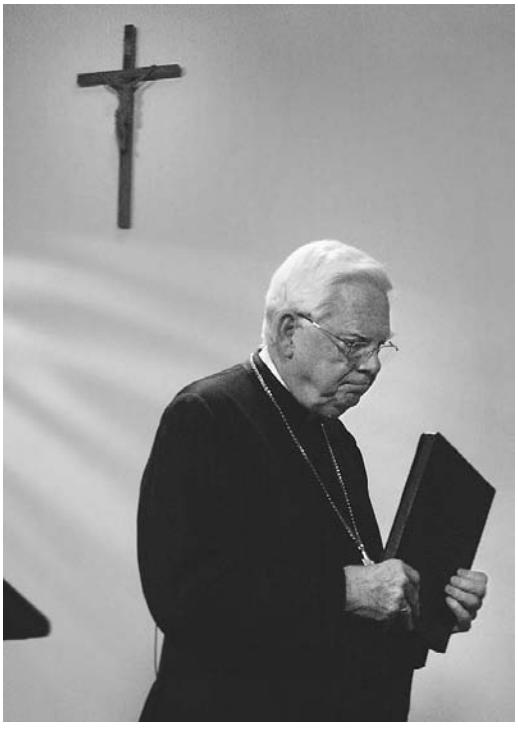

*Cardinal Bernard F. Law came under bitter public rebuke for allegedly shielding abusive priests from scrutiny, footing their legal bills, and either allowing them to remain on the job or reassigning them to new, unsuspecting churches. Law resigned in December 2002.*

AP/WIDE WORLD PHOTOS

unfounded, these critics claim. Contentious CHILD CUSTODY battles sometimes prompt false accusations of physical or sexual abuse, costing the accused time and money in the fight to reclaim their children and their reputations. Others object to the names of the accused being included on the central registry even when the accusations are unsubstantiated. The backlash against child-protective services spurred the establishment, in 1984, of an information and support group known as Victims of Child Abuse Laws (VOCAL). VOCAL claims to have thousands of members nationwide, and its members lobby for new laws that protect not only children but also parents who are falsely accused of being abusive or negligent.

Despite increased legislation and penalties for child abuse, extreme cases continue to appear and to sustain the debates over child abuse laws. Such cases include the Schoo case in suburban Chicago, which received widespread media coverage. In December 1992, David Schoo, a 45-year-old electrical engineer, and his 35-year-old wife, Sharon Schoo, a homemaker, flew to Acapulco, Mexico, for a Christmas vacation, leaving their daughters, nine-year-old Nicole Schoo and four-year-old Diana Schoo, home alone. The Schoos provided their daughters only with cereal and frozen dinners to eat and a note telling them when to go to bed. One day during their parents' absence, the girls left the house when a smoke alarm sounded. As they stood barefoot in the snow, a neighbor found them, learned of their situation, and called the police.

The Schoos were arrested while still on the plane that returned them from Mexico nine days after they had left their children. Following their indictment on various state charges of child endangerment and cruelty, a GRAND JURY also found evidence that the Schoos had beaten, kicked, and choked their children in order to discipline them. In April 1993, the Schoos plea-bargained, agreeing to serve two years of PROBATION and 30 days of house arrest while the girls remained in foster care. In August 1993, the Schoos agreed to give up their parental rights and placed their daughters up for permanent adoption.

Another nationally publicized case raised questions regarding the effectiveness of child-protective services and implicated social workers charged with protecting the victim. Two-year-old Bradley McGee, of Lakeland, Florida, died in July 1989 from massive head injuries after his stepfather, 23-year-old Thomas E. Coe, repeatedly plunged him head-first into a toilet. Coe later testified that he had become angry when the child had soiled his pants. McGee's 21-year-old mother, Sheryl McGee Coe, pleaded no contest to second-degree murder and aggravated child abuse for allowing her husband to abuse McGee, and received a 30-year prison sentence. Thomas Coe, convicted of first-degree murder and aggravated child abuse, received a sentence of life in prison.

The McGee case alarmed the public not only because of the harsh physical abuse that caused the toddler's death but also because of what many perceived to be a failure in the system that is designed to protect children like Bradley McGee. Two months before his death, Bradley had been living with foster parents owing to allegations of abuse at the hands of the Coes. Despite strong objections by the foster parents, caseworkers for Florida's Health and Rehabilitative Services returned McGee to his mother and stepfather, determining them to be fit parents.

Public reaction was strong following the news of Bradley's death. Four social workers were prosecuted for negligently handling the case, but only the main caseworker, Margaret

Barber, was convicted, for disregarding a report from a psychologist who had warned that the Coes were unfit parents. The publicity shed light on problems within Florida's child-protective services agency, including severe understaffing, and led to new laws that emphasize keeping children safe over keeping families together and that also increase funding for more social workers. A Florida appellate court later overturned Barber's felony conviction but left standing a misdemeanor conviction for failing to report child abuse.

In 1997, a controversial court decision led to a new legal concept: abuse of an unborn child. Traditionally, courts have refused to hold a woman who causes injuries to her own fetus criminally liable for the injuries. But in August 1977, the Supreme Court of South Carolina affirmed the criminal conviction of a woman whose crack cocaine usage while pregnant caused the fetus to be born with cocaine in its system, (*Whitner v. State*, 328 S.C. 1, 492 S.E. 2d 777 [1997]). By regarding the fetus as a person, the 3–2 majority concluded that the mother was guilty of criminal child neglect. In January 2003, the state court revisited its holding in *Whitner* when it voted 3–2 to uphold the 12-year sentence of a woman who had been convicted under the state's homicide-by-child-abuse law after her cocaine use had resulted in a stillbirth. (*State v. McKnight*, 353 S.C. 238, 577 S.E. 2d 456 [2003]).

In early 2002, a major child-abuse scandal involving priests shook the Catholic Church. Although child-abuse litigation against priests is hardly new, the public was shocked by the revelation that senior church officials had covered up the facts about widespread abuse. Beginning with allegations against church officials in Massachusetts, the scandal swiftly became national in scope. By year's end, 432 U.S. priests had resigned; at least 1,205 more had been accused of child sex abuse; church officials paid hundreds of millions of dollars to settle victims' lawsuits; and seven grand jury probes continued nationwide.

At the epicenter of the scandal was Boston-based Cardinal Bernard F. Law. Following the molestation conviction of former priest John Geoghan in January 2002, it emerged that Law had known of Geoghan's abuse during the 1980s yet had merely reassigned him to a new parish. More abuse ensued and ultimately led to over $10 million in settlements with victims.

**Child abuse and neglect cases, in 2000**

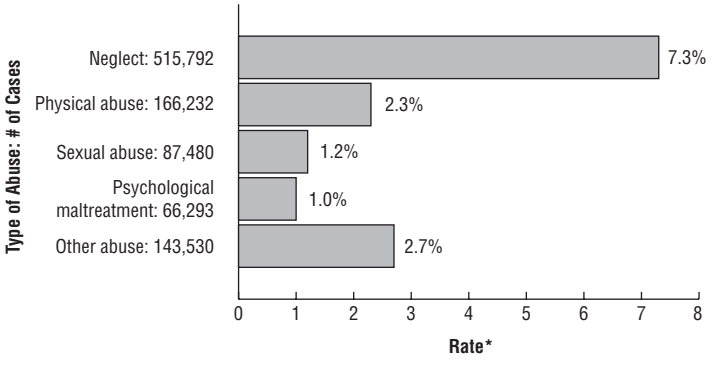


*Rates were based on the number of victims divided by the child population in the reporting States and multiplied by 1,000. The numbers for victims are based on data from reporting States for that year. Data for 1996–1999 are based on SDC submissions only.

SOURCE: U.S. Dept of Health and Human Services, *Child Maltreatment 2000: Reports from the States to the National Child Abuse and Neglect Data System*

As fresh allegations emerged throughout the year, Law came under bitter public rebuke for allegedly shielding abusive priests from scrutiny, footing their legal bills, and either allowing them to remain on the job or reassigning them to new, unsuspecting parishes. Critics charged that such policies failed to protect children. With church attendance and donations reportedly in decline, the U.S. Conference of Bishops responded by instituting a policy requiring bishops to report abuse allegations to civil authorities. The church also began cleaning house: Following a meeting with the Pope, Law resigned in December 2002.

With most investigations continuing in 2003, grand juries probed possible criminal actions by church officials in Massachusetts, New York, Philadelphia, Phoenix, St. Louis, Los Angeles, and Cincinnati. Even with Law and seven bishops under subpoena, and with evidence of what was called an elaborate cover-up, Massachusetts attorney general Thomas Reilly dampened expectations for a criminal prosecution, due to barriers under state law to holding a superior liable for the actions of a subordinate. In New York, which concluded its probe in February 2003, no charges were brought because the five-year STATUTE OF LIMITATIONS had expired. But grand jurors there issued a blistering 181-page report alleging that church officials had protected 58 sexually abusive priests and that they had intimidated victims in order to prevent

legal action. The New York archdiocese denied the allegations.

Legislation at the state and federal levels continues to change to meet the goal of protecting children from abuse and neglect while protecting families from the damage of false accusations.

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CROSS-REFERENCES

Parent and Child.

## CHILD CARE

*The supervision and nurturing of a child, including casual and informal services provided by a parent and more formal services provided by an organized child care center.*

Because there are many different views about how a child should be reared or nurtured, the topic of child care often involves controversial social and political issues. For instance, it may raise complex questions about a child's religious upbringing or whether a child should be disciplined with CORPORAL PUNISHMENT. Some people believe that providing child care outside the home undermines so-called traditional family structures in which the mother is considered the primary caretaker. Others are concerned primarily with broadening community responsibility for children and removing barriers for women who wish to enter and participate fully in the labor force. In addition, the term *child care* encompasses a wide range of services. It can include home-based care by a child's mother or father, care by a grandparent or other relative, care by a nanny, or care by an organized licensed facility or family center. It can also involve early childhood education such as that offered by nursery schools, Montessori schools, and kindergarten programs.

According to a 1997 study by the Urban Institute, an estimated 76 percent of preschool children with mothers who are employed are cared for by someone other than their parents. According to these statistics, center-based day-care centers cared for 32 percent of children throughout the United States. By comparison, 23 percent of the children were cared for by relatives, while 16 percent were cared for by a childcare provider in the provider's home. Six percent of the children were cared for by a nanny or a babysitter in the child's home.

Child care has always existed in the United States. Organized childcare centers in the early 1800s took the form of infant day schools in parts of Boston and New York. During the industrial revolution, and as a result of increased immigration to the United States, day nurseries were created in the late nineteenth century to care primarily for poor urban children. In New York City, in approximately 1910, 85 such nurseries cared for more than 5000 children each day. Day nurseries were privately run and charitable in nature and were intended to provide custodial supervision, hygiene instruction, and nutrition services. Later, many middle-class parents opted to enroll their children in kindergartens, educational programs adopted in parts of the United States in the mid-nineteenth century.

During WORLD WAR II, millions of women entered the workforce in war production areas. The need for an organized childcare program became acute. Congress responded by including provisions in the Community Facilities Act of 1941, then more commonly known as the LANHAM ACT, which created Lanham Act centers for child care. (As of the early 2000s, the term Lanham Act is generally used to refer to the Trademark Act of 1946, 15 U.S.C.A. § 1051 et. seq.) The establishment of the Lanham Act centers marked the first time the federal government became directly involved in providing childcare services to children who were not poor: the centers were open to all children whose parents worked in war production areas. The federal government provided 50 percent of the funds needed to operate the Lanham Act centers;

states, localities, and parents provided the remaining 50 percent in matching funds. In 1943, the cost to parents for child care in a Lanham Act center was uniformly set at 50 cents a day.

The federally sponsored Lanham Act centers closed in 1946, soon after World War II ended, although California continued them at a state level. After that, direct federal involvement in a national childcare program virtually ceased. Although the U.S. Congress passed the Comprehensive Child Development Act of 1972, which would have in part established a national childcare program, President **RICHARD M. NIXON** vetoed the bill. Nixon stated that the act would "commit the vast moral authority of the national government to the side of communal approaches to child-rearing over and against the family-centered approach." Nixon's statement reflected the continuing debate about the appropriateness of providing child care outside a traditional family structure.

Although in the early 2000s the federal government does not have a national child care program, it does provide numerous social programs that include funding for childcare services. In 2000, the U.S. states spent an estimated $8 billion on child care. Of this number, approximately $6 billion came from the federal government in the form of subsidies provided by a number of programs.

The Head Start program provides developmental education programs primarily to poor children under the age of four. **WELFARE** programs such as Aid to Families with Dependent Children (AFDC) provide funds for states to implement childcare services for parents—usually mothers—who receive welfare grants. The Family Support Act of 1988 (FSA), Pub. L. 100–485, 102 Stat. 2343, created the federal Jobs Opportunity and Basic Skills (JOBS) program, in which qualifying parents who receive AFDC are required to enter education or training programs to enhance their chances of finding employment. The federal government funds the JOBS program by providing money to the states. The states in turn are allowed to choose the method of providing childcare services to welfare recipients. They may provide child care directly, reimburse parents for childcare expenses, or make direct payments to childcare providers. In 1993, the federal government spent approximately $480 million on FSA childcare subsidies.

*Kindergartens grew in popularity during the late nineteenth century, especially in New York City and Boston.*

BETTMANN/CORBIS

The federal government also provides funds to states through the Social Services Block Grant, under title XX of the **SOCIAL SECURITY ACT**, 42 U.S.C.A. §§ 1397a et seq., as well as funds for the operation of the At-Risk Child Care Program. The At-Risk Program divides more than $350 million among state governments for childcare subsidies to families who are at risk of welfare dependency; the states must match the grants before they can use the money. Finally, the federal government allows families to deduct childcare expenses from their taxes in the form of the federal dependent care tax credit.

In response to increasing demands, Congress passed the Family and Medical Leave Act of 1993 (FMLA), Pub. L. 103–3, 107 Stat. 6. Although the FMLA does not directly provide for childcare services, it does mandate in part that employers with more than 50 employees must allow those employees to take up to 12 weeks of unpaid leave for the birth or **ADOPTION** of a child or in order to take care of a child with a serious health condition. Many states also have parental leave legislation, which allows a parent to take unpaid time off for the birth or adoption of a child. The length of time allowed for unpaid leave varies from state to state and may be from six weeks to six months.

The regulation of childcare services occurs primarily on the state level, with the federal government requiring states to implement minimal regulations for private childcare centers. When Peggy McMartin Buckey and Raymond Buckey were accused of sexually abusing children in a day care center in California in the early 1980s, their case (*McMartin v. Children's Institute Intern.*, 212 Cal. App. 3d 1393, 261 Cal. Rptr. 437 [Cal. App. 1989]) and others like it received

**Primary Child Care Arrangements Used by Employed Mothers for Children Under 5 Years Old in 1997[a]**

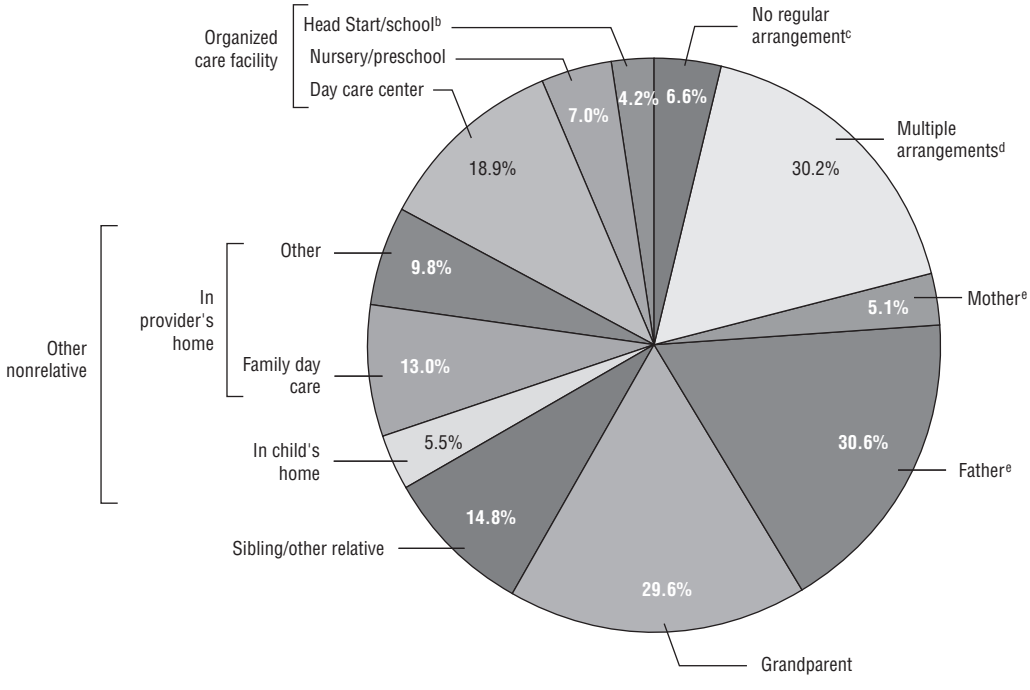


[a] Numbers of children in specified arrangements may exceed the total because of multiple arrangements.
[b] Includes children in federal Head Start program and in kindergarten or grade school.
[c] May indicate instability in child care arrangements or difficulty in identifying what is regularly used. It does not necessarily indicate that no one looked after the child.
[d] Being cared for by two or more child care arrangements, excluding school and self care.
[e] Only asked for the time the designated parent was working or in school.

SOURCE: U.S. Bureau of Census, *Who's Minding the Kids: Childcare Arrangements: Spring 1997*.

national media attention. Out of a stated concern for the notice given to such allegations, the federal government passed legislation in 1985 that appropriated funds to the states to provide training for childcare workers and to support licensing and enforcement officials. The federal government also required states to implement procedures that would require childcare centers to screen workers for any criminal history. In addition, the Child Care and Development Block Grant of 1990 (CCDBG), which provided funds to state government agencies to subsidize childcare services for low-income working parents, required states to develop minimum health and safety requirements for state-licensed childcare centers. Amendments to the CCDBG in 1995 removed such requirements but did obligate states to ensure that parents or guardians may visit or have access to a child while the child is in a child care center.

The regulation of child care facilities and caregivers on the state level varies considerably. A state may require a child care center to obtain a license in order to operate, or it may mandate certain minimum standards for all child care facilities. As of the early 2000s, every state requires that space for a child care facility be "adequate" or of a certain specified size. Most states also regulate how many child care workers must be on duty for a specified number of children, depending on the age of the children: for instance, New York requires one caregiver on duty for every two children under the age of two. Most states also regulate the qualifications and training requirements for child care workers and require child care centers to determine whether a job applicant or worker has a criminal record or has been listed in the state's CHILD ABUSE registry. Some states, such as Arkansas and South Carolina, in some circumstances

allow corporal punishment of children in their licensed day care centers.

Most states exempt certain child care centers from regulations or licensing requirements. Religious or church-based day care centers, as well as small home-based day care programs, are often exempt from regulations or licensing requirements other than basic health and safety regulations. In addition, private day care groups or associations may set goals for quality child care and may provide certification or accreditation programs for member centers.

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CROSS-REFERENCES

Family Law; Parent and Child; Welfare.

## CHILD CUSTODY

*The care, control, and maintenance of a child, which a court may award to one of the parents following a* DIVORCE *or separation proceeding.*

Under most circumstances, state laws provide that biological parents make all decisions that are involved in rearing their child—such as residence, education, HEALTH CARE, and religious upbringing. Parents are not required to secure the legal right to make these decisions if they are married and are listed on the child's birth certificate. However, if there is disagreement about which parent has the right to make these decisions, or if government officials believe that a parent is unfit to make the decisions well, then family courts or juvenile courts will determine custody.

District and state courts base their decisions on state laws, which vary greatly among states. If a case challenges the constitutionality of a state law or—in rare instances—a state's jurisdiction (i.e., its right to decide the case), then the U.S. Supreme Court may issue an opinion.

### Divorced Parents

When custody must be spelled out because of a couple's divorce, the custody arrangement usually becomes part of the divorce decree. The decree names the parent with whom the child will live, how visitation will be handled, and who will provide financial support. Courts consider a custody award to be subject to change until the child comes of age, and in most states proof of a "change in circumstances" may overturn an earlier award. This flexibility is intended to allow for the correction of poor or outdated decisions, but it consequentially enables some parents to wage bitter custody battles that can last for years.

In a typical divorce involving at least one child, permanent physical custody is awarded to the parent with whom the child will live most of the time. Usually, the custodial parent shares joint legal custody with the noncustodial parent, meaning that the custodial parent must inform and consult with the noncustodial parent about the child's education, health care, and other concerns. In such situations, courts may order visitation, sometimes called temporary custody, between the child and the noncustodial parent. A clear schedule with dates and times may be written into the order, or a court may simply state that visitation should be reasonable. CHILD SUPPORT is a common requirement and is paid by the noncustodial parent to the custodial parent as assistance in raising the child.

The typical arrangement is subject to some exceptions. Some courts allow parents to retain joint physical custody, in which the child spends equal time with both parents. In California, the Family Code, for example, establishes a presumption that joint custody is in the child's best interest, thus placing joint custody as a preferred option when courts make custody determinations in that state. Cal. Fam. Code. Ann. § 3040 (West 1995). Advocates of joint custody argue that it lessens the feelings of losing a parent that children may experience after a divorce, and that it is fair to both parents. Many courts, on the other hand, resist ordering joint custody if either

parent does not want it, due to the high degree of cooperation it requires, especially when the children involved are young or if the parents live a great distance apart, such as in separate states.

Split custody is an arrangement in which the parents divide custody of their children, with each parent being awarded physical custody of one or more children. In general, courts try not to separate siblings when awarding custody.

### Unmarried Parents

Where a child's parents were never married, most states provide that the child's biological mother has sole physical custody unless the biological father takes steps to have himself considered for custody. Those steps include obtaining a court's finding of PATERNITY and filing a petition for custody. In some states, this is a bifurcated (i.e., two-step) process; in others, the two steps are combined. An unwed father usually cannot win custody from a mother who is a good parent, but he may have priority over other relatives, foster parents, or strangers who want to adopt his child.

The government must provide a child's unwed parents with the opportunity to step forward if it is seeking custody. In *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), the U.S. Supreme Court held that under the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT, an unwed father was entitled to a hearing to determine his fitness as a parent before the state could obtain custody of his children following their mother's death.

### Criteria for Custody Awards

Much debate about CHILD CUSTODY has focused upon the criteria that the courts use in awarding permanent physical custody in cases where two biological parents disagree. Noncustodial parents of both genders have long charged that judges' decision making is ARBITRARY and that it does not focus on the child. In response to this criticism, many states have adopted a standard that places primary emphasis on the best interests of the child. The challenge for courts since the 1990s has been to interpret the standard objectively in the absence of meaningful guidelines.

Policies of the past offer little guidance. Before the late 1800s, fathers had sole rights to custody, because it was closely tied to inheritance and PROPERTY LAW. Mothers had no such rights. Beginning in the nineteenth century, courts began to award custody of young boys and of girls of all ages solely to mothers on the presumption that mothers are inherently better caretakers of young children.

Until 1970, most states encouraged or allowed this maternal preference, also called the TENDER YEARS DOCTRINE, and mothers almost always received custody. Eventually, many state courts found this preference to be unconstitutional, and gender-neutral custody statutes had replaced maternal-preference standards in 45 states by 1990. A catalyst for this change was *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (197]), a noncustody case in which the U.S. Supreme Court ruled that the Equal Protection Clause of the Fourteenth Amendment prevents courts from basing opinions on generalizations about either gender.

A 1994 AMERICAN BAR ASSOCIATION study of divorces in Utah showed that after maternal preference in divorce cases was declared unconstitutional in that state in 1986, the number of mothers who received sole custody decreased, the number of joint legal custody awards increased, and the number of specific-visitation schedules increased. The researchers concluded that although the proportion of fathers who received sole custody did not necessarily go up, the net result was more involvement by fathers after divorce.

No straightforward criterion has replaced the simple—although unconstitutional—presumption that children belong with one gender or the other. The decisions that result are often inconsistent, and many participants view them as arbitrary. Ultimately, the judge decides the child's future, and few guidelines are provided to ensure that the decision is objective.

Nevertheless, courts have instituted some mechanisms to determine a child's best interests. GUARDIANS AD LITEM (caretakers "for the lawsuit") or friends are sometimes appointed to represent the child's interests and to advocate in court on the child's behalf. Custody evaluations may be ordered, in which court-services personnel visit each parent's home and evaluate each parent's plan for caring for the child. The fact that one parent has been the child's primary caretaker is often considered but is not enough to guarantee a custody award.

### Changing Custody Awards

Standards for changing custody awards are similarly vague, although most states' criteria allow courts to modify custody only when the

circumstances of the custodial parent or of the children—not of the noncustodial parent—have changed. A 1993 Stanford University study of petitions to modify custody found that these awards were highly inconsistent, and it attributed them in many cases to personal gender biases held by judges.

### Social Issues: Sexual Orientation and Race

Social issues are sometimes slow to affect custody decisions. Homosexual parents still pose dilemmas for judges. Although in many cases homosexual parents have won or retained custody, the Virginia Supreme Court in 1995 reinstated a trial court order awarding custody of a boy to his grandmother because the lesbian mother's sexual orientation was deemed potentially harmful to the boy (*Bottoms v. Bottoms,* 249 Va. 410, 457 S.E. 2d 102). Similarly, the Alabama Supreme Court in *Ex parte H.H.*, 830 So. 2d 21 (Ala. 2002) refused to return custody of a mother's children to her, despite the mother's assertions that the father, the custodial parent, had abused the children. Although the majority in the decision did not address the fact that the mother was a lesbian, a concurrence written by the chief judge of the court suggested that the court should consider homosexuals as presumptively unfit to have custody of minor children. In contrast to these types of decisions, many courts have been more willing to grant custody to gay and lesbian parents when the parents are a same-sex couple. See also GAY AND LESBIAN RIGHTS.

Although the U.S. Supreme Court ruled in 1984 that removing custody from a white child's mother because of her marriage to a black man would be discriminatory (*Palmore v. Sidoti,* 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed. 2d 421), a Tennessee court in 1986 removed custody from a white mother who was living with a black man. In that case, when one of the children's guardians died two years later, the mother, who had by then married the man, was awarded custody of one of her children (*Smith v. Smith,* 1989 WL 73229 (Tenn. App).

### Adoption

ADOPTION can provide courts with another source of custody disputes. Most state laws require that both birth parents give consent before their child can be adopted. Such a law was at issue in a custody battle over Jessica DeBoer, who was born in Iowa in 1991 and adopted by a Michigan couple. DeBoer's birth mother later married DeBoer's birth father, and they sought and won custody of DeBoer in Iowa, based on the father's never having consented to the adoption. The adoptive parents then won in the Michigan courts, based on an analysis of the child's best interests. On appeal, the Michigan Supreme Court reversed, declaring that under federal law, Iowa had jurisdiction in this case, and that unless a child's birth parents are unfit, an unrelated person may not retain custody. The U.S. Supreme Court agreed, in *DeBoer by Darrow v. DeBoer*, 509 U.S. 1301, 114 S. Ct. 1, 125 L. Ed. 2d 755 (1993), and Jessica was returned to her birth parents.

Family ties are often a compelling factor for judges even when birth relatives other than parents are involved. For example, the Minnesota Supreme Court ruled in 1992 in *Matter of Welfare of D. L.,* 486 N.W.2d 375 (Minn.), that the biological grandparents of Baby D., a three-year-old African-American, should be granted custody, rather than the white foster parents who had raised her from birth. The case convinced the Minnesota Legislature to change a law (M. S. A. § 259. 28, subd. 2) providing for same-race preference in adoptions, but race was not the deciding factor in the case: The court based its decision on reuniting Baby D. with her birth relatives and her siblings, of whom the grandparents also had custody.

Critics of removing children from parents and from parental figures to whom they have become attached argue that the rupture is too difficult to overcome and that children suffer from imperfect child-custody laws. The National Conference of Commissioners on Uniform State Laws approved in 1994 a model adoption statute, which was designed to reduce the chances that custody will be changed after children have become attached to parent figures. The model statute provides guidelines for birth parents and adoptive parents to follow before an adoption in order to prevent custody battles afterward.

In the 1990s, courts appeared to place more importance on child-caretaker attachment and in some cases even denied custody to birth parents in order to uphold this attachment. A Florida judge ruled in 1993 that 14-year-old Kimberly Mays could choose not to see her birth parents, from whom she had been separated at birth by a hospital error (*Twigg v. Mays,* 1993 WL 330624 [Fla. Cir. Ct.]). The decision was based on the length of time she had spent with

her nonbiological family and her attachment to it.

In 1978, the U.S. Supreme Court ruled that the adoption of a child by the child's stepfather did not violate the DUE PROCESS rights of the child's unwed biological father. In *Quilloin v. Walcott,* 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978), the Court decided that the adoption was in the best interests of the child, and wrote that because that particular biological father had participated very little in rearing the child, he did not have the same rights under the Equal Protection Clause that a more involved father would have.

### Terminating Parental Rights

Owing in part to a national surge in reports of CHILD ABUSE and neglect in the 1980s and 1990s, courts and society faced questions of whether abusive or dangerously neglectful parents should retain custody of their own children. It is the government's role to step in when a child is not being safely cared for, and if parents are judged unfit, the local social-services department may seek to terminate their parental rights and to free the child for adoption or alternative care. A child may be placed in foster care while a custody case is pending.

Before removing a child from her or his parents, the state must produce "clear and convincing" evidence that terminating parental rights is the best option for the child. This was clarified in *Santosky v. Kramer,* 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The case arose after a New York County social-services department successfully brought neglect proceedings in state court against the Santoskys, a couple with three children. The U.S. Supreme Court found that the state's standard—"a fair preponderance of evidence" —was too low for deciding something as important as a family's future.

### Courts and Jurisdiction

Most custody decisions are made by family courts. However, where a juvenile court has found that a minor poses a threat to society if current custody arrangements continue, the juvenile court may turn over physical custody to the state. The court may simultaneously issue a so-called CHIPS petition, declaring the "child in need of protective services," if the current custodian is abusive or negligent.

Jurisdiction is an issue that has received much attention. A court has the power to settle a custody dispute if a child lives for at least six months in the location where the court has jurisdiction or if it is demonstrated that the court has the closest connection with the child. All states have adopted the Uniform Child Custody Jurisdiction Act, originally adopted in 1967, which provides that a state's court will not accept a custody case unless that state has original jurisdiction or the state with original jurisdiction relinquishes it. All states have adopted the original uniform law. This law was updated in 1997 with the passage of the Uniform Child Custody Jurisdiction and Enforcement Act, which added a number of provisions for the enforcement of child-custody orders from other states. As of 2003, more than 30 states, including the District of Columbia, had adopted the new law, and several others were considering its adoption. The Hague Convention Treaty provides similar reciprocity between nations that are parties to it (implemented at 42 U.S.C.A. §§ 11601–11610 [Supp. 1993]).

A parent's interstate move sometimes blurs jurisdictional lines. For this reason, courts may restrict the geographic area in which a parent may live as part of the custody order, or they may deny a subsequent request for permission to move if the move is viewed as an attempt to hinder the other parent's visitation.

### Parental Kidnapping

Parental KIDNAPPING occurs when one parent deprives the other of his or her legal right to custody or visitation by illegally taking the child out of the jurisdiction. It is outlawed by the federal Parental Kidnapping Prevention Act (28 U.S.C.A. § 1738A [Supp. 1993]), which applies the FULL FAITH AND CREDIT CLAUSE of the U.S. Constitution to child-custody cases, meaning that each state must abide by custody decisions made by another state's courts if the other state would be bound by those decisions. The law was enacted to respond to cases in which one parent leaves the state that has jurisdiction; however, in 1998 the U.S. Supreme Court ruled in *Thompson v. Thompson,* 484 U.S. 174, 108 S. Ct. 513, 98 L. Ed. 2d 512, that the existence of two different state-custody decrees is not, itself, a reason for federal involvement under this law.

The Parental Kidnapping Prevention Act often works in concert with state laws, such as state adoptions of the Uniform Child Custody Jurisdiction and Enforcement Act, in order to facilitate the return of a child to the state that has proper jurisdiction. Many of the custody

provisions in the federal law are similar to those in the corresponding state laws.

### Termination of Custody

Most types of custody end when the child is emancipated (i.e., considered a legal adult) by becoming self-supporting, by marrying, or by reaching the age of majority as specified by state law. Not until then does family court lose its power to determine custody.

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CROSS-REFERENCES

Illegitimacy; Gay and Lesbian Rights; Family Law; Parent and Child.

## CHILD LABOR LAWS

*Federal and state legislation that protects children by restricting the type and hours of work they perform.*

The specific purpose of child labor laws is to safeguard children against harm generally associated with child labor, such as exposure to hazardous, unsanitary, or immoral conditions, and overwork. Child labor legislation primarily applies to business enterprises, but in some states nonprofit activities are within the purview of the law.

The federal law controlling child labor is the **FAIR LABOR STANDARDS ACT** of 1938 (FLSA) 29 U.S.C. §§ 201 et. seq., administratively regulated through 29 C.F.R. Part 570 et seq. The law is enforced by the U.S. Labor Department's Wage & Hour Division. Federal law provides the basic structural framework for certain prohibitions or restrictions placed on the employment of children. Regulations further delineate minimum requirements to include age restrictions, **MINIMUM WAGE** provisions, occupational restrictions, hours of work restrictions, and certain prohibited fields or occupations (e.g., hazardous occupations, liquor and lottery sales, or occupations involving moving vehicles or power-driven machinery). Moreover, all states and the federal government require that children have work permits on file with their employers that certify their ages. (29 C.F.R. § 570.9)

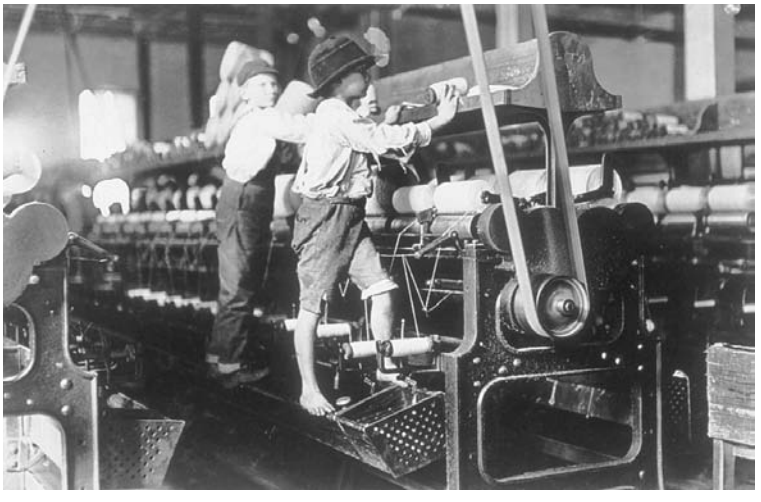

*Two young boys at work in a textile mill. Before child labor laws went into effect, many companies employed young people at low wages, often exposing them to overwork, as well as hazardous and unsanitary conditions.*

LIBRARY OF CONGRESS

Each state also has its own set of child labor laws that may further prohibit or restrict employment of children. The laws vary in detail from state to state, particularly for those states where seasonal or agricultural employment is high. However, federal law preempts state law, and so all state laws must comply with all federal minimum requirements.

Specific provisions of the particular child labor law govern the age of majority. Some laws permit minors to be employed in certain activities if their parents satisfy stated conditions concerning supervision, control, and approval. The state has the right to prohibit parents from binding a minor to an employment contract based upon the theory that parents cannot diminish benefits that the law confers to children.

Cursory directions to subordinates are not sufficient to fulfill the employer's duty to enforce child labor regulations. Where such directives are followed by further violations, sterner measures controlling the actions of subordinates are required.

In some states, it is unlawful to employ children under a specified age in certain activities without an employment certificate issued and filed in accordance with the law. An employer's failure to comply with this requirement makes the employment illegal. Technical errors, such as the lack of a detailed account of the child's duties in the employer's pledge of employment, will not have this effect nor invalidate the certificate.

Regulations also relate to occupations that are or may be potentially dangerous, extremely hazardous, or harmful to a child's health or

morals, as defined by statute or judicial decision. In one state a log-loading machine was held to be within the meaning of a law that barred the employment of minors in businesses using dangerous machinery.

The violation of child labor regulations can subject the perpetrator to criminal prosecution or render the employment contract illegal. In appropriate circumstances an **INJUNCTION**, a court order that commands or prohibits a certain act, may be issued against a violator to stop the illegal conduct.

In 1919, Congress passed the so-called **CHILD LABOR TAX LAW**, (40 Stat. 1057) which imposed a ten percent excise tax on persons or establishments that employed children under the age of 14 or children between the ages of 14 and 16 working more than eight hours daily or more than six days a week. However, in *Bailey v. Drexel Furniture Co.,* 259 U.S. 20, 42 S. Ct. 449, 66 L. Ed. 2d 817 (1922), the U.S. Supreme Court invalidated the law as unconstitutional, agreeing with a lower court that "the provisions of the so-called taxing act must be naturally and reasonably adapted to the collection of the tax and not solely to the achievement of some other purpose plainly within state power."

Liability for child labor law violations depends upon the provisions of the law. As a general rule, the owner of the business is liable, whether it is a natural person, a corporation, or a joint association. An employer is usually not liable if a minor is assigned to work on the premises in violation of law by an **INDEPENDENT CONTRACTOR**, a person whose work methods are not controlled by the employer. Some states, however, will impose liability on the owner under such circumstances.

The employer's knowledge that the child is within the prohibited age is not an element of the offense. The offense is committed if the employer does not know but should have known by the exercise of reasonable diligence that the child was underage. The employer's good faith—his honest belief—is no defense even though the child misrepresented his age.

A person who hires a child in violation of law will be liable if the child is injured. The duration of the employment and the status of the child as an employee are irrelevant.

The parents will not be held liable merely because they assented to the hiring of their child by another. Only the injured child will recover damages, reparations for injury caused by another, for third persons are not within the class of persons that the laws were enacted to protect.

During the 1990s, a new issue of child labor moved into the forefront: imported foreign goods that were produced by foreign "sweatshops" employing child labor—legally repugnant in the United States. As more domestic or multinational corporations opened facilities in foreign countries—where labor costs were cheaper—the problem worsened. The FLSA prohibits sweatshops. The U.S. **DEPARTMENT OF LABOR** considers a work place to be a sweatshop if it violates two or more of the most basic labor laws, for example, child labor, fire safety, minimum wage, or overtime hours. Senator Tom Harkin (D-IA) has been at the forefront of legislative initiatives, including the Child Labor Deterrence Act, still pending as of mid-2003. The act would prohibit the importation of manufactured or mined goods that are produced by foreign children under the age of 15. Meanwhile, President **BILL CLINTON** signed **EXECUTIVE ORDER** 13,126, "Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor," on June 12, 1999.

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**CROSS-REFERENCES**

Labor Law; Parent and Child.

## CHILD MOLESTATION

*Child molestation is a crime involving a range of indecent or sexual activities between an adult and a child, usually under the age of 14. In psychiatric terms, these acts are sometimes known as pedophilia. It is important, however, to keep in mind that child molestation and child* **SEXUAL ABUSE** *refer to specific, legally defined actions. They do not necessarily imply that the perpetrator bears a particular psychological makeup or motive. For example, not all incidents of child molestation are perpetrated by pedophiles; sometimes the perpetrator has other motives for his or her actions and does not manifest an ongoing pat-*

*tern of sexual attraction to children. Thus, not all child molestation is perpetrated by pedophiles, and not all pedophiles actually commit child molestation.*

Regardless of the terminology, it is illegal for an adult to touch any portion of a child's body with a "lewd and lascivious" intent. Usually, consent is not a matter of consideration, and is not available as a defense to a charge of child molestation. Even in cases where it can be proven that the minor victim was a willing participant, a sex act or improper touching is still a crime because children cannot legally consent to anything. Criminal penalties are severe for those convicted of child molestation.

According to the JUSTICE DEPARTMENT, there are approximately four million pedophiles in the United States. It is difficult, however, to accurately assess the number of child molesters because many child molesters are not caught. The Justice Department reports the alarming statistic that one in four girls and one in seven boys will experience sexual abuse before the age of 18.

There is no single profile that accurately describes or accounts for all child molesters. There are many variables among individuals in terms of their personal characteristics, life experiences, criminal histories, and reasons for committing such offenses. One common misconception is that molested children grow up to become child molesters themselves. But, in fact, most childhood sexual abuse victims do not go on to become perpetrators. In some instances, if a child is sexually victimized, and is abused in other ways as well, he or she may later molest a child. Likewise, a sexually abused child who also exhibits antisocial behavior may go on to commit acts of child molestation, although an individual's inadequate social and interpersonal skills do not make it inevitable that he will sexually abuse children.

Few criminal offenses are more despised than the sexual abuse of children, and few are so little understood in terms of the number of offenses committed, the proportion of the population who commit offenses, and the risks of re-offense. One reason is that sex crimes committed against children and teenagers are believed to be widely underreported. This assumption is supported by the reports of both SEX OFFENDERS and sexually abused children. Offenders commonly report fewer incidents of child molestation than those for which they are ultimately convicted. And children are often loathe to report an incident because they are ashamed or they fear REPRISAL.

*An Amber Alert, a law enforcement and broadcast media response to a report of a missing child, is displayed over Interstate 80 near Omaha, Nebraska, in December 2002.*

AP/WIDE WORLD PHOTOS

Most convicted sex offenders are eventually released, giving rise to concerns over RECIDIVISM. Recidivism rates are affected by a number of factors, including differences in legal guidelines and statutes in the states; opportunities to re-offend; characteristics of the offender; treatment availabilities; and post-treatment supervision. Child molesters have been known to re-offend as late as 20 years following release into the community. Problems caused by recidivist offenders have given rise to several legislative initiatives to help manage societal risk. For example, there are various sex offender registration schemes known as MEGAN'S LAWS, which list names, addresses, and other specifics about convicted sex offenders. Such registries are available for public access. The laws take their name from a child named Megan Kanka who was abducted, molested, and murdered by a convicted child molester who lived near her home in New Jersey.

A more active scheme that gained increased attention in the wake of several national news stories of abducted and molested children is known as Amber Alert Laws. These laws were prompted by citizen concerns following the tragic 1996 KIDNAPPING and murder of nine-year-old Amber Hagerman in Arlington, Texas. The "Amber Alert" involves law enforcement and broadcast media response when there is a

report of a missing child, and it appears that the child has been abducted by a sexual predator. Although the scope of the Amber Alert varies from jurisdiction to jurisdiction, the criteria to trigger it are generally consistent: the missing child falls within a certain age range; the law enforcement agency believes the child has been abducted; the agency believes the missing child is under threat of serious bodily harm or death. In all cases, law enforcement activates an Amber Alert by notifying broadcast media with relevant information about the child's identity, the description of the suspected perpetrator, and the circumstances of the abduction.

Once an Amber Alert has been issued by law enforcement, radio and television stations interrupt regularly scheduled programming to notify the public that a child has been kidnapped and to provide relevant information about the case. Because approximately 95 percent of all people driving in their cars are tuned in to a radio station, the Amber Alert is an extremely effective way of disseminating descriptions of the child, the kidnapper, accomplices, and vehicles. The goal of the Amber Alert is to notify an entire community. It adds extra eyes and ears to watch, listen, and help in the safe return of the child and apprehension of the suspect. The federal government is also working on legislation that would establish a national Amber Alert system. Legislation has been introduced in the House and the Senate, and President GEORGE W. BUSH signed a national Amber Alert bill at the end of April of 2003. [PL 108-21, April 30, 2003, 117 Stat 650. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (Protect Act).

For several years numerous charges of child molestation and other allegations of sexual abuse or improprieties were levied against members of the Roman Catholic clergy. These cases had been in various stages for some time, but since the late 1990s the scope of the problem became more widely known. By 2003, it was common to regularly hear a report of a priest resigning or being defrocked or censured by his bishop. These scandals originated in the United States, but spread to many other countries around the world.

In March 2002, a Polish archbishop, a friend and former personal assistant to the Pope, resigned in the wake of sexual abuse charges. In Australia, 51 priests were convicted of child molestation between 1992 and 2003. In England, 21 priests were convicted of sexual molestation between 1995 and 2002. In Ireland, taxpayers have contributed about one-fifth of $500 million to pay claims against the church relating to cases of abuse of over three thousand victims spanning 30 years. There have been hundreds of resignations, firings, or monetary settlements in many countries, particularly Australia, Canada, England, France, Germany, Ireland, Mexico, Poland, and the United States.

One of the most notorious cases that made national and international news involved a priest named John Geoghan. Over 130 men reported that they had been abused by Geoghan when they were children; the abuse cases spanned 30 years. The priest was ultimately sentenced to nine years for child molestation. What turned this story into a national and a Catholic institutional scandal was the revelation that Geoghan's bishop, Cardinal Bernard Law of Boston, had been privy to the allegations against Geoghan, but had quietly reassigned him to a succession of parishes. Several times, Cardinal Law even presided over secret financial settlements of claims that were substantiated or confirmed. The cardinal resigned his post in the wake of these revelations.

The Boston case opened the floodgates to hundreds of similar cases in a dozen states. Upon inquiry, similar stories of child molestation or other sexual abuse and financial coverups have drained the financial resources of many parishes. Already, the church has set aside $30 million just for victims of John Geoghan. In Texas, the Dallas diocese paid out $31 million to 11 plaintiffs after a Dallas priest, Rudolph Kos, was convicted on seven counts. In New Mexico, the Santa Fe diocese paid $50 million to victims of 20 priests. In Bridgeport, Connecticut, the diocese settled a multimillion dollar civil case against six priests. And in Santa Rosa, California, four plaintiffs alleging sexual abuse by clergy were awarded $1.6 million. In most of the cases that have resulted in large awards, the Catholic Church itself has been implicated, accused of shielding priests it knew were molesting children.

While these revelations of priests molesting children have focused attention on the issue, the breadth of child sexual abuse reaches beyond the Catholic Church. Society is just beginning to understand its many dimensions and the legal line is being more firmly drawn to protect the rights of children.

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## CHILD PORNOGRAPHY

Child pornography *is the visual representation of minors under the age of 18 engaged in sexual activity or the visual representation of minors engaging in lewd or erotic behavior designed to arouse the viewer's sexual interest.*

Child pornography may include actual or simulated sexual intercourse involving minors, deviant sexual acts, bestiality, masturbation, sado-masochistic abuse, or the exhibition of genitals in a sexually arousing fashion. In most instances, however, the mere visual depiction of a nude or partially nude minor does not rise to the level of child pornography. Thus, home movies, family pictures, and educational books depicting nude children in a realistic, non-erotic setting are protected by the Free Speech Clause of the FIRST AMENDMENT to the U.S. Constitution and do not constitute child pornography.

Child pornography differs from pornography depicting adults in that adult pornography may only be regulated if it is obscene. In MILLER V. CALIFORNIA, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) the U.S. Supreme Court ruled that pornography depicting adults is obscene if (1) the work, taken as a whole by an average person applying contemporary community standards, appeals to the prurient interest; (2) the work depicts sexual conduct in a patently offensive way; and (3) the work, when taken as a whole, lacks serious literary, artistic, political, or scientific value. In contrast, child pornography can be banned without regard to whether the pornographic depictions of minors violate contemporary community standards or otherwise satisfy the *Miller* standard for OBSCENITY.

In *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (U.S. 1982), the Supreme Court explained the rationale underlying the distinction between child pornography and adult pornography. The Court said that the government has a compelling interest in protecting minor children from SEXUAL ABUSE and exploitation. Using the same rationale, the Supreme Court later said that even the mere possession of child pornography may be prohibited without violating the First Amendment. *Osborne v. Ohio,* 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (U.S. 1990).

However, the Supreme Court drew the line with so-called "virtual" depictions of child pornography. In 1996 Congress passed the Child Pornography Prevention Act (CPPA), which expanded the federal prohibition on child pornography to include not only pornographic images made using actual children, but also "any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256. Civil libertarians worried that the CPPA would be applied to ban a range of sexually explicit images that appeared to depict minors but were produced by means other than using real children, such as through the use of computer-imaging technology.

The Supreme Court agreed. In *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), the Court ruled that the CPPA's provisions went too far by trying to ban speech that created no real minor victims of sexual abuse. Nor could the CPPA be sustained on grounds that pedophiles might use virtual child pornography to seduce actual children into participating in real child pornography. The prospect of crime, by itself, does not justify laws suppressing protected speech, the Court said.

In response to the Court's decision, the Senate and U.S. House of Representatives introduced almost identical bills that attempt to implement the substantive provisions of the CPPA in a way that would survive constitutional scrutiny. The Child Obscenity and Pornography Prevention Act of 2002 was approved by the House (H.R. 4623 § 3(a)) and as of early 2003 was pending before the SENATE JUDICIARY COMMITTEE. S. 2511, § 2(a).

In the new bill, Congress changed the prohibition against images that "appear" to be of a minor engaging in sexually explicit conduct to a prohibition against "computer image or computer-generated image that is, or is indistinguishable" from a conventional image of child pornography. Similarly, the proposed legislation replaced language prohibiting electronic images that "convey the impression" that the pornographic material contains a visual depiction of a minor engaging in sexually explicit conduct with an SCIENTER requirement, which makes it

an offense to advertise or promote material "with the intent to cause any person to believe that the material is, or contains, a visual depiction of a minor engaging in sexually explicit conduct."

Finally, the House and Senate included a number of "findings" that attempt to bolster the constitutionality of the proposed law. Section 2 of the bill details at length how the limitations placed on prosecuting child pornographers who pander both "real" and "virtual" child pornography have frustrated law enforcement efforts and meritorious prosecutions in the Ninth Circuit. These findings are plainly meant to provide any courts that might scrutinize the proposed legislation with a compelling interest necessary to uphold it over First Amendment objections. However, as of early 2003, Congress had not yet passed the bill.

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U.S. Senate, Committee on the Judiciary. 2003 *Stopping Child Pornography: Protecting Our Children and the Constitution: Hearing Before . . . 107th Congress, 2nd Session, October 2, 2002.* Washington, DC: U.S. G.P.O.

CROSS-REFERENCES

Child Abuse; Computer Crime; First Amendment; Freedom of Speech; Obscenity; Pedophilia.

## CHILD SUPPORT

*A payment that a noncustodial parent makes as a contribution to the costs of raising her or his child.*

In the mid-1990s, as never before, child support became a topic of urgent U.S. national discussion. The system that awards and enforces child support was declared inadequate by state and federal policy makers. Failures in the system were blamed for child poverty rates, long-term dependence on government assistance, and the "feminization of poverty." Courts drew criticism for awarding child support inconsistently and inequitably. These social and economic issues attracted both federal attention and reform efforts.

The need for child support payments usually arises when one parent does not have physical custody of his or her child, so that parent's income does not benefit the child on a daily basis. At times, neither parent has custody, and both may pay a third person who is caring for the child. When both of a child's parents have full custody (as when they are married to each other), and usually when they are divorced and share joint physical custody, the needs of the child are presumed met and child support is not an issue. As long as parents provide a safe level of care, the government does not control their contributions to their children.

In the United States in the early 2000s, nearly half of all marriages ended in DIVORCE, and almost one-quarter of all children were born to unmarried parents. Most of the children who lived in single-parent families had a legal right to a child support order. Child support can be voluntary or court ordered and can be secured through a divorce decree or a separate action. Increasingly, support orders are issued by state agencies.

The legal duty to support a minor child belongs to both parents, even if the custodial parent is capable of caring for the child singlehandedly. Support is awarded to provide for the child's basic needs and to allow the child to share in the standard of living of both parents. Although both mothers and fathers can be ordered to pay support, a 1994 study in Utah found that over a 20-year period, mothers were required to pay child support in fewer than one in five cases in which fathers received sole custody. A greater proportion of noncustodial fathers were ordered to pay support.

A petition for support is usually begun in a state court where the plaintiff (the parent seeking the order) resides. The Uniform Interstate Family Support Act of 1992, which was updated in 1996 and 2001 and which has been adopted in some form in the majority of states, provides that jurisdiction exists where the child or one of the parents resides. Before support can be awarded, parentage (called PATERNITY in the case of fathers, maternity in the case of mothers) must be demonstrated. The would-be payer is entitled to blood tests, but in some states must pay for them. The 1993 FEDERAL BUDGET bill (Omnibus Budget Reconciliation Act of 1993, 42 U.S.C.A. § 666[a][2]) required states to offer speedy means of establishing parentage, since parentage disputes can delay a valid child support award.

### Determining Awards

Child support awards are made by each state's family court system. Most states require that they be based on the best interests of the

child. In addition to determining support in contentious divorce cases, courts review stipulations (agreements) between parents and can overrule an agreement that does not adequately provide for children.

Often, courts feel pressure to balance children's needs with their parents' needs. Awards are based on the noncustodial parent's ability to pay and must allow the parent to remain self-supporting. Many associations of noncustodial parents emerged after the 1980s to express their belief that awards were burdensome to the payers, benefited only the custodial parent, or did not provide payers with enough in return. At the same time, more single parents with children slipped into poverty than had at any other point in the nation's history.

In the mid-1990s, no federal child support guideline existed, mainly because child support was historically a state-controlled issue. Most states had established their own guidelines in the quest for fair standards. About 15 states used the "percentage-of-income" guideline, which is based on the income of the noncustodial parent. Thirty states used the "income-shares" method, which is based on the income of both parents. It prorates the total support between the parents and calculates each contribution proportionally according to income. Several states used the elaborate Melson formula, which provides a basic subsistence level for each parent before determining the primary support needs of the children. This formula then awards a percentage of the remaining income so that the children share in the standard of living of each parent.

Even when guidelines are used, judges consider the facts of a case and other statutes. They can depart from the guidelines for considerations such as how property is divided, whether an arrearage (unpaid child support) exists, and what disparities in parents' incomes exist. In many states, judges must prove in writing that an exception to the guidelines serves the child's best interest.

In practice, courts are allowed to use many criteria in setting an award amount. Some judges consider the needs of subsequent children when obligors (payers) remarry and start new families. Some may adhere to the Uniform Parentage Act, which states that courts must take into consideration, among other things, the age of the child, the financial resources and earning ability of the child, and the value of services contributed by the custodial parent.

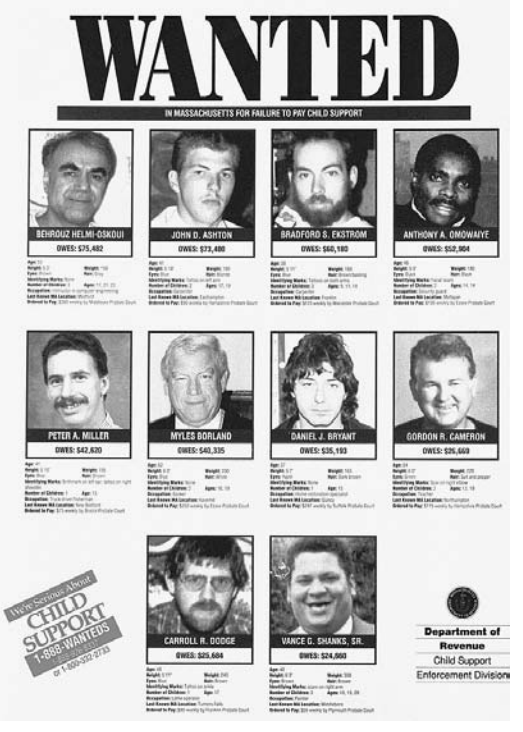


*The Massachusetts Department of Revenue, Child Support Enforcement Division, issued this "Ten Most Wanted" poster in March 2001.*

AP/WIDE WORLD PHOTOS

Investment income, unearned income, overtime, bonuses, income from a second job, gifts, and retirement pay may all be eligible income when calculating child support due, regardless of its tax status. Putative income (earning capacity) is used to calculate support in many states if it is suspected that the noncustodial parent is deliberately underemployed or unemployed. The court is allowed to credit SOCIAL SECURITY benefits toward support, but this action is not automatic. Child support is not deductible from either parent's taxes, any more than are the provisions that married parents supply to their children. The children themselves qualify as household deductions, but only one parent may claim them.

Unless a state mandates that child support be awarded, the court can deny it. Courts have denied support in situations of split custody, in which each parent has custody of one or more children. With exceptions, the court usually does not award child support to a noncustodial parent during visitation. Support can be ordered for legally adopted children. It cannot be ordered for grandchildren who have not been legally adopted.

### Consequences for Nonpayment

The consequences of not paying child support are inconsistently applied—a situation

**State Child Support Enforcement Offices**

Alabama
Department of Human Resources
Division of Child Support
(334) 242-9300

Alaska
Child Support Enforcement Division
(907) 269–6900

Arizona
Division of Child Support Enforcement
(602) 252-4045

Arkansas
Office of Child Support Enforcement
(501) 682–8398

California
Office of Child Support
Department of Social Services
(916) 654–1532

Colorado
Division of Child Support Enforcement
(303) 866–5994

Connecticut
Department of Social Services
Bureau of Child Support Enforcement
(860) 424-5251

Delaware
Division of Child Support Enforcement
Delaware Health and Social Services
(302) 577-4863

District of Columbia
Child Support Enforcement
Department of Human Services
(202) 724-1444

Florida
Child Suppport Enforcement Program
Department of Revenue
(850) 922-9590

Georgia
Child Support Administration
(404) 657-3851

Hawaii
Child Support Enforcement Agency
Department of Attorney General
(808) 692-7000

Idaho
Bureau of Child Support Services
Department of Health and Welfare
(208) 334-5710

Illinois
Child Support Enforcement Division
Illinois Department of Public Aid
(217) 524-4602

Indiana
Child Suppport Office
(317) 233-5437

[continued]

Iowa
Bureau of Collections
Department of Human Services
(515)281-5580

Kansas
Child Support Enforcement Program
Department of Social &
Rehabilitation Services
(913) 296-3237

Kentucky
Division of Child Support Enforcement
Cabinet for Families and Children
(502) 564-2285

Louisiana
Support Enforcement Services
Office of Family Support
(504) 342-4780

Maine
Division of Support Enforcement
and Recovery
Bureau of Family Independence
Department of Human Services
(207) 287-2886

Maryland
Child Support Enforcement Administration
Department of Human Resources
(410) 767-7619

Massachusetts
Child Support Enforcement Division
Department of Revenue
1-800-332-2733

Michigan
Office of Child support
Department of Social Services
(517) 373-7570

Minnesota
Office of Child Support Enforcement
Department of Human Services
(651) 215-1714

Mississippi
Division of Child Support Enforcement
Department of Human Services
(601) 359-4861

Missouri
Department of Social Services
Division of Child Support Enforcement
(573) 751-4301

Montana
Child Support Enforcement Division
Department of Public Health and
Human Services
(406) 442-7278

Nebraska
Child Support Enforcement Office
Department of Social Services
(402) 471-9160

many states want to remedy. A delinquent obligor may face contempt-of-court charges and civil penalties. Criminal sanctions can include a jail sentence or a fine, but these punishments are used sparingly and for repeat violations. Prosecution may proceed on a misdemeanor or felony level, depending on the circumstances. In addition, federal prosecution may occur for a parent who crosses a state line to avoid paying support.

## Enforcement

In 1992 $27 billion in child support went uncollected. The U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES has estimated that a substantial increase in child support collections could reduce the payments of Aid to Families with Dependent Children (AFDC) by 25 percent. The federal government created the AFDC program in 1935 to enable states to provide money and services to help poor children remain in their own, single-parent homes.

These observations were not lost on the 1994 Senate, which directed the JUSTICE DEPARTMENT to "immediately address shortcomings in enforcement of the law [regarding child support]." Enforcement efforts are administered federally through the department's Office of Child Support Enforcement, but child support recovery units at the state level perform the daily task of securing payment.

The problems surrounding the collection of child support have provoked frustration and ingenuity in states throughout the nation. A major barrier to timely and regular collection is the large volume of child support orders that states are required to enforce monthly. One response has been to divert cases from the court system by empowering state agencies to enforce child support orders.

A primary means of collecting is wage withholding. This action requires that the employer of the obligor send a percentage of the obligor's paychecks to the state or county, which forwards it to the custodial parent. Where the custodial parent receives federal public assistance, income withholding is mandatory. GARNISHMENT is similar to withholding, but it is used when the obligor is about to receive a lump-sum payment.

Interception of the obligor's federal tax return is another enforcement tool. In the first seven years after implementing a pilot of this requirement, $1.8 billion was collected. As of the early 2000s federal law requires every state to have legislation for intercepting the tax returns

of delinquent obligors and applying them to child support after a review.

Self-employed obligors, or those whose employment is unknown, pose a challenge to collection agencies. In their case, states may rely on the custodial parent's knowledge of the obligor's income and on tax returns to pursue enforcement.

If a parent who owes child support dies, the child support payments may be made from the deceased parent's estate, at least according to one court. In *L. W. K. v. E. R. C.,* 735 N.E.2d 359 (Mass. 2000), in the Supreme Judicial Court of Massachusetts a father was required by a court to pay $100 per month in child support for his minor daughter until the daughter turned 18. The father subsequently disinherited the daughter in his will. He died five months after he executed the will. The court ruled that the child was entitled to receive child support payments from the father's estate until she turned 18.

Other enforcement methods include placing a lien on the obligor's property so that it cannot be sold without clearing the arrearage. At times, interest is added to unpaid child support in order to motivate the obligor to pay off this debt; in 1995, the default rate was nearly 50 percent on child support, compared with only 3 percent on car loans. Some states have taken the high-profile approach of publicly issuing controversial "Wanted" posters depicting delinquent obligors. Others have revoked state-issued fishing, hunting, and even driver's licenses as punishment for nonpayment.

Less common methods for securing child support owed are the seizure of government security bonds, collection of the full amount by the INTERNAL REVENUE SERVICE (this method was still under consideration in 1995), and seizure and sale of property or other forced payment. The effects of reporting delinquent obligors to credit bureaus are being studied.

Interstate orders (orders for support to be paid by a parent in a different state) pose additional problems for enforcement. Although three in ten child support cases are interstate, only 10 percent of the delinquent collections nationwide result from these cases. This circumstance has caused child support collection, usually considered a state function, to become an issue of national importance. Although most states have LONG-ARM STATUTES enabling them to retain jurisdiction over obligors in other states, delays result when the laws are not uniform. Failures to collect across state lines are due to heavy case backlogs, multiple and conflicting orders, lack of priority given to interstate cases

**State Child Support Enforcement Offices**

Nevada
Child Support Enforcement Program
Nevada State Welfare Division
(702) 687-4744

New Hampshire
Office of Child Support
Division of Human Services
Health and Human Services Building
(603) 271–4427

New Jersey
Division of Family Development
Department of Human Sevices
Bureau of Child Support and
Paternity Programs
(609) 588-2915

New Mexico
Child Support Enforcement Bureau
Department of Human Services
(505) 827–7200

New York
Office of Child Support Enforcement
Department of Social Services
(518) 474–9081

North Carolina
Child Support Enforcement Office
Division of Social Services
Department of Human Services
(919) 571–4114

North Dakota
Department of Human Services
Child Support Enforcement Agency
(701) 328-3582

Ohio
Office of Family Assistance and Child
Support Enforcement
Department of Human Services
(614) 752-6561

Oklahoma
Child Support Enforcement Division
Department of Human Services
(405) 522-5871

Oregon
Recovery Services Section
Adult and Family Services Division
Department of Human Resources
(503) 378-5567

Pennsylvania
Bureau of Child Support Enforcement
Department of Public Welfare
(717) 787-3672

Rhode Island
Child Support Services
Division of Administration and
Taxation
(401) 222-2847

South Carolina
Department of Social Services
Child Support Enforcement Division
(803) 737-5875

South Dakota
Office of Child Support Enforcement
Department of Social Services
(605) 773-3641

Tennessee
Child Support Services
Department of Human Services
(615) 313-4880

Texas
Office of the Attorney General
State Office
Child Support Division
(512) 460-6000

Utah
Office of Recovery Services
(801) 536-8500

Vermont
Office of Child Support
1-800-786-3214

Virginia
Division of Support Enforcement
Department of Social Services
(804) 692-1428

Washington
Division of Child Support
Department of Social Health Services
(360) 664-5000

West Virginia
Child Support Enforcement Division
Department of Health & Human Resources
(304) 558-3780

Wisconsin
Bureau of Child Support
Division of Economic Support
(608) 266-9909

Wyoming
Child Support Enforcement
Department of Family Services
(307) 777-6948

SOURCE: U.S. Department of Health & Human Services, Administration of Children & Families, *Office of Child Support Enforcement Handbook*.

*A sample child support guidelines worksheet (state of NE)*

## Child Support Guidelines Worksheet (State of NE)

**CHILD SUPPORT GUIDELINES WORKSHEETS 1 (Basic), 4 (Number of Children), & 5 (Deviations) (2000)**

| _____ = No. of Children | | MOTHER | COMBINED | FATHER | |
|---|---|---|---|---|---|
| **INCOME:** | | | | | |
| 1a/b | Last Two Years Schedule C/F income | _____ | _____ | _____ | _____ |
| 2a/b | Last Two Years Depreciation claimed | _____ | _____ | _____ | _____ |
| 3 | MONTHLY S. E. INCOME ((1a+1b+2a+2b)/24) | | _____ | _____ | |
| 4 | MONTHLY SALARY INCOME | | _____ | _____ | |
| 5 | MONTHLY VALUE of Fringe Benefits | | _____ | _____ | |
| **6** | **MONTHLY INCOME ALL SOURCES (sum L3..L5)** | | _____ | _____ | |
| **DEDUCTIONS:** | | | | | |
| 7 | Filing Status (1=Single; 2=HH) | | _____ | _____ | |
| 8 | No. of Exemptions | | _____ | _____ | |
| 9 | Annual Gr. Inc (((1a+1b)/2)+(L4x12)) | _____ | | | _____ |
| 10 | Standard Ded. (S:$4400; HH:$6450) | _____ | | | _____ |
| 11 | Exemptions ($2800 each) | _____ | | | _____ |
| 12 | Fed Taxable Inc. (L9-L10-L11) | _____ | | | _____ |
| 13 | Annual Fed Income Tax (from table) | _____ | | | _____ |
| 14 | Child Credit ($500/ch in custody) | _____ | | | |
| 15 | Federal Income Taxes ((L13-L14)/12) | | _____ | _____ | |
| 16 | St Taxable Inc (L9-L10) | _____ | | | _____ |
| 17 | State Tax Before Credits (from table) | _____ | | | _____ |
| 18 | State Exemption Credit (L8 x $91) | _____ | | | _____ |
| 19 | Annual State Income Tax (L17-L18) | _____ | | | _____ |
| 20 | State Income Taxes (L19/12) | | _____ | _____ | |
| 21 | FICA/Medicare: 7.65% Sal; 15.3% SE | | _____ | _____ | |
| 22 | Child(ren)'s Health Insurance Premiums | | _____ | _____ | |
| 23 | Mandatory Retirement | | _____ | _____ | |
| 24 | Child Support Previously Ordered for Other Children | | _____ | _____ | |
| **25** | **TOTAL DEDUCTIONS (sum L15+L20 to L24)** | | _____ | _____ | |
| **26** | **MONTHLY NET INC Bef Othr Chldrn Dedtn (L6-L25)** | | _____ | _____ | |
| 27 | Deduction for Children Not Subject of Order | | _____ | _____ | |
| **28** | **MONTHLY NET INCOME (L26-L27)** | | _____ | _____ | |
| **29** | **Percentage of Combined Income** | | _____ % | | _____ % |
| **MONTHLY SUPPORT, from table** | | | (rounded) | (unrounded) | (rounded) |
| 30 | One Child | | _____ | _____ | _____ |
| 31 | Two Children | | _____ | _____ | _____ |
| 32 | Three Children | | _____ | _____ | _____ |
| 33 | Four Children | | _____ | _____ | _____ |
| 34 | Five Children | | _____ | _____ | _____ |
| 35 | Six Children | | _____ | _____ | _____ |
| **36** | **GUIDELINE R LIMITATION (rounded down):** | | _____ | | _____ |
| **DEVIATION (Specify):** | | | | | |
| 37 | | | +/- _____ | | +/- _____ |
| **MONTHLY SUPPORT NET OF DEVIATIONS:** | | | | | |
| 38 | One Child | | _____ | | _____ |
| 39 | Two Children | | _____ | | _____ |
| 40 | Three Children | | _____ | | _____ |
| 41 | Four Children | | _____ | | _____ |
| 42 | Five Children | | _____ | | _____ |
| 43 | Six Children | | _____ | | _____ |

| FED: | Single | Head H: | STATE: | Single: | Head H: |
|---|---|---|---|---|---|
| 15.0% | 26,250 | 3,515 | 2.51% | 2,400 | 3,800 |
| 28.0% | 63,550 | 90,800 | 3.49% | 17,000 | 24,000 |
| 31.0% | 132,600 | 147,050 | 5.01% | 26,500 | 35,000 |
| 36.0% | 288,350 | 288,350 | 6.68% | excess | excess |
| 39.6% | excess | excess | | | |

**APPENDIX "B" Support Worksheet; _____ v. _____;_____ County, Case No. _____**

F-4 & G-1

by the responding state, and an inability to locate the noncustodial parent.

The Uniform Interstate Family Support Act (UIFSA), which was developed in 1992, contains what is called the one order, one time rule, in which the initial state retains jurisdiction in order to prevent multiple orders. The act limits modifications and provides that they must occur in the child's home state. The model legislation also features direct income withholding, so that the state of origin can communicate directly with the obligor's employer in another state. It also requires that states that adopt the uniform law provide enforcement services to one another.

In October 1994, the U.S. Congress's Full Faith and Credit for Child Support Orders Act became effective (28 U.S.C.A. §§ 1 note, 1738B, 1738B note), enabling states to enforce and modify orders under certain circumstances.

### Public Assistance

In 1991 the CENSUS BUREAU found that nearly half of all single-parent families headed by a woman live at the poverty level. A report on child support enforcement presented to the Senate in 1994 found that more than one-fifth of all U.S. children lived in poverty. As a result, in the 1990s, reliance on AFDC increased dramatically nationwide.

In recognition that many families require public WELFARE because a noncustodial parent does not contribute, Congress adopted Title IV-D of the Social Security Act in 1975 (Social Services Amendments of 1974, Pub. L. No. 93–647, 88 Stat. 2337 [1975] [pertinent sections codified at 42 U.S.C.A. §§ 661–665 (1988)]). The legislation created the federal Office of Child Support Enforcement and required states to establish state child support offices. Under Title IV-D, services such as locating noncustodial parents, determining parentage, and establishing and enforcing support orders must be provided free to families that receive AFDC. In addition, these services must be provided at very low cost to custodial parents who do not receive AFDC. The federal government requires states to provide these services as a condition for receiving AFDC services.

In the 1990s, child support was sought as part of the regular intake procedure for unmarried parents who were requesting public assistance. To comply with federal funding requirements, most states require that an unmarried parent seeking AFDC identify the absent parent and cooperate in efforts to establish parentage and secure child support.

### Modifying Awards

A family's postdivorce economic situation will likely be different from its predivorce economic situation. In most cases, divorced parents set up separate households whereas they lived together in one home while married. Because the same resources cannot support two households at the same level as a single household, awards are often considered inadequate by the custodial parent and burdensome by the obligor.

An existing support order may be modified if the child's needs or the paying parent's resources change. Back child support can be ordered if a modification or other order delays payment.

Remarriage or COHABITATION does not necessarily affect child support, although if demonstrated to be a permanent change in circumstances, it could become a basis for modification. A child's ADOPTION releases the obligor from future payments but does not cancel an arrearage.

Some orders are automatically modified when certain conditions are met. For example, an escalation clause allows the child support amount to increase as the obligor's income increases. A cost-of-living-adjustment (commonly referred to as COLA) clause permits modification without a hearing when there is an increase in income coupled with inflation. The purpose of these clauses is to keep cases out of court. Courts usually do not approve automatic increases that are not based on an increase in income.

To ensure that orders remain adequate and equitable, Congress began in 1993 to require that states review and, if necessary, adjust child support orders at least once every three years if the custodial parent receives federal public assistance. This arrangement differs from state modification standards that are based on changes in circumstances.

BANKRUPTCY does not end a child support obligation. A child's move, if authorized, does not end support. And an obligor's estate may be required to continue support payments after the obligor's death. In most cases, the obligation ends only when the child reaches the age of majority, marries, or can support herself or himself.

In some states, the court may terminate or suspend child support as a way to enforce a visitation order. The difficulty with this modification is that the child may suffer as a result.

### Other Awards

Financial awards for higher education are sometimes included in an order to pay support but are not meant to substitute for primary support. Education awards are common in families in which children are expected and able to complete postsecondary coursework. Courts have denied awards for tuition, for lessons, and for other education-related expenses when those expenses are deemed unnecessary.

A responsibility to provide HEALTH CARE is occasionally clarified in orders for support, especially when one or both parents have access to an employer-provided health plan. In the early 1990s, a total of 25 million children had no employer-provided insurance, and 8.4 million had no coverage at all. Nevertheless, also in the early 1990s, a majority of support orders lacked provisions regarding HEALTH INSURANCE.

An obligor may be required to maintain a life insurance policy naming the child or guardian as beneficiary.

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CROSS-REFERENCES

Child Custody; Divorce; Family Law; Parent and Child; Welfare.

## CHILDREN'S DEFENSE FUND

The Children's Defense Fund (CDF) is a national organization that is committed to the social WELFARE of children. Founded in 1973, the nonprofit group uses its annual $9 million budget to lobby legislators and to speak out publicly on a broad array of issues on the law, the family, and society. It is involved in the welfare debate: The CDF has consistently fought for federal welfare programs that directly help poor children, a cause that has enjoyed significant success in Washington, D.C. In the 1980s, its intensive LOBBYING efforts saved billions of dollars in proposed funding cuts, and in the early 1990s, close ties with the administration of President BILL CLINTON increased its influence, leading to new federal legislation. Besides its work on Capitol Hill, the organization issues reports on the health and the economic and social well-being of U.S. children. The organization owes much of its effectiveness to the work of its founder and director, CIVIL RIGHTS attorney MARIAN WRIGHT EDELMAN.

The first black woman to pass the bar exam in Mississippi, Edelman fought RACIAL DISCRIMINATION in the 1960s. She initially came to national attention by stopping efforts in Mississippi to deny African Americans money from the federal Head Start program. By the end of the 1960s, she ran an advocacy group called the Washington Research Project, whose chief focus was antidiscrimination law. The group acquired powerful allies—one staff attorney was Hillary Rodham, who would become First Lady. Edelman lobbied extensively for federal HEALTH CARE and CHILD CARE, but to little avail. By 1973, she realized that "the country was tired of the concerns of the sixties. When you talked about poor people or black people, you faced a shrinking audience. I got the idea that children might be a very effective way to broaden the base for change." She renamed her organization, made children's issues its primary focus, and began building the corporate sponsorship that has grown to include such major donors as American Express and Coca-Cola.

The CDF has taken a stand against cutting federal programs that benefit poor children.

Leading its list are the Head Start and Women, Infants, and Children (WIC) nutrition programs. Although viewed as a liberal organization, it has blasted presidential administrations from Jimmy Carter's to George H.W. Bush's whenever budgets have been threatened. It has attacked social spending cuts as "callous" and motivated by "greed," arguing that welfare is properly seen as a children's issue. In a display of its influence during the Reagan era, the CDF convinced Congress to spare approximately $2.5 billion in cuts. In addition to supporting existing programs, the CDF has argued in favor of greater federal support for underprivileged families in the areas of housing, day care, child immunization, so-called family preservation programs, and employment training.

The organization's research and recommendations are often the catalyst for debate. For example, its 1991 study *Bright Futures or Broken Dreams: The Status of the Children of the District of Columbia and an Investment Agenda for the 1990s*—noting items such as infant mortality, teenage pregnancy and murder, and child abuse—concluded that "across almost every indicator of health, income, and social well-being, the status of children in the District is abysmal." Edelman opened the CDF's first local office in the District of Columbia. She called society's failure to save children's lives unforgivable and blamed it on local and federal governments. Such conclusions sit well with traditional liberals but not with conservatives. Nationally syndicated columnist Mona Charen, for example, attacked the CDF for wanting "a bigger and bigger welfare state, with less and less emphasis on personal responsibility and self control." Even neoliberals such as author Mickey Kaus found the CDF's social analysis to be outdated and its answers impractical. "Are American taxpayers more likely to open their wallets for someone with an unvarnished analysis of the underclass problem," Kaus wrote in the *New Republic,* "or someone who tries to overwhelm analysis with emotionalism about children?"

Despite such criticism, the organization's agenda flourished during the Clinton administration, in part due to long-established personal and political ties between the Clintons and Edelman: HILLARY RODHAM CLINTON was CDF chair from 1986 to 1992. The president promoted several of the CDF's positions in his legislative goals: He signed family-leave legislation and stepped up enforcement of CHILD SUPPORT payments with the help of the INTERNAL REVENUE SERVICE. He also proposed budgets that would fully fund or expand Head Start and WIC; advocated a comprehensive federal immunization program for children; and supported health care reform that would ensure care for children and pregnant women.

**Children Living in Poverty: Best and Worst States**

| Best States | | | Worst States | | |
|---|---|---|---|---|---|
| Rank | | Rate | Rank | | Rate |
| 1 | New Hampshire | 7.1% | 51 | District of Columbia | 30.9% |
| 2 | Minnesota | 9.3% | 50 | West Virginia | 27.7% |
| 3 | Colorado | 9.8% | 49 | Louisiana | 27.6% |
| 4 | Utah | 10.7% | 48 | Mississippi | 25.8% |
| 5 | New Jersey | 10.8% | 46 | Arkansas | 25.5% |
| | | | 46 | New Mexico | 25.5% |

SOURCE: Children's Defense Fund, *The State of Children in America's Union,* 2002.

The CDF has been critical of the administration of GEORGE W. BUSH with respect to federal support for poor children. Edelman and the organization have embarked upon a mission called Leave No Child Behind, calling for comprehensive legislation to provide federal support for the health, safety, and education of all children. The mission is named similarly to an initiative by Bush that resulted in the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (20 U.S.C.A. §§ 6301 et seq.), which was primarily an educational bill. Edelman and other CDF supporters have disapproved of several of Bush's initiatives relating to children's programs.

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Family Law.

## CHILDREN'S RIGHTS

*The opportunity for children to participate in political and legal decisions that affect them; in a broad sense, the rights of children to live free from hunger, abuse, neglect, and other inhumane conditions.*

The issue of children's rights is poorly defined in legislation and by the courts, partly because U.S. society as a whole has not decided how much autonomy to grant children. Although the United States is built on protecting

the interests of individuals and the twentieth century saw the rights of people with special needs recognized, the nation has yet to extend to children legal standing (the right to bring a court case) and legal protection similar to that of adults.

When most children's advocates talk about children's rights, they are not referring to the same rights held by adults, such as the rights to vote, drink, smoke, and run for office. Instead, they mean that more emphasis should be placed on children's status as "natural persons" deserving of benefits under the law as provided in the U.S. Constitution and its BILL OF RIGHTS.

The U.S. legal system grants rights to people who are deemed competent to exercise those rights. This qualification poses a dilemma for advocates of children's rights because most children lack the skills to advocate for themselves in the political, judicial, or economic arena. Yet, children's rights supporters believe that because of this powerlessness, children must be granted more protections and power than has been provided in their legal status.

PARENS PATRIAE ("the state as parent") is the philosophy that guided many court decisions in the 1990s. This approach basically assumes that the government has a duty to make decisions on behalf of children to ensure that their best interests are met. But the doctrine can be interpreted as allowing government interests to replace interests children may wish to express on their own behalf. It also assumes that what the government wants matches what the child needs, which may or may not be true.

How U.S. society defines and provides children's rights has implications for many areas: how children are represented by attorneys; how resources are distributed, for example, in a family experiencing DIVORCE; how long some children will live in abusive situations or foster care; how the role of families is viewed; and more.

### Court Standing

Twelve-year-old Gregory Kingsley made the news headlines in 1992 when he went to court to sever his legal ties to his parents—and won (*In re Kingsley,* No. JU90-5245, 1992 WL 551484 [Fla. Cir. Ct. Oct. 21, 1992; *Kingsley v. Kingsley,* 623 So. 2d 780 (Fla. Ct. App. 1993)]). A year later, Kimberly Mays, age 17, won her legal battle to end any parental rights her biological parents might attempt to exercise (*Twigg v. Mays,* No. 88-4489-CA-01, 1993 WL 330624 [Fla. Cir. Ct. Aug. 18, 1993]). What was unusual in both cases was that children were allowed to advocate for their interests on their own behalf. Some children's rights advocates believe that competent children like Mays and Kingsley must be allowed to use the courts to pursue their interests. But these particular cases may have done more to promote the discussion of children's rights than to promote actual rights.

For example, when Kingsley's mother subsequently appealed the termination of her rights, the appellate court ruled that as a minor, Kingsley alone did not have standing (*Kingsley v. Kingsley*). It was ultimately the support of adults who later joined Kingsley in bringing the case (including his adoptive parents), along with his parents' inability to care for him, that influenced the appeals court to affirm the lower court's decision.

The situation surrounding Mays's parentage is so unusual that few similar cases are anticipated to arise. Mays was raised by Robert Mays and Barbara Mays after being mistakenly identified as their daughter in the hospital where she was born. When Mays's biological parents discovered the switch more than a decade later, they sought visitation with Mays, starting a battle between them and the man who had believed that Mays was his daughter and had raised her alone after his wife's death.

Except when there is evidence of neglect or abuse, parents usually retain their status as preferred caretakers of their children. The case of *Meyer v. Nebraska,* 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) established that the Liberty Clause of the FOURTEENTH AMENDMENT gives parents the right to raise their children. The government's assumption is that parents' priorities match their children's.

The situation is less clear when the conflict is between children and their parents, as in the cases of Mays and Kingsley. When a family court is considering a CHILD CUSTODY or support petition, it may become aware that the parents are not acting in their children's best interests. In these cases, the court may appoint a GUARDIAN AD LITEM to identify the children's needs and to advocate that those needs be met. This caretaker "for the lawsuit" may be an attorney chosen to act on behalf of the child in court. But heavy increases in child protection and family court caseloads nationwide have led to long delays in making determinations on behalf of children—and have led many advocates to suggest that a

solution may lie in allowing children to initiate actions for themselves.

Many situations in which children and parents do not share common interests have not been resolved in favor of the minors. These include cases that challenge laws requiring minors to get their parents' consent before an ABORTION or that challenge parents' efforts to commit their children to psychiatric institutions. For example, in *Parham v. J. R.,* 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979), the Supreme Court decided that when parents seek to institutionalize their children in mental hospitals, the DUE PROCESS provided to the children need be no more than an evaluation by an independent medical decision maker. Again, the Court upheld the government's assumption that what is best for the children is what the parents and the state decide, despite criticisms that this is not always true.

### Juvenile Justice

Some advocates of children's rights believe that children should be afforded the same constitutional and procedural safeguards that adults are given in court. The juvenile justice system is cited by some experts as an area in which the protections granted to children lag behind those provided to adults. For example, children may be detained in situations where adults would not be. Bail is not set for children, and children do not receive the benefit of a jury of their peers. In some states, as recently as the late 1980s, minors could receive longer incarceration sentences than could adults.

Some constitutional protections were won in the late 1960s on behalf of juveniles who could be tried as adults. These protections included the right to an attorney's advice at the time when the court was deciding whether to try the juvenile as an adult, the right to a hearing on that issue, and the right to the same information the court would use in making a decision (IN RE GAULT, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 [1967]; *Kent v. United States,* 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d [1966]). However, advances in this area have not kept pace with federal and state legislation expanding the punishment of juveniles as adults.

### Constitutional Issues

Legal commentators have noted that the courts were seemingly willing to recognize the constitutional rights of children during the 1960s and 1970s. A series of U.S. Supreme Court decisions recognized minors' RIGHTS TO COUNSEL in criminal proceedings, to protection from SELF-INCRIMINATION, as well as other procedural rights and general privacy rights. However, according to some commentators, the 1988 case of *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988) marked a turning point in the Court's recognition of children's constitutional rights. In that case, the Court limited the right of children to exercise free speech and free expression. According to the decision, children's rights "are not coextensive with the rights of adults in other settings."

One 1993 study of constitutional decisions concluded that from the 1960s to the early 1990s, the U.S. Supreme Court was increasingly less supportive of expanding children's claims to constitutional rights. The study showed that under the liberal WARREN COURT, 100 percent of decisions about constitutional cases upheld children's claims. The Burger Court, which followed, upheld children's claims in 59 percent of such decisions, and the Rehnquist Court in 22 percent of such cases to 1993. The cases in the survey concerned issues of EQUAL PROTECTION, due process, privacy, free expression, and free exercise of religion.

Statistics such as these prompted concern among experts as to the denial of basic legal rights given to children. During the mid- to late-1990s, a number of scholarly article were published advocating expanded rights for children. However, the trend toward restricting children's rights continued into the early 2000s. Courts, with some frequency, find that children are not capable of managing full legal rights and of making decisions on their own behalf. The question of how far society should go in allowing children to participate in determining their destiny remains a difficult challenge.

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Child Abuse; Child Custody; Child Support; Divorce; Family Law; Guardian ad Litem; Parent and Child.

## CHILLING EFFECT DOCTRINE

*In* CONSTITUTIONAL LAW, *any practice or law that has the effect of seriously dissuading the exercise of a constitutional right, such as* FREEDOM OF SPEECH.

## CHINESE EXCLUSION ACT OF 1882

Passed by U.S. Congress in 1882 and signed into law by President CHESTER A. ARTHUR, the Chinese Exclusion Act (22 Stat. 58) created a ten-year MORATORIUM on the immigration of Chinese laborers into the United States. The Act represents the first law ever passed by Congress that denied entry to the United States on the basis of race or ethnicity. Congress indefinitely extended the act in 1902 and made it permanent in 1904. However, it was repealed in its entirety in 1943, when China became an important ally to the United States against Japan. However, its residual effect on Chinese-American relations continued far beyond.

Anti-Chinese sentiment in the United States began during the 1850s' Gold Rush, which eclipsed a period of great poverty in China. Chinese laborers flocked to California, where they soon became an exploited workforce because even the meager wages they earned in California represented far more than they could have earned in their homeland. By the 1870s, clear resentment existed among American miners, who felt their own wages were being held down by the industrious Chinese. U.S. miners also felt that the laborers were sending too much gold back to China, believing the natural resource should stay within the United States. Moreover, the Chinese were beginning to prosper in the laundry business, particularly in overcrowded San Francisco, where Victorian tastes and cultures approved of such domestic indulgences. Mounting political pressure resulted in heated debate, and final passage of the act occurred on May 6, 1882.

Under the provisions of the act, immigration of Chinese laborers to the United States was suspended for ten years. Chinese laborers already in the country were permitted to remain, even following temporary absences, but were barred from naturalization. Illegal immigrants were to be deported. Non-labor Chinese students, teachers, merchants, or those "proceeding to the United States from curiosity" were permitted entry. The act expressly defined "Chinese laborers" as "both skilled and unskilled laborers and Chinese employed in mining." Additional provisions of the act levied heavy fines on those who would bring in or "aid and abet" any Chinese person unlawfully within the United States.

Under the Geary Act (making the act permanent), other provisions were added to require Chinese residents in the United States to register and obtain a certificate of residence. This act required that they be photographed and submit photograph copies with local police. Moreover, they had to carry identification with them at all times. The federal government paid for all related costs associated with compliance.

Following an influx of general post-war immigrants during the 1920s, Congress began to implement quotas and requirements pertaining to national origin. By 1943, Congress repealed all exclusion acts, instead leaving in place a yearly limit of 105 Chinese. Further, Congress gave foreign-born Chinese naturalization rights of citizenship. The so-called origin system (with several subsequent modifications) continued to control immigration until the passage of the Immigration and Nationality Amendment Acts of 1965, Pub. L. No. 89–836, 79 Stat, 911.

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## CHIPMAN, DANIEL

Daniel Chipman was born October 22, 1765, in Salisbury, Connecticut. He graduated from Dartmouth College in 1788, pursued legal studies, and was admitted to the Vermont bar in 1790.

In 1794 Chipman relocated to Middlebury, Vermont, where he established a successful legal practice and acted as counselor until 1819. In 1797 he became state attorney for Addison County, performing these duties until 1817.

Chipman entered state politics in 1798 as a delegate from Middlebury to the General Assembly. From 1808 to 1815 he served as a member of the governor's council, acting as speaker in 1813 and 1814.

In 1814 Chipman began service in the federal government as a congressman; he left his post after one session, due to illness. In 1818 he returned to the General Assembly and represented Middlebury during that year and again in 1821.

Chipman's career interests also extended to the field of education. He accepted a professorship of law at Middlebury College in 1806 and taught for the next ten years.

The last years of Chipman's life were devoted to his writing; however, he also served as a Vermont supreme court reporter in 1823, and as a representative to two state constitutional conventions, in 1843 and in 1850.

As an author, Chipman wrote numerous publications, including several biographies. His most famous work is *An Essay on the Law of Contracts for the Payment of Specific Articles,* published in 1822.

Chipman died April 23, 1850, in Ripton, Vermont.

## CHISHOLM, SHIRLEY ANITA ST. HILL

A distinguished congresswoman, scholar, and African American spokeswoman, Shirley Chisholm was the first black woman elected to the U.S. House of Representatives. A dynamic public speaker who boldly challenged traditional politics, "Fighting Shirley Chisholm," as she called herself during her first congressional campaign, championed liberal legislation from her seat in the House beginning with her inauguration in 1968 and continuing until her retirement in 1982. Admirers and foes alike dubbed her the "Pepperpot" because of her fondness for saying, "I breathe fire." Known for her wit, dedication, and compassion, she remains a fierce and eloquent voice on national matters.

Chisholm was born Shirley Anita St. Hill on November 30, 1924, in the impoverished Bedford-Stuyvesant section of Brooklyn. Her father, an emigrant from Guyana, worked as an unskilled laborer, and her mother, a native of Barbados, was a seamstress and a domestic worker. Extraordinary circumstances separated Chisholm from her parents for much of her early childhood. Struggling to save money for a house and for their children's education, the St. Hills sent their four daughters to live on the farm of a grandmother in Barbados. From the age of three to the age of 11, Chisholm received a British elementary school education and acquired a West Indian rhythm of speech. An important influence on her early life, her grandmother instilled in her the values of pride, courage, and faith. Her parents took her back to Brooklyn at the age of 11.

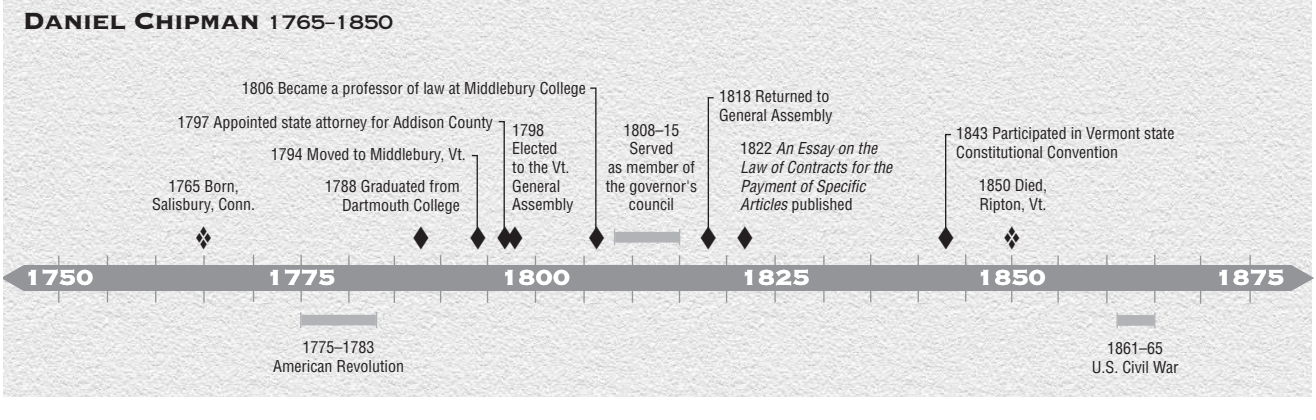

*Shirley Chisholm.* AP/WIDE WORLD PHOTOS

Graduating with an excellent academic record from a Brooklyn girls' high school, Chisholm earned a scholarship to study sociology at Brooklyn College. She quickly became active in political circles, joining the Harriet Tubman Society, serving as an Urban League volunteer, and winning prizes in debate. Her interest in her community led her to attend city meetings, where, as a student, she astonished older adults by confronting civic leaders with questions about the quality of government services to her predominantly black neighborhood. While beginning to establish her profile in her community, she also impressed her professors with a powerful speaking style and was encouraged to enter politics. She received her sociology degree with honors in 1946. While working in a nursery school she studied for a master's degree in elementary education at Columbia University where she met Conrad Chisholm, whom she married in 1949. Two years later she received her master's degree in early childhood education.

"THE WORD 'RADICAL,' PROPERLY USED, MEANS GOING TO THE BASIS OF A PROBLEM—THE WORD COMES FROM THE LATIN FOR 'ROOT'—RATHER THAN DEALING WITH ITS MANIFESTATIONS."
—SHIRLEY CHISHOLM

Over the next decade Chisholm built a reputation as an authority on early education and child welfare. She served as the director of the Friends Day Nursery, in Brownsville, New York, and, from 1953 to 1959, of the Hamilton-Madison Child Care Center, in Lower Manhattan. Taking her expertise into the public sector, she became an educational consultant in New York City's Bureau of Child Welfare from 1959 to 1964. In addition to her professional work, she participated in a variety of community and civic activities. She served on the board of directors of the Brooklyn Home for Aged Colored People and became a prominent member of the Brooklyn branch of the National Association for the Advancement of Colored People (NAACP). She frequently volunteered her time for such groups as the Democratic Women's Workshop; the League of Women Voters; and the Bedford-Stuyvesant Political League, an organization formed to support black candidates. Her intense participation in local politics—marked by her forthrightness and her willingness to confront politicians with difficult questions about racial equality—made her unpopular with the predominantly white Democratic establishment in New York. But it won her the recognition and respect of her community which was about 70 percent African American and Hispanic residents.

So well known was Chisholm in Brooklyn by 1964 that she could mount a successful campaign for a seat in the New York State Assembly despite having no support from the Democratic establishment. She stressed that "the people" had asked her to run. As an assemblywoman from 1964 to 1968, she spearheaded legislation providing for state-funded day care centers and for unemployment insurance for domestic workers. Of particular importance to her were bills that she shepherded through the Education Committee. One major accomplishment was a financial aid program known as Search for Elevation, Education and Knowledge (SEEK). Passed into law in 1965, SEEK reached out to students of color who lacked the necessary academic requirements to enter state universities by providing them with scholarships and remedial training. Other legislative successes boosted school spending limits and wiped out the practice of stripping tenure from women teachers who took maternity leave.

In 1968, Chisholm became the first African American woman to run for the U.S. Congress. In her pursuit of the Democratic nomination for the Twelfth District she bested two other African American candidates and was appointed New York's National Committee representative at the party's national convention. She later said that to win the nomination she had to beat the political machine, an entrenched bureaucracy that had never been fond of her brash style. With the nomination in hand, she faced her Republi-

can opponent, James Farber, a liberal white male who enjoyed national prominence as a CIVIL RIGHTS leader. Farber was expected to win, but on November 5, 1968, by a margin of more than 2–1, Chisholm staged an upset victory. The success of her antiestablishment campaign, which ran under the slogan "Unbought and Unbossed," was attributed both to widespread support from women and to her ability to address Puerto Rican voters in Spanish.

From the moment she took her seat in the House of Representatives, Chisholm demonstrated the bold iconoclasm that would mark her career in Washington, D.C. With her, it would not be politics as usual. Her initial appointment to a minor subcommittee of the Agriculture Committee struck her as a waste of her talents and experience, and, despite warnings that she was endangering her career, she protested. The House Ways and Means Committee relented and she was appointed to Veterans' Affairs. In her first speech on the floor of the House she vowed to vote against all defense spending. She told lawmakers, "Our children, our jobless men, our deprived, rejected and starving fellows, our dejected citizens must come first." In May of 1969 she gave a speech to the House of Representatives in which she introduced the EQUAL RIGHTS AMENDMENT and pointed out that the bill had been introduced before every Congress for the previous 40 years. To those who argued that women were already protected under the law, she pointed out that existing laws were inadequate and that the majority of women were concentrated in lower-paying menial jobs. "If women are already equal", she asked. "Why is it such an event whenever one gets elected to Congress?"

Chisholm's goals as a congresswoman were twofold. First, when she took office, only nine of the 435 House members were black, so she made herself an advocate for African Americans both in and out of her district. Second, she tried to advance the goal of racial equality. She supported programs that provided housing and education aid to cities, voted to uphold laws that would end discrimination in federally funded jobs, and promoted new antidiscrimination legislation. ABORTION rights also became a focal point in her politics. As a state assemblywoman she had supported bills that would make it easier for women whose lives were endangered to have abortions, although she had opposed outright legalization of abortion. But in 1968, with a change of heart, she agreed to be honorary president of the newly formed National Association for the Repeal of Abortion Laws. This would have been a dangerous position for an established politician, let alone a newly elected House member.

Independence of thought was Chisholm's hallmark, however, and the following year she crossed party lines to support Republican mayor John V. Lindsay in the New York mayoral election. Her decision so outraged her own party that some members called, unsuccessfully, for her ouster from the Democratic National Committee. But Chisholm saw the need for revamping traditional politics, supporting foes if necessary, and creating new bases of power. In 1971, along with such feminist leaders as author GLORIA STEINEM, she helped found the National Women's Political Caucus.

Chisholm's dramatic decision to run for president in 1972 came in part through her widely publicized opposition to the VIETNAM

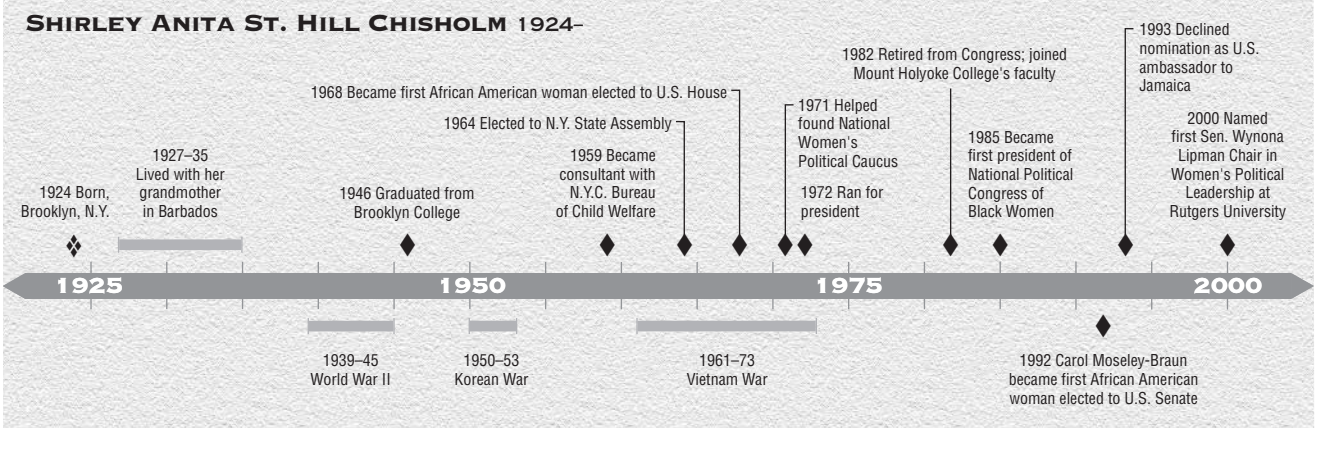

WAR and the policies of President RICHARD M. NIXON. While speaking at college campuses she was frequently asked if she would consider running. At first doubtful that an African American woman would stand a chance, she became encouraged by the growing numbers of blacks serving in elected office. Initially she received little support, even within black political circles, but following an enthusiastic tour of Florida, she announced her candidacy on January 25, 1972. During campaign stops she asked voters to replace entrenched white male leadership with a new voice: "I am your instrument of change. . . . give your votes to me instead of one of those warmed-over gentlemen who come to you once every four years." Criticized for running a hopeless campaign, she remained steadfast. "Some people call me a freak for running for the presidency," she said, "but I am very glad to be a freak in order to break down this domain."

Despite her popularity with women and young people, Chisholm's campaign suffered from limited finances, internal disarray, and lukewarm support from black political leaders. By July 1972, she had 28 delegates, almost half of what she had hoped to bring to the Democratic National Convention. Nevertheless, she won the support of the convention's black caucus, and, in a symbolic move, HUBERT H. HUMPHREY released his black delegates to vote for her. As a result, on the first ballot, she received 152 delegates and addressed the convention. But the number was far too small to stop candidate George S. McGovern from winning the party's nomination.

After the election the trouble that had beset her campaign continued. A 1973 report by the government's GENERAL ACCOUNTING OFFICE recommended that the U.S. JUSTICE DEPARTMENT investigate possible misconduct in handling campaign funds but a 1974 investigation found no evidence of any wrongdoing.

Following her reelection to the House in the fall of 1972, Chisholm served every two-year term until 1982. The seniority she earned over seven terms—she was the only woman on the House Rules Committee—made her effective in building coalitions among liberal politicians. In addition to supporting women's equality, she was instrumental in advancing welfare legislation designed to help poor and needy citizens. However, the onset of the Reagan era drastically changed the political landscape in Washington, D.C., as liberals were swept aside by conservative challengers. Announcing her retirement on February 10, 1982, Chisholm cited as her chief reason the defeat of liberal senators and representatives, which made it impossible for the old alliances to work.

Chisholm accepted an invitation to join the faculty at Mount Holyoke, the United States' oldest women's college, where she taught courses in political science and women's studies until 1987. She was also a visiting professor at Spelman College in Atlanta, Georgia. At one commencement address she urged new graduates to be active citizens: "Ask questions and demand answers. Do not just tend your garden, collect your paycheck, bolt the door, and deplore what you see on television. Too many people are doing that already. Instead, you must live in the mainstream of your time and of your generation." Although she had left Washington, D.C., she remained immersed in politics. In 1985, she became the first president of the newly formed National Political Congress of Black Women, which in three years grew from five hundred to 8,500 members. In 1988, she campaigned for the Reverend JESSE JACKSON, who was seeking the Democratic Party's presidential nomination.

Using her retirement to give speeches and commencement addresses on vital issues, Chisholm has continued to inspire the public imagination. She has advocated sex education for students beginning at the age of seven in order to combat the "national plague" of teenage pregnancy. In 1991, calling the small numbers of African American college professors a crisis in black education, she warned, "Blacks run the risk of becoming an intellectual boat people, just drifting." Opposing the Persian Gulf War in 1991, she argued that the expense of U.S. militarism blocked the goals of peace and equality. "The foundation is being laid for yet another generation of minority Americans to be denied the American dream," she cautioned.

In 1993, Chisholm was nominated to the position of ambassador to Jamaica but was prevented from assuming the role because of poor health. In 1999, she was a commencement speaker at San Diego State University College of Health and Human Services, where she received her 38th honorary degree. Chisholm received the AMERICAN ASSOCIATION OF RETIRED PERSONS (AARP) Andrus Award in May 2000. The award is given biennially to nationally recognized older Americans who have made significant contributions to society. In an interview with AARP's

news magazine *Modern Maturity,* the former congresswoman listed her grandmother, ELEANOR ROOSEVELT, and Harriet Tubman as her three greatest influences and stated that race and poverty were the two major issues that still need to be addressed in modern America.

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## CHISHOLM V. GEORGIA

*An early U.S. Supreme Court case holding that Article III of the federal Constitution gives the Court original jurisdiction over lawsuits between a state government and the citizens of another state, even if the state being sued does not consent. The decision generated immediate opposition from 12 states and led to the ratification of the* ELEVENTH AMENDMENT*, which gives states* SOVEREIGN IMMUNITY *from being sued in federal court by citizens of other states without the consent of the state being sued.*

In 1777, Robert Farquhar, a Charleston, South Carolina, merchant, sold goods to the Georgia army for use in the Revolutionary War. The next year Farquhar died, and in 1791, his executor, Alexander Chisholm, brought suit to collect the debt in the U.S. Circuit Court for the District of Georgia. Plaintiffs sought 100,000 pounds in sterling silver for payment of the debt plus interest. Notably, Associate Justice JAMES IREDELL, who later filed the famous dissenting opinion in the U.S. Supreme Court's decision in *Chisholm v. Georgia*, heard the arguments at the district court level while discharging his duties as a traveling circuit judge (in the early days of the U.S. Supreme Court, justices performed the double duty of deciding cases for the nation's highest court and *riding circuit* to hear cases in the particular jurisdictions they were assigned).

In his opinion for the circuit court, Iredell dismissed the suit for want of jurisdiction. If any court had jurisdiction over the dispute, Iredell said, it was the U.S. Supreme Court because Article III of the federal Constitution gave only the Supreme Court original jurisdiction over all cases in which a state is named as a party. "It may fairly be presumed," Iredell wrote for the circuit court, "that the several States thought it important to stipulate that so awful and important a Trial [to which a State is party] should not be cognizable by any Court but the Supreme." Iredell's conclusion was not challenged when the Supreme Court heard Chisholm under its original jurisdiction.

One reason Iredell's lower court decision was not challenged in the Supreme Court is that Georgia would likely have been the only party objecting to it, and Georgia refused to appear before the nation's high court after Chisholm refiled his lawsuit there. Georgia feared that by making an appearance at trial, the Supreme Court would deem that appearance consent to the Court's jurisdiction over the dispute, something Georgia denied the Court had power to exercise. Nonetheless, in public pronouncements the Georgia governor made clear that he believed the Court had no jurisdiction because the state had not consented to the suit in its capacity as an independent and sovereign government. Without such consent, the Georgia legislature contended, the states are immune from being sued in federal court, and Article III did nothing to abrogate this immunity.

At oral argument, the Supreme Court thus heard only from Chisholm's attorney, EDMUND RANDOLPH. According to Caleb Nelson in his article on sovereign immunity, a courtroom observer later reported that Georgia "was right in not appearing to this action," since Chief Justice JOHN JAY "said from the Bench that had the State pleaded it would have been an acknowledgement of the jurisdiction of the Court." Having heard from only one party to the dispute, the Supreme Court had no choice but to enter a default judgment in Chisholm's favor. *Chisholm v. Georgia*, 2 U.S. 419, 2 Dall. 419, 1 L.Ed. 440 (U.S. 1793).

In a 4–1 decision, the Court issued five separate opinions. Justices Jay, JAMES WILSON, WILLIAM CUSHING, and JOHN BLAIR JR. wrote opinions concurring in judgment, while Justice Iredell wrote the only dissent. The four concurring justices agreed that final sovereignty resided in the people of the United States, and at least for the purposes of this lawsuit Georgia was not a sovereign state. Wilson's opinion drew most attention among the concurring justices because Wilson had been the delegate who had introduced the Original Jurisdiction Clause at the Constitutional Convention in Philadelphia. Not surprisingly, Wilson said it was difficult for him to imagine words that would "describe, with

more precise accuracy, the cause now [pending] before the tribunal."

In his dissenting opinion Iredell observed that through the JUDICIARY ACT OF 1789 Congress had authorized federal courts to issue all writs "necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." Judiciary Act of 1789, ch. 20, §14, 1 Stat. 73, 81-82. Iredell interpreted "principles and usages of law" to mean the COMMON LAW of the several states, which Iredell said embodied the common law as it existed in England when America was first settled. Under the English common law, the British Crown was sovereign and could not be sued without its consent. Iredell then concluded that the states enjoyed the same sovereign immunity as the English King at the time of the American settlement. Article III did not alter the states' immunity from being sued without their consent, Iredell continued, and "even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case."

The states' reaction to the majority's decision in *Chisholm* was fast and furious. Each state understood the implications of being forced to pay Revolutionary War debt at a time when the state treasuries were struggling to avoid insolvency. The Massachusetts legislature led the way. In a resolution that was circulated to the other states, it condemned "a power . . . of compelling a State to be made defendant in any Court of the United States, at the suit of an individual." The resolution instructed the state's lawmakers "to obtain such amendments in the CONSTITUTION OF THE UNITED STATES as will remove any clause or article of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States." Other states quickly followed suit.

Congress responded to this groundswell of state activity by drafting the Eleventh Amendment. It provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or EQUITY, commenced or prosecuted against one of the United States by Citizens of another State . . ." In short, the Eleventh Amendment sought to guarantee states sovereign immunity from being sued in federal court without their consent, the very right denied to them in *Chisholm*. By 1798 the requisite 12 states had ratified the amendment. New Jersey and Pennsylvania refused to ratify, while Tennessee and South Carolina took no action.

*Chisholm v. Georgia* is considered the first great case decided by the U.S. Supreme Court. The case forced the Court to grapple with contentious debates over FEDERALISM or the proper balance of power between the state and federal governments. It was heard by justices who not only participated in the Constitutional Convention, but by the one justice who had actually drafted the very constitutional provision being scrutinized. Finally, *Chisholm v. Georgia* is the first Supreme Court case that was superseded by a constitutional amendment.

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CROSS-REFERENCES

Eleventh Amendment; Federalism; Sovereign Immunity.

## CHOATE

*Perfected, complete, or certain.*

A *choate right* is an undefeatable right that is totally valid and cannot be subsequently lessened or altered by later claims. If someone purchases a plot of land totally free from encumbrances, that person has a choate property interest in the land.

A *choate lien* is one to which nothing further must be done to make it enforceable. Elements such as the identity of the lienor and the property that is subject to the lien are established; thus, the lien is certain and definite.

*Inchoate,* the opposite of choate, is the more commonly used phrase. It means unfinished or incomplete and is used to describe a number of things such as liens, rights, crimes, or interests. For example the term inchoate BATTERY can be used to describe an assault.

## ♦ CHOATE, JOSEPH HODGES

Joseph Hodges Choate was a popular lawyer in New York in the late 1800s. Choate distinguished himself by his exceptional career before the bar, his accomplishments as ambassador to the Court of St. James's (an ambassador to England), his dedication to public service, and his sharp wit and clever after-dinner speeches.

Choate was born January 24, 1832, in Salem, Massachusetts, the fifth of six children and the youngest of four boys in a family with an established heritage. His father, Dr. George Choate, was a graduate of Harvard University and Harvard Medical School and was one of Salem's most distinguished physicians. Choate was also the cousin of Congressman **RUFUS CHOATE**, who was just beginning his second term when Choate was born.

Continuing the family tradition, Choate attended Harvard with his three brothers. He went on to Harvard Law School, graduating in 1855. Choate then left New England to pursue a career in New York. With the help of a letter from Rufus Choate to **WILLIAM M. EVARTS** (who would become **SECRETARY OF STATE** for President **RUTHERFORD B. HAYES** from 1877 to 1881), Choate joined the law office of Butler, Evarts, and Southmayd.

Choate's skills as an orator made him a formidable litigator. He appeared in hundreds of cases covering a wide range of controversies. One of the most notorious of these cases was the prosecution of William Marcy ("Boss") Tweed. Tweed, elected to the New York State Senate in 1868, headed **TAMMANY HALL**, a corrupt political organization in New York City that was controlled by the **DEMOCRATIC PARTY**. In 1871 Choate was appointed to the committee that eventually charged Tweed with embezzling funds from the city treasury.

*Joseph H. Choate.*
LIBRARY OF CONGRESS

Many of Choate's cases involved matters of national importance and were appealed to the U.S. Supreme Court. Choate unsuccessfully fought Kansas's liquor prohibition in *Mugler v. Kansas,* 123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1887), and anti-Chinese legislation in *Fong v. United States,* 149 U.S. 698, 13 S. Ct. 1016, 37 L. Ed. 905 (1893). He successfully appealed claims of certain Native Americans that the government had reneged on a treaty and deprived them of their land in *New York Indians v. United States,* 170 U.S. 1, 18 S. Ct. 531, 42 L. Ed. 927 (1898). In the landmark case **POLLOCK V. FARMERS' LOAN &**

"LAW IS THE EXPRESSION AND THE PERFECTION OF COMMON SENSE."
—JOSEPH CHOATE

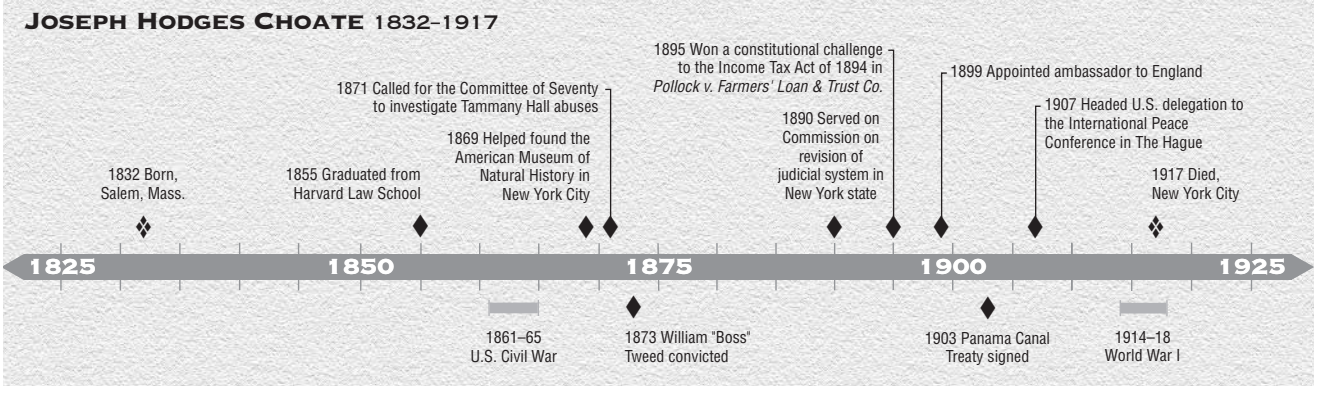

TRUST CO., 157 U.S. 429, 15 S. Ct. 673, 39 L. Ed. 759 (1895), *reh'g granted,* 158 U.S. 601, 15 S. Ct. 912, 39 L. Ed. 1108 (1895), *overruled by South Carolina v. Baker,* 485 U.S. 505, 108 S. Ct. 1355, 99 L. Ed. 2d 592 (1988), Choate won a constitutional challenge to an INCOME TAX act of 1894. In his winning argument, Choate said, "The act . . . is communistic in its purposes and tendencies, and is defended here upon principles as communistic, socialistic—what should I call them—populistic as ever have been addressed to any political assembly in the world."

Choate's prominence as an attorney attracted the attention of the White House and in January 1899, President WILLIAM MCKINLEY appointed Choate ambassador to the Court of St. James's, in England. As ambassador Choate negotiated the Hay-Pauncefote Treaty, which allowed the U.S. government to build and operate the Panama Canal. Choate was also instrumental in gaining an "open door" to China, and he resolved a controversy over Samoa with Germany and the United Kingdom. In 1907 Choate headed the delegation from the United States at the International Peace Conference at The Hague.

Choate supported many charitable causes. He was president of the New York State Charities Aid Association and of the Association of the Blind. Choate was a member of the Provisional Committee of 1869 which was appointed to establish the Metropolitan Museum of Art. He continued his relationship with the museum as one of its incorporators and as a member of the executive committee of the board of trustees. He was also an incorporator and officer of the Museum of Natural History.

Choate's successes were due in part to his talents as a public speaker. His keen intellect and engaging speaking style combined with his sense of humor to captivate audiences. No lawyer of the New York bar was in as much demand at public functions. He had speaking engagements before the New England Society, the Union League Club, and the Century Association before and during his presidency of these societies, at dinners and receptions of the bar association, and at innumerable philanthropic events. Shortly after Choate had passed his eighty-fifth birthday he was appointed chairman of a committee of citizens to receive French and British commissioners on a visit to the United States. He was in poor health but he survived long enough to fulfill his duties. Choate died May 14, 1917, in New York City.

Choate once described the path of his career as follows:

> To be a priest . . . in the temple of justice, to serve at her altar and aid in her administration, to maintain and defend those inalienable rights of life, liberty, and property upon which the safety of society depends, to succor the oppressed and to defend the innocent, to maintain constitutional rights against all violations, . . . to rescue the scapegoat and restore him to his proper place in the world—all this seemed to me to furnish a field worthy of any man's ambition.

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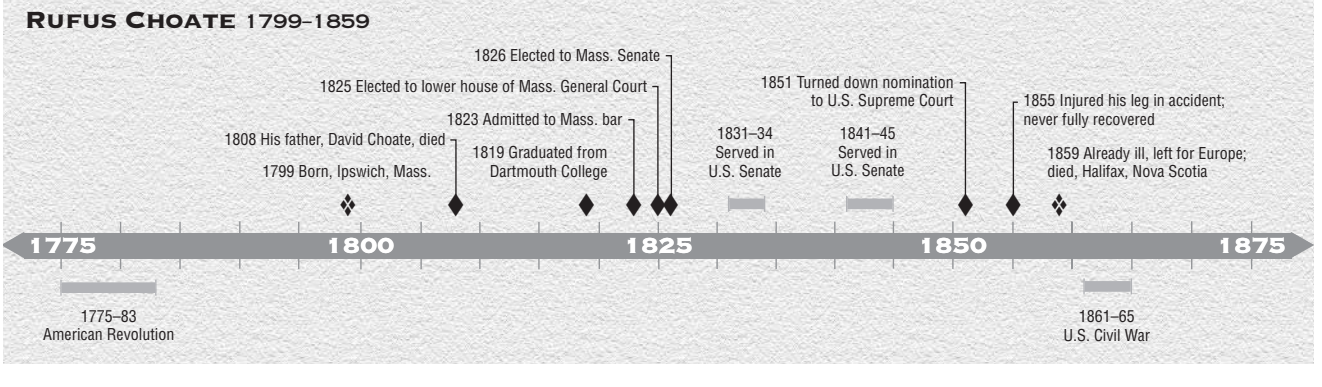

## ♦ CHOATE, RUFUS

Rufus Choate was born October 1, 1799, in Ipswich, Massachusetts. He graduated from Dartmouth College in 1819 and was admitted to the bar in 1823.

In 1827 Choate served as a member of the Massachusetts Senate and from 1831 to 1834 he acted as a representative from Massachusetts to the U.S. House of Representatives. He was involved in the organization of the WHIG PARTY in Massachusetts. He served as U.S. senator from Massachusetts from 1841 to 1845.

Choate continued his participation in politics by nominating DANIEL WEBSTER for the presidency in 1852 and by attending the Massachusetts Constitutional Convention in 1853. He is the author of the *Discourse Commemorative of Daniel Webster.*

Choate died July 13, 1859, in Halifax, Nova Scotia.

## CHOSE

*[*French, Thing.*]* *Chattel; item of* PERSONAL PROPERTY.

## CHOSE IN ACTION

*The right to bring a lawsuit to recover chattels, money, or a debt.*

A *chose in action* is a comprehensive term used to describe a property right or the right to possession of something that can only be obtained or enforced through legal action. It is used in contradistinction to *chose in possession*, which refers to cases where title to money or property is in one person but possession is held by another.

Examples of a chose in action are the right of an heir to interest in the estate of his or her decedent; the right to sue for damages for an injury; and the right of an employee to unpaid wages.

## CHRISTIAN COALITION

The Christian Coalition is a nonprofit organization that serves as a powerful lobby for politically conservative causes. Under federal tax law, the organization is permitted to lobby for political issues but cannot endorse political candidates. The Christian Coalition has primarily sought the support of born-again evangelical Christians, but since 1996 it has attempted to build alliances with Roman Catholics, members of the Greek Orthodox Church, and Jews.

The Christian Coalition was founded in 1989 by religious broadcaster Pat Robertson. Robertson, who unsuccessfully sought the 1988 REPUBLICAN PARTY presidential nomination, decided to create an organization of evangelical Christians that would exert influence over the party. The coalition's central goals have been to gain working control of the Republican Party through grassroots organizing and to elect Christian candidates to office. The coalition soon became a potent political force. By 1997, it claimed control of several Republican state central committees and had elected to public office numerous Christian Coalition members and other candidates it endorsed. Prior to the congressional elections of 2002, the Christian Coalition distributed 70 million voter guides throughout the 50 states, an effort that has been credited with helping the Republican Party gain control of Congress.

The Christian Coalition has focused on family and moral issues. It strongly opposes legalized ABORTION, and in 1998 it began an effort to require all endorsed Republican candidates to oppose partial-birth abortions. The coalition has also campaigned against gay rights, and through its legal arm, the American Center for Law and Justice, it has filed many church-state lawsuits.

Robertson, who served as president until 1997, appears on the *700 Club*, a television program that, as of July of 2003, is watched by 1 million viewers each week. Robertson has characterized politics as a struggle pitting militant leftists, secular humanists, and atheists against conservative, evangelical Christians. The success of the coalition's grassroots organizing, however, can be attributed to Ralph Reed, who served as executive director until 1997. Reed encouraged coalition members to run for school boards, city councils, and legislatures without revealing their affiliation. This strategy also proved effective within the Republican Party.

The Christian Coalition has over 1,500 chapters in the United States with over one million members. The coalition's staff is headquartered in Chesapeake, Virginia; it also maintains a legislative office in Washington, D.C. With a budget of more than $27 million, the coalition has the resources to mount nationwide campaigns on public policy issues. The organization also actively lobbies Congress on numerous issues, sponsors grassroots training schools across the United States, and organizes activists

*Christian Coalition founder Pat Robertson (right) and the group's former executive director Ralph Reed built the organization into a powerful political force whose grassroots organizing is credited with helping the Republicans gain control of Congress in 1994.*

AP/WIDE WORLD PHOTOS

around the country who are involved in federal and local politics.

The election of GEORGE W. BUSH as president in 2000 and the gain of Republican seats in both the House and Senate in 2002 gave increased clout to the Christian Coalition's already vigorous advocacy. In early 2003, the Christian Coalition lobbied for the confirmation of Miguel Estrada, an Hispanic lawyer, to be a judge on the District of Columbia Circuit Court of Appeals. According to the coalition, his confirmation was "being blocked by those who would subject judicial nominees to a liberal litmus test." The organization also supported a ban on partial-birth abortions and the cloning of humans. In addition, the Christian Coalition voiced strong support for President Bush as the United States was poised on the brink of war with Iraq.

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## CHRISTIAN LEGAL SOCIETY

The Christian Legal Society (CLS), founded in 1961, is a nonprofit organization of lawyers, judges, law professors, and law students. The group's missions are to promote high ethical standards within the legal profession, to support its members' commitment to Christian professional lives, and to advance religious freedom for all U.S. citizens regardless of affiliation. CLS provides resources for research into law and theology; maintains a data bank of commentaries on legal issues; and provides a speakers' bureau, a lawyer-referral service, and mediation and ARBITRATION services. It also publishes *Christian Legal Society—Briefly,* a quarterly newsletter for its members, and *Christian Legal Society—Quarterly,* a magazine that covers issues that are in line with the society's goals. CLS's legal-advocacy arm, the Center for Law and Religious Freedom, promotes freedom of religion and challenges government interference with the free exercise of religion.

In 1993, CLS backed passage of the Religious Freedom Restoration Act (RFRA), 42 U.S.C.A. §§ 2000bb, et seq., a response to the 1990 U.S. Supreme Court decision in *Employment Division, Department of Human Resources v. Smith,* 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876. *Smith* upheld a denial of unemployment benefits to Native Americans who had been fired from their jobs for using peyote, a hallucinogenic drug, as part of a religious ceremony. CLS and numerous other groups representing a wide range of religious and political persuasions lobbied for RFRA, which requires the government to show a "compelling state interest," such as public health or safety, before interfering with religious practices.

CLS members successfully argued two important religious-freedom cases before the U.S. Supreme Court in 1993. In *Zobrest v. Catalina Foothills School District,* 509 U.S. 1, 113 S. Ct. 2462, 125 L. Ed. 2d 1, the Court held that the Establishment Clause did not prohibit a public school district from paying for a sign language interpreter for a deaf student who attended a Catholic high school. In *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352, the Court held that a school district's denial of a religious organization's application to use school facilities to show a film on Christian values in family relationships violated the church's FIRST AMENDMENT right to FREEDOM OF SPEECH.

In *Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995), CLS supported the plaintiff, who sued the University of Virginia

for denying his request for financial support for publication of a Christian magazine. Although the university subsidized a wide range of publications from its Student Activities Fund (SAF), it denied Ronald W. Rosenberger's request on the grounds that his magazine violated SAF guidelines. Rosenberger argued that the guidelines, which prohibited the university from subsidizing a publication that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality," violated his free speech rights. A brief filed by CLS maintained that the guidelines discriminated on the basis of religious belief and that a decision against the plaintiff would be a step toward "a relentlessly secular society" that is intolerant of religious persons and their views. The U.S. Supreme Court decided in favor of the plaintiff but rested its holding on free speech grounds, stating that the SAF guidelines discriminated on the basis of viewpoint and violated the plaintiff's First Amendment rights.

The position taken by CLS in its *amicus* brief filed in the U.S. Supreme Court case of BOY SCOUTS OF AMERICA V. DALE, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000) also raised arguments considered by the high court in its final ruling. The Court held that New Jersey's public-accommodations law violated the Boy Scouts' First Amendment right of association when the law required the Boy Scouts of America to admit James Dale, an avowed homosexual and gay-rights activist, as a member of its organization. The Boy Scouts, a private, not-for-profit organization, had asserted that homosexual conduct was inconsistent with the values it sought to instill in its members.

In the early part of the decade, CLS filed *amicus* briefs in numerous cases involving religious, ethical, or moral issues, including *Newdow v. U.S. Congress*, 292 F.2d 597 (9th Cir. 2002), *judgement stayed* (opposing a challenge to the "under God" phrase in the Pledge of Allegiance) and *Oregon v. Aschcroft*, 192 F. Supp. 2d 1077 (D. Or. 2002) (supporting Attorney General Ashcroft's directive to revoke federal controlled-substances licenses from physicians who prescribed narcotics for suicides). In 2002, CLS also published a scholarly position paper opposing human cloning for any purpose. It argued that the scientific distinction between human reproductive cloning and therapeutic (stem cell) cloning was specious and not supported by scientific data, in that both forms of cloning required the killing of a living human embryo.

CLS members are committed to the biblical injunction to "not leave justice and the love of God undone" (Luke 11:42, Matt. 23:23). They are dedicated to ending injustice, limiting or eliminating legal ABORTION, outlawing PORNOGRAPHY, and bringing religious thought and precepts into public education. They also are committed to the evangelization of the legal profession, and plan to increase the society's membership by ten to 12 percent each year.

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## CHURNING

*The practice whereby a* BROKER *dealing in* SECURITIES *abuses the confidence of a client for personal gain by unnecessarily trading stocks to earn more commissions.*

## CIPOLLONE V. LIGGETT GROUP, INC.

See TOBACCO "Cipollone v. Liggett Group, Inc." (Sidebar).

## CIRCUIT

*A territorial or geographical division of a country or state.*

A circuit is the judicial territory over which a court has the jurisdiction to hear cases.

## CIRCUIT COURT

*A specific tribunal that possesses the legal authority to hear cases within its own geographical territory.*

A circuit court is ordinarily an inferior trial-level court; appeals are heard by superior courts possessing the requisite jurisdiction. The jurisdiction of a circuit court generally extends over a number of counties or districts wherein the court sits.

The name *circuit court* can be traced historically to the period when a single judge rode the circuit to hold trials in each county within the designated territory. In geographical locations with small populations, this method of dispensing justice eliminates the expense of providing every small village with its own judiciary.

## CIRCUMSTANTIAL EVIDENCE

*Information and testimony presented by a party in a civil or criminal action that permit conclusions that indirectly establish the existence or nonexistence of a fact or event that the party seeks to prove.*

CIRCUMSTANTIAL EVIDENCE is also known as indirect evidence. It is distinguished from direct evidence, which, if believed, proves the existence of a particular fact without any inference or presumption required. Circumstantial evidence relates to a series of facts other than the particular fact sought to be proved. The party offering circumstantial evidence argues that this series of facts, by reason and experience, is so closely associated with the fact to be proved that the fact to be proved may be inferred simply from the existence of the circumstantial evidence.

The following examples illustrate the difference between direct and circumstantial evidence: If John testifies that he saw Tom raise a gun and fire it at Ann and that Ann then fell to the ground, John's testimony is direct evidence that Tom shot Ann. If the jury believes John's testimony, then it must conclude that Tom did in fact shoot Ann. If, however, John testifies that he saw Tom and Ann go into another room and that he heard Tom say to Ann that he was going to shoot her, heard a shot, and saw Tom leave the room with a smoking gun, then John's testimony is circumstantial evidence from which it can be inferred that Tom shot Ann. The jury must determine whether John's testimony is credible.

Circumstantial evidence is most often employed in criminal trials. Many circumstances can create inferences about an accused's guilt in a criminal matter, including the accused's resistance to arrest; the presence of a motive or opportunity to commit the crime; the accused's presence at the time and place of the crime; any denials, evasions, or contradictions on the part of the accused; and the general conduct of the accused. In addition, much SCIENTIFIC EVIDENCE is circumstantial, because it requires a jury to make a connection between the circumstance and the fact in issue. For example, with fingerprint evidence, a jury must make a connection between this evidence that the accused handled some object tied to the crime and the commission of the crime itself.

Books, movies, and television often perpetuate the belief that circumstantial evidence may not be used to convict a criminal of a crime. But this view is incorrect. In many cases, circumstantial evidence is the only evidence linking an accused to a crime; direct evidence may simply not exist. As a result, the jury may have only circumstantial evidence to consider in determining whether to convict or acquit a person charged with a crime. In fact, the U.S. Supreme Court has stated that "circumstantial evidence is intrinsically no different from testimonial [direct] evidence" (*Holland v. United States,* 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150 [1954]). Thus, the distinction between direct and circumstantial evidence has little practical effect in the presentation or admissibility of evidence in trials.

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## CITATION

*A paper commonly used in various courts—such as a probate, matrimonial, or traffic court—that is served upon an individual to notify him or her that he or she is required to appear at a specific time and place.*

*Reference to a legal authority—such as a case, constitution, or treatise—where particular information may be found.*

Cases are published in a series of books called reporters, which are compilations of judicial decisions made in a certain court, state, or jurisdiction. Reporters are published in consecutively numbered volumes, each of which contains the most recently decided cases. When the volume numbers on a set of reporters get too high, the publisher will begin a new set with a new series of numbers.

To refer to a particular case in a reporter, a designation including the volume number, the name of the reporter, and the page number is given. If, for example, a case decided in the U.S. Supreme Court were cited as 60 S. Ct. 710, the case would be in volume 60 of the Supreme Court Reporter on page 710. To promote uniformity of citations, many lawyers and law students use *The Blue Book: A Uniform System of Citation*, commonly referred to simply as *The Blue Book.* This manual is published jointly by law schools at Harvard, Yale, Columbia, and the University of Pennsylvania. Other citation manuals have also been published.

When a court issues a citation, it orders a person to appear at a certain time and place. Failure by the person to adhere to the requirements in a citation results in punishment by the court. On appeal, a court may issue a citation of appeal, giving parties notice of the appeal and ordering them to appear in court. Issuance of a citation is required in order to give an appellate court jurisdiction over the appeal. The clerk of a court is generally required to issue a citation.

Police officers also issue citations for minor offenses, especially for traffic violations. The citation that an officer gives to a violator states the charge and requires an appearance before a judge on a specified date, subject to punishment for failure to appear. Citations issued by police officers for minor violations are typically only admissible for a criminal action that is based upon the violation. In most jurisdictions, evidence of an arrest from a citation is not admissible in a civil action based upon the same facts.

CROSS-REFERENCES

Legal Publishing.

## CITATOR

*A volume or set of volumes that is a record of the status of cases or statutes.*

A citator is a guide published primarily for use by judges and lawyers when they are in the process of preparing such papers as judicial decisions, briefs, or memoranda of law. Its purpose is to provide a judicial history of cases and statutes as well as to make a note of new cases. A citator indicates whether or not the law in a particular case has been followed, modified, or overruled in subsequent cases.

A citator is usually organized into columns of citations. Various abbreviations designate such things as whether a case has been overruled, superseded, or cited in the dissenting opinion of a later case.

The most well-known and commonly used citator is SHEPARD'S CITATIONS. The process of consulting this book or any other citator is known as shepardizing a case.

## CITE

*To notify a person of a proceeding against him or her or to call a person forth to appear in court.*

*To make reference to a legal authority, such as a case, in a citation.*

Cases, statutes, constitutions, treatises, and other similar authorities are cited to support a certain view of law on an issue. When writing a legal brief, an attorney may wish to strengthen his or her position by referring to cases that support what he or she is saying in order to persuade the court to make a ruling favorable for the client.

CROSS-REFERENCES

Precedent; Stare Decisis.

## CITIZENS

*Those who, under the Constitution and laws of the United States, or of a particular community or of a foreign country, owe allegiance and are entitled to the enjoyment of all* CIVIL RIGHTS *that* ACCRUE *to those who qualify for that status.*

Neither the United States nor a state is a citizen for purposes of DIVERSITY OF CITIZENSHIP, a phrase that is used in regard to the jurisdiction of the federal courts, which—under Article III, Section 2, of the Constitution—empowers those courts to hear and decide cases between citizens of different states. Municipalities and other local governments, however, are deemed to be citizens.

The term *citizen* in Article III of the Constitution, which established the federal judiciary, includes corporations; therefore, suits concerning corporations involve citizens for federal jurisdictional purposes. The term *citizen,* however, as defined by the Fourteenth and Fifteenth Amendments, does not encompass either corporations or ALIENS. Neither corporations nor aliens receive the protection of the PRIVILEGES AND IMMUNITIES Clauses of the FOURTEENTH AMENDMENT and Article IV, as those clauses protect only citizens.

Aliens, however, are considered to be "persons" for the purposes of the DUE PROCESS Clauses of the Fifth and Fourteenth Amendments and the EQUAL PROTECTION CLAUSE of the Fourteenth Amendment. In the 1982 case of *Plyler v. Doe,* 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786, the U.S. Supreme Court recognized that even illegal aliens are "persons" within the Equal Protection Clause of the Fourteenth Amendment for purposes of public education. A corporation is also deemed to be a citizen for certain purposes. It is a citizen of the United States and of the state under whose laws it was organized. A particular state, commonly Delaware, is selected for incorporation because

that state charges lower taxes and its laws favor businesses. Once the company incorporates in the designated state, it is a citizen of that state, but it can apply in any other state for authority to do business there.

The Fourteenth Amendment to the Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . ." The important right of citizenship, whether for native-born or naturalized citizens, cannot be divested, whether as punishment for a crime or for any other reason, by the states or the federal government, including their agencies and officials (see also *Afroyim v. Rusk,* 387 U.S. 253, 87 S. Ct. 1660, 18 L. Ed. 2d 757 [1967]). American citizenship can be relinquished, but it cannot be taken away unless it was procured through FRAUD or any other unlawful action.

The Fourteenth Amendment, through the inclusion of the phrase "all persons," was specifically enacted in 1868 specifically to grant citizenship to former slaves. Since 1924, it has been judicially interpreted to include American Indians. U.S. citizenship does not divest an Indian of tribal citizenship but, rather, coexists with it.

The Fourteenth Amendment does not, however, make children who are born within the territory of the United States of foreign ambassadors, consuls, and military officers American citizens. Such children derive their citizenship from their parents.

Ordinarily, a person who is in a country other than the one of which he or she is a citizen owes to that country a type of "temporary allegiance," which essentially is a respect for the laws of the host country, although it is not as substantial as the loyalty demanded of citizens. It requires that an alien observe the laws of the country and, in some countries, even serve in the military; it ensures the protection of the alien by the laws of the country.

Ambassadors, consuls, and military officers, however, owe no allegiance to the foreign country where they are assigned, and their children are not "born within the allegiance" of a foreign country in which they serve.

### Citizen of a State

The Fourteenth Amendment provides that American citizens are also citizens "of the state wherein they reside," but U.S. citizenship does not necessitate residence in a particular state. Persons living abroad, for example, are citizens of the United States but not of any state.

One significant legal disadvantage exists for a person who is not a citizen of a state. The Constitution provides that federal courts can hear "Controversies . . . between Citizens of different States." The phrase "Citizens of different States" includes citizens of Puerto Rico, the Virgin Islands of the United States, and Guam. Puerto Rico is in the First Circuit, the Virgin Islands are in the Third Circuit, and Guam, Alaska, and Hawaii are in the Ninth Circuit. A person who is not a resident of a state or designated area, even if he or she is a U.S. citizen, cannot satisfy the diversity of citizenship requirement and therefore cannot bring an action under the Diversity Clause in a federal court.

### American Citizenship

U.S. citizenship is attained either by birth or by naturalization, the legal procedure that a qualified person must satisfy in order to be accepted as a citizen.

Federal law provides that those who are born in any of the 50 states, Puerto Rico, the former Panama Canal Zone, the Virgin Islands of the United States, and Guam are all native-born citizens, including the children of an American Indian, Eskimo, Aleutian, or any other tribal member.

Persons born in outlying possessions of the United States, such as Wake Island or Midway Island, and their children are called *nationals.* They owe allegiance to the United States and enjoy some rights. The term *national* denotes everyone who owes allegiance to the country, including citizens, but not every national possesses all of the rights of a citizen.

A person born beyond the geographical boundaries of the United States and its outlying possessions, of parents who are both U.S. citizens, is a national and a citizen of the United States at birth if one parent had a residence in the United States or one of its outlying possessions prior to the birth of such person. If only one parent is a citizen and the other is a national—but not a citizen—the parent who is a citizen must have been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of the child in order for the child to be a national and a citizen of the United States at birth.

A person born out of wedlock in a foreign country acquires at birth American citizenship if the mother was a citizen at the time of such person's birth and had formerly been physically present in the United States or one of its outlying possessions for a continuous period of one year preceding the birth.

### Derivative Citizenship

A child born in a foreign country can become a U.S. citizen if his or her parents become naturalized U.S. citizens. If the child is brought to the United States before becoming an adult, and the child's parents become citizens, then the child is entitled to claim U.S. citizenship when he or she becomes an adult. Although his or her birth certificate will still reflect a foreign-born status, a person in this situation can obtain a certificate of nationality by filing an application with the SECRETARY OF STATE.

### Rights of U.S. Citizens

Everyone within the jurisdiction of the United States is protected by most of the guarantees and safeguards of the Constitution. A U.S. citizen traveling abroad retains the protection of the United States. If property of an individual is stolen while he or she is in a foreign country, the United States consul can lend him or her money to return to the United States. U.S. citizens, of course, must observe and obey the laws of other countries while they are visiting, but if a U.S. citizen is arrested, a representative from the U.S. ambassador's office can visit him or her and inform the foreign government that the treatment of the U.S. citizen will be scrutinized.

Unlike citizens of other countries, U.S. citizens are entitled to enter into, and to depart from, the United States, and to obtain a passport from the government. The passport certifies to foreign nations that its holder is entitled to all of the protection afforded by the U.S. government. The right to enter and leave the United States is so fundamental, however, that a citizen cannot be prevented from coming into the United States merely because he or she has no passport. Even if someone departs from the country without obtaining a passport, knowing that he or she should have done so, he or she must be permitted to enter upon returning if a birth certificate or expired passport is presented, or if the person takes an oath as to his or her citizenship.

However, the U.S. government can prohibit its citizens from traveling in designated countries that are hostile to the U.S. and perilous to U.S. citizens. The passport of a person who ignores these restrictions can be revoked, and such a traveler can be denied protection by the government.

*Immigrants take an oath of citizenship in a 1990 ceremony held on Ellis Island in New York City. Naturalized citizens have all the rights of a native-born U.S. citizen with one exception: they cannot serve as president of the United States.*

AP/WIDE WORLD PHOTOS

A naturalized citizen has all of the rights of a native-born U.S. citizen but one: He or she can never be president of the United States. Article II of the Constitution provides: "No person except a natural-born Citizen, or a Citizen of the United States, at the time of Adoption of this Constitution, shall be eligible to the Office of President."

### Obligations of Citizenship

The most fundamental duty of a citizen is to be loyal to the United States. Allegiance is not an unquestioning acceptance, but a general faith in the U.S. system. In times of national emergency, citizens can be required to defend the country, through military service or alternative service such as employment in a hospital.

Issues surrounding the duties of citizens often arise in the same context as the freedoms enjoyed by citizens of the United States. In one of his more famous speeches, *The Duties of American Citizenship*, President THEODORE ROOSEVELT said, "It ought to be axiomatic in this country that every man must devote a reasonable share of his time to doing his duty in the Political life of the community. No man has the right to shirk his political duties under whatever plea of pleasure or business. . . ."

In the wake of the SEPTEMBER 11TH ATTACKS in 2001, the case against one American citizen, John Philip Walker Lindh, demonstrated the

attitude that the U.S. government takes against nationals who breach their duty of citizenship. Lindh, also known by the Islamic names Suleyman al-Faris and Abdul Hamid, as well as the nickname "the American Taliban," converted to Islam in 1997. After visiting such countries as Yemen and Pakistan to study Islam at various times from 1997 to 2000, Lindh began training with the terrorist organization al-Qaeda in 2001. Both before and after the terrorist attacks in September 2001, Lindh served the Taliban regime of Afghanistan in an ongoing conflict with the Northern Alliance in northeastern Afghanistan. Lindh was captured by Northern Alliance groups in November 2001. He was eventually turned over to the U.S. military, who returned him to the United States on January 23, 2002.

In the case of *United States v. Lindh*, 198 F. Supp. 2d 739 (E.D. Va. 2002), Lindh was indicted on ten criminal charges, including conspiracy to murder U.S. nationals, contributing to and conspiring to contribute to al-Qaeda, and using and carrying firearms and other destructive devices during crimes of violence. Lindh pled guilty in July 2002 to a count of supplying services to the Taliban government and received a 20-year sentence.

### Surrender of Citizenship

Unlike some nations, the United States permits expatriation, the voluntary relinquishment of one's citizenship. A U.S. citizen can lose his or her citizenship by declaring that he or she no longer wishes to be a citizen or to owe allegiance to the United States, or by performing a VOLUNTARY ACT that constitutes the surrender of citizenship, as prescribed by law.

The test of whether an ABANDONMENT of citizenship is voluntary depends on whether the person's acts were of his or her own choice and pertained to allegiance to the United States. If they were, federal law provides that one has intentionally and voluntarily surrendered his or her right to American citizenship.

A loss of citizenship can occur by serving in the military of another nation; serving as a public official in a foreign country that requires an oath of allegiance to that country; and attempting to overthrow the U.S. government, which is established by a conviction for the crime.

Conduct that might be construed as a renunciation of citizenship sometimes is insufficient to prove voluntary expatriation. If a person merely enjoys the benefits that are available in another country, the surrender of his or her U.S. citizenship is not necessarily established.

The U.S. Supreme Court has recognized the power of Congress to specify conduct that constitutes expatriation, but the right to citizenship is so substantial that such actions must be closely related to a conspicuous movement of allegiance away from the United States. Although some courts have ruled that Congress *never* is empowered to deprive the native born of citizenship, this view is not in accordance with current law.

Conviction of a crime can result in a partial deprivation of rights of citizenship. Prior to the twentieth century under English and American COMMON LAW, convicts actually lost their citizenship, which was known in some jurisdictions as civil death. Today, however, only some rights are divested, even if the applicable law is called "loss of citizenship."

A state is empowered to deny someone the right to vote after his or her conviction of a felony or an "infamous crime," such as BRIBERY or perjury. This denial of a right of citizenship can remain in effect until the completion of the sentence, including periods of PAROLE, or it might be permanent. A pardon from the president or a governor can restore such rights, however. Some statutes even authorize the courts to restore rights of citizenship upon proof of the rehabilitation of the former prisoner.

### International Law

Questions concerning whether someone is a citizen of one country or another are generally resolved by treaty, a compact formed between two or more nations with respect to matters pertaining to the public welfare pursuant to principles of INTERNATIONAL LAW. One person might qualify for dual nationality, that is, citizenship in more than one nation, if he or she can satisfy the citizenship requirements of different countries.

International law also recognizes a rule labeled the "law of the flag," which determines the citizenship of persons born on ships. The rule is responsive to the citizenship laws of different nations and to treaties that are rewritten to fulfill new political conditions.

A child born of U.S. parents on a vessel anywhere in the world is a U.S. citizen. A child born in U.S. waters on a foreign ship is a citizen of that foreign nation when his or her parents are citizens of that country. If his or her parents

are from a different country, provisions of treaty or international law apply. A child born on the high seas on a foreign vessel of parents from that same country assumes that country's citizenship and not the citizenship of his or her destination.

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## CITIZENS FOR DECENCY THROUGH LAW

Citizens for Decency through Law (CDL), one of the first major anti-pornography organizations in the United States, was founded in 1956 by lawyer and future financier Charles H. Keating Jr., after his daughter was sexually attacked in the 1950s. Believing that PORNOGRAPHY causes violence and CHILD ABUSE, CDL members have endeavored to stop the sale of pornographic material and close movie theaters that show sexually explicit movies by pressuring politicians and judges into enforcing OBSCENITY laws.

CDL has provided legal advice to cities investigating dealers in sexually explicit motion pictures, magazines, and mail-order publications. CDL attorneys have concentrated on helping the police and prosecutors to prepare trials and appeals in obscenity cases, prepare testimony before local, state, and federal legislative committees, and draft model legislation. Between 1963 and 1981, CDL sponsored or wrote AMICUS CURIAE (FRIEND-OF-THE-COURT) briefs for 27 obscenity cases reviewed by the U.S. Supreme Court. Of those cases, 37 percent had rulings favorable to CDL's views. In addition to providing direct, personal assistance in certain important cases, CDL's legal staff have prepared and mailed comprehensive analyses of developments in obscenity law to prosecutors around the United States. The group has also sought to educate the public on the extent of the traffic in obscene materials.

Keating, a staunch Roman Catholic who originally called his group Citizens for Decent Literature, is perhaps best known as a central figure in a scandal involving the Lincoln Savings and Loan Association. Between 1989 and 1993, he was charged with and convicted on numerous civil RACKETEERING and FRAUD charges and sentenced to prison. CDL as a national organization splintered after the scandal, but local chapters remain active in some cities and states.

Keating began his career as a prosecutor in Cincinnati—a conservative city that now prides itself on being a national center for anti-pornography efforts—and first sought to rid newsstands of sexually explicit materials in the 1950s when he prosecuted a local candy store accused of selling obscene publications. By 1969, his zealous battles against pornography had earned him an appointment by RICHARD M. NIXON to the Presidential Commission on Obscenity and Pornography. In 1970, Keating filed a lawsuit that delayed release of a report by the commission that recommended repeal of all adult CENSORSHIP laws.

Over the years, CDL battled foes ranging from Larry Flynt, publisher of *Hustler* magazine, to Pacific Bell, which allowed indiscriminate access to dial-a-porn messages. A long-running skirmish in the 1980s involved an adult movie theater in an Orange County, California, shopping center that Lincoln Savings and Loan sued after the city of Santa Ana failed to close the theater. Lincoln's lawsuit charged that the theater, operated by Mitchell Brothers, attracted "criminal elements, ORGANIZED CRIME and persons who practice sexual deviations, such as homosexuals, lesbians, voyeurs, prostitutes, pedophiles, sadists, masochists, rapists, etc., into the area." (After the Lincoln bank failed, the federal government took over the institution, and the lawsuit was dropped.)

During the administrations of Presidents RONALD REAGAN and GEORGE HERBERT WALKER BUSH lawyers recruited from CDL took part in a controversial and lengthy prosecution of businesses involved with obscene materials. In November 1993, the U.S. JUSTICE DEPARTMENT dropped this prosecution tactic, which involved threatening businesses with indictments in numerous jurisdictions in order to extract agreements to stop distribution of the materials. The theory behind the strategy was that the mere expense of defending themselves in so many places would encourage plea bargains by the businesses. Among the targets of these prosecutions was Adam and Eve, a large distributor of sexually explicit films, magazines, and books.

A number of federal judges and civil liberties organizations denounced the multidistrict tactic as a form of harassment, sweeping in nonobscene materials protected by the FIRST AMENDMENT in addition to unprotected obscenity.

CDL often worked with other organizations, including the National Religious Alliance against Pornography; Morality in Media; the Moral Majority; Citizens against Pornography; the American Family Association; and the National Federation for Decency. It has also been aligned with smaller compatriot groups such as Citizens for Legislation against Decadence in Portland, Oregon; Women against Pornography in New York; Feminists against Pornography in Chicago and in Washington, D.C.; and the feminist-sponsored Pornography Resource Center in Minneapolis. CDL opponents include the AMERICAN CIVIL LIBERTIES UNION and other civil liberties organizations as well as publishers of pornography, such as *Oui* magazine, which in 1975 dubbed Keating the number one enemy of pornography.

FURTHER READINGS

"Interest Group Litigation During the Rehnquist Era." 1993. *Journal of Law and Politics* (summer).

"The Public Interest and the Constitutionality of Private Prosecutors." 1994. *Arkansas Law Review* 47.

## CIVIL ACTION

*A lawsuit brought to enforce, redress, or protect rights of private litigants—the plaintiffs and the defendants—not a criminal proceeding.*

Today, courts in the United States generally are not divided into common-law courts and EQUITY courts because most states and the federal government have merged the procedures for law and equity into one system. Now all kinds of lawsuits are simply called civil actions without the former distinctions of procedure in law or in equity.

A criminal proceeding is called a penal action to distinguish it from civil actions.

## CIVIL DEATH

*The* FORFEITURE *of rights and privileges of an individual who has been convicted of a serious crime.*

Civil death is provided for by statute in some states. Most civil death statutes apply only to offenders who have been sentenced to a life term.

Civil death involves the imposition of numerous disabilities, including the denial of the privilege to vote, to hold public office, and to obtain many job and occupational licenses. In addition, an offender cannot enter into judicially enforceable agreements, such as contracts, and may not obtain insurance and PENSION benefits. The offender may also be deprived of any right to commence certain lawsuits in court.

Successive marriages can also be affected by civil death laws. The issue is whether or not the spouse of a person declared civilly dead may enter into a subsequent marriage. The state courts are in disagreement on the matter, although, in most instances, where a felony is a ground for DIVORCE, the spouse of the convicted person may end the marriage.

## CIVIL DISOBEDIENCE

*A symbolic, non-violent violation of the law, done deliberately in protest against some form of perceived injustice. Mere dissent, protest, or disobedience of the law does not qualify. The act must be nonviolent, open and visible, illegal, performed for the moral purpose of protesting an injustice, and done with the expectation of being punished.*

By peacefully and openly violating the law and submitting to punishment, those engaging in civil disobedience hope to draw attention to the law they hope to reform, the injustice they hope to stop, or the policy or practice they hope to end. By calling into question the justness, fairness, EQUITY, or propriety of the status quo, persons engaging in civil disobedience usually appeal to some form of higher law, whether it be the divine law of god, NATURAL LAW, or some form of moral reasoning.

The philosophical underpinnings for civil disobedience can be found in New Testament writings which report on the teachings of Jesus. They also appear in works by Cicero, Thomas Aquinas, JOHN LOCKE, and THOMAS JEFFERSON. In a famous essay entitled "Civil Disobedience," HENRY DAVID THOREAU claimed that the individual is "a higher and independent power" from which the state obtains its authority. As individuals, people must not wait for the government to recognize injustice and instigate reform, Thoreau said, because the machinery of government moves too slowly. If individuals have right on their side, then they must do right by trying to peacefully and openly change society.

Civil disobedience has been extensively employed around the world by nationalist movements (e.g., MOHANDAS GANDHI used civil disobedience to protest against British colonial rule in India), CIVIL RIGHTS leaders (e.g., MARTIN LUTHER KING JR. used civil disobedience to protest against racial SEGREGATION laws in the United States), and anti-war protestors (e.g., Muhammad Ali used civil disobedience to protest U.S. involvement in the VIETNAM WAR), among others.

CROSS-REFERENCES

Civil Rights Movement; Protest.

## CIVIL LAW

*A body of rules that delineate private rights and remedies, and govern disputes between individuals in such areas as contracts, property, and* FAMILY LAW*; distinct from criminal or public law. Civil law systems, which trace their roots to ancient Rome, are governed by doctrines developed and compiled by legal scholars. Legislators and administrators in civil law countries use these doctrines to fashion a code by which all legal controversies are decided.*

The civil law system is derived from the Roman *Corpus Juris Civilus* of Emperor JUSTINIAN I; it differs from a common-law system, which relies on prior decisions to determine the outcome of a lawsuit. Most European and South American countries have a civil law system. England and most of the countries it dominated or colonized, including Canada and the United States, have a common-law system. However, within these countries, Louisiana, Quebec, and Puerto Rico exhibit the influence of French and Spanish settlers in their use of civil law systems.

In the United States, the term *civil law* has two meanings. One meaning of civil law refers to a legal system prevalent in Europe that is based on written codes. Civil law in this sense is contrasted with the common-law system used in England and most of the United States, which relies on prior case law to resolve disputes rather than written codes. The second meaning of civil law refers to the body of laws governing disputes between individuals, as opposed to those governing offenses that are public and relate to the government—that is, civil law as opposed to CRIMINAL LAW.

In France, the civil law is set forth in the comprehensive French Civil Code of 1804, also known as the Code Napoléon. France exported this legal system to the New World when it settled Louisiana in 1712. When the French ceded Louisiana to Spain in 1762, the new Spanish governor replaced French civil law with Spanish civil law. France regained control of the territory in 1803 and the United States purchased it a mere 20 days later. During that brief period of French rule, the French prefect abolished all Spanish courts but did not reintroduce French law. Hence, the new U.S. governor of Louisiana, William Claiborne, took control of a territory that lacked a legal system.

Determined to Americanize Louisiana, Claiborne attempted to impose COMMON LAW but met fierce resistance from Louisianans who had grown accustomed to their mixture of French and Spanish laws and culture. Realizing that he would not be able to mandate a common law system, he directed the state's legislature to draft a civil code based on existing law. Louisiana's first civil code, enacted in 1808, drew heavily from the Code Napoléon and was even written in French. It was replaced in 1825 by a more comprehensive and detailed code. Finally, the Louisiana Civil Code, enacted in 1870 and still largely in force, clarifies and simplifies the earlier laws. The 1870 code is written in English, signaling a shift toward a partial Americanization of Louisiana's legal culture. To this day, Louisiana enjoys the distinction of being the only state in the United States to have a civil law system rather than a common-law system.

The first article of the Louisiana Civil Code reads: "The sources of law are legislation and custom" (LA C.C. Art. 1). This means that judges in Louisiana are obligated to look first to written laws for guidance in reaching their decisions. If no statute directly governs the dispute, judges may base their decisions on established custom. Article 3 defines custom as a "practice repeated for a long time and generally accepted as having acquired the force of law." However, Article 3 makes it clear that custom may not abrogate or conflict with legislation. Hence, Louisiana judges do not make law with their decisions; rather, the code charges them with interpreting, as closely as possible, what has been written and passed by the legislature or long established by custom.

Louisiana judges, unlike their common-law counterparts, are not bound by judicial precedent. Common-law judges adhere to the doctrine of STARE DECISIS, which mandates that the outcome of a lawsuit be governed by previous

decisions in similar cases. Louisiana's civil code does not recognize the binding force of precedent. However, under the civil law doctrine of *jurisprudence constante,* or settled JURISPRUDENCE, judges are expected to follow a series of decisions that agree on the interpretation of a code provision.

Although Louisiana is generally called a civil law state, its code is imbued with some common-law features, making it a hybrid of the two traditions. The state's constitution, administrative and criminal law, civil and CRIMINAL PROCEDURE, and RULES OF EVIDENCE all contain elements derived from common-law principles. As a result, Louisiana judges operate under administrative rules that differ from those found in other civil law jurisdictions. For example, whereas European judges actively elicit the facts in a controversy and seldom use a jury, Louisiana judges operate more like their common-law colleagues, assuming the role of neutral and passive fact finder or arbiter, and leaving the final decision to a jury. Oral argument is generally absent in a pure civil law proceeding, whereas Louisiana's procedural and evidentiary rules allow oral presentations, resulting in trials that are closer to those found in a common-law court. Finally, European courts allow almost unlimited discovery by the accused in a lawsuit, whereas Louisiana's procedural and evidentiary rules place certain restrictions on such discovery.

Civil law systems differ from common-law systems in another important way: in a common-law jurisdiction, appellate courts, in most instances, may review only findings of law. However, civil law appellate courts may review findings of fact as well as findings of law. This allows a Louisiana appellate court to declare a jury's decision erroneous, impose its own findings of fact, and possibly even reduce a damage award. This is a significant consideration for a plaintiff who has a choice of whether to file suit in Louisiana or in another state (to bring suit in a particular state, a plaintiff must demonstrate some relationship between that state and the lawsuit). Since a jury award could be overturned on appeal, the plaintiff with a strong case may wish to file in a common-law state. On the other hand, if the plaintiff is uncertain of success at the trial level, the possibility of broader review on appeal may make Louisiana the better choice. As a practical matter, such dilemmas arise infrequently, and most often involve complex multistate litigation concerning corporations.

FURTHER READINGS

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CROSS-REFERENCES

Napoleonic Code; Roman Law.

## CIVIL PROCEDURE

*The methods, procedures, and practices used in civil cases.*

The judicial system is essentially divided into two types of cases: civil and criminal. Thus, a study of CIVIL PROCEDURE is basically a study of the procedures that apply in cases that are not criminal.

Generally, criminal trials are used by the government to protect and provide relief to the general public by attempting to punish an individual. Civil trials can be used by anyone to enforce, redress, or protect their legal rights through court orders and monetary awards. The two types of trials are very different in character and thus have separate procedural rules and practices.

Procedural law is distinguished from SUBSTANTIVE LAW, which creates, defines, and regulates the rights and duties of individuals. Federal and state constitutions, statutes, and judicial decisions form the basis for substantive CIVIL LAW on matters such as contracts, TORTS, and probate. Procedural law prescribes the methods by which individuals may enforce substantive laws. The basic concern of procedural law is the fair, orderly, efficient, and predictable application of substantive laws. Procedural guidance can be found in court rules, in statutes, and in judicial decisions.

### Federal Rules of Civil Procedure

State and federal courts maintain separate procedural rules. On the federal level, the Federal Rules of Civil Procedure govern the process of civil litigation at the level of the U.S. district court, which is a trial court. At least one U.S. district court operates in each state. Each district court also exists within one of thirteen federal circuits. Any appeal of a decision by a U.S. district court is heard by the court of appeals for the federal circuit in which the district court sits. Appeals of decisions by a U.S. court of appeals may be heard by the SUPREME COURT OF THE UNITED STATES.

The Supreme Court and the courts of appeals use procedures contained in the Federal Rules of Appellate Procedure and in the U.S.

Supreme Court Rules. As reviewing courts, they are concerned with the district courts' application of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure are now contained in title 28 of the U.S. Code. Before 1938, the procedural rules in U.S. district courts varied from circuit to circuit. The rules in the western United States, for example, were generally less complex than those in the East. To add to the confusion, federal civil cases were designated either at law, which essentially meant that the relief sought was monetary or equitable, which meant that the court was asked to act on principles of fairness and, generally, to award nonmonetary relief. The distinction was important because the procedural rules for a case at law differed from those for an EQUITY suit.

In response to widespread criticism of procedural complexity, the U.S. Congress in 1934 passed the Federal Rules Enabling Act (28 U.S.C.A. §§ 2071, 2072). This act conferred on the Supreme Court the power to make new rules for federal courts. In 1938, new rules were recommended by an advisory committee appointed by the Supreme Court and approved by Congress. The new rules featured simplified PLEADING requirements, comprehensive discovery procedures, a PRETRIAL CONFERENCE to narrow the scope of a trial and define issues, and broad provisions for joining parties and claims to a lawsuit. In addition, legal and equitable claims were merged to proceed with the same set of rules.

After the first set of uniform federal rules were promulgated, it became clear that continuous oversight of the rules was necessary to ensure their improvement. In 1958, Congress created the JUDICIAL CONFERENCE OF THE UNITED STATES, a freestanding body to study federal civil procedure and propose amendments to the Supreme Court. The Judicial Conference, in turn, created the ongoing Committee on Rules of Practice and Procedure to help fashion the best procedural rules for federal courts. Subsequently amendments to the Federal Rules of Civil Procedure occurred on a regular basis.

State courts generally follow the same judicial hierarchy as federal courts. In all states, a party to a civil suit is entitled to at least one review of a trial court decision. In some states, a party may be entitled to two appeals: one in a court of appeals, and one in the state supreme court.

Procedural rules in state courts are similar to the federal rules. Indeed, many states base their procedural rules on the federal rules. Thus, there is a large measure of uniformity among the states and among state and federal courts.

### Litigation Process: Pleadings, Justisdiction, and Venue

A civil action is commenced with the filing of a complaint. The plaintiff must file the complaint with the court and must give a summons to the court and a copy of the complaint to the defendant. The complaint must set forth the claims and the legal bases for them.

Before filing the complaint, the plaintiff must decide where to file it. As a general rule, cases are filed in state, not federal, courts. The question of whether a particular court has authority over a certain matter and certain parties is one of jurisdiction. Federal courts generally have jurisdiction over civil actions in three situations. The most common is when the parties to the suit live in different states and the amount of money in controversy exceeds $50,000. The second instance is when a claim is specifically authorized by federal statute. The third is when a claim is made by or against the federal government or its agents.

The jurisdiction of state courts depends on a number of variables. Plaintiffs filing in state court generally prefer to file in their home state. However, this may be difficult in a case where the defendant lives in another state and the injury occurred outside the plaintiff's home state. A court in the plaintiff's home state can gain jurisdiction over an out-of-state defendant in several ways. For example, if the defendant enters the plaintiff's home state, the plaintiff may serve the defendant there and force the defendant to appear there for trial. Or the plaintiff can show the court that the defendant has some minimal amount of contact with the plaintiff's home state. Or the plaintiff can show that the defendant has property in the plaintiff's home state and the property is the subject matter of the dispute.

In addition to jurisdiction, the plaintiff must also consider venue. Venue is the term describing the particular county or geographical area in which a court with jurisdiction may hear and determine a case. The plaintiff makes a decision on venue after deciding whether to file suit in state or federal court. For example, if a plaintiff decides to file suit in state court, and

has settled on a particular state, the plaintiff must decide in which county to file suit. The overriding consideration in determining the best venue in a case is the convenience to the parties.

Once the plaintiff determines where to file the complaint, the plaintiff must prepare pleadings and motions. Pleadings are the plaintiff's initial allegations and the defendant's responses to those allegations. Motions are requests made by the parties for a specific order by the court. Courts usually schedule pretrial conferences to review and rule on pleadings and motions, sort out preliminary issues, and prepare a case for trial.

Before a case can proceed, the court must determine whether the plaintiff has standing to bring the suit. In order to hear the suit the court must find that the plaintiff has some legally protectible, tangible interest in the outcome of the litigation. Other plaintiffs may join the original plaintiff if they seek the same relief concerning the same transaction or event and the complaints involve a common QUESTION OF LAW or fact. This is called JOINDER.

In some cases, joinder may be compulsory. Under Rule 19, a person must be joined if (1) complete relief cannot be accorded to the parties without joining the missing person or (2) the missing person claims an interest in the action, and absence from the suit will impair that person's ability to protect the interest, or absence would subject the parties to multiple or inconsistent obligations regarding the matter of the suit. Both plaintiffs and defendants may be ordered by the court to join a suit.

The court must also determine before trial that the issues in the case are JUSTICIABLE, that is, the case is ready and proper for a judicial determination. Courts do not hear hypothetical, abstract, or political cases. For example, a person may not file a suit against a legislator over the legislator's vote on a matter before the legislature. Nor may a person file a suit against another unless the filing person can demonstrate having been harmed by the other.

If the complaint does not state a claim upon which judicial relief can be granted, the defendant may move for SUMMARY JUDGMENT, which is a request that the court issue a final judgment on the case in favor of the defendant. The plaintiff also may submit a motion for summary judgment, either soon after filing the complaint or after the defendant submits a summary judgment motion. When deciding a motion for summary judgment, the court must consider the pleadings in the light most favorable to the party opposing the motion.

The parties to a lawsuit prepare their case based on information gained through the process of discovery. Discovery consists of a variety of methods including depositions and interrogatories. A deposition is an interview of a party or witness conducted by a lawyer. Usually, this interview is conducted orally with a lawyer for the other side present and able to participate; sometimes, it is conducted using written questions. Information about a party may be secured through written interrogatories or requests to produce documents or other things. These requests may be served only upon a party. A request for production may seek any item within a party's control.

Procedural rules for depositions and other forms of discovery address a number of concerns, including how a deposition is conducted, the permissible scope of a deposition, who may conduct a deposition, when a party may object to a question at a deposition, when a party may object to an interrogatory, when a party may enter upon land for inspection, when a party may make physical or mental inspections of another party, and what happens when a party does not cooperate with a court order directing compliance with discovery.

If the parties cannot reach a settlement, the case goes to trial. Just before trial, the plaintiff must decide whether to ask for a jury trial. Not all civil cases may be tried before a jury. The right to a jury trial is usually tied to the amount of money at issue: if the case concerns less than a certain amount, such as $10,000, the case may be limited to trial before a judge. In federal court, however, all parties have the constitutional right to a jury trial. If a plaintiff or defendant is granted a jury trial, both sides will have the opportunity to screen potential jurors for bias.

At trial, each side is given the opportunity to make an OPENING STATEMENT to the fact finder, be it judge or jury. The plaintiff then presents evidence. Evidence can include testimony from witnesses and tangible items presented through witnesses. When the plaintiff has presented her or his case, the defendant has the option of presenting evidence. After the defendant presents evidence, the parties make closing arguments to the fact finder.

After final arguments, the judge must determine what laws apply to the case. Both parties submit proposed instructions to the judge. If the case is tried before a jury, the judge must read instructions to the jury. If the case is tried before a judge, the judge will give the parties an opportunity to argue that certain favorable law controls the case.

At this point, either party may move the court for a directed verdict. This is a request that the court decide in the party's favor before deliberating on the case or sending it to the jury. A directed verdict may be granted only if no substantial evidence supports a finding in the opposing party's favor, and the opposing party bears the burden of producing evidence on the issue. If the judge does not issue a directed verdict, the fact finder retires to deliberate the case in secret.

The final phase of the trial is the judgment. The court has the option of requesting different types of verdicts. If it requests a general verdict, it is looking for a flat finding of liability or no liability. If it requests a special verdict, it expects the fact finder to answer specific factual questions, and then the judge determines the legal consequences of the answers.

In a complex jury trial, the court may request that the jury deliver a general verdict along with answers to special interrogatories. This form of verdict allows the judge to ensure that the jury delivers the correct verdict based on its factual findings.

The number of jurors on a civil jury can be as few as five or as many as twelve, depending on the jurisdiction. In most jurisdictions, including federal courts, the jury's decision must be unanimous, but some jurisdictions allow a verdict with something less than unanimity, such as an agreement among nine of twelve jurors.

If the defendant has failed to appear for the proceedings, default judgment will be entered for the plaintiff. However, in this situation, the defendant may contest the judgment when the plaintiff attempts to collect on it, by filing a separate suit and challenging the jurisdiction of the court.

When the verdict is delivered, the losing party may seek a reversal of the judgment. Sometimes a verdict is unsatisfactory to both parties, and both parties seek a reversal; this might happen, for example, when one party wins the lawsuit but receives a small damages award. Reversal of a verdict may be pursued through a motion for JUDGMENT NOTWITHSTANDING THE VERDICT, or J.N.O.V. (for judgment *non obstante veredicto,* which is Latin for "notwithstanding the verdict"). The standard for this order is the same as that for a directed verdict. A reversal of judgment usually occurs only in jury trials; judges generally are not inclined to reverse their own decisions.

A court may grant a new trial if procedural problems at trial prejudiced a party or worked against the interests of a party, and affected the verdict. Such problems include juror misconduct and unfair withholding of evidence by an opposing party. A new trial may also be granted if the damages authorized by the jury were excessive or inadequate. In extreme cases, a new trial may be granted if newly discovered evidence comes to light after the case is given to the jury.

All jurisdictions give parties to a civil suit the right to at least one appeal. A decision may be reversed if an error at trial prejudiced the appellant (the party bringing the appeal). Appeals courts generally do not reverse verdicts based on the WEIGHT OF EVIDENCE. Instead, they limit their review of cases to mistakes of law. This nebulous concept generally refers to mistakes relating to procedural and constitutional violations.

Sometimes a party may appeal a court order or decision to a higher court during trial. Known as an INTERLOCUTORY appeal, this option is limited. A party may appeal during trial if the party stands to suffer irreparable harm if the order or decision is not immediately reviewed. A party may also appeal an order or decision during trial if it affects a matter that is collateral to, or separate from, the litigation.

After a judgment is reached, the winning party must enforce it. If the losing party does not voluntarily relinquish the disputed property or pay the monetary judgment, the winning party may seize and sell the property of the losing party. This is accomplished by filing the judgment in the county where the property is located and proceeding to obtain ownership of the property through another civil suit. If the losing party has no money, the winning party may seek to garnish a portion of the losing party's wages. If the losing party does not work and has no property, the winning party may be unable to collect on the judgment.

Some parties come to court seeking provisional remedies, which are forms of temporary relief available in urgent situations. Temporary

restraining orders and injunctions are court orders that direct a party to perform a certain act or refrain from performing a certain act. For example, if a party wants to bring suit to prevent the imminent demolition of what he believes is a historic building, he may petition the court for a TEMPORARY RESTRAINING ORDER to prevent demolition while the suit is filed. A temporary restraining order will last up to ten days. When the ten days have expired, the litigant may seek either renewal of the temporary restraining order or a preliminary injunction.

A preliminary INJUNCTION, if granted, requires a party to perform an act or refrain from performing an act until the end of trial. A permanent injunction is a court order that requires a defendant to perform an act or refrain from performing an act permanently.

### Civil Justice Reform Act of 1990

Civil cases often are expensive and time-consuming. In August 1990, the U.S. Congress passed the Civil Justice Reform Act to help remedy these problems (28 U.S.C.A. §§ 471–482). The U.S. Senate explained that the Civil Justice Reform Act was "to promote for all citizens, rich or poor, individual or corporation, plaintiff or defendant, the just, speedy and inexpensive resolution of civil disputes in our Nation's federal courts" (S. Rep. No. 101-416, 101 Cong., 2d Sess., at 1 [Aug. 3, 1990]). The act ordered each U.S. district court to implement a Civil Justice Expense and Delay Reduction Plan under the direction of an advisory group comprising "those who must live with the civil justice system on a regular basis" (S. Rep. No. 101-416, at 414 [quoting statement of SENATE JUDICIARY COMMITTEE chairman Biden, *Cong. Rec.* S416 (Jan. 25, 1990)]).

The advisory groups in each federal district were appointed by the chief judge of the federal circuit, and they generally consisted of judges, clerks, and law professors. These experts prepared a report on methods for reducing expense and delay in civil litigation. The report was then considered by the federal circuit court judges in forming the Civil Justice Expense and Delay Reduction Plan.

One major challenge that faced the advisory groups was how to get courts to best use modern technology. Since passage of the act, many federal circuits have authorized the filing of court documents by facsimile and other electronic means, which may include the use of computers.

Federal courts have also acted to improve scheduling. The U.S. District Court for the District of New Hampshire, for example, created four separate categories for scheduling civil cases: administrative, expedited ("rocket docket"), standard, and complex. The determination of a case's category is made at the preliminary pretrial conference. Most cases fall into the standard category, which means a trial will be held within one year of the preliminary pretrial conference. A rocket docket case can be tried within six months of the preliminary pretrial conference, if the parties agree and the trial will last no more than five days. Administrative and complex cases are scheduled with special attention. By identifying the length and complexity of a case at the preliminary pretrial conference, federal circuit courts are able to minimize unnecessary delays.

In all jurisdictions, preliminary pretrial conferences have become important in civil litigation. The court, after consulting the parties, schedules and holds this conference within a certain amount of time after the filing of the complaint. At this conference, the court attempts to resolve all the issues that can be resolved outside of trial. These issues include the control and scheduling of discovery, the admissibility of evidence, the possibility of separate trials, and orders limiting the length of the trial presentation. To reach, or decide, substantive issues more quickly, many federal courts ask litigants to file any motions for summary judgment or motions to dismiss before the preliminary pretrial conference. Pre-trial conferences also offer the opportunity to discuss settling the case, allowing both parties to save the costs of going to trial and litigating the issue. Saving costs by settling disputes without resorting to formal litigation is the primary objective of ALTERNATIVE DISPUTE RESOLUTION.

### Alternative Dispute Resolution

*Alternative dispute resolution* (ADR) is a generic term that refers to a wide array of practices the purpose of which are to manage and quickly resolve disagreements at a lower cost than formal civil litigation and with as little adverse impact as possible on business and personal relationships. Every jurisdiction provides residents with some form of ADR technique by which they can resolve legal disputes, but ARBITRATION, mediation, minitrials, and early neutral evaluations are generally the most popular.

Arbitration is the process of referring a dispute to an impartial intermediary chosen by the parties who agree in advance to abide by the arbitrator's award that is issued after a hearing at which all parties have the opportunity to be heard. There are two different forms of arbitration: private and judicial arbitration. Private arbitration is the product of an agreement to arbitrate drafted by the parties who enter a relationship anticipating that disputes will arise but who mutually desire to keep any such disputes out of court. Judicial arbitration, sometimes called court-annexed arbitration, is a non-binding form of arbitration, which means that any party dissatisfied with the arbitrator's decision may choose to go to trial rather than accept the decision. However, most jurisdictions prescribe a specific time period within which the parties to a judicial arbitration may elect to reject the arbitrator's decision and go to trial. If this time period expires before either party has rejected the arbitrator's decision, the decision becomes final, binding, and just as enforceable as a private arbitrator's decision.

Mediation is a rapidly growing ADR technique. Sometimes referred to as conciliation, mediation consists of assisted negotiations in which the disputants agree to enlist the help of a neutral intermediary, whose job it is to facilitate a voluntary, mutually acceptable settlement. A mediator's primary function is to identify issues, explore possible bases for agreement, discuss the consequences of reaching impasse, and encourage each party to accommodate the interests of other parties through negotiation. However, unlike arbitrators, mediators lack the power to impose a decision on the parties if they fail to reach an agreement on their own.

A **MINITRIAL** is a process by which the attorneys for the parties present a brief version of the case to a panel, often comprised of the clients themselves and a neutral intermediary who chairs the process. Expert witnesses (and less frequently, lay witnesses) may be used in presenting the case. After the presentation, the clients, normally top management representatives who by now are more aware of the strengths and weaknesses of their positions, attempt to negotiate a settlement of the dispute. If a negotiated settlement is not reached, the parties may allow the intermediary to mediate the dispute or render a non-binding **ADVISORY OPINION** regarding the likely outcome of the case were it to be tried in civil court.

Early neutral evaluation is an informal process by which a neutral intermediary is appointed to hear the facts and arguments of counsel and the parties. After the hearing, the intermediary provides an evaluation of the strengths and weaknesses of the parties' positions and the parties' potential exposure to liability for money damages. The parties, counsel, and intermediary then engage in discussions designed to assist the parties in identifying the agreed upon facts, isolating the issues in dispute, locating areas in which further investigation would be useful, and devising a plan to streamline the investigative process. Settlement negotiations and mediation may follow, but only if the parties desire. In some jurisdictions, early neutral evaluation is a court-ordered ADR technique. However, even in these jurisdictions the parties are given the option of hiring their own neutral intermediary or having the court appoint one.

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**CROSS-REFERENCES**

Alternative Dispute Resolution; Judicial Conference of the United States; Substantive Law; Tort Law.

## CIVIL RIGHTS

*Personal liberties that belong to an individual, owing to his or her status as a citizen or resident of a particular country or community.*

The most common legal application of the term *civil rights* involves the rights guaranteed to U.S. citizens and residents by legislation and by the Constitution. Civil rights protected by the

Constitution include FREEDOM OF SPEECH and freedom from certain types of discrimination.

Not all types of discrimination are unlawful, and most of an individual's personal choices are protected by the freedoms to choose personal associates; to express himself or herself; and to preserve personal privacy. Civil rights legislation comes into play when the practice of personal preferences and prejudices of an individual, a business entity, or a government interferes with the protected rights of others. The various civil rights laws have made it illegal to discriminate on the basis of race, color, religion, sex, age, handicap, or national origin. Discrimination that interferes with VOTING RIGHTS and equality of opportunity in education, employment, and housing is unlawful.

The term PRIVILEGES AND IMMUNITIES is related to civil rights. Privileges and immunities encompass all rights of individuals that relate to people, places, and real and PERSONAL PROPERTY. *Privileges* include all of the legal benefits of living in the United States, such as the freedom to sell land, draft a will, or obtain a DIVORCE. *Immunities* are the protections afforded by law that prevent the government or other people from hindering another's enjoyment of his or her life, such as the right to be free from illegal SEARCHES AND SEIZURES and the freedom to practice religion without government persecution. The Privileges and Immunities Clause in Article IV of the U.S. Constitution states, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The clause is designed to prevent each state from discriminating against the people in other states in favor of its own citizens.

*One effect of legislation and judicial decisions concerning civil rights has been an increase in the number of women in what were traditionally male jobs.*

AP/WIDE WORLD PHOTOS

The BILL OF RIGHTS, the first ten amendments to the U.S. Constitution, delineates specific rights that are reserved for U.S. citizens and residents. No state can remove or abridge rights that are guaranteed by the Constitution.

In 1857, the U.S. Supreme Court held, in DRED SCOTT V. SANDFORD, 60 U.S. (19 How.) 393, 15 L. Ed. 691, that the Constitution did not apply to African Americans because they were not citizens when the Constitution was written. After the Civil War, therefore, new laws were necessary for the purpose of extending civil liberties to the former slaves.

In 1865, the THIRTEENTH AMENDMENT to the Constitution was enacted to make SLAVERY and other forms of INVOLUNTARY SERVITUDE unlawful. In addition, Congress was given the power to enact laws that were necessary to enforce this new amendment.

The FOURTEENTH AMENDMENT, ratified in 1868, provides that every individual who is born or naturalized in the United States is a citizen and ensures that a state may not deprive a citizen or resident of his or her civil rights, including DUE PROCESS OF LAW and EQUAL PROTECTION of the laws. Congress is also empowered to enact laws for the enforcement of these rights.

### The Origin of Federal Civil Rights Laws

During the period immediately following the Civil War, civil rights legislation was originally enacted by Congress, based upon its power under the Thirteenth and Fourteenth Amendments to pass laws to enforce these rights. The first two of these laws were based upon the CIVIL RIGHTS ACT of 1866 (42 U.S.C.A. § 1982), which had preceded the Fourteenth Amendment.

The first civil rights law guaranteed *equal rights* under the law for all people who lived within the jurisdiction of the United States. The second guaranteed each citizen an equal right to own, inherit, rent, purchase, and sell real property as well as personal property. The third original civil rights law, the KU KLUX KLAN ACT of 1871 (17 Stat. 13), provided citizens with the right to bring a civil action for a violation of protected rights. The fourth law made violation of such rights a criminal offense.

### Subsequent Legislation

Although these initial laws purported to guarantee the civil rights of all citizens, including African Americans and other minorities,

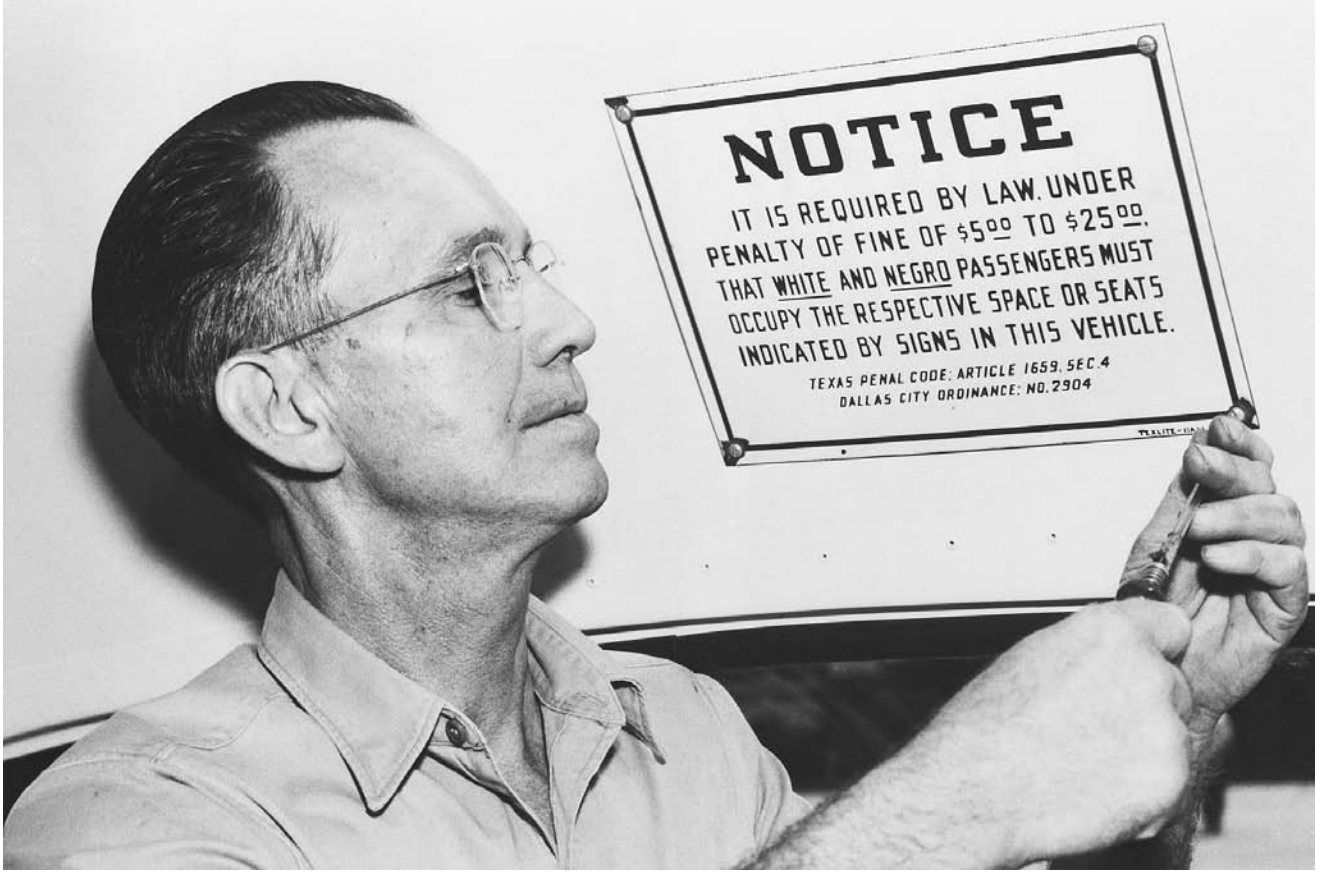


*In 1956 the Dallas Transit Company removed all segregated seating signs from its buses to comply with the Supreme Court ruling banning racial segregation on public transportation.*

BETTMANN/CORBIS

they were effectively negated for most African-Americans in the late nineteenth century by the passage of **JIM CROW LAWS**, or **BLACK CODES**, in the South. These laws made it illegal for African-Americans to use the same public facilities as whites, restricted their travel, impeded their ability to vote, forbade interracial marriage, and generally relegated them to a legally inferior position.

In the 1896 landmark case **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, the U.S. Supreme Court upheld the constitutionality of a Jim Crow law that required the **SEGREGATION**, or separation, of the races on railroad cars. The Court held that the Louisiana law in question was not a violation of the Equal Protection Clause of the Fourteenth Amendment as long as the facilities that were provided for each race were "separate but equal." This **SEPARATE-BUT-EQUAL** doctrine was used to support other segregation laws applying to public schools and public facilities.

No significant civil rights legislation was enacted until many decades later, when the **COMMISSION ON CIVIL RIGHTS** was established by Congress in the Civil Rights Act of 1957 (42 U.S.C.A. § 1975) to monitor and collect facts regarding race relations for consideration by Congress and the president. Congress subsequently passed the Civil Rights Act of 1960 (42 U.S.C.A. § 1971). The statute guarantees that qualified voters have the right to register to vote in any state and that they have the right to sue any person who prevents them from doing so. Voters possess this right to sue regardless of whether the individual who so prevents them is a state official or merely an individual who acting as one.

The **CIVIL RIGHTS ACT OF 1964** (42 U.S.C.A. §§ 2000a et seq.) is the most comprehensive civil rights legislation in the history of the United States. It contains provisions for parity in the use and enjoyment of public accommodations, facilities, and education, as well as federally assisted programs and employment. Title VII of that act, which prohibits employment discrimination based on an employee's race, color, religion, sex, or national origin, is regarded as the most inclusive source of employment rights. All employers who have at least 15 employees,

including state and local governments and LABOR UNIONS, are subject to its provisions, but it does not apply to the federal government, American Indian tribes, clubs, or religious organizations.

The Civil Rights Act of 1968 (25 U.S.C.A. § 1301 et seq.) proscribes discrimination in the sale and rental of most U.S. housing. It also prohibits discrimination in financing arrangements and extends to agents, brokers, and owners. Both the 1964 and 1968 Civil Rights Acts establish the right of an injured party to sue and to obtain damages from any individual who illegally infringes with a person's civil rights, conspires to deprive others of their civil rights, or abuses either government authority or public office to accomplish such unlawful acts.

In the area of education, a significant civil rights milestone was achieved in 1954 with the U.S. Supreme Court's decision in BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873. In *Brown,* the justices unanimously rejected the separate-but-equal doctrine that it had upheld in *Plessy.* They found that segregating black and white children in different public schools violates the Equal Protection Clause of the Fourteenth Amendment. Segregation, the Court held, effectively discriminates against African-American children by promoting in them a sense of inferiority that limits their opportunities in life. The Court also required that school districts desegregate "with all deliberate speed." INTEGRATION, or desegregation, of public schools has been a divisive issue ever since. In particular, arguments arise over the practice of busing students a distance to school, a method that has been used, often by court order, to create a better racial balance.

The issue of segregation continues to cause strife. In 2002, Senate Majority Leader TRENT LOTT (R.-Miss.) suggested during comments at the 100th birthday party of retired Senator STROM THURMOND that he was proud that the state of Mississippi had supported Thurmond in a presidential bid in 1948. Thurmond had run on the so-called "Dixiecrat" platform that advocated segregation. The comments caused a storm of criticism directed at Lott, and he resigned as senate majority leader in December 2002.

In employment, COMMON LAW permits an employer or LABOR UNION to discriminate for a valid reason in its relations with employees, unless otherwise provided by federal or state statute. The National Labor Relations Act of 1935 (29 U.S.C.A. § 151 et seq.) initially restrained discrimination against employees or job applicants who engage in union activities. Subsequently, the act has been extended through various amendments to prohibit other forms of discrimination, including race and SEX DISCRIMINATION. In 1963, Congress enacted the Equal Pay Act (29 U.S.C.A. § 206), which requires that men and women be paid the same wages when they do substantially similar work. The federal EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) is the initial forum for claims of illegal employment discrimination. It also publishes advisory guidelines that explain or define the law. Many states have agencies or HUMAN RIGHTS commissions that are similar to the EEOC.

### The 1980s and Beyond

One result of civil rights legislation is AFFIRMATIVE ACTION, which is the effort to enforce race and sex classifications when necessary to correct past discriminatory patterns. The ordering of affirmative action requires employers or labor unions to make concerted efforts to hire minorities who traditionally have been discouraged from seeking employment with them. The basis for affirmative action is that if such efforts are not made, unlawful discrimination will be perpetuated.

Affirmative action and other attempts to end discrimination raise new questions. For example, have efforts to help minorities and women begun to infringe on the rights of individuals outside of those groups, such as white men? Some argue that affirmative action results in *reverse discrimination,* which is prejudice or bias practiced against a particular person or class of people in order to remedy a pattern of past discrimination against another individual or group of individuals.

Much of the attention on the constitutionality of affirmative action programs has focused upon the federal courts of appeals. The most heated controversy has centered on affirmative action programs in higher education. The Fifth Circuit Court of Appeals in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) held that a program at the University of Texas School of Law granting preferences to minorities in admissions decisions was unconstitutional. This case stirred a national debate, and several commentators noted that the percentage of minorities who were admitted to the school dropped markedly

after the decision. The U.S. Supreme Court allowed the decision to stand when it denied certioari.

In 2003, the U.S. Supreme Court clarified some of the confusion experienced by the lower federal courts with respect to affirmative action programs in higher education. In *Grutter v. Bollinger,* 539 U.S.___, 123 S. Ct. 2325, ___ L. Ed. 2d ___ (2003), the Court upheld a practice by the law school at the University of Michigan that considered race one of the factors the school considered when admitting students. The ruling upheld the decision in **BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE**, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978), a controversial decision that had likewise allowed schools to consider race as a factor in admissions. In a companion case to *Grutter*, however the Court limited the scope of affirmative action programs of universities when it struck down Michigan's undergraduate admissions policies. *Gratz v. Bollinger,* 539 U.S. ___, 123 S. Ct. 2411, ___ L. Ed. 2d ___ (2003). Unlike the law school's admissions policies at Michigan, the undergraduate admissions department added a certain number of "points" to the application of a racial minority. Because the university added these points automatically without consideration of the individual applicant, the Court held that this policy could not pass constitutional muster.

After President **RONALD REAGAN** appointed three justices to the U.S. Supreme Court during his two presidential terms between 1981 and 1989, the Court proceeded to render more conservative opinions regarding civil rights. For example, in *Patterson v. McLean Credit Union,* 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989), it addressed the issue of discrimination in the private sector and held that section 1981 of the Civil Rights Act of 1866 barred only **RACIAL DISCRIMINATION** in hiring, and thus not racial harassment while on the job. Minority-rights groups were disappointed by the ruling and saw it as part of a general trend toward making civil rights violations more difficult to prove. However, Justice **ANTHONY M. KENNEDY**, who wrote the Court's opinion, stated, "Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress's policy to forbid discrimination in the private, as well as the public, sphere."

Less controversial have been developments in the area of civil rights for handicapped people. In 1990, President **GEORGE H. W. BUSH** signed into law the Americans with Disabilities Act (ADA) (Pub. L. No. 101-336, 104 Stat. 327 [codified in scattered sections of 42, 29, 47 U.S.C.A.] [effective 1992]), which was quickly hailed as the most significant civil rights legislation since the Civil Rights Act of 1964. The ADA prohibits discrimination against **DISABLED PERSONS** in employment, public accommodations, transportation, and **TELECOMMUNICATIONS**. Referred to as the bill of rights for physically and mentally disabled citizens—who were estimated to number 43 million at the time of the act's passage—the act supersedes previous state and local laws and extends protection to any person with a physical or mental impairment that "substantially limits one or more of the major life activities of such individual."

The act includes many features that are intended to improve living conditions for those with disabilities. For example, employers, providers of public transportation, and private businesses with public accommodation (such as theaters, restaurants, hotels, and banks) must make "reasonable accommodations" for disabled persons. Often such accommodations must include wheelchair access. Similarly, all commuter and intercity trains are required to have at least one car that is handicapped-accessible, and telephone companies must provide relay operators for hearing-impaired individuals who use special telecommunications devices.

The Civil Rights Act of 1991 (Pub. L. No. 102-166, 105 Stat. 1071 [codified in scattered sections of 42, 29, 2 U.S.C.A.]) marked another important step in civil rights legislation. The act repudiated several U.S. Supreme Court decisions on civil rights; granted women and disabled persons the right to recover money damages under Title VII of the Civil Rights Act of 1964; and granted congressional employees the protection of Title VII. Among the high court's decisions that were overturned by the 1991 act was *Patterson.* Section 101 of the act states that employees may sue for damages experienced through racial discrimination in hiring, promotion, dismissal, and all other terms of employment. The changes in Title VII employee-discrimination cases entitle plaintiffs to jury trials and allow them to recover damages in addition to back pay.

Although many minority groups have made rapid advances toward recognition of their civil rights, one group that continues to struggle is

the homosexual community. Similar to ethnic and racial minorities, individuals who identify themselves as homosexual, bisexual, or transsexual have long been subject to disparate treatment from the majority. Although GAY AND LESBIAN RIGHTS groups have made advances toward changing perceptions in society, challenges in the courts have been only marginally successful.

Gay and lesbian rights group claimed a victory in 1996 with the Supreme Court's decision in ROMER V. EVANS, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). In that case, a constitutional amendment in the state of Colorado prohibited governmental units from passing any statute, regulation, or ordinance purporting to protect the rights of homosexuals or bisexuals. The U.S. Supreme Court held that the amendment violated the Equal Protection Clause because it explicitly denies a single group protection under the law.

Although *Romer* represented one of the first major victories for gay and lesbian groups, other decisions have been less favorable. In BOY SCOUTS OF AMERICA V. DALE, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000), the Court held that the Boy Scouts could properly exclude gay boys from their organization based upon the principle of FREEDOM OF ASSOCIATION. Due in large part to their limited success in the courts and legislatures, gay and lesbian advocates have focused much of their attention on changing societal perceptions of homosexual, bisexuals, and other similar minority groups.

Another issue that has arisen in the courts with respect to civil rights is the limitations placed upon SECTION 1983 actions against governmental officials for violations of constitutional rights. For instance, in *Board of County Commissioners of Bryan County, Okla. v. Brown*, 520 U.S. 397, 117 S. Ct. 12382, 137 L. Ed. 2d 626 (1997), the U.S. Supreme Court clarified that a plaintiff cannot recover in an action under section 1983 under a theory of repondeat superior. The plaintiff in the case was injured when a police officer forced her to the ground after a chase. The officer had been hired by his great-uncle, a county sheriff, despite the fact that he had had a number of criminal convictions. The plaintiff claimed that the sheriff and the county had shown a reckless indifference toward her constitutional rights through their hiring practices. The U.S. Supreme Court disagreed, holding that a plaintiff in a Section 1983 action must prove that a governmental unit, through deliberate conduct, was a moving force behind the alleged injury.

### Prisoners' Rights

Lawsuits brought by prisoners to recover damages for alleged violations of their civil rights have caused problems in American legal systems. Many of these cases have involved alleged violations by prisons or prison officials against inmates. Although many of these claims have no valid legal basis, some do, so courts must determine, among the thousands of cases that are filed each year, which ones have merit. In response to these claims, Congress enacted the Prison Litigation Reform Act of 1995, 28 U.S.C.A. § 1932 (2003), which requires prisoners to pay filing fees and restricts the amount of money damages that prisoners can recover.

Prisoners have prevailed on a variety of claims, notwithstanding limitations placed upon their court actions. For example, in *Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998), the U.S. Supreme Court reversed an appellate court decision that had imposed a higher BURDEN OF PERSUASION on inmate claims. Similarly, prisoners are periodically successful in claims that prison officials have deprived them of constitutional rights, including due process of law.

However, the majority of claims by inmates fail. For instance, in *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001), the U.S. Supreme Court held that a plaintiff held in a halfway house that was operated by a private corporation under a contract with the federal government could not sue the corporation. The plaintiff had sought to bring the case under the rule in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (called a *Bivens* action), which allows for suits against federal officials who have violated the civil rights of plaintiffs. The Court in *Malesko* held that *Bivens* actions do not apply the to acts of government agencies or business entities and ruled against the plaintiff.

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CROSS-REFERENCES

Civil Rights Acts; Ku Klux Klan Act; Section 1983; Voting Rights Act of 1965. See also primary documents in "Civil Rights" section of Appendix.

## CIVIL RIGHTS ACTS

*Federal legislation enacted by Congress over the course of a century beginning with the post-Civil War era that implemented and extended the fundamental guarantees of the Constitution to all citizens of the United States, regardless of their race, color, age, or religion.*

The Civil Rights Acts of 1866 (14 Stat. 27) and 1870 (16 Stat. 140) were enacted to give newly freed slaves the same rights under federal law as those afforded to non-slaves. Such rights were the rights to sue and be sued, the rights to own real and PERSONAL PROPERTY, and the rights to testify and present evidence in legal proceedings. Serious questions existed, however, as to the constitutionality of the 1866 act and to whether Congress actually had authority to enact such a measure. Subsequent to the passage of the FOURTEENTH AMENDMENT in 1868, Congress reenacted the act pursuant to its power under the amendment to enforce the amendment through appropriate legislation. The Civil Rights Act of 1866 was, therefore, superseded by the CIVIL RIGHTS Act of 1870.

In 1875 Congress passed a third Civil Rights Act (18 Stat. 336) in response to the refusal of many whites who owned public establishments, inns, railroads, and other facilities to make them equally available to blacks. The Civil Rights Act of 1875 prohibited RACIAL DISCRIMINATION in such places and guaranteed "full and equal enjoyment" of such places.

Violations of this act abounded and criminal prosecutions ensued. A number of convictions were appealed to the SUPREME COURT OF THE UNITED STATES which in 1883 declared the act unconstitutional in the CIVIL RIGHTS CASES, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835. The Court reasoned that the social rights that the act safeguarded were not civil rights and, therefore, Congress was powerless to legislate on the social conduct of private individuals. Following this decision, states began enacting SEGREGATION into various laws, the most notorious of which were the JIM CROW LAWS. It took more than eighty years before Congress would again attempt to legislate in this area.

The Civil Rights Acts of 1957 represented congressional recognition that the federal government had to bring about an end to racial discrimination. The CIVIL RIGHTS COMMISSION was established and the laws guaranteed qualified voters the right to vote, regardless of their color. In the years 1964 to 1968 Congress enacted extensive and far-reaching legislation affording blacks equal status under the law, ranging from full and free enjoyment of public accommodations and facilities to the prohibition of racial discrimination in employment as well as transactions affecting housing in the United States.

The Civil Rights Act of 1991 granted to victims of unlawful discrimination the right to seek money damages, jury trials, and back pay.

CROSS-REFERENCES

Civil Rights; "Civil Rights Act of 1964" (Appendix, Primary Document); Ku Klux Klan Act; "Voting Rights Act of 1965" (Appendix, Primary Document).

## CIVIL RIGHTS CASES

*A landmark decision, which was a consolidation of several cases brought before the* SUPREME COURT OF THE UNITED STATES *in 1883 that declared the* CIVIL RIGHTS ACT *of 1875 (18 Stat. 336) unconstitutional and ultimately led to the enactment of state laws, such as* JIM CROW LAWS, *which codified what had previously been individual adherence to the practice of racial* SEGREGATION. *The cases were* United States v. Stanley, United States v. Ryan, United States v. Nichols, *and* United States v. Singleton, *109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835.*

The Civil Rights Act of 1875 was passed by Congress in the post-Civil War era in response to the refusal of many whites to afford newly freed slaves equal treatment with whites under federal law. The act mandated that owners of public facilities, such as inns, restaurants, railroads, and other carriers, not discriminate against blacks who sought access to, or service from, them on the basis of their race. Anyone who violated the law was subject to criminal prosecution.

Scores of prosecutions ensued and six cases reached the Supreme Court. The fact patterns of the cases were comparable in that they all were predicated upon the failure of blacks to be

treated the same as whites in various establishments such as restaurants, theaters, railroads, and even the New York City Grand Opera House.

The Court consolidated these cases by deciding that the crucial issue in each was whether the Civil Rights Act of 1875 was constitutional, to which it answered "no." In an 8–1 decision, Justice JOSEPH BRADLEY reasoned that neither the Thirteenth nor Fourteenth Amendments empowered Congress to safeguard blacks against the actions of private individuals. To decide otherwise would afford blacks a special status under the law that whites did not enjoy. The Thirteenth Amendment's prohibition of SLAVERY had no application to discrimination in the area of public accommodations. Neither did the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT apply to prohibit racial segregation, since it was as the result of conduct by private individuals, not state law or action, that blacks were suffering.

The only dissenting justice was JOHN MARSHALL HARLAN, who criticized the majority opinion on a number of grounds, including that the exclusion of blacks from state licensed facilities for no other reason than their race did bring into application both the Thirteenth and Fourteenth Amendments and that Congress had the authority pursuant to the COMMERCE CLAUSE to legislate in those cases involving railroads.

The decision in the *Civil Rights Cases* severely restricted the power of the federal government to guarantee equal status under the law to blacks. State officials in the South took advantage of the eclipsed role of Congress in the prohibition of RACIAL DISCRIMINATION and proceeded to embody individual practices of racial segregation into laws that legalized the treatment of blacks as second-class citizens for another seventy years.

CROSS-REFERENCES

Civil Rights; Civil Rights Acts; "Civil Rights Cases" (Appendix, Primary Document).

## CIVIL RIGHTS MOVEMENT

The civil rights movement was a struggle by African Americans in the mid-1950s to late 1960s to achieve CIVIL RIGHTS equal to those of whites, including equal opportunity in employment, housing, and education, as well as the right to vote, the right of equal access to public facilities, and the right to be free of RACIAL DISCRIMINATION. No social or political movement of the twentieth century has had as profound an effect on the legal and political institutions of the United States. This movement sought to restore to African Americans the rights of citizenship guaranteed by the Fourteenth and Fifteenth Amendments, which had been eroded by segregationist JIM CROW LAWS in the South. It fundamentally altered relations between the federal government and the states, as the federal government was forced many times to enforce its laws and protect the rights of African American citizens. The civil rights movement also spurred the reemergence of the judiciary, including the Supreme Court, in its role as protector of individual liberties against majority power. In addition, as the Reverend Martin Luther King Jr, and other leaders of the movement predicted, the movement prompted gains not only for African Americans but also for women, persons with disabilities, and many others.

The civil rights movement has been called the Second Reconstruction, in reference to the Reconstruction imposed upon the South following the Civil War. During this period, the FOURTEENTH AMENDMENT (1868)—granting EQUAL PROTECTION of the laws—and FIFTEENTH AMENDMENT (1870)—giving the right to vote to all males regardless of race—were ratified, and troops from the North occupied the South from 1865 to 1877 to enforce the ABOLITION of SLAVERY. However, with the end of Reconstruction in 1877, southern whites again took control of the South, passing a variety of laws that discriminated on the basis of race. These were called Jim Crow laws, or the BLACK CODES. They segregated whites and blacks in education, housing, and the use of public and private facilities such as restaurants, trains, and rest rooms; they also denied blacks the right to vote, to move freely, and to marry whites. Myriad other prejudicial and discriminatory practices were committed as well, from routine denial of the right to a fair trial to outright murder by LYNCHING. These laws and practices were a reality of U.S. life well into the twentieth century.

Organized efforts by African Americans to gain their civil rights began well before the official civil rights movement got under way. By 1909, blacks and whites together had formed the National Association for the Advancement of Colored People (NAACP), which became a lead-

## The Birth of the Civil Rights Movement

On December 1, 1955, **ROSA PARKS** was arrested in Montgomery, Alabama, for refusing to give up her seat on a city bus to a white man. News of Parks's arrest quickly spread through the African American community. Parks had worked as a secretary for the local branch of the **NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE**. Because she was a well-respected and dignified figure in the community, her arrest was finally enough to persuade African Americans that they could no longer tolerate racially discriminatory laws.

After exchanging phone calls, a group of African American women, the Women's Political Council, decided to call for a boycott of the city buses as a response to this outrage. This suggestion was greeted with enthusiasm by local African American leaders, including the influential black clergy.

On December 5, members of the African American community rallied at the Holt Street Baptist Church in Montgomery and decided to carry out the boycott. Their resolve was inspired by the words of the Reverend **MARTIN LUTHER KING JR.**

"We are here this evening," King declared to the packed church, "to say to those who have mistreated us so long that we are tired—tired of being segregated and humiliated; tired of being kicked about by the brutal feet of oppression." He went on to make a case for peace and nonviolence. Contrasting the methods of nonviolence that he envisioned for a civil rights movement, to the methods of violence used by the racist and terrorist **KU KLUX KLAN**, King declared,

> in our protest there will be no cross burnings.... We will be guided by the highest principles of law and order. Our method will be that of persuasion, not coercion. We will only say to the people, "Let conscience be your guide" ... [O]ur actions must be guided by the deepest principles of our Christian faith. Love must be our regulating ideal. Once again we must hear the words of Jesus echoing across the centuries: "Love your enemies, bless them that curse you, and pray for them that despitefully use you."

With these words and these events, the long, difficult struggle of the **CIVIL RIGHTS** movement began.

ing organization in the cause of civil rights for African Americans. From its beginning, the NAACP and its attorneys challenged many discriminatory laws in court, but it was not until after **WORLD WAR II** that a widespread movement for civil rights gathered force.

The war itself contributed to the origins of the movement. When African Americans who had fought for their country returned home, they more openly resisted being treated as second-class citizens. The movement's first major legal victory came in 1954, when the NAACP won **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, in which the Supreme Court struck down laws segregating white and black children into different public elementary schools. With *Brown,* it became apparent that African Americans had important allies in the highest federal court and its chief justice, **EARL WARREN**.

Another catalyzing event occurred on December 1, 1955, when **ROSA PARKS**, an African American woman, was arrested after she refused to give up her seat to a white man on a Montgomery, Alabama, bus. The law required African Americans to sit in the back of city buses and to give up their seats to whites should the white section of the bus become full. The city's black residents, long tired of the indignities of **SEGREGATION**, began a boycott of city buses. They recruited King, a 27-year-old preacher, to head the Montgomery Improvement Association, the group which organized the boycott. The African Americans of Montgomery held out for nearly a year despite violence—including the bombing of King's home—directed at them by angry whites. This violence was repugnant to many whites and actually increased support for the civil rights movement among them. The boycott finally achieved its goal on November 13, 1956, when the Supreme Court, in *Gayle v.*

# Million Man March

On Monday, October 16, 1995, hundreds of thousands of African American men gathered on the Mall in Washington, D.C., for the Million Man March, a daylong rally promoting personal responsibility and racial solidarity. Organized by Louis Farrakhan, leader of the **NATION OF ISLAM**, the march was one of the most well attended and significant rallies in the history of the nation's capital. With its mass of men stretching from the Capitol steps to the Washington Monument, the gathering marked a renewed commitment to self-empowerment and betterment on the part of African Americans.

The Million Man March deliberately recalled the 1963 March on Washington, which many consider the high point of the civil rights movement. During that earlier gathering, the Reverend **MARTIN LUTHER KING JR.**, gave his famous "I Have a Dream" speech. Many speakers at the Million Man March invoked King's speech, noting with a combination of sorrow, anger, and penitence that King's dreams for a racially united America had not yet been realized.

Farrakhan gave the keynote address of the day. Flanked by members of his paramilitary group, the Fruit of Islam, and speaking from behind a bulletproof shield, he announced at the beginning of his speech, "We are gathered here to collect ourselves for a responsibility that God is placing on our shoulders to move this nation toward a more perfect union." He continued to orate for over two hours, frequently bringing home the point that African Americans still suffer disadvantages that European Americans did not have. "There's still two Americas," he declared, "one black, one white, separate and unequal."

In another significant speech, the Reverend **JESSE JACKSON** expanded on the religiously inspired tone of repentance that was so much a part of the Million Man March. Speaking for those in attendance, the **CIVIL RIGHTS** leader prayed for "God to forgive us for our sins and the foolishness of our ways." Like many of the other speakers, he called on African American men to take responsibility for their families, to end violence and drug use in the home and in their communities, and to make sure their children are learning in school. He had this to say about the current problems facing African Americans:

> We come here today because there is a structural malfunction in America. It was structured in the Constitution, and they referred to us as three-fifths of a human being, legally. . . .
>
> Why do we march? Because our babies die earlier. . . . Why do we march? Because we're less able to get a primary or secondary education. Why do we march? Because the media stereotypes us. We are projected as less intelligent than we are; less hard-working than we work; less universal than we are; less patriotic than we are; and more violent than we are. Why do we march? We're less able to borrow money. . . . Why do we march? Because we're trapped with second-class schools and first-class jails.

Other speakers at the march included the Reverend Joseph Lowery; Damu Smith, of Greenpeace; poet Maya Angelou; and **ROSA PARKS**, whose arrest inspired the 1955 **MONTGOMERY BUS BOYCOTT**.

Away from the speakers' podium, the men collected on the Mall made their own history on that day. Coming from different classes, regions, and religions, they were a diverse group not beholden to any one leader. Many men remarked on the deep meaning the experience had for them, on the fellowship and friendships they gained, and on their own commitment to renewal and repair of both themselves and their communities.

One of the most contentious issues of all regarding the march was the attendance figure. The National Park Service officially estimated attendance at 400,000, whereas event organizers pegged it at over 1.5 million. In comparison, the 1963 March on Washington attracted 250,000 participants.

The Million Man March drew an extremely large share of the nation's television audience, as well as laudatory comments from many national leaders, including President **BILL CLINTON** and former general Colin L. Powell.

*Browder,* 352 U.S. 903, 77 S. Ct. 145, declared Montgomery's bus segregation law unconstitutional. By December 1956, the city was forced to desegregate its buses.

Although African Americans had sporadically demonstrated against segregation laws in previous decades, the **MONTGOMERY BUS BOYCOTT** became a turning point for their protests. It gained significant media attention for the civil rights cause, and it brought King to the fore as a leader. King would go on to head the **SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE** (SCLC), which was formed in 1957, and to guide the civil rights movement itself. The boycott also marked the end of reliance on litigation as the major tactic for gaining civil rights for African Americans. From this point on the movement also engaged in nonviolent direct action, a technique of civil disobedience that had been used before by pacifists, by labor movements, and by Mohandas K. Gandhi in the struggle to secure India's freedom from Great Britain.

Nonviolent methods had been used by African Americans since the 1940s, when the **CONGRESS OF RACIAL EQUALITY** (CORE)—a group of blacks and whites that formed in 1942 to lobby for equal civil rights for all—organized nonviolent direct action to protest racial discrimination. King described his own view of nonviolent protest in his 1958 book *Stride toward Freedom.* This type of protest worked in part by seeking to create a sense of shame in the opponent.

The nonviolence of the civil rights movement and the power of the federal government over the states were tested as African Americans sought to make use of the rights that had been confirmed by the Supreme Court. For example, segregationist whites, including the Alabama legislature, refused to recognize the rulings of the federal judiciary regarding **SCHOOL DESEGREGATION.** Some whites formed citizens' councils to combat desegregation, and the **KU KLUX KLAN** and other reactionary whites began a campaign of **TERRORISM**, including bombings and murders, intended to intimidate African Americans into giving up their cause.

A significant state-federal confrontation occurred in 1957 at Little Rock, Arkansas's Central High School, when angry mobs of whites attacked nine black students attempting to enroll for classes. President **DWIGHT D. EISENHOWER** had to send in troops to enforce the Supreme Court's decision in *Brown*, confirming the right of the students to attend the school. In 1962, when **JAMES MEREDITH** attempted to enroll at the University of Mississippi, President **JOHN F. KENNEDY** also sent in federal military troops to uphold desegregation.

*Dr. Martin Luther King Jr. and other Civil Rights movement leaders participate in the March on Washington on August 28, 1963.*
AP/WIDE WORLD PHOTOS

The SCLC, which under King's leadership had become one of the most important civil rights organizations in the country, in turn spawned another influential group, the **STUDENT NON-VIOLENT COORDINATING COMMITTEE** (SNCC, popularly called Snick). In 1960 this group, which was made up of both blacks and whites, became a major player in the civil rights struggle. SNCC attracted youths who were often dissatisfied by what they saw as the unnecessarily moderate goals and methods of the NAACP and the SCLC. SNCC members later led voting registration and education efforts throughout the South, often at great personal risk. Eventually, the group planted the seed of factionalism in the civil rights movement, as it became increasingly radical and alienated from the mainstream of the movement as represented by King.

SNCC played an influential role in another form of nonviolent direct action employed in the civil rights movement: sit-ins. These demonstrations often focused upon the whites-only lunch counters across the South. Armed only with a strict code of conduct that forbade them to strike back or curse their opponents, demon-

strators endured jeers, spitting, and blows by angry whites. One tactic associated with this strategy was the jail-in—also called jail, no bail—in which hundreds of people, many of them underage youths, arrived in waves at segregated lunch counters, were arrested for trespassing, and proceeded to overcrowd local jails. Jail-ins bogged down local governments and drew national attention to the cause. In the North, activists responded by picketing businesses, including the Woolworth chain of stores that operated segregated lunch counters in the South. The right to participate in sit-ins was upheld by the Supreme Court decisions *Garner v. Louisiana,* 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961), and *Peterson v. City of Greenville,* 373 U.S. 244, 83 S. Ct. 1119, 10 L. Ed. 2d 323 (1963).

The Freedom Rides were a type of nonviolent direct action designed to oppose segregation in interstate buses and bus stations. They were inspired in part by the 1960 Supreme Court decision *Boynton v. Virginia,* 364 U.S. 459, 81 S. Ct. 182, 5 L. Ed. 2d 206, which outlawed racial segregation in bus terminals and other places of public accommodation related to interstate transportation. Organized by CORE in 1961, the Freedom Rides were undertaken by six whites and seven blacks who rode two interstate buses from Washington, D.C., to New Orleans. Along the way, the riders deliberately violated segregation policies on the buses and in bus terminal rest rooms, waiting areas, and restaurants. White mobs savagely beat Freedom Riders of both races at different stops in the Deep South and in Alabama, one of the buses was firebombed.

*In order to protect them from possible violence on the part of desegregation opponents, African American students at Central High School in Little Rock, Arkansas, are escorted from school by members of the Army's 101st Airborne division in September 1957.*

AP/WIDE WORLD PHOTOS

Although the 1961 Freedom Rides proceeded no farther than Jackson, Mississippi, they achieved their larger goal of inducing the federal government to enforce its laws. The administration of President Kennedy sent in **U.S. MARSHALS** to protect the riders during the last part of their journey. An even clearer victory was achieved in September 1961 when the **INTERSTATE COMMERCE COMMISSION** abolished all segregated facilities in interstate transportation.

On August 28, 1963, the civil rights movement reached a high point of public visibility when it held the March on Washington. Hundreds of thousands of people—an estimated 20 to 30 percent of them white—gathered in front of the Lincoln Memorial in Washington, D.C., to urge Congress and the federal government to support desegregation and **VOTING RIGHTS**. During this occasion, King gave his famous "I Have a Dream" speech.

The following summer, civil rights activists in Mississippi organized another highly publicized event, Freedom Summer, a campaign to bring one thousand students, both white and black, into the South to teach and organize voter registration. Many civil rights groups provided backing for this movement, including SNCC, CORE, and the NAACP.

Throughout this period of nonviolent protest, the civil rights movement continued to suffer the effects of white violence. **MEDGAR EVERS**, an NAACP leader who was organizing a black boycott in Jackson, was shot and killed outside his home in 1963. Three participants in Freedom Summer—James Chaney, an African American, and Andrew Goodman and Michael Schwerner, both whites—were killed in Mississippi in June 1964. Events such as these murders outraged many in the nation and solidified popular support for the civil rights cause.

Then Congress passed one of the most significant pieces of civil rights legislation ever proposed, the **CIVIL RIGHTS ACT OF 1964** (42 U.S.C.A. § 2000a et seq.). This act made Congress an equal partner with the Supreme Court in establishing civil rights. Title II of the act outlawed discrimination in all places of public accommodation, including restaurants and lunch counters, motels and hotels, gas stations, theaters, and sports arenas. It also allowed the **DEPARTMENT OF JUSTICE** to bring suit in order to achieve desegregation in public schools, relieving the NAACP of some of its civil rights litigation caseload. The following year, Congress

*After the Supreme Court outlawed segregation in interstate bus terminals, the 1961 Freedom Rides were undertaken to challenge continuing segregation policies in the South. The riders were attacked at many of the stops, and are shown here being protected by police and National Guard troops in Montgomery, Alabama.*

AP/WIDE WORLD PHOTOS

passed another important piece of legislation, the **VOTING RIGHTS ACT OF 1965** (42 U.S.C.A. § 1973 et seq.). This act outlawed the voting qualifications, including literacy tests, that whites had used to keep African Americans from voting. It also gave the federal government oversight powers regarding changes in state voting laws. These laws together with federal actions showed that the civil rights movement had the backing of the powers of the federal government and that no amount of resistance, however violent, by white southerners would impede the cause.

By the mid-1960s, the nature of the civil rights movement began to change. African Americans, who had been united in their support of activities such as the Montgomery bus boycott, began to diverge in their views over what political action should be taken to improve their situation. Members of different groups within the movement increasingly expressed their dissatisfaction with other groups. More radical groups, including the Black Muslims and black power proponents, voiced discontent with the limited goals of the civil rights movement and its advocacy of nonviolence.

Many of the new African American radicals called for black separatism or nationalism—that is, separation from white society rather than **INTEGRATION** with it. Not content merely to seek civil equality, they began to press for social and economic equality. They also questioned the usefulness of nonviolence and no longer sought to include whites in the movement. SNCC, for example, became an all-black organization in 1966. The arguments of the African American radicals were punctuated by urban riots such as those in the Watts section of Los Angeles in 1965.

By the late 1960s, African Americans still suffered from many disadvantages, including poverty rates that were much higher than those among whites and physical health that was much worse. Racially motivated violence persisted as well, as seen in the assassination of King by a white man in 1968.

Despite these problems, the civil rights movement had forever changed the face of U.S. law and politics. It had led to legislation that gave greater protection to the rights of minorities. It had also greatly changed the role of the judiciary in U.S. government, as the Supreme Court had become more active in its defense of individual rights, often in response to litigation and demonstrations initiated by those in the movement. In this respect, the Court and the civil rights movement had great influence on each other, with each reacting to and encouraging the efforts of the other. Likewise, the federal government had, even if hesitatingly, enforced

the rights of a persecuted minority in the face of vigorous opposition from the southern states.

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## CIVIL SERVICE

*The designation given to government employment for which a person qualifies on the basis of merit rather than political patronage or personal favor.*

Civil service employees, often called civil servants or public employees, work in a variety of fields such as teaching, sanitation, HEALTH CARE, management, and administration for the federal, state, or local government. Legislatures establish basic prerequisites for employment such as compliance with minimal age and educational requirements and residency laws. Employees enjoy job security, promotion and educational opportunities, comprehensive medical insurance coverage, and PENSION and other benefits often not provided in comparable positions in private employment.

Most civil service positions are filled from lists of applicants who are rated in descending order of their passing scores on competitive civil service examinations. Such examinations are written tests designed to measure objectively a person's aptitude to perform a job. They are open to the general public upon the completion and filing of the necessary forms. Promotional competitive examinations screen eligible employees for job advancement. Veterans of the ARMED SERVICES may be given hiring preference, usually in the form of extra points added to their examination scores, depending upon the nature and duration of their service. Applicants may also be required to pass a medical examination and more specialized tests that relate directly to the performance of a designated job. Once hired, an employee may have to take an oath to execute his job in GOOD FAITH and in accordance with the law.

Unlike workers in private employment, civil service employees may be prohibited from certain acts that would compromise their position as servants of the government and the general public. For example, the federal HATCH ACT (5 U.S.C.A. § 7324 et seq. [1887]) makes participation by federal, state, and local civil service employees in designated public electoral and political activities unlawful.

The U.S. Civil Service Commission, created by Congress in 1883 and reorganized under the Civil Service Reform Act of 1978 (5 U.S.C.A. § 1101 et seq.) as the MERIT SYSTEMS PROTECTION BOARD, established a merit system for federal employment and governs various aspects of such employment, such as job classification, tenure, pay, training, employee relations, equal opportunity, pensions, and health and life insurance. Most states have comparable bodies for the regulation of state and local civil service employment.

## CIVIL WAR

Civil war exists when two or more opposing parties within a country resort to arms to settle a conflict or when a substantial portion of the population takes up arms against the legitimate government of a country. Within INTERNATIONAL LAW distinctions are drawn between minor conflicts like riots, where order is restored promptly, and full-scale insurrections finding opposing parties in political as well as military control over different areas. When an internal

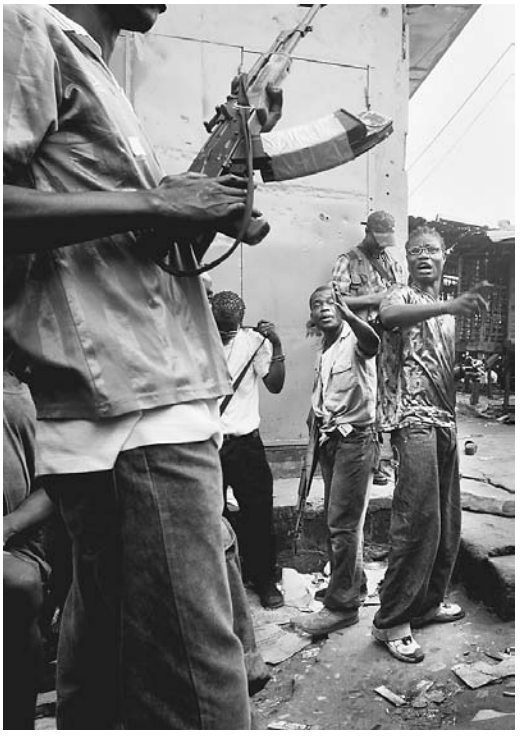

*Combatants loyal to President Charles Taylor gather in Monrovia, Liberia, during a July 2003 ceasefire in that nation's civil war.* AP/WIDE WORLD PHOTOS

conflict reaches sufficient proportions that the interests of other countries are affected, outside states may recognize a state of insurgency. A recognition of insurgency, whether formal or de facto, indicates that the recognizing state regards the insurgents as proper contestants for legitimate power. Although the precise status of insurgents under international law is not well-defined, recognized insurgents traditionally gain the protection afforded soldiers under international RULES OF LAW pertaining to war. A state may also decide to recognize the contending group as a belligerent, a status that invokes more well-defined rights and responsibilities. Once recognized as a belligerent party, that party obtains the rights of a belligerent party in a public war, or war between opposing states. The belligerents stand on a par with the parent state in the conduct and settlement of the conflict. In addition, states recognizing the insurgents as belligerents must assume the duties of neutrality toward the conflict.

**CROSS-REFERENCES**

U.S. Civil War; War.

## CIVIL WAR AMENDMENTS

See FIFTEENTH AMENDMENT; FOURTEENTH AMENDMENT; THIRTEENTH AMENDMENT.

## ♦ CIVILETTI, BENJAMIN RICHARD

Benjamin Richard Civiletti served as U.S. attorney general from 1979 to 1981 under President JIMMY CARTER. His leadership helped the JUSTICE DEPARTMENT regain public credibility in the years following the WATERGATE scandal.

Civiletti was born July 17, 1935, in Peekskill, New York. He received a bachelor of arts degree from Johns Hopkins University in 1957 and a law degree from the University of Maryland in 1961. He served from 1961 to 1962 as clerk to William Calvin Chesnut, a U.S. district judge for Maryland. From 1962 to 1964, he worked as assistant U.S. attorney in Baltimore.

Civiletti then turned to private practice with the prestigious Baltimore law firm of Venable, Baetjer, and Howard. His skill as a trial attorney enabled him to rise quickly in the firm. He became a partner in 1969 and headed the litigation department two years later. He also became highly active on various professional committees in Baltimore and Maryland, including the Character Committee of the Court of Appeals of Maryland (1970–76), the Mayor's Commission to Investigate Baltimore City Jails (1972–73), the Judiciary Committee of the Bar Association of Baltimore (1972–75), and the Maryland state legislature's Task Force on Crime (1975–76).

"LAW REQUIRES BOTH A HEART AND A HEAD."
—BENJAMIN CIVILETTI

Civiletti's reputation as an outstanding lawyer and civic leader attracted the notice of officials in President Carter's administration. In 1977, the Carter administration appointed Civiletti assistant attorney general in charge of the Criminal Division of the Justice Department. He oversaw a number of sensitive cases in the Criminal Division, including the investigation of Bert Lance, a friend of Carter's who resigned as director of the OFFICE OF MANAGEMENT AND BUDGET in September 1977 after being questioned by the Senate about alleged violations of banking laws. Civiletti also dealt with a scandal involving alleged attempts by South Korean government officials to buy influence from members of Congress and from other U.S. government officials.

In late 1977, the Carter administration nominated Civiletti as deputy attorney general. He was finally appointed to the post in January 1978. As deputy attorney general, Civiletti received widespread praise for his coordination

*Benjamin Civiletti.* AP/WIDE WORLD PHOTOS

of an interagency campaign against WHITE-COLLAR CRIME.

Civiletti's rapid rise through the ranks of the Justice Department culminated in his appointment, in 1979, as U.S. attorney general. His appointment came after President Carter requested the resignation of top cabinet officials in an attempt to improve the functioning of his administration. The previous attorney general, GRIFFIN B. BELL, had strongly recommended Civiletti to be his replacement. The Senate approved Civiletti's appointment on August 1, 1979, by a vote of 94–1.

As attorney general, Civiletti continued policies initiated by Bell: a restructuring of the FEDERAL BUREAU OF INVESTIGATION so that it might better investigate white-collar crime; recodification of CRIMINAL LAW statutes; increased pursuit of antitrust cases; and improvement of the Immigration and Naturalization Service. In addition, Civiletti continued his earlier work to improve cooperation between different law enforcement divisions of the federal government.

Civiletti was also forced to respond to international events during his tenure as attorney general. After U.S. citizens were seized at the U.S. Embassy in Tehran in 1979, Civiletti directed the Justice Department's efforts to deport Iranians who had entered the United States illegally. Civiletti also traveled to the INTERNATIONAL COURT OF JUSTICE at The Hague, and persuaded its judges to rule in favor of the United States and denounce the Iranian capture of the U.S. embassy.

After RONALD REAGAN took office as president in 1981, Civiletti returned to private practice at the Venable law firm. He founded the Maryland LEGAL SERVICES CORPORATION and was the original director of the National Institute against Prejudice and Violence. In 1992, Civiletti became the director and vice president of the American Judicature Society, and in 1993, he was named chairman of the Maryland Governor's Commission on Welfare Policy. Civiletti has served as a trustee of Johns Hopkins University and has received honorary doctorates of law from the University of Baltimore, Tulane University, Saint John's University, the University of Notre Dame, and the University of Maryland.

In 1999, Civiletti testified before a House Judiciary Subcommittee in opposition to the

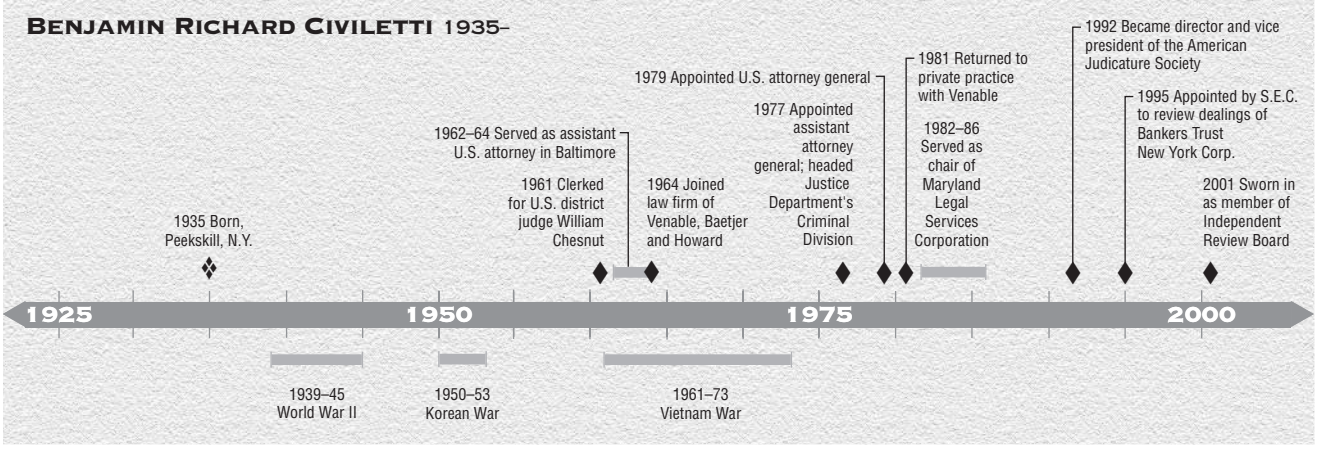

reauthorization of the Independent Counsel Act. The act authorized a three-judge panel to appoint a special prosecutor to investigate alleged illegal actions by government officials. It drew criticism for granting these prosecutors too much power without any effective oversight from the executive or judicial branches of government. In August 2001, Civiletti was sworn in as the second member of the Independent Review Board, a quasi-governmental agency that was created by court order to monitor the activities of the Teamsters Union.

In the early 2000s, Civiletti continued his work in private practice where he focused on litigation and antitrust issues as well as white collar-crime, corporate governance, government regulation, and health law. He also built a practice in ALTERNATIVE DISPUTE RESOLUTION. Civiletti continued to sit on numerous boards, committees, councils and task forces. He also published extensively and maintained a steady schedule of speaking engagements.

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## CIVILIAN REVIEW BOARDS

*A municipal body composed of citizen representatives charged with the investigation of complaints by members of the public concerning misconduct by police officers. Such bodies may be independent agencies or part of a law enforcement agency.*

Generally, the power of a civilian review board is restricted to reviewing an already completed internal police investigation, and commenting on it to the Chief of Police. Citizen review boards have not been very effective at causing reform, as they are often co-opted by the police department whose investigations they are supposed to review, and thus wind up agreeing with the police department in almost all instances.

Some of the newer civilian review board models, however, provide board members with investigatory as well as review authority. Some of these models contemplate that the board will conduct parallel investigations to supplement the internal affairs investigations. In a few localities, the review board has subpoena power and can force a police officer to testify. A few jurisdictions even grant sole investigatory power to their civilian review boards. But it is very rare for a civilian review board to have the final say as to the disposition of an investigation or discipline to be imposed on an officer. These ultimate decisions generally continue to be the province of the chief of police. Nonetheless, all civilian review boards with independent investigatory authority seem to have the power to make recommendations to the chief on disposition and discipline.

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## C.J.

*An abbreviation for chief justice, the principal presiding judge or the judge with most seniority on a particular court, as well as an abbreviation for circuit judge, the judge of a particular judicial circuit.*

## CJS®

*The abbreviation for* Corpus Juris Secundum, *which is a comprehensive encyclopedia of the principles of American law.*

*Corpus Juris Secundum* (CJS) serves as an important research tool that enables a user to locate statements and reported decisions on points of law in which he or she is interested. It is a multivolume set that alphabetically arranges broad topics of law, such as contracts, PRODUCT LIABILITY and SECURED TRANSACTIONS. Preceding the text of each topic or title is a detailed sectional analysis that demonstrates a logical development of the principles of the title. The analysis permits a researcher to obtain a skeletal overview of the title and provides easy access to the desired area. Within each section, a more detailed analysis of subsections is provided when necessary to elucidate the finer points of a particular principle. A concise summary of the law discussed within the section is set out in heavy black print and is referred to as black letter law. This feature, which introduces the text of a section, allows a researcher to determine quickly whether the text explains the RULE OF LAW that is desired. Immediately following the

statements of black letter law are the library references, which refer the researcher to the relevant key number of the West Digest System, thereby providing access to all of the related cases.

The main body of text discusses the general principles of the title. It is supported by footnotes that contain citations to relevant decisions that are reported in the various digests and reporters. A brief statement of the case is sometimes included in the footnote.

Each volume of *CJS* contains an index to the titles found within it. The entire set has a general index that facilitates location of the desired point of law. Each of the volumes is kept current through the use of annual pocket parts that include all relevant new cases and changes in statutes that affect the title. Volumes undergo complete revision periodically when substantial changes and developments in the law warrant the reorganization of the title.

*CJS* is one of two major legal encyclopedias with a national focus. The other is *American Jurisprudence*, which began publication in 1936 and is now in its second series. Although the two were competitors of sorts for a number of years, both are now published by the same company, the West Group. *CJS* and *American Jurisprudence 2d* are both available in electronic format on WESTLAW, the online legal-research database.

## CLAIM

*To demand or assert as a right. Facts that combine to give rise to a legally enforceable right or judicial action. Demand for relief.*

A claim is something that one party owes another. Someone may make a legal claim for money, or property, or for SOCIAL SECURITY benefits.

A claim also means an interest in, as in a possessory claim, or right to possession, or a claim of title to land.

## CLAIM FOR RELIEF

*The section of a modern complaint that states the redress sought from a court by a person who initiates a lawsuit.*

A civil action is commenced with the filing of a complaint with the court. The person who is seeking money damages or a court order, called the plaintiff, files a complaint, which notifies or warns the defendant that legal action has begun. Within a complaint, the claim for relief portion sets forth a short, concise statement justifying the relief requested by the plaintiff.

## CLARENDON, CONSTITUTIONS OF

*Statutes—enacted by a parliament convened at Clarendon, England, in 1164 during the reign of King Henry II—that restricted the authority of the pope and his clergy by subjecting them to the secular jurisdiction of the king's court.*

The Constitutions of Clarendon limited the jurisdiction that ecclesiastical courts exercised over members of the clergy while expanding the jurisdiction of the civil court of the king. Clerics accused of common-law crimes, as opposed to violations of CANON LAW, were tried in the king's court. The procedure for making appeals in ecclesiastical law was revised so that the final decision was to be rendered by the king, rather than the pope. Archbishop of Canterbury THOMAS À BECKET reluctantly agreed to these enactments at first but subsequently rejected them with the approval of Pope Alexander III. His efforts had, however, no effect on the development of ENGLISH LAW resulting from the Constitutions of Clarendon.

## ♦ CLARK, MARCIA RACHEL

Marcia Rachel Clark gained national prominence as the prosecutor of legendary football player O.J. SIMPSON. Yet, long before the Simpson trial made her famous, Clark had built an enviable legal reputation. The one-time professional dancer left private practice to become a Los Angeles assistant district attorney in 1981, a fortuitous career choice that allowed the 28-year-old lawyer to combine her interest in victim advocacy with powerful preparatory skills and a strong courtroom style. Clark prevailed in 19 successful HOMICIDE prosecutions in just over a decade against such high-profile defendants as the murderer of TV actress Rebecca Schaeffer and Los Angeles vigilante James Hawkins. Colleagues and adversaries alike praise her abilities. She is noted for her ability to critically examine complex SCIENTIFIC EVIDENCE.

Clark was born in Oakland, California, on August 31, 1953, to Abraham Kleks and Rozlyn Mazur Kleks. In their strict orthodox Jewish household academic achievement took priority. Clark and her brother studied heavily and took classes in Hebrew twice a week. Clark's passion was drama: she studied ballet; took lead roles in high school plays; and later, as a student at the

University of California, Los Angeles, briefly toured with a professional dance company. But Clark had nonartistic interests as well, as reflected in her undergraduate degree in political science, awarded in 1976. Upon graduation, she married and enrolled in Southwestern University School of Law. The marriage, to Gabriel Horowitz, a flamboyant backgammon gambler known for his high-stakes hustling of celebrities, did not last. It did, however, once bring Clark across the path of Simpson, one of her husband's—and later her own—famous opponents.

Following her graduation from law school in 1979 Clark decided to specialize in CRIMINAL LAW. Her life changed rapidly. In 1980, she married Gordon Clark, a computer engineer and an executive in the Church of Scientology, and took his name. She had recently joined the Los Angeles firm of Brodey and Price as a junior attorney but the job did not suit her: she strongly disliked defending violent suspects and soon came to a personal crossroads. The turning point was her involvement in the defense of James Holiday, a man accused of fatally stabbing a woman he had lured into his car. So disturbing was the case to Clark that she believed herself incapable of completing a legal brief for him. But she did the work and won; the case was thrown out of court for lack of evidence and Holiday walked. Afterward, confronting her boss with her deep misgivings, Clark was advised to consider a career change. She took this recommendation, and in 1981 the Los Angeles district attorney's office hired her.

The new assistant district attorney assumed her duties in the Culver City, California, courthouse with enthusiasm. She knew that her sympathies lay with VICTIMS OF CRIME and it only remained for her to prove herself as a prosecutor. Working with another assistant district attorney, Clark successfully tried several murder suspects over the next four years. These cases established her reputation for thorough preparation and toughness in court. In 1985, she won convictions in a lurid case involving the double murders of a college couple, Michelle Ann Boyd and Brian Harris, by four inner-city youths, convincing one of the murderers to testify against his friends. If tough guys did not intimidate her, neither did high-powered defense attorneys. In a case that anticipated their matchup in the Simpson trial, she faced off successfully against noted California defense attorney ROBERT L. SHAPIRO who ultimately entered a plea bargain for his client, Theodore Pacheco, an estranged husband accused of storming into his wife's home with a shotgun and killing her friend.

*Marcia Clark.*
AP/WIDE WORLD PHOTOS

Clark's success quickly came to the attention of the district attorney's office. In 1985, she got a considerable career boost when she was assigned to work with veteran Los Angeles prosecutor Harvey Giss on the James Hawkins murder case. Hawkins, an African American who worked at his father's grocery store in Watts, had shot a street gang member. Hawkins said he intervened to stop the gangster from harassing a woman and her five children; the shooting, he claimed, was accidental. Turning him into an overnight folk hero, the media and community leaders praised him for fighting back against criminals. But investigators believed that he had simply shot a rival gang member. In 1987, in part because of Clark's skillful presentation of gun ballistics evidence, she and Giss won a conviction on not one but two charges of murder. Her success against Hawkins's top-notch defense team, headed by Los Angeles attorney Barry Levin, did not go unnoticed. "She was born to be a trial prosecutor," Levin later told the *San Jose Mercury News.* "She's tenacious, she's ethical, she's highly competent, she's prepared."

Clark's reputation continued to grow, not simply because she won cases but because of how she won them. She was innovative and daring, as the Rebecca Schaeffer murder case revealed. After slaying the young TV actress in

"I CAN OFFER ONLY THAT I WILL DO EVERYTHING IN MY POWER TO SEE THAT HER LOSS IS AVENGED—I CANNOT PROMISE JUSTICE BECAUSE TO ME JUSTICE WOULD MEAN REBECCA IS ALIVE AND HER MURDERER DEAD."
—MARCIA CLARK

California in 1989, John Bardo, an emotionally disturbed Arizona man who stalked celebrities, fled back to Arizona where he was arrested. His public defender fought Clark's request for Bardo's extradition—but filed pleadings in the wrong Arizona court. Clark capitalized on his legal error by dispatching detectives at the eleventh hour to return Bardo to Los Angeles to stand trial. The action provoked controversy, but Clark withstood it, supported by Los Angeles district attorney Ira Reiner who praised her tactics and understanding of the law. The successful prosecution of Bardo in 1991 involved keen preparation that undermined the testimony of the defense's star witness, a psychiatrist who argued that Bardo had shot the actress in a fit of anger. Chipping away at the expert's testimony, Clark proved that the murder had been premeditated. Later, superior court judge Dino Fulgoni publicly complimented her on her trial preparation skills. Bardo's public defender was ambivalent; having refused to enter any plea for his client in protest of the surprise EXTRADITION, he later told the *Los Angeles Daily News* that Clark was "very aggressive, but she's always very well-prepared, very professional in her presentation."

By the time of O. J. Simpson's arrest on suspicion of murder in mid-1994, Clark was highly qualified to bring the state's case against him. She had a record of 19 successful homicide prosecutions. She had matched abilities with star defense attorneys. Moreover, her ability to win a case in court using highly detailed, complex scientific evidence was proved; she had, after all, won the conviction of murderer Christopher Johnson in 1991 on the strength of a single drop of blood found in his car, establishing a link to Johnson through DNA comparisons with blood of the victim and of the victim's living relatives. In addition, Clark was already recognized as a victim advocate who went out of her way to forge close ties to victims' families. Early in the case against Simpson, she endeavored to build public sympathy for the slain Nicole Brown Simpson and Ronald Lyle Goldman. "We have two young people whose lives stretched out before them, with all the possibilities," she said at a press conference in June 1994. "These two young victims have been murdered in a brutal and horrible way."

The Simpson trial earned Clark mixed reviews. At first, legal analysts generally approved of the prosecution's strategy although sometimes not of Clark's tactics. In the long, frustrating case, Clark readily held her own against Simpson's celebrated defense team in their many biting exchanges. Even from the beginning, Clark sparred with Shapiro as each warned the other not to try to direct her or his case. Yet, as the weeks wore on, she did not always come out favorably in the eyes of Judge Lance Ito, who sometimes admonished her for inappropriate remarks in court. Clark and lead defense attorney JOHNNIE L. COCHRAN JR., battled passionately over the admissibility of certain evidence, but it was with attorneys F. LEE BAILEY and Barry Scheck that she fought most bitterly. In court, she likened Bailey to a bizarre character out of the novel *Alice in Wonderland,* and after a query from Scheck, she exploded, "There is no lawyer with half a brain, with an IQ above five, who would not have known that such a question was improper."

Given the extraordinary attention paid to the trial, it was inevitable that Clark herself came under exacting scrutiny. Her new status as the best-known woman attorney in the nation car-

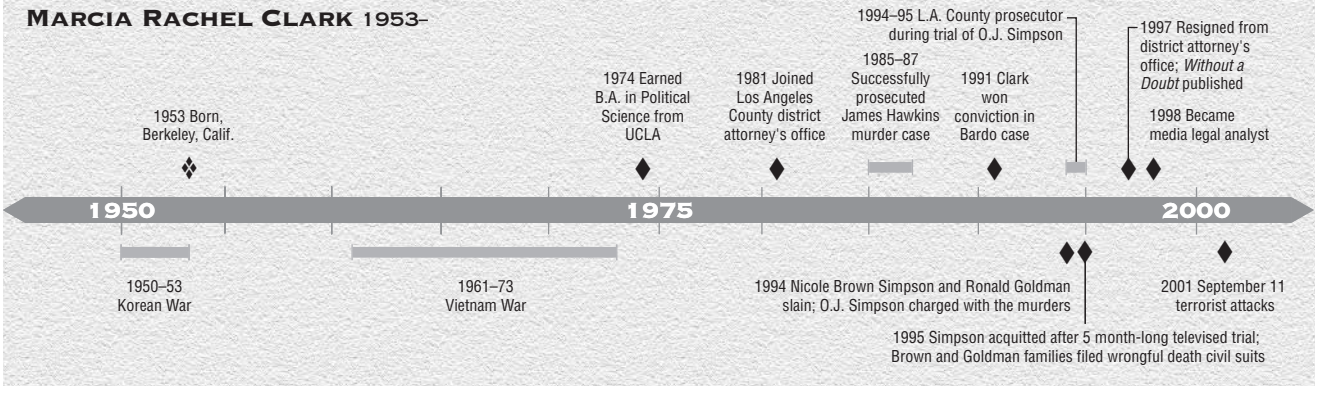

ried certain liabilities. Her gender opened her to peculiar criticism: initially, critics jumped on her decision to wear what the media called short skirts. When she changed clothes and hairstyle, the criticism sharpened. Clark took the advice of jury specialists (consultants who advise attorneys on the subtleties of body language, clothing, and speech) who had recommended that she soften her image to be more appealing to jurors. Feminist critics generally sympathized with her but called the need to change her appearance offensive. Susan Estrich, a University of Southern California law professor, told the *Boston Globe,* "This woman is in the business of prosecuting murderers, and the notion that she has to do it wearing pink is a stunning indictment of how far we've come in terms of equal rights." "She's not going to a tea party, after all," observed GLORIA ALLRED, president of the Women's Equal Rights Legal Defense and Education Fund. Clark also became the focus of discussion about working mothers, after Gordon Clark, from whom she was divorced in 1994, sued for custody of their two children, alleging that she had no time left over from the Simpson trial to care for them.

On July 6, 1995, after five and a half months, the prosecution rested its case. The numbers were staggering: Clark and fellow prosecutors had presented 58 witnesses over 92 days of testimony with 488 exhibits—at a minimum expense to Los Angeles County of $5.69 million. As expected, defense attorney Cochran immediately filed a motion to have the case dismissed, arguing that the prosecution had failed to prove its case; the motion failed. If any consensus emerged among legal analysts, it was that the prosecution had presented too much CIRCUMSTANTIAL EVIDENCE, much of which defense attorneys had apparently been able to discredit. Standing by his prosecutors, Los Angeles district attorney Gil Garcetti told reporters, "The mountain, truly the giant mountain of evidence that we have produced in court over these many weeks, points to only one person, and we know who that person is." *Esquire* magazine named Clark its Woman of the Year for 1995, and speculation immediately began about whether she would continue her career as a prosecutor or pursue movie offers.

In October 1995, O.J. Simpson was acquitted. The jury verdict stunned the prosecution and strained race relations throughout the country. Immediately afterwards, Clark took a leave of absence and ultimately resigned from the district attorney's office in 1997. She began a series of speaking engagements that continues to this day.

In 1997, Clark published her book about the trial. Cowritten with Teresa Carpenter, *Without a Doubt* describes the Simpson trial as well as the experiences that brought Clark to her role as prosecuting attorney. The book immediately hit the best-seller lists where it remained for a number of weeks. Since then Clark has appeared as legal commentator on a number of TV and radio shows.

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## ♦ CLARK, TOM CAMPBELL

Distinguished jurist and federal law enforcement official Tom Campbell Clark played a pivotal role in U.S. law following WORLD WAR II. During his three decades in the federal government, Clark served in various capacities in the DEPARTMENT OF JUSTICE (1937–45), as U.S. attorney general (1945–49), and as an associate justice of the U.S. Supreme Court (1949–67). A conservative whose political philosophy moderated in his later years, Clark took part in the Supreme Court's expansion of CIVIL RIGHTS and civil liberties in the 1960s.

"NOTHING CAN DESTROY A GOVERNMENT MORE QUICKLY THAN ITS FAILURE TO OBSERVE ITS OWN LAWS, OR WORSE, ITS DISREGARD OF THE CHARTER OF ITS OWN EXISTENCE."
—TOM CLARK

Clark was born in Dallas on September 23, 1899, to a life of comfort and privilege. Following high school, he attended the Virginia Military Institute and then served as a sergeant in 1917, narrowly missing overseas action in WORLD WAR I. After his discharge, Clark followed his grandfather, father, and brother into the PRACTICE OF LAW. He entered the University of Texas, and completed bachelor of arts and bachelor of law degrees in 1922 before joining his father and brother in their law practice. He soon married Mary Jane Ramsey, a former fellow student, with whom he later had two children.

Family political connections served Clark throughout his career. Help in launching his career came from two influential Texas politicians, Senator Tom Connally and Representative

*Tom Clark.*
LIBRARY OF CONGRESS

Sam Rayburn. With Connally's help, Clark left private practice in 1927 to become the civil district attorney of Dallas County. He had a perfect prosecution record in his five years in the office. In the early 1930s, he was active in Texas politics as well as in corporate law, and he briefly represented the Texas Petroleum Council as a lobbyist fighting tax increases.

In 1937, Clark began his long career in Washington, D.C. He joined the U.S. Department of Justice as a special assistant to the attorney general, an appointment secured through the strong political support of Senator Connally. The job required overseeing several department bureaus and prosecuting antitrust cases, in which he distinguished himself. By 1939, he was chief of the Antitrust Division's West Coast offices, fighting and ending price-fixing in the lumber industry.

During World War II, Clark held two leading positions in the Justice Department: chief of the Antitrust Division in 1942 and chief of the Criminal Division in 1945. Wartime had transformed the federal government, multiplying responsibilities for its officers, and thus, Clark found himself assisting the U.S. Army in a controversial domestic action: he coordinated the federal effort to round up and intern in camps American citizens of Japanese ancestry residing on the West Coast. Clark also worked closely with Senator Harry S. Truman's Special Senate Committee Investigating the War Program, which unearthed cases of war FRAUD for the Justice Department to prosecute.

Throughout the late 1940s, Clark and Truman's association benefited both men. Clark supported Truman at the 1944 DEMOCRATIC PARTY convention, and was awarded an appointment to Truman's cabinet as U.S. attorney general. Holding the position from 1945 to 1949, he took the unusual step of personally arguing the federal government's position in antitrust cases—his specialty—before the U.S. Supreme Court. He also helped fuel the postwar era's RED SCARE by investigating so-called subversive groups and helping to prosecute the leaders of the American Communist party. Clark's anti-Communism and loyalty to the president converged when Truman sought election in 1948. Republicans attacked Truman for not being suf-

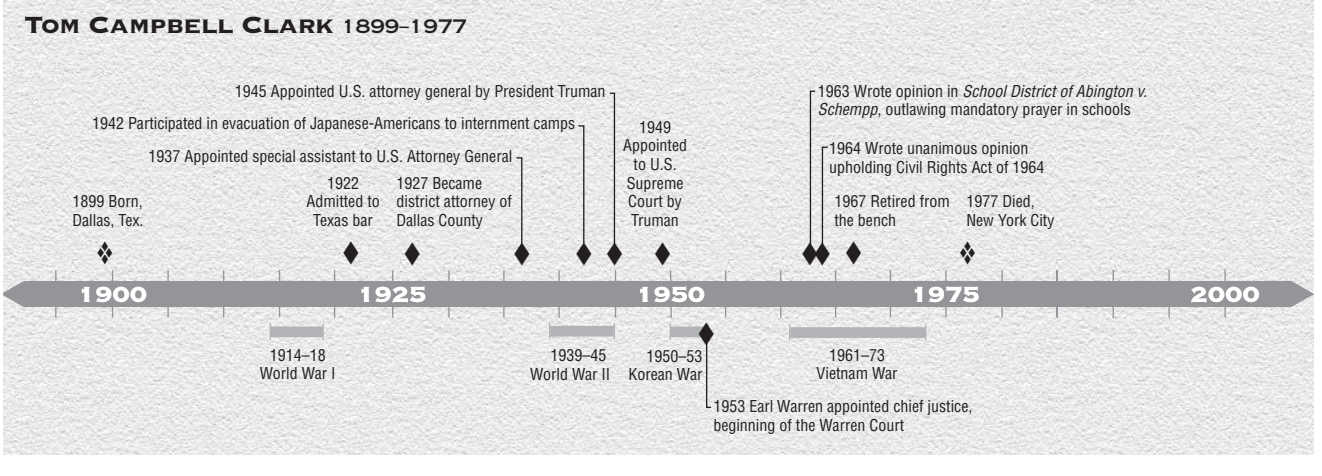

ficiently anti-Communist, a common tactic in the era's fervent politics, and Clark came to his defense. After Truman won a second term, he appointed Clark to the U.S. Supreme Court in 1949.

In his early years on the bench, the new associate justice remained conservative. Under the leadership of Chief Justice FRED M. VINSON, the Court was reluctant to return decisions in favor of civil liberties, and Clark tended to vote with Vinson. But the character of the Court—and subsequently that of U.S. law—changed with the appointment of EARL WARREN as chief justice in 1953. In its exercise of JUDICIAL REVIEW, the WARREN COURT placed a high value on the BILL OF RIGHTS, handing down decisions that profoundly altered the course of life in the United States.

Clark supported several of these decisions. Like the Court, he had changed, shifting toward a more moderate position on First and FOURTH AMENDMENT issues. He still resisted liberalism: for instance, he dissented in *Aptheker v. Secretary of State,* 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964), which struck down a provision of the Subversive Activities Control Act of 1950 (50 U.S.C.A. §785) that prevented members of the Communist party from securing passports. But on balance, he voted in favor of VOTING RIGHTS, privacy, and the separation of church and state.

In 1961, Clark wrote the majority opinion in MAPP V. OHIO, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), a seminal and controversial decision. *Mapp* concerned the Fourth Amendment right to be secure from unreasonable searches. By a narrow 5–4 majority, the Court extended to defendants in state criminal cases a protection that had previously been available only in federal cases: it barred state prosecutors from using illegally obtained evidence under the so-called EXCLUSIONARY RULE. In theory, the Fourth Amendment had always protected citizens from government intrusion. But the amendment contains no specific means for redressing violations. Since the vast majority of criminal cases have always been brought at the state level, it took the decision in *Mapp* to give this liberty real teeth. Now, cases in which police officers abused their power—for example, by failing to properly obtain a search warrant—could be thrown out of court. "To hold otherwise," Clark wrote, "is to grant the right but in reality to withhold its privilege and enjoyment."

In 1963, Clark wrote the majority opinion in another pivotal civil liberties case. ABINGTON SCHOOL DISTRICT V. SCHEMPP, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844, banned the Lord's Prayer and Bible reading from public schools. It followed by one year the Court's landmark ruling in ENGEL V. VITALE, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962), which held unconstitutional a state-authored school prayer. *Engel* was the first major decision on the unconstitutionality of religious practice in public schools. *Schempp* went further. It issued the Court's first concrete test for determining violations of the First Amendment's Establishment Clause. Thus, it laid the groundwork for anti-prayer rulings that continued into the 1990s.

Earning a reputation for integrity and judicial independence, Clark remained on the Court until 1967. He stepped down to clear the way for his son, RAMSEY CLARK, to become U.S. attorney general, thus removing the possibility of a conflict of interest in government cases before the Supreme Court. But he did not leave the federal judiciary: he went on to become the only justice in U.S. history to sit on all eleven circuits of the U.S. Court of Appeals.

After Clark's death on June 13, 1977, in New York City, among the tributes paid to his life and work was this statement by U.S. Supreme Court Justice WILLIAM J. BRENNAN JR.: "His great distinction as a judge is the reflection of his conviction that it is wrong to live life without some deep and abiding social commitment."

"IT IS THE HIGHEST DUTY OF EVERY INDIVIDUAL ON THIS PLANET TO SEE THAT HIS OR HER GOVERNMENTAL OFFICIALS ARE ACCOUNTABLE FOR THEIR ACTS."
—WILLIAM CLARK

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CROSS-REFERENCES

Communism; Japanese American Evacuation Cases; Religion; School Prayer; Search and Seizure; Warren Court.

## ♦ CLARK, WILLIAM RAMSEY

Ramsey Clark is a unique attorney whose list of clients reads like a who's who of political underdogs. After serving as assistant attorney general, deputy attorney general, and finally attorney general of the United States in the 1950s and 1960s, he returned to private practice with a strong interest in INTERNATIONAL LAW and HUMAN RIGHTS. His liberal views on crime, particularly crime against the U.S. government, have led him to represent a number of individuals and groups that are notably disliked or feared by the U.S. public.

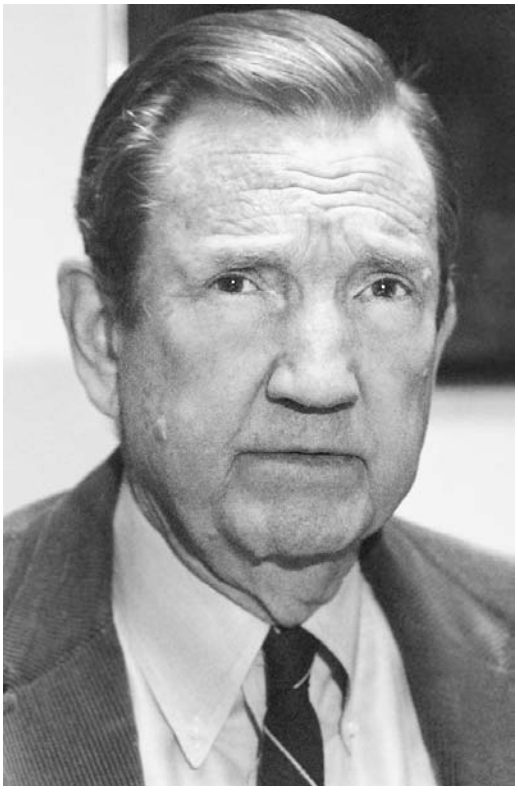

*Ramsey Clark.*
AP/WIDE WORLD PHOTOS

William Ramsey Clark was born December 18, 1927, in Dallas, Texas, to TOM C. CLARK and Mary Ramsey Clark. He received his bachelor of arts degree from the University of Texas in 1949 and his master of arts and doctor of JURISPRUDENCE degrees from the University of Chicago in 1950. After being admitted to the Texas bar in 1951, he practiced law in Dallas for ten years. In 1961 he was appointed assistant attorney general in the U.S. DEPARTMENT OF JUSTICE. He served in that capacity until 1965 when he was made deputy attorney general. In 1967, President LYNDON B. JOHNSON appointed him attorney general, a position he held until 1969.

Clark was politically well connected. His father had served as U.S. attorney general from 1945 to 1949 under President HARRY S. TRUMAN and as an associate justice of the U.S. Supreme Court from 1949 to 1967. President Johnson was not happy with Clark's performance as attorney general. Clark was criticized for being too soft on crime in the United States as well as too soft on defense. Clark was one of many 1960s-era proponents of a new approach to solving the crime problem—focusing on education and rehabilitation rather than punishment—and his influence extended into the 1990s.

In 1968, after Congress passed the Omnibus Crime Control and Safe Streets Act (Pub. L. No. 90-351, 82 Stat. 197 [June 19, 1968]) to overturn MIRANDA V. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), Clark disagreed with the act and refused to apply it, a precedent that all U.S. attorneys general have followed since. The Omnibus Crime Control and Safe Streets Act, which replaced *Miranda*'s flat prohibition on the use of confessions obtained illegally, employed a five-part test for judges to decide whether a confession was voluntary (18 U.S.C.A. § 3501[b]). However, in *Dickerson v. U.S.,* 530 U.S. 428, 120 S.Ct 2326, 147 L.Ed.2d 405 (U.S. 2000), the U.S. Supreme Court ruled that Miranda is a constitutional decision, and thus it may not be in effect overruled by an Act of Congress, specifically including 18 USCA 3501. Congress may not legislatively supercede Supreme Court decisions interpreting and applying the Constitution, the Court concluded, and any attempt to do so would thus be invalid.

Under Clark the JUSTICE DEPARTMENT was considerably more liberal than it was under later leaders. The department opposed CAPITAL PUNISHMENT, even in an incident where two Immigration and Naturalization Service agents were killed. While with the Justice Department, Clark brought future SECRETARY OF STATE Warren M. Christopher in to serve as deputy attorney general. Under Clark's authority, Christopher shepherded the 1968 CIVIL RIGHTS ACT (Pub. L. No. 90-284, 82 Stat. 73-92 [Apr. 11, 1968]) through Congress. The passage of the Civil Rights Act was a notable accomplishment because the United States was experiencing considerable civil strife and social turmoil and Congress did not want to appear soft on crime.

After exiting the attorney general post in 1969, Clark moved to New York City to practice law, taking on clients in matters of international law and human rights, particularly those with claims against the U.S. government—a unique position for a former attorney general. In particular, Clark has specialized in representing Middle Eastern groups and individuals, including the Palestine Liberation Organization (PLO). Clark successfully represented the PLO in an action brought by the U.S. government to close the PLO's Permanent Observer Mission at the UNITED NATIONS (*United States v. PLO,* 695 F. Supp. 1456 [S.D.N.Y. 1988]). Clark also represented the PLO in a suit brought by the survivors of Leon Klinghoffer, who was killed in

1985 while aboard the hijacked *Achille Lauro* (*Klinghoffer v. SNC Achille Lauro,* 816 F. Supp. 930 [S.D.N.Y. 1993]).

Clark has been unafraid to represent clients whose alleged crimes have angered and outraged U.S. citizens and foreigners alike, including two men who fought EXTRADITION to Israel: Abu Eain, accused by the Israeli government of a 1979 bombing that killed two in Tiberias, Israel (*Eain v. Wilkes,* 641 F.2d 504 [7th Cir. 1981]), and Mahmoud El-Abed Ahmad, accused of a 1986 terrorist attack on an Israeli bus in the West Bank (*Ahmad v. Wigen,* 910 F.2d 1063 [2d Cir. 1990]). To protest the United States' 1986 air strike against Libya, Clark brought suit against the United States and the United Kingdom on behalf of 55 Libyans seeking damages for injuries, death, and property loss sustained in the air strike. The U.S. Court of Appeals for the District of Columbia fined Clark for filing a frivolous lawsuit, one for which there was no hope whatsoever of success (*Saltany v. Regan,* 886 F.2d 438 [D.C. Cir. 1989]). Sheik Omar Ahmad Ali Abdel Rahman, a fundamentalist Muslim cleric who was accused of conspiracy to wage a war of TERRORISM in the United States, also had Clark at his side in proceedings related to his involvement in the 1993 bombing of the World Trade Center.

Clark's practice has also included cases that arose out of wartime acts. He represented Radovan Karadzic, leader of the Bosnian Serbs, who was accused of permitting his soldiers to rape thousands of Muslim women in Bosnian detention camps (*Doe v. Karadzic,* 866 F. Supp. 734 [S.D.N.Y. 1994]); Jack (Jakob) Reimer, an instructor at a WORLD WAR II German SS camp in Poland who was accused of WAR CRIMES for participation in the murder of more than 50 Jewish civilians in the winter of 1941–42; and Bernard Coard and Phyllis Coard, former officials of the Grenadian government who were sentenced to death for murdering Prime Minister Maurice Bishop and his followers in the coup that preceded the U.S. invasion in 1983 (Petition for Provisional and Permanent Relief against Death Penalties and Sentences of Imprisonment, 137 Cong. Rec. H6305, 102d Cong., 1st Sess. [Aug. 1, 1991]). Clark also counted as one of his clients Captain Lawrence P. Rockwood who was court-martialed for dereliction of duty for leaving his army post in September 1994 to investigate human rights abuses in a Haitian prison.

Clark has represented clients who were arrested while engaging in acts of civil disobedience including a group of people who protested at a General Electric plant in Pennsylvania where parts of Minuteman nuclear missiles were manufactured (*Commonwealth v. Berrigan,* 369 Pa. Super. 145, 535 A.2d 91 [1987]).

Clark's clients have included U.S. citizens who fought the U.S. government in court for reasons other than civil disobedience: Vander Beatty, a former New York state senator convicted of conspiracy and forgery in an election scandal (*Beatty v. Snow,* 588 F. Supp. 809 [S.D.N.Y. 1984]); followers of the Branch Davidians who sued federal authorities over the 1993 BRANCH DAVIDIAN RAID in Waco, Texas; and Lyndon LaRouche, who was convicted of MAIL FRAUD and conspiracy to defraud the INTERNAL REVENUE SERVICE in connection with fund-raising efforts (*United States v. LaRouche,* 896 F.2d

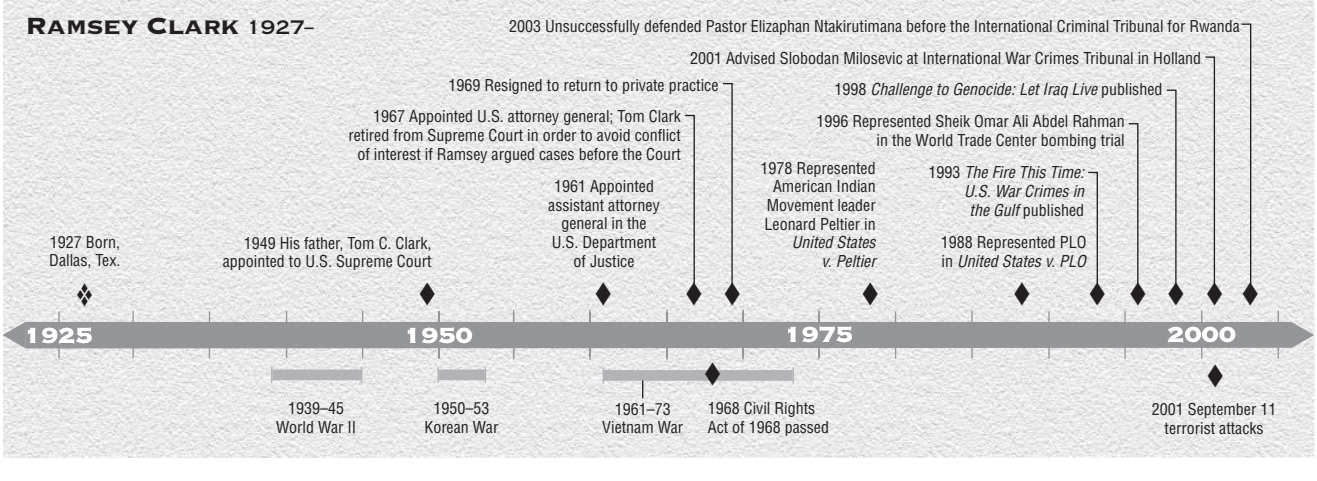

815 [4th Cir. 1990], *aff'd,* 4 F.3d 987, No. 92-6701, 1993 WL 358525 [4th Cir. Sept. 13, 1993]).

One notable group of Clark's clients consisted of some attorneys and a judge who were sanctioned for their conduct in court. This group included New York attorney Arthur V. Graseck Jr., who was ordered by a federal court to pay his opponent's attorney's fees for pursuing frivolous claims, under 28 U.S.C.A. § 1927 and rule 11 of the Federal Rules of Civil Procedure (*Oliveri v. Thompson,* 803 F.2d 1265 [2d Cir. 1986]; California-based civil rights attorney Stephen Yagman, who was suspended from the PRACTICE OF LAW for criticizing a federal district judge (*Yagman v. Republic Insurance,* 987 F.2d 622 [9th Cir. 1993]; *Standing Committee on Discipline v. Yagman,* 856 F. Supp. 1395 [C.D. Cal. 1994]); and U.S. district judge Miles Lord, who presided over the Dalkon Shield CLASS ACTION litigation and was accused of prejudicial administration of justice (*In re Miles Lord,* NOS. JCP 84-001 and JCP 84-002 [8th Cir. Judicial Council 1984] (unreported order); *Gardinier v. Robins,* 747 F.2d 1180 [8th Cir. 1984]).

Throughout the 1990s and beyond, Clark has been unwavering in his support of Leonard Peltier, an AMERICAN INDIAN MOVEMENT leader who was convicted of killing two FEDERAL BUREAU OF INVESTIGATION agents in a siege on the Rosebud Indian Reservation in 1975, in his quest for a new trial (*United States v. Peltier,* 585 F.2d 314 [8th Cir. 1978], *aff'd, Peltier v. Henman,* 997 F.2d 461 [8th Cir. 1993]).

In 1990, Clark organized the Coalition to Stop U.S. Intervention in the Middle East. He has served as spokesman for a U.S. group of supporters of Fidel Castro and has accused the media of presenting a one-sided view of Cuba because it has focused on the dictatorship rather than on U.S. efforts to undermine the Cuban Revolution. In 1993, he brought U.S. doctors, and with them eight tons of medicines and vitamins, to Cuba to help the population overcome shortages of medicines and medical care that have occurred since the fall of the Soviet Union.

In the early 1990s, as a reaction to what he characterized as war crimes committed by the U.S. government against Iraqi civilians during the first Persian Gulf war, Clark conducted a war-crimes tribunal in which former president George H. W. Bush and Generals Colin Powell and Norman Schwarzkopf were among those found guilty of committing war crimes. He also helped to found the International Action Center, which views its mission as providing information and resources to help people fight racism, U.S. corporate greed, and militarism.

Throughout the 1990s and into the 2000s, Clark continued an ambitious agenda of speaking and writing about international and constitutional rights, civil rights, crime control, VOTING RIGHTS, and international affairs. He authored or coauthored numerous books, including *Acts of Aggression: Policing Rogue States,* coauthored with Noam Chomsky and Edward Said.

In early 2003, Clark drafted ARTICLES OF IMPEACHMENT against President GEORGE W. BUSH, Attorney General JOHN ASHCROFT, and other administration officials for planning a preemptive strike against Iraq.

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## ❖ CLARKE, JOHN HESSIN

After a career as a successful corporate lawyer, civic reformer, and federal judge in Ohio, John Hessin Clarke was appointed by WOODROW WILSON to the Supreme Court in 1916. He served only a short time on the Court, however, stepping down in 1922 to work for U.S. entry into the League of Nations—becoming one of the few justices to leave office while in reasonably good health. During his brief tenure Clarke earned the respect of his fellow justices and became known for his liberal positions on many issues. A Progressive Era Democrat, he joined with Justice LOUIS D. BRANDEIS on many votes. He also wrote the Court's opinion in ABRAMS V. UNITED STATES, 250 U.S. 616, 40 S. Ct. 17, 63 L. Ed. 1173 (1919), in which the Court upheld the conviction of several radicals accused of fomenting unrest and in the process helped define the Court's position on free speech issues for decades to come.

Clarke was born in Lisbon, Ohio, on September 18, 1857. His father, John Clarke, Sr., was an Irish Protestant who immigrated to Lisbon in 1830 and became a successful lawyer and judge. Clarke attended Western Reserve College in Hudson, Ohio, graduating Phi Beta Kappa in

1877 and receiving a master of arts degree in 1880. After college Clarke returned to Lisbon to study law under his father's tutelage. He passed the bar with honors in 1878 and practiced briefly in his father's firm. At age twenty-three he moved to the nearby city of Youngstown and opened his own corporate law firm. He soon gained a reputation as an excellent lawyer and developed an impressive list of clients. Clarke also became an active citizen of Youngstown. He bought an interest in the local Democratic newspaper, the *Vindicator,* and used it to promote progressive political reform including national civil service reform and free public libraries. He was an active participant and speaker in a local literary society. Clarke did not marry.

In 1897, after spending seventeen years in Youngstown, Clarke moved to Cleveland, where he joined the firm of Williamson and Cushing. His clients there included the Erie Railroad, the Nickel Plate Railroad, and the Pullman Company, maker of railcars. In Cleveland, Clarke continued to advocate progressive political reform, sometimes conflicting with the interests of his clients. He became part of the circle of Tom L. Johnson, Cleveland's Democratic mayor (from 1901 to 1909) and a leader in political reform. Among other things, Clarke pushed for limits on railroad fares and profits. He also sought to impose ANTITRUST LAWS on the rail industry. In 1896 Clarke opposed the populist policies of fellow Democrat WILLIAM JENNINGS BRYAN, who ran for president that year. Unlike Bryan, Clarke supported the gold standard, a policy that fixed the value of the dollar in terms of a specific amount of gold.

Clarke's name came up at times for political office, including that of governor and of congressional representative but he declined such invitations. In 1903, however, he finally ran for the U.S. Senate as a Democratic candidate. His platform advocated radical reform, including municipal ownership of street railways, equalization of taxes, direct election of senators, institution of WORKERS' COMPENSATION, and disclosure of campaign finances. Clarke lost to the more conservative incumbent, Mark Hanna, a fellow native of Lisbon. He sought the Democratic nomination for the U.S. Senate again in 1914 but withdrew when a popular politician, Thomas Hogan, entered the race. Clarke later supported progressive reforms including women's VOTING RIGHTS.

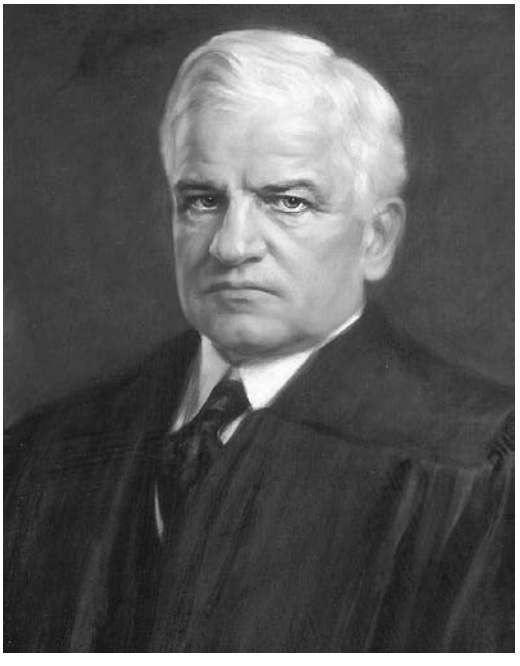

*John Hessin Clarke.*
U.S. SUPREME COURT

At age fifty-six the silver-haired Clarke began a judicial career when President Wilson appointed him to become a federal judge in the Northern District of Ohio. Only two years later, on July 14, 1916, Wilson summoned him again, this time to be a nominee for the U.S. Supreme Court. Wilson hoped that Clarke would join with Justice Brandeis—who had been confirmed shortly before Clarke's nomination—in moderating the conservative slant of the Court. Taking the place of CHARLES E. HUGHES who had stepped down to run for president, Clarke met Wilson's expectations. He took a liberal stance on most issues, becoming, for example, a strong advocate of enforcing antitrust laws against business monopolies. He also made many decisions that were pro-labor.

Clarke had become wary of the potential of large corporations to eliminate competition and infringe on the rights of workers. One of his most important contributions to the history of the Court was in the area of antitrust law. He dissented in several decisions early in his term—including *United States v. United States Steel Corp.,* 251 U.S. 417, 40 S. Ct. 293, 64 L. Ed. 343 (1920)—in which the Court found the defendants not guilty of violating antitrust laws. However, in *United States v. Reading R.R.,* 253 U.S. 26, 40 S. Ct. 425, 64 L. Ed. 760 (1920), the Court majority joined him in his earlier dissenting position, dissolving a railroad holding com-

"IT IS NOT UNCOMMON FOR IGNORANT AND CORRUPT MEN TO FALSELY CHARGE OTHERS WITH DOING WHAT THEY IMAGINE THAT THEY THEMSELVES, IN THEIR NARROW MINDS AND EXPERIENCE, WOULD HAVE DONE UNDER THE CIRCUMSTANCES."
—JOHN CLARKE

pany because it was, according to Clarke's opinion, "a menace to … interstate commerce within the meaning of the Anti-Trust Act." Then, in *United States v. Lehigh Valley R.R.,* 254 U.S. 255, 41 S. Ct. 104, 65 L. Ed. 253 (1920), Clarke garnered unanimous support for his opinion, in which the Court opined that a railroad had bought up its competition in order to gain a MONOPOLY on rail service. *Lehigh Valley R.R.* served as a model for antitrust decisions during the 1930s.

Clarke often sided with labor and he opposed efforts to use antitrust laws against unions. He upheld labor's right to strike in several cases and in *Bunting v. Oregon,* 243 U.S. 426, 37 S. Ct. 435, 61 L. Ed. 830 (1917), he voted to sustain Oregon's MINIMUM WAGE law and its ten-hour workday limit.

Clarke's record on civil liberties was less uniformly liberal. Although he often voted with fellow justices Brandeis and OLIVER WENDELL HOLMES JR., he differed with them in *Abrams.* At issue was the First Amendment's Free Speech Clause, which states, "Congress shall make no law . . . abridging the freedom of speech." The case involved Russian-born anarchists and socialists who had been accused of distributing leaflets calling for weapons workers to go on strike during WORLD WAR I. In the Court's opinion, Clarke wrote, "the defendants plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war." Clarke said that the Sedition Act of 1918, 40 Stat. 553, allowed for the restriction of speech that intended to disrupt the conduct of the war, even if that intention had not led to such disruption. This interpretation of the FIRST AMENDMENT remained dominant for several decades. In his dissent, Holmes argued that Clarke and the majority had overblown the effect of "the surreptitious publishing of a silly leaflet by an unknown man." Clarke again opted for a conservative interpretation of the First Amendment in *U.S. ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson,* 255 U.S. 407, 41 S. Ct. 352, 65 L. Ed. 704 (1921). In that decision, Clarke upheld a Milwaukee postmaster's denial of mailing privileges to a socialist newspaper, claiming that a mailing permit was a privilege and not a right.

Clarke resigned from the Court in 1922 on his sixty-fifth birthday. He left in order to become an advocate for U.S. membership in the LEAGUE OF NATIONS. Among the reasons for his resignation, he told Brandeis, was his perception that many of the cases accepted by the Court were trivial in nature. Clarke was suffering from health problems, including loss of hearing and a heart condition, and he had been greatly affected by the death of two sisters. He also resented the hostility of the conservative justice JAMES C. MCREYNOLDS. President Wilson wrote to Clarke of the resignation, "I am only sorry, deeply sorry. Like thousands of other liberals throughout the country, I have been counting on the influence of you and Justice Brandeis to restrain the Court in some measure from the extreme reactionary course which it seems inclined to follow." During his time on the Court, Clarke wrote 129 opinions and 23 dissents.

In the same year that he resigned Clarke became president of the League of Nations Non-Partisan Association of the United States, a position he held until 1928. After the carnage of World War I Clarke put great stock in the League

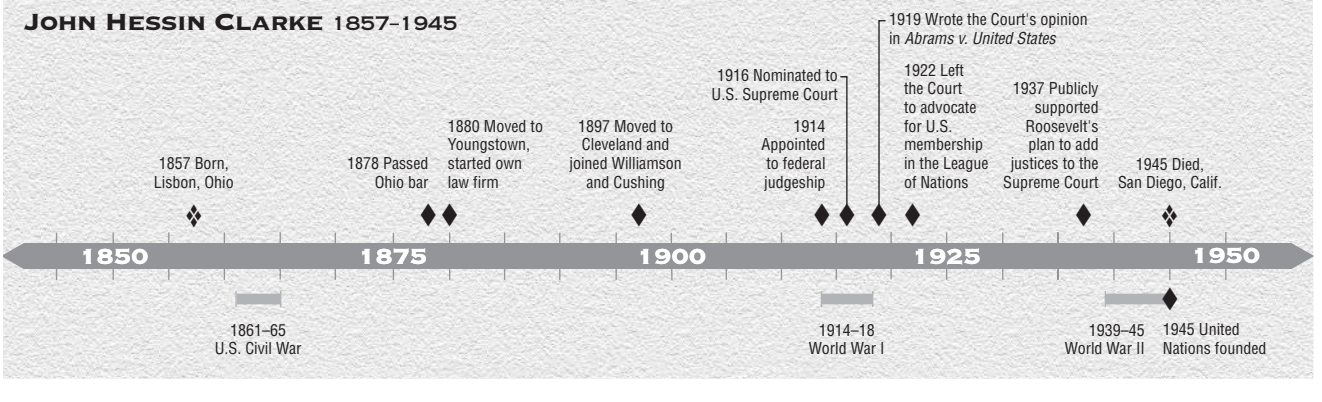

of Nations' efforts "to devise some rational substitute for irrational war as a means of settling international disputes." Clarke worked hard as an advocate for the League of Nations, traveling around the country, making speeches and campaigning for the cause—and spending a good deal of his own personal fortune in the process. He also became an active trustee of the World Peace Foundation in 1923.

Plagued with respiratory problems in addition to his heart condition, Clarke retired to San Diego in 1930. He remained disappointed by the United States' persistent isolationism and its refusal to join the League of Nations.

In the 1930s Clarke made known his support for FRANKLIN D. ROOSEVELT'S NEW DEAL legislation. In 1937 he made a radio address speaking in favor of Roosevelt's plan to add more justices to the Supreme Court. He was greatly saddened by the events of WORLD WAR II and told a friend that he "began to gravely doubt the existence of a moral government on this seemingly abandoned planet." He died in 1945, shortly before the explosion of the atomic bomb on Hiroshima and the formal creation of the UNITED NATIONS.

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## CLASS ACTION

*A lawsuit that allows a large number of people with a common interest in a matter to sue or be sued as a group.*

The class action suit began in the EQUITY courts of seventeenth-century England as a *bill of peace.* English courts would allow a bill of peace to be heard if the number of litigants was so large that joining their claims in a lawsuit was not possible or practical; the members of the group possessed a joint interest in the question to be adjudicated; and the parties named in the suit could adequately represent the interests of persons who were absent from the action but whose rights would be affected by the outcome. If a court allowed a bill of peace to proceed, the judgment that resulted would bind all members of the group.

Justice JOSEPH STORY, who served on the U.S. Supreme Court from 1811 to 1845, advocated the development of the bill of peace in the United States. He wrote that in equity courts, "all persons materially interested, either as plaintiffs or defendants in the subject matter of a bill ought to be made parties to the suit, however numerous they may be," so that the court could "make a complete decree between the parties [and] prevent future litigation by taking away the necessity of a multiplicity of suits" (*West v. Randall,* 29 F. Cas. 718, 2 [C.C.R.I. Mason] 181 [1820] [No. 17, 424]). The bill of peace, and later the class action, provided a convenient and efficient vehicle for resolving legal disputes affecting a number of parties with similar claims. Common issues that could have similar outcomes did not have to be tried piecemeal in separate actions, thus saving the courts and the litigants time and money.

Initially, a class action could be brought only in equity cases, disputes in which the parties did not necessarily seek monetary damages but instead might desire some other type of relief. The adoption of Rule 23 of the Federal Rules of Civil Procedure in 1938 broadened the scope of the class action suit, providing that cases in law seeking money damages as well as cases in equity could be brought as class actions. In 1966, the scope of the class action was again clarified and expanded when Rule 23 was amended to provide that unnamed parties to a class action were bound by the final judgment in the action so long as their interests were adequately represented.

Rule 23 of the Federal Rules of Civil Procedure defines three kinds of class actions. The first type may be brought where separate lawsuits might adversely affect other members of the class or the defendant in either of two ways—if the piecemeal litigation resulting from separate suits might impose inconsistent standards of conduct on the defendant, or if multiple suits might "impair or impede" the class members from protecting their various interests. In the second type of class action, a class seeks an INJUNCTION or some type of relief compelling the defendant either to cease a certain activity or to perform some other type of action. In the third category of class action lawsuit, there are QUESTIONS OF LAW or fact common to the entire class that predominate over questions peculiar to each individual plaintiff, and a class action suit is a more efficient means to resolve the controversy. Under the third type of class action, individual members of the class may "opt out" of the litigation if they do not

# Should Class Actions Be Restricted?

Class action lawsuits have become a controversial topic in the 1990s. Once seen as a way of empowering individuals with small claims to have their day in court, class actions are viewed by many lawyers, legislators, and government officials as a vehicle for plaintiffs' lawyers to make millions of dollars on issues of dubious merit. Other critics charge that class actions have been used by defendants in mass **TORT** cases, such as asbestos litigation, to frustrate the large and legitimate claims of individual victims.

Defenders of class actions argue that this type of lawsuit has a legitimate social purpose. A lawyer who prosecutes a class action can be viewed as a "private attorney general" who aggressively enforces various regulatory laws or who alerts the public to **FRAUD**, health, and safety problems. In a time when government is seeking to reduce government regulation, class action lawsuits provide an opportunity for the private sector to take up the oversight function.

Defenders note that the class action format has most often been used to aggregate small claims that were not worth litigating separately. A class action is an effective means for holding defendants accountable for widespread harm that would otherwise go unchecked. There is public value in allowing this type of class action to go forward, even if the amount payable to each member of the class is small. The deterrent effect of a class action can be substantial, forcing the defendant to change its product or procedures.

Supporters of class actions contend that trivial cases are rare and that neither high settlement rates nor small individual recoveries demonstrate frivolous litigation. Moreover, criticism of multimillion-dollar attorney fees ignores the risk that class action attorneys take in starting such lawsuits. Not every class action will be successful and the costs of litigation can be substantial. Without a financial incentive, attorneys will not take on and plaintiffs will not find redress for certain types of injury. Defenders also point out that personal injury attorneys receive large portions of the awarded damages through **CONTINGENT FEE** agreements. Class action attorneys should not be treated differently.

Defenders of large claim class actions believe that mass tort cases benefit from using a class action structure. When victims of mass torts seek substantial compensation for injuries caused by a defective product, such as asbestos, breast implants, and **BIRTH CONTROL** devices, it makes sense to aggregate the claims. It is more economical for attorneys and the courts to manage hundreds or even thousands of similar claims as a group rather than on a case-by-case basis. The courts would be tied up for years if each case had to be handled individually, and the duplication of evidence and expert witnesses would generate needless expense. A class action, on the other hand, can resolve the central issues and develop rational compensation schedules for the victims. Settlement also becomes a more attractive option for defendants when the victims are members of a class.

Critics of class actions remain unconvinced about the social and legal value of group lawsuits. In small claims class actions, critics question the value of want to be bound by the results of the suit. Courts have held that **DUE PROCESS** requires that absent class members be given adequate notice, adequate representation, and adequate opportunity to opt out, before they can be bound by a final judgment in the suit (*Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 [1985]).

Class action suits have led to social reform in the United States. They have helped to remedy discrimination based on race and gender; been used to address inequities in education, housing, and **VOTING RIGHTS** laws; and helped to ensure due process. For example, **BROWN V. BOARD OF EDUCATION**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the Supreme Court decision striking down segregated schools, was brought as a class action lawsuit. The landmark decision *Goldberg v. Kelly,* 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), in which the **SUPREME COURT OF THE UNITED STATES** held that recipients of public assistance must be given notice and the opportunity for a hearing prior to termination of benefits, was also litigated as a class action suit.

In addition, the class action suit has been used in several widely publicized mass **TORT** cases. In these actions, many plaintiffs, often hundreds or even thousands, have alleged injuries suffered as the result of the actions of a single defendant, usually the manufacturer of some product believed to have caused damage. In the mid-1970s, thousands of women brought suit against the manufacturer of the Dalkon Shield, an intrauterine contraceptive device linked to numerous health problems, including sterility. A class action suit was also employed in lawsuits against the manufacturer of the

supporting litigation in which individual class members have very small stakes. For example, does it make sense to permit a lawyer to initiate a class action where a utility company overcharged two million customers two cents per month? Such filings demonstrate to the critics the lawyer-driven nature of most small claims class actions. The individual claimants, because they have so little at stake, do not exercise any control over the litigation or elect to opt out of the class and pursue individual claims. With the plaintiffs' lawyer in total control, the dynamics of the lawsuit change. The lawyer has the largest economic stake in the outcome, leading to settlements that guarantee high attorney fees and minimal payouts to the class members.

Critics also dispute the value of the private attorney general role. Most class action attorneys, they contend, are seeking lucrative financial awards rather than social justice. Moreover, class actions may interfere with the regulatory and oversight functions of the appropriate government agency. The agency may conclude that the injuries attributed to the defendant are insignificant and do not warrant prosecution. A class action substitutes the judgment of the private attorney for that of the public's elected officials.

As to the deterrence value of class actions, the critics maintain that state and federal law enforcement organizations have the ability to investigate and punish cases involving widespread small-scale fraud and offer an alternative means of addressing wrongful conduct. Private enforcement through a class action reduces the accountability of the law enforcement effort and delegates to the plaintiffs' attorney control over enforcement priorities.

As to large claim class actions, critics believe that the victims may not be fairly served. They contend that large claim cases raise concerns about the capacity of the class action format to provide individualized justice, the ability of class attorneys to effectively represent the various needs of class members, and the impact on future class members who do not, at the time of litigation, have a ripe claim (their injury is not yet apparent).

Critics argue that in these large claim cases, defendants have sought class action status as a way of limiting liability. In some cases, the parties propose a settlement before a complaint has ever been filed, suggesting the possibility of collusion between the attorneys for the two sides. Finally, defendants in mass tort class actions have an incentive to search for and negotiate with the plaintiffs' attorney for the lowest settlement amount.

Critics of class actions propose that legislation and court rules be changed to give more power to the courts to examine class action applications. Courts should carefully review the applications and deny class status to small claims cases with little social value in the adjudicating the claims. Another alternative is to sharply reduce attorney fees, which would reduce the incentive for frivolous actions.

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herbicide Agent Orange, a highly toxic defoliant that was used during the VIETNAM WAR and has been linked to cancer and birth defects in Vietnam era veterans and their families. In mid-1995, two major class action suits on behalf of millions of smokers were instituted against several tobacco companies. The plaintiffs hoped to prove that they had become addicted to nicotine and suffered illnesses as a result, and that the defendant tobacco companies concealed their knowledge of the addictive nature of nicotine and the harmful effects of smoking.

Some large companies, anticipating liability for potentially huge damages as a result of class action suits, file for BANKRUPTCY in order to protect their assets. The pharmaceutical company A. H. Robins, the manufacturer of the Dalkon Shield, filed for bankruptcy in 1985 when it was faced with the prospect of paying millions of dollars as a result of class action suits filed against it. In 1995, Dow Corning Corporation, the subject of hundreds of claims resulting from allegedly defective silicone gel breast implants, filed for Chapter 11 bankruptcy protection. Other companies, fearing the financial consequences of possible class action suits arising from certain types of products, have ceased research and development in certain areas altogether. The Upjohn Company, for instance, ceased contraceptive research in 1986.

The Supreme Court addressed concerns about the use of Rule 23 in mass tort actions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). This case involved persons who had been exposed to asbestos and who either had diseases attributed to this exposure or who had the potential of developing these diseases. The federal courts

became worried that they would be inundated by thousands of individual cases. Therefore, in 1991 all asbestos cases that had been filed but not tried were consolidated and transferred to a single judge in Pennsylvania.

During settlement discussions the defendants refused to negotiate unless the final agreement bound victims who would file claims in the future. The plaintiffs eventually agreed and the parties came to a settlement. They then went into court and obtained a certification of class action. However, objections were raised by many class members and the Supreme Court was required to make a final determination.

The Supreme Court ruled the class action was improper. The Court was troubled by attorneys of current victims, who stood to receive payment from the defendants, binding future victims to a settlement that greatly restricted their ability to receive compensation. Rule 23 requires class representatives to protect the interests of all class members, yet it seemed unlikely that future victims were fully protected. Another concern was that the proposed class did not have sufficient unity so that the future claimants could "fairly be bound by class representatives' decisions." The current plaintiffs, who had asbestos injuries and wanted immediate compensation, had agreed to terms that future claimants might find unacceptable. These included the lack of inflation adjustment, the limitation on the number of payable claims each year, and the prohibitions against asking for damages based on emotional distress and loss of consortium.

The Court found that the proposed class was not "sufficiently cohesive." Although all members of the class shared experience of asbestos exposure, this did not meet the predominance requirement under Rule 23 (b)(3). In fact, there were many individual issues and many categories of persons who were exposed and injured or exposed but not yet injured. The supposed class was too "sprawling" to meet the Rule 23 requirement.

In 2002, the Supreme Court reviewed the rights of persons who seek to intervene in a class action settlement for the purpose of objecting to the settlement. In *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), the Court held that persons affected by a settlement may appeal even if they are not a class representative or a court-approved intervener. The decision is likely to increase such appeals.

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CROSS-REFERENCES

Civil Procedure; Product Liability.

## CLAUSE

*A section, phrase, paragraph, or segment of a legal document, such as a contract, deed, will, or constitution, that relates to a particular point.*

A document is usually broken into several numbered components so that specific sections can be easily located. The SUPREMACY CLAUSE, for example, is part of Article IV of the U.S. Constitution.

## CLAUSE PARAMOUNT

*In* ADMIRALTY LAW, *a statement required by federal law to be included in any bill of lading, which evinces a contract for the transportation of goods by sea from U.S. ports in foreign trade.*

The statement provides that such bill is subject to the provisions of the Carriage of Goods by Sea Act (46 U.S.C.A. § 1300 et seq. [1936]), the federal legislation that governs the rights, obligations, and liabilities arising out of the relation of issuer to holder of the ocean bill of lading, in regard to the loss or damage of goods.

CROSS-REFERENCES

Shipping Law.

## ♦ CLAY, HENRY

Fiery southern lawmaker, Speaker of the House, and SECRETARY OF STATE Henry Clay played a pivotal role in preserving the Union during the early and middle years of the nineteenth century. Clay rose from modest origins to become a well-known politician. During his lifetime, the self-educated leader was known as the Great Compromiser and the Great Pacifier, epithets earned for his ability to find the necessary middle ground between the federal government and the states over issues such as SLAVERY, tariffs, and the admittance of new states to the Union. Argumentative, eloquent, and quick to propose

a duel if insulted, he helped forge the MISSOURI COMPROMISE OF 1820 during a career that included five bids for the presidency. His contributions to federal policy ranged from trade and finance to foreign affairs in the administration of President JOHN QUINCY ADAMS.

Born in Hanover County, Virginia, on April 12, 1777, Clay became a lawyer by the age of 20. He moved to Lexington, Kentucky, where he entered private practice while keeping an eye open for an entry to politics. Frontier life suited him. He especially liked gambling and drinking, pursuits that only exacerbated his hot temper. But he flourished as an attorney. His sharp oratory brought him prominence and while not yet thirty he represented former vice president AARON BURR in GRAND JURY proceedings involving Burr's real estate dealings.

In 1799, Clay married the socially prominent Lucretia Hart. Clay and his wife eventually had eleven children, and great tragedy. All six daughters and one son died at a young age.

Clay rose quickly through Kentucky politics. He used his opposition to the repressive ALIEN AND SEDITION ACTS of 1798 as a springboard into the state legislature in 1803, where he ultimately served seven terms. Immensely popular with his fellow lawmakers, Clay was their choice to fill an expired term in the U.S. Senate in 1806—despite his not having reached the constitutionally mandated minimum age of thirty. In 1810, he assumed a vacant seat in the Senate for a one-year period.

Two ironies emerged from Clay's early political career. Both would bear on his future course as a national leader. First, he opposed slavery and favored emancipation, an unusual and unpopular position in nineteenth-century southern politics. Clay saw slavery as evil. He was not, however, ultimately interested in African Americans sharing in U.S. society: he would later become an originator of the American Colonization Society, which sought to return former slaves to Africa, and at his death, his will would free the fifty slaves he had owned and provide for their transportation to Liberia. Second, Clay's sensitivity to insult and his hair-trigger temper landed him in personal crises that would continue throughout his career. He fought his first duel with a fellow Kentucky lawmaker in 1809, and by the time he became secretary of state, he would be DUELING with a U.S. senator.

Brief service in Washington, D.C., whetted Clay's appetite for a national political career.

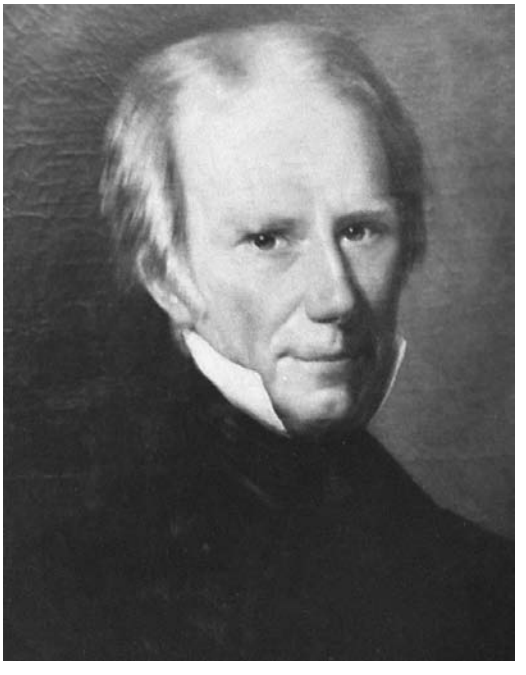

*Henry Clay.*
LIBRARY OF CONGRESS

From 1811 to 1821, and 1823 to 1825, he was elected to the House of Representatives as a Democratic-Republican. He served as Speaker of the House for all but two of those years. Clay advocated a national economic policy that he called the American System, an ambitious attempt to link the East and West through transportation reforms, protectionism in the form of tariffs to boost U.S. industries, a plan for national defense, and a reorganization of the National Bank. Calling for war with Britain in 1812, he became nationally prominent as a leading member of the so-called War Hawks. In 1814, he acted as a representative to the Ghent Peace Commission, which ended the WAR OF 1812. Strong stands were his trademark: in 1819, opposing General Andrew Jackson's invasion of Florida, he resigned as Speaker of the House.

"I WOULD RATHER BE RIGHT THAN PRESIDENT."
—HENRY CLAY

In 1820 Clay helped bring about the Missouri Compromise. This was a federal response to a bitter controversy over new slave states' joining the Union, which came to a head when the slave-owning Missouri Territory applied for admission in 1818. Northerners objected to the entry of more slave states. Southerners protested when the House considered a measure that would block further slavery in Missouri. Thomas Jefferson declared the Missouri issue—and in particular questions of constitutional authority—to be part of a Federalist conspiracy to destroy the Union. Clay drafted a compromise,

persuading northern lawmakers to drop the slavery restriction, while southern lawmakers agreed to limit the geographic boundaries of slavery. In 1821 he secured a second compromise in the form of a resolution that prohibited Missouri from discriminating against citizens from other states. Clay won wide praise for his work, although the compromise would be undone in time by the Supreme Court and the question of slavery would be ultimately decided by the Civil War.

As a candidate of the WHIG PARTY, Clay made his first of five bids for the White House in 1824. He never succeeded, but the first failure bore fruit. In a runoff between Jackson and Adams that was decided in the House, Clay gave his support to Adams, who won. Clay's reward was the job of secretary of state, one he had long coveted.

For years, Democrats bitterly scorned the obvious deal, and the criticism wounded Clay. By 1826, he became the target of a particularly venomous attack by Senator John Randolph, an old opponent, who compared Clay to one of the scoundrels from Henry Fielding's novel *Tom Jones* in a series of blasts at Clay's competence and ethics as secretary. Clay promptly challenged Randolph to a little-celebrated pistol duel—a series of bad aims and misfires in which neither man could hit anything and the two ended up shaking hands.

In 1831 Clay was elected to the Senate. He represented Kentucky for an eleven-year stretch, to which he added another term from 1849 to 1852. Two of his achievements were significant. One was the Compromise Tariff of 1833, which eased the situation caused by South Carolina's nullification policy—a political doctrine under which a state held that it could reject any federal law that it deemed unconstitutional. Upset over federal tariffs that it found discriminatory, South Carolina had refused to allow tariffs to be collected in its state and had threatened to secede from the Union. This refusal brought the first test of a state's decision to invoke nullification, and the reaction was swift: President Jackson, declaring that the state had no right to nullify a federal law, threatened to send troops. Clay's compromise called for a gradually declining tariff, which pleased South Carolina, averting further trouble. But, like the Missouri Compromise, it was a temporary balm to the aggravations between the North and the South.

Clay's greatest achievement occurred at the end of his long career. In 1850, as the question of slavery threatened to split the nation, he formulated a plan that fairly decided the admission of California and the New Mexico and Utah territories as free or slave states. Again, a compromise of his averted civil war.

Clay died two years later, on June 29, 1852, in Washington, D.C. The war he had helped forestall came less than a decade after his death.

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## CLAYTON ACT

*A federal law enacted in 1914 as an amendment to the* SHERMAN ANTI-TRUST ACT *(15 U.S.C.A. § 1 et seq. [1890]), prohibiting undue restriction of trade and commerce by designated methods.*

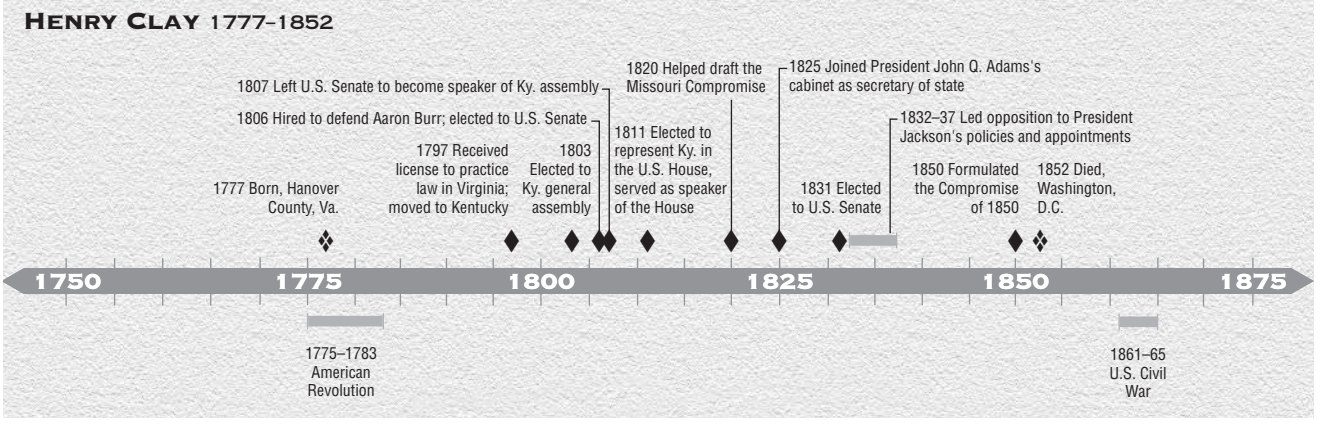

The Clayton Act (15 U.S.C.A. § 12 et seq. [1914]) was originally enacted to exempt unions from the scope of ANTITRUST LAWS by refusing to treat human labor as a commodity or an article of commerce. Today, it is used primarily to prohibit the suppression of free competition by making illegal four business practices: price discrimination, which is the sale of the same product to comparably situated buyers at different prices; tying and exclusive dealing contracts, which are the sale of products on condition that the buyer stop dealing with the seller's competitors; corporate mergers, the acquisition of competing companies by one company; and interlocking directorates, the members of which are common members on the boards of directors of competing companies.

These practices are illegal when they might substantially lessen competition or tend to create a MONOPOLY in any line of commerce. By making the suppression of free competition unlawful the Clayton Act supplements the provisions of the Sherman Act, which outlaws monopolies.

## ♦ CLAYTON, HENRY DELAMAR

Henry DeLamar Clayton achieved prominence as a jurist and as the originator of the CLAYTON ANTITRUST ACT (15 U.S.C.A. § 12 et seq. [1914]).

Clayton was born February 10, 1857, in Barbour County, Alabama. He was a graduate of the University of Alabama, where he received a bachelor of arts degree in 1877 and a bachelor of laws degree in 1878.

After establishing a law firm in Clayton, Alabama, in 1878, Clayton relocated his practice to Eufaula, Alabama, in 1880, and practiced there until 1914.

From 1890 to 1891, Clayton participated in the Alabama General Assembly. He performed the duties of U.S. district attorney for Alabama from 1893 to 1896 before entering the federal government system.

Clayton became a representative in the U.S. House of Representatives in 1897 and served until 1914. From 1911 to 1914 he was the presiding officer of the Judiciary Committee. During his last year in the House, Clayton drafted the Clayton Antitrust Act, which simplified and added provisions to the SHERMAN ANTI-TRUST ACT OF 1890 (15 U.S.C.A. § 1 et seq.), a law that was enacted to prevent the combination of businesses for the purpose of unreasonably restricting free competition.

In 1914 Clayton began the judicial phase of his career and presided as U.S. district judge in Alabama for the next fifteen years.

Clayton died December 21, 1929, in Montgomery, Alabama.

CROSS-REFERENCES

Clayton Act.

## ♦ CLAYTON, JOHN MIDDLETON

John Middleton Clayton achieved prominence as a U.S. senator and as a drafter of the Clayton-Bulwer Treaty.

Clayton was born July 24, 1796, in Dagsborough, Delaware. A graduate of Yale University in 1815, Clayton was admitted to the Delaware bar in 1819. He began his political career in 1824 as a member of the Delaware legislature, and, in 1826, he served as Delaware SECRETARY OF STATE for a two-year period.

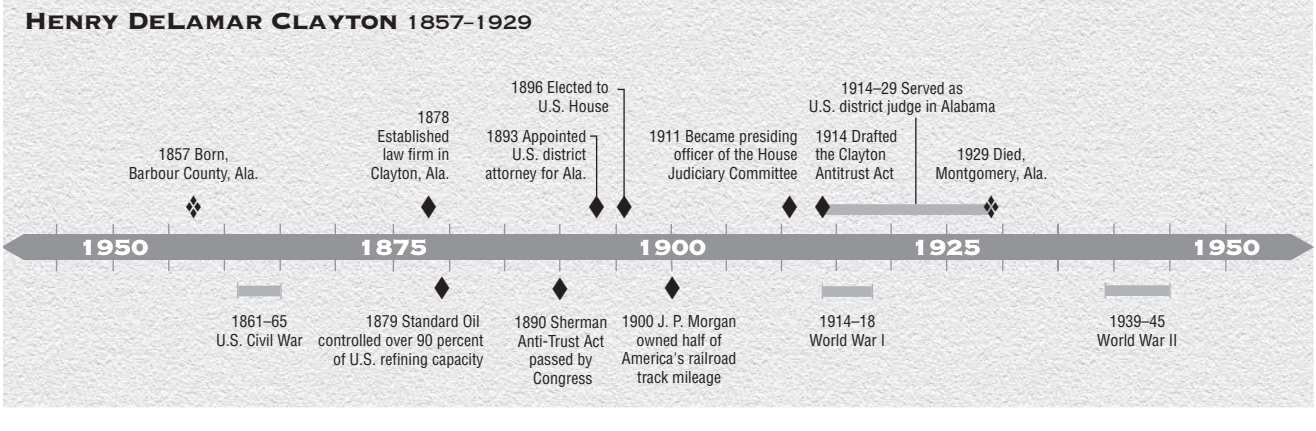

*John Middleton Clayton.*
LIBRARY OF CONGRESS

In 1829 Clayton entered the federal political system and represented Delaware in the U.S. Senate until 1836. During his tenure, he served on the Judiciary Committee and directed an inquiry concerning scandalous activities in the U.S. Post Office. Clayton was a member of the Senate twice more, from 1845 to 1849 and from 1853 to 1856.

Between his senatorial duties, Clayton acted as U.S. secretary of state during 1849 and 1850. He formulated the Clayton-Bulwer Treaty in 1850 with British emissary Sir Henry Bulwer, which settled a dispute concerning an isthmian canal in Central America by providing for neutrality by both countries in the use of the canal.

Clayton died November 9, 1856, in Dover, Delaware.

## CLEAN STATE DOCTRINE

See SUCCESSION OF STATES.

## CLEAR

*Free from doubt, burden, or obstacle; without limitation; plain or unencumbered.*

The term is used to mean unambiguous or definitive and has various applications. For example, a clear intent to make a gift means that there is no doubt that the donor had the intent to relinquish all dominion and control over the property.

Clear and convincing proof is evidence that establishes a firm belief in a person's mind that a fact much more likely than not exists.

## CLEAR AND CONVINCING PROOF

*A standard applied by a jury or by a judge in a nonjury trial to measure the probability of the truthfulness of particular facts alleged during a civil lawsuit.*

Clear and convincing proof means that the evidence presented by a party during the trial is more highly probable to be true than not and the jury or judge has a firm belief or conviction in it. A greater degree of believability must be met than the common standard of proof in civil actions, PREPONDERANCE OF THE EVIDENCE, which requires that the facts more likely than not prove the issue for which they are asserted.

The standard of clear and convincing proof—also known as "clear and convincing

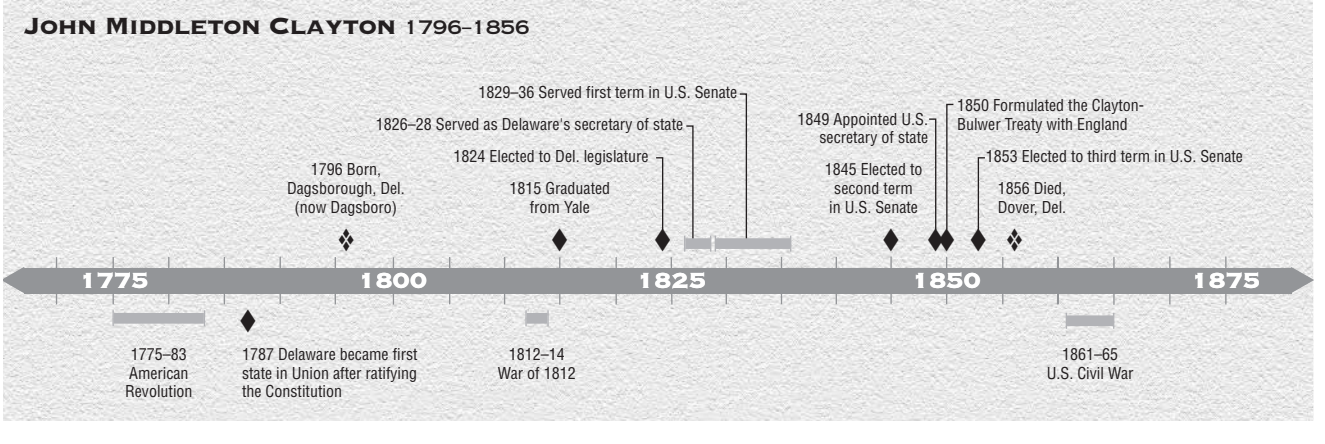

evidence"; "clear, convincing, and satisfactory"; "clear, cognizant, and convincing"; and "clear, unequivocal, satisfactory, and convincing"—is applied only in particular cases, primarily those involving an equitable remedy, such as reformation of a deed or contract for mistake.

## CLEAR AND PRESENT DANGER

*An early standard by which the constitutionality of laws regulating subversive expression were evaluated in light of the First Amendment's guarantee of* FREEDOM OF SPEECH.

Justice OLIVER WENDELL HOLMES JR., writing for the U.S. Supreme Court in SCHENCK V. UNITED STATES, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919), stated: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

The famous free speech standard proved easier to formulate than to apply, when less than a year after first articulating it in *Schenck*, Holmes dissented from a majority opinion that invoked the clear-and-present-danger test to justify upholding the convictions of five antiwar protestors who had distributed allegedly seditious pamphlets. ABRAMS V. UNITED STATES, 250 U.S. 616, 1180, 40 S. Ct. 17, 63 L. Ed 1173 (1919).

The clear-and-present-danger doctrine is a freedom of speech doctrine first announced by the U.S. Supreme Court in *Schenck v. United States,* 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919), during a controversial period in U.S. history when the FIRST AMENDMENT often clashed with the government's interest in maintaining order and morale during wartime. Various formulations of the doctrine have appeared in other significant Supreme Court decisions throughout the years.

In *Schenck,* the defendants had been convicted of violating the ESPIONAGE ACT OF 1917, 18 U.S.C.A. §§ 11, 791–794, 2388, 3241; 22 U.S.C.A. §§ 213 et seq.; 50 U.S.C.A. §§ 191 et seq., which prohibited the making of false statements with the intent to interfere with the operation of the armed forces or to cause insubordination, disloyalty, or mutiny in the armed forces. The act also made it a crime to obstruct military recruitment and enlistment. Charles T. Schenck, who was the general secretary of the Socialist party, and the other defendants had printed and distributed 15,000 leaflets opposing the then recently enacted SELECTIVE SERVICE Act and mailed many to WORLD WAR I draftees (May 18, 1917, c. 15, 40 Stat. 76). At trial, Schenck had not denied that the leaflets were intended to obstruct recruitment and enlistment by attempting to persuade people to resist the draft, in violation of the Espionage Act. Instead, he had argued that the leaflets were protected by the First Amendment. The U.S. Supreme Court upheld the convictions.

Justice Oliver Wendell Holmes Jr., writing for a unanimous Court, stated that speech could be punished if "the words are used in such circumstances and of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." According to Holmes, the leaflets in *Schenck* were printed during wartime with the intent to obstruct induction efforts, an intent that was prohibited by federal law, and thus constituted such a clear and present danger. "When a nation is at war," he wrote, ". . . things that might be said in time of peace that are such a hindrance to its effort . . . will not be endured so long as men fight and . . . no Court could regard them as protected by any constitutional right."

In later decisions, the Supreme Court revisited and, in some instances, reformulated the clear-and-present-danger standard as first enunciated by Holmes. In another World War I decision issued just eight months after *Schenck, Abrams v. United States,* 250 U.S. 616, 40 S. Ct. 17, 63 L. Ed. 1173 (1919), five Russian-born immigrants had been convicted of distributing allegedly seditious pamphlets that were critical of the U.S. government for sending troops into Russia. A seven-justice majority of the Court upheld the convictions. In his majority opinion, Justice JOHN H. CLARKE followed Holmes's reasoning in *Schenck,* noting that the pamphlets had been distributed "at the supreme crisis of the war" and that they were "an attempt to defeat the war plans of the Government." Thus, Clarke concluded, the leaflets presented a clear and present danger. Holmes dissented from the majority decision and modified his earlier statement of the clear-and-present-danger test. Concerned about a rising tide of hysteria that could potentially impinge on free expression, Holmes argued for a broader interpretation of the clear-and-present-danger standard, writing that

speech could be punished only if it "produces or is intended to produce a clear and imminent danger that will bring about . . . certain substantive evils that the United States . . . may seek to prevent." All opinions, he argued, must be protected "unless they imminently threaten immediate interference with the lawful and pressing purposes of the law." Holmes believed that in *Abrams,* the "surreptitious publishing of a silly leaflet" did not create such a danger.

Six years after *Abrams,* the Court decided GITLOW V. NEW YORK, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925), in which Benjamin Gitlow, a member of the Socialist party, had been convicted of distributing leaflets advocating the overthrow of the government in violation of New York state CRIMINAL LAW. The Supreme Court upheld Gitlow's conviction with Justice EDWARD T. SANFORD writing, "A state may punish utterances endangering the foundations of organized government and threatening its overthrow by violent means." Sanford, while conceding that Gitlow's pamphlet did not immediately incite criminal action, nevertheless maintained that it could constitute a "revolutionary spark" that could later result in a "sweeping and destructive conflagration." Holmes strongly disagreed with the majority's contention that words not associated with action could be punished. Joined by LOUIS D. BRANDEIS in dissent, Holmes once more argued for application of a standard requiring that danger be imminent before speech could be punished. According to Holmes, Gitlow's pamphlets presented no such danger: "[E]loquence may set fire to reason. But whatever may be thought of the . . . discourse before us, it has no chance of starting a present conflagration."

Holmes and Brandeis joined forces again two years later in *Whitney v. California,* 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927), in which they once more argued that before speech could be prohibited, a clear and present danger must be imminent. Charlotte Whitney, a prominent member of the Socialist party, had participated in a convention establishing the California branch of the new Communist Labor party. Whitney argued for the adoption of a resolution dedicating the party to seek political change through ballot measures. Her efforts were defeated by a competing resolution arguing for revolution as a means to overthrow capitalism. Whitney remained a participant in the convention and attended one or two meetings of the party. She was later convicted under a California law prohibiting participation in groups advocating criminal activity (Criminal Sydicalism Act of California, Statutes 1919, c. 188, p. 281). A unanimous Supreme Court sustained Whitney's conviction, holding that by assembling with others to form a group that advocated the forceful overthrow of the government, she had acted in a manner that posed a danger to the "public peace," in violation of the state law. Holmes and Brandeis, though concurring in the judgment, believed that the law had improperly infringed on Whitney's free speech rights and maintained that speech could be restricted only if the assembly created an imminent danger. Brandeis wrote that "to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated.... The fact that speech is likely to result in . . . violence or in destruction is not enough to justify its suppression."

Subsequently, the Supreme Court applied the clear-and-present-danger test in a variety of other contexts. In *Thornhill v. Alabama,* 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940), for example, the doctrine was used to protect LABOR UNION picketing, and in *Bridges v. California,* 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192 (1941), the Court relied on it to overturn the conviction of a union leader who had criticized a judge in a pending case.

Some 30 years after Holmes first enunciated the clear-and-present-danger test in *Schenck,* the Court returned to the doctrine in another case involving individuals advocating the overthrow of the government. In *Dennis v. United States,* 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951), 11 Communist party leaders had been convicted of violating the SMITH ACT, 18 U.S.C.A. § 2385, which made it a crime to advocate the overthrow of the government by force and violence. In upholding the convictions, the Court applied the clear-and-present-danger standard. Chief Justice FRED M. VINSON, writing for the majority, stated that in considering whether speech could be prohibited, the Court must determine "whether the gravity of 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." The Court's approach was thus seen as a "balancing test" that weighed free speech against the government's interest (e.g., in national security) offered to justify restraints on free speech. The Court's new formulation of the clear-and-

present-danger test was widely criticized by civil libertarians for omitting the requirement of proving imminent danger, as originally envisioned by Holmes.

Eighteen years later, the Supreme Court appeared to return to Holmes's views in *Brandenburg v. Ohio,* 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). In *Brandenburg,* the Court reversed the conviction of a KU KLUX KLAN leader under a state statute, Ohio Rev. Code Ann. § 2923.13, prohibiting advocacy of crime and violence as a necessary means to accomplish political reform. The Court held that a state could not "forbid or proscribe advocacy of the use of force . . . except where such advocacy is directed to producing imminent lawless action and is likely to incite or produce such action." Though the Court's opinion fails to mention specifically the phrase *clear and present danger,* many CONSTITUTIONAL LAW scholars have seen *Brandenburg* as a return to the Holmes-Brandeis immediacy test first set forth in *Abrams.* However, the Court has not specifically addressed the clear-and-present-danger doctrine since *Brandenburg,* and thus it is not clear whether the Court would embrace it anew or would fashion an entirely new standard for determining whether, in certain circumstances, free expression can be punished.

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CROSS-REFERENCES

Balancing.

## CLEAR TITLE

*Unencumbered or unrestricted legal ownership that is free from doubt as to its validity.*

The phrase implies that ownership is not subject to claims by anyone but the person holding title. It is also called marketable title, or title that can be easily transferred or sold because of its lack of encumbrances.

## ♦ CLEAVER, LEROY ELDRIDGE

Eldridge Cleaver rose to prominence in the late 1960s as a leading African American intellectual and political revolutionary. As minister of information for the BLACK PANTHER PARTY during tumultuous years of social upheaval, Cleaver became a symbol of rebellion, freedom, and eloquence for those seeking political and social change. His 1968 best-selling book of essays *Soul on Ice* served as a kind of guidebook for radicals in the New Left, student, and CIVIL RIGHTS movements of the day. Cleaver was involved with the U.S. legal system as a convict, social critic, political activist, political candidate, fugitive, and business owner.

Leroy Eldridge Cleaver was born August 3, 1935, in Wabbaseka, Arkansas. When he was still young, the family moved to Phoenix, and then to the Watts section of Los Angeles. While in Los Angeles during his teenage years, Cleaver was arrested for bicycle theft and for selling marijuana, and was sent to two different reformatories. In 1954, he was again arrested for dealing marijuana and was sentenced to two-and-a-half years at the California State Prison at Soledad.

"WHAT WE'RE SAYING TODAY IS THAT YOU'RE EITHER PART OF THE SOLUTION OR YOU'RE PART OF THE PROBLEM."
—LEROY CLEAVER

Unreformed by his first prison stay, Cleaver resumed dealing drugs and embarked on a series of rapes, directed first at black women, then at white women. He later came to see the recklessness and inhumanity of these crimes as both a product of his own misguided choices and a reaction to the racism of U.S. society. In *Soul on Ice,* he described the delight he felt at "defying and trampling upon the white man's law" through these actions. He also claimed that his motivation in the rapes was to get "revenge" for "the historical fact of how the white man has used the black woman."

In 1958, roughly a year after his release from the Soledad prison, Cleaver was arrested again, this time for armed assault when he attempted to rape a nurse in a parking lot. During his subsequent eight-year stay in the San Quentin and Folsom prisons, Cleaver read widely and became a member and minister of the NATION OF ISLAM, often called the Black Muslims. He also became an admirer of MALCOLM X, a Nation of Islam leader. When Malcolm X broke from the group in 1963, Cleaver followed his example.

*Eldridge Cleaver.* AP/WIDE WORLD PHOTOS

Cleaver was released from prison for the second time in 1965—the same year that Malcolm X was assassinated, allegedly by Nation of Islam members—with the help of Beverly Axelrod, a white San Francisco lawyer. Correspondence and a brief love affair between Axelrod and Cleaver had led to Axelrod's help in getting several essays by Cleaver published in *Ramparts,* an influential left-wing magazine. These essays, in turn, had built support for Cleaver's cause among members of the U.S. intellectual community, including writer Norman Mailer. The support of such intellectuals helped persuade the **PAROLE** board to release Cleaver from prison.

After his parole Cleaver began writing for *Ramparts.* In 1967, while living in the San Francisco Bay area, Cleaver married Kathleen Neal, who had been an activist with the **STUDENT NONVIOLENT COORDINATING COMMITTEE** (SNCC). In that same year, he befriended **HUEY P. NEWTON** and **BOBBY SEALE**, cofounders of the Black Panthers, and he soon became that group's minister of information. The Black Panthers was an African American political organization that sought to defend the African American community from police intimidation and violence. As part of their **SELF-DEFENSE** actions, Black Panthers carried guns and law books, followed police cars, and observed police encounters with African Americans.

As a spokesperson for the Panthers, Cleaver explained the group's goals and ideas to the rest of the world. In media interviews, for example, he described how "Pig Power" or "the Gestapo power of the police" contributed to many of the problems in the African American community.

In February 1968, Cleaver published *Soul on Ice,* the book that made him a celebrity. It quickly became a best-seller and was named Book of the Year by the *New York Times.* The book begins with the observation that Cleaver's first year in prison, 1954, coincided with that of the landmark Supreme Court case **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS,** 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, the first significant legal victory African Americans achieved in the **CIVIL RIGHTS MOVEMENT**. The book explores, among its many topics, Cleaver's relationship to Malcolm X, Cleaver's rejection of U.S. capitalism, the solidarity between African Americans and citizens of third-world countries, the relationship between sexuality and race in the United States, and Cleaver's admiration of the student movement of the 1960s. The book also deals with themes that came to dominate African American political activism of the time: racial pride, rejection of white standards of beauty, and acceptance of violence as a necessary part of political struggle.

In his essay "Domestic Law and International Order," Cleaver reflected on the situation of African Americans in light of the **VIETNAM WAR** and of the suppression of the Watts riots of 1965 by the **NATIONAL GUARD**. For Cleaver, both these events were examples of U.S. imperialism, with the U.S. army in Vietnam and the police in Watts acting as essentially identical agents of state coercion over colonized peoples:

> The police do on the domestic level what the armed forces do on the international level: protect the way of life of those in power. The police patrol the city, cordon off communities, blockade neighborhoods, invade homes, search for that which is hidden. The armed forces patrol the world, invade countries and continents, cordon off nations, blockade islands and whole peoples. . .. The policeman and the soldier will have the last word.

Accordingly, Cleaver called for African Americans, "who in this land of private property have all private and no property," to oppose this system and fight for power and property.

The success of *Soul on Ice,* combined with a vacuum in African American leadership caused by the assassinations of **MARTIN LUTHER KING**

JR. and Malcolm X, and the imprisonment of other leaders such as Newton, made Cleaver seem for a brief time to be an important African American leader. In the spring of 1968, he was nominated for the presidency of the United States by the white radical Peace and Freedom party. During his candidacy he spoke out for a revolutionary movement that involved both blacks and whites. He received 30,000 votes nationally.

Cleaver's time in the spotlight was cut short as a result of violence that erupted between the police and the Panthers. On April 6, 1968,—two days after the assassination of King—Cleaver was involved in a shoot-out with the police in which one Black Panther was killed. Cleaver was arrested, but two months later was released on a writ of HABEAS CORPUS (release from unlawful imprisonment). A higher court later reversed his release and scheduled him for reincarceration in November 1968. Cleaver chose to become a fugitive from the law and fled to Cuba.

Cleaver's exile overseas was accompanied by a rapid decline in his influence as both a political and intellectual leader. His short stay in Cuba was followed by stints in Algeria, North Korea, and Paris. He continued to speak out as a revolutionary during his time overseas. Sometimes his revolutionary efforts were in the sartorial rather than political sphere, as in 1975 when he attempted to publicize his design for Cleavers, a new type of pants that featured a codpiece intended to display the male sexual organ. The new pants would, he theorized, revolutionize sexual attitudes in a way that would ultimately eliminate such crimes as rape. They would also, Cleaver said, "abolish . . . the crime of indecent exposure" and replace it with "decent exposure."

After he had lived for several years in communist countries, Cleaver's political radicalism began to wane and he became more conservative in his beliefs. Eventually, he could no longer abide life away from the United States, and by the mid-1970s Cleaver began to voice a different view of his native country. In 1975 he returned to the States where he was immediately put in prison. "I'd rather be in jail in America than free anywhere else," Cleaver commented after his return.

Cleaver's subsequent career in the United States was marked by a series of unsuccessful ventures as he has tried to regain the spotlight. While in jail in 1976 he announced that he was a born-again Christian and renounced the Marxism-Leninism and atheism of his Black Panther days. After his release on bail he began a short career as leader of a religious revivalist movement, the Eldridge Cleaver Crusades. In 1980, he attempted to create a new church called "Christlam," a synthesis of Christianity and Islam. He also dabbled with Reverend Sun Myung Moon's Unification Church and the MORMON CHURCH becoming, for a short period, a Black Mormon. Cleaver was a perennially unsuccessful candidate for political office, running for a seat in the U.S. House of Representatives in 1984 and for the U.S. Senate in 1986. In the second race he campaigned as a conservative Republican, the ultimate rebuke to his earlier radicalism.

Cleaver continued to have run-ins with the law. In 1987, he was arrested for cocaine possession and the following year he was arrested for theft from a residence. He was ordered to make restitution and was placed on parole for three years. Also in 1987, the Cleavers divorced.

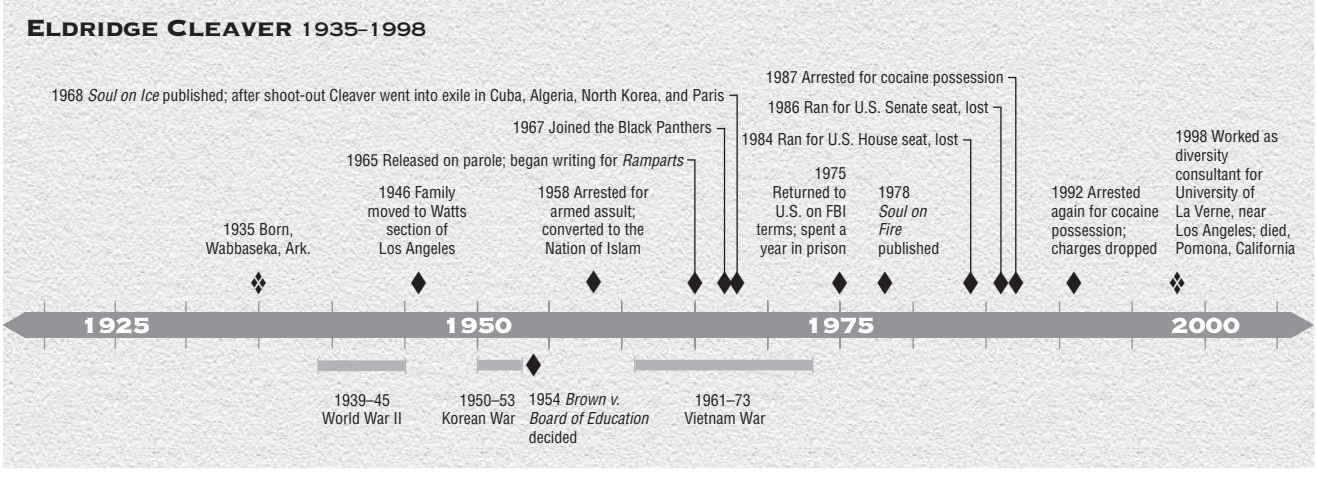

Cleaver was again arrested for cocaine possession in 1992, but the charges were dropped, and in 1994 he was seriously injured by a blow to the head from a fellow drug addict. In the mid-1990s, Cleaver was owner of a recycling company in Oakland and a lecturer.

Cleaver started work in February 1998 as a consultant to the Coalition for Diversity at the University of LaVerne located in southern California. A few months later, however, on May 1, 1998, he died in Pomona, Californa.

Although his public career was a mixed success, Cleaver's writings and activities have affected U.S. politics and culture. Besides *Soul on Ice,* his books include *Eldridge Cleaver: Post-Prison Writings and Speeches* (1969) and *Soul on Fire* (1978). And despite his later rejection of many of the Black Panther beliefs, Cleaver viewed that group's legacy as beneficial. "The Black Panther Party," he said, "played a very positive role at a decisive moment toward the liberation of Black people in America."

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## CLEMENCY

*Leniency or mercy. A power given to a public official, such as a governor or the president, to in some way lower or moderate the harshness of punishment imposed upon a prisoner.*

Clemency is considered to be an act of grace. It is based on the policy of fairness, justice, and forgiveness. It is not a right but rather a privilege, and one who is granted clemency does not have the crime forgotten, as in AMNESTY, but is forgiven and treated more leniently for the criminal acts. Clemency is similar to pardon inasmuch as it is an act of grace exempting someone from punishment. Commutation of an offender's sentence, however, is the lessening of the punishment based on the offender's own good conduct subsequent to his conviction.

Although clemency is a privilege and not a right, questions have arisen as to whether a prisoner sentenced to death is entitled to certain constitutional rights during a clemency proceeding. States that impose the death penalty require a clemency review before a prisoner is executed. For example, Ohio requires the state PAROLE authority to conduct a clemency review 45 days before the date of execution and file its report with the governor. As part of the review the prisoner may request an interview with a parole board member but the prisoner does not have the right to have an attorney present.

An Ohio death row inmate objected to the interview on two grounds, contending it violated his FIFTH AMENDMENT right against SELF-INCRIMINATION and his FOURTEENTH AMENDMENT right to DUE PROCESS. He insisted that he should not have to make a choice between seeking clemency and remaining silent about the crime he had been convicted of, and of other crimes he may have committed. A federal appeals court agreed with the inmate that the process violated his Fifth Amendment right, but the Supreme Court reversed the decision in *Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998).

The Supreme Court found that the inmate did not have any due process rights because clemency could only be given at the discretion of the governor. Moreover, the EXECUTIVE BRANCH, not the judicial branch, conducted the process. In addition, the Court cited prior rulings where it had stated that pardon and commutation proceedings have not traditionally been the business of courts and are rarely, if ever, appropriate subjects for JUDICIAL REVIEW. As to the Fifth Amendment argument, the Court ruled that the inmate had to exercise the same choice he had made at trial: to testify or to remain silent. In the Ohio clemency process, the inmate has a choice of providing information—at the risk of damaging his case for clemency or for post-conviction relief—or of remaining silent.

Acts of clemency are usually issued in isolated cases. In 2002, however, outgoing governor George Ryan announced that he had concerns about the fairness of Illinois judicial proceedings against 160 death row inmates, which compelled him to begin clemency review proceedings into their crimes. During the fall of 2002 a special review board conducted public hearings and private reviews concerning each inmate's case. Relatives of victims gave emotional testimony, while attorneys for the inmates pointed out troublesome charges, including the use of torture on suspects to make them confess. In January 2003, Governor Ryan took the unprecedented step of granting clemency to all the death row inmates.

He pardoned four inmates who he believed were not guilty; the remainder of the inmates were given life sentences. Ryan concluded that the legal process surrounding CAPITAL PUNISHMENT had become so corrupted that he had no choice but to grant clemency.

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CROSS-REFERENCES

Due Process of Law; Prisoners' Rights.

## CLERGY MALPRACTICE

*A breach of the duty owed by a member of the clergy (e.g., trust, loyalty, confidentiality, guidance) that results in harm or loss to his or her parishioner. A claim for clergy malpractice asserts that a member of the clergy should be held liable for professional misconduct or an unreasonable lack of competence in his or her capacity as a religious leader and counselor.*

Generally speaking, most clergy malpractice cases are couched in terms of TORT LAW as matters of alleged NEGLIGENCE, abuse of authority or power, inappropriate conduct, breach of confidentiality and trust, or incompetence. The claims assert that members of the clergy owe the same kind of duty to persons they serve as doctors owe to patients or lawyers owe to clients. Most licensed professionals in the secular world, including physicians, lawyers, and psychologists, may be held liable for negligence. Clergy members, however, are not licensed as professional counselors, making them accountable only to religious standards in many jurisdictions. Moreover, because the practice (or "free exercise") of religion is protected by the Constitution, which, under the FIRST AMENDMENT, requires separation of church and state, courts remain reluctant to apply secular laws to what they perceive as religious matters. For these and other social reasons, claims of clergy malpractice historically were relatively fruitless, with courts consistently ruling in favor of defendants. In the late 1990s, however, a rising number of sexual misconduct allegations surfaced in the Roman Catholic Church, which resulted in courts taking a closer look at the viability of such a legal premise.

One of the earlier claims for clergy malpractice was brought in *Nally v. Grace Community Church of the Valley,* 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988). In *Nally,* the parents of 24-year-old Kenneth Nally argued that pastors at Grace Community Church, in Sun Valley, California, were liable for his suicide in 1979. Nally's parents maintained that church pastors should have directed him to seek psychiatric care. Instead, they claimed, the pastors may have actually encouraged Nally's suicide by teaching him that taking his own life would not prevent his entrance into heaven.

The ensuing litigation extended over eight years. The final appeal to the California Supreme Court attracted about 1,500 churches and religious organizations that spoke out in support of Grace Community Church in seeking protection against TORT claims under the Free Exercise Clause of the First Amendment. But when the California Supreme Court finally dismissed the lawsuit on November 24, 1988, it did not directly address the First Amendment issue. In a 5–2 opinion the majority held that the clergy in this case were not licensed counselors and could not, therefore, be held legally liable for failing to provide proper care for the people they had advised. The case established the principle that religious counseling need not abide by the same legal standards that apply in other professional areas.

Another case in the 1980s elaborated on constitutional issues more explicitly than did *Nally.* In 1986, in *Baumgartner v. First Church of Christ, Scientist,* 141 Ill. App. 3d 898, 96 Ill. Dec. 114, 490 N.E.2d 1319 (1986), Mary Baumgartner brought suit against the church for the WRONGFUL DEATH of her husband, John Baumgartner, a Christian Scientist. The plaintiff Baumgartner, the executor of the decedent's estate, claimed that the First Church of Christ Scientist had prevented her husband from finding treatment for his acute prostatitis condition. The church allegedly informed him that he would die if he sought medical care and that he should instead practice the steps of Christian Science to cure his illness. Church representatives also convinced him to alter his will, leaving half of his multimillion-dollar estate to the Christian Science church.

In addition to claims for wrongful death and MEDICAL MALPRACTICE, Baumgartner brought a claim for Christian Science malpractice. The substance of this complaint was that a member

of the church and a church nurse had deviated from the standard of care of an ordinary Christian Science practitioner and nurse when they treated the decedent. The Illinois Court of Appeals refused to rule on this claim, holding that the First Amendment to the Constitution allows only the church itself to determine whether there has been a deviation from the church's religious standards. The question of whether a practitioner of Christian Science deviated from the church's standard of care was not, held the court, a JUSTICIABLE controversy.

A 1991 Ohio case took a slightly different look at clergy malpractice claims. In *Byrd v. Faber,* 57 Ohio St. 3d 56, 565 N.E.2d 584 (1991), Leroy Byrd and his wife, Garnet Byrd, brought suit against the church and its reverend for nonconsensual sex between the reverend and Garnet arising during marital counseling. The Byrds claimed clergy malpractice in addition to FRAUD, intentional infliction of emotional distress, and nonconsensual sexual conduct. The Ohio Supreme Court denied the clergy malpractice action, calling it a redundant claim. The court held that since the Byrds had not addressed any aspect of the clergy-communicant relationship that could not be redressed through general tort law, allowing them to recover under clergy malpractice would give them two recoveries for the same injury.

Likewise, in the 1994 case of *Hertel v. Sullivan,* 261 Ill. App.3d 156, an Illinois appellate court refused to hold a priest liable for professional negligence based on an alleged violation of the standards of care applicable to a psychologist. In 2000, a New York appellate court upheld a lower court's dismissal of a woman's claim that her priest breached his fiduciary duty by allowing counseling sessions to develop into a sexual relationship. The court ruled that any attempt to define the duty owed by a member of the clergy would foster excessive entanglement with religion. For similar reasons, the Utah Supreme Court unanimously upheld the dismissal of a rape case in which a woman accused the MORMON CHURCH of negligence for advising her to "forgive and forget" the childhood incident (*Franco v. The Church of Jesus Christ of Latter Day Saints,* 2001 UT 25 '2001').

Allegations of sexual misconduct appear among various faiths, but the Roman Catholic Church was rocked by scandal involving CHILD MOLESTATION and the supposed cover-up of such acts at the diocesan level. When the news broke in Boston in early 2002, the Massachusetts attorney general began investigating for evidence of a criminal cover-up by the church, and nine priests were criminally charged with rape or molestation. Under mounting pressure, Boston's cardinal Bernard Law resigned. In the ensuing months, more than five hundred alleged victims brought civil lawsuits against the Archdiocese of Boston, coincident with a rash of similar civil suits across the country. In June 2002, the United States Conference of Catholic Bishops, pressed by its constituency, came forward with a formal policy statement, the *Charter for the Protection of Children and Young People,* declaring that abusive priests would be removed from direct contact with parishioners. In February 2003, Massachusetts Superior Court judge Constance M. Sweeney denied the church's request for dismissal of the hundreds of pending civil suits. She ruled that the cases dealt with the handling of sexually abusive priests by their superiors, and not more prohibitive issues that would require delving into religious principles.

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CROSS-REFERENCES

Religion.

## CLERICAL ERROR

*A mistake made in a letter, paper, or document that changes its meaning, such as a typographical error or the unintentional addition or omission of a word, phrase, or figure.*

A mistake of this kind is a result of an oversight. Such an error was mistakenly, not purposely, written and should be readily remedied

without objection. If the amount of money owed a plaintiff by the defendant is mistakenly recorded by a court reporter as being $50 rather than $500, then the plaintiff is not bound by this since it is only a clerical error. An error of this nature can be rectified by the court acting sua sponte, on its own, or on the motion of either party once the court learns of the error.

A *clerical misprision* is FRAUD that is perpetrated by the clerk of the court and may be readily discerned by examining the record. Such an error can only be corrected from information that appears elsewhere in the record and not from memory by the judge or clerk or by outside testimony.

## CLERK

*A person employed in an office or government agency who performs various tasks such as keeping records or accounts, filing, letter writing, or transcribing. One who works in a store and whose job might include working as a cashier, selling merchandise, or waiting on customers.*

A law clerk is either a law student employed by a licensed attorney to do mundane legal tasks and learn the law in the process, or a licensed lawyer working for a judge to aid in the writing and research of the cases before the judge.

## ♦ CLEVELAND, STEPHEN GROVER

Grover Cleveland was born STEPHEN GROVER CLEVELAND on March 18, 1837, in Caldwell, New Jersey. He pursued legal studies in Buffalo, was admitted to the bar in 1859, and established his law practice in Buffalo. He was subsequently granted a doctor of laws degree from Princeton University in 1897.

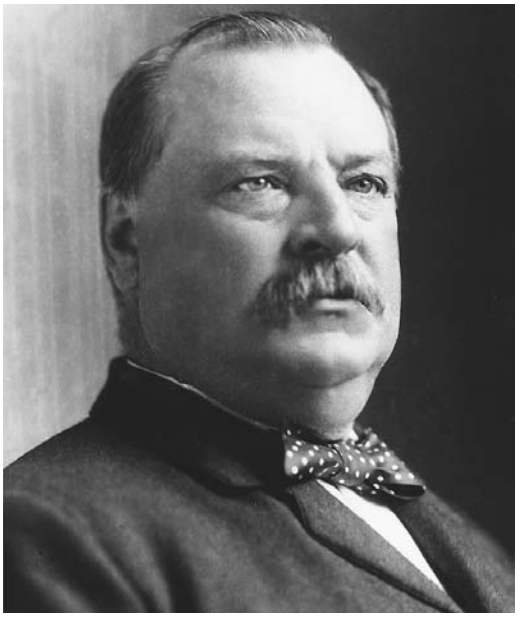

*Grover Cleveland.*
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From 1863 to 1866 Cleveland performed the duties of assistant district attorney of Erie County, New York, and, four years later, served as sheriff for three years. He entered politics in 1881 with his election as mayor of Buffalo and gained public attention with his forceful policy against corruption in the Buffalo government. In 1882 he became governor of New York and, for the next two years, achieved prominence for his reform policies.

Cleveland was elected to the presidency of the United States in 1884. He advocated civil service reforms and less stringent tariffs on foreign commerce and opposed excessive pensions awarded to Civil War veterans. He ran for reelection in 1888 against BENJAMIN HARRISON but lost. Four years later he successfully waged

"THOUGH THE PEOPLE SUPPORT THE GOVERNMENT, THE GOVERNMENT SHOULD NOT SUPPORT THE PEOPLE."
—GROVER CLEVELAND

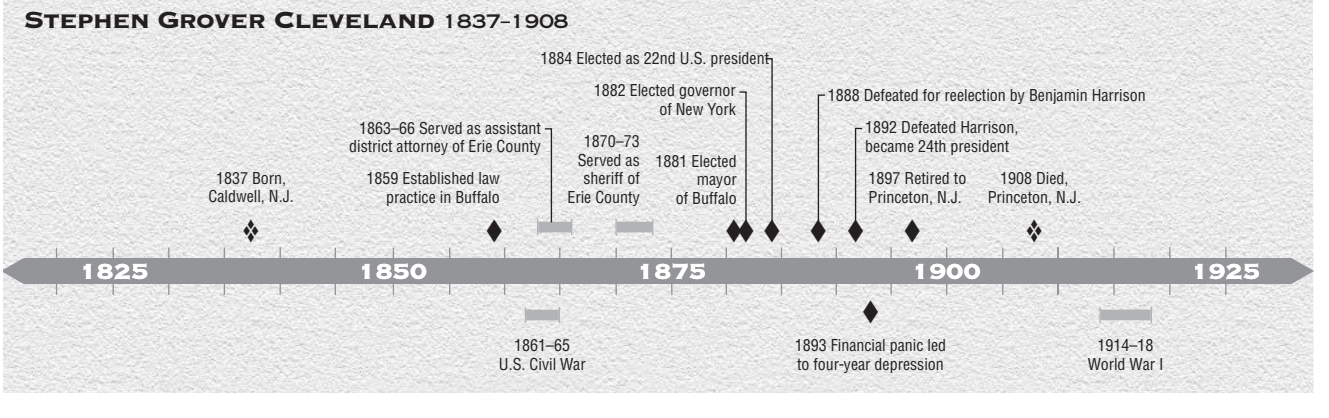

another campaign for the presidency, defeating the incumbent President Harrison.

The second presidential administration of Cleveland was fraught with difficulties. The financial panic of 1893 caused a controversy between factions favoring the free coinage of silver and those advocating the gold standard; Cleveland belonged to the latter group and pushed to repeal the Sherman Silver Purchase Act of 1890, which had provided for an increase in the purchase of silver. The following year workers of the Pullman Parlor Car Company staged a strike, causing a stoppage of the delivery of the U.S. mail. Cleveland viewed this as sufficient reason to dispatch federal troops to intercede.

Cleveland's decisions in the silver crisis and the PULLMAN STRIKE earned him great disfavor. He was strong in foreign policy, however, and staunchly opposed force by Britain in that country's boundary dispute with Venezuela.

At the end of his second term in 1896 Cleveland settled in Princeton, New Jersey, where he spent the remainder of his years in retirement. In 1904 he wrote *Presidential Problems,* which attempted to explain his views on many of the controversial issues of his administration.

Cleveland died June 24, 1908, in Princeton.

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## CLIENT

*A person who employs or retains an attorney to represent him or her in any legal business; to assist, to counsel, and to defend the individual in legal proceedings; and to appear on his or her behalf in court.*

This term includes a person who divulges confidential matters to an attorney while pursuing professional assistance, regardless of subsequent employment of the attorney. This attorney-client relationship is quite complex and extensive in its scope. One of the key aspects of this relationship is confidentiality of communications. A client has the right to require that his or her attorney keep secret any discussion between them during the course of their relationship that pertains to the matters for which the attorney is hired. This protection extends to a person who might have disclosed any confidential matters while seeking aid from an attorney, whether the attorney was employed or not. If, for example, someone is "shopping" for an attorney to handle a DIVORCE, the person might reveal certain private information to several attorneys, all of whom are expected to keep such communications confidential.

CROSS-REFERENCES

Attorney-Client Privilege.

## CLIENT SECURITY FUNDS

*State funds that compensate clients of attorneys who have stolen their money. Monies for these funds come from attorney registration and bar association fees.*

The PRACTICE OF LAW requires lawyers to hold money in trust that is legally owned by their clients. Lawyers often receive checks on behalf of their clients, whether as part of a jury award, an insurance settlement, a WORKERS' COMPENSATION award, or any number of legal and financial transactions. For attorneys who are in financial difficulties there is a temptation to dip into client funds. Such behavior is both unlawful and a violation of the canons of professional conduct. Victims of such FRAUD usually cannot recover their money from the attorney, as the attorney is typically bankrupt. In response, states have established client security funds to pay claims based on the misappropriation of client funds.

In 1959, the AMERICAN BAR ASSOCIATION (ABA) called on state bar associations to establish client security funds. During the 1960s many states established such funds and, by 2000, 49 states and the District of Columbia had established client security funds. In 1981, the ABA developed model rules for such funds. These rules were amended in 1989 as the Model Rules for Lawyers' Funds for Client Protection. States generally follow the model rules but are free to make their own modifications. The use of trust account overdraft notification, record keeping, and random audit rules have helped discourage attorneys from believing that they can use client funds, even temporarily, for their own purposes.

A key feature of client security funds is the funding mechanism: a portion of an attorney's annual registration or bar association fee is allocated to the fund. A victim of misappropriation files a claim with a client security board, which

is made up of lawyers and nonlawyers. The board reviews each claim and determines under its rules how much of the claim it can pay. Client security fund rules specify a maximum amount a victim may be compensated, which, in serious cases, means that victims will not be fully compensated. Client security boards have discovered that lawyers who steal money often steal it from a number of clients, leading to multiple claims.

Client security funds cannot be used to pay clients who have alleged lawyer MALPRACTICE. In those situations a client must file a civil lawsuit to seek compensation. Likewise, client security boards do not consider fee disputes.

CROSS-REFERENCES

Legal Malpractice.

## ♦ CLIFFORD, CLARK McADAMS

Clark McAdams Clifford was a prominent Washington, D.C., attorney who served as an adviser to every Democratic president from HARRY S. TRUMAN to JIMMY CARTER. He was White House counsel to President Truman, personal lawyer to JOHN F. KENNEDY, and secretary of defense under LYNDON B. JOHNSON. Later his reputation suffered seriously with his involvement in a scandal over the Bank of Credit and Commerce International (BCCI).

Clifford was born on December 25, 1906, in Fort Scott, Kansas, and spent his childhood in St. Louis. He entered Washington University, in St. Louis, in September 1923. In the fall of 1925, after two years as an undergraduate, he entered the university's law school. He received his law degree in 1928 and practiced law in St. Louis until entering the navy in 1944.

Lieutenant Clifford began his career of public service in 1945 as a naval aide to President Truman. In 1946, he became special counsel to the president. Clifford played an important role in the birth of the national security system. He helped draft legislation creating the DEFENSE DEPARTMENT and worked with others in the Truman administration to establish the CENTRAL INTELLIGENCE AGENCY (CIA), the U.S. Air Force, and the NATIONAL SECURITY COUNCIL.

Clifford had been associated with Kennedy since Kennedy's days as a congressman and senator. After Kennedy's election to the presidency in 1960, Clifford assisted in the transition, helping pick members of the cabinet and other important high government officials. He also served as a personal legal adviser to President Kennedy and his family.

*Clark McAdams Clifford.*
AP/WIDE WORLD PHOTOS

During the Johnson administration Clifford advised the president on matters of foreign policy. Clifford served as secretary of defense from March 1968 to January 1969. During his short tenure at the Pentagon he was the leader of an influential group of officials who persuaded Johnson to de-escalate the VIETNAM WAR. He argued that the burden of fighting should be transferred from the U.S. troops to South Vietnamese forces as quickly as possible.

"POLITICS IS A VERY IMPORTANT PART OF OUR GOVERNMENT . . . IT'S THE LUBRICANT THAT KEEPS THINGS RUNNING SMOOTHLY."
—CLARK CLIFFORD

As the years went by Clifford rose in status as an influential elder statesman. Several years after most would have begun enjoying their retirement, the 70-year-old Clifford was advising President Carter on foreign policy issues, as he continued his work with the DEMOCRATIC PARTY and high government officials.

Despite his long-standing prominence at the top levels of government, Clifford's later years were consumed with a scandal surrounding BCCI. BCCI was founded in 1972 by Aga Hassan Abedi, a Pakistani financier who retired in 1990 owing to health problems. From the start, BCCI officials had grandiose dreams of the organization becoming a worldwide financial power, the equal of large Western banks but with special ties to developing countries. Unfortunately, the bank never had a great deal of capital and was

always desperate for deposits. One of BCCI's largest customers was the Gulf Group, a consortium of shipping companies. The Gulf Group made substantial deposits to BCCI in 1972, but began borrowing from BCCI heavily after that. By 1977, BCCI's loans to the consortium had become so large that Gulf Group accounts were transferred from BCCI's London office to its Cayman Islands subsidiary to avoid British limits on the amount the bank could lend to individual customers. This deception eventually grew to involve approximately 750 accounts and a special department within the bank dedicated to carrying out the subterfuge. To cover its losses, the bank apparently resorted to a variety of schemes such as using deposits from other customers to make interest payments on delinquent loans. To add needed capital, BCCI lent money to its existing shareholders to buy more stock. The purchases artificially inflated the stock price, thereby giving the appearance of increased capitalization, but BCCI was only investing its depositors' money in the bank.

On July 5, 1991, banking regulators in seven countries—the Cayman Islands, France, Great Britain, Luxembourg, Spain, Switzerland, and the United States—seized the assets of BCCI, charging that the bank had engaged in widespread FRAUD over a number of years. The seizure set off a worldwide investigation that touched several U.S. government agencies, some leading figures in Washington, D.C.—most notably, Clifford—and individuals in several other agencies. The collapse of BCCI had tremendous repercussions throughout the world.

In the United States, the main issue was whether the federal government had made sufficient efforts to investigate BCCI prior to its seizure in 1991. Various federal agencies had been interested in BCCI since the late 1980s. The CIA had prepared a report in 1986 alleging that BCCI was the owner of First American Bankshares, a major Washington bank. In 1989, the CIA prepared a report that alleged possible criminal activities conducted by BCCI, including MONEY LAUNDERING. Questions remained about what the federal government knew of BCCI's illegal activities and when it became aware of them.

Clifford was chairman of First American and his law partner Robert Altman was president. First American was allegedly acquired in 1982 by a group of Middle Eastern investors who were using BCCI money, but Clifford and Altman said they believed that the investors were acting on their own. From 1982 to 1991, Clifford had assured federal regulators on several occasions that BCCI had no connection with First American.

On August 13, 1991, both men resigned their posts at First American. In September, Clifford testified before the House Banking Committee that he had been duped by BCCI and had not known that it had owned the controlling interest in First American during the nine years that he ran the bank.

On July 29, 1992, Clifford and Altman were indicted simultaneously by federal and New York state grand juries on charges of conspiring to defraud the FEDERAL RESERVE BOARD by concealing the role of BCCI in acquiring U.S. banks. At the heart of the case were allegations of an elaborate scheme by BCCI to expand illegally into the United States by purchasing First American and acquiring National Bank of Georgia. Again, Clifford and Altman assured federal, as well as state, regulators that the group of Middle

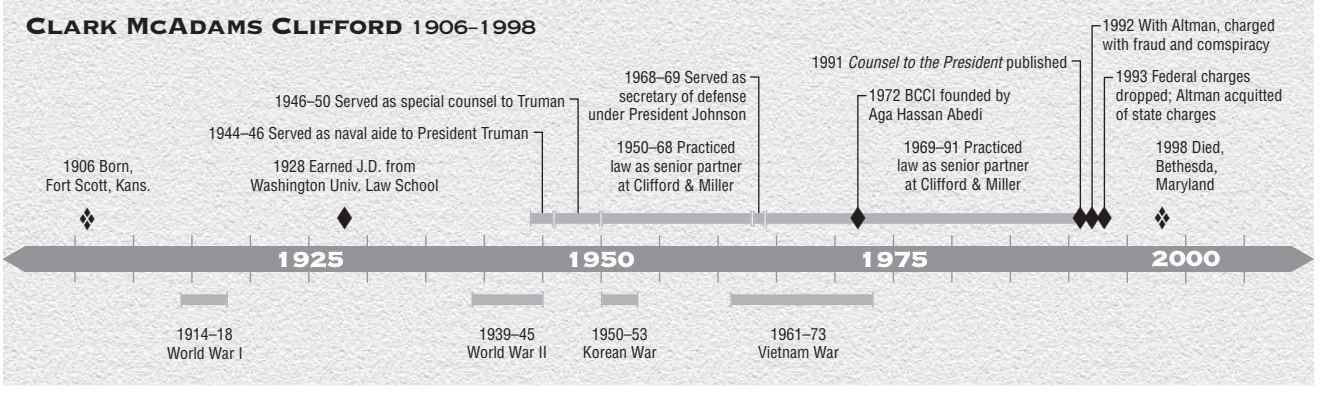

Eastern investors who purchased First American in 1982 had no ties to BCCI, and insisted that they believed the group had acted on its own. Nevertheless, Clifford and Altman were aware of BCCI's attempts to purchase other banks. In fact, both men represented BCCI when it first attempted to acquire U.S. banks in the late 1970s, and in a series of transactions in the 1980s, the two allegedly made a profit of nearly $10 million on First American stock that they purchased with loans from BCCI and later sold at a much higher price to a buyer who reportedly was subsidized by BCCI.

Following the two indictments, federal and state prosecutors tangled in a complex legal procedural drama about where or when the two would be tried. In September 1992, the federal trial was postponed, thereby allowing the New York state prosecution to proceed. But then the state trial was delayed as Clifford's lawyers tried to have the charges dropped because Clifford was in poor health. Clifford, age 86, eventually underwent quadruple bypass heart surgery, on March 22, 1993.

On March 30, 1993, the state trial of Altman began in a Manhattan courtroom. The prosecution alleged that Altman had participated in an elaborate scheme of deceit to help BCCI gain a foothold in the U.S. banking system. Altman countered that federal regulators were making him a scapegoat to deflect criticism of their own failings in the BCCI affair.

On April 7, federal prosecutors asked the judge to dismiss the charges against Clifford and Altman. Clifford's physical condition made it questionable that he would be able to stand trial and it was impossible for him to assist his attorneys in preparation for trial. The judge agreed and formally dismissed the federal charges against Clifford and Altman.

On August 14, a state court jury found Altman not guilty on four counts. Of the original eight felony charges, the judge had dismissed four during the trial, leaving the jury to deliberate on one count of scheming to defraud and three counts of filing false documents. During the trial the prosecution offered only CIRCUMSTANTIAL EVIDENCE, failing to prove that Altman was aware of BCCI's illegal activities.

After the state court acquittal, and with Clifford's health still precarious, efforts to prosecute the BCCI case in the United States ended, although it continued in other countries. No one can say for certain what happened to the $12 billion in missing depositors' funds. About one million people who lost money live in third-world countries and England. In England, depositors are expected to receive a return of 30 to 40 cents on the dollar; third-world depositors can expect even less.

In 1996, in an interview conducted by CNN as part of its 24-part documentary on the COLD WAR, Clifford discussed a number of topics including President Truman's reaction to Winston Churchill's Iron Curtain speech, the Truman Doctrine, the MARSHALL PLAN, the blockade of West Berlin, and U.S. strategy during the Cold War. Clifford died at age 91 on October 10, 1998, in Bethesda, Maryland. In 2001, he was portrayed by actor Donald Sutherland in HBO's *Path to War,* a retelling of Lyndon Johnson's involvement in Vietnam.

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"EQUALITY OF POLITICAL RIGHT IS VALUELESS AS A THEORY, UNLESS IT BE PRESERVED IN PRACTICE."
—NATHAN CLIFFORD

## ♦ CLIFFORD, NATHAN

Nathan Clifford was an associate justice of the Supreme Court from 1858 to 1881. A traditional Jacksonian Democrat strongly disposed to favor STATES' RIGHTS, Clifford served on a Court that in his later career was largely dominated by Republicans. As a result, one-fifth of all his writing for the Court was made up of dissents: Clifford opposed centralization of power in the federal government at a time when the Court was moving toward expansion of federal authority; he was a Northerner who often sided with Southern democrats on issues related to SLAVERY; and he advocated a conservative interpretation of the Constitution. Clifford also served as attorney general of the United States from 1846 to 1848 and as a negotiator in the Mexican War. As the negotiator, he successfully procured a treaty with Mexico that added a huge amount of land to the southwestern part of the United States.

Clifford was born August 18, 1803, in Rumney, New Hampshire, the oldest child and only son in a family with seven children. His English ancestors had moved to the United States in 1644. As a child he worked on his family's small farm in New Hampshire. Although his parents did not encourage him to attend school he was

*Nathan Clifford.*
LIBRARY OF CONGRESS

able to receive some education at Haverhill Academy, where he earned his tuition tutoring and giving singing lessons to younger children. He hoped to attend Dartmouth College but that proved impossible when his father died.

Ever ambitious, Clifford persuaded a local lawyer, Josiah Quincy, to take him on as an apprentice. He learned enough of the law to pass the bar in 1827 and moved to Newfield, Maine, where he opened a law office. Most of his legal work involved land claim disputes related to the lumber business.

In 1830, at age 27, Clifford was elected to Maine's House of Representatives on the Democratic ticket, quickly rising to Speaker of the House in 1833. Beginning in 1834 he served four years as state attorney general. During that time he made an unsuccessful bid for the U.S. Senate. He won a seat in the U.S. House of Representatives in 1838.

As a Jacksonian Democrat—that is, a Democrat in the mold of ANDREW JACKSON, who served as president of the United States from 1829–1837—Clifford was suspicious of power concentrated in urban centers of finance and politics. He was also a strong supporter of MARTIN VAN BUREN, a fellow Democrat who succeeded Jackson as president. In Congress Clifford opposed high tariffs, the creation of a federal banking system, and attempts to abolish slavery. The latter position earned him the label of "doughface"—a northern Democrat with southern sympathies. Clifford lost his seat in the House in 1843 after serving two terms.

In October 1846, President JAMES POLK appointed Clifford to become his attorney general. Clifford accepted the post but when the Supreme Court session was to begin he panicked about his qualifications for the job and suggested to Polk that he resign. Polk persuaded him to stay on. While he served as attorney general Clifford's most notable case before the Supreme Court was *Luther v. Borden,* 48 U.S. (7 How.) 1, 12 L. Ed. 581 (1849), which involved Dorr's Rebellion, the attempt by a group of Rhode Island citizens to form a new, more democratic state government to replace the established one. The rebellion had been put down through MARTIAL LAW imposed by the existing state government. Representing the rebels in court, Clifford had as his opposition DANIEL WEBSTER, a leading politician and constitutional lawyer. Clifford argued that a state could not impose martial law and that the people of Rhode Island had a right to change their constitution. The Court ruled that the case was outside of its jurisdiction.

Clifford also became involved in the Polk administration's policies regarding the Mexican War, which occurred between 1846 and 1848. He helped mediate differences between Polk and Secretary of State JAMES BUCHANAN, who would later, as president, nominate Clifford to the Supreme Court. As the war came to a close, Polk asked Clifford to resign as attorney general and become emergency peace negotiator. Clifford negotiated a treaty in 1848 that fulfilled the administration's expansionist goals in the Southwest. He eventually worked for progressive reform in Mexico, staying on there until September 1849.

When Whig candidate ZACHARY TAYLOR was elected president in 1848, Clifford was recalled from Mexico. He moved to Portland, Maine, and resumed his legal career. Not content to simply practice law, he attempted to gain the U.S. Senate in 1850 and 1853. His hopes of achieving a higher position and being rewarded for his work in Mexico materialized on December 9, 1857, when President Buchanan nominated him to the Supreme Court, filling the vacancy of BENJAMIN R. CURTIS who stepped down after the controversial case DRED SCOTT V. SANDFORD, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857). In appointing the New Englander Clifford, Buchanan hoped to maintain the geographic balance of the Court at a time when such balance was crucial. The nation was increasingly divided over the

issue of slavery when Clifford joined the Court. In particular, different factions hotly debated the admission of Kansas to the Union and the status of fugitive slaves. As a Northern Democrat who nevertheless had demonstrated his sympathy for Southern causes, Clifford was a logical choice for the Court. His nomination caused great debate in the Senate, particularly over his strong Democratic loyalties and his perceived lack of legal training and qualifications. However, Clifford was finally approved by the Senate on January 12, 1858, on a 26–23 vote.

Clifford showed his anti-abolitionist stripes early when he joined a unanimous Court in upholding the fugitive slave law in *Ableman v. Booth,* 62 U.S. (21 How.) 506, 16 L. Ed. 169 (1859). When the Civil War came, however, he strongly supported the Union, deeming secession to be "wicked heresy." Unlike his later years on the Court, those during the Civil War saw Clifford supporting Republican attempts to expand federal authority in order to better conduct the war. He stood behind the federal government in its first attempts to issue paper currency to finance the war effort. In TEXAS V. WHITE, 74 U.S. (7 Wall.) 700, 19 L. Ed. 227 (1868), he concurred with the majority in upholding the legality of congressional Reconstruction laws. However, in the *Prize Cases*—67 U.S. 635, 17 L. Ed. 459 (1862); 70 U.S. 451, 18 L. Ed. 197 (1865); 70 U.S. 514, 18 L. Ed. 200 (1865); and 70 U.S. 559, 18 L. Ed. 220—he dissented when the Court upheld the seizure of shipping through the Union's blockade of Confederate ports.

After the war Clifford consistently found fault with Republican attempts to increase federal powers over the states. In the 1867 *Test Oath Cases—Cummings v. Missouri,* 71 U.S. (4 Wall.) 277, 18 L. Ed. 356, and *Ex parte Garland,* 71 U.S. (4 Wall.) 333, 18 L. Ed. 366—for example, Clifford voted with the majority in striking down laws requiring oaths of loyalty to the Union. In two decisions—*Hepburn v. Griswold,* 75 U.S. (8 Wall.) 603, 19 L. Ed. 513 (1870) (the first of what became known as the *Legal Tender Cases*) and *Knox v. Lee* (heard concurrently with *Parker v. Davis*), 79 U.S. (12 Wall.) 457, 20 L. Ed. 287 (1871)—regarding the constitutionality of the Legal Tender Acts (12 Stat. 345, 532, 709), which had allowed the government to print paper money to repay war debt, Clifford reversed his earlier stances on paper currency and considered the act to be unconstitutional. In *Hepburn,* he was in the majority, whereas in *Knox,* he dissented, writing, "[T]he members of the Convention who framed the Constitution . . . not only knew that the money of the commercial world was gold and silver, but they also knew, from bitter experience, that paper promises, whether issued by the States or the United States, were utterly worthless as a standard of value for any practical purpose."

In a later decision, *Ford v. Surget,* 97 U.S. 594, 24 L. Ed. 1018 (1878), he argued for granting clemency to the former Confederacy and honoring agreements made after the war. Only through these means could another civil war be avoided. If the sovereign, he wrote, "does not observe the terms of the capitulations and all other conventions with his enemies, they will no longer rely on his word. Should he burn and ravage, they will follow his example, and the war will become cruel, horrible, and every day more destructive to the nation."

Clifford consistently voted against federal enforcement of the Fourteenth and Fifteenth Amendments, both of which sought to protect the rights of African Americans against infringements by state legislation. In the SLAUGHTER-

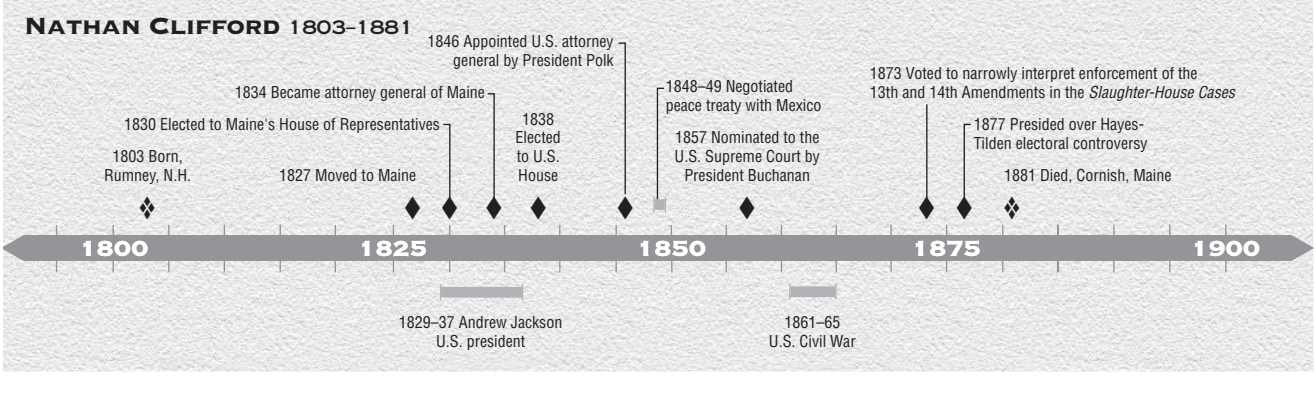

HOUSE CASES, 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1873), Clifford voted with the majority in its decision to interpret the amendments narrowly. He joined the majority in two 1876 decisions—*United States v. Reese,* 92 U.S. 214, 23 L. Ed. 563, and *United States v. Cruikshank,* 92 U.S. 542, 23 L. Ed. 588—that prevented federal enforcement of VOTING RIGHTS for African Americans as guaranteed by the FIFTEENTH AMENDMENT. He also dissented in several decisions that struck down racially discriminatory jury selection.

Clifford expressed his judicial conservatism in his dissent to *Citizens' Savings and Loan Ass'n v. Topeka,* 87 U.S. (20 Wall.) 655, 22 L. Ed. 455 (1875), in which he argued that courts can declare laws unconstitutional only when state and federal constitutions expressly prohibit such legislation:

> Courts cannot nullify an act of the State legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism.

In 1877 Clifford presided over the electoral commission established to resolve the contested results of the presidential election between RUTHERFORD B. HAYES and SAMUEL J. TILDEN. Tilden, a Democrat, had won the popular vote, but a controversy arose over the accuracy of election returns in three states. Voting along strict party lines, the Republican majority on the commission accepted all electoral votes as originally reported. Hayes, the Republican, therefore won the election by the narrow margin of 185–184. Clifford officially signed the order certifying Hayes's victory but he never fully accepted the legitimacy of his presidency. He did not attend Hayes's inauguration nor did he visit the White House during the justices' customary visits to the White House.

Clifford's last act of party loyalty consisted of staying on the Court until a Democratic president was elected and could nominate his successor. Despite failing health and increasing absentmindedness, Clifford stubbornly refused to step down, hampering the Court's effectiveness. Even after suffering a severe stroke in 1880, he remained on the bench. He died on July 25, 1881, in Cornish, Maine, unsuccessful in his last attempt to stymie his Republican opponents. The following year Republican president CHESTER A. ARTHUR appointed HORACE GRAY to take Clifford's place on the bench.

Chief Justice MORRISON R. WAITE, who served on the Court from 1874 to 1888, once calculated that of the 66 significant constitutional cases that he assigned between 1874 and 1881, only one went to Clifford. This fact owed something to Clifford's minority status as a Democrat on a Court dominated by Republicans. He remained a stalwart embodiment of pre–Civil War Jacksonian Democracy even when that era had passed away.

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## ♦ CLINTON, HILLARY RODHAM

Attorney, professor, First Lady, and now senator Hillary Rodham Clinton created a new and dramatic role in national politics. With a distinguished career that ranged from working for the House Judiciary Committee to teaching CRIMINAL LAW and workin as a lawyer, she assumed a key policy role in the administration of her husband, President BILL CLINTON. From 1993 to 1994 she ran that administration's top legislative priority, the failed effort at HEALTH CARE reform. Not surprisingly, her role in the administration was quite controversial. She was also exposed to criticism in the WHITEWATER scandal. However, supporters praised her for her skills as a manager and negotiator.

Clinton was born on October 26, 1947, in Chicago, the eldest of three children, to Hugh E. Rodham, a drapery businessman, and Dorothy Howell Rodham, a homemaker. She became head of the local Young Republicans chapter as a first-year student at Wellesley College, in Massachusetts, but she eventually changed her party affiliation. Clinton's shift in political opinion is visible from her ongoing volunteer work for presidential candidates: In 1964, the high-school senior backed the conservative BARRY GOLDWA-

TER; in 1968, the political science major supported the liberal EUGENE MCCARTHY.

At Yale Law School, Clinton did research work for the Yale Child Study Center and for Senator Walter F. Mondale and also volunteered for the child advocacy group that later became the CHILDREN'S DEFENSE FUND.

While working as an editor on the *Yale Review of Law and Social Action,* she wrote the first of several articles on CHILDREN'S RIGHTS. She was troubled by the law's refusal to consider children competent to make their own decisions until the age of 18. She concluded that the law should presume competence in children from the age of 12. Her 1979 article "Children's Rights: A Legal Perspective" argued in favor of children having the right to make a broad range of decisions, from tailoring their education to leaving an abusive home.

Yale also introduced Clinton to Bill Clinton, a fellow law student. They briefly went separate ways after graduating in 1973—he to teach law in Arkansas, she to work at the Children's Defense Fund in Massachusetts. Then, in January 1974, the 26-year-old Clinton was asked to Washington, D.C., to help impeach President RICHARD M. NIXON, whose presidency was undercut by the WATERGATE scandal. The special counsel to the House Judiciary Committee hired her to be in charge of legal procedures for its inquiry. When Nixon resigned in August rather than face almost certain IMPEACHMENT, Clinton's career was on the rise.

The Clintons were married in October 1975. They taught law at the University of Arkansas School of Law, in Fayetteville. In addition to conducting her criminal law courses, Clinton ran the school's legal aid clinic, founded the nonprofit Arkansas Advocates for Children and Families, and worked on Jimmy Carter's 1976 presidential campaign. Afterward, President Carter named her to the board of directors of the LEGAL SERVICES CORPORATION, which distributes federal funds to legal aid clinics nationwide. Over the next decade, she served on the boards of directors for national corporations and for the Children's Defense Fund. In 1980, she became a partner at the Rose Law Firm in Arkansas. Her husband, meanwhile, won election to five terms as governor of Arkansas and appointed her to head several committees, thus beginning the working partnership that would carry them to Washington, D.C. She chaired the Rural Health Advisory Committee and headed the Arkansas Education Standards Committee as well as holding other official posts.

*Hillary Rodham Clinton.*
LIBRARY OF CONGRESS

In 1992, Clinton campaigned for her husband for president. Her speeches on domestic issues made clear to voters nationwide what voters in Arkansas already knew: She was her husband's political and intellectual equal and not merely the a spouse along for the ride.

After he took office in 1993, Clinton's husband named her to head his task force on health care reform. The reform was a key campaign promise, and the stakes were high. Most critics thought it inappropriate to appoint her. A common complaint was nepotism: the president could not be expected to fire his own wife if problems arose. This resistance largely subsided once Clinton began managing the 500-employee task force, and it was silenced after the U.S. Court of Appeals for the District of Columbia held in June 1993 that she was a de facto government official. Voters responded with mixed reactions in opinion polls, although a slim majority approved of her role. But lawmakers, despite bipartisan praise for her work with them, proved less receptive. Even a Democratic majority in Congress lacked sufficient votes to enact the plan developed by her task force.

The Whitewater scandal created more controversy around Clinton. The issue began with a failed land deal that she and her husband had made in the 1980s while he was governor and

"THERE IS NO FORMULA FOR HOW WOMEN SHOULD LEAD THEIR LIVES. THAT IS WHY WE MUST RESPECT THE CHOICES THAT EACH WOMAN MAKES FOR HERSELF AND HER FAMILY. EVERY WOMAN DESERVES THE CHANCE TO REALIZE HER GOD-GIVEN POTENTIAL."
—HILLARY CLINTON

she an attorney at the Rose Law Firm. It surfaced during the 1992 presidential campaign. By 1994, it became a flood of legal, political, and personal concerns: shady deals, improper influence, TAX EVASION, BRIBERY, cover-ups, congressional hearings, INDEPENDENT COUNSEL, and even the suicide of deputy White House counsel Vincent Foster. Clinton's work at the Rose Law Firm placed her squarely in the middle of the controversy. In the spring of 1994, she admitted to having made some mistakes but claimed that neither she nor her husband had done anything criminal. She asserted that political enemies were trying to smear the administration.

Despite spending millions of dollars and obtaining convictions of several Clinton associates, special prosecutor Ken Starr was unable to prove that the Clintons had broken the law. As the case began to wind down, new controversy reignited the investigation. In the course of being deposed by Starr on SEXUAL HARASSMENT charges by a woman named Paula Jones, President Clinton denied having had a sexual relationship with White House intern Monica Lewinsky. Starr issued a report, called a "referral" in which he accused the president of having perjured himself. As a result of the report, the Republican-led House passed ARTICLES OF IMPEACHMENT in December 1998. Hillary Clinton voiced her strong support of her husband, and in 1999 President Clinton was acquitted of the charges.

In 1999, Clinton announced that she would run for the Senate seat that had been held by Democrat Daniel Patrick Moynihan, who had announced his retirement. When New York City mayor Rudy Giuliani decided not to run, the Republican nomination went to U.S. Representative Rick Lazio. After a long and costly campaign, Clinton was elected senator from New York on November 7, 2000, becoming the first former First Lady to be elected to the United States Senate as well as the first woman elected statewide in New York. Clinton serves on the Senate Committees for Environmental and Public Works; Health, Education, Labor and Pensions. In 2003, she was appointed to the Senate Armed Services Committee becoming the first New Yorker to serve on that committee.

As a freshman senator, Clinton's greatest challenges arose in the aftermath of the SEPTEMBER 11TH ATTACKS in 2001. She worked with members of the New York delegation and Congress to secure funds for clean-up and recovery of Ground Zero (as the former World Trade Center site is now known) as well as health tracking for persons who worked in the area and grants to small enterprises who lost business as a result of the terrorist attacks.

In October, 2002, Clinton spoke in support of the resolution authorizing the United States to use force against Iraq, while voicing opposition to a unilateral attack. In early 2003 she proposed a funding formula for homeland security and also proposed a $7 billion Domestic Defense Fund that included $1 billion in funding for "high-threat" areas such as New York City and Washington, D.C.

Clinton has been the recipient of numerous honorary degrees and awards, including the National Association for Home Health Care's Claude Pepper Award, the Public Spirit Award of the AMERICAN LEGION Auxiliary, and the New York City Legal Aid Society's Servant of Justice Award. Clinton has written numerous op-ed pieces as well as articles for magazines and jour-

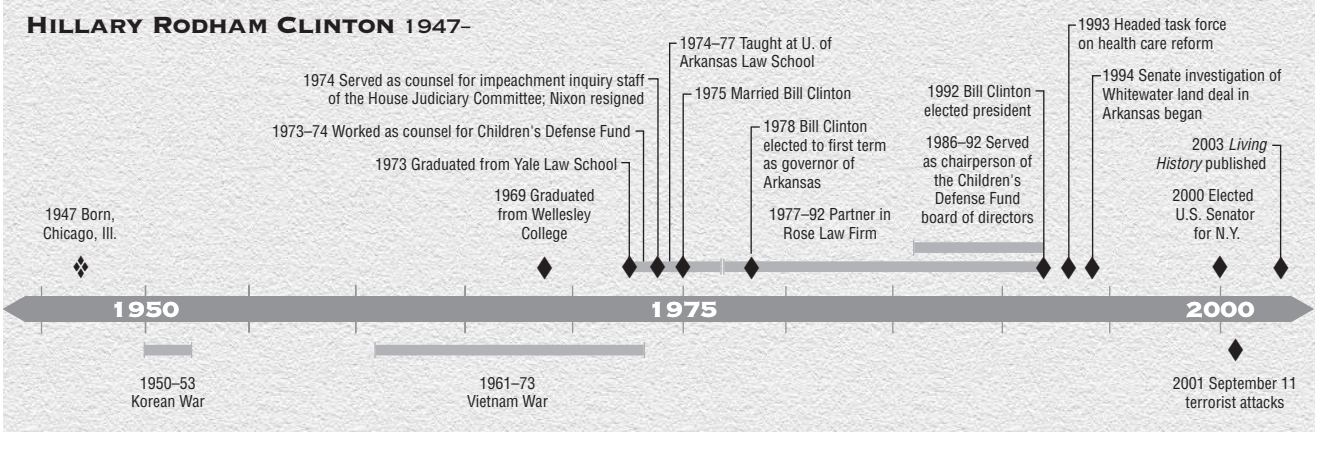

nals. She has published several books, including 1997's *It Takes a Village, and Other Lessons Children Teach Us* and the *An Invitation to the White House* (2000), both of which were best-sellers.

Over the last two decades, Clinton has been the subject of more than a dozen books and hundreds of articles. Many have recognized her for her advocacy of democracy and HUMAN RIGHTS, including WOMEN'S RIGHTS and children's rights, as well as religious tolerance and health care. Many have vilified her for her promotion of the same. As long as she remains on the political stage, Hillary Rodham Clinton will be the focus of heated debates and discussions.

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## ❖ CLINTON, WILLIAM JEFFERSON

With his election as the forty-second president of the United States on November 3, 1992, William Jefferson Clinton became the first Democrat in the White House since JIMMY CARTER left office in 1981. Clinton began his presidency pledging to reduce the federal government's budget deficit; streamline bureaucracy; increase public investment in education, job training, and the environment; and initiate widespread domestic reforms in HEALTH CARE, WELFARE, and taxation. Although the United States achieved significant economic growth under Clinton, his presidency was eventually marred by personal and legal problems, including the second IMPEACHMENT of a president in the history of the country.

Although Clinton made progress toward reducing the budget deficit during his presidency, some of his other reforms, such as his proposal for universal health care coverage, met with opposition in the 103d Congress of 1993–94. Nevertheless, Clinton made an impact on U.S. law. On many issues, from ABORTION to environmental protection, he steered the nation in a different direction from that of his Republican predecessors, Presidents RONALD REAGAN and GEORGE H. W. BUSH.

*Bill Clinton.*
THE WHITE HOUSE

"IF YOU LIVE LONG ENOUGH, YOU'LL MAKE MISTAKES. BUT IF YOU LEARN FROM THEM, YOU'LL BE A BETTER PERSON. IT'S HOW YOU HANDLE ADVERSITY, NOT HOW IT AFFECTS YOU."
—BILL CLINTON

Clinton was born William Jefferson Blythe IV on August 19, 1946, in Hope, Arkansas. His father, William Jefferson Blythe III, died in a car accident before the future president was born, and his mother, Virginia Cassidy Blythe, married Roger Clinton four years after Blythe's death. When Clinton was seven years old, the family moved to Hot Springs, Arkansas, where he spent the rest of his childhood.

Clinton graduated fourth in his class at Hot Springs High School in 1964. Already intent on entering politics, he enrolled at Georgetown University, in Washington, D.C. He completed a bachelor's degree in international studies in 1968 and won a Rhodes Scholarship to study at Oxford University, in England. After two years at Oxford, he entered Yale University Law School on a scholarship in 1970. He married Hillary Rodham on October 11, 1975.

After a brief stint as a staff attorney for the House Judiciary Committee, Clinton was hired in 1973 as a member of the faculty of the University of Arkansas School of Law, in Fayetteville. The following year, he ran for a seat in the U.S. House of Representatives from Arkansas's Third Congressional District. He lost by only four percentage points in a Republican stronghold. After successfully running Carter's Arkansas presidential campaign in 1976, Clin-

ton won the office of state attorney general that same year.

In 1978, at the age of 32, Clinton was elected governor of Arkansas. He was the youngest governor ever to enter office in Arkansas, and the youngest governor in the nation since 1938, when Harold C. Stassen was elected governor of Minnesota at the same age. Shortly after entering office, Clinton raised the gasoline tax and automobile-licensing fees in order to finance highway improvements. These tax increases proved unpopular, and he lost the governorship in the 1980 election.

Clinton spent the next two years working in private legal practice, then won re-election as governor in 1982 and held the post until his election as president. He implemented educational reforms in Arkansas during the 1980s, increasing educational funding through a higher sales tax and introducing such measures as competency tests for teachers and compulsory school attendance through age 17 for students.

In 1992, Clinton entered a crowded field of candidates jostling for the Democratic nomination for president. His competitors included Jerry Brown, a former governor of California; Paul E. Tsongas, a former U.S. senator from Massachusetts; and Thomas R. Harkin, a U.S. senator from Iowa. Despite rumors of an affair with a singer named Gennifer Flowers, Clinton won his party's nomination. He chose ALBERT GORE Jr., a U.S. senator from Tennessee, as his running mate. In the general election, he defeated President George H. W. Bush and an independent candidate, H. Ross Perot. Clinton tallied 43 percent of the popular vote, against 38 percent for Bush and 19 percent for Perot.

Clinton was sworn in as president on January 20, 1993. At 46 years of age, he was the youngest president since JOHN F. KENNEDY. Entering office at a time of economic recession, he immediately set to work on domestic agenda calling for economic stimulus, long-term public investments, and a deficit-reduction plan. Key aspects of this plan involved health care reform, reduction of tariffs, tax increases for the wealthy, tax cuts for the poor, spending increases for job training, and programs to increase the efficiency of the federal government.

Clinton experienced only partial success in implementing his proposals in Congress, even though his party enjoyed majority status in both the House and the Senate during the 103d Congress. He won passage of and earned INCOME TAX credit for working poor people; cut federal spending and bureaucracy; and passed the National and Community Service Trust Act (107 Stat. 785 [1993]), which provides students with tuition assistance in exchange for work on special service projects.

The NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) (32 I.L.M. 605), signed by Clinton on December 8, 1993, was hailed as landmark legislation. Although NAFTA negotiations had begun under President George H. W. Bush, Clinton made the controversial trade agreement a test of his presidency and used his influence to secure its passage through Congress in the North American Free Trade Implementation Act (107 Stat. 2057 [1993]). The agreement removes tariffs on products traded between the United States, Mexico, and Canada over a 15-year period. The Clinton administration also secured major changes in the GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT).

Clinton did not win passage of his entire economic stimulus package, nor was he able to generate significant welfare reform. But the most noted failure of the early Clinton administration proposals was its sweeping plan to reform health care. Organized by HILLARY RODHAM CLINTON and presented to Congress in the fall of 1993, the 240,000-word document was one of the most detailed legislative proposals ever presented to Congress. The Health Care Security Act, as it was later called, would have provided HEALTH INSURANCE to all citizens. Although the act was defeated in Congress, it spurred modest reforms that helped to bring down the health care inflation rate in future years.

During the 1992 presidential campaign, Clinton had pledged to lift a ban on homosexuals in the military. His efforts to fulfill this promise during his first year in office quickly met with disapproval from military leaders, members of Congress, and the general public. After lengthy debate of the issue in Congress, Clinton moderated his initial position with a new policy that was dubbed "don't ask, don't tell." Under this policy, homosexuals are free to serve in the military as long as they do not display their homosexuality or engage in homosexual conduct. Many homosexual rights advocates voiced their disappointment with Clinton's compromise on the issue.

Other significant legislation signed by Clinton included the Family and Medical Leave Act

(29 U.S.C.A. §§ 2601 et seq. [1993]), which allows employees to take up to 12 weeks of unpaid leave each year for family illness, childbirth, or ADOPTION. The National Voter Registration Act (42 U.S.C.A. §§ 1973gg et seq. [1993]), also called the motor-voter law, permits citizens to register to vote by mail or while obtaining a driver's license. Similar bills had been vetoed by President Bush.

Another bill signed by Clinton, the Freedom of Access to Clinic Entrances Act (18 U.S.C.A. § 248 [1994]), strengthens protection of family-planning clinics that perform abortions by making it a federal crime to obstruct clinic entrances and harass clinic patients and personnel.

Clinton signed into law a major piece of anticrime legislation on September 13, 1994 (108 Stat. 1796). The $30.2 billion measure was a complex mixture of government spending and changes in CRIMINAL LAW. It provided for social programs, prisons, and the hiring of 100,000 police officers nationwide; the extension of the death penalty to more crimes; and the banning of 19 different assault-style firearms.

Clinton was the first Democratic president since LYNDON B. JOHNSON to make an appointment to the U.S. Supreme Court. Clinton appointed RUTH BADER GINSBURG in 1993 and STEPHEN BREYER in 1994. Both justices were approved by the U.S. Senate with little controversy. With their moderate positions, these justices were likely to help prevent threatened reversals of previous Court decisions on abortion and CIVIL RIGHTS.

Clinton appeared less confident in the area of foreign policy. Early in his term, critics characterized his handling of U.S. policy toward conflicts in Bosnia, Somalia, and Rwanda as indecisive. Clinton appeared to gain confidence with time, however, and claimed a number of foreign policy victories later in his administration. He successfully sent U.S. troops to Haiti in 1994 to restore democratically elected President Jean-Bertrand Aristide to power. The Clinton administration also secured significant disarmament agreements with Ukraine, Belarus, and Kazakhstan, former states of the Soviet Union that possessed NUCLEAR WEAPONS; restored normal diplomatic relations with Vietnam; helped to broker peace negotiations in the Middle East and Northern Ireland; and slowed North Korea's development of nuclear weapons.

In March 1992, questions arose concerning a failed Arkansas business deal that the Clintons had been involved in during the 1980s. The deal centered on the Whitewater Development Corporation, a proposed real estate development near Little Rock. Among the charges later directed at Clinton was that he had benefited from criminal actions of James McDougal, an Arkansas savings-and-loan owner. In particular, it was alleged that McDougal had illegally diverted money to Clinton's gubernatorial campaign fund—money that McDougal had been able to raise partly through the help of then-Governor Clinton. James and Susan McDougal, along with former Arkansas governor Jim Guy Tucker, were convicted of FRAUD in 1996 for their roles in several transactions, including the Whitewater affair.

The Whitewater scandal was the most damaging to Clinton in the first term of his presidency, drawing comparisons to the WATERGATE scandal under President RICHARD M. NIXON and the IRAN-CONTRA scandal under President Reagan. The continuing investigation into White-

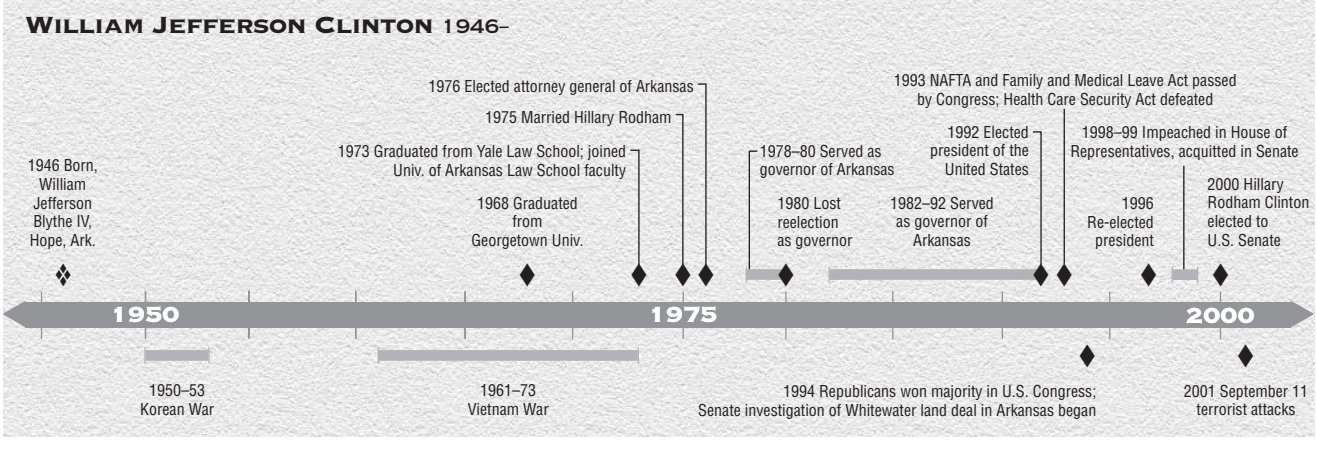

water by independent counsel KENNETH W. STARR also led to first impeachment trial in the U.S. House of Representatives since President ANDREW JOHNSON in 1868.

The roots of Clinton's impeachment began in 1994, when Starr began his investigation and Clinton faced a series of accusations regarding sexual misconduct. In 1994, Paula C. Jones filed a SEXUAL HARASSMENT lawsuit against Clinton, alleging that Clinton had made unwanted sexual advances in a hotel room in 1991, when he was governor of Arkansas and she was a state employee. Clinton was the first sitting president since 1962 to face a civil lawsuit. Meanwhile, as early as 1995, Clinton began having an adulterous relationship with White House intern Monica S. Lewinsky that lasted into 1997. In December 1997, Jones's lawyers named Lewinsky as a potential witness in the sexual harassment lawsuit. Lewinsky filed an AFFIDAVIT in the Jones case, denying that she had had sexual relations with the president, although in a series of events that were disclosed later, Lewinsky had returned several gifts that Clinton had reportedly given her during the affair. On January 12, 1997, Linda Tripp, a co-worker of Lewinsky's who had recorded telephone conversations in which Lewinsky had described the affair, turned tapes over to Starr. About a year later, on January 17, 1998, Clinton denied in a testimony before the GRAND JURY in the Jones case that he had had an "extramarital sexual affair," "sexual relations," or a "sexual relationship" with Lewinsky. Starr then investigated whether Clinton had lied under oath and/or whether he had encouraged others to lie. After Starr granted her IMMUNITY for her testimony, Lewinsky appeared before a grand jury in August 1998, describing at least 11 sexual encounters, although none involved sexual intercourse. Clinton admitted to some encounters with Lewinsky that had involved oral sex, but he claimed that because he had not engaged in intercourse, his denials about sexual relations did not constitute perjury.

Starr submitted a report to the House of Representatives on September 8, 1998, outlining 11 grounds for impeaching Clinton, including charges of perjury and obstructing justice. On October 5, 1998, the House Judiciary Committee voted 21-16, along party lines, to recommend that the House begin formal impeachment proceedings. The House concurred with the committee's recommendation, and in December 1998, Clinton faced four ARTICLES OF IMPEACHMENT. On December 19, the House approved two of the articles charging Clinton with perjury in his grand jury testimony and with OBSTRUCTION OF JUSTICE. The trial then moved to the Senate, where Chief Justice WILLIAM H. REHNQUIST presided as the senators listened in silence to presentations by Clinton's defense team and representatives from the House. After about a month of deliberations, the Senate voted on whether to remove Clinton from office. On both counts, the vote failed to garner the necessary two-thirds majority.

Although the impeachment undoubtedly scarred Clinton's legacy, his economic success was virtually unparalleled in recent U.S. history. Although Republicans gained control of both houses of Congress in 1994 for the first time in 40 years (Clinton admitted that he was partly responsible for his party's losses) the national deficit was reduced by several billion dollars during the last few years of the Clinton presidency. The country also experienced sustained levels of economic growth that were unmatched since the early 1960s.

Notwithstanding his successes, controversies surrounding Clinton continued even as he left office in 2001. On January 20, 2001, on his final morning in office, Clinton granted more than 170 presidential pardons and commutations, including those for two fugitive financiers who allegedly had traded illegally with Iran in the 1980s and defrauded the U.S. government of about $48 million in taxes. In March 2001, Attorney General JOHN ASHCROFT announced that he had launched an investigation into the pardons, dubbed "Pardongate" by the media. Clinton's actions in office also affected his status as a lawyer, as both the Arkansas Supreme Court and the U.S. Supreme Court suspended his law license for the perjury and obstruction-of-justice charges stemming from the Lewinsky and Paula Jones affairs.

Clinton has remained in the public consciousness, although his legacy in U.S. history is difficult to assess thus far. In 2001, he received a $12 million advance to publish his memoirs. In March 2003, the CBS television network announced that Clinton had agreed to appear with former senator ROBERT DOLE, whom Clinton had defeated in the 1996 presidential election, in a regular piece on the news program *60 Minutes,* where the former politicians debate current political issues. Clinton maintains an office in New York City, and construction of the

William J. Clinton Presidential Center in Little Rock, Arkansas, will be completed in the fall of 2004. Conservatives typically dismiss Clinton's economic and domestic achievements, pointing out his indiscretions throughout his two terms in office. Liberal supporters do not dismiss his imprudence, but they point out that he both presided over the country's emergence from economic recession and provided millions of Americans with opportunities that they would not have had without his programs.

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CROSS-REFERENCES

Armed Services; Gay and Lesbian Rights; Voting; Presidential Powers; Veto.

## CLOSE

*A parcel of land that is surrounded by a boundary of some kind, such as a hedge or a fence. To culminate, complete, finish, or bring to an end. To seal up. To restrict to a certain class. A narrow margin, as in a close election.*

A person can close a bank account; a trial may be closed after each lawyer has concluded his or her presentation in the case at bar.

## CLOSE WRIT

*In* ENGLISH LAW*, a certain kind of letter issued by the sovereign that is sealed with the great seal indicating his or her office and directed to a particular person and for a special purpose.*

A close writ—unlike a patent writ—is closed up, sealed on the outside, and not open to inspection by the public. In former times, such a writ could have been directed to the sheriff rather than the lord of a particular manor.

## CLOSED ACCOUNT

*A detailed statement of the mutual debit and credit demands between parties to which no further changes can be made on either side.*

A closed account is distinguishable from an account stated, which remains open for the purposes of adjustment and set-off.

## CLOSED CORPORATION

*A type of business corporation that is owned and operated by a small group of people.*

A closed corporation is also known as a *close corporation,* a *family corporation,* an *incorporated* partnership, and a *chartered partnership.* In this type of corporation all of the functions are usually performed by the same parties. These individuals serve as shareholders, officers, and directors and are involved in the management and operation of the business. A closed corporation differs from a publicly held corporation since its stock is neither issued nor traded to the public at large.

## CLOSED SHOP

*A shop in which persons are required to join a particular union as a precondition to employment and to remain union members for the duration of their employment.*

The federal National Labor Relations Act (NLRA) (29 U.S.C.A. §§ 151 et seq.) protects the rights of workers to organize and bargain collectively and prohibits management from engaging in UNFAIR LABOR PRACTICES that would interfere with these rights. Popularly known as the WAGNER ACT, the NLRA was signed into law by President FRANKLIN D. ROOSEVELT on July 5, 1935.

Among the workers' rights legalized by the NLRA was the right to enter into a "closed shop" agreement. It differs from a union shop, in which all workers, once employed, must become union members within a specified period of time as a condition of their continued employment. Closed shop agreements ensured that only union members who were bound by internal union rules, including those enforcing worker solidarity during strikes, were hired.

As WORLD WAR II ended a decade after the NLRA was enacted, unions sought to make up the pay cuts caused by wage freezes during the war, resulting in a rash of strikes. Many people viewed these strikes as economically destructive, and union practices, such as closed shop agreements, became increasingly unpopular. Critics of the closed shop contended that it allowed unions to monopolize employment by limiting membership or closing it altogether. They also

argued that the closed shop allowed unions to force unwilling individuals to give them financial support.

In response to these criticisms, Congress amended the NLRA in 1947, with the adoption of the **LABOR-MANAGEMENT-RELATIONS ACT** (29 U.S.C.A. §§ 151 et seq.). Known as the **TAFT-HARTLEY ACT**, this law placed many restrictions on union activities. It limited picketing rights, banned supervisory employees from participating in unions, and restricted the right to strike in situations where the president of the United States and Congress determined that a strike would endanger national health and safety. The Taft-Hartley Act prohibited secondary boycotts, wherein a union incites a strike by employees of a neutral or "secondary" party, such as a retailer, in order to force the secondary party to cease doing business with the party with whom the union has its primary dispute, such as a manufacturer. The Taft-Hartley Act also allowed individual states to ban the union shop by passing **RIGHT-TO-WORK LAWS** that prohibited employees from being required to join a union as a condition of receiving or retaining a job.

Section 8(a)(3) of the Taft-Hartley Act specifically outlawed the closed shop but did allow a collectively bargained agreement for a union shop, provided certain safeguards were met. Under the union shop proviso, a union and an employer could agree that employees must join the union within thirty days of employment in order to retain their jobs. Section 8(a)(3) stated, in relevant part,

> It shall be an unfair labor practice for an employer— . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, that nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement . . . if such labor organization is the representative of the employees. . . . Provided further, that no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Some observers believe that the **ABOLITION** of the closed shop helped to minimize **RACIAL DISCRIMINATION** by unions. The Wagner Act allowed unions to effectively shut out black employees from employment opportunities and benefits by simply refusing them membership. The Taft-Hartley Act curtailed this practice by prohibiting the negotiation of security agreements that limited employment opportunities to union members.

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#### CROSS-REFERENCES

Collective Bargaining; Labor Law; Labor Union.

## CLOSELY HELD

*A phrase used to describe the ownership, management, and operation of a corporation by a small group of people.*

In a closely held corporation, the same people often act as shareholders, directors, and officers, and no outside investors exist.

## CLOSING

*The final transaction between a buyer and seller of real property.*

At the closing, all agreements between buyer and seller are finalized, documents are signed and exchanged, money passes to the seller, and title to the property passes to the buyer.

Closings generally take place at the office of the title company, which issues title insurance to both buyer and lender. This insurance is issued after the title company has researched the chain of title to the property and cleared any matter that might interfere with a successful transfer of title.

Both the buyer and the seller may be represented by attorneys who review the closing package, which may include more than twenty-five documents and affidavits required by a raft of regulations. The buyer's attorney, if any, also reviews the title company's research to ensure that the buyer receives clear title.

An agent of the title company conducts and facilitates the closing. At the closing, the buyer reviews and endorses all loan documents, which may include the following:

- the mortgage,
- the promissory note by which the buyer promises to pay the loan and interest in full,
- a truth-in-lending statement, in which the lender informs the buyer of the approximate annual percentage rate over the term of the loan,
- various affidavits and inspection forms,
- a survey form indicating that the buyer has seen and understands the survey, and

**Closing**

**ONE-FAMILY HOUSES SOLD, 1980 TO 1999**

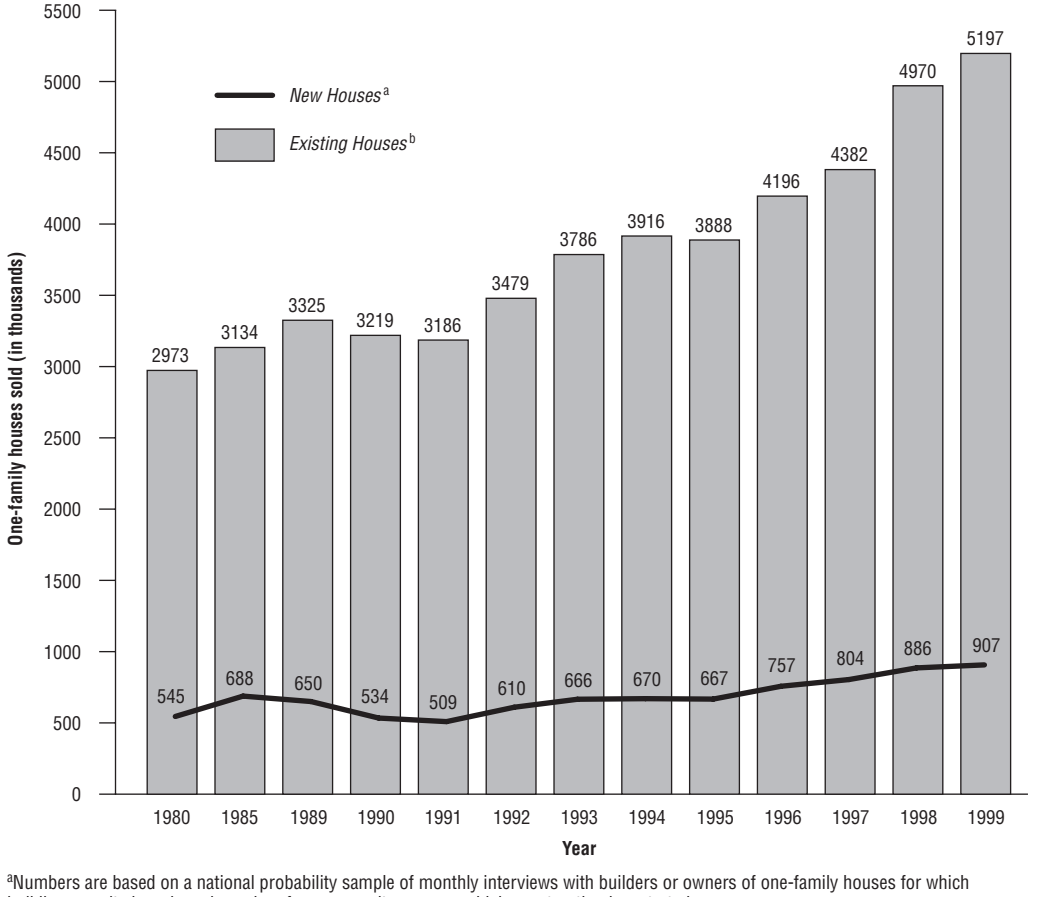


[a]Numbers are based on a national probability sample of monthly interviews with builders or owners of one-family houses for which building permits have been issued or, for nonpermit areas, on which construction has started.

[b]Numbers are based on data reported by participating real estate multiple listing services.

SOURCE: U.S. Census Bureau, *Statistical Abstract of the United States*, 2000.

- a private mortgage insurance application, if required.

The seller also endorses a number of documents at the closing. These may include the following:

- the deed transferring title to the buyer,
- a bill of sale transferring ownership of any **PERSONAL PROPERTY** included in the sale,
- any required affidavits, such as affidavits concerning mechanic's liens or inspections, and,
- in the case of new construction, a certificate of occupancy.

Among the documents that both the buyer and the seller sign are an **AFFIDAVIT** indicating the source of the funds the buyer is using to purchase the property, and a **SETTLEMENT STATEMENT** showing all the costs associated with the transaction. This statement, required by the Real Estate Settlement Procedure Act of 1974 (RESPA) (12 U.S.C.A. § 2601 et seq.), is required in all transactions involving a mortgage from any lender whose funds are federally insured or regulated. RESPA mandates full disclosure by the lender of all the terms and conditions of the loan, as well as a good-faith estimate of the buyer's closing costs. These may include fees for the loan origination process, credit report, appraisal, title search, survey, and administrative procedures.

At closing, the buyer also pays the contract sale price, minus any earnest money deposited, usually in certified funds; loan discount fees, or points, charged by the lender to obtain the mortgage; and attorneys' fees. The buyer is often required to purchase separate buyer's and lender's title insurance policies, although in some areas this expense is split between buyer and seller.

Once all the necessary signatures have been obtained and the monies have been disbursed, the buyer takes possession of the property. In some areas, it is customary to allow the seller a short period of time to vacate the premises; in other areas, the seller may be expected to move out before the closing. If any disputes arise at closing, the title company may escrow a portion of the funds to settle the dispute later so that the closing can be concluded.

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## CLOSING ARGUMENT

*The final factual and legal argument made by each attorney on all sides of a case in a trial prior to a verdict or judgment.*

Just as trials begin with attorneys making statements about the case, they end with a direct address to the judge or jury. The **OPENING STATEMENT** lays out what each side intends to prove; the closing argument, which is generally more forceful, has broader ambitions. By recapitulating the facts, evidence, and testimony presented during the trial, the closing argument tries to deal a fatal blow to the opposing case while definitively proving the attorney's own. Trial lawyers put great emphasis on their closing argument, or summation, because it is their last chance to be persuasive before the judge or jury begins deliberations. An art form in itself, the closing argument often brings forth a trial's most dramatic speech, marked by criticism, appeals to emotion and reason, and florid rhetoric.

Tradition dictates only a few rules for closing arguments. Generally, in civil actions, the plaintiff's attorney speaks first and the defendant's counsel immediately follows. In criminal trials, the prosecution gives its summation, followed by that of the defense. In addition, the plaintiff's counsel or the prosecutor is allowed time for a rebuttal argument. The reason for this additional time is that the **BURDEN OF PROOF** is on the plaintiff or prosecution; thus, the plaintiff's attorney or the prosecutor is allowed to reply to the defense's closing argument. Attorneys see the rebuttal as a useful weapon, as it is the last word to be heard from counsel in a case.

Closing arguments and rebuttals vary in duration. Hollywood court dramas often make the closing argument a brief, terse statement; in real life, it can go on much longer. Summations lasting an hour or more are typical. Depending on the complexity of a case, the entire summation period may last several days, particularly in jury trials where numerous witnesses and difficult **SCIENTIFIC EVIDENCE** have been presented.

However, most attorneys avoid droning on, for fear of losing the jury's attention or possibly incurring its antagonism. Ultimately, the length of a closing argument is left to the discretion of the judge, who may impose a time limit. Judges can also sustain objections by the opposing side if the scope of the rebuttal is deemed too far-reaching.

Throughout history, rhetoric has assumed a high place in summations. Orators, including attorneys, have always known that style in a speech can be as persuasive as substance. The colonial prosecutor Josiah Quincy peppered his closing arguments with rich flourishes of indignation. "Does the law allow one member of the community to behave in this manner towards his fellow citizens," Quincy thundered during the trial of British soldiers accused of murdering protesters in the **BOSTON MASSACRE** of 1770, "and then bid the injured party be calm and moderate?" He went on to quote Shakespeare. But he met his match in attorney **JOHN ADAMS**, whose summation helped win the soldiers' acquittal. Adams argued that any soldier "would be warranted in depriving those of life who were endeavoring to deprive him of his. That is a point I would not give up for my right hand, nay, for my life."

In an age when jury consultants warn about short attention spans, contemporary attorneys shy away from arch rhetoric. Most lawyers want to reach the jury's emotions through plain, but pointed, speech. Rhetorical questions are still used powerfully; quotations from literature are featured to a somewhat lesser extent. Charts, graphs, and even photographs play a large role in keeping juries focused. Both the prosecution and the defense calculatedly used props to underscore their arguments about brothers Erik Menendez and Lyle Menendez, who were tried in California in late 1993 for the murder of their parents. Arguing that the murders were intentional, Prosecutor Pamela Bozanich displayed a photograph of the bloodied corpses. Defense Attorney Jill Lansing countered by tacking up a nude photograph of Lyle, reminding the jury that her clients claimed to have been sexually abused and saying, "You need to decide what was going on in Erik and Lyle Menendez's mind that night before you decide what kind of crime was committed." The first trial ended in a mistrial. The brothers were retried and found guilty of first degree murder on March 21, 1996.

*Trials end with attorneys for each side directly addressing the judge or jury. Ron Kuby, the attorney for plaintiff Darrel Cabey, is shown making his closing argument to the jury in the 1996 civil trial of New York City subway "vigilante" Bernhard Goetz.*

AP/WIDE WORLD PHOTOS

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## CLOTURE

*The procedure by which debate is formally ended in a meeting or legislature so that a vote may be taken.*

Cloture is a means of terminating a filibuster, which is a prolonged speech on the floor of the Senate designed to forestall legislative action.

## CLOUD ON TITLE

*An apparent claim or encumbrance, such as a lien, that, if true, impairs the right of the owner to transfer his or her property free and clear of the interests of any other party.*

The existence of a cloud on title casts doubt upon the ability of an owner of real property to convey marketable title to his or her land, thereby lessening its value. The owner must present evidence to dispel the cloud on title if he or she wants to transfer ownership free of legal uncertainty. One method to remove a cloud on title is the commencement of an action to quiet title.

## CLUB

*An organization composed of people who voluntarily meet on a regular basis for a mutual purpose other than educational, religious, charitable, or financial pursuits. A club is any kind of group that has members who meet for a social, literary, or political purpose, such as health clubs, country clubs, book clubs, and women's associations. The term* club *is not a legal term per se, but a group that organizes itself as a club must comply with any laws governing its organization and otherwise be cognizant of the legal ramifications in undertaking to organize itself in this manner.*

Various types of clubs exist. An *incorporated members' club* is composed of a group of individuals who each contribute to the club's funds, which are used to pay the expenses of conducting the society. An *unincorporated proprietary club* is one whose proprietor owns the property and funds and conducts the club to attempt to make a profit. The members are entitled to use the premises and property in exchange for the payment of entrance fees and subscriptions to the proprietor as well as any additional rights and privileges provided in their contractual agreement.

An incorporated club is generally governed by state statute. Many statutes provide for the incorporation of clubs, and the statutory requirements must be strictly observed. A statute may require that an application for incorporation state the purposes of the club in a definitive manner to help the court determine whether the objective of the club is legal. In addition, the application should state the manner in which club revenues are to be provided and the basis upon which an individual may become a member of the club.

A club's certificate of incorporation should indicate pecuniary means (i.e., funds, money, property), describe the objective of the club, and specify a place of business or office. If a club is unincorporated, the rules that govern associations apply.

Voluntary clubs are not partnerships, since the members do not join them for profit-making purposes and, unlike partners, are not responsible for the acts of each other. If a club's members do unite for a commercial venture, however, this association would constitute a partnership. In such cases, a club might be required to comply with state law governing partnerships.

### Purpose and Objective

The purpose and objective of a club must be in compliance with the law and in the best interests of the community, whether a club is incorporated or not. An application for a club charter will be denied if the proposed bylaws provide for illegal methods of management.

The POLICE POWER of the state encompasses the supervision of amusements and thereby regulates clubs to make sure that the objectives of these organizations are lawful and that the organizations do not become harmful to society. Statutes may authorize the revocation of a club's charter if the club conducts unlawful activities.

### Constitution and Bylaws

The constitution and bylaws adopted by a club constitute a binding contract between the club and its members. There is a presumption that every member of the club is acquainted with its rules. The rules and bylaws of a club must provide for the selection of officers, handling of money or property, selection of members, and dissolution or disbanding of the club itself.

A club's rights and powers are usually governed by applicable statutes and the club's own charter, constitution, and bylaws. Clubs ordinarily have the power to acquire and convey real property, to hold real estate, and to obtain suitable buildings for their accommodation, as well as to borrow money for such purposes.

Private clubs have the right to IMMUNITY from public interference, since public authorities have no power to interfere with a private club's festivities when they are organized for a legitimate purpose and do not constitute a breach of the peace.

### Liabilities

If a contract is made by a club's duly authorized agent on its behalf, then the club will be liable under the contract. A membership corporation is subject to strictly limited powers and well-defined methods of procedure, and anyone

dealing with such a club is deemed to know this information. Unincorporated clubs are not liable for members' debts.

Concerning liability to its members for TORTS, an incorporated club that has a clubhouse and is financed by membership dues is financially responsible for injuries due to its NEGLIGENCE. Similarly, a club, whether incorporated or not, that maintains a clubhouse has a duty to keep the premises reasonably safe for its members. It also has a duty to inform and warn guests of all dangers related to the enjoyment of club privileges, that are not immediately observable.

A club may have various responsibilities to nonmembers. For example, a hunting club may be required to carry insurance in case of an accidental injury within its boundaries. Similarly, a club owes invitees on club property the duty to exercise ordinary care to prevent them from being injured.

### Protecting Civil Rights

Almost every organization that provides food, drink, lodging, or entertainment must obey the federal CIVIL RIGHTS laws and any applicable state statutes. The federal laws are designed to protect all people from interference with their right to get a job or education, participate in government, and enjoy public accommodations.

Private membership clubs are exempted from these civil rights laws in order to preserve their rights to privacy and FREEDOM OF ASSOCIATION. In attempting to determine whether an organization genuinely deserves private club status, courts have considered a number of factors, including the club's criteria for admission, membership fees, membership control over the

*During 2002 and 2003, William W. "Hootie" Johnson, chairman of the private, all-male Augusta National Golf Club, engaged in a publicized dispute over the club's membership policies.*

AP/WIDE WORLD PHOTOS

organization's operations, and use of facilities by nonmembers. Because the courts have applied these factors on a case-by-case basis, the results have been inconsistent. For example, recreational sports clubs such as golf, tennis, fishing and hunting, private dining, and swimming clubs have generally been found to provide public accommodations. Fraternal orders and lodges have proven to be more difficult to categorize. In four decisions dealing with these types of organizations, the Supreme Court narrowed the definition of freedom of association and upheld the constitutionality of state statutes designed to keep private clubs from discriminating.

**The Jaycees** In the first case, ROBERTS V. UNITED STATES JAYCEES, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984), the Supreme Court addressed the constitutionality of a state public accommodations law that had been applied to a private club. The club, the U.S. Jaycees, a major national and international civic organization, had been ordered by the Minnesota Department of Human Rights to accept women as full members. The Court rejected the Jaycees' argument that this order violated its constitutional rights. In its decision, the Court identified two distinct types of protected associations: intimate associations and expressive associations.

According to the Court, intimate associations, such as families, are distinguished by "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." Such associations are always subject to protection, the Court said, whereas large business enterprises are not. Private clubs such as the Jaycees fall somewhere in between the two. According to the Court, factors that may be relevant in determining whether a particular organization is an intimate association include "size, purpose, policies, selectivity, [and] congeniality."

The Court concluded that the Jaycees is not subject to protection as an intimate association because its chapters are large and unselective. With regard to the Jaycees' rights as an expressive association, the Court acknowledged that the organization has the right to associate with others for political, social, economic, educational, religious, and cultural purposes. However, the Court held that this right may be infringed by compelling state interests such as the desire to eliminate SEX DISCRIMINATION. The Court concluded that Minnesota had such a compelling interest in ensuring women equal access to the leadership skills, business contacts, and employment promotions offered by the Jaycees.

**Rotary Clubs** Three years after *Roberts,* the U.S. Supreme Court decided *Board of Directors v. Rotary Club,* 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987). This case involved the application of the Unruh CIVIL RIGHTS ACT (Cal. Civ. Code § 51 [West 1996]), a California statute that prohibits gender discrimination by all "business establishments," to Rotary clubs. The Rotary is a major national and international service club. The Supreme Court held that application of the act to require the Rotary to admit women as members did not violate the club's FIRST AMENDMENT right to intimate or expressive association. The Court pointed out that Rotary chapters range in size from 20 to more than nine hundred members, the organization has a high dropout rate, and many club activities are carried out in the presence of visitors. In finding that application of the Unruh Act would not interfere significantly with the Rotary's right to expressive association, the Court stated, "Indeed, by opening membership to leading business and professional women in the community, Rotary Clubs are likely to obtain a more representative cross section of community leaders with a broadened capacity for service."

**New York Clubs** In 1988, in *New York State Club Ass'n v. City of New York,* 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988), an association of 125 private clubs challenged the constitutionality of a New York City public accommodations ordinance that prevents discrimination. The ordinance, Local Law No. 63 of 1984, exempts clubs that are "distinctly private" in nature, specifically excluding from that status any club that has more than four hundred members, serves meals on a regular basis, and receives payments directly or indirectly from nonmembers in the pursuit of business. The Court rejected the clubs' challenge to the ordinance, finding that the law could be validly applied.

In this case, the Court went beyond its decisions in *Roberts* and *Rotary* by approving a statutory presumption that large clubs that serve food and receive payments from nonmembers are not entitled to First Amendment protection. The Court emphasized the fact that significant commerce occurs at most of the clubs and that

"business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed." Such characteristics, according to the Court, are significant in determining the nonprivate nature of clubs. The law upheld by the Court in this case narrowed the definition of a private club in order to remedy a situation deemed inappropriate by a legislative body.

**Boy Scouts of America** The Supreme Court clarified its position on the reach of civil rights laws in *Boys Scouts of America v. Dale*, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000). The Court, in a 5–4 decision, held that forcing the Boy Scouts of America (BSA) to accept gay troop leaders would violate its rights of free expression and free association under the First Amendment. The BSA is a private association and therefore was not subject to state and federal public accommodation laws.

The Supreme Court tied this ruling to its previous decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). In *Hurley*, the Court ruled that the sponsor of Boston's St. Patrick's Day parade could not be forced to let a group of gays and lesbians participate. The Court held that parades are a form of expression and that the sponsors could not be forced to include "a group imparting a message the organizers do not wish to convey."

### Public Opinion

Despite the fact that private clubs may be exempt from civil rights laws, they are still subject to the power of public opinion. In 2002, the National Council of Women's Organizations (NCWO), which has approximately six million members from over one hundred groups, announced that it would seek the admittance of women members to the Augusta National Golf Club in Augusta, Georgia. The club, with a membership of three hundred, is the home of the prestigious Masters Golf Tournament. When NCWO stated that it would contact television sponsors of the Masters to seek their help in applying pressure, the club announced it would forgo advertising revenue for the 2003 tournament. The controversy generated friction within the membership, with some members urging the admittance of women and some resigning in protest at the club's actions in dealing with the demands of NCWO. The NCWO pressed the CBS network not to televise the 2003 tournament but was rebuffed by the network. However, many corporations declined to sponsor the tournament, a sure indication that the NCWO campaign had some success.

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## CO

*A prefix that denotes jointness or the state of being conjunct or united. To be together, with, or not separate from; conjoint or combined.*

A corespondent in a lawsuit is one who is joined as a defendant in the suit. A *co-owner* is a person who owns something in conjunction with another person. A *co-administrator* is one who jointly handles the management of property with one or more persons.

"NEGRO SLAVERY, AS IT EXISTS IN THE U.S., IS NOT CONTRARY TO THE LAW OF NATURE."
—THOMAS COBB

## ♦ COBB, THOMAS READE ROOTES

Thomas Reade Rootes Cobb achieved prominence as a legislator and was known for his staunch secessionist views.

He was born April 10, 1823, in Jefferson County, Georgia. An 1841 graduate of the University of Georgia, Cobb was admitted to the Georgia bar the following year. As a jurist he achieved prominence for his authorship of legal publications, including *A Digest of the Statute Laws of the State of Georgia,* which was published in 1851, and for his editorial efforts on twenty volumes of books containing the reports of the Georgia Supreme Court. From 1858 to 1861 he participated in the organization of the Georgia criminal code.

Cobb advocated the secession of Georgia from the Union. He was instrumental in the

drafting of the new state constitution of Georgia in 1861 at the Georgia secession convention and participated in the creation of the Constitution of the Confederacy. He was serving as a brigadier general in the Civil War when he was fatally wounded at the Battle of Fredericksburg. He died on December 13, 1862.

## COCHRAN, JOHNNIE L., JR.

Johnnie L. Cochran Jr. built a reputation as a tough, uncompromising litigator by working on both sides of the courtroom. He has been the third-highest-ranking official of the Los Angeles County district attorney's office, and he has fought numerous cases in private practice. The recurrent theme of his career is social justice: Cochran specializes in representing African-American clients he believes have been treated unfairly by the law. His work on behalf of ordinary citizens in police-brutality cases achieved spectacular success in the 1980s and 1990s, ultimately leading to significant changes in Los Angeles Police Department (LAPD) policy. High-profile cases for celebrity clients—including Michael Jackson and O. J. (Orenthal James) Simpson—have tended to overshadow his less glamorous accomplishments, for which he has won numerous citations, awards, and courtroom victories. His controversial stewardship of Simpson's defense team in 1995 made him a household name.

Growing up in Shreveport, Louisiana, where he was born on October 2, 1937, Cochran had strong role models in his parents. His mother, a homemaker, ran an Avon business. His father and namesake, Johnnie L. Cochran, Sr., sold policies for Golden State Mutual Life Insurance, a large, black-owned company. Cochran's father moved the family to Los Angeles in 1942, where he was promoted to chief of Golden State's training program. Cochran went on to attend the University of California, Los Angeles, and then Loyola University School of Law. His father remained a great influence and, even in the 1990s, lived in the mansion home of the younger Cochran and his wife. "I think Johnnie got a lot of his ideas about justice from seeing me as he grew up," his father said. ". . . I tried to make my children sensitive to racism. But we also didn't want them to get consumed by anger." The anger—outrage that became the cornerstone of the young lawyer's career—came later.

Upon graduation from law school in 1962, Cochran wanted to further social justice. Joining the Los Angeles city attorney's office allowed him to do so. As a deputy prosecutor, he represented African-Americans who had been brutalized by Los Angeles police officers. Cases of mistreatment were rife and were getting worse; in 1965, long-simmering racial tensions erupted in widespread rioting in the Watts section of the city. Cochran left for private practice that year and soon had the pivotal case of his young career. He represented the family of Leonard Deadwyler, a young African-American who was shot dead by police officers while rushing his pregnant wife to the hospital. Although Cochran's client lost, the case had lasting personal and professional importance for him. The televised trial made him immediately recognizable in Los Angeles. Moreover, his courtroom performance helped to establish him as a figure whom African-Americans trusted; he later said that the case taught him the importance of police-abuse issues to minority communities.

Cochran had found his cause. He spent much of the next decade in private practice

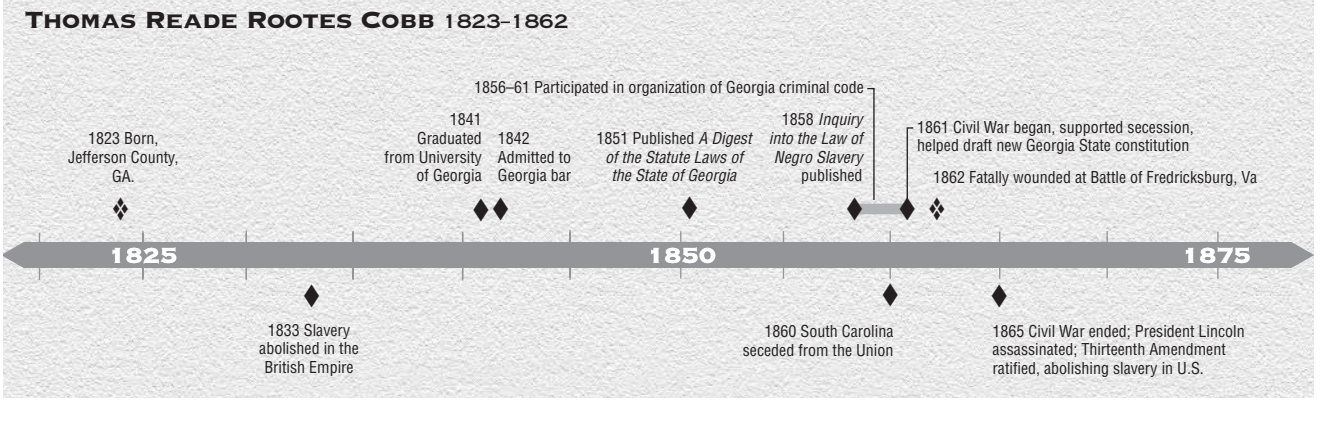

fighting cases involving excessive force or SEXUAL ABUSE by police officers. Most of his clients had little or no money, but, winning time and again, Cochran could afford to take their cases. One loss in court, however, proved to be another turning point in his life. The case of Elmer ("Geronimo") Pratt tested Cochran's faith in the justice system, changed him politically, and troubled him for decades. Pratt was a member of the BLACK PANTHER PARTY FOR SELF-DEFENSE, a radical, African-American political organization of the late 1960s. In 1968, the Santa Monica, California, police accused Pratt of shooting to death a white, female teacher in a tennis court ROBBERY. Pratt had an apparently strong alibi: He claimed to have been in Oakland at the time of the killing, attending a high-level Black Panther party meeting. The alibi was strengthened by the previous identification of a different suspect by the victim's husband. Nevertheless, Pratt was convicted of murder in 1972.

Pratt's conviction shocked Cochran, who attributed it to institutional racism. "It taught me that you can work within the system and believe in it, but if the government wants to get you, they can go out and get you," he told *Time Magazine* in 1995. "It also taught me that you never stop fighting." Cochran continued to fight for Pratt's release for nearly 25 years, although at least a dozen efforts failed to win PAROLE for his client. Then, in 1994, he uncovered new evidence that suggested that Pratt might have been framed by the FEDERAL BUREAU OF INVESTIGATION (FBI) in its notorious Counterintelligence Program (COINTELPRO), which once was aimed at disrupting the Panthers and other radical groups. Cochran alleged that the FBI had wiretapped his telephone and used informants to weaken Pratt's defense, and that it even had lied in court—all illegal efforts. The evidence convinced the Los Angeles district attorney's office to review the case.

Cochran's ultimate success in winning review of Pratt's case was partly due to the influence that he had accumulated over 30 years in Los Angeles. "He deals effectively with everyone, from presidents to common people," John Mack, president of the Los Angeles Urban League, told *Time Magazine,* "and he knows everyone in between." If Cochran is well-connected, it is owing not only to his affability but also to the unique course that his career has taken. Following a decade of successful private practice, he briefly returned to public service as chief administrator of the Los Angeles County district attorney's office in the late 1970s. He was third in command. Working beneath Cochran was Gil Garcetti, who later became district attorney.

Returning to private practice in 1980, Cochran soon took a case that epitomized his professional and moral concerns: It involved a dead African American and disavowals of responsibility by police officers. Ron Settles, a black football player from California State University, had been arrested and jailed for speeding; soon afterward, he was found hanged in his cell. The LAPD called his death a suicide, but Cochran convinced the family to have Settle's body exhumed for a new autopsy—which revealed that Settles had died from being choked. At the time, choke holds were commonly used by Los Angeles police officers when making arrests. In a WRONGFUL DEATH suit, Cochran persuaded a jury that Settles had been choked to death by officers, winning an award for the family of $760,000. He later noted ironically that when he had begun practicing law, "you would be almost held in CONTEMPT of court if you said a police officer was lying." The suit helped to bring about an important reform of LAPD policy: Shortly thereafter, the department banned the use of the choke hold.

"I THINK RACE PLAYS A PART OF EVERYTHING IN AMERICA, LET ALONE THIS TRIAL."
—JOHNNIE COCHRAN JR.

Prominent clients flocked to Cochran. He won a dismissal of rape charges brought against football great Jim Brown in 1985. He also secured an acquittal for actor Todd Bridges, star of the television comedy show *Diff'rent Strokes.* Bridges had been accused of attempted murder, attempted MANSLAUGHTER, and assault with a deadly weapon, but even the testimony of four eyewitnesses did not stop Cochran from winning the case in 1989. Cochran's work for pop singer Michael Jackson achieved only mixed success. After Jackson was accused of sexual molestation of a 13-year-old boy in 1993, Cochran managed to keep the case from going to court. He arranged a controversial private settlement with the boy's family, which reportedly totaled $10 million.

Even when he represents white citizens, race is often an issue. After the epochal Los Angeles riots in 1992, Cochran represented Reginald Denny, a white truck driver whose near-fatal beating by black assailants was broadcast live on television. During the 1993 criminal trial of two suspects, Denny suddenly embraced the defendants' mothers. The spontaneous display of compassion—and apparent lack of any resentment—stunned onlookers. Praising his client, Cochran observed, "I guess he's a lot kinder than you and I." Both defendants were acquitted in a controversial verdict, but Cochran subsequently pursued a separate civil suit against the city of Los Angeles based on a novel legal claim: The suit alleged that police officers violated Denny's CIVIL RIGHTS by failing to come to his aid during the beating because they had chosen not to enter a predominantly black neighborhood.

The preparation of O. J. Simpson's defense initially began without Cochran's participation. Charged in the double murder of Nicole Brown Simpson and Ronald Lyle Goldman, Simpson brought in Cochran only after hiring Los Angeles defense attorney ROBERT SHAPIRO. As the new leader among several prominent attorneys, Cochran attacked the prosecution for "a classic rush-to-judgment case."

Cochran's work for Simpson divided critics. Legal analysts praised his eloquent OPENING STATEMENT and occasionally brilliant tactics that undermined the prosecutors' lengthy and repetitive case. But Cochran was criticized when the defense began presenting its own case, particularly for calling witnesses whose testimony backfired. Despite the opinions of critics, Cochran's role in the Simpson trial was pivotal. Simpson's acquittal was a resounding victory for Cochran. Shortly after the bombing of a federal office building in Oklahoma City in 1995, several families of victims retained his services in anticipation of bringing their own lawsuits.

Like MARCIA CLARK, his adversary in the Simpson trial, Cochran has found fame and fortune on the lecture circuit. He has given speeches, has moderated panel discussions, and has been a host on COURT TV. In 1998, Cochran published his autobiography, *Journey to Justice* which recounted his life story and a number of the significant legal cases in which he was involved, including the O.J. SIMPSON TRIAL.

Cochran now focuses his law practice on civil rights and personal injury cases. He has represented clients as diverse as ROSA PARKS and Sean "P. Diddy" Combs. In 2002, representatives of Rev. Al Sharpton's National Action Network announced that it had retained Cochran to represent workers who had been laid off from the Enron Corporation.

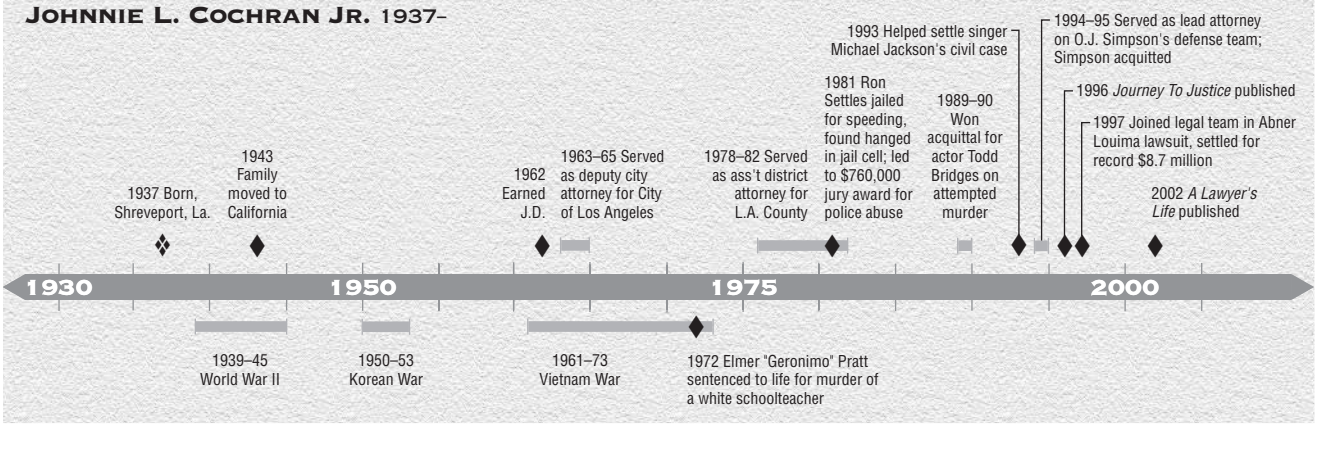

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## ♦ COCKBURN, SIR ALEXANDER JAMES EDMUND

Sir Alexander James Edmund Cockburn was an eminent British jurist. He was born December 24, 1802. He graduated in 1829 from Trinity Hall, Cambridge, England. In 1847, Cockburn began his career in Parliament as a liberal. He served in the British government as attorney general from 1851 to February 1852; he resumed these duties in December of 1852 and continued until 1856. In that same year, he presided as chief justice of the Court of Common Pleas. In 1859 he was appointed Lord Chief Justice of England.

The 19th century British jurist is known for successfully defending Daniel M'Naghten, who killed British Prime Minister Sir Robert Peel's secretary (thought by M'Naghten to be the prime minister himself). In the M'Naghten case of 1843, Cockburn established the customary test of insanity in Anglo-American criminal proceedings, which states the defendant is so mentally disturbed that he is unable to fully realize that what he did was actually wrong

Cockburn died November 21, 1880, in London.

## CODE

*A systematic and comprehensive compilation of laws, rules, or regulations that are consolidated and classified according to subject matter.*

Many states have published official codes of all laws in force, including the COMMON LAW and statutes as judicially interpreted, that have been compiled by code commissions and enacted by legislatures. The U.S. Code (U.S.C.) is the compilation of federal laws.

## CODE OF FEDERAL REGULATIONS

The NEW DEAL program of legislation enacted during the administration of President FRANKLIN ROOSEVELT established a large number of new federal agencies, which generated a shapeless and confusing mass of new regulations. There was no one place for a person affected by the regulations to examine them until 1935 when Congress created the FEDERAL REGISTER, a daily publication of the rules and federal documents produced by the EXECUTIVE BRANCH of the federal government and by the agencies. By 1937 this chronological compilation of regulations was effective in informing the public of new regulations, but it did not help a researcher who wanted to locate a regulation promulgated earlier. A publication that organized the regulations by subject was needed.

To meet this need, Congress created the Code of Federal Regulations (C.F.R.) as a more permanent and better organized source of federal regulations.

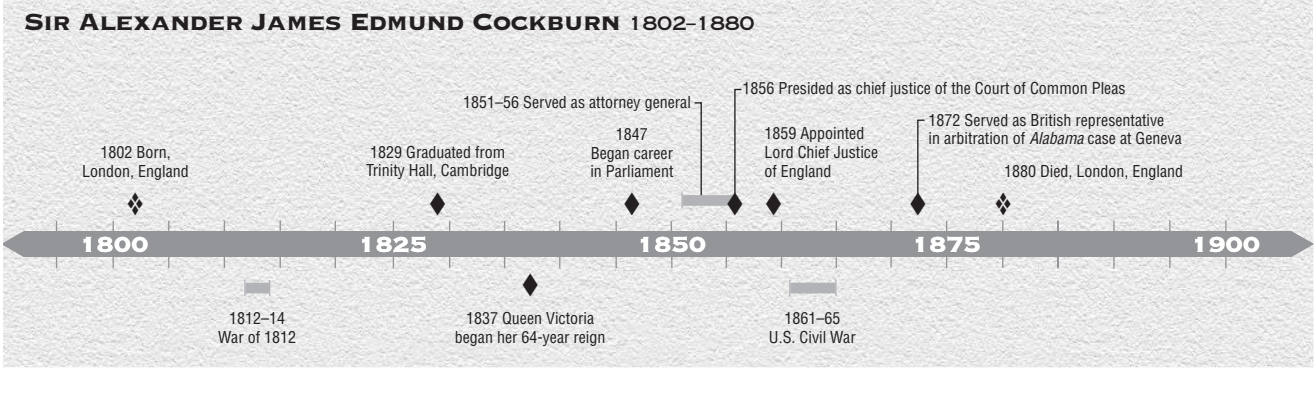

The original methods employed in compiling the code are still used. Documents are selected from the *Federal Register* and arranged in a scheme of fifty titles, some of which are the same as the titles used to organize federal statutes in the U.S. Code. Each title is divided into chapters, parts, and sections. A particular provision can be cited by reference, first to the title and then to the section where it is found. For example, standards promulgated by the Occupational Safety and Health Administration to promote safe workplaces are cited as 29 C.F.R. 1910. This means that they are found in Part 1910 of Title 29 in the Code of Federal Regulations. Title 29 contains regulations relating to labor.

The Code of Federal Regulations is kept up-to-date by a complete revision each year. New pamphlets are issued containing all the regulations in force at the time of publication. One-fourth of the pamphlets are revised at the end of each quarter of the year. For example, revisions of Titles 1 to 16 are issued as of January 1. Each volume contains a list of sections that have been affected by changes since January 1, 1964. There is a separate list covering changes made between 1949 and 1964. Revised pamphlets, however, do not cover changes that were made and then discarded or modified again during the year.

To facilitate research, one volume of the C.F.R. contains both a general index and a finding aid. A general index helps researchers find regulations by looking up the name of the agency issuing them or the subject covered by them. The finding aid helps a researcher convert information from one source of law to a parallel reference in the Code of Federal Regulations. It shows how to locate a regulation in the C.F.R. after discovering a reference to it in the U.S. Code.

It is necessary to have the Code of Federal Regulations to use along with the daily issues of the *Federal Register* because the *Federal Register* announces changes in federal regulations by listing them according to the parts in the C.F.R. that are affected.

## CODE OF HAMMURABI

The Code of Hammurabi was a comprehensive set of laws, considered by many scholars to be the oldest laws established; they were handed down four thousand years ago by King Hammurabi of Babylon.

*This stele shows King Hammurabi (c. 1780 B.C.) standing before Shamash, a Sumerian sun god associated with justice. The law code is set out in cuneiform writing below the figures.* GIANNI DAGLI ORTI/CORBIS

Although the Code of Hammurabi was essentially humanitarian in its intent and orientation, it contained the "eye for an eye" theory of punishment, which is a barbarian application of the concept of making the punishment fit the crime. The Code of Hammurabi recognized such modern concepts as that of corporate personality.

## CODE OF JUDICIAL CONDUCT

*A collection of rules governing the conduct of judges while they serve in their professional capacity.*

The Code of Judicial Conduct was formulated by the AMERICAN BAR ASSOCIATION (ABA) in 1972. The code itself does not have the force of law, but federal and state governments have adopted it and use violations of its rules as the basis for punitive action against judges.

### History of the Code

The first rules governing the conduct of judges in the United States were the Canons of

Judicial Ethics, which were written in 1924 by an ABA committee chaired by WILLIAM HOWARD TAFT, then chief justice of the U.S. Supreme Court. Prior to the promulgation of these canons, no cohesive framework existed to inform judges of the ethical obligations of their position. Judges were subject to removal, but only through the cumbersome, politicized procedures of congressional IMPEACHMENT, address, or recall.

A judge's leadership as the commissioner of professional BASEBALL helped provide the inspiration for the Canons of Judicial Ethics. In 1919, eight members of the Chicago White Sox conspired to purposely lose the 1919 World Series in exchange for payments from bookmakers. To restore public faith in the professional baseball league, the owners of the teams, on November 12, 1920, asked prominent federal judge KENESAW MOUNTAIN LANDIS to be the game's new commissioner. Landis accepted the position, which he subsequently filled while simultaneously serving as a U.S. district court judge in the Northern District of Illinois. Landis helped restore professional baseball's integrity, but his highly publicized role as the sport's commissioner damaged the integrity of the judiciary. The ABA considered his simultaneous service as a federal court judge a conflict of interest, and it voted to censure Landis in 1921. Landis resigned from the bench on March 1, 1922. In 1924, in part as a response to the Landis affair, the ABA promulgated the Canons of Judicial Ethics to regulate the activity of judges.

The Canons of Judicial Ethics were criticized as being too vague to provide guidance in resolving important questions. Even the preamble revealed the canons to be nothing more than an ABA wish list:

> The American Bar Association, mindful that the character and conduct of a Judge should never be objects of indifference, and that declared ethical standards tend to become habits of life, deems it desirable to set forth its views respecting those principles which should govern the personal practice of members of the Judiciary in the administration of their office. The Association accordingly adopts the following Canons, the spirit of which it suggests as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them.

A majority of states adopted the canons or wrote their own based on the ABA version. Other states had their supreme courts write ADVISORY OPINIONS informed by the canons. Nevertheless, the canons were roundly criticized as ineffective and were replaced by the ABA in 1972 with the Code of Judicial Conduct.

### The Current Code

The preface to the code stands in sharp contrast to the weak preamble of the canons. According to the preface, the Code of Judicial Conduct "states the standards that judges should observe. The canons and text establish mandatory standards unless otherwise indicated. It is hoped that all jurisdictions will adopt this Code and establish effective disciplinary procedures for its enforcement."

The code borrows much from the original canons. However, it is more specific and thus more enforceable. There had been 36 separate original canons, "a curious mixture of generalized, hortatory admonitions and specific rules" (Sutton, 1972 *Utah L. Rev.* 355, 355–56). The code trimmed the number of canons to seven and supplied each canon with subsections and comments.

In 1990, the code was amended by the ABA. Two canons were deleted, resulting in a total of five canons, and the wording of the remaining canons was changed to achieve gender neutrality. Changes and additions were also made to the subtext and comments accompanying each remaining canon.

**Canon 1**

A judge shall uphold the integrity and independence of the judiciary.

Canon 1 addresses the need for impartiality in judicial proceedings and the importance of judicial independence. This canon is a catchall; it holds, in part, that judges should "participate in establishing, maintaining and enforcing high standards of conduct" and "personally observe those standards."

**Canon 2**

A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

Canon 2 broadly prohibits conduct that would impair, or appear to impair, judicial impartiality. A judge must comply with the law and avoid favoritism and the appearance of favoritism. For example, a judge may not be a member in an organization that invidiously discriminates on the basis of race, sex, religion, or national origin.

**Canon 3**

A judge shall perform the duties of judicial office impartially and diligently.

Canon 3 contains rules regarding conduct in the judge's official capacity. This canon is the most comprehensive. It addresses the judge's duties in general, public comments, administrative responsibilities, disciplinary responsibilities, and disqualification. Canon 3 also contains a variety of rules designed to eliminate bias and prejudice.

**Canon 4**

A judge shall so conduct the judge's extrajudicial activities as to minimize the risk of conflict with judicial obligations.

Canon 4 reaches far into the judge's private life. Although the first comment acknowledges that a judge is not expected to live in isolation, comment 2 directs that a judge should refrain from, for example, jokes or remarks that may demean individuals "on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status." The canon prohibits a judge from appearing at a public hearing before, or consulting with, an executive or legislative body or official. An exception is made if the appearance concerns the law, the legal system, the administration of justice, or the judge or the judge's interests.

A judge is prohibited, through this canon, from accepting appointment to a government committee, commission, or position if the committee, commission, or position is concerned with issues other than the improvement of the law, the legal system, or the administration of justice. Exceptions to this prohibition are made for historical, educational, and cultural activities.

This canon also prohibits judges from practicing law (except on the judge's own behalf or to give uncompensated advice), accepting employment or service in organizations that would ordinarily come before the judge, and engaging in business dealings that would be perceived as an exploitation of the judge's position. Financial interests, gifts, and the reporting of financial assets are also covered in Canon 4.

**Canon 5**

A judge or judicial candidate shall refrain from inappropriate political activity.

Canon 5 prohibits public political activity by a judge. A judge may not, for example, act as a leader or hold an office in a political organization, publicly endorse a political candidate, or make speeches on behalf of a political organization.

Under this canon, a judicial candidate may not promise any judicial conduct except the faithful and impartial performance of official duties. A judicial candidate may not authorize or knowingly permit another person to act in violation of Canon 5, but a judicial candidate may establish a campaign committee to carry out advertising and fund-raising. Canon 5 also identifies which provisions of the code do not apply to retired, part-time, and temporary judges.

Each state has crafted its own interpretation of Canon 5 and the boundaries of political campaigns for judgeships. Some states are looser than others in terms of what a candidate may say or whether a political party may endorse a candidate. In many states judicial elections have been nonpartisan and lackluster, as candidates cannot disclose their political or legal view without risk of being disciplined under the professional conduct rules for attorneys.

Minnesota's restrictions on political speech for judicial candidates triggered a lawsuit that led to a landmark Supreme Court decision in *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002). A lawyer sought to run for the Minnesota Supreme Court but objected to Canon 5 restrictions. The Minnesota Republican Party sued in federal court to remove Minnesota's restrictions on speech and party endorsements in judicial elections. The district court and the circuit court of appeals rejected the claims, finding that the state had good reasons for regulating judicial elections.

The U.S. Supreme Court, however, overturned the restrictions on what a candidate can say in a campaign. The Court found that Canon 5 *announce clauses*, which prohibit candidates from discussing their views on legal and political views, were unconstitutional under the FIRST AMENDMENT. Such restrictions are illegal because they regulate speech based on content and burden an important category of speech.

The Court applied the STRICT SCRUTINY test to review the Minnesota rules. Under this test the state needed to show that its rules were narrowly tailored to serve a compelling state interest. Minnesota argued that promoting impartial judicial elections was a compelling STATE INTEREST but the Court rejected the argument, finding the interest to be vague and hard to define. The Court recognized that unrestricted speech might change the tenor of judicial elections, but it found that this was the price the state must pay if it was to select judges by election rather than by some other method, such as judicial

selection. In the wake of this decision a number of states began the process of revising their judicial codes to change election rules.

### Enforcement of the Code

Forty-seven states and the District of Columbia have adopted the code in whole or in part. Montana, Rhode Island, and Wisconsin have not adopted it, but each has fashioned its own set of regulations based largely on the code. The JUDICIAL CONFERENCE OF THE UNITED STATES adopted the Code of Judicial Conduct in 1973, thus subjecting federal judges to its rules.

In 1980, Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act (28 U.S.C.A. §§ 331, 332, 372, 604 [1982]). This act authorized each of the 13 federal circuits to establish a judicial council to review complaints against federal judges. The judicial council, comprising judges, was also authorized to order sanctions for violations of the Code of Judicial Conduct.

When the judicial council of a federal circuit receives a complaint of judicial misconduct, the chief judge of the circuit court of appeals conducts an initial review of the complaint. The chief judge may dismiss the complaint as baseless. If the chief judge finds that the complaint has merit, she or he assembles a special committee, which makes findings and refers the complaint to the entire judicial council. If the council finds that the judge in question has violated the Code of Judicial Conduct, it may suspend the judge from office, or it may publicly or privately reprimand the judge.

The aggrieved judge may appeal the judicial council's order to a review committee known as the U.S. Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders. The decision of this committee is final and may not be appealed. Every state maintains a similar process to govern its state court judges.

A federal circuit judicial council may not remove a judge on its own. If removal is considered by the judicial council, the matter is referred to the Judicial Conference of the U.S. Courts. If the Judicial Conference finds cause for removal, it refers the matter to the U.S. House of Representatives, which holds hearings on the proposed removal.

Enforcement of the Code of Judicial Conduct is considered a matter of public concern. In *In re Complaints of Judicial Misconduct,* 9 F.3d 1562 (U.S. Jud. Conf. 1993), the U.S. Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders held that a proceeding on a complaint of judicial misconduct or disability need not satisfy the standing requirements necessary in most judicial proceedings. (Standing is the doctrine that the person seeking relief of the court must be the person aggrieved by the alleged conduct.) Essentially, the committee's holding meant that any person may lodge a complaint of judicial misconduct against a judge, with the appropriate JUDICIAL REVIEW council.

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CROSS-REFERENCES

Ethics, Legal.

## CODE OF MILITARY JUSTICE

See MILITARY LAW.

## CODE OF PROFESSIONAL RESPONSIBILITY

See PROFESSIONAL RESPONSIBILITY.

## CODE PLEADING

*A statutory scheme that abolished the ancient common-law* FORMS OF ACTION *and replaced the overly technical system of* COMMON-LAW PLEADING *with simplified provisions for a plaintiff to bring a lawsuit and a defendant to answer the claims alleged against him or her.*

As the COMMON LAW developed in England after the Norman Conquest in 1066, a plaintiff could start a lawsuit only by obtaining a writ from the king or the king's chancellor. In time these writs took on fixed forms and a plaintiff could obtain one only if the words of the claim

fit one of the established forms of action. There was no room for variation in the words of the plaintiff's complaint or the defendant's response. By the fourteenth century the forms of action had become quite rigid and they took on the same overly technical characteristics under the common law in the United States. Frequently a worthy claim was tossed out of court because of some miscalculation or misstatement in the pleadings and justice was ill-served.

In 1848 New York enacted a new code to govern PLEADING in the courts of that state. It was called the Field Code after DAVID DUDLEY FIELD, the man who devised it. A number of other states followed the lead of New York. This pattern of pleading a CAUSE OF ACTION or a response came to be called code pleading.

Common-law pleading had required reducing every case to one claim and one response. Since grievances did not always fit into common-law forms, code pleading abandoned it. All the old forms of action were abolished and the extreme formality of common-law pleading was abandoned. Under code pleading the plaintiff has only to make a statement of facts that, if true, justify legal relief. The only requirement is that those facts fit the general pattern of some established legal right and that they state a claim on which relief can be granted. Furthermore, the plaintiff can present alternative or even inconsistent sets of facts and leave it to the trier of fact to establish which are correct. This is allowed when the plaintiff does not know all the facts affecting the claim, so long as the pleading is made honestly and in GOOD FAITH. More than one cause of action can be alleged but they must be stated as separate counts. For example, some states allow a simplified form of pleading of a breach of contract. The plaintiff may simply state that money is owed but has not been paid or services have been rendered but payment has not been made.

Code pleading solved many of the problems associated with common-law pleading but it also spawned a new controversy. The requirement that a plaintiff set out a claim by reciting facts justifying relief left open the question of what facts might be included. It has often been said that a plaintiff need plead ULTIMATE FACTS, not legal conclusions. Case after case has been fought on this point. The distinction primarily concerns how much detail must be given. A plaintiff must be able to show that he or she has a legal right, the defendant breached or violated that right, and the plaintiff thereby suffered some harm.

## CODICIL

*A document that is executed by a person who had previously made his or her will, to modify, delete, qualify, or revoke provisions contained in it.*

A codicil effectuates a change in an existing will without requiring that the will be reexecuted. The maker of the codicil identifies the will that is to be changed by the date of its execution. The codicil should state that the will is affirmed except for the changes contained therein. The same formalities that are necessary for the valid execution of a will must be observed when a codicil is executed. Failure to do so renders the codicil void.

## CODIFICATION

*The collection and systematic arrangement, usually by subject, of the laws of a state or country, or the statutory provisions, rules, and regulations that govern a specific area or subject of law or practice.*

The term *codification* denotes the creation of codes, which are compilations of written statutes, rules, and regulations that inform the public of acceptable and unacceptable behavior.

U.S. law is often described as a COMMON LAW system of JURISPRUDENCE. This means that it relies on previous cases, or precedents, to determine procedures and to decide the outcome of cases. U.S. jurisprudence also involves the interpretation of written laws, including constitutions, regulations, ordinances.

Codification rearranges and displaces prior statutes and case decisions. Codification of an area of law generally constitutes the whole source that is relied upon for a legal question in that area. Thus, when a state codifies its criminal laws, the statutes contained within the new code supersede the laws that had been in place prior to the codification. There are exceptions to this general rule, however. For example, the Michigan Supreme Court ruled in 1994 that Dr. JACK KEVORKIAN could be prosecuted under Michigan common law for assisting patient with suicide, despite the absence in Michigan's criminal code of a statute that prohibits such action law (*People v. Kevorkian,* 447 Mich. 436, 527 N.W.2d 714).

Public demand for written laws can be traced to the dawn of recorded history. The first known codification of laws is attributed to Ur-

Nammu, king of Ur, in the twenty-fifth century B.C. Lipit-Ishtar, king of Isin, in ancient Sumer, promulgated a written code around 2210 B.C. Hammurabi, a monarch in Babylonia, codified laws in the eighteenth century B.C. Both Lipit-Ishtar and Hammurabi announced in the prologues of their respective codes that these compilations established justice.

Ancient Greek and Roman civilizations continued the practice of codification. However, their written codes were not always helpful. The Roman emperor Caligula wrote his laws in small characters and hung them high on pillars in order to ensnare the public. Julius Caesar attempted codification, but he was unable to reduce the enormous body of ROMAN LAW to its essentials.

Not until the sixth century A.D. did Rome, under emperor JUSTINIAN I, accomplish a complete codification of its laws. The Code of Justinian, known as the Corpus Juris Civilis (Body of Civil Laws), became the legal authority of Rome in 533–34 A.D. Justinian's code completely revised imperial laws; omitted obsolete, contradictory, and repetitive laws; and contained a digest of legal essays for guidance. The Corpus Juris Civilis was a landmark in LEGAL HISTORY, and it served as the basis for modern CIVIL LAW systems.

Civil law systems—based on comprehensive codes—were installed in such countries as Germany, France, Austria, Switzerland, Italy, Japan, and Spain. Common law systems—based on case precedents—developed in England, South Africa, and Australia. Jurisprudence in colonial America was based on the English common law system.

At first, all American colonies enacted laws, but none of these statutes purported to be a comprehensive codification of court procedures or of substantive areas of law (such as CRIMINAL LAW, real and personal PROPERTY LAW, or ADMIRALTY LAW). Early codification efforts were limited in scope to basic concepts and general criminal prohibitions. In 1611, Virginia became the first colony to adopt and print a body of laws. Massachusetts wrote the Liberties of the Massachusetts Colony of New England in 1641, and then the Laws and Liberties of Massachusetts in 1648. The Massachusetts codes identified simple rules of conduct based on biblical principles. Connecticut published its first code in 1650. Idolatry, blasphemy, and witchcraft were identified as capital offenses in its Book of General Laws. In 1665, Long Island and Westchester, New York, adopted a set of laws relating to the rights of persons and property, and to civil and criminal procedures. Aside from these and similar laws, jurisprudence in colonial America was guided by precedent.

The civil law system and the common law system were driven by diverging philosophies. Proponents of comprehensive codification and the civil law system saw the benefits of public notice. By using simple language to inform the citizenry, the state could allow people more freedom to conduct their affairs without fear of the unexpected. Codifiers contended that it was more democratic to live by rules that had been enacted by elected legislators, rather than judges, and that the common law system was too vast and obtuse for the lay public.

Supporters of the common law system resisted codification. They noted that rules that were culled from reported case decisions and written in digests notified the public of behavior standards, and argued that it was impossible to distill legal nuances into authoritative rules. Common law advocates maintained that a simple rule could not be written to apply to all of the situations that it might cover. They further argued that precedents, carefully developed over the centuries, were fairer than rules reflecting moods of the moment.

The debate over codification raged in the 1800s. The democratic revolutions in France and the United States inspired codifiers, who emphasized that codification by legislators would reflect the will of the people more than would law as determined by judges. In 1804, France enacted the Code Civil, a set of rules that were designed to regulate the organization of courts, civil court procedures, remedies, and the execution of judgments. The Code Civil, renamed the Code Napoléon during Napoléon's reign as emperor, was supplemented shortly after 1804 to contain five codes relating to CIVIL PROCEDURE, commerce, CRIMINAL PROCEDURE, criminal laws, and the regulation of SLAVERY in French colonies.

In the United States, the Code Napoléon inspired French-influenced Louisiana to enact a similar comprehensive code in 1824. A codification movement was also sparked in the northern states. In 1848, DAVID DUDLEY FIELD (1805–94) convinced the New York Legislature to enact the Code of Civil Procedure, which replaced a complicated common law system of PLEADING and installed a simpler, more rational system.

The U.S. Congress passed the U.S. Code in 1926. Before the enactment of this code, federal laws were contained in the Revised Statutes and the subsequent Statutes at Large. The new U.S. Code synthesized and rearranged those statutes, divided them into 50 titles, and compiled them all in four volumes. In 1932, a new edition of the U.S. Code was published. Now, a new edition of the U.S. Code is promulgated every six years, with a cumulative supplement printed for each title in every intervening year.

Procedural rules have been codified as well. The resulting codes include the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the FEDERAL RULES OF EVIDENCE. Most states have codified their procedural rules based on these federal codes.

The American Law Institute (ALI), a group of legal scholars, has been responsible for the most recent codification movement in the United States. The ALI has written RESTATEMENTS OF LAW for such areas as contracts, TORTS, and conflict of laws. The restatements do not have the force of law, but they are used by states as models for codification, and courts refer to them in judicial decisions. The ALI also drafts codes such as the MODEL PENAL CODE in an effort to help standardize and make consistent the application of law throughout the United States. The ALI also works with the National Conference of Commissioners to promote uniform laws. The most notable of these efforts is the UNIFORM COMMERCIAL CODE, a collection of laws relating to commercial transactions such as sales and leasing of goods, transfer of funds, COMMERCIAL PAPER, bank deposits and collections, letters of credit, investment SECURITIES, and SECURED TRANSACTIONS. The Uniform Commercial Code has been adopted in whole or in part by all of the states.

Administrative agencies follow their own procedural and substantive codes. The CODE OF FEDERAL REGULATIONS contains the general body of regulatory laws governing practice and procedure in federal administrative agencies. This code is divided into 50 titles and is revised annually. All states have codified regulations for their own administrative agencies.

Yet another compilation of statutes, rules, and regulations is the UNIFORM CODE OF MILITARY JUSTICE, which covers the substantive and procedural law governing the armed forces of the United States.

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CROSS-REFERENCES

Code Pleading; Napoleonic Code; U.S. Code.

## COERCION

*The intimidation of a victim to compel the individual to do some act against his or her will by the use of psychological pressure, physical force, or threats. The crime of intentionally and unlawfully restraining another's freedom by threatening to commit a crime, accusing the victim of a crime, disclosing any secret that would seriously impair the victim's reputation in the community, or by performing or refusing to perform an official action lawfully requested by the victim, or by causing an official to do so.*

*A defense asserted in a criminal prosecution that a person who committed a crime did not do so of his or her own free will, but only because the individual was compelled by another through the use of physical force or threat of immediate serious bodily injury or death.*

In the laws governing wills, coercion is present when a testator is forced by another to make provisions in his or her will that he or she otherwise would not make if permitted to act according to free choice. It is an element of both duress and UNDUE INFLUENCE, two ways in which a testator is deprived of his or her free choice in making the will. If coercion is established in a proceeding to admit a will to probate, the document will be denied probate, thereby becoming void; and the property of the decedent will be distributed pursuant to the laws of DESCENT AND DISTRIBUTION.

Coercion, as an element of duress, is grounds for seeking the RESCISSION or cancellation of a contract or deed. When one party to an instrument is forced against his or her will to agree to its terms the document can be declared void by a court. A marriage may be annulled or a separation or DIVORCE granted on the grounds of coercion.

*Patty Hearst, shown here in a poster issued by the Symbionese Liberation Army, later claimed she was coerced into committing crimes on behalf of the organization.* AP/WIDE WORLD PHOTOS

The coercion of small businesses by a cartel to fix prices of particular items supplied to them is a violation of **ANTITRUST LAWS**, which are intended to prevent the restraint of competition in commerce. Laws regulating labor-management relations are violated by coercion when the employer coerces employees not to join a **LABOR UNION** or when a union representative pressures, uses physical force, or threatens an employee into joining the union.

Coercion is recognized as a defense in prosecutions for crimes other than murder. If an accused can establish that he or she committed a crime as a result of the coercion imposed by another the defendant will be acquitted on the charge as a **MATTER OF LAW**. He or she will not be excused for the crime if there was only fear of minor physical injury, damage to reputation, or property loss. The person who coerces another to commit a crime is guilty of the crime committed. The coercer can also be prosecuted for the separate crime of coercion.

Coercion by law is the rendition of a judgment or a decree by a court, tax assessment board, or other **QUASI-JUDICIAL** body for an amount of money presently due that mandates the sale of property owned by the defendant to pay the judgment.

## COGNIZABLE

*The adjective "cognizable" has two distinct (and unrelated) applications within the field of law. A cognizable claim or controversy is one that meets the basic criteria of viability for being tried or adjudicated before a particular tribunal. The term means that the claim or controversy is within the power or jurisdiction of a particular court to adjudicate.*

*Conversely, a "cognizable group " of jurors or potential jurors refers to that common trait or characteristic among them that is recognized as distinguishing them from others, such as race, ethnicity, and gender. Trial counsel are generally prohibited from eliminating jurors who are in the same cognizable group as that of a party or litigant through discriminatory* **PEREMPTORY CHALLENGES** *when that distinction is the basis for the challenge. In* Batson v. Kentucky, *476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, 54 USLW 4425 (U.S.Ky., Apr 30, 1986) (No. 84-6263), the U.S. Supreme Court ruled that prosecutors may not use peremptory challenges to exclude African Americans from a jury solely on the basis of race. Over the years, other cases have expanded the scope of protected or "cognizable groups" of jurors to include gender, religion, and socioeconomic status.*

**CROSS-REFERENCES**

Failure to State a Claim; Peremptory Challenge.

## COGNIZANCE

*The power, authority, and ability of a judge to determine a particular legal matter. A judge's decision to take note of or deal with a cause.*

That which is cognizable to a judge is within the scope of his or her jurisdiction. A **JUSTICE OF THE PEACE** would not have cognizance of a major criminal matter, for example.

## COGNOVIT ACTIONEM

*[*Latin, He has confessed the action.*] The written confession made by a defendant admitting the merits of the action brought against him or her by a plaintiff. The confession is usually based upon designated conditions, given in court, and impliedly empowers the plaintiff's attorney to sign judgment and issue execution for its enforcement.*

**CROSS-REFERENCES**

Cognovit Note.

## COGNOVIT NOTE

*An extraordinary document by which a debtor authorizes his or her creditor's attorney to enter a confession in court that allows judgment against the debtor.*

A creditor may ask the borrower to sign a cognovit note when credit is extended. If the debtor falls into arrears the creditor can obtain a judgment against the person without notification to the debtor. There is usually little the debtor can do to attack the judgment when it is discovered. The Supreme Court has held that cognovit notes are not necessarily illegal but most states have outlawed their use in consumer transactions.

## COHABITATION

*A living arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage.*

Couples cohabit, rather than marry, for a variety of reasons. They may want to test their compatibility before they commit to a legal union. They may want to maintain their single status for financial reasons. In some cases, such as those involving gay or lesbian couples, or individuals already married to another person, the law does not allow them to marry. In other cases, the partners may feel that marriage is unnecessary. Whatever the reasons, between 1970 and 1990, the number of couples living together outside of marriage quadrupled, from 523,000 to nearly 3 million. These couples face some of the same legal issues as married couples, as well as some issues that their married friends need never consider.

In most places, it is legal for unmarried people to live together, although some ZONING laws prohibit more than three unrelated people from inhabiting a house or apartment. A few states still prohibit fornication, or sexual relations between an unmarried man and woman, but such laws are no longer enforced. Even in the early twenty-first century, some states continue to prohibit SODOMY, which includes sexual relations between people of the same sex. Although these laws are rarely enforced, the U. S. Supreme Court upheld the constitutionality of these sodomy statutes as applied to same-sex couples in *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986). The Court reconsidered the same issue 17 years later, however, and decided that a Texas sodomy law that applied specifically to homosexual conduct violated the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT (LAWRENCE V. TEXAS, 539 U.S. ___, 123 S. Ct. 2472,156 L. Ed. 2d 508 [2003]). Advocates of GAY AND LESBIAN RIGHTS viewed the case as a victory for their cause.

The law traditionally has been biased in favor of marriage. Public policy supports marriage as necessary to the stability of the family, the basic societal unit. To preserve and encourage marriage, the law reserves many rights and privileges to married persons. Cohabitation carries none of those rights and privileges. It has been said that cohabitation has all of the headaches of marriage without any of the benefits. Cohabiting couples have little guidance as to their legal rights in such areas as property ownership, responsibility for debts, custody, access to HEALTH CARE and other benefits, and survivorship.

FAMILY LAW experts advise cohabiting couples to address these and other issues in a written cohabitation agreement, similar to a PREMARITAL AGREEMENT. The contract should outline how the couple will divide expenses and own property, whether they will maintain joint or separate bank accounts, and how their assets will be distributed if one partner dies or leaves the relationship. Property acquired during cohabitation, such as real estate, home furnishings, antiques, artwork, china, silver, tools, and sports equipment, may be contested if partners separate or if one of them dies. To avoid this, the agreement should clearly outline who is entitled to what.

When cohabiting couples separate, division of assets often becomes a contentious issue. In the past, courts refused to enforce agreements between unmarried couples to share income or assets, holding that such agreements were against public policy. In 1976, the California Supreme Court decided *Marvin v. Marvin,* 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106, holding that agreements between cohabiting couples to share income received during the time they live together can be legally binding and enforceable. The highly publicized suit between actor Lee Marvin and his live-in companion, Michelle Triola Marvin, was the first of a series of "palimony" suits that have become more numerous since the 1980s. The plaintiff in a palimony suit must prove that the agreement of financial support is not a meretricious agreement, that is, one made in exchange for a promise of sexual relations. Courts refuse to enforce

meretricious contracts because of their similarity to contracts for prostitution.

The only way to guarantee that a valid agreement of support or division of property exists is to have it in writing. In the *Marvin* case, the plaintiff, who asked for $1.6 million, was awarded only $104,000. An appeals court revoked that amount and found that the plaintiff had failed to show that she and the defendant had an agreement (*Marvin v. Marvin,* 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 [Cal. Ct. App. 1981]). Conversely, when tennis star Martina Navratilova separated from live-in lover Judy Nelson in 1993, Nelson filed a $16 million palimony suit, claiming that Navratilova reneged on a promise to share whatever the couple accumulated during their relationship. A signed and videotaped 1986 cohabitation agreement supported Nelson's claim, and Navratilova settled out of court for an undisclosed amount.

Cohabiting parents may face legal difficulties if they separate without a written parenting agreement. An unmarried father must acknowledge PATERNITY by filing an AFFIDAVIT with the state legitimating his child and establishing his parental relationship. Likewise, both parents must actively participate in the raising of the child in order to have a legitimate claim to custody or visitation. By legitimating their child and being involved in the child's upbringing, unmarried parents establish their right to seek custody or visitation if the family breaks up. Legitimation is also important for inheritance purposes. If an unmarried father dies without a will, his legitimated child can freely inherit his estate (see *Trimble v. Gordon,* 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 [1977], which held that a signed statement establishing paternity of a child born out of wedlock is adequate protection of the child's inheritance rights). Of course, the best way to guarantee the distribution of assets to children is through a written will.

Cohabiting couples may face difficulties when one of them becomes ill and requires hospitalization or long-term care. The case of Sharon Kowalski and Karen Thompson illustrates this problem. Kowalski and Thompson lived together for four years before Kowalski sustained serious head injuries in a 1983 automobile accident. She was left paralyzed and seriously brain damaged, but able to communicate. Kowalski's parents refused to allow Thompson to see her or to participate in decisions about her treatment.

**Cohabiting and Married Couple Households, by Region, in March 2000**

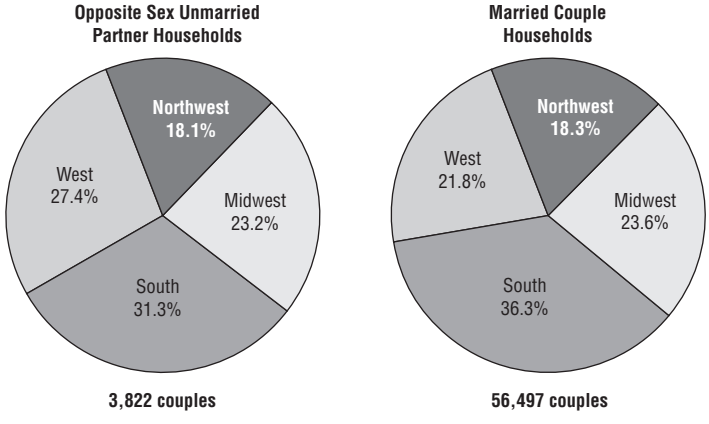


SOURCE: U.S. Census Bureau, *Current Population Survey Report*, 2000.

In 1984, Kowalski's father was awarded guardianship of Kowalski (*In re Kowalski,* 382 N.W.2d 861 [Minn. Ct. App. 1986] and the family continued to frustrate Thompson's efforts to see or assist Kowalski. In 1991, Kowalski's father voluntarily gave up his guardianship for medical reasons, and a Minnesota trial court awarded guardianship to Karen Tomberlin, a family friend whom the court considered a "neutral third party." The Minnesota Court of Appeals reversed the trial court, and after a seven-year battle, Thompson was finally granted guardianship of Kowalski (*In re Kowalski,* 478 N.W.2d 790 [Minn. Ct. App. 1991]). The court held that Kowalski had "sufficient capacity" to express her preference as to a guardian and that she had consistently said she wanted to be with Thompson. The court also noted the duration of the couple's relationship as well as the fact that they had exchanged rings and named each other as insurance beneficiaries before Kowalski's accident.

Cohabiting couples can avoid such conflicts by executing certain documents, including a durable POWER OF ATTORNEY and a medical power of attorney. A durable power of attorney grants an unmarried partner the necessary authority to make decisions in the event of physical or mental disability of the other partner. It goes further than a general power of attorney in that it specifically allows one partner to continue making decisions even if the other partner becomes incapacitated. A medical power of

attorney allows one partner to make decisions regarding medical treatment for the other. If the partners have specific instructions about funeral arrangements, these too should be put in writing. In addition, a written will or trust allows partners to specify the distribution of their property, including life insurance benefits, IRAs, and bank accounts. Partners may also name their preferred trustee or executor.

Many cohabiting heterosexual couples believe that the law will recognize their relationship as a COMMON-LAW MARRIAGE with the legal protections and financial benefits of marriage. However, only Alabama, Colorado, the District of Columbia, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah recognize common-law marriage. In those states, a man and woman who live together and represent themselves as married may be given common-law recognition. Once a common-law marriage has been established, it must be dissolved through DIVORCE. Cohabiting couples who live in a state that recognizes common-law marriage and do not wish to be married should execute a statement that they are not married in order to avoid a later finding that a common-law marriage existed.

In the 1990s, a few courts began to recognize the familial ties of unmarried couples. In *Braschi v. Stahl Associates,* 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989), New York State's highest court found that a homosexual man and his deceased life partner had constituted a family for purposes of New York City's rent control ordinance. The court found that in this case, the term *family* should be construed broadly and should encompass contemporary realities, including unmarried adult partners in a long-term, committed relationship that shows mutual sharing of the mundane tasks of everyday life. Similarly, in *Dunphy v. Gregor,* 261 N.J. Super. 110, 617 A.2d 1248 (N.J. 1992), the court found that a woman who had witnessed the events leading to her fiancé's death had standing to sue for the emotional damage she suffered as a result. Previously, suits such as this (called bystander liability suits) were limited to those who were married or had blood ties to the victim. However, the court in *Dunphy* found that the plaintiff met the requirement of "intimate familial relationship," noting that the plaintiff and her fiancé had lived together for several years, that there was a high degree of mutual dependence in their relationship, and that they contributed to and shared a common life.

Since the 1980s, a growing number of states and municipalities have passed laws allowing unmarried couples, both heterosexual and homosexual, to register as domestic partners. Some cities have established a domestic partner registry, while others extend certain benefits to domestic partners even if the city does not provide a registry. The state of California leads the nation in the number of cities and counties that provide benefits to domestic partners, offer domestic partner registries, or both. Cities providing domestic partner benefits include New York City, Los Angeles, Chicago, Boston, and Philadelphia. The ordinances and statues in these cities allow couples to register as domestic partners, and to dissolve their partnerships if they separate.

Two 1995 court decisions declared particular domestic partner ordinances invalid. In *Lilly v. City of Minneapolis,* 527 N.W. 2d 107, the Minnesota Court of Appeals struck down a Minneapolis city council resolution authorizing reimbursement to city employees for health care insurance costs for same-sex domestic partners and for blood relatives not classified as dependents under state law. The court held that the resolution was beyond the scope of the council's authority and lacked legal force. Likewise, in *City of Atlanta v. McKinney,* 265 Ga. 161, 454 S.E.2d 517, the Supreme Court of Georgia held that the city of Atlanta had exceeded its authority when it had extended employee benefits to persons who did not qualify as dependents under state law.

Some same-sex cohabitants face other types of legal challenges. In *Garcia v. Garcia*, 60 P.3d 1174 (Utah Ct. App. 2002), the Utah Court of Appeals held that an ex-wife's involvement in a same-sex relationship constituted cohabitation for the purpose of determining whether the ex-husband's ALIMONY payments should be terminated. Under Utah law, a court's order requiring alimony payments from one spouse to the other terminates upon proof that the spouse receiving alimony is cohabiting with another person. The ex-wife allegedly maintained a long-term relationship with another woman, during which time she shared a common residency and had sexual contact. The trial court held that the statute's definition of cohabitation applied only to relationships between members of the opposite sex. The appeals court disagreed, holding

that the term "sexual contact" in the statute also included such contact between members of the same sex, and reversed the trial court's decision.

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## ❖ COHEN, FELIX SOLOMON

Felix Solomon Cohen was born July 3, 1907, in New York City. He graduated from the College of the City of New York with a bachelor of arts degree in 1926. He subsequently received a master of arts degree in 1927, a doctor of philosophy degree in 1929 from Harvard University, and a bachelor of laws degree from Columbia Law School in 1931.

In 1931 and 1932 Cohen performed the duties of secretary to the justice of the New York Supreme Court. He was also admitted to the New York bar and established his law office in New York. In 1948 Cohen was admitted to the District of Columbia bar; he practiced law in his later years in Washington, D.C.

Cohen's career interests extended to the field of education and he presented a series of lectures on legal philosophy at the New School for Social Research during 1932 and 1933. He entered government service in 1933, serving as assistant solicitor for the U.S. Department of the Interior for ten years. From 1936 to 1948 he also acted on the board of appeals of the INTERIOR DEPARTMENT where he was presiding officer from 1940 to 1948. In 1939 he performed the duties of special assistant to the attorney general. Cohen served in the U.S. DEPARTMENT OF JUSTICE from 1939 to 1940 and returned to the Department of the Interior in 1943, acting as associate solicitor for the next five years.

In 1946 Cohen returned to teaching and served as a visiting professor at the Yale Law School; he also taught law at the City College of New York in 1948.

Cohen wrote several publications including *Ethical Systems and Legal Ideals,* which was published in 1933.

Cohen died October 19, 1953, in Washington, D.C.

## ❖ COHEN, MORRIS RAPHAEL

Morris Raphael Cohen achieved prominence as an educator and author.

Cohen was born July 25, 1880, in Minsk, Russia. He emigrated to the United States in 1892 and earned a bachelor of science degree from the College of the City of New York in 1900 and a doctor of philosophy degree from Harvard University in 1906. Cohen was the father of Felix Cohen, who became a somewhat noteworthy philosopher/writer in the jurisprudential school of LEGAL REALISM.

In 1899, Cohen began his teaching career as a history teacher at the Educational Alliance in New York. He also taught at Davidson Collegiate

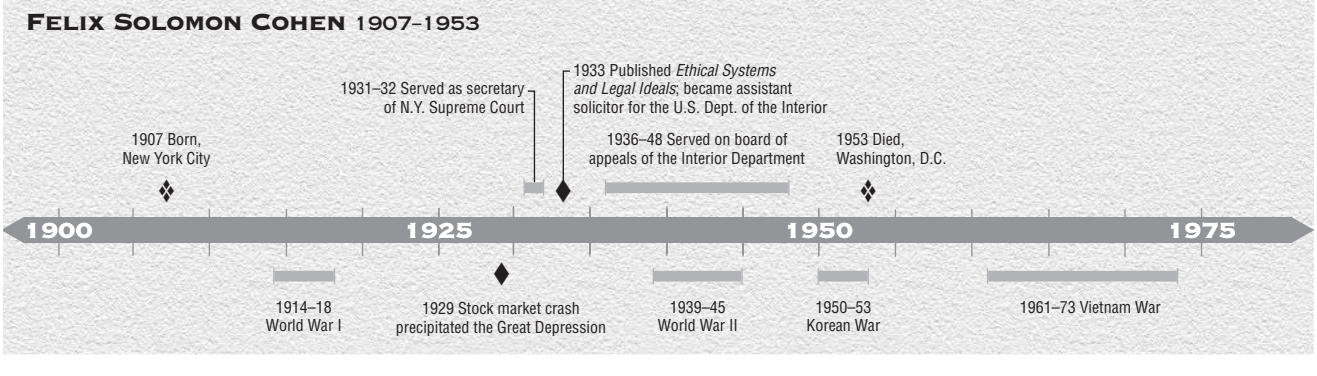

Institute from 1900 to 1901, and in 1902 he accepted a position as mathematics teacher at his alma mater, the College of the City of New York. He held that position until 1912, when he switched his interests to philosophy and served as a professor until 1938. In that year, he accepted a professorship at the University of Chicago and continued his career as a philosophy professor.

In addition to his permanent teaching duties, Cohen also served at numerous institutions as a temporary professor—including his presentation of a series of lectures at Columbia Law School from 1906 to 1907, 1914 to 1915, the summer of 1918, and the summer of 1927; at Yale from 1929 to 1931; and at Harvard from 1938 to 1939.

Cohen is the author of several noteworthy publications, including *Reason and Nature* (1931), *Law and the Social Order* (1933), and *Faith of a Liberal* (1945).

He died January 28, 1947, in Washington, D.C.

## ❖ COHN, ROY MARCUS

Attorney, federal prosecutor, and communist-hunter, Roy Marcus Cohn built a flamboyant, successful, and troubled career on his prominent role in COLD WAR politics. As a *wunderkind* whose legal prowess quickly brought him to national attention, Cohn took part in the controversial ESPIONAGE trial of Julius and Ethel Rosenberg in 1951. By the mid-1950s, he helped engineer Senator Joseph R. McCarthy's notorious anti-Communist witch hunts. From the 1950s to the 1980s, his private practice put him in the top rank of celebrity attorneys, but questionable ethics ultimately led to his being disbarred in 1986.

The privilege of family connections helped launch Cohn's career. He was born on February 20, 1927, in New York, New York, the son of a prominent state supreme court judge. His father was well connected in the DEMOCRATIC PARTY. By age ten, Cohn had already met FRANKLIN D. ROOSEVELT. Academic brilliance helped Cohn sail quickly through college, and he earned his law degree from Columbia University in 1947 at the age of twenty. He then had to wait one year in order to meet the state's minimum age for admission to the New York State Bar. Meanwhile, he worked for two years in the U.S. district attorney's office before moving to Washington, D.C., in 1950, to join the JUSTICE DEPARTMENT as an assistant U.S. attorney.

In Washington, Cohn established his anti-Communist credentials. For the period of the Cold War, this was an auspicious career move: Hysteria was about to afflict the nation, and he would help tighten the grip. At age twenty-three, he served as the third-ranking prosecutor on the espionage trial of Julius and Ethel Rosenberg, the American Communists who were convicted and sentenced to death in 1951 for furnishing atomic secrets to Soviet spies. During the trial, Cohn held a number of improper *ex parte*—one-sided—private conversations with Judge Irving Kaufman outside of court. According to Nicholas von Hoffman's 1988 biography *Citizen Cohn,* the attorney probably used these talks to convince Judge Kaufman to impose the death penalty. Cohn denied doing so, in his posthumously published 1988 book *The Autobiography of Roy Cohn,* but he claimed that the judge had told him the verdict of the trial even before it had begun. The AMERICAN BAR ASSOCIATION ultimately exonerated both Cohn and Kaufman for their conversations.

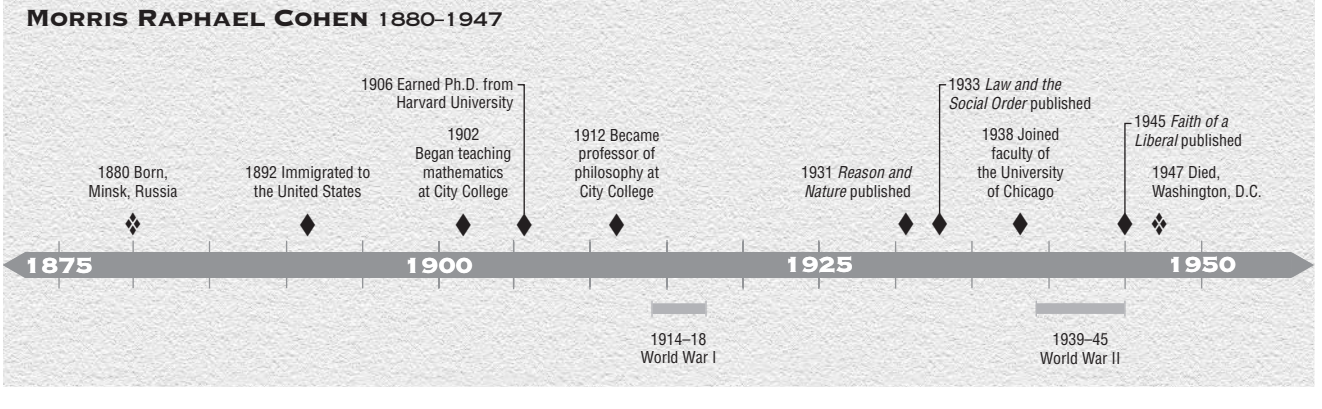

The ROSENBERG TRIAL put Cohn on a fast track to prominence. Adding to his reputation as an enemy of radicalism, Cohn toured U.S.-sponsored libraries in Europe in 1952 on behalf of the U.S. Senate, confiscating subversive books. In 1953, he was a special assistant to Attorney General JAMES MCGRANERY, but he left the job for greater visibility. He became chief counsel to the Senate Permanent Investigations Subcommittee, beating out ROBERT F. KENNEDY for the position. The subcommittee would make history as the bully pulpit for Senator JOSEPH R. MCCARTHY, who used it to conduct his relentless pursuit of communists in the U. S. government.

Cohn was McCarthy's right-hand man. In the Senate, he sat beside the senator and took part in the grilling of witnesses who were hauled before the committee. Officially, his role as McCarthy's special counsel made him the senator's assistant, but the relationship worked differently behind the scenes. Cohn knew more people than McCarthy did. He helped to compile lists of witnesses and suspects, a task made easier by his friendship with FBI Director J. EDGAR HOOVER. When McCarthy blundered by challenging the army in 1954, his political career ended abruptly. Cohn was criticised for having sought special favors for a friend in the army. But unlike McCarthy, who was censured by the Senate and died a broken man in 1957, Cohn escaped to a new, lucrative career.

In private practice in New York, Cohn flourished. Although many intellectuals excoriated him for his role in the McCarthy witch hunts, he gained prominent clients from across the political spectrum. He represented everyone from alleged mafia bosses to pop stars, and he was largely successful, often without having to appear in court. Cohn had developed the right

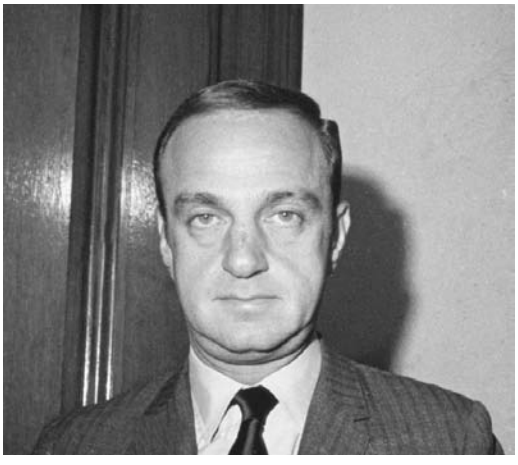

*Roy Marcus Cohn.*
AP/WIDE WORLD PHOTOS

friends: newspaper columnists, publishing magnates, politicians, judges, and fellow lawyers. He was as feared for his ability to get headlines published as he was for any oral argument he might make. Outside of his law practice, he wrote widely in the popular and legal press, and authored four books, including *How to Stand Up for Your Rights—And Win!* (1981).

"I BRING OUT THE WORST IN MY ENEMIES AND THAT'S HOW I GET THEM TO DEFEAT THEMSELVES."
—ROY COHN

Though successful and popular until shortly before his death, Cohn was a complicated and enigmatic figure. Although he was Jewish, he befriended anti-Semites and used anti-Semitic jibes. Outspoken against homosexual rights, he was a gay man himself. Until the end, he concealed the fact that he was dying of AIDS. Pursued for twenty years by the INTERNAL REVENUE SERVICE (IRS), he had no bank account and owned little property; the IRS was unable to collect the reported $7 million he owed in back taxes. Months before his death on August 2, 1986, Cohn was disbarred for ethical abuses that included lying, stealing, attempting to defraud a client, and forgery.

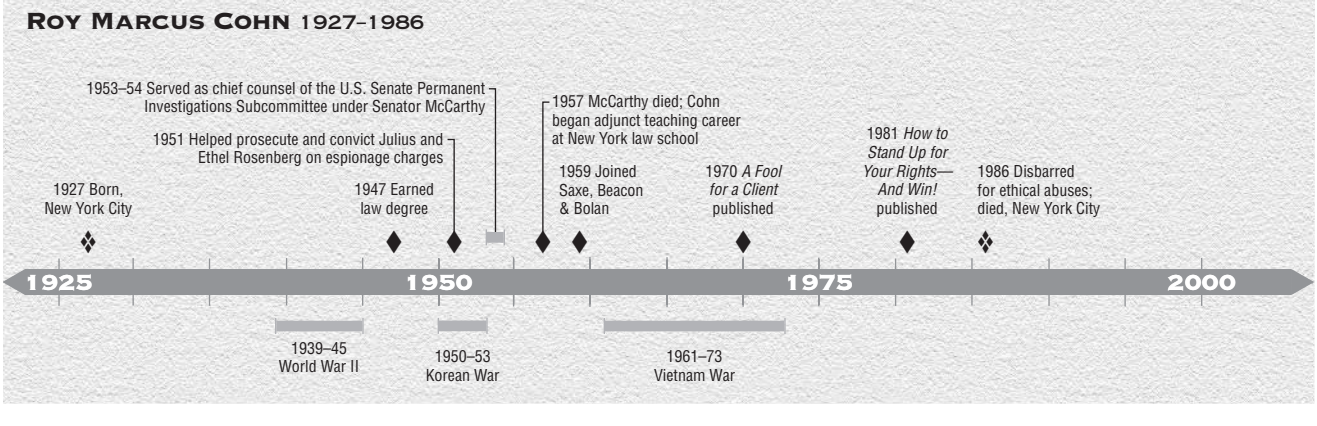

CROSS-REFERENCES

Communism.

## COINSURANCE

*A provision of an insurance policy that provides that the insurance company and the insured will apportion between them any loss covered by the policy according to a fixed percentage of the value for which the property, or the person, is insured.*

Insurance is intended to spread the risk of any loss among every insured who purchases a particular type of policy from an insurance company and the company itself. The likelihood that every policyholder will suffer the loss that has been insured against is slim, and, therefore, an insurance company should be able to compensate those who have losses, if those policyholders have complied with the terms of their policies.

Coinsurance divides the risk of loss according to the amount of insurance purchased by each person through the payment of premiums. The size of insurance premiums is based primarily upon the value of the property covered by the policy. If a person fails to insure a property for an amount close to its actual cash value or replacement cost, then the person must accept a greater share of the risk of loss than someone who pays larger premiums to insure his or her property for an amount close or equal to its actual value.

In insurance policies for fire or water damage the coinsurance clause provides that property must be insured for a specific percentage, usually 80 percent of its actual cash value. The 80 percent provision is known as the New York Standard Coinsurance Clause. The owner of the property is liable for the remaining 20 percent of its actual cash value. If the insured party's property is only partially damaged, that person's recovery under the policy will be reduced in proportion to the amount of loss suffered.

For example, a homeowner has a $120,000 fire insurance policy on her home, which is valued at $150,000. The woman's coverage is 80 percent of the home's actual cash value. If her house is completely destroyed by a fire that is not ARSON, she will recover $120,000, which is the full face amount of the policy. She is responsible for the remaining 20 percent of its actual cash value, or $30,000. If a fire caused only $20,000 worth of damages, the homeowner could recover only $16,000, or 80 percent of the loss. The homeowner is a coinsurer for the remaining $4,000, or 20 percent of the replacement cost of the property.

If that homeowner has purchased only $36,000 worth of fire insurance, or 60 percent of replacement costs, thereby paying a lower premium than a policy with coverage for $48,000, she would be responsible for a larger share of the damages incurred in the total or partial destruction of the property. The total destruction of the $60,000 house will result in a recovery limited to the amount of insurance bought by the homeowner, or $36,000. She is responsible for 40 percent of replacement costs. The recovery for the partial loss of $20,000 will be $12,000, or 60 percent of the loss, since recovery is reduced proportionately by the amount of actual loss.

Although insurance policies stipulate a specific percentage of loss that must be covered, an insured may purchase maximum insurance coverage for up to 100 percent of the replacement cost of the property covered by the policy. The premiums for such protection will be proportionately larger than the one for 80 percent of the property's actual cash value.

Coinsurance clauses in fire or water damage policies encourage property owners to purchase full or nearly full coverage. It is important for policyholders to periodically review their insurance policies to verify that their coverage adequately protects the value of their property.

In medical or HEALTH INSURANCE policies, coinsurance has a similar meaning. The amount of expenses that a medical insurer will reimburse a policyholder is a fixed percentage—usually 80 percent—of the approved charges—the amount of a submitted bill which the insurer considers reasonable and will reimburse after the policyholder has paid the deductible, which is usually the first $100 of medical expenses. The insured becomes a coinsurer for the remaining 20 percent of the approved charges as well as for the amount by which the individual medical bills exceed the approved charges.

## COINTELPRO

Between 1956 and 1971, the Federal Bureau of Investigation (FBI) conducted a campaign of domestic counterintelligence. The agency's Domestic Intelligence Division did more than simply spy on U.S. citizens and their organizations; its ultimate goal was to disrupt, discredit, and destroy certain political groups. The divi-

sion's operations were formally known within the bureau as COINTELPRO (the Counterintelligence Program). The brainchild of former FBI director J. EDGAR HOOVER, the first COINTELPRO campaign targeted the U.S. Communist party in the mid-1950s. More organizations came under attack in the 1960s. FBI agents worked to subvert CIVIL RIGHTS groups, radical organizations, and white supremacists. COINTELPRO existed primarily because of Director Hoover's extreme politics and ended only when he feared its exposure by his critics. A public uproar followed revelations in the news media in the early 1970s, and congressional hearings criticized COINTELPRO campaigns in 1976.

In 1956 Hoover interpreted a recent federal law—the Communist Control Act of 1954 (50 U.S.C.A. § 841)—as providing the general authority for a covert campaign against the U.S. Communist party. Officially, the law stripped the party of "the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States." Hoover saw the party as a peril to national security and ordered a large-scale effort to infiltrate and destabilize it.

Employing classic ESPIONAGE techniques, FBI agents joined the party and recruited informants. They spread dissension at party meetings by raising embarrassing questions about the recent Soviet invasion of Hungary, for instance, or about Soviet premier Nikita Khrushchev's denunciation of the Soviet leader JOSEPH STALIN, who had been a hero to U.S. Communists. Agents also engaged in whispering campaigns identifying party members to employers and neighbors. The FBI intensified its harassment by enlisting the INTERNAL REVENUE SERVICE (IRS) to conduct selective tax audits of party members. And it spread rumors within the party itself—employing a practice known as snitch jacketing—that painted loyal members as FBI informants. In all, the government executed 1,388 separate documented efforts, and they worked: whereas party membership was an estimated twenty-two thousand in the early 1950s, it fell to some three thousand by the end of 1957.

After his initial success, Hoover did not rest. From the late 1950s through the end of the 1960s, he unleashed his agents against a wide range of political groups. Some were civil rights organizations, such as the National Association for the Advancement of Colored People (NAACP) and the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (SCLC). Others were radical, such as the BLACK PANTHER PARTY, the AMERICAN INDIAN MOVEMENT, and the Socialist Workers party. Yet another target was the nation's oldest white hate group, the KU KLUX KLAN, although Hoover was less enthusiastic about pursuing it and did so chiefly because of political pressure resulting from the Klan's highly publicized murders of civil rights workers. In internal FBI memorandums, Hoover's motive for these operations is given as the need to stamp out COMMUNISM and subversion, but the historical record reveals a muddier picture. What turned Hoover's attention to the NAACP, for example, was the organization's criticism of FBI hiring practices for excluding minorities.

In their scope and tactics, these FBI operations occasionally went much further than the original anti-Communist COINTELPRO effort. They involved at least twenty documented burglaries of the offices of the SCLC, an organization headed by MARTIN LUTHER KING JR. Hoover detested King, whom he called "one of the most reprehensible . . . individuals on the American scene today," and urged his agents to use "imaginative and aggressive tactics" against King and the SCLC. To this end, agents bugged King's hotel rooms; tape-recorded his infidelities; and mailed a recording, along with a note urging King to commit suicide, to the civil rights leader's wife. The COINTELPRO operation against the radical Black Panther party, which Hoover considered a black nationalist hate group, tried to pit the party's leaders against each other while also fomenting violence between the Panthers and an urban gang. In at least one instance, FBI activities did lead to violence. In 1969, an FBI informant's tip culminated in a police raid that killed Illinois Panther chairman Fred Hampton and others; more than a decade later, the federal government agreed to pay restitution to the victims' survivors, and a federal judge sanctioned the bureau for covering up the facts in the case.

Political changes in the early 1970s weakened Hoover's position. Critics in the media and Congress began to question Hoover's methods, and the newly created FREEDOM OF INFORMATION ACT (FOIA), 5 U.S.C.A. § 552, promised to pierce the veil of secrecy that had always protected him. In 1971, a break-in at an FBI field office in Pennsylvania yielded secret documents that were ultimately published. Fearing greater exposure of FBI counterintelligence programs,

Hoover formally canceled them on April 28, 1971. Some small-scale operations continued, but the days when agents had carte blanche to carry out the director's will were over.

Hoover died May 2, 1972, at the age of seventy-seven. His death was followed by the realization of his greatest fear. In 1973 and 1974, NBC reporter Carl Stern gained access to COINTELPRO documents through an FOIA claim. More revelations followed, producing a public outcry and leading to an internal investigation by Attorney General William B. Saxbe. The U.S. Congress was next: in 1975 and 1976, hearings of the House and Senate Select Committees on Intelligence further probed COINTELPRO. Even as Hoover's legacy was laid bare, supporters tried to keep the cover on: House lawmakers kept their committee's report secret. The Senate did not; its report, released on April 28, 1976, denounced a "pattern of reckless disregard of activities that threatened our constitutional system."

Along with revealing other instances of FBI illegalities under Hoover, the investigation of his activities set in motion a process of reform. Congress ultimately limited the term of the director of the FBI to ten years, to be served at the pleasure of the president, a safeguard designed to ensure that no single individual could again run the bureau indefinitely and without check. Details about COINTELPRO continue to be made public through government documents.

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## ♦ COKE, RICHARD

Richard Coke achieved prominence as a politician and jurist in the state of Texas.

Coke was born March 13, 1829, in Williamsburg, Virginia. He graduated from the College of William and Mary in 1849 and was admitted to the Texas bar in 1850. After a tour of military duty during the Civil War, Coke became a district court judge in 1865 and subsequently presided as an associate justice of the Texas Supreme Court from 1866 to 1867.

In 1874 Coke was elected governor of Texas. Two years later he became a member of the U.S. Senate, representing Texas until 1894.

He died May 14, 1897, in Waco, Texas.

## ♦ COKE, SIR EDWARD

An influential figure of Renaissance England and a great jurist, Sir Edward Coke bravely fought for the supremacy of the COMMON LAW over the monarchy. He served in numerous high public offices under Elizabeth I, who reigned from 1558 to 1603, James I, who reigned from 1603 to 1625, and Charles I, who reigned from 1625 to 1649—and his continual efforts to restrain the last two rulers remain a significant part of his legacy. He was frequently a member of Parliament (M.P.), and in the 1620s, he became a leading figure of that body, staunchly advocating the rights and freedoms of Parliament against challenges from James I and Charles I.

Coke was a contemporary of such great figures of Elizabethan England as William Shakespeare, Edmund Spenser, Sir Walter Raleigh, Ben Jonson, and FRANCIS BACON. He is most well-known for his influential legal writings, particularly his four-volume *Institutes of the Laws of England.* He also published, during his career, *Reports,* a compendium of leading cases of common law with his own analyses that finally constituted thirteen volumes. Coke's ideas formed part of the intellectual background for the

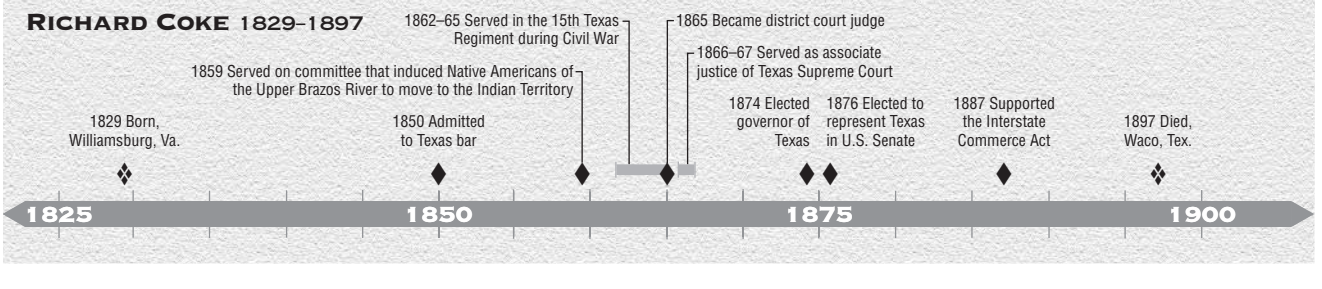

American Revolution and the U.S. Constitution. His writings on English common law, along with those of SIR WILLIAM BLACKSTONE, greatly influenced U.S. law and were considered required reading for U.S. lawyers until well into the nineteenth century.

Coke was born February 1, 1552, at Mileham, Norfolk, England, into a family of Norfolk gentry, the only son among eight children. His father was a barrister, or trial lawyer, and Coke took up the same profession. In 1572, after being educated at Norwich Grammar School; at Trinity College, Cambridge; and at Clifford's Inn, London, he was admitted to the Inner Temple—one of the inns of court that served as colleges in the university of law. He became a barrister in 1578, and quickly rose to great prominence in his profession and in the political sphere of his time. He was aided in his rise by his friendship with William Cecil, Baron Burghley, the chief minister to Queen Elizabeth I. Coke became recorder of Coventry in 1585 and of Norwich in 1586, M.P. for Aldeburgh in 1589, recorder of London and SOLICITOR GENERAL in 1592, and M.P. for Norfolk and Speaker of the Commons in 1593.

In 1582, Coke married Bridget Paston. The union brought him a considerable fortune in money and land, as well as seven children. With his later political power, he was able to add greatly to his wealth over the course of his life. His first wife died in 1598. His subsequent marriage a few months later to Lady Elizabeth Hatton, twenty-six years his junior and granddaughter of Burghley, was a troubled one and ended in separation. He had one daughter by Lady Hatton.

In 1594, Coke became attorney general for the Crown, or "the quenes atturney," as a contemporary put it, winning the post in competition against Bacon, a noted philosopher and politician and Coke's chief rival during his public career. As attorney general, Coke was responsible for defending the interests and royal prerogative, or power, first of Queen Elizabeth and then of King James. He supervised state prosecutions in several major TREASON trials, including those of the earls of Essex and Southampton (1600–01); Raleigh (1603); and the conspirators involved in the Gunpowder Plot (1605), an attempt by Catholic opponents to blow up the House of Lords. A gifted speaker, Coke also proved in such trials that he could be brutal in court. He said of Raleigh, a former favorite of Queen Elizabeth and hero of the realm, "[T]hou hast a Spanish heart, and thyself art a spider of hell" and "there never lived a viler viper upon the face of the earth than thou." Coke was so powerful at this point in his career that in 1601 he was able to invite the queen to his estate at Stoke Poges, where he presented her with jewels and other gifts valued at over £1,000.

*Sir Edward Coke.*
LIBRARY OF CONGRESS

"THE GREATEST INHERITANCE THAT A MAN HATH IS THE LIBERTY OF HIS PERSON, FOR ALL OTHERS ARE ACCESSORY TO IT."
—SIR EDWARD COKE

Coke's responsibilities as "the queen's attorney" were diametrically opposed to those in his later role as champion of the common law against the Crown. In 1606, he was made chief justice of the Court of Common Pleas, a position as judge of the common law that soon put him at odds with King James. Through this position, Coke sought to limit thejurisdiction of the royal courts—particularly the ecclesiastical, or church, courts and the Chancery, or courts of the king's lord chancellor—by maintaining that the king was bound by the tradition of common law in making decisions. Coke told King James that he could not make judicial decisions that were in conflict with common-law precedent. He argued that the common law was a system of "artificial reason and judgment," the accumulated wisdom of many decisions over hundreds of years that could only be acquired through laborious study. The common law was therefore not amenable to ARBITRARY change by one individual, even if that individual was the king. In *Fuller's* case (1607–8), for example, Coke argued that "the king in his own person cannot adjudge any case." He also delivered an opinion in 1610

in which he stated that the king cannot change any part of the common law or create through royal proclamation a new offense under the law. Coke's concept of the common law's authority over the monarchy eventually became part of the English constitution.

In 1613, Coke was made chief justice of the King's Bench, moving to a lower-paying position that Bacon and other enemies inflicted on him as punishment and with the hope that it would force Coke to give in to the demands of the Crown. However, shortly thereafter, Coke was appointed to the PRIVY COUNCIL, the king's formal body of advisers. Again, he stubbornly asserted the superiority of the common law over the powers of the king and the king's advisers. He clashed with the Court of King's Bench and with the king in several more prominent cases—including the king's attempts to hold several ecclesiastical benefices, or offices, at the same time—and in 1616, James dismissed Coke from office. Ever resilient—and ever valuable to the state because of his great legal skills and knowledge—by 1617, he was back in the Privy Council and the STAR CHAMBER, a court of law made up largely of members of the Privy Council.

In 1620, Coke again entered Parliament, this time as a member from a Cornwall borough. While in Parliament in this last stage of his public career, Coke became a leading advocate for that body's independent power against the king. He participated in the IMPEACHMENT of Bacon as lord chancellor and helped draft the Protestation of December 1621, which stated that "the liberties, franchises, privileges and jurisdictions of Parliament are the ancient and undoubted birthright and inheritance of the subjects of England" and that Parliament "hath and of right ought to have freedom of speech" in England. This document caused James to dissolve that session of Parliament and dismiss its leaders. Coke, at age seventy, received the most severe sentence of anyone in Parliament and was put in the Tower of London for nine months.

Coke soon became an M.P. again, sitting for Coventry in the Parliament of 1624. James I died in 1625, the same year that Coke sat in Parliament for Norfolk, and the throne was taken by Charles I. In 1628, Coke spent his last term in Parliament, for Buckinghamshire. That year, he led the movement to put forward the Petition of Right, which guaranteed the subjects' rights with respect to the monarchy, including protection against arbitrary imprisonment, freedom from taxation without parliamentary representation, and DUE PROCESS OF LAW. In his defiant reply to the petition, King Charles was adamant about what he called his "sovereign power" to rule the country. Later, in an eloquent speech before Parliament, Coke questioned the king's phrase, reminding the members of the importance of MAGNA CHARTA, the medieval document that protected the nobility, Parliament, and, to a certain degree, the common people from arbitrary royal decrees. "Take we heed what we yield unto," Coke declared. "Magna Carta is such a fellow that he will have no sovereign."

Coke retired from public life shortly after this speech. Despite his efforts, ideas such as those contained in the Petition of Right were not embodied in formal law until much later in English history. Sadly, Coke suffered the indignities of royal prerogative once again, in July 1634, several months before his death, when his papers were ransacked and stolen by royal officials. Though Coke was very old and infirm, the king still deemed him "too great an oracle among the people" and therefore dangerous to the power of the monarchy. Coke died in his house at Stoke Poges in September 1634.

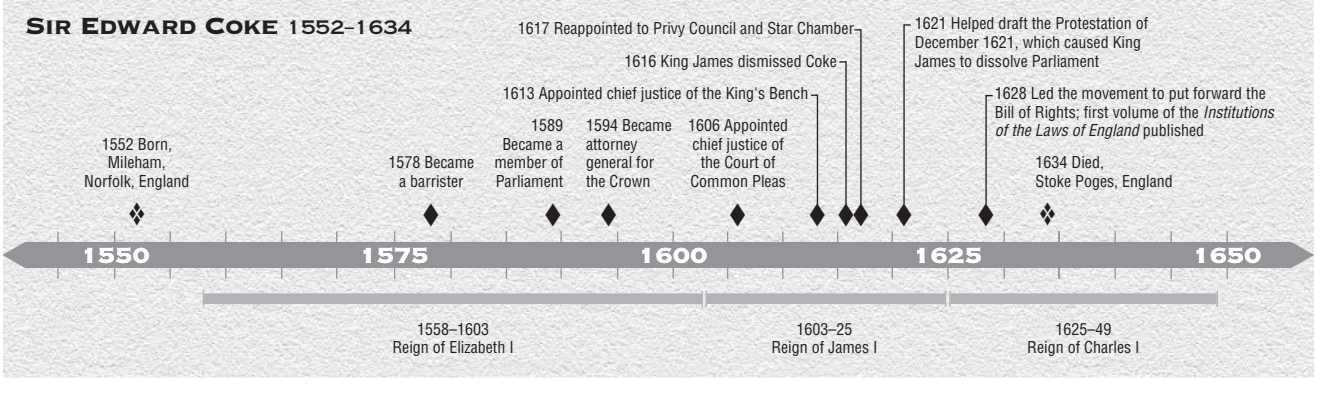

Coke's legal writings served as invaluable guides to jurists for centuries after his death. His *Reports* (1600–1611, 1650–59), covering a period of 40 years, were the preeminent legal texts of their time. These 13 volumes were based on careful notes on cases he had heard since he had been nominated to the bar. Arranged by subject, they went into greater detail than had previous law reports, including coverage of earlier precedents affecting contemporary judicial decisions. They are different from modern legal reports in that they reflect Coke's own interpretations of the law, with each report forming a brief treatise on the relevant points of law. They also contain numerous factual errors and misinterpretations of legal precedent.

Coke's four-volume *Institutes of the Laws of England* (1628–64) was the first significant legal work to be written partly in English. The first volume, called *Coke upon Littleton* (1628), contains the text of Sir Thomas Littleton's 1481 treatise on property, *On Tenures,* with an English translation and commentary by Coke. The second volume (1642) deals with statutes of Parliament, the third (1664) with CRIMINAL LAW, and the fourth (1644) with the jurisdiction and history of different English courts. Though the *Institutes* reflect many of Coke's own shortcomings—they have been criticized for their disorganization, inaccuracies, and idiosyncrasies—they nevertheless put into modern language and make accessible a body of law that would have otherwise remained obscure and difficult to gather.

Coke's ideas later influenced the American Revolution, particularly through the voice of JAMES OTIS JR., a lawyer in Massachusetts. In arguing the WRITS OF ASSISTANCE CASE in 1761, Otis used Coke's writings to support his contention that an unwritten English constitution had been developed by precedent over the years, and that any act of Parliament deemed to be in violation of that constitution could be declared void by the judiciary. The relevant passage in Coke is taken from *Dr. Bonham's* case (1610):

> It appears in our books that in many cases the common law will control acts of Parliament, and sometimes adjudge them to be utterly void: for when an act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void.

Leaders of the American Revolution, including JOHN ADAMS, used such ideas in the eighteenth century to lobby for power to void PARLIAMENTARY LAWS that were considered to be harmful. Such ideas also influenced the development of the U.S. Constitution and the power of JUDICIAL REVIEW, which allows the judiciary to strike down legislation that violates the Constitution.

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## COLD WAR

The cold war was a pivotal era in the twentieth century. The term *cold war* itself, popularized in a 1946 speech by prime minister Winston Churchill of Britain, describes the ideological struggle between democracy and COMMUNISM that began shortly after the end of WORLD WAR II and lasted until 1991. For the foreign policy of the United States, the cold war defined the last half of the twentieth century. It was a war of ideas, of threats, and of actual fighting in the countries of Korea and Vietnam, pitting western nations against the Soviet Union and China and their Communist allies. The 1940s and 1950s saw the cold war bloom into a period of unparalleled suspicion, hostility, and persecution. Anti-Communist hysteria ran through each branch of government as the pursuit of U.S. Communists and their sympathizers consumed the energies of the EXECUTIVE BRANCH, lawmakers, and the courts. Rarely in the nation's history have constitutional rights been so widely and systematically sacrificed.

The cold war began in the aftermath of World War II. Although only recently allied against Germany, the United States and the Soviet Union saw their relationship quickly disintegrate. The division of Europe, with the Soviet bloc countries sealed off behind what Churchill called the "iron curtain," had been the first blow. A fear that Communism would

*A family sits in their bomb shelter, a common feature of many homes during the early years of the Cold War when fear of a nuclear war with the Soviet Union was intense.*

undermine the security of the United States took hold of the nation's leaders and citizens alike. Measures had to be taken to safeguard the country from infiltration, it was popularly believed, and the government began a vigorous campaign against Communist activity. On March 21, 1947, President **HARRY S. TRUMAN** took a significant early step toward protecting the country from Communism by issuing an order establishing so-called loyalty boards within each department of the executive branch (Exec. Order No. 9835, 3 C.F.R. 627). These boards were designed to hear cases brought against employees "disloyal to the Government" and, on the evidence presented, remove disloyal employees from federal service.

The loyalty boards deviated from the traditional standard of presumed innocence. Instead, the boards made their determinations based on whether "reasonable grounds exist for belief" that an accused employee was disloyal. Thus, instead of having to prove **BEYOND A REASONABLE DOUBT** that the accused person was guilty of disloyalty, it was sufficient to bring enough evidence against the accused person to damn that person in the eyes of the board. This abridgment of **DUE PROCESS**, which ended jobs and ruined reputations, grew harsher under the administration of President **DWIGHT D. EISENHOWER**. By amending the order in 1951, Eisenhower made it even harder for an accused employee to prove his or her innocence (Exec. Order No. 10,241, 16 Fed. Reg. 3690). Now, the **BURDEN OF PROOF** was reduced to a showing of "reasonable doubt as to the loyalty of [the] person," a standard amenable to trumped-up charges.

The intensity of domestic fears grew in 1949, following the announcement by President Truman that the Soviets had developed the atomic bomb. Only a year later, the **KOREAN WAR** broke out. These events ushered in a period of bomb shelters; air raid drills in schools; civilian anti-Communist organizations; and suspicion of anyone whose ideas, behavior, personal life, or appearance suggested belief in or sympathy for Communism. Terms like Pinko, Red, and Communist sympathizer found their way into the national vocabulary.

During the late 1940s, the House Un-American Activities Committee (HUAC), created to investigate subversives, provoked widespread concern that government officials had given secrets to the Soviets. Over the next

decade, in a climate of general suspicion that it helped foster, it also investigated union leaders, academics, and, most dramatically, Hollywood. The right to FREEDOM OF ASSOCIATION meant little to congressional investigators. HUAC subpoenaed private citizens and confronted them with a no-win choice: cooperate in naming Communists or face CONTEMPT charges. Crucial to the success of these hearings was the cooperation of the FEDERAL BUREAU OF INVESTIGATION (FBI), which provided the committee with both public support and information.

At the same time, Senator JOSEPH R. MCCARTHY conducted his own hearings through the Permanent Subcommittee on Investigations. From 1950 to 1954, McCarthy's charges about alleged Communist operatives in the STATE DEPARTMENT and the Army captivated the nation. Like HUAC activities, his witch-hunt shattered reputations and lives, but it backfired when he attacked the U.S. Army. Censured by the U.S. Senate in 1954, he ultimately gave history a word that symbolizes the zealous disregard for fairness in accusation: *McCarthyism.*

Starting in 1948, the JUSTICE DEPARTMENT prosecuted members of the American Communist party under the SMITH ACT of 1940 (18 U.S.C.A. § 2385), a broadly written law that prohibited advocating the violent overthrow of the government. The U.S. Supreme Court upheld 12 convictions in *Dennis v. United States,* 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951), and this ruling cleared the way for 141 subsequent indictments. Over the next several years, 29 convicted party members were sent to jail. In time, Congress provided prosecutors with new ammunition through the MCCARRAN INTERNAL SECURITY ACT of 1950 (50 U.S.C.A. § 781 et seq.) and the Communist Control Act of 1954 (50 U.S.C.A. § 841).

Anti-Communist hysteria decreased somewhat following the embarrassment of McCarthy. However, the cold war continued. HUAC operated throughout the 1960s, as did the Senate Permanent Subcommittee on Investigations; both continued to locate the nation's troubles in the work of alleged subversives. And from the late 1950s to the 1960s, the FBI, under the direction of J. EDGAR HOOVER, secretly fought Communists and other targets through its Counterintelligence Program (COINTELPRO).

Although the domestic waging of the cold war had diminished by the early 1970s, the international struggle continued. Over the next two decades the cold war drew the United States into military involvement in Asia, Africa, and Central America. After Vietnam, the United States fought communism by supporting anti-communist factions in Angola, El Salvador, Nicaragua, Guatemala, and Afghanistan. During the 1980s, the United States shifted to an economic strategy, hoping to bankrupt the Soviet Union through an arms race of unprecedented scale. The cold war effectively ended with the breakup of the Soviet Union in 1991.

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## COLLATERAL

*Related; indirect; not bearing immediately upon an issue. The property pledged or given as a security interest, or a guarantee for payment of a debt, that will be taken or kept by the creditor in case of a default on the original debt.*

That which is collateral is not of the essence. *Collateral facts* are facts that are not independently provable from, and that are not directly relevant to, issues in a CAUSE OF ACTION. *Collateral heirs* are those individuals who are not directly related to the deceased through consanguinity. Similarly, *collateral ancestors* are uncles and aunts, as contrasted with direct ancestors, such as parents and grandparents.

## COLLATERAL ATTACK

*An attempt to impeach or overturn a judgment rendered in a judicial proceeding, made in a proceeding other than within the original action or an appeal from it.*

A defendant may make a collateral attack on a judgment entered against him or her in some instances. If a default judgment is entered against the person, he or she may collaterally attack the authority of the issuing court to render it, claiming that there was a lack of PERSONAL JURISDICTION.

Similarly, if a man leaves his wife and moves to another state where he obtains a DIVORCE that contains no support provisions for the woman, she may directly attack the judgment by appealing it in the state where it was entered or initiate a collateral attack by bringing her own divorce action in her state of residence.

A collateral attack may also be made upon a judicial proceeding in a single state.

## COLLATERAL ESTOPPEL

*A doctrine by which an earlier decision rendered by a court in a lawsuit between parties is conclusive as to the issues or controverted points so that they cannot be relitigated in subsequent proceedings involving the same parties.*

Collateral estoppel is an AFFIRMATIVE DEFENSE that must be pleaded by a defendant in civil actions. The similar affirmative defense of RES JUDICATA differs from collateral ESTOPPEL in that it completely precludes the relitigation of a claim, demand, or CAUSE OF ACTION, as opposed to an issue or controverted point, in a subsequent proceeding between the same parties to an earlier action.

The application of the collateral estoppel doctrine promotes the speedy administration of justice by preventing the continuous, duplicative litigation of fruitless claims when relitigation of them is unlikely to change the original decision made regarding them.

### Requirements

Issues or findings of fact, not conclusions of law, are subject to collateral estoppel only in certain cases. The issue against which collateral estoppel is claimed must be identical to an issue already litigated in the earlier case and must have been fully litigated at that time. In addition, the court must have actually decided the issue. The decision on the issue must have been integral in the outcome of the original lawsuit. This last requirement assures the issue was vigorously litigated so that it is fair to prevent its relitigation in a second action because there is little likelihood that the results will be different the second time.

If an action has been settled by the agreement of the parties, most jurisdictions will not apply collateral estoppel, since the issues have not been fairly and fully litigated.

### Persons Affected

Collateral estoppel is binding only upon those parties to the first action in which a decision was made and anyone who might be regarded as in privity with those parties, such as a bailor and bailee or a principal and his or her agent. In many jurisdictions a party in a lawsuit who is not subject to the estoppel effect of a prior judgment because the party was not a party to the original action in which the judgment was rendered can, in certain instances, use that judgment to bind his or her adversary who had been a party in the former action.

A defendant who, in a second action, pleads the defenses of collateral estoppel against the plaintiff uses it defensively. In many jurisdictions this use of the doctrine is considered fair because the plaintiff has the advantage of selecting the defendant and the forum in which the case is to be decided. The decision to commence the second lawsuit is based, in part, upon the findings or issues in the first action, and, therefore, it is not unreasonable to bind the plaintiff by the issues or findings made in that case.

In contrast, a plaintiff in a subsequent lawsuit who asserts collateral estoppel against a defendant uses the doctrine offensively to buttress his or her cause of action. Fewer jurisdictions, however, permit its offensive use since the defendant against whom it would be applied has neither the choice of forum nor of adversary.

### Limitations

Collateral estoppel has limited applicability in cases where the issues raised in the court where the action was first heard were beyond its jurisdiction. In antitrust cases brought in federal court, which has exclusive jurisdiction over such matters, prior state court rulings concerning antitrust violations made during the course of deciding the legality of a contract will not be given collateral estoppel effect. Courts reason that the punitive and exclusive nature of the federal remedy in antitrust cases precludes collateral estoppel based upon state court decisions.

In contrast, federal courts have applied collateral estoppel in patent cases to any underlying facts decided by state courts but not to facts alleged to prove the issue of patent validity or infringement.

The availability of collateral estoppel is also limited by changes in the law that take place between the original and subsequent action. Collateral estoppel will not apply if modifications in the applicable law alter the operative facts needed to obtain a favorable ruling. To do otherwise would deny an individual EQUAL PROTECTION of law merely because of the luck of the person who obtained the previous ruling.

### Criminal Matters

Jurisdictions differ on whether to give an estoppel effect to a criminal conviction of a party currently involved in a civil lawsuit. Traditionally, estoppel was not permitted, since the plaintiff in the civil action was not a party to the criminal proceeding. Today, a number of states give full collateral estoppel effect to a previous criminal conviction. Acquittal of a crime is not given collateral estoppel effect in a civil proceeding because the plaintiff in the civil suit was not a party to the criminal proceeding and could not offer evidence against the defendant. This rule prevented O. J. SIMPSON from using his acquittal of murder as a defense in the civil trials brought against him by the families of Nicole Brown Simpson and Ronald Goldman following the murder trial.

In addition, the difference between the BEYOND A REASONABLE DOUBT standard of proof necessary for a criminal conviction and the PREPONDERANCE OF EVIDENCE standard in civil actions would make it unfair to allow the acquitted defendant to use his or her acquittal to bind the opponent in the civil matter in which the standard of proof to obtain a judgment is not as stringent.

## COLLATERAL HEIR

*A successor to property—either by will or descent and distribution—who is not directly descended from the deceased but comes from a parallel line of the deceased's family, such as a brother, sister, uncle, aunt, niece, nephew, or cousin.*

## COLLATERAL WARRANTY

*In real estate transactions, an assurance or guaranty of title made by the holder of the title to the person to whom the property is conveyed.*

Such a WARRANTY is not the same as a COVENANT running with the land, since it runs only to a particular convenantee who accepts the land from the holder of title and not to each successive owner of the land upon taking ownership of it.

## COLLECTIVE BARGAINING

*The process through which a* LABOR UNION *and an employer negotiate the scope of the employment relationship.*

A collective bargaining agreement is the ultimate goal of the collective bargaining process. Typically, the agreement establishes wages, hours, promotions, benefits, and other employment terms as well as procedures for handling disputes arising under it. Because the collective bargaining agreement cannot address every workplace issue that might arise in the future, unwritten customs and past practices, external law, and informal agreements are as important to the collective bargaining agreement as the written instrument itself.

Collective bargaining allows workers and employers to reach voluntary agreement on a wide range of topics. Even so, it is limited to some extent by federal and state laws. A collective bargaining agreement cannot accomplish by contract what the law prohibits. For example, a union and an employer cannot use collective bargaining to deprive employees of rights they would otherwise enjoy under laws such as the CIVIL RIGHTS statutes (*Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 [1974]). Collective bargaining also cannot be used to waive rights or obligations that laws impose on either party. For example, an employer may not use collective bargaining to reduce the level of safety standards it must follow under the OCCUPATIONAL SAFETY AND HEALTH ACT (29 U.S.C.A. §§ 651 et seq.). Furthermore, the collective bargaining agreement is not purely voluntary. One party's failure to reach agreement entitles the other to resort to certain legal tactics, such as strikes and lockouts, to apply economic pressure and force agreement. Moreover, unlike commercial contracts governed by state law, the collective bargaining agreement is governed almost exclusively by federal LABOR LAW, which determines the issues that require collective bargaining, the timing and method of bargaining, and the consequences of a failure to bargain properly or to adhere to a collective bargaining agreement.

*National Basketball Association (NBA) Commissioner David Stern (right) shakes hands with NBA Players Association Executive Director Billy Hunter during a January 1999 press conference in which a collective bargaining agreement between the league and players was announced.*

AP/WIDE WORLD PHOTOS

### National Labor Relations Act

Congress passed the National Labor Relations Act (NLRA) (29 U.S.C.A. §§ 151 et seq.) in 1935 to establish the right of workers to engage in collective bargaining and other group activities (§ 157). The NLRA also created the **NATIONAL LABOR RELATIONS BOARD** (NLRB), a federal agency authorized to enforce the right to bargain collectively (§ 153). The NLRA has been amended several times since 1935, most notably in 1947, 1959, and 1974.

The NLRA governs labor relations for businesses involved in interstate commerce only; thus, it does not protect the collective bargaining interests of all categories of workers. Several classes of employers fall outside the NLRA, including those working for the U.S. government and its wholly owned corporations, states and their political subdivisions, railroads, and airlines. The NLRA also does not protect certain types of workers, such as agricultural workers, independent contractors, and supervisory and managerial employees. But other federal and state laws often provide protection for workers not covered under the NLRA. For example, federal government workers enjoy the right to bargain collectively under the Civil Service Reform Act of 1978, which is patterned largely after the NLRA and enforced by the Federal Labor Relations Authority. Railroads and airlines are generally governed by the Railway Labor Act, the predecessor to the NLRA. Plus many states have adopted statutes similar to the NLRA that protect the rights of state and local government workers to bargain collectively.

Sections 8(a)(5) and 8(b)(3) of the NLRA define the failure to engage in collective bargaining as an unfair labor practice (29 U.S.C.A. § 158[a][5], [b][3]). The aggrieved party may file an **UNFAIR LABOR PRACTICE** charge with the NLRB, which has the authority to prevent or halt the performance of unfair labor practices (§ 160).

### Law of Collective Bargaining

The law of collective bargaining encompasses four basic points:

- The employer may not refuse to bargain over certain subjects with the employees' representative, provided that the employees' representative has majority support in the bargaining unit.
- Those certain subjects, called mandatory subjects of bargaining, include wages, hours, and other terms and conditions of employment.
- The employer and the union are not required to reach agreement but must bargain in **GOOD FAITH** over mandatory subjects of bargaining until they reach an impasse.
- While a valid collective bargaining agreement is in effect, and while the parties are bargaining but have not yet reached an impasse, the employer may not unilaterally change a term of employment that is a mandatory subject of bargaining. But once the parties have reached an impasse, the employer may unilaterally implement its proposed changes, provided that it had previously offered the changes to the union for consideration.

**Exclusive Representation** A majority of the workers in a bargaining unit must designate a representative with the sole or exclusive right to represent them in negotiations with the employer's representative (29 U.S.C.A. § 159[a]). The employer is not required to bargain with an unauthorized representative (§ 158[a][5]). Once a valid representative has been selected, even workers who do not belong to the union are bound by the collective bargaining agreement and cannot negotiate individual contracts with the employer (*J. I. Case Co. v. NLRB*, 321 U.S. 332, 64 S. Ct. 576, 88 L. Ed. 762 [1944]). As a corollary, the employer may not extend different terms to any workers in the bargaining unit, even if those terms are more favorable, unless the collective bargaining agreement contemplates flexible terms (*Emporium Capwell Co. v. Western Addition Commu-*

*nity Organization,* 420 U.S. 50, 95 S. Ct. 977, 43 L. Ed. 2d 12 [1975]).

Once the NLRB certifies a union as the exclusive bargaining agent, the union enjoys an irrebuttable presumption of majority support for one year (*Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27, 107 S. Ct. 2225, 96 L. Ed. 2d 22 [1987]). During that year, the employer may not refuse to bargain with the union on the ground that the union does not represent a majority of employees. After that year expires, the employer may rebut the presumption that the union represents a majority of employees by showing either that the union in fact does not enjoy majority support or that the employer has a good faith doubt founded on sufficient objective evidence that the union has lost majority support (*NLRB v. Curtin Matheson Scientific,* 494 U.S. 775, 110 S. Ct. 1542, 108 L. Ed. 2d 801 [1990]). In cases where the employer doubts that a union enjoys majority support, the employer may "anticipatorily withdraw" recognition of the union by insisting on a collective bargaining agreement that will terminate with the end of the certification year (*Rock-Tenn Co. v. NLRB,* 69 F.3d 803 [7th Cir. 1995]).

Similarly, a successor employer may not simply refuse to recognize the union for bargaining purposes. Instead, courts have required successor employers to recognize the incumbent union if "substantial continuity" exists between both employers (*NLRB v. Burns Security Service,* 406 U.S. 272, 92 S. Ct. 1571, 32 L. Ed. 2d 61 [1972]). To determine whether there is substantial continuity, courts will consider, among other factors, whether both employers are engaged in the same business, whether the employees perform substantially similar tasks under both employers, whether the customer base remains much the same, and whether the successor employer continues to use the same industrial or business processes as its predecessor (*Frye v. Specialty Envelope,* 10 F.3d 1221 [6th Cir. 1993]).

**Mandatory Subjects of Bargaining** Although the parties need not bargain over every conceivable topic, they must bargain in good faith over mandatory subjects of bargaining, which include wages, hours, and other "terms and conditions of employment" (29 U.S.C.A. § 158[d]). Because these mandatory subjects are very broad, courts over the years have attempted to set standards for determining whether a specific bargaining topic is mandatory. Generally, terms and conditions of employment encompass only issues that "settle an aspect of the relationship between the employer and the employees" (*Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 92 S. Ct. 383, 30 L. Ed. 2d 341 [1971]).

If one party wishes to bargain over a mandatory subject, it is an unfair labor practice for the other to refuse. Other topics are permissive subjects of bargaining, and it may be an unfair labor practice for a party to demand bargaining over them (*NLRB v. Wooster Division of Borg-Warner Corp.,* 356 U.S. 342, 78 S. Ct. 718, 2 L. Ed. 2d 823 [1958]). Thus, although the parties must bargain to an impasse over mandatory subjects of bargaining before implementing unilateral changes, they may change permissive subjects unilaterally without bargaining and cannot be forced to bargain over such changes.

Although most of the decisions an employer makes will affect employees, not all are mandatory subjects of bargaining. Some decisions, such as advertising and product selection, bear such an indirect relationship to and have such a minimal effect on the employment relationship that they are almost certainly only permissive subjects of bargaining. Other decisions, such as those regarding hiring, layoffs, and plant rules, are so directly relevant to the employment relationship that they are almost certainly mandatory subjects of bargaining. Still other decisions are not aimed at the employment relationship but have a sizable effect on it and are thus difficult to categorize as permissive or mandatory bargaining subjects (*First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 101 S. Ct. 2573, 69 L. Ed. 2d 318 [1981] [citing *Fibreboard Paper Products v. NLRB,* 379 U.S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964) [Stewart, J., concurring]). The Supreme Court has attempted on several occasions to define the scope of mandatory bargaining for this third category of management decisions.

In *Fibreboard,* the Supreme Court held that under its three-part analysis, an employer's decision to subcontract out a portion of its operations was a mandatory bargaining subject. First, subcontracting falls within the literal meaning of the NLRA phrase "terms and conditions of employment." Second, determining that subcontracting is a mandatory bargaining subject effectuates the purposes of the NLRA by "bringing a problem of vital concern to labor and management within the framework established

by Congress as most conducive to industrial peace"—namely, collective bargaining. Third, other employers in the same industry have addressed contracting out in the bargaining process, rather than leaving it to managerial discretion. Justice POTTER STEWART added in his concurrence that subjects that "lie at the core of entrepreneurial control," such as decisions about "the commitment of investment capital and the basic scope of the enterprise," are not mandatory subjects of bargaining.

In *First National Maintenance,* the Court addressed whether an employer's decision to terminate certain operations entirely constituted a mandatory subject of bargaining. The Court, relying primarily on Justice Stewart's concurrence in *Fibreboard,* held that the decision to terminate all operations at a particular site was an economically motivated management decision that was separate from the employment relationship, even though it obviously affected job security. The Court noted, however, that the effects of the employer's decision, such as severance pay and benefits, were mandatory subjects of bargaining under section 8(a)(5) of the NLRA. Accordingly, under this *Fibreboard-First National Maintenance* framework, most significant economic decisions, such as plant shutdowns, layoffs, and relocations, are not mandatory subjects of bargaining, even though the employer must engage in "effects bargaining" as a result of them.

**Duty to Bargain in Good Faith** During the bargaining process, the parties are not required by law to reach agreement. They must, however, bargain in good faith (29 U.S.C.A. § 158[d]). Although good faith is a somewhat subjective concept, courts will look to the entire circumstances surrounding bargaining, including behavior away from the bargaining table such as pressure and threats (*NLRB v. Billion Motors,* 700 F.2d 454 [8th Cir. 1983]). Most authorities agree that an absolute refusal to bargain constitutes bad faith (*Wooster*).

Even so, one party's insistence on a certain contract term is not necessarily an unfair labor practice. The NLRB and the courts that review and enforce its orders are unwilling to substitute their judgment for that of the parties and will not judge the content of collective bargaining agreements (*NLRB v. American National Insurance Co.,* 343 U.S. 395, 72 S. Ct. 824, 96 L. Ed. 1027 [1952]). In addition, the use of "economic weapons" such as pressure tactics, picketing, and strikes to force bargaining concessions is not necessarily bad faith bargaining (*NLRB v. Insurance Agents' International Union,* 361 U.S. 477, 80 S. Ct. 419, 4 L. Ed. 2d 454 [1960]).

The refusal to comply with an information request may constitute bad faith. For example, in *NLRB v. Truitt Manufacturing Co.,* 351 U.S. 149, 76 S. Ct. 753, 100 L. Ed. 1027 (1956), the employer committed an unfair labor practice when it refused to supply the union with information supporting its claim that it could not afford to pay a wage increase the union demanded. Over the years, courts have clarified that employers' claims of an inability to pay requested wage increases are conceptually distinct from claims that wage increases will result in a competitive disadvantage (*United Steelworkers of America v. NLRB,* 983 F.2d 240 [D.C. Cir. 1993]). Accordingly, in *Graphic Communications International Union Local 508 v. NLRB,* 977 F.2d 1168 (7th Cir. 1992), the court held that an employer was not required to disclose financial information unless it had asserted specifically that it was unable to pay a requested wage increase; an employer's claim that a wage increase would lead to competitive disadvantage did not require it to disclose wage information.

However, a refusal to provide requested information is not necessarily an unfair labor practice. For example, in *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 99 S. Ct. 1123, 59 L. Ed. 2d 333 (1979), the Supreme Court held that an employer's refusal to provide a union with confidential test results was not an unfair labor practice, where the company would have violated the right to privacy of the tested employees by disclosing the results.

**Unilateral Changes** During the time a collective bargaining agreement is in effect, the employer may not change a working condition that is a mandatory subject of bargaining, without first bargaining with the union (29 U.S.C.A. § 158[d]). Even after the collective bargaining agreement expires, the employer must maintain the status quo and may not unilaterally change mandatory subjects of bargaining, until the parties have reached an impasse (*Louisiana Dock Co. v. NLRB,* 909 F.2d 281 [7th Cir. 1990]). This proscription against unilateral changes continues even if the employer disputes that the union is the exclusive representative (*Livingston Pipe & Tube v. NLRB,* 987 F.2d 422 [7th Cir. 1993]; *NLRB v. Parents & Friends of the Specialized Living Center,* 879 F.2d 1442 [7th Cir. 1989]). Once

good faith negotiations between the parties "exhaust the prospect of concluding agreement," the parties have reached an impasse, and implementing unilateral changes in working conditions does not constitute an unfair labor practice (*NLRB v. Plainville Ready Mix Concrete Co.,* 44 F.3d 1320 [6th Cir. 1995]; *United Paperworkers International Union v. NLRB,* 981 F.2d 861 [6th Cir. 1992]; *Southwest Forest Industry v. NLRB,* 841 F.2d 270 [9th Cir. 1988]).

A pre-impasse unilateral change to a mandatory subject of bargaining generally constitutes an unfair labor practice, even though employees may regard the change as beneficial. According to the Supreme Court, unilateral changes minimize the influence of collective bargaining by giving employees the impression that a union is unnecessary to achieve agreement with the employer. For example, in *NLRB v. Katz,* 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962), the employer unilaterally changed its sick leave policy and increased its wage rates without first bargaining over them with the union. The Court ruled that the employer's unilateral change undermined the union's ability to negotiate over sick leave, wages, and other terms of employment.

One area of ongoing conflict between unions and employers concerns when wage increases constitute mandatory subjects of bargaining. In *Acme Die Casting v. NLRB,* 26 F.3d 162 (D.C. Cir. 1994), the court of appeals analyzed the employer's historical practice of establishing the frequency and size of wage increases and determined that whether to grant a wage increase was not an issue within the employer's discretion and could not be decided without bargaining with the union (see also *Daily News of Los Angeles v. NLRB,* 979 F.2d 1571 [D.C. Cir. 1992] [remanding to NLRB to determine whether wage increases that are consistent in terms of timing but discretionary in terms of amount are considered mandatory subjects of bargaining]).

One area of ongoing conflict between unions and employers concerns when wage increases constitute mandatory subjects of bargaining. In *Acme Die Casting v. NLRB,* 26 F.3d 162 (D.C. Cir. 1994), the court of appeals analyzed the employer's historical practice of establishing the frequency and size of wage increases, and determined that whether to grant a wage increase was not an issue within the employer's discretion and could not be decided without bargaining with the union.

*In a show of support for collective bargaining rights, state employees gather in Sante Fe, New Mexico, in February 2003. One month later, Governor Bill Richardson signed a bill restoring the employees' right to collective bargaining.*

AP/WIDE WORLD PHOTOS

As of 2003, the U.S. Supreme Court had not resolved this issue of whether wage increases were mandatory subjects of collective bargaining, so the federal courts of appeals have developed rules of their own to govern this question. Where an employer does not exercise discretion in determining the timing or the amount of a wage increase, then the issue of wage increases is a mandatory subject for collective bargaining. *NLRB v. Beverly Enter.-Mass., Inc.,* 174 F.3d 13 (1st Cir. 1999). Moreover, even if an employer exercises a certain amount of discretion in determining wage increase, such as an annual increase to cover the costs of living, this fact does not prevent the wage increase from becoming a mandatory subject if the company has a long-standing practice of granting such pay increases. *NLRB v. Pepsi-Cola Bottling Co.,* No. 00-1969, 2001 WL 791645 (4th Cir. July 13, 2001).

Once the parties have reached an impasse, the employer may implement unilateral changes to mandatory bargaining subjects as long as it has previously proposed those changes to the union (*NLRB v. Plainville Ready Mix Concrete Co.,* 44 F.3d 1320 [6th Cir. 1995]; *NLRB v. Emsing's Supermarket,* 872 F.2d 1279 [7th Cir. 1989]).

**FURTHER READINGS**

Aidt, Toke, and Zafiris Tzannatos. 2002. *Economic Effects in a Global Environment.* Washington, D.C.: World Book.

Bagchi, Aditi. 2003. "Unions and the Duty of Good Faith in Employment Contracts." *Yale Law Journal* 112 (May).

**CROSS-REFERENCES**

Employment Law; Good Faith; Picketing.

## COLLECTIVE BARGAINING AGREEMENT

*The contractual agreement between an employer and a* LABOR UNION *that governs wages, hours, and working conditions for employees and which can be enforced against both the employer and the union for failure to comply with its terms. Such an agreement is ordinarily reached following the process of* COLLECTIVE BARGAINING. *A high profile example of such bargaining happens in the world of professional* BASEBALL.

## COLLEGES AND UNIVERSITIES

The term *college* is a general one that encompasses a wide range of higher-education institutions, including those that offer two- to four-year programs in the arts and sciences, technical and vocational schools, and junior and community colleges. The term *university* specifically describes an institution that provides graduate and professional education in addition to four-year post-secondary education. Despite these distinctions, the terms *college* and *university* are frequently used interchangeably in the United States.

The first institution of higher education in the United States was Harvard College, founded in 1636. At the time of the Revolutionary War, nine colleges existed in the colonies—a number that had tripled by the time of the Civil War. In 1876, the first true university in the United States was established, with the founding of Johns Hopkins, in Baltimore. The university format rapidly gained popularity, and prominent private and state-run colleges soon assumed university status. According to the *Statistical Abstract of the United States,* 4,084 colleges and universities operated in the United States in 1999.

U.S. colleges and universities fall into two general categories: private and public. Private institutions are usually corporations operating under state charters. Although tuition and private gifts and endowments provide much of their financial support, most private colleges and universities also receive some degree of government support. Many of the 2,000-plus private colleges and universities in the United States claim a religious affiliation.

Public institutions are established either by state constitution or by statute, and they receive funding from state appropriations as well as tuition and endowments. Although the federal government operates several institutions of higher learning, such as the U.S. Military Academy and the U.S. Air Force Academy, it is prohibited by statute from exercising direct control over other educational institutions.

### The Legal Climate

U.S. colleges and universities are governed by many of the same laws that regulate the rest of U.S. society. In addition, they have generated a unique body of law. Educational institutions reflect the legal climate of the rest of the country, but the importance of a good education has elevated equal access, equal opportunity, and ACADEMIC FREEDOM to a higher status than they might otherwise assume.

Three general types of laws affect the operation of colleges and universities. State laws affect public and private colleges and universities in the absence of federal laws that supersede them. Federal laws may affect public and private institutions, and they usually affect entities that receive federal funding or that are subject to regulation under the COMMERCE CLAUSE of the Constitution. The most common such laws are statutes that prohibit discrimination. Finally, the Constitution governs public, but almost never private, institutions.

As state entities, public institutions must conform to constitutional provisions that prohibit the state from discriminating and from denying constitutional rights. Thus, much of the law of public institutions stems from constitutional amendments such as the following:

- the Free Speech Clause of the FIRST AMENDMENT, which guarantees that the government will not interfere with FREEDOM OF SPEECH
- the Free Exercise Clause of the First Amendment, which ensures that the government will not interfere with or outlaw religious expression
- the Establishment Clause of the First Amendment, which prohibits the government from endorsing or establishing a state religion
- the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT, which guarantees that a state will enforce its laws equally with respect to all persons, with certain exceptions
- the DUE PROCESS CLAUSE of the Fourteenth Amendment, which requires the state to provide certain procedural safeguards before depriving an individual of a liberty or prop-

*A sample collective bargaining agreement between the City of Stamford, Connecticut, and Teamsters Union Local #415.*

## Collective Bargaining Agreement

**Collective Bargaining Agreement**
**Between**
**The City of Stamford**
**and**
**Teamsters Union Local #145**
Affiliated with the International Brotherhood of Teamsters

**July 1, 2001 - June 30, 2003**

**AGREEMENT**

This Agreement is made and entered into between THE CITY OF STAMFORD, hereinafter referred to as the "Employer" or "City", and TEAMSTERS UNION LOCAL 145, affiliated with the International Brotherhood of Teamsters, hereinafter referred to as the "Union".

**ARTICLE I**
**RECOGNITION**

The City of Stamford recognizes and acknowledges that the Union, its duly authorized agents and representatives is the exclusive bargaining agent with respect to wages, hours, and working conditions of the employees in the Public Works Department, the Department of Traffic and Parking, the E. Gaynor Brennan Golf Course, and Golf Course Seasonals, as set forth in Supplemental Agreement dated 5/18/93, of the City in the job classifications set forth in the Appendix hereof (hereinafter referred to as the employees).

**ARTICLE II**
**UNION SECURITY**

(a) All employees hired after the date of execution hereof shall become members of the Union not later than sixty (60) days after the date of their employment as a condition of continued employment. All such employees and all present employees who are members of the Union on the date of execution of this Agreement and all employees who become members of the Union hereafter, shall remain members of the Union in good standing by the payment of their regular monthly dues on or before the last day of each month as a condition of continued employment.

(b) The City agrees to deduct regular Union Dues and one (1) Initiation Fee from the pay of each employee who has signed and submitted to the City a card authorizing such deduction. All sums so deducted shall be sent monthly to the Treasurer of the Union.

(c) The City will notify the Local #145 Union office and the Chief Steward of the Union, in writing, of all new hires, transfers, suspensions and discharges concerning the employees covered by this Agreement.

(d) The Union agrees to indemnify and hold harmless the City for any loss or damage arising from the operation and execution of this Article.

**ARTICLE III**
**SENIORITY**

(a) Seniority, as used in this Article, is defined as the total length of continuous service with the City in a classification within a particular department, bureau, or division covered by this Agreement and subject to the provisions of this Article, except that anyone transferred from one department or location to another due to bidding on an open job shall retain Citywide seniority as long as the classification is covered under the Teamsters Local #145 contract.

(b) Seniority shall be accrued during periods of layoff.

(c) Upon completion of the probationary period provided for in Article XVIII hereof, employee's seniority shall date from the date of employment.

(d) An employee shall lose all accrued seniority status if he is discharged for just cause, is laid off for a period in excess of his recall rights or quits. Furthermore, an employee who takes or is promoted to any other job in the City that is not covered by a Teamsters Local 145 contract, shall lose all accrued seniority and may not regain any seniority if he shall return to such position for any reason.

(e) Officers and Stewards of the Union shall be placed at the head of the Seniority List in the bureau to which they are assigned by the City. This preferred seniority status shall be effective only in connection with layoffs.

(f) The City will furnish the Union, annually, with a Seniority List showing employee's seniority. These lists shall be simultaneously dated and posted on the bulletin boards and any employee who feels there is an error in his seniority date, as shown, must present his facts substantiating his position within thirty (30) calendar days of the date of posting. If no objection is raised, the date on the list will be presumed to be correct.

(g) The union will notify the City annually in writing, of the names and positions of all local Union officials and Stewards & Committeemen. The City will be promptly notified in writing, of any changes.

(h) The term "regular" employee as contained in this agreement shall mean non-probationary full-time employee.

[continued]

*A sample collective bargaining agreement between the City of Stamford, Connecticut, and Teamsters Union Local #415 (continued).*

## Collective Bargaining Agreement

**ARTICLE IV**
**HOURS OF WORK**

(a) To the extent possible, consistent with efficient operations, the regular hours of employment shall be thirty seven and one half (37-1/2) hours per week, divided equally over five (5) working days of seven and one half (7-1/2) hours each Monday through Friday. To the extent possible consistent with efficient operations the regular summer hours for the Division of Highway will be from the first Monday in May to the first Monday in October. The City may change the summer hours to meet operational requirements with two weeks notice, except as follows:

(1) The basic workday for the Refuse Collectors shall remain on an incentive basis and shall be the time required to complete the route assigned for the day. The City may schedule the work to be performed over any five (5) days out of six(6) between Monday and Saturday. The normal work hours, for the sanitation routes, is 4:00 a.m. to 12:00 p.m. However, if this change creates operational problems or difficulties, then the City reserves its right to adjust the schedule to alleviate these difficulties.

(2) (A) The WPCA employees shall work a continuous 24 hour operation, seven (7) days a week, divided into three (3) shifts per day of eight and one-half (8-1/2) hours per shift. The employees will work eight (8) hours per shift with one-half (1/2) hour off, without pay, for lunch. The lunch periods will be staggered between the third (3rd) and fifth (5th) hours of each shift so that the facility will always be covered. In the event an employee agrees to work a double shift, he must complete the full shift. These employees will have all accumulated leave time (vacation and sick) earned, before the execution of the contract and continuing thereafter, credited as eight (8) hour days.

(B) For the purposes of overtime, employees will begin to receive overtime (one and one-half [1-1/2] times their regular hourly rate) after working forty (40) hours in any given work week.

(3) The Incinerator employees shall continue to work on the present three (3) rotating shift and six (6) day operation basis.

(4) WPCA Mechanics shall continue to work on their present basis, which includes stand-by time and miscellaneous overtime, as required in their regular weekly wage.

(5) The Golf Course employees will continue to work thirty-seven and one-half (37-1/2) hours per week, divided equally over five (5) working days of seven and one half (7-1/2) hours each.

(6) Highway personnel alerted for snowstorms and plumbers shall continue to stand-by for emergencies as at present.

(b) For purposes of this Agreement, the workweek shall be deemed to start on Monday and end on Sunday. The terms "normally scheduled work day and work week" as used herein, consist of the schedule that an employee knows he is expected to work either because such schedule is posted on a bulletin board in advance or because it is the schedule he accepted upon employment or transfer, or because it is the schedule he has worked continuously so as to become routine. This includes schedules of irregular daily or weekly duration which are repetitive. New employees may be required to work different hours as a condition of employment.

(c) An assignment of work beyond the employee's regularly scheduled hours of any work day or any work week other than that necessitated by emergencies, shall be made four (4) hours in advance by authorized personnel.

(d) Overtime work shall be divided equally as far as practicable by rotation on a seniority and classification basis, subject to the employee's ability to perform the required work. Shop Stewards shall keep a list of overtime hours worked, provided to them by the time-keepers, weekly, and may post the same so that all employees may see who is receiving how much overtime. Any employee who refuses to perform overtime without just cause shall be dropped to the bottom of the overtime rotation list. If there are no employees accepting the overtime assignment, the least senior men must perform the work as scheduled. In the event of an emergency requiring callback of crews of men, a Shop Steward shall be called back one (1) hour in advance of other employees, whenever practical, to assist in telephoning men to be called in. When drivers are needed for such emergency callback, regular drivers shall be called in before temporary drivers or laborers.

(e) Employees refusing to report for a general emergency without just cause shall be subject to discipline.

(f) Any Refuse Collector desiring to work on his day off shall notify his superior of his availability.

(g) Employees may be required to take lunch on the job.

(h) The City shall maintain a minimum crew of at least four (4) sanitation employees of the bargaining unit.

(i) The provisions of Article IV, Section (a) (2) and Article V, Section (f) will be waived to permit flexibility in scheduling to meet golf course operating needs and to permit L. Mallizia and J. Gilello to work up to nine (9) hours on an assigned day at their regular rate straight time rates of pay. Overtime will be paid at the rate of time and one-half (1-1/2) per Article V, Section (f), for work in excess of thirty seven and one-half (37-1/2) hours in the workweek.

**ARTICLE V**
**WAGES**

(a) The annual wages of employees covered by this Agreement shall be as set forth in "Appendix A" annexed hereto. Any retroactive payments shall apply to a base salary, overtime, premium time, callback, standby, or any other form of pay including the employee's vacation pay.

(1) Effective and retroactive to July 1, 2001, the pay rates in effect on June 30, 2001 will be increased by three percent (3%).

(2) Effective July 1, 2002, the pay rates in effect on June 30, 2002 will be increased by three percent (3%).

[continued]

*A sample collective bargaining agreement between the City of Stamford, Connecticut, and Teamsters Union Local #415 (continued).*

**Collective Bargaining Agreement**

(b) Effective July 1, 2002, each employee shall receive longevity pay in accordance with the following:

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|---|---|
| After 10th Anniversary | $350 |
| After 15th Anniversary | $450 |
| After 20th Anniversary | $550 |
| After 25th Anniversary | $650 |

Longevity payments will be made lump-sum during the month of December each year. An employee, who will be eligible for longevity during the fiscal year, will receive his/her longevity in December (ex. Employee with ten years as of February 20th during the fiscal year, will receive longevity pay in December, two months earlier. Conversely, an employee who reaches ten years as of August 20th will receive longevity in December, four months later). Pro rata payments shall be made upon termination, using July 1st as the date which the pro-rating begins (ex. employee who leaves in August will receive two-twelfths [2/12] of their annual longevity).

(c) Any employee required to work temporarily in a higher classification shall receive for such work, the rate in the higher classification for an employee with seniority equal to that of the acting employee.

(d) Employees working a second (2nd) shift (one commencing after 2:00 p.m.) shall receive a shift differential of seven percent (7%) over their regular rates, and employees working on a third (3rd) shift (one commencing after 10:00 p.m.) shall receive a shift differential of twelve percent (12%) over their regular rates. No shift premium shall be payable for emergency call-outs, standby time, or overtime, unless specifically provided herein.

(e) Except as otherwise provided, employees working in excess of a normally scheduled seven and one half (7-1/2) hour day or thirty seven and one half (37-1/2) hour week, shall be compensated for all such excess hours (expect time of brief duration to complete tasks in process, e.g. returning to garage) at one and one half (1-1/2) times regular straight time rates.

(f) Each employee shall be given a minimum of four (4) hours work if called back to work for an emergency after completion of a regular day's work and shall be paid for such work at one and one half (1-1/2) times his regular straight time rate. On all such emergency calls, the employee called may be required to remain on duty for the full four (4) hours and thereafter until the emergency is over. If such employee so elects, he may, with the consent of his supervisor, remain at work less than the four (4) hours and be paid only for the hours worked. Any employee working on snow or ice (in connection with a storm) duty on Monday through Friday shall be paid straight time for hours worked between 8:00 a.m. and 4:00 p.m., time and one half (1-1/2) for hours worked between 4:00 p.m. and 12:00 midnight, and double (2) time between 12:00 midnight and 8:00 a.m. For hours worked on Saturday between 8:00 a.m. and 12:00 p.m., he will be paid time and one half (1-1/2) and for hours worked on Sunday, he will be paid double time. Pay for work on a holiday will continue as it now is in Article V, Section (k) of this Agreement.

(g) All employees shall be compensated for hours worked on the sixth (6th) day in any week at one and one half (1-1/2) times the regular straight time rates and for hours worked on the seventh (7th) day in any week at two (2) times the regular straight time rates.

(h) Except for pumping station mechanics, where Saturday or Sunday work is part of an employee's regular scheduled work week but is not performed on a sixth (6th) or seventh (7th) day of work, a weekend differential of ten percent (10%) shall be paid for all hours worked on such days.

(i) Employees who are required to standby because of an impending snow storm or hurricane or the like, will be compensated for hours spent on standby duty at one and one half (1-1/2) times regular straight time rates.

Other employees required to standby, will receive the same compensation as has been the practice, i.e. an employee who is required to standby for a week will receive, in addition to his regular pay, eleven (11) hours of straight time for that period.

(j) Employees may be scheduled not to work on any of the holidays listed in Article VI(a). If scheduled to work on a holiday, employees shall be compensated at one and one half (1-1/2) times the regular straight time for all hours worked on any holiday referred to in Article VI(a). Refuse Collectors shall also receive one and one half (1-1/2) days pay in addition to compensation for the holiday not worked, on condition that such Collector is scheduled to work the load day following the holiday day off in such a manner as to make up for the work customarily performed on the day of the week on which the holiday falls.

(k) For tardiness, each employee will be allowed a paid grace period of fifteen (15) minutes for a maximum of three (3) times in any twelve (12) consecutive month period, provided such tardiness does not result in actual additional cost to the City. If an employee is late more than fifteen (15) minutes, or is late more frequently than three (3) times in twelve (12) consecutive months, he shall not be paid for the total amount of time he is late on any occasion.

(l) Nothing in the foregoing paragraph shall limit the authority of a department supervisor to impose disciplinary action an any employee where attendance and/or tardiness record warrants the taking of such action. This action will include written warning to the employee that his record is not satisfactory.

(m) During snow storms and general emergencies, no employee shall be required to work more than fifteen (15) hours continuously without a rest period of six (6) hours in between.

**ARTICLE VI**
**HOLIDAYS AND PERSONAL LEAVE**

(a) All employees covered by this Agreement shall receive a full day's pay at their straight time rate of pay for the holidays listed below, or days celebrated as such, regardless of the day of the week upon which such holiday shall fall:

| | |
|---|---|
| New Year's Day | Labor Day |
| Martin Luther King Day | Columbus Day |

[continued]

*A sample collective bargaining agreement between the City of Stamford, Connecticut, and Teamsters Union Local #415 (continued).*

**Collective Bargaining Agreement**

| | |
|---|---|
| President's Day | Veteran's Day |
| Good Friday | Thanksgiving Day |
| Memorial Day | Day after Thanksgiving |
| Independence Day | Christmas Eve after 12:00 noon |
| | Christmas Day |

(b) Each employee shall have two(2) days of personal leave in each contract year to be taken at such time as the employee may elect, with the prior consent of his department head, which such consent shall not be unreasonably withheld. Effective July 1, 1997, in consideration of consolidating Washington's and Lincoln's Birthdays into President's Day, each employee will receive an additional one (1) day of personal leave, bringing the total number of personal days in each contract year to three (3) days.

Employees will receive pro-rated personal days during their first year of employment, as follows:

If employee is hired:

| | |
|---|---|
| July 1 - August 31 | Three (3) personal days |
| September 1 - October 31 | Two (2) personal days |
| November 1 - December 31 | One (1) personal day |

Personal days may not be used by a new employee while that person is on probation. Personal days may not be accumulated from year to year.

(c) In the event the Mayor proclaims any day as an additional day off for all City employees, any employee covered by this Agreement who must work because of the nature of his job, shall be granted a compensatory day off at a time mutually convenient to the employee and his department head.

(d) Employees shall normally be entitled to at least three (3) days prior notice of any holiday on which they will be required to work.

TEAMSTERS Local #145 CONTRACT

erty interest. State-run institutions also are subject to state and often federal law.

Private institutions are not governed directly by the Constitution. Instead, they are regulated solely by state and federal law. Since the mid 1960s, federal laws enacted pursuant to Congress's power to regulate interstate commerce have enabled the federal government to regulate much private university activity that the Constitution cannot reach directly. Such federal statutes often protect against discriminatory behavior not otherwise foreclosed by the Constitution, such as discrimination based on age or disability. Accordingly, a university may not discriminate merely because it is a private entity. The most important statutes governing the behavior of private universities are the same statutes regulating public accommodations, employment, and federally funded activities:

- Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000a et seq., which prohibits discrimination on the basis of race by entities that receive federal funding
- Title VII of the CIVIL RIGHTS ACT of 1964, which prohibits discrimination on the basis of race, color, national origin, gender, or religion, by entities employing a certain number of workers (generally 15)
- Title IX of the Education Amendments of 1972 (codified in scattered sections of 7, 12, 16, 20, and 42 U.S.C.A.), which prohibits discrimination on the basis of gender by entities that receive federal funding
- the Age Discrimination in Employment Act, 29 U.S.C.A. § 621 et seq., which prohibits employment discrimination on the basis of age against individuals between the ages of 40 and 70 by entities employing a certain number of workers (generally twenty)
- the Americans with Disabilities Act of 1990, codified in scattered sections of 2, 29, 42, and 47 U.S.C.A., which prohibits discrimination on the basis of disability in public accommodations, transportation, and employment, by a wide range of privately owned entities
- the Rehabilitation Act of 1973, 29 U.S.C.A. § 701 et seq., which prohibits discrimination on the basis of disability by entities that receive federal funding
- the Higher Education Act, 20 U.S.C.A. § 403 et seq., which establishes federal financial aid programs and the conditions accompanying them; the EDUCATION DEPARTMENT (until 1980, the Department of Health, Education, and Welfare) administers Title VI, Title IX, and the Higher Education Act.

### Racial Discrimination

**The Equal Protection Clause and Public Institutions** The Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying to individuals the equal protection of the laws. This clause requires, among other things, that a state and its instrumentalities may not treat members of different racial or ethnic backgrounds differently unless the discriminatory action is necessary to achieve a compelling government purpose and is narrowly tailored to satisfy that purpose. Despite the Fourteenth Amendment's passage in 1870, public higher education in the United States remained legally segregated on the basis of race until the mid-1950s. This de jure (i.e., legally sanctioned) SEGREGATION may be traced to a pre-Civil War decision by the Massachusetts Supreme Court upholding the legality of segregated schools in the heart of abolitionist territory (*Roberts v. Boston,* 59 Mass. [5 Cush.] 198 [1849]).

After the Civil War, Congress outlawed SLAVERY and made discrimination by the state unconstitutional, with the Thirteenth and Fourteenth Amendments to the Constitution. Not much changed, however, as states, obligated to provide all citizens with the equal protection of the laws, devised bifurcated educational systems that provided white citizens with one set of schools and black citizens with a supposedly parallel, but grossly underfunded and qualitatively inferior, set of schools. These systems were approved by the U.S. Supreme Court as "separate but equal" in *Cumming v. Board of Education of Richmond County,* 175 U.S. 528, 20 S. Ct. 197, 44 L. Ed. 262 (1899).

Public centers of higher education also remained segregated and unequal. Many states established dual systems of higher education. A number of states established whites-only flagship campuses, with separate blacks-only campuses that received less funding and fewer resources; others simply refused to admit black students.

In the early twentieth century, the National Association for the Advancement of Colored People (NAACP) began its attack against segregated schools at the university level, where it won a series of cases that eroded the SEPARATE-BUT-EQUAL principle. In the first of these cases, decided under the Equal Protection Clause, the U.S. Supreme Court ruled that a state could not avoid training qualified black law students by providing them tuition payments to out-of-state law schools rather than permitting them to attend an in-state school (*Missouri ex rel. Gaines v. Canada,* 305 U.S. 337, 59 S. Ct. 232, 83 L. Ed. 208 [1938]). Next, in *McLaurin v. Oklahoma State Regents,* 339 U.S. 637, 70 S. Ct. 851, 94 L. Ed. 1149 (1950), the Court held that the University of Oklahoma could not force its only black graduate student to sit in a hallway adjoining the classroom in which a course was offered, nor could it require the student to sit behind a railing marked "Reserved for Colored." Finally, in *Sweatt v. Painter,* 339 U.S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 (1950), the Court found that a proposed blacks-only law school in Texas would be unequal to the prestigious and then-all-white University of Texas Law School not only in the quality of its tangible facilities but also in the quality of such intangibles as reputation and education.

Despite these early victories, de jure racial segregation of public colleges and universities did not become illegal until the Court decided BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873

**College Enrollment of Recent High School Graduates, 1960 to 2000**

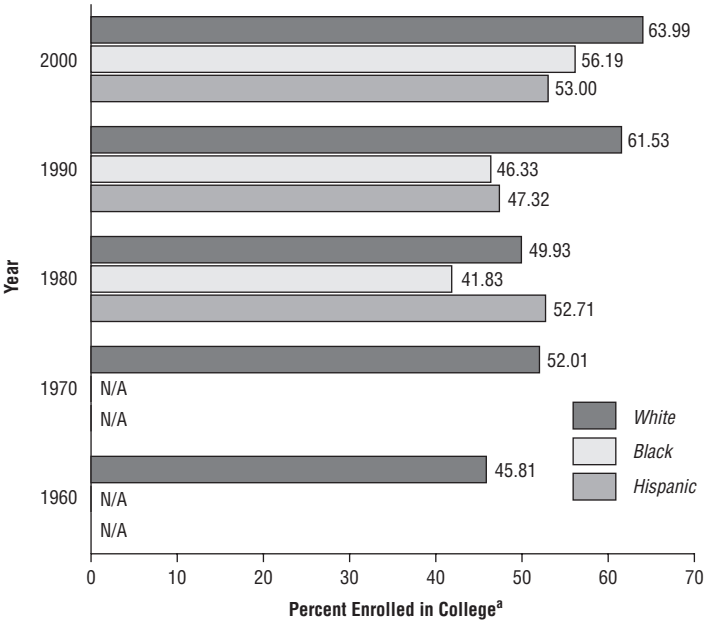


[a]Persons aged 16 to 24 who graduated from high school in the preceding 12 months. Includes persons receiving GEDs.

SOURCE: National Center for Education Statistics, *Digest of Education Statistics*, 2001.

*In* McLaurin v. Oklahoma *(1950) the Supreme Court ruled that the University of Oklahoma could not force G.W. McLaurin, the school's only African American graduate student, to sit in a hallway adjoining the classroom.*

UPI/CORBIS-BETTMANN

(1954). Following *Brown,* schools throughout the United States were required to adopt desegregation policies, but de facto (i.e., actual) segregation remained in many university systems.

Litigation in the federal courts continues more than 40 years after *Brown.* In 1992, the U.S. Supreme Court held that the state of Mississippi had failed to satisfy its duty to desegregate the state university system, in *United States v. Fordice,* 505 U.S. 717, 112 S. Ct. 2727, 120 L. Ed. 2d 575 (1992). In *Fordice,* the state had eliminated its requirement that blacks and whites be educated separately, but allowed previously white schools to remain distinct from previously black schools, and inaccessible to black students. By the mid-1980s, previously all-white schools in Mississippi remained over 80 percent white and previously all-black schools remained over 90 percent black. The Court found that the state's policy of requiring higher American College Test (ACT) scores for admission to white schools than to black schools perpetuated the state's formerly de jure dual system because it effectively foreclosed many black students from attending white schools and forced them to attend black schools, which received less funding. The Court ruled that merely abolishing legal segregation and implementing race-neutral policies (i.e., policies that purport to treat individuals equally without regard to race) did not satisfy the state's duty to desegregate. Instead, the Court held, if schools or school policies maintain racially identifiable characteristics that can be traced to STATE ACTION, the state may be deemed to perpetuate former discriminatory practices in violation of the Equal Protection Clause. In the wake of *Fordice,* federal courts re-examined segregated systems of higher education in several states (*Knight v. Alabama,* 14 F.3d 1534 [11th Cir. 1994]; *United States v. Louisiana,* 9 F.3d 1159 [5th Cir. 1993]).

**Federal Law and Private Institutions** In 1964, in response to the slow pace of racial reform, Congress passed the Civil Rights Act of 1964, which prohibited discrimination on the basis of race (and sometimes gender) in public accommodations, federally funded programs, and employment. Title VI of the act prohibits discrimination "on the basis of race, color, or national origin," in "any program or activity receiving Federal financial assistance," which includes many centers of higher learning in the United States. Title VI reaches state and private schools that receive direct federal funding. It also reaches some institutions that receive no direct federal aid but that have a significant proportion of students who do (*Grove City College v. Bell,* 465 U.S. 555, 104 S. Ct. 1211, 79 L. Ed. 2d 516 [1984]).

**Affirmative Action** Beginning in the late 1960s, in response to the CIVIL RIGHTS MOVEMENT, many universities began adopting AFFIRMATIVE ACTION policies. Such policies attempt to encourage or to promote racial equality by ending de jure inequalities that remain even though legal inequalities have been abolished. In the beginning, many institutions employed quotas that reserved a certain number of spots for applicants of racial minorities. Other institutions considered membership in a racial minority as one variable in determining whether to admit a student.

It was not long before affirmative action policies came under legal attack as "reverse discrimination." The first serious challenge to affirmative action, REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978), fundamentally changed its structure. In *Bakke,* Allan Bakke, a civil engineer of Norwegian descent, applied for admission to a medical program at the University of California. The program in question set aside 16 spaces for minority students out of a class of 100. Candidates for the set-aside spaces

did not have to meet the minimum grade-point-average threshold established for other candidates. Although Bakke's grade-point average fell slightly below the minimum, he argued that he would have been admitted on an evaluative basis if the set-aside spots had not existed. He sued the university under Title VI and the Equal Protection Clause, arguing that the affirmative action program discriminated against him on the basis of his race. The U.S. Supreme Court found that the university's affirmative action program violated Title VI because it used strict racial quotas to determine admission.

The Court found that the program also violated the Equal Protection Clause, because it was not narrowly tailored to meet a compelling government interest. The Court observed that the program was designed to remedy the effects of general societal discrimination (a legitimate, but not compelling, government interest), not its own specific discriminatory practices, which might constitute a compelling interest. Nonetheless, the Court held that the use of race as one criterion in determining admission does not violate either Title VI or the Fourteenth Amendment. In doing so, it did not prohibit all consideration of race in admission decisions, noting with approval certain programs that take race into account to promote educational diversity.

Following *Bakke,* programs that set aside a fixed number of spaces for minority students no longer constituted an acceptable means of affirmative action. Most universities that maintained affirmative action programs adopted the type of program approved in *Bakke,* which permits the consideration of race in admission or scholarship decisions in order to encourage diversity. Some schools also introduced scholarships that were designed to benefit only certain groups, such as students belonging to a particular race. Beginning in the mid-1980s, as the U.S. Supreme Court began holding that affirmative action programs designed to remedy the effects of past discrimination would need to satisfy the same strict standards as other race-based classifications (*City of Richmond v. J. A. Croson Co.,* 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 [1989]), race-restricted scholarships became the focus of lawsuits.

In *Podberesky v. Kirwan,* 38 F.3d 147 (4th Cir. 1994), the U.S. Court of Appeals for the Fourth Circuit considered a challenge to the University of Maryland's Banneker Scholarship program, a merit-based scholarship for which only black students were eligible. Daniel J. Podberesky, a Hispanic student, qualified for the Banneker Scholarship in all respects but race. He sued the university, alleging that the scholarship program discriminated on the basis of race. The university countered that the program was designed to remedy the institution's own past discrimination, which had led to the underrepresentation of black students at the university. The court held that the Banneker program violated the Fourteenth Amendment because it was not narrowly tailored to remedy the effects of the university's past discrimination.

### Gender Discrimination

**Segregated Public Institutions** The Equal Protection Clause does not require states to satisfy the same strict standards for gender discrimination as for RACIAL DISCRIMINATION. Whereas states are held to a "strict scrutiny" requirement with regard to racial discrimination, they need only demonstrate that discrimination on the basis of gender substantially furthers an important government purpose.

The men-only policies maintained by the Virginia Military Institute (VMI) and the Citadel, of South Carolina, have been challenged throughout the years by women seeking admission. In the early 1990s, the U.S. Court of Appeals for the Fourth Circuit considered two unrelated cases that challenged the legality of men-only public colleges: *Faulkner v. Jones,* 51 F.3d 440 (1995), *cert. denied,* 516 U.S. 910, 116 S. Ct. 331, 133 L. Ed. 2d 202 (1995), and UNITED STATES V. VIRGINIA, 44 F.3d 1229 (1994), *cert. granted,* 516 U.S. 910, 116 S. Ct. 281, 133 L. Ed. 2d 201 (1995) (hereinafter *VMI*).

The same court reached two different results in *VMI* and *Faulkner,* because *Faulkner* involved an individual plaintiff who had sought admission to the Citadel, whereas *VMI* was brought by the DEPARTMENT OF JUSTICE and did not involve a particular student.

In *Faulkner,* the Court required the Citadel to admit the plaintiff, Shannon Faulkner, because Faulkner was a "real live plaintiff." The court explained that, although admission to the school was the only appropriate remedy in a case involving a live plaintiff, the state might later develop a parallel program, as recommended in *VMI,* or adopt a coeducational policy.

In *VMI,* the court held that because "homogeneity of gender" was integral to the type of

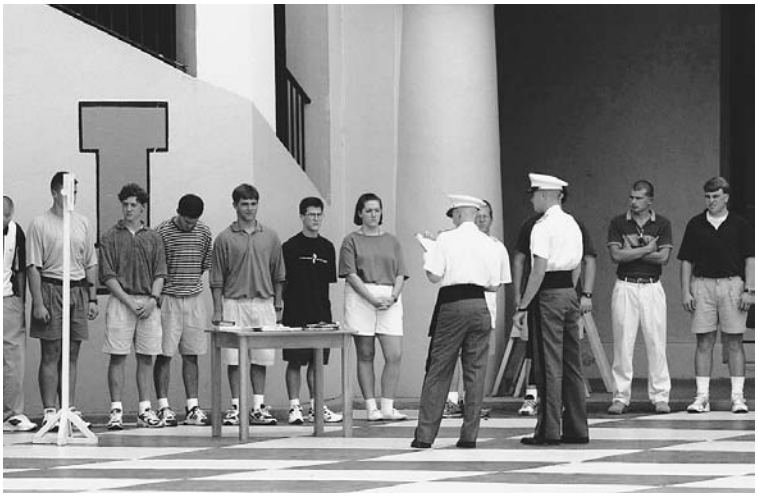

*Shannon Faulkner sued for and won admission to The Citadel, a previously men-only public college. She is shown here (center) with other new cadets during orientation on August 12, 1995.*

MITCHELL SMITH/CORBIS SYGMA

leadership education provided at VMI, maintaining a men-only college substantially furthered the legitimate public purpose of providing unique leadership education. It then held that the establishment of a separate-but-parallel, state-sponsored women's college with substantially the same goals as VMI's would satisfy the requirements of the Equal Protection Clause. Faulkner withdrew shortly after the school year began, putting an end to any possible appeals in her case. However, the Court did hear the government's appeal from the *VMI* decision and held that Virginia's categorical exclusion of women from VMI denied equal protection to women (*United States v. Virginia,* 116 S. Ct. 2264). The Court agreed that gender-based classifications are not completely forbidden by the Equal Protection Clause, but it stated that Virginia had failed to provide "exceedingly persuasive justification" for excluding women from VMI. In addition, the Court held that the separate-but-parallel women's college that Virginia had proposed violated the Equal Protection Clause, terming the women's college a "pale shadow of VMI" in terms of its educational and leadership opportunities.

**Title IX** Eight years after Congress enacted Title VI of the Civil Rights Act of 1964, it amended the act to extend protection against discrimination in federally funded programs to include gender. Title IX of the Education Amendments of 1972 parallels Title VI and has been used to attack gender discrimination in such diverse areas as admissions, scholarships, discipline, and SEXUAL HARASSMENT. For example, in *Sharif v. New York State Education Department,* 709 F. Supp. 345 (S.D.N.Y. 1989), a federal district court held that the state of New York could not use Scholastic Aptitude Test (SAT) scores as its sole criterion for awarding college scholarships, without violating Title IX. Because girls scored an average of 60 points lower on the test than boys did, and because the SAT was not, and did not purport to be, a measure of past performance in school, the court ruled that its use had a discriminatory effect on the awarding of scholarships without bearing any relationship to a reward for successful performance in high school. In *Yusuf v. Vassar College,* 35 F.3d 709 (1994), the U.S. Court of Appeals for the Second Circuit held that a private college may have discriminated against a male student who allegedly sexually harassed a female student, by systematically applying different and stricter standards to sexual harassment proceedings than to other disciplinary proceedings. And in *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992), the U.S. Supreme Court held that Title IX also prohibits sexual harassment in educational institutions and that teachers who sexually harass or abuse students discriminate on the basis of sex in violation of Title IX.

Title IX's most visible effect has been in college athletics. Most colleges and universities operate men's and women's athletic programs, some of which participate in intercollegiate competitions administered by the National Collegiate Athletic Association (NCAA). Title IX caused a great deal of concern when first enacted, as many schools were concerned that they could not remedy unequal participation by men and women in various athletic programs without going to considerable expense or cutting successful programs to achieve gender equality. These schools also were uncertain about the degree of equalizing that would be necessary in order to avoid lawsuits.

In response, the Department of Health, Education, and Welfare (now the Department of Education) established a three-part test for determining whether an institution is complying with Title IX with respect to its athletic program. An institution has accommodated the interests of male and female students if it satisfies any of the three benchmarks:

> . . . intercollegiate-level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

> Where the members of one sex have been and are underrepresented among intercollegiate athletes, . . . the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> Where members of one sex are underrepresented among intercollegiate athletics and the institution cannot show a continuing practice of program expansion, . . . it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program (44 Fed. Reg. 71,418 [1979]).

The balance between a university's interest in maintaining a profitable and successful athletic program and its need to comply with Title IX is a delicate one. In *Kelley v. Board of Trustees,* 35 F.3d 265 (1994), the U.S. Court of Appeals for the Seventh Circuit addressed a typical case involving these competing interests. In *Kelley,* the men's swim team at the University of Illinois sued the university for violating Title IX after the school cut the men's, but not the women's, swimming program in an attempt to eliminate unprofitable athletic programs and to reduce its budget deficit. Although neither swim team was popular with spectators, and both programs were historically weak, the university did not cut the women's program because its legal counsel advised that doing so would violate Title IX. The court ruled that eliminating the men's program, but retaining the women's program, did not violate Title IX even though the school treated the two programs differently.

Although Title IX continues to have many critics, the effect that it has had upon women's athletics is practically unquestioned. Twenty-four years after the enactment of Title IX, the number of female athletes at the Olympic Games in Atlanta had risen to 287. The interest among spectators was almost startling, especially because women's athletics had suffered for years in order to garner support. About 65,000 fans watched the women's soccer team in 1996 win the gold medal, and another 35,000 spectators watched the women fall in the finals of the softball competition.

Interest in women's sports continued to increase throughout the 1990s. Although several professional women's basketball leagues had been established, few were successful. This changed in 1997 with the establishment of the Women's National Basketball Association (WNBA), which garnered support from the established National Basketball Association. The league has had unprecedented success, maintaining contracts with television networks that show the games. The focus on women's athletics expanded to a national scale in 1999, when the United States women's soccer team won a stunning victory in the World Cup competition. Neither the men's nor the women's soccer teams had had success in world-class competition, and the women's victory transformed many of the female athletes to celebrity status.

Few question that these events would have occurred were it not for Title IX. Women's college basketball, probably the highest-profiled sport for female athletes, typically receives equal attention as the corresponding men's programs. Likewise, softball and soccer have gained popularity among individual schools as spectator sports. Nevertheless, college and universities continue to pour extensive resources into larger men's program, especially football and men's basketball.

Many athletic departments note that these men's programs earn more revenues based upon a much larger fan base, so the support is justified. Athletic departments often chose to drop minor men's sports instead of adding women's sports, citing the budgetary constraints. Advocates for women's programs counter that cutting the budgets of these programs would not likely hinder the revenues significantly and that it would allow athletic programs both to add women's programs and to retain smaller men's programs.

Policies under the administration of President GEORGE W. BUSH have come under fire from supporters of women's athletics. During his campaign, Bush stated his opposition toward any racial or gender quotas, and some felt that this policy could cause conflict with Title IX. In 2002, the secretary of education established the Commission on Opportunity in Athletics, which issued its final report on February 28, 2003. Although the commission found that opportunities should be improved for all competitors, women's groups claimed that the report undermines the importance of improving opportunities for women's programs specifically.

### Academic Freedom: The Right to Speak Freely

The First Amendment prohibits the federal and state governments from infringing on freedom of speech. Not surprisingly, freedom of speech, which is central to academic freedom, is

highly prized on college and university campuses. At the same time, most educational institutions recognize the importance of maintaining an atmosphere in which all students enjoy equal educational opportunities and freedom from discrimination. The need to balance differing individual rights has led many universities to enact policies purporting to regulate or discipline certain types of speech, and was the focus of many First Amendment cases in the 1980s and early 1990s.

Racially and religiously motivated acts of VANDALISM, intimidation, and violence on college campuses began to attract increased attention in the mid 1980s. Much of this activity involved incidents like the following:

- A fraternity fund-raising "slave auction" featuring fraternity members in blackface who were "sold" to provide services to bidders
- The distribution at a state school of leaflets warning, "The Knights of the KU KLUX KLAN Are Watching You"
- A poster made by a student and hung on her dormitory room door, listing "homos" as a category of people who would be "shot on sight"

In response, many universities adopted policies that prohibited speech and conduct that caused offense or interfered with educational opportunities based on any number of characteristics, especially race, national origin, gender, and religion. The University of Michigan adopted a typical policy on discrimination and discriminatory harassment that became the subject of a lawsuit in 1989. In *Doe v. University of Michigan,* 721 F. Supp. 852 (1989), the U.S. District Court for the Eastern District of Michigan examined this policy and determined that it violated the First Amendment because it was vague and overbroad—that is, it was unclear about the scope of the speech that it would affect and thus potentially encompassed constitutionally protected speech. *Doe* was filed by a graduate student who feared that his theories about genetic bases for differences between men's and women's relative abilities to perform certain tasks would be regarded as a violation of the policy were he to discuss them in class, because some students might regard them as sexist and offensive.

The court agreed that the university policy violated the First Amendment and had a "chilling effect" on the free exchange of ideas. The court observed that the policy certainly applied to speech that would not be constitutionally protected, such as imminent threats of violence, but also swept under its umbrella speech that might be controversial or even offensive but otherwise constitutionally protected. "It is firmly settled," noted the court,

> that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. These principles acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's education mission.

The court then observed that because Michigan's policy was so vague that it encompassed even constitutionally protected speech, and because this vagueness led to the potential for ARBITRARY enforcement, the policy was unconstitutional.

First Amendment protection is not limited to the classroom setting alone. In *Iota Xi Chapter v. George Mason University,* 993 F.2d 386 (1993), the U.S. Court of Appeals for the Fourth Circuit held that George Mason University, a state university, had violated the Sigma Chi Fraternity's First Amendment rights by suspending its privileges as a university organization after the fraternity held an event, called the Ugly Woman Contest, that depicted women in a particularly degrading manner. The court held that skits, like motion pictures, movies, theatrical productions, and nude dancing, are a form of expression that are entitled to First Amendment protection.

Public university professors and employees also enjoy First Amendment protection, but as workers in the public sector, they are subject to certain limits. Generally, unlike private-sector employees, who may be disciplined or terminated for nearly anything that is not prohibited by state or federal law, public-sector employees may not be disciplined on the basis of their speech if the speech involves a matter of public concern. The state may discipline an employee if it can show that it would have done so regardless of the speech, or if the speech actually interfered with the effective fulfillment of public responsibilities.

In *Jeffries v. Harleston,* 52 F.3d 9 (1995), the U.S. Court of Appeals for the Second Circuit held that the City College of New York could reduce the term of a black studies professor's chairmanship based on an off-campus speech he had made (which had included derogatory remarks about Jews) about bias in the New York

public-school system. The court ruled that although the speech involved an area of public concern, the college was justified in reducing Jeffries's term because it was motivated by a reasonable prediction that the speech would adversely affect the school's operation. In an earlier case, the same court had held that the City College of New York could not undermine a philosophy professor's classes by setting up "alternative" sessions for students who might want to transfer out of the classes after the professor had published letters to scholarly journals that denigrated the intelligence of blacks (*Levin v. Harleston,* 966 F.2d 85 [1992]).

Even so, not all speech by public university employees is protected. Employees still may be disciplined for speech that does not involve an area of public concern, as the courts have defined it. In *Dambrot v. Central Michigan University,* 839 F. Supp. 477 (E.D. Mich. 1993), *aff'd,* 55 F.3d 1177 (6th Cir. 1995), the district court upheld the termination of a basketball coach who used the term *nigger* in a locker-room pep talk. The university refused to renew the coach's employment contract, arguing that his use of the term violated the university's policy on racial and ethnic harassment. Although the court found that the school's policy violated the First Amendment (for the same reasons as in *Doe*), it also found that the coach's speech did not involve an area of public concern.

A public institution also may restrict religious speech by faculty if failure to do so would violate the First Amendment's Establishment Clause (*Bishop v. Aronov,* 926 F.2d 1066 [1991]). In *Bishop,* the U.S. Court of Appeals for the Eleventh Circuit held that the University of Alabama could constitutionally restrict a professor from discussing his religious views during class, and could instruct him not to hold optional class sessions to discuss Christian perspectives on academic topics. The court noted that were the professor permitted to engage in these activities, the university would risk violating the Establishment Clause, which prohibits states from establishing religion and, by extension, extending preferential treatment to, or endorsement of, a particular religious view.

### Religion and Public Funding

The Establishment Clause prohibits states from establishing an official religion. Thus, a public university may not denominate itself as a religious school, nor may the state directly fund a private religious school. At the same time, the Free Exercise Clause prohibits states from restricting individuals in the practice of religion. Thus, a public university may not permit all student groups except for religious groups to use its facilities. Maintaining a balance between the two clauses is not simple, and it has generated controversy in two principal areas: the extent to which the state may fund attendance at private religious schools indirectly, and the extent to which public schools may fund religious activities on campus directly.

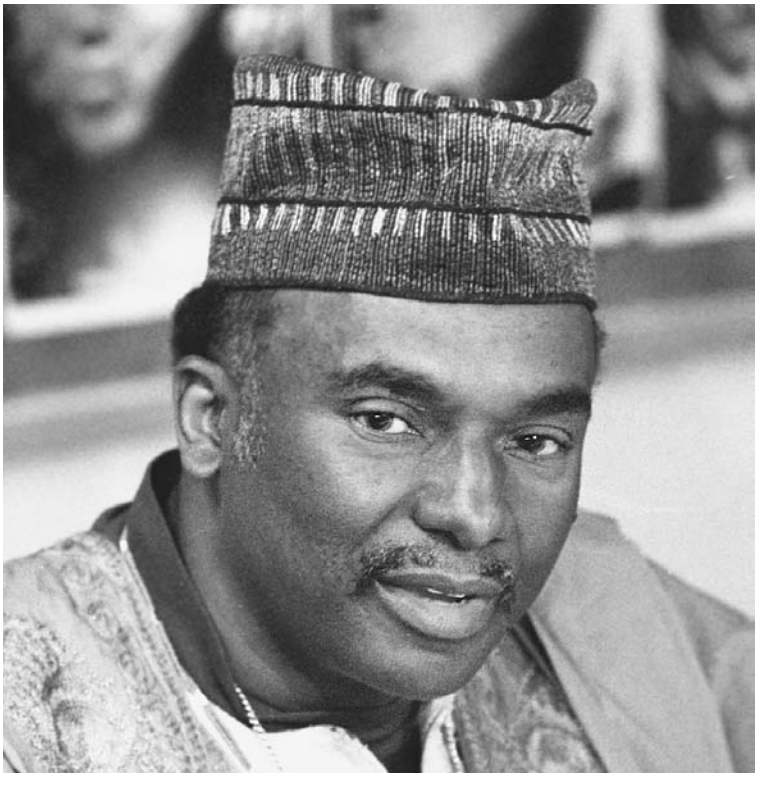

*In 1995 the Second Circuit Court of Appeals held that the City College of New York could reduce the term of Leonard Jeffries, a black studies professor and chairman at the school, based on an off-campus speech he made in 1992.*

AP/WIDE WORLD PHOTOS

**Public Funding of Private Religious Practice** In 1971, the U.S. Supreme Court decided *Lemon v. Kurtzman,* 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), which defined the scope of the Establishment Clause. In *Lemon,* the Court held that a state policy or practice violates the Establishment Clause if it fails to satisfy a three-part test: First, the policy must serve a secular purpose. Second, the primary effect of the policy cannot be to advance or inhibit religion. Third, the policy cannot foster an excessive entanglement of the state with religion.

Unfortunately, the *Lemon* test is easier to state than to apply, and it has led to numerous lawsuits concerning the relationship of state-funding programs to private religious organiza-

tions. Generally, a state law that provides benefits to individuals without regard to religion does not violate the Establishment Clause even if an individual uses the state benefits for a religious purpose. For example, in *Witters v. Washington Department of Services for the Blind,* 474 U.S. 481, 106 S. Ct. 748, 88 L. Ed. 2d 846 (1986), the U.S. Supreme Court held that a blind Washington resident was eligible for state vocational rehabilitation assistance, even though he planned to use the funds to complete his religious training at a Christian college. The Court held that payment of public assistance by the state satisfied the *Lemon* test because the aid was provided directly to the individual, was not skewed toward religion in any way, and created no financial incentive for students to undertake religious education. Furthermore, the Court noted that the primary effect of the assistance program was not to advance religion and that religious programs would not benefit in any significant or disproportionate way from the state program.

In contrast, in *Stark v. St. Cloud State University,* 802 F.2d 1046 (1986), the U.S. Court of Appeals for the Eighth Circuit held that a state university violated the Establishment Clause by permitting education students to satisfy their student-teaching requirement at parochial schools. The court noted that the public university approved the use of religious schools, including them on a list of appropriate schools for student teaching, and that because of this, the university had entangled itself excessively with religion.

**Public Schools and Religious Activity** Funding of religious activities in public schools requires similar BALANCING. The U.S. Supreme Court held in 1995 that a public university may fund a student-run religious publication without violating the Establishment Clause. In *Rosenberger v. Rector of the University of Virginia,* 515 U.S.819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995), a sharply divided Court considered a Christian student group's claim that the university's refusal to pay the publication costs of its newspaper, even though it paid the costs of printing other student publications, violated the Free Speech Clause of the First Amendment. The university had convinced the U.S. Court of Appeals for the Fourth Circuit that it had a compelling interest in not funding the newspaper: specifically, to avoid violating the Constitution's Establishment Clause, which prohibits the government from establishing, or promoting, religion. Before the U.S. Supreme Court, the university backed off on this argument and instead stated that it had a right to be selective in its choice of recipients of public funds (i.e. university student fees). The Court considered both arguments and found that the university's policy regarding the distribution of monies from student fees was neutral, that is, that it could not be seen as a policy designed to advance religion; the Court therefore concluded that the free speech rights of the student publication prevailed and ordered the university to pay the publication costs of the Christian student group's newspaper.

### Termination of Employment Claims

Colleges and universities have often been the subject of lawsuits by former employees who have been terminated. Many of these claims arise when an institution refuses to grant tenure to a faculty member. In most educational institutions, teachers and other faculty members are not guaranteed permanent employment when they are hired for a teaching position. The institution generally requires the teacher or professor to achieve certain goals, such as publishing scholarly articles or demonstrating superior teaching skills, within a prescribed period of time, often six to eight years. In state institutions, the process for granting tenure is usually prescribed by statute.

At the conclusion of this time period, an institution reviews the performances of the teacher, professor, or other employee. If the review is favorable, the institution may award tenure to the employee. Although tenure does not necessarily guarantee lifetime employment, it provides considerable protection for the employee from being terminated by the institution. On the other hand, if the employee is denied tenure, he or she will not be retained as an employee of the institution.

More often than not, disgruntled former employees lose their cases when they contest denial of tenure. Many contest the tenure process, while others claim breach of contract on the part of the institution. Additionally, several courts have had to consider whether a college or university has violated the constitutional rights of an employee by denying him or her tenure. For example, in *Hendrich v. Board of Regents of University of Wisconsin System*, 274 F.3d 1174 (7th Cir. 2001), the complainant claimed that the University of Wisconsin at

WHITEWATER had violated her equal protection and due process rights when the school denied her tenure. The U.S. Court of Appeals for the Seventh Circuit denied her claims, finding that she had failed to meet the necessary BURDEN OF PERSUASION on these issues.

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CROSS-REFERENCES

Religion; School Desegregation; Schools and School Districts.

## ♦ COLLIER, WILLIAM MILLER

William Miller Collier was born November 11, 1867, in Lodi, New York. He graduated from Hamilton College with a bachelor of arts degree in 1889 and a master of arts degree in 1892. He was the recipient of several other degrees from various institutions, including an honorary doctor of laws degree from New York University in 1920; a doctor of CIVIL LAW degree from Wesleyan University in 1920; and a doctor of letters and humanities degree from Hobart College in 1920.

*William Miller Collier.*
LIBRARY OF CONGRESS

After his admission to the New York bar in 1892 Collier established his law firm in Auburn and practiced law until 1903. From 1903 to 1904 he performed the duties of special assistant to the U.S. attorney general where his main task was the enforcement of ANTITRUST LAWS.

In 1905 Collier entered the diplomatic field and for the next four years he served as U.S. minister to Spain.

Collier's next field of endeavor was that of education. He presented a series of lectures on INTERNATIONAL LAW at New York Law School from 1912 to 1918. He became president of George Washington University in that same year

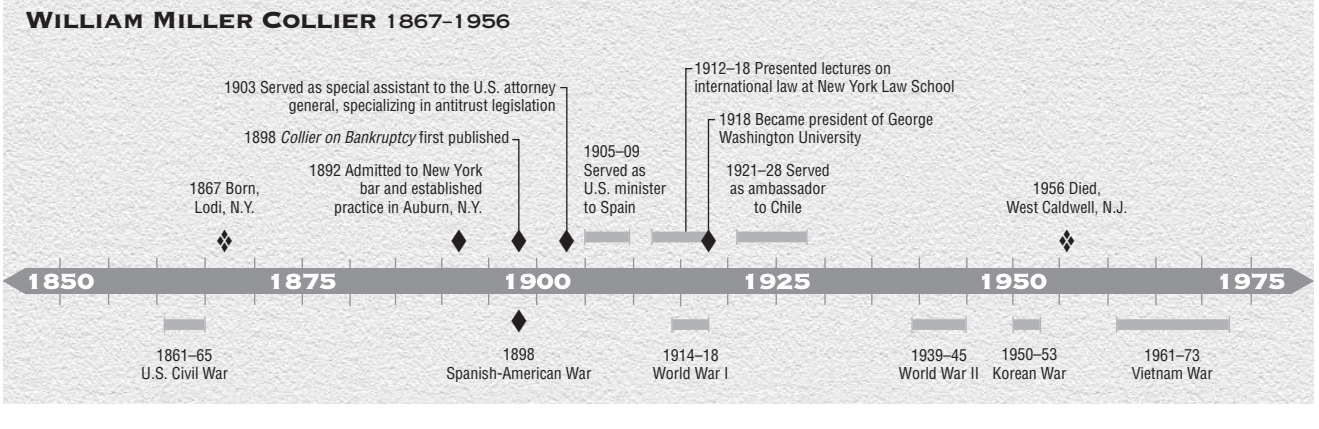

and served in this capacity for the next three years.

In 1921 Collier reentered the foreign service and served as ambassador to Chile until 1928.

Collier was the author of several noteworthy publications, including *Collier on Bankruptcy* (1898); *Collier on Civil Service Law* (1901); *The Trusts: What Can We Do with Them—What Can They Do for Us?* (1900); and *The Influence of Lawyers in the Past and in the Future* (1921).

He died April 15, 1956, in West Caldwell, New Jersey.

## COLLISION

*The violent contact of one vehicle—such as an automobile, ship, or boat—with another vehicle.*

Collision insurance is a type of policy that motorists purchase to cover property losses in the event of a car accident.

A collision that does not result from the NEGLIGENCE of either vessel involved is considered to be an inevitable accident. In the event of an inevitable accident, neither party is liable to the other, but each bears his or her own individual losses. Exclusion from fault is ordinarily determined with reference to the safeguards observed by the parties to the inevitable accident.

## COLLUSION

*An agreement between two or more people to defraud a person of his or her rights or to obtain something that is prohibited by law.*

*A secret arrangement wherein two or more people whose legal interests seemingly conflict conspire to commit* FRAUD *upon another person; a pact between two people to deceive a court with the purpose of obtaining something that they would not be able to get through legitimate judicial channels.*

Collusion has often been used in DIVORCE proceedings. In the past some jurisdictions made it extremely difficult for a couple to obtain a divorce. Often a "sweetheart" agreement would take place, whereby a husband or wife would commit, or appear to commit, ADULTERY or other acts that would justify a divorce. The public policy against collusive divorces is based on the idea that such actions would conflict with the effective administration by society of laws on marriage and divorce and would undermine marriage as a stabilizing force in society.

Virtually all jurisdictions have adopted no-fault divorce statutes or laws that allow a couple to obtain a divorce without traditional fault grounds, such as adultery or cruel and inhuman treatment. Because of this development, collusive divorces should diminish in number, since it will no longer be necessary for persons seeking a divorce to resort to such measures.

The fundamental societal objection to collusion is that it promotes dishonesty and fraud, which, in turn, undermines the integrity of the entire judicial system.

## COLOR

*The appearance or semblance of a thing, as distinguished from the thing itself.*

The thing to which the term *color* is applied does not necessarily have to possess the character imputed to it. A person who holds land under color of title does not have actual title to it.

## COLOR OF LAW

*The appearance of a legal right.*

The act of a state officer, regardless of whether or not the act is within the limits of his or her authority, is considered an act under color of law if the officer purports to be conducting himself or herself in the course of official duties.

Under the CIVIL RIGHTS ACT of 1871 (42 U.S.C.A. SECTION 1983), color of law is synonymous with STATE ACTION, which is conduct by an officer that bears a sufficiently close nexus to a state so that the action is treated as though it is by the state.

CROSS-REFERENCES

Ku Klux Klan Act.

## COLOR OF OFFICE

*A description of an act by an officer done without authority under the pretext that he or she has an official right to do the act by reason of the officer's position.*

An officer acts under color of office when he or she extracts a fee from another under the pretense that the office confers the authority on him or her to do so. Such conduct may constitute EXTORTION, a crime proscribed by statute in most states. The penalty imposed on a public officer for extortion may include FORFEITURE of office in addition to a fine, imprisonment, or both.

## COLOR OF TITLE

*The appearance of a legally enforceable right of possession or ownership. A written instrument that purports to transfer ownership of property but, due to some defect, does not have that effect. A document purporting to pass title to land, such as a deed that is defective due to a lack of title in the grantor, passes only color of title to the grantee.*

It has been held that in order to pass color of title, the instrument appearing to pass title must be in good form, duly executed, and profess to pass good title.

## COLORABLE

*False; counterfeit; something that is false but has the appearance of truth.*

# Abbreviations

| | |
|---|---|
| A. | Atlantic Reporter |
| A. 2d | Atlantic Reporter, Second Series |
| AA | Alcoholics Anonymous |
| AAA | American Arbitration Association; Agricultural Adjustment Act of 1933 |
| AALS | Association of American Law Schools |
| AAPRP | All African People's Revolutionary Party |
| AARP | American Association of Retired Persons |
| AAS | American Anti-Slavery Society |
| ABA | American Bar Association; Architectural Barriers Act of 1968; American Bankers Association |
| ABC | American Broadcasting Companies, Inc. (formerly American Broadcasting Corporation) |
| ABM | Antiballistic missile |
| ABM Treaty | Anti-Ballistic Missile Treaty of 1972 |
| ABVP | Anti-Biased Violence Project |
| A/C | Account |
| A.C. | Appeal cases |
| ACAA | Air Carrier Access Act |
| ACCA | Armed Career Criminal Act of 1984 |
| ACF | Administration for Children and Families |
| ACLU | American Civil Liberties Union |
| ACRS | Accelerated Cost Recovery System |
| ACS | Agricultural Cooperative Service |
| ACT | American College Test |
| Act'g Legal Adv. | Acting Legal Advisor |
| ACUS | Administrative Conference of the United States |
| ACYF | Administration on Children, Youth, and Families |
| A.D. 2d | Appellate Division, Second Series, N.Y. |
| ADA | Americans with Disabilities Act of 1990 |
| ADAMHA | Alcohol, Drug Abuse, and Mental Health Administration |
| ADC | Aid to Dependent Children |
| ADD | Administration on Developmental Disabilities |
| ADEA | Age Discrimination in Employment Act of 1967 |
| ADL | Anti-Defamation League |
| ADR | Alternative dispute resolution |
| AEC | Atomic Energy Commission |
| AECB | Arms Export Control Board |
| AEDPA | Antiterrorism and Effective Death Penalty Act |
| A.E.R. | All England Law Reports |
| AFA | American Family Association; Alabama Freethought Association |
| AFB | American Farm Bureau |
| AFBF | American Farm Bureau Federation |
| AFDC | Aid to Families with Dependent Children |
| aff'd per cur. | Affirmed by the court |
| AFIS | Automated fingerprint identification system |
| AFL | American Federation of Labor |

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| AFL-CIO | American Federation of Labor and Congress of Industrial Organizations |
| AFRes | Air Force Reserve |
| AFSC | American Friends Service Committee |
| AFSCME | American Federation of State, County, and Municipal Employees |
| AGRICOLA | Agricultural Online Access |
| AIA | Association of Insurance Attorneys |
| AIB | American Institute for Banking |
| AID | Artificial insemination using a third-party donor's sperm; Agency for International Development |
| AIDS | Acquired immune deficiency syndrome |
| AIH | Artificial insemination using the husband's sperm |
| AIM | American Indian Movement |
| AIPAC | American Israel Public Affairs Committee |
| AIUSA | Amnesty International, U.S.A. Affiliate |
| AJS | American Judicature Society |
| ALA | American Library Association |
| Alcoa | Aluminum Company of America |
| ALEC | American Legislative Exchange Council |
| ALF | Animal Liberation Front |
| ALI | American Law Institute |
| ALJ | Administrative law judge |
| All E.R. | All England Law Reports |
| ALO | Agency Liaison |
| A.L.R. | American Law Reports |
| ALY | *American Law Yearbook* |
| AMA | American Medical Association |
| AMAA | Agricultural Marketing Agreement Act |
| Am. Dec. | American Decisions |
| amdt. | Amendment |
| Amer. St. Papers, For. Rels. | American State Papers, Legislative and Executive Documents of the Congress of the U.S., Class I, Foreign Relations, 1832–1859 |
| AMS | Agricultural Marketing Service |
| AMVETS | American Veterans (of World War II) |
| ANA | Administration for Native Americans |
| Ann. Dig. | Annual Digest of Public International Law Cases |
| ANPA | American Newspaper Publishers Association |
| ANSCA | Alaska Native Claims Act |
| ANZUS | Australia-New Zealand-United States Security Treaty Organization |
| AOA | Administration on Aging |
| AOE | Arizonans for Official English |
| AOL | America Online |
| AP | Associated Press |
| APA | Administrative Procedure Act of 1946 |
| APHIS | Animal and Plant Health Inspection Service |
| App. Div. | Appellate Division Reports, N.Y. Supreme Court |
| Arb. Trib., U.S.-British | Arbitration Tribunal, Claim Convention of 1853, United States and Great Britain Convention of 1853 |
| Ardcor | American Roller Die Corporation |
| ARPA | Advanced Research Projects Agency |
| ARPANET | Advanced Research Projects Agency Network |
| ARS | Advanced Record System |
| Art. | Article |
| ARU | American Railway Union |
| ASCME | American Federation of State, County, and Municipal Employees |
| ASCS | Agriculture Stabilization and Conservation Service |
| ASM | Available Seatmile |
| ASPCA | American Society for the Prevention of Cruelty to Animals |
| Asst. Att. Gen. | Assistant Attorney General |
| AT&T | American Telephone and Telegraph |
| ATFD | Alcohol, Tobacco and Firearms Division |
| ATLA | Association of Trial Lawyers of America |
| ATO | Alpha Tau Omega |
| ATTD | Alcohol and Tobacco Tax Division |
| ATU | Alcohol Tax Unit |
| AUAM | American Union against Militarism |
| AUM | Animal Unit Month |
| AZT | Azidothymidine |

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| BAC | Blood alcohol concentration |
| BALSA | Black-American Law Student Association |
| BATF | Bureau of Alcohol, Tobacco and Firearms |
| BBS | Bulletin Board System |
| BCCI | Bank of Credit and Commerce International |
| BEA | Bureau of Economic Analysis |
| Bell's Cr. C. | Bell's English Crown Cases |
| Bevans | United States Treaties, etc. *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled under the direction of Charles I. Bevans, 1968–76) |
| BFOQ | Bona fide occupational qualification |
| BI | Bureau of Investigation |
| BIA | Bureau of Indian Affairs; Board of Immigration Appeals |
| BID | Business improvement district |
| BJS | Bureau of Justice Statistics |
| Black. | Black's United States Supreme Court Reports |
| Blatchf. | Blatchford's United States Circuit Court Reports |
| BLM | Bureau of Land Management |
| BLS | Bureau of Labor Statistics |
| BMD | Ballistic missile defense |
| BNA | Bureau of National Affairs |
| BOCA | Building Officials and Code Administrators International |
| BOP | Bureau of Prisons |
| BPP | Black Panther Party for Self-defense |
| Brit. and For. | British and Foreign State Papers |
| BSA | Boy Scouts of America |
| BTP | Beta Theta Pi |
| Burr. | James Burrows, *Report of Cases Argued and Determined in the Court of King's Bench during the Time of Lord Mansfield* (1766–1780) |
| BVA | Board of Veterans Appeals |
| c. | Chapter |
| $C^3I$ | Command, Control, Communications, and Intelligence |
| C.A. | Court of Appeals |
| CAA | Clean Air Act |
| CAB | Civil Aeronautics Board; Corporation for American Banking |
| CAFE | Corporate average fuel economy |
| Cal. 2d | California Reports, Second Series |
| Cal. 3d | California Reports, Third Series |
| CALR | Computer-assisted legal research |
| Cal. Rptr. | California Reporter |
| CAP | Common Agricultural Policy |
| CARA | Classification and Ratings Administration |
| CATV | Community antenna television |
| CBO | Congressional Budget Office |
| CBS | Columbia Broadcasting System |
| CBOEC | Chicago Board of Election Commissioners |
| CCC | Commodity Credit Corporation |
| CCDBG | Child Care and Development Block Grant of 1990 |
| C.C.D. Pa. | Circuit Court Decisions, Pennsylvania |
| C.C.D. Va. | Circuit Court Decisions, Virginia |
| CCEA | Cabinet Council on Economic Affairs |
| CCP | Chinese Communist Party |
| CCR | Center for Constitutional Rights |
| C.C.R.I. | Circuit Court, Rhode Island |
| CD | Certificate of deposit; compact disc |
| CDA | Communications Decency Act |
| CDBG | Community Development Block Grant Program |
| CDC | Centers for Disease Control and Prevention; Community Development Corporation |
| CDF | Children's Defense Fund |
| CDL | Citizens for Decency through Law |
| CD-ROM | Compact disc read-only memory |
| CDS | Community Dispute Services |
| CDW | Collision damage waiver |
| CENTO | Central Treaty Organization |
| CEO | Chief executive officer |
| CEQ | Council on Environmental Quality |

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| CERCLA | Comprehensive Environmental Response, Compensation, and Liability Act of 1980 |
| cert. | *Certiorari* |
| CETA | Comprehensive Employment and Training Act |
| C & F | Cost and freight |
| CFC | Chlorofluorocarbon |
| CFE Treaty | Conventional Forces in Europe Treaty of 1990 |
| C.F. & I. | Cost, freight, and insurance |
| C.F.R | Code of Federal Regulations |
| CFNP | Community Food and Nutrition Program |
| CFTA | Canadian Free Trade Agreement |
| CFTC | Commodity Futures Trading Commission |
| Ch. | Chancery Division, English Law Reports |
| CHAMPVA | Civilian Health and Medical Program at the Veterans Administration |
| CHEP | Cuban/Haitian Entrant Program |
| CHINS | Children in need of supervision |
| CHIPS | Child in need of protective services |
| Ch.N.Y. | Chancery Reports, New York |
| Chr. Rob. | Christopher Robinson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (1801–1808) |
| CIA | Central Intelligence Agency |
| CID | Commercial Item Descriptions |
| C.I.F. | Cost, insurance, and freight |
| CINCNORAD | Commander in Chief, North American Air Defense Command |
| C.I.O. | Congress of Industrial Organizations |
| CIPE | Center for International Private Enterprise |
| C.J. | Chief justice |
| CJIS | Criminal Justice Information Services |
| C.J.S. | Corpus Juris Secundum |
| Claims Arb. under Spec. Conv., Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| CLASP | Center for Law and Social Policy |
| CLE | Center for Law and Education; Continuing Legal Education |
| CLEO | Council on Legal Education Opportunity; Chief Law Enforcement Officer |
| CLP | Communist Labor Party of America |
| CLS | Christian Legal Society; critical legal studies (movement); Critical Legal Studies (membership organization) |
| C.M.A. | Court of Military Appeals |
| CMEA | Council for Mutual Economic Assistance |
| CMHS | Center for Mental Health Services |
| C.M.R. | Court of Military Review |
| CNN | Cable News Network |
| CNO | Chief of Naval Operations |
| CNOL | Consolidated net operating loss |
| CNR | Chicago and Northwestern Railway |
| CO | Conscientious Objector |
| C.O.D. | Cash on delivery |
| COGP | Commission on Government Procurement |
| COINTELPRO | Counterintelligence Program |
| Coke Rep. | Coke's English King's Bench Reports |
| COLA | Cost-of-living adjustment |
| COMCEN | Federal Communications Center |
| Comp. | Compilation |
| Conn. | Connecticut Reports |
| CONTU | National Commission on New Technological Uses of Copyrighted Works |
| Conv. | Convention |
| COPA | Child Online Protection Act (1998) |
| COPS | Community Oriented Policing Services |
| Corbin | Arthur L. Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (1950) |
| CORE | Congress on Racial Equality |
| Cox's Crim. Cases | Cox's Criminal Cases (England) |
| COYOTE | Call Off Your Old Tired Ethics |

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| CPA | Certified public accountant |
| CPB | Corporation for Public Broadcasting, the |
| CPI | Consumer Price Index |
| CPPA | Child Pornography Prevention Act |
| CPSC | Consumer Product Safety Commission |
| Cranch | Cranch's United States Supreme Court Reports |
| CRF | Constitutional Rights Foundation |
| CRR | Center for Constitutional Rights |
| CRS | Congressional Research Service; Community Relations Service |
| CRT | Critical race theory |
| CSA | Community Services Administration |
| CSAP | Center for Substance Abuse Prevention |
| CSAT | Center for Substance Abuse Treatment |
| CSC | Civil Service Commission |
| CSCE | Conference on Security and Cooperation in Europe |
| CSG | Council of State Governments |
| CSO | Community Service Organization |
| CSP | Center for the Study of the Presidency |
| C-SPAN | Cable-Satellite Public Affairs Network |
| CSRS | Cooperative State Research Service |
| CSWPL | Center on Social Welfare Policy and Law |
| CTA | *Cum testamento annexo* (with the will attached) |
| Ct. Ap. D.C. | Court of Appeals, District of Columbia |
| Ct. App. No. Ireland | Court of Appeals, Northern Ireland |
| Ct. Cl. | Court of Claims, United States |
| Ct. Crim. Apps. | Court of Criminal Appeals (England) |
| CTI | Consolidated taxable income |
| Ct. of Sess., Scot. | Court of Sessions, Scotland |
| CU | Credit union |
| CUNY | City University of New York |
| Cush. | Cushing's Massachusetts Reports |
| CWA | Civil Works Administration; Clean Water Act |
| DACORB | Department of the Army Conscientious Objector Review Board |
| Dall. | Dallas's Pennsylvania and United States Reports |
| DAR | Daughters of the American Revolution |
| DARPA | Defense Advanced Research Projects Agency |
| DAVA | Defense Audiovisual Agency |
| D.C. | United States District Court; District of Columbia |
| D.C. Del. | United States District Court, Delaware |
| D.C. Mass. | United States District Court, Massachusetts |
| D.C. Md. | United States District Court, Maryland |
| D.C.N.D.Cal. | United States District Court, Northern District, California |
| D.C.N.Y. | United States District Court, New York |
| D.C.Pa. | United States District Court, Pennsylvania |
| DCS | Deputy Chiefs of Staff |
| DCZ | District of the Canal Zone |
| DDT | Dichlorodiphenyltricloro-ethane |
| DEA | Drug Enforcement Administration |
| Decl. Lond. | Declaration of London, February 26, 1909 |
| Dev. & B. | Devereux & Battle's North Carolina Reports |
| DFL | Minnesota Democratic-Farmer-Labor |
| DFTA | Department for the Aging |
| Dig. U.S. Practice in Intl. Law | Digest of U.S. Practice in International Law |
| Dist. Ct. | D.C. United States District Court, District of Columbia |
| D.L.R. | Dominion Law Reports (Canada) |
| DMCA | Digital Millennium Copyright Act |
| DNA | Deoxyribonucleic acid |
| Dnase | Deoxyribonuclease |
| DNC | Democratic National Committee |
| DOC | Department of Commerce |
| DOD | Department of Defense |
| DODEA | Department of Defense Education Activity |
| Dodson | Dodson's Reports, English Admiralty Courts |
| DOE | Department of Energy |

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| DOER | Department of Employee Relations |
| DOJ | Department of Justice |
| DOL | Department of Labor |
| DOMA | Defense of Marriage Act of 1996 |
| DOS | Disk operating system |
| DOT | Department of Transportation |
| DPT | Diphtheria, pertussis, and tetanus |
| DRI | Defense Research Institute |
| DSAA | Defense Security Assistance Agency |
| DUI | Driving under the influence; driving under intoxication |
| DVD | Digital versatile disc |
| DWI | Driving while intoxicated |
| EAHCA | Education for All Handicapped Children Act of 1975 |
| EBT | Examination before trial |
| E.coli | Escherichia coli |
| ECPA | Electronic Communications Privacy Act of 1986 |
| ECSC | Treaty of the European Coal and Steel Community |
| EDA | Economic Development Administration |
| EDF | Environmental Defense Fund |
| E.D.N.Y. | Eastern District, New York |
| EDP | Electronic data processing |
| E.D. Pa. | Eastern-District, Pennsylvania |
| EDSC | Eastern District, South Carolina |
| EDT | Eastern daylight time |
| E.D. Va. | Eastern District, Virginia |
| EEC | European Economic Community; European Economic Community Treaty |
| EEOC | Equal Employment Opportunity Commission |
| EFF | Electronic Frontier Foundation |
| EFT | Electronic funds transfer |
| Eliz. | Queen Elizabeth (Great Britain) |
| Em. App. | Temporary Emergency Court of Appeals |
| ENE | Early neutral evaluation |
| Eng. Rep. | English Reports |
| EOP | Executive Office of the President |
| EPA | Environmental Protection Agency; Equal Pay Act of 1963 |
| ERA | Equal Rights Amendment |
| ERDC | Energy Research and Development Commission |
| ERISA | Employee Retirement Income Security Act of 1974 |
| ERS | Economic Research Service |
| ERTA | Economic Recovery Tax Act of 1981 |
| ESA | Endangered Species Act of 1973 |
| ESF | Emergency support function; Economic Support Fund |
| ESRD | End-Stage Renal Disease Program |
| ETA | Employment and Training Administration |
| ETS | Environmental tobacco smoke |
| et seq. | *Et sequentes* or *et sequentia* (“and the following”) |
| EU | European Union |
| Euratom | European Atomic Energy Community |
| Eur. Ct. H.R. | European Court of Human Rights |
| Ex. | English Exchequer Reports, Welsby, Hurlstone & Gordon |
| Exch. | Exchequer Reports (Welsby, Hurlstone & Gordon) |
| Ex Com | Executive Committee of the National Security Council |
| Eximbank | Export-Import Bank of the United States |
| F. | Federal Reporter |
| F. 2d | Federal Reporter, Second Series |
| FAA | Federal Aviation Administration; Federal Arbitration Act |
| FAAA | Federal Alcohol Administration Act |
| FACE | Freedom of Access to Clinic Entrances Act of 1994 |
| FACT | Feminist Anti-Censorship Task Force |
| FAIRA | Federal Agriculture Improvement and Reform Act of 1996 |
| FAMLA | Family and Medical Leave Act of 1993 |
| Fannie Mae | Federal National Mortgage Association |
| FAO | Food and Agriculture Organization of the United Nations |
| FAR | Federal Acquisition Regulations |

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| FAS | Foreign Agricultural Service |
| FBA | Federal Bar Association |
| FBI | Federal Bureau of Investigation |
| FCA | Farm Credit Administration |
| F. Cas. | Federal Cases |
| FCC | Federal Communications Commission |
| FCIA | Foreign Credit Insurance Association |
| FCIC | Federal Crop Insurance Corporation |
| FCLAA | Federal Cigarette Labeling and Advertising Act |
| FCRA | Fair Credit Reporting Act |
| FCU | Federal credit unions |
| FCUA | Federal Credit Union Act |
| FCZ | Fishery Conservation Zone |
| FDA | Food and Drug Administration |
| FDIC | Federal Deposit Insurance Corporation |
| FDPC | Federal Data Processing Center |
| FEC | Federal Election Commission |
| FECA | Federal Election Campaign Act of 1971 |
| Fed. Cas. | Federal Cases |
| FEHA | Fair Employment and Housing Act |
| FEHBA | Federal Employees Health Benefit Act |
| FEMA | Federal Emergency Management Agency |
| FERC | Federal Energy Regulatory Commission |
| FFB | Federal Financing Bank |
| FFDC | Federal Food, Drug, and Cosmetics Act |
| FGIS | Federal Grain Inspection Service |
| FHA | Federal Housing Administration |
| FHAA | Fair Housing Amendments Act of 1998 |
| FHWA | Federal Highway Administration |
| FIA | Federal Insurance Administration |
| FIC | Federal Information Centers; Federation of Insurance Counsel |
| FICA | Federal Insurance Contributions Act |
| FIFRA | Federal Insecticide, Fungicide, and Rodenticide Act |
| FIP | Forestry Incentives Program |
| FIRREA | Financial Institutions Reform, Recovery, and Enforcement Act of 1989 |
| FISA | Foreign Intelligence Surveillance Act of 1978 |
| FISC | Foreign Intelligence Surveillance Court of Review |
| FJC | Federal Judicial Center |
| FLSA | Fair Labor Standards Act |
| FMC | Federal Maritime Commission |
| FMCS | Federal Mediation and Conciliation Service |
| FmHA | Farmers Home Administration |
| FMLA | Family and Medical Leave Act of 1993 |
| FNMA | Federal National Mortgage Association, "Fannie Mae" |
| F.O.B. | Free on board |
| FOIA | Freedom of Information Act |
| FOMC | Federal Open Market Committee |
| FPA | Federal Power Act of 1935 |
| FPC | Federal Power Commission |
| FPMR | Federal Property Management Regulations |
| FPRS | Federal Property Resources Service |
| FR | Federal Register |
| FRA | Federal Railroad Administration |
| FRB | Federal Reserve Board |
| FRC | Federal Radio Commission |
| F.R.D. | Federal Rules Decisions |
| FSA | Family Support Act |
| FSB | Federal'naya Sluzhba Bezopasnosti (the Federal Security Service of Russia) |
| FSLIC | Federal Savings and Loan Insurance Corporation |
| FSQS | Food Safety and Quality Service |
| FSS | Federal Supply Service |
| F. Supp. | Federal Supplement |
| FTA | U.S.-Canada Free Trade Agreement of 1988 |
| FTC | Federal Trade Commission |
| FTCA | Federal Tort Claims Act |
| FTS | Federal Telecommunications System |
| FTS2000 | Federal Telecommunications System 2000 |
| FUCA | Federal Unemployment Compensation Act of 1988 |

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| FUTA | Federal Unemployment Tax Act |
| FWPCA | Federal Water Pollution Control Act of 1948 |
| FWS | Fish and Wildlife Service |
| GAL | Guardian ad litem |
| GAO | General Accounting Office; Governmental Affairs Office |
| GAOR | General Assembly Official Records, United Nations |
| GAAP | Generally accepted accounting principles |
| GA Res. | General Assembly Resolution (United Nations) |
| GATT | General Agreement on Tariffs and Trade |
| GCA | Gun Control Act |
| Gen. Cls. Comm. | General Claims Commission, United States and Panama; General Claims United States and Mexico |
| Geo. II | King George II (Great Britain) |
| Geo. III | King George III (Great Britain) |
| GHB | Gamma-hydroxybutrate |
| GI | Government Issue |
| GID | General Intelligence Division |
| GM | General Motors |
| GNMA | Government National Mortgage Association, "Ginnie Mae" |
| GNP | Gross national product |
| GOP | Grand Old Party (Republican Party) |
| GOPAC | Grand Old Party Action Committee |
| GPA | Office of Governmental and Public Affairs |
| GPO | Government Printing Office |
| GRAS | Generally recognized as safe |
| Gr. Br., Crim. Ct. App. | Great Britain, Court of Criminal Appeals |
| GRNL | Gay Rights-National Lobby |
| GSA | General Services Administration |
| Hackworth | Green Haywood Hackworth, *Digest of International Law* (1940–1944) |
| Hay and Marriott | Great Britain. High Court of Admiralty, *Decisions in the High Court of Admiralty during the Time of Sir George Hay and of Sir James Marriott, Late Judges of That Court* (1801) |
| HBO | Home Box Office |
| HCFA | Health Care Financing Administration |
| H.Ct. | High Court |
| HDS | Office of Human Development Services |
| Hen. & M. | Hening & Munford's Virginia Reports |
| HEW | Department of Health, Education, and Welfare |
| HFCA | Health Care Financing Administration |
| HGI | Handgun Control, Incorporated |
| HHS | Department of Health and Human Services |
| Hill | Hill's New York Reports |
| HIRE | Help through Industry Retraining and Employment |
| HIV | Human immunodeficiency virus |
| H.L. | House of Lords Cases (England) |
| H. Lords | House of Lords (England) |
| HMO | Health Maintenance Organization |
| HNIS | Human Nutrition Information Service |
| Hong Kong L.R. | Hong Kong Law Reports |
| How. | Howard's United States Supreme Court Reports |
| How. St. Trials | Howell's English State Trials |
| HUAC | House Un-American Activities Committee |
| HUD | Department of Housing and Urban Development |
| Hudson, Internatl. Legis. | Manley Ottmer Hudson, ed., *International Legislation: A Collection of the Texts of Multipartite International Instruments of General Interest Beginning with the Covenant of the League of Nations* (1931) |
| Hudson, World Court Reps. | Manley Ottmer Hudson, ea., *World Court Reports* (1934– ) |
| Hun | Hun's New York Supreme Court Reports |
| Hunt's Rept. | Bert L. Hunt, *Report of the American and Panamanian General Claims Arbitration* (1934) |
| IAEA | International Atomic Energy Agency |
| IALL | International Association of Law Libraries |

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| IBA | International Bar Association |
| IBM | International Business Machines |
| ICA | Interstate Commerce Act |
| ICBM | Intercontinental ballistic missile |
| ICC | Interstate Commerce Commission; International Criminal Court |
| ICJ | International Court of Justice |
| ICM | Institute for Court Management |
| IDEA | Individuals with Disabilities Education Act of 1975 |
| IDOP | International Dolphin Conservation Program |
| IEP | Individualized educational program |
| IFC | International Finance Corporation |
| IGRA | Indian Gaming Regulatory Act of 1988 |
| IJA | Institute of Judicial Administration |
| IJC | International Joint Commission |
| ILC | International Law Commission |
| ILD | International Labor Defense |
| Ill. Dec. | Illinois Decisions |
| ILO | International Labor Organization |
| IMF | International Monetary Fund |
| INA | Immigration and Nationality Act |
| IND | Investigational new drug |
| INF Treaty | Intermediate-Range Nuclear Forces Treaty of 1987 |
| INS | Immigration and Naturalization Service |
| INTELSAT | International Telecommunications Satellite Organization |
| Interpol | International Criminal Police Organization |
| Int'l. Law Reps. | International Law Reports |
| Intl. Legal Mats. | International Legal Materials |
| IOC | International Olympic Committee |
| IPDC | International Program for the Development of Communication |
| IPO | Intellectual Property Owners |
| IPP | Independent power producer |
| IQ | Intelligence quotient |
| I.R. | Irish Reports |
| IRA | Individual retirement account; Irish Republican Army |
| IRC | Internal Revenue Code |
| IRCA | Immigration Reform and Control Act of 1986 |
| IRS | Internal Revenue Service |
| ISO | Independent service organization |
| ISP | Internet service provider |
| ISSN | International Standard Serial Numbers |
| ITA | International Trade Administration |
| ITI | Information Technology Integration |
| ITO | International Trade Organization |
| ITS | Information Technology Service |
| ITT | International Telephone and Telegraph Corporation |
| ITU | International Telecommunication Union |
| IUD | Intrauterine device |
| IWC | International Whaling Commission |
| IWW | Industrial Workers of the World |
| JAGC | Judge Advocate General's Corps |
| JCS | Joint Chiefs of Staff |
| JDL | Jewish Defense League |
| JNOV | Judgment *non obstante veredicto* ("judgment nothing to recommend it" or "judgment notwithstanding the verdict") |
| JOBS | Jobs Opportunity and Basic Skills |
| John. Ch. | Johnson's New York Chancery Reports |
| Johns. | Johnson's Reports (New York) |
| JP | Justice of the peace |
| K.B. | King's Bench Reports (England) |
| KFC | Kentucky Fried Chicken |
| KGB | Komitet Gosudarstvennoi Bezopasnosti (the State Security Committee for countries in the former Soviet Union) |
| KKK | Ku Klux Klan |
| KMT | Kuomintang (Chinese, "national people's party") |
| LAD | Law Against Discrimination |

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| LAPD | Los Angeles Police Department |
| LC | Library of Congress |
| LCHA | Longshoremen's and Harbor Workers Compensation Act of 1927 |
| LD50 | Lethal dose 50 |
| LDEF | Legal Defense and Education Fund (NOW) |
| LDF | Legal Defense Fund, Legal Defense and Educational Fund of the NAACP |
| LEAA | Law Enforcement Assistance Administration |
| L.Ed. | Lawyers' Edition Supreme Court Reports |
| LI | Letter of interpretation |
| LLC | Limited Liability Company |
| LLP | Limited Liability Partnership |
| LMSA | Labor-Management Services Administration |
| LNTS | League of Nations Treaty Series |
| Lofft's Rep. | Lofft's English King's Bench Reports |
| L.R. | Law Reports (English) |
| LSAC | Law School Admission Council |
| LSAS | Law School Admission Service |
| LSAT | Law School Aptitude Test |
| LSC | Legal Services Corporation; Legal Services for Children |
| LSD | Lysergic acid diethylamide |
| LSDAS | Law School Data Assembly Service |
| LTBT | Limited Test Ban Treaty |
| LTC | Long Term Care |
| MAD | Mutual assured destruction |
| MADD | Mothers against Drunk Driving |
| MALDEF | Mexican American Legal Defense and Educational Fund |
| Malloy | William M. Malloy, ed., *Treaties, Conventions International Acts, Protocols, and Agreements between the United States of America and Other Powers* (1910–1938) |
| Martens | Georg Friedrich von Martens, ea., *Noveau recueil général de traités et autres actes relatifs aux rapports de droit international* (Series I, 20 vols. [1843–1875]; Series II, 35 vols. [1876–1908]; Series III [1909– ]) |
| Mass. | Massachusetts Reports |
| MCC | Metropolitan Correctional Center |
| MCCA | Medicare Catastrophic Coverage Act of 1988 |
| MCH | Maternal and Child Health Bureau |
| MCRA | Medical Care Recovery Act of 1962 |
| MDA | Medical Devices Amendments of 1976 |
| Md. App. | Maryland, Appeal Cases |
| M.D. Ga. | Middle District, Georgia |
| Mercy | Movement Ensuring the Right to Choose for Yourself |
| Metc. | Metcalf's Massachusetts Reports |
| MFDP | Mississippi Freedom Democratic party |
| MGT | Management |
| MHSS | Military Health Services System |
| Miller | David Hunter Miller, ea., *Treaties and Other International Acts of the United States of America* (1931–1948) |
| Minn. | Minnesota Reports |
| MINS | Minors in need of supervision |
| MIRV | Multiple independently targetable reentry vehicle |
| MIRVed ICBM | Multiple independently targetable reentry vehicled intercontinental ballistic missile |
| Misc. | Miscellaneous Reports, New York |
| Mixed Claims Comm., Report of Decs | Mixed Claims Commission, United States and Germany, Report of Decisions |
| M.J. | Military Justice Reporter |
| MLAP | Migrant Legal Action Program |
| MLB | Major League Baseball |
| MLDP | Mississippi Loyalist Democratic Party |
| MMI | Moslem Mosque, Incorporated |
| MMPA | Marine Mammal Protection Act of 1972 |
| Mo. | Missouri Reports |
| MOD | Masters of Deception |
| Mod. | Modern Reports, English King's Bench, etc. |

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| Moore, Dig. Intl. Law | John Bassett Moore, *A Digest of International Law,* 8 vols. (1906) |
| Moore, Intl. Arbs. | John Bassett Moore, *History and Digest of the International Arbitrations to Which United States Has Been a Party,* 6 vols. (1898) |
| Morison | William Maxwell Morison, *The Scots Revised Report: Morison's Dictionary of Decisions* (1908–09) |
| M.P. | Member of Parliament |
| MP3 | MPEG Audio Layer 3 |
| MPAA | Motion Picture Association of America |
| MPAS | Michigan Protection and Advocacy Service |
| MPEG | Motion Picture Experts Group |
| mpg | Miles per gallon |
| MPPDA | Motion Picture Producers and Distributors of America |
| MPRSA | Marine Protection, Research, and Sanctuaries Act of 1972 |
| M.R. | Master of the Rolls |
| MS-DOS | Microsoft Disk Operating System |
| MSHA | Mine Safety and Health Administration |
| MSPB | Merit Systems Protection Board |
| MSSA | Military Selective Service Act |
| N/A | Not Available |
| NAACP | National Association for the Advancement of Colored People |
| NAAQS | National Ambient Air Quality Standards |
| NAB | National Association of Broadcasters |
| NABSW | National Association of Black Social Workers |
| NACDL | National Association of Criminal Defense Lawyers |
| NAFTA | North American Free Trade Agreement of 1993 |
| NAGHSR | National Association of Governors' Highway Safety Representatives |
| NALA | National Association of Legal Assistants |
| NAM | National Association of Manufacturers |
| NAR | National Association of Realtors |
| NARAL | National Abortion and Reproductive Rights Action League |
| NARF | Native American Rights Fund |
| NARS | National Archives and Record Service |
| NASA | National Aeronautics and Space Administration |
| NASD | National Association of Securities Dealers |
| NATO | North Atlantic Treaty Organization |
| NAVINFO | Navy Information Offices |
| NAWSA | National American Woman's Suffrage Association |
| NBA | National Bar Association; National Basketball Association |
| NBC | National Broadcasting Company |
| NBLSA | National Black Law Student Association |
| NBS | National Bureau of Standards |
| NCA | Noise Control Act; National Command Authorities |
| NCAA | National Collegiate Athletic Association |
| NCAC | National Coalition against Censorship |
| NCCB | National Consumer Cooperative Bank |
| NCE | Northwest Community Exchange |
| NCF | National Chamber Foundation |
| NCIP | National Crime Insurance Program |
| NCJA | National Criminal Justice Association |
| NCLB | National Civil Liberties Bureau |
| NCP | National contingency plan |
| NCSC | National Center for State Courts |
| NCUA | National Credit Union Administration |
| NDA | New drug application |
| N.D. Ill. | Northern District, Illinois |
| NDU | National Defense University |
| N.D. Wash. | Northern District, Washington |
| N.E. | North Eastern Reporter |
| N.E. 2d | North Eastern Reporter, Second Series |
| NEA | National Endowment for the Arts; National Education Association |

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| NEH | National Endowment for the Humanities |
| NEPA | National Environmental Protection Act; National Endowment Policy Act |
| NET Act | No Electronic Theft Act |
| NFIB | National Federation of Independent Businesses |
| NFIP | National Flood Insurance Program |
| NFL | National Football League |
| NFPA | National Federation of Paralegal Associations |
| NGLTF | National Gay and Lesbian Task Force |
| NHL | National Hockey League |
| NHRA | Nursing Home Reform Act of 1987 |
| NHTSA | National Highway Traffic Safety Administration |
| Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| NIEO | New International Economic Order |
| NIGC | National Indian Gaming Commission |
| NIH | National Institutes of Health |
| NIJ | National Institute of Justice |
| NIRA | National Industrial Recovery Act of 1933; National Industrial Recovery Administration |
| NIST | National Institute of Standards and Technology |
| N.J. | New Jersey Reports |
| N.J. Super. | New Jersey Superior Court Reports |
| NLEA | Nutrition Labeling and Education Act of 1990 |
| NLRA | National Labor Relations Act |
| NLRB | National Labor Relations Board |
| NMFS | National Marine Fisheries Service |
| No. | Number |
| NOAA | National Oceanic and Atmospheric Administration |
| NOC | National Olympic Committee |
| NOI | Nation of Islam |
| NOL | Net operating loss |
| NORML | National Organization for the Reform of Marijuana Laws |
| NOW | National Organization for Women |
| NOW LDEF | National Organization for Women Legal Defense and Education Fund |
| NOW/PAC | National Organization for Women Political Action Committee |
| NPDES | National Pollutant Discharge Elimination System |
| NPL | National priorities list |
| NPR | National Public Radio |
| NPT | Nuclear Non-Proliferation Treaty of 1970 |
| NRA | National Rifle Association; National Recovery Act |
| NRC | Nuclear Regulatory Commission |
| NRLC | National Right to Life Committee |
| NRTA | National Retired Teachers Association |
| NSA | National Security Agency |
| NSC | National Security Council |
| NSCLC | National Senior Citizens Law Center |
| NSF | National Science Foundation |
| NSFNET | National Science Foundation Network |
| NSI | Network Solutions, Inc. |
| NTIA | National Telecommunications and Information Administration |
| NTID | National Technical Institute for the Deaf |
| NTIS | National Technical Information Service |
| NTS | Naval Telecommunications System |
| NTSB | National Transportation Safety Board |
| NVRA | National Voter Registration Act |
| N.W. | North Western Reporter |
| N.W. 2d | North Western Reporter, Second Series |
| NWSA | National Woman Suffrage Association |
| N.Y. | New York Court of Appeals Reports |
| N.Y. 2d | New York Court of Appeals Reports, Second Series |
| N.Y.S. | New York Supplement Reporter |

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| N.Y.S. 2d | New York Supplement Reporter, Second Series |
| NYSE | New York Stock Exchange |
| NYSLA | New York State Liquor Authority |
| N.Y. Sup. | New York Supreme Court Reports |
| NYU | New York University |
| OAAU | Organization of Afro American Unity |
| OAP | Office of Administrative Procedure |
| OAS | Organization of American States |
| OASDI | Old-age, Survivors, and Disability Insurance Benefits |
| OASHDS | Office of the Assistant Secretary for Human Development Services |
| OCC | Office of Comptroller of the Currency |
| OCED | Office of Comprehensive Employment Development |
| OCHAMPUS | Office of Civilian Health and Medical Program of the Uniformed Services |
| OCSE | Office of Child Support Enforcement |
| OEA | Organización de los Estados Americanos |
| OEM | Original Equipment Manufacturer |
| OFCCP | Office of Federal Contract Compliance Programs |
| OFPP | Office of Federal Procurement Policy |
| OIC | Office of the Independent Counsel |
| OICD | Office of International Cooperation and Development |
| OIG | Office of the Inspector General |
| OJARS | Office of Justice Assistance, Research, and Statistics |
| OMB | Office of Management and Budget |
| OMPC | Office of Management, Planning, and Communications |
| ONP | Office of National Programs |
| OPD | Office of Policy Development |
| OPEC | Organization of Petroleum Exporting Countries |
| OPIC | Overseas Private Investment Corporation |
| Ops. Atts. Gen. | Opinions of the Attorneys-General of the United States |
| Ops. Comms. | Opinions of the Commissioners |
| OPSP | Office of Product Standards Policy |
| O.R. | Ontario Reports |
| OR | Official Records |
| OSHA | Occupational Safety and Health Act |
| OSHRC | Occupational Safety and Health Review Commission |
| OSM | Office of Surface Mining |
| OSS | Office of Strategic Services |
| OST | Office of the Secretary |
| OT | Office of Transportation |
| OTA | Office of Technology Assessment |
| OTC | Over-the-counter |
| OTS | Office of Thrift Supervisors |
| OUI | Operating under the influence |
| OVCI | Offshore Voluntary Compliance Initiative |
| OWBPA | Older Workers Benefit Protection Act |
| OWRT | Office of Water Research and Technology |
| P. | Pacific Reporter |
| P. 2d | Pacific Reporter, Second Series |
| PAC | Political action committee |
| Pa. Oyer and Terminer | Pennsylvania Oyer and Terminer Reports |
| PATCO | Professional Air Traffic Controllers Organization |
| PBGC | Pension Benefit Guaranty Corporation |
| PBS | Public Broadcasting Service; Public Buildings Service |
| P.C. | Privy Council (English Law Reports) |
| PC | Personal computer; politically correct |
| PCBs | Polychlorinated biphenyls |
| PCIJ | Permanent Court of International Justice |
| | Series A-Judgments and Orders (1922–30) |
| | Series B-Advisory Opinions (1922–30) |
| | Series A/B-Judgments, Orders, and Advisory Opinions (1931–40) |

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| PCIJ (cont'd.) | Series C-Pleadings, Oral Statements, and Documents relating to Judgments and Advisory Opinions (1923–42) |
| | Series D-Acts and Documents concerning the Organization of the World Court (1922 –47) |
| | Series E-Annual Reports (1925–45) |
| PCP | Phencyclidine |
| P.D. | Probate Division, English Law Reports (1876–1890) |
| PDA | Pregnancy Discrimination Act of 1978 |
| PD & R | Policy Development and Research |
| Pepco | Potomac Electric Power Company |
| Perm. Ct. of Arb. | Permanent Court of Arbitration |
| PES | Post-Enumeration Survey |
| Pet. | Peters' United States Supreme Court Reports |
| PETA | People for the Ethical Treatment of Animals |
| PGA | Professional Golfers Association |
| PGM | Program |
| PHA | Public Housing Agency |
| Phila. Ct. of Oyer and Terminer | Philadelphia Court of Oyer and Terminer |
| PhRMA | Pharmaceutical Research and Manufacturers of America |
| PHS | Public Health Service |
| PIC | Private Industry Council |
| PICJ | Permanent International Court of Justice |
| Pick. | Pickering's Massachusetts Reports |
| PIK | Payment in Kind |
| PINS | Persons in need of supervision |
| PIRG | Public Interest Research Group |
| P.L. | Public Laws |
| PLAN | Pro-Life Action Network |
| PLC | Plaintiffs' Legal Committee |
| PLE | Product liability expenses |
| PLI | Practicing Law Institute |
| PLL | Product liability loss |
| PLLP | Professional Limited Liability Partnership |
| PLO | Palestine Liberation Organization |
| PLRA | Prison Litigation Reform Act of 1995 |
| PNET | Peaceful Nuclear Explosions Treaty |
| PONY | Prostitutes of New York |
| POW-MIA | Prisoner of war-missing in action |
| Pratt | Frederic Thomas Pratt, *Law of Contraband of War, with a Selection of Cases from Papers of the Right Honourable Sir George Lee* (1856) |
| PRIDE | Prostitution to Independence, Dignity, and Equality |
| Proc. | Proceedings |
| PRP | Potentially responsible party |
| PSRO | Professional Standards Review Organization |
| PTO | Patents and Trademark Office |
| PURPA | Public Utilities Regulatory Policies Act |
| PUSH | People United to Serve Humanity |
| PUSH-Excel | PUSH for Excellence |
| PWA | Public Works Administration |
| PWSA | Ports and Waterways Safety Act of 1972 |
| Q.B. | Queen's Bench (England) |
| QTIP | Qualified Terminable Interest Property |
| Ralston's Rept. | Jackson Harvey Ralston, ed., *Venezuelan Arbitrations of 1903* (1904) |
| RC | Regional Commissioner |
| RCRA | Resource Conservation and Recovery Act |
| RCWP | Rural Clean Water Program |
| RDA | Rural Development Administration |
| REA | Rural Electrification Administration |
| Rec. des Decs. des Trib. Arb. Mixtes | G. Gidel, ed., *Recueil des décisions des tribunaux arbitraux mixtes, institués par les traités de paix* (1922–30) |
| Redmond | Vol. 3 of Charles I. Bevans, *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled by C. F. Redmond) (1969) |
| RESPA | Real Estate Settlement Procedure Act of 1974 |
| RFC | Reconstruction Finance Corporation |

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| RFRA | Religious Freedom Restoration Act of 1993 |
| RIAA | Recording Industry Association of America |
| RICO | Racketeer Influenced and Corrupt Organizations |
| RLUIPA | Religious Land Use and Institutionalized Persons Act |
| RNC | Republican National Committee |
| Roscoe | Edward Stanley Roscoe, ed., *Reports of Prize Cases Determined in the High Court Admiralty before the Lords Commissioners of Appeals in Prize Causes and before the judicial Committee of the Privy Council from 1745 to 1859* (1905) |
| ROTC | Reserve Officers' Training Corps |
| RPP | Representative Payee Program |
| R.S. | Revised Statutes |
| RTC | Resolution Trust Corp. |
| RUDs | Reservations, understandings, and declarations |
| Ryan White CARE Act | Ryan White Comprehensive AIDS Research Emergency Act of 1990 |
| SAC | Strategic Air Command |
| SACB | Subversive Activities Control Board |
| SADD | Students against Drunk Driving |
| SAF | Student Activities Fund |
| SAIF | Savings Association Insurance Fund |
| SALT | Strategic Arms Limitation Talks |
| SALT I | Strategic Arms Limitation Talks of 1969–72 |
| SAMHSA | Substance Abuse and Mental Health Services Administration |
| Sandf. | Sandford's New York Superior Court Reports |
| S and L | Savings and loan |
| SARA | Superfund Amendment and Reauthorization Act |
| SAT | Scholastic Aptitude Test |
| Sawy. | Sawyer's United States Circuit Court Reports |
| SBA | Small Business Administration |
| SBI | Small Business Institute |
| SCCC | South Central Correctional Center |
| SCLC | Southern Christian Leadership Conference |
| Scott's Repts. | James Brown Scott, ed., *The Hague Court Reports*, 2 vols. (1916–32) |
| SCS | Soil Conservation Service; Social Conservative Service |
| SCSEP | Senior Community Service Employment Program |
| S.Ct. | Supreme Court Reporter |
| S.D. Cal. | Southern District, California |
| S.D. Fla. | Southern District, Florida |
| S.D. Ga. | Southern District, Georgia |
| SDI | Strategic Defense Initiative |
| S.D. Me. | Southern District, Maine |
| S.D.N.Y. | Southern District, New York |
| SDS | Students for a Democratic Society |
| S.E. | South Eastern Reporter |
| S.E. 2d | South Eastern Reporter, Second Series |
| SEA | Science and Education Administration |
| SEATO | Southeast Asia Treaty Organization |
| SEC | Securities and Exchange Commission |
| Sec. | Section |
| SEEK | Search for Elevation, Education and Knowledge |
| SEOO | State Economic Opportunity Office |
| SEP | Simplified employee pension plan |
| Ser. | Series |
| Sess. | Session |
| SGLI | Servicemen's Group Life Insurance |
| SIP | State implementation plan |
| SLA | Symbionese Liberation Army |
| SLAPPs | Strategic Lawsuits Against Public Participation |
| SLBM | Submarine-launched ballistic missile |
| SNCC | Student Nonviolent Coordinating Committee |
| So. | Southern Reporter |
| So. 2d | Southern Reporter, Second Series |
| SPA | Software Publisher's Association |
| Spec. Sess. | Special Session |
| SPLC | Southern Poverty Law Center |
| SRA | Sentencing Reform Act of 1984 |

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| SS | *Schutzstaffel* (German, "Protection Echelon") |
| SSA | Social Security Administration |
| SSI | Supplemental Security Income |
| START I | Strategic Arms Reduction Treaty of 1991 |
| START II | Strategic Arms Reduction Treaty of 1993 |
| Stat. | United States Statutes at Large |
| STS | Space Transportation Systems |
| St. Tr. | State Trials, English |
| STURAA | Surface Transportation and Uniform Relocation Assistance Act of 1987 |
| Sup. Ct. of Justice, Mexico | Supreme Court of Justice, Mexico |
| Supp. | Supplement |
| S.W. | South Western Reporter |
| S.W. 2d | South Western Reporter, Second Series |
| SWAPO | South-West Africa People's Organization |
| SWAT | Special Weapons and Tactics |
| SWP | Socialist Workers Party |
| TDP | Trade and Development Program |
| Tex. Sup. | Texas Supreme Court Reports |
| THAAD | Theater High-Altitude Area Defense System |
| THC | Tetrahydrocannabinol |
| TI | Tobacco Institute |
| TIA | Trust Indenture Act of 1939 |
| TIAS | Treaties and Other International Acts Series (United States) |
| TNT | Trinitrotoluene |
| TOP | Targeted Outreach Program |
| TPUS | Transportation and Public Utilities Service |
| TQM | Total Quality Management |
| Tripartite Claims Comm., Decs. and Ops. | Tripartite Claims Commission (United States, Austria, and Hungary), Decisions and Opinions |
| TRI-TAC | Joint Tactical Communications |
| TRO | Temporary restraining order |
| TS | Treaty Series, United States |
| TSCA | Toxic Substance Control Act |
| TSDs | Transporters, storers, and disposers |
| TSU | Texas Southern University |
| TTBT | Threshold Test Ban Treaty |
| TV | Television |
| TVA | Tennessee Valley Authority |
| TWA | Trans World Airlines |
| UAW | United Auto Workers; United Automobile, Aerospace, and Agricultural Implements Workers of America |
| U.C.C. | Uniform Commercial Code; Universal Copyright Convention |
| U.C.C.C. | Uniform Consumer Credit Code |
| UCCJA | Uniform Child Custody Jurisdiction Act |
| UCMJ | Uniform Code of Military Justice |
| UCPP | Urban Crime Prevention Program |
| UCS | United Counseling Service |
| UDC | United Daughters of the Confederacy |
| UFW | United Farm Workers |
| UHF | Ultrahigh frequency |
| UIFSA | Uniform Interstate Family Support Act |
| UIS | Unemployment Insurance Service |
| UMDA | Uniform Marriage and Divorce Act |
| UMTA | Urban Mass Transportation Administration |
| U.N. | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCTAD | United Nations Conference on Trade and Development |
| UN Doc. | United Nations Documents |
| UNDP | United Nations Development Program |
| UNEF | United Nations Emergency Force |
| UNESCO | United Nations Educational, Scientific, and Cultural Organization |
| UNICEF | United Nations Children's Fund (formerly United Nations International Children's Emergency Fund) |
| UNIDO | United Nations Industrial and Development Organization |
| Unif. L. Ann. | Uniform Laws Annotated |
| UN Repts. Intl. Arb. Awards | United Nations Reports of International Arbitral Awards |

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|---|---|
| UNTS | United Nations Treaty Series |
| UPI | United Press International |
| URESA | Uniform Reciprocal Enforcement of Support Act |
| U.S. | United States Reports |
| U.S.A. | United States of America |
| USAF | United States Air Force |
| USA PATRIOT Act | Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act |
| U.S. App. D.C. | United States Court of Appeals for the District of Columbia |
| U.S.C. | United States Code; University of Southern California |
| U.S.C.A. | United States Code Annotated |
| U.S.C.C.A.N. | United States Code Congressional and Administrative News |
| USCMA | United States Court of Military Appeals |
| USDA | U.S. Department of Agriculture |
| USES | United States Employment Service |
| USF | U.S. Forestry Service |
| USFA | United States Fire Administration |
| USGA | United States Golf Association |
| USICA | International Communication Agency, United States |
| USMS | U.S. Marshals Service |
| USOC | U.S. Olympic Committee |
| USSC | U.S. Sentencing Commission |
| USSG | United States Sentencing Guidelines |
| U.S.S.R. | Union of Soviet Socialist Republics |
| UST | United States Treaties |
| USTS | United States Travel Service |
| v. | *Versus* |
| VA | Veterans Administration |
| VAR | Veterans Affairs and Rehabilitation Commission |
| VAWA | Violence against Women Act |
| VFW | Veterans of Foreign Wars |
| VGLI | Veterans Group Life Insurance |
| Vict. | Queen Victoria (Great Britain) |
| VIN | Vehicle identification number |
| VISTA | Volunteers in Service to America |
| VJRA | Veterans Judicial Review Act of 1988 |
| V.L.A. | Volunteer Lawyers for the Arts |
| VMI | Virginia Military Institute |
| VMLI | Veterans Mortgage Life Insurance |
| VOCAL | Victims of Child Abuse Laws |
| VRA | Voting Rights Act |
| WAC | Women's Army Corps |
| Wall. | Wallace's United States Supreme Court Reports |
| Wash. 2d | Washington Reports, Second Series |
| WAVES | Women Accepted for Volunteer Service |
| WCTU | Women's Christian Temperance Union |
| W.D. Wash. | Western District, Washington |
| W.D. Wis. | Western District, Wisconsin |
| WEAL | *West's Encyclopedia of American Law,* Women's Equity Action League |
| Wend. | Wendell's New York Reports |
| WFSE | Washington Federation of State Employees |
| Wheat. | Wheaton's United States Supreme Court Reports |
| Wheel. Cr. Cases | Wheeler's New York Criminal Cases |
| WHISPER | Women Hurt in Systems of Prostitution Engaged in Revolt |
| Whiteman | Marjorie Millace Whiteman, *Digest of International Law,* 15 vols. (1963–73) |
| WHO | World Health Organization |
| WIC | Women, Infants, and Children program |
| Will. and Mar. | King William and Queen Mary (Great Britain) |
| WIN | WESTLAW Is Natural; Whip Inflation Now; Work Incentive Program |
| WIPO | World Intellectual Property Organization |
| WIU | Workers' Industrial Union |
| W.L.R. | Weekly Law Reports, England |
| WPA | Works Progress Administration |
| WPPDA | Welfare and Pension Plans Disclosure Act |

| | |
|---|---|
| WTO | World Trade Organization |
| WWI | World War I |
| WWII | World War II |
| Yates Sel. Cas. | Yates's New York Select Cases |
| YMCA | Young Men's Christian Association |
| YWCA | Young Women's Christian Association |

# WEST'S ENCYCLOPEDIA *of* AMERICAN LAW

2ND EDITION

# How to Use This Book

❚1❚ Article Title

❚2❚ Definition in italics with Latin translation provided

❚3❚ First-level subhead

❚4❚ Timeline for subject of biography, including general historical events and life events

❚5❚ Sidebar expands upon an issue addressed briefly in the article

❚6❚ Quotation from subject of biography

❚7❚ Biography of contributor to American law

❚8❚ Internal cross-reference to entry within WEAL

❚9❚ In Focus article examines a controversial or complex aspect of the article topic

❚10❚ Cross-references at end of article

❚11❚ Full cite for case

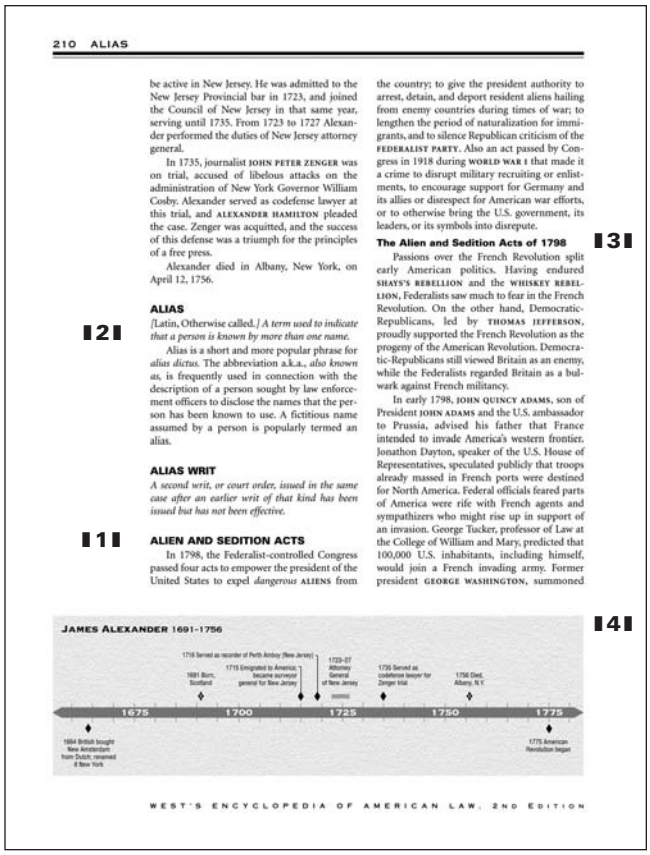



be active in New Jersey. He was admitted to the New Jersey Provincial bar in 1723, and joined the Council of New Jersey in that same year, serving until 1735. From 1723 to 1727 Alexander performed the duties of New Jersey attorney general.

In 1735, journalist JOHN PETER ZENGER was on trial, accused of libelous attacks on the administration of New York Governor William Cosby. Alexander served as codefense lawyer at this trial, and ALEXANDER HAMILTON pleaded the case. Zenger was acquitted, and the success of this defense was a triumph for the principles of a free press.

Alexander died in Albany, New York, on April 12, 1756.

**ALIAS**

❚2❚ *[Latin, Otherwise called.] A term used to indicate that a person is known by more than one name.*

Alias is a short and more popular phrase for *alias dictus.* The abbreviation a.k.a., *also known as,* is frequently used in connection with the description of a person sought by law enforcement officers to disclose the names that the person has been known to use. A fictitious name assumed by a person is popularly termed an alias.

**ALIAS WRIT**

*A second writ, or court order, issued in the same case after an earlier writ of that kind has been issued but has not been effective.*

❚1❚ **ALIEN AND SEDITION ACTS**

In 1798, the Federalist-controlled Congress passed four acts to empower the president of the United States to expel *dangerous* ALIENS from the country; to give the president authority to arrest, detain, and deport resident aliens hailing from enemy countries during times of war; to lengthen the period of naturalization for immigrants, and to silence Republican criticism of the FEDERALIST PARTY. Also an act passed by Congress in 1918 during WORLD WAR I that made it a crime to disrupt military recruiting or enlistments, to encourage support for Germany and its allies or disrespect for American war efforts, or to otherwise bring the U.S. government, its leaders, or its symbols into disrepute.

❚3❚ **The Alien and Sedition Acts of 1798**

Passions over the French Revolution split early American politics. Having endured SHAYS'S REBELLION and the WHISKEY REBELLION, Federalists saw much to fear in the French Revolution. On the other hand, Democratic-Republicans, led by THOMAS JEFFERSON, proudly supported the French Revolution as the progeny of the American Revolution. Democratic-Republicans still viewed Britain as an enemy, while the Federalists regarded Britain as a bulwark against French militancy.

In early 1798, JOHN QUINCY ADAMS, son of President JOHN ADAMS and the U.S. ambassador to Prussia, advised his father that France intended to invade America's western frontier. Jonathon Dayton, speaker of the U.S. House of Representatives, speculated publicly that troops already massed in French ports were destined for North America. Federal officials feared parts of America were rife with French agents and sympathizers who might rise up in support of an invasion. George Tucker, professor of Law at the College of William and Mary, predicted that 100,000 U.S. inhabitants, including himself, would join a French invading army. Former president GEORGE WASHINGTON, summoned

❚4❚

❚5❚

## The First Payments of Social Security

After the enactment of the Social Security Act of 1935 (42 U.S.C.A. § 301 et seq.) and the creation of the Social Security Administration (SSA), the federal government had a short time to establish the program before beginning to pay benefits. Monthly benefits were to begin in 1940. The period from 1937 to 1940 was to be used both to build up the trust funds and to provide a minimum period for participation for persons to qualify for monthly benefits.

From 1937 until 1940, however, Social Security paid benefits in the form of a single, lump-sum payment. The purpose of these one-time payments was to provide some compensation to people who contributed to the program but would not participate long enough to be vested for monthly benefits.

The first applicant for a lump-sum benefit was Ernest Ackerman, a Cleveland motorman who retired one day after the Social Security Program began. During his one day of participation in the program, five cents was withheld from Ackerman's pay for Social Security, and upon retiring, he received a lump-sum payment of seventeen cents.

Payments of monthly benefits began in January 1940. On January 31, 1940, the first monthly retirement check was issued to Ida May Fuller of Ludlow, Vermont, in the amount of $22.54. Fuller died in January 1975 at the age of one hundred. During her thirty-five years as a beneficiary, she received more than $20,000 in benefits.

tions to Social Security. There is no financial need requirement to be satisfied. Once a worker qualifies for protection, his family is also entitled to protection. The entire program is geared toward helping families as a matter of social policy.

Two large funds of money are held in trust to pay benefits earned by people under OASDI: the Old Age and Survivors Trust Fund and the Disability Insurance Trust Fund. As workers and employers make payroll contributions to these funds, money is paid out in benefits to people currently qualified to receive monthly checks.

The OASDI program is funded by payroll taxes levied on employees and their employers and on the self-employed. The tax is imposed upon the employee's taxable income, up to a maximum taxable amount, with the employer contributing an equal amount. The self-employed person contributes twice the amount levied on an employee. In 2003 the rate was 6.2 percent, levied on earned income up to a maximum of $87,000.

**Old Age Benefits** A person becomes eligible for Social Security old age benefits by working a minimum number of calendar quarters. The number of quarters required for full insurance increases with the worker's age. Forty quarters is the maximum requirement. The individual is credited for income up to the maximum amount of money covered by Social Security for those years. This amount is adjusted to reflect the impact of inflation on normal earnings and ensure that a worker who pays increasing Social Security contributions during his or her work life will receive retirement benefits that keep pace with inflation.

Persons born before 1950 can retire at age 65 with full benefits based on their average income during their working years. For those born between 1950 and 1960, the retirement age for full benefits has increased to age 66. Persons born in 1960 or later will not receive full retirement benefits until age 67. Any person, however, may retire at age 62 and receive less than full benefits. At age 65, a worker's spouse who has not contributed to Social Security receives 50 percent of the amount paid to the worker.

Since 1975 Social Security benefits have increased annually to offset the corrosive effects of inflation on fixed incomes. These increases, known as cost of living allowances (COLAs), are based on the annual increase in consumer prices. Allowing benefits to increase automatically ended the need for special acts of Congress, but it has also steadily increased the cost of the Social Security Program.

have the same inheritance rights as other children. The ruling was believed to be the first on the controversial issue by any state supreme court.

Also in January 2002, Marshall addressed the Massachusetts Bar Association Conference, where she called for "a revolution in the administration of justice" stating that the court system needed to improve its management system as well as its staffing and budget controls. In March 2002, her discussion of the court system's problems were amplified in a 52-page report that was published by a blue-ribbon panel appointed by Marshall.

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**16**

*THE GOVERNMENT [THAT THE FRAMERS OF THE CONSTITUTION] DEVISED REQUIRED SEVERAL AMENDMENTS, A CIVIL WAR, AND MOMENTOUS SOCIAL TRANSFORMATION TO ATTAIN THE SYSTEM OF CONSTITUTIONAL GOVERNMENT, AND ITS RESPECT FOR THE INDIVIDUAL FREEDOMS AND HUMAN RIGHTS, THAT WE HOLD AS FUNDAMENTAL TODAY.*
*THURGOOD MARSHALL*

## MARSHALL PLAN

After **WORLD WAR II**, Europe was devastated and urgently needed an organized plan for reconstruction and economic and technical aid. The Marshall Plan was initiated in 1947 to meet this need.

The originator of the plan, U.S. Secretary of State George C. Marshall, introduced it in a speech at Harvard University on June 5, 1947. He pointed out two basic reasons for providing aid to Europe: the United States sought the reestablishment of the European countries as independent nations capable of conducting valuable trade with the United States; and the threat of a Communist takeover was more prevalent in countries that were suffering economic depression.

In 1947 a preliminary conference to discuss the terms of the program convened in Paris. The Soviet Union was invited to attend but subsequently withdrew from the program, as did other Soviet countries.

Sixteen European countries eventually participated, and, in July 1947, the Committee for European Economic Cooperation was established to allow representatives from member countries to draft a report that listed their requirements for food, supplies, and technical assistance for a four-year period.

The Committee for European Economic Cooperation subsequently became the Organization of European Economic Cooperation, an expanded and permanent organization that was responsible for submitting petitions for aid. In 1948, Congress passed the Economic Cooperation Act (62 Stat. 137), establishing funds for the Marshall Plan to be administered under the Economic Cooperation Administration, which was directed by Paul G. Hoffman.

Between 1948 and 1952, the sixteen-member countries received more than $13 billion dollars in aid under the Marshall Plan. The plan was generally regarded as a success that led to industrial and agricultural production, while stifling the Communist movement. The plan was not without its critics, however, and many Europeans believed the **COLD WAR** hostilities between the Soviet nations and the free world were aggravated by it.

**17**

## ◊ MARSHALL, THURGOOD

Thurgood Marshall, the first African American to serve on the U.S. Supreme Court, saw law as a catalyst for social change. For nearly 60 years, as both a lawyer and a jurist, Marshall worked to dismantle the system of **SEGREGATION** and improve the legal and social position of minorities.

Marshall was born July 2, 1908, in Baltimore, the son of a Pullman porter and a schoolteacher. He was a graduate of Lincoln University, a small, all-black college in Pennsylvania, and Howard University Law School in Washington, D.C. At Howard, Marshall excelled under the guidance of Vice Dean **CHARLES HAMILTON HOUSTON**, the first African American to win a case before the U.S. Supreme Court. Houston encouraged his students to become not just lawyers but "social engineers" who could use the legal system to improve society. Marshall graduated first in his law class in 1933.

Marshall's attendance at predominantly black Howard University illustrates the barriers faced by African Americans during the early twentieth century. Although Marshall wished to attend law school at the University of Maryland (a public institution in his home town of Baltimore), he was prohibited by law from doing so because of his race. This injustice helped set Marshall on a course of opposing all forms of official segregation that denied equal opportunities to African Americans.

After law school, Marshall set up a practice in Baltimore, representing indigent clients in civil rights cases. In 1936, his mentor Houston offered him a position with the National Association for the Advancement of Colored People (**NAACP**),





and in 1940, Marshall became director of the **NAACP LEGAL DEFENSE AND EDUCATIONAL FUND**, a position he held until 1961. Determined to eliminate segregation, Marshall coordinated a nationwide campaign to integrate higher education. He filed several successful lawsuits against public graduate and professional schools that refused to accept African-American students. These suits paved the way for similar cases at the high school and elementary school levels. Marshall also journeyed throughout the deep South, traveling fifty thousand miles a year to fight **JIM CROW LAWS** (a series of laws that provided for racial segregation in the South) and to represent criminal defendants.

Marshall argued 32 cases before the U.S. Supreme Court and won 29 of them. No doubt his most famous and far-reaching triumph before the High Court was **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). In that case, the father of African-American student Linda Brown sued the school board of Topeka, Kansas, over its segregation policy. Brown was required by law to attend an all African-American school several blocks from her home even though an all white public school was located in her own neighborhood. Under Kansas law, cities of more than 15,000 people, such as Topeka, could choose to operate segregated schools. Marshall argued that these segregated schools, defended by officials as "separate but equal," were unconstitutional.

**18**

The **SEPARATE-BUT-EQUAL** doctrine originated in **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), a case allowing segregated public accommodations for whites

*Thurgood Marshall.*
LIBRARY OF CONGRESS

and blacks. In a plainspoken argument, Marshall dismissed as fallacy the notion that segregated schools offered the same educational experiences to black and white students. Sociological and psychological studies demonstrated that black children were in fact harmed by the policy of school segregation. The students' self-esteem was damaged and their future diminished when they were forced to accept inadequate facilities, equipment, and educational opportunities. Marshall argued that the only purpose segregation served was to perpetuate the myth of African-Americans' inferiority. A unanimous Court agreed and struck down the separate-but-equal doctrine, a

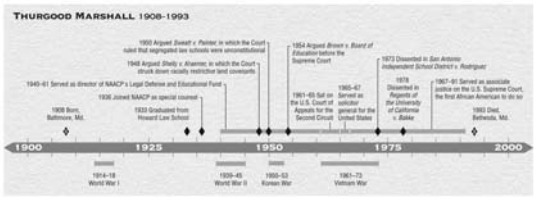






# THE FUTURE OF SOCIAL SECURITY

**19**

The payment of **OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE** (OASDI) benefits has been a cornerstone of U.S. social welfare policy since the establishment of the **SOCIAL SECURITY ADMINISTRATION** in 1935. At the same time, the long-term financial stability of OASDI has been a constant worry. In the early years of the twenty-first century, concerns about Social Security mounted as policy makers assessed the impact of the retirement of the "Baby Boom" generation. Many younger people raised the issue of "generation equity." They express doubt that Social Security benefits will be available when they retire, and anger that they will be forced to pay, through payroll taxes, for the baby boomers' retirement benefits.

Reform of the Social Security system has always been a political hot potato. Retirees and those approaching retirement form a strong **LOBBYING** force, and they zealously protect their benefits. Employers and employees are equally vocal in their opposition to higher payroll taxes to fund OASDI. Thus, changes in Social Security required bipartisan support, which materialized in the face of an impending Social Security crisis. The 1982–83 National Commission on Social Security Reform successfully secured from Congress the short-term financing of OASDI. As a result, Congress passed a series of laws meant to accumulate surpluses as a hedge against future burdens. The Social Security surplus is the amount by which revenue from the federal payroll tax exceeds the amount of Social Security benefits paid out.

IN FOCUS

Shortly after these new laws went into effect, Social Security began running a surplus. Surplus Social Security revenue can be used to fund other government programs and to help retire the national debt. During the favorable economic climate of the late 1990s, Congress began to use the surplus to pay down the federal debt, hoping to better position the government to meet its obligations to future retirees. And, in 2000, the federal government generated enough revenue so that the entire Social Security surplus was available for paying off debt.

The state of Social Security became a major campaign issue in the 2000 elections, with both Republicans and Democrats attempting to appear as though they were guardians of Social Security assets. Candidates from both parties promised to create a "lockbox," meaning that the Social Security surplus would be spent entirely on debt retirement. With the advent of fiscally lean years in the early 2000s, the lockbox approach was largely disregarded by politicians who advanced other ideas about what to do with Social Security surpluses. These ideas included using the surplus to help offset decreases in revenues brought about by tax cuts and using the surplus to fund new or expanded spending initiatives.

Analysts argue that the real issue often is clouded. It is not how to spend the surplus now, but how to maintain the long-term solvency of the Social Security trust fund. Planners estimate that the income from the trust fund will exceed expenses each year until 2020. The trust fund balances will then start to decline as investments are redeemed to meet the increased expenses from a swelling retired workforce. Although it is estimated that 75 percent of the costs would continue to be met from current payroll and income taxes, in the absence of any changes, full benefits could not be paid beginning in 2030.

In its 1996 report, the Social Security Administration's Advisory Council looked at various long-term financing options for OASDI. The council could not reach consensus on a specific long-term plan, but it did suggest several types of financing that represent a marked departure from previous efforts to fund Social Security. The council noted that past efforts have generally featured cutting benefits and raising tax rates on a "pay-as-you-go" basis. The council agreed that this approach must be changed and offered three ways of restoring financial solvency.

One approach, called Maintenance of Benefits (MB), calls for an increase in income taxes on OASDI benefits, a redirection of some revenue from other trust funds, and, most importantly, the adoption of a plan allowing the federal government to invest a portion of the trust fund assets directly in common stocks. Rates of returns on stocks have historically exceeded those on federal government bonds, where all Social Security

A person who continues to work past the retirement age may lose some benefits because Social Security is designed to replace lost earnings. If earnings from employment do not exceed the amount specified by law, the person receives the full benefits. If earnings are greater than that amount, one dollar of benefit is withheld for every two dollars in wages earned above the exempt amount. Once a person reaches age 70, however, he does not have to report earnings to the SSA, and the benefit is not reduced.

**Survivors' Benefits** Survivors' benefits are paid to family members when a worker dies. Survivors can receive benefits if the deceased worker was employed and contributed to Social





momentous victory for Marshall, affecting public schools in twenty-one states.

Marshall was appointed to the U.S. Court of Appeals for the Second Circuit in 1961, and served there until 1965 when he was named **SOLICITOR GENERAL** for the United States. He was appointed to the U.S. Supreme Court in 1967 by President **LYNDON B. JOHNSON** and served as an associate justice for 24 years.

While on the Court, Marshall was known more for his impassioned dissents than for his majority opinions. In particular, as a staunch opponent of **CAPITAL PUNISHMENT**, he regularly voiced his disagreement with the majority in death penalty cases. He was also a firm backer of **AFFIRMATIVE ACTION** and contributed one of his most famous dissents in **REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE**, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In that case, Marshall criticized the high court's ruling that a public medical school's policy of reserving 16 of 100 spots for minority students was unconstitutional. Marshall also dissented in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), disagreeing with the majority view that a Texas property tax system used to fund public education was acceptable, even though it allowed wealthier districts to provide a better school system for students in those districts than less wealthy districts could provide. Marshall objected strongly to the property tax arrangement, claiming that it deprived poor children of an equal education.

Marshall wrote the majority opinion in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968), in which the Court declared that a shopping center was a public forum from which picketers could not be barred by private owners.

Marshall retired from the Court in 1991, but continued his criticism of government policies that were detrimental to African Americans or other disenfranchised groups.

Marshall died on January 24, 1993, in Bethesda, Maryland. Upon Marshall's death, nearly 20,000 mourners filed by his casket during the 12 hours it lay in state in the Great Hall of the U.S. Supreme Court.

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CROSS-REFERENCES

**10**

*Civil Rights Movement; Integration; School Desegregation.*

## MARTIAL LAW

*The exercise of government and control by military authorities over the civilian population of a designated territory.*

**11**

Martial law is an extreme and rare measure used to control society during war or periods of civil unrest or chaos. According to the Supreme Court, the term *martial law* carries no precise meaning (*Duncan v. Kahanamoku*, 327 U.S. 304, 66 S. Ct. 606, 90 L. Ed. 688 [1946]). However, most declarations of martial law have some common features. Generally, the institution of martial law contemplates some use of military force. To a varying extent, depending on the martial law order, government military personnel have the authority to make and enforce civil and criminal laws. Certain civil liberties may be suspended, such as the right to be free from unreasonable **SEARCHES AND SEIZURES**, **FREEDOM OF ASSOCIATION**, and freedom of movement. And the writ of **HABEAS CORPUS** may be suspended (this writ allows persons who are unlawfully imprisoned to gain freedom through a court proceeding).

In the United States, martial law has been instituted on the national level only once, during the Civil War, and on a regional level only once, during **WORLD WAR II**. Otherwise, it has been limited to the states. Uprisings, political protests, labor strikes, and riots have, at various times, caused several state governors to declare some measure of martial law.

Martial law on the national level may be declared by Congress or the president. Under

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*West's Encyclopedia of American Law (WEAL)* is dedicated to librarians and library patrons throughout the United States and beyond. Your interest in the American legal system helps to expand and fuel the framework of our Republic.

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# PREFACE

The U.S. legal system is admired around the world for the freedoms it allows the individual and the fairness with which it attempts to treat all persons. On the surface, it may seem simple, yet those who have delved into it know that this system of federal and state constitutions, statutes, regulations, and common-law decisions is elaborate and complex. It derives from the English common law, but includes principles older than England, along with some principles from other lands. The U.S. legal system, like many others, has a language all its own, but too often it is an unfamiliar language: many concepts are still phrased in Latin. The second edition of *West's Encyclopedia of American Law (WEAL)* explains legal terms and concepts in everyday language, however. It covers a wide variety of persons, entities, and events that have shaped the U.S. legal system and influenced public perceptions of it.

## MAIN FEATURES OF THIS SET

### Entries

This encyclopedia contains nearly 5,000 entries devoted to terms, concepts, events, movements, cases, and persons significant to U.S. law. Entries on legal terms contain a definition of the term, followed by explanatory text if necessary. Entries are arranged alphabetically in standard encyclopedia format for ease of use. A wide variety of additional features, listed later in this preface, provide interesting background and supplemental information.

**Definitions** Every entry on a legal term is followed by a definition, which appears at the beginning of the entry and is italicized. The Dictionary and Indexes volume includes a glossary containing all the definitions from *WEAL*.

**Further Readings** To facilitate further research, a list of Further Readings is included at the end of a majority of the main entries.

**Cross-References** *WEAL* provides two types of cross-references, within and following entries. Within the entries, terms are set in small capital letters—for example, LIEN—to indicate that they have their own entry in the encyclopedia. At the end of the entries, related entries the reader may wish to explore are listed alphabetically by title.

Blind cross-reference entries are also included to direct the user to other entries throughout the set.

### In Focus Essays

In Focus essays accompany related entries and provide additional facts, details, and arguments on particularly interesting, important, or controversial issues raised by those entries. The subjects covered include hotly contested issues, such as abortion, capital punishment, and gay rights; detailed processes, such as the Food and Drug Administration's approval process for new drugs; and important historical or social issues, such as debates over the formation of the U.S. Constitution.

### Sidebars

Sidebars provide brief highlights of some interesting facet of accompanying entries. They

complement regular entries and In Focus essays by adding informative details. Sidebar topics include the Million Man March and the branches of the U.S. armed services. Sidebars appear at the top of a text page and are set in a box.

### Biographies

*WEAL* profiles a wide variety of interesting and influential people—including lawyers, judges, government and civic leaders, and historical and modern figures—who have played a part in creating or shaping U.S. law. Each biography includes a timeline, which shows important moments in the subject's life as well as important historical events of the period. Biographies appear alphabetically by the subject's last name.

## ADDITIONAL FEATURES OF THIS SET

**Enhancements** Throughout *WEAL*, readers will find a broad array of photographs, charts, graphs, manuscripts, legal forms, and other visual aids enhancing the ideas presented in the text.

**Indexes** *WEAL* features a cases index and a cumulative index in a separate volume.

### Appendixes

Three appendix volumes are included with *WEAL*, containing hundreds of pages of documents, laws, manuscripts, and forms fundamental to and characteristic of U.S. law.

### Milestone Cases in the Law

A special Appendix volume entitled Milestones in the Law, allows readers to take a close look at landmark cases in U.S. law. Readers can explore the reasoning of the judges and the arguments of the attorneys that produced major decisions on important legal and social issues. Included in each Milestone are the opinions of the lower courts; the briefs presented by the parties to the U.S. Supreme Court; and the decision of the Supreme Court, including the majority opinion and all concurring and dissenting opinions for each case.

### Primary Documents

There is also an Appendix volume containing more than 60 primary documents, such as the English Bill of Rights, Martin Luther King Jr.'s Letter from Brimingham Jail, and several presidential speeches.

### Citations

Wherever possible, *WEAL* entries include citations for cases and statutes mentioned in the text. These allow readers wishing to do additional research to find the opinions and statutes cited. Two sample citations, with explanations of common citation terms, can be seen below and opposite.

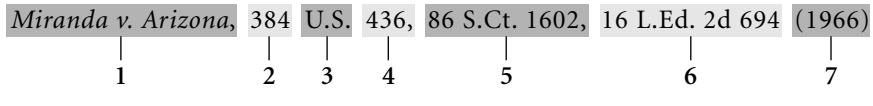


1. *Case title.* The title of the case is set in i and indicates the names of the parties. The suit in this sample citation was between Ernesto A. Miranda and the state of Arizona.
2. *Reporter volume number.* The number preceding the reporter name indicates the reporter volume containing the case. (The volume number appears on the spine of the reporter, along with the reporter name).
3. *Reporter name.* The reporter name is abbreviated. The suit in the sample citation is from the reporter, or series of books, called *U.S. Reports,* which contains cases from the U.S. Supreme Court. (Numerous reporters publish cases from the federal and state courts.)
4. *Reporter page.* The number following the reporter name indicates the reporter page on which the case begins.
5. *Additional reporter page.* Many cases may be found in more than one reporter. The suit in the sample citation also appears in volume 86 of the *Supreme Court Reporter*, beginning on page 1602.
6. *Additional reporter citation.* The suit in the sample citation is also reported in volume 16 of the *Lawyer's Edition*, second series, beginning on page 694.
7. *Year of decision.* The year the court issued its decision in the case appears in parentheses at the end of the cite.

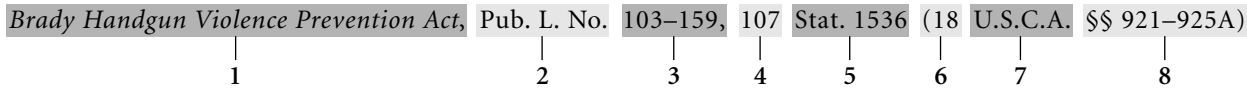


1. *Statute title.*
2. *Public law number.* In the sample citation, the number 103 indicates this law was passed by the 103d Congress, and the number 159 indicates it was the 159th law passed by that Congress.
3. *Reporter volume number.* The number preceding the reporter abbreviation indicates the reporter volume containing the statute.
4. *Reporter name.* The reporter name is abbreviated. The statute in the sample citation is from *Statutes at Large.*
5. *Reporter page.* The number following the reporter abbreviation indicates the reporter page on which the statute begins.
6. *Title number.* Federal laws are divided into major sections with specific titles. The number preceding a reference to the U.S. Code stands for the section called Crimes and Criminal Procedure.
7. *Additional reporter.* The statute in the sample citation may also be found in the *U.S. Code Annotated.*
8. *Section numbers.* The section numbers following a reference to the *U.S. Code Annotated* indicate where the statute appears in that reporter.

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## CO-MAKER

*One who becomes obligated, an obligor, under a negotiable instrument—such as a check or promissory note—by signing his or her name along with the name of the original obligor, thereby promising to pay on it in full.*

*A co-maker is a type of accommodation party, who is someone who has signed a* COMMERCIAL PAPER *to aid someone wishing to raise money on it. An accommodation party lends his or her name to another person and makes a promise to pay the bill or note when it is due if the other person defaults.*

## COMBINATION

*In* CRIMINAL LAW*, an agreement between two or more people to act jointly for an unlawful purpose; a conspiracy. In patent law, the joining together of several separate inventions to produce a new invention.*

An illegal combination in restraint of trade, defined under the SHERMAN ANTI-TRUST ACT, is one in which the conspirators agree expressly or impliedly to use devices such as price-fixing agreements to eliminate competition in a certain locality, e.g., when a group of furniture manufacturers refuse to deliver goods to stores that sell their goods for under a certain price.

In patent law a combination is distinguishable from an aggregation in that it is a joint operation of elements that produces a new result as opposed to a mere grouping together of old elements. This is important in determining whether or not something is patentable, since no valid patent can extend to an aggregation.

## COMBINATION IN RESTRAINT OF TRADE

*An illegal compact between two or more persons to unjustly restrict competition and monopolize commerce in goods or services by controlling their production, distribution, and price or through other unlawful means.*

Such combinations—whether in the form of a contract, holding company, or other association—are prohibited by the provisions of the SHERMAN ANTI-TRUST ACT and other antitrust acts.

CROSS-REFERENCES

Monopoly.

## COMITY

*Courtesy; respect; a disposition to perform some official act out of goodwill and tradition rather than obligation or law. The acceptance or* ADOPTION *of decisions or laws by a court of another jurisdiction, either foreign or domestic, based on public policy rather than legal mandate.*

In comity, an act is performed to promote uniformity, limit litigation, and, most important, to show courtesy and respect for other court decisions. It is not to be confused with FULL FAITH AND CREDIT, the constitutional pro-

*Cargo ships docked in Newark, New Jersey. Commerce includes the transport of goods by sea.*

AP/WIDE WORLD PHOTOS

vision that various states within the United States must recognize the laws, acts, and decisions of sister states.

*Comity of nations* is a recognition of fundamental legal concepts that nations share. It stems from mutual convenience as well as respect and is essential to the success of international relations. This body of rules does not form part of INTERNATIONAL LAW; however, it is important for public policy reasons.

*Judicial comity* is the granting of reciprocity to decisions or laws by one state or jurisdiction to another. Since it is based upon respect and deference rather than strict legal principles, it does not require that any state or jurisdiction adopt a law or decision by another state or jurisdiction that is in contradiction, or repugnant, to its own law.

*Comity of states* is the voluntary acceptance by courts of one state of the decision of a sister state on a similar issue or question.

## COMMERCE

*The exchange of goods, products, or any type of* PERSONAL PROPERTY. *Trade and traffic carried on between different peoples or states and its inhabitants, including not only the purchase, sale, and exchange of commodities but also the instrumentalities, agencies, and means by which business is accomplished. The transportation of persons and goods, by air, land, and sea. The exchange of merchandise on a large scale between different places or communities.*

Although the terms *commerce* and *trade* are often used interchangeably, *commerce* refers to large-scale business activity, while *trade* describes commercial traffic within a state or a community.

## COMMERCE CLAUSE

*The provision of the U.S. Constitution that gives Congress exclusive power over trade activities among the states and with foreign countries and Indian tribes.*

Article 1, Section 8, Clause 3, of the Constitution empowers Congress "to regulate Commerce with foreign Nations, and among several States, and with the Indian Tribes." The term *commerce* as used in the Constitution means business or commercial exchanges in any and all of its forms between citizens of different states, including purely social communications between citizens of different states by telegraph, telephone, or radio, and the mere passage of persons from one state to another for either business or pleasure.

Intrastate, or domestic, commerce is trade that occurs solely within the geographic borders of one state. As it does not move across state lines, intrastate commerce is subject to the exclusive control of the state.

Interstate commerce, or commerce among the several states, is the free exchange of commodities between citizens of different states across state lines. Commerce with foreign nations occurs between citizens of the United States and citizens or subjects of foreign governments and, either immediately or at some stage of its progress, is extraterritorial. Commerce with Indian tribes refers to traffic or commercial exchanges involving both the United States and American Indians.

The Commerce Clause was designed to eliminate an intense rivalry between the groups of those states that had tremendous commercial advantage as a result of their proximity to a major harbor, and those states that were not near a harbor. That disparity was the source of constant economic battles among the states. The exercise by Congress of its regulatory power has increased steadily with the growth and expansion of industry and means of transportation.

### Power to Regulate

The Commerce Clause authorizes Congress to regulate commerce in order to ensure that the flow of interstate commerce is free from local restraints imposed by various states. When Congress deems an aspect of interstate commerce to be in need of supervision, it will enact legislation

that must have some real and rational relation to the subject of regulation. Congress may constitutionally provide for the point at which subjects of interstate commerce become subjects of state law and, therefore, state regulation.

Although the U.S. Constitution places some limits on state power, the states enjoy guaranteed rights by virtue of their reserved powers pursuant to the **TENTH AMENDMENT**. A state has the inherent and reserved right to regulate its domestic commerce. However, that right must be exercised in a manner that does not interfere with, or place a burden on, interstate commerce, or else Congress may regulate that area of domestic commerce in order to protect interstate commerce from the unreasonable burden. Although a state may not directly regulate, prohibit, or burden interstate or foreign commerce, it may incidentally and indirectly affect it by a bona fide, legitimate, and reasonable exercise of its **POLICE POWERS**. States are powerless to regulate commerce with Indian tribes.

Although Congress has the exclusive power to regulate foreign and interstate commerce, the presence or absence of congressional action determines whether a state may act in a particular field. The nature of the subject of commerce must be examined in order to decide whether Congress has exclusive control over it. If the subject is national in character and importance, thereby requiring uniform regulation, the power of Congress to regulate it is plenary, or exclusive.

It is for the courts to decide the national or local character of the subject of regulation, by **BALANCING** the national interest against the **STATE INTEREST** in the subject. If the state interest is slight compared with the national interest, the courts will declare the state statute unconstitutional as an unreasonable burden on interstate commerce.

The U.S. Supreme Court, in the case of *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945), held that an Arizona statute that prohibited railroads within the state from having more than 70 cars in a freight train, or 14 cars in a passenger train, was unconstitutional. The purpose of the legislation, deemed a safety measure, was to minimize accidents by reducing the lengths of trains passing through the state. Practically speaking, however, the statute created an unreasonable burden on interstate commerce, as trains entering and leaving the state had to stop at the borders to break up a 100-car freight train into two trains and to put on additional crews, thus increasing their operating costs. The Court held that the means used to achieve safety was unrealistic and that the increase in the number of trains and train operators actually enhanced the likelihood of accidents. It balanced the national interest in the free flow of interstate commerce by a national railway system, against the state interest of a dubious safety measure. It decided that the value of the operation of a uniform, efficient railway system significantly outweighed that of a state law that has minimal effect.

However, where there is an obvious compelling state interest to protect, state regulations are constitutional. Restrictions on the width and weight of trucks passing through a state on its highways are valid, because the state, pursuant to its police power, has a legitimate interest in protecting its roads.

Where the subject is one in which Congress or the state may act, a state may legislate unless Congress does so. Thereafter, a valid federal regulation of the subject supersedes conflicting state legislative enactments and decisions and actions of state judicial or administrative bodies.

If Congress has clearly demonstrated its intent to regulate the entire field, then the state is powerless to enact subsequent legislation even if no conflict exists between state and federal law. This type of congressional action is known as federal **PREEMPTION** of the field. Extensive federal regulation in a particular area does not necessarily result in federal preemption of the field. In determining whether a state may regulate a given field, a court evaluates the purpose of the federal regulations and the obligations imposed, the history of state regulation in the field, and the **LEGISLATIVE HISTORY** of the state statute. If Congress has not preempted the field, then state law is valid, provided that it is consistent with, or supplements, the federal law.

State health, sanitary, and quarantine laws that interfere with foreign and interstate commerce no more than is necessary in the proper exercise of the state's police power are also valid as long as they do not conflict with federal regulations on the subject. Such laws must have some real relation to the objects named in them, in order to be upheld as valid exercises of the police power of the state. A state may not go beyond what is essential for self-protection by interfering with interstate transportation into or through its territory.

A state may not burden interstate commerce by discriminating against it or persons engaged in it or the citizens or property originating in another state. However, the regulation of interstate commerce need not be uniform throughout the United States. Congress may devise a national policy with due regard for varying and fluctuating interests of different regions.

### Acts Constituting Commerce

Whether any transaction constitutes interstate or intrastate commerce depends on the essential character of what is done and the surrounding circumstances. The courts take a commonsense approach in examining the established course of business in order to distinguish where interstate commerce ends and local commerce begins. If activities that are intrastate in character have such a substantial effect on interstate commerce that their control is essential to protect commerce from being burdened, Congress may not be denied the power to exercise that control.

In 1995, for the first time in nearly 60 years, the U.S. Supreme Court held that Congress had exceeded its power to regulate interstate commerce. In *United States v. Lopez,* 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), the Court ruled 5–4 that Congress had exceeded its Commerce Clause power in enacting the Gun-Free School Zones Act of 1990 (18 U.S.C.A. § 921), which prohibited the possession of firearms within 1,000 feet of a school.

In reaching its decision, the Court took the various tests used throughout the history of the Commerce Clause to determine whether a federal statute is constitutional, and incorporated them into a new standard that specifies three categories of activity that Congress may regulate under the clause: (1) the channels of interstate commerce, (2) persons or things in interstate commerce or instrumentalities of interstate commerce, and (3) activities that have "a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce." The Court then applied this new standard to the 1990 Gun-Free School Zones Act and found that the statute could be evaluated under the third category of legislation allowed by the Commerce Clause. But the Court noted that the act was a criminal statute that had nothing to do with commerce and that it did not establish any jurisdictional authority to distinguish it from similar state regulations. Because the statute did not "substantially affect interstate commerce," according to the Court, it went beyond the scope of the Commerce Clause and was an unconstitutional exercise of Congress's legislative power.

The Court stressed that federal authority to regulate interstate commerce cannot be extended to the point that it obliterates the distinction between what is national and what is local and creates a completely centralized government. Although recognizing the great breadth of congressional regulatory authority, the Court in *Lopez* attempted to create a special protection for the states by providing for heightened scrutiny of federal legislation that regulates areas of traditional concern to the states.

In a novel application of the Commerce Clause, a federal court decided in *United States v. Bishop Processing Co.,* 287 F. Supp. 624 (D.C. Md. 1968), that the movement of AIR POLLUTION across state lines from Maryland to Delaware constituted interstate commerce that is subject to congressional regulation. The plaintiff, the United States, sought an INJUNCTION under the federal Clean Air Act (42 U.S.C.A. §§ 7401 et seq. [1955]) to prevent the operation of the Maryland Bishop Processing Company, a fat-rendering plant, until it installed devices to eliminate its emission of noxious odors. The defendant plant owners argued, among other contentions, that Congress was powerless to regulate their business because it was clearly an intrastate activity. The court disagreed. Foul-smelling air POLLUTION adversely affects business conditions, depresses property values, and impedes industrial development. These factors interfere with interstate commerce, thereby bringing the plant within the scope of the provisions of the federal air-pollution law.

The power of Congress to regulate commerce also extends to contracts that substantially relate to interstate commerce. For example, Congress may regulate the rights and liabilities of employers and employees, as labor disputes adversely affect the free flow of commerce. Otherwise, contracts that do not involve any property or activities that move in interstate commerce are not ordinarily part of interstate commerce.

Congress acts within its power when it regulates transportation across state lines. The essential nature of the transportation determines its character. Transportation that begins and ends within a single state is intrastate commerce and is generally not within the scope of the Com-

merce Clause. If part of the journey passes through an adjoining state, then the transportation is interstate commerce, as long as the travel across state lines is not done solely to avoid state regulation. Commerce begins with the physical transport of the product or person and ends when either reaches the destination. Every aspect of a continuous passage from a point in one state to a point in another state is a transaction of interstate commerce. A temporary pause in transportation does not automatically deprive a shipment of its interstate character. For a sale of goods to constitute interstate commerce, interstate transportation must be involved. Once goods have arrived in one state from another state, their local sale is not interstate commerce.

Interstate commerce also includes the transmission of intelligence and information—whether by telephone, telegraph, radio, television, or mail—across state lines. The transmission of a message between points within the same state is subject to state regulation.

### Agencies and Instrumentalities of Commerce

Congress, acting pursuant to the Commerce Clause, has the exclusive power to regulate the agencies and instrumentalities of interstate and foreign commerce, such as private and common carriers. A bridge is an instrumentality of interstate commerce when it spans NAVIGABLE WATERS or is used by travelers and merchandise passing across state lines. Navigable waters are instrumentalities of commerce that are subject to the control of federal and state legislation. A bridge over a navigable stream located in a single state is also subject to concurrent control by the state.

An office used in an interstate business is an instrumentality of interstate commerce. Railroads and tracks, terminals, switches, cars, engines, appliances, equipment used as components of a system engaged in interstate traffic, and vessels (including ferries and tugs) are also subject to federal regulation. Warehouses, grain elevators, and other storage facilities also might be considered instrumentalities of interstate commerce. Although local in nature, wharves are related to commerce and are subject to control by Congress, or by the state if Congress has not acted.

The INTERSTATE COMMERCE ACT of 1887, which Congress enacted to promote and facilitate commerce by ensuring equitable interaction between carriers and the public, provided for the creation of the INTERSTATE COMMERCE COMMISSION. As designated by statute, the commission had jurisdiction and supervision of such carriers and modes of transportation as railroads, express-delivery companies, and sleeping-car companies. Concerning the transportation of persons and property, the commission had the power to enforce the statutory requirement that a certificate of public convenience and necessity be obtained before commencing or terminating a particular transportation service. The commission adopted reasonable and lawful rules and regulations to implement the policies of the law that it administered. The ICC was abolished by Congress in 1995 after Congress deregulated the trucking industry.

### Business Affecting Commerce

Not every private enterprise that is carried on chiefly or in part by means of interstate shipments is necessarily so related to the interstate commerce as to come within the regulating power of Congress. The original construction of a factory building does not constitute interstate commerce, even though the factory is used after its construction for the manufacture of goods that are to be shipped in interstate commerce and even though a substantial part of the material used in the building was purchased in different states and transported in interstate commerce to the location of the plant.

Under some circumstances, however, businesses—such as advertising firms, hotels, restaurants, companies that engage in the leasing of PERSONAL PROPERTY, and companies in the entertainment and sports industries—may be regulated by the federal government. A business that operates primarily intrastate activities, such as local sporting or theatrical exhibits, but makes a substantial use of the channels of interstate trade, develops an interstate character, thereby bringing itself within the ambit of the Commerce Clause.

### Discrimination as a Burden on Commerce

A state has the power to regulate intrastate commerce in a field where Congress has not chosen to legislate, as long as there is no injustice or unreasonable discrimination in favor of intrastate commerce as against interstate commerce. In a Colorado case, out-of-state students at the University of Colorado sued the state BOARD OF REGENTS to recover the higher costs

of the tuition paid by them as compared to tuition paid by in-state residents. They contended that their classification as out-of-state students—which violated, among other things, the Commerce Clause—constituted unreasonable discrimination in favor of in-state students. The court held that the statutes that classified students who apply for admission to the state university into in-state and out-of-state students did not violate the Commerce Clause because the classification was reasonable. A state statute affecting interstate commerce is not upheld merely because it applies equally to, and does not discriminate between, residents and nonresidents of the state, as it can otherwise unduly burden interstate commerce.

Discrimination must be more than merely burdensome; it must be unduly or unreasonably burdensome. One state required a licensed foreign corporation with retail stores in the state to collect a state sales tax on the sales it made from its mail-order houses located outside the state to customers within the state. The corporation contended that this statute discriminated against its operations in interstate commerce. Other out-of-state mail-order houses that were not licensed as foreign corporations in the state did not have to collect tax on their sales within the state. The court decided that the state could impose this burden of tax collection on the corporation because the corporation was licensed to do business in the state and it enjoyed the benefits flowing from its state business. Such a measure was not an unreasonable burden on interstate commerce.

A state may not prohibit the entry of a foreign corporation into its territory for the purpose of engaging in foreign or interstate commerce, nor can it impose conditions or restrictions on the conduct of foreign or interstate business by such corporations. When intrastate business is involved, it may do so.

Similarly, a private person who conducts a business that has a significant effect on interstate commerce in a discriminatory manner is not beyond the reach of lawful congressional regulation.

**RACIAL DISCRIMINATION** in the operation of public accommodations, such as restaurants and lodgings, affects interstate commerce by impeding interstate travel and is prohibited by the **CIVIL RIGHTS ACT OF 1964** (codified in scattered sections of 42 U.S.C.A.). In *Heart of Atlanta Motel v. United States,* 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964), a local motel owner had refused to accept black guests. He argued that since his motel was a purely local operation, Congress exceeded its authority in legislating as to whom he should accept as guests. The U.S. Supreme Court held that the authority of Congress to promote interstate commerce encompasses the power to regulate local activities of interstate commerce, in both the state of origin and the state of destination, when those activities would otherwise have a substantial and harmful effect upon the interstate commerce. The Court concluded that in this case, the federal prohibition of racial discrimination by motels serving travelers was valid, as interstate travel by blacks was unduly burdened by the established discriminatory conduct.

### State Taxation of Nondomiciliary Corporations

In February 2000, the U.S. Supreme Court added another layer to its sometimes complicated Commerce Clause **JURISPRUDENCE** when it held that the Commerce Clause forbids states from taxing income received by nondomiciliary corporations for unrelated business activities that constitute a discrete business enterprise. *Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal.*, 528 U.S. 458, 120 S.Ct. 1022, 145 L. Ed. 2d 974 (2000)

Hunt-Wesson Inc., a California-based corporation, was the successor in interest to the Beatrice Companies Inc., the original taxpayer in the case. During the years in question, Beatrice was domiciled in Illinois but was engaged in the food business in California and throughout the world. For the purposes of this lawsuit, Beatrice's *unitary* operations consisted only of those corporate family business units engaged in its global food business. From 1980 to 1982, Beatrice also owned foreign subsidiaries that were not part of its food operations, but that formed a discrete business enterprise. For the purposes of this lawsuit, the parties stipulated that these foreign subsidiaries were part of the company's *non-unitary* business operations.

These non-unitary foreign subsidiaries paid dividends to Beatrice of $27 million for 1980, $29 million for 1981, and $19 million for 1982, income that both parties agree was not subject to California tax under the Commerce Clause. In the operation of its unitary business, Beatrice took out loans and incurred interest expenses of $80 million for 1980, $55 million for 1981, and $137 million for 1982. None of those loans was

related to borrowings of Beatrice's non-unitary subsidiaries that made the dividend payments to Beatrice.

On its franchise tax returns, Beatrice claimed deductions for its non-unitary interest expenses in calculating its net income apportioned to California. Following an audit, the California Franchise Tax Board applied the "interest offset" provision in California Revenue and Taxation Code Section 24344. Under that section, multistate corporations may take a deduction for interest expenses, but only to the extent that the expenses exceed their out-of-state income arising from the unrelated business activity of a discrete business enterprise; that is, the *non-unitary* income that the parties agree that California could not otherwise tax. The Section 24344 interest offset resulted in the tax board reducing Beatrice's interest-expenses deduction on a dollar-for-dollar basis by the amount of the constitutionally exempt dividend income that Beatrice received from its non-unitary subsidiaries.

Beatrice responded by filing suit in California state court to challenge the constitutionality of the law. The trial court struck down Section 24344 on the ground that it allowed the state to indirectly tax non-unitary business income that the Commerce Clause prohibits from being taxed directly. The California Court of Appeals reversed, and Hunt-Wesson, having intervened in the lawsuit as Beatrice's successor-in-interest, appealed.

In a unanimous opinion written by Justice **STEPHEN BREYER**, the U.S. Supreme Court struck down California Revenue and Taxation Code Section 24344. In reducing an out-of-state company's tax deduction for interest expenses by an amount that is equal to the interest and dividends that the company receives from the unrelated business activities of its foreign subsidiaries, Breyer wrote, Section 24344 enables California to circumvent the federal Constitution.

States may tax a proportionate share of the income of a nondomiciliary corporation that carries out a particular business both inside and outside the state, Breyer observed. But states may not, without violating the Commerce Clause, tax nondomiciliary corporations for income earned from unrelated business activities that constitute a discrete business enterprise. Thus, what California called a *deduction limitation* would amount to an impermissible tax under the Commerce Clause.

### License and Privilege Tax

A state may not impose a tax for the privilege of engaging in, and carrying on, interstate commerce, but it might be permitted to require a license if doing so does not impose a burden on interstate commerce. A state tax on the use of an instrumentality of commerce is invalid, but a tax may be imposed on the use of goods that have traveled in interstate commerce, such as cigarettes. A state may not levy a direct tax on the gross receipts and earnings derived from interstate or foreign commerce, but it may tax receipts from intrastate business or use the gross receipts as the measurement of a legitimate tax that is within the state's authority to levy.

A state may tax the sale of gasoline or other motor fuels that were originally shipped from another state, after the interstate transaction has ceased. As long as the sale is made within the state, it is immaterial that the gasoline to fulfill the contract is subsequently acquired by the seller outside the state and shipped to the buyer. The state may tax the sale of this fuel to one who uses it in interstate commerce, as well as the storage or withdrawal from storage of imported motor fuel, even though it is to be used in interstate commerce.

Although radio and television broadcasting may not be burdened by state-privilege taxes as far as they involve interstate commerce, broadcasting involving intrastate activity may be subject to local taxation.

A state may impose a nondiscriminatory tax for the use of its highways by motor vehicles in interstate commerce if the charge bears a fair relation to the cost of the construction, maintenance, and regulation of its highways.

The Commerce Clause does not prohibit a state from imposing a tax on a natural resource that is produced within its borders and that is sold primarily to residents of other states. In *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981), the U.S. Supreme Court upheld a 30 percent severance tax levied by Montana on the production of coal, the bulk of which was exported for sale to other states. The amount of the tax was challenged as an unconstitutional burden on interstate commerce. The Court reasoned that the Commerce Clause does not give the residents of one state the right to obtain resources from another state at what they consider a reasonable price, for that right would enable one state to control the development and depletion of natu-

ral resources in another state. If that right were recognized, state and federal courts would be forced to formulate and to apply a test for determining what is a reasonable rate of taxation on legitimate subjects of taxation, tasks that rightfully belong to the legislature.

### Crimes Involving Commerce

Congress may punish any conduct that interferes with, obstructs, or prevents interstate and foreign commerce, whether it occurs within one state or involves a number of states. The MANN ACT—which outlaws the transportation any woman or girl in interstate or foreign commerce for the purpose of prostitution, debauchery, or other immoral acts—is a constitutional exercise of the power of Congress to regulate commerce (18 U.S.C.A. §§ 2421–2424 [1910]). The counterfeiting of notes of foreign corporations and bills of lading is a crime against interstate commerce. Under federal statutes, the knowing use of a common carrier for the transportation of obscene matter in interstate or foreign commerce for the purpose of its sale or distribution is illegal. This prohibition applies to the importation of obscene matter even though it is for the importer's private, personal use and possession and not for commercial purposes.

The Anti-Racketeering Act (18 U.S.C.A. § 1951 [2000]) makes RACKETEERING by ROBBERY or personal violence that interferes with interstate commerce a federal offense. The provisions of the CONSUMER CREDIT PROTECTION ACT (15 U.S.C.A. § 1601 et seq. [2000]) prohibiting EXTORTION have been upheld, as extortion is deemed to impose an undue burden on interstate commerce. Anyone who transports stolen goods of the value of $5,000 or more in interstate or foreign commerce is subject to criminal prosecution pursuant to the National Stolen Property Act (18 U.S.C.A. § 2311 et seq. [2000]).

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CROSS-REFERENCES

Civil Rights; Federalism; States' Rights; Telecommunications.

## COMMERCE DEPARTMENT

The Department of Commerce (DOC) is an agency of the EXECUTIVE BRANCH of the federal government that promotes international trade, economic growth, and technological advancement. It performs many activities related to business, trade, and technology. Its numerous divisions work to foster business growth and to create jobs; to prevent UNFAIR COMPETITION in foreign trade; to distribute economic statistics and studies for use by businesses, the government, and the general public; to support and conduct scientific, engineering, and technological research and development; and to promote foreign trade and U.S. exports. As part of its broad mission, the DOC administers the Bureau of the Census, the Bureau of Economic Analysis, the National Oceanic and Atmospheric Administration, the National Weather Service, the U.S. PATENT AND TRADEMARK OFFICE, the National Institute of Standards and Technology, and several other major government agencies.

Originally part of the Department of Commerce and Labor, which was created in 1903, the Department of Commerce was established as a separate entity by law on March 4, 1913 (U.S.C.A. § 1501). The secretary of commerce sits on the president's cabinet along with the secretaries of the 13 other executive agencies of the federal government and other selected executive officials.

Although the activities of the Department of Commerce are not always prominent in the American consciousness, the department's efforts in administering economic programs have a major effect on the average citizen. Under the administration of President GEORGE H.W. BUSH, the Department of Commerce has administered a number of programs designed to enhance economic growth and to stimulate economic progress in the wake of a recession.

### Economics and Statistics Administration

The Economics and Statistics Administration, supervised by the undersecretary for economic affairs, advises the president on economic developments and macroeconomic and microeconomic policy. It also makes economic forecasts and presents current economic data to the public through the National Trade Data Bank and the Economic Bulletin Board. The office oversees the Bureau of the Census and the Bureau of Economic Analysis.

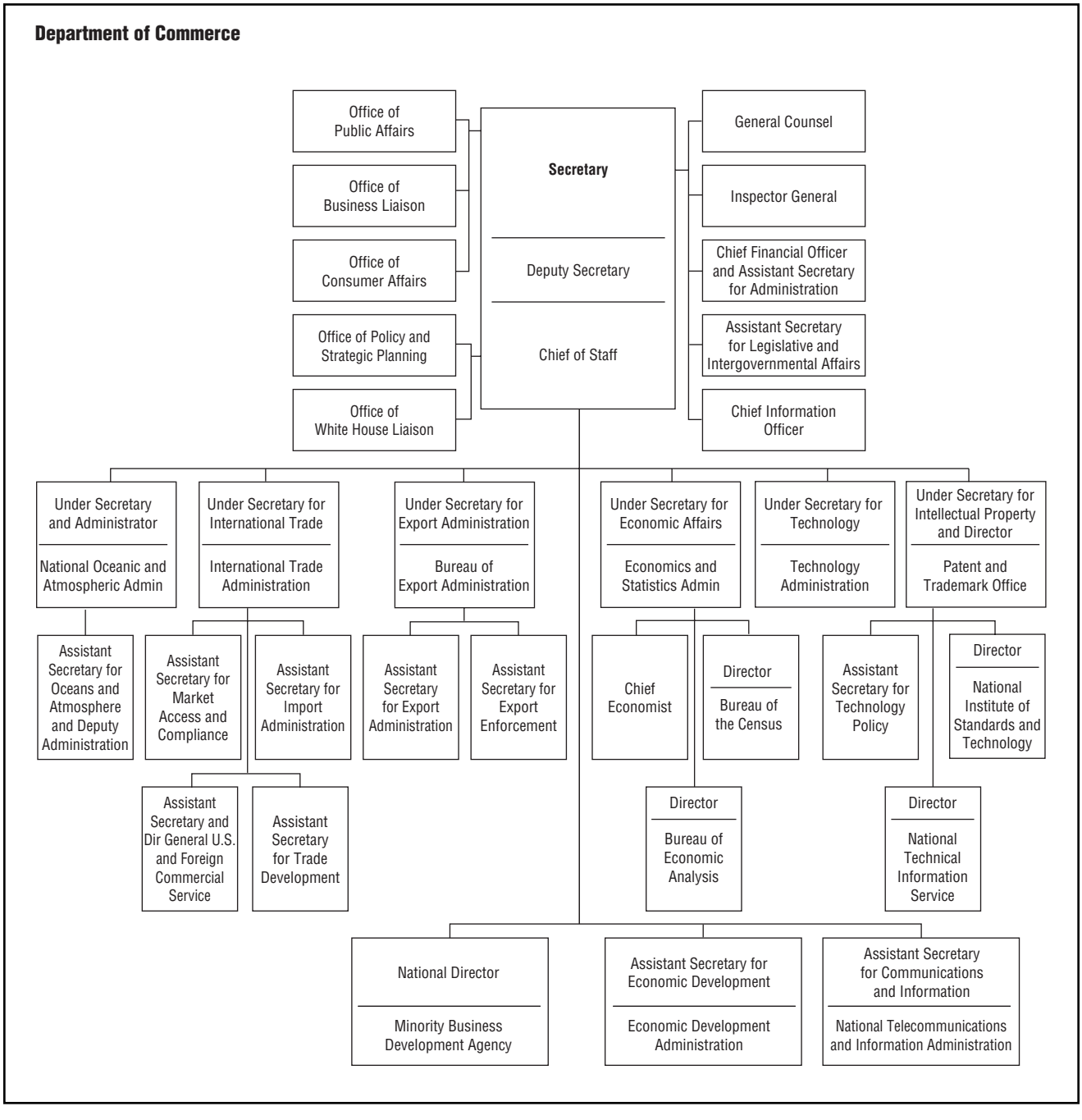


The Bureau of the Census was officially established as a permanent office on March 6, 1902 (32 Stat. 51). Its major duties are authorized by the Constitution (which requires that a census of the U.S. population be conducted every ten years) and by laws codified in Title 13 of the U.S. Code. By law, the census data collected from individuals must be kept confidential. However, statistics collected from the data are published for use by Congress, the executive branch, and the general public. The Bureau of the Census collects data on housing, agriculture, state and local governments, business, industry, and international trade. The bureau also publishes projections of future population trends. For a fee, the bureau will search records and furnish certificates to individuals who require evidence of age, relationship, or place of birth. The headquarters of the bureau is located in Suitland, Maryland, and the bureau operates 12 regional offices.

The Bureau of Economic Analysis, formerly the Office of Business Economics, was established on December 1, 1953. The bureau prepares and interprets statistics on the gross domestic product, personal income, foreign trade, and many other national accounts relating to commerce. It makes statistics available through numerous media and publications, including the monthly *Survey of Current Business.*

### Bureau of Export Administration

The Bureau of Export Administration, with its offices of Export Administration and of Export Enforcement, directs the nation's export control policy, including the processing of export license applications. Export Administration oversees export licensing. It assesses whether export controls should be imposed upon specific products, with particular regard for the potential danger to U.S. national security that may result if the products are exported. This office works with U.S. allies to advocate for better ways of controlling strategic exports. Export Enforcement investigates violations of export-control laws, including possible diversions of exports to countries that are forbidden to receive particular products.

### Economic Development Administration

The Economic Development Administration, established in 1965, works to generate economic and job growth in the United States, including developing the economies of distressed areas experiencing high unemployment; low income levels; or sudden, severe economic hardship. It funds public-works projects for public, private nonprofit, and American Indian groups, including industrial parks, roads, water and sewer lines, and airports. It also provides technical assistance and grants in order to promote business development.

### International Trade Administration

Created in 1980, the International Trade Administration (ITA) works to improve the international trade position of the United States. The ITA oversees nonagricultural trade operations of the U.S. government and supports the efforts of the OFFICE OF THE U.S. TRADE REPRESENTATIVE. It includes the offices of International Economic Policy, Import Administration, and Trade Development, and the U.S. and Foreign Commercial Service. The last agency produces and markets services and products to promote U.S. exports, including seminars and conferences on international trade.

### Minority Business Development Agency

Formerly the Office of Minority Business Enterprise, the Minority Business Development Agency was established in 1979. It helps to develop minority-owned businesses. The agency operates a network of six regional offices and four district offices that provide technical and managerial assistance to business owners and entrepreneurs.

### National Oceanic and Atmospheric Administration

The National Oceanic and Atmospheric Administration (NOAA) was formed in 1970. It is authorized to explore and to map the global ocean and its living resources; to analyze and predict conditions of the atmosphere, ocean, sun, and space; to monitor and issue warnings regarding destructive natural events such as hurricanes, tsunamis, and tornadoes; and to assess the changing condition of the environment. Included in this wide mandate are such activities as protection of marine species; preparation of nautical and aeronautical charts and geodetic surveys; prediction of ocean tides and currents; satellite observation of the atmosphere and oceans; and management of ocean coastal zones. Offices of the NOAA include the National Weather Service; the National Marine Fisheries Service; the National Environmental Satellite, Data, and Information Service; the National Ocean Service; and the Office of Oceanic and Atmospheric Research.

### National Telecommunications and Information Administration

The National Telecommunications and Information Administration (NTIA) was formed in 1978. It is responsible for advising the president on telecommunications policy; developing and presenting national plans at international communications conferences; managing federal use of the radio frequency spectrum; and administering the National Endowment for Children's Educational Television. Offices of the NTIA include the Public Telecommunication Facilities Program, which provides grants to extend delivery of public telecommunications services to as many citizens as possible, and the Institute for Telecommunication Sciences, which operates a research and engineering laboratory in Boulder, Colorado.

### Patent and Trademark Office

The U.S. Patent and Trademark Office (PTO) awards PATENTS, which give inventors

exclusive rights to their inventions, and registers TRADEMARKS, which provide businesses and organizations with rights to symbols and other features that distinguish their products or services. The PTO issues three types of patents: design patents, plant patents, and utility patents. A patent is valid for 20 years from the date when the application was filed. The PTO also participates in legal proceedings involving patents or trademarks; advocates for strengthening INTELLECTUAL PROPERTY protection worldwide; and maintains a roster of qualified patent agents and attorneys.

### Technology Administration

The Technology Administration helps businesses to develop technology that will increase their competitiveness in the marketplace. It identifies and attempts to remove governmental barriers to the commercialization of U.S. science and technology; helps to identify priority technologies; monitors foreign competitors' progress in technology; advises the president on issues concerning commercial technology and related policy; and promotes joint efforts among business, government, educational institutions, and nonprofit organizations. The office also manages the National Medal of Technology Program, the president's highest technology award.

The Technology Administration operates the National Technical Information Service (NTIS), which collects and distributes scientific and technical information generated by the U.S. government and foreign sources. Its collection comprises over 2 million works. The NTIS Bibliographic Database is available on CD-ROM or online through commercial vendors. The Technology Administration produces the Federal Research in Progress Database, a summary listing of 140,000 federally funded research projects in progress. The NTIS also licenses government-owned inventions, operates the FedWorld computer system, and makes available a major Japanese on-line information system. The NTIS is a self-supporting agency, collecting its revenues through sales of its research products.

### National Institute of Standards and Technology

The National Institute of Standards and Technology (NIST) was founded in 1901 as the National Bureau of Standards and was renamed in 1988. In addition to its traditional role as developer and protector of national standards of measurement, the institute has increasingly been called upon to help industry to use technology to improve product quality and reliability, improve manufacturing processes, and more rapidly bring to market products that use new scientific discoveries. The NIST administers the Malcolm Baldrige National Quality Award, first established in 1987, which recognizes outstanding quality achievement in business. The institute operates a world-class center in Boulder, Colorado, for science and engineering research, including research in the fields of chemistry, physics, electronics, materials science, computing, and mathematics. Its headquarters is located in Gaithersburg, Maryland.

### U.S. Travel and Tourism Administration

Established in 1981, the U.S. Travel and Tourism Administration formulates and implements national policy relating to travel and tourism. It develops trade and statistical research programs to assist the tourism industry, and aids small- and medium-sized travel and tourist businesses. It operates regional offices in Amsterdam, Frankfurt, London, Mexico City, Milan, Paris, Sydney, Tokyo, and Toronto, as well as a Miami office that services South American markets.

Web site: http://www.commerce.gov/

FURTHER READINGS

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## COMMERCE, ELECTRONIC

*Any sales transaction that takes place via computer or over the* INTERNET.

In 1990, nobody would have predicted that by the end of the twentieth century people could conduct nearly all of their commercial transactions electronically. Today, a person with a simple Internet connection can purchase anything from clothing to books to jewelry to stereo equipment online. It is possible to purchase insurance, pay one's telephone bill, and buy groceries over the Internet. Banking transactions such as transfers from one account to another can be accomplished online quickly and efficiently. Although most commerce is still conducted in person, more than one-third of adults in the U.S. made at least one purchase online in 2002.

Electronic commerce (or e-commerce) has its origins in the 1960s, with the introduction of a computerized check-processing system called

the Electronic Recording Machine—Accounting (ERMA). Banks used ERMA to process billions of checks each year, making it possible for nine employees to do the work of 50. During the 1970s, companies began using Electronic Data Interchange (EDI) to process purchase orders, invoices, and shipping notifications. Although EDI could save time and money, it was an expensive and somewhat cumbersome system, and small to mid-size businesses could not afford it.

The introduction of the Internet in the mid 1990s opened electronic processing up to companies of all sizes; anyone with a computer could connect to a global system that reached into countless businesses and homes.

The first major "virtual" company to appear on the Internet was Amazon.com, founded by Jeff Bezos in Seattle. Amazon.com began doing business in July 1995. Its premise was simple: People could purchase books online through Amazon.com for less money than the same books would cost at a local bookstore. Because Amazon.com had no actual retail stores (the books were stored in a warehouse), it could afford to keep prices lower than the competition. If Amazon.com had a buyer's order in stock in its warehouse, it could be delivered within two to three days. In some bookstores, a special order for an out-of-stock book could take weeks. (Today, Amazon.com sells a wide variety of products in addition to books.)

Not long afterward, in September 1995, Pierre Omidyar and Jeff Skoll founded eBay, an online auction service. Essentially, eBay allows sellers and potential buyers to deal online; as with a live auction, various buyers bid for an item, and the seller accepts the highest bid.

In the ensuing years, Amazon.com, eBay, and similar virtual companies cropped up on the Internet. Established "brick and mortar" companies also established an Internet presence. Today, the average person can find the local lawyer, doctor, dry cleaner, and baker on the Internet along with companies such as Amazon .com and eBay. Not every company offers online retail services; in truth, many smaller companies merely have one or two web pages on their site with a telephone number and a link to an E-MAIL address. For some companies, the Internet has proven to be a double-edged sword. On the one hand, a growing number of consumers expect that the businesses they deal with will have a web site. Even many self-employed individuals have web sites for precisely this reason. On the other hand, a web site that has nothing of substance to offer will simply drive potential customers away.

Why do people shop online? One compelling advantage is convenience. The idea of being able to sit in front of one's computer, look at different objects, compare prices, enter some data, press a button, and wait for a package to arrive two or three days later is attractive to many people, especially if they do not live close to major retail stores. (Or, for that matter, a person on the East Coast can make an online purchase from a West Coast store.) Speed is another factor. Most e-commerce retailers offer two- or three-day delivery (or next-day service for an additional fee. An online bookstore might be able to ship a hard-to-find book to the buyer in less time—and possibly for less money—than a small neighborhood bookstore that tries to track the book down.

In 2002, according to UCLA's third annual Internet Report (released February 2003), the percentage of adults using the Internet to make purchases actually dropped to 39.7 percent from a high of 50.9 percent the previous year. That figure does not necessarily reflect a loss of confidence or interest in online shopping, although some people may simply stop making online purchases once the novelty wears off. In fact, the average number of purchases made by those who still use the Internet for shopping nearly tripled between 2001 and 2002, from an average 0.8 to 28.32. The average dollar figure also rose between 2001 and 2002, from $70.21 to $100.70.

Even consumers who use the Internet on a regular basis do not necessarily see online shopping as a routine option. In fact, according to the UCLA report, many Internet buyers wait before they make their first online purchase (nearly half waited more than two years after their first Internet experience). By far the most common reason cited (32.4 percent) is fear of providing credit card information online. Other reasons include fear of deception, not knowing whether the online purchase would be cheaper than a "live" purchase, and uncertainty over what is available for sale online.

Thanks to improved technology that allows information to be encrypted when it is sent from one computer to another, it is extremely difficult for an unauthorized person to obtain one's credit card number or SOCIAL SECURITY number. (Proponents of e-commerce argue that

it is no more dangerous to send one's credit card number over the Internet than it is to have it on a receipt that can be read by countless people.)

As for missing out on the experience of actually seeing and touching an object before purchasing it, many web sites now have detailed information as well as photographs of the merchandise being offered for sale. Even retailers that do not offer electronic purchases can do this. Lenscrafters, the large optical chain that is famous for its one-hour glasses service, clearly cannot sell its wares over the Internet. The Lenscrafters web site has pictures of many of its frames, as well as a guide to help visitors determine their facial shape and which frame would look best on them. (According to the UCLA study, many Internet shoppers browse through their local retail stores to examine a product, and after that they look on the computer to see whether they can order it for less online.)

A major breakthrough in safe electronic transactions came with the passage of the Electronic Signatures in Global and National Commerce Act. The statute, which was signed into law by President BILL CLINTON on June 30, 2000, had been passed 426 to 4 by the House and unanimously passed by the Senate. Better known as the E-Sign Act, it removes one of the most stubborn barriers to e-commerce by making it safe for people to transmit personal information over their computer.

The E-Sign Act authorizes legal recognition of electronic (digital) signatures, contracts, and records. It also provides a uniform framework for all of the states to follow. A number of states had enacted their own laws, which made interstate electronic commerce cumbersome at best. E-Sign can be quite useful for people who need to sign something by a deadline. A person who wishes to purchase HEALTH INSURANCE online, for example, can do so over the computer instead of having to fill out a form and mail it in and risk being presented with a rate increase that went into effect before the paperwork was received. With an electronic signature, the transaction is completed on the spot.

In June 1998, the U.S. DEPARTMENT OF COMMERCE issued a white paper that called for the creation of a not-for-profit corporation to help manage the Internet's infrastructure. This corporation became known as the Internet Corporation for Assigned Names and Numbers (ICANN). The best known function of ICANN is its coordination of the Domain Name Service (DNS). In other words, ICANN is responsible for overseeing the technology that allows Internet users to type in domain names (i.e., www.domainname.com) instead of long strings of numbers. This technology makes it easier for users to type in names of retail stores or online commerce sites. ICANN also oversees the Uniform Domain-Name Dispute Resolution Policy (URDP). This policy governs the methods by which corporate entities can choose and protect their domain names. All URDP cases are arbitrated through the World Intellectual Property Organization (WIPO), a group created in 1970 to safeguard intellectual property rights. Companies whose names are trademarked, or who are well-known organizations, are sometimes forced to contend with individuals who try to use a similar domain name. This practice is known as "cybersquatting." An example of a company that was the victim of cybersquatting is ABC Carpet Company, an established New York City-based retailer of rugs and other home accessories. In 1998, ABC registered the name "ABC Carpet & Home" (which it had begun

**E-Commerce Revenue, by Selected Service Industries, in 2001**

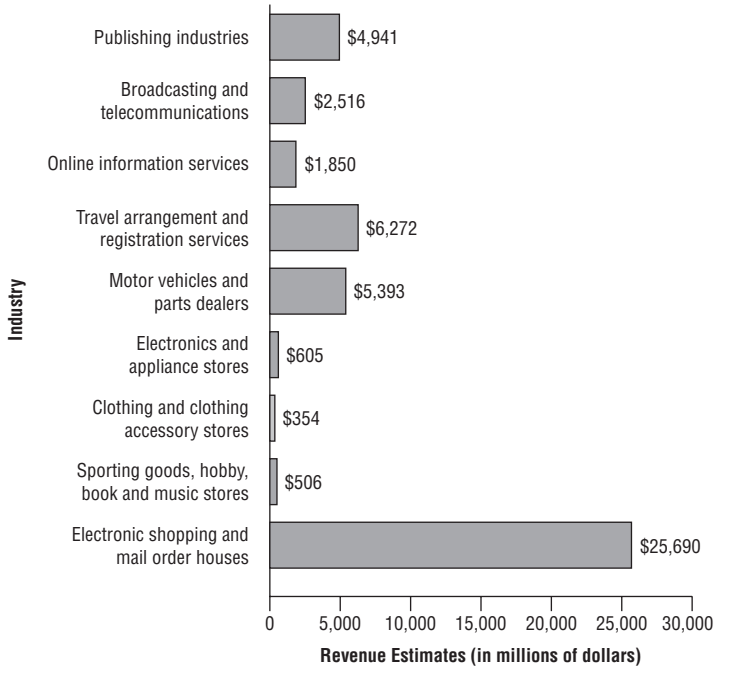


SOURCE: U.S. Census Bureau, *Service Annual Survey*.

using in 1995) with the U.S. PATENT AND TRADEMARK OFFICE. Two separate individuals tried to use domain names with "ABC Carpet & Home" in them, and in both cases WIPO ordered that ownership of the domain names in question be transferred to the New York company. *ABC Carpet Co. v. Helen Gladstone,* WIPO Case No. D2001-0521; *ABC Carpet Co. v. Tom Boltz* and abccarpetandhome.com, WIPO Case No. D2001-0531.

One e-commerce question that has generated interest is whether states should be able to tax sales conducted over the Internet. Technically, Internet transactions are taxable, but a 1992 ruling by the U.S. Supreme Court held that states could only require sellers to collect taxes if they have a physical presence in the same state as the consumer. In 1998, Congress imposed a three-year MORATORIUM against any Internet taxes, which was renewed for two years in 2001. Meanwhile, the National Governors Association (NGA) introduced the Streamlined Sales Tax Project (SSTP) in 2000 to adopt uniform tax rates among the 50 states. The estimated date for SSTP's completion is late 2005.

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CROSS-REFERENCES

Justice Department; Internet; Taxation; Telecommunications.

## COMMERCIAL CODE

*A colloquial designation for the body of law known as the* UNIFORM COMMERCIAL CODE *(UCC), which governs the various business transactions that are integral parts of the U.S. system of commerce. The UCC has been adopted in virtually all of the states.*

## COMMERCIAL LAW

*A broad concept that describes the* SUBSTANTIVE LAW *that governs transactions between business entities, with the exception of maritime transportation of goods (regulated by* ADMIRALTY AND MARITIME LAW*). Commercial law includes all aspects of business, including advertising and marketing, collections and* BANKRUPTCY*, banking, contracts, negotiable instruments,* SECURED TRANSACTIONS*, and trade in general. It covers both domestic and foreign trade; it also regulates trade between states.*

The term commercial law describes a wide body of laws that govern business transactions. The UNIFORM COMMERCIAL CODE (UCC), which has been adopted in part by every state in the United States, is the primary authority that governs commercial transactions. The UCC is divided into nine articles, covering a broad spectrum of issues that arise in commercial transactions. These articles govern the following: sales of goods, leases of goods, negotiable instruments, bank deposits, fund transfers, letters of credit, bulk sales, warehouse receipts, bills of lading, investment SECURITIES, and secured transactions.

A number of other laws also govern business transactions. For instance, although Article 4 of the UCC governs bank deposits, federal law in the form of statutes and regulations prescribe requirements for BANKS AND BANKING in general. Likewise, federal law governs such issues related to commercial law as bankruptcy and debt collection. Many of the federal laws related to commercial transactions are codified in title 15 of the U.S. Code.

Although the UCC controls most aspects of domestic commercial law, the COMMON LAW of contracts, as well as other state laws, still applies to some types of transactions that arise in business, such as contracts for services. INTERNATIONAL LAW is likewise an important component of this area. For instance, the United Nations Convention on Contracts for the International Sale of Goods has been ratified by approximately 62 nations, representing two-thirds of the world's trade.

Though the business world undergoes constant change, commercial laws generally have remained static. The COMMISSIONERS ON UNIFORM LAWS, in conjunction with the American Law Institute and other organizations, periodically revises the articles of the UCC. However, the revision process of the UCC is typically slow and deliberate. Recent revisions to Article 2 (governing the sale of goods) and Article 9 (governing secured transactions) took several years to complete. Thus, not only is commercial law substantially uniform throughout the United States, but also those who conduct business can proceed with commercial transactions with

some degree of certainty as to the law that governs those transactions.

CROSS-REFERENCES

Banks and Banking; Check; Contracts; Mercantile; Merchantable; North American Free Trade Agreement; Promissory Note; Sales Law; Uniform Commercial Code; Warranty.

## COMMERCIAL LAW LEAGUE OF AMERICA

The Commercial Law League of America (CLLA) was founded in 1895 to elevate standards and improve the practice of COMMERCIAL LAW, to encourage an honorable course of dealing among its members and among the profession at large, to promote uniformity of legislation in matters affecting commercial law, and to foster among its members a feeling of fraternity and mutual confidence. Its members are lawyers, commercial agencies, and law list publishers.

The league has been a pioneer in standardizing commercial practice. It continues to maintain and expand its program of activities in such areas as creditors' rights, commercial laws and legislation, and BANKRUPTCY and reorganization. In March 2003, the CLLA presented testimony and a formal position paper before a U.S. Congress subcommittee for meaningful bankruptcy reform, relative to the pending Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, H.R. 975, 108th Cong., 1st Sess.

The CLLA maintains over 40 committees covering various areas of commercial law and other topics, such as world peace through law and world trade. Its activities include educational programs on legal issues of public interest and importance. Along with the American Bankruptcy Institute, it also sponsors the American Board of Certification (ABC), a non-profit organization that serves to improve and certify attorneys belonging to bankruptcy and creditors' rights bars.

The CLLA has sections on commercial collection agencies and young members; it also has committees on bankruptcy and the UNIFORM COMMERCIAL CODE. It publishes the *Commercial Law Journal* ten times a year and holds annual meetings, often combining national conferences with those of other prominent organizations, such as the National Association of Credit Management and the Finance, Credit and International Business Association (FCIB). In 1998, the CLLA began holding international credit conferences as well.

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CROSS-REFERENCES

Bankruptcy; Uniform Commercial Code.

## COMMERCIAL PAPER

*A written instrument or document such as a check, draft, promissory note, or a certificate of deposit, that manifests the pledge or duty of one individual to pay money to another.*

Commercial paper is ordinarily used in business transactions, since it is a reliable and expedient means of dealing with large sums of money and minimizes the risks inherent in using cash, such as the increased possibility of theft.

One of the most significant aspects of commercial paper is that it is negotiable, which means that it can be freely transferred from one party to another, either through endorsement or delivery. The terms *commercial paper* and negotiable instrument can be used interchangeably.

Since commercial paper constitutes PERSONAL PROPERTY, it is transferable by sale or gift and can be loaned, lost, stolen, and taxed. Commercial paper is a specific type of property primarily governed by article 3 of the UNIFORM COMMERCIAL CODE (UCC), which is in effect in all 50 states, the District of Columbia, and the Virgin Islands. Although Louisiana has not enacted all the articles of the UCC, it has adopted article 3.

### Types of Commercial Paper

The UCC identifies four basic kinds of commercial paper: promissory notes, drafts, checks, and certificates of deposit. The most fundamental type of commercial paper is a promissory note, a written pledge to pay money. A promissory note is a two-party paper. The maker is the individual who promises to pay while the payee or holder is the person to whom payment is promised. The payee can be either a specifically named individual or merely the bearer of the

*Checks are considered a type of commercial paper, as well as a specific kind of bank draft.*

DENNIS DEGNAN/CORBIS

instrument who has it in his or her physical possession when he or she seeks to be paid according to its terms. A note payable to "bearer" can be paid to the person who presents it for remuneration. Such an instrument is said to be *bearer paper.*

A promissory note that is *payable on demand* can be redeemed by the payee at any time, whereas a *time note* has a date for payment on its face that establishes the date when the holder will have an enforceable right to receive payment under it. There is no obligation to pay a time note until the date designated on its face.

The ordinary purpose of a promissory note is to borrow money. Promissory notes should not be confused with credit or loan agreements, which are separate instruments that are usually signed at the same time as promissory notes, but which merely describe the terms of the transactions.

A promissory note serves as documentary evidence of a debt. It can be endorsed and sold at a discount to other parties, and each subsequent endorser becomes secondarily liable for the amount specified on the face of the instrument. A number of CONSUMER CREDIT dealings are funded through the use of promissory notes.

Certain types of promissory notes are sold at a discount, such as U.S. savings bonds and corporation bonds. Such an instrument is sold for an amount below its face value and can subsequently be redeemed on the due date or date of maturity for the entire face amount. The interest obtained by the holder of the instrument is the difference between the purchase price and the redemption price. In certain instances, bonds that are not redeemed immediately upon maturity accumulate interest following the due date and are ultimately worth more than their face value when redeemed at a later time. If such bonds are cashed in before maturity, the holder receives less than the face value.

A draft, also known as a bill of exchange, is a three-party paper ordering the payment of money. The drawer is the individual issuing the order to pay, while the drawee is the party to whom the order to pay is given. As in the case of a promissory note, the payee is either a specified individual or the bearer of the draft who is to receive payment according to its terms. The draft is made payable on demand or on a certain date. A common example of a draft is a cashier's check.

A draft is often used in business to obtain payment for items that must be shipped over long distances. Drafts are often the preferred method of payment for purchasers who want to examine goods prior to payment or who do not have the necessary funds available at the time of sale. The vendor might have reservations concerning the buyer's credit and desire payment as soon as possible. The procedure ordinarily followed in such instances is that upon shipment of the goods, the seller receives a bill of lading from the carrier. The bill of lading also serves as a certificate of title to the goods, which is ordinarily in the seller's name.

Upon shipment, the seller draws a draft against the buyer-drawee, who is required to pay the draft. The seller's bank is named as the payee. The seller endorses the bill of lading to the payee and attaches the bill to the draft. The seller can either negotiate these instruments to the payee at a discount or use them as security for a loan. Subsequently, the papers are endorsed by the seller's bank and delivered to a correspondent bank in the community where the buyer is located. The correspondent bank seeks payment of the draft from the buyer and when payment is made, the bank transfers ownership of the goods from seller to buyer by endorsing

the bill of lading to the buyer. The buyer can then obtain the goods from the carrier upon presentation of the bill of lading, which demonstrates his or her title to the shipped goods.

A check is a specific kind of draft, which is drawn on a bank and payable on demand to a particular individual or to the bearer, in which case it can be written payable to "cash."

An individual who opens a checking account is engaged in a contractual relationship with a bank. The individual agrees to deposit money therein, while the bank agrees that it is indebted to the depositor for the amount in the account, in addition to promising to honor checks written for payment against the account when there are sufficient funds on hand to do so.

A certificate of deposit, frequently referred to as a CD, is a written recognition by a bank of the acquisition of a sum of money from a depositor for a designated period of time at a specified interest rate, coupled with a promise of repayment. The bank is both the maker and the drawee, and the individual making the deposit is the payee.

Ordinarily, certificates of deposit come in specific denominations that vary according to the length of the term that the bank will hold the funds and are available only for large sums of money. They are used mainly by corporations and individuals as savings devices since they generally bear higher interest rates than ordinary savings accounts. They must, however, be left on deposit for the designated time period. Ordinarily, a CD can be cashed in prior to the date of maturity, but some interest will be forfeited. Depending upon the provisions of the CD, however, a bank may have the legal right to refuse to close an account before the expiration of the designated date of maturity.

### Negotiability

There are basic requirements for the negotiability of commercial paper. The instrument must be in writing and signed by either its maker or its drawer. In addition, it must be either an unconditional promise, as in the case of a promissory note, or an order to pay a specific amount of money, such as a draft. It must be payable either on demand or at a fixed time to order or to bearer.

The requirement that the instrument must be in writing can be met in various ways. The paper can be printed, typed, engraved, or written in longhand, either in ink, pencil, or both. Ordinarily, specimens of commercial paper can be obtained from banks or stationery stores.

Similarly, there are a number of ways to comply with the signature requirement. The signature may legally be either handwritten, typed, printed, or stamped by a machine. Individuals who are unable to write their names can sign with a simple mark, such as an *X*. Also permissible are initials, a symbol, a business or TRADE NAME, or an assumed name.

The pledge or order for payment must be unconditional to insure certainty that the instrument will be paid, since it is used in place of money and as a means of obtaining credit.

When the paper includes an unconditional promise or order, supplementary facts can be mentioned that will not defeat its negotiability. For example, the paper can indicate the transaction was secured by a mortgage. It might mention a specific account or fund out of which payment is expected, although not required. Ordinarily, such a collateral statement is made for purposes of accounting and does not create a conditional promise or order to pay. Payment can, however, be limited to the total assets of a partnership, unincorporated association, or trust.

A promise to pay is conditional when it indicates that it is either subject to or governed by another agreement. When payment is conditional, negotiability is terminated and the instrument is not commercial paper. The holder of the paper cannot rely upon the face of the document to establish and fix his or her right to payment.

A paper does not qualify for treatment as a negotiable instrument if payment of it is to be made exclusively from a particular fund, unless such instrument is issued by a government or division thereof.

In dealing with a promissory note, practically any terms that state a definite promise will suffice to make the instrument legally enforceable. The phrase "I promise to pay" clearly demonstrates an unconditional pledge of payment; whereas an IOU is not deemed definite enough to warrant payment and, therefore, is not a negotiable instrument. There must be an order to pay in a check or a draft. A mere request, as in "I wish you would pay," is insufficient. Language used for courtesy, such as "please pay," does not, however, defeat the order. Suitable language to instruct payment would be "pay to the order of *X*."

The holder of the negotiable instrument must be able to ascertain the precise value of the paper by looking at its face. In certain instances, it might be necessary to compute interest, as in the case of a promissory note that bears a certain annual rate. A provision for interest does not impair the determination of the actual sum. In addition, certainty regarding the amount is not altered by the fact that the interest rate can differ before or after default or before or after a particular date.

The amount payable remains a fixed sum even in the event that it is paid in installments, or reduced by agreement of payment prior to a set time or increased following the date of payment. In addition, the certainty of the sum is not affected by a provision for collection of expenses and lawyer's fees.

The sum must be payable in money, which is a medium of exchange adopted by governments; otherwise, the document is not considered commercial paper.

An instrument must be payable either on demand or at a set time in order to have negotiability. Papers that are payable on demand are payable upon presentation, such as checks.

When a note or a draft is payable on, or prior to, a fixed date or for a set period thereafter, it is considered to be negotiable at a definite time. When an instrument is *payable on or before* a certain date, payment is required no later than the date indicated, although it can be made prior to that date. Similarly, a paper made payable at an established time *after sight* is payable at a definite time. After sight means that upon presentation of the instrument to the maker by the holder, payment will occur after the expiration of the time designated on the note. The payee of a note due one week after sight must be paid by the maker within a week of the date it is presented for payment. It need not be paid immediately upon presentation, since the terms of the note do not make it a demand instrument.

If the time provided for payment of an instrument is definite except for the presence of an acceleration clause, the time of payment of the instrument is still considered definite. That is, a note can provide that the time for payment will be accelerated if a certain event takes place or at the option of one of the parties to the agreement without destroying its negotiability. Also acceptable are extensions of the payment period, which can be made at the choice of the holder, maker, or acceptor, or immediately when a particular act occurs.

An instrument retains its negotiable quality even if it is undated, antedated, or postdated. An undated instrument takes effect immediately upon delivery to the payee. An antedated paper is given a date that has passed, and a postdated instrument is given a future date. In the event that an instrument is either antedated or postdated, the determination of the date on which it becomes legally operative is contingent upon the date that appears on its face and upon whether it is payable on demand or on a certain date. A postdated check cannot be cashed prior to the date appearing on its face, in spite of the fact that a check is ordinarily payable on demand.

An instrument is not negotiable if it is payable upon an occurrence of indefinite timing, even when the event is certain to happen, such as death.

The requirement that an instrument be made payable either to order or to bearer is met when the paper is made available to the bearer, or to an individual specifically designated, or to the order of that person, as in "X, or his order." An estate, trust, corporation, partnership, or unincorporated association may be designated as a payee of a commercial paper.

An instrument can be made payable to two or more people, either together or in the alternative. If the paper is made out to two parties together, as in "to X and Y," then both payees must endorse it before payment will be made. An instrument made out in the alternative, however, as in "To X or Y," requires endorsement by only one payee in order to be paid.

Checks and drafts are ordinarily written on printed forms, made payable both to order and bearer. An empty space is left between the words "pay to the order of" and "or bearer." When the name of the payee is inserted by the drawer, the paper is regarded as an order instrument in spite of the fact that the phrase "or bearer" is not deleted. In such instances, the presumption is that the drawer merely neglected to eliminate this language. An instrument is bearer paper, however, when it is made payable to a specific payee and the words "or bearer" are either typed or handwritten on the document as additions to it.

Bearer paper is made payable either to the holder, a specific individual, the bearer, or to cash. It is common for such an instrument to read "pay to the order of bearer." This occurs in the case

where a printed form is used and the term *bearer* is written in following "pay to the order of." The word *bearer* serves to make the instrument bearer paper in such an instance.

Bearer instruments are tantamount to cash because they are freely transferrable from one person to another without requiring an endorsement. They are thereby not as secure as order instruments since if they are stolen, their terms permit payment to be made to whoever possesses them at the time they are presented for payment. Many banks require customers to endorse bearer paper prior to payment as a safety measure. This provides both the drawer and the bank with the name of the individual who is given payment.

### Endorsements

An endorsement is the process of signing the back of a paper, thereby imparting the rights that the signer had in the paper to another person. The number of times an instrument may be endorsed is unlimited. There is no requirement that the word "order" be embodied in the endorsement. Four principal kinds of endorsements exist: special, blank, restrictive, and qualified.

An endorsement that clearly indicates the individual to whom the instrument is payable is a special endorsement.

A paper containing a blank endorsement is one that has the signature of the payee but no specific endorsee is designated. A check that is made payable to the order of X is endorsed in the blank when X signs it. Once endorsed, it becomes bearer paper and is negotiable by anyone who physically holds it. A blank endorsement is changed into a special endorsement if certain words are written above the endorsee's signature, such as "pay to the order of Y."

A qualified endorsement is one wherein liability is disclaimed by the endorser through inclusion of a phrase preceding his or her signature. Ordinarily, an unqualified endorser's liability may be either secondary, whereby the endorser is bound to pay if the individual expected to pay defaults and certain conditions are met or by WARRANTY, by which the endorser incurs liability upon ALTERATION OF THE INSTRUMENT. To disclaim secondary liability, the endorser can include the words "without recourse," thereby relieving himself or herself of any responsibility to pay it.

Attorneys who are the recipients of checks drawn in settlement of the claims of their clients commonly sign their clients' checks with qualified endorsements. This type of check is ordinarily made payable to the lawyer and client jointly. It is generally endorsed by the lawyer WITHOUT RECOURSE and given to the client. The attorney then is not liable if the client does not receive the money promised by the terms of the check.

A restrictive endorsement is conditional and attempts to prevent subsequent transfer of the document. The language of the endorsement indicates that the instrument is intended for limited use, such as "for deposit only," or specifies that the paper is meant for the benefit of the endorser or another individual, as in "Pay X in trust for Y." The condition imposed by a restrictive endorsement must be satisfied before payment can be properly made.

However, an endorsement that tries to prohibit further transfer of an instrument will not succeed. If a check says "Pay X only," it is still completely negotiable upon its endorsement by X.

### Liability of Parties

An individual who signs an instrument is either primarily or secondarily liable for payment. Primary liability is extended to the person who is expected to pay first, and the individual who is legally responsible to pay upon the failure of the first party to do so is secondarily liable.

The maker of a promissory note is primarily liable, since that person is the individual who has originally promised to pay. He or she must meet this obligation when payment becomes due unless he or she has a valid defense or has been discharged of the debt.

The drawer of a check or draft is secondarily liable, since that individual does not make an unconditional promise to pay the instrument. He or she expects the bank to pay and promises to pay the amount of the instrument only upon notification of dishonor, a refusal by the drawee to accept the paper when properly presented for payment. This might occur, for example, if the bank refuses to pay a check due to insufficient funds in the drawer's checking account or because he or she has notified the drawee to stop payment.

The drawee of a draft or check has primary liability to the holder, an individual who has lawfully acquired possession and is entitled to payment, upon acceptance of the instrument by the drawee. A draft is accepted for payment when the acceptance is indicated by the drawee

**Commercial Paper Outstanding, 1991 to 2002**

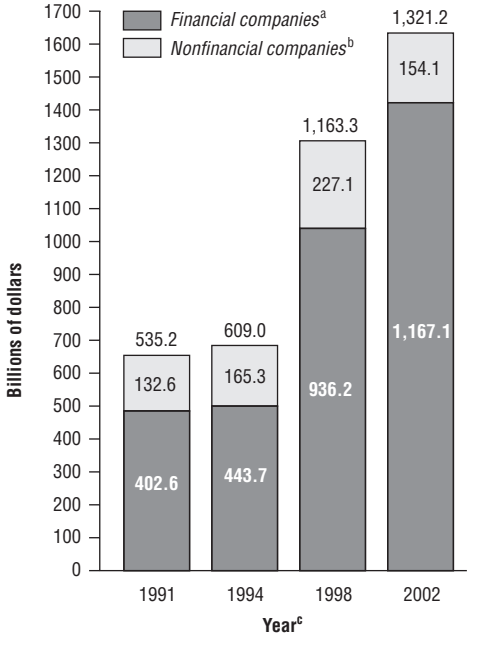


[a]Institutions engaged primarily in activities such as commercial, savings, and mortgage banking; sales, personal, and mortgage financing; factoring, finance leasing, and other business lending; insurance underwriting; and other investment activities.

[b]Includes public utilities and firms engaged primarily in such activities as communications, construction, manufacturing, mining, wholesale and retail trade, transportation, and services.

[c]As of December of each year.

SOURCE: Board of Governors of the Federal Reserve System, *Federal Reserve Bulletin*, monthly.

on the face of the document. Certification of an instrument, such as a check, is its acceptance by a bank guaranteeing that payment will be forthcoming. A drawee is liable to the drawer if the drawee refuses to pay a draft or check that is properly drawn and presented because such action constitutes a noncompliance of the drawee's contractual obligation to the drawer.

Any person who places his or her unqualified endorsement on a commercial paper incurs secondary liability for its payment. Such liability occurs when the individual who has the primary duty to pay defaults on his or her obligation.

A maker or drawer is not relieved from payment of an instrument endorsed with the payee's name when an imposter manages to have a paper issued to himself or herself by the maker or drawer; when an individual signing on the behalf of the maker or drawer plans that the payee shall have no interest in the paper, for example, the case of a check being made out to a fictitious payee; and when the agent or employee of the maker or drawer designates the name of a payee with the intent that the named party will actually have no interest in the instrument. In the last two instances, the failure of the employer to use reasonable care in choosing and supervising employees makes the employer personally responsible for all losses that arise from his or her NEGLIGENCE. Many employers guard against such risks by taking out fidelity insurance policies to cover losses that might occur through employee misconduct.

### Secondary Liability

Individuals who are secondarily liable on a negotiable instrument are not obliged to pay unless it has been presented for payment and dishonored. The commercial paper must first be given to the person who is primarily liable for payment. In the event that the instrument clearly notes the date of payment, the instrument must be presented on the date indicated. If payment is unjustifiably refused by the individual who has primary liability, the secondary party must be given notice of the dishonor and the presentation of the instrument for payment must be made within a reasonable period of time. What constitutes a reasonable time is contingent upon what type of instrument is involved. If the paper is a check, the drawer has primary liability for thirty days following the date on the check or the day it was given or sent to the payee, with the later date prevailing. An endorser is secondarily liable for seven days following his or her endorsement. When presentation does not occur within these time periods, either the drawer or the endorser may escape liability.

Individuals who are secondarily liable must receive notice of the dishonor of a commercial paper in order to be held liable for its payment. Such notice must be given by a bank prior to midnight on the date following the dishonor. Notice can be oral or in writing, as long as the language identifies the paper and indicates that it has been dishonored. If more than one person is eligible to obtain payment, only one of them need notify those parties who are secondarily liable.

### Holders

A holder is an individual who is in possession of an instrument that is either payable to

him or her as the payee, endorsed to him or her, or payable to the bearer. Those who obtain instruments after the payee are holders if such instrument is either payable to the bearer or endorsed properly to their order. The party in possession is not considered to be the holder in a case in which a necessary endorsement has been forged.

According to law, a holder may either be an ordinary holder or a holder in due course, who has preemptive rights to payment. An ordinary holder becomes a holder in due course upon taking an instrument subject to the reasonable belief that it will be paid and that there are no legal reasons why payment will not occur.

In more technical terms, to be a holder in due course, the party must take the paper for value, in GOOD FAITH, and absent the notice that it is overdue, has been dishonored, or is subject to an adverse claim. Such notice of problems affecting the validity of the instrument exists if the party either is specifically informed about something or otherwise has reason to believe in the existence of a problem.

A holder takes a paper for value when the holder has imparted something of value, such as property or services, in exchange for the value of the paper, as evidenced by its terms. In such a case, the individual becomes the holder for value.

If a paper is used in satisfaction of or as security for the repayment of a debt, even though the debt might not be due when the paper is taken, the instrument is taken for value. In addition, value is given when one commercial paper is traded for another.

A person who receives a check or other type of negotiable instrument as a gift is an ordinary holder as opposed to a holder in due course, since no consideration that is bargained-for value has been exchanged by the parties. A holder in due course has greater legal rights concerning protection for enforcement of the provisions for payment of a negotiable instrument than does an ordinary holder.

For an individual to be a holder in due course, the negotiable instrument must be taken in good faith that it represents a valuable legal right. There must be honesty in the transaction, but the determination of whether or not good faith is present is totally subjective.

Frequently, a due date is clearly specified on the face of the document. A holder is presumed to have knowledge of the terms appearing on the paper. If an individual is presented with a note on May 15 that is payable on May 1, he or she is regarded as having knowledge that it is overdue. A person is legally considered to have knowledge that a demand instrument is overdue if he or she accepts it after being informed that a demand for payment has previously been made and refused or if a reasonable period of time has elapsed since its issuance. Ordinarily, 30 days after the date on which a check was issued is a reasonable time period within which its presentation to a bank for payment should occur. An individual who accepts a check that is more than 30 days old is assumed to be doing so with the knowledge that it is overdue.

An instrument that has been dishonored ordinarily has that fact indicated on its face. For example, a check might be stamped "insufficient funds," "account closed," or "payment stopped." An individual who accepts such a document possessing knowledge of its dishonor cannot be a holder in due course. A person cannot be a holder in due course if he or she takes an instrument subject to his or her knowledge that a claim exists against it, such as when it has been stolen or transferred as a result of FRAUD.

### Defenses

A holder of a negotiable instrument who has been refused payment when payment was due has a CAUSE OF ACTION against the party or parties liable for payment. Ordinarily, when an individual is sued on a negotiable paper, he or she will try to defend his or her right to refuse payment. Certain defenses, known as *real defenses,* are valid against ordinary holders as well as holders in due course, whereas *personal defenses* are only valid against ordinary holders.

Normally, any defense that can be asserted in an action concerning a contract may also be used in an action brought to enforce payment of a negotiable instrument. The legal incapacity of the maker, drawer, or endorser, a signature effected by duress, illegality, or fraud, and alteration of the instrument qualify as real defenses.

One of the most prevalent legal incapacity defenses asserted is infancy. The law affords protection to INFANTS by permitting them to evade their contractual obligations, even when, in some instances, they have reaped the benefits. A holder is usually excluded from receiving payment on a note from a minor.

Another incapacity defense is legal insanity or INCOMPETENCY. A party who has been legally declared insane or incompetent is not liable for

any contractual obligations entered during that time so that if such a person signs or endorses a negotiable instrument, the transaction is nullified. Intoxication is not a valid defense to dishonor of a commercial paper.

Duress may be used as a defense in the event that the individual against whom a suit is brought can prove that he or she was subject to extreme pressure caused by another at the time of the execution of the paper. If the defendant signed the instrument subject to a threat of immediate physical violence or death, he or she is not legally bound to honor its terms since he or she had not freely entered into the transaction. Certain types of duress, such as a threat to report a wrongdoing to the police or to bring a civil lawsuit, are not valid against a holder in due course, although they can be used as valid personal defenses against an ordinary holder.

Certain jurisdictions deem a paper that has been negotiated to pay a usurious loan or gambling debt null and void. An individual can legally avoid payment to the holder in due course of such an instrument based on the illegal nature of the debt it was meant to pay.

Two basic types of fraud exist: *fraud in the essence* and *fraud in the inducement. Fraud in the essence* occurs when an individual is intentionally lied to about the nature of the instrument or its terms. It is a defense that is valid against both an ordinary holder and a holder in due course. *Fraud in the inducement* takes place when the party signing the paper is cognizant of its nature and terms but is misled into believing that the reasons for its creation have been satisfied when in actuality they have not. For example, an individual might be induced to issue a check for a certain amount to a mechanic who claims to have repaired a car. If the individual subsequently discovers that the car was not repaired, fraud may be used as a personal defense against the mechanic who has not performed his or her part of the contract to repair the car. Fraud in the inducement is only valid against an ordinary holder, not a holder in due course.

A *material alteration* is an addition or deletion of the language of an instrument, which changes the obligations of any party to it. A defendant may avoid liability for payment of a commercial paper if its terms have been materially altered. Examples of such alterations are a change in the date of payment or amount to be paid. When an individual's own negligence is a contributing factor to a material alteration, that negligence may not be asserted by him or her as a defense against someone who pays the instrument in good faith or against a holder in due course.

An alteration made by a holder that is both material and fraudulent can be used as a defense against enforcing the payment of the document by all those people whose agreements were changed. If these two conditions of materiality and fraud are not met, the instrument is ordinarily enforceable according to the way it was initially written, and none of those involved can use the alteration as a defense against payment.

When a holder in due course takes a paper following its fraudulent alteration by the previous holder, he or she is entitled to receive payment according to the original terms of the instrument prior to its alteration. None of the parties responsible for payment can use the alteration as a defense against a holder in due course, but it may be used against an ordinary holder.

### Discharge from Liability

The most common way to be discharged from liability on a commercial paper is through payment. The intentional CANCELLATION OF AN INSTRUMENT by the holder by either marking the instrument paid or by destroying it discharges all liability.

The holder may also discharge an individual from liability for payment through renunciation. This can be accomplished when a document is signed and delivered by the holder or when a paper is relinquished to the party who is being discharged. A stop-payment order put on a check by its drawer has the effect of discharging the bank from liability for refusing to honor the check when presented for payment. It cannot, however, discharge the drawer from liability in cases where the drawer was contractually or otherwise obligated to pay the payee.

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#### CROSS-REFERENCES

Bonds; Documentary Evidence.

## COMMERCIAL SPEECH

See FIRST AMENDMENT; FREEDOM OF SPEECH.

## COMMINGLING

*Combining things into one body.*

The term *commingling* is most often applied to funds or assets. When a fiduciary, a person entrusted with the management of funds other than his or her own in trust, mixes trust money with that of others, the fiduciary is commingling funds and thereby breaching his or her fiduciary duty.

A member of a corporation's board of directors commingles funds when he or she mixes personal funds with the funds of the corporation. An attorney who commingles his or her money with money belonging to a client is violating the ethics of the legal profession.

## COMMISSION ON CIVIL RIGHTS

The federal Commission on Civil Rights evaluates CIVIL RIGHTS laws and policies of the U.S. government, follows legal developments regarding discrimination, investigates allegations that U.S. citizens are being denied their civil rights, and evaluates equal opportunity programs. It collects and monitors information on discrimination or the denial of EQUAL PROTECTION of the laws on the basis of race, color, religion, sex, age, handicap, or national origin. It also investigates equality of opportunity in voting, education, employment, transportation, housing, and the administration of justice.

The commission holds public hearings, publishes findings and reports, and maintains a toll-free phone line by which people may make complaints regarding civil rights. The commission disseminates the information it gathers but cannot enforce existing civil rights laws. It offers its findings and makes recommendations to the president and to Congress. Many of the commission's recommendations have been incorporated into laws, executive orders, and regulations. The commission also collects and stores civil rights information gathered from around the United States.

The Commission on Civil Rights was created by the CIVIL RIGHTS ACT of 1957, and it was later reestablished by the U.S. Commission on Civil Rights Act of 1983 (42 U.S.C.A. § 1975 et seq.). It maintains six regional offices and is headed by eight members, or commissioners, of whom no more than four shall come from any one political party. Members serve for three or six years. Four members of the commission are appointed by the president, two by the president pro tempore of the Senate, and two by the Speaker of the House of Representatives. The president designates a chairperson and vice chairperson from among the commission's members.

From the beginning, the Commission on Civil Rights has interjected itself in controversy. It has investigated activities ranging from discrimination to HATE CRIMES. Because appointments to the commission are political, its tone often swings from the right to the left, depending on who is president. During the 1980s, it issued opinions that were so conservative that some congressional Democrats wanted to shut it down. In contrast, during the 1990s, under the leadership of its outspoken chairwoman, Mary Frances Berry, it tilted toward the left.

The commissions most controversial recent action was its investigation into the 2000 presidential election in Florida. After a six-month investigation, the commission issued a report claiming that Florida's conduct of this election was marked by "injustice, ineptitude and inefficiency." The report claimed that minority voters were disenfranchised through unequal access to voting equipment and overzealous efforts to purge state voter lists of felons and other ineligible voters. It recommended that the JUSTICE DEPARTMENT initiate litigation to correct this discrimination.

The four commissioners who backed the report were all Democrats or otherwise considered liberal. Two Republican commissioners issued a dissenting report, stating that the Florida election problems were hampered by unintentional and unanticipated problems that were not motivated by racial bias and that did not disenfranchise minority voters. The dissent cited a study that low income and literacy rates were more likely than race to explain the number of ballots rejected in certain neighborhoods. In addition to the dissenters, Florida's Republican governor and SECRETARY OF STATE denounced the commission's findings.

Lost in the controversy over whether the commission's finding of bias in the Florida 2000 presidential election was itself biased were some non-controversial recommendations of the commission. These included better training for poll-workers, upgraded voting equipment that would be consistently used, and better resource

allocation for voting education. Some of the commission's recommendations were later adopted by Florida for the 2002 election cycle.

The fact that appointees to the commission are political has meant that the appointment process to the commission itself has become political at times. For example, in 1993, Republicans refused to confirm a Democratic appointee for the chair of the commission. In 2002, a Republican appointee to the commission had to go to court before he could take his seat on the commission.

Nevertheless, the Commission had remained in existence for almost 50 years, and has made valuable contributions to America's civil rights debate in that period. Its web site, <www.usccr.gov>, gives important information on how to enforce federal civil rights laws, and different state civil rights organizations. As long as it exists, the commission will probably stir up controversy, but ideally it will continue to educate and enlighten about civil rights issues as well.

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## COMMISSIONER

*A person charged with the management or direction of a board, a court, or a government agency.*

A commissioner has the power and responsibility to administer laws or rules that relate to a specific subject matter over which he or she has authority. Generally, he or she is appointed specially, as in the case of a commissioner of court.

## COMMISSIONERS ON UNIFORM LAWS

The United States has a central federal government, the authority of which is restricted to those powers given to it by the Constitution. Each state has its own system of legislative and judicial functions that operate in areas not within the exclusive control of the federal government.

Attempts have been made to provide an organized system of uniform legislation throughout the states. The Commissioners on Uniform Laws, properly known as the National Conference of Commissioners on Uniform States Laws and also referred to as the Uniform Law Commissioners, was established in 1890 to draft uniform and model laws on subjects where uniformity is desirable. The organization consists of more than 300 lawyers, judges, and law professors, each selected by the state governments. The acts approved by the organization do not become "law" in the states until they are adopted by legislatures of those states, and the Commissioners on Uniform Laws work with the legislatures to promote such enactments.

The organization has been most instrumental in persuading the states to adopt commercial laws approved by the commissioners, most notably the UNIFORM COMMERCIAL CODE (UCC). It has also drafted a number of laws relating in such areas as CHILD CUSTODY, business organizations, and consumer law. The commissioners often work in conjunction with such organizations as the AMERICAN BAR ASSOCIATION and the American Law Institute when drafting the uniform and model laws.

The web site of the Commissioners on Uniform Laws is located at http://www.nccusl.org.

## COMMITMENT

*Proceedings directing the confinement of a mentally ill or incompetent person for treatment.*

Pursuant to statutory and case law, DUE PROCESS protections are afforded to persons who have been involuntarily committed, including periodic JUDICIAL REVIEW. Commitment has often raised difficult issues of BALANCING the civil liberties of the person who is subject to commitment against other competing interests, including the rights of society to be protected from individuals who might prove dangerous as a result of their mental illness or incompetence, and the community's interest in ensuring that these individuals receive proper treatment.

Each state has its own detailed statutory scheme providing for the involuntary commitment of individuals who might be mentally ill or incompetent. These statutes usually contain language defining the types of mental illnesses and conditions covered by the law, as well as certain conditions that are excluded from coverage—generally mental retardation, epilepsy, develop-

mental disabilities, and drug or alcohol addiction. In addition, most state commitment statutes set forth specific criteria or standards that link these conditions to justifications for involuntary commitment.

Most jurisdictions have at least one criterion that is based on a person's dangerousness to himself or herself, or others. Some states require that other criteria that are closely related to dangerousness be met, such as the presence of a grave disability or an inability to provide for one's basic human needs, or that some medical or psychological treatment is essential to the person's welfare. Since the 1980s, some states have moved significantly away from a strict dangerousness standard for involuntary commitment. In Arizona, for example, a person who is "persistently or acutely disabled" because of mental illness may be subject to commitment (Ariz. Rev. Stat. Ann. § 36-540 (A) [1995]), and in Delaware, an individual who cannot make "responsible decisions" about inpatient care and treatment may be committed (Del. Code Ann. tit. 16, § 5001 [1995]). An even broader standard has been enacted in Iowa, where the law provides that a person may be committed if he or she is likely to inflict serious emotional injury on family or others who "lack reasonable opportunity" to avoid contact with that person (Iowa Code Ann. § 229.1 [West 1995]).

In most jurisdictions, commitment requires a showing that inpatient hospitalization is the least restrictive treatment alternative for the person, in addition to a showing of dangerousness. This requirement is based on the principle, established by the U.S. Supreme Court, that even though a government purpose might be legitimate and substantial, the purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved" (*Shelton v. Tucker,* 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 [1960]). As a result, most states, through either statutes or case law, recognize a patient's right to be treated in the least restrictive setting.

Despite the difficult legal issues relating to the restriction of liberty that results from involuntary treatment, the U.S. Supreme Court has considered the constitutionality of civil commitment on relatively few occasions. In 1975, in perhaps its most significant decision on the issue, the Court held that a state "cannot constitutionally confine . . . a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends" (*O'Connor v. Donaldson,* 422 U.S. 563, 95 S. Ct. 2486, 45 L. Ed. 2d 396). The Court further stated that a "mere finding" of mental illness "cannot justify a state's locking a person up against his will and keeping him indefinitely in simple custodial confinement." Although the Court appeared to establish the right of a nondangerous individual not to be involuntarily committed, it left unresolved the issue of whether a mentally ill person has a constitutional right to treatment.

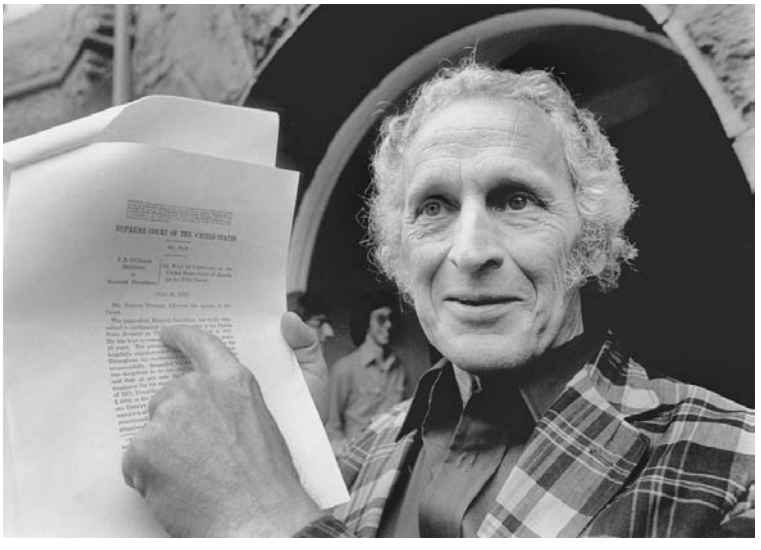

*Kenneth Donaldson, respondent in* O'Connor v. Donaldson, *displays the Supreme Court's opinion, which said that a state cannot hold a non-dangerous individual against his will if the person is capable of "surviving safely" on his own or with the help of friends or family.*

AP/WIDE WORLD PHOTOS

In a later decision, *Zinermon v. Burch,* 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990), the Court further addressed dangerousness as a justification for civil commitment. It stated that involuntary commitment procedures "guard against the confinement of a person who, though mentally ill, is harmless and can live safely outside an institution." Confinement of such a person would be unconstitutional, the Court held.

The involuntary commitment of individuals who previously have been convicted of a crime has presented an entirely new set of constitutional considerations. The most significant issue has concerned whether a prisoner, following completion of her or his sentence, may be committed to a psychiatric facility without receiving the same due process protections afforded to other individuals who are subjected to civil commitment.

The high court addressed the issue in *Jones v. United States,* 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983). In *Jones,* the defendant was

acquitted of a crime by reason of insanity, but was confined to a psychiatric hospital for longer than his sentence would have been, had he been convicted. Michael Jones challenged the constitutionality of his commitment. A 5–4 majority of the U.S. Supreme Court affirmed the commitment. The Court reasoned that punishment of an insanity acquittee is inappropriate, and thus the length of the criminal sentence that would have been imposed, had the patient been found sane, was not relevant. Instead, the Court held, the duration of the commitment should depend on the patient's recovery. Thus, if the patient's condition warrants further treatment, the commitment could continue, regardless of the length of the sentence that otherwise would have been imposed.

The commitment of individuals who have been convicted of sex-related crimes has sparked even more intense debate. Courts in many states have had to address difficult questions involving so-called sexual predators: Should these individuals be allowed to re-enter society after they have served their prison terms? May a state detain them indefinitely without violating their constitutional rights?

These questions went before the U.S. Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). In that case, the Court reviewed the constitutionality of the Kansas Sexually Violent Predator Act, which establishes procedures for the civil commitment of persons who, due to a *mental abnormality* or a *personality disorder,* are likely to engage in *predatory acts of sexual violence.* Kan. Stat. §§ 59-29a01 et seq. Kansas invoked the act in committing an inmate who had a long history of sexually molesting children, and who was scheduled for release from prison shortly after the act became law.

In a 5-4 decision written by Associate Justice CLARENCE THOMAS, the Court rejected arguments that someone can be confined to a mental institution only if the person has been diagnosed with a *mental illness.* The Court also rejected arguments that the Kansas law violated the DOUBLE JEOPARDY provision of the FIFTH AMENDMENT to the U.S. Constitution, even though, under the law, persons who are first imprisoned for a sex crime may be institutionalized again when their criminal sentence has been served, based on some of the same evidence that had been used to convict them. The Kansas law created a *civil* commitment procedure that would result in confinement in a mental hospital, the Court said, and the protection against double jeopardy is only triggered by subsequent criminal punishments and prosecutions.

The U.S. Supreme Court's decision was hailed by Kansas and the 38 other states that had urged the justices to uphold the law. However, defense lawyers, civil libertarians, and mental health professionals warned that the decision might allow states to lock up convicts who are not truly dangerous to society. In effect, said several mental health experts, the ruling misuses mental hospitals for punishment purposes, singling out one category of violent criminal for unlimited incarceration without the safeguards afforded to criminal defendants in the BILL OF RIGHTS. Dissenting justices echoed these sentiments in *Hendricks*, writing that while they agreed in principle with idea that states may confine sexual predators who are deemed to be *mentally abnormal*, in this case it appeared that Kansas had not tried to treat the mental problems of the convict whose case was before the court. As a result, they wrote, his institutionalization functioned more like a punishment, and therefore it was unconstitutional.

Although 19 states now have laws authorizing civil commitment for sexual predators, courts in many of those states have been highly circumspect in applying them. For example, the Iowa Supreme Court ruled that the state could not commit a prisoner, who was serving a criminal sentence for operating a motor vehicle without the owner's consent, as a sexually violent predator, even though the prisoner had been convicted for sexually violent offenses in the past. *In re Detention of Gonzales*, 658 N.W.2d 103 (Iowa 2003). The prisoner was not confined for a sexually violent offense at the time that state filed its petition for commitment. Further, the state failed to prove, or even to allege, a recent OVERT ACT that met the statutory definition for being a *sexual predator.* The Iowa Supreme Court reasoned that it would not be just or reasonable "to allow the state to reach back in time, seize on a sexually violent offense for which a defendant was discharged, and couple this with a present confinement for a totally different offense—or, perhaps, a trivial one—and use the Sexually Violent Predator Act to confine the person."

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**CROSS-REFERENCES**

Patients' Rights.

## COMMITMENT FEE

*Compensation paid to a lender by a borrower for the lender's promise to give a mortgage at some future time.*

A commitment fee, frequently employed in real estate transactions, is an expense separate from interest charged on the loan to be secured by the mortgage. The controversy surrounding nonrefundable commitment fees arises when a borrower decides not to proceed with the loan and then demands return of the fee on the premise that the lender has performed no services to earn it. The courts have consistently rejected this contention and held that the lender is entitled to the commitment fee either as LIQUIDATED DAMAGES for breach of contract or as compensation for earmarking the funds for loan to the borrower.

## COMMITTEE

*An individual or group of people to whom authority has been delegated by a larger group to perform a particular function or duty. A part of a legislative body made up of one or more individuals who have been assigned the task of investigating a certain issue and reporting their observations and recommendations to the legislature. The Senate has various committees, such as the Committee on Nuclear Energy. The name given to the person or group of people appointed by a court and charged with the responsibility of acting as the guardian of an incompetent person.*

## COMMODITY

*A tangible item that may be bought or sold; something produced for commerce.*

Commodities are defined as marketable goods or wares, such as raw or partially processed materials, farm products, or jewelry. Intangibles, such as human labor, services, or advertising, are generally not considered to be commodities.

## COMMODITY CREDIT CORPORATION

The Commodity Credit Corporation (CCC) is a federal agency that was established to stabilize and protect farm income and prices; to assist in the maintenance of balanced and sufficient supplies of useful or serviceable agricultural goods, especially articles of merchandise movable in trade; and to promote the orderly distribution of such products. It was organized on October 17, 1933, pursuant to an EXECUTIVE ORDER, as an agency of the United States.

From October 17, 1933, to July 1, 1939, the CCC was managed and operated in close affiliation with the Reconstruction Finance Corporation. On July 1, 1939, it was transferred to the AGRICULTURE DEPARTMENT under a presidential REORGANIZATION PLAN. Adoption by Congress of the Commodity Credit Corporation Charter Act on June 29, 1948, established the CCC as an agency and instrumentality of the United States under a permanent federal charter.

The CCC is managed by a board of directors and is subject to the general supervision and direction of the secretary of agriculture, who is an ex officio director and chairperson of the board. The board consists of seven members (in addition to the secretary of agriculture) who are appointed by the president of the United States by and with the advice and consent of the Senate.

In carrying out its principal operations the CCC utilizes the personnel and facilities of the Farm Service Agency (FSA) and, in certain foreign trade operations, the Foreign Agricultural Service. A commodity office in Kansas City, Missouri, has specific responsibilities concerned with the disposal (through donation, sale, or transfer) of designated commodities and products held by the Commodity Credit Corporation.

### Commodity Stabilization

The CCC administers commodity loan programs, which are part of the "price support" system that has dominated U.S. agriculture since the 1930s. Farmers who agree to limit their production of specially designated crops can sell them to the CCC or borrow money at support prices. In 2003, the CCC managed loan programs for wheat, corn, rice, grain sorghum, bar-

ley, oats, oilseeds, tobacco, peanuts, cotton, and sugar.

Commodities acquired under the stabilization program are disposed of through domestic and export sales, transfers to other government agencies, and donations for domestic and foreign welfare use. The CCC is also authorized to exchange surplus agricultural commodities acquired by the CCC for strategic and other materials and services produced abroad.

### Support Programs

Under Public Law 480, the Agricultural Trade Development and Assistance Act of 1954, as amended (7 U.S.C.A. 1691 et seq.), the CCC carries out other assigned activities. Along with providing domestic assistance to schools, hospitals, and nonprofit organizations, major emphasis is also directed toward meeting the needs of developing nations. Under the Food for Peace Act of 1966, which further amends the Agricultural Trade Act of 1954, agricultural commodities are procured and exported to combat hunger and malnutrition and to encourage economic improvement in developing countries.

The CCC is also involved in environmental issues. In 2000, the Agriculture Department implemented a two-year, $300 million incentive program designed to encourage increased production of biofuels (environmentally-friendly fuels) such as ethanol and soy-based biodiesel. As a result, the Commodity Credit Corporation provided cash incentives to bioenergy producers who increase their purchase of eligible agricultural commodities to expand production of ethanol, biodiesel, and other biofuels. Eligible commodities include barley, corn, grain sorghum, oats, rice, wheat, soybeans, and many seed crops.

#### FURTHER READINGS

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#### CROSS-REFERENCES

Agricultural Law; Agriculture Subsidies.

## COMMODITY FUTURES TRADING COMMISSION

The Commodity Futures Trading Commission (CFTC), the federal regulatory agency for futures trading, was established by the Commodity Futures Trading Commission Act of 1974 (88 Stat. 1389; 7 U.S.C.A. 4a), approved October 23, 1974. The commission began operation in April 1975 and its authority to regulate futures trading was renewed by Congress in 1978. Its authority was again renewed with the Commodity Futures Modernization Act of 2000, which also mandated major reforms of the commission. The CFTC maintains a comprehensive web site at <http://www.cftc.gov>.

The CFTC consists of five commissioners who are appointed by the president with the advice and consent of the Senate. The commissioners serve staggered five-year terms and by law no more than three commissioners can belong to the same political party. One commissioner is designated by the president to serve as chairperson. The chair's staff includes the Office of the Inspector General and the Office of International Affairs.

To comply with the requirements of the Modernization Act, the commission underwent a restructuring in 2002. As a result, it consists of six major operating units: the Division of Clearing and Intermediary Oversight, the Division of Market Oversight, the Division of Enforcement, the Office of the Chief Economist, the Office of the General Counsel, and the Office of the Executive Director.

The CFTC regulates trading on the 11 U.S. futures exchanges, which offer numerous kinds of futures contracts. It also regulates the activities of some three thousand commodity exchange members, 360 public brokerage houses (futures commission merchants), about 38,000 commission-registered futures industry salespeople and associated persons, and 2,500 commodity trading advisers and commodity pool operators. Some off-exchange transactions involving instruments similar in nature to futures contracts also fall under CFTC jurisdiction.

The commission's regulatory and enforcement efforts are designed to ensure that the futures trading process is fair and that it protects both the rights of customers and the financial integrity of the marketplace. The CFTC approves the rules under which an exchange proposes to operate and monitors exchange enforcement of those rules. It reviews the terms of proposed futures contracts and registers companies and individuals who handle customer funds or give trading advice. The commission also protects the public by enforcing rules that require that customer funds be kept in bank

accounts separate from accounts maintained by firms for their own use, and that such customer accounts be marked to present market value at the close of trading each day.

Futures contracts for agricultural commodities were traded in the United States for more than one hundred years before futures trading was diversified to include trading in contracts for precious metals, raw materials, foreign currencies, commercial interest rates, and U.S. government and mortgage SECURITIES. Contract diversification has grown in exchange trading volume, a growth not limited to the newer commodities.

The CFTC maintains large regional offices in Chicago and New York, cities in which eight of the nation's 11 futures exchanges are located. Smaller regional offices are located in Kansas City and San Francisco, and there is a suboffice of the Chicago regional office in Minneapolis.

**FURTHER READINGS**

Commodity Futures Trading Commision. *2002 Annual Report.* Available online at <www.cftc.gov/files/anr/anr2002.pdf> (accessed June 1, 2003).

## COMMON

*Belonging to or pertaining to the general public. Common lands, also known as public lands, are those that are set aside for use by the community at large, such as parks and public recreation areas. Common also means habitual or recurring, such as offenses that are committed frequently or repeatedly. A* common thief *is one who has been repeatedly convicted of* LARCENY. *Something that is common is owned equally by two or more people, such as a piece of land. A* TENANCY IN COMMON *is an interest in land wherein at least two people share ownership.*

## COMMON CARRIER

*An individual or business that advertises to the public that it is available for hire to transport people or property in exchange for a fee.*

A common carrier is legally bound to carry all passengers or freight as long as there is enough space, the fee is paid, and no reasonable grounds to refuse to do so exist. A common carrier that unjustifiably refuses to carry a particular person or cargo may be sued for damages.

The states regulate common carriers engaged in business within their borders. When interstate or foreign transportation is involved, the federal government, by virtue of the COMMERCE CLAUSE of the Constitution, regulates the activities of such carriers. A common carrier may establish reasonable regulations for the efficient operation and maintenance of its business.

*A man hails a cab in New York's Times Square. A taxi is considered a common carrier, and, as such, is regulated by the state in which it operates.*

AP/WIDE WORLD PHOTOS

## COMMON COUNCIL

*In English* LEGAL HISTORY*, the name given to Parliament. In the U.S. legal system, the legislative body of a city or of a* MUNICIPAL CORPORATION.

## COMMON COUNT

*A traditional type of* COMMON-LAW PLEADING *that is used in actions to recover a debt of money of the defendant based upon an express or implied promise to pay after performance had been rendered. In a common-count* PLEADING*, the plaintiff sets forth in account form the facts that constitute the basis of his or her claim, such as money had and received and goods sold and delivered.*

Common counts were once used to allege the grounds for actions of ASSUMPSIT, a common-law action for the recovery of money owed by a defendant to the plaintiff. The four classes of common counts were (1) the *indebitatus* count; (2) the QUANTUM MERUIT count; (3) the QUANTUM VALEBANT count; and (4) the ACCOUNT STATED count. The generalized nature of common counts enabled a plaintiff to take advantage of any ground of liability for which proof was available within the limits of the action of assumpsit. This is in contrast to special counts within which a plaintiff had to state a particular claim or be denied relief.

Common counts are no longer used for pleading purposes but have been replaced by complaints according to the Federal Rules of Civil Procedure and state codes of civil procedure.

## COMMON DISASTER

*A set of circumstances in which two individuals die apparently simultaneously.*

In a common disaster there is no certainty of who died first, an important issue that frequently arises in the determination of the inheritance of property or the distribution of proceeds of a life insurance policy.

The *common disaster clause* found in insurance policies and wills is a provision that names an alternate beneficiary in the event that the testator and legatee or the insured and the beneficiary die simultaneously. SIMULTANEOUS DEATH acts are state laws that provide for the disposal of property in the event of a common disaster.

## COMMON LANDS

*An archaic designation of property set aside and regulated by the local, state, or federal government for the benefit of the public for recreational purposes.*

Common lands established by the Federal government are known as public lands.

## COMMON LAW

*The ancient law of England based upon societal customs and recognized and enforced by the judgments and decrees of the courts. The general body of statutes and case law that governed England and the American colonies prior to the American Revolution.*

*The principles and rules of action, embodied in case law rather than legislative enactments, applicable to the government and protection of persons and property that derive their authority from the community customs and traditions that evolved over the centuries as interpreted by judicial tribunals.*

*A designation used to denote the opposite of statutory, equitable, or civil, for example, a common-law action.*

The common-law system prevails in England, the United States, and other countries colonized by England. It is distinct from the civil-law system, which predominates in Europe and in areas colonized by France and Spain. The common-law system is used in all the states of the United States except Louisiana, where French CIVIL LAW combined with English CRIMINAL LAW to form a hybrid system. The common-law system is also used in Canada, except in the Province of Quebec, where the French civil-law system prevails.

Anglo-American common law traces its roots to the medieval idea that the law as handed down from the king's courts represented the common custom of the people. It evolved chiefly from three English Crown courts of the twelfth and thirteenth centuries: the Exchequer, the King's Bench, and the COMMON PLEAS. These courts eventually assumed jurisdiction over disputes previously decided by local or manorial courts, such as baronial, admiral's (maritime), guild, and forest courts, whose jurisdiction was limited to specific geographic or subject matter areas. EQUITY courts, which were instituted to provide relief to litigants in cases where common-law relief was unavailable, also merged with common-law courts. This consolidation of jurisdiction over most legal disputes into several courts was the framework for the modern Anglo-American judicial system.

Early common-law procedure was governed by a complex system of **PLEADING**, under which only the offenses specified in authorized writs could be litigated. Complainants were required to satisfy all the specifications of a writ before they were allowed access to a common-law court. This system was replaced in England and in the United States during the mid-1800s. A streamlined, simplified form of pleading, known as **CODE PLEADING** or notice pleading, was instituted. Code pleading requires only a plain, factual statement of the dispute by the parties and leaves the determination of issues to the court.

Common-law courts base their decisions on prior judicial pronouncements rather than on legislative enactments. Where a statute governs the dispute, judicial interpretation of that statute determines how the law applies. Common-law judges rely on their predecessors' decisions of actual controversies, rather than on abstract codes or texts, to guide them in applying the law. Common-law judges find the grounds for their decisions in law reports, which contain decisions of past controversies. Under the doctrine of **STARE DECISIS**, common-law judges are obliged to adhere to previously decided cases, or precedents, where the facts are substantially the same. A court's decision is binding authority for similar cases decided by the same court or by lower courts within the same jurisdiction. The decision is not binding on courts of higher rank within that jurisdiction or in other jurisdictions, but it may be considered as persuasive authority.

Because common-law decisions deal with everyday situations as they occur, social changes, inventions, and discoveries make it necessary for judges sometimes to look outside reported decisions for guidance in a **CASE OF FIRST IMPRESSION** (previously undetermined legal issue). The common-law system allows judges to look to other jurisdictions or to draw upon past or present judicial experience for analogies to help in making a decision. This flexibility allows common law to deal with changes that lead to unanticipated controversies. At the same time, stare decisis provides certainty, uniformity, and predictability and makes for a stable legal environment.

Under a common-law system, disputes are settled through an adversarial exchange of arguments and evidence. Both parties present their cases before a neutral fact finder, either a judge or a jury. The judge or jury evaluates the evidence, applies the appropriate law to the facts, and renders a judgment in favor of one of the parties. Following the decision, either party may appeal the decision to a higher court. Appellate courts in a common-law system may review only findings of law, not determinations of fact.

Under common law, all citizens, including the highest-ranking officials of the government, are subject to the same set of laws, and the exercise of government power is limited by those laws. The judiciary may review legislation, but only to determine whether it conforms to constitutional requirements.

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CROSS-REFERENCES

Adversary System; English Law.

## COMMON-LAW ACTION

*A lawsuit governed by the general principles of law derived from court decisions, as opposed to the provisions of statutes. Actions* ex contractu, *arising out of a breach of contract, and actions* ex delicto, *based upon the commission of a* **TORT**, *are common-law actions.*

## COMMON-LAW COURTS

*The early royal courts in England that administered the law common to all.*

For a time after the Norman Conquest of England in 1066, the king himself sat to hear cases involving royal interests and the court was called coram rege (Latin for "before the king"). When the king began delegating authority to administer justice, the tribunal he appointed was called Curia Regis, the King's Court. Out of the Curia Regis came the three royal common-law courts. The first offshoot was the Exchequer, which originally collected taxes and administered the king's finances, but by 1250 was exercising full powers as a court. Next to develop as a separate court was **COMMON PLEAS**, a court probably established by **HENRY II** during the lat-

ter half of the twelfth century to hear cases not involving the king's rights. The remaining part of the Curia Regis reviewed decisions of the Common Pleas by issuing writs of error. This court, later known as the King's Bench, also heard cases involving the king's interests, particularly criminal matters and cases involving high noblemen. For many years the work of the court was written as if proceedings before it were before the king himself. The common-law courts competed with the Chancery, which exercised EQUITY jurisdiction, and their struggles shifted the division of authority at various times. They were consolidated with the other high courts of England by the JUDICATURE ACTS in the late nineteenth century.

CROSS-REFERENCES

Law "Common-Law Courts" (Sidebar).

## COMMON-LAW MARRIAGE

*A union of two people not formalized in the customary manner as prescribed by law but created by an agreement to marry followed by* COHABITATION.

A fundamental question in marriage is whether the union is legally recognized. This question is important because marriage affects property ownership, rights of survivorship, spousal benefits, and other marital amenities. With so much at stake, marriage has become a matter regulated by law.

In the United States, the law of marriage is reserved to the states and thus governed by state law. All states place restrictions on marriage, such as age requirements and the prohibition of intrafamilial marriage. Further, most states recognize marriage only upon completion of specified procedures. A typical statute requires a witnessed ceremony solemnized by a lawfully authorized person, submission to blood tests, and fulfillment of license requirements. However, in some states, the marital union of a man and a woman can still be achieved in the most simple, time-honored ways.

### History

Marriage has evolved over the centuries, but some basic features have remained constant. In ancient Rome, it was accomplished by consent of the parties to live together. No forms were required, and no ceremony was necessary. This early Roman model of marriage was displaced when the Catholic Church declared in 1563 that marriages were not valid unless contracted in the presence of a priest and two witnesses. In England, under the Anglican Church, marriage by consent and cohabitation was valid until the passage of Lord Hardwicke's Act in 1753. This act instituted certain requirements for marriage, including the performance of a religious ceremony observed by witnesses.

The American colonies rejected the requirement of a religious ceremony but retained the custom of a ceremony, religious or otherwise. The ancient Roman concept of marriage by agreement and cohabitation was adopted by early American courts as valid under the COMMON LAW.

In the 1800s, state legislatures began to enact laws expressly to prohibit marriage without an observed ceremony and other requirements. Common-law marriage was prohibited in a majority of jurisdictions. However, the FULL FAITH AND CREDIT CLAUSE of the U.S. Constitution requires all states that prohibit it to nonetheless recognize a common-law marriage created in a jurisdiction that allows it. U.S. Const. art. IV, § 1. Laws in all states require a common-law spouse to obtain a DIVORCE before remarrying.

Common-law marriage is allowed in fourteen jurisdictions: Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and the District of Columbia. The manner in which a state authorizes common-law marriage varies. Pennsylvania maintains a statute that declares that the statutory chapter covering licensed marriage does not affect the recognition of common-law marriage (23 Pa. Const. Stat. Ann. § 1103). In Georgia, the operative marriage statute simply states, "To constitute a valid marriage in this State there must be—1. Parties able to contract; 2. An actual contract; 3. Consummation according to law" (Ga. Code Ann. § 19-3-1).

Several reasons have been offered for recognizing common-law marriage. In some states, including Pennsylvania and Rhode Island, common-law marriage was originally permitted to allow for religious and social freedom. Some state legislatures have noted the private importance of marriage and assailed the insensitivity of governments purporting to regulate such a personal matter. Other states have been reluctant to require licensing and ceremony in consideration of the financial hardship such requirements impose on poor citizens.

### Features

A common-law marriage has three basic features. When a common-law marriage is challenged, proof of the following elements is critical in most jurisdictions.

1. *A present agreement to be married.* The parties must announce to each other that they are married from that moment forward. Specific words are not mandated, but there must be evidence of an agreement to be married. Proof may consist of CIRCUMSTANTIAL EVIDENCE, including evidence that the partners have cohabitated and held themselves out to the public as being married. However, neither cohabitation nor a public holding out constitutes sufficient proof to establish the formation of a common-law marriage, either by themselves or taken together. An agreement to marry must be proved by the party asserting marriage.
2. *Cohabitation.* The parties must actually live together in order to support a claim of common-law marriage. Whether maintenance of a separate home by one of the parties will nullify a common-law marriage is a QUESTION OF FACT and depends on the circumstances of the particular case.
3. *Public representations of marriage.* The couple must consistently hold themselves out to the public as married. A married couple is expected to tell people that they are married. They should also file joint tax returns and declare their marriage on other documents, such as applications, leases, and birth certificates.

### Legal Applications

A challenge to a common-law marriage can come from a variety of sources. For example, an insurance carrier or PENSION provider may contest a common-law marriage when one spouse claims benefits by virtue of the marriage. Often, it is one of the purported spouses who challenges the existence of a common-law marriage.

In *Flores v. Flores,* 847 S.W.2d 648 (Tex. App. Waco 1993), Peggy Ann Flores sought to prove that she had been married by common law to Albert Flores. Peggy and Albert were married in a ceremony on July 18, 1987, and divorced on March 9, 1989. They continued to live together until November 1990, when Albert moved away to live with his girlfriend, Lisa. Albert and Lisa were married on January 1, 1991.

Peggy filed for a second divorce from Albert on January 31, 1991. In the same proceeding, she applied for custody of their child, Joshua, and CHILD SUPPORT payments from Albert. The County Court, Brazos County, found that a common-law marriage had existed between Peggy and Albert following their 1989 divorce. The county court granted the second divorce and ordered custody and child support payments to Peggy. Albert appealed, arguing in part that there was insufficient evidence to support a finding both that Peggy and Albert had agreed to remarry and that Peggy and Albert had represented to others that they were married.

The Court of Appeals of Texas, Waco, agreed with Albert. The court of appeals opened its opinion by listing the important factual background. According to Peggy's testimony at the 1991 divorce proceeding, she had considered herself married to Albert after the 1989 divorce, and Albert had, on one occasion, introduced her as his wife after the 1989 divorce. Peggy's employer, Irma Ortega, testified that she did not know of the first divorce, that Albert sent gifts and affectionate notes to Peggy, and that Peggy kept a picture of Albert and Joshua at her workplace. Relatives of both Peggy and Albert testified that after the 1989 divorce, the relationship continued much as it had before.

Other testimony revealed that on a visit to a hospital after the divorce, Peggy told hospital personnel that she was single. Albert and Peggy signed a lease together that did not specify their relationship. Peggy used Albert's credit cards, and Albert paid the rent and other bills. They also maintained a joint bank account and carried on a sexual relationship.

Albert testified that Peggy had asked him to stay with her until she got "back on her feet." He also testified that he had moved in with Peggy after the 1989 divorce to help her and that he had informed Lisa that he was living with his former wife "and helping her out."

The court of appeals then addressed whether these facts sufficed to establish a common law marriage in Texas. The court said that while the facts must demonstrate cohabitation by the parties, public representations of marriage by the parties, and an agreement to be married, all three elements need not exist simultaneously for a common-law marriage to exist.

On the issue of whether the couple had agreed to be married again after the 1989 divorce, the court acknowledged that such an

agreement can be inferred from cohabitation. However, the court warned that cohabitation is more common than it once was and that cohabitation evidence should be weighed more carefully than it has been in the past. After an examination of the record, the court concluded that there was no direct evidence of an agreement between Albert and Peggy to marry. The evidence showing that Albert and Peggy had lived together and shared resources did not compel a finding of an agreement to be married.

Nor did the evidence support a finding that Peggy and Albert had held themselves out as married. According to the court of appeals, one public representation of marriage did not constitute a public holding out. Other evidence offered by Peggy, such as the joint bank account, was insufficient to support public holding out, the court found. Thus, the court of appeals ultimately reversed the judgment of the county court and ordered that Peggy take nothing but child support payments from her suit.

### Late Twentieth-Century Developments

During the last 15 years of the twentieth century a growing number of states, counties, and municipalities granted qualified legal recognition to unmarried "domestic partners." Known in some jurisdictions as "reciprocal beneficiaries," unmarried couples who receive legal recognition as domestic partners may be eligible for HEALTH INSURANCE benefits, life insurance benefits, and child VISITATION RIGHTS. Depending on the jurisdiction, domestic partners may also be entitled to hospital visitation rights.

However, in most jurisdictions domestic partners may only inherit from their partners or their partner's family if they are specifically named in the deceased's will. A few states allow domestic partners to inherit from each other or each other's family in the absence of a will, called intestate succession. By contrast, the law of all states that recognize common-law marriage allow both parties to the common-law marriage to inherit under state intestacy laws when either spouse dies without a will.

Also unlike common-law marriages, domestic partners may not typically ask courts to settle their post-relationship property disputes. Nor may domestic partners petition courts for ALIMONY awards, unless the partners entered a formal agreement for *palimony* prior to their cohabitation. *Marvin v. Marvin,* 18 Cal.3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (Cal. 1976). But if partners do enter a palimony agreement, they will generally be enforced, unless during the period of cohabitation the partners resided in Illinois, Georgia, and Tennessee, the three states that have expressly refused to recognize palimony agreements.

Every jurisdiction recognizing domestic partners as a legal entity has its own list of formal requirements that unmarried couples must satisfy before they will be formally recognized as domestic partners. The formal requirements in no two jurisdictions are identical. However, most jurisdictions do share many of the same core requirements.

These core requirements include that both partners must be older than 18 and unmarried, currently live together, apply together before a public official with authority to recognize them as domestic partners, and pay the related fees to be registered. To end a domestic partnership, most jurisdictions allow the couple simply to send a letter to the registrar of domestic partners. The letter must be dated and signed by both partners, and it must specifically request that the domestic partnership be terminated.

Laws in eight states and more than 100 municipalities now provide legal recognition for unmarried couples as domestic partners. This legislation often allows both opposite-sex and same-sex couples to form domestic partnerships, unlike the states that recognize common-law marriage, none of which expressly permits homosexual common-law marriages, and some of which expressly prohibit it. Pursuant to state and local domestic-partner legislation, 157 Fortune 500 companies, 3,960 private employers and unions, and 158 COLLEGES AND UNIVERSITIES were as of mid-2003 providing benefits to domestic partners. Although no nationwide statistics exist, the 2000 census revealed almost 10,000 domestic partners were registered in St. Louis, Missouri, alone, and more than 15,000 same-sex couples were registered as domestic partners in California.

#### FURTHER READINGS

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#### CROSS-REFERENCES

Circumstantial Evidence; Cohabitation; Domestic Partnership Law; Survivorship.

## COMMON-LAW PLEADING

*The system of rules and principles that governed the forms into which parties cast their claims or defenses in order to set an issue before the court.*

The system prevailed in the common-law courts and in many U.S. states until it was replaced by statute with a procedure called **CODE PLEADING** in the nineteenth century. Those states that do not have systems of code pleading today follow the pleading procedures established by the rules of **CIVIL PROCEDURE** adopted for the federal district courts in 1938.

During the twelfth and thirteenth centuries a person with a grievance sought a writ from the king's chief minister, the chancellor. The writ ordered the defendant to submit to the plaintiff's demands or to appear and answer the charge made against him or her. Over a period of time, the format of the particular writs began to become standardized and were called **FORMS OF ACTION**. There were different writs for different types of actions.

The purpose of the writ was to assert the court's authority to hear the dispute and to demand the presence of the defendant. In this regard it corresponded to the modern summons. The plaintiff then had to state the claim against the defendant. For the pleading to be valid the plaintiff had to use exactly those words permitted by the form of action selected. Some forms of action, such as **TRESPASS**, became immensely popular because they allowed more variation in the facts pleaded than other forms. If a plaintiff selected a writ that did not fit the particular case the action was thrown out of court. If there were no writs for some kinds of actions and the chancellor refused to devise one then the aggrieved person could find no relief at all in the royal courts.

A defendant faced a similar array of established responses. The defendant could, for example, deny the plaintiff's right to legal relief even if the facts alleged were true. Such a response was known as a demurrer. A defendant could choose to enter a dilatory plea, which argued against the court's authority to hear that particular case rather than directly objecting to the plaintiff's claim. A third option was to enter a plea in bar which denied the plaintiff's right to maintain the action at all. An example of such a plea was a traverse, an assertion that some essential element of the plaintiff's case was lacking or untrue. Another plea in bar was confession and avoidance which stated that additional facts rendered the claim unenforceable, even if the plaintiff's facts were true.

Like the plaintiff, the defendant was limited to choosing a single position. The alternative responses were mutually exclusive even though they were not necessarily contradictory. For example, if the defendant pleaded a confession and avoidance he or she conceded the accuracy of the plaintiff's version of the facts and would not be allowed to contest those facts. The issue became the new facts that the defendant had asserted in order to avoid the effect of the plaintiff's allegation. The plaintiff had to argue against the newly introduced facts by entering a demurrer, a traverse, or another confession and avoidance.

Eventually the system of common-law pleading fell into an established order that proceeded alternatively from plaintiff to defendant and back to plaintiff. The plaintiff first stated the claim in a declaration and the defendant answered in a plea. The plaintiff was permitted to respond with a replication. Then came the defendant's rejoinder, the plaintiff's surrejoinder, the defendant's rebutter, and the plaintiff's surrebutter. No distinctive names were given to any pleadings used beyond that stage.

The system of common-law pleading eventually became so encrusted with requirements and risks that actions were won or lost on the fine points of pleading rather than on the merits of a party's case. The insistence on reducing every case to one claim and one answer created more problems than it solved. As a result, in 1948 many states began enacting code pleading, while other states eventually adopted rules of pleading patterned on the rules of federal civil procedure.

## COMMON-LAW TRUST

*More commonly known as a* **BUSINESS TRUST** *or a Massachusetts trust. A business organization for investment purposes by which trustees manage and control property for the benefit of beneficiaries who are protected against personal liability for any losses incurred.*

## COMMON PLEAS

*Trial-level courts of general jurisdiction. One of the royal common-law courts in England existing since the beginning of the thirteenth century and developing from the Curia Regis, or the King's Court.*

In the United States only Pennsylvania has courts of common pleas with the authority to hear all civil and criminal cases. In most states courts of common pleas have been abolished and their jurisdiction transferred to district, circuit, or superior courts.

For some time after the Norman Conquest of England in 1066, parties seeking justice from the king were greatly inconvenienced by the fact that the king was constantly on the move and frequently abroad. Scholars have speculated that the king was attempting to consolidate his power and that feeding and financing the royal household could be accomplished only by continually moving throughout the land. Parties could submit a dispute to a court held coram rege, before the king himself, only by pursuing the king in his travels. The barons finally forced the issue with King John in 1215 when they insisted on the following provision in the MAGNA CHARTA: "Common Pleas shall not follow our court but shall be held in some certain place." That certain place came to be Westminster, where some legal business was already being handled by the end of the twelfth century. There the Court of Common Pleas, also called Common Bench, heard all real actions and common pleas—actions between subjects that did not involve royal interests. It had no authority to hear criminal matters which were the special prerogative of the King's Bench. The Court of Common Pleas consisted of a chief justice and four (later five) associate justices. Appeals and their decisions were taken to the King's Bench but later to the Exchequer. The court was consolidated with the other high courts of England by the JUDICATURE ACTS in the late nineteenth century.

## COMMON SCOLD

*A person who frequently or habitually causes public disturbances or breaks the peace by brawling or quarreling.*

Scolding, which was an indictable offense at COMMON LAW but is obsolete today, did not involve a single incident but rather the repeated creation of discord.

## COMMON STOCK

*Evidence of participation in the ownership of a corporation that takes the form of printed certificates.*

Each share of common stock constitutes a contract between the shareholder and the corporation. The owner of a share of common stock is ordinarily entitled to participate in and to vote at stockholders' meetings. He or she participates in the profits through the receipt of dividends after the payment of dividends on preferred stock. Shares of common stock are the PERSONAL PROPERTY of their holder.

## COMMUNIS ERROR FACIT JUS

*[*Latin, common error makes law.*] Another expression for this idea is "common opinion," or* communis opinio. *In ancient Rome, the phrase expressed the notion that a generally accepted opinion or belief about a legal issue makes that opinion or belief the law. Judges have pointed out that universal opinion may also be universal error. Until the error is discovered, however, the belief continues to be the law. The concept of communis opinio is not especially favored by contemporary U.S. courts.*

## COMMUNISM

*A system of social organization in which goods are held in common.*

Communism in the United States is something of an anomaly. The basic principles of communism are, by design, at odds with the free enterprise foundation of U.S. capitalism. The freedom of individuals to privately own property, start a business, and own the means of production is a basic tenet of U.S. government, and communism opposes this arrangement. However, there have been, are, and probably always will be communists in the United States.

As early as the fourth century B.C., Plato addressed the problems surrounding private ownership of property in the *Republic.* Some early Christians supported communal principles, as did the German Anabaptists during the sixteenth-century religious Reformation in Europe.

The concept of common ownership of goods gained a measure of support in France during the nineteenth century. Shortly after the French Revolution of 1789, François-Noël ("Gracchus") Babeuf was arrested and executed for plotting the violent overthrow of the new French government by revolutionary communists. Etienne Cabet inspired many social explorers with his *Voyage en Icarie* (1840), which promoted peaceful, idealized communities. Cabet is often credited with the spate of communal settlements that appeared in mid-

nineteenth-century North America. Louis-Auguste Blanqui offered a more strident version of communism by urging French workers during the 1830s to organize insurrections and establish a dictatorship for the purpose of reorganizing the government.

Communism received, however, its first comprehensive intellectual foundation in 1848, when Germans KARL MARX and Friedrich Engels published *The Communist Manifesto.* As technology increased and industry expanded in nineteenth-century Europe and America, it became clear that the GENERAL WELFARE of laborers was not improving. Although the new democratic governments gave new freedoms to workers, or "the proletariat," the capitalism that came with democracy had created different means of oppression. By drawing on existing theories of materialism, labor, and historical evolution, Marx and Engels were able to identify the reasons why, despite periodic drastic changes in government, common laborers had been doomed to abject poverty throughout recorded history.

In the first chapter of *The Communist Manifesto,* Marx and Engels argued that human history was best understood as a continuing struggle between a small exploiting class (the owners of the means of production) and a larger exploited class (laborers in factories and mills who often worked for starvation wages). At any point in time, the exploiting class controlled the means of production and profited by employing the labor of the masses. In the capitalism that developed alongside democracy, Marx and Engels saw a progressive concentration of the powers of production placed in the hands of a privileged few. Although society was producing more goods and services, the general welfare of the middle class, they believed, was declining. According to Marx and Engels, this disparity or internal contradiction in capitalistic societies predicted capitalism's doom. Over time, as the anticipated numbers of the middle class, or "bourgeoisie," began to decrease, the conflicts between laborers and capitalists would sharpen, and social revolution was inevitable. At the end of *The Communist Manifesto,* Marx and Engels wrote that the transfer of power from the few to the many could only take place by force. Marx later retreated from this position and wrote that it was possible for this radical change to take place peacefully.

The social revolution originally envisioned by Marx and Engels would begin with a proletariat dictatorship. Once in possession of the means of production, the dictatorship would devise the means for society to achieve the communal ownership of wealth. Once the transitional period had stabilized the state, the purest form of communism would take shape. Communism in its purest form would be a classless societal system in which property and wealth were distributed equally and without the need for a coercive government. This last stage of Marxian communism has as of the early 2000s never been realized in any government.

### Russia

In October 1917, VLADIMIR LENIN and Leon Trotsky led the Bolshevik party in a bloody revolution against the Russian monarch, Czar Nicholas II. Lenin relied on violence and persistent aggression during his time as a Russian leader. Although he professed to being in the process of modernizing Marxist theory, Lenin stalled Marx's communism at its transitional phase and kept the proletariat dictatorship to himself.

Lenin's communist philosophy was designated by followers as Marxist-Leninist theory in 1928. Marxism-Leninism was characterized by the refusal to cooperate and compromise with capitalist countries. It also insisted upon severe restrictions on HUMAN RIGHTS and the extermination of actual and supposed political opponents. In these respects, Marxist-Leninist theory was unrecognizable to democratic socialists and other followers of Marxist doctrine, and the 1920s saw a gradual split between Russian communists and other European proponents of Marxian theory. The Bolshevik party, with Lenin at the helm, renamed itself the All-Russian Communist party, and Lenin presided over a totalitarian state until his death in 1924.

JOSEPH STALIN succeeded Lenin as the Communist party ruler. In 1924, Stalin established the Union of Soviet Socialist Republics (U.S.S.R.) by colonizing land surrounding Russia and placing the territories within the purview of the Soviet Union. The All-Russian Communist party became the All-Union Communist party, and Stalin sought to position the Soviet Union as the home base of a world revolution. In his quest for worldwide communism, Stalin sent political opponents such as Trotsky into exile, had thousands of political dissidents tortured and murdered, and imprisoned millions more.

# House Un-American Activities Committee

Between 1938 and 1969, the House Un-American Activities Committee (HUAC) hunted political radicals. In hundreds of public hearings, this congressional panel set out to expose and punish citizens whom it deemed guilty of holding "un-American" views—fascism and communism. From government to labor, academia, and Hollywood, the committee aggressively pursued so-called subversives. It used Congress's subpoena power to force citizens to appear before it, holding them in **CONTEMPT** if they did not testify. HUAC's tactics of scandal, innuendo, and the threat of imprisonment disrupted lives and ruined careers. After years of mounting criticism, Congress renamed HUAC in 1969 and finally abolished it in 1975.

In the late 1930s, HUAC arose in a period of fear and suspicion. The United States was still devastated by the Great Depression, and fascism was on the rise in Europe. Washington, D.C., feared spies. In early May 1938, Representative Martin Dies (R-Tex.) called for a probe of fascism, communism, and other so-called un-American (meaning anti-patriotic) beliefs. The idea was popular with other lawmakers. Two weeks later, HUAC was established as a temporary committee, with Dies at its head.

Because Chairman Dies was in charge, the press referred to HUAC as the Dies Committee. The chairman had ambitious goals. At first, he set out to stop German and Italian propaganda. Early investigations focused on two pro-Nazi groups, the German-American Bund and the Silver Shirt Legion. But Dies had a partisan agenda as well. An outspoken critic of Roosevelt, he wanted to discredit the president's **NEW DEAL** programs. Contending that the Federal Writers' Project (a program to compile oral histories and travel guides) and Federal Theatre Project (employing out-of-work actors to help produce plays) were rife with Communists, HUAC urged the firing of thirty-eight hundred federal employees. In this atmosphere of conflict between the committee and the White House, the **JUSTICE DEPARTMENT** found the numbers grossly exaggerated; its own probe concluded that only thirty-six employees had been validly accused. The committee's first great smear ended with dismal results.

HUAC's limited success in its early years was largely due to its chairman's political mistakes. Besides alienating Roosevelt and the Justice Department, Dies made an even more powerful enemy in **J. EDGAR HOOVER**, director of the **FEDERAL BUREAU OF INVESTIGATION** (FBI). After Dies publicly criticized the director, Attorney General **ROBERT H. JACKSON** went on the attack, accusing HUAC of interfering with the FBI's proper role. Hoover himself saw to it that the turf battle was short-lived. In 1941 Dies was quietly informed that the FBI had evidence of his accepting a bribe. Although no charges were brought and Dies retained the title of chairman until 1944, he conspicuously avoided HUAC's hearings from that point on.

HUAC grew in both power and tenacity after **WORLD WAR II**, for several reasons. A deterioration in U.S.-Soviet relations started the **COLD WAR**, a decades-long battle of words—and, as in Korea and Vietnam, of bullets—in which Communism became identified as the United States' single greatest enemy. Both bodies of Congress, the White House, the FBI, and numerous conservative citizens' groups such as the John Birch Society rallied to the anti-Communist cause. Moreover, HUAC had new leadership. With Dies gone, Hoover was more than willing to assist with the committee's investigations, which was fortunate, since no congressional committee had the resources available to the FBI. When HUAC chairman J. Parnell Thomas announced in 1947 that the committee would root out Communists in Hollywood, he had nothing but **HEARSAY** to go on. No Hollywood investigation would have taken place if Hoover, responding to Thomas's plea, had not provided HUAC with lists of suspects and names of cooperative witnesses.

Thus began a pattern of FBI and HUAC cooperation that lasted for three decades. Hoover's testimony before HUAC in March 1947 illuminated their common interest in driving the enemy into the open:

> I feel that once public opinion is thoroughly aroused as it is today, the fight against Communism is well on its way. Victory will be assured once Communists are identified and exposed, because the public will take the first step

Stalin saw the Soviet Union through **WORLD WAR II**. Although it joined with the United States and other democratic countries in the fight against Nazism, the Soviet Union remained strongly opposed to capitalist principles. In the scramble for control of Europe after World War II, the Soviet Union gained power over several Eastern European countries it had helped liberate and placed them under communist rule. Bulgaria, Czechoslovakia, Hungary, East Germany, Poland, and Romania were forced to comply with the totalitarianism of Stalin's rule. North Korea was also supported and influenced by the Soviet Union. More independent communist

> of quarantining them so they can do no harm. . . . This Committee renders a distinct service when it publicly reveals the diabolic machinations of sinister figures engaged in un-American activities.

The FBI director's prediction was right: quarantining of a sort did indeed follow.

The Hollywood probe marked a new height for HUAC. The committee investigated the film industry three times, in 1947, 1951–52, and 1953–55. The first hearing produced the so-called Hollywood Ten, a group of screenwriters and professionals who refused to answer questions about whether or not they were Communists. Despite invoking their **FIRST AMENDMENT** right to **FREEDOM OF SPEECH**, they were subsequently charged with contempt of Congress, tried, convicted, and jailed for between six months and one year. In later HUAC hearings, other film industry professionals invoked the Fifth Amendment—the constitutional protection against self-incrimination—and they too suffered. HUAC operated on the dubious premise that no innocent person would avoid answering its questions, and members of Congress frequently taunted witnesses who attempted to "hide," as they said, behind the **FIFTH AMENDMENT**. Not everyone subpoenaed was a Communist, but the committee usually wanted each person to name others who were, who associated with, or who sympathized with Communists. Intellectual sympathy for leftists was considered evil in itself; such "dupes," "commie symps," and "fellow travelers" were also condemned by HUAC.

These investigations had a tremendous effect. Hollywood executives, fearing the loss of profits, created a blacklist containing the names of hundreds of actors, directors, and screenwriters who were shut out of employment, thus ending their careers. In short time, television and radio did the same. For subpoenaed professionals, an order to appear before HUAC presented a no-win situation. If they named names, they betrayed themselves and others; if they did not cooperate, they risked their future. Some cooperated extensively: the writer Martin Berkeley coughed up 155 names. Some did so in order to keep working, but lived to regret it: the actor Sterling Hayden later described himself as a worm in his autobiography *Wanderer.* Others, like the playwright Lillian Hellman, remained true to their conscience and refused to cooperate. The HUAC-inspired blacklist caused a measurable disruption to employment as well as more than a dozen suicides.

HUAC's postwar efforts also transformed U.S. political life. In 1948, the committee launched a highly publicized investigation of **ALGER HISS**, a former high-ranking government official, on charges of spying for the Soviet Union. Hiss's subsequent conviction on perjury helped inspire the belief that other Communist spies must exist in federal government, leading to lavish, costly, and ultimately futile probes of the **STATE DEPARTMENT** by HUAC and Senator **JOSEPH R. MCCARTHY**. HUAC had laid the groundwork for the senator's own witch-hunt, a reign of unfounded accusation that came to be known as McCarthyism. By 1950, McCarthyism so influenced U.S. political life that HUAC sponsored the most sweeping anti-Communist law in history, the McCarren Act (50 U.S.C.A. § 781 et seq.), which sought to clamp down on the Communist party but stopped short of making membership illegal. The U.S. Supreme Court ultimately stripped it of any meaningful force.

HUAC came under fire in the late 1950s and early 1960s. After turning its attention on labor leaders, the committee at last provoked the U.S. Supreme Court: the Court's 1957 decision in *Watkins v. United States,* 354 U.S. 178, 77 S. Ct. 1173, 1 L. Ed. 2d 1273, overturned the contempt conviction of a man who refused to answer all of HUAC's questions, and, importantly, set broad limits on the power of congressional inquiry. Yet HUAC pressed on. In 1959 an effort to expose Communists in California schools resulted in teachers being fired and prompted some of the first public criticisms of the committee. By the late 1960s, as outrage over the **VIETNAM WAR** made public dissent not only feasible but widely popular, many lawmakers began to see HUAC as an anachronism. In 1969 the House renamed it the Internal Security Committee. The body continued on under this name until 1975, when it was abolished and the House Judiciary Committee took over its functions (with far less enthusiasm than its progenitors).

HUAC's legacy to U.S. law was a long, relentless campaign against personal liberty. Its members cared little for the constitutional freedoms of speech or association, let alone constitutional safeguards against **SELF-INCRIMINATION**. Much of its work would not have been possible without the steady assistance of the FBI, whose all-powerful director Hoover (1895–1972) died shortly after the committee's heyday had ended. HUAC is remembered today, along with Hoover and McCarthyism, as characterizing the worst abuses of federal power during the cold war.

governments emerged in Yugoslavia and Albania after World War II.

For nearly 50 years after the end of World War II, the Soviet Union and the United States engaged in a "cold war." So named for the absence of direct fighting between the two superpowers, the **COLD WAR** was, in reality, a bloody one. The Soviet Union and the United States fought each other through other countries in an effort to control the expansion of each other's influence.

When a country was thrown into civil war, the Soviet Union and the United States aligned themselves with the competing factions by pro-

*By 1949, when this photograph was taken, Mao Tse-Tung and the Chinese Communist Party had established Beijing as the capital of China and declared the People's Republic of China as the new government.*

AP/WIDE WORLD PHOTOS

viding financial and military support. They sometimes even supplied their own troops. The United States and Soviet Union engaged in war-by-proxy in many countries, including Korea, Vietnam, El Salvador, Nicaragua, Guatemala, and Angola.

Cuba officially adopted communism in 1965 after Fidel Castro led a band of rebels in an insurrection against the Cuban government in 1959. Despite intense opposition by the United States to communism in the Western Hemisphere, Cuba became communist with the help of the Soviet Union.

### China

Communism was also established in China. In 1917, Chinese students and intellectuals, inspired by the Bolsheviks' October Revolution, began to study and promote Leninist Marxism. China had been mired in a century-long civil war, and many saw Lenin's brand of communism as the solution to China's internal problems. In 1919, at the end of **WORLD WAR I**, China received a disappointing settlement from Western countries at the Versailles Peace Conference. This outcome confirmed growing suspicion of capitalist values and strengthened the resolve of many Chinese to find an alternative basis for government.

On July 1, 1921, the Chinese Communist party (CCP) was established. Led by Chinese intellectuals and Russian advisers, the CCP initially embraced Russia's model of communism and relied on the organization of urban industrial laborers. By 1927, CCP membership had grown from fewer than 500 in 1923 to over 57,000. This increase was achieved in large part because the CCP had joined with another political party, the Kuomintang (KMT). KMT leader Chiang Kai-shek and KMT troops eventually became fearful of CCP control of the state, and in July 1927, the KMT purged communists from its ranks. CCP membership plummeted, and the party was forced to search for new ways to gain power.

Throughout the late 1920s and early 1930s, the CCP sought to change its strategies. The party was divided between urban, Russian-trained students and a wing made up of peasants led by Mao Tse-tung. At the same time, the CCP was engaged in battles with the KMT over control of various cities, and several CCP attempts to capture urban areas were unsuccessful.

Mao was instrumental in switching the concentration of CCP membership from the city to the country. In October 1934, the CCP escaped from threatening KMT forces in southern China. Led by Mao, CCP troops conducted the Long March to Yenan in the north, recruiting rural peasants and increasing its popularity en route. In 1935, Mao was elected chairman of the CCP.

Japan's invasion of China in 1937 spurred a resurgence in CCP popularity. The CCP fought Japanese troops until their surrender in 1945. The CCP then waged civil war against the KMT. With remarkable organization and brilliant military tactics, the CCP won widespread support throughout China's rural population and eventually its urban population as well. By 1949, the CCP had established Beijing as the capital of China and declared the People's Republic of China as the new government.

Chinese communism has been marked by a willingness to experiment. In 1957, Chairman Mao announced China's Great Leap Forward, an attempt to advance industry within rural communes. The program did not flourish, and within two years, Mao concluded that the Soviet Union's emphasis on industry was incompatible with communal principles. Mao launched an ideological campaign in 1966 called the Cultural Revolution, in which students were employed to convert opponents of communism. This campaign also failed, as too many students loyal to Mao carried out their mission with violent zeal.

After Chairman Mao died in 1976, powerful CCP operatives worked to eliminate Jiang Quing, Mao's widow, and three other party officials from the party. This Gang of Four was accused of undermining the strength of the party through adherence to Mao's traditional doctrines. The Chinese version of communism placed enormous emphasis on conformity and uniform enthusiasm for all CCP policies. With the conviction of the Gang of Four in 1981, the CCP sent a message to its members that it would not tolerate dissension within its ranks.

Also in 1981, the CCP Central Committee declared Mao's Cultural Revolution a mistake. Hu Yaobang was named chairman of the CCP, and Deng Xiaoping was named head of the military. These changes in leadership marked the beginning of CCP reformation. The idolization of Mao was scrapped, as was the ideal of continuous class struggle. The CCP began to incorporate into Chinese society technological advances and Western production management techniques. Signs of Western culture, such as blue jeans and rock and roll music, began to appear in China's cities.

In 1987, Hu Yaobang was removed as CCP chairman and replaced by Zhao Ziyang. Zhao's political philosophy was at odds with the increasing acceptance of Western culture and concepts of capitalism, and China's urban areas began to simmer with discontent. By May 1989, students and other reformists in China had organized and were regularly staging protests against Zhao's leadership. After massive demonstrations in Tiananmen Square in Beijing, the CCP military crushed the uprisings, executed dozens of radicals, and imprisoned thousands more.

Thus, the CCP maintained control of China's government. At the same time, it made attempts to participate in world politics and business.

### The Demise of Communist States

In the late 1980s and early 1990s, several communist states transformed their governments to free-market economies. In 1985, Mikhail Gorbachev was named leader of the Soviet Union, and he immediately embarked on a program to liberalize and democratize the Soviet Union and its Communist party. By 1990, the campaign had won enough converts to unsettle the power of communism in the Soviet Union. In August 1991, opponents of Gorbachev attempted to oust him from power by force, but many in the Soviet military supported Gorbachev, and the coup failed.

*From 1950 to 1954, Senator Joseph McCarthy led highly publicized hearings that focused upon alleged Communist infiltration of the U.S. government and military.*

AP/WIDE WORLD PHOTOS

The Soviet Union was formally dissolved in December 1991. The republics previously controlled by the All-Union Communist party held democratic elections and moved toward participation in the world business market. Bulgaria, Czechoslovakia, Hungary, East Germany, and Poland also established their independence. Romania had conducted its own revolution by trying, convicting, and executing its communist dictator, Nicolae Ceausescu, at the end of 1989.

Communist control of governments may be dwindling, but communist parties still exist all over the world. China and Cuba have communist governments, and Spain and Italy have powerful Communist parties. In the United States, though, Communism has had a difficult time finding widespread support. The justice system in the United States has historically singled out Communists for especially harsh treatment. For example, JOSEPH MCCARTHY, a U.S. senator from Wisconsin, led an anti-Communist campaign from 1950 to 1954 that disrupted many lives in the United States.

### Communism in the United States

Anti-Communist hysteria in the United States did not begin with Senator McCarthy's campaign in 1950. In *Whitney v. California,* 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927), Charlotte Whitney was found guilty of violating the Criminal Syndicalism Act of California for

organizing the Communist Labor Party of California. Criminal syndicalism was defined to include any action even remotely related to the teaching of violence or force as a means to effect political change.

Whitney argued against her conviction on several grounds: California's Criminal Syndicalism Act violated her DUE PROCESS rights because it was unclear; the act violated the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT because it did not penalize those who advocated force to maintain the current system of government; and the act violated Whitney's FIRST AMENDMENT rights to free speech, assembly, and association.

The Court rejected every argument presented by Whitney. Justices LOUIS D. BRANDEIS and OLIVER WENDELL HOLMES JR., concurred in the result. They disagreed with the majority that a conviction for mere association with a political party that advocated future revolt was not violative of the First Amendment. However, Whitney had failed to challenge the determination that there was a CLEAR AND PRESENT DANGER of serious evil, and, according to Brandeis and Holmes, this omission was fatal to her defense. Forty-two years later, the decision in Whitney's case was expressly overruled in *Brandenburg v. Ohio,* 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).

The political and social protests of the 1960s led to an increased tolerance of unconventional political parties in the United States. However, this tolerance did not reach every state in the Union. In August 1972, the Indiana State Election Board denied the Communist party of Indiana a place on the 1972 general-election ballot. On the advice of the attorney general of Indiana, the board denied the party this right because its members had refused to submit to a LOYALTY OATH required by section 29-3812 of the Indiana Code. The oath consisted of a promise that the party's candidates did not "advocate the overthrow of local, state or National Government by force or violence" (*Communist Party v. Whitcomb,* 414 U.S. 441, 94 S. Ct. 656, 38 L. Ed. 2d 635 [1974]).

The Supreme Court, following its earlier *Brandenburg* decision, held that the loyalty oath violated the *First and Fourteenth Amendments.* In *Brandenburg,* the Court had held that a statute that fails to differentiate between teaching force in the abstract and preparing a group for imminent violent action runs contrary to the constitutional rights of free speech and FREEDOM OF ASSOCIATION. Although the Communist party missed the deadline for entering its candidates in the 1972 general election, it succeeded in clearing the way for its participation in future elections.

In the twentieth century communism gained a hold among the world's enduring political ideologies and its popularity continues to ebb and flow with the shifting distribution of wealth and power within and between nations.

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CROSS-REFERENCES

Cuban Missile Crisis; *Dennis v. United States*; First Amendment; Fourteenth Amendment; Freedom of Association and Assembly; Freedom of Speech; Marx, Karl Heinrich; McCarran Internal Security Act; Smith Act; Socialism; Socialist Party of the United States of America; Vietnam War.

## COMMUNIST PARTY CASES

The Communist Party Cases were a series of cases during the 1950s in which the federal government prosecuted Communist Party members for conspiring and organizing the party to advocate the overthrow of the U.S government by force and violence.

COMMUNISM became a central concern in U.S. law following WORLD WAR II, which ended with the Soviet Union occupying much of Central and Eastern Europe, after having liberated those areas from Nazi occupation. An ally of the United States for most of the war, Soviet President JOSEPH STALIN promised to hold democratic elections in the European countries he occupied. However, the governments in most of

those countries were eventually converted into Soviet satellite regimes. Meanwhile, Soviet propaganda professed the goal of spreading communist revolution around the world, and Russian leaders remained publicly committed to this doctrine.

American leaders were concerned that talk of a global communist revolution was more than idle propaganda. In addition to the Iron Curtain of Soviet-style communism that had descended over much of Europe, China, another U.S. ally during World War II, was overtaken by communist revolution in 1949. That same year the Soviet Union announced that it had successfully detonated its first atomic bomb, ending a short-lived, U.S. nuclear monopoly. Shortly after this revelation, British scientist Klaus Fuchs and Americans **JULIUS AND ETHEL ROSENBERG** were implicated in an **ESPIONAGE** ring that was allegedly responsible for accelerating the Russian **NUCLEAR WEAPONS** program. In 1950 communist North Korea, aided by Chinese troops and Russian advisors, invaded South Korea, starting what would be a three year conflict.

Communist hysteria in the United States was ratcheted up another notch on February 9, 1950, when Senator **JOSEPH MCCARTHY**, a Republican senator from Wisconsin, ushered in the era of McCarthyism by delivering his famous speech at Wheeling, West Virginia, where he accused the U.S. **STATE DEPARTMENT** of harboring communists. The 1950s communist **RED SCARE** in the United States was marked by a series of free-wheeling investigations conducted by several congressional committees, the most notorious of which was the House Committee on Un-American Activities (HUAC), which summoned before it thousands of Americans who were asked questions delving into personal beliefs, political affiliations, and loyalties.

The first Communist Party Case, *Dennis v. United States*, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951), was decided at the height of McCarthyism. Eugene Dennis was one of a number of persons convicted in federal district court for violation of the **SMITH ACT**, which proscribed teaching and advocating the violent and forcible overthrow of the U.S. government. 18 U.S.C.A. 2385. He and the others were alleged to have engaged in a conspiracy to form the Party of the United States in order to teach and advocate the overthrow of the United States government by force and violence. Such conduct was in direct contravention with the provisions of the Smith Act. Dennis unsuccessfully appealed his conviction and was granted certiorari by the Supreme Court.

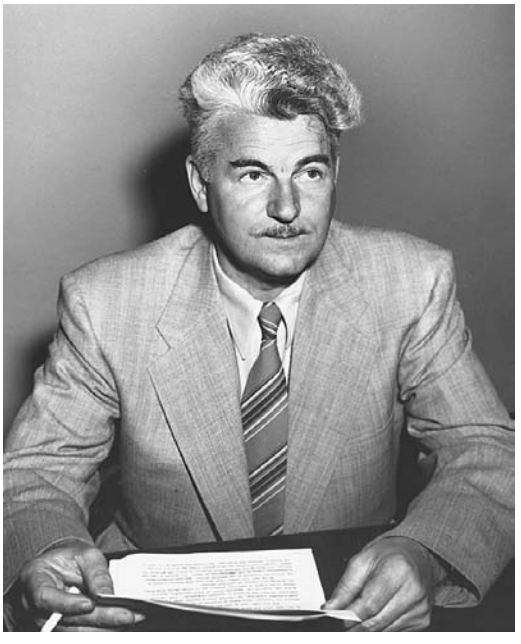

*The criminal conviction of Eugene Dennis, under the Smith Act, was upheld by the Supreme Court in 1951.*

AP/WIDE WORLD PHOTOS

In an opinion written by Chief Justice **FREDERICK VINSON**, the Court focused its review on two issues: whether the particular provisions of the Smith Act violated the **FIRST AMENDMENT** and the **BILL OF RIGHTS** and whether the sections in question were unconstitutional because they were indefinite in describing the nature of the proscribed conduct. The Court relied upon the determination of the Court of Appeals that the objective of the **COMMUNIST PARTY OF THE UNITED STATES** was to bring about the overthrow of its government by force and violence. From this perspective, it reasoned that Congress was empowered to enact the Smith Act, which was designed to safeguard the federal government against **TERRORISM** and violent revolution. Peaceable and lawful change was not proscribed, however. The power of Congress to so legislate was not in question, but the means it used to do so created constitutional problems.

The defendants argued that the statute inhibited a free and intelligent discussion of Marxism-Leninism, in violation of the defendants' rights to free speech and press. The Court countered that the Smith Act prohibits advocacy, not intellectual discussion, which is admittedly protected by the First Amendment. It continued, however, that the rights given by the First Amendment are not absolute and unquali-

fied, but must occasionally yield to other concerns and values in society.

The Court decided that the CLEAR-AND-PRESENT-DANGER test, first formulated by the Supreme Court in 1919 in SCHENCK V. UNITED STATES, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470, applied to the case and set out to explain its applicability. The forcible and violent overthrow of the government constituted a substantial enough interest to permit the government to limit speech that sought to cause it. The Court then reasoned that "If [the] Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required." The likelihood of success or success itself is not necessary, provided the words and proposed actions posed a clear and present danger to the government. The Court based its rationale upon the majority opinion in GITLOW V. NEW YORK, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925), "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

Concerning the issue of indefiniteness, the Court concluded that since the defendants were found by the jury to have intended the forcible overthrow of the government as soon as the circumstances permitted, there was no need to reverse their convictions because of the possibility that others might, in the future, be unaware of its proscriptions. When possible "borderline" cases arise, the Court would at that time strictly scrutinize the convictions.

The next major Communist Party case was *Yates v. United States*, 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957), in which the Supreme Court reviewed the appeal of 14 Communist Party leaders who also had been convicted under the Smith Act. However, the Court in *Yates* reversed the convictions of all 14 defendants, distancing itself from *Dennis* on two grounds.

The *Yates* defendants were charged with conspiring to organize the Communist Party to teach members the duty of overthrowing the U.S government. The prosecution offered proof that the conspiracy had started in 1940, the year the Smith Act was enacted, and continued through 1951. The defendants had countered with evidence that the Communist Party had disbanded after 1940 and was not reformed until 1945. Since the government offered no proof that the *Yates* defendants had helped reform the party in 1945, the defendants argued that prosecution had failed to prove the defendants were guilty of *organizing* the party. The Court found that the word *organize* was ambiguous and agreed with the defendants that under the Smith Act the word *organize* meant only the creation of a new organization and not the continuing participation in a party that disbands and later reforms.

Next the Court examined the portion of the indictment that charged the defendants with conspiring to advocate the duty and necessity of overthrowing the U.S. government by force and violence. The indictment was defective, the Court found, because it failed to distinguish between advocacy of forcible overthrow as an abstract doctrine and advocacy of immediate action to that end. The First Amendment protects the former type of speech, the Court emphasized, but not the latter. The government has the right to prohibit speech that advocates its forcible overthrow by a subversive political party that is *sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur.* The government had failed to prove that the Communist Party U.S.A. presented this type of threat, the Supreme Court concluded.

Several factors account for the Supreme Court's retreat from the *Dennis* opinion in *Yates.* Decided in 1957, *Yates* came at a time when both international and domestic tensions had subsided. The KOREAN WAR ended in 1953, the Senate had censured Joe McCarthy in 1954, President Eisenhower attended a cordial Geneva summit conference with new Soviet leadership in 1955, and HUAC investigations had precipitously tapered off. Time had also given Americans the opportunity to more accurately assess the minimal threat posed to national security by the Communist Party in the United States. Equally important, the Supreme Court was under new leadership. Chief Justice Vinson died in 1953 and was replaced EARL WARREN, a chief justice who began a legacy of greatly expanding the scope of civil liberties in the United States.

Twelve years after *Yates*, the WARREN COURT reiterated the First Amendment distinction between lawful subversive advocacy in the abstract and unlawful present incitement. In *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct.

1827, 23 L. Ed. 2d 430 (1969), the Court reversed the conviction of a KU KLUX KLAN leader under a state statute that prohibited advocacy of crime and violence as a necessary means to accomplish political reform. Ohio Rev. Code Ann. § 2923.13. The Court held that a state could not forbid advocacy of force or violence except where such advocacy is directed to producing imminent lawless action and is likely to incite or produce such action.

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**CROSS-REFERENCES**

Freedom of the Press; Freedom of Speech.

## COMMUNIST PARTY USA

Known officially as the Communist Party USA (CPUSA), the Communist party was formed in the United States in 1919, two years after the Russian Revolution had overthrown the monarchy and established the Soviet Union. Many American Communists had been members of the SOCIALIST PARTY OF AMERICA, but that party's socialist leadership opposed the Russian revolution and expelled those members who supported it. The Communists were even more left-wing than the Socialists and attracted a number of radicals and anarchists as well as Communists. By August 1919, only months after its founding, the Communist party had 60,000 members, while the Socialist party had only 40,000.

The administration of President WOODROW WILSON, fearful that American radicals might attempt to overthrow the U.S. government, began making mass arrests in the fall of 1919. Ultimately, 10,000 suspected subversives were arrested in what became known as the Palmer Raids (after U.S. Attorney General A. MITCHELL PALMER), with 249 deported to Russia. The Palmer Raids ended in May 1920, and the American Communists began to gain strength. In 1924, the party founded a newspaper, *The Daily Worker,* which, at its peak, had a circulation of 35,000. That same year, the party nominated labor activist William Z. Foster as its first candidate for U.S. president. Foster received 35,361 votes.

*In 1932 Communist Party presidential candidate William Z. Foster (left) received 102,991 votes. He is pictured with his running mate James W. Ford, the first African American to run for vice president.*

BETTMANN/CORBIS

The death of VLADIMIR LENIN and the rise of JOSEPH STALIN caused dissent among the party in the United States, with some supporting Stalin and others supporting the views of Leon Trotsky. A number of Trotskyists formed the Communist League of America, and by 1920 the American Communist party had only 7,000 members. By then, the party was concentrating on helping to build LABOR UNIONS and improving workers' rights. They lobbied for higher wages, a national retirement program, and unemployment insurance. With so many Americans affected by the Great Depression, the Communist message sounded a note of hope to unemployed workers, and Foster received 102,991 votes in the 1932 presidential election. Still, many people were more comfortable with the less radical Socialist party, whose candidate, Norman Thomas, received 884,781 votes.

The Spanish Civil War created a renewed interest in the Communist party, with many of its members opposing the government of Francisco Franco. Many American Communists went to Spain to fight against Franco's forces. Once again, there was a mounting fear of COMMUNISM in the United States. The Communist candidate for president in 1940, Earl Browder, was forbidden to travel within the United States and had to conduct his entire campaign through written statements and recorded speeches.

During WORLD WAR II, the party had 75,000 members, and 15,000 registered Communists fought against Axis forces in Europe and Asia. The alliance with the Soviets did not survive beyond the war's end in 1945, and a wave of

anti-communism swept the United States. Although the Communist party in the United States was arguably less radical than it had been in its early days (in 1948, the party endorsed the PROGRESSIVE PARTY candidate, former Vice President Henry A. Wallace, for President), the COLD WAR created a spirit of considerable distrust. In 1948, a dozen leaders of the party were arrested for violating the Alien Registration Act, which made it illegal to advocate or assist in trying to overthrow the government.

The House Un-American Activities Committee (HUAC) investigated individuals who were thought to have Communist ties, and Senator JOSEPH R. MCCARTHY (R-Wis.) claimed that Communists had infiltrated the federal government. Although many of these accused Communists had either never been party members or else had been involved briefly in the 1930s when the party was more active in organizing labor, invariably their lives were shattered. Membership in the Communist party dropped to about 10,000 by 1957, even though it was never illegal to be a member.

During the 1960s, the Communist party became involved in the CIVIL RIGHTS MOVEMENT and also the antiwar movement. Gus Hall, longtime general secretary of the party, ran for President in 1968 (the party had not run its own candidate since 1940) and received only 1,075 votes. He ran in subsequent years and in 1976 he received 58,992 votes. In 1988, instead of running, Hall pledged his support to JESSE JACKSON, who was seeking the Democratic nomination for president.

In the new millennium, the CPUSA maintains its commitment to the same political ideas that drove the Russian Revolution, but it embraces a more peaceful approach to creating change and social justice. Among the ideas it actively supports are socialized medicine, improved SOCIAL SECURITY benefits, stronger legislation to protect the environment, and full funding for education. The party also seeks greater cooperation with other political groups, believing that the best way to effect change is through the strength of broad-based coalitions.

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CROSS-REFERENCES

Independent Parties; Socialist Party of the United States of America.

## COMMUNITY-ORIENTED POLICING

*A philosophy that combines traditional aspects of law enforcement with prevention measures, problem-solving, community engagement, and community partnerships.*

From the 1930s to the 1960s, U.S. law enforcement relied on a professional policing model. This model was based on hierarchical structures, efficient response times, standardization, and the use of motorized patrol cars. Although this model improved efficiency, operations, and accountability, it proved inadequate when civil disturbances erupted in the late 1960s. Critics charged that police and the communities they served were alienated from each other, and a call came for community-oriented policing.

A first attempt was the team policing approach, which assigned responsibility for a certain geographic area to a team of police officers who would get to know the neighborhood, its people, and its problems. This harkened back to the early twentieth century when police walked a beat. The approach, however, proved ineffective because it placed more emphasis on long-term problem solving than on rapid response to crime incidents. Internally, team policing intruded on functional lines of authority, with patrol officers becoming involved in areas reserved to detectives and other specialists.

Community policing programs grew out of the failures of team policing. The goal of community policing is to bring the police and the public it serves closer together to identify and address crime issues. Instead of merely responding to emergency calls and arresting criminals, police officers in such programs get involved in finding out what causes crime and disorder, and attempt to creatively solve problems in their assigned communities. To do this police must develop a network of personal contacts both inside and outside their departments. This contact is fostered by foot, bike, or horse patrols—any effort that gets a police officer out of his or her squad car.

The community policing philosophy now dominates contemporary police work. The federal government promoted community policing through the passage of the **VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994** (Violent Crime Control Act), Pub.L. 103-322, Sept. 13, 1994, 108 Stat. 1796. Title I of the Crime Act, the Public Safety Partnership and Community Policing Act, provided $8.8 billion to fund local law enforcement agencies as they developed and enhanced their community policing capabilities. To assist in this effort the **JUSTICE DEPARTMENT** created a new agency, the Office of Community Oriented Policing Services (the COPS Office), to develop, administer, and supervise new grant programs resulting from the act. By 2002, COPS had awarded grants to law enforcement agencies to hire over 116,000 community police officers, purchase crime fighting technology, and support innovations in policing. More than 12,000 law enforcement agencies have received COPS funding. COPS has also trained more than 130,000 law enforcement officers and community members through a network of Regional Community Policing Institutes and Community Policing Consortium.

A key element of community policing is an emphasis on crime prevention. The public has been encouraged to partner with the police in these efforts through the Neighborhood Watch Program. The National Sheriffs' Association (NSA) started the program in 1972 as a way to lower crime rates. The Neighborhood Watch has grown in popularity since the early 1980s and is now familiar to most people.

The Neighborhood Watch Program stresses education and common sense. It teaches residents how to help themselves by identifying and reporting suspicious activity in their neighborhoods. Most citizen groups concentrate on observation and awareness as the primary means of preventing crime. Some groups, however, look out for their neighborhood by actively patrolling on a regular basis. In addition, the Neighborhood Watch Program gives residents the opportunity to reinvigorate their communities. For example, some groups seek to address youth crime by creating activity programs, which range from athletic events such as "midnight basketball" leagues to tutoring and drug awareness programs.

One limitation of Neighborhood Watch Programs is that communities that need them the most are the ones that find them the hardest to maintain. This is particularly the case in lower income neighborhoods where adults work multiple jobs with odd hours, thus making it more difficult to schedule meetings and organize events. It also makes it difficult for neighbors to get to know and care about one another in a way that makes them feel comfortable watching out for one another.

*An emphasis on bringing police and the public closer together to identify and address crime issues is a mark of community policing. Such contact has been fostered by an increase of patrol methods, such as bicycle patrols, that get officers out of squad cars and into the community.*

KELLY-MOONEY PHOTOGRAPHY/CORBIS

An effective Neighborhood Watch Program must follow certain steps to become an effective and ongoing crime prevention tool. The first step is to plan strategies that address the problems in the area. The second step is building a relationship and cooperation between law enforcement officers and residents. The third step is to assess the neighborhood needs and then to select and train volunteers. Finally, meaningful projects must be developed or else the group will lose interest.

The Neighborhood Watch Program has also been adapted for rural and sparsely-populated areas, and business districts. And, following the terrorist attacks of September 11, 2001, Attorney General **JOHN ASHCROFT** announced that Neighborhood Watch Programs would be furnished with information that will enable citizens to recognize and report signs of potential terrorist activities.

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## COMMUNITY PROPERTY

*The holdings and resources owned in common by a* HUSBAND AND WIFE.

Community PROPERTY LAW concerns the distribution of property acquired by a couple during marriage in the event of the end of the marriage, whether by DIVORCE or death of one of the parties. In community property states all property accumulated by a husband and wife during their marriage becomes joint property even if it was originally acquired in the name of only one partner. The states that utilize a community property method of dividing resources were influenced by the CIVIL LAW system of France, Spain, and Mexico.

Laws vary among the states that recognize community property; however, the basic idea is that a husband and wife each acquire a one-half interest in what is labeled community property. A determining factor in the classification of a particular asset as community property is the time of acquisition. Community property is ordinarily defined as everything the couple owns that is acquired during the marriage with the exception of separate property owned by either of them individually. *Separate property* is that property that each individual brings into the marriage, in addition to anything that either spouse acquires by inheritance during the marriage.

Generally, four types of property acquired after marriage amount to community property: earnings, damages obtained from a personal injury suit, damages awarded in an industrial accident action, and rents and profits from separate property.

### Divorce

In many community property law states, a husband and wife may enter into a PREMARITAL AGREEMENT that there will be no community property. Divorce terminates the community relationship in all community property states; however, the manner in which the property is divided differs.

Upon the dissolution of a marriage, the source of property becomes important in determining whether an asset is community or separate property. Ordinarily, separate property includes that which is acquired through gift, DESCENT AND DISTRIBUTION, and devise or bequest. Each partner in a PROPERTY SETTLEMENT reacquires whatever he or she owned prior to the marriage.

In some states, community property is divided equally; in others, the division is based on the court's discretion. In certain jurisdictions, the guilt of a spouse in a divorce action can be a factor in reducing his or her share of the community property.

### Inheritance Laws

Each spouse owns one-half of the couple's property in community property states, and, therefore, when a husband or wife dies only one-half of the marital property is inheritable since the surviving spouse owns in his or her own right one-half of the marital property.

## COMMUNITY SERVICE

*A sentencing option for persons convicted of crimes in which the court orders the defendant to perform a number of hours of unpaid work for the benefit of the public.*

A person convicted of a criminal offense may be required to complete a sentence of community service directly or as an express condition of PROBATION. Typically, the community service will involve performance at a facility that has been authorized by the court or probation department. Community service is appropriate when it is reasonably designed to repair the harm caused by the offense.

## COMMUNITY SERVICES, OFFICE OF

The Office of Community Services (OCS) was established within the HEALTH AND HUMAN SERVICES DEPARTMENT by section 676 of the Omnibus Budget Reconciliation Act of 1981 (95 Stat. 516; 42 U.S.C. 9905). Its mission, as stated on its website, is to "work in partnership with states, communities, and other agencies to provide a range of human and economic develop-

ment services and activities which ameliorate the causes and characteristics of poverty and otherwise assist persons in need." The goal of OCS services and programs is to help individuals and families become self-sufficient and to revitalize communities throughout the United States.

The OCS administers the Community Services block grant and discretionary grant programs established by section 672 (95 Stat. 511; 42 U.S.C. 9901) and 681 (95 Stat. 518; 42 U.S.C. 9910) of the Reconciliation Act. The office awards approximately $4 billion in block grants and $47 million in discretionary grants. It also provides grant money and technical assistance to the over three thousand Community Action Agencies and the Community Development Corporations that are locally based throughout the United States.

In 2002, the Office of Community Services implemented some of President GEORGE W. BUSH's faith-based initiatives. It awarded almost $25 million from its Compassion Capital Fund to 21 intermediary organizations; these organizations will provide technical assistance to help faith-based and community organizations access funding sources, operate and manage their programs, develop and train staff, expand the reach of programs into the community, and replicate promising programs. The office also awarded $850,000 in research grants to study how religious-based organizations provide social services and over $2 million to start a national clearinghouse of information to help faith-based organizations obtain government grants.

## COMMUTATION

*Modification, exchange, or substitution.*

Commutation is the replacement of a greater amount by something lesser. To commute periodic payments means to substitute a single payment for a number of payments, or to come to a "lump sum" settlement.

In CRIMINAL LAW, commutation is the substitution of a lesser punishment for a greater one. Contrasted with clemency, which is an act of grace eliminating a sentence or punishment, commutation is the modification or reduction of a punishment.

The change from *consecutive prison sentences* to *concurrent sentences* is a commutation of punishment.

## COMPACT

*An agreement, treaty, or contract.*

The term *compact* is most often applied to agreements among states or between nations on matters in which they have a common concern.

The Constitution contains the COMPACT CLAUSE, which prohibits one state from entering into a compact with another state without the consent of Congress.

## COMPACT CLAUSE

*A provision contained in Article I, Section 10, Clause 3, of the U.S. Constitution, which states, "No State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State." Intended to curtail the increase of political power in the individual states that might interfere with the supremacy of the federal government or impose an unconstitutional burden on interstate commerce in violation of the* COMMERCE CLAUSE.

## COMPANY

*An organization of individuals conducting a commercial or industrial enterprise. A corporation, partnership, association, or joint stock company.*

## COMPARABLE WORTH

*The idea that men and women should receive equal pay when they perform work that involves comparable skills and responsibility or that is of comparable worth to the employer; also known as pay equity.*

Many jobs are segregated by sex. For example, approximately 80 percent of all office secretaries are female, and approximately 99 percent of all construction workers are male. Both jobs demand valuable, if different, skills. However, the annual income of a secretary is only three-fifths that of a construction worker. Comparable worth seeks to remedy this and other sex-based wage inequities by identifying and eliminating sex as an element in wage setting.

The term *comparable worth* describes the notion that sex-segregated jobs should be reanalyzed to determine their worth to an employer. In practice, comparable worth consists of raising wages for traditionally female-dominated jobs to the level of those for comparable male-dominated jobs. Comparable worth should not be confused with equal pay for equal work. Rather, comparable worth policies promote equal pay for comparable work.

*During World War II many women took jobs in what had traditionally been male fields of work. Ten years after the war ended, the Census Bureau released figures showing that women earned only 64 percent of what men earned.*
FDR LIBRARY

Proponents of comparable worth argue that SEX DISCRIMINATION in wage setting has been built into society and has tainted the law of supply and demand. Women have endured centuries of devaluation, and the devaluation is reflected in the value attached to work traditionally performed by females. According to supporters, wages should be reset after comprehensive studies are made and statistical analyses undertaken to better reflect the true value produced by an employee.

Some critics of comparable worth maintain that wage fairness is achieved by allowing free-market forces to set the value of jobs. They argue that employers, not the courts or legislatures, should set wages and that sufficient legislation is already in place to prevent discrimination based on sex. They further argue that wage disparities are largely a result of innocent forces, such as differences in experience and education, the tendency of women to make educational choices that do not interfere with childbearing and child rearing, and the tendency of women to leave and reenter the job market more frequently than men.

Other critics of comparable worth, including some WOMEN'S RIGHTS advocates, argue that comparable worth efforts are well-intentioned but misplaced. According to these opponents, the best way for women to win wage equality is to integrate fully into all sectors of the economy. Comparable worth may work to the immediate benefit of those in traditionally "female" jobs, critics contend, but it fails to promote long-term advancement for women.

Generally, employees in a wage system based on comparable worth are paid according to job evaluations that concentrate on the differences between sex-segregated jobs. The job evaluations are conducted by vocational experts who examine the various characteristics of each job in the system, including the skill, education, and effort required; the level of independent decision making required; the working conditions; and accountability. The job evaluations yield a point total for each job, which is used to determine employee compensation.

In 1955, the U.S. CENSUS BUREAU published, for the first time, the ratio of women's to men's full-time, year-round, median annual earnings. The figures revealed that women were earning 64 percent of what men were earning. This imbalance persisted. In 1960, women aged 25 to 34 earned 65 percent of what men in the same age group earned. In 1980, the same women, now aged 45 to 54, were earning only 54 percent as much as men in the same age group. Census figures for 1980 also disclosed that full-time, year-round female professionals were earning less than semiskilled male blue-collar workers, and female college graduates were earning less than male high school graduates who had not attended college.

Women's pay became a national issue after the enormous contribution of women to the workforce in WORLD WAR II, and a simmering controversy shortly after the 1955 census report. The U.S. Congress took action by passing the EQUAL PAY ACT OF 1963 (29 U.S.C.A. § 206(d)) (EPA). The EPA mandates the same pay for all persons who do the same work, without regard to sex. This means that an employer may not discriminate between employees on the basis of sex by paying lower wages to women who perform the same work as men. In 1964, Congress enacted title VII of the Civil Rights Act of 1964 (42 U.S.C.A. § 2000e-2(a)), which provides that employers may not discriminate in employment practices on the basis of race, color, religion, national origin, or sex. Like the EPA, title VII prohibits employers from discriminating against women by paying them less than they pay males who perform the same work.

Women's rights advocates and LABOR UNION leaders were inspired by these bold federal acts and sought to extend them. In the fight against sex-based wage discrimination, women began to demand not only equal pay for equal work, but also equal pay for comparable work. States, cities, and towns began experimenting with the idea of wage restructuring based on comparable worth studies. In 1977, with the support of ELEANOR HOLMES NORTON (D-D.C.), then chair of the Equal Employment Opportunity Commission(EEOC), comparable worth came to national attention. Women's rights advocates adopted the slogan Fifty-nine Cents, which represented, according to Judy Goldsmith, past president of the NATIONAL ORGANIZATION FOR WOMEN (NOW), "the plain frightening fact that most women are paid just over half as much as men for the very same work." The comparable worth movement grew, but not without opposition. In 1985, President RONALD REAGAN described comparable worth as a "cockamamie idea."

The state of Washington was at the forefront of the comparable worth movement. In 1974, Washington began a study of sex-related differences for a selected group of sex-segregated positions in the state civil service. The study revealed that female employees in job classes requiring the same level of skill, effort, and responsibility earned 25 to 35 percent less than employees in comparable male-dominated positions. Despite these figures, the state legislature declined to implement comparable worth laws. Two more studies were conducted, in 1976 and 1980, and both corroborated the findings of the first study.

The Washington Legislature continued to reject comparable worth. In 1981, the EEOC refused to take action on charges filed with it against the state of Washington by the American Federation of State, County, and Municipal Employees (AFSCME) and the Washington Federation of State Employees (WFSE). On July 20, 1982, AFSCME and WFSE filed a CLASS ACTION suit against the state. The case was initiated by eight women and one man on behalf of all the male and female employees under the jurisdiction of the Washington Department of Personnel and the Washington Higher Education Personnel Board, who had worked or were working in positions that were 70 percent or more female. The government employees alleged that the state had discriminated against employees in female-dominated jobs by paying them lower wages than employees in comparable male-dominated jobs. This, according to the state employees, violated title VII of the CIVIL RIGHTS ACT of 1964. The District Court for the Western District of Washington agreed and awarded $400 million in back pay to female state employees.

The state of Washington appealed, and the U.S. Court of Appeals for the Ninth Circuit overturned the award (*AFSCME,* 770 F.2d 1401 [1985]). In its opinion, the Ninth Circuit court declared that an employer may set wages according to the prevailing market rate even if that market discriminates against women. According to the court, the value of a particular job is only one of several elements that influence the wages that the job commands. Another element, noted the court, is job availability. The court further recognized that the state in this case did not itself create any economic disparity. Although the state was free to institute a comparable worth policy, it could not be obliged "to eliminate an economic inequality that it did not create." Ultimately, the court held that, absent a discriminatory motive, it would not interfere with the state's decision to base wages on prevailing market standards.

After the appeals court decision, AFSCME, WFSE, and the state of Washington negotiated a comparable worth framework for state employees. The framework was based on the state's plan, which called for a gradual move to restructure its employees' wages on the basis of comparable worth. Washington now maintains a comparable worth statute, Revised Code of Washington, section 41.06.155, which mandates the achievement of comparable worth for all state government employees.

San Jose, California, was another early battleground for comparable worth proponents. In 1979, city government workers went on strike to protest wage disparities. After a nine-day strike, the city agreed to provide pay EQUITY adjustments and other salary adjustments to city workers. In 1983 and 1990, additional comparable worth adjustments were gained by the San Jose chapter of AFSCME.

Comparable worth has been won in numerous quarters through COLLECTIVE BARGAINING. Montgomery County, Maryland, workers negotiated pay equity increases in 1989, and in 1992, Montgomery County school employees received $484,000 in pay equity increases. In 1991, the

**Best and Worst States in Earnings for Women**

| Five Best | Female Earnings per $1 Male | Five Worst | Female Earnings per $1 Male |
|---|---|---|---|
| Washington, D.C. | $0.90 | West Virginia | $0.68 |
| Hawaii | $0.80 | Utah | $0.67 |
| Florida | $0.79 | Michigan | $0.67 |
| California | $0.78 | Louisiana | $0.66 |
| Vermont | $0.78 | Wyoming | $0.63 |

SOURCE: *Detroit Free Press*, "Michigan Among Worst in Equal Pay for Women," September 19, 2002.

Utility Workers of America negotiated a 15 percent pay equity increase for clerical workers in the Southern California Gas Company. In 1991 and 1992, clerical workers represented by the United Auto Workers (UAW) went on strike at Columbia University in New York. After a ten-month strike, an agreement was reached that included pay equity increases for both male and female workers.

Many courts are unwilling to order employers to enact comparable worth pay standards in the absence of legislation. Thus, comparable worth advocates have turned to the legislative process. Minnesota has been an enduring model for achieving comparable worth through legislation. In 1979, the Minnesota Department of Finance completed a study that included an evaluation of state and local government jobs. In 1981, the Council on the Economic Status of Women established the Task Force on Pay Equity to examine salary differences between comparable male and female jobs in state government. The task force report showed consistent inequities between comparable male- and female-dominated jobs, and the Minnesota state legislature passed the State Government Pay Equity Act in 1982 (1982 Minn. Laws c. 64, § 1 et seq.). In 1983, the legislature provided the funds for pay increases, and the Minnesota Department of Employee Relations (DOER) negotiated new contracts for state employees. These contracts included pay equity increases for underpaid female-dominated job classes and cost-of-living increases for all job classes.

In 1984, the Minnesota state legislature enacted the Local Government Pay Equity Act (Minn. Stat. Ann. §§ 471.991 et seq.), which mandated a comparable worth program for cities, counties, school districts, and other units of local government. In 1987 and 1988, the legislature passed laws that assessed fines for local government units that did not report according to provisions of the Local Government Pay Equity Act. In 1996, a DOER report revealed that 92 percent of local government units in Minnesota had achieved pay equity. Those not in compliance with reporting requirements were subject to penalties of up to five percent of state funding, or $100 a day.

Pay equity is a growing movement that builds on progress made in the 1980s. During that time, 20 states adjusted their payrolls to ameliorate sex or race inequities; seven of these states fully implemented broad-based comparable worth laws for their state government employees. States continue to lead in the area of pay equity. For example, New Hampshire has established reporting requirements and enforcement procedures to ensure fair pay; Vermont, West Virginia, and Wyoming have passed legislation requiring studies in comparable worth; and Maine's DEPARTMENT OF LABOR assists in enforcing existing pay equity laws in the state.

In the early twenty-first century, comparable worth legislation was introduced in over half the state legislatures. On the federal level, two newer pieces of legislation were introduced in 2003: the Fair Pay Act and the Paycheck Fairness Act. Representative Holmes Norton and Senator Tom Harkin (D-Iowa) introduced the Fair Pay Act in the U.S. House of Representatives and Senate respectively. The Fair Pay Act seeks to broaden the Equal Pay Act's protections against wage discrimination to workers in equivalent jobs with similar skills and responsibilities, even if the jobs are not identical. Senator Tom Daschle (D-S.D.) and representative from Connecticut Rosa DeLauro (D-New Haven) introduced the Paycheck Fairness Act in the Senate and House. The Paycheck Fairness Act is an attempt to provide better remedies to workers who are not being paid equal wages for doing equal work. Passage of the Paycheck Fairness Act would amend the Equal Pay Act and the Civil Rights Act of 1964.

**FURTHER READINGS**

Department of Labor, Bureau of Statistics. 2002. *Highlights of Women's Earnings in 2001.* (Report 960) Available online at <www.bls.gov/cps/cpswom2001.pdf> (accessed May 7, 2003)

National Committee on Pay Equity. Available online at <www.feminist.com/fairpay/index.htm> (accessed May 7, 2003).

**CROSS-REFERENCES**

Affirmative Action; Employment Law.

## COMPARATIVE RECTITUDE

*The principle by which a* DIVORCE *is awarded to the party whose fault is less serious in cases where both spouses allege grounds that would justify a divorce.*

The idea of fault in divorce actions stemmed from the idea that a marriage remained alive until one partner's guilt destroyed it. This gave rise to problems such as people lying in court to obtain a divorce when both parties mutually wanted to end the marriage.

When a divorce based upon comparative rectitude occurs, the spouse with less fault might acquire rights denied to the other spouse, such as the right to remarry.

A divorce of this type, also called a *least-fault divorce,* is rarely granted. This is due to the increasing number of states that have adopted no-fault divorce laws, eliminating fault as a ground for divorce.

## COMPELLING STATE INTEREST

See STRICT SCRUTINY.

## COMPENSATION

*A pecuniary remedy that is awarded to an individual who has sustained an injury in order to replace the loss caused by said injury, such as* WORKERS' COMPENSATION. *Wages paid to an employee or, generally, fees, salaries, or allowances. The payment a landowner is given to make up for the injury suffered as a result of the seizure when his or her land is taken by the government through* EMINENT DOMAIN.

## COMPENSATORY DAMAGES

*A sum of money awarded in a civil action by a court to indemnify a person for the particular loss, detriment, or injury suffered as a result of the unlawful conduct of another.*

Compensatory damages provide a plaintiff with the monetary amount necessary to replace what was lost, and nothing more. They differ from PUNITIVE DAMAGES, which punish a defendant for his or her conduct as a deterrent to the future commission of such acts. In order to be awarded compensatory damages, the plaintiff must prove that he or she has suffered a legally recognizable harm that is compensable by a certain amount of money that can be objectively determined by a judge or jury.

One of the more heated issues facing the U.S. legal system during the past quarter century has been the call for reform of states' TORT LAWS. HEALTH CARE providers and other organizations have sought to limit the amount of damages a plaintiff can receive for pain and suffering because they claim that large jury awards in MEDICAL MALPRACTICE cases cause premiums on medical insurance policies to rise, thus raising the overall costs of medical services. California took the lead in addressing concerns with rising medical costs when it enacted the Medical Injury Compensation Reform Act, Cal. Civ. Code § 3333.2 (1997). The act limits the recoverable amount for non-economic loss, such as pain and suffering, to $250,000 in actions based on professional NEGLIGENCE against certain health care providers. Although the statute has been the subject of numerous court challenges, it remains the primary example of a state's efforts to curb medical costs through tort reform.

Other states have sought to follow California's lead, though efforts to limit compensatory damages have met with considerable resistance. Opponents claim that because these limitations greatly restrict the ability of juries and courts to analyze the true damage that plaintiffs have suffered, defendants avoid paying an amount equal to the harm inflicted upon the plaintiffs. Medical organizations, such as the AMERICAN MEDICAL ASSOCIATION, continue to advocate for limitations on damages, however, and they have sought to encourage state legislatures to enact such provisions.

CROSS-REFERENCES

Damages.

## COMPETENT

*Possessing the necessary reasoning abilities or legal qualifications; qualified; capable; sufficient.*

A court is competent if it has been given jurisdiction, by statute or constitution, to hear particular types of lawsuits.

A testator is competent to make a will if he or she understands what a will is and its effects, the nature and extent of the property involved, and the relationships with the people named in the will and those disinherited.

## COMPETENT EVIDENCE

*Information that proves a point at issue in a lawsuit.*

Competent evidence is admissible evidence in contrast to incompetent or inadmissible evidence.

CROSS-REFERENCES

Evidence.

## COMPLAINANT

*A plaintiff; a person who commences a civil lawsuit against another, known as the defendant, in order to remedy an alleged wrong. An individual who files a written accusation with the police charging a suspect with the commission of a crime and providing facts to support the allegation and which results in the criminal prosecution of the suspect.*

Once the suspect is indicted, the state becomes the complainant since the alleged wrong is considered a crime against the state.

## COMPLAINT

*The* PLEADING *that initiates a civil action; in* CRIMINAL LAW, *the document that sets forth the basis upon which a person is to be charged with an offense.*

### Civil Complaint

A civil complaint initiates a civil lawsuit by setting forth for the court a claim for relief from damages caused, or wrongful conduct engaged in, by the defendant. The complaint outlines all of the plaintiff's theories of relief, or causes of action (e.g., NEGLIGENCE, BATTERY, assault), and the facts supporting each CAUSE OF ACTION. The complaint also serves as notice to the defendant that legal action is underway. The Federal Rules of Civil Procedure govern construction of complaints filed in federal courts. Many state courts follow the same rules as the federal courts, or similar rules.

The caption opens the complaint and identifies the location of the action, the court, the docket or file number, and the title of the action. Each party to the lawsuit must be identified in the caption and must be a real party in interest, that is, either a person who has been injured or harmed in some way, or a person accused of causing the injury or harm. In addition, a party must have the capacity to sue or to be sued. If a party lacks capacity owing to mental incompetence, for example, the suit may be dismissed. Any number of parties may be named and joined in a single lawsuit as long as all meet the requirements of capacity and all are real parties in interest.

Courts of limited–subject matter jurisdiction, such as federal courts, require the complaint to demonstrate that the court has jurisdiction to hear the case. In general-jurisdiction courts, such as most state courts, a jurisdictional allegation is unnecessary.

The most critical part of the complaint is the claim, or cause of action. The claim is a concise and direct statement of the basis upon which the plaintiff seeks relief. It sets forth the RULE OF LAW that forms the basis of the lawsuit and recounts the facts that support the rule of law. Finally, the claim concludes that the defendant violated the rule of law, thereby causing the plaintiff's injuries or damages, and that the plaintiff is entitled to relief. For example: A negligence claim might begin with a statement that the defendant owed a duty of care to the plaintiff; that the defendant breached that duty; and that, as a result, the plaintiff suffered injuries or other damages. The conclusion then states that because the defendant's breach was the cause of the plaintiff's injuries, the plaintiff is entitled to compensation from the defendant.

The complaint may state separate claims or theories of relief in separate counts. For example, in a negligence case, count 1 might be for negligence, count 2 for breach of WARRANTY, and count 3 for FRAUD. Each count contains a separate statement of the rule of law, supporting facts, and conclusion. There is no limit to the number of counts a plaintiff may include in one complaint.

Federal courts and other jurisdictions that follow the Federal Rules of Civil Procedure require a brief, simple pleading known as a notice pleading. The notice pleading informs the defendant of the allegations and the basis for the claim. The rules require that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief" (Fed. R. Civil P. 8[a]). Rule 8(c)(1) states, "Each averment of a pleading shall be simple, concise, and direct."

Following the claim, the prayer for relief or demand for judgment appears. Commonly called the wherefore clause, the prayer for relief demands judgment for the plaintiff and relief in the form of the remedies the plaintiff requests. The plaintiff may demand relief in several forms. Money damages are compensation for injuries and loss. General money damages cover injuries directly related to the defendant's actions—such as pain and suffering, or emotional distress. Special money damages arise indirectly from the defendant's actions and may include lost wages or medical bills. The court

**Letter of Complaint**

Your Name

Address

Date

(Name/Address)

Dear _____ ,

On (specify date), I purchased a Sonic Dishwasher, style #1401B, from Bernard's Bargain Store in Tulsa, Oklahoma. It was installed by employees from Bernard's store. The following day the appliance malfunctioned, causing a small electrical fire and damage to my utility room wall. Based on written estimates, the approximate cost of repair to my home totals $972.50. In addition, I am seeking $488.89, which represents the purchase price and/or replacement value of the dishwasher. Demand for this amount was made repeatedly to Mr. Victor Tegeria, general manager of Bernard's Bargain Store, in person on (specify date), and (specify date); by telephone; and by two (2) certified letters dated (specify date), and (specify date). To date, my requests for reimbursement have been ignored.

Sincerely yours,

Signature

--Send certified mail, return receipt requested.

*A sample complaint.*

awards exemplary or PUNITIVE DAMAGES when the defendant's actions are particularly egregious. The purpose of punitive damages is to punish the defendant and deter similar wrongdoing. Other types of damages are recovery of property, injunctions, and SPECIFIC PERFORMANCE of a contractual obligation. The plaintiff may demand alternative relief or several different types of relief, in the same complaint (Fed. R. Civ. P. 8[a]).

A demand for a jury trial may be included near the end of the complaint. The complaint must be signed by the plaintiff's attorney, indicating that the attorney has read the complaint; that it is grounded in fact, to the best of the attorney's knowledge, information, and belief; and that it is brought in GOOD FAITH.

## Criminal Complaint

A criminal complaint charges the person named or an unknown person with a particular offense. For example, after the bombing of a federal building in Oklahoma City in 1995, authorities issued a JOHN DOE complaint, charging an unknown person or persons with the crime.

A criminal complaint must state the facts that constitute the offense and must be supported by PROBABLE CAUSE. It may be initiated by the victim, a police officer, the district attorney, or another interested party. After the complaint is filed, it is presented to a magistrate, who reviews it to determine whether sufficient cause exists to issue an arrest warrant. If the magistrate determines that the complaint does not state sufficient probable cause, the complaint is rejected and a warrant is not issued. In federal court, the complaint is presented under oath (Fed. R. Crim. P. 3).

### FURTHER READINGS

Federal Employees News Digest, eds. 2000. *Whistleblowing: A Federal Employee's Guide to Charges, Procedures, and Penalties.* Reston, Va.: Federal Employees News Digest.

Kahan, Jeffrey B. 2001. "How to Prepare Response to Complaints." *Los Angeles Lawyer* 24 (April).

McCord, James W.H. "Drafting the Complaint: Defending and Testing the Lawsuit." *Practising Law Institute* 447.

### CROSS-REFERENCES

Civil Procedure.

## COMPLIANCE

*Observance; conformity; obedience.*

Compliance with the federal INCOME TAX laws is essential to avoid prosecution for TAX EVASION.

## COMPOSITION WITH CREDITORS

*A contract made by an insolvent or financially pressed debtor with two or more creditors in which the creditors agree to accept one specific partial payment of the total amount of their claims, which is to be divided pro rata among them in full satisfaction of their claims.*

A composition with creditors is an agreement not only between the debtor and the creditors but also between the creditors themselves to accept less than what each is owed. It is a contract and such an arrangement is largely governed by contract law. There must be a meeting of the minds or mutual assent between the debtor and the creditors before a composition is created. A debtor must accept an offer by the creditors to accept partial payment of the amounts outstanding in order for the composition to be binding. The creditors themselves must also agree to the amount they will accept in satisfaction of their claims. They rely on mutual concessions of their rights to full payment in order to further the common purpose of securing their claims.

No standard form is required for a composition with creditors to be valid. A debtor can enter individual agreements with each creditor if it is clear that each follows a common purpose. All the creditors of a debtor do not have to agree to a composition. Those who do not participate are not bound by it.

Like any contract, a composition with creditors must be supported by consideration to be enforceable. Each creditor's promise to accept a pro rata share of the partial payment, as opposed to full payment of what is due, is consideration for the other creditors and the debtor. The surrender of debtor's right to file a petition for BANKRUPTCY is deemed consideration for the creditors.

Failure to obey the terms of a composition provides a basis for a lawsuit for breach of the agreement. The debtor is released from the duty of payment only after he or she has complied with the payment provisions. All the debts that are part of a composition are extinguished once a composition has been terminated.

**Composition with Creditors**

This agreement made on _____ [*date*], between _____ [*name of debtor*] ("Debtor") of _____ , _____ County, _____ [*city, county, and state of debtor's residence or place of business*], and _____ [*list names and addresses of the principal creditors*] ("Principal Creditors")

Debtor has been, and is now, engaged in the business of _____. In the course of conducting business, Debtor has become indebted to the Principal Creditors in the several sums set opposite of their respective names in the schedule annexed hereto.

In consideration of the mutual covenants, promises, and conditions contained in this Agreement, it is agreed as follows:

1. **Schedule of Payments.** In exchange for the full satisfaction and discharge of the respective debts of the Principal Creditors, Debtor shall pay to each of the Principal Creditors _____ cents on the dollar on his, her, or its debt specified in the schedule annexed hereto.

2. **Release of the Debtor.** Each of the Principal Creditors hereby agrees to accept such composition in the full satisfaction of his, her, or its debt. When such compensation is duly paid to the Principal Creditors respectively, then the Debtor shall be released and discharged from the debts and liabilities that the Debtor now owes the Principal Creditors.

3. **Validity of Agreement.** This agreement shall become binding and effective although not executed by all of the creditors of the Debtor, and although all or any of the nonexecuting creditors may be paid in full. This agreement shall be void if the composition is not paid at the time and manner specified in this Agreement, or of the Debtor is adjudged bankrupt.

4. **Binding Effect.** This agreement shall legally bind the parties, and their respective legal representatives, successors, and assigns.

[*Signature of all parties*]

*A sample composition with creditors.*

### Void Agreements

If one creditor is secretly paid more or given a preference, the other creditors can void the agreement because the law guards against the inequitable treatment of creditors. The preferred creditor cannot enforce or void the agreement. The debtor is entitled to recover payments made to such a creditor on the theory that a debtor is vulnerable to pressure by a creditor who has the power to force the debtor to file bankruptcy by refusing to enter into a composition.

### Advantages

A composition with creditors usually benefits a debtor more than bankruptcy because it accomplishes the same end—discharge of all or most of a debtor's debts—without the stigma of bankruptcy. Unlike a bankruptcy discharge, a composition does not preclude future bankruptcy for six years. Creditors, however, are often reluctant to enter into a composition and those who refuse to do so are not affected by its terms.

### Distinctions

A composition with creditors is not the same as an accord or an ASSIGNMENT FOR THE BENEFIT OF CREDITORS. Unlike an accord, which is an arrangement between a debtor and a single creditor for a discharge of an obligation by partial payment, a composition is an arrangement between a debtor and a number of creditors acting collectively for the liquidation of their claims.

A composition with creditors differs from an assignment for the benefit of creditors in a number of ways. It is created by contract, as opposed to COMMON LAW or statute. Only creditors who agree to it are bound, while an assignment discharges debts voluntarily released by creditors. The terms of the composition determine whether the debtor retains property. However, in most jurisdictions, the property of a debtor who has assigned it for his or her creditors' benefit is given to a third person with orders to sell it and distribute the proceeds to the creditors. Unlike an assignment, a composition is not a basis for an involuntary bankruptcy proceeding.

A sample form for composition with creditors can be found above.

## COMPOUND INTEREST

*Interest generated by the sum of the principal and any accrued interest.*

Interest is normally compounded on a daily, quarterly, or yearly basis. The more often interest is compounded, the larger the principal will grow and the greater the interest the new principal will produce.

## COMPOUNDING A FELONY

*A criminal offense consisting of the acceptance of a reward or other consideration in exchange for an agreement not to prosecute or reveal a felony committed by another.*

Compounding a felony is encompassed in statutes that make compounding offenses a crime.

## COMPOUNDING OFFENSE

*A criminal act in which a person agrees not to report the occurrence of a crime or not to prosecute a criminal offender in exchange for money or other consideration.*

The offense is also committed when a person accepts remuneration for encouraging a witness to be absent from a trial or employs any unlawful tactics to delay a criminal proceeding.

Under the COMMON LAW and most modern statutes a compounding offense consists of three basic elements: (1) knowledge of the crime; (2) the agreement not to prosecute or inform; and (3) the receipt of consideration. The offense is complete when there is an agreement to either withhold evidence of the crime, conceal it, or fail to prosecute it. A crime is not compounded when a person merely reacquires property previously stolen from him or her; the crime would further require that the return of the stolen property was conditioned on an agreement not to report or prosecute the crime.

The individual compounding the crime must be aware of the previous offense although the person who committed it need not be tried or convicted. The fact that the person who committed the previous crime is not tried until after the prosecution for compounding occurs is irrelevant.

The consideration can consist of anything of value, such as money, property, or a promise of monetary gain. Only the recipient of the consideration can be guilty of compounding an offense. Although the person who offers the consideration is not considered guilty of compounding a crime, he or she might be guilty of BRIBERY.

At common law the compounding of any crime was an offense. Today many jurisdictions limit the offense to the compounding of felonies. The usual punishment is a fine, imprisonment, or both.

## COMPRISE

*To embrace, cover, or include; to confine within; to consist of.*

In the law governing patents—grants of an exclusive right or privilege to make, use, or sell an invention or product for a term of years—the term *comprise* indicates inclusion rather than limitation. When a patent claim states that a particular product is comprised of certain elements, this means that other elements may also be present.

As used in the devise of land, comprise means to contain or embrace. A plot of land may be comprised of a certain number of acres.

## COMPROMISE AND SETTLEMENT

*Resolution of a dispute by mutual agreement to avoid a lawsuit.*

Public policy favors the settlement of disputes to avoid lawsuits. Parties to conflicts that might otherwise end up in court are encouraged to resolve those conflicts by mutual agreement through their attorneys, through mediators, or even on their own. A compromise and settlement can be used for many types of disagreements including contract disputes, civil disputes, labor-management negotiations, criminal cases, and DIVORCE and custody problems.

The terms of a settlement agreement do not necessarily need to be equal. One party may give up more than originally intended. However, as long as the parties agree to the terms and the court views the compromise as fair, the settlement will be upheld by the court. A settlement is considered binding, and the court views it as final and conclusive. A compromise and settlement will be put aside only if there is evidence of bad faith or FRAUD.

A valid compromise and settlement can be in any form, written or verbal. A writing is not required unless specified by statute, court rule, or the terms set by the parties. When the agreement is written, it must clearly state the intentions of the parties.

A compromise and settlement must have the same elements as a contract: parties who have the capacity and authority to agree, an offer and acceptance, and valuable consideration (consideration is something of value received or promised by one party to induce the other party to enter into an agreement).

Any party competent to enter into a contract can use compromise and settlement to resolve a conflict. There must be a meeting of minds in order to form a valid compromise; in other words, the parties must have the same understanding of the settlement. There must also be an offer of compromise and an acceptance of that offer. The offer can be made by either party. The terms of the offer must be clear and must show that the party making the offer intends to assume some obligation.

The offer can be made subject to certain conditions that must be satisfied for a valid compromise. For example, a creditor creates a conditional offer when he or she sends a promissory note for less than the full amount of a debt. If the debtor signs the note, he or she is agreeing to forgive part of the debt. If the debtor refuses to sign the note, the creditor's offer is rejected. The offer is conditioned on the debtor's signing the note.

An offer of compromise and settlement must be made within a reasonable time. Acceptance of an offer of compromise must likewise be made within a reasonable time, and on the terms offered. However, delay in acceptance is immaterial when the person making the offer is not prejudiced by it. Acceptance can be implied or expressed. If it is based on a condition that proves impossible to perform, no settlement is possible.

An offer of compromise can be withdrawn before acceptance, but not after. When an agreement is put in writing, either party may withdraw before signing. If court approval is necessary, one party can repudiate the agreement prior to the approval of the court.

Like any other contract, a valid compromise and settlement must be based on consideration. Anything of value exchanged by the parties, including money or property, is sufficient to support a compromise and settlement. If a debtor agrees to pay more than she or he thinks is owed, the additional amount is consideration in exchange for settlement of the debt. Resolution of family conflicts can also be considered valuable consideration. The adequacy of the consideration, however small or slight it might be, is usually not a matter for judicial scrutiny. Unless the consideration is so unfair as to shock

the conscience, inadequacy of consideration does not justify setting aside a compromise and settlement.

Disputes involving family matters are frequently the subject of compromise and settlement. Increasingly, courts are encouraging, and sometimes mandating, that parties in divorce and custody matters seek settlement before pursuing an issue through trial. In a family setting, where issues are very personal and emotional, compromise and settlement provides a means of preserving some sense of the close relationship between the parties. Because the parties reach the final agreement together, family matters resolved through compromise and settlement tend to be more amicable than those resolved through litigation.

Compromise and settlement can also be used to settle disputes with the INTERNAL REVENUE SERVICE (IRS). A taxpayer who owes the IRS money may propose a compromise for the method or amount of its payment. When the government accepts this compromise offer, it becomes a binding contract (47B C.J.S. *Internal Revenue* § 1064 [1995]).

## COMPROMISE OF 1850

The Compromise of 1850, also known as the Omnibus Bill, was a program of legislative measures enacted by Congress to reconcile the differences existing between the North and South concerning the issue of SLAVERY in newly formed TERRITORIES OF THE UNITED STATES.

The historical background of the enactment of the Compromise involved the increasingly hostile relationship between the northern and southern states of the Union over the existence of slavery. This hostility was partly due to the reluctant enforcement by northern states of the Fugitive Slave Act of 1793, which established procedures for the return of runaway slaves to their owners. The dissension was exacerbated in 1848 when the United States annexed Texas and gained new territories under the provisions of the Treaty of Guadalupe Hidalgo, which brought about the end of the Mexican American War. Abolitionists continued to favor the antislavery stance of the WILMOT PROVISO prohibiting slavery in the lands acquired from Mexico, which was proposed in 1846, but was never enacted into law. The South vehemently opposed the exclusion of slavery from the new territories.

In 1849 the request of California to join the Union as a free state resulted in heated debates on the floor of Congress. Many viewed the situation as a grave threat to the existence of the Union. HENRY CLAY returned to the Senate to propose measures, based upon the ideas of STEPHEN DOUGLAS, that would reconcile the

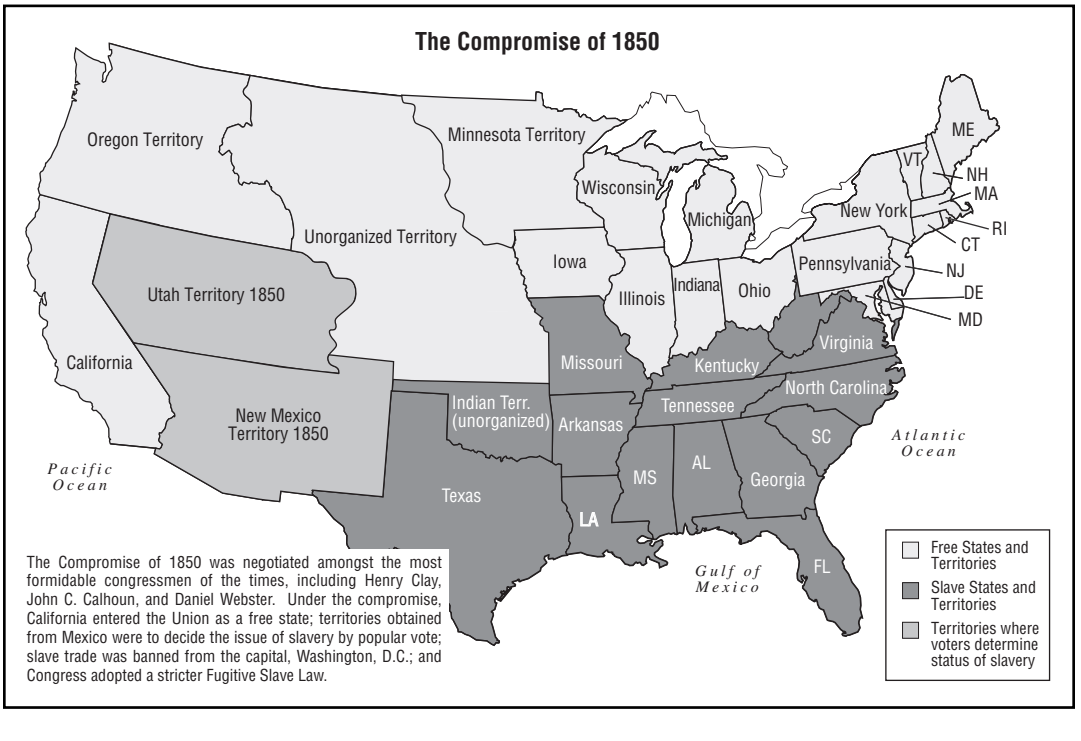


The Compromise of 1850 was negotiated amongst the most formidable congressmen of the times, including Henry Clay, John C. Calhoun, and Daniel Webster. Under the compromise, California entered the Union as a free state; territories obtained from Mexico were to decide the issue of slavery by popular vote; slave trade was banned from the capital, Washington, D.C.; and Congress adopted a stricter Fugitive Slave Law.

ILLUSTRATION BY ERIC WISNIEWSKI. GALE GROUP

different positions of the North and South. The proposals included the admission of California into the Union as a free state, the right of the New Mexico and Utah territories to determine the slavery issue for themselves at the time of their admission to the Union, the outlawing of the slave trade in the District of Columbia, and the congressional enactment of the more stringent FUGITIVE SLAVE ACT OF 1850 (9 Stat. 462).

Due to the efforts of DANIEL WEBSTER and others, these controversial measures, which initially caused heated debate, were enacted by Congress in September 1850. Although labeled a compromise due to its position on slavery, the Compromise of 1850 had short-lived effect as a solution to the issue in light of the subsequent problems resulting in the enactment of the KANSAS-NEBRASKA ACT in 1854 (10 Stat. 277) and the onset of the Civil War less than ten years later.

CROSS-REFERENCES

"Compromise of 1850" (Appendix, Primary Document).

## COMPTROLLER

*An officer who conducts the fiscal affairs of a state or* MUNICIPAL CORPORATION.

A comptroller, which is often synonymous with auditor, generally has specific duties including the supervision of revenue, the examination and certification of accounts, and the inspection, examination, or control of the accounts of other public officials.

A state comptroller's major function is the final auditing and settling of all claims arising against the state.

The chief financial officer of any private organization, such as a university or a corporation, is also called a comptroller.

Within the federal government, the office of the comptroller of the currency exists as part of the national banking system. The function of this office is to promulgate and execute rules and regulations that govern the national banks. The approval of the comptroller of currency is essential to the organization of new national banks, as well as the transformation of state-chartered banks into national banks and the consolidation and merger of banks.

The comptroller general of the United States is the leading official of the GENERAL ACCOUNTING OFFICE whose primary duty is to audit various governmental agencies.

## COMPULSORY PROCESS

*The method employed by which a person wanted as a witness, or for some other purpose, in a civil or criminal action is forced to appear before the court hearing the proceeding.*

Compulsory process encompasses not only a subpoena, which is a command to appear at a particular time and location to provide testimony upon a certain matter, but also a bench warrant, which is a written order commanding a law enforcement officer to seize the person named and bring that person into court.

The SIXTH AMENDMENT to the Constitution provides that the accused in criminal prosecutions shall have the right "to have compulsory process for obtaining witnesses in his favor."

## COMPURGATOR

*In early legal practice, one of several character witnesses produced by someone accused of a crime or by a defendant in a civil suit to attest, in court, that he or she believed the defendant on his or her oath.*

The process of compurgation, called WAGER OF LAW in England, was a type of absolution from a criminal or civil charge that enabled the defendant to come forward and swear to his or her innocence or nonliability. Through compurgation, the person on trial was able to conclusively contradict the charges and reinforce his or her position through others who testified under oath that they believed the defendant's testimony.

The use of character witnesses in a lawsuit by a party is derived from the old practice of summoning compurgators to buttress one's case.

## COMPUTER-ASSISTED LEGAL RESEARCH

*Technology that allows lawyers and judges to bypass the traditional law library and locate statutes, court cases, and other legal references in minutes using a personal computer, research software or the* INTERNET, *and an online connection.*

The two largest computer-assisted legal research (CALR) services are WESTLAW, offered by Thomson Corporation's Eagan, Minnesota-based West unit, and LEXIS, offered by Reed Elsevier's Dayton, Ohio-based LexisNexis unit. Both services provide on-line access to the fundamental tools of the legal profession—court

opinions, federal and state statutes, federal regulations, administrative law cases, and other law-related materials. Their extensive databases are updated frequently, providing attorneys with the most up-to-the-minute developments in U.S. law.

CALR systems contain thousands of databases. In addition to primary source materials, they offer access to business and economic journals, national newspapers, law reviews, federal tax abstracts, and financial data and materials. Specialized databases for narrower topics such as taxes, SECURITIES, labor, insurance, and BANKRUPTCY are also available.

When CALR was first developed in the 1970s, it borrowed Boolean search techniques from the field of computer programming. A Boolean search looks for a particular term or group of terms in a specific relationship to one another. CALR Boolean searches can include limits with respect to time: for example, court opinions are always dated, so an attorney can use a Boolean search to look for cases released in a given year or in a range of years.

CALR service providers have also created plain language search systems. Under the plain language approach, an attorney simply types in a search in the form of a question.

The following two samples demonstrate the difference between a Boolean search and a plain language search for the same issue: whether a successor corporation is liable for the cleanup of toxic waste left by a prior owner of the property. The two examples reflect WESTLAW notation; the notation for LEXIS would be similar.

**Boolean search**

(successor /5 corporation) /p (toxic or hazardous or chemical or dangerous /5 waste) /p clean! and da(aft 1/1/90)

**Plain language search**

is a successor corporation liable for the cleanup of hazardous (toxic) waste?

The sample Boolean search looks for the combination of *successor* within five words of *corporation,* in the same paragraph as the combination of *toxic* or *hazardous* or *chemical* or *dangerous* within five words of *waste,* within the same paragraph as *clean* or *cleanup* or *cleans* or *cleaned* or *cleaning* (the exclamation mark in *clean!* causes the computer to search for all words with *clean* as a root). Cases are limited to those dated after January 1, 1990.

Boolean search results usually are listed in reverse chronological order (the most recent case first). A plain language search ranks the first 20 documents that best match the search. The first ranked document is the one that most closely matches the terms in the search. A document will be ranked higher if the terms appear more often in that document.

Advances in computer technology have produced another innovation in automated research: voice recognition research. With this method, a search query is dictated either in plain language or by using Boolean terms and connectors. After the simple commands are spoken, the researcher's exact words appear on the computer screen and the requested documents are retrieved. The keyboard is not used at all during the search.

Legal researchers have the option of using CD-ROM (compact disc read-only memory) libraries, although these have become less popular in the early 2000s. A personal computer, CD-ROM drive, and specific software are required. Some CD-ROMs allow for access to a CALR online service (these require a modem).

Lawyers are also using the Internet, the public access electronic network. Because many statutes, court opinions, and LIBRARY OF CONGRESS materials are online, the Internet is becoming a valuable resource for business and legal research. It is also used for document transfers and client E-mail.

### Recent Developments

Most judges, lawyers, and law librarians continue to rely on the traditional fee-based giants of online legal research—Lexis, Westlaw, and Loislaw (owned by New York-based Aspen Publishers, Inc., a subsidiary of Dutch publishing company Wolters Kluwer). However, more law-related professionals are turning to free Internet sites to conduct their legal research. A number of Web sites now provide free access to a variety of legal materials that include federal and state case law, codes and regulations, treatises, law reviews, scholarly articles, mainstream news stories, as well as legal forms, public records, and attorney directories.

Examples of Internet sites that provide free access to at least some of these legal resources are numerous, though the depth and breadth of coverage offered by each site varies. Among the myriad of such providers, FindLaw generally remains the benchmark for comprehensive quality. Many law school Internet sites also provide free access to a wide variety of information. One such example is the Legal Information Institute, a site maintained by Cornell Law

School (www.law.cornell.edu). This site provides a range of primary and secondary source materials, as well as directories to locate additional information on the Web.

FindLaw provides multiple channels to access information from its portal and caters the information to specific types of end users. These include channels for legal professionals, students, businesses, and the public. Material specific to these targeted audiences is made available as well as resources for all users, such as cases, codes, articles, and guides. Within each channel users can drill down to the area of law that interests them.

For example, students can look at outlines and examinations for a variety of legal courses, view employment opportunities, or learn about study skills. Business people can gain insights into starting a business, review different types of business organizations, and look into bankruptcy provisions. For the general public, topics include employment, immigration, personal injury, education, estate planning, and real estate law. FindLaw also continues to provide an excellent federal case law database that is searchable by title, citation, and full text. All cases from U.S. Reports from 1893 to the present are included.

While boatloads of legal information can now be obtained on the Internet free of charge, the information typically consists of unanalyzed, non-value-added material such as primary-source documents stripped of the editorial enhancements provided by pay services. Such enhancements include case synopses (editorially created summaries of the procedural history and holding of a case), case headnotes (editorially created snapshots of each court ruling in a case), statutory annotations (editorially created indices listing every case that has interpreted or applied a particular statute), and legal citators (editorially created reference guides telling users whether a legal authority may still be cited in court as good law), among others. Because these editorial enhancements can be so valuable in making legal research more efficient and successful, most law-related professionals remain willing to pay significant subscriber and user fees to access them.

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CROSS-REFERENCES

Computer Law Association; Internet; Law Review.

## COMPUTER CRIME

*The use of a computer to take or alter data, or to gain unlawful use of computers or services.*

Because of the versatility of the computer, drawing lines between criminal and noncriminal behavior regarding its use can be difficult. Behavior that companies and governments regard as unwanted can range from simple pranks, such as making funny messages appear on a computer's screen, to financial or data manipulation producing millions of dollars in losses. Early prosecution of computer crime was infrequent and usually concerned EMBEZZLEMENT, a crime punishable under existing laws. The advent of more unique forms of abuse, such as computer worms and viruses and widespread computer hacking, has posed new challenges for government and the courts.

The first federal computer crime legislation was the Counterfeit Access Device and Computer Fraud and Abuse Act (18 U.S.C.A. § 1030), passed by Congress in 1984. The act safeguards certain classified government information and makes it a misdemeanor to obtain through a computer financial or credit information that federal laws protect. The act also criminalizes the use of computers to inflict damage to computer systems, including their hardware and software.

In the late 1980s, many states followed the federal government's lead in an effort to define and combat criminal computer activities. At least 20 states passed statutes with similar definitions of computer crimes. Some of those states might have been influenced by studies released in the late 1980s. One report, made available in 1987 by the accounting firm of Ernst and Whinney, estimated that computer abuse caused between $3 billion and $5 billion in losses in the United States annually. Moreover, some of those losses were attributable to newer, more complicated crimes that usually went unprosecuted.

The number of computer crimes continued to increase dramatically in the early 1990s. According to the Computer Emergency and

Response Team at Carnegie-Mellon University, the number of computer intrusions in the United States increased 498 percent between 1991 and 1994. During the same time period, the number of network sites affected by computer crimes increased by 702 percent. In 1991, Congress created the National Computer Crime Squad within the FEDERAL BUREAU OF INVESTIGATION (FBI). Between 1991 and 1997, the Squad reportedly investigated more than 200 individual cases involving computer hackers.

Congress addressed the dramatic rise in computer crimes with the enactment of the National Information Infrastructure Act of 1996 as title II of the Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488. That Act strengthened and clarified provisions of the original Computer Fraud and Abuse Act, although lawmakers and commentators have suggested that as technology develops, new legislation might be necessary to address new methods for committing computer crimes. The new statute also expanded the application of the original statute, making it a crime to obtain unauthorized information from networks of government agencies and departments, as well as data relating to national defense or foreign relations.

Notwithstanding the new legislation and law enforcement's efforts to curb computer crime, statistics regarding these offenses remain staggering. According to a survey in 2002 conducted by the Computer Security Institute, in conjunction with the San Francisco office of the FBI, 90 percent of those surveyed (which included mostly large corporations and government agencies) reported that they had detected computer-security breaches. Eighty percent of those surveyed acknowledged that they had suffered financial loss due to computer crime. Moreover, the 223 companies and agencies in the survey that were willing to divulge information about financial losses reported total losses of $455 million in 2002 alone.

Concerns about TERRORISM have also included the possibility that terrorist organizations could perform hostile acts in the form of computer crimes. In 2001, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT), Pub. L. No. 107-56, 115 Stat. 277, to provide law enforcement with the necessary tools to combat terrorism. The Act includes provisions that allow law enforcement greater latitude in hunting down criminals who use computers and other communication networks. The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 also directed the UNITED STATES SENTENCING COMMISSION to review, and possibly to amend, the sentencing provisions that relate to computer crimes under 18 U.S.C.A. § 1030.

The Department of Justice's Computer Crime and Intellectual Property Section prosecutes dozens of computer-crime cases each year. Many of those cases involve instances of computer hacking and other unauthorized intrusions, as well as software PIRACY and computer fraud.

One set of especially destructive crimes—internal computer crimes—includes acts in which one computer's program interferes with another computer, thus hindering its use, damaging data or programs, or causing the other computer to crash (i.e., to become temporarily inoperable). Two common types of such programs are known in programming circles as "worms" and "viruses." Both cause damage to computer systems through the commands written by their authors. Worms are independent programs that create temporary files and replicate themselves to the point where computers grow heavy with data, become sluggish, and then crash. Viruses are dependent programs that reproduce themselves through a computer code attached to another program, attaching additional copies of their program to legitimate files each time the computer system is started or when some other triggering event occurs.

The dangers of computer worms and viruses gained popular recognition with one of the first cases prosecuted under the Computer Fraud and Abuse Act. In *United States v. Morris,* 928 F.2d 504 (2d Cir. 1991), Cornell University student Robert T. Morris was convicted of violating a provision of the act that punishes anyone who, without authorization, intentionally accesses a "federal interest computer" and damages or prevents authorized use of information in such a computer, causing losses of $1,000 or more. Morris, a doctoral candidate in computer science, had decided to demonstrate the weakness of security measures of computers on the INTERNET, a network linking university, government, and military computers around the United States. His plan was to insert a worm into as many computers as he could gain access to, but to ensure that the worm replicated itself slowly

enough that it would not cause the computers to slow down or crash. However, Morris miscalculated how quickly the worm would replicate. By the time he released a message on how to kill the worm, it was too late: Some 6,000 computers had crashed or become "catatonic" at numerous institutions, with estimated damages of $200 to $53,000 for each institution. Morris was sentenced to three years' PROBATION and 400 hours of community service, and was fined $10,500. The U.S. Supreme Court declined to review the case (*Morris, cert. denied,* 502 U.S. 817, 112 S. Ct. 72, 116 L. Ed. 2d 46 [1991]).

Computer hackers often share Morris's goal of attempting to prove a point through the clever manipulation of other computers. Hackers, who, typically, are young, talented, amateur computer programmers, earn respect among their peers by gaining access to information through TELECOMMUNICATIONS systems. The information obtained ranges from other individuals' E-MAIL or credit histories to the Department of Defense's secrets.

A high-profile case in 1992 captured national headlines. In what federal investigators called a conspiracy, five young members of an underground New York City gang of hackers, the Masters of Deception (MOD), faced charges that they had illegally obtained computer passwords, possessed unauthorized access devices (long-distance calling-card numbers), and committed wire fraud in violation of the Computer Fraud and Abuse Act. Otto Obermaier, the U.S. attorney who prosecuted the youths, described their activities as "the crime of the future," and said that he intended to use the case to make a critical statement about computer crime. The indictment contained 11 counts, each punishable by at least five years in prison and individual fines of $250,000. Supporters of MOD's civil liberties questioned whether the gang members had done anything truly illegal.

MOD members Paul Stira and Eli Ladopoulos pleaded guilty to the charges against them. They confessed that they had broken the law but insisted that they had not done anything for personal profit. They were sentenced to six months in a federal penitentiary, followed by six months' home detention. John Lee and Julio Fernandez faced specific charges of illegally selling passwords for personal profit. Lee pleaded guilty and received a year behind bars, followed by 300 hours of community service. Fernandez bargained with prosecutors, offering them information on MOD activities, and thus received no jail time. Gang leader Mark Abene, who was notorious in computer circles by his handle Phiber Optik, pleaded guilty to charges of fraud. A U.S. District Court judge sentenced Abene to a year in federal prison, hoping to send a message to other hackers. However, by the time Abene was released from prison in 1995, his notoriety had grown beyond the hacker underground. Many in the computer world hailed him as a martyr in the modern web of computer technology and criminal prosecution. Abene subsequently found employment as a computer technician at a New York-based on-line service.

Computer crime can become an obsession. Such was the case for Kevin Mitnick, a man federal prosecutors described prior to his arrest as the most wanted computer hacker in the world. In the early 1980s, as a teenager, Mitnick proved his mettle as a hacker by gaining access to a North American Air Defense terminal, an event that inspired the 1983 movie *War Games.* Like the MOD gang, Mitnick gained access to computer networks through telecommunications systems. In violation of federal law, he accessed private credit information, obtaining some 20,000 credit numbers and histories. Other break-ins by Mitnick caused an estimated $4 million in damage to the computer operations of the Digital Equipment Corporation. The company also claimed that Mitnick had stolen more than one million dollars in software.

Mitnick was convicted, sentenced to one year in a minimum-security prison, and then released into a treatment program for compulsive-behavior disorders. Federal investigators tried to keep close track of him during his probation, but in November 1992, he disappeared. Authorities caught up with his trail when Mitnick broke into the system of computer-security expert Tsutomu Shimomura at the San Diego Supercomputer Center—a move that was clearly intended as a challenge to another programming wizard. Shimomura joined forces with the Federal Bureau of Investigation to pursue their elusive quarry in cyberspace. Using a program designed to record activity in a particular database that they were sure that Mitnick was accessing, while monitoring phone activity, Shimomura and authorities narrowed their search to Raleigh, North Carolina. A special device detecting cellular-phone use ultimately led them to Mitnick's apartment. Mitnick was arrested and was charged on 23 federal counts. He plea-

bargained with prosecutors, who agreed to drop 22 of the counts in exchange for Mitnick's guilty plea for illegally possessing phone numbers to gain access to a computer system. Mitnick was sentenced to eight months in jail.

Mitnick's case illustrates the difficulties that legislatures and courts face when defining and assigning penalties for computer crime. Using a computer to transfer funds illegally or to embezzle money is clearly a serious crime that merits serious punishment. Mitnick broke into numerous services and databases without permission and took sensitive information, in violation of federal laws; however, he never used that information for financial gain. This type of behavior typically has no counterpart outside of cyberspace—for example, people do not break into jewelry stores only to leave a note about weak security.

Some instances of computer crimes demonstrate the way in which small computer files that require relatively little effort on the part of the perpetrator can cause millions of dollars' worth of damage to computer networks. In March 1999, David L. Smith of New Jersey created a virus that lowered the security levels of certain word-processing programs and caused infected computers to send e-mail messages containing attachments with the virus to e-mail addresses contained in the infected computer's e-mail address book. The virus was activated on an infected computer when the user opened the word-processing program.

Smith posted a message on March 26, 1999, to an Internet newsgroup called "Alt.Sex." The message claimed that if a user opened an attachment, it would provide a list of passcodes to pornographic websites. The attachment contained the virus, which became known as the "Melissa" virus. Smith was arrested by New Jersey authorities on April 1, 1999, but not before the virus had infected an estimated 1.2 million computers and affected one-fifth of the country's largest businesses.

The total amount of damages was $80 million. Smith pleaded guilty in December 1999 to state and federal charges. He faced 20 months in a federal prison and a fine of approximately $5,000 for his crime. He faced additional time in state prison. According to U.S. Attorney Robert J. Cleary, "There is a segment in society that views the unleashing of computer viruses as a challenge, a game. Far from it; it is a serious crime. The penalties Mr. Smith faces—including potentially five years in a federal prison—are no game, and others should heed his example."

*David L. Smith was arrested in April 1999 for creating and disseminating the "Melissa" virus, which infected an estimated 1.2 million computers and affected one-fifth of the country's largest businesses.*

AP/WIDE WORLD PHOTOS

Others have continued to commit such crimes. In February 2000, a computer hacker stunned the world by paralyzing the Internet's leading U.S. web sites. Three days of concentrated assaults upon major sites crippled businesses like Yahoo, eBay, and CNN for hours, leaving engineers virtually helpless to respond. When the dust had settled, serious doubts were raised about the safety of Internet commerce. An international hunt ensued, and web sites claimed losses in the hundreds of millions of dollars. After pursuing several false leads, investigators ultimately charged a Canadian teenager in March 2000 in one of the attacks.

On February 7, engineers at Yahoo, the popular portal web site, noticed traffic slowing to a crawl. Initially, suspecting faulty equipment that facilitates the thousands of connections to the site daily, they were surprised to discover that it was receiving many times the normal number of hits. Buckling under exorbitant demand, the servers—the computers that receive and transmit its Internet traffic—had to be shut down for several hours. Engineers then isolated the problem: Remote computers had been instructed to bombard Yahoo's servers with automated

requests for service. Over the next two days, several other major web sites suffered the same fate. Hackers hit the auction site eBay, the bookseller Amazon.com, the computer journalism site ZDnet, stock brokerages E*Trade and Datek, the computer store Buy.com, the web portal Excite at Home, and the flagship site for news giant CNN. As each site ground to a halt or went offline, engineers tried in vain to determine where the digital bombardment had originated.

Experts expressed amazement at the attacks' simplicity as well as at the inherent vulnerabilities that they exposed in the Internet's architecture. Hackers had launched what quickly came to be known as a distributed Denial-of-Service (DOS) attack—essentially a remote-controlled strike using multiple computers. First, weeks or months in advance, they had surreptitiously installed commonly available hacking programs called "scripts" on 50 or more remote computers, including university systems chosen for their high-speed connections to the Internet. Later, they activated these scripts, turning the remote computers into virtual zombies that were ordered to send unfathomably large amounts of data—up to one gigabyte per second—continuously to their victims. These data asked the target web sites to respond, just as every legitimate connection to a web site does. The sheer multitudes of requests and responses overwhelmed the victim sites. To escape detection, the "zombies" forged their digital addresses.

Federal investigators were initially stymied. They had legal authority to act under 18 U.S.C.A. § 1030, which criminalizes "knowingly transmit(ting) a program information code or command" that "intentionally causes damage." Sleuthing was difficult, however. Not only had the hackers covered the trail well, but also the FBI had suffered numerous personnel losses to private industry. The bureau had to hire consultants and had to develop special software to assist in its manhunt. Moreover, as FBI official Ron Dick told reporters, the proliferation of common hacking tools meant that even a teenager could have orchestrated the crime.

In early March 2000, authorities arrested 17-year-old New Hampshire resident Dennis Moran, allegedly known online as "Coolio." The lead proved false. In mid-April, claiming to have found "Mafiaboy," Royal Canadian Mounted Police arrested a 15-year-old Montreal hacker. The youth, whose real name was not divulged, allegedly had boasted of his exploits online while trying to recruit helpers. Officials charged him with a misdemeanor for launching the attack upon CNN's website.

Although the DEPARTMENT OF JUSTICE continued its hunt, this denial-of-service attack was never completely resolved. Analysts have noted that DOS attacks have occurred for several years, although not to the extent as that of February 2000. In May 2001, for instance, the White House's web page was hit with a DOS attack that blocked access to the site for about two hours.

Based upon the sheer number of cases involving computer crime, commentators remain puzzled as to what is necessary to curb this type of activity. Clearly, technology for law enforcement needs to stay ahead of the technology used by the hackers, but this is not an easy task. A number of conferences have been held to address these issues, often attracting large corporations such as Microsoft and Visa International, but the general consensus is that the hackers still hold the upper hand, with solutions still elusive.

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## COMPUTER LAW ASSOCIATION

The Computer Law Association, Inc., was formed in 1973 to fill the need for mutual education by lawyers concerned with the unique legal considerations related to the evolution, production, marketing, acquisition, and use of computer communications technology. The association is committed to providing lawyers and law students concerned with the legal and practical aspects of computers, computer services, and computer communications with a

forum for an exchange of ideas and an in-depth examination of related problems. The association's meetings are open to nonmembers for the purpose of fostering useful interdisciplinary dialogue.

Over the years, the association has sponsored a wide variety of programs, covering such areas as the use of the computer as a litigation tool; privacy issues related to data banks; competition in the computer and communications industries; contracting for computer technology; computer communications issues, particularly the Federal Communications Commission's second computer inquiry and the proposed legislation affecting TELECOMMUNICATIONS; the effect of the Copyright Act of 1976 (17 U.S.C.A. § 101 et seq.) on computer technology and the work of the National Commission on New Technological Uses of Copyrighted Works (CONTU); federal, state, local, and international taxation of computer-related properties, transactions, and activities; electronic funds transfer systems; liability for computer usage; computer technology in the next decade; contracting in the computer industry; marketing of software by nonsoftware specialists; negotiating contracts for custom software; and emerging national information systems, such as the national SECURITIES markets, E-MAIL, and CABLE TELEVISION.

The association holds semiannual conferences and publishes transcripts of the meetings. It amended and adopted new by–laws in 1995. Its members are lawyers and law students.

Web site: <www.cla.org>.

CROSS-REFERENCES

Computer Crime; Copyright.

## ♦ COMSTOCK, GEORGE FRANKLIN

George Franklin Comstock was born August 24, 1811, in Williamstown, New York. He graduated from Union College in 1834, was admitted to the New York bar in 1837, and received an honorary doctor of laws degree in 1858.

In 1847, Comstock began his service in the New York judiciary system as first reporter of the New York Court of Appeals, a position he held until 1851. From 1852 to 1853, he served as SOLICITOR GENERAL of the United States, then returned to the New York courts as justice of the New York Court of Appeals in 1855. He sat on the bench until 1861, becoming chief justice in 1860. In 1868, he was a representative at the New York Constitutional Convention.

Comstock pursued interests in the field of education in addition to his legal career. He was a trustee of Hobart College from 1870 to 1877 and of Syracuse University from 1870 to 1890. He established the St. John's School for Boys, which is located in Manilus, New York.

In the literary field, Comstock acted as editor for *Kent's Commentaries.*

Comstock died September 27, 1892, in Syracuse, New York.

## COMSTOCK LAW OF 1873

The Comstock Law of 1873 was a federal law that made it a crime to sell or distribute materials that could be used for contraception or ABORTION, to send such materials or information about such materials through the federal mail system, or to import such materials from abroad. It was motivated by growing societal concerns over OBSCENITY, abortion, pre-marital and extra-marital sex, the institution of mar-

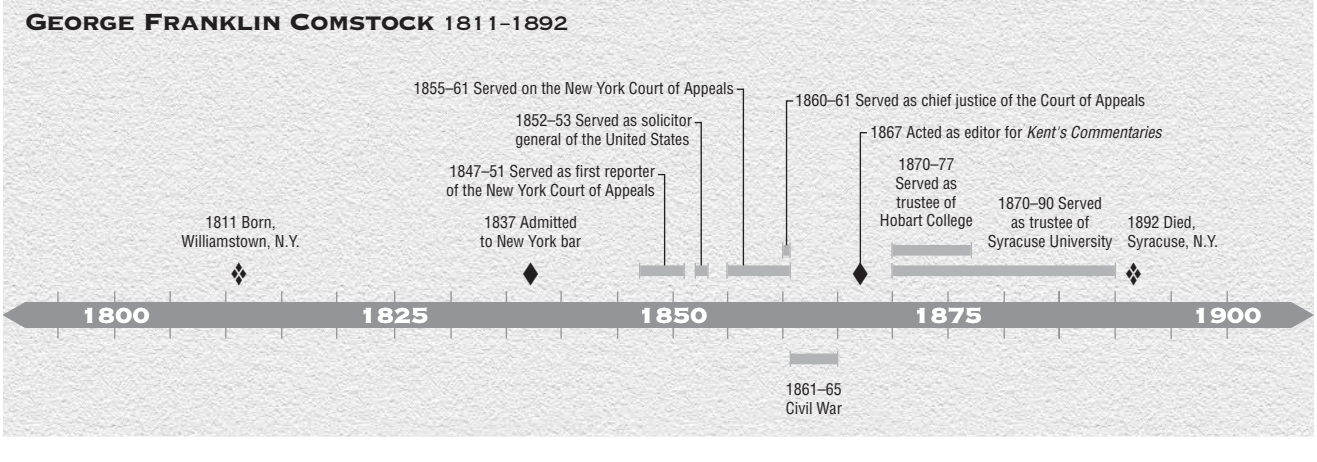

riage, the changing role of women in society, and increased procreation by the *lower classes.* Following the bloodbath of the Civil War and the emancipation of the slaves, many Americans sought a return to simpler times, while other Americans yearned for a nationwide spiritual and moral revival.

But the United States was undergoing rapid change during this period. The industrial revolution was making a large number of jobs available to members of both sexes, and women were taking advantage of this opportunity by entering the workforce in unprecedented numbers. The United States was also experiencing a significant wave of immigration. Some Americans complained that the new immigrants were tainting the moral fabric of the United States with their radical political beliefs and their permissive attitudes about sex. Members of the so-called *upper classes* grew worried that members of the *lower classes* were procreating at a faster rate, in part because better educated, more affluent women were postponing their childbearing years to lead lives of their own choosing, free from the dictates or needs of their fathers, husbands, or children.

The AMERICAN MEDICAL ASSOCIATION (AMA) voiced concern about abortion, not only because of the danger to women, but also because of the possibility of a woman *overlooking the duties imposed on her by the marriage contract.* The Catholic Church condemned abortion and BIRTH CONTROL as twin evils. States began enacting laws that made it more difficult to DIVORCE and gave single people greater incentive to marry.

In the middle of such local reform efforts in New York City was twenty-nine-year-old Anthony Comstock, head of the New York Society for the Suppression of Vice (NYSSV). Established in 1872, the NYSSV was financed by some of the wealthiest and most influential New York philanthropists. Comstock used their money to lobby the New York State Legislature for laws criminalizing pre-marital sex and ADULTERY, among other moral vices. He also used their money to lobby Congress for a law that would implement his overall agenda.

In 1873 Comstock got his wish, when Congress passed *An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use.* March 3, 1873, ch. 258, § 2, 17 Stat. 599. Known popularly as the *Comstock Law,* the statute's avowed purpose was "to prevent the mails from being used to corrupt the public morals." The Comstock Law made it a crime to sell or distribute materials that could be used for contraception or abortion, to send such materials or information about such materials in the federal mail system, or to import such materials from abroad. Immediately after the law was enacted, Comstock was appointed special agent of the U.S. Post Office and given the express power to enforce the statute. Comstock held this position for the next 42 years.

Comstock claimed to have successfully prosecuted more than 3,600 defendants under the federal law and destroyed over 160 tons of obscene literature in his role as special agent. At first Comstock targeted what he considered to be easy prey, mail-order services and low-rent shops that sold cheaply produced photographs of nude women. Typically poor and uneducated, the defendants first prosecuted by Comstock often failed even to present a defense on their own behalf.

Comstock next targeted indecency in *high* culture, prosecuting prominent art gallery owners for selling European paintings containing partially clad women. But Comstock's attempted CENSORSHIP of traditional art triggered a groundswell of opposition. The *New York Times* criticized Comstock for overreaching. By 1887 many mainstream Americans who had originally supported the Comstock Law were now reconsidering that support in light of countervailing concerns over free speech. But Comstock was not deterred, continuing to prosecute alleged violators as they were made known to him.

At the turn of the century, 24 states had enacted their own versions of the Comstock Act, many of which were more stringent than the federal statute. The Comstock Law itself was recodified and reenacted several times in the twentieth century, and prosecutions for violations of the federal statute continued even as Americans became increasingly diverse and tolerant. As a result, several challenges were made to the constitutionality of the Comstock Law, most of them on FIRST AMENDMENT grounds. To the surprise of many observers, the U.S Supreme Court continued to uphold the Comstock Law into the 1960s. *United States v. Zuideveld*, 316 F.2d 873, 875-76, 881 (7th Cir. 1963).

The fate of the Comstock Law began to change, however, when the Supreme Court

announced its decision in MILLER V. CALIFORNIA, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). In *Miller* the Supreme Court ruled that material is obscene if (1) the work, taken as a whole by an average person applying contemporary community standards, appeals to the prurient interest; (2) the work depicts sexual conduct in a patently offensive way; and (3) the work, when taken as a whole, lacks serious literary, artistic, political, or scientific value. Although the Comstock Law was never challenged on grounds that it violated the *Miller* standards for obscenity, the Supreme Court declared the law unconstitutional in 1983.

In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983), the Supreme Court re-examined the reasons underlying the Comstock Law (then codified at 39 USCA § 3001) in light of the First Amendment standards governing commercial speech, which allow the government to regulate false, deceptive, and misleading advertisements if the regulation is supported by a substantial governmental interest. The Court concluded that the Comstock Law did not meet this burden. The government's interest in purging all mailboxes of advertisements for contraceptives is more than offset, the Court said, by the harm that results in denying the mailbox owners the right to receive truthful information bearing on their ability to practice birth control or start a family. "We have previously made clear," the Court emphasized, "that a restriction of this scope is more extensive than the Constitution permits, for the government may not reduce the adult population . . . to reading only what is fit for children."

CROSS-REFERENCES

Abortion; Adultery; American Medical Association; Birth Control; Censorship; First Amendment; Freedom of Speech.

## CON

*A prefix meaning* with *or* together. *A slang abbreviation for* confidence, *as in* con *man or* con *game. To con someone is to deceive or take advantage of a person through* FRAUD *or trickery after winning the person's confidence.* Con *is also used as a slang abbreviation for* convict, *as in ex-*con *to mean someone previously incarcerated. An abbreviation for* contra, *which means against. To show the* pros *and* cons *of a particular issue means to present arguments or evidence on both sides.*

## CONCEALMENT OF BIRTH OR DEATH

*The crime of refusing to disclose the birth or death of a newborn child.*

The offense is entirely statutory in nature, and state laws differ on its elements. In some jurisdictions the essence of the offense is the deliberate concealment of the birth; in others it is the willful concealment of the death. Intent to conceal the birth or death must be proven in order to obtain a conviction.

The concealment must be accomplished in such a manner as to prevent ascertainment of whether the child was stillborn or was born alive and died as a result of a HOMICIDE. There is no requirement that every other person be deprived of the knowledge of the birth or death of the child. The crime is still actionable when another person participates in withholding the information. Failure to provide notice of the birth of an infant who later dies does not constitute a concealment, however.

Evidence of stillbirth has been held to entitle an accused to an acquittal under some statutes. Under others it is essential to prove the live birth of the child. And in some states the offense can be committed regardless of whether there was stillbirth or live birth. ILLEGITIMACY is a necessary element of the offense in a majority of jurisdictions, based on the supposition that concealment is generally perpetrated only by those individuals wishing to conceal or destroy proof of the birth.

## CONCILIATION

*The process of adjusting or settling disputes in a friendly manner through extrajudicial means. Conciliation means bringing two opposing sides together to reach a compromise in an attempt to avoid taking a case to trial.* ARBITRATION, *in contrast, is a contractual remedy used to settle disputes out of court. In arbitration the two parties in controversy agree in advance to abide by the decision made by a third party called in as a mediator, whereas conciliation is less structured.*

Conciliation is used in labor disputes before arbitration and may also take place in several areas of the law. A court of conciliation is one that suggests the manner in which two opposing parties may avoid trial by proposing mutually acceptable terms. In the past, some states have had bureaus of conciliation for use in DIVORCE proceedings.

The federal government has established the FEDERAL MEDIATION AND CONCILIATION SERVICE, an independent department devoted to settling labor disputes by conciliation and mediation, or settlement of disputes through the intervention of a neutral party.

CROSS-REFERENCES

Alternative Dispute Resolution.

## CONCILIATION, INTERNATIONAL

*A method by which the differences between nations may be settled by means of a commission employed to consider and report upon such differences.*

When conciliation is used, a commission of inquiry is introduced to investigate and report on the facts surrounding a particular dispute. The report need not be in the form of an award, and the parties involved may freely decide whether or not they will give it any effect. Conciliation is distinguishable from ARBITRATION in that the terms of a conciliation settlement constitute mere proposals to the disputing powers, whereas an arbitration settlement is binding.

## CONCLUSION OF LAW

*The rule by which the rights of parties in a lawsuit are determined by a judge's application of relevant statutes or legal principles to the facts of the case that have been found to be true by the jury. The final judgment or decree rendered by a court based upon the verdict reached by the jury. Legal principles that provide the basis for the decision rendered by a judge in a case tried without a jury or with an* ADVISORY JURY *after certain facts have been established.*

Under rules of federal CIVIL PROCEDURE, conclusions of law made in such cases must be stated separately from the findings of fact.

## CONCLUSIVE

*Determinative; beyond dispute or question. That which is conclusive is manifest, clear, or obvious. It is a legal inference made so peremptorily that it cannot be overthrown or contradicted.*

A *conclusive* presumption cannot be refuted; no evidence can rebut it, as in the presumption that a child who is below a certain age has a fundamental inability to consent to sexual relations.

*Conclusive* evidence is evidence that is either unquestionable because it is so clear and convincing or because the law precludes its contradiction. A death certificate is considered conclusive evidence that a person has died.

## CONCUR

*To agree; coincide; act together. To* concur *is to evidence consent in an affirmative or concrete manner as opposed to merely acquiescing or silently submitting to a decision.*

In appellate court practice, a judge may file a *concurring opinion,* which expresses accord with the conclusions of the majority opinion filed in the same lawsuit but at the same time separately states the judge's reason for reaching the same conclusions.

## CONCURRENT

*Simultaneous; converging; of equal or joint authority.*

*Concurrent estates* is a term used in PROPERTY LAW to describe ownership of, or possessory interest in, a piece of property by two or more people jointly, such as a JOINT TENANCY or TENANCY IN COMMON.

*Concurrent power* is the authority of Congress and the state legislatures to make laws on the same subject matter while working independently of one another.

*Concurrent negligence* involves the negligent acts of at least two people that, although they might not have occurred at exactly the same moment, produce a single, indivisible injury.

*Concurrent sentences* are two or more prison terms to be served simultaneously, one of which might be longer than the others. The prisoner is entitled to be discharged after the longest of the terms is served.

## CONCURRENT ESTATES

*Ownership or possession of real property by two or more individuals simultaneously.*

The three most common kinds of concurrent estates are JOINT TENANCY; TENANCY BY THE ENTIRETY; and TENANCY IN COMMON.

## CONCURRENT JURISDICTION

*The authority of several different courts, each of which is authorized to entertain and decide cases dealing with the same subject matter.*

State and federal courts possess concurrent jurisdiction over particular civil lawsuits, such as an action to declare a state law unconstitutional. Federal courts have exclusive jurisdiction over other matters, such as cases involving PATENTS.

## CONCURRENT RESOLUTION

*An action of Congress passed in the form of an enactment of one house, with the other house in agreement, which expresses the ideas of Congress on a particular subject.*

A concurrent resolution does not have the legal impact of a joint resolution, which has the force of official legislative action. It is more commonly employed as a method of expressing an opinion on some question. Commendations to victorious sports teams and statespersons and petitions from state legislatures to Congress or the president are examples of concurrent resolutions.

## CONCURRENT WRITS

*Court orders issued in duplicate originals; several orders issued at the same time for the same purpose.*

A court could, for example, issue concurrent writs ordering the arrest of a person whose whereabouts were unknown, or it could issue concurrent writs for service on several defendants in a single lawsuit.

## CONDEMN

*To adjudge or find guilty of a crime and sentence. To declare a building or ship unsafe for use or occupancy. To decide that a navigable vessel is a prize or is unfit for service. To take privately owned land for public use in exchange for just compensation by virtue of the power of* EMINENT DOMAIN.

## CONDEMNATION

*The process of implementing* EMINENT DOMAIN, *whereby the government takes private property for public use.*

When land is condemned through eminent domain, owners must be paid just compensation and provided with notice and an opportunity to defend their rights.

## CONDITION

*A future and uncertain event upon the happening of which certain rights or obligations will be either enlarged, created, or destroyed.*

A condition may be either express or implied. An *express condition* is clearly stated and embodied in specific, definite terms in a

*A court may issue concurrent writs for the arrest of a person whose whereabouts are unknown.*

UNDERWOOD & UNDERWOOD/CORBIS

contract, lease, or deed, such as the provision in an installment credit contract that, if the balance is paid before a certain date, the debtor's interest will be reduced.

An *implied condition* is presumed by law based upon the nature of a particular transaction and what would be reasonable to do if a particular event occurred. If a woman leases a hall for a wedding on a certain date, her ability to use the hall is based on its implied continued existence. If the hall burns down before that date, use of the hall is impossible due to fire; therefore, the law would imply a condition excusing the lessor from liability.

In the law of contracts, as well as estates and conveyancing, conditions *precedent* and *subsequent* may exist.

A *condition precedent* must occur before a right accrues. A woman may convey her house to her son based on the condition that the son marry by the age of twenty-five. If the son fails to marry by that age, he has lost his right to the house. Similarly, in contract law, if an agreement is signed by one party and sent to a second party with the intention that it will not become enforceable until the second party signs it, the second party's signature would be a condition precedent to its effectiveness.

A *condition subsequent* means that a right may be taken away from someone upon the occurrence of a specified event. An owner of property may convey land to a town on the condition that it be used only for church purposes. If the land conveyed is used to build a shopping mall, then ownership would revert to the original owner.

A condition subsequent may also affect a transaction involving a gift. In many states, an engagement ring is regarded as an inter vivos gift to which no conditions are attached. In some states, however, its ownership is considered to be conditioned upon the subsequent marriage of the couple involved; therefore, if a woman does not marry the man who gave her the engagement ring, ownership reverts to him and she must return it to him.

*Concurrent conditions* are conditions in the law of contracts that each party to the contract must simultaneously perform.

## CONDITIONAL

*Subject to change; dependent upon or granted based on the occurrence of a future, uncertain event.*

A *conditional payment* is the payment of a debt or obligation contingent upon the performance of a certain specified act. The right to demand back payment if the condition fails is generally reserved.

## CONDOMINIUM, INTERNATIONAL

*A non-self-governing territory over which two states share administrative control. In this context the term* coimperium *is sometimes used interchangeably with the term* condominium.

## CONDOMINIUMS AND COOPERATIVES

*Two common forms of multiple-unit dwellings, with independent owners or lessees of the individual units comprising the multiple-unit dwelling who share various costs and responsibilities of areas they use in common.*

A *condominium* is a multiple-unit dwelling in which there is separate and distinct ownership of individual units and joint ownership of common areas. For example, in an apartment house, the individual owners would each own their own apartments while all the owners of the separate apartments would together own the parts of the building common to all of them, such as the entrances, laundry rooms, elevators, and hallways. The building is managed by the condominium association, either directly or through a professional manager. The owners of the individual units are jointly responsible for the costs of maintaining the building and common areas, but they are individually responsible for the maintenance expenses of their particular units.

A *cooperative* apartment house is usually owned and managed by a corporation, and the shareholders are tenants who lease their apartments from the corporation. The relative size of the apartment that a shareholder-tenant leases determines the proportion of the corporation's stock that that shareholder owns. Each shareholder-tenant pays a monthly assessment, based upon his or her proportionate share of the stock, to cover the principal and interest on the building mortgage, taxes, and maintenance costs.

### History

The development of condominium and cooperative housing arrangements accelerated with increasing costs of real estate, inflation, increased urbanization, and population growth. Until the 1960s, the condominium as a separate

form of ownership was relatively unknown in the United States. The development of condominiums was hastened when the FAIR HOUSING ACT OF 1968 (42 U.S.C.A. § 3601 et seq.) authorized the use of mortgage insurance, established under the National Housing Act (12 U.S.C.A. § 1701 et seq. [1934]), on one-family units in multiple-family structures.

### Advantages

Some advantages of cooperative or condominium ownership are ownership interest in the premises; sharing high building site and maintenance costs; INCOME TAX deductions for the interest and taxes paid by individual owners; decreased risk of personal liability of the various members; and increased choice of location, since high real estate costs frequently preclude individual housing on expensive sites.

### Condominium Ownership

An individual who purchases a unit in a condominium receives title to such unit in fee simple, owning it outright. The owner has all legal rights incident to ownership, including the right to sell, absent a RESTRICTIVE COVENANT limiting its use.

Title to a condominium also encompasses ownership of the land and common areas with the remaining unit owners. The individual owner has certain rights, such as use of the *common areas,* and certain obligations, such as paying his or her share of the expenses incurred for maintenance or improvements of the common areas, regardless of whether the individual owner approves of the upkeep or improvements. The size of the share of operating, maintaining, and improving costs of a building and common areas to be borne by an individual unit owner depends on the size of that owner's unit, usually measured by the number of rooms in the unit.

The three basic instruments used in the purchase of a condominium are a deed to the unit; a declaration of condominium; and the bylaws of the condominium association, the membership of which is comprised of the units' owners.

An individual buying a condominium receives a deed, which must be duly recorded in the appropriate county office. Such deed ordinarily describes the individual unit, the building in which the unit is located, and the property upon which the building is constructed. Generally it will also embody all limitations or restrictions imposed on the use of the unit and any other details agreed upon by the purchaser and seller. The deed cannot contain any provision that is contrary to the rules of the condominium or declaration of condominium.

*A 1997 condominium development near Denver, Colorado. The condominium as a form of ownership agreement has grown rapidly in popularity since the 1960s.*

AP/WIDE WORLD PHOTOS

The declaration of condominium is the official record of the owner's rights and duties pursuant to receiving title to the condominium. It also states precisely what portions the owner of a unit owns and must maintain. State statute prescribes what must be included in the declaration of condominium. These requirements vary from one state to another, but a declaration of condominium must ordinarily contain the following: (a) a legal description of the land and buildings of the condominium, which is essentially the same information contained in the deed; (b) a description of each unit, including the address, size, number of rooms, and exact location within the building; (c) a description of the common areas and any restrictions upon the use thereof; (d) the pecuniary worth of each unit of the condominium and of the land under it, as well as the percentage of shares in the common areas assigned to each unit owner, usually based upon the number of rooms in his or her unit; (e) the number of votes assigned to each unit. The declaration of condominium must also state the procedure for making decisions concerning repairs, improvements, and similar costs, as well as provisions for amendment of the declaration or for ending the condominium arrangement. The number of votes assigned to each unit owner is in proportion to that owner's percentage share. A declaration must also provide the procedures for owners' payments of fees

and other costs and sanctions imposed for failure to pay them.

Condominium unit owners must adhere to the regulations set forth in the bylaws. The bylaws of a condominium—the rules and regulations by which the condominium association governs itself—are generally drafted by the developers of the condominium or the original purchasers of the individual units.

The bylaws ordinarily establish procedures for electing the officers or board members of the condominium association, conducting meetings, and handling routine building maintenance and insurance for the common areas. They prescribe any restrictions that may be imposed on the sale of individual units and penalties for violation of the rules.

A condominium unit may be purchased for cash; however, the more common procedure is for a mortgage to be obtained to help finance it. Since each unit is owned individually, if an owner defaults on mortgage payments or property taxes, no other unit owner is liable.

### Cooperative Organization

A cooperative can be created in a number of ways:

1. *Corporate organization.* The most common type of cooperative organization is its corporate form. Three documents are required for the formation of a corporate cooperative: a corporate charter or certificate of incorporation; bylaws; and a proprietary lease or occupancy agreement. These three instruments together constitute the contract between the individual owners and the corporation. The relationship of the unit owners to the corporation is such that they are tenants as well as shareholders. Corporate financing is ordinarily accomplished by a single mortgage executed by the corporation, which covers the entire project. Since separate mortgages on the individual units are uncommon, occupants are dependent upon the financial stability of their fellow occupants.
2. *Co-ownership in joint tenancy.* In a **JOINT TENANCY**, title to the premises vests in all of the co-owners as joint tenants, which means that they have an undivided interest coupled with a **RIGHT OF SURVIVORSHIP**. Such an arrangement includes provisions for exclusive occupancy of individual units, vested in designated co-owners. This type of plan is not often practicable, since there must be four unities in a joint tenancy: time, title, interest, and possession.
3. *Tenancy in common.* The occupants own the entire project collectively as tenants in common. Each tenant is given the right to occupy exclusively a specifically designated unit. A **TENANCY IN COMMON** differs from a joint tenancy in that each tenant owns an undivided portion; however, the portions are not necessarily equal. In addition, each tenant has the legal right to dispose of his or her undivided share or a portion thereof by deed or by will. Various covenants are employed to enforce the financial obligations in maintenance and operation by the co-tenants.
4. *Business trust.* In a **BUSINESS TRUST** or Massachusetts trust, title to the entire premises vests in the trustees of the trust. Certificates of beneficial interest are issued to the individual tenants, and each beneficial owner is assigned an exclusive right of occupancy of a specific unit under a proprietary lease.

Each tenant-shareholder may deduct on his or her federal income tax return a proportionate share of the interest that the cooperative corporation has paid upon its blanket mortgage, so long as the corporation does not obtain in excess of 20 percent of its gross income from sources apart from its tenant-shareholders.

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#### CROSS-REFERENCES

Community Property; Lease.

## CONDONATION

*In marriage, the voluntary pardoning by an innocent spouse of an offense committed by his or her*

*partner conditioned upon the promise that it will not recur.*

Condonation, which is used as a defense in DIVORCE actions based on fault grounds, is strongly supported by public policy. The institution of marriage and its preservation are considered essential for the stability of society, and therefore condonation is encouraged to promote the notion that marriages should not be lightly dissolved.

The elements of condonation are the resumption of normal marital relations after knowledge of the offense or offenses and the promise that the offense will not be repeated. Various cases have attempted to interpret whether or not condonation has actually taken place. If, for example, a wife commits ADULTERY and her husband, after discovering this, allows her to return to their home but does not resume normal marital relations with her, a full condonation has not taken place. Whether or not a marital relationship has been fully resumed is generally considered to be a QUESTION OF FACT in divorce cases.

Whether or not condonation has taken place is important in the area of maintenance or support obligations. In many states, remedies for nonsupport will be granted only when there is a showing that the husband has been guilty of a serious marital offense. If a husband who has committed such an offense can prove condonation, he can use this as a defense to his wife's claim of nonsupport. Similarly, condonation has important consequences in formulating the grounds for divorce. If a woman's husband has beaten her on a few occasions but she subsequently continued to cohabit with him, she might later be unable to sue for divorce on grounds of cruel and inhuman treatment.

Some offenses, such as mental cruelty, due to their ongoing, continuous nature, may not be eliminated by a showing of condonation.

## CONFEDERACY

*The association or banding together of two or more persons for the purpose of committing an act or furthering an enterprise that is forbidden by law, or that, though lawful in itself, becomes unlawful when made the object of the confederacy. More commonly called a* conspiracy. *The union of two or more independent states for the purpose of common safety or a furtherance of their mutual goals.*

## CONFEDERATE ATTORNEYS GENERAL

Following secession from the Union, the Southern states immediately began the process of establishing a separate government to guide their course. One of the first acts of the provisional congress of the Confederate States of America was to preserve the force and framework of existing law in the South by adopting the Constitution of the Confederate States, which closely mirrored the CONSTITUTION OF THE UNITED STATES OF AMERICA.

Though the Confederate constitution made provisions for the existence of a supreme judicial court, with powers like those of the SUPREME COURT OF THE UNITED STATES, the provisional congress refused to enact the legislation necessary to actually establish the national court. Therefore, the attorneys general of the Confederacy were often called on to act in place of a national tribunal and to render opinions interpreting the laws enacted by the Confederate congress. Accordingly their opinions were varied, covering both commonplace issues and constitutional questions.

From 1861 to 1865, the Confederacy was served by four full time attorneys general—Judah Philip Benjamin, Thomas Bragg, Thomas Hill Watts, and George Davis—and by Wade Keyes, who functioned at various times as assistant, acting, and *ad interim* (temporary) attorney general. As a group, they authored 218 opinions for Confederate president Jefferson Davis and members of his cabinet; most of the opinions were requested by the Departments of War, Treasury, and the Navy, and most were related to the fighting of, or financing of, the U.S. CIVIL WAR.

### Judah Philip Benjamin

Judah Philip Benjamin (1811–84) was the Confederacy's first attorney general. Appointed by President Davis, Benjamin was confirmed on March 5, 1861, and served until November 21, 1861, when he was named secretary of war. As attorney general, he wrote 13 opinions on such matters as agricultural products tariffs, mail route contracts, and defense appropriations.

### Wade Keyes Jr.

Wade Keyes Jr. (1821–79) was named assistant attorney general by Benjamin on May 6, 1861. He became a central figure in the Confederate Department of Justice, and he often

assumed the responsibilities of the attorney general when the current appointee was absent or in times of transition.

Before taking the position of assistant attorney general under Benjamin, Keyes was a prominent Alabama lawyer who specialized in property cases. Born to wealth and privilege, he was educated at La Grange College and the University of Virginia. His parents financed an extended tour of Europe and, on his return to the United States, arranged for him to study law with several noted Southern attorneys.

Though Keyes directed his efforts to the PRACTICE OF LAW and generally avoided politics, he did hold public office for six years as chancellor of the Southern Division of Alabama. It was during his years in this office that Keyes was first noticed by Benjamin. Benjamin, impressed with Chancellor Keyes's administrative abilities, legal intellect, and writing skills, was instrumental in bringing Keyes into the newly formed Confederate Department of Justice.

In the course of Keyes's service to the Confederate president and cabinet, he authored 24 opinions—both for himself and for other attorneys general—on such diverse subjects as the duties of the attorney general; the treatment of prisoners of war; and, drawing on his former area of expertise, the appropriation of PERSONAL PROPERTY for the war effort. Following Watts's election as governor of Alabama and resignation as attorney general, Keyes stepped in and served as attorney general ad interim from October 2, 1863, to January 1, 1864, when George Davis was able to take the office.

### Thomas Bragg

Thomas Bragg (1810–72) was named attorney general on November 21, 1861, when Benjamin became secretary of war. Bragg had been attorney general for only four months and had authored just seven opinions, when the escalating military conflict threatened his family and his personal interests. He resigned on March 18, 1862.

Bragg was born on November 9, 1810, in Warrenton, North Carolina, the son of Thomas Bragg and Margaret Crossland Bragg. He attended local schools in Warrenton and a military academy in Middletown, Connecticut, before studying law in Warrenton with John Hall, a North Carolina Supreme Court judge. Bragg was admitted to the bar and began the practice of law in 1833 at the age of 23. On October 4, 1837, he married Isabella Cuthbert, the daughter of a locally prominent and politically active family.

Bragg continued to practice law for the next several years, and he began to take an interest in local politics. He was elected to the North Carolina legislature in 1844, and by 1854 he was governor of the state. After two highly successful terms as governor, he was sent to the U.S. Senate, where he served until the secession of North Carolina.

In spite of Bragg's brief service as attorney general, he remained a friend of, and adviser to, the Davis administration throughout the war. After the war, Bragg returned to practice in North Carolina and tried, without success, to restore the personal property and fortune he had lost during the war years. Bragg died on January 21, 1872, in Raleigh, North Carolina.

### Thomas Hill Watts

On March 19, 1862, Thomas Hill Watts (1819–92) was named to succeed Bragg as attorney general. He served more than a year, and he wrote 99 opinions on MARTIAL LAW, reorganization of the military under CONSCRIPTION, pay allowances, rights of prisoners of war, treasonable offenses, and many other issues related to military service and the war.

At the outbreak of the Civil War, Watts had organized the Seventeenth Alabama Infantry Regiment and served as its colonel. He was commanding the regiment in Tennessee when he received the appointment as attorney general. Perhaps because of this background, he had a special affinity for the men on the front lines of the conflict and for men from his home state. He spent many hours visiting wounded Alabama soldiers at nearby field hospitals and camps.

Watts was born January 3, 1819, in Alabama Territory near the town of Greenville in present-day Butler County, Alabama. He was a middle son in a family of modest means. His parents, John Hughes Watts and Prudence Hill Watts, agreed to pay for his education at the University of Virginia if he agreed to forfeit any future claim to the family estate. He thought the bargain was a good one, and he graduated in 1839. He studied law locally and was admitted to the bar in 1840.

On January 10, 1842, he married Eliza Brown Allen. The Wattses had ten children.

While practicing law and providing for his growing family, Watts served several terms in the Alabama legislature in the 1840s. In 1850, he made an unsuccessful bid for a congressional seat.

As war approached, Watts was an outspoken opponent of ABRAHAM LINCOLN and a firm believer in the right of an individual state to determine its future. While serving as attorney general, Watts left the office in the hands of Keyes on several occasions in order to return home and tend to state business. During the course of those visits, he decided to make a bid for the Alabama governorship in 1863. He was successful. Following his election, he resigned his position as attorney general effective October 1, 1863.

Watts's term as governor of Alabama ended with the fall of the Confederacy. For his part in the rebellion, Watts lost his personal fortune in land and slaves, and, in 1865, he was sent to a Northern prison camp.

Three years later, he was pardoned by President ANDREW JOHNSON and permitted to return to Alabama to care for his ailing wife. She died in 1873. Following her death, Watts moved to Montgomery, Alabama, and resumed the practice of law. He remarried in September 1875. Watts died in Montgomery on September 16, 1892.

### George Davis

George Davis (1820–96) took office as attorney general on January 2, 1864, and he served until the collapse of the Confederacy. He authored 75 opinions on issues such as the constitutionality of the conscription act, the legality of contracts for imports and exports, and the liability of the government for seized property and stored goods.

Davis was born March 1, 1820, at Porter's Neck, New Hanover (now Pender) County, North Carolina. His parents were Thomas Frederick Davis and Sarah Isabella Eagles Davis. He graduated first in the University of North Carolina class of 1838, and he was admitted to the bar in 1839.

He became a prominent and respected member of the local legal community, as well as a man of wealth and taste. He was married, on November 17, 1842, to Mary A. Polk, and they had a large family.

Davis had an early interest in politics, but as a WHIG PARTY member living in a DEMOCRATIC PARTY stronghold, he had little opportunity to serve. Finally, when North Carolina withdrew from the Union, Davis was sent to the provisional congress as a delegate from his state. The following year, he entered the Confederate Senate, where he generally supported the administration of the Confederate president. It was from his position in the Confederate Senate that Davis was tapped by the president and asked to take the office of attorney general after Watts resigned. Davis was unable to accept the office immediately, owing to the illness and subsequent death of his wife, so the position was temporarily filled by Keyes.

Davis's last act as attorney general was to advise the president and the cabinet to accept the terms of a presurrender agreement. The agreement was not accepted by the Union. After receiving word of General Robert E. Lee's surrender at Appomattox Courthouse, in Virginia, the attorney general resigned and became a fugitive.

Fleeing southward, Davis first sought to locate his children, who were staying with friends near Wilmington, North Carolina. He managed to elude federal forces for a while but was eventually captured at Key West, Florida. He was imprisoned and held until January 1, 1866.

After his release, Davis returned to Wilmington, North Carolina. Just six months after leaving prison, he married Monimia Fairfax, on May 9, 1866. He resumed his legal practice and found himself in demand as a regional speaker. In the mid-1870s, he was offered, and declined, the chief justiceship of the North Carolina Supreme Court. His last public appearance was to deliver the eulogy at the 1889 funeral of Jefferson Davis. George Davis died in Wilmington, North Carolina, on February 23, 1896.

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U.S. Civil War.

## CONFEDERATION

*A union of states in which each member state retains some independent control over internal and external affairs. Thus, for international purposes, there are separate states, not just one state. A federation, in contrast, is a union of states in which external affairs are controlled by a unified, central government.*

## CONFERENCE OF CHIEF JUSTICES

Improving the state judicial system is the mission of the Conference of Chief Justices. Founded in 1949 as an association of chief justices of state supreme courts, the conference tackles organizational, administrative, and procedural issues at its biannual meetings and through standing and special committees. It is governed by a board of directors. Long regarded as an austere group with narrow concerns, the conference emerged in a broader role in the 1990s. Pressing concerns about a logjam of cases in state courts led it to open a new partnership with federal courts, resulting in the first-ever meeting between the highest judicial officers of both court systems in 1990. More dramatically, the conference broke its long-standing silence on politics: it entered a heated battle with the JUSTICE DEPARTMENT over ethics rules, made outspoken attacks on federal HEALTH CARE and crime legislation, and began earnestly LOBBYING Congress. This bolder identity caused ripples in the legal community as the conference announced its willingness to be a political player with the help of its research and lobbying arm, the National Center for State Courts (NCSC).

Traditionally, the Conference of Chief Justices tended to looked inward. Its membership includes, besides state supreme court justices, the highest judicial officers of the District of Columbia, Puerto Rico, and U.S. territories, and each jurisdiction has long faced similar concerns. State court systems are simple only in appearance: every system of trial, appellate, and supreme courts requires vast organizational resources. The conference was founded to share ideas, compare methods, and brainstorm new solutions to managing these behemoths. From the mid-1970s to the mid-1990s, meetings addressed matters ranging from the expanding role of the court administrator to the problems of caseload management and rules and methods of procedure. Not all these concerns were limited to the courts. The conference reacted in dismay to the ruling in the 1984 case of *Pulliam v. Allen,* 466 U.S. 522, 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984), which overturned the historic doctrine of JUDICIAL IMMUNITY and permitted attorneys to collect awards against state judges, and it began an ongoing lobbying effort aimed at having Congress restore judicial immunity.

The conference's horizons started to broaden in the 1980s, as changes in federal policy began overloading state courts. The states have always handled the vast majority of civil and criminal cases, but the so-called war on drugs filled state court dockets with more cases than they could reasonably handle. By 1990, the conference's president, Chief Justice Vincent L. McKusick, of the Supreme Judicial Court of Maine, noted that Arizona's trial courts processed more drug cases annually than did all federal trial courts combined. The conference's response was to open a dialogue with the JUDICIAL CONFERENCE OF THE UNITED STATES, its federal partner. In September 1990, the highest officials of both systems met for the first time at the national level to address mutual concerns about drug and TORT cases. They formed the Federal-State Judicial Council to continue to seek solutions.

By 1994, the conference was taking bolder steps in a long-running dispute with the Justice Department. As far back as 1989, then attorney general RICHARD THORNBURGH had suggested changing the Justice Department's code of ethics to stop following Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct. Upheld by the states and most federal courts, this rule governs the communication of lawyers in disputes: it specifically bars lawyers from communicating with a party who is represented by another lawyer, without that lawyer's consent. The Justice Department believed that the rule hampered federal prosecutors in their investigations, and in early 1994, Attorney General JANET RENO said the U.S. Constitution exempted federal prosecutors from the ethics rules of state bar associations. In August 1994, the conference passed a resolution blasting the Justice Department's position and advising state bars and supreme courts to enforce Rule 4.2. Conference members accused the department of blatant illegality, and legal observers expected the matter ultimately to end up before the U.S. Supreme Court.

Although the conference had traditionally refrained from taking overtly political positions, members decided in 1994 to enter the fray. Two issues troubled them: health care reform and the

crime bill, both put forward by the administration of President BILL CLINTON. Using the research facilities of the NCSC, the conference claimed that health care reform would fill state courts with 90 million new claims. And in a strongly worded resolution, it lashed out at the original text of the crime bill for "indiscriminate federalization of crimes, the needless disruption of effective state and local law enforcement efforts, and the inefficient use of the special but limited resources of the federal courts." Going beyond harsh criticism, the conference directed the NCSC to lobby members of Congress in what became a partially successful effort at trimming the bill.

This departure from tradition excited the legal community. The *National Law Journal* spotted "new-found muscle and aggression" in the conference's activities, and other observers saw potential for the conference to become a major player in political debate. Not wishing to be viewed as a partisan organization, the conference itself vowed to limit its lobbying to issues that affected JUDICIAL ADMINISTRATION.

The conference maintained a lower profile since the mid-1990s and reaffirmed its commitment to improving the administration of justice. In 2002, it passed a resolution endorsing a report on public access to court information that seeks to bring uniform practices to the judiciary. In addition, the conference endorsed a resolution that seeks to make the system more accessible to self-represented litigants. With the precipitous decline in state government budgets in 2002 and 2003, the conference began to explore how far the judicial branch must go in sharing the financial burden with the other two branches of government.

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## CONFERENCE OF STATE COURT ADMINISTRATORS

Founded in 1955, the Conference of State Court Administrators is an association of the administrators of state courts and the courts of the District of Columbia, Puerto Rico, and Guam. According to the conference, its purpose is "to deal with problems of state court systems." Toward that end, the conference tries to

- encourage the formulation of fundamental policies, principles, and standards for state court administration.
- facilitate cooperation, consultation, and exchange of information by and among national, state, and local offices and organizations directly concerned with court administration.
- foster the utilization of the principles and techniques of modern management in the field of JUDICIAL ADMINISTRATION.
- improve administrative practices and procedures in and increase the efficiency and effectiveness of all courts in the several states.

The members of the conference are the principal court administrative officers of the several states, the Commonwealth of Puerto Rico, and any other jurisdiction that is elected as a full member of the CONFERENCE OF CHIEF JUSTICES. If any state or any other member jurisdiction of the Conference of Chief Justices does not have a duly appointed principal court administrative officer, the chief justice of that state or jurisdiction may designate an individual to take part in the activities of the Conference of State Court Administrators in an associate member status. An associate member is not eligible to vote or hold office. Serving as the secretariat is the National Center for State Courts. It publishes *State Judiciary News* and holds annual meetings.

## CONFERENCE ON PERSONAL FINANCE LAW

The Conference on Personal Finance Law was founded in 1927 to encourage study, research, and education in the area of personal finance law. Its members are lawyers. The conference disseminates information on the history and current status of laws and regulations pertaining to personal finance, provides a forum for exchange of views on the subject among lawyers in the hope of stimulating improvement of legal procedures, and fosters sound development of

consumer finance through education and publication. The conference stages an annual argument before the supreme court of the mythical state of Franklin in order to dramatize an important issue in the field of CONSUMER CREDIT.

The conference publishes *Quarterly Report* and programs and briefs related to the annual argument, which is staged during the AMERICAN BAR ASSOCIATION annual meeting.

## CONFESSION

*A statement by which an individual acknowledges his or her guilt in the commission of a crime.*

One vital function of the U.S. judicial system is to determine the guilt or innocence of suspects who have been accused of crimes. Confessions can play a key role in making this determination. Courts in the U.S. have recognized the fallibility of inaccurate or involuntary confessions—such as those that have been obtained as the result of threats or trickery—and have developed a body of law to prevent untrustworthy confessions from jeopardizing a criminal defendant's CIVIL RIGHTS.

Confessions were always allowed as evidence in early English common-law trials, even when torture was used to elicit them. Not until the mid–eighteenth century did judges in England start to admit only confessions that they deemed trustworthy. To determine the trustworthiness of a confession, judges considered the circumstances surrounding it, whether a threat or promise coerced the suspect to confess, and whether the suspect confessed voluntarily.

The U.S. Supreme Court first addressed the issue of confessions in the 1884 case of *Hopt v. Utah,* 110 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262. Following the English common-law standard, the Court looked at whether the suspect had confessed voluntarily or as a result of a threat or promise. The Court first invoked the U.S. Constitution to support this voluntariness standard in the 1897 case of *Bram v. United States,* 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568.

In *Bram,* the Court applied the FIFTH AMENDMENT'S PRIVILEGE AGAINST SELF-INCRIMINATION to confessions in federal courts, observing that any amount of influence exerted to obtain a confession would render the confession involuntary and thus inadmissible. The *Bram* holding initially created a harsh standard of confession admissibility. Later decisions interpreting *Bram* lowered the standard by requiring that a confession be excluded from evidence only if the amount of influence that had been used to obtain it actually called into question the statement's reliability.

In 1936, the U.S. Supreme Court considered the issue of coerced confessions for actions in state court, rather than federal court, in *Brown v. Mississippi,* 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682. *Brown* involved three African-American defendants who had confessed to the murder of a white man only after being beaten and tortured by state police. The Court, this time, invoked the Fourteenth Amendment's DUE PROCESS guarantee in holding the confessions to be inadmissible because the police had obtained them in a way that violated basic liberty and justice principles. The Court in *Brown* announced a due process analysis to be employed by state courts on a case-by-case basis to determine whether, given the totality of the circumstances, a suspect had confessed voluntarily. The analysis was to include an assessment of the suspect's character and status as well as of the methods used by the police.

Case-by-case determination of the kind required by *Brown* proved to be unwieldy for state courts because the method was so fact-specific. Appellate courts had difficulty setting effective precedents because case outcomes depended solely on unique factual circumstances. As a result, the police were left with little guidance as to thew way to interrogate suspects properly and lawfully.

By the mid-1960s, the U.S. Supreme Court once again began to alter its approach to determining the admissibility of confessions. Starting with *Malloy v. Hogan,* 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), the Court held that the Fifth Amendment privilege against SELF-INCRIMINATION, which previously had applied only to federal actions, now applied to state actions as well. Thus, the Court held, suspects in state court were entitled to the same standards governing confessions—initially set forth in the *Bram* opinion—as were suspects in federal court.

In MASSIAH V. UNITED STATES, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), the Court continued to move away from the FOURTEENTH AMENDMENT due process analysis that it had employed in its previous decisions. In *Massiah,* the Court held that the SIXTH AMENDMENT grants criminal defendants the RIGHT TO COUN-

SEL during post-indictment interrogations, and when this right is violated, confessions obtained are inadmissible. In ESCOBEDO V. ILLINOIS, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), the Court expanded this protection to pre-indictment confessions, holding that the right to counsel attaches when a police investigation becomes accusatory.

Two years later, the Court handed down the landmark decision MIRANDA V. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), finding that police custody is inherently coercive, and therefore that criminal suspects in police custody must be informed expressly of their constitutional rights before interrogation begins. A suspect's *Miranda* rights include the right to remain silent and to have a lawyer present during questioning. Any statements made by the suspect may be used against him or her in a court of law. The Court held in *Miranda* that a suspect may waive any of these rights, but only if the waiver is made voluntarily, knowingly, and intelligently. But *Miranda* left these criteria essentially undefined, thus prompting a glut of litigation concerning the validity of *Miranda* waivers.

The Court attempted to clarify its position in *North Carolina v. Butler,* 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 286 (1979). Willie Thomas Butler had spoken with the police after they had advised him of his *Miranda* rights, then later sought to have the court exclude his incriminating statements because he had declined to sign a waiver agreement. In ruling against Butler, the high court adopted the "totality of the circumstances" approach for determining whether a waiver of *Miranda* rights is voluntary, knowing, and intelligent. Butler, the Court found, had implied a voluntary waiver through his words and actions, thus making an express written waiver unnecessary. *Butler* thus required courts to determine the voluntariness of a suspect's waiver case by case. *Butler* further instructed courts to invalidate seemingly voluntary waivers in instances of apparent coercion, deceit, or trickery on the part of police.

Another attempt at clarification came in *Moran v. Burbine,* 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986), in which the Court held that the suspect's confession had been voluntary and valid even though the police, after reciting *Miranda* rights, had failed to inform him that his attorney had been trying to contact him. The Court in *Burbine* found that although the police have a duty to convey *Miranda* rights, including the right to an attorney, there is no constitutional duty to inform a suspect when that suspect's attorney wants to confer. The Court further held that *Miranda* rights belong to the suspect, and therefore it was irrelevant that the police in *Burbine* had deceived the suspect's attorney by falsely stating that they would not interrogate the suspect. *Burbine* invoked a two-pronged test for courts to apply in determining waiver validity: (1) whether the suspect's choice to waive *Miranda* rights was free and uncoerced; and (2) whether the suspect fully understood the consequences of waiving those rights.

Nine months later, the Court refined *Burbine*'s first prong in *Colorado v. Connelly,* 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). Francis Barry Connelly, who was diagnosed as schizophrenic, made unsolicited murder confessions to the police while he was in a psychotic state. He continued to talk even after the police read him the *Miranda* rights. In attempting to exclude the confession at trial, Connelly's attorney argued that Connelly had no control over his psychotic delusions, and that the confession therefore had been involuntary.

Finding no POLICE MISCONDUCT, the high court ruled against Connelly, stating that "*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that." *Connelly* suggests that the voluntariness of a waiver depends on the conduct of the police, not the mental state of the suspect. Yet the mental state of the suspect may still play a role in *Burbine*'s second prong, which considers the suspect's awareness of *Miranda* rights and the consequences of waiving them.

Legal commentators have criticized *Miranda* and its subsequent line of decisions, stating that criminal suspects seldom truly understand the meaning or importance of the rights recited to them. Studies have indicated that the *Miranda* decision has had little effect on the numbers of confessions and requests for lawyers made by suspects in custody. What is more, critics of *Miranda* cite concerns that the police might fabricate waivers, as a suspect's waiver of *Miranda* rights need not be recorded or made to a neutral party. Proponents argue that *Miranda* protects criminal suspects and reduces needless litigation by providing the police with concrete guidelines for permissible interrogation.

Even though the idea behind *Miranda* rights is to protect suspects in custody from police coercion, the U.S. Supreme Court in 1991 held that coerced confessions nevertheless may be used in court if their use is harmless—in other words, if a jury would probably convict even without them (*Arizona v. Fulminante,* 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302). The police suspected that Oreste Fulminante had killed his 11-year-old stepdaughter, whose body was found in an Arizona desert two days after he had reported her missing. Before he was charged with the murder, Fulminante had received a prison sentence for an unrelated weapons-possession charge. While in prison on that charge, he confessed the murder to a fellow inmate, who actually was a paid federal informant. The informant had offered to protect Fulminante from other inmates in exchange for hearing the truth about the murder. Fulminante was subsequently indicted for the killing, and his confession was used at trial despite his objection. A jury found him guilty of murder and sentenced him to death. The U.S. Supreme Court applied the harmful error test and found that the jurors most likely would not have convicted Fulminante had they not heard his coerced confession, thus its use at trial was harmful. The Court ordered the case back for a new trial, this time without use of the confession.

Legal scholars have criticized the *Fulminante* decision for failing to follow decades of legal precedent holding that coerced confessions violate the due process rights of criminal suspects and that their use at trial necessitates automatic reversal, whether they are harmful or not. *Fulminante,* they argue, encourages the police to ignore the civil rights of suspects and to coerce confessions. Others argue that the decision is correct because it focuses on achieving an accurate determination of guilt or innocence regardless of whether constitutional rights are violated. Whatever its long-term effects, *Fulminante* will not be the final word in the progression of U.S. Supreme Court cases defining the law of confessions.

### Recent Developments

In 1999, the U.S. Court of Appeals for the Fourth Circuit fueled long-standing speculation that *Miranda* would be overruled, when it held that the admissibility of confessions in federal court is governed not by *Miranda*, but by a federal statute enacted two years after that decision. The statute, 18 U.S.C.A. Section 3501, provides that a confession is admissible if voluntarily given. Congress enacted the statute in order to overturn *Miranda,* the Fourth Circuit said, and Congress had the authority to do so pursuant to its authority to overrule judicially created RULES OF EVIDENCE that are not mandated by the U.S. Constitution. *United States. v. Dickerson*, 166 F.3d 667 (4th Cir. 1999).

The U.S. Supreme Court reversed. In an opinion authored by Chief Justice WILLIAM REHNQUIST, the Court said that, whether or not it agreed with *Miranda*, the principles of STARE DECISIS weigh heavily against overruling it now. While the Court has overruled its precedents when subsequent cases have undermined their doctrinal underpinnings, that has not happened to the *Miranda* decision, which the Court said "has become embedded in routine police practice to the point where the warnings have become part of our national culture." Although the Court acknowledged that a few guilty defendants might go free as the result of the application of the *Miranda* rule, "experience suggests that the totality-of-the-circumstances test which Section 3501 seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to and for courts to apply in a consistent manner." *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

In another decision, the Court actually increased defendants' constitutional rights when it ruled that the protections provided by its decision in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (which held that the introduction of a non-testifying codefendant's confession incriminating both himself and the other defendant in a joint trial violated the other defendant's Sixth Amendment right to cross-examine witnesses) were applicable to a codefendant's confession that substituted blanks and the word *deleted* in place of the defendant's proper name. The Court said that redactions that simply replace the defendant's name with an obvious substitute, such as *deleted*, a blank space, a symbol, or other similarly obvious indications of alteration, result in statements that so closely resemble the unredacted statements in *Bruton* that the law must require the same result. The Court believed that juries will often react similarly to unredacted confessions and to poorly redacted confessions, as jurors often realize that a poorly redacted confession refers

specifically to the defendant, even when the statement does not expressly link the defendant to the deleted name. Additionally, the Court stressed that by encouraging the jury to speculate about the removed name, the redaction might overemphasize the importance of the confession's accusation once the jurors figure out the redacted reference. *Gray v. Maryland*, 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998)

In *Martinez v. City of Oxnard*, 270 F.3d 852 (9th Cir. 2001), the U.S. Court of Appeals for the Ninth Circuit ruled that violating a defendant's rights against coerced confessions can give rise to a civil rights action against the police officer who attempted to coerce the confession. *Martinez* stemmed from a 45-minute emergency-room interrogation of a narcotics suspect who had been shot five times by a police officer while being subdued during the arrest. The suspect, who was rendered blind in one eye and paralyzed below the legs by the gunshot wounds, sued the officer who had conducted the interrogation. The officer interposed a defense of qualified IMMUNITY, claiming that he could not be sued for injuries suffered by the defendant while the officer was simply doing his job.

The district court rejected the officer's defense and granted SUMMARY JUDGMENT to the narcotics suspect on his civil rights claim under 42 U.S.C.A § 1983. In affirming the district court's decision, the Ninth Circuit ruled that a police officer may raise the defense of qualified immunity only when he or she could have reasonably believed that his or her conduct was lawful under settled law. In this case, the record revealed that the officer had doggedly tried to exact a confession from the suspect without first reading him the *Miranda* warnings, and that he then had proceeded to ignore the suspect's repeated requests for the officer to cease the interrogation until he was finished receiving medical treatment for his life-threatening injuries. No reasonable officer, the court concluded, could have believed that interrogating the suspect under those "extreme circumstances" comported with the Fifth Amendment's prohibitions against coerced confessions, and thus the officer was not entitled to assert qualified immunity as a defense. Accordingly, the district court's grant of summary judgment against the officer was affirmed. However, the U.S. Supreme Court granted the officer's petition for certiorari.

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CROSS-REFERENCES

Criminal Law; Criminal Procedure; Custodial Interrogation.

## CONFESSION AND AVOIDANCE

*A form of plea that served as the formal answer to a plaintiff's complaint or declaration.*

Under the old system of COMMON-LAW PLEADING, a defendant might choose to respond to the plaintiff's claim with a plea of confession and avoidance. By that, the defendant acknowledged the truth of the allegations in the plaintiff's declaration, either specifically or by implication, and then asserted that there were additional facts that neutralized the legal effect of the plaintiff's allegations.

## CONFESSION OF JUDGMENT

*A procedure whereby a defendant did not enter a plea, the usual response to a plaintiff's declaration in* COMMON-LAW PLEADING, *but instead either confessed to the accuracy of the plaintiff's claim or withdrew a plea already entered.*

The result of a confession of judgment was that judgment was entered for the plaintiff on the confession alone without further proceedings being required.

A confession of judgment could also be accomplished if the plaintiff offered a *cognovit* actionem, a written confession made out earlier by the defendant. A creditor could demand that a borrower sign a cognovit note when the debtor first became indebted to the creditor. The cognovit note said in writing that the debtor owed a particular sum and voluntarily submitted himself or herself to the authority of the court. If the debtor later fell into arrears, the creditor could obtain a judgment against the debtor without even bothering to notify the debtor of the pro-

ceedings. A warrant of attorney served the same purpose as a cognovit note. The unfairness of the procedure has prompted most states to enact laws making agreements for the confession of judgment void.

## CONFIDENTIAL COMMUNICATION

*A form of* **PRIVILEGED COMMUNICATION** *passed from one individual to another, intended to be heard only by the individual addressed.*

A confidential communication is ordinarily between two people who are affiliated in a confidential relation, such as an attorney and client, **HUSBAND AND WIFE**, or **MASTER AND SERVANT**.

If this type of communication is made in the presence of a third party, whose presence is not necessary for such communication, it is not considered privileged. In certain cases, the presence of a third party might be required, as where there is a language barrier such that one of the individuals engaged in the confidential communication needs an interpreter.

**CROSS-REFERENCES**

Attorney-Client Privilege; Marital Communications Privilege; Physician-Patient Privilege.

## CONFIDENTIAL RELATION

*Any connection between two individuals in which one of the parties has an obligation to act with extreme* **GOOD FAITH** *for the benefit of the other party.*

Confidential relations, also known as fiduciary relations, are not confined to any specific relationships but refer to all those that are founded upon secrecy and trust. The duty of secrecy in such a relation is intended to prevent undue advantage that might stem from the unlimited confidence that one party places in the other. A confidential relation need not be a legal one, but rather may be moral, domestic, social, or personal. Kinship alone, however, is insufficient to give rise to a confidential relation.

Common examples of confidential relationships, which give rise to confidential communications, include attorney and client, **HUSBAND AND WIFE**, and physician and patient.

*The relationship between doctor and patient is confidential: the doctor has a responsibility to act in good faith for the benefit of the patient.*

AP/WIDE WORLD PHOTOS

## CONFISCATE

*To expropriate private property for public use without compensating the owner under the authority of the* **POLICE POWER** *of the government. To seize property.*

When property is confiscated it is transferred from private to public use, usually for reasons such as insurrection during a time of war or because the private property had been used in illegal activities. A person convicted of violating the **INTERNAL REVENUE CODE** by carrying untaxed cigarettes may suffer the penalty of confiscation of any property used in the crime—as, for example, a truck.

Confiscation differs from **EMINENT DOMAIN** and condemnation in that the person from whom private property is taken is not compensated for its value at the time of confiscation.

## CONFISCATION

See **EXPROPRIATION**.

## CONFLICT OF INTEREST

*A term used to describe the situation in which a public official or fiduciary who, contrary to the obligation and absolute duty to act for the benefit of the public or a designated individual, exploits the relationship for personal benefit, typically pecuniary.*

In certain relationships, individuals or the general public place their trust and confidence in someone to act in their best interests. When an individual has the responsibility to represent another person—whether as administrator, attorney, executor, government official, or trustee—a clash between professional obligations and personal interests arises if the individual tries to perform that duty while at the same

time trying to achieve personal gain. The appearance of a conflict of interest is present if there is a potential for the personal interests of an individual to clash with fiduciary duties, such as when a client has his or her attorney commence an action against a company in which the attorney is the majority stockholder.

Incompatibility of professional duties and personal interests has led Congress and many state legislatures to enact statutes defining conduct that constitutes a conflict of interest and specifying the sanctions for violations. A member of a profession who has been involved in a conflict of interest might be subject to disciplinary proceedings before the body that granted permission to practice that profession.

CROSS-REFERENCES

Attorney Misconduct; Ethics, Legal.

## CONFORMED COPY

*A duplicate of a document that includes handwritten notations of items incapable of reproduction, such as a signature, which must be inscribed upon the duplicate with the explanation that it was placed there by the person whose signature appears on the original document.*

Under the best evidence rule, a conformed copy is admissible as evidence in a lawsuit when the actual document is not available because it has been lost or destroyed. It is considered secondary evidence, while the original document is primary evidence. State and FEDERAL RULES OF EVIDENCE determine the admissibility of a conformed copy in their respective judicial proceedings.

## CONFORMING USE

*When land is employed in compliance with* ZONING *ordinances in a particular area.*

All real property that is privately owned is subject to certain restrictions or LAND-USE CONTROL. Land that is not used in conformity with such controls is said to be of nonconforming use.

## CONFRONTATION

*A fundamental right of a defendant in a criminal action to come face-to-face with an adverse witness in the court's presence so the defendant has a fair chance to object to the testimony of the witness, and the opportunity to cross-examine him or her.*

The BILL OF RIGHTS (the first ten amendments of the U.S. Constitution) specifies certain rights that are inherent to all individuals, in order to protect them from the ARBITRARY use of government power. Among these is the right to confront one's accusers in a criminal case, which derives from the SIXTH AMENDMENT: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Confrontation Clause, as this part of the Sixth Amendment is generally known, was understood traditionally to mean that criminal defendants had the right to be put in the presence of their accusers in open court, face-to-face, in front of the jury. This right was intended to give defendants the opportunity to cross-examine adverse witnesses, as well as to provide the jury with an opportunity to observe the demeanor of, and to make inferences regarding the reliability of, those witnesses. The substantive meaning of this right has been the subject of great debate, especially regarding the trying of CHILD ABUSE cases involving child witnesses. Does the Confrontation Clause provide the right to confront witnesses in open court, or does it simply convey a right to cross-examine witnesses?

Like most of the protections given criminal defendants in the Constitution, the right of confronting one's accusers has its origins in English COMMON LAW and in the experiences of the colonies before the American Revolution. Until the sixteenth century, the right of confronting one's accusers was nearly absent from the Anglo-American legal tradition. Then, with the introduction of the right to trial by an impartial jury and the firm establishment of the PRESUMPTION OF INNOCENCE, the right of confrontation came to be seen as an integral part of a proper defense of the rights of the accused. In the American colonies, the SALEM WITCH TRIALS in particular created an impetus for establishing the right of the accused to a face-to-face confrontation with the accusers—who, in those cases, were mostly children anonymously accusing their elders. Horrified by the widespread use of coerced and anonymous accusations in these trials, and by the executions that resulted, the Massachusetts Legislature established the right to confront one's accusers. Soon after, the colonial governor disbanded the special Salem court for witch trials; few accusers were willing to face their targets in open court.

The experience of the Salem witch trials made a great impression on the other colonies.

By the end of the sixteenth century, most of the colonies had established in their constitutions a right of confrontation that was similar to that recognized in Massachusetts. Thus, at the time of the writing of the Constitution, the right was so firmly entrenched that its inclusion in the Bill of Rights elicited no debate.

The Confrontation Clause gives criminal defendants two specific rights: the right to be present during all critical stages of trial, and the right to confront adverse witnesses. Each of these rights has certain limitations.

The right to be present during critical stages of trial allows defendants to participate actively in their defense by listening to the evidence against them and consulting with their attorneys. However, unruly, defiant, disrespectful, disorderly, and abusive defendants can be removed from the courtroom if the judge feels it is necessary, to maintain the decorum and respect of a judicial proceeding. If a defendant persists in DISORDERLY CONDUCT, yet demands to remain in the courtroom, the Sixth Amendment allows a trial court to have that defendant bound and gagged so that his or her presence does not disrupt the proceedings (*Tyars v. Finner,* 709 F.2d 1274 [9th Cir. 1983]).

The second prong of the Confrontation Clause guarantees defendants the right to face adverse witnesses in person and to subject them to cross-examination. Through cross-examination, defendants are allowed to test the reliability and credibility of witnesses by probing their recollection and exposing any underlying prejudices, biases, or motives that may cause the witness to distort the truth or to lie. However, the right of cross-examination also has limits. Courts may restrict defendants from delving into certain areas on cross-examination. For example, defendants may be denied the right to ask questions that are irrelevant, collateral, confusing, repetitive, or prejudicial. Defendants also may be prevented from pursuing a line of questioning that is meant solely for the purpose of harassment.

Under exceptional circumstances, defendants may be denied the right to confront their accusers face-to-face. In *Maryland v. Craig,* 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), the U.S. Supreme Court upheld a statute that permitted a small child to testify via a one-way, closed-circuit television from a remote location outside the courtroom. In such situations, the Court ruled, the trial court must make a specific finding that keeping the witness out of the presence of the defendant is necessary to protect the witness from traumatic injury. The *Craig* decision has been the subject of some debate. VICTIMS' RIGHTS advocates and some prosecutors support the additional protection of witnesses, but defense attorneys have argued that shielding children from confrontation is risky, given that the reliability of children's testimony is often in dispute. Even when a witness is permitted to testify outside the presence of the accused, defendants maintain the right of cross-examination.

The importance of a defendant's right to confront and cross-examine his accusers face-to-face in open court was revisited by the U.S. Supreme Court in *Lilly v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999).

The case began when the state of Virginia charged Benjamin Lee Lilly with capital murder and called his brother Mark Lilly to testify against him during the trial. When Mark invoked his PRIVILEGE AGAINST SELF-INCRIMINATION, the prosecution sought to introduce a statement that Mark had made to the police in which he had admitted being with Benjamin on the night of the murder, and had told police that he saw Benjamin kill the victim.

The trial court admitted Mark's statement into evidence over Benjamin's objection that it violated the Confrontation Clause. In particular, Benjamin argued that the FIFTH AMENDMENT gave him the right to confront his brother face-to-face in open court, and that admitting his brother's out-of-court, HEARSAY statement without allowing him to cross-examine Mark violated that right.

The Virginia trial court overruled Benjamin's objection, finding that the statement fell within a "firmly rooted" hearsay exception. In Virginia, the trial court said, it is well settled that declarations against interest are a settled hearsay exception, and thus admissible against a criminal defendant without the declarant being subject to cross-examination.

A declaration against interest is an out-of-court hearsay statement made by a declarant who implicates himself in criminal activity or other wrongdoing, the trial court explained. Because such declarations are not considered to be self-serving, the trial court continued, they are deemed inherently trustworthy. In this case, the trial court noted that Mark Lilly had admitted committing a number of crimes that would have made him eligible for long prison terms if convicted.

Based in part on Mark's statement, the jury convicted the defendant of capital murder and sentenced him to death. The defendant appealed, and the Virginia Supreme Court affirmed. *Lilly v. Commonwealth*, 255 Va. 558, 499 S.E.2d 522 (Va. 1998). Although Virginia's high court recognized that Mark's statements were self-serving to the extent they shifted blame for the more serious crime of murder, from himself to his brother, it said that the self-serving nature of the statement went to the weight of the evidence, not its admissibility. The court also underscored the fact that prosecutors gave Mark no express promise of leniency in exchange for his statement.

The U.S. Supreme Court disagreed, reversing the Virginia Supreme Court's decision and remanding the case for further proceedings. Writing for a plurality of the justices, Justice JOHN PAUL STEVENS ruled that an accomplice's statements that tend to shift or spread the blame to a criminal defendant are presumptively unreliable, when that ACCOMPLICE has made himself or herself unavailable for cross-examination by invoking the privilege against SELF-INCRIMINATION.

The "absence of an express promise of leniency," Stevens wrote, does not ensure reliability because "police need not tell a person who is in custody that his statements may gain him leniency in order for the suspect to surmise that speaking up, and particularly placing blame on his cohorts," could be in his best interest. Stevens observed that while the presumptive unreliability of Mark's statement could be rebutted on remand to the trial court, any rebuttal evidence would need to take into account that the statement had been made in response to the government's leading questions.

On remand, the Virginia Supreme Court decided that the statement's presumptive unreliability could not be rebutted, and overturned the defendant's conviction. *Lilly v. Commonwealth*, 258 Va. 548, 523 S.E.2d 208 (Va. 1999).

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CROSS-REFERENCES

Criminal Procedure.

## CONFUSION

*The combination or mixture of two things; the process of commingling.*

*Confusion* has been used synonymously with merger, meaning a union of two separate entities that eliminates clear boundaries. *Confusion of rights,* for example, is a combination of the rights of debtor and creditor in the same individual. Similarly, a *confusion of titles* exists when two titles to the same property combine in the same person. A *confusion of debts* is a method of eliminating a debt or canceling it. This may occur, for example, upon the death of a creditor when the debtor is the creditor's heir.

## CONFUSION OF GOODS

*A blending together of property individually owned by two or more people so as to make it impossible to distinguish who owns what.*

A confusion of goods results when the property belonging to two or more persons becomes so intermixed that it can only be identified as a large mass of goods. This might apply to such substances as oil or grain.

Generally, a wrongful, willful, or fraudulent intermingling of goods by an individual with the goods of another person results in FORFEITURE to the other person of all rights and interest in the resulting mixture.

## CONGLOMERATE

*A corporation operating in several different and unrelated enterprises, such as the movie industry, baking, and oil refining.*

A *conglomerate merger* is one that brings together two firms with totally different product lines, economic relationships, and functions. Such a merger may violate antitrust acts inasmuch as it may have an adverse effect on competition.

## CONGRESS OF THE UNITED STATES

The Congress of the United States is the highest lawmaking body in the United States and one of the oldest national legislatures in the world. Established under the terms of the U.S. Constitution in 1789, the House of Representatives and the Senate have for over 200 years created the federal laws governing the United States. Congress remains one of the few national assemblies that research and draft their own legislation rather than simply voting on bills created by the government in power. In addition to its legislative functions, the U.S. Congress is

# Speaker of the House

As the presiding officer of the House of Representatives, the Speaker of the House holds one of the highest positions in Congress. The position is filled at the start of each two-year term in a vote by the full House membership. The selection of the Speaker is generally determined by the majority party, and thus the Speaker is always a leading member of that party. The Speaker's broad powers and privileges allow the majority to control the House's legislative agenda.

The significance of the office cannot be underestimated. The Speaker is in a position to set the rules of the House and to adjudicate when procedural conflicts arise. The Speaker's rulings can be challenged, but rarely are; traditionally, they are final. Behind the scenes, the office's power is even broader. This is because voting is a relatively small part of the House's business: its essential legislative work is done in committees. The Speaker plays a vital role in appointing committee chairs, influences the referral of bills to the committees, and effectively decides the timetables of the bills. Bills favored by the Speaker will leave committee more quickly and come to an early vote. The minority party's concerns will wait.

Outside Congress, the Speaker customarily enjoys high visibility in U.S. politics. The media frequently report the Speaker's opinions, transforming the office into a political bully pulpit much like that of the Senate majority leader, and the Speaker often campaigns for party loyalists in election years. Depending on which party occupies the White House, the Speaker can be either a strategically placed ally or powerful foe of the president. The relationship between the two branches of government does not end there: under the rules of succession, the Speaker is second in line after the vice president to assume the presidency.

Not every Speaker has been a high-profile individual. In 1999, the House elected J. Dennis Hastert (R-IL) to serve as Speaker, replacing **NEWTON GINGRICH**. Hastert served as a high school teacher for 16 years until he was elected to the Illinois House of Representatives, where he served for six years. He was elected to Congress in 1986.

Hastert has retained a relatively low profile in his two terms as Speaker, especially compared to that of his immediate predecessor. Gingrich was largely credited with leading Republican victories in Congress in 1994, when the GOP took control of both houses for the first time since 1954. He remained in the public spotlight for the next four years, including strong advocacy to fulfill the **CONTRACT WITH AMERICA** and other GOP programs. However, in 1997, he faced several charges for ethical violations stemming from alleged use of official House resources for unofficial purposes, and he was reprimanded and fined $300,000 by the House. Gingrich resigned suddenly in November 1998, almost exactly four years after the 1994 Republican victory.

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empowered by the Constitution to ensure that the administration of government is carried out according to the laws it establishes, to conduct special investigations, and to exercise other special powers in relation to the executive and the judiciary.

### History and Structure

Between 1774 and 1789, the CONTINENTAL CONGRESS served as the federal lawmaking body for the 13 American colonies and (after it passed the Declaration of Independence on July 4, 1776) the United States. The Continental Congress proved to be an ineffective national legislature, however, particularly after ratification of its founding constitution, the ARTICLES OF CONFEDERATION, in 1781. This congress lacked the authority to raise funds from the states and was not adept at the administration of federal government.

# Senate Majority Leader

The Senate majority leader has somewhat less official power than the Speaker of the House. This is because the vice president is technically the Senate's presiding officer, a ceremonial position that calls chiefly for casting a vote in the event of a tie. The Senate majority leader's official duties include helping make committee appointments, helping establish a legislative timetable, and directing debate. Notably, in the Senate, these duties usually involve consultation with the leadership of the minority party. The comparatively diminished procedural powers of the majority leader hardly reduce the position's significance. As chief strategist and spokesperson for the majority party, the majority leader exercises considerable influence over political debate, and certain unique duties of the Senate itself lend extra influence to the role.

Differences between the House and Senate account for the contrasts in leadership duties. The House sends bills to the Senate, where they are debated extensively at a slower, more deliberate pace. For this reason, the majority leader is chosen from within the party's caucus less for the Senator's bureaucratic efficiency than for his or her knowledge, experience, and persuasive abilities. The Senate leader does not have the House Speaker's extensive authority over the legislative agenda: instead, bills are called up for debate depending on when the committees report them and on when both parties' leaders have agreed to schedule them. The majority leader can speed up the process for certain bills but requires the unanimous consent of the Senate to do so.

However, the majority leader exercises influence in important areas not open to the House Speaker. Only the Senate can approve treaties with foreign governments, and the Senate alone has the authority to confirm presidential nominations to the cabinet and federal courts. The majority leader, assisted by a lieutenant known as the majority whip, seeks to marshal the votes of the party's members on these matters. The responsiveness of the majority leader to the president's wishes thus plays a crucial role in shaping domestic and foreign policy as well as the composition of the federal judiciary.

The national importance of the majority leader was highlighted in December 2002 when Senator **TRENT LOTT** (R-MS) was engulfed in a firestorm of public criticism that forced him to give up his position as majority leader in the Congress beginning in January 2003. Lott, who had served as majority leader from 1996 until 2001, ignited the controversy at a 100th-birthday tribute to Sen. **STROM THURMOND** (R-SC). Lott said he was proud Mississippi had voted for Thurmond for president in 1948, when the South Carolinian ran on the segregationist "Dixiecrat" platform. Lott then said: "If the rest of the country had followed our lead, we wouldn't have had all these problems over the years."

Once this statement was picked up by the press, Lott tried several times to explain that his statement did not mean to imply he supported **SEGREGATION** or was a racist. President **GEORGE W. BUSH**, while supporting Lott in his leadership position, chastised his comments; within days commentators speculated how long Lott could hold on to his post. Three weeks after he made the comments, Lott resigned his leadership position. Senator Bill Frist (R-TN) succeeded Lott as majority leader. The episode made clear that Senate majority leaders have both an institutional role and a national leadership role in U.S. government.

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The Framers of the Constitution, meeting in the Constitutional Convention of 1787, attempted to repair the shortcomings of the Continental Congress by creating a more effective federal legislature. The resulting Congress, made up of a House of Representatives and a Senate, first met with a quorum of members on April 1, 1789, in New York City, eventually

# How a Bill Becomes a Law

Before a federal law can exist in the United States, it must first be introduced as a bill in Congress, and then pass through a series of steps. At any of these steps it may be effectively vetoed, or nullified, if it does not attract a majority of support. As a result, only a small percentage of all bills succeed in becoming laws. In the 103d Congress (1993–95), for example, 8,544 public bills and joint resolutions (generally the same as bills) were introduced, and only 465 became laws.

**Introduction of bills** Bills must be introduced, or sponsored, by a member of the House or Senate. Most bills are introduced simultaneously in both houses in order to speed their passage. Sponsored bills are placed in the "hopper," a mahogany box near the House Speaker's podium. A bill may be cosponsored by other members of Congress in order to earn wider political support. Bills receive special designation codes to identify their house of origin and the order in which they have been received. For example, the code H.R. 171 designates the 171st House bill of that congressional term, and S. 52 indicates the fifty-second Senate bill.

Ideas for bills may come from a variety of sources other than members of Congress, including the president, other government officials, interest groups, scholars, constituents, staff, and state and local officials. Although a member of Congress must sponsor a bill, anyone may draft a bill. Proposed bills are often drafted by executive agencies and special interest groups. Also, experts in the Senate and House offices of legislative counsel help members of Congress draft bills.

Frequently, bills are grouped together into comprehensive bills, also called omnibus bills or package bills, to increase their chances of approval. This practice has become increasingly common, and as a result, Congress has enacted fewer but lengthier laws in recent decades.

Bills may be either private or public. Public bills include those authorizing spending for the federal government and those establishing the federal laws applicable to the general public, including criminal laws. Private bills deal with more specialized matters such as the claims of individuals regarding land titles and citizenship. If approved, these bills become private laws.

Although most laws originate as bills, some originate as joint resolutions, designated H.R.J. Res. or S.J. Res. Joint resolutions must pass through the same hurdles as bills, including required acceptance by both houses and the president, but generally deal with more limited matters. Constitutional amendments begin as joint resolutions, though they require ratification by three-fourths of the states instead of presidential approval.

Bills introduced in Congress must be approved by both houses in identical form during the congressional term in which they are introduced. (Each congressional term is two years; the 100th Congress, for example, officially began its term at noon on January 3, 1987, and ended it at noon on January 3, 1989.) Thus, a bill that is introduced during the 105th Congress must be passed before the beginning of the 106th Congress. If it is not passed during that congressional term, it must be reintroduced in the next Congress.

**Committee action** After a bill has been introduced in the House or Senate, it is referred to an appropriate committee by the House Speaker or the presiding officer in the Senate. Committee referral can be a crucial determinant of a bill's success. If a bill is referred to a hostile or unreceptive committee, it may fail to be reported out of the committee, or be passed.

A committee assigns the bill to a subcommittee, which may hold hearings to consider the bill's merits. The subcommittee often amends the bill, in a procedure known as markup. After the subcommittee completes its work, the committee votes to approve and report the bill with amendments; to make further amendments; or to table the bill—that is, take no more action on it.

**House Rules Committee** House bills, unlike Senate bills, must pass through a rules committee before proceeding to the House floor. The House Rules Committee establishes the limits for debate and amendment of the bill, elements that can determine the bill's outcome. The Speaker of the House appoints all majority party members to the committee and exerts great influence over the committee and, as a result, the fate of legislation in the House.

**Floor action** Bills that are reported out of committee—including those that have passed through the House Rules Committee—proceed to the floor of the House and Senate.

reaching its full size at 65 representatives and 26 senators.

Article I of the Constitution sets forth the basic form and powers of Congress. As designed by the Constitution's Framers, the House is more responsive to public sentiment, and the Senate is a more deliberate and stable body. JAMES MADISON, writing in *The Federalist,* no. 62, argued that members of the Senate should have a "tenure of considerable duration" and should be fewer in number in order to avoid the "intemperate and pernicious resolutions" often

The Speaker decides when the House will debate a bill. On the day that a bill is scheduled for debate, the House first votes on the rules of debate proposed by the Rules Committee. Once these have been approved, general debate begins. The typical length of general debate on the House floor is one to two hours, but for a controversial bill, debate may last four to ten hours. Each political party receives an equal amount of time to debate the bill.

After general debate, the bill proceeds to the amending phase. Here, House members engage in more lively debate as they attempt to win passage of the bill or kill it through the amendment process. Successful amendments can greatly alter proposed legislation, and even unsuccessful amendments can win significant publicity for a representative. During this process, House members vote on each amendment as it comes up for consideration.

Finally, after all amendments have been made, the House votes on the bill. Usually, this vote is recorded. Since 1973 the House has used an electronic voting system in which members insert a personalized card (roughly the size of a credit card) into one of more than forty voting stations on the House floor. They then press a button indicating whether their vote is Yea, Nay, or Present.

Because it is a much smaller body, the Senate maintains floor procedures that are much less formal than those of the House. The Senate allows each of its members more freedom to debate bills, and it allows the minority party to make more decisions than in the House.

Scheduling of bills in the Senate is determined jointly by the majority and minority party leadership, though the majority leader makes the final decisions. For most bills, the majority leader then obtains the unanimous consent of the Senate regarding the date a bill will be brought to the floor and the rules regarding its amendment and debate. Generally, senators are able to offer an unlimited number of floor amendments during debate. Debate is also theoretically unlimited; it does not end until all members are through talking. The Senate has a rule passed in 1917 called a cloture rule, which limits debate to thirty hours before a final vote is taken on a bill. The cloture rule is difficult to invoke because it requires the approval of sixty senators.

During floor debate, senators may engage in a practice called the filibuster, in which they speak on the floor for many hours in order to delay, defeat, or amend a bill. A senator may filibuster for as long as he or she can remain standing. Two senators may work together in a filibuster; when one tires, the other continues. In 1957 Senator **STROM THURMOND**, of South Carolina, then a Democrat, set the record for the longest solo filibuster in Senate history when he spoke for twenty-four hours and eighteen minutes in an attempt to defeat a **CIVIL RIGHTS** bill.

After debate is over, the Senate conducts a roll call vote to determine whether the bill passes or fails. In a roll call vote, each senator is asked to state aloud his or her vote on the bill.

**Conference committee** If the House and Senate versions of a bill differ, the two chambers form a conference committee to resolve the discrepancies. Roughly 10 to 15 percent of all bills—usually the most controversial ones—passed by Congress end up in a conference committee. Members of the conference committee are typically drawn from the committees that reported the bill. During the 1980s and 1990s, conference committees sometimes became quite large, involving as many as two hundred conferees when debating large budget measures. Party ratios on these committees reflect the ratios in Congress itself. Since 1975 conference meetings have been open to the public.

When the conference committee is done, a majority of conferees from each house sign the compromise bill and report it to Congress. The House and Senate then vote to approve the common bill. No amendments are allowed at this point. Because members have invested much time and effort in the bill by the time it has left a conference committee, it is nearly always approved.

**Enactment into law** Following approval by both houses of Congress, a bill is presented to the president for approval. Article I, Section 7, of the Constitution outlines the procedure for presidential judgment of legislation. The president has four options: sign the bill, which makes it law; **VETO** the bill and return it to Congress; refuse to take any action, in which case, after ten days, the bill becomes law without the president's signature; or, if less than ten days are left in the congressional term, "pocket veto" the bill by not signing it (because Congress has no time to take up the bill, the pocket veto kills the bill).

In the case of a normal veto, the bill must be approved again by Congress, this time by a two-thirds majority in each house. Because of this supermajority requirement, vetoes are difficult to override. No amendments can be made to a vetoed bill. Congress is not required to vote on a vetoed bill, and such bills are often simply referred to committee and tabled.

**CROSS-REFERENCES**

Joint Resolution.

passed by "single and numerous" legislative assemblies. Accordingly, the Constitution requires that senators serve six years in office, with one-third of them up for reelection every two years—whereas all House members, called representatives, go up for reelection every two years. In addition, the Constitution requires that senators be at least 30 years old to take office, whereas representatives must be a minimum of 25 years old. Moreover, senators were originally elected by state legislatures and representatives rather than the general population, but this pro-

## Congressional Timeline: Twentieth and Twenty-first Centuries

SOURCE: *Congress and Its Members*, reprinted with the permission of the Congressional Quarterly, Inc.

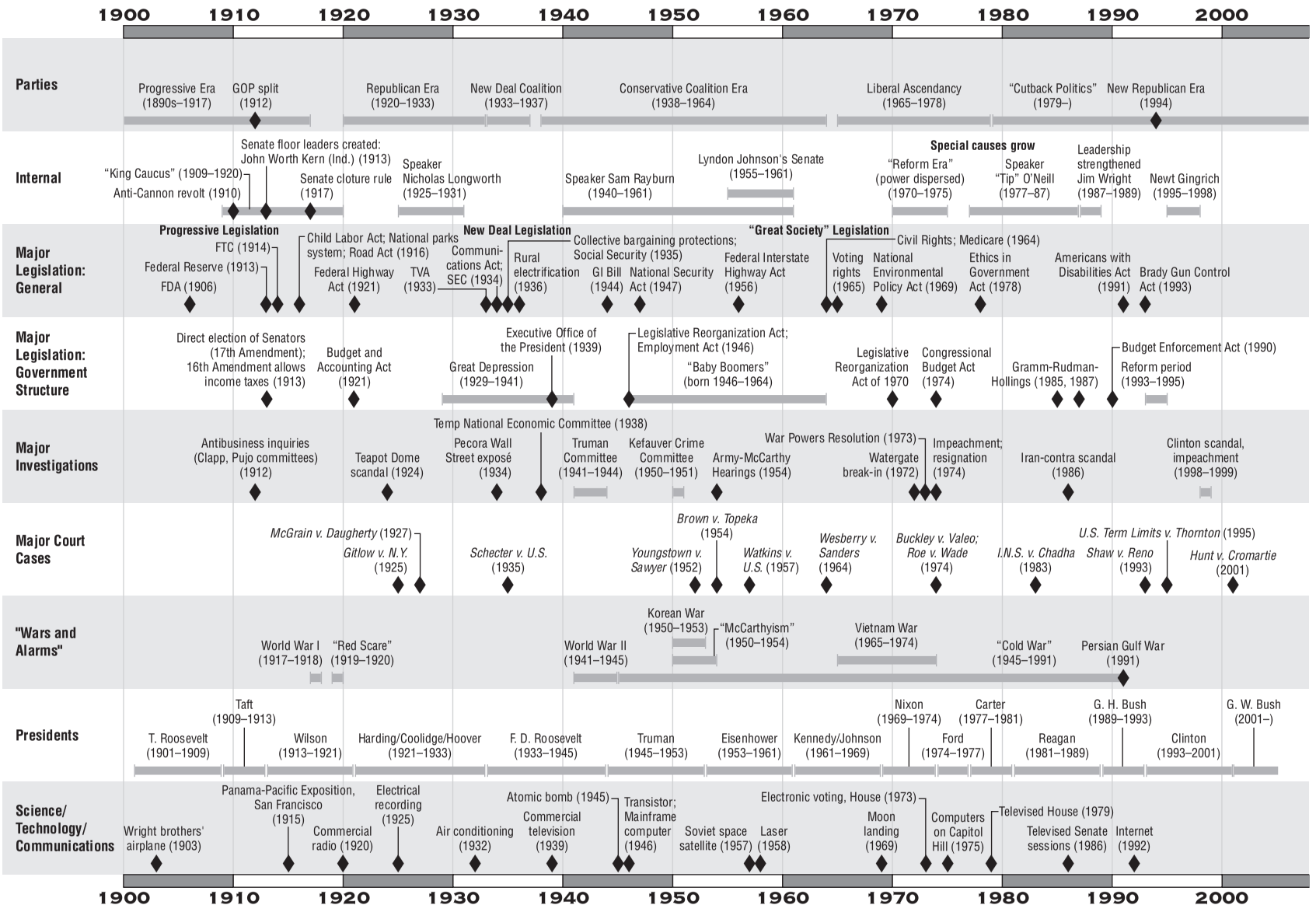

cedure was ended with the passage of the SEVENTEENTH AMENDMENT in 1913.

Congress has grown steadily in size as the nation has gained population and added states. The House reached its current size of 435 members in 1912, and the Permanent Apportionment Act of 1929 (46 Stat. 21, 26, 27) fixed its size at this number. The Senate reached 100 members after the admission of Hawaii as a state in 1959.

### Powers of Congress

Article I, Section 8, of the Constitution defines the powers of Congress. These include the powers to assess and collect taxes; to regulate commerce, both interstate and with foreign nations; to coin money; to establish post offices and post roads; to establish federal courts inferior to the Supreme Court; to declare war; to establish rules for the government; and to raise and maintain an army and navy.

Article I, Section 8, also declares that "Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Called the NECESSARY AND PROPER CLAUSE or the Implied Powers Clause, this part of the Constitution enables Congress to undertake activities not specifically enumerated by the Constitution but implied by its provisions. The Necessary and Proper Clause has been used to greatly expand congressional authority (MCCULLOCH V. MARYLAND, 17 U.S. [4 Wheat.] 316, 4 L. Ed. 579 [1819]).

Another power vested in Congress is the right to propose amendments to the Constitution upon approval by two-thirds of both houses. Should two-thirds of the state legislatures demand changes in the Constitution, Congress must call a constitutional convention. Proposed amendments are valid as part of the Constitution when ratified by the legislatures or by conventions of three-fourths of the states. Either means of ratification may be proposed by Congress.

Congress retains a number of other special powers. It may act as a judicial body to impeach and try a president or other civil officer for misconduct; in such cases, the House impeaches, or charges, the official, and the Senate conducts the trial. Congress is also empowered to create and use administrative agencies and boards, such as the National Highway Traffic Safety Administration and the NATIONAL MEDIATION BOARD, to determine facts and to enforce its legislative policies and enactments.

The Constitution vests each house of Congress with distinct powers as well. The House, for example, has sole responsibility for originating all tax bills, and the Senate has power to approve treaties. The House also chooses the president and vice president if no candidate wins a majority of electoral votes in the presidential election.

Section 9 of Article I of the Constitution imposes prohibitions upon Congress. This section forbids Congress to suspend the privilege of HABEAS CORPUS, except in cases of rebellion; to pass EX POST FACTO, or retroactive, laws; to impose duties on exports; or to grant titles of nobility.

### Apportionment

Seats in the Senate are apportioned, or distributed, evenly across the states, with each state receiving two. Seats in the House of Representatives are apportioned between the states on the basis of population, with the most populated states receiving the most representatives and no state receiving less than one. The Constitution requires that a census be conducted every ten years in order to determine the number of seats allotted to each state. An apportionment method called equal proportions is used so that no state will receive less than one member.

The Constitution does not mandate that states having more than one representative be divided into congressional districts, although a state legislature can make such a division. States cannot apportion congressional districts on a discriminatory or unreasonable basis.

### Investigations

The Senate and the House of Representatives, acting together or independently, can authorize investigations, or hearings, to obtain information for use in connection with the exercise of their constitutional powers. Information gathered in congressional hearings helps lawmakers draft legislation and monitor the actions of government. It also informs the public about important issues confronting the nation. Noted congressional investigations have included the TEAPOT DOME inquiry in 1923, the 1973–74 Senate WATERGATE hearings, and the IRAN-CONTRA investigation in 1987. Congress has also examined perceived threats to the government,

as in the Army-McCarthy hearings of 1954 in which Senator **JOSEPH R. MCCARTHY** (R-WI) led an investigation into Communist influence in the U.S. government.

A congressional committee may conduct an appropriate investigation under the authority granted to it, but the methods used in the exercise of its investigative power must not violate the constitutional rights of those under investigation. The extent of the authority of a congressional committee must be determined at the time the particular information is sought and cannot be extended by later action of Congress.

Congressional investigations can be held to obtain information in connection with Congress's power to legislate and to appropriate funds, in addition to other express powers it possesses. Congress has wide discretion to determine the subject matter it studies as well as the scope and extent of its inquiry. An investigation must, however, be based on direct statements made to Congress, its members, or its committees. Congress or its committees may not indiscriminately examine private citizens in order to learn valuable information or to inhibit the exercise of constitutionally protected rights, such as **FREEDOM OF SPEECH.**

Individuals summoned in a proper manner, or subpoenaed, by Congress or a committee must comply and conform with the summoner's procedure. However, witnesses are legally entitled to refuse to answer questions that are beyond the power of the investigating body or that are irrelevant to the matter under inquiry. A witness who has not been given a grant of **IMMUNITY** can refuse to answer questions that tend to be incriminating under the protection afforded by the Self-Incrimination Clause of the **FIFTH AMENDMENT** to the Constitution.

## Committees and Staff

The work of preparing and considering legislation is done largely by committees of both houses of Congress. The membership of the standing committees of each house is chosen by the political parties in Congress. Committee seats are generally distributed to members of different political parties in a ratio equivalent to party membership in the larger House or Senate. Thus, if a party has two-thirds of the seats in the House, it will have approximately two-thirds of the seats in each House committee.

Each bill and resolution is usually referred to the appropriate committee, which may report it out (send it to the floor of the House or Senate) in its original form, favorably or unfavorably; recommend amendments; or allow it to die in committee without action.

A growing workload and the increasingly complex nature of the legislation it passes have caused Congress to hire an increasing number of staff. Thousands of staff workers support the Congressional members in their work.

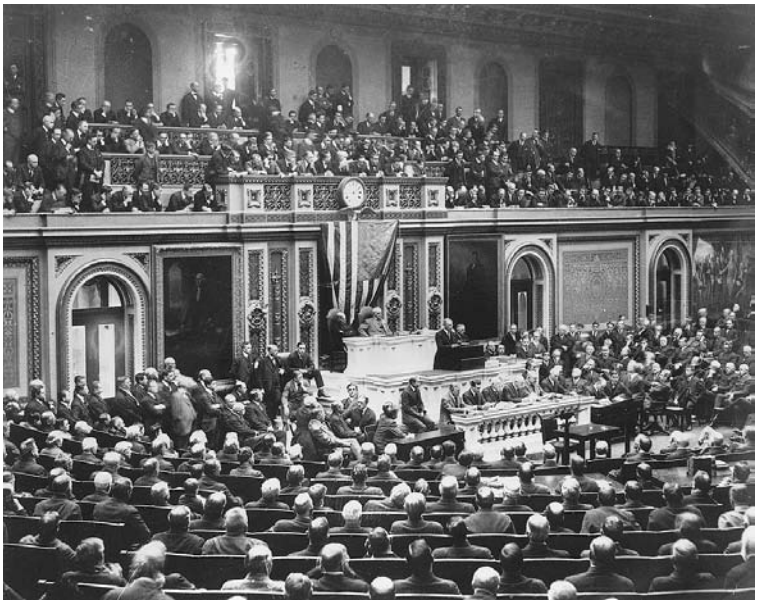

*President Woodrow Wilson addresses a joint session of the 64th Congress on February 26, 1917, with a request to arm U.S. merchant ships.*

LIBRARY OF CONGRESS

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**CROSS-REFERENCES**

Constitution of the United States.

## CONGRESSIONAL BUDGET OFFICE

The Congressional Budget Office (CBO) is responsible for economic forecasting and fiscal policy analysis, scorekeeeping, cost projections, and an ANNUAL REPORT on the FEDERAL BUDGET. The office also underdakes special budget-related studies at the request of Congress. The CBO enables Congress to have an overview of the federal budget and to make overall decisions regarding spending, taxation levels, and any federal deficit or surplus. Congress is thus provided with a mechanism through which it can weigh the priorities for national resource allocation and explicitly address issues of fiscal policy.

The Congressional Budget Office provides Congress with basic budget data and with analyses of alternative fiscal, budgetary, and programmatic policy issues. The agency employs more than 200 full-time employees. Seventy percent of these employees hold advanced degrees in economics or public policy. CBO also retains a panel of economic advisors, including a number of scholars from top universities in the United States. It has specific responsibility for the following:

### Economic Forecasting and Fiscal Policy Analysis

The federal budget both affects and is affected by the national economy. Congress considers the federal budget in the context of the current and projected state of the national economy. CBO provides periodic forecasts and analyses of economic trends and alternative fiscal policies.

### Scorekeeping

Under the new budget process, Congress establishes, by concurrent resolution, targets (also known as ceilings) for overall expenditures for budget authority and budget outlays and for broad functional categories. It also establishes targets for the levels of revenues, the deficit, and the public debt. CBO "keeps score" for Congress by monitoring the results of congressional action on individual authorization, appropriation, and revenue bills against the targets that are specified in the concurrent resolutions.

### Cost Projections

The Congressional Budget Office is required to develop five-year cost estimates for carrying out any public bill or resolution reported by congressional committees. At the start of each fiscal year, CBO also provides five-year projections on the costs of continuing current federal spending and taxation policies.

### An Annual Report on the Budget

The Congressional Budget Office is responsible for furnishing the House and Senate Budget Committees (by April 1 of each year) with a report that includes a discussion of alternative spending and revenue levels and alternative allocations among major programs and functional categories, all in light of major national needs and the effect on the balanced growth and development of the United States.

### Special Studies

The Congressional Budget Office undertakes studies that Congress requests on budget-related areas. As the establishing statute requires, such service is provided, in the following order of priority, to the House and Senate Budget Committees; the House and Senate Appropriations Committees; the Senate Finance and the House Ways and Means Committees; and all other congressional committees.

Web site: <www.cbo.gov>

## CONGRESSIONAL-EXECUTIVE AGREEMENT

*An accord made by joint authority of the Congress and the president covering areas of* INTERNATIONAL LAW *that are not within the ambit of treaties.*

A congressional-executive agreement comes about in different ways. Congress may authorize the president to conclude a particular agreement already negotiated, as when a multilateral agreement establishes an international organization such as the INTERNATIONAL MONETARY FUND. Congress sometimes has approved presidential agreements by legislation or appropriation of funds to carry out its obligations.

It is now widely accepted that a congressional-executive agreement is a complete alternative to a treaty: the president can seek approval of any agreement by joint resolution of

both Houses of Congress instead of by a two-thirds vote of the Senate alone. Like a treaty, such an agreement is the law of the land, superseding inconsistent state laws as well as inconsistent provisions in earlier treaties, other international agreements, or acts of Congress.

## CONGRESSIONAL RECORD

*A daily publication of the federal government that details the legislative proceedings of Congress.*

The *Congressional Record* began in 1873 and, in 1947, a feature called The Daily Digest was added to briefly highlight the daily legislative activities of each House, committee, and subcommittee.

The text of the *Congressional Record* is not a verbatim transcript of the statements made on the floor of the Senate or the House of Representatives. After obtaining permission from their respective Houses to do so, members of Congress can revise their speeches prior to publication in the *Record* and are permitted to extend their comments to include remarks not made on the floor of Congress.

## CONGRESSIONAL RESEARCH SERVICE

The Congressional Research Service (CRS) is a branch of the LIBRARY OF CONGRESS that provides objective, nonpartisan research, analysis, and information to assist Congress in its legislative, oversight, and representative functions. U.S. senators and representatives, and their staffs consult the CRS for timely and accurate information regarding major issues and policies. The CRS researches and advises on questions and concerns related to many subject areas. It is organized into six interdisciplinary research divisions: American Law; Domestic Social Policy; Foreign Affairs, Defense and Trade; Government and Finance; Information Research; and Resources, Science and Industry. Each division is organized into smaller sections, which focus on specific areas of public policy. The work of these divisions is supported by five offices: Congressional Affairs and Counselor to the Director; Finance and Administration; Information Resources Management; Legislative Information; and Workforce Development.

The CRS is made up of two reference divisions: the Congressional Reference Division and the Library Services Division. These provide reference, bibliographic, and other information services using advanced methods of computerized searching.

The CRS conducts a host of other support activities for Congress. It develops specialized reading lists for members of Congress and their staffs. It operates the Library of Congress's automated legislative information systems, including digests of all public bills and briefing papers on major legislative issues. It also attempts to anticipate congressional research needs, and it develops seminars that allow members of Congress, their staffs, CRS researchers, and outside experts to exchange ideas on timely issues. The CRS has produced programs on the congressional CABLE TELEVISION system, and it provides language service support and translations for members of Congress.

The CRS is governed by a director, a deputy director, and a management team. The highest-level researchers are called senior specialists. They are often nationally and internationally recognized experts in their field of study. CRS offices include Special Programs, Operations, Policy, and Research Coordination.

The Congressional Research Service evolved from the Legislative Reference Service, which was created by the Legislative Reorganization Act of 1946 (codified as amended at Act of Aug. 2, 1946, ch. 753, 60 Stat. 812), and the Legislative Reorganization Act of 1970 (codified as amended at Act of Oct. 26, 1970, Pub. L. No. 91-510, 84 Stat. 1140). In the beginning of the twenty-first century, the CRS experienced tremendous growth as Congress sought to respond to the increasing scope and complexity of public policy issues. Specifically, the service expanded its website to enhance on-line research. In 2001, over 540,000 users accessed the CRS site to obtain reports and briefs. The CRS anticipates expanding web services as Congress demands 24-hour access to its research data.

FURTHER READINGS

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## CONJUGAL

*Pertaining or relating to marriage; suitable or applicable to married people.*

Conjugal rights are those that are considered to be part and parcel of the state of matrimony, such as love, sex, companionship, and support.

Loss of consortium is a loss of any or all conjugal rights.

## ♦ CONKLING, ROSCOE

Roscoe Conkling was for many years in the late nineteenth century the most powerful politician in the most powerful state in the Union, New York. Conkling served in both the U.S. House (1859–63 and 1865–67) and the U.S. Senate (1867–81). During his years in Congress, he became an influential Republican leader. Conkling was a close friend of President ULYSSES S. GRANT and an avowed enemy of other prominent Republicans of the day, namely, James G. Blaine, RUTHERFORD B. HAYES, and JAMES GARFIELD. Conkling twice turned down nominations to the U.S. Supreme Court, including a confirmed nomination in 1882. In the Senate, he fought ferociously for the continuation of political patronage—the system whereby elected officials appoint individuals to positions in the civil service and other areas of governments—and against the civil service reform efforts that would have ended it. His political machine in New York State was, according to his principal biographer, "one of the wonders of the age." Conkling himself, it might be said, was one of the wonders of the age—the Gilded Age, that is, the late-nineteenth-century era following the Civil War when business and moneymaking were the foremost concerns in the United States.

Conkling was born October 30, 1829, in Albany, New York. After attending Mount Washington Collegiate Institute, in New York City, he moved to Utica, New York, where he studied law with a local firm. He was admitted to the bar in 1850 and was immediately appointed district attorney of Albany. In subsequent years, and while still in his twenties, Conkling made a reputation for himself as an orator and aspiring politician at the Whig party's county and state conventions. In 1855, he married Julia Seymour—sister of Horatio Seymour, who was elected governor of New York in 1853 and 1863.

In 1858, Conkling was elected both mayor of Utica and representative to the U.S. Congress. He won the latter office as a Republican and served three terms. He became a Free-Soil Republican, strongly opposing the introduction of SLAVERY into the territories and new states of the U.S. West. After the Civil War was over in 1865, Conkling served on the Committee of Reconstruction, and on the Committee of Fifteen, where he helped draft the FOURTEENTH AMENDMENT.

At about the same time, one of the principal rivalries of Conkling's political career began to heat up. In 1866, while skirmishing over issues of Reconstruction in the House, fellow Republican Blaine, of Maine, in a famous speech before Congress, criticized Conkling's "haughty disdain, his grandiloquent swell, his majestic, supereminent, overpowering, turkey-gobbler strut"—words that became associated with Conkling for the rest of his career. Blaine became Speaker of the House from 1869 to 1875. Conkling never forgave him, and when Blaine ran for the Republican presidential nomination in 1876 and 1880, Conkling helped frustrate his candidacies. The rivalry between these two politicians was a defining feature of Republican politics in the 1870s and 1880s.

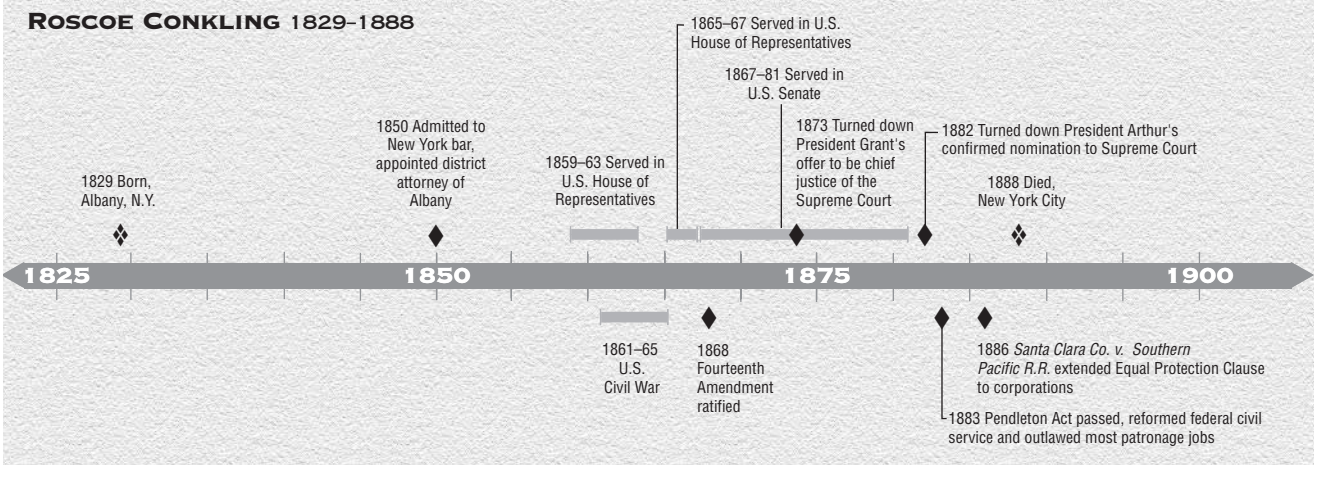

In 1866, Conkling was elected to the U.S. Senate from New York, winning a seat he would hold through two reelections, until his resignation in 1881. These were the years of Conkling's greatest political ascendancy, when he became the most powerful politician in New York. Most notoriously, Conkling gained control over appointments to the New York Custom House, the large administrative body that oversaw business at the nation's most important commercial hub. The Custom House's payroll was the plum of the patronage system, and Conkling appointed dozens of people to it. These people, in turn, became political allies, able to use their time and energy to aid the politician who gave them their jobs.

Conkling's power was solidified when Grant entered the office of president in 1869, a post he held to 1877. Conkling and Grant became strong political allies, and in 1873, Grant offered Conkling the position of chief justice of the Supreme Court, after Salmon P. Chase's death. Conkling refused the offer, believing his talents to be suited more to the role of politician than to that of judge.

In 1877 Conkling made important contributions to the electoral commission bill that resolved the contested election between presidential candidates SAMUEL J. TILDEN, a Democrat, and Hayes, a Republican. He also became a strong opponent of Hayes, who sought to end patronage by separating civil service officials from party control. Conkling asserted that a senator had the right to control the federal administration in his own state, and he opposed the idea that the president should make such appointments. In 1879, Hayes ousted many of Conkling's friends in the New York patronage system. However, in 1880, Conkling won reelection to the Senate, and his friend Thomas C. Platt was elected as a fellow U.S. senator from New York.

In the events surrounding the presidential election of 1880, Conkling became the leader of a group of Republicans known as the Stalwarts, who were fervent supporters of Grant. Opposed to the Stalwarts was the Half-Breed faction of the REPUBLICAN PARTY, which favored Blaine. At the Republican National Convention in the summer of 1880, Conkling made a desperate bid for the nomination of Grant as the presidential candidate. He failed, and his political machine quickly crumbled, though he did succeed in blocking the nomination of Blaine. Garfield and

*Roscoe Conkling.* PHOTOGRAPH BY M. BRADY. LIBRARY OF CONGRESS

CHESTER A. ARTHUR, an ally of Conkling's, became the Republican nominees, and Conkling reluctantly supported them during the election. Conkling provided crucial campaign support to Garfield and believed that he would be rewarded for his help, but those hopes were dashed when Garfield nominated Conkling's enemy Blaine as SECRETARY OF STATE. Conkling opposed the Garfield administration after it assumed office, again over the issue of the right to control jobs in the New York Custom House. When he failed to prevent the confirmation of Garfield's appointees, Conkling resigned his Senate seat in disgust, on May 16, 1881, and persuaded Platt to join him. Conkling's defeat was an important gain for the presidency at a time when congressional powers were stronger than ever before or since.

Strangely enough, when the psychotic Charles Julius Guiteau assassinated President Garfield on July 2, 1881, he claimed to be a Stalwart who sought to remove Garfield and make way for Vice President Arthur. Much of the public outrage over Garfield's assassination was vented on Conkling, and, though Guiteau was only remotely associated with Conkling, many considered the assassin to be one of Conkling's followers.

After failing in an attempt to induce the New York Legislature to reelect him as senator after his resignation, Conkling retired from politics

and began a successful and lucrative corporate law practice in New York City. He proved to be a highly effective trial lawyer. His clients included the financier Jay Gould and other notorious figures of the Gilded Age. On February 24, 1882, President Arthur, who had become Garfield's vice president through Conkling's help, attempted to repay his political debt when he nominated Conkling to take the seat of U.S. Supreme Court justice WARD HUNT, who was retiring. Conkling turned the nomination down, even after it had been confirmed by the Senate. Conkling was later upset that Arthur—whom Conkling sneeringly called His Accidency—had not decided to run a Stalwart-dominated administration. Indeed, in 1883, Arthur signed into law the Pendleton Act, also called the Civil Service Act (5 U.S.C.A. § 1101 et seq.), which was the first comprehensive act of Congress toward civil service reform, further dismantling the system whereby Conkling and others had amassed tremendous political power.

On December 19, 1882, Conkling appeared before the Court as a lawyer in *San Mateo County v. Southern Pacific R.R.,* 116 U.S. 138, 6 S. Ct. 317, 29 L. Ed. 589 (1885). Arguing on behalf of the railroad, Conkling sought to persuade the Court that a county tax violated the DUE PROCESS CLAUSE of the Fourteenth Amendment, which reads, " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law." Previously, in the SLAUGHTER-HOUSE CASES, 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1873), the Court had restricted application of the Due Process Clause to freed African Americans. Conkling, of course, had been involved in framing the Fourteenth Amendment, and now he argued that the clause was originally intended to protect corporations as well as persons. The Court did not make a decision regarding Conkling's claims, declaring the case moot after the railroad honored some of its tax requirements to the county.

In the 1886 case SANTA CLARA COUNTY V. SOUTHERN PACIFIC R.R., 118 U.S. 394, 6 S. Ct. 1132, 30 L. Ed. 118, the Court agreed with Conkling's claims that the term *person* as used in the EQUAL PROTECTION CLAUSE applies to corporations as well as natural persons. Conkling's arguments therefore influenced the later development of the doctrine of SUBSTANTIVE DUE PROCESS, which the Court used repeatedly to strike down state and federal regulation of business from the 1890s to the 1930s.

On April 18, 1888, Conkling died at age fifty-nine, in New York City, of complications surrounding a brain abscess. Despite his political stature, Conkling had sponsored relatively little significant legislation during his career. Though he did help create the Fourteenth Amendment, he played a fairly peripheral role in Reconstruction legislation. He was a politician motivated principally by personal rivalries rather than by ideas. He remains most well-known for his tremendous New York political machine and for his spirited political maneuvers that helped define the political atmosphere during the post–Civil War era in the United States.

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## CONNECTING UP DOCTRINE

*A term relating to the admissibility of evidence which means that a fact may be admitted into evidence provided that its relevance will subsequently become apparent when it is linked to other facts presented later.*

Proof that a witness was present at a certain time and place may be connected up with later evidence to show its significance to the case at bar.

## CONNIVANCE

*The furtive consent of one person to cooperate with another in the commission of an unlawful act or crime—such as an employer's agreement not to withhold taxes from the salary of an employee who wants to evade federal* INCOME TAX. *The false consent that a plaintiff gave to a defendant's past conduct during their marriage which the plaintiff presently alleges as a ground for* DIVORCE.

Connivance has been used as a defense primarily in an action for divorce based upon ADULTERY. In situations where connivance is used, the facts must establish that the plaintiff either consented or knowingly acquiesced to the adulterous conduct of the spouse or created the opportunity for adultery by persuading someone to seduce the spouse. It is considered a logical extension of the equitable MAXIM of clean hands in that it would be unfair to permit a plaintiff to obtain judicial relief for a situation which he or she created. Practically speaking, however, connivance is rarely asserted as a defense. The modern trend in divorce laws is that there is little benefit to continuing a marital relationship between partners so indifferent to

each other that they consent to a serious violation of their marital vows.

The defense of connivance cannot be asserted in an action based upon a state's no-fault divorce laws.

## CONQUEST

*A term used in feudal law to designate land acquisition by purchase; or any method other than descent or inheritance by which an individual obtains ownership of an estate. A term used in* INTERNATIONAL LAW *for the process whereby a sovereign nation is, by force of arms, made to submit to another nation; the defeated country thus becomes part of the empire of the conqueror.*

## CONSANGUINITY

*Blood relationship; the relation of people who descend from the same ancestor.*

Consanguinity is the basis of the laws that govern such matters as rules of DESCENT AND DISTRIBUTION of property, the degree of relation between which marriage is prohibited under the laws concerning INCEST, and a basis for the determination of who may serve as a witness.

*Lineal consanguinity* is the relation in a direct line—such as between parent, child, and grandparent. It may be determined either upward—as in the case of son, father, grandfather—or downward—as in son, grandson, great-grandson.

*Collateral consanguinity* is a more remote relationship describing people who are related by a common ancestor but do not descend from each other—such as cousins who have the same grandparents.

Consanguinity is not the same as affinity, which is a close relation based on marriage rather than on common ancestry.

## CONSCIENTIOUS OBJECTOR

*A person who, because of principles of religious training and moral belief, is opposed to all war regardless of its cause.*

A conscientious objector may be released from the obligation to serve in the armed forces or to participate in SELECTIVE SERVICE registration. A conscientious objector must oppose war in any form, and not just a particular war, in order to avoid military service. He does not have to be a member of a religious congregation that forbids participation in war. Under the Military Selective Service Act (50 App. U.S.C.A. § 451 et seq. [1967]), a registrant needs only a conscientious scruple against war in all forms to obtain conscientious objector status. A conscientious scruple against war is an objection to war based on moral beliefs. A conviction that war is wrong, arrived at solely on intellectual and rational grounds, does not entitle one to exemption as a conscientious objector.

Under prior draft laws, conscientious objectors were divided into two classes. One class was composed of those who were opposed to all military service, regardless of whether it was combatant or noncombatant. This class was required to serve in civilian work that contributed to the national welfare, such as the Red Cross, but was exempt from military service. The other class was opposed to only combatant military service. These conscientious objectors were drafted into the ARMED SERVICES for noncombatant duty, such as in the medical corps.

Today there is no draft law; however, males are required to register for the Selective Service at the age of eighteen. Registrants can obtain a discharge, or a release, from the armed services on the ground of conscientious objection. A person who seeks a discharge on this basis must satisfy certain tests established by the federal courts. He must oppose all forms of war and object to any type of service in the armed forces. Total PACIFISM, however, is not required. Willingness to use force in SELF-DEFENSE to protect oneself and family does not defeat a claim of opposition to all war. Enlistment in the military service is also not inconsistent with a claim of conscientious objection.

The objection must be founded on deeply held moral, ethical, and religious convictions about right or wrong. Although this limits discharges to those persons who object to war for essentially religious reasons, which are individually held beliefs, it does not restrict discharges to only those who participate in organized religion. The test of a religious belief is not measured by traditional religious concepts but is based upon whether the belief is sincere and has an effect on the life of the nonconforming believer that is comparable with or parallel to traditional religious beliefs held by persons who believe in God. The objective or actual truth of the beliefs is not the standard used to measure the sincerity of the individual in his beliefs; the test is completely subjective, determined by what the indi-

vidual actually believes. A military board's skepticism as to the sincerity of an objector's belief is not enough to deny a discharge; some objective evidence is required.

Conscientious objectors can be ordered to report for civilian duty in lieu of military service.

CROSS-REFERENCES

Selective Service System.

## CONSCRIPTION

*Compulsory enrollment and induction into the military service.*

**Conscription**

**ARMED FORCES PERSONNEL SERVING IN MAJOR U.S. CONFLICTS, CIVIL WAR THROUGH VIETNAM**

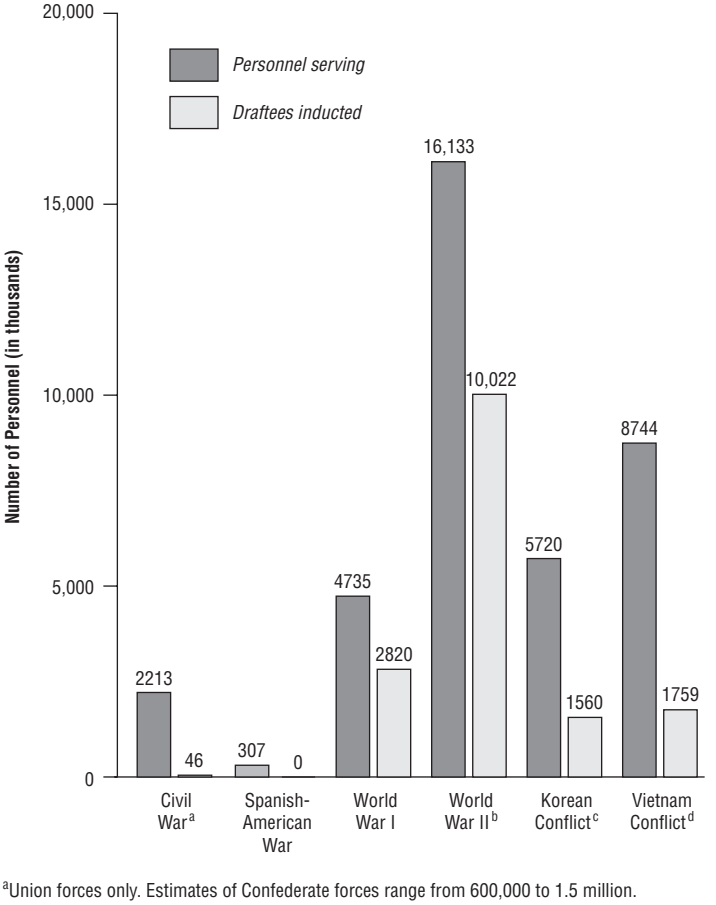


[a]Union forces only. Estimates of Confederate forces range from 600,000 to 1.5 million.
[b]Covers Dec. 1, 1941, to Dec. 31, 1946.
[c]Covers June 25 1950 to July 27, 1953.
[d]Covers Aug. 4, 1964 to Jan. 27, 1973.

SOURCE: U.S. Department of Defense, *Selected Manpower Statistics* annual.

Conscription is commonly known as the draft, but the concepts are not exactly the same. Conscription is the compulsory induction of individuals into the ARMED SERVICES, whereas the draft is the procedure by which individuals are chosen for conscription. Men within a certain age group must register with the Selective Service for possible conscription, but conscription itself was suspended in 1973.

*Conscription* first came into use as a legal term in France in 1798. It derives from the Latin *conscriptionem,* which refers to the gathering of troops by written orders, and *conscribere,* which means "to put a name on a list or roll, especially a list of soldiers." A person who becomes a member of the armed forces through the process of conscription is called a conscript.

Conscription typically involves individuals who are deemed fit for military service. At times, however, governments have instituted universal military service, in which all men or all people of a certain age are conscripted.

Most governments use conscription at some time, usually when the voluntary enlistment of soldiers fails to meet military needs. Conscription by national governments became widespread in Europe during the nineteenth century.

Some of the American colonies employed conscription. During the Revolutionary War, the American government used selective, temporary conscription to fill the ranks of its military.

The United States used conscription again briefly during the Civil War. The Union Enrollment Act of 1863 drafted all able-bodied men between twenty and forty-five years of age. The act provoked a hostile public response because it excused from military service those who were able to pay a fee of three hundred dollars. The law incited violent public disturbances, called the Draft Riots, in New York City between July 13 and 16, 1863. One thousand people were injured in the riots.

In 1917, one month after the entry of the United States into WORLD WAR I, Congress passed the Selective Draft Act (40 Stat. 76). The act created a government office to oversee conscription. It also authorized local draft boards to select eligible individuals for conscription. The following year, the Supreme Court upheld the constitutionality of conscription, noting that Article I of the Constitution gives Congress the power to "raise and support Armies" (*Selective*

*Draft* cases, 245 U.S. 366, 38 S. Ct. 159, 62 L. Ed. 349 [1918]).

Congress instituted the first peacetime use of conscription in 1940 when it passed the Selective Training and Service Act (54 Stat. 885). This act, which expired in 1947, enrolled those who served in U.S. armed forces during WORLD WAR II. In 1948, Congress passed the Selective Service Act (50 U.S.C.A. app. § 451 et seq.), which was used to induct individuals for service in the KOREAN WAR (1950–53) and the VIETNAM WAR (1954–75). Presidential authority to conscript individuals into the U.S. armed forces ended in 1973. No individual has been conscripted into the military since then.

In 1976, the SELECTIVE SERVICE SYSTEM was placed on a standby status, and local offices of the agency were closed. President JIMMY CARTER issued a proclamation in 1980 requiring all males who were born after January 1, 1960, and who had attained age eighteen to register with the Selective Service at their local post office or at a U.S. embassy or consulate outside the United States (Presidential Proclamation No. 4771, 3 C.F.R. 82 [1981]). Those who fail to register are subject to prosecution by the federal government.

In 1981, the Supreme Court upheld the constitutionality of requiring only men, and not women, to register with the Selective Service (ROSTKER V. GOLDBERG, 453 U.S. 57, 101 S. Ct. 2646, 69 L. Ed. 2d 478). The United States has never conscripted women into military service, nor has it ever instituted universal military service. It has conscripted only individuals meeting certain age, mental, and physical standards. Congress has allowed the deferral of conscription for certain individuals, including those who need to support dependents or are pursuing an education. Among those who have been declared exempt from service are sole surviving sons, conscientious objectors to war, and ministers of religion.

The U.S. government also has the power to conscript property in times of emergency.

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CROSS-REFERENCES

Involuntary Servitude; Solomon Amendment; Thirteenth Amendment.

## CONSENSUAL ALTERATION

*A change in a legal document agreed to by the parties and binding upon them.*

Such consensual alteration is usually evidenced by the signing by each party of his or her initials and the date on which the agreement to the changes to the instrument is made.

## CONSENT

*Voluntary* ACQUIESCENCE *to the proposal of another; the act or result of reaching an accord; a concurrence of minds; actual willingness that an act or an infringement of an interest shall occur.*

Consent is an act of reason and deliberation. A person who possesses and exercises sufficient mental capacity to make an intelligent decision demonstrates consent by performing an act recommended by another. Consent assumes a physical power to act and a reflective, determined, and unencumbered exertion of these powers. It is an act unaffected by FRAUD, duress, or sometimes even mistake when these factors are not the reason for the consent. Consent is implied in every agreement.

Parties who terminate litigation pursuant to a consent judgment agree to the terms of a decision that is entered into the court record subsequent to its approval by the court.

In the context of rape, submission due to apprehension or terror is not real consent. There must be a choice between resistance and acquiescence. If a woman resists to the point where additional resistance would be futile or until her resistance is forcibly overcome, submission thereafter is not consent.

## CONSENT DECREE

*A settlement of a lawsuit or criminal case in which a person or company agrees to take specific actions without admitting fault or guilt for the situation that led to the lawsuit.*

A consent decree is a settlement that is contained in a court order. The court orders injunctive relief against the defendant and agrees to maintain jurisdiction over the case to ensure that the settlement is followed. (Injunctive relief is a remedy imposed by a court in which a party is instructed to do or not do something. Failure to obey the order may lead the court to find the party in CONTEMPT and to impose other penalties.) Plaintiffs in lawsuits generally prefer consent decrees because they have the power of the court behind the agreements; defendants who

wish to avoid publicity also tend to prefer such agreements because they limit the exposure of damaging details. Critics of consent decrees argue that federal district courts assert too much power over the defendant. They also contend that federal courts have imposed conditions on state and local governments in CIVIL RIGHTS CASES that usurp the power of the states.

Most civil lawsuits are settled before going to trial and most settlements are private agreements between the parties. Typically, the plaintiff will file a motion to dismiss the case once the settlement agreement has been signed. The court then issues a dismissal order and the case is closed. However, if the defendant does not live up to the terms of the settlement agreement the plaintiff cannot reactivate the old lawsuit. This means filing a new lawsuit with the court and going to the end of the line in order to process the case.

In more complex civil lawsuits that involve the conduct of business or industry, and in actions by the government against businesses that have allegedly violated regulatory laws, consent decrees are regularly part of the settlement agreement. A court will maintain jurisdiction and oversight to make sure the terms of the agreement are executed. The threat of a contempt order may keep defendants from dragging their feet or seeking to evade the intent of the agreement. In addition, the terms of the settlement are public.

Certain types of lawsuits require a court to issue a consent decree. In CLASS ACTION settlements, Rule 23 of the Federal Rules of Procedure mandates that a federal district court must determine whether a proposed settlement is fair, adequate, and reasonable before approving it. Under the Antitrust Procedures and Penalties Act (the Tunney Act), 15 U.S.C.A. § 16(b)-(h), the court must review proposed consent decrees in antitrust suits filed by the JUSTICE DEPARTMENT. The statute directs the court to review certain items, including whether the decree advances the public interest.

The U.S. Supreme Court, in *Local No.93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986), ruled that consent decrees "have attributes both of contracts and of judicial decrees." The division between contracts and judicial decrees suggests that consent decrees are contracts that resolve some issues through the consent of the parties. However, for some issues, the decree contains judicial acts rendered by the judge, not the parties. Commentators have noted that these dual attributes require a court to determine when it is appropriate to "rubber-stamp" a proposed settlement and when it is more appropriate for the court to treat the proposal as it would any judicial order.

The federal courts have been criticized for using consent decrees to reform prison systems, school systems, and other government agencies. Some courts have maintained oversight of agencies for many years and have imposed conditions that have cost state and local governments substantial amounts of money. Congress intervened in one litigation area when it passed the Prison Litigation Reform Act of 1995 (Pub.L. 104-134, 110 Stat. 1321). The law imposed strict limits on what federal courts could do in the future to improve prison conditions through the use of consent decrees. In addition, it gave government agencies the right to seek the termination of consent decrees, many of which had lasted for decades.

FURTHER READINGS

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CROSS-REFERENCES

Civil Action.

## CONSEQUENTIAL DAMAGES

*Injury or harm that does not ensue directly and immediately from the act of a party, but only from some of the results of such act, and that is compensable by a monetary award after a judgment has been rendered in a lawsuit. Detriment that arises from the interposition of special, unpredictable circumstances. Harm to a person or property directly resulting from any breach of* WARRANTY *or from a false factual statement, concerning the quality or nature of goods sold, made by the seller to induce the sale and relied on by the buyer.*

In terms of the UNIFORM COMMERCIAL CODE (UCC)—a body of law governing commercial transactions adopted by every state except for a few articles that were not adopted in Louisiana—consequential damages are injuries that result from a seller's breach of contract.

Such damages include any loss from general or particular requirements and needs of the buyer that the seller at the time of contracting

had reason to know and that could not reasonably be prevented by cover, the purchase of substitute goods or other alternatives.

## CONSERVATOR OF THE PEACE

*An officer of the government authorized by law to act in such a manner that will preserve and maintain the order and safety of the community and the general public.*

The phrase *conservator of the peace* derives its meaning from its use in England during the Middle Ages. Until the reign of King Edward III, conservators of the peace were elected locally by the people. Subsequently they were appointed by the king. Among their duties were prevention of disturbances of the peace and arrest of individuals who did so. Around the year 1360, the duties of conservators of the peace were broadened by an act of Parliament to include the ARRAIGNMENT and trial of offenders. They, therefore, became known as justices of the peace.

In the U.S. legal system, a conservator of the peace is synonymous with a peace officer. A police officer, a CORONER, or a court officer may be considered a conservator of the peace.

## CONSIDERATION

*Something of value given by both parties to a contract that induces them to enter into the agreement to exchange mutual performances.*

Consideration is an essential element for the formation of a contract. It may consist of a promise to perform a desired act or a promise to refrain from doing an act that one is legally entitled to do. In a bilateral contract—an agreement by which both parties exchange mutual promises—each promise is regarded as sufficient consideration for the other. In a unilateral contract, an agreement by which one party makes a promise in exchange for the other's performance, the performance is consideration for the promise, while the promise is consideration for the performance.

Consideration must have a value that can be objectively determined. A promise, for example, to make a gift or a promise of love or affection is not enforceable because of the subjective nature of the promise.

Traditionally, courts have distinguished between unilateral and bilateral contracts by determining whether one or both parties provided consideration and at what point they provided the consideration. Bilateral contracts were said to bind both parties the minute the parties exchanged promises, as each promise was deemed sufficient consideration in itself. Unilateral contracts were said to bind only the promisor and did not bind the promisee unless the promisee accepted by performing the obligations specified in the promisor's offer. Until the promisee performed, he or she had provided no consideration under the law.

For example, if someone offered to drive you to work on Mondays and Tuesdays in exchange for your promise to return the favor on Wednesdays and Thursdays, a BILATERAL CONTRACT would be formed binding both of you once you provided consideration by accepting those terms. But if that same person offered to pay you $10 each day you drove him to work, a unilateral contract would be formed, binding only upon the promisor until you provided consideration by driving him to work on a particular day.

Modern courts have de-emphasized the distinction between unilateral and bilateral contracts. These courts have found that an offer may be accepted either by a promise to perform or by actual performance. An increasing number of courts have concluded that the traditional distinction between unilateral and bilateral contracts fails to significantly advance legal analysis in a growing number of cases where performance is provided over an extended period of time.

Suppose you promise to pay someone $500.00 to paint your house. The promise sounds like an offer to enter a unilateral contract that binds only you until the promisee accepts by painting your house. But what constitutes lawful *performance* under these circumstances? The act of beginning to paint your house or completely finishing the job to your satisfaction?

Most courts would rule that the act of beginning performance under these circumstances converts a unilateral contract into a bilateral contract, requiring both parties to fulfill the obligations contemplated by the contract. However, other courts would analyze the facts of each case so as not to frustrate the reasonable expectations of the parties. In neither of these cases are the legal rights of the parties ultimately determined by courts by applying the concepts of *unilateral* and *bilateral* contracts.

In still other jurisdictions, courts have simply expressed a preference for interpreting con-

tracts as creating bilateral obligations in all cases where no clear evidence suggests that a unilateral contract was intended. The rule has been stated that in case of doubt an offer will be presumed to invite the formation of a bilateral contract by a promise to perform what the offer requests, rather than the formation of a unilateral contract commencing at the time of actual performance. The bottom line across most jurisdictions is that as courts have been confronted by a growing variety of fact patterns involving complicated contract disputes, courts have turned away from rigidly applying the concepts of unilateral and bilateral contracts and moved towards a more ad hoc approach.

CROSS-REFERENCES

Contracts; Performance; Promise.

## CONSIGNMENT

*The delivery of goods to a carrier to be shipped to a designated person for sale. A* BAILMENT *of goods for sale.*

A consignment is an arrangement resulting from a contract in which one person, the *consignor,* either ships or entrusts goods to another, the *consignee,* for sale. If the goods are transported by a carrier to the consignee, the name of the consignor appears on the bill of lading as the person from whom the goods have been received for shipment. The consignee's name appears on it as the person to whom delivery is to be made. The consignee acts as an agent on behalf of the consignor, a principal, in selling the goods and must take reasonable care of them while in his or her possession. The consignor does not give up ownership of the goods until their sale.

Under the terms of the consignment contract, the consignee agrees to pay the consignor a balance of the price received for any goods sold, which has been reduced by a fee, usually a small percentage of the sale price. Any goods that have not been sold must be returned to the consignor.

CROSS-REFERENCES

Shipping Law.

## CONSORTIUM

*The marital alliance between a* HUSBAND AND WIFE *and their respective right to each other's support, cooperation, aid, and companionship.*

Loss of consortium is an actionable injury for which money damages may be awarded. The loss of the love, sexual relations, and services of a spouse are being considered tangible injuries to an increasing extent. An action for loss of consortium is based upon the inconvenience of having a spouse who has been injured. Such injury might result from MEDICAL MALPRACTICE, ASSAULT AND BATTERY, NEGLIGENCE, the sale of addictive drugs, WRONGFUL DEATH, or FALSE IMPRISONMENT. The key requirement is that the wrongful act has a debilitating effect upon the individual whose spouse is initiating the action.

Consortium encompasses services performed by a spouse. The COMMON LAW did not recognize a wife's right to services on her husband's part. Because she was viewed as a social and legal inferior, she could not demand that he work for her and, therefore, she had no remedy for loss of sexual relations, affection, or services. The wrongdoer was liable only to the husband directly.

A husband was considered to have suffered tangible damages for injury to his wife and, initially, had the sole right to bring an action for loss of consortium. The loss of services that had to be asserted included his wife's general usefulness, household services such as cooking and cleaning, industry, and frugality. Eventually, the assumption evolved that a man suffered these impairments upon injury to his wife, and damages were recoverable by him for any period in which he was divested of sex, fellowship, and affection, in spite of the fact that his wife might not be responsible for housekeeping.

Subsequently, the Married Women's Property Acts (29 Stat. 193 [1896]) emerged. Some states interpreted these acts to mean that a man could no longer sue for the loss of his wife's services, as she was a full legal person. Most states, however, interpreted the acts as extending to women the right to sue for loss of consortium. A plethora of recent cases indicate that either spouse may bring action for loss of consortium.

In 1950, the U. S. Court of Appeals for the District of Columbia in *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir. 1950), held that women had a right to sue for loss of consortium. Many states directly repudiated its holding and adhered to the old rule, while others supported the change.

By the late 1970s, many courts revised their views and held that women may sue for loss of consortium. Other jurisdictions refuse to rule in favor of the change on the ground that it can be made only by the state legislatures.

Some states seek to prevent double recoveries by requiring that the spouse who is suing for loss of consortium assert that claim in the same action as the spouse who is suing for damages for injuries. When this might be inconvenient or impossible in some instances, other states require judicial supervision of the second action in order to ensure that the amount of damages awarded will not be excessive.

## CONSORTIUM/ INTERGOVERNMENTAL CORPORATIONS AND CONSORTIUMS

*Quasi-business associations formed to provide services, arrange financing, or operate certain enterprises.*

The involvement of more than one state or institution can be advantageous in expanding the financial and administrative resources available to the entity and, in some cases, permitting services or products to be distributed on a larger and more efficient scale. Various banks, for example, may form a consortium with a government to finance a major development project that is too large for one bank to finance alone. The terms of the agreement forming the consortium or corporation will determine the reciprocal rights and duties of the members of the entity. While in practical terms there may be little difference between an intergovernmental consortium or corporation, the usual ad hoc nature of a consortium suggests its use for individual projects with a definite completion schedule. The widespread use of the corporate framework in other circumstances indicates that the corporate form works well when the entity must provide services over an indefinite period of time. The corporate structure, with its separate board of directors and management, can also protect the independence of the entity from direct political control and may help to facilitate access to private financial markets.

## CONSPIRACY

*An agreement between two or more persons to engage jointly in an unlawful or criminal act, or an act that is innocent in itself but becomes unlawful when done by the combination of actors.*

Conspiracy is governed by statute in federal courts and most state courts. Before its CODIFICATION in state and federal statutes, the crime of conspiracy was simply an agreement to engage in an unlawful act with the intent to carry out the act. Federal statutes, and many state statutes, now require not only agreement and intent but also the commission of an OVERT ACT in furtherance of the agreement.

Conspiracy is a crime separate from the criminal act for which it is developed. For example, one who conspires with another to commit BURGLARY and in fact commits the burglary can be charged with both conspiracy to commit burglary and burglary.

Conspiracy is an inchoate, or preparatory, crime. It is similar to solicitation in that both crimes are committed by manifesting an intent to engage in a criminal act. It differs from solicitation in that conspiracy requires an agreement between two or more persons, whereas solicitation can be committed by one person alone.

Conspiracy also resembles attempt. However, attempt, like solicitation, can be committed by a single person. On another level, conspiracy requires less than attempt. A conspiracy may exist before a crime is actually attempted, whereas no attempt charge will succeed unless the requisite attempt is made.

The law seeks to punish conspiracy as a substantive crime separate from the intended crime because when two or more persons agree to commit a crime, the potential for criminal activity increases, and as a result, the danger to the public increases. Therefore, the very act of an agreement with criminal intent (along with an overt act, where required) is considered sufficiently dangerous to warrant charging conspiracy as an offense separate from the intended crime.

According to some criminal-law experts, the concept of conspiracy is too elastic, and the allegation of conspiracy is used by prosecutors as a superfluous criminal charge. Many criminal defense lawyers maintain that conspiracy is often expanded beyond reasonable interpretations. In any case, prosecutors and criminal defense attorneys alike agree that conspiracy cases are usually amorphous and complex.

### The Elements of Conspiracy Agreement

The essence of conspiracy is the agreement between two or more persons. A single person acting alone cannot be guilty of conspiracy.

# Quiz Show Conspiracies

In the 1950s, the new medium of television was fast becoming a staple in U.S. households, and quiz shows, with their low production costs and high-stakes drama, were enjoying immense popularity. Contestants on quiz shows played until they lost; some competed for months and won tens of thousands of dollars. The quiz show concept of rewarding intelligence with instant wealth appealed to the U.S. public and inspired many to seek an invitation to play.

In May 1958, Edward Hilgemeier was in the studio audience of the quiz show "Dotto" when he was approached by a "Dotto" producer. The producer asked if Hilgemeier would like to compete on the show. Hilgemeier, an aspiring actor, accepted the offer. On May 20, he went to the "Dotto" set as a standby contestant.

Marie Winn, a student at Columbia University, was the defending champion of "Dotto." A charming, animated native of Czechoslovakia, the twenty-one-year-old Winn had won "Dotto" on two consecutive nights. As Hilgemeier waited for his possible turn against Winn, he got the impression that studio personnel were unduly familiar with the woman.

Winn's first challenger that day was Yeffe Kimball Slatin. Hilgemeier watched as Winn defeated Slatin with ease; Winn seemed to have every answer at hand. After the contest between Winn and Slatin, Hilgemeier returned to the contestants' dressing room, where he discovered a notebook belonging to Winn that appeared to contain answers to "Dotto" questions. Hilgemeier notified Slatin, and the two returned to the dressing room, where one of them tore the apparent answer sheet out of Winn's notebook.

That night, after speaking to Slatin's lawyer, Hilgemeier and Slatin went to the "Dotto" offices, where they spoke with the show's producers. The "Dotto" producers promised compensation to both Hilgemeier and Slatin. Slatin agreed to stay quiet about the affair for a nominal sum of money from "Dotto," but Hilgemeier, fearing for his reputation, refused. Hilgemeier took his information to Manhattan district attorney Frank Hogan and assistant district attorney Joseph Stone.

Initially, the Manhattan district attorney's office was skeptical of Hilgemeier's complaint. The rigging of quiz shows was, after all, not illegal. Shortly into the investigation, however, it became apparent to Hogan and Stone that a widespread conspiracy was in place to hide the truth from the public—and conspiracy to commit **FRAUD** *was* illegal.

The Manhattan district attorney's office convened **GRAND JURY** hearings, and a subcommittee of the U.S. House of Representatives held congressional hearings on the quiz shows' practices. Many producers and contestants lied to the grand jury and the congressional subcommittee about their role in quiz show trickery. On October 14, 1959, their elaborate web of deceit began to unravel when Charles Van Doren, a Columbia University professor, admitted to the subcommittee his involvement in a rigged quiz show, "Twenty-One." (This incident was the basis of Robert Redford's 1995 film *Quiz Show.*)

Quiz show producers and contestants eventually admitted their subterfuge to authorities. What emerged were stories of how favored quiz show contestants were coached to agonize and sweat over answers they already knew. On August 30, 1960, the U.S. Congress passed a bill that made giving or receiving assistance on a quiz show a federal crime. The bill was signed into law by President **DWIGHT D. EISENHOWER** two weeks later. Now, under 47 U.S.C.A. § 509, it is a federal crime to rig quiz shows with the intent to deceive the listening or viewing public. Under 18 U.S.C.A. § 371, a conspiracy to engage in prohibited practices regarding radio and television quiz shows is also a federal crime.

However, if a coconspirator dies prior to the indictment or trial, the surviving coconspirator may still be charged with conspiracy. A HUSBAND AND WIFE can be guilty of conspiracy. A corporation is considered a person for conspiracy purposes, so a corporation can be guilty of conspiracy, but it cannot conspire with itself. For example, if two or more employees within a corporation conspire to break the law and subsequently commit an act in furtherance of the conspiracy, the corporation itself is not criminally liable for conspiracy.

The agreement must be made voluntarily and with an intent to participate in furthering a common purpose. Mere knowledge or approval, in the absence of an actual agreement to cooperate, does not constitute conspiracy.

Once an agreement with criminal intent is made, the conspiracy is complete, unless the applicable statute requires the additional element of an overt act. The agreement need not be written or formal, and it may be proved by CIRCUMSTANTIAL EVIDENCE. A tacit understanding is sufficient to constitute agreement, even if no words are spoken that expressly communicate the conspiracy. Conspiracy exists if there is some form of mutual understanding between persons working together with a common unlawful end.

**Intent** Criminal intent is also necessary to create a conspiracy. This means that the parties must intend both to agree on and to engage in the unlawful act. Ignorance of the law is not usually a defense to a crime, but an unwitting conspirator may defend against conspiracy charges on grounds of ignorance. Ignorance will not be a defense if the person continues to participate in the common plan after learning of its illegality.

Either the purpose of the agreement or the means by which it is accomplished must be illegal to support criminal prosecution on conspiracy charges. If the purpose is unlawful, the offense is committed even if the means used to achieve the purpose are lawful. One illustration is where a noncustodial parent conspires with another person to KIDNAP the parent's child, and the child is abducted during a court-approved visit. Conspiracy also occurs if the purpose of the agreement is lawful but the means used to achieve it are illegal. For example, if a custodial parent chooses to retrieve a child who has been kidnapped by the noncustodial parent, an agreement to use unlawful force constitutes conspiracy.

**Overt Act** An overt act can be any step that indicates that the execution of the conspiracy has begun. This can be an innocuous act and need not be illegal unto itself. For example, if two persons agree to rob a bank, then purchase a ski mask, the act of buying the mask may constitute the overt act required to charge the two with conspiracy.

The overt act must follow the agreement and must be executed with an intent to carry out the purpose of the conspiracy. For example, if one of the potential bank robbers buys a ski mask after the agreement is made, the purchase may not constitute the overt act if the ski mask will not be worn to carry out the ROBBERY. An overt act need not be committed by each and every conspirator; an overt act by one conspirator solidifies the offense for all coconspirators. Thus, a conspirator who does not participate in the overt act can be charged with conspiracy.

If a conspirator completely and voluntarily renounces the criminal purpose to all conspirators, that person may withdraw from the conspiracy before the overt act is committed. Many jurisdictions require that the withdrawing conspirator also inform law enforcement officials or take measures to thwart the crime, in order to avoid criminal liability for the conspiracy.

### Other Considerations

A conspiracy exists as long as measures are taken to conceal evidence of the crime. A person who did not participate in the original agreement can become a coconspirator after the actual criminal act if the person joins in the concealment of the conspiracy. Whether a coconspirator received personal benefit or profit is of no importance.

Generally, conspirators are liable for all crimes committed within the course or scope of the conspiracy. The application of this general rule varies from state to state. Ordinarily, an act is within the course or scope of the conspiracy if it is a foreseeable result of the agreement. In some states, a conspirator is not liable where he or she has no knowledge of the specific act and argues successfully that the act was beyond the scope of the conspiracy. Also, if the purpose of the agreement is later changed by coconspirators, a conspirator who did not participate in the alteration may not be held liable for the new conspiracy. A person is liable for conspiracy only in regard to the meaning of the agreement as he or she understands it.

In some jurisdictions, a person may be guilty of conspiracy even if a coconspirator is immune from prosecution. For example, if two persons conspire to commit murder and one is found to have been insane at the time of the killing, the other conspirator may not be exempt from prosecution for conspiracy.

One who provides services to conspirators will not be guilty of conspiracy if that person has not participated in the agreement and does not know that a conspiracy exists. There must be a willful participation in the conspiracy, as well as

an intent to further the common purpose or design for conspiratorial liability. Therefore, aiding a conspiracy by selling material to further it does not make someone a conspirator if the person does not know of the conspiracy, even if that person knows the goods sold will be used for an unlawful purpose. However, if the circumstances indicate a conspiracy, one who cooperates and knowingly sells goods for illegal use may be guilty of conspiracy.

Generally, if a number of conspirators agree to carry out different functions in furtherance of the conspiracy, the agreement constitutes a single conspiracy. This is so even if the different functions amount to more than one unlawful purpose. In some states, however, the different functions may constitute multiple conspiracies if there is an agreement to commit more than one crime.

Punishment for the crime of conspiracy is ordinarily defined by statute and varies in accordance with the conspiracy's objective. For example, a conspiracy to commit a misdemeanor will not be subject to the same punishment as a conspiracy to commit a felony. Conspiracy may be alleged in a civil case if the plaintiff has suffered an injury as a result of the conspiracy. Civil conspiracy is ordinarily not a CAUSE OF ACTION, but the existence of a conspiracy may be used in determining the amount of damages in a civil action and the respective liabilities of civil codefendants for the payment of damages.

### History of Conspiracy

Federal conspiracy statutes were first passed in 1909. Under 18 U.S.C.A. § 371, it is a crime to commit an offense against or to defraud the United States or any agency of the United States. If the crime actually committed is a felony, the punishment is a fine of not more than $10,000 or five years' imprisonment, or both. Under 18 U.S.C.A. § 372, it is a crime to conspire to impede or injure a federal law enforcement officer.

The U.S. Congress has made specific conspiracies illegal through a variety of statutes. For example, conspiracy to murder federal or foreign officials is prohibited by 18 U.S.C.A. § 1117, a freestanding statute. Conspiracy to kidnap is contained in subsection C of 18 U.S.C.A. § 1201, the federal kidnapping statute. Other federal statutes prohibit conspiracies to assassinate the president, the vice president, and their successors; assassinate the director or deputy director of the CENTRAL INTELLIGENCE AGENCY (CIA); assassinate or kidnap a Supreme Court justice; interfere with commerce and trade; violate computer laws; launder money; obstruct state or local regulation of gambling; injure property of the federal government; tamper with consumer products; gather, transmit, lose, remove, or destroy national defense information or materials; incite sailors to mutiny; engage in prohibited practices regarding radio broadcasts or game show contests; defraud the TENNESSEE VALLEY AUTHORITY; violate or interfere with VOTING RIGHTS; and sexually exploit children.

Conspiracy cases are often infamous for their ambition and breadth. The assassination of President ABRAHAM LINCOLN in 1865 by John Wilkes Booth was a product of a conspiracy between Booth and several supporters of the defunct Confederacy. In the early 1950s, the U.S. Congress conducted numerous hearings on Communist conspiracies against the United States. In the mid-1970s, several White House aides were indicted on charges of conspiracy in connection with the 1972 burglary of the offices of the Democratic National Committee in the Watergate Hotel, in Washington, D.C.

In November 1986, a Lebanese weekly, *Al-Shiraa,* reported that the U.S. government had secretly sold military weapons to so-called moderate factions in Iran. In exchange for the arms sales, according to *Al-Shiraa,* the moderate Iranians would work to secure the release of U.S. citizens held hostage in Lebanon. Thus began an investigation into a conspiracy that became popularly known as the IRAN-CONTRA AFFAIR.

Congressional investigations that followed the *Al-Shiraa* article revealed a covert "enterprise" connected with the arms sales. The operation, staffed by private citizens and funded by private monies, had diverted profits from the sale of the weapons to the Contras, a loosely knit military force in Honduras that sought to overthrow the socialist Sandinista government in Nicaragua.

Congressional investigations in the spring of 1987 revealed that the enterprise had been supervised by U.S. NATIONAL SECURITY COUNCIL (NSC) staff. The NSC, created by the National Security Act of 1947 (61 Stat. 496 [50 U.S.C.A. §§ 402]) and amended by the National Security Act Amendments of 1949 (63 Stat. 579 [50 U.S.C.A. § 401 et seq.]), existed to advise the president with respect to the INTEGRATION of

domestic, foreign, and military policies relating to national security.

One of the many problems presented by the enterprise was its apparent violation of the Boland amendments to a series of appropriations bills. These bills were established in the early 1980s to prevent any "agency or entity of the United States involved in intelligence activities" from spending funds available to it "to support military or paramilitary operations in Nicaragua" (133 Cong. Rec. H4982-87 [daily ed. June 15, 1987]). The covert arms sales also violated procedural and substantive requirements of the Arms Export Control Act of 1976 (Pub. L. No. 90-629, 82 Stat. 1320 [22 U.S.C.A. §§ 2751–2796c (1989 Supp.)]). Moreover, the executive branch's failure to notify Congress of the covert arms sales flouted the reporting provisions of the 1980 Intelligence Oversight Act (Pub. L. No. 96-450, tit. IV, § 407(b)(1), 94 Stat. 1981 [50 U.S.C.A. § 413 (1982)]).

In 1987, Lawrence Walsh, a former AMERICAN BAR ASSOCIATION president and former federal judge, was assigned by the U.S. Court of Appeals for the District of Columbia Circuit, Independent Counsel Division, to investigate the Contra-funding scheme. In March 1988, Walsh charged Richard Secord, Albert Hakim, Oliver North, and John Poindexter with conspiracy to obstruct the U.S. government. North and Poindexter had worked for the NSC.

As in all conspiracy cases, an important goal of the prosecution was to determine who was involved in the agreement. A major issue in the Iran-Contra investigation was to determine precisely who in the EXECUTIVE BRANCH authorized or was aware of the arms diversions and, specifically, whether the president had knowledge of the unlawful activities.

In the legal battles that ensued over access to information in connection with the prosecutions, Walsh faced challenges by the RONALD REAGAN and GEORGE H. W. BUSH administrations, the JUSTICE DEPARTMENT, intelligence agencies, and lawyers for the accused. Ultimately, the White House refused to relinquish classified information crucial to the prosecutions, and Walsh was forced to drop all conspiracy charges. The Iran-Contra Affair resulted in criminal convictions of several persons directly connected with the Reagan administration, but Walsh was never able to link the president to a conspiracy to obstruct the U.S. government.

In another conspiracy case, Patricia Caldwell, a bookkeeper with the Northwest Community Exchange (NCE), was charged with conspiracy to defraud the United States because she refused to provide to the IRS certain account information it requested regarding NCE customers. The NCE was one of a number of warehouse banks, which promised their customers that they would not reveal account information to third parties, including the INTERNAL REVENUE SERVICE (IRS). As a result, the IRS shut down the warehouse banks, and it charged several customers and employees with conspiracy to defraud the United States. A jury convicted Caldwell of conspiring to defraud the United States, in violation of 18 U.S.C.A. § 371.

The Ninth Circuit Court of Appeals reversed Caldwell's conspiracy conviction (*United States v. Caldwell,* 989 F.2d 1056 [1993]). The government had argued that people have a duty to conduct their business affairs so as to not impair or impede the collection of revenue by the IRS. The majority opinion, written by Judge Alex Kozinski, rejected this interpretation of 18 U.S.C.A. § 371 and held that to defraud the government, a person had to act deceitfully or dishonestly. To allow otherwise would create an oppressive theory of criminal conspiracy. The court observed that under the government's theory, "a husband who asks his wife to buy him a radar detector would be a felon . . . because their actions would obstruct the government function of catching speeders." According to the court, Congress did not intend to make a federal crime out of actions that merely make "the government's job more difficult."

The jury in Caldwell's case had not been instructed that it had to find that Caldwell agreed to obstruct the IRS's tax-collecting functions by deceitful or dishonest means. This failure to inform the jury about an essential element of conspiracy constituted reversible error, and Caldwell's conviction was overturned.

### American Honda Conspiracy

The sheer size of a conspiracy can create distinct problems for prosecutors and defense attorneys alike. In 1993, U.S. attorneys in New Hampshire began to investigate employees of the American Honda Motor Company. By 1994, prosecutors had cobbled together an immense conspiracy-based commercial BRIBERY case.

The conspiracy prosecutions of American Honda executives and dealers began to develop

in 1989, when Richard Nault, an automobile dealer in Nashua, New Hampshire, brought a civil suit against American Honda, claiming unfair treatment. In 1993, after testimony raised concerns of bribery, the judge in Nault's case recommended that federal authorities investigate the financial affairs at American Honda.

Investigations by the FEDERAL BUREAU OF INVESTIGATION (FBI) revealed a widespread pattern of illegal payoffs in which American Honda executives were given cash, jewelry, cars, and store ownership interests in return for the awarding of new Honda dealerships and favorable car allocations. According to the prosecutors, assistant U.S. attorneys Michael Connolly and Donald Feith, the alleged conspiracy involved twenty-two American Honda executives and dealers, encompassed thirty states, and was responsible for the misappropriation of approximately $50 million. In 1993 and 1994, prosecutors dangled various substantive and conspiracy charges before the executives and dealers.

By the end of 1994, only three of the alleged conspirators had refused to plead guilty: John Billmyer, an 18-year American Honda veteran and longtime vice president of auto field sales; Stanley Cardiges, another vice president of auto field sales and Billmyer's protégé; and Dennis Josleyn, whose last position was West Coast sales manager for Acura, American Honda's flagship automobile. In March 1994, Billmyer, Cardiges, and Josleyn were arrested at their homes, booked at local jails, and then released pending trial.

A federal GRAND JURY charged Billmyer with one count of conspiring with Cardiges and Josleyn to defraud American Honda, the United States, the TREASURY DEPARTMENT, and the IRS, in violation of 18 U.S.C.A. § 1341. Specifically, the indictment alleged that Billmyer, Josleyn, and Cardiges had conspired to receive money and gifts by secretly selling the valuable contract rights conferred on prospective dealers by American Honda.

Cardiges and Josleyn were charged with participating in the broad conspiracy with Billmyer and also conspiring to receive kickbacks in connection with an American Honda advertising campaign. Cardiges and Josleyn were further charged with violating the RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (18 U.S.C.A. § 1961 et seq.). In November 1993, Cardiges allegedly asked former American Honda zone manager Edward Temple to tell the FBI that payments the two had received from a hidden interest in a Conway, Arkansas, car dealership were actually loan payments.

American Honda was portrayed by prosecutors as a victim of the conspiracies. As the trial approached, lawyers for Cardiges and Josleyn prepared a defense that would further victimize the company. According to Cardiges's lawyer Philip Israels, any conspiracy case should have included the Japanese executives of Honda Motor Company International, the owner of American Honda. Israels maintained that the Japanese executives knew of, condoned, and even participated in the kickback schemes. Israels further charged that the federal government had information that suggested that Japanese executives knew of the kickbacks, and that the decision not to prosecute the Japanese executives was being used as a bargaining chip in trade negotiations between the United States and Japan.

Josleyn adopted a defense similar to that of Cardiges. Josleyn's attorneys, Paul Twomey and Mark Sisti, noted that the alleged conspiracy was so widespread that Japanese executives must have known of it. Josleyn would deny no specific facts. Rather, he would invert the meaning of the mountain of evidence uncovered by the prosecutors and the FBI, to show that the Japanese executives must have known about and approved of the kickback schemes. Such a showing would allow Josleyn's attorneys to argue that the alleged conspiracy was actually a lawful, routine business practice promoted by American Honda's parent company.

Billmyer had retired from American Honda in 1988. His lawyers, David Long and Kevin Sharkey, centered his defense on a variety of grounds. Their arguments included that the prosecution of Billmyer was barred by the five-year STATUTE OF LIMITATIONS on conspiracy charges because the indictment actually alleged multiple conspiracies, and any criminal liability for a conspiracy involving Billmyer expired in 1993; Billmyer had withdrawn from any alleged conspiracies by retiring in 1988; and New Hampshire was an improper venue because none of the acts Billmyer was alleged to have committed had any relation to New Hampshire.

In the months before trial, several motions to dismiss the case were denied by Judge Joseph DiClerico of the U.S. District Court for the District of New Hampshire. On January 22, 1994, after two years of maintaining his innocence and

just one day before jury selection was scheduled to begin, Cardiges pleaded guilty to all charges. In exchange for lenient sentencing recommendations by the prosecutors, Cardiges agreed to testify against Billmyer and Josleyn. All the conspirators except Billmyer and Josleyn were prepared to testify to conspiracies to defraud.

The case proceeded to jury trial in February 1995 and was presided over by Judge DiClerico. In opening statements, assistant U.S. attorney Connolly submitted to the jury that the conspiracy was limited to a few rogue U.S. executives and dealers, and that the United States and American Honda had been conspired against and defrauded by them. Twomey declared that "the government is going to take you everywhere—north, south, east and west" to prove a conspiracy that was supposedly limited to U.S. executives and was completely unknown to Japanese executives. Long and Sharkey covered the litany of apparent infirmities in the government's conspiracy case against Billmyer.

A seemingly endless stream of witnesses then proceeded to testify against Billmyer and Josleyn. American Honda executives and dealers regaled the jury with descriptive accounts of opulence and excess. The kickback schemes resembled homage to the executives, a practice that Honda and Acura dealers called kissing the ring. Dealers and executives told of expensive offerings, including cash payments, free automobiles, Rolex watches, shopping sprees, swimming pools, and tuition payments for children. In several days on the witness stand, Cardiges alone testified to the receipt of approximately $5 million in kickbacks.

At the close of the government's case in chief, Long made a motion to dismiss, arguing that the suit was one of multiple conspiracies, that any conspiracy involving Billmyer supported by the evidence was barred by the statute of limitations, and that any payments or gifts received by Billmyer were unconnected to any conspiracy with Josleyn. The motion was denied, Billmyer called no witnesses, and Josleyn began his defense.

Throughout the presentation of the government's case, Josleyn's lawyers had been fighting a battle with American Honda. They sought to obtain, and eventually received, a copy of handwritten notes kept by Sherry Cameron, American Honda's vice president of human resources. Cameron's notes had been made in connection with American Honda's 1992 internal investigations into rumors of kickbacks. American Honda had appealed Judge DiClerico's decision to order American Honda's release of the notes to the defense, but the First Circuit Court of Appeals refused to reverse the order.

Cameron had testified for the government in March 1995, and Sisti's cross-examination of her had been suspended while the production of her notes was contested. On May 15, 1995, Cameron resumed the witness stand and was faced with poster-sized copies of her notes, one of which revealed that her "point of view" in the investigation was to "try to protect" the company. Cameron further testified that she had limited her investigation to facts, not rumors.

Twomey then called to the stand J. D. Powers, a prominent market research specialist for the automobile industry. Powers testified that in 1983, he sent a letter to Yoshihida Munekujni, then president of American Honda, informing him of widespread rumors of corruption in American Honda. According to Powers, several unindicted top-ranking American Honda executives knew of the kickback schemes in the early 1980s.

This and other evidence allowed Twomey to argue in his closing statement that the conspiracy was so implicit as to constitute one company's policy. Twomey asked the jury whether it could be satisfied that it knew the entire truth in the case. Long contended, in part, that the government had been selective and heavy-handed in its prosecution. The case was submitted to the jury. After five days of deliberations, Billmyer and Josleyn were convicted of all charges. Both vowed to appeal.

Although no Japanese executives were charged in the case, 20 American Honda executives and dealers pleaded guilty, making this the largest conspiracy-based commercial bribery prosecution in the history of the United States.

### United States v. Mohamed

Even before the SEPTEMBER 11TH ATTACKS against the United States in 2001, the country and the world were well aware of the activities of Osama bin Laden and the terrorist network known as al Qaeda. In October 2000, 48-year-old Ali A. Mohamed pled guilty in federal court in New York to five counts of conspiracy, including conspiring to kill U.S. nationals; conspiring to murder, kidnap, and maim outside the United States; conspiring to murder in general; and conspiring to destroy U.S. buildings and property. The charges stemmed from the August 7,

*An artist's rendition of Ali Mohamed (second from left) as he stands before U.S. District Judge Leonard B. Sand. In October 2000, Mohamed pleaded guilty to five counts of conspiracy related to the 1998 embassy bombings in Kenya and Tanzania.*

AP/WIDE WORLD PHOTOS

1998, TERRORISM at U.S. embassies in Nairobi, Kenya, and in Dar es Salaam, Tanzania. More than 200 people, including 12 American citizens, were killed in the attacks, and more than 5,000 were injured.

The case attracted national and international attention because Mohamed was a former U.S. Army officer and because he implicated bin Laden in the bombings. Mohamed, a native Egyptian, served briefly with the CIA in 1984, until the agency determined that Mohamed had revealed his assignment to Middle East terrorists. In 1985, Mohamed moved to the California, seeking to become a U.S. citizen. He enlisted in the U.S. Army and was assigned to the Special Operations Command at Fort Bragg, where the Army trains its Special Forces. Mohamed was trained as a paratrooper and achieved the rank of sergeant before being honorably discharged in 1989. Upon his discharge, he renewed his contacts with the Egyptian "Islamic Jihad," a radical group he had secretly associated with since the early 1980s. In 1991 he was recruited by al Qaeda to serve several missions directly related to bin Laden's terrorist activities.

In 1993, bin Laden asked Mohamed to scout possible sites in Kenya to target for terrorist attacks. Mohamed, then a naturalized U.S. citizen, took photographs and drew diagrams of the U.S. embassy in Nairobi. He personally delivered these to bin Laden, who planned the attack that occurred about five years later. Mohamed became a suspect when one of his aliases turned up at the Nairobi bombing site. After reaching a plea bargain agreement with federal prosecutors, Mohamed implicated bin Laden in the attacks. At the time, prosecutors said it was the first time that a close associate of bin Laden had implicated the reputed terrorist in open court. Mohamed faces a prison term for an unspecified number of years. Less than one year after he gave his testimony, the United States suffered terrorist attacks on its own soil, as al Qaeda operatives destroyed the World Trade Center in New York City and seriously damaged the Pentagon in Washington, D.C.

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**CROSS-REFERENCES**

Communism.

## CONSTABLE

*An official of a* MUNICIPAL CORPORATION *whose primary duties are to protect and preserve the peace of the community.*

In medieval law, a constable was a high functionary under the French and English kings. The importance and dignity of this position was second only to that of the monarch. The constable led the royal armies and was cognizant of all military matters, exercising both civil and military jurisdiction. It was also his duty to conserve the peace of the nation.

In ENGLISH LAW, a constable was a public civil officer whose general duty was to maintain the peace within his district, although he was frequently charged with additional obligations. "High," "petty," and "special" constables formerly existed. The police have assumed the functions of constables.

State constitutions and laws in the United States generally establish prerequisites for holding the office of constable. In most instances, a constable must be a U.S. citizen, a qualified voter, and a resident in the area of his or her jurisdiction.

The term of office and removal therefrom are usually governed by state constitutions and laws. A basis for removal may reside in neglect of duty.

A constable-elect is generally required to post a bond as security for faithful performance of the duties and obligations of the office. The bond protects those individuals who might oth-

erwise be harmed by any possible neglect of duty.

A constable has the status of peace officer, a person designated by public authority to maintain the peace and arrest persons guilty or suspected of crime. The constable must yield to the superior authority of a sheriff, the chief executive and administrative officer of a county, where a conflict exists concerning jurisdiction.

Service of process—the delivering of a summons which informs a person that he or she is a defendant in a lawsuit—is an important function of a constable. State laws confer the power to serve process. The constable executes the process of magistrates' court and of some other tribunals. The courts do not instruct constables on the manner of serving process. The constable should exercise due diligence to make the service but is not obligated to exert every conceivable effort.

Attachment—the seizure of a debtor's property pursuant to court order—is another function of a constable. It is the constable's duty to assume custody of and carefully preserve the property to be seized. In most instances, the constable is expected to sell the property and collect and distribute the sale proceeds.

Miscellaneous duties assigned to constables by local or state law include the custody of juries, attendance at criminal court sessions, and the service of writs—court orders requiring the performance of a specified act or giving authority to have it done. The powers and duties of constables have, however, been replaced by sheriffs in many jurisdictions.

## CONSTITUTE

*To comprise or put together. That which is* duly constituted *is properly made up and formally correct and valid.*

*Constituted authorities* are officers who are properly appointed under constitutional provision to govern the people.

## CONSTITUTION

*The fundamental law, written or unwritten, that establishes the character of a government by defining the basic principles to which a society must conform; by describing the organization of the government and regulation, distribution, and limitations on the functions of different government departments; and by prescribing the extent and manner of the exercise of its sovereign powers.*

*A legislative charter by which a government or group derives its authority to act.*

The concept of a constitution dates to the city-states of ancient Greece. The philosopher ARISTOTLE (384–322 B.C.), in his work *Politics,* analyzed over 150 Greek constitutions. He described a constitution as creating the frame upon which the government and laws of a society are built:

> A constitution may be defined as an organization of offices in a state, by which the method of their distribution is fixed, the sovereign authority is determined, and the nature of the end to be pursued by the association and all its members is prescribed. Laws, as distinct from the frame of the constitution, are the rules by which the magistrates should exercise their powers, and should watch and check transgressors.

In modern Europe, written constitutions came into greater use during the eighteenth and nineteenth centuries. Constitutions such as that of the United States, created in 1787, were influenced by the ancient Greek models. During the twentieth century, an increasing number of countries around the world concluded that constitutions are a necessary part of democratic or republican government. Many thus adopted their own constitutions.

Different forms and levels of government may have constitutions. All 50 states have constitutions, as do many countries including Japan, India, Canada, and Germany. It is also common for nongovernmental organizations and civic groups to have constitutions.

In its ideal form, a constitution emanates from the consent and will of the people whom it governs. Besides establishing the institutions of government and the manner in which they function toward each other and toward the people, a constitution may also set forth the rights of the individual and a government's responsibility to honor those rights.

Constitutions, whether written or unwritten, typically function as an evolving body of legal custom and opinion. Their evolution generally involves changes in judicial interpretation or in themselves, the latter usually through a process called amendment. Amendment of a constitution is usually designed to be a difficult process in order to give the constitution greater stability. On the other hand, if a constitution is extremely difficult to amend, it might be too inflexible to survive over time.

The ongoing evolutionary nature of constitutions explains why England may be described as having a constitution even though it does not have a single written document that is designated as such. England's constitution instead inheres in a body of legal custom and tradition that regulates the relationship among the monarchy, the legislature (Parliament), the judicial system, and COMMON LAW. Although England's constitution is, in a sense, unwritten because it does not originate in a single document, many written laws have been instrumental in its creation, and England in fact has one of the oldest traditions of constitutionalism.

In a truly constitutional form of government, public officials are subject to constitutional rules and provisions and may not violate them without punishment. Such constitutional governments are also called limited governments because the constitution restricts the scope of their power over the people. However, many governments that have constitutions do not practice true constitutionalism. The former Soviet Union, for example, created the 1936 Constitution of the Union of Soviet Socialist Republics, also known as the "Stalin Constitution," but that document did not establish a truly constitutional form of government. JOSEPH STALIN, the ruler of the Soviet Union from 1924 to 1953, could not be formally penalized or called to account for his actions, no matter how heinous, before any other government official, any court, or the people themselves. The Soviet Constitution also claimed to guarantee FREEDOM OF SPEECH, press, and assembly, but in practice the Soviet government continually repressed those who sought to express those freedoms. Constitutions such as that of the former Soviet Union are called nominal constitutions, whereas those that function more truly as prescriptive documents, such as the CONSTITUTION OF THE UNITED STATES, are called normative constitutions.

In the United States, individual state constitutions must conform to the basic principles of the U.S. Constitution—they may not violate rights or standards that it establishes. However, states are free to grant rights that are not defined in the U.S. Constitution, as long as doing so does not interfere with other rights that are drawn from it. For this reason, groups or individuals who seek to file constitutional claims in court are increasingly examining state constitutions for settlement of their grievances. In the issue of SCHOOL DESEGREGATION, for example, groups such as the National Association for the Advancement of Colored People (NAACP) began in the 1990s to shift focus to the state level, with the hope of finding greater protection of rights under state constitutions.

In many states, however, courts have construed their respective state constitutions to provide rights that are equivalent to those provided under the U.S. Constitution. For example, in *Jackson v. Benson,* 578 N.W.2d 602 (Wisc. 1998), the Wisconsin Supreme Court, citing settled precedent, noted that the Wisconsin Constitution's provisions relating to EQUAL PROTECTION provide the same rights as those provisions in the federal counterpart, even though the Wisconsin provisions are phrased quite differently. The NAACP claimed that a school program in Milwaukee, which allowed parents of certain qualifying students of public schools in the city to send their children to any private, nonsectarian school of their choice at no cost, was enacted with discriminatory intent. The court treated the state and federal constitutional claims of the NAACP as alike.

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#### CROSS-REFERENCES

Constitution of the United States; "Constitution of the United States" (Appendix, Primary Document).

## CONSTITUTION OF THE UNITED STATES

*A written document executed by representatives of the people of the United States as the absolute rule of action and decision for all branches and officers of the government, and with which all subsequent laws and ordinances must be in accordance unless it has been changed by a constitutional amendment by the authority that created it.*

For over 200 years, the Constitution of the United States has served as the foundation for U.S. government. Created in 1787, the U.S. Constitution establishes and defines the basic outlines of a national government that joins the states in an effective political union. The U.S. Constitution has been and remains one of the most enduring political agreements in the history of the world. Throughout its existence, it has served as an

# Constitutional Convention of 1787

The Constitutional Convention of 1787 is a high point in the history of the United States. This remarkable assemblage of men, meeting in Philadelphia between May 23 and September 17, 1787, created the document that has given the United States one of the most stable and admired constitutional democracies in the history of the world.

55 delegates from 12 states attended various parts of the convention. Drawn from the educated and wealthy elite of the country, they included such luminaries as **GEORGE WASHINGTON**, the commander of American forces in the **WAR OF INDEPENDENCE**, who presided over the convention, and **BENJAMIN FRANKLIN**, at 81, the oldest delegate and the country's most famous statesman. A majority of the delegates were lawyers, and many, such as **JAMES MADISON**, were wealthy landowners. Many notable leaders of the time, however, including **THOMAS JEFFERSON**, who was in France, and **PATRICK HENRY**, did not attend.

The meetings of the convention were closed to the public and to the press. Thus, behind closed doors, the delegates hammered out the eventual form of U.S. government. The agreements reached during the convention exemplified the values of constitutional government. In an atmosphere that combined competitive, lively debate with tolerance and respect for differences of opinion, the delegates reached vital compromises on matters that threatened to divide the still loosely connected union of states. Many different factions opposed one another—small states versus large states, farmers versus businesspeople, North versus South, and slave states versus nonslave states.

The Constitutional Convention occurred in three separate phases. The first, from May 23 to July 26, created the basic features of the national government, including its division into legislative, executive, and judicial branches. During this phase, delegates also arrived at one important compromise between the interests of large and small states. That compromise created a bicameral, or two-chamber, legislature, composed of the House of Representatives and the Senate. During the second phase of the convention, from July 27 to August 6, the five-man Committee of Detail created a rough draft of the Constitution. In the third phase, which lasted from August 6 to September 6, the delegates debated remaining sticking points, particularly relating to the **EXECUTIVE BRANCH** and the means of electing a president. Eventually, they settled on the **ELECTORAL COLLEGE** suggested by Benjamin Franklin.

On September 17, 39 of the 42 delegates present signed the Constitution. Gouverneur Morris, coauthor of the New York State Constitution and a key delegate, summed up the significance of the Constitution that the convention had created when, after affixing his signature to it, he uttered these words: "The moment this plan goes forth, all other considerations will be laid aside and the great question will be: Shall there be a *national* government or not? And this must take place or a general anarchy will be the alternative."

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inspiring example of the potential of constitutional government, causing many other countries and peoples to emulate its provisions.

According to Article VI of the Constitution, the U.S. Constitution is "the supreme Law of the Land." All other laws and judicial decisions are subject to its mandates. The Constitution therefore has higher authority than all other laws in the nation, including statutes and laws passed by Congress and state legislatures. Unlike those other laws, the Constitution may be changed, or amended, only in special ways that reflect its character as a demonstration of the people's will.

The original document of the U.S. Constitution is held at the National Archives, in Washington, D.C.

### History of the Constitution

When the United States declared itself a country separate from Great Britain in 1776, it

# Federalists versus Anti-Federalists

After the Constitution was signed and approved by delegates of the Constitutional Convention of 1787, it had to be ratified by the states. As determined by Article VII of the Constitution, ratification required the approval of nine special state conventions. States that did not ratify the Constitution would not be considered a part of the Union and would be separate countries.

Passage of the Constitution by the states was by no means certain in 1787. Indeed, many people at that time opposed the creation of a federal, or national, government that would have power over the states. These people were called Anti-Federalists. They included primarily farmers and tradesmen and were less likely to be a part of the wealthy elite than were members of their opposition, who called themselves Federalists. The Anti-Federalists believed that each state should have a sovereign, independent government. Their leaders included some of the most influential figures in the nation, including **PATRICK HENRY** and **GEORGE MASON**, leading national figures during the Revolutionary War period. Many Anti-Federalists were local politicians who feared losing power should the Constitution be ratified. As one member of their opposition, **EDMUND RANDOLPH**, said, these politicians "will not cherish the great oak which is to reduce them to paltry shrubs."

The Federalists favored the creation of a strong federal government that would more closely unite the states as one large, continental nation. They tended to come from the wealthier class of merchants and plantation owners. Federalists had been instrumental in the creation of the Constitution, arguing that it was a necessary improvement on the **ARTICLES OF CONFEDERATION**, the country's first attempt at unifying the states in a national political arrangement. Leaders among the Federalists included two men who helped develop the Constitution, **JAMES MADISON** and **ALEXANDER HAMILTON**, and two national heroes whose support would greatly improve the Federalists' prospects for winning, **GEORGE WASHINGTON** and **BENJAMIN FRANKLIN**.

Between September 17, 1787, the day the Constitution was signed by the Constitutional Convention, and May 29, 1790, the day Rhode Island became the thirteenth and last state to ratify the Constitution, the Federalists and Anti-Federalists engaged in a fierce national debate on the merits of the Constitution. This debate occurred in meeting halls, on streets, and on the printed page. Both sides in the argument had a considerable following. Many of the questions raised remain with us today: What is the best form of government? What rights must the government protect? Which government powers should be granted to the states, and which to the federal government?

**The Anti-Federalists** The Anti-Federalists found many problems in the Constitution. They argued that the document would give the country an entirely new and untested form of government. They saw no sense in throwing out the existing government. Instead, they believed that the Federalists had overstated the current problems of the country. They also maintained that the Framers of the Constitution had met as an elitist group under a veil of secrecy and had violated the provisions of the Articles of Confederation in the means selected for ratification of the Constitution.

In making their arguments, the Anti-Federalists often relied on the rhetoric of the Revolutionary War era, which stressed the virtues of local rule and associated centralized power with a tyrannical monarch. Thus, the Anti-Federalists frequently claimed that the Constitution represented a step away from the democratic goals of the American Revolution and toward the twin evils of monarchy and aristocracy. The Anti-Federalists feared that the Constitution gave the president too much power and that the proposed Congress would be too aristocratic in nature, with too few representa-

did not have a written constitution. Instead, the 13 former colonies each had their own sovereignty and separate bodies of law. How the newly formed United States would act as one nation remained uncertain and undefined. The **CONTINENTAL CONGRESS**, the first national legislative body of the new nation, attempted to address this state of affairs by drafting the nation's first constitution, the **ARTICLES OF CONFEDERATION**, which were ratified in 1781, the same year that hostilities in the Revolutionary War against Britain came to an end at Yorktown, Virginia.

The Articles of Confederation proved an ineffective national constitution. That document did not provide for a strong federal, or central, government and allowed each state its own "sovereignty, freedom and independence" (art. II). It also did not provide the federal government power to tax or regulate commerce.

The problems of a weak federal government with insufficient funds for operation became apparent as a number of problems developed in the 1780s: harmful economic warfare between states, inadequate commercial treaties with for-

tives for too many people. They also criticized the Constitution for its lack of a **BILL OF RIGHTS** of the kind that had been passed in England in 1689 to establish and guarantee certain rights of Parliament and of the English people against the king. Moreover, the Anti-Federalists argued that the Constitution would spell an end to all forms of self-rule in the states.

Many Anti-Federalists believed in a type of government that has been described as agrarian republicanism. Such a government is centered on a society of landowning farmers who participate in local politics. **THOMAS JEFFERSON** agreed with this view. He felt that the virtues of democratic freedom were best nurtured in an agrarian, or agricultural, society, and that with increasing urbanization, commercialization, and centralization of power would come a decline in political society and eventual tyranny. Unlike the Anti-Federalists, however, Jefferson supported the Constitution, although rather reluctantly. He was not strongly identified with the Federalist position and would eventually oppose the Federalists as a member of the **DEMOCRATIC-REPUBLICAN PARTY**.

The Anti-Federalists also shared the feeling that so large a country as the United States could not possibly be controlled by one national government. One Pennsylvania Anti-Federalist, who signed his articles "Centinel," declared,

> It is the opinion of the greatest writers, that a very extensive country cannot be governed on democratical principles, on any other plan than a confederation of a number of small republics, possessing all the powers of internal government, but united in the management of their foreign and general concerns.
>
> . . . [A]nything short of despotism could not bind so great a country under one government.

Although the Anti-Federalists were united in their opposition to the Constitution, they did not agree on what form of government made the best alternative to it. Some still believed that the Articles of Confederation could be amended in such a way that they would provide a workable confederation. Some wanted the Union to break up and re-form into three or four different confederacies. Others were even ready to accept the Constitution if it were amended in such a way that the rights of citizens and states would be more fully protected.

**The Federalists** The Federalists focused their arguments on the inadequacies of national government under the Articles of Confederation and on the benefits of national government as formed by the Constitution. They were also much more favorably disposed toward commerce than were the Anti-Federalists, and they argued that a strong central government would foster the commercial growth of the new country. Moreover, the Federalist vision of society was more pluralistic than the Anti-Federalist vision. That is, the Federalists did not see society as made up principally of farmers, as did the Anti-Federalists, but instead viewed it as comprising many different and competing interests and groups, none of which would be completely dominant in a federalist system of government. For this reason, many later scholars have argued that the Federalists were more aware of the economic and social changes then transforming American society.

The most famous example of Federalist doctrine is *The Federalist Papers,* a collection of 85 essays by Alexander Hamilton, James Madison, and **JOHN JAY**. Published in New York newspapers and in two bound volumes distributed during the ratification debate, these essays were signed with the pseudonym Publius, taken from Publius Valerius Poplicola, a man who reputedly saved the ancient Roman republic. *The Federalist Papers* is an important American contribution to political philosophy and remains a classic today. It is also a great and authoritative commentary on the Constitution.

*The Federalist Papers* communicates the central ideas of the Federalists: the benefits of a Union between the states; the problems with the confederation as it stood at the time; the importance of an energetic, effective federal government; and a defense of the republicanism of the proposed Constitution. *The Federalist Papers* makes a persuasive case for the necessity of federal government in preserving order and securing the liberty of a large republic. In doing so, it asserts that a weak union of the states will make the

*(continued)*

eign countries, and the inability to raise an army to oppose British troops in the Northwest Territory. Particularly disturbing for many critics of the Confederation was the lack of a federal response to Shays's Rebellion in 1786–87, an armed uprising by debtor farmers in western Massachusetts directed against courts of law. **GEORGE WASHINGTON** reacted to this lack of response with words that expressed his strong desire for a better union of the states:

> I am mortified beyond expression when I view the clouds that have spread over the brightest morn that ever dawned upon any country. You talk of employing influence to appease the present tumults in Massachusetts. Influence is no government. Let us have a government by which our lives, liberties and properties will be secured; or let us know the worst at once.

Seeking to address the inadequacies of the Articles of Confederation, the Continental Congress called for the Constitutional Convention to create a better basis for union between the states. The convention began in Philadelphia on

## Federalists versus Anti-Federalists (continued)

country more vulnerable to internal and external dissension, including civil war and invasion from foreign powers.

One of the most famous of its essays is *The Federalist,* number 10, by James Madison. In it, Madison addressed the issue of whether or not the republican government created by the Constitution can protect the liberties of its citizens. The problem that Madison saw as most destructive of popular government is what he called faction. A faction, according to Madison, is "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." Factions, Madison added, become especially dangerous when they form a majority of the population.

Madison divided popular government into two types, democratic and republican, and preferred the latter. In a democracy, all citizens participate directly in the decisions of government. In a republic, representatives elected by the people make the decisions of government.

In his intricate argument in *The Federalist,* number 10, Madison contended that a republican government of the kind envisioned by the U.S. Constitution can best solve the problem of faction not by "removing its causes"—which only tyranny can do—but by "controlling its effects." Madison proposed that elected representatives, as opposed to the people as a whole, will be more disposed to consider the national interest ahead of a particular factional interest. He also argued that the nature of an "extensive," or large, republic such as the United States will naturally frustrate the ability of a single faction to advance its own interests ahead of the interests of other citizens. With the huge variety of parties and interests in an extended republic, it becomes "less probable that a majority of the whole will have a common motive to invade the rights of other citizens." Thus, Madison, in contrast to the Anti-Federalists, saw the large size of the United States as a help rather than a hindrance to the cause of liberty.

This is only one of the many points that *The Federalist Papers* makes in favor of the Constitution. However, as brilliant and carefully reasoned as *The Federalist Papers* may be, it probably did not greatly sway opinion toward ratification of the Constitution. The politics of ratification were instead influenced most by direct, face-to-face contact and negotiation. Nevertheless, *The Federalist Papers* aided the Constitution's cause by giving the Constitution's adherents ideas with which to counter their opposition.

**The outcome** Ultimately, the ratification provisions of Article VII of the Constitution, created by the Federalists themselves, were one of the best allies the Federalists had in their attempt to ratify the Constitution. After the Constitution had been created at the Constitutional Convention, Federalist leaders quickly returned to their states to elect Federalist delegates to the state conventions. The Anti-Federalists were not able to muster enough votes in response, though in several states, they nearly defeated the Federalists. By 1790, all thirteen states had ratified the document, giving the Federalists and their Constitution a great victory.

The Anti-Federalist outcry was not without its effects, however. By 1791, in response to Anti-Federalist sentiments, state legislatures voted to add the first ten amendments to the Constitution. Those ten amendments are also called the Bill of Rights, and they have become an important part of the Constitution and its heritage of liberty.

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May 25, 1787, with the original intention of amending the Articles of Confederation. However, the delegates—including **BENJAMIN FRANKLIN, ALEXANDER HAMILTON, JAMES MADISON,** and George Washington—soon planned an entirely new constitution.

Fifty-five delegates representing 12 states (all but Rhode Island) discussed different plans for a federal government. They agreed to create a government consisting of three separate branches—executive, legislative, and judicial—with checks and balances to keep any one branch from becoming too powerful. However, they disagreed strongly over particulars.

For example, two plans for representation in a national legislature competed for the loyalty of delegates. The so-called Virginia Plan, presented by **EDMUND RANDOLPH** and designed by James Madison, called for a bicameral, or two-house, legislature. Representation in the lower house would be proportional to population, and representation in the upper house would be elected by the lower house. Delegates from small states felt that such a plan would give too much power

to large states. They favored the New Jersey Plan, which called for a unicameral legislature with equal representation to each state. Delegates settled the issue by voting for a compromise plan—called the Great Compromise, or the Connecticut Compromise—which established a Senate that gave each state two representatives and a House of Representatives that granted each state a number of representatives proportional to its population.

On September 17, 1787, 39 delegates signed the completed Constitution. In subsequent months, the document went before each of the states for ratification. The ratification process was accompanied by a spirited debate on the merits of the Constitution. The Federalists, on one side of the debate, supported ratification. Federalist leaders Alexander Hamilton, JOHN JAY, and James Madison argued eloquently on behalf of the Constitution in a series of newspaper essays that were published as *The Federalist* papers. Those opposed to the Constitution were called Anti-Federalists.

The ratification process, as contained in Article VII of the Constitution, required that nine of the 13 states approve the Constitution in special conventions. Within ten months after the Constitution was completed, ten states had ratified it. Rhode Island was the last of the 13 states to ratify the Constitution, on May 29, 1790, officially making the Constitution the highest law of the land.

### Contents of the Constitution

The Constitution is divided into seven articles, or divisions, each addressing a different topic. Each article is divided into sections. The Constitution begins with a preamble that states the purpose of the document and the source of its power:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America. The Preamble is not strictly considered a part of the Constitution and is not legally binding on issues relating to either government power or private right (*Jacobson v. Massachusetts,* 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 [1905]).

**Article I** Article I of the Constitution deals with the legislative branch of government. It establishes the bicameral Congress, consisting of a Senate and a House of Representatives, and it delineates the means by which Congressional members shall be elected, the length of their terms, and the requirements for membership, including age. It also sets forth guidelines for legislative procedure, including a requirement that bills of revenue, or taxation, must originate in the House; requirements for the process by which bills pass from Congress to the president; and the procedures in case of presidential VETO, or refusal to sign a bill into law.

Article I, Section 2, prescribes for the means of APPORTIONMENT, or the method by which representatives are allocated to the states. Because political power would inevitably flow to the states with the most congressional representatives, this topic was controversial at the time of the framing of the Constitution. Whereas each state receives two votes in the Senate, the number of representatives each state receives in the House is determined by an enumeration, or census, to be conducted every ten years.

According to this same section, a state's population is to "be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." Thus, an indentured servant was counted as a whole person, and an African American slave was counted as only three-fifths of a person. This last provision arose out of differences between slave and nonslave states. Counting slaves as equal persons would have given southern states a greater number of representatives and more power in Congress. Northern states vigorously opposed such a scheme, and the resulting compromise was called the Three-fifths Compromise.

Article I, Section 8, gives Congress some of its delegated powers, many of them crucial powers that had been denied to the Congress of the Confederation. These include the powers to "lay and collect Taxes," "borrow Money," "coin Money," "establish Post Offices," "declare War," "raise and support Armies," "provide and maintain a Navy," and "make all Laws which shall be necessary and proper for carrying into Execution" all the other powers. This last clause is called the NECESSARY AND PROPER CLAUSE and has been used to justify later expansion of congressional activity not specifically mentioned in the Constitution. The clause has also been called the elastic clause or implied powers clause.

*A depiction of George Washington presiding over the signing of the U.S. Constitution in Philadelphia on September 17, 1787.*
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Article I, Section 8, also gives Congress the power to "regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes." This is called the COMMERCE CLAUSE. And Article I, Section 8, gives Congress power over a district to "become the Seat of the Government of the United States," later established as the District of Columbia, or Washington, D.C.

Article I, Section 9, limits congressional powers, forbidding the passage of laws prohibiting the "Migration or Importation" of persons before the year 1808. This provision was designed as a concession to slaveholding states, ensuring that the practice of SLAVERY would not be challenged for at least 20 years. Section 9 also prohibits Congress from passing any EX POST FACTO, or retroactive, laws, and from granting any "Title of Nobility."

Article I, Section 10, limits the powers of the states, prohibiting, for example, the states to enter into foreign treaties and coin money.

**Article II** Article II concerns the EXECUTIVE BRANCH, or the presidency. Section 1 establishes the ELECTORAL COLLEGE as the means of electing the president, identifies the requirements for holding presidential office, and outlines the procedure in case a president is removed from office or dies. It also contains the oath that the president must take before entering the office, which explicitly requires that the president support the Constitution: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Article II, Section 2, names the president as commander in chief of the armed forces. It also gives the president the power to grant pardons or reprieves; make treaties with foreign powers, subject to approval by the Senate; and appoint ambassadors and Supreme Court justices.

Article II, Section 4, allows for removal and IMPEACHMENT of the president and "all civil Officers of the United States" in cases of conviction for "Treason, BRIBERY, or other High Crimes and Misdemeanors."

**Article III** Article III establishes the SUPREME COURT OF THE UNITED STATES as the highest judicial power. Section 2 defines the jurisdiction of the federal judiciary. Section 3 defines and limits prosecution for TREASON. The power of JUDICIAL REVIEW, whereby the Supreme Court may declare laws and regulations of government to be unconstitutional, is not explicitly declared in the Constitution and was not established by the Supreme Court until the case of MARBURY V. MADISON, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).

**Article IV** Article IV defines the relations between the states. It requires each state to give "full Faith and Credit" to the laws of the other states; establishes that citizens are entitled to the same "Privileges and Immunities," or liberties and rights, as citizens in every other state; provides for EXTRADITION between states of persons charged with crimes; provides for and limits the admission of new states; gives Congress full power over U.S. territories that are not yet states; and guarantees each state "a Republican Form of Government" and protection against invasion or "domestic Violence."

**Article V** Article V sets forth a two-step procedure for amending the Constitution: proposal of amendments, followed by ratification. Amendments may be proposed in two ways: by a two-thirds vote of both houses of Congress or by a special convention called by two-thirds of the state legislatures. Amendments are ratified by one of two methods, determined by Congress: approval of three-fourths of the state legislatures or approval of three-fourths of special state conventions.

**Article VI** Article VI declares the Constitution and the laws and treaties made by the U.S. government under its authority to be "the supreme Law of the Land." This provision is called the SUPREMACY CLAUSE. Article VI also requires that all judges in every state be subject to the provisions of the Constitution, that all state and federal officeholders swear an oath supporting the Constitution, and that "no religious Test shall ever be required as a Qualification to any Office" of the United States.

**Amendments** The Constitution has been amended 26 times. The first ten amendments were ratified in 1791 and are called the BILL OF RIGHTS.

### Principles of the Constitution

The Constitution defined a number of the fundamental and enduring principles of U.S. government, particularly the concepts of SEPARATION OF POWERS, checks and balances, and FEDERALISM.

Separation of powers refers to the division of power between the legislative, executive, and judicial branches of government. Checks and balances refers to a system whereby each branch of government retains some of the powers of the other branches, which it may use to control other branches. Thus, the president may veto bills passed by Congress, the Senate may vote down presidential appointments, and the Supreme Court may strike down laws approved by Congress or regulations put forth by the executive. Such actions keep the separate branches of government in balance and prevent any one of them from becoming too powerful.

The inclusion of the concepts of separation of powers and checks and balances in the Constitution owes much to James Madison, who has been called the Father of the Constitution. The U.S. system of government has often been referred to as the Madisonian Model. According to Madison, a system in which the different elements of government competed against one another, each preventing the other from becoming too powerful, was the best system to prevent the rise of a tyrannical government that would abuse the rights of the people. As he wrote in *The Federalist,* No. 51:

> In framing a government, . . . the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught the necessity of auxiliary precautions. The Constitution, with its separation of powers and checks and balances, provided just such "auxiliary precautions" to be used in controlling government.

The Constitution is also guided by the concept of federalism in the way that it constructs the U.S. government. Federalism is a system in which smaller political entities—such as states, counties, cities, and localities—are united in a larger political organization. Federalism intends to protect the liberties of people in these smaller political units by providing them with a great degree of freedom in governing themselves. The federal, or larger, government is then a limited government that cedes many decision-making responsibilities—including, for example, the creation of most criminal and civil laws, municipal codes, regulations for administering school districts, and the like—to states and localities, while leaving itself other responsibilities. In short, federalism is a partnership in which a central government shares authority and power with regional or local governments.

The U.S. Constitution gives the federal government—made up of the executive, legislative, and judicial branches—power to make decisions regarding such issues as war, national defense, and trade with foreign countries. The federal government also retains the right to

overrule laws or decisions of lower units of government when they are in violation of the Constitution. Thus, for example, the federal government took on responsibilities in the oversight of local school districts after the Supreme Court, in **BROWN V. BOARD OF EDUCATION**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), ruled that segregating children in different public schools by race violated the **EQUAL PROTECTION CLAUSE** of the **FOURTEENTH AMENDMENT** to the Constitution, which says, "No State shall . . . deny to any person . . . the equal protection of the laws."

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Congress of the United States; "Constitution of the United States" (Appendix, Primary Document); Constitutional Amendment; Constitutional Law; Federalist Papers; Full Faith and Credit Clause; Presidential Powers.

## CONSTITUTION PARTY

The Constitution Party was founded in 1992 as the U.S. Taxpayers Party. The man who was most responsible for establishing the party was Howard Phillips, a veteran conservative political activist who had left the **REPUBLICAN PARTY** in 1974 after feeling that the party was insufficiently conservative. Phillips has been the dominant figure in the party since its founding, running as its presidential candidate in 1992, 1996, and 2000.

Phillips had been involved in the Republican Party since his early teens, when he decided to chart a different course. He had served as chairman of the Boston Republican Party, as a staff member at the Republican National Committee in Washington, D.C., and finally as the director of the Office of Economic Opportunity under President **RICHARD NIXON**, with an explicit mandate to dismantle the program. When, because of political constraints, he was not allowed to do this, he quit the administration and established the Conservative Caucus, a **LOBBYING** group that became somewhat influential during the presidency of **RONALD REAGAN**.

Phillips decided that the next step was to form a political party, according to his web site, with "the common goal of limiting the federal government to its Constitutional boundaries and restoring the foundations of civil government back to the fundamental principles our country was founded upon." The party that he formed in 1992 was named the U.S. Taxpayers Party, and befitting its name, it committed itself to stopping all federal expenditures that were not specifically authorized by the U.S. Constitution, and to "restore to the states those powers, programs, and sources of revenue that the federal government has usurped."

Though the original party that Phillips formed had a primarily fiscal purpose, it also took strong conservative stands on social issues, advocating making **ABORTION** illegal in all instances, supporting a **MORATORIUM** on immigration into the United States, and calling for the **ABOLITION** of all **WELFARE** programs. Taking this platform nationwide, Phillips and his running mate, Albion Knight, managed to get on the presidential ballot in 21 states and garnered approximately 40,000 votes in the 1992 presidential campaign. In 1996, Phillips and running mate, Herb Titus, managed to get on the ballot in 39 states and won 182,000 votes.

In 1999, the U.S. Taxpayer Party renamed itself the Constitution Party. With Phillips once again its presidential candidate, this time running with Dr. J. Curtis Frazier, the party was able to gain access to the ballot in 42 states. However, the totals for Phillips this time were lower than he had received in 1996—approximately 98,000

votes. For the 2004 election, the Constitution Party has as its goal to get its presidential ticket on all 50 states.

The Constitution Party does not only run presidential candidates. For the 2002 election, at least 20 states had candidates affiliated with the Constitution Party running for office, for positions ranging from governor and U.S. Senate down to city council and state house. In Nevada alone, the party had affiliated candidates for 30 offices for the 2002 election. In Wisconsin, the party has two affiliated elected officials: an alderman and a county supervisor.

The Constitution Party takes strongly conservative stands on a variety of issues. The party's preamble to its 2000 National Platform views the American political system with a strongly religious bent. "The U.S. Constitution established a Republic under God, rather than a democracy," it states. "Our Republic is a nation governed by a Constitution that is rooted in Biblical law, administered by representatives who are Constitutionally elected by the citizens."

On abortion, the Constitution Party's 2000 platform stated that "*Roe v. Wade* is illegitimate, contrary to the law of the nation's Charter and Constitution. It must be resisted by all civil government officials, federal, state, and local, and by all branches of the government—legislative, executive, and judicial." It argues that abortion should be illegal nationwide.

Regarding the prevention of AIDS, the Constitution Party states in its platform, "Under no circumstances should the federal government continue to subsidize activities which have the effect of encouraging perverted or promiscuous sexual conduct. Criminal penalties should apply to those whose willful acts of omission or commission place members of the public at risk of contracting AIDS or HIV."

For members of Congress, the Constitution Party suggests abolishing federal pay for members of Congress, and abolishing Congressional pensions. It also advocates abolishing the direct election of Senators and returning that function to the state legislatures. It supports repealing all laws that delegate legislative powers to regulatory agencies, bureaucracies, private organizations, the **FEDERAL RESERVE BOARD**, international agencies, the president, and the judiciary.

On national defense, the Constitution Party platform advocates "maintenance of a strong, state-of-the-art military on land, sea, in the air, and in space." It opposes allowing U.S. forces to serve under any foreign flag or command. However, it also opposes "the Presidential assumption of authority to deploy American troops into combat without the consent of Congress."

*Howard Phillips ran as the Constitution Party's candidate in the 1992, 1996, and 2000 presidential elections. He received 98,020 votes in the 2000 election, just under 1 percent of the popular vote.*

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The Constitution Party would like to see the **DEPARTMENT OF EDUCATION** abolished, and it also supports the elimination of the **FOOD AND DRUG ADMINISTRATION**, the Federal Reserve Board, the National Security Administration, and the **INTERNAL REVENUE SERVICE**. It supports voluntary **SOCIAL SECURITY** and would change the tax system to offer an apportioned "state-rate tax" in which the responsibility for covering the cost of federal obligations unmet by a tariff on foreign products will be divided among the several states in accordance with their proportion of the total population of the United States, excluding the District of Columbia. Under this system, if a state contains 10 percent of the nation's citizens, it will be responsible for assuming payment of 10 percent of the annual deficit.

On foreign affairs, The Constitution Party would like to see the United States withdraw from all international monetary and financial institutions and agencies, including the **INTERNATIONAL MONETARY FUND** (IMF), the **WORLD BANK**, the World Trade Organization (WTO), the **NORTH AMERICAN FREE TRADE AGREEMENT** (NAFTA), and the **GENERAL AGREEMENT ON TARIFFS AND TRADE** (GATT). It wants to terminate all programs of foreign aid, whether military or non-military, to any foreign government or to any international organization. It would

withdraw the United States from the North Atlantic Treaty Organisation (NATO), and would withdraw recognition of Communist China, which its platform describes as a murderous and tyrannical regime enslaving the Chinese people.

The Constitution Party refuses to take any federal funds for its presidential campaigns. The party made it clear after the 2000 campaign that it planned to be around for a while. On its web site, it stated, "In light of the widespread need across the country, the party is fully dedicated to building party strength and organization at the State, County and local level."

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CROSS-REFERENCES

Democratic Party; Elections; Republican Party; *Roe v. Wade.*

## CONSTITUTIONAL

*That which is consistent with or dependent upon the fundamental law that defines and establishes government in society and basic principles to which society is to conform.*

A law is constitutional when it does not violate any provision of the U.S. Constitution or any state constitution.

## CONSTITUTIONAL AMENDMENT

*The means by which an alteration to the U.S. Constitution, whether a modification, deletion, or addition, is accomplished.*

Article V of the U.S. Constitution establishes the means for amending that document according to a two-step procedure: proposal of amendments, followed by ratification. Amendments may be proposed in two ways: by a two-thirds vote of both houses of Congress or by a special convention summoned by Congress on the petition of two-thirds (34) of the state legislatures.

In the long history of the U.S. Constitution, over 5,000 amendments have been introduced in Congress. Only 33 of these have been formally proposed by Congress, and none has ever been proposed by a special convention.

No matter which method is used for the proposal of a constitutional amendment, Congress retains the power to decide what method will be used for ratification: approval of three-fourths (38) of the state legislatures, or approval of three-fourths (38) of special state conventions. Congress may also place other restrictions, such as a limited time frame, on ratification.

Of the 33 amendments proposed by Congress, 27 were ratified. Of the amendments ratified, only one—the TWENTY-FIRST AMENDMENT, which repealed a PROHIBITION on alcohol—was ratified by the state convention method. The rest have been ratified by three-fourths of the state legislatures.

The process for amending the Constitution is deliberately difficult. Even when an amendment is proposed by Congress, it has taken, on average, two-and-a-half years for it to be ratified. That difficulty creates stability, with its accompanying advantages and disadvantages. The advantages lie in the fact that the Constitution's provisions are not subject to change according to the whims of a particular moment. The disadvantages inhere in the reality that the Constitution must also adapt and be relevant to a changing society. Given the difficulty of amendment, much of the burden of adapting the Constitution to a changing world has fallen on the shoulders of the Supreme Court and its powers of JUDICIAL REVIEW, which have been described as an informal method of changing the Constitution. However, constitutional amendments may in turn modify or overturn judicial opinion, as was the case with the Eleventh, Thirteenth, Fourteenth, Sixteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments.

Commentators have also pointed out that the amendment process is not a very democratic one. As the constitutional scholar EDWARD S. CORWIN wrote: "A proposed amendment can be added to the Constitution by thirty-eight states containing considerably less than half of the population of the country, or can be defeated by thirteen states containing less than one-twentieth of the population of the country."

### Brief History of Constitutional Amendments

Before the creation of the U.S. Constitution in 1787, constitutional amendments had already been instituted as part of several early state constitutions. The pioneering framers of these state constitutions recognized the need to incorporate an element of flexibility into CONSTITUTIONAL LAW, and they provided for constitutional amendment through the legislature or through special conventions. However, the

first national CONSTITUTION OF THE UNITED STATES, the ARTICLES OF CONFEDERATION, did not have such flexibility. Amendment of that document required a unanimous vote of Congress, nearly impossible to achieve.

The Framers of the U.S. Constitution sought to avoid the inflexibility of the Articles of Confederation. JAMES MADISON, one of the principle architects of the Constitution, argued in *The Federalist Papers* that the new compact's amendment procedures, unlike those of the old Articles, protected "equally against that extreme facility, which would render the Constitution too mutable, and that extreme difficulty, which might perpetuate its discovered faults."

Proving the truth of Madison's contention, the first ten amendments to the Constitution were passed as a package by the first session of Congress in 1791. This group of amendments is called the BILL OF RIGHTS. The Bill of Rights fulfilled a promise that the backers of the Constitution, known as the Federalists, had made during the ratification procedure of the Constitution. It guarantees specific liberties relating to (1) rights of conscience, including the freedoms of speech, press, religion, and peaceable assembly (FIRST AMENDMENT); (2) rights of the accused, including freedom from "unreasonable searches and seizures" (FOURTH AMENDMENT), freedom from compulsory SELF-INCRIMINATION (FIFTH AMENDMENT), the "right to a speedy and public trial, by an impartial jury" and with legal counsel (SIXTH AMENDMENT), and freedom from "excessive bail" and "cruel and unusual punishments" (EIGHTH AMENDMENT); and (3) rights of property, including freedom from seizure of property without "due process of law" (Fifth Amendment).

Subsequent amendments have dealt with many different issues, including the extent of federal judicial jurisdiction (ELEVENTH AMENDMENT [1795]), the method of electing the president (TWELFTH AMENDMENT [1804]), the ABOLITION OF SLAVERY (THIRTEENTH AMENDMENT [1865]), legalization of the INCOME TAX (SIXTEENTH AMENDMENT [1913]), granting women the right to vote (NINETEENTH AMENDMENT [1920]), presidential succession (TWENTY-FIFTH AMENDMENT [1967]), and the voting age (TWENTY-SIXTH AMENDMENT [1971]).

The FOURTEENTH AMENDMENT (1868), which holds that no state shall "deprive any person of life, liberty, or property, without DUE PROCESS OF LAW; nor deny to any person . . . the EQUAL PROTECTION of the laws," has arguably been the most important and far-reaching of all the amendments, particularly with regard to its Due Process and Equal Protection Clauses. Through the Fourteenth Amendment, most of the provisions of the Bill of Rights were eventually applied to the states.

In 1972, the EQUAL RIGHTS AMENDMENT (ERA) was formally proposed by Congress. The ERA, which would have forbidden discrimination on the basis of sex, failed to gain ratification within the seven-year deadline proposed by Congress, even after a 39-month extension through June 30, 1982.

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Constitution of the United States.

## CONSTITUTIONAL LAW

*The written text of the state and federal constitutions. The body of judicial precedent that has gradually developed through a process in which courts interpret, apply, and explain the meaning of particular constitutional provisions and principles during a legal proceeding. Executive, legislative, and judicial actions that conform with the norms prescribed by a constitutional provision.*

The text of the U.S. Constitution is marked by four characteristics: a delegation of power, in which the duties and prerogatives of the executive, legislative, and judicial branches are delineated by express constitutional provisions; a SEPARATION OF POWERS, in which the responsibilities of government are divided and shared among the coordinate branches; a reservation of power, in which the sovereignty of the federal government is qualified by the sovereignty reserved to the state governments; and a limitation of power, in which the prerogatives of the three branches of government are restricted by constitutionally enumerated individual rights, UNENUMERATED RIGHTS derived from sources outside the text of the Constitution, and other constraints inherent in a democratic system where the ultimate source of authority for government action is the consent of the people.

In deciding their cases, courts look to these constitutional provisions and principles for guidance. Once a court has interpreted a constitutional provision in a certain fashion, it becomes a precedent. Under the doctrine of STARE DECISIS, the judicial branch is required to adhere to existing precedent in all future cases presenting analogous factual and legal circumstances, unless it has a compelling reason for deviating from the precedent or overruling it.

A state or federal law is said to be constitutional when it is consistent with the text of a constitutional provision and any relevant judicial interpretations. A law that is inconsistent with either the written text or judicial interpretation of a constitutional provision is unconstitutional.

## The Constitution

The U.S. Constitution is the highest law in the land and the foundation on which all U.S. law has been built. By establishing a structure for the federal government and preserving certain areas of sovereignty for the states, the Constitution has created a system of government that has allowed every area of civil, criminal, and ADMINISTRATIVE LAW to evolve with the needs of society. The federal Constitution became binding on the U.S. people in 1788 when New Hampshire, pursuant to Article VII, became the ninth state to vote for ratification.

The federal Constitution comprises seven articles and 26 amendments. Articles I, II, and III set forth the basic structure of the U.S. government. Article I defines congressional lawmaking powers, Article II sets forth the presidential executive powers, and Article III establishes federal judicial powers. The first ten amendments to the U.S. Constitution, known as the BILL OF RIGHTS, enumerate certain individual liberties that must be protected against government infringement. The rest of the Constitution contains miscellaneous other provisions, many of which are intended to maintain a federalist system of government in which the federal Constitution is the supreme law of the land and the federal government shares sovereignty with the states.

**Article I: The Lawmaking Power** Article I of the Constitution allocates the lawmaking power to Congress. Section 1 provides that "[a]ll legislative Powers herein granted shall be vested in a CONGRESS OF THE UNITED STATES, which shall consist of a Senate and a House of Representatives." Article I also requires that candidates running for the House of Representatives be elected directly by the residents of each state. Originally, Article I endowed the state legislatures with the power to choose members of the Senate. However, the SEVENTEENTH AMENDMENT now requires all senators to be elected directly by the people of their home state.

Section 8 enumerates specific lawmaking powers that Congress may exercise. These include the power to declare war; raise and support armies; provide and maintain a navy; regulate commerce; borrow and coin money; establish and collect taxes; pay debts; establish uniform laws for immigration, naturalization, and BANKRUPTCY; and provide for the common defense and GENERAL WELFARE of the United States. Both the Senate and the House must approve all bills before they are submitted to the president. If the president vetoes a bill, Section 7 authorizes Congress to override the VETO by a two-thirds vote in both houses. Because Congress is a public body, this article requires the House and Senate to record and publish its proceedings, including the votes made by any of its members.

Section 8 also grants Congress the power to pass all laws that are "necessary and proper" to the performance of its legislative function. In MCCULLOCH V. MARYLAND, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819), the Supreme Court broadly interpreted the NECESSARY AND PROPER CLAUSE to grant Congress the implied powers to enact all laws that are useful, convenient, or essential to fulfilling its lawmaking and fiscal responsibilities. THOMAS JEFFERSON had earlier

argued that the Necessary and Proper Clause authorized Congress only to enact measures that are indispensable to the implementation of the enumerated powers.

Congress frequently relies on its authority to regulate commerce as a justification for the legislation it enacts. Section 8 gives Congress the "power to regulate commerce among the several states." In **GIBBONS V. OGDEN**, 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824), the Supreme Court ruled that congressional power to regulate commerce is plenary (complete in itself) and extends to all interstate commerce (commercial activity that concerns more than one state). The Court said that intrastate commerce (commercial activity that is conducted exclusively within one state) is beyond the reach of this congressional power.

Congressional commerce power reached its zenith in *Wickard v. Filburn,* 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942), where the Supreme Court ruled that Congress has authority to regulate a family farm that produces and consumes its own wheat. The Court said that "even if [a farm's] activity be local, and though it may not be regarded as commerce, it may still . . . be reached by Congress, if it exerts a substantial economic effect on interstate commerce . . . irrespective of whether such effect [is] direct or indirect."

This seemingly unfettered power was later limited, in *United States v. Lopez,* 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), where the Supreme Court ruled that mere possession of a gun at or near a school does not substantially affect interstate commerce and may not be regulated at the federal level. Although the interstate commerce power has been given an expansive reading in modern times, the Court said in *Lopez,* the scope of congressional authority in this area

> must be considered in light of our dual system of [state and federal] government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

Article I of the Constitution not only delegates specific powers to Congress, it also forbids Congress to take certain action. Section 9, for example, prohibits Congress from passing bills of attainder and **EX POST FACTO LAWS**. (A *bill of attainder* is a legislative act that imposes punishment on a party without the benefit of a judicial proceeding. An *ex post facto* law makes criminal or punishes conduct that was not illegal at the time it occurred.) Section 9 further prohibits Congress from suspending **HABEAS CORPUS** (a citizen's right to protection against illegal imprisonment) except as may be necessary to preserve national security in time of rebellion or invasion. Although the Constitution delegated this power to Congress, President **ABRAHAM LINCOLN** suspended habeas corpus during the Civil War without congressional assent. Article I also restricts the power of state legislatures, such as the power to make treaties, alliances, and confederations, are also prohibited by Article I.

**Article II: The Executive Power** Congressional power is not absolute. The Framers of the Constitution were familiar with the abuses of absolute power. In the century preceding the American Revolution, Parliament acquired unlimited sovereignty. This arrangement replaced an earlier system of government in which the English monarchy ruled with a tyrannical scepter. In the United States, the Framers sought to create a system of checks and balances in which the executive and legislative branches would share power with each other and with the judiciary. In this light, many of the powers delegated to the president must be viewed in conjunction with the powers delegated to the coordinate branches of government.

Article II provides that "[t]he executive Power shall be vested in a President of the United States . . . [who] shall hold . . . Office during the Term of four Years . . . together with the Vice President." The **ELECTORAL COLLEGE**, which provides the method by which the president and vice president are elected, derives its constitutional authority from Article II as well as from the Twelfth and Twenty-third Amendments. The **TWENTY-SECOND AMENDMENT** limits the president to two terms in office, and the Twentieth and Twenty-fifth Amendments set forth the order of succession for presidents who are unable to begin their term or continue in office.

Article II, Section 2, makes the president the commander in chief of the armed forces. Yet only Congress has the power to declare war. Between these two powers lies a gray area in which presidents have exercised the prerogative to commit U.S. troops to foreign military excursions without congressional approval. The U.S. involvement in the **VIETNAM WAR** resulted from

one such exercise of power. In response to these executive maneuvers, Congress passed the War Powers Resolution (Pub. L. No. 93-148 [ codified at 50 U.S.C.A. §§ 1541 et seq.]), which restricts the president's authority to involve the United States in foreign hostilities for more than 60 days without the approval of Congress.

The president also shares power with Congress in other areas under Article II. Section 2 authorizes the president to make treaties with foreign governments, but only with the advice and consent of the Senate. The president must also seek senatorial approval when appointing ambassadors; federal judges, including Supreme Court justices; and other public ministers.

Section 4 states that the president may be removed from office only through IMPEACHMENT for "Treason, Bribery, or other High Crimes and Misdemeanors." The House is responsible for drafting ARTICLES OF IMPEACHMENT (accusations of misconduct), and the Senate is responsible for holding an impeachment trial. A two-thirds vote in the Senate is required for conviction.

The United States revisited the issue of what constitutes a *High Crime and Misdemeanor* during the impeachment proceedings against President WILLIAM JEFFERSON CLINTON. In 1998 the U.S. House of Representatives approved two articles of impeachment against President Clinton, accusing the president of having committed the crimes of perjury and OBSTRUCTION OF JUSTICE to conceal his relationship with a White-House intern named Monica Lewinsky. The impeachment trial was then held before the Senate from January 7, 1999, through February 12, 1999.

Clinton supporters generally opposed impeachment on grounds that concealing a private, extramarital affair should not constitute an impeachable high crime or misdemeanor. Clinton detractors generally supported impeachment on grounds that perjury and obstruction of justice are felony-level offenses that render a chief executive who is guilty of such offenses incompetent to discharge the duties of his office. Clinton supporters contended that past presidents had concealed their extramarital affairs without it rising to the level of an impeachable offense, while Clinton detractors countered by arguing that the president was not being impeached for having an extramarital affair but for committing crimes to conceal it.

Scholars debated the merits of the Clinton impeachment proceedings as well. However, constitutional historians on both sides of the debate generally agreed that the phrase *High Crimes and Misdemeanors* had no settled usage at the time the Constitution was ratified by the states, except that the Founding Fathers rejected proposals that would have allowed for impeachment in cases of *maladministration, malpractice,* or *neglect of duty.* The Founding Fathers favored a chief executive who was subject to constitutional checks and balances, but not one who was weak and easy to remove by political opponents. In the end, the Senate voted to acquit President Clinton. Neither article of impeachment was supported by even a majority of votes, far short of the 67 votes required to convict.

Although the president participates in the lawmaking process by preparing budgets for congressional review, recommending legislation on certain subjects, and signing and vetoing bills passed by both houses, no formal lawmaking powers are specifically delegated to the EXECUTIVE BRANCH. The president nonetheless "legislates" by issuing executive orders, decrees, and proclamations. No express provision of the Constitution delineates the parameters of this executive lawmaking power. However, in YOUNGSTOWN SHEET & TUBE CO. V. SAWYER, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952), the Supreme Court set forth some guidelines. Known as the *Steel Seizure* case, *Youngstown* examined the issue of whether the president of the United States could order the government seizure of steel mills that were crippled by a labor strike during the KOREAN WAR. In holding the EXECUTIVE ORDER unconstitutional, the Supreme Court ruled that "the President's power to see that the laws are faithfully executed refutes the idea that [the president] is to be a lawmaker."

Justice ROBERT H. JACKSON, in a concurring opinion, set forth an analysis by which the Supreme Court has subsequently evaluated the constitutionality of presidential action. Jackson opined that PRESIDENTIAL POWERS are not fixed, but fluctuate according to "their disjunction or conjunction with those of Congress." When the president acts pursuant to congressional authorization, the action carries maximum authority. When the executive acts contrary to congressional will, presidential powers are at their lowest ebb. Between these positions, when a president faces an issue on which Congress is silent, the executive acts in "a zone of twilight in which [the president] and Congress may have concurrent authority, or in which the

distribution is uncertain." In such instances, Jackson reasoned, courts must balance the interests of the parties and of society to determine if a particular executive action has violated the separation of powers.

Another area that has stirred debate over the appropriate separation of powers involves the delegation of legislative, executive, and judicial authority to federal administrative bodies. Since the mid-1930s, the United States has seen an enormous growth in the administrative state. Administrative agencies have been created to establish, evaluate, and apply rules and policies over a diverse area of law, including taxes, SECURITIES, transportation, antitrust, the environment, and employment relations. Federal administrative bodies are created by statute, and Congress has the authority to prescribe the qualifications for administrative officials who are appointed by the president, courts of law, and heads of government departments.

The NATIONAL LABOR RELATIONS BOARD (NLRB) demonstrates the overlapping powers that may be exercised by an administrative body. The NLRB is empowered by statute to issue regulations that govern union activities. Such regulations are virtually indistinguishable from legislative enactments and are considered no less authoritative. The NLRB also adjudicates disputes between unions and employers, with an administrative law judge presiding over such cases. Finally, the NLRB is endowed with the power to make prosecutorial decisions, a power traditionally exercised by the executive branch. Although successful challenges have been lodged against the delegation of certain powers to federal administrative bodies, by and large, the Supreme Court has permitted administrative officials and agencies to play all three government roles.

**Article III: The Judicial Power** Article III provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Pursuant to this constitutional authorization, Congress has created a federal judicial system comprising a lower tier of federal trial courts, known as the U.S. district courts, and an intermediate tier of federal appellate courts, known as the U.S. COURTS OF APPEALS. At least one federal district court is located in each of the 50 states.

The federal appellate courts consist of 11 numbered circuit courts plus the Court of Appeals for the District of Columbia and the Court of Appeals for the Federal Circuit. Each federal appellate court has jurisdiction over a certain geographic area and may only hear appeals from federal district courts within that jurisdiction. Specialized courts of appeals have been created to hear appeals concerning such disputes as international trade (the court of International Trade) and military matters (the Court of Military Appeals). Parties aggrieved by a decision made by any of these federal appellate courts may appeal their case to the Supreme Court, which has the ultimate judicial power. Cases that originate in state court and present a federal question may also be appealed to the U.S. Supreme Court.

The Supreme Court is not required to hear every case that is appealed to it; instead, the Court has broad discretion to accept or decline cases that are appealed by a lower court. Only four justices need to vote in favor of hearing an appeal before a writ of certiorari will be granted. Certiorari is a device that allows the Supreme Court to call up the records of a lower court and review them in order to identify important legal questions that need to be resolved. Granting "cert" has no bearing on the Court's subsequent resolution of a case. The Court is asked to review about 5,000 cases a year and grants certiorari in less than 250 of them.

Federal courts do not have jurisdiction to hear every kind of lawsuit. Article III lists certain types of cases that may be heard by the federal judiciary, including cases arising under the Constitution; under treaties with foreign nations; and under federal laws passed by Congress, the executive, or an administrative body. Federal courts also have jurisdiction to hear lawsuits between two or more states, between citizens of different states, and between a citizen or government of one state and a citizen or government of a foreign country.

The Supreme Court has original jurisdiction over cases involving ambassadors and other public ministers as well as cases in which a state government is a party. Original jurisdiction gives a court the power to hear a lawsuit from the beginning, rather than on appeal. This grant of original jurisdiction does not preclude Congress from giving original jurisdiction to other courts over the same matters. In fact, Congress has granted concurrent original jurisdiction to the federal district courts for all controversies except those between state governments.

Nowhere in Article III, or elsewhere in the Constitution, is the power of the federal judiciary defined. Historically, the role of English and U.S. courts was to interpret and apply the laws passed by the other two branches of government. At the close of the eighteenth century, it was unclear whether that role included the prerogative of JUDICIAL REVIEW, which is the authority of state and federal courts to review and invalidate laws passed by legislatures that violate a constitutional provision or principle.

In MARBURY V. MADISON, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), the U.S. Supreme Court clarified this AMBIGUITY by pronouncing that it "is emphatically the duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret the rule. If two laws conflict with each other, the court must decide on the operation of each." Because the federal Constitution is the supreme law of the land, the Court reasoned, any laws that violate the Constitution must be declared void. It was the essence of judicial duty, the Court intimated, for judges to evaluate the constitutionality of a particular act, because judges are not elected and are therefore independent from the political considerations that may have motivated the popular branches of government to enact that law. The Court reasoned that the executive and legislative branches could not be impartial arbiters of their own laws.

### The Bill of Rights

When the U.S. Constitution was ratified by the states in 1789, it contained no bill of rights. During the last days of the Constitutional Convention, one of the delegates proposed that a bill of rights be included, but this proposal was voted down by every state. Many Framers of the Constitution believed that there was no need for a bill of rights because the powers of Congress and of the president were explicitly enumerated and limited, and no provision of the Constitution authorized any branch of government to invade the personal liberties of U.S. citizens.

Other Framers were concerned that any list of rights would be hopelessly incomplete and that the government would deny any liberties left unmentioned. This concern was ultimately expressed by the NINTH AMENDMENT to the U.S. Constitution, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Ninth Amendment was later relied on by the Supreme Court to recognize the unenumerated right of married adults to use BIRTH CONTROL (GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 [1965]).

By 1791, the need for a bill of rights was viewed in a different light. The residents of the states soon realized that government by the will of the majority not only achieved democracy, it sometimes achieved majoritarian tyranny. The system of checks and balances created by the original Constitution was insufficient to avoid the pitfalls of absolute power endemic to the English form of government that the American colonists had overthrown. A bill of rights was needed to serve as a bulwark between individual liberty and ARBITRARY government power.

As with each of the 26 amendments to the Constitution, the Bill of Rights was proposed by a two-thirds majority in both houses of Congress and ratified by three-fourths of the states as required by Article V. The Bill of Rights, which comprises the first ten amendments to the Constitution, contains both procedural and substantive protections. In some instances, these protections guarantee the right to do, say, or believe something without government interference. In other instances, these protections guarantee the right to refrain from doing, saying, or believing something without government coercion.

The first three amendments provide substantive protections. The FIRST AMENDMENT guarantees FREEDOM OF SPEECH, press, religion, assembly, and petition. The Free Speech Clause protects "thoughts that we hate" (*United States v. Schwimmer,* 279 U.S. 644, 49 S. Ct. 448, 73 L. Ed. 889 [1929] [Holmes J., dissenting]). Such thoughts can be expressed verbally, as in a racially derogatory remark, or in writing, as in a Marxist-Leninist pamphlet denouncing the U.S. government, and still receive First Amendment protection. The First Amendment also protects certain symbolic expression, such as burning the U.S. flag in protest over government policy (TEXAS V. JOHNSON, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 [1989]). The Supreme Court has ruled that no political speech may be curtailed by the government unless it presents a CLEAR AND PRESENT DANGER of imminent lawless action (*Brandenburg v. Ohio,* 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 [1969]).

The Free Press Clause prohibits the government from censoring news stories in the print

and electronic media merely because the content is critical of the government. However, the Founding Fathers did not agree on the definition of *censorship*.

A majority of the Founding Fathers adhered to the English COMMON LAW view articulated in the eighteenth century by SIR WILLIAM BLACKSTONE, who equated a free press with the doctrine of no PRIOR RESTRAINT. This doctrine provides that a publication cannot be suppressed by the government before it is released to the public. Nor can publication of something be conditioned upon judicial approval before its release.

While the English common law prohibited prior restraint, it permitted prosecution for libelous and seditious material after publication. Thus, the law protected vituperative political publications only insofar as the author was prepared to serve time in jail or pay a fine for offending the sensibilities of the wrong person.

A minority of Founding Fathers adhered to the view articulated by JAMES MADISON, who said that

> The security of the freedom of the press requires that it should be exempt, not only from previous restraint of the executive, as in Great Britain; but from legislative restraint also; and this exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws.

Madison was concerned that authors would be deterred from writing articles assailing governmental activity if the government was permitted to prosecute them following release of their works to the public.

In NEAR V. MINNESOTA, 283 U.S. 697, 51 S. Ct 625, 75 L. Ed. 2d 1357 (1931), the Supreme Court incorporated the doctrine of no prior restraint in First Amendment JURISPRUDENCE, when it ruled that under the Free Press Clause there is a constitutional presumption against prior restraint which may not be overcome unless the government can demonstrate that CENSORSHIP is necessary to prevent a *clear and present danger* of a national security breach. In NEW YORK TIMES V. UNITED STATES, 403 U.S. 713 92 S.Ct 2140, 29 L. Ed.2d 822 (1971) the Court applied this presumption against the United States JUSTICE DEPARTMENT which had sought an INJUNCTION to prevent the publication of classified material revealing the secrecy and deception behind American involvement in the Vietnam War. If this classified material, also known as the Pentagon Papers, had threatened American troops by disclosing their location or movement, the Court said, publication would not have been permitted.

The Supreme Court's interpretation of the Free Press Clause has also gone a long way toward adopting Madison's sentiments against subsequent punishments for publishers of materials criticizing public officials. In a series of cases the Supreme Court has held that the First Amendment protects media outlets from being held liable in civil court for money damages merely because a published story contains an inaccuracy or falsehood about a public official. The Supreme Court has ruled that the media are immune from LIBEL actions brought by public officials unless the plaintiff can demonstrate that a particular story was printed or aired with knowledge that it was false or in reckless disregard of its veracity, a principle that has become known as the "actual-malice" standard (NEW YORK TIMES V. SULLIVAN, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 [1964]). Finally, the media cannot be punished with civil or criminal sanctions for publishing pornographic material unless that material rises to the level of OBSCENITY (MILLER V. CALIFORNIA, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 [1973]).

The First Amendment contains two religion clauses. One guarantees the free exercise of religion. In most instances, the Free Exercise Clause prohibits the government from compelling a person to act contrary to his or her religious beliefs. For example, in *Wisconsin v. Yoder,* 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972), the Supreme Court held that a state cannot compel Amish parents to send their children to school past the eighth grade when doing so would violate their religious faith. However, in *Reynolds v. United States,* 8 U.S. 145, 25 L. Ed. 244 (1879), the Supreme Court refused to exempt Mormons from a federal law against bigamy, reasoning that POLYGAMY was more a religious practice than a religious belief.

The other religion clause in the First Amendment prohibits the government from establishing religion. The Framers drafted the Establishment Clause to prevent the federal government from passing legislation that would create an official national church in the United States as Great Britain had done with the Anglican Church in England. Since the early 1970s, the Supreme Court has applied the Establishment Clause more broadly to strike down certain forms of government assistance to religion, such as financial aid. Such assistance will be

invalidated unless the government demonstrates that it has a secular purpose with a primary effect that neither advances nor inhibits religion nor fosters excessive entanglement between government and religion (*Lemon v. Kurtzman,* 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 [1971]).

The Second and Third Amendments also provide substantive protections. The SECOND AMENDMENT acknowledges that a "well regulated Militia" is "necessary to the security of a free State," and guarantees "the right of the people to keep and to bear Arms." The right to bear arms is not absolute. It restricts only federal laws regulating the use and possession of firearms and has no applicability to state governments (*Presser v. Illinois,* 116 U.S. 252, 6 S. Ct. 580, 29 L. Ed. 615 [1886]). In addition, Congress may prohibit the possession or use of a firearm that lacks any reasonable relationship to the preservation or efficiency of a well-regulated militia (*United States v. Miller,* 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206 [1939]). Federal courts have interpreted the term *militia* to include only military groups that are organized by the state governments, such as the NATIONAL GUARD, and to exclude private military groups that are not associated with the government, such as the Kansas POSSE COMITATUS (*United States v. Oakes,* 564 F.2d 384 [10th Cir. 1977]).

The THIRD AMENDMENT, which is an outgrowth of the American Revolution, prohibits the government from compelling homeowners to house soldiers without their consent. Although the Supreme Court has never decided a case that directly involved the forced quartering of soldiers, the Court of Appeals for the Second Circuit ruled that the Third Amendment's protections apply to the National Guard (*Engblom v. Carey,* 724 F.2d 28 [2d Cir. 1982]).

The Fourth, Fifth, Sixth, Seventh, and Eighth Amendments contain a mixture of procedural and substantive rights. Most of the procedural rights pertain to CRIMINAL LAW. As such, these rights offer protection against unconstitutional actions taken by government bodies and officials, such as law enforcement agencies and agents. These rights do not offer protection against action taken by private citizens unaffiliated with the government. For example, the FOURTH AMENDMENT prohibits the government from performing unreasonable SEARCHES AND SEIZURES and from issuing warrants on less than PROBABLE CAUSE. The procedural requirements of the Fourth Amendment protect homes, papers, and other personal belongings in which an individual can demonstrate a "reasonable expectation of privacy" (*Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 [1967]).

The FIFTH AMENDMENT offers procedural safeguards to criminal defendants and suspects. It provides that no person shall be held to answer for a capital or infamous offense unless first indicted by a GRAND JURY. The Fifth Amendment further safeguards defendants from being "twice put in jeopardy of life or limb" for the "same offence." It also prohibits the government from compelling someone to incriminate himself or herself. The right to be apprised of many of these procedural protections during custodial police interrogations, through what are known as *Miranda* warnings, is derived from the Fifth Amendment (MIRANDA V. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 [1966]).

The SIXTH AMENDMENT provides a panoply of procedural protections for criminal defendants. Under the Sixth Amendment, defendants are entitled to notice of any criminal accusations against them. The Sixth Amendment guarantees the right to a jury trial for all crimes more serious than a petty offense. The Sixth Amendment guarantees the right to be represented by an attorney during a criminal proceeding and entitles indigent defendants to a state-appointed lawyer when they are charged with a misdemeanor or more serious offense (GIDEON V. WAINWRIGHT, 372 U.S. 355, 83 S. Ct. 792, 9 L. Ed. 2d 799 [1963]). A defendant's right to a speedy and public trial in which she or he can cross-examine adverse witnesses and subpoena favorable witnesses is also protected by the Sixth Amendment.

The protections offered by the EIGHTH AMENDMENT are more substantive. This amendment forbids the government from inflicting a punishment that is "cruel and unusual." The Eighth Amendment also prohibits the government from setting bail in an excessive amount and from imposing a fine that is disproportionate to the seriousness of the crime. Under the CRUEL AND UNUSUAL PUNISHMENTS CLAUSE, the Supreme Court has ruled that it is not necessarily unconstitutional for the government to execute a mentally retarded person (*Penry v. Lynaugh,* 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 [1989]) or a juvenile above the age of 15 (*Stanford v. Kentucky,* 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 [1989]).

Some of the protections offered by the Bill of Rights apply to civil proceedings. For example,

the SEVENTH AMENDMENT guarantees the right to a jury trial in civil "Suits at common law." In condemnation proceedings, the Fifth Amendment recognizes the power of EMINENT DOMAIN, by which the government may appropriate a piece of property owned by a private citizen and convert it to a public use. Concomitantly, the Fifth Amendment guarantees the right to "just compensation" for private landowners when the government exercises its power of eminent domain.

### Due Process Clauses

Of all the liberties protected by the Bill of Rights, none has been a greater source of constitutional litigation than DUE PROCESS. The Fifth Amendment provides that no person shall be deprived of "life, liberty, or property, without due process of law." The Supreme Court has interpreted this provision to regulate actions taken by only the federal government, not the state governments (BARRON V. BALTIMORE, 32 U.S. [7 Pet.] 243, 8 L. Ed. 672 [1833]).

Broadly speaking, the Due Process Clause of the Fifth Amendment guarantees litigants the right to be informed of any legal action being taken against them, and the opportunity to be heard during a fair proceeding in which they may assert relevant claims and defenses. Specifically, many procedural protections have been recognized by the Supreme Court as essential to the concept of due process. For example, in criminal cases, the Due Process Clause requires that the prosecution prove its case BEYOND A REASONABLE DOUBT before a conviction may be obtained. In civil cases, the Due Process Clause prohibits a court in one state from asserting jurisdiction over a resident in another state unless that resident has sufficient contacts with the jurisdiction in which that court sits.

The FOURTEENTH AMENDMENT also contains a Due Process Clause. Whereas the Due Process Clause of the Fifth Amendment regulates only the federal government, the Due Process Clause of the Fourteenth Amendment regulates actions taken by state governments. During the twentieth century, the Supreme Court interpreted the Due Process Clause of the Fourteenth Amendment to make most of the liberties enumerated in the Bill of Rights applicable to the states.

Through a series of decisions, the Supreme Court has ruled that certain liberties guaranteed in the Bill of Rights are too fundamental to be denied protection by the state governments. Only the right to bear arms, the right to be indicted by a grand jury, the right to a jury trial in civil cases, the right against excessive bail and fines, and the right against involuntary quartering of soldiers have not been made applicable to the states. Because these constitutional guarantees remain inapplicable to state governments, the Supreme Court is said to have selectively incorporated the Bill of Rights into the Due Process Clause of the Fourteenth Amendment.

The Supreme Court has interpreted the Due Process Clauses to have a substantive content in addition to their procedural content. Procedurally, due process prescribes the manner in which the government may deprive persons of their life, liberty, or property. In short, the procedural guarantees of due process entitle litigants to fair process.

Substantively, the Due Process Clauses of the Fifth and Fourteenth Amendments protect persons from legislation infringing on certain individual rights. Such individual rights may be expressly enumerated in a constitutional provision, as are the liberties that are enumerated in the Bill of Rights and have been incorporated into the Due Process Clause of the Fourteenth Amendment. Since DRED SCOTT V. SANDFORD, 60 U.S. (19 How.) 393, 15 L. Ed. 691 [1856]), where the Supreme Court recognized a slave owner's property interest in his slaves, the Due Process Clauses have been interpreted to protect other liberties that are not expressly enumerated in any provision of the federal Constitution.

These unenumerated rights have been derived from Supreme Court precedent, common law, history, and moral philosophy. Such rights, the Court said, "represent the very essence of ordered liberty" and embody "principles of justice so rooted in the traditions and conscience of our people as to be ranked fundamental" (*Palko v. Connecticut,* 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 [1937]). Since the mid-1960s, the Supreme Court has relied on the concept of SUBSTANTIVE DUE PROCESS to establish a general right to privacy that protects a woman's decision to terminate her pregnancy under certain circumstances (ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 [1973]).

### Equal Protection Clause

The EQUAL PROTECTION CLAUSE of the Fourteenth Amendment has been another

bountiful source of litigation. Ratified during the aftermath of the Civil War along with the THIRTEENTH AMENDMENT, which outlawed SLAVERY, and the FIFTEENTH AMENDMENT, which protected the right to vote from discriminatory infringement, the Fourteenth Amendment was designed to promote racial equality.

Until the middle of the twentieth century, the Supreme Court interpreted the Equal Protection Clause to permit state-implemented racial SEGREGATION. Then, in BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the Supreme Court declared that the institution of segregation is inherently unequal. Almost immediately after issuing the *Brown* decision, the Court began striking down state-implemented racial segregation at a host of public accommodations, including golf courses, beaches, and public schools. Pursuant to the Fourteenth Amendment, Congress has passed a number of CIVIL RIGHTS statutes that protect African Americans and other racial groups from discrimination in the private sector. Title VII of the Civil Rights Act of 1964 (Pub. L. No. 88-352 [42 U.S.C.A. § 2000e et seq.]), for example, prohibits RACIAL DISCRIMINATION in private employment.

Persons of any race, creed, or ethnic origin may bring a claim against a state government for discriminating against them in violation of the Fourteenth Amendment. The Supreme Court has also relied on the Equal Protection Clause to invalidate state laws that discriminate on the basis of gender, state residency, and national citizenship, among other legislative classifications. In 1996 the U.S. Supreme Court struck down a Colorado constitutional amendment that discriminated against homosexuals, because it served no rational purpose (ROMER V. EVANS, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 [1996]). The CIVIL RIGHTS ACT of 1871 (17 Stat. 13 [42 U.S.C.A. § 1983]) authorizes individuals to enforce the provisions of the Fourteenth Amendment against state governments.

Members of other minority groups, such as persons who are elderly or disabled, are protected from discrimination in both the public and private sectors by federal laws that Congress has passed pursuant to its constitutionally delegated powers. The Americans with Disabilities Act (Pub. L. No. 101-336 [ codified at 42 U.S.C.A. §§ 12111 et seq.]) and the Age Discrimination in Employment Act (Pub. L. No. 90-202 [ codified at 29 U.S.C.A. § 621 et seq.]) are two such laws.

## Supremacy Clause

The SUPREMACY CLAUSE in Article VI makes the Constitution, federal laws, and treaties "the supreme Law of the Land." Under this clause, state courts may not interpret the Bill of Rights, or any other constitutional provision, differently than does the Supreme Court. States may not provide less protection for individual liberties than is provided under the federal Constitution. However, state courts do retain the power to afford their residents greater protection for certain liberties established by their own state constitution than is afforded by the federal Constitution (*Prune Yard Shopping Center v. Robins,* 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 [1980]).

## Other Constitutional Provisions

The Nineteenth, Twenty-fourth, and Twenty-sixth Amendments provide that the right to vote shall not be denied to a U.S. citizen on account of gender, age (so long as the citizen is at least eighteen years old), or the failure to pay a poll tax. The TWENTY-FIRST AMENDMENT repeals the EIGHTEENTH AMENDMENT, which banned the manufacture, sale, and transportation of intoxicating liquors, otherwise known as PROHIBITION. The SIXTEENTH AMENDMENT establishes the congressional power to lay and collect income taxes.

The Tenth and Eleventh Amendments attempt to preserve the federalist system created by the Constitution, whereby the state and federal governments share sovereignty and jurisdiction. Recognizing the threat presented by an omnipotent federal government, the TENTH AMENDMENT reserves to the states all powers not delegated to the federal government. The text of the ELEVENTH AMENDMENT restricts federal courts from hearing lawsuits against state governments brought by the residents of another state or the citizens of a foreign country. The Supreme Court has also interpreted the Eleventh Amendment to restrict federal courts from hearing lawsuits instituted by residents of the state being sued and lawsuits initiated by the governments of foreign countries.

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### CROSS-REFERENCES

Abortion; Administrative Law and Procedure; Age Discrimination; Commerce Clause; Congress of the United States;

Constitution of the United States; Criminal Procedure; Custodial Interrogation; Disability Discrimination; Double Jeopardy; Federal Budget; Federalism; Freedom of the Press; Gay and Lesbian Rights; Incorporation Doctrine; Right to Counsel; Sex Discrimination; Speedy Trial.

## CONSTRUCTION

*The process by which the meaning of an ambiguous provision of a statute, written document, or oral agreement is determined.*

A judge usually makes a construction of an unclear term in a document at issue in a case that involves a dispute as to its legal significance. The judge examines the circumstances surrounding the provision, laws, other writings, verbal agreements dealing with the same subject matter, and the probable purpose of the unclear phrase in order to conclude the proper meaning of such words. Once the judge has done so, the court will enforce the words as construed. However, for language that is plain and clear, there cannot be a construction.

When ambiguous language is given its exact and technical meaning, and no other equitable considerations or reasonable implications are made, there has been a strict or literal construction of the unclear term.

A liberal or equitable construction permits a term to be reasonably and fairly evaluated so as to implement the object and purpose for which the document is designed. This does not mean that the words will be strained beyond their natural or customary meanings.

A rule of construction is a principle that either governs the effect of the ascertained intention of a document or agreement containing an ambiguous term or establishes what a court should do if the intention is neither express nor implied. A regular pattern of decisions concerning the application of a particular provision of a statute is a rule of construction that governs how the text is to be applied in similar cases.

The constitutionality of an ambiguous statute is a QUESTION OF LAW and a matter of construction within the province of the court. The meaning of the language of the statute must be determined in light of its objectives, purposes, and practical effect as a whole. If a statute is so ambiguous that a judge cannot make a reasonable construction of its disputed provisions, and a reasonable person could not determine from reading it what the law orders or prohibits, it is VOID FOR VAGUENESS because it violates the guarantee of DUE PROCESS OF LAW.

Some states have codified terms that had in the past been subject to repeated judicial construction. The need for court proceedings to determine the real meaning of some terms has been eliminated by enactment of statutes that give specific meanings—such as specifying that "calendar day" means a twenty-four hour period starting on midnight of one date and ending midnight of the next day.

CROSS-REFERENCES

Canons of Construction; Judicial Action.

## CONSTRUCTIVE

*That which exists, not in fact, but as a result of the operation of law. That which takes on a character as a consequence of the way it is treated by a rule or policy of law, as opposed to its actual character.*

For example, *constructive knowledge* is notice of a fact that a person is presumed by law to have, regardless of whether he or she actually does, since such knowledge is obtainable by the exercise of reasonable care.

For example, possession of the key to a safe-deposit box is *constructive possession* of the contents of the box since the key gives its holder power and control over the contents.

## CONSTRUCTIVE DESERTION

*The end of marital* COHABITATION *brought about when one spouse, by his or her conduct, forces the other to leave home.*

Constructive desertion takes place when a husband or wife intentionally forces the innocent spouse to leave the marital dwelling by acting in an offensive manner. The misconduct must be so extensive as to make marital relations insufferable.

Authority is divided on what constitutes justification for leaving the marital abode. The narrow view is that only conduct that would be grounds for DIVORCE is adequate. In application of this view, cruelty, nonsupport, ADULTERY, or other divorce grounds must be proved before the innocence of the fleeing spouse can be established. Stringent requirements limit the doctrine; in some states a mere unjustified refusal to have sexual relations with one's spouse for a certain length of time constitutes constructive desertion. Similarly, if one spouse communicates venereal disease to the mate, this might constitute constructive desertion. The prolonged nagging or drunkenness of a spouse is

not ordinarily viewed as misconduct that would justify marital dissolution based upon constructive desertion.

## CONSTRUCTIVE EVICTION

*The disturbance, by a landlord, of a tenant's possession of premises that the landlord makes uninhabitable and unsuitable for the purposes for which they were leased, causing the tenant to surrender possession.*

Constructive eviction arises when a landlord does not actually evict but does something that renders the premises untenantable. This might occur, for example, where a tenant vacates an apartment because a landlord turns off the heat or water.

The term is also used to mean the breach of a COVENANT of WARRANTY and QUIET ENJOYMENT of real property, which prevents a purchaser from obtaining possession of property due to the existence of a paramount claim of title.

CROSS-REFERENCES

Landlord and Tenant.

## CONSTRUCTIVE TRUST

*A relationship by which a person who has obtained title to property has an equitable duty to transfer it to another, to whom it rightfully belongs, on the basis that the acquisition or retention of it is wrongful and would unjustly enrich the person if he or she were allowed to retain it.*

A constructive trust does not arise because of the expressed intent of a settlor, one who establishes a trust. It is created by a court whenever title to property is held by a person who, in fairness, should not be permitted to retain it. It is frequently based on disloyalty or other breach of trust by an express trustee (the person appointed or required by law to execute a trust), and it is also created where no express trust is created but property is obtained or retained by other UNCONSCIONABLE conduct. The court employs the constructive trust as a remedial device to compel the defendant to convey title to the property to the plaintiff. It treats the defendant as if he or she had been an express trustee from the date of the unlawful holding of the property in question. A constructive trust is not a trust, in the true meaning of the word, in which the trustee is to have duties of administration enduring for a substantial period of time, but rather it is a passive, temporary arrangement, in which the trustee's sole duty is to transfer the title and possession to the beneficiary.

The right to a constructive trust is generally an alternative remedy. The aggrieved party can choose between a trust and other relief at law, such as recovery of money wrongfully taken, but cannot obtain both types of relief.

A constructive trust, as with an express trust, must cover specific property. It cannot be predicated on mere possession of property, or on a breach of contract where no ownership of property is involved.

The court decides what acts are required of the plaintiff as conditions precedent to the securing of a decree (a court order that determines the rights of all the parties to the suit). For example, if the defendant has acquired title to property of the plaintiff by means of FRAUD, the plaintiff will be required to return any consideration (inducement to enter into a contract) received from the defendant. In addition, if the defendant has, during his or her period of wrongful retention of the property, spent money for the preservation or protection of the property, such as by paying taxes or the principal or interest on a mortgage, reimbursement might be required of the plaintiff. If the defendant has made improvements or performed services in managing the property, some courts require the plaintiff to compensate the defendant to the extent of the benefits inuring to the plaintiff through the imposition of a constructive trust, particularly in cases in which the defendant was not an intentional wrongdoer, but rather acted under mistake or ignorance.

The decree establishing the constructive trust requires the defendant to deliver possession and convey title to the property and to pay to the plaintiff profits received or rental value during the period of wrongful holding and otherwise to adjust the equities of the parties after taking an accounting.

### Mistake, Undue Influence, or Duress

If by MISTAKE OF FACT the plaintiff conveys title to the wrong person, or the wrong property is conveyed to the intended person, or the plaintiff is otherwise induced to act by reason of mistake, the transfer can be set aside. An alternative is to obtain a decree which reforms the instrument of conveyance so that it expresses the intent of the parties. In these cases, the conveyance is not void (without legal effect). The plaintiff actually intends a transfer, but the cir-

cumstances which cause the plaintiff's mind to operate are such that the court considers it unfair for the transferee to retain the property.

The same doctrine applies where the plaintiff is induced to make the conveyance through the exertion of UNDUE INFLUENCE (conduct by a person that dominates and destroys the free will of another). If the conduct of the defendant goes beyond persuading the plaintiff to convey—if it encompasses violence, threats of violence or restraint, or other injury—there is an even stronger case for charging the transferee as a constructive trustee on the ground of duress.

### Fraudulent Misrepresentation or Concealment

The courts hold in numerous cases that a transferee who uses fraud to obtain the transfer of property is a constructive trustee. Such situations might involve an affirmative assertion of the truth of a material fact or concealment of the existence of a material fact when there was a duty to speak. The state of the defendant's mind is a material fact and might be a basis for a constructive trust—such as when the defendant promises to use the property for certain purposes beneficial to the plaintiff but intends at the time of the transfer to retain it for himself or herself. The defrauded party can also proceed on the theory of setting aside the transfer, which is substantially equivalent to obtaining a constructive trust, or the defrauded party can sue for damages.

### Property Obtained by Homicide

If a person obtains property through a will or intestacy by wrongfully and intentionally killing the owner, a constructive trust can be decreed as to the property obtained. The beneficiaries of the constructive trust imposed on the murderer are those persons who would have taken by intestacy or will or otherwise from the murdered person, as if the murderer had predeceased the victim.

Statutes in many states prevent the murderer from acquiring or retaining the property of the victim. They vary from state to state, but most require that the excluded person must be convicted of wrongfully and intentionally causing the death of the property owner. None applies to negligent killing. It is not necessary for the murderer to have committed the crime for the purpose of acquiring the property. The statutes apply if the murderer commits suicide immediately after killing the property holder. They do not apply, however, to an insane murderer or to one who kills in SELF-DEFENSE.

### Gift by Will or Intestacy Based upon Broken Promise

If a property owner is induced to make an absolute gift to the defendant by will due to reliance on an oral promise by the defendant to apply all or part of the property to the use of another designated person and, after the death of the testator, the defendant refuses to do as promised, he or she can be made a constructive trustee. The same result will hold when the property owner is induced to die intestate on the faith of an oral agreement by his or her heir or next of kin.

If the recipient by will or intestacy promises to hold for others to be later described by the property owner and no description is communicated to the recipient until after the death of the property owner, the recipient will hold as a trustee of a RESULTING TRUST for the heirs, next of kin, or residuary legatees or devisees of the property owner. No trust will be established for the intended beneficiaries but such persons might take the property as the recipients of the resulting trust.

If a will provides that a gift is to be made to a recipient as trustee, but no description of the beneficiary appears in the will, and the recipient verbally agrees to hold it for beneficiaries who are orally or otherwise informally described to the recipient, the successors of the decedent can enforce a resulting trust in their favor against the recipient. The courts rely on the argument that a property owner who wishes the property to pass to others than the heirs at his or her death must give it to those others by a formally executed will.

### Breach of Express Trust by Disloyalty

If a trustee of an express trust acquires property by a breach of trust—for example, by a violation of an obligation to be loyal to the beneficiary—a constructive trust can be imposed on such property. The constructive trust can be applied not only to the property originally obtained by disloyalty, but also to its products and proceeds. It can be used against persons who succeed the disloyal trustee as the owner of the products of the disloyalty if they are not bona fide purchasers.

It is immaterial that the trustee acted innocently because of ignorance or in the belief that the conduct was not disloyal. It is unnecessary to

prove that the acquisition of the property by disloyalty damaged the beneficiary, since it is sufficient to show the receipt by the trustee of property obtained by breach of his or her duty.

In addition, the duty and the remedy exist with respect to persons who are in a confidential relation. This term has no exact definition but entails dominance and superiority of one individual over another because of such elements as a close familiar relationship, an enduring practice of entrusting business matters to the knowledge of a confidant, and differences in age, health, and education.

### Breach of Duty in Direct Dealing with Beneficiary

The trustee has a duty to make a complete disclosure and to treat the beneficiary with the utmost fairness when there is a direct conveyance, contract, or other transaction between them. This duty extends to everyone who acts as a fiduciary and to persons in a confidential relation, similar to the duty of loyalty in the administration of a trust. It is a duty arising from the superiority and dominance of the fiduciary and the danger of overreaching or undue influence.

The trustee or other representative can be declared a constructive trustee of any property obtained through a transaction where there was a breach of the duty to make full disclosure and to act fairly. Such clearly inequitable conduct justifies the imposition of a constructive trust. If, therefore, a trustee purchases the interest of one of the beneficiaries under the trust for an inadequate price, without revealing facts that the beneficiary did not know concerning the value of the interest being sold, and later the trustee realizes a profit on the transaction, a constructive trust can be imposed to remove this gain from the trustee.

### Statute of Frauds

The STATUTE OF FRAUDS, an old ENGLISH LAW adopted in the United States that requires certain contracts to be in writing, does not apply to constructive trusts. The courts create constructive trusts, whether the evidence on which they are based is oral or written and whether the property involved is real or personal.

However, public policy favors the security of titles to property. Therefore, reluctant to disturb record title or other apparent ownership, courts require the plaintiff to prove his or her case for a constructive trust by clear and convincing evidence. In nearly all suits to establish constructive trusts, the defendant appears to be the complete owner of the property, by virtue of deeds, wills, records, or otherwise. As a result, the courts reject the plaintiff's claim if the evidence is vague, conflicting, or dubious.

**Breach of Unenforceable Contract to Convey** Ordinarily the breach of an oral contract to convey realty by deed or will is not a basis for charging the defendant as a constructive trustee, where the defendant employs the statute of frauds as a defense and refuses to perform the contract. The statute provides that contracts to convey interests in land are not enforceable when they are not in writing and no memorandum was signed by the seller. To decree a constructive trust in such a case would usually constitute an evasion of the statute. The plaintiff can be protected adequately by an award of damages that, in effect, mandates a return of any consideration paid for the promise to convey.

With respect to the breach of some contracts, however, the constructive trust is occasionally used to prevent UNJUST ENRICHMENT, as in the case of a contract to leave property by will in return for personal services that have been rendered, the value of which is not computable in money.

**Breach of Oral Trust of Realty by Retention of Property** When the plaintiff conveys land by absolute deed (a document that transfers real property without restriction) based on an oral promise by the defendant to hold it in trust for the plaintiff or for a third person, and the defendant retains the property for his or her own benefit, refusing to execute the trust because it violates the statute of frauds, the majority of courts refuse to make the defendant a constructive trustee for the plaintiff or for the intended beneficiary of the oral trust. The courts reason that to construct a trust in such a case would circumvent the purpose of the statute of frauds.

A minority of courts grant the decree for a constructive trust for the intended beneficiary of the oral trust because they view it as dishonest for the defendant to withhold the land from the intended beneficiary by employing the statute.

If the defendant obtains the land by MISREPRESENTATION of the state of his or her mind as to intended performance of the oral trust or other false statement and later refuses to perform the trust, the court will enforce a constructive trust against him or her.

If the defendant was in a confidential or fiduciary relation with the plaintiff at the time of

the deed and the oral promise to hold in trust, the defendant is usually made a constructive trustee for the intended beneficiary of the oral trust because the wrong entailed a violation of the relationship by repudiation of the promise.

### Product of Theft

The remedy of constructive trust applies to PERSONAL PROPERTY that is stolen or misappropriated and used to purchase other property in the name of the perpetrator. A constructive trust in favor of the aggrieved party can be imposed on such property, so long as it remains in the hands of the wrongdoer or any person to whom the wrongdoer transfers it who is not a bona fide purchaser. In order to facilitate the unimpeded flow of commercial transactions, bona fide purchasers are not subject to the application of a constructive trust.

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CROSS-REFERENCES

Bona Fide; Clear and Convincing Proof; Fiduciary; Misrepresentation; Personal Property; Unjust Enrichment.

## CONSULAR COURT

*A tribunal convened by public officials who reside in a foreign country to protect the interests of their country for the settlement of civil cases based upon situations that happened in the foreign nation and which is held pursuant to authority granted by treaty.*

A consular court exercises criminal jurisdiction in some instances, but its determinations are reviewable by the courts of the home government. The last of the U.S. consular courts in Morocco was abolished in 1956.

## CONSULAR LAW SOCIETY

Founded in 1940, the Consular Law Society is an association of lawyers serving consulates and/or embassies and other attorneys specializing in related international affairs. Its activities include the presentation of awards and the publication of occasional papers. Membership is by invitation.

Committees of the society include Diplomatic and Consular Practice; Governments in Exile; HUMAN RIGHTS; Immigration and Nationality; Immunities; International Companies; International and Comparative Law; International Double Taxation; International Copyright Relations; INTERNATIONAL LAW in U.S. Courts; Neutrality; Private Claims Against Governments; Recognition of States; and Treaties.

The society meets annually.

## CONSULS

*Public officials stationed in a foreign country who are responsible for developing and securing the economic interests of their government and safeguarding the welfare of their government's citizens who might be traveling or residing within their jurisdiction.*

CROSS-REFERENCES

Ambassadors and Consuls.

## CONSUMER

*An individual who purchases and uses products and services in contradistinction to manufacturers who produce the goods or services and wholesalers or retailers who distribute and sell them. A member of the general category of persons who are protected by state and federal laws regulating price policies, financing practices, quality of goods and services, credit reporting, debt collection, and other trade practices of U.S. commerce. A purchaser of a product or service who has a legal right to enforce any implied or express warranties pertaining to the item against the manufacturer who has introduced the goods or services into the marketplace or the seller who has made them a term of the sale.*

## CONSUMER CREDIT

*Short-term loans made to enable people to purchase goods or services primarily for personal, family, or household purposes.*

Consumer credit transactions can be classified into several different classes.

*Installment credit* involves credit that is repaid by the borrower in several periodic payments; loans repaid in one lump sum are classified as *noninstallment credit.* Installment credit has expanded in popularity, with an increasing number of consumers buying goods on credit in order to spread repayment of the purchase price and the interest owed on the principal borrowed over an extended time.

### Originator and Holder

The originator of credit is the person or company who originally extended the credit, while the holder is the individual or business who obtained the debt at a discounted price in order to collect payments at a subsequent time. Auto dealers are credit originators at the time a consumer purchases an auto on credit, but many loans are subsequently assigned by them to banks or sales finance companies, which become credit holders.

*Commercial banks* buy many consumer installment loans from car dealers and department stores and also participate in all aspects of consumer credit transactions both as originators and holders. The portion of the consumer credit market attributable to banks has greatly increased due in large part to widespread use of bank credit cards.

In addition, two types of finance companies are active in the consumer credit industry. The first type is the *small loan company,* which has contact with consumers as originators and makes loans to them directly. The other type is the *sales finance company,* which does not deal directly with consumers; it purchases and holds consumer installment debts related to the sale of durable goods on time. The distinction between the two decreases in importance as consumer finance companies diversify and engage in business on both levels.

### Vendor and Lender

The law might regard credit differently, depending on whether it is offered by a vendor (seller). When an appliance store gives credit to customers who buy such items as washing machines and refrigerators and pay for them over a certain period of time, this action is known as *vendor credit.* When a consumer borrows funds from a finance company to pay for appliances, this action is known as *lender credit,* since the finance company lends but does not sell.

Some states exempt vendor credit transactions from the provisions of state USURY laws. A vendor or a lender can charge the consumer interest (a fee for the use over time of borrowed money). In the past, usury statutes restricting the legal interest rate have ordinarily been applied only to lender credit. The difference in the treatment of lender credit and vendor credit is based upon the assumption made by law that vendors are able to adjust their prices to allow for the period during which they await payment. If, for example, the vendor's *time price* was excessive in that it allowed for a high interest rate, then the consumer could opt for payment of the *cash price.* Courts believe that competitive pricing will prevent vendors from charging too much interest when they extend credit. It is the seller's right to determine how to reduce the time price to encourage consumers to pay cash for goods.

Some courts have found since 1970, however, that these principles have no application to revolving charge accounts because department stores do not charge consumers less for paying for items in cash. There is one uniform purchase price, regardless of whether the sale is a credit or cash transaction. Both finance charges and tax are computed on the basis of the cash price.

In cases where courts have indicated that state usury laws must necessarily be applied in the *vendor credit* extended through revolving charge account customers, state legislatures have enacted statutes to increase the legal rate of interest that may be charged on such accounts. Most consumer credit cannot exist within the usury law limits; therefore, the pattern has been to enact laws that permit special higher finance rates for vendor credit to consumers.

### Licensing Creditors

Banks, savings and loan associations, and finance companies ordinarily must be licensed under state or federal statute. Credit companies that purchase retail installment debts from sellers are also subject to governmental licensing regulations.

When the licensing requirement is primarily a revenue-raising device, potential licensees often need only file the appropriate forms and pay the required fee to obtain a license. However, when the licensing provisions require the applicant to be reputable and reliable, the public is protected only if the licensing agency has the energy and resources to investigate the applicant's qualifications.

### Credit Reports

When a consumer makes an application for credit, the creditor must decide whether he or she is a good risk. Most creditors regularly order a credit report on an applicant rather than undertake a costly investigation on their own. Files are retained by two types of credit agencies.

**Credit Bureaus** Credit bureaus publish reports which are primarily used by merchants who are attempting to decide whether to allow consumers to purchase merchandise financed by credit that will be repaid on time. Such reports ordinarily disclose financial information, such as the location and size of an individual's bank accounts, charge accounts, and other debts and the person's bill-paying habits, income, occupation, marital status, and lawsuits.

Credit bureaus supply such information to a group of subscribers who, in exchange, provide them with information for their files. All the information obtained is filed in case it is requested by someone in the future. Nonsubscribers can ordinarily obtain information through the payment of a fee.

A majority of credit bureaus are members of the Associated Credit Bureaus of America, which regulates public information for them. It keeps members apprised of financial transactions that might cause people to be unable to meet their obligations.

**Credit Reporting Bureaus** Credit reporting bureaus formulate financial reports on individuals for purposes not directly related to the extension of credit. Such reports are used by employers to evaluate job applicants, by insurance companies to assess the risk in relation to a prospective policy buyer, and by landlords to avoid renting to tenants likely to cause damage to the property or disturb other tenants. Bureaus of this type compile data and provide it upon request to interested parties.

These reports contain personal information about the subjects and their families that is obtained from interviews with neighbors, associates, and co-workers. Information is kept for possible future investigation requests.

**Problems** In the late 1960s, Congress investigated abuses in the collection and dissemination of information by credit bureaus and determined that such bureaus compiled files on more than 50 percent of the people in the United States. These information files, however, frequently contain inaccurate, misleading, or irrelevant facts and were not kept confidential. The most frequent error was to confuse two individuals having the same name or similar names. The possibility of committing this error increased as the area covered by the bureau became larger.

**Supervision** Many states have enacted statutes to regulate the business practices of credit bureaus. However, the need for national uniformity led to the enactment of federal laws dealing with consumer credit information.

The FAIR CREDIT REPORTING ACT, which is title VI of the CONSUMER CREDIT PROTECTION ACT (15 U.S.C.A. § 1601 et seq.), was enacted in 1970. This congressional enactment affects and regulates businesses that regularly obtain consumer credit information for other businesses, either for payment or in a cooperative exchange.

The law covers any report by an agency if it is related to a consumer's creditworthiness, credit standing or capacity, character, general reputation, personal characteristics, or mode of living. Further, the law applies to any such report when employed or expected to be used for evaluating a consumer for one of four purposes: credit or insurance for personal, family, or household use; employment; licenses to operate particular businesses or practice a profession; and any other legitimate business need.

The requirements of the Fair Credit Reporting Act affect (1) the credit bureau; (2) the businesses that use the credit reports compiled by credit bureaus; (3) the rights of consumers who are the subjects of such reports; and (4) how the consumer can enforce his or her rights when errors are discovered in such reports.

Credit bureaus are required to have *standard procedures* for determining and updating the accuracy of the information in their files. There is a seven-year limit on the information on file, except where the file discloses that the party was bankrupt within a period of ten years. Data relating to an individual's character, reputation, or lifestyle that are obtained through personal interviews with neighbors and friends cannot remain in a file unless it is verified every three months.

While the Fair Credit Reporting Act does not prohibit the collection and compilation of information unrelated to finance—such as appearance, political tenets, and sexual orientation—such information must be accurate and not obsolete. The law does, however, restrict

credit bureaus to furnishing reports for reasons of credit, insurance, employment, obtaining a government license or other benefit, or other legitimate business needs related to business transactions with the consumer. Credit bureaus are required to investigate new clients to ascertain that they are using reports solely for one of these five permitted purposes. In addition, prospective clients are required to file a statement with bureaus certifying the purpose for which the reports will be used and agreeing not to use them for any other purposes.

Consumers are legally entitled to ascertain that no inaccurate or obsolete information is kept in files on them and to be notified when a creditor relies upon a report issued by a credit bureau, so the consumer can see the type of information kept on file and correct all mistakes in it.

A consumer, however, has no right to examine the actual file kept on him or her by a credit reporting agency. Anyone who has been refused credit on the basis of a report can discover the nature and substance of all but medical information contained therein, as well as the source of the information, except investigations based on comment from neighbors and associates. The consumer can also find out the identity of anyone who has received the report for employment purposes during the last two years or any other purpose during the last six months.

A consumer who discovers inaccurate or misleading information in his or her file can request that the agency reinvestigate his or her credit background and submit a brief statement which either explains or corrects the information. The agency must include such information in the consumer's file and notify recent users of the changes in the consumer's file upon the consumer's request.

Federal agencies, such as the FEDERAL TRADE COMMISSION (FTC), can issue orders for the enforcement of this law. Officers and employees of the credit bureau who willfully or intentionally violate this law are subject to criminal prosecution. Both a fine and imprisonment for each violation can be imposed upon conviction.

A credit bureau that fails to treat a consumer in the manner required by this law can be sued by the consumer who must prove that the credit bureau or the business that used the report did not properly maintain reasonable procedures to ensure compliance with the law. The consumer must also show that such failure to maintain was negligent or careless and that he or she incurred personal or financial injury from this failure.

### Credit Discrimination

Discriminatory practices in the granting of credit led to the enactment of legislation to ensure that all qualified applicants have the same opportunity to receive credit.

**Sex** In the past, women were systematically denied credit regardless of whether they would be able to repay their loans. It was not uncommon for bankers to refuse to consider a married woman's income when a couple applied for a loan or a mortgage. Banks made the assumption that a woman of childbearing age was an automatic credit risk.

Single women had greater difficulty than single men in obtaining credit, particularly home mortgages. Creditors were also reluctant to extend credit to married women in their own names and refused to count a woman's income when calculating the creditworthiness of a married couple. Women also had a difficult time reestablishing credit upon DIVORCE or widowhood.

In 1974, Congress enacted the Federal Equal Credit Opportunity Act (15 U.S.C.A. § 1691 et seq.), which prohibits credit discrimination based not only upon sex and marital status, but also upon race, religion, and national origin. It has, however, very detailed prohibitions against discrimination based upon sex and marital status. Creditors are not permitted to (1) assign a value to sex or marital status in calculating an applicant's creditworthiness; (2) assign a value to having a telephone in the name of the applicant; (3) question a married couple's childbearing plan; (4) alter the terms of credit or require a reapplication when there is a change in an individual's marital status; (5) refuse to consider the total income of the couple who are making the application; (6) delay action on an application or refuse to consider it; or (7) discourage an individual from making an application for credit.

Federal agencies such as the FTC can guard against violations of this law through the issuance of restraining orders. In addition, consumers can commence an action against creditors who have denied them an equal opportunity to acquire credit. Where credit discrimination is prohibited by a state law also, the consumer can choose whether to pursue the state or the federal remedy.

**Other Types of Discrimination** Subsequent amendments to the Equal Credit Opportunity Act were concerned with *race* and *age discrimination.* The act provides that a creditor can take an applicant's age into consideration only in a situation where older people are given a preference or where a specific type of credit is allowed someone because that person is elderly. The law also requires that public assistance benefits be counted by creditors as a portion of an applicant's income. The race of an applicant cannot be used as a ground for the denial of credit.

**Disclosure of Terms** Until the late 1960s, there was considerable variety as to the information given consumers about their credit arrangements. The greatest lack of uniformity was in the statement of the rate of interest charged. Some creditors did not disclose the rate of interest, telling consumers only the number and amount of monthly payments. Those creditors that did state the rate of interest stated it in a variety of ways.

In response, Congress enacted the TRUTH IN LENDING ACT as Title I of the Consumer Credit Protection Act of 1968. The law is essentially a disclosure statute, offering little substantive protection to consumers. A creditor is free to impose any charges for credit permitted by state law. In addition, the statute does not restrict or confine the terms and conditions of the extension of credit. All that the Truth-in-Lending Act requires is that the consumer be informed of the terms and conditions of the credit transaction.

Under the statute and FTC regulations, the creditor must describe the credit terms clearly and conspicuously in a disclosure statement. At the time of disclosure, the creditor must furnish the customer with a copy of the statement. The disclosure requirements of the act are detailed and complex, because they deal with many types of credit transactions. In general, the creditor must disclose the amount financed, the annual percentage rate, and any finance charges associated with the extension of credit to the consumer. Any charges payable in the event of late payment must also be disclosed.

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CROSS-REFERENCES

Restraining Order; Truth in Lending Act.

## CONSUMER CREDIT PROTECTION ACT

The Consumer Credit Protection Act (15 U.S.C.A. § 1601 et seq. [1972]) is federal statute designed to protect borrowers of money by mandating complete disclosure of the terms and conditions of finance charges in transactions; by limiting the GARNISHMENT of wages; and by regulating the use of charge accounts.

The Consumer Credit Protection Act was the first general federal CONSUMER PROTECTION legislation. Title I of this law, known as the TRUTH-IN-LENDING ACT (15 U.S.C.A. § 1601 et seq. [1968]), requires that the terms in CONSUMER CREDIT transactions be fully explained to the prospective debtors. Title VI of the Consumer Credit Protection Act, known as the FAIR CREDIT REPORTING ACT (15 U.S.C.A. § 1601 et seq. [1978]), applies to businesses that regularly obtain consumer credit information for other businesses. Its purpose is to ensure that consumer reporting activities are conducted in a manner that is fair and equitable to the affected consumer.

Whereas the Consumer Credit Protection Act is federal law, states have also passed many statutes regulating consumer credit. For example, the UNIFORM CONSUMER CREDIT CODE (UCCC) is an initiative that was drafted by the National Conference of Commissioners on Uniform State Laws in 1968 to help provide consistency among the variety of consumer credit laws that exist throughout state jurisdictions. The purpose of the UCCC is threefold: to protect consumers obtaining credit to finance transactions; to ensure that adequate credit is provided; and to generally govern the credit industry. As of 2003, the UCCC had been adopted in only seven states and Guam. Many states, however, continue to enact legislation that would provide

consumer debtors similar protections contained in the provisions of the UCCC.

## CONSUMER FRAUD

*Deceptive practices that result in financial or other losses for consumers in the course of seemingly legitimate business transactions.*

Many think that consumer fraud only affects unwitting people who are all too willing to be duped. In truth, even the most savvy customer can fall victim to FRAUD. It may be as simple and seemingly innocuous as getting stuck paying a higher rate for a magazine subscription, or it may be as devastating as having one's identity stolen.

According to the FEDERAL TRADE COMMISSION (FTC), consumers reported $343 million in losses from fraud in 2002. In addition to those who are unwittingly defrauded, there are a number of consumers who share at least a degree of culpability in their losses. People who try to save money on their income taxes by purchasing a new SOCIAL SECURITY number or wage statement may become victims of fraud, but chances are that they understood that their actions were illegal, which makes them guilty of fraud as well.

Consumer fraud can take place in person, by telephone or mail, or over the INTERNET. As technology continues to improve, INTERNET FRAUD has risen faster than other types. With or without technology, however, consumers can protect themselves against fraud by following a few simple, common-sense measures such as not revealing personal information to strangers.

Following are some of the most common types of consumer fraud.

**Consumer Fraud Complaints, by Consumer Age, in 2002[a]**

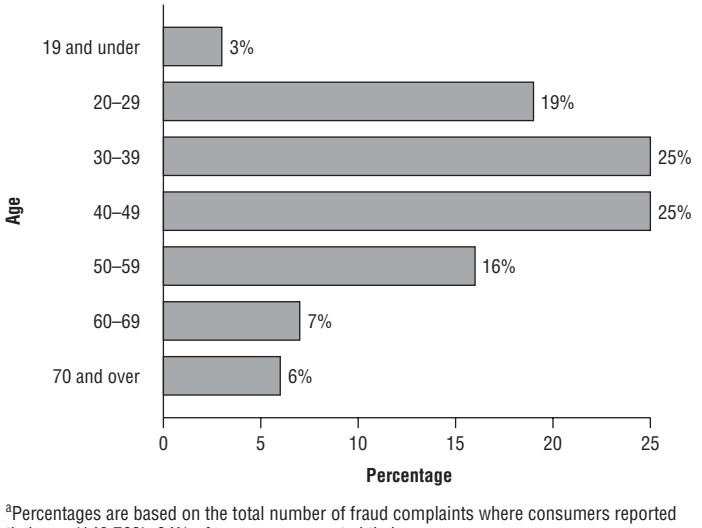


[a]Percentages are based on the total number of fraud complaints where consumers reported their age (140,763). 64% of consumers reported their age.

SOURCE: Federal Trade Commission, *Consumer Sentinel Fraud Complaints*.

### Identity Theft

IDENTITY THEFT accounts for more than 40 percent of all fraud complaints reported to the FTC. All identity theft is serious, but even in its mildest form it can involve the theft of a consumer's long-distance access code. The thief sells the code to individuals who use the code to charge long-distance calls all over the world. In its most serious form, a thief gains access to the victim's Social Security number. With this number, and some other basic information, a thief can create a double of the victim. The victim's information can be used to make purchases, to rent an apartment, or to take out bank loans. Often, victims of identity theft first find out their misfortune when they receive credit card bills totaling thousands of dollars, even though they had neither opened the accounts nor made the purchases.

Identity thieves can gain access to their victim's information by copying it off of forms (for example, if they work in an office where such information is kept), by stealing a wallet or personal papers, or by otherwise exploiting a careless individual. (Fraud experts warn people never to give their Social Security or bank account numbers to someone who has phoned them, even from a seemingly legitimate business.) Often identity thieves work in large rings that span several states, which makes it difficult to track them down. Thus, even when a theft ring is cracked, others quickly crop up to take its place.

### Telephone and Mail Solicitations

To most people, junk mail and telemarketer calls are merely a NUISANCE, but unscrupulous companies can use both the mail and the telephone to part innocent (and not merely gullible) people from their money. Applications for credit cards or personal loans promise easy credit, but the fine print promises exorbitant interest rates. Sweepstakes promising millions in winnings await the lucky recipient, who often feels compelled to send an order for several magazines along with the prize receipt. Charities use telemarketing and mass mailings to ask for

donations; while some of those charities are established and legitimate, others are dubious. Many phony charities assume names that sound like better-known organizations in the hope of fooling consumers.

Every day, people are contacted by telephone and mail with phony offers. Despite warnings from consumer-advocacy groups, people continue to provide credit card numbers, bank information, and even Social Security numbers to those whom they do not know. The elderly are a common target, in part because once they find that they have been defrauded they refuse to report the crime because they are embarrassed. Groups such as the Federal Trade Commission, the National Consumers League (NCL), and Consumers Union provide information to the general public in an effort to curtail fraud.

In 2002, several states initiated "do-not-call" programs that allow people to store their telephone numbers in a centralized database that telemarketers are prohibited from calling. A telemarketer who calls a prohibited number faces stiff fines.

### Internet Fraud

The growth of the Internet as a communication tool has also meant its growth as an instrument of fraud. Internet fraud has grown so rapidly in recent years that FEDERAL BUREAU OF INVESTIGATION (FBI) and the National White Collar Crime Center launched the Internet Fraud Complaint Center, which compiles data and offers tips on ways to avoid being defrauded. In 2001, Internet fraud accounted for $17.8 million in losses, with a median loss of $435 per victim.

The most common type of fraud, accounting for nearly two thirds of all reported fraud, is Internet-auction fraud. Although there are a number of legitimate online auction houses, there are many that are simply scams. Consumers who purchase items on these sites find that the goods they bid for never existed, or that the goods are stolen, or that the seller has added numerous hidden charges. The seller might even act as a shill by placing false bids. (Some consumers jump on the fraud bandwagon, as well, by using aliases to place multiple phony high bids in order to deter low or moderate bidders.)

The Internet is also home to credit card scams, investment scams, and home-improvement scams. These may appear on web sites or they may be sent in the form of *unsolicited commercial e-mail* (UCE), better known as "spam." One common spam message is the "Nigerian Letter," in which a person who claims to be a former high official, usually from the Nigerian government, seeks help in converting millions of dollars in funds. The consumer is asked to provide bank account information so that the funds can be transferred to that account.

### Income Tax Fraud

The INTERNAL REVENUE SERVICE warns taxpayers to be on guard against tax scams that can result in loss of funds and, in some cases, legal difficulties. Some con artists make money at their victims' expense by claiming that they can help to secure tax refunds for their clients. Invariably, the clients must pay a fee up-front. One example of this is a company that claims it can help taxpayers find legal loopholes that will allow them to stop paying taxes. Another is a company that offers to help people submit claims for nonexistent credits. (Some African-Americans have been targeted by a "reparations" scam in which they are told they can apply for a slavery-reparations credit simply by paying a fee. No such credit exists.)

If the taxpayer knowingly engages in a scheme that is illegal (for example, signing up for a new Social Security number), he or she may face fines or imprisonment.

### Combating Fraud

Education is key to combating consumer fraud. The FTC, FBI, NCL, Consumers Union, and Direct Marketing Association all work to educate the public and to identify fraudulent businesses. The Better Business Bureau is also a useful tool for consumers who wish to find out information about specific companies.

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CROSS-REFERENCES

False Advertising; Federal Trade Commission; Internet.

## CONSUMER PRICE INDEX

*A computation made and issued monthly by the Bureau of Labor Statistics of the federal* LABOR DEPARTMENT *that attempts to track the price level of designated goods and services purchased by the average consumer.*

The consumer price index (CPI) is an indicator of the rate of inflation in the economy because it measures changes in the cost of maintaining a particular standard of living.

## CONSUMER PRODUCT SAFETY COMMISSION

The CONSUMER PRODUCT SAFETY COMMISSION was established to protect the public against unreasonable risks of injury from consumer products; to assist consumers in evaluating the comparative safety of consumer products; to develop uniform safety standards for consumer products and to minimize conflicting state and local regulations; and to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries. The commission is an independent federal regulatory agency, established by the act of October 27, 1972 (86 Stat. 1207). It makes information available to the public through its Web site, <http://www.cpsc.gov>.

The commission has primary responsibility for establishing mandatory product-safety standards in order to reduce the unreasonable risk of injury to consumers from consumer products. It also has the authority to ban hazardous consumer products. The Consumer Product Safety Act (15 U.S.C. 2051 et seq. [1972]) authorizes the commission to conduct extensive research on consumer product standards, to engage in broad consumer, industry information, and education programs, and to establish a comprehensive injury-information clearinghouse.

In addition to the authority created by the act, the commission assumes responsibility for the Flammable Fabrics Act (67 Stat. 111; 15 U.S.C. 1191), the Poison Prevention Packaging Act (84 Stat. 1670), the Hazardous Substances Act (74 Stat. 372; 15 U.S.C. 1261), and the act of August 2, 1956 (70 Stat. 953; 15 U.S.C. 1211), which prohibits the transportation of refrigerators without door-safety devices. The act also provides for petitioning of the commission by any interested person, including consumers or consumer organizations, to commence proceedings for the issuance, amendment, or revocation of a consumer product safety rule.

In 1999, the commission introduced a new interactive section for children, on its web site. Geared toward children between the ages of 8 and 12, it features games and puzzles that are designed to test children's knowledge of safety and to teach them safety facts.

CROSS-REFERENCES

Consumer Protection.

## CONSUMER PROTECTION

*Consumer protection laws are federal and state statutes governing sales and credit practices involving consumer goods. Such statutes prohibit and regulate deceptive or* UNCONSCIONABLE *advertising and sales practices, product quality, credit financing and reporting, debt collection, leases, and other aspects of consumer transactions.*

The goal of consumer protection laws is to place consumers, who are average citizens engaging in business deals such as buying goods or borrowing money, on an even par with companies or citizens who regularly engage in business. Historically, consumer transactions—purchases of goods or services for personal, family, or household use—were presumed fair because it was assumed that buyers and sellers bargained from equal positions. Starting in the 1960s, legislatures began to respond to complaints by consumer advocates that consumers were inherently disadvantaged, particularly when bargaining with large corporations and industries. Several types of agencies and statutes, both state and federal, now work to protect consumers.

### Consumer Product Safety Commission

In 1972, Congress established the CONSUMER PRODUCT SAFETY COMMISSION (CPSC). It is the job of the CPSC to protect consumers from faulty or dangerous products by enacting mandatory safety standards for those products. The CPSC has the authority to ban products from the marketplace or to recall products (when a product is recalled, it is removed from the shelves or sales lots, and consumers may be able to return it to the manufacturer or place of purchase for repair, replacement, or a refund). Still, the agency has trouble protecting consumers from hazardous products of which it is unaware.

In recent years, the CPSC has fallen victim to FEDERAL BUDGET cuts. Reductions in the agency's legal staff have prompted the CPSC to rely more and more on manufacturers to voluntarily recall their defective or hazardous products. When manufacturers do not cooperate, the CPSC must commence a legal action that may take years to resolve.

### Unfair or Deceptive Trade Practices

The FEDERAL TRADE COMMISSION (FTC), the largest federal agency that handles consumer

complaints, regulates unfair or deceptive trade practices. Even local trade practices deemed unfair or deceptive may fall within the jurisdiction of FTC laws and regulations when they have an adverse effect on interstate commerce.

In addition, every state has enacted consumer protection statutes, which are modeled after the Federal Trade Commission Act (15 U.S.C.A. § 45(a)(1)). These acts allow state attorneys, along with general and private consumers, to commence lawsuits over false or deceptive advertisements, or other unfair and injurious consumer practices. Many of the state statutes explicitly provide that courts turn to the federal act and interpretations of the FTC for guidance in construing state laws.

The FTC standard for unfair consumer acts or practices has changed with time. In 1964, the agency instituted criteria for determining unfairness when it enacted its cigarette advertising and labeling rule. A practice was deemed unfair when it (1) offended public policy as defined by statutes, COMMON LAW, or otherwise; (2) was immoral, unethical, oppressive, or unscrupulous; and (3) substantially injured consumers. The FTC changed the standard in 1980. Now, substantial injury of consumers is the most heavily weighed element, and it alone may constitute an unfair practice. Such an unfair practice is illegal pursuant to the Federal Trade Commission Act unless the consumer injury is outweighed by benefits to consumers or competition, or consumers could not reasonably have avoided such injury. The FTC may still consider the public policy criterion, but only in determining whether substantial injury exists. Finally, the FTC no longer considers whether conduct was immoral, unethical, oppressive, or unscrupulous.

The FTC has also developed, over time, its definition of deceptive acts or practices. Historically, an act was deceptive if it had the tendency or capacity to deceive, and the FTC considered the act's effect on the ignorant or credulous consumer. A formal policy statement made by the FTC in 1988 changed this definition: currently, a practice is deceptive if it will likely mislead a consumer, acting reasonably under the circumstances, to that consumer's detriment.

FALSE ADVERTISING is often the cause of consumer complaints. At common law, a consumer had the right to bring an action against a false advertiser for FRAUD, upon proving that the advertiser made false representations about the product, that these representations were made with the advertiser's knowledge of or negligent failure to discover the falsehoods, and that the consumer relied on the false advertisement and was harmed as a result. In 1911, an advertising trade journal called *Printer's Ink* proposed model legislation criminalizing false advertisements. Forty-four states enacted statutes based on this model statute. However, because of the difficulty in proving BEYOND A REASONABLE DOUBT an advertiser's dishonesty, prosecutors seldom use these criminal laws. More frequently, the state attorneys general or the FTC regulates false advertising. For example, the FTC can issue a cease and desist order, forcing a manufacturer to stop advertising, or compelling the advertiser to make corrections or disclosures informing the public of the misrepresentations.

### Truth in Lending Act

Consumer credit—home mortgages, student financial aid, and credit cards, for example—is an area fraught with complicated finance terms, and Congress has designed laws requiring lenders to fully disclose and explain those terms to potential borrowers. The CONSUMER CREDIT PROTECTION ACT of 1968 (15 U.S.C.A. § 1601 et seq.), also known as the TRUTH IN LENDING ACT, prohibits lenders from advertising loan terms that are only available to preferred borrowers. In addition, advertisements for CONSUMER CREDIT transactions cannot disclose partial terms; either all the terms of the transaction or none of them must be spelled out. Finally, when the terms of credit provide for repayment in more than four installments, the agreement must conspicuously state that "the cost of credit is included in the price quoted for the goods and services."

The Truth in Lending Act is designed to protect society as a whole, and therefore does not provide the individual consumer with a personal CAUSE OF ACTION when a lender violates the law. Nor are publishers of advertising, such as radio, newspapers, and television, generally held liable for lenders' advertisements that violate the act. Finally, the act does not consider statements made by salespeople in the course of selling products or services to be advertisements, therefore the law does not apply to those statements.

### Fair Debt Collection Practices Act

The Consumer Protection Act was amended in 1996 to include the Fair Debt Collection Practices Act (Public Law 104-208, 110 Stat. 3009 [1996]). Congress passed the law to address the

*At a November 2002 news conference, Hal Stratton, chairman of the Consumer Products Safety Commission, demonstrates one of the five different brands of collapsing playpens recalled due to the danger of infant strangulation.*

AP/WIDE WORLD PHOTOS

abusive, deceptive, and unfair debt collection practices used by many debt collectors. Personal, family, and household debts are covered under the act. This includes money owed for the purchase of an automobile, for medical care, or for charge accounts. A collector may contact a person by mail, telephone, telegram, or fax. However, a debt collector may not contact a debtor at an inconvenient time, such as before 8 A.M. or after 9 P.M., unless the debtor agrees. A debt collector also may not contact a debtor at an inappropriate place. For example, a collector may not contact a debtor at his place of work if the collector knows that the debtor's employer disapproves of such contacts.

Collectors may not contact debtors if the debtors send the collectors a letter asking them to stop. Collectors may not threaten or abuse debtors nor make false statements. Persons may sue collectors for violating the law and can collect up to $1,000 and attorneys' fees for a violation. A group of people also may sue a debt collector and recover money for damages up to $500,000, or one percent of the collector's net worth, whichever is less.

### Warranties

Warranties are promises by a manufacturer, made to the consumer purchasing the manufacturer's product, that the product will serve the purpose for which it was designed. The UNIFORM COMMERCIAL CODE is a law, adopted in some form in all states, that regulates sales transactions and specifically the three most common types of consumer warranties: express, merchantability, and fitness.

*Express warranties* are promises included in the written or oral terms of a sales agreement that assure the quality, description, or performance of the product. Express warranties are usually included in the sales contract, or are written in a separate pamphlet and packaged with the merchandise sold to the consumer. These warranties may be less obvious than are product advertisements. A consumer who relies on a written description of a product in a catalog or on a sample of a product may have a cause of action if the actual product differs. Express warranties can also be verbal, such as promises made by salespeople. However, because oral warranties are extremely difficult to prove, they are rarely litigated.

Merchantability and fitness warranties are both implied warranties, which are promises that arise by operation of law. A *warranty of merchantability* concerns the basic understanding that the product is fit to be purchased and used in the ordinary way—for instance, a lamp will provide light, a radio will pick up broadcast stations, and a refrigerator will keep food cold. A *warranty of fitness* concerns the consumer's purpose in purchasing a product, and allows the consumer to rely on the seller to offer goods only if they are suitable for that particular purpose. For example, there may be a breach of the IMPLIED WARRANTY of fitness if a salesperson knowingly sells a consumer software that is not designed for operation on the consumer's computer. For a breach-of-implied-warranty claim to be successful, the consumer must establish that an implied WARRANTY existed and was breached, that the breach harmed the consumer, that the consumer dealt with the party responsible for the implied warranty, and that the consumer notified the seller within a reasonable time. Implied warranties may be disclaimed by the seller if they are denied expressly and specifically at the time of the sale.

The MAGNUSON-MOSS WARRANTY ACT (15 U.S.C.A. § 2301 et seq.) is a federal law that requires sellers to explain, in easy-to-understand language, the terms of warranties that apply to written sales contracts for items costing $5 or more. Under this act, when a product fails to meet the standards promised by the warranty, the seller must repair it, replace it, or refund the purchase price.

### Consumer Remedies

Laws protecting consumers vary in the remedies they provide to consumers for viola-

tions. Many federal laws merely provide for public agencies to enforce consumer regulations by investigating and resolving consumer complaints. For example, in the case of a false advertisement, a common remedy is the FTC-ordered removal of the offensive advertisements from the media. In other circumstances, consumers may be entitled to money damages, costs, and attorneys' fees; these remedies can be effective in a case involving a breach of warranty. Depending on the amount of damages alleged, consumers may bring such actions in small-claims courts, which tend to be speedier and less expensive than trial courts.

ALTERNATIVE DISPUTE RESOLUTION (ADR) is another option for consumers. Some states pass consumer protection statutes that require some form of ADR—usually ARBITRATION or mediation—before a consumer can seek help from the courts. Finally, when a large number of consumers have been harmed in the same way as a result of the same practice, they may join in a CLASS ACTION, a single lawsuit in which one or more named representatives of the consumer group sue to redress the injuries sustained by all members of the group.

In response to public frustration over telephone solicitations, many states and the FTC began to set up systems to bar unwanted telephone sales calls. The FTC, in 2002, amended the Telemarketing Sales Rule (TSR) to give consumers the option of placing their phone numbers on a national "do not call" registry. It will be illegal for most telemarketers to call a number listed on the registry. The registry was scheduled to go into operation in July 2003, but telephone marketing companies promised a lawsuit to contest the rules, arguing that they violated the FIRST AMENDMENT.

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CROSS-REFERENCES

Consumer Fraud; Product Liability.

## CONSUMER SOFTWARE PIRACY

*The unauthorized use, possession, downloading, duplication, distribution, or sale of copyrighted computer software.*

COPYRIGHT infringement is a serious problem for the computer software industry. Programs can be copied easily on a personal computer, thus making detecting and prosecuting infringements of software copyrights extremely difficult. By estimates of the Software Publisher's Association, nearly 25 percent of all software in use in the United States is pirated (acquired through unlawful copying), and domestic and international losses ran to $10.9 billion in 2001 alone. The growth of computer networks, especially the INTERNET, presents further problems by providing the means for the almost effortless transmission of data. In the 1990s, Congress strengthened protections for software, and aggressive litigation by the computer industry targeted corporations, individuals, and counterfeiters in an effort to clamp down on this massive theft. Yet during the early 2000s, law enforcement remained difficult as software pirates turned to new technologies to share files illegally.

The Copyright Act (17 U.S.C.A. §§ 1 et seq.) gives exclusive rights to the authors of computer software. Their work is a type of INTELLECTUAL PROPERTY, which the law treats differently from tangible property. Software companies own their copyrighted programs even after selling them to consumers. For consumers, buying software is different from buying a car: Purchasers of cars are called owners, whereas purchasers of software are called licensees. Although software buyers own the disc or CD-ROM on which the software is stored, they are entitled to use it in only a specific, limited way. The law provides that manufacturers, as owners of the copyright, retain the *exclusive* right to reproduce and distribute copies of the software. Consumers, as licensees, do not have the same right. They may only copy the software onto a single computer and make another copy for archival purposes.

Consumers break the law when they make unauthorized copies of software. Whether for profit, free distribution, or personal use, such duplication constitutes copyright infringement. Copyright owners can sue infringers for damages that may include profits made by the infringers, or statutory damages of up to $100,000 for each work infringed. The penalties are more severe when software copying is done

# Software Publisher's Association

The Software Publisher's Association (SPA) is an 1,100-member trade group representing the legal interests of U.S. software companies. Founded in 1988, SPA fights **COPYRIGHT** infringement from its offices in Washington, D.C., and Paris. SPA is a division of the Software & Information Industry Association (SIIA), which offers rewards of up to $50,000 to individuals who report verifiable corporate end-user **PIRACY** to SIIA through the SIIA hotline or through the SIIA Corporate End-User Piracy Internet Report Form. Its chief goal is to eliminate the unauthorized duplication of computer programs.

On December 16, 1997, President **BILL CLINTON** signed into law the No Electronic Theft (NET) Act of 1997, Pub. L. No. 105-147, 111 Stat.2678. The act was passed to address a loophole in copyright law, which was successfully exploited by a 21-year-old MIT student, David LaMacchia, who escaped federal prosecution for distributing free copyrighted software on the Web. The NET Act punishes software pirates who willfully copy, distribute, and traffic in protected software on the Web whether or not they enjoy a financial gain. David LaMacchia set up a bulletin board on the Internet which he named "Cynosure." LaMacchia then solicited bulletin board correspondents to upload popular software applications such as Excel, WordPerfect, and various computer games such as *Sim City*. He then transferred the uploaded software to a second encrypted address, named "Cynosure II." Users who had access to the Cynosure password could then download the software. The worldwide traffic generated by the offer of free software attracted the notice of university and federal authorities. During the brief six-week life of Cynosure, software copyright holders claim to have lost one million dollars as a result of the free trafficking of their products. Even though a federal **GRAND JURY** returned a one-count indictment charging LaMacchia with conspiring with unknown persons to violate the wire-fraud statute, the government could not prosecute under the criminal copyright statute because there was no evidence that LaMacchia made any profit.

SPA efforts are targeted primarily at the U.S. market, where the industry generates approximately 60 percent of its revenues and where, SPA estimates, nearly 85 percent of losses to software piracy occur. Successes in cracking down on infringement have made SPA a major player in copyright law. The organization's enforcement actions netted $14 million in recoveries between 1988 and 1995. Among these were a half-million-dollar settlement against a corporation, resulting from an audit, and a $350,000 settlement in May 1991 from a successful lawsuit against Parametrix, an environmental engineering firm. In 2002, in a case originating from SIIA, Yaroslav Suris, 27, of Brooklyn, New York, was convicted of one felony count of Criminal Infringement of a Copyright, in violation of 17 U.S.C. 506(a)(1) and 18 U.S.C. 2319(b)(1). Suris was sentenced to two months incarceration, followed by 14 months of home detention. He was also ordered to pay $290,556 in restitution for computer piracy.

In the area of **LOBBYING**, SPA has asked Congress for tougher legislation designed to stop copyright infringement over computer networks, especially the Internet. SPA anti-piracy department conducts public education campaigns and distributes auditing software that allows businesses and organizations to ensure that they are following the law.

According to SPA, Web framing can be a form of piracy when a viewing window is created for all or a portion of a Web page or a particular piece of content residing on a Web page. Problems with framing typically arise when the manner in which the Web site is framed removes, obscures, or alters navigation tools, links, indicators of source, **TRADEMARKS**, logos, or advertising located on the Website that is framed. Framing of third-party content into another Web page raises many legal issues, including passing off content as one's own, **UNFAIR COMPETITION**, trademark infringement, trademark dilution, misappropriation, and perhaps copyright infringement.

**FURTHER READINGS**

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**CROSS-REFERENCES**

Copyright; Internet; Trademarks.

"willfully and for purposes of commercial advantage or private financial gain" (17 U.S.C.A. § 506). This is a federal crime, carrying fines of up to $250,000 and jail terms of up to five years.

The remote possibility of arrest and prosecution hardly hinders most software thieves. The chances of being caught are slight, and the allure can be difficult to resist. Software packages are often expensive—from around $50 to several hundred dollars—and copying is literally as simple as clicking a mouse.

The rise of computer networking—in which computers are linked within an office or across cities by means of telephone modems—has made illegal copying even easier. Network communication is hard to monitor, especially when it takes place over large geographic distances between or among users who can conceal their identities. Thousands of computer bulletin boards, as well as the Internet, proved fertile ground for young computer enthusiasts who saw copyright law as a minor hurdle in their acquisition of new *warez* (computer hacker slang for "illegally acquired software"). During 1995, the Usenet news group <alt.binaries.warez.ibm-pc> amounted to a bonanza where thousands of dollars worth of copyrighted software was uploaded weekly by anonymous hackers, free for the taking.

Despite gaining ground against infringers, the computer industry's battle is still ongoing. The Software Publisher's Association (SPA), an industry trade group that sues infringers on behalf of its members, claims to have greatly reduced illegal copying in the workplace. However, home copying by individuals and counterfeiters has remained a persistent problem.

In 1994, federal district Judge Richard Stearns dismissed a case against David LaMacchia, a Massachusetts Institute of Technology student who had set up an Internet bulletin board over which users traded more than one million dollars worth of software. The judge ruled that federal copyright law did not cover not-for-profit copying of computer software. Subsequently, the software industry blamed this so-called "LaMacchia loophole" for the proliferation of online PIRACY during the middle and second half of the decade. The industry argued that because federal copyright law defined violations strictly in terms of financial gain, most casual violators fell through the cracks.

During the late 1990s, software manufacturers successfully lobbied Congress to enact stringent, new federal legislation to curb software piracy. The first of two major laws, the No Electronic Theft (NET) Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678, immediately closed the LaMacchia loophole. Under the NET Act, the definition of a violation includes unauthorized reproduction or distribution of copyrighted materials, and financial gain is understood to mean mere possession. The NET Act provides severe penalties for violating the copyright of materials worth more than $1,000 in a six-month period by copying, distributing, or receiving software.

One year later, Congress enacted a second, more sweeping law in the Digital Millennium Copyright Act (DMCA) of 1998. The DMCA broadly revamped U.S. copyright law to keep pace with changing international treaties as well as evolving technologies. One major provision, essentially aimed at hackers, criminalized the use of any device or technology to break anti-copying protections on software or other media such as movies and music. But while being embraced by the software and entertainment industries, critics including scientists, scholars, and civil-liberties advocates have argued that the DMCA limits legitimate professional research and stifles technological innovation.

Further complicating antipiracy efforts, new technologies arose following the introduction of Napster in 1999. As a free, online software program used to trade MP3 music files anonymously, Napster proved wildly popular with millions of Internet users before prompting Congressional hearings in 2001 as its parent company came under fierce litigation from the music industry. After the company filed for BANKRUPTCY, file trading moved to other so-called peer-to-peer (or "P2P") networks, such as the popular Gnutella, which similarly allowed users to connect online in order to trade software, music, and movies. Critically, P2P decentralized file trading through the use of programs designed by computer hobbyists, making enforcement efforts all the harder.

As the P2P phenomenon spread, attempts to combat it came from industry, academic administrators, and lawmakers. Industry representatives chiefly targeted colleges where students reportedly were slowing campus computer systems to a crawl with their volume of illegal file trading. Some educational institutions restricted computer use in the face of copyright-infringement lawsuits. Under combined LOBBYING from the software, music and

movie industries, a subcommittee of the U.S. House Judiciary Committee held hearings into potential policy solutions in 2003.

Because of the ease with which software piracy may be carried out, and the substantial revenue losses that it causes, software manufacturers continue to call for more stringent legislation and to search for improved methods for detecting and preventing software theft.

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CROSS-REFERENCES

Computer Crime; Copyright; Intellectual Property.

## CONSUMMATE

*To carry into completion; to fulfill; to accomplish.*

A COMMON-LAW MARRIAGE is consummated when the parties live in a manner intended to bring about public recognition of their relationship as HUSBAND AND WIFE.

To consummate an agreement is to carry it out completely, as in a consummated sale. It is to bring to completion whatever was either intended or undertaken to be done.

## CONTEMNER

*An individual who intentionally acts to hinder or obstruct the administration of justice by a court, either by refusing to comply with its orders or by disrupting its orderly proceedings, thereby committing* CONTEMPT.

## CONTEMPLATION OF DEATH

*The apprehension of an individual that his or her life will be ended in the immediate future by a particular illness the person is suffering from or by an imminent known danger which the person faces.*

The phrase *in contemplation of death* applies to a gift of property made by its owner who expects to die shortly, the gift being motivated solely by the thought of his or her demise. Such transfers are considered akin to testamentary dispositions since they are ineffective unless the owner dies but differ in that the owner must die within a reasonable time from the making of the gift.

The words *contemplation of death* are synonymous with the Latin phrase *causa mortis.*

## CONTEMPT

*An act of deliberate disobedience or disregard for the laws, regulations, or decorum of a public authority, such as a court or legislative body.*

Individuals may be cited for contempt when they disobey an order, fail to comply with a request, tamper with documents, withhold evidence, interrupt proceedings through their actions or words, or otherwise defy a public authority or hold it up to ridicule and disrespect. The laws and rules governing contempt have developed in a piecemeal fashion over time and give wide discretion to judges and legislative leaders in determining both what constitutes contempt and how it is punished.

### Contempt of Court

Contempt of court is behavior that opposes or defies the authority, justice, and dignity of the court. Contempt charges may be brought against parties to proceedings; lawyers or other court officers or personnel; jurors; witnesses; or people who insert themselves in a case, such as protesters outside a courtroom. Courts have great leeway in making contempt charges, and thus confusion sometimes exists about the distinctions between types of contempt. Generally, however, contempt proceedings are categorized as civil or criminal, and direct or indirect.

*Civil contempt* generally involves the failure to perform an act that is ordered by a court as a means to enforce the rights of individuals or to secure remedies for parties in a civil action. For instance, parents who refuse to pay court-ordered CHILD SUPPORT may be held in contempt of court under civil contempt. *Criminal contempt* involves behavior that assaults the dignity of the court or impairs the ability of the court to conduct its work. Criminal contempt can occur within a civil or criminal case. For

example, criminal contempt occurs when a witness or spectator shouts or insults the judge during a trial. A civil contempt usually is a violation of the rights of one person, whereas a criminal contempt is an offense against society. Courts use civil contempt as a coercive power, wielding it only to ask that the contemnor comply with the courts' actions. Criminal contempt is punitive; courts use it to punish parties who have impaired the courts' functioning or bruised their dignity.

A *direct contempt* is an act that occurs in the presence of the court and is intended to embarrass or engender disrespect for the court. Shouting in the courtroom or refusing to answer questions for a judge or attorney under oath is a direct contempt. *Indirect contempt* occurs outside the presence of the court, but its intention is also to belittle, mock, obstruct, interrupt, or degrade the court and its proceedings. Attempting to bribe a district attorney is an example of an indirect contempt. Publishing any material that results in a contempt charge is an indirect contempt. Other kinds of indirect contempt include preventing process service, improperly communicating to or by jurors, and withholding evidence. One man was threatened with contempt charges because he had filed more than 350 lawsuits that the judge considered frivolous. Indirect contempt also may be called constructive or consequential contempt; all three terms mean the same thing.

The essence of contempt of court is that the misconduct impairs the fair and efficient administration of justice. Contempt statutes generally require that the actions present a CLEAR AND PRESENT DANGER that threatens the administration of justice.

The manner in which an act is committed or the tone in which words are spoken can determine whether contempt has occurred. Circumstances, such as the context in which the words were spoken, the tone, the facial expression, the manner, and the emphasis, are also evaluated by the court. Failure to complete an act that, if completed, would tend to bring the court into disrespect does not preclude the act from being contemptuous.

### Criticisms of the Contempt-of-Court Power

The discretion permitted to judges in determining what is contempt and how to punish it has led some legal scholars to argue that the contempt power gives too much authority to judges. Earl C. Dudley, University of Virginia law professor, wrote that in the contempt power, "the roles of victim, prosecutor and judge are dangerously commingled."

Much of the criticism focuses on the lack of restraint or DUE PROCESS in determining punishments for contempt. In criminal contempt, the contempt charges become a separate matter, but they may be heard by the judge who made them. In addition, the same judge may commence punishment immediately, and the punishment may be in effect until the contempt case is settled. Critics have argued that judges—who are the principal offended party—may be too harsh. For instance, in 1994, the U.S. Supreme Court overturned a decision by a Virginia judge who had fined the United Mine Workers of America $52 million in connection with violence that occurred during a 1989 strike. The High Court stated that the fines were excessive and improperly imposed because the union had never had a chance to defend itself in a trial before the fines were imposed.

Similarly, individuals who have refused to provide courts with information have been held in jail—sometimes for years—under contempt charges. In Maryland, a woman involved in a custody battle with her ex-husband refused to reveal the whereabouts of her child. Elizabeth Morgan spent 25 months in jail before her ex-husband dropped the custody case and it was revealed that the child was staying with Morgan's parents in New Zealand. Journalist Myron Farber, of the *New York Times,* spent more than three years in jail for refusing to turn over notes that prosecutors sought for a murder trial.

Judges and scholars have defended the practices of indefinite jail time because the contemnor "carries the keys to his prison in his own pocket" and can be released by complying with the court (*In re Nevitt,* 117 F. 448 [8th Cir. 1902]).

Civil contempt proceedings end when the suit from which they arose is resolved. Criminal contempt continues as a separate matter. Settlements may involve jail time, fines, or other retribution. For instance, when the Cable News Network (CNN) was found guilty of contempt of court for airing audiotapes related to the trial of Manuel Noriega, the deposed president of Panama, the network was given the choice of airing a retraction and an apology for using the tapes or paying a large fine. The network made the apology.

### Contempt of Congress

The Constitution does not explicitly grant Congress the power to coerce cooperation from individuals or to punish acts of disobedience or disrespect through contempt proceedings. However, the power was discussed at the Constitutional Convention and was implied in the Constitution. In 1795, Congress used the power of contempt for the first time when it arrested, tried, and punished a man accused of bribing members of the House of Representatives. Then Congress acted on its own authority—subsequently called the SELF-HELP power, which grants Congress the right to compel testimony and punish disobedience without the involvement of a court or other government body if the individual's actions obstruct the legislative process. By 1821, the Supreme Court recognized Congress's power to arrest and punish individuals for contempt. In 1857, Congress created a statute governing prosecution for contempt, which shifted the responsibility for determining contempt from Congress itself to the courts. Until 1945, Congress largely ignored this criminal statute and continued to compel testimony and deal with contemnors through its own power.

*In 1957 a federal court found playwright Arthur Miller guilty of contempt of Congress charges for refusing to disclose the names of alleged Communist writers to the House Un-American Activities Committee. The conviction was overturned by an appellate court in 1958.*

AP/WIDE WORLD PHOTOS

In the late twentieth century, the Supreme Court noted, "Congress has practically abandoned its original practice of utilizing the coercive (self-help) sanction of contempt proceedings at the bar of the House" (*Watkins v. United States,* 354 U.S. 178, 77 S. Ct. 1173, 1 L. Ed. 2d 1273[1957]). Under the criminal statute, Congress must petition the U.S. attorney to bring a case of possible contempt before a GRAND JURY. The case is then tried in federal court.

Most contempt citations arise from Congress's investigatory powers. In its decisions since WORLD WAR II, the Supreme Court has outlined requirements that Congress must meet before it can compel testimony. The investigation must have a valid legislative purpose. It must be conducted by a committee or subcommittee of the House of Representatives or Senate, or the authority of the investigating body must be clearly defined in a resolution. The questions asked of witnesses must be pertinent to the subject of inquiry. Contempt proceedings cannot be used to harass an individual or organization. Finally, before individuals can be held in contempt, they must willfully default, either by failing to appear before the investigating body or by refusing to answer pertinent questions.

Congress's contempt power has come into conflict with the FIRST AMENDMENT in several cases. The first of these cases was *Barenblatt v. United States,* 360 U.S. 109, 79 S. Ct. 1081, 3 L. Ed. 2d 1115 (1959), in which Lloyd Barenblatt refused to answer five questions of the House Un-American Activities Committee, regarding Communist infiltration of educational institutions. Barenblatt was convicted of contempt then appealed to the Supreme Court, arguing that the questions violated his First Amendment right to FREEDOM OF ASSOCIATION. The Court, in a 5–4 decision, supported Barenblatt. The Court stated that the questions were too vague to support a contempt citation and that Congress's investigative powers must be balanced against First Amendment rights.

The conflict between Congress's investigative powers and the First Amendment surfaced again in 1992 when Nina Totenberg, a National Public Radio correspondent, refused to answer questions of a Senate special counsel about how she obtained confidential documents related to

the nomination of CLARENCE THOMAS to the U.S. Supreme Court. Totenberg had earlier revealed that the SENATE JUDICIARY COMMITTEE was looking into accusations that Thomas had sexually harassed members of his staff. The charges led to public testimony by law professor ANITA HILL. A Senate special counsel asked to have Totenberg held in contempt when she refused to reveal who leaked information about the charges to her. The request was denied by the Senate Rules Committee because of its potential "chilling effect on the media."

Congress also has used the contempt power in conflicts with private parties and the EXECUTIVE BRANCH of government. For instance, business partners of Ferdinand Marcos, former president of the Philippines, produced documents for the House Foreign Affairs Committee only under threat of contempt citations. And James G. Watt, former secretary of the interior, was charged with contempt by a congressional committee in the early 1980s when, citing EXECUTIVE PRIVILEGE, he refused to release INTERIOR DEPARTMENT documents.

### Contempt Proceedings against President Clinton

On April 12, 1999, President WILLIAM JEFFERSON CLINTON became the first sitting president in United States history to be held in contempt of court. The contempt charge against President Clinton stemmed from a deposition he gave in connection with a 1994 SEXUAL HARASSMENT lawsuit filed by Paula Jones. *Jones v. Clinton,* 858 F. Supp. 902 (E.D. Ark. 1994). Jones alleged that on May 8, 1991, she was an Arkansas state employee working at a conference held at a hotel in Little Rock. At some point during the conference, Jones claimed she was escorted to a hotel room by one of Clinton's bodyguards, where she was introduced to the then-governor. Shortly after the introduction, Jones alleged that Clinton dropped his trousers and demanded oral sex from her. Jones said that though she refused and was allowed to leave, her career as a state government employee suffered thereafter.

The Jones lawsuit languished in pre-trial discovery for the first three years after it was filed. On January 17, 1998, Jones and her lawyers deposed Clinton, who was now serving his second term as president of the United States. During the deposition, Clinton was asked a series of questions about his relationship with a White House intern named Monica Lewinsky. The president testified that he was never alone with the former White House intern and did not have a sexual relationship with her.

A subsequent probe by independent counsel KENNETH STARR revealed that the president's DNA had been found on Lewinsky's dress, which eventually led Clinton to admit that he had an "inappropriate intimate relationship" with his former intern (*Jones v. Clinton,* 36 F. Supp. 2d 1118 (E.D. Ark. 1999). The discovery of the dress also fueled the House of Representatives to draft ARTICLES OF IMPEACHMENT against the president.

A month after giving the deposition, Clinton filed a motion to dismiss the Jones lawsuit. On April 1, 1998, United States District Judge SUSAN WEBBER WRIGHT granted the motion to dismiss, finding that Jones had "failed to demonstrate that she has a case worthy of submitting to a jury." *Jones v. Clinton,* 990 F. Supp. 657 (E.D. Ark. 1998). While the case was pending on appeal, Clinton and Jones settled the sexual harassment lawsuit for $850,000.

A year later Judge Wright addressed the issue whether President Clinton should be held in contempt for denying his relationship with Lewinsky during the January 1998 deposition. At the time he gave the deposition, there was very little evidence indicating that the president's testimony was false. But in the 14 months that followed, it became clear that the president had not only been alone with Monica Lewinsky but also had some form of sexual relations with her.

Accordingly, Judge Wright found the president in contempt for giving "false, misleading and evasive answers that were designed to obstruct the judicial process" at a deposition over which she personally presided. *Jones v. Clinton,* 36 F. Supp. 2d 1118 (E.D. Ark. 1999). Although Clinton maintained that his "intimate" relationship with Lewinsky did not constitute "sexual" relations, Wright said that it is difficult to construe "the president's sworn statements . . . as anything other than a willful refusal to obey this court's discovery orders." *Jones v. Clinton* 36 F. Supp. 2d 1118 (E.D. Ark. 1999).

In July 1998, Wright leveled a $90,686 fine against the president. Wright said regarding this case that the fine was intended to both punish Clinton for the contempt violation and also "to deter others who might consider emulating the president's misconduct."

Wright then referred the matter to the Arkansas Supreme Court to determine whether the president should lose his license to practice law in that state. In May 1999 the Arkansas Supreme Court Committee on Professional Conduct recommended that Clinton be disbarred. However, on January 19, 2001, his last day in office, President Clinton resolved the case before the state ethics committee by agreeing to surrender his law license for a period of five years and admitting, according to Pete Yost in an AP Online report, that he "knowingly gave evasive and misleading answers" about his relationship with Monica Lewinsky in violation of Arkansas rules governing attorney ethics. Additionally, Clinton agreed to pay a $25,000 fine.

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CROSS-REFERENCES

Communism; Freedom of the Press.

## CONTEST

*To defend against an adverse claim made in a court by a plaintiff or a prosecutor; to challenge a position asserted in a judicial proceeding, as to contest the probate of a will.*

## CONTEXT

*The language that precedes and follows a series of words, such as a particular sentence or clause.*

The context of a legal document is often scrutinized to shed light upon the intent of an ambiguous or obscure sentence or clause so that it may be interpreted as its drafter intended.

## CONTINENTAL CONGRESS

*The first national legislative assembly in the United States, existing from 1774 to 1789.*

During its fifteen-year existence, the Continental Congress served as the chief legislative and executive body of the federal government. Although hobbled by provisions such as an inability to raise funds directly through taxation, it nevertheless created a viable, if sometimes ineffective, national union during the earliest years of the United States. The Continental Congress passed the DECLARATION OF INDEPENDENCE and other lasting measures, and it set important precedents for the government instituted under the Constitution in 1789. Some of the most important figures of early American history were members of the Continental Congress, including JOHN ADAMS, Samuel Adams, SAMUEL CHASE, BENJAMIN FRANKLIN, ALEXANDER HAMILTON, PATRICK HENRY, JOHN JAY, THOMAS JEFFERSON, JAMES MADISON, and GEORGE WASHINGTON.

The First Continental Congress met in Philadelphia between September 5 and October 26, 1774. Although it was officially called simply the Congress, contemporaries referred to it as the Continental Congress in order to distinguish it from the various state congresses. Fifty-six delegates from twelve colonies (Georgia did not participate) assembled in an attempt to unite the colonies and restore rights and liberties that had been curtailed by Great Britain. The Continental Congress adopted the Declaration of Rights, agreements regarding common policies toward Britain, and a resolution that it would meet again the following year if its grievances were not settled.

When Britain rebuffed their demands, the colonists assembled the Second Continental Congress in May of 1775, again in Philadelphia. Fighting between Britain and Massachusetts at the Battles of Lexington and Concord had already occurred, and the Continental Congress voted to back Massachusetts. It appointed George Washington as commander in chief of colonial armed forces. With this decision, Congress undertook a vital role directing the Revolutionary War.

As the war continued, colonial opinion began to move toward permanent separation from Great Britain. On July 4, 1776, the Continental Congress adopted the Declaration of Independence, which announced the formation of the United States of America as a new nation. In succeeding months, the Congress drafted the ARTICLES OF CONFEDERATION, the new country's first constitution. The Congress approved

the Articles on November 15, 1777, but the states did not ratify them until 1781.

The Articles contained provisions for a national legislature designated simply Congress. Although some historians have called this subsequent body the Congress of the Confederation, most group it with its predecessor and call it the Continental Congress. In this Congress, each state had from two to seven delegates but only one vote. Delegates were to serve no more than "three years in any term of six years" (art. V).

During the struggle to approve and then ratify the Articles, the advocates of **STATES' RIGHTS** greatly weakened its provisions for a strong federal, or national, government. As a result, the Articles did not allow the federal government to raise its own funds directly through taxation. Instead, the central government could only requisition money from the states. The Articles also required a unanimous vote of Congress to approve any amendments, a feature that made it difficult to adapt their provisions to the changing needs of the nation. In addition, Congress as it was constituted under the Articles proved ill suited to tasks that the Constitution later assigned to the **EXECUTIVE BRANCH**, including the conduct of diplomatic, military, and commercial affairs. For example, Congress fared poorly in negotiating with Britain and France, in paying war debts, and in putting down armed revolts such as **SHAYS'S REBELLION**.

The problems of the Continental Congress and the Articles of Confederation led to plans for a new federal constitution. During the Constitutional Convention of 1787, leading members of the Continental Congress joined with other politicians and lawmakers to create a framework for a new national government, including a new Congress. Following ratification of the Constitution by the states in 1789, the Continental Congress handed over its legislative powers to the Congress that continues in form to the present day.

Although the Continental Congress had weaknesses, it nevertheless passed crucial legislation and set vital precedents for the framing of the Constitution. Its legislative legacy includes the establishment of the Northwest Territory, provisions for the sale and oversight of western land, and many other laws adopted by the later Congress. According to Edmund C. Burnett, a leading historian on the subject, the

> Continental Congress . . . developed and formulated many of those fundamental principles of government that have become our national heritage. Indeed it is not too much to say that [a] great part of the materials built into the structure of the Constitution itself were wrought in the forge of the Continental Congress.

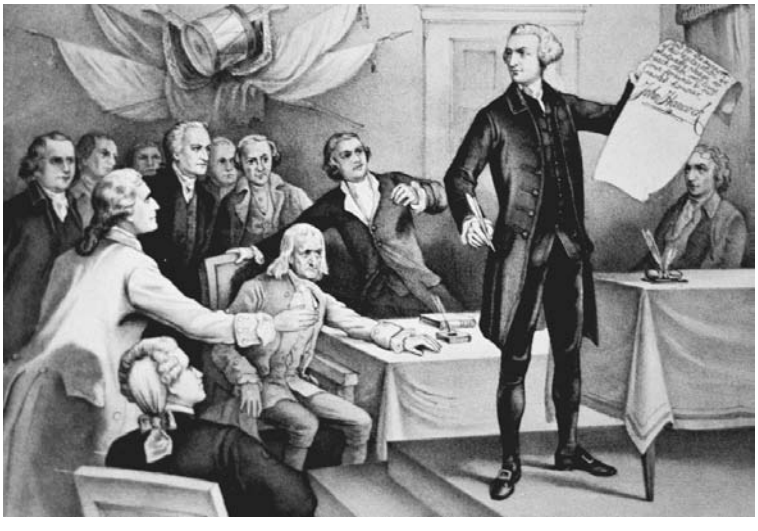

*A depiction of members of the Continental Congress, the first national legislative assembly in the United States, during the signing of the Declaration of Independence. John Hancock, president of the Congress from 1775 to 1777, is shown holding the document.*

LIBRARY OF CONGRESS

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**CROSS-REFERENCES**

Congress of the United States; Constitution of the United States; "Declaration of the Causes and Necessity of Taking up Arms" (Appendix, Primary Document); Northwest Ordinance.

## CONTINGENT

*Fortuitous; dependent upon the possible occurrence of a future event, the existence of which is not assured.*

The word *contingent* denotes that there is no present interest or right but only a conditional one which will become effective upon the happening of the designated condition. A *contingent remainder* is the right to possess property after the death of a person who holds a life estate in the land provided a specified condition is fulfilled. An owner of land who grants a life estate to a son, with a remainder to a daughter if she marries, has created a contingent remainder, the contingency being the daughter's marriage.

## CONTINGENT FEE

*Payment to an attorney for legal services that depends, or is contingent, upon there being some recovery or award in the case. The payment is then a percentage of the amount recovered—such as 25 percent if the matter is settled, or 30 percent if it proceeds to trial.*

Contingent-fee agreements are valid only in civil cases and are frequently used in personal injury cases. Court rules and statutes often regulate these fees in relation to the type of action and amount of recovery. Such an arrangement is generally used when the party seeking recovery cannot afford to retain an attorney and therefore would not have any effective means of prosecuting a claim.

An attorney is not entitled to a contingent fee in the absence of an express contract. Contingent-fee agreements, although intensively scrutinized by the courts, are valid if equitable and reasonable to the client. The purpose of a contingent fee is to reward attorneys for proficiency and diligence in prosecuting disputed and litigated claims, as opposed to rendering minor services that any inexperienced attorney might perform.

Contingent fees are never permitted in criminal cases, as there is no possibility of a financial recovery that would be the source of the contingent fee. These arrangements are emphatically discouraged in DIVORCE proceedings due to public policy considerations. An attorney may discourage a reconciliation if a fee depends upon the granting of a divorce. Public policy favors the continuation of marriage, which is traditionally viewed as a stabilizing force in society. A contingent-fee contract that prohibits a client from settling a case is also void as against public policy because society views the avoidance of unnecessary litigation as desirable.

When an attorney who was retained on a contingent-fee basis dies, his or her estate will not be entitled to any fee unless the attorney had completely performed the contract prior to death. In some states, the estate cannot recover unless the jury had returned a monetary award in favor of the client before the attorney's death. However, the attorney's personal representatives may collect payment for the reasonable services that were rendered.

An attorney might be entitled to recover his or her share of the proceeds of an action if the contingent-fee contract was substantially performed prior to the death of the client. If the case had been submitted to the jury before the client died, and the jury found in favor of the client, the attorney is entitled to his or her fee from the proceeds. If the suit is dismissed or settled by the client's personal representatives, the attorney might have no right to a fee unless the contract so provided. However, the death of a client does not deprive an attorney of the right to recover the reasonable value of his or her services rendered until the time of the client's death.

Jurisdictions are not unanimous as to the question of whether an attorney's contingent fee should be calculated based on the net amount of the recovery that a client actually receives or the gross amount of recovery before any successful counterclaims are factored in. For example, suppose that a personal-injury lawyer agrees to represent the plaintiff for a one-third contingent fee and recovers a $100,000 jury verdict. However, the jury also returned a verdict on the defendant's counterclaim for $10,000. Should the plaintiff's lawyer receive a $33,000 contingent fee or a $30,000 contingent fee?

Section 35 of the Restatement (Third) of the Law Governing Lawyers provides that "when a lawyer has contracted for a contingent fee, the lawyer is entitled to receive the specified fee only when and to the extent the client receives payment." Comment d to section 35 provides that "[i]n the absence of [a] prior agreement to the contrary, the amount of the client's recovery is computed net of any offset, such as a recovery by an opposing party on a counterclaim." To date, Section 35 has been adopted only in Texas. Other states calculate the fee based on the client's full award, regardless of whether the client ever actually recovers the full amount awarded, reasoning that such a calculation better reflects the comprehensive value of the attorney's services and the economic value received by the client.

## CONTINUANCE

*The adjournment or postponement of an action pending in a court to a later date of the same or another session of the court, granted by a court in response to a motion made by a party to a lawsuit. The entry into the trial record of the adjournment of a case for the purpose of formally evidencing it.*

Courts, by virtue of their authority to hear and determine cases, have inherent discretionary power to grant or deny continuances,

*A sample contingent fee agreement between an attorney and a client.*

**Contingent Fee Agreement Form**

LEGAL SERVICES AGREEMENT

1. IDENTIFICATION OF PARTIES. This agreement, executed in duplicate with each party receiving an executed original, is made between JOHN SMITH, hereafter referred to as "Attorney," and JANE DOE, hereafter referred to as "Client."

   This agreement is required by Business and Professions Code section 6147 and is intended to fulfill the requirements of that section.

2. LEGAL SERVICES TO BE PROVIDED. The legal services to be provided by Attorney to Client are as follows: Representation of Client with respect to her claim for damages for personal injuries arising out of the automobile accident of September 15, 2002.

3. LEGAL SERVICES SPECIFICALLY EXCLUDED. Legal services that are not to be provided by Attorney under this agreement specifically include, but are not limited to, the following: Representation with respect to (a) any claim for property damage arising out of the accident, (b) any dispute with a medical care provider about amounts owed by Client for services received, or (c) any appeal in which Client is an appellant from a court judgment on Client's personal injury claim (i.e., Attorney's obligation to represent Client under this agreement extends to an appeal only if Client is a respondent).

   If Client wishes that Attorney provide any legal services not to be provided under this agreement, a separate written agreement between Attorney and Client will be required.

4. RESPONSIBILITIES OF ATTORNEY AND CLIENT. Attorney will perform the legal services called for under this agreement, keep Client informed of progress and developments, and respond promptly to Client's inquiries and communications. Client will be truthful and cooperative with Attorney and keep Attorney reasonably informed of developments and of Client's address, telephone number, and whereabouts.

5. ATTORNEY'S FEES. The amount Attorney will receive for attorney's fees for the legal services to be provided under this agreement will be:

   (a) percent of the net recovery if the recovery is obtained before the filing of a lawsuit;

   (b) percent of the net recovery if the recovery is obtained after the filing of a lawsuit but before the arbitration hearing, settlement conference, or trial, whichever occurs first;

   (c) percent of the net recovery if the recovery is obtained at or after the arbitration hearing, settlement conference, or trial, whichever occurs first, but before the filing of Client's brief in an appeal from a court judgment; and

   (d) percent of the net recovery if the recovery is obtained after the filing of Client's brief in an appeal from a court judgment.

   "Net recovery" means the amount remaining after the total amount received (whether by settlement, arbitration award, or court judgment) has been reduced by the sum of all "costs," as defined in Paragraph 7 of this agreement.

   If payment of all or any part of the amount to be received will be deferred (such as in the case of an annuity, a structured settlement, or periodic payments), the "total amount received," for purposes of calculating the attorney's fees, will be the initial lump-sum payment plus the present value, as of the time of the settlement, final arbitration award, or final judgment, of the payments to be received thereafter. The attorney's fees will be paid out of the initial lump-sum payment. If the payment is insufficient to pay the attorney's fees in full, the balance will be paid from subsequent payments of the recovery before any distribution to Client.

   Client is informed that this Attorney's fee is not set by law but rather is negotiable between the Attorney and the Client.

   If there is no net recovery, Attorney will receive no attorney's fees.

6. DIVISION OF ATTORNEY'S FEES. Attorney will divide the attorney's fees received for the legal services provided under this agreement with Margaret Andover. The terms of the division are as follows: Attorney will pay to Margaret Andover one third of all attorney's fees received. Client is informed that, under the Rules of Professional Conduct of the State Bar of California, such a division may be made only with the Client's written consent after a full disclosure to the Client in writing that a division of fees will be made and of the terms of such division. Client hereby expressly consents to the division.

7. COSTS. Attorney will advance all "costs" in connection with Attorney's representation of Client under this agreement. Attorney will be reimbursed out of the recovery before any distribution of fees to Attorney or any distribution to Client. If there is no recovery, or the recovery is insufficient to reimburse Attorney in full for costs advanced, Attorney will bear the loss. Costs include, but are not limited to, court filing fees, deposition costs, expert fees and expenses, investigation costs, long-distance telephone charges, messenger service fees, photocopying expenses, and process server fees. Items that are not to be considered costs, and that must be paid by Client without being either advanced or contributed to by Attorney, include, but are not limited to, Client's medical expenses and other parties' costs, if any, that Client is ultimately required to pay.

8. REPRESENTATION OF ADVERSE INTERESTS. Client is informed that the Rules of Professional Conduct of the State Bar of California require the Client's informed written consent before an Attorney may begin or continue to represent the Client when the attorney has or had a relationship with another party interested in the subject matter of the Attorney's proposed representation of the client.

[continued]

*A sample contingent fee agreement between an attorney and a client (continued).*

**Contingent Fee Agreement Form**

Attorney is not aware of any relationship with any other party interested in the subject matter of Attorney's services for Client under this agreement. As long as Attorney's services for Client continue under this agreement, Attorney will not agree to provide legal services for any such party without Client's prior written consent.

9. SETTLEMENT. Attorney will not settle Client's claim without the approval of Client, who will have the absolute right to accept or reject any settlement. Attorney will notify Client promptly of the terms of any settlement offer received by Attorney.

10. ATTORNEY'S LIEN. Attorney will have a lien for Attorney's fees and costs advanced on all claims and causes of action that are the subject of her representation of Client under this agreement and on all proceeds of any recovery obtained (whether by settlement, arbitration award, or court judgment).

11. DISCHARGE OF ATTORNEY. Client may discharge Attorney at any time by written notice effective when received by Attorney. Unless specifically agreed by Attorney and Client, Attorney will provide no further services and advance no further costs on Client's behalf after receipt of the notice. If Attorney is Client's attorney of record in any proceeding, Client will execute and return a substitution-of-attorney form immediately on its receipt from Attorney. Notwithstanding the discharge, Client will be obligated to pay Attorney out of the recovery a reasonable attorney's fee for all services provided and to reimburse Attorney out of the recovery for all costs advanced. If there is no recovery, or the recovery is insufficient to reimburse Attorney in full for costs advanced, Attorney will bear the loss.

12. WITHDRAWAL OF ATTORNEY. Attorney may withdraw at any time as permitted under the Rules of Professional Conduct of the State Bar of California. The circumstances under which the Rules permit such withdrawal include, but are not limited to, the following: (a) The client consents, and (b) the client's conduct renders it unreasonably difficult for the attorney to carry out the employment effectively. Notwithstanding Attorney's withdrawal, Client will be obligated to pay Attorney out of the recovery a reasonable attorney's fee for all services provided, and to reimburse Attorney out of the recovery for all costs advanced, before the withdrawal. If there is no recovery, or the recovery is insufficient to reimburse Attorney in full for costs advanced, Attorney will bear the loss.

13. RELEASE OF CLIENT'S PAPERS AND PROPERTY. At the termination of services under this agreement, Attorney will release promptly to Client on request all of Client's papers and property. "Client's papers and property" include correspondence, deposition transcripts, exhibits, experts' reports, legal documents, physical evidence, and other items reasonably necessary to Client's representation, whether Client has paid for them or not.

14. DISCLAIMER OF GUARANTY. Although Attorney may offer an opinion about possible results regarding the subject matter of this agreement, Attorney cannot guarantee any particular result. Client acknowledges that Attorney has made no promises about the outcome and that any opinion offered by Attorney in the future will not constitute a guaranty.

15. ENTIRE AGREEMENT. This agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this agreement will be binding on the parties.

16. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.

17. MODIFICATION BY SUBSEQUENT AGREEMENT. This agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them or an oral agreement to the extent that the parties carry it out.

18. ARBITRATION OF FEE DISPUTE. If a dispute arises between Attorney and Client regarding attorney's fees under this agreement and Attorney files suit in any court other than small claims court, Client will have the right to stay that suit by timely electing to arbitrate the dispute under Business and Professions Code sections 6200-6206, in which event Attorney must submit the matter to such arbitration.

19. ATTORNEY'S FEES AND COSTS IN ACTION ON AGREEMENT. The prevailing party in any action or proceeding to enforce any provision of this agreement will be awarded reasonable attorney's fees and costs incurred in that action or proceeding or in efforts to negotiate the matter.

20. EFFECTIVE DATE OF AGREEMENT. The effective date of this agreement will be the date when, having been executed by Client, one copy of the agreement is received by Attorney, provided the copy is received on or before February 1, 2002, or Attorney accepts late receipt.

The foregoing is agreed to by:

Date: _____ _____
Client

Date: _____ _____
Attorney

[This agreement is meant to be illustrative only. Counsel should consider what provisions should be included, and what modifications should be made, in a particular fee agreement.]

subject to restrictions imposed by statute. Continuances are granted when necessary to avert a miscarriage of justice but will be denied if sought merely for the purpose of delay. Criminal defendants are entitled to a SPEEDY TRIAL unless good cause justifies a continuance of the action.

In ruling on a motion for a continuance, a court examines all the facts and circumstances of a case—in particular, the applicant's GOOD FAITH, the purpose and necessity for the postponement, the probable advantage that could result from the continuance, and the possibility of prejudice to the rights of other parties. If there are multiple defendants in a case, a continuance granted to one of them postpones the trial of the case against all of them. A continuance is usually granted if requested by a defendant, since the plaintiff should have adequately prepared his or her case before commencing the action.

A court can, sua sponte (on its own motion), order a continuance in certain instances, such as when none of the parties appears on the date of the hearing.

A continuance can occur by operation of law when a case has not been tried or otherwise disposed of during a particular term because of unanticipated problems, such as the death of the presiding judge. The case is automatically postponed until the following term.

Parties in a lawsuit file pleadings (written statements presenting each side of the case before trial to elucidate the issues to be resolved). A plaintiff whose complaint fails to state a CAUSE OF ACTION is not entitled to a continuance to correct this failure, but a defendant can make a motion for a dismissal of the action. Nor can a defendant whose answer to the plaintiff's complaint does not allege a meritorious defense cure this deficiency by seeking a continuance, but the plaintiff might make a motion for a SUMMARY JUDGMENT in his or her favor. A continuance may be granted, however, in a case that was scheduled for trial before the issues were joined or clearly established.

After a trial has begun or while motions are made pending the decision, a court can grant a continuance provided adequate grounds exist.

The trial of a case that has been remanded (sent back) by an appellate court to a lower court for a new trial may be continued at a later date if there is not enough time to prepare for the new trial.

When the parties consent to or stipulate a postponement of a case, a court will grant a continuance only if their agreement meets its approval.

### Grounds

Continuances are granted only if valid grounds exist that justify the postponement of the action. For example, a court will continue a case in which all the interested parties have not appeared in order to bring them into the action so that they may present their side of the case. If SERVICE OF PROCESS has not been properly made upon a defendant, a court may grant a continuance to perfect service so that a plaintiff will not be deprived of an opportunity to have the action tried. A delay in filing pleadings, which surprises the opposing party and affects the issues in an action, ordinarily entitles the adverse party to a continuance, since that party must be given time to prepare a response before the trial in order to prevent prejudice to his or her rights. A continuance may be granted for the accidental loss or destruction of papers in an action provided they cannot be readily replaced and the applicant for the continuance was not responsible for their loss.

**Lack of Preparation** Where the party making the motion is guilty of inexcusable ignorance, delay, or NEGLIGENCE in preparing the case, the court will deny a motion for a continuance. An applicant who can, however, demonstrate some legal or equitable reason or exercise of diligence in trying to prepare for the case may win a continuance.

**Change of Counsel** Withdrawal of legal counsel or employment of new counsel immediately preceding or during a trial does not necessarily warrant a continuance of the action. For example, if it is clear that a party has changed attorneys a number of times solely as a dilatory tactic for the purpose of delay, that party will be denied a continuance. Only where the circumstances of the case demonstrate that a miscarriage of justice will ensue from a denial of a continuance will a court seriously consider postponing the action.

**Pendency of Action** A continuance is granted when it is in the interests of justice to await the outcome of another proceeding affecting the same parties or where the interests of the parties are closely related, such as in cases dealing with VICARIOUS LIABILITY.

**Illness** The illness of a party to a lawsuit justifies a continuance only if injustice would result from proceeding with the case. If an illness is feigned or alleged merely for the purpose of delay, the applicant's motion will be denied and the applicant might be held in CONTEMPT. A party who becomes ill before trial should notify the court and the other parties, as soon as it is reasonably practicable to provide such notice, that his or her condition may jeopardize his or her participation in the proceedings. An AFFIDAVIT or certificate of a physician that a party's illness precludes his or her presence at trial should be filed with the court.

The illness of the judge presiding over the trial operates as a continuance of the action.

### Determination

A motion for a continuance is heard by the court which rules upon it after an evaluation of the evidence before it. If a continuance is granted, the trial court will set its duration with regard to the rights of both parties and impose any necessary restrictions. During the time of the adjournment the court may modify or revoke its order if reasonable cause is shown or if the court is satisfied that no injustice will result.

Successive continuances sought by a party are scrutinized closely by a court because there is a likelihood that they are sought for dilatory purposes. Unless the applicant clearly establishes that a postponement is essential to the integrity of the judicial process and a preservation of the rights of the parties, it will be denied. A motion based upon newly discovered evidence will be denied if the applicant could have discovered the evidence sooner by the use of reasonable efforts.

A continuance expires on the date specified in the court order. If the basis for the continuance ceases to exist prior to that date, the court may revoke its order and require that the case proceed to trial.

### Waiver

A party relinquishes or waives the right to obtain a continuance if he or she (1) fails to request one; (2) proceeds with the case after the motion for a continuance has been denied without making an exception to the ruling; or (3) voluntarily discontinues the action.

FURTHER READINGS

Yeazell, Stephen C. 1998. *Federal Rules of Civil Procedure: With Selected Statutes and Cases.* Gaithersburg, Md.: Aspen.

CROSS-REFERENCES

Motion; Pleading; Speedy Trial.

## CONTINUING LEGAL EDUCATION

The purpose of continuing legal education is to maintain or sharpen the skills of licensed attorneys and judges. Accredited courses examine new areas of the law or review basic practice and trial principles. Programs for continuing legal education are sponsored by state, local, and federal bar associations, law firms, law schools, and groups such as the AMERICAN BAR ASSOCIATION (ABA) and the American Law Institute.

Continuing legal education is mandatory in 40 states; voluntary programs are offered in the remaining 10. Courses are approved by state boards that oversee continuing education. In states with mandatory continuing legal education, attorneys receive credits for attending lectures and seminars taught by respected attorneys, judges, and scholars. The courses cover a variety of topics involving virtually all areas of practice. Written program materials are usually included as part of the tuition fee.

A 1974 informal poll conducted by state and local bar associations revealed widespread support for compulsory continuing legal education. The measure was favored to ensure professional competence and to improve the public image of lawyers. Supporters believed that continuing legal education would reduce the number of LEGAL MALPRACTICE suits, keep lawyers updated on important changes in the law, and improve the representation of clients. A year later, in 1975, Minnesota became the first state to adopt mandatory continuing legal education. The Minnesota Legislature appeared ready to take over the administration of continuing legal education; the Minnesota Supreme Court, however, preferred judicially mandated education, and took appropriate steps to institute it. The court ordered all Minnesota lawyers and judges to complete 45 hours of post-admission legal education every three years.

The Code of Professional Responsibility adopted by every state maintains that lawyers must remain proficient in their work. Continuing legal education is one way to achieve professional competence. Other professions such as medicine, education, and accounting also require continuing education. Beginning in the 1990s, states added specific content requirements. For example, Minnesota requires that in

each reporting cycle attorneys must take three hours of ethics-related coursework and two hours of coursework related to the elimination of bias in the legal profession. The state of California requires attorneys to take one hour per reporting cycle of coursework on the prevention and detection of substance abuse.

The delivery of continuing legal education has changed over time. Although most programs are presented at the local level, many providers now videotape sessions and replay them at a variety of sites around a state. This allows attorneys in rural areas and more remote locations to earn their credits locally. In addition, national providers such as the ABA produce seminars that are delivered through satellite transmissions to cities around the United States.

In most states where continuing legal education is required, nonpracticing lawyers may elect to be on restricted status. This means they can maintain their law license but do not have to fulfill continuing education requirements. Sometimes hardship or MITIGATING CIRCUMSTANCES exempt practicing attorneys from a continuing education requirement.

FURTHER READINGS

MacCrate, Robert, ed. 1992. *Legal Education and Professional Development: An Educational Continuum.* St. Paul, Minn.: West.

Sheran, Robert J., and Laurence C. Harmon. 1976. *Minnesota Plan: Mandatory Continuing Legal Education for Lawyers and Judges as a Condition for the Maintaining of Professional Licensing.* Reprinted in *Fordham Law Review* (May).

Tamayo-Calabrese, Macarena, Annette Cook, and Shirley Meyer. August 2002. "Continuing Legal Education in the United States." *Issues of Democracy.* Available online at <usinfo.state.gov/journals/itdhr/0802/ijde/calabrese.htm> (accessed May 22, 2003).

CROSS-REFERENCES

Legal Education.

## CONTRA

*Against; conflicting; opposite.*

A *contra-balance* is the amount in an account of a creditor that is the opposite of the usual balance of such an account. It is an account receivable (a debt owed to the creditor) but with a credit balance (an amount owed to the debtor greater than what is owed to the creditor). The creditor therefore owes the debtor money, the opposite of the normal debtor-creditor relationship.

*Marijuana plants, such as these seized by a Miami police officer, are considered contraband because it is illegal to produce or possess them.*

AP/WIDE WORLD PHOTOS

## CONTRABAND

*Any property that it is illegal to produce or possess. Smuggled goods that are imported into or exported from a country in violation of its laws.*

Contraband confiscated by law enforcement authorities upon the arrest of a person for the crimes of production or possession of such goods will not be returned, regardless of the outcome of the prosecution.

## CONTRACT WITH AMERICA

In the historic 1994 midterm elections, Republicans won a majority in Congress for the first time in forty years, partly on the appeal of a platform called the Contract with America. Put forward by House Republicans, this sweeping ten-point plan promised to reshape government. Its main theme was the decentralization of federal authority: deregulation, tax cuts, reform of social programs, increased power for states, and a balanced FEDERAL BUDGET were its chief ambitions. With unusual speed, all ten items came to a vote in the House of Representatives within one hundred days, and the House passed nine of the ten measures. Yet, even as House Speaker NEWT GINGRICH (R-Ga.) compared the plan to the most important political reforms of the twentieth century, progress on the contract stalled. Senate Republicans were slow to embrace it, Democrats in both chambers denounced it, and President BILL CLINTON threatened to VETO its most radical provisions. Only three of the least controversial measures had become law by the end of 1995 as Congress and the White House battled bitterly over the federal budget.

On the surface, the contract differed little from other modern Republican platforms. It

began with a statement of three "core" principles in the form of an argument: the federal government is too big and unresponsive *(accountability),* and big government programs sap individual and family willpower *(responsibility)*—and thus an overtaxed and overregulated citizenry cannot pursue the American Dream *(opportunity).* Republicans had been saying as much for at least two decades. Although Democrats had controlled Congress for more than forty years with an almost opposite view of government's duty to its people, Republicans had held the White House from 1980 to 1992. The election of President Clinton in 1992 was a striking setback for **REPUBLICAN PARTY** strategists. Yet, they took encouragement from voter discontent with the pace of Clinton's legislative plans, two key provisions of which—an economic stimulus package and **HEALTH CARE** reform—failed to pass even with a Democratic majority in Congress. For the mid-1994 congressional elections, they intended to capitalize on this discontent with a platform that promised quick and dramatic change.

Toward this end, the Contract with America made two promises "to restore the bonds of trust between the people and their elected representatives." First, it promised to change the way Congress works by requiring that lawmakers follow the same workplace laws as the rest of the country—notably, **SEXUAL HARASSMENT** laws—and by strictly reforming the sluggish committee process in the House of Representatives. Second, it promised that the House would vote on the ten key planks of the contract within the first one hundred days of the new Congress. The contract gave these ten planks names such as the Fiscal Responsibility Act, the Taking Back Our Streets Act, and the Personal Responsibility Act. The contract promised action on the following issues: the federal deficit, crime, **WELFARE** reform, family values, middle-class tax cuts, national defense, **SOCIAL SECURITY**, federal deregulation and capital gains tax cuts, legal reform, **CIVIL LAW** and **PRODUCT LIABILITY**, and term limits for federal lawmakers.

The actual proposals represented a mixture of old and new ideas. Republicans had long supported deregulation of industry, **TORT** reform, and middle-class tax cuts. As a deficit reduction solution, the line-item veto was an old idea: ever since the 1980s, Republicans had called for a **PRESIDENTIAL POWER** to veto specific parts of federal spending bills (rather than the entire bills). More revolutionary was the contract's related proposal: a constitutional amendment requiring a balanced budget. In the same sense, the welfare reform proposals reflected a long-running debate and yet offered ambitiously strict limits on spending, eligibility, and administration, and even sought to transfer authority over traditionally federal programs to the states. Other proposals grew out of more recent concerns. The crime reform measure was a Republican effort to scale back social spending and increase law enforcement spending, in reaction to the Clinton crime bill of 1994; and proposals to curb U.S. military involvement in the United Nations' peacekeeping missions reflected Republican criticism of Clinton's decisions to send troops to Somalia and Haiti.

The contract met with mixed results in 1995. The House Republican leadership did indeed put each item to a vote within the first one hundred days. It divided each item into one or more bills, and thirty-one of the resulting thirty-two measures passed—only one, for congressional term limits, failed. The Senate moved much more slowly. In part, this was because the Senate, as a debating body, customarily proceeds more cautiously. Another reason was that the senators, unlike their first-year counterparts in the House, were far less eager to pass sweeping reforms: the Senate killed the proposal for a constitutional amendment on the budget, for example, and simply delayed action on several other bills. President Clinton's promise to veto any far-ranging welfare and budgetary proposals also crimped Republican plans, and by November 1995 this threat had produced a bitter standoff that resulted in the temporary closing of the federal government.

*In September 1994, Newt Gingrich and a group of Republican congressional candidates announced their plans for a platform called Contract with America. The ten-point plan helped the Republican Party win a majority in Congress.*

AP/WIDE WORLD PHOTOS

Three contract proposals became law: the Congressional Accountability Act of 1995 (Pub. L. No. 104-1, 109 Stat. 3), which requires Congress to follow eleven workplace laws; the Unfunded Mandates Reform Act of 1995 (Pub. L. No. 104-4, 109 Stat. 48), which restricts Congress from imposing mandates on states that are not adequately funded; and the Paperwork Reduction Act of 1995 (Pub. L. No. 104-13, 109 Stat. 163), which reduces federal paperwork requirements.

## CONTRACTS

*Agreements between two entities, creating an enforceable obligation to do, or to refrain from doing, a particular thing.*

### Nature and Contractual Obligation

The purpose of a contract is to establish the agreement that the parties have made and to fix their rights and duties in accordance with that agreement. The courts must enforce a valid contract as it is made, unless there are grounds that bar its enforcement.

Statutes prescribe and restrict the terms of a contract where the general public is affected. The terms of an insurance contract that protect a common carrier are controlled by statute in order to safeguard the public by guaranteeing that there will be financial resources available in the event of an accident.

The courts may not create a contract for the parties. When the parties have no express or implied agreement on the essential terms of a contract, there is no contract. Courts are only empowered to enforce contracts, not to write them, for the parties. A contract, in order to be enforceable, must be a valid. The function of the court is to enforce agreements only if they exist and not to create them through the imposition of such terms as the court considers reasonable.

It is the policy of the law to encourage the formation of contracts between competent parties for lawful objectives. As a general rule, contracts by competent persons, equitably made, are valid and enforceable. Parties to a contract are bound by the terms to which they have agreed, usually even if the contract appears to be improvident or a bad bargain, as long as it did not result from FRAUD, duress, or UNDUE INFLUENCE.

The binding force of a contract is based on the fact that it evinces a meeting of minds of two parties in GOOD FAITH. A contract, once formed, does not contemplate a right of a party to reject it. Contracts that were mutually entered into between parties with the capacity to contract are binding obligations and may not be set aside due to the caprice of one party or the other unless a statute provides to the contrary.

### Types of Contracts

**Contracts under Seal** Traditionally, a contract was an enforceable legal document only if it was stamped with a seal. The seal represented that the parties intended the agreement to entail legal consequences. No legal benefit or detriment to any party was required, as the seal was a symbol of the solemn acceptance of the legal effect and consequences of the agreement. In the past, all contracts were required to be under seal in order to be valid, but the seal has lost some or all of its effect by statute in many jurisdictions. Recognition by the courts of informal contracts, such as implied contracts, has also diminished the importance and employment of formal contracts under seal.

**Express Contracts** In an express contract, the parties state the terms, either orally or in writing, at the time of its formation. There is a definite written or oral offer that is accepted by the offeree (i.e., the person to whom the offer is made) in a manner that explicitly demonstrates consent to its terms.

**Implied Contracts** Although contracts that are *implied in fact* and contracts *implied in law* are both called implied contracts, a true implied contract consists of obligations arising from a mutual agreement and intent to promise, which have not been expressed in words. It is misleading to label as an implied contract one that is implied in law because a contract implied in law lacks the requisites of a true contract. The term quasi-contract is a more accurate designation of contracts implied in law. Implied contracts are as binding as express contracts. An implied contract depends on substance for its existence; therefore, for an implied contract to arise, there must be some act or conduct of a party, in order for them to be bound.

A contract implied in fact is not expressed by the parties but, rather, suggested from facts and circumstances that indicate a mutual intention to contract. Circumstances exist that, according to the ordinary course of dealing and common understanding, demonstrate such an intent that is sufficient to support a finding of an implied contract. Contracts implied in fact do not arise

contrary to either the law or the express declaration of the parties. Contracts implied in law (quasi-contracts) are distinguishable in that they are not predicated on the assent of the parties, but, rather, exist regardless of assent.

The implication of a mutual agreement must be a reasonable deduction from all of the circumstances and relations that contemplate parties when they enter into the contract or which are necessary to effectuate their intention. No implied promise will exist where the relations between the parties prevent the inference of a contract.

A contract will not be implied where it would result in inequity or harm. Where doubt and divergence exist in the minds of the parties, the court may not infer a contractual relationship. If, after an agreement expires, the parties continue to perform according to its terms, an implication arises that they have mutually assented to a new contract that contains the same provisions as the old agreement.

A contract implied in fact, which is inferred from the circumstances, is a true contract, whereas a contract implied in law is actually an obligation imposed by law and treated as a contract only for the purposes of a remedy. With respect to contracts implied in fact, the contract defines the duty; in the case of quasi-contracts, the duty defines and imposes the agreement upon the parties.

**Executed and Executory Contracts** An executed contract is one in which nothing remains to be done by either party. The phrase is, to a certain extent, a misnomer because the completion of performances by the parties signifies that a contract no longer exists. An executory contract is one in which some future act or obligation remains to be performed according to its terms.

**Bilateral and Unilateral Contracts** The exchange of mutual, reciprocal promises between entities that entails the performance of an act, or forbearance from the performance of an act, with respect to each party, is a BILATERAL CONTRACT. A bilateral contract is sometimes called a two-sided contract because of the two promises that constitute it. The promise that one party makes constitutes sufficient consideration (see discussion below) for the promise made by the other.

A unilateral contract involves a promise that is made by only one party. The offeror (i.e., a person who makes a proposal) promises to do a certain thing if the offeree performs a requested act that he or she knows is the basis of a legally enforceable contract. The performance constitutes an acceptance of the offer, and the contract then becomes executed. Acceptance of the offer may be revoked, however, until the performance has been completed. This is a one-sided type of contract because only the offeror, who makes the promise, will be legally bound. The offeree may act as requested, or may refrain from acting, but may not be sued for failing to perform, or even for abandoning performance once it has begun, because he or she did not make any promises.

**Unconscionable Contracts** An UNCONSCIONABLE contract is one that is unjust or unduly one-sided in favor of the party who has the superior bargaining power. The adjective *unconscionable* implies an affront to fairness and decency. An unconscionable contract is one that no mentally competent person would accept and that no fair and honest person would enter into. Courts find that unconscionable contracts usually result from the exploitation of consumers who are poorly educated, impoverished, and unable to shop around for the best price available in the competitive marketplace.

The majority of unconscionable contracts occur in consumer transactions. Contractual provisions that indicate gross one-sidedness in favor of the seller include limiting damages or the rights of the purchaser to seek court relief against the seller, or disclaiming a WARRANTY (i.e., a statement of fact concerning the nature or caliber of goods sold the seller, given in order to induce the sale, and relied upon by the purchaser).

Unconscionability is ascertained by examining the circumstances of the parties when the contract was made. This doctrine is applied only where it would be an affront to the integrity of the judicial system to enforce such a contract.

**Adhesion Contracts** Adhesion contracts are those that are drafted by the party who has the greater bargaining advantage, providing the weaker party with only the opportunity to adhere to (i.e., to accept) the contract or to reject it. (These types of contract are often described by the saying "Take it or leave it.") They are frequently employed because most businesses could not transact business if it were necessary to negotiate all of the terms of every contract. Not all adhesion contracts are unconscionable, as the terms of such contracts do not necessarily exploit the party who assents to the contract.

Courts, however, often refuse to enforce contracts of adhesion on the grounds that a true meeting of the minds never existed, or that there was no acceptance of the offer because the purchaser actually had no choice in the bargain.

**Aleatory Contracts** An aleatory contract is a mutual agreement the effects of which are triggered by the occurrence of an uncertain event. In this type of contract, one or both parties assume risk. A fire insurance policy is a form of aleatory contract, as an insured will not receive the proceeds of the policy unless a fire occurs, an event that is uncertain to occur.

**Void and Voidable Contracts** Contracts can be either void or VOIDABLE. A void contract imposes no legal rights or obligations upon the parties and is not enforceable by a court. It is, in effect, no contract at all.

A voidable contract is a legally enforceable agreement, but it may be treated as never having been binding on a party who was suffering from some legal disability or who was a victim of fraud at the time of its execution. The contract is not void unless or until the party chooses to treat it as such by opposing its enforcement. A voidable contract may be ratified either expressly or impliedly by the party who has the right to avoid it. An express ratification occurs when that party who has become legally competent to act declares that he or she accepts the terms and obligations of the contract. An implied ratification occurs when the party, by his or her conduct, manifests an intent to ratify a contract, such as by performing according to its terms. Ratification of a contract entails the same elements as formation of a new contract. There must be intent and complete knowledge of all material facts and circumstances. Oral ACKNOWLEDGMENT of a contract and a promise to perform constitute sufficient ratification. The party who was legally competent at the time that a voidable contract was signed may not, however, assert its voidable nature to escape the enforcement of its terms.

## Which Law Governs

Although a general body of contract law exists, some aspects of it, such as construction (i.e., the process of ascertaining the proper explanation of equivocal terms), vary among the different jurisdictions. When courts must select the law to be applied with respect to a contract, they consider what the parties intended as to which law should govern; the place where the contract was entered into; and the place of performance of the contract. Many courts apply the modern doctrine of the "grouping of contracts" or the "center of gravity," in which the law of the jurisdiction that has the closest or most significant relationship with the matter in issue applies.

Courts generally apply the law that the parties expressly or impliedly intend to govern the contract, provided that it bears a reasonable relation to the transaction and the parties acted in good faith. Some jurisdictions follow the law of the place where the contract was performed, unless the intent of the parties is to the contrary. Where foreign law governs, contracts may be recognized and enforced under the doctrine of comity (i.e., the acknowledgment that one nation gives within its territory to the legislative, executive, or judicial acts of another nation).

## Elements of a Contract

The requisites for formation of a legal contract are an offer, an acceptance, competent parties who have the legal capacity to contract, lawful subject matter, mutuality of agreement, consideration, mutuality of obligation, and, if required under the STATUTE OF FRAUDS, a writing.

**Offer** An offer is a promise that is, by its terms, conditional upon an act, forbearance, or return promise being given in exchange for the promise or its performance. It is a demonstration of willingness to enter into a bargain, made so that another party is justified in understanding that his or her assent to the bargain is invited and will conclude it. Any offer must consist of a statement of present intent to enter a contract; a definite proposal that is certain in its terms; and communication of the offer to the identified, prospective offeree. If any of these elements are missing, there is no offer to form the basis of a contract.

***Preliminary negotiations, advertisements, invitations to bid*** Preliminary negotiations are clearly distinguished from offers because they contain no demonstration of present intent to form contractual relations. No contract is formed when prospective purchasers respond to such terms, as they are merely invitations or requests for an offer. Unless this interpretation is employed, any person in a position similar to a seller who advertises goods in any medium would be liable for numerous contracts when there is usually a limited quantity of merchandise for sale.

An advertisement, price quotation, or catalogue is customarily viewed as only an invitation to a customer to make an offer and not as an offer itself. The courts reason that an establishment might not have sufficient stock to satisfy potential demand and that it would not be reasonable for a customer to expect to form a binding contract by responding to advertisements that are intended to make consumers aware of a product for sale. In addition, the courts have held that an advertisement is an offer for a unilateral contract that can be revoked at the will of the offeror, the business enterprise, prior to performance of its terms.

An exception exists, however, to the general rule on advertisements. When the quantity offered for sale is specified and contains words of promise, such as "first come, first served," courts enforce the contract where the store refuses to sell the product when the price is tendered. Where the offer is clear, definite, and explicit, and no matters remain open for negotiation, acceptance of it completes the contract. New conditions may not be imposed on the offer after it has been accepted by the performance of its terms.

An advertisement or request for bids for the sale of particular property or the erection or construction of a particular structure is merely an invitation for offers that cannot be accepted by any particular bid. A submitted bid is, however, an offer, which upon acceptance by the offeree becomes a valid contract.

***Mistake in sending offer*** If an intermediary, such as a telegraph company, errs in the transmission of an offer, most courts hold that the party who selected that method of communication is bound by the terms of the erroneous message. The same rule applies to acceptances. In reaching this result, courts regard the telegraph company as the agent of the party who selected it. Other courts justify the rule on business convenience. A few courts rule that if there is an error in transmission, there is no contract, on the grounds that either the telegraph company is an INDEPENDENT CONTRACTOR and not the sender's agent, or there has been no meeting of the minds of the parties. However, an offeree who knows, or should know, of the mistake in the transmission of an offer may not take advantage of the known mistake by accepting the offer; he or she will be bound by the original terms of the offer.

***Termination of an offer*** An offer remains open until the expiration of its specified time period or, if there is no time limit, until a reasonable time has elapsed. A reasonable time is determined according to what a reasonable person would consider sufficient time to accept the offer.

The death or insanity of either party, before an acceptance is communicated, causes an offer to expire. If the offer has been accepted, the contract is binding, even if one of the parties dies thereafter. The destruction of the subject matter of the contract; conditions that render the contract impossible to perform; or the supervening illegality of the proposed contract results in the termination of the offer.

When the offeror, either verbally or by conduct, clearly demonstrates that the offer is no longer open, the offer is considered revoked when learned by the offeree. Where an offer is made to the general public, it can be revoked by furnishing public notice of its termination in the same way in which the offer was publicized.

***Irrevocable offers*** An option is a right that is purchased by a person in order to have an offer remain open at agreed-upon price and terms, for a specified time, during which it is irrevocable. It constitutes an exception to the general rule that an offer may be withdrawn prior to acceptance. The offeror may not withdraw this offer because that party is bound by the consideration given by the offeree. The offeree is free, however, to decide whether or not to accept the offer.

Most courts hold that an offer for a unilateral contract becomes irrevocable as soon as the offeree starts to perform the requested act, because that action serves as consideration to prevent revocation of the offer. Where it is doubtful whether the offer invites an act (as in the case of a unilateral contract) or a promise (as in the case of a bilateral contract), the presumption is in favor of a promise, and therefore a bilateral contract arises. If an offer to form a unilateral contract requires several acts, it is interpreted as inviting acceptance by completion of the initial act. Performance of the balance constitutes a condition to the offeror's duty of performance. Where such an offer invites only a single act, it includes by implication a subsidiary promise to keep the offer open if the offeree will commence performance. Some courts hold that an offer for a unilateral contract may be revoked at any time prior to completion of the act bargained for, even after the offeree has partially performed it.

***Rejection of an offer*** An offer is rejected when the offeror is justified in understanding from the words or conduct of the offeree that he or she intends not to accept the offer, or to take it under further advisement. Rejection might come in the form of an express refusal to accept an offer by a counteroffer, which is a new proposal that rejects the offer by implication; or by a conditional acceptance that operates as a counteroffer. The offer may continue, however, if the offeree expressly states that the counteroffer shall not constitute a rejection of the offer.

If an offer is rejected, the party who made the original offer no longer has any liability for that offer. The party who rejected the offer may not subsequently, at his or her own option, convert the same offer into a contract by a subsequent acceptance. In such a case, the consent of the offeror must be obtained for a contract to be formed.

**Acceptance** Acceptance of an offer is an expression of assent to its terms. It must be made by the offeree in a manner requested or authorized by the offeror. An acceptance is valid only if the offeree knows of the offer; the offeree manifests an intention to accept; the acceptance is unequivocal and unconditional; and the acceptance is manifested according to the terms of the offer.

The determination of a valid acceptance is governed by whether a promise or an act by the offeree was the bargained-for response. Since the acceptance of a unilateral contract requires an act rather than a promise, it is unnecessary to furnish notice of intended performance unless the offeror requested it. If, however, the offeree has reason to believe that the offeror will not learn of the acceptance with reasonable promptness, the duty of the offeror is discharged unless the offeree makes a reasonable attempt to give notice; the offeror learns of the performance; or the offer indicates that no notice is required.

In bilateral contracts, the offer is effective when the offeree receives it. The offeree may accept it until the offeree receives notice of revocation from the offeror. Thereafter, an offer is revoked. Under the majority rule, which is known as the "mailbox rule," an acceptance is effective upon dispatch if the offeror explicitly authorizes that method of acceptance to be employed by the offeree, even if the acceptance is lost or destroyed in transit.

The majority rule is inapplicable, however, unless the acceptance is properly addressed and postage prepaid. It has no application to most option contracts, as acceptance of an option contract is effective only when received by the offeror.

If the acceptance mode used by the offeree is implicitly authorized by the offeror, such as the selection by the offeree of the same method used by the offeror, who neglected to designate a method of communication, an acceptance is effective upon dispatch if it is correctly addressed and the expense of its conveyance is prepaid. As with expressly authorized methods, the acceptance need not ever reach the offeror in order to form the contract.

In some jurisdictions, the use of a method not expressly or impliedly authorized by the offeror, even if more rapid in nature, results in a contract only upon receipt of the acceptance. In most jurisdictions, however, if the acceptance mode is inherently faster, it is deemed to be an impliedly authorized means, and acceptance is effective upon dispatch.

If the acceptance is transmitted by an expressly or impliedly authorized method to the wrong address, it is effective only upon receipt by the offeror. A wrong address is any address other than that implicitly authorized, even if the offeror were in a position to receive the acceptance at the substituted address.

An offeror who specifically states that there is no contract until the acceptance is received is entitled to insist upon the condition of receipt or upon any other provision concerning the manner and time of acceptance specified.

Rejection of the offer or revocation of conditional acceptance is effective upon receipt. A late or defective acceptance is treated as a counteroffer, which will not result in a contract unless the offeror accepts it. If offers cross in the mail, there will be no binding contract, as an offer may not be accepted if there is no knowledge of it.

As a general rule, an offer may be accepted only by the offeree or an authorized agent. If, however, the offer is contained in an option contract, it may be the subject of an assignment or transfer without the consent of the offeror, unless the option involves a purchase on credit or expressly prohibits an assignment.

In contracts that do not involve the sale of goods, acceptance must comply exactly with the requirements of the offer (this is known as the

"mirror-image rule"), and must omit nothing from the promise or performance requested. An offer of a prize in a contest, for example, becomes a binding contract when a contestant successfully complies with the terms of the offer. If a response to an offer purports to accept it, but adds qualifications or conditions, then it is a counteroffer and not an acceptance.

Acceptance may be inferred from the offeree's acts, conduct, or silence; but as a general rule, silence, without more, can never constitute acceptance. The effect of silence accompanied by AMBIGUITY must be ascertained from all the circumstances in the case.

Prior dealings between the parties may create a duty to act. Silence or the failure to take some action under such circumstances might constitute acceptance. For example, if the parties have engaged in a series of business transactions involving the mailing of goods and payment by the recipient, the recipient will not be permitted to retain an article without paying for it within a reasonable time, due to their prior dealings. A recipient who does not intend to accept the goods is under a duty to inform the sender. Silence, where there is a duty to speak, prevents the offeree from rejecting an offer and the offeror from claiming that there is no acceptance. If ownership rights are exercised over an item, this might be deemed an acceptance.

***Unsolicited goods*** At COMMON LAW, the recipient of unsolicited goods in the mail was not required to accept or to return them, but if the goods were used, a contract and a concomitant obligation to pay for them were created. Today, in order to offer protection against unwanted solicitations, some state statutes have modified the common-law rule by providing that where unsolicited merchandise is received as part of an offer to sell, the goods are an outright gift. The recipient may use the goods and is under no duty to return or pay for them unless he or she knows that they were sent by mistake.

***Agreements to agree*** An "agreement to agree" is not a contract. This type of agreement is frequently employed in industries that require long-term contracts in order to ensure a constant source of supplies and outlet of production. Mutual manifestations of assent that are, in themselves, sufficient to form a binding contract are not deprived of operative effect by the mere fact that the parties agree to prepare a written reproduction of their agreement. In determining whether, on a given set of facts, there is merely an "agreement to agree" or a sufficiently binding contract, the courts apply certain rules. If the parties express their intention—either to be bound or not bound until a written document is prepared—then that intention controls. If they have not expressed their intention, but they exchange promises of a definite performance and agree upon all essential terms, then the parties have formed a contract even though the written document is never signed. If the expressions of intention are incomplete—as, for example, if a material term such as quantity has been left to further negotiation—the parties do not have a contract. The designation of the material term for further negotiation is interpreted as demonstrating the intention of the parties not to be bound until a complete agreement has been reached.

**Competent Parties** A natural person who agrees to a transaction has complete legal capacity to become liable for duties under the contract unless he or she is an infant, insane, or intoxicated.

***Infants*** An infant is defined as a person under the age of 18 or 21, depending on the particular jurisdiction. A contract made by an infant is voidable but is valid and enforceable until or unless he or she disaffirms it. He or she may avoid the legal duty to perform the terms of the contract without any liability for breach of contract. INFANTS are treated in such a way because public policy deems it desirable to protect the immature and naive infant from liability for unfair contracts that he or she is too inexperienced to negotiate on equal terms with the other party.

Once an infant attains majority (i.e., the age at which a person is no longer legally considered an infant), he or she must choose either to disaffirm or avoid the contract, or to ratify or accept it. After reaching the age of majority, a person implicitly ratifies and becomes bound to perform the contract if he or she fails to disaffirm it within a reasonable time, which is determined by the circumstances of the particular case. A person who disaffirms a contract must return any benefits or consideration received under it that he or she still possesses. If such benefits have been squandered or destroyed, the person usually has no legal obligation to recompense the other party. The law imposes liability on the infant in certain cases, however. Although the contract of an infant or other person may be

voidable, the person still may be liable in quasi-contract in order to prevent UNJUST ENRICHMENT for the reasonable value of goods or services furnished if they are necessaries that are reasonably required for the person's health, comfort, or education.

The majority of courts hold that an infant who willfully misrepresents his or her age may, nevertheless, exercise the power to avoid the contract. As a general rule, however, the infant must place the adult party in the status quo ante (i.e., his or her position prior to the contract). The jurisdictions are in disagreement in regard to whether an infant is liable in TORT (i.e., a civil wrong other than breach of contract) for willful misrepresentation of his or her age. This divergence arises from the rule that a tort action may not be maintained against an infant if it essentially entails the enforcement of a contract. Some courts regard the action for fraud that would be commenced against the infant as being based on the contract. Others rule that the tort is sufficiently independent of the contract so that the granting of relief would not involve indirect enforcement of the contract. The other party, however, is able to avoid a contract entered into on the basis of an infant's fraudulent MISREPRESENTATION with respect to age or other material facts because he or she is the innocent victim of the infant's fraud.

***Mental incapacity*** When a party does not comprehend the nature and consequences of the contract when it is formed, he or she is regarded as having mental incapacity. A distinction must be drawn between those persons who have been adjudicated incompetent by a court and have had a guardian appointed, and those mentally incompetent persons who have not been so adjudicated. A person who has been declared incompetent in a court proceeding lacks the legal capacity to enter into a contract with another. Such a person is unable to consent to the contract, as the court has determined that he or she does not understand the obligations and effects of the contract. A contract made by such a person is void and without any legal effect. Neither party may be legally compelled to perform or comply with the terms of the contract. If there has been no adjudication of insanity, a contract made by a mentally incapacitated individual is voidable by him or her.

Many contract principles that apply to minors also apply to insane persons. There is an obligation to recompense the injured party where a voidable contract is avoided, and to pay for necessaries based upon quasi-contract for the reasonable value of the goods or services. The incompetent, a guardian, or a PERSONAL REPRESENTATIVE after death may avoid the contract. The incompetent may ratify a voidable contract only if they recover the capacity to contract. The right to avoid the contract belongs to the incompetent; the other party may not avoid the contractual obligation. A contract that is ordinarily voidable may not be set aside when it is inherently fair to both parties and has been executed to such an extent that the other party cannot be restored to the position that they occupied prior to the contract.

***Intoxicated persons*** A contract made by an intoxicated person is voidable. When a person is inebriated at the time of entering into a contract with another and subsequently becomes sober and either promises to perform the contract or fails to disaffirm it within a reasonable time after becoming sober, then that person has ratified his or her voidable contract and is legally bound to perform.

**Subject Matter** Any undertaking may be the subject of a contract, provided that it is not proscribed by law. When a contract is formed in restraint of trade, courts will not enforce it, because it imposes an illegal and unreasonable burden on commerce by hindering competition. Contracts that provide for the commission of a crime or any illegal objective are also void.

Future rights and liabilities—performing or refraining from some designated act, or assuming particular risks or obligations—may constitute the basis of a contract. An idea that never assumes concrete form at the time of disclosure, such as a concept for a short story, even though new and unusual, may not, however, be the subject of a contract.

A person may not legally contract concerning a right that he or she does not have. A seller of a home who does not possess clear title to the property may not promise to convey it without encumbrances. Neither may a seller promise that property will not be appropriated by EMINENT DOMAIN, which is an inherent power of government that is not subject to restrictions imposed by individuals.

**Mutual Agreement** There must be an agreement between the parties, or mutual assent, for a contract to be formed. In order for an agreement to exist, the parties must have a common intention or a meeting of minds on the terms of

the contract and must subscribe to the same bargain. Aside from certain statutory exceptions pertaining to the sale of goods, as prescribed by Article 2 of the UNIFORM COMMERCIAL CODE (UCC), if any of the proposed terms is not settled, or if no method of settlement is provided, then there is no agreement. The parties may settle one term at a time, but their contract becomes complete only when they assent to the final term. An agreement is binding if the parties concur with respect to the essential terms and intend the agreement to be binding, even though all of the details are not definitely fixed. The quantity of goods are usually essential terms of the contract that must be agreed upon if the contract is to be enforced. Exceptions to the rule requiring the terms of an agreement to be definite and certain are contained in article 2 of the UCC, which permits the courts to imply reasonably the missing terms if the essential terms unambiguously demonstrate the mutual agreement of the parties.

**Consideration** Consideration is a legal detriment that is suffered by the promisee and that is requested by the promisor in exchange for his or her promise. A valid contract requires some exchange of consideration. As a general rule, in a bilateral contract, one promise is valid consideration for the other. In a unilateral contract, the agreed performance by the offeree furnishes the necessary consideration and also operates as an acceptance of the offer.

Consideration may consist of a promise; an act other than a promise; a forbearance from suing on a claim that is the subject of an honest and reasonable dispute; or the creation, modification, or destruction of a legal relationship. It signifies that the promisee will relinquish some legal right in the present, or that he or she will restrict his or her legal freedom of action in the future as an inducement for the promise of the other party. It is not substantially concerned with the benefit that accrues to the promisor.

Love and affection are not permissible forms of consideration. A promise to make a gift contains no consideration because it does not entail a legal benefit received by the promisor or a legal detriment suffered by the promisee. Because a promise to give a gift is freely made by the promisor, who is not subject to any legal duty to do so, the promise is not enforceable unless there is PROMISSORY ESTOPPEL. Promissory estoppel is a doctrine by which a court enforces a promise that the promisor reasonably expects will induce action or forbearance on the part of a promisee, who justifiably relied on the promise and suffered a substantial detriment as a result. Where a court enforces a promise by applying this doctrine, promissory estoppel serves as a substitute for the required consideration.

At common law, courts refused to inquire into the adequacy or fairness of a bargain, finding that the payment of some price constituted legally sufficient consideration. If one is seeking to prove mistake, misrepresentation, fraud, or duress—or to assert a similar defense—the inadequacy of the price paid for the promise might represent significant evidence for such defenses, but the law does not require adequacy of consideration in order to find an enforceable contract.

**Mutuality of Obligation** Where promises constitute the consideration in a bilateral contract, they must be mutually binding. This concept is known as mutuality of obligation. If one party's promise does not actually bind him or hers to some performance or forbearance, it is an illusory promise, and there is no enforceable contract.

Where the contract provides one party with the right to cancel, there might be no consideration because of lack of mutuality of obligation. If there is an absolute and unlimited right to cancel the obligation, the promise by the party with the right of cancellation is illusory, and the lack of consideration means that there is no contract. If the power to cancel the contract is restricted in any manner, the contract is usually considered to be binding. Performance of a void promise in a defective bilateral contract may render the other promise legally binding, however. For example, in virtually all states, an oral contract to transfer title to land is not merely unenforceable, it is absolutely void. (See discussion of the statute of frauds, below.) A seller who orally promises to transfer land to a purchaser, for which the purchaser orally promises a designated sum, may sue the purchaser for the price if the purchaser receives title to the land from the seller. The purchaser is not relieved of his or her promise to pay, because of the performance of the void oral promise by the seller.

A promise to perform an act that one is legally bound to do does not qualify as consideration for another promise.

Past consideration consists of actions that occurred prior to the making of the contractual promise, without any purpose of inducing a

promise in exchange. It is not valid, because it is not furnished as the bargained-for exchange of the present promise. There are exceptions to this rule, such as a present promise to pay a debt that has been discharged in BANKRUPTCY, which constitutes valid consideration because it renews a former promise to pay a debt that was supported by consideration.

Most states do not recognize moral obligation as consideration, as there is no acceptable method of setting the parameters of moral duty. Some courts will enforce a moral obligation where there has been a benefit conferred on the promisor.

**Statute of Frauds** The statute of frauds was enacted by the English Parliament in 1677 and has since been the law in both England and in the United States in varying forms. It requires that certain types of contracts be in writing. The principal characteristic of various state laws modeled after the original statute is the provision that no suit or action shall be maintained on a contract unless there is a note or memorandum of its subject matter, terms and conditions, and the identity of the parties, signed by the party to be charged or obligated under it or an authorized agent. The purpose of the statute is to prevent the proof of a nonexistent agreement through fraud or perjury in actions for breach of an alleged contract.

### Reality of Consent

The parties must mutually assent to the proposed objectives and terms of a contract in order for it to be enforceable. The manifestation of the common intent of the parties is discerned from their conduct or verbal exchanges.

What one party secretly intended is irrelevant if his or her conduct appears to demonstrate agreement. In a few limited cases, however, where there is no stated expression of the parties' intent, their subjective intentions may establish an enforceable contract if both believe in the same terms of the contract.

There will be no binding contract without the real consent of the parties. Apparent consent may be vitiated because of mistake, fraud, innocent misrepresentation, duress, or undue influence, all of which are defenses to the enforcement of the contract.

**Mutual Mistake** When there is a mutual MISTAKE OF FACT with respect to the subject of the contract, the subjective intention of the parties is evaluated by the courts to determine whether there had been, in fact, a meeting of the minds of the parties.

If the mutual mistake significantly changed the subject matter of the contract, a court will refuse to enforce the contract. If, however, the difference in the subject matter of the contract concerned some incidental quality that has no (or negligible) effect on the value of the contract, the contract is binding, even though the mistake altered or removed what had been the incentive to one or both parties to enter the contract.

**Unilateral Mistake** Ordinarily, a unilateral mistake (i.e., an error made by one party) affords no basis for avoiding a contract, but a contract that contains a typographical error may be corrected. A contract may be avoided if the error in value in what is to be exchanged is substantial, or if the mistake is caused by or known to the other party. Unilateral mistakes frequently occur where a contractor submits an erroneous bid for a PUBLIC CONTRACT. Where such a bid is accepted, the contractor will be permitted to avoid the contract only if the agreement has not been executed or if the other party can be placed in the position that they occupied prior to the contract. If the mistake is obvious, the contract will not be enforced, but if it is inconsequential, the contract will be upheld. The mistake must consist of a clerical error or a mistake in computation, as an error in judgment will not permit a contractor to avoid a contract.

**Mistake of Law** When a party who has full knowledge of the facts reaches an erroneous conclusion as to their legal effect, such a MISTAKE OF LAW will not invalidate a contract or affect its enforceability.

**Illiteracy** Illiteracy neither excuses a party from the duty of learning the contents of a written contract nor prevents the mutual agreement of the parties. An illiterate person is capable of giving real consent to a contract; the person has a duty to ask someone to read the contract to him or her and to explain it, if necessary. Illiteracy can, however, serve as a basis for invalidating a contract when considered in relation to other factors, such as fraud or overreaching. If the person whom the illiterate designates to read or explain the contract misrepresents it and acts in collusion with the other party to the contract, the contract may be set aside.

**Fraud** Fraud prevents mutual agreement to a contract because one party intentionally

deceives another as to the nature and the consequences of a contract. It is the willful misrepresentation or concealment of a material fact of a contract, and it is designed to persuade another to enter into that contract. If a special relationship exists, such as that of attorney and client, nondisclosure of a material fact is fraud. Many courts have held that mere silence concerning a material fact did not constitute fraud, but the emerging trend is to find a duty to disclose and, therefore, deliberate concealment of a material fact gives rise to an action for fraud.

A contract that is based on fraud is void or voidable, because fraud prevents a meeting of the minds of the parties. If the fraud is in the factum, (i.e., during the execution of the contract) so that the party would not have signed the document if he or she understood its nature, then the contract is void ab initio (i.e., from its inception). The signatory is not bound if a different contract is substituted for the one that he or she had intended to execute. If, however, a party negligently chooses to sign the contract without reading it, then no fraud exists and the contract is enforceable. If the fraud is in the inducement, by which a party is falsely persuaded to sign a contract, the terms of which he or she knows and understands, then the contract is not void but is voidable by the innocent party, as that party executes what is intended to be executed. If, however, due to fraud, a contract fails to express the agreement that the parties intended it to express, then the defrauded party may seek a decree of reformation, by which the court will rewrite a written agreement to conform with the ORIGINAL INTENT of the parties.

**Misrepresentation without Fraud** A contract may be invalidated if it was based on any innocent misrepresentation pertaining to a material matter on which one party justifiably relied.

**Duress** Duress is a wrongful act or threat by one party that compels another party to perform some act, such as the signing of a contract, which he or she would not have done voluntarily. As a result, there is no true meeting of minds of the parties and, therefore, there is no legally enforceable contract. Blackmail, threats of physical violence, or threats to institute legal proceedings in an abusive manner can constitute duress. The consensus of most jurisdictions is that the threat to commence legal proceedings, which otherwise might be justifiable, becomes wrongful when done with the corrupt intent to coerce a transaction that bears no relation to the subject of such proceedings and is grossly unjust to the victim.

A contract that is induced by duress is either void or voidable. If the duress consists of one party taking the other's hand as a mechanical instrument by which to sign his or her name to a contract, then the contract is void *ab initio* for lack of any intent on the victim's part to perform the act. The result is the same if the victim is compelled to sign a contract at gunpoint without any knowledge of its contents. These are highly unusual situations. In most cases involving duress, the contract is voidable, and the person who was subjected to the duress may ask the court to declare the contract unenforceable.

**Undue Influence** Undue influence is unlawful control exercised by one person over another in order to substitute the first person's will for that of the other. It generally occurs in two types of situations. In the first, a person takes advantage of the psychological weakness of another, in order to influence that person to agree to a contract to which, under normal circumstances, he or she would not otherwise consent. The second situation entails undue influence based on a fiduciary relationship that exists between the parties. This occurs where one party occupies a position of trust and confidence in relation to the other, as in familial or professional-client relationships. The question of whether the assent of each party to the contract is real or induced by factors that inhibit the exercise of free choice determines the existence of undue influence. Mere legitimate persuasion and suggestion that do not destroy free will are not considered undue influence and have no effect on the legality of a contract.

### Assignments

An assignment of a contract is the transfer to another person of the rights of performance under it. Contracts were not assignable at early common law, but today most contracts are assignable unless the nature of the contract or its provisions demonstrates that the parties intend to make it personal to them and therefore incapable of assignment to others.

### Joint and Several Contracts

Joint and several contracts always entail multiple promises for the same performance. Two or more parties to a contract who promise to the same promisee that they will give the same performance are regarded as binding

themselves jointly, severally, or jointly and severally.

Promises impose *several liability* only when promisors singly promise to pay or to act. If the three promisors singly promise to pay the party $500, it is as though there are three discrete and individual contracts, except that the promisee is to receive a total of only $500. The three promisors do not promise as a unit, but each individually assumes to pay the entire sum.

*Joint liability* ensues only when promisors make one promise as a unit. If three promisors promise to pay $500, then the three will owe the debt as a unit, not individually. The party may enforce the contract only against one promisor or against any number of joint promisors. The promisee is entitled, however, to only one award of the amount due.

Promises impose joint and several liability when the promisors promise both as a unit and individually to pay or perform according to the terms of the contract.

If a promisor who is jointly or jointly and severally liable on a contract performs or pays the promisee in full, then the other promisors are thereby discharged from their obligations on the contract to the promisee, as he or she may only collect the amount due to him or her. The promisor who performed, however, has a right to contribution from the co-promisors—that is, the right to receive from the other co-promisors their proportionate share of the debt. The general rule is that a co-obligor who has paid in excess of his or her proportionate share is entitled to contribution, unless there is a particular agreement to the contrary.

Joint and several promises can exist if a promisor promises to pay two promisees a certain sum of money. The promisees are joint and several promisees or obligees, and the promisor has the duty to pay. Both promisees are entitled to performance of the promise jointly and separately, even though there is only one promise made to two people. Any one of the joint obligees in a contract has the power to discharge the promisor from the obligation. If the promisor pays one promisee, this payment operates as a discharge of the promisor's liability under the contract. The promisee who has not been paid may not compel the promisor to pay him or her, as the promisor has been discharged by the payment to the other promisee. The unpaid promisee may seek contribution from the promisee who has been paid, however.

### Third-Party Beneficiaries

There are only two principal parties, the offeror and the offeree, to an ordinary contract. The terms of the contract bind one or both parties to render performance to the other in consideration of receiving, or having received, the other's performance. Contracts sometimes specify that the benefits accruing to one party will be conferred upon a third party. The effect of a third-party contract is to provide, to a party who has not assented to it, a legal right to enforce the contract.

A *creditor beneficiary* is a nonparty to a contract who receives the benefit when a promise is made to satisfy a legal duty. For example, suppose that a debtor owed a creditor $500. The debtor lends $500 to a third person, who promises to use the money to pay the debtor's debt. The third person is the promisor, who makes the promise to be enforced. The debtor is the promisee, to whom the promise is made. The contract is between the debtor and the third person, the promisor, and the consideration for the promise is the $500 loan that the promisor received from the debtor. The creditor is the third-party beneficiary. If the promisor refuses to pay the creditor $500, then the creditor may sue the promisor and prevail. Although the creditor is not a party to their contract, both the debtor and the promisor intend that the creditor should be the beneficiary of the contract and have enforceable rights against the promisor, since he or she is to pay the creditor. The debtor or the creditor may sue to enforce the promisor's promise to pay. The creditor's right to enforce the contract between the debtor and the promisor is effective only when he or she learns of, and assents to, the contract. The creditor may also sue the debtor for the $500, as the debtor had a legal duty to pay this loan. The debtor then may sue the promisor for breach of contract for refusing to pay the creditor.

A *donee beneficiary* of the contract is a nonparty who benefits from a promise that is made for the purpose of making a gift to him or her. A donor wishes to give a donee $200 as an anniversary present. The donor plans to sell a television set for $200 to a purchaser, who promises to pay the donee the $200 directly. The donee is a donee beneficiary of the purchaser's promise to pay the money and may enforce this claim against the purchaser. The donee has no claim against the donor, the promisee, as the donor has no legal duty to the donee but is merely giv-

ing the donee a gift. However, the donor will be able to sue the purchaser for refusal to pay the donee, because it would be a breach of the terms of their contract of sale.

The difference between a creditor beneficiary and a donee beneficiary becomes significant when the parties to a contract attempt to alter the rights of the third-party beneficiary. The promisor and the promisee have no right or power to alter the accrued rights of the donee beneficiary without consent unless this power was expressly reserved in the contract, regardless of whether the donee knows about the contract. A donee beneficiary's rights become effective when the contract is made for his or her benefit, regardless of whether he or she knows about the contract. In contrast, a creditor beneficiary's rights vest only when the creditor beneficiary learns of, and assents to, the contract.

### Conditions and Promises of Performance

The duty of performance under many contracts is contingent upon the occurrence of a designated condition or promise. A condition is an act or event, other than a lapse of time, that affects a duty to render a promised performance that is specified in a contract. A condition may be viewed as a qualification placed upon a promise. A promise or duty is absolute or unconditional when it does not depend on any external events. Nothing but a lapse of time is necessary to make its performance due. When the time for performance of an unconditional promise arrives, immediate performance is due. A dependent or conditional promise is not effective until the occurrence of some external event that the parties have specified. An implied condition is one that the parties should have reasonably comprehended to be part of the contract because of its presence by implication.

**Types of Conditions** Conditions precedent, conditions concurrent, and conditions subsequent are types of conditions that are commonly found in contracts. A condition precedent is an event that must exist as a fact before the promisor incurs any liability pursuant to it. For example, suppose that an employer informs an employee that if the employee successfully completes an accounting course, he or she will receive $500. The completion of the course must exist as a fact before the employer will be liable to the employee; when that fact occurs, the employer becomes liable.

A condition concurrent must exist as a fact when both parties to a contract are to perform simultaneously. Neither party has a duty to perform until the other has performed or has tendered performance. Practically speaking, however, the party who wants to complete the transaction must perform in order to establish the duty of performance by the other party. The performances are concurrently contingent upon each other. Concurrent conditions are usually found in contracts for the sale of goods and in contracts for the conveyance of land.

A condition subsequent is one that, when it exists, ends the duty of performance or payment under the contract. For example, suppose that an insurance contract provides that suit against it for a loss covered by the policy must be commenced within one year of the insured's loss. If the destruction of the insured's building by fire is a risk that the policy covers, then the insured must file suit against the insurer within the time specified, or the condition subsequent will end the duty of the company pursuant to the policy.

**Substantial Performance** The failure to comply strictly with the terms of a condition will not prevent recovery if there has been substantial performance of the contractual obligation. Courts created this doctrine in order to prevent forfeitures and to ensure justice. Where recovery is permitted for substantial performance, it is offset by damages for injuries caused by failure to render complete performance. Courts determine whether there has been a breach or a substantial performance of a contract by evaluating the purpose to be served; the excuse for deviation from the letter of the contract; and the cruelty of enforced adherence to the contract. If the deviation from the contract were accidental and resulted in only a trivial difference between what was required by the contract and what was performed, the plaintiff will receive only nominal damages.

**Satisfactory Performance** A contract may be contingent upon the satisfaction of a person's opinion, taste, or fancy. Most courts apply a good-faith test in determining whether rejection of a performance was reasonable. If a rejection is made in bad faith, the court will enforce the contract.

If satisfaction can be measured with reference to the commercial value or caliber of the subject matter of the contract, the performance must be proved to be deficient in these respects and the dissatisfaction must be proven to be suf-

ficiently reasonable and well-founded to justify non-enforcement of the contract. The test is: What would satisfy a reasonable person? The condition of satisfaction need not be met when the expression of dissatisfaction is made in bad faith and not related to the quality or commercial value of the subject of the contract.

**Divisible Contracts** The entire performance of a contract can be a condition to the other party's duty to perform. If the contract is legally divisible, the performance of a divisible portion can fulfill the condition precedent to the other party's corresponding divisible performance. A contract is divisible when the performance of each party is divided into two or more parts; each party owes the other a corresponding number of performances; and the performance of each part by one party is the agreed exchange for a corresponding part by the other party. If it is divisible, the contract, for certain purposes, is treated as though it were a number of contracts, as in employment contracts and leases. If an employer hires a prospective employee for one year at a weekly salary, the contract is divisible. Each week's performance is a constructive or implied condition precedent to the employee's right to a week's salary. The right to the salary is not contingent on performance of the obligation to work for one year. In most contracts of employment, the courts allow recovery to the employee for the number of weeks or months of service rendered, on the theory that such contract is divisible. The same is true for a lease of real property or an apartment. If the lease is breached before the entire term has expired, the tenant is liable for the remaining rent as each month occurs, but is not liable prior to that time. In effect, the court treats the lease as a contract for each month, with rent due on the first of each month. In a divisible contract, the performance of a separate unit that is treated as a separate contract entitles the performing party to immediate payment, whereas in an entire contract, the party who is first to perform must render full performance in order to be entitled to performance from the other party.

**Breach of Conditions** Compliance with a condition can be excused under certain circumstances. As a general rule, if the facts would excuse compliance with a condition, they will also excuse performance of a promise. An excuse for nonperformance of a condition can exist in many forms, such as a waiver (the intentional relinquishment of a known right) of performance of the condition.

If an unintentional failure to perform a condition would result in a FORFEITURE, a court may excuse compliance in order to prevent injustice. The duty of performance by the other party arises just as though the condition has been fulfilled if compliance with a condition is excused.

## Discharge of Contracts

The duties under a contract are discharged when there is a legally binding termination of such duty by a VOLUNTARY ACT of the parties or by operation of law. Among the ways to discharge a contractual duty are impossibility or impracticability to perform personal services because of death or illness; or impossibility caused by the other party.

The two most significant methods of voluntary discharge are ACCORD AND SATISFACTION and novation. An accord is an agreement to accept some performance other than that which was previously owed under a prior contract. Satisfaction is the performance of the terms of that accord. Both elements must occur in order for there to be discharge by these means.

A novation involves the substitution of a new party while discharging one of the original parties to a contract by agreement of all three parties. A new contract is created with the same terms as the original one, but the parties are different.

Contractual liability may be voluntarily discharged by the agreement of the parties, by estoppel, and by the cancellation, intentional destruction, or surrender of a contract under seal with intent to discharge the duty.

The discharge of a contractual duty may also occur by operation of law through illegality, merger, statutory release, such as a discharge in bankruptcy, and objective impossibility. Merger takes place when one contract is extinguished because it is absorbed into another.

There are two types of impossibility of performance that discharge the duty of performance under a contract. *Subjective impossibility* is due to the inability of the individual promisor to perform, such as by illness or death. *Objective impossibility* means that no one can render the performance. The destruction of the subject matter of the contract, the frustration of its purpose, or supervening impossibility after the contract is formed are types of objective impossibility. "Impracticability" because of extreme and unrea-

sonable difficulty, expense, injury, or loss involved is considered part of impossibility.

### Breach of Contract

An unjustifiable failure to perform all or some part of a contractual duty constitutes a breach of contract. It ensues when a party who has a duty of immediate performance fails to perform, or when one party hinders or prevents the performance of the other party.

A total, major, material, or substantial breach of contract constitutes a failure to perform properly a material part of the contract. A partial or minor breach of contract is merely a slight deviation from the bargained-for performance. A breach may occur by ANTICIPATORY REPUDIATION, whereby the promisor, without justification and before committing a breach, makes an affirmative statement to the promisee, indicating that he or she will not or cannot perform the contractual duties.

The differences in the types of breach are significant in ascertaining the kinds of remedies and damages available to the aggrieved party.

### Remedies

Damages, reformation, RESCISSION, restitution, and SPECIFIC PERFORMANCE are the basic remedies available for breach of contract.

**Damages** The term *damages* signifies a sum of money awarded as a compensation for injury caused by a breach of contract. The type of breach governs the extent of the damages to be awarded.

***Failure to perform*** The measure of damages in breach-of-contract cases is the sum that would be necessary to recompense the injured party for the amount of losses incurred through breach of contract. The injured party should be placed in the position that he or she would have occupied if the contract had been performed, and they are entitled to receive the *benefit of the bargain,* the net gain that would have accrued to them under the contract. The injured party is not, however, to be put in a better position than he or she would have occupied had performance taken place.

Damages for anticipatory repudiation are ordinarily assessed as of the scheduled performance dates that are fixed by the breached contract. The measure of damages for the breach of an installment contract is determined at the time each installment is due.

When the parties have included a LIQUIDATED DAMAGES clause in a contract, it generally will be enforced. Such clause is a prior agreement by the parties as to the measure of damages upon breach. Additional damages may not be claimed.

***Partial performance*** When the defendant has failed to complete performance of an agreement according to its terms, the plaintiff may recover such damages as will compensate him or her to the same extent as though the contract had been completely performed. The customary measure of damages is the reasonable expense of completion. Completion refers to a fulfillment of the same work, if possible, which does not involve unreasonable economic waste. The injured party is not automatically entitled to recover the difference between the contract price and the amount it would cost to have the work completed when a contract is breached after partial performance; he or she will be entitled to recover that amount only if completion is actually accomplished at a greater cost.

A provision in a building contract that allows the owner, in the event of a default by the contractor, to complete the job and to deduct the expenses from the contract price does not preclude the owner's recovering damages also where the contractor intentionally leaves the work undone. A plaintiff may also recover the monetary value of materials that are lost through a breach of contract.

A plaintiff contractor who subsequently performs the work upon breach of a contract will ordinarily recover the reasonable value of the labor and materials that he or she has furnished, with the contract price used as a guideline. The award may not properly exceed the benefit that the owner received in the properly completed work, and it will be reduced by the amount of damages that the owner incurs as a result of the contractor's failure to complete performance of the contractual obligation. If the value of the work performed exceeds the contract price, the contractor will not receive the excess.

Where a contract for the performance of services exists with payment to be made in installments, and the obligation to pay for each installment constitutes an independent promise, the individual who is entitled to payment may recover only the installments that are due when the suit is brought.

***Defective performance*** Damages for defective performance of a contractual agreement are measured by calculating the difference in value

between what is actually tendered and what is required as performance under the agreement. If the performance tendered is either of no value or unsuitable for the purpose that the contract contemplated, the proper measure of damages is the sum that is necessary to repair the defect. If a defect can be easily remedied through repairs, the measure of damages is the price of the repairs performed.

Generally, the total contract price may not be recovered for substantial performance. If the plaintiff furnished materials for items that were manufactured for the plaintiff in such a manner as to be rendered worthless, the proper measure of damages ordinarily has been held to be the discrepancy between the contract price and the market price of such items if they had been manufactured according to the contract terms.

When a building or construction contract is defectively performed, the proper measure of damages is the difference between the value of the property with the defective work, and its value had there been strict compliance with the contract. Where the contractor deliberately deviates from the contractual agreement, but there has been no substantial performance, damages are determined by the actual expense of reconstructing the building according to the terms of the contract.

*Delay in performance* The loss precipitated by the wrongful delay of the performance of a contract is calculated by fixing the rental or use of the property or interest as a result of the loss incurred through increased material and labor expenses, as distinguished from what the value would have been had the contract been performed on time.

**Reformation** Reformation is an equitable remedy that is applied when the written agreement does not correspond to the contract that was actually formed by the parties, as a result of fraud or mutual mistake in drafting the original document. Quasi-contractual relief for the reasonable value of services rendered is also available, although it applies only when there is no enforceable contract.

**Rescission** Rescission terminates the contract, and the parties are restored to the position of never having entered into the contract in the first place.

**Restitution** Restitution is a remedy that is designed to restore the injured party to the position that they occupied prior to the formation of the contract.

**Specific Performance** Specific performance is an equitable remedy by which a contracting party is required to execute, as nearly as practicable, a promised performance when monetary damages would be inadequate to compensate for the breach. A contract to sell land is specifically enforceable because land is considered to be unique and not compensable by money. In addition, property that has sentimental value, as well as antique, heirloom, or one-of-a-kind articles, are viewed as unique, and therefore it would be impossible to estimate damages. A personal-service contract or an employment contract, however, cannot be specifically enforced because the THIRTEENTH AMENDMENT to the U.S. Constitution prohibits SLAVERY. If, however, the contract proscribes a person from performing some act, breach of that negative covenant may be specifically enforced.

### Parol Evidence Rule

Tentative terms discussed in preliminary negotiations are subsumed by the provisions of the contract executed by the parties. The PAROL EVIDENCE rule governs the admissibility of evidence other than the actual agreement when a dispute arises over a written contract. When parties memorialize their agreements in writing, all prior oral and written agreements, and all contemporaneous oral agreements, merge in the writing, which is also known as an integration. The written contract may not be modified, altered, or varied by parol or oral evidence, provided that it has been legally executed by a person who intends for it to represent the final and complete expression of his or her understanding of the contract. This is not the case, however, where there has been some mistake or fraud in the drafting of the document.

The parol evidence rule effectuates the presumed intention of the parties; achieves certainty and finality as to the rights and duties of the contracting parties; and prevents fraudulent and perjured claims. It has no application to subsequent oral contracts that modify or discharge the written contract, however.

### Ambiguity

Ambiguity in the terms of a contract exists when the court cannot, after applying the rules or tools of interpretation, give a meaning to the language used in an agreement or document. The plain-meaning rule is often applied judicially to ascertain whether a contract is ambiguous. If the contract appears to the trial judge to

be clear and unequivocal on its face, then there is no need for parol evidence. However, when a writing is ambiguous, parol evidence is admissable only to elucidate, not to vary, the instrument as written.

Courts have used other rules to resolve ambiguous terms. Where neither party knows, or has reason to know, of the ambiguity, or where both parties know or have reason to know of it, the ambiguous term is given the meaning that each party intended it to convey. As a practical matter, this means that if the parties give the equivocal expression the same meaning, then a contract is formed; but if they give it a different meaning, then there is no contract, at least if the ambiguity pertains to a material term, as there is no meeting of their minds. Where one party knows, or has reason to know, of the ambiguity, and the other does not, it conveys the meaning given to it by the latter—which means, in essence, that there is a contract predicated upon the meaning of the party who is without fault.

### Contracts for the Sale of Goods

The nature of a transaction determines the type of contract law that applies. General contract law described above applies to such transactions as service agreements and sales of real property. Contracts for the sale of goods, however, are governed by Article 2 of the UCC, which has been adopted, at least in part, in every state. The UCC defines "goods" as all things that are movable at the time of the sale.

The drafters of the UCC adhered to a more liberal view of contracts, so some of its provisions differ significantly from those that are found in general contract law. A contract for the sale of goods may be made in any manner that is sufficient to show agreement, and courts may consider the conduct of the parties when making this determination. An offer to sell goods may be made in any manner that invites acceptance. Courts also may consider the COURSE OF PERFORMANCE between the parties when determining whether a contract for the sale of goods exists.

The UCC provides for, and recognizes, certain warranties that relate to the goods being sold. For example, an affirmation of fact or a promise made by the seller to the buyer creates an express warranty. Sales also create implied warranties, such as the implied warranties of merchantability and fitness for a particular purpose. Remedies and other damages for breach of a sale-of-goods contract are also governed by the UCC. In addition to monetary damages, buyers and sellers may take several actions when the other party breaches a sales contract. For example, a seller who has been injured by a breach of contract may withhold delivery of the goods; resell the goods that are subject to the contract; or recover monetary damages. A buyer may seek to "cover" by making a good-faith purchase of substitute goods from a different seller, and then may recover from the original seller any difference between the substitute contract and the original contract.

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## CONTRAVENTION

*A term of French law meaning an act violative of a law, a treaty, or an agreement made between parties; a breach of law punishable by a fine of fifteen francs or less and by an imprisonment of three days or less. In the U.S. legal system, a breach or violation of the provisions of a contract, statute, or treaty.*

## CONTRIBUTING TO THE DELINQUENCY OF A MINOR

*Any action by an adult that allows or encourages illegal behavior by a person under the age of 18, or that places children in situations that expose them to illegal behavior. Contributing to the delinquency of a minor can be as simple as keeping a child home from school and thus, making the child a truant. It also can manifest itself in more serious behavior. For example, an adult who commits a crime in the presence of a child can be charged with contributing to the delinquency of a minor, as can an adult who serves alcoholic beverages to anyone under the legal drinking age. Still more egregious is sexual exploitation, which could include having sexual relations with minors or engaging in the production or trafficking of* CHILD PORNOGRAPHY.

CROSS-REFERENCES

Battered Child/Spouse Syndrome; Child Abuse; Child Pornography; Children's Rights; Domestic Violence.

## CONTRIBUTION

*In maritime law, where the property of one of several parties with interests in a vessel and cargo has been voluntarily sacrificed for the common safety of the vessel—as by casting goods overboard to lighten the vessel—such loss must be made up by the contribution of the others, which is labeled "general average." In* CIVIL LAW, *a partition by which the creditors of an insolvent debtor divide among themselves the proceeds of the debtor's property in proportion to the amount of their respective credits. The right of a defendant who has paid an entire debt, or common liability, to recoup a proportionate share of the payment from another defendant who is equally responsible for the payment of that debt or liability.*

Certain principles apply when contribution is sought in contractual situations. Where the parties are severally (individually) liable for a specific portion of a debt, one person who pays in excess of his or her proportionate share has no legal right to contribution from the others for the excess. Where the parties are jointly liable (as a unit) for the payment of a debt, a party who pays in excess of his or her ratable share can seek contribution from the others for the amount of his or her overpayment. If the parties are jointly and severally liable for a debt, both as a unit and as individuals, any party who pays in excess of his or her proportionate share can seek contribution.

To entitle a person to contribution, the payment of the debt or liability must arise from a legal obligation to pay. The payment of the entire debt or liability is unnecessary, but the payment must have exceeded the share of the person seeking contribution.

A plaintiff who procures a judgment (a final court decision that resolves a controversy and determines the rights and obligations of the parties) against two or more joint tortfeasors (those who together commit a civil wrong) can collect that judgment from all, any one, or less than all of them. The English and early U.S. COMMON LAW held that if one such defendant did in fact pay less than a proportionate share of the judgment, that defendant should reimburse the other defendant(s) who paid more, except in cases of intentional TORTS or acts of the defendant that did not justify the court's assistance. During the past century, however, the majority of jurisdictions in this country expanded this exception and denied all common-law contribution among joint tortfeasors regardless of the basis of liability, including cases of NEGLIGENCE and STRICT LIABILITY.

Statutes—some of which are patterned after the Uniform Contribution Among Tortfeasors Act—supersede the common law in more than half the states and provide for contribution in some form. Several jurisdictions continue to permit contribution by judicial decision, never having adhered to the majority rule disallowing it, although some states still generally deny contribution.

Of those states allowing contribution, the majority allocate the damages among the defendants in proportion to their relative fault. In the remainder, which includes almost all those without a statute, the damages are divided equally. Certain defendants, such as an employer and his or her employee, are aggregated and assessed a single share.

Contribution is still generally but not universally denied to willful tortfeasors. If the plaintiff has sued and obtained a judgment against fewer than all joint tortfeasors, some statutes prohibit contribution from one against whom there is no judgment. Other statutes permit contribution in this instance, subject to satisfactory proof of liability.

It is generally held, unless there is a statute requiring otherwise, that a tortfeasor who settles prior to trial—and therefore against whom there is no judgment—can nevertheless obtain contribution from other joint tortfeasors, but must prove the liability to the plaintiff of the other tortfeasors, the amount of the damages, and the reasonableness of the prior settlement.

In an action for contribution, the party seeking it must ordinarily establish that the tortfeasor from whom contribution is sought was subject to liability to the injured plaintiff, if no judgment has been obtained determining that liability. Certain defenses usually bar contribution, such as automobile GUEST STATUTES and the IMMUNITY granted to employers under the WORKERS' COMPENSATION acts, which only the defendant in the action for contribution could have asserted against the injured person. There is some authority to the contrary, however.

CROSS-REFERENCES

Joint and Several Liability.

## CONTROLLER

*The key financial officer of a state, private, or* MUNICIPAL CORPORATION, *who is charged with certain specific responsibilities related to its financial affairs.*

CROSS-REFERENCES

Comptroller.

## CONTROVERSY

*An actual dispute between individuals who seek judicial resolution of their grievances that have arisen from a conflict of their alleged legal rights.*

A controversy describes only civil litigation, which is intended to protect and enforce private rights. In contrast, the term *case* applies to both a civil action and a criminal prosecution, designed to enforce and safeguard the rights of the general public.

The judicial power of a court to provide redress of wrongs exists only when issues arise in a given situation that can be categorized as a case or controversy.

## CONTROVERT

*To contest, deny, or take issue with.*

A claim of reckless driving alleged in a plaintiff's complaint that initiates a lawsuit for NEGLIGENCE is controverted by the statements made in the defendant's answer that he or she was driving at a speed below the speed limit and was observing the rules of the road.

## CONTUMACY

*Willful disobedience. The intentional failure of an individual to obey a summons to appear in court to defend against a charge or to obey an order rendered by the court.*

Contumacy is a sufficient basis for finding an individual in CONTEMPT of court.

## CONVENTION

*An agreement or compact, particularly an international agreement, such as the* GENEVA CONVENTION. *An accord between states or nations, which resembles a treaty: ordinarily applied to agreements prior to an execution of an official treaty or which serve as its foundation; or to international agreements for the regulation of international affairs of common interest not within the ambit of commercial transactions or politics, such as international postage. An agreement between states concerning finance, trade, or other matters considered less significant than those usually governed by a treaty. An assembly or meeting of representatives or members of legislative, political, or fraternal organizations.*

A *constitutional convention* is an assembly of representatives or delegates of the people of a state or nation, convened for the purpose of framing, altering, or amending its constitution. Article V of the U.S. Constitution provides that a constitutional convention may be convoked on application of the legislatures of two-thirds of the states.

A *judicial convention* is an assembly of judges of the superior courts (courts of general jurisdiction), empowered in some states to meet during specified periods to adopt uniform rules of practice. The powers of the convention are restricted to making necessary rules that conform to the provisions of the relevant statute. Revision or abrogation of any rule of practice established by statute is prohibited.

A *legislative convention* is a congregation of representatives or delegates selected by the people for extraordinary and special legislative objectives, such as the framing or alteration of a state constitution.

A *political convention* is an assembly of delegates designated by a political party to nominate candidates for a pending election.

## CONVENTIONAL

*Derived from or contingent upon the mutual agreement of the parties, as opposed to that created by or dependent upon a statute or other act of the law.*

A conventional home mortgage is one in which the interest rate is agreed upon by the parties to it: the borrower and the lender.

## CONVENTIONAL FORCES IN EUROPE TREATY

The United States, the Soviet Union, and twenty other member countries of the NORTH ATLANTIC TREATY ORGANIZATION (NATO) and the Warsaw Pact signed the Conventional Forces in Europe (CFE) Treaty on November 19, 1990. The most complex and comprehensive conventional ARMS CONTROL treaty in history, the CFE limits levels of conventional—that is, nonnuclear—weapons and equipment with the purpose of creating greater military stability in Europe. The CFE played a crucial stabilizing role during the breakup of the Soviet Union and its satellite states in Eastern Europe during the late 1980s and early 1990s. It also made possible steep reductions in U.S. troop and equipment levels in Europe. In a period of remarkable his-

torical change that transformed the political map of Europe, the treaty's provisions enabled a "velvet" rather than a violent revolution.

The CFE grew out of arms control negotiations between the United States and the Soviet Union during the 1980s. In particular, treaty negotiations were prompted by a 1986 call for conventional arms control by Soviet president Mikhail Gorbachev, and a 1989 proposal by U.S. president **GEORGE H. W. BUSH** to limit the United States and the Soviet Union to 275,000 troops each in Europe. However, as the Soviet satellites gained independence in the late 1980s and early 1990s and large numbers of U.S. and Soviet troops were transferred out of Europe, the initial level of troops proposed by Bush proved needlessly high, and subsequent negotiations focused on armaments alone.

By November 1990, a treaty had been completed. Meeting in Paris, Bush, Gorbachev, and other leaders signed the CFE that month. The U.S. Senate approved it on November 25, 1991, by a vote of 90–4.

The treaty placed limits on five types of conventional armaments deployed between the Atlantic Ocean and the Ural Mountains: tanks, artillery, armored combat vehicles (such as armored personnel carriers), aircraft, and helicopters. It divided the area covered by the agreement into subzones, each having its own equipment limits. The agreement limited NATO and the Warsaw Pact each to 20,000 tanks, 30,000 armored combat vehicles, 20,000 artillery pieces, 6,800 combat aircraft, and 2,000 attack helicopters. The treaty did not address naval forces.

As originally designed, the CFE was meant to stabilize relations between NATO and the Warsaw Pact. NATO, for its part, sought to relocate Soviet forces eastward from the German border and to prevent their concentration in the Soviet Union west of the Urals. After the dissolution of the Warsaw Pact on July 1, 1991, and the breakup of the Soviet Union into 15 separate nations in December 1991, the CFE began to change its focus from management of the **COLD WAR** standoff to management of the effects of the Cold War's conclusion.

Later amendments adapted the treaty to the changing European political situation. On May 15, 1992, the Commonwealth of Independent States—the 15 successor states of the Soviet Union—ratified armament limits in their territories as specified by the CFE limits for the Warsaw Pact nations. All adherents to the treaty met subsequent arms reduction targets, though Russia continued to negotiate changes owing to unrest in Chechnya and other regions within its borders. By September 1994 the CFE had resulted in the destruction of more than 18,000 pieces of military equipment, including 6,000 by the Russian Federation.

The CFE enjoys widespread support in Europe and appears likely to remain in force for some time. CFE supporters argue that its armament limits and inspection requirements prevent an arms race and enhance the exchange of information between European countries, allowing each member nation to easily assess the military capabilities of its neighbors.

*German Foreign Minister Hans-Dietrich Genscher looks on as President George H.W. Bush signs the Conventional Forces in Europe Treaty on November 19, 1990. The treaty, which has been amended to reflect changes in the European political system since its original adoption, limits levels of conventional weapons in order to ensure military stability in Europe.*

REUTERS NEWMEDIA INC./CORBIS

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**CROSS-REFERENCES**

Arms Control and Disarmament; Intermediate-Range Nuclear Forces Treaty; Strategic Arms Reduction Talks.

## CONVERSION

*Any unauthorized act that deprives an owner of personal property without his or her consent.*

The wrongdoer converts the goods to his or her own use and excludes the owner from use and enjoyment of them. The English COMMON LAW early recognized such an act as wrongful and, by the middle of the fifteenth century, allowed an action in TROVER to compensate the aggrieved owner.

The earliest cases allowing a lawsuit for conversion were based on claims that the plaintiff had possession of certain items of PERSONAL PROPERTY, then casually lost them, and the defendant had found them and had not returned them but instead "converted them to his own use." This phrase was picked up, and it gave a name to a TORT that originally was a kind of ACTION ON THE CASE, a form of TRESPASS. As time passed, the plea that the plaintiff had lost his or her goods and the defendant had found them came to be considered a legal fiction (that is, a decision was made in the case as if the plea were true, and it did not have to be proved). The defendant was not allowed to dispute the allegations but could answer only the claim that the plaintiff had a right to possession of the goods and the defendant had refused to restore them to the plaintiff.

Today the word *conversion* is still applied to the unlawful taking or use of someone else's property. The type of property that can be converted is determined by the original nature of the CAUSE OF ACTION. It must be personal property, because real property cannot be lost and then found. It must be tangible, such as money, an animal, furniture, tools, or receipts. Crops or timber can be subject to conversion after they are severed from the ground. The rights in a paper—such as a life insurance policy, a stock certificate, or a promissory note—can be converted by one who appropriates the paper itself.

A thief, a trespasser, or a bailee may be guilty of conversion because the action may be maintained whether or not the property was lawfully acquired at the outset. For example, a dry cleaner who mistakenly delivers a suit to the wrong customer has converted it. Moving someone's property without his or her permission might constitute a conversion if the inconvenience is substantial: for example, having someone's car towed away in order to take the parking place. Unauthorized use is a conversion—such as a mechanic who, without permission, borrows a sports car that he or she is supposed to repair. Misuse of property can also be a conversion. If a neighbor lends his or her hedge trimmer to a friend, it is a conversion for the friend to use the hedge trimmer to cut down a tree.

## CONVEYANCE

*The transfer of ownership or interest in real property from one person to another by a document, such as a deed, lease, or mortgage.*

## CONVICT

*To adjudge an accused person guilty of a crime at the conclusion of a criminal prosecution, or after the entry of a plea of guilty or a plea of* nolo contendere. *An individual who has been found guilty of a crime and, as a result, is serving a sentence as punishment for the act; a prisoner.*

## CONVICTION

*The outcome of a criminal prosecution which concludes in a judgment that the defendant is guilty of the crime charged. The juncture of a criminal proceeding during which the question of guilt is ascertained. In a case where the perpetrator has been adjudged guilty and sentenced, a record of the summary proceedings brought pursuant to any penal statute before one or more justices of the peace or other properly authorized persons.*

The terms *conviction* and *convicted* refer to the final judgment on a verdict of guilty, a plea of guilty, or a plea of nolo contendere. They do not include a final judgment that has been deleted by a pardon, set aside, reversed, or otherwise rendered inoperative.

The term *summary conviction* refers to the consequence of a trial before a court or magistrate, without a jury, which generally involves a minor misdemeanor.

## ♦ COOLEY, THOMAS McINTYRE

As a jurist, scholar, and educator in the late nineteenth century, Thomas McIntyre Cooley greatly influenced the development of U.S. CONSTITUTIONAL LAW. In particular, Cooley's writings shaped later interpretation of the DUE PROCESS CLAUSES of the Fifth and Fourteenth Amendments to the Constitution. His ideas were used, and sometimes misused, by others to help define a laissez-faire approach to constitutional law that sought to minimize the power of government over private and commercial life. (*Laissez-*

*faire* is French for "let [people] do [as they choose].") Cooley's most important books include *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (1868) and *A Treatise on the Law of Torts* (1879, 3d ed. 1906), both of which became the leading texts in their respective fields. In his writings, Cooley consistently defended constitutional government and its ability to protect the rights of individuals from ARBITRARY actions by the state.

Cooley had a distinguished career on the Michigan Supreme Court between 1864 and 1885. From the 1870s onward, he was considered a leading candidate for a seat on the U.S. Supreme Court; however, he never received a nomination. Cooley was also a founding member of the University of Michigan's law department in 1859, remaining there as a professor until 1884. As an indication of the complexity of Cooley's brand of conservatism, he served as the first chairman of the INTERSTATE COMMERCE COMMISSION (ICC), the body that regulates interstate transportation. He was instrumental in the establishment of the ICC as the federal government's first regulatory commission.

A descendant of seventeenth-century New England settlers, Cooley was born January 6, 1824, on a farm near Attica, New York, the eighth of his mother's thirteen children. He had a very basic education in local schools and did not attend college. In 1842, he began studying law under Theron R. Strong, a politician and lawyer from Palmyra, New York. After moving to Adrian, Michigan, to explore life on the frontier, Cooley earned ADMISSION TO THE BAR in 1846. In that same year, he married Mary Horton. Cooley's frontier experiences in Michigan had a profound effect on him and shaped much of his later thought. He learned the benefits of frugality and self-reliance, and he took great pride in being one of the state's pioneers. He later wrote of the way in which Michigan had been transformed before his very eyes: "It was a state almost lost in its woods . . . but the magic touch of industry plied by vigorous hands speedily transformed the scene; the woods opened to the building of many beautiful and prosperous towns."

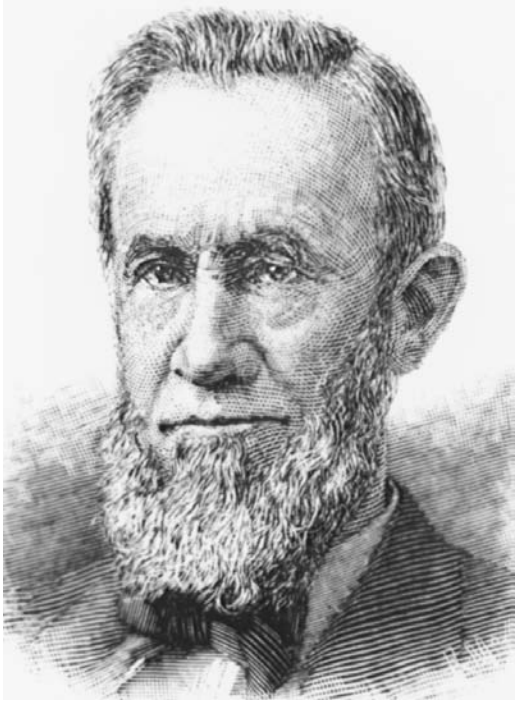

*Thomas McIntyre Cooley.*
THE GRANGER COLLECTION, NEW YORK

Cooley was influenced in his youth by the history and traditions of his New England forebears, as well as the values of Jacksonian Democracy, so named for ANDREW JACKSON, president of the United States from 1829 to 1837. The Jacksonians lay claim to the legacy of THOMAS

"THE VALUE OF GOVERNMENT TO ANY MAN IS PROPORTIONED TO THE COMPLETENESS OF THE PROTECTION IT EXTENDS TO ALL MEN."
—THOMAS MCINTYRE COOLEY

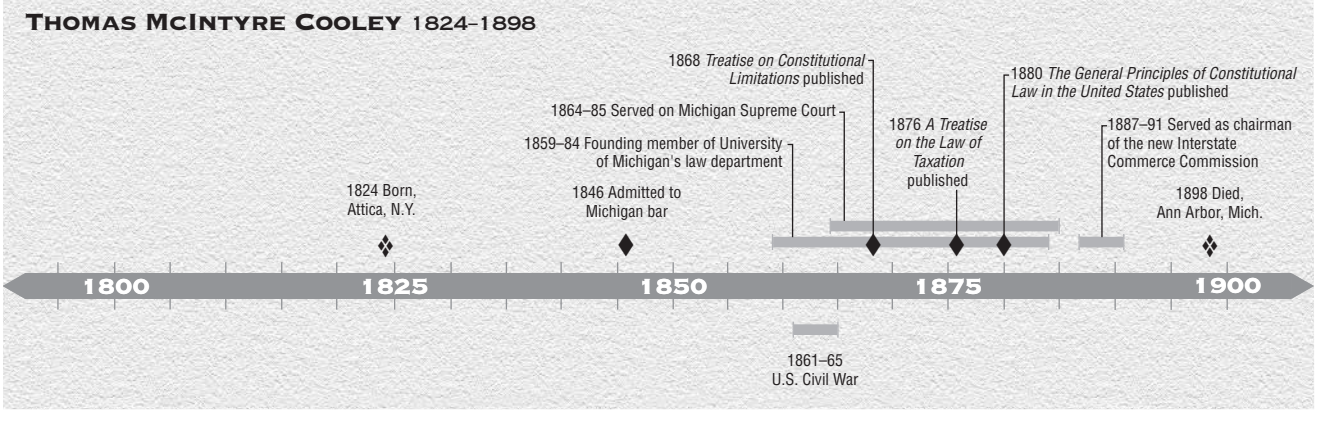

JEFFERSON, and, like Jefferson, they had a bias in favor of an agrarian society rather than a commercial one. The Jacksonians were, therefore, suspicious of big government and big business, and saw both as a potential danger to the common individual. Cooley's constitutional philosophy grew out of the Jeffersonian and Jacksonian ideals of self-reliance, free trade, equal rights, limited government, and maximum personal liberties such as FREEDOM OF SPEECH.

During the 1840s and 1850s, Cooley was a member of the radical wing of the DEMOCRATIC PARTY. He was, for example, a Free-Soiler, believing that territories and new states should remain free of SLAVERY. In 1854, he accepted the Democratic nomination to run for district judge of COMMON PLEAS in Toledo, but he lost the election. His views on slavery led him to join the REPUBLICAN PARTY shortly after its inception in 1854, and he remained a member of it for the rest of his life.

After a difficult decade spent moving about and trying to get his legal career underway, in 1855, Cooley formed a law partnership in Adrian with Charles M. Croswell, who later became governor of Michigan. Two years later, the state legislature chose Cooley to compile the state statutes. He performed this task so ably that in 1858 he was appointed the official reporter of the state's supreme court, an office he held through 1865 and in which he edited volumes 5 through 12 of *Michigan Reports.* Cooley became one of the three founding professors of the law department at the University of Michigan in 1859, and later he served as its dean. In 1884, he gave up his position with the law department to serve as professor of U.S. history and constitutional law in the literary department, a position he held until his death on September 12, 1898.

Largely because of his excellent work editing the Michigan Supreme Court's reports, Cooley was elected to the Michigan Supreme Court in 1864. Not long afterward, he began to prepare a book based on his lectures on constitutional law. *A Treatise on Constitutional Limitations* made Cooley a nationally recognized authority on the Constitution.

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## ❖ COOLIDGE, CALVIN

"PERHAPS ONE OF THE MOST IMPORTANT ACCOMPLISHMENTS OF MY ADMINISTRATION HAS BEEN MINDING MY OWN BUSINESS."
—CALVIN COOLIDGE

Born John Calvin Coolidge—after his father—on July 4, 1872, in Plymouth, Vermont, he shortened his name to Calvin Coolidge after leaving college. Coolidge became the thirtieth president of the United States upon the death of President WARREN G. HARDING. He was educated at Amherst College, where he received a bachelor of arts degree in 1895 and a doctor of laws degree in 1919. He also received doctor of laws degrees from several other institutions, including Wesleyan University and Tufts University.

In 1897, Coolidge was admitted to the bar and established his legal firm in Northampton,

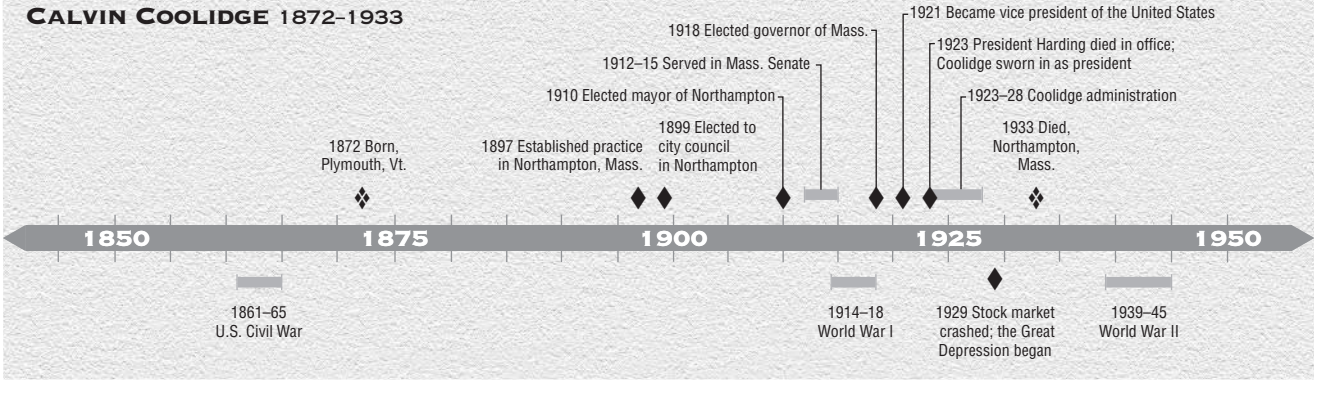

*Calvin Coolidge.* © HARRIS & EWING

Massachusetts, where he practiced until 1919. He became councilman in Northampton in 1899, then city solicitor from 1900 to 1901, clerk of courts in 1904, and member of the General Court of Massachusetts from 1907 to 1908. In 1910, he was elected mayor of Northampton, a post that he held for one year.

Coolidge served in the Massachusetts Senate from 1912 to 1915, acting as president during 1914 and 1915. He was the lieutenant governor of the state from 1916 to 1918 and the following year became governor. As governor, he gained public recognition for his strong policy regarding the Boston police strike of 1919, regarding which he denied the right of any individual or group to strike if the public welfare is jeopardized.

With such extensive experience in state government, Coolidge was a natural choice for a federal position. In 1921, he was elected to the vice presidency of the United States. On August 2, 1923, President Warren G. Harding died suddenly and Coolidge became president. He was sworn in by his father, a NOTARY PUBLIC, on August 3, 1923, at 2:47 A.M. in his hometown of Plymouth, Vermont. In the next presidential election, held in 1924, Coolidge was elected, and so his administration lasted for five years.

As president, Coolidge adopted policies that favored business and discouraged government intervention in the economic system. He influenced the speculative activity of the STOCK MARKET toward the end of the 1920s, which, some believe, precipitated the crash of 1929. When Coolidge left office in that year, the country was on the brink of economic disaster.

Coolidge spent his last years in retirement, writing articles. His *Autobiography* was published in 1929. He died January 5, 1933, in Northampton, Massachusetts.

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## COOLING-OFF PERIOD

*An interval of time during which no action of a specific type can be taken by either side in a dispute. An automatic delay in certain jurisdictions, apart from ordinary court delays, between the time when* DIVORCE *papers are filed and the divorce hearing takes place. An amount of time within which a buyer is permitted to cancel a contract for the purchase of consumer goods—designed to effect* CONSUMER PROTECTION. *A number of states require that a three-day cancellation period must be allowed purchasers following door-to-door sales.*

A cooling-off period is frequently used in labor disputes. There might, for example, be a period of one month following the filing of a grievance by a union or company against the other, during which neither the union nor the company is allowed to take retaliatory actions against each other.

## COOPERATIVE

*An association or corporation established for the purpose of providing services on a nonprofit basis to its shareholders or members who own and control it.*

The nature and functions of cooperatives differ considerably—such as purchasing cooperatives, consumer cooperatives, and marketing cooperatives.

In the context of agriculture, a farmers' cooperative refers to an organization of farmers residing in the same locale that is established for their mutual benefit in regard to the cultivation

and harvest of their products, the purchase of farm equipment and supplies at the lowest possible cost, and the sale of their products at the maximum possible price.

The term *cooperative* also signifies the ownership of an apartment building by a nonprofit corporation that holds title to it and the property upon which it is situated. Stock in the corporation is allotted among the apartment units on the basis of their relative value or size. The right of occupancy to a particular apartment is granted to each cooperative member, who purchases the shares assigned to the desired unit. The member subsequently receives a long-term proprietary lease to that unit. The rent payable pursuant to the lease is that member's proportionate share of the expenses the corporation incurs in operating the cooperative—such as insurance, taxes, maintenance, management, and debt service. The cooperative concept evolved in New York City during the early 1900s as a mode of accommodating the public's desire for home ownership; it subsequently expanded to other large urban centers.

In order to finance the purchase or construction of the cooperative building, the cooperative places a blanket mortgage on the property, which is pledged to support the given debt. Lenders usually are hesitant to accept an individual member's stock and proprietary lease as security for a long-term loan. The members' lien (a claim on property to satisfy a debt) on the lease would be subordinate to the blanket mortgage on the property. The purchaser of a cooperative apartment usually must have sufficient cash available to pay for the stock allotted to the unit he or she wishes to obtain. The initial price of the stock generally does not exceed the amount required for a down payment on a single-family residence. As cooperative members accumulate EQUITY (the value of property exceeding the total debts on it) in their stock, subsequent purchasers must either have a substantial amount of cash available or locate a seller who is willing to recoup the equity in installments over several years.

Cooperative members are also financially dependent on each other. The existence of a single blanket mortgage paid by rent receipts means that if several members default in their rent payments, the corporation might not have sufficient funds to pay a mortgage loan installment. Foreclosure will ensue in regard to the entire membership unless it acts to satisfy the default. Although special reserves and assessments are generally employed to cover such a contingency, the available funds might be inadequate to prevent default.

## COOPERATIVES

See CONDOMINIUMS AND COOPERATIVES.

## COPYRIGHT

*A bundle of intangible rights granted by statute to the author or originator of certain literary or artistic productions, whereby, for a limited period, the exclusive privilege is given to that person (or to any party to whom he or she transfers ownership) to make copies of the same for publication and sale.*

A copyright is a legal device that gives the creator of a literary, artistic, musical, or other creative work the sole right to publish and sell that work. Copyright owners have the right to control the reproduction of their work, including the right to receive payment for that reproduction. An author may grant or sell those rights to others, including publishers or recording companies. Violation of a copyright is called infringement.

Copyright is distinct from other forms of creator protection such as PATENTS, which give inventors exclusive rights over use of their inventions, and TRADEMARKS, which are legally protected words or symbols or certain other distinguishing features that represent products or services. Similarly, whereas a patent protects the application of an idea, and a trademark protects a device that indicates the provider of particular services or goods, copyright protects the expression of an idea. Whereas the operative notion in patents is novelty, so that a patent represents some invention that is new and has never been made before, the basic concept behind copyright is originality, so that a copyright represents something that has originated from a particular author and not from another. Copyrights, patents, and trademarks are all examples of what is known in the law as INTELLECTUAL PROPERTY.

As the media on which artistic and intellectual works are recorded have changed with time, copyright protection has been extended from the printing of text to many other means of recording original expressions. Besides books, stories, periodicals, poems, and other printed literary works, copyright may protect computer programs; musical compositions; song lyrics; dramas; dramatico-musical compositions; pic-

torial, graphic, and sculptural works; architectural works; written directions for pantomimes and choreographic works; motion pictures and other audiovisual works; and sound recordings.

### History of Copyright Law

U.S. copyright law grew out of English COMMON LAW and statutory law. When the printing press was developed in the fifteenth century, rights for the reproduction of written works extended to printers rather than to authors. In England, a printers' guild, the Stationers' Company, claimed for itself the exclusive right—in effect, a monopoly—on written works. It was not until 1710 that Parliament passed a statute relating to copyright. That law, called the Statute of Anne, established authors' rights to control the reproduction of their work after it was published. It also created a term of protection of 28 years from the date of publication. After that time, an author's work entered the public domain, meaning that anyone could print or distribute it without obtaining the author's permission or paying a royalty, or fee, to the author. Other European countries developed similar laws in the late eighteenth and early nineteenth centuries.

Under the British system, the author retained a common-law right to ownership of his or her work until publication. After publication, copyright was established as a statutory right, protected by the Statute of Anne. U.S. copyright law retained this distinction between prepublication common-law rights and postpublication statutory rights, until 1976.

By the late eighteenth century, the protection of intellectual property as a means of advancing the public interest was considered important enough to receive mention in the U.S. Constitution. The Patent and Copyright Clause—Article I, Section 8, Clause 8—of the U.S. Constitution empowers Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Congress passed its first copyright statute in 1790—and has substantially revised copyright law four times, in 1831, 1870, 1909, and 1976.

Revisions in the copyright law have been driven largely by commercially significant changes in technology. In 1802, for example, graphic prints came under copyright protection, establishing the notion that the Constitution's language regarding copyright not be interpreted to apply literally to "Writings" alone. In 1831, musical compositions were incorporated into copyright protection, and in 1870, paintings, statues, and other works of fine art were placed under copyright protection.

The distinction between common-law protection for unpublished works and statutory protection of published works received increasing criticism in the twentieth century, particularly as the notion of publication changed greatly with technological innovations in communication. Congress removed this distinction in the landmark Copyright Act of 1976 (17 U.S.C.A. § 102(a)). According to this statute, an author receives copyright protection as soon as a work is recorded in a concrete way—when, for example, it is written on a piece of paper, recorded on an audiotape, or stored on a computer disk. Any unauthorized copying of the work is subject to an infringement suit and criminal charges. The 1976 act also allows copyright protection of works that derive from the original, such as

**Copyright Registration by Subject Matter, 2001[a] (in thousands)**

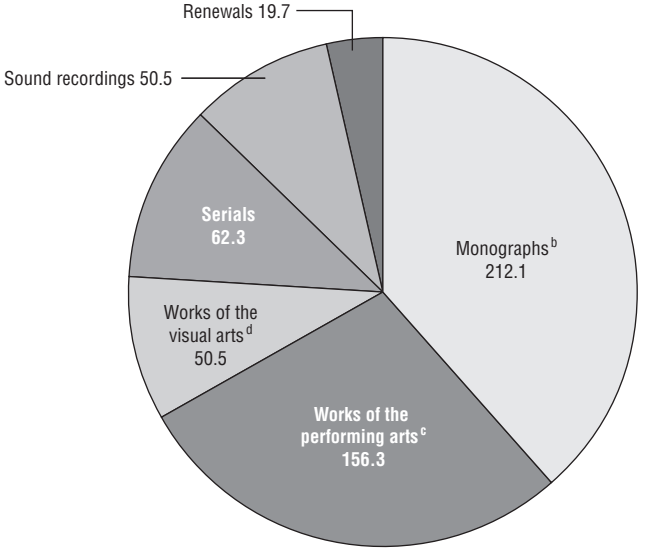


[a]Includes published and unpublished works.
[b]Includes traditional books, computer software, and machine readable works.
[c]Includes dramatic works, musical works, choreography, pantomimes, motion pictures, and filmstrips.
[d]Two-dimensional works of fine or graphic art, including prints and art reproductions; sculptural works; technical drawings and models; photographs; commercial prints and labels; works of applied arts, cartographic works; and multimedia works.

SOURCE: Library of Congress, U.S. Copyright Office, *Annual Report*, 2001.

# Copyright Law in Action: Basic Books v. Kinko's Graphics Corp.

Copyright cases typically involve disputes between competing private interests: an author against someone who has copied the author's work without permission. However, the outcome of such cases often has significant repercussions for the general public as well. One such case with significant public effect was *Basic Books v. Kinko's Graphics Corp.,* 758 F. Supp. 1522 (S.D.N.Y. 1991), which dealt with the question of whether photocopy stores may sell copied excerpts of books to college students without authorization from the books' publishers. The decision in the case ultimately affected the price that the public must pay for access to copyrighted information.

Many college and university students purchase photocopied materials from copy stores in association with courses they are taking. Usually consisting of chapters or sections taken from different books or journals, these photocopied materials enable students to read from a wide variety of sources without having to purchase a large number of books. By the late 1980s, book publishers realized they were losing sales owing to such photocopying. As a result, several publishers, including Basic Books, Inc., filed a lawsuit in federal court against one of the largest photocopy firms in the United States—Kinko's Graphics Corporation, a company that in 1989 had more than two hundred locations and annual sales of $54 million.

At issue in the case was the question of who may profit from the reproduction of an author's work, particularly with regard to the practice that Kinko's called anthologizing, which is the copying of book excerpts into course "packets" sold to college students. The publishers, the plaintiffs in the case, maintained that Kinko's violated the Copyright Act of 1976 (17 U.S.C.A. § 101 et seq.), by failing to secure permission to reprint the excerpts included in course packets and, in turn, pay the necessary fees involved, part of which would be passed on to the authors of the books. Kinko's claimed that its sale of the excerpts was an example of the kind of fair use that is allowed by the Copyright Act.

Citing the commercial interests involved—namely, the fact that Kinko's made a significant amount of money from the sale of course packets, and that packet sales competed with book sales—the court found that Kinko's was guilty of copyright infringement. It ordered the company to pay $500,000 in damages to the publishers and issued an order forbidding it to prepare anthologies without securing permission from and prepaying fees to the appropriate publishers.

*Basic Books* was a victory for the publishers and authors of books that are excerpted for course anthologies. As for Kinko's, it now has to pay fees to publishers, but it is able to pass on those costs to customers in the form of higher prices. Does this mean that students are the losers in this case? In the short run, yes, because they will pay more for their course materials. But in the long run, students and the rest of society may derive more benefit, even if it is indirect, from a system that rewards authors for their intellectual labor.

motion pictures, CD-ROM multimedia editions, and other adaptations. These subsequent creations are known as derivative works.

Many features of the 1976 act make U.S. copyright law conform more to international copyright standards, particularly with regard to the duration of copyright protection and to the formalities of copyright deposit, registration, and notice. These changes have been greatly influenced by the most important international copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works (828 U.N.T.S. 221, S. Treaty Doc. No. 99-27). In 1988, the United States passed the Berne Convention Implementation Act (102 Stat. 2853), which made the nation an official member of the treaty as of 1989. Section 2(a) of this act holds that provisions of the treaty are not legally binding in the United States without domestic legislation that specifically implements them.

U.S. copyright law has continued to evolve toward greater conformity with international copyright standards. In the 1990s, for example, the Berne Convention added 20 years to the minimum standard for copyright duration, changing it to the length of the author's life plus 70 years. U.S. copyright law followed suit in 1998, with the passage of the Sonny Bono Copyright Term Extension Act.

### Copyrightable Works

The 1976 Copyright Act provides that copyright protection "subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed" (17 U.S.C.A. § 102(a)). Thus, virtually any form of fixed recording is protected, no matter how new the technology.

Originality is the most important quality needed by a work in order for it to receive copyright protection. Originality is not dependent on the work's meeting any standard of aesthetic or artistic quality. Thus, a work need not be fine art to be copyrightable.

### Works That Are Not Copyrightable

Copyright protects the *expression* of an idea or vision, not the idea itself. In legal terminology, this concept is called the idea-expression dichotomy, and it has been an important feature of legal reasoning related to copyright. Ideas, procedures, processes, systems, methods of operation, concepts, principles, and discoveries are not within the scope of copyright protection. Other works that are not copyrightable are words and short phrases, including slogans; blank forms for recording information (such as bank checks); and works containing no original authorship (such as standard calendars or simple phone listings).

Some works are not copyrightable because they are not fixed in a tangible medium. These include unrecorded dance choreography, and unrecorded speeches, lectures, and other vocal performances. Although typefaces are tangible, they traditionally have been regarded as lying outside of copyright protection. A dramatic character is not copyrightable.

### Holders of a Copyright

A copyright is initially owned by the author or authors of the work, except in the case of a "work for hire." A work for hire can arise in two situations: (1) where an employee creates a work within the scope of his or her employment, in which case the employer owns the copyright to the work upon its creation; (2) where two parties enter a written agreement designating the creation as a work for hire and the work falls within one of nine specific categories of work designated by copyright law. If the work does not fit one of the specified categories, it will not be a work for hire even if the parties have called it one. In such a case, the author or authors retain the copyright, and transfer must be accomplished through a written assignment of copyright. Where there is a valid work for hire, the employer who owns the copyright has the same rights as any copyright holder, including the right to initiate an action for copyright infringement.

The ownership of a copyright, or the ownership of any of the five exclusive rights afforded by a copyright (discussed later in this article), can be transferred to another and is regarded as PERSONAL PROPERTY upon the death of the copyright holder. Copyright ownership and ownership of the material object in which the copyrighted work is embodied are two entirely separate legal entities. Furthermore, transfer of an object and transfer of the copyright to that object are separate, independent transactions, neither of which, by itself, has any effect on the other. Therefore, transfer of a material object, such as an original manuscript, photograph negative, or master tape recording, does not transfer the copyright to that work. Likewise, transfer of the copyright to a work does not require transfer of the original copy of the work.

### Exclusive Rights

Copyright affords an author a number of exclusive rights: (1) the exclusive right to reproduce, or copy, the work; (2) the exclusive right to prepare new works that derive from the copyrighted work; (3) the exclusive right to distribute the work to the public by sale or other arrangement; (4) the exclusive right to perform the work publicly; and (5) the exclusive right to display the work publicly. The first two rights, involving reproduction and derivation, are infringed whether violated in public or in private, or whether violated for profit or not. The last three rights are infringed only when violated publicly, that is, before a "substantial number of persons" outside of family and friends (17 U.S.C.A. § 101).

All of the exclusive rights afforded by copyright may have significant economic value. For example, derivative works, which may include

translations, dramatizations, films, recordings, and abridgments, can offer substantial rewards to the author. An author may sell, license, or transfer one or all of the exclusive rights.

### Duration of Ownership

Under the original provisions of the Copyright Act of 1976, copyright protection of an authored work extended through the life of the author and to fifty years after the author's death. However, in a major piece of legislation, Congress extended copyright terms in 1998 in the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (17 U.S.C.A. §§ 101 et seq.). Title I defines the terms of the copyright extension, while Title II provides a "music licensing exemption for food service or drinking establishments." This portion of the law is also known as the Fairness in Music Licensing Act of 1998.

The duration of copyright law under the 1998 act was extended for all copyrighted materials. Works created on January 1, 1978, or after are protected from the time the work was "fixed in a tangible medium of expression." The term is for life of the creator plus 70 years. If the creator is a corporation, then the term is 95 years from publication or 120 years from the date of creation, whichever is shorter.

Works published between 1923 and 1963 are protected, if they were published with notice, for 28 years and can be renewed for 67 years. If not renewed, they will fall into the public domain. Materials that were published during this period without notice entered the public domain upon publication.

Items published between 1964 and 1977 are protected if they were published with notice. They are protected for 28 years, and the copyright has been automatically extended for 67 years. Works created before January 1, 1978, but not published, are protected for the life of the creator plus 70 years or until December 31, 2002, whichever is later. Materials created before January 1, 1978, but published between then and December 31, 2002, are protected for the life of the creator plus 70 years or until December 31, 2002, whichever is later.

Libraries, archives, museums, and scholars expressed concerns about the 20-year extension. Items created in 1923 would have passed into the public domain on January 1, 1999, if the law had not been changed. At the beginning of 2000, works created in 1924 would have fallen under the public domain. The act's opponents argued that original scholarly research would be hampered by the extension.

In answer to those concerns, a special clause was included in the Copyright Term Extension Act for libraries, archives, and nonprofit educational institutions. Such institutions are permitted to "reproduce, distribute, display, or perform in facsimile or digital form" a copy of any copyrighted, published work during the last 20 years of its term "for purposes of preservation, scholarship, or research." However, the work must not be used in such a manner if it "can be obtained at a reasonable price."

The changes in the duration of copyrights were made partly to keep pace with the evolution of European copyright laws. In 1995, Europe extended its copyright protection to life of the creator plus 70 years, but in the United States it remained the life of the creator plus 50 years.

### Copyright Infringement

Copyright infringement involves any violation of the exclusive rights of the copyright owner. It may be unintentional or intentional. When unintentional, it is called innocent infringement. An example of innocent infringement occurred when former Beatle George Harrison created his song "My Sweet Lord." Harrison was found to have unconsciously copied the tune of another song, "He's So Fine," by the Chiffons, and thus was liable for infringement (*Bright Tunes Music Corp. v. Harrisongs Music,* 420 F. Supp. 177 [S.D.N.Y. 1976]). Vicarious or related infringement refers to those who profit indirectly from the infringement of copyright, as in the case of a theater owner who profits from booking a band that illegally performs copyrighted works.

Since evidence of direct copying or PLAGIARISM of an authored work is difficult to obtain, infringement of copyright is usually established through CIRCUMSTANTIAL EVIDENCE. Such evidence typically must show a *substantial similarity* between the original and the copy, as well as prove that the copier had *access* to the original. This means that where two works are similar or identical, there is nevertheless no infringement if each work was produced through the original and independent work of its creator. An infringer is not relieved of liability by crediting the source or the creator of the infringed work. Although infringement does not require that

## Copyright Form

Copyright Office fees are subject to change. For current fees, check the Copyright Office website at *www.copyright.gov,* write the Copyright Office, or call (202) 707-3000.

**FORM TX**
**For a Nondramatic Literary Work**
UNITED STATES COPYRIGHT OFFICE
REGISTRATION NUMBER

TX TXU

EFFECTIVE DATE OF REGISTRATION

Month Day Year

**DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.**

**1** **TITLE OF THIS WORK ▼**

**PREVIOUS OR ALTERNATIVE TITLES ▼**

**PUBLICATION AS A CONTRIBUTION** If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. **Title of Collective Work ▼**

If published in a periodical or serial give: **Volume ▼** **Number ▼** **Issue Date ▼** **On Pages ▼**

**2** **a** **NAME OF AUTHOR ▼**

**DATES OF BIRTH AND DEATH**
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☐ Yes
☐ No

**AUTHOR'S NATIONALITY OR DOMICILE**
Name of Country
**OR** { Citizen of ▶ _____
Domiciled in ▶ _____

**WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK**
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No
If the answer to either of these questions is "Yes," see detailed instructions.

**NATURE OF AUTHORSHIP** Briefly describe nature of material created by this author in which copyright is claimed. ▼

**b** **NAME OF AUTHOR ▼**

**DATES OF BIRTH AND DEATH**
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☐ Yes
☐ No

**AUTHOR'S NATIONALITY OR DOMICILE**
Name of Country
**OR** { Citizen of ▶ _____
Domiciled in ▶ _____

**WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK**
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No
If the answer to either of these questions is "Yes," see detailed instructions.

**NATURE OF AUTHORSHIP** Briefly describe nature of material created by this author in which copyright is claimed. ▼

**c** **NAME OF AUTHOR ▼**

**DATES OF BIRTH AND DEATH**
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☐ Yes
☐ No

**AUTHOR'S NATIONALITY OR DOMICILE**
Name of Country
**OR** { Citizen of ▶ _____
Domiciled in ▶ _____

**WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK**
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No
If the answer to either of these questions is "Yes," see detailed instructions.

**NATURE OF AUTHORSHIP** Briefly describe nature of material created by this author in which copyright is claimed. ▼

**NOTE**
Under the law, the "author" of a "work made for hire" is generally the employer, not the employee (see instructions). For any part of this work that was "made for hire" check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part, and leave the space for dates of birth and death blank.

**3** **a** **YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED** This information must be given in all cases.

_____ ◀ Year

**b** **DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK**
**Complete this information ONLY if this work has been published.** Month ▶ _____ Day ▶ _____ Year ▶ _____

_____ ◀ Nation

**4** **COPYRIGHT CLAIMANT(S)** Name and address must be given even if the claimant is the same as the author given in space 2. ▼

See instructions before completing this space.

**TRANSFER** If the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright. ▼

**DO NOT WRITE HERE OFFICE USE ONLY**
APPLICATION RECEIVED
ONE DEPOSIT RECEIVED
TWO DEPOSITS RECEIVED
FUNDS RECEIVED

**MORE ON BACK ▶** • Complete all applicable spaces (numbers 5-9) on the reverse side of this page. • See detailed instructions. • Sign the form at line 8.

**DO NOT WRITE HERE**
Page 1 of _____ pages

[continued]

**Copyright Form**

EXAMINED BY **FORM TX**

CHECKED BY

☐ CORRESPONDENCE Yes

FOR COPYRIGHT OFFICE USE ONLY

**DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.**

**PREVIOUS REGISTRATION** Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office? 5

☐ **Yes** ☐ **No** If your answer is "Yes" why is another registration being sought? (Check appropriate box.) ▼

a. ☐ This is the first published edition of a work previously registered in unpublished form.

b. ☐ This is the first application submitted by this author as copyright claimant.

c. ☐ This is a changed version of the work, as shown by space 6 on this application.

If your answer is "Yes" give: **Previous Registration Number** ▶ **Year of Registration** ▶

**DERIVATIVE WORK OR COMPILATION** a 6

**Preexisting Material** Identify any preexisting work or works that this work is based on or incorporates. ▼

See instructions before completing this space.

**Material Added to This Work** Give a brief, general statement of the material that has been added to this work and in which copyright is claimed. ▼ a

**DEPOSIT ACCOUNT** If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account. a 7

Name ▼ Account Number ▼

**CORRESPONDENCE** Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/ZIP ▼ a

Area code and daytime telephone number ▶ Fax number ▶

Email ▶

**CERTIFICATION*** I, the undersigned, hereby certify that I am the 8

Check only one ▶
- ☐ author
- ☐ other copyright claimant
- ☐ owner of exclusive right(s)
- ☐ authorized agent of _____
  Name of author or other copyright claimant, or owner of exclusive right(s) ▲

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

**Typed or printed name and date** ▼ If this application gives a date of publication in space 3, do not sign and submit it before that date.

_____ Date ▶ _____

Handwritten signature (X) ▼

X ___ ___ ___ ___ ___ ___ ___ ___ ___ ___ ___ ___ ___ ___ ___ ___ ___ ___ ___ ___ ___ ___ ___ ___

**Certificate will be mailed in window envelope to this address:**

Name ▼

Number/Street/Apt ▼

City/State/ZIP ▼

**YOU MUST:**
- Complete all necessary spaces
- Sign your application in space 8

**SEND ALL 3 ELEMENTS IN THE SAME PACKAGE:**
1. Application form
2. Nonrefundable filing fee in check or money order payable to *Register of Copyrights*
3. Deposit material

**MAIL TO:**
Library of Congress
Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

9

**Fees are subject to change. For current fees, check the Copyright Office website at www.copyright.gov, write the Copyright Office, or call (202) 707-3000.**

*17 U.S.C. § 506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than $2,500.

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even a large portion of the work be similar, it does require that a substantial part be similar. It is irrelevant if the copied work is an improvement of the original work.

The Copyright Act of 1976 recognizes a copyright not only in a publisher's collective work, but also a separate copyright for each author's contribution to the work. With the growth in the use of electronic databases and disk to store data, some freelance authors began to object to their articles being sold to companies that produced these databases and disks. The Supreme Court, in *New York Times v. Tasini*, 533 U.S. 483, 121 S. Ct. 2381, 150 L. Ed. 2d 500 (2001), held that the Act protects the copyrights of the writers, rejecting an argument by the publishers that the conversion of the original works to an electronic format constituted a "revision" of the collective work, which would have been permissible under the Copyright Act.

### Remedies for Infringement

Because the owner loses the value of a copyright when infringement occurs, relief is often sought through filing a lawsuit in federal court. If infringement is established, the court can grant preliminary and permanent injunctions, or court orders that restrain the offending party from continuing to infringe the copyright. A court may also award monetary damages as a remedy for copyright infringement. The copyright owner can recover for actual financial losses and any additional profits that the infringer earned from the infringement.

The copyright owner may instead choose to receive statutory damages, which range from a minimum of $250 to a maximum of $10,000. The court may adjust these limits based on the innocence or willfulness of the infringer. Innocent infringers may prove their GOOD FAITH and may have damages reduced to as little as $100, whereas willful infringers may be punished by the court with damages as high as $50,000. Courts may also impound and even destroy illicit reproductions of copyrighted works.

Willful copyright infringement can be a federal misdemeanor, punishable by as much as $10,000 or one year's imprisonment. Criminal prosecutions on this basis require that infringement be for the "purposes of commercial advantage or private financial gain" (17 U.S.C.A. § 506(a)). Criminal prosecutions for copyright infringement are generally rare. Nevertheless, PIRACY of music and motion picture recordings —in which criminals mass-produce such recordings without permission and without paying royalties—has become increasingly common. This fact led to the passage of the Piracy and Counterfeiting Amendments Act of 1982 (18 U.S.C.A. § 2318), which allows punishment of up to $250,000 in fines or five years in prison for pirating 1,000 phonorecords or 65 films within 180 days. The fraudulent use or removal of copyright notices is also a punishable offense.

### Fair Use

Fair use is a judicial doctrine that refers to a use of copyrighted material that does not infringe or violate the exclusive rights of the copyright holder. Fair use is an important and well established limitation on the exclusive right of copyright owners. Examples of fair use include the making of braille copies or audio recordings of books for use by blind people, and the making of video recordings of broadcast television programs or films by individuals for certain private, noncommercial use.

Examples of fair use typically involve, according to the Copyright Act of 1976, the reproduction of authored works for the purpose of "criticism, comment, news reporting, teaching . . ., scholarship, or research" (17 U.S.C.A. § 107). The same act also establishes a four-part test to determine fair use according to the following factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for, or value of, the copyrighted work (17 U.S.C.A. § 107).

It is usually considered fair use of an authored work to take small quotations or excerpts and to include them in another work, as when quotations are taken from a book and inserted into a book review. However, courts have found that such quotation is not fair use when material is taken from unpublished sources, as happened in the 1985 case *Harper & Row v. Nation Enterprises,* 471 U.S. 539, 105 S. Ct. 2218, 85 L. Ed. 2d 588.

The *Harper* case involved publication by *The Nation* magazine of quotations from Gerald R. Ford's unpublished memoir, *A Time to Heal.* Harper & Row, publisher of the memoir, sued

*The Nation,* claiming that the magazine's actions had caused it to lose a lucrative contract with *Time Magazine* to publish excerpts from the memoir. The Court ruled in favor of Harper, citing the economic value of first publication to the copyright holder as an important factor in its decision. It found that *The Nation* had infringed Ford's copyright by becoming the first publisher of his original expression, thereby inflicting economic losses on Ford. It rejected *The Nation's* argument that it was simply reporting news. Lower courts have subsequently applied the Court's reasoning to other cases involving quotations from unpublished works. In *Salinger v. Random House,* 811 F.2d 90 (2d Cir. 1987), a federal appeals court blocked publication of a book that used extensive quotations from unpublished letters of the author J. D. Salinger. The court ruled that the author retained copyright ownership of the "expressive content" of the letters, even when the letters themselves were deposited in university library collections.

PARODY often constitutes fair use of copyrighted material. In cases involving parodies of copyrighted works, courts typically assess the purpose and intent involved in taking material from the original expression, and whether or not the author of the parody has borrowed a reasonable amount of material in producing the parody. For example, in the 1994 case of *Campbell v. Acuff-Rose Music,* 501 U.S. 569, 114 S. Ct. 1164, 127 L. Ed. 2d 500— which involved a parody by the rap group 2 Live Crew of the Roy Orbison song "Pretty Woman"—the U.S. Supreme Court ruled that a parody could be fair use under copyright law even if it is created for commercial purposes.

### Copyright Registration, Deposit, and Notice

Registration of copyright involves recording the existence of an authored work and the identity of its author with the U.S. Copyright Office, which is a part of the LIBRARY OF CONGRESS. Deposit involves placing the work in its recorded, physical form with the same office. Notice, or notification, involves placing on an authored work the © or the word *Copyright* or the abbreviation *Copr.,* along with the year of first publication and the name of the owner of the copyright.

Many of the major copyright acts in U.S. history have required that works be registered and deposited with a U.S. district court or with the U.S. Copyright Office, in order to be legally enforceable. Over time, however, deposit, registration, and notice of copyright have increasingly become formalities. Under the Copyright Act of 1976, authors automatically receive federal copyright protection when they fix their work in a tangible medium. Even if a copyright is not registered and an authored work is not deposited, the author maintains exclusive rights to the work.

Nevertheless, registration and deposit may have significant legal consequences. Most importantly, owners of copyright cannot sue for copyright infringement until they have registered the copyright (17 U.S.C.A. § § 411, 412). Deposit is not a requirement for copyright protection, but federal law requires that two copies of a published work be deposited within three months of publication. Failure to deposit a copy after it has been demanded by the U.S. Copyright Office is an offense punishable by a fine. Registration of copyright requires the deposit of at least one copy of a work and two copies of a published work. The U.S. Copyright Office has the power to vary these requirements.

Copyright notice serves a number of functions. A lack of copyright notice has traditionally informed users that a particular work is in the public domain, whereas the presence of a notice has warned users that a work is copyrighted and identifies the date and year of the work. Despite these traditions, copyright notice is optional for works distributed after October 31, 1988. Under prior law, an omission of copyright notice resulted in a loss of copyright protection.

### Digital Millennium Copyright Act

Copyright laws have had to evolve in order to protect the interests of owners of copyrights from infringement through transfer of digital copies of protected works. INTERNET users may employ a myriad of methods to transmit digital files, and much of the information contained in these files consists of copyrighted works. Given the sheer number of Internet users—estimated by some at more than 500 million in 2002—and trillions of pages on the World Wide Web, protection of electronic publications and media is a global concern.

In 1998, then-President WILLIAM JEFFERSON CLINTON signed the Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (17 U.S.C.A. §§ 101 et seq.) into law

following a 99-0 vote in the U.S. Senate. This legislation was the focus of intense LOBBYING efforts on the part of a wide range of interest groups. These groups included TELECOMMUNICATIONS companies and online service providers; consumer-electronics manufacturers, library, museum, and university groups; and the publishing, recording, film, and software industries. The primary goal of this legislation was to adapt U.S. copyright laws for the digital age.

Passage of the DMCA was also required for the United States to keep pace with changes in international copyright treaties. In December 1996, the World Intellectual Property Organization (WIPO), an agency of the UNITED NATIONS, negotiated the Copyright Treaty and the Performances and Phonograms Treaty at a meeting in Geneva, Switzerland. WIPO is responsible for the advancement and safeguarding of intellectual property throughout the world, and it has 170 member countries.

The treaties, ratified in 2002, provide increased protection for copyrighted materials in the digital world. By signing, each country agrees to put into place laws, based on their own legal system, in order to enforce the treaties. The DMCA serves that purpose for the United States.

The DMCA consists of five main sections: WIPO Treaties Implementation, Online Copyright Infringement Liability Limitation, Computer Maintenance or Repair Copyright Exemption, Miscellaneous Provisions, and Protection of Certain Original Designs. Title I, WIPO Treaties Implementation, contains an "anti-circumvention" provision, making it illegal to "manufacture, import, offer to the public, provide, or otherwise traffic any technology, product, service, device, component, or part thereof," for the primary purpose of "circumventing a technological measure that effectively controls access to" a copyrighted work. Thus, technologies that are designed to protect digital material are safeguarded.

Moreover, this provision makes the act of circumventing a "technological measure that effectively controls access to a work protected" by copyright illegal. Every three years, the librarian of Congress, the register of copyrights, and the assistant secretary for communications and information of the COMMERCE DEPARTMENT must determine whether people with legitimate noninfringing uses of copyrighted materials are being unfavorably affected by the law. The law does state that fair use is not affected, but this nevertheless has been a controversial provision. Libraries, museums, and scholars were concerned about digital materials only being available on a pay-per-use basis. An exemption was included for nonprofit libraries, archives, and educational institutions allowing them to circumvent technical protection measures for the purpose of determining whether or not to purchase the copyrighted work.

Title I of the DMCA contains another addition to U.S. copyright law required by the WIPO treaties. This section prohibits the deletion or alteration of information associated with copyrighted material. Organizations will benefit from this provision because it will help protect information and images on their web sites. Furthermore, it prohibits the distribution of false copyright-management information. The DMCA provides for civil and criminal enforcement. However, archives, schools, nonprofit libraries, and public broadcasting stations are exempt from criminal prosecution.

The DCMA also limits the liability for copyright infringement by providing safe harbors for online service providers. The definition of an online service provider is generous. Other organizations may qualify for protection, which could be useful if they provide Internet access, have a company bulletin board or inhouse E-MAIL system, or chat rooms. Prior to the passage of the DMCA, online service providers could have been liable if infringing materials were posted on their sites, even if they were unaware of the problem. The DMCA explains the responsibilities of copyright owners and service providers. Under specific conditions, online service providers are exempt from having to pay monetary damages as long as they are not benefiting financially from infringing activity and as long as they remove the material promptly from the Internet.

Limitations have also been set on exclusive rights for computer programs. A provision allows users to copy programs that are needed in order to maintain and repair a machine. Any such copies must be destroyed as soon as the machine is repaired, however.

One significant exemption for libraries and archives was included in Title IV of the DMCA. Up to three copies may be made of a copyrighted work without the permission of the copyright owner for research use in other libraries or archives through interlibrary loan.

The word "facsimile" has been struck from the former copyright law, thus allowing for digital formats. Libraries and archives can now loan digital copies of works to other libraries and archives by electronic means. Copies for preservation and security purposes are also permitted when the existing format in which the material is stored becomes outdated, or if the work is lost, stolen, damaged, or deteriorating.

Title IV also established guidelines for licensing and ROYALTIES in regard to copyrighted music transmitted over the Internet and in other digital forms. Transmissions are not subject to licensing if transmitted with encoded copyright information and with permission from the copyright owner of the sound recording.

### No Electronic Theft Act

The concerns surrounding the protection of the copyrights of electronic data extend to computer software. In 1997, Congress approved the No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678, which substantially enhanced existing federal copyright law. Aimed primarily at the rampant theft of computer software, it allows the prosecution of anyone who violates the copyright of materials worth more than $1,000 in a six-month period by copying, distributing, or receiving software.

Congress passed the law in November 1997 after the software and entertainment industries strongly lobbied for it, claiming losses amounting to $2 billion in 1996 in the United States alone. In particular, the law closed a narrow loophole in existing federal law, which made criminal prosecution for copyright violation only possible if the violation resulted in financial gain. Under the NET Act, individuals face fines and jail sentences even if they do not profit financially from the violation. The law was enacted over protests by scientists who feared that it would hinder their research.

Lobbyists pointed to what became known as the "*LaMaccia* loophole." This term refers to an unforeseen weakness in federal law that was exposed by the failed federal prosecution of computer hacker David LaMacchia in 1994 (*United States v. LaMacchia*, 871 F. Supp. 535 [D. Mass. 1994]). LaMacchia, then a 21-year-old student at the Massachusetts Institute of Technology, had used an electronic bulletin board to freely distribute countless commercial software programs. Although he was indicted for wire FRAUD under 18 U.S.C.A. § 1343 for allegedly causing software companies losses of more than $1 million, the case was dismissed. U.S. District Court Judge Richard Stearns ruled that criminal sanctions did not apply because LaMacchia had not profited from his actions.

According to the software industry, the decision paved the way for piracy of material through web pages and other commonly used Internet sites. Software manufacturers were not only concerned about deliberate piracy by computer hackers; they also wanted to stop the casual lending and copying of computer software between consumers and within offices as well. Joining them in this effort were the music and film industries, which have increasingly become partners of software companies in the production of multimedia CD-ROMs. Additionally, the music industry viewed with alarm the widespread distribution of commercial recordings by fans, which became popular over the Internet in 1997 with the development of new software technology for digitally copying songs.

The NET Act was designed to close the *LaMacchia* loophole. Swiftly passed by the House and subsequently approved by the Senate, the act accomplished this by amending two key parts of federal copyright law: Titles 17 and 18 of the United States Code. These laws previously defined copyright violation strictly in terms of financial gain. The NET Act broadened them to include the reproduction or distribution of one or more copies of copyrighted works and considers financial gain simply to be the possession of copyrighted work. It defines a misdemeanor violation as occurring when the value of the copied material exceeds $1,000 over a 180-day period; a felony occurs if the value exceeds $2,500. Penalties range from a one-year jail sentence and up to $100,000 in fines for first-time offenders, to five years' imprisonment, and up to $250,000 in fines for repeat offenders.

#### FURTHER READINGS

Electronic Frontier Foundation. 1995. *To Have and to Hold: Can Copyrights Extend to Cyberspace Without Increased Costs and Threats to Privacy?* (June 8).

Goldstein, Paul. 2003. *Copyright's Highway: From Gutenberg to the Celestial Jukebox.* Rev. ed. Stanford, Calif.: Stanford Univ. Press.

Vaidhyanathan, Siva. 2001. *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity.* New York Univ. Press.

#### CROSS-REFERENCES

Copyright, International; Intellectual Property.

## COPYRIGHT ARBITRATION ROYALTY PANEL

*Three-member ad hoc board empowered to make decisions regarding ratemaking and distributions of* COPYRIGHT ROYALTIES *collected for compulsory licenses under the Copyright Act of 1976.*

In order for a person to use another's copyrighted work, the person must generally obtain a license from the copyright owner. The terms of the agreement normally depend upon market conditions at the time of the agreement. However, the Copyright Act of 1976, codified in Title 17 of the *United States Code*, creates an exception under some circumstances whereby a prospective user may obtain a compulsory license that allows the individual to use a copyrighted work without the owner's permission. The compulsory license applies so long as the person applying for the license meets statutory requirements and pays the required royalties.

Congress in the 1976 act created the COPYRIGHT ROYALTY TRIBUNAL (CRT), an independent federal agency empowered to distribute royalties collected under the compulsory license provisions, as well as to make periodic adjustments to the royalty rates attached to the compulsory licenses. The original copyright act provided for four compulsory licenses, including those for CABLE TELEVISION, musical mechanical, noncommercial broadcasting, and jukeboxes. In 1992, Congress extended responsibility to the CRT to include distribution of levies collected from manufacturers and importers of digital recording devices.

The Copyright Royalty Tribunal was controversial from its inception. Although the ratemaking provisions were generally clear, the statute was rather ambiguous regarding the methods by which the tribunal should distribute royalties. The tribunal's decisions with respect to its ratemaking powers led to frequent criticism and litigation. Moreover, critics charged that Congress had created a full-time independent agency to perform a part-time job. In 1990, Congress reduced the number of commissioners on the tribunal from five to three, and during hearings in the House of Representatives in 1993, two of the three commissioners testified that they were in favor of abolishing the Copyright Royalty Tribunal.

In 1988, Congress enacted the Satellite Home Viewer Act, Pub. L. No. 100-667, 102 Stat. 3935, which created, at that time, a fifth compulsory license. However, the act required the formation of ad hoc ARBITRATION panels to amend royalty fees for satellite retransmissions, thus bypassing the authority of the CRT. The success of these arbitration panels persuaded Congress to use them for the other forms of compulsory licenses under the Copyright Act. The Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304, immediately abolished the Copyright Royalty Tribunal and allowed for the formation of ad hoc copyright arbitration royalty panels.

The 1993 act did not change the system of compulsory licenses, but rather it shifted authority from the CRT to the new panels. Arbitrators on these panels are appointed and convened by the librarian of Congress, who acts on the recommendation of the Register of Copyrights. The arbitrators must meet minimum criteria set forth under the statute in order to quality for the position.

At the time of the creation of these arbitration panels, the librarian of Congress was directed to adopt the rules and regulations of the CRT in their entirety, though the CRT no longer existed. These rules and regulations were to remain in force until the librarian decided to supplement or supersede them. The adoption of the tribunal's former rules and regulations presented problems, however, because the 1993 act eliminated a single body—the CRT—and replaced it with a system of ad hoc panels. In December 1993, the librarian of Congress adopted the former CRT rules on an interim basis. One year later, the librarian issued new rules governing the panels, effective January 6, 1995. Additional revisions to the rules governing the panels have also been made since the 1994 revisions.

Like the CRT, the arbitration panels make decisions regarding distribution of royalties and ratemaking for royalties under the compulsory license provisions. Unlike the CRT, the purposes of the copyright arbitration royalty panels are set out clearly in the statute. Among the many purposes of the panels in the statute is the maximization of the availability of creative works to the public; the assurance that copyright owners receive a fair return for their creative works; and the guarantee that the roles of the copyright owner and the copyright user in the product made available to the public were reflected. 18 U.S.C.A. § 801(b) (1998). The statute lists other purposes as well.

The copyright arbitration royalty panels have proven more popular than the former CRT, although disputes still arise regarding ratemaking or distribution decisions by the panels. Convening a panel to make a rate adjustment is more difficult than the procedure that was followed under the CRT, which was a permanent body. The time frame under which a panel decision must be completed is also a concern for those involved in a panel proceeding. All actions by the parties—including discovery, testimony, studies, arguments, motions, and so forth—as well as rulings, orders, and final report issued by the panel, must be completed within 180 days after the librarian of Congress directs the formation of the arbitration panel. Nevertheless, these procedures are generally believed to promote efficiency when these panels make these determinations, and the panels have not been subjected to the same level of criticism as the former tribunals.

FURTHER READINGS

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Goldstein, Paul. 2003. *Copyright.* 2d ed. New York: Aspen.

Nimmer, Melville B., and David Nimmer. 2003. *Nimmer on Copyright.* Newark, NJ: LexisNexis/Matthew Bender.

CROSS-REFERENCES

Copyright; Copyright, International; Copyright Society of the U.S.A.

## COPYRIGHT, INTERNATIONAL

*The manner in which the exclusive rights to reproduce and distribute copies of various intellectual productions may be obtained in foreign countries.*

International copyright protection can be secured in only two ways: (1) by obtaining separate and independent COPYRIGHT protection in each of the countries where such protection is sought, in compliance with the laws of each country; or (2) through international conventions or treaties that provide for the mutual recognition and protection of the literary and INTELLECTUAL PROPERTY of the citizens of the nations that are parties to such treaties or conventions. Citizens of the United States who seek copyright protection in foreign countries may sometimes avail themselves of the first method, sometimes the second, and sometimes neither, depending upon the laws of the countries in which the foreign copyrights issue.

In 1989, the United States for the first time became a signatory to the oldest and most widely approved international copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works (828 U.N.T.S. 221, S. Treaty Doc. No. 99-27). In doing so, the United States ended a long history of noncompliance with the Berne Convention, finally joining the vast majority of developed countries. As of the mid 1990s, 96 countries had signed the Berne Convention.

Among the works protected by the Berne Convention are books, pamphlets, and other printed materials; dramatic and dramatico-musical works and musical compositions; drawings and paintings; works of architecture, sculpture, engraving, and lithography; illustrations and geographic charts, plans, and sketches; translations, adaptations, arrangements of music, and collections of various works; and cinematographic and photographic works.

### History of the Berne Convention

The Berne Convention was first adopted on September 9, 1886, in Berne, Switzerland, and was later revised at several conferences: Paris, 1896; Berlin, 1908; Berne, 1914; Rome, 1928; Brussels, 1948; Stockholm, 1967; and Paris, 1971. The agreement grew out of a perceived need in the late nineteenth century to protect authored works from international PIRACY, or unauthorized copying. A growing demand for new printed materials during this era was motivating many publishers to reprint unauthorized versions of foreign works. Authors whose works were pirated had little recourse against those publishers because copyright laws were typically enacted on a national basis. Such laws gave copyright protection only to authors who were nationals of the country in which the laws were enacted.

A few countries negotiated bilateral treaties—two-party contracts termed reciprocal agreements—that protected the nationals of both countries, but such arrangements were rare. In the mid nineteenth century, a nongovernment organization, the Association Littéraire et Artistique International, was formed in Paris and led the movement for international copyright protection. This organization created the draft of what eventually became the Berne Convention. Among the first countries adhering to the Berne Convention were France, Germany, and the United Kingdom.

The Berne Convention established several principles of international copyright that have remained through all of the treaty's versions. First, rather than operating on a system of reciprocity (under which a country protects foreign authors only to the extent that its own authors are protected in return), the convention works on the principle of national treatment (under which a country extends the same protection to foreigners that it accords to its own authors). Second, rather than trying to impose the same standards on all nations, the convention solved the problem of national differences in copyright protection by establishing minimum standards of protection that all signatories must meet. Thus, member countries may treat the copyrighted work of their own nationals in any way they choose, but they must treat works from nationals of other treaty members according to minimum treaty standards. Third, the convention provides for automatic protection of copyrighted works as soon as they are created, without any required formalities, such as notice or registration.

### The United States and the Berne Convention

Influenced greatly by its early status as a net importer of copyrighted materials, the United States resisted joining the Berne Convention for over a century. Adherence to the treaty's conventions would have required U.S. publishers of foreign works—many of whom produced pirated copies—to pay ROYALTIES and fees to foreign copyright holders, thus causing a significant amount of money to flow overseas. However, by the end of WORLD WAR II, the United States had become a major exporter of copyrighted materials, and it became clear that it would be to the country's economic advantage if its own authors and copyright holders could be assured of receiving royalties from overseas publishing.

At that point, rather than joining the Berne Convention, the United States lobbied for a different international treaty, the Universal Copyright Convention (UCC) (25 U.S.T. 1341, T.I.A.S. No. 7868), established in 1952 under the auspices of the U.N. Educational, Scientific, and Cultural Organization (UNESCO). The United States became a member of the UCC in 1955. Many countries that already belonged to the Berne Convention—including France, West Germany, and Japan—also joined the UCC. The UCC generally operated on the national-treatment principle, thus allowing U.S. authors to receive the same copyright protection in a specific country that the country afforded its own authors, and not requiring the United States to reciprocate that treatment for foreign authors.

The United States experienced still more international pressure to join the Berne Convention after passage of the Copyright Act of 1976 (17 U.S.C.A. §§ 101 et seq.). This statute brought several important features of the Berne Convention into U.S. law, including relaxed standards on the formalities of copyright registration, deposit, and notice, and new provisions that extended the duration of copyright protection to the Berne minimum of the author's life plus 50 years (which has since been extended to life plus 70 years). The act also phased out a protectionist manufacturing clause that had required foreign works to be set in type in the United States in order to receive U.S. copyright protection—a clause that had benefited U.S. printers for decades. (In fact, LOBBYING by printers had long stymied attempts to make the United States part of the Berne Convention.)

By the 1980s, the United States was still one of the few major developed countries not abiding by the Berne Convention. When it became clear that the United States' role as a pariah in international copyright circles had begun to erode its position in reaching other trade agreements concerning intellectual property, Congress finally passed the Berne Convention Implementation Act of 1988 (Pub. L. No. 100-568, 102 Stat. 2853). That act made the United States a party to the Berne Convention beginning in 1989, officially ending U.S. copyright isolationism.

### Protection of Copyright in the Digital Age

Protection of the interests of copyright owners and enforcement of their rights has become more difficult since the rise of INTERNET around the world. The World Wide Web, a component of the Internet, now consists of trillions of individual web pages, and according to some estimates, the number of Internet users has increased to more than 500 million.

The Internet has created a new avenue for copyright infringement on a global scale. Although virtually all types of works that are subject to copyright law can be transferred through digital networks, transfers of music recordings have received the most attention. A web-based company, Napster, during the 1990s became the most well-known and heavily used

portal for transferring electronic files containing copies of music. Users of this system were capable of transferring copyrighted works in a format called MP3 (MPEG-1 Audio Layer 3) to their home computers, with a sound quality that was comparable to that of a compact disc. The musical compositions in most of these files were copyrighted, and owners of those copyrighted materials complained that the file transfers infringed their copyrights. The Recording Industry Association of America sued Napster, eventually prevailing and causing Napster to close down. Napster was not merely a phenomenon in the United States and North America. The company had an estimated 16.9 million worldwide users, and the system accommodated about 65 million downloads.

Domestic copyright law is limited in its protection of some of these works because the Copyright Act generally has no application outside of the United States. For example, in *Subafilms, Inc. v. MGM—Pathe Communications Co.*, 24 F.3d 1088 (9th Cir. 1994), U.S. Court of Appeals for the Ninth Circuit noted as much in holding that a copyright holder could not sue individuals who distributed the plaintiff's movies abroad, because the infringement occurred outside of U.S. soil. Although the Berne Convention, as well as such international intellectual property treaties as the Geneva Phonograms Convention and the Rome Convention, protect such copyrights, additional protection was needed.

In 1996, the World Trade Organization approved the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which requires member countries to provide certain levels of protection for copyright holders in their countries. Additional protection came in the form of so-called "digital treaties" approved by the World Intellectual Property Organization, including the Copyright Treaty and the Performance and Phonograms Treaty. Both of these treaties, which became effective in 2002, clarified and extended the Berne and TRIPS provisions by allowing copyright holders to encrypt their works in order to protect their rights.

## COPYRIGHT ROYALTY TRIBUNAL

The Copyright Royalty Tribunal was established by an act of October 19, 1976 (90 Stat. 2594; 17 U.S.C. 801).

The tribunal made determinations concerning the adjustment of COPYRIGHT royalty rates for records, jukeboxes, and certain CABLE TELEVISION transmissions. After compulsory cable television and jukebox ROYALTIES were deposited with the register of copyrights, the tribunal distributed the fees and, in cases of controversy among claimants, determined their distribution.

The tribunal established and made determinations concerning terms and rates of royalty payments for the use by public broadcasting stations of published nondramatic compositions and pictorial, graphic, and sculptural works. Cost-of-living adjustments were made to noncommercial broadcasting rates in August of each year.

Tribunal decisions factor in the existence of economic conditions, the impact on copyright owners and users and the industry involved, and the maximization of public availability of creative works. Recognizing copyright owners' right to receive a fair return, the tribunal ensured them access to information about the use of their works.

It was supplanted by COPYRIGHT ARBITRATION ROYALTY PANELS.

## COPYRIGHT SOCIETY OF THE U.S.A.

The Copyright Society of the U.S.A. was founded in 1953 to promote the protection and study of intellectual property rights in areas such as art, literature, motion pictures, and music. Its primary function is gathering, disseminating, and interchanging information concerning protection and use of copyrighted materials. The organization undertakes and engages in research in the field of COPYRIGHT law in cooperation with universities, law schools, libraries, governmental agencies, lawyers, and industry representatives in the United States and foreign countries. It also seeks to promote better understanding of copyright and the vital importance of legal and economic protection of INTELLECTUAL PROPERTY in general, and copyright in particular, among the general public, in industry, and in the academic world. It also provides information to the public through its web site, http://www.csusa.org.

To accomplish its goals, the society has undertaken a wide-ranging program including symposia on copyright subjects; workshops for people in such fields as music, motion pictures, and publishing, stressing the practical aspects

and mechanics of copyright administration; and publication of materials relating to copyright that otherwise would not be available. Its members are lawyers, laypersons, firms, libraries, universities, and publishers. The society publishes a journal and holds annual meetings. In 2001, it launched its Copyright Kids web site (www.copyrightkids.org), a comprehensive resource for school-age children that explains copyright facts and regulations and answers questions about the importance of copyright protection.

## CORAM

*[*Latin, Before; in the presence of.*]*

The term *coram* is used in phrases that refer to the appearance of a person before another individual or a group. *Coram non judice,* "in the presence of a person not a judge," is a phrase that describes a proceeding brought before a court that lacks the jurisdiction to hear such a matter. Any judgment rendered by the court in such a case is void.

## CORAM NOBIS

*[*Latin, In our presence; before us.*]* *The designation of a remedy for setting aside an erroneous judgment in a civil or criminal action that resulted from an error of fact in the proceeding.*

In civil actions, a petition for a writ of *coram nobis* was addressed to the court in which the judgment was made, unlike an appeal, which is made to a superior court. The petition asserted that the court had made an erroneous judgment due to the defendant's excusable failure to make a valid defense as a result of FRAUD, duress, or excusable neglect, such as illness. *Coram nobis* could not be used where a party caused an error because of NEGLIGENCE.

The writ of *coram nobis* has been abolished in civil actions by the rules of federal CIVIL PROCEDURE and similar provisions of state codes of civil procedure that, instead, establish different methods for setting aside judgments.

In CRIMINAL PROCEDURE, *coram nobis* serves the same purpose as it did in civil actions and is a recognized procedure in federal criminal prosecutions. Traditionally, it was available to direct the court's attention to information that did appear in the trial record and was not admitted into evidence because of fraud, duress, or excusable mistake. A defendant could not use *coram nobis* to relitigate the same charges if, through his or her own fault, such facts were not introduced as evidence.

Modern statutes have expanded the grounds for relief based upon the principles derived from the ancient writ of *coram nobis.* It is no longer a common-law remedy, but statutes provide for the vacation of a conviction and usually order a new trial if there is insufficient evidence to sustain the conviction, newly discovered evidence, erroneous instruction to the jury, or prejudicial comments or conduct by the prosecutor during the trial.

## CORAM REGE

*[*Latin, In the presence of the king himself.*]*

After the Norman Conquest of England in 1066, court was held before the king himself—*coram rege*—whenever matters affecting the royal interest were in issue. When the king began to appoint a tribunal to hear cases for him, it was called the Curia Regis, or the King's Court. From the Curia Regis developed the royal common-law courts.

"WHERE NEITHER CUSTOM NOR AGREEMENT DETERMINES THE ALLOCATION OF RISK, THE COURT MUST EXERCISE ITS EQUITY POWERS AND PRAY FOR THE WISDOM OF SOLOMON."
—ARTHUR LINTON CORBIN

## ♦ CORBIN, ARTHUR LINTON

Arthur Linton Corbin was a leading legal scholar and professor who made significant and influential contributions to the development of U.S. contract law.

Corbin was born October 17, 1874, in Cripple Creek, a small mining town near Colorado Springs. He was raised in Cripple Creek and then left Colorado to attend the University of Kansas, from which he graduated in 1894. He went on to the Yale Law School, graduating magna cum laude in 1899. After several years of practicing law and teaching high school back in Cripple Creek, he returned to Yale in 1903 to accept a position as an instructor in contracts. He became a full professor in 1909 and remained at Yale until his retirement in 1943 at the age of 68.

During his tenure at Yale, Corbin played a major role in establishing the institution as a major national law school and center for legal scholarship. He was instrumental in recruiting more highly qualified students to the school by convincing the administration to tighten admission standards. He also drew praise for his efforts to persuade the school to hire and maintain a full-time faculty that would be committed to teaching and writing, instead of relying on judges and practicing lawyers who taught only part-time and thus were not always available to students. In addition, Corbin helped to imple-

ment the CASE METHOD of teaching at Yale, in which students glean the principles of law through the study of cases rather than simply by rote without reference to COMMON LAW as developed by the courts. Corbin was a popular and committed teacher, even filling in as a writer and editor for the *Yale Law Journal* when the First World War left a serious shortage of student editors and contributors.

Corbin made his greatest contribution to contemporary legal thought through his extensive and widely studied writings on the law of contracts. He authored many books and articles on the subject and served as adviser to the reporters of the first and second Restatement of Contracts, treatises designed to set forth and analyze the relevant principles governing contract law. Corbin is best known for his own eight-volume treatise on contracts, *Corbin on Contracts: A Comprehensive Treatise on the Working Rules of Contracts Law,* which was first published in 1950, 17 years after his retirement from Yale Law School. Corbin kept his work up-to-date until his death, through his own revisions and by adding new material to "pocket parts" at the back of each volume. *Corbin on Contracts* quickly became a classic in the field for practicing attorneys and is still considered essential reading for students of contract law.

Corbin subscribed to a "realist" philosophy in his legal writings and thought. He believed that the law is a critical part of everyday life and that resulting rules governing conduct had to reflect a changing social context. He wrote,

> Law does not consist of a series of unchangeable rules or principles. . . . Every system of justice and of right is of human development, and the necessary corollary is that no known system is eternal. In the long history of the law, one can observe the birth and death of legal principles. . . . The law is merely part of our changing civilization.

In 1954, on his eightieth birthday, Corbin reiterated his belief that law is inextricably tied to human experience, stating that the "development of our law—common, statutory, and constitutional—is part of the continuing evolutionary development of life in society."

Corbin's legal realist views are strongly evident in his approach to contract law. The main purpose of a contract, he stated in his treatise, is "the realization of reasonable expectations that have been induced by the making of a promise." Reasonableness, he maintained, is an expression of customs and mores, which in turn could be discerned from what he called the operative facts of judicial decisions. To solve a contractual dispute, Corbin believed, a judge should first determine the intention of the parties, and thus the terms of the promise or agreement; then analyze the intention in terms of reasonableness; and finally apply rules, doctrines, or other principles to determine what remedy should be offered. Above all, Corbin believed that the reasonable expectations of the parties should be protected. Thus, according to Corbin, even if the price term were left open in an agreement that otherwise had been concluded, the court should consider whether the parties had intended to be bound by the contract. The court, he maintained, should make every effort to fill in the gaps of an agreement by looking to reasonable terms consistent with what the parties had previously agreed upon. The contract should fail only if it appears that the parties did not intend to be bound, or if reasonable terms cannot be ascertained.

Corbin further believed that in resolving contractual disputes, courts should not be lim-

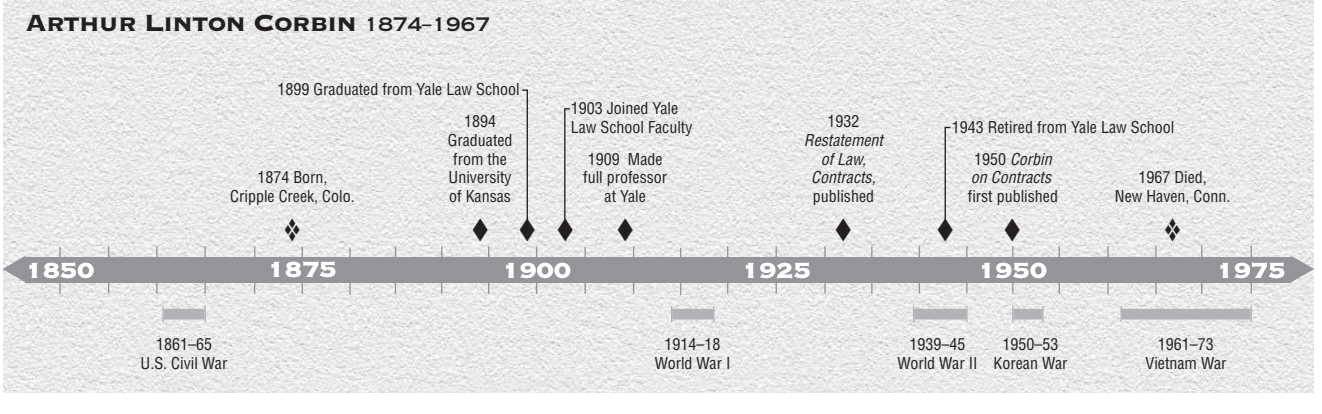

ited to a contract's "four corners" (the explicit terms of the agreement) or to the "plain meaning" of those terms. The parties' intent should be gleaned from what they stated and from their conduct; their prior course of dealing, trade practices, or any other pertinent circumstances also should be considered. Corbin's views are evident in the UNIFORM COMMERCIAL CODE, adopted in 49 states, and in the law of contracts as developed by the courts since the mid 1900s.

Corbin's views often stand in contrast to those of another leading American scholar in contracts, SAMUEL WILLISTON. Williston subscribed to the theory of legal formalism, which views the law as a body of scientific rules from which legal decisions can be readily deduced. Legal formalism dominated legal thought in the early twentieth century, and those who advocated its application viewed law as essentially conservative. Williston applied many of his theories in the first *Restatement of Contracts*, which the American Law Institute completed in 1932. *Williston on Contracts* has been a leading treatise in American contract law since the early 1900s and is still a competitor of Corbin's treatise.

In addition to the Uniform Commercial Code, Corbin also contributed to the second *Restatement of Contracts*, the provisions of which represented a considerable shift from the conservative views in the first *Restatement*. Corbin continued his study and writing well into his later life, stopping work on the second *Restatement* when he was nearly 90, and only because of failing eyesight. Corbin died in 1967, at the age of 93. The second *Restatement* was first published in 1981, 14 years after Corbin's death. To a significant extent, the second *Restatement* advocates changes in the law of contracts, many of which are based upon Corbin's views.

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Legal Realism; Restatement of Law.

## CORESPONDENT

*One of two or more parties against whom a lawsuit is commenced. A person named with others who must answer claims alleged in a bill, petition, or* LIBEL *in a judicial proceeding. An individual who is accused of* ADULTERY *with another's spouse being sued for* DIVORCE *on that ground and who thereby becomes a defendant in the action.*

## CORNER

*For surveying purposes, the designation given to a particular location formed by the intersection of two boundary lines of real property.*

*The process by which a group of investors or dealers in a particular commodity exploit its market by purchasing it in large quantities and removing it from general sale for a time, thereby dramatically increasing its market price because its limited supply is greatly exceeded by the demand for it. The condition created when a commitment is made to sell at a special time of delivery in the future, a much greater quantity of a commodity than is available in the present market.*

This type of commitment is known as a futures contract. Frequently, neither buyer nor seller expects actual delivery of the goods. They are solely speculating on the difference between the contract price and market price on a particular date. The market price is affected by various economic factors. When a corner is created, the demand for the commodity far exceeds its supply, thereby driving up market prices. On the date of delivery, therefore, the market price will exceed the contract price if no additional quantities can be delivered by persons other than the seller who has "cornered" the market. The buyer must then pay the seller, who had a corner on the specified commodity, the amount by which the market price exceeds the contract price. If, however, additional quantities of the commodity are available in the market, the seller incurs financial losses because the market price will be less than the contract price at which the market was "cornered."

The COMMODITY FUTURES TRADING COMMISSION is the federal regulatory agency charged with the administration of the Commodity Exchange Act (7 U.S.C.A. § 1 et seq.), which is designed to protect all commodity investors from manipulative practices that hinder the free flow of commerce. Anyone who deliberately exploits the commodities market to create a corner may be prosecuted under federal law for commission of a felony, punishable by a fine of not more than $500,000 or imprisonment of not more than five years, or both, plus the costs of prosecution.

## COROLLARY

*A consequence or result that can be logically drawn from the existence of a set of facts by the exercise of common sense and reason.*

## CORONER

*An official of a* MUNICIPAL CORPORATION *whose designated functions include the investigation of the cause of any violent or suspicious death that takes place within the geographical boundaries of his or her municipality.*

The office of the coroner was established at COMMON LAW and was one of great dignity since coroners dealt primarily with pleas concerning the crown. In the early 2000s, statutes establish the terms and procedure of the coroner's office, which has been replaced in some states with the office of medical examiner.

The main function of a coroner is to conduct inquests, but other powers and duties may include the duty of acting as sheriff, in the event of the sheriff's incapacity, as conservator of the peace, or as magistrate. The duties are considered to be either judicial, ministerial, or both.

### Holding Inquests

The purpose of an inquest is to gather evidence that may be used by the police in their exploration of a violent or suspicious death and the subsequent prosecution of a person if death ensued from a criminal act.

An inquest is not a trial but rather a criminal proceeding of a preliminary, investigatory nature. It is not a criminal prosecution but may result in the discovery of facts justifying one.

Statutes mandate that whenever there exists reasonable ground to believe that a death resulted from violence, unlawful means, or other mysterious or unknown causes, an inquest must be held. Death by disease, natural causes, NEGLIGENCE of the deceased, accident, or suicide does not warrant the commencement of an inquest, unless statute so requires.

A coroner should not arbitrarily or capriciously hold an inquest. The presumption is that when a coroner decides to hold an inquest it is made in exercise of his or her sound discretion, in GOOD FAITH, and for sufficient cause. Most statutes require that a coroner make a preliminary inquiry into the cause of death before summoning a jury.

**Time and Place** The general requirement is that an inquest be held immediately upon the notice to the coroner of the death or discovery of the dead body. The inquest may either take place in the territory of the coroner in whose jurisdiction the body was found or where the death itself took place.

**Summoning and Swearing the Jury** If it is public knowledge that the decedent was killed by someone who is already in police custody, then it is not necessary to summon a jury to hold an inquest. A coroner's jury is usually summoned by warrant but may be summoned personally by the coroner. A juror who refuses to attend an inquest may be subject to a fine and a CONTEMPT citation. The general practice is that the jury should be sworn in in the presence of the body.

**Autopsy** Incident to the coroner's duties is the power to order an autopsy when appropriate and essential to ascertain the circumstances and the nature of death. The reasons underlying this power are numerous—the primary one being that a thorough examination of a body is necessary since an accused person may be acquitted if there is some doubt as to the cause of death. Similarly, a proper examination of the cause of death should exclude all other possible causes that would not support a criminal investigation and subsequent prosecution.

Some statutes provide that a coroner is not authorized to hold an autopsy where no suspicion of foul play exists or where no inquest is being held. A needless autopsy may be considered unreasonable interference with a dead body. If authorized, however, a coroner may hold an autopsy without the consent of the decedent's next of kin. Civil liability may be imposed upon coroners and their physicians who perform improper or unauthorized autopsies.

To examine the body during an autopsy, a coroner may hire an expert physician, the selection of whom is within the coroner's discretion. This power must be exercised with great caution. During the autopsy, the coroner has the discretionary power to decide who, if anyone, should be present aside from the surgeon or surgeons. Neither a person accused of criminally causing the death nor the jurors have a right to witness the actual dissection of the cadaver.

**View of Body** Statutes require that the coroner and jury together must have a view of the body except in cases where the body cannot be found or is too decomposed for view. The purpose of this inspection is to ascertain from the appearance of the body how the death was

caused. The jury also hears the summaries of various medical reports regarding the condition of the body to help it reach its determinations concerning the cause of death.

**Verdict and Inquisition** It is the duty of the coroner to accept from the jury the verdict, which should identify the deceased, if possible, or state that the deceased is unknown and should include how, when, and where the decedent died. The coroner submits a return of inquest, also known as an inquisition, which is a record of the jury's finding, that must be executed in accordance with statutory requirements.

The effect of the verdict at common law is that it is a sufficient basis for prosecution for murder or MANSLAUGHTER so long as the jury finds evidence supporting prosecution. Under some statutes, its effect is not as strong as a finding by a GRAND JURY but has merely been held to render a person accused of illegally causing the death liable to arrest.

Many jurisdictions require that the coroner complete a certificate of death showing the cause and probable manner of death subsequent to the termination of the inquest.

### Arrest

It is the power and the duty of the coroner to have anyone implicated by an inquest in murder or manslaughter to be arrested and held for trial. If a statute gives a coroner magisterial jurisdiction in HOMICIDE cases, he or she may issue warrants for the arrest of the person probably chargeable with the crime and hold the person to answer or discharge the charges.

### Record of Inquest as Evidence

**Civil Actions** In general, evidence given at an inquest has not been permitted to be used against either party in a civil action. There are, however, exceptions to this rule. Some authorities hold the testimony of a witness before a coroner to be admissible if used to contradict other testimony given when the person is a witness or party in such an action. Other jurisdictions hold that such evidence by a party is admissible as an admission against interest. For example, a defendant's admission at an inquest of driving at an unlawful speed was admissible as an admission against interest in a civil action for negligence.

Some jurisdictions allow the coroner's findings to be used in a civil action to show the cause of death. The general practice in most jurisdictions, however, is to allow the verdict to show that the deceased is dead but not to show the cause of death. The rationale underlying this rule is that a person is not entitled to be represented by counsel at an inquest since it is merely a preliminary investigation. The practical consequences of allowing the coroner's verdict to be used as evidence of the cause of death is that it could easily become the key piece of evidence in the action. If this were to occur, the judgment awarded in the case would probably end up being a ratification or formal adoption of the coroner's verdict, thereby depriving the party to the action of his or her rights. That person is entitled to a formal judicial hearing or a "day in court," with all procedural safeguards, so that an opportunity to dispute the evidence will be given.

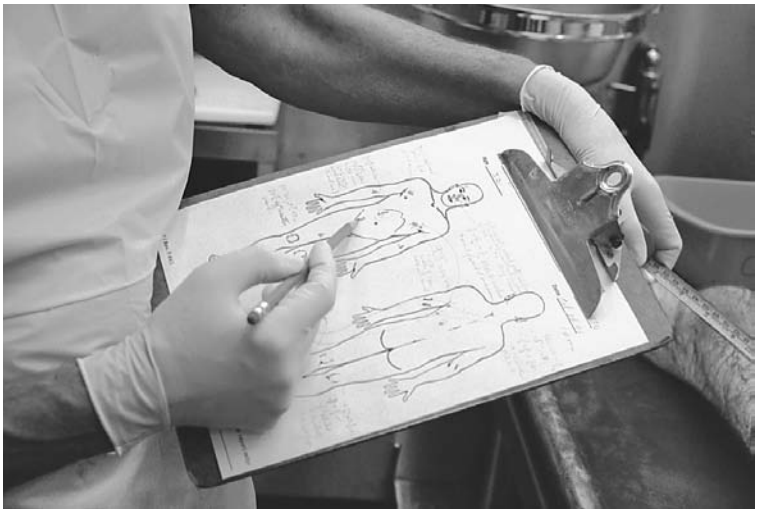

*A coroner's office worker prepares an autopsy report at the Harris County Medical Examiner Office's morgue in Houston, Texas. Coroners have the right to order autopsies to determine the causes of violent or suspicious deaths.*

SHEPARD SHERBELL/CORBIS SABA

**Criminal Prosecutions** The main purpose of a coroner's inquest is to provide information and evidence for use by the police in their investigation and detection of a crime; therefore, the proceedings of an inquest are generally inadmissible at a trial for homicide.

When a person is either under arrest or accused of a crime at a coroner's inquest, any testimony that he or she gives cannot subsequently be used against him or her at a trial that stems from the inquest, unless such testimony was given voluntarily after the party was advised of his or her constitutional rights. If an individual testifies as a witness at an inquest but is subsequently prosecuted, that testimony is admissible in his or her prosecution since it was voluntarily given at the inquest. Generally, the testimony of witnesses at an inquest cannot be

used in a trial for homicide unless the witness has died or is otherwise unavailable at the time of the criminal prosecution.

Ordinarily, on an indictment for homicide, neither the verdict of the coroner's jury nor the finding of the coroner can be used as evidence for any purpose.

### Liabilities of a Coroner

A coroner who is acting pursuant to his or her statutory authority is immune for error, mistake, or misconduct in the exercise of judicial functions. A coroner, acting in a ministerial capacity, is answerable for any abuse of those powers. Some statutes make it a criminal offense for a coroner to deliberately hold an inquest when to do so clearly exceeds the scope of his or her powers.

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CROSS-REFERENCES

Autopsy; Jury; Presumption.

## CORPORAL PUNISHMENT

*Physical punishment, as distinguished from pecuniary punishment or a fine; any kind of punishment inflicted on the body.*

Corporal punishment arises in two main contexts: as a method of discipline in schools and as a form of punishment for committing a crime.

Corporal punishment, usually in the form of paddling, though practiced in U.S. schools since the American Revolution, was only sanctioned by the U.S. Supreme Court in the late 1970s. In *Ingraham v. Wright,* 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977), students from a Florida junior high school had received physical punishment, including paddling so severe that one student had required medical treatment. The plaintiffs, parents of students who had been disciplined, brought suit against the school district, alleging that corporal punishment in public schools constituted CRUEL AND UNUSUAL PUNISHMENT in violation of the EIGHTH AMENDMENT to the U.S. Constitution. The plaintiffs also maintained that the FOURTEENTH AMENDMENT required DUE PROCESS before corporal punishment could be administered.

The Court rejected the Eighth Amendment claim, holding that the prohibition against cruel and unusual punishment was designed to protect persons who were convicted of crimes, not students who were paddled as a form of discipline. The Court also held that although corporal punishment did implicate a constitutionally protected liberty interest, traditional COMMON LAW remedies, such as filing an action in TORT, were "fully adequate to afford due process." Thus, the Court concluded, teachers could use "reasonable but not excessive" corporal punishment to discipline students.

Since the Court's decision in *Ingraham,* corporal punishment in the schools has been challenged on other constitutional grounds. In *Hall v. Tawney,* 621 F.2d 607 (4th Cir. 1980), a grade-school student from West Virginia alleged that she had been severely injured after she had been struck repeatedly with a hard, rubber paddle by her teacher while the school principal had looked on. She filed suit against the school, claiming that her Eighth Amendment rights had been violated and that she had been deprived of her procedural due process rights. She further alleged that she had been denied SUBSTANTIVE DUE PROCESS under 42 U.S.C.A. § 1983, which provides that a civil action may be brought for a deprivation of constitutional rights. While the case was pending, the U.S. Supreme Court handed down its decision in *Ingraham,* thus foreclosing the plaintiff's Eighth Amendment and procedural due process claims.

Addressing the remaining constitutional claim, the U.S. Court of Appeals for the Fourth Circuit held that excessive corporal punishment in public schools could violate a student's constitutional right to substantive due process and thus subject school officials to liability under § 1983. The standard to be applied, the court ruled, was whether the force applied were to cause injury so severe and disproportionate to the need for it and were " so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhuman abuse of official power literally shocking to the conscience." The case was remanded to the lower court so that the plaintiff's § 1983 claim could be tried in light of the Fourth Circuit's ruling. Other federal appeals courts have since followed *Hall* in corporal punishment cases involving schools, although the high standard has proved very difficult for plaintiffs to meet.

**States Banning Corporal Punishment in Schools**

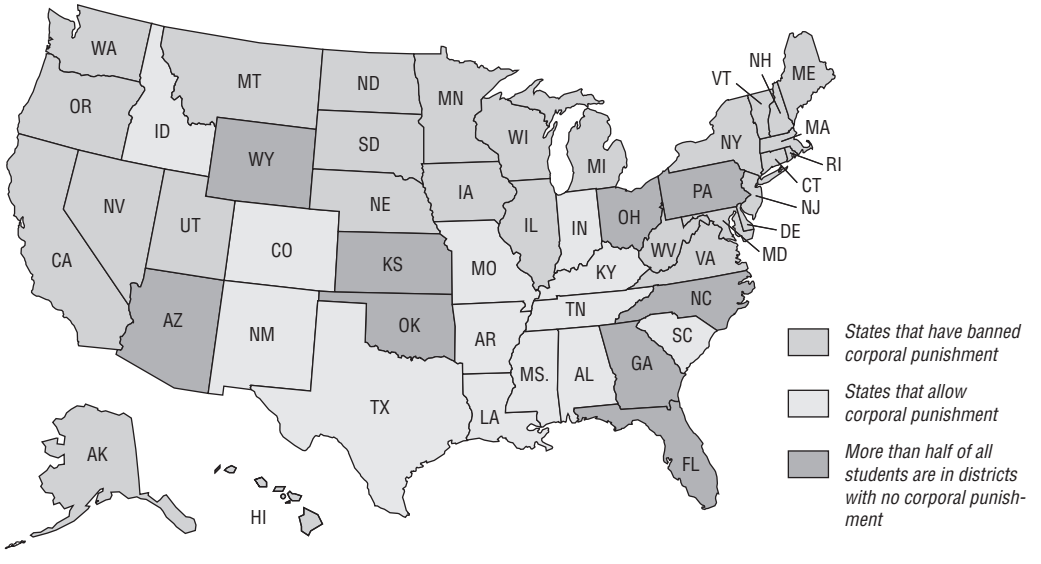


SOURCE: Center for Effective Discipline, *Statistics on Corporal Punishment by State and Race.*

In cases where plaintiffs have been successful, the conduct of the educator is often rather extreme. In *Neal ex rel. Neal v. Fulton County Board of Education*, 229 F.3d 1069 (11th Cir. 2000), a high-school teacher and football coach, while breaking up a fight, struck one of the fighting students with a metal weight lock. The blow to the student was so severe that it knocked his eyeball out of its socket. The Eleventh Circuit Court of Appeals found that because the punishment inflicted by the coach had been intentional, and obviously excessive, and that it had created a foreseeable risk of serious injury, the student had stated a claim upon which he could recover. Many other cases, on the other hand, have held in favor of educators and school districts because the students who brought suit could not prove the elements necessary to hold the defendants liable.

As a result of limited success in the courts, opponents of corporal punishment have turned to the political process and have worked to persuade state legislatures to outlaw the use of corporal punishment in schools. Scientific studies over the past decade have demonstrated that corporal punishment contributes to such behavioral problems as increased anger, aggression, tolerance for violence, and lower self-esteem. Partially as a result of these studies, a growing number of groups, including the NATIONAL EDUCATION ASSOCIATION, the American Academy of Pediatrics, the American Academy of Child & Adolescent Psychiatry, and the AMERICAN BAR ASSOCIATION, disfavor corporal punishment and have sought to ban it in public schools. These LOBBYING efforts have proven successful: Only about half of the states continue to practice corporal punishment, whereas the other half specifically prohibit it by state statute or regulation.

In California, for example, state law provides that "[]no person employed by . . . a public school shall inflict, or cause to be inflicted corporal punishment upon a pupil" (Cal. Educ. Code § 49001 [West 1996]). But despite the trend against permitting corporal punishment in schools, public opinion is split on the issue: In a 1995 Scripps Howard News Service Poll, 49 percent of those surveyed favored corporal punishment, and 46 percent opposed it.

Like corporal punishment in schools, physical punishment for committing a crime also dates back to the American Revolution. The CONTINENTAL CONGRESS allowed floggings on U.S. warships, and confinement in stocks and public hangings were common. Gradually, imprisonment and other forms of rehabilitation began to replace corporal punishment, largely

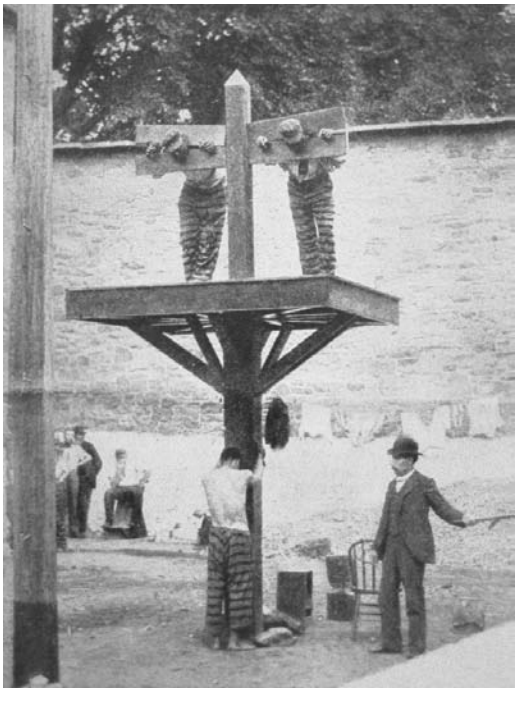

*This 1907 photograph taken in a Delaware prison shows two inmates in a pillory with another receiving a whipping. Such forms of punishment have been outlawed.*

LIBRARY OF CONGRESS

because of the work of reformers who campaigned against its use on convicts and advocated for improved prison conditions. Most states eventually abolished public floggings and other forms of physical punishment for crimes, but in some jurisdictions "whipping laws" remained in effect until the early 1970s. In addition, courts have held that corporal punishment in prisons can take a variety of forms (e.g., whipping, deprivation of food, and placement in restraints) and is prohibited by the Eighth Amendment.

The mid-1990s case of a U.S. teenager convicted of **VANDALISM** in a foreign country revived a long-dormant debate over whether criminals should be corporally punished. In May 1994, Michael Fay was sentenced to six strokes with a rattan cane and four months in jail for painting graffiti on parked cars and for other acts of vandalism he had committed while living in Singapore. The case drew immediate international attention. Many U.S. citizens—including President **BILL CLINTON**, who appealed to the government of Singapore for clemency—were outraged by the sentence. Despite the intervention of the U.S. government and **HUMAN RIGHTS** groups, the punishment was eventually carried out, although the number of strokes was reduced to four.

In the wake of the publicity surrounding the Fay matter, polls indicated that a surprising number of U.S. citizens supported the sentence. Unconvinced that current penalties provide a sufficient deterrent, many believed that the long-standing prohibition against physical punishment should be reconsidered, at least with respect to juvenile offenders. In some states, lawmakers introduced legislation to provide for corporal punishment of juveniles who were convicted of certain crimes. In California, for example, a bill requiring paddling of juvenile graffiti vandals was proposed (1995 California Assembly Bill No. 7, California 1995–96 Regular Session).

Proposed measures in other states have not limited the use of corporal punishment to juveniles. In Tennessee, for instance, a bill was introduced in 1995 providing for floggings for property crimes such as **BURGLARY**, vandalism, and trespassing. The measure would further provide for the punishment to be administered by the county sheriff on the courthouse steps of the county where the crime was committed. According to the bill's sponsor, "People that follow a life of crime generally get started in the area of property crimes . . . if you knew they were going to . . . whale the living daylights out of you, you might think twice about it." This bill, like other measures proposed for physically punishing juveniles, failed to pass the state legislature.

In response to renewed calls for physical punishment for criminals, critics have argued that such measures may meet a "revenge" need on the part of the public but that they do nothing in the long term to address the deeper issue of why crime occurs. Groups such as the **AMERICAN CIVIL LIBERTIES UNION**, in lobbying against corporal punishment, maintain that state legislators, law enforcement personnel, criminologists, and social scientists should instead direct their efforts to what can be done to prevent crime in the first place.

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## CORPORATE

*Pertaining to or possessing the qualities of a corporation, a legal entity created—pursuant to state law—to serve the purposes set out in its certificate of incorporation.*

A *corporate officer* is an individual who is charged with the management of a corporation by virtue of a position as its president, vice president, treasurer, or secretary.

## CORPORATE FRAUD

On October 16, 2001, Enron, the seventh largest corporation in the U.S., announced a $638 million loss in third-quarter earnings. On November 8, 2001, the company publicly admitted to having overstated earnings for four years by $586 million and to having created limited partnerships to hide $3 billion in debt. As investors lost confidence in the company, Enron stock, which had been worth as much as $90 per share in 2000, plummeted to less than $1 per share. Thousands of Enron employees lost their jobs and retirement savings, which had been invested in corporate stock through a 401(k) retirement plan. Banks and lenders lost millions of dollars in loans made to Enron based on the fraudulent earnings reports.

Enron Corporation started as a pipeline company in Houston, Texas, that delivered gas at market price. Over the next 15 years, Enron expanded into an energy power broker that traded electricity and other commodities, such as water and broadband INTERNET services. Enron became one of the nation's most successful companies, employing 21,000 people in more than 40 countries. The senior executives at Enron attributed their success to their corporate strategy, which was to be light in assets but heavy in innovation.

The innovative business practices of overstating profits and concealing debt increased the company's stock value, thus allowing the company to borrow more money and to expand. It also led to some top executives selling their stock and making over one billion dollars. Those former executives were later indicted for FRAUD, MONEY LAUNDERING, and conspiracy, and they also face dozens of civil lawsuits filed by PENSION funds and former employees. The company's accounting firm, Arthur Andersen, admitted to having shredded Enron documents after it had learned that the SECURITIES AND EXCHANGE COMMISSION (SEC) was conducting an investigation of the corporation. The accounting firm was convicted of OBSTRUCTION OF JUSTICE, lost hundreds of clients and employees, and went out of business.

After the Enron scandal became public knowledge, many wondered how such an overstatement could have escaped notice. What the public soon would learn was that Enron was only one among many such stories.

In March 2002, the world learned that WorldCom, the second largest long-distance phone company in the U.S., had overstated profits by listing $3.8 billion in normal operating expenses (which were basically routine maintenance costs) as capital expenses. This move allowed them to spread the expenses out over several years, thereby making profits look much larger and artificially inflating the company's value in order to meet Wall Street's expected earnings. WorldCom stock, which was valued as high as $60 per share in 1999, dropped to 20 cents per share in response to the news. Seventeen thousand WorldCom employees lost their jobs. The JUSTICE DEPARTMENT has secured indictments against the former Chief Financial Officer, Richard Breeden, for bank fraud, SECURITIES fraud, conspiracy and false statements in SEC filings. Four other former WorldCom executives have pled guilty to securities fraud and agreed to cooperate with the prosecution. The SEC has filed a civil suit against the company. As of 2003, the SEC has uncovered over $9 billion in bogus accounting. In July 2002, WorldCom filed the world's largest BANKRUPTCY.

After Enron's and WorldCom's fraudulent accounting practices became public knowledge, news of more corporate accounting scandals came flooding in. In February 2002, Global Crossing was caught inflating revenue and shredding documents that contained accounting information. In April 2002, Adelphia Communications made headlines amidst the discovery that $3.1 billion worth of secret loans had been made to the company's founding family—some of whom were later arrested—and earnings were overstated. In May 2002, Tyco International, Ltd. accused three former senior executives of having fraudulently taken out loans from the company without permission and without paying them back. The men also allegedly issued bonuses to themselves and other employees without approval from the company's board of directors. The SEC has since charged the three for fraud and theft and is investigating whether the company had knowl-

# Enron: An Investigation into Corporate Fraud

The collapse of Enron Corporation in 2001 led to massive investigations involving allegations of a range of criminal activities perpetrated by some of the company's top executives. In January 2002, the **U.S. JUSTICE DEPARTMENT** announced that it had formed an Enron Task Force consisting of a team of federal prosecutors and under the supervision of the department, agents of the **FEDERAL BUREAU OF INVESTIGATION**, and agents of the criminal division of the **INTERNAL REVENUE SERVICE**. The scandal developed into a case study of corporate fraud, poor management decisions, and faulty accounting practices.

Enron had built itself into the seventh largest company in the United States, with annual revenues of $100 billion. In December 2000, the company's stock sold for as much as $84.87 per share. However, stock prices fell throughout much of 2001. In October, the company announced that it had overstated its revenues, claiming losses of $638 million during the third quarter of 2001 alone. Stock prices then plunged, hurting investors and employees with retirement plans that were tied into company stock. By the beginning of December, Enron's stock prices had fallen to below $1 per share. Enron filed for Chapter 11 **BANKRUPTCY** protection on December 2, 2001. To date, the event constituted the largest bankruptcy in U.S. history.

Much of the early investigation into the Enron fiasco focused on the company's financial reporting practices. Though the company followed generally accepted accounting principles (GAAP), these practices gave the false impression that the company was more profitable and more secure than it really was. The company reported revenues that were actually funds flowing through transitional transactions with related companies. Moreover, the company hid its losses and debts in partnerships that did not appear on Enron's financial statements.

The first criminal charges were filed against Enron's accounting firm, Arthur Andersen, L.L.P. The Justice Department brought charges that the accounting firm had destroyed thousands of documents, including computer files, related to its dealings with Enron. Anderson was also convicted for doctoring a memo and misstating a news release related to Enron. The company was found guilty of **OBSTRUCTION OF JUSTICE** in June 2002—an appeal is still pending as of September 2003. It was placed on **PROBATION** for five years and required to pay a fine of $500,000. Analysts questioned whether the accounting firm would survive after the conviction. In addition to its role as accountant, Arthur Andersen had served as a consultant to Enron for a number of years, thus raising conflicts of interest questions.

Because the Justice Department had not moved forward with criminal indictments against Enron officials, several critics charged that the federal government under President **GEORGE W. BUSH** was protecting top Enron executives. Several of these executives were questioned by the Senate Commerce Committee in February 2002, but no charges were filed. Several of Enron's senior executives

edge of this conduct. In July 2002, it was revealed that AOL Time Warner had inflated sales figures. Amid further investigations, the company admitted to having possibly overstated revenue by $49 million. Other companies in the spotlight for corporate accounting scandal allegations include Bristol-Myers Squibb, Kmart, Qwest Communications International, and Xerox. In addition to corporate scandal, television personality and home decorating maven Martha Stewart was indicted for allegedly selling 3,928 shares of stock in ImClone Systems, thus making about $227,824, based on an insider trading tip that she had received from the company's founder, Samuel Waksal.

Many fraudulent accounting practices came about over the past decade when energy, telecommunication, and other industries were expanding rapidly, and competition was especially fierce. The **STOCK MARKET** indices were reaching all-time records, and investors were looking for short-term earnings targets. Many corporate executives did whatever was necessary to meet the quarterly expectations of the analysts on Wall Street, thereby increasing the price of their stock. This often allowed their companies to borrow more money to grow and compete. Since most top executives also enjoyed stock options that rose in value with their companies' stock prices, they had the added incentive of making significant profits by selling their stocks at the higher prices. This resulted in a considerable transfer of money from individual shareholders to corporate managers. However, the individual investors were still making profits and therefore not paying attention to conflicts of interest and

reportedly had personal interests in certain risky transactions. These executives even sold Enron stock while at the same time convincing employees to hold their stock. The board of directors of the company also allegedly failed to provide significant oversight regarding the auditing and reporting by the company.

The first major criminal charges involving an Enron executive were brought against Michael Kopper, who had served as an aide to chief financial officer Andrew Fastow. Kopper pleaded guilty to charges of **MONEY LAUNDERING** and conspiracy to commit **FRAUD** in August 2002. Kopper implicated Fastow, claiming that Fastow had conducted transactions on behalf of Enron for the benefit of third-party partnerships owned by Fastow.

The Justice Department then focused its attention on Fastow, who allegedly had $12.8 million in funds and was constructing a $2.6 million house. The government alleged that Fastow and Kopper had accumulated $22 million from illegal Enron deals. In November 2002, the Justice Department indicted Fastow on 78 counts, including fraud, money laundering, and obstruction of justice. The criminal indictment did not include former CEO Kenneth Lay, former CEO Jeffrey Skilling, or any other top executives. The Justice Department also announced that it could file a superseding indictment with additional charges. This superseding indictment might name additional defendants as well.

Fastow appeared before the **SECURITIES AND EXCHANGE COMMISSION** in December 2002 but invoked his **FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION**. In several trade publications in the late 1990s, Fastow had discussed his accounting practices at Enron, including methods for keeping funds off of Enron's books. According to several commentators, Fastow could represent a "fall guy" for the Enron fiasco, as it was probable that other executives and members of the board were aware of these reporting practices.

Others involved in Enron transactions were also brought up on criminal charges. In July 2002, three British bankers were charged with wire fraud for their dealings with Enron. The Justice Department subsequently focused its attention on Enron Broadband Services, an **INTERNET** division of the company. The *Houston Chronicle* reported in April 2003 that executives of that branch were likely to be indicted for insider trading, fraud, and money laundering.

As of the end of April 2003, twelve charges had been filed relating to the Enron fiasco, though only seven were filed against company insiders.

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Accounting; Bankruptcy; Embezzlement; Fraud.

fraudulent practices, thus allowing the executives to go almost unchecked in their actions.

Since the collapse of Enron and WorldCom, some corrective actions have been taken. The New York Stock Exchange has made improvements in its accounting, auditing, and corporate governance rules for corporations that want to list their stock on the exchange. Congress approved the **SARBANES-OXLEY ACT**, Pub. L. No. 107-204, 116 Stat. 745, which created the Public Accounting Oversight Board to monitor public accountants, made changes in auditing rules, and authorized an increase in criminal penalties for more **WHITE-COLLAR CRIMES**. The declining economy and bear market has also changed the attitude of corporate managers who had to downsize and apply more caution in making new investments and deciding executive salaries and bonuses. Most importantly, corporate employees and individual investors are paying more attention to the actions of the executives who control their investments.

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## CORPORATE PERSONALITY

*The distinct status of a business organization that has complied with law for its recognition as a legal entity and that has an independent legal existence from that of its officers, directors, and shareholders.*

Corporate personality encompasses the capacity of a corporation to have a name of its own, to sue and be sued, and to have the right to purchase, sell, lease, and mortgage its property in its own name. In addition, property cannot be taken away from a corporation without DUE PROCESS OF LAW.

## CORPORATIONS

*Artificial entities that are created by state statute, and that are treated much like individuals under the law, having legally enforceable rights, the ability to acquire debt and to pay out profits, the ability to hold and transfer property, the ability to enter into contracts, the requirement to pay taxes, and the ability to sue and be sued.*

The rights and responsibilities of a corporation are independent and distinct from the people who own or invest in them. A corporation simply provides a way for individuals to run a business and to share in profits and losses.

### History

The concept of a corporate personality traces its roots to ROMAN LAW and found its way to the American colonies through the British. After gaining independence, the states, not the federal government, assumed authority over corporations.

Although corporations initially served only limited purposes, the Industrial Revolution spurred their development. The corporation became the ideal way to run a large enterprise, combining centralized control and direction with moderate investments by a potentially unlimited number of people.

The corporation today remains the most common form of business organization because, theoretically, a corporation can exist forever and because a corporation, not its owners or investors, is liable for its contracts. But these benefits do not come free. A corporation must follow many formalities, is subject to publicity, and is governed by state and federal regulations.

Many states have drafted their statutes governing corporations based upon the Model Business Corporation Act. This document, prepared by the American Bar Association Section of Business Law, Committee on Corporate Laws, and approved by the AMERICAN LAW INSTITUTE, provides a framework for all aspects of corporate governance as well as other aspects of corporations. Like other MODEL ACTS, the Model Business Corporation Act is not necessarily designed to be adopted wholesale by the various states, but rather is designed to provide guidance to states when they adopt their own acts.

### Types of Corporations

Corporations can be private, nonprofit, municipal, or quasi-public. Private corporations are in business to make money, whereas nonprofit corporations generally are designed to benefit the general public. Municipal corporations are typically cities and towns that help the state to function at the local level. Quasi-public corporations would be considered private, but their business serves the public's needs, such as by offering utilities or telephone service.

There are two types of private corporations. One is the public corporation, which has a large number of investors, called shareholders. Corporations that trade their shares, or investment stakes, on SECURITIES exchanges or that regularly publish share prices are typical publicly held corporations.

The other type of private corporation is the closely held corporation. Closely held corporations have relatively few shareholders (usually 15 to 35 or fewer), often all in a single family; little or no outside market exists for sale of the shares; all or most of the shareholders help run the business; and the sale or transfer of shares is restricted. The vast majority of corporations are closely held.

### Getting a Corporation Started

Many corporations get their start through the efforts of a person called a promoter, who goes about developing and organizing a business venture. A promoter's efforts typically involve arranging the needed capital, or financing, using loans, money from investors, or the promoter's own money; assembling the people and assets (such as land, buildings, and leases) necessary to run the corporation; and fulfilling the legal requirements for forming the corporation.

A corporation cannot be automatically liable for obligations that a promoter incurred on its behalf. Technically, a corporation does not exist during a promoter's pre-incorporation activities. A promoter therefore cannot serve as a legal agent, who could bind a corporation to a con-

## Delaware: The Mighty Mite of Corporations

Delaware may be among the United States' smallest states, but it is the biggest when it comes to corporations: more than a third of all corporations listed by the New York Stock Exchange are incorporated in Delaware.

Delaware's allure is explained through a combination of history and law. Although today the state's corporations law is not necessarily less restrictive and less rigid than other states' corporation laws, Delaware could boast more corporation friendly statutes before model corporation laws came into vogue. As a result, corporate lawyers nationwide are more familiar with Delaware's law, and its statutes and case law provide certainty and easy access.

Delaware, more than any other state, relies on franchise tax revenues; thus, Delaware, more than any other state, is committed to remaining a responsive and desirable incorporation site. In addition, Delaware offers a level of certainty and stability: the state's constitution requires a two-thirds vote of both legislative houses to change its corporations statutes.

Delaware also has a specialized court that is staffed by lawyers from the corporate bar, and its highest court has similar expertise. Lawyers in the state continually work to keep Delaware's corporate law current, effective, and flexible. All combine to make Delaware the first state for incorporation.

tract. After formation, a corporation must somehow assent before it can be bound by an obligation that a promoter has made on its behalf. Usually, if a corporation gets the benefits of a promoter's contract, it will be treated as though it has assented to, and accepted, the contract.

The first question facing incorporators (those forming a corporation) is where to incorporate. The answer often depends on the type of corporation. Theoretically, both closely held and large public corporations may incorporate in any state. Small businesses operating in a single state usually incorporate in that state. Most large corporations select Delaware as their state of incorporation because of its sophistication in dealing with corporation law.

Incorporators then must follow the mechanics that are set forth in the state's statutes. Corporation statutes vary from state to state, but most require basically the same essentials in forming a corporation. Every statute requires incorporators to file a document, usually called the articles of incorporation, and pay a filing fee to the secretary of state's office, which reviews the filing. If the filing receives approval, the corporation is considered to have started existing on the date of the first filing.

The articles of incorporation typically must contain (1) the name of the corporation, which often must include an element like *Company, Corporation, Incorporated, or Limited,*" and may not resemble too closely the names of other corporations in the state; (2) the length of time the corporation will exist, which can be perpetual or renewable; (3) the corporation's purpose, usually described as "any lawful business purpose"; (4) the number and types of shares that the corporation may issue and the rights and preferences of those shares; (5) the address of the corporation's registered office, which need not be the corporation's business office, and the registered agent at that office who can accept legal SERVICE OF PROCESS; (6) the number of directors and the names and addresses of the first directors; and (7) each incorporator's name and address.

A corporation's bylaws usually contain the rules for the actual running of the corporation. Bylaws normally are not filed with the SECRETARY OF STATE and are easier to amend than are the articles of incorporation. The bylaws should be complete enough so that corporate officers can rely on them to manage the corporation's affairs. The bylaws regulate the conduct of direc-

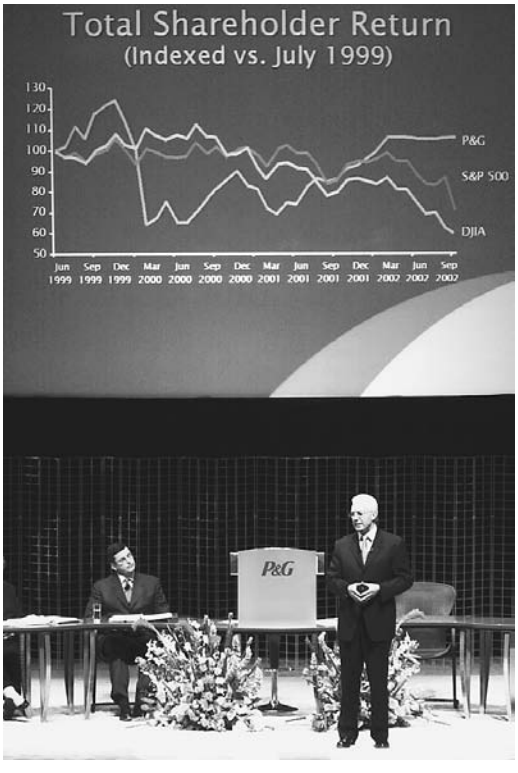


*Proctor and Gamble president and CEO A.G. Lafley addresses shareholders at the company's annual meeting in 2002. A corporation's officers are responsible for running day-to-day business affairs and carrying out policies established by the directors.*

AP/WIDE WORLD PHOTOS

tors, officers, and shareholders and set forth rules governing internal affairs. They can include definitions of management's duties, as well as times, locations, and voting procedures for meetings that affect the corporation.

### People Behind a Corporation: Rights and Responsibilities

The primary players in a corporation are the shareholders, directors, and officers. Shareholders are the investors in, and owners of, a corporation. They elect, and sometimes remove, the directors, and occasionally they must vote on specific corporate transactions or operations. The board of directors is the top governing body. Directors establish corporate policy and hire officers, to whom they usually delegate their obligations to administer and manage the corporation's affairs. Officers run the day-to-day business affairs and carry out the policies the directors establish.

**Shareholders** Shareholders' financial interests in the corporation is determined by the percentage of the total outstanding shares of stock that they own. Along with their financial stakes, shareholders generally receive a number of rights, all designed to protect their investments. Foremost among these rights is the power to vote. Shareholders vote to elect and remove directors, to change or add to the bylaws, to ratify (i.e., approve after the fact) directors' actions where the bylaws require shareholder approval, and to accept or reject changes that are not part of the regular course of business, such as mergers or dissolution. This power to vote, although limited, gives the shareholders some role in running a corporation.

Shareholders typically exercise their VOTING RIGHTS at annual or special meetings. Most statutes provide for an annual meeting, with requirements for some advance notice, and any shareholder can get a court order to hold an annual meeting when one has not been held within a specified period of time. Although the main purpose of the annual meeting is to elect directors, the meeting may address any relevant matter, even one that has not been mentioned specifically in the advance notice. Almost all states allow shareholders to conduct business by unanimous written consent, without a meeting.

Shareholders elect directors each year at the annual meeting. Most statutes provide that directors be elected by a majority of the voting shares that are present at the meeting. The same number of shares needed to elect a director normally is required to remove a director, usually without proof of cause, such as FRAUD or abuse of authority.

A special meeting is any meeting other than an annual meeting. The bylaws govern the persons who may call a special meeting; typically, the directors, certain officers, or the holders of a specified percentage of outstanding shares may do so. The only subjects that a special meeting may address are those that are specifically listed in an advance notice.

Statutes require that a quorum exist at any corporation meeting. A quorum exists when a specified number of a corporation's outstanding shares are represented. Statutes determine what level of representation constitutes a quorum; most require one-third. Once a quorum exists, most statutes require an affirmative vote of the majority of the shares present before a vote can bind a corporation. Generally, once a quorum is present, it continues, and the withdrawal of a faction of voters does not prevent the others from acting.

A corporation determines who may vote based on its records. Corporations issue share certificates in the name of a person, who becomes the record owner (i.e., the owner

according to company records) and is treated as the sole owner of the shares. The company records of these transactions are called stock-transfer books or share registers. A shareholder who does not receive a new certificate is called the beneficial owner and cannot vote, but the beneficial owner is the real owner and can compel the record owner to act as the beneficial owner desires.

Those who hold shares by a specified date before a meeting, called the record date, may vote at the meeting. Before each meeting, a corporation must prepare a list of shareholders who are eligible to vote, and each shareholder has an unqualified right to inspect this voting list.

Shareholders typically have two ways of voting: straight voting or cumulative voting. Under straight voting, a shareholder may vote his or her shares once for each position on the board. For example, if a shareholder owns 50 shares and there are three director positions, the shareholder may cast 50 votes for each position. Under cumulative voting, the same shareholder has the option of casting all 150 votes for a single candidate. Cumulative voting increases the participation of minority shareholders by boosting the power of their votes.

Shareholders also may vote as a group or block. A shareholder voting agreement is a contract among a group of shareholders to vote in a specified manner on certain issues; this is also called a pooling agreement. Such an agreement is designed to maintain control or to maximize voting power. Another arrangement is a voting trust. This has the same objectives as a pooling agreement, but in a voting trust, shareholders assign their voting rights to a trustee who votes on behalf of all the shares in the trust.

Shareholders need not attend meetings in order to vote; they may authorize a person, called a proxy, to vote their shares. Proxy appointment often is solicited by parties who are interested in gaining control of the board of directors or in passing a particular proposal; their request is called a proxy solicitation. Proxy appointment must be in writing. It usually may last no longer than a year, and it can be revoked.

Federal law generates most proxy regulation, and the Securities and Exchange Commission (SEC) has comprehensive and detailed regulations. These rules define the form of proxy-solicitation documents and require the distribution of substantial information about director candidates and other issues that are up for shareholder vote. Not all corporations are subject to federal proxy law; generally, the law covers only large corporations with many shareholders and with shares that are traded on a national securities exchange. These regulations aim to protect investors from promiscuous proxy solicitation by irresponsible outsiders who seek to gain control of a corporation, and from unscrupulous officers who seek to retain control of management by hiding or distorting facts.

In addition to voting rights, shareholders also have a right to inspect a corporation's books and records. A corporation almost always views the invocation of this right as hostile. Shareholders may only inspect records if they do so for a "proper purpose"; that is, is a purpose that is reasonably relevant to the shareholder's financial interest, such as determining the worth of his or her holdings. Shareholders can be required to own a specified amount of shares or to have held the shares for a specified period of time before inspection is allowed. Shareholders generally may review all relevant records that are needed, in order to gather information in which they have a legitimate interest. Shareholders also may examine a corporation's record of shareholders, including names and addresses and classes of shares.

**Directors** Statutes contemplate that a corporation's business and affairs will be managed by the board of directors or under the board's authority or direction. Directors often delegate to corporate officers their authority to formulate policy and to manage the business. In closely held corporations, directors normally involve themselves more in management than do their counterparts in large corporations. Statutes empower directors to decide whether to declare dividends; to formulate proposed important corporate changes, such as mergers or amendments to the articles of incorporation; and to submit proposed changes to shareholders. Many boards appoint committees to handle technical matters, such as litigation, but the board itself must address important matters. Directors customarily are paid a salary and often receive incentive plans that can supplement that salary.

A corporation's articles or bylaws typically control the number of directors, the terms of the directors' service, and the directors' ability to change their number and terms. The shareholders' power of removal functions as a check on directors who may wish to act in a way that is

contrary to the majority shareholders' wishes. The directors' own fiduciary duties, or obligations to act for the benefit of the corporation, also serve as checks on directors.

The bylaws usually regulate the frequency of regular board meetings. Directors also may hold special board meetings, which are any meetings other than regular board meetings. Special meetings require some advance notice, but the agenda of special directors' meetings is not limited to what is set forth in the notice, as it is with shareholders' special meetings. In most states, directors may hold board meetings by phone and may act by unanimous written consent without a meeting.

A quorum for board meetings usually exists if a majority of the directors in office immediately before the meeting are present. The quorum number may be increased or decreased by amending the bylaws, although it may not be decreased below any statutory minimum. A quorum must be present for directors to act, except when the board is filling a vacancy. Most statutes allow either the board itself or shareholders to fill vacancies.

Directors' fiduciary duties fall under three broad categories: the duty of care, the duty of loyalty, and duties imposed by statute. Generally, a fiduciary duty is the duty to act for the benefit of another—here, the corporation— while subordinating personal interests. A fiduciary occupies a position of trust for another and owes the other a high degree of fidelity and loyalty.

A director owes the corporation the duty to manage the entity's business with due care. Statutes typically define using due care as acting in GOOD FAITH, using the care that an ordinarily prudent person would use in a similar position and situation, and acting in a manner that the director reasonably thinks is in the corporation's best interests. Courts seldom second-guess directors, but they usually find personal liability for corporate losses where there is self-dealing or NEGLIGENCE.

Self-dealing transactions raise questions about directors' duty of loyalty. A self-dealing transaction occurs when a director is on both sides of the same transaction, representing both the corporation and another person or entity who is involved in the transaction. Self-dealing may endanger a corporation because the corporation may be treated unfairly. If a transaction is questioned, the director bears the burden of proving that it was in fact satisfactory.

Self-dealing usually occurs in one of four types of situations: transactions between a director and the corporation; transactions between corporations where the same director serves on both corporations' boards; by a director who takes advantage of an opportunity for business that arguably may belong to the corporation; and by a director who competes with the corporation.

The usurping of a corporate opportunity poses the most significant challenge to a director's duty of loyalty. A director cannot exploit the position of director by taking for himself or herself a business opportunity that rightly belongs to the corporation. Most courts facing this question compare how closely related the opportunity is to the corporation's current or potential business. Part of this analysis involves assessing the fairness of taking the opportunity. Simply taking a corporation's opportunity does not automatically violate the duty of loyalty. A corporation may relinquish the opportunity, or the corporation may be incapable of taking the opportunity for itself.

Directors who are charged with violating their duty of care usually are protected by what courts call the BUSINESS JUDGMENT RULE. Essentially, the rule states that even if the directors' decisions turn out badly for the corporation, the directors themselves will not be personally liable for losses if those decisions were based on reasonable information and if the directors acted rationally. Unless the directors commit fraud, a breach of good faith, or an illegal act, courts presume that their judgment was formed to promote the best interests of the corporation. In other words, courts focus on the process of reaching a decision, not on the decision itself, and require directors to make informed, not passive, decisions.

State statutes often impose additional duties and liabilities on directors as fiduciaries to a corporation. These laws may govern conduct such as paying dividends when a statute or the articles prohibit doing so; buying shares when a statute or the articles prohibit doing so; giving assets to shareholders during liquidation without resolving a corporation's debts, liabilities, or obligations; and making a prohibited loan to another director, an officer, or a shareholder.

If a court finds that a director has violated a duty, the director still might not face personal liability. Some statutes require or permit corporations to indemnify a director who violated a

duty but acted in good faith, who received no improper personal benefit, and who reasonably thought that the action was lawful and in the corporation's best interests. Indemnification means that the corporation reimburses the director for expenses incurred defending himself or herself and for amounts he or she paid after losing or settling a claim.

**Officers** The duties and powers of corporate officers can be found in statutes, articles of incorporation, bylaws, or corporate resolutions. Some statutes require a corporation to have specific officers; others merely require that the bylaws contain a description of the officers. Officers usually serve at the will of those who appointed them, and they generally can be fired with or without cause, although some officers sign employment contracts.

Corporations typically have as officers a president, one or more vice presidents, a secretary, and a treasurer. The president is the primary officer and supervises the corporation's business affairs. This officer sometimes is referred to as the chief executive officer, but the ultimate authority lies with the directors. The vice president fills in for the president when the latter cannot or will not act. The secretary keeps minutes of meetings, oversees notices, and manages the corporation's records. The treasurer manages and is responsible for the corporation's finances.

Officers act as a corporation's agents and can bind the corporation to contracts and agreements. Many parties who deal with corporations require that the board pass a resolution approving any contract negotiated by an officer, as a sure way to bind the corporation to the contract. In the absence of a specific resolution, the corporation still may be bound if it ratified the contract by accepting its benefits or if the officer appeared to have the authority to bind the corporation. Courts treat corporations as having knowledge of information if a corporate officer or employee has that knowledge.

Like directors, officers owe fiduciary duties to the corporation: good faith, diligence, and a high degree of honesty. But most litigation about fiduciary duties involves directors, not officers.

An officer does not face personal liability for a transaction if he or she merely acts as the corporation's agent. Nevertheless, the officer may be personally liable for a transaction where the officer intends to be bound personally or creates the impression that he or she will be so bound; where the officer exceeds his or her authority; and where a statute imposes liability on the officer, such as for failure to pay taxes.

### Finances

**Shares** A corporation divides its ownership units into shares, and can issue more than one type or class of shares. The articles of incorporation must state the type or types and the number of shares that can be issued. A corporation may offer additional shares once it has begun operating, sometimes subject to current shareholders' preemptive rights to buy new shares in proportion to their current ownership.

Directors usually determine the price of shares. Some states require corporations to assign a nominal or minimum value to shares, called a par value, although many states are eliminating this practice. Many states allow some types of non-cash property to be exchanged for shares. Corporations also raise money through debt financing—also called debt securities—which gives the creditor an interest in the corporation that ultimately must be paid back by the corporation, much like a loan.

If a corporation issues only one type of share, its shares are called common stock or common shares. Holders of common stock typically have the power to vote and a right to their share of the corporation's net assets. Statutes allow corporations to create different classes of common stock, with varying voting power and dividend rights.

A corporation also may issue preferred shares. These are typically nonvoting shares, and their holders receive a preference over holders of common shares for payment of dividends or liquidations. Some preferred dividends may be carried over into another year, either in whole or in part.

**Dividends** A dividend is a payment to shareholders, in proportion to their holdings, of current or past earnings or profits, usually on a regular and periodic basis. Directors determine whether to issue dividends. A dividend can take the form of cash, property, or additional shares. Shareholders have the right to force payment of a dividend, but they usually succeed only if the directors abused their discretion.

Restrictions on the distribution of dividends can be found in the articles of incorporation and in statutes, which seek to ensure that the dividends come out of current and past earnings. Directors who vote for illegal dividends can be held personally liable to the corporation. In

# Piercing the Corporate Veil

When a corporation is a sham, engages in **FRAUD** or other wrongful acts, or is used solely for the personal benefit of its directors, officers, or shareholders, courts may disregard the separate corporate existence and impose personal liability on the directors, officers, or shareholders. In other words, courts may pierce the "veil" that the law uses to divide the corporation (and its liabilities and assets) from the people behind the corporation. The veil creates a separate, legally recognized corporate entity and shields the people behind the corporation from personal liability.

In these cases, courts look beyond the form to the substance of the corporation's actions. The facts of a particular case must show some misuse of the corporate privilege or show a reason to cut back or limit the corporate privilege to prevent fraud, **MISREPRESENTATION**, or illegality or to achieve **EQUITY** or fairness.

Courts traditionally require fraud, illegality, or misrepresentation before they will pierce the corporate veil. Courts also may ignore the corporate existence where the controlling shareholder or shareholders use the corporation as merely their instrumentality or alter ego, where the corporation is undercapitalized, and where the corporation ignores the formalities required by law or commingles its assets with those of a controlling shareholder or shareholders. In addition, courts may refuse to recognize a separate corporate existence when doing so would violate a clearly defined statutory policy.

Courts may pierce the corporate veil in taxation or **BANKRUPTCY** cases, in addition to cases involving plaintiffs with contract or **TORT** claims. Federal law in this area is usually similar to state law.

The instrumentality and alter ego doctrines used by courts are practically indistinguishable. Courts following the instrumentality doctrine concentrate on finding three factors: (1) the people behind the corporation dominate the corporation's finances and business practices so much that the corporate entity has no separate will or existence; (2) the control has resulted in a fraud or wrong, or a dishonest or unjust act; and (3) the control and harm directly caused the plaintiff's injury or unjust loss.

IN FOCUS

The alter ego doctrine allows courts to pierce the corporate veil when two factors exist: (1) the shareholder or shareholders disregard the separate corporate entity and use the corporation as a tool for personal business, merging their separate entities with that of the corporation and making the corporation merely their alter ego; and (2) recognizing the corporation and shareholders as separate entities would give court approval to fraud or cause an unfair result.

It may appear that a corporation owned by one or two persons or a single family would almost automatically lose its separate legal existence under these doctrines, but this is not necessarily so. A sole owner of a business, for example, can incorporate herself or himself, or the business; issue all shares to herself or himself; and set up dummy directors to follow the necessary corporate formalities. However, the sole shareholder may lose the protection of limited liability—just as any other corporation would—if the corporate affairs and assets are confused or commingled with personal affairs and assets, if the sole shareholder abuses her or his control, or if the sole shareholder ignores the necessary corporate formalities.

When courts ponder piercing the corporate veil, they consider undercapitalization to exist when a corporation's assets or the value it receives for issuing shares or bonds is disproportionately small considering the nature of the business and the risks of engaging in that business. Courts assess undercapitalization by examining the capitalization at the time the corporation was formed or entered a new business. For example, if a corporation that faces or may face obligations to creditors and potential lawsuits has received only a token or minimal amount for its shares, or has siphoned off its assets through dividends or salaries, courts may find undercapitalization. Such corporations are called shells or shams designed to take advantage of limited liability protections while not exposing to a risk of loss any of the profits or assets they gained by incorporating.

addition, a corporation's creditors often will contractually restrict the corporation's power to make distributions.

### Changes and Challenges Faced by Corporations

**Amendments** The most straightforward and common changes faced by corporations are amendments to their bylaws and articles. The directors or incorporators initially adopt the bylaws. After that, the shareholders or directors, or both, hold the power to repeal or amend the bylaws, usually at shareholders' meetings and subject to a corporation's voting regulations. Those who hold this power can adopt or change quorum requirements; prescribe procedures for the removal or replacement of directors; or fix the qualifications, terms, and numbers of directors. Most modern statutes limit the authority to amend articles only by requiring that an amendment would have been legal to include in the

The undercapitalization doctrine especially comes into play when courts must determine who should bear a loss—a corporation's shareholders or a third person. This determination usually depends on whether the claim involves a contract or a tort (civil wrong or injury). In contract cases, the third party usually has had some earlier dealings with the corporation and should know that the corporation is a shell. So, unless there has been deception, courts typically find that the third party assumes the risk and should suffer the loss. In tort cases, the third party normally has not dealt voluntarily with the corporation. Courts thus must decide whether the owners of the business can shift the risk of loss or injury off themselves and onto the innocent general public simply by creating a marginally financed corporation to conduct their business.

Courts may disregard the separate corporate existence when a corporation fails to follow the formalities required by corporation statutes. Courts often cite the lack of corporate formalities in finding that a corporation has become the alter ego or instrumentality of the controlling shareholder or shareholders. For example, a court may justify piercing the corporate veil if a corporation began to conduct business before its incorporation was completed; failed to hold shareholders' and directors' meetings; failed to file an **ANNUAL REPORT** or tax return; or directed the corporation's business receipts straight to the controlling shareholder's or shareholders' personal accounts.

Courts also may ignore the corporate existence when a corporation's funds or assets are commingled with the controlling shareholder's or shareholders' funds or assets. For example, they may pierce the corporate veil when no sharp distinction is drawn between corporate and **PERSONAL PROPERTY**; corporate money has been used to pay personal debts without the appropriate accounting, and vice versa; the controlling shareholder's or shareholders' personal assets have been depreciated along with corporate assets; or the controlling shareholder or shareholders have endorsed company checks in their own name.

Many times, a controlling shareholder is itself a corporation: the controlling shareholder is the parent corporation, and the controlled corporation is a subsidiary. In some circumstances courts may pierce the corporate veil protecting the parent and hold the parent liable for the subsidiary's obligations. This happens where the subsidiary loses its independent existence because the parent dominates the subsidiary's affairs by participating in day-to-day operations, resolving important policy decisions, making business decisions without consulting the subsidiary's directors or officers, and issuing instructions directly to the subsidiary's employees or instructing its own employees to conduct the subsidiary's business.

Courts also hold the parent liable where the parent runs the subsidiary in an unfair manner by allocating profits to the parent and losses to the subsidiary; the parent represents the subsidiary as a division or branch rather than as a subsidiary; the subsidiary does not follow its own corporate formalities; or the parent and subsidiary are engaged in essentially the same business, and the subsidiary is undercapitalized.

A final scenario in which courts may pierce the corporate veil involves an enterprise entity, which is a single business enterprise divided into separate corporations. For example, a taxicab enterprise may consist of five corporations with two taxis each, a corporation for the dispatching unit, and a corporation for the parking garage. All the corporations, though separate, essentially engage in a single business—providing taxi service.

Courts often harbor suspicions that such arrangements are made in an attempt to minimize each corporation's assets that would be subject to claims by creditors or injured persons. Courts often will, in essence, put the corporations together as a single entity and make that entity liable to a creditor or injured person, perhaps because treating them as separate entities is unfair to those who believe they really form a single unit.

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original articles. Some statutes shield minority shareholders from harmful majority-approved amendments.

**Mergers and Acquisitions** A merger or acquisition generally is a transaction or device that allows one corporation to merge into or to take over another corporation. **MERGERS AND ACQUISITIONS** are complicated processes that require the involvement and approval of the directors and the shareholders.

In a merger or consolidation, two corporations become one by either maintaining one of the original corporations or creating a new corporation consisting of the prior corporations. Where statutes authorize these combinations, these changes are called statutory mergers. The statutes allow the surviving or new corporation to automatically assume ownership of the assets and liabilities of the disappearing corporation or corporations.

Statutes protect shareholder interests during mergers, and state courts assess these combinations using the fiduciary principles that are applied in self-dealing transactions. Most statutes require a majority of the shareholders in order to approve a merger; some require two-thirds. Statutes also allow shareholders to dissent from such transactions, to have a court appraise the value of their stake, and to force payment at a judicially determined price.

Mergers can involve sophisticated transactions that are designed simply to combine corporations or to create a new corporation or to eliminate minority shareholder interests. In some mergers, an acquiring corporation creates a subsidiary as the form for the merged or acquired entity. A subsidiary is a corporation that is majority-owned or wholly owned by another corporation. Creating a subsidiary allows an acquiring corporation to avoid responsibility for an acquired corporation's liabilities, while providing shareholders in the acquired corporation with an interest in the acquiring corporation.

Mergers also can involve parent corporations and their subsidiaries. A similar, though distinct, transaction is the sale, lease, or exchange of all or practically all of a corporation's property and assets. The purchaser in such a transaction typically continues operating the business, although its scope may be narrowed or broadened. In most states, shareholders have a statutory right of dissent and appraisal in these transactions, unless the sale is part of ordinary business dealings, such as issuing a mortgage or deed of trust covering all of a corporation's assets.

Not all business combinations are consensual. Often, an aggressor corporation will use takeover techniques to acquire a target corporation. Aggressor corporations primarily use the cash tender offer in a takeover: The aggressor attempts to persuade the target corporation's shareholders to sell, or tender, their shares at a price that the aggressor will pay in cash. The aggressor sets the purchase price above the current market price, usually 25 to 50 percent higher, to make the offer attractive. This practice often requires the aggressor to assume significant debts in the takeover, and these debts often are paid for by selling off parts of the target corporation's business.

Restraints and protections exist for these situations. In takeovers of registered or large, publicly held corporations, federal law requires the disclosure of certain information, such as the source of the money in the tender offer. In smaller corporations, a controlling shareholder, who holds a majority of a corporation's shares, may not transfer control to someone outside the corporation without a reasonable investigation of the potential buyer. A controlling shareholder also may not transfer control where there is a suspicion that the buyer will use the corporation's assets to pay the purchase price or otherwise wrongfully take the corporation's assets.

Corporations can employ defensive tactics to fend off a takeover. They can find a more compatible buyer (a "white knight"); issue additional shares to make the takeover less attractive (a "lock-up"); create new classes of stock whose rights increase if any person obtains more than a prescribed percentage (a "poison pill"); or boost share prices to make the takeover price less appealing.

**Dissolution** A corporation can terminate its legal existence by engaging in the dissolution process. Most statutes allow corporations to dissolve before they begin to operate as well as after they get started. The normal process requires the directors to adopt a resolution for dissolution, and the shareholders to approve it, by either a simple majority or, in some states, a two-thirds majority. After approval, the corporation engages in a "winding-up" period, during which it fulfills its obligations for taxes and debts, before making final, liquidation distributions to shareholders.

**Derivative Suits** Shareholders can bring suit on behalf of a corporation to enforce a right or to remedy a wrong that has been done to the corporation. Shareholders "derive" their right to bring suit from a corporation's right. One common claim in a derivative suit would allege misappropriation of corporate assets or other breaches of duty by the directors or officers. Shareholders most often bring derivative suits in federal courts.

Shareholders must maneuver through several procedural hoops before actually filing suit. Many statutes require them to put up security, often in the form of a bond, for the corporation's expenses and attorneys' fees from the suit, to be paid if the suit fails; this requirement often kills a suit before it even begins. The shareholders must have held stock at the time of the contested action and must have owned it continuously ever since. The shareholders first must demand that the directors enforce the right or remedy the wrong; if they fail to make a

demand, they must offer sufficient proof of the futility of such a demand. Normally, a committee formed by the directors handles—and dismisses—the demand, and informed decisions are protected by the business judgment rule.

**Proxy Contests** A proxy contest is a struggle for control of a public corporation. In a typical proxy contest, a nonmanagement group vies with management to gain enough proxy votes to elect a majority of the board and to gain control of the corporation. A proxy contest may be a part of a takeover attempt.

Management holds most of the cards in such disputes: It has the current list of shareholders; shareholders normally are biased in its favor; and the nonmanagement group must finance its part of the proxy contest, but if management acts in good faith, it can use corporate money for its solicitation of proxy votes. In proxy contests over large, publicly held corporations, federal regulations prohibit, among other things, false or misleading statements in solicitations for proxy votes.

**Insider Trading** Federal, and often state, laws prohibit a corporate insider from using nonpublic information to buy or sell stock. Most cases involving violations of these laws are brought before federal courts because the federal law governing this conduct is extensive. The federal law, which is essentially an antifraud statute, states that anyone who knowingly or recklessly misrepresents, omits, or fails to correct a material or important fact that causes reliance in a sale or purchase, is liable to the buyer or seller. Those with inside information must either disclose the information or abstain from buying or selling.

## Permutations

Corporations do not represent the only, or necessarily the best, type of business. Several other forms of business offer varying degrees of organizational, financial, and tax benefits and drawbacks. The selection of a particular form depends upon the investors' or owners' objectives and preferences, and upon the type of business to be conducted.

A partnership is the simplest business organization involving more than one person. It is an association of two or more people to carry on business as co-owners, with shared rights to manage and to gain profits and with shared personal liability for business debts. A sole proprietorship is more or less a one-person partnership. It is a business owned by one person, who alone manages its operation and takes its profits and is personally liable for all of its debts. A limited partnership is a partnership with two or more general partners, who manage the business and have personal and unlimited liability for its debts, and one or more limited partners, who have almost no management powers and whose liability is limited to the amount of their investment. In a LIMITED LIABILITY COMPANY, the limited liability of a limited partnership is combined with the tax treatment of a partnership, and all partners have limited liability and the authority to manage. This is a relatively new business form.

A corporation thus provides limited liability for shareholders, unlike a partnership, a sole proprietorship, or a limited partnership, each of which exposes owners to unlimited liability. A corporation is taxed like a separate entity on earnings, out of which the corporation pays dividends, which are then taxed (again) to the shareholders; this is considered double taxation. Partnerships and limited partnerships are not taxed as separate entities, and income or losses are allocated to the partners, who are directly taxed; this "flow-through" or "pass-through" taxation allocates income or losses only once. Corporations centralize management in the directors and officers, whereas partnerships divide management among all partners or general partners. Corporations can continue indefinitely despite the death or withdrawal of a shareholder; partnerships and limited partnerships, however, dissolve with the death or withdrawal of a partner. Shareholders in a publicly held corporation generally can sell or transfer their stock without limitation. Holders of interest in a partnership or limited partnership, however, can convey their interest only if the other partners approve. Corporations must abide by significant formalities and must cope with a great volume of paperwork; partnerships and limited partnerships face few formalities and few limitations in operating their business.

## New Issues Faced by Corporations

Corporations in the United States have suffered a series of major fiascos in recent years that have cost investors and employees billions of dollars and have eroded public confidence in the governance of major corporations. During the mid to late 1990s, the U.S. economy grew in record numbers, much to the delight of investors and the public in general. Adding to this elation

*Federal law prohibits a corporate insider from using nonpublic information to buy or sell stock. In a highly publicized case of insider trading, Samuel Waksal, founder of ImClone Systems Inc., was sentenced in June 2003 to over seven years in prison for his role in an insider trading scheme.*

AP/WIDE WORLD PHOTOS

was the success of Internet-based companies, known generally as "dot-coms." Business commentators and the general press referred to this collective success as the "dot-com bubble."

The "bubble" burst during the early part of 2000. Marketing analysts in 1999 predicted that the enormous flow of capital, coupled with a limited range of business models that tended to copy from one another, would lead to a severe downturn or shakedown. Early in 2000, stock in several of these companies sank rapidly, leading to hundreds of BANKRUPTCY filings and thousands of employees losing their jobs. Although not all of the companies shut down, entrepreneurs and investors have been weary to follow this model since the collapse.

Confidence in American corporations decreased further with a series of corporate failure based largely upon mismanagement by directors and officers. In 2001, Enron Corporation, a large energy, commodities, and service company, suffered an enormous collapse that led to the largest bankruptcy in U.S. history. Many of the company's employees lost their 401(k) retirements plans that held company stock. The controversy also extended to the company's auditor, Arthur Andersen, L.L.P., which was accused of destroying thousands of Enron documents.

Enron reported annual revenues of $101 billion in 2000, but stock prices began to fall throughout 2001. In the third quarter of 2001 alone, Enron reported losses of $638 million, leading to an announcement that the company was reducing shareholder EQUITY by $1.2 billion. The SEC began an inquiry into possible conflicts of interest within the company regarding outside partnerships. The SEC investigation became formal in October 2001, and initial reports focused on problems with Enron's dealings with partnerships run by the company's chief financial offer.

Many additional allegations continued to surface throughout November 2001, including rumors suggesting that company officials sought the assistance of top-level White House officials, including Treasury Secretary Paul O'Neill. In December 2001, Enron's stock prices fell below $1 per share in the largest single-day trading volume on either the New York Stock Exchange or the NASDAQ. Because the company's employees' 401(k) plans were tied into company stock, these employees lost their retirement plans.

Concerns over corporate governance continued to dominate business news in 2002, as WorldCom, Inc., the second-largest long-distance provider in the United States, filed for bankruptcy. Like Enron employees, WorldCom's employee 401(k) plans held company stock, and by 2003, the value of these plans had decreased by 98 percent from their value in 1999. Moreover, similar to the Enron fiasco, many allegations focused upon the accounting methods that WorldCom's accountants employed. The company's board of directors and chief executive officer expressed "shock" that the company had misstated $38 billion in capital expenses and that the company may have lost money in 2001 and 2002 when, instead, it had claimed a profit.

The SEC has responded to these problems by requiring greater oversight of the accounting profession in the United States. New regulations have also modified the accounting methods that by these companies employed. Nevertheless, public confidence in U.S. corporations and the capital markets remains shaken, and much of the criticism has focused upon the lack of oversight regarding corporate directors and officers. Many have called for reforms that will hold these directors and officers responsible in instances of malfeasance.

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## CORPOREAL

*Possessing a physical nature; having an objective, tangible existence; being capable of perception by touch and sight.*

Under COMMON LAW, corporeal hereditaments are physical objects encompassed in land, including the land itself and any tangible object on it, that can be inherited.

Corporeal is the opposite of incorporeal, that which exists but is incapable of physical manifestation, as in the right to bring a lawsuit.

## CORPSE

*The physical remains of an expired human being prior to complete decomposition.*

### Property and Possession Rights

In the ordinary use of the term, a property right does not exist in a corpse. For the purpose of burial, however, the corpse of a human being is considered to be property or quasi-property, the rights to which are held by the surviving spouse or next of kin. This right cannot be conveyed and does not exist while the decedent is living. Following burial, the body is considered part of the ground in which it is placed. Articles of PERSONAL PROPERTY that have been buried with the body, such as jewelry, may be taken by their rightful owner as determined by traditional property rules or laws relating to DESCENT AND DISTRIBUTION or wills, as they are material objects independent of the body.

A corpse may not be retained by an undertaker as security for unpaid funeral expenses, particularly if a body was kept without authorization and payment was demanded as a condition precedent to its release.

At times, the need to perform an autopsy or postmortem examination gives the local CORONER a superior right to possess the corpse until such an examination is performed. The general rule is that such examinations should be performed with discretion and not routinely. Some state statutes regulate the times when an autopsy may be performed, which may require the procurement of a court order and written permission of a designated person, usually the one with property rights in the corpse.

### Burial Rights

The right to a decent burial has long been recognized as COMMON LAW, but no universal rule exists as to whom the right of burial is granted. Generally, unless otherwise provided before death by the deceased, the right will go to the surviving spouse; if there is none, it will go to the next of kin. When a controversy arises concerning the right of burial, each case will be considered on its own merits. The burial right per se is a sacred trust for those who have an interest in the remains.

Although the surviving spouse usually has the principal right to custody of the remains and to burial, special circumstances undermine this right, such as the absence or neglect of the surviving spouse or the separation of the parties at the time of death.

When there is no surviving spouse, the next of kin, in order of age, have the burial rights, unless a friend or remote relative is found by the court to have a superior right. The caretaker of an elderly, childless decedent who lived with the decedent for years prior to his or her death and to whom the estate was bequeathed might have a burial right that is superior to that of relatives.

In the case of the death of a child of divorced parents, the paramount privilege of burial is awarded to the parent who had custody.

The preference of the deceased concerning the disposition of his or her body is a right that should be strictly enforced. Some states confer this right, considering a decedent's wishes of foremost importance.

In most instances, the courts will honor the wishes of the decedent, even in the face of opposition by the surviving spouse or next of kin. If for some reason a decedent's wishes cannot be carried out, direction should be sought by the court. The court will decide how the body should be disposed of and will most likely do so according to the wishes of the surviving spouse or next of kin, provided those wishes are reasonable and not contrary to public policy.

When an individual wishes to direct the disposition of his or her remains, no formality is required. Oral directions are considered to be sufficient, and an individual's last wish will ordinarily be the controlling factor, provided it is within the limits of reason and decency.

Occasionally, a decision by the person who holds the right to burial can cause controversy beyond the deceased's family. One of the more

*In some cases, the need to perform an autopsy or postmortem examination gives the local coroner a superior right to retain possession of a corpse until the examination is performed.*

AP/WIDE WORLD PHOTOS

unusual cases involves the body of Ted Williams, one of the greatest baseball players in the history of the game, as well as a military hero in WORLD WAR II and the KOREAN WAR. John Henry Williams, Ted's son, decided when his father died in July 2002 to freeze the body in liquid nitrogen in a process called cryonics. The body is stored in a warehouse in Arizona. Friends and family have suggested that Ted Williams wanted to be cremated, but his body remains in a frozen state. John Henry's decision has been a major controversy, not only among close friends and family, but among former teammates, baseball fans, and commentators.

### Duties as to Burial

Public policy favors the concept of what is colloquially referred to as a "decent burial." There is a strong societal interest in the proper disposition of the bodies of deceased persons. It is universally recognized that a duty is owed to both society and the deceased that the body be buried without any unnecessary delay. This duty rests upon whoever has the right to bury the decedent. At common law, the duty was imposed upon the person under whose roof the deceased died.

Some state statutes specifically name those people who are charged with the duty of having a decedent buried. Statutes of this kind have been enacted for various policy reasons, such as the general interests of public health and the protection of public welfare, as well as the relief of anxiety that some people might experience concerning the proper disposition of their remains.

### Rights to Disinterment

After a body has been buried, it is considered to be in the custody of the law; therefore, disinterment is not a matter of right. The disturbance or removal of an interred body is subject to the control and direction of the court.

The law does not favor disinterment, based on the public policy that the sanctity of the grave should be maintained. Once buried, a body should not be disturbed. A court will not ordinarily order or permit a body to be disinterred unless there is a strong showing of necessity that disinterment is within the interests of justice. Each case is individually decided, based on its own particular facts and circumstances.

The courts frequently allow a change of burial place in order to enable people who were together during life to be buried together, such as husbands and wives, or family members. Disinterment for the purposes of reburial in a family plot acquired at a later date is generally authorized by law, particularly if the request is made by the surviving members of the decedent's family.

Disinterment may be allowed under certain circumstances, such as when a cemetery has been abandoned as a burial place or when it is condemned by the state by virtue of its EMINENT DOMAIN power for public improvement.

Consideration of the deceased's wishes as to his or her burial place is instrumental in a decision of a court as to whether or not a body should be disinterred. Such wishes are of paramount importance but are not necessarily controlling in all cases, such as when subsequent circumstances require a change of burial.

In states that have statutes regulating the exhumation or removal of the dead, such statutes are controlling.

Purchasing a lot in a cemetery entails a contract that obligates the purchaser and his or her survivors to abide by and observe the laws, rules, and regulations of the cemetery as well as those of the religious group that maintains it. When a dispute over the right to disinter a corpse arises, the court must make a finding of fact as to whether or not the rules or regulations of the cemetery forbid it.

**Rights of Particular Persons to Disinterment** The surviving spouse or next of kin of a deceased person has the right to let the body remain undisturbed. This right, however, is not absolute and can be violated when it conflicts

with the public good or when the demands of justice require it.

Also, the right to change the place of burial is not absolute, and the courts take various factors into consideration when deciding whether a body should be removed for burial elsewhere, such as the occurrence of unforeseen events. If an elderly woman's husband died and was buried in New York and she subsequently moved to California, she might be allowed to have his remains removed to a different location to facilitate her visits to his grave.

The consent of the surviving spouse of a decedent to the decedent's original resting place is another factor that the court will consider in determining whether a body may be disinterred, particularly if it is against the wishes of the next of kin. Once consent has been shown, the burial will usually not be disturbed in the absence of strong and convincing evidence of new and unforeseen events.

If a body is improperly buried—that is, buried in a grave belonging to someone else who has not consented to the burial—the court will order the body removed for reburial.

A landowner who allows the burial of a deceased person on his or her property cannot later remove the body against the will of the surviving spouse or next of kin. On the other hand, the landowner is entitled to object to the removal of the remains from his or her land. A landowner may not assert that a burial was made without his or her consent if he or she fails to raise any objections within a reasonable time after the interment of the decedent.

**Disinterment for Autopsies** The disinterment of a body may be ordered by the courts for the purpose of an autopsy. Courts may permit a body to be exhumed and an autopsy to be performed under certain circumstances in order to discover truth and promote justice. If disinterment for the purpose of examination is to be allowed, good cause and exigent circumstances must exist to make such action necessary, such as controversy over the cause of death, or to determine in an heirship proceeding whether or not a decedent ever gave birth to a child.

Disinterment for an autopsy should not be granted arbitrarily. The law will only search for facts by this method in the rarest of cases and when there is a reasonable probability that answers will be found through disturbing interment.

## Civil Liabilities

A civil action for breach of contract as to the care and burial of a corpse may be brought under certain circumstances. An individual who makes an agreement to properly bury a corpse may be subject to a lawsuit if he or she gives the body an improper burial, negligently allows the body to be taken from his or her custody, or allows the body to suffer indignities while in his or her possession.

General rules that govern damages for breach of contract have been applied in these actions.

In one case, an undertaker was sued for failure to embalm a body in such a manner that it would be preserved for a reasonably long time. The plaintiff recovered damages for illness and disability suffered when he found out that the body had disintegrated and become infested with insects as a result of the undertaker's breach of contract. However, exemplary or PUNITIVE DAMAGES are not recoverable in such cases.

**Funeral or Burial Expenses** Even in the absence of a contract or statute, a person may be liable for funeral or burial expenses based on his or her relationship to the decedent, such as a HUSBAND AND WIFE, or a PARENT AND CHILD. Statutes may also dictate liability. Some statutes designate the persons charged with the duty of burial but do not impose financial responsibility for burial or funeral expenses. Others impose financial liability on designated people in the order in which they are named in the statute.

Liability for burial expenses is not ordinarily imposed on someone merely because that person received a financial benefit as a result of the decedent's death. A joint tenant will not be charged with funeral expenses merely as a result of the joint ownership of property with the deceased.

**Contractual Liability** An individual who would not ordinarily be obligated to pay for burial or funeral expenses may accept responsibility to do so by contract. The terms of such an agreement must be very clear. The mere direction to furnish funeral services does not automatically create a contract for their payment. Liability for funeral services cannot be imposed arbitrarily. The obligation to pay the costs of a decent burial will be enforced by the law on those who should properly pay.

Although there is a lack of authority on the question of who should bear the costs of disin-

terment and reburial, it has generally been held as the responsibility of the person who caused it to be done.

**Torts** In the law of TORTS, there are a large number of cases involving the mishandling of corpses. These cases are concerned with mutilation, unauthorized disinterment, interference with proper burial, and other types of intentional disturbance. The breach of any duty as well as the unlawful invasion of any right existing with regard to a corpse is a tort for which an action may be commenced. For example, if the wrong body is delivered to a funeral home and the family discovers this when they attend the wake, they may be able to recover damages for mental suffering. Thus, the right of recovery is not necessarily based directly on injury to the corpse per se. Exemplary damages may be awarded in cases where the injury to plaintiffs was either malicious or resulting from gross negligence.

The award of damages is subject to appellate court review, and the adequacy or excessiveness of the amount awarded is dependent upon the particular circumstances of each case.

A tort action for damages in such cases may be maintained to protect the personal feelings of the survivors and, mainly, to compensate for the mental distress that has been caused.

**Mutilation, Embalmment, and Autopsy** An important component of the right to decent burial is the right to possession of the body in the same condition in which it is left by death. There is no additional basis for recovery where mutilation is caused simultaneously with death, as in the case of a person who dies in a train crash or who is fatally stabbed.

Some statutes authorize the delivery of corpses to medical colleges for dissection under certain conditions. It is mandatory, however, that the consent of relatives be obtained if such relatives can be found. Only a reasonable inquiry is necessary, the duty of which is on the school and on those delivering the body.

The unauthorized embalming of a body alone does not necessarily support a CAUSE OF ACTION for damages based upon mutilation or mishandling. When such unauthorized embalming occurs, combined with the resulting mental suffering of the next of kin and other such factors, a legal action may be brought. If, for example, an unauthorized embalming contrary to the decedent's religious beliefs is performed, an actionable wrong occurs for which damages may be granted.

Generally, an unauthorized autopsy is a tort. No liability exists, however, when an autopsy is performed in accordance with the consent of the individual having burial rights or pursuant to statute or the proper execution of the duties of the coroner.

## Offenses and Prosecutions

Several varied offenses with respect to corpses are recognized both at common law and under statute. At common law, it is an offense to treat a corpse indecently by keeping, handling, and exposing it to view in order to create the impression that the deceased is still alive. The attempt to dispose of a corpse for gain and profit is a misdemeanor punishable at common law. Ordinarily, it is a misdemeanor for the individual possessing the duty of having a body buried to refuse or neglect to do so, or to dispose of the corpse indecently. The burning of a corpse in such a way as to incite the feelings of the public is a common-law offense.

At common law and often under statute, interfering with another person's right of burial or neglecting to bury or cremate a body within a reasonable time after death is an offense. It is also a crime to detain a body as security for the payment of a debt.

The mutilation of a corpse is an offense at common law, and under some statutes, the unauthorized dissection of a corpse is a specific criminal offense. Someone who receives a corpse for the purpose of dissection with the knowledge that it has been unlawfully removed is subject to prosecution.

The unauthorized disturbance of a grave is indictable at common law and by statute as highly contrary to acceptable community conduct. Similarly, the unauthorized disinterment of a body is a criminal offense under some statutes and at common law.

Some statutes make disinterment for specified purposes an offense; therefore, an offense is not committed unless disinterment was done for such purposes. A case where a body was exhumed and a portion of the body was removed by the next of kin for use as evidence in a MALPRACTICE trial, however, did not warrant prosecution for removal of the body because of mere wantonness, as set forth in a statute.

Under laws that proscribe opening a grave to remove anything interred, the act is forbidden per se and is conclusive as to the intent with which it is done. In such cases, no SPECIFIC

INTENT, whether felonious or otherwise, needs to be shown.

Statutes that make make disinterment an offense do not apply to exhumations made by public officials attempting to ascertain whether a crime has been committed. Similarly, statutes are not directed against cemetery authorities who wish to change the place of burial and who are authorized to do so; nor are they directed against people who had obtained the permission of those having burial rights or against those who, under necessary permit, remove the corpse of a relative for reinterment.

## CORPUS

*[*Latin, Body, aggregate, or mass.*]*

*Corpus* might be used to mean a human body, or a body or group of laws. The term is used often in CIVIL LAW to denote a substantial or positive fact, as opposed to one that is ambiguous. The corpus of a trust is the sum of money or property that is set aside to produce income for a named beneficiary. In the law of estates, the corpus of an estate is the amount of property left when an individual dies. Corpus juris means a body of law or a body of the law. Corpus Juris Secundum (C.J.S.®) is an all-inclusive, multivolume legal encyclopedia.

## CORPUS DELICTI

*[*Latin, The body of the crime.*] The foundation or material substance of a crime.*

The phrase *corpus delicti* might be used to mean the physical object upon which the crime was committed, such as a dead body or the charred remains of a house, or it might signify the act itself, that is, the murder or ARSON.

The *corpus delicti* is also used to describe the evidence that proves that a crime has been committed.

## CORPUS JURIS

*[*Latin, A body of law.*] A phrase used to designate a volume encompassing several collections of law, such as the Corpus Juris Civilis. The name of an American legal encyclopedia, the most recent edition of which is known as* Corpus Juris Secundum *(C.J.S.®).*

## CORPUS JURIS CIVILIS

*[*Latin, The body of the civil law.*] The name given in the early seventeenth century to the collection of* CIVIL LAW *based upon the compilation and* CODIFICATION *of the Roman system of* JURISPRUDENCE *directed by the Emperor* JUSTINIAN I *during the years from 528 to 534* A.D.

## CORRELATIVE

*Having a reciprocal relationship in that the existence of one relationship normally implies the existence of the other.*

*Mother* and *child,* and *duty* and *claim,* are correlative terms.

In the law governing gas and oil transactions, a *correlative right* is the opportunity of each owner of land making up part of a common source of supply of oil and gas to produce an equitable share of such products.

In the law governing WATER RIGHTS, the correlative rights doctrine gives the individual owners of land overlying a strata of percolating waters limited rights to use the water reasonably when there is not enough water to meet the needs of everyone in the area.

## CORRESPONDENCE AUDIT

*An examination of the accuracy of a taxpayer's income tax return conducted through the mail by the* INTERNAL REVENUE SERVICE*, which sends the taxpayer a request for proof of a particular deduction or exemption taken by either completing a special form or sending photocopies of relevant financial records.*

A correspondence audit is distinguishable from a field audit and an office audit in the manner in which it is conducted.

## CORRESPONDENT

*A bank,* SECURITIES *firm, or other financial institution that regularly renders services for another in an area or market to which the other party lacks direct access. A bank that functions as an agent for another bank and carries a deposit balance for a bank in another city.*

Securities firms may have correspondents in foreign countries or on exchanges—organizations that provide facilities for convening purchasers and sellers of securities—of which the firms are not members.

The term *correspondent* is distinct from corespondent—a person summoned to respond to litigation, together with another person, particularly, a paramour in a DIVORCE action based on ADULTERY.

## CORROBORATE

*To support or enhance the believability of a fact or assertion by the presentation of additional information that confirms the truthfulness of the item.*

The testimony of a witness is corroborated if subsequent evidence, such as a coroner's report or the testimony of other witnesses, substantiates it.

## CORRUPTION OF BLOOD

*In* ENGLISH LAW, *the result of attainder, in that the attainted person lost all rights to inherit land or other hereditaments from an ancestor, to retain possession of such property and to transfer any property rights to anyone, including heirs, by virtue of his or her conviction for* TREASON *or a felony punishable by death, because the law considered the person's blood tainted by the crime.*

Attainder and the consequent corruption of the blood were abolished by English statutes and are virtually unknown in the United States.

## ❖ CORWIN, EDWARD SAMUEL

Edward Samuel Corwin was a noted historian, political scientist, and CONSTITUTIONAL LAW scholar.

Born January 19, 1878, on a farm in rural Plymouth, Michigan, Corwin graduated Phi Beta Kappa from the University of Michigan in 1900, where he was president of his class. He entered graduate school at the University of Pennsylvania, earning his doctor's degree in 1905. Corwin then took a teaching position at Princeton University, where he began a long association with WOODROW WILSON, then president of Princeton. Wilson had recruited Corwin to be one of the first faculty at the university to teach undergraduates in small seminars called precepts, one of Wilson's many educational innovations. Wilson and Corwin quickly became friends, though Corwin often disagreed with Wilson's more conservative views. Corwin was selected by Wilson to update his book *Division and Reunion,* and Corwin wrote part 6 of the text, which was published in 1909.

In 1911, Corwin was promoted to full professor. Seven years later, he was appointed to a chair first occupied by Wilson, the McCormick Professor of Jurisprudence, which Corwin held until his retirement from Princeton in 1946. In 1924, he also became chair of the newly formed Department of Politics. Corwin was known at Princeton as a demanding yet popular professor; students regularly voted his courses on constitutional interpretation as the most difficult but also the most valuable.

While pursuing his teaching career, Corwin authored an impressive number of books and articles. In his first book, *National Supremacy—Treaty Power vs. State Power* (1913), Corwin explored the complex relationship between federal and state powers in foreign affairs. His later books, including *The President: Office and Powers* (1940, 3d ed. 1948), *The Twilight of the Supreme Court* (1934), *Court over the Constitution* (1938), *Constitutional Revolution, Ltd.* (1941), *The Constitution and World Organization* (1944), *Total War and the Constitution* (1947), and *Liberty against Government* (1948) established him as a preeminent authority on the Constitution. Some of his books—including *The Constitution and What It Means Today* (first published in 1920 and now called *Edward S. Corwin's Constitution and What It Means Today*) and *The Constitution of the United States of America: Analysis and Interpretation* (1949)—

"WHAT THE PRESIDENCY IS AT ANY PARTICULAR MOMENT DEPENDS IN IMPORTANT MEASURE ON WHO IS PRESIDENT."
—EDWARD CORWIN

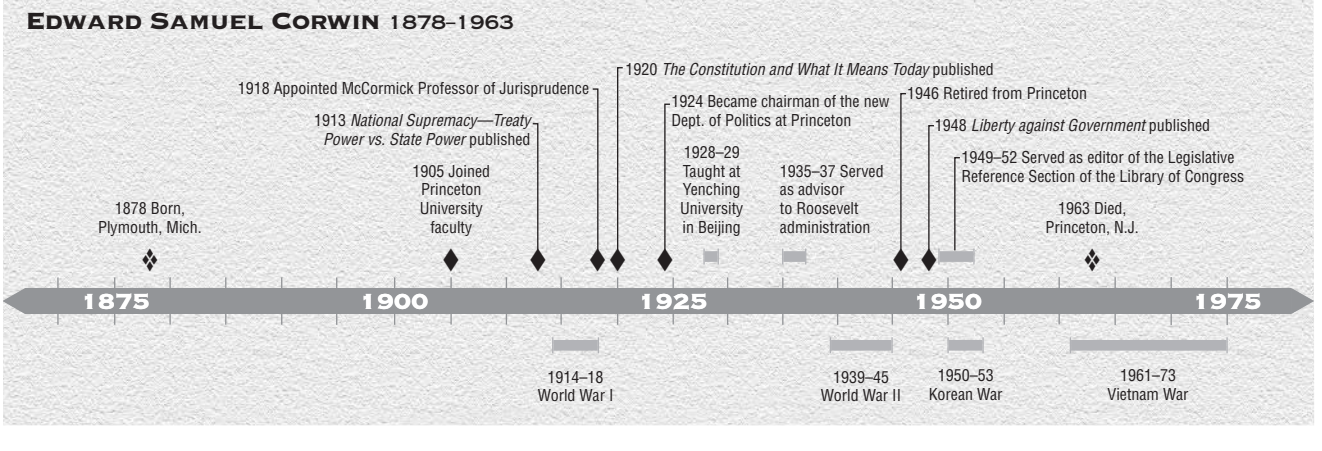

are considered standard texts in the field of constitutional law and are still kept current.

In addition to his work at Princeton, Corwin served as a visiting professor and lecturer at major universities, including Johns Hopkins University, New York University, Boston University, and Yale University. From 1928 to 1929, he was visiting professor at Yenching University, in Beijing. He was also the recipient of a number of major awards, including the American Philosophical Society's Franklin Medal in 1940 and the Henry M. Phillips Prize in the Science and Philosophy of Jurisprudence in 1942.

Corwin's expertise eventually led him to federal government service. In 1935, he became adviser to the Public Works Administration, and from 1936 to 1937, he acted as special assistant and consultant to the attorney general, on constitutional issues. He publicly supported President FRANKLIN D. ROOSEVELT'S COURT-PACKING PLAN—a bill proposed by Roosevelt to expand the U.S. Supreme Court so that he could nominate justices who would uphold NEW DEAL legislation—but opposed Roosevelt's run for a third term as a breach of tradition.

Corwin maintained an active career following his retirement from Princeton in 1946. During the 1947–48 academic year, he served as a visiting professor at Columbia University, and from 1949 to 1952, he was an editor for the Legislative Reference Section, LIBRARY OF CONGRESS, where he directed a major research project that resulted in the multivolume *Constitution Annotated: Analysis and Interpretation* (1952). In 1954, he became chairman of a national committee opposed to the Bricker Amendment, S.J. Res. 1, 83d Cong., 1st Sess. (1953), which had been proposed to restrict the president's treaty-making power.

Corwin, who died in 1963 at the age of 85, carries the distinction of being the only nonlawyer among the ten legal scholars and writers most frequently cited by the Supreme Court of the United States. Corwin was acutely aware of his important role, noting that "if judges make law, so do commentators."

FURTHER READINGS

Loss, Richard. 1981. *Corwin on the Constitution.* Ithaca, N.Y.: Cornell Univ. Press.

## COSIGNER

*An obligor—a person who becomes obligated, under a* COMMERCIAL PAPER*, such as a promissory note or check—by signing the instrument in conjunction with the original obligor, thereby promising to pay it in full.*

The cosigner may be held equally responsible for the payment of the debt or may be required to pay only upon the failure of the original obligor to do so, depending upon state law and the terms of the agreement that also determine the rights of the cosigner.

*Cosigner* is synonymous with the term comaker.

## COSTS

*Fees and charges required by law to be paid to the courts or their officers, the amount of which is specified by court rule or statute. A monetary allowance, granted by the court to a prevailing party and recoverable from the unsuccessful party, for expenses incurred in instituting or defending an action or a separate proceeding within an action.*

A *bill of costs* is a certified, itemized statement of the amount of the expenses incurred in bringing or defending a lawsuit.

A *cost bond,* or bond for costs, is a promise to pay litigation expenses; it is provided by a party to an action as a guarantee of payment of any costs awarded against him or her. A cost bond also might be required of an appealing party in a civil case, in order to cover the appellee's expenses if the judgment is affirmed.

*Final costs* are paid at the conclusion of an action, the liability for which depends upon its final outcome.

*Interlocutory costs* ACCRUE during the intermediate stages of a proceeding, as distinguished from final costs.

Security for costs refers to an assurance of payment that a defendant may demand of a plaintiff who does not reside within the jurisdiction of the court, for the payment of such costs as might be awarded to the defendant.

*Statutory costs* are amounts specified by law to be awarded for various phases of litigation.

The award of costs is not a penalty but is a method used to reimburse an innocent party for the expenses of litigation. Costs include the payment of court fees for the commencement of the litigation; the submission of pleadings or other documents; or the SERVICE OF PROCESS or other papers by a public officer. The appointment by a court of a referee to hear extremely technical testimony, or a receiver to retain and preserve the

defendant's funds or property during litigation, is included in costs. Costs entail expenditures made in interviewing parties or witnesses prior to trial and the fees that are properly paid to witnesses who testify. Printing expenses for maps or necessary documents are also included.

Costs do not include the compensation of an attorney. Expenditures in terms of the adversary nature of the proceedings, however, are included. Only when specifically authorized by law may attorney's fees be awarded in addition to costs.

### Prevailing Party

A party must request the court to award costs. The court generally defers its decision until judgment is rendered, then determines whether the prevailing party is entitled to costs. The successful party is not required to prevail on every issue or to obtain the entire amount of damages sought. Costs are also awarded to a party prevailing on appeal, even though the case was lost in the trial court.

Under the Federal Rules of Civil Procedure, after which most states have patterned their own procedural rules, "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Since state laws vary on this subject, however, the applicable state law must be consulted to determine the exact rules.

Costs cannot be assessed against a party merely because of tenacity in pursuing the claim. In *Delta Air Lines, Inc. v. August,* 450 U.S. 346, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981), the justices held that plaintiffs who lose their lawsuits in federal court after rejecting a settlement offer (a proposal to avoid litigation by compromising a disputed claim that does not admit liability) are not required to pay the defendant's costs and attorney fees.

Parties may determine the imposition of costs pursuant to an agreement. The court will enforce a contractual provision or a stipulation provided neither is UNCONSCIONABLE or the result of FRAUD.

When cases involve multiple parties—more than one plaintiff or more than one defendant—a court may allocate costs among the losing parties.

If one party is a stakeholder—a person who is or might be exposed to multiple liability from adverse claims—the stakeholder's costs are generally obtained from all the other parties to an INTERPLEADER action or from the stake: funds or property deposited by two persons with a third person, the stakeholder, for delivery to the person entitled to it upon the occurrence of a particular event.

### Amount

In some instances, the amount of costs is specified by law, which restricts a party who is awarded costs to the figure permitted by law for each component of the total costs.

### Security

A court may order a party to post a bond to guarantee that costs will be paid if he or she is unsuccessful. Three other alternatives provide sufficient security: a signed statement by the party that he or she will pay determined costs; the deposit of sufficient funds with the court; or the promise of a person who accepts the obligation to pay in full if the party who would normally be responsible fails to do so.

### Denial of Costs

A court may deny costs, although they are ordinarily awarded to the prevailing party. Misconduct, such as the concealment of a party's actual financial circumstances, when relevant to the action, justifies the denial of costs. A court that incurs additional, unnecessary expenses as a result of inadequate preparation of the case by the counsel of the prevailing party is entitled to reject a request for costs. In such an instance, the court has the discretion to order the attorney to pay a client's costs, particularly where his or her actions were grossly negligent.

### Criminal Proceedings

Costs in criminal proceedings are those expenses specified by law that have been necessarily incurred in a criminal prosecution. The concept of costs was unknown at COMMON LAW. The allowance of costs, therefore, is based on the applicable statutory provisions.

## COUNCIL

*A legislative body of local government. A group of persons who, whether elected or appointed, serve as representatives of the public to establish state or municipal policies and to assist the chief executive of the government unit in the performance of duties.*

## COUNSEL

*An attorney or lawyer. The rendition of advice and guidance concerning a legal matter, contemplated form of argument, claim, or action.*

The terms *counsel* and *advise* are frequently employed as synonyms for the term aid and abet to describe a person who, while not actually performing a criminal act, induced its performance or contributed to it.

The term *junior counsel* refers to the younger member of the team of attorneys retained on the same side of a case, or the one lower in the hierarchy of the firm, or one who is assigned to the preparation or trial of less significant aspects of the case.

The term of counsel refers to the description given to an attorney who is not the principal lawyer in charge of a case but who merely contributes his advice on the way it should be handled.

Where *of counsel* follows an attorney's name on a letterhead or office sign, this designation indicates that the person is employed by the firm primarily as a consultant on specialized matters, not as a full-time partner or associate.

## COUNSELLOR

*One engaged in the* PRACTICE OF LAW*; lawyer; advocate.*

The term *counsellor* is commonly used interchangeably with attorney, except in a few states where the terms refer to lawyers of different ranks. In such states, an attorney may become a counsellor only after practicing law for a certain designated period of time and passing an additional examination.

Formerly, the Supreme Court of the United States made a distinction between a counsellor and an attorney. A counsellor was a lawyer who litigated on a party's behalf whereas an attorney at law did not do any trial work. This distinction is no longer made by the Court.

## COUNT

*In* COMMON-LAW PLEADING *or* CODE PLEADING*, the initial statements made by a plaintiff that set forth a* CAUSE OF ACTION *to commence a civil lawsuit; the different points of a plaintiff's declaration, each of which constitute a basis for relief. In* CRIMINAL PROCEDURE*, one of several parts or charges of an indictment, each accusing the defendant of a different offense.*

The term *count* has been replaced by the word complaint in the Federal Rules of Civil Procedure and many state codes of civil procedure. Sometimes *count* is used to denote the numbered paragraphs of a complaint, each of which sets out an essential element of the claim.

Federal and state rules of criminal procedure govern the standards that a criminal count must satisfy in federal and state criminal matters.

## COUNTERCLAIM

*A claim by a defendant opposing the claim of the plaintiff and seeking some relief from the plaintiff for the defendant.*

A counterclaim contains assertions that the defendant could have made by starting a lawsuit if the plaintiff had not already begun the action. It is governed by many of the same rules that regulate the claims made by a plaintiff except that it is a part of the answer that the defendant produces in response to the plaintiff's complaint. In general a counterclaim must contain facts sufficient to support the granting of relief to the defendant if the facts are proved to be true. These facts may refer to the same event that gave rise to the plaintiff's CAUSE OF ACTION or they may refer to an entirely different claim that the defendant has against the plaintiff. Where there is more than one party on a side, a counterclaim may be made by any defendant against any plaintiff or plaintiffs.

According to the rules governing federal CIVIL PROCEDURE, a defendant usually is required to make a counterclaim in an answer if the counterclaim arises from the same transaction or occurrence on which the plaintiff is suing. This is called a compulsory counterclaim because the claim must be made in response to the plaintiff's complaint and cannot be made later or in a separate lawsuit. There are also permissive counterclaims that may be made in the defendant's answer at a later time. A claim against the plaintiff that is based on an entirely different event is one kind of PERMISSIVE COUNTERCLAIM. For example, a man may sue a woman for money damages because of a minor injury and some property damage after their cars collided. Under the rules governing PLEADING in most courts, the woman would be required to assert a demand for money damages for the same accident in her answer to the man's complaint or she would lose the right to sue on that claim. If the man also happens to be a neighbor who borrowed the woman's chain saw and never returned it, the woman could demand return of the saw as a counterclaim or she could wait and sue the man for that at some other time. She might decide to wait in order to sue in

a different court or because she does not want to argue the different circumstances of both claims before the same jury.

A defendant usually cannot make a counterclaim if it is not possible to make the same claim by starting a lawsuit. For example, a lawsuit to collect on a claim cannot be started after the period of time allowed by a STATUTE OF LIMITATIONS has run out. In certain situations, however, a defendant may assert an expired cause of action as a counterclaim. This procedure, allowed for reasons of fairness and justice, is called equitable recoupment. The court may reduce the plaintiff's money damages up to the amount of the defendant's counterclaim, but the defendant will not be allowed an affirmative recovery of money over and above the amount to which the plaintiff may be entitled.

CROSS-REFERENCES

Set-off.

## COUNTERCLAIMS AND SET-OFFS AGAINST SOVEREIGNS

*A comprehensive term for the vulnerability of a foreign government to retaliatory suits against it arising out of a lawsuit that it commences against a party.*

The Federal Foreign Sovereign Immunities Act (28 U.S.C.A. § 1602 et seq. [1976]) provides that, in any action initiated by a foreign state or in which a foreign state intervenes, such a state is not afforded IMMUNITY regarding any counterclaim for which no immunity would have been granted if such a claim had been brought in a separate action against the foreign state. In addition, a foreign state is not entitled to immunity in cases involving counterclaims that arise out of the transaction that is the subject matter of the foreign state's claim, or to the extent that the counterclaim does not seek relief that is in excess of, or different from, the type sought by the foreign state.

The Foreign Sovereign Immunities Act codified the general rule that when a foreign government brings suit, it is deemed to have submitted to the court's jurisdiction and waives its immunity to the extent that a counterclaim arising out of the same transaction or to the extent that the counterclaim, when used defensively in the form of a SET-OFF, is not in excess of the amount of the foreign state's claims.

A foreign nation that is a plaintiff in an action brought before a court of another nation is not barred in appropriate cases from invoking the act of state doctrine to preclude a counterclaim against it. This doctrine provides that, as a general rule, the acts of one foreign state committed within its own boundaries or territories are not reviewable by the courts of another nation.

CROSS-REFERENCES

International Law; Set-off.

## COUNTERFEIT

*To falsify, deceive, or defraud. A copy or imitation of something that is intended to be taken as authentic and genuine in order to deceive another.*

A counterfeit coin is one that may pass for a genuine coin and may include a lower denomination coin altered so that it may pass as a higher denomination coin.

## COUNTERFEITING

*The process of fraudulently manufacturing, altering, or distributing a product that is of lesser value than the genuine product.*

Counterfeiting is a criminal offense when it involves an intent to defraud in passing off the counterfeit item. The law contains exemptions for collector's items and items that are so obviously dissimilar from the original that a reasonable person would not consider them real. However, making a poor copy is no defense if the intent to defraud exists.

Counterfeiting most commonly applies to currency and coins. It is illegal to manufacture, possess, or sell equipment or materials for use in producing counterfeit coins and currency. Federal law also prohibits producing counterfeit postmarks, postage stamps, military papers, or government SECURITIES. Counterfeiting also applies to the fraudulent manufacture and sale of other items, such as computer software, CDs, consumer products, airplane parts, and even designer dresses. An increase in this type of counterfeiting has led to a strengthening of intellectual property laws worldwide. Counterfeiting or conspiracy to distribute counterfeit goods can lead to state or federal criminal charges. Civil lawsuits also can result from allegations of counterfeiting.

### Coins and Currency

Counterfeit coins appeared within a century of the first legitimate coins, which appeared in

about the seventh century B.C. The severity of the punishment for counterfeiting (death, in many cultures) and the difficulty of creating counterfeit coins that did not include some metal of value (and therefore cost a significant amount to produce) kept the practice in check. However, counterfeiting flourished after the development of paper money in about A.D. 1650, especially in American colonies where counterfeit bills and even coins were sometimes more common than genuine ones. Counterfeiters had honed their skills so much that when the United States issued its first federal coins in the 1780s, the government hired an ex-counterfeiter to cut the dies. Counterfeiting boomed again during the Civil War, when the United States issued its first paper money.

For many decades, the skills and equipment that are needed to create counterfeit money confined the practice to a few professionals, and the SECRET SERVICE, the branch of the TREASURY DEPARTMENT that is charged with enforcing counterfeiting laws, discovered most counterfeiters before the money leaked into circulation. But in the late twentieth century, with the availability of new technologies, such as color copying and electronic reprographics, more counterfeit schemes emerged. The Department of the Treasury estimated that $25 million worth of counterfeit bills were passed off in fiscal year 1994. Further damaging U.S. currency was a flood of fraudulent $100 bills on the world market. The Secret Service believes that from the early to mid 1990s, as much as $10 billion worth of nearly perfect counterfeit $100 bills were circulating internationally. It believes that the bills were printed on a press that is similar to those used by the U.S. Treasury and that had been sold to Iran in the 1970s. In 2002, authorities seized $130 million in fraudulent U.S. notes worldwide before they were circulated, and detected $44.3 million in spurious U.S. currency after it had passed into unwitting hands. But according to the Secret Service, the amount of fake money circulating has been fairly constant over recent decades, and only one or two notes in every 10,000 are counterfeit.

The increase in counterfeiting prompted Congress to pass the Counterfeit Deterrence Act of 1992 (18 U.S.C.A. § 471 note) to increase penalties. Prior to the enactment of new law, it was not a criminal act to manufacture counterfeit U.S. currency abroad. The law also instructed the Department of the Treasury to redesign paper money in order to make it more difficult to reproduce. In 1996, the first new currency was released. The bills' portraits were increased in size and moved to the left, to make

*A fan displays both a counterfeit (top) and an actual ticket to the opening game of the 1996 World Series. Counterfeiting laws apply to a wide variety of products, not just currency.*

AP/WIDE WORLD PHOTOS

room for watermark miniatures of them. Treasury officials believe that the watermark and the use of color-shifting inks make the currency nearly impossible to reproduce with current technologies.

### Other Items

Counterfeiting also applies to reproductions of packaging when the intent is to defraud or to violate protections under TRADEMARK, COPYRIGHT, or patent laws. It is estimated that U.S. companies lose $8.1 billion annually in overseas business owing to violations of INTELLECTUAL PROPERTY laws. Increasing the enforcement of trademark and copyright law to discourage counterfeiting has been a focus of U.S. trade negotiations, both with individual countries and during the Uruguay Round of the international GENERAL AGREEMENT ON TARIFFS AND TRADE, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

Disputes over counterfeit CDs and computer software have been at the center of U.S. trade conflicts with China for several years. Software manufacturers claim that 98 percent of the software used in China, including that used by the government, was illegally copied. Other goods that are distributed under false trademarks include cereal, razor blades, and soap. Under pressure from the United States, China strengthened its copyright and trademark laws in 1993. Lax enforcement resulted in a new trade agreement in 1995, which was designed to give U.S. manufacturers greater access to Chinese markets. Nevertheless, counterfeiting in China remains rampant.

Although most counterfeiting allegations are brought through the criminal courts, counterfeiting that violates patent, trademark, or copyright laws has resulted in civil lawsuits. For example, in 1994, a Paris court found that designer Ralph Lauren had copied a tuxedo dress pattern from Yves Saint Laurent's collection and ordered Lauren to pay his competitor $386,000 in damages.

### Punishment

Under federal law, counterfeiting is a class C felony, punishable by up to 12 years in prison and/or a fine of as much as $250,000. State laws also establish penalties for counterfeiting.

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## COUNTEROFFER

*In contract law, a proposal made in response to an original offer modifying its terms, but which has the legal effect of rejecting it.*

A counteroffer normally terminates the original offer, but the original offer remains open for acceptance if the counteroffer expressly provides that the counteroffer shall not constitute a rejection of the offer.

The UNIFORM COMMERCIAL CODE (UCC)—a body of law adopted by the states that governs commercial transactions—modifies this principle of contract law with respect to the sale of goods by providing that the "additional terms are to be construed as proposals for addition to the contract."

## COUNTERSIGN

*The inscription of one's name at the end of a writing, done by a secretary or a subordinate, to attest to the fact that such a writing has been signed by a principal or a superior, thereby vouching for the genuineness of the signature. To write one's name at the end of a document—in addition to the inscription of a name by another—to attest to the authenticity of the signature.*

## COUNTY

*A political subdivision of a state, the power and importance of which varies from one state to another.*

A county is distinguishable from a city or MUNICIPAL CORPORATION, since a municipal corporation has a dual character, both public and private, while a county is established by the state and is considered to be an agency thereof. Through home rule, a municipality may make certain decisions on matters of local concern, while a county is controlled by the state and does the work of state administration.

In the state of Louisiana, a state political subdivision is known as a parish. Comparable to counties, parishes have no independent existence apart from the state but possess only such authority as the state grants them.

### Status

The state constitution determines the procedures for the formation of a county. Certain states require a specific minimum size population or property value before a county is created. A county government that is too small can be either completely abolished or subject to a con-

solidation plan designed to merge urban and rural areas. Conversely, a county that becomes too large or diverse following an extended period of development can be divided by the state to form a new county.

The principle of SOVEREIGN IMMUNITY permits states to refuse to allow anyone to sue them. This doctrine protects counties from legal action to the same extent that the states they exist in are so protected. States and counties can only be sued where state law specifically permits it.

### Boundaries

Ordinarily, the boundaries of a county are set by the state legislature. If a boundary is marked by a stream or river, the county extends to the center and remains there from the time of the county's creation, even if the stream subsequently changes course. When a lake is the boundary, the county line ordinarily extends to the bank or the low water mark. A boundary that is on the ocean extends to the three-mile limit offshore.

State law provides for the revision of the boundaries of counties. Certain state statutes proscribe the creation of a new county line too close to an already existing county seat. Ordinarily voters can petition for the expansion or division of a county where population and commercial growth justify it. Although citizens have no absolute right to prevent the alteration of county lines by state legislatures, the legislature cannot change boundaries for the purpose of diluting the voting power of some of the citizens in an election.

The state retains power to designate special districts for purposes of irrigation, flood control, fire protection, or library services, which do not affect the makeup of existing counties.

### Government

The government of a county is located at the county seat, a city or town where court sessions are held and duties are performed by county officers. The county board, comprised of public officials who are elected or appointed to serve on it, is the body that manages the government of the county. Other county officials include sheriffs, clerks, surveyors, and commissioners responsible for certain areas such as highways and HUMAN RIGHTS.

The state gives counties express authority to purchase and sell property and to raise funds from taxes, licenses, or bond issues. Counties have state-granted authority to make provisions for public health, safety, welfare, and morals of its residents through the enactment and enforcement of ordinances and regulations. The state, however, has the authority to make the decision whether to create courts on the county level or to use counties to designate intrastate judicial districts.

## COUPON

*A certificate evidencing the obligation to pay an installment of interest or a dividend that must be cut and presented to its issuer for payment when it is due.*

Coupons are usually attached to a document, such as a promissory note, bond, share of stock, or a bearer instrument. A coupon is a written contract for the payment of a definite amount on a specified date according to the terms of the main document from which it must be separated for presentation for payment. Each coupon represents a separate promise by its issuer to pay its holder on the due date. Failure to do so will support a CAUSE OF ACTION for breach of contract.

## COURSE OF DEALING

*A clearly recognizable pattern of previous conduct between parties to a business transaction.*

The course of dealing between parties to an action is examined by a court in ascertaining what the parties intended when they entered into a contract. The supposition is that the parties drew up the contract in view of the customary manner in which business had been transacted prior to the signing of the contract.

In a breach-of-contract action, evidence of the course of dealing is admissible in order to interpret ambiguities in the contract, but not to effectuate an alteration or contradiction of the contract's provisions. A term that was seemingly unambiguous when the contract was entered into might subsequently prove to be problematic.

Course of dealing is distinguishable from both COURSE OF PERFORMANCE and TRADE USAGE. Course of performance refers to a pattern of conduct that occurs subsequent to approval of the contract terms. Trade usage entails behavior that is the standard of conformity for a majority of businesses engaged in a particular business or commercial venture.

Course of dealing safeguards the expectations of the parties and augments the certainty

of their transactions, based upon their prior experiences with each other.

The concepts of course of dealing, course of performance, and trade usage in the context of contract law are derived largely from the work of LINTON CORBIN, who did not believe that courts should be bound by the so-called four corners of a contract or to the "plain meaning" to those terms. Corbin was instrumental in the drafting of the UNIFORM COMMERCIAL CODE (UCC), which governs commercial agreements and transactions in most states. The UCC defines course of dealing in its general provisions (U.C.C. § 1-205). The term applies, for example, to the laws governing contracts for the sale of goods, negotiable instruments, and SECURED TRANSACTIONS.

## COURSE OF EMPLOYMENT

*As set forth in* WORKERS' COMPENSATION *acts, the time, place, and conditions under which an on-the-job accident occurs. The performance of an act that an employee might prudently do while in the appropriate area during working hours.*

In the event that an employee causes an injury to another or another's property, it is necessary to ascertain whether the employee was acting within the course of employment. The employer is legally responsible for the damages if the employee caused them while performing a job. If a driver for a transportation firm is involved in an accident with a pedestrian, for example, the pedestrian can sue both the driver and the firm. Under the doctrine of RESPONDEAT SUPERIOR, an employer can be held liable for a TORT, a civil wrong other than breach of contract, committed by an employee operating within the scope of the employee's employment.

Workers' compensation laws require the payment of compensation from the employer to the employee in conformity with a schedule for a particular category of injury, provided that the employee is injured during the course of employment. The course of employment encompasses the actual period of employment and the period during which the employee, while on the employer's premises, prepares to commence or to depart from work, such as by changing clothes. Employer-sponsored recreational activities are also considered part of the course of employment when organized, encouraged, or supported by the employer for business purposes, such as the promotion of efficiency. The test is whether the recreation inured to the employee's exclusive benefit or whether the employer had some interest in the activity. Injuries suffered by an employee while observing, participating, or traveling to or from recreational activities sponsored in whole or in part by the employer but conducted on the employee's time and off the employer's premises are not compensable.

Where the recreational activity is part of the employee's compensation, an injury is compensable. If an employer, for business reasons, arranges and pays for an employee to join and participate in a social or athletic club, the employee's activities are an incident of the course of employment and an injury is, therefore, compensable.

The periods during which an employee prepares for work while at home or commutes to his or her place of business are not within the course of employment, and, therefore, are not covered by workers' compensation laws.

## COURSE OF PERFORMANCE

*Evidence of the conduct of parties concerning the execution of obligations under a contract requiring more than one performance that is used for the purpose of interpreting the contract's provisions.*

Course of performance refers to the systematic and uniform conduct in which parties engage after they enter into a contract. The intent of the parties in regard to the meaning of the agreement is reliably ascertainable through the application of course of performance only when a contract requires a repetitive series of performances. There must be more than one performance, but no particular number is required. The fewer the performances, the more probable it is that such performances cannot constitute a course of performance.

If a party accepts a course of performance without objection, his or her ACQUIESCENCE is relevant to determining the meaning of the contract. The recipient of the performance need not expressly assent to the performance; the lack of an objection is sufficient. Unless there has been acceptance without objection, a party who performs cannot benefit from the application of course of performance.

Sometimes the acts of the parties may be inconsistent with the pertinent contractual language. A party may argue that the meaning of the agreement is unequivocal—that the course of performance is inconsistent with the contract

provisions—and, therefore, that the express terms of the contract should predominate over the course of performance.

The prevailing view is that no contractual term is so clearly defined that a party cannot demonstrate the way in which the parties actually applied it. Pursuant to the admissibility of the course of performance, and assuming that this evidence is credible, the language selected by the parties has the meaning that they had ascribed to it, and, therefore, no inconsistency exists between the contract provisions and the course of performance.

A minority of jurisdictions hold that some words have a PLAIN MEANING and, consequently, that course of performance is inadmissible to show their meaning when they are not ambiguous. Other courts reason that it is relevant to show that there has been either a waiver, an intentional relinquishment of a known right, or a modification of the contract before the application of course of performance.

The concept of course of performance in the context of contract law, along with such concepts as course of dealing and TRADE USAGE, is derived largely from the work of ARTHUR LINTON CORBIN. One of the leading theorists in the field of contract law in the twentieth century, Corbin did not believe that courts should be bound by a formal reading of the "four corners" of the contract. Corbin was instrumental in the drafting of the UNIFORM COMMERCIAL CODE (UCC), which governs commercial agreements and transactions in most states. Under the UCC, courts may consider course of performance of the parties in order to determine, for example, whether the parties have formed a contract for the sale or lease of goods (U.C.C. §§ 2-208, 2A-207).

CROSS-REFERENCES

Plain-Meaning Rule.

## COURT

*A judicial tribunal established to administer justice. An entity in the government to which the administration of justice is delegated. In a broader sense, the term may also refer to a legislative assembly; a deliberative body, such as the General Court of Massachusetts, which is its legislature. The words* court, judge, *or* judges, *when used in laws, are often synonymous. A kangaroo court is a mock legal proceeding that disregards law and justice by issuing a biased, predetermined judgment regardless of the evidence presented before it.*

Judicial courts are created by the government through the enactment of statutes or by constitutional provisions for the purpose of enforcing the law for the public good. They are impartial forums for the resolution of controversies between parties who seek redress from a violation of a legal right. Both civil and criminal matters may be heard in the same court, with different court rules and procedures for each.

The public has a right to attend judicial proceedings. This right ensures that the proceedings will be conducted in a fair and unbiased manner. Anyone who wants may attend trials as a spectator unless a judge has closed a courtroom for particular proceedings in order to maintain order, to assure DUE PROCESS OF LAW, or to protect a witness's identity.

The U.S. Judicial System consists of 52 separate court systems, plus territorial courts, in the United States. Each state and the District of Columbia has its own independent system, and the United States government maintains federal courts throughout the country. The federal courts and state courts are independent of each other. The federal courts are authorized by Article III, Section 2, of the Constitution to hear controversies that especially affect federal interests. Sometimes the existence of two parallel court systems in every state creates a strain and raises important issues concerning FEDERALISM, the relationship between the states and the United States. For some of these questions, the SUPREME COURT OF THE UNITED STATES makes the final determination that is binding on everyone.

Most courts have a multilevel structure. A few states have a two-tiered system, but the federal government and most states use a three-tiered model. All litigants have an opportunity to argue their cases before a trial-level court, and subsequently they may be able to pursue the matter further up through two levels of appeals courts.

In the federal court system the trial-level court is the district court. Each state contains at least one district court, and most of these courts have more than one judge available to try cases. Litigants may file an appeal with the U.S. Court of Appeals that has jurisdiction over that district if they are unhappy with the lower court's decision, and the decision is the type that may be appealed. The United States is divided into 13 judicial circuits, and one court of appeals sits in

# The First Virtual State Court

U.S. courts have adopted various new technologies that can assist in the administration of justice, but the state of Michigan took the most radical step in 2002 when it authorized the creation of the first fully functioning cybercourt in the country. This virtual court, once fully operational, would allow attorneys to file court appearances, briefs, and other court documents online. Specially trained district and circuit judges would serve three-year assignments on this court.

The cybercourt in its first incarnation is to be limited in jurisdiction to business disputes with an amount in controversy exceeding $25,000. The court would not use juries, as it was designed to assist businesses that need quick resolutions of disputes, such as those involving trade secrets. Critics have pointed out that the system would not allow judges to examine evidence physically or even to view evidence with any certainty, given the limitations in viewing screen resolution in many video or real-time communications. In addition, critics contend that many business disputes involve issues of federal law and diversity jurisdiction, thereby denying this court the opportunity to hear many cases.

The Michigan Supreme Court proposed new rules to govern the operation of the cybercourt. These rules addressed: the filing of pleadings and other documents via the **INTERNET**; the prevention of tampering with electronic documents; how testimony would be given via the Internet, videoconferencing, or interactive video; how serving notice on parties to a lawsuit via **E-MAIL** will work; and how court proceedings will be made accessible to the public.

The Michigan cybercourt was supposed to be operational by late 2002 but by mid-2003 it was still on the drawing board. In June 2003 the state legislature debated whether to provide $2 million to establish it in three locations.

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**CROSS-REFERENCES**

Courtroom Television Network; Internet.

each of twelve geographical circuits. The Court of Appeals for the Federal District sits in the thirteenth district to hear cases formerly entertained in the Court of Claims and the Court of Customs and Patents Appeals, which were abolished by the enactment of the Federal Courts Improvement Act of 1982 (28 U.S.C.A. § 1 note). Each court of appeals has four or more judges who sit either as panels of three or as a whole to review the decisions of district courts and to review or enforce the orders of many federal. administrative agencies. If a court sits as a whole, it is called an *en banc* court. Litigants who lose a cause in a court of appeals may be able to carry the appeal to the U.S. Supreme Court.

Cases in state courts may also proceed from the trial-level court up through appeals in an appellate court and then to a state supreme court. Different systems assign different functions to the state supreme court, which is usually the court of last resort, but this is not the case in every state. When an issue based on the federal Constitution, a treaty, or a federal statute is involved, the U.S. Supreme Court may agree to hear an appeal from the state supreme court.

The organization of a court and its personnel is determined by the law that created that court and by the court's own rules. Generally, the papers for each lawsuit must be filed with the clerk of the court. The clerk and his or her staff organize all of the records for the judges assigned to the court. Each judge may have a law secretary or law clerk, or there may be several clerks who perform legal research and assist in the drafting of decisions, orders, and memoranda. Court officers, court attendants, or bailiffs are available to give information and to maintain order and peace around the courthouse. Interpreters may be kept on call to translate for witnesses and parties who do not speak English well. A county sheriff or federal marshal has the responsibility for enforcement of various judicial orders. PROBATION officers are usually civilian employees who assist the court by administering the probation system for criminal offenders and supervise court-ordered custody or payments of money, especially CHILD SUPPORT. A court stenographer, or court reporter creates a written record of proceedings word for word.

Attorneys are called officers of the court because they have a dual responsibility to protect the integrity of the legal system and pursue their clients' claims. An attorney who has been admitted to the bar in one state is entitled to practice in the courts of that state but that does not entitle him or her to practice in the courts of another state, in a federal court, or in the Supreme Court. In order to do so, he or she must qualify and be sworn in separately.

A term is the time during which a court is authorized to hear cases, and a session is one of those periods in a term when a judge is actually hearing cases. A regular term is one called for by law, and a special term may be called by a judge or other official when the circumstances warrant it. A jury may hear a case during the jury term while a motion for relief may be made to the court during the motion term. A general term sometimes means the time that all of the judges of a court sit together, or en banc, but occasionally it refers to a single judge's hearing all of the cases on a particular subject.

Laws or court rules fix the particular terms or sessions when a court is open for judicial business. If none is fixed, a court is open at all times. Any judicial action taken by a judge of the court is not invalid in such circumstances because of the time when it was taken, but it does not necessarily mean that the courthouse doors are unlocked 24 hours a day.

Rules of CIVIL PROCEDURE and of CRIMINAL PROCEDURE regulate practice in the courts. The rules spell out rights and the manner of proceeding in regard to a court's jurisdiction and venue, the commencement of an action, parties, motions, subpoenas, pretrial discovery, juries, evidence, the order of a trial, provisional remedies, judgments, and appeals.

## COURT ADMINISTRATOR

*An officer of the judicial system who performs administrative and clerical duties essential to the proper operation of the business of a court, such as tracking trial dates, keeping records, entering judgments, and issuing process.*

A go-between for judges, attorneys, and clients, the court administrator essentially runs the court's business. The behind-the-scenes work of this position ranges from scheduling trial dates to handling all official correspondence. Courts produce volumes of paper; the administrator's office processes them, accepting lawsuit filings, authenticating court documents, and issuing writs and summonses. Formerly known as the clerk, the post has evolved since the mid-1980s as technology has streamlined some elements of the justice system.

State and county administrators do essentially the same job. Unlike those in past decades, nearly all administrators today are appointed by judges. Judicial appointment has helped take politics out of this powerful position, and by the mid-1990s, only the state of Montana still preserved an elected post for its court administrator. State administrators operate under statutory authority that entitles them to execute court affairs and provides an annual staff budget. County-level administrators are generally chosen by committee, with funding for their offices commonly generated by court fees.

Contemporary trends in court management have reshaped this traditional office. Technology has led the change: where once courts relied entirely on paper records, computer databases are fast becoming the norm. For example, using computer software to track trial dates has begun to replace the ancient practice of relying on the court docket. Beyond allowing for greater flexibility, this new method also turns the tables on lawyers who have customarily controlled the pace of cases. A related trend in the mid-1990s, introduced by Minnesota, is toward uniformity:

the state's General Rules of Practice place all jurisdictions under the same uniform rules, aiming to save time in scheduling as well as ensuring that local attorneys have no advantage over out-of-state attorneys.

## COURT COMMISSIONERS

*Persons appointed by a judge to find facts, to hear testimony, or to perform a specific function connected with certain types of cases.*

An attorney, a judge, a retired judge, or any person with the background necessary to comprehend complex legal matters may be a court commissioner, although a court commissioner is not a judge. The court that the court commissioner serves ordinarily reviews his or her decisions.

Commissioners may take testimony in hearings to determine the validity of a will; proceedings concerning the entry of default judgments or stipulations; pretrial conferences in criminal cases; or proceedings involving family court petitions to modify ALIMONY or CHILD SUPPORT.

State law governs the powers of court commissioners.

## COURT HAND

*In old English practice, the peculiar style and form of writing in which court records were transcribed from the earliest period to the reign of George II, circa 1760.*

This form of Latin shorthand was characteristically concise, strong, and absolutely uniform even though it was handwritten. Due to the numerous and unusual abbreviations and contractions, proficiency in the art of court hand was an important step in entering the "clerkship" profession. Court hand imported to the ancient record the essential quality of durability.

## COURT-MARTIAL

*A tribunal that tries violations of military* CRIMINAL LAW. *It often refers to the entire military justice process, from actual court proceedings to punishment.*

First established in eighteenth-century U.S. law, the court-martial is today the result of tremendous modernization that has made it similar to a trial in federal district court. Defendants are presumed innocent until proven guilty, accorded considerable legal protections, and guaranteed the right to appeal. The court-martial is governed by the UNIFORM CODE OF MILITARY JUSTICE (10 U.S.C.A. §§ 801–940), a federal law that Congress originally passed in 1950, but that legislators, presidents, and the U.S. Supreme Court have since changed several times. Significant reforms of the court-martial now grant military defendants essentially the same DUE PROCESS rights that are afforded defendants in civilian courts.

The Uniform Code of Military Justice vests in the president of the United States the authority to draft and to amend the Manual for Courts-Martial, United States (10 U.S.C.A. §§ 801-946). This document includes a number of procedural rules in the military justice system, including the Rules for Courts-Martial and Military Rules of Evidence. These rules are practiced by judge advocates, who serve as the attorneys in the military justice system. While many of the rules are similar or analogous to procedural rules in the civil justice system, such as the Federal Rules of Criminal Procedure and the FEDERAL RULES OF EVIDENCE, the military rules provide specific rights and procedures that do not have civil counterparts. In 1998, President WILLIAM JEFFERSON CLINTON approved several amendments to the Manual, including those related to pre- and post-trial confinement, trials, sentencing, substantive criminal offenses and defenses, post-trial procedures, and the authority of the Judge Advocate General.

Three levels of courts exist in the military justice system: military trial courts, courts of military review, and the U.S. Court of Military Appeals. Courts-martial are handled by the lowest courts, which are presided over by military trial judges who are quite similar to U.S. district court judges. These judges are commissioned officers selected by judge advocates according to rules established by Congress, and their responsibility for individual cases begins and ends with the court-martial process. The military trial courts are organized by the type of courts-martial that they address—summary, special, and general, which reflect increasingly serious charges and punishments.

Just as trials in civilian criminal courts are the result of work by police officers and prosecutors, courts-martial are preceded by a formal investigation. During questioning, military suspects have the same FIFTH AMENDMENT right to remain silent, as do civilians, as well as some additional rights. Civilian police officers

must read a suspect the *Miranda* rights at the time of arrest. Article 31 of the Uniform Code of Military Justice requires military investigators to go even further: As soon as suspicion focuses on a suspect during interrogation, they must advise him or her of the right to remain silent. This stringent requirement places a higher burden on military investigators to protect suspects' rights, and later it can become grounds for the dismissal of charges if it is not followed.

Military laws provide generous protections to defendants before a case goes to trial. These include complete pretrial discovery, allowing defendants free access to witnesses and evidence, as well as a requirement that prosecutors reveal the names of witnesses who will be called during all stages of the trial. In addition, the government must provide defendants with expert witnesses at its own expense; judges may delay or dismiss trials if prosecutors fail to do so. The military judge is empowered to hear pretrial motions on a broad range of issues, ranging from alleged violations of the defendant's constitutional rights to the admissibility of evidence. Before the case is heard, defendants have the choice of trial by judge or jury, and enlisted members can request that at least one-third of the court be enlistees. Defendants may also elect to be provided with military counsel or to hire a civilian attorney.

The court-martial closely resembles a trial in federal court. Military judges have the same authority as federal judges to rule on all matters of law and to give orders to the prosecution and the defense on such procedural matters as arguments, motions, and challenges. Two differences are particularly significant. First, whereas few civilian courts allow jurors to pose questions to witnesses, military courts have long permitted the practice. Jurors may submit written questions, which both the prosecution and the defense read in order to prepare any possible objections, which also must be in writing. The judge then decides which questions to allow. Second, military judges have a greater duty than do federal judges to review a defendant's entry of a guilty plea. This duty is designed to protect defendants from PLEADING guilty because of coercion, which could be more likely in the military because of its strict code of discipline and obedience to authority. MILITARY LAW requires judges to reject the plea at any stage of a proceeding if any hint of coercion is found.

The right to appeal convictions in military courts is different from that in civilian courts. Options for appeal are determined by the type of court-martial: Summary court-martial convictions, which are for lesser offenses, offer only the right to appeal to the commander who convened the court, and to make a further petition for review to the judge advocate general. Convictions in special and general courts-martial can be appealed to higher authorities, but the type of sentence handed down also governs a convicted party's rights. If the sentence is less than six months' confinement or a bad-conduct discharge, the case is reviewed by a legal officer in the convening authority's staff judge advocate's office, with no further appeals other than a right to petition the judge advocate general.

Greater convictions are automatically appealed to a court of military review, which considers matters of fact and law. Consisting largely of higher-ranking military judges, these courts exist for each branch of the military and have a total of 31 appellate military judges. The Uniform Code of Military Justice requires them to review serious sentences such as confinement of one year or more, dishonorable discharge, or dismissal of officers or cadets. Sentences to general officers and flag officers are also reviewed automatically. In all cases, defendants are granted free counsel for their appeals.

At the next level, the Court of Military Appeals—composed of five civilian judges who are appointed by the president of the United States—may decide to hear any petition from an unsuccessful appeal to a court of military review.

Finally, once military remedies have been exhausted, federal courts, including the U.S. Supreme Court, will review a court-martial conviction for claims of denial of constitutional rights.

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# Any Last Words? The Evolution of the Court-Martial

Throughout most of its two-hundred-year history, the court-martial was the ogre of U.S. law. Modeled on sixteenth-century European ideas about discipline and punishment, courts-martial worked smoothly. Commanders ran them, defendants had few rights, and punishments were **ARBITRARY**: disobedient soldiers were fined, jailed, or discharged, and deserters flogged or hanged. **CONSTITUTIONAL LAW** rarely got in the way. Between 1775 and 1950, the U.S. military scarcely altered its methods. It was not until the **VIETNAM WAR** era that reform came at the hands of federal lawmakers and judges. Today, the military tribunal resembles the average federal court.

Historically, the military justice system has always been distinct from the civilian court system. It formally began in 1775 when the **CONTINENTAL CONGRESS** enacted the first American Articles of War, closely modeled on the British Articles of War, which had their roots in sixteenth-century Europe. Under the articles, military justice had a simple two-sided goal: to promote good behavior and punish bad behavior. It specified civilian offenses such as murder and **LARCENY**, and military offenses such as disobedience, disrespect to officers, and desertion. To try defendants for violations, it established a simple tribunal made up of officers under the control of their commander. Accused parties had few if any of the **DUE PROCESS** and appeal rights enjoyed by defendants in civilian courts. No standard rules for punishment existed; as with all matters in a court-martial, punishment was decided completely at the discretion of the commander.

Free from the constraints of civilian courts, early courts-martial produced stark results. General **GEORGE WASHINGTON**, like other commanders, understood the court-martial's potential for keeping order in the ranks. During the Revolutionary War, he ordered his troops to watch the execution of fellow soldiers who had been convicted of desertion. Discipline—often severe—remained the hallmark of the court-martial for the next century. Few citizens or politicians objected because military culture was highly esteemed. Soldiers who brought shame on the service were thought to deserve whatever they got.

Despite earnest efforts, few early critics of the court-martial achieved much. By the mid-1800s, scholarly calls for reform began with the work of John O'Brien, an Army lieutenant who wrote *A Treatise on American Military Laws, and the Practice of Courts Martial: with Suggestions for Their Improvements* in 1846. O'Brien argued for lessening the influence of commanders, enacting more uniform rules, and clearly establishing specific punishments. But neither lawmakers nor the courts were very impressed. Congress had always accepted the distinction between civilian and military justice, and in a number of decisions, the U.S. Supreme Court consistently upheld the constitutionality of the court-martial system.

The onset of **WORLD WAR I** brought changes in the form of new Articles of War (Act of August 29, 1916, ch. 418, §§ 3–4, 39 Stat. 619, 650). Defense counsel was guaranteed "if such counsel be reasonably available," but there was no provision for appealing convictions. The author of the revision, Judge Advocate General Enoch H. Crowder, had scoffed at the latter idea in testimony before the U.S. Senate:

> In a military code there can be, of course, no provision for courts of appeal. Military discipline and the purposes which it is expected to [serve] will not permit of the vexatious delays. . . . However, we safeguard the rights of an accused, and I think we effectively safeguard them, by requiring every case to be appealed in [the] sense [that commanding generals must approve every sentence, and sentences of death or dismissal require additional confirmation by the president] (S. Rep. No. 130, 64th Cong., 1st Sess. 34–35).

As a startling example soon showed, these protections had little if any value. In November 1917, a court-martial tried sixty-three members of the all-black Twenty-fourth Infantry Division of the U.S. Army who were charged with a vari-

## COURT OF APPEAL

*An intermediate federal judicial tribunal of review that is found in thirteen judicial districts, called circuits, in the United States.*

*A state judicial tribunal that reviews a decision rendered by an inferior tribunal to determine whether it made errors that warrant the reversal of its judgment.*

**U.S. COURTS OF APPEALS** were created by Congress in 1891 and were known until 1948 as U.S. Circuit Courts of Appeals. Such courts have appellate jurisdiction over the majority of cases decided by U.S. District Courts except those cases in which the court has made an **INTERLOCUTORY** order regarding an **INJUNCTION**; such cases are directly reviewable by the

ety of offenses, including mutiny and murder, stemming from a race riot in Houston in which over a dozen people had died. The court-martial convicted fifty-eight men. Thirteen were sentenced to death and hanged the following morning. Despite General Crowder's assurances, neither the president nor even the military authorities in Washington, D.C., had been informed. According to regulations, the authority of a department commander was sufficient in time of war to confirm death sentences and the commander's order needed no further confirmation because he was the convening authority who had started the court-martial.

The Houston hangings prompted an immediate tightening of the rules for death sentences, but the experience of drafted men in World War I and **WORLD WAR II** brought about greater change. Called up to fight in the millions—and also court-martialed in the millions—civilians disliked their taste of military justice. As a result of public outcry, Senate hearings in 1917 led to a 1920 revision of the Articles of War. This revision provided for preliminary investigations, defense counsel, the presence of a legally trained member at every court-martial, and higher review of all sentences of death, dismissal, or dishonorable discharge. The right to defense counsel for soldiers was ahead of its time; civilians would not have this right universally recognized by the U.S. Supreme Court for several more decades. The new Articles of War also provided for automatic appellate review of convictions.

In practice, not all the provisions of the new articles were followed. Resources for carrying them out were limited, and commanders could not always be counted on to depart from tradition. The aftermath of World War II, in which some 2 million soldiers faced court-martial, brought even greater calls for reform.

Major reform began in 1950. Congress passed the **UNIFORM CODE OF MILITARY JUSTICE** (10 U.S.C.A. §§ 801–940), a sweeping reform of the military justice system applying to all branches of the service. This code created the Court of Military Appeals, a three-judge civilian body designed to review certain convictions. The code also extended greater protections to defendants: lawyers had to be assigned to defend them, and they now enjoyed significant due process rights. On the other hand, the military retained all other authority over the administration of military justice. The code kept the traditional hierarchy of three courts convened by commanders at increasingly higher command levels with escalating punishments—summary, special, and general courts-martial. It established "law officers" who functioned like judges, but it retained much of the traditional model of command control, which gave to commanders the power to appoint the investigating officer, counsel, and court members (with the enlisted accused having the right to request that one-third be enlisted members). And it extended court-martial jurisdiction over both service members and certain classes of civilians.

Further reform came through the courts and Congress. In 1955, the U.S. Supreme Court held that discharged service members could not be court-martialed for crimes committed while they were on active duty (*United States ex rel. Toth v. Quarles,* 350 U.S. 11, 76 S. Ct. 1, 100 L. Ed. 8). In 1969 the Court held that a case could be tried at court-martial only if the offense was connected to the defendant's military service in *O'Callahan v. Parker,* 395 U.S. 258, 89 S. Ct. 1683, 23 L. Ed. 2d 291. In 1970, the Court of Military Appeals held that civilian employees of the military overseas could not be subjected to court-martial (*United States v. Averette,* 19 U.S.C.M.A 363).

Congress brought reform with the Military Justice Act of 1968 (Pub. L. 90-632, Oct. 24, 1968, 82 Stat. 1335), which revamped the Uniform Code of Military Justice. It accomplished several key changes: (1) court-martial procedures were made to resemble more closely those of U.S. district courts; (2) the law officer was changed to a military judge, with functions and powers like those of a federal district judge; (3) the military judge was protected from influence by military authorities; (4) new intermediate appellate courts of military review were created in each service; and (5) defendants were given the choice of trial by judge or by jury. Additional reform came in the Military Justice Act of 1983 (Pub. L. 98-209, Dec. 6, 1983, 97 Stat. 1393), which specifically provided for review of Court of Military Appeals decisions by the U.S. Supreme Court. By 1987, military justice had improved to the point that the U.S. Supreme Court overturned *O'Callahan* and returned to the military greater authority to conduct courts-martial (*Solorio v. United States,* 483 U.S. 435, 107 S. Ct. 2924, 97 L. Ed. 2d 364).

Today the court-martial functions smoothly as a system governed by law. In every significant way, the modern court-martial is at least the equivalent of a federal criminal trial.

**SUPREME COURT OF THE UNITED STATES.** Federal courts of appeals are also empowered to review orders of many federal administrative agencies, such as the **NATIONAL LABOR RELATIONS BOARD.**

Cases before the court of appeals are usually heard by a panel of three judges, but in some circuit cases, actions involving significant constitutional questions are heard en banc, with all the judges serving on the court present to decide the case by a majority vote. In 1982 Congress enacted the Federal Courts Improvement Act (96 Stat. 25; 28 U.S.C.A. § 1 note) creating the Court of Appeals for the Federal Circuit which commenced hearing cases on October 1, 1982, and constitutes the thirteenth circuit in the United States. The Court of Appeals for the Federal Circuit provides

a national forum for the uniform application and enforcement of law in cases involving similar issues, particularly those involving patent and public contracts law, which in the past were often decided differently from circuit to circuit, necessitating appeal to the Supreme Court for a definitive answer. This court was established from the merger of the Federal Court of Claims and the Court of Customs and Patent Appeals. Although structurally similar to the 12 other courts of appeals, it differs from them in that its intermediate appellate jurisdiction is based upon subject matter, not geography, and it hears appeals from all federal circuits. This topical approach toward adjudication results from the new court assuming appellate jurisdiction from cases formerly brought before the Court of Claims and the Court of Patent Appeals. The court also entertains appeals from the Court of International Trade, the PATENT AND TRADEMARK OFFICE, the MERIT SYSTEMS PROTECTION BOARD, and other agencies.

In some states, the court of appeals is an intermediate appellate tribunal that reviews the decisions of lower courts on appeal. Its decisions are, however, subject to review by the highest appellate tribunal in the state if the unsuccessful party files an appeal and the justices agree to hear the case. When the state court of appeals is the intermediate level of appellate review, it possesses mandatory jurisdiction; litigants have a statutory right to appeal their cases to it.

State courts of appeals are frequently courts of last resort when their decisions are final and are not subject to review by any other state tribunal. When it is the highest appellate court in the state, the court of appeals has discretionary jurisdiction; it selects the decisions it will review. If a case presents questions involving federal statutes or the Constitution, the U.S. Supreme Court might accept the case for review of the judgment rendered by the state courts of appeals.

There might be two separate systems of state courts of appeals: one for the review of civil cases and one for the appeal of criminal matters.

CROSS-REFERENCES

Appellate Court; Federal Courts.

## COURT OF CLAIMS

*A state judicial tribunal established as the forum in which to bring certain types of lawsuits against the state or its political subdivisions, such as a county. The former designation given to a federal tribunal created in 1855 by Congress with original jurisdiction—initial authority—to decide an action brought against the United States that is based upon the Constitution, federal law, any regulation of the executive department, or any express or implied contracts with the federal government.*

Such courts are created by statute or constitution and can entertain only actions specified by law, such as those involving violations of provisions of the state constitution or law or based upon breach of government contracts.

The Federal Courts Improvement Act of 1982 (28 U.S.C.A. § 1 et seq.) abolished the U.S. Court of Claims and established the Court of Appeals for the Federal Circuit and the U.S. Claims Court to share various aspects of the jurisdiction of the former court.

## COURT OF PROBATE

*A judicial body that exercises jurisdiction over the acceptance of wills as valid documents and over the management and settlement of the estates of minors or of spendthrifts, of mentally incompetent persons, and of habitual drunkards.*

Such courts possess a limited jurisdiction in civil and criminal cases in some states. In some jurisdictions, they are also called ORPHANS' COURTS and surrogate courts.

## COURT OPINION

*A statement that is prepared by a judge or court announcing the decision after a case is tried; includes a summary of the facts, a recitation of the applicable law and how it relates to the facts, the rationale supporting the decision, and a judgment; and is usually presented in writing, though occasionally an oral opinion is rendered.*

Court opinions are the pronouncements of judges on the legal controversies that come before them. In a common-law system, court opinions constitute the law by which all controversies are settled. Attorneys analyze prior opinions on similar legal issues, attempting to draw parallels between their case and favorable court opinions and to distinguish unfavorable opinions. Judges study relevant opinions in rendering their decisions.

The majority of court opinions are not released for publication. Those that are released by the courts are collected in law books called reporters. Each state has at least one reporter that contains the opinions of its courts, and the nation has several reporters that contain the opinions of the federal courts.

# Who's Suing Whom? Terms and Abbreviations in Case Titles

The titles of court cases frequently contain terms and abbreviations that help to indicate the nature of the dispute. The accompanying chart identifies and explains many of the terms that may appear in case titles.

| Term | Definition | Example |
|---|---|---|
| ad hoc | For this; for this purpose | *Capital City Press v. Mouton, Judge ad Hoc* |
| ad litem | For the suit; for the litigation | *Estate of Langhorn v. Laws, Administrator Ad Litem* |
| adm'r | Administrator | *Grievance Adm'r v. Lange* |
| adm'r de bonis non | Administrator of the remainder of a partially settled estate. | *Vogel, Adm'r De Bonis Non v. Wells* |
| ad valorem | According to value; a tax imposed on value of property | *Aerospace Workers Inc. v. Dept. of Revenue, Division of ad Valorem Taxes* |
| a.k.a., a/k/a | Also known as | *Luis Barras, a.k.a. Luis Ramos v. State of Texas* |
| alter ego | The other self (*Alter ego* asserts that the defendants are one for purposes of liability) | *Ledford v. Mining Specialists, Inc., and Its Alter Ego, Point Mining, Inc.* |
| amicus curiae | Friend of the court; one with an interest in the case, but not a party | *Livingston v. Guice. United States of America, Amicus Curiae* |
| appellant | Party appealing a court's decision to a higher court | *Moore, Appellant v. Derwinski, Appellee* |
| appellee | Party against whom an appeal is taken | *Moore, Appellant v. Derwinski, Appellee* |
| certiorari, cert. | Writ requiring a certified record of a case from a court | *In re Petition of Johnson for a Writ of Certiorari* |
| complainant | One who applies to a court for legal redress | *Florida Bar, Complainant v. Clement, Respondent* |
| d.b.a., d/b/a | Doing business as | *M./t/L. Rendleman d.b.a. Commercial Insulators, Inc. v. Clarke* |
| de facto | In fact; in deed; actually | *McMullen, a De Facto Guardian v. Muir* |
| defendant | Party defending against or denying allegations | *Gretencord, Plaintiff v. Ford Motor Co., Defendant* |
| defendant in error | Appellee | *May v. State of Wisconsin, Defendant in Error* |
| duces tecum | A command to produce certain evidence | *In re Grand Jury Subpoena Duces Tecum* |
| et alius, et allii, et al. | And another; and others | *City of Lubbock et alius v. Knox* |

| Term | Definition | Example |
|---|---|---|
| et uxor; et ux. | And wife | *Kostohryz et ux. v. McGuire* |
| et vir | And husband | *Broadwater v. Dorsey et vir* |
| ex officio | By virtue of the office | *Tenneco Oil Co. v. Stephens, Ex Officio Tax Collector* |
| ex parte | By or for one party | *Ex parte Johnson* |
| ex'r | Executor | *Marilyn Haudrich as Ex'r v. Howmedica* |
| ex relatione, ex rel. | On information or on behalf of an interested party | *State ex rel. Miller v. Miller* |
| feme sole | A single woman | *Holman, Feme Sole v. Stephen F. Austin Hotel* |
| guardian ad litem | Guardian for the suit or litigation (concerning an incompetent or minor) | *Grace M., as Guardian ad Litem for Laurie M., a Minor v. Oakland Unified School District* |
| habeas corpus | Writ commanding that a person be released from unlawful detention | *In re Writ of Habeas Corpus for Martinez* |
| in personam | Against the person | *Claudio v. United States and Ken's Marine Service, Inc., in personam* |
| in re | In the matter of | *In re Estate of Lange* |
| in rem | Against the thing; against the property | *Scindia Steam Navigation Co., Ltd. v. 3,952.536 Metric Tons Peerless Eagle Coal, in rem, et al.* |
| inter alia | Among others | *Kot v. Inter alia, North East Detective Division* |
| inter vivos | Between the living | *Rudd v. Ruth inter vivos Family Trust* |
| mandamus | Writ commanding the performance of an act or the restoration of illegally deprived rights | *Ex parte Sierra Club Petition for Writ of Mandamus v. Alabama Environmental Management Commission* |
| n.k.a., n/k/a | Now known as | *Bernasek n.k.a. Staron v. Bernasek* |
| nunc pro tunc | After a deadline and given retroactive effect | *Application of West for Admission to the Bar nunc pro tunc* |
| pendente lite | Pending the suit; during the litigation | *Parsley, Administrator Pendente Lite v. Harlan* |
| petitioner | Party filing a petition | *Walton, Petitioner v. Walton, etc., et al., Respondents* |
| plaintiff | Party bringing a civil action by filing a complaint | *Oetting, Plaintiff v. United States, Defendant* |
| plaintiff in error | Appellant | *Miles, Plaintiff in Error v. Justice of the Peace Court #13* |
| pro forma | As a matter of form | *Pentecostal Church of God of America, a Pro Forma Corporation v. Hughlett* |
| pro hac vice | For this occasion | *Mohawk Assoc. and Furlough, Inc., as Owner Pro Hac Vice of the Tug Mohawk for exoneration from liability* |

| Term | Definition | Example |
|---|---|---|
| pro se | For one's own behalf; appearing for oneself | *Loftin, Individually, pro se v. United States* |
| quasi | As if; analogous to | *Mount Carbon Metropolitan District, a Quasi-Municipal Corporation, v. Lake George Co.* |
| respondent | Appellee | *Forehand, Petitioner v. Fogg, Respondent* |
| sub nom | Under the name | *Jones v. Lujan, sub nom. Hodel* |
| versus, vs., v. | Against | *Roe v. Wade* |

All published opinions are similar in format. At the top of each reporter page appears the name of the reporter preceded by the volume number. In the upper outside corner of the page is the page number. The volume, reporter name, and page number constitute the citation, which is used to locate the opinion or to refer to it. This citation may be abbreviated; for example, the citation "100 Cal. Rptr. 600" is a shorthand reference to the opinion that appears in volume 100 of the California Reporter at page 600. Many opinions are published in more than one reporter. In that situation, the additional citations are called parallel citations.

The first segment of the court opinion itself is the title of the action. It identifies the parties to the case and their roles in the action, such as plaintiff or defendant. If the opinion is from an appellate court, the party who appealed the lower court's decision is identified as appellant, and the party who is defending the lower court's decision is identified as respondent. In a criminal case, the plaintiff is usually the state prosecuting the crime—or the United States, if the federal government is prosecuting. After the title, a docket or calendar number assigned by the court appears, followed by the name of the court delivering the opinion and the date of the decision.

After this identifying information, most reporters insert a summary of the facts and the decision. In addition, some reporters classify the points of law applied by the court into individual paragraphs, called headnotes, that help the reader extract and analyze each legal concept discussed. The summary and headnotes are written by the publisher of the reporter for the convenience of the reader and are not part of the court's opinion.

The court's discussion of the case is often preceded by a syllabus, written by the court reporter, which briefly summarizes the case. After the syllabus, the court identifies the attorneys representing the parties.

Finally, the text of the opinion is presented. It usually opens with the name of the judge who wrote it. If the words *per curiam* or *by the court* appear at this point, they mean that the court chose not to identify any individual judge as the author. If the opinion is designated a memorandum opinion, it is usually a concise opinion of the entire court.

At the beginning of the opinion, the court briefly recounts the facts and issues involved in the case. Then, it delineates the applicable RULES OF LAW and explains how they relate to the facts of the case. In determining what the applicable law is, the court first looks for any relevant statutes. If no statute governs the action, the court relies on past decisions in similar cases, or precedent. If it is a case of first impression—that is, no existing statute or precedent governs the case—the court bases its opinion on similar decisions and on its own reasoning.

A court opinion may be as brief as a few sentences or as long as several hundred pages. In its course, the judge or the court may make observations or express convictions that do not contribute to the final holding in the case. These statements are called dicta and have no binding or

precedential force. After the discussion of the facts and the applicable law, the opinion announces the holding, which is the legal principle or principles derived from the opinion. Only the holding is binding precedent in subsequent cases.

Each reported decision may comprise one opinion written by one judge on behalf of the entire court, or several opinions written by individuals or groups of judges. Not all the opinions in a case have the same legal force. The most significant is a majority opinion, in which a majority of the members of the court agree both with the reasoning and with the holding. A majority opinion has the most conclusive precedential value of any opinion. An opinion agreed upon by the largest number of judges but fewer than a majority of those on the court is a plurality opinion. A plurality may occur where, for example, four of nine justices join one opinion, two others write concurrences, and three write dissents. A plurality opinion constitutes the holding of the court, since it is joined by the largest number of justices, but it carries less precedential value than a majority opinion because it is not agreed upon by a majority of the court. If a judge or judges agree with the outcome of the case but not with the majority's reasoning, they may write a separate concurring opinion. Conversely, a dissenting opinion may be written by a judge or judges who disagree with the decision of the court. Neither a concurrence nor a dissent has precedential value.

The last segment of a majority or plurality opinion sets forth the judgment of the court. The judgment is the official decision of the court on the rights and claims of the parties and resolves the controversy between them. It may be a final determination, or it may remand the case (send it back) to a lower court for further action. A judgment may be completely in favor of one party, or partly in favor of one and partly in favor of another. It may be a straightforward affirmance or reversal of a lower court's decision, or it may affirm on some questions, reverse on others, and remand on still others.

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CROSS-REFERENCES

Canons of Construction; Stare Decisis.

## COURTROOM TELEVISION NETWORK

The Courtroom Television Network (Court TV) is a cable network devoted to explaining law to the layperson. Founded in 1991, this novel venture in television programming was a long shot: few thought a twenty-four-hour-a-day, seven-day-a-week diet of live trials and legal analysis would succeed. Within two years, though, the network ranked fourth in the Nielsen Company's daytime cable ratings. It built this record with gavel-to-gavel coverage of civil and criminal trials, including a string of highly publicized cases in the early 1990s, as well as with a mixture of regular programs that examine in simple language how the legal system works. This nuts-and-bolts approach coincided with—and, to an extent, helped influence—controversial changes in legal journalism. Lawyers, judges, and the media are divided over whether the public is served or misled by the Court TV approach, and this debate only intensified after comprehensive coverage of the O. J. Simpson murder trial in 1995.

Changes in the media and the law paved the way for Court TV. From the 1960s to the 1980s, reporting on legal affairs was largely the business of two markets: specialized publications for lawyers and daily newspapers. The former was highly detailed; the latter took a broad, general approach. Television took the most sparing look at the law, usually in small slices of news broadcasts. But as state laws increasingly permitted television cameras in state courtrooms, the role of television increased. At the same time, another trend shook up television itself: the public's appetite for so-called reality programming, a format popularized by shows such as the National Broadcasting Company's *Unsolved Mysteries* and the Fox Network's *Cops* and *America's Most Wanted.* Cheaper to make than dramas and sitcoms, this programming subsequently glutted the airwaves in the form of cops-and-criminals shows, tabloid journalism, and "infotainment" (the combination of information and entertainment).

Court TV was created by legal publisher Steven Brill. Known as an innovator, Brill had founded *American Lawyer* magazine in 1978. Neither as technical as law journals nor as cursory as the mainstream press, the trade magazine critically profiled attorneys and law firms, dealt with matters such as how juries reach deci-

sions, and generally modeled its methods on investigative journalism. It emphasized the inner workings of the law—taking an approach that, ten years later, television was avidly pursuing with law enforcement. In July 1991, with the financial backing of Time Warner, Brill launched Court TV. The network initially broadcast an obscure Florida murder trial but soon had high profile cases to cover, including the prosecution of murderer-cannibal Jeffrey Dahmer and the trials of accused parent murderers Erik and Lyle Menendez. Court TV's viewership slowly increased.

In addition to essentially live trial broadcasts—delayed by ten seconds to preserve confidential information about jurors, witnesses, and attorney-client privilege—Court TV developed legal affairs programs. *In Context,* an analysis show hosted by Arthur Miller, a Harvard Law School professor, was an intellectual look at legal and social issues. *Instant Justice,* in contrast, turned its cameras on the often emotional scenes played out in night courts by problem drinkers and traffic violators. Other programs condensed entire trials into two-hour highlights *(Prime Time Justice)* or followed accused persons from jail to court *(The System)* in what the network called "the ultimate lesson on how the judicial process works, outlining legal failures and successes through the lives of those who are players in the system." Its also featured a weekly debate program, *Washington Watch*, which featured guests such as U.S. attorneys general JANET RENO and EDWIN MEESE III.

Steven Brill's decision in 1997 to sell his stake in Court TV to his partners, Time Warner and Liberty Media, changed the direction of the channel. CEO Henry Schleiff decided to expand into new areas, worried that the network's reliance on trials was turning it into a niche network like C-SPAN or the Golf Channel. He also disliked that ratings were dependent on the availability of a "hot" trial. For example, ratings dropped dramatically after the O.J. SIMPSON TRIAL ended—down 80 percent by 1997.

Court TV moved to purchase programming from the broadcast networks to syndicate to its viewers. *Homicide: Life on the Street* and *NYPD Blue* were two of its early acquisitions. Schleiff also hired Catherine Crier away from Fox News Channel to host her own news and talk show.

Court TV also decided to get more into original programming. In 2000, the network introduced *Forensic Files,* which profiled actual criminal cases and the scientific sleuthing done by the coroners, medical examiners, and physicians who solve them. The launch of *Forensic Files* occurred at the same time that CBS television premiered its fictional forensics-based hit *CSI: Crime Scene Investigation.* The resulting public interest in all things forensic made *Forensic Files* a smash hit by CABLE TELEVISION standards. The series became so popular that NBC "borrowed" it for its own network schedule.

*In 2001 the Court TV Network marked its tenth anniversary. Henry Schleiff, the network's chairman and CEO, stands beside Fred Graham, Court TV's first employee and chief anchor.*

AP/WIDE WORLD PHOTOS

Buoyed by its success with *Forensic Files*, Court TV expanded its original programming. Among the new shows it introduced was *Dominick Dunne's Power, Privilege and Justice,* a look at cases involving people from high society hosted by the noted author, and *From the Case Files of Dayle Hinman,* a real life criminal profiler. It also began to show original movies, based on one of the many crime documentaries Court TV produces each year.

As a result of all this, five years after Brill's departure, Court TV's ratings had increased 10-fold. It had moved from being available in 30 million homes to being available in 70 million homes. And advertising revenue grew to $64 million, from $15 million in 1998.

Despite this success, Court TV did not completely abandon televising court trials. In 2002 it went to court in a failed effort to televise the trial of terrorist suspect Zacarias Moussaoui. Trial broadcasts and analysis still make up a substantial part of its programming for the 2002–03 season, including its entire schedule from 9 A.M. to 5 P.M. on weekdays. Schleiff has promised this will continue. Trial analysis is "what distinguishes Court TV," he says. "The combination is what makes us different."

Although Court TV continues to broadcast programming around the clock, many local cable affiliates only air its programming during particular times of the day, such as during prime time, day time, or early morning hours.

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CROSS-REFERENCES

Broadcasting; Cameras in Court; Simpson, O. J.

## COURTS OF REQUEST

*Inferior judicial tribunals in England, created by special enactments of Parliament, that possessed local jurisdiction to determine actions involving claims for small debts. These courts were abolished in 1846 and replaced by county courts.*

## COVENANT

*An agreement, contract, or written promise between two individuals that frequently constitutes a pledge to do or refrain from doing something.*

The individual making the promise or agreement is known as the *covenantor,* and the individual to whom such promise is made is called the *covenantee.*

Covenants are really a type of contractual arrangement that, if validly reached, is enforceable by a court. They can be phrased so as to prohibit certain actions and in such cases are sometimes called negative covenants.

There are two major categories of covenants in the law governing real property transactions: *covenants running with the land* and *covenants for title.*

### Covenants Running with the Land

A covenant is said to run with the land in the event that the covenant is annexed to the estate and cannot be separated from the land or the land transferred without it. Such a covenant exists if the original owner as well as each successive owner of the property is either subject to its *burden* or entitled to its *benefit.* A covenant running with the land is said to touch and concern the property. For example, an individual might own property subject to the restriction that it is only to be used for church purposes. When selling the land, the person can only do so upon an agreement by the buyer that he or she, too, will only use the land for church purposes. The land is thereby burdened or encumbered by a RESTRICTIVE COVENANT, since the covenant specifically limits the use to which the land can be put. In addition, the covenant runs with the land because it remains attached to it despite subsequent changes in its ownership. This type of covenant is also called a *covenant appurtenant.*

Certain EASEMENTS also run with the land. An easement, for example, that permits one landowner to walk across a particular portion of the property of an adjoining landowner in order to gain access to the street would run with the land. Subsequent owners of both plots would take the land subject to such easement.

A *covenant in gross* is unlike a covenant running with the land in that it is personal, binding only the particular owner and not the land itself. A subsequent owner is not required to keep the promise as one would with a covenant appurtenant.

### Covenants for Title

When an individual obtains title to, or possession and ownership of, real property, six covenants are ordinarily afforded to him or her. They are (1) covenant for seisin; (2) covenant of the right to convey; (3) covenant against encumbrances; (4) covenant for QUIET ENJOYMENT; (5) covenant of general WARRANTY; and (6) covenant for further assurances.

A deed to real property that provides for *usual covenants* generally includes the first five of these covenants. When a deed provides for *full covenants,* it is regarded as giving such protection as is extended pursuant to all six covenants.

Covenants for seisin and of the right to convey are ordinarily regarded as being the same thing. Essentially, they make a guarantee to the grantee that the grantor is actually the owner of the estate that he or she is transferring.

The covenant against encumbrances promises to the grantee that the property being conveyed is not subject to any outstanding rights or interests by other parties, such as mortgages, liens, easements, profits, or restrictions on its

**Covenant Not to Sue**

**COVENANT NOT TO SUE**

For good and valuable consideration the receipt of which is hereby acknowledged, _____ ,

the undersigned being the holder of an actual, asserted or potential claim against _____ arising from:

do hereby covenant that I shall not commence or maintain any suit thereon against said party whether at law or in equity provided nothing in this agreement constitutes a release of this or any other party thereto.

This covenant shall be binding upon, and inure to, the benefit of the parties, their successors, assigns and executors, administrators, personal representatives and heirs.

_____
Signature

_____
Witness

STATE OF )

COUNTY OF )

Subscribed and sworn to me by _____ , on this _____ day of _____ , 20_____.

WITNESS my hand and official seal.

_____

My commission expires:

Notary Public

*A sample covenant not to sue.*

use that would diminish its value. The existence of ZONING restrictions do not constitute breach of this covenant; however, the existence of a violation of some type of zoning or building restriction might be regarded as a breach thereof.

The covenants of quiet enjoyment and general warranty both have the legal effect of protecting the grantee against all unlawful claims of others, including the grantor and third parties, who might attempt to effect an actual or constructive eviction of the grantee.

The sixth covenant, which is the covenant for further assurances, is not widely used in the United States. It is an agreement by the grantor to perform any further necessary acts within his or her ability to perfect the grantee's title.

The first three covenants of title ordinarily do not run with the land, since they become personal choses in action—rights to initiate a lawsuit—if breached upon delivery of the deed. The others are covenants appurtenant or run with the land and are enforceable by all grantees of the land.

In order to recover on the basis of a breach of a covenant of title, financial loss must actually be sustained by the covenantee, since such covenants are contracts of indemnity. In most jurisdictions, the maximum amount of damages recoverable for such a breach is the purchase price of the land plus interest.

### Purposes

Land use planning is often effected through the use of covenants. Covenants facilitate the creation of particular types of neighborhoods as part of a *neighborhood plan.* A housing developer might, for example, buy up vacant land to divide into building lots. A low price is paid for the undeveloped land, which the developer subsequently sells burdened with a number of restrictive covenants. The developer might stipulate in the contract of sale that the owner must retain the original size of a lot. Developers can also make owners agree that houses to be constructed upon the lots must be larger than a certain size and include other specifications to ensure that such property will more than likely sell for premium prices because of the desirability of the neighborhood. Courts enforce such covenants provided they benefit and burden all the property owners in a neighborhood equally.

Covenants will not, however, be enforced if they are intended to accomplish an illegal purpose. The Supreme Court ruled in *Shelley v. Kraemer,* 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), that no court or state officials have the power under law to take any action toward the enforcement of a *racial covenant.* In this case, a group of neighbors were bringing suit to prohibit a property owner from selling his home to blacks, based on the argument that the owner had purchased the home subject to the restrictive covenant not to sell to blacks. The covenant was found to be unenforceable based on equal housing laws. To enforce it would constitute a CIVIL RIGHTS violation.

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#### CROSS-REFERENCES

Chose in Action; Easement; Encumbrance; Estate.

## COVENANT, ACTION OF

*One of the old common-law* FORMS OF ACTION *by which the plaintiff claimed damages for breach of a* COVENANT*, that is, a contract under seal.*

When the common-law system was first developing in England after the Norman Conquest of 1066, the king's courts were little concerned with the personal disputes of private parties. When the royal courts began assuming more authority the procedure for asserting a legal claim became more technical. A dispute would not be heard unless the plaintiff could make out a claim in an established form, or form of action. The courts initially refused to hear cases involving private agreements because parties could not testify in their own cases, and there often was no other way to prove the existence of a contract or its terms. Gradually, judges came to the conclusion that a contract could be proved by introducing a written agreement bearing a seal—an impression in wax or in the paper itself—and by offering evidence that the agreement had been properly delivered to the party who held it. Such a sealed writing was known as a covenant, and it was legally sufficient to give the plaintiff grounds to sue on the rights embodied in it.

The action of covenant gained recognition in the thirteenth century and remained important for centuries, as long as agreements were enforceable only if they were under seal. It was not until the end of the fourteenth century that the law began to recognize as legally enforceable a contract that was supported by consideration but not under seal.

In very early times an action of covenant could be used by a tenant who had been wrongfully ousted from his or her premises before the term of the lease had expired. If it were the landlord who ejected the tenant, the tenant could seek damages as well as recovery of tenancy, but the only remedy against anyone else was money damages. As time went by, the action was not allowed for agreements involving real property.

Originally, the action of covenant was intended to force the defendant to perform his or her part of the bargain. Where that performance could not be forced and the defendant remained adamant, the plaintiff was entitled to damages in proportion to losses. The COMMON LAW first collected amercements, or fines, from the defendant and later ordered the defendant to pay money damages to the plaintiff as well.

Today, the common-law forms of action have been supplanted in U.S. law by modern rules of CIVIL PROCEDURE, and the action of covenant no longer exists. Even so, some states have preserved certain legal consequences for contracts under seal.

CROSS-REFERENCES

Assumpsit.

## COVENANT MARRIAGE

*A legal union of* HUSBAND AND WIFE *that requires premarital counseling, marital counseling if problems occur, and limited grounds for* DIVORCE.

The declining stability of U.S. marriages has been dramatic. In 2002, the CENSUS BUREAU issued a study that concluded almost half of all first marriages will end in divorce. The rise in the divorce rate began in the 1960s and accelerated in the 1970s, after most states enacted no-fault divorce laws, which made it much easier for married couples to dissolve their marriage contracts. By the 1990s, a small but vocal number of people argued that it was too easy to divorce. Prior generations of husbands and wives had worked out their problems and preserved their marriages. Current divorce laws allowed couples to quit a marriage at the first sign of trouble.

These concerns led Louisiana, in 1997, to enact the first covenant marriage law in the United States (L.S.A.-R.S. 9:272 et seq. [1997]). The law created two forms of marriage in the state: the traditional *marriage contract,* with minimal formalities of formation and dissolution, and a *covenant marriage,* which imposes heightened requirements for entering and leaving a marriage. Supporters of the covenant marriage law saw it as a way to strengthen marriages and families. Opponents expressed doubts. They were troubled over the creation of a marriage contract that had religious connotations—the word *covenant* is associated in Christianity with a contract between man and God. Critics also pointed out that there would be additional costs associated with the additional requirements.

The law mandates three significant requirements for couples who choose to enter into a covenant marriage: (1) the couple must legally agree to seek marital counseling if problems develop during the marriage; and (2) the couple can only seek a divorce or legal separation for limited reasons. In addition, before obtaining a covenant marriage license, the couple must receive premarital counseling from a priest, minister, rabbi, clergyman of any religious sect, or a professional marriage counselor.

For the premarital counseling to be accepted by the state the couple must sign a notarized AFFIDAVIT, which is attested to by the counselor, that (1) the counselor has discussed the seriousness of a covenant marriage; (2) the commitment to the marriage is one for life; (3) the couple will fulfill the obligation of seeking marital counseling if problems arise in the marriage; and (4) they received an informational pamphlet on the legal requirements of covenant marriage prepared by the Louisiana attorney general. The state grants a marriage license when the couple furnishes both the affidavit and a signed declaration of intent to enter into a covenant marriage. In addition, couples who have been married under the traditional marriage contract have the option of converting to a covenant marriage by filing a declaration of intent and participating in marital counseling.

Once married, a husband and wife are expected to commit to a lifetime partnership. However, the law recognizes that some couples will want to separate or divorce. The covenant marriage provisions require a spouse to first obtain counseling and then prove one or more grounds for separation or divorce as listed in the statute. This is the key difference between the two types of marriage: in essence, a spouse has to prove fault by the other spouse. The grounds for legal separation are: ADULTERY by the other spouse; commission of a felony by the other spouse and a sentence of imprisonment at hard labor, or death; ABANDONMENT by the other spouse for one year; physical or SEXUAL ABUSE of the spouse or of a child of either spouse; the spouses have lived separate and apart for two years; or habitual intemperance (for example, alcohol or drug abuse), cruel treatment, or severe ill treatment by the other spouse. The reasons for divorce exclude this last ground but include the other four.

The enactment of the Louisiana law did not signal a swift change in marriage law preferences. In the first year only one percent of couples elected covenant marriage; the rate remains less than five percent. Advocates of covenant marriage introduced similar legislation in other states but the results have not been overwhelming. Arizona passed a covenant marriage law in 1998 (A.R.S. § 25-901 et seq. [1998]), but it is less restrictive in setting grounds for divorce and does not have a two-year waiting period. Arkansas passed its covenant marriage law in 2001 (Covenant Marriage Act of 2001, § 9-11-801 et seq.). At least 16 other state legislatures considered laws between 1999 and 2002, but failed to enact them.

It is too early to tell whether covenant marriage will gain in popularity or whether other states will enact similar measures. In addition, it will take many years for researchers to assess the effectiveness of this type of marriage contract and to determine whether it helps couples avoid divorce. The small number of couples who seek covenant marriage may be the very ones who would have succeeded with a traditional marriage, as they have demonstrated a serious commitment to making their marriages last.

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CROSS-REFERENCES

Common-Law Marriage; Defense of Marriage Act of 1996.

"THROUGH THE CENTURIES, MEN OF LAW HAVE BEEN PERSISTENTLY CONCERNED WITH THE RESOLUTION OF DISPUTES . . . IN WAYS THAT ENABLE SOCIETY TO ACHIEVE ITS GOALS WITH A MINIMUM OF FORCE AND A MAXIMUM OF REASON."
—ARCHIBALD COX

## COVER

*To protect or shelter; to make good; to insure.* To cover a check *means to deposit sufficient funds in a bank account to pay the amount written on a check or checks.*

*The right of a purchaser to buy goods other than those that were originally contracted for as a remedy in the event of a breach of contract by the seller.*

In contract law concerning sales transactions, the UNIFORM COMMERCIAL CODE provides that a buyer may use cover for protection in an action for breach of a sales contract. The person may, in GOOD FAITH, purchase substitute goods when a seller violates their contract by failure to deliver goods. The buyer may then recover the difference between the original goods or contract price and the cost of cover.

## COVERAGE

*The risks that are included in the terms of an insurance contract for protection under the policy; the amount and type of insurance.*

An insurance policy provides coverage for particular losses, such as theft, fire, or accidents. The provisions of each individual policy determine the duration, extent, and nature of the coverage.

## COVERTURE

*An archaic term that refers to the legal status of a married woman.*

At COMMON LAW, coverture was the protection and control of a woman by her husband that gave rise to various rights and obligations. Upon marriage, a HUSBAND AND WIFE were said to have acquired unity of person that resulted in the husband having numerous rights over the property of his wife and in the wife being deprived of her power to enter into contracts or to bring lawsuits as an independent person. These restrictions were abolished by various statutes.

*During coverture* means within the duration of the marriage.

## ♦ COX, ARCHIBALD

Archibald Cox, a former Harvard Law School professor, came to national attention in the 1950s as a federal labor official. From 1961 to 1965, he served as SOLICITOR GENERAL. He is best known for his appointment in 1973 as the Department of Justice's special prosecutor in charge of investigating President RICHARD M. NIXON during the WATERGATE scandal. Cox's tenacious pursuit of Nixon's secret tape recordings precipitated a constitutional crisis, led to Cox's firing, and ultimately set the stage for Nixon's resignation from office in 1974.

Born on May 17, 1912, in Plainfield, New Jersey, Cox was one of six children of Archibald Cox and Francis Bruen Cox. He studied American history and economics before entering Harvard Law School, from which he graduated magna cum laude in 1937. After serving a law clerkship for the celebrated federal appellate judge LEARNED HAND, Cox entered private practice. In 1946, he became a full professor of law at Harvard. He held various federal positions in the area of LABOR LAW during the 1940s and 1950s, including that of head of the Korean War–era Wage Stabilization Board following an appointment in 1952 by President HARRY S. TRUMAN. Throughout those decades, he also arbitrated national labor disputes.

By the 1960s, Cox had established a reputation as a specialist in labor law. President JOHN F. KENNEDY sought him out as a campaign adviser in the 1960 election. After winning office, the president rewarded Cox by appointing him U.S. solicitor general, the attorney who argues government cases before the U.S. Supreme Court. Cox held the post until 1965, and then returned

to teaching law. He remained a highly sought-after negotiator and mediator. He was chosen by the New York City school system to help settle a teacher strike in 1967, and by Columbia University to investigate riots on its campus in 1968. He served as a special investigator for the Massachusetts state legislature in 1972.

For Cox, the pivotal appointment came in May 1973, when attorney general designate ELLIOT RICHARDSON appointed him to investigate President Nixon's role in the Watergate affair. The scandal had been simmering since the arrest, in June 1972, of five Republican political operatives for breaking into the Democratic party's national headquarters in the Watergate office complex in Washington, D.C. Nixon denied any involvement. But after evidence suggested a connection to White House aides, he promised to appoint a special prosecutor to investigate. When Cox took the appointment, Watergate was chiefly an embarrassment to Nixon; partly through Cox's efforts, it would become Nixon's undoing.

Since 1971, the president had been surreptitiously recording conversations in the White House, and Cox believed that the tapes contained key evidence. Cox put pressure on Nixon to release the recordings. Nixon refused, claiming that he had a constitutional right to keep presidential documents confidential. Cox warned that the refusal would precipitate a constitutional crisis. The Senate Select Committee on Presidential Campaign Activities was also conducting an investigation and was then holding public hearings. The two investigations resulted in a lawsuit that sought to force Nixon to release the tapes, and U.S. district court judge John J. Sirica ultimately ordered the president to do so. The president stonewalled.

*Archibald Cox.*
LIBRARY OF CONGRESS

By October 1973, Nixon had had enough. He wanted Cox gone. But rather than compromise the integrity of the DEPARTMENT OF JUSTICE by firing the special prosecutor, Attorney General Richardson and Deputy Attorney General William D. Ruckelshaus resigned. Nixon ultimately found someone who was willing to do the job. He promoted Solicitor General ROBERT H. BORK to acting attorney general, and Bork fired Cox. Cox told the press, "Whether ours shall continue to be a government of laws and

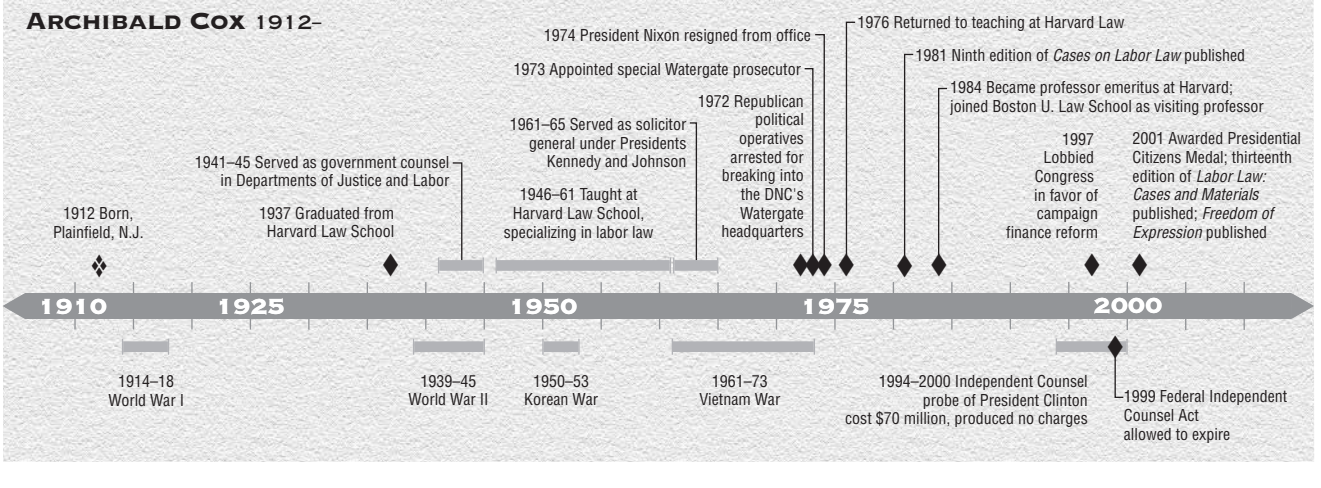

not of men is now for Congress and ultimately the American people to decide."

The public uproar following Cox's firing—including 3 million messages of protest sent to Congress—further destabilized the president, who was increasingly viewed as covering up his role in Watergate. Resolutions urging IMPEACHMENT were quickly introduced in the House of Representatives. Nine months later, the U.S. Supreme Court, in UNITED STATES V. NIXON, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), ordered Nixon to surrender materials that he had withheld from the Senate. On August 9, 1974, with impeachment almost certain, he resigned from office.

Cox returned to teaching at Harvard in 1976, pronouncing himself satisfied with the outcome of the Watergate affair. He remained at Harvard until 1984 and then served as a visiting professor of law at Boston University from 1984 to 1996. In his later years, he has advocated reform of campaign finance laws, delivering several speeches about the ethics of campaign financing in presidential elections. In 2000, he joined a lawsuit against the FEDERAL ELECTION COMMISSION, claiming that political party-financed advertisements in support of presidential candidates were illegal. The case was eventually dismissed by the U.S. Court of Appeals for the District of Columbia Circuit. *Wertheimer v. Federal Election Comm'n*, 268 F.3d 1070 (D.C. Cir. 2001).

"IT OFTEN HAPPENS THAT THE PRISONER SEEKS TO PALLIATE HIS CRIME BY THE PLEAS OF INTOXICATION; AS IF THE VOLUNTARY ABANDONMENT OF REASON . . . WERE NOT, OF ITSELF, AN OFFENSE SUFFICIENT TO MAKE HIM RESPONSIBLE FOR ALL ITS CONSEQUENCES."
—WILLIAM CRANCH

Besides writings in the legal and popular press, Cox's prodigious output of scholarship includes *Cases on Labor Law* (1948, 8th edition 1976), *Civil Rights, the Constitution, and the Courts* (1967), *The Role of the Supreme Court in American Government* (1976), and *The Court and the Constitution* (1987). Cox is a member of the American Academy of Arts and Sciences and the recipient of eight honorary law degrees from U.S. universities.

In 1997, Cox was the subject of a biography entitled *Archibald Cox: Conscience of a Nation* by Ken Gormley. The book focuses on Cox's long and distinguished career as a public servant. In 2001, Cox was honored with the Presidential Citizens Medal for exemplary public service.

## CPA

*An abbreviation for certified public accountant. A CPA is a trained accountant who has been examined and licensed by the state. He or she is permitted to perform all the tasks of an ordinary accountant in addition to examining the books and records of various business organizations, such as corporations.*

## CRAFT UNION

*An association of laborers wherein all the members do the same type of work.*

In a craft union, the members all perform an occupation, or trade, that relies on the use of the hands. They practice a particular trade and perform their work in different industries for a variety of employers. Carpenters and tool and die makers are types of employees who may belong to a craft union.

CROSS-REFERENCES

Labor Union.

## ❖ CRANCH, WILLIAM

William Cranch served as a federal judge for more than five decades, and was also reporter of decisions for the SUPREME COURT OF THE UNITED STATES from 1801 to 1815.

Cranch was born July 17, 1769, in Weymouth, Massachusetts. His father, Richard Cranch, was a member of the Massachusetts Legislature and judge of the court of COMMON PLEAS, and his mother, Mary Cranch, was the sister of Abigail Adams, wife of the future president JOHN ADAMS. Educated privately in his early life, Cranch entered Harvard in 1784 and graduated with honors in 1787. He then studied law in Boston and was admitted to the Massachusetts bar in 1790. He subsequently practiced law briefly, first in Braintree, Massachusetts, and then in Haverhill, Massachusetts.

In 1791, Cranch moved to Washington, D.C., to become a legal agent for a real estate firm that made large and speculative investments in the city based on the municipality's recent selection to be the nation's capital. The venture later proved to be financially disastrous, and Cranch was financially ruined as a result of its collapse. In 1800, John Adams, by then president, came to Cranch's rescue by appointing him a commissioner of public buildings for the District of Columbia. In early 1801, the District of Columbia Circuit Court was established, and Adams appointed Cranch an assistant judge of the court. Cranch was elevated to chief judge in 1805 and served on the court for fifty-four years.

About the same time Cranch became a judge, the Supreme Court of the United States moved from Philadelphia to Washington, D.C.

ALEXANDER J. DALLAS, who had reported some of the Court's decisions on an unofficial and fairly informal basis during its terms in Philadelphia, left the position after the Court relocated, and Cranch, while serving on the circuit court, became reporter of the Supreme Court's decisions in 1802. As reporter, Cranch assembled and published the Court's decisions and then sold them to the public and the practicing bar. Cranch was not appointed to the position but took it strictly on his own initiative. Cranch's first volume of published opinions contained the Court's decisions from 1801 to 1804. Before 1804, the Court's opinions had not been readily available to the practicing bar and were known even less by the general public.

In his preface to his first volume, Cranch stated that he hoped the publication of the Court's decisions would eliminate the "uncertainty of the law" while also ensuring its consistency. "Every case decided is a check upon the judge," he wrote. "He cannot decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public. The avenues to corruption are thus obstructed, and the sources of litigation closed." Cranch went on to publish nine volumes in all, which contained many of the important CONSTITUTIONAL LAW decisions of the Court when it was headed by Chief Justice JOHN MARSHALL. As was the practice during the early days of the Court, the volumes published by Cranch bear his name on the spine.

In addition to his duties as Supreme Court reporter, Cranch enjoyed a distinguished career as a federal circuit court judge. He decided *United States v. Bollman & Swartwout,* 1 Cranch 379, later upheld on appeal to the Supreme Court (80 S. (4 Cranch) 75 [1807]). *Bollman* was a TREASON case tried against Dr. Justus E. Bollman, Samuel Swartwout, and AARON BURR, who were accused of conspiring to create a new nation in the western United States. In *Bollman,* Cranch found that, despite popular opinion to the contrary, the arrest of Aaron Burr's accomplices was not justified because of insufficient evidence. Cranch also wrote a number of papers and articles on legal topics, and in 1817, delivered a series of lectures about his uncle, the president, that was later published as *Memoir of the Life, Character, and Writings of John Adams* (1827).

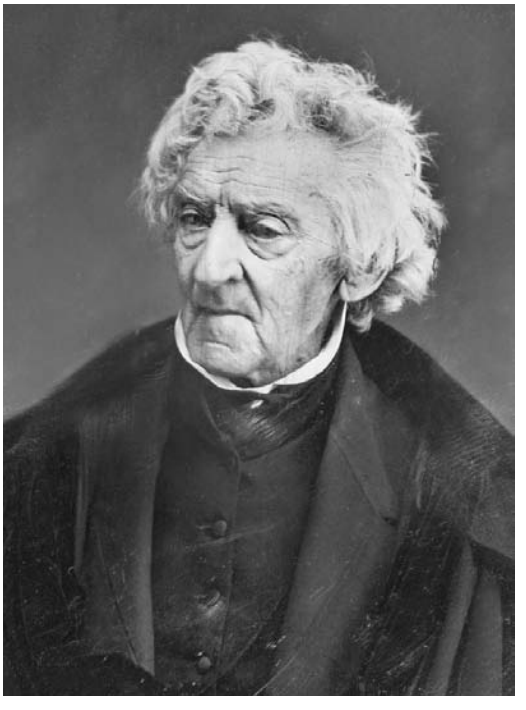

*William Cranch.*
LIBRARY OF CONGRESS

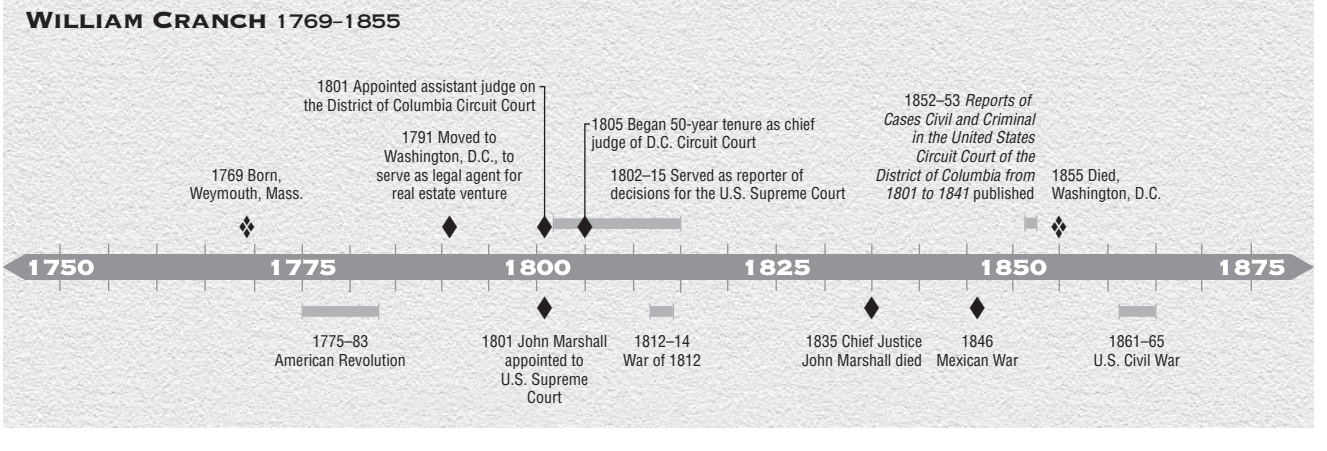

Cranch continued as reporter through the WAR OF 1812. By that time, his own judicial workload as well as the increasing number of opinions issued by the Marshall Court caused him to fall steadily behind schedule, so that opinions often did not appear in print until long after they had first been issued by the Court. Furthermore, though Cranch was credited for providing the text of lawyers' arguments and introducing summaries of the principal points decided in a case, he was also widely criticized by members of the bar for his inaccurate and sometimes obscure notes and annotations. Under pressure from some members of the Court, Cranch resigned the reporter's post, which had not been financially lucrative for him, and was replaced in 1815 by HENRY WHEATON, the Court's first officially appointed reporter and the first to be paid a yearly salary.

Cranch continued to serve as judge on the District of Columbia Circuit Court for another forty years after leaving the Supreme Court. He remained active in publishing, assembling and publishing in 1853 the decisions of his own court in six volumes. He also wrote other scholarly and political works, sometimes published under pseudonyms, until his death in 1855 at the age of eighty-seven.

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CROSS-REFERENCES

Legal Publishing.

## CREDIBILITY

*Believability. The major legal application of the term* credibility *relates to the testimony of a witness or party during a trial. Testimony must be both competent and credible if it is to be accepted by the trier of fact as proof of an issue being litigated.*

The credibility of a witness or party is based upon the ability of the jury to trust and believe what he or she says, and relates to the accuracy of his or her testimony as well as to its logic, truthfulness, and sincerity. *Personal credibility* depends upon the qualities of a person that would lead a jury to believe or disbelieve what the person said.

## CREDIT

*A term used in accounting to describe either an entry on the righthand side of an account or the process of making such an entry. A credit records the increases in liabilities, owners'* EQUITY, *and revenues as well as the decreases in assets and expenses.*

*A sum in taxation that is subtracted from the computed tax, as opposed to a deduction that is ordinarily subtracted from gross income to determine adjusted gross income or taxable income. A claim for a particular sum of money.*

*The ability of an individual or a company to borrow money or procure goods on time, as a result of a positive opinion by the particular lender concerning such borrower's solvency and reliability. The right granted by a creditor to a debtor to delay satisfaction of a debt, or to incur a debt and defer the payment thereof.*

CONSUMER CREDIT consists of short-term loans made to people so that they can purchase consumer goods and services for personal or household purposes.

The term *credit* has various applications to transactions that involve borrowing. Credit can be used in reference to the ability to postpone payment, as in the case of an individual who has credit with a local store that allows purchase of items on a weekly basis and settlement of account due once a month. An individual might also be extended a credit line, the maximum amount of money that a lender will put at a borrower's disposal. In such case, an individual enters into an agreement for the taking out of a series of loans. Since there is a fixed limitation on the amount to be borrowed, payments must be made to reduce the debt incurred when the maximum is reached.

A letter of credit, sometimes called a creditor's bill, is a written instrument from a bank or merchant in one location requesting that anyone, or some specifically named individual, advance money or items on credit to the individual holding, or named in, the letter. Repayment of the debt is guaranteed by the bank or merchant issuing the letter. Letters of credit are popular in international commercial transactions because they enable parties to transact business without the need to exchange large amounts of cash. This type of instrument was also popular prior to the common usage of credit cards and travelers' checks.

*Personal credit* is granted based upon an individual's character, reputation, and business standing regarding his or her financial reliability.

*A sample plain-language cardholder agreement for a bank credit card.*

## Plain-language Cardholder Agreement

**Erie Shores Credit Union, Inc.**
**VISA CARDHOLDER AGREEMENT**

Effective: February 2002

This Agreement covers your credit card account with us, Erie Shores Credit Union, Inc.. The person ("Account Holder" or "You") whose name is embossed on the face of the Visa credit card ("Card") provided to Account Holder and issued by us and each Account Holder, by signing or using the Card, agrees with Issuer to the following terms:

1. Your Account. If you have a joint account, each Account Holder has the right to use the account up to the extended credit limit as described below. Each Account Holder is bound by these terms and each, individually, will be liable for all charges, even if only one of you uses the account. For joint accounts, each individual separately, and both individuals together, are referred to in this Agreement as "You".

2. Credit Card Account Services. These services are available through your Card account, up to the amount of your credit limit.

   a. Credit Purchases. You can use your account to purchase goods and services wherever Visa credit cards are accepted (referred to in this Agreement as "Credit Purchases").

   b. Cash Advances. You can get a Cash Advance (referred to in this Agreement as a "Cash Advance") from your account by presenting your Card at a financial institution that accepts Visa. You can also use your Card to obtain up to $1005 per day in cash from any authorized Erie Shores Credit Union, Inc. Automated Teller Machine ("ATM"). You may not obtain a Cash Advance if your account is delinquent, closed or the amount of the advance would cause your balance to go over your credit limit.

3. Your promise to pay.

3.1 You promise to pay us, when due, the total of all Credit Purchases and Cash Advances you make on your account. You also promise to pay the total of any Finance Charge and other charges due on the account. You also promise to pay all costs and expenses, including reasonable attorneys' fees that we incur in enforcing this Agreement.

3.2 You may pay your entire balance at any time.

4. Additional Card Holders or Others Using Your Account. You may authorize others to use your account. You may add up to 3 additional card holder(s) to your account at no extra charge. Each additional card holder will receive a credit card with his or her individual name embossed. You promise to pay for all Credit Purchases and Cash Advances made by anyone you authorize to use your account, with or without a card, and whether or not you notify us that he or she will be using it. If another person has use of your account and you want to end that person's privilege, you must recover and return that person's credit card, if any. If you are unable to recover and return the card, you will continue to be liable for any charges made unless you tell us to cancel all cards and establish a new account for you, which will be done automatically if you notify us of unauthorized use under Paragraph 22 of this Agreement. We may request written verification from you regarding any change or cancellation to your account.

5. U.S. Currency. If you make a purchase or cash advance in foreign currency the transaction will be converted into U.S. Dollars by Visa.

   For Visa Accounts: To the extent that you have used your Visa card to purchase goods or services, or obtain cash in another country, your statement may reflect the conversion into U.S. dollars of transactions which occurred, initially, in a different currency. The exchange rate applied to such transactions is a (I) wholesale market rate or (ii) government-mandated rate in effect one day prior to the processing date, increased by one percent.

6. Your Credit Limit; Overlimit Fees. Your credit limit is shown on each of your billing statements. You agree not to use your account in any way that will cause your balance to go over your limit. If you do, we may at our option, close your account, and/or exercise any of our other remedies under this Agreement or at law. You must pay the full amount of your balance which is over the credit limit. The fact that we do not ask you for that amount as part of the Minimum Periodic Payment shown on your billing statement does not relieve you of your obligation to pay it immediately. We will charge you a fee each time your balance exceeds your credit limit by $1.00 or more. We will not authorize any new Credit Purchases or Cash Advances if your records show that doing so will cause your balance to go over your limit. If we do authorize any such Credit Purchase or Cash Advance, such authorization will not result in any waiver of our rights under this section. If we increase your credit limit, we will notify you.

7. Law Governing This Agreement. TO THE EXTENT NOT EXPRESSLY PROHIBITED BY APPLICABLE LAW, THIS AGREEMENT AND YOUR ACCOUNT, AS WELL AS OUR RIGHTS AND DUTIES AND YOUR RIGHTS AND DUTIES REGARDING THIS AGREEMENT AND YOUR ACCOUNT, WILL BE GOVERNED BY AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF THE STATE OF OHIO, (EXCLUDING THE CONFLICTS LAW OF OHIO AND THE UNITED STATES, REGARDLESS OF WHERE YOU MAY RESIDE OR USE YOUR ACCOUNT AT ANY TIME. This choice of law is made because of a strong relationship between this Agreement and your account to Erie Shores Credit Union, Inc., because Issuer is located in Ohio, and to insure uniform procedures and interpretation for all of our customers, no matter where they reside or use their accounts. If any term or provision of this Agreement is found to be unenforceable, this will not make any other terms or provision unenforceable.

8. Limitation on Lawsuits. You agree that any lawsuit based on any cause of action which you may have against us must be filed within one year from the date that it arises or you will be barred from filing a lawsuit. This limitation is intended to include tort, contract, and all other causes of action for which you and we may lawfully contract to set limitations for bringing suit.

9. Honoring Your Card. We will not have any responsibility to you if anyone refuses to honor a Card issued on your account. Any refund, adjustment or credit allowed by a Seller shall not be by cash but rather by a credit advice to us which shall be shown as a credit on your account statement.

10. Security for This Account. If I am in default, I authorize the Credit Union to exercise its right of offset, to use any funds in its possession which are titled in my name or joint name, except funds in an Individual Retirement Account to pay the balance due on this VISA account.

    If you have other loans or credit extensions from Issuer, or take out other loans or credit extensions with Issuer in the future, collateral securing those loans or credit extensions will also secure your obligations under this Agreement. However,

[continued]

*A sample plain-language cardholder agreement for a bank credit card (continued).*

**Plain-language Cardholder Agreement**

unless you expressly agree otherwise, your household goods and dwelling will not secure your obligations under this Agreement even if Issuer has or later acquires a security interest in the household goods or a mortgage on the dwelling. If you have executed a written agreement granting a security interest in any deposit accounts (checking, savings, or share accounts) or other funds held by Issuer to secure your obligations under this credit card plan, such accounts and/or funds are additional security for your obligations to Issuer arising from the use of your Card.

11. Payment Period. You will receive monthly billing statements from us. The New Balance shown on your statement is the total of unpaid obligations, which have been posted to your account as of the statement date. You can either pay the entire New Balance or you can pay in installments, but we must receive at least the Minimum Periodic Payment shown on your billing statement by the payment due date. The Minimum Periodic Payment is figured as follows:

| If Your New Balance is: | Your Minimum Periodic Payment is: |
|---|---|
| $10.00 or less | The amount of your New Balance. |
| Over $10.00 | 2.5% of that portion of the New Balance which does not exceed your credit limit, plus the entire portion of the New Balance in excess of your credit limit, plus any amount past due, or $10.00 whichever is greater. |

12. Payment Applications. Payments made to your account will be applied in the following order: Fees and Finance Charges; previously billed purchases; cash advances; and new purchases. We may accept checks marked "Payment in Full" or with words of similar effect without losing any of our rights to collect the full balance of your account.

13. Immediate Repayment of Your Full Balance. You will be in default, and we may, without notifying you, temporarily suspend your credit, close your account, cancel all credit cards issued on it and require immediate payment of your entire balance if any of the following occurs:

a. You fail to make a payment when it is due;
b. You do not follow the terms of this Agreement in any way;
c. You have made any false or misleading statement on the application for your account;
d. You fail to pay any other loans you owe us;
e. You become insolvent or die;
f. There is an attachment, execution or levy against your property or you make an assignment for the benefit of creditors;
g. A bankruptcy petition is filed by or against you or your spouse;
h. A guardian, conservator, receiver, custodian or trustee is appointed for you;
i. You are generally not paying your debts as they become due; or
j. There has been a material adverse change in your financial standing.

14. Reevaluation of Credit. We can reinvestigate and reevaluate any information you provided on your credit application at any time, and in the course of doing so, we may ask you for additional information, request credit bureau reports and/or otherwise verify your current credit standing.

15. Periodic FINANCE CHARGE. Your account will be subject to the Monthly Periodic FINANCE CHARGE Rate and corresponding Annual Percentage Rate applicable to the Erie Shores Credit Union, Inc. accounts, set forth in the Initial Disclosure provided to you by us.

The Periodic Finance charge on Cash Advances is calculated as follows:

A Finance Charge will be imposed on Cash Advances from the date of the Cash Advance, or from the first day of the billing cycle in which the Cash Advance is posted to your account, whichever is later, and will otherwise be calculated in the same manner as explained for Credit Purchases.

The Periodic Finance Charge on Credit Purchases is calculated as follows:

A Finance Charge will be imposed on Credit Purchases only if you elect not to pay the entire New Balance shown on your monthly statement for the previous billing cycle within 25 days from the closing date of that statement. If you elect not to pay the entire New Balance shown on your previous monthly statement within that 25-day period, a Finance Charge will be imposed on the unpaid average daily balance of such Credit Purchases from the previous statement closing date and on new Credit Purchases from the date of posting to your account during the current billing cycle, and will continue to accrue until the closing date of the billing cycle preceding the date on which the entire New Balance is paid in full or until the date of payment if more than 25 days from the closing date.

The Finance Charge for a billing cycle is computed by applying the monthly Periodic Rate to the average daily balance of Credit Purchases, which is determined by dividing the sum of the daily balances during the billing cycle by the number of days in the cycle. Each daily balance of Credit Purchases is determined by adding to the outstanding unpaid balance of Credit Purchases at the beginning of the billing cycle any new Credit Purchases posted to your account, and subtracting any payments as received and credits as posted to your account, but excluding any unpaid Finance Charges.

16. Transaction Finance Charge. The Transaction Finance Charge is a one-time charge made each time a new Cash Advance is posted to your account. The charge for each Cash Advance obtained through any ATM is $2.00. The charge of each Cash Advance obtained through any other source is $2.00.

Since Transaction Finance charges are one-time charges that must be included in calculating the Annual Percentage Rate, the actual Annual Percentage Rate shown on your periodic statement may exceed the corresponding Annual Percentage Rate (which is based on Periodic Finance Charge) in any month for which a new Cash Advance is posted to your account.

17. When Finance Charge Begins. The Transaction Finance Charge is assessed on the date the new Cash Advance is posted to your account. The Periodic Finance Charge for Credit Purchases and Cash Advances begins on the dates as described in paragraph 15 of this document.

[continued]

*A sample plain-language cardholder agreement for a bank credit card (continued).*

**Plain-language Cardholder Agreement**

18. Other Charges. The Total Other Charges is the sum of:

a. Membership Fee. We charge a membership fee of $0 per year, which will be billed to your account during the same "renewal month" each year. If we assign your account a renewal month other than the month of your first billing statement, we may assess a partial Membership Fee prorated for the period until the first renewal month. All Membership Fees are payable when posted to your account and are non-refundable except as otherwise provided for by law. This annual fee shall be treated as a credit purchase for purposes of calculating Finance Charges unless prohibited by law.

b. Late Charge. If we do not receive at least your minimum required payment within 10 days after the closing date subsequent to the payment due date indicated on your billing statement, we will impose a late or delinquency charge of $25.00.

c. Overlimit Charge. Each time your New Balance exceeds your maximum authorized credit we will impose an Overlimit Charge of $25.00.

d. Replacement Card. We reserve the right to charge you $15.00 to replace a card.

e. Non-Sufficient Funds. We reserve the right to charge $25.00 for non-sufficient funds.

19. If You Change Your Name or Address. You agree to notify us in writing within twenty days if you change your name, your home or mailing address, or home or business telephone number.

20. Our Right to Cancel Your Account. We can cancel your account at any time, or reduce the amount of your credit line, without notice to you, except in those situations where notice is required by law. If we cancel your account, you agree to destroy all Cards issued on your account by cutting them in half and returning them to us. You will continue to be responsible for full payment of the balance on your account and all charges to your account, including those not yet received by us, as well as subsequent Finance Charge and other charges. Each Card is our property, and you agree that the Cards are not transferable and to surrender any Card upon demand.

21. Change in Terms of Your Account. We can change any terms of your account at any time. We will provide you with such notice as is required by law by mailing a notice to you at the latest address shown in our records. Subject to applicable law, any change will apply to the current balance of your account, as well as to future balances.

22. If Your Card is Lost or Stolen or if an Unauthorized Use May Occur. You agree to notify us immediately if your card is ever lost or stolen or if an unauthorized use may have occurred. The telephone number to call is (800) 325-3678, and you agree to follow up your call with notice in writing to us at: Credit Card Security Department, P.O. Box 30035, Tampa, Florida 33630. You also agree to assist us in determining the facts, circumstances and other pertinent information relating to any loss, theft or possible unauthorized use of your credit card and comply with such procedures as we may require in connection with our investigation, including assisting in the prosecution of any unauthorized user.

23. Liability for Unauthorized Use of Credit Card. We may hold you liable for the unauthorized use of your credit card. You will not be liable for unauthorized use that occurs after you notify us orally or in writing of the loss, theft, or possible unauthorized use. In any case, your liability will not exceed $50.00.

24. Credit Information. You agree that we may release information to others, such as credit bureaus, regarding the status and history of your account. However, we are not obligated to release any such information to anyone unless we are required by law to do so.

25. Waivers. If, for any reason, we do not make use of any of our rights under this Agreement on a particular occasion, that will not limit our rights in the future in any way.

26. Our Address. To send payment: Payments must be sent to the address listed on the front of the billing statement after the phrase "make check payable to." To inquire or send correspondence: Write us at the address indicated on the front of the billing statement after the phrase "send inquiries to."

27. Important Notice to Our Customer Who Contacts Us by Phone. Cardholder agrees that Issuer, its agents and service companies may, without the need to seek additional confirmation from Cardholder, monitor and/or record any telephone communications with Cardholder to insure that inquiries from you are handled promptly, courteously, and accurately.

28. Visa Rules and Regulations. The services being provided to you under this Agreement are made possible by Issuer's status as a licensee of Visa U.S.A. You recognize Issuer's responsibility to comply with the current Visa U.S.A. rules and regulations and changes to them in order to continue to provide these services. Visa cards may not be used for any illegal transaction.

29. Regulation Z Initial Disclosures. By using your card, you acknowledge receipt from us of the Initial Disclosures required by Regulation Z of the Truth-In-Lending Act and that the terms contained in the Initial Disclosures apply to you and your use of the card and are incorporated in full into this Agreement. The information about the terms and costs of the Card described in this Customer Agreement is accurate as of the Effective Date. This information may have changed after that date. To find out what may have changed, call us or write to us.

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|---|---|
| Write to: | Erie Shores Credit Union, Inc.<br>P.O. Box 9037<br>1688 Woodlands Drive<br>Maumee, OH 43537 |
| Call at: | (800) 248-8110 or<br>(419) 897-8110 |

**Printed Nov-01**

### Development of the Law of Credit

Traditionally, the law has sought to protect borrowers since they are easily exploitable by lenders. Often the two parties do not have equal bargaining opportunities to negotiate all the terms of the agreement, and, therefore, the stronger is able to take advantage of the more vulnerable. The established legal viewpoint is that a lender can properly charge a fee for use of the funds he or she lends, but the rate of interest should be neither unfair nor UNCONSCIONABLE.

USURY traditionally meant charging interest or a fee in exchange for a loan, but it has come to mean charging an illegal rate of interest. Certain credit transactions, such as the loan of money pursuant to a mortgage, are exempt from the provisions of usury statutes.

**Amortization** Amortization—a system that allows a borrower to discharge a debt in regular, equal installments—was developed in the nineteenth century by savings and loan associations. To amortize a loan, the lender must calculate the total interest due over the term of repayment, add that figure to the total sum borrowed, and divide the total by the number of payments to determine the size of regular, periodically scheduled payments to be made by a debtor.

**Morris Plans** The establishment of Morris plan companies, still found in some states, was a significant development in the consumer credit business. These industrial banks accept deposits from the general public and issue investment certificates in the amount of each deposit. The certificates entitle the holder to obtain interest on a deposit at regularly scheduled intervals. The bank utilizes the funds primarily to make small loans to wage earners who are steadily employed. It is necessary for borrowers to secure two other salaried individuals to endorse the agreement. The loan is repaid in installments during the course of a one-year period.

**State Consumer Laws** Originally the fact that consumer loans were difficult to obtain created loan sharking—the practice of lending money at usurious interest rates—coupled with the threat or use of extortionate methods of enforcing repayment. The Russell Sage Foundation analyzed the loan shark problem in 1916 and suggested that credit should be made available to consumers. It proposed a Uniform Small Loan Law for enactment by the states that defined small loans as those under $300. A maximum interest rate of three and one-half percent monthly on small loans was suggested. The interest rate was stated as a per-month charge in order to encourage legislators to adopt the act and to prevent consumers from going to loan sharks who make a practice of concealing their true rates of interest.

The Uniform Small Loan Law was subsequently revised but was important since it made way for legal lending to consumers. It was created as an exception to state usury laws and furnished the pattern for the subsequent creation of consumer credit legislation.

### Legal Rate of Interest

Interest can be computed in a number of ways, and creditors generally attempt to use the most profitable way that is within legal limits. In figuring the legal rate of interest, it is essential to determine which expenses are a part of the finance or interest charges. Not customarily considered components of finance charges are fees for filing or recording a document, for payment of an individual who does an appraisal, and for the expense of preparing documents; closing costs; and prepayment penalties.

## CREDIT BUREAU

*A privately owned, profit-making establishment that—as a regular business—collects and compiles data regarding the solvency, character, responsibility, and reputation of a particular individual or business in order to furnish such information to subscribers, in the form of a report allowing them to evaluate the financial stability of the subject of the report.*

Credit bureaus ordinarily prepare and issue reports for lending institutions and stores that investigate the financial reliability of an applicant for credit prior to the execution of the credit agreement.

Credit bureaus are regulated by the federal FAIR CREDIT REPORTING ACT (15 U.S.C.A. § 1681 et seq. [1970]) and by state statute to safeguard against abusive and damaging practices.

## CRÉDIT MOBILIER SCANDAL

The Reconstruction era after the Civil War was a time of chaos, reorganization, and corruption that affected not only lesser state officials but also federal government agents. The Crédit Mobilier affair, which had its early beginnings in 1864 but was not publicly investigated until 1873, is an example of the corrupt practices that characterized the period.

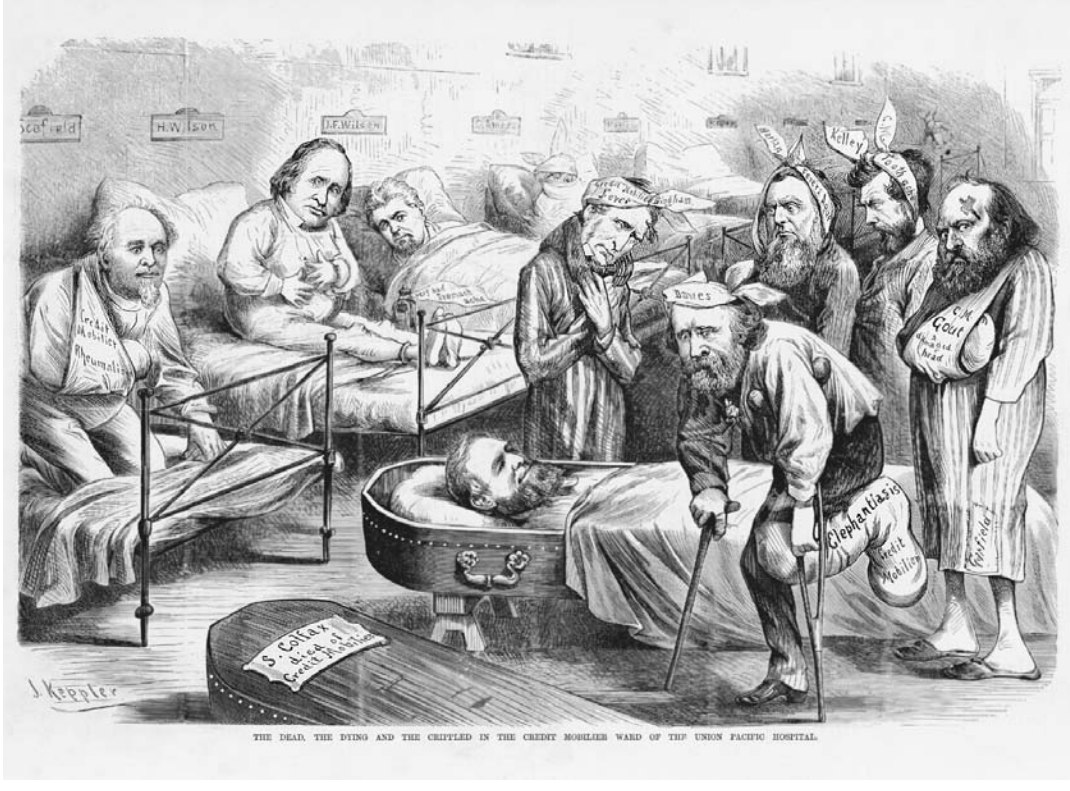


*Cartoonist Joseph Keppler offered a satirical portrayal of the Crédit Mobilier Scandal by depicting politicians involved in the affair as residents in a hospital ward. In actuality, punishment was lenient: Representatives James Brooks and Oakes Ames were merely censured.*

CORBIS

In 1864, Thomas C. Durant, an administrator of the Union Pacific Railroad, bought the Pennsylvania Fiscal Agency, which was chartered in 1859. The agency was renamed Crédit Mobilier of America and its proposed purpose as a construction company was the building of the Union Pacific Railroad. The federal government had granted the railroad generous loans and contracts for its construction, and the administrators of the railroad planned to divert this money into the Crédit Mobilier Company, allowing the stockholders of the company to enjoy huge profits. Government officials first became involved in 1865 when Oakes Ames, congressional representative from Massachusetts, and his brother Oliver bought shares of stock in the Crédit Mobilier and, indirectly, in the Union Pacific Railroad. The Ames brothers soon became the power behind the Union Pacific, and, in 1866, Durant was replaced by Oliver Ames.

The building of the railroad was fraudulently financed for approximately $50 million more than was necessary. In addition, Oakes Ames sold a large number of shares of stock in Crédit Mobilier at a reduced rate to several of his fellow congressmen. This move on the part of Ames was to allay any suspicious interest in the undertakings of the two companies and to encourage legislation beneficial to the railroad. This maneuver occurred in 1867, and for the next five years rumors surrounding the activities of Ames and other government officials circulated.

The scandal erupted in 1872 when the details of the Crédit Mobilier Company became an issue of the presidential campaign of that year. Several important officials were involved including vice presidential candidate Henry Wilson, incumbent vice president Schyler Colfax, future president and member of the House of Representatives JAMES A. GARFIELD, and Speaker of the House James G. Blaine. An investigation began in 1873. The punishments for such behavior were surprisingly lenient, however, and the Crédit Mobilier Company and Congressman Ames were merely publicly censured.

## CREDIT UNION

*A corporation formed under special statutory provisions to further thrift among its members while providing credit for them at more favorable rates of interest than those offered by other lending institutions. A credit union is a cooperative association that utilizes funds deposited by a small group of people who are its sole borrowers and*

*beneficiaries. It is ordinarily subject to regulation by state banking boards or commissions. When formed pursuant to the Federal Credit Union Act (12 U.S.C.A. § 1751 et seq. [1934]), credit unions are chartered and regulated by the* NATIONAL CREDIT UNION ADMINISTRATION.

A credit union can be distinguished from other financial institutions by the fact that membership is ordinarily restricted to individuals who meet certain residential or occupational criteria. In addition, it can make loans of a more diversified nature than certain institutions, such as building and loan associations.

## CREDITOR

*An individual to whom an obligation is owed because he or she has given something of value in exchange. One who may legally demand and receive money, either through the fulfillment of a contract or due to injury sustained as a result of another's* NEGLIGENCE *or intentionally wrongful act. The term* creditor *is also used to describe an individual who is engaged in the business of lending money or selling items for which immediate payment is not demanded but an obligation of repayment exists as of a future date.*

An attachment *creditor* is an individual who has obtained an order of attachment from a court to command a sheriff to seize the property of a debtor who has defaulted in the repayment of an outstanding obligation so that the property may be used to satisfy the creditor's claim.

A JUDGMENT CREDITOR is a party who has gone to court and obtained a judgment against the person who owes him or her money. If that judgment creditor obtains an order of attachment, he or she becomes an attachment creditor.

A general creditor or *creditor at large* is an individual who has neither a lien nor a security interest in the property of the debtor.

A *junior creditor* is one whose right to collect money from a debtor is subordinate to that of another individual who also has a right to collect payment of a different debt from the same debtor. The person with the primary right to payment is known as a *senior creditor.*

A *principal creditor* is the party who has a claim against the debtor that is far greater than the debt owed to any other creditor, and in some instances, to all other creditors combined.

A secured creditor holds a special legal right in particular property of the debtor to assure him or her of repayment of the debt. A creditor who has the protection of a lien or mortgage is secured.

A *single creditor* has a lien on only one of the debtor's funds or accounts.

*Petitioning creditors* are those parties to whom one debtor owes money and who apply to the court of BANKRUPTCY in order to secure the debtor's property and distribute it equitably among them.

## CREDITOR'S BILL

*An equitable proceeding initiated by a person who has obtained—and is entitled to enforce—a money judgment against a debtor to collect the payment of a debt that cannot be reached through normal legal procedures.*

A plaintiff might, for example, win a lawsuit against a defendant whereupon the defendant might be ordered to pay damages. In the event that the defendant does not pay promptly, the usual way for the plaintiff to obtain payment is to pay a certain designated fee to the sheriff who would seize the defendant's property, sell it, and pay the plaintiff with the proceeds. If, for example, the defendant only has property that is worth less than the plaintiff's judgment, the plaintiff creditor might pursue the defendant's rights to collect money from others. The person can then initiate a creditor's bill, also known as *creditor's suit,* requesting that the court authorize a way to obtain the money affected by such rights. Such funds as those that come from corporate stock, ANNUITY checks, growing crops, and money owed to the debtor from another person can all be subjected to creditors' suits. A creditor's bill cannot, however, be used to obtain a liquor license, property in another state, or future unearned wages or salary.

## CRIME CONTROL ACTS

The vast majority of substantive criminal statutes may be characterized, in one way or another, as "crime control acts." The term "crime control act" is often used in the titles of comprehensive bills that can be hundreds of pages long. These acts can identify a broad array of new crimes, revise existing criminal laws, enhance sentencing and other penalties attached to those crimes, and finance the provisions of these bills. Congress enacted a series of crime control statutes, especially during the late twentieth century, that has introduced a myriad of new forms of CRIMINAL LAW at the federal level, including

provisions prohibiting MONEY LAUNDERING, CARJACKING, drug enforcement, criminal forfeiture, and offenses under the RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT.

According to the Task Force on Federalization of Criminal Law of the AMERICAN BAR ASSOCIATION, only an "initial handful" of federal statutes existed at the turn of the nineteenth century, as federal criminal law consisted of a total of 17 statutes. Throughout the nineteenth century, federal criminal statutes were fairly narrow, generally protecting only federal interests and interests where the states held limited power to address a particular form of crime. The number of federal crimes, however, grew considerably toward the latter part of the nineteenth century and into the early twentieth century. By the 1930s, Congress sought to address concerns that crime had become rampant across the United States, and that states had difficulty handling the increase of crime effectively.

Many of the federal criminal statutes in the 1930s addressed specific forms of criminal activity, such as KIDNAPPING, RACKETEERING, SECURITIES FRAUD, and the illegal use and sale of firearms. In 1934, Congress enacted a series of statutes known as the Crime Control Acts, chs. 299-304, 48 Stat. 780-83 (codified as amended in scattered sections of 18 U.S.C.A.). These acts included provisions for punishment for killing and assaulting federal officers, EXTORTION, transportation of kidnapped persons, and interstate flight, as well as provisions defining crimes in connection with the administration of federal prisons and crimes committed against banks operating under the laws of the United States.

Although the number of federal crimes continued to grow throughout the twentieth century, the perception persisted that crime was rampant throughout the United States, particularly during the turbulent times of the 1960s. Faced with the high incidence of crime throughout the country, Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended in scattered sections of 18 U.S.C.A.). When enacting this legislation, Congress acknowledged that crime is fundamentally a state and local problem, and that it requires the efforts of state and local law enforcement in order to control crime effectively. The 1968 statute encouraged states and units of local government to prepare and adopt comprehensive plans to address crime in those particular states or localities. Under the statute, Congress also authorized grants to the states and local entities to strengthen and improve law enforcement, and encouraged research and development that would be aimed at the improvement of law enforcement methods, the reduction of crime, and the detection and apprehension of criminals.

Included within the original Omnibus Crime Control and Safe Streets Act were a number of controversial provisions regarding wire intercepting and interception of oral communications, as well as measures to allow states and local agencies to control firearms at the local level. The provisions contained in this act have been amended and revised dozens of times since the initial 1968 enactment.

The federalization of criminal law continued during the 1970s. The Crime Control Act of 1973, 93-83, 87 Stat. 197 (codified as amended in scattered sections of 18 U.S.C.A.) serviced the same general purpose as the Omnibus Crime Control and Safe Streets Act. Its primary purpose was to provide grants and other funding to law enforcement agencies in their fights against crime at the state and local levels. Three years later, Congress approved the Crime Control Act of 1976, Pub. L. No. 94-503, 90 Stat. 2407 (codified as amended in scattered sections of 18 U.S.C.A.). The 1976 act established the Office of Community Crime Programs and other measures that were designed to enhance the ability of local law enforcement agencies.

Although federal criminal law had undergone a metamorphosis in the 1960s and 1970s, the federal criminal code had not undergone a comprehensive revision since the early 1900s. In 1984, Congress wrangled with a major bill that would provide this comprehensive revision, eventually enacting the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976. Although controversial sections of the original bill related to CAPITAL PUNISHMENT, an exception to the EXCLUSIONARY RULE in CRIMINAL PROCEDURE, restrictions on HABEAS CORPUS proceedings in federal courts, and liability of the government for CIVIL RIGHTS violations were removed before the bill was passed, the final draft of the legislation was not satisfactory to several members of Congress. Within days of the passage of the Comprehensive Crime Control Act, Congress enacted the Criminal Fine Enforcement Act, Pub. L. No. 98-596, 98 Stat. 3134, which repealed some of the provisions of the Comprehensive Crime Control Act soon

after they became effective. Nevertheless, the provisions that remained intact were significant in federal criminal law.

Among the new provisions in the Comprehensive Crime Control Act were those addressing violent offenses, federal anti-terrorism provisions, certain economic offenses, controlled substances, and a number of other miscellaneous crimes. One of the more important measures in the act included a new system governing sentencing for federal crimes. Chapter 2 of the act, the Sentencing Reform Act of 1984, established the UNITED STATES SENTENCING COMMISSION, which is responsible for drafting and revising the Federal Sentencing Guidelines. The first of these sentencing guidelines went into effect in 1987, although they have been amended significantly since then. The Federal Sentencing Guidelines not only have changed the sentencing procedures in federal courts, but also have affected the ways in which state courts approach sentencing.

Comprehensive crime control legislation continued into the 1990s. The Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 further revised provisions of previous crime control statutes. Four years later, Congress addressed problems associated with violent crimes with the enactment of the VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994, Pub. L. No. 103-322, 108 Stat. 1796. That statute increased and enhanced punishment for violent offenders, including punishment of young offenders. The statute included numerous provisions regarding crime prevention. Some of the more controversial provisions of this act were contained in title IV of the statute, known as the VIOLENCE AGAINST WOMEN ACT. Although the statute has increased funds for research and education to enhance knowledge and awareness for judges and judicial staff in matters involving DOMESTIC VIOLENCE and sexual assault, the original statute also contained a measure that would make gender-motivated crimes a violation of federal civil rights law. The U.S. Supreme Court, in *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000), struck down the latter provision as unconstitutional.

Other crime control acts have addressed specific areas of concern with respect to crime. The Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, for instance, addressed specific problems relating to ORGANIZED CRIME, including the establishment of protected facilities to house government witnesses. The ongoing war against drugs has similarly led to the enactment of comprehensive legislation, including the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 and the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

Scholars have criticized the continued growth of the federalization of criminal law, as Congress continues to enact these comprehensive crime control bills. Federal criminal law now consists of more than 3,000 individual criminal offenses, many times more than the number that existed a century ago. Supporters of these bills note, however, that state and local officials have not shown the ability to address many of the criminal problems that are addressed under the new federal laws, and that federal law enforcement is in a better position to conduct the type of investigation that is necessary to curb incidents of crime throughout the country.

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CROSS-REFERENCES

Criminal Law; Criminal Procedure; Sentencing.

## CRIMES

*Acts or omissions that are in violation of law.*

Each state in the United States, as well as the federal government, maintains a body of criminal laws. As populations have increased and personal interactions and business transactions have grown more complicated, criminal laws have likewise grown in number and complexity. Most jurisdictions codify criminal statutes in a separate section in their laws. However, some crimes are placed in chapters or titles outside the designated criminal code. Generally, criminal laws are divided into several broad categories: offenses affecting public order, health, and morals; offenses involving trade, business, and professions; and offenses against the family. These categories often overlap. Juveniles and

minors generally receive special treatment under criminal statutes.

### Offenses Affecting Public Order, Health, and Morals

A number of acts are made criminal to preserve public order, health, and morals. Some of these laws are based in the COMMON LAW but have undergone significant changes over the years. Prostitution, if discreet and practiced indoors, was generally tolerated in colonial America, but streetwalkers were charged under lewdness, VAGRANCY, or similar laws. In the late nineteenth century, states began to identify and prohibit all prostitution, in criminal statutes, where it was defined as engaging in sex for hire. Prostitution is now illegal in all states except Nevada, where it is strictly regulated.

Pandering, or inducing another into prostitution, is illegal in all states, including Nevada. The solicitation of prostitution is illegal in all states except Nevada, where it is allowed only in licensed brothels.

Public OBSCENITY laws find their roots in the religious prohibitions of blasphemy and heresy, or defiance of the church. Laws prohibiting blasphemy and heresy were passed in colonial America, but after the passage of the FIRST AMENDMENT in 1791, states began to focus obscenity statutes on material with a sexual content. In 1996, the U.S. Congress passed the Telecommunications Act of 1996, Pub. L. 104-104, Feb. 8, 1996, 110 Stat. 56, which included criminal punishment for the transmission of obscenity through cyberspace.

The definition of obscenity is generally a matter of contemporary community standards. In New York, for example, any material or performance is obscene if "the average person, applying contemporary community standards," would find that the predominant effect of the work as a whole appeals "to the prurient interest in sex" (N.Y. Penal Law § 235.00 [McKinney 1995]). To be defined as obscene, the material or performance must also depict or describe "in an offensive manner, actual or simulated: sexual intercourse, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals." Finally, the material or performance must lack "serious literary, artistic, political and scientific value" before its creator can be punished for obscenity.

Obscenity laws include the prohibition of public profanity. The federal government, for example, outlaws visible written profanity in the mails and profanity on radio and television. The FEDERAL COMMUNICATIONS COMMISSION makes some exceptions for certain words during nighttime hours. Profanity, like obscenity, is a fluid concept, and its treatment is frequently the subject of legislation.

Gambling is illegal in some states. Other states allow only certain forms of gambling. Even where gambling is legal, it is strictly regulated, and the regulations are enforced by criminal statutes. For example, persons who maintain an unlicensed gambling operation in New Jersey may be charged with a crime of the fourth degree. Fourth-degree crimes in New Jersey normally carry a penalty of a $7,500 fine or eighteen months' imprisonment, or both; when the crime is unlicensed gambling, fines may reach $25,000 for individuals and $100,000 for organizations.

The U.S. Congress and state legislatures prohibit the manufacture, possession, and sale of certain mood-altering substances, such as marijuana, cocaine, heroin, and hallucinogens. Many manufactured drugs yielding psychotropic effects are legal, but only under the administration of a physician.

All states maintain laws that prohibit the driving of motorized vehicles while under the influence of alcohol or other mood-altering substances. These driving-under-the-influence (DUI) and driving-while-intoxicated (DWI) statutes outlaw or prohibit the drunken driving of boats and snowmobiles in addition to passenger vehicles and motorcycles. The range of vehicles subject to these laws is ever expanding: in 1996, a Texas man was charged with riding a bicycle while intoxicated. Intoxication is defined by statute at a specified blood-alcohol ratio.

Some criminal statutes are mainly designed to preserve public order. For example, many states criminalize loitering or prowling. In New Hampshire, no person is allowed to appear "at a place, or at a time, under circumstances that warrant alarm for the safety of persons or property in the vicinity" (N.H. Rev. Stat. Ann. § 644:6). When challenged, however, many loitering statutes are held by courts to be unconstitutionally vague.

Breach of the peace is a generic description for a range of DISORDERLY CONDUCT. Generally, breach-of-the-peace crimes consist of acts that disturb public tranquility and order. STALKING, or menacing, is the related crime of continually following or forcing unwanted contact on another.

The federal Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C.A. §§ 1961 et seq.) is designed to investigate, control, and prosecute ORGANIZED CRIME. Many states have enacted their own RACKETEERING laws to mirror RICO. Essentially, RICO punishes a pattern of racketeering activity that is accomplished through an organized enterprise. Prosecutors have broadened the use of RICO to support an additional criminal charge for even the most loosely organized crimes. For example, a person who conspires with another to commit FRAUD may be charged with fraud and violation of RICO, if the conspiracy was the product of an organized enterprise. Youth GANGS are among the organizations subject to RICO laws.

State and federal statutes criminalize the unlicensed possession of firearms. Firearm statutes prevent convicted felons from owning a gun. State and federal laws also place an outright ban on some models of automatic firearms.

Other criminal laws respecting public order, health, and morals are many and varied. State and federal election laws have burgeoned since the nineteenth century to prohibit a wide range of acts in connection with the public vote, such as campaigning on election day, coercing voters, and engaging in fraud. Immigration laws provide criminal penalties for immigrating illegally and for hiring illegal immigrants. All states maintain statutes to punish littering and the unauthorized dumping or storage of toxic waste. In Mississippi, DUELING is outlawed (Miss. Code Ann. § 97-39-1), as is cruelty to animals (§ 97-41-1). In New Hampshire, desecration of the U.S. flag is punishable as a misdemeanor (N.H. Rev. Stat. Ann. § 646-A:4).

### Offenses Involving Trade, Business, and Professions

Fraud, theft, and MISREPRESENTATION are extensively covered in state and federal statutes concerning virtually every occupation. These laws prohibit a wide variety of acts ranging from simulating gemstones and rigging weight scales to impersonating a doctor or a police officer, breaching confidentiality, and engaging in insider trading (the buying or selling of publicly held corporate shares by persons with inside or advance information regarding the corporation). The fraudulent use of credit cards is also the subject of criminal statutes. And CABLE TELEVISION and computers have inspired a number of criminal statutes punishing their abuse; state statutes, for example, punish the theft of cable television services.

### Offenses Against the Family

State legislatures enact numerous statutes to protect people against members of their own family. CHILD ABUSE laws make criminal the physical or mental abuse of a child. Spousal abuse is also punished under state statutes.

The failure of a parent to pay court-ordered CHILD SUPPORT is made criminal in state statutes. States work together in apprehending so-called deadbeat parents through a uniform statute called the Uniform Interstate Family Support Act (U.L.A. Unif. Interstate Family Support Act [1995]). A divorced parent who flees with a child may be criminally charged under state and federal KIDNAPPING statutes as well as CHILD CUSTODY statutes.

### Juveniles and Minors

Persons under the age of eighteen, known as juveniles, are presumed incapable of forming the criminal intent to commit criminal acts. They are, then, generally immune from prosecution for their crimes. They can still be held responsible in juvenile court for committing "delinquent acts," which, if they were committed as an adult, would be considered crimes. However, a juvenile may be tried for a crime if the prosecution is able to convince the court to certify the juvenile as an adult. A prosecutor generally reserves certification of a juvenile for serious crimes, such as murder or rape. In the 1990s, some state legislatures passed statutes allowing prosecutors to certify for criminal trial juveniles as young as age 14.

Minors also warrant special protection from society. Criminal statutes punish adults for contributing to the delinquency of a minor. This crime can be any act that tends to make a child delinquent. For example, giving a minor illegal drugs or PORNOGRAPHY is criminal under these statutes. State statutes also criminalize the sale of other adult materials, such as tobacco and alcohol, to minors.

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Computer Crime; Domestic Violence; Drugs and Narcotics; Gaming; Juvenile Law.

## CRIMINAL

*Pertaining to, or involving, crimes or the administration of penal justice. An individual who has been found guilty of the commission of conduct that causes social harm and that is punishable by law; a person who has committed a crime.*

## CRIMINAL ACTION

*The procedure by which a person accused of committing a crime is charged, brought to trial, and judged.*

The main part of a criminal action is the trial in which the innocence or guilt of the accused is determined. If the defendant is not found guilty, he or she will be acquitted of the charges. If the defendant is found to be guilty, a suitable punishment, such as a fine, imprisonment, or even a death sentence, will be imposed depending upon the punishment provided in the statute under which he or she was prosecuted.

## CRIMINAL CONVERSATION

*A* TORT *under* COMMON LAW *that involves the seduction of another person's spouse.*

A few states still permit a lawsuit for damages by the injured spouse against the wrongdoer. Many states have abolished this action.

Criminal conversation is not the same as alienation of affection, which does not necessarily involve the commission of ADULTERY.

## CRIMINAL FORFEITURE

*The loss of a criminal defendant's rights to property which is confiscated by the government when the property was used in the commission of a crime. The seizure by law enforcement officers of an automobile used in the transportation of illegal narcotics is a criminal forfeiture.*

Property that is subject to criminal FORFEITURE is taken from its owner without any compensation being made because of its use in illegal conduct. The taking of such property by the government is an exception to the principles of condemnation provided that the item is seized and retained as a result of the valid exercise of the POLICE POWER of the state or pursuant to constitutional federal statutes.

## CRIMINAL LAW

*A body of rules and statutes that defines conduct prohibited by the government because it threatens and harms public safety and welfare and that establishes punishment to be imposed for the commission of such acts.*

The term *criminal law* generally refers to substantive criminal laws. Substantive criminal laws define crimes and may establish punishments. In contrast, CRIMINAL PROCEDURE describes the process through which the criminal laws are enforced. For example, the law prohibiting murder is a substantive criminal law. The manner in which government enforces this substantive law—through the gathering of evidence and prosecution—is generally considered a procedural matter.

Crimes are usually categorized as felonies or misdemeanors based on their nature and the maximum punishment that can be imposed. A felony involves serious misconduct that is punishable by death or by imprisonment for more than one year. Most state criminal laws subdivide felonies into different classes with varying degrees of punishment. Crimes that do not amount to felonies are misdemeanors or violations. A misdemeanor is misconduct for which the law prescribes punishment of no more than one year in prison. Lesser offenses, such as traffic and parking infractions, are often called violations and are considered a part of criminal law.

The power to make certain conduct illegal is granted to Congress by virtue of the NECESSARY AND PROPER CLAUSE of the Constitution (art. I, § 8, cl. 18). Congress has the power to define and punish crimes whenever it is necessary and proper to do so, in order to accomplish and safeguard the goals of government and of society in general. Congress has wide discretion in classifying crimes as felonies or misdemeanors, and it may revise the classification of crimes.

State legislatures have the exclusive and inherent power to pass a law prohibiting and punishing any act, provided that the law does not contravene the provisions of the U.S. or state constitution. When classifying conduct as criminal, state legislatures must ensure that the classification bears some reasonable relation to the welfare and safety of society. Municipalities may make designated behavior illegal insofar as the power to do so has been delegated to them by the state legislature.

Laws passed by Congress or a state must define crimes with certainty. A citizen and the courts must have a clear understanding of a criminal law's requirements and prohibitions. The elements of a criminal law must be stated explicitly, and the statute must embody some

reasonably discoverable standards of guilt. If the language of a statute does not plainly show what the legislature intended to prohibit and punish, the statute may be declared VOID FOR VAGUENESS.

In deciding whether a statute is sufficiently certain and plain, the court must evaluate it from the standpoint of a person of ordinary intelligence who might be subject to its terms. A statute that fails to give such a person fair notice that the particular conduct is forbidden is indefinite and therefore void. Courts will not hold a person criminally responsible for conduct that could not reasonably be understood to be illegal. However, mere difficulty in understanding the meaning of the words used, or the AMBIGUITY of certain language, will not nullify a statute for vagueness.

A criminal statute does not lapse by failure of authorities to prosecute violations of it. If a statute is expressly repealed by the legislature, but some of its provisions are at the same time re-enacted, the re-enacted provisions continue in force without interruption. If a penal statute is repealed without a saving clause, which would provide that the statute continues in effect for crimes that were committed prior to its repeal, violations committed prior to its repeal cannot be prosecuted or punished after its repeal.

The same principles govern pending criminal proceedings. The punishment that is provided under a repealed statute without a saving clause cannot be enforced, nor can the proceeding be prosecuted further, even if the accused pleads guilty. A court cannot inflict punishment under a statute that no longer exists. If a relevant statute is repealed while an appeal of a conviction is pending, the conviction must be set aside if there is no saving clause. However, once a final judgment of conviction is handed down on appeal, a subsequent repeal of the statute upon which the conviction is based does not require reversal of the judgment.

Generally, two elements are required in order to find a person guilty of a crime: an overt criminal act and criminal intent. The requirement of an OVERT ACT is fulfilled when the defendant purposely, knowingly, or recklessly does something prohibited by law. An act is purposeful when a person holds a conscious objective to engage in certain conduct or to cause a particular result. To act knowingly means to do so voluntarily and deliberately, and not owing to mistake or some other innocent reason. An act is reckless when a person knows of an unjustifiable risk and consciously disregards it.

An omission, or failure to act, may constitute a criminal act if there is a duty to act. For example, a parent has a duty to protect his or her child from harm. A parent's failure to take reasonable steps to protect a child could result in criminal charges if the omission were considered to be at least reckless.

Ordinarily, a person cannot be convicted of a crime unless he or she is aware of all the facts that make his or her conduct criminal. However, if a person fails to be aware of a substantial and unjustifiable risk, an act or omission involving that risk may constitute negligent conduct that leads to criminal charges. NEGLIGENCE gives rise to criminal charges only if the defendant took a very unreasonable risk by acting or failing to act.

### Intent

Criminal intent must be formed before the act, and it must unite with the act. It need not exist for any given length of time before the act; the intent and the act can be as instantaneous as simultaneous or successive thoughts.

A jury may be permitted to infer criminal intent from facts that would lead a reasonable person to believe that it existed. For example, the intent to commit BURGLARY may be inferred from the accused's possession of tools for picking locks.

Criminal intent may also be presumed from the commission of the act. That is, the prosecution may rely on the presumption that a person intends the NATURAL AND PROBABLE CONSEQUENCES of his or her voluntary acts. For example, the intent to commit murder may be demonstrated by the particular voluntary movement that caused the death, such as the pointing and shooting of a firearm. A defendant may rebut this presumption by introducing evidence showing a lack of criminal intent. In the preceding example, if the murder defendant reasonably believed that the firearm was actually a toy, evidence showing that belief might rebut the presumption that death was intended.

Proof of general criminal intent is required for the conviction of most crimes. The intent element is usually fulfilled if the defendant was generally aware that he or she was very likely committing a crime. This means that the prosecution need not prove that the defendant was aware of all of the elements constituting the crime. For example, in a prosecution for the pos-

session of more than a certain amount of a controlled substance, it is not necessary to prove that the defendant knew the precise quantity. Other examples of general-intent crimes are BATTERY, rape, KIDNAPPING, and FALSE IMPRISONMENT.

Some crimes require a SPECIFIC INTENT. Where specific intent is an element of a crime, it must be proved by the prosecution as an independent fact. For example, ROBBERY is the taking of property from another's presence by force or threat of force. The intent element is fulfilled only by evidence showing that the defendant specifically intended to steal the property. Unlike general intent, specific intent may not be inferred from the commission of the unlawful act. Examples of specific-intent crimes are solicitation, attempt, conspiracy, first-degree premeditated murder, assault, LARCENY, robbery, burglary, forgery, false pretense, and EMBEZZLEMENT.

Most criminal laws require that the specified crime be committed with knowledge of the act's criminality and with criminal intent. However, some statutes make an act criminal regardless of intent. When a statute is silent as to intent, knowledge of criminality and criminal intent need not be proved. Such statutes are called STRICT LIABILITY laws. Examples are laws forbidding the sale of alcohol to minors, and STATUTORY RAPE laws.

The doctrine of transferred intent is another nuance of criminal intent. Transferred intent occurs where one intends the harm that is actually caused, but the injury occurs to a different victim or object. To illustrate, the law allows prosecution where the defendant intends to burn one house but actually burns another instead. The concept of transferred intent applies to HOMICIDE, battery, and ARSON.

Felony-murder statutes evince a special brand of transferred intent. Under a felony-murder statute, any death caused in the commission of, or in an attempt to commit, a predicate felony is murder. It is not necessary to prove that the defendant intended to kill the victim. For example, a death resulting from arson will give rise to a murder charge even though the defendant intentionally set the structure on fire without intending to kill a human being. Furthermore, the underlying crime need not have been the direct cause of the death. In the arson example, the victim need not die of burns; a fatal heart attack will trigger a charge of felony murder. In most jurisdictions, a death resulting from the perpetration of certain felonies will constitute first-degree murder. Such felonies usually include arson, robbery, burglary, rape, and kidnapping.

### Malice

Malice is a state of mind that compels a person to deliberately cause unjustifiable injury to another person. At COMMON LAW, murder was the unlawful killing of one human being by another with malice aforethought, or a predetermination to kill without legal justification or excuse. Most jurisdictions have omitted malice from statutes, in favor of less-nebulous terms to describe intent, such as *purpose* and *knowing.*

Massachusetts, for example, has retained malice as an element in criminal prosecutions. Under the General Laws of the Commonwealth of Massachusetts, Chapter 265, Section 1, malice is an essential element of first- and second-degree murder. According to the Supreme Judicial Court of Massachusetts malice is a mental state that "includes any unexcused intent to kill, to do grievous bodily harm, or to do an act creating a plain and strong likelihood that death or grievous harm will follow" (*Commonwealth v. Huot,* 403 N.E.2d 411 [1980]).

### Motives

Motives are the causes or reasons that induce a person to form the intent to commit a crime. They are not the same as intent. Rather, they explains why the person acted to violate the law. For example, knowledge that one will receive insurance funds upon the death of another may be a motive for murder, and sudden financial difficulty may be motive for embezzlement or burglary.

Proof of a motive is not required for the conviction of a crime. The existence of a motive is immaterial to the matter of guilt when that guilt is clearly established. However, when guilt is not clearly established, the presence of a motive might help to establish it. If a prosecution is based entirely on CIRCUMSTANTIAL EVIDENCE, the presence of a motive might be persuasive in establishing guilt; likewise, the absence of a motive might support a finding of innocence.

### Defenses

**Defenses Negating Criminal Capacity** To be held responsible for a crime, a person must understand the nature and consequences of his or her unlawful conduct. Under certain circumstances, a person who commits a crime lacks the legal capacity to be held responsible for the act.

# Should More Crimes Be Made Federal Offenses?

Enforcement of criminal laws in the United States has traditionally been a matter handled by the states. The federal government, conversely, has typically limited itself to policing only crimes against the federal government and interstate crime. This is just one expression of the U.S. system of **FEDERALISM**, the notion that the federal government exists in tandem with the states and does not, without necessity, deprive states of their powers. The **TENTH AMENDMENT** to the U.S. Constitution is an example of federalism at work. That amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Near the end of the twentieth century, however, Congress passed a host of federal laws that directly overlap with existing state criminal laws. Such laws include the Anti-Car Theft Act of 1992, the Child Support Recovery Act of 1992, the Animal Enterprise Protection Act of 1992, and new criminal laws on **ARSON**, narcotics and dangerous drugs, guns, **MONEY LAUNDERING** and reporting, **DOMESTIC VIOLENCE**, environmental transgressions, career criminals, and repeat offenders. As a result, in 1998, the number of criminal prosecutions in federal courts increased by 15 percent. The increase was nearly three times the increase in federal criminal prosecutions in 1997.

In a Report of the Federal Judiciary issued at the end of 1998, U.S. Supreme Court Chief Justice **WILLIAM H. REHNQUIST** criticized the congressional movement toward federalizing the criminal justice system. "Federal courts were not created to adjudicate local crimes," Rehnquist instructed, "no matter how sensational or heinous the crimes may be." Rehnquist noted the tremendous toll that federalization of crime was exacting on the federal judiciary, and he decried the damage it was doing to the concept of federalism: "The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system." According to Rehnquist, the problem was political in nature; senators and representatives in Congress were using the act of lawmaking to win or keep their seats: "The pressure in Congress to appear responsive to every highly publicized societal ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in this particular area and, ultimately, whether we want most of our legal relationships decided at the national rather than local level."

In his 1998 report, Rehnquist cited a report on federal courts issued by the 1995 **JUDICIAL CONFERENCE OF THE UNITED STATES**. The Judicial Conference recommended that federal courts be used for only five types of cases: 1) offenses against the government or its inherent interests; 2) criminal activity with substantial multi-state or international aspects; 3) criminal activity involving complex commercial or institutional enterprises most effectively prosecuted under federal resources or expertise; 4) serious high level or widespread state or local government corruption; and 5) criminal cases raising highly sensitive local issues. "Although Congress need not follow the recommendations of the Judicial Conference," Rehnquist wrote, "this Long-Range Plan is based not simply on the preference of federal judges, but on

Examples of legal incapacity are infancy, incompetence,and intoxication.

Children are not criminally responsible for their actions until they are old enough to understand the difference between right and wrong and the nature of their actions. Children under the age of seven are conclusively presumed to lack the capacity to commit a crime. Between the ages of seven and 14, children are presumed to be incapable of committing a crime. However, this presumption is not conclusive; it can be rebutted by the prosecution through the admission of evidence that the child knew that what he or she was doing was wrong. Anyone over the age of 14 is presumed to be capable of committing a crime, but this presumption can be rebutted by proof of either mental or physical incapacity.

All states have juvenile courts, which are separate from criminal courts. Juveniles who are accused of a crime are tried in these courts as delinquent children, rather than as criminal defendants. This alternative prevents children from invoking the defense of infancy. In juvenile courts, criminal charges lead to an adjudication rather than prosecution, because the aim of juvenile courts is to rehabilitate, rather than to punish. In the 1990s, some state legislatures passed laws to make it easier to prosecute juveniles in adult courts, especially in cases involving violent crimes.

the traditional principle of federalism that has guided the country throughout its existence."

Concern over the federalization trend spread during the late 1990s. The Criminal Justice Section of the **AMERICAN BAR ASSOCIATION** (ABA) organized a task force—the Task Force on the Federalization of Criminal Law—to look into the matter. In 1998, the task force issued a report in which it criticized the trend. Victor S. (Torry) Johnson, a representative of the National District Attorneys Association (NDAA) on the task force, declared in *Prosecutor,* "By trying to fight street crime through federal legislation, Congress misleads the public into believing that a national response will be effective and that the problem will be solved with federal intervention." Congress then fails to provide enough federal funding to prosecute all the new laws, creating a situation in which the efforts of local law enforcement "are undermined by the unrealistic expectations created by Congress' well-publicized enactments."

In his 1999 article for *Corrections Today,* James A. Gondles Jr., executive director of the American Correctional Association, lamented the introduction of low-level, local criminals into the federal system. According to Gondles, mixing such prisoners with big-time federal criminals blurs the jurisdictional line and makes it "more difficult for those at the state and local levels to do their jobs."

Not everyone is troubled by the federalization of criminal law enforcement. Proponents of federal criminal laws argue that they are necessary in an increasingly mobile society. Crime tends to span more than one state and even local crime can have effects which cross state boundaries. In his article for the *Hastings Law Journal,* Rory K. Little, a professor of law at the University of California, Hastings College of Law, defended the increase in federal crimes as a protection against the inability of states to catch and prosecute all criminals. If the quality of justice is better in the federal courts, Little opines, "then problems of crime cannot be ignored federally while state criminal justice systems slowly sink and justice fails."

A U.S. Supreme Court decision in March 1999 constituted an approval of increased federal authority over crime. In *United States v. Rodriguez-Moreno,* 526 U.S. 275, 119 S.Ct. 1239, 143 L.Ed.2d 388 (1999), Jacinto Rodriguez-Moreno **KIDNAPPED** a drug associate and took him from Texas to New Jersey, then to New York, and finally to Maryland. Rodriguez-Moreno was charged with, among other crimes, kidnapping and using and carrying a firearm in relation to a kidnapping, an act that violated 18 U.S.C.A. § 924(c)(1). Section 924(c)(1) makes it a crime to use or carry a firearm during, and in relation to, any crime of violence. Rodriguez-Moreno was tried in New Jersey on the charges, even though he did not have a gun in New Jersey.

Rodriguez-Moreno, who did not want to be tried in New Jersey, argued that the statute did not allow the federal government to prosecute him for the § 924 crime in New Jersey because he did not commit the crime in that state. The Court rejected the argument, holding that because the crime of violence (kidnapping) continued through several states, prosecution was proper in any district where the crime of violence was committed, even if the firearm was used or carried in only one state. The decision made it easier for federal prosecutors to pick and choose the venues for their cases.

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**CROSS-REFERENCES**

Federal Courts; State Courts; States' Rights.

Insane persons cannot, in a legal sense, form the intent necessary to commit a crime. They are not, therefore, criminally responsible for their actions. Courts have applied a variety of legal tests to determine the mental state of a criminal defendant who claims that he or she was insane at the time of the alleged crime. One test is the **M'NAGHTEN RULE**, which was originally used by an English court in the criminal prosecution of Daniel M'Naghten.

M'Naghten had an insane delusion that the prime minister of England, Sir Robert Peel, was trying to kill him. Mistaking the prime minister's secretary, Edward Drummond, for the prime minister, M'Naghten killed the secretary. At his trial, M'Naghten asserted that he had been insane when he committed the crime. The jury accepted his argument and acquitted him. From that decision evolved the *M'Naghten* test, under which, in order to disclaim criminal responsibility, a defendant must be affected by a disease of the mind at the time he or she commits the act. The disease must cause the ability to reason to become so defective that the person does not know the nature and quality of the act or else does not know that the act is wrong. A successful invocation of the *M'Naghten* defense results in commitment to a mental institution for treatment, rather than imprisonment.

A number of states prefer the "irresistible impulse" test as the standard for determining the sanity of a criminal defendant. If the defendant is suffering from a mental disease that prevents control of personal conduct, he or she may be adjudged not guilty by reason of insanity, even if he or she knows the difference between right and wrong.

The MODEL PENAL CODE of the American Law Institute established another test of insanity that has been adopted by almost all of the federal courts and by numerous state legislatures. Under the Model Penal Code test, a person is not responsible for criminal conduct if, at the time of such conduct, he or she lacks the capacity either to appreciate the criminality or the wrongfulness of the conduct, or to conform his or her conduct to the requirement of law. This lack-of-capacity excuse does not apply to abnormalities demonstrated by a repetitive pattern of illegal or violent acts.

Some states employ the "lack-of-substantial-capacity" test. The phrase "lacks substantial capacity" is a qualification of the *M'Naghten* rule and the irresistible-impulse test, both of which require the total absence of capacity. This test also requires a showing of causality. The defense is not established merely by a showing of a mental disease; rather, it is established only if, as a result of the disease, the defendant lacks the substantial capacity that is required in order to hold him or her criminally responsible. For example, pyromania may be a defense to a charge of arson, but it is no defense to a charge of larceny. An IRRESISTIBLE IMPULSE arising from anger, jealousy, or a desire for revenge does not excuse a defendant from criminal responsibility unless such emotions are part of the mental disease that caused the crime.

Generally, voluntary intoxication from drugs or alcohol does not excuse a criminal act. Involuntary intoxication is, however, a valid defense. It occurs when a person is forced to take an intoxicating substance against his or her will, or does so by mistake. If a defendant's involuntary intoxicated condition causes a criminal act, the defendant will not be convicted if, because of the intoxication, he or she is unable to appreciate the criminality of the conduct.

**Fair Warning Defense** The DUE PROCESS Clauses contained in the Fifth and Fourteenth Amendments to the U.S. Constitution require that before a defendant may be prosecuted for criminal conduct, the law must make clear which conduct is criminal. Justice OLIVER WENDELL HOLMES articulated the standard when he wrote that a criminal statute must give "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States,* 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L. Ed. 816 (1931)."

The U.S. Supreme Court had the opportunity to revisit the fair-warning requirement in *United States. v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). Lanier was a case involving a prosecution under 18 U.S.C.A. § 242, a Reconstruction-era CIVIL RIGHTS law that makes it a federal crime to deprive another of "any rights, privileges, or immunities secured or protected by the constitution or laws of the United States" while acting "under color of any law."

Congress originally passed the law to afford a federal right in federal courts for situations when, by reason of prejudice, passion, neglect, intolerance, or otherwise, state courts might not be as vigilant as federal courts in protecting the rights that are guaranteed by the FOURTEENTH AMENDMENT to the U.S. Constitution.

Traditionally, Section 242 had been primarily invoked against police officers and prison guards. The Lanier case arose from allegations of sexual misconduct against the sole state Chancery Court judge for two rural counties in western Tennessee, David Lanier. The trial record shows that from 1989 to 1991, while Lanier was in office, he sexually assaulted several women in his judicial chambers.

Lanier's most serious assault involved a woman whose DIVORCE proceedings had come before his chancery court and whose daughter's custody remained subject to his jurisdiction. When the woman applied for a secretarial job at Lanier's courthouse, Lanier interviewed her. As the woman got up to leave, Lanier grabbed her, sexually assaulted her, and finally committed oral rape.

On five other occasions Lanier sexually assaulted four other women: two of his secretaries, a Youth Services officer, and a local coordinator for a federal program who had been in Lanier's chambers to discuss a matter affecting the same court.

Lanier was later charged with 11 violations of Section 242. Each count of the indictment alleged that Lanier, acting willfully and under

color of Tennessee law, had deprived the victims of the right to be free from willful sexual assault. Before trial, Lanier moved to dismiss the indictment on the ground that Section 242 is void for vagueness. The district court denied the motion.

The jury returned verdicts of guilty on seven counts, and not guilty on three (one count having been dismissed at the close of the prosecution's case). Lanier was then sentenced to consecutive maximum terms totaling 25 years.

A panel of the U.S. Court of Appeals for the Sixth Circuit affirmed the convictions and sentence, *United States v. Lanier*, 33 F.3d 639 (6th Cir. 1994), but the full court vacated that decision and granted a rehearing en banc. *United States. v. Lanier,* 43 F.3d 1033 (1995). On rehearing, the full court set aside Lanier's convictions for "lack of any notice . . . that this ambiguous criminal statute [i.e., Section 242] includes simple or sexual assault crimes within its coverage." *United States v. Lanier*, 73 F.3d 1380 (6th Cir. 1996).

Specifically, the Sixth Circuit held that criminal liability may be imposed under Section 242 only if the constitutional right said to have been violated is first identified in a decision of the U.S. Supreme Court (not any other federal or state court), and only when that right has been held to apply in "a factual situation fundamentally similar to the one at bar."

The Sixth Circuit then said it could not find any decision of the U.S. Supreme Court that recognized, under Section 242, a right to be free from unjustified assault or invasions of bodily integrity in a situation "fundamentally similar" to those circumstances under which Lanier was charged.

In the absence of such a decision, the Sixth Circuit said that Tennessee had violated Lanier's due process right to be fairly warned that particular conduct is prohibited and carries with it the possibility for criminal punishment. Accordingly, the Sixth Circuit reversed the judgment of conviction and instructed the trial court to dismiss the indictment.

The state of Tennessee appealed, and the U.S. Supreme Court reversed the Sixth Circuit, observing that there are three manifestations of the "fair warning requirement." First, the "vagueness doctrine" bars enforcement of statutes that either forbid or require an act in terms that are so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application. Second, the Court wrote that the "canon of STRICT CONSTRUCTION of criminal statutes" ensures fair warning by limiting application of ambiguous criminal statutes to conduct that is clearly covered. Third, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. In other words, a trial court cannot "clarify" a statute by supplying terms through its own interpretation of the law, when those terms were not clearly contemplated by the statutory language chosen by the legislature.

However, the Court emphasized that the due process fair-warning requirement does not require that prohibited criminal conduct be previously identified by one of its own decisions and held to apply in a factual situation "fundamentally similar" to the defendant's case at bar. Instead, the Court wrote, "all that can usefully be said about criminal liability under [Section 242] is that [liability] may be imposed for deprivation of constitutional right if, but only if, in light of preexisting law, unlawfulness under the constitution is apparent."

The Court then remanded the case to the Sixth Circuit for further proceedings in light of its opinion. After reading the high court's opinion, the Sixth Circuit vacated its earlier decision and ordered Lanier to begin serving his sentence. One Sixth Circuit judge dissented, criticizing the U.S. Supreme Court for not writing a clearer opinion that articulated what constituted "apparent" unlawful conduct.

**Exculpatory Defenses** Exculpatory defenses are factors that excuse a competent person from liability for a criminal act. Duress is an exculpatory defense. One who commits a crime as a result of the pressure of an unlawful threat of harm from another person is under duress and may be excused from criminal liability. At trial, whether the defendant was under duress is a QUESTION OF FACT for the judge or jury. The defense of duress was invoked in the 1976 trial of Patricia Campbell Hearst, the young daughter of wealthy newspaper owners Randolph A. Hearst and Catherine C. Hearst. On February 4, 1974, Patricia Hearst was kidnapped by the Symbionese Liberation Army (SLA) and held for the unusual ransom of food distribution to the poor. Shortly after the abduction, Hearst sent a recorded message to her parents, in which she announced that she had become a social revolutionary.

On April 15, Hearst participated in a bank robbery with members of the SLA. She was arrested in September 1975 and tried for armed bank robbery. At trial, Hearst's lawyers argued, in part, that Hearst's participation in the robbery had been caused by duress. Hearst testified that she had feared for her life as she had stood inside the Hibernia Bank. On cross-examination, Hearst invoked her FIFTH AMENDMENT privilege against SELF-INCRIMINATION 42 times. The refusal to answer so many prosecution questions might have damaged Hearst's credibility, and the jury did not accept her argument of duress. Hearst was convicted and sentenced to seven years in prison. (President JIMMY CARTER commuted her sentence on February 1, 1979, and ordered her release from prison.)

ENTRAPMENT is another exculpatory defense to criminal charges. Entrapment exists if a law enforcement officer induces a person to commit a crime, for the purpose of instituting a criminal prosecution against that person. It is not available if law enforcement merely provides material for the crime.

Mistakes of law or fact are seldom successful defenses. Generally, a MISTAKE OF LAW is applicable only if the criminal statute was not published or made reasonably available prior to the act; the accused reasonably relied on the contrary teaching of another statute or judicial decision; or, in some jurisdictions, the accused reasonably relied on contrary official advice or a contrary official interpretation. A MISTAKE OF FACT may excuse a defendant if the mistake shows that the defendant lacked the state of mind required for the crime. For example, in a specific-intent crime such as embezzlement, evidence that the accused was unaware of transfers into his or her own bank account would negate the specific criminal intent required for conviction.

Justification defenses include necessity, SELF-DEFENSE, defense of others, and defense of property. If a person acts to protect the life or health of another in a reasonable manner and with no other reasonable choice, that person may invoke the defense of necessity. According to the Model Penal Code, self-defense and defense of others are permissible when it reasonably appears necessary that force is required to defend against an aggressor's imminent use of unlawful force. Nondeadly force may be used in order to retain property, and DEADLY FORCE may be used only to prevent serious bodily harm.

### Merger

Under common law, when a person committed a major crime that included a lesser offense, the latter merged with the former. This meant that the accused could not be charged with both crimes. The modern law of merger applies only to solicitation and attempt. One who solicits another to commit a crime may not be convicted of both the solicitation and the completed crime. Likewise, a person who attempts and completes a crime may not be convicted of both the attempt and the completed crime.

### Attempt

An attempt to commit a crime is conduct intended to lead to the commission of the crime. It is more than mere preparation, but it falls short of actual commission of the intended offense. An intent to commit a crime is not the same as an attempt to commit a crime. Intent is a mental quality that implies a purpose, whereas attempt implies an effort to carry that purpose or intent into execution. An attempt goes beyond preliminary planning and involves a move toward commission of the crime.

As a general rule, an attempt to commit a crime is a misdemeanor, whether the crime itself is a felony or a misdemeanor. However, in a case of violent crime, an attempt may be classified as a felony. Attempted murder and attempted rape are examples of felonious attempts. In an attempt case, the prosecution must prove that the defendant specifically intended to commit the attempted crime that has been charged. General intent will not suffice. For example, in an attempted-murder case, evidence must show a specific intent to kill, independent from the actual act, such as a note or words conveying the intent. In a murder case, intent may be inferred from the killing itself.

### Conspiracy

When two or more persons act together to break the law, conspiracy is an additional charge to the intended crime. For example, if two persons conspire to commit robbery, and they commit the robbery, both face two charges: conspiracy to commit robbery and robbery.

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CROSS-REFERENCES

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## CRIMINAL NEGLIGENCE

*The failure to use reasonable care to avoid consequences that threaten or harm the safety of the public and that are the foreseeable outcome of acting in a particular manner.*

Criminal negligence is a statutory offense that arises primarily in situations involving the death of an innocent party as a result of the operation of a motor vehicle by a person who is under the influence of DRUGS AND NARCOTICS or alcohol. Most statutes define such conduct as criminally negligent HOMICIDE. Unlike the TORT of NEGLIGENCE, in which the party who acted wrongfully is liable for damages to the injured party, a person who is convicted of criminal negligence is subject to a fine, imprisonment, or both, because of the status of the conduct as a crime.

## CRIMINAL PROCEDURE

*The framework of laws and rules that govern the administration of justice in cases involving an individual who has been accused of a crime, beginning with the initial investigation of the crime and concluding either with the unconditional release of the accused by virtue of acquittal (a judgment of not guilty) or by the imposition of a term of punishment pursuant to a conviction for the crime.*

### Introduction

Criminal procedures are safeguards against the indiscriminate application of criminal laws and the wanton treatment of suspected criminals. Specifically, they are designed to enforce the constitutional rights of criminal suspects and defendants, beginning with initial police contact and continuing through arrest, investigation, trial, sentencing, and appeals.

The main constitutional provisions regarding criminal procedure can be found in Amendments IV, V, VI, and VIII to the U.S. Constitution. The FOURTH AMENDMENT covers the right to be free from unreasonable searches and arrests:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. A warrant is a paper that shows judicial approval of a search or arrest. The U.S. Supreme Court has held that the Fourth Amendment does not require a warrant for all searches; rather, it prohibits unreasonable searches. All warrantless searches are unreasonable unless they are executed pursuant to one of several exceptions carved out by the Court.

The FIFTH AMENDMENT covers an array of procedural concerns, including the death penalty, multiple trials for the same criminal offense (DOUBLE JEOPARDY), SELF-INCRIMINATION, and the general right to DUE PROCESS. It reads, in relevant part,

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

The SIXTH AMENDMENT addresses the procedures required at trial. It provides,

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

Finally, the EIGHTH AMENDMENT states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

At first, these amendments were construed as applying only to federal prosecutions. The states were free to enact criminal procedures contrary to them until the passage of the FOURTEENTH AMENDMENT in 1868. The Fourteenth Amendment forbids the states to "deprive any person of life, liberty, or property, without due process of law" (§ 1). Under the Fourteenth Amendment, states must provide most of the

criminal safeguards found in the Fourth, Fifth, Sixth, and Eighth Amendments.

Federal courts must comply with all the criminal procedures listed in the amendments to the Constitution. For state courts, the U.S. Supreme Court has adopted a "selective incorporation" approach to determine precisely what process is due a criminal defendant. Under this approach, only fundamental rights are protected.

According to the Court, fundamental rights in criminal procedure include freedom from unreasonable SEARCHES AND SEIZURES; freedom from CRUEL AND UNUSUAL PUNISHMENT; assistance of counsel; PROTECTION AGAINST SELF-INCRIMINATION; confrontation of opposing witnesses; a SPEEDY TRIAL; compulsory process for obtaining witnesses; a jury trial for prosecutions for cases in which the defendant could be incarcerated; and protection against double jeopardy. The only protections that are not specifically required of states are the Eighth Amendment prohibition against excessive bail and the Fifth Amendment requirement that infamous crimes be prosecuted by grand jury.

The judicial interpretation of fundamental rights has allowed states considerable leeway in shaping their own criminal procedures. Although their procedural rules and statutes are similar in many respects, federal and state legislatures are responsible for their own criminal procedures, and procedures vary from state to state. State and federal governments may not limit the protections guaranteed by the Constitution, but they may expand them.

### Automobile Exception to the Warrant Requirement

An example of this principle may be seen with the so-called automobile exception to the Constitution's search-warrant requirement. Under the automobile exception, states may allow the warrantless search of an automobile, except for the trunk, if the police officer reasonably believes that the vehicle holds evidence of a crime. The U.S. Supreme Court has determined that this exception is not a violation of the Fourth Amendment because drivers have a "reduced expectation of privacy" and because a vehicle is inherently mobile. This reduced expectation of privacy also allows police officers with PROBABLE CAUSE to search a car to inspect drivers' and passengers' belongings that are capable of concealing the object of the search, even if there is no proof that the driver and passenger were engaged in a common enterprise. *Wyoming v. Houghton*, 526 U.S. 295, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999).

However, states are not required to adopt the automobile exception. The New Hampshire Supreme Court, for example, ruled that all warrantless searches are unreasonable except for a group of well-defined such searches, and this group does not include warrantless AUTOMOBILE SEARCHES (*State v. Sterndale,* 139 N.H. 445, 656 A.2d 409 [1995]). Thus, in New Hampshire, a police officer may not base the warrantless search of a vehicle on the mere fact that the place to be searched is a vehicle. New Hampshire, therefore, provides expanded protections under the Fourth Amendment.

Conversely, a state may not allow the search of any vehicle without reasonable suspicion. A vehicle search that is conducted in the absence of reasonable suspicion would be an infringement of guaranteed Fourth Amendment protection, and a court would strike down such an infringement as unconstitutional. A state law may not diminish the scope of the automobile exception by authorizing a warrantless search of an entire vehicle following a traffic stop in which the driver is issued a citation for speeding. Although law enforcement may conduct a full vehicle search if the defendant is formally arrested, the issuance of a traffic citation does not justify the considerably greater intrusion of a full-fledged search. *Knowles v. Iowa*, 525 U.S. 113, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998)

### Investigation

Criminal prosecutions officially begin with an arrest. However, even before the arrest, the law protects the defendant against unconstitutional police tactics. The Fourth Amendment protects persons against unreasonable searches and seizures by law enforcement officers. Generally, a SEARCH WARRANT is required before an officer may search a person or place, although police officers may lawfully prevent a criminal suspect from entering his or her home while they obtain a search warrant. *Illinois v. McArthur*, U.S. 326, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001).

Police officers need no justification under the Fourth Amendment to stop persons on the street and ask questions, and persons who are stopped for questioning are completely free to refuse to answer any such questions and to go about their business. But the Fourth Amend-

ment does prohibit police officers from detaining pedestrians and conducting any kind of search of their clothing without first having a reasonable and articulable suspicion that the pedestrians are engaged in criminal activity. The U.S. Supreme Court has held that reasonable suspicion is provided for a stop-and-frisk type of search when a pedestrian who, upon seeing police officers patrolling the streets in an area known for heavy narcotics trafficking, flees from the officers on foot. *Illinois v. Wardlow*, 528 U.S. 119, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)

The warrant requirement is waived for many other searches and seizures as well, including a search incident to a lawful arrest; a seizure of items in plain view; a search to which the suspect consents; a search after a HOT PURSUIT; and a search under exigent or emergency circumstances. Nor does the Fourth Amendment require the police to obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that the vehicle is forfeitable contraband. *Florida v. White*, 526 U.S. 559, 119 S. Ct. 1555, 143 L. Ed. 2d 748 (1999).

However, the Fourth Amendment does prohibit police use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home. Such devices are typically employed to determine whether a suspect is using a high-intensity lamp to grow marijuana in his or her home. The U.S. Supreme Court has ruled that the use of thermal-imaging devices constitutes a "search" within the meaning of the Fourth Amendment, and thus their use is presumptively unreasonable without a warrant. *Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001).

The Supreme Court also ruled that a state hospital conducted an unreasonable search when it undertook warrantless and nonconsensual urine testing of pregnant women who had manifested symptoms of possible cocaine use. The governmental interest in using the threat of criminal sanctions to deter pregnant women from using cocaine did not justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid search warrant. *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001).

The U.S. Supreme Court's Fourth Amendment JURISPRUDENCE is splintered over the constitutionality of using fixed checkpoints or roadblocks to conduct warrantless and suspicionless vehicle seizures. The Court has held that the Fourth Amendment allows law enforcement to perform warrantless vehicle seizures at a fixed checkpoint along the nation's border to intercept illegal ALIENS, so long as the search is reasonable in light of the "totality of the circumstances". *United States v. Arvizu*, 534 U.S. 266, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). The Court also ruled that roadblocks may be used to intercept drunk drivers. However, the Court rejected on Fourth Amendment grounds the use of a roadblock to perform warrantless and suspicionless searches of automobiles for the purpose of drug interdiction. *Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000).

When an officer seeks a search warrant, he or she must present evidence to a judge or magistrate. The evidence must be sufficient to establish probable cause that evidence of a crime will be found at the place to be searched. Probable cause is a level of belief beyond mere suspicion but short of full certainty. Whether an officer can establish probable cause to obtain a search warrant depends on the facts of the case. For example, if an arrested person is discovered with a small amount of marijuana, this alone will not justify a search of the person's home. However, if the person is discovered with a large amount of marijuana, the quantity may support the suspicion that more marijuana may be found in the person's home, and the large amount may be used as the basis for obtaining a search warrant.

Police officers seeking a search warrant must state, under oath and with particularity, the facts supporting probable cause. If the search warrant is later found to be lacking in probable cause, or if important statements made by the officers are found to have been intentionally misleading, the evidence seized pursuant to the warrant might not be admissible at trial. Moreover, if the search goes beyond the scope granted in the warrant, the evidence seized as a result of that encroachment might not be admissible at trial. For example, if the warrant states that the officers may search only the suspect's apartment, they may not expand the search to a storage closet outside the apartment.

In executing a search warrant pursuant to the Fourth Amendment, law enforcement officers may enter private property without knocking or announcing their presence if the officers have reasonable suspicion that knocking and

# The Stages of a Criminal Prosecution

A criminal prosecution usually begins with an arrest. In some cases, the arrest is the culmination of a police investigation; in other cases, it may occur with minimal police investigation. Either way, the manner in which the police investigate suspects and collect evidence is almost always an issue in a criminal case.

During an arrest, a criminal suspect is advised of his or her *Miranda* rights. These include the right to remain silent and the right to an attorney. After arrest, the defendant is subjected to a cursory search for weapons and contraband. The defendant is then driven to the nearest jail, police station, or detention center for booking. During booking, the defendant is photographed and fingerprinted, and the arrest is entered into the police log, or blotter. The defendant is informed of the charge or charges if she or he has not already been so informed. The defendant is also allowed to make one telephone call. After being stripped of all personal items, belts, and shoelaces, the defendant may be placed in a holding cell to await presentation before a magistrate. For misdemeanors, which are less serious than felonies, the defendant may be released with the posting of a cash bond and a promise to appear before a magistrate.

While the person waits for this first appearance before the court, a police officer prepares a complaint against the suspect. The complaint is a document that describes the alleged crime. It is screened by prosecutors and then submitted to the court. The court reviews the complaint to determine whether there is sufficient legal basis to hold the person in custody. If the magistrate finds that the facts alleged do not establish **PROBABLE CAUSE** to believe that the suspect committed the crime, the magistrate must dismiss the complaint and order the release of the person from custody.

The first appearance must be held without unnecessary delay. Many jurisdictions impose a twenty-four-hour limit on initial detention before a hearing, but this limit may extend to seventy-two hours if the arrest is made on a Friday.

In the first appearance, the magistrate informs the defendant of the charge or charges as set forth in the complaint. The magistrate also informs the defendant of his or her rights, such as the right to remain silent and the right to an attorney. If the defendant in a felony case is not already represented by private counsel and is unable to afford private counsel, the court appoints an attorney. This is usually a public defender, but it may be a private defense attorney paid by the court or working free of charge. In most states, the attorney meets with and represents the defendant in the first appearance. The defendant in a misdemeanor case does not always qualify for a free attorney.

If the magistrate finds probable cause, the magistrate sets bail in the first appearance. Bail consists of the conditions the defendant will have to meet to gain release from custody pending trial. Acceptable bail is usually cash or other liquid assets. Bail is intended to guarantee the defendant's appearance at trial. In some jurisdictions, if the magistrate determines that the defendant presents a danger to the community or may attempt to flee, the magistrate may refuse to set bail. In such a case, the defendant is forced to remain in jail until the case is resolved.

If the charge is a misdemeanor, the first appearance serves as an **ARRAIGNMENT**, where the defendant enters a plea of guilty or not guilty. The magistrate then allows the defendant to post bail or leave on her or his own recognizance, with the understanding that the defendant will reappear for trial.

Following the first appearance, a felony case proceeds to a **PRELIMINARY HEARING**. Before this hearing is held, the prosecutor and the defense attorney communicate to see if there is any possibility of a plea bargain, or a mutually acceptable disposition of the case. If a deal can be reached, and it is acceptable to the defendant, it is presented to the court for approval at the preliminary hearing.

announcing would be dangerous, futile, or would inhibit an effective criminal investigation by allowing the destruction of evidence. While the lawfulness of a "no-knock" entry does not depend on whether property is subsequently damaged during the search, excessive or unnecessary destruction of property in the course of the search might violate Fourth Amendment rights, even though the entry itself is lawful and the fruits of search are not subject to suppression. *United States v. Ramirez*, 523 U.S. 65, 118 S. Ct. 992, 140 L. Ed. 2d 191 (1998).

### The Exclusionary Rule

The **EXCLUSIONARY RULE** protects the right to be free from unreasonable searches. This rule holds that otherwise incriminating subject matter that police officers have obtained illegally must be excluded from evidence. Along with the right of appeal, the exclusionary rule is a defendant's chief remedy for a violation of his or her rights in a criminal procedure.

The exclusionary rule deters **POLICE MISCONDUCT** in searches. Without the admission of the evidence at trial, the case against the alleged

The preliminary hearing is conducted by the magistrate to determine whether the prosecution has sufficient evidence to continue the prosecution. Unlike the first appearance, the preliminary hearing is adversarial. The prosecutor relies on witnesses to present the prosecution's evidence, and the defendant may do the same. Both sides are allowed to question, or cross-examine, the opposing side's witnesses. After this hearing, the court may dismiss the charges if they are not supported by probable cause.

In some states, review by a **GRAND JURY** is also required before a felony prosecution may continue; this review is not required for a misdemeanor prosecution. A grand jury is a group of private citizens summoned to review, in private, the prosecution's evidence. Generally, a grand jury consists of more jurors than a trial jury, which usually numbers twelve. In a grand jury proceeding, the prosecutor presents the evidence against the defendant to the grand jurors, and the grand jurors may ask questions of the prosecutor. The prosecutor then presents a proposed indictment, or a written accusation sworn to by the prosecutor. If a majority of the grand jury finds no probable cause for the prosecution, it returns a no bill, or a refusal of the indictment. If a majority finds probable cause, the grand jury returns a true bill, and prosecution continues.

Following a true-bill finding by a grand jury, the prosecution files the indictment with the trial court. Where no grand jury was required and only a preliminary hearing was held, the prosecution files an information, which is similar in form to an indictment but written and approved by the prosecutor alone.

After the indictment or information courts review criminal convictions for trial court errors. They rarely overturn verdicts on evidentiary bases. Even if an appeals court finds a trial court error, it will affirm the conviction if it feels the error did not affect the outcome of the case.

Generally, state court defendants appeal to a first court of appeals, then to the highest state court (usually the state supreme court), and then to the U.S. Supreme Court. In federal cases, defendants appeal to a U.S. court of appeals and then to the U.S. Supreme Court. The review of appeals after the first appeal is discretionary; that is, the court may decline to hear the case.

After exhausting all appeals, a defendant sentenced to incarceration may collaterally attack the conviction and sentence. This means the defendant attacks the conviction in an action other than an appeal. The most common method of collateral attack is submission of a petition for a writ of **HABEAS CORPUS**. This is a civil action against the warden of a prison, challenging the legality of the imprisonment. If the court approves the writ, the inmate must be set free.

A habeas corpus petition is not an appeal; courts will grant a writ of habeas corpus only if the defendant can prove that the court that sent the petitioner to prison was actually powerless to do so or that such detention violated the petitioner's constitutional rights. Generally, an inmate will ask for the writ in state court before filing in federal court.

All states also have a procedure in place to hear claims of newly discovered evidence. However, no relief is granted if the new evidence would not have made a difference in the verdict.

Some inmates are given early release from prison, or **PAROLE**. Parole is granted by the state or federal parole board or correctional board. It allows the inmate to finish the prison sentence in the community. The court requires a paroled defendant, or parolee, to meet certain conditions on release and to meet regularly with a parole officer for the duration of the sentence.

In some states, if the conviction was for first-degree murder, the defendant may be sentenced to death. Where the sentence is death and the defendant has lost all appeals and collateral attacks, the defendant may ask the governor of the state for clemency. For federal crimes, the president retains the power of clemency. Clemency is forgiveness and mercy, and it usually comes in the form of a pardon or of a commutation of a sentence. A pardon releases the inmate from custody and restores his or her legal rights and privileges, such as voting and gun ownership. A commutation decreases or suspends an inmate's sentence. A commutation is a lesser form of clemency because it does not restore the legal rights of the inmate.

**CROSS-REFERENCES**

Criminal Procedure; Double Jeopardy.

criminal may be dismissed, and the officer's actions in gathering that evidence will have been wasted effort. The exclusionary rule also prohibits the use of evidence obtained in violation of other constitutional rights, such as statements of the accused that are elicited in violation of the right against self-incrimination.

The most important exception to the exclusionary rule is the good-faith exception. Essentially, the good-faith exception allows the use of evidence obtained in violation of a person's constitutional rights if the officer who obtained the evidence acted in a reasonable manner. If evidence is illegally seized and does not fall under an exception but is erroneously admitted at trial by the judge, a guilty verdict will be reversed on appeal if the prosecution cannot show **BEYOND A REASONABLE DOUBT** that the evidence did not contribute to the conviction.

When officers have collected evidence pursuant to a search warrant, the burden is on the defendant to show that the warrant lacked probable cause or that other problems tainted the collection process. For a warrantless search, the

prosecution bears the burden of proving that the search was reasonable. However, before evidence seized during a warrantless search will be excluded from trial, the defendant must prove that he or she had a reasonable expectation of privacy in the place that was searched. Homeowners, for example, enjoy a reasonable expectation of privacy in items that they keep inside their homes. However, houseguests might not have a similar expectation of privacy in the homes they are visiting, especially when they do not stay overnight and their sole purpose for being inside the house is to participate in criminal activity such as a drug transaction. *Minnesota v. Carter*, 525 U.S. 83, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998). Disputes over the application of the exclusionary rule are usually resolved at a pretrial proceeding called a "suppression hearing."

### Arrest

The general rule is that to make an arrest, the police must obtain an arrest warrant. However, if an officer has probable cause to believe that a crime has been committed, and there is no time to obtain a warrant, the officer may make a warrantless arrest. An officer also may make a warrantless arrest of persons who commit a crime in the officer's presence.

An invalid arrest is not generally a defense to prosecution. However, if an arrest is unsupported by probable cause, evidence obtained pursuant to the invalid arrest can be excluded from trial.

When an arrest is made, the arresting officer must read the *Miranda* warnings to the arrestee. These warnings apprise an arrestee of the right to obtain counsel and the right to remain silent. If these warnings are not read to an arrestee as soon as he or she is taken into custody, any statements that the arrestee makes after the arrest may be excluded from trial.

After the arrest, the police must follow certain guidelines during their investigations. For example, if the arrestee requests an attorney or expresses a wish to remain silent, the officers must honor the request and refrain from questioning the arrestee. However, the police may attempt to confirm that they have arrested the right person. They may do so by showing a victim a photo array that includes a picture of the suspect; by arranging a lineup of live persons at the police station, with the suspect included in the lineup; or by organizing a show-up, which is a personal showing of the arrestee to the victim shortly after commission of the crime.

Where photo arrays or lineups are used, the police must refrain from highlighting the arrestee. For example, if an arrestee is white, an officer may not show a witness a series of photographs in which all of the other subjects are black. If an identification procedure is too suggestive, any identification by the victim may be excluded from trial.

### Trial

At trial, a criminal defendant has a number of constitutional rights, including the RIGHT TO COUNSEL, the right to a public trial, the right to a trial by jury, the right to a fair and impartial trial, the right to confront witnesses in court, the right to compulsory process to obtain witnesses, and the PRIVILEGE AGAINST SELF-INCRIMINATION. Violation of any of these rights may result in the reversal or vacation of a conviction on appeal.

There are exceptions and nuances to most of the procedural trial rights. Under the Sixth Amendment, if a defendant is indigent, or unable to afford an attorney, the court will appoint an attorney. This right applies only for felony charges and cases in which actual imprisonment may be imposed. Accordingly, an indigent who is not represented by counsel at trial may not be sentenced to incarceration, regardless of whether conviction of the offense warrants incarceration (*Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 [1979]). However, a defendant will not be appointed an attorney if the he or she is able to pay for a private one.

A criminal defendant has the right to an attorney from the first critical stage of the criminal process through the end. An attorney must be present at the request of the defendant during such events as interrogation, lineup identifications after charges have been filed, preliminary hearings before the court, trial, and sentencing.

The Sixth Amendment right to counsel includes the mandate that a defendant's counsel must be effective and not incompetent. Attorneys must generally consult with their clients about trial strategy and tactics, in order to be effective and competent. However, a criminal defense attorney's failure to consult with a client before deciding against filing a post-conviction appeal does not necessarily render his or her assistance ineffective or incompetent. While the better practice would be for attorneys to always consult with their clients regarding the possibil-

ity of appeal, the Sixth Amendment only requires such consultation when there is reason to believe either (1) that any rational defendant would want to appeal; or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

A defendant is free to reject counsel and to proceed pro se, or by self-representation. However, a judge may disregard the defendant's request and appoint an attorney if the pro se defendant engages in dilatory or disruptive tactics. Additionally, state courts of appeal may disregard a defendant's request to represent himself or herself on appeal without violating Sixth Amendment rights. *Martinez v. Court of Appeals of California, Fourth Appellate Dist.,* , 528 U.S. 152, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000)

The Sixth Amendment right to a trial by jury does not guarantee a jury in all cases. The right generally applies only in "serious cases"—which are generally considered to be those in which conviction can result in incarceration for more than six months. When a jury trial is not guaranteed, the trial court judge will hear the case and make a decision.

In federal court, a jury verdict must be unanimous. This directive is not applicable to the states. In some states, a vote of nine out of twelve jurors is sufficient to convict or to acquit. States may even provide as few as six jurors. Six is the minimum, because juries should represent a cross section of the community. If a jury of six is used, the verdict must be unanimous.

Under the Confrontation Clause of the Sixth Amendment, a defendant has the right to cross-examine all prosecution witnesses at trial. In limited circumstances, the out-of-court statements made by a witness who is absent from court may be offered through the testimony of a third party. Known as HEARSAY statements, this type of evidence may be admitted if the statements were made under oath and subject to cross-examination by the defendant's attorney, and if the witness is unavailable to testify at trial despite the best efforts of the prosecution. However, a defendant's Sixth Amendment right to confront and to cross-examine the accuser in open court is violated when the prosecution introduces the incriminating hearsay statements of a non-testifying co-defendant in a joint trial, even if the defendant's name is redacted from the incriminating statements, because juries will often realize that the redacted portions are referring to the defendant. *Gray v. Maryland*, 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998)

The Fifth Amendment privilege against self-incrimination extends from the moment of custody. A defendant need not make statements or testify at trial, and that right is absolute. However, with a sufficient showing of need by the prosecution, self-incrimination may come from sources other than the defendant's statements or testimony. For example, a court may force a defendant to appear before witnesses for identification; to provide handwriting or blood or voice or fingerprint samples; or to repeat certain words or gestures.

However, the mere fact that a defendant has pled guilty to a criminal act does not waive the privilege against self-incrimination during the sentencing phase. As a result, a defendant has the right to remain silent, during sentencing, about facts that bear upon the severity of the sentence, and the sentencing court may not draw an adverse inference from the defendant's silence. *Mitchell v. United States*, 526 U.S. 314, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999).

If the defendant does testify, he or she may be questioned by the prosecutor about previously inadmissible statements that contradict that testimony. Thus, the Fifth Amendment privilege against self-incrimination will not apply if the defendant has made statements that are contrary to testimony given on the witness stand. Nor does the Fifth Amendment prohibit a prosecutor from calling the jury's attention during closing arguments to the fact that the defendant had the opportunity to hear all other witnesses testify and to tailor his testimony accordingly. The Fifth Amendment prohibits the prosecution from commenting to the jury about the defendant's failure to testify at trial, but it does not prohibit the prosecution from making comments that impeach the defendant's credibility after her or she has testified. *Portuondo v. Agard*, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 294 (2000).

The Compulsory Process Clause of the Sixth Amendment gives a defendant the right to obtain favorable witnesses. This means that the defendant has the same power as the prosecutor to subpoena witnesses. However, if the government, acting in GOOD FAITH, deports a potential defense witness (i.e., makes the witness leave the jurisdiction), it does not violate compulsory process rights.

The Sixth Amendment grants the right to "an impartial jury of the State and district wherein the crime shall have been committed." This clause gives a defendant the right to question jurors for bias and prejudice. The right belongs to both the defense and the prosecution, and it is exercised in a proceeding called VOIR DIRE. In voir dire, both sides are allowed to question jurors and to reject a certain number of jurors, until the jury pool is complete. The rejection of jurors may not be based on race, sex, or national origin.

At trial, the prosecution has the burden of proving the defendant's guilt beyond a REASONABLE DOUBT. This level of belief is abstract and has been described in a number of ways. The best definition is that any doubt regarding the defendant's guilt should not be fanciful or conjured up to avoid delivering a verdict of guilty. This standard is reserved for criminal trials; it is a higher standard than "a preponderance of the evidence" and "clear and convincing evidence," the burdens of proof used in civil trials.

The vast majority of criminal cases are resolved with a plea of guilty before, or sometimes during, trial. Prosecutors may use their discretion to reduce charges in exchange for a guilty plea, in an arrangement known as a plea-bargain. A plea of guilty cannot be revoked after a court has accepted it. Generally, it is appealable only if the right to a trial was not knowingly, intelligently, and voluntarily waived.

Prosecutors are often content with a plea-bargain because it satisfies the criminal justice system's goal of encouraging people to accept responsibility for their actions, and because plea-bargains avoid costly, time-consuming trials. A prosecutor also may agree to defer prosecution and to drop charges after a specified period if the defendant fulfills certain conditions. A defense attorney may seek a plea-bargain if the evidence against the defendant is overwhelming. Both sides are free to reject any plea-bargains and to proceed to trial.

If a defendant is acquitted of all criminal charges, the prosecution may not subsequently prosecute the defendant for the same act that produced those charges. This right is derived from the prohibition of double jeopardy that is found in the Fifth Amendment. In a jury trial, double jeopardy protection attaches when the jury is impaneled and sworn in. For bench trials, or cases presented to a judge only, double jeopardy protection begins when the first witness is sworn in. Under double jeopardy protection, the prosecution may not deliberately cause a mistrial if the trial is going poorly for the prosecution. However, if the jury cannot reach a verdict, and the court declares a mistrial, the defendant may be retried for the same offense.

Generally, a defendant may not face both federal and state prosecutions for the same offense. One exception to this general rule is that a defendant in state court may face charges in federal court for the same act with the permission of the attorney general, but only if the offense is within the jurisdiction of the federal court. For example, a conviction for driving while intoxicated raises no federal concerns; federal laws do not address that offense. Thus, the attorney general may not authorize the federal prosecution of a defendant who has been acquitted in state court of driving while intoxicated. The acquitted defendant may, however, face a civil lawsuit for damages, because civil actions do not put a person "in jeopardy of life or limb," and therefore double jeopardy does not apply to them (U.S. Const. amend. V, cl. 2). Similarly, the Double Jeopardy Clause is not violated when a defendant faces both criminal and administrative proceedings arising out of a single wrongful act. *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997).

### Postconviction

**Sentencing** After conviction, a defendant may be allowed to remain free until sentencing. The decision on this issue is made by the court, and it depends on the nature of the conviction and the nature of the defendant's perceived character. For example, a court will not allow a convicted murderer or rapist to remain free until sentencing. A court may, however, allow a nonviolent convict to post a bond and to remain free pending sentencing.

Sentencing for a felony conviction is usually heard by the court in a separate hearing held several days or weeks after the verdict. At a felony sentencing hearing, the prosecution makes a recommendation of punishment, and the defendant usually argues for leniency. For lesser offenses, such as misdemeanors and violations, sentencing may immediately follow the verdict.

Judges generally have wide discretion to craft individualized sentences within statutory guidelines. However, states violate defendants' Sixth Amendment right to trial by jury in capital cases when they authorize the sentencing

judge alone to determine the presence or absence of aggravating factors required for the imposition of the death penalty. *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). And where a capital defendant's future dangerousness is at issue and the only sentencing alternative to death available to the jury is life imprisonment without the possibility of PAROLE, due process requires the court to allow the defendant to inform the jury of his or her parole ineligibility, either by a jury instruction or in arguments by counsel. *Shafer v. South Carolina*, 532 U.S. 36, 121 S. Ct. 1263, 149 L. Ed. 2d 178 (2001).

Sentencing can include any combination of community service, FORFEITURE of property, fines, and incarceration. Courts may also exercise their sentencing discretion and order a term of PROBATION.

Under state and federal forfeiture laws, law enforcement authorities are authorized to confiscate property of certain criminal defendants. Under federal law, persons who have been convicted of controlled-substance violations or RACKETEERING schemes may be forced to relinquish much of their PERSONAL PROPERTY, including real estate, stocks, cash savings, and vehicles. States also authorize forfeitures for the violation of certain state laws, such as those regarding controlled substances and the solicitation of prostitution.

Probation releases a convicted defendant into the community under the supervision of a probation officer. This type of sentence is generally reserved for first-time offenders, to give them an opportunity to reform and rehabilitate.

A probationer will be called back into court and sentenced to serve a term of incarceration if he or she breaks the terms of the probation. For example, suppose that a person who has been convicted of marijuana possession and sentenced to probation has been ordered to complete treatment for chemical dependency and to report to a probation officer twice a week. If the probationer fails to complete these requirements, the court may order the defendant to serve a period of incarceration for the marijuana offense.

If probation is revoked, the probationer is entitled to counsel. However, an indigent probationer is not automatically entitled to a court-appointed attorney. Whether a probationer receives free counsel depends on a number of factors. Generally, the court will appoint an attorney if an indigent probationer denies committing the alleged act and faces lengthy imprisonment.

Under the Eighth Amendment prohibition of cruel and unusual punishment, sentencing and confinement in jail or prison may not involve torture or barbarity. The Eighth Amendment is also construed as meaning that the punishment should fit the crime. For example, it would be cruel and unusual punishment to sentence a person who has been convicted of trespassing to the same punishment as a person who has been convicted of HOMICIDE.

With regard to the amount of punishment that may be inflicted, the prohibition against cruel and unusual punishment also bars punishment that is clearly out of proportion to the offense committed. The U.S. Supreme Court has considered the issue of proportionality, particularly in the context of the death penalty. In *Coker v. Georgia,* 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977), the Court held that death was a disproportionate penalty for the crime of raping an adult woman.

But the high court has held that the death penalty itself is not inherently cruel, instead describing it as "an extreme sanction, suitable to the most extreme of crimes" (GREGG V. GEORGIA, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 [1976]). Modern methods of administering CAPITAL PUNISHMENT, such as shooting, hanging, electrocution, and lethal injection, have been upheld as constitutional by federal and state courts. The U.S. Supreme Court has held that statutes providing a mandatory death sentence for certain degrees or categories of murder are unconstitutional because they preclude sentencing authorities from considering aspects of a particular defendant's character or record, or from considering circumstances that might mitigate a particular crime (see *Lockett v. Ohio,* 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 [1978]). In *Ford v. Wainwright,* 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), the Court held that the Eighth Amendment prohibits states from inflicting the penalty of death upon a prisoner who is insane.

The U.S. Supreme Court has also ruled that the execution of mentally retarded criminals violates the Eighth Amendment's guarantee against cruel and unusual punishment. ATKINS V. VIRGINIA, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). Citing "evolving standards of decency," the Court stated that its decision was

informed by a national consensus reflected in deliberations of the American public, legislators, scholars, and judges. *Atkins* overruled *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), a decision rendered just 13 years earlier. However, in *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989), the Court found that there was no national consensus prohibiting the execution of juvenile offenders over age 15.

**Appeal** Contrary to popular belief, the U.S. Constitution does not guarantee the right to appeal a criminal conviction. Most states do provide the right to an appellate review of criminal convictions, to protect against trial court errors. However, many states limit their review of state court convictions by hearing only short oral arguments and issuing decisions without explanation.

Federal statutes grant criminal defendants in federal court the right to appeal. Only one review is granted as a matter of right, and this is to a U.S. court of appeals. Review of state and federal convictions in the U.S. Supreme Court is discretionary.

Where a criminal appeal is granted by state law as a matter of right, the court is required to appoint an attorney to represent indigent defendants on appeal. An indigent defendant is also entitled to a free trial transcript or other means of affording appellate review; this applies to any indigent defendant, including one who is punished only with a fine.

On appeal, the burden is on the defendant to prove that an error occurred in the trial or that the evidence was insufficient to convict. Appellate courts reviewing a defendant's challenge to the appropriateness of a particular sentence must generally apply a deferential standard of review. Sentencing courts are in a better position than are appellate courts to decide whether a particular set of individual circumstances justifies the imposition of a given sentence under the sentencing guidelines, the U.S. Supreme Court has observed. *Burford v. United States*, 532 U.S. 59, 121 S. Ct. 1276, 149 L. Ed. 2d 197 (2001). Defendants must raise all claims of trial error in their first appeal in order to preserve the claims for future appeals.

**Habeas Corpus Petitions** After an incarcerated defendant has exhausted all appeals without success, he or she may file a writ of HABEAS CORPUS. This is a civil suit against the warden of the prison (in his or her professional capacity), challenging the constitutionality of the incarceration. There is no right to the assistance of an attorney for habeas corpus petitions.

A habeas corpus petition is not another appeal. The only basis for a writ of habeas corpus is the deprivation of a constitutional right. For example, an inmate may claim that he or she was denied the assistance of counsel guaranteed by the Sixth Amendment, because the defense attorney was incompetent. But defendants generally may not rely on habeas corpus proceedings to challenge a federal sentence on the ground that the prior state convictions upon which the federal sentence was based had been unconstitutionally obtained. *Daniels v. United States*, 5532 U.S. 394, 121 S.Ct. 1567, 149 L. Ed. 2d 608 (2001).

**Parole** If an inmate is released on parole and then violates the terms of the parole, he or she must attend a hearing to determine whether parole will be revoked. The parolee may be entitled to the assistance of counsel at the revocation hearing. This entitlement will depend on a number of factors, including whether the parolee denies committing the alleged acts, as well as the rules of the parole board. If the parolee can afford a private attorney, he or she is free to hire one; there is no bar to representation in parole-revocation hearings.

Inmates who seek parole often cite mitigating factors that existed either before, after, or at the time the crime was committed. However, parole boards and related EXECUTIVE BRANCH departments are under no obligation to give mitigating evidence any weight, and may typically reject an inmate's request for parole without providing any reason for doing so. Accordingly, the federal Bureau of Prisons has the authority to adopt regulations that categorically deny early-release incentive to prisoners whose current offense was a felony attended by "the carrying, possession, or use of a firearm." *Lopez v. Davis*, 531 U.S. 230, 121 S.Ct. 714, 148 L. Ed. 2d 635 (2001).

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CROSS-REFERENCES

Automobile Searches "Is the Fourth Amendment in Jeopardy?" (In Focus); Custodial Interrogation; Incorporation Doctrine; Prisoners' Rights; Public Defender; Right to Counsel.

## CRIMINOLOGY

*The scientific study of the causation, correction, and prevention of crime.*

As a subdivision of the larger field of sociology, criminology draws on psychology, economics, anthropology, psychiatry, biology, statistics, and other disciplines to explain the causes and prevention of criminal behavior. Subdivisions of criminology include penology, the study of prisons and prison systems; biocriminology, the study of the biological basis of criminal behavior; feminist criminology, the study of women and crime; and criminalistics, the study of crime detection, which is related to the field of FORENSIC SCIENCE.

Criminology has historically played a reforming role in relation to CRIMINAL LAW and the criminal justice system. As an applied discipline, it has produced findings that have influenced legislators, judges, prosecutors, lawyers, PROBATION officers, and prison officials, prompting them to better understand crime and criminals and to develop better and more humane sentences and treatments for criminal behavior.

### History

The origins of criminology are usually located in the late-eighteenth-century writings of those who sought to reform criminal justice and penal systems that they perceived as cruel, inhumane, and ARBITRARY. These old systems applied the law unequally, were subject to great corruption, and often used torture and the death penalty indiscriminately.

The leading theorist of this classical school of criminology, the Italian Cesare BONESANO BECCARIA (1738–94), argued that the law must apply equally to all, and that punishments for specific crimes should be standardized by legislatures, thus avoiding judicial abuses of power. Both Beccaria and another classical theorist, the Englishman JEREMY BENTHAM (1748–1832), argued that people are rational beings who exercise free will in making choices. Beccaria and Bentham understood the dominant motive in making choices to be the seeking of pleasure and the avoidance of pain. Thus, they argued that a punishment should fit the crime in such a way that the pain involved in potential punishment would be greater than any pleasure derived from committing the crime. The writings of these theorists led to greater CODIFICATION and standardization of European and U.S. laws.

Criminologists of the early nineteenth century argued that legal punishments that had been created under the guidance of the classical school did not sufficiently consider the widely varying circumstances of those who found themselves in the gears of the criminal justice system. Accordingly, they proposed that those who could not distinguish right from wrong, particularly children and mentally ill persons, should be exempted from the punishments that were normally meted out to mentally capable adults who had committed the same crimes. Along with the contributions of a later generation of criminologists, known as the positivists, such writers argued that the punishment should fit the criminal, not the crime.

Later in the nineteenth century, the positivist school of criminology brought a scientific approach to criminology, including findings from biology and medicine. The leading figure of this school was the Italian Cesare Lombroso (1836–1909). Influenced by Charles R. Darwin's theory of evolution, Lombroso measured the physical features of prison inmates and concluded that criminal behavior correlated with specific bodily characteristics, particularly cranial, skeletal, and neurological malformations. According to Lombroso, biology created a criminal class among the human population. Subsequent generations of criminologists have disagreed harshly with Lombroso's conclusions on this matter. However, Lombroso had a more lasting effect on criminology with other findings that emphasized the multiple causes of crime, including environmental causes that were not biologically determined. He was also a pioneer of the case-study approach to criminology.

Other late-nineteenth-century developments in criminology included the work of statisticians of the cartographic school, who analyzed data on population and crime. These included Lambert Adolphe Quetelet, (1796–1874) of France and André Michel Guerry, of Belgium. Both of these researchers compiled detailed, statistical information relating to crime and also attempted to identify the circumstances that predisposed people to commit crimes.

The writings of French sociologist Emile Durkheim (1858–1917) also exerted a great

influence on criminology. Durkheim advanced the hypothesis that criminal behavior is a normal part of all societies. No society, he argued, can ever have complete uniformity of moral consciousness. All societies must permit some deviancy, including criminal deviancy, or they will stagnate. He saw the criminal as an acceptable human being and one of the prices that a society pays for freedom.

Durkheim also theorized about the ways in which modern, industrial societies differ from nonindustrial ones. Industrial societies are not as effective at producing what Durkheim called a collective conscience that effectively controls the behavior of individuals. Individuals in industrial societies are more likely to exhibit what Durkheim called *anomie*—a Greek word meaning "without norms." Consequently, modern societies have had to develop specialized laws and criminal justice systems that were not necessary in early societies to control behavior.

Early efforts to organize criminologists in the United States attracted law enforcement officials and others who were interested in the criminal justice system. In 1941, a group of individuals in California organized for the purpose of improving police training and the standardization of police-training curricula. In 1946, this movement developed into the establishment of the Society for the Advancement of Criminology, which changed its name to the American Society of Criminology in 1957. Initial efforts of this organization focused upon scientific crime detection, investigation, and identification; crime prevention, public safety, and security; law enforcement administration; administration of criminal justice; traffic administration; and probation.

The American Society of Criminology has since attracted thousands of members, including academics, practitioners, and students of the criminal justice system. Studies of criminology include both the theoretical and the pragmatic, and some combine elements of both. Although some aspects of criminology as a science are still considered radical, others have developed as standards in the study of crime and criminal justice.

### Sociology and Criminology

During the twentieth century, the sociological approach to criminology became the most influential approach. Sociology is the study of social behavior, systems, and structures. In relation to criminology, it may be divided into social-structural and social-process approaches.

**Social-Structural Criminology** Social-structural approaches to criminology examine the way in which social situations and structures influence or relate to criminal behavior. An early example of this approach, the ecological school of criminology, was developed in the 1920s and 1930s at the University of Chicago. It seeks to explain crime's relationship to social and environmental change. For example, it attempts to describe why certain areas of a city will have a tendency to attract crime and also have less-vigorous police enforcement. Researchers have found that urban areas in transition from residential to business uses are most often targeted by criminals. Such communities often have disorganized social networks that foster a weaker sense of social standards.

Another social-structural approach is the conflict school of criminology. It traces its roots to Marxist theories that saw crime as ultimately a product of conflict between different classes under the system of capitalism. Criminology conflict theory suggests that the laws of society emerge out of conflict rather than out of consensus. It holds that laws are made by the group that is in power, to control those who are not in power. Conflict theorists propose, as do other theorists, that those who commit crimes are not fundamentally different from the rest of the population. They call the idea that society may be clearly divided into criminals and noncriminals a dualistic fallacy, or a misguided notion. These theorists maintain, instead, that the determination of whether someone is a criminal or not often depends on the way society reacts to those who deviate from accepted norms. Many conflict theorists and others argue that minorities and poor people are more quickly labeled as criminals than are members of the majority and wealthy individuals.

Critical criminology, also called radical criminology, shares with conflict criminology a debt to Marxism. It came into prominence in the early 1970s and attempted to explain contemporary social upheavals. Critical criminology relies on economic explanations of behavior and argues that economic and social inequalities cause criminal behavior. It focuses less on the study of individual criminals, and advances the belief that existing crime cannot be eliminated within the capitalist system. It also asserts, like the conflict school, that law has an inherent bias

in favor of the upper or ruling class, and that the state and its legal system exist to advance the interests of the ruling class. Critical criminologists argue that corporate, political, and environmental crime are underreported and inadequately addressed in the current criminal justice system.

Feminist criminology emphasizes the subordinate position of women in society. According to feminist criminologists, women remain in a position of inferiority that has not been fully rectified by changes in the law during the late twentieth century. Feminist criminology also explores the ways in which women's criminal behavior is related to their objectification as commodities in the sex industry.

Others using the social-structural approach have studied GANGS, juvenile delinquency, and the relationship between family structure and criminal behavior.

**Social-Process Criminology** Social-process criminology theories attempt to explain how people become criminals. These theories developed through recognition of the fact that not all people who are exposed to the same social-structural conditions become criminals. They focus on criminal behavior as learned behavior.

Edwin H. Sutherland (1883–1950), a U.S. sociologist and criminologist who first presented his ideas in the 1920s and 1930s, advanced the theory of differential association to explain criminal behavior. He emphasized that criminal behavior is learned in interaction with others, usually in small groups, and that criminals learn to favor criminal behavior over noncriminal behavior through association with both forms of behavior in different degrees. As Sutherland wrote, "When persons become criminal, they do so because of contacts with criminal patterns and also because of isolation from anticriminal patterns." Although his theory has been greatly influential, Sutherland himself admitted that it did not satisfactorily explain all criminal behavior. Later theorists have modified his approach in an attempt to correct its shortcomings.

Control theory, developed in the 1960s and 1970s, attempts to explain ways to train people to engage in law-abiding behavior. Although there are different approaches within control theory, they share the view that humans require nurturing in order to develop attachments or bonds to people and that personal bonds are key in producing internal controls such as conscience and guilt and external controls such as shame. According to this view, crime is the result of insufficient attachment and commitment to others.

Walter C. Reckless developed one version of control theory, called *containment.* He argued that a combination of internal psychological containments and external social containments prevents people from deviating from social norms. In simple communities, social pressure to conform to community standards, usually enforced by social ostracism, was sufficient to control behavior. As societies became more complex, internal containments played a more crucial role in determining whether people behaved according to public laws. Furthermore, containment theorists have found that internal containments require a positive self-image. All too often, a sense of alienation from society and its norms forms in modern individuals, who, as a result, do not develop internal containment mechanisms.

The sociologist Travis Hirschi has developed his own control theory that attempts to explain conforming, or lawful, rather than deviant, or unlawful, behavior. He stresses the importance of the individual's bond to society in determining conforming behavior. His research has found that socioeconomic class has little to do with determining delinquent behavior, and that young people who are not very attached to their parents or to school are more likely to be delinquent than those who are strongly attached. He also found that youths who have a strongly positive view of their own accomplishments are more likely to view society's laws as valid constraints on their behavior.

### Political Criminology

Political criminology is similar to the other camps in this area. It involves study into the forces that determine how, why, and with what consequences societies chose to address criminals and crime in general. Those who are involved with political criminology focus on the causes of crime, the nature of crime, the social and political meanings that attach to crime, and crime-control policies, including the study of the bases upon which crime and punishment is committed and the choices made by the principals in criminal justice.

Although the theories of political criminology and conflict criminology overlap to some extent, political criminologists deny that the terms are interchangeable. The primary focus

points in the new movement of political criminology similarly overlap with other theories, including the concerns and ramifications of street crime and the distribution of power in crime-control strategies. This movement has largely been a loose, academic effort.

### Other Issues

Criminologists also study a host of other issues related to crime and the law. These include studies of the VICTIMS OF CRIME, focusing upon their relations to the criminal, and their role as potential causal agents in crime; juvenile delinquency and its correction; and the media and their relation to crime, including the influence of PORNOGRAPHY. Much research related to criminology has focused on the biological basis of criminal behavior. In fact, a field of study called biocriminology, which attempts to explore the biological basis of criminal behavior, has emerged. Research in this area has focused on chromosomal abnormalities, hormonal and brain chemical imbalances, diet, neurological conditions, drugs, and alcohol as variables that contribute to criminal behavior.

The true effect of criminology upon practices in the criminal justice system is still subject to question. Although a number of commentators have noted that studies in criminology have led to significant changes among criminal laws in the various states, other critics have suggested that studies in criminology have not directly led to a reduction of crime.

In *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), an individual who had been sentenced to death for a murder in Georgia demonstrated to the U.S. Supreme Court that a criminologist's study showed that the race of individuals in that state impacted whether the defendant was sentenced to life or to death. The study demonstrated that a black defendant who had killed a white victim was four times more likely to be sentenced to death than was a defendant who had killed a black victim. The defendant claimed that the study demonstrated that the state of Georgia had violated his rights under the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT, as well as under the Eighth Amendment's protection against CRUEL AND UNUSUAL PUNISHMENT.

The high court disagreed. Although the majority did question the validity of the study's findings, it held that the study did not establish that officials in Georgia had acted with discriminatory purpose, and that it did not establish that racial bias had affected the officials' decisions with respect to the death sentence. Accordingly, the death sentence violated neither the Fourteenth Amendment nor the EIGHTH AMENDMENT.

Criminology has had more of an effect when states and the federal government consider new criminal laws and sentencing provisions. Criminologists' theories are also often debated in the context of the death penalty and crime control acts among legislators and policymakers. In this light, criminology is perhaps not at the forefront of the development of the criminal justice system, but it most certainly works in the background in the determination of criminal justice policies.

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## CRITICAL LEGAL STUDIES

*An intellectual movement whose members argue that law is neither neutral nor value free but is in fact inseparable from politics.*

Critical legal studies (CLS) is a sometimes revolutionary movement that challenges and seeks to overturn accepted norms and standards in legal theory and practice. CLS seeks to fundamentally alter JURISPRUDENCE, exposing it as not a rational system of accumulated wisdom but an ideology that supports and makes possible an unjust political system. CLS scholars attempt to debunk the law's pretensions to determinacy, neutrality, and objectivity. The law, in CLS scholarship, is a tool used by the establishment to maintain its power and domination over an unequal status quo. Openly a movement of leftist politics, CLS seeks to subvert the philosophical and political authority of what it sees as an unjust social system. CLS advances a theoretical and practical project of reconstruction of the law and of society itself. CLS is also a mem-

bership organization that seeks to advance its own cause and that of its members.

CLS was officially started in the spring of 1977 at a conference at the University of Wisconsin in Madison. However, the roots of the organization extend back to LEGAL REALISM, a movement in U.S. legal scholarship that flourished in the 1920s and 1930s. OLIVER WENDELL HOLMES is credited with being the grandfather of CLS with his various observations in *The Common Law* (1881). The legal realists rebelled against the accepted legal theories of the day, including most of the accepted wisdom of nineteenth-century legal thought. Like CLS, legal realism emphasized that judicial decisions depend largely on the predilections and social situation of the judge. Thus, the legal realists urged that much more attention be paid to the social context of the law. The legal realists eventually influenced the development of the NEW DEAL under President FRANKLIN D. ROOSEVELT in the 1930s, and many served in positions where they affected government policy.

In the 1960s, many of the founding members of CLS participated in social activism connected to the CIVIL RIGHTS MOVEMENT and the VIETNAM WAR. Many future CLS scholars entered law school in those years or shortly thereafter, and they quickly became unhappy with what they saw as a lack of philosophical depth and rigor in the teaching and theory of law. Roberto Mangabeira Unger, a leading CLS theorist, has described the law faculty of those days as "a priesthood that had lost their faith and kept their jobs." These young students began to apply the ideas, theories, and philosophies of postmodernity (intellectual movements of the last half of the twentieth century) to the study of law, borrowing from fields as diverse as social theory, political philosophy, economics, and literary theory. Since then, CLS has steadily grown in influence. By 1989, over 700 articles and books had been published expounding the ideas of this movement. Besides Unger, noted CLS theorists include Robert W. Gordon, Morton J. Horwitz, Duncan Kennedy, and CATHARINE A. MACKINNON.

CLS has been largely a U.S. movement, though it has borrowed heavily from European philosophers, including nineteenth-century German social theorists such as KARL MARX, Friedrich Engels, and MAX WEBER; Max Horkheimer and Herbert Marcuse of the Frankfurt school of German social philosophy; the Italian Marxist Antonio Gramsci; and poststructuralist French thinkers such as Michel Foucault and Jacques Derrida, representing, respectively, the fields of history and literary theory.

Several subcategories exist within the CLS movement: feminist legal criticism, which examines the role of gender in the law; critical race theory (CRT), which is concerned with the role of race in the law; postmodernism, a critique of the law influenced by developments in literary theory; and a subcategory that emphasizes political economy and the economic context of legal decisions and issues. Scholars disagree about the extent to which CLS is a coherent intellectual movement. Some see it simply as a political position adopted by a disparate group of legal theorists who have fundamentally different, even contradictory, views. Others emphasize that CLS theorists share a number of important ideas and approaches that together constitute a new approach to legal scholarship.

First among the basic ideas that CLS scholars tend to share is the notion that law is politics—in other words, that law and politics are indistinguishable from one another. Liberalism, according to CLS theorists, has traditionally viewed the law as an objective, rational process of precise decision-making and politics as a realm of imprecise, often irrational opinions and competing interests. According to CLS theorists, however, the law is not separate from the political realm and its disputes. Legal reasoning, rather than being a strong fortress of objective rationality, is a fragile structure fraught with contradictory and ARBITRARY categorizations that are endlessly redefined and reworked.

In this view, the law is only an elaborate political ideology, which, like other political ideologies, exists to support the interests of the party or class that forms it. The legal system, according to CLS, supports the status quo, perpetuating the established power relations of society. The law does have logic and structure, but these grow out of the power relationships of society. CLS therefore sees the law as a collection of beliefs and prejudices that covers the injustices of society with a mask of legitimacy. Law is an instrument for oppression used by the wealthy and the powerful to maintain their place in the hierarchy.

As part of its project, CLS exposes what it sees as the flaws in various aspects of liberal legal theory and practice. It argues, for example, that

judicial objectivity is impossible because political neutrality or philosophical objectivity cannot exist. CLS thus strips the judiciary of its supposedly disinterested role in society. As Allan C. Hutchinson, a CLS theorist, wrote: "The judicial emperor, clothed and coifed in appropriately legitimate and voguish garb by the scholarly rag trade, chooses and acts to protect and preserve the propertied interest of vested white and male power." In this way, CLS seeks to "delegitimate" and "demystify" the law—that is, it seeks to undermine the law's acceptance and to remove the cloak of mystery and awe surrounding its functioning.

CLS theorists also share the related view that the law is indeterminate. They have shown that using standard legal arguments, it is possible to reach sharply contrasting conclusions in individual cases. The conclusions reached in any case will have more to do with the social context in which they are argued and decided than with any overarching scheme of legal reasoning. Moreover, CLS scholars argue that the esoteric and convoluted nature of legal reasoning actually screens the law's indeterminacy. They have used the ideas of deconstruction to explore the ways in which legal texts are open to multiple interpretations. (Deconstruction is a movement in literary theory that is connected to the work of French philosopher Derrida and that emphasizes the fundamental indeterminacy of language.)

Consistent with their position on the political left, CLS scholars have a common dissatisfaction with the established legal and political order and particularly for the liberalism that they see as the dominant political ideology. CLS demonstrates how liberalism describes the world according to categories that exist as dualities: subjective-objective, male-female, public-private, self-other, individual-community, and so forth. These dualities are sometimes called paired opposites by CLS theorists. CLS then breaks down the dualities and shows how they create an ideology that furthers the interests of the ruling class. CLS theorists also decry the individualism that liberal society fosters, and they call for a renewed emphasis on communal rather than individual values. They particularly object to capitalism as an economic system, and they see liberalism as capitalism's greatest apologist.

### Feminist Legal Criticism

Catharine A. MacKinnon is a leading figure in radical feminist criticism (sometimes called fem-crit). Throughout her career, MacKinnon has attempted to show the ways in which the established legal system reflects the sexism of the society that created it. The law, according to MacKinnon, is only one extension of a male-dominated society that is characterized by inequality between the genders and by the sexual objectification of women. As the product of a male-oriented view of the world and a male-dominated state, the law systematically victimizes and discriminates against women. "The law," MacKinnon wrote, "sees and treats women the way men see and treat women." It ensures male control over female sexuality. The feminist project to counter this negative aspect of the legal tradition, MacKinnon wrote, is "to uncover and claim as valid the experience of women, the major content of which is the devalidation of women's experience."

One topic that MacKinnon has examined in detail is the legal doctrine regarding rape. Citing the difficulty that women have proving legally that they have been raped, MacKinnon interprets rape doctrine as the product of male ideology. She argues that rape and the laws surrounding it, which are often ineffective in securing convictions of male rapists, are used by men to keep women in a position of submission and inferiority. The law's standards of objectivity and neutrality, according to MacKinnon, actually hide a male bias that makes it very difficult for a woman to win a rape case in the legal system. The state thus perpetuates rape in a way that promotes the dominance of men.

MacKinnon also uses rape as an example of the way in which the conventional liberal distinction between public and private spheres actually enhances male power. For women, according to MacKinnon, the private sphere cannot be separated from the public. The private sphere as it is usually understood—that is, the home—is actually a place where the law defines men's right to dominate women through domestic abuse, marital rape, and exploitive work conditions. The law, according to MacKinnon, overlooks such injustices, and legal doctrines regarding the private sphere of the home perpetuate rather than resolve them.

### Critical Race Theory (CRT)

CRT began in the mid-1970s when many intellectuals perceived that the civil rights movement of the 1960s had ended and that in fact many of its gains were being turned back. As a result, they began to develop new theories and concepts that would allow them to understand

the causes and implications of these new developments. Like CLS, CRT gathers disparate scholars and theorists under a common heading. However, CRT is a less formally organized school of thought than CLS. Leading critical race theorists include DERRICK ALBERT BELL JR., Alan D. Freeman, and Patricia J. Williams. The first annotated bibliography of CRT writings, published in 1993, listed over 200 books and articles.

Critical race theorists share a number of themes. Like CLS, CRT finds major faults in liberalism and particular features of liberal jurisprudence that bear on race, including AFFIRMATIVE ACTION, neutrality, and "color blindness." Many CRT writers, for example, dispute that the Constitution is or ever can be "color-blind." They also assert that supposed breakthroughs in the area of racial rights by the Supreme Court serve only to validate an unjust political system by creating the illusion that racial inequalities are being ended when in fact they are not. CRT scholars generally seek a greater understanding of the social origins of race and racism, and, like CLS theorists, they employ social theory and science in that cause. Many in the CRT movement examine how the structure of legal thought or culture influences its content, usually in a way that maintains the status quo. Some in the movement make a case for cultural separatism or nationalism for people of color, arguing that preserving the diversity and separateness of different racial groups will benefit everyone. CRT also attempts to understand the cyclical nature of U.S. race relations—characterized by periods of racial progress and relative harmony followed by periods of racial retrenchment and discord. CRT writers also make frequent use of historical and social theories regarding colonialism and SLAVERY.

Many CRT writers employ unconventional narrative methods—sometimes called legal storytelling—in their legal writing, including fiction, myth, parable, anecdote, and autobiography. These approaches often demonstrate the way in which the majoritarian mind-set (in this case, the outlook of the white majority, including its prejudices and presuppositions) impedes the cause of racial reform. Bell, for example, published in a legal journal a science fiction story with implications for race relations in the United States. In it, an extraterrestrial race comes to earth and offers to solve the United States' economic and environmental problems in exchange for possession of all black U.S. citizens. In describing what happens after this event, the story shows how a majority group (here, white U.S. citizens) must always put some other group on the bottom of the socioeconomic ladder as a scapegoat for the country's social ills.

### CLS and Its Alternative View of the Law and Society

Consistent with their leftist heritage, CLS theorists call for radical changes in the law and in the structure of society itself. Unger has called this radical project "institutional reconstruction." Many in the CLS movement want to overturn the hierarchical structures of domination in modern society, and many of them have focused on the law as a tool in achieving this goal. The law, CLS claims, has played a key role in maintaining that hierarchy by impeding efforts at social change. In general, CLS argues that there is no natural or inevitable form of social organization, and there is by no means agreement between CLS scholars as to what form society and its laws should take. CLS thus avoids the kind of blueprint for social revolution that radical leftist movements such as Marxism-Leninism supplied in the past. Instead, leading CLS devotees envision a potential emancipation of individuals from the structures of power that restrict and victimize them. For these reasons, the political philosophy of many in the CLS movement has been described as utopian, a characterization that many do not completely deny.

Unger provides the most well-known example of the utopian tendencies in CLS. In his writings, he has attempted to outline a "cultural-revolutionary practice" that will lead to nothing less than "the systematic remaking of all direct personal connections . . . through their progressive emancipation from a background plan of social division and hierarchy." Unger envisions a future in which the categories that currently divide and separate people—including sexual, racial, political, and class categories—are broken down, allowing people to share more values and to create a more harmonious society. He calls for an "empowered democracy" with a government and economy that are largely decentralized. In terms of the economy, he proposes that capital be controlled by the government, which would establish a "rotating capital fund" that would pass to "teams of workers or technicians" who would decide how to use it. Many conditions of

the economy, such as income disparity between individuals, would be addressed by "central agencies of government."

Such innovations would require major changes in the law, particularly as regards an understanding of rights, including property rights. In his call for a radical restructuring of rights, Unger proposes creating four categories: IMMUNITY rights, which protect the individual from the state, organizations, and other individuals; destabilization rights, which make it possible to dismantle institutions and practices that create social hierarchy and division; market rights, which constitute claims to social capital and replace conventional property rights; and solidarity rights, which are "the legal entitlements of communal life." Despite his criticism of liberalism, Unger calls his philosophy "super-liberalism":

> It pushes the liberal premises about state and society, about freedom from dependence and governance of social relations by the will, to the point at which they merge into a larger ambition: the building of a social world less alien to a self that can always violate the generative rules of its own mental or social constructs and put other rules and other constructs in their place.Unger therefore seeks to reform the law and society in such a way as to liberate and empower every individual.

"I HOPE TO FIND MY COUNTRY IN THE RIGHT; HOWEVER, I WILL STAND BY HER, RIGHT OR WRONG."
—JOHN J. CRITTENDEN

CLS has many critics. Some see it as lacking coherence, fraught with the very contradictions that it identifies in liberalism. Others accuse the movement of being nihilistic, of destroying the foundations of legal reasoning without putting anything in its place or without even making positive recommendations for change. They find CLS prescriptions for the future to be too vague and utopian for practical application. Another widespread complaint is that the writings of CLS scholars are unnecessarily obscure, opaque, and turgid.

Despite these criticisms, CLS has greatly influenced the study and theory of the law. After some early battles to gain acceptance in the 1970s and 1980s, it earned an accepted position in law schools across the United States. However, some legal scholars, both inside and outside the CLS movement, argue that as many of the original CLS adherents age and reach positions of power in established law schools, their original radical impetus will fade and moderate. Others argue that the call for justice and equality will always require an untempered radicalism that will be fueled by CLS. Whatever the outcome, CLS has permanently changed the landscape of legal theory.

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## ♦ CRITTENDEN, JOHN JORDAN

John Jordan Crittenden served as attorney general of the United States in 1841 under President WILLIAM H. HARRISON, and again in 1850 under President MILLARD FILLMORE. He is also known for his efforts to keep Kentucky in the Union during the Civil War.

Crittenden was born September 10, 1787, near Versailles, Woodford County, Kentucky. His father was a Revolutionary War soldier and an early Kentucky settler. Crittenden was schooled near his home in Jessamine County, Kentucky. He showed a great aptitude for learning and was encouraged to pursue a career in the law. He attended William and Mary College, and graduated in 1807. His first law practice was established in Logan County, Kentucky.

After two years as a struggling country lawyer, Crittenden was appointed attorney general for the Illinois Territory by Governor Vinian Edwards, of Kentucky, in 1809. His first experience as a public servant was cut short by the WAR OF 1812. Crittenden returned to Kentucky and enlisted as a volunteer; he served for three years and experienced firsthand the tragedy of war.

In 1816 Crittenden was elected to a term in the Kentucky state legislature. The following year, he was elected to a seat in the U.S. Senate, but he did not complete the term. Finding local politics more to his liking, he resigned in 1819 and returned to Frankfort, Kentucky, to reclaim his old seat in the statehouse.

Though he had little affection for national politics, Crittenden did support fellow Kentuckian HENRY CLAY in his unsuccessful 1824 bid for the presidency. Crittenden respected Clay's views on a number of issues, and they became political allies and lifelong friends. It was because of his association with Clay that Crittenden lost his next job. In 1827 Crittenden was appointed U.S. district attorney for Kentucky by President JOHN QUINCY ADAMS. He held the post until 1829, when he was removed by President Andrew Jackson—after Crittenden and Clay had voiced their opposition to the financial policies of the Jackson administration.

In 1835 Crittenden decided to give politics another chance. Again, he sought and won a seat in the U.S. Senate. Crittenden was beginning his second Senate term when he was offered the position of attorney general by President Harrison. He accepted.

Crittenden had been an ardent Harrison supporter and had campaigned for him in 1840. When Harrison died of pneumonia shortly after his inauguration and was succeeded by Vice President JOHN TYLER, Crittenden was unable to support the new president. Along with other Whigs in the cabinet, Crittenden resigned in September 1841. In 1842 Crittenden found himself back in the U.S. Senate, appointed to fill the seat left vacant by the retirement of Clay. He finished Clay's term and was subsequently reelected in his own right.

Throughout his five separate terms in the Senate, Crittenden was affiliated with the Whigs. With the WHIG PARTY, he opposed the annexation of Texas, discouraged animosity toward Great Britain over the Oregon boundary, and refused to give enthusiastic support to the Mexican War.

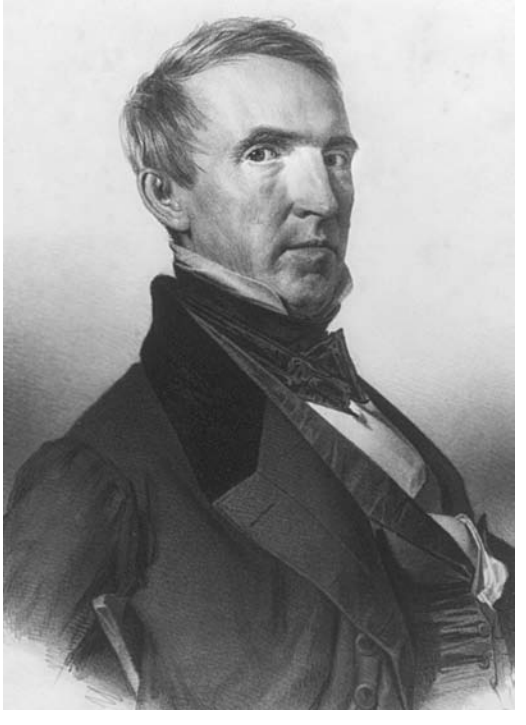

*John J. Crittenden.*
LIBRARY OF CONGRESS

In 1848 while still a U.S. senator, Crittenden was elected governor of Kentucky; he resigned his Senate seat to accept the job. His return to Kentucky brought renewed contact with Clay, who was again running for the presidency. Crittenden, convinced that Clay was not a viable candidate, threw his support to ZACHARY TAYLOR, and caused a permanent rift between himself and Clay.

Following the death of President Taylor and the succession of Vice President Fillmore, Crittenden was offered his old cabinet post as attorney general. He again accepted, and through this office he authored an opinion upholding the

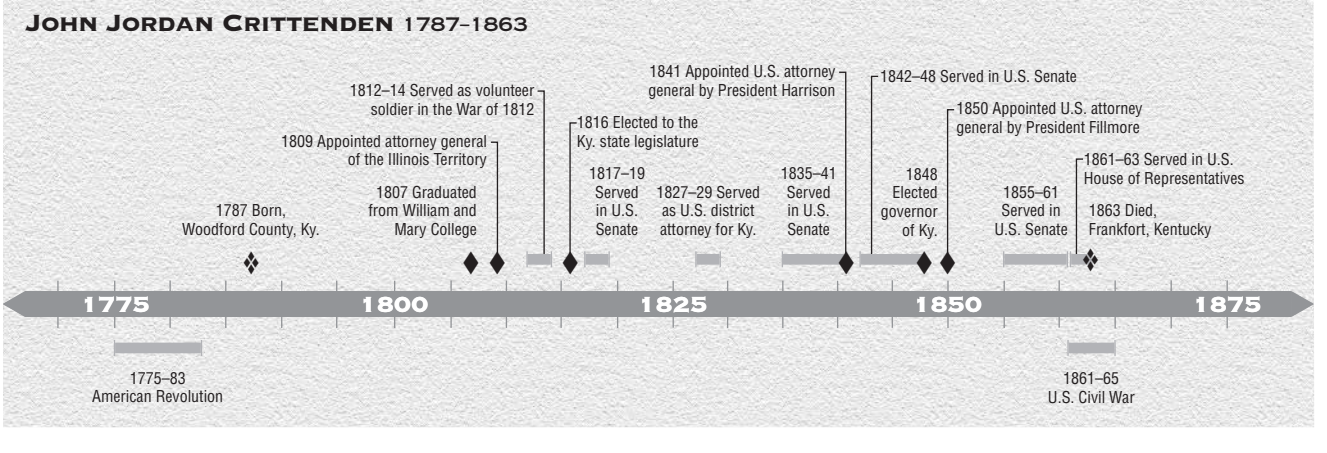

constitutionality of fugitive slave laws. Though many of Crittenden's writings were controversial, he agreed with the view that attorney general opinions were only advisory and could be ignored by the president.

In 1855 Crittenden was elected to another term in the U.S. Senate. There, he vigorously opposed the KANSAS-NEBRASKA ACT of 1854. When the issue led to the breakup of the Whig party, he joined the KNOW-NOTHING PARTY in 1856. Two years later, he joined the Constitutional Union party, and campaigned on behalf of JOHN BELL and Edward Everett in the 1860 presidential election that brought ABRAHAM LINCOLN to the White House.

Although Crittenden did not agree with Lincoln on all matters of policy, he did oppose secession of the Southern states and he did support Lincoln's efforts to preserve the Union. As a prominent political figure in both the North and the South, Crittenden worked hard to effect a compromise that would avert a civil war.

"NO OTHER PROFESSIONAL GROUP BEARS A RESPONSIBILITY AS GREAT AS THAT OF THE LEGAL PROFESSION FOR RIDDING OUR LAW AND OUR BODY POLITIC OF THIS CANCEROUS GROWTH OF RACISM."
—GEORGE W. CROCKETT

In December 1860, he proposed an amendment to the Constitution that has come to be known as the Crittenden Resolution. To bring the Union together, he suggested that the Missouri Compromise line be restored and continued to California, that SLAVERY be guaranteed indefinitely in the District of Columbia, and that slaveholders be reimbursed for runaway slaves.

Crittenden's compromise effort was defeated by Lincoln's strong stand against any extension of slavery into the territories, and by opposition from strong Republican leaders in Congress. Nevertheless, Crittenden stood with the government and continued to support Lincoln's position that it was the right and duty of the government to maintain the Union.

Returning to Kentucky in early 1861, Crittenden traveled the state urging citizens to support the Union cause and to remain neutral in the escalating conflict. On May 27, 1861, he acted as chairman of the Frankfort Convention and successfully argued against leaders who encouraged Kentucky to join the Southern secessionists. For his efforts, Crittenden was returned to Congress, but this time to the U.S. House of Representatives.

As a representative, he opposed the confiscation acts, the EMANCIPATION PROCLAMATION, the military regime in Kentucky, the employment of slaves as soldiers, and the war in general. On July 19, 1861, he offered a resolution that was adopted with only two dissenting votes:

> Resolved by the house of representatives of the CONGRESS OF THE UNITED STATES, That the present deplorable civil war has been forced upon the country by the disunionists of the southern states, now in arms against the constitutional government, and in arms around the capital; that in this national emergency congress, banishing all feelings of mere passion or resentment, will recollect its only duty to the whole country; this war is not waged on their part in any spirit of oppression, or for any purpose of conquest or subjugation, or purpose of overthrowing or interfering with the rights of established institutions of those states, but to defend and maintain the supremacy of the constitution, and to preserve the Union with all the dignity, equality, and rights of the several states unimpaired; and that as soon as these objects are accomplished the war ought to cease.

By 1863 Crittenden had held political office for almost forty-five years. He had served two presidents as attorney general, completed five terms as a U.S. senator, and finished a single term as a U.S. representative. He was preparing to run for another term in the House when he died. He was remembered at his funeral as a man with fine personal qualities, a gift for public speaking, and a firm commitment to the Union.

Crittenden's efforts to preserve the Union were personal as well as political: two of his sons were on opposite sides of the issues and the battle lines. His youngest son, Thomas L. Crittenden, was a commissioned officer in the Union army; another son, George Bibb Crittenden, held similar rank in the army of the Confederacy.

## ❖ CROCKETT, GEORGE WILLIAM, JR.

George William Crockett Jr.'s political career spanned almost six decades. He was an attorney, a judge, and a leading CIVIL RIGHTS and LABOR UNION activist. At the age of 71, he was tapped to represent Michigan's 13th district in the U.S. House of Representatives. His ten-year stint in Congress was marked by many milestones and much controversy.

Crockett was born August 10, 1909, in Jacksonville, Florida. He grew up in the South when racial SEGREGATION was a fact of everyday life, an experience that fueled his commitment to correct injustices. He attended public schools and graduated with a bachelor of arts degree from Morehouse College in Atlanta in 1931. He studied law at the University of Michigan, grad-

uating in 1934. He was admitted to the Florida bar in the same year and began his legal career in Jacksonville.

In 1939, Crockett became the first African American lawyer in the U.S. DEPARTMENT OF LABOR. He was one of the first hearing examiners in the Fair Employment Practices Commission. Crockett's early involvement in LABOR LAW led to his founding and directing the Fair Employment Practices Department of the International United Auto Workers (UAW) Union in 1944. He also served as treasurer and associate general counsel to the UAW and as assistant to the union's secretary-treasurer.

After leaving the UAW, Crockett returned to private practice with the law firm of Goodman, Crockett, Eden, and Rob, where he was a partner from 1946 to 1966. He remained active in the civil rights and labor movements throughout his career. In the 1949 Foley Square trial, he defended several members of the U.S. Communist Party against charges of un-American activities. (*United States v. Foster,* 9 F.R.D. 367 [S.D.N.Y.]). Crockett's clients, along with many codefendants, were charged with conspiracy to advocate the overthrow or destruction of the government by force or violence and conspiracy to organize the Communist Party as a society advocating such overthrow or destruction. During the trial, he railed against what he thought were the judge's abuses of his clients' rights. His refusal to back down earned him a CONTEMPT citation (*United States v. Sacher,* 9 F.R.D. 394 [S.D.N.Y.]). His conviction and sentence for contempt were upheld on appeal, 182 F.2d 416 (2nd Cir.), and he spent four months in the penitentiary at Ashland, Kentucky, in 1952.

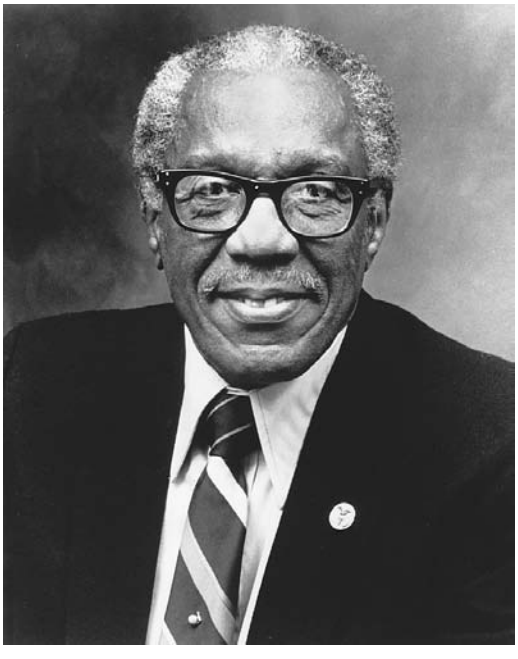

*George W. Crockett.*
AP/WIDE WORLD PHOTOS

While serving his prison term, Crockett wrote to his son that prison is a good place to learn patience because the relentless passage of time teaches the value of persistence. Crockett's patience was severely tested after his return from prison when he was ostracized and forced to fight a move to disbar him. Because of his involvement in the Foley Square trial, the labor movement, and the CIVIL RIGHTS MOVEMENT, he was labeled a communist sympathizer. However, in 1963, when President JOHN F. KENNEDY planned a meeting of civil rights lawyers at the White House, Crockett's name was on the list of those the president wanted to attend. To be allowed into the White House, Crockett had to

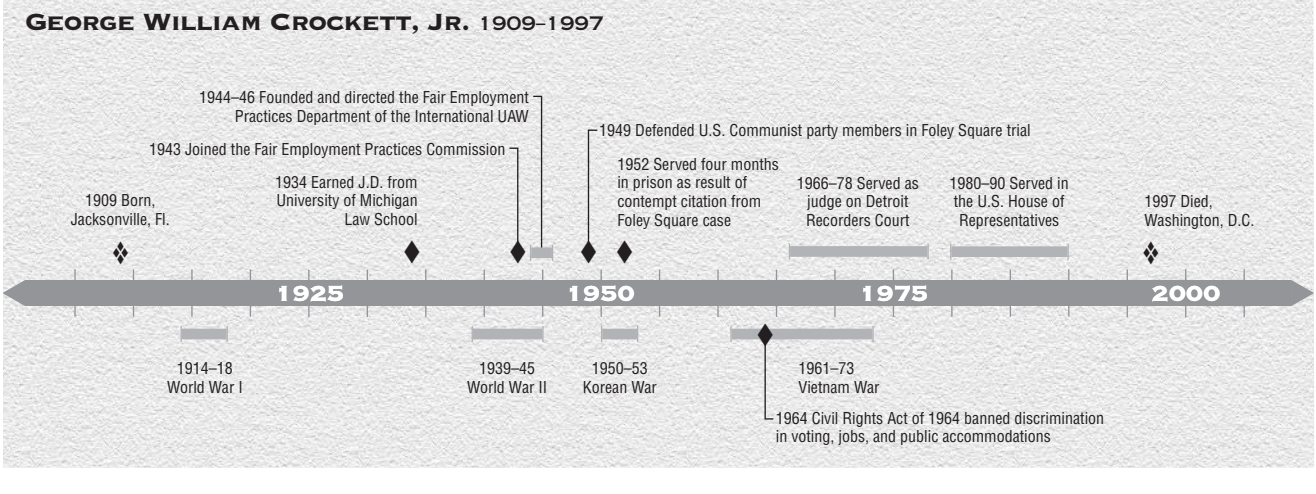

be investigated by the FEDERAL BUREAU OF INVESTIGATION, which finally granted him a security clearance.

Crockett served as a judge of the Detroit Recorder's (Criminal) Court from 1966 to 1978. His years on the bench included a term as presiding judge in 1974. He retired from the recorder's court in 1978, but soon returned to public service. In 1980, Representative Charles C. Diggs Jr. (D-Mich.), one of the few people who had befriended Crockett upon his return from prison in 1952, was himself sentenced to three years in prison, for accepting kickbacks from his congressional staff. Diggs endorsed Crockett to replace him, and, in a special election to fill the vacancy, Crockett was elected to the post.

At the age of 71, Crockett launched into his new career in Congress. He continued to take controversial positions on issues ranging from African Americans in the foreign service to decriminalization of drugs. He was arrested in 1984 at a demonstration protesting South Africa's policy of apartheid. In 1985, when tensions between Arabs and Jews in the Middle East were high and the United States officially supported Israel, Crockett invited a representative of the Palestine Liberation Organization (PLO) to brief members of Congress on the PLO's views about conditions in the Middle East. The invitation was denounced by some members of the House, and, after intervention by the SECRETARY OF STATE, the visit was canceled.

In 1986, Crockett criticized President Ronald Reagan's administration for not appointing more African American ambassadors. He noted that the number of African Americans in the foreign service had declined during the years Reagan had been president. He used his position as chair of the House Subcommittee on Western Hemisphere Activities to initiate a hearing on racism in appointments to the foreign service. The result was a promise from the secretary of state that the STATE DEPARTMENT would pursue a goal of appointing more members of minority groups to foreign service positions. In 1987, President Reagan appointed Crockett to the position of public delegate to the UNITED NATIONS.

In addition to chairing the House Subcommittee on Western Hemisphere Activities, Crockett served on the Committee on Foreign Affairs, the Committee on the Judiciary, and the Select Committee on Aging. His final controversial act as a representative came in 1989 when he became the first member of Congress to recommend publicly the decriminalization of drug possession. Stating, "Our courts are burdened down with these drug cases and there is nothing they can do about it," Crockett called for decriminalization as "the only solution." He was sharply criticized by many members of the administration, including William J. Bennett, who was the director of federal drug policy.

Crockett retired from public life at the end of his fifth term in the House, which ended Januar 3, 1991, but remained one of Detroit's best-known civil rights leaders. In 1992, he surprised many when he openly backed Dennis Archer in the Detroit mayoral race, and encouraged longtime friend Coleman Young to step down. In 1995, Crockett's story was recounted in a chapter of *Black Judges on Justice.* Crockett died on September 7, 1997, in Washington, D.C, after suffering a stroke. He had been battling bone cancer.

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## CROP INSURANCE

*A contract of indemnity by which, for a specified premium, one party promises to compensate another for the financial loss incurred by the destruction of agricultural products from the forces of nature, such as rain, hail, frost, or insect infestation.*

The federal government, acting through the Federal Crop Insurance Corporation, an agency of the DEPARTMENT OF AGRICULTURE, sponsors such insurance. By improving the economic stability of agriculture, crop insurance promotes the welfare of the nation.

CROSS-REFERENCES

Agricultural Law.

## CROPS

*Commodities produced from the earth which are planted, raised, and gathered within the course of a single season.*

Crops might be produced either naturally or under cultivation. This distinction becomes important when determining whether a crop is to be sold as PERSONAL PROPERTY or as real estate, and also in terms of how crops are to be devised.

*Fructus naturales* are crops that are produced by the powers of nature alone, without any harvesting methods. They include fruit trees, berries growing on bushes, and hay growing spontaneously from perennial roots. They are considered real property when they are not severed from the land, but personal property when severed.

*Fructus industriales,* or emblements, are annual crops that are raised by yearly labor and owe their existence to human intervention and cultivation. Such crops include wheat, corn, and vegetables. Authorities differ as to whether they constitute real or personal property.

The ownership of crops is generally held to be in the owner of the land, whether the crops are natural or cultivated. The owner may voluntarily choose to sever and sell the crops, without being obligated to sell the land upon which they are grown. The situation often arises in which the land belongs to one person and the crops belong to another, such as in the case of one person leasing land from another person. In such a case, whoever is in possession of the land subject to the consent of the owner may take and carry away the products of land resulting from his or her own care and labor.

Ordinarily, crops that are attached to land at the time of a sale pass automatically to the buyer, except where the owner has provided to the contrary. Someone disposing of land may, therefore, stipulate the retention of the title to the crops.

It has been widely held that a trespasser who enters another person's land and cultivates crops does not acquire title to them, since the owner is lawfully entitled to full possession and enjoyment of his or her property. Some authorities have held that as long as crops planted by an intruder remain unsevered, they are the property of the owner of the land upon which they are planted, whereas severed crops belong to the trespasser if he or she possesses the land when the crops are ready to be harvested.

**CROSS-REFERENCES**

Agricultural Law.

*Crops, such as these green peppers, are commodities that are planted and gathered within a single season.*

AP/WIDE WORLD PHOTOS

## CROSS-ACTION

*A separate and independent lawsuit brought by the defendant against a plaintiff for some reason arising from the same transaction or event that is the basis for the plaintiff's lawsuit.*

Under some circumstances, the court may order a consolidation of the actions.

## CROSS-CLAIM

*A demand made in a* PLEADING *against another party on the same side of the lawsuit.*

For example, a manufacturer of desks shipped thirty desks to a buyer by truck. When the buyer refused to pay because the desks arrived in a damaged condition, the manufacturer sued both the buyer and the trucking company. The buyer did not know whether the manufacturer or the trucking company was responsible for the damage, so the buyer served an answer containing a denial that he owed money to the manufacturer for unusable desks and a cross-claim demanding that the trucking company compensate him for the damage to the desks.

A counterclaim is comparable to a cross-claim except that it is a claim against an adverse party in the lawsuit, not a party on the same side of the lawsuit.

## CROSS-COMPLAINT

*A type of* PLEADING *that asserts a claim against any of the parties suing the person making the complaint, or against anyone else involved in the*

*same controversy or having an interest in the same property that is the subject of the lawsuit.*

The rules in many states permit or require a defendant to make claims for recovery from another party using a counterclaim or a cross-claim within the answer rather than using a different kind of pleading, but some jurisdictions permit a cross-complaint to be used instead of an answer for this purpose.

## CROSS-DEMAND

*A claim made against someone who has already made a demand of the person asserting that claim.*

These mutual claims are called cross-demands. A counterclaim is a kind of cross-demand.

## CROSS-EXAMINATION

*The questioning of a witness or party during a trial, hearing, or deposition by the party opposing the one who asked the person to testify in order to evaluate the truth of that person's testimony, to develop the testimony further, or to accomplish any other objective. The interrogation of a witness or party by the party opposed to the one who called the witness or party, upon a subject raised during direct examination—the initial questioning of a witness or party—on the merits of that testimony.*

The scope of cross-examination is generally restricted to matters covered during direct examination.

## CRUEL AND INHUMAN TREATMENT

*Another name for cruelty, or for the intentional, hostile infliction of physical or mental suffering upon another individual, which is a ground for* DIVORCE *in many states.*

Cruel and inhuman treatment ordinarily encompasses mental and physical cruelty of any kind and is also known as *cruel and abusive treatment* and as *cruel and barbarous treatment.*

## CRUEL AND UNUSUAL PUNISHMENT

*Such punishment as would amount to torture or barbarity, any cruel and degrading punishment not known to the* COMMON LAW*, or any fine, penalty, confinement, or treatment that is so disproportionate to the offense as to shock the moral sense of the community.*

The EIGHTH AMENDMENT to the U.S. Constitution prohibits the federal government from imposing cruel and unusual punishment for federal crimes. The amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." The DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT to the U.S. Constitution bars the states from inflicting such punishment for state crimes, and most state constitutions also prohibit the infliction of cruel and unusual punishment.

In attempting to define cruel and unusual punishment, federal and state courts have generally analyzed two aspects of punishment: the method and the amount. As to the method of punishment, the Eighth Amendment clearly bars punishments that were considered cruel at the time of its ADOPTION, such as burning at the stake, crucifixion, or breaking on the wheel (see *In re Kemmler,* 136 U.S. 436, 10 S. Ct. 930, 34 L. Ed. 519 [1890]). In *Hudson v. McMillian,* 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992), the U.S. Supreme Court held that the use of excessive physical force against a prisoner may constitute cruel and unusual punishment even if the prisoner does not suffer serious injury. When an inmate does suffer serious injury from the excessive use of force by prison officials, a violation of the Cruel and Unusual Punishment Clause is clear. In *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 153 L. Ed. 2d 666 (2002), the U.S. Supreme Court held that the Eighth Amendment had been contravened when prison officials had disciplined an inmate for disruptive behavior by handcuffing him to a "hitching post", once for two hours and once for seven hours, depriving the inmate of his shirt, exposing him to the sun, denying his requests for hydration, and refusing to allow him the opportunity to use the bathroom.

However, a defendant need not suffer actual physical injury or pain before a punishment will be declared cruel and unusual. In *Trop v. Dulles,* 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958), the U.S. Supreme Court held that the use of denationalization (the deprivation of citizenship) as a punishment is barred by the Eighth Amendment. The Court reasoned that when someone is denationalized, "[t]here may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was

centuries in the development." The Court also opined that the Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

The U.S. Supreme Court has held that the death penalty itself is not inherently cruel, but has described it as "an extreme sanction, suitable to the most extreme of crimes" (**GREGG V. GEORGIA**, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 [1976]). Federal and state courts have upheld modern methods of carrying out the death penalty, such as shooting, hanging, electrocution, and lethal injection, as constitutional. The U.S. Supreme Court has held that statutes providing a mandatory death sentence for certain degrees or categories of murder are unconstitutional because they preclude sentencing authorities from considering aspects of a particular defendant's character or record, or from considering circumstances that might mitigate a particular crime (see *Lockett v. Ohio,* 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 [1978]). In *Ford v. Wainwright,* 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), the Court held that the Eighth Amendment prohibits states from inflicting the death penalty upon a prisoner who is insane.

The Court has also ruled that execution of mentally retarded criminals violates the Eighth Amendment's guarantee against cruel and unusual punishment. **ATKINS V. VIRGINIA**, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). Citing "evolving standards of decency," the Court in *Atkins* stated that its decision was informed by a national consensus reflected in deliberations of the American public, legislators, scholars, and judges. *Atkins* overruled *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L. Ed. 2d 256 (1989), a decision rendered just 13 years earlier. However, in *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989), the Court found that there was no national consensus prohibiting the execution of juvenile offenders over age 15.

With regard to the amount of punishment that may be inflicted, the prohibition against cruel and unusual punishment also bars punishment that is clearly out of proportion to the offense committed. The U.S. Supreme Court has considered the issue of proportionality, particularly in the context of the death penalty. In *Coker v. Georgia,* 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977), the Court held that death was a disproportionate penalty for the crime of raping an adult woman. In *Enmund v. Florida,* 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), the Court held that the Eighth Amendment does not permit the imposition of the death penalty upon a defendant who aids and abets a felony during which murder is committed by someone else, when the defendant does not kill or attempt to kill, or does not intend that murder take place or that lethal force be used.

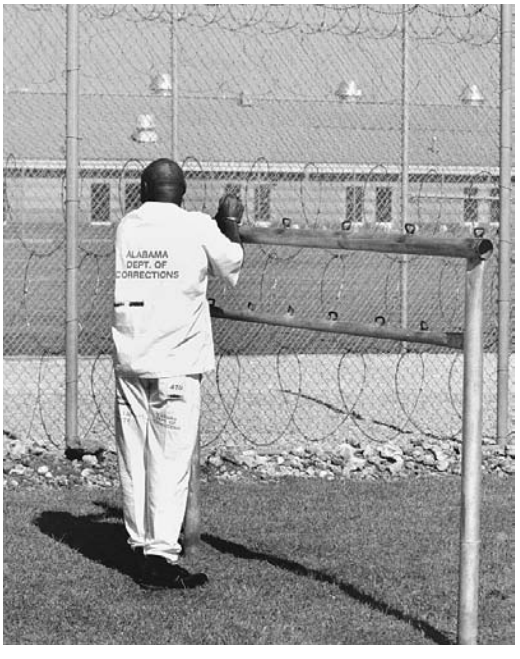


*The "hitching post" at Alabama's Limestone Correctional facility was the subject of former inmate Larry Hope's (not pictured) lawsuit,* Hope v. Pelzer, *alleging cruel and unusual punishment.*

AP/WIDE WORLD PHOTOS

In *Solem v. Helm,* 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983), the Court applied its proportionality analysis to felony prison sentences. In *Solem,* the defendant had passed a bad check in the amount of $100. Although this crime ordinarily would be punishable by a maximum five-year sentence, the defendant had been sentenced to life imprisonment without **PAROLE** because of six prior felony convictions. The Court held that the sentence was significantly disproportionate to the defendant's crime and that it was thus prohibited by the Eighth Amendment.

The U.S. Court of Appeals for the Ninth Circuit applied the proportionality analysis in overturning the life sentence of a defendant who had been convicted under California's "three-strikes" law, which requires that courts impose harsh sentences upon defendants who have been convicted of three felonies. Cal. Penal Code Section 667. In *Brown v. Mayle*, 283 F.3d 1019 (9th Cir. 2002), the defendants were charged with

# Is Death by Electrocution Cruel and Unusual under Evolving Standards?

Convicted killer Kenneth Spivey's attorneys argued that Spivey's impending death in Georgia's electric chair constituted cruel and unusual punishment under the **EIGHTH AMENDMENT** and the **FOURTEENTH AMENDMENT** to the Constitution of the United States. In a March 2001 opinion that initially stayed s punishment, Justice Leah J. Sears wrote, "Electrocution offends the evolving standards of decency that characterize a mature, civilized society." *Spivey v. State of Georgia*, 544 S.E. 2d 136 (Ga. 2001). Georgia's attorney general and a county prosecutor asked the court for reconsideration. In October of the same year, the Georgia Supreme Court outlawed electrocution as a means of execution in the state because it was deemed cruel and unusual punishment under the *state* constitution and because of the implications of the state's year 2000 revised **CAPITAL PUNISHMENT** statute (*Dawson v. State of Georgia,* 554 S.E. 2d 137 [Ga. 2001]). The 4–3 ruling gave momentum to the movement against death by electrocution elsewhere, but the U.S. Supreme Court continued to refuse appeals of this nature, leaving the decision in the hands of state courts and legislatures.

In early May 2001, several radio stations, including WYNC in New York, aired audiotapes of electrocutions in Georgia's prisons spanning a period from 1983 to 1998. The recordings were made by state officials to protect themselves from litigation over the manner in which they followed policies to ensure smooth executions. The tapes were devoid of emotion and merely recorded the voices of the executing officials during the process. There were no shouts or cries of pain, but several tapes contained the final words of the inmates. The tapes might support the argument that electrocution, when properly conducted, is as humane as other alternatives.

Dr. Chris Sparry, Georgia's chief medical examiner, who has testified on the matter, stated:

> The best evidence that exists to indicate that people who are judicially executed never feel any conscious pain or suffering rests in the tens of thousands of people who have sustained accidental electrocutions and have survived. None of those people can even remember the event if the current goes through their head . . . consciousness is obliterated instantly when the current is passed through the body because the amount of the current is so very, very great.

Georgia was one of four states still employing the use of electric chairs for execution of condemned criminals, although both Georgia and Florida changed their *primary* means of execution to lethal injection for the newly-convicted starting in 2000. Nebraska and Alabama continue to use their electric chairs as the sole means of execution although both states have considered legislation to allow lethal injection as well.

In an April 2001 Gallup poll, roughly two of every three surveyed Americans said they favored the death penalty. Despite some of the media's characterization of declining support, the percentage remained consistently above 60 percent for at least the preceding five years. The all-time high for supporting capital punishment was in 1994 at 80 percent; the

misdemeanor petty theft for stealing three videotapes and a steering wheel alarm, together worth less than $400.00. However, because both defendants had two prior felony convictions involving violent crimes, the misdemeanor petty theft charges were enhanced and prosecuted as felonies. The Ninth Circuit ruled that the defendants' sentences constituted cruel and unusual punishment, for the trial court was effectively imposing life sentences for what was the legislature classified as a misdemeanor under any other circumstances.

The U.S. Supreme Court granted certiorari, reversed, and remanded the case with instructions for the Ninth Circuit to reconsider its decision in light of *Lockyer v. Andrade*, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 144 (2003), where the Court ruled that the Eighth Amendment's proportionality principle was not violated by the imposition of two 25-years-to-life sentences under the California Three Strikes law, on a conviction of two counts of petty theft with a prior conviction. The defendant in *Andrade* had been convicted of stealing videotapes worth $153.54.

The prohibition on cruel and unusual punishment also bans all penal sanctions in certain situations. For example, in **ROBINSON V. CALIFORNIA**, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962), the Court ruled that punishment may not be inflicted simply because a person is in a certain condition or has a particular illness. *Robinson* concerned a California statute (Cal.

low of 42 percent was in 1966. The manner by which execution is accomplished is a different matter toward which there is growing sensitivity.

In many states, condemned persons are given the opportunity to elect the method by which they will die. Some Americans bristle at the thought that "humane consideration" should be given to those who have wreaked heinous inhumanity upon others. There remains a palpable undercurrent of opinion/attitude that execution should hurt, not only because it may serve to deter future wrongdoers but also because of the belief that death is intended as a punishment, not an escape.

Still, as of spring 2001, 36 of the 38 states with death penalty laws employed lethal injection as the preferred method. With lethal injection, the victim is first put to sleep with sodium pentothal, after which other drugs are administered to paralyze the body and stop the heart. The person never regains consciousness.

The U.S. Supreme Court has provided guidance as to what should constitute cruel and unusual punishment under the Eighth Amendment, but made it clear that the standards must be evolving and dynamic. "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture [such as drawing and quartering, emboweling alive, beheading, public dissecting, and burning alive], and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution," the Court said, more than 100 years ago, in *Wilkerson v. Utah*, 99 U.S. 130, 25 L. Ed. 345 (1878), which upheld an execution by firing squad. Twelve years later, in *In re Kemmler,* 136 U.S. 436, 10 S. Ct. 930, 34 L. Ed. 519 (1890), the Court, under the Fourteenth Amendment's **DUE PROCESS CLAUSE**, found electrocution to be a permissible method of execution. Moreover, in assuming the applicability of the Eighth Amendment to the States, the Court, many years later, held that a second electrocution, resulting from the failure of the first one, did not violate the proscription. "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely," the majority opinion stated. *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 67 S. Ct. 374, 916 L. Ed. 422 (1947).

In *Trop v. Dulles* 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958), the Supreme Court, in referring to the United States as "an enlightened democracy," held that "The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." That language was repeated again in **GREGG V. GEORGIA** 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1978), wherein the Court noted that the Eighth Amendment was to be interpreted "in a flexible and dynamic manner to accord with evolving standards of decency." Most likely, this is the language from which the Georgia Supreme Court formed their ultimate *Spivey* ruling. The U.S. Supreme Court, on the other hand, denied certiorari to an appeal challenging Alabama's use of the electric chair and had not ruled against electrocution as of the end of the 2003 term.

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**CROSS-REFERENCES**

Capital Punishment; Eighth Amendment; Fourteenth Amendment.

Health & Safety Code § 11721 [West]) that criminalized addiction to narcotics, rather than the possession, use, or sale of them. The Court struck down the statute, stating,

> We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment. . . . To be sure, imprisonment for ninety days [the sentence imposed in this case] is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

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CROSS-REFERENCES

Capital Punishment; Determinate Sentence; Juvenile Law; Sentencing.

## CRUELTY

*The deliberate and malicious infliction of mental or physical pain upon persons or animals.*

As applied to people, cruelty encompasses abusive, outrageous, and inhumane treatment that results in the wanton and unnecessary infliction of suffering upon the body or mind.

Legal cruelty involves conduct that warrants the granting of a DIVORCE to the injured spouse. Phrases such as "cruel and inhuman treatment," "cruel and abusive treatment," or "cruel and barbarous treatment" are commonly employed in matrimonial law. The term comprehends mental and physical harm, but a single act of cruelty is usually insufficient for divorce; a pattern of cruel conduct must occur over a period of time. This ground of divorce is of diminished significance due to the enactment of no-fault legislation by most jurisdictions.

Cruelty to children, also known as CHILD ABUSE, encompasses mental and physical battering and abuse, as defined by statutes in a majority of jurisdictions.

Cruelty to animals involves the infliction of physical pain or death upon an animal, when unnecessary for disciplinary, instructional, or humanitarian purposes, such as the release of the animal from incurable illness.

A person commits a misdemeanor if he or she intentionally or recklessly neglects any animal in his or her custody, mistreats any animal, or kills or injures any animal without legal privilege or the consent of its owner.

CROSS-REFERENCES

Animal Rights.

## C-SPAN

The Cable-Satellite Public Affairs Network (C-SPAN) broadcasts proceedings of the U.S. Congress, as well as other public events and programs, on CABLE TELEVISION. It is funded entirely by the U.S. cable television industry and receives no government support.

C-SPAN was established by Brian P. Lamb as a nonprofit venture in 1977. On March 19, 1979, C-SPAN began live and unedited television broadcasts of proceedings in the U.S. House of Representatives. On June 2, 1986, C-SPAN II broadcast, for the first time, proceedings on the floor of the U.S. Senate.

C-SPAN also broadcasts congressional hearings; call-in programs with elected officials, policy makers, and journalists; coverage of Democratic and Republican conventions and presidential campaigns; programs reviewing the activities of the U.S. Supreme Court and developments in the law; coverage of such events as the annual meetings of the National Governors Association and the U.S. Conference of Mayors; speeches at the National Press Club; proceedings of foreign legislatures such as Canada's House of Commons and the United Kingdom's House of Commons; and many other public-affairs programs.

As part of its mission, C-SPAN seeks to provide direct access to proceedings of government in the United States, free of the editing, commentary, and analysis that are typical in most other media. In 1989, ten years after C-SPAN's first broadcast, the network was available in 40 million homes. On this tenth anniversary, Congress issued a resolution honoring the cable television industry for funding the public affairs channel and for 'the invaluable contribution it has made and continues to make toward informing and educating the citizenry of this Nation and thereby enhancing the quality of its government of, by and for the people" (S. Con. Res. 22, 101st Cong., 1st Sess., 135 Cong. Rec. S2732-02 [1989]).

C-SPAN has expanded its programming since the mid-1990s. Like many other cable television networks, it has added such sister stations as C-SPAN2 and C-SPAN3, both of which are available to millions of cable subscribers. C-SPAN has also expanded to radio and has added content developed for INTERNET users with broadband access. Regular programming on the C-SPAN stations includes *American Writers*, *American Presidents*, and *Book TV*. According to a survey conducted by the network in December 2000, about 28.5 million people watch C-SPAN's programming each week. More than 90 percent of those who watch the network are registered voters. More than half are in the 18- to 49-year-old demographic. About 48 percent of the viewers are women.

C-SPAN is increasingly used in school classrooms as a teaching tool. The network offers a program called C-SPAN in the Classroom, which included free membership and resources to educators who use the network's resources in

the classroom. For classrooms that do not have cable access, C-SPAN offers videotapes and web access so students can view the content. The network also offers a Teacher Fellowship Program through the C-SPAN Education Foundation to honor educators who have demonstrated creative use of the programming in the classroom.

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**CROSS-REFERENCES**

Broadcasting.

## CTA

*An abbreviation for cum testamento annexo, Latin for "with the will annexed."*

## CUBAN MISSILE CRISIS

The 1962 Cuban Missile Crisis was a dangerous moment in the COLD WAR between the United States and the Soviet Union. The actions taken by President John F. Kennedy's administration prevented the installation of Soviet nuclear missiles in Cuba, just 90 miles from Florida. The crisis also illustrated the limitations of international law,as the United States relied on military actions and threats to accomplish its goal.

The crisis grew out of political changes in Cuba. In the 1950s, Fidel Castro, a young lawyer, led a guerrilla movement against Cuban dictator Fulgencio Batista. Batista lost the confidence of the Cuban people and on January 1, 1959, fled the country. Castro became premier of the new government.

At first, the United States supported the Castro government. This changed when Castro seized U.S.-owned sugar estates and cattle ranches in Cuba. The United States subsequently embargoed trade with Cuba, and the CENTRAL INTELLIGENCE AGENCY (CIA) began covert operations to topple Castro. In 1960, Castro openly embraced COMMUNISM and signed Cuba's first trade agreement with the Soviet Union.

Many Cubans had left the island of Cuba for the United States following the Castro revolution. Aided by the United States, a Cuban exile army was trained for an invasion. Although most of the planning took place in 1960, when President DWIGHT D. EISENHOWER was finishing his second term, the final decision to invade came during the first months of the Kennedy administration. In April 1961, Cuban exiles invaded Cuba at the Bay of Pigs. The invasion was a debacle, in part because U.S. air support that had been promised was not provided. The exile army was captured.

*U.S. Ambassador Adlai Stevenson (seated, far right) addresses members of the U.N. Security Council on October 25, 1962. On display are aerial photographs of missile sites in Cuba—proof that the Soviet Union had indeed been building missile sites on the island.*

AP/WIDE WORLD PHOTOS

Convinced that the United States would attempt another invasion, Castro asked Premier Nikita Khrushchev, of the Soviet Union, for nuclear missiles. Khrushchev agreed to what would be the first deployment of NUCLEAR WEAPONS outside the Soviet Union. President Kennedy at first did not believe the Soviets would follow through on their promise. On October 14, 1962, however, photographs taken by reconnaissance planes showed that missile sites were being built in Cuba. The president convened a small group of trusted advisers, called the Executive Committee of the NATIONAL SECURITY COUNCIL (Ex Com). Attorney General ROBERT F. KENNEDY served on Ex Com and became the key adviser to President Kennedy during the crisis.

Military officials advocated bombing the missile sites or invading Cuba. Others argued for a nuclear strike on Cuba. These ideas were rejected in favor of a naval blockade of Cuba. All ships attempting to enter Cuba were to be stopped and searched for missiles and related military material. President Kennedy, believing that the Soviets were using the missiles to test his will, resolved to make the crisis public. Bypassing private, diplomatic procedures, Kennedy went on national television on October 22 and

informed the United States of the missile sites, the naval blockade, and his resolve to take any action necessary to prevent the missile deployment.

Tension built during the last days of October as the world awaited the approach of Soviet missile-bearing ships at the blockade line. If Soviet ships refused to turn back, it was likely that U.S. ships would either stop them or sink them. If that happened, nuclear war seemed probable.

During the crisis, the UNITED NATIONS was not used as a vehicle for negotiation or mediation. The United States and the Soviet Union ignored an appeal by Secretary General U Thant, of the United Nations, that they reduce tensions for a few weeks. Instead, the Security Council of the United Nations became a stage for both sides to trade accusations. Ambassador ADLAI STEVENSON, from the United States, presented photographs of the missile sites to back up U.S. claims.

On October 24, the crisis began to ease, as 12 Soviet ships on their way to Cuba were, on orders from Moscow, diverted or halted. However, construction on the missile sites continued. On October 26, Premier Khrushchev sent a long, emotional letter to President Kennedy, claiming that the missiles were defensive. He implied that a pledge by the United States not to invade Cuba would allow him to remove the missiles. President Kennedy replied, accepting the proposal to exchange withdrawal of the missiles for the promise not to invade. He also stated that if the Soviet Union did not answer his reply in two or three days, Cuba would be bombed. On October 28, the Soviets announced on Radio Moscow that the missile sites were being dismantled.

Some historians maintain that President Kennedy acted heroically to meet a threat to the security of the United States. Others claim that the missiles at issue were of limited range and were purely defensive, and that Kennedy was reckless in brandishing the threat of nuclear war. Most agree that the crisis was probably the closest the Soviet Union and the United States ever got to nuclear war.

The significance of the crisis to INTERNATIONAL LAW and the management of international crises has led to many books, articles, and scholarly conferences. In October 2002, a conference hosted by Fidel Castro was held in Havana. It was a rare event because participants from the United States, Soviet, and Cuban governments attended the gathering, sharing their impressions of what had happened during the crisis. Participants included former U.S. defense secretary Robert McNamara, Kennedy presidential aides Arthur Schlesinger, Ted Sorensen, and Richard Goodwin, as well as Ethel Kennedy, the widow of ROBERT KENNEDY.

The Cuban government declassified documents relating to the crisis and Castro took center stage, arguing that Khrushchev had inflamed the situation by lying to Kennedy that there were no nuclear weapons in Cuba. McNamara confirmed that most of Kennedy's advisers, both military and civilian, had recommended he attack Cuba. The conference ended with a trip to a former missile silo on the western side of Cuba.

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## CULPA

*[*Latin, Fault, blame, or neglect.*]* *A* CIVIL LAW *term that implies that certain conduct is actionable.*

The word *culpa* is applied to acts of commission and omission in both TORT and contract cases. It implies the failure to perform a legally imposed duty, or NEGLIGENCE.

*Lata culpa* means gross or wanton fault, or neglect. *Levis culpa* is common or ordinary negligence, or the absence of reasonable care. *Levissima culpa* is slight neglect or fault.

## CULPABLE

*Blameworthy; involving the commission of a fault or the breach of a duty imposed by law.*

Culpability generally implies that an act performed is wrong but does not involve any evil intent by the wrongdoer. The connotation of the term is fault rather than malice or a guilty purpose. It has limited significance in CRIMINAL

LAW except in cases of reckless HOMICIDE in which a person acts negligently or demonstrates a reckless disregard for life, which results in another person's death. In general, however, culpability has milder connotations. It is used to mean reprehensible rather than wantonly or grossly negligent behavior. Culpable conduct may be wrong but it is not necessarily criminal.

*Culpable ignorance* is the lack of knowledge or understanding that results from the omission of ordinary care to acquire such knowledge or understanding.

## CULPRIT

*An individual who has been formally charged with a criminal offense but who has not yet been tried and convicted.*

Culprit is a colloquial rather than a legal term and is commonly applied to someone who is guilty of a minor degree of moral reprehensibility. According to SIR WILLIAM BLACKSTONE, the term is most likely a derivative of the archaic mode of ARRAIGNMENT during which upon a prisoner's plea of not guilty the cleric would say *culpabilis prit,* meaning "he is guilty and the crown is ready." The more common derivation is from culpa, meaning "fault or blame."

## CUM TESTAMENTO ANNEXO

*[*Latin, With the will annexed.*] A phrase that describes an administrator named by a probate or surrogate court to settle and distribute an estate according to the terms of a will in which the testator, its maker, has failed to name an executor, or in which the one named refuses to act or is legally incapable of acting.*

The term is often applied to the administration conducted by such a person.

## CUMMINGS, HOMER STILLE

Homer Stille Cummings was the 55th attorney general of the United States, serving from 1933 to 1939 in the administration of President FRANKLIN D. ROOSEVELT. Cummings was a DEMOCRATIC PARTY leader and an advocate for reform of prisons in the United States. He was instrumental in establishing the Alcatraz Island Prison, which was envisioned as a model for housing maximum security-level inmates in the federal prison system.

Cummings was born in Chicago, Illinois, on April 30, 1870. He attended Yale University where he received his undergraduate degree in 1891 and two years later, his law degree. Cummings was admitted to the Connecticut bar in 1893 and began a private practice in Stamford. He rose in prominence as a litigator, becoming a member of the New York bar. He also was admitted to practice before a number of federal district courts and the U.S. Supreme Court.

Cummings became involved with the Democratic Party and was elected mayor of Stamford for three terms. He also served, from 1908 to 1912, as the city's corporation counsel. In 1902, Cummings ran for a seat as congressman at large from Connecticut and lost; he also ran unsuccessfully for a U.S. Senate seat in 1916. Cummings's entry on the national scene began when he served seven terms as a delegate at large to the Democratic National Convention. From 1919 to 1920, he was chairman of the Democratic National Committee.

Beginning in 1914, Cummings served for a decade as the state's attorney for Fairfield County, Connecticut. His interest in the topic of prison reform paid off in 1930 when he was appointed chairman of Connecticut's Committee on State Prison Conditions. Cummings's

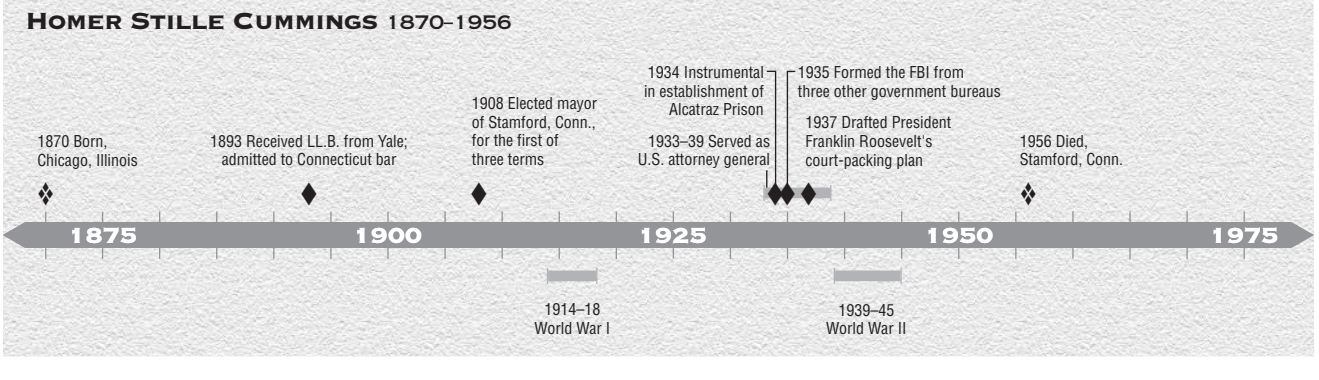

*Homer S. Cummings.*
LIBRARY OF CONGRESS

long years of labor on behalf of the Democratic Party and his work on the successful 1932 presidential campaign of Franklin D. Roosevelt were rewarded. In 1933, President Roosevelt appointed Senator Thomas J. Walsh of Montana to be his attorney general, but Walsh died suddenly of a heart attack on a train trip to Washington, D.C., to attend the presidential inauguration. Roosevelt then appointed Cummings as U.S. attorney general. Cummings turned out to be the first of four attorneys general appointed by Roosevelt, the nation's longest-serving president.

The 63-year-old Cummings's interest in and experience concerning prison reform proved to be significant in his work as attorney general. Cummings proposed and oversaw improvements in various prison conditions and in the general operation of the Federal Bureau of Prisons that had been established in 1930 to oversee the 11 federal prisons that then existed.

With public fear escalating over the 1932 KIDNAPPING of the baby son of national hero Charles Lindbergh, an expanding list of "public enemies," and mob violence at a peak, Cummings also advocated for the establishment of a maximum security prison for the nation's most dangerous criminals. He chose Alcatraz Island, located in the San Francisco Bay, to house the country's most dangerous criminals. Nicknamed "Uncle Sam's Devil's Island," the prison opened in 1934 and quickly entered the public imagination as a symbol of the tough punishment to be dealt out to the worst offenders.

In 1935, Cummings merged the Justice Department's Bureau of Investigation (BI), the Prohibition Bureau, and the Bureau of Identification into the newly renamed FEDERAL BUREAU OF INVESTIGATION (FBI), all under the control of FBI Director J. EDGAR HOOVER.

In 1937, after the conservative U.S. Supreme Court had overturned much of Roosevelt's NEW DEAL legislative reforms that focused on moving the country back on the road to economic prosperity, Cummings drafted a proposal that came to be known as the court-packing plan. Enthusiastically endorsed by Roosevelt, the plan would have given the president the power to appoint a new judge for each incumbent judge who was 70 or older. Because six of the nine justices were over the age of 70, the new law would have meant a Supreme Court with 15 members. While the president and his attorney general saw the proposal as a way to get around the fact that Supreme Court justices have lifetime tenure, such a drastic change in the composition of the court was too much even for the Democratic Congress, and the bill failed. Chief Justice CHARLES EVANS HUGHES and Associate Justice OWEN ROBERTS began to vote more often with the more liberal justices, however, thus allowing Roosevelt to proceed with many of his economic reform measures. Many saw the failed proposal as having been the stimulus for Justice Hughes's changed voting pattern. Cummings remained as attorney general until his retirement in 1939. He died on September 10, 1956, in Stamford, Connecticut.

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## CUMULATIVE EVIDENCE

*Facts or information that proves what has previously been established by other information concerning the same issue.*

Cumulative evidence is synonymous with corroborative evidence.

## CUMULATIVE SENTENCE

*Separate consecutive terms of imprisonment imposed upon a defendant who has been convicted*

*of two or more distinct offenses; any term of imprisonment that becomes effective subsequent to the expiration of a prior one.*

A cumulative sentence is also known as a *from and after* sentence.

## CUMULATIVE VOTING

*A method of election of the board of directors used by corporations whereby a stockholder may cast as many votes for directors as he or she has shares of stock, multiplied by the number of directors to be elected.*

*A plan used for the election of members to the lower house of the Illinois legislature by which voters, each of whom is given three votes, may cast all of the votes for one candidate or allocate them among two or three candidates.*

The purpose of cumulative voting is to facilitate the representation of minority stockholders on the board. The stockholder may cast all of his or her votes for one or more, but not all, of the directors on the ballot, which therefore promotes representation of small shareholders. Cumulative voting is mandatory under the corporate laws of some states and is allowed in most states.

## CUNNILINGUS

*An act in which the female sexual organ is orally stimulated.*

At COMMON LAW, cunnilingus was not a crime. It is presently a crime in some jurisdictions and is usually treated as SODOMY.

## CURE

*The act of restoring health after injury or illness. Care, including medical and nursing services rendered to a sailor throughout a period of duty, pursuant to the principle that the owner of a vessel must furnish maintenance and cure to a sailor who becomes ill or is injured during service.*

*The right of a seller, under the* UNIFORM COMMERCIAL CODE *(UCC), a body of law governing commercial transactions, to correct a delivery of goods that do not conform to contractual terms made to a buyer within the period specified by the contract in order to avoid a breach of contract action.*

*The actual payment of all amounts that are past due in regard to a default in such payments.*

## CURFEW

A curfew is a law, regulation, or ordinance that forbids particular people or particular classes of people from being outdoors in public places at certain specified times of the day.

### Juvenile Curfews

Local ordinances and state statutes may make it unlawful for minors below a certain age to be on public streets, unless they are accompanied by a parent or an adult or on lawful and necessary business on behalf of their parents or guardians. For example, a Michigan state law provides that "[n]o minor under the age of 12 years shall loiter, idle or congregate in or on any public street, highway, alley or park between the hours of 10 o'clock P.M. and 6 o'clock A.M., unless the minor is accompanied by a parent or guardian, or some adult delegated by the parent or guardian to accompany the child." MCLA § 722.751; MSA § 28.342(1). Curfew laws in other states and cities typically set forth different curfews for minors of different ages.

Curfew laws and ordinances have been sustained as necessary to control the presence of juveniles in public places at nighttime with the attendant risk of mischief. *In re Osman*, 109 Ohio App. 3d 731, 672 N.E.2d 1114 (1996). Courts have found that curfew ordinances promote the safety and good order of the community by reducing the incidence of juvenile criminal activity. *Schleifer v. City of Charlottesville*, 159 F.3d 843 (4th Cir. 1998).

Curfew laws have generally been upheld against constitutional challenges on FIRST AMENDMENT and DUE PROCESS grounds. Hodgkins ex rel. Hodgkins v. Peterson, 175 F. Supp. 2d 1132 (S.D. Ind. 2001). One federal court held that minors have no fundamental right to freedom of movement or travel that protects them from restrictions imposed by curfew laws. *Hutchins v. District of Columbia*, 188 F.3d 531,(D.C. Cir. 1999). However, a juvenile curfew ordinance that exempted minors who had graduated from high school was found to violate the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT to the U.S. Constitution. *In re Mosier*, 59 Ohio Misc. 83, 394 N.E.2d 368, 13 O.O.3d 290 (Ohio Com. Pl. 1978).

In some instances, courts will find particular language in a juvenile curfew law to be impermissibly vague under the "void for vagueness" doctrine (a FIFTH AMENDMENT doctrine that requires all laws to be sufficiently clear that per-

sons of average intelligence will understand in advance which conduct is prohibited). If possible, courts will simply delete offending language from the law so that what remains passes constitutional muster. For example, one curfew law allowed the city's mayor to issue permits for minors to use public streets during prohibited times if the mayor found that such use was "consistent with the public interest." A California state court held that that language failed to provide any standards by which the mayor could lawfully exercise the discretion to grant permits. The court deleted the language but said the mayor could still grant permits when to do so would be consistent with the purposes of ordinance as expressly set forth therein. *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242 (M.D. Pa. 1975).

### Curfew as a Condition of Probation

State laws typically allow courts to impose curfews on criminal defendants as a condition of pre-trial release, and on probationers as a condition for successful discharge from PROBATION. Defendants and probationers who are subject to curfews can be ordered to pay the cost of monitoring their compliance with the terms of the order. Curfew violations can result in the revocation of probation or termination of the pre-trial release bond.

However, curfew orders themselves must be reasonable, and courts must be careful to explain the rationale underlying them. Orders imposing curfews that are harsh or excessive, for example, have been invalidated. *People v. Braun*, 177 A.D. 2d 981, 578 N.Y.S.2d (1991). Similarly, orders that cite no justification for a curfew have also been overturned. *People v Sztuk*, 126 A.D. 2d 950, 511 N.Y.S.2d 720 (1987).

### Adult Curfews & Strict Scrutiny

Curfews directed at adults touch upon fundamental constitutional rights and thus are subject to strict judicial scrutiny. The U. S. Supreme Court has ruled that "[t]he right to walk the streets, or to meet publicly with one's friends for a noble purpose or for no purpose at all—and to do so whenever one pleases—is an integral component of life in a free and ordered society." *Papachristou v. City of Jacksonville*, 405 US 156, 164, 31 L. Ed. 2d 110, 92 S. Ct 839 (1972).

To satisfy strict-scrutiny analysis, a government-imposed curfew on adults must be supported by a compelling state interest that is narrowly tailored to serve the curfew's objective. Court's are loath to find that an interest advanced by the government is compelling. The more justifications that courts find to uphold a curfew on adults, the more watered-down becomes the fundamental right to travel and to associate with others in public places at all times of the day.

The U.S. Supreme Court has ruled that this right may be legitimately curtailed when a community has been ravaged by flood, fire, or disease, or when its safety and WELFARE are otherwise threatened. *Zemel v. Rusk*, 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965). The California Court of Appeals cited this ruling in a case that reviewed an order issued by the city of Long Beach, California, which declared a state of emergency and imposed curfews on all adults (and minors) within the city's confines after widespread civil disorder broke out following the Rodney G. King beating trial, in which four white Los Angeles police officers were acquitted of using excessive force in subduing an African-American motorist following a high-speed traffic chase. In re Juan C., 28 Cal. App. 4th 1093, 33 Cal. Rptr. 2d 919 (Cal. App. 1994).

"Rioting, looting and burning," the California court wrote, "pose a similar threat to the safety and welfare of a community, and provide a compelling reason to impose a curfew." "The right to travel is a hollow promise when members of the community face the possibility of being beaten or shot by an unruly mob if they attempt to exercise this right,"the court continued, and "[t]emporary restrictions on the right. . .are a reasonable means of reclaiming order from ANARCHY so that all might exercise their constitutional rights freely and safely."

## CURIA

*[*Latin, Court.*]* *A judicial tribunal or court convened in the sovereign's palace to dispense justice. A court that exercised jurisdiction over civil matters, as distinguished from religious matters, which were determined by ecclesiastical courts, a system of courts in England that were held by authority of the sovereign and had jurisdiction over matters concerning the religion and ritual of the established church.*

In England the tribunal of the king's justice was the curia regis, so named because the king originally presided over its proceedings.

## CURIA REGIS

*[*Latin, The King's Court.*]*

The Anglo-Saxon kings of England regularly summoned the bishops and great men of the kingdom to a council (Witenagemot), which advised the king and occasionally served as a court of justice. Building upon this foundation, the Norman kings after the Conquest in 1066 developed more effective ways of centralizing royal government. By the end of the eleventh century the king was entrusting business to his Curia, a body of officials appointed from the ranks of the highest noblemen, church leaders, and officers of the royal court. With the king, the *Curia Regis* administered all of the king's business—financial, legislative, and judicial. From the *Curia Regis* developed the common-law courts, the Chancery, and even the Parliament.

## CURRENT ACCOUNT

*A detailed financial statement representing the debit and credit relationship between two parties that has not been finally settled or paid because of the continuous, ongoing dealings of the parties.*

## CURTESY

*An estate to which a man is entitled by common-law right on the death of his wife, in all the lands that his wife owned at any time during their marriage, provided a child is born of the marriage who could inherit the land.*

COMMON LAW provided that upon marriage a husband acquired a right, sometimes called a freehold estate, to the use and profits of his wife's lands. His estate *jure uxoris* (Latin for "in the right of the wife") continued only during the marriage and terminated upon the death of either spouse or upon theirdivorce. At early common law in England, an absolute DIVORCE could be obtained only by an Act of Parliament. Consequently, for practical purposes, the husband acquired a right to the use and profit of the land during the joint lives of the parties. This estate was subject to sale or mortgage by the husband and could be reached to satisfy the claims of his creditors. The estate *jure uxoris* virtually disappeared with the enactment of Married Women's Acts, which gave married women a right to manage their own separate estates.

Pursuant to common law, upon the birth of a child capable of inheriting the land, a husband acquires a life estate, or property interest, the duration of which is limited to the life of the party holding it or to that of some other person, in the lands his wife owns. This estate is designated as *curtesy initiate,* which replaces the husband's estate *jure uxoris* under early common law. The husband can sell or mortgage the land, and it can be reached to satisfy the claims of his creditors. Upon the death of the wife, it becomes *curtesy consummate.*

In some states, due to the Married Women's Acts, the birth of a child does not give the husband a vested interest in his wife's property. Until the death of the wife, the husband has a right of curtesy, which is not a present right, but which might develop into a legally enforceable right if not barred, extinguished, or divested. This interest cannot be subjected to the claims of the husband's creditors.

The right of curtesy rests upon proof of a legally recognized marriage, as distinguished from a GOOD FAITH marriage or a de facto marriage, one in which the parties live together as HUSBAND AND WIFE, but the union has no legal effect due to defects in form, such as an invalid license. A VOIDABLE marriage, one that is valid when entered into and that remains valid until either party obtains a lawful court order dissolving the marital relationship, suffices for purposes of curtesy if the marriage is not rendered null before the right to the estate arises.

Curtesy has gradually lost much of its previous significance in the law. In some jurisdictions, curtesy attaches only to the real estate that the wife owns at death, rather than to the real estate owned by the wife during the marriage. In others, curtesy has been abolished and replaced by a statutory elective share in the wife's estate. A few jurisdictions have enacted statutes that embody the basic principles of common-law curtesy but with some modification.

Common law provides that an absolute divorce bars a claim of curtesy. A legal separation—sometimes called a divorce, or a mensa et thoro "from bed and board"—does not terminate the marital relationship. In the absence of an express statute, such a divorce will not bar curtesy. This is also true in regard to an interlocutory decree of divorce, a temporary, interim order of the court.

Statutes in some states provide that curtesy can be denied upon proof of certain types of misconduct, such as ADULTERY, voluntary sexual intercourse of a married person with a person other than one's spouse. Several states have statutes preserving curtesy if a divorce or legal separation was obtained because of the fault of the wife.

Statutes in many states provide that a murderer is not entitled to property rights in the estate of the victim. Some decisions apply these statutes to cases involving curtesy. In other states, these interests are barred upon the principle that a person must not be permitted to profit from his or her own wrong. In accordance with this theory, a CONSTRUCTIVE TRUST will be declared in favor of the heirs or devisees of the deceased wife who is murdered by her husband.

CROSS-REFERENCES

Husband and Wife.

## CURTILAGE

*The area, usually enclosed, encompassing the grounds and buildings immediately surrounding a home that is used in the daily activities of domestic life.*

A garage, barn, smokehouse, chicken house, and garden are curtilage if their locations are reasonably near to the home. The determination of what constitutes curtilage is important for purposes of the FOURTH AMENDMENT to the Constitution, which prohibits unreasonable SEARCHES AND SEIZURES of a person and of his or her home or property. Courts have construed the word *home* to include curtilage so that a person is protected against unlawful searches and seizures of his or her curtilage.

"AT THE TIME OF THE RATIFICATION OF THE ARTICLES OF CONFEDERATION, ALL FREE NATIVE-BORN INHABITANTS OF . . . [FIVE STATES], THOUGH DESCENDED FROM AFRICAN SLAVES, WERE NOT ONLY CITIZENS OF THOSE STATES, BUT . . . POSSESSED THE FRANCHISE OF ELECTORS . . ."
—BENJAMIN ROBBINS CURTIS

## ♦ CURTIS, BENJAMIN ROBBINS

Benjamin Robbins Curtis served as an associate justice of the U.S. Supreme Court from 1851 to 1857. A native of Massachusetts, Curtis wrote a famous dissent in DRED SCOTT V. SANDFORD, 60 U.S. 393, 15 L. Ed. 691 (1857), a case that upheld the legitimacy of SLAVERY and denied free African Americans U.S. citizenship.

Curtis was born in Watertown, Massachusetts, on November 4, 1809. He graduated from Harvard College in 1829 and Harvard Law School in 1832. Curtis established a law practice and became active in the WHIG PARTY. In 1851, he was elected to the Massachusetts House of Representatives and later that year was nominated to the U.S. Supreme Court by President MILLARD FILLMORE.

During his brief tenure on the U.S. Supreme Court, Curtis made a lasting impact with his dissent in *Dred Scott* and his majority opinion in *Cooley v. Board of Wardens*, 53 U.S. 299, 13 L. Ed. 996 (1851). Curtis was one of two dissenters in *Dred Scott*, which the majority opinion viewed as the final word on the legal merits of slavery and the issue of citizenship for African Americans. Chief Justice Roger Taney's majority opinion concluded that at the time of the ratification of the Constitution, there were no African-American citizens in the United States. Therefore, the Framers never contemplated that African Americans could be U.S. citizens. Curtis refuted this conclusion, pointing out that there were African-American citizens in both northern and southern states at the time of ratification. They were part of the "people of the United States" that the Constitution described. In addition, Curtis stated that "every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States."

The majority opinion also held that the Missouri Compromise was unconstitutional because Congress did not have the power to legislate policies on slavery in the federal territories. Curtis countered this finding by noting 14 instances where Congress had legislated on slavery prior to the Missouri Compromise. He concluded that this demonstrated that Congress had the power to regulate slavery in the territories.

In *Cooley v. Board of Wardens*, Curtis enunciated an enduring principle concerning the COMMERCE CLAUSE of the Constitution. Prior to

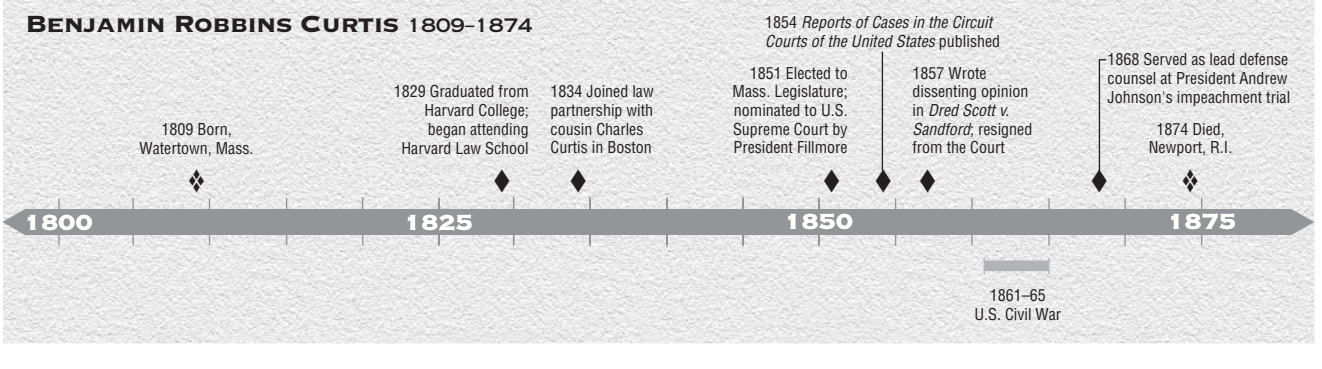

*Benjamin Robbins Curtis.* LIBRARY OF CONGRESS

*Cooley*, the Supreme Court had failed to resolve the issue of state power to regulate interstate commerce. In his majority opinion, Curtis held that the Commerce Clause did not automatically bar all state regulation in this field. At issue in this case was the constitutionality of a Pennsylvania law requiring ships entering or leaving the port of Philadelphia to hire local harbor pilots. Although this was a regulation of interstate commerce, Curtis upheld the law. He reasoned that the term *commerce* covered many topics, some requiring national uniformity, others calling for diversity of local control. The distinction between local and national aspects of interstate commerce was a major contribution to constitutional interpretation. *Cooley* is regarded as one of the most significant Commerce Clause cases of the nineteenth century.

Curtis left the Supreme Court shortly after the *Dred Scott* decision. The decision so polarized the Court that Curtis did not feel comfortable serving with the other members. He returned to Boston and resumed his law practice.

Curtis was pulled back into the national arena in 1868, when he served as defense counsel at the IMPEACHMENT trial of President ANDREW JOHNSON. He made a lasting contribution to the theory of impeachment by convincing the Senate that impeachment is a judicial trial, not a political proceeding. This meant that impeachment required evidence of misconduct rather than a finding of no-confidence in the president.

As an author, Curtis gained prominence for his publications *Reports of Cases in the Circuit Courts of the United States* (1854), *Digest of the Decisions of the Supreme Court* (1856), and his posthumously published *Memoirs* (1879).

Curtis died on September 15, 1874.

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## ♦ CUSHING, CALEB

Caleb Cushing was a lawyer, politician, diplomat, and statesman who served as attorney general of the United States under President FRANKLIN PIERCE. Cushing was the nation's first full-time attorney general; he is credited with institutionalizing and expanding the office.

Cushing was born January 17, 1800, in Salisbury, Massachusetts, descending from a family with roots in colonial Massachusetts. A gifted student, he tutored classmates in mathematics and philosophy, and he graduated from Harvard at the age of seventeen. He studied law in Boston and was admitted to the Massachusetts bar in 1821. The same year, he moved to Newburyport, Massachusetts, and established his first practice. Although he represented a number of clients and interests as a young lawyer, he spent most of his time in public service. Cushing also had a long-standing love of literature and devoted his free time to a variety of literary pursuits.

His political career began in 1825 when he was elected, as a Republican candidate, to the lower house of the Massachusetts Legislature; in 1826, he was elected to the state senate.

His formal writing career also began in 1826 with the publication of his first two books, *History of the Town of Newburyport* and *The Practical Principles of Political Economy.* Encouraged by interest in these texts and eager to develop his talent, Cushing resigned his state senate office and moved to Europe in 1829. He devoted the next two years to writing. His two-volume *Historical and Political Review of the Late Revolution in France* and his *Reminiscences of Spain* were published in 1833.

Returning to the United States, Cushing ran for Congress in 1832. In his first effort, he was defeated—largely because of divisions within the REPUBLICAN PARTY. In 1834 he was elected as a

"THE SPIRIT OF THE CONSTITUTION, THE SENTIMENT OF NATIONALITY, THE FEELING OF EMOTION AND AMERICANISM, IS THE TRUE UNION, THE ONLY UNION WORTH HAVING, THE ONLY UNION POSSIBLE TO KEEP."
—CALEB CUSHING

*Caleb Cushing.*

Whig candidate from the Essex North District of Massachusetts. He served the district in Congress for four consecutive terms. He also continued to write. His *Growth and Territorial Progress in the United States* was published in 1839.

In 1840 Cushing supported the successful candidacy of WILLIAM H. HARRISON for president. To aid the campaign, he authored a biographical booklet called *The Life of William H. Harrison.* When Vice President JOHN TYLER succeeded to the presidency after Harrison's death in 1841, Cushing was one of the few northern Whigs to support him. During the Tyler administration, a break in the WHIG PARTY occurred, and Cushing became allied with the Democrats—making his third change of party affiliation in a decade. Cushing's support of Tyler was rewarded in 1843 with a nomination as secretary of the treasury. But, suspicious of his party hopping, the Senate would not confirm him. Nevertheless, several months later, he was confirmed by the Senate as the new U.S. commissioner to China.

During the early 1840s, U.S. traders had asked the U.S. government for help in easing the restrictive trade conditions in China. Congress responded by setting up a commission to negotiate a trade agreement with China's representatives; Cushing was selected to head the commission. His work in China, known as the Cushing Mission, resulted in the first trade treaty between China and the United States—the Treaty of Wanghia (Wangxia, Wangsia, Wang-Hsia), signed in 1844.

After completing his mission in China, Cushing returned to serve in the Massachusetts state legislature until the outbreak of the Mexican War. In 1847, he raised a volunteer regiment at his own expense and traveled to Mexico to participate in the conflict. He attained the rank of brigadier general.

While still in Mexico, Cushing was drafted as a gubernatorial candidate by Massachusetts's DEMOCRATIC PARTY. He lost the election, and subsequent bids for the governor's seat in 1847 and 1848. He served a term in the Massachusetts state legislature from 1850 to 1852, and was then appointed an associate justice of the Massachusetts Supreme Court.

One year later, Cushing was named attorney general of the United States by President Pierce. Cushing had been a personal friend of the new president's for more than twenty years, and he was one of the most influential members of the Pierce cabinet. According to biographer Claude M. Fuess, "Cushing had a part in nearly every

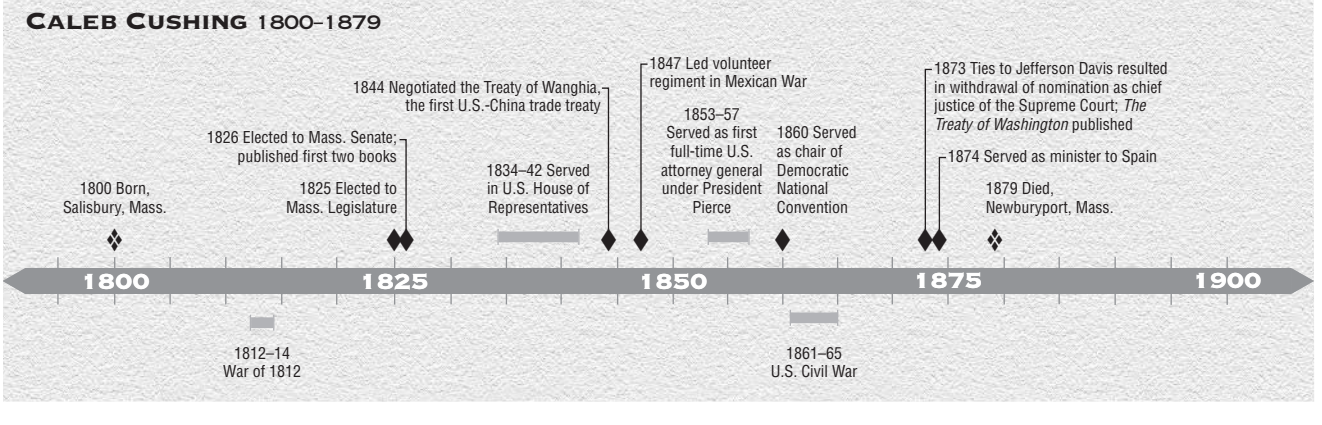

matter of significance arising during the next four years in Washington."

When Cushing accepted the job of attorney general, it was a part-time position with a substantially smaller salary than those of other cabinet positions. Cushing's appointment coincided with a move by Congress to increase the attorney general's salary, and to enforce a residency requirement that had been routinely ignored by previous appointees.

Cushing interpreted Congress's actions as a mandate to relinquish his private practice and serve as attorney general full-time. His decision to abandon his practice was controversial. The old tradition of continuing a private practice while in office was thought by many to be essential in maintaining sharp legal skills and keeping abreast of current law. In defense of his action, Cushing wrote,

> Within the last few years . . . the condition of the country has undergone changes, occasioning a vast augmentation in the amount of administrative business . . . and it would not be possible now . . . for the Attorney General . . . to be frequently absent from the seat of government, attending to private professional pursuits, nor could he find much leisure to prepare and argue private causes even before the Supreme Court.

With the barriers of low pay and part-time status removed, the attorney general became an equal member of the cabinet, and the office became more visible and more constant than in previous administrations. The changes had the cumulative effect of stabilizing and institutionalizing the office.

As a full-time cabinet officer, Cushing had both the time and the personal inclination to be active in a broad range of government activities. He assumed responsibility for several functions previously overseen by the SECRETARY OF STATE, such as pardons, legal and judicial appointments, and EXTRADITION cases.

In keeping with his lifelong love of writing, Cushing wrote frequently about the office of attorney general and his duties and responsibilities. In an 1856 treatise on the office, Cushing described his role as the administrative head of the government's legal business. He also took his opinion-writing function seriously. An opinion, he wrote, "is in practice final and conclusive,—not only as respects the action of public officers in administrative matters . . . but also in questions of private right, inasmuch as parties, having concerns with the government, possess in general no means of bringing a controverted matter before the courts of law."

Following his term as attorney general, Cushing continued to play a conspicuous role in both local and national politics until the end of his life. He returned to the Massachusetts state legislature from 1857 to 1859. In 1860 he served as chairman of the Democratic National Convention in Charleston, South Carolina, but he gave loyal support to Republican President ABRAHAM LINCOLN and the Union during the Civil War.

In 1866 he was named to a commission charged with revising and codifying the laws of Congress. In 1868, he served on a diplomatic mission to Bogota, Colombia. And in 1872, he was appointed counsel for the United States at the Geneva conference for the settlement of the *Alabama* claims, where arbitrators determined the amount of the award in a dispute concerning the construction and release of confederate cruisers by Great Britain.

In 1873 he was nominated by President ULYSSES S. GRANT as chief justice of the Supreme Court. With the memory of the Civil War still fresh, Cushing's opponents questioned his cordial relations with Jefferson Davis (based upon his Democratic connections) and forced the withdrawal of his nomination. *The Treaty of Washington,* Cushing's last work—and said to be his most important—was published in 1873. In 1874, he was nominated and confirmed as minister to Spain; he finished his term abroad in 1877.

Cushing died at his Newburyport home on January 2, 1879, just two weeks short of his eightieth birthday.

"ALL LANGUAGE, NOT ADDRESSED TO THE HOUSE, IN A PARLIAMENTARY COURSE, MUST BE CONSIDERED NOISE AND DISTURBITIVE."
—LUTHER CUSHING

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## ♦ CUSHING, LUTHER STEARNS

Luther Stearns Cushing achieved prominence as a legal educator, author, and jurist. He was born June 22, 1803, in Lunenberg, Massachusetts.

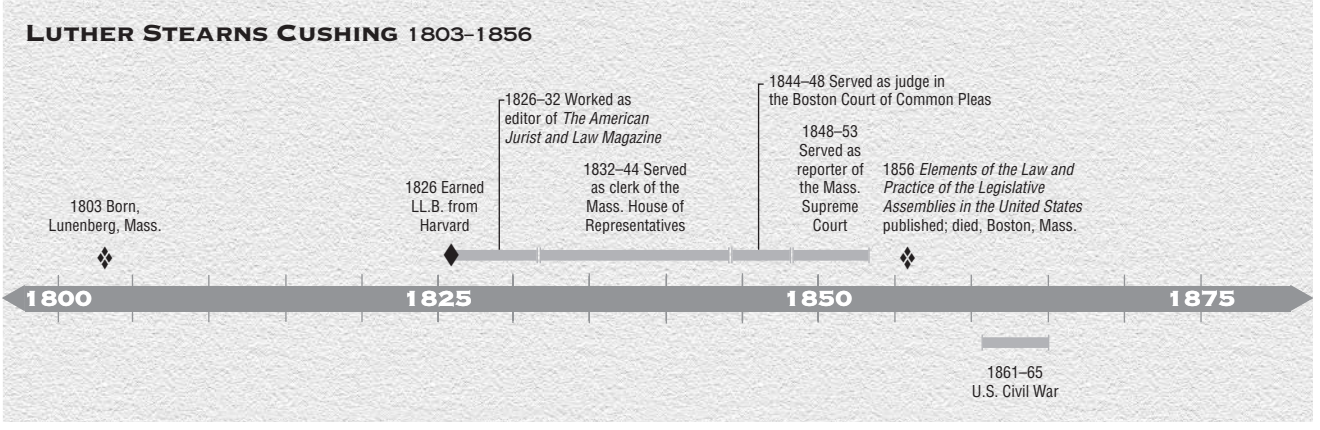


Cushing graduated from Harvard University with a bachelor of laws degree in 1826.

From 1826 to 1832, Cushing was an editor for *The American Jurist and Law Magazine.* For the next twelve years, he served in the state government system as clerk of the Massachusetts House of Representatives.

Cushing entered the judicial phase of his career in 1844, presiding as judge of the Boston Court of Common Pleas for a four-year period. In 1848, he became a reporter for the Massachusetts Supreme Court, performing these duties until 1853.

In 1848 Cushing returned to his alma mater, Harvard University, and presented a series of lectures on ROMAN LAW at the Harvard Law School until 1851.

As an author, Cushing is famous for several publications, including *A Manual of Parliamentary Practice,* also known as *Cushing's Manual,* published in 1844, and *Elements of the Law and Practice of the Legislative Assemblies in the United States,* published in 1856.

"WHERE [STATES' RIGHTS HAVE] BEEN ABRIDGED, IT WAS THOUGHT NECESSARY FOR THE GREATER, INDISPENSABLE GOOD OF THE WHOLE."
—WILLIAM CUSHING

Cushing died June 22, 1856, in Boston, Massachusetts.

## ♦ CUSHING, WILLIAM

William Cushing was born March 1, 1732. He graduated from Harvard College in 1751, and received an honorary master of arts degree from Yale University in 1753 and an honorary doctor of laws degree from Harvard University in 1785.

After his ADMISSION TO THE BAR in 1755, Cushing began his judicial career in Lincoln County, Massachusetts (now a part of Maine), as judge for the Probate Court of that county during 1760 and 1761. In 1772, he served as a justice for the Massachusetts Superior Court, followed by a term as chief justice of that court from 1777 to 1789.

In 1779, Cushing was a member of the first Massachusetts Constitutional Convention. In 1788, he acted as vice president at the Massachusetts Convention, a convention that endorsed the U.S. Constitution.

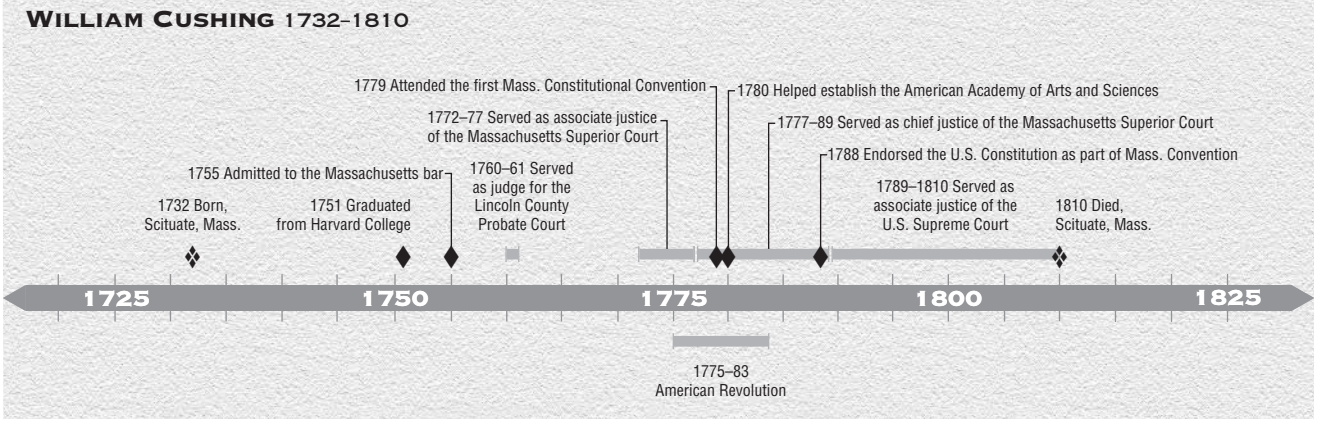

*William Cushing.* U.S. SUPREME COURT

Cushing returned to the bench in 1789 as associate justice of the U.S. Supreme Court, rendering decisions until 1810.

In addition to his legal and judicial career, Cushing was active in the establishment of the American Academy of Arts and Sciences and was a fellow of that institution from 1780 to 1810.

Cushing died September 13, 1810, in Scituate, Massachusetts.

## CUSTODIAL INTERROGATION

*Questioning initiated by law enforcement officers after a person is taken into custody or otherwise deprived of his or her freedom in any significant way, thus requiring that the person be advised of his or her applicable constitutional rights.*

In the landmark decision **MIRANDA V. ARIZONA**, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the U.S. Supreme Court set standards for law enforcement officers to follow when attempting to interrogate suspects whom they hold in custody. Suspects who are subject to custodial interrogation must be warned that they have the right to remain silent; that any statements that they make may be used as evidence against them; that they have the right to an attorney; and that if they cannot afford an attorney, one will be appointed for them prior to any questioning, if they so desire. Under *Miranda,* unless those warnings are given, no evidence obtained during the interrogation may be used against the accused.

Since *Miranda* was decided, state and federal courts have struggled with a number of issues with regard to its application, including: when a suspect is deemed to be in custody and thus entitled to the warnings required by *Miranda;* and when a suspect will be deemed to have waived the right to have an attorney present during questioning. Some recent decisions by the U.S. Supreme Court have attempted to answer these difficult questions.

In *Stansbury v. California,* 511 U.S. 318, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994), the Court considered whether a police officer's subjective and undisclosed opinion concerning whether a person who had been questioned had been a suspect was relevant in determining whether that person had been in custody and thus entitled to the *Miranda* warnings. In 1982, Robert Stansbury was convicted of first-degree murder, rape, **KIDNAPPING**, and a lewd act on a child under the age of 14. The morning after ten-year-old Robyn Jackson had disappeared from a Baldwin Park, California, playground, a witness in Pasadena, California, had observed a large man leaving a turquoise car and throwing something into a nearby flood-control channel. The witness called the police, who discovered Jackson's body in the channel. She had been raped, strangled, and struck on the head with a blunt instrument. The police later learned that Jackson had talked to two ice-cream truck drivers, one of whom was Stansbury, shortly before she disappeared. Officers went to Stansbury's home and asked Stansbury to go to the police station to answer some questions concerning their investigation into Jackson's murder. Stansbury agreed and accepted a ride to the station in a police car.

At the police station, Stansbury was questioned about his whereabouts and activities on the day Jackson's body was discovered. The police did not read him the *Miranda* warnings at the time. Stansbury told the police that he had talked to the girl, that he had returned to his trailer a few hours later, and that he had left around midnight in his roommate's turquoise car. The car matched the description given by the witness. Stansbury also admitted that he pre-

*After a person has been taken into custody by law enforcement officials, he must be advised of his constitutional rights before the officials begin an interrogation. Pictured is Jose Canseco in 2003.*

AP/WIDE WORLD PHOTOS

viously had been convicted of rape, kidnapping, and CHILD MOLESTATION. The detective interviewing Stansbury then terminated the conversation and read Stansbury the *Miranda* warnings. Stansbury was later charged with first-degree murder and other crimes.

At a PRETRIAL CONFERENCE, Stansbury moved to suppress all of the statements that he had made at the station, as well as the evidence that had been discovered as a result of those statements. The trial court denied his motion, ruling that Stansbury had not been in custody—and thus that he had not been entitled to the *Miranda* warnings—until he had mentioned the turquoise car. Before that point in the interview, the court reasoned, Stansbury had not been considered a suspect. Based on that conclusion, the trial court permitted introduction of the statements that Stansbury had made before he had mentioned the car. Stansbury was convicted on all charges and was sentenced to death for first-degree murder.

On appeal, the California Supreme Court affirmed Stansbury's conviction, rejecting the "in-custody" claim that he had raised in the trial court. The state supreme court, applying an in-custody legal standard based on whether the investigation has focused on the subject, agreed with the trial court's conclusion that suspicion had focused on Stansbury only after he mentioned driving the turquoise car on the night of the crime. Therefore, the court held, Stansbury had not been subject to custodial interrogation before that time, and in turn *Miranda* warnings had not been required, and his statements were admissible.

The U.S. Supreme Court reversed and remanded the case. In a per curiam decision (a brief, unanimous, and unsigned opinion), the Court held that "an officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment [of] whether the person is in custody." Instead, according to the Court, the key inquiry should be whether the individual had been placed under formal arrest, or whether the restraint placed on the individual's freedom of movement rose to the level of a formal arrest. The Court further noted that the "initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogation officers or the person being questioned." So long as an officer's subjective view that an individual being questioned is a suspect is not disclosed to the individual, the officer's view has no bearing on the in-custody issue. If the officer's knowledge or beliefs are communicated to the individual being questioned, the Court stated, that knowledge or those beliefs are relevant only to the extent that the individual "would gauge the breadth of his or her 'freedom of action.' " But a statement from the officer that the individual is the prime suspect, in and of itself, is not "dispositive of the custody issue."

In *Stansbury,* the California Supreme Court had not analyzed the in-custody issue based on these principles. Thus, the U.S. Supreme Court remanded the case to the trial court to determine whether the objective facts surrounding Stansbury's interrogation supported the trial court's original conclusion that Stansbury had not been in custody before he mentioned the turquoise car.

The high court tackled another difficult *Miranda* issue in *Davis v. United States,* 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d (1994), when it considered the circumstances under which a suspect who was subject to custodial interrogation has validly waived the right to have an attorney present during questioning. In an earlier decision, *Edwards v. Arizona,* 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), the Court had held that such a waiver must be "knowing and intelligent." Furthermore, the Court had made clear in *Edwards* that police officers must immediately stop questioning a

suspect who clearly asserts the right to have legal counsel present during the interrogation.

*Edwards* applied only when a suspect clearly asserted the right to have counsel present; it did not provide guidance to officers when a suspect made an ambiguous or equivocal request for counsel. Addressing that situation, some jurisdictions had held that any mention of counsel, no matter how ambiguous, required that questioning cease. Other courts had attempted to define a threshold standard of clarity, under which comments that fell below the required clarity did not invoke the RIGHT TO COUNSEL. Still other jurisdictions had ruled that questioning must cease upon any mention of counsel, but officers were permitted to ask further, narrow questions to clarify whether the suspect desired an attorney. In *Davis,* the U.S. Supreme Court settled the issue, holding that officers are not required to cease questioning if a suspect makes an ambiguous request for counsel. Questioning may continue until the suspect makes an "unambiguous" request for an attorney. Furthermore, the Court held, police officers have no duty to seek clarification of an ambiguous request.

The case began when Robert Davis, a member of the U.S. Navy, became a suspect in the murder of another sailor at the Charleston, South Carolina, naval base. Davis was interviewed by the authorities and informed of his *Miranda* rights. He waived, orally and in writing, his right to remain silent and his right to counsel. But after talking with agents for 90 minutes, he stated, "Maybe I should talk to a lawyer." One of the agents asked Davis whether he wanted an attorney, or whether he was just making a comment. Davis replied, "No, I'm not asking for a lawyer." After a short break, the agents reminded him of his right to remain silent and then resumed the questioning. An hour later, Davis said, "I think I want a lawyer before I say anything else." The agents then stopped the interview.

At his general COURT-MARTIAL, Davis maintained that the statements made during the interview after his ambiguous statement concerning the need to talk with a lawyer should not be admitted. The court ruled that the ambiguous statement had not been in the form of a request for an attorney, and thus the statements made after it were admissible. Davis was found guilty of unpremeditated murder and sentenced to life imprisonment. His conviction was affirmed by the military appellate court.

The U.S. Supreme Court also affirmed the conviction. Writing for the majority, Justice SANDRA DAY O'CONNOR noted that none of the Court's previous decisions addressing *Miranda* issues required that questioning of a suspect be terminated if the suspect makes an ambiguous or equivocal request for counsel. To gain *Miranda* protection, she maintained, a suspect must "unambiguously request counsel," and the request must "articulate [the suspect's] desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." She further stated that requiring questioning to stop when a suspect makes ambiguous references to requesting an attorney would transform the *Miranda* protections into "wholly irrational obstacles to legitimate police investigative activity." Police officers, she maintained, would be forced to end questioning even if the suspect does not want an attorney, thus hampering effective law enforcement. Permitting a mere reference to an attorney to end an interrogation would require police officers to "make difficult judgment calls whether the suspect in fact wants a lawyer even though he hasn't said so, with the threat of suppression if they guess wrong."

In a separate opinion, Justice DAVID H. SOUTER, joined by Justices HARRY A. BLACKMUN, JOHN PAUL STEVENS, and RUTH BADER GINSBURG, concurred in the judgment affirming Davis's conviction. In Souter's view, officers could constitutionally pose questions to clarify a suspect's ambiguous reference for counsel, as was done in *Davis.* Souter believed that the statements given by Davis, after the counsel issue was clarified, indicated that Davis did not want an attorney. Nevertheless, Souter disagreed with the Court's ruling that the agents could entirely disregard Davis's references to wanting one. He argued that, like the agents in *Davis,* the Court should adopt a rule barring officers from further questioning until they have determined whether a suspect's ambiguous statement was meant as a request for an attorney. According to Souter, a "timid or verbally inept subject" might not understand what is required in order for him or her to stop the interrogation and to consult with an attorney. If the suspect understands that a request has been ignored, he or she may not object further and may see "confession (true or not) as the only way to end [the] interrogation."

### The Future of Miranda

*Miranda* and its progeny have long served as a whipping post for politicians, legal commentators, and others who perceive the decision as "coddling criminals." They argue that the *Miranda* warnings impede police officers from efficiently and effectively doing their jobs by adding additional layers of unnecessary procedure to the law enforcement process. *Miranda* critics also maintain that the police are punished, and that society is harmed, when defendants are set free, because key evidence is suppressed after being obtained in violation of the Fifth Amendment's prohibition against un-Mirandized confessions. Moreover, *Miranda* critics contend that criminal suspects seldom fully understand the meaning or importance of the rights recited to them. Finally, critics cite studies indicating that the *Miranda* decision has had little effect in reducing the number of confessions and requests for lawyers made by suspects in custody.

In 1999, the U.S. Court of Appeals for the Fourth Circuit fueled long-standing speculation that *Miranda* would be overruled when it held that the admissibility of confessions in federal court is governed not by *Miranda*, but by a federal statute enacted two years after *Miranda*. The statute, 18 U.S.C.A. § 3501, provides that a confession is admissible if voluntarily given, with the voluntariness of each confession being evaluated by the "totality of the circumstances" on a cases-by-case basis, without any requirement that the defendant be Mirandized. Congress enacted the statute to overturn *Miranda,* the Fourth Circuit wrote, and Congress had the authority to do so pursuant to its authority to overrule judicially created RULES OF EVIDENCE that are not mandated by the Constitution. *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999).

The U.S. Supreme Court reversed. In a 7-2 opinion authored by Chief Justice WILLIAM REHNQUIST, the Court wrote that whether or not it agreed with *Miranda*, the principles of STARE DECISIS weigh heavily against overruling it then. While the Court has overruled other precedents when subsequent cases have undermined their doctrinal underpinnings, that has not happened to the *Miranda* decision, which the Court said "has become embedded in routine police practice to the point where the warnings have become part of our national culture." Although a few guilty defendants may sometimes go free as the result of the application of the *Miranda* rule, the Court observed, experience shows that the totality-of-the-circumstances test set forth in Section 3501 is more difficult than *Miranda* for law enforcement officers and courts to apply in a consistent manner. *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

The Court said that a contrary conclusion is not required by the fact that it has subsequently made exceptions to the Miranda rule. No constitutional rule is immutable, much less immune from the sort of refinements *Miranda* has undergone to adapt to the needs and realities of law enforcement. Moreover, the Court emphasized, these exceptions have reduced some of the law enforcement inefficiencies that *Miranda* critics were predicting would undermine the efficiency of criminal investigations, as the *Miranda* warnings are now often provided in a rote and perfunctory manner during arrest and custodial interrogation. "If anything," Rehnquist wrote, "subsequent cases have reduced the impact of the Miranda rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief."

*Dickerson* surprised many observers, not only because the Court declined to overrule *Miranda,* but also because Chief Justice William Rehnquist authored the opinion upholding *Miranda,* even suggesting that *Miranda* had become so "embedded" in the nation's JURISPRUDENCE as to be unlikely to be overturned in the foreseeable future. Most observers consider Rehnquist to be one of the Court's more conservative members. His opinions are frequently joined by fellow conservatives, Justices ANTONIN SCALIA and CLARENCE THOMAS, both of whom dissented in *Dickerson.* On any number of other issues, civil libertarians have assailed the chief justice for what they regard as his narrow reading of the BILL OF RIGHTS. *Dickerson* both tempered that criticism and quieted speculation about the future of *Miranda.*

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CROSS-REFERENCES

Criminal Procedure; Privilege Against Self-Incrimination; Right to Counsel; Self-Incrimination.

## CUSTODY

*The care, possession, and control of a thing or person. The retention, inspection, guarding, maintenance, or security of a thing within the immediate care and control of the person to whom it is committed. The detention of a person by lawful authority or process.*

For example, in a BAILMENT, the bailee has custody of goods delivered to him or her in trust for the execution of a special object upon such goods.

The term is flexible and may mean actual imprisonment or the mere power—legal or physical—of imprisoning or assuming manual possession. A petitioner must be "in custody" to be entitled to HABEAS CORPUS relief, which provides for release from unlawful confinement in violation of constitutional rights. Custody in this context is synonymous with restraint of liberty and does not necessarily mean actual physical imprisonment. Persons who are on PROBATION or who are released on their own recognizance are "in custody" for purposes of habeas corpus proceedings.

CHILD CUSTODY, which encompasses the care, control, guardianship, and maintenance of a child, may be awarded to one of the parents in a DIVORCE or separation proceeding. Joint custody is an emerging concept that involves the apportionment of custody between the parents during specified periods of time. For example, a child may reside with each parent for six months each year.

Jurisdiction of courts over custody disputes has been heavily litigated, especially in child-custody cases. In the past, some parents sought to obtain custody over their children by removing them from one state, then seeking to obtain custody through a decree in another state. The federal and state governments have sought to prevent this occurrence through the enactment of a series of statutes. In 1967, the COMMISSIONERS ON UNIFORM LAWS approved the Uniform Child Custody Jurisdiction Act, which was eventually adopted in every state. The act provides that a state court will not accept a custody case unless it has original jurisdiction or unless the state with original jurisdiction relinquishes it. The Commissioners on Uniform Laws updated the law in 1997 with the approval of the Uniform Child Custody Jurisdiction and Enforcement Act, which more than 30 states have adopted. Congress has enacted similar legislation, including the Parental KIDNAPPING Prevention Act (28 U.S.C.A. § 1738A [Supp. 2003]). That statute requires that a state give FULL FAITH AND CREDIT to another state's custody order.

The jurisdiction of federal courts over custody of ALIENS has also become a significant issue with the enactment of several anti-TERRORISM statutes since the late 1990s. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996), and the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996), both of which removed much of the power from federal courts to review cases involving immigrants who are held in custody for certain crimes. Several legal commentators criticized the application of these statutes due to their limitation of the habeas corpus rights that traditionally are extended to aliens. Commentators have similarly raised questions with respect to orders issued by President GEORGE W. BUSH, which limit the ability of federal courts to review cases of suspected terrorists who are held in custody.

## CUSTOMS DUTIES

*Tariffs or taxes payable on merchandise imported or exported from one country to another.*

Customs laws seek to equalize the charges imposed by other countries, furnish income for the federal government, and preserve the financial stability of domestic industries.

Congress has the exclusive authority to determine the imposition and enforcement of such duties and federal courts have exclusive jurisdiction to resolve controversies involving customs duties.

### Customs Service

The U.S. Customs Service has these responsibilities: the proper assessment and collection of customs duties, excise taxes, fees, and penalties owing on imported items; the prohibition and seizure of contraband, including narcotics and illegal drugs; the processing of people, car-

*Customs duties are taxes paid on merchandise brought into the United States, including, for example, gifts brought home to another person.*

MARTHA TABOR/WORKING IMAGES PHOTOGRAPHS

riers, cargo, and mail into and out of the country; the administration of certain navigation laws; the detection and apprehension of individuals engaged in fraudulent activities who intend to circumvent customs; the protection of U.S. business and labor through the enforcement of statutes, regulations, and countervailing duty; the enforcement of COPYRIGHT, patent, and TRADEMARK provisions and quotas; and the setting of requirements for imported merchandise.

## Goods and Merchandise Subject to Duties

Federal tariff schedules set forth terms that prescribe those goods that are to be subject to duties. Such schedules specify the items upon which a duty is to be imposed when imported into the United States and the rates at which the items will be taxed based upon the monetary value of each item.

**Exemptions** Any U.S. resident, including an infant, who returns from a foreign trip is permitted an exemption from being charged duty on specific items that would otherwise be subject to duty, provided the individual was out of the United States for a minimum of 48 hours. The size of the exemption depends upon the reasonable retail value of each item, which is determined by the place of purchase, not by what it would sell for in the United States. Articles must be for personal or household purposes or for use as gifts. Included within the exemption are limited amounts of alcoholic beverages, cigars, and cigarettes.

Household goods—including rugs, draperies, and furniture—obtained abroad and used there for a period of one year can be imported without the imposition of a duty, provided these goods are not brought into the country for sale or for use by some other individual. Cameras, stereo equipment, and watches do not fall under the classification of household goods; therefore, a duty must be paid on such items. Household goods transported abroad from the United States are, upon their return, exempt from duty. In addition, personal articles, such as cameras and jewelry, that were originally manufactured in a foreign country can also be returned without the imposition of a duty, provided they were purchased in the United States and identified and registered with the Customs Service prior to being brought to a foreign country.

Vehicles, including automobiles, that are taken abroad for nonbusiness purposes can be sent back to the United States duty free upon proof that such vehicles were shipped from the United States. Such proof can be in the form of either a state motor vehicle certificate or customs registration certificate upon the registration of the automobile prior to shipment. If an automobile is repaired while abroad, the value of the repairs must be stated and a duty must be discharged on their value.

**Gifts** The established exemption applies to both gifts received abroad and those brought home for others. Gifts that do not exceed a value of $50 in the country of shipment can be accepted by the recipient in the United States free from any duty charges and, therefore, have no effect on the exemption. However, no one person can receive gifts exceeding $50 on any one day. If this occurs, a duty and, if applicable, a tax will be imposed on all articles. The $50 limit does not include gifts of liquor or tobacco, nor does it include gifts that an individual sends to himself or herself or to any person with whom he or she is traveling. The common practice is to have gifts wrapped and labeled separately so as to avoid having them included in the sum total of purchases by the customs officer.

**Other Purchases** In the event that the total dollar value of the imported items is greater than the set exemption amount, the purchaser must complete a written declaration itemizing all articles. A duty of 10 percent on the first $1,000 in the excess amount must be paid, but the duties on goods above that amount vary, based on their wholesale, rather than on their fair retail, value. Those articles assessed at the maximum duty rates are included within the exemption, whereas those assessed at lower rates

are put in the excess category. Discharge of the duty on the excess items can be made with American money, a personal check, a government check, a traveler's check, or a money order. Personal checks cannot be drawn on foreign banks; rather, they must be drawn on a national or state bank or trust company of the United States. In the event that a government check, traveler's check, or money order is used, it must not be for an amount higher than $50 in excess of the duty charge.

**Restricted Articles** Various items such as plants that shelter harmful insects are subject to restrictions because they are hazardous to the GENERAL WELFARE of the United States as a whole or to a particular segment of society. Restricted plants cannot be brought into the United States unless the Customs Service issues special permits. Livestock—including horses, goats, sheep, and zoo animals—are also restricted and require permits for their importation. Pets must pass inspection by veterinarians employed by the U.S. DEPARTMENT OF AGRICULTURE and are frequently subject to a quarantine period prior to entry into the United States.

Importation of firearms and ammunition requires a permit. Weapons taken abroad to be used on a hunting expedition can be brought back by the individual who removed them without a permit. The owners of firearms customarily register them with the Customs Service before their departure; however, no more than three firearms and one thousand cartridges can be registered.

**Prohibited Articles** A wide range of items cannot be brought back to the United States from a foreign country. Included in this category are plants in soil, citrus peels, fresh dairy products, and seeds from a number of plants. Narcotic drugs are strictly prohibited; however, medication containing narcotic substances can be brought in provided the substances are properly identified and the traveler has a doctor's prescription or a statement relating to the drug. The importation of various articles from certain countries, including Cuba and Vietnam, are prohibited without a license obtained from the Office of Foreign Assets Control of the DEPARTMENT OF THE TREASURY.

**Penalties** Failure to declare articles that must be declared makes the items subject to seizure and FORFEITURE. An individual who fails to declare an article is held liable for a penalty equivalent to its value, which is its worth in the place where it was acquired. An individual who fails to declare an item can also be subject to a criminal action.

Seizure and forfeiture provisions are also applicable in the event that the value of an item is understated or misrepresented and the individual who is guilty of such understatement or MISREPRESENTATION must pay the duty on the forfeited item.

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CROSS-REFERENCES

Contraband; Tariff.

## CY PRES

*Abbreviated form of* cy pres comme possible, *French for "as near as possible." The name of a rule employed in the construction of such instruments as trusts and wills, by which the intention of the person who executes the instrument is effectuated as nearly as possible when circumstances make it impossible or illegal to give literal effect to the document.*

Cy pres is applied in cases where the court concludes that, under the circumstances, the intent of the settlor who creates a trust or the testator who makes a will will not be contradicted by employing a flexible approach toward the application of the provisions of the document. Without cy pres, the intent of the settlor or testator will never be implemented because the document will be without any legal effect and not subject to enforcement by the court. In one case a settlor directed that his property be used as a home for retired clergymen, but the clergymen's wives were prohibited from residing there with them. This trust provision substantially reduced the number of applicants to the home. A court ordered the trustee, a person either appointed by the settlor or required by law to execute a trust, to ignore this provision under the doctrine of cy pres. However, a court does not have the power to alter a settlor's dispositive provisions. For example, a trustee who is in charge of two charitable trusts cannot be authorized by a court to transfer funds from one charity to the other.

A court also has the power under the cy pres doctrine to order trust funds to be applied to a charitable purpose other than the one specifically named by a settlor when it was the settlor's intention to benefit charity in general and it has become impossible, inexpedient, or impractical to accomplish his or her specific purpose. Since a CHARITABLE TRUST can be perpetual, many become obsolete due to changing social, political, economic, or other conditions. A trust established in 1790 to combat yellow fever would, for example, be of little or no practical value now, since that disease has been virtually eradicated as a result of advances in medicine. When cy pres is applied, the court reasons that the settlor would have wanted his or her general charitable purposes implemented despite the changing conditions. In one case a testator provided for two trusts: the first to facilitate the end of SLAVERY, and the second to assist runaway slaves. Shortly after the testator died, slavery was abolished, so the purposes of both trusts were completely outdated. A court reasoned that the testator intended the broad purpose of aiding African Americans, so the changes in the structure of society justified the court's application of funds of the trusts to purposes similar to those chosen by the testator. The first trust fund was applied to the education of former slaves in the South, and the second was used to assist impoverished blacks in the city where the testator had lived and granted preference to those who had previously escaped from slavery.

The cy pres doctrine can be applied only by a court, never by the trustees of a trust who must execute the terms of the trust. Trustees can, however, apply to the court for cy pres instructions when they believe the trust arrangement warrants it. A cy pres action is instituted by the trustees with the state attorney general as a party to the action, or the attorney general can initiate the suit. Once conditions are deemed suitable for the employment of cy pres, the court has broad discretion in the framing of a scheme for the application of the charitable fund to a purpose "as near as possible" to the one designated by the settlor. Some states authorize the living settlor to VETO the application of cy pres to an irrevocable trust that he or she created.

The doctrine of cy pres is not employed where a settlor was concerned with only one specific charitable objective and it fails, or when the settlor provides that a gift be made to another upon failure of the charitable gift. When cy pres is not applied and the trust fails without any provision for the property to be given to another, there is a RESULTING TRUST for the settlor or his successors.

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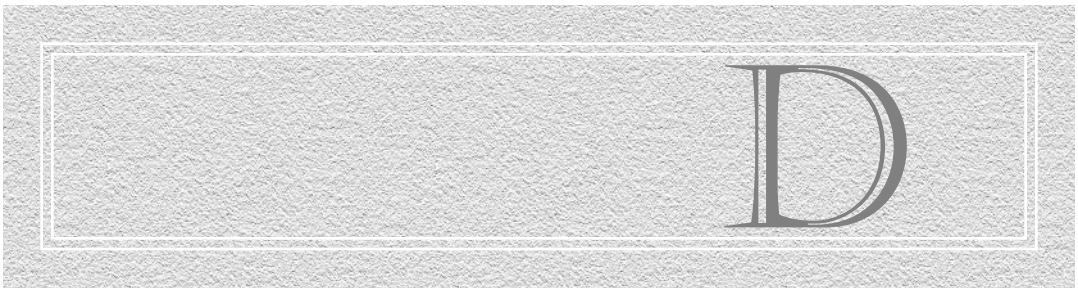

## ♦ DALLAS, ALEXANDER JAMES

Alexander James Dallas achieved prominence as a jurist, statesman, and author. Dallas was born June 21, 1759, in Jamaica, British West Indies. He relocated to the United States, becoming a citizen in 1783.

In 1785, Dallas was admitted to the Pennsylvania bar and began his judicial career as counselor of the Pennsylvania Supreme Court. Six years later he acted as secretary of the Commonwealth of Pennsylvania. He also performed editorial duties on the first series of the U.S. Supreme Court Reports and served as U.S. district attorney from 1801 to 1814, before entering the federal government system.

Dallas became secretary of the treasury in 1814 and remained in the cabinet of President JAMES MADISON for two years. He gained recognition during his tenure for his policies advocating protective tariffs, public credit, and the formation of the Second Bank of the United States. His programs were responsible for restoring the United States to a strong financial position after several years of depression. In addition to these duties, he served concurrently as acting secretary of war from 1815 to 1816.

As an author, Dallas wrote many noteworthy publications, including *Features of Mr. Jay's Treaty* (1795); *Laws of the Commonwealth of Pennsylvania,* four volumes (1793 to 1801); *Reports of Cases Ruled and Adjudged in the Several Courts of the United States and Pennsylvania,* four volumes (1790 to 1807); and *Treasury Reports: An Exposition of the Causes and Character of the War* (1815).

Dallas died January 16, 1817, in Trenton, New Jersey.

"OVER THEIR REPRESENTATIVES THE PEOPLE HAVE A COMPLETE CONTROL, AND IF ONE SET TRANSGRESS THEY CAN APPOINT ANOTHER SET, WHO CAN RESCIND AND ANNUL ALL PREVIOUS BAD LAWS."
—ALEXANDER J. DALLAS

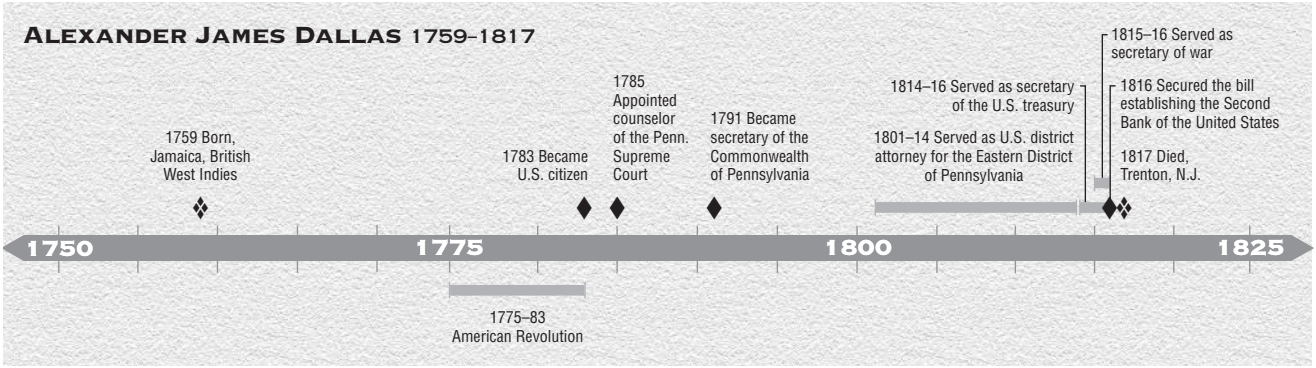

*Alexander J. Dallas.*
LIBRARY OF CONGRESS

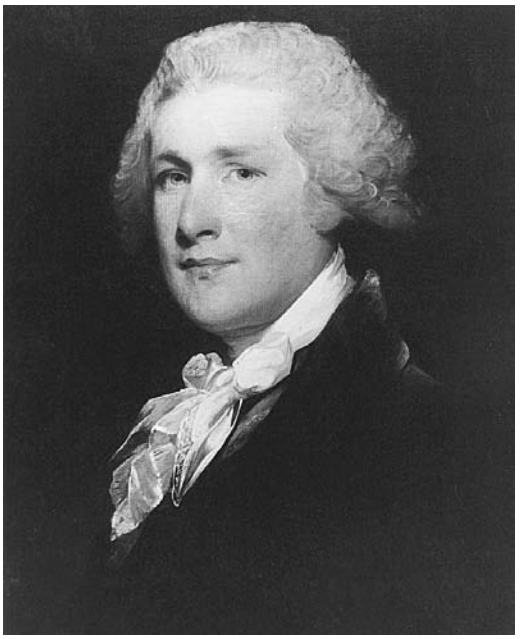

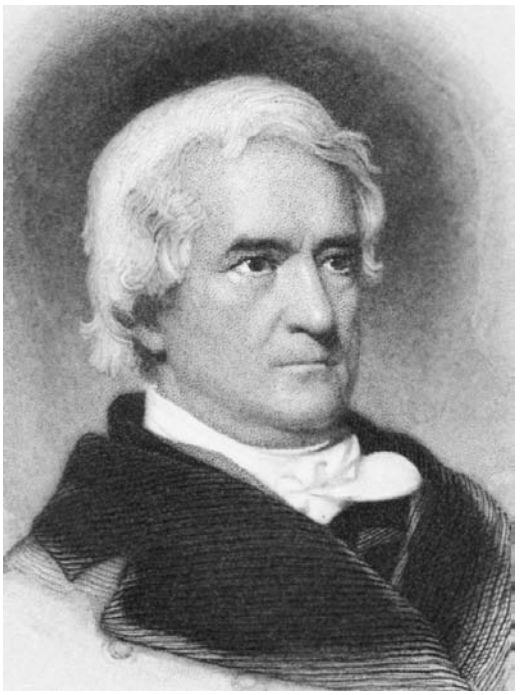

*George M. Dallas.*

**CROSS-REFERENCES**

Bank of the United States.

## ◆ DALLAS, GEORGE MIFFLIN

George Mifflin Dallas was born July 10, 1792, to statesman ALEXANDER JAMES DALLAS. He graduated from Princeton University in 1810 and was admitted to the bar three years later.

In 1813, statesman Albert Gallatin was dispatched to Russia for the purpose of securing Russian aid in negotiating an end to the WAR OF 1812 between the United States and Great Britain. Dallas performed the duties of secretary to Gallatin and was commissioned in 1814 by the American delegates at the Ghent Peace Conference to relay the terms of peace to the British.

Dallas returned to Philadelphia and served as deputy attorney general before becoming mayor in 1829 for a three-year period. He also acted as U.S. district attorney, and in 1831, he entered the federal government.

Dallas filled a vacancy in the U.S. Senate and represented Pennsylvania until 1833; in that same year, he also performed the duties of attorney general of Pennsylvania and continued in this capacity until 1835.

In 1837, Dallas again acted as a diplomat, serving as emissary to Russia. Eight years later, he was elected as U.S. vice president during the

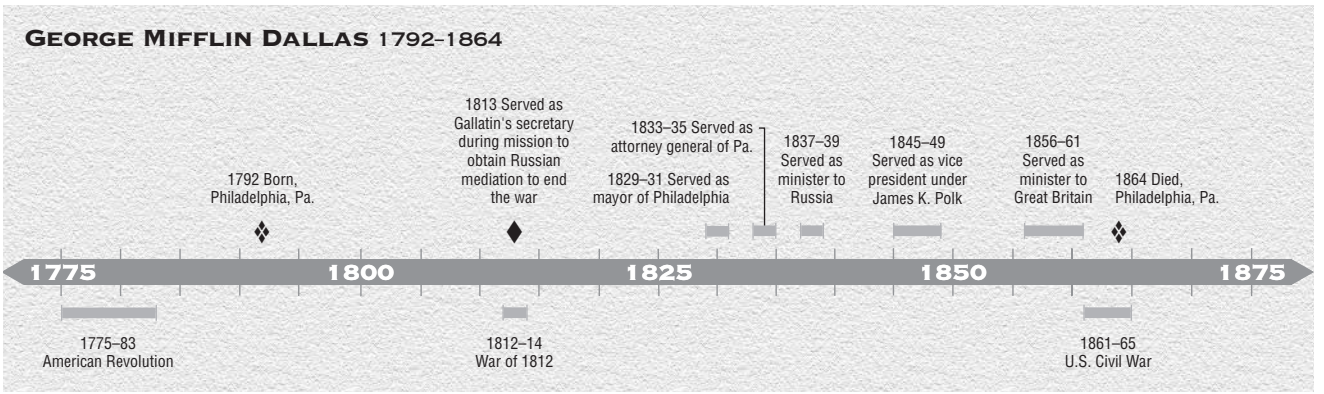

administration of JAMES K. POLK. His term lasted until 1849, and in 1856, he returned to foreign service, acting as minister to Great Britain until 1861. During his tenure Dallas was instrumental in the negotiations that resulted in the formation of the Dallas-Clarendon Convention of 1856, for the purpose of arbitrating disputes concerning Central America between the United States and Great Britain.

Dallas died December 31, 1864, in Philadelphia, Pennsylvania.

## DAMAGES

*Monetary compensation that is awarded by a court in a civil action to an individual who has been injured through the wrongful conduct of another party.*

Damages attempt to measure in financial terms the extent of harm a plaintiff has suffered because of a defendant's actions. Damages are distinguishable from costs, which are the expenses incurred as a result of bringing a lawsuit and which the court may order the losing party to pay. Damages also differ from the verdict, which is the final decision issued by a jury.

The purpose of damages is to restore an injured party to the position the party was in before being harmed. As a result, damages are generally regarded as remedial rather than preventive or punitive. However, PUNITIVE DAMAGES may be awarded for particular types of wrongful conduct. Before an individual can recover damages, the injury suffered must be one recognized by law as warranting redress, and must have actually been sustained by the individual.

The law recognizes three major categories of damages: COMPENSATORY DAMAGES, which are intended to restore what a plaintiff has lost as a result of a defendant's wrongful conduct; nominal damages, which consist of a small sum awarded to a plaintiff who has suffered no substantial loss or injury but has nevertheless experienced an invasion of rights; and punitive damages, which are awarded not to compensate a plaintiff for injury suffered but to penalize a defendant for particularly egregious, wrongful conduct. In specific situations, two other forms of damages may be awarded: treble and liquidated.

### Compensatory Damages

With respect to compensatory damages, a defendant is liable to a plaintiff for all the natural and direct consequences of the defendant's wrongful act. Remote consequences of a defendant's act or omission cannot form the basis for an award of compensatory damages.

Consequential damages, a type of compensatory damages, may be awarded when the loss suffered by a plaintiff is not caused directly or immediately by the wrongful conduct of a defendant, but results from the defendant's action instead. For example, if a defendant carried a ladder and negligently walked into a plaintiff who was a professional model, injuring the plaintiff's face, the plaintiff could recover consequential damages for the loss of income resulting from the injury. These consequential damages are based on the resulting harm to the plaintiff's career. They are not based on the injury itself, which was the direct result of the defendant's conduct.

The measure of compensatory damages must be real and tangible, although it can be difficult to fix the amount with certainty, especially in cases involving claims such as pain and suffering or emotional distress. In assessing the amount of compensatory damages to be awarded, a trier of fact (the jury or, if no jury exists, the judge) must exercise good judgment and common sense, based on general experience and knowledge of economics and social affairs. Within these broad guidelines, the jury or judge has wide discretion to award damages in whatever amount is deemed appropriate, so long as the amount is supported by the evidence in the case.

A plaintiff can recover damages for a number of different injuries suffered as a result of another person's wrongful conduct. The plaintiff can recover for a physical impairment if it results directly from a harm caused by the defendant. The jury, in determining damages, considers the present as well as long-range effects of the disease or injury on the physical well-being of the plaintiff, who must demonstrate the disability with reasonable certainty.

Compensatory damages can be awarded for mental impairment, such as a loss of memory or a reduction in intellectual capacity suffered as a result of a defendant's wrongful conduct.

A plaintiff may recover compensatory damages for both present and future physical pain and suffering. Compensation for future pain is permitted when there is a reasonable likelihood that the plaintiff will experience it; the plaintiff is not permitted to recover for future pain and

suffering that is speculative. The jury has broad discretion to award damages for pain and suffering, and its judgment will be overturned only if it appears that the jury abused its discretion in reaching the decision.

Mental pain and suffering can be considered in assessing compensatory damages. Mental pain and suffering includes fright, nervousness, grief, emotional trauma, anxiety, humiliation, and indignity. Historically, a plaintiff could not recover damages for mental pain and suffering without an accompanying physical injury. Today, most jurisdictions have modified this rule, allowing recovery for mental anguish alone where the act precipitating the anguish was willful or intentional, or done with extreme carelessness or recklessness. Ordinarily, mental distress brought on by sympathy for the injury of another will not warrant an award of damages, although some jurisdictions may allow recovery if the injury was caused by the willful or malicious conduct of the defendant. For instance, if an individual wrongfully and intentionally injures a child in the presence of the child's mother, and the mother suffers psychological trauma as a result, the defendant can be liable for the mother's mental suffering. In some jurisdictions, a bystander can recover damages for mental distress caused by observing an event in which another person negligently, but not intentionally, causes harm to a family member.

Compensatory damages of an economic nature may also be recovered by an injured party. A plaintiff may recover for loss of earnings resulting from an injury. The measure of lost earnings is the amount of money that the plaintiff might reasonably have earned by working in her or his profession during the time the plaintiff was incapacitated because of the injury. In the case of a permanent disability, this amount can be determined by calculating the earnings that the injured party actually lost and multiplying that figure out to the age of retirement—with adjustments. If the amount of earnings actually lost cannot be determined with certainty, as in the case of a salesperson paid by commission, the plaintiff's average earnings or general qualities and qualifications for the occupation in which she or he has been employed are considered. Evidence of past earnings can also be used to determine loss of future earnings. As a general rule, lost earnings that are speculative are not recoverable, although each case must be examined individually to determine whether damages can be established with reasonable certainty. For example, a plaintiff who bought a restaurant immediately before suffering an injury could not recover damages for the profits he might have made running it, because such profits would be speculative. A plaintiff who is unable to accept a promotion to another job because of an injury would stand a better chance of recovering damages for loss of earnings, because the amount lost could be established with more certainty.

Individuals injured by the wrongful conduct of another may also recover damages for impairment of earning capacity, so long as that impairment is a direct and foreseeable consequence of a disabling injury of a permanent or lingering nature. The amount of damages is determined by calculating the difference between the amount of money the injured person had the capacity to earn prior to the injury and the amount he or she is capable of earning after the injury, in view of his or her life expectancy.

Loss of profit is another element of compensatory damages, allowing an individual to recover if such a loss can be established with sufficient certainty and is a direct and probable result of the defendant's wrongful actions. Expected profits that are uncertain or contingent upon fluctuating conditions would not be recoverable, nor would they be awarded if no evidence existed from which they could be reasonably determined.

A plaintiff can recover all reasonable and necessary expenses brought about by an injury caused by the wrongful acts of a defendant. In a contract action, for example, the party who has been injured by another's breach can recover compensatory damages that include the reasonable expenses that result from reliance on the contract, such as the cost of transporting perishable goods wrongfully refused by the other contracting party. In other actions, expenses awarded as part of compensatory damages may include medical, nursing, and prescription drug costs; the costs of future medical treatment, if necessary; or the costs of restoring a damaged vehicle and of renting another vehicle while repairs are performed.

Interest can be awarded to compensate an injured party for money wrongfully withheld from her or him, as when an individual defaults on an obligation to pay money owed under a contract. Interest is ordinarily awarded from the date of default, which is set by the time stated in

the contract for payment, the date a demand for payment is made, or the date the lawsuit alleging the breach of the contract is initiated.

### Nominal Damages

Nominal damages are generally recoverable by a plaintiff who successfully establishes that he or she has suffered an injury caused by the wrongful conduct of a defendant, but cannot offer proof of a loss that can be compensated. For example, an injured plaintiff who proves that a defendant's actions caused the injury but fails to submit medical records to show the extent of the injury may be awarded only nominal damages. The amount awarded is generally a small, symbolic sum, such as one dollar, although in some jurisdictions it may equal the costs of bringing the lawsuit.

### Punitive Damages

Punitive damages, also known as exemplary damages, may be awarded to a plaintiff in addition to compensatory damages when a defendant's conduct is particularly willful, wanton, malicious, vindictive, or oppressive. Punitive damages are awarded not as compensation, but to punish the wrongdoer and to act as a deterrent to others who might engage in similar conduct.

The amount of punitive damages to be awarded lies within the discretion of the trier of fact, which must consider the nature of the wrongdoer's behavior, the extent of the plaintiff's loss or injury, and the degree to which the defendant's conduct is repugnant to a societal sense of justice and decency. An award of punitive damages will usually not be disturbed on the grounds that it is excessive, unless it can be shown that the jury or judge was influenced by prejudice, bias, passion, partiality, or corruption.

In the late twentieth century, the constitutionality of punitive damages has been considered in several U.S. Supreme Court decisions. In 1989, the Court held that large punitive damages awards did not violate the EIGHTH AMENDMENT prohibition against the imposition of excessive fines (*Browning-Ferris Industries of Vermont v. Kelco Disposal,* 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219). Later, in *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), the Court held that unlimited jury discretion in awarding punitive damages is not "so inherently unfair" as to be unconstitutional under the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT to the U.S. Constitution. And in *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993), the Court ruled that a punitive damages award that was 526 times the compensatory award did not violate due process. Both *Haslip* and *TXO Production* disappointed observers who hoped that the Court would place limits on large and increasingly common punitive damages awards. In a 1994 decision, the Court did strike down an amendment to the Oregon Constitution that prohibited JUDICIAL REVIEW of punitive damages awards, on the ground that it violated due process (*Honda Motor Co. v. Oberg,* 512 U.S. 415, 114 S. Ct. 2331, 129 L. Ed. 2d 336).

In a jury proceeding, the court may review the award, although the amount of damages to be awarded is an issue for the jury. If the court determines that the verdict is excessive in view of the particular circumstances of the case, it can order REMITTITUR, which is a procedural process in which the jury verdict is reduced. The opposite process, known as ADDITUR, occurs when the court deems the jury's award of damages to be inadequate and orders the defendant to pay a greater sum. Both *remittitur* and *additur* are used at the discretion of the trial judge, and are designed to remedy a blatantly inaccurate damages award by the jury without the necessity of a new trial or an appeal.

### Treble Damages

In some situations, where provided by statute, treble damages may be awarded. In such situations, a statute will authorize a judge to multiply the amount of monetary damages awarded by a jury by three, and to order that a plaintiff receive the tripled amount. The CLAYTON ACT of 1914 (15 U.S.C.A. §§ 12 et seq.), for example, directs that treble damages be awarded for violations of federal ANTITRUST LAWS.

### Liquidated Damages

LIQUIDATED DAMAGES constitute compensation agreed upon by the parties entering into a contract, to be paid by a party who breaches the contract to a nonbreaching party. Liquidated damages may be used when it would be difficult to prove the actual harm or loss caused by a breach. The amount of liquidated damages must represent a reasonable estimate of the actual damages that a breach would cause. A contract term fixing unreasonably large or dispropor-

tionate liquidated damages may be void because it constitutes a penalty, or punishment for default. Furthermore, if it appears that the parties have made no attempt to calculate the amount of actual damages that might be sustained in the event of a breach, a liquidated damages provision will be deemed unenforceable. In determining whether a particular contract provision constitutes liquidated damages or an unenforceable penalty, a court will look to the intention of the parties, even if the terms *liquidated damages* and *penalty* are specifically used and defined in the contract.

### Appellate Review of Damages

When reviewing a trial court's award of damages, an appellate court generally examines all of the evidence from the trial to determine whether the evidence supports the award. When reviewing awards for compensatory damages, an appellate court determines from the lower court's record whether the trial judge abused his or her discretion in allowing a jury's damage award to stand or in making his or her own damage award, called a *bench award.* A bench award by a judge is typically subject to closer scrutiny than an award by a jury.

An appellate court may determine that a damage award is excessive or inadequate. If the court of appeals determines that the damages are excessive or inadequate, and can determine the proper amount with reasonable certainty, the court may adjust the award so that it corresponds with the evidence. One common method for altering an award is through the use of remittitur, whereby the judge directs the plaintiff either to accept a lower award or face a new trial. On the other hand, if the appellate court cannot determine the proper amount of the award based upon the evidence, the court may order a new trial. A court of appeals will also review a trial court's decision whether to admit or to exclude evidence that supports the damage award, such as the decision whether to admit or exclude testimony regarding SCIENTIFIC EVIDENCE. Appellate courts typically review the trial court's decision with respect to admission or exclusion of evidence under the ABUSE OF DISCRETION standard.

Courts review awards of punitive damages differently than other types of damage awards. Several federal courts of appeals are engaged in an ongoing struggle over what standard of review should be applied to punitive damages at the appellate court level. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001), the U.S. Supreme Court ruled that appellate courts must conduct de novo review rather than apply an abuse of discretion standards. This ruling means that federal appellate courts have great freedom to review and reduce punitive damages based on previous U.S. Supreme Court standards. The decision is one more example of the Court expressing its desire to control excessive punitive damage awards.

*Cooper Industries, Inc.* involved a suit for TRADEMARK infringement, where Cooper Industries was accused of using photographs of a knife manufactured by Leatherman Tool Group. A jury awarded Leatherman $50,000 in general damages and $4.5 million in punitive damages. On appeal, the U.S. Court of Appeals for the Ninth Circuit upheld the trial court, basing its analysis on the abuse of discretion standard. This standard is very deferential to the trial court's actions, allowing the appeals courts to overturn a decision only if the trial judge clearly abused his or her authority. By comparison, de novo review empowers the appeals court to review all of the evidence on punitive damages without regard to the trial court's decision.

The U.S. Supreme Court agreed to hear Cooper's appeal to resolve the division among the federal circuits over the appropriate standard of review for punitive damages. The Court, in an 8–1 decision, determined that the federal courts should apply de novo review. Justice JOHN PAUL STEVENS, writing for the majority, concluded that the nature of punitive damages demanded that appeals courts conduct a fresh inquiry. He noted the similarities of punitive damages to criminal fines and cited various criminal cases that addressed the proportionality of sentences that relied on de novo review. Moreover, Stevens rejected the idea that when a jury awards punitive damages, it makes a finding of fact that could not be disturbed by an appeals court unless it was clearly erroneous.

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## DAMNUM

*[*Latin, Damage.*]* *The loss or reduction in the value of property, life, or health of an individual as a consequence of* FRAUD*, carelessness, or accident.*

The phrase *ad damnum,* "to the damage," is the name of a clause in a complaint that states the damages for which the individual seeks judicial relief.

## ♦ DANA, RICHARD HENRY

Richard Henry Dana achieved prominence as a lawyer and author, and for his knowledge of the sea.

Dana was born August 1, 1815, in Cambridge, Massachusetts. A student at Harvard University, he interrupted his studies in 1834 and spent two years as a sailor. In 1836, he returned to Harvard, graduating in 1837. He subsequently received an honorary doctor of laws degree in 1866.

Before entering a legal career, Dana taught elocution at Harvard from 1839 to 1840. He was admitted to the bar in 1840 and established a successful legal practice, demonstrating his expertise in ADMIRALTY cases.

Dana entered politics in 1848 as an organizer of the FREE SOIL PARTY, which opposed the principles of SLAVERY. He attended the party's convention of that same year, held in Buffalo, New York.

In 1861, Dana performed the duties of U.S. attorney for the district of Massachusetts, serving in this capacity until 1866. From 1867 to 1868, he participated in the TREASON trial against confederate President Jefferson Davis, acting as attorney for the United States. During 1866 and 1868, he also returned to Harvard as a lecturer at the law school. In 1877, Dana was selected to represent the United States as senior counsel at the fisheries commission held at Halifax, Nova Scotia.

*Richard H. Dana.*
PHOTOGRAPH BY J.W. BLACK & COMPANY. LIBRARY OF CONGRESS/CORBIS

Dana is regarded as an eminent writer, as is evidenced by the enduring popularity of *Two Years Before the Mast,* published in 1840. In this book, Dana described his experiences as a sailor, recounting his voyage from Boston around Cape Horn to California from 1834 to 1836. He also authored *The Seaman's Friend* (1841) and *To Cuba and Back* (1859), and he edited *Wheaton's Elements of International Law* (1866).

He died January 6, 1882, in Rome, Italy.

"IN ORDER THAT JUSTICE MAY BE DONE TO THE WEAKEST, AND THAT IN ANY HOUR OF FRENZY OR MISTAKE, WE MAY NOT TOUCH THE HAIR OF [HIS] HEAD, WE WILL GIVE HIM A TRIBUNAL WHICH SHALL BE INDEPENDENT OF THE FLUCTUATIONS OF OUR OPINIONS OR PASSIONS."
—RICHARD H. DANA

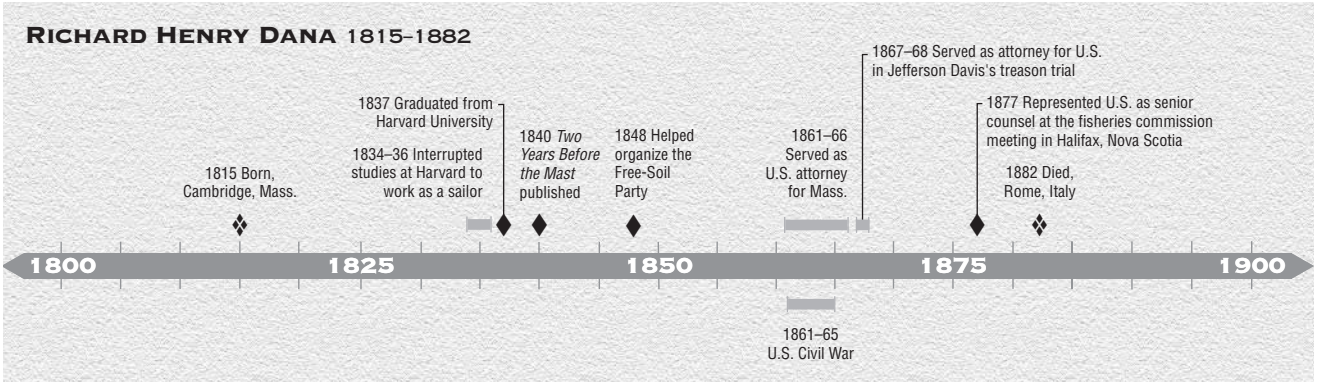

## DANELAGE

*A system of law introduced into England as a result of its invasion and conquest by the Danes during the eighth and ninth centuries, which occurred primarily in some of the midland counties and on the eastern coast.*

Danelage provided basic values and customs to which the later Norman conquerors of England added their customs to provide the foundation of ENGLISH LAW.

## DANGEROUS INSTRUMENTALITY

*Any article that is inherently hazardous or has the potential for harming people through its careless use.*

Examples of a dangerous instrumentality include explosives and electrically charged wires. Statutes and case law must be consulted to determine what items are regarded as dangerous instrumentalities.

When dealing with dangerous instrumentalities, some jurisdictions require that due care be exercised to prevent harm to those who are reasonably expected to be in proximity with them. Others impose STRICT LIABILITY for injuries and losses caused by them.

"THE MERE GRANT OF POWER TO THE [FEDERAL] GOVERNMENT CANNOT . . . BE CONSTRUED TO BE AN ABSOLUTE PROHIBITION TO THE EXERCISE OF ANY POWER OVER THE SAME SUBJECT BY THE STATES."
—PETER V. DANIEL

## ♦ DANIEL, PETER VIVIAN

Peter Vivian Daniel served as an associate justice of the U.S. Supreme Court from 1841 to 1860. A prominent lawyer and Democratic politician from Virginia, Daniel adhered to a Jeffersonian political philosophy that favored STATES' RIGHTS and disfavored large economic institutions. A minor figure in the history of the Supreme Court, Daniel joined the majority in DRED SCOTT V. SANDFORD, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857), which held that freed black slaves could not be citizens under the Constitution because they had originally been property, not citizens.

Daniel was born in Stafford County, Virginia, on April 24, 1784. He came from a wealthy family and was educated at Princeton University, graduating in 1805. He read the law in the Richmond offices of EDMUND RANDOLPH, who helped draft the Constitution. He was admitted to the Virginia bar in 1808.

Although Daniel maintained a law practice, his focus was on politics and government. He was elected to the Virginia House of Delegates in 1809. In 1812 he was appointed by the house to serve on the PRIVY COUNCIL, which acted as an advisory board for the state governor. Daniel remained on the council for twenty-three years, serving as lieutenant governor for much of his term.

Daniel was active in the DEMOCRATIC PARTY and was a strong supporter of President ANDREW JACKSON. In 1836 Jackson appointed Daniel as a judge to the U.S. District Court for Eastern Virginia. Five years later President MARTIN VAN BUREN appointed Daniel to the U.S. Supreme Court. This move sparked controversy because it occurred at the end of Van Buren's term of office. The WHIG PARTY's presidential candidate, WILLIAM HENRY HARRISON, was elected president. Whigs in Congress tried to block the appointment of Daniel so Harrison could choose a justice. Daniel was confirmed by the Senate on March 3, 1841, in the last moments of the Van Buren administration.

Throughout his years on the Supreme Court, Daniel maintained his commitment to Jeffersonian government. THOMAS JEFFERSON's view of republican government valued an agricultural economy and a limited role for government. Daniel also adopted the Jacksonian

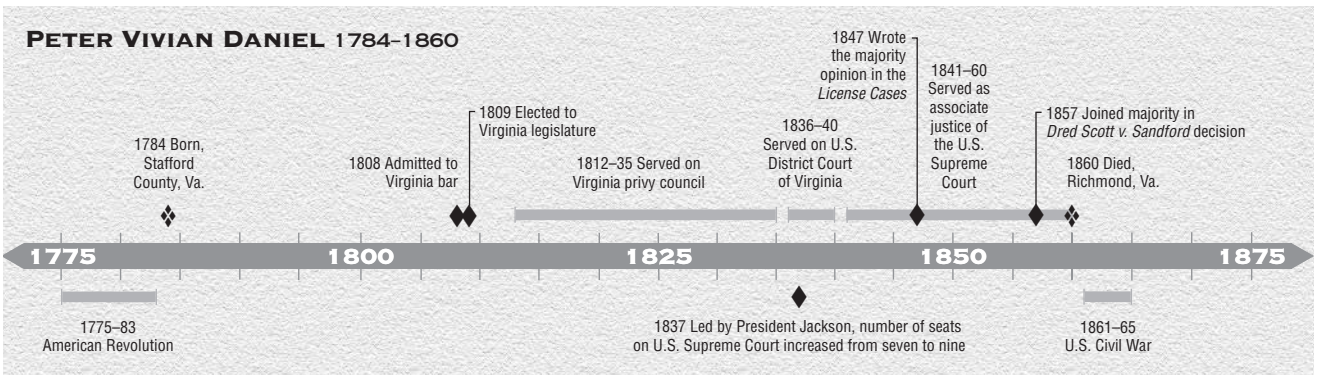

variation, which included hostility to banks, corporations, and the federal government. A southerner and a believer in states' rights, he supported the right of states to maintain the institution of SLAVERY.

Daniel was known more for his dissents than for crafting majority opinions. He did, however, join the majority in the *Dred Scott* case. Dred Scott was a slave owned by an army surgeon, John Emerson, who resided in Missouri. In 1836 Emerson took Scott to Fort Snelling, in what is now Minnesota but was then a territory where slavery had been expressly forbidden by the MISSOURI COMPROMISE legislation of 1820. In 1846 Scott sued for his freedom in Missouri state court, arguing that his residence in a free territory released him from slavery. The Missouri Supreme Court rejected his argument, and Scott appealed to the U.S. Supreme Court.

The Court heard arguments on *Dred Scott* in 1855 and 1856. A key issue was whether African Americans could be citizens of the United States, even if they were not slaves. Daniel was a loyal southerner, holding in his concurring opinion that African Americans who had been freed since the enactment of the Constitution could never be citizens. The Framers had not contemplated the prospect of granting citizenship to persons who were legally recognized as property when the Constitution was drafted.

During his term on the Supreme Court, Daniel's adherence to his principles led him to drift further from the mainstream. As the national economy expanded, and with it both big business and the federal government, Daniel's Jeffersonian beliefs lost relevance.

Daniel died May 31, 1860, in Richmond, Virginia.

*Peter V. Daniel.*
CORBIS

## ♦ DARROW, CLARENCE SEWARD

Lawyer and social reformer Clarence Seward Darrow was the most famous and controversial defense attorney of the early twentieth century. He won unprecedented fame in momentous courtroom battles in which he championed the causes of labor, liberal social thought, and the use of scientific CRIMINOLOGY. His aggressive legal tactics, as well as his outspoken denunciations of industrial capitalism, political corruption, and popular religion, aroused animosities throughout his life. But in the end, his compassion for oppressed persons, as well as his winsome personality, compelled friends and foes alike to honor his unparalleled legal career as attorney for the damned.

Darrow was the master of the courtroom drama. One striking and effective aspect of his legal style was his physical appearance in the courtroom. He wore rumpled suits—often bared to shirtsleeves and suspenders—and let his tousled hair hang into his face. He had a halting walk and slouching stance, and his habits of smoking long cigars slowly during the proceedings and even reading and writing during the prosecution's presentation were endlessly arresting for juries and distracting for opponents.

Darrow was born poor, on April 18, 1857, near Kinsman, Ohio. His mother died when he was fourteen, and his father, an embittered seminary student–turned–undertaker, bore the stigma of the village atheist in an intensely religious rural community. As a child, Darrow hated formal schooling, but with his father's encouragement, he read widely from the extensive family library to educate himself. As his father's intellectual companion, Darrow grew to love reading, to hate being poor, and to willingly embrace unpopular causes. Once, Darrow's father went to observe a public hanging to see what it was like, but left before the moment of execution and reported to Darrow how he felt a terrible shame and guilt for being any part of such a "barbaric practice." This report was not lost on Darrow, who would become a fierce public opponent of the popular practice of capital

"I DO NOT CONSIDER IT AN INSULT, BUT RATHER A COMPLIMENT TO BE CALLED AN AGNOSTIC. I DO NOT PRETEND TO KNOW WHERE MANY IGNORANT MEN ARE SURE—THAT IS ALL AGNOSTICISM MEANS."
—CLARENCE DARROW

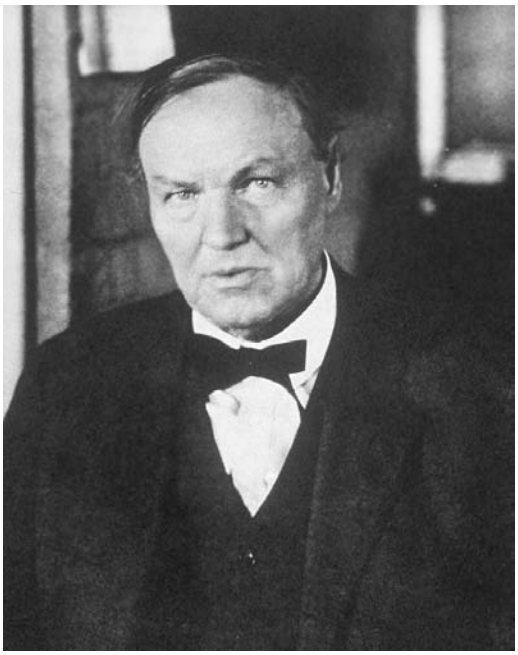

*Clarence Darrow.*
LIBRARY OF CONGRESS

punishment, defending fifty murderers in his legal career, with only one being sentenced to death and executed.

Darrow's entrance into the PRACTICE OF LAW was strained by poverty. He left his studies at Allegheny College after one year for lack of money. After three years teaching in a rural one-room schoolhouse and one year at the Michigan University Law School, where he again withdrew for lack of tuition, Darrow gained an apprenticeship with a law firm in Youngstown, Ohio. There, he read the law and passed the bar exam in 1878 at the age of 21. Returning home, he married his childhood sweetheart, Jessie Ohl, began his own practice in the rural Ohio towns of Andover and Ashtabula, and fathered his only child, a son. In search of a better income for his family and eager for opportunity, Darrow accepted an invitation from his brother Everett Darrow to move to Chicago—then the commercial and cultural center of the Midwest—in 1887.

Darrow's path from the country to the city was well-worn by millions of others at the end of the nineteenth century. The lure of jobs and opportunities following the Civil War combined with mass migrations from Europe added 31 million residents to U.S. cities between 1860 and 1930. Chicago, which had barely existed in 1830, had grown by 1900 to 3 million inhabitants. Along with other large U.S. cities such as New York and Boston, Chicago was unprepared for this overwhelming influx of urban immigrants. The results were poverty, crime, and corruption spawning human misery on a grand scale.

When Darrow moved his hopes and his family to Chicago, the city was in the midst of both a population and an industrial boom. With its being the railroad center of the nation, the meatpacking, lumber, steel, and agricultural industries were rapidly expanding. A devastating fire in 1871 had leveled much of the city and helped to inspire new building programs and fresh commercial initiatives. The city had also become a magnet for social reformers, artists, and intellectuals, including JANE ADDAMS, Lincoln Steffens, UPTON SINCLAIR, Edgar Lee Masters, and Theodore Dreiser, who viewed the human suffering of the great city with outrage.

Darrow found Chicago both fascinating and troubling. While he saw opportunity for himself to advance, he was moved by the evident suffering of laboring families, poor people, and those who were imprisoned. His passion for the lower class only increased as he witnessed the economic contrasts of industry and labor. Throughout the city, industrial tycoons were striking it rich off the backs of laborers—often uneducated and poor—who earned poverty wages under hazardous conditions. Similarly, the prisons were filled with poor and broken people who had little means of defending themselves.

Having read the prison reform writings of Judge John P. Altgeld of Illinois, Darrow shortly introduced himself to this social reformer who would one day become governor. He began a mentorship in the law and politics of reform under Altgeld that would last until Altgeld's death. When Darrow became outraged by the heavy sentences laid upon four anarchist defendants in the Haymarket Square bombing of 1887, Altgeld urged him to join the alliance for their AMNESTY. In turn, Darrow later successfully implored Altgeld as governor to commute their sentences.

In 1888, after being impressed by Darrow's public speaking ability, Mayor DeWitt Cregier, of Chicago, offered him an appointment as a special assessment attorney. Within a year, Darrow rose to chief corporation counsel—becoming the head of the legal department for the entire city of Chicago at age thirty-three. From this vantage point, he observed firsthand the plight of the city's working class in industries

where labor had little power to organize, and government had little power to regulate.

After four years, with his city appointment about to be terminated, Darrow accepted an offer to become chief counsel for the Chicago and Northwestern Railway (CNR), which he had recently defeated in court. He imposed one condition: that he be allowed to continue his outside legal assistance work as long as it did not conflict with his loyalty to the company. Within two years, a decisive conflict was staring Darrow in the face: the PULLMAN STRIKE of 1894. This bitter dispute pitted the workers of the newly formed American Railway Union (ARU) against the powerful Pullman Company and its railroad industry allies. The conflict was so violent that President GROVER CLEVELAND sent in army troops to protect the trains.

Darrow resigned his corporate position with CNR despite enticing offers of higher pay. Instead, he took the case of the ARU's national leader EUGENE V. DEBS, who was charged with violating a strike INJUNCTION. Darrow's defense strategy was not to quibble about the violation of an injunction order but to expose the working conditions imposed upon railroad workers by the industry—in this case, the enormously wealthy Pullman Company. To do this, Darrow boldly subpoenaed company president George M. Pullman to testify, but the tycoon went into hiding rather than appear. So, after describing the abysmal working conditions of Pullman's railroad workers and their families, he argued fervently that people had a right to strike for just causes, and that adequate wages and safe working conditions were such causes.

Darrow defended Debs in two trials—taking an appeal to the U.S. Supreme Court before finally losing and seeing his client sentenced to six months in prison. In this defense of the underdog against the powerful, Darrow had found his calling. In just six years, Darrow had moved from positions of political power and financial security to that of gladiator in the nation's emerging class struggle.

In 1894 Darrow handled his first criminal case in Chicago, defending Eugene Prendergast. Prendergast was a mentally ill drifter who had murdered Mayor Carter H. Harrison Sr. of Chicago, then walked to a police station and confessed to the crime. Darrow attempted an INSANITY DEFENSE and failed, and Prendergast was executed. Of the fifty murder defendants Darrow represented in his lifetime, this was the first and last one he lost to execution.

In 1897, Darrow divorced his wife of 17 years. In 1903, he married Ruby Hamerstrom, a Chicago newspaper journalist. This second marriage for Darrow lasted for the rest of his lifetime but produced no children.

In 1907, the former governor of Idaho Frank Steunenberg was killed by a booby trap bomb on his front gate. Steunenberg had been a powerful supporter of the mining industry. WILLIAM ("BIG BILL") HAYWOOD, leader of the Western Federation of Miners union, and several others were abducted by PINKERTON AGENTS from other states and brought to Boise, where they were charged with conspiracy to murder. The miners' union hired Darrow for the defense, and he traveled with Ruby to Idaho and assembled a defense team.

The prominence of the individuals involved and the violent nature of the crime drew national attention to the trial. Darrow was able to crack the government's case with painstaking

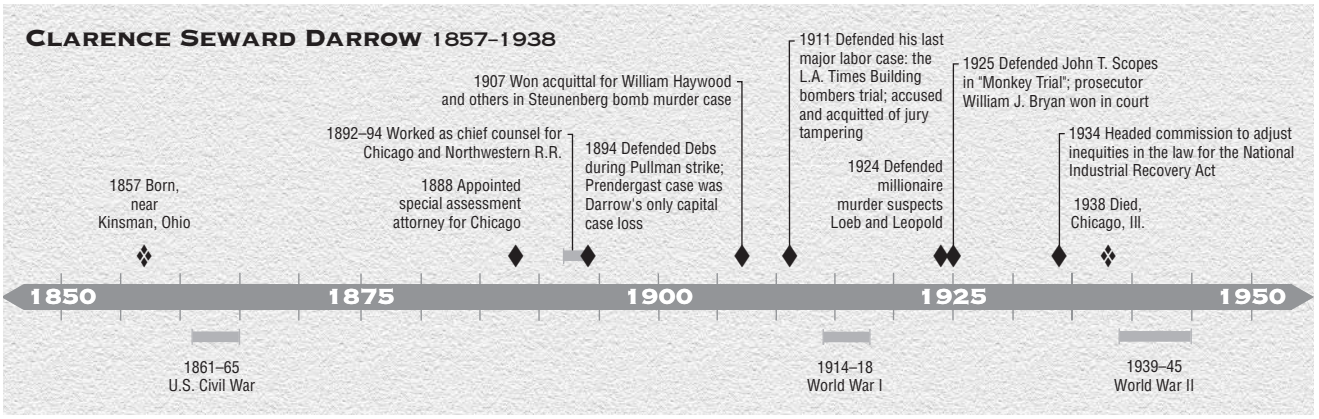

cross-examination of its star witness, the self-confessed perpetrator of the crime, Harry Orchard. Darrow exposed Orchard to be a man bent on personal revenge who had implicated the labor leaders only after being prompted to do so by the prosecutors. Darrow's moving summation in defense of the labor movement—"for the poor, for the weak, for the weary—who, in darkness and despair, have borne the labors of the human race"—drew tears in the courtroom, and Haywood and the others were acquitted.

Thanks to Darrow, labor was again vindicated over opponents in government and industry. But the cost to Darrow was considerable. After the trial, he was broke and in poor health. His legal fees from the union had already been spent, and he suffered from an acute ear infection. When he returned to Chicago, the financial crash of 1907 had wiped out all of his savings, and he returned to his law practice.

Darrow reluctantly entered the limelight again in 1911, when he agreed to defend the accused in what newspapers called the crime of the century. At one o'clock in the morning on October 10, 1910, Los Angeles was rocked by two explosions that blew apart the Los Angeles Times Building with over one hundred people inside. Twenty-one people were killed and 40 injured in the concussion and the fire that followed. The *Times*'s prominent and antiunion editor, Harrison Gray Otis, managed to get out an edition with the headline "Unionist Bombs Wreck Times."

Under pressure from Otis, the mayor of Los Angeles hired a private detective agency to investigate and abduct labor movement suspects living in Indiana and Michigan and return them to Los Angeles to stand trial. Labor movement members appealed to Darrow, but he resisted, still drained and wary from the Haywood defense. Renowned labor leader **SAMUEL GOMPERS**, then president of the **AMERICAN FEDERATION OF LABOR** (AFL), visited Darrow in Chicago and appealed to him to defend labor, the innocent, and **DUE PROCESS**. In return, Gompers promised that a nationwide AFL union war chest would generously compensate him for his services. Darrow agreed.

By the time Darrow arrived in Los Angeles, the three defendants had already confessed to the crime. Darrow entered guilty pleas on their behalf in an attempt to save them from execution. The shock and outrage from labor supporters were devastating. Darrow was jeered by a waiting crowd and shunned by Gompers and other labor leaders. The promised legal fees evaporated.

Within days, Darrow was charged with attempting to bribe the jury and was brought to trial. Away from home, and without funds or allies to make a strong defense, Darrow fell into a depression that lasted through most of the proceedings. But in the closing arguments, he arose to defend himself to the jury with such force and poignancy that he again brought the jury, the audience, the press, and even the judge to tears. When the verdict came, and Darrow was acquitted, the courtroom burst into sustained cheers and embraces. Darrow never again took a major labor case.

Darrow continued to take the unpopular route in his court cases. When the United States entered **WORLD WAR I** despite a strong pacifist movement, Darrow managed to offend people on both sides of the war issue by personally supporting the war while professionally defending pacifists who refused to serve.

Darrow's choice of clients in a notorious murder case further outraged popular sentiments. In 1924, two Chicago teens from millionaire families—Richard Loeb, age 18, and Nathan Leopold Jr., age 19—decided to commit a murder for the thrill of it. Loeb had graduated with honors from the University of Michigan and was on his way to Harvard Law School. Leopold was a Phi Beta Kappa member, already attending law school. They thought they were clever enough that they would not get caught. Luring a 14-year-old friend named Bobby Franks into their car, Loeb killed Franks with a chisel. The two then stuffed his body into the trunk before sending ransom notes to the boy's millionaire family. Two days after the boys had been caught, had been charged, and had confessed, three members of the Loeb family came to Darrow's home in the early morning before he had yet awakened and insisted on making their way to his bedside to beg him to take the case. As a friend of the family, and because of their desperation, Darrow accepted.

Hoping to save the boys from execution, Darrow had his clients plead guilty and then presented expert scientific testimony from 14 psychiatrists and psychologists. These witnesses contended that the boys suffered from a mental illness that caused them to commit the crime. Loeb and Leopold received life sentences. This verdict was extremely unpopular with the pub-

lic, for many had called for the death penalty for this unusually grisly murder. Darrow was attacked in the press and threatened in the mail, and the millionaire families who had begged him to save their children balked at paying the agreed legal fees. Darrow, by then age 67, spoke of retiring from legal work unless he could really "have some fun" doing it. The following year, he got his chance.

Intent on stemming the influence of modernist thinking in the schools, in 1925, the Tennessee legislature passed a law making it illegal to teach anything that contradicted the account of the Creation portrayed in the Bible's book of Genesis. With the help of local citizens and the support of the AMERICAN CIVIL LIBERTIES UNION (ACLU), a 24-year-old biology teacher in rural Dayton (TN), a Tennessee native named John T. Scopes, challenged the law by teaching the evolutionary theories of Charles R. Darwin in his high-school classroom. When Scopes was arrested and charged with violating the law, WILLIAM JENNINGS BRYAN, a well-known former member of the U.S. House, offered his services. At Scopes's insistence, the ACLU recruited the most controversial defense attorney and atheist in the country, Darrow.

For nearly a century, European scholars in linguistics and geology, as well as in Darwin's biology, had contested certain beliefs about the Bible, which left many of the faithful anxious. The fundamentalists in the Tennessee legislature had attempted one solution to this problem: forbid the teaching of anything in conflict with creationism in the public schools. Since Darrow passionately opposed this in principle and was no friend of religion, he happily took the case.

The trial drew enormous media attention in the form of international newspaper coverage and live nationwide radio broadcasts. The popular Henry L. Mencken covered the story and joined other major newspaper reporters in calling it the "Monkey Trial." Since the weather was hot and muggy, and the trial had drawn more than 2,000 visitors, the judge moved the proceedings outside the courthouse onto a platform built for the occasion. There, the two masters of law and rhetoric sparred before a stirred crowd and an international audience. The trial was ostensibly intended to determine whether Scopes had violated the law, which clearly he had purposely done. But the exchanges between Bryan and Darrow quickly revealed deeper issues, such as the constitutional guarantee of free speech and the struggle between fundamentalist and modernist interpretations of the Bible.

This time, Darrow's favorite strategies of elevating the crime to a context of higher issues and presenting expert SCIENTIFIC EVIDENCE did not work. The presiding judge repeatedly upheld objections to these defense tactics. So, knowing that the local folk were overwhelmingly fundamentalist and that they saw Bryan as their champion, Darrow took a masterful gamble and put Bryan himself on the stand as a Bible expert for the defense. In a series of deft and probing questions about the Bible, Darrow managed to so befuddle the champion of fundamentalism that the crowds were finally laughing with Darrow and at Bryan. To many observers, Bryan and his cause were humiliated.

Although the jury voted to convict, the judge imposed only a nominal fine of $100 on Scopes, who was immediately rehired by the school board. Five days later, after eating a characteristically heavy meal, Bryan died in his sleep. Many believed that the devastating cross-examination by Darrow and the court's decision against imposing a larger fine upon Scopes were the cause of Bryan's death.

After the Scopes trial, Darrow became a public celebrity once again. He received many invitations to speak and to debate the issue of religion. As he had in the Pullman case, Darrow lost in the courts but seemingly won before a wider audience.

A year later, the National Association for the Advancement of Colored People (NAACP) asked Darrow to defend 11 blacks in Detroit who were being charged in the death of a single white during an ugly racial incident. Darrow again, at age 69, called upon his powerful defense skills to prove that none of the accused had fired the fatal bullet but that all were instead the target of racial prejudice. All charges were dismissed.

In 1934, President FRANKLIN D. ROOSEVELT appointed Darrow, at age 77, to head a commission to adjust inequities in the law for the NATIONAL INDUSTRIAL RECOVERY ACT, a program intended to relieve the Depression. Darrow's work proved successful when the Supreme Court declared the law unconstitutional, and the necessary revisions were made. The same year, Darrow was asked to chair the opening session of the American Inquiry Commission, a citizens' committee to study the darkening events in Germany. He emerged to tell Mayor Fiorello La

Guardia, of New York, at lunch that "Herr Hitler is a very dangerous man and should be destroyed."

Darrow died in Chicago in 1938, at the age of 81. He had asked his friend Judge William H. Holly to deliver his eulogy because, as Darrow put it, "he knows everything about me, and has the sense not to tell it." As Darrow's body lay in state in Chicago for two days, thousands from every sector of humanity lined up in a driving rain to say good-bye. The tributes to Darrow were bountiful. He was commended for his courage and compassion; his public service and his private practice; his support for labor, minority groups, poor people, and criminals; and, always, his defense of freedom. Although his popularity rose and fell during his lifetime, Darrow's memory has received the highest accolades. Popular and scholarly biographies, as well as theater, cinema, and television dramatizations of his impassioned career and complex life, have won for Darrow a legendary stature in U.S. law and history.

Despite wavering public opinion, fickle allies, and powerful opponents, he was an uncommonly skillful and courageous warrior for justice in the courts and in public life. The secret of his courage was revealed in a memorial comment by the eminent attorney JOSEPH N. WELCH: Darrow was "so brave and fearless that he never seemed to realize he was either."

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Haymarket Riot; Labor Union; Leopold and Loeb Trial; Scopes Monkey Trial.

## DARTMOUTH COLLEGE CASE

See TRUSTEES OF DARTMOUTH COLLEGE V. WOODWARD.

## DAUBERT TEST

In 1993, the U.S. Supreme Court handed down the seminal decision of *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469, (U.S. Jun 28, 1993) (NO. 92-102). The case involved the admissibility of novel SCIENTIFIC EVIDENCE. But to begin to understand the significance of *Daubert,* one needs to view the case in its wider context, going back 70 years to *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923).

*Frye* involved the admissibility of opinion evidence based upon the use of an early version of the POLYGRAPH. The D.C. Circuit Court held that scientific evidence was admissible if it was based on a scientific technique generally accepted as reliable in the scientific community. Thus, EXPERT TESTIMONY was admitted based on the expert's credentials, experience, skill, and reputation. The theory was that deficiencies or flaws in the expert's conclusions would be exposed through cross-examination. This decision became known as the *Frye* test or the *general-acceptance test.* By the 1990s, the *Frye* test had become the majority view in federal and state courts for the admissibility of new or unusual scientific evidence, even in view of Federal Rule of Evidence 702, passed in 1975, which some courts believed to provide a more flexible test for admissibility of opinion testimony by expert witnesses.

Then, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* the U.S. Supreme Court changed the standard for admissibility of expert testimony. Under *Daubert,* a trial judge has a duty to scrutinize evidence more rigorously to determine whether it meets the requirements of Federal Rule of Evidence 702. This rule states, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

In *Daubert,* the Court stated that evidence based on innovative or unusual scientific knowledge may be admitted only after it has been established that the evidence is reliable and scientifically valid. The Court also imposed a gatekeeping function on trial judges by charging them with preventing "junk science" from entering the courtroom as evidence. To that end, *Daubert* outlined four considerations: testing, peer review, error rates, and acceptability in the relevant scientific community. These four tests for reliability are known as the *Daubert* factors or the *Daubert* test.

In 1999, the U.S. Supreme Court significantly broadened that test and the trial court's gatekeeping role to include expert testimony based on technical and other specialized knowledge. *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (U.S. Mar 23, 1999) (NO. 97-1709). In *Kumho,* the Court held that the gatekeeping obligation imposed upon trial judges by *Daubert* applies to scientific testimony as well as to expert opinion testimony. In order to meet its gatekeeping obligation, a trial court may use the criteria identified in *Daubert* only when they can be applied to determine the reliability of either the underlying scientific technique or the expert's conclusions. But inasmuch as the *Daubert* gatekeeping function is meant to be a flexible one, it must necessarily be tied to the particular facts of a case. Thus, the factors identified in *Daubert* do not constitute an exhaustive checklist or a definitive litmus test.

In *Kumho,* the Court continued to grant trial judges a great deal of discretion. The Court generally permits trial judges to apply any useful factors that will assist the trial court in making a determination of reliability of proffered evidence as deemed appropriate in the particular case. The trial judge may use these factors whether they are identified in *Daubert* or elsewhere.

Despite *Daubert* and the cases that have followed in its aftermath, several issues involving expert testimony remain unresolved, and courts have reached various conclusions on these questions. One such question arises from the U.S. Supreme Court's language defining scientific knowledge. A related issue involves identifying four specific factors by which reliability of such knowledge was to be determined. In forming this definition, the Court drew almost exclusively from the physical sciences. But critics have argued that the *Daubert* factors are not easily applied to many other types of expert testimony, particularly those that depended on unique skills, generalized knowledge and experience, technical prowess, or even on applied science or clinical judgment. Another unresolved issue is whether a *Daubert* inquiry would even be required at all when a court is considering nonscientific expert opinion evidence, or when a particular technique already had gained widespread judicial acceptance.

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## ♦ DAUGHERTY, HARRY MICAJAH

Harry Micajah Daugherty served as the 51st attorney general of the United States, under Presidents WARREN G. HARDING and CALVIN COOLIDGE, but left office with his reputation forever tainted by accusations of political corruption and scandal.

Daugherty was born in Ohio on January 26, 1860, in a town called Washington Court House. He received his law degree in 1881 from the University of Michigan. He moved back to Ohio and was admitted to the state bar. Daugherty began practicing law in his hometown before entering politics. Daugherty became township clerk and, in 1890, was elected to the Ohio General Assembly. The ambitious Daugherty served two terms in the assembly before moving to Columbus in 1894. In Columbus he established a lucrative corporate law practice and continued to build his connections within the REPUBLICAN PARTY. Daugherty ran for state attorney general in 1895 and lost. In 1897, he failed in his attempt to become governor of Ohio.

In 1902, Daugherty established the law firm of Daugherty, Todd & Rarey; he remained a senior member of the firm until his appointment as U.S. attorney general in 1921. Daugherty had become acquainted with rising Republican star

*Harry M. Daugherty.*
LIBRARY OF CONGRESS

Warren G. Harding, who served as lieutenant governor of Ohio from 1904 to 1905. Daugherty became involved in Harding's campaigns, which included an unsuccessful run for governor in 1910. Daugherty managed Harding's successful campaign for the U.S. Senate in 1914.

At the 1920 Republican Convention, a standoff developed between supporters of the presidential candidacies of former Army Chief of Staff General Leonard Wood and Illinois Governor Frank O. Lowden. Although Harding had introduced no significant national legislation and was not known for his leadership abilities, Daugherty and a group of Harding's political supporters managed to position him as the ideal compromise candidate to break the deadlock. Harding was elected as the Republican party nominee on the 10th ballot and went on to become the 29th president of the United States. In return for his help and support, Harding appointed Daugherty U.S. attorney general in 1921.

U.S. Supreme Court Chief Justice **WILLIAM HOWARD TAFT**, faced with a backlog of cases in the federal courts and efforts by some congressmen to end lifetime tenure for federal judges, had sought judicial reform by proposing the creation of a conference of judges to assess lower court needs. He also suggested the appointment of at-large judges who could be assigned as needed to various courts. Daugherty joined with Taft to urge Congress to pass the proposed legislation. In 1922, Congress established what ultimately became the **JUDICIAL CONFERENCE OF THE UNITED STATES.**

Daugherty and many of the Ohio Republicans who had helped Harding achieve the presidency moved to Washington with him, and became mired in allegations of corrupt self-enrichment schemes. Harding's sudden death in August 1923 and the succession of Calvin Coolidge as president happened just as the public was beginning to become aware of the machinations of those the press dubbed the "Ohio Gang."

Daugherty was acquitted of charges that he was directly involved in the most famous of these scandals, the **TEAPOT DOME SCANDAL**, where the secretary of the interior was accused of arranging for the private development of federally-owned oil fields in return for a bribe of $100,000. However, Daugherty's failure to aggressively prosecute those involved and further allegations that he obstructed justice by trying to block a congressional investigation resulted in a loss of confidence in the attorney general. An investigation led by Democratic Senator Burton K. Wheeler of Montana resulted in Daugherty's resignation in March 1924.

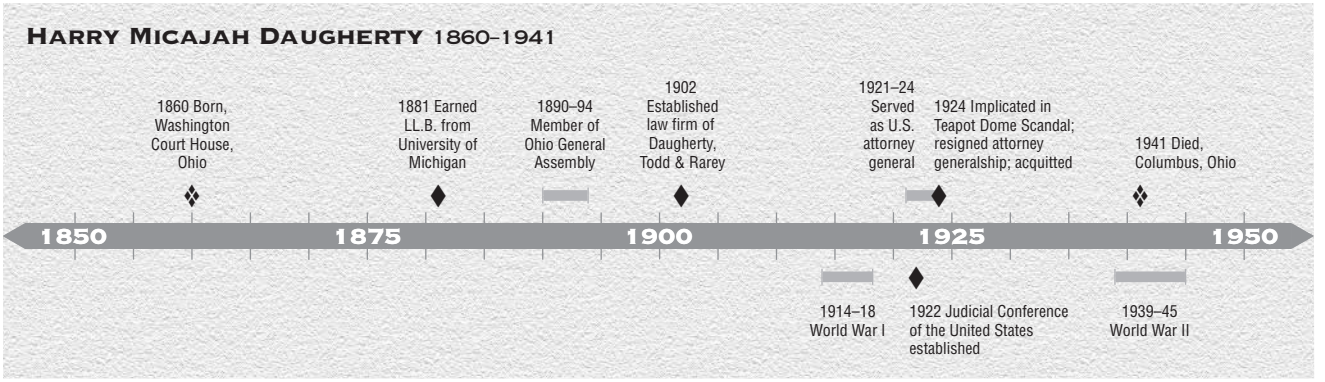

In 1927, Daugherty was tried twice on charges of engaging in graft and FRAUD while serving as attorney general. Both cases ended in a hung jury. Daugherty spent the rest of his life practicing law in Ohio and attempting to rehabilitate both his own reputation and that of Harding. In 1932, he coauthored a book with Thomas Dixon called *The Inside Story of the Harding Tragedy.* Daugherty died of a heart attack in Columbus, Ohio, on October 12, 1941, at the age of 81.

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Teapot Dome Scandal.

## DAVIS-BACON ACT

The Davis-Bacon Act (40 U.S.C.A. §§ 276a to 276a-5) is federal law that governs the MINIMUM WAGE rate to be paid to laborers and mechanics employed on federal public works projects. It was enacted on March 3, 1931, and has been amended. Its purpose is to preserve local wage standards and promote local employment by preventing contractors who bid on public contracts from basing their bids on the use of cheap labor recruited from foreign sources.

When controversies arise under the Davis-Bacon Act, they are first submitted to the federal agency that is in charge of the project. Thereafter, if the dispute is not satisfactorily resolved, the matter is submitted to the secretary of labor. The Wage Appeals Board of the LABOR DEPARTMENT acts on behalf of the secretary in reviewing QUESTIONS OF LAW and fact made in wage determinations issued under the act and its related prevailing wage statutes. The board has discretion in selecting the controversies that it will review. Following these administrative procedures, a dissatisfied party may seek relief in the federal courts. The courts, however, will only review whether there has been compliance with the constitutional, statutory, and procedural requirements of the practices and procedures of the agencies involved in the dispute.

CROSS-REFERENCES

Labor Law.

## ♦ DAVIS, ANGELA YVONNE

Angela Yvonne Davis, political activist, author, professor, and Communist party member, was an international symbol of the black liberation movement of the 1960s and 1970s.

Davis was born in Birmingham, Alabama, on January 26, 1944, the eldest of four children. Her family was relatively well-off among the blacks in the city. Her father and mother were teachers in the Birmingham school system, and her father later purchased and operated a service station.

When Davis was four years old, the family moved out of the Birmingham projects and bought a large wooden house in a nearby neighborhood. Other black families soon followed. Incensed white neighbors drew a dividing line between the white and black sections and began trying to drive the black families out by bombing their homes. The area soon was nicknamed Dynamite Hill. Davis's mother had in college been involved in antiracism movements that had brought her into contact with sympathetic whites. She and Davis's father tried to teach their daughter that this hostility between blacks and whites was not preordained.

"WE HAVE ACCUMULATED A WEALTH OF HISTORICAL EXPERIENCE WHICH CONFIRMS OUR BELIEF THAT THE SCALES OF JUSTICE ARE OUT OF BALANCE."
—ANGELA DAVIS

All of Birmingham was segregated during Davis's childhood. She attended blacks-only schools and theaters and was relegated to the back of city buses and the back doors of shops, which rankled her. On one occasion, as teenagers, Davis and her sister Fania entered a Birmingham shoe store and pretended to be non-English-speaking French visitors. After receiving deferential treatment by the salesmen and other customers, Davis announced in English that black people only had to pretend to be from another country to be treated like dignitaries.

Davis later wrote that although the black schools she attended were much poorer than the white schools in Birmingham, her studies of black historical and contemporary figures such as FREDERICK DOUGLASS, SOJOURNER TRUTH, and Harriet Tubman helped her develop a strong positive identification with black history.

The CIVIL RIGHTS MOVEMENT was beginning to touch Birmingham at the time Davis entered high school. Her parents were members of the National Association for the Advancement of Colored People (NAACP). In her junior year of high school, Davis decided to leave what she considered to be the provincialism of Birm-

*Angela Davis.*
AP/WIDE WORLD PHOTOS

ingham. She applied for an early entrance program at Fisk University, in Nashville, Tennessee, and an experimental program developed by the American Friends Service Committee (AFSC) through which black students from the South could attend integrated high schools in the North. Although Davis was admitted to Fisk—which she viewed as a stepping-stone to medical school, where she could pursue a childhood dream of becoming a pediatrician—she chose the AFSC program.

At age 15, she boarded a train for New York City. There, she lived with a white family headed by an Episcopalian minister who had been forced from his church after speaking out against Senator JOSEPH R. MCCARTHY's anti-Communist witch-hunts. Davis attended Elisabeth Irwin High School, located on the edge of Greenwich Village. The school originally had been a public school experiment in progressive education; when funding was cut off, the teachers turned it into a private school. Here, Davis learned about SOCIALISM and avidly studied the *Communist Manifesto.* She also joined a Marxist-Leninist youth organization called Advance, which had ties to the Communist Party.

In September 1961, Davis entered Brandeis University, in Waltham, Massachusetts, on a full scholarship. One of only three black first-year students, she felt alienated and alone. The following summer, eager to meet revolutionary young people from other countries, Davis attended a gathering of communist youth from around the world in Helsinki, Finland. Here, she was particularly struck by the cultural presentations put on by the Cuban delegation. She also found that the U.S. CENTRAL INTELLIGENCE AGENCY had stationed agents and informers throughout the festival. Upon her return to the United States, Davis was met by an investigator from the FEDERAL BUREAU OF INVESTIGATION (FBI), who questioned her about her participation in a communist event.

Meeting people from around the world convinced Davis of the importance of tearing down cultural barriers like language, and she decided to major in French at Brandeis. She was accepted in the Hamilton College Junior Year in France Program, and studied contemporary French literature at the Sorbonne, in Paris. Upon her return to Brandeis, Davis, who had always had an interest in philosophy, studied with the German philosopher Herbert Marcuse. The following year, she received a scholarship to study philosophy in Frankfurt, Germany, where she focused on the works of the Germans IMMANUEL KANT, GEORG HEGEL, and KARL MARX.

During the two years Davis spent in Germany, the black liberation and BLACK POWER MOVEMENTS were emerging in the United States. The BLACK PANTHER PARTY FOR SELF-DEFENSE had been formed in Oakland to protect the black community from police brutality. In the summer of 1967, Davis decided to return home to join these movements.

Back in Los Angeles, Davis worked with various academic and community organizations to build a coalition to address issues of concern to the African American community. Among these groups was the Black Panther Political Party (unrelated to HUEY NEWTON and Bobby Seale's Black Panther Party for Self-Defense). During this period, Davis was heavily criticized by black male activists for doing what they considered to be men's work. Women should not assume leadership roles, they claimed, but should educate children and should support men so that they could direct the struggle for black liberation. Davis was to encounter this attitude in many of her political activities.

By 1968, Davis had decided to join a collective organization in order to achieve her goal of organizing people for political action. She first

considered joining the Communist Party. But because she related more to Marxist groups, she decided instead to join the Black Panther Political Party, which later became the Los Angeles branch of the STUDENT NONVIOLENT COORDINATING COMMITTEE (SNCC). SNCC was soon embroiled in internal disputes. After her longtime friend Franklin Kenard was expelled from his leadership position in the group because of his Communist Party membership, Davis resigned from the organization. In July 1968, she joined the Che-Lumumba Club, the black cell of the Communist Party in Los Angeles.

In 1969, Davis was hired as an assistant professor of philosophy at the University of California, Los Angeles. In July 1969, Davis joined a delegation of Communist Party members who had been invited to spend a month in Cuba. There, she worked in coffee and sugarcane fields, and visited schools, hospitals, and historical sites. Davis remarked that everywhere she went in Cuba, she was immensely impressed with the gains that had been made against racism. She saw blacks in leadership positions throughout the country, and she concluded that only under a socialist system such as that established by Cuban leader Fidel Castro could the fight against racism have been so successful.

When she returned to the United States, she discovered that several newspaper articles had been published detailing her membership in the Communist Party and accusing her of activities such as gunrunning for the Black Panther party. Governor RONALD REAGAN, of California, invoked a regulation in the handbook of the regents of the University of California that prohibited the hiring of communists. Davis responded by affirming her membership in the Communist Party, and she began to receive hate mail and threatening phone calls. After she obtained an INJUNCTION prohibiting the regents from firing her, the threats multiplied. Soon, she was receiving so many bomb threats that the campus police stopped checking her car for explosives, forcing her to learn the procedure for doing so herself. By the end of the year, the courts had ruled that the regulation prohibiting the hiring of communists was unconstitutional. However, in June 1970, the regents announced that Davis would not be rehired the following year, on the grounds that her political speeches outside the classroom were unbefitting a university professor.

During this time, Davis became involved with the movement to free three black inmates of Soledad Prison in California: George Jackson, John Clutchette, and Fleeta Drumgo. The men, known as the Soledad Brothers, had been indicted for the murder of a prison guard. The guard had been pushed over a prison railing when he inadvertently stumbled into a rebellion among black prisoners caused by the killing of three black prisoners by another prison guard. Although Jackson, Clutchette, and Drumgo claimed there was no evidence that they had killed the guard, they were charged with his murder. Davis began corresponding with Jackson and soon developed a personal relationship with him. She attended all the court hearings relating to the Soledad Brothers' indictment, along with many other supporters, including Jackson's younger brother, Jonathon Jackson,

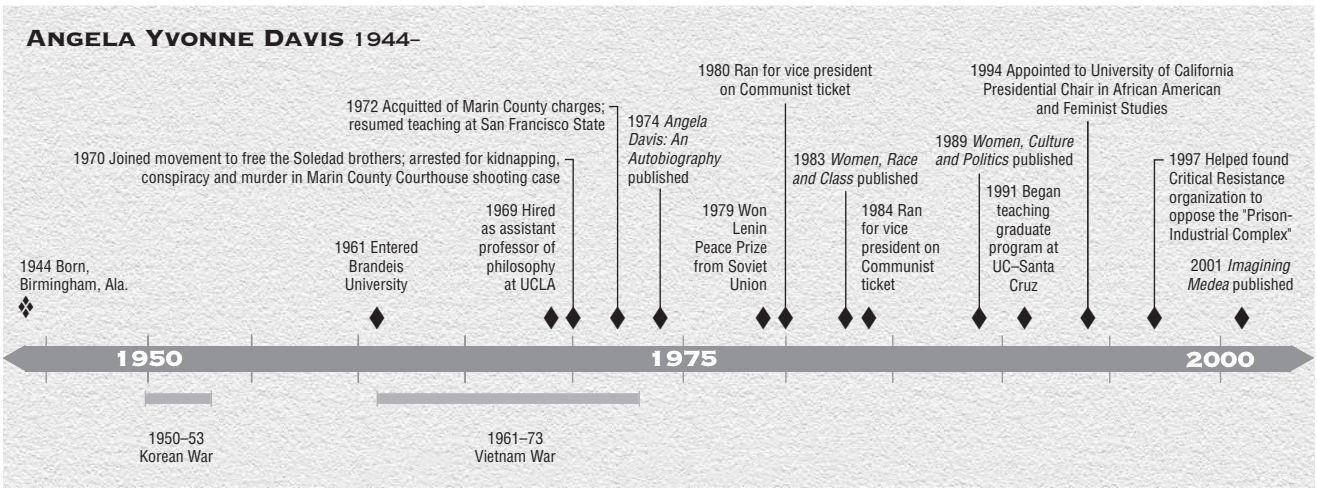

who was committed to freeing his brother and the other inmates. On August 7, 1970, using guns registered to Davis, Jonathon attempted to free his brother in a shoot-out at the Marin County Courthouse. Four people were killed, including Jonathon and superior court judge Harold Haley.

Davis was charged with KIDNAPPING, conspiracy, and murder, which was punishable in California by death. She fled, traveling in disguise from Los Angeles to Las Vegas, Chicago, Detroit, New York, Miami, and finally back to New York. In October 1970, she was arrested by the FBI, which had placed her on its most wanted list. In December, after two months in jail, Davis was extradited to California, where she spent the next 14 months in jail. She later said that this period was pivotal to her understanding of the black political struggle in the United States. Having worked to organize people in communities and on campuses against political repression, Davis now found herself a victim of that repression. In August 1971, while incarcerated in the Marin County Jail, she was devastated to learn that George Jackson had been killed by a guard in San Quentin Prison, allegedly while trying to escape.

In February 1972, Davis was released on bail following the California Supreme Court's decision to abolish the death penalty (*People v. Anderson,* 6 Cal. 3d 628, 100 Cal. Rptr. 152, 493 P.2d 880). Previously, bail had not been available to persons accused of crimes punishable by death. Her trial began a few days later, and lasted until early June 1972, when a jury acquitted her of all charges.

After her acquittal, Davis resumed her teaching career, at San Francisco State University. She continued her affiliation with the Communist Party, receiving the Lenin Peace Prize from the Soviet Union in 1979 and running for vice president of the United States on the Communist Party ticket in 1980 and 1984. Davis is also a founder and cochair of the National Alliance against Racist and Political Repression, and is on the national board of the National Political Congress of Black Women and on the board of the Atlanta-based National Black Women's Health Project. She has authored several books, including *Angela Davis: An Autobiography* (1974), *Women, Race, and Class* (1983), *Women, Culture, and Politics* (1989), and *Blues Legacies and Black Feminism* (1998). In 1980, she married Hilton Braithwaite, a photographer and faculty colleague at San Francisco State. The marriage ended in DIVORCE several years later.

In 1991, Davis began teaching an interdisciplinary graduate program titled the History of Consciousness at the University of California, Santa Cruz. In 1994, she found herself again surrounded by controversy when she was awarded a prestigious University of California President's Chair by university president Jack Peltason. The appointment provides $75,000 over several years to develop new ethnic studies courses. Some state lawmakers were outraged over the award and unsuccessfully demanded that Peltason rescind the appointment. Davis held the position until 1997.

In the late 1990s and early 2000s, Davis was still speaking out against and writing about the plight of persons she considered to be political prisoners, such as Indian activist Leonard Pelletier and ex-Black Panther Mumia Abu-Jamal, both convicted of killing law enforcement officers. She has continued to call for the decriminalization of prostitution on the basis that it would greatly reduce the number of women in prison. And she has lectured on what she calls the Prison Industrial Complex (PIC), positing that imprisonment has become the most common answer to societal problems and that corporations are profiting from prison labor thereby weakening the chances of prison reform. In 1997, Davis helped found Critical Resistance, an organization that seeks to build an international movement dedicated to dismantling the PIC.

Since the late 1970s, Davis has lectured throughout the United States and in countries in Africa, Europe, and Asia. She also remains a prolific author, producing numerous articles and essays. In 2003, in addition to writing and traveling for speaking engagements, Davis continued her work as tenured professor at the University of California at Santa Cruz.

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**CROSS-REFERENCES**

Carmichael, Stokely; Cleaver, LeRoy Eldridge; Communism.

## ♦ DAVIS, DAVID

David Davis served as an associate justice of the U.S. Supreme Court from 1862 to 1877. An Illinois attorney and judge, Davis acted as Abraham Lincoln's campaign manager in the 1860 election, working tirelessly to win the REPUBLICAN PARTY nomination and the general election for Lincoln.

Davis was born in Sassafras Neck, Maryland, on March 9, 1815. He attended Kenyon College at the age of thirteen. Following graduation he read the law in a Massachusetts law firm, before attending New Haven Law School for less than a year. In 1835 he moved to Illinois and was admitted to the bar, and opened a law firm in Pekin. In 1836 he purchased a law practice in Bloomington, Illinois, where he remained a resident the rest of his life.

He was soon drawn into politics. After losing a bid for a seat in the Illinois Senate in 1840, he was elected to the Illinois House of Representatives in 1844. He participated in the Illinois Constitutional Convention, which convened in 1847. A force for judicial reform, Davis was elected to Illinois's Eighth Judicial Circuit, where he served as presiding judge until 1862.

During his years as a practicing attorney and judge, Davis became a close friend and adviser to ABRAHAM LINCOLN. Ignoring the traditional concept of judicial neutrality concerning politics, Davis acted as Lincoln's campaign manager during the 1860 election. His actions have been credited with securing the Republican party nomination for Lincoln.

In 1862 Lincoln rewarded his friend with an appointment to the U.S. Supreme Court. Davis's tenure encompassed both the Civil War and Reconstruction. He is best remembered for his 1866 majority opinion in EX PARTE MILLIGAN, 71 U.S. 2, 18 L. Ed. 281. In 1864 Lamdin Milligan was arrested and tried for TREASON by a military commission established by order of President Lincoln. He was convicted and sentenced to death, but the sentence was not carried out.

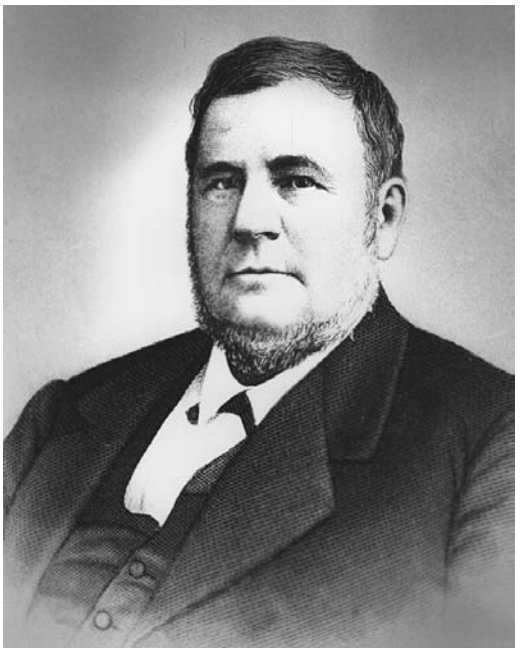

*David Davis.*
CORBIS

In his majority opinion, Davis noted that the civilian courts were open and operating in Indiana when Milligan was arrested and tried by the military. In ordering Milligan's release, Davis condemned Lincoln's directive establishing military jurisdiction over civilians outside of the immediate war area. He strongly affirmed the fundamental right of a civilian to be tried in a regular court of law, with all the required procedural safeguards.

In 1872 Davis was nominated for president by the National Labor Reform party, but he turned down the opportunity. However, political ambition led him to resign from the Supreme

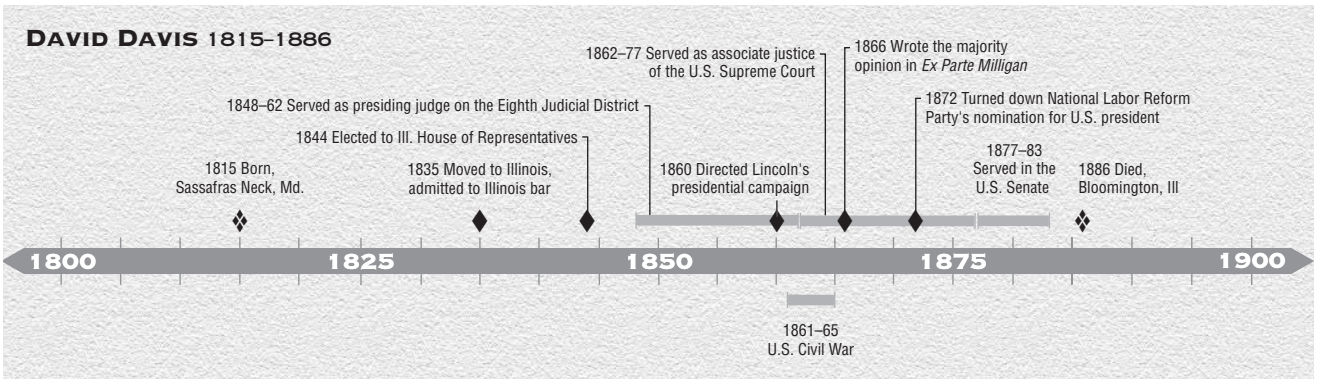

Court in 1877 and run for the Senate, representing Illinois. He was elected as an independent and served one six-year term. From 1881 to 1883, he served as president pro tempore of the Senate.

Davis died June 26, 1886, in Bloomington, Illinois.

## DAVIS, GEORGE

See CONFEDERATE ATTORNEYS GENERAL.

## ♦ DAVIS, JOHN CHANDLER BANCROFT

John Chandler Bancroft Davis enjoyed a long and prolific career as a diplomat, jurist, and legal historian.

The son of John Davis, a Massachusetts governor and U.S. senator, Davis was born December 29, 1822, in Worcester, Massachusetts. He entered Harvard College in 1840, but was suspended (unjustly, by some accounts) during his senior year. He then studied law and was admitted to the Massachusetts bar in 1844. Three years later, he received his law degree from Harvard.

Davis practiced law in New York City until August 1849, when he was appointed secretary of the U.S. legation in Great Britain. He was also acting chargé d'affaires of the embassy for a brief time. Davis left his diplomatic post in November 1852 to resume his law practice and to become U.S. correspondent for the London *Times.* Illness forced him to give up his law practice, and in 1862 he and his wife settled on a farm in rural New York State.

Six years later, after regaining his health, Davis was elected to the New York State Assembly. In 1869, he left the legislature to accept an

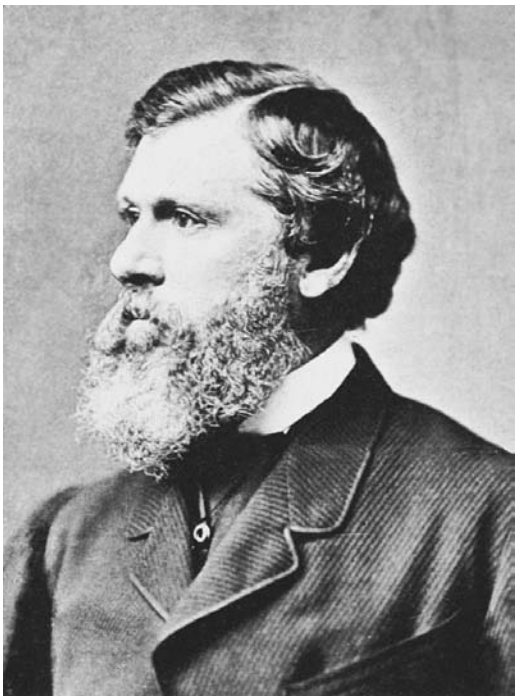

*John C. Davis.*

appointment as assistant SECRETARY OF STATE under President ULYSSES S. GRANT. As the assistant secretary, Davis arbitrated a dispute between Portugal and Great Britain over their African possessions. In 1871, a joint high commission was created to settle a dispute between the United States and Great Britain over damages sustained by Confederate vessels during the Civil War. Davis resigned his position with the STATE DEPARTMENT to become U.S. secretary to the commission. He prepared the case for the United States and wrote a 500-page book, *The*

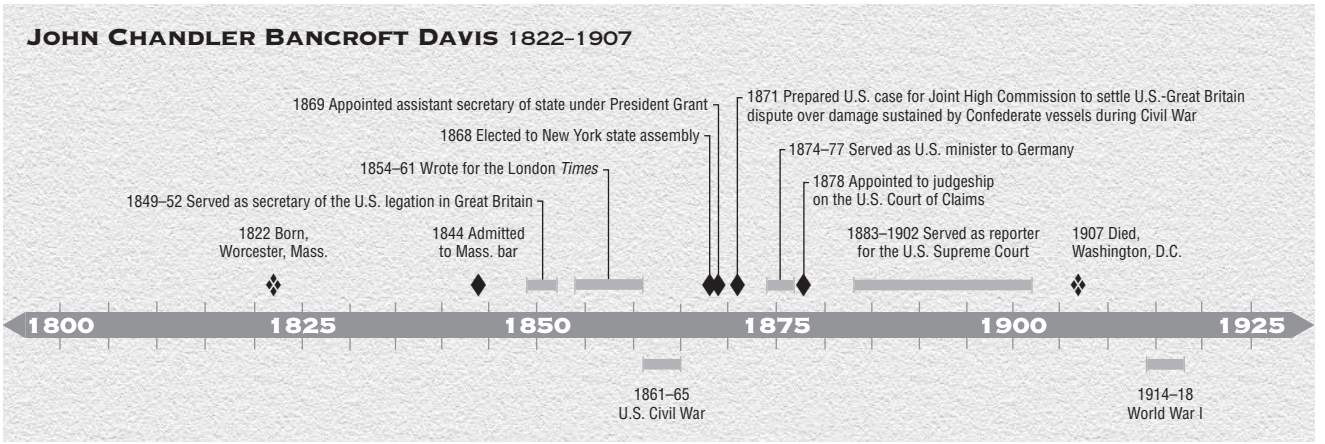

*Case of the United States,* in which the government demanded compensation for losses sustained by Confederate cruisers and for injuries to commerce. The Tribunal of Arbitration at Geneva later awarded the United States over $15 million in gold for damages.

Davis was reappointed assistant secretary of state in January 1873 but resigned in July 1874 to succeed his uncle, George Bancroft, as minister to Germany.

After three years in Berlin, Davis gave up his diplomatic career to become a judge on the U.S. Court of Claims. He sat on the court for five years and then served for nearly twenty years as reporter of decisions for the U.S. Supreme Court. As reporter for the Court, he edited over 75 volumes of the *United States Reports,* the official publication of the Court's opinions. Davis also classified important historical data on the federal judiciary. At the time of his death in 1907, at age 85, he had authored significant works on diplomacy, religion, and history, including *The Massachusetts Justice* (1847), *Mr. Fish and the Alabama Claims* (1893), and *Origin of the Book of Common Prayer of the Protestant Episcopal Church in the United States of America* (1897).

## ♦ DAVIS, JOHN WILLIAM

John William Davis was born April 13, 1873, in Clarksburg, West Virginia. Davis earned a bachelor of arts degree from Washington and Lee University in 1892, a bachelor of laws degree in 1895, and a doctor of laws degree in 1915. He also received doctor of laws degrees from numerous other institutions, including the University of Birmingham, England, 1919; Yale, 1921; Dartmouth, 1923; Princeton, 1924; and Oberlin College, 1947. Three doctor of CIVIL LAW degrees were bestowed upon Davis, by Oxford University in England, 1950; Columbia, 1953; and Hofstra College, 1953.

After his ADMISSION TO THE BAR in 1895, Davis returned to his alma mater, Washington and Lee University, as an assistant professor of law, teaching from 1896 to 1897. In the latter year, he established his law practice in Clarksburg, West Virginia, serving as counselor until 1913.

Davis entered politics in 1899 by participating in the West Virginia House of Delegates. He was a member of the Democratic National Conventions from 1904 to 1932.

In 1911, he served the federal government as a congressman, representing West Virginia until 1915. Davis left this post to perform the duties of SOLICITOR GENERAL from 1913 to 1918.

The next phase of Davis's career encompassed foreign service. He was appointed ambassador to Great Britain in 1918 and acted in this capacity until 1921. Also in 1918, Davis was chosen as an American delegate to Berne, Switzerland, to the conference with Germany regarding prisoners of war captured during WORLD WAR I.

In 1924, Davis was the Democratic candidate for president of the United States; he was defeated by CALVIN COOLIDGE.

Davis died March 24, 1955, in Charleston, South Carolina.

"THERE IS NOTHING I RESENT MORE THAN THE IDEA THAT A LAWYER SELLS HIMSELF BODY AND SOUL TO HIS CLIENTS."
—JOHN WILLIAM DAVIS

## DAY CERTAIN

*A specified date. A term used in the rules of civil and* CRIMINAL PROCEDURE *to designate a particular time by which all motions for a new trial must be submitted to the court.*

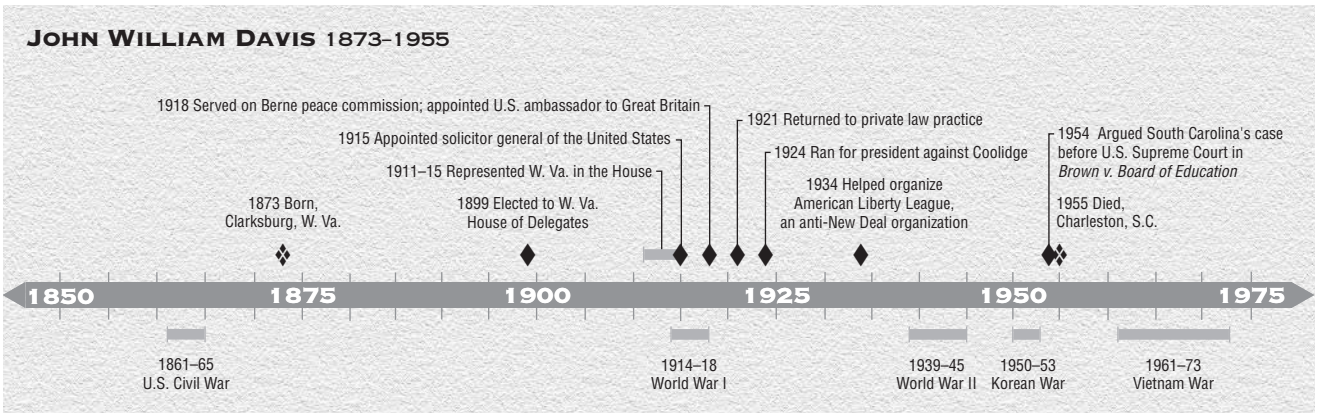

## DAY IN COURT

*The opportunity afforded an individual to have a claim litigated in a judicial setting.*

A person is said to have his or her day in court when he or she is given notice to appear and has the opportunity to defend his or her rights, seek relief, or set forth his or her claims. When someone has had his or her day in court with reference to a particular matter, that individual will generally be prevented from relitigating the claim in a subsequent action unless grounds exist that warrant an appeal of the matter.

## ◆ DAY, WILLIAM RUFUS

William Rufus Day served as an associate justice of the U.S. Supreme Court from 1903 to 1922. Day served on a Court dominated by Justice **OLIVER WENDELL HOLMES JR.**, yet Day played a key role during a period when the federal government began to extend its police and regulatory powers.

"PROPERTY IS MORE THAN THE MERE THING WHICH A PERSON OWNS. IT IS ELEMENTARY THAT IT INCLUDES THE RIGHT TO ACQUIRE, USE, AND DISPOSE OF IT. THE CONSTITUTION PROTECTS THESE ESSENTIAL ATTRIBUTES OF PROPERTY."
—WILLIAM DAY

Day was born April 17, 1849, in Ravenna, Ohio. He graduated from the University of Michigan in 1870 and attended its law school for one year. He was admitted to the Ohio bar in 1872 and entered practice in Canton, Ohio.

Ohio was a hotbed of **REPUBLICAN PARTY** politics in the late nineteenth century. Day became active in the party and, more important, became a trusted friend and adviser to **WILLIAM MCKINLEY**, who was elected president in 1896. McKinley appointed Day **SECRETARY OF STATE** in April 1898. Five months later Day was chosen to head the U.S. Peace Commission to negotiate an end to the **SPANISH-AMERICAN WAR** with Spain. He left his cabinet post to fulfill this duty.

McKinley rewarded Day for his friendship, political counsel, and service as secretary of state with an appointment in 1899 to the U.S. Sixth Circuit Court of Appeals. With McKinley's assassination in 1901, Vice President **THEODORE ROOSEVELT** assumed the presidency. In 1903 Roosevelt appointed Day to the Supreme Court, in part because Roosevelt needed to strengthen his ties with Ohio Republicans.

Day held a centrist position on the Supreme Court. More liberal justices such as Holmes and **LOUIS D. BRANDEIS** sought to allow more active government involvement in the national economy. Conservative justices continued to restrict government regulation of business and the growth of federal power. Day took a middle course, though some commentators believe he tilted more to supporting **STATES' RIGHTS**.

His most famous opinion, **HAMMER V. DAGENHART**, 247 U.S. 251, 38 S. Ct. 529, 62 L. Ed. 1101 (1918), illustrates his more conservative tendencies. In the early 1900s, Congress sought to regulate the use of child labor, passing a child labor act in 1916 (39 Stat. 675, c. 432, formally known as the Keating-Owen Act). The act prohibited the movement in interstate commerce of goods that were made by children. In *Hammer,* a manufacturer was charged with violating the act. Under the Constitution's **COMMERCE CLAUSE**, Congress has the right to regulate interstate commerce. Day gave the clause a restrictive reading, ruling that commerce did not include manufactured goods that were themselves harmless. In addition, he said, Congress had intruded into an area of regulation that was reserved to the states. To allow Congress to regulate industry would destroy **FEDERALISM** and the system of government set out in the Constitution.

Despite this hostility to the Child Labor Act, Day upheld the federal government's power to regulate interstate commerce in other cases that

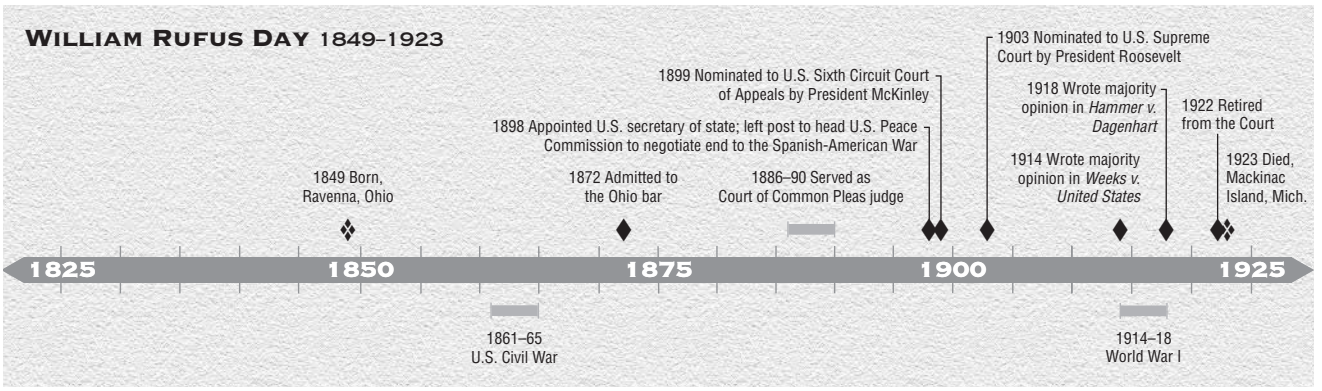

involved the shipment of impure food, drugs, and liquor. He was also supportive of federal antitrust prosecutions that involved restraint of trade.

However, Day's opposition to federal regulation of the workplace did not carry over to state regulation of industry. This is revealed in his dissent in **LOCHNER V. NEW YORK**, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905). In *Lochner* the Court, on a 5–4 vote, struck down a New York state law that specified a maximum sixty-hour week for bakery employees. The Court ruled that the law was a "meddlesome interference" with business, concluding that the regulation of work hours was an unjustified infringement on "the right to labor, and with the right of free contract on the part of the individual, either as employer or employee." Although Holmes's dissent has received more attention, Day's made clear that the state had the right to promote public welfare, even if it came in conflict with the concept of liberty of contract.

Finally, Day authored the opinion in *Weeks v. United States,* 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914), which established the federal **EXCLUSIONARY RULE** for criminal evidence seized in violation of the **FOURTH AMENDMENT.** Day's opinion suggested that exclusion of tainted evidence was implicit in the requirement of the Fourth Amendment. If illegally seized evidence could be admitted in a criminal trial, he said, "the protection of the 4th Amendment . . . is of no value . . . and might as well be stricken from the Constitution."

Day retired from the Court in 1922. He died on Mackinac Island, Michigan, on July 9, 1923.

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Child Labor Laws; Labor Law.

*William R. Day.*
THE GRANGER COLLECTION, NEW YORK

## DAYS OF GRACE

*An extension of the time originally scheduled for the performance of an act, such as payment for a debt, granted merely as a gratuitous favor by the person to whom the performance is owed.*

In old English practice, days of grace allowed a person an extra three days beyond the date specified in a writ summoning him or her before a court in which to make an appearance without being subject to punishment for failure to appear. This allowance of time was granted in consideration of the far distances that had to be traveled to court.

The laws and customs that regulate the commercial affairs of merchants have recognized days of grace as a means of facilitating various transactions. Three days of grace were originally allowed to give a maker or acceptor of a note, bill, or draft, in which the person is ordered to make payment according to its terms, a longer time to pay than specified by the date in the document. This practice was begun merely as a favor to those who regularly engaged in business with each other, but it soon became a custom between merchants. Eventually, the courts recognized this right, often as a result of statute; in some cases, it has become a right that must be demanded.

The phrase *days of grace* is sometimes used interchangeably with grace period, a term used in insurance law to denote an extension of time within which to pay a premium due on a policy, but the terms do not have identical meanings.

## DE BONIS NON ADMINISTRATIS

*[*Latin, Of the goods not administered.*] When an administrator is appointed to succeed another who has left the estate partially unsettled, the administrator is said to be granted "administration* de bonis non,*" that is, of the goods not already administered.*

## DE FACTO

*[*Latin, In fact.*] In fact, in deed, actually.*

This phrase is used to characterize an officer, a government, a past action, or a state of affairs that must be accepted for all practical purposes, but is illegal or illegitimate. Thus, an office, position, or status existing under a claim or color of right, such as a de facto corporation. In this sense it is the contrary of *de jure,* which means rightful, legitimate, just, or constitutional. Thus, an officer, king, or government *de facto* is one that is in actual possession of the office or supreme power, but by usurpation, or without lawful title; while an officer, king, or governor *de jure* is one who has just claim and rightful title to the office or power, but has never had plenary possession of it, or is not in actual possession. A wife *de facto* is one whose marriage is VOIDABLE by decree, as distinguished from a wife *de jure,* or lawful wife. But the term is also frequently used independently of any distinction from *de jure;* thus a blockade *de facto* is a blockade that is actually maintained, as distinguished from a mere paper blockade.

A de facto corporation is one that has been given legal status despite the fact that it has not complied with all the statutory formalities required for corporate existence. Only the state may challenge the validity of the existence of a de facto corporation.

De facto SEGREGATION is the separation of members of different races by various social and economic factors, not by virtue of any government action or statute.

## DE JURE

*[*Latin, In law.*] Legitimate; lawful, as a* MATTER OF LAW. *Having complied with all the requirements imposed by law.*

*De jure* is commonly paired with *de facto,* which means "in fact." In the course of ordinary events, the term *de jure* is superfluous. For example, in everyday discourse, when one speaks of a corporation or a government, the understood meaning is a de jure corporation or a de jure government.

A de jure corporation is one that has completely fulfilled the statutory formalities imposed by state corporation law in order to be granted corporate existence. In comparison, a de facto corporation is one that has acted in GOOD FAITH and would be an ordinary corporation but for failure to comply with some technical requirements.

A de jure government is the legal, legitimate government of a state and is so recognized by other states. In contrast, a de facto government is in actual possession of authority and control of the state. For example, a government that has been overthrown and has moved to another state will attain de jure status if other nations refuse to accept the legitimacy of the revolutionary government.

De jure SEGREGATION refers to intentional actions by the state to enforce racial segregation. The JIM CROW LAWS of the southern states, which endured until the 1960s, are examples of de jure segregation. In contrast, de facto racial segregation, which occurred in other states, was accomplished by factors apart from conscious government activity.

## DE MINIMIS

*An abbreviated form of the Latin* MAXIM de minimis non curat lex, *"the law cares not for small things." A legal doctrine by which a court refuses to consider trifling matters.*

In a lawsuit, a court applies the *de minimis* doctrine to avoid the resolution of trivial matters that are not worthy of judicial scrutiny. Its application sometimes results in the dismissal of an action, particularly when the only redress sought is for a nominal sum, such as one dollar. Appellate courts also use the *de minimis* doctrine when appropriate.

## DE NOVO

*[*Latin, Anew.*] A second time; afresh. A trial or a hearing that is ordered by an appellate court that has reviewed the record of a hearing in a lower court and sent the matter back to the original court for a new trial, as if it had not been previously heard nor decided.*

## DEAD MAN'S STATUTES

*State* RULES OF EVIDENCE *that make the oral statements of a decedent inadmissible in a civil lawsuit against the executor or administrator of the decedent's estate when presented by persons to bolster their claims against the estate.*

Dead man's statutes are designed to protect the estate of a deceased person from fraudulent claims made by a person who had engaged in transactions with the decedent. These laws do not permit the claimant to testify as to what terms a decedent verbally accepted, since the

decedent is unable to testify and give his or her version of the transaction.

Such statutes are derived from common-law principles that disqualified witnesses from testifying in an action if they would be affected by the outcome of the case. Many states admit such testimony as evidence under specific statutory conditions, such as if the decedent's statements can be corroborated by the testimony of other disinterested witnesses.

The FEDERAL RULES OF EVIDENCE govern the use of oral statements made by decedents in federal cases.

## DEADLY FORCE

*An amount of force that is likely to cause either serious bodily injury or death to another person.*

Police officers may use deadly force in specific circumstances when they are trying to enforce the law. Private citizens may use deadly force in certain circumstances in SELF-DEFENSE. The rules governing the use of deadly force for police officers are different from those for citizens.

During the twelfth century, the COMMON LAW allowed the police to use deadly force if they needed it to capture a felony suspect, regardless of the circumstances. At that time, felonies were not as common as they are now and were usually punishable by death. Also, law officers had a more difficult time capturing suspects because they did not have the technology and weaponry that are present in today's world. In modern times, the courts have restricted the use of deadly force to certain, dangerous situations.

In police jargon, deadly force is also referred to as shoot to kill. The Supreme Court has ruled that, depending on the circumstances, if an offender resists arrest, police officers may use as much force as is reasonably required to overcome the resistance. Whether the force is reasonable is determined by the judgment of a reasonable officer at the scene, rather than by hindsight. Because police officers can find themselves in dangerous or rapidly changing situations where split second decisions are necessary, the judgment of someone at the scene is vital when looking back at the actions of a police officer.

The Supreme Court has defined the "objective reasonableness" standard as a balance between the rights of the person being arrested and the government interests that allow the use of force. The FOURTH AMENDMENT protects U.S. citizens from unreasonable searches and seizures, the category into which an arrest falls. The Supreme Court has said that a SEARCH AND SEIZURE is reasonable if it is based on PROBABLE CAUSE and if it does not unreasonably intrude on the rights and privacy of the individual. This standard does not question a police officer's intent or motivation for using deadly force during an arrest; it only looks at the situation as it has happened.

*In specific circumstances, police officers may use deadly force when attempting to enforce the law. These SWAT team members resorted to the use of deadly force after attempting to arrest a suspect in a November 1995 hijacking in Miami, Florida.*

AP/WIDE WORLD PHOTOS

For deadly force to be constitutional when an arrest is taking place, it must be the reasonable choice under all the circumstances at the time. Therefore, deadly force should be looked at as an option that is used when it is believed that no other action will succeed. The MODEL PENAL CODE, although not adopted in all states, restricts police action regarding deadly force. According to the code, officers should not use deadly force unless the action will not endanger innocent bystanders, the suspect used deadly force in committing the crime, or the officers believe a delay in arrest may result in injury or death to other people.

Circumstances that are taken into consideration are the severity of the offense, how much of a threat the suspect poses, and the suspect's attempts to resist or flee the police officer. When

arresting someone for a misdemeanor, the police have the right to shoot the alleged offender only in self-defense. If an officer shoots a suspect accused of a misdemeanor for a reason other than self-defense, the officer can be held liable for criminal charges and damages for injuries to the suspect. This standard was demonstrated in the Iowa case of *Klinkel v. Saddler,* 211 Iowa 368, 233 N.W. 538 (1930), where a sheriff faced a WRONGFUL DEATH lawsuit because he had killed a misdemeanor suspect during an arrest. The sheriff said he had used deadly force to defend himself, and the court ruled in his favor.

When police officers are arresting someone for a felony, the courts have given them a little more leeway. The police may use all the force that is necessary to overcome resistance, even if that means killing the person they are trying to arrest. However, if it is proved that an officer used more force than was necessary, the officer can be held criminally and civilly liable. In *Tennessee v. Garner,* 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), the Supreme Court ruled that it is a violation of the Fourth Amendment for police officers to use deadly force to stop fleeing felony suspects who are nonviolent and unarmed. The decision, with an opinion written by Justice BYRON R. WHITE, said, in part, "We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."

When deadly force is used by a private citizen, the reasonableness rule does not apply. The citizen must be able to prove that a felony occurred or was being attempted, and that the felony threatened death or bodily harm. Mere suspicion of a felony is considered an insufficient ground for a private citizen to use deadly force.

This was demonstrated in the Michigan case of *People v. Couch,* 436 Mich. 414, 461 N.W.2d 683 (1990), where the defendant shot and killed a suspected felon who was fleeing the scene of the crime. The Michigan supreme court ruled that Archie L. Couch did not have the right to use deadly force against the suspected felon because the suspect did not pose a threat of injury or death to Couch.

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## DEATH AND DYING

Death *is the end of life.* Dying *is the process of approaching death, including the choices and actions involved in that process.*

Death has always been a central concern of the law. The many legal issues related to death include laws that determine whether a death has actually occurred, as well as when and how it occurred, and whether or not another individual will be charged for having caused it. With the development of increasingly complex and powerful medical procedures and devices in the middle and late twentieth century, the U.S. legal system has had to establish rules and standards for the removal of life-sustaining medical care. This would include, for example, withdrawing an artificial respirator or a feeding tube from a comatose person, or withholding chemotherapy from a terminally ill cancer patient. Such laws and judicial decisions involve the right of individuals to refuse medical treatment—sometimes called the right to die—as well as the boundaries of that right, particularly in regard to the state's interest in protecting life and the medical profession's right to protect its standards. The issues involved in death and dying have often pitted PATIENTS' RIGHTS groups against physicians' professional organizations as each vies for control over the decision of how and when people die.

### Defining Death in the Law

The law recognizes different forms of death, not all of them meaning the end of physical life. The term *civil death* is used in some states to describe the circumstance of an individual who

has been convicted of a serious crime or sentenced to life imprisonment. Such an individual forfeits his or her CIVIL RIGHTS, including the ability to marry, the capacity to own property, and the right to contract. *Legal death* is a presumption by law that a person has died. It arises following a prolonged absence, generally for a prescribed number of years, during which no one has seen or heard from the person and there is no known reason for the person's disappearance that would be incompatible with a finding that the individual is dead (e.g., the individual had not planned to move to another place). *Natural death* is death by action of natural causes without the aid or inducement of any intervening instrumentality. *Violent death* is death caused or accelerated by the application of extreme or excessive force. *Brain death,* a medical term first used in the late 1960s, is the cessation of all functions of the whole brain. *Wrongful death* is the end of life through a willful or negligent act.

In the eyes of the law, death is not a continuing event but something that takes place at a precise moment in time. The courts will not wield authority concerning a death. The determination of whether an individual has died, and the way in which this is proved by the person's vital signs, is not a legal decision but rather a medical judgment. The opinion of qualified medical personnel will be taken into consideration by judges when a controversy exists as to whether an individual is still alive or has died.

### Legal Death and Missing Persons

There is a legal presumption that an individual is alive until proved dead. In attempting to determine whether a person has died after having been missing for a certain period of time, the law assumes that the person is alive until a reason exists to believe otherwise.

The common-law rule is that where evidence indicates that the absent person was subject to a particular peril, he or she will be legally presumed dead after seven years unless the disappearance can be otherwise explained. The seven-year interval may be shortened if the state decides to enact legislation to change it. Some states may permit the dissolution of a marriage or the administration of an estate based on a mysterious disappearance that endures for less than seven years. A majority of states will not make the assumption that a missing person is dead unless it is reasonable to assume that the person would return if still alive.

A special problem emerges in a situation where a person disappears following a threat made on his or her life. Such an individual would have a valid reason for voluntarily leaving and concealing his or her identity. Conversely, however, the person would in fact be dead if the plot succeeded. A court would have to examine carefully the facts of a particular case of this nature.

In some states, the court will not hold that an individual has died without proof that an earnest search was made for him or her. During such a search, public records must be consulted, wherever the person might have resided, for information regarding marriage, death, payment of taxes, or application for government benefits. The investigation must also include questioning of the missing person's friends or relatives as to his or her whereabouts.

### Death Certificates

The laws of each state require that the manner in which an individual has died be determined and recorded on a death certificate. Coroners or medical examiners must deal with issues establishing whether someone can be legally blamed for causing the death. Such issues are subsequently determined by CRIMINAL LAW in the event that someone is charged with HOMICIDE, and by TORT LAW in the event of a civil suit for WRONGFUL DEATH.

### The Nature of Dying

Because of the many advances in modern medicine, the nature of death and dying has changed greatly in the past several centuries. A majority of people in industrial societies such as the United States no longer perish, as they once did, from infectious or parasitic diseases. Instead, life expectancies range above 70 years and the major causes of mortality are illnesses such as cancer and heart disease. Medicine is able to prolong life by many means, including artificial circulatory and respiratory systems, intravenous feeding and hydration, chemotherapy, and antibiotics.

The cultural circumstances of death have changed as well. A study published by the American Lung Association in the late 1990s, indicated that 90 percent of patients who are in intensive care units of hospitals die as a result of surrogates and physicians deciding together to withhold life-sustaining medical care. This rate doubled from earlier in the decade.

### Brain Death

In traditional Western medical practice, death was defined as the cessation of the body's circulatory and respiratory (blood pumping and breathing) functions. With the invention of machines that provide artificial circulation and respiration that definition has ceased to be practical and has been modified to include another category of death called brain death. People can now be kept alive using such machines even when their brains have effectively died and are no longer able to control their bodily functions. Moreover, in certain medical procedures, such as open-heart surgery, individuals do not breathe or pump blood on their own. Since it would be wrong to declare as dead all persons whose circulatory or respiratory systems are temporarily maintained by artificial means (a category that includes many patients undergoing surgery), the medical community has determined that an individual may be declared dead if brain death has occurred—that is, if the whole brain has ceased to function, or has entered what is sometimes called a persistent vegetative state. An individual whose brain stem (lower brain) has died is not able to maintain the vegetative functions of life, including respiration, circulation, and swallowing. According to the Uniform Determination of Death Act (§ 1, U.L.A. [1980]), from which most states have developed their brain death statutes, "An individual who has sustained either (1) irreversible cessation of circulatory and respiratory function, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead."

Brain death becomes a crucial issue in part because of the importance of organ transplants. A brain-dead person may have organs—a heart, a liver, and lungs, for example—that could save other people's lives. And for an individual to be an acceptable organ donor, he or she must be dead but still breathing and circulating blood. If a brain-dead person is maintained on artificial respiration until his or her heart fails, then these usable organs would perish. Thus, the medical category of brain death makes it possible to accomplish another goal: saving lives with organ transplants.

### The Right to Die: Individual Autonomy and State Interests

The first significant legal case to deal with the issue of termination of life-sustaining medical care was IN RE QUINLAN, 70 N.J. 10, 355 A.2d 647. This 1976 case helped resolve the question of whether a person could be held liable for withdrawing a life-support system even if the patient's condition is irreversible. In 1975, Karen Ann Quinlan inexplainably became comatose and was put on a mechanical respirator. Her parents authorized physicians to use every possible means to revive her, but no treatment improved her condition. Although doctors agreed that the possibility of her recovering consciousness was remote, they would not pronounce her case hopeless. When her parents themselves lost all hope of Quinlan's recovery, they presented the hospital with an authorization for the removal of the respirator and an exemption of the hospital and doctors from responsibility for the result. However, the attending doctor refused to turn off the respirator on the grounds that doing so would violate his professional oath. Quinlan's parents then initiated a lawsuit asking the court to keep the doctors and the hospital from interfering with their decision to remove Quinlan's respirator.

In a unanimous decision, the New Jersey Supreme Court ruled that Quinlan had a constitutional right of privacy that could be safeguarded by her legal guardian; that the private decision of Quinlan's guardian and family should be honored; and that the hospital could be exempted from criminal liability for turning off a respirator if a hospital ethics committee agreed that the chance for recovery is remote. Quinlan was removed from the respirator, and she continued to live in a coma for ten years, nourished through a nasal feeding tube.

In cases following *Quinlan,* courts have ruled that life-sustaining procedures such as artificial feeding and hydration are the legal equivalent of mechanical respirators and may be removed using the same standards (*Gray v. Romeo,* 697 F. Supp. 580 [D.R.I. 1988]). Courts have also defined the right to die according to standards other than that of a constitutional right to privacy. The patient's legal right to refuse medical treatment has been grounded as well on the common-law right of bodily integrity, also called bodily self-determination, and on the liberty interest under the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT. These concepts are often collected under the term *individual autonomy,* or *patient autonomy.*

Subsequent cases have also defined the limits of the right to die, particularly the state's interest in those limits. The state's interests in

*Dr. Jack Kevorkian displays the machine he designed to allow a patient to self-administer lethal doses of poison.*
AP/WIDE WORLD PHOTOS

cases concerning the termination of medical care are the preservation of life (including the prevention of suicide), the protection of dependent third parties such as children, and the protection of the standards of the medical profession. The interests of the state may, in some cases, outweigh those of the patient.

In 1990, the U.S. Supreme Court issued its first decision on the right-to-die issue, *Cruzan v. Director of Missouri Department of Health,* 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224. *Cruzan* illustrates the way in which individual and state interests are construed on this issue, but leaves many of the legal questions on the issue still unresolved. Nancy Cruzan was in a persistent vegetative state as a result of severe brain injuries suffered in an automobile accident in 1983. She had no chance of recovery, although with artificial nutrition and hydration could have lived another 30 years. Her parents' attempts to authorize removal of Cruzan's medical support were first approved by a trial court and then denied by the Missouri Supreme Court. Her parents then appealed the case to the U.S. Supreme Court.

The Court held that the guarantee of liberty contained in the Fourteenth Amendment to the Constitution does not prohibit Missouri from insisting that "evidence of the incompetent [patient's] wishes as to the withdrawal of treatment be proved by clear and convincing evidence." The Court left other states free to adopt this "clear-and-convincing evidence" standard but did not compel them to do so. Thus, existing state laws remained the same after the *Cruzan* decision. Although the Court affirmed that a competent patient has a constitutionally protected freedom to refuse unwanted medical treatment, it emphasized that an incompetent person is unable to make an informed choice to exercise that freedom.

The Court explained that the state has an interest in the preservation of human life and in safeguarding against potential abuses by surrogates and is therefore not required to accept the "substituted judgment" of the patient's family. The Court agreed with the Missouri Supreme Court ruling that statements made by Cruzan to a housemate a year before her accident did not amount to clear-and-convincing proof that she desired to have hydration and nutrition withdrawn. Cruzan had allegedly made statements to the effect that she would not want to live should she face life as a "vegetable." There was no testi-

mony that she had actually discussed withdrawal of medical treatment, hydration, or nutrition.

After the Court's decision, Cruzan's parents went back to the Missouri probate court with new evidence regarding their daughter's wishes. On December 14, 1990, a Missouri judge ruled that clear evidence of Cruzan's wishes existed, and permitted her parents to authorize withdrawing artificial nutrition and hydration. Cruzan died on December 27, 12 days after feeding tubes were removed.

### Advance Directives

A court must consider many factors and standards in right-to-die cases. It must determine, for example, whether a patient is *competent* or *incompetent.* A competent patient is deemed by the court to be able to give informed consent or refusal relative to the treatment under consideration, whereas an incompetent patient (e.g., a patient in a coma) lacks the decision-making capacity to do so. According to the principle of individual autonomy, the court must honor the informed consent of competent patients regarding their medical care.

For incompetent patients who cannot make informed decisions regarding their care, an *advance directive* may provide a means of decision making for the termination of life-supporting treatment. An advance directive is a document, prepared in advance of incompetence, which gives patients some control over their HEALTH CARE after they have lost the ability to make decisions owing to a medical condition. It may consist of detailed instructions about medical treatment, as in a LIVING WILL; or the appointment of a proxy, or substitute, who will make the difficult choices regarding medical care with the patient's earlier directions in mind. The appointment of a proxy is sometimes called a *proxy directive* or *durable power of attorney.* The patient names a proxy decision maker when he or she is competent. In other cases, the physician may appoint a proxy, or the court may appoint a legal guardian who acts on behalf of an incompetent person. Usually, a relative such as a spouse, adult child, or sibling is chosen as a proxy. If an advance directive provides adequate evidence of a patient's wishes, a decision about the termination of life support can often be made without involving a court of law.

For an incompetent patient whose preferences regarding medical care are known from prior oral statements, the patient's proxy may make a *substituted judgment*—that is, a judgment consistent with what the patient would have chosen for himself. If no preference regarding medical treatment is known, the standard for the proxy's decision is the "best interests of the patient." According to that standard, the proxy's decision should approximate what most reasonable individuals in the same circumstances as the patient would choose. Individual states have statutes governing the requirements for living wills and advance directives.

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CROSS-REFERENCES

Euthanasia; Physicians and Surgeons; Power of Attorney.

## DEATH PENALTY

See CAPITAL PUNISHMENT.

## DEATH WARRANT

*An order from the executive, the governor of a state, or the president directing the warden of a prison or a sheriff or other appropriate officer to carry into execution a sentence of death; an order commanding that a named person be put to death in a specified manner at a specific time.*

CROSS-REFERENCES

Capital Punishment.

*A sample debenture.*

## Debenture

I.D. Control # _____

License # _____

**DEBENTURE**

$ _____ (the "Original Principal Amount")

_____ (the "Maturity Date")

_____ (the "Company")

_____

(Street) (City) (State) (Zip)

**PART I – PERIOD SPECIFIC TERMS**

**A. Applicable for the Scheduled Interim Period (and New Interim Periods, as applicable)**

Interest rate per annum for the Scheduled Interim Period: _____%
Annual Charge applicable to the Scheduled Interim Period: 1% per annum

Date of Issuance: _____

Scheduled Pooling Date: _____
Scheduled Interim Period: from and including the Date of Issuance to but excluding the Scheduled Pooling Date

***The following italicized terms will apply if the Interim Period is extended by SBA:***

| | | | | | | |
|---|---|---|---|---|---|---|
| *New interest rate(s) per annum* | *(a)* | *%* | *(b)* | *%* | *(c)* | *%* |
| *New Annual Charge per annum* | *(a)* | *1%* | *(b)* | *1%* | *(c)* | *1%* |
| *New Pooling Date(s):* | *(a)* | _____ | *(b)* | _____ | *(c)* | _____ |
| *New Interim Period(s): from and including:* | *(a)* | _____ | *(b)* | _____ | *(c)* | _____ |
| *to but excluding:* | *(a)* | _____ | *(b)* | _____ | *(c)* | _____ |

The Company, for value received, promises to pay to The Chase Manhattan Bank, as Custodian (the "Custodian") for the U.S. Small Business Administration ("SBA") and SBIC Funding Corporation (the "Funding Corporation"), pursuant to the Custody and Administration Agreement (the "Custody Agreement") dated as of April 27, 1998 among SBA, the Funding Corporation, the Federal Home Loan Bank of Chicago, as Interim Funding Provider (the "Interim Funding Provider"), and the Custodian: (i) interest on the Original Principal Amount listed above at the applicable rate per annum listed above, and (ii) an Annual Charge on the Original Principal Amount listed above at the applicable rate per annum listed above, each at such location on SBA, as guarantor of this Debenture, may direct and each at the related rate per annum identified for the Scheduled Interim Period (and each New Interim Period, if any). This Debenture will bear interest for, and the Annual Charge will apply to, the Scheduled interim Period (and each New Interim Period, if any) at the rate(s) and for the applicable period(s) indicated above, to be paid in arrears by 1:00 p.m. (New York City time) on the Business Day prior to the Scheduled Pooling Date (and each New Pooling Date, if any) listed above. As used throughout this Debenture, "Business Day" means any day other than: (i) a Saturday or Sunday; (ii) a legal holiday in Washington, D.C.; and (iii) a day on which banking institutions in New York City are authorized or obligated by law or executive order to be closed. Interest on this Debenture and the Annual Charge for the Scheduled Interim Period (and each New Interim Period, if any) will each be computed on the basis of the actual number of days in the applicable Interest Period divided by 360. The Company may not prepay this Debenture, in whole or in part, during the Scheduled Interim Period or any New Interim Period.

**B. This Section B. is effective only after (i) the Scheduled Interim Period and any New Interim Period(s) expire and (ii) the Custodian receives this Debenture for pooling.**

The Company, for value received, promises to pay to the order of The Chase Manhattan Bank, acting as Trustee (the "Trustee") under that certain Amended and Restated Trust Agreement dated as of February 1, 1997, as the same may be amended from time to time, by and among the Trustee, the SBA and SBIC Funding Corporation, and as the Holder hereof, interest semiannually on March 1st and September 1st (the "{Payment Dates") of each year, at such location as SBA, as guarantor of this Debenture, may direct at the rate of _____% per annum (the "Stated Interest Rate"), and to pay a 1% per annum fee to SBA on each Payment Date, each calculated on the basis of a year of 365 days, for the actual number of days elapsed (including the first day but excluding the last day), on the principal sum from the last day of the Interim Period until payment of such principal sum has been made or duly provided for. The Company shall deposit all payments with respect to this Debenture not later than 12:00 noon (New York City time) on the applicable Payment Date or the next Business Day if the Payment Date is not a Business Day, all as directed by SBA.

The Company may elect to prepay this Debenture, in whole and not in part, on any Payment Date, in the manner and at the price as next described. The prepayment price (the "Prepayment Price") must be an amount equal to the outstanding principal balance of this Debenture, plus interest accrued and unpaid thereon to the Payment Date selected for prepayment, plus a prepayment premium (the "Prepayment Premium"). The Prepayment Premium amount is calculated as a declining percentage (the "Applicable Percentage") multiplied by the Original Principal Amount of this Debenture in accordance with the following table:

| Consecutive Payment Dates | Applicable Percentage |
|---|---|
| 1st or 2nd | 5% |
| 3rd or 4th | 4% |
| 5th or 6th | 3% |
| 7th or 8th | 2% |
| 9th or (10th - If not also Maturity Date) | 1% |

[continued]

*A sample debenture (continued).*

## Debenture

No Prepayment Premium is required to repay this Debenture on its Maturity Date. No Prepayment Premium is required when the prepayment occurs on a Payment Date that is on or after the 11th consecutive Payment Date of this Debenture, if this debenture has a 20 consecutive Payment Date term.

The amount of the Prepayment price must be sent to SBA or such agent as SBA may direct, by wire payment in immediately available funds, not less than three Business Days prior to the regular Payment Date. Until the Company is notified otherwise in writing by SBA, any Prepayment Price must be paid to the account maintained by the Trustee, entitled the SBA Prepayment Subaccount and must include an identification of the Company by name and SBA-assigned license number, the loan number appearing on the face of this Debenture, and such other information as SBA or its agent may specify.

**II. –GENERAL TERMS**

For value received, the Company promises to pay to the order of the Trustee the Original Principal Amount on the Maturity Date at such location as SBA, as guarantor of this Debenture, may direct.

This Debenture is issued by the Company and guaranteed by SBA, pursuant and subject to Section 303 of the Small Business Investment Act of 1958, as amended (the "Act") (15 U.S.C. Section 683). This Debenture is subject to all of the regulations promulgated under the Act, as amended from time to time, provided, however, that 13 C.F.R. Sections 107.1810 and 107.1830 through 107.1850 as in effect on the date of this Debenture are incorporated in this Debenture as if fully set forth. If this Debenture is accelerated, then the Company promises to pay an amount equal to the outstanding principal balance of this Debenture, plus interest accrued and unpaid on such balance to but excluding the next Payment Date following such acceleration.

This Debenture is deemed issued in the District of Columbia as of the day, month, and year first stated above. The terms and conditions of this Debenture must be construed in accordance with, and its validity and enforcement governed by, federal law.

The warranties, representations, or certification made to SBA on any SBA Form 1022 or any application letter of the Company for an SBA commitment related to this Debenture, and any documents submitted in connection with the issuance of this Debenture, are incorporated in this Debenture as if fully set forth.

Should any provision of this Debenture or any of the documents incorporated by reference in this Debenture be declared illegal or unenforceable by a court of competent jurisdiction, the remaining provisions will remain in full force and effect and this Debenture must be construed as if such provisions were not contained in this Debenture.

All notices to the Company which are required or may be given under this Debenture shall be sufficient in all respects if sent to the above-noted address of the Company. For the purposes of this Debenture, the Company may change this address only upon written approval of SBA.

COMPANY ORGANIZED AS CORPORATION

IN WITNESS WHEREOF, the Company has caused this debenture to be signed by its duly authorized officer and its corporate seal to be hereunto affixed and attested by its Secretary or Assistant Secretary as of the date of issuance stated above.

CORPORATE SEAL

_____
(Name of Licensee)

By: _____

_____
(Typed Name and Title)

ATTEST:

_____
Secretary or Assistant Secretary (Strike One)

SBA FORM 444C (Revised 6/98)

## DEBENTURE

*[*Latin, Are due.*] A promissory note or bond offered by a corporation to a creditor in exchange for a loan, the repayment of which is backed only by the general creditworthiness of the corporation and not by a mortgage or a lien on any specific property.*

Debentures are usually offered in issues under an INDENTURE, a document that sets the terms of the exchange. A debenture is usually a bearer instrument. When it is presented for payment, the person in possession of it will be paid, even if the person is not the original creditor. Coupons representing annual or semi-annual payments of interest on the debt are attached, to be clipped and presented for payment on their due dates. They may be deposited in, and collected by, the banks of holders of the debentures, the creditors of the corporation.

A *convertible debenture* is one that can be changed or converted, at the option of its holder, into shares of stock, usually common stock, at a fixed ratio as stated in the indenture. The ratio can be adjusted in light of stock dividends; otherwise the value of converting the debt into SECURITIES would be worth less than retaining the debenture until its date of maturity.

A *subordinate debenture* is one that will be repaid only after other corporate debts have been satisfied.

A *convertible subordinate debenture* is one that is subject or subordinate to the prior repayment of other debts of the corporation but which can be converted into another form of security.

A *sinking fund debenture* is one whereby repayment is secured by periodic payments by the corporation into a sinking fund, an amount of money made up of corporate assets and earnings that are set aside for the repayment of designated debentures and long-term debts.

## DEBIT

*A sum charged as due or owing. An entry made on the asset side of a ledger or account. The term is used in bookkeeping to denote the left side of the ledger, or the charging of a person or an account with all that is supplied to or paid out for that person or for the subject of the account. Also, the balance of an account where it is shown that something remains due to the party keeping the account.*

*As a noun, an entry on the left-hand side of an account. As a verb, to make an entry on the left-hand side of an account. A term used in accounting or bookkeeping that results in an increase to an asset and an expense account and a decrease to a liability, revenue, or owner's* EQUITY *account.*

## ♦ DEBS, EUGENE

Labor leader, presidential candidate, author, and radical, social, and political agitator, Eugene Debs employed a combination of self-determination, grit, defiance, and risk-taking to play a sometimes pivotal role in American law from the late 1890s through the early twentieth century.

The son of Alsatian immigrants, Eugene Victor Debs was born in Terre Haute, Indiana, on November 5, 1855. As a young teenager growing up in Terre Haute, Debs took a job as a railway fireman, where he became active in the Brotherhood of Locomotive Firemen (BLF). Although Debs left his job as a railway fireman four years later, he remained active in the BLF, undertaking increased leadership responsibilities. Debs then was elected to serve two terms as the city clerk for Terre Haute and one term in the Indiana House of Representatives. In winning all three elections, Debs leveraged his role as grand secretary and treasurer in the BLF to garner votes from working class laborers.

"WHILE THERE IS A LOWER CLASS, I AM IN IT; WHILE THERE IS A CRIMINAL ELEMENT, I AM OF IT; AND WHILE THERE IS A SOUL IN PRISON, I AM NOT FREE."
—EUGENE DEBS

In 1893, Debs broke with the tradition of limiting membership in craft unions to skilled artisans by helping found the American Railway Union, which organized both skilled and unskilled workers. Debs believed that labor's greatest strength lay more in its sheer numbers and less in the individual skills of its members.

The following year Debs, now president of the American Railway Union, led a strike against the Pullman Palace Car Company, which was owned by George Pullman and located in Pullman, Illinois, a company town in which nearly all residents worked for Pullman. Pullman also provided housing units for his workers to rent. In 1894, Pullman began laying off workers, cutting wages, and withholding their paychecks as payment for unpaid rent.

The Debs-led strike, known as the Pullman Boycott, turned violent when workers began pillaging, rioting, and burning railway cars. Railway strikes erupted across the Midwest, forcing much of the nation's railroad system to shut down. President GROVER CLEVELAND deployed 12,000 troops to quell the strike in Pullman.

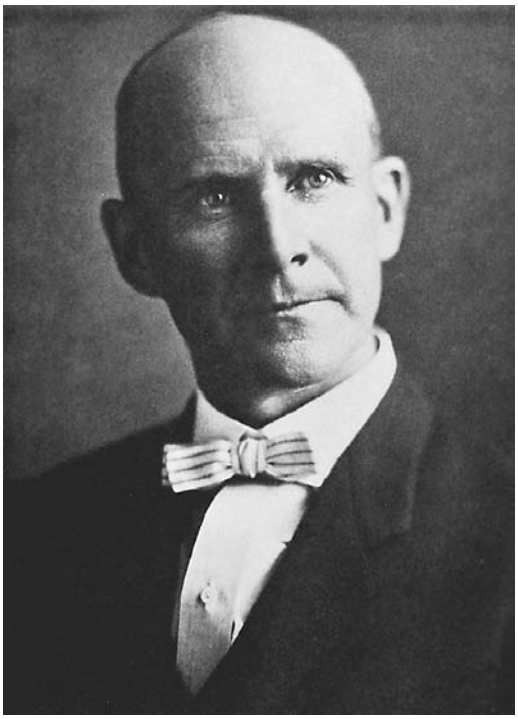

*Eugene Debs.*
LIBRARY OF CONGRESS

After two workers were killed in clashes with the troops, President Cleveland declared the strike over. Workers were allowed to return to work only if they promised not to unionize again.

A few weeks before Cleveland deployed the troops, a federal court had issued an **INJUNCTION** ordering Debs and the other union leaders to cease and desist their concerted activities against Pullman. Debs ignored the injunction, and was eventually arrested and cited for **CONTEMPT** of court. Tried before a judge without a jury and defended by **CLARENCE DARROW**, Debs lost and was sentenced to six months in jail. Debs challenged his conviction on the ground that he had been denied the **SIXTH AMENDMENT** right to a jury trial.

The U.S. Supreme Court rejected Debs's argument, finding that he and the other union leaders had formed an unlawful conspiracy in restraint of trade (*In re Debs*, 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092 [U.S. 1895]). The injunction obtained by the federal government was an equitable remedy, the Supreme Court said, and the Sixth Amendment right to a jury trial does not apply in equitable proceedings. To preserve their power in equitable proceedings, judges must have the authority to punish violations through the power of contempt, the Court concluded. Debs was forced to serve out the full six months of his jail sentence.

The Supreme Court's decision in *Debs* served to legitimize Cleveland's deployment of the strike-breaking troops, even though the Court did not expressly weigh in on that issue. Almost 40 years would pass before industrial unions would receive increased recognition and protection from U.S. law.

Nonetheless, Debs continued advocating unions as the best means to advance labor's interests. The same year that Debs led the **PULLMAN STRIKE**, President Cleveland signed into law an act that declared the first Monday in September as a holiday to honor the American laborer. Despite the concession from the White House, Debs forged his own brand of politics by organizing the Social Democratic Party of America in 1897. As its candidate for president in 1900, he received 96,116 votes. Thereafter he spent most of his time as a lecturer and organizer in the socialist movement, although he purported to be less interested in the political underpinnings of the movement and instead,

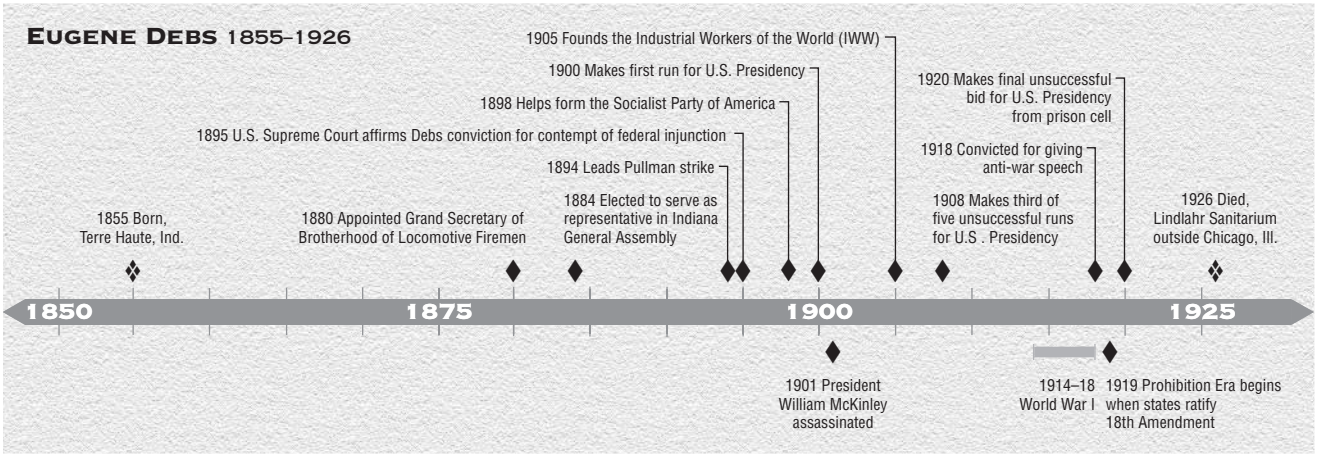

viewed SOCIALISM as a means to guarantee dignity and equality for the average worker. He was the presidential candidate of the SOCIALIST PARTY in 1904, 1908, and 1912.

In 1905, Debs's politics moved further to the left when he helped form the INDUSTRIAL WORKERS OF THE WORLD (IWW), also known as the Wobblies. The IWW was an inclusive organization that sought to create "One Big Union," by welcoming African Americans, immigrants, and women. The IWW promoted a rigorous standard of racial equality, and attempted to educate workers about the ways in which capitalists used race to undermine labor interests. Debs marketed IWW to workers as a radical alternative to the AMERICAN FEDERATION OF LABOR led by SAMUEL GOMPERS.

In 1907, Debs was named associate editor for the progressive magazine *Appeal to Reason*, published in Girard, Kansas. For the next five years he received a salary of $100 per week. The weekly magazine achieved a circulation of several hundred thousand due in part to the powerful writing of Debs.

In 1918, during WORLD WAR I, Debs was convicted of violating the ESPIONAGE ACT OF 1917, after he gave a speech in Canton, Ohio, encouraging listeners to obstruct the draft. The Supreme Court upheld the conviction, notwithstanding Debs's argument that the federal law violated his rights to free speech guaranteed by the FIRST AMENDMENT to the U.S. Constitution (*Debs v. United States*, 39 S.Ct. 252, 249 U.S. 211, 63 L.Ed. 566 [U.S. 1919]). Debs served two years in prison, from 1919 to 1921. While in prison he again ran for president on the Socialist ticket in 1920 and received almost one million votes.

Debs died on October 20, 1926, in Elmhurst, Illinois. He was survived by his wife of 41 years, Kate Metzel. They had no children. In 1962, the Debs Foundation was established in Terre Haute, as a memorial to Eugene Debs, and as an archive and research center for the study of the social sciences, and labor and political history. Each year the foundation bestows the Eugene V. Debs Award on an individual "who has contributed to the advancement of the causes of industrial unionism, social justice, or world peace."

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## DEBT

*A sum of money that is owed or due to be paid because of an express agreement; a specified sum of money that one person is obligated to pay and that another has the legal right to collect or receive.*

**Federal Debt, 1945–2001**

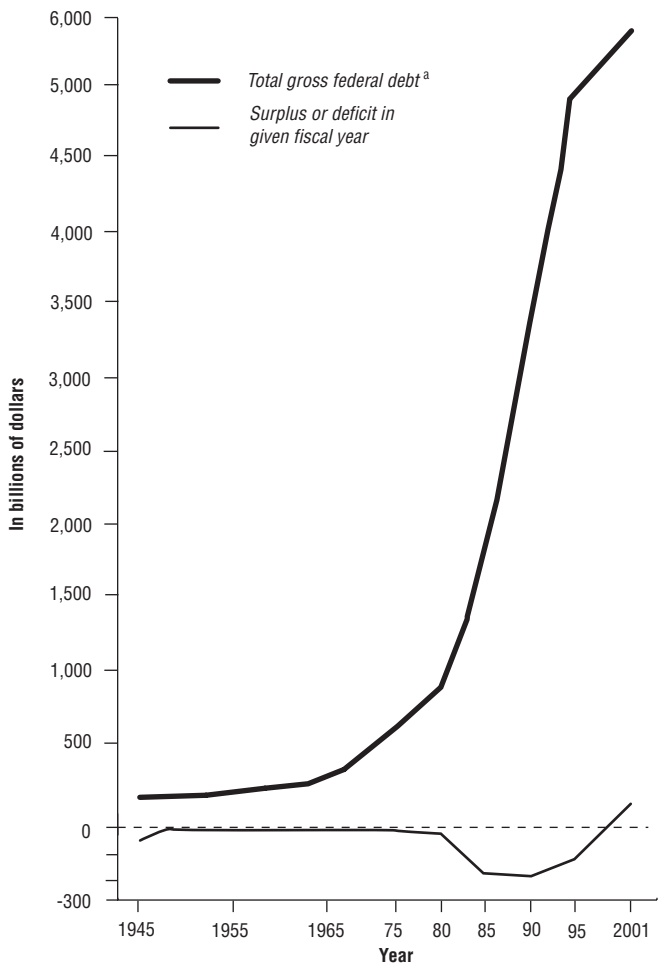


[a]Gross federal debt includes money borrowed by the U.S. Treasury and various federal agencies.

SOURCE: U.S. Office of Management and Budget, *Historical Tables*, annual.

*A fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future. In a still more general sense, that which is due from one person to another, whether money, goods, or services. In a broad sense, any duty to respond to another in money, labor, or service; it may even mean a moral or honorary obligation, unenforceable by legal action. Also, sometimes an aggregate of separate debts, or the total sum of the existing claims against a person or company. Thus we speak of the "national debt," the "bonded debt" of a corporation, and so on.*

## DEBT, ACTION OF

*One of the oldest common-law* FORMS OF ACTION *available to private litigants seeking to collect what is owed to them because of a harm done to them by another.*

Originally, the action was allowed for any plaintiff who claimed an obligation owed by another person, but the courts gradually began to recognize two forms of action: DETINUE, an action to collect a specific item of property, and a debt for a sum of money. The distinction had become clear in England by the early thirteenth century. In debt, as in detinue, a defendant who lost the case had the option of either paying a sum of money for the judgment or giving back the property that gave rise to the debt. Later in the thirteenth century, courts began to permit REPLEVIN, an action for the return of goods wrongfully taken or withheld, and COVENANT, an action for damages from someone who broke an agreement. Gradually, judges began to demand firm proof of the agreement, and finally they would accept nothing less than a contract made under seal. Later the action in ASSUMPSIT enlarged the rights of a disappointed party to a contract by allowing monetary damages for any breach. This action enjoyed growing popularity and supplanted the action of debt for a time because it permitted the defendant to prove his or her case by swearing in open court and by bringing along eleven neighbors who would proclaim their belief in their neighbor's truthfulness. When this procedure, called the WAGER OF LAW, was abolished during the reign of King William IV (1830–1837), the action of debt again became important as an action to enforce a simple contract.

As long as common-law forms of action were the required modes for PLEADING civil actions, the action of debt continued to be useful. Relief was available only for those whose claims fit exactly into its form, however, and there was criticism of its rigidity and technicalities. By the end of the nineteenth century most states had passed laws to replace the old forms of action with CODE PLEADING. Today, the law of CIVIL PROCEDURE recognizes only one form for a lawsuit, the civil action. An individual can still sue to collect what is due on a debt, but no longer is it necessary to draw the complaint in the form of the ancient action of debt.

## DEBT POOLERS

*Individuals or organizations who receive and apply monthly funds from a person owing money to several creditors and who make arrangements to pay these creditors less than what is actually owed.*

Debt poolers, also known as *debt adjusters* or *consolidators,* are helpful to consumers, particularly when they are nonprofit organizations that provide their services free or for a reasonable fee. In other cases, however, their usefulness to consumers is lessened when they charge fees that would make it less costly for consumers to make similar arrangements with creditors on their own.

## DEBTOR

*One who owes a debt or the performance of an obligation to another, who is called the creditor; one who may be compelled to pay a claim or demand; anyone liable on a claim, whether due or to become due. In* BANKRUPTCY *law, a person who files a voluntary petition or person against whom an involuntary petition is filed. A person or municipality concerning which a bankruptcy case has been commenced.*

## DECALOGUE SOCIETY OF LAWYERS

Founded in 1934, the Decalogue Society of Lawyers is an association of attorneys of the Jewish faith who seek to advance and improve the law, the legal profession, and the administration of justice; to foster friendly relations among its members, and between its members and other members of the bar, the courts, and the public; to cooperate as lawyers and citizens in worthy movements for the public welfare; to maintain vigilance against public practices that are antisocial or discriminatory; and to cooperate with other bar associations for the attainment of

those objectives. Activities include a forum on legal topics of general and Jewish interest, lectures and seminars on recent decisions and legislation, and the presentation of awards. The society provides a placement service for members and maintains a welfare fund. Meetings are held annually in June.

The society has several active committees including those on ARBITRATION, civic affairs, CIVIL RIGHTS, FAMILY LAW, lawyer counseling, LEGAL EDUCATION, legislation, and professional relations.

The society publishes *The Decalogue Journal* (quarterly) and a membership directory (annually).

## DECEDENT

*An individual who has died. The term literally means "one who is dying," but it is commonly used in the law to denote one who has died, particularly someone who has recently passed away.*

A decedent's estate is the real and PERSONAL PROPERTY that an individual owns upon his or her death.

## DECEIT

*A* MISREPRESENTATION *made with the express intention of defrauding someone, which subsequently causes injury to that person.*

In order for a statement to be deceit, it must be untrue, made with knowledge of its falsity, or made in reckless disregard of the truth. The misrepresentation must be such that it causes harm to another individual.

## DECENNIAL DIGEST®

*One of the titles of the American Digest System that classifies by topic the summaries of court decisions that were reported chronologically in the various units of the National Reporter System.*

Each of the more than 400 subject classifications corresponds to a general legal concept—torts, for example—and all cases found under a specific topic discuss similar points of law. The digest contains summaries of cases decided during the period from 1897 to 1905 and for every ten-year period until 1976, and every five years thereafter.

## DECISION

*A conclusion reached after an evaluation of facts and law.*

As a generic term, *decision* refers to both administrative and judicial determinations. It includes final judgments, rulings, and INTERLOCUTORY or provisional orders made by the court pending the outcome of the case. Frequently, a decision is considered the initial step in a rendition by a court of a judgment in an action.

When referring to judicial matters, a decision is not the same as an opinion, although the terms are sometimes used interchangeably. A decision is the pronouncement of the solution of the court or judgment in a case, while an opinion is a statement of the reasons for its determination made by the court.

## DECISION ON THE MERITS

*An ultimate determination rendered by a court in an action that concludes the status of legal rights contested in a controversy and precludes a later lawsuit on the same* CAUSE OF ACTION *by the parties to the original lawsuit.*

A decision on the merits is made by the application of SUBSTANTIVE LAW to the essential facts of the case, not solely upon technical or procedural grounds.

## DECLARATION

*The first* PLEADING *in a lawsuit governed by the rule of* COMMON-LAW PLEADING. *In the law of evidence, a statement or narration made not under oath but simply in the middle of things, as a part of what is happening. Also, a proclamation.*

A declaration is the plaintiff's statement of a claim against the defendant, formally and specifically setting out the facts and circumstances that make up the case. It generally is broken into several sections, which describe the different counts of the CAUSE OF ACTION. The declaration should give the title of the action, the court and place of trial, the basis for the claim, and the relief demanded. The defendant then answers with a plea. Common-law pleading has been abolished in the United States, and modern systems of CODE PLEADING and rules based on federal CIVIL PROCEDURE now provide for a complaint to accomplish the same purpose as did the declaration in former times.

Under some circumstances, statements made out of court by one person may be repeated in court by someone else even though the HEARSAY rule ordinarily forbids secondhand testimony. For example, a DYING DECLARATION

*On December 8, 1941, President Franklin Delano Roosevelt signs the Congressional Declaration of War on Japan.*
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

is a statement in which a **HOMICIDE** victim names his or her killer on his or her deathbed. If the victim had known who had attacked him or her, had abandoned all hope of recovery, and had in fact died of the wounds, a person who heard the dying declaration can repeat it in court at the time the killer is brought to trial. The theory is that a deceased person would not have lied just before dying.

A *declaration against interest* is another type of statement received into evidence even though it is being repeated by someone who heard it out of court. It is any comment that admits something harmful to the rights of the person who made the statement. For example, a driver says to his or her passenger just before the car misses a curve and ends up in a ditch, "I know the brakes are bad, but don't worry." Later when suing to recover compensation for injuries, the passenger can testify that he or she heard the driver make a declaration against his or her interest even though that testimony is hearsay.

Customs law requires all persons entering the United States to provide officers with a list of merchandise they are bringing into the country. This list is also called a declaration.

Real property laws in various states require the filing of statements to disclose plans that establish certain rights in particular buildings or parcels. For example, a homeowners' association formed by neighbors to maintain a recreation center owned by all of them together may file a declaration of covenants. A builder may be required to file a declaration of condominium before beginning to sell new units.

As a preliminary step before becoming naturalized U.S. citizens, **ALIENS** must file a declaration of intention which states that they are honestly trying to become citizens and that they formally renounce all allegiance to any other nation where they were ever citizens or subjects.

The Declaration of Independence was a formal announcement on July 4, 1776, by which the Continental Congress of the United States of America proclaimed the independence of the people of the colonies from the rule of Great Britain. It explained the reasons for their assertion of political autonomy and announced to the world that the United States was a free and independent nation.

**INTERNATIONAL LAW** recognized that nations may formally and publicly proclaim a condition of armed conflict by a declaration of war, which in effect forbids all persons to aid or assist the enemy. In the United States, the Congress has the authority to declare war, and a declaration fixes a beginning date for the war.

A *declaration of a dividend* is an act of a corporation in setting aside a portion of net or surplus income for proportional distribution as a dividend to those who hold shares of stock.

## DECLARATION OF INDEPENDENCE

Since its creation in 1776, the Declaration of Independence has been considered the single most important expression of the ideals of U.S. democracy. As a statement of the fundamental principles of the United States, the Declaration is an enduring reminder of the country's commitment to popular government and equal rights for all.

The Declaration of Independence is a product of the early days of the Revolutionary War. On July 2, 1776, the Second Continental Congress—the legislature of the American colonies—voted for independence from Great Britain. It then appointed a committee of five—**JOHN ADAMS**, **BENJAMIN FRANKLIN**, **THOMAS JEFFERSON**, **ROGER SHERMAN**, and Robert R. Livingston—to draft a formal statement of independence designed to influence public opinion at home and abroad. Because of his reputation as an eloquent and forceful writer, Jefferson was assigned the task of creating the document, and the final product is almost entirely his own

work. The Congress did not approve all of Jefferson's original draft, however, rejecting most notably his denunciation of the slave trade. Delegates from South Carolina and Georgia were not yet ready to extend the notion of inalienable rights to African Americans.

On July 4, 1776, the day of birth for the new country, the CONTINENTAL CONGRESS approved the Declaration of Independence on behalf of the people living in the American colonies. The Declaration served a number of purposes for the newly formed United States. With regard to the power politics of the day, it functioned as a propaganda statement intended to build support for American independence abroad, particularly in France, from which the Americans hoped to have support in their struggle for independence. Similarly, it served as a clear message of intention to the British. Even more important for the later Republic of the United States, it functioned as a statement of governmental ideals.

In keeping with its immediate diplomatic purposes, most of the Declaration consists of a list of 30 grievances against acts of the British monarch George III. Many of these were traditional and legitimate grievances under British CONSTITUTIONAL LAW. The Declaration firmly announces that British actions had established "an absolute Tyranny over these States." Britain's acts of despotism, according to the Declaration's list, included taxation of Americans without representation in Parliament; imposition of standing armies on American communities; establishment of the military above the civil power; obstruction of the right to trial by jury; interference with the operation of colonial legislatures; and cutting off of trade with the rest of the world. The Declaration ends with the decisive resolution that "these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved."

The first sentences of the document and their statement of political ideals have remained the Declaration's most memorable and influential section. Among these sentences are the following:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government.

*The Declaration of Independence was signed July 4, 1776. This work, assembled by John Binns in 1819, surrounds a facsimile of the document's text with portraits of George Washington, John Hancock, and Thomas Jefferson, along with the seals of the 13 original states.*

LIBRARY OF CONGRESS

Ever since their creation, these ideas have guided the development of U.S. government, including the creation of the U.S. Constitution in 1787. The concepts of equal and inalienable rights for all, limited government, popular consent, and freedom to rebel have had a lasting effect on U.S. law and politics.

Scholars have long debated the relative importance of the different sources Jefferson used for his ideas in the Declaration. Most agree that the natural rights philosophy of English philosopher JOHN LOCKE greatly influenced Jefferson's composition of the Declaration. In par-

ticular, Locke advanced the ideas that a just government derives its legitimacy and power from the consent of the governed, that people possess inalienable rights that no legitimate government may take away, and that the people have the right and duty to overthrow a government that violates their rights. Jefferson also paralleled Locke in his identification of three major rights—the rights to "Life, Liberty and the pursuit of Happiness"—though the last of his three is a change from Locke's right to "property."

Jefferson himself minimized the Declaration's contribution to political philosophy. In a letter that he wrote in 1825, 50 years after the Declaration was signed, he described the document as "an appeal to the tribunal of the world." Its object, he wrote, was

> [n]ot to find out new principles or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take. Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion.

Although the Declaration of Independence stands with the Constitution as a founding document of the United States of America, its position in U.S. law is much less certain than that of the Constitution. The Declaration has been recognized as the founding act of law establishing the United States as a sovereign and independent nation, and Congress has placed it at the beginning of the U.S. Code, under the heading "The Organic Laws of the United States of America." The Supreme Court, however, has generally not considered it a part of the organic law of the country. For example, although the Declaration mentions a right to rebellion, this right, particularly with regard to violent rebellion, has not been recognized by the Supreme Court and other branches of the federal government. The most notable failure to uphold this right occurred when the Union put down the rebellion by the Southern Confederacy in the Civil War.

Despite its secondary authority, many later reform movements have quoted the Declaration in support of their cause, including movements for universal suffrage, ABOLITION of SLAVERY, women's rights, and CIVIL RIGHTS for African Americans. Many have argued that this document influenced the passage and wording of such important developments in U.S. law and government as the Thirteenth and Fourteenth Amendments, which banned slavery and sought to make African Americans equal citizens. In this way, the Declaration of Independence remains the most outstanding example of the spirit, as opposed to the letter, of U.S. law.

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#### CROSS-REFERENCES

"Declaration of Independence" (Appendix, Primary Document); Fourteenth Amendment; Thirteenth Amendment.

## DECLARATION OF TRUST

*An assertion by a property owner that he or she holds the property or estate for the benefit of another person, or for particular designated objectives.*

The term also signifies the deed or other instrument that contains the statement—which may be either written or oral, depending upon the applicable state law.

## DECLARATORY JUDGMENT

*Statutory remedy for the determination of a* JUSTICIABLE *controversy where the plaintiff is in doubt as to his or her legal rights. A binding adjudication of the rights and status of litigants even though no consequential relief is awarded.*

Individuals may seek a declaratory judgment after a legal controversy has arisen but before any damages have occurred or any laws have been violated. A declaratory judgment differs from other judicial rulings in that it does not require that any action be taken. Instead, the judge, after analyzing the controversy, simply issues an opinion declaring the rights of each of the parties involved. A declaratory judgment may only be granted in justiciable controver-

sies—that is, in actual, rather than hypothetical, controversies that fall within a court's jurisdiction.

A declaratory judgment, sometimes called declaratory relief, is conclusive and legally binding as to the present and future rights of the parties involved. The parties involved in a declaratory judgment may not later seek another court resolution of the same legal issue unless they appeal the judgment.

Declaratory judgments are often sought in situations involving contracts, deeds, leases, and wills. An insurance company, for example, might seek a declaratory judgment as to whether a policy applies to a certain person or event. Declaratory judgments also commonly involve individuals or parties who seek to determine their rights under specific regulatory or criminal laws.

Declaratory judgments are considered a type of preventive justice because, by informing parties of their rights, they help them to avoid violating specific laws or the terms of a contract. In 1934 Congress enacted the Declaratory Judgment Act (28 U.S.C.A. § 2201 et seq.), which allows for declaratory judgments concerning issues of federal law. At the state level, the National Conference of Commissioners on Uniform State Laws passed the Uniform Declaratory Judgments Act (12 U.L.A. 109) in 1922. Between 1922 and 1993, this act was adopted in forty-one states, the Virgin Islands, and the Commonwealth of Puerto Rico. Most other states have varying laws that provide for declaratory judgments. Most declaratory judgment laws grant judges discretion to decide whether or not to issue a declaratory judgment.

FURTHER READINGS

Howard, Davis J. 1994. "Declaratory Judgment Coverage Actions." *Ohio Northern University Law Review* 13.

## DECREE

*A judgment of a court that announces the legal consequences of the facts found in a case and orders that the court's decision be carried out. A decree in* EQUITY *is a sentence or order of the court, pronounced on hearing and understanding all the points in issue, and determining the rights of all the parties to the suit, according to equity and good conscience. It is a declaration of the court announcing the legal consequences of the facts found. With the procedural merger of law and equity in the federal and most state courts under the Rules of Civil Procedure, the term* judgment *has generally replaced* decree.

A *divorce decree* sets out the conclusions of the court relating to the facts asserted as grounds for the DIVORCE, and it subsequently dissolves the marriage.

Decree is sometimes used interchangeably with determination and order.

## DEDICATION

*In* COPYRIGHT *law the first publication of a work that does not comply with the requirements relating to copyright notice and which therefore permits anyone to legally republish it. The gift of land—or an* EASEMENT*, that is, a right of use of the property of another—by the owner to the government for public use, and accepted for such use by or on behalf of the public.*

The owner of the land does not retain any rights that are inconsistent with the complete exercise and enjoyment of the public uses to which the property has been committed.

A dedication is express where the gift is formally declared, but it can also be implied by operation of law from the owner's actions and the facts and circumstances of the case.

A dedication may be made under COMMON LAW or pursuant to the requirements of statute. A common-law dedication is not subject to the STATUTE OF FRAUDS, an ENGLISH LAW adopted in the United States, which provides that certain agreements must be in writing. Therefore, a common-law dedication does not have to be expressed in writing to be effective; it is based on ESTOPPEL. If the landowner indicates that his or her land is to be used for a public purpose and public use then occurs, the landowner is estopped, or prevented, from refuting the existence of the public right.

An *express common-law dedication* is one in which the intent is explicitly indicated—such as by ordinary deeds or recorded plats, which are maps showing the locations and boundaries of individual land parcels subdivided into lots—but the execution of the dedication has not been in accordance with law or certification of it has been defective so as not to constitute a statutory dedication.

A *statutory dedication* is necessarily express, since it is executed pursuant to, and in conformity with, the provisions of a statute regulating the subject. It cannot be implied from the circumstances of the case.

A dedication can result from the contrary exclusive use of land by the public pursuant to a claim of right with the knowledge, actual or attributed, and the acceptance of the owner. This method is known as *dedication by adverse user.*

## DEDUCTIBLE

*That which may be taken away or subtracted. In taxation, an item that may be subtracted from gross income or adjusted gross income in determining taxable income (e.g., interest expenses, charitable contributions, certain taxes).*

*The portion of an insured loss to be borne by the insured before he or she is entitled to recovery from the insurer.*

Automotive insurance policies frequently include a deductible, such as $250 or $500, which the insured must pay before receiving reimbursement under the policy. Usually, the insured motorist chooses among several levels of deductible, with the policy payment being somewhat lower when the insured chooses a higher deductible.

Many types of insurance policies include a deductible amount.

## DEDUCTION

*That which is deducted; the part taken away; abatement; as in deductions from gross income in arriving at net income for tax purposes.*

*In* CIVIL LAW, *a portion or thing that an heir has a right to take from the mass of the succession before any partition takes place.*

A contribution to a charity can be used as a deduction to reduce income for INCOME TAX purposes if the taxpayer meets the requirements imposed by law.

## DEED

*A written instrument, which has been signed and delivered, by which one individual, the grantor, conveys title to real property to another individual, the grantee; a conveyance of land, tenements, or hereditaments, from one individual to another.*

At COMMON LAW, a deed was an instrument under seal that contained a COVENANT or contract delivered by the individual who was to be bound by it to the party to whom it was granted. It is no longer required that such an instrument be sealed.

### Transfer of Land

Land can only be transferred from one individual to another in the legally prescribed manner. Historically speaking, a written deed is the instrument used to convey ownership of real property.

A deed is labeled an instrument of conveyance. Under Spanish law, which was in effect at an early date in areas of the western United States, a written deed was not necessary to convey title to land. A verbal grant was sufficient to complete the transaction, provided that it was accompanied by a transfer of possession. Verbal grants of land in Texas have, therefore, been given recognition in U.S. courts.

A deed must describe with reasonable certainty the land that is being conveyed. The conveyance must include operative words of grant; however, technical terms do not need to be used. The grantor must be adequately identified by the conveyance, although it is not required that the grantor's name be specifically mentioned. State laws sometimes require that the deed indicate the residence of the grantor by town, city, county, and state.

In order for title to property to pass, a deed must specify the grantee with sufficient certainty to distinguish that individual from the rest of the world. Some statutes mandate that the deed list the grantee's residence by town, city, county, and state.

### Execution

In order for a deed to be properly executed, certain acts must be performed to create a valid conveyance. Ordinarily, an essential element of execution is the signature of the grantor in the proper place. It is not necessary, however, that the grantee sign the deed in order for it to take effect as a conveyance. Generally state statutes require that the deed be signed in the presence of witnesses, attesting to the grantor's request.

### Delivery

Proper delivery of a deed from the grantor to the grantee is an essential element of its effectiveness. In addition, the grantor must make some statement or perform some act that implies his or her intention to transfer title. It is insufficient for a grantor to have the mere intention to transfer title, in the absence of further conduct that consummates the purpose.

There is no particular prescribed act, method, or ceremony required for delivery, and it is unnecessary that express words be employed

or used in a specified manner. The deed need not be physically delivered to the grantee. It is sufficient to mail it to the grantee. Delivery of the deed by the attorney who has written the instrument for the grantor is also adequate. Unless otherwise provided by statute, a deed becomes effective upon its delivery date. The mere fact that the grantee has physical possession of the deed does not constitute delivery unless it was so intended by the grantor.

### Acceptance

A deed must be accepted by the grantee in order for proper transfer of title to land to be accomplished. There are no fixed principles regarding what acts are sufficient to effect acceptance, since the issue is largely dependent upon the party's intent.

Acceptance of a deed need not be made by express words or in writing, absent a contrary statutory provision. A deed is ordinarily accepted when the grantee retains it or obtains a mortgage on the property at issue.

### Recording

Legal policy mandates that a deed to real property be a matter of public record; therefore, subsequent to delivery and acceptance, a deed must be properly recorded.

The recording process begins when the deed is presented to the clerk's or recorder's office in the county where the property is located. The entire instrument is duplicated, ordinarily by photocopying. The copy is inserted into the current book of official records, which consists exclusively of copies of documents that are maintained and labeled in numerical order.

A properly recorded deed provides constructive notice of its contents, which means that all parties concerned are considered to have notice of the deed whether or not they actually saw it. A majority of jurisdictions place the burden upon home buyers to investigate any suspicious facts concerning the property of which they have actual or constructive notice. If, for example, there is a reference to the property for sale in the records to other deeds, the purchaser might be required to determine whether such instruments give rights in the property to other individuals.

A map referred to in a recorded deed that describes the property conveyed becomes part of the document for identification purposes.

The original copy of a deed is returned to the owner once it has been duplicated, recorded, and filed in the office of the recorder.

A records or clerk's office maintains a set of indexes, in addition to official records, in which information about each deed is recorded, so that upon a search for a document such information can be disclosed. A majority of states have a grantor-grantee index, a set of volumes containing a reference to all documents recorded alphabetically according to the grantor's name. The index lists the name of the grantor first, followed by the name of the grantee, then ordinarily a description of the instrument and sometimes of the property, and ultimately a reference to the volume and page number in the official record where the document has been copied. A grantee-grantor index has the identical information, but it is listed alphabetically according to the grantees' names. A *tract index* arranges all of the entries based upon the location of the property.

Indexes are frequently classified according to time periods. Therefore separate sets of indexes covering various periods of time may be available.

A significant problem can result in the event that a deed cannot be located through the indexes. This situation could result from a mistake in the recording process, such as indexing the deed under the wrong name. In a number of states, the courts will hold that such a deed was never recorded inasmuch as it was not indexed in such a manner as to provide notice to someone properly conducting a check on the title. In these jurisdictions, all grantees have the duty to return to the recorder's office after filing to protect themselves by checking on the indexing of their deeds. A purchaser who lives in a state with such laws should protect himself or herself either by consulting an attorney or returning to the recorder's office to ascertain that the deed is properly recorded and indexed. Other state statutes provide that a document is considered recorded when it is deposited in the proper office even if it is improperly recorded such that it cannot be located. In these states, there are no practical steps for subsequent buyers to take to circumvent this problem.

### Types of Deeds

Three basic types of deeds commonly used are the grant deed, the quitclaim deed, and the warranty deed.

**Grant Deed** By use of a grant deed, the conveyor says, "I grant (convey, bargain, or sell) the property to you." In a number of jurisdictions a representation that the conveyor actually owns

*A sample grant deed.*

**GRANT DEED**

RECORDING REQUESTED BY

_____

AND WHEN RECORDED MAIL THIS DEED AND, UNLESS OTHERWISE SHOWN BELOW, MAIL TAX STATEMENT TO:

NAME_____

STREET ADDRESS_____

CITY, STATE & ZIP CODE _____

TITLE ORDER NO. _____ ESCROW NO. _____

SPACE ABOVE THIS LINE FOR RECORDER'S USE

**GRANT DEED**

DOCUMENTARY TRANSFER TAX $ _____

☐ computed on full value of property conveyed, or

☐ computed on full value less liens and encumbrances remaining at time of sale.

_____

Signature of Declarant or Agent Determining Tax — Firm Name

FOR VALUABLE CONSIDERATION, receipt of which is acknowledged, I (We), _____

_____

grant to _____
(NAME OF GRANTOR(S))

all that real property situated in the City of _____ (or in an unincorporated area of)
(NAME OF GRANTEE(S))

_____County, _____ described as follows (insert legal description):
(NAME OF COUNTY) (STATE)

_____

_____

_____

_____

_____

_____

Accessor's parcel No. _____

Executed on _____ _____, at _____
(CITY AND STATE)

STATE OF _____

COUNTY OF _____

On _____ before me, _____
(NAME/TITLE i.e. "JANE DOE, NOTARY PUBLIC")

personally appeared _____ personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

_____ (SEAL)
(SIGNATURE OF NOTARY)

MAIL TAX STATEMENTS TO: _____

_____

RIGHT THUMBPRINT (Optional)

**CAPACITY CLAIMED BY SIGNER(S)**

☐ INDIVIDUAL(S)
☐ CORPORATE _____
OFFICER(S) _____
(TITLES)
☐ PARTNER(S) ☐ LIMITED
☐ GENERAL
☐ ATTORNEY IN FACT
☐ TRUSTEE(S)
☐ GUARDIAN/CONSERVATOR
☐ OTHER _____

SIGNER IS REPRESENTING:
Name of Person(s) or Executive(s)

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the property he or she is transferring is implied from such language.

**Quitclaim Deed** A *quitclaim deed* is intended to pass any title, interest, or claim that the grantor has in the property but makes no representation that such title is valid. In effect, this type of deed states that if the grantor actually owns the premises described or any interest therein, it is to be conveyed to the grantee. For this type of deed, some state statutes require a WARRANTY by the grantor, stating that neither the grantor nor anyone associated with him or her has encumbered the property, and that the grantor will defend the title against any defects that arise under and through him or her, but as to no others.

**Warranty Deed** In a *warranty deed* the grantor inserts covenants for title, promising that such title is good and clear. The customary covenants of title include warranty of seisin, QUIET ENJOYMENT, the right to convey, freedom from encumbrances, and a defense of the title as to all claims.

### Validity

If a deed is to have any validity, it must be made voluntarily. The test of the capacity of an individual to execute a valid deed is based upon that person's ability to comprehend the consequences of his or her act. If a deed is not made through the conscious act of the grantor, it can be set aside in court. Relevant factors for the determination of whether a particular individual is capable of executing a valid deed are his or her age, and mental and physical condition. Extreme physical weakness resulting from old age or disease is a proper element for consideration in establishing capacity. Mental capacity, however, is the most important factor. If an individual is deemed to be mentally capable of disposing of his or her own property, the deed is ordinarily valid and would withstand objections made to it.

If FRAUD is committed by either the grantor or grantee, a deed can be declared invalid. For example, a deed that is a forgery is completely ineffective.

The exercise of UNDUE INFLUENCE also ordinarily serves to invalidate a deed. The test of whether such influence has been exerted turns upon the issue of whether the grantor executed the deed voluntarily. Undue influence is wrongful and serves to confuse the judgment and to control the will of the grantor. Ordinary influence is insufficient to invalidate a deed. Deeds between parties who share a confidential relationship are frequently examined by the courts for undue influence. For example, the courts might place a deed under close scrutiny if the grantor's attorney or physician is named grantee. In addition, if the grantor is a drunkard or uses DRUGS AND NARCOTICS to excess, such would be circumstances for consideration when a court determines whether undue influence was exercised upon the grantor.

### Defects

In a number of jurisdictions, an individual selling a house is required to disclose any material defect known to him or her but not to the purchaser. A failure to disclose gives the buyer the right to cancel the deed, sue for damages, and in some instances, recover for personal injuries incurred as a result of such defect.

FURTHER READINGS

Dasso, Jerome J., et al. 1995. *Real Estate.* 12th ed. Englewood Cliffs, N.J.: Prentice-Hall.

Karvel, George, and Maurice Unger. 1991. *Real Estate: Principles and Practices.* 9th ed. Cincinnati: South-Western.

CROSS-REFERENCES

Quitclaim Deed; Records; Recording of Land Titles.

## DEED OF TRUST

*A document that embodies the agreement between a lender and a borrower to transfer an interest in the borrower's land to a neutral third party, a trustee, to secure the payment of a debt by the borrower.*

A deed of trust, also called a trust deed or a Potomac Mortgage, is used in some states in place of a mortgage, a transfer of interest in land by a mortgagor-borrower to a mortgagee-lender to secure the payment of the borrower's debt. Although a deed of trust serves the same purpose as a type of security, it differs from a mortgage. A deed of trust is an arrangement among three parties: the borrower, the lender, and an impartial trustee. In exchange for a loan of money from the lender, the borrower places legal title to real property in the hands of the trustee who holds it for the benefit of the lender, named in the deed as the beneficiary. The borrower retains equitable title to, and possession of, the property.

The terms of the deed provide that the transfer of legal title to the trustee will be void on the timely payment of the debt. If the borrower defaults in the payment of the debt, the trustee is empowered by the deed to sell the property

*A sample deed of trust.*

## DEED OF TRUST

**GENERAL FORM**

Deed of trust made on _____(*date*), between _____, of _____ (*address*), referred to as trustor, _____, of _____ (*address*), referred to as trustee, and _____, of _____ (*address*), referred to as beneficiary.

Trustor, in consideration of the indebtedness recited below, irrevocably grants, bargains, sells, assigns, and conveys to trustee in trust, with power of sale, the property in _____ (*location and address*) described as _____ _____ (*description of property*), together with all the tenements, hereditaments, and appurtenances now or hereafter belonging or in any wise appertaining. To have and to hold the same, with the appurtenances, unto trustee.

For the purpose of securing performance of each agreement of trustor and of securing payment of the sum of _____ (*amount*) ($_____) with interest thereon according to the terms of a _____ (*Note or Bond*), dated _____ (*month & day*), _____ (*year*) payable to beneficiary or order and made or executed by trustor, the final payment of principal and interest, if not paid sooner, to be due and payable on _____ (*month & day*),_____ (*year*) at the office of _____, at _____ (*address*), or at such other place as beneficiary may designate in writing delivered or mailed to trustor. The terms of the _____ (*Note or Bond*) are incorporated by reference.

Trustor covenants and agrees as follows:

1. PAYMENT OF INDEBTEDNESS

1.1 Trustor shall pay the indebtedness, as provided above. Trustor reserves the right and privilege to prepay at any time, without premium or fee, the entire indebtedness or any part of it not less than the amount of one installment, or _____ (*amount*) ($_____), whichever is less. Any prepayment made on other than an installment due date will not be credited until the next following installment due date.

2. OWNERSHIP OF PROPERTY

2.1 Trustor is lawfully seized (in possession) of _____ _____ (*description of estate*) and, except as otherwise stated, the premises are free from any encumbrances. Trustor hereby warrants the usual covenants to the same extent as a statutory _____ (*warranty*) deed under the laws of _____ (*state*), and all covenants herein made, and trustor will defend against any breach of any such covenant.

3. CONTINUED EFFECTIVENESS

3.1 The provisions of this instrument shall remain in full force and effect during any postponement or extension of the time of payment of the indebtedness or any part of it.

4. TAXES AND ASSESSMENTS

4.1 Trustor shall pay all taxes, assessments, water rates, and other governmental or municipal charges, fines, or impositions; and, in default thereof, beneficiary may pay the same.

5. WASTE; REPAIR OR REMOVAL OF STRUCTURES

5.1 Trustor shall not commit waste or authorize the repair or the removal of any structures on the premises, and shall not do or permit any act that may lawfully result in the creation of a lien or claim on the land or the improvements of equal or prior rank to the claim of this trust deed without prior written consent of beneficiary; but shall maintain the property in as good condition as at present, reasonable wear and tear excepted. On any failure to so maintain, beneficiary, at its option, may cause reasonable maintenance work to be performed at trustor's cost.

6. INSURANCE

6.1 Trustor shall maintain continuously hazard insurance of such type or types and amounts as beneficiary may from time to time require on the improvements now or hereafter on the premises, and shall pay promptly when due any premiums for such insurance. All insurance

[continued]

*A sample deed of trust (continued).*

**DEED OF TRUST**

shall be carried with companies approved by beneficiary, and the policies and renewals shall be held by beneficiary and provide that loss be payable solely and in form acceptable to beneficiary. In event of loss, trustor shall give immediate notice by mail to beneficiary, who may make proof of loss if not made promptly by trustor, and each insurance company concerned is hereby authorized and directed to make payment of the loss directly to beneficiary, rather than to trustor and beneficiary jointly. The insurance proceeds, or any part of them, may be applied by beneficiary, at its option, either to the reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged. In the event of a conveyance to beneficiary, or other transfer of title to the premises in extinguishment of the indebtedness secured hereby, all right, title, and interest of trustor in and to any insurance policies then in force shall pass to the purchaser or grantee.

7. BENEFICIARY PAYMENT IN EVENT OF DEFAULT

7.1 If trustor defaults in any of the covenants or agreements contained in this trust deed, or in the _____ (*Note or Bond*) secured by it, then beneficiary, at its option, may perform the same. All expenditures made by beneficiary in so doing shall draw interest at the rate provided for in the principal indebtedness, and shall be repayable by trustor to beneficiary, and, together with interest and costs accruing thereon, shall be secured by this trust deed.

8. SUPPLEMENTAL NOTES

8.1 On beneficiary's request, trustor shall execute and deliver a supplemental note or notes for the sum or sums advanced by beneficiary for the alteration, modernization, improvement, maintenance, or repair of such premises, for taxes or assessments against the same, and for any other purpose authorized under this trust deed. The note or notes shall be secured by this trust deed with equal priority and as fully as if the advance evidenced thereby were included in the _____ (*Note or Bond*) first described above. The supplemental note or notes shall bear interest at the rate provided for in the principal indebtedness and shall be payable in approximately equal _____ (*monthly*) payments for such period as may be agreed on by trustor and beneficiary. On the failure to agree on the maturity, the whole of the sum or sums so advanced shall be due and payable _____ days after beneficiary's demand. In no event, shall the maturity extend beyond the ultimate maturity of the _____ (*Note or Bond*) first described above.

9. RIGHT OF BENEFICIARY TO APPEAR

9.1 Beneficiary may appear in and defend any action or proceeding purporting to affect the security of this trust deed, and trustor shall pay all costs and expenses, including the costs of evidence of title and reasonable attorney fees, in any such action or proceeding in which beneficiary may appear.

10. WAIVER OF NOTICE

10.1 Trustor waives notice of the exercise of any option granted to beneficiary in this trust deed or in such _____ (*Note or Bond*).

11. CONDEMNATION

11.1 Any award of compensation or damages in connection with any condemnation for public use of or injury to the premises or any part of them is hereby assigned and shall be paid to beneficiary, who may apply or release such moneys received in the same manner and with the same effect as provided above for the disposition of fire or other insurance proceeds.

12. NONWAIVER OF RIGHTS

12.1 Beneficiary's accepting payment of any sum secured by this trust deed after its due date shall not constitute a waiver of its right either to require prompt payment when due of all other sums so secured or to declare default for failure so to pay.

13. RIGHTS OF TRUSTEE

13.1 At any time or from time to time, without liability therefor and without notice, on beneficiary's written request and presentation of this trust deed and such _____ (*Note or Bond*) for Endorsement, and without affecting the personal liability of any person for payment of the indebtedness secured by this trust deed, trustee may: reconvey all or any part of the premises; consent to the making of any map or plat thereof; join in granting any easement thereon; or join in any extension agreement or any agreement subordinating this trust deed to subsequent liens or charges.

14. RECONVEYANCE

14.1 On beneficiary's written request stating that all sums secured by this trust deed have been paid, and on surrender of this trust deed and such _____ (*Note or Bond*) to trustee for cancellation and retention, and on payment of trustee's fees, trustee shall reconvey, without warranty, the property then held under this trust deed. The recitals in any reconveyance accepted under this trust deed of any matters or facts shall be conclusive proof of their truthfulness. The grantee in such reconveyance may be described as "the person or persons legally entitled thereto."

15. RENTS, ISSUES, AND PROFITS

15.1 As additional security, trustor hereby gives to and confers on beneficiary the right, power, and authority during the continuance of the interests created by this trust deed to collect the rents, issues, and profits of the premises, reserving to trustor the right, prior to any

[continued]

*A sample deed of trust (continued).*

**DEED OF TRUST**

default by trustor in payment of any indebtedness secured by this trust deed or in the performance of any agreement under this trust deed, to collect and retain such rents, issues, and profits as they become due and payable. On any such default, beneficiary may at any time without notice, either in person, by agent, or by a court-appointed receiver, and without regard to the adequacy of any security for the indebtedness secured by this trust deed, enter on and take possession of the premises or any part of them, in its own name sue for or otherwise collect such rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney fees, on any indebtedness secured by this trust deed, and in such order as beneficiary may determine. The entering on and taking possession of the premises, the collection of the rents, issues, and profits, and the application thereof as stated above shall not cure or waive any default or notice of default under this trust deed or invalidate any act done pursuant to such notice.

16. DEFAULT; BANKRUPTCY

16.1 On default by trustor in payment of any indebtedness secured by this trust deed, or in performance of any agreement herein contained, or if trustor is adjudicated bankrupt or made defendant in a bankruptcy or receivership proceeding, all sums secured by this trust deed shall, at beneficiary's option, immediately become due and payable. In the event of default, beneficiary shall execute or cause trustee to execute a written notice of such default and of beneficiary's election to cause the above-described property to be sold to satisfy the obligation hereof, and shall cause such notice to be recorded as then required by law.

16.2 On notice of sale as then required by law and elapse of the then-required time period after recordation of notice of default, trustee, without demand on trustor, shall sell the property at the time and place of sale fixed by it in the notice of sale, either as a whole or in separate parcels and in such order as it may determine, at public auction to the highest and best bidder for cash, payable at the time of sale. Trustee may postpone the sale of all or any part of the property by public announcement at the time and place of sale, and from time to time thereafter may postpone the sale by public announcement at the time fixed by the preceding postponement. Trustee shall deliver to the purchaser its deed conveying the property so sold, but without any covenant or warranty, express or implied. The recitals in the deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including trustor, trustee, or beneficiary, as defined under this trust deed, may purchase at such sale.

16.3 After deducting all costs, fees, and expenses of trustee and of this trust, including the cost of evidence of title and reasonable counsel fees in connection with the sale, trustee shall apply the proceeds of the sale to the payment of all sums expended under the trust terms, not then repaid with accrued interest at the rate provided on the principal debt, all other sums then secured by this trust deed, and the remainder, if any, to the person or persons legally entitled to receive them.

17. APPLICATION OF TRUST DEED

17.1 This trust deed applies to, inures to the benefit of, and binds all parties to this agreement, their heirs, legatees, devisees, administrators, executors, successors, and assigns. The term "beneficiary" shall mean the holder and owner, including pledgee, of the _____ (*Note or Bond*) secured by this trust deed, whether or not named as a beneficiary herein. Whenever the context of this trust deed so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

18. ACCEPTANCE OF TRUST

18.1 Trustee accepts this trust when this trust deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party to this trust deed of any pending sale under any other trust deed or of any action or proceeding in which trustor, beneficiary, or trustee shall be a party, unless brought by trustee.

19. SUCCESSOR TRUSTEE

19.1 Beneficiary may, from time to time, as provided by statute, appoint another trustee in place of trustee herein named, and on such appointment, trustee herein named shall be discharged and the trustee so appointed shall be substituted as trustee with the same effect as if originally named trustee.

20. MULTIPLE TRUSTEES

20.1 If two or more persons are designated as trustee, all powers granted to trustee may be exercised by any of such persons, if the other person or persons are unable, for any reason, to act; and any recital of such inability in any instrument executed by any of such persons shall be conclusive against trustor, or trustor's heirs and assigns.

_____ (If appropriate, add: _____, the _____ (*wife or husband*) of trustor, for the above-stated consideration, hereby relinquishes _____ (*her or his*) right of _____ (*dower or curtesy*) _____ (*and homestead*) in and to the above-described premises.)

20.2 The undersigned trustor requests that a copy of any notice of default and of any notice of sale under this trust deed be mailed to trustor's address set forth above.

In witness whereof, trustor has executed this trust deed the day and year first written above.

_____ _____
Signature Date

_____ _____
Signature Date

and pay the lender the proceeds to satisfy the debt. Any surplus will be returned to the borrower.

The right of the trustee to sell the premises is called foreclosure by power of sale. It differs in several respects from the power of a mortgagee to sell mortgaged property upon default, which is called a judicial foreclosure. A foreclosure by power of sale is neither supervised nor confirmed by a court, unlike a judicial foreclosure. While the rights received by a purchaser at a foreclosure by power of sale are the same as those obtained at a judicial foreclosure, there is a practical difference. Since the sale has not been judicially approved, there is a greater possibility of litigation over title, thereby making title to the purchased premises less secure than one purchased at a judicial foreclosure. In addition, the lender may purchase the property for sale under the provisions of a deed of trust, since the neutral trustee conducts the sale. This is not the case in a foreclosure, unless contract or statute provides otherwise, since the mortgagee must act impartially in selling the property to satisfy the debt. Some mortgages may, however, provide for foreclosure by power of sale.

The procedure for a foreclosure by power of sale is regulated by statute, a characteristic shared by a judicial foreclosure. All interested parties must be given notice of the sale, which must be published in local newspapers, usually in the public notice columns, for a certain period of time as required by statute. The sale is usually open to the public to ensure that the property will be sold at its fair market value.

## DEEM

*To hold; consider; adjudge; believe; condemn; determine; treat as if; construe.*

To deem is to consider something as having certain characteristics. If an act is deemed a crime by law, then it is held to be a crime. If someone is deemed liable for damages, then he or she will have to pay them.

## DEFALCATION

*The misappropriation or* EMBEZZLEMENT *of money.*

Defalcation implies that funds have in some way been mishandled, particularly where an officer or agent has breached his or her fiduciary duty. It is commonly applied to public officers who fail to account for money received by them in their official capacity, or to officers of corporations who misappropriate company funds for their own private use.

Colloquially, the term is used to mean any type of bad faith, deceit, misconduct, or dishonesty.

## DEFAMATION

*Any intentional false communication, either written or spoken, that harms a person's reputation; decreases the respect, regard, or confidence in which a person is held; or induces disparaging, hostile, or disagreeable opinions or feelings against a person.*

Defamation may be a criminal or civil charge. It encompasses both written statements, known as LIBEL, and spoken statements, called slander.

The probability that a plaintiff will recover damages in a defamation suit depends largely on whether the plaintiff is a public or private figure in the eyes of the law. The public figure law of defamation was first delineated in NEW YORK TIMES V. SULLIVAN, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). In *Sullivan,* the plaintiff, a police official, claimed that false allegations about him appeared in the *New York Times,* and sued the newspaper for libel. The Supreme Court balanced the plaintiff's interest in preserving his reputation against the public's interest in freedom of expression in the area of political debate. It held that a public official alleging libel must prove actual malice in order to recover damages. The Court declared that the FIRST AMENDMENT protects open and robust debate on public issues even when such debate includes "vehement, caustic, unpleasantly sharp attacks on government and public officials." A public official or other plaintiff who has voluntarily assumed a position in the public eye must prove that defamatory statements were made with knowledge that they were false or with reckless disregard of whether they were false.

Where the plaintiff in a defamation action is a private citizen who is not in the public eye, the law extends a lesser degree of constitutional protection to defamatory statements. Public figures voluntarily place themselves in a position that invites close scrutiny, whereas private citizens who have not entered public life do not relinquish their interest in protecting their reputation. In addition, public figures have greater

access to the means to publicly counteract false statements about them. For these reasons, a private citizen's reputation and privacy interests tend to outweigh free speech considerations and deserve greater protection from the courts. (See *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 [1974]).

Distinguishing between public and private figures for the purposes of defamation law is sometimes difficult. For an individual to be considered a public figure in all situations, the person's name must be so familiar as to be a household word—for example, Michael Jordan. Because most people do not fit into that category of notoriety, the Court recognized the limited-purpose public figure, who is voluntarily injected into a public controversy and becomes a public figure for a limited range of issues. Limited-purpose public figures, like public figures, have at least temporary access to the means to counteract false statements about them. They also voluntarily place themselves in the public eye and consequently relinquish some of their privacy rights. For these reasons, false statements about limited-purpose public figures that relate to the public controversies in which those figures are involved are not considered defamatory unless they meet the actual-malice test set forth in *Sullivan.*

Determining who is a limited-purpose public figure can also be problematic. In *Time, Inc. v. Firestone,* 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976), the Court held that the plaintiff, a prominent socialite involved in a scandalous DIVORCE, was not a public figure because her divorce was not a public controversy and because she had not voluntarily involved herself in a public controversy. The Court recognized that the divorce was newsworthy, but drew a distinction between matters of public interest and matters of public controversy. In *Hutchinson v. Proxmire,* 443 U.S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979), the Court determined that a scientist whose federally supported research was ridiculed as wasteful by Senator William Proxmire was not a limited-purpose public figure because he had not sought public scrutiny in order to influence others on a matter of public controversy, and was not otherwise well-known.

FURTHER READINGS

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CROSS-REFERENCES

Freedom of the Press; Libel and Slander.

## DEFAULT

*An omission; a failure to do that which is anticipated, expected, or required in a given situation.*

Default is distinguishable from NEGLIGENCE in that it does not involve carelessness or imprudence with respect to the discharge of a duty or obligation but rather the intentional omission or nonperformance of a duty.

To default on a debt is to fail to pay it upon its due date. Default in contract law implies failure to perform a contractual obligation.

A *default* judgment is one that may be entered against a party in a lawsuit for failure to comply with a procedural step in the suit, such as failure to file an answer to a complaint or failure to file a paper on time. A default judgment is not one that goes to the merits of a lawsuit but is procedural in nature.

## DEFAULT JUDGMENT

*Judgment entered against a party who has failed to defend against a claim that has been brought by another party. Under rules of* CIVIL PROCEDURE, *when a party against whom a judgment for affirmative relief is sought has failed to plead (i.e., answer) or otherwise defend, the party is in default and a judgment by default may be entered either by the clerk or the court.*

## DEFEASANCE CLAUSE

*A provision of a mortgage—an interest in land given to a mortgagee-lender to secure the payment of a debt—which promises that the mortgagor-borrower will regain title to the mortgaged property when all the terms of the mortgage have been met.*

Defeasance clauses are found in mortgages in the few states that still follow the common-law theory of mortgages. At early English COMMON LAW, a mortgagee who lent money to a mortgagor received in exchange a deed of defeasible fee to the property, offered as security for the payment of the debt. Such title was subject to defeat or cancellation upon payment of the debt on the law day, that is, at its maturity, and

**Default Judgment**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____X

Plaintiff,

— against —

Defendant.

_____X

_____ Civ. _____ ( )

**DEFAULT JUDGMENT**

This action having been commenced on _____ *(date)* by the filing of the Summons and Complaint, and a copy of the Summons and Complaint having been personally served on the defendant, _____ *(name)* , on _____ *(date)* by _____ (*STATE SPECIFICALLY HOW SERVICE WAS MADE ON DEFENDANT*) personal service on _____ *(name)* , and a proof of service having been filed on _____ *(date)* and the defendant not having answered the Complaint, and the time for answering the Complaint having expired, it is

ORDERED, ADJUDGED AND DECREED: That the plaintiff have judgment against defendant in the liquidated amount of $ _____ with interest at _____ % from _____ *(date)* amounting to $ _____ plus costs and disbursements of this action in the amount of $ _____ amounting in all to $ _____ .

Dated: New York, New York

_____

_____
U.S.D.J.

This document was entered on the docket on

_____ .

**SDNY Web 5/99**

*A sample default judgment.*

the mortgagor would at that time regain title to the property. If the mortgagor failed to pay the debt, even by only one day, the mortgagee's title became an estate in fee simple absolute, which gave the mortgagee absolute ownership of the property. A defeasance clause embodies these common-law principles that govern this type of mortgage agreement.

Defeasance clauses are not found in mortgages based upon the lien theory, observed in most states. The mortgage creates a lien for the mortgagee on the mortgaged property, which gives the mortgagee the right to its possession only after the mortgage has been foreclosed. Since the mortgage has not been given defeasible title, there is no need for a defeasance clause.

## DEFEASIBLE

*Potentially subject to defeat, termination, or* ANNULMENT *upon the occurrence of a future action or event, or the performance of a condition* subsequent.

The most common legal application of the term is with respect to estates as interest in land, such as in the case of a conveyance or a life estate, which is defeasible upon the happening of a certain specified event, for example, the death of the person holding such an interest.

## DEFECT

*Imperfection, flaw, or deficiency.*

That which is subject to a defect is missing a requisite element and, therefore, is not legally binding. Defective SERVICE OF PROCESS, for example, is service that does not comply with a procedural or jurisdictional requirement. A defective will is one that has not been properly drawn up, has been obtained by unlawful means, or does not comply with a particular law. In some cases, however, defects can be cured; for example, defective service of process can be cured by the service of an amended complaint.

In PRODUCT LIABILITY, a defective product is one that cannot be used for the purposes intended or is made dangerous as a result of a flaw or imperfection. Such a defect might exist in the entire design of a product or in the production of a particular individual product. A *latent defect* is one that is not readily observable by the buyer of an item, whereas a *patent defect* is obvious or immediately apparent upon observation.

A *fatal defect* is one that, due to its serious nature, serves to nullify a contract.

**Product Defect Notice**

Date:_____

To:_____

Dear_____:

Notice is hereby provided that we have purchased a product manufactured, distributed, or sold by you and described as:

You are advised of a product defect or warranty claim. In support of same we provide the following information:

1. Date of Purchase:
2. Nature of Defect:
3. Injuries or Damage:
4. Item Purchased From:

This is provided to give you earliest notice of said claim. I request that you or your representative contact me as soon as possible.

Very truly,

_____
Name

_____
Address

_____
City, State, Zip

_____
Telephone Number

CERTIFIED MAIL, Return Receipt Requested

*A sample form letter providing notice to manufacturer for a product defect.*

## DEFENDANT

*The person defending or denying; the party against whom relief or recovery is sought in an action or suit, or the accused in a criminal case.*

In every legal action, whether civil or criminal, there are two sides. The person suing is the plaintiff and the person against whom the suit is brought is the defendant. In some instances, there may be more than one plaintiff or defendant.

If an individual is being sued by his or her neighbor for TRESPASS, then he or she is the defendant in a civil suit. The person being accused of murder by the state in a HOMICIDE case is the defendant in a criminal action.

## DEFENSE

*The forcible repulsion of an unlawful and violent attack, such as the defense of one's person, property, or country in time of war.*

*The totality of the facts, law, and contentions presented by the party against whom a civil action or ciminal prosecution is instituted in order to defeat or diminish the plaintiff's* CAUSE OF ACTION *or the prosecutor's case. A reply to the claims of the other party, which asserts reasons why the claims should be disallowed. The defense may involve an absolute denial of the other party's factual allegations or may entail an* AFFIRMATIVE DEFENSE*, which sets forth completely new factual allegations. Pursuant to the rules of federal* CIVIL PROCEDURE*, numerous defenses may be asserted by motion as well as by answer, while other defenses must be pleaded affirmatively.*

A *frivolous defense* is one that entails a vacuous assertion, which is not supported by argument or evidence. The rules of federal procedure provide that on motion such defense may be ordered stricken from the pleadings.

A *meritorious defense* is one that involves the essence or substance of the case, as distinguished from technical objections or delaying tactics.

With respect to a criminal charge, defenses such as alibi, consent, duress, ENTRAPMENT, ignorance or mistake, infancy, insanity, intoxication, and SELF-DEFENSE can result in a party's acquittal.

## DEFENSE DEPARTMENT

The Department of Defense (DOD) is the executive department in the federal government that is responsible for providing the military forces needed to deter war and to protect the security of the United States. The major elements of the military forces under its control are the Army, Navy, Air Force, and Marine Corps, consisting of about 1.5 million men and women on active duty. They are backed, in case of emergency, by 1 million members of reserve units. In addition, the DOD employs approximately nine hundred thousand civilians.

Although every state has some defense activities, the central headquarters of the DOD is in northern Virginia at the Pentagon, the "world's largest office building."

The National Security Act of 1947 (50 U.S.C.A. § 401) created the National Military Establishment, which replaced the War Department and was later renamed the Department of Defence. It was established as an executive department of the government by the National Security Act Amendments of 1949, with the secretary of defense as its head (5 U.S.C.A. § 101). Since 1949, many legislative and administrative changes have occurred, evolving the department into the structure under which it currently operates.

### Structure

The DOD includes the Office of the Secretary of Defense, the military departments and the military services within those departments, the chair of the Joint Chiefs of Staff and the Joint Staff, the unified combatant commands, the DOD agencies, the DOD field activities, and such other offices, agencies, activities, and commands as may be established or designated by law or by the president or the secretary of defense.

### Office of the Secretary

The secretary of defense is the principal adviser on defense policy to the president. The secretary is responsible for the formulation of general defense policy and DOD policy and for the execution of approved policy. Under the direction of the president, the secretary exercises authority, direction, and control over the DOD. The deputy secretary of defense has full power and authority to act for the secretary of defense.

Three positions are designated as undersecretary of defense. The undersecretary of defense for acquisition and technology chairs the Defense Acquisition Board and advises the secretary of defense on all matters relating to the acquisition system, research and development, test and evaluation, production, logistics, military construction, procurement, and economic affairs.

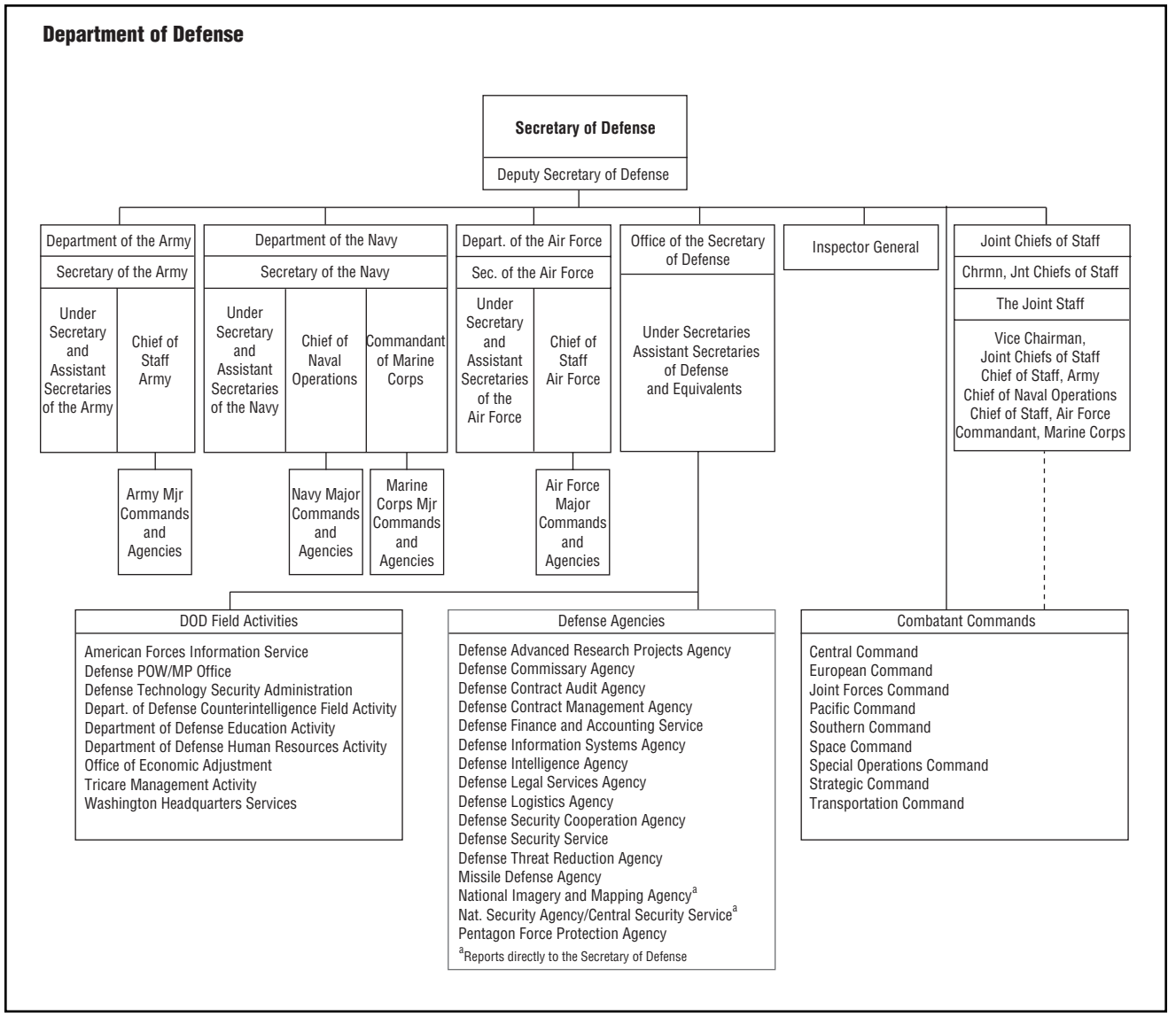


The undersecretary of defense for policy advises the secretary of defense on policy matters relating to overall international security and political-military affairs, including NORTH ATLANTIC TREATY ORGANIZATION affairs, arms limitations agreements, and international trade and technology.

The undersecretary of defense for personnel and readiness develops policies and administrative processes to ensure that the military forces have sufficient readiness to execute the National Military Strategy; develops civilian and military personnel policies including health and drug policies, equal opportunity programs, and family issues and support; and oversees matters concerning the reserve components.

The comptroller and chief financial officer of the DOD is the principal adviser and assistant to the secretary of defense for budgetary and fiscal matters, including financial management, accounting policy, and systems and budget formulation and execution.

The director of operational test and evaluation serves as a staff assistant and adviser to the secretary of defense, prescribing policies and procedures for the conduct of operational test and evaluation within the department, including assessments of operational effectiveness and of the suitability of major defense acquisition programs.

The assistant secretary of defense for command, control, communications, and intelli-

gence (C3I) is the principal staff assistant and adviser to the secretary of defense for C3I, information management, counterintelligence, and security countermeasures.

The assistant secretary of defense for legislative affairs is responsible for maintaining a direct liaison with Congress, coordinating departmental actions relating to congressional consideration of the legislative program of the department, coordinating responses to requests for information by members of Congress, and arranging for witnesses from the DOD and the various military departments at congressional hearings on defense matters.

The general counsel is the chief legal officer of the DOD and is responsible for the preparation and processing of legislation, executive orders, and proclamations, and reports and comments thereon. The general counsel also serves as director of the Defense Legal Services Agency, providing legal advice and services for the Office of the Secretary of Defense, its field activities, and the defense agencies. The general counsel also administers the Defense Industrial Security Clearance Review Program and the Standards of Conduct Ethics Program.

The inspector general serves as an independent and objective official in the DOD. The inspector general is responsible for conducting, supervising, monitoring, and initiating audits, investigations, and inspections relating to programs and operations of the department. The inspector general coordinates activities designed to promote economy, efficiency, and effectiveness in the administration of such programs and operations, and to prevent and detect FRAUD and abuse in them.

The assistant secretary of defense for public affairs is responsible for the functional areas of the DOD, which include public and internal information, audiovisual activities, community relations, and security clearance. The assistant secretary also reviews information intended for public release, and implements programs under the FREEDOM OF INFORMATION ACT (5 U.S.C.A. § 552) and Federal Privacy Act (5 U.S.C.A. § 552a) within the DOD.

The assistant secretary of defense for intelligence oversight conducts independent oversight inspections of DOD intelligence and counterintelligence operations to ensure compliance with legal requirements, and reviews all allegations that raise questions of legality or propriety involving intelligence and counterintelligence activities.

*In March 2002, (l-r) Gen. Eric Shinseki, Adm. Vernon Clark, Gen. James Jones, and Gen. John Jumper, members of the Joint Chiefs of Staff, appear before the Senate Armed Services Committee to discuss the Defense Department's 2003 budget.*

AP/WIDE WORLD PHOTOS

The director of administration and management serves as the principal staff assistant to the secretary and deputy secretary of defense on matters concerning department-wide organizational and administrative management, and also serves as the director of the Washington Headquarters Service.

### Joint Chiefs of Staff

The Joint Chiefs of Staff consists of a chair and vice chair, the chief of staff of the U.S. Army, the chief of naval operations, the chief of staff of the U.S. Air Force, and the commandant of the Marine Corps.

The chair of the Joint Chiefs of Staff is the principal military adviser to the president, the NATIONAL SECURITY COUNCIL, and the secretary of defense. While serving, the chair holds the grade of general or admiral and outranks all other officers of the armed forces.

The chair of the Joint Chiefs of Staff helps the president and the secretary of defense to provide for the strategic direction and planning of the armed forces, including resource allocation, the assessment of the military strength of potential adversaries, and the preparation of both contingency plans and joint logistic and mobility plans. In addition, the chair coordinates military education and training, represents the United States on the Military Staff Committee of the UNITED NATIONS, and convenes and presides over regular meetings of the Joint Chiefs of Staff.

### The Department of Defense in the Response to Terrorism

Recent acts of TERRORISM have required the Department of Defense to reconsider some of its methods for protecting the United States from

foreign threats. The SEPTEMBER 11TH ATTACKS perpetrated by the terrorist organization al Qaeda not only destroyed the World Trade Center towers in New York City but also severely damaged the Pentagon building in Virginia. In the months following these attacks, the U.S. military engaged in operations in Afghanistan, which had harbored suspected al Qaeda leader Osama bin Laden. Since the campaign against Afghanistan, the secretary of defense under President GEORGE W. BUSH, Donald Rumsfeld, has become a central figure in the American media.

The WAR ON TERRORISM, dubbed Operation Enduring Freedom by President Bush, has required the Department of Defense to work closely with other nations. The department has assisted in rebuilding Afghanistan after the former regime, known as the Taliban, was toppled. Since that time, the department has focused much of its attention on nations that have been suspected of assisting and harboring terrorist organizations—especially Iraq. In 2002 and 2003, the United States maintained a campaign calling for the disarmament of Iraq, a campaign that led to the second armed conflict between the two countries in twelve years when the United States attacked Iraq on March 19, 2003.

The Department of Defense also restructured other operations and developed new defense strategies in light of new threats against the United States. In 2002, the department redrafted the Unified Command Plan as part the largest restructuring of the military since WORLD WAR II. The revised structure places more emphasis on terrorism and other threats, with considerable focus on the development of technologies to assist in fighting these threats. Homeland security has also been a primary focus for the department. In 2002, more than 10,000 members of the NATIONAL GUARD provided security at the nation's airports and borders.

### Field Activities

The American Forces Information Service, established in 1977 under the supervision of the assistant secretary of defense for public affairs, is responsible for the department's internal information program and visual information policy. The Armed Forces Radio and Television Service and Broadcast Center and the American Forces Press and Publications Service (which includes among its many products the *Current News Early Bird*) function under the director of the American Forces Information Service. *Current News Early Bird* is a Pentagon-produced newspaper that contains clippings and analysis of defense-related articles from newspapers around the country. The American Forces Information Service provides policy guidance and oversight for departmental periodicals and pamphlets, the *Stars and Stripes* newspapers, military command newspapers, and the Defense Information School, among other projects.

The Department of Defense Civilian Personnel Management Service was established on August 30, 1993, and functions under the authority, direction, and control of the undersecretary of defense for personnel and readiness. It provides services in civilian personnel policy, support, functional information management, and civilian personnel administration to DOD components and their activities.

The Department of Defense Education Activity (DODEA) was established in 1992, and also functions under the authority, direction, and control of the undersecretary of defense for personnel and readiness. It consists of three subordinate entities: the DOD dependents schools, the DOD section 6 schools, and the Continuing Adult and Post-Secondary Education Office. The DODEA formulates, develops, and implements policies, technical guidance plans, and standards for the effective management of defense activities and programs both stateside and overseas.

The Office of Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS) was established as a field activity in 1974. The office administers a civilian health and medical care program for retired service members and the spouses and dependent children of active duty, retired, disabled, and deceased service members, and also administers a program for payment of emergency medical and dental services provided to active duty service members by civilian medical personnel.

The Defense Medical Programs Activity develops and maintains the department's Unified Medical Program to provide resources for all medical activities, including planning, programming, and budgeting construction projects for medical facilities. It also provides information systems and related communications and automated systems in support of the activities of the DOD Military Health Services System (MHSS), the Defense Enrollment Eligibility and

Reporting System, the Tri-Service Medical Information System, the Reportable Disease Database, and other department-wide automated MHSS information systems.

The Defense Prisoner of War/Missing in Action Office was established on July 16, 1993, under the authority, direction, and control of the assistant secretary of defense for international security affairs. It provides centralized management of prisoner of war–missing in action (POW-MIA) affairs with the DOD. The office provides DOD personnel to negotiate with officials of foreign governments to achieve the fullest possible accounting of missing U.S. military personnel and also assembles and administrates information and databases on U.S. military and civilian personnel who are, or were, prisoners of war or missing in action. The office declassifies DOD documents and maintains open channels of communication between the department and Congress, POW-MIA families, and veterans' organizations.

The Defense Technology Security Administration was established on May 10, 1985 and functions under the control, direction, and authority of the undersecretary of defense for policy. This office is responsible for reviewing the international transfer of defense technology, goods, services, and munitions, consistent with U.S. foreign policy and national security objectives.

The Office of Economic Adjustment is responsible for planning and managing the DOD's economic adjustment programs and for assisting federal, state, and local officials in cooperative efforts to alleviate any serious social and economic side effects resulting from major departmental realignments or other actions. The office supports the secretary of defense in his or her capacity as chair of the Economic Adjustment Committee, an interagency group established to coordinate federal economic adjustment activities.

The Washington Headquarters Service is headed by the director of administration and management. It provides administrative and operational support to certain DOD activities in the Washington, D.C., area. This support includes budgeting and accounting, personnel management, office services, security, travel aid, information and data systems, and other services as required.

Web site: http://www.defenselink.mil/.

FURTHER READINGS

DefenseLINK - Official Web Site of the US Department of Defense. Available online at <www.defenselink.mil> (accessed November 20, 2003).

*U.S. Government Manual* Website. Available online at <www.gpoaccess.gov/gmanual> (accessed November 10, 2003).

CROSS-REFERENCES

Armed Services; Arms Control and Disarmament; Military Law.

## DEFENSE OF MARRIAGE ACT OF 1996

The Defense of Marriage Act (DOMA) (Pub.L. 104-199, Sept. 21, 1996, 110 Stat. 2419) is a federal law that denies federal recognition of same-sex marriages and authorizes states to refuse to recognize same-sex marriages licensed in other states. DOMA was passed out of the fear that a lawsuit in Hawaii would force that state to recognize same-sex marriages. Under the U.S. Constitution's FULL FAITH AND CREDIT CLAUSE (Article IV, Section 1), states are expected to recognize the public acts, records, and judicial proceedings of every other state. Therefore, Congress was alarmed at the prospect of a gay or lesbian couple being married in Hawaii and then going to another state and expecting that state to recognize them as legally married. In addition, Congress did not want to grant same-sex couples the same federal benefits that are given to heterosexual couples who are legally married.

The apparent need for DOMA began after the Hawaii Supreme Court issued a ruling in *Baehr v. Lewin*, 852 P,2d 44 (1993). In this case three same-gender couples filed a lawsuit after being denied marriage licenses. The couples alleged the state had acted unconstitutionally because Hawaii's state constitution contains an equal rights provision, which mandates that all persons, regardless of gender, should be given EQUAL PROTECTION of the law. The state marriage law did not state that licenses should be issued only to male-female couples. The supreme court agreed that the state marriage law should guarantee same-gender couples equal protection but did not order the state to grant the couples licenses. Instead, the court sent the case back to the lower court of appeals and directed the state to prove that the inequality of marriage rights (in this case, involving same-sex marriages) was justified.

In 1994, the Hawaii legislature changed the marriage law to explicitly state that the contract of marriage applied only to marriages between a

man and a woman. Despite this change and the reluctance of the state supreme court to address the issue again, supporters of traditional marriage around the United States voiced concern that same-sex marriage could be legitimized. If this happened in Hawaii it would generate lawsuits in other states from same-gender couples married in Hawaii seeking recognition of their new legal status. These fears intensified when the Hawaii legislature failed in 1996 to pass a proposed constitutional amendment that would overrule the court decision.

In 1996, DOMA was introduced in the House of Representatives by Representative Bob Barr (R-Ga.) and in the Senate by Senator Don Nickles (R-Okla.). It passed the House by a vote of 342–67 and the Senate by a vote of 85–14. President BILL CLINTON signed the act into law on September 21, 1996. Supporters of GAY AND LESBIAN RIGHTS had no success in stopping DOMA, in part because the vote became a REFERENDUM on the idea of "gay marriage." Even liberal Democrats who were staunch supporters of gay and lesbian rights voted for DOMA, arguing that it would be better to give same-gender couples some form of legal recognition short of traditional marriage.

The text of DOMA is very brief and contains only two provisions. The first provision states that no state, territory, or Indian tribe shall be required to legally recognize a "relationship between persons of the same sex that is treated as a marriage under the laws of another state, territory, or Indian tribe." This language tells these jurisdictions that the Full Faith and Credit Clause has no application to same sex marriages.

The second provision directs the federal government to follow a definition of the word *marriage* that means "only a legal union between one man and one woman as husband and wife." Likewise, the word *spouse* is defined as a "person of the opposite sex who is a husband or a wife." These definitions are meant to preclude a same-sex couple that has been married in a state from being eligible for federal benefits such as married INCOME TAX status and SOCIAL SECURITY survivor benefits. In effect, DOMA bars federal recognition of same-sex marriages through the use of these definitions.

Although opponents of DOMA argued that it violates both the DUE PROCESS CLAUSE of the FIFTH AMENDMENT and the Full Faith and Credit Clause they did not file a lawsuit challenging its constitutionality. By 2002, 36 states had passed laws that bar same-sex marriages or the recognition of same-sex marriages formed in other states. Hawaii, the state that started the debate, passed a constitutional amendment in 1998 that gave the legislature the right to decide on the legality of same-sex marriages. In 1999, the Hawaii Supreme Court ruled that the 1998 amendment and the act of the legislature barring same-sex marriages ended the litigation that had been pending since 1993.

Gay and lesbian organizations have shifted their political agenda since DOMA, seeking some lesser form of civil recognition for same-sex couples. Vermont became the first state to enact a law recognizing "civil unions" between same-sex couples (23 V.S.A. § 1201 et seq. [2000]). The 2000 law came in response to a 1999 Vermont Supreme Court ruling that its state constitution required same-sex couples to receive the same benefits and protections given to opposite-sex couples. The court, in *Baker v. Vermont*, 170 Vt. 194, 744 A.2d 864 (1999), rejected the plaintiffs' claim that as same-sex couples they were eligible for marriage licenses under the marriage statutes. Vermont laws reflected the common understanding that marriage consists of a union between a man and a woman.

However, the court was persuaded by the plaintiffs' constitutional claims. The plaintiffs contended that their ineligibility for a marriage license violated their rights to the common benefit and protection of the law guaranteed by Chapter I, Article 7 of the Vermont constitution. By denying them access to a civil marriage license, the law effectively excluded them from a wide array of benefits and protections, including access to a spouse's medical, life, and disability insurance; hospital visitation, and other medical decision-making privileges; spousal support; the ability to inherit property from the deceased spouse without a will; homestead protections; and over two hundred other statutory items. The court stopped short of legalizing gay marriage, stating that it was up to the legislature to modify the marriage laws, create a parallel domestic partnership system, or create some "equivalent statutory alternative." The legislature responded with the civil union statute.

Some commentators have speculated that couples from other states that are granted a civil union in Vermont may file a lawsuit in their home states challenging the constitutionality of DOMA and state laws barring same-sex marriages.

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"Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees." 2002. *Loyola Law Journal* 33.

CROSS-REFERENCES

Covenant Marriage; Gay and Lesbian Rights; Marriage.

## DEFENSE RESEARCH INSTITUTE

The Defense Research Institute (DRI) was founded in 1960 to limit the abuse of legal processes for personal injury compensation through a program of education and information. The institute seeks to improve the knowledge and ability of defense attorneys and the fairness of the ADVERSARY SYSTEM of justice. It is intended to be a counterpart to the American Trial Lawyers Association (ATLA), which is plaintiff-oriented. The institute provides research facilities such as files of speeches, briefs, and names of expert witnesses, plus a small library. Activities include institutes and programs for lawyers, law students, the general public, and special interest groups. Its members include attorneys, claims investigators, adjusters, insurance companies, trade associations, corporations, and groups of frequently targeted defendants such as doctors, pharmacists, engineers, and manufacturers.

The institute is organized into three divisions: the Arbitration Program, the Individual Research Service, and Transcripts of Economists' Testimony. DRI also has various committees including those with the following titles: ADMIRALTY LAW, Congressional Liaison, ENVIRONMENTAL LAW, Manufacturers' Corporate Counsel, Medical-Legal, PRODUCT LIABILITY, Professional Liability, Property and Liability Insurance, and Workers' Compensation.

The institute publishes *For the Defense* (monthly), *Brief Bank Index* (annually), and a membership directory. It also maintains a database of expert witnesses for defense litigation purposes.

FURTHER READINGS

Defense Research Institute. Available online at <www.dri.org> (accessed June 2, 2003).

CROSS-REFERENCES

Defendant; Defense.

## DEFICIENCY

*A shortage or insufficiency. The amount by which federal* INCOME TAX *due exceeds the amount reported by the taxpayer on his or her return; also, the amount owed by a taxpayer who has not filed a return. The outstanding balance of a debt secured by a mortgage after the mortgaged property has been sold to satisfy the obligation at a price less than the debt.*

## DEFICIENCY JUDGMENT

*An assessment of personal liability against a mortgagor, a person who pledges title to property to secure a debt, for the unpaid balance of the mortgage debt when the proceeds of a foreclosure sale are insufficient to satisfy the debt.*

Legislation enacted during the Depression still restricts the availability of deficiency judgments in several states. In some jurisdictions, deficiency judgments are proscribed in certain situations, while in other states, they are limited to the amount by which the debt exceeds the fair market value of the property. Waiver, the intentional relinquishment of a known right, of the benefits conferred by antideficiency legislation contravenes public policy and is ineffective.

## DEFICIT

*A deficiency, misappropriation, or defalcation; a minus balance; something wanting.*

Deficit is commonly used to mean any kind of shortage, as in an account, a number, or a balance due. Deficit spending or financing involves taking in less money than the amount that is paid out.

CROSS-REFERENCES

Federal Budget.

## DEFINITIVE

*Conclusive; ending all controversy and discussion in a lawsuit.*

That which is definitive is capable of finally and completely settling a legal question or action.

A *definitive judgment* is final and not provisional; a *definitive sentence* mandates imprisonment for a certain specified period of time.

*A sample deficiency judgment.*

**Deficiency Judgment**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**

**ORDER STRIKING/UNFILING PLEADING**

**The Clerk, having identified a defect in the form of the document indicated below, and the Court, having independently determined that the document should be stricken, it is ordered that the document be stricken from the record of this case. The Clerk is hereby directed to unfile and return this document to the party who filed it.**

_____ _____
DATE JUDICIAL OFFICER

**NOTICE OF DEFICIENCY**

Judge: _____ Date: _____
Case Number: _____ Plaintiff: _____
Deputy Clerk: _____ Telephone Number: _____

* * * * * * * * * * * * * * *

A(n) _____

has been filed by_____ and is considered deficient in the areas(s) noted below:

_____ 1. A civil cover sheet must be filed with the complaint. See LR 3.1(c).

_____ 2. The document(s) must be in proper form. See LR 10.1.

_____ 3. The signature of the attorney of record or the party proceeding *pro se* is required on each document filed. See F.R.C.P. 11.

_____ 4. A completed certificate of service as defined in F.R.C.P. 5(d) is required.

_____ 5. Each separate document contained therein must be identified. See LR 5.1(c).

_____ 6. The motion must include:

a. ____ certificate of conference or inability to confer. See LR 7.1(b).

b. ____ brief in support of motion. See LR 7.1(d) or LR 56.5(a).

c. ____ proposed order. See LR 7.1(c).

d. ____ documentary or non-documentary evidence in a separate appendix. See LR 7.1(i) or LR 56.6(a).

_____ 7. A motion for leave to amend must be accompanied by a copy of the proposed amended pleading attached as an exhibit and an original and second copy of the proposed pleading that is neither attached to the motion nor made an exhibit to the motion. See LR 15.1.

_____ 8. A motion for continuance of a trial setting must be signed by the party as well as by the attorney of record. See LR 40.1.

_____ 9. An attorney seeking *pro hac vice* admission must apply for admission on an approved form and pay a $25.00 fee. See LR 83.9(b).

_____10. Additional copies are required. See LR 5.1(b).

_____11. The attorney filing the pleading is not admitted to practice in this district. See LR 83.7.

_____12. The document requires a separately signed certificate of interested persons. See LR 3.1(f), LR 7.4, or LR 81.1 (a)(3)(D).

_____13. Other _____

## DEFORCEMENT

*The common-law name given to the wrongful possession of land to which another person is rightfully entitled; the detention of* DOWER *from a widow.*

Although the term includes disseisin, abatement, discontinuance, and intrusion, deforcement especially applies to situations in which a person is entitled to a life estate or absolute ownership of land but has never taken possession.

## DEFRAUD

*To make a* MISREPRESENTATION *of an existing material fact, knowing it to be false or making it recklessly without regard to whether it is true or false, intending for someone to rely on the misrepresentation and under circumstances in which such person does rely on it to his or her damage. To practice* FRAUD*; to cheat or trick. To deprive a person of property or any interest, estate, or right by fraud, deceit, or artifice.*

*Intent to defraud* means an intention to deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter, or terminate a right, obligation, or power with reference to property.

## DEGREE

*Extent, measure, or scope of an action, condition, or relation. Legal extent of guilt or* NEGLIGENCE*. Title conferred on graduates of school, college, or university. The state or civil condition of a person. The grade or distance one thing may be removed from another; i.e., the distance, or number of removes that separate two persons who are related by consanguinity. Thus, a sibling is in the second degree of kinship but a parent is in the first degree of kinship.*

## DEL CREDERE

*[*Italian, Of belief or trust.*] An arrangement in which an agent or factor—an individual who takes possession and agrees to sell goods for another—consents for an additional fee to guarantee that the purchaser, to whom credit has been extended, is financially solvent and will perform the contract.*

As the result of a *del credere agency,* the *del credere agent* becomes a surety of the purchaser. If the purchaser defaults, the agent is responsible to the principal for the outstanding amount. A *del credere commission* is the extra fee paid to the agent for such promises.

## DELECTUS PERSONAE

*[*Latin, Choice of the person.*] By this term is understood the right of partners to exercise their choice and preference as to the admission of any new members to the partnership, and as to the persons to be so admitted, if any. The doctrine is equally applicable to close and family corporations and is exemplified in the use of restrictions for the transfer of shares of stock.*

## DELEGATE

*A person who is appointed, authorized, delegated, or commissioned to act in the place of another. Transfer of authority from one to another. A person to whom affairs are committed by another.*

*A person elected or appointed to be a member of a representative assembly. Usually spoken of one sent to a special or occasional assembly or convention. Person selected by a constituency and authorized to act for it at a party or state political convention.*

*As a verb, it means to transfer authority from one person to another; to empower one to perform a task in behalf of another, e.g., a landlord may delegate an agent to collect rents.*

## DELEGATION

*A sending away; a putting into commission; the assignment of a debt to another; the entrusting of another with a general power to act for the good of those who depute him or her; a body of delegates. The transfer of authority by one person to another.*

*The body of delegates from a state to a national nominating convention or from a county to a state or other party convention. The whole body of delegates or representatives sent to a convention or assembly from one district, place, or political unit is collectively spoken of as a* delegation.

*Delegation of powers*, for example, occurs when a government branch in which authority is placed imparts such authority to another branch or to an ADMINISTRATIVE AGENCY. The U.S. Constitution delegates different powers to the three branches of government: the executive, legislative, and judicial. However, certain powers may not be transferred from one branch of government to another, such as the congressional power to declare war.

Congress has wide latitude in delegating powers to administrative agencies, and the breadth of the powers given to these agencies has led to a perception that administrative bodies are a "fourth branch" of the U.S. government. On a few occasions, mostly in the early twentieth century, the U.S. Supreme Court has applied the "non-delegation doctrine," which restricts the ability of Congress to delegate responsibilities reserved for one of the three branches of government established in the Constitution. However, the Court has seldom invoked this doctrine and rarely finds that Congress has exceeded its authority in delegating powers to agencies. Legal

scholars nevertheless continue to debate what the proper limits of congressional delegation should be.

CROSS-REFERENCES

Administrative Law and Procedure.

## DELIBERATE

*Willful; purposeful; determined after thoughtful evaluation of all relevant factors; dispassionate. To act with a particular intent, which is derived from a careful consideration of factors that influence the choice to be made.*

When used to describe a crime, deliberate denotes that the perpetrator has weighed the motives for the conduct against its consequences and the criminal character of the conduct before deciding to act in such a manner. A deliberate person does not act rashly or suddenly but with a preconceived intention.

Deliberate is synonymous with premeditated.

## DELICTUM

*[*Latin, A fault.*] An injury, an offense, or a tort—a wrong done to the property or person of another that does not involve breach of contract. Culpability; blameworthiness of a criminal nature, as in the Latin phrase* in pari delicto*—in equal fault or equally criminal—used to describe accomplices to a crime.*

An *actio ex delicto* is a lawsuit based upon the commission of a TORT, as opposed to an *actio ex contractu,* an action for breach of contract.

## DELIVERY

*The transfer of possession of real property or* PERSONAL PROPERTY *from one person to another.*

Two elements of a valid gift are delivery and donative intent. Delivery is not restricted to the actual physical transfer of an item—in some cases delivery may be symbolic. Such is the case where one person gives land to another person. Land cannot be physically delivered, but delivery of the deed constitutes the transfer if coupled with the requisite intent to pass the land on to another.

Similarly, delivery can take place in a situation where goods are set apart and notice is given to whoever is scheduled to receive them. This is known as constructive delivery.

## DEMAND

*Peremptory allegation or assertion of a legal right.*

A demand is an emphatic claim, which presumes that no doubt exists regarding its legal force and effect. It is a request made with authority.

A *money demand* is a demand for a fixed sum of money that arises out of an agreement or contract. COMMERCIAL PAPER is frequently payable on demand or immediately upon request.

A *legal demand* is one that is made by a lawfully authorized individual and is proper as to form, time, and place.

## DEMEANOR

*The outward physical behavior and appearance of a person.*

Demeanor is not merely what someone says but the manner in which it is said. Factors that contribute to an individual's demeanor include tone of voice, facial expressions, gestures, and carriage.

The term *demeanor* is most often applied to a witness during a trial. Demeanor evidence is quite valuable in shedding light on the credibility of a witness, which is one of the reasons why personal presence at trial is considered to be of paramount importance and has great significance concerning the HEARSAY rule. To aid a jury in its determination of whether or not it should believe or disbelieve particular testimony, it should be provided with the opportunity to hear statements directly from a witness in court whenever possible.

## DEMISE

*Death. A conveyance of property, usually of an interest in land. Originally meant a posthumous grant but has come to be applied commonly to a conveyance that is made for a definitive term, such as an estate for a term of years. A lease is a common example, and demise is sometimes used synonymously with "lease" or "let."*

## DEMOCRATIC PARTY

The modern Democratic Party is the descendant of the DEMOCRATIC-REPUBLICAN PARTY, an early-nineteenth-century political organization led by THOMAS JEFFERSON and JAMES MADISON. Also known as the Jeffersonian Republican Party, the Democratic-Republican Party began

as an antifederalist group, opposed to strong, centralized government. The party was officially established at a national nominating convention in 1832. It dropped the Republican portion of its name in 1840.

Despite destructive struggles and philosophical shifts, the Democratic Party remains a dominant political force in the United States. The Democrats compete for office with the Republicans, their counterparts in the United States's de facto two-party system though third-party candidates and independents have experienced increasing success at both the state and federal levels, with Minnesota Governor Jesse Ventura, a former professional wrestler and Navy Seal, being the most visible example. He won the gubernatorial race as a member of the state's REFORM PARTY.

The Democratic Party of the late 1990s supports liberal government policies in social and economic matters. The early party disapproved of federal involvement. Jefferson, Madison, and James Monroe—Virginians who were each elected president of the United States—favored limited powers for the national government.

The fundamental change in Democratic philosophy was the result of fluid coalitions and historical circumstance. The master coalition builder and founder of the modern Democratic Party was ANDREW JACKSON, a populist president who was portrayed as a donkey by political satirists. Jackson transformed presidential politics by expanding party involvement. (The donkey later became the symbol for the Democratic Party.)

The transformation began after Jackson's first unsuccessful bid for the White House. In the 1824 presidential election, Jackson won the popular vote but failed to win a majority in the ELECTORAL COLLEGE. The U.S. Constitution requires the House of Representatives to select the president under these circumstances. When the House chose JOHN QUINCY ADAMS, Jackson was incensed—and began a four-year campaign to win the next presidential election.

With help from political adviser and future president MARTIN VAN BUREN, Jackson won the presidency in 1828.

Jackson had benefited from growth in the nation's population and from laws that increased the number of U.S. citizens eligible to vote. In the 1824 presidential election, about 365,000 votes had been counted. In the 1828 election, over 1 million votes were cast, an increase that clearly helped Jackson, the so-called people's president.

In reaching his goal, Jackson laid the groundwork for a strong party system. He set up an efficient Democratic political organization by forming committees at the local, district, and state levels; holding rallies and conventions; generating publicity; registering new voters; and getting people to the polls.

**Democratic National Convention Sites, 1832 to 2004**

| Year | Site |
|---|---|
| 1832 | Baltimore |
| 1836 | Baltimore |
| 1840 | Baltimore |
| 1844 | Baltimore |
| 1848 | Baltimore |
| 1852 | Baltimore |
| 1856 | Cincinnati |
| 1860 | Baltimore[a] |
| 1864 | Chicago |
| 1868 | New York City |
| 1872 | Baltimore |
| 1876 | St. Louis |
| 1880 | Cincinnati |
| 1884 | Chicago |
| 1888 | St. Louis |
| 1892 | Chicago |
| 1896 | Chicago |
| 1900 | Kansas City, MO |
| 1904 | St. Louis |
| 1908 | Denver |
| 1912 | Baltimore |
| 1916 | St. Louis |
| 1920 | San Francisco |
| 1924 | New York City |
| 1928 | Houston |
| 1932 | Chicago |
| 1936 | Philadelphia |
| 1940 | Chicago |
| 1944 | Chicago |
| 1948 | Philadelphia |
| 1952 | Chicago |
| 1956 | Chicago |
| 1960 | Los Angeles |
| 1964 | Atlantic City |
| 1968 | Chicago |
| 1972 | Miami Beach |
| 1976 | New York City |
| 1980 | New York City |
| 1984 | San Francisco |
| 1988 | Atlanta |
| 1992 | New York City |
| 1996 | Chicago |
| 2000 | Los Angeles |
| 2004 | Boston |

[a]An earlier convention, held in Charleston, South Carolina, had resulted in a split ticket in the party. The official nomination was made at the Baltimore convention.

SOURCE: *Democratic Nation Convention* website.

Jackson also backed the newly created convention system for nominating presidential candidates and was himself nominated for reelection at the 1832 Democratic convention. The original purpose of conventions was to allow local input in the political process. In Jackson's time, conventions were forums for debate and deal making.

As the Democratic Party changed in form and purpose, alliances became more difficult. Relations between southern and northern Democrats were increasingly strained. Southern states sought the reduction of tariffs, or taxes on imports, whereas northern states favored tariffs to safeguard their manufactured goods. Some southern Democrats suggested that individual states could nullify federal tariff laws.

Even more troublesome was the issue of STATES' RIGHTS and SLAVERY. The regional split within the party widened over the designation of new territories as free or slave states. The breaking point was the 1860 national convention. The Democrats were divided—the southern faction favored John C. Breckinridge, and the northerners selected STEPHEN A. DOUGLAS. Although Douglas advocated limited national control, or popular sovereignty, the southern delegates were not appeased. Republican nominee ABRAHAM LINCOLN capitalized on the dissension in the Democratic Party and won the election.

Following Lincoln's election came a twenty-four-year spell with no Democrat in the White House. After the Civil War, Democrats were denounced in the North because they had not supported legislation to finance the war or to enlist new soldiers. Meanwhile, the South became solidly Democratic in response to the Republicans' unpopular Reconstruction policies.

During the nineteenth century, the Democrats also created powerful urban political machines such as New York City's TAMMANY HALL. In these systems, people were offered political jobs or money in exchange for voter loyalty. Immigrants tended to support the Democratic Party and machine politics as a way to gain a foothold in their new country. Unfortunately, the machines became sources of corruption and graft.

In 1884, Democratic nominee GROVER CLEVELAND, of New York, was elected president with a pledge to end political patronage and support for the gold standard. Again, factionalism undermined Democratic strength. WILLIAM JENNINGS BRYAN, a powerful Democratic orator, supported free coinage of silver currency. He tapped into the discontent of southern and western farmers who sought government assistance. He also drew support from the labor movement. With Bryan as the unsuccessful Democratic presidential nominee in 1896, 1900, and 1908, the party's original position on limited government was all but abandoned.

Factionalism was the party's strength as well as its weakness. On the one hand, it gave minority interests a chance to be heard. However, successful coalitions among the different interests were difficult to achieve. The traditional Democratic alliance consisted of labor supporters, immigrants, farmers, urban interests, and southern populists. Later, African Americans and northern liberals joined the coalition.

After Bryan's losses, the Democrats were determined to regain the White House. In 1912, former Princeton University President WOODROW WILSON won the nomination on the forty-sixth ballot of the Democratic convention. A liberal reformer, Wilson defeated Republican WILLIAM HOWARD TAFT and third-party candidate THEODORE ROOSEVELT. Wilson's accomplishments as president included lowering tariffs, establishing the FEDERAL TRADE COMMISSION, backing antitrust legislation, and leading the country during WORLD WAR I. However, the Republicans regained the presidency in 1920 with a huge victory by WARREN G. HARDING.

The Republicans prevailed for the next decade. Finally, in 1932, the Democratic Party triumphed at the polls with the election of New York's FRANKLIN D. ROOSEVELT. Roosevelt introduced his sweeping NEW DEAL to pull the nation out of the Great Depression. Ambitious government programs helped put many businesses and millions of people back on their feet. The Roosevelt administration openly embraced social WELFARE programs and economic regulation. Elected president in 1932, 1936, 1940, and 1944, Roosevelt was the only president in U.S. history to win four terms in office, before the constitutional limitation of two consecutive terms was put in place in 1951 with the ratification of the TWENTY-SECOND AMENDMENT to the U.S. Constitution. He also steered the nation through most of WORLD WAR II.

After Roosevelt's death in 1945, Vice President HARRY S. TRUMAN assumed office. In 1948, after Truman had supported key CIVIL RIGHTS

legislation, a cadre of southern Democrats rebelled by joining the Dixiecrat Party, a group advocating states' rights and SEGREGATION. The Dixiecrats eventually disbanded, and some southern Democrats switched to the REPUBLICAN PARTY. This shift began in earnest with the election of DWIGHT D. EISENHOWER in 1952 and peaked with the election of RONALD REAGAN in 1980 and 1984.

In 1960, Democratic nominee JOHN F. KENNEDY became the first Roman Catholic to hold the Oval Office. Kennedy's administration, called the New Frontier, established the Peace Corps; weathered the CUBAN MISSILE CRISIS, in which it convinced the Soviet Union to dismantle long-range nuclear missile sites in Cuba and return the missiles to Russia; and lent support to INTEGRATION efforts in the South. After Kennedy's assassination in 1963, Vice President LYNDON B. JOHNSON was sworn in as president. He later defeated Republican BARRY M. GOLDWATER for the chief executive position in the 1964 general election.

Johnson strongly supported civil rights, a position that further eroded the Democrats' base of southern whites and northern labor and ethnic voters. Johnson's policies for U.S. military involvement in Southeast Asia made him unpopular at home and abroad. In 1968, after Johnson declined a reelection bid, the Democrats held a tumultuous convention in Chicago that tarnished the image of party leaders and Chicago police. As protesters and police officers clashed on the streets, convention delegates nominated Minnesota's HUBERT H. HUMPHREY, despite a groundswell of support for VIETNAM WAR critic EUGENE MCCARTHY. Humphrey lost the general election to Republican RICHARD M. NIXON.

In 1976, Governor JIMMY CARTER, of Georgia, reclaimed the White House and the South for Democrats. Carter served one term, losing the 1980 election to Republican Reagan. Another southern Democrat, Governor BILL CLINTON, of Arkansas, won the presidency in 1992 and again in 1996, becoming the first Democratic president to win reelection since Franklin D. Roosevelt.

Under Bill Clinton, the Democratic Party was led to what many believed to be a centrist position. After the failure of his HEALTH CARE plan in the early part of his term, Clinton backed welfare reform and ran a budget surplus through most of his presidency. At the same time, Clinton did not shrink from all liberal positions, vetoing Republican efforts to ban partial-birth ABORTION and to reform BANKRUPTCY laws to help creditors, among other things, and allowing the government to be shut down for a long period rather than give in to Republican spending cuts.

*Al Gore and Joe Lieberman, the Democratic Party's candidates for president and vice president in the 2000 election, at the Democratic National Convention in Los Angeles.*

AP/WIDE WORLD PHOTOS

The IMPEACHMENT of Clinton in 1999 furthered the partisan divide in the country. Led by a Republican Congress, the impeachment was backed by a majority of Republicans and opposed by a majority of Democrats. Despite the embarrassment to Clinton, the impeachment did not seem to hurt the Democrats in the same way WATERGATE hurt the Republicans—the Democrats actually picked up seats in the House and the Senate in both the 1998 and 2000 elections.

Just how evenly the country was split between the Republicans and Democrats was illustrated by the 2000 election. Democratic presidential candidate AL GORE won the popular vote by over 500,000 votes; however, the Electoral College was another story. A disputed ballot count in Florida kept the election from being officially decided for over a month after Election Day. When it was over, GEORGE W. BUSH had become president of the United States by a mere 537 votes, according to the Florida statewide official tally. Bush beat Al Gore in the Electoral College 271-266, one of the closest results in U.S. history.

Ironically, considering that they won the popular vote for president and picked up seats in both the House and Senate, the 2000 election paradoxically left the Democrats in their weak-

est position since the Eisenhower administration. In addition to the presidency, the Republicans controlled the House and the Senate by slim majorities. In the Senate, that majority consisted of one seat.

However, the decision by Republican Senator Jim Jeffords, of Vermont, to become an independent in 2001 gave the Senate majority to the Democrats for the first time since 1994. Using their majority, the Democrats were able to frustrate President Bush on some of his proposed policies, though they were too weak to pass legislation on their own. The Republicans strengthened their position after the 2002 election, regaining control of the Senate and increasing the number of seats they controlled in the House. But they still did not have enough votes to stop a Democratic filibuster in the Senate, thus giving the Democrats a measure of power.

Some party activists felt at the end of the 2002 campaign that the Democratic Party had lost its way with the centrist policies advocated by former President Clinton and others—they saw the way back to power to take the party in a more liberal direction and to delineate more strongly their differences with Republicans. Others saw this as political suicide, pointing out that Clinton was the only successful Democratic candidate in the past quarter century. Whom the Democrats nominate for the 2004 presidential election was seen as an important determinant of what direction the Democratic Party goes from here, in an era when much of Middle America appears politically ambivalent, fluctuating across party lines.

FURTHER READINGS

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Wilson, James Q. 2004. *American Government: Institutions and Policies.* 9th ed. Boston: Houghton Mifflin.

CROSS-REFERENCES

Elections; Republican Party.

## DEMOCRATIC-REPUBLICAN PARTY

The Jeffersonian Republican party, better known as the Democratic-Republican Party, is an ancestor of the modern DEMOCRATIC PARTY. It evolved in the 1790s during the early days of GEORGE WASHINGTON's presidency. Washington had been unanimously chosen president in 1789 and had a broad base of support. THOMAS JEFFERSON served as Washington's SECRETARY OF STATE, while ALEXANDER HAMILTON served as secretary of the treasury. Jefferson and his followers favored states' rights and a strict interpretation of the Constitution. They believed that a powerful central government posed a threat to individual liberties. They viewed the United States more as a confederation of sovereign entities woven together by a common interest. Hamilton and his followers argued that a strong central government was essential to the unity of the new nation. They favored a broad interpretation of the Constitution, which they saw as a document that should evolve with the country as it grew.

Virtually all the leading political figures of the new country, starting with Washington, believed that political parties would polarize citizens and paralyze government. Hamilton and Jefferson agreed with this notion, but by 1793 the two groups that they represented had broken off into separate factions. Hamilton's group became the Federalists, while Jefferson's faction adopted the name "Democratic Republicans."

One early and divisive difference between the Federalists and the Democratic-Republicans was how they approached Britain and France. The Federalists believed that American foreign policy should favor British interests, while the Democratic-Republicans wanted to strengthen ties with the French. The Democratic-Republicans supported the government that had taken over France after the revolution of 1789.

On economic matters, the Jeffersonians differed strongly with the Federalists. The Democratic-Republicans believed in protecting the interests of the working classes—merchants, farmers, and laborers. They believed that an agrarian economy would best serve these citizens. They saw the establishment of a national BANK OF THE UNITED STATES (which Hamilton strongly favored) as a means of usurping power that belonged to individual states, and they also believed that it would be tied too closely to the rich. The Federalists saw industry and manufacturing as the best means of domestic growth and economic self-sufficiency. They favored the existence of protective tariffs on imports (which had Congress had adopted in 1789) both as a means of protecting domestic production and as a source of revenue.

The ratification in 1795 of Jay's Treaty (named after JOHN JAY) sparked anger at the Federalists from a wide array of citizens. The British were still in control of fur-trading posts in the Northwest Territories, and they were

accused of encouraging Indians to rise up against the Americans. British ships were seizing American ships and impressing American sailors; they were also prohibiting American ships from engaging in trade with the West Indies. Jay, the chief justice of the U.S. Supreme Court, was sent to England as an envoy and returned with a treaty that gave the British a deadline for leaving the fur posts. Almost none of the other issues was addressed. A particularly unpopular provision of the treaty called for the U.S. to settle pre-Revolution debts to the British, totaling $2.6 million.

Jeffersonians, and even many Federalists, felt that the treaty had been too generous to the British, although Hamilton saw it as a necessary action because Britain generated tariff revenues through its exports. In 1796, JOHN ADAMS (a Federalist) was elected the nation's second president with 71 electoral votes, defeating Jefferson by three votes. Jefferson became vice president.

Meanwhile, relations with France were deteriorating rapidly. The notorious "XYZ Affair" in 1796 was typical of what Jeffersonians saw as the weakness of FEDERALISM. The XYZ AFFAIR involved an unsuccessful attempt by a French agent to exact bribes in exchange for France's cooperation in negotiating an international trade treaty. France, angered by the pro-British Jay's Treaty, began to interfere with American ships. An American delegation was sent to France, and the French demanded a loan to the French government as well as a $240,000 bribe.

Although American public opinion hardened against the French, President Adams tried to repair the situation diplomatically, which angered many Federalists who thought that declaring war on France was the best course of action. This split within the FEDERALIST PARTY helped to ensure Jefferson's victory in the 1800 presidential election. Democratic-Republicans also won a majority of the seats in Congress.

Jefferson's party dominated American politics for the next two decades. One reason was that the Jeffersonians proved themselves to be willing to adapt to change. An example was the LOUISIANA PURCHASE of 1803. As a Republican, Jefferson initially felt that the president did not have the power to make such a large purchase (828,000 square miles). He recognized, however, that the price of $15 million (about three cents per acre) was a significant bargain, and that the purchase would double the size of the U.S. and also eliminate the danger of having an imperialist French colony on its border. He went against his partisan instinct and made what he believed was the right decision for the country.

During the WAR OF 1812, Jefferson's successor, JAMES MADISON, battled the British overseas and the Federalists at home. Many Federalists, especially in the New England states, felt that the war would irreparably damage their ability to trade by sea with Europe. This anti-war stance proved unpopular, however, since the war ended in what most Americans perceived as a victory over Great Britain. Thus the Federalists were soundly defeated in the 1816 presidential election. The new president, JAMES MONROE, presided over a time of relative political calm during which many Federalists came to support the Republicans. This period was known as the "Era of Good Feeling," and although Monroe enjoyed wide support during his two terms in office, various factions were developing within his own party.

In the election of 1824, JOHN QUINCY ADAMS was elected president, narrowly defeating War of 1812 military hero ANDREW JACKSON. Although both were Democratic-Republicans, Adams's political philosophy was closer to that of the Federalists, and during his term in office the party split into two main factions. When Jackson ran for president in 1828, he ran as a Democrat—and won handily. Adams's wing of the party became known as the National Republicans, many of whom later formed the WHIG PARTY.

FURTHER READINGS

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Cunningham, Noble E., 1963. *The Jeffersonian Republicans in Power: Party Operations, 1801–1809.* Chapel Hill, N.C.: Univ. of North Carolina Press.

## DEMONSTRATIVE EVIDENCE

*Evidence other than testimony that is presented during the course of a civil or criminal trial. Demonstrative evidence includes actual evidence (e.g., a set of bloody gloves from a murder scene) and illustrative evidence (e.g., photographs and charts).*

Many trial attorneys view the presentation of evidence to the jury as analogous to the presentation of information by a teacher to students. As in the classroom, the involvement of more than one of a juror's senses in the courtroom increases the amount of information retained by that juror. For example, combining verbal testimony

from witnesses with before and after X rays, or introducing a defective machine part that jurors can hold in their hands for inspection, makes for compelling courtroom activity. In a modern, "show-me" society, the ability of a trial lawyer to use demonstrative evidence effectively can make the difference between winning and losing a case.

One common and effective example of demonstrative evidence is the still photograph. Photographs of a plaintiff's bruises taken immediately after an accident can help a jury understand those injuries in a trial that occurs months or even years after the accident, when the injuries may have healed. Aerial photographs of the scene of a vehicular accident can show how a particular intersection is laid out, and can make more clear an ambiguous description of a blind intersection given by a witness.

X rays and medical models and illustrations can be very helpful to a jury in physical injury cases. These examples of demonstrative evidence help the jury "see inside" the victim to understand the nature and extent of the injuries. X rays can show not only fractures but also permanent metal pins and plates. Accurate models of a plaintiff's head and neck can show the interaction between the cervical area of the spine and the surrounding muscle and tissues in a soft-tissue injury case. Sometimes, partial or full skeletons are brought into courtrooms to demonstrate losses or restrictions of movement due to injuries. Modern computer-generated illustrations can show the exact injury to a specific plaintiff, as opposed to the generic injury represented in a stock medical illustration.

Graphs and charts are perhaps the most useful forms of demonstrative evidence. These tools can vividly illustrate a loss of earnings, a decrease in life expectancy, and past and future medical bills. Clear and concise charts can help a jury to arrange a complex set of events in a chronological fashion. These time lines can be crucial in organizing evidence, whether in a criminal trial or in a complex SECURITIES litigation. Often, maps and other geographic charts are used to show water flow, elevation, and other physical characteristics of real property (land).

Graphs and charts can be presented to a jury in a variety of ways. In addition to offering the standard large prepared poster board on an easel, some attorneys prefer to create charts as they speak to the jury, using large blank pieces of poster board and colored marker pens. Other attorneys like the dramatic effect of dimming the courtroom lights and using an overhead projector or computer screen to focus visual attention on their illuminated charts and graphs. Whatever the style of presentation, well-constructed charts and graphs that make good use of color and are clear and easy to understand are appreciated by jurors and can have a big effect during deliberations.

Articles and objects are also forms of demonstrative evidence. In addition to actual evidence that is introduced at trial (like the knife from a murder scene), other physical articles and objects can be used to help the jury understand the testimony. For example, in a PRODUCT LIABILITY action based on a defective artificial hip, giving the jury models of ball-and-socket joints to manipulate and examine with their own hands can clarify testimony regarding the replacement joint that is still inside the plaintiff. Three-dimensional models and mock-ups of roadways, accident sites, or proposed buildings can simulate the outside world inside the courtroom to give proportion and scale to a witness's testimony.

With the permission of the judge, attorneys may be allowed to take the jurors to the scene of the crime or accident. Here, all a juror's senses are at work, and testimony presented in court can be compared to and contrasted with the physical scene. A list prepared by both attorneys of items to "notice" may be read by the bailiff at the scene. Many juries appreciate not only the chance to get outside the courtroom but also the opportunity to see for themselves the place where it all happened.

With the advent of low-cost videocassette players and recorders, it has become more and more common to see videotape in the courtroom. A "day in the life of . . ." video can graphically demonstrate the activities of a plaintiff living with debilitating injuries. For example, a plaintiff witness may say, "I can't pick up my children," whereas a video can actually show the plaintiff's young children milling about with the plaintiff able only to sit by and watch them. Videotapes can also show the traffic volume at a busy intersection or provide a driver's-eye view of a road sign obstructed by brush and leaves. If a jury is unable to leave the courtroom to visit the scene of a fire, a video camera can provide a tour through the burned-out remains of the family's residence. Some attorneys have actually begun hiring stuntpersons to re-create vehicular accidents, driving comparable vehicles at the

speeds they were going when the accidents occurred, and filming the results. Unlike a controlled dramatic re-creation, this kind of actual re-creation, with its inherent danger yet accurate representation of accident conditions, can be an effective tool at trial.

Though waning in popularity owing to the greater availability and lower cost of computers, slide projectors and human-created animation are still used by some attorneys. By taking two slide projectors, superimposing their projections, and connecting them with a sophisticated mechanical device, an attorney can make a before picture fade into an after picture with dramatic results. As with a presentation using an overhead projector, the dark courtroom and brightly-lit screen of a slide presentation focus the jury's visual attention. Animated cartoon shorts, hand inked by artists, are eye-catching and can portray exactly what the attorney wants to emphasize to the jury: for example, a cutaway "operating" engine might show how a defective part can cause the engine to break down.

Computers and computer-generated displays are at the cutting edge of demonstrative evidence. Computer-enhanced graphics can demonstrate anything from the speed of a vehicle to the loss of range of motion on an injured portion of the body. Computers also provide high storage capacity. One CD-ROM disc can store thousands of still photos, graphs, charts, digitized video clips, and even three-dimensional computer animations. An attorney who uses a computer to coordinate a presentation can combine many different forms of demonstrative evidence into a cohesive and dramatic whole. Still photos of an injury might be followed by a digitized video showing limited physical abilities after the injury. X-ray images can fade into graphs showing a loss of earning capacity. All these exhibits can be stored in a laptop computer and presented with minimal setup and distraction to the jurors. And the attorney making the presentation can instantly return to a particular demonstrative exhibit when making a point during closing arguments.

Another significant development in courtroom technology is the use of bar codes. This technology is helpful in organizing evidence in cases with numerous exhibits. Bar codes function in court much as they do in the department or grocery store. Exhibits, be they photographs or documents, are stored on CD-ROM according to bar code. By entering or scanning the number, the item is immediately retrieved and can be displayed on the computer screen.

*A common and effective type of demonstrative evidence is the still photograph. A police technician points to an area on an interior photograph of a defendant's home where fiber evidence (actual evidence) submitted in a San Diego, California, murder trial was discovered.*

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Many newer courtrooms are now equipped with individual computer terminals, so that jurors may view computer displays by attorneys on individual screens in the jury box. A future development may be the use of virtual reality—where individuals see and hear computer-generated images and sounds, and through body sensors "see" their hands and body within the simulation.

No matter the technology, demonstrative evidence must still conform to standard evidentiary rules. The trial court may disallow any item of demonstrative evidence that is inaccurate or incomplete. Courts can also strike evidence if it is unnecessarily cumulative: for example, 30 photographs of one bruise that can be seen clearly in one or two photographs constitute evidence that is unnecessarily cumulative.

An attorney must keep in mind that demonstrative evidence is not real evidence: it merely illustrates the points being argued to the jury and court. Computer-generated animation may only portray evidence that has been properly presented to the jury through testimony or as physical evidence. A chart or graph may only present numbers and amounts that have been properly calculated and proved. No matter how exciting the "show," the attorney must remember that items of demonstrative evidence are merely props, and that the witnesses and their testimony are still the primary method of presenting evidence to a jury.

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## DEMONSTRATIVE LEGACY

*A gift by will of money or other* **PERSONAL PROPERTY** *that is to be paid to an heir from a fund designated in the provisions of the will but, in any event, is to be paid if there are sufficient available assets in the estate.*

A demonstrative legacy differs from a specific legacy, a gift of particular personal property by will. A demonstrative legacy is payable from the general assets of the estate that have not been specifically devised or bequeathed if its designated source has been adeemed or no longer exists or if it is inadequate to satisfy the gift. In the case of a specific legacy the **ADEMPTION** of property revokes the gift completely so that the heir receives nothing. However, if the value of the gift has only been reduced, the heir receives the decreased value.

Courts often interpret provisions of a will that appear to grant specific legacies of money or shares of stock as demonstrative legacies to avoid the consequences of ademption where it is clear that the testator intended the gift to be made in any event.

## DEMUR

*To dispute a legal* **PLEADING** *or a statement of the facts being alleged through the use of a demurrer.*

## DEMURRAGE

*A separate freight charge, in addition to ordinary shipping costs, which is imposed according to the terms of a carriage contract upon the person responsible for unreasonable delays in loading or unloading cargo. In maritime law, demurrage is the amount identified in a charter contract as damages payable to a shipowner as compensation for the detention of a ship beyond the time specified by a charter party for loading and unloading or for sailing.*

Demurrage is intended to serve the public interest by facilitating the flow of commerce through the prompt loading and unloading of cargo. In general, the person liable for demurrage is the one who assumed the duty to unload or load the cargo but failed to fulfill it. A consignee who agrees to unload a shipment but unreasonably delays in doing so is liable for the charge.

Payment of demurrage is excused only if the delay was unavoidable, such as a delay caused by a natural disaster or the fault of the carrier. *Reciprocal demurrage* may be imposed upon a carrier who unreasonably delays in providing transportation to customers. The practical effect of reciprocal demurrage is a reduction in the customer's shipping charges unless the contractual amount exceeds that figure. If a person against whom demurrage is imposed fails to pay, the carrier might have a right to keep the goods until payment is made. This is known as demurrage lien, enforceable only if authorized by statute, contract, or custom.

CROSS-REFERENCES

Shipping Law.

## DEMURRER

*An assertion by the defendant that although the facts alleged by the plaintiff in the complaint may be true, they do not entitle the plaintiff to prevail in the lawsuit.*

The pleadings of the parties to a lawsuit describe the dispute to be resolved. The plaintiff sets out the facts that support the claim made in the complaint, and the defendant then has an opportunity to respond in an answer.

A demurrer is a type of answer used in systems of **CODE PLEADING**, established by statute to replace the earlier common-law **FORMS OF ACTION**. While a demurrer admits the truth of the plaintiff's set of facts, it contends that those facts are insufficient to grant the complaint in favor of the plaintiff. A demurrer may further contend that the complaint does not set forth enough facts to justify legal relief or it may introduce additional facts that defeat the legal effectiveness of the plaintiff's complaint. A demurrer asserts that, even if the plaintiff's facts

are correct, the defendant should not have to answer them or proceed with the case.

Under the modern rules of PLEADING established by the rules of federal CIVIL PROCEDURE and followed in a number of states, the demurrer has been abolished as a formal type of answer. The same argument against the plaintiff's CAUSE OF ACTION can be, however, made by motion to dismiss the plaintiff's action on the ground that he or she has failed to state a claim on which relief can be granted. Even where the formal demurrer is no longer used, lawyers and judges often use the old term for an argument of the same type.

## DENY

*To refuse to acknowledge something; to disclaim connection with or responsibility for an action or statement. To deny someone of a legal right is to deprive him or her of that right.*

A *denial* is a part of a legal PLEADING that refutes the facts set forth by the opposing side. A *general denial* takes exception to all the material elements of the complaint or petition, and a specific denial addresses a particular allegation in issue.

## DEPARTMENT OF . . .

See specific department; e.g., EDUCATION DEPARTMENT.

## DEPENDENT

*A person whose support and maintenance is contingent upon the aid of another. Conditional.*

A dependent is someone who is sustained by another person, such as a child supported by his or her parents.

In an insurance policy, the term *legal dependent* generally includes all of those people whom the insured person is under a legal duty to support, such as a spouse and minor children. A *lawful dependent* includes someone whom an insured person is permitted, but not required, to support.

That which is dependent is conditional upon the occurrence of another event. A *dependent contract* is an agreement between two parties that is conditional upon another agreement. For example, one person agrees to deliver goods to another person only after that person contracts to purchase such goods from the first person only for a certain designated period.

## DEPENDENT RELATIVE REVOCATION

*The doctrine that regards as mutually interrelated the acts of a testator destroying a will and executing a second will. In such cases, if the second will is either never made or improperly executed, there is a rebuttable presumption that the testator would have preferred the former will to no will at all, which allows the possibility of probate of the destroyed will.*

Some jurisdictions decline to apply the doctrine of dependent relative revocation to cases to eliminate a written revocation of a will, but apply it to declare the ineffectiveness of a physical act of revocation. The justification for the distinction is that the physical act is inherently equivocal. The court has the power to interpret the ambiguous act to ascertain what the testator did but not to disregard an express statement of the testator and substitute its own conception of what the testator should have done.

The doctrine of dependent relative revocation contravenes the strict interpretation of and demand for rigid adherence to the specific language of the statutes concerning the execution and revocation of wills and the theory of the PAROL EVIDENCE rule. In deciding whether to apply the doctrine, the court considers the testamentary pattern of the decedent, the terms of the prior wills, the respective identities and shares of the beneficiaries under the previous will and the new will in question, the nature of the defect that prevents the new will from taking effect, and the trustworthiness of the proof of the reasons for the testator's desire to make the desired objective to the former testamentary plans as contrasted to the application of the laws of DESCENT AND DISTRIBUTION. The court will not execute a new will, but it will eradicate revocations to infuse new life into a prior will that achieves the same objective.

## DEPENDENT STATES

States can be classified into two general categories: dependent and independent. A dependent state does not exercise the full range of power over external affairs that an independent state possesses under INTERNATIONAL LAW. The controlling or protecting state may also regulate some of the internal affairs of the dependent state. Formal treaties and the conditions under which the status of dependency has been recognized by other states govern the balance of sovereign powers exercised by the protecting state and the dependent state. Various terms have

*Federal law allows the owners of mining operations, such as this copper mine in southeastern Arizona, to claim a tax deduction upon the depletion of the mine's natural deposits.*

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been used to describe different types of dependent states, such as condominium, mandate, protectorate, and vassal state. Since 1945 there has been strong international pressure to eliminate forms of dependency associated with colonialism.

## DEPLETION ALLOWANCE

*A tax deduction authorized by federal law for the exhaustion of oil and gas wells, mines, timber, mineral deposits or reserves, and other natural deposits.*

Frequently, the ownership of such resources is split so that the depletion deduction is allotted among the various owners. Rights to royalty payments, leases, and subleases are not the same as ownership but the holders of such rights may be entitled to depletion deductions under the theory of "economic interest" formulated by the courts to ascertain the right to depletion allowances. Such economic interest, which signifies an investment interest in the minerals that furnish the sole resource for recouping the investment, is usually determined by the parties according to the provisions of their contract.

The cost method and the percentage, or statutory, method represent the two ways of calculating the DEPLETION ALLOWANCE.

Cost depletion, like depreciation, bases the allowance on the original cost of the income-generating property. For example, a taxpayer who purchases rights to extricate oil for $2 million should be permitted to regain the capital tax-free when he or she extracts and markets the oil. The earnings from the depletable property should be viewed as encompassing a return of the taxpayer's capital investment. A proportionate segment of such receipts each year should be exempt from taxation as income. When oil is viewed as a "wasting asset," cost depletion permits yearly deductions for the receipt of $2 million tax-free over the duration of the pumping operations. The tax law permits the taxpayer to divide the cost of the investment by the estimated total of recoverable units in the natural deposit. This cost per unit is subsequently multiplied by the number of units sold annually, which results in the depletion deduction permitted for that year.

The percentage, or statutory, method does not employ recovery of cost in the computation of the deduction. A percentage of annual income, rather than cost, is deductible each year, even if the owner has recovered all cost or discovery value of the depletable asset. The federal tax laws vary from year to year in regard to the percentage depletion allowable for oil and some other deposits, and the categories of producers entitled to such allowances.

Percentage depletion, which applies to other mineral deposits or energy sources such as geothermal steam, provides an extremely profitable allowance as an alternative to cost depletion. The taxpayer calculates a fixed percentage of his or her gross income and deducts that amount from gross income annually for as long as the property generates income, even after he or she has completely recovered the actual cost. Some taxpayers employ cost depletion at the outset of operations, when a large number of units of the deposit are extracted and sold, and then convert to percentage depletion upon recoupment of cost in other circumstances—when percentage depletion yields a more sizable deduction.

Percentage depletion furnishes an additional tax subsidy to detection, development, and dissipation of qualified reserves. The subsidy approach began during WORLD WAR I to induce exploration for minerals. Cost depletion had been expanded to permit discovery value rather than cost to serve as the gauge of tax-exempt recovery. A problem in estimating the quantity of depletable units prior to extraction existed, however, and percentage depletion was enacted in 1924 as the solution. This method was subsequently extended to include additional minerals and other deposits and to raise rates of depletion in some instances. It was eventually diminished due to excessive profits and tax benefits obtained

by some companies. Only depletion, rather than percentage depletion, may be used for gas, water, soil, timber, and oil.

For percentage depletion, gross income must be restricted to income from extracting and selling the deposit, not from refining, processing, or manufacturing it.

The option to deduct present exploration and development expenditures rather than capitalizing them represents an additional tax advantage for the industries entitled to depletion allowances. A more substantial tax benefit ensues if such expenses are deducted immediately, since they would never be recovered through the application of percentage depletion, which is based on gross income and not the cost of the capital invested in the enterprise.

CROSS-REFERENCES

Income Tax; Mine and Mineral Law.

## DEPONENT

*An individual who, under oath or affirmation, gives out-of-court testimony in a deposition. A deponent is someone who gives evidence or acts as a witness. The testimony of a deponent is written and carries the deponent's signature.*

## DEPORTATION

*Banishment to a foreign country, attended with confiscation of property and deprivation of* CIVIL RIGHTS.

*The transfer of an alien, by exclusion or expulsion, from the United States to a foreign country. The removal or sending back of an alien to the country from which he or she came because his or her presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated. The grounds for deportation are set forth at 8 U.S.C.A. § 1251, and the procedures are provided for in §§ 1252–1254.*

To further clarify deportation, the U.S. Supreme Court, in *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct.2491, 150 L.Ed.2d 653 (2001), ruled that ALIENS who are under investigation cannot be held indefinitely. This would be in violation of the DUE PROCESS CLAUSE of the FIFTH AMENDMENT of the federal Constitution. Moreover, the Court established a maximum six-month detention period. At that point the alien must provide information as to why removal to the country of origin is not likely in the foreseeable future. For example, in this case, Kestutis Zadvydas was born to Lithuanian parents who were held in a German displaced persons camp; both Lithuania and Germany refused to accept him into their countries because he was not a citizen. If the government cannot rebut this information, the alien must be released from confinement. Finally, the Court declared that the federal courts are the proper place to review issues of deportation, rejecting the government's claim that immigration is strictly the province of the EXECUTIVE BRANCH.

Following the September 11, 2001, terrorist attacks on the United States, Congress created the USA PATRIOT ACT, Pub.L. No. 107-56, 115 Stat. 272 (2001). The law deals with various means of combating TERRORISM and includes provisions that authorize the deportation of individuals who provide lawful assistance to any group that provides assistance to terrorists. Accused persons must convince the government that they did not know their contributions were being used for terrorist activities.

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## DEPOSE

*To make a deposition; to give evidence in the shape of a deposition; to make statements that are written down and sworn to; to give testimony that is reduced to writing by a duly qualified officer and sworn to by the deponent.*

*To deprive an individual of a public employment or office against his or her will. The term is usually applied to the deprivation of all authority of a sovereign.*

*In ancient usage, to testify as a witness; to give evidence under oath.*

## DEPOSITION

*The testimony of a party or witness in a civil or criminal proceeding taken before trial, usually in an attorney's office.*

Deposition testimony is taken orally, with an attorney asking questions and the deponent (the individual being questioned) answering while a court reporter or tape recorder (or sometimes both) records the testimony. Deposition testi-

*Depositions, the pretrial testimonies of parties or witnesses in civil or criminal proceedings, are often recorded by a court reporter on a stenographic machine.*

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mony is generally taken under oath, and the court reporter and the deponent often sign affidavits attesting to the accuracy of the subsequent printed transcript.

Depositions are a discovery tool. (Discovery is the process of assembling the testimonial and documentary evidence in a case before trial.) Other forms of discovery include interrogatories (written questions that are provided to a party and require written answers) and requests for production of documents.

Depositions are commonly used in civil litigation (suits for money damages or equitable relief); they are not commonly used in criminal proceedings (actions by a government entity seeking fines or imprisonment). A minority of states provide for depositions in criminal matters under special circumstances, such as to compel statements from an uncooperative witness and a few provide for depositions in criminal matters generally.

Before a deposition takes place, the deponent must be given adequate notice as to its time and place. Five days' notice is usually sufficient, but local rules may vary. Persons who are witnesses but not parties to the lawsuit must also be served with a subpoena (a command to appear and give testimony, backed by the authority of the court).

Depositions commonly take place after the exchange of interrogatories and requests for production of documents, because the evidence obtained from the latter often provides foundation for the questions posed to the deponent. Any documents, photographs, or other evidence referred to during the deposition is marked and numbered as exhibits for the deposition, and the court reporter attaches copies of these exhibits to the subsequent deposition transcript. Generally, at the outset of the deposition, the court reporter, who is often also a **NOTARY PUBLIC**, leads the deponent through an oath that the testimony that will be given will be true and correct.

The examining attorney begins the deposition and may ask the deponent a wide variety of questions. Questions that could not be asked of a witness in court because of doubts about their relevance or concerns about **HEARSAY** (statements of a third party) are usually allowed in the deposition setting, because they might reasonably lead to admissible statements or evidence. A party who refuses to answer a reasonable question can be subject to a court order and sanctions. However, a party may refuse to answer questions on the basis of privilege (a legal right not to testify). For example, statements made to an attorney, psychiatrist, or physician by a client seeking professional services can remain confidential, and a client may assert a privilege against being required to disclose these statements.

After the examining attorney's questions are completed, the attorney representing the adverse party in the litigation is permitted to ask follow-up questions to clarify or emphasize the deponent's testimony. In litigation involving a number of represented parties, any other attorney present may also ask questions.

The court reporter often records the proceedings in a deposition on a stenographic machine, which creates a phonetic and coded paper record as the parties speak. Occasionally, an attorney or witness may ask the court reporter to read back a portion of previous testimony during the deposition.

Most modern stenographic machines also write a text file directly to a computer diskette during the deposition. In the past, arduous manual labor was required to turn the phonetic and coded paper copy into a complete hand-typed transcript. This is now rarely necessary because sophisticated computer programs can

create a transcript automatically from the text file on the diskette. When the transcription is complete, copies are provided to the attorneys, and the deponent is given the opportunity to review the testimony and correct any typographic errors.

The deposition, because it is taken with counsel present and under oath, becomes a significant evidentiary document. Based upon the deposition testimony, motions for SUMMARY JUDGMENT or partial summary judgment as to some claims in the lawsuit may be brought. (Summary judgment allows a judge to find that one party to the lawsuit prevails without trial, if there are no disputed material facts and judgment must be rendered as a matter of law.) If motions for summary judgment are denied and the case goes to trial, the deposition can be used to impeach (challenge) a party or witness who gives contradictory testimony on the witness stand.

The advent of sophisticated and low-cost video technology has resulted in increased videotaping of depositions. Both sides must agree to the videotaping, through a signed agreement called a stipulation, and in some jurisdictions, the parties must also seek a court order.

A videotaped record of a deposition offers several advantages. First, a videotape shows clearly the facial expressions and posture of the witnesses, which can clarify otherwise ambiguous statements. Second, physical injuries such as burns, scars, or limitations can easily be demonstrated. Third, a videotape may have a greater effect on a jury if portions of the deposition are introduced at trial as evidence. Finally, a videotape can serve as a more effective substitute for a party who cannot testify at trial, like an expert witness from another state or a witness who is too ill to be brought to the courtroom. If a witness dies unexpectedly before trial, a videotaped deposition can be admitted in lieu of live testimony because the deposition was taken under oath and the opposing attorney had the opportunity to cross-examine the witness.

Another advance in technology is the ability to take depositions by telephone. Telephonic depositions are allowed under the federal rules and are acceptable in most states. The procedures for a telephonic deposition are the same as for a regular deposition, although it is preferable (and sometimes required) that the examining attorney state for the record that the deposition is being taken over the telephone. A telephonic deposition can occur with the attorneys and the deponent in three different sites; in any case, federal and state rules stipulate that the judicial district within which the deponent is located is the official site of the deposition.

Another technology used for depositions is videoconferencing, where sound transmitters and receivers are combined with video cameras and monitors, allowing the attorneys and deponents to see each other as a deposition proceeds. Videoconferencing makes the examination of exhibits easier and also helps reduce confusion among the participants that may result from ambiguous or unclear verbal responses.

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## DEPOSITORY

*The place where a deposit is placed and kept, e.g., a bank, savings and loan institution, credit union, or trust company. A place where something is deposited or stored as for safekeeping or convenience, e.g., a safety deposit box.*

This term should not be confused with *depositary,* which is the person or institution taking responsibility for the deposit, rather than the place itself.

U. S. depositories are banks selected and designated to receive deposits of the public funds (e.g., taxes) of the United States.

## DEPOSITS IN COURT

*The payments of funds or property to an officer of the court as a precautionary measure during the pendency of litigation.*

The amount placed with the court constitutes the acknowledged liability of a person who is uncertain as to whom he or she is liable. The ascertainment of the court as to who is entitled to the property is binding.

This term also encompasses payment into court pursuant to court order.

## DEPRECIATION

*The gradual decline in the financial value of property used to produce income due to its increasing age and eventual obsolescence, which is measured by a formula that takes into account these factors in addition to the cost of the property and its estimated useful life.*

Depreciation is a concept used in accounting to measure the decline in an asset's value spread over the asset's economic life. Depreciation allows for future investment that is required to replace used-up assets. In addition, the U.S. INTERNAL REVENUE SERVICE allows a reasonable deduction for depreciation as a business expense in determining taxable net income. This deduction is used only for property that generates income. For example, a building used for rent income can be depreciated, but a building used as a residence cannot be depreciated.

Depreciation arises from a strong public policy in favor of investment. Income-producing assets such as machines, trucks, tools, and structures have a limited useful life—that is, they wear out and grow obsolete while generating income. In effect, a taxpayer using such assets in business is gradually selling those assets. To encourage continued investment, part of the gross income should be seen as a return on a capital expenditure, and not as profit. Accordingly, tax law has developed to separate the return of capital amounts from net income.

Generally, depreciation covers deterioration from use, age, and exposure to the elements. An asset likely to become obsolete, such as a computer system, can also be depreciated. An asset that is damaged or destroyed by fire, accident, or disaster cannot be depreciated. An asset that is used in one year cannot be depreciated; instead, the loss on such an asset may be written off as a business expense.

Several methods are used for depreciating income-producing business assets. The most common and simplest is the straight-line method. Straight-line depreciation is figured by first taking the original cost of an asset and subtracting the estimated value of the asset at the end of its useful life, to arrive at the depreciable basis. Then, to determine the annual depreciation for the asset, the depreciable basis is divided by the estimated life span of the asset. For example, if a manufacturing machine costs $1,200 and is expected to be worth $200 at the end of its useful life, its depreciable basis is $1,000. If the useful life span of the machine is 10 years, the depreciation each year is $100 ($1,000 divided by 10 years). Thus, $100 can be deducted from the business's taxable net income each year for 10 years.

Accelerated depreciation provides a larger tax write-off for the early years of an asset. Various methods are used to accelerate depreciation. One method, called declining-balance depreciation, is calculated by deducting a percentage up to two times higher than that recognized by the straight-line method, and applying that percentage to the undepreciated balance at the start of each tax period. For the manufacturing machine example, the business could deduct up to $200 (20 percent of $1,000) in the first year, $160 (20 percent of the balance, $800) the second year, and so on. As soon as the amount of depreciation under the declining-balance method would be less than that under the straight-line method (in our example, $100), the straight-line method is used to finish depreciating the asset.

Another method of accelerating depreciation is the sum-of-the-years method. This is calculated by multiplying an asset's depreciable basis by a particular fraction. The fraction used to determine the deductible amount is figured by adding the number of years of the asset's useful life. For example, for a 10-year useful life span, one would add 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, to arrive at 55. This is the denominator of the fraction. The numerator is the actual number of useful years for the machine, 10. The fraction is thus 10/55. This fraction is multiplied by the depreciable basis ($1,000) to arrive at the depreciation deduction for the first year. For the second year, the fraction 9/55 is multiplied against the depreciable basis, and so on until the end of the asset's useful life. Sum-of-years is a more gradual form of accelerated depreciation than declining-balance depreciation.

Depreciation is allowed by the government as a reward to those investing in business. In 1981, the Accelerated Cost Recovery System (ACRS) (I.R.C. § 168) was authorized by Con-

gress for use as a tax accounting method to recover capital costs for most tangible depreciable property. ACRS uses accelerated methods applied over predetermined recovery periods shorter than, and unrelated to, the useful life of assets. ACRS covers depreciation for most depreciable property, and more quickly than prior law permitted. Not all property has a predetermined rate of depreciation under ACRS. The INTERNAL REVENUE CODE indicates which assets are covered by ACRS.

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CROSS-REFERENCES

Income Tax; Taxable Income.

## DEPUTY

*A person duly authorized by an officer to serve as his or her substitute by performing some or all of the officer's functions.*

A *deputy* sheriff is designated to act on behalf of the sheriff in regard to official business.

A *general deputy* or undersheriff, pursuant to an appointment, has authority to execute all of the regular duties of the office of sheriff and serves process without any special authority from the sheriff.

A *special deputy,* who is an officer *pro hac vice* (Latin for "for this turn"), is appointed to render a special service. A special deputy acts under a specific, rather than a general, appointment and authority.

CROSS-REFERENCES

Service of Process.

## DERIVATIVE ACTION

*A lawsuit brought by a shareholder of a corporation on its behalf to enforce or defend a legal right or claim, which the corporation has failed to do.*

A derivative action, more popularly known as a STOCKHOLDER'S DERIVATIVE SUIT, is derived from the primary right of the corporation to seek redress of legal grievances through the courts. The procedure to be followed in such an action is governed by the rules of federal CIVIL PROCEDURE and state provisions, where applicable.

## DERIVATIVE EVIDENCE

*Facts, information, or physical objects that tend to prove an issue in a criminal prosecution but which are excluded from consideration by the trier of fact because they were learned directly from information illegally obtained in violation of the constitutional guarantee against unreasonable* SEARCHES AND SEIZURES.

Derivative evidence is inadmissible as proof because of the application of the FRUIT OF THE POISONOUS TREE doctrine, which treats the original evidence and any evidence derived from it as tainted because of the illegal way in which it was obtained by agents of the government.

## DEROGATION

*The partial repeal of a law, usually by a subsequent act that in some way diminishes its* ORIGINAL INTENT *or scope.*

Derogation is distinguishable from abrogation, which is the total ANNULMENT of a law.

"IN POKER IT IS IMPOSSIBLE TO BLUFF WITH ALL YOUR CARDS SHOWING. IN LAW IT IS DIFFICULT, BUT NOT IMPOSSIBLE."
—ALAN DERSHOWITZ

## ♦ DERSHOWITZ, ALAN MORTON

Scholar and constitutional authority Alan Morton Dershowitz is a well-known, controversial, and successful U.S. appellate attorney. A professor at the Harvard School of Law, he has a reputation for taking on the cases of little-loved criminal defendants. His list of clients is a who's who of notoriety, ranging from wealthy socialites to a pornographic film star and a convicted spy. Dershowitz has captured attention both in the courtroom and out, as much for his sometimes brilliant legal strategies as for his ubiquitous books, articles, and TV appearances. A staunch defender of FIRST AMENDMENT freedoms, civil and HUMAN RIGHTS, and Jewish issues, he has earned praise and enmity for his influence on U.S. law.

Dershowitz, born September 1, 1938, in Brooklyn, was raised in the orthodox Jewish area of Boro Park, New York. He attended Yeshiva University High School, where a principal advised the unexceptional but talkative student to seek a career "where you use your mouth, not your brains" (Keegan 1992). He apparently ignored that advice, graduating magna cum laude from Brooklyn College and gaining admittance to Yale Law School. As a law student, he quickly distinguished himself: he was named editor of the *Yale Law Journal* in his second year, and his research on the relationship of psychiatry to the law was such that Harvard offered

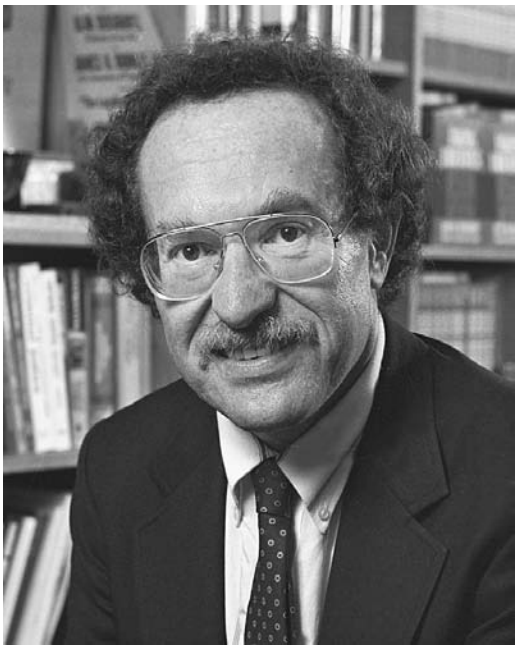

*Alan Dershowitz.* AP/WIDE WORLD PHOTOS

Dershowitz a teaching position upon his graduation. Finishing at the top of his class in 1962, he postponed the Harvard offer to clerk for Chief Judge David L. Bazelon, of the U.S. Court of Appeals. This clerkship was followed by another with U.S. Supreme Court Justice ARTHUR J. GOLDBERG.

Appointed associate professor at Harvard Law School in 1964, Dershowitz went on to become, three years later, the youngest tenured professor in the school's history at 28. His specialty, CRIMINAL LAW, did not prevent him from continuing the academic research he had begun at Yale, and he coauthored the standard casebook *Psychoanalysis, Psychiatry, and the Law* (1967). He also began a lifelong immersion in liberal political issues. As protest over the VIETNAM WAR galvanized campuses around the United States, Dershowitz created a course on legal concerns raised by the war, which inspired similar courses at numerous law schools. He worked privately on behalf of several antiwar protesters, including Harvard students facing disciplinary proceedings and the antiwar leader Dr. Benjamin M. Spock. In 1972, he drafted a successful appeal for WILLIAM M. KUNSTLER, a radical lawyer convicted of CONTEMPT of court for his defense of the CHICAGO EIGHT antiwar activists at the 1968 Democratic convention.

Free speech concerns animated Dershowitz to fight CENSORSHIP of PORNOGRAPHY. In his view, "There is simply no justification for government censorship of offensive material of any kind." Even if pornography can be shown to lead to violence against women, Dershowitz opposes any controls on it. His position is that of a classic First Amendment absolutist: fight bad speech with good speech, but do not limit speech.

Dershowitz made his first U.S. Supreme Court argument in 1969, attempting to remove a Boston ban on screenings of the internationally acclaimed Swedish film *I am Curious (Yellow)*. Championed by intellectuals such as Norman Mailer, the sexually explicit film was the first of its kind to be distributed commercially in the United States. Dershowitz successfully argued before a three-judge Court that the First Amendment protected the rights of consenting adults to view whatever they chose in a discreet setting. After the Supreme Court remanded the case, the prosecution was dismissed and the ban was lifted.

In 1976, Dershowitz handled the appeal of Harry Reems, a star in the pornographic film *Deep Throat*. Several years after acting in the film, Reems had been convicted on federal charges of taking part in an ongoing conspiracy to transport it across state lines. Dershowitz won a new trial for Reems, and the JUSTICE DEPARTMENT later dropped the indictment.

The attorney took his first criminal case in 1972. His defense of Sheldon Seigel, accused of making a bomb used by the terrorist Jewish Defense League (JDL), established a pattern that Dershowitz would follow throughout his career: a commitment to civil liberties and constitutional rights regardless of the notoriety or apparent immorality of his clients. The bomb Seigel was said to have made had exploded in the Manhattan office of arts impresario Sol Hurok, killing a young woman. While associated with the JDL, Seigel had also been a government informer. When the case came to trial, the government denied making a deal protecting him from testifying against his associates. Using secret tape recordings of his client and government agents, Dershowitz destroyed the prosecution's claims. An appellate court ruled against forcing Seigel to testify, and the case against the JDL suspects was dismissed for lack of evidence. Dershowitz later said he cried upon realizing that he had gotten Seigel acquitted, thinking about the woman killed by the bomb. Yet the case had allowed him to challenge what he saw as systematic unconstitutionality in the government's handling of informers.

Defending other unpopular clients has sometimes earned Dershowitz the criticism of his peers. The attorney nonetheless accepts cases few other lawyers will touch, making him, in the words of *Time* magazine, the "patron saint of hopeless cases." In 1975, he was widely criticized for agreeing to represent Bernard Bergman, a New York City nursing home operator, on appeal of his conviction for **MEDICARE FRAUD** and attempted **BRIBERY**. The press and the public had vilified Bergman for running a chain of nursing homes in which elderly patients were abused. Dershowitz tried, unsuccessfully, to have Bergman's one-year sentence reduced to four months, arguing that the special prosecutor in the case had violated a plea bargain.

In 1980, Dershowitz represented two brothers, Ricky Tison and Raymond Tison, who were convicted and sentenced to die for the crime of felony murder. The brothers had helped their father, Gary Tison, escape from prison; the father subsequently took part in a murder. Dershowitz raised the question of whether the brothers could be executed for a murder they did not plan or commit. In 1987, he argued for their lives before the Supreme Court, which remanded the case and ordered a new hearing.

A 1982 appeal for socialite Claus von Bulow catapulted Dershowitz to greater public attention than had any of his previous endeavors. Closely watched by the press, von Bulow's trial seemed the stuff of best-selling fiction. He had been convicted of attempting to murder his wife, heiress Martha (Sunny) Crawford von Bulow, by injecting her with insulin—presumably, to lay hands on her millions. On appeal, Dershowitz made multiple arguments for reversal or retrial. He contended that his client had been the victim of an unconstitutional search, that evidence had been withheld from the defense, and that new medical evidence raised doubts about the insulin found in Crawford's blood. The appeals court reversed von Bulow's conviction in April 1984, and at a subsequent trial, with Dershowitz directing the defense strategy, a second jury acquitted him in 1985. The attorney wrote an account of the trial, *Reversal of Fortune* (1986), which later became an Academy Award-winning film.

Throughout the 1980s and 1990s, Dershowitz seldom escaped public notice for his work on behalf of a string of controversial clients. He represented, among others, Leona Helmsley, a hotel magnate convicted of **TAX EVASION**; Michael R. Milken, a Wall Street junk-bond financier who pleaded guilty to six felonies; Jonathan Pollard, a U.S. intelligence analyst who pleaded guilty to spying for Israel; and Mike Tyson, a former heavyweight champion who was convicted of rape. Dershowitz lost these appeals, but not for want of trying. His tactics routinely include a vociferous use of the media, on the assumption that judges and juries are influenced by what they see and read. Besides numerous interviews, he also has taken out full-page ads in the *New York Times* on behalf of clients, for example, Milken.

Dershowitz was in the limelight as a member of the "Dream Team," assembled to defend **O.J. SIMPSON**, who was acquitted of murder charges in October 1995. Like many others involved in the case, Dershowitz published a book, *Reasonable Doubts: The Criminal Justice System and the O.J. Simpson Case* (1997). Not all Dershowitz's clients, however, are celebrities. He conducts **PRO BONO** work for those unable to afford a lawyer, let alone his reputed $400-an-hour fee.

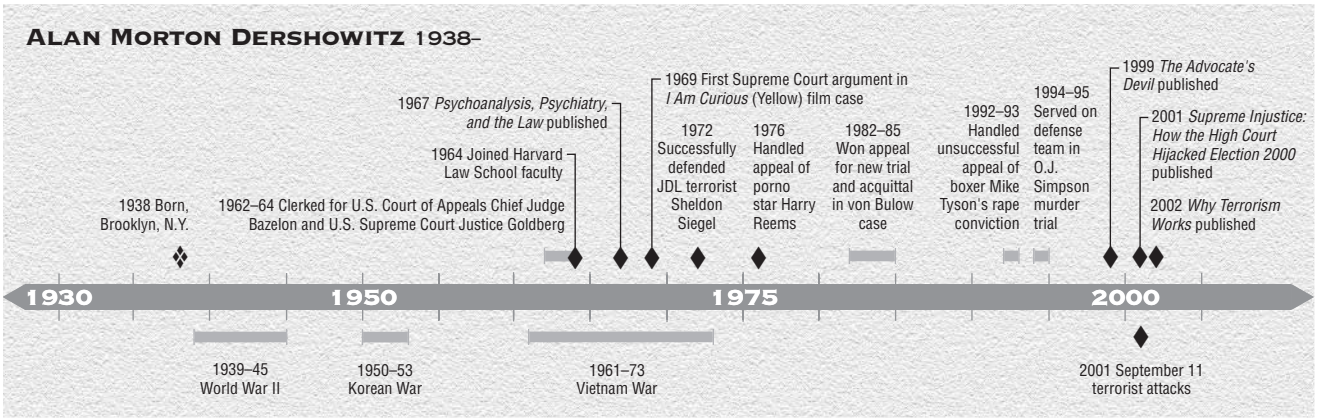

As an appellate lawyer, Dershowitz estimates his chance of losing a client's appeal at 95 percent, saying, "I'm like a brain surgeon brought in after the tumor's been discovered." He cites constitutional concerns as his justification for his choice of clients. Others have accused him of greed and grandstanding. His one-time ally, the late Kunstler, was one such critic, bemoaning what he considered a former idealist's selling out. No stranger to criticism, Dershowitz gives as well as he gets. He frequently addresses audiences, writes articles, gives press conferences, and conducts debates with his critics and those with whom he disagrees. In the mid-1980s, he attacked the Justice Department under President RONALD REAGAN as "dangerous for our constitutional health." A major area of battle for him in the early 1990s was the trend on university and college campuses toward "political correctness," which he views as stifling to free speech and detrimental to education. Denouncing the trend, Dershowitz said, "We are tolerating and teaching intolerance and hypocrisy."

Committed to working on behalf of Jewish rights, Dershowitz traveled to the Soviet Union in 1974 as part of the Soviet Jewry Defense Project. This U.S. group submitted appeals on behalf of 14 Russian Jews and two non-Jews sentenced to prison terms for conspiracy after their emigration visas were refused. The effort helped to bring about the early release of several prisoners, who immigrated to Israel. Dershowitz also attempted to represent Russian dissident Anatoly Scharansky, but was blocked by Soviet authorities. A tireless foe of anti-Semitism whose office door is decorated with hate mail, Dershowitz argued in his best-selling 1991 book *Chutzpah* that U.S. Jews have too long accepted being second-class citizens. Named for the Yiddish expression for brashness, *Chutzpah* made an impassioned plea for greater pride: "We need not be apologetic or defensive about our power in America." The book won high praise from Nobel laureate Saul Bellow and others, although some Jewish intellectuals regarded it as overzealous.

Dershowitz continues to be a prolific and highly topical writer. In 2001, Dershowitz, a strong supporter of Al Gore's presidential bid, published *Supreme Injustice: How the High Court Hijacked Election 2000*. In 2002, he published books on two subjects that were in the forefront of national attention: *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* and *Shouting Fire: Civil Liberties in a Turbulent Age*.

After the September 11, 2001, attack on the World Trade Center, Dershowitz garnered a great deal of attention and controversy when he wrote a column in the *Los Angeles Times* in which he posited that if United States authorities were to engage in torture to extract information from prisoners, judges should have to issue "torture warrants."

In addition to his numerous writings (including over one thousand op ed articles), Dershowitz continues to lecture in the United States and around the world. He also delivers legal commentary on TV and radio shows, as well as INTERNET broadcasts. Dershowitz maintains his ties with Harvard Law School where he has been the FELIX FRANKFURTER Professor of Law since 1993.

Dershowitz has received many awards honoring his work for civil and human rights. These include a Guggenheim Fellowship in 1979, a commendation from the New York Criminal Bar Association in 1981, and the WILLIAM O. DOUGLAS First Amendment Award from the ANTI-DEFAMATION LEAGUE of the B'nai Brith in 1983. He has also received honorary degrees and awards from Yeshiva University, Syracuse University, Hebrew Union College, the University of Haifa, Monmouth College, Fitchburg College, and Brooklyn College. In 1996, he received the FREEDOM OF SPEECH Award from the National Association of Radio Talk Show Hosts.

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## DESCENT

*Hereditary succession. Succession to the ownership of an estate by inheritance, or by any act of law, as distinguished from* purchase. *Title by descent is the title by which one person, upon the death of another, acquires the real estate of the latter as an heir at law. The title by inheritance is in all cases called descent, although by statute law the title is sometimes made to ascend. The division among those legally entitled thereto of the real property of intestates.*

## DESCENT AND DISTRIBUTION

*The area of law that pertains to the transfer of real property or* PERSONAL PROPERTY *of a decedent who failed to leave a will or make a valid will and*

*the rights and liabilities of heirs, next of kin, and distributees who are entitled to a share of the property.*

### Origin of the Law

The passage of property from ancestors to children has been recognized and enforced since biblical times. As a general rule, the law, and not the deceased person, confers the right of succession—the passing of title to a decedent's property—and determines who shall take intestate property. In the United States, such law is derived from the CIVIL LAW and English statutes of distributions, rather than from the COMMON LAW, which preferred the eldest male, under the doctrine of primogeniture, and males over females. Statutes in every state prescribe the order in which persons succeed to a decedent's property if he or she dies intestate, which means without a lawfully executed will. These statutes provide for an orderly administration by identifying successors to a decedent's, also called an intestate's, estate. They seek to implement the distribution that most intestates would have provided had they made wills, on the theory that most persons prefer that their property pass to their nearest relatives rather than to more remote ones. An order of preference among certain relatives of the deceased is established by the statute. If there are no relatives who can inherit the property, the estate escheats, or reverts, to the state.

### Persons Entitled

The terms *heirs, next of kin,* and *distributees* usually refer to the persons who by operation of law—the application of the established rules of law—inherit or succeed to the property of a person intestate on his or her death. Statutes generally confer rights of inheritance only on blood relatives, adopted children, adoptive parents, and the surviving spouse. *Line of descent* is the order or series of persons who have descended one from the other or all from a common ancestor, placed in a line in the order of their birth showing the connection of all blood relatives. The direct line of descent involves persons who are directly descended from the same ancestor, such as father and son, or grandfather and grandson. Whether an adopted child can be regarded as in the direct line of descent depends upon the law in the particular jurisdiction. The collateral line of descent involves persons who are descended from a common ancestor, such as brothers who share the same father or cousins who have the same grandfather. Title by descent differs from title by purchase because descent involves the operation of law, while purchase involves the act or agreement of the parties. Usually direct descendants have first preference in the order of succession, followed by ascendants (persons in the collateral line of ascent), and finally, collateral heirs. Each generation is called a degree in determining the consanguinity, or blood relationship, of one or more persons to an intestate. Where the next of kin of the intestate who are entitled to share in the estate are in equal degree to the deceased, such as children, they share equally in the estate. For example, consider a mother who has two daughters, her only living relations, and dies intestate, leaving an estate of $100,000. Since the two daughters occupy the same proximity of blood relationship to their mother, they share her estate equally, each inheriting $50,000.

Issue has been defined as all persons in the line of descent without regard to the degree of nearness or remoteness from the original source.

### Law Governing

If at the time of death, the intestate's estate is located in the state of his or her domicile or permanent residence, the law of that state will govern its descent and distribution. Local laws that govern the area where the property is located generally determine the descent of real property, such as land, houses, and farms, regardless of the domicile of the deceased owner. The succession to and the disposition and distribution of personal or movable property, wherever situated, are governed by the law of the domicile of the owner or intestate at the time of death, unless a statute in the state where the property is located provides otherwise.

Since the privilege of receiving property by inheritance is not a natural right but a creation of law, the legislature of a state has plenary power, or complete authority, over the descent and distribution of property within the borders of the state subject to restrictions found in constitutions and treaties. The disposition of the property of an intestate is governed by the statutes in force at the time of death.

### Property Subject to Descent and Distribution

As a general rule, property subject to descent and distribution includes all vested rights and interests owned by the deceased at the time of

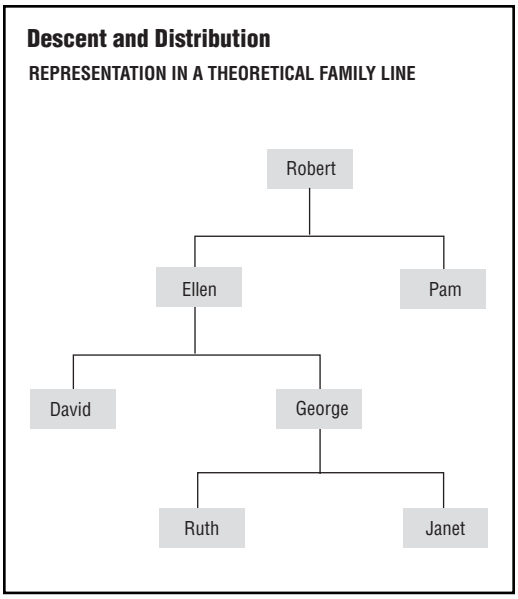


death. However, rights or interests that are personal to the deceased, and not of an inheritable nature, ordinarily are not subject to descent and distribution. Examples are a personal right to use land or a statutory right to contest a will.

If a seller dies prior to the completion of the sale of real property, the legal title to land that the seller contracted to sell vests in the heirs at law on the owner's death, subject to their obligation to convey the land to the purchaser according to the contract. A few states authorize the distribution of property among different persons according to whether it is real or personal, but this is not the general rule.

### Representation, Per Stirpes, Per Capita

Representation is the principle of law by which the children, or their descendants, of an heir to an estate, who dies without leaving a will, have a collective interest in the intestate's share of the property. Taking by representation means taking per stirpes. For example, Robert, who only has two daughters, Ellen and Pam, dies intestate, leaving an estate of $200,000 after the payment of debts and charges. Under a typical statute, Robert's daughters are his distributees, each receiving $100,000. However, Ellen predeceases her father and leaves two sons, David and George. Since Ellen is not alive to take her share, there would be a per stirpes division of Robert's estate, which means that Ellen's share of $100,000 would be divided equally between David and George, and each would receive $50,000. Pam's $100,000 share of her father's estate remains unaffected. Since they are brothers, the degree of blood relationship between David and George is equal; therefore, they take per capita, or equal, parts of Ellen's share. However, they have taken per stirpes shares of Robert's estate. Assume that George also died before his grandfather and left two daughters, Ruth and Janet, but his brother David was still alive. David would take $50,000, but Ruth and Janet would have $25,000 apiece. Pam, who is still alive, would still be entitled to $100,000, her share of Robert's estate. The degrees of consanguinity among David and Ruth and Janet are unequal, since David is Robert's grandchild, while Ruth and Janet are his great-grandchildren. David and Ruth and Janet share Ellen's portion of Robert's estate per stirpes. David takes 50 percent, or $50,000, whereas Ruth and Janet each take 25 percent, or $25,000, because of the unequal degrees of blood relationship to Ellen. David is one generation removed from Ellen, while Ruth and Janet are two generations removed from her.

### Kindred of the Half Blood

The term *kindred of the half blood* refers to persons who share a half blood relationship with the intestate because they have only one parent in common with each other. As a general rule, kindred of the half blood inherit equally with kindred of the whole blood who have the same parents, unless expressly prohibited by statute. For example, A and B shared the same father with C and D but had a different mother. If A dies, leaving no surviving spouse, children, or parents, C and D share equally with B in A's estate, even though C and D were of the half blood in relation to A, since they had only one parent in common. C and D inherit as if they had both the same parents as A and B.

### Necessary or Forced Heirs

The law of forced heirship gave certain relatives, besides the spouse, an absolute legal right, of which they could not be deprived by will or gift, to inherit a certain portion of the decedent's estate. Ordinarily, a person has no right to prevent another from disposing of his or her property by gift or will to someone else. The law of forced heirship in effect in only Louisiana limits the disposition of a decedent's property if his or her parents or legitimate children or their descendants are alive at his or her death. Such persons are expressly declared by law to be forced heirs, and a decedent cannot deprive

them of the portion of an estate reserved to them by law unless there is JUST CAUSE to disinherit them. Anyone else who received the property can be legally obligated to return it or to make up the portion of which the forced heirs have been deprived out of his or her own property.

### Designated Heirs

In some jurisdictions, statutes permit a person, the designator, to name another to stand in his or her place as an heir at law in the event of his or her death. Anyone can be a designated heir, even a stranger to the designator. The statute does not grant a designated heir any status until the designation becomes effective on the death of the designator. The designator can revoke the designation until the time of his or her death and then designate another. After the death of the designator, a designated heir has the status of an heir at law, and under the statute, the status of a legitimate child of the designator. For example, H designates his wife W as his heir at law. H and W are childless. H is the only child of F. F dies intestate after H's death. The applicable statute of descent and distribution gives all of F's property to his lineal descendants. W will inherit all of F's property since she was H's designated heir at law and is, for inheritance purposes, considered a child of H. She is, therefore, a lineal descendant of F. If the designated heir dies before the designator, his or her heirs generally will not have a right of inheritance in the designator's intestate estate.

### Descendants

Subject to the rights of the surviving spouse, children have superior inheritance rights compared to those of other blood relatives. In many jurisdictions, the same principle applies to adopted children of the intestate. Once the debts of the estate have been paid and the surviving spouse has taken his or her legal share, the remainder of the estate is apportioned in equal distributive shares, the portions specified by the law of descent and distribution, among the number of children of the decedent. The rights of the decedent's child or children are greater than not only those of the deceased's brothers and sisters, nephews and nieces, and other collateral kindred but also of the deceased's parents.

**Posthumous Children** A posthumous child is one born after the death of its father or mother (as, for example, by Caesarean section). Both at common law and under various state statutes, a posthumous child takes as an heir and a distributee as long as it is born alive after a period of fetal existence that indicates that it was conceived before the death of the intestate father, usually a period of nine months. Some statutes require that a child be born within ten months after the death of the intestate in order to be regarded as a posthumous child. The technique of ARTIFICIAL INSEMINATION, through which a woman can be impregnated with frozen sperm months or even years after the death of the father, poses problems for courts interpreting posthumous child statutes.

**Children of Successive Marriages** On the death of an intestate who had children by different marriages, all of his or her children take equal shares of the estate once the estate debts have been paid off and the surviving spouse has taken the legal portion. This method of distribution applies unless barred by statute, such as in cases where the property of an intestate was received from a deceased spouse of a former marriage. In that instance, only children of that particular marriage would inherit that property to the exclusion of children of other marriages. In a few states, a slightly different distribution is made of COMMUNITY PROPERTY of the first marriage—one half of that property belonging to the deceased spouse going to the children of that marriage in equal shares, and those children together with the children of the second marriage dividing equally the other half, subject to any rights of the surviving spouse.

**Issues of Children who Predecease Intestate** The share that a child who dies before the intestate would have inherited if he or she had survived the intestate parent is inherited by his or her children or descendants by the right of representation in per stirpes shares. Grandchildren have better inheritance rights than brothers and sisters of the intestate and their children. However, they do not inherit unless their parent, the child of the intestate, is dead.

**Illegitimate Children** At common law, an illegitimate child was a filius nullius (Latin for "child of no one") and had no right to inherit. Only legitimate children and issue could inherit an estate upon the death of an intestate parent. This is no longer the case as a result of statutes that vary from state to state. As a general rule, an illegitimate child is treated as the child of the mother and can inherit from her and her relatives and they from the child. In some jurisdic-

tions, the illegitimate child is usually not regarded as a child of the father unless legitimated by the subsequent marriage of the parents or acknowledged by the father as his child, such as in affiliation proceedings. A legitimated child has the same inheritance rights as any other child of the parent. Many statutes permit a child to inherit from his or her father if the PATERNITY is judicially established before the father's death. In the case of *Trimble v. Gordon,* 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977), the SUPREME COURT OF THE UNITED STATES decided that it is unconstitutional for states to deprive an illegitimate child of the right to inherit from his or her father when he dies without leaving a will, especially in cases where paternity is already established in state court proceedings prior to the father's death.

### Parents

Some statutes permit one or both parents of the intestate to inherit, to some extent, the property of a child leaving no issue or descendants subject to the rights of a surviving spouse. Provisions differ as to whether one or both parents take, whether they take exclusively or share with brothers and sisters, and as to the extent of the share taken. Frequently, if one parent is dead, the surviving parent takes the entire estate, both real and personal, of a deceased child who dies without issue. Some statutes provide that a surviving parent shares with the brothers and sisters.

### Stepchildren, Stepparents

Ordinarily, a stepparent does not inherit from the estate of a deceased stepchild. Similarly, stepchildren do not inherit from their stepparent unless the terms of a statute grant them this right.

### Brothers, Sisters, and Their Descendants

**Brothers and Sisters** If an intestate dies without a surviving spouse, issue, or parents, the decedent's brothers and sisters and the children of deceased brothers and sisters will inherit the estate. Brothers and sisters inherit when and only when there are no other surviving persons having priority by virtue of statute. Their inheritance rights are subordinate to children and grandchildren and the parents of the intestate in a number of jurisdictions.

**Nephews and Nieces** Nephews and nieces usually inherit only if their parent is deceased and would have inherited if he or she had survived the intestate.

### Grandparents and Remote Ascendants

Generally, where paternal and maternal grandparents are next of kin to the decedent, they share equally in the estate of an intestate. Some statutes provide that where the estate descended to the intestate from his or her father, it will go to a paternal grandparent to the exclusion of a maternal grandparent. State statutes vary as to whether the grandparents all inherit, or where there are surviving aunts and uncles, as to whether they are excluded by the grandparents. There is a similar division of authority as to whether great-grandparents share with surviving great-uncles and great-aunts.

### Remote Collaterals

A collateral heir is one who is not of the direct line of the deceased but comes from a collateral line, such as a brother, a sister, an uncle, an aunt, a nephew, a niece, or a cousin of the deceased. People are related collaterally when they have a common ancestor, such as a parent or grandparent. Where the property in question is within a statute directing the course of descent of property that came to the intestate by gift, devise, or descent from an ancestor, as long as they are the nearest heirs, the remote collateral heirs (for example, cousins) who share that common ancestor are entitled to inherit to the exclusion of collateral heirs who do not.

### Operation and Effect of a Will

Rights under intestacy laws are only taken away by a properly executed will disposing of the testator's entire property. These laws can, however, operate in case of partial intestacy where part of the decedent's property is not disposed of by will.

### Surviving Spouse

The right of a surviving spouse to share in the estate of a deceased spouse arises automatically from the marital status and not from any contract, conveyance, or other act of the spouse. Statutes conferring such rights on a surviving spouse make the spouse a statutory heir. Some statutes regulating the rights of inheritance of a surviving spouse treat property acquired by the decedent prior to the marriage differently than that acquired during the course of the marriage. Others relating to the descent of ancestral estates and property acquired by gifts do not, ordinarily, exclude a surviving spouse.

**Right of Surviving Wife** As a general rule, modern statutes confer rights of inheritance on a widow. At common law, the wife was entitled

to DOWER, which was a fixed interest in all the land owned by her husband during the marriage. This interest in the lands of her husband was inchoate during his life. She had to survive her husband before she could take possession of her interest in the property. Most states have abolished common-law dower and have replaced it with statutes allowing the surviving widow to take an elective share prescribed by statute, usually one-third or what would have gone to her by intestacy or the provision made in her spouse's will. The extent of and the method for computing the inheritance depends on the terms of the statute applicable to the facts in the particular case. Her rights attach only to property that her husband owned at the time of death. The right of a wife to share in the estate of her husband is qualified by his right to make a valid will. The widow, however, will be given a RIGHT OF ELECTION to choose between the elective share, which is usually her share under the laws of intestacy, or the provision in the will, whichever is larger.

**Right of Surviving Husband** At common law, a surviving husband had an estate by curtesy in his wife's real property to which he was absolutely entitled upon her death. Curtesy has been abolished by many jurisdictions. As of the early 2000s, a husband's rights of inheritance are regulated by statute applicable to the facts in the particular case. As a general rule, a widower's rights of inheritance attach only to property that his wife owned and possessed at the time she died.

### Rights in Case of Remarriage

Unless a statute provides otherwise, a surviving spouse's rights of inheritance are not affected by a later marriage after the death of the decedent. The rights of a survivor of a second or subsequent marriage of the decedent are the same as though he or she were the survivor of the first marriage. In a number of states, the rights of a survivor of a second or subsequent marriage of the deceased or of a surviving spouse who subsequently remarries are, or have been, governed by statutes specifically regulating descent in cases of remarriage.

### Waiver or Release of Right

A spouse can waive the right of inheritance to the estate of the other spouse by an antenuptial agreement, which is fairly entered into by both parties with knowledge of all the relevant facts, such as the extent of the spouse's wealth. This is frequently done by couples who remarry late in life, in order to protect the inheritance rights of their children by previous marriages. For example, an affluent couple executes an antenuptial agreement by which they both agree to surrender their inheritance rights in each other's estate. This insures the inheritance rights of their children from prior marriages in their respective estates, without having the estate reduced by the share given to the surviving spouse under the laws of intestacy. To be effective as a bar, the agreement must, in clear terms or by necessary implication, relinquish the surviving spouse's right of inheritance. It must affirmatively appear that neither spouse took advantage of the confidential relation existing between the parties at the time of its execution.

Unless there are statutory provisions to the contrary, a husband or wife can waive, release, or be estopped (prevented) from asserting rights of inheritance in the estate of the other by certain acts or conduct on his or her part during marriage. As a general rule, a spouse can waive his or her rights in the estate of the other by an express postnuptial agreement. Such an agreement is effective only if it manifests a clear and unmistakable intention to trade away such rights, and it must be supported by a valid and valuable consideration, freely and fairly made; be just and equitable in its provisions; and free from FRAUD and deceit. In one case, the assent of a wife to cohabit with her husband only upon his execution of a release of any claim on her property did not constitute sufficient consideration for his agreement, since she was under a legal duty as his wife to live with him.

A separation agreement can provide for the mutual release of the rights of each spouse in the other's property, including an inchoate or potential right of inheritance that will not vest until the death of one spouse. The rights of inheritance in the property of the husband or wife are not to be denied the surviving spouse unless the purpose to exclude him or her is expressed or can be clearly inferred. A PROPERTY SETTLEMENT agreement conditioned upon a DIVORCE cannot bar a spouse's statutory share in the other's estate where the divorce was never finalized because of the death of the spouse. A mere agreement between HUSBAND AND WIFE in contemplation of divorce, by which specific articles of property are to be held by each separately, is no bar to the rights of the surviving spouse, if no divorce has in fact been granted.

The surviving spouse, however, is not prevented from asserting his or her rights in the estate of the deceased spouse by an agreement entered into as a result of ignorance or mistake as to his or her legal rights.

### Forfeiture of Rights

As a general rule, a surviving spouse's misconduct, whether criminal or otherwise, does not bar his or her rights to succeed to the deceased person's estate where the statute of descent and distribution confers certain rights on the surviving spouse and makes no exception on account of misconduct.

**Abandonment, Adultery, and Nonsupport** Unless there are statutes to the contrary, the fact that one spouse abandoned or deserted the other, or even the fact that he or she abandoned the other and lived in ADULTERY, does not bar that spouse's rights of inheritance in the other's estate. However, in a number of jurisdictions express statutory provisions do not permit a surviving wife to succeed to her husband's estate if she has abandoned him or left him to live in adultery. A surviving husband similarly loses his statutory right to inherit from his wife's estate where he abandoned or willfully and maliciously deserted her or neglected or refused to support her. In order to constitute a FORFEITURE of inheritance rights, such conduct must be deliberate and unjustified and continue for a period of time specified by statute. Mere separation is not necessarily ABANDONMENT or desertion if the parties have consented to the separation or there is reasonable and justifiable cause for the action. The fact of one spouse's subsequent meretricious conduct is not abandonment if a separation agreement does not provide for forfeiture of that spouse's right to share in the decedent's estate.

**Murder of Spouse** There is no uniform rule as to whether a person who murders his or her spouse can succeed to the decedent's estate as the surviving spouse. Some jurisdictions refuse to recognize the murderer as a surviving spouse. In others, a statute that confers certain rights on the surviving spouse does not strip the spouse of that right because he or she caused the death of the intestate spouse by criminal conduct. Different states have enacted statutes that preclude any person who has caused or procured the death of another from inheriting the decedent's property under certain circumstances. An intentional killing will bar an inheritance, but a death that occurs as a result of NEGLIGENCE, accidental means, or insanity will not have this effect. For example, where conviction is essential to create a forfeiture under the statute, a surviving spouse who is not convicted but is committed to a state hospital for the legally insane is not excluded from the rights of inheritance. A conviction of MANSLAUGHTER might be sufficient to satisfy the statutory requirement of conviction, but it is insufficient if the statute requires actual conviction of murder.

**Bigamous Marriage** In some jurisdictions, a spouse who commits bigamy, marrying while still legally married to another, can be denied any rights of inheritance in the estate of his or her lawful spouse. This is true even if the bigamous marriage had been terminated long before the death of the lawful spouse. In a few jurisdictions, the fact that one who was legally married to the decedent contracted a bigamous marriage does not bar his or her rights of inheritance in the decedent's estate.

**Divorce** Generally, a person who has been divorced can claim no share in the estate of the former spouse. Under some statutes, a divorce a mensa et thoro (Latin for "from bed or board"), which is a legal separation, can abrogate any right of intestate inheritance in the spouse's estate, even though the decedent and spouse remained lawfully married until the death of the decedent.

### Rights and Liabilities of Heirs

No one is an heir to a living person. Before the death of the ancestor, an expectant heir or distributee has no vested interest but only a mere expectancy or possibility of inheritance. Such an individual cannot on the basis of his or her prospective right maintain an action during the life of the ancestor to cancel a transfer of property made by the ancestor.

**Advancements** An advancement is similar to an absolute or irrevocable gift of money or real or personal property. It is made in the present by a parent to a child in anticipation of what the child's intestate share will be when the parent dies. An advancement differs from an ordinary gift in that it reduces only the child's distributive share of the parent's estate by the stated amount, while a gift diminishes the entire estate. The doctrine of advancements is based on the theory that a parent is presumed to intend that all his or her children have equal rights not only in what may remain at the parent's death but in all property owned by the parent. Statutes of descent and distribution can

provide for consideration of advancements made by a deceased during his or her lifetime to achieve equality in the distribution of the estate among the children.

An advancement can also be made by grandparents and, where statutes permit, by spouses and collateral relatives. A parent's gifts to a child cannot be deemed advancements while the donor is alive, since they are significant only in relation to a decedent's estate. Several statutes provide that no gift or grant of realty can be deemed to have been made as an advancement unless expressed in writing by the donor or acknowledged in writing by the donee. A transfer based on love and affection or a nominal consideration can constitute an advancement, while a transfer for a valuable consideration cannot, since as a gift, an advancement is made without consideration.

**Release, Renunciation, or Acceptance of Rights** An heir can relinquish his or her rights to an estate by an express waiver, release, or ESTOPPEL. Generally, the release of an expected share, fairly and freely made to an ancestor in consideration of an advancement or for other valuable consideration, excludes the heir from sharing in the ancestor's estate at the time of death. It is necessary that the person executing the release be competent to contract at the time, that the release not be obtained by means of fraud or UNDUE INFLUENCE, and that the instrument or transaction in question be sufficient to constitute a release or renunciation of rights. In one case, a daughter gave her father a receipt acknowledging payment of money that she accepted as her "partial" share of all real estate left by him. The court held that she was not barred from sharing in the remainder of the real estate left upon her father's death, since the word *partial* indicated that the money received was merely an advancement.

At common law, a person could not renounce an intestate share, but modern statutes permit renunciation. A renunciation or a waiver sometimes requires the execution and delivery of a formal document. Renunciation is frequently employed by those who would incur an increased tax burden if the gift were to be accepted.

A simple acceptance can be either express or implied. A person can be barred from accepting his or her rights to an estate by a lapse of time, as specified by statute. Once a person accepts an intestate share, he or she cannot subsequently renounce the share under most statutes. A person who renounces the succession cannot revoke the renunciation after the other heirs have accepted the property that constitutes his or her share. However, that person can accept his or her share if the other heirs have not yet done so.

### Gifts and Conveyances in Fraud of Heirs

A person ordinarily has the right to dispose of his or her property as he or she sees fit, so that heirs and distributees cannot attack transfers or distributions made during the decedent's lifetime as being without consideration or in fraud of their rights. For example, a parent during his or her life can distribute property among his or her children any way he or she wants with or without reason, and those adversely affected have no standing to challenge the distribution.

One spouse can deprive the other of rights of inheritance given by statute through absolute transfers of property during his or her life. In some jurisdictions, however, transfers made by a spouse for the mere purpose of depriving the other of a distributive share are invalid. Whether a transfer made by a spouse was real or made merely to deprive the other spouse of the statutory share is determined by whether the person actually surrenders complete ownership and possession of the property. For example, a husband's transfer of all his property to a trustee is void and illusory as to the rights of his surviving wife if he reserves to himself the income of the property for life, the power to revoke and modify the trust, and a significant amount of control over the management of the trust. There is no intent to part with ownership of his property until his death. Such a trust is a device created to deprive the wife of her distributive share. Advancements or gifts to children, including children by a former marriage, which are reasonable in relation to the amount of property owned and are made in GOOD FAITH without any intent to defraud a spouse, afford that spouse no grounds of complaint. Good faith is shown where the other spouse knew of the advancements. If a spouse gives all or most of his or her property to the children without the other spouse's knowledge, a rebuttable presumption of fraud arises that might be explained by the children.

### Title of Heirs and Distributees

Inheritance rights vest immediately on the death of an intestate, and the heirs are usually

determined as of that time. The title to realty ordinarily vests in an intestate's heirs immediately upon his or her death, subject, under varying circumstances, to certain burdens, such as the rights of the surviving spouse or the debts of the intestate. The title obtained by the heirs on the death of their ancestor is subject to funeral expenses, the expenses, debts, or charges of the administration, and the charges for which the real property is liable, such as liens and encumbrances attached to the land during the lifetime of the intestate.

At common law and under the statutes of most states, the title to personal property of a deceased person does not ordinarily vest in his or her heirs, next of kin, or distributees on his or her death. Their title and rights, therefore, must generally be obtained or enforced by virtue of administration or distribution. Legal title to personal property is suspended between the time of the intestate's death and the granting of the LETTERS OF ADMINISTRATION. On distribution, the title of the distributees relates back to the date of the intestate's death. While the title to personal property does not immediately vest in the heirs, their interest in the estate does. The heirs have a vested equitable right, title, or estate in the personal property, subject to the rights of creditors and to charges and expenses of the administration. The personal estate of an intestate goes ultimately to those who are next of kin at the time of the intestate's death as opposed to those who are next of kin at the time that the estate is to be distributed. If a person who is entitled as a distributee dies after the death of the intestate and before distribution, his or her share does not go to the other persons entitled as distributees, but instead passes to his or her own heirs.

### Debts of Intestate Estate

Heirs and distributees generally receive property of their ancestor subject to his or her debts. The obligation of an heir or distributee to pay an ancestor's debt is based upon his or her possession of the ancestor's property. All property of an intestate ordinarily can be applied to pay his or her debts, but, generally, the personal property must be exhausted first before realty can be used.

### Rights and Remedies of Creditors, Heirs, and Distributees

The interest of an heir or distributee in the estate of an ancestor can be taken by his or her creditors for the payment of debts, depending upon the applicable law. Advancements received by an heir or distributee must be deducted first from his or her share before the rights of creditors of the heir or distributee can be enforced against the share.

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CROSS-REFERENCES

Consanguinity; Decedent; Escheat; Premarital Agreement.

## DESCRIPTIVE WORD INDEX

*An alphabetically arranged aid used in legal research used to locate cases that have discussed a particular topic.*

The descriptive word index contains key WORDS AND PHRASES that lead researchers to the information they are seeking. For example, in preparing a brief on behalf of a client who slipped and fell in a supermarket, an attorney might look in the descriptive word index under the heading "slip and fall" to find legal precedent for the case.

Descriptive word indices are generally part of all case digests.

## DESEGREGATION

See SCHOOL DESEGREGATION.

## DESERTION

*The act by which a person abandons and forsakes, without justification, a condition of public, social, or family life, renouncing its responsibilities and evading its duties. A willful* ABANDONMENT *of an employment or duty in violation of a legal or moral obligation.*

*Criminal desertion is a husband's or wife's abandonment or willful failure without* JUST CAUSE *to provide for the care, protection, or support of a spouse who is in ill health or necessitous circumstances.*

Desertion, which is called abandonment in some statutes, is a DIVORCE ground in a major-

ity of states. Most statutes mandate that the abandonment continue for a certain period of time before a divorce action may be commenced. The length of this period varies between one and five years; it is most commonly one year. The period of separation must be continuous and uninterrupted. In addition, proof that the departed spouse left without the consent of the other spouse is required in most states.

Ordinarily, proof of desertion is a clear-cut factual matter. Courts generally require evidence that the departure was voluntary and that the deserted husband or wife in no way provoked or agreed to the abandonment. Constructive desertion occurs when one party makes life so intolerable for his or her spouse that the spouse has no real choice but to leave the marital home. For an individual to have legal justification for departing, it is often required that the spouse act so wrongfully as to constitute grounds for divorce. For example, a wife might leave her husband if she finds that he is guilty of ADULTERY.

In desertion cases, it is not necessary to prove the emotional state of the abandoning spouse, but only the intent to break off matrimonial ties with no animus revertendi, the intention to return.

Mere separation does not constitute desertion if a HUSBAND AND WIFE agree that they cannot cohabit harmoniously. Sexual relations between the parties must be totally severed during the period of separation. If two people live apart from one another but meet on a regular basis for sex, this does not constitute desertion. State law dictates whether or not an infrequent meeting for sexual relations amounts to an interruption of the period required for desertion. Some statutes provide that an occasional act of sexual intercourse terminates the period only if the husband and wife are attempting reconciliation.

Unintentional abandonment is not desertion. For example, if a man is missing in action while serving in the ARMED SERVICES, his wife may not obtain a divorce on desertion grounds since her spouse did not intend to leave his family and flee the marital relationship. The COMMON LAW allows an individual to presume that a spouse is dead if the spouse is unexplainably absent for a seven-year period. If the spouse returns at any time, the marriage remains intact under common law.

Laws that embody the ENOCH ARDEN DOCTRINE grant a divorce if evidence establishes that an individual's spouse has vanished and cannot be found through diligent efforts. A particular period of time must elapse. Sometimes, if conditions evidencing death can be exhibited, a divorce may be granted prior to the expiration of the time specified by law.

In some jurisdictions, the law is stringent regarding divorce grounds. In such instances, an Enoch Arden decree might be labeled a dissolution of the marriage rather than a divorce.

Upon the granting of an Enoch Arden decree, the marriage is terminated regardless of whether or not the absent spouse returns. Generally, the court provides that the plaintiff must show precisely what has been done to locate the missing person. Efforts to find the absent spouse might include inquiries made to friends or relatives to determine if they have had contact with the missing spouse, or checking public records for such documents as a marriage license, death certificate, tax returns, or application for SOCIAL SECURITY in locations where the individual is known to have resided.

Desertion is frequently coupled with nonsupport, which is a failure to provide monetary resources for those to whom such an obligation is due. Nonsupport is a crime in a majority of states but prosecutions are uncommon.

## DESK AUDIT

*An evaluation of a particular civil service position to determine whether its duties and responsibilities correspond to its job classification and salary grade.*

## DESTROY

*In general, to ruin completely; may include a taking. To ruin the structure, organic existence, or condition of a thing; to demolish; to injure or mutilate beyond possibility of use; to nullify.*

As used in policies of insurance, in leases, and in maritime law, and under various statutes, this term is often applied to an act that renders the subject useless for its intended purpose, though it does not literally demolish or annihilate it.

In relation to wills, contracts, and other documents, the term *destroy* does not mean the annihilation of the instrument or its resolution into other forms of matter, but a destruction of its legal efficacy, which may be by cancellation, obliterating, tearing into fragments, and so on.

## DESUETUDE

*The state of being unused; legally, the doctrine by which a law or treaty is rendered obsolete because of disuse. The concept encompasses situations in which a court refuses to enforce an unused law even if the law has not been repealed.*

Desuetude saw use as a defense during the U.S. Supreme Court's landmark 2003 decision in **LAWRENCE V. TEXAS**, which dealt with Texas' **SODOMY** law. Lawrence successfully argued that since statutes prohibiting sodomy had either fallen into obscurity or been overturned in most states, Texas' statute was similarly invalid.

## DETAINER

*The act (or the juridical fact) of withholding from a lawfully entitled person the possession of land or goods, or the restraint of a person's personal liberty against his or her will; detention. The wrongful keeping of a person's goods is called an* **UNLAWFUL DETAINER** *although the original taking may have been lawful.*

*A request filed by a criminal justice agency with the institution in which a prisoner is incarcerated asking the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent.*

## DETECTIVES

*Individuals whose business it is to observe and provide information about alleged criminals or to discover matters of secrecy for the protection of the public.*

*The approach and questioning of an individual by law enforcement officials is considered an act of detention. Police officers in Norfolk, Virginia, question a man following the September 2002 robbery of a U.S. bank branch.*

AP/WIDE WORLD PHOTOS

*Private detectives* are those who are hired by individuals for private protection or to obtain information. A private detective is licensed but is not ordinarily considered to be a public officer. In cases where private detectives perform the duties and exercise the powers of public officers, the constitutional provisions governing such officers can be applied to them.

*Public detectives* are employed by the general community for the protection of society and, as members of public law enforcement agencies and police departments, are considered peace officers.

The incorporation of private detective companies or associations may be subject to statutory requirements. Detectives are regulated by legislation as well as the rules of the municipality where they are employed. In the absence of contrary statutory provision, private detectives do not have the same powers as public peace officers.

A private detective can be held liable for *rough shadowing*—the open and public surveillance of an individual done in an unreasonable manner that constitutes an invasion of privacy.

## DETENTION

*The act of keeping back, restraining, or withholding, either accidentally or by design, a person or thing.*

Detention occurs whenever a police officer accosts an individual and restrains his or her freedom to walk away, or approaches and questions an individual, or stops an individual suspected of being personally involved in criminal activity. Such a detention is not a formal arrest. Physical restraint is not an essential element of detention.

Detention is also an element of the **TORT** of **FALSE IMPRISONMENT.**

## DETERMINABLE

*Liable to come to an end upon the happening of a certain contingency. Susceptible of being determined, found out, definitely decided upon, or settled.*

## DETERMINATE SENTENCE

*A sentence to confinement for a fixed or minimum period that is specified by statute.*

Determinate sentencing encompasses sentencing guidelines, mandatory minimum sentences, and enhanced sentences for certain

crimes. Sentencing guidelines allow judges to consider the individual circumstances of the case when determining a sentence, whereas mandatory minimum and enhanced-sentence statutes leave little or no discretion to judges in setting the terms of a sentence.

Determinate sentencing statutes have existed at various times throughout the history of the United States. They became popular in the 1980s, when public concern over crime increased dramatically and the public demanded stringent laws to address the crime problem. Operating under the belief that certainty of punishment deters crime, Congress and the states responded by passing laws that dictate specific sentences for certain crimes or for repeat offenders. These laws have been a source of considerable controversy.

Many of the determinate sentencing measures adopted during the 1980s and 1990s were by-products of the war on drugs. They require strict, harsh, and non-negotiable sentences for the possession of narcotics. These stringent laws have led to some unintended and inconsistent results. For example, repeat offenders who have information that is useful to the police sometimes receive lighter sentences than do nonviolent, first-time offenders, in return for their testimony.

Another type of determinate sentence that has been popular since the 1990s is the "three-strikes-and-you're-out" law, which mandates a heavy sentence for anyone who is convicted of a third felony. For example, California Penal Code, section 667, requires a minimum sentence of 25 years to life for a third conviction for a serious felony, and it doubles the usual sentence imposed for a crime when it is a second offense. The purposes of the law are to incapacitate repeat offenders and to deter others from committing crimes.

The constitutionality of the three-strikes laws has come into question in a number of decisions. In 2003, the U.S. Supreme Court, in *Lockyer v. Andrade*, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003), held that these laws do not violate the Eighth Amendment's prohibition against CRUEL AND UNUSUAL PUNISHMENT, thus reversing a decision by the Ninth Circuit Court of Appeals. The decision resolved a dispute between state and federal courts in California.

Leandro Andrade received a life sentence with no possibility for PAROLE for 50 years for stealing nine videotapes worth a total of $153.54. The California trial court applied the three-strikes provision and elevated the crimes to felonies. These felony convictions for petty theft counted as "strikes" three and four against Andrade. Andrade appealed his sentence to a California appellate court, which upheld the trial court's ruling and rejected, among other claims, that the sentence violated Andrade's EIGHTH AMENDMENT rights.

Andrade then filed a petition for a writ of HABEAS CORPUS with a federal district court in California, which denied the petition. He then appealed to the Ninth Circuit, which reversed the denial of the petition in *Andrade v. Lockyer*, 270 F.3d 743 (9th Cir. 2001). The appeals court noted that, while all other states enhance sentences for repeat offenders, California's law is unusually strict. It held that the sentence was so grossly disproportionate to Andrade's crime that it violated the Eighth Amendment's prohibition against cruel and unusual punishment. Andrade would not be eligible for parole until age 87.

The Ninth Circuit's opinion relied in part on the U.S. Supreme Court's decision in *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983), which held that the Eighth Amendment prohibits sentences that are disproportionate to the crime committed. The Ninth Circuit panel disapproved the ruling by the California appellate court that had heard Andrade's original appeal, because the state court had disregarded *Solem* in making its decision. In the months that followed the Ninth Circuit's decision, two California courts of appeals affirmed trial-court sentences of 25 years to life for petty theft convictions. According to the California court, the Ninth Circuit's majority opinion in *Andrade* was flawed. More than a dozen additional California courts refused to follow *Andrade* because the facts in those cases could be distinguished from those in *Andrade*.

The Supreme Court in *Lockyer v. Andrade* analyzed the Ninth Circuit's decision in light of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C.A. § 2254(d)(1) (2003). Under that statute, a federal court may grant a writ of habeas corpus if a state court correctly identifies a legal principle from U.S. Supreme Court decisions, but incorrectly applies the principle to the facts of the case under review. The Ninth Circuit had determined that the California appellate court had improperly applied "clearly established" U.S. Supreme Court precedent to Andrade's case.

**Determinate Sentence**

**AVERAGE PRISON SENTENCES FOR SELECTED OFFENSES, IN 2001[a]**

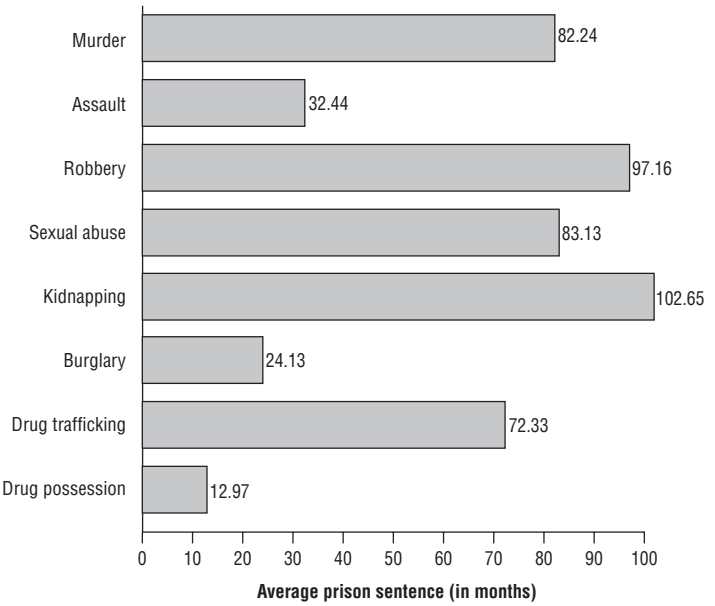


[a]Averages based only on criminal cases terminating in U.S. district courts, fiscal year 2001.

SOURCE: U.S. Bureau of Justice Statistics, Federal Justice Statistics Resource Center.

The Court found that prior decisions by the Court had not provided sufficient clarity on the issue, and that the California appellate court had not misapplied "clearly established" precedent. The fact that the 50-year sentence was essentially a life sentence because of the age of the defendant did not change the outcome, a point that Justice DAVID SOUTER raised in a dissent. Justice SANDRA DAY O'CONNOR, who wrote the majority opinion, disagreed, stating that Justice Souter's argument "misses the point." According to the analysis by the Court, because the state court had not violated a "clearly established" principle, the federal court should not have granted the writ of habeas corpus.

Although the Court focused on the standard for a federal court granting habeas corpus, the effect of the decision is that the three-strikes law does not violate the Eighth Amendment. Accordingly, the several states are generally free to enact such sentencing provisions, and the debate for and against such laws has been left to the various state legislatures.

Supporters of three-strikes laws maintain that the severity of the third crime is not important. Rather, the pattern of violations indicates a life of lawlessness deserving severe penalty. Critics contend that the punishment is sometimes out of proportion to the crime. They point to the example of Jerry Williams, who, in January 1995, was convicted of felony petty theft for stealing a slice of pizza from a group of children in Redondo Beach. Usually, petty theft is a misdemeanor; prosecutors were allowed to charge Williams with felony petty theft because he had previous felony convictions. Williams's 1995 conviction triggered the three-strikes law and brought him an automatic sentence of 25 years to life. A similar case involved Steve Gordon, who had turned to petty crime to support his drug habit after he was fired from his job in 1985. Gordon was convicted of stealing $200 from the cash register at a fast-food restaurant and of snatching a purse, and then, in March 1994, of attempting to steal a wallet. His third conviction triggered the mandatory minimum sentence of 25 years to life.

Many judges oppose determinate sentencing when it prescribes mandatory minimum terms. A 1994 survey of federal judges conducted by the AMERICAN BAR ASSOCIATION found that a majority strongly supported repealing most or all mandatory minimum sentences. In March 1994, during a hearing before the House Appropriations Committee on the U.S. Supreme Court's budget, Justice ANTHONY M. KENNEDY, of the Supreme Court, called mandatory sentence legislation imprudent, unwise, and potentially unjust. Most judges feel that sentencing guidelines, which prescribe sentences that may be altered in accord with aggravating or MITIGATING CIRCUMSTANCES, are preferable to mandatory minimums.

Some judges have attempted to circumvent determinate sentences, but their efforts have failed. In July 1994, Judge Lawrence Antolini, of the Sonoma County, California, Superior Court, challenged California's three-strikes law by sentencing Jeffrey Missamore, a three-time offender, to PROBATION and drug treatment instead of the 25 years to life that the statute mandated. The state petitioned the appellate court to overturn Antolini's probation order. The Superior Court of Sonoma County granted the writ, stating that it is not the role of the judiciary to question the appropriateness of the public policy decisions embodied in the three-strikes law. The court held, "If people (including judges) feel those provisions . . . lead to unfair results, the law can

be changed" (*People v. Superior Court,* 45 Cal. Rptr. 2d 392 [Cal. App. 1995]).

Another divisive issue in the determinate sentencing debate is the disparate effects of new laws concerning cocaine. The penalties for the possession of crack cocaine are substantially higher than those for powder cocaine. Crack is a less expensive form of cocaine that is smoked rather than snorted. Because crack is less expensive than powder, it is used more widely by young people, poor people, and members of minority groups—who constitute a disproportionate number of those incarcerated on drug charges. Critics have attacked the enhanced and mandatory penalties for possession of crack as discriminatory.

Whether determinate sentences work to deter crime is an open question. Both sides of the debate summon statistical evidence to support their positions. Opponents claim that from 1986 to 1991, when determinate sentencing was used extensively, violent crime continued to increase, even as the rate of incarceration rose dramatically. Supporters counter that the FBI's Uniform Crime Index shows a four percent drop in serious crime between 1989 and 1993, suggesting that perhaps stringent sentencing is beginning to affect the crime rate. Supporters also cite statistics indicating that the number of federal drug convictions doubled from 1985 to 1993. Opponents counter that most of those who were convicted were first-time offenders or low-level drug dealers, not the powerful drug kingpins whom the laws were designed to ensnare.

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## DETERMINATION

*The final resolution or conclusion of a controversy.*

In legal use, determination usually implies the conclusion of a dispute or lawsuit by the rendering of a final decision. After consideration of the facts, a determination is generally set forth by a court of justice or other type of formal decision maker, such as the head of an ADMINISTRATIVE AGENCY.

Determination has been used synonymously with adjudication, award, decree, and judgment. A ruling is a judicial determination concerning matters, such as the admissibility of evidence or a judicial or an administrative interpretation of a statute or regulation.

## DETERRENCE

*A theory that criminal laws are passed with well-defined punishments to discourage individual criminal defendants from becoming repeat offenders and to discourage others in society from engaging in similar criminal activity*

Deterrence is one of the primary objects of the CRIMINAL LAW. Its primary goal is to discourage members of society from committing criminal acts out of fear of punishment. The most powerful deterrent would be a criminal justice system that guaranteed with certainty that all persons who broke the law would be apprehended, convicted, and punished, and would receive no personal benefit from their wrongdoing. However, it is unrealistic to believe that any criminal justice system could ever accomplish this goal, no matter how many law enforcement resources were dedicated to achieving it.

As a result, philosophers, criminologists, judges, lawyers, and others have debated whether and to what extent any criminal justice system actually serves as a deterrent. Deterrence requires the would-be criminal to possess some degree of reflective capacity before the crime is committed, at least enough reflection to consider the possible consequences of violating the law if caught.

Since many crimes are committed during "the heat of the moment" when an individual's reflective capacities are severely compromised, most observers agree that some crimes simply cannot be deterred. Individuals who commit crimes for the thrill of "getting away with it" and outwitting law enforcement officials probably cannot be deterred either. In fact, such individuals may only be tempted and encouraged by law enforcement claims of superior crime-prevention and crime-solving skills.

CROSS-REFERENCES

Criminology; Justification; Motive.

## DETINUE

*One of the old common-law* FORMS OF ACTION *used to recover* PERSONAL PROPERTY *from a person who refuses to give it up. Also used to collect money damages for losses caused by the wrongful detention.*

Dating back to the twelfth century, detinue is one of the oldest forms of action in common law, along with the action of debt—a lawsuit for a specific sum of money owed. In detinue a favorable judgment awarded the plaintiff the actual chattels—items of personal property— or their value in money. For example, an action of detinue was available against someone who wrongfully refused to return goods that were held subject to a BAILMENT, such as a deposit for safekeeping or repair. It could be used against an executor who refused to turn over a deed for the deceased person's property to the proper heir. Since the plaintiff did not have to show wrongful detention to prove his or her case, the action was appropriate for recovering goods from a thief as well as from someone who first acquired the property lawfully.

There were several drawbacks in an action of detinue. The defendant could prove his or her case by WAGER OF LAW, for example. That meant that the defendant could swear in open court and bring along eleven neighbors who would take an oath that they, in good conscience, believed the defendant was telling the truth. If the plaintiff won the case, the defendant was required only to give up the items in question. This was small comfort when the goods were damaged or spoiled, since there was no remedy at detinue for harm done to the property while it was in the hands of the defendant. By the fifteenth century, plaintiffs were able to use the more satisfactory form of action on the case, and in the sixteenth century a special kind of action on the case, called TROVER, was introduced. After that, these forms were used much more often than detinue to recover personal property.

Today the action of detinue has been almost entirely superseded by statutes that streamline CIVIL PROCEDURE, but the principles underlying the ancient COMMON LAW form of action are still the foundation of modern actions for the recovery of personal property.

## DETRIMENT

*Any loss or harm to a person or property; relinquishment of a legal right, benefit, or something of value.*

Detriment is most frequently applied to contract formation, since it is an essential element of consideration, which is a prerequisite of a legally enforceable contract. To incur detriment means to cement a promise by either refraining from doing something that one has a legal right to do or by doing something that one is not under any legal obligation to do.

## ♦ DEVENS, CHARLES

Charles Devens was born April 4, 1820, in Charlestown, Massachusetts. He graduated from Harvard University in 1838 and received a doctor of laws degree in 1877. He was admitted to the Massachusetts bar in 1840 and began a career that encompassed military and legal achievements.

Devens participated in the Massachusetts Senate during 1848 and 1849, followed by service as U.S. marshal from 1849 to 1853. He acted as solicitor for the city of Worcester, Massachusetts, from 1856 to 1858 and then left government service to pursue a military career in 1861.

The Civil War provided Devens with many opportunities to display his military expertise. He fought for the Union in three major Virginia

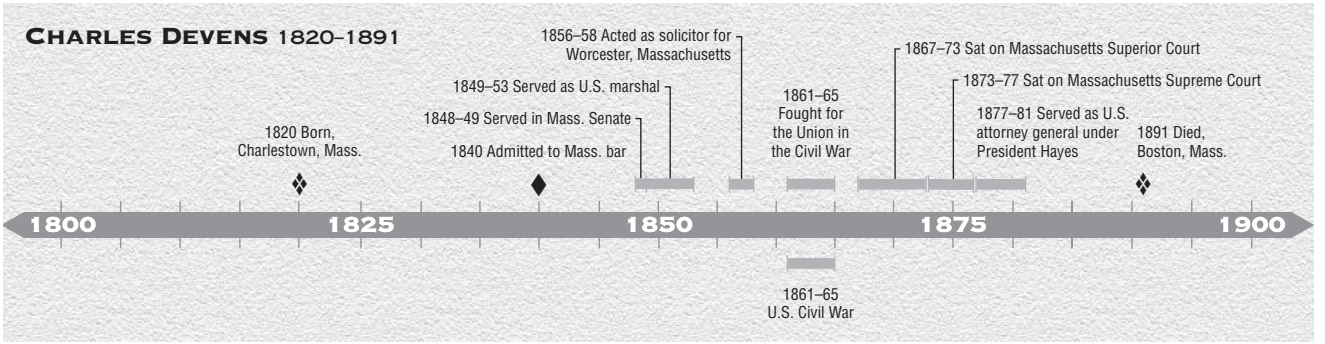

battles fought at Fredericksburg, Chancellorville, and Cold Harbor, earning the rank of major general.

In 1867, he began his judicial career and served as judge of the Massachusetts Superior Court. In 1873, he was appointed to the bench of the Massachusetts Supreme Court.

He began service to the federal government in 1877 as attorney general under President RUTHERFORD B. HAYES, a post he held until 1881.

An army post, Camp Devens, in Ayer, Massachusetts, was named for Charles Devens in recognition of his military accomplishments.

Devens died January 7, 1891, in Boston.

## DEVIANCE

*Conspicuous dissimilarity with, or variation from, customarily acceptable behavior.*

Deviance implies a lack of compliance to societal norms, such as by engaging in activities that are frowned upon by society and frequently have legal sanctions as well, for example, the illegal use of drugs.

## DEVISE

*A testamentary disposition of land or realty; a gift of real property by the last will and testament of the donor. When used as a noun, it means a testamentary disposition of real or* PERSONAL PROPERTY, *and when used as a verb, it means to dispose of real or personal property by will. To contrive; plan; scheme; invent; prepare.*

## DEWEY DECIMAL SYSTEM

*A numerical classification system of books employed by libraries.*

*Thomas E. Dewey.*
LIBRARY OF CONGRESS

The Dewey Decimal System, created by Melvil Dewey, is a reference system that classifies all subjects by number. The numbers in a particular grouping all refer to a designated general topic. For example, the numbers in the 340s concern topics of law. Each new number after the decimal point further subdivides the previous number and the subject it covers.

## ◆ DEWEY, THOMAS EDMUND

Thomas Edmund Dewey was born March 24, 1902, in Owosso, Michigan. He received a bachelor of arts degree in 1923 from the University of Michigan and a bachelor of laws degree from Columbia University in 1925.

After his admission to the bar in 1925, Dewey established his legal practice before becoming U. S. Attorney for the Southern Dis-

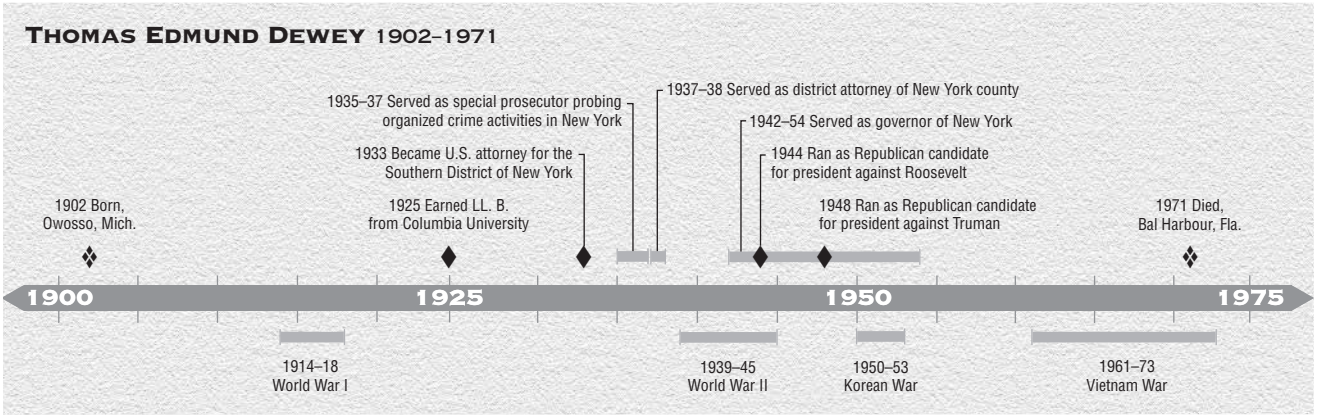

trict of New York in 1933. During the next three years, Dewey achieved prominence for his campaign against crime in New York City, serving as special prosecutor to probe the activities of ORGANIZED CRIME from 1935 to 1937 and as district attorney of New York county from 1937 to 1938.

Dewey's public service to the state of New York culminated in his election as governor in 1942; he remained in this post until 1954.

Twice during his years as governor, Dewey unsuccessfully sought election to the U. S. presidency. He was the Republican candidate in 1944 but was defeated by FRANKLIN DELANO ROOSEVELT; he ran again in 1948 but lost by a small percentage of votes to HARRY S. TRUMAN.

As an author, Dewey is famous for several publications, including *Journey to the Far Pacific* (1952), which is a chronicle of his trip to the Far East.

Dewey died March 16, 1971, in Bal Harbour, Florida.

"IT IS INSEPARABLY ESSENTIAL TO THE FREEDOM OF A PEOPLE THAT NO TAXES BE IMPOSED ON THEM BUT WITH THEIR OWN CONSENT, GIVEN PERSONALLY OR BY THEIR REPRESENTATIVES."
—JOHN DICKINSON

## ❖ DICKINSON, JOHN

John Dickinson was born November 8, 1732, in Talbot County, Maryland. He was educated at the College of New Jersey (today known as Princeton University), where he earned a doctor of laws degree in 1768. He also pursued legal studies at the Middle Temple, Inn of the Court, England.

After his admission to the Philadelphia bar in 1757, Dickinson established a prestigious legal practice in that city and subsequently entered politics on the state level.

In 1760, Dickinson served in the Assembly of Lower Counties, Delaware, and performed the duties of speaker. Two years later, he participated in the Pennsylvania legislature, representing Philadelphia until 1764, and again, from 1770 to 1776. In 1765, Dickinson wrote a pamphlet titled *The Late Regulations Respecting the British Colonies on the Continent of America Considered,* which protested the passage of two unjust acts of taxation, the STAMP ACT and the Sugar Act, by England. In the same year, he also served at the Stamp Act Congress and drafted a series of requests to King George III. Although he opposed many of the policies enforced by England, Dickinson favored conciliatory action over violence.

England passed the unpopular TOWNSHEND ACTS in 1767, which levied tariffs on colonial imports of certain items. Dickinson composed another publication in protest, known as "Letters from a Farmer in Pennsylvania"; these letters advocated nonimportation of the taxed materials, rather than a violent reaction to the passage of the act.

Dickinson continued to serve in pre-Revolutionary War activities, including the Committee of Correspondence in 1774 and the CONTINENTAL CONGRESS from 1774 to 1776 and from 1779 to 1781. He still hoped for reconciliation with England and, as a result of this sentiment, opposed the Declaration of Independence. However, with the outbreak of the Revolutionary War, Dickinson served a tour of military duty.

From 1781 to 1785, Dickinson was a participant in state government activities, acting as

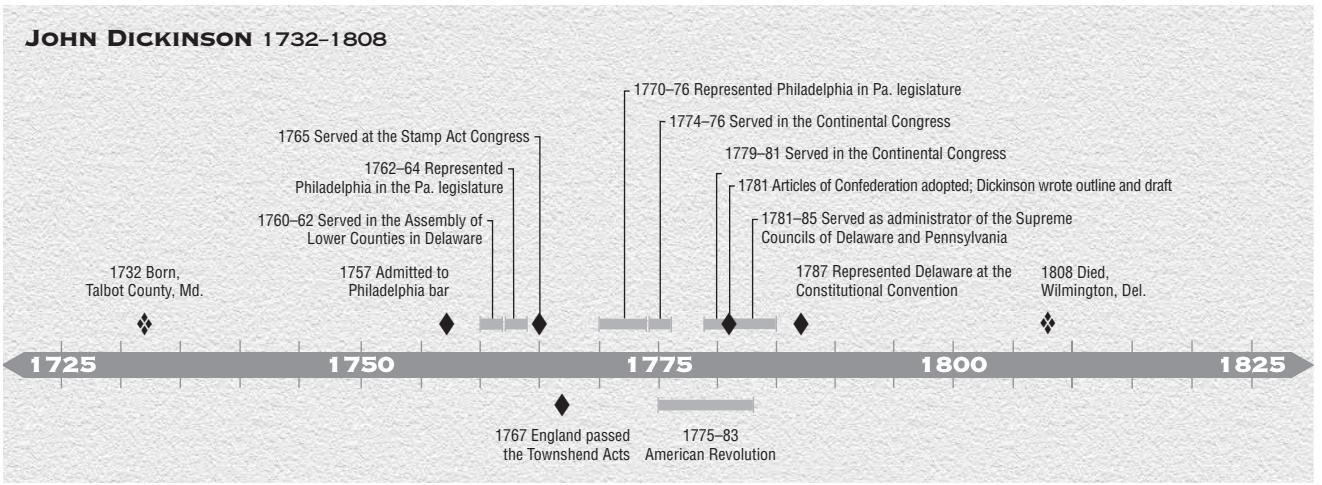

administrator of the Supreme Council of Delaware in 1781 and performing the same duty for the Supreme Council of Pennsylvania from 1782 to 1785.

Dickinson was instrumental in the formation of the ARTICLES OF CONFEDERATION, adopted in 1781, by serving as presiding officer of the committee appointed to compose the document and creating the outline that became the foundation of the articles. In 1787, he represented Delaware at the Constitutional Convention and advocated the ratification of the Constitution through a series of letters published under the name of Fabius.

In addition to his achievements as a statesman, Dickinson also contributed to the field of education as a founder of Dickinson College, located at Carlisle, Pennsylvania.

Dickinson died February 14, 1808, in Wilmington, Delaware.

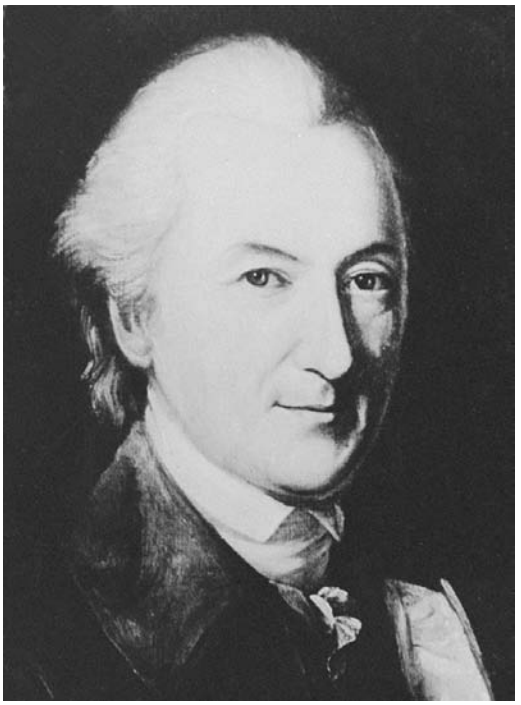

*John Dickinson.*
LIBRARY OF CONGRESS

## DICTA

*Opinions of a judge that do not embody the resolution or determination of the specific case before the court. Expressions in a court's opinion that go beyond the facts before the court and therefore are individual views of the author of the opinion and not binding in subsequent cases as legal precedent. The plural of* dictum.

## DICTUM

*[*Latin, A remark.*] A statement, comment, or opinion. An abbreviated version of obiter dictum, "a remark by the way," which is a collateral opinion stated by a judge in the decision of a case concerning legal matters that do not directly involve the facts or affect the outcome of the case, such as a legal principle that is introduced by way of illustration, argument, analogy, or suggestion.*

Dictum has no binding authority and, therefore, cannot be cited as precedent in subsequent lawsuits. Dictum is the singular form of *dicta.*

## DIGEST

*A collection or compilation that embodies the chief matter of numerous books, articles, court decisions, and so on, disposed under proper heads or titles, and usually by an alphabetical arrangement, for facility in reference.*

*An index to reported cases, providing brief statements of court holdings or facts of cases, which is arranged by subject and subdivided by jurisdiction and courts.*

As a legal term, *digest* is to be distinguished from *abridgment.* The latter is a summary of the contents of a single work, in which, as a rule, the original order or sequence of parts is preserved, and in which the principal labor of the compiler is in the matter of consolidation. A digest is wider in its scope, is made up of quotations or paraphrased passages, and has its own system of classification and arrangement. An *index* merely points out the places where particular matters may be found, without purporting to give such matters *in extenso.* A treatise or *commentary* is not a compilation, but an original composition, though it may include quotations and excerpts.

## DILATORY

*Tending to cause a delay in judicial proceedings.*

*Dilatory tactics* are methods by which the rules of procedure are used by a party to a lawsuit in an abusive manner to delay the progress of the proceedings. For example, when numerous motions brought before a court for postponement are baseless, time is wasted because the court must stop the course of ongoing proceedings to examine whether there is any merit to the motions. The party in whose interests the motion is brought uses this tactic to gain time to enhance his or her position, or to postpone an action by a court as long as possible to minimize

the impact of a decree rendered against him or her. A party found to engage in dilatory tactics may be held in CONTEMPT of court.

## DILATORY PLEA

*In common-law-pleading, any of several types of defenses that could be asserted against a plaintiff's* CAUSE OF ACTION, *delaying the time when the court would begin consideration of the actual facts in the case.*

Under COMMON LAW, a plaintiff began the lawsuit and drew up a paper reciting the events that supported his or her claim to relief. The defendant was entitled to enter a plea responding to the plaintiff's allegations. If the defendant's plea required the court to decide some threshold question not related to the merits of the plaintiff's case, it was called a dilatory plea. For example, a plea to the jurisdiction challenged the authority of the court to hear the kind of matters described by the plaintiff. A *plea in suspension* presented facts to justify a temporary halt to the proceedings, such as when a guardian was needed for one of the parties. A plea in abatement objected to the place, manner, or time of the lawsuit; it did not defeat the plaintiff's claim entirely but, if successful, forced the plaintiff to renew the suit in another form, place, or time.

Federal courts and states that follow the pattern of PLEADING permitted by the rules of federal CIVIL PROCEDURE no longer specifically allow dilatory pleas. The same assertions can be made by motion, but the motions may sometimes be called dilatory pleas by persons complaining that they unnecessarily delay proceedings.

## DILIGENCE

*Vigilant activity; attentiveness; or care, of which there are infinite shades, from the slightest momentary thought to the most vigilant anxiety. Attentive and persistent in doing a thing; steadily applied; active; sedulous; laborious; unremitting; untiring. The attention and care required of a person in a given situation; the opposite of* NEGLIGENCE.

There may be a high degree of diligence, a common degree of diligence, and a slight degree of diligence, with their corresponding degrees of negligence. Common or ordinary diligence is that degree of diligence which persons generally exercise in respect to their own concerns; high or great diligence is, of course, extraordinary diligence, or that which very prudent persons take of their own concerns; and low or slight diligence is that which persons of less than common prudence, or indeed of any prudence at all, take of their own concerns.

*Special diligence* is the skill that a good businessperson exercises in his or her specialty. It is more highly regarded than ordinary diligence or the diligence of a nonspecialist in a given set of circumstances.

## DIMINISHED CAPACITY

*This doctrine recognizes that although, at the time the offense was committed, an accused was not suffering from a mental disease or defect sufficient to exonerate him or her from all criminal responsibility, the accused's mental capacity may have been diminished by intoxication, trauma, or mental disease so that he or she did not possess the specific mental state or intent essential to the particular offense charged.*

## DIMINUTION

*Taking away; reduction; lessening; incompleteness.*

The term *diminution* is used in law to signify that a record submitted by an inferior court to a superior court for review is not complete or not fully certified.

*Diminution in market value* is a rule of damages, within which the proper measure of damages for permanent injury to real property is the reduction of market value for any use to which the property might be appropriated. It is a rule providing for the before-and-after value of stolen or damaged property.

## DIPLOMATIC AGENTS

*Government representatives who are sent by one country to live and work in another, to serve as intermediaries between the two countries.*

The concept of diplomatic agents residing in another country dates to the fifteenth century, but the role of diplomats has evolved with the passage of time. Originally, agents were asked to help to work out specific negotiations between countries. Nowadays, their duties include cultivating a relationship between their native country and the host country; serving as intermediaries by relaying each country's positions to the other; and trying to ensure the best possible treatment for their home countries.

The Vienna Convention on Diplomatic Relations (Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95) contains the most widely accepted description of the INTERNATIONAL LAW on diplomacy. The convention splits the functions of diplomatic agents into six categories: representing the sending state; protecting the sending state's nationals within the receiving state; negotiating with the receiving state; notifying the sending state of conditions and developments within the receiving state; promoting friendly relations between the two states; and developing economic, cultural, and scientific relations between the two states.

Historically, the nomination of U.S. ambassadors to foreign countries is based on the recommendation of the president and is subject to approval by the Senate. It has also been a U.S. tradition that nominations are often given to acquaintances of the president or to those who have contributed heavily to political campaigns. The United States is the only major country that assigns ambassadorships as political rewards.

Despite legislation passed by Congress in 1980 stating that "contributions to political campaigns should not be a factor in the appointment" of an ambassador (22 U.S.C.A. § 3944), this practice of political spoils continues. Former president GEORGE H. W. BUSH nominated six Republicans as U.S. ambassadors in 1989. Each was a member of Bush's Team 100, contributors who had given more than $100,000 to the GOP.

The practice did not change when Democrat BILL CLINTON first won the presidency in 1992. According to an Associated Press review, by the end of Clinton's first year in office, he had nominated five $100,000-plus donors as foreign ambassadors. However, Clinton was able to deflect some of the criticism following these appointments by shifting the focus to the qualifications of his appointees. He stressed that his recommendations extended beyond campaign participation and that they required some real expertise that suited the demands of the appointments. For example, the Japanese regarded Clinton's pick for ambassador to Japan, Walter F. Mondale, as a well-qualified diplomat who would help to steady U.S.-Japanese partnership. Investment banker Nicholas A. Rey was chosen as ambassador to Warsaw on the basis that he spoke fluent Polish and that he had previously led an effort to stimulate private investments in Poland.

*Howard Baker is sworn in as ambassador to Japan by Secretary of State Colin Powell on June 26, 2001.*

AP/WIDE WORLD PHOTOS

President GEORGE W. BUSH similarly rewarded contributors with ambassador positions, but he came under heavier criticism due to the number of contributors who had received these appointments. Bush set a fundraising record during the 2000 presidential election, receiving more than $100 million from individual donors. He later appointed 43 "elite" fundraisers—those who donated at least $100,000 to the campaign.

Another topic involving diplomatic agents that has come under scrutiny in the 1990s involves a shift toward commercialism. Promoting exports and assisting U.S. businesses with their foreign dealings has become a top priority for the U.S. embassies. Since Deputy SECRETARY OF STATE Lawrence Eagleburger took office in 1989, all new foreign service officers and ambassadors have studied commerce as part of their basic training. Eagleburger has emphasized a necessity for diplomats to understand the needs of U.S. businesses and ways to help them to make the right connections abroad. This transition toward trade diplomacy is not new: Diplomats have always tried, in one way or another, to increase U.S. exports. The trend now is for diplomats to help specific companies to obtain specific contracts overseas and to help to find buyers for U.S. exports.

U.S. ambassadors direct, supervise, and coordinate a body of representatives in the country to which they have been assigned. This body of representatives from the sending government is referred to as a diplomatic mission. Under the Vienna Convention, both the prop-

erty and the employees of a diplomatic mission are considered inviolable. However, the convention leaves to the receiving state the decision of how to protect a resident diplomatic agent from assault.

In the United States, specific legislation outlines the penalties that will be imposed if someone attacks a diplomatic officer residing in the United States. The penalties apply to anyone who "assaults, strikes, wounds, imprisons, or offers violence to a foreign official, official guest, or internationally protected person, his official premises, private accommodation, or means of transport or attempts to commit any of the foregoing" (Act of Oct. 24, 1972, Pub. L. No. 92-539, 18 U.S.C.A. § 112(a)). This statute criminalizes acts or attempts to "intimidate, coerce, threaten or harass a foreign official" (18 U.S.C.A. § 112). This section applies to any conduct outside the District of Columbia, which has somewhat different laws that penalize certain conduct directed at foreign embassies (see *Boos v. Barry,* 485 U.S. 312, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988) [striking down part of the D.C. law as violating freedom of speech]).

The United States is among a number of signatories to two separate conventions that are intended to protect visiting dignitaries. These include the Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related EXTORTION That Are of International Significance, and the UNITED NATIONS Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents. Both conventions require host countries to take measures to prevent terrorist acts, and to make efforts to arrest and to punish the offenders should an attack occur.

The Vienna Convention grants special PRIVILEGES AND IMMUNITIES to diplomats, on the grounds that these are necessary to allow performance of official duties without outside interference or constraint. Some examples of privileges are exemption from customs on goods that diplomats import for their own or their family's use, from property taxes on mission property, from income taxes for pay received for their diplomatic duties, and from military obligations. Diplomatic agents and their families are also immune from civil or criminal prosecution. If a diplomat is accused of committing a crime, the STATE DEPARTMENT takes specific steps, including notifying the diplomat's home country and asking to have the diplomat's IMMUNITY waived so that the case can advance to the U.S. judicial system. Diplomatic agents are also exempt from serving as witnesses in civil or criminal proceedings, unless their country waives their immunity if the agents feel their testimony is essential to the case. For example, in 1881, Venezuela asked its minister to the United States to testify in the trial of Charles J. Guiteau for the assassination of U.S. president JAMES GARFIELD.

CROSS-REFERENCES

Ambassadors and Consuls; Diplomatic Immunity.

## DIPLOMATIC IMMUNITY

*A principle of* INTERNATIONAL LAW *that provides foreign diplomats with protection from legal action in the country in which they work.*

Established in large part by the Vienna conventions, diplomatic immunity is granted to individuals depending on their rank and the amount of immunity they need to carry out their duties without legal harassment. Diplomatic immunity allows foreign representatives to work in host countries without fully understanding all the customs of that country. However, diplomats are still expected to respect and follow the laws and regulations of their host countries; immunity is not a license to commit crimes.

In the United States, several levels of immunity are granted: the higher the rank, the greater the immunity. DIPLOMATIC AGENTS and their immediate families have the most protection and are immune from criminal prosecution and civil lawsuits. The lowest level of protection is granted to embassy and consular employees, who receive immunity only for acts that are part of their official duties—for example, they cannot be forced to testify in court about the actions of the people they work with. The Diplomatic Relations Act of 1978 [22 U.S.C.A. § 254a et seq.] follows the principles introduced by the Vienna conventions. The United States has had a tendency to be generous when granting diplomatic immunity to visiting diplomats because a large number of U.S. diplomats work in host countries less protective of individual rights. If the United States were to punish a visiting diplomat without sufficient grounds, U.S. representatives in other countries could receive harsher treatment.

In the United States, if a person with immunity is alleged to have committed a crime or faces a civil lawsuit, the DEPARTMENT OF STATE alerts the government that the diplomat works for. The Department of State also asks the home country to waive immunity of the alleged offender so that the complaint can be moved to the courts. If immunity is not waived, prosecution cannot be undertaken. However, the Department of State still has the discretion to ask the diplomat to withdraw from her or his duties in the United States. In addition, the diplomat's visas are often canceled, and the diplomat and her or his family are barred from returning to the United States. Crimes committed by members of a diplomat's family can also result in dismissal.

Abuse of diplomatic immunity was made more visible by media coverage in the early 1990s. The abuse spans a variety of activities, ranging from parking violations to more serious criminal behavior such as domestic abuse and rape. In February 1995 Mayor Rudolph Giuliani of New York City forgave $800,000 in parking tickets accumulated by foreign diplomats. Although no clear reason was given, the action, which was perhaps meant as a show of goodwill, sent a message to visiting diplomats that the U.S. government may be willing to allow diplomats greater leniency than its own private citizens. This is a good example of how some diplomatic debts have either been erased or not collected. However, outstanding debts may not be the worst illustration of how diplomatic immunity can be abused.

Diplomats and their families have also been known to use diplomatic immunity to avoid prosecution for criminal behavior. For example, in a 1983 case the New York City Police Department suspected a diplomat's son of 15 different rapes. The son was allowed to leave the United States without ever being taken to court because he claimed diplomatic immunity. If diplomatic immunity is used as a shield, the police cannot prosecute, no matter how serious the crime may be.

U.S. citizens and businesses are often at a disadvantage when filing civil claims against a diplomat, especially in cases of unpaid debts, such as rent, ALIMONY, and CHILD SUPPORT. In the summer of 1994 U.S. diplomat Victor Marrero reportedly complained to the UNITED NATIONS secretariat that foreign diplomats' debts in the United States were $5.3 million. The *New Yorker* later reported that a well-informed source had said the figure had risen "closer to $7 million."

The bulk of diplomatic debt lies in the rental of office space and living quarters. Individual debts can range from a few thousand dollars to $1 million in back rent. A group of diplomats and the office space in which they work are referred to as a *mission.* Creditors cannot sue missions individually to collect money they owe. Landlords and creditors have found that the only thing they can do is contact a city agency to see if they can try to get some money back. They cannot enter the offices or apartments of diplomats to evict them because the Foreign Sovereign Immunities Act says that "the property in the United States of a foreign state shall be immune from attachment, arrest and execution" (28 U.S.C.A. § 1609). This has led creditors who are owed money by diplomats to become more cautious about their renters and to change their rental or payment policies. For example, Milford Management, a New York-based company that rents deluxe apartments, is owed more than $20,000 in back rent from diplomats from five different countries. Milford and other creditors have created their own "insurance" policies by refusing to rent to foreign missions unless there is a way of guaranteeing payment, such as collecting money in advance.

The issue of abusing diplomatic immunity in family relations, especially alimony and child support, has become enough of a widespread problem that it prompted discussion at the 1995 United Nations Fourth World Conference on Women, in Beijing. Historically, the United Nations has not gotten involved with family disputes and has refused to garnishee the wages of diplomats who owe money for child support, citing SOVEREIGN IMMUNITY. However, in September 1995, the incumbent head of legal affairs for the United Nations acknowledged there was a moral and legal obligation to take at least a partial responsibility in family disputes. Deadbeat "diplodads" were increasing in numbers in the United Nations: several men who had left their wives and children were still claiming U.N. dependency, travel, and education allowances for their families even though they are no longer supporting those families. One U.S. woman, Barbara Elzohairy, and her daughter were threatened with eviction from their New Jersey apartment because they did not pay their rent. Their reason? Elzohairy's husband, a U.N. representative from Egypt, refused to pay her $16,000 in court-

ordered support. The United Nations told diplomats they must meet their moral obligations, but there were no consequences if they did not.

**DIVORCE** is difficult for the spouses of foreign diplomats, as illustrated in the case of *Fernandez v. Fernandez,* 208 Conn. 329, 545 A.2d 1036, 57 USLW 2115 (Conn., Jul 19, 1988) (NO. 13283). This case involved a U.S. citizen, Barbara Fernandez, who wanted a divorce from her husband, Antonio Diende Fernandez, a U.N. representative from the Republic of Mozambique. Along with the divorce, Fernandez wanted a monetary settlement and property rights to the home the couple owned in a New York suburb. Her husband asked that the courts dismiss her claim on the grounds that he had diplomatic immunity. Under the trial court's interpretation of the Vienna Convention, a U.S. citizen who marries a foreign diplomat is married until either the diplomat dies or the diplomat's country grants permission for divorce proceedings. The Republic of Mozambique gave the court permission to grant the divorce but would not allow the court to make a decision on Fernandez's property or monetary claims. The case went on to the Connecticut Supreme Court, which dissolved the marriage and allowed Fernandez to claim property rights under article 31 of the Vienna Convention.

Article 31 gives diplomats immunity from all civil cases except for those that involve "private immovable property." The Connecticut Supreme Court interpreted that exception to apply to Fernandez's claim on the home, which was valued at more than $8 million. Article 31 of the Vienna Convention does not allow the "private residence of a diplomatic agent" to be included in a civil suit. However, the Connecticut Supreme Court declined to consider this article as a form of defense for Fernandez's husband. The Vienna Convention specifically does not allow exceptions for spouses to seek monetary compensation in divorce proceedings, so Fernandez was not granted any money by the Connecticut court.

The *Fernandez* decision did not settle all the issues revolving around dissolution of diplomats' marriages, such as whether U.S. courts can grant a divorce without the permission of the diplomat's country. Critics of *Fernandez* say it might cause foreign countries to think twice before granting permission to dissolve marriages because property claims can then also be brought against the diplomats.

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**CROSS-REFERENCES**

Ambassadors and Consuls.

## DIRECT

*As a verb, to point to; guide; order; command; instruct. To advise; suggest; request. As an adjective, immediate; proximate; by the shortest course; without circuity; operating by an immediate connection or relation, instead of operating through an intermediary; the opposite of* indirect. *In the usual or regular course or order, as distinguished from that which diverts, interrupts, or opposes. The opposite of cross, contrary, collateral, or remote. Without any intervening medium, agency, or influence; unconditional.*

## DIRECT EVIDENCE

*Evidence in the form of testimony from a witness who actually saw, heard, or touched the subject of questioning. Evidence that, if believed, proves existence of the fact in issue without inference or presumption. That means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact, and which is distinguished from* **CIRCUMSTANTIAL EVIDENCE**, *often called* indirect.

*Evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.*

## DIRECT EXAMINATION

*The primary questioning of a witness during a trial that is conducted by the side for which that person is acting as a witness.*

During the course of a direct examination, the attorney who is conducting the interrogation generally asks specific questions that provide the foundation of the case. After a witness is directly examined, the opposing side conducts a cross-examination, the purpose of which is to impeach or test the validity of the testimony.

## DIRECT TAX

*A charge levied by the government upon property, which is determined by its financial worth.*

A direct tax is usually a property tax or ad valorem tax, as opposed to an indirect tax imposed upon some right or privilege, such as a franchise tax.

## DIRECTED VERDICT

*A procedural device whereby the decision in a case is taken out of the hands of the jury by the judge.*

A verdict is generally directed in a jury trial where there is no other possible conclusion because the side with the BURDEN OF PROOF has not offered sufficient evidence to establish a PRIMA FACIE case.

A directed verdict is provided for by federal and state rules of CIVIL PROCEDURE. In a criminal action, an acquittal may be directed in favor of a defendant, based upon rules of CRIMINAL PROCEDURE.

## DIRECTOR

*One who supervises, regulates, or controls.*

A director is the head of an organization, either elected or appointed, who generally has certain powers and duties relating to management or administration. A corporation's board of directors is composed of a group of people who are elected by the shareholders to make important company policy decisions.

Director has been used synonymously with manager.

## DIRECTORY

*A provision in a statute, rule of procedure, or the like, that is a mere direction or instruction of no obligatory force and involves no invalidating consequence for its disregard, as opposed to an imperative or mandatory provision, which must be followed. The general rule is that the prescriptions of a statute relating to the performance of a public duty are so far directory that, though neglect of them may be punishable, it does not affect the validity of the acts done under them, as in the case of a statute requiring an officer to prepare and deliver a document to another officer on or before a certain day.*

Generally, statutory provisions that do not relate to the essence of a thing to be done, and as to which compliance is a matter of convenience rather than of substance, are *directory,* while provisions that relate to the essence of a thing to be done, that is, matters of substance, are mandatory.

## DISABILITY

*The lack of competent physical and mental faculties; the absence of legal capability to perform an act.*

**Directed Verdict**

After hearing a motion at the close of the evidence. I have determined that the plaintiff has failed to present the proof that the law requires to prevail on his/her claim [or: to prevail on some of the claims, namely, _____]. Since I have made this legal determination, I am directing you that the law requires that you render a verdict in favor of the defendant. [or: in favor of the defendant on Counts _____ and _____].

The verdict form which you will use for this purpose is headed "Defendant's Verdict" [describe finding for defendant on particular counts on the verdict form]. You should elect a foreperson, who should sign this verdict form on behalf of the jury at the direction of the court.

REVISED TO DECEMBER 31, 1998

*A sample judgment on directed verdict, for the defendant.*

*The term* disability *usually signifies an incapacity to exercise all the legal rights ordinarily possessed by an average person. Convicts, minors, and incompetents are regarded to be under a disability. The term is also used in a more restricted sense when it indicates a hindrance to marriage or a deficiency in legal qualifications to hold office.*

*The impairment of earning capacity; the loss of physical function resulting in diminished efficiency; the inability to work.*

In the context of WORKERS' COMPENSATION statutes, disability consists of an actual incapacity to perform tasks within the course of employment, with resulting wage loss, in addition to physical impairment that might, or might not, be incapacitating.

Under federal law, the definition of a disability, for SOCIAL SECURITY benefits purposes, requires the existence of a medically ascertainable physical or mental impairment that can be expected to result in death or endures for a stated period, and an inability to engage in any substantial gainful activity due to the impairment.

## DISABILITY DISCRIMINATION

Approximately 43 million people in the United States are physically or mentally disabled. Like individuals of various races, religions, genders, and national origins, individuals with physical or mental limitations historically have faced discrimination in the forms of exclusion from mainstream society; intentional and unintentional SEGREGATION; unequal or inferior services, benefits, or activities; and screening criteria that do not correlate with actual ability. Legal commentators have noted that the discrimination against DISABLED PERSONS differs from other forms of discrimination in that a rational basis for treating members of other excluded groups differently rarely exists, whereas a person's disability might hinder his or her abilities and might provide a rational basis for different treatment. Thus, the mere fact that an individual with a disability is treated differently is insufficient for a finding of illegal discrimination.

Another frequently noted difference between discrimination based on disability and discrimination based on race, color, religion, gender, and national origin is the attitude behind the discrimination. For example, discrimination based on race tends to be rooted in hostility toward a different race. On the other hand, discrimination based on disability is often caused by discomfort and pity, or misguided compassion that materializes as paternalistic and patronizing behavior. Other times, discrimination against disabled persons is the result of "benign neglect" and is "primarily the result of apathetic attitudes rather than affirmative animus" (*Alexander v. Choate,* 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 2d 661 [1985]). For example, a restaurant owner who fails to provide a wheelchair ramp to the restaurant's entrance is more likely to be guilty of failing to consider the needs of patrons than of expressing a specific dislike of wheelchair users.

Whatever its roots, discrimination impedes those with disabilities from obtaining jobs that they are qualified to perform; access to some buildings and modes of transportation; and the independence and dignity that nondisabled people take for granted. The U.S. Constitution provides little relief. Courts have held that mentally and physically disabled persons do not fall within a suspect or quasi-suspect class (i.e., classes subjected to a history of purposeful unequal treatment or political powerlessness). This means that under the Constitution's EQUAL PROTECTION CLAUSE, courts review government action affecting disabled people without the heightened or STRICT SCRUTINY afforded suspect or quasi-suspect classes formed by race or religion.

This lack of distinct constitutional protection has resulted in legislative action. Following a concerted LOBBYING effort by and on behalf of individuals with disabilities, Congress in the late 1960s and early 1970s passed the first federal laws designed to protect disabled persons. Lobbying continued when these laws proved to be inadequate owing to their limited coverage. Then, in 1990, Congress passed the much-heralded Americans with Disabilities Act (ADA) (42 U.S.C.A. §§ 12101–12213), legislation with a much broader application and a fair amount of controversy over the relative cost of its effectiveness.

### Rehabilitation Act of 1973

The Rehabilitation Act of 1973 (19 U.S.C.A. §§ 791, 793, 794) prohibits disability discrimination by federal agencies, federal contractors, and other recipients of federal financial assistance. Types of prohibited discrimination include employment; education; building accessibility; and health, welfare, and social services. Courts have held that private individuals may file

actions under the Rehabilitation Act against federal employers or against recipients of federal financial assistance; the action need not be brought by a government entity. A plaintiff who proves that a federal employer discriminated intentionally in violation of the Rehabilitation Act may receive compensatory and PUNITIVE DAMAGES.

What constitutes a disability under the Rehabilitation Act is often the source of controversy. Blindness, deafness, diabetes, cardiac problems, mobility impairments, and chronic fatigue syndrome have been recognized as physical impairments. The U.S. Supreme Court has held that tuberculosis, a contagious disease, is a physical impairment (*School Board v. Arline,* 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 [1987]). Numerous courts have followed the logic in *Arline* in holding that individuals who have AIDS or who have tested positive for HIV, the virus that causes AIDS, are physically impaired. Courts also have held that alcoholism, anxiety panic disorder, and post-traumatic stress disorder are impairments under the Rehabilitation Act.

Prior to the enactment of the Americans with Disabilities Act, section 504 of the Rehabilitation Act was the principal federal prohibition of discrimination on the basis of disability. Even with the ADA, the Rehabilitation Act remains an important protection for those with disabilities. The ADA expressly excludes from its coverage protection against discriminatory acts by the federal government, so the Rehabilitation Act provides the only private CAUSE OF ACTION for disability discrimination by federal employers and agencies. The Rehabilitation Act also remains an alternative means of remedying discrimination even when a plaintiff concurrently invokes ADA protection.

### Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act (IDEA) (20 U.S.C.A. §§ 1400–1485) requires states to provide a free, appropriate public education to children who are disabled. Formerly known as the Education of the Handicapped Act or the Education for All Handicapped Children Act, the law was established in 1975 in response to studies showing that more than half of all disabled children were receiving an inappropriate public education, and about one-eighth of those children were simply excluded from public education altogether.

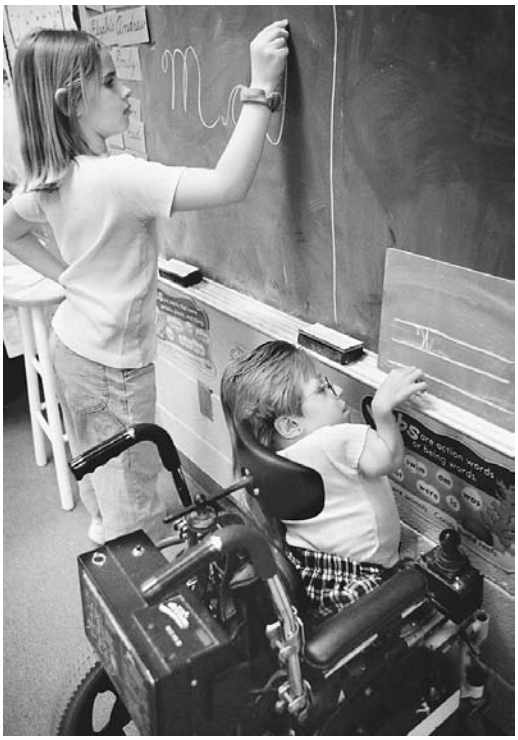

*The Individuals with Disabilities Education Act requires that states provide a free and appropriate public education to children who are disabled.*

AP/WIDE WORLD PHOTOS

IDEA requires states seeking federal financial assistance for education to develop plans ensuring disabled children a free education that meets their needs. IDEA covers children ages three to 21 who have educational disabilities—in other words, mental retardation; hearing, speech, or language impairments; visual impairments; serious emotional disturbances; orthopedic impairments; autism; traumatic brain injuries; and specific learning disabilities—and as a result of such conditions require special education and related services such as transportation to and from school. The act does not, under normal circumstances, cover a child who is nearsighted and needs glasses, or a child who walks with a leg brace; many children with minor disabilities can be educated without special attention.

Each child covered by IDEA is entitled to have an individualized educational program, or IEP, developed jointly by the child's parents and school personnel. The IEP describes the child's abilities and needs, and outlines educational placement and services that will address the listed needs. IDEA contains procedural safeguards designed to ensure that parents can participate in the IEP process and have methods of recourse if they disagree with educators about their child's education.

Finally, IDEA supports the INTEGRATION of disabled children by requiring that they receive their education in the least restrictive environment. The goal of this requirement is to keep children with disabilities in regular public school classrooms to the extent possible. Only when a satisfactory education cannot be achieved in regular classes, even with the use of supplementary aids and services, may a disabled child be removed from regular classes. In many cases, children with disabilities are mainstreamed—placed in a regular educational setting—for part of their school day, and removed to a special-needs setting for the other part. Depending on the disability, children may be mainstreamed into certain academic classes or simply during lunch, during study hall, or on the school bus.

### Architectural Barriers Act

The Architectural Barriers Act (ABA) (42 U.S.C.A. §§ 4151–4157) requires that federally owned, leased, or financed buildings be accessible to disabled persons. Originally enacted in 1968, this law requires each of four federal agencies—the DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, the DEPARTMENT OF DEFENSE, the GENERAL SERVICES ADMINISTRATION, and the Postal Service—to promulgate design, construction, and alteration standards for buildings within its jurisdiction.

The coverage, and thus the effectiveness, of the ABA is limited. The act encompasses the subway system in Washington, D.C., as well as (1) structures that the federal government constructs or alters; (2) structures that the federal government leases; and (3) structures that depend on federal grants or loans for their design, construction, or alteration. If a federal agency is housed in a building that was constructed by the federal government prior to the ABA's original enactment date in 1968, and that building is not altered, it need not be accessible to disabled individuals under the ABA. Further, when structures covered by the ABA are altered, only the altered portion need be made accessible. Thus, an altered wing of a building may have elevators, wheelchair ramps, and accessible rest rooms, whereas stairs in front of the building's entrance render the building inaccessible to wheelchair users. Perhaps the most obvious shortcoming of the ABA's effectiveness is that it covers only buildings that are owned, leased, or financed by the U.S. government. Even after the ABA's enactment, individuals with disabilities remained challenged by the many inaccessible buildings not covered under it.

### Americans with Disabilities Act

Despite the efforts of Congress, until 1990, no federal law outlawed most of the disability discrimination by employers, owners of places of public accommodation, and program administrators. During the late 1980s, two-thirds of employable, working-age, disabled persons in the United States had a job, and many of those who were employed held a job far below their actual capabilities. In the United States in 1990, more than 8 million persons with disabilities who wanted to work were unable to find jobs and were forced to live on welfare and other government subsidies funded by taxpayers.

Disabled individuals faced more obstacles when it came to transportation. Because disabilities often prevent people from driving cars, many with disabilities must rely on buses, trains, and subways. As of 1990, very few public modes of transportation were accessible to those with disabilities. That same year, Congress passed the Americans with Disabilities Act in the hopes of alleviating day-to-day problems faced by those with disabilities.

**Employment Discrimination and the ADA** Titles I and II of the ADA prohibit employers, employment agencies, labor organizations, and joint labor-management committees, in the private sector and in state and local governments, from discriminating on the basis of disability. At the ADA's effective date in July 1992, the act covered private employers with 25 or more employees; since July 1994, the act has covered private employers with 15 or more employees. All state and local government employers are covered, regardless of their number of employees.

The EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) is the federal agency charged with overseeing the employment-discrimination provisions of the ADA. That agency administers complaints and enforces the ADA. The act also provides that its powers, remedies, and procedures may be invoked by the EEOC, the U.S. attorney general, and any person alleging illegal discrimination pursuant to the ADA or its underlying regulations. Any party seeking redress for ADA-prohibited discrimination must exhaust certain administrative remedies before instituting a lawsuit.

The employment discrimination outlawed by the ADA may take one of several forms explicitly defined by the act: (1) limiting, segregating,

or classifying job applicants or employees in a way that adversely affects the status or opportunities of a disabled individual; (2) entering into a contract or business arrangement that has the effect of discriminating against a disabled individual; (3) implementing administrative procedures or criteria that have the effect of discriminating against a disabled individual; (4) denying a disabled person equal jobs or benefits; (5) failing to make reasonable accommodations to allow those with disabilities to perform their job in the workplace; (6) using criteria that screen, or tend to screen, disabled individuals from the workplace; and (7) administering employment tests for the purpose, or partial purpose, of measuring a job applicant's disabilities. In determining whether illegal discrimination has occurred under the ADA, it is irrelevant that the employer did not intend to discriminate. But discriminatory actions are permissible if they are job related and necessary for the business, and if the required job performance cannot be accomplished with reasonable accommodation.

Reasonable accommodation can be modifications or adjustments to the job application process, to the work environment, or to the manner or circumstances under which the job is performed. The ADA does not require an employer to reasonably accommodate an employee who does not make his or her disability known to the employer, and unless it is obvious, the employer may legally require documented proof of a disability before accommodating it. Examples of reasonable accommodation include making work areas, and nonwork areas such as lunch rooms and rest rooms, accessible; modifying work schedules; modifying equipment such as computers and desks; and providing interpreters for blind or deaf workers. An accommodation that imposes an undue hardship, causing the employer significant difficulty or expense, is not a reasonable accommodation. An accommodation that fundamentally alters the business is also not reasonable. For example, a nightclub would not be forced to provide bright lighting for a visually impaired employee, because bright lighting would significantly alter the nightclub's business. An employer is not responsible for providing personal items of accommodation such as eyeglasses, leg braces, and prostheses, nor is an employer responsible for accommodating current users of illegal drugs. But the ADA does protect rehabilitated drug users and rehabilitated and nonrehabilitated alcoholics, provided that the employees do not threaten the employer's property or the health and safety of others in the workplace. Whether an accommodation is reasonable is, under the ADA, determined on a case-by-case basis, considering all relevant factors including hardship and cost to the employer.

*Title II of the Americans with Disabilities Act requires state and local governments to ensure that modes of public transportation—such as this Oklahoma City Metro Transit bus—are accessible to those with disabilities.*

AP/WIDE WORLD PHOTOS

The ADA does not require employers to accommodate every individual with a disability. Only qualified individuals with disabilities—disabled individuals who can perform, with or without reasonable accommodation, the job's essential functions—are protected from discrimination. Two factors are involved in the determination of whether a disabled individual is qualified. First, the employer must determine whether the individual satisfies the job prerequisites at the time of the hiring decision. This determination should not be based on speculative fears that the employee will not be able to function on the job, or that the employer's insurance premiums will rise. Second, the employer must determine whether the individual can perform the job's essential functions with or without reasonable accommodation. The essential functions of a job are tasks that are fundamental as opposed to marginal. Written job descriptions are frequently considered relevant evidence of essential functions.

To ensure that employers do not consider a person's disability at the time of hiring, the ADA prohibits employers from inquiring about disabilities or conducting medical examinations of prospective employees before hiring them. It is

illegal to ask questions about medical history, prior WORKERS' COMPENSATION claims, and overall health before a hiring decision is made. The employer is permitted to inquire about the applicant's abilities as they relate to essential or nonessential job functions—although refusing to hire an applicant because of his or her inability to perform a nonessential job function is prohibited. Upon extending a job offer, the employer may require the prospective worker to submit to a medical examination, provided that all prospective workers face the same requirement. In fact, a job offer may be conditioned upon the results of the examination, and the employer may rescind the offer if the examination indicates that the prospective worker would pose a direct threat to health or safety in the workplace, or that he or she would not be able to perform the job's essential functions even with reasonable accommodation. The ADA does not consider tests for illegal drugs to be within its definition of a medical examination; therefore, before extending a job offer, employers may test applicants for illegal drugs—but not prescription drugs or alcohol. An employer may legally test for HIV only after an employment offer has been extended. Even then, the employer may not fire or refuse to hire an individual because of that person's HIV status, unless such discrimination is both related to the job and necessary for the business.

When an employer violates the ADA, the aggrieved party usually is entitled only to equitable relief, such as a court order requiring the construction of wheelchair ramps or the provision of voice-activated computers. Only when the employee shows intentional discrimination may compensatory or punitive damages be awarded. Where the dispute involves the provision of a reasonable accommodation, and the employer made GOOD FAITH efforts to make reasonable accommodation, the court may not award money damages; it may award only equitable relief.

**Public Accessibility and the ADA** Title II of the ADA requires that state and local government programs and activities be accessible to those with disabilities. Title III of the ADA applies the same requirement to certain private entities that own, lease, or operate places of public accommodation: (1) hotels, motels, and certain other places of lodging; (2) restaurants, bars, and other establishments that serve food or drink; (3) theaters, stadiums, concert halls, and other places of exhibition or entertainment; (4) auditoriums, convention centers, and lecture halls; (5) retail or rental establishments such as grocery stores, bakeries, shopping centers, and hardware stores; (6) self-service laundries, dry cleaners, banks, hair salons, travel services, shoe repair services, gas stations, law offices, accounting offices, pharmacies, doctors' offices, hospitals, and other service establishments; (7) public transit stations and depots; (8) museums, libraries, and galleries; (9) parks, zoos, and other places of recreation; (10) private schools; (11) day care centers, homeless shelters, food banks, and other social-service establishments; and (12) health clubs, gymnasiums, bowling alleys, golf courses, and other places of exercise or recreation. The ADA does not limit its coverage to the size of the public accommodation; if a private entity fits into one of the twelve descriptive categories, it must comply with the ADA accessibility requirements. The ADA does exempt from its coverage some private clubs and religious entities.

When a private entity falls within a class of public accommodation, it must provide reasonable modifications in its practices, policies, or procedures, or auxiliary aids and services, for those with disabilities, unless such modifications would fundamentally alter the nature of the entity or would result in an undue burden of significant difficulty or expense. Title III requires only that those with disabilities be given equal opportunities to achieve the same results as nondisabled individuals. For example, a clothing store need not print price tags in braille so long as a sales clerk is available to read the price tags to a blind shopper. Auxiliary aids, such as closed-captioned televisions for hearing-impaired hotel guests, are required, but this provision is often flexible. Thus, the owner or operator of a public accommodation may often determine the type of auxiliary aid to assist the disabled individual, provided that the chosen aid is effective.

Title III also requires the owners and operators of public accommodation in existing facilities to remove structural, architectural, and communication barriers when such removal is "easily accomplishable and able to be carried out without much difficulty and expense" (42 U.S.C.A. § 12181(9)). To determine whether barrier removal is readily achievable, courts look at the nature and cost of the action needed; the number of people employed at the facility and its financial resources; the action's effect on the

facility; and the size, nature, type, and financial resources of the covered entity. Under Title II, state and local governments must remove barriers unless the removal would cause a fundamental alteration to the program or activity, or unless it would cause the government entity an undue financial and administrative burden.

A private individual may enforce the provisions of Title III, as may the U.S. attorney general. To enforce the provisions of Title II, a private individual may file an administrative complaint with the appropriate federal agency (usually the agency that provides federal funding to the public entity that is the subject of the complaint) or the U.S. DEPARTMENT OF JUSTICE, or the individual may file a federal lawsuit.

On May 29, 2001, the U.S. Supreme Court ruled 7-2 that federal disability rights law entitled professional golfer Casey Martin to ride a golf cart among shots while competing in PGA Tour events, *PGA Tour, Inc. v. Martin,* 532 U.S. 661, 121 S.Ct. 1879, 149 L.Ed.2d 904 (U.S.Or., May 29, 2001) (NO. 00-24). In reaching its decision, the Court addressed two distinct legal issues, ruling that the PGA tour is a "public accommodation" subject to ADA requirements, and that under those requirements Martin's use of a cart was a "reasonable modification." The decision was the first high court case to interpret the nondiscrimination mandate of Title III of the ADA.

**The ADA and Public Perception** Many individuals with disabilities credit the ADA with helping them to overcome the special challenges that they face from day to day. From the visually impaired social worker who is able to take his licensing test in braille, to the wheelchair user who is able to park her car just a few yards from her office's entrance, the ADA has helped many disabled people to become fully functioning members of society. But not everyone heralds the act, particularly when the price of compliance outweighs the legislation's effectiveness. Business owners complain that they have to make their buildings accessible even when those buildings are never used by disabled individuals. Between 1990 and 1995, local governments within Orange County, Florida, spent more than $2 million on architectural changes to make buildings accessible. The city of Winter Park, Florida, spent approximately $35,000 to make a new tennis facility that would be accessible to the disabled, yet the facility's manager reported that only one disabled person used the building in the first year after it opened.

**Persons with Disabilities, 1997[a]**

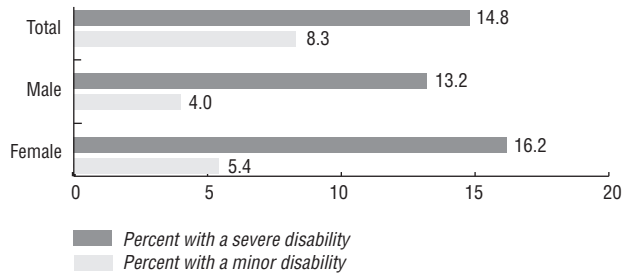


**There were approximately 52.6 million Americans with disabilities in 1997, or 19.7% of the U.S. population.**

[a]Covers civilian noninstitutional resident population age 15 and over, as well as members of the armed forces living off post or with their families on post.

SOURCE: U.S Census Bureau, *Americans with Disabilities: 1997.*

Other critics of the ADA contend that the law is draining administrative and legal resources. During the first three years following the effective date of the ADA's employment provisions, the EEOC reported a 25 percent increase in its workload owing to ADA-related complaints. About 20 percent of those complaints were found to be without merit. By the early 1990s, the act had done little to improve the employment rate for those with disabilities. According to figures by the National Organization on Disability, a private group, as of December 1993, 31 percent of working-age disabled people were employed, whereas in 1986, prior to the ADA's enactment, 33 percent were employed. More recent figures indicate that employment and opportunities for disabled persons are on the rise.

Some legal commentators argue that the act is new and evolving. As courts interpret the law and Congress fine-tunes it, the ADA's benefits will become clearer. Peter David Blanck, a fellow at the Annenberg Washington Program, has stated that people with disabilities are not the only beneficiaries of the ADA. Businesses have found a new market, and new technology developed to help those with disabilities often helps the nondisabled as well.

## Restrictions on ADA Application

**Defining Disability** In *Sutton v. United Airlines,* 527 U.S. 471, 119 S.Ct 2139, 144 L.Ed.2d 450 (1999), the U.S. Supreme Court held that for the purposes of the Americans with Disabilities Act, whether a person has a disability is to be

determined based on the person's condition when that person uses corrective measures. The case concerned two women who had been denied positions as airline pilots because they each had extremely poor vision when they were not wearing glasses. The Court held that because the women had perfect vision when wearing glasses, they were not disabled and thus not protected by the ADA. It stated that "if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures, both positive and negative, must be taken into account when judging whether that person is substantially limited in a major life activity and thus disabled under the [ADA]." That is, to determine whether someone is disabled, ask whether her physical or mental impairment, when mitigated by medication or other corrective devices, substantially limits her ability to perform major life activities.

In *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (U.S., Jan 8, 2002) (NO. 00-1089), the high court further narrowed the standard for establishing that one has a disability covered under the ADA. In that case, Ella Williams, an assembly line worker in a Toyota automobile-manufacturing plant, developed severe carpal tunnel syndrome from her job. Her physician imposed limitations on her manual activities, disqualifying her from most of the assembly jobs in the plant. Toyota eventually accommodated her by assigning her to a lighter-duty unit but later required her to rotate to an additional job station, where she had to work at regular intervals with her hands and arms above shoulder height. Her disabling symptoms reappeared and worsened, but her request to be returned to her original accommodation was denied. She became unable to work and lost her job soon afterward. The court ruled that under the ADA, the inability to perform occupation-specific tasks does not necessarily mean that employee is substantially limited in performing a major life activity.

**Damage Limitations** In *Barnes v. Gorman,* 536 U.S. 181, 122 S.Ct. 2097, 153 L.Ed.2d 230 (U.S., Jun 17, 2002) (NO. 01-682), the U.S. Supreme Court declared that persons excluded by local governments from programs funded with federal dollars may not receive punitive damages, no matter how egregious the discrimination that they have suffered. In that case, Jeffrey Gorman, who was confined to a wheelchair, was arrested one night in Kansas City, Missouri, and transported in a city police van that did not have the right equipment to take him safely. He sustained serious injuries, which prevented him from further gainful employment. At trial, the jury learned that the police department had failed to comply with the Rehabilitation Act since its passage in 1973, and even worse, it had done nothing after Gorman was hurt to prevent further injuries. A federal appeals court upheld the jury's damages award of more than $2 million. Local officials appealed the punitive damages portion, about half the total award, to the U.S. Supreme Court, arguing that punitive damages for disability discrimination could bankrupt city governments. Several groups, including AARP, pointed out that in Gorman's case, and other instances of egregious, intentional discrimination, punitive damages serve the worthy goals of deterring illegal conduct and compensating victims for their unneeded suffering. The U.S. Supreme Court reversed in a decision reflecting that neither the Rehabilitation Act nor the ADA permits an award of punitive damages in cases of access to public services.

**Eleventh Amendment Issues** In *University of Alabama v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (U.S.Ala., Feb 21, 2001) (NO. 99-1240), Respondents Garrett and Ash filed separate lawsuits against petitioners, Alabama state employers, seeking money damages under Title I of the ADA. In an opinion disposing of both cases, the District Court found that the ADA exceeds Congress's authority to abrogate the State's ELEVENTH AMENDMENT IMMUNITY. The Eleventh Circuit reversed on the ground that the ADA validly abrogates such immunity. The U.S. Supreme Court held that suits in federal court by state employees to recover money damages by reason of the state's failure to comply with Title I of the ADA are barred by the Eleventh Amendment.

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CROSS-REFERENCES

Acquired Immune Deficiency Syndrome; Equity.

## DISABILITY INSURANCE

See OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE.

## DISAFFIRM

*Repudiate; revoke consent; refuse to support former acts or agreements.*

*Disaffirm* is commonly applied in situations where an individual has made an agreement and opts to cancel it, which he or she may do by right—such as a minor who disaffirms a contract.

A disaffirmance is a denial or nullification of the existence of something, as opposed to a revocation, which is the breaking of an existing agreement.

## DISALLOW

*To exclude; reject; deny the force or validity of.*

The term *disallow* is applied to such things as an insurance company's refusal to pay a claim.

## DISARMAMENT

See ARMS CONTROL AND DISARMAMENT.

## DISASTER RELIEF

*Monies or services made available to individuals and communities that have experienced losses due to disasters such as floods, hurricanes, earthquakes, drought, tornadoes, and riots.*

The term *disaster* has been applied in U.S. law in a broad sense to mean both human-made and natural catastrophes. Human-made catastrophes include civil disturbances such as riots and demonstrations; warfare-related upheavals, including those created by guerrilla activity and TERRORISM; refugee crises involving the forced movements of people across borders; and many possible accidents, including transportation, mining, POLLUTION, chemical, and nuclear incidents.

Natural disasters may be divided into three categories: meteorological disasters, such as hur-

**Number of Lives Lost in Major U.S. Weather Disasters, 1980 to 2000**

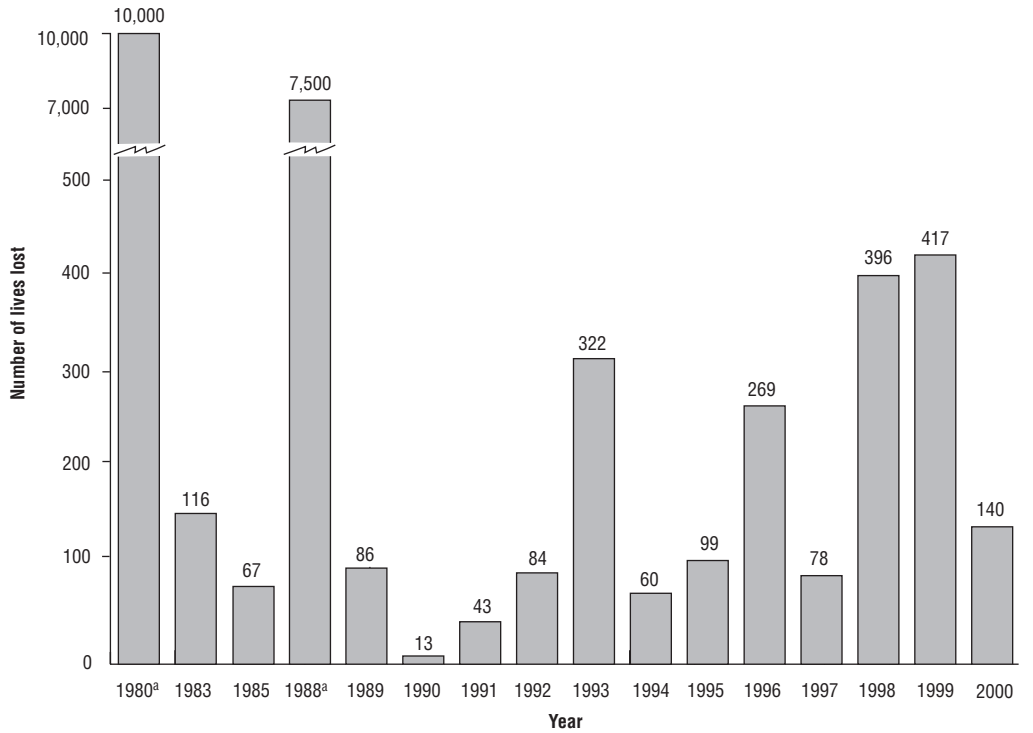


[a]A drought/heat wave occurred across the central and eastern United States during the summer months.

SOURCE: U.S. National Oceanic and Atmospheric Administration, *Billion Dollar U.S. Weather Disasters Since 1980*, and U.S. Census Bureau, *Statistical Abstract of the United States*, 2000.

**Property Loss in Major U.S. Weather Disasters,[a] 1980 to 2000**

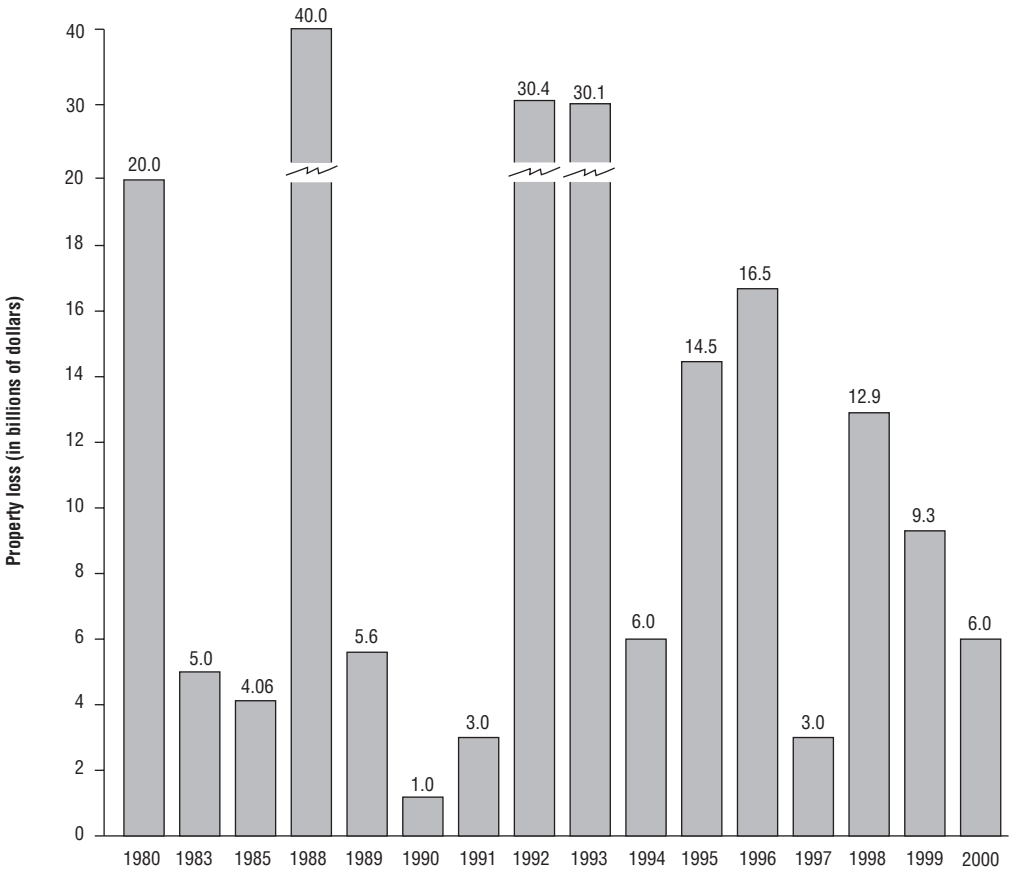


[a]Weather related disasters costing $1 billion or more, including hurricanes, tropical storms, floods, droughts, blizzards, severe freezes, ice storms, and wildfires.

SOURCE: U.S. National Oceanic and Atmospheric Administration, *Billion Dollar U.S. Weather Disasters Since 1980*, and U.S. Census Bureau, *Statistical Abstract of the United States*, 2000.

ricanes, hailstorms, tornadoes, typhoons, snowstorms, droughts, cold spells, and heat waves; topological catastrophes, such as earthquakes, avalanches, landslides, and floods; and biological disasters, including insect swarms and disease epidemics.

A disaster may also be defined in sociological terms as a major disruption of the social pattern of individuals and groups.

Disaster relief efforts are typically an example of FEDERALISM at work, as local, state, and national governments take on varied responsibilities. However, disaster relief has historically been considered a local responsibility, with the federal government providing assistance when local and state relief capacities are exhausted.

Most states have agencies that coordinate disaster relief and planning. A majority of states have statutes that define appropriate procedures for disaster declarations and emergency orders. Such statutes also empower relief agencies to utilize state and local resources, commandeer private property, and arrange for temporary housing during an emergency.

The federal government has played an increasingly influential role in disaster response and preparedness. In fact, as federal disaster assistance grew in the late twentieth century, it became a unique form of aid to states and localities. Often, significant amounts of money are made available to a disaster area for years after the disaster has occurred.

At all levels of government, disaster relief is carried out under the authority of an executive official: a city mayor, a state governor, or the nation's president. In the last instance, federal disaster legislation gives the president wide powers. The president decides what situations may be declared disasters and dictates the extent of federal assistance.

Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) (Pub. L. No. 93-288, 42 U.S.C.A. § 5121 et seq.), the president may declare a catastrophe either an emergency or a major disaster. This classification is not necessarily indicative of the severity of the event. Instead, the designation determines the extent of federal aid available for the particular calamity. In general, more federal funds are available for major disasters than for emergencies. For the president to declare either an emergency or a major disaster, the governor of the affected state must announce that the catastrophe is of such severity that state resources cannot effectively cope with it.

After a formal declaration has been made at the federal level, all authority for disaster relief operations descends from the president, through the FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA), and down to other agencies engaged in relief operations. First established in 1979, FEMA coordinates federal efforts related to natural disaster planning, preparedness, response, and recovery. FEMA funds emergency programs and works closely with state and local governments.

After the president declares an emergency or major disaster, FEMA implements the Federal Response Plan. This plan identifies 12 emergency support functions (ESFs), each of which entails a particular aspect of the relief operation, and assigns specific federal agencies to each function. For example, under the Stafford Act, the DEPARTMENT OF DEFENSE (DOD) is the primary agency responsible for ESF 3 (public works and engineering), and ESF 9 (urban search and rescue). The DOD may provide secondary support for all other ESFs.

FEMA administers the President's Disaster Assistance Program, which provides supplemental federal assistance in declared disasters and emergencies. FEMA also operates the Emergency Food and Shelter Program, which provides grants to private, nonprofit organizations for temporary food and shelter for HOMELESS PERSONS. In addition, FEMA controls the Federal Insurance Administration, which oversees the National Flood Insurance Program, a self-supporting program that provides flood insurance to communities that adopt its floodplain management regulations to reduce the effect of future floods.

Although the Stafford Act authorizes the president to call on the DOD to assist state and local governments in times of disaster, the use of the federal armed forces in such situations is limited by law. For example, the POSSE COMITATUS Act (18 U.S.C.A. § 1385) prohibits the military from performing the duties of CIVIL LAW enforcement. The DOD has no independent authority to undertake disaster relief operations, though according to the Stafford Act, it may do so for an emergency ten-day period before the president declares an emergency or disaster. In times of civil disturbance such as the 1992 Los Angeles riots, the president may issue a proclamation that permits federal armed forces to take on law enforcement duties in order to put down a civil disturbance (10 U.S.C.A. §§ 331–334).

Congress and state legislatures may also make assistance available in times of disaster. For example, the Disaster Assistance Act of 1988 (7 U.S.C.A. §§ 1421, 1471; 26 U.S.C.A. § 451) made $5 billion available to farmers during a severe drought. Farmers who had lost more than 35 percent of their crops could receive up to $100,000 to cover 65 percent of their losses over an initial threshold. When Hurricane Hugo hit the southeastern coastal states in 1989, Congress approved $1.1 billion in aid only six days later.

Congress has also authorized other agencies to provide disaster assistance. The Small Business Administration's Office of Disaster Assistance supplies loans to businesses that suffer economic losses owing to natural disasters. The AGRICULTURE DEPARTMENT provides emergency loans to eligible farmers and ranchers for losses owing to natural disasters. It may also give farmers cost-sharing assistance as well as the use of land that was previously set aside for conservation purposes. The U.S. government's Agency for International Development makes disaster relief and planning available to foreign countries.

Private organizations, including the Red Cross and the Salvation Army, play a significant role in disaster relief as well. In 1905, Congress officially recognized the Red Cross and its role in responding to significant crises (36 U.S.C.A. § 1), and all subsequent federal disaster laws

*A member of the American Red Cross Disaster Relief Team admits displaced persons to a shelter following a chemical spill near Knoxville, Tennessee. The role the Red Cross has traditionally played in disaster relief was first recognized by Congress in 1905.*

AP/WIDE WORLD PHOTOS

have renewed this recognition. The Red Cross makes a careful distinction between its humanitarian relief activities, including the provision of food and shelter, and activities that it believes are best handled by government.

Experts on disaster relief have increasingly called for a greater emphasis on prevention as opposed to relief. Plans for improved disaster preparedness often call for a greater use of new technologies, including satellite and radar technologies that would aid in the early detection of potential disasters.

Before 1950, disaster response was characterized by an ad hoc, or case by case, approach. Relief involved a reaction to specific crises with little planning or preparation for future disasters. Then, as now, it was initially activated by local or state officials, and, if necessary, appeals were made to the federal government. Such an approach was often so disorganized that it frustrated effective disaster relief. Federal aid was rarely immediate and instead came some time after a disaster had occurred. Critics often complained that the federal response to disasters was dilatory, insufficient, and inconsistent.

During the 1930s, the expansion of the federal government under the New Deal—including greater federal participation in public works projects—led to a greater federal role in disaster assistance. NEW DEAL agencies such as the Reconstruction Finance Corporation, Federal Emergency Relief Administration, Federal Civilian Works Administration, Works Progress Administration, and Civilian Conservation Corps all participated in disaster control and recovery. The Army Corps of Engineers helped communities to prevent and recover from flood damage, and the DEPARTMENT OF AGRICULTURE offered aid to farmers who sustained economic losses in disasters. The 1930s marked the federal government's first use of low-interest loans and outright grants for disaster relief—both features of subsequent disaster laws. During this same decade, Congress considered making the American Red Cross a government agency, but Red Cross officials chose to keep their organization private.

With the passage of the Disaster Relief Act of 1950 (Pub. L. No. 81-875, 64 Stat. 1109), Congress for the first time authorized a coordinated federal response to major disasters. The act, which was repealed in 1970, defined a disaster as "[a]ny flood, drought, fire, hurricane, earthquake, storm, or other catastrophe in any part of the U.S. which in the determination of the President, is or threatens to be of sufficient severity and magnitude to warrant disaster assistance by the Federal government." Significantly, this definition gave the president broad powers to respond to a crisis, powers that are related to the president's role as commander in chief of the nation's military and that have remained in all subsequent federal disaster legislation.

Later laws gradually increased the scope of federal disaster assistance. In the 1950s and 1960s, Congress authorized the provision of temporary shelter, surplus federal supplies, loans, and unemployment assistance for disaster victims. Many of these features were later incorporated into the comprehensive Disaster Relief Act of 1970 (84 Stat. 1744 [42 U.S.C.A. § 4401 et seq.]). This act also offered generous assistance for the reconstruction of public facilities, authorizing 100 percent federal financing for such projects even when reconstruction went beyond damage caused by a particular disaster.

The Stafford Act expanded further the role of the federal government in disaster relief. Under this legislation, the federal government may provide grants to fund a number of additional forms of assistance: the full cost for the reconstruction of certain private, nonprofit facilities and owner-occupied private residential structures; loans to local governments to cover operating expenses; free temporary housing for up to 12 months; the installation of essential utilities; mortgage or rental payments to individuals for up to one year; and food stamps, legal services, and counseling services for low-income citizens. The act also includes an unprecedented authorization of long-range community economic recovery programs for disaster areas. Under these provisions, recovery planning councils develop five-year recovery investment plans, which are eligible to receive up to 90 percent of their funding from the federal government.

In 1979, concerns about overly bureaucratic procedures and a lack of coordination in government efforts to respond to disasters, as well as the need for improved programs for disaster prevention and preparedness, led to the creation of FEMA. A poor federal response to disasters such as Hurricane Hugo and the Loma Prieta earthquake, both occurring in 1989, prompted calls for a greater use of the military in disaster relief. In 1993, amendments to the Stafford Act empowered the president to more readily call on the federal armed forces to assist in disaster relief.

### Disaster Relief for September 11 Victims

The SEPTEMBER 11, 2001, TERRORIST ATTACKS against the United States triggered what became an unprecedented level of federal disaster relief. The twin towers at the World Trade Center complex in New York City collapsed after being targeted by two hijacked commercial airliners, and four other buildings partially collapsed shortly thereafter. Several nearby buildings also suffered extensive collateral damage. After the World Trade Center attacks, another hijacked plane was deliberately crashed into the Pentagon and a fourth hijacked plane crashed in Somerset County, Pennsylvania.

In response to the attacks, President GEORGE W. BUSH immediately signed a major disaster declaration for 5 counties in New York. The disaster declaration was amended on September 27 and again on October 2, 2001, making all counties in the state of New York eligible for some form of federal disaster assistance in the wake of the terrorist attack. The president also promptly declared a federal emergency in Virginia under subsection 501(b) of the Stafford Act, and a short time later declared a major disaster in Virginia to trigger a broader range of Stafford-Act responses.

In addition, the president declared an emergency for all 21 counties in New Jersey. These declarations made available federal programs that provide assistance for families and individuals victimized by the attacks. Normally, the federal government provides 75 percent of the disaster response costs with the remaining 25 percent of the costs undertaken by non-federal entities. However, FEMA reimbursed the states and affected local governments for 100 percent of the eligible costs for debris removal, emergency protective measures, and public infrastructure rebuilding costs in response to the September 11 terrorist attacks.

Minutes after the first hijacked airplane hit the World Trade Center, FEMA activated a full Emergency Support Team at its National Interagency Emergency Operations Center in Washington, D.C. Federal officials immediately began arriving at the center to coordinate the nationwide response and recovery effort. Some 1,800 federal workers were deployed to New York to support the disaster response, about 800 from FEMA and almost 1,000 from other federal departments and agencies.

FEMA'S top priorities throughout its entire disaster response effort included: (1) providing urban search and rescue support; (2) assisting in life saving operations; (3) meeting individual and public assistance needs; (4) implementing human services and victims assistance programs; and (5) assisting in debris removal (FEMA helped remove close to 1.4 million tons of debris from the disaster areas, then transported the debris to the sorting and disposal site at the Staten Island landfill).

The New York City Office of Emergency Management's US&R Task Force was among the first responders at the World Trade Center. The New York Force is part of FEMA's 28 Task Forces that make up the National US&R Response System. Its Task Force leader, Chief Raymond Downey, was one of the first responders on the scene, where he ultimately died during search and rescue operations. The DEPARTMENT OF HEALTH AND HUMAN SERVICES and PUBLIC

HEALTH SERVICE played an important role in the health and medical response. One hundred and sixty-seven persons were assigned to Disaster Medical Assistance Teams and a Medical Support Team to support the response in New York and remain in the City. Thirty-three Centers for Disease Control epidemiologists were assigned to track illness trends. A Veterinary Medical Assistance Team was deployed to treat the rescue dogs.

Since the Stafford Act prohibits FEMA from duplicating disaster assistance, FEMA had to be very careful in coordinating its activities with all of the organizations providing disaster relief. For example, FEMA worked with the Department of Justice's Office for Victims of Crime to maximize the investigative resources deployed at Ground Zero, which was not only a disaster area but a crime scene as well. FEMA also deployed resources to non-governmental organizations that were having difficulty managing the flood of charitable donations made by people around the world. Finally, FEMA worked with the NATIONAL TRANSPORTATION SAFETY BOARD (NTSB) to provide assistance from United and American Airlines to the families of the victims.

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CROSS-REFERENCES

Refugees.

## DISBAR

*To revoke an attorney's license to practice law.*

A disbarment proceeding is the investigation into the conduct of a member of the bar in order to determine whether or not that person should be disbarred or disciplined. The state bar association normally takes such action based on allegations of a lawyer's unethical conduct. For example, the bar association might initiate an action for disbarment against a lawyer who has revealed information obtained from the PRIVILEGED COMMUNICATION between the lawyer and a client.

In one of the more high-profile cases of disbarment in recent history, the U.S. Supreme Court in 2001 moved to disbar former President WILLIAM JEFFERSON CLINTON, thus preventing him from practicing before the high court. The Court's action came after a similar move by the Arkansas Supreme Court's Committee on Professional Conduct, which recommended disbarment of the former president in that state. The actions stemmed from charges of CONTEMPT, OBSTRUCTION OF JUSTICE, and perjury based on misleading statements made by Clinton about his relationship with White House intern Monica Lewinsky. Those charges led to Clinton's IMPEACHMENT by the U.S. House of Representatives in 1998. Clinton agreed to a fine and suspension imposed by the Arkansas Supreme Court disbarment committee and later asked to resign from the U.S. Supreme Court bar.

## DISCHARGE

*To liberate or free; to terminate or extinguish. A discharge is the act or instrument by which a contract or agreement is ended. A mortgage is discharged if it has been carried out to the full extent originally contemplated or terminated prior to total execution.*

*Discharge also means to release, as from legal confinement in prison or the military service, or from some legal obligation such as jury duty, or the payment of debts by a person who is bankrupt. The document that indicates that an individual has been legally released from the military service is called a discharge.*

The performance of a duty discharges it. An attorney may speak of discharging a legal obligation.

## DISCIPLINARY RULES

*Precepts, such as the Code of Professional Responsibility, that proscribe an attorney from taking certain actions in the* PRACTICE OF LAW.

Proceedings can be instituted to disbar an attorney who violates the disciplinary rules.

## DISCLAIMER

*The denial, refusal, or rejection of a right, power, or responsibility.*

A disclaimer is a defensive measure, used generally with the purpose of protection from unwanted claims or liability. A restaurant may disclaim responsibility for loss or damage to a customer's PERSONAL PROPERTY, or a disclaimer clause in a contract might set forth certain promises and deny all other promises or responsibilities.

A disclaimer of WARRANTY, which is provided for in the UNIFORM COMMERCIAL CODE, limits a warranty in the sale of goods. It may be general or specific in its terms.

## DISCONTINUANCE

*Cessation; ending; giving up. The discontinuance of a lawsuit, also known as a dismissal or a nonsuit, is the voluntary or involuntary termination of an action.*

## DISCOVERY

*A category of procedural devices employed by a party to a civil or criminal action, prior to trial, to require the adverse party to disclose information that is essential for the preparation of the requesting party's case and that the other party alone knows or possesses.*

### Civil Procedure

Discovery devices used in civil lawsuits are derived from the practice rules of EQUITY, which gave a party the right to compel an adverse party to disclose material facts and documents that established a CAUSE OF ACTION. The federal rules of CIVIL PROCEDURE have supplanted the traditional equity rules by regulating discovery in federal court proceedings. State laws governing the procedure for civil lawsuits, many of which are based upon the federal rules, have also replaced the equity practices.

Discovery is generally obtained either by the service of an adverse party with a notice to examine prepared by the applicant's attorney or by a court order pursuant to statutory provisions.

Discovery devices narrow the issues of a lawsuit, obtain evidence not readily accessible to the applicant for use at trial, and ascertain the existence of information that might be introduced as evidence at trial. Public policy considers it desirable to give litigants access to all material facts not protected by privilege to facilitate the fair and speedy administration of justice. Discovery procedures promote the settlement of a lawsuit prior to trial by providing the parties with opportunities to realistically evaluate the facts before them.

Discovery is contingent upon a party's reasonable belief that he or she has a good cause of action or defense. A court will deny discovery if the party is using it as a fishing expedition to ascertain information for the purpose of starting an action or developing a defense. A court is responsible for protecting against the unreasonable investigation into a party's affairs and must deny discovery if it is intended to annoy, embarrass, oppress, or injure the parties or the witnesses who will be subject to it. A court will stop discovery when used in bad faith.

**Information Discovered** Pretrial discovery is used for the disclosure of the identities of persons who know facts relevant to the commencement of an action but not for the disclosure of the identities of additional parties to the case. In a few jurisdictions, however, the identity of the proper party to sue can be obtained through discovery. Discovery pursuant to state and federal procedural rules may require a party to reveal the names and addresses of witnesses to be used in the development of the case.

Discovery is not automatically denied if an applicant already knows the matters for which he or she is seeking discovery since one of its purposes is to frame a PLEADING in a lawsuit. On the other hand, discovery is permitted only when the desired information is material to the preparation of the applicant's case or defense. Discovery is denied if the matter is irrelevant or if it comes within the protection of a privilege.

**Privileged Information** Privileged matters are not a proper subject for discovery. For example, a person cannot be forced to disclose confidential communications regarding matters that come within the ATTORNEY-CLIENT PRIVILEGE. Discovery cannot be obtained to compel a person to reveal information that would violate his or her constitutional guarantee against SELF-INCRIMINATION. However, if a party or witness has been granted IMMUNITY regarding the mat-

ters that are the basis of the asserted privilege, that party can be required to disclose such information on pretrial examination.

A person who refuses to comply with discovery on the basis of an asserted privilege must claim the privilege for each particular question at the time of the pretrial examination. An attorney or the court itself cannot claim the privilege for that person. However, a person may waive the privilege and answer the questions put to him or her during discovery.

**Objections** A party may challenge the validity of a pretrial examination if asserted prior to trial. The merits of such an objection will be evaluated by the court during the trial when it rules on the admissibility of the evidence. If the questions to be asked during a discovery, such as the identity and location of a particular witness, pose a threat to anyone's life or safety, a party can make a motion to a court for a protective order to deny discovery of such information.

**Refusal to Respond** Failing to appear or answer questions at an examination before trial might result in a CONTEMPT citation, particularly if the person has disobeyed the command of a subpoena to attend. If discovery is pursuant to a court order, the court will require that the party's refusal to answer questions be treated as if the party admitted them in favor of the requesting party. Such an order is called a preclusion order since the uncooperative party is precluded from denying or contradicting the matters admitted due to his or her intentional failure to comply with a discovery order.

### Costs

A party who makes a motion for a court to order discovery may be required to pay or make provision for payment of costs—expenses incurred in obtaining discovery when it is granted. If the party eventually wins the lawsuit, the court may demand that the costs be paid by the adversary in the proceedings.

### Types of Discovery Devices

Discovery of material information is obtainable by use of DEPOSITIONS, interrogatories, requests for the production and inspection of writings and other materials, requests for admission of facts, and physical examinations.

**Depositions** A party to a lawsuit may obtain an oral pretrial examination of an adverse party or witness—the deponent—who is under oath to respond truthfully to the questions. This interrogation is known as a deposition or an examination before trial (EBT). The notice or order of examination must specify the particular matters to be discovered, and the line of questioning is usually restricted to such matters. However, the scope and extent of the examination is within the discretion of the court.

In some jurisdictions, a deponent may bring along documents to refresh his or her memory and facilitate testimony. Such materials can be used only when relevant to the line of questioning to which the deponent is subject and only by the designated deponent.

**Interrogatories** Interrogatories are specific written questions submitted by a person, pursuant to a discovery order, to an adversary who must respond under oath and in writing. Interrogatories must state questions in a precise manner so as to elicit an answer that is pertinent to the issues being litigated.

**Production and Inspection** A litigant is generally entitled to the production and inspection of relevant documents in the possession or control of an adversary pursuant to discovery. The applicant must have a reasonable belief that such evidence is necessary to the lawsuit if discovery is to be granted.

**Requests for Admissions of Facts** A party may ask an adversary to admit any material fact or the authenticity of a document that is to be presented as evidence during the trial. This procedure, called a request for an admission of fact, facilitates the fair and efficient administration of justice by minimizing the time and expense incurred in proving issues that are not in dispute.

Only facts, not matters or conclusions of law or opinions, can be admitted when there is no disagreement between the parties. The requesting party does not have to make a motion before a court prior to making such a demand but must comply with any statutory requirements. The matters or documents to be admitted must be particularly described and there must be a time limit for a reply. The response should admit or deny the request or explain in detail the reason for refusing to do so—for example, if the request calls for admission of a MATTER OF LAW. Failure to make a response within the specified time results in the matter being admitted, precluding the noncomplying party from challenging its admission during the trial.

**Physical Examination** A mental or physical examination of a party whose condition is an

issue in litigation may be authorized by a court in the exercise of its discretion.

### Criminal Procedure

Under COMMON LAW, there was no discovery in criminal cases. As of the early 2000s, in federal and many state criminal prosecutions, only limited discovery is permissible, unlike the full disclosure of information available in civil actions. Limited discovery prevents the possible intimidation of prosecution witnesses and the increased likelihood of perjury that might result from unabridged disclosure. The obligation of the prosecutor to prove the case BEYOND A REASONABLE DOUBT, the possibility of an unconstitutional infringement upon a defendant's right against self-incrimination, and violations of the attorney-client privilege pursuant to a client's RIGHT TO COUNSEL also hinder complete discovery. A defendant who requests particular documents from the government may be required to submit items of a similar nature to the government upon its request for discovery. The disclosure of false evidence or the failure of the prosecution to disclose documents that are beneficial to the defense can result in a denial of DUE PROCESS OF LAW.

The federal Jencks Act (18 U.S.C.A. § 3500 [1957]) entitles a defendant to obtain access to prosecution documents necessary to impeach the testimony of a prosecution witness by showing that the witness had made earlier statements that contradict present testimony. Theoretically, the defense cannot receive the statements until the witness has finished testimony on direct examination, but, in practice, such statements are usually available before then. Many states have similar disclosure rules.

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CROSS-REFERENCES

Deposition; Immunity; Interrogatories; Self-Incrimination.

## DISCRETION IN DECISION MAKING

Discretion *is the power or right to make official decisions using reason and judgment to choose from among acceptable alternatives.*

Legislatures, the president and the governors of the various states, trial and appellate judges, and administrative agencies are among the public officers and offices charged with making discretionary decisions in the discharge of public duties. All discretionary decisions made are subject to some kind of review and are also subject to reversal or modification if there has been an ABUSE OF DISCRETION.

An abuse of discretion occurs when a decision is not an acceptable alternative. The decision may be unacceptable because it is logically unsound, because it is ARBITRARY and clearly not supported by the facts at hand, or because it is explicitly prohibited by a statute or RULE OF LAW.

Discretion in decision making can be viewed from the perspective of the flexibility and choices granted to the decision maker based on the decision being made. Only the Constitution, through judicial enforcement, can limit discretionary decision making by legislative bodies to pass laws. Great flexibility is granted to the EXECUTIVE BRANCH in the area of foreign relations decision making. Statutes and prior judicial decisions limit the flexibility and discretion of a judge in a court of law. Moreover, Congress has granted broad decision-making authority to administrative agencies and their administrators, giving them great flexibility to make decisions within their area of concern.

### Legislative Discretion

Legislatures have very broad discretion to create and pass laws that prohibit, regulate, and encourage a wide variety of activities. In Article I, Section 8, of the U.S. Constitution, Congress is empowered to "make all Laws which shall be necessary and proper" for carrying out its enumerated powers. Most state legislatures are empowered by similar language from their state constitution. An example of a proper exercise of legislative discretion is to make STALKING a crime and to make that crime punishable by fines or imprisonment.

The discretion of legislatures is also limited by the U.S. and state constitutions. A state may not pass a statute that allows the police to search any person's residence at any time for any reason, because that statute would clearly violate the U.S. Constitution's FOURTH AMENDMENT protection against unreasonable SEARCHES AND SEIZURES.

### Executive Discretion

Executive discretion, like that vested in the president by Article II of the U.S. Constitution, is most evident in the area of foreign affairs: the

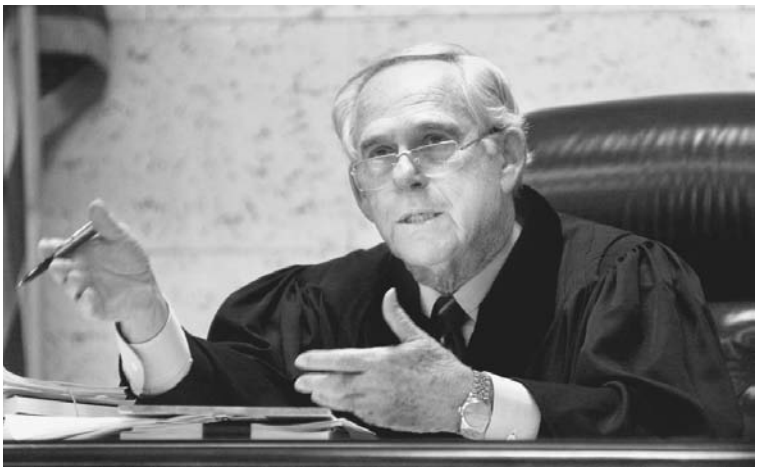

*Judges' discretion in decision making has been reduced by federal sentencing guidelines, but they still enjoy some latitude as they sentence those found guilty of crimes.*
AP/WIDE WORLD PHOTOS

president is the commander in chief of all the military forces and also has the power to make treaties with other countries. If Congress is silent on a particular issue—that is, if Congress has not passed a specific statute or resolution concerning that issue—then the president has broad discretion to act. This arrangement is particularly relevant in the area of foreign policy during war or other military action, when decisions must be made quickly in response to rapidly changing circumstances.

One improper exercise of executive discretion that is almost always reversed by reviewing courts is IMPOUNDMENT, whereby a president places in reserve a sum of money appropriated by Congress for a particular purpose, effectively blocking that appropriation. Courts have routinely held that the president has no implied power to take such action. Implied powers are those held by the president but not granted expressly by statute, regulation, or constitution. The act of impoundment, then, constitutes an abuse of discretion by the executive branch.

### Judicial Discretion

Judicial discretion is a very broad concept because of the different kinds of decisions made by judges and because of the different limits placed on those decisions. Article III, Section 2, of the U.S. Constitution grants the judiciary broad power, which extends "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made." Judges' decisions must be made based on the "rule of law," which, in the United States, derives not only from statutes passed by Congress but also from the tenets of the Constitution. In addition, COMMON LAW, or judge-made law, provides limits based on the principle of STARE DECISIS, which holds that a court's decision in a particular case must comport with the RULES OF LAW as they have been determined by that court or by other, higher-level courts, in previous cases. Legal conclusions that do not fit within the prescribed limits of both statutory and common law may be overturned by a reviewing court if that court determines that the conclusions were an abuse of judicial discretion.

At one time, the sentencing of those convicted of crimes was almost entirely within the discretion of judges. Judges could take into account various mitigating factors (circumstances reducing the degree of blame or fault attributed to the offender) and craft a punishment that most appropriately fit the crime. For example, a first-time petty offender convicted of shoplifting might be sentenced to PAROLE and community service.

With the implementation of Federal Sentencing Guidelines and with mandatory minimum sentencing legislation, which passed in both Congress and the states, judges no longer had the broad latitude to make the sentence fit the crime and the defendant. In some states, first-time offenders have been sent to jail for life for the possession of large amounts of controlled substances. Many federal judges must incarcerate parole violators for minor parole violations because the guidelines specifically direct them to and severely limit their sentencing choices. A judge's failure to abide by the sentencing guidelines in issuing a sentence would constitute an abuse of judicial discretion.

### Administrative Agency Discretion

Legislative, executive, and judicial discretion in decision making is limited within the structure of the three branches of the U.S. government as established in the Constitution. Each branch is subject to the influence, review, and even rejection of certain decisions. Administrative agencies, granted authority by Congress to administer specific government programs and areas of concern, operate outside this tripartite system, and many decisions made by administrative agencies are protected from review. For this reason, the administrative branches of federal and state governments have often been referred to as the headless fourth branch of government.

The U.S. Constitution does not expressly grant administrative authority. However, Congress may create administrative agencies as an

extension of its authority to make laws that are necessary and proper, to help it execute its powers (U.S. Const. art. I). The president may appoint the heads of these agencies under a general grant of authority to appoint "public Ministers and Consuls" and "all other Officers of the United States, whose Appointments are not herein otherwise provided for" (U.S. Const. art. II). The judiciary, under its very broad grant of authority to hear all cases in law and equity, has a right, in some circumstances, to review and overturn administrative decisions (U.S. Const. art. III).

Administrative agencies, like the SOCIAL SECURITY ADMINISTRATION and the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC), and the Bureau of Citizen and Immigration Services (BCIS), formerly the Immigration and Naturalization Service (INS), make both rules and adjudicative decisions, which means that they not only promulgate regulations but also decide conflicts dealing with their area of concern.

For example, the Social Security Administration promulgates regulations concerning the provision of income for totally disabled people and also decides who is or is not disabled. The EEOC promulgates regulations and guidance dealing with SEXUAL HARASSMENT and also decides whether PROBABLE CAUSE exists to pursue a particular claim of harassment. (Probable cause, which is a reasonable basis to believe the facts alleged, must be established before litigation can commence.) The BCIS not only helps to set immigration quotas but also makes individual decisions regarding deportation.

To review an agency decision under the standard of abuse of discretion, courts must follow a three-part analysis. First, courts must look to the legislation passed by Congress that gave the decision-making authority to the particular agency and determine if the administrator acted within the limits of that authority. Second, courts must determine if a clear error of judgment has occurred. Without clear error, a court cannot substitute its own judgment; if it did so, the court would itself commit an abuse of discretion. Third, courts must determine whether the administrator followed the procedural requirements.

Courts reviewing administrative decisions for abuse of discretion give great deference to the administrator or agency, who not only is an expert in the area of concern but also had access to all the facts that influenced the decision. This "hands-off" approach gives administrative agencies the opportunity to execute the authority granted them by Congress efficiently and effectively.

An administrative decision that is difficult to reverse or challenge is that made by the Board of Immigration Appeals to uphold an immigration judge's decision to deport an ALIEN. Once a deportation decision is made and upheld, the alien can seek to have the attorney general reverse it. Should the attorney general uphold the deportation, a court reviewing this discretionary decision will have limited opportunity to challenge it, because the Board of Immigration Appeals clearly has authority to make the decision in the first place. The alien must show either failure to follow procedure or clear error of judgment on the part of the board. Deportation challenges are common, but successful challenges are rare because the great discretion afforded to the BCIS makes an abuse of discretion extremely difficult to prove.

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CROSS-REFERENCES

Abuse of Discretion; Discovery.

## DISCRETIONARY TRUST

*An arrangement whereby property is set aside with directions that it be used for the benefit of another, the beneficiary, and which provides that the trustee (one appointed or required by law to administer the property) has the right to accumulate, rather than pay out to the beneficiary, the annual income generated by the property or a portion of the property itself.*

Depending on the terms of the instrument that creates the trust, such income can be accumulated for future distributions to the income beneficiaries or added to the corpus, the main body or principal of a trust, for the benefit of the remainderman, one who is entitled to the balance of the estate after a particular estate carved out of it has expired. This is a discretionary trust since the trustee has the latitude or discretion to give or deny the beneficiary some benefits under the trust. The beneficiary cannot compel the trustee to use any of the trust property for the beneficiary's advantage.

In this type of trust the beneficiary has no interest that can be transferred or reached by creditors unless the trustee decides to pay or apply some of the trust property for the benefit of the beneficiary. At that time, the beneficiary's creditors can reach it unless it is protected by a SPENDTHRIFT TRUST clause. An assignee, a person who has received an interest in the trust from the beneficiary by assignment (a transfer of property), can hold the trustee liable for any future payment to the beneficiary by giving notice of the assignment. As an illustration, the settlor, one who creates a trust, delivers $10,000 to the trustee in trust for the beneficiary, and the trustee has the discretion to make any and every payment, or no payment at all, to the beneficiary from the corpus or income. Before the trustee has decided to make any payment to the beneficiary, the beneficiary assigns a right to $50 of any payment the trustee elects to make to him or her. The assignee notifies the trustee of the assignment and demands that if the trustee decides to pay the beneficiary any amount up to $50, the trustee must pay the assignee and not the beneficiary. If the trustee decides not to pay the beneficiary, the assignee has no right to payment. If the trustee subsequently decides to pay the beneficiary $50, the trustee will be liable to the assignee for it.

A person can create a discretionary trust for his or her own benefit, but creditors can reach the maximum amount that the trust can apply for or pay to the beneficiary under the trust terms, regardless of whether he or she actually received payment.

## DISCRIMINATION

*In* CONSTITUTIONAL LAW, *the grant by statute of particular privileges to a class arbitrarily designated from a sizable number of persons, where no reasonable distinction exists between the favored and disfavored classes. Federal laws, supplemented by court decisions, prohibit discrimination in such areas as employment, housing,* VOTING RIGHTS, *education, and access to public facilities. They also proscribe discrimination on the basis of race, age, sex, nationality, disability, or religion. In addition, state and local laws can prohibit discrimination in these areas and in others not covered by federal laws.*

In the 1960s, in response to the CIVIL RIGHTS MOVEMENT and an increasing awareness of discrimination against minorities, several pieces of landmark legislation were signed into law. Title VII of the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000e et seq.), the most comprehensive CIVIL RIGHTS legislation in U.S. history, prohibits discrimination on the basis of sex, race, religion, nationality, or color. Title VII was designed to provide for parity in the use and enjoyment of public accommodations, facilities, and education as well as in federally assisted programs and employment. It further allows an injured party to bring suit and obtain damages from any individual who illegally infringes upon the party's civil rights. The VOTING RIGHTS ACT OF 1965 (42 U.S.C.A. § 1973 et seq.) prohibits the states and their political subdivisions from imposing voting qualifications or prerequisites to voting or standards, practices, or procedures that deny or curtail the right of citizens to vote, because of race, color, or membership in a language minority group. The FAIR HOUSING ACT OF 1968 (42 U.S.C.A. § 3601 et seq.) prohibits discrimination based on race, color, religion, sex, and national origin, in connection with the sale or rental of residential housing. In 1988, Congress passed the Fair Housing Amendments Act, which extends the same protections to handicapped people.

Other important federal laws have been aimed at remedying discrimination against other groups, including older U.S. citizens and

individuals with disabilities. The Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C.A. § 621 et seq.) prohibits employers with 20 or more employees from discriminating because of age against employees over age 40. Industries affecting commerce as well as state and local governments are covered by the ADEA. Disabled individuals received federal protection against discrimination with the passage of the Rehabilitation Act of 1973 (29 U.S.C.A. § 701 et seq.), which prohibits any program activity receiving federal funds from denying access to a handicapped person. In 1990, Congress enacted the Americans with Disabilities Act (ADA) (codified in scattered sections of 42, 29, 47 U.S.C.A.). The ADA was widely hailed as the most significant piece of civil rights legislation since the Civil Rights Act of 1964. It provides even broader protection, prohibiting discrimination against disabled individuals, in employment, public accommodations, transportation, and TELECOMMUNICATIONS.

Although discrimination on the basis of gender is included in title VII of the Civil Rights Act of 1964, a number of other federal laws also prohibit SEX DISCRIMINATION. The EQUAL PAY ACT OF 1963 (29 U.S.C.A. § 206 [d]) amended the FAIR LABOR STANDARDS ACT of 1938 (29 U.S.C.A. §§ 201–219). It prohibits discrimination through different forms of compensation for jobs with equal skill, effort, and responsibility. The Pregnancy Discrimination Act of 1978 (42 U.S.C.A. § 2000e[k]) prohibits discrimination against employees on the basis of pregnancy and childbirth, in employment and benefits. Title IX of the Education Amendments of 1972 (20 U.S.C.A. §§ 1681–1686) prohibits sex discrimination in educational institutions that receive federal funds, including exclusions from noncontact team sports on the basis of sex. In addition, the Equal Credit Opportunity Act (15 U.S.C.A. § 1691 et seq.) prohibits discrimination in the extension of credit, on the basis of sex or marital status.

State and local laws can also protect individuals from discrimination. For example, GAYS AND LESBIANS, although not yet included under federal civil rights laws, are protected in many cities by local ordinances outlawing discrimination against individuals on the basis of sexual orientation. Minnesota, New Jersey, Rhode Island, Vermont, Wisconsin, and other states have passed such legislation—although some voters have sought to repeal it, with mixed results.

**Charges of Discrimination Filed with the EEOC in 2001**

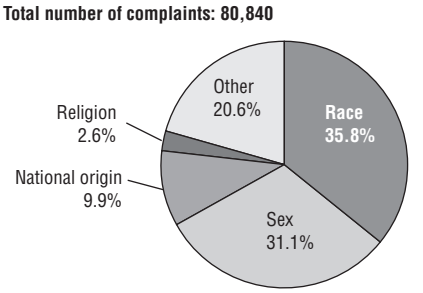


SOURCE: Equal Employment Opportunity Commission.

Local antidiscrimination laws have been used to deny funding to groups that bar members because of their sexual orientation. This was the case after the Supreme Court issued its ruling in *Boys Scouts of America v. Dale*, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000). The Court held that the Boy Scouts of America (BSA), as a private organization, had the constitutional right to bar homosexual troop leaders and members from its ranks. The Boy Scouts hailed this as an important victory, but many corporations and local governments were angered by the decision.

Major corporate sponsors withdrew their support, and school districts and city councils reviewed their relationships with the BSA. The one million Boy Scouts are organized into 19,000 local troops. Many of the troops use public schools or community centers for their meetings. In light of the court decision, a number of cities around the United States either barred the Boy Scouts from using public space or required them to pay, citing antidiscrimination ordinances and policies. In at least 39 cities, the local United Way charitable organizations withdrew funding to the BSA, again citing antidiscrimination policies. The BSA estimated in 2002 that these decisions cut local troop income by 10 to 15 percent, totaling millions of dollars.

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CROSS-REFERENCES

Affirmative Action; Age Discrimination; Club; Colleges and Universities; Disability Discrimination; Equal Employment Opportunity Commission; Gay and Lesbian Rights; Women's Rights.

## DISFRANCHISEMENT

*The removal of the rights and privileges inherent in an association with a group; the taking away of the rights of a free citizen, especially the right to vote. Sometimes called disenfranchisement.*

*The relinquishment of a person's right to membership in a corporation is distinguishable from a motion, which is the act of removing an officer from an office without depriving him or her of membership in the corporate body.*

In U.S. law, disfranchisement most commonly refers to the removal of the right to vote, which is also called the franchise or suffrage. Historically, states passed a variety of laws disfranchising poor people, insane people, and criminals. Most conspicuously, the JIM CROW LAWS passed by Southern states effectively disfranchised African-Americans from the late nineteenth century until well into the 20th century.

During Reconstruction, following the Civil War, African-Americans in the South briefly enjoyed voting privileges that were nearly equal to those of whites. However, beginning around 1890, legally sanctioned disfranchisement occurred on a huge scale. For example, during the years directly following the Civil War, African-Americans made up as much as 44 percent of the registered electorate in Louisiana, but by 1920, they constituted only 1 percent of the electorate. In Mississippi, almost 70 percent of eligible African-Americans were registered to vote in 1867; after 1890, fewer than 6 percent were eligible to vote. There were similar decreases in the percentages of elected black officials in all Southern states.

Although the FIFTEENTH AMENDMENT to the Constitution, passed in 1870, asserts that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," Southern states established laws and practices that circumvented these provisions. They employed disfranchisement devices such as POLL TAXES, property tests, literacy tests, and all-white primaries to prevent African-Americans from voting. On the surface, such laws discriminated on the basis of education and property ownership rather than race, but their practical and intended effect was to block African-Americans from the polls. Legal devices called grandfather clauses allowed poor and illiterate whites to avoid discriminatory tests on the grounds that they or their ancestors had previously had the franchise. When discriminatory laws were combined with the violence and intimidation directed at potential black voters by white hate groups such as the KU KLUX KLAN, the silencing of the African-American political voice was almost complete.

Despite Supreme Court rulings striking down discriminatory measures as early as 1915 (see, e.g., *Guinn v. United States,* 238 U.S. 347, 35 S. Ct. 926, 59 L. Ed. 1340 [1915]), Southern states continued to bar African-Americans from voting for most of the twentieth century. Only with the passage of the VOTING RIGHTS ACT OF 1965 (42 U.S.C.A. § 1973 et seq.) did twentieth-century African-Americans in the South finally reach the polls in significant numbers. For example, in 1965, only 19 percent of non-whites in Alabama and 7 percent of non-whites

**Disfranchisement**

**BLACK ELECTED OFFICIALS, BY OFFICE, 1970 TO 2000**

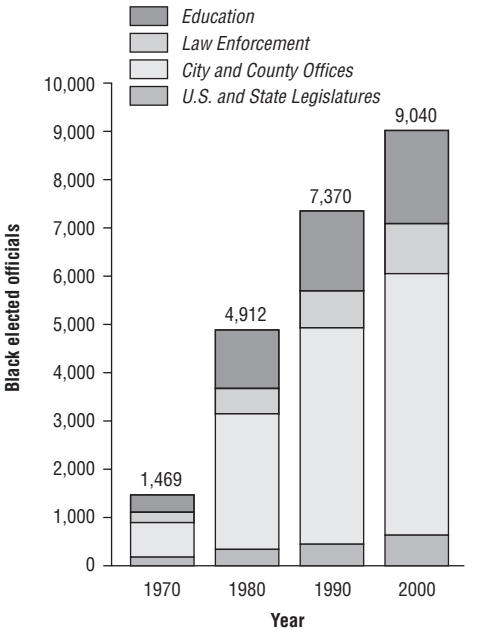


SOURCE: Joint Center for Political and Economic Studies, Washington, DC, *Black Elected Officials: A Statistical Summary*, annual.

in Mississippi were registered to vote. Four years later, after passage of the VOTING RIGHTS ACT, the percentages of non-white registrants in Alabama and Mississippi had jumped to 57 percent and 59 percent, respectively.

Although blatant disfranchisement is somewhat rare in current elections, claims of racism still occur. During the 2000 presidential election, which was one of the most heavily contested and highly controversial in history, thousands of minority voters claimed that their votes were not counted due to minor errors on their ballots. Federal election law leaves the particular voting procedures in presidential elections to the states, so the states use a variety of techniques to count the ballots. Many states used a hole-punch method, where machines count ballots based upon holes punched in ballot cards. If the machine could not read the card, which may occur if the hole punch is incomplete or if more than one hole is punched, the vote was not counted. This was particularly problematic in the state of Florida, which was the subject of a national controversy surrounding the proper vote count. During the initial election on November 7, 2000, and during subsequent recounts during the weeks following the election, many votes were not counted due to errors, and many minority voters claimed that they cast many of the discounted votes. Minority groups have pressured Congress to enact stricter standards in order to prevent this occurrence in future elections.

Other forms of disfranchisement, including the disfranchisement of criminals, remain controversial. Since the early 1990s, all but three states prohibited imprisoned offenders from voting. Thirty-five states disfranchise offenders on PROBATION or PAROLE, and fourteen disfranchise ex-offenders for life. Because a disproportionate share of convicted criminals are non-white, some have argued that such laws constitute a racially discriminatory voting barrier that is as pernicious as poll taxes and literacy tests. Many state criminal disfranchisement laws date back to the Reconstruction era, and such laws were often targeted at offenses for which African-Americans were disproportionately convicted. For this reason, some groups have called for the reform or removal of criminal disfranchisement laws.

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## DISHONOR

*To refuse to accept or pay a draft or to pay a promissory note when duly presented. An instrument is dishonored when a necessary or optional presentment is made and due acceptance or payment is refused, or cannot be obtained within the prescribed time, or in case of bank collections, the instrument is seasonably returned by the midnight deadline; or presentment is excused and the instrument is not duly accepted or paid. Includes the insurer of a letter of credit refusing to pay or accept a draft or demand for payment.*

*As respects the flag, to deface or defile, imputing a lively sense of shaming or an equivalent acquiescent callousness.*

## DISINHERIT

*To cut off from an inheritance. To deprive someone, who would otherwise be an heir to property or another right, of his or her right to inherit.*

A parent who wishes to disinherit a child may specifically state so in a will.

## DISINTERESTED

*Free from bias, prejudice, or partiality.*

A *disinterested witness* is one who has no interest in the case at bar, or matter in issue, and is legally competent to give testimony.

## DISMISSAL

*A discharge of an individual or corporation from employment. The disposition of a civil or criminal proceeding or a claim or charge made therein by a court order without a trial or prior to its completion which, in effect, is a denial of the relief sought by the commencement of the action.*

The legal effect of a dismissal varies depending upon its type. A dismissal, granted by a court that has exercised its discretion in evaluating the particular case before it, operates similarly in civil and criminal actions.

### Civil Proceedings

Rules embodied in state codes of CIVIL PROCEDURE and the Federal Rules of Civil Proce-

dure govern the granting of dismissals in civil actions brought in state and federal courts. The primary function of a dismissal is to promote the speedy and efficient administration of justice by removing from the consideration of a court any matters that have been unnecessarily delayed to the disadvantage of the defendant.

**Dismissal with Prejudice** A dismissal with prejudice is a judgment rendered in a lawsuit on its merits that prevents the plaintiff from bringing the same lawsuit against the same defendant in the future. It is a harsh remedy that has the effect of canceling the action so that it can never again be commenced. A dismissal with prejudice is RES JUDICATA as to every issue litigated in the action.

The possibility of such a dismissal acts as a deterrent to the use of dilatory tactics by a plaintiff who wants to prejudice a defendant's case by unreasonably hindering the disposition of the action from the time of the filing of the action to the actual trial of the issues. It is also designed to minimize, if not eliminate, the congestion of court calendars caused by unnecessary delays in pending cases. Because it is regarded as a drastic remedy, courts grant dismissals with prejudice only in the most egregious cases in response to a motion brought by a defendant or by a court sua sponte or on its own will.

***Motion by a Defendant*** A defendant may make a motion to a court to dismiss the CAUSE OF ACTION if the plaintiff has failed to appear to prosecute his or her case. A plaintiff is obligated to prosecute the action with due diligence within a reasonable time of commencing the action. If the passage of time hurts the defendant in the preparation of his or her case or if it substantially affects the defendant's rights, then the defendant may seek a dismissal with prejudice. A dismissal will not be granted if the failure to prosecute resulted from unavoidable circumstances, such as the death of the plaintiff, and there is a delay in the appointment of a PERSONAL REPRESENTATIVE to continue the action. When the parties attempt to negotiate a settlement of the controversy, consequent delays in reaching an agreement will not provide a basis for dismissal with prejudice. If, however, a plaintiff delays prosecution based on the mere possibility of a settlement without demonstrating concrete efforts to achieve an agreement, a court may grant a dismissal upon the defendant's motion.

The defendant must be free of any responsibility for delay when he or she seeks a dismissal for failure to prosecute. A lawsuit will not be dismissed if the defendant caused or contributed to the delay, such as if the individual leaves the state to avoid the trial.

***Sua sponte power of court*** A court has inherent power to dismiss an action with prejudice if it is vexatious, brought in bad faith, or when there has been a failure to prosecute it within a reasonable time. If a plaintiff who has commenced an action fails to comply with discovery devices, a court, which has issued the order of compliance, may *sua sponte* dismiss the case with prejudice.

**Dismissal without Prejudice** A plaintiff is not subsequently barred from suing the same defendant on the same cause of action when a court grants a dismissal WITHOUT PREJUDICE of his or her case. Such a dismissal operates to terminate the case. It is not, however, an ultimate disposition of the controversy on the merits, but rather it is usually based upon procedural errors that do not substantially harm the defendant's rights. It effectively treats the matter as if the lawsuit had never been commenced, but it does not relieve a plaintiff of the duty of complying with the STATUTE OF LIMITATIONS, the time limit within which his or her action must be commenced. A dismissal without prejudice is granted in response to a notice of dismissal, stipulations, or a court order.

***Notice of Dismissal*** A plaintiff may serve a notice of dismissal upon a defendant only if the defendant has not yet submitted an answer in response to the plaintiff's complaint. A notice of dismissal preserves the right of the plaintiff to commence a lawsuit at a later date. While not commonly employed, such a notice is useful when exigent circumstances—such as the sudden unavailability of witnesses—warrant the termination of the action. The clerk of the court in which the lawsuit was commenced must receive a copy of the notice of dismissal served upon the defendant to adjust the record of the action accordingly.

***Stipulation*** Once a defendant has served an answer to the plaintiff's complaint, the plaintiff may obtain a dismissal without prejudice by entering a formal agreement, a stipulation, with the defendant. The parties agree to the terms of the dismissal, which must be filed with the court clerk and put into effect by the action of the clerk. A dismissal agreement is a court order that enforces the stipulation of the parties. A dismissal by stipulation is a dismissal without prejudice

unless the parties otherwise agree and record their agreement in the text of the stipulation.

*Court Order* A plaintiff may make a motion to dismiss his or her action without prejudice if the plaintiff cannot serve a notice of dismissal or obtain a stipulation. A dismissal will not be granted to a plaintiff, however, if it would prejudice the rights of any other individual who has a legal interest in the subject matter of a lawsuit. If a joint tenant fails to agree with his or her cotenant to dismiss an action against a landlord for breach of the WARRANTY of habitability without prejudice, then there will not be a dismissal.

### Criminal Prosecutions

A dismissal in a criminal prosecution is a decision of a court, which has exercised its discretion prior to trial or before a verdict is reached, that terminates the proceedings against the defendant. The procedure by which dismissals in state and federal criminal actions are obtained are governed, respectively, by the state and federal rules of CRIMINAL PROCEDURE. In criminal prosecutions, delay often prejudices the defendant's rights because of the greater likelihood that evidence would be lost or memories or events would not be recalled easily. The possibility of dismissal ensures the prompt government prosecution of individuals accused of criminal activity.

The legal effect of a dismissal in a criminal prosecution is dependent upon the type that is granted by the court.

**Dismissal with Prejudice** A dismissal with prejudice bars the government from prosecuting the accused on the same charge at a later date. The defendant cannot subsequently be reindicted because of the constitutional guarantee against DOUBLE JEOPARDY. A dismissal with prejudice is made in response to a motion to the court by the defendant or by the court *sua sponte.*

*Motion by a Defendant* A defendant may make a motion to the court to have the charges against him or her—whether embodied in an indictment, information, or complaint—dismissed with prejudice because the delay has violated the individual's constitutional right to a SPEEDY TRIAL or there is no sufficient evidence to support the charges. In deciding whether a delay is unreasonable, the court evaluates the extent of the delay, the reasons for it, the prejudice to the defendant, and the defendant's contribution to the delay.

*Sua Sponte Power of Court* A court with jurisdiction to decide criminal matters can *sua sponte* dismiss a criminal prosecution with prejudice if the facts of the case clearly established that an accused has been deprived of his or her constitutional right to a speedy trial.

**Dismissal without Prejudice** A dismissal without prejudice that permits the reindictment or retrial of a defendant on the same charge at a subsequent date may be granted by a court acting *sua sponte* or after the prosecuting attorney has made a motion to do so. Only nonconstitutional grounds that do not adversely affect the rights of the defendant, such as the crowding of court calendars, might be sufficient to warrant the dismissal of a criminal action without prejudice.

FURTHER READINGS

Cohen, Alan G., ed., et al. 1992. *The Living Law: A Guide to Modern Legal Research.* Rochester, N.Y.: Lawyers Cooperative.

Kraut, Jayson, et al. 1983. *American Jurisprudence.* Rochester, N.Y.: Lawyers Cooperative.

CROSS-REFERENCES

Civil Action; Criminal Procedure; Discovery; Double Jeopardy.

## DISORDERLY CONDUCT

*A broad term describing conduct that disturbs the peace or endangers the morals, health, or safety of a community.*

Unlike the offense of breach of the peace, which originated under COMMON LAW, disorderly conduct is strictly a statutory crime. It is commonly considered a broader term than breach of the peace and, under some statutes, breach of the peace is an element of disorderly conduct.

The elements of disorderly conduct vary from one jurisdiction to another. Most statutes specify the misconduct that constitutes the offense. Acts such as the use of vulgar and obscene language in a public place, VAGRANCY, loitering, causing a crowd to gather in a public place, or annoying passengers on a mode of public transportation have been regarded as disorderly conduct by statute or ordinance. The offense is not committed unless the act complained of clearly falls within the statute.

In most jurisdictions, the decision of whether or not the act complained of is disorderly conduct is made by a judge. Following this determination, a jury decides whether or not the accused is guilty of the offense, provided there is a QUESTION OF FACT to be decided.

The punishment for disorderly conduct is usually fixed by statute. Under most statutes the penalty consists of a fine, imprisonment, or both. Some statutes provide that an accused cannot be imprisoned for disorderly conduct unless he or she has been given an opportunity to pay a fine and has defaulted on the payment.

CROSS-REFERENCES

Disturbance of the Peace.

## DISORDERLY HOUSE

*A place where individuals reside or which they frequent for purposes that pose a threat to public health, morals, convenience, or safety, and that may create a public* NUISANCE. *A* disorderly house *is an all-inclusive term that may be used to describe such places as a house of prostitution, an illegal gambling casino, or a site where drugs are constantly bought and sold. It is any place where unlawful practices are habitually carried on by the public.*

Various offenses concerning disorderly houses exist at COMMON LAW and under criminal statutes. The maintenance of a disorderly house is considered to be an ongoing offense and, at times, the offense involves a specific type of place, such as a bordello or GAMING house. The offenses are divided into four classes, which encompass keeping or maintaining a disorderly house, letting a house to be used as a disorderly house, frequenting or abiding permanently in a disorderly house, and disguising a disorderly house by displaying a sign of an honest occupation—such as disguising a house of prostitution as a dress shop.

### Statutes

In most jurisdictions, the maintenance of a disorderly house is an offense and, in order to be valid, each statute must clearly state the nature of the offense. Ordinarily, most statutes merely define the common-law offense rather than create a new statute. In states with statutes that provide for the punishment of an offense but do not define what a disorderly house is, the common law is examined to determine what the definition should be. In contrast, where the statute embodies a characterization of the house as well as prohibited conduct therein, the statute itself determines what constitutes the offense.

The prohibition against disorderly houses and the offenses they encompass are valid exercises of the POLICE POWER of the state.

### Elements

The elements of the offense of maintaining a disorderly house depend on statutory provisions that vary from state to state. A place may be named a disorderly house if alcohol is sold on the premises and if the law in that jurisdiction prohibits such sale. Essential to all offenses involving disorderly houses is the character of the house.

**House or Other Building or Place** The commission of the offense is dependent upon the presence of a house or place of public resort, the physical characteristics of which are immaterial. A disorderly house may be any place, including a room in a building or a steamship, an apartment, a garden, or a space under the grandstand at the racetrack.

The character of the place as a public resort is important. The general rule is that a disorderly house must be a place to which the general public or a segment of the public retreats for immoral purposes without prior invitation. A disorderly house may be used for other purposes that are not prohibited by law in addition to immoral purposes, but this in no way affects its classification as a disorderly house.

**Annoyance or Injury to the Public** The annoyance to the general public, as opposed to anyone in particular, is an essential element of the definition of a disorderly house. This annoyance or injury is based on the fact that activities being conducted are considered detrimental to public morals, welfare, and safety. They need not disturb the peace and quiet of a neighborhood to be construed as disorderly. A house where drugs are sold quietly or where a bordello is discreetly operated would be considered an endangerment to the public peace.

### Persons Liable

The liability of those concerned in offenses in connection with disorderly houses is not based upon their civil or contractual status. Some statutes specify who may be liable and in such cases, only those designated may be prosecuted. Partners, servants, and agents as well as the officers of a corporation have all been held liable for the operation of disorderly houses and the various offenses committed on the premises.

## DISPARAGEMENT

*In old* ENGLISH LAW, *an injury resulting from the comparison of a person or thing with an individual or thing of inferior quality; to discredit oneself*

*by marriage below one's class. A statement made by one person that casts aspersions on another person's goods, property, or intangible things.*

In TORTS, a considerable body of law has come about concerning interference with business or economic relations. The TORT of injurious falsehood, or disparagement, is concerned with the publication of derogatory information about a person's title to his or her property, to his or her business in general, or anything else made for the purpose of discouraging people from dealing with the individual. Generally, if the aspersions are cast upon the quality of what the person has to sell, or the person's business itself, proof of damages is essential.

*Disparagement of goods* is a false or misleading statement by an entrepreneur about a competitor's goods. It is made with the intention of influencing people adversely so they will not buy the goods.

*Disparagement of title* is a false or malicious statement made about an individual's title to real or PERSONAL PROPERTY. Such disparagement may result in a pecuniary loss due to impairment of vendibility that the defamatory statements might cause.

CROSS-REFERENCES

Defamation.

## DISPARATE IMPACT

*A theory of liability that prohibits an employer from using a facially neutral employment practice that has an unjustified adverse impact on members of a protected class. A facially neutral employment practice is one that does not appear to be discriminatory on its face; rather it is one that is discriminatory in its application or effect.*

Under Title VII of the CIVIL RIGHTS ACT OF 1964, plaintiffs may sue employers who discriminate on the basis of race, color, gender, religion, or national origin. Employers who intentionally discriminate are obvious candidates for a lawsuit, but the courts also allow plaintiffs to prove liability if the employer has treated classes of people differently using apparently neutral employment policies. The *disparate impact* theory of liability will succeed if the plaintiff can prove that these employment policies had the effect of excluding persons who are members of Title VII's protected classes. Once disparate impact is established, the employer must justify the continued use of the procedure or procedures causing the adverse impact as a "business necessity."

Proof of discriminatory motive is not required, because in these types of cases Congress is concerned with the consequences of employment practices, not simply the motivation. If the employer proves that the requirement being challenged is job related, the plaintiff must then show that other selection devices without a similar discriminatory effect would also serve the employer's legitimate interest in efficient workmanship.

The Supreme Court, in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), articulated the disparate impact theory and constructed a model of proof that the plaintiff and defendant must use in presenting their cases. In *Griggs*, the employer required a high school diploma and a passing score on two professionally developed tests. Although the lower courts found no liability because the plaintiff failed to prove that the employer had a discriminatory motive for the requirements, the Supreme Court reversed the decision. The Court stated that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." In a famous quote, the Court said that the "absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built in headwinds' for minority groups and are unrelated to measuring job capacity."

In the three-step model defined by the *Griggs* Court, the plaintiff must first prove that a specific employment practice adversely affects employment opportunities of Title VII protected classes. If the plaintiff can establish a disparate impact, the employer must demonstrate that the challenged practice is justified by "business necessity" or that the practice is "manifestly related" to job duties. The courts, between 1971 and 1989, used these two phrases interchangeably. If the employer does not meet the burdens of production and persuasion in proving business necessity, the plaintiff prevails. If the employer does meet these burdens, the third step requires the plaintiff to demonstrate that alternative practices exist that would meet the business needs of the employer yet would not have a discriminatory effect.

The plaintiff has the burden of persuading the fact finder that the employment practice used by the employer adversely affects the employment opportunities of a Title VII protected class. If the plaintiff fails to meet this bur-

den, the court will dismiss the action under Rule 41(b) of the Federal Rules of Civil Procedure.

Demonstrating that the employer's workforce does not reflect the racial, ethnic, or gender percentage of the population of the area does not prove disparate impact. Such an imbalance may be the product of legitimate factors, such as geography, cultural differences, or the lack of unchallenged qualifications for the job. Therefore, it is incumbent upon the plaintiff to show that the imbalance is *because of* the challenged practice. The most compelling evidence of disparate impact is proof that an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of actual applicants, or, in promotion and benefit cases, in a proportion smaller than in the actual pool of eligible employees.

If the plaintiff proves that the employer's practice had a disproportionate impact on a protected class, the burden shifts to the defendant to justify its use of the challenged practice. *Griggs* labeled this burden as business necessity, but suggested that exclusionary practices would be justified if they were manifestly related to job duties.

Business necessity is the only known defense against the accusation that a personnel practice denies protected classes equal opportunity for hire, promotion, training, earnings and any other term or condition of employment. Three conditions must exist before business necessity can be asserted: (1) The standard used as the basis for the employment practice must be apparently neutral; (2) the standard must be uniformly applied by the employer; and (3) the standard must have a disparate impact on a protected class.

The term *business necessity* is a fluid concept rather than a bright-line rule (a firm legal standard that courts are required to honor without regard to the particular circumstances of the case being heard). In some cases, courts conclude that business necessity is established by showing a reasonable relationship between the practice in question and the employer's business needs. However, the majority of courts hold that an employment practice having a discriminatory impact can be justified on business necessity grounds only if it is "essential" to the safety and efficiency of the employer's operations. These courts contend that the mere fact that the employment practice serves legitimate management functions will not justify discrimination.

The Supreme Court, in *Wards Cove Packing v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), revisited the concept of business necessity and realigned the burdens of proof and persuasion. The Wards Cove Packing Company employed low-paid cannery workers in its salmon canning facility in Alaska and higher-paid non-cannery workers at the company offices in Washington and Oregon. Non-white workers filled a high percentage of the cannery worker positions; primarily white workers held the non-cannery worker jobs. The court of appeals found this statistical disparity sufficient to establish a **PRIMA FACIE** case of disparate impact.

The Supreme Court reversed and remanded because the statistical proof the plaintiffs offered was not adequate. As to the defendant's **BURDEN OF PROOF**, the Court stated that the employer "carries the burden of producing evidence of a business justification for his employment practice. The **BURDEN OF PERSUASION**, however, remains with the disparate-impact plaintiff." This meant that although the employer had to show a legitimate business reason for using a test or certain job requirements, the plaintiff had to prove that he or she was denied a desired employment opportunity based on race, color, religion, gender, or national origin. This pushed the burden closer to that of *disparate treatment,* where the plaintiff has to show intentional discrimination by the employer. This is often difficult to prove. In addition, the Court held that just because the plaintiff could offer nondiscriminatory alternatives did not prove that the employer had improper motivations for the use of the employment practice.

The *Wards Cove* decision was severely criticized by **CIVIL RIGHTS** leaders, who believed the Supreme Court had made disparate impact cases almost impossible to win. Congress responded by passing the **CIVIL RIGHTS ACT** of 1991, which overturned *Wards Cove.* In effect, Congress reversed the Court's holding that the burden of proof must remain with the employee at all times. Therefore, once the plaintiff has carried the burden of proving that the challenged employment practice causes a disparate impact, the employer must not only articulate a business justification for the practice but must also prove the validity of the asserted justification.

The Supreme Court has put limits on the disparate impact theory. For example, the Court has made it clear that it is not unlawful for an employer to apply different standards of com-

pensation or different terms or conditions of employment to employees, if the employer acts according to a legitimate seniority system. This is true even if the seniority system has a discriminatory effect, as long as the system was not intended to be discriminatory. In addition, it has ruled that disparate impact theory cannot be applied in AGE DISCRIMINATION cases under the Age Discrimination in Employment Act of 1967.

FURTHER READINGS

Fick, Barbara. 1997. *The American Bar Association Guide to Workplace Law: Everything You Need to Know About Your Rights As an Employee or Employer.* New York: Times Books.

CROSS-REFERENCES

Employment Law.

## DISPOSABLE EARNINGS

*That portion of one's income that a person is free to spend or invest as he or she sees fit, after payment of taxes and other obligations.*

Legally mandated deductions are those for the payment of taxes and SOCIAL SECURITY. Any deductions for medical insurance, PENSION plans, life insurance, or employee savings plans do not qualify and must be included in the disposable earnings. Take-home pay is, therefore, not necessarily synonymous with disposable earnings because of this distinction between the deductions.

The federal CONSUMER CREDIT PROTECTION ACT (15 U.S.C.A. § 1601 et seq. [1968]) establishes a minimum amount of disposable earnings that can be garnished by a debtor's creditors. The lesser figure of 25 percent of a worker's weekly disposable earnings or the amount by which his or her disposable earnings exceed thirty times the maximum hourly wage is subject to GARNISHMENT.

State laws also impose restrictions on the garnishment of debtor's wages.

## DISPOSITION

*Act of disposing; transferring to the care or possession of another. The parting with, alienation of, or giving up of property. The final settlement of a matter and, with reference to decisions announced by a court, a judge's ruling is commonly referred to as disposition, regardless of level of resolution. In* CRIMINAL PROCEDURE, *the sentencing or other final settlement of a criminal case. With respect to a mental state, means an attitude, prevailing tendency, or inclination.*

## DISPOSITIVE FACT

*Information or evidence that unqualifiedly brings a conclusion to a legal controversy.*

Dispositive facts clearly settle an issue. The fact that the defendant in a personal injury case ran a red light and hit the plaintiff with his or her car settles the question of the defendant's NEGLIGENCE and is, therefore, a dispositive fact.

## DISPOSSESSION

*The wrongful, nonconsensual ouster or removal of a person from his or her property by trick, compulsion, or misuse of the law, whereby the violator obtains actual occupation of the land.* Dispossession *encompasses intrusion, disseisin, or deforcement.*

## DISPUTE

*A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other. The subject of litigation; the matter for which a suit is brought and upon which issue is joined, and in relation to which jurors are called and witnesses examined.*

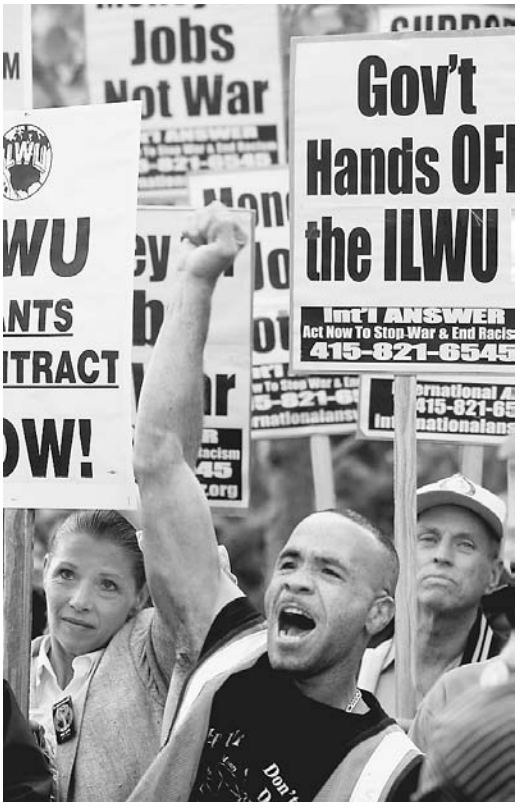


*International Longshore and Warehouse Union members rally in August 2002 in an attempt to keep the Bush administration out of their labor dispute with the Pacific Maritime Association.*

AP/WIDE WORLD PHOTOS

A *labor dispute* is any disagreement between an employer and his or her employees concerning anything job-related, such as tenure, hours, wages, fringe benefits, and employment conditions.

## DISQUALIFY

*To deprive of eligibility or render unfit; to disable or incapacitate.*

To be disqualified is to be stripped of legal capacity. A wife would be disqualified as a juror in her husband's trial for murder due to the nature of their relationship. A person may be disqualified for employment at a certain job because of a physical disability.

## DISSENT

*An explicit disagreement by one or more judges with the decision of the majority on a case before them.*

A dissent is often accompanied by a written dissenting opinion, and the terms *dissent* and *dissenting opinion* are used interchangeably.

Dissents have several functions. In some cases, they are a simple declaration of disagreement with the majority. In others, they instruct, prod, scold, or otherwise urge the majority to consider the dissenter's point of view.

Dissents carry no precedential weight and are not relied on as authority in subsequent cases. However, attorneys and judges sometimes consult them to understand the dissenter's analysis of the majority opinion. Attorneys and judges may also cite a dissent if they agree with its reasoning and conclusion and seek support for a change in the law.

Although the majority opinion constitutes the judgment of the court, its legal weight can be diminished if a sufficient number of judges dissent. On issues that divide the courts and the country, there can be sharply divergent opinions on what the law is or should be. During the 1990s, for example, one divisive question before the U.S. Supreme Court was whether AFFIRMATIVE ACTION programs to redress the effects of past discrimination were constitutional. In *Miller v. Johnson,* 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995), the U.S. Supreme Court held that Georgia's congressional redistricting plan, implemented to give minorities a strong voting block, constituted racial gerrymandering and violated the EQUAL PROTECTION CLAUSE. However, the case was not an unqualified success for those urging the rejection of affirmative action. Five justices joined in the majority block (plurality) in the case, and four justices filed dissents. With such a large minority, the dissents gained significance. Legal analysts monitor close cases such as *Miller* because a shift by one justice would signal a change in the law.

Dissents are a relatively recent phenomenon. Chief Justice JOHN MARSHALL, who served on the Supreme Court from 1801 to 1835, urged unanimity on the Court to demonstrate that its opinions were the last word on an issue. Others believed that individual conscience should dictate a justice's opinions, without regard to unanimity. In its early years, most of the Supreme Court's decisions showed little or no dissent. During the late nineteenth century and early twentieth century, as the Court became firmly established as the law of the land, more dissents appeared. Yet, even those who dissented during this period often recognized the importance of consensus opinions. For instance, Justice OLIVER WENDELL HOLMES JR., a frequent and famous dissenter, wrote a scathing dissent in LOCHNER V. NEW YORK, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), but not before he expressed his reluctance to do so: "I regret sincerely that I am unable to agree with the judgment in this case, and that I think it is my duty to express my dissent."

By the 1960s and 1970s, dissents were an accepted part of the Court's business, perhaps reflecting the fractious political and social climate of those years. One frequent dissenter during the mid-twentieth century was Justice WILLIAM O. DOUGLAS. During his thirty-six years on the Court, from 1939 to 1975, Douglas wrote 524 opinions of the Court, 154 concurring opinions, and an astounding 486 dissenting opinions. In addition, he dissented without opinion in 309 cases.

Justice BENJAMIN N. CARDOZO, of the Supreme Court, defended those who disagree with the majority, writing that the dissenter is "the gladiator making a last stand against the lions." A few justices raised their roles as dissenters to an art form. Justices WILLIAM J. BRENNAN JR. and THURGOOD MARSHALL displayed particular courage in opposition to the majority. During their long tenure on the Court, Brennan and Marshall were unwavering in their conviction that the death penalty violates the Constitution. By doggedly and relentlessly repeating

their dissent, they sought to win others to their view that the law on CAPITAL PUNISHMENT should be changed.

Together as well as separately, Brennan and Marshall wrote scores of dissents in death penalty cases. In so doing, they opposed clear precedent that supported the legality of capital punishment. However, both were convinced that they were justified in their continued opposition. Brennan felt that the intrinsic morality of the EIGHTH AMENDMENT superseded any right of individual states to impose capital punishment. He wrote, "It would effectively write the [CRUEL AND UNUSUAL PUNISHMENT] clause out of the BILL OF RIGHTS were we to permit legislatures to police themselves by having the last word on the scope of the protection that the clause is intended to secure against their own overreaching." Marshall's opposition was less philosophical and more practical. He repeatedly pointed out that the application of the death penalty was ARBITRARY and unfair, and affected minorities disproportionately. He felt a responsibility to continue bringing this issue before the public and believed that most people, if sufficiently informed about all its ramifications, would find capital punishment "shocking, unjust, and unacceptable" (FURMAN V. GEORGIA, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 [1972] [Marshall, J., dissenting]).

Some legal analysts believe that dissents are an important part of the system of checks and balances. Justice CHARLES E. HUGHES—who served on the Court from 1910 to 1916, left the bench to run for president, and then returned to the Court as chief justice from 1930 to 1941—wrote, "A dissent . . . is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."

FURTHER READINGS

Mello, Michael. 1995. "Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment." *Florida State University Law Review* 22 (winter).

CROSS-REFERENCES

Court Opinion.

## DISSOLUTION

*Act or process of dissolving; termination; winding up. In this sense it is frequently used in the phrase* dissolution of a partnership.

The dissolution of a contract is its RESCISSION by the parties themselves or by a court that nullifies its binding force and reinstates each party to his or her original position prior to the contract.

The dissolution of a corporation is the termination of its existence as a legal entity. This might occur pursuant to a statute, the surrender or expiration of its charter, legal proceedings, or BANKRUPTCY.

In domestic relations law, the term *dissolution* refers to the ending of a marriage through DIVORCE.

The dissolution of a partnership is the end of the relationship that exists among the partners as a result of any partner discontinuing his or her involvement in the partnership, as distinguished from the winding up of the outstanding obligations of the business.

## DISSOLVE

*To terminate; abrogate; cancel; annul; disintegrate. To release or unloose the binding force of anything.*

The dissolution of something is the act of disorganizing or disuniting it, as in marriage, contracts, or corporations.

## DISTINGUISH

*To set apart as being separate or different; to point out an essential disparity.*

To distinguish one case from another case means to show the dissimilarities between the two. It means to prove a case that is cited as applicable to the case currently in dispute is really inapplicable because the two cases are different.

## DISTRAIN

*To seize the property of an individual and retain it until an obligation is performed. The taking of the goods and chattels of a tenant by a landlord in order to satisfy an unpaid debt.*

*Distrain* is a comprehensive term that may be used in reference to any detention of PERSONAL PROPERTY, lawful or unlawful.

## DISTRESS

*The seizure of* PERSONAL PROPERTY *for the satisfaction of a demand.*

The process of distress, sometimes called distrain, began at COMMON LAW wherein a land-

lord had the right to confiscate the chattels of a tenant who had defaulted on a rent payment. Today, it is regulated by statute, and is used to mean the taking of property to enforce the performance of some obligation.

A *warrant of distress* is a writ that authorizes an officer to seize a person's goods. It is usually used in situations where a landlord has the right to obtain a lien on a tenant's goods for nonpayment of rent.

If personal property is seized to enforce the payment of taxes and then publicly sold if the taxes are not subsequently paid, the sale is called a *distress sale. Distressed goods* are chattels sold at a distress sale.

## DISTRIBUTEE

*An heir; a person entitled to share in the distribution of an estate. This term is used to denote one of the persons who is entitled, under the statute of distributions, to the personal estate of one who is dead intestate.*

## DISTRIBUTOR

*A wholesaler; an individual, corporation, or partnership buying goods in bulk quantities from a manufacturer at a price close to the cost of manufacturing them and reselling them at a higher price to other dealers, or to various retailers, but not directly to the general public.*

## DISTRICT

*One of the territorial areas into which an entire state or country, county, municipality, or other political subdivision is divided, for judicial, political, electoral, or administrative purposes.*

*The circuit or territory within which a person may be compelled to appear. Circuit of authority; province.*

A *judicial district* is a designated area of a state over which a court has been empowered to hear lawsuits that arise within it or that involve its inhabitants. A *federal judicial district* is an area of a state in which a federal district court sits to determine matters involving federal questions or DIVERSITY OF CITIZENSHIP of the parties.

A *congressional district* is a geographical subdivision of a state that elects a representative to Congress.

A *legislative district* is a specific section of a state that elects a representative to the state legislature.

## DISTRICT AND PROSECUTING ATTORNEYS

*The elected or appointed public officers of each state, county, or other political subdivision who institute criminal proceedings on behalf of the government.*

Federal attorneys who represent the United States in prosecuting federal offenses are U.S. attorneys.

A district or prosecuting attorney is the legal representative of the state, county, or municipality, whose primary function resides in instituting criminal proceedings against violators of state or municipal penal laws. The law of the particular jurisdiction determines whether they are appointed or elected to office and their term of office.

The legislature may, within the restrictions imposed by constitution or statute, prescribe the qualifications of the prosecuting attorney. He or she may be required to reside in the district or satisfy a particular minimum-age requisite. District attorneys usually must be attorneys-at-law who are licensed to practice in the state and, depending upon the jurisdiction, must have spent a specified number of years practicing law.

The duty of the district attorney is to ensure that offenses committed against the public are rectified pursuant to the commencement of criminal prosecutions. He or she may exercise considerable discretion in ascertaining the manner in which the duty of district attorney should be performed. The prosecuting attorney, however, must be fair and unbiased, and refrain from conduct that would deprive the defendant of any constitutional or statutory right. The legislature may regulate his or her functions within statutory or constitutional limitations.

A district attorney determines when to initiate a particular prosecution and must exercise due diligence in conducting the prosecution. The individual may neither restrain the GRAND JURY from considering charges by asserting that the government will not prosecute nor dismiss a criminal charge pending before it. He or she does, however, maintain control of criminal proceedings in the trial court. Statutes define the duties of the prosecuting attorney with respect to civil litigation.

The respective powers of the district attorney and of the ATTORNEY GENERAL, the principal law officer of the state, are ordinarily disparate. Neither the district attorney nor the attorney

general may impinge upon powers reserved exclusively to the other.

A district attorney is immune from liability for damages incurred as a result of his or her acts or omissions that occur within the scope of official duties, although the person may be held liable for conduct in excess of such scope.

Statutes prescribe the compensation of prosecuting attorneys.

A prosecuting attorney whose term is regulated by law cannot be removed or suspended from office, other than pursuant to the manner authorized by constitution or statute. The grounds specified by law govern removal. Mere misconduct committed in office, such as habitual intoxication, is usually an insufficient basis for removal. In some jurisdictions, however, conduct that is entirely extraneous to official duties may reveal flaws in personal character that render the individual unfit to hold the office and subject him or her to removal.

Suspension or removal may ensue from official misconduct or neglect of duty, such as the improper refusal to initiate criminal investigations or prosecutions, or inept execution of such proceedings.

Removal may also be justified on the basis of the prosecuting attorney's failure to comply with the constitutional duties of disclosure imposed by *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates DUE PROCESS where the evidence is material either to guilt or to punishment, irrespective of the GOOD FAITH or bad faith of the prosecution."

Removal of a prosecuting attorney may also be predicated on his or her conferral of positions in the office to friends or relatives regardless of their qualifications.

The removal process must comply with constitutional or statutory requirements. In some jurisdictions, the district attorney may be removed by the court in proceedings commenced by the interested parties or by IMPEACHMENT. The legislature, within constitutional limitations, may designate the nature of the removal proceeding.

Statutes provide for the appointment of assistant district attorneys to render supplementary services to the district attorney. Independent of statute, however, the courts frequently exercise discretionary power to appoint attorneys to assist the prosecuting attorney in criminal cases. Statutes primarily govern the qualifications, salary, tenure, powers, and removal of such attorneys.

Special prosecutors are attorneys appointed by the government to investigate criminal offenses involving officials of the EXECUTIVE BRANCH, since the government cannot effectively investigate itself.

CROSS-REFERENCES

Criminal Procedure; Due Process of Law; Prosecutor; Selective Prosecution.

## DISTRICT COURT

*A designation of an inferior state court that exercises general jurisdiction that it has been granted by the constitution or statute which created it. A U.S. judicial tribunal with original jurisdiction to try cases or controversies that fall within its limited jurisdiction.*

A state district might, for example, determine civil actions between state residents based upon contract violations or tortious conduct that occurred within the state.

Federal district courts are located in places designated by federal law, hearing cases in at least one place in every state. Most federal cases, whether civil actions or criminal prosecutions for violations of federal law, commence in district court. Cases arising under the Constitution, federal law, or treaty, or cases between citizens of different states, must also involve an interest worth more than $75,000 before the district court can exercise its jurisdiction.

The federal district courts also have original and exclusive jurisdiction of BANKRUPTCY cases, and ADMIRALTY, maritime, and prize cases, which determine rights in ships and cargo captured at sea. State courts are powerless to hear these kinds of controversies.

A party can appeal a decision made in district court in the Court of Appeal.

CROSS-REFERENCES

Federal Courts.

## DISTRICT OF COLUMBIA

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States" (U.S. Const. Art. I, § 8). The U.S.

Constitution, with this proclamation, left the legal formation of a national capital up to the U.S. Congress. To this day, the District of Columbia is neither a state nor a territory and remains under congressional jurisdiction.

### History

The location of the national capital was born out of a political compromise between the northern and southern states after the United States had achieved its independence. The South feared that the North would have too much influence if the capital were placed in a northern city. The North demanded federal assistance in paying its Revolutionary War debt, something the South was strongly against. ALEXANDER HAMILTON initiated a compromise whereby the federal government would pay off the war debt in return for locating the capital between the states of Maryland and Virginia on the Potomac River.

In 1800, Virginia and Maryland ceded portions of land to the federal government. The citizens living in the new capital were required to give up all the political rights they had enjoyed as inhabitants of Maryland and Virginia. In return, Congress, which had exclusive power over the district, would allow them some form of self-government. In 1802, Congress called for an appointed mayor and an elected council in the district. By 1820, the election of the mayor was also permitted.

This form of representative government lasted in the district until 1874, when Congress abolished the citizens' right to vote for their local officials and established a three-person board of commissioners appointed by the president. For over one hundred years, the residents of the District of Columbia were denied the democratic right to elected local representation.

Although residents of the district had always been required to pay federal INCOME TAX and serve in the military, their right to vote in presidential elections was denied until the 1961 passage of the TWENTY-THIRD AMENDMENT to the Constitution. This amendment granted the district a number of votes in the ELECTORAL COLLEGE, not to exceed the number given to the least populous state.

### Home Rule

In 1967, through an EXECUTIVE ORDER (Exec. Order No. 11379, 32 FR 15625, 1967 WL 7776 [Pres.]), President LYNDON B. JOHNSON

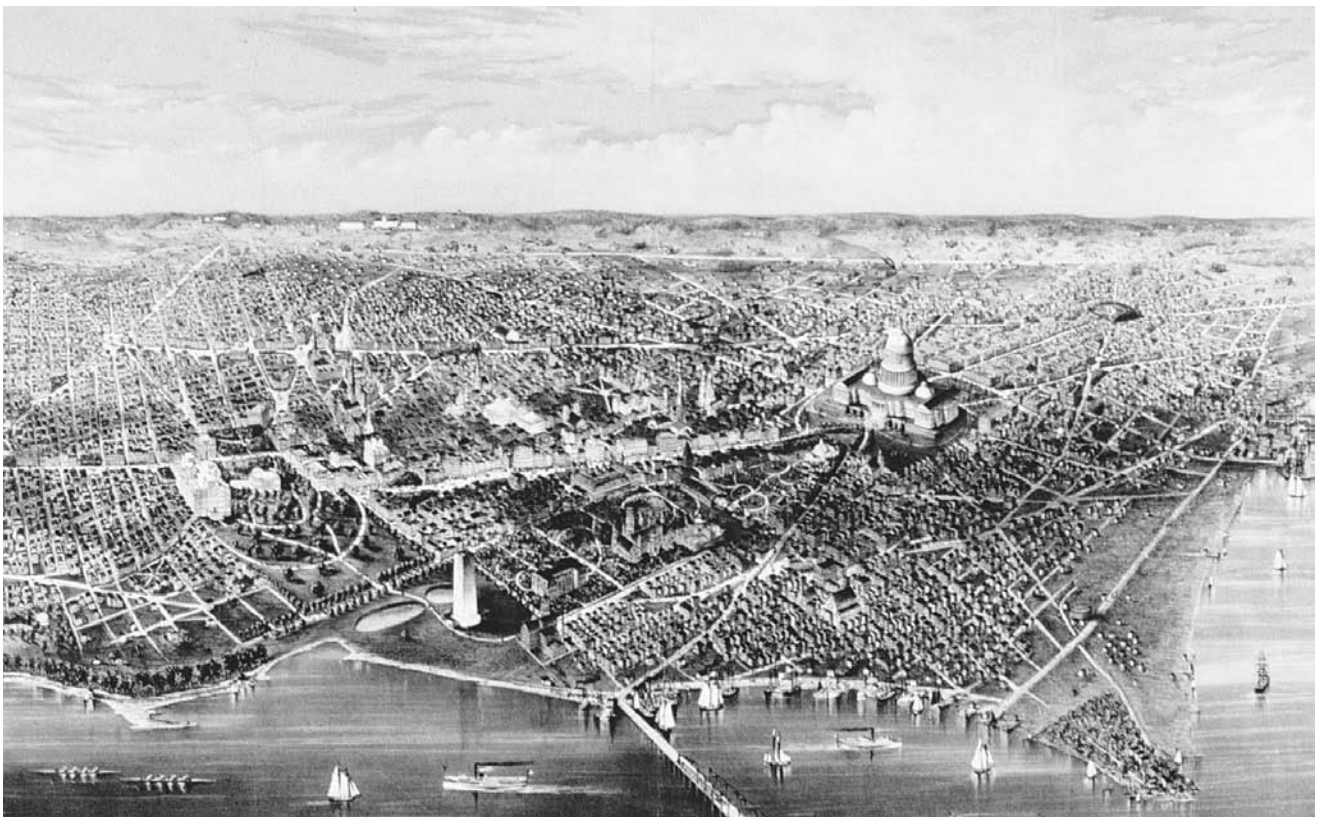

*An 1880 drawing of the District of Columbia by C.R. Parsons. Article 1, Section 8 of the U.S. Constitution grants Congress complete legislative authority over the district.*
LIBRARY OF CONGRESS

did away with the three-member board of commissioners and appointed a mayor and a council for the district. In 1970, the district was given back its nonvoting delegate in Congress. But this still did not satisfy residents who demanded full self-determination. Congress then passed the District Home Rule Act of 1973 (Pub. L. 93-198, Dec. 24, 1973, 87 Stat. 774), and restored to the citizens their right to vote for a local government. For the first time in exactly a hundred years, the residents of the District of Columbia were able to vote for a mayor and a 13-member council.

The Constitution granted Congress complete legislative authority over the District of Columbia. Congress alone has the jurisdiction to expand the district's powers over local government affairs. It also has the jurisdiction to contract those same powers. Congress, through the Home Rule Act, dictated the legislative powers to the district council and the executive powers to the mayor. Advisory neighborhood commissions, which are groups elected by the residents, advise the council on matters of public policy. Congress still retains ultimate legislative authority through its power to VETO any of the district's legislation.

### Statehood

Besides the citizens of U.S. territories, district residents are the only U.S. citizens without full representation in Congress and with federal limitations on their own local government. Advocates of statehood rebel against such restrictions. They argue that because the district's congressional delegate is not allowed to vote, residents are subject to a fundamental democratic wrong, taxation without representation. They add that because Congress retains control over the city's purse strings, city officials are powerless in raising more revenue. Federal restrictions on taxation have prevented the district from taxing commuters as have some other U.S. cities, which could have given the district a huge tax windfall.

Opponents of statehood argue that the District of Columbia belongs to all U.S. citizens, and therefore all citizens should have a say in how it is managed. Constitutionally, Congress has complete authority over the district, and to have it otherwise would require a constitutional amendment (supporters dismiss this argument, pointing out that 37 states were allowed into the Union through only a simple majority vote in Congress). If the district were to become an independent state, some opponents argue, the federal government would have to abide by the laws of this new state. Opponents of statehood also maintain that the district's power needs to be checked by Congress because of the district's financial difficulties.

The push toward statehood has become a partisan issue, with the DEMOCRATIC PARTY generally in favor of it and the REPUBLICAN PARTY generally opposed. One reason for this division is the political makeup of the city, which is predominantly Democratic. Statehood would add more Democratic members to the House and the Senate. When the Democrats won the White House in 1992, the stage was set for the statehood issue to move forward through the 103d Congress.

On November 21, 1993, the House considered Bill 51, calling for the creation of New Columbia, the nation's fifty-first state. Democrats spoke in favor of statehood, saying it would give D.C. residents the same benefits of citizenship that are enjoyed by other U.S. citizens. Republicans spoke out against it, saying the city was unable to govern itself. Republican sentiments carried the day, defeating the bill by a vote of 277–153.

### Legal Challenge to Voting Rights

After Congress rejected the idea of statehood for the district, D.C. residents felt they had exhausted their legislative options for change. They explored other ways of increasing their influence in Congress, but again the fact that their representative could not vote in Congress posed a major roadblock. A group of residents sought to overcome this limitation by filing a federal lawsuit that challenged the status quo.

Lois Adams and 75 other D.C. residents filed the lawsuit against the president and Congress, arguing that it was unjust that they pay taxes and defend the country in times of war, yet they could not send elected representatives to vote on taxes and war. They claimed that this deprived them of EQUAL PROTECTION of the law and denied them a republican form of government. They also argued that this deprivation violated their DUE PROCESS rights and abridged their PRIVILEGES AND IMMUNITIES as citizens of the United States.

A special three-judge panel heard the case but in the end rejected these arguments. In *Adams v. Clinton*, 90 F.Supp.2d 35 (D.C. 2000), the court addressed both jurisdictional and constitutional issues. Regarding jurisdiction, the

executive and legislative branches contended that the court had no right to even hear the case because the plaintiffs raised issues that were not subject to review by the judicial branch. However, the court rejected the idea that the issues were POLITICAL QUESTIONS beyond its reach and reviewed the merits of the case.

The court looked at the language of the Constitution, as well as history and legal precedent, in making is decisions. It first held that Article I of the Constitution repeatedly refers to "each state," thereby demonstrating that the term did not refer generally to all the people of the United States but to citizens of individual states. Tying the right to Congressional representation to statehood was reinforced by the fact that residents of U.S. territories cannot elect voting representatives to Congress. In addition, history and precedent revealed that the District of Columbia had never been considered a "state" for constitutional purposes. Therefore, the direct constitutional challenge had no merit.

The court rejected an even more novel theory advanced by the plaintiffs that they were entitled to vote in Maryland elections because of their "residual citizenship." This theory relies on the fact that residents of the land ceded by Maryland to form the district continued to vote in Maryland elections between 1790 and 1801, when Congress assumed jurisdiction and provided for the district's government. The court dismissed this claim, noting that a 1964 court decision had rejected the concept of residual citizenship based on the fact that former residents of Maryland lost their state citizenship when the District of Columbia separated from it.

Finally, the court concluded that the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT could not be used to strike down another constitutional provision. Though the court found that Congress and the EXECUTIVE BRANCH had failed to give a compelling reason for denying D.C. residents voting representatives, the denial was based on a provision of Article I. Unlike a statute that contains illegal classifications, the constitution cannot be ruled unconstitutional. Therefore, D.C. residents had to convince Congress to either grant it statehood or pass a constitutional amendment that would allow voting representatives from the district.

### The Courts

The courts of the District of Columbia were established by an act of Congress. Originally, federal courts heard controversies that arose in the District of Columbia. Disputes over federal or district law came under the jurisdiction of the federal district courts. Appeals went from the district courts to the Court of Appeals for the District of Columbia Circuit, and then to the U.S. Supreme Court.

Just as the legislative branch of the district government became less dependent on the federal system in the 1970s, so too did the courts. The district court system was completely reorganized under the District of Columbia Court Reform and Criminal Procedure Act of 1970 (Pub. L. 91-358, July 29, 1970, 84 Stat. 473; Pub. L. 99-573, § 17, Oct. 28, 1973, 100 Stat. 3234, 3235). The U.S. District court no longer has jurisdiction over criminal or civil actions occurring under D.C. law. These cases are now heard by the district's new trial court, the Superior Court. The District of Columbia Court of Appeals has jurisdiction to review decisions of the Superior Court.

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Markham, Steven. 1998. *Statehood for the District of Columbia.* Washington, D.C.: National Legal Center for the Public Interest.

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#### CROSS-REFERENCES

States' Rights.

## DISTURBANCE OF PUBLIC MEETINGS

It was a misdemeanor at COMMON LAW to be guilty of conduct that tended to disturb a public assembly, though the prosecution, in most instances, was required to prove that the disturbance was caused wantonly or willfully. In most jurisdictions there is statutory crime for such conduct and the disturbance need not be so turbulent as to constitute a RIOT.

## DISTURBANCE OF THE PEACE

*An offense constituting a malicious and willful intrusion upon the peace and quiet of a community or neighborhood.*

The crime is usually committed by an offensive or tumultuous act, such as the making of loud or unusual noises, or quarreling in public.

The term is similar in meaning to breach of the peace, however, the latter is generally a broader term, encompassing all violations of public peace and order. It can also be a form of DISORDERLY CONDUCT and is similarly punishable upon conviction by a fine, imprisonment, or both.

## DIVERS

*Several; any number more than two; different.*

*Divers* is a collective term used to group a number of unspecified people, objects, or acts. It is used frequently to describe property, as in divers parcels of land.

## DIVERSION

*A turning aside or altering of the natural course or route of a thing. The term is chiefly applied to the unauthorized change or alteration of a water course to the prejudice of a lower riparian, or to the unauthorized use of funds.*

*A program for the disposition of a criminal charge without a criminal trial; sometimes called operation de nova, intervention, or deferred prosecution.*

The disposition is conditional on the defendant's performing certain tasks or participating in a treatment program. If the conditions are successfully completed, the charge is dismissed. But if the accused does not meet his or her obligations, prosecution may be instituted.

CROSS-REFERENCES

Riparian Rights.

## DIVERSITY OF CITIZENSHIP

*A phrase used with reference to the jurisdiction of the federal courts which, under the U.S. Constitution, Art. III, § 2, extends to cases between citizens of different states designating the condition existing when the party on one side of a lawsuit is a citizen of one state and the party on the other side is a citizen of another state, or between a citizen of a state and an* ALIEN. *The requisite jurisdictional amount must, in addition, be met.*

Diversity of citizenship is one of the factors that will allow a federal district court to exercise its authority to hear a lawsuit. This authority is called diversity jurisdiction. It means that a case involving questions that must be answered according to state laws may be heard in federal court if the parties on the two sides of the case are from different states. No matter how many parties are involved in a lawsuit, there must be complete diversity in order for the federal court to exercise this type of authority. If a single plaintiff is a citizen of the same state as any defendant, there is no diversity and the case must be pursued in a state court.

Being a citizen of a state is something more than simply owning property or being physically present within the state. Citizenship means that the individual has a residence in the state and intends to have that residence as his or her present home. Residence plus this intent makes that place the individual's domicile, and a party can have only one domicile at a time. Citizenship does not mean that the individual must swear that he or she never intends to move, but the residence and the intent to consider it home are essential. Students, prisoners, and service personnel can establish a domicile in a state even though they are living in it involuntarily or temporarily.

Corporations are citizens of the state in which they are incorporated and also of the state where they maintain their principal place of business. This citizenship in two places has the effect of narrowing the number of cases that qualify for a federal court's diversity jurisdiction because a corporation's citizenship is not diverse from the citizenship of anyone else in either of those two states.

The citizenship of each party must be determined as of the time the lawsuit is commenced. A party's domicile at the time of the events that give rise to the CAUSE OF ACTION or a change of domicile during the course of proceedings does not affect the court's jurisdiction. This rule, of course, gives a person contemplating a lawsuit the opportunity to change his or her domicile just before serving legal papers that start an action. This tactic has been challenged on a few occasions on the ground that it violates another federal law that prohibits collusion to create federal jurisdiction. Generally, the courts have ruled that a plaintiff's motives in moving to a new state are not determinative, and the only question is whether in fact the plaintiff's domicile is different from that of the defendants at the time the lawsuit begins.

The right of an individual to take his or her case into a federal court is assured by Article III, § 2 of the U.S. Constitution. This provision extends the federal judicial power to controversies between the citizen of a state and the gov-

ernment of a different state, citizens of a different state, or between a state or its citizens and a foreign government or its citizens. It is put into effect by a statute that limits federal diversity jurisdiction to cases involving a dispute worth more than $10,000. This minimum is intended to keep small cases from clogging the calendars of federal courts. Cases worth less than $10,000 must be brought in a state court even though diversity of the parties' citizenship otherwise would entitle them to be brought in federal court.

The origin and purposes of federal diversity jurisdiction have long been debated. It was created when the Constitution was first adopted, a time when loyalty to one's state was usually stronger than feelings for the United States. It was undoubtedly intended to balance national purposes with the independence of the states. Chief Justice JOHN MARSHALL of the Supreme Court wrote in *Bank of United States v. Deveaux,* 9 U.S. (5 Cranch) 61, 87, 3 L. Ed. 38 (1809):

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, . . . it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies . . . between citizens of different states.

Some scholars believe that the opportunity to take business and commercial disputes into an impartial federal court helped to encourage investment in the developing South and West. People from the industrialized Northeast felt more secure when their financial transactions in other states were not necessarily at the mercy of local prejudices.

Even if diversity jurisdiction did help the economic growth of the United States, many people question whether it continues to be useful. Because these cases require substantial investments of time and energy by the federal judiciary in cases that arise under state law, proposals to curtail or abolish diversity jurisdiction have been introduced repeatedly in Congress since the 1920s. None of the proposals have been adopted, however.

FURTHER READINGS

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Jacobsohn, Gary Jeffrey, and Susan Dunn, ed. 1996. *Diversity and Citizenship: Rediscovering American Nationhood.* Lanham, Md.: Rowman & Littlefield.

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## DIVEST

*To deprive or take away.*

*Divest* is usually used in reference to the relinquishment of authority, power, property, or title. If, for example, an individual is disinherited, he or she is divested of the right to inherit money. Similarly, an individual may be divested of his or her citizenship for TREASON.

Divest is also spelled *devest.*

## DIVIDEND

*The distribution of current or accumulated earnings to the shareholders of a corporation pro rata based on the number of shares owned. Dividends are usually issued in cash. However, they may be issued in the form of stock or property. The dividend on preferred shares is generally a fixed amount; however, on common shares the dividend varies depending on such things as the earnings and available cash of the corporation as well as future plans for the acquisition of property and equipment by the corporation.*

## DIVINE RIGHT OF KINGS

*The authority of a monarch to rule a realm by virtue of birth.*

The concept of the divine right of kings, as postulated by the patriarchal theory of government, was based upon the laws of God and nature. The king's power to rule was derived from his ancestors who, as monarchs, were appointed to serve by God. Regardless of misconduct, a king or his heir could not be forced to forfeit the right to the obedience of subjects or the right to succeed to the throne. This concept was formulated to dispel any possibility of papal and ecclesiastical claims to supremacy in secular as well as spiritual matters.

## DIVORCE

*A court decree that terminates a marriage; also known as marital dissolution.*

A divorce decree establishes the new relations between the parties, including their duties and obligations relating to property that they own, support responsibilities of either or both of them, and provisions for any children.

When a marriage breaks up, divorce law provides legal solutions for issues that the HUSBAND AND WIFE are unable to resolve through mutual cooperation. Historically, the most important question in a divorce case was whether the court should grant a divorce. When a divorce was granted, the resolution of continuing obligations was simple: The wife was awarded custody of any children, and the husband was required to support the wife and children.

Modern divorce laws have inverted the involvement of courts. The issue of whether a divorce should be granted is now generally decided by one or both of the spouses. Contemporary courts are more involved in determining the legal ramifications of the marriage breakup, such as spousal maintenance, CHILD SUPPORT, and CHILD CUSTODY. Other legal issues relating to divorce include court jurisdiction, antenuptial and postnuptial agreements, and the right to obtain a divorce. State laws govern a wide range of divorce issues, but district, county, and family courts are given broad discretion in fixing legal obligations between the parties.

In early civilizations, marriage and marriage dissolution were considered private matters. Marriage and divorce were first placed under comprehensive state regulation in Rome during the reign of Augustus (27 B.C.–A.D. 14). As Christianity spread, governments came under religious control, and the Roman Catholic Church strictly forbade divorce. The only exception to this ban was if one of the parties had not converted to Christianity before the marriage.

During the 1500s, the Protestant Reformation movement in Europe rejected religious control over marriage and helped to move the matter of divorce from the church to the state. European courts granted divorces upon a showing of fault, such as ADULTERY, cruelty, or desertion.

England struggled with the matter of divorce. From 1669 to 1850, only 229 divorces were granted in that country. Marriage and divorce were controlled by the Anglican Church, which, like the Roman Catholic Church, strictly forbade divorce. The Anglican Church allowed separations, but neither spouse was allowed to remarry while the other was still living.

The law of divorce in the American colonies varied according to the religious and social mores of the founding colonists. England insisted that its American colonies refrain from enacting legislation that contradicted the restrictive English laws, and a colonial divorce was not considered final until it had been approved by the English monarch. Despite these deterrents, a few northern colonies adopted laws allowing divorce in the 1650s.

Divorce law in the middle and northern colonies was often curious. Under one late-seventeenth-century Pennsylvania law, divorce seemed a mere afterthought: If a married man committed SODOMY or bestiality, his punishment was castration, and "the injured wife shall have a divorce if required." In Connecticut, divorce was allowed on the grounds of adultery, desertion, and the husband's failure in his conjugal duties. In the Massachusetts Bay Colony, a woman was allowed to divorce her husband if the husband had committed adultery and another offense. A man could divorce if his wife committed adultery or the "cruel usage of the husband."

After the Revolutionary War, divorce law in the United States continued to develop regionally. The U.S. Constitution was silent as to divorce, leaving the matter to the states for regulation. For the next 150 years, state legislatures passed and maintained laws that granted divorce only upon a showing of fault on the part of a spouse. If a divorce were contested, the divorcing spouse would be required to establish, before a court, specific grounds for the action. If the court felt that the divorcing spouse had not proved the grounds alleged, it would be free to deny the petition for divorce.

The most common traditional grounds for divorce were cruelty, desertion, and adultery. Other grounds included nonsupport or neglect, alcoholism, drug addiction, insanity, criminal conviction, and voluntary separation. Fault-based divorce laws proliferated, but not without protest. In 1901, author JAMES BRYCE was moved to remark that U.S. divorce laws were "the largest and the strangest, and perhaps the saddest, body of legislative experiments in the sphere of FAMILY LAW which free, self-governing communities have ever tried."

In 1933, New Mexico became the first state to allow divorce on the ground of incompatibility. This new ground reduced the need for divorcing spouses to show fault. In 1969, California became the first state to completely revise its divorce laws. The California Family Law Act of 1969 provided, in part, that only one of two grounds was necessary to obtain a divorce: irreconcilable differences that have caused the irre-

mediable breakdown of the marriage, or incurable insanity (Cal. Civ. Code § D. 4, pt. 5 [West], *repealed by* Stat. 1992, ch. 162 [A.B. 2650], § 3 [operative Jan. 1, 1994]). In divorce proceedings, testimony or other evidence of specific acts of misconduct were excluded. The one exception to this rule was where the court was required to award child custody. In such a case, serious misconduct on the part of one parent would be relevant.

California's was the first comprehensive "no-fault" divorce law, and it inspired a nationwide debate over divorce reform. Supporters of no-fault divorce noted that there were numerous problems with fault-based divorce. Fault-based divorce was an odious event that destroyed friendships. It also encouraged spouses to fabricate one of the grounds for divorce required under statute. No-fault divorce, conversely, recognized that a marriage breakdown might not be the result of one spouse's misconduct. No-fault divorce laws avoided much of the acrimony that plagued fault-based divorce laws. They also simplified the divorce process and made it more consistent nationwide, thus obviating the need for desperate couples to cross state lines in search of simpler divorce laws.

In 1970, the Commissioners on Uniform State Laws prepared a Uniform Marriage and Divorce Act, which provides for no-fault divorce if a court finds that the marriage is "irretrievably broken" (U.L.A., Uniform Marriage and Divorce Act §§ 101 et seq.). Such a finding requires little more than the desire of one spouse to end the marriage. Many state legislatures adopted the law, and by the end of the 1970s, nearly every state legislature had enacted laws allowing no-fault divorce, or divorce after a specified period of separation. Some states replaced all traditional grounds with a single no-fault provision. Other states added the ground of irreconcilable differences to existing statutes. In such states, a divorce petitioner remains free to file for divorce under traditional grounds.

Most states allow the filing of a divorce petition at any time, unless the petitioner has not been a resident of the state for a specified period of time. Some states require a waiting period for their residents. The waiting period can range from six weeks to two or three years.

Illinois and South Dakota maintain the strictest divorce laws. In Illinois, a marriage may be dissolved without regard to fault where three conditions exist: the parties have lived apart for a continuous period of two years; irreconcilable differences have caused the irretrievable breakdown of the marriage; and efforts at reconciliation would be impracticable and not in the best interests of the family (Ill. Rev. Stat. ch. 750 I.L.C.S. § 5/401(a)(2)). In South Dakota, irreconcilable differences are a valid ground for divorce, which suggests some measure of fault blindness (S.D. Codified Laws Ann. § 25:4-2). However, irreconcilable differences exist only when the court determines that there are "substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved" (§ 25:4-17.1).

In Minnesota, the statute covering dissolution of marriage reads like a primer on no-fault divorce. Minnesota Statutes Annotated, Section 518.05, defines dissolution as "the termination of the marital relationship between a husband and wife" and concludes that a divorce "shall be granted by a county or district court when the court finds there has been an irretrievable breakdown of the marriage relationship." "Irretrievable breakdown" is left undefined in the statute. In Texas, the no-fault statute is titled "Insupportability." This law provides that on petition by either party, "a divorce may be decreed without regard to fault if the marriage has become insupportable because of discord or conflict of personalities" that destroys the purpose of marriage and renders reconciliation improbable (Tex. Fam. Code Ann. § 3.01 [West]).

No-fault is not without its detractors. Some critics argue that strict, no-fault divorce can provide a cover for serious marital misconduct. By refusing to examine the marital conduct of parties in setting future obligations, some states prevent spouses, usually impoverished wives, from exposing and receiving redress for tortious or criminal conduct. In response to this problem, the vast majority of states have abolished statutes that prevent one spouse from suing the other. However, TORT claims for marital misconduct are often treated with suspicion, and juries are seldom eager to settle marital discord. A marital tort claim is also subject to business judgment: If the case does not appear cost-effective, an attorney might be reluctant to accept it.

Fault has survived in some aspects of divorce proceedings. It was once relevant to a decree of divorce and irrelevant to such matters as child custody and property divisions. Under current trends, marital misconduct is irrelevant to the

divorce itself, but it may be relevant to related matters such as child custody, child support and VISITATION RIGHTS, spousal maintenance, and property distribution.

A recent movement in a small number of states has sought to reintroduce fault as an element in divorce proceedings. In 1997, Louisiana approved a COVENANT MARRIAGE law that is designed to provide an alternative to the traditional method for obtaining a marriage license. La. Rev. Stat. Ann. §§ 9:272-75, 9:307-09 (West Supp. 2003). Under the covenant marriage law, couples who wish to obtain a marriage license must first enter pre-marriage counseling, and then must provide an AFFIDAVIT from a marriage counselor stating that they have completed this counseling. Once the couple is married, the covenant marriage does not differ from a traditional marriage until the potential dissolution of the marriage. Before partners to a covenant marriage may divorce, they must complete pre-divorce counseling and must provide an affidavit stating that the counseling has taken place. The statute is designed to make it more difficult to obtain a so-called "quickie" divorce.

The introduction of covenant marriage as an alternative to the traditional marriage agreement comes in the wake of several studies regarding the implications of divorce on children. Studies have shown that the economic standard of living for divorced women and children of a marriage decrease significantly after the divorce, while the standard of living for men increases. Likewise, other studies have shown that children of divorced parents are less likely to marry, have less education, and are more likely to abuse drugs and alcohol later in life.

In response to these and similar statistics, legislatures considered several means by which they could curb the climbing rate of divorce. Highly restrictive provisions on divorce, including the elimination of no-fault divorce, failed to pass any state legislature. Louisiana's covenant marriage law represents a compromise in that it leaves the decision to enter into such a marriage up to the couples. Several states in 1997 and 1998 considered enacting similar laws, but only Arizona and Arkansas have done so.

Covenant marriage laws also do not appear popular with couples in the three states that have adopted such laws. According to an article in the *New York Times*, only three percent of couples in Louisiana and Arizona have chosen to pursue this type of marital agreement, and studies show that tougher divorce laws have failed to gain popularity in those states. Moreover, several commentators have noted that the divorce rate in Louisiana and Arizona is not likely to decrease even with these laws in place.

Other states that have not enacted covenant marriage laws have considered other methods to discourage divorce. Several states have included provisions that encourage couples to seek pre-marital counseling before entering into the marriage. Unlike the covenant marriage laws, these provisions do not mandate such counseling, and they leave the decision to pursue counseling to the individual couples. The various statutes provide a number of incentives for seeking counseling, including, for example, reduction in the cost for a marriage license upon completion of counseling.

Historically, custody of the children of divorcing parents was awarded to the mother. Today, courts exercise their discretion in awarding custody, considering all relevant factors, including marital misconduct, to determine the children's best interests. Many parents are able to reach settlements on custody and visitation through mediation. Joint custody is a popular option among conciliatory spouses. Child custody is, however, a frequent battleground for less-than-conciliatory spouses.

In determining child-support obligations, courts generally hold that each parent should contribute in accordance with his or her means. Child support is a mutual duty. However, for pre-school children, the primary caretaker may not be obligated to obtain employment; in such cases, caretaking may be regarded as being in lieu of financial contribution.

All states have enacted some form of the Reciprocal Enforcement of Support Act, a uniform law designed to facilitate the interstate enforcement of support obligations by spouses and parents (U.L.A., Uniform Interstate Family Support Act of 1992). Such statutes prevent a nonsupporting spouse or parent from escaping obligations by moving to a different state. State laws also make nonsupport of a spouse or child a criminal offense, and uniform laws now give states the power to detain and surrender individuals who are wanted for criminal nonsupport in another state.

Property distribution is frequently contested in modern divorce proceedings. Commonly disputed property includes real estate, PERSONAL PROPERTY, cash savings, stocks, bonds, savings

*A sample finding of fact and conclusions of law, which are part of a judgment and decree of divorce.*

**Finding of Fact and Conclusions of Law**

At the *Matrimonial/IAS* Part _____
of New York State Supreme Court at
the Courthouse, _____
County, on _____

Present:

Hon. _____ *Justice/Referee* X
Plaintiff,
-against-

Index No.:
Calendar No.:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Defendant.
X

The issues of this action having ☐ *been submitted to* **OR** ☐ *been heard* before me as one of the *Justices/Referees* of this Court at Part _____ hereof, held in and for the County of _____ on _____, and having considered the allegations and proofs of the respective parties, and due deliberation having been had thereon.

NOW, after ☐ *reading and considering the papers submitted* ☐ *hearing the testimony,* I do hereby make the following findings of essential facts which I deem established by the evidence and reach the following conclusions of law.

**FINDINGS OF FACT**

**FIRST:** Plaintiff and Defendant were both eighteen (18) years of age or over when this action was commenced.

**SECOND:**

☐ The Plaintiff has resided in New York State for a continuous period in excess of two years immediately preceding the commencement of this action.

**OR**

☐ The Defendant has resided in New York State for a continuous period in excess of two years immediately preceding the commencement of this action

**OR**

☐ The Plaintiff has resided in New York State for a continuous period in excess of one year immediately preceding the commencement of this action, and:

a. ☐ the parties were married in New York State.
b. ☐ the Plaintiff has lived as husband or wife in New York State with the Defendant.
c. ☐ the cause of action occurred in New York State.

**OR**

☐ The Defendant has resided in New York State for a continuous period in excess of one year immediately preceding the commencement of this action; and:

a. ☐ the parties were married in New York State.
b. ☐ the Defendant has lived as husband or wife in New York State with the Plaintiff.
c. ☐ the cause of action occurred in New York State.

**OR**

☐ The cause of action occurred in New York State and both parties were residents thereof at the time of the commencement of this action.

**THIRD:** The Plaintiff and the Defendant were married on the date of _____ in the City, Town or Village of _____, County of _____, State or Country of _____; in a ☐ *civil* **OR** ☐ *religious* ceremony.

**FOURTH:** That no decree, judgment or order of divorce, annulment or dissolution of marriage has been granted to either party against the other in any Court of competent jurisdiction of this state or any other state, territory or country, and that there is no other action pending for divorce by either party against the other in any Court.

**FIFTH:** That this action was commenced by filing the ☐ *Summons With Notice* **OR** ☐ *Summons and Verified Complaint* with the County Clerk on _____. Defendant was served ☐ *personally* **OR** ☐ *pursuant to Court order dated* _____ with the above stated pleadings. Defendant ☐ *defaulted in appearance* **OR** ☐ *appeared and waived his/her right to answer* **OR** ☐ *filed an answer/amended answer withdrawing any previous pleading, and neither admitting nor denying the allegations in plaintiff's complaint, and consenting to entry of judgment.*

[continued]

*A sample finding of fact and conclusions of law, which are part of a judgment and decree of divorce (continued).*

**Finding of Fact and Conclusions of Law**

**SIXTH:** ☐ That Defendant is not in the military service of the United States of America, the State of New York, or any other state. **OR** ☐ Defendant is a member of the military service of the _____ and ☐ has appeared by affidavit and does not oppose the action **OR** ☐ is in default.

**SEVENTH:** ☐ There are no children of the marriage. **OR** ☐ There *is/are* _____ child(ren) of the marriage. Their name(s), social security number(s), address(es) and date(s) of birth are:

| Name & Social Security Number | Date of Birth | Address |
|---|---|---|
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |

**EIGHTH:** The grounds for divorce that are alleged in the Verified Complaint were proved as follows:

**Cruel and Inhuman Treatment (DRL §170(1)):**

☐ At the following times, none of which are earlier than (5) years prior to commencement of this action, the Defendant engaged in conduct that so endangered the mental and physical well being of the Plaintiff, so as to render it unsafe and improper for the parties to cohabit (live together) as husband and wife.

(State the facts that demonstrate cruel and inhuman conduct giving dates, places and specific acts. Conduct may include physical, verbal, sexual or emotional behavior).

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

**(Attach an additional sheet, if necessary).**

**Abandonment (DRL §170(2):**

☐ That commencing on or about _____ , and continuing for a period of more than one (1) year immediately prior to commencement of this action, the Defendant left the marital residence of the parties located at _____ _____ , and did not return. Such absence was without cause or justification, and was without Plaintiff's consent.

☐ That commencing on or about _____ , and continuing for a period of more than one (1) year immediately prior to commencement of this action, the Defendant refused to have sexual relations with the Plaintiff despite Plaintiff's repeated requests to resume such relations. Defendant does not suffer from any disability which would prevent *her/him* from engaging in such sexual relations with Plaintiff. The refusal to engage in sexual relations was without good cause or justification and occurred at the marital residence located at _____ .

☐ That commencing on or about _____ , and continuing for a period of more than one(1) year immediately prior to commencement of this action, the Defendant willfully and without cause or justification abandoned the the Plaintiff, who had been a faithful and dutiful *husband/wife*, by depriving Plaintiff of access to the marital residence located at _____ . This deprivation was without the consent of the Plaintiff and continued for a period of greater than one year.

**Confinement to Prison (DRL §170(3)):**

☐ a. That after the marriage of Plaintiff and Defendant, Defendant was confined in prison for a period of three or more consecutive years, to wit: that Defendant was confined in _____ prison on _____ , and has remained confined to this date; and

[continued]

*A sample finding of fact and conclusions of law, which are part of a judgment and decree of divorce (continued).*

## Finding of Fact and Conclusions of Law

b. not more that five (5) years elapsed between the end of the third year of imprisonment and the date of commencement of this action.

**Adultery (DRL §170(4)):**

☐ a. That on _____, at the premises located at _____ _____, the Defendant engaged in sexual intercourse with _____, without the procurement nor the connivance of the Plaintiff and the Plaintiff ceased to cohabit (live) with the Defendant upon the discovery of the adultery.

b. not more than five (5) years elapsed between the date of said adultery and the date of commencement of this action.

**(Attach a corroborating affidavit of a third party witness or other additional proof).**

**Living Separate and Apart Pursuant to a Separation Decree or Judgment of Separation (DRL §170(5)):**

☐ a. That the _____ Court, _____ County, (Country or State) rendered a decree or judgment of separation on _____ under Index Number _____ ; and

b. that the parties have lived separate and apart for a period of one year or longer after the granting of such decree; and

c. that the Plaintiff has substantially complied with all the terms and conditions of such decree or judgment.

**Living Separate and Apart Pursuant to a Separation Agreement (DRL §170(6)):**

☐ a. That the Plaintiff and Defendant entered into a written agreement of separation, which they subscribed and acknowledged on _____, in the form required to entitle a deed to be recorded; and

b. that the *agreement/memorandum of said agreement* was filed _____ in the Office of the Clerk of the County of _____ , wherein *Plaintiff/Defendant* resided; and

c. that the parties have lived separate and apart for a period of one year or longer after the execution of said agreement; and

d. that the Plaintiff has substantially complied with all terms and conditions of such agreement.

**NINTH:**

☐ A sworn statement pursuant to DRL §253 that Plaintiff has taken all steps within his or her power to remove all barriers to Defendant's remarriage following the divorce was served on the Defendant.

☐ A sworn statement as to the removal of barriers to remarriage is not required because the parties were married in a civil ceremony.

☐ A sworn statement as to the removal of barriers to remarriage is not required because Defendant waived the need for the statement in his or her affidavit.

**TENTH:** ☐ *The parties have agreed* **OR** ☐ *the court has determined* that ☐ *Plaintiff* **OR** ☐ *Defendant* will receive maintenance of $ _____ ☐ *per week* **OR** ☐ bi-weekly **OR** ☐ *per month* commencing on _____ pursuant to DRL §236(B)(6)(C).

**ELEVENTH:** The children of the marriage now reside with ☐ *Plaintiff* **OR** ☐ *Defendant* **OR** ☐ *third party,* namely _____ _____ . The ☐ *Plaintiff* **OR** ☐ *Defendant* is entitled to visitation away from the custodial residence. The ☐ *Plaintiff* **OR** ☐ *Defendant* **OR** ☐ *Third Party, namely* _____ is entitled to custody. **OR** ☐ No award of custody due to the child(ren) of the marriage not residing in New York State, **OR** ☐ Other custody arrangement (specify): _____

_____

**TWELFTH:** Equitable Distribution and ancillary issues shall be ☐ *in accordance with the settlement agreement* **OR** ☐ *pursuant to the decision of the court* **OR** ☐ *Equitable Distribution is not an issue.* _____

_____

**THIRTEENTH:** ☐ There *is/are* no unemancipated child(ren). **OR** ☐ The award of child support is based upon the following:

(A) The children of the marriage entitled to receive support are:

| *Name* | *Date of Birth* |
|---|---|
| | |
| | |
| | |
| | |
| | |
| | |

(B) (1) By order of _____ Court, _____ County, *Index/Docket No.* _____ dated _____ the *Plaintiff/Defendant* was directed to pay the sum of _____ per _____ for child support. Said Order shall continue.

[continued]

*A sample finding of fact and conclusions of law, which are part of a judgment and decree of divorce (continued).*

**Finding of Fact and Conclusions of Law**

**OR**

(2) The adjusted gross income of the Plaintiff who is the ☐ *custodial* **OR** ☐ *non-custodial* parent is _____ per year and the adjusted gross income of the Defendant who is the ☐ *custodial* **OR** ☐ *non-custodial* parent is _____ per year and the combined parental annual income is _____ . The applicable child support percentage is *17/25/29/31/35%*. The combined basic child support obligation attributable to both parents is _____ per year on income to $80,000 and _____ per year on income over $80,000. The Plaintiff's pro rata share of the combined parental income is _____ % and the Defendant's pro rata share of the combined parental income is _____ %. The non-custodial parent's pro rata share of the child support obligation on combined income to $80,000 is _____ per year or ☐ *per week* ☐ *bi-weekly* ☐ *per month*. The non-custodial parent's pro rata share of the child support obligation on combined income over $80,000 is _____ per year or _____ ☐ *per week* ☐ *bi-weekly* ☐ *per month*. The non-custodial parent's pro rata share of future health care expenses not covered by insurance, child care expenses, educational or other extraordinary expenses is _____ %.

**OR**

(3) The parties entered into a *stipulation/agreement* on _____ wherein the ☐ *Plantiff* **OR** ☐ *Defendant* agrees to pay _____ ☐ *per week* **OR** ☐ *bi-weekly* **OR** ☐ *per month* child support ☐ *directly* **OR** ☐ *through the Support Collection Unit* to ☐ *Plaintiff* **OR** ☐ *Defendant* **OR** ☐ *Third Party, namely* _____ . The parties agree to ☐ *waive* **OR** ☐ *apply* the Child Support Standards Act to Combined income over $80,000. The parties have agreed that health care expenses not covered by insurance shall be paid by ☐ *Plaintiff* **OR** ☐ *Defendant* in the amount of _____ ☐ *per week* **OR** ☐ *bi-weekly* **OR** ☐ *per month* **OR** _____ % of the uncovered expenses. The parties have agreed that child care expenses shall be paid by ☐ *Plaintiff* **OR** ☐ *Defendant* to ☐ *Plaintiff* **OR** ☐ *Defendant* in the amount of _____ ☐ *per week* **OR** ☐ *bi-weekly* **OR** ☐ *per month* **OR** ☐ _____ % of said child care expenses. The parties have agreed that educational and extraordinary expenses shall be paid by ☐ *Plaintiff* **OR** ☐ *Defendant* to ☐ *Plaintiff* **OR** ☐ *Defendant* in the amount of _____ ☐ *per week* **OR** ☐ *bi-weekly* **OR** ☐ *per month* **OR** ☐ _____ % of said educational and extraordinary expenses. Said agreement reciting in compliance with DRL §2401-b(h): The parties have been advised of the Child Support Standards Act. The basic child support obligation presumptively results in the correct amount of child support. The unrepresented party, if any, has received a copy of the Child Support Standards Chart promulgated by Commissioner of Social Services Law Section 111-1. The presumptive amount of child support attributable to the non-custodial parent is _____ ☐ *per week* **OR** ☐ *bi-weekly* **OR** ☐ *per month*. The amount of child support agreed to ☐ *conforms with the non-custodial parent's basic child support obligation* **OR** ☐ *deviates from the non-custodial parent's basic child support obligation for the following reasons:*

_____

_____

_____

_____

**FOURTEENTH:** The Plaintiff's address is _____ and social security number is _____ . The Defendant's address is _____ , and social security number is _____ .

☐ There are no unemancipated children. **OR**

☐ There are no health plans available to the parties through their employment. **OR**

☐ The parties are covered by the following group health plans through their employment:

| **Plaintiff** | **Defendant** |
|---|---|
| Group Health Plan: _____ | Group Health Plan: _____ |
| Address: _____ | Address: _____ |
| Identification Number: _____ | Identification Number: _____ |
| Plan Administrator: _____ | Plan Administrator: _____ |
| Type of Coverage: _____ | Type of Coverage: _____ |

☐ *The parties have agreed or stipulated* **OR** ☐ *the court has determined* that the ☐ *Plaintiff* **OR** ☐ *Defendant* shall be the legally responsible relative and that the unemancipated child(ren) shall be enrolled in *his/her* group health plan as specified above *until the age of 21 years* **OR** u*ntil the child(ren) is/are sooner emancipated.*

[continued]

*A sample finding of fact and conclusions of law, which are part of a judgment and decree of divorce (continued).*

**Finding of Fact and Conclusions of Law**

**FIFTEENTH:** The _____ Court entered the following order(s) under Index No(s)./Docket No(s).: _____

_____

**SIXTEENTH:** ☐ *Plaintiff* **OR** ☐ *Defendant* may resume use of the prior surname: _____

**CONCLUSIONS OF LAW**

**FIRST:** Residency as required by DRL §230 has been satisfied.

**SECOND:** ☐ *Plaintiff* **OR** ☐ *Defendant* is entitled to a judgment of divorce on the grounds of DRL §170 subd. _____ and granting the incidental relief awarded.

Dated: _____ _____

J.S.C./Referee

(Form UD-10 - Rev. 5/99)

plans, and retirement benefits. The statutes that govern property division vary by state, but they generally can be grouped into two types: equitable distribution and COMMUNITY PROPERTY. Most states follow the equitable-distribution method. Generally, this method provides that courts divide a divorcing couple's assets in a fair and equitable manner, given the particular circumstances of the case.

Some equitable-distribution states look to the conduct of the parties and permit findings of marital fault to affect property distribution. New Hampshire, Rhode Island, South Carolina, and Vermont have statutes that explicitly include both economic and marital misconduct as factors in the disposition of property. Connecticut, Florida, Maryland, Massachusetts, Missouri, Virginia, and Wyoming all consider marital conduct in property distribution. In Florida and Virginia, only fault relating to economic WELFARE is relevant in property distribution. Alaska, Kentucky, Minnesota, Montana, and Wisconsin expressly exclude marital misconduct from consideration in the disposition of marital property.

Equitable-distribution states generally give the court considerable discretion as to the division of property between the parties. The courts consider not only the joint assets held by the parties, but also separate assets that the parties either brought with them into the marriage or that they inherited or received as gifts during the marriage. Generally, if the separate property is kept separate during the marriage, and not commingled with joint assets like a joint bank account, then the court will recognize that it belongs separately to the individual spouse, and they will not divide it along with the marital assets. A minority of states, however, support the idea that all separate property of the parties becomes joint marital property upon marriage.

As for the division of marital assets, equitable-distribution states look to the monetary and nonmonetary contributions that each spouse made to the marriage. If one party made a greater contribution, the court may grant that party a greater share of the joint assets. Some states do not consider a professional degree earned by one spouse during the marriage to be a joint asset, but do acknowledge any financial support contributed by the other spouse, and they let that be reflected in the property distribution. Other states do consider a professional degree or license to be a joint marital asset and have devised various ways to distribute it or its benefits.

States that follow community-property laws provide that nearly all of the property that has been acquired during the marriage belongs to the marital "community," such that the husband and wife each have a one-half interest in it upon death or divorce. It is presumed that all property that has been acquired during the marriage by either spouse, including earned income, belongs to the community unless proved otherwise. Exceptions are made for property received as a gift or through inheritance, and for the property that each party brought into the marriage. Those types of property are considered separate and not part of the community. Upon divorce, each party keeps his or her own separate property, as well as half of the community property. True community property systems exist in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Other states, such as Wisconsin, have adopted variations of the community-property laws.

ALIMONY, or spousal maintenance, is the financial support that one spouse provides to the other after divorce. It is separate from, and in addition to, the division of marital property. It can be either temporary or permanent. Its use originally arose from the common-law right of a wife to receive support from her husband. Under contemporary law, men and women are eligible for spousal maintenance. Factors that are relevant to an order of maintenance include the age and marketable skills of the intended recipient, the length of the marriage, and the income of both spouses.

Maintenance is most often used to provide temporary support to a spouse who was financially dependent on the other during the marriage. Temporary maintenance is designed to provide the necessary support for a spouse until he or she either remarries or becomes self-supporting. Many states allow courts to consider marital fault in determining whether, and how much, maintenance should be granted. These states include Connecticut, Georgia, Hawaii, Iowa, Kansas, Kentucky, Maine, Massachusetts, Missouri, Nebraska, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, and Wisconsin.

Like the entire body of divorce law, the issue of maintenance differs from state to state. If a spouse is found to have caused the breakup of the marriage, Georgia, North Carolina, Virginia, and West Virginia allow a court to refuse main-

tenance, even if that spouse was financially dependent on the other. North Carolina requires a showing of the supporting spouse's fault before awarding maintenance. Illinois allows fault grounds for divorce but excludes consideration of fault in maintenance and property settlements. Florida offers only no-fault grounds for divorce but admits evidence of adultery in maintenance determinations.

An antenuptial agreement, or PREMARITAL AGREEMENT, is a contract between persons who plan to marry, concerning property rights upon divorce. A postnuptial agreement is a contract entered into by divorcing parties before they reach court. Traditionally, antenuptial agreements were discouraged by state legislatures and courts as being contrary to the public policy in favor of lifetime marriage. An antenuptial agreement is made under the assumption that the marriage may not last forever, which suggests that it facilitates divorce. No state expressly prohibits antenuptial agreements, but, as in any contract case, courts reserve the right to void any that it finds UNCONSCIONABLE or to have been made under duress.

State statutes that authorize antenuptial and postnuptial agreements usually require that the parties fulfill certain conditions. In Delaware, for example, a man and a woman may execute an antenuptial agreement in the presence of two witnesses at least ten days before their marriage. Such an agreement, if notarized, may be filed as a deed with the office of the recorder in any county of the state (Del. Code Ann. tit. 13, § 301). Both antenuptial and postnuptial contracts concerning real estate must be recorded in the registry of deeds where the land is situated (§ 302).

Jurisdiction over a divorce case is usually determined by residency. That is, a divorcing spouse is required to bring the divorce action in the state where he or she maintains a permanent home. States are obligated to acknowledge a divorce that was obtained in another state. This rule derives from the FULL FAITH AND CREDIT CLAUSE of the U.S. Constitution (art. IV, § 1), which requires states to recognize the valid laws and court orders of other states. However, if the divorce was originally granted by a court with no jurisdictional authority, a state is free to disregard it.

In a divorce proceeding where one spouse is not present (an ex parte proceeding), the divorce is given full recognition if the spouse received proper notice and the original divorce forum was the bona fide domicile of the divorcing spouse. However, a second state may reject the divorce decree if it finds that the divorce forum was improper.

State courts are not constitutionally required to recognize divorce judgments granted in foreign countries. A U.S. citizen who leaves the country to evade divorce laws will not be protected if the foreign divorce is subsequently challenged. However, where the foreign divorce court had valid jurisdiction over both parties, most U.S. courts will recognize the foreign court's decree.

The only way that an individual may obtain a divorce is through the state. Therefore, under the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT to the U.S. Constitution, a state must make divorce available to everyone. If a party seeking divorce cannot afford the court expenses, filing fees, and costs associated with the serving or publication of legal papers, the party may file for divorce free of charge. Most states offer mediation as an alternative to court appearance. Mediation is less expensive and less adversarial than appearing in public court.

In January 1994, the American Bar Association Standing Committee on the Delivery of Legal Services published a report entitled *Responding to the Needs of the Self-Represented Divorce Litigant.* The committee recognized that a growing number of persons are divorcing pro se, or without the benefit of an attorney. Some of these persons are pro se litigants by choice, but many want the assistance of an attorney and are unable to afford one. In response to this trend, the committee offered several ideas to the state bar associations and state legislatures, including the formation of simplified divorce pleadings and the passage of plainly worded statutes. The committee also endorsed the creation of courthouse day care for children of divorcing spouses, night-court divorce sessions, and workshop clinics that give instruction to pro se divorce litigants. Many such programs are currently operating at district, county, and family courts around the United States.

In the United States, divorce law consists of 51 different sets of conditions—one for each state and the District of Columbia. Each state holds dear its power to regulate domestic relations, and peculiar divorce laws abound. Nevertheless, divorce law in most states has evolved to recognize the difference between regulating the

actual decision to divorce and regulating the practical ramifications of such a decision, such as property distribution, support obligations, and child custody. Most courts ignore marital fault in determining whether to grant a divorce, but many still consider it in setting future obligations between the parties. To determine the exact nature of the rights and duties relating to a divorce, one must consult the relevant statutes for the state in which the divorce is filed.

FURTHER READINGS

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CROSS-REFERENCES

Annulment; Family Law; Premarital Agreement.

## ♦ DIX, DOROTHEA LYNDE

Dorothea Lynde Dix was a remarkably foresighted educator and social reformer who made major contributions to the welfare of persons with mental illness, prisoners, and injured Civil War soldiers. Dix was born on April 4, 1802, in Hampden, Maine. Her father, Joseph Dix, was an alcoholic and circuit-riding Methodist preacher who required young Dorothea to spend her time laboriously stitching and pasting the thick religious tracts he wrote and sold during his travels. Although considered a strict and sometimes abusive father, Joseph Dix taught his daughter to read and write at an early age. Dix, in turn, taught reading and writing to her two younger brothers. Her mother, Mary (Bigelow) Dix, suffered from depression that made it difficult for her to care for her three children.

At age 12, Dix lived briefly with her father's mother in Boston and then moved in with an aunt in Worcester, Massachusetts. Although her grandmother helped with her education, Dix had little formal training. Gifted with strong beliefs and intellectual abilities, Dix, at age 14, began teaching young girls a rigorous curriculum that she had created with emphasis on the natural sciences and ethical responsibilities. In 1821, Dix moved back to Boston and opened a private school on property belonging to her grandmother.

*Dorothea Dix.*

Dix combined teaching with a prolific schedule of writing books and religious tracts, including *Meditations for Private Hours* (1828), *The Garland of Flora* (1829), and *American Moral Tales for Young Persons* (1832). One of her best known and most-often reprinted publications was *Conversations on Common Things,* which was published in 1824 as a guide to help parents answer everyday questions, such as "Why do we call this day Monday?" and "What is tin?"

After her father's death in 1821, Dix used her income to support her mother and her two younger brothers who had come to live with her in Boston. In addition to the private school she ran, Dix also conducted free evening classes for indigent children. She read prodigiously, continued to study the natural sciences as well as history and literature, attended public lectures, and met the leading members of Boston's intellectual and religious communities. She made the acquaintance of many Unitarians and became friends with William Ellery Channing,

"MAN IS NOT MADE BETTER BY BEING DEGRADED; HE IS SELDOM RESTRAINED FROM CRIME BY HARSH MEASURES, EXCEPT THE PRINCIPLE OF FEAR PREDOMINATES IN HIS CHARACTER; AND THEN HE IS NEVER MADE RADICALLY BETTER FOR ITS INFLUENCE."
—DOROTHEA DIX

the famed pastor of Unitarian Federal Street Church in Boston and his wife Julia Allen Channing.

Never robust, Dix suffered intermittently from depression and chronic upper respiratory infections variously attributed to tuberculosis and malaria. Her illnesses would flare up from time to time, exacerbated by the demanding schedule she kept and she developed a pattern of cutting back briefly on her work until she was able to resume her tasks. In 1836, Dix broke down while trying to care for her ill grandmother in addition to all her other duties and it became clear that she would need to take an extended period of rest.

She closed her school and sailed to Europe where she stayed in Liverpool, England, with William Rathbone and his wife who were friends of the Channings. Rathbone was a prominent humanitarian and philanthropist who introduced Dix to a number of social welfare advocates including prison reformer Elizabeth Fry and William Tuke, a Quaker who had opened the York Retreat for the Mentally Disordered and who pioneered the theory of humane treatment for persons with mental illness.

While Dix was in England, both her mother and her grandmother died, the latter leaving Dix a large inheritance. The income from the inheritance and ROYALTIES from her books were sufficient to give Dix a comfortable living for the rest of her life. Dix returned to Boston in 1838 and spent several years visiting friends and family members and traveling to various points of interest.

In 1841, a ministerial student asked Dix to teach a Sunday school class to a group of women incarcerated in the East Cambridge Jail in Massachusetts. Her first visit to the jail marked a turning point in her life. After teaching the class, Dix toured the jail. On the lower level she found the "dungeon cells" that housed inmates considered to be insane. Dix was horrified to find men, women, and children, half-naked and underfed, chained to walls, and forced to sleep on the floors of the filthy unlit cells.

Dix immediately took action. She surveyed every jail, poorhouse, and prison in Massachusetts. In 1843, she delivered a report to the Massachusetts state legislature. Legislators and others at first criticized the report and denied the charges. When Dix's charges were sustained by independent observations, the legislature allocated funds to expand the State Mental Hospital at Worcester.

Dix continued her investigations in other states, first in New England and eventually nationwide. Dix traveled the country systematically collecting data that she would then present in reports (called "memorials") to various state legislatures. Seeking the establishment of state-supported institutions, Dix would lobby state officials and influential persons and attempt to raise a public outcry over the dreadful conditions she had found.

Until Dix began her campaign to better the lives of persons with mental illness, the popular assumption was that persons who were insane were incurable and did not feel deprivation in the same way as ordinary persons. Dix was among the first to espouse the theory that insanity was treatable and that better living conditions could do much to help persons with mental illness.

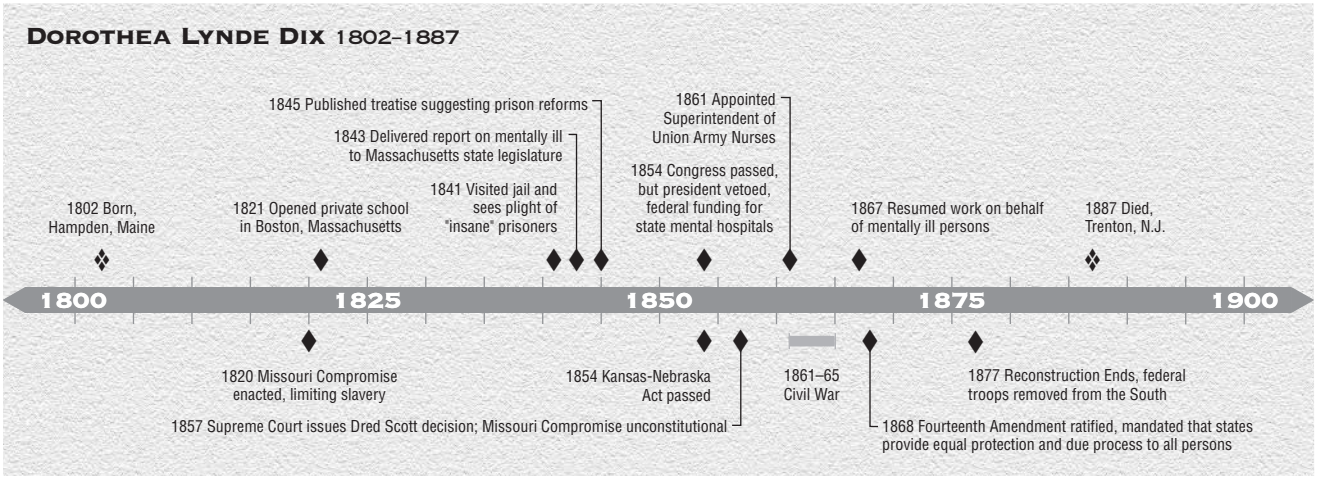

In three years, the indefatigable Dix traveled over 30,000 miles crusading for her cause. Her labors proved highly successful. In 1843, when she delivered her first memorial, there were 13 mental institutions in the United States. Several decades later, that number had grown to 123 with Dix helping to found 32 of them. In addition, Dix's efforts played a major part in the founding of 15 schools for what were then called the "feeble-minded," a school for blind persons, and a number of training schools for nurses.

Buoyed by her success, Dix next set out to accomplish her goal of persuading Congress to set aside five million acres in federal land grants; the idea was that income from the land trusts would be used to endow state mental hospitals. In 1854, Congress passed the legislation she sought. Although President MILLARD FILLMORE favored the bill, it did not reach his desk before the end of his term. The bill was vetoed by Fillmore's successor, President FRANKLIN PIERCE, thus dashing the hopes of Dix and her supporters of establishing federal funding for mentally ill persons. Eventually, in 1855, Congress provided funds for the founding of St. Elizabeth's Hospital in Washington, D.C., which remains the oldest large mental hospital that is federally funded.

Worn out and discouraged, Dix traveled to Europe to rest. Instead, she found herself investigating the same deplorable conditions in prisons and poorhouses in numerous European countries and once again began campaigning for, and achieving, many reforms. Throughout the 1850s, Dix worked for humanitarian reform in the United States and Europe as well in Canada, Russia, and Japan.

In 1845, Dix published a treatise entitled *Remarks on Prisons and Prison Discipline in the United States,* in which she advocated for progressive reforms for ordinary prisoners including the separation of prisoners according to the type of offense committed and the need for education of prisoners.

In 1861, at the beginning of the Civil War, the 59-year-old Dix volunteered her services and was made superintendent of women nurses for the Union Army. Although she worked until 1866 helping to organize women volunteers, establish hospitals, and raise funds, her capabilities as an administrator were questioned and her tenure was viewed as only partially successful.

Dix resumed her work with persons with mental illness in 1867. She found many problems including rising immigration rates, state treasuries depleted by the war, a growing population of indigent persons with mental illness, and state legislatures that had new priorities. She continued her fight until ill health forced her to stop. In 1881, Dix took up residence in the guest quarters of the Trenton, New Jersey, state hospital she had helped found. She lived there until her death on July 17, 1887.

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## ❖ DIXON, JULIAN CAREY

Representative Julian C. Dixon, who served the West Los Angeles District for twenty-two years in Congress, left a legacy as a supporting legislator on CIVIL RIGHTS and national security matters. He is also remembered for the differences he made in California and in the District of Columbia in his various roles serving in the U.S. House of Representatives.

Julian Carey Dixon was born in Washington, D.C., in 1934. He moved to Los Angeles, California, with his family at the age of ten. He grew up and attended public school in Los Angeles. In 1957 he left to serve in the Army, returning in 1960 to receive his degree from California State University in 1962. Dixon then went on to earn his law degree from Southwestern State University in Los Angeles in 1967.

Dixon spent only a few years in the private PRACTICE OF LAW before entering a life devoted to politics and public service. In 1972 he was elected to the California State Assembly, where he served for six years. In 1978 he was elected to serve in the U.S. House of Representatives. He served his constituents in the 32nd District of California for twenty-two more years in the House.

Throughout his career, Julian Dixon was a strong advocate for civil rights causes. During the 1980s he was chairman of the Congressional Black Caucus. He also created a MARTIN LUTHER KING JR. memorial in Washington, D.C. The

Human Rights Campaign, this nation's largest lesbian and gay political organization, views Dixon as an advocate for their cause, citing his introduction of the $8.6 billion relief bill after the 1994 earthquake in Los Angeles. The bill, for the first time ever in a federal law, specifically outlawed discrimination of disaster victims on the grounds of sexual orientation. Dixon was also co-sponsor of bills which sought to reduce discrimination against minority groups, including the Employment Non-Discrimination Act and Hate Crimes Prevention Act.

From the beginning of his career on Capitol Hill, Dixon earned the respect of his peers and served as chairman of several committees. In 1984 he was Rules Committee chairman of the Democratic Convention. He also served as chairman of the Committee on Standards of Official Conduct, better known as the Ethics Committee. This position proved to be Dixon's most challenging position, particularly in 1989 when then-House Speaker JIM WRIGHT a Democrat from Texas, was being investigated for ethics violations. Georgia Republican NEWT GINGRICH backed the Republicans in their attacks against the speaker, which predictably sparked a defensive tone from Democrats. As chairman of the Ethics Committee, Dixon emerged as a bi-partisan leader who focused on the facts and the true issues presented. In June 1989, Wright resigned. As a result of his leadership in this episode, Dixon was commended by members of both sides of the House for his fairness and judgment.

More recently, Dixon was ranking Democrat on the House Permanent Select Committee on Intelligence. Additionally, he served on a panel to determine defense spending. Here, he fought on behalf of his constituents for the appropriation of funds to aid southern California communities hurt by base closings and defense budget cuts.

Dixon was also a senior member of the Appropriations Committee and, during the mid-1990s, chaired the Washington, D.C., subcommittee where he was able to make a difference in the city of his birth by focusing on public safety and education. During his leadership of the subcommittee, Congress began a crackdown on the scandal-ridden administration of Mayor Marion Barry, leading the way for a federal takeover of the finances for Washington, D.C. Because of his efforts in Washington, Dixon is still heralded by the leadership of Capitol Hill and the citizens of the city.

Dixon is, of course, highly regarded and remembered by his own constituents in western Los Angeles. He always came through with aid in times of emergency. In 1992 the streets of Los Angeles were rocked as buildings were broken into, looted, and burned after a verdict of "not guilty" was issued in the trial of two white police officers who beat motorist RODNEY KING in a highly-broadcast, videotaped incident. Dixon acquired emergency funds for the businesses of Los Angeles that suffered in the riots. He also came to the aid of his city after the 1994 Northridge earthquake.

Perhaps his most lasting contribution to the Los Angeles community, however, was the effort he put into establishing the MTA, the commuter rail system in Los Angeles. Dixon was well aware that the city needed a solution to its major traffic problems, and high-speed public transportation seemed to be a good answer. The city and MTA recognized his efforts; they renamed one of the busiest rail stations the "Julian Dixon Metro Rail Station." Dixon was so highly revered by his constituents that he won re-election in the November 2000 election with 84 percent of the vote. He died one month later, on December 8, 2000, at the age of 66 in Inglewood, California.

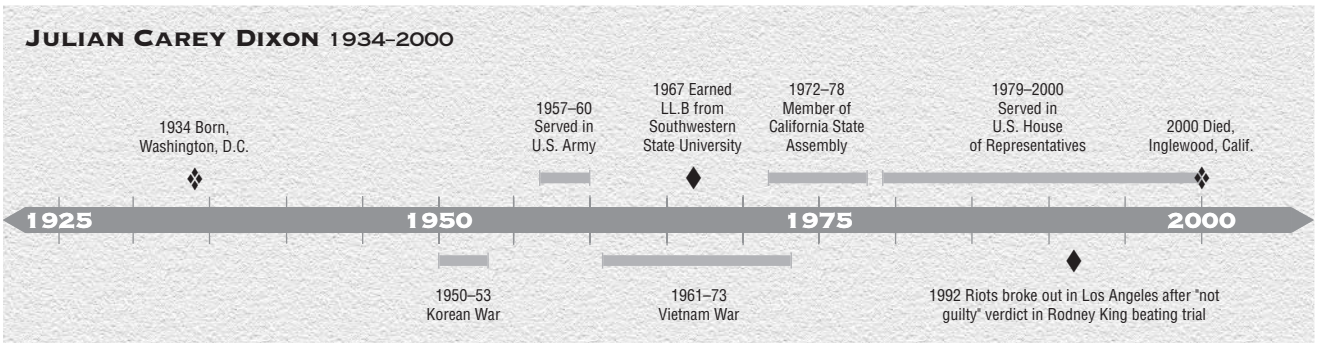

## DNA EVIDENCE

Among the many new tools that science has provided for the analysis of forensic evidence is the powerful and controversial analysis of deoxyribonucleic acid, or DNA, the material that makes up the genetic code of most organisms. DNA analysis, also called DNA typing or DNA profiling, examines DNA found in physical evidence such as blood, hair, and semen, and determines whether it can be matched to DNA taken from specific individuals. DNA analysis has become a common form of evidence in criminal trials. It is also used in civil litigation, particularly in cases involving the determination of PATERNITY or identity.

### History and Process of DNA Analysis

DNA, sometimes called the building block or genetic blueprint of life, was first described by the scientists Francis H. C. Crick and James D. Watson in 1953. Crick and Watson identified the double-helix structure of DNA, which resembles a twisted ladder, and established the role of DNA as the material that makes up the genetic code of living organisms. The pattern of the compounds that constitute the DNA of an individual lifeform determines the development of that lifeform. DNA is the same in every cell throughout an individual's body, whether it is a skin cell, sperm cell, or blood cell. With the exception of identical twins, no two individuals have the same DNA blueprint.

DNA analysis was first proposed in 1985 by the English scientist Alec J. Jeffreys. By the late 1980s, it was being performed by law enforcement agencies, including the FEDERAL BUREAU OF INVESTIGATION (FBI), and by commercial laboratories. It consists of comparing selected segments of DNA molecules from different individuals. Because a DNA molecule is made up of billions of segments, only a small proportion of an individual's entire genetic code is analyzed.

In DNA analysis for a criminal investigation, using highly sophisticated scientific equipment, first a DNA molecule from the suspect is disassembled, and selected segments are isolated and measured. Then the suspect's DNA profile is compared with one derived from a sample of physical evidence to see whether the two match. If a conclusive nonmatch occurs, the suspect may be eliminated from consideration. If a match occurs, a statistical analysis is performed to determine the probability that the sample of physical evidence came from another person with the same DNA profile as the suspect's. Juries use this statistical result in determining whether a suspect is guilty or innocent.

Although DNA analysis is sometimes called DNA fingerprinting, this term is a misnomer. Because the entire DNA structure of billions of compounds cannot be evaluated in the same way that an entire fingerprint can, a "match" resulting from DNA typing represents only a statistical likelihood. Thus, the results of DNA typing are not considered absolute proof of identity. A DNA nonmatch is considered conclusive, however, because any variation in DNA structure means that the DNA samples have been drawn from different sources.

An example from the early 1990s illustrates the way in which DNA evidence is used in the criminal justice system. After a Vermont woman was KIDNAPPED and raped in a semi-trailer truck, police identified Randolph Jakobetz, a truck driver, as a suspect in the crime. Officers searched the trailer that Jakobetz had hauled on the night of the crime and found hairs matching those of the victim. After arresting Jakobetz, law enforcement officials sent a sample of his blood to the FBI laboratory in Washington, D.C., for DNA analysis and for comparison with DNA taken from semen found in the victim shortly after the crime.

At Jakobetz's trial, an FBI expert testified that the blood and semen samples were a "match," concluding that there was one chance in 300 million that the semen samples could have come from someone other than Jakobetz. Based on this and other strong evidence, Jakobetz was convicted and sentenced to almost 30 years in prison.

Jakobetz appealed the decision, claiming that DNA profiling was unreliable and that it should not be admitted as evidence. In the first major federal decision on DNA profiling, the U.S. Court of Appeals for the Second Circuit upheld the lower court's decision to admit the DNA evidence (*United States v. Jakobetz*, 955 F.2d 786 [2d Cir. 1992]). The U.S. Supreme Court later declined to hear an appeal.

The *Jakobetz* case illustrates the way in which the probabilities generated by DNA analysis can be used as devastating evidence against a criminal suspect. Juries have tended to view the statistical results of this analysis as highly incriminating, which has caused many defense attorneys to challenge the validity of the results, and many prosecuting attorneys to defend them. At the same time, defense lawyers have used DNA

# DNA Evidence: Boon or Boondoggle for Criminal Justice?

Since its first use in the late 1980s, DNA evidence has been a subject of controversy in the U.S. criminal justice system. Although courts have increasingly allowed DNA analysis to be admitted as evidence, doubts about the propriety of such evidence remain. In general, the debate over DNA evidence pits those, such as prosecutors and law enforcement officials, who are eager to use it as a tool to fight crime, against those, particularly defense attorneys, who claim that it is unreliable and will lead to the wrongful conviction of innocent people.

Law enforcement officials and prosecuting attorneys are quick to identify the benefits of DNA evidence for the criminal justice system. DNA evidence, they argue, is even more useful than fingerprinting, with several advantages over that more traditional tool of investigation. DNA evidence is more readily available in criminal investigations than are legible fingerprints because body fluids and hair are more likely to be left at the scene of a crime. DNA evidence is also "robust"; that is, it does not decay or disappear over time. The DNA in a piece of physical evidence such as a hair may be examined years after a crime.

Law enforcement officials have confidence in the reliability of DNA analysis performed by commercial and government forensic laboratories. They maintain that innocent people have no need to worry about the use of DNA evidence in the legal system. In fact, they argue, DNA evidence will help to ensure that innocent suspects are not convicted because the DNA of such suspects will not match that taken from crime-related samples.

Proponents of DNA evidence fear that successful courtroom attacks on its reliability will erode public confidence in its use, giving the state less power in bringing criminals to justice. But most remain confident that it will be a permanent part of criminal investigation. According to Eric E. Wright, an assistant attorney general for Maine, "[T]he history of forensic DNA evidence consistently and ever increasingly demonstrates its reliability. It has been subjected to savage scrutiny unlike any **FORENSIC SCIENCE** before, and it has survived. Soon the only wonder about DNA evidence will be: What was all the fuss about?"

Defense attorneys and others who are skeptical about DNA evidence strongly disagree with many of these claims. While generally accepting the scientific theory behind DNA evidence, including its ability to exculpate the innocent suspect, they assert that it is not nearly as reliable in practice as its proponents claim. They argue that DNA evidence may be unreliable for any number of reasons, including contamination owing to improper police procedures and faulty laboratory work that may produce incorrect results.

Barry C. Scheck is a leading critic of DNA evidence. A professor at the Benjamin N. Cardozo School of Law, a defense attorney in several notable cases involving DNA evidence, and an expert for the defense in the celebrated 1995 murder trial of **O. J. SIMPSON**, Scheck has led the movement for increased scrutiny of DNA evidence. Conceding that "there is no scientific dispute about the validity of the general principles underlying DNA evidence," he nevertheless argued that serious problems with DNA evidence remained. He found particular fault in the work of forensic laboratories and pointed to research that showed that as many as one to four percent of the DNA matches produced by laboratories were in error. Laboratories denied such claims.

Scheck also criticized the procedures used by laboratories to estimate the likelihood of a DNA match. Because juries consider the probabilities generated by the labs—figures such as one in 300 million or one in 5 million—when assessing the validity of DNA results, it is important to ensure that they are accurate.

DNA critics assert that statistical estimates of a match may be skewed by incorrect assumptions about the genetic variation across a population. In some population subgroups, they claim, individuals may be so genetically similar that a DNA match is more likely to occur when comparing samples drawn from

analysis as evidence to reverse the convictions of their clients.

### Legal History of DNA Evidence

In general, state and federal courts have increasingly accepted DNA evidence as admissible. The first state appellate court decision to uphold the admission of DNA evidence was in 1988 (*Andrews v. Florida,* 533 So. 2d 841 [Fla. App.]), and the first major federal court decision to uphold its admission occurred in *Jakobetz.* By the mid-1990s, most states' courts admitted DNA test results into evidence.

No court has rejected DNA evidence on the grounds that the underlying scientific theory is invalid. However, some courts have excluded it from evidence because of problems with the possible contamination of samples, questions surrounding the significance of its statistical probabilities, and laboratory errors. Several states have passed laws that recognize DNA evi-

within that subgroup. Examples of such subgroups are geographically isolated populations or tightly knit immigrant or religious communities. Other problems may occur in cases where suspects are closely related to one another. Critics call for more research on population substructures and DNA similarities within them, in order to get a better understanding of statistical properties.

In response to these arguments, proponents of DNA analysis maintain that the importance of frequency calculations has been overrated. They claim that such calculations are, if anything, conservative. Furthermore, they argue that a match itself is more important than a frequency calculation and that questions of how to calculate frequency should not mean that DNA evidence is inaccurate.

DNA critics call for a number of other procedures to make DNA testing more accurate. They advocate sample splitting, a procedure by which samples of physical evidence are sent to two forensic laboratories in order to better guard against mistaken matches. They also ask that all DNA laboratories be required to undergo proficiency testing through blind trials. Such trials would have laboratories analyze DNA samples without knowing whether the analysis was being done for an actual investigation or for evaluation purposes only. Blind trials would yield error rates for each laboratory that could be given to a jury to help it weigh the significance of DNA evidence. Blind trials would also provide incentives for laboratories to lower their error rates.

Criminal defense lawyers have also called for state-funded access to the services of experts who can evaluate the handling and analysis of DNA evidence. These "counter experts" would give the defense a chance to scrutinize DNA evidence more closely. Defense attorneys also assert the need for access to laboratory records and physical samples for retesting. Providing this access would require the state to preserve samples.

Prosecutors and attorneys have continued to identify new uses for DNA in law enforcement and in the legal system. In July 2001, a Milwaukee, Wisconsin, appeals court judge upheld the validity of a criminal warrant for the arrest of "John Doe 12," issued for a 1994 rape case just days before the **STATUTE OF LIMITATIONS** was to expire. What made the warrant noteworthy was that the suspect was identified only by his DNA profile. This was the first known case in which prosecutors sought arrest warrants based solely on a DNA description. When a DNA evaluation matched the DNA of "John Doe 12" with Bobby Richard Dabney Jr., the state replaced "John Doe" with Dabney's name. Dabney's attorney sought to dismiss the claim because Dabney was not named in the original complaint until after a six-year statute of limitations had expired. A Milwaukee County Circuit Court Judge denied the motion to dismiss the case.

In September 2001, the Wisconsin state legislature effected new changes to the statute of limitations. This legislation expressly addresses DNA evidence and extends the time limits for such cases. The amendments permit prosecution any time within 12 months of the time a DNA match results in a probable identification of a person.

In another legal "first," attorneys for plaintiff Nanette Sexton Bailey of West Palm Beach, Florida, used DNA evidence found on bed sheets to allege **ADULTERY** on the part of her husband in a pending **DIVORCE** matter. Five years into their marriage, the couple mutually agreed to amend their prenuptial agreement to include a "bad boy clause," guaranteeing Sexton $20,000 per month for her husband's infidelity. When she found a nightgown and stained bed sheets in their home, she wrapped them in a plastic bag. When the sheets and nightgown were examined by a Denver laboratory, it confirmed that the DNA on the items belonged to another woman. Although the husband eventually challenged the "bad boy" clause, the judge ruled that the DNA evidence was admissible as evidence of the adultery.

Science may eventually solve many of the problems regarding DNA evidence. In the meantime, debate over its use has already led to changes that will allow courts and juries to better assess the guilt or innocence of criminal suspects.

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**CROSS-REFERENCES**

Forensic Science.

dence as admissible in criminal cases, and others have enacted laws that specifically admit DNA evidence to help resolve civil paternity cases.

The admissibility of novel **SCIENTIFIC EVIDENCE** such as DNA profiling is governed by two different judicial tests or standards: the *Frye,* or general acceptance, standard, and the *Daubert,* or relevancy-reliability, standard. The *Frye* test, which comes from the 1923 case *Frye v. United States* 293 F. 1013 (D.C. Cir.), holds that the admissibility of evidence gathered by a specific technique (such as DNA analysis) is determined by whether that technique has been "sufficiently established to have gained general acceptance in the particular field in which it belongs." In *Frye,* the Court of Appeals for the District of Columbia Circuit ruled that a lie-detector test using a blood-pressure reading was not admissible as evidence. By the 1970s, 45 states had adopted this common-law stan-

dard for the admission of novel scientific evidence.

The U.S. Supreme Court overruled use of the *Frye* test in federal courts in its 1993 decision *Daubert v. Merrell Dow,* 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469. In *Daubert,* the Court held that the FEDERAL RULES OF EVIDENCE, enacted in 1975, govern the admission of novel scientific evidence in federal courts. It found that *Frye* provides too stringent a test and that it is incompatible with the federal rules, which allow the admission of all evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" (Fed. R. Evid. 401). The Court found that judges have a responsibility to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."

In general, courts that have used the *Daubert* standard have been more likely to admit DNA evidence, although many jurisdictions that have relied on *Frye* have permitted it as well. Nearly all cases in which DNA evidence has been ruled inadmissible have been in jurisdictions that have used *Frye.*

States are free to adopt their own standards for the admission of evidence, and have increasingly adopted the *Daubert* standard. By 1995, the number of states using the *Frye* standard had dropped to 23, while 21 had adopted the *Daubert* standard.

### Current Issues Surrounding Use of DNA Evidence

A report issued by the JUSTICE DEPARTMENT in 2002 indicated that two-thirds of chief prosecutors in the United States rely on DNA testing during investigations and trials. The use of DNA evidence has exonerated at least ten individuals who were wrongly convicted of murder and faced the death penalty, while the sentences of more than 100 others convicted of lesser crimes were overturned based upon DNA evidence. The FBI maintains a database that may be used to compare DNA samples from unsolved state and federal crimes. Since its inception in 1992, the FBI's database has made more than 5,000 matches, thus allowing law enforcement officials to solve crimes that might not have been solved without the use of DNA.

The FBI crime laboratory dominated research in forensic sciences for much of the 1980s and 1990s. However, allegations surfaced in 1995 that suggested scientists at the crime lab had tainted evidence related to the 1993 bombing of the World Trade Center in New York City. A former chemist in the lab, Frederic Whitehurst, testified before the House Committee on the Judiciary that the FBI had knowingly drafted misleading scientific reports and pressured FBI scientists to commit perjury by backing up the false reports. These allegations injured the FBI's reputation and led to speculation in the late 1990s that prosecutors could not rely on the FBI's analysis of DNA evidence.

Even as the FBI rebuilt its reputation, other questions surrounding the use of DNA evidence have arisen since the late 1990s. In 1999, the DEPARTMENT OF JUSTICE issued a report stating that evidence from at least 180,000 unsolved rape cases had not been submitted for testing. A 2002 report by *USA Today* suggested that several thousand pieces of evidence from rape and HOMICIDE cases had not been submitted for DNA testing, so they do not appear in the FBI's database. In 2000, Congress allocated $125 million to support the national DNA database system, including $45 million designated to allow states to test evidence from unsolved crimes. However, several states claim that their law enforcement officials are so swamped with current cases that they cannot test older, unsolved cases. Moreover, a small number of states—primarily New York, Florida, Virginia, and Illinois—have aggressively developed their own DNA databases and have contributed heavily to the FBI's system. These states accounted for more than half of the FBI's DNA matches between 1992 and 2002.

Use of DNA evidence to overturn criminal convictions remains a common topic of discussion among legal and criminal justice experts, as well as the popular media. One of the most closely followed cases involved the convictions of five young men for the rape of a jogger in Central Park in New York City in 1989. The five men in the case, dubbed the "Central Park Jogger Case," served sentences ranging from seven to eleven years for the incident. However, another man, Matias Reyes, who was convicted for murder in 1989, confessed to the rape. Testing confirmed that the semen found in the victim and on the victim's sock matched Reyes's DNA.

Upon receiving the new evidence, the New York County district attorney's office asked the New York State Supreme Court to overturn the

convictions of the five men. Several groups, including WOMEN'S RIGHTS groups, cited this case as an example of why law enforcement should be more proactive in pursuing unsolved rape cases through the use of DNA testing.

FURTHER READINGS

Bennett, Margann. 1995. "Admissibility Issues of Forensic DNA Evidence." *University of Kansas Law Review* 44 (November).

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National Research Council. 1992. *DNA Technology in Forensic Science.* Washington, D.C.: National Academy Press.

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CROSS-REFERENCES

Forensic Science.

## DOCK

*To curtail or diminish, as, for example, to dock a person's wages for lateness or poor work. The cage or enclosed space in a criminal court where prisoners stand when brought in for trial.*

## DOCKET

*A written list of judicial proceedings set down for trial in a court.*

*To enter the dates of judicial proceedings scheduled for trial in a book kept by a court.*

In practice, a docket is a roster that the clerk of the court prepares, listing the cases pending trial.

An *appearance docket* contains a list of the appearances in actions and a brief abstract of the successive steps in each case.

A *judgment docket* is a listing of the judgments entered in a particular court that is available to the public for examination. Its purpose is to give official notice of the existence of liens or judgments to interested parties.

A *docket fee* is a sum of money charged for the docketing of a case or a judgment or a set amount chargeable as part of the costs of the action.

## DOCTRINE

*A legal rule, tenet, theory, or principle. A political policy.*

Examples of common legal doctrines include the clean hands doctrine, the doctrine of false demonstration, and the doctrine of merger.

The MONROE DOCTRINE, enunciated by President JAMES MONROE on December 2, 1823, was an American policy to consider any aggression by a European country against any western hemisphere country to be a hostile act toward the United States.

## DOCTRINE OF EQUALITY OF STATES

One of the fundamental rights of a state is equality with all other states. This right is inherent in the concept of a state as a subject of INTERNATIONAL LAW and is given general recognition by long-standing state practice. Precise definition of the principle of equality of states is difficult, however, since many factors affect its application in any particular situation. Thus, it is best to differentiate between *legal equality,* that is, the concept of state equality as it applies to the legal relations that states maintain with each other, and *political equality,* which reflects the relative distribution of economic and military power between states.

In its legal effects the principle of state equality has several important consequences. Probably the most important manifestation of the doctrine is the right of every state to have one vote in matters requiring the consent of states. A natural consequence of this is that the vote of every state, no matter how large or small the state, counts the same as the individual votes of all other states. Legal equality also means that no state can claim jurisdiction over other states, and as corollary, a state is independent of the political will of all other states. From this also flows the concept of SOVEREIGN IMMUNITY, which prevents one state from being sued in the courts of another state without the consent of the first state. Likewise, equality of states means that no other state can question the legality of official acts of another state, a rule known in U.S. law as the act of state doctrine.

The doctrine of equality of states means one thing in legal effect, but it also must be reflected against the realities imposed by differences in political power. Political equality is in some sense a fiction, because in political terms few states are equals. More powerful states can establish arrangements that less powerful states assent to informally, even though under a strict legal regime, they would not be bound by the agreement.

*A sample docketing statement.*

**Docketing Statements (Civil)**

**Appellate Docket Number:** _____

**Appellate Case Style:**

**DOCKETING STATEMENT (CIVIL)**
**Tenth Court of Appeals**
**P.O. Box 1606, Waco, Texas 76703-1606**
**(254) 757-5200**

**[to be filed in the court of appeals upon perfection of appeal**

**under TRAP 32]**

| **I. Parties (TRAP 32.1(a), (e)):** | |
|---|---|
| Appellant(s):<br><br>(*See* note at bottom of page) | Appellee(s):<br><br>(*See* note at bottom of page) |
| Attorney (lead appellate counsel): | Attorney (lead appellate counsel, if known; if not, then trial counsel): |
| Address (lead counsel): | Address (lead appellate counsel, if known; if not, then trial counsel): |
| Telephone:<br>(include area code) | Telephone:<br>(include area code) |
| Telecopy:<br>(include area code) | Telecopy:<br>(include area code) |
| SBN (lead counsel): | SBN (lead counsel): |

[continued]

*A sample docketing statement (continued).*

**Docketing Statements (Civil)**

If not represented by counsel, provide appellant's/appellee's address, telephone number, and telecopy number.

On Attachment 1, or a separate attachment if needed, list the same information stated above for any additional parties to the trial court's judgment.

**II. Perfection Of Appeal And Jurisdiction (TRAP 32.1(b), (c), (g), (j)):**

| | |
|---|---|
| Date order or judgment signed:<br><br>(Attach a signed copy, if possible) | Date notice of appeal filed in trial court:<br><br>(Attach file-stamped copy; if mailed to the trial court clerk, also give the date of mailing) |
| What type of judgment? (e.g., jury trial, bench trial, summary judgment, directed verdict, other (specify)) | Interlocutory appeal of appealable order:<br>☐ Yes ☐ No<br>(Please specify statutory or other basis on which interlocutory order is appealable) (See TRAP 28) |
| If money judgment, what was the amount?<br>Actual damages: | Accelerated appeal (See TRAP 28):<br>☐ Yes ☐ No |
| Punitive (or similar) damages: | (Please specify statutory or other basis on which appeal is accelerated) |
| Attorneys' fees (trial): | |
| Attorneys' fees (appellate): | |

[continued]

*A sample docketing statement (continued).*

**Docketing Statements (Civil)**

| | |
|---|---|
| Other (specify): | Appeal that receives precedence, preference, or priority under statute or rule?<br>☐ Yes ☐ No<br>(Please specify statutory or other basis for such status) |
| Appeal from final judgment? Yes ☐ No ☐<br>Does judgment dispose of all parties and issues:<br>Yes ☐ No ☐<br>Does judgment have a Mother Hubbard clause?<br>(E.g.: "All relief not expressly granted is denied"):<br>Yes ☐ No ☐<br>Does judgment have language that one or more parties "take nothing"?<br>Yes ☐ No ☐<br>Other basis for finality? | Will you challenge this Court's jurisdiction? If yes, explain. |

**III. Actions Extending Time To Perfect Appeal (TRAP 32.1(d)):**

| Action | Filed<br>Check as appropriate | Date Filed |
|---|---|---|
| Motion for New Trial | No Yes | |
| Motion to Modify Judgment | No Yes | |
| Request for Findings of Fact and Conclusions of Law | No Yes | |
| Motion to Reinstate | No Yes | |
| Motion under TRCP 306a | No Yes | |
| Other (specify): | No Yes | |

**IV. Indigency Of Party (TRAP 32.1(k)): (Attach file-stamped copy of affidavit)**

| Event | Filed<br>Check as appropriate | Date | N/A |
|---|---|---|---|
| Affidavit filed | No Yes | | |
| Contest filed | No Yes | | |
| Date ruling on contest due: | | | |
| Ruling on contest:<br>Sustained Overruled | | | |

[continued]

*A sample docketing statement (continued).*

**Docketing Statements (Civil)**

**V. Bankruptcy (TRAP 8):**

Will the appeal be stayed by bankruptcy? Date bankruptcy filed?

Name of bankruptcy court: Bankruptcy Case No.:

Style of bankruptcy case:

**VI. Trial Court And Record (TRAP 32.1(c), (h), (i)):**

| Court: | County: | Trial Court Docket Number<br>(Cause No.): |
|---|---|---|

| Trial Judge (who tried or disposed of case): | Court Clerk (district clerk): |
|---|---|
| Telephone Number:<br>(include area code)<br>Telecopy Number:<br>(include area code)<br>Address: | Telephone Number:<br>(include area code)<br>Telecopy Number:<br>(include area code)<br>Address: |

| Clerk's Record | Sworn copy for accelerated appeal | Will request<br>(Note: No request required under TRAP 34.5(a), (b)) | Was requested on: |
|---|---|---|---|
| Yes | Yes<br>(*See* TRAP 28.3) | | |

| Court Reporter or Court Recorder: | Court Reporter or Court Recorder: |
|---|---|
| Telephone Number:<br>(include area code)<br>Telecopy Number:<br>(include area code) | Telephone Number:<br>(include area code)<br>Telecopy Number:<br>(include area code) |

[continued]

*A sample docketing statement (continued).*

**Docketing Statements (Civil)**

| Address: | Address: |
|---|---|
| (Attach additional sheet if necessary for additional court reporters/recorders) | |
| Length of trial (approximate): | State arrangements made for payment of court reporter/recorder: |

| Reporter's or Recorder's Record (check if electronic recording ) | None | Will request | Was requested on: |
|---|---|---|---|

**VII. Nature Of The Case (TRAP 32.1(f))** (Subject matter or type of case: E.g., personal injury, breach of contract, workers' compensation, or temporary injunction) (see list below):

| | |
|---|---|
| Administrative/agency _____ | Malpractice |
| | Legal _____ |
| | Medical _____ |
| Banking _____ | Other _____ |
| Business _____ | Motor Vehicle _____ |
| Condemnation _____ | Municipal _____ |
| Consumer/DTPA _____ | Oil & Gas _____ |
| Construction _____ | Personal Injury _____ |
| Contract _____ | Premises Liability _____ |
| Employment/Labor _____ | Probate _____ |
| Family _____ | Products Liability _____ |
| Custody _____ | Real Property _____ |
| Property Division _____ | Securities _____ |
| Termination _____ | Tax _____ |
| Other _____ | U.C.C./Tex. Bus. & Com. Code _____ |
| Fraud _____ | Venue _____ |
| Insurance _____ | Workers' compensation _____ |
| Juvenile _____ | Other (specify): _____ |
| Landlord/Tenant _____ | |

**VIII. Supersedeas Bond** None Will file Was filed on:

**(TRAP 32.1(1)):**

**IX. Extraordinary Relief:** Will you request extraordinary relief (e.g., temporary or ancillary relief) from this Court? Yes ☐ No ☐
If yes, briefly state the basis for your request.

[continued]

*A sample docketing statement (continued).*

**Docketing Statements (Civil)**

**X. Alternative Dispute Resolution/Mediation (if applicable)** (As of 8/19/97, these programs exist in the 1st (Houston), 3rd (Austin), 4th (San Antonio), 5th (Dallas), 9th (Beaumont), 13th (Corpus Christi), and 14th (Houston)). (Use additional sheets, if necessary)

1. Should this appeal be referred to mediation? If not, why not.

2. Has the case been through an ADR procedure in the trial court?

If yes, answer the following:

a. Who was the mediator?

b. What type of ADR procedure?

c. At what stage did the case go through ADR? (Specify pre-trial, trial, post-trial, other)

d. Rate the case for complexity. Use 1 for the least complex and 5 for the most complex. Circle one.
1 2 3 4 5

e. Can the parties agree on an appellate mediator? If yes, give name, address, and telephone and telecopy numbers (with area codes).

f. Languages other than English in which the mediator should be proficient:

3. Give a brief description of the issues to be raised on appeal, the relief sought, and the applicable standard of review, **if known** (without prejudice to the right to raise additional issues or request additional relief; use a separate attachment, if necessary).

[continued]

*A sample docketing statement (continued).*

**Docketing Statements (Civil)**

**XI. Related Matters:** List any pending or past related **appeals or original proceedings** (e.g., mandamus, injunction, habeas corpus) before this or any other Texas appellate court by court, docket number, and style.

**XII.** Any other information requested by the court (see attachments, if any).

**XIII. Signature:**

_____ Date:
Signature of counsel

(or pro se party) State Bar No.:_____

Printed Name: _____

**XIV. Certificate of Service:** The undersigned counsel certifies that this docketing statement has been served on the following lead counsel for all parties to the trial court's order or judgment as follows on _____, 19____.

_____
Signature

(TRAP 9.5(e) requirements stated below; use additional sheets, if necessary)

**Note: Certificate of Service Requirements (TRAP 9.5(e))**: A certificate of service must be signed by the person who made the service and must state:

(1) the date and manner of service;

(2) the name and address of each person served; and

(3) if the person served is a party's attorney, the name of the party represented by that attorney.

The differences between legal and political equality are also recognized in the organization of the UNITED NATIONS. Although the Charter of the United Nations expressly recognizes the sovereign equality of states, and the General Assembly formally operates according to that principle, the five permanent members of the Security Council retain express VETO power over several important aspects of U.N. functions, such as use of enforcement measures, admission to membership, amendments to the Charter, and election of the Secretary-General. Notwithstanding the fact that nations recognize limits on the principle of state equality in instances where political power is crucial, the principle of legal equality is basic to the operation of international law and a symbolic concept incorporated into the formal structure of most international institutions.

## DOCUMENT

*A written or printed instrument that conveys information.*

The term *document* generally refers to a particular writing or instrument that has a bearing upon specific transactions. A deed, a marriage license, and a record of account are all considered to be documents.

When a document is signed and the signature is authentic, the law accurately expresses the state of mind of the individual who signed it. A *false document* is one of which a material portion is purported to have been made or authorized by someone who did not do so. It can also be a document that is falsely dated or which has allegedly been made by or on behalf of someone who did not in fact exist.

An ancient document is a writing presumed by the court to be genuine due to its antiquity, because it has been produced from a reliable source where it would be logically found, and because it has been carefully kept.

A *private document* is any instrument executed by a private citizen. A *public document* is one that is or should legally be readily available for inspection by the public, as a document issued by Congress or a governmental department.

*Judicial documents* include inquisitions, depositions, examinations, and affidavits.

CROSS-REFERENCES

Ancient Writing.

## DOCUMENT OF TITLE

*Any written instrument, such as a bill of lading, a warehouse receipt, or an order for the delivery of goods, that in the usual course of business or financing is considered sufficient proof that the person who possesses it is entitled to receive, hold, and dispose of the instrument and the goods that it covers.*

A document of title is usually either issued or addressed by a bailee—an individual who has custody of the goods of another—to a bailor—the person who has entrusted the goods to him or her. Its terms must describe the goods covered by it so that they are identifiable as well as set forth the conditions of the contractual agreement. Possession of a document of title is symbolic of ownership of the goods that are described within it.

Documents of title are an integral part of the business world since they facilitate commercial transactions by serving as security for loans sought by their possessors and by promoting the free flow of goods without unduly burdening the channels of commerce.

A person who possesses a document of title can legally transfer ownership of the goods covered by it by delivering or endorsing it over to another without physically moving the goods. In such a situation, a document of title is a negotiable instrument because it transfers legal rights of ownership from one person to another merely by its delivery or endorsement. It is negotiable only if its terms state that the goods are to be delivered to the bearer, the holder of the document, to the order of the named party, or, where recognized in overseas trade, to a named person or his or her assigns. The UNIFORM COMMERCIAL CODE and various federal and state regulatory laws define the legal rights and obligations of the parties to a document of title.

## DOCUMENTARY EVIDENCE

*A type of written proof that is offered at a trial to establish the existence or nonexistence of a fact that is in dispute.*

Letters, contracts, deeds, licenses, certificates, tickets, or other writings are documentary evidence.

## ♦ DOE, CHARLES

Charles Doe was a prominent nineteenth-century jurist, serving as chief justice of the New Hampshire Supreme Court from 1876 until his death in 1896. Doe has been regarded by legal historians

as one of the greatest judges in U.S. history but he remains an obscure figure. He is best remembered for his procedural reforms, which sought to overcome burdensome COMMON LAW practices that filled the legal landscape with many pitfalls.

Doe was born in 1830 in Derry, New Hampshire. He came from a wealthy and prominent family, and thus it was not surprising that he would matriculate at Dartmouth College. After graduating in 1849 he studied law with a New Hampshire lawyer for several years. At this time in the United States most aspiring lawyers "read the law" as Doe did, apprenticing themselves until they were ready to take the state bar exam. Doe passed the New Hampshire bar exam in 1852 and began a private law practice in Dover. During the 1850s, he also served as the county solicitor and assistant clerk to the New Hampshire State Senate.

In 1859, at the age of 29, Doe was appointed an associate justice to the New Hampshire Supreme Judicial Court. At this point in the state's history the Supreme Judicial Court functioned as both a trial and appellate court. Doe spent much of his time riding circuit and hearing cases. Before the Civil War he left the DEMOCRATIC PARTY over the party's pro-slavery position and joined the REPUBLICAN PARTY. This action temporarily hurt his judicial career when the court was dissolved in 1874 by the Democratic state legislature. He spent two years in private practice before the 1876 state constitutional convention created a new Supreme Court and a Republican administration named him chief justice. He would serve for the next 20 years in this capacity.

Though personally eccentric (he dressed in the clothes of a farmer instead of judicial garb and insisted that the courtroom window be removed during frigid winter weather), Doe distinguished himself as a jurist. He was primarily concerned with simplifying and codifying court procedures and the RULES OF EVIDENCE. He did not develop a judicial philosophy but subscribed to New England Yankee "practicality." Doe ignored court precedents, which are the bedrock of the common law, to adopt simplified procedures. In addition, he was the first judge to abandon the common law rule that required a new criminal trial if any prejudicial error was found. Instead, Doe stated that a new trial should be limited to only the issues in which the error had occurred. In the realm of evidence rules, Doe dispensed with many exclusionary rules and placed as much information before the jury as possible. He did so out of respect for the wisdom of the jury.

Doe died in 1896 in Rollinsford, New Hampshire, having spent 35 years on the state's highest court.

FURTHER READINGS

"Doe of New Hampshire: Reflections on a Nineteenth Century Judge." 1950. *Harvard Law Review.*

## DOING BUSINESS

*A qualification imposed in state* LONG-ARM STATUTES *governing the* SERVICE OF PROCESS, *the method by which a lawsuit is commenced, which requires nonresident corporations to engage in commercial transactions within state borders in order to be subject to the* PERSONAL JURISDICTION *of state courts.*

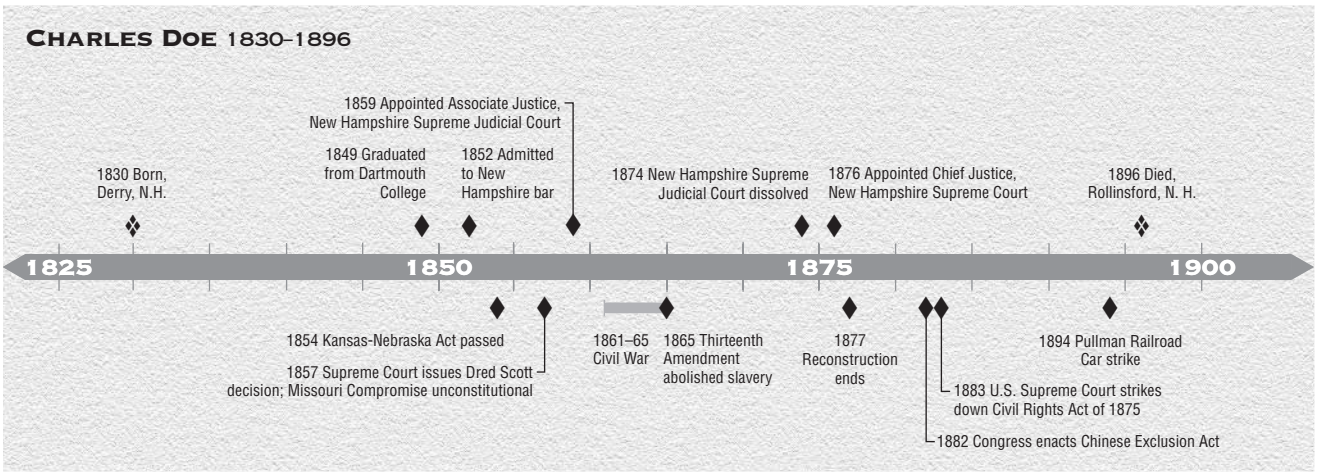

The DUE PROCESS CLAUSE of the U.S. Constitution, and similar provisions found in state constitutions, guarantees the fair and orderly administration of justice by the courts by providing that any individual, including corporations, must receive notice of the charges against him or her or it and an opportunity to present a defense prior to the rendition of judgment. This clause has been interpreted by courts to require a state to have some tie or relationship to a defendant before its courts acquire the power to bind the individual personally. Employing this reasoning, state legislatures enacted statutory provisions requiring nonresident or foreign corporations to do or transact business within the state if they are to be amenable to the personal jurisdiction of its courts. Doing business is one kind of minimum contact that brings such a corporation within the jurisdiction of the court.

The nature and extent of business to be done within a state varies according to the jurisdiction. It must be an exercise of some of the functions for which the enterprise is incorporated and it must be of a sufficient nature to justify an inference that the corporation is present within the state. If so, the corporation is viewed as having received some benefit of the laws of the state and, therefore, should also be liable for its actions therein. In the past, there had to be a substantial tie to the state, such as the operation of an office or the presence of a resident employee. Today, courts consider this requirement fulfilled by a single commercial transaction, if the cause of action—facts providing a right to a judicial remedy—arises from it. If the CAUSE OF ACTION does not, however, a nonresident corporation is not amenable to service of process unless it has a substantial and regular relationship with the state comparable to the residency of an individual, such as having its corporate headquarters in the forum state. In cases involving subsidiary corporations, the intrastate business engaged in by a subsidiary is sufficient to make its parent corporation amenable to process in the state because the parent corporation is deemed to be doing business in the state.

The laws of each state must be consulted to determine whether a foreign corporation is doing business within a state to make it amenable to process therein.

The phrase *doing business* is sometimes used in the assessment of local taxes upon a nonresident corporation in jurisdictions other than the place of its incorporation in which it engages in business.

## ♦ DOLE, ROBERT JOSEPH

Robert Joseph "Bob" Dole overcame childhood poverty and a wartime injury that left him partially paralyzed to become one of the most powerful players in national politics. The Republican majority leader from Kansas often won praise from Republicans and Democrats alike for finding a middle course through difficult issues. His long career in national politics put him at the center of major legislative debates; and whether in budgetary, social, or foreign policy matters, he often bridged party differences. These battles made him not only a skilled negotiator but, by the 1990s, the most powerful leader in his party. His politics were generally characterized by economic conservatism, support for CIVIL RIGHTS, and moderation on social issues. In addition to being a vice presidential candidate in 1976, Dole mounted three presidential campaigns, in 1980, 1988, and 1996.

"THE GOVERNMENT CANNOT DIRECT THE PEOPLE, THE PEOPLE MUST DIRECT THE GOVERNMENT."
—BOB DOLE

The values of Dole's working-class family informed his upbringing. He was born on July 22, 1923, in Russell, Kansas, the son of an egg and cream station owner, Doran Ray Dole, and a traveling sewing machine saleswoman, Bina Talbot Dole. An athletic young man, Dole excelled in football, basketball, and track. He worked at several jobs and wanted to be a doctor. At age 18, he enrolled in the pre-med program at the University of Kansas. Drafted two years later, in 1943, he found himself fighting in Italy. WORLD WAR II had almost ended in April 1945 when a shell hit him on the battlefield, smashing his neck, shoulder, and spine. Doctors thought he would be crippled. But Dole's persistence through three years of operations and therapy brought an amazing recovery. His only permanent disabilities are a lack of control of his right arm and hand, and partial loss of control of his left.

The 25-year-old survivor was transformed. With new earnestness, he finished his undergraduate studies at the University of Arizona and earned a law degree with honors from Washburn University of Topeka.

Law quickly led to politics. Dole served one term in the Kansas Legislature in 1951, and for the remainder of the decade worked as a prosecutor in his local county. He entered national politics in 1960 with election to the U.S. House of Representatives, where he won reelection

*Bob Dole.*
LIBRARY OF CONGRESS

every two years through 1968. Dole advocated fiscal conservatism while supporting limited WELFARE spending. He voted against the GREAT SOCIETY programs of President LYNDON B. JOHNSON, but he supported aid to hungry and DISABLED PERSONS and to farmers. He strongly backed civil rights legislation, a position from which he never wavered throughout his career. His model in politics—and the figure who ultimately became his mentor—was RICHARD M. NIXON, a friend since the 1950s. Dole's election to the U.S. Senate in 1968 gave President Nixon a vociferous supporter, and earned Dole the post of Republican National Committee (RNC) chairman in 1971.

The 1970s and 1980s brought Dole prominence in national politics. One reason for this was his marriage in 1975 to Elizabeth Hanford, an accomplished Harvard graduate who later held the posts of secretary of transportation and secretary of labor. Dole's chairmanship of the RNC also brought dividends. In 1976, President GERALD R. FORD chose Dole as his vice presidential running mate in an unsuccessful bid for reelection. The 1976 race whetted Dole's appetite for more, and he mounted his own campaign for president in 1980, losing out to RONALD REAGAN.

In 1984, Dole was elevated to Senate majority leader. Although his function in this role was to deliver party loyalty on votes in the Senate, he also became a strong supporter of President Reagan. During the IRAN-CONTRA scandal, Dole took a leading role in damage control. He made public reassurances and traveled the United States to rally support for the president.

Dole made another bid for president after Reagan's departure in 1988. This unsuccessful struggle for the Republican nomination against Vice President GEORGE H. W. BUSH revealed what many critics had long seen as a mixed blessing in Dole: his acerbic tongue. This had appeared as an issue as early as 1976, when, while campaigning as Gerald Ford's running mate, Dole had ridiculed Democratic candidate JIMMY CARTER as "Southern Fried McGovern." In 1988, again while campaigning, he lashed out at George H. W. Bush on national TV, saying

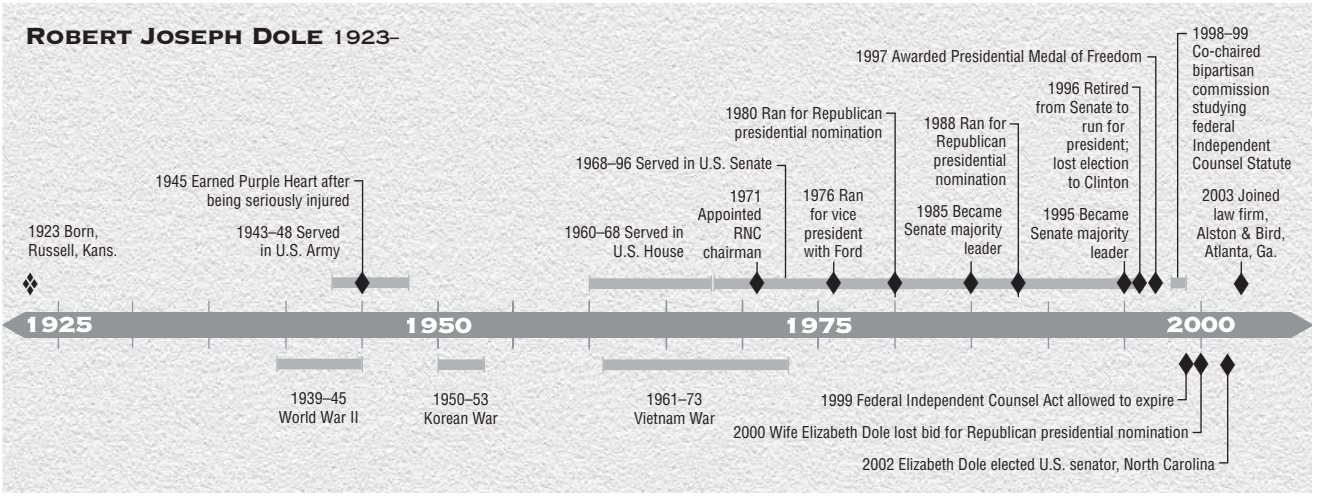

Bush had lied about him. The attack on Bush raised some speculation about whether Dole could control his temper.

In 1996, Dole's third run for the White House was characterized by a rightward shift. Soon after declaring his candidacy, he attacked Hollywood for making movies that "revel in mindless violence and loveless sex." Dole called for making English the nation's official language, returned the campaign contribution of a gay Republican organization (later calling the move a mistake), and quit attending a United Methodist church that conservative critics had denounced as excessively liberal.

More crucially, perhaps, Dole's ideas on economics now resembled those that he had found untenable in President Reagan. The senator who had won bipartisan praise for a 1982 tax compromise now told voters, "We can cut taxes and balance the budget at the same time." And less apparent was his trademark willingness to compromise: throughout late 1995 and early 1996, Dole and House Majority Leader NEWT GINGRICH (R-Ga.) engaged in a budget deadlock with President BILL CLINTON that forced a shutdown of the federal government. He lost the 1996 election to Clinton.

Although he retired from elective politics in 1996, Dole remained active. In 1997, President Clinton awarded Dole the Presidential Medal of Freedom, the nation's highest civilian award. That same year, Dole was appointed chair of the International Commission on Missing Persons, an organization established to help find information on the fates of thousands of persons missing in the former Yugoslavia; and chair of the National World War II Memorial, the first national memorial dedicated to those who served in World War II. He also helped establish the Robert J. Dole Institute of Politics at the University of Kansas. In 1998, he campaigned in 37 states for Republican candidates; in 2000, he was active in GEORGE W. BUSH's campaign for the presidency; and in 2002, he worked on the successful senatorial campaign of his wife Elizabeth.

After the September 11, 2001, attack on the World Trade Center, Dole joined with Clinton, his former political rival, as co-chair of a scholarship fund that raised money to provide education assistance to the families of persons killed or wounded in the terrorist attacks. In 2003, Dole began a series of appearances with Clinton on the CBS news show *Sixty Minutes*. The format of the segment, two-minute debates on highly topical subjects, was based on the show's highly popular *Point/Counterpoint* segments that aired in the 1970s. Noting that both his wife and President Clinton's wife were freshman senators, Dole quipped that they had permission to do the show, "We both cleared it with our wives so we won't get into trouble."

FURTHER READINGS

Bob Dole website. Available online at <www.bobdole.org> (accessed July 1, 2003).

Moraes, Lisa. 2003. "Clinton and Dole Agree to Disagree Weekly on 'Sixty Minutes'." *Washington Post* (March 6).

The Robert J. Dole Institute of Politics. Available online at <www.ku.edu/~dole> (accessed July 1, 2003).

"THE UPRISING OF A SMALL PEOPLE MAY BE AS INSPIRING AS THE UPRISING OF A GREAT NATION."
—SANFORD B. DOLE

## ♦ DOLE, SANFORD BALLARD

Sanford Ballard Dole was a prominent figure in the creation of Hawaii as a republic and its annexation to the United States. Dole was born

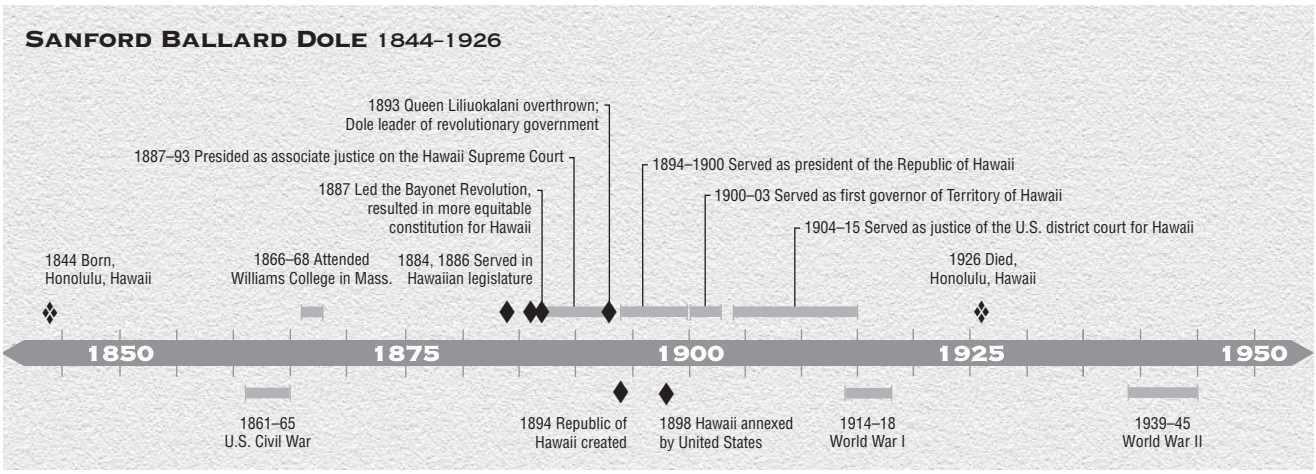

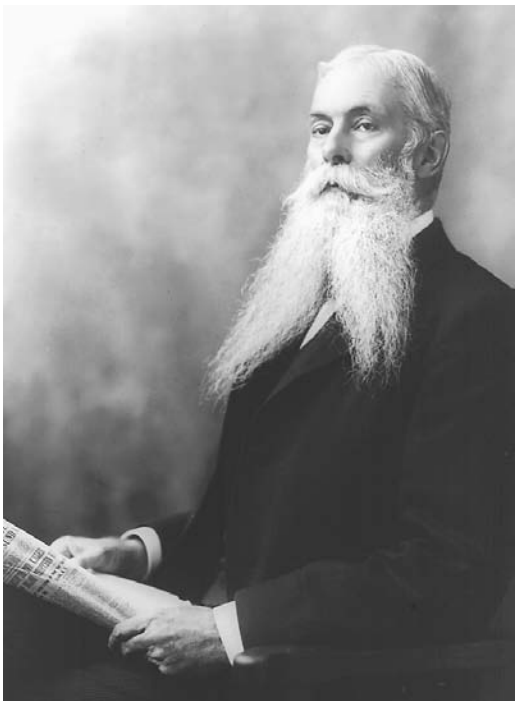

*Sanford B. Dole.*
LIBRARY OF CONGRESS

in 1844. His parents were American missionaries assigned to Hawaii, and Dole was raised and educated there. After attending Williams College and his admission to the Massachusetts bar in 1868, he settled in Hawaii and began his law practice.

In 1884 and 1886, he served in the Hawaiian legislature. His first act of dissension against the existing monarchy was as a leader of the Bayonet Revolution in 1887. As a result, the power of the monarchy was reduced and a more equitable constitution was adopted.

Also in 1887, Dole sat on the bench of the Hawaii Supreme Court as an associate justice.

In 1893, Queen Liliuokalani refused to recognize the limitations imposed upon her by the 1887 constitution. An insurrection occurred and the queen was overthrown. Dole left his post as justice to become the leader of the revolutionary provisional government that replaced the monarchy.

The republic of Hawaii was created in 1894, and Dole acted as its president. He began his efforts for the U.S. annexation of Hawaii, but his first attempts were thwarted by President GROVER CLEVELAND, who opposed the deposition of the monarchy. Dole wrote a treatise defending the revolution and its results but to no avail. He was finally able to achieve annexation under the administration of President WILLIAM MCKINLEY in 1898. Dole continued to serve as president throughout these years.

With the annexation of Hawaii completed, Dole became the first governor of the newly formed Territory of Hawaii. He performed these duties from 1900 to 1903.

In 1904, Dole returned to the judiciary and served as justice of the U.S. district court for Hawaii until 1915. He died in Hawaii in 1926.

## DOMAIN

*The complete and absolute ownership of land. Also the real estate so owned. The inherent sovereign power claimed by the legislature of a state, of controlling private property for public uses, is termed the* right of *eminent domain.*

*National domain is sometimes applied to the aggregate of the property owned directly by a nation. Public domain embraces all lands, the title to which is in the United States, including land occupied for the purposes of federal buildings, arsenals, dock-yards, and so on, and land of an agricultural or mineral character not yet granted to private owners.*

*Sphere of influence. Range of control or rule; realm.*

## DOMBEC

*[*Saxon, Judgment book.*] The name given by the Saxons to the code of laws by which they lived.*

Several Saxon kings published dombecs, also spelled dombocs. Dombecs were also known as dome-books or doom-books. The dombec compiled during the ninth-century reign of Alfred the Great was among the most important because it contained the law for the entire kingdom of England, encompassing the principal maxims of COMMON LAW, the penalties for crimes, and the forms of judicial proceedings.

A dombec is not the same as the Domesday Book, although the two are often confused.

## DOMESDAY BOOK

*An ancient record of land ownership in England.*

Commissioned by William the Conqueror in the year 1085 and finished in 1086, the book is a superb example of thorough and speedy administration, unequaled by any other project undertaken during the Middle Ages. Minute and accurate surveys of all of England were done for the purpose of compiling information essential for levying taxes and enforcing the land tenure system.

The work was done by five justices in each county who took a census and listed all the feudal landowners, their PERSONAL PROPERTY, and other information. The judges gathered their information by summoning each man and having him give testimony under oath. This is perhaps the earliest use of the inquest procedure in England, and it established the right of the king to require citizens to give information, a foundation of the jury trial.

*Domesday* was a Saxon word meaning Judgment Day, at the end of time when God will pronounce judgment against all of mankind. The name given to this record may have come from the popular opinion that the inquiry was as thorough as that promised for Judgment Day.

Two volumes of the Domesday Book are still in existence, and they continue to be valuable for historical information about social and economic conditions. They are kept in the Public Record Office in England.

## DOMESTIC

*Pertaining to the house or home. A person employed by a household to perform various servient duties. Any household servant, such as a maid or butler. Relating to a place of birth, origin, or domicile.*

That which is domestic is related to household uses. A *domestic animal* is one that is sufficiently tame to live with a family, such as a dog or cat, or one that can be used to contribute to a family's support, such as a cow, chicken, or horse. When something is *domesticated,* it is converted to domestic use, as in the case of a wild animal that is tamed.

*Domestic relations* are relationships between various family members, such as a HUSBAND AND WIFE, that are regulated by FAMILY LAW.

A domestic corporation of a particular state is one that has been organized and chartered in that state as opposed to a foreign corporation, which has been incorporated in another state or territory. In tax law, a domestic corporation is one that has originated in any U.S. state or territory.

*Domestic products* are goods that are manufactured within a particular territory rather than imported from outside that territory.

## DOMESTIC PARTNERSHIP LAW

*The area of law that deals with the rights of unmarried adults who choose to live together in the same manner as a married couple but who are not married.*

Domestic partnership law is evolving rapidly, in part because more individuals are choosing to identify themselves as domestic partners. Although any two adults living together in a loving relationship may be called partners, the term is most frequently used to describe same-sex couples.

In the last decade of the twentieth century and continuing into the twenty-first, a number of city and county governments enacted domestic partnership laws, including Seattle, New York City, and Broward County, Florida. In 1999, California passed a state domestic partnership law that provided a number of protections that formerly had been offered only to married couples. These protections include the right to inherit from a partner's estate; the right to make medical decisions for an incapacitated partner; the right to use sick leave to care for a partner; the right to obtain HEALTH INSURANCE through a partner; and the right to adopt a partner's child as a stepparent. Domestic partners in California may obtain these benefits by registering with the state.

Although domestic partnership law is intended to provide benefits to partners, it still represents uncharted territory and is far from comprehensive or complete. Using the California law as an example, a domestic partner is defined as a committed member of a same-sex couple; heterosexual couples who cohabit may not register as domestic partners. The rationale is that heterosexual couples in a committed relationship have the option of marriage, an option that is not open to same-sex couples. The only exception for heterosexual couples is when one partner is age 62 or older, because frequently SENIOR CITIZENS who cohabit run the risk of losing part of their SOCIAL SECURITY benefits if they marry.

A more problematic issue for domestic partners is the fact that their partnership is generally not recognized outside of their jurisdiction. Thus, their domestic partnership rights are not binding if they should move to a community that has no such laws of its own. In fact, domestic partners who relocate to a new community that does have protective laws are advised to reregister in their new home in order to eliminate any AMBIGUITY.

**CROSS-REFERENCES**

Adoption; Gay and Lesbian Rights; Family Law.

## DOMESTIC VIOLENCE

*Any abusive, violent, coercive, forceful, or threatening act or word inflicted by one member of a family or household on another can constitute domestic violence.*

Domestic violence, once considered one of the most underreported crimes, became more widely recognized during the 1980s and 1990s.

Various individuals and groups have defined domestic violence to include everything from saying unkind or demeaning words, to grabbing a person's arm, to hitting, kicking, choking, or even murdering. Domestic violence most often refers to violence between married or cohabiting couples, although it sometimes refers to violence against other members of a household, such as children or elderly relatives. It occurs in every racial, socioeconomic, ethnic, and religious group, although conditions such as poverty, drug or alcohol abuse, and mental illness increase its likelihood. Studies indicate that the incidence of domestic violence among homosexual couples is approximately equivalent to that found among heterosexual couples.

Domestic violence involving married or cohabiting couples received vast media attention during the 1990s. The highly publicized 1995 trial of former professional football player and movie actor O.J. (Orenthal James) Simpson for the murders of his ex-wife Nicole Brown Simpson and her friend Ronald Lyle Goldman thrust it onto the front pages of newspapers for many months. Simpson was acquitted of the murder charges, but evidence produced at his trial showed that he had been arrested in 1989 for spousal BATTERY and that he had threatened to kill his ex-wife. The disclosure that a prominent sports figure and movie star had abused his wife prompted a national discussion on the causes of domestic violence, its prevalence, and effective means of eliminating it.

Despite the attention that domestic violence issues have received, publicized instances of domestic violence continue to occur. Like the case of O.J. SIMPSON, several of these cases involved current or former athletes. Jim Brown, who, like Simpson, was both a famous football player and actor, received a six-month sentence in 2000 for vandalizing his wife's car during an argument. Also like Simpson, Brown had a history of alleged domestic-violence incidents, though he had not been convicted in the previous allegations.

Although thousands of cases involving domestic violence occur each year, those that involve celebrities continue to attract the most attention. In 1999, movie director John Singleton pled no-contest to charges of battering his girlfriend. Singleton is best known for such movies as *Boyz 'n the Hood* and *Poetic Justice.* In 2001, Rae Carruth, a player for the National Football League's Carolina Panthers, was found guilty of conspiracy to commit the murder of his former girlfriend, who had been carrying Carruth's child at the time of her death. Although he avoided the death penalty, Carruth was sentenced to up to 25 years in prison. Also in 2001, former heavyweight boxing champion Riddick Bowe was charged with third-degree assault for a fight with his wife.

Those who have studied domestic violence believe that it usually occurs in a cycle with three general stages. First, the abuser uses words or threats, perhaps humiliation or ridicule. Next, the abuser explodes at some perceived infraction by the other person, and the abuser's rage is manifested in physical violence. Finally, the abuser "cools off," asks forgiveness, and promises that the violence will never occur again. At that point, the victim often abandons any attempt to leave the situation or to have charges brought against the abuser, although some prosecutors will go forward with charges even if the victim is unwilling to do so. Typically, the abuser's rage begins to build again after the reconciliation, and the violent cycle is repeated.

In some cases of repeated domestic violence, the victim eventually strikes back and harms or kills the abuser. People who are repeatedly victimized by spouses or other partners often suffer from low self-esteem, feelings of shame and guilt, and a sense that they are trapped in a situation from which there is no escape. Some who feel that they have no outside protection from their batterer may turn to self-protection. During the 1980s, in a number of cases in which a victim of repeated domestic abuse struck back, the battered spouse defense was used to exonerate the victim. However, in order to rely on the battered-spouse defense, victims must prove that they genuinely and reasonably believed that they were in immediate danger of death or great bodily injury and that they used only such force as they believed was reasonably necessary to protect themselves. Because this is a very difficult standard to meet, it is estimated that fewer than one-third of vic-

tims who invoke the battered-spouse defense are acquitted.

Heightened awareness and an increase in reports of domestic violence has led to a widespread legal response since the 1980s. Once thought to be a problem that was best handled without legal intervention, domestic violence is now treated as a criminal offense. Many states and municipalities have instituted measures designed to deal swiftly and harshly with domestic abusers. In addition, governments have attempted to protect the victims of domestic violence from further danger and have launched programs designed to address the root causes of this abuse. One example is Alexandria, Virginia, which, in 1994, began prosecuting repeat abusers under a Virginia law (Va. St. § 18.2–57.2 Code 1950, § 18.2–57.2) that makes the third conviction for ASSAULT AND BATTERY a felony punishable by up to five years in prison. In addition, the city established a shelter for battered women, a victims' task force, and a domestic-violence intervention program that includes a mandatory arrest policy and court-ordered counseling. As a result, domestic homicides in Alexandria declined from 40 percent of all homicides in 1987, to 16 percent of those between 1988 and 1994. Other states have adopted similar measures. States that already had specific laws directed toward domestic violence toughened the penalties during the 1990s. For example, a 1995 amendment to California's domestic-abuse law (West's Ann. Cal. Penal Code §§ 14140–14143) revoked a provision that allowed first-time abusers to have their criminal record expunged if they attended counseling.

Public outrage over domestic violence also led to the inclusion of the VIOLENCE AGAINST WOMEN ACT as title IV of the VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994 (Pub. L. No. 103-322, 108 Stat. 1796 [codified as amended in scattered sections of 18 and 42 U.S.C.A.]). The act authorized research and education programs for judges and judicial staff to enhance knowledge and awareness of domestic violence and sexual assault. It also provided funding for police training and for shelters, increased penalties for domestic violence and rape, and provided for enhanced privacy protection for victims, although the U.S. Supreme Court struck it down as unconstitutional in 2000.

One of the more controversial portions of the original act made gender-motivated crimes a violation of federal CIVIL RIGHTS law. In 2000, the U.S. Supreme Court considered the application of this portion in *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000). In that case, a woman brought suit against a group of University of Virginia students who allegedly had raped her. Although the district court found that the woman had stated a claim against the respondents, it held that Congress did not have authority to enact the provision under the COMMERCE CLAUSE or § 5 of the FOURTEENTH AMENDMENT to the U.S. Constitution. The U.S. Court of Appeals for the Fourth Circuit affirmed the decision, and the United States, which had intervened to defend the statute, appealed to the U.S. Supreme Court. The Court, per an opinion by Chief Justice WILLIAM H. REHNQUIST, agreed with the lower courts, holding the Congress had exceeded its constitutional power. The result of the case is that the civil-remedy provisions in the original statute should fall under the purview of the states, rather than the federal government.

Studies on the incidence of domestic violence vary a great deal. Research conducted by Murray A. Straus of the University of New Hampshire and Richard J. Gelles of the University of Rhode Island, both veterans of extensive research into family violence, found that approximately four million people each year are victims of some form of domestic assault, ranging from

**Domestic Violence**

**VICTIMS OF VIOLENCE, 1999[a]**

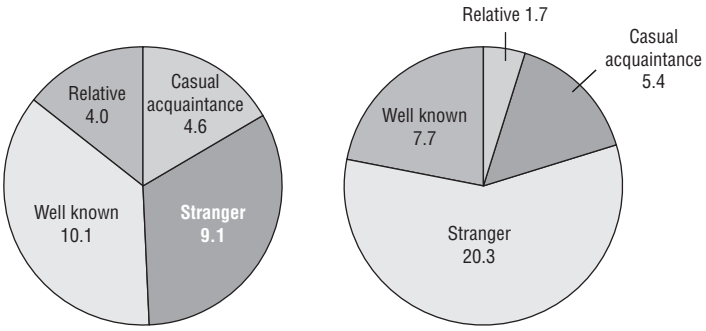


[a]Rate per 1,000 persons age 12 and over. Crimes of violence include data on rape, sexual assault, and robbery.

SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, *Crime Victimization in the United States,* 1999.

minor threats and thrown objects to severe beatings. This number represents women and men who report suffering attacks by partners. In a 1995 survey conducted by Dr. Jeanne McCauley of Johns Hopkins University School of Medicine, one in three women responding to a confidential questionnaire indicated that she had been physically or sexually attacked, and half of these incidents had occurred before the age of 18. The National Coalition against Domestic Violence reported in 1993 that 50 percent of all married women will experience some form of violence from their spouse, and that more than one-third are battered repeatedly each year.

The JUSTICE DEPARTMENT suggests that incidents of rape and assault against women at the hands of intimates dropped between 1993 and 2001. According to these statistics, 588,490 women were victims of rape and assault by intimates in 2001, down from 1.1 million in 1993. The same report noted that men were victims of 103,220 violent crimes by intimate partners, down from about 160,000 in 1993. Statistics regarding domestic violence against men have been in dispute for several years. Straus and Gelles reported that men were as likely to endure domestic assault as women, but that women were far more likely to be injured. Domestic-violence activists dispute the notion that men suffer domestic assault at approximately the same rate as women, and other statistical reports, including those issued by the DEPARTMENT OF JUSTICE, tend to support these claims.

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CROSS-REFERENCES

Child Abuse; Family Law.

## DOMICILIARY ADMINISTRATION

*The settlement and distribution of a decedent's estate in the state of his or her permanent residence, the place to which the decedent intended to return even though he or she might actually have resided elsewhere.*

Domiciliary administration is deemed principal or primary administration and is distinguishable from ancillary administration, which is the management of a decedent's property in the state where it is situated, which is other than the state in which the decedent permanently resided.

## DOMINANT

*Prevalent; paramount in force or effect; of primary importance or consideration. That which is dominant possesses rights that prevail over those of others.*

In PROPERTY LAW, the estate to which an EASEMENT, or right of use, is given is called the *dominant tenement* or *estate,* and the one upon which the easement is imposed is called the *servient tenement* or *estate.*

## DOMINANT CAUSE

*The essential or most direct source of an accident or injury, regardless of when it occurred.*

In TORT LAW, the dominant cause of an injury is the proximate cause, or the primary or moving cause, without which the injury would not have occurred.

## DOMINION

*Perfect control in right of ownership. The word implies both title and possession and appears to require a complete retention of control over disposition. Title to an article of property, which arises from the power of disposition and the right of claiming it. Sovereignty; as in the dominion of the seas or over a territory.*

*In* CIVIL LAW, *with reference to the title to property that is transferred by a sale of it, dominion is said to be either* proximate *or* remote, *the former being the kind of title vesting in the purchaser when he or she has acquired both the ownership and the possession of the article, the latter describing the nature of the title when he or she has legitimately acquired the ownership of the property but there has been no delivery.*

## DONATIVE

*Relating to the gratuitous transfer of something as in the nature of a gift.*

A *donative* trust is the conveyance of property in trust set up as a gift from one person to another.

*Donative intent* is the intent to give something as a gift.

### DONEE

*The recipient of a gift. An individual to whom a power of appointment is conveyed.*

### DONOR

*The party conferring a power. One who makes a gift. One who creates a trust.*

### DOOM

*An archaic term for a court's judgment. For example, some criminal sentences still end with the phrase " . . . which is pronounced for doom."*

### DORMANT

*Latent; inactive; silent. That which is dormant is not used, asserted, or enforced.*

A *dormant* partner is a member of a partnership who has a financial interest yet is silent, in that he or she takes no control over the business. The partner's identity is secret because the individual is unknown to the public.

### ♦ DORR, THOMAS WILSON

Known for his central role in Rhode Island's 1842 Dorr's Rebellion, Thomas Wilson Dorr fought for changes in the voting laws of his native state. Until the tumultuous 1842 election of Dorr as governor, long-standing laws, based on the state's initial charter from England, had limited VOTING RIGHTS to men who owned at least $134 in land. Dorr helped to initiate a new state constitution that granted more liberal voting rights to white males. Once he was governor, some of Rhode Island's other authorities treated him as a traitor to the aristocracy. However, Dorr's extension of voting rights to a larger section of the populace stands as a cornerstone in the democratization of the United States.

The changes in voting rights that Dorr proposed flew in the face of Rhode Island's staunch political conservatism. Although the example of newer, noncolonial states had changed the way in which some older, seaboard states practiced government, Rhode Island adhered to the charter it had received from the English monarchy in 1663. This document's property requirement for voting excluded more than half of the white males in the state. By 1840 even though only one other state retained a possession-of-property requirement, Rhode Island's leaders claimed that their constitution served as a standard of law and order. The Rhode Island charter, they said, had spared the state from one unwelcome effect of industrialization: political turmoil. Changes in government, however, were inevitable, even in Rhode Island. An increase in industry led to an increase in crime, unemployment, and poverty. Such changes brought a demand for a populist voice in the workings of government.

During this time of change, Dorr emerged as a legal spokesman. Born November 5, 1805, the son of a wealthy Providence merchant, Dorr graduated from Harvard in 1823. He then pursued legal studies, and was admitted to the Rhode Island bar in 1827. In 1834 he participated in the Rhode Island legislature, where he led a campaign to secure extended voting rights. When the movement gained momentum, the Rhode Island Suffrage Association was founded, which Dorr headed in 1840. As support for Dorr grew, he formed the People's party. In 1841 the party organized a convention and drafted a

"THE SERVANTS OF A RIGHTEOUS CAUSE MAY FAIL OR FALL IN THE DEFENSE OF IT. BUT ALL THE TRUTH THAT IT CONTAINS IS INDESTRUCTIBLE."
—THOMAS DORR

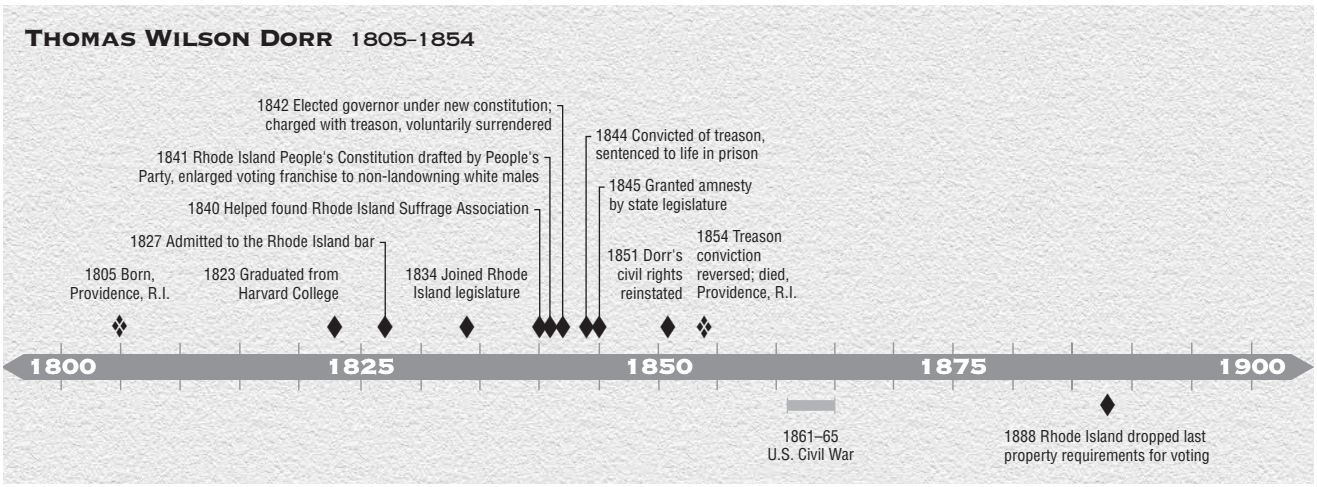

more liberal state constitution, the People's Constitution. It appealed to voteless urban workers by issuing the vote to all white adult males.

To counteract Dorr's movement, the Rhode Island state legislature called for a convention in Newport in November 1841. Conservatives saw this as their chance to derail the newly drafted constitution. Many others, however, supported Dorr's constitution, and two rival positions emerged. In 1842 Dorr's supporters elected him governor of the state. For a while, Rhode Island had to juggle two state governments. Samuel H. King, representing opponents of Dorr's efforts, also served as governor, under the guides of the old charter. Both sides wooed the federal government for recognition. President JOHN TYLER wrote to King and warned him that any attempt to overthrow Dorr's government would result in the presence of federal troops in Rhode Island.

Dorr sought to establish an entirely new state government in Providence. King declared that Dorr's party had initiated an insurrection. The sides of the dual government clashed, and, under King's authority, many of Dorr's supporters were imprisoned. On May 17, 1842, Dorr countered King's efforts to crush the People's "treason" and attacked the Providence arsenal. But the state militia held back the attack, and Dorr subsequently fled the state. King declared MARTIAL LAW and offered a reward for Dorr's capture.

A compromise came about when the state drafted a new constitution that extended voting rights. When the state adopted the new constitution, Dorr surrendered to authorities. Convicted of TREASON in 1844, Dorr faced a life sentence of solitary confinement and hard labor. Protests followed the severe sentence. One year later, the state legislature granted him AMNESTY and Dorr was set free.

Meanwhile, a suit arose from the competing state governments (*Luther v. Borden,* 48 U.S. (7 How.) 1, 12 L. Ed. 581 [1849]). In response to one of the "political questions" in the case, the Supreme Court declared that Congress, under Article IV, Section 4, of the Constitution, held the power to ensure a republican state government while simultaneously recognizing the lawful government of that state. The court ruled that the president had the authority to support a lawful state government with federal troops if an armed conflict occurred. The federal courts could not disturb these rights of Congress and the president. As President Tyler had not taken the opportunity to act on his power, the Court was left with much to decide regarding the balance between Rhode Island's new constitution and the federal executive and legislative powers.

The reform movement set forth by Dorr, later known as Dorrism, had helped to solidify a greater trend in U.S. government. As more and more people were granted the right to vote, the United States strayed further and further from the original English monarchical rule. Although the rebellion of Dorr and his followers consisted of only a few skirmishes, its influence extended through a long period of time. For conservatives, Dorrism represented bloody class conflict. For many others, Dorr appeared to be less a traitor than a representative for the common person. In 1851, Dorr's CIVIL RIGHTS were reinstated, and in 1854, the verdict against him was reversed. Later that year, on December 27, Dorr died in Providence, in his native Rhode Island.

# Abbreviations

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|---|---|
| A. | Atlantic Reporter |
| A. 2d | Atlantic Reporter, Second Series |
| AA | Alcoholics Anonymous |
| AAA | American Arbitration Association; Agricultural Adjustment Act of 1933 |
| AALS | Association of American Law Schools |
| AAPRP | All African People's Revolutionary Party |
| AARP | American Association of Retired Persons |
| AAS | American Anti-Slavery Society |
| ABA | American Bar Association; Architectural Barriers Act of 1968; American Bankers Association |
| ABC | American Broadcasting Companies, Inc. (formerly American Broadcasting Corporation) |
| ABM | Antiballistic missile |
| ABM Treaty | Anti-Ballistic Missile Treaty of 1972 |
| ABVP | Anti-Biased Violence Project |
| A/C | Account |
| A.C. | Appeal cases |
| ACAA | Air Carrier Access Act |
| ACCA | Armed Career Criminal Act of 1984 |
| ACF | Administration for Children and Families |
| ACLU | American Civil Liberties Union |
| ACRS | Accelerated Cost Recovery System |
| ACS | Agricultural Cooperative Service |
| ACT | American College Test |
| Act'g Legal Adv. | Acting Legal Advisor |
| ACUS | Administrative Conference of the United States |
| ACYF | Administration on Children, Youth, and Families |
| A.D. 2d | Appellate Division, Second Series, N.Y. |
| ADA | Americans with Disabilities Act of 1990 |
| ADAMHA | Alcohol, Drug Abuse, and Mental Health Administration |
| ADC | Aid to Dependent Children |
| ADD | Administration on Developmental Disabilities |
| ADEA | Age Discrimination in Employment Act of 1967 |
| ADL | Anti-Defamation League |
| ADR | Alternative dispute resolution |
| AEC | Atomic Energy Commission |
| AECB | Arms Export Control Board |
| AEDPA | Antiterrorism and Effective Death Penalty Act |
| A.E.R. | All England Law Reports |
| AFA | American Family Association; Alabama Freethought Association |
| AFB | American Farm Bureau |
| AFBF | American Farm Bureau Federation |
| AFDC | Aid to Families with Dependent Children |
| aff'd per cur. | Affirmed by the court |
| AFIS | Automated fingerprint identification system |
| AFL | American Federation of Labor |

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| AFL-CIO | American Federation of Labor and Congress of Industrial Organizations |
| AFRes | Air Force Reserve |
| AFSC | American Friends Service Committee |
| AFSCME | American Federation of State, County, and Municipal Employees |
| AGRICOLA | Agricultural Online Access |
| AIA | Association of Insurance Attorneys |
| AIB | American Institute for Banking |
| AID | Artificial insemination using a third-party donor's sperm; Agency for International Development |
| AIDS | Acquired immune deficiency syndrome |
| AIH | Artificial insemination using the husband's sperm |
| AIM | American Indian Movement |
| AIPAC | American Israel Public Affairs Committee |
| AIUSA | Amnesty International, U.S.A. Affiliate |
| AJS | American Judicature Society |
| ALA | American Library Association |
| Alcoa | Aluminum Company of America |
| ALEC | American Legislative Exchange Council |
| ALF | Animal Liberation Front |
| ALI | American Law Institute |
| ALJ | Administrative law judge |
| All E.R. | All England Law Reports |
| ALO | Agency Liaison |
| A.L.R. | American Law Reports |
| ALY | *American Law Yearbook* |
| AMA | American Medical Association |
| AMAA | Agricultural Marketing Agreement Act |
| Am. Dec. | American Decisions |
| amdt. | Amendment |
| Amer. St. Papers, For. Rels. | American State Papers, Legislative and Executive Documents of the Congress of the U.S., Class I, Foreign Relations, 1832–1859 |
| AMS | Agricultural Marketing Service |
| AMVETS | American Veterans (of World War II) |
| ANA | Administration for Native Americans |
| Ann. Dig. | Annual Digest of Public International Law Cases |
| ANPA | American Newspaper Publishers Association |
| ANSCA | Alaska Native Claims Act |
| ANZUS | Australia-New Zealand-United States Security Treaty Organization |
| AOA | Administration on Aging |
| AOE | Arizonans for Official English |
| AOL | America Online |
| AP | Associated Press |
| APA | Administrative Procedure Act of 1946 |
| APHIS | Animal and Plant Health Inspection Service |
| App. Div. | Appellate Division Reports, N.Y. Supreme Court |
| Arb. Trib., U.S.-British | Arbitration Tribunal, Claim Convention of 1853, United States and Great Britain Convention of 1853 |
| Ardcor | American Roller Die Corporation |
| ARPA | Advanced Research Projects Agency |
| ARPANET | Advanced Research Projects Agency Network |
| ARS | Advanced Record System |
| Art. | Article |
| ARU | American Railway Union |
| ASCME | American Federation of State, County, and Municipal Employees |
| ASCS | Agriculture Stabilization and Conservation Service |
| ASM | Available Seatmile |
| ASPCA | American Society for the Prevention of Cruelty to Animals |
| Asst. Att. Gen. | Assistant Attorney General |
| AT&T | American Telephone and Telegraph |
| ATFD | Alcohol, Tobacco and Firearms Division |
| ATLA | Association of Trial Lawyers of America |
| ATO | Alpha Tau Omega |
| ATTD | Alcohol and Tobacco Tax Division |
| ATU | Alcohol Tax Unit |
| AUAM | American Union against Militarism |
| AUM | Animal Unit Month |
| AZT | Azidothymidine |

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|---|---|
| BAC | Blood alcohol concentration |
| BALSA | Black-American Law Student Association |
| BATF | Bureau of Alcohol, Tobacco and Firearms |
| BBS | Bulletin Board System |
| BCCI | Bank of Credit and Commerce International |
| BEA | Bureau of Economic Analysis |
| Bell's Cr. C. | Bell's English Crown Cases |
| Bevans | United States Treaties, etc. *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled under the direction of Charles I. Bevans, 1968–76) |
| BFOQ | Bona fide occupational qualification |
| BI | Bureau of Investigation |
| BIA | Bureau of Indian Affairs; Board of Immigration Appeals |
| BID | Business improvement district |
| BJS | Bureau of Justice Statistics |
| Black. | Black's United States Supreme Court Reports |
| Blatchf. | Blatchford's United States Circuit Court Reports |
| BLM | Bureau of Land Management |
| BLS | Bureau of Labor Statistics |
| BMD | Ballistic missile defense |
| BNA | Bureau of National Affairs |
| BOCA | Building Officials and Code Administrators International |
| BOP | Bureau of Prisons |
| BPP | Black Panther Party for Self-defense |
| Brit. and For. | British and Foreign State Papers |
| BSA | Boy Scouts of America |
| BTP | Beta Theta Pi |
| Burr. | James Burrows, *Report of Cases Argued and Determined in the Court of King's Bench during the Time of Lord Mansfield* (1766–1780) |
| BVA | Board of Veterans Appeals |
| c. | Chapter |
| $C^3I$ | Command, Control, Communications, and Intelligence |
| C.A. | Court of Appeals |
| CAA | Clean Air Act |
| CAB | Civil Aeronautics Board; Corporation for American Banking |
| CAFE | Corporate average fuel economy |
| Cal. 2d | California Reports, Second Series |
| Cal. 3d | California Reports, Third Series |
| CALR | Computer-assisted legal research |
| Cal. Rptr. | California Reporter |
| CAP | Common Agricultural Policy |
| CARA | Classification and Ratings Administration |
| CATV | Community antenna television |
| CBO | Congressional Budget Office |
| CBS | Columbia Broadcasting System |
| CBOEC | Chicago Board of Election Commissioners |
| CCC | Commodity Credit Corporation |
| CCDBG | Child Care and Development Block Grant of 1990 |
| C.C.D. Pa. | Circuit Court Decisions, Pennsylvania |
| C.C.D. Va. | Circuit Court Decisions, Virginia |
| CCEA | Cabinet Council on Economic Affairs |
| CCP | Chinese Communist Party |
| CCR | Center for Constitutional Rights |
| C.C.R.I. | Circuit Court, Rhode Island |
| CD | Certificate of deposit; compact disc |
| CDA | Communications Decency Act |
| CDBG | Community Development Block Grant Program |
| CDC | Centers for Disease Control and Prevention; Community Development Corporation |
| CDF | Children's Defense Fund |
| CDL | Citizens for Decency through Law |
| CD-ROM | Compact disc read-only memory |
| CDS | Community Dispute Services |
| CDW | Collision damage waiver |
| CENTO | Central Treaty Organization |
| CEO | Chief executive officer |
| CEQ | Council on Environmental Quality |

| | |
|---|---|
| CERCLA | Comprehensive Environmental Response, Compensation, and Liability Act of 1980 |
| cert. | *Certiorari* |
| CETA | Comprehensive Employment and Training Act |
| C & F | Cost and freight |
| CFC | Chlorofluorocarbon |
| CFE Treaty | Conventional Forces in Europe Treaty of 1990 |
| C.F. & I. | Cost, freight, and insurance |
| C.F.R | Code of Federal Regulations |
| CFNP | Community Food and Nutrition Program |
| CFTA | Canadian Free Trade Agreement |
| CFTC | Commodity Futures Trading Commission |
| Ch. | Chancery Division, English Law Reports |
| CHAMPVA | Civilian Health and Medical Program at the Veterans Administration |
| CHEP | Cuban/Haitian Entrant Program |
| CHINS | Children in need of supervision |
| CHIPS | Child in need of protective services |
| Ch.N.Y. | Chancery Reports, New York |
| Chr. Rob. | Christopher Robinson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (1801–1808) |
| CIA | Central Intelligence Agency |
| CID | Commercial Item Descriptions |
| C.I.F. | Cost, insurance, and freight |
| CINCNORAD | Commander in Chief, North American Air Defense Command |
| C.I.O. | Congress of Industrial Organizations |
| CIPE | Center for International Private Enterprise |
| C.J. | Chief justice |
| CJIS | Criminal Justice Information Services |
| C.J.S. | Corpus Juris Secundum |
| Claims Arb. under Spec. Conv., Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| CLASP | Center for Law and Social Policy |
| CLE | Center for Law and Education; Continuing Legal Education |
| CLEO | Council on Legal Education Opportunity; Chief Law Enforcement Officer |
| CLP | Communist Labor Party of America |
| CLS | Christian Legal Society; critical legal studies (movement); Critical Legal Studies (membership organization) |
| C.M.A. | Court of Military Appeals |
| CMEA | Council for Mutual Economic Assistance |
| CMHS | Center for Mental Health Services |
| C.M.R. | Court of Military Review |
| CNN | Cable News Network |
| CNO | Chief of Naval Operations |
| CNOL | Consolidated net operating loss |
| CNR | Chicago and Northwestern Railway |
| CO | Conscientious Objector |
| C.O.D. | Cash on delivery |
| COGP | Commission on Government Procurement |
| COINTELPRO | Counterintelligence Program |
| Coke Rep. | Coke's English King's Bench Reports |
| COLA | Cost-of-living adjustment |
| COMCEN | Federal Communications Center |
| Comp. | Compilation |
| Conn. | Connecticut Reports |
| CONTU | National Commission on New Technological Uses of Copyrighted Works |
| Conv. | Convention |
| COPA | Child Online Protection Act (1998) |
| COPS | Community Oriented Policing Services |
| Corbin | Arthur L. Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (1950) |
| CORE | Congress on Racial Equality |
| Cox's Crim. Cases | Cox's Criminal Cases (England) |
| COYOTE | Call Off Your Old Tired Ethics |

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|---|---|
| CPA | Certified public accountant |
| CPB | Corporation for Public Broadcasting, the |
| CPI | Consumer Price Index |
| CPPA | Child Pornography Prevention Act |
| CPSC | Consumer Product Safety Commission |
| Cranch | Cranch's United States Supreme Court Reports |
| CRF | Constitutional Rights Foundation |
| CRR | Center for Constitutional Rights |
| CRS | Congressional Research Service; Community Relations Service |
| CRT | Critical race theory |
| CSA | Community Services Administration |
| CSAP | Center for Substance Abuse Prevention |
| CSAT | Center for Substance Abuse Treatment |
| CSC | Civil Service Commission |
| CSCE | Conference on Security and Cooperation in Europe |
| CSG | Council of State Governments |
| CSO | Community Service Organization |
| CSP | Center for the Study of the Presidency |
| C-SPAN | Cable-Satellite Public Affairs Network |
| CSRS | Cooperative State Research Service |
| CSWPL | Center on Social Welfare Policy and Law |
| CTA | *Cum testamento annexo* (with the will attached) |
| Ct. Ap. D.C. | Court of Appeals, District of Columbia |
| Ct. App. No. Ireland | Court of Appeals, Northern Ireland |
| Ct. Cl. | Court of Claims, United States |
| Ct. Crim. Apps. | Court of Criminal Appeals (England) |
| CTI | Consolidated taxable income |
| Ct. of Sess., Scot. | Court of Sessions, Scotland |
| CU | Credit union |
| CUNY | City University of New York |
| Cush. | Cushing's Massachusetts Reports |
| CWA | Civil Works Administration; Clean Water Act |
| DACORB | Department of the Army Conscientious Objector Review Board |
| Dall. | Dallas's Pennsylvania and United States Reports |
| DAR | Daughters of the American Revolution |
| DARPA | Defense Advanced Research Projects Agency |
| DAVA | Defense Audiovisual Agency |
| D.C. | United States District Court; District of Columbia |
| D.C. Del. | United States District Court, Delaware |
| D.C. Mass. | United States District Court, Massachusetts |
| D.C. Md. | United States District Court, Maryland |
| D.C.N.D.Cal. | United States District Court, Northern District, California |
| D.C.N.Y. | United States District Court, New York |
| D.C.Pa. | United States District Court, Pennsylvania |
| DCS | Deputy Chiefs of Staff |
| DCZ | District of the Canal Zone |
| DDT | Dichlorodiphenyltricloro-ethane |
| DEA | Drug Enforcement Administration |
| Decl. Lond. | Declaration of London, February 26, 1909 |
| Dev. & B. | Devereux & Battle's North Carolina Reports |
| DFL | Minnesota Democratic-Farmer-Labor |
| DFTA | Department for the Aging |
| Dig. U.S. Practice in Intl. Law | Digest of U.S. Practice in International Law |
| Dist. Ct. | D.C. United States District Court, District of Columbia |
| D.L.R. | Dominion Law Reports (Canada) |
| DMCA | Digital Millennium Copyright Act |
| DNA | Deoxyribonucleic acid |
| Dnase | Deoxyribonuclease |
| DNC | Democratic National Committee |
| DOC | Department of Commerce |
| DOD | Department of Defense |
| DODEA | Department of Defense Education Activity |
| Dodson | Dodson's Reports, English Admiralty Courts |
| DOE | Department of Energy |

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|---|---|
| DOER | Department of Employee Relations |
| DOJ | Department of Justice |
| DOL | Department of Labor |
| DOMA | Defense of Marriage Act of 1996 |
| DOS | Disk operating system |
| DOT | Department of Transportation |
| DPT | Diphtheria, pertussis, and tetanus |
| DRI | Defense Research Institute |
| DSAA | Defense Security Assistance Agency |
| DUI | Driving under the influence; driving under intoxication |
| DVD | Digital versatile disc |
| DWI | Driving while intoxicated |
| EAHCA | Education for All Handicapped Children Act of 1975 |
| EBT | Examination before trial |
| E.coli | Escherichia coli |
| ECPA | Electronic Communications Privacy Act of 1986 |
| ECSC | Treaty of the European Coal and Steel Community |
| EDA | Economic Development Administration |
| EDF | Environmental Defense Fund |
| E.D.N.Y. | Eastern District, New York |
| EDP | Electronic data processing |
| E.D. Pa. | Eastern-District, Pennsylvania |
| EDSC | Eastern District, South Carolina |
| EDT | Eastern daylight time |
| E.D. Va. | Eastern District, Virginia |
| EEC | European Economic Community; European Economic Community Treaty |
| EEOC | Equal Employment Opportunity Commission |
| EFF | Electronic Frontier Foundation |
| EFT | Electronic funds transfer |
| Eliz. | Queen Elizabeth (Great Britain) |
| Em. App. | Temporary Emergency Court of Appeals |
| ENE | Early neutral evaluation |
| Eng. Rep. | English Reports |
| EOP | Executive Office of the President |
| EPA | Environmental Protection Agency; Equal Pay Act of 1963 |
| ERA | Equal Rights Amendment |
| ERDC | Energy Research and Development Commission |
| ERISA | Employee Retirement Income Security Act of 1974 |
| ERS | Economic Research Service |
| ERTA | Economic Recovery Tax Act of 1981 |
| ESA | Endangered Species Act of 1973 |
| ESF | Emergency support function; Economic Support Fund |
| ESRD | End-Stage Renal Disease Program |
| ETA | Employment and Training Administration |
| ETS | Environmental tobacco smoke |
| et seq. | *Et sequentes* or *et sequentia* (“and the following”) |
| EU | European Union |
| Euratom | European Atomic Energy Community |
| Eur. Ct. H.R. | European Court of Human Rights |
| Ex. | English Exchequer Reports, Welsby, Hurlstone & Gordon |
| Exch. | Exchequer Reports (Welsby, Hurlstone & Gordon) |
| Ex Com | Executive Committee of the National Security Council |
| Eximbank | Export-Import Bank of the United States |
| F. | Federal Reporter |
| F. 2d | Federal Reporter, Second Series |
| FAA | Federal Aviation Administration; Federal Arbitration Act |
| FAAA | Federal Alcohol Administration Act |
| FACE | Freedom of Access to Clinic Entrances Act of 1994 |
| FACT | Feminist Anti-Censorship Task Force |
| FAIRA | Federal Agriculture Improvement and Reform Act of 1996 |
| FAMLA | Family and Medical Leave Act of 1993 |
| Fannie Mae | Federal National Mortgage Association |
| FAO | Food and Agriculture Organization of the United Nations |
| FAR | Federal Acquisition Regulations |

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| FAS | Foreign Agricultural Service |
| FBA | Federal Bar Association |
| FBI | Federal Bureau of Investigation |
| FCA | Farm Credit Administration |
| F. Cas. | Federal Cases |
| FCC | Federal Communications Commission |
| FCIA | Foreign Credit Insurance Association |
| FCIC | Federal Crop Insurance Corporation |
| FCLAA | Federal Cigarette Labeling and Advertising Act |
| FCRA | Fair Credit Reporting Act |
| FCU | Federal credit unions |
| FCUA | Federal Credit Union Act |
| FCZ | Fishery Conservation Zone |
| FDA | Food and Drug Administration |
| FDIC | Federal Deposit Insurance Corporation |
| FDPC | Federal Data Processing Center |
| FEC | Federal Election Commission |
| FECA | Federal Election Campaign Act of 1971 |
| Fed. Cas. | Federal Cases |
| FEHA | Fair Employment and Housing Act |
| FEHBA | Federal Employees Health Benefit Act |
| FEMA | Federal Emergency Management Agency |
| FERC | Federal Energy Regulatory Commission |
| FFB | Federal Financing Bank |
| FFDC | Federal Food, Drug, and Cosmetics Act |
| FGIS | Federal Grain Inspection Service |
| FHA | Federal Housing Administration |
| FHAA | Fair Housing Amendments Act of 1998 |
| FHWA | Federal Highway Administration |
| FIA | Federal Insurance Administration |
| FIC | Federal Information Centers; Federation of Insurance Counsel |
| FICA | Federal Insurance Contributions Act |
| FIFRA | Federal Insecticide, Fungicide, and Rodenticide Act |
| FIP | Forestry Incentives Program |
| FIRREA | Financial Institutions Reform, Recovery, and Enforcement Act of 1989 |
| FISA | Foreign Intelligence Surveillance Act of 1978 |
| FISC | Foreign Intelligence Surveillance Court of Review |
| FJC | Federal Judicial Center |
| FLSA | Fair Labor Standards Act |
| FMC | Federal Maritime Commission |
| FMCS | Federal Mediation and Conciliation Service |
| FmHA | Farmers Home Administration |
| FMLA | Family and Medical Leave Act of 1993 |
| FNMA | Federal National Mortgage Association, "Fannie Mae" |
| F.O.B. | Free on board |
| FOIA | Freedom of Information Act |
| FOMC | Federal Open Market Committee |
| FPA | Federal Power Act of 1935 |
| FPC | Federal Power Commission |
| FPMR | Federal Property Management Regulations |
| FPRS | Federal Property Resources Service |
| FR | Federal Register |
| FRA | Federal Railroad Administration |
| FRB | Federal Reserve Board |
| FRC | Federal Radio Commission |
| F.R.D. | Federal Rules Decisions |
| FSA | Family Support Act |
| FSB | Federal'naya Sluzhba Bezopasnosti (the Federal Security Service of Russia) |
| FSLIC | Federal Savings and Loan Insurance Corporation |
| FSQS | Food Safety and Quality Service |
| FSS | Federal Supply Service |
| F. Supp. | Federal Supplement |
| FTA | U.S.-Canada Free Trade Agreement of 1988 |
| FTC | Federal Trade Commission |
| FTCA | Federal Tort Claims Act |
| FTS | Federal Telecommunications System |
| FTS2000 | Federal Telecommunications System 2000 |
| FUCA | Federal Unemployment Compensation Act of 1988 |

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| FUTA | Federal Unemployment Tax Act |
| FWPCA | Federal Water Pollution Control Act of 1948 |
| FWS | Fish and Wildlife Service |
| GAL | Guardian ad litem |
| GAO | General Accounting Office; Governmental Affairs Office |
| GAOR | General Assembly Official Records, United Nations |
| GAAP | Generally accepted accounting principles |
| GA Res. | General Assembly Resolution (United Nations) |
| GATT | General Agreement on Tariffs and Trade |
| GCA | Gun Control Act |
| Gen. Cls. Comm. | General Claims Commission, United States and Panama; General Claims United States and Mexico |
| Geo. II | King George II (Great Britain) |
| Geo. III | King George III (Great Britain) |
| GHB | Gamma-hydroxybutrate |
| GI | Government Issue |
| GID | General Intelligence Division |
| GM | General Motors |
| GNMA | Government National Mortgage Association, "Ginnie Mae" |
| GNP | Gross national product |
| GOP | Grand Old Party (Republican Party) |
| GOPAC | Grand Old Party Action Committee |
| GPA | Office of Governmental and Public Affairs |
| GPO | Government Printing Office |
| GRAS | Generally recognized as safe |
| Gr. Br., Crim. Ct. App. | Great Britain, Court of Criminal Appeals |
| GRNL | Gay Rights-National Lobby |
| GSA | General Services Administration |
| Hackworth | Green Haywood Hackworth, *Digest of International Law* (1940–1944) |
| Hay and Marriott | Great Britain. High Court of Admiralty, *Decisions in the High Court of Admiralty during the Time of Sir George Hay and of Sir James Marriott, Late Judges of That Court* (1801) |
| HBO | Home Box Office |
| HCFA | Health Care Financing Administration |
| H.Ct. | High Court |
| HDS | Office of Human Development Services |
| Hen. & M. | Hening & Munford's Virginia Reports |
| HEW | Department of Health, Education, and Welfare |
| HFCA | Health Care Financing Administration |
| HGI | Handgun Control, Incorporated |
| HHS | Department of Health and Human Services |
| Hill | Hill's New York Reports |
| HIRE | Help through Industry Retraining and Employment |
| HIV | Human immunodeficiency virus |
| H.L. | House of Lords Cases (England) |
| H. Lords | House of Lords (England) |
| HMO | Health Maintenance Organization |
| HNIS | Human Nutrition Information Service |
| Hong Kong L.R. | Hong Kong Law Reports |
| How. | Howard's United States Supreme Court Reports |
| How. St. Trials | Howell's English State Trials |
| HUAC | House Un-American Activities Committee |
| HUD | Department of Housing and Urban Development |
| Hudson, Internatl. Legis. | Manley Ottmer Hudson, ed., *International Legislation: A Collection of the Texts of Multipartite International Instruments of General Interest Beginning with the Covenant of the League of Nations* (1931) |
| Hudson, World Court Reps. | Manley Ottmer Hudson, ea., *World Court Reports* (1934– ) |
| Hun | Hun's New York Supreme Court Reports |
| Hunt's Rept. | Bert L. Hunt, *Report of the American and Panamanian General Claims Arbitration* (1934) |
| IAEA | International Atomic Energy Agency |
| IALL | International Association of Law Libraries |

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| IBA | International Bar Association |
| IBM | International Business Machines |
| ICA | Interstate Commerce Act |
| ICBM | Intercontinental ballistic missile |
| ICC | Interstate Commerce Commission; International Criminal Court |
| ICJ | International Court of Justice |
| ICM | Institute for Court Management |
| IDEA | Individuals with Disabilities Education Act of 1975 |
| IDOP | International Dolphin Conservation Program |
| IEP | Individualized educational program |
| IFC | International Finance Corporation |
| IGRA | Indian Gaming Regulatory Act of 1988 |
| IJA | Institute of Judicial Administration |
| IJC | International Joint Commission |
| ILC | International Law Commission |
| ILD | International Labor Defense |
| Ill. Dec. | Illinois Decisions |
| ILO | International Labor Organization |
| IMF | International Monetary Fund |
| INA | Immigration and Nationality Act |
| IND | Investigational new drug |
| INF Treaty | Intermediate-Range Nuclear Forces Treaty of 1987 |
| INS | Immigration and Naturalization Service |
| INTELSAT | International Telecommunications Satellite Organization |
| Interpol | International Criminal Police Organization |
| Int'l. Law Reps. | International Law Reports |
| Intl. Legal Mats. | International Legal Materials |
| IOC | International Olympic Committee |
| IPDC | International Program for the Development of Communication |
| IPO | Intellectual Property Owners |
| IPP | Independent power producer |
| IQ | Intelligence quotient |
| I.R. | Irish Reports |
| IRA | Individual retirement account; Irish Republican Army |
| IRC | Internal Revenue Code |
| IRCA | Immigration Reform and Control Act of 1986 |
| IRS | Internal Revenue Service |
| ISO | Independent service organization |
| ISP | Internet service provider |
| ISSN | International Standard Serial Numbers |
| ITA | International Trade Administration |
| ITI | Information Technology Integration |
| ITO | International Trade Organization |
| ITS | Information Technology Service |
| ITT | International Telephone and Telegraph Corporation |
| ITU | International Telecommunication Union |
| IUD | Intrauterine device |
| IWC | International Whaling Commission |
| IWW | Industrial Workers of the World |
| JAGC | Judge Advocate General's Corps |
| JCS | Joint Chiefs of Staff |
| JDL | Jewish Defense League |
| JNOV | Judgment *non obstante veredicto* ("judgment nothing to recommend it" or "judgment notwithstanding the verdict") |
| JOBS | Jobs Opportunity and Basic Skills |
| John. Ch. | Johnson's New York Chancery Reports |
| Johns. | Johnson's Reports (New York) |
| JP | Justice of the peace |
| K.B. | King's Bench Reports (England) |
| KFC | Kentucky Fried Chicken |
| KGB | Komitet Gosudarstvennoi Bezopasnosti (the State Security Committee for countries in the former Soviet Union) |
| KKK | Ku Klux Klan |
| KMT | Kuomintang (Chinese, "national people's party") |
| LAD | Law Against Discrimination |

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| LAPD | Los Angeles Police Department |
| LC | Library of Congress |
| LCHA | Longshoremen's and Harbor Workers Compensation Act of 1927 |
| LD50 | Lethal dose 50 |
| LDEF | Legal Defense and Education Fund (NOW) |
| LDF | Legal Defense Fund, Legal Defense and Educational Fund of the NAACP |
| LEAA | Law Enforcement Assistance Administration |
| L.Ed. | Lawyers' Edition Supreme Court Reports |
| LI | Letter of interpretation |
| LLC | Limited Liability Company |
| LLP | Limited Liability Partnership |
| LMSA | Labor-Management Services Administration |
| LNTS | League of Nations Treaty Series |
| Lofft's Rep. | Lofft's English King's Bench Reports |
| L.R. | Law Reports (English) |
| LSAC | Law School Admission Council |
| LSAS | Law School Admission Service |
| LSAT | Law School Aptitude Test |
| LSC | Legal Services Corporation; Legal Services for Children |
| LSD | Lysergic acid diethylamide |
| LSDAS | Law School Data Assembly Service |
| LTBT | Limited Test Ban Treaty |
| LTC | Long Term Care |
| MAD | Mutual assured destruction |
| MADD | Mothers against Drunk Driving |
| MALDEF | Mexican American Legal Defense and Educational Fund |
| Malloy | William M. Malloy, ed., *Treaties, Conventions International Acts, Protocols, and Agreements between the United States of America and Other Powers* (1910–1938) |
| Martens | Georg Friedrich von Martens, ea., *Noveau recueil général de traités et autres actes relatifs aux rapports de droit international* (Series I, 20 vols. [1843–1875]; Series II, 35 vols. [1876–1908]; Series III [1909– ]) |
| Mass. | Massachusetts Reports |
| MCC | Metropolitan Correctional Center |
| MCCA | Medicare Catastrophic Coverage Act of 1988 |
| MCH | Maternal and Child Health Bureau |
| MCRA | Medical Care Recovery Act of 1962 |
| MDA | Medical Devices Amendments of 1976 |
| Md. App. | Maryland, Appeal Cases |
| M.D. Ga. | Middle District, Georgia |
| Mercy | Movement Ensuring the Right to Choose for Yourself |
| Metc. | Metcalf's Massachusetts Reports |
| MFDP | Mississippi Freedom Democratic party |
| MGT | Management |
| MHSS | Military Health Services System |
| Miller | David Hunter Miller, ea., *Treaties and Other International Acts of the United States of America* (1931–1948) |
| Minn. | Minnesota Reports |
| MINS | Minors in need of supervision |
| MIRV | Multiple independently targetable reentry vehicle |
| MIRVed ICBM | Multiple independently targetable reentry vehicled intercontinental ballistic missile |
| Misc. | Miscellaneous Reports, New York |
| Mixed Claims Comm., Report of Decs | Mixed Claims Commission, United States and Germany, Report of Decisions |
| M.J. | Military Justice Reporter |
| MLAP | Migrant Legal Action Program |
| MLB | Major League Baseball |
| MLDP | Mississippi Loyalist Democratic Party |
| MMI | Moslem Mosque, Incorporated |
| MMPA | Marine Mammal Protection Act of 1972 |
| Mo. | Missouri Reports |
| MOD | Masters of Deception |
| Mod. | Modern Reports, English King's Bench, etc. |

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| Moore, Dig. Intl. Law | John Bassett Moore, *A Digest of International Law,* 8 vols. (1906) |
| Moore, Intl. Arbs. | John Bassett Moore, *History and Digest of the International Arbitrations to Which United States Has Been a Party,* 6 vols. (1898) |
| Morison | William Maxwell Morison, *The Scots Revised Report: Morison's Dictionary of Decisions* (1908–09) |
| M.P. | Member of Parliament |
| MP3 | MPEG Audio Layer 3 |
| MPAA | Motion Picture Association of America |
| MPAS | Michigan Protection and Advocacy Service |
| MPEG | Motion Picture Experts Group |
| mpg | Miles per gallon |
| MPPDA | Motion Picture Producers and Distributors of America |
| MPRSA | Marine Protection, Research, and Sanctuaries Act of 1972 |
| M.R. | Master of the Rolls |
| MS-DOS | Microsoft Disk Operating System |
| MSHA | Mine Safety and Health Administration |
| MSPB | Merit Systems Protection Board |
| MSSA | Military Selective Service Act |
| N/A | Not Available |
| NAACP | National Association for the Advancement of Colored People |
| NAAQS | National Ambient Air Quality Standards |
| NAB | National Association of Broadcasters |
| NABSW | National Association of Black Social Workers |
| NACDL | National Association of Criminal Defense Lawyers |
| NAFTA | North American Free Trade Agreement of 1993 |
| NAGHSR | National Association of Governors' Highway Safety Representatives |
| NALA | National Association of Legal Assistants |
| NAM | National Association of Manufacturers |
| NAR | National Association of Realtors |
| NARAL | National Abortion and Reproductive Rights Action League |
| NARF | Native American Rights Fund |
| NARS | National Archives and Record Service |
| NASA | National Aeronautics and Space Administration |
| NASD | National Association of Securities Dealers |
| NATO | North Atlantic Treaty Organization |
| NAVINFO | Navy Information Offices |
| NAWSA | National American Woman's Suffrage Association |
| NBA | National Bar Association; National Basketball Association |
| NBC | National Broadcasting Company |
| NBLSA | National Black Law Student Association |
| NBS | National Bureau of Standards |
| NCA | Noise Control Act; National Command Authorities |
| NCAA | National Collegiate Athletic Association |
| NCAC | National Coalition against Censorship |
| NCCB | National Consumer Cooperative Bank |
| NCE | Northwest Community Exchange |
| NCF | National Chamber Foundation |
| NCIP | National Crime Insurance Program |
| NCJA | National Criminal Justice Association |
| NCLB | National Civil Liberties Bureau |
| NCP | National contingency plan |
| NCSC | National Center for State Courts |
| NCUA | National Credit Union Administration |
| NDA | New drug application |
| N.D. Ill. | Northern District, Illinois |
| NDU | National Defense University |
| N.D. Wash. | Northern District, Washington |
| N.E. | North Eastern Reporter |
| N.E. 2d | North Eastern Reporter, Second Series |
| NEA | National Endowment for the Arts; National Education Association |

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| NEH | National Endowment for the Humanities |
| NEPA | National Environmental Protection Act; National Endowment Policy Act |
| NET Act | No Electronic Theft Act |
| NFIB | National Federation of Independent Businesses |
| NFIP | National Flood Insurance Program |
| NFL | National Football League |
| NFPA | National Federation of Paralegal Associations |
| NGLTF | National Gay and Lesbian Task Force |
| NHL | National Hockey League |
| NHRA | Nursing Home Reform Act of 1987 |
| NHTSA | National Highway Traffic Safety Administration |
| Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| NIEO | New International Economic Order |
| NIGC | National Indian Gaming Commission |
| NIH | National Institutes of Health |
| NIJ | National Institute of Justice |
| NIRA | National Industrial Recovery Act of 1933; National Industrial Recovery Administration |
| NIST | National Institute of Standards and Technology |
| N.J. | New Jersey Reports |
| N.J. Super. | New Jersey Superior Court Reports |
| NLEA | Nutrition Labeling and Education Act of 1990 |
| NLRA | National Labor Relations Act |
| NLRB | National Labor Relations Board |
| NMFS | National Marine Fisheries Service |
| No. | Number |
| NOAA | National Oceanic and Atmospheric Administration |
| NOC | National Olympic Committee |
| NOI | Nation of Islam |
| NOL | Net operating loss |
| NORML | National Organization for the Reform of Marijuana Laws |
| NOW | National Organization for Women |
| NOW LDEF | National Organization for Women Legal Defense and Education Fund |
| NOW/PAC | National Organization for Women Political Action Committee |
| NPDES | National Pollutant Discharge Elimination System |
| NPL | National priorities list |
| NPR | National Public Radio |
| NPT | Nuclear Non-Proliferation Treaty of 1970 |
| NRA | National Rifle Association; National Recovery Act |
| NRC | Nuclear Regulatory Commission |
| NRLC | National Right to Life Committee |
| NRTA | National Retired Teachers Association |
| NSA | National Security Agency |
| NSC | National Security Council |
| NSCLC | National Senior Citizens Law Center |
| NSF | National Science Foundation |
| NSFNET | National Science Foundation Network |
| NSI | Network Solutions, Inc. |
| NTIA | National Telecommunications and Information Administration |
| NTID | National Technical Institute for the Deaf |
| NTIS | National Technical Information Service |
| NTS | Naval Telecommunications System |
| NTSB | National Transportation Safety Board |
| NVRA | National Voter Registration Act |
| N.W. | North Western Reporter |
| N.W. 2d | North Western Reporter, Second Series |
| NWSA | National Woman Suffrage Association |
| N.Y. | New York Court of Appeals Reports |
| N.Y. 2d | New York Court of Appeals Reports, Second Series |
| N.Y.S. | New York Supplement Reporter |

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| N.Y.S. 2d | New York Supplement Reporter, Second Series |
| NYSE | New York Stock Exchange |
| NYSLA | New York State Liquor Authority |
| N.Y. Sup. | New York Supreme Court Reports |
| NYU | New York University |
| OAAU | Organization of Afro American Unity |
| OAP | Office of Administrative Procedure |
| OAS | Organization of American States |
| OASDI | Old-age, Survivors, and Disability Insurance Benefits |
| OASHDS | Office of the Assistant Secretary for Human Development Services |
| OCC | Office of Comptroller of the Currency |
| OCED | Office of Comprehensive Employment Development |
| OCHAMPUS | Office of Civilian Health and Medical Program of the Uniformed Services |
| OCSE | Office of Child Support Enforcement |
| OEA | Organización de los Estados Americanos |
| OEM | Original Equipment Manufacturer |
| OFCCP | Office of Federal Contract Compliance Programs |
| OFPP | Office of Federal Procurement Policy |
| OIC | Office of the Independent Counsel |
| OICD | Office of International Cooperation and Development |
| OIG | Office of the Inspector General |
| OJARS | Office of Justice Assistance, Research, and Statistics |
| OMB | Office of Management and Budget |
| OMPC | Office of Management, Planning, and Communications |
| ONP | Office of National Programs |
| OPD | Office of Policy Development |
| OPEC | Organization of Petroleum Exporting Countries |
| OPIC | Overseas Private Investment Corporation |
| Ops. Atts. Gen. | Opinions of the Attorneys-General of the United States |
| Ops. Comms. | Opinions of the Commissioners |
| OPSP | Office of Product Standards Policy |
| O.R. | Ontario Reports |
| OR | Official Records |
| OSHA | Occupational Safety and Health Act |
| OSHRC | Occupational Safety and Health Review Commission |
| OSM | Office of Surface Mining |
| OSS | Office of Strategic Services |
| OST | Office of the Secretary |
| OT | Office of Transportation |
| OTA | Office of Technology Assessment |
| OTC | Over-the-counter |
| OTS | Office of Thrift Supervisors |
| OUI | Operating under the influence |
| OVCI | Offshore Voluntary Compliance Initiative |
| OWBPA | Older Workers Benefit Protection Act |
| OWRT | Office of Water Research and Technology |
| P. | Pacific Reporter |
| P. 2d | Pacific Reporter, Second Series |
| PAC | Political action committee |
| Pa. Oyer and Terminer | Pennsylvania Oyer and Terminer Reports |
| PATCO | Professional Air Traffic Controllers Organization |
| PBGC | Pension Benefit Guaranty Corporation |
| PBS | Public Broadcasting Service; Public Buildings Service |
| P.C. | Privy Council (English Law Reports) |
| PC | Personal computer; politically correct |
| PCBs | Polychlorinated biphenyls |
| PCIJ | Permanent Court of International Justice |
| | Series A-Judgments and Orders (1922–30) |
| | Series B-Advisory Opinions (1922–30) |
| | Series A/B-Judgments, Orders, and Advisory Opinions (1931–40) |

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| PCIJ (cont'd.) | Series C-Pleadings, Oral Statements, and Documents relating to Judgments and Advisory Opinions (1923–42) |
| | Series D-Acts and Documents concerning the Organization of the World Court (1922 –47) |
| | Series E-Annual Reports (1925–45) |
| PCP | Phencyclidine |
| P.D. | Probate Division, English Law Reports (1876–1890) |
| PDA | Pregnancy Discrimination Act of 1978 |
| PD & R | Policy Development and Research |
| Pepco | Potomac Electric Power Company |
| Perm. Ct. of Arb. | Permanent Court of Arbitration |
| PES | Post-Enumeration Survey |
| Pet. | Peters' United States Supreme Court Reports |
| PETA | People for the Ethical Treatment of Animals |
| PGA | Professional Golfers Association |
| PGM | Program |
| PHA | Public Housing Agency |
| Phila. Ct. of Oyer and Terminer | Philadelphia Court of Oyer and Terminer |
| PhRMA | Pharmaceutical Research and Manufacturers of America |
| PHS | Public Health Service |
| PIC | Private Industry Council |
| PICJ | Permanent International Court of Justice |
| Pick. | Pickering's Massachusetts Reports |
| PIK | Payment in Kind |
| PINS | Persons in need of supervision |
| PIRG | Public Interest Research Group |
| P.L. | Public Laws |
| PLAN | Pro-Life Action Network |
| PLC | Plaintiffs' Legal Committee |
| PLE | Product liability expenses |
| PLI | Practicing Law Institute |
| PLL | Product liability loss |
| PLLP | Professional Limited Liability Partnership |
| PLO | Palestine Liberation Organization |
| PLRA | Prison Litigation Reform Act of 1995 |
| PNET | Peaceful Nuclear Explosions Treaty |
| PONY | Prostitutes of New York |
| POW-MIA | Prisoner of war-missing in action |
| Pratt | Frederic Thomas Pratt, *Law of Contraband of War, with a Selection of Cases from Papers of the Right Honourable Sir George Lee* (1856) |
| PRIDE | Prostitution to Independence, Dignity, and Equality |
| Proc. | Proceedings |
| PRP | Potentially responsible party |
| PSRO | Professional Standards Review Organization |
| PTO | Patents and Trademark Office |
| PURPA | Public Utilities Regulatory Policies Act |
| PUSH | People United to Serve Humanity |
| PUSH-Excel | PUSH for Excellence |
| PWA | Public Works Administration |
| PWSA | Ports and Waterways Safety Act of 1972 |
| Q.B. | Queen's Bench (England) |
| QTIP | Qualified Terminable Interest Property |
| Ralston's Rept. | Jackson Harvey Ralston, ed., *Venezuelan Arbitrations of 1903* (1904) |
| RC | Regional Commissioner |
| RCRA | Resource Conservation and Recovery Act |
| RCWP | Rural Clean Water Program |
| RDA | Rural Development Administration |
| REA | Rural Electrification Administration |
| Rec. des Decs. des Trib. Arb. Mixtes | G. Gidel, ed., *Recueil des décisions des tribunaux arbitraux mixtes, institués par les traités de paix* (1922–30) |
| Redmond | Vol. 3 of Charles I. Bevans, *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled by C. F. Redmond) (1969) |
| RESPA | Real Estate Settlement Procedure Act of 1974 |
| RFC | Reconstruction Finance Corporation |

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| RFRA | Religious Freedom Restoration Act of 1993 |
| RIAA | Recording Industry Association of America |
| RICO | Racketeer Influenced and Corrupt Organizations |
| RLUIPA | Religious Land Use and Institutionalized Persons Act |
| RNC | Republican National Committee |
| Roscoe | Edward Stanley Roscoe, ed., *Reports of Prize Cases Determined in the High Court Admiralty before the Lords Commissioners of Appeals in Prize Causes and before the judicial Committee of the Privy Council from 1745 to 1859* (1905) |
| ROTC | Reserve Officers' Training Corps |
| RPP | Representative Payee Program |
| R.S. | Revised Statutes |
| RTC | Resolution Trust Corp. |
| RUDs | Reservations, understandings, and declarations |
| Ryan White CARE Act | Ryan White Comprehensive AIDS Research Emergency Act of 1990 |
| SAC | Strategic Air Command |
| SACB | Subversive Activities Control Board |
| SADD | Students against Drunk Driving |
| SAF | Student Activities Fund |
| SAIF | Savings Association Insurance Fund |
| SALT | Strategic Arms Limitation Talks |
| SALT I | Strategic Arms Limitation Talks of 1969–72 |
| SAMHSA | Substance Abuse and Mental Health Services Administration |
| Sandf. | Sandford's New York Superior Court Reports |
| S and L | Savings and loan |
| SARA | Superfund Amendment and Reauthorization Act |
| SAT | Scholastic Aptitude Test |
| Sawy. | Sawyer's United States Circuit Court Reports |
| SBA | Small Business Administration |
| SBI | Small Business Institute |
| SCCC | South Central Correctional Center |
| SCLC | Southern Christian Leadership Conference |
| Scott's Repts. | James Brown Scott, ed., *The Hague Court Reports*, 2 vols. (1916–32) |
| SCS | Soil Conservation Service; Social Conservative Service |
| SCSEP | Senior Community Service Employment Program |
| S.Ct. | Supreme Court Reporter |
| S.D. Cal. | Southern District, California |
| S.D. Fla. | Southern District, Florida |
| S.D. Ga. | Southern District, Georgia |
| SDI | Strategic Defense Initiative |
| S.D. Me. | Southern District, Maine |
| S.D.N.Y. | Southern District, New York |
| SDS | Students for a Democratic Society |
| S.E. | South Eastern Reporter |
| S.E. 2d | South Eastern Reporter, Second Series |
| SEA | Science and Education Administration |
| SEATO | Southeast Asia Treaty Organization |
| SEC | Securities and Exchange Commission |
| Sec. | Section |
| SEEK | Search for Elevation, Education and Knowledge |
| SEOO | State Economic Opportunity Office |
| SEP | Simplified employee pension plan |
| Ser. | Series |
| Sess. | Session |
| SGLI | Servicemen's Group Life Insurance |
| SIP | State implementation plan |
| SLA | Symbionese Liberation Army |
| SLAPPs | Strategic Lawsuits Against Public Participation |
| SLBM | Submarine-launched ballistic missile |
| SNCC | Student Nonviolent Coordinating Committee |
| So. | Southern Reporter |
| So. 2d | Southern Reporter, Second Series |
| SPA | Software Publisher's Association |
| Spec. Sess. | Special Session |
| SPLC | Southern Poverty Law Center |
| SRA | Sentencing Reform Act of 1984 |

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| SS | *Schutzstaffel* (German, "Protection Echelon") |
| SSA | Social Security Administration |
| SSI | Supplemental Security Income |
| START I | Strategic Arms Reduction Treaty of 1991 |
| START II | Strategic Arms Reduction Treaty of 1993 |
| Stat. | United States Statutes at Large |
| STS | Space Transportation Systems |
| St. Tr. | State Trials, English |
| STURAA | Surface Transportation and Uniform Relocation Assistance Act of 1987 |
| Sup. Ct. of Justice, Mexico | Supreme Court of Justice, Mexico |
| Supp. | Supplement |
| S.W. | South Western Reporter |
| S.W. 2d | South Western Reporter, Second Series |
| SWAPO | South-West Africa People's Organization |
| SWAT | Special Weapons and Tactics |
| SWP | Socialist Workers Party |
| TDP | Trade and Development Program |
| Tex. Sup. | Texas Supreme Court Reports |
| THAAD | Theater High-Altitude Area Defense System |
| THC | Tetrahydrocannabinol |
| TI | Tobacco Institute |
| TIA | Trust Indenture Act of 1939 |
| TIAS | Treaties and Other International Acts Series (United States) |
| TNT | Trinitrotoluene |
| TOP | Targeted Outreach Program |
| TPUS | Transportation and Public Utilities Service |
| TQM | Total Quality Management |
| Tripartite Claims Comm., Decs. and Ops. | Tripartite Claims Commission (United States, Austria, and Hungary), Decisions and Opinions |
| TRI-TAC | Joint Tactical Communications |
| TRO | Temporary restraining order |
| TS | Treaty Series, United States |
| TSCA | Toxic Substance Control Act |
| TSDs | Transporters, storers, and disposers |
| TSU | Texas Southern University |
| TTBT | Threshold Test Ban Treaty |
| TV | Television |
| TVA | Tennessee Valley Authority |
| TWA | Trans World Airlines |
| UAW | United Auto Workers; United Automobile, Aerospace, and Agricultural Implements Workers of America |
| U.C.C. | Uniform Commercial Code; Universal Copyright Convention |
| U.C.C.C. | Uniform Consumer Credit Code |
| UCCJA | Uniform Child Custody Jurisdiction Act |
| UCMJ | Uniform Code of Military Justice |
| UCPP | Urban Crime Prevention Program |
| UCS | United Counseling Service |
| UDC | United Daughters of the Confederacy |
| UFW | United Farm Workers |
| UHF | Ultrahigh frequency |
| UIFSA | Uniform Interstate Family Support Act |
| UIS | Unemployment Insurance Service |
| UMDA | Uniform Marriage and Divorce Act |
| UMTA | Urban Mass Transportation Administration |
| U.N. | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCTAD | United Nations Conference on Trade and Development |
| UN Doc. | United Nations Documents |
| UNDP | United Nations Development Program |
| UNEF | United Nations Emergency Force |
| UNESCO | United Nations Educational, Scientific, and Cultural Organization |
| UNICEF | United Nations Children's Fund (formerly United Nations International Children's Emergency Fund) |
| UNIDO | United Nations Industrial and Development Organization |
| Unif. L. Ann. | Uniform Laws Annotated |
| UN Repts. Intl. Arb. Awards | United Nations Reports of International Arbitral Awards |

| | |
|---|---|
| UNTS | United Nations Treaty Series |
| UPI | United Press International |
| URESA | Uniform Reciprocal Enforcement of Support Act |
| U.S. | United States Reports |
| U.S.A. | United States of America |
| USAF | United States Air Force |
| USA PATRIOT Act | Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act |
| U.S. App. D.C. | United States Court of Appeals for the District of Columbia |
| U.S.C. | United States Code; University of Southern California |
| U.S.C.A. | United States Code Annotated |
| U.S.C.C.A.N. | United States Code Congressional and Administrative News |
| USCMA | United States Court of Military Appeals |
| USDA | U.S. Department of Agriculture |
| USES | United States Employment Service |
| USF | U.S. Forestry Service |
| USFA | United States Fire Administration |
| USGA | United States Golf Association |
| USICA | International Communication Agency, United States |
| USMS | U.S. Marshals Service |
| USOC | U.S. Olympic Committee |
| USSC | U.S. Sentencing Commission |
| USSG | United States Sentencing Guidelines |
| U.S.S.R. | Union of Soviet Socialist Republics |
| UST | United States Treaties |
| USTS | United States Travel Service |
| v. | *Versus* |
| VA | Veterans Administration |
| VAR | Veterans Affairs and Rehabilitation Commission |
| VAWA | Violence against Women Act |
| VFW | Veterans of Foreign Wars |
| VGLI | Veterans Group Life Insurance |
| Vict. | Queen Victoria (Great Britain) |
| VIN | Vehicle identification number |
| VISTA | Volunteers in Service to America |
| VJRA | Veterans Judicial Review Act of 1988 |
| V.L.A. | Volunteer Lawyers for the Arts |
| VMI | Virginia Military Institute |
| VMLI | Veterans Mortgage Life Insurance |
| VOCAL | Victims of Child Abuse Laws |
| VRA | Voting Rights Act |
| WAC | Women's Army Corps |
| Wall. | Wallace's United States Supreme Court Reports |
| Wash. 2d | Washington Reports, Second Series |
| WAVES | Women Accepted for Volunteer Service |
| WCTU | Women's Christian Temperance Union |
| W.D. Wash. | Western District, Washington |
| W.D. Wis. | Western District, Wisconsin |
| WEAL | *West's Encyclopedia of American Law,* Women's Equity Action League |
| Wend. | Wendell's New York Reports |
| WFSE | Washington Federation of State Employees |
| Wheat. | Wheaton's United States Supreme Court Reports |
| Wheel. Cr. Cases | Wheeler's New York Criminal Cases |
| WHISPER | Women Hurt in Systems of Prostitution Engaged in Revolt |
| Whiteman | Marjorie Millace Whiteman, *Digest of International Law,* 15 vols. (1963–73) |
| WHO | World Health Organization |
| WIC | Women, Infants, and Children program |
| Will. and Mar. | King William and Queen Mary (Great Britain) |
| WIN | WESTLAW Is Natural; Whip Inflation Now; Work Incentive Program |
| WIPO | World Intellectual Property Organization |
| WIU | Workers' Industrial Union |
| W.L.R. | Weekly Law Reports, England |
| WPA | Works Progress Administration |
| WPPDA | Welfare and Pension Plans Disclosure Act |

| | |
|---|---|
| WTO | World Trade Organization |
| WWI | World War I |
| WWII | World War II |
| Yates Sel. Cas. | Yates's New York Select Cases |
| YMCA | Young Men's Christian Association |
| YWCA | Young Women's Christian Association |

# WEST'S ENCYCLOPEDIA *of* AMERICAN LAW

2ND EDITION

# How to Use This Book

❚1❚ Article Title

❚2❚ Definition in italics with Latin translation provided

❚3❚ First-level subhead

❚4❚ Timeline for subject of biography, including general historical events and life events

❚5❚ Sidebar expands upon an issue addressed briefly in the article

❚6❚ Quotation from subject of biography

❚7❚ Biography of contributor to American law

❚8❚ Internal cross-reference to entry within WEAL

❚9❚ In Focus article examines a controversial or complex aspect of the article topic

❚10❚ Cross-references at end of article

❚11❚ Full cite for case

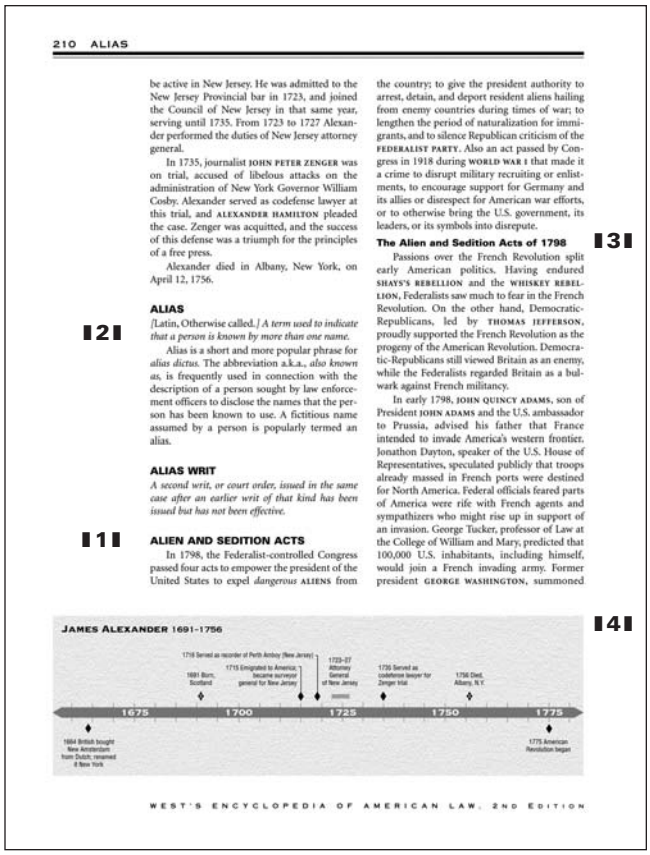



be active in New Jersey. He was admitted to the New Jersey Provincial bar in 1723, and joined the Council of New Jersey in that same year, serving until 1735. From 1723 to 1727 Alexander performed the duties of New Jersey attorney general.

In 1735, journalist JOHN PETER ZENGER was on trial, accused of libelous attacks on the administration of New York Governor William Cosby. Alexander served as codefense lawyer at this trial, and ALEXANDER HAMILTON pleaded the case. Zenger was acquitted, and the success of this defense was a triumph for the principles of a free press.

Alexander died in Albany, New York, on April 12, 1756.

**ALIAS**

❚2❚ *[Latin, Otherwise called.] A term used to indicate that a person is known by more than one name.*

Alias is a short and more popular phrase for *alias dictus.* The abbreviation a.k.a., *also known as,* is frequently used in connection with the description of a person sought by law enforcement officers to disclose the names that the person has been known to use. A fictitious name assumed by a person is popularly termed an alias.

**ALIAS WRIT**

*A second writ, or court order, issued in the same case after an earlier writ of that kind has been issued but has not been effective.*

❚1❚ **ALIEN AND SEDITION ACTS**

In 1798, the Federalist-controlled Congress passed four acts to empower the president of the United States to expel *dangerous* ALIENS from the country; to give the president authority to arrest, detain, and deport resident aliens hailing from enemy countries during times of war; to lengthen the period of naturalization for immigrants, and to silence Republican criticism of the FEDERALIST PARTY. Also an act passed by Congress in 1918 during WORLD WAR I that made it a crime to disrupt military recruiting or enlistments, to encourage support for Germany and its allies or disrespect for American war efforts, or to otherwise bring the U.S. government, its leaders, or its symbols into disrepute.

❚3❚ **The Alien and Sedition Acts of 1798**

Passions over the French Revolution split early American politics. Having endured SHAYS'S REBELLION and the WHISKEY REBELLION, Federalists saw much to fear in the French Revolution. On the other hand, Democratic-Republicans, led by THOMAS JEFFERSON, proudly supported the French Revolution as the progeny of the American Revolution. Democratic-Republicans still viewed Britain as an enemy, while the Federalists regarded Britain as a bulwark against French militancy.

In early 1798, JOHN QUINCY ADAMS, son of President JOHN ADAMS and the U.S. ambassador to Prussia, advised his father that France intended to invade America's western frontier. Jonathon Dayton, speaker of the U.S. House of Representatives, speculated publicly that troops already massed in French ports were destined for North America. Federal officials feared parts of America were rife with French agents and sympathizers who might rise up in support of an invasion. George Tucker, professor of Law at the College of William and Mary, predicted that 100,000 U.S. inhabitants, including himself, would join a French invading army. Former president GEORGE WASHINGTON, summoned

❚4❚

❚5❚

## The First Payments of Social Security

After the enactment of the Social Security Act of 1935 (42 U.S.C.A. § 301 et seq.) and the creation of the Social Security Administration (SSA), the federal government had a short time to establish the program before beginning to pay benefits. Monthly benefits were to begin in 1940. The period from 1937 to 1940 was to be used both to build up the trust funds and to provide a minimum period for participation for persons to qualify for monthly benefits.

From 1937 until 1940, however, Social Security paid benefits in the form of a single, lump-sum payment. The purpose of these one-time payments was to provide some compensation to people who contributed to the program but would not participate long enough to be vested for monthly benefits.

The first applicant for a lump-sum benefit was Ernest Ackerman, a Cleveland motorman who retired one day after the Social Security Program began. During his one day of participation in the program, five cents was withheld from Ackerman's pay for Social Security, and upon retiring, he received a lump-sum payment of seventeen cents.

Payments of monthly benefits began in January 1940. On January 31, 1940, the first monthly retirement check was issued to Ida May Fuller of Ludlow, Vermont, in the amount of $22.54. Fuller died in January 1975 at the age of one hundred. During her thirty-five years as a beneficiary, she received more than $20,000 in benefits.

tions to Social Security. There is no financial need requirement to be satisfied. Once a worker qualifies for protection, his family is also entitled to protection. The entire program is geared toward helping families as a matter of social policy.

Two large funds of money are held in trust to pay benefits earned by people under OASDI: the Old Age and Survivors Trust Fund and the Disability Insurance Trust Fund. As workers and employers make payroll contributions to these funds, money is paid out in benefits to people currently qualified to receive monthly checks.

The OASDI program is funded by payroll taxes levied on employees and their employers and on the self-employed. The tax is imposed upon the employee's taxable income, up to a maximum taxable amount, with the employer contributing an equal amount. The self-employed person contributes twice the amount levied on an employee. In 2003 the rate was 6.2 percent, levied on earned income up to a maximum of $87,000.

**Old Age Benefits** A person becomes eligible for Social Security old age benefits by working a minimum number of calendar quarters. The number of quarters required for full insurance increases with the worker's age. Forty quarters is the maximum requirement. The individual is credited for income up to the maximum amount of money covered by Social Security for those years. This amount is adjusted to reflect the impact of inflation on normal earnings and ensure that a worker who pays increasing Social Security contributions during his or her work life will receive retirement benefits that keep pace with inflation.

Persons born before 1950 can retire at age 65 with full benefits based on their average income during their working years. For those born between 1950 and 1960, the retirement age for full benefits has increased to age 66. Persons born in 1960 or later will not receive full retirement benefits until age 67. Any person, however, may retire at age 62 and receive less than full benefits. At age 65, a worker's spouse who has not contributed to Social Security receives 50 percent of the amount paid to the worker.

Since 1975 Social Security benefits have increased annually to offset the corrosive effects of inflation on fixed incomes. These increases, known as cost of living allowances (COLAs), are based on the annual increase in consumer prices. Allowing benefits to increase automatically ended the need for special acts of Congress, but it has also steadily increased the cost of the Social Security Program.

have the same inheritance rights as other children. The ruling was believed to be the first on the controversial issue by any state supreme court.

Also in January 2002, Marshall addressed the Massachusetts Bar Association Conference, where she called for "a revolution in the administration of justice" stating that the court system needed to improve its management system as well as its staffing and budget controls. In March 2002, her discussion of the court system's problems were amplified in a 52-page report that was published by a blue-ribbon panel appointed by Marshall.

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**16**

*THE GOVERNMENT [THAT THE FRAMERS OF THE CONSTITUTION] DEVISED REQUIRED SEVERAL AMENDMENTS, A CIVIL WAR, AND MOMENTOUS SOCIAL TRANSFORMATION TO ATTAIN THE SYSTEM OF CONSTITUTIONAL GOVERNMENT, AND ITS RESPECT FOR THE INDIVIDUAL FREEDOMS AND HUMAN RIGHTS, THAT WE HOLD AS FUNDAMENTAL TODAY.*
*THURGOOD MARSHALL*

## MARSHALL PLAN

After **WORLD WAR II**, Europe was devastated and urgently needed an organized plan for reconstruction and economic and technical aid. The Marshall Plan was initiated in 1947 to meet this need.

The originator of the plan, U.S. Secretary of State George C. Marshall, introduced it in a speech at Harvard University on June 5, 1947. He pointed out two basic reasons for providing aid to Europe: the United States sought the reestablishment of the European countries as independent nations capable of conducting valuable trade with the United States; and the threat of a Communist takeover was more prevalent in countries that were suffering economic depression.

In 1947 a preliminary conference to discuss the terms of the program convened in Paris. The Soviet Union was invited to attend but subsequently withdrew from the program, as did other Soviet countries.

Sixteen European countries eventually participated, and, in July 1947, the Committee for European Economic Cooperation was established to allow representatives from member countries to draft a report that listed their requirements for food, supplies, and technical assistance for a four-year period.

The Committee for European Economic Cooperation subsequently became the Organization of European Economic Cooperation, an expanded and permanent organization that was responsible for submitting petitions for aid. In 1948, Congress passed the Economic Cooperation Act (62 Stat. 137), establishing funds for the Marshall Plan to be administered under the Economic Cooperation Administration, which was directed by Paul G. Hoffman.

Between 1948 and 1952, the sixteen-member countries received more than $13 billion dollars in aid under the Marshall Plan. The plan was generally regarded as a success that led to industrial and agricultural production, while stifling the Communist movement. The plan was not without its critics, however, and many Europeans believed the **COLD WAR** hostilities between the Soviet nations and the free world were aggravated by it.

**17**

## ◊ MARSHALL, THURGOOD

Thurgood Marshall, the first African American to serve on the U.S. Supreme Court, saw law as a catalyst for social change. For nearly 60 years, as both a lawyer and a jurist, Marshall worked to dismantle the system of **SEGREGATION** and improve the legal and social position of minorities.

Marshall was born July 2, 1908, in Baltimore, the son of a Pullman porter and a schoolteacher. He was a graduate of Lincoln University, a small, all-black college in Pennsylvania, and Howard University Law School in Washington, D.C. At Howard, Marshall excelled under the guidance of Vice Dean **CHARLES HAMILTON HOUSTON**, the first African American to win a case before the U.S. Supreme Court. Houston encouraged his students to become not just lawyers but "social engineers" who could use the legal system to improve society. Marshall graduated first in his law class in 1933.

Marshall's attendance at predominantly black Howard University illustrates the barriers faced by African Americans during the early twentieth century. Although Marshall wished to attend law school at the University of Maryland (a public institution in his home town of Baltimore), he was prohibited by law from doing so because of his race. This injustice helped set Marshall on a course of opposing all forms of official segregation that denied equal opportunities to African Americans.

After law school, Marshall set up a practice in Baltimore, representing indigent clients in civil rights cases. In 1936, his mentor Houston offered him a position with the National Association for the Advancement of Colored People (**NAACP**),





and in 1940, Marshall became director of the **NAACP LEGAL DEFENSE AND EDUCATIONAL FUND**, a position he held until 1961. Determined to eliminate segregation, Marshall coordinated a nationwide campaign to integrate higher education. He filed several successful lawsuits against public graduate and professional schools that refused to accept African-American students. These suits paved the way for similar cases at the high school and elementary school levels. Marshall also journeyed throughout the deep South, traveling fifty thousand miles a year to fight **JIM CROW LAWS** (a series of laws that provided for racial segregation in the South) and to represent criminal defendants.

Marshall argued 32 cases before the U.S. Supreme Court and won 29 of them. No doubt his most famous and far-reaching triumph before the High Court was **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). In that case, the father of African-American student Linda Brown sued the school board of Topeka, Kansas, over its segregation policy. Brown was required by law to attend an all African-American school several blocks from her home even though an all white public school was located in her own neighborhood. Under Kansas law, cities of more than 15,000 people, such as Topeka, could choose to operate segregated schools. Marshall argued that these segregated schools, defended by officials as "separate but equal," were unconstitutional.

**18**

The **SEPARATE-BUT-EQUAL** doctrine originated in **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), a case allowing segregated public accommodations for whites

*Thurgood Marshall.*
LIBRARY OF CONGRESS

and blacks. In a plainspoken argument, Marshall dismissed as fallacy the notion that segregated schools offered the same educational experiences to black and white students. Sociological and psychological studies demonstrated that black children were in fact harmed by the policy of school segregation. The students' self-esteem was damaged and their future diminished when they were forced to accept inadequate facilities, equipment, and educational opportunities. Marshall argued that the only purpose segregation served was to perpetuate the myth of African-Americans' inferiority. A unanimous Court agreed and struck down the separate-but-equal doctrine, a

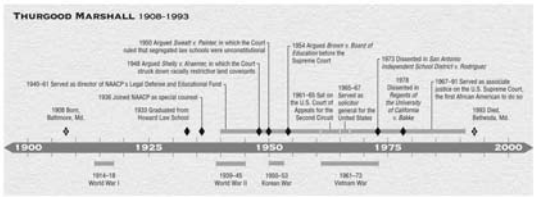






# THE FUTURE OF SOCIAL SECURITY

**19**

The payment of **OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE** (OASDI) benefits has been a cornerstone of U.S. social welfare policy since the establishment of the **SOCIAL SECURITY ADMINISTRATION** in 1935. At the same time, the long-term financial stability of OASDI has been a constant worry. In the early years of the twenty-first century, concerns about Social Security mounted as policy makers assessed the impact of the retirement of the "Baby Boom" generation. Many younger people raised the issue of "generation equity." They express doubt that Social Security benefits will be available when they retire, and anger that they will be forced to pay, through payroll taxes, for the baby boomers' retirement benefits.

Reform of the Social Security system has always been a political hot potato. Retirees and those approaching retirement form a strong **LOBBYING** force, and they zealously protect their benefits. Employers and employees are equally vocal in their opposition to higher payroll taxes to fund OASDI. Thus, changes in Social Security required bipartisan support, which materialized in the face of an impending Social Security crisis. The 1982–83 National Commission on Social Security Reform successfully secured from Congress the short-term financing of OASDI. As a result, Congress passed a series of laws meant to accumulate surpluses as a hedge against future burdens. The Social Security surplus is the amount by which revenue from the federal payroll tax exceeds the amount of Social Security benefits paid out.

IN FOCUS

Shortly after these new laws went into effect, Social Security began running a surplus. Surplus Social Security revenue can be used to fund other government programs and to help retire the national debt. During the favorable economic climate of the late 1990s, Congress began to use the surplus to pay down the federal debt, hoping to better position the government to meet its obligations to future retirees. And, in 2000, the federal government generated enough revenue so that the entire Social Security surplus was available for paying off debt.

The state of Social Security became a major campaign issue in the 2000 elections, with both Republicans and Democrats attempting to appear as though they were guardians of Social Security assets. Candidates from both parties promised to create a "lockbox," meaning that the Social Security surplus would be spent entirely on debt retirement. With the advent of fiscally lean years in the early 2000s, the lockbox approach was largely disregarded by politicians who advanced other ideas about what to do with Social Security surpluses. These ideas included using the surplus to help offset decreases in revenues brought about by tax cuts and using the surplus to fund new or expanded spending initiatives.

Analysts argue that the real issue often is clouded. It is not how to spend the surplus now, but how to maintain the long-term solvency of the Social Security trust fund. Planners estimate that the income from the trust fund will exceed expenses each year until 2020. The trust fund balances will then start to decline as investments are redeemed to meet the increased expenses from a swelling retired workforce. Although it is estimated that 75 percent of the costs would continue to be met from current payroll and income taxes, in the absence of any changes, full benefits could not be paid beginning in 2030.

In its 1996 report, the Social Security Administration's Advisory Council looked at various long-term financing options for OASDI. The council could not reach consensus on a specific long-term plan, but it did suggest several types of financing that represent a marked departure from previous efforts to fund Social Security. The council noted that past efforts have generally featured cutting benefits and raising tax rates on a "pay-as-you-go" basis. The council agreed that this approach must be changed and offered three ways of restoring financial solvency.

One approach, called Maintenance of Benefits (MB), calls for an increase in income taxes on OASDI benefits, a redirection of some revenue from other trust funds, and, most importantly, the adoption of a plan allowing the federal government to invest a portion of the trust fund assets directly in common stocks. Rates of returns on stocks have historically exceeded those on federal government bonds, where all Social Security

A person who continues to work past the retirement age may lose some benefits because Social Security is designed to replace lost earnings. If earnings from employment do not exceed the amount specified by law, the person receives the full benefits. If earnings are greater than that amount, one dollar of benefit is withheld for every two dollars in wages earned above the exempt amount. Once a person reaches age 70, however, he does not have to report earnings to the SSA, and the benefit is not reduced.

**Survivors' Benefits** Survivors' benefits are paid to family members when a worker dies. Survivors can receive benefits if the deceased worker was employed and contributed to Social





momentous victory for Marshall, affecting public schools in twenty-one states.

Marshall was appointed to the U.S. Court of Appeals for the Second Circuit in 1961, and served there until 1965 when he was named **SOLICITOR GENERAL** for the United States. He was appointed to the U.S. Supreme Court in 1967 by President **LYNDON B. JOHNSON** and served as an associate justice for 24 years.

While on the Court, Marshall was known more for his impassioned dissents than for his majority opinions. In particular, as a staunch opponent of **CAPITAL PUNISHMENT**, he regularly voiced his disagreement with the majority in death penalty cases. He was also a firm backer of **AFFIRMATIVE ACTION** and contributed one of his most famous dissents in **REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE**, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In that case, Marshall criticized the high court's ruling that a public medical school's policy of reserving 16 of 100 spots for minority students was unconstitutional. Marshall also dissented in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), disagreeing with the majority view that a Texas property tax system used to fund public education was acceptable, even though it allowed wealthier districts to provide a better school system for students in those districts than less wealthy districts could provide. Marshall objected strongly to the property tax arrangement, claiming that it deprived poor children of an equal education.

Marshall wrote the majority opinion in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968), in which the Court declared that a shopping center was a public forum from which picketers could not be barred by private owners.

Marshall retired from the Court in 1991, but continued his criticism of government policies that were detrimental to African Americans or other disenfranchised groups.

Marshall died on January 24, 1993, in Bethesda, Maryland. Upon Marshall's death, nearly 20,000 mourners filed by his casket during the 12 hours it lay in state in the Great Hall of the U.S. Supreme Court.

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CROSS-REFERENCES

**10**

*Civil Rights Movement; Integration; School Desegregation.*

## MARTIAL LAW

*The exercise of government and control by military authorities over the civilian population of a designated territory.*

**11**

Martial law is an extreme and rare measure used to control society during war or periods of civil unrest or chaos. According to the Supreme Court, the term *martial law* carries no precise meaning (*Duncan v. Kahanamoku*, 327 U.S. 304, 66 S. Ct. 606, 90 L. Ed. 688 [1946]). However, most declarations of martial law have some common features. Generally, the institution of martial law contemplates some use of military force. To a varying extent, depending on the martial law order, government military personnel have the authority to make and enforce civil and criminal laws. Certain civil liberties may be suspended, such as the right to be free from unreasonable **SEARCHES AND SEIZURES**, **FREEDOM OF ASSOCIATION**, and freedom of movement. And the writ of **HABEAS CORPUS** may be suspended (this writ allows persons who are unlawfully imprisoned to gain freedom through a court proceeding).

In the United States, martial law has been instituted on the national level only once, during the Civil War, and on a regional level only once, during **WORLD WAR II**. Otherwise, it has been limited to the states. Uprisings, political protests, labor strikes, and riots have, at various times, caused several state governors to declare some measure of martial law.

Martial law on the national level may be declared by Congress or the president. Under

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## DEDICATION

*West's Encyclopedia of American Law (WEAL)* is dedicated to librarians and library patrons throughout the United States and beyond. Your interest in the American legal system helps to expand and fuel the framework of our Republic.

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# PREFACE

The U.S. legal system is admired around the world for the freedoms it allows the individual and the fairness with which it attempts to treat all persons. On the surface, it may seem simple, yet those who have delved into it know that this system of federal and state constitutions, statutes, regulations, and common-law decisions is elaborate and complex. It derives from the English common law, but includes principles older than England, along with some principles from other lands. The U.S. legal system, like many others, has a language all its own, but too often it is an unfamiliar language: many concepts are still phrased in Latin. The second edition of *West's Encyclopedia of American Law (WEAL)* explains legal terms and concepts in everyday language, however. It covers a wide variety of persons, entities, and events that have shaped the U.S. legal system and influenced public perceptions of it.

## MAIN FEATURES OF THIS SET

### Entries

This encyclopedia contains nearly 5,000 entries devoted to terms, concepts, events, movements, cases, and persons significant to U.S. law. Entries on legal terms contain a definition of the term, followed by explanatory text if necessary. Entries are arranged alphabetically in standard encyclopedia format for ease of use. A wide variety of additional features, listed later in this preface, provide interesting background and supplemental information.

**Definitions** Every entry on a legal term is followed by a definition, which appears at the beginning of the entry and is italicized. The Dictionary and Indexes volume includes a glossary containing all the definitions from *WEAL*.

**Further Readings** To facilitate further research, a list of Further Readings is included at the end of a majority of the main entries.

**Cross-References** *WEAL* provides two types of cross-references, within and following entries. Within the entries, terms are set in small capital letters—for example, LIEN—to indicate that they have their own entry in the encyclopedia. At the end of the entries, related entries the reader may wish to explore are listed alphabetically by title.

Blind cross-reference entries are also included to direct the user to other entries throughout the set.

### In Focus Essays

In Focus essays accompany related entries and provide additional facts, details, and arguments on particularly interesting, important, or controversial issues raised by those entries. The subjects covered include hotly contested issues, such as abortion, capital punishment, and gay rights; detailed processes, such as the Food and Drug Administration's approval process for new drugs; and important historical or social issues, such as debates over the formation of the U.S. Constitution.

### Sidebars

Sidebars provide brief highlights of some interesting facet of accompanying entries. They

complement regular entries and In Focus essays by adding informative details. Sidebar topics include the Million Man March and the branches of the U.S. armed services. Sidebars appear at the top of a text page and are set in a box.

### Biographies

*WEAL* profiles a wide variety of interesting and influential people—including lawyers, judges, government and civic leaders, and historical and modern figures—who have played a part in creating or shaping U.S. law. Each biography includes a timeline, which shows important moments in the subject's life as well as important historical events of the period. Biographies appear alphabetically by the subject's last name.

## ADDITIONAL FEATURES OF THIS SET

**Enhancements** Throughout *WEAL*, readers will find a broad array of photographs, charts, graphs, manuscripts, legal forms, and other visual aids enhancing the ideas presented in the text.

**Indexes** *WEAL* features a cases index and a cumulative index in a separate volume.

### Appendixes

Three appendix volumes are included with *WEAL*, containing hundreds of pages of documents, laws, manuscripts, and forms fundamental to and characteristic of U.S. law.

### Milestone Cases in the Law

A special Appendix volume entitled Milestones in the Law, allows readers to take a close look at landmark cases in U.S. law. Readers can explore the reasoning of the judges and the arguments of the attorneys that produced major decisions on important legal and social issues. Included in each Milestone are the opinions of the lower courts; the briefs presented by the parties to the U.S. Supreme Court; and the decision of the Supreme Court, including the majority opinion and all concurring and dissenting opinions for each case.

### Primary Documents

There is also an Appendix volume containing more than 60 primary documents, such as the English Bill of Rights, Martin Luther King Jr.'s Letter from Brimingham Jail, and several presidential speeches.

### Citations

Wherever possible, *WEAL* entries include citations for cases and statutes mentioned in the text. These allow readers wishing to do additional research to find the opinions and statutes cited. Two sample citations, with explanations of common citation terms, can be seen below and opposite.

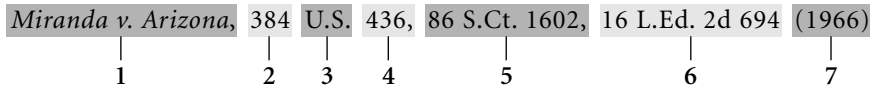


1. *Case title.* The title of the case is set in i and indicates the names of the parties. The suit in this sample citation was between Ernesto A. Miranda and the state of Arizona.
2. *Reporter volume number.* The number preceding the reporter name indicates the reporter volume containing the case. (The volume number appears on the spine of the reporter, along with the reporter name).
3. *Reporter name.* The reporter name is abbreviated. The suit in the sample citation is from the reporter, or series of books, called *U.S. Reports,* which contains cases from the U.S. Supreme Court. (Numerous reporters publish cases from the federal and state courts.)
4. *Reporter page.* The number following the reporter name indicates the reporter page on which the case begins.
5. *Additional reporter page.* Many cases may be found in more than one reporter. The suit in the sample citation also appears in volume 86 of the *Supreme Court Reporter*, beginning on page 1602.
6. *Additional reporter citation.* The suit in the sample citation is also reported in volume 16 of the *Lawyer's Edition*, second series, beginning on page 694.
7. *Year of decision.* The year the court issued its decision in the case appears in parentheses at the end of the cite.

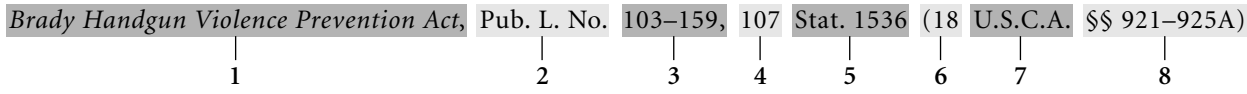


1. *Statute title.*
2. *Public law number.* In the sample citation, the number 103 indicates this law was passed by the 103d Congress, and the number 159 indicates it was the 159th law passed by that Congress.
3. *Reporter volume number.* The number preceding the reporter abbreviation indicates the reporter volume containing the statute.
4. *Reporter name.* The reporter name is abbreviated. The statute in the sample citation is from *Statutes at Large.*
5. *Reporter page.* The number following the reporter abbreviation indicates the reporter page on which the statute begins.
6. *Title number.* Federal laws are divided into major sections with specific titles. The number preceding a reference to the U.S. Code stands for the section called Crimes and Criminal Procedure.
7. *Additional reporter.* The statute in the sample citation may also be found in the *U.S. Code Annotated.*
8. *Section numbers.* The section numbers following a reference to the *U.S. Code Annotated* indicate where the statute appears in that reporter.

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# D (cont.)

## DOUBLE ENTRY

*A bookkeeping system that lists each transaction twice in the ledger.*

Double-entry bookkeeping is a method whereby every transaction is shown as both a debit and a credit. This is done through the use of horizontal rows and vertical columns of numbers. The reason for the use of this bookkeeping method is that if the total of horizontal rows and vertical columns is not the same, it is easier to find mistakes than when the records are kept with only a single entry for each item.

## DOUBLE INDEMNITY

*A term of an insurance policy by which the insurance company promises to pay the insured or the beneficiary twice the amount of coverage if loss occurs due to a particular cause or set of circumstances.*

Double indemnity clauses are found most often in life insurance policies. In the case of the accidental death of the insured, the insurance company will pay the beneficiary of the policy twice its face value. Such a provision is usually financed through the payment of higher premiums than those paid for a policy that entitles a beneficiary to recover only the face amount of the policy, regardless of how the insured died.

In cases where the cause of death is unclear, the insurance company need not pay the proceeds until the accidental nature of death is sufficiently established by a PREPONDERANCE OF EVIDENCE. A beneficiary of such a policy may sue an insurance company for breach of contract to enforce his or her right to the proceeds, whenever necessary.

## DOUBLE INSURANCE

*Duplicate protection provided when two companies deal with the same individual and undertake to indemnify that person against the same losses.*

When an individual has double insurance, he or she has coverage by two different insurance companies upon the identical interest in the identical subject matter. If a HUSBAND AND WIFE have duplicate medical insurance coverage protecting one another, they would thereby have double insurance. An individual can rarely collect on double insurance, however, since this would ordinarily constitute a form of UNJUST ENRICHMENT, and a majority of insurance contracts contain provisions that prohibit this.

## DOUBLE JEOPARDY

*A second prosecution for the same offense after acquittal or conviction or multiple punishments for same offense. The evil sought to be avoided by prohibiting double jeopardy is double trial and double conviction, not necessarily double punishment.*

The FIFTH AMENDMENT to the U.S. Constitution provides, "No person shall . . . be subject for the same offence [*sic*] to be twice put in jeopardy of life or limb." This provision, known as the Double Jeopardy Clause, prohibits state and

federal governments from prosecuting individuals for the same crime on more than one occasion, or imposing more than one punishment for a single offense. Each of the 50 states offers similar protection through its own constitution, statutes, and COMMON LAW.

Five policy considerations underpin the double jeopardy doctrine: (1) preventing the government from employing its superior resources to wear down and erroneously convict innocent persons; (2) protecting individuals from the financial, emotional, and social consequences of successive prosecutions; (3) preserving the finality and integrity of criminal proceedings, which would be compromised were the state allowed to arbitrarily ignore unsatisfactory outcomes; (4) restricting prosecutorial discretion over the charging process; and (5) eliminating judicial discretion to impose cumulative punishments that the legislature has not authorized.

Double jeopardy is one of the oldest legal concepts in Western civilization. In 355 B.C., Athenian statesman Demosthenes said, "[T]he law forbids the same man to be tried twice on the same issue." The Romans codified this principle in the Digest of JUSTINIAN I in A.D. 533. The principle also survived the Dark Ages (A.D. 400–1066), notwithstanding the deterioration of other Greco-Roman legal traditions, through CANON LAW and the teachings of early Christian writers.

In England, the protection against double jeopardy was considered "a universal MAXIM of the common law" (*United States v. Wilson,* 420 U.S. 332, 340, 95 S. Ct. 1013, 1020, 43 L. Ed. 2d 232 [1975]) and was embraced by eminent jurists HENRY DE BRACTON (1250), SIR EDWARD COKE (1628), Sir Matthew Hale (1736), and SIR WILLIAM BLACKSTONE (1769). Nonetheless, the English double jeopardy doctrine was extremely narrow. It applied only to defendants who were accused of capital felonies, and only after conviction or acquittal. It did not apply to cases that had been dismissed prior to final judgment, and it was not immune from flagrant abuse by the Crown.

The American colonists, who were intimately familiar with Coke, Blackstone, and the machinations of the Crown, expanded the protection against double jeopardy, making it applicable to all crimes. Yet some perceived James Madison's original draft of the Double Jeopardy Clause as being too broad. It provided, "No person shall be subject . . . to more than one punishment or *one trial* for the same offense" (emphasis added) (*United States v. Halper,* 490 U.S. 435, 440, 109 S. Ct. 1892, 1897 104 L. Ed. 2d 487 [1989]). Several House members objected to this wording, arguing that it could be misconstrued to prevent defendants from seeking a second trial on appeal following conviction. Although the Senate later amended the language to address this concern, the final version ratified by the states left other questions for judicial interpretation.

Double jeopardy litigation revolves around four central questions: (1) In what type of legal proceeding does double jeopardy protection apply? (2) When does jeopardy begin, or, in legal parlance, attach? (3) When does jeopardy terminate? (4) What constitutes successive prosecutions or punishments for the same offense? Although courts have answered the second and third questions with some clarity, they continued to struggle over the first and last.

### Where Jeopardy Applies

Only certain types of legal proceedings invoke double jeopardy protection. If a particular proceeding does not place an individual in jeopardy, then subsequent proceedings against the same individual for the same conduct are not prohibited. The Fifth Amendment suggests that the protection against double jeopardy extends only to proceedings that threaten "life or limb." Nevertheless, the U.S. Supreme Court has established that the right against double jeopardy is not limited to capital crimes or CORPORAL PUNISHMENT, but that it extends to all felonies, misdemeanors, and juvenile-delinquency adjudications, regardless of the applicable punishments.

In *Benton v. Maryland,* 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969), the U.S. Supreme Court ruled that the federal Double Jeopardy Clause is applicable to state and federal prosecutions. Prior to this ruling, an individual who was accused of violating state law could rely only on that particular state's protection against double jeopardy. Some states offered greater protection against double jeopardy than did others. The Court, relying on the doctrine of incorporation, which makes fundamental principles in the BILL OF RIGHTS applicable to the states through the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT, said this was not permissible. The right against double jeopardy is so important, the Court concluded, that it must be equally conferred upon the citizens of every

state. Under *Benton*, no state may provide its residents with less protection against double jeopardy than that offered by the federal Constitution.

The U.S. Supreme Court has also held that the right against double jeopardy precludes only subsequent *criminal* proceedings. It does not preclude ordinary civil or administrative proceedings against a person who already has been prosecuted for the same act or omission. Nor is prosecution barred by double jeopardy if it is preceded by a final civil or administrative determination on the same issue.

Courts have drawn the distinction between criminal proceedings on the one hand, and civil or administrative proceedings on the other, based on the different purposes served by each. Criminal proceedings are punitive in nature and serve two primary purposes: deterrence and retribution. Civil proceedings are more remedial; their fundamental purpose is to compensate injured persons for any losses incurred. Because civil and criminal remedies fulfill different objectives, a government may provide both for the same offense.

The multiple legal proceedings brought against O. J. (Orenthal James) Simpson in the death of Nicole Brown Simpson and Ronald Lyle Goldman illustrate these various objectives. The state of California prosecuted Simpson for the murders of his former wife and her friend. Despite Simpson's acquittal in the criminal case, three civil suits were filed against him by the families of the two victims. The criminal proceedings were instituted with the purpose of punishing Simpson, incarcerating him, and deterring others from similar behavior. The civil suits were intended to make the victims' families whole by compensating them with money damages for the losses they had suffered.

The distinctions between criminal and civil proceedings and between punitive and remedial remedies may appear semantic, but they raise real legal issues. Courts have recognized that civil remedies may advance punitive goals. When they do, double jeopardy questions surface. For example, a civil FORFEITURE or civil fine, although characterized by the legislature as remedial, becomes punitive when the value of the property seized or the amount of the fine imposed is "overwhelmingly disproportionate" to society's loss (*Halper*). This principle was exemplified when the U.S. Supreme Court prohibited the federal government from seeking a $130,000 civil penalty against a man who previously had been sentenced to prison for the same offense of filing $585 worth of false MEDICARE claims (*Halper*). The Court concluded that the gross disparity between the fine imposed and society's economic loss reflected a punitive remedial aim.

Conversely, many courts have ruled that PUNITIVE DAMAGES awarded in civil suits are not sufficiently criminal for double jeopardy purposes when the plaintiff seeking those damages is a private party, not the state. This ruling can be best explained by noting that the Bill of Rights guarantees protection only against government action. It does not create a system of rights and remedies for disputes between private citizens, as do the laws of contracts and TORTS. Courts have not determined whether punitive damages recovered by the government in a civil suit would bar subsequent prosecution, nor have they agreed whether a number of administrative proceedings can be uniformly characterized as punitive or remedial. Cases involving the revocation of professional licenses, driving privileges, PROBATION, and PAROLE have divided courts over the purposes underlying these proceedings.

### When Jeopardy Attaches

Courts have provided much clearer guidance on the question of when jeopardy attaches, or begins. This question is crucial to answer because any action taken by the government before jeopardy attaches, such as dismissal of the indictment, will not prevent later proceedings against a person for the same offense. Once jeopardy has attached, the full panoply of protection against multiple prosecutions and punishments takes hold.

The U.S. Supreme Court has held that jeopardy attaches during a jury trial when the jury is empanelled. In criminal cases tried by a judge without a jury, jeopardy attaches when the first witness is sworn. Jeopardy begins in juvenile-delinquency adjudications when the court first hears evidence. If the defendant or juvenile enters a plea agreement with the prosecution, jeopardy does not attach until the court accepts the plea.

### When Jeopardy Terminates

Determining when jeopardy terminates is no less important, but somewhat more complicated. Once jeopardy has terminated, the government may not hail someone into court for additional

proceedings on the same matter without raising double jeopardy questions. If jeopardy does not terminate at the conclusion of one proceeding, it is said to be continue, and further criminal proceedings are permitted. Jeopardy can terminate in four instances: after acquittal; after dismissal; after a mistrial; and on appeal after conviction.

A jury's verdict of acquittal terminates jeopardy, and it may not be overturned on appeal even if it is contrary to overwhelming proof of a defendant's guilt and derived from a trial that was rife with reversible error. This elemental maxim of double jeopardy JURISPRUDENCE entrusts the jury with the power to nullify criminal prosecutions that are tainted by egregious police, prosecutorial, or judicial misconduct.

A jury also may impliedly acquit a defendant. If a jury has been instructed by the judge on the elements of a particular crime and a LESSER INCLUDED OFFENSE, and the jury returns a guilty verdict as to the lesser offense but is silent as to the greater one, then reprosecution for the greater offense is barred by the Double Jeopardy Clause. For example, a jury that has been instructed as to the crimes of first- and second-degree murder may impliedly acquit the defendant of first-degree murder by returning only a guilty verdict as to murder in the second degree. A not-guilty verdict as to the greater offense is inferred from the silence.

A dismissal is granted by the trial court for errors and defects that operate as an absolute barrier to prosecution. It may be entered before a jury has been impaneled, during the trial, or after a conviction. But jeopardy must attach before a dismissal implicates double jeopardy protection.

Once jeopardy attaches, a dismissal granted by the court for insufficient evidence terminates it. Such a dismissal also bars further prosecution, with one exception: The prosecution may appeal a dismissal entered after the jury has returned a guilty verdict. If the appellate court reverses the dismissal, the guilty verdict may be reinstated without necessitating a second trial. The state may not appeal a dismissal granted for lack of evidence after a case has been submitted to a jury, but before a verdict has been reached.

Reprosecution is permitted, and jeopardy continues, when the court dismisses the case on a motion by the defendant for reasons other than sufficiency of the evidence. For example, a court may dismiss a case when the defendant's right to a SPEEDY TRIAL has been denied by prosecutorial pretrial delay. The U.S. Supreme Court has held that no double jeopardy issue is triggered when defendants obtain dismissal for reasons that are unrelated to their guilt or innocence (see *United States v. Scott,* 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 [1978]).

A mistrial is granted when it has become impracticable or impossible to finish a case. Courts typically declare a mistrial when jurors fail to reach a unanimous verdict. Like a dismissal, a mistrial that is declared at the defendant's behest will not terminate jeopardy or bar reprosecution. Nor will a mistrial preclude reprosecution when declared with the defendant's consent. Courts disagree as to whether a defendant's mere silence is tantamount to consent.

A different situation is presented when a mistrial is declared over the defendant's objection. Reprosecution is then allowed only if the mistrial resulted from "manifest necessity," a standard that is more rigorous than "reasonable necessity," and less exacting than "absolute necessity." A mistrial that could have been reasonably avoided terminates jeopardy, but jeopardy continues if a mistrial was unavoidable.

The manifest-necessity standard has been satisfied where mistrials have resulted from defective indictments, disqualified or deadlocked jurors, and procedural irregularities willfully occasioned by the defendant. Manifest necessity is never established for mistrials resulting from prosecutorial or judicial manipulation. In determining manifest necessity, courts balance the defendant's interest in finality against society's interest in a fair and just legal system.

Every defendant has the right to appeal a conviction. If the conviction is reversed on appeal for insufficient evidence, the reversal is treated as an acquittal, and further prosecution is not permitted. However, the defendant may be reprosecuted when the reversal is not based on a lack of evidence. The grounds for such a reversal include defective search warrants, unlawful seizure of evidence, and other so-called technicalities. Retrials in these instances are justified by society's interest in punishing the guilty. A defendant's countervailing interests are subordinated when a jury's verdict is overturned for reasons that are unrelated to guilt or innocence.

The interests of accused individuals are also subordinated when courts permit prosecutors to seek a more severe sentence during the retrial of a defendant whose original conviction was

reversed on appeal. Courts have suggested that defendants who appeal their convictions assume the risk that a harsher sentence will be imposed during reprosecution. However, in most circumstances, courts are not permitted to impose a death sentence on a defendant during a second trial when the jury recommended life in prison during the first. The recommendation of life imprisonment is construed as an acquittal on the issue of CAPITAL PUNISHMENT.

### What Constitutes the Same Offense

The final question that courts must resolve in double jeopardy litigation is whether successive prosecutions or punishments are geared toward the same offense. Jeopardy may already have attached and terminated in a prior criminal proceeding, but the state may bring further criminal action against a person so long as it is not for the same offense. Courts have analyzed this question in several ways, depending on whether the state is attempting to reprosecute a defendant or to impose multiple punishments.

At common law, a single episode of criminal behavior produced only one prosecution, no matter how many wrongful acts were committed during that episode. Under current law, a proliferation of overlapping and related offenses may be prosecuted as separate crimes stemming from the same set of circumstances. For example, an individual who has stolen a car to facilitate an abduction resulting in attempted rape could be separately prosecuted and punished for auto theft, KIDNAPPING, and molestation. This development has significantly enlarged prosecutors' discretion over the charging process.

The U.S. Supreme Court curbed this discretion in *Blockburger v. United States,* 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), in which it wrote that the government may prosecute an individual for more than one offense stemming from a single course of conduct only when each offense requires proof of a fact that the other offenses do not require. *Blockburger* requires courts to examine the elements of each offense as they are delineated by statute, without regard to the actual evidence that will be introduced at trial. The prosecution has the burden of demonstrating that within a pair or group of offenses, each has at least one mutually exclusive element. If any one offense is wholly subsumed by another, such as a lesser included offense, the two offenses are deemed to be the same, and punishment is allowed for only one.

*Blockburger* is the exclusive means by which courts determine whether cumulative punishments pass muster under the Double Jeopardy Clause. But courts have used several other methods to determine whether successive prosecutions apply the same offense. COLLATERAL ESTOPPEL, which prevents the same parties from relitigating ultimate factual issues previously determined by a valid and final judgment, is one such method. In *Ashe v. Swenson,* 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), the U.S. Supreme Court collaterally estopped the government from prosecuting an individual for robbing one of six men during a poker game. A jury had already acquitted the defendant of robbing one of the other players. Although the second prosecution would have been permitted under *Blockburger* because two different victims were involved, it was disallowed because the defendant had already been declared not guilty of essentially the same crime.

The "same-transaction" analysis, which many state courts use to bar successive prosecutions, requires the prosecution to join all offenses that were committed during a continuous interval and that both share a common factual basis and display a single goal or intent. Although Justices WILLIAM J. BRENNAN JR., WILLIAM O. DOUGLAS, and THURGOOD MARSHALL endorsed the same-transaction test, no federal court has ever adopted it.

State and federal courts have employed the "actual-evidence" test in order to preclude successive prosecutions for the same offense. Unlike *Blockburger,* which demands that courts examine the statutory elements of proof, the actual-evidence test requires courts to compare the evidence that *actually* has been introduced during the first trial with the evidence that the prosecution seeks to introduce at the second one. The offenses are considered to be same when the evidence that is necessary to support a conviction for one offense would be sufficient to support a conviction for the other.

Under the "same-conduct" analysis, the government is forbidden to prosecute an individual twice for the same criminal behavior, regardless of the actual evidence introduced during trial or the statutory elements of the offense. In *Grady v. Corbin,* 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), the U.S. Supreme Court applied this analysis to prevent a prosecution for a vehicular HOMICIDE that resulted from drunk driving, when he earlier

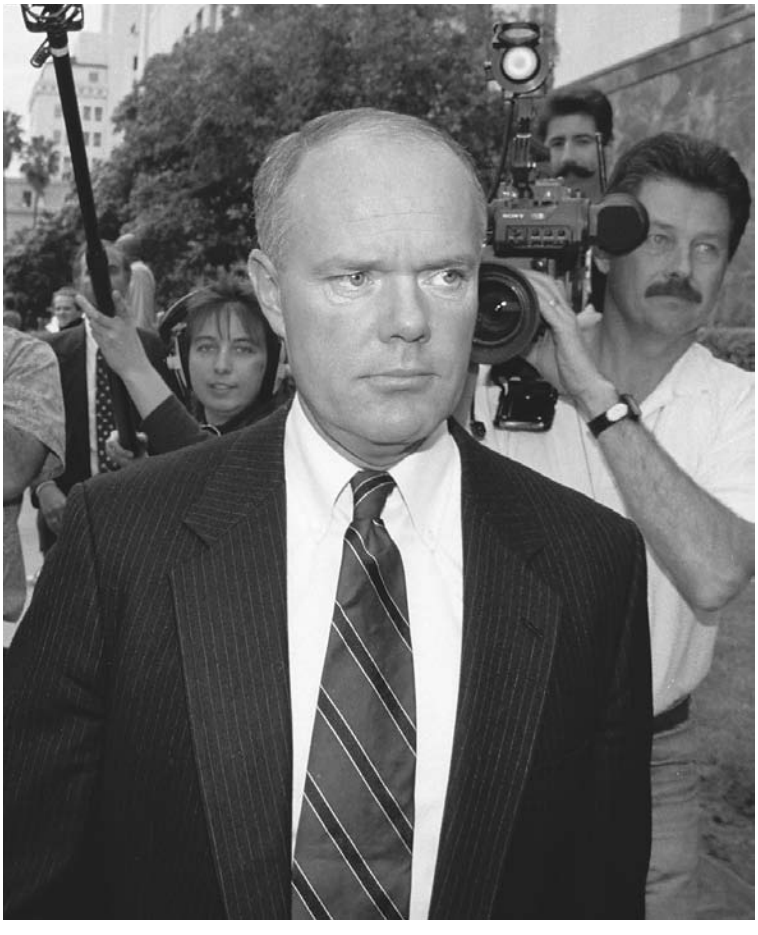

*Former L.A. police officer Stacey Koon was acquitted of criminal charges in the beating of motorist Rodney King but was found guilty of violating King's civil rights in a federal case.*

AP/WIDE WORLD PHOTOS

had been convicted of driving while under the influence of alcohol. The second prosecution would have been permitted had the state been able to prove the driver's **NEGLIGENCE** without proof of his intoxication. Although *Grady* was abandoned by the Supreme Court three years later, the same-conduct analysis is still used by state courts when they interpret their own constitutions and statutes.

The dual-sovereignty doctrine received national attention during the early 1990s, when two Los Angeles police officers were convicted in federal court for violating the **CIVIL RIGHTS** of **RODNEY KING** during a brutal, videotaped beating, even though they previously had been acquitted in state court for excessive use of force (*United States v. Koon,* 833 F. Supp. 769 (C.D. Cal. 1993), *aff'd,* 34 F.3d 1416 (9th Cir. 1994), rehearing denied 45 F.3d 1303). Although many observers believed that the officers had been tried twice for the same offense, the convictions were upheld on appeal over double jeopardy objections. Under the dual-sovereignty doctrine, the appellate court ruled, a defendant who violates the laws of two sovereigns, even if by a single act, has committed two distinct offenses, punishable by both authorities.

The dual-sovereignty doctrine is designed to vindicate the interest that each sovereign claims in promoting peace and dignity within its forum, and permits state and federal governments to prosecute someone for the same behavior after either has already done so. A defendant also may be prosecuted successively by two states for the same act or omission. In *Heath v. Alabama*, 474 U.S. 82, 106 S. Ct. 433, 88 L. Ed. 2d 387 (1985), the U.S. Supreme Court held that successive prosecutions by the states of Georgia and Alabama based upon the same offense did not violate the Double Jeopardy Clause. In *Heath*, the defendant had committed murder in the state of Alabama but had taken the body to Georgia, where Georgia officials eventually found it. Both states prosecuted Heath and convicted him of murder for the same action, and the U.S. Supreme Court allowed the convictions to stand.

Some limitations apply to the dual-sovereignty doctrine. Successive prosecutions by a state and one of its political subdivisions (such as a county, city, or village) are not permitted, because these entities are deemed to be one sovereign. Moreover, federal and state authorities may not achieve a second prosecution by manipulating the criminal justice system, sometimes called a "sham prosecution." Although this exception to the dual sovereignty doctrine has been cited in several cases, it is seldom invoked.

The U.S. **DEPARTMENT OF JUSTICE** has developed an internal restriction on pursuing a prosecution after state prosecution has failed. Federal prosecutors under this restriction may only pursue a second prosecution for compelling reasons, and the prosecutor must obtain prior approval from the assistant attorney general prior to bringing the prosecution. This restriction is called the "*Petite* policy," named after the U.S. Supreme Court's decision in *Petite v. United States*, 361 U.S. 529, 80 S. Ct. 45, 4 L. Ed. 2d 490 (1960), which involved the prosecution of an individual in two federal district courts for what amounted to the same offense. Although the *Petite* policy appears in the Department of Justice's manual, criminal defendants may not rely upon this restriction if a federal prosecutor fails to adhere to the department's guidelines.

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## DOUBLE TAXATION AGREEMENTS

*The requirement that an entity or individual pay two separate taxes on the same property for the same purpose and during the same time period. Under Subchapter C of the* INTERNAL REVENUE CODE*, the federal government imposes double taxation on corporations by taxing both the profits received by the corporation and the earnings distributed to shareholders of the corporation through stock dividends.*

Double taxation occurs when the same transaction or income source is subject to two or more taxing authorities. This can occur within a single country, when independent governmental units have the power to tax a single transaction or source of income, or may result when different sovereign states impose separate taxes, in which case it is called international double taxation. The source of the double taxation problem is that the taxing jurisdictions do not follow a common principle of taxation. One taxing jurisdiction might tax income at its source, while others will tax income based on the residence or nationality of the recipient. Indeed, a jurisdiction might use all three of these basic approaches in imposing taxes.

The consequence of double taxation is to tax certain activities at a higher rate than similar activity that is located solely within a taxing jurisdiction. This leads to unnecessary relocation of economic activity in order to lower the incidence of taxation, or other, more objectionable forms of tax avoidance. Businesses especially have had the most trouble with double taxation, but individuals also might find it uneconomic to work abroad if all of their income is subject to taxation by two authorities, regardless of the origin of the income.

The problems that double taxation presents have long been recognized, and with the growing INTEGRATION of domestic economies into a world economy, countries have undertaken several measures to reduce the problem of double taxation. An individual country can offer tax credits for foreign taxes paid, or outright exemptions from taxation of foreign-source income.

Treaties have also been negotiated between states to address the double taxation problem. One of the most important of these agreements was the International Tax Convention, which the United States and the United Kingdom concluded in 1946. It has served as a model for several other tax conventions. Under the tax convention between the United States and the United Kingdom, for example, exemptions from taxes, credits for taxes paid, and reduction or equalization of overall tax rates are all utilized to reduce double taxation. Within the United States, many states have worked to prevent the incidence of taxation from reaching uneconomic levels on income that derives from multistate sources.

## DOUBT

*To question or hold questionable. Uncertainty of mind; the absence of a settled opinion or conviction; the attitude of mind toward the acceptance of or belief in a proposition, theory, or statement, in which the judgment is not at rest but inclines alternately to either side.*

Proof BEYOND A REASONABLE DOUBT is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof *to a moral certainty,* that is, such proof as satisfies the judgment and consciences of the jury, as reasonable people and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible.

A REASONABLE DOUBT is such a doubt as would cause a reasonable and prudent person in the graver and more important affairs of life to

pause and hesitate to act upon the truth of the matter charged. It does not mean a mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt.

## ♦ DOUGLAS, STEPHEN ARNOLD

"THERE CAN BE BUT TWO GREAT POLITICAL PARTIES IN THIS COUNTRY." —STEPHEN A. DOUGLAS

Stephen Arnold Douglas achieved prominence as a U.S. senator and as the originator of the policy known as Popular Sovereignty. He was born on April 23, 1813, in Brandon, Vermont. He pursued legal studies and was admitted to the Illinois bar in 1834.

In 1843 Douglas entered the legislative branch of the federal government as a member of the U.S. House of Representatives. Four years later, he was elected to the U.S. Senate and served until 1861.

During his lengthy tenure as senator from Illinois, Douglas became an outspoken leader in the **SLAVERY** controversy, and his many debates and innovative policies earned him the name "Little Giant." He was presiding officer of the Committee on Territories, a forum for the discussion of whether slavery should be allowed in the new territories.

Douglas was instrumental in the formulation of the bills which constituted that section of the **COMPROMISE OF 1850** that allowed the residents of Utah and New Mexico to decide whether or not their states would institute slavery. This freedom of choice became known as the policy of Popular Sovereignty. Four years later, Douglas again attempted to apply this policy to the slavery issue involved in the admission of Kansas and Nebraska to the Union. The plan was not successful, however, for the proslavery and antislavery forces in Kansas clashed in a violent action. Two separate governments were established, the Lecompton, or proslavery, faction and the abolitionist faction. Douglas vehemently opposed the Lecompton Constitution, and criticized President James Buchanan's support of such a measure. After much violence and debate, Kansas was admitted as a free state.

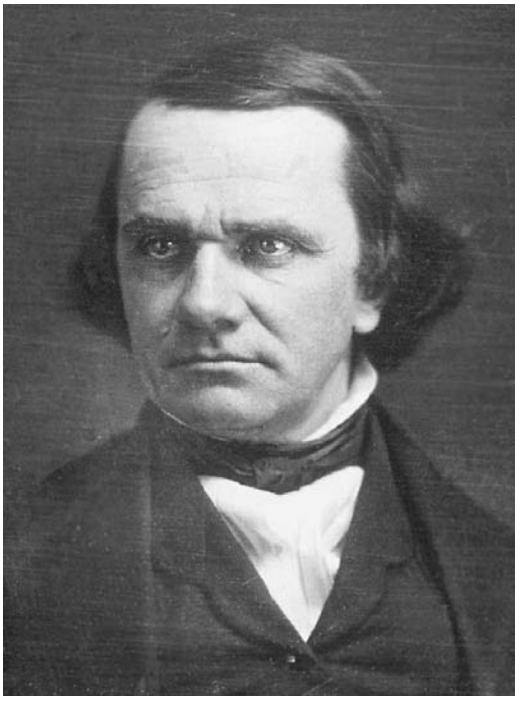

*Stephen A. Douglas.* LIBRARY OF CONGRESS

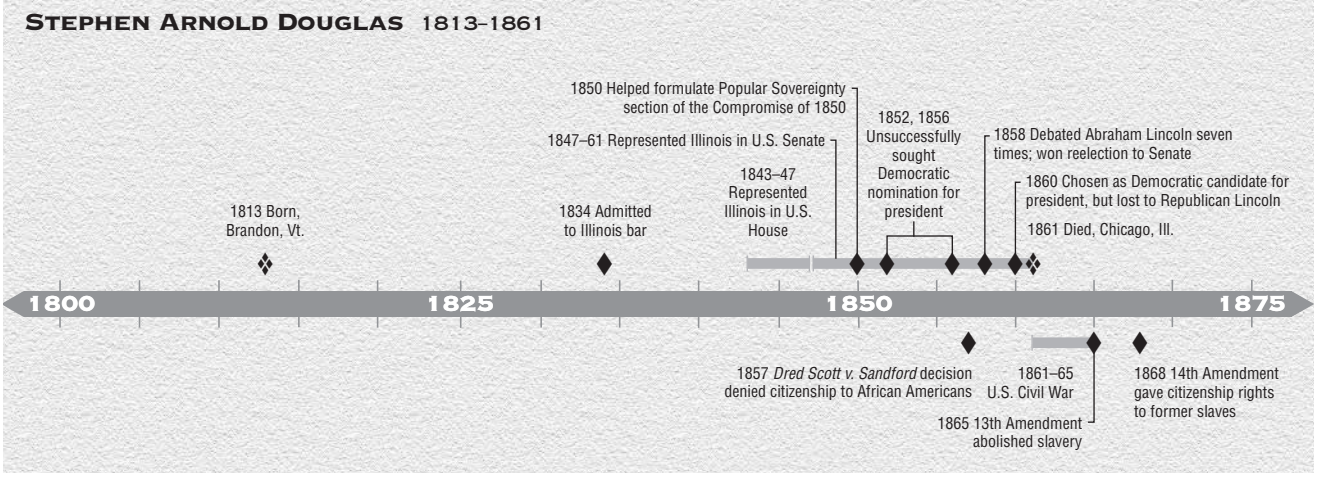

ABRAHAM LINCOLN and Douglas were opponents in the Illinois senatorial election of 1858, and they met seven times throughout their campaign to debate the issues. These arguments were the famous Lincoln-Douglas debates, and several of Douglas's responses won him disfavor with southern Democrats. Although he won the senatorial election, this faction was responsible for Douglas's removal from the Committee on Territories.

In 1860 Douglas fared better with the Democrats, and his Popular Sovereignty policy was incorporated into the national program. He was chosen as the Democratic candidate for the presidential election. The southern Democrats still refused to accept him and supported their own candidate, John C. Breckinridge. Both Douglas and Breckenridge lost the election to the Republican candidate, Abraham Lincoln.

At the outbreak of the Civil War, Douglas staunchly supported the newly elected Lincoln. Adept at public speaking, Douglas's last contribution to government was a tour of the Northwest to encourage support of the Union, during which he contracted a fatal case of typhoid fever. Douglas died June 3, 1861, in Chicago, Illinois.

CROSS-REFERENCES

Kansas-Nebraska Act.

## ♦ DOUGLAS, WILLIAM ORVILLE

William Orville Douglas, a legal educator, NEW DEAL reformer, environmental advocate, and prolific author, was an outspoken and controversial associate justice on the U.S. Supreme Court during much of the twentieth century. For over 36 years, under six presidents and five chief justices, Douglas's opinions—including an unequaled 531 dissents—touched and shaped the momentous constitutional questions and crises of the Depression, WORLD WAR II, the COLD WAR, the KOREAN WAR, the CIVIL RIGHTS MOVEMENT, the VIETNAM WAR, the rise of the WELFARE state, and the fall of RICHARD M. NIXON.

Asserting that the purpose of the Constitution is to "keep the government off the backs of the people," Douglas became a champion of civil liberties on the high court in seminal cases interpreting FREEDOM OF SPEECH, privacy, PORNOGRAPHY, TREASON, the rights of the accused, the limits of the military, the limits of Congress, and even the limits of the President of the United States. As an outspoken New Deal reformer and a popular libertarian, he was courted by the DEMOCRATIC PARTY for high political office, and likewise excoriated by leading Republicans who three times tried to impeach him. A man of enormous energy, he did not confine his public views to opinions from the U.S. Supreme Court alone, but wrote over thirty books on a variety of legal and social topics. As an engaging storyteller, vigorous outdoorsman, and blunt social critic, he was irresistible to the liberal press, under whose influence he was named Father of the Year in 1950. At his death in 1980, he was lionized as an outstanding protector of freedoms.

Since his death, however, historians have criticized both his public career and his private life. From his position on the U.S. Supreme Court, he twice flirted with a place on the presidential ticket—with FRANKLIN D. ROOSEVELT in 1944 and with HARRY S. TRUMAN in 1948—despite the clear opposition of his Court colleagues. He wrote his opinions faster, and with less scholarship or collegial cooperation, than any of his fellow justices. His lifelong stream of books, which referred to him as Associate Justice of the Supreme Court on their covers, showed a similar haste to regard primarily his own views as he exhorted the nation impatiently on foreign policy, anthropology, religion, history, law, economics, and the environment. Unprecedented for a U.S. Supreme Court justice, he advocated public issues in extralegal activities around the world, creating difficulties for both the Court and the federal government at large. He claimed that J. EDGAR HOOVER had bugged the inner conference room of the Supreme Court Building and that Hoover had had FEDERAL BUREAU OF INVESTIGATION (FBI) agents plant marijuana on his mountain retreat property in Goose Prairie, Washington; when no evidence of these activities was ever found, he refused to recant. When a stroke at age 75 left him paralyzed in a wheelchair, wracked with pain, and periodically incoherent, he nonetheless refused to resign his seat in the high court until forced to do so through the extraordinary efforts of his colleagues. And even then, he insisted on lingering in his judicial office for months, demanding attention as though he were still on the Court.

"THE FIFTH AMENDMENT IS AN OLD FRIEND AND A GOOD FRIEND . . . ONE OF THE GREAT LANDMARKS IN MAN'S STRUGGLE TO BE FREE OF TYRANNY, TO BE DECENT AND CIVILIZED."
—WILLIAM O. DOUGLAS

This brilliant and complex man was born October 16, 1898, in Maine, Minnesota. He grew up in small towns of rural Minnesota, California, and Washington as his family moved in search of a climate that would preserve the frail health of his father, a hardworking Presbyterian

*William O. Douglas.*
PHOTOGRAPH BY HARRIS & EWING. COLLECTION OF U.S. SUPREME COURT

minister of Scottish pioneer ancestry. Douglas's father died in Washington when the boy was five, leaving the family with only a meager inheritance, which a local attorney immediately squandered on a foolish investment. Douglas's widowed mother, Julia Bickford Fiske Douglas, had saved just enough to buy a house for the family in Yakima (WA), across the street from the elementary school, where she raised Douglas and his two siblings on the virtues of hard work and high ambition as preparation for success in life. All three of the children achieved success in school and in professional life, but William was brilliant: valedictorian of his high school class, Phi Beta Kappa at Whitman College, and second in his class and on the law review at Columbia Law School.

Polio had stricken Douglas when he was an infant, and the local doctor had advised the family that he would never fully recover the use of his legs and that he probably would be dead by age 40. His mother, who had favored her firstborn with the name Treasure, went to work massaging the muscles of his legs vigorously in two-hour shifts around the clock for months, telling him that he would recover to run again "like the wind," the way she had as a girl. He not only recovered the use of his legs but, as an adolescent, put himself on a merciless discipline of hiking miles a day in the mountains under full pack, to strengthen his legs to the point of outstanding endurance, determined that no one would ever call him puny.

In 1920, he graduated from Whitman College, in Walla Walla, Washington, and returned home for two years to teach English, Latin, and public speaking in Yakima High School. He pursued a Rhodes Scholarship unsuccessfully, and then decided to hitchhike by rail across the country to enter Columbia Law School, although he did not yet possess the money for tuition. While in law school, in 1924, he married Mildred Riddle, with whom he had his only two children, Millie Douglas and William O. Douglas Jr. The marriage ended in DIVORCE 29 years later.

After graduating from Columbia Law School in 1925, he practiced in a Wall Street firm for one year before joining the faculty at Columbia. A year later, he went to teach at Yale, where he specialized in corporate law and finance, writing respected casebooks and gaining recognition as an expert in those fields. Desperate for a cure for the continuous headaches and stomach pains

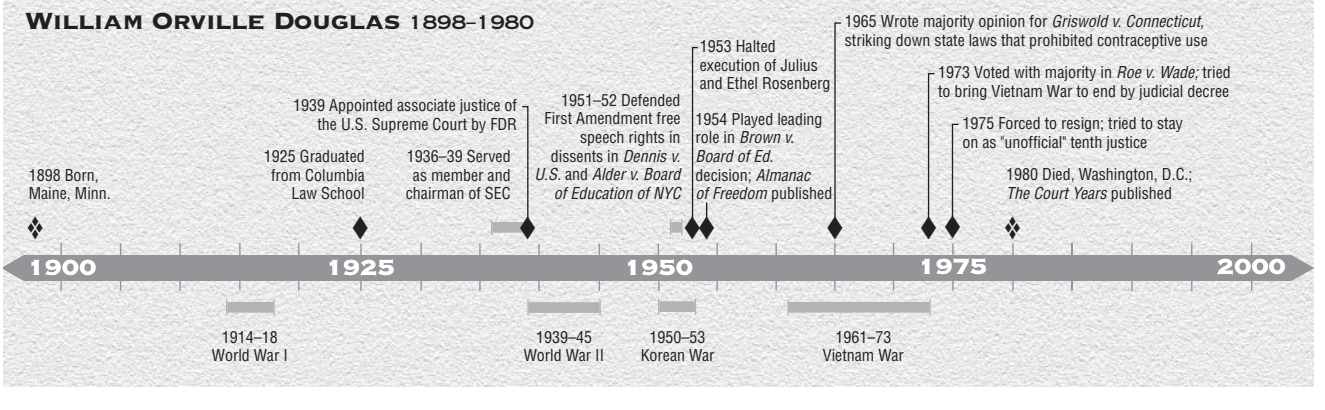

that had plagued him since his days on Wall Street, he briefly undertook psychoanalysis at Yale.

Following the STOCK MARKET crash of 1929, Douglas did original and painstaking work with the help of sociologist Dorothy S. Thomas, interviewing failed businesses in BANKRUPTCY court to determine the causes of their loss. He was asked to head a study committee of the SECURITIES AND EXCHANGE COMMISSION (SEC) in 1934. In 1936 he became a member of the SEC, and in 1937 he was appointed chairman with the mandate from Franklin D. Roosevelt to reform practices of the stock exchange that had led to the great crash.

In 1939, Roosevelt had Douglas, then chairman of the SEC, hailed off a golf course to meet immediately with him at the White House. "I have a new job for you," the president said in the Oval Office. "It's a job you'll detest." Pausing dramatically to light up a cigarette, the president continued, "I am sending your name to the Senate as Louis Brandeis' successor." Douglas was stunned. At age 40, he was about to become the second-youngest U.S. Supreme Court justice in history.

Douglas was sworn in on April 17, 1939, and quickly helped to constitute a new majority on the Court that supported Roosevelt's New Deal laws regulating the economy. Within two years, he had opposed the Court's leading personality, FELIX FRANKFURTER, and its reigning philosophy of defending civil liberties from the BILL OF RIGHTS in cases involving religious freedom and the rights of the accused. It was the beginning of a two-decade battle with Frankfurter and his philosophy of judicial restraint. This conflict did not end amicably, but it helped to transform Douglas into a champion of civil liberties. After World War II, Douglas joined forces frequently with Justice HUGO L. BLACK and later Justice WILLIAM J. BRENNAN JR. in applying the Bill of Rights to protect individual liberties.

In 1951, when fears of COMMUNISM exacerbated by the public ravings of Senator JOSEPH R. MCCARTHY overtook the nation, Douglas's dissent in *Dennis v. United States,* 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951), defended the FIRST AMENDMENT free speech rights of Eugene Dennis and ten other members of the American Communist Party who admitted teaching the works of KARL MARX, Friedrich Engels, VLADIMIR LENIN, and JOSEPH STALIN. Douglas argued that despite current fears of communist influence in U.S. society, their speech alone presented no CLEAR AND PRESENT DANGER to the nation. Similarly, in dissent, he defended the First Amendment rights of several New York schoolteachers who had challenged the state's Feinberg law (Educ. Law N.Y.S. 3022) giving authorities the right to compile a list of subversive organizations to which a teacher could not belong. Douglas wrote that teachers need the guarantee of free expression more than anyone and that the Feinberg Law "turned the school system into a spying project" (*Alder v. Board of Education of City of New York,* 342 U.S. 485, 72 S. Ct. 380, 96 L. Ed. 517 [1952]).

During this same period, he vigorously opposed the expanding use of government WIRE TAPPING enabled by the 1929 decision in OLMSTEAD V. UNITED STATES, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928). Writing for the public in his book *Almanac of Freedom* (1954), Douglas declared that "wire tapping, wherever used, has a black record. The invasion of privacy is ominous. It is dragnet in character, recording everything that is said, by the innocent as well as by the guilty. . . . wire tapping is a blight on the civil liberties of the citizen."

In 1953, Douglas single-handedly halted the execution of Julius and Ethel Rosenberg, the defendants in the most sensational spy trial of the cold war (*Rosenberg v. United States,* 346 U.S. 273, 73 S. Ct. 1173, 97 L. Ed. 1607 [1953]). After voting four times not to hear the case, he finally ordered a stay at the last possible minute, and then headed off on vacation. Unable to reach Douglas en route, the other justices called a special session to vacate the stay, and the Rosenbergs were executed. Douglas's colleagues accused him of grandstanding. His enemies in Congress accused him of treason, and he survived three IMPEACHMENT attempts led by GERALD R. FORD. Ford, eager to be rid of Douglas, declared that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history." However, Douglas was not a traitor but an adamant civil libertarian, unwilling to let the heavy hand of the government crush any individual's rights.

During the tenure of Chief Justice EARL WARREN (1953–69), Douglas found more frequent majorities for his activist philosophy. He took a leading role in reaching a majority for the 1954 *Brown* decision (BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 [1954]) desegregating

public schools, telling his colleagues simply that "a state can't classify by color in education." He argued in dissent in several cases that the Bill of Rights was applicable to the states through the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT, an argument that the Court finally accepted in MAPP V. OHIO, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), which held the FOURTH AMENDMENT provision prohibiting unreasonable SEARCHES AND SEIZURES applicable to the states. He supported each of the Warren Court's major decisions extending the rights of criminal suspects, including the RIGHT TO COUNSEL, in GIDEON V. WAINWRIGHT, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), and the right to be advised of one's constitutional rights before being interrogated, in MIRANDA V. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

In 1965, Douglas wrote for the majority in GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510, striking down a state law that prohibited the use of contraceptives. In the opinion, he argued that, taken together, the First, Fourth, Fifth, and Ninth Amendments created a constitutional right to privacy. This may have been Douglas's most influential single opinion on the Court. He argued that the government did not belong in the bedroom, which was one of the "zones of privacy" protected by "penumbras" emanating from the specific guarantees in the Bill of Rights. Criticism of the *Griswold* opinion was fierce. But based on this right to privacy, a majority of the Court, Douglas concurring, would vote for a woman's right to have an ABORTION in ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

Douglas made no secret of his long-standing dislike for the Vietnam War. In the fall of 1967, he dissented from the Court's decision not to review several cases that might have raised the issue of the legality of the Vietnam War. On August 4, 1973, in a solitary performance reminiscent of the Rosenberg stay of execution, acting from the Yakima courthouse near his summer vacation home, Douglas reinstated a lower-court order to stop the Nixon administration's bombing of Cambodia and, in effect, bring the Vietnam War to a halt by judicial decision. Douglas wrote that only Congress could declare war, and Congress had not done so. Six hours later, eight members of the Court reversed him by the telephone polling of Justice THURGOOD MARSHALL.

In his most personal relationships, Douglas was a tyrant. He sternly demanded the back-breaking 16-hour days and six-day weeks from his law clerks that he loved to put in himself (when a clerk asked for time off to get married, Douglas granted him 24 hours' leave), but never allowed them significant responsibilities for his opinions. One clerk said, "It was a master/slave relationship" (Simon 1980). He married four times while serving on the Supreme Court, to successively younger women: after Riddle, Mercedes Davidson (1953), whom he met in Washington, D.C.; Joan Martin (1962), a twenty-three-year-old college student who had written her senior thesis in praise of him; and Catherine Heffermin (1965), a twenty-one-year-old college student whom he met while she was working as a waitress. Most of his wives found him distant, demanding, and faithless. The 860 pages of his two-volume autobiography (*The Court Years,* 1980) are filled with words of revenge upon his personal and political enemies but contain less than a page for his wife of 29 years, Riddle. He was so inept and cold as a father that his two children fled him. As his son put it, "Father was scary."

Felled by a stroke in 1974, Douglas became confined to a wheelchair pushed by an aide, wracked by constant pain, glazed by medication, and increasingly incoherent. But he would not resign. He tried to return to the Court in 1975, refusing all advice to the contrary. His presence was embarrassing to the Court and impossible to sustain. He officially resigned on November 12, 1975, but tried to hang on to an unofficial role as the Court's tenth justice. When even his clerks would not support his fantasy, he prepared a statement of farewell to be read to the justices on his behalf while he sat in his wheelchair. His farewell compared the relationship he had shared with his Court colleagues to the slow warm growth of friendships on a camping trip in the wilderness. His colleagues wept.

Douglas died on January 19, 1980, in Washington, D.C.

Douglas had shattered the popular view of the high court as a somber gathering of elderly people in black robes pondering the weighty truths of the Constitution. His irrepressible personality, extralegal activities, popular book writing, and serial marriages brought unprecedented color and controversy to the Court. A libertarian by disposition and principle, he would not easily allow the government to

abridge the liberties of others, nor would he conform to the traditional role of U.S. Supreme Court justice.

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## ♦ DOUGLASS, FREDERICK

A very influential African American leader of the nineteenth century, Frederick Douglass used his exceptional skills as an orator, writer, journalist, and politician to fight for the ABOLITION of SLAVERY and for an end to RACIAL DISCRIMINATION. He helped to shape the climate of public opinion that led to the ratification of the THIRTEENTH, FOURTEENTH, and FIFTEENTH AMENDMENTS to the U.S. Constitution, which were created in large measure to protect, respectively, the freedom, citizenship, and VOTING RIGHTS of ex-slaves. His *Narrative of the Life of Frederick Douglass* (1845) is a classic account of the dehumanizing effects of slavery for slave and slaveholder alike.

According to his own calculations, Frederick Augustus Washington Bailey was born in February 1817, on a plantation west of the Tuckahoe River in Talbot County, Maryland. (As an adult, he celebrated his birthday on February 14.) His mother was a black slave, and his father most likely her white owner. Douglass was separated from his mother at an early age, and at age 7 he was sent to Baltimore to work for a family. He later regarded this change from the plantation to the city as a great stroke of fortune because in Baltimore he was able to begin educating himself. His master's wife taught him the alphabet, and Douglass, under the tutelage of young boys on the streets and docks, proceeded to teach himself how to read and write. Even when he was very young, his limited reading convinced him of the evils of slavery and the need to seek his freedom.

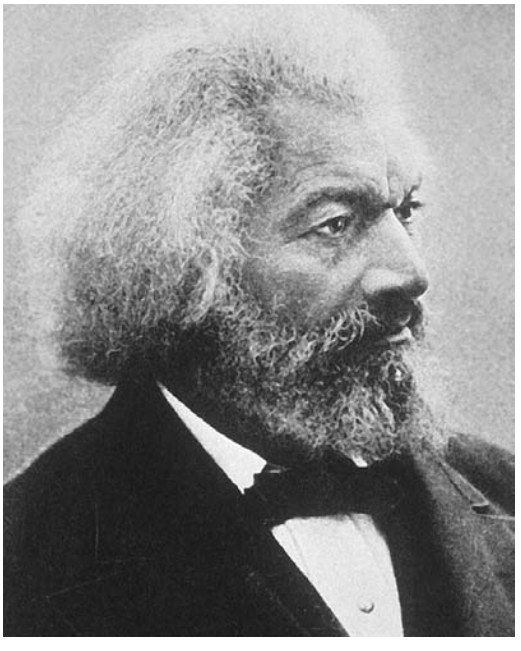

*Frederick Douglass.*
LIBRARY OF CONGRESS

Douglass continued to suffer under slavery. At times during the 1830s, he was sent back to the plantation to endure its scourges, including beatings and whippings. He briefly attempted to teach fellow slaves to read and write, but his efforts were quickly put to an end by whites.

In 1838, living again in Baltimore and caulking ships, Douglass escaped north and won his freedom. He married a free African American woman, Anna Murray, and settled in New Bedford, Massachusetts. By then a fugitive slave, he changed his name to Frederick Douglass in order to avoid capture. Douglass quickly became a respected member of the community in New Bedford. However, he was disappointed to find that racism was prevalent in the North as well as in the South.

"NO MAN CAN PUT A CHAIN ABOUT THE ANKLE OF HIS FELLOW MAN WITHOUT AT LAST FINDING THE OTHER END FASTENED ABOUT HIS OWN NECK."
—FREDERICK DOUGLASS

Shortly after his arrival in the North, Douglass became an avid reader of the *Liberator,* a newspaper published by a leading abolitionist, WILLIAM LLOYD GARRISON. He became involved in abolitionist campaigns and soon earned a reputation as an eloquent speaker for the cause. In 1841, he met Garrison and was recruited to speak for the Massachusetts Anti-Slavery Society. Throughout his life, he would travel all over the United States on speaking engagements, becoming a famous and sought-after orator.

In part to refute those who did not believe that someone as eloquent as he had once been a slave, Douglass published *Narrative of the Life of Frederick Douglass* in 1845. The book became a

bestseller and made Douglass into a celebrity. It also made known his status as a fugitive slave, and he was forced to flee to the British Isles for safety in 1845. During his travels, he was greatly impressed by the relative lack of racism in Ireland, England, and Scotland. English friends purchased his legal freedom in 1846, paying his old master $711.66.

Upon his return to the States in 1847, Douglass settled in Rochester, New York, and founded his own abolitionist newspaper, the *North Star.* In its pages, he published writers and focused on achievements. He also wrote highly influential editorials for the paper. Douglass published a series of newspapers, including *Frederick Douglass' Weekly,* until 1863.

Douglass continued to lecture widely and became sympathetic to other reformist causes of the day, including the temperance, peace, and feminist movements. By the 1850s and 1860s, he increasingly came to doubt that slavery could be ended by peaceful means. He became friends with the militant abolitionist JOHN BROWN, although he did not join Brown in his ill-fated 1859 military campaign against slavery at Harpers Ferry, Virginia.

During the Civil War (1861–65), Douglass fought hard to make the abolition of slavery a Union goal, and he also lobbied for the enlistment of blacks into the Union armed forces. In public speeches and even in private meetings with President ABRAHAM LINCOLN, Douglass made his case forcefully. Aided by rising sentiment against slavery in the North, both of Douglass's goals became a reality. Lincoln's 1863 EMANCIPATION PROCLAMATION sent a strong signal that the North would seek the abolition of slavery in the South, and in 1865, the THIRTEENTH AMENDMENT to the Constitution formally ended the institution of slavery in the United States. By the end of the war, nearly 200,000 African Americans had enlisted in the Union armed forces. Douglass personally helped to enlist men for the Fifty-fourth and Fifty-fifth Massachusetts Colored Regiments and served as a leading advocate for the equal treatment of African Americans in the military.

After the Thirteenth Amendment had been ratified in 1865, some abolitionists pronounced their work finished. Douglass argued that much more remained to be done, and he continued to struggle for the rights of blacks. He called for voting rights for blacks, the repeal of racially discriminatory laws, and the redistribution of land in the South. Although disappointed that land redistribution was never achieved, he was encouraged by the passage of the Fourteenth (1868) and Fifteenth (1870) Amendments, which, respectively, protected against the infringement of constitutional rights by the states and established the right of all citizens to vote.

Although these constitutional amendments appeared to guarantee the CIVIL RIGHTS of blacks, the actual laws and practices of states and localities continued to discriminate against blacks. Blacks were also harassed by violence from private groups. The KU KLUX KLAN waged a campaign of terror against those who sought to exercise their civil rights, and white lynch mobs killed hundreds of men each year. Douglass spoke out against these forms of TERRORISM and called for federal laws against LYNCHING.

Douglass was a loyal spokesman for the REPUBLICAN PARTY and vigorously campaigned for its candidates. His support helped to gain hundreds of thousands of black votes for

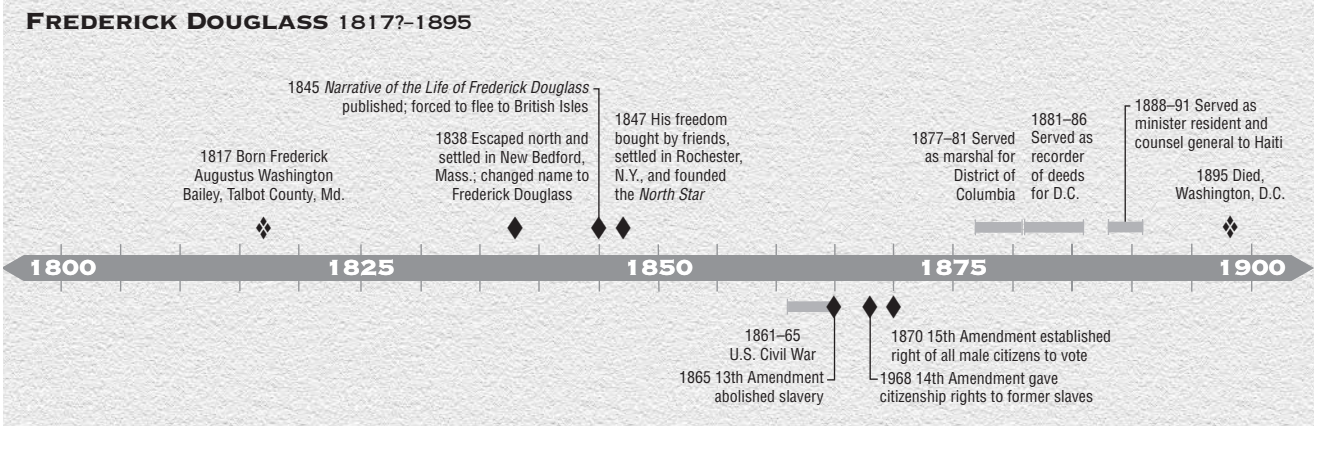

Republicans. As a result of such work, several Republican presidents rewarded him with political offices. In 1871, President ULYSSES S. GRANT named him assistant secretary to the Santo Domingo Commission. Later, Republican presidents appointed him marshal (1877–81) and recorder of deeds (1881–86) for the District of Columbia. In 1888, President BENJAMIN HARRISON appointed Douglass minister resident and consul general to Haiti, the first free black republic in the Western Hemisphere. He resigned the position in 1891 over policy differences with the Harrison administration. Although such positions did not afford Douglass great political power in themselves, they provided a comfortable living as well as some recognition for his significant contributions to the public life of the country.

Douglass was also the first African American ever to be nominated for the vice presidency. He declined the nomination, which had come from the little known Equal Rights Party in 1872.

Until the end of his life, Douglass continued to lecture and write for the cause of freedom. He died on February 20, 1895, in Washington, D.C., after attending a meeting of the National Council of Women.

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Celia, a Slave; Civil Rights Acts; Civil Rights Cases; *Dred Scott v. Sandford*; Jim Crow Laws; *Prigg v. Pennsylvania.*

## DOWER

*The provision that the law makes for a widow out of the lands or tenements of her husband, for her support and the nurture of her children. A species of life estate that a woman is, by law, entitled to claim on the death of her husband, in the lands and tenements of which he was seised in fee during the marriage, and which her issue, if any, might by possibility have inherited. The life estate to which every married woman is entitled on the death of her husband, intestate, or, in case she dissents from his will, one-third in value of all lands of which her husband was beneficially seized in law or in fact, at any time during coverture.*

*Dower is the provision the law makes for a widow in the distribution of her husband's estate.*

AP/WIDE WORLD PHOTOS

The real property must be inheritable by the wife's offspring in order for her to claim dower. Even if, however, their marriage produces no offspring, the wife is entitled to dower as long as any such progeny of her husband would qualify as his heirs at the time of his death.

Prior to the death of the husband, the interest of the wife is called an inchoate right of dower, in the sense that it is a claim that is not a present interest but one that might ripen into a legally enforceable right if not prohibited or divested. It is frequently stated that an inchoate right of dower is a mere expectancy and not an estate. The law governing dower rights is the law in existence at the time of the husband's death and not the law existing at the time of the marriage.

The courts, however, protect the inchoate right of dower from a fraudulent conveyance—a transfer of property made to defraud, delay, or hinder a creditor, or in this case, the wife, or to place such property beyond the creditor's reach—by the husband in contemplation of, or subsequent to, the marriage. Protection is also available against the claims of creditors if the claims arose after the marriage. The posting of security can be required to protect the interest if

oil, gas, or other substances are removed from the land, which thereby results in a depreciation—a reduction of worth—with respect to the value of the estate. Decisions supporting a contrary view take the position that a wife cannot interfere with her husband's complete enjoyment of the land during his lifetime.

A wife can relinquish her inchoate right of dower by an antenuptial agreement—which is a contract entered into by the prospective spouses prior to the marriage that resolves issues of support, division of property, and distribution of wealth in the event of death, separation, or divorce—or by a release, that is, the relinquishment of a right, claim, or privilege.

The claim of dower is based upon proof of a legally recognized marriage, as distinguished from a GOOD FAITH marriage or a de facto marriage—one in which the parties live together as HUSBAND AND WIFE but that is invalid for certain reasons, such as defects in form. A VOIDABLE marriage, one that is valid when entered into and which remains valid until either party obtains a lawful court order dissolving the marital relationship, suffices for this purpose if it is not rendered void—of no legal force or binding effect—before the right to the dower arises.

Most states have varied the dower provisions. The fraction of the estate has frequently been increased from one-third to one-half. The property affected has been expanded from realty only to both realty and personalty. The time of ownership has sometimes been changed from "owned during marriage" to "owned at death." The type of interest given to the surviving spouse has been expanded from a life estate to outright ownership of property.

In many states, a widow is entitled to a statutory share in her husband's estate. This is often called an elective share because the surviving spouse can choose to accept the provisions made for her in the decedent's will or accept the share of the property specified by law of DESCENT AND DISTRIBUTION or the particular law governing the elective share. In many jurisdictions, dower has been abolished and replaced by the elective share. In others, statutes expressly provide that a spouse choose among the elective share, the dower, or the provisions of the will.

COMMON LAW prescribes that an absolute DIVORCE will bar a claim of dower. A legal separation—sometimes labeled a divorce from bed and board, a mensa et thoro—does not end the marital relationship. Unless there is an express statute, such a divorce will not defeat a claim of dower. This is also true with respect to an INTERLOCUTORY decree of divorce, an interim or temporary court order.

In some states, statutes provide that dower can be denied upon proof of particular types of misconduct, such as ADULTERY, which is voluntary sexual intercourse of a married person with a person other than his or her spouse. Statutes in several states preserve dower if a divorce or legal separation is obtained due to the fault of the other spouse.

In many states, statutes provide that a murderer is not entitled to property rights in the estate of the victim upon the principle that a person must not be allowed to profit from personal wrong. Following this theory, a CONSTRUCTIVE TRUST will be declared in favor of the heirs or devisees of the deceased spouse.

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CROSS-REFERENCES

Premarital Agreement.

## DOWN PAYMENT

*A percentage of the total purchase price of an item that is proffered when the item is bought on credit.*

In an installment sales agreement, a buyer is required to pay part of the total price, usually in cash, and later pays the balance through a number of regularly scheduled payments.

A down payment is sometimes known as earnest money, or a sum of money that a buyer pays upon entering a contract to indicate a GOOD FAITH intention as well as an ability to pay the balance.

## DRACONIAN LAWS

*A code of laws prepared by Draco, the celebrated lawgiver of Athens, that, by modern standards, are considered exceedingly severe. The term* draconian *has come to be used to refer to any unusually harsh law.*

## DRAFT

*A written order by the first party, called the drawer, instructing a second party, called the drawee (such as a bank), to pay money to a third*

**Sight Draft**

**WESTERN HEMISPHERE TRADING COMPANY**
Troy/Deckerville, Michigan USA

Draft No.:
Date: / /
Reference:
Advising Bank:

*For Value Received,*

At **SIGHT** of this Bill of Exchange

Pay to the Order of **Ourselves**

the Sum of **XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX and 00/100 U.S. Dollars (US$ xxxxxxxxxxxxxxxxx.xx)**

Drawn under **Issuing Bank**, Xxxxx, Xxxxx, Documentary Credit

LC No.:
Dated : / /

TO: **ISSUING BANK**
Street Address
City
Country

**WESTERN HEMISPHERE TRADING COMPANY**

by: _____
(Authorized Signature)

*A sample sight draft.*

*party, called the payee. An order to pay a sum certain in money, signed by a drawer, payable on demand or at a definite time, to order or bearer.*

*A tentative, provisional, or preparatory writing out of any document (as a will, contract, lease, and so on) for purposes of discussion and correction, which is afterward to be prepared in its final form.*

*Compulsory* CONSCRIPTION *of persons into military service.*

*Also, a small arbitrary deduction or allowance made to a merchant or importer, in the case of goods sold by weight or taxable by weight, to cover possible loss of weight in handling or from differences in scales.*

A draft that is payable on demand is called a sight draft because the drawee must comply with its terms of payment when it is presented, in his or her sight or presence, by the payee. In contrast, a time draft is one that is payable only on the date specified on its face or thereafter.

A draft may be payable to a designated payee or to the bearer—the person who has possession of the draft at the time it is presented to the drawee for payment—pursuant to the drawer's directions.

A draft is sometimes synonymous with a bill of exchange, COMMERCIAL PAPER, or negotiable instrument.

## DRAFTER

*The person who draws or frames a legal document such as a will,* PLEADING, *conveyance, or contract. One who writes an original legislative bill for the U.S. Senate or House of Representatives is called the drafter of that bill.*

## DRAIN

*A trench or ditch to convey water from wet land; a channel through which water may flow off. The word has no technical legal meaning. Any hollow space in the ground, natural or artificial, where water is collected and passes off, is a ditch or drain.*

*Also, sometimes, the* EASEMENT *or servitude (acquired by grant or prescription) that consists of the right to drain water through another's land.*

A number of states have *drainage statutes* in order to protect the welfare of the public. Such statutes provide for the construction of drains in areas that are swampy, marshy, or overflowed past their natural boundaries. Also contained in

drainage statutes are provisions that regulate the creation and organization of *drainage districts.* The state legislature has the discretion to decide which lands will be included within a particular drainage district. For example, such a district might include territory of a city or village or property in two or more counties.

The specific plan for the construction of a drain is within the discretion of local authorities as modified by limitations or restrictions set forth by state drainage statutes. Only land that will be benefited through drainage improvements should properly be included within a drainage district.

In certain instances, liability has been extended to drainage districts that have failed to maintain existing drains. In order to remedy this situation, in some cases, landowners are given a certain portion of a drain to clean out and maintain in proper repair. Regardless of whether or not a landowner is specifically given the responsibility for maintenance, a landowner may only close or obstruct a drain with his or her neighbors' consent. If the land of an individual is injured because a public drain is being obstructed by a neighbor, then the person can bring suit for the damage resulting therefrom.

Subject to limitations imposed by the U.S. Constitution, a state legislature has the power to authorize drainage districts to prescribe special assessments to cover the cost of drainage improvements. Generally, only those lands included within a particular district are subject to such assessment. In certain states, school lands are exempted from assessments that drainage districts levy. Assessment review boards frequently entertain objections to drainage assessments; however, if no such board exists, assessments are subject to judicial reviews in the courts. A property owner can, therefore, go to court to challenge what he or she believes to be an unjust drainage assessment against his or her land.

## DRAMSHOP ACTS

*Statutes, also called civil liability acts, that impose civil liability upon one who sells intoxicating liquors when a third party has been injured as a result of the purchaser's intoxication and such sale has either caused or contributed to the state of intoxication.*

A dramshop is any type of drinking establishment where liquor is sold for consumption on the premises, such as a bar, a saloon, or, in some cases, a restaurant. Under dramshop acts, the seller of liquor can be sued by an individual who is injured by an intoxicated person. Such acts protect the injured third party not only against personal injuries and property damages resulting directly from the actions of the intoxicated individual (such as those resulting from drunken driving or ASSAULT AND BATTERY) but also against the loss of family support owing to such injuries. Generally, the person who became intoxicated cannot sue the seller if she or he is injured, nor can any active participant in the drinking.

The dramshop laws are based on the principle that anyone who profits from the sale of alcoholic beverages should be held liable for any resulting damages. For a seller to be held liable, it is unnecessary to show that he or she is negligent, provided it is proved that the seller sold liquor to a habitual drunkard or a person who was already drunk, which is generally illegal in itself.

Dramshop acts originated in the TEMPERANCE MOVEMENT of the mid-1800s. In Illinois, for example, the first such law was passed in 1872 and amended in subsequent decades. By

**Dramshop Acts**

**ALCOHOL-RELATED TRAFFIC FATALITIES, 1985 TO 1998**

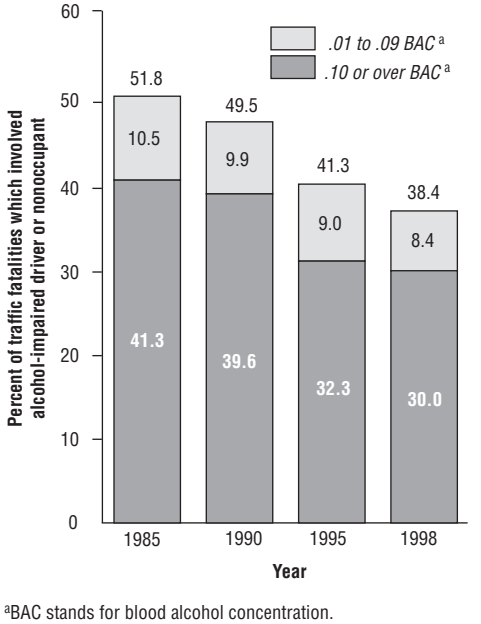


[a]BAC stands for blood alcohol concentration.

SOURCE: U.S. Census Bureau, *Statistical Abstract of the United States*, 2000.

the 1990s, more than forty states had either dramshop acts or court rulings that made a commercial server or seller of alcohol liable if an intoxicated customer caused an accident or injury upon leaving the server's or seller's establishment (e.g., the Iowa Alcoholic Beverage Control Act [Iowa Code Ann. § 123.92 (West)]). Typical modern statutes include limitations on awards, specifications regarding the commercial defendant's type and degree of liability, and a STATUTE OF LIMITATIONS.

By the late 1980s, dramshop statutes and court rulings had caused a dramatic increase in lawsuits involving liquor liability, with a corresponding increase in damage awards to victims. As a result, liquor liability insurance became increasingly expensive and difficult to obtain.

To guard against costly dramshop suits, liquor vendors have taken a variety of steps to prevent negligent behavior: eliminating "happy hours," reducing late-night operation, offering free Breathalyzer tests, instituting designated-driver programs, and training servers on how to deal with intoxicated patrons. Several states have made precautions such as these mandatory. Some, such as Oklahoma, have banned happy hours (see 37 Okla. Stat. Ann. § 537 [West]); others have required server training. Many insurance companies either require such preventive measures or offer incentives for their use.

Many states have extended dramshop liability to corporate or individual social hosts who provide alcoholic beverages without charge. This new source of liability has produced an extraordinary number of lawsuits. Accordingly, individuals wishing to host a social or business function in one of these states would now be required to take many of the same precautions commercial establishments do, including obtaining liquor liability insurance, or else they would have to hold their gathering at an insured bar or hotel.

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## DRAW

*To aim a firearm, or deadly weapon, at a particular target.*

*To prepare a written bill of exchange,* COMMERCIAL PAPER, *draft, or negotiable instrument and place one's signature on it, creating a legal obligation under its terms. To write a document, such as a deed, complaint, or petition, including the essential information necessary to make it legally effective upon its execution by the designated parties.*

*To lawfully remove money from an account held in a bank, treasury, or other depository.*

## DRAWEE

*A person or bank that is ordered by its depositor, a drawer, to withdraw money from an account to pay a designated sum to a person according to the terms of a check or a draft.*

CROSS-REFERENCES

Commercial Paper.

## DRAWER

*A person who orders a bank to withdraw money from an account to pay a designated person a specific sum according to the term of a bill, a check, or a draft. An individual who writes and signs a* COMMERCIAL PAPER, *thereby becoming obligated under its terms.*

## DRED SCOTT V. SANDFORD

In *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857), the U.S. Supreme Court faced the divisive issue of SLAVERY. Chief Justice ROGER B. TANEY, a former slaveholder, authored the Court's opinion, holding that the U.S. Constitution permitted the unrestricted ownership of black slaves by white U.S. citizens. In a stunning 7–2 decision, the Court declared that slaves and emancipated blacks could not be full U.S. citizens. Any attempt by Congress to limit the spread of slavery in U.S. territories was held to be a direct violation of slave owners' due process rights.

Chief Justice Taney's opinion fueled the nineteenth-century abolitionist movement and helped push the United States toward civil war. Although Taney was an accomplished jurist who served as chief justice for 29 years, his record was permanently tarnished by what many considered to be his flawed reasoning in the Dred Scott case.

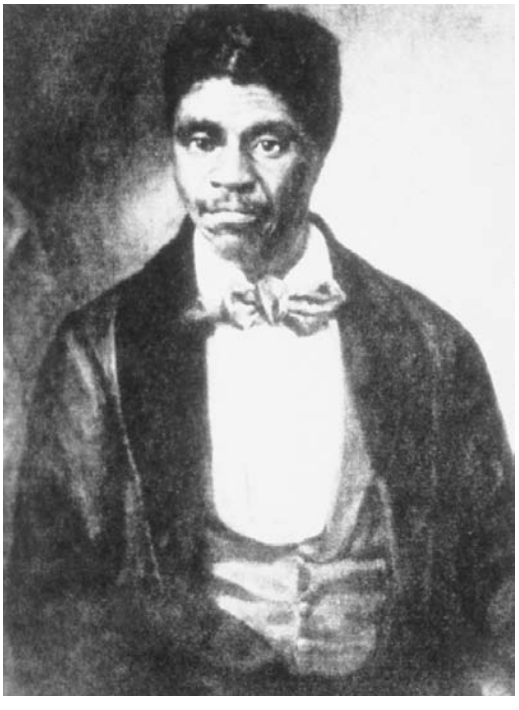

*Dred Scott sued for his freedom in 1857, claiming that his residence with his owner in a free state and free territories entitled him to liberty. The Supreme Court ruled against Scott, sparking outrage among abolitionists.*

African slavery was introduced in the American colonies in 1619. As the new country grew, slavery spread throughout the South, where cheap labor was needed for harvesting large cotton and tobacco crops. During the early nineteenth century, opponents of slavery began to organize in the North.

Abolitionists initially wanted to restrict slavery to the southern states, but their ultimate goal was to outlaw black servitude throughout the United States. As new territories from the LOUISIANA PURCHASE applied for U.S. statehood, the issue became a sticking point. Most southerners supported the spread of slavery, viewing it as a necessary condition for their social, political, and economic survival. Most northerners favored the containment and eventual eradication of slavery. Although political moderates called for voters in each new territory to resolve the slavery issue, a national consensus on this point was never reached.

The 1820 Missouri Compromise was an attempt by the U.S. Congress to balance the competing viewpoints. Congress passed a law designating as free states any new states located north of a line drawn across the Louisiana Purchase. New states south of the line would be slave states. In other words, slavery was outlawed north of Missouri's border and west to the Rocky Mountains. After the passage of the Missouri Compromise, two new states were admitted: Missouri, where slavery was permitted, and Maine, where it was forbidden.

The Missouri Compromise did not improve the bitter rivalry between pro-slavery and anti-slavery forces. The controversial *Dred Scott* opinion further exacerbated regional tensions.

Dred Scott was a slave owned by Dr. John Emerson, a U.S. Army officer. In 1834, Scott moved with Emerson from Missouri, a slave state, to Illinois, a state in which slavery was prohibited by statute. Scott and Emerson also lived in northern U.S. territories that later became the free states of Minnesota and Wisconsin. In 1838, Scott and his family returned to Missouri with Emerson.

When Emerson died, Scott sued Emerson's widow in Missouri state court, seeking freedom for himself and his family. Scott's 1846 lawsuit claimed that his prior residence in a free state and free territories entitled him to liberty and back wages since 1834.

Scott won his case in the lower court. Emerson's widow appealed to the state supreme court, which sided with her. Then, she married Calvin Clifford Chafee, a prominent Massachusetts abolitionist and member of Congress. The new Mrs. Chafee switched to the abolitionist camp and agreed to seek a federal ruling against slavery on Scott's behalf.

Scott was sold in a sham transaction to Mrs. Chafee's brother, John F. A. Sanford, an abolitionist from New York. Sanford agreed to participate in the *Dred Scott* case as a personal protest against slavery. (Mr. Sanford's name was misspelled by a clerk in the case title as "Sandford" and has remained so in court records.)

Scott filed a lawsuit against his new owner in federal court. A federal court was able to hear the case because of diversity of jurisdiction, which entitles litigants from two different states (in this case, Missouri and New York) to pursue claims in federal court.

Like the state lawsuit, the federal case claimed that Scott was no longer a slave, owing to his previous residence in a free state and free territory. The federal court ruled against Scott, who then brought his case before the U.S. Supreme Court in a writ of error—an order from an appeals court requiring a trial court to send records to the U.S. Supreme Court for review.

The Supreme Court conducted a four-day hearing. Chief Justice Taney delivered what he hoped would be the definitive statement on slavery in the United States. Taney, a respected Maryland lawyer and former U.S. attorney general, had succeeded the legendary JOHN MARSHALL as chief justice. He used *Dred Scott* as a national forum on constitutional rights and race.

Chief Justice Taney's colleague, Associate Justice SAMUEL NELSON, urged the Court to reach a narrow decision based on the facts in *Dred Scott.* Because Scott's original action was brought in a Missouri court, Nelson believed simply that state law should prevail in the case. Under Missouri law, a slave's status was not affected by a temporary change in residence.

Chief Justice Taney did not want Scott defeated in a narrow holding. Instead, he wrote a sweeping defense of slavery, emphasizing the slave owners' constitutional rights and privileges. Taney observed that under the DUE PROCESS CLAUSE of the FIFTH AMENDMENT of the U.S. Constitution, no person can be deprived of property without legal proceedings. By outlawing slavery in certain U.S. territories, the Missouri Compromise stripped slave owners of their constitutional right to own property, or "articles of merchandise," as Taney referred to slaves. Taney found the Missouri Compromise unconstitutional. (Actually, the Missouri Compromise had been repealed by Congress in 1854, but Taney's ruling nevertheless worried abolitionists, who feared that Taney's findings could be applied to any federal legislation that restricted slavery.) Thus, the *Scott* decision both sanctioned slavery and encouraged its spread throughout all U.S. territories.

Taney's opinion also declared that black slaves and their descendants could not become U.S. citizens. Because blacks were ineligible for citizenship, they could not sue in federal court. Taney claimed that the architects of the U.S. Constitution did not intend for blacks to have constitutionally protected rights and immunities. The Founding Fathers had regarded blacks as socially and politically unfit. Taney observed that even if Scott were free, he could not appear before federal court, because of his race. However, Taney determined that Scott was not free, because his brief residence in a free state did not divest him of slave status.

President JAMES BUCHANAN hoped that the Supreme Court's unequivocal ruling in *Scott* would dispose of the slavery issue once and for all. The opinion had the opposite effect. Outrage among abolitionists and fence-sitters was deep. The nascent REPUBLICAN PARTY benefited from *Scott,* as new members joined in the wake of the pro-slavery ruling. The Republican party denounced the *Scott* decision, calling for measures to restrict slavery. Presidential candidate ABRAHAM LINCOLN used the case as a campaign issue and pledged to overturn the Court's ruling against Scott. Lincoln won the presidential election in 1860, and in 1861, the Civil War began.

After the unfortunate ruling, Scott was freed by Sanford and worked as a porter in a St. Louis hotel. He died of tuberculosis in 1858 or 1859. Sanford was institutionalized for mental illness, a condition his friends traced to his public involvement in the *Scott* fiasco.

The Supreme Court's reputation suffered greatly owing to its poor handling of the slavery issue. Newspaper editors and politicians lambasted the Court for its colossal misstep. Historians single out Taney's *Dred Scott* decision as one of the lowest points in U.S. JURISPRUDENCE.

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CROSS-REFERENCES

Civil Rights Acts; "*Dred Scott Case*" (Appendix, Primary Document); Prejudice; Racial and Ethnic Discrimination.

## DRIVING UNDER THE INFLUENCE (DUI)

See DWI.

## DROIT

*[*French, Justice, right, law.*] A term denoting the abstract concept of law or a right.*

*Droit* is as variable a phrase as the English *right* or the Latin *jus.* It signifies the entire body of law or a right in terms of a duty or obligation.

## DRUG COURTS

*A special court with jurisdiction over cases involving drug-using offenders. Drug courts are treatment-based alternatives to prisons, youth-detention facilities, jails, and* PROBATION. *These courts make extensive use of comprehensive supervision, drug testing, treatment services, immediate sanctions, and incentives.*

Drug courts concentrate the efforts of judges, prosecutors, defense counsel, substance-abuse treatment specialists, probation officers, law enforcement and correctional personnel, educational and vocational experts, community leaders, and others on individuals who are charged with illicit drug abuse. The criminal justice system works cooperatively with treatment systems and others to provide an offender with the necessary tools to get into recovery, stay in recovery, and lead a productive, crime-free life.

The drug court acts to help the offender change his or her life in order to stop criminal activity, rather than focusing only on punishment of the offender. Drug courts also help to provide consistent responses to drug offenses among the judiciary, and they can foster coordination between intervention agencies and resources, thus increasing the cost-effectiveness of drug-intervention programs. Successful completion of the drug court's treatment or intervention regimen usually results in the dismissal of drug charges, shortened or suspended sentences, or a combination of these. Participants acquire the wherewithal to rebuild their lives.

In 1989, the nation's first drug court was established in Miami, Florida. Circuit Court Judge Herbert M. Klein had become troubled by the negative effects of drug offenses on Dade County. He became determined to address the problem caused by widespread drug use. This first drug court became a model program for the nation.

Drug courts that followed the Miami model essentially began as diversionary programs that dealt with non-violent offenders. These subjects typically were charged with relatively minor offenses, such as simple drug possession or charges of driving under the influence.

At first, drug courts were geared toward adult populations. The successes of adult drug courts in intervention and in changing the lives of adult offenders prompted juvenile courts to establish similar drug court programs aimed at juvenile offenders. Juvenile drug courts likewise have proven successful, and now many jurisdictions include family drug courts that primarily hear substance-abuse and neglect cases.

Differing needs across jurisdictions have resulted in a variety of drug courts in terms of their structure, scope, and target populations, but they all share three primary goals: reduction of RECIDIVISM, reduction of substance abuse among participants, and rehabilitation of participants.

To achieve these goals, drug courts generally structure themselves to include the following features:

- Incorporation of drug testing into case processing.
- Creation of a non-adversarial relationship between the offender and the court.
- Identification of offenders who are in need of treatment and referring them to treatment as soon as possible after arrest.
- Access to a continuum of treatment and rehabilitation services.
- Monitoring of abstinence through frequent, mandatory drug testing.
- Establishment of a coordinated strategy to govern drug court responses to offenders' compliance.
- Maintainence of judicial interaction with each drug court participant.
- Monitoring and evaluation of program goals and effectiveness.
- Continuing education to promote effective drug court planning, implementation, and operations.
- Forging of partnerships among drug courts, public agencies, and community-based organizations in order to generate local support and to enhance drug court effectiveness.

Drug courts can be used for a variety of case types and are adaptable enough to fit the needs and acceptability of any given community. Jurisdictions tailor their drug courts to meet the specific needs of their communities. Most drug courts are pre-plea courts, but some drug courts are post-plea, and others are used as a method of alternative sentencing. In a pre-plea program, charges are deferred while the defendant is actively participating in the drug court program. At that point in the process, he or she has not

pled guilty to any charges. This program is designed principally for non-violent, first-time, low-risk offenders.

Post-plea drug courts are not as common but are used mostly in the cases of more serious offenders when the prosecutor wants to ensure a guilty plea in order to avoid a trial. The chances of a more serious offender successfully completing a program in a drug court might be reduced, but the prosecution's trial-preparation time is saved in the event of failure.

As drug courts have consistently proven to be effective at controlling both the drug use and the criminality of drug-using offenders, communities have successfully expanded drug court programs to include those who are on probation for drug offenses, extending them to drug-using offenders who are charged with non-drug offenses. Some jurisdictions are even beginning to apply the drug court model to cases of driving under the influence of alcohol (DUI). In doing so, DUI courts, like the traditional drug courts, make DUI offenders accountable for their actions in ways that go beyond standard punitive measures such as fines and incarceration, thus helping to bring about a behavioral change among some DUI offenders that ends DUI recidivism, halts the abuse of alcohol, and protects the public.

The **VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994**, 18 U.S.C.A. §§ 1033, 1034, signed by President **WILLIAM JEFFERSON CLINTON** on September 13, 1994, was a key factor behind the expansion of the drug court movement. This statute provided federal support for planning, implementing, and enhancing drug courts for nonviolent drug offenders. The Act was the product of six years of bipartisan efforts. It remains one of the largest crime bills in the history of the country and provides for a competitive grant program to support state and local drug courts that provide supervision and specialized services to offenders who have rehabilitation potential.

The Bureau of Justice Assistance (BJA) administers the drug court grant program that was established under the 1994 Act. The BJA provides financial and technical assistance, training, program guidance, and leadership. It offers grants to jurisdictions for planning, implementing, or enhancing existing drug courts. In conjunction with the National Institute of Justice, BJA also evaluates drug court programs to identify the most effective program features and organizational structures to combat drug abuse and crime. State courts, local courts, units of local government, and American Indian tribal governments may apply for funding. $29 million was available in 1995, and $971 million was authorized under this program to cover the years 1996–2000.

The record of success, supported by large, federal support initiatives such as the 1994 Act, led to a rapid proliferation of drug courts throughout the United States. By the end of 2000, nearly 600 drug courts were in operation in all 50 States, the District of Columbia, Puerto Rico, Guam, and two federal districts. Another 456 drug court programs were being planned.

Over 300,000 drug-using offenders have participated in drug court programs since 1989. In 2001, Columbia University's National Center on Addiction and Substance Abuse updated its 1998 review of drug court research and evaluations. The updated report concludes that drug courts continue to provide the most comprehensive and effective control of the drug-using offenders' drug-related criminal activity and drug use while under the drug court's jurisdiction. For example, the average rate of recidivism for those who complete the drug court program is between 4 percent and 29 percent, as compared to 48 percent for offenders who do not participate in a drug court program.

Drug courts have paved the way for the latest criminal justice innovation: therapeutic **JURISPRUDENCE**. Accordingly, several jurisdictions are developing special dockets that are modeled after the drug court format. Courts and judges have become more receptive to new approaches and thus have brought about a proliferation of problem-solving courts, including DUI courts, domestic-violence courts, mental-health courts, and re-entry courts.

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**CROSS-REFERENCES**

Drugs and Narcotics; Drug Enforcement Administration; Office of National Drug Control Policy.

## DRUG ENFORCEMENT ADMINISTRATION

The Drug Enforcement Administration (DEA) was established in 1973 by President RICHARD M. NIXON as part of the JUSTICE DEPARTMENT, thus uniting a number of federal drug agencies that had often worked at cross-purposes. Its mission is to "enforce the controlled substances laws and regulations of the United States and bring to the criminal and civil justice system those organizations and principal members of organizations who are involved in the growing, manufacture, or distribution of controlled substances in the United States." In addition to its domestic oversight the DEA has sole responsibility for coordinating and pursuing U.S. drug investigations abroad. The DEA also works closely with federal, state, local, and INTERNATIONAL LAW enforcement agencies to address drugs and drug-related crime.

The DEA concentrates on investigating and prosecuting organizations and their members who are involved in the cultivation, production, SMUGGLING, distribution, or diversion of controlled substances in or destined for the United States. The agency seeks to disrupt these organizations by arresting their members, confiscating their drugs, and seizing their assets. It creates, manages, and supports enforcement-related programs, both domestically and internationally, aimed at reducing the availability of and demand for controlled substances. This effort requires the ongoing management of a national narcotics intelligence system, the fruits of which are shared with federal, state, and local law enforcement authorities.

Because the importation of controlled substances is the main source of illegal drugs, the DEA has increasingly put its energies into international enforcement programs. It currently has offices in 56 foreign countries and maintains contacts with the UNITED NATIONS, INTERPOL (the international police organization. It is headquartered in Paris and has approximately 180 member countries), and other international drug enforcement agencies.

Training DEA agents and other law enforcement personnel on the intricacies of the drug trade has led the DEA to create rigorous educational courses. It provides training to DEA agents and support personnel, as well as to state and local police, international law enforcement officials, and other law enforcement employees on a wide range of critical subject matter. In 1999, this effort took a significant step forward with the opening of the DEA Justice Training Center in Quantico, Virginia. Apart from training, the DEA also conducts an international visitor program. The agency briefs foreign officials and U.S. diplomats on drug trafficking developments and new enforcement initiatives.

The collection of human and electronic intelligence is a major piece of the DEA's work. A substantial infrastructure supports these efforts to collect, analyze, and disseminate drug-related intelligence. The agency maintains a number of airplanes that are used to provide sophisticated electronic, air-based assistance to federal, state, and local law enforcement agencies. It also operates eight laboratories in the United States that are used to analyze seized drugs and to provide evidence for drug prosecutions by law enforcement.

Since the 1990s, the DEA has put more emphasis on asset FORFEITURE. Federal law provides that profits from drug-related crimes, as well as property used to facilitate certain crimes, are subject to forfeiture to the government. Asset forfeiture removes the profit from these illegal activities and it can financially disable drug-trafficking organizations. Assets that are acquired through forfeiture are sold and the money is put into the Asset Forfeiture Fund, which is used to help crime victims and to fund law enforcement programs that further combat crime. Property is seized by the DEA only when it is determined to be a tool for, or the proceeds of, illegal activities such as drug trafficking, ORGANIZED CRIME, or MONEY LAUNDERING.

The DEA seeks both to destroy illegal narcotics and to reduce the demand for drugs. For example, The DEA aggressively strives to halt the spread of marijuana cultivation to the United States through the Domestic Cannabis Eradication and Suppression Program (DCE/SP)—presently the only nationwide program that exclusively targets marijuana. The DEA continues to improve the effectiveness of its marijuana eradication efforts by spending $12.2 million in 2002 to support the 99 state and local agencies that are now active DCE/SP participants. In addition, the DEA continues monitoring state legislation to combat marijuana legalization. The DEA also funds a Demand Reduction program in the hopes that education will lead to reduced drug use. There are demand reduction coordinators in every field division in the United States.

**DEA Domestic Arrests, 1986 to 2002**

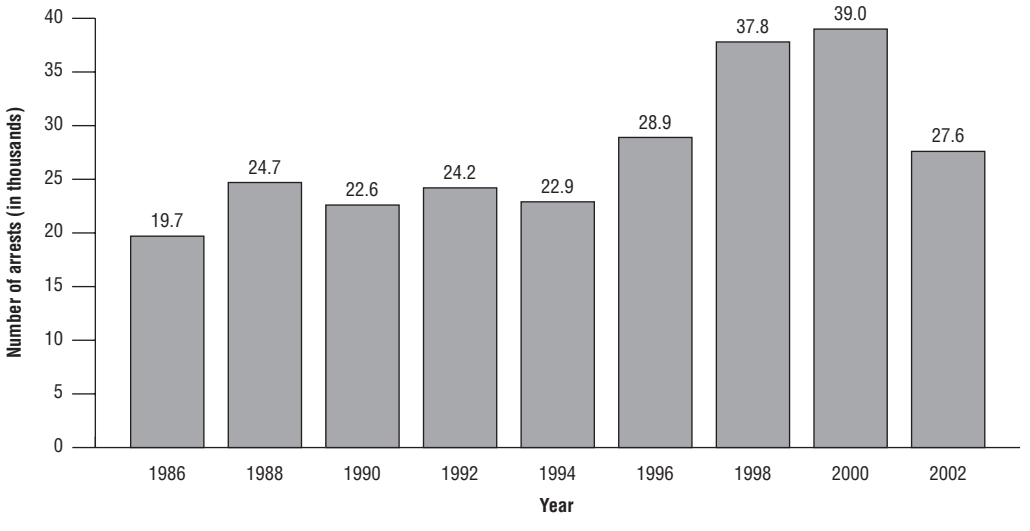


SOURCE: Drug Enforcement Administration web page.

The public is most familiar with the DEA's interdiction programs along the southern border of the United States. The El Paso Intelligence Center (EPIC) was created in 1974 to increase border security and to serve as a strategic drug and border enforcement facility. It coordinates enforcement intelligence with state, local, and other federal law enforcement agencies. EPIC also serves as the training center and real-time information outlet for Operation Pipeline, a national highway interdiction program. By 2000, the DEA's fleet of 95 aircraft routinely patrolled this border.

The DEA also participates in the High Intensity Drug Trafficking Areas (HIDTAs) program. This program was authorized by the Anti-Drug Abuse Act of 1988 and is administered by the OFFICE OF NATIONAL DRUG CONTROL POLICY. Its mission is to reduce drug trafficking throughout the United States by coordinating federal, state, and local law enforcement efforts. There were five HIDTAs in 1990, but the number expanded to 31 in 1999.

With the growing popularity of community-based policy in the 1990s, the DEA sought ways to provide local law enforcement agencies with support for reducing violent crime related to drugs. Out of this concern came the Mobile Enforcement Team (METs) program. METs use DEA, state, and local law enforcement personnel and resources to target high-crime areas. Thanks to the program, by August 2000, 265 deployments were completed resulting in over 11,000 arrests of violent drug criminals. In areas where the DEA has deployed METs, assaults have been reduced by 15 percent, homicides by 16 percent, and robberies by 14 percent. METs also contributed to the overall national decrease in violent crime during the 1990s.

By 2002, the DEA had identified heroin and methamphetamine as major threats to the United States. Although heroin is imported to the United States, methamphetamine is produced domestically in numerous "meth labs" throughout the country. In addition, the DEA argued that international terrorists had used drug trafficking and the laundering of proceeds from this trafficking to fund their violent actions against the United States and other nations. The agency labeled these persons as "narco-terrorists."

**FURTHER READINGS**

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**CROSS-REFERENCES**

Drugs and Narcotics.

## DRUGGIST

*An individual who, as a regular course of business, mixes, compounds, dispenses, and sells medicines and similar health aids.*

The term *druggist* may be used interchangeably with pharmacist.

Ordinarily, druggists must be registered under the Food, Drug, and Cosmetic Act (21 U.S.C.A. § 301 et seq. [1938]). Federal drug abuse laws make provisions for the special registration of any individual who handles controlled substances.

### Regulation

As a public health measure, states have the power to regulate the preparation and dispensing of drugs. They can proscribe the sale of certain substances without a prescription and specifically designate who is permitted to deal in prescription drugs. Statutes govern the procedures that must be observed when drugs are handled, as well as the steps that must be taken for the inspection of drugstores and pharmacy records by agents of the state.

States can properly mandate that pharmacists be licensed, provided the necessary qualifications are not unreasonable. For example, although it would be reasonable for a state to require that pharmacists earn college degrees, it would be unreasonable to require them to be natural-born citizens of the United States. State legislatures have the authority to prohibit any type of improper competition that would tend to lower the service standards.

*Druggists must ordinarily be a graduate of an accredited pharmacy school. Because they handle controlled substances, they must also be licensed and registered.*

AP/WIDE WORLD PHOTOS

### Education and License

A druggist must ordinarily be a graduate of an accredited pharmacy school and be of sound moral character. In some instances, he or she might be required to pass a written qualifying examination. An individual who conforms to all the requisite qualifications cannot be refused a license arbitrarily.

An individual who is licensed in one state does not have the authority to dispense drugs in other states, except where one state consents to recognize a license that has been issued in another state. A license might have to be periodically renewed and can be revoked or suspended for misconduct, such as the selling of an unlabeled drug, the unauthorized substitution of a cheaper for a more expensive drug, or the sale of prescription drugs to an individual who does not have a valid prescription.

Any state board decision to grant, revoke, or suspend a license is a proper subject for court review. A judge has the power to modify the decision of the board in the event that it is either ARBITRARY or unsupported by evidence.

Any business or individual engaged in handling drugs has a legal obligation to exercise proper care.

A druggist does not have the duty to fill every prescription that is presented, and he or she is not permitted to fill a prescription that appears to be a sham. A druggist who refuses to fill a prescription must return such prescription to the customer. The pharmacist is not permitted to retain it, for example, merely because money is owed by the customer.

Pharmacists are required to maintain written records of the drugs they sell and must allow the proper state officials to inspect such records. It is not ordinarily unlawful for a pharmacist to fill a prescription on the direction of a doctor who telephones it in, even if the doctor does not subsequently send a written authorization. The pharmacist, however, is required to make a written record at the time the prescription is filled.

Although a pharmacist is not required to know everything possible about drugs, he or she is required to be as skilled as most others in the profession. Additionally, a pharmacist owes customers a high degree of care in the service given to them, and they may properly make the assumption that the drugs that they are sold are suitable for the use that he or she recommends.

Customers can rely upon any specific claims that the pharmacist makes for the drugs.

### Liability for Injuries

A druggist who has failed to comply with the legal responsibilities of the profession can be subject to a legal action by a consumer. Liability is extended to a licensed pharmacist for his or her own NEGLIGENCE as well as the negligence of employees who work for him or her. The pharmacist is not ordinarily held liable for injuries sustained due to medicines sold by him or her in their original packages.

### Drugstores

A state can require that a drugstore be registered, and some mandate that the individual who runs the store be a licensed pharmacist. Regardless of whether or not this is a requirement, only a licensed pharmacist is permitted to dispense drugs. In addition, depending on individual state statute, some types of drugs can be sold only by a pharmacist.

Certain types of drugs have been designated patent medicines and household remedies, such as hydrogen peroxide, zinc oxide, camphor olive oil, aspirin, isopropyl alcohol, and essence of peppermint, and they may or may not be sold exclusively by pharmacists. Foods ordinarily do not fall under the category of drugs to be sold only by pharmacists regardless of health claims that are made for them. Vitamins are regarded as medicines in some instances and as food in others. Ordinarily, all of these items may be sold without a pharmacy license.

A physician does not have any special right to own or operate a drugstore. A person should not, however, be denied a license merely because he or she is also a medical doctor. Laws governing pharmacy do not generally interfere with the right of a physician to sell drugs to his or her patients. The physician cannot, however, make it a regular practice to fill prescriptions that other physicians send.

CROSS-REFERENCES

Drugs and Narcotics; Health Care Law; Physicians and Surgeons.

## DRUGS AND NARCOTICS

Drugs *are articles that are intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals, and any articles other than food, water, or oxygen that are intended to affect the mental or body function of humans or animals.* Narcotics *are any drugs that dull the senses and commonly become addictive after prolonged use.*

In the scientific community, drugs are defined as substances that can affect a human's or animal's biological and neurological states. They may be organic, such as the chemical tetrahydrocannabinol (THC), which occurs naturally in marijuana; or synthetic, such as amphetamines or sedatives, which are manufactured in laboratories. Drugs can be swallowed, inhaled through the nostrils, injected with a needle, applied to the skin, taken as a suppository, or smoked. Scientists categorize drugs according to their effects. Among their categories are analgesics, which kill pain, and psychoactive drugs, which alter the mind or behavior. Some psychoactive substances produce psychological highs or lows according to whether they are stimulants or depressants, respectively. Others, called hallucinogens, produce psychedelic states of consciousness; lysergic acid diethylamide (LSD) and mescaline are examples of such drugs. Marijuana is placed in its own category.

U.S. law categorizes these substances differently. Commonly, federal and state statutes distinguish drugs from narcotics. Drugs are substances designed for use in and on the body for the diagnosis, cure, treatment, or prevention of disease. These substances are regulated by the FOOD AND DRUG ADMINISTRATION (FDA). Drugs have been defined to include such things as herb tonics, cold salves, laxatives, weight-reduction aids, vitamins, and even blood. Narcotics are defined by statute as substances that either stimulate or dull an individual's senses, and that ordinarily become habit-forming (i.e., addictive) when used over time. The regulation of narcotics falls into two areas. Legal narcotics are regulated by the FDA and are generally available only with a physician's prescription. The production, possession, and sale of illegal narcotics—commonly called controlled substances—are banned by statute.

The U.S. government has expended billions of dollars in a fight to reduce drug use in the United States, citing startling numbers about the number of individuals who use drugs. According to a survey in 2000 by the JUSTICE DEPARTMENT, more than half of the adults in the United States between the ages of 18 and 34 have used illicit drugs during their lifetime. Moreover, 28 percent of children between the ages of 12 and

17 have used illicit drugs. Although much of the attention has focused upon use of such drugs as marijuana and cocaine, new "club" or "designer" drugs have become popular among some younger individuals. About six million children and young adults over the age of 12 have reported using the designer drug methylene-n-methylamphetamine (MDMA), also known as "ecstasy," which has sparked a national debate about improved drug education in grade schools and high schools in the United States.

### Drug Laws

Authority to regulate drug use rests foremost with the federal government, derived from its power to regulate interstate commerce. States are free to legislate so long as their laws remain consistent with federal law. Most states have adopted federal models for their own drug legislation.

Current law has two main objectives. First, it regulates the manufacture, sale, and use of legal drugs such as aspirin, sleeping pills, and antidepressants. Second, it prohibits and punishes the manufacture, possession, and sale of illegal drugs from marijuana to heroin, as well as some dangerous legal drugs.

The distinction between legal and illegal drugs is a twentieth-century phenomenon. During the nineteenth century, there was very little governmental control over drugs. The federal government regulated the smallpox vaccine in 1813 (2 Stat. 806) and established some controls through the Imported Drugs Act of 1848 (9 Stat. 237, *repealed by* Tariff Act of 1922 [42 Stat. 858, 989]). But addictive substances such as opium and cocaine were legal; in fact, the latter remained a minor ingredient in Coca-Cola soft drinks until 1909. Heroin, discovered in 1888, was prescribed for treating other addictions. California began restricting opium in 1875, but widespread criminalization of the substance would not come for decades.

States began a widespread movement toward control of legal and illegal drugs at the turn of the twentieth century. The federal government joined this process with the **PURE FOOD AND DRUG ACT OF 1906** (34 Stat. 768, 1906, Ch. 3915, §§ 1–13, *repealed by* Federal Food, Drug, and Cosmetics Act of 1938), which primarily sought to protect consumers from "misbranded or poisonous" drugs, medicines, and alcohol. It established federal jurisdiction over the domestic manufacture and sale of drugs and also regulated drug imports.

Nevertheless, when Congress passed the Harrison Act of 1914 (Pub. L. No. 223, 38 Stat. 785), which imposed a tax on opium and cocaine, it stopped short of declaring either drug illegal. Most efforts to restrict drug use focused on alcohol. The temperance movement's **PROHIBITION** crusade culminated in the passage of the **EIGHTEENTH AMENDMENT** and the **VOLSTEAD ACT** of 1920 (41 Stat. 305), which made alcohol illegal. Alcohol remained illegal until the repeal of Prohibition in 1933.

Despite numerous amendments, flaws in the Pure Food and Drug Act spurred Congress to replace the statute. In 1938, federal lawmakers enacted the Federal Food, Drug, and Cosmetics Act (FFDC) (21 U.S.C.A. §§ 301 et seq.), which established the Food and Drug Administration (FDA) as the federal agency charged to enforce the law. The FFDC exerted broad control over the domestic commercial-drug market. Over the next two decades, states and the federal government continued to criminalize nonmedicinal and recreational drugs, and by midcentury, the division between legal and illegal drugs was firmly in place. In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act (21 U.S.C.A. §§ 801 et seq.), which continues to be the primary source of federal law on controlled substances.

Over-the-counter and prescription drugs are tightly regulated under the FFDC. This act and the Kefauver-Harris Drug Amendments of 1962 (Pub. L. No. 87-781, 76 Stat. 781) give the FDA a broad mandate. The agency protects consumers from the potential hazards of dangerous drugs, misleading labels, and **FRAUD**. The FDA sets standards of safety and quality, and its enforcement duties include the research, inspection, and licensing of drugs for manufacture and sale. Because the law requires that drugs not be adulterated, the FDA ascertains that they conform to legal standards of strength, quality, and purity. It also classifies the drugs that are to be dispensed only by a physician's prescription. Finally, new drugs can be placed on the market only after being approved by the FDA. Traditionally a slow process, FDA approval was speeded up significantly for some drugs in the 1980s and 1990s, largely in response to the AIDS epidemic.

To control the use of dangerous drugs, federal law and most state statutes use a classification system outlined by the Uniform Controlled Substances Act, based on the federal Comprehensive Drug Abuse Prevention and Control

Act. This system includes both illegal and dangerous legal drugs. It uses five groups, called schedules, to organize drugs according to their potential for medical use, harm, or abuse, and it imposes a series of controls and penalties for each schedule.

Heroin, hallucinogens, and marijuana are placed on schedule I, as they are thought to have a high potential for harm and no medical use. Other types of opiates and cocaine are on schedule II. Most depressants and stimulants are on schedule III. Some mild tranquilizers are on schedule IV. Schedule V is for drugs that are considered medically useful and less dangerous but that can cause limited physical and psychological dependence, such as cough-syrup mixtures that contain some codeine. Under the law, drugs may be rescheduled as new evidence of their uses or risks becomes apparent, and the attorney general has the authority to add new drugs to the schedules at any time.

Penalties are established according to the severity of the crime. Possession of a controlled substance is the most simple crime involving drugs. Possession with intent to sell is more serious. Selling or trafficking incurs the greatest penalties. The exact penalty for a particular offense depends on numerous factors, including the type of drug, its amount, and the convicted party's previous criminal record. Penalties range from small monetary fines to life imprisonment and even greater punishments. Under a general expansion of federal offenses that can invoke CAPITAL PUNISHMENT, the Violent Crime and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, imposes the death penalty for major drug trafficking. Generally, the highest price paid by drug offenders is prison time for trafficking. In 1999, according to statistics from the DEPARTMENT OF JUSTICE, the average sentence for drug offenders engaged in drug trafficking was 77.1 months, compared to an average of 15.8 months for drug possession.

Between the mid-1980s and early 1990s, lawmakers enacted the harshest drug laws in U.S. history. The impetus for these laws came from the so-called war on drugs, a broad federal and state public-policy push initiated under President RONALD REAGAN that received widespread public support. Among its many initiatives was the creation of the cabinet-level office of the national director of drug control policy, known as the drug czar, to coordinate national and international antidrug efforts.

The war on drugs also created a patchwork of antidrug laws. These included the Anti–Drug Abuse Act of 1986 (Pub. L. No. 99-570, 100 Stat. 3207), which toughened penalties for drug violations involving cocaine, especially its smokable derivative, crack. The law imposed mandatory minimum sentences, even for first-time offenders. For sentencing purposes, it established a ratio that regards one gram of crack as equivalent to 100 grams of powder cocaine. While greatly increasing the number of drug offenders in prisons, the law has provoked considerable controversy over its effect on minorities. The Anti–Drug Abuse Act of 1988 (Pub. L. No. 100-690, 102 Stat. 4181) further increased federal jurisdiction over drug crime. For the first time, it became a federal crime to possess even a minimal amount of a controlled substance. Penalties were added for crimes that involve minors, pregnant women, and the sale of drugs within 100 feet of public and private schools. States toughened their laws, as well. Michigan, for example, imposed life imprisonment without PAROLE for cocaine trafficking (Mich. Comp. Laws Ann. § 333.7403[2][a][i]).

Under the Violent Crime and Law Enforcement Act, Congress exempted certain first-time, non-violent offenders from minimum sentencing. An exempted person must be a first-time offender with a limited criminal history; must not have used violence or possessed a weapon during the offense; could not have organized or supervised activities of others; and must provide truthful information and evidence to the government during the offense.

The fight against illegal drugs has extended to housing. The Anti-Drug Abuse Act mandates that every local public-housing agency insert a clause in its standard lease document that gives the agency the right to evict tenants if they use or tolerate the use of illegal drugs on or near their premises.

The law has been lauded as an effective means of ridding public housing of drug dealers and other criminal activity that comes with it. However, critics have contended that many elderly citizens who live with their children and grandchildren have been unfairly evicted under this zero-tolerance policy. These critics have argued that the eviction of so-called "innocent" tenants violates the 1988 law, as Congress only meant to penalize those persons who have knowledge of drug use. The U.S. Supreme Court, in *Department of Housing and Urban*

# Crack Cocaine, Race, and the War on Drugs

In the war on drugs in the United States, race is a critical issue. Although statistics indicate that African Americans account for only 12 percent of all illegal drug use, they make up 44 percent of all drug arrests. This racial disparity has drawn the attention of policy makers, politicians, and the courts. Many observers attribute much of it to the severe penalties imposed for offenses involving crack cocaine, which lead to the arrest and conviction of primarily black defendants.

Smokable cocaine, or crack, originated in the 1980s in U.S. inner cities. Because crack costs much less than powder cocaine, it quickly became the choice of poor drug users. In response to the resulting increased use of crack, Congress passed the Anti-Drug Abuse Act of 1986 (Pub. L. No. 99-570, 100 Stat. 3207 [codified as amended in scattered sections of 21 U.S.C.A. §§ 801–970]).

The 1986 law regards one gram of crack as equivalent to one hundred grams of powder cocaine. The **U.S. SENTENCING COMMISSION** adopted this ratio when it revised the Sentencing Guidelines that same year. In 1988 the Anti-Drug Abuse Act was amended to establish new mandatory minimum sentences. The amendment's sponsor, Representative E. Clay Shaw, Jr. (R-FL), said of the tougher sentences: "Crack is an extraordinarily dangerous drug so we must take extraordinary steps to combat it."

Under federal law the offense of selling five grams of crack, for example, is punishable by a mandatory minimum sentence of five years. To receive the same sentence for trafficking in powder cocaine, an offender would have to sell five hundred grams. Thus, small-time crack dealers can receive longer prison terms than cocaine wholesalers. In addition, mandatory minimum sentences for crack offenses mean that **PLEA BARGAINING** for a reduced sentence is not available. First-time offenses involving crack or powder cocaine are also differentiated. First-time offenders convicted in powder cocaine cases often receive **PAROLE** and drug treatment; most first-time offenders in crack cases receive jail sentences.

By the early 1990s, the effect of these harsher laws on African Americans was evident. In a survey of 1992 sentencing data, the U.S. Sentencing Commission found that 92.6 percent of offenders sentenced for crack offenses were black, whereas 4.7 percent were white. With regard to cocaine offenses in general, 78 percent of offenders were black, and 6 percent were white.

The Bureau of Justice Statistics in the **JUSTICE DEPARTMENT** concluded in 1993 that blacks are jailed longer than whites for drug offenses. The bureau explained that "the main reasons that African Americans' sentences are longer than whites' . . . was that 83 percent of all federal offenders convicted of trafficking in crack cocaine in guideline cases were black, and the average sentence imposed for crack trafficking was twice as long as for trafficking in powdered cocaine."

*Development v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002), rejected these arguments, ruling that the law clearly gives the housing agency discretion to evict tenants, whether or not they knew about drug use. The case arose when a 63-year-old grandmother in Oakland, California, was evicted when her adult daughter had been caught using crack cocaine three blocks from her mother's house.

### Drug Policy and Law Enforcement

The enforcement of U.S. drug laws involves the use of substantial federal and state resources to educate, interdict, and prosecute. Estimates of the total annual cost of drug enforcement ranged from $20 billion to $30 billion in the 1990s. The federal government directs drug enforcement policy through the national director of drug control policy. Policy implementation involves both federal and state agencies, including the Department of Justice, the **DRUG ENFORCEMENT ADMINISTRATION** (DEA), the **FEDERAL BUREAU OF INVESTIGATION** (FBI), the **STATE DEPARTMENT**, branches of the **ARMED SERVICES** and the U.S. Coast Guard, and local police departments. Drug enforcement is primarily a national effort, yet because drugs enter the United States from other countries, it also has international considerations.

The war on drugs can be traced back to the 1960s, when illicit drugs became especially popular again. The accompanying increase in drug use led to comprehensive antidrug legislation under President **RICHARD M. NIXON**, whose administration introduced the metaphor of war for the drive to enforce drug laws. In the 1980s, under President Reagan, the campaign took its present form. The Reagan administration's public-relations campaign (which popularized the

Some critics believe that the racial disparities in sentencing are a result of intentional discrimination. They argue that race has long been an issue in drug enforcement laws, from concerns about Chinese laborers and opium at the turn of the twentieth century to fears about blacks and cocaine in the early 1900s that produced headlines such as "Negro Cocaine 'Fiends' Are a New Southern Menace." Other critics take the suggestion of conspiracy further, arguing that the comparatively heavy drug use (as well as violence) in the black community is a result of deliberate attempts by whites to foster black self-destruction.

Not all critics believe that the racial disparities created by the war on drugs are intentional. As of 2003, at least one state court had struck down enhanced penalties for crack offenses as a violation of **EQUAL PROTECTION** under the state constitution (*State v. Russell,* 477 N.W.2d 886 [Minn. 1991]). In that case the court said that state law treated black crack offenders and white powder cocaine offenders unfairly, although that result may have been unintentional.

On the federal level, several convicted crack offenders have argued that the discrepancy between sentences for crack and powder cocaine violates equal protection or **DUE PROCESS**, but nearly every appellate court has rejected this argument. In May 1996 the U.S. Supreme Court held that statistics showing that most crack defendants are black do not in themselves support the claim of **SELECTIVE PROSECUTION**. Instead, the Court ruled, the burden is on defendants to prove that "similarly situated defendants of other races could have been prosecuted, but were not" (*United States v. Armstrong,* 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687).

Lawmakers have also rejected the assertion that racial discrepancies are unjust. In April 1995 the U.S. Sentencing Commission proposed abandoning the guidelines. Determining that the penalties were too harsh, the seven-member commission voted 4 to 3 to equalize penalties for crack and powder cocaine. Although most black members of Congress supported changing the sentencing guidelines, conservatives argued that crack sentencing had nothing to do with race and that revising the guidelines would allow serious offenders to serve little or no time. The penalties remained intact.

Many liberal organizations, including the **AMERICAN CIVIL LIBERTIES UNION**, have decried the war on drugs due to the disproportionate impact on racial minorities. The Drug Policy Alliance, which claims to be the leading organization promoting alternatives to the war, has held a number of national conferences on this issue. In 2001, a group of politicians, celebrities, religious leaders, and advocates for drug policy reform submitted a letter to the secretary general of the **UNITED NATIONS** calling the war on drugs a "de facto form of racism."

As long as the war on drugs remains a priority for domestic policy, prosecution and incarceration for drug crimes will continue on a large scale. The challenge facing legislators, attorneys, and the courts is how to make a system that reduces the effects of drug use on U.S. society, while avoiding excessive punishment of particular societal groups.

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Due Process of Law; Equal Protection; Selective Prosecution; Sentencing.

saying "Just say no") was bolstered by stricter state and federal drug laws. Federal spending to enforce drug laws rose from $37 million in 1969 to $1.06 billion in 1983. Over the next decade, it increased to approximately $30 billion, including the full cost of federal, state, and local law enforcement efforts, along with costs incurred by the judiciary and prison and **HEALTH CARE** systems. In 2003, President **GEORGE W. BUSH** set aside about $3.4 billion to the DEA alone in the fight against drugs.

Enforcement efforts are shared between federal and state governments. Joint federal-state task forces investigate illegal drug sales for two key reasons. First, states have declared an interest in eradicating the illegal sale and use of controlled substances through the enactment of severe antidrug laws, but they lack the necessary resources. Second, in return for their participation, state law enforcement agencies are eligible for federal funds that are crucial to their operation. Besides helping the agencies to meet administrative expenses, local undercover police officers use these funds to buy drugs so that they can arrest dealers.

As a result of these shared operations, prosecutors have broad discretion in pursuing drug offenses. They may charge defendants under federal law, state law, or sometimes both. The U.S. Constitution's protection against **DOUBLE JEOPARDY** (i.e., being tried twice for the same criminal action) does not apply when separate jurisdictions bring charges, and the dual-sovereignty doctrine allows successive federal and state prosecutions; however, many states prohibit prosecution in their courts if the conduct already has been the subject of a federal prosecution. Prosecutors consider several

factors when deciding where to bring charges, including the relative severity of state and federal drug laws; the existence of mandatory minimum sentencing guidelines in federal court; and the comparative leniency of federal rules regarding wiretaps and informants. Although federal law generally is tougher because of its mandatory minimum sentences, nearly every state has enacted laws requiring mandatory prison time for certain drug offenses.

Prosecutors also take into account the kind of drug involved. Under federal sentencing guidelines, crack cocaine is treated much more harshly than is powder cocaine. Prosecutors also may seek civil fines and civil **FORFEITURE** of property.

The number of individuals charged with drug offenses by the federal government rose from 11,854 to 29,306 between 1984 and 1999. The percentage of crimes prosecuted by the federal government likewise increased. In 1984, 18 percent of referrals by federal prosecutors involved drug offenses. This number increased to 32 percent in 1999. Between October 1999 and September 2000, the federal government successfully prosecuted 24,206 drug defendants. Ninety-one percent of those convictions resulted in incarceration.

The majority of federal drug offenses involve marijuana, powder cocaine, crack cocaine, and methamphetamine. In 1999, federal officials made 38,288 arrests for drug offenses. Thirty-one percent of those cases involved marijuana, while 28 percent involved powder cocaine; 15 percent involved crack cocaine; and 15 percent involved methamphetamine. The remaining 11 percent involved opiates and other types of drugs.

On February 12, 2002, President George W. Bush announced the creation of the National Drug Control Strategy. The core principles include (1) stopping drug use before it starts; (2) healing America's drug users; and (3) disrupting the drug market. The goals of the initiative include the reduction of drug use by ten percent in the first two years, and by 25 percent over the first five years. The DEA is largely responsible for carrying out this strategy.

In addition to domestic efforts to police drug sales, international efforts are part of the war on drugs. These efforts include interdiction by federal law enforcement agents at the U.S. border to prevent drugs from entering the country. The federal government has also posted DEA agents in other countries, such as Bolivia and Colombia, as part of a broader campaign to prevent the flow of drugs into the United States. Throughout the 1980s and 1990s, the United States applied diplomatic pressure to the governments of Bolivia and Colombia to persuade them to end drug production in their countries. In order to continue receiving U.S. aid and government-backed loans, foreign nations have had to cooperate with the antidrug initiatives of Washington. In March 1996, President **BILL CLINTON** cut off such aid to Colombia for lack of cooperation.

The funding in Colombia did not end in 1996, despite a strong opposition to the policies against funding the drug war through South American countries. The United States has invested an estimated $30 billion in the war on drugs in Latin America, yet the influx of drugs into the United States continues. An estimated 80 percent of drugs in the United States originate in South America, many in Colombia.

In 2000, President Clinton approved a spending bill that called for $1.3 billion in aid to the Colombian government. Members of Congress expressed concern that financing the Colombian government would spread the ongoing civil war in that country, which claimed more than 35,000 lives in the 1990s. Much of the bill was designed to provide Colombia with military equipment, and it also called for training of Colombian soldiers. Colombian leaders promised that the aid would cut drug production in that country by half.

The courts have played a significant role in the war on drugs. Broadly speaking, under the **FOURTH AMENDMENT**, they have expanded the power of the police to conduct **SEARCHES AND SEIZURES**. In a series of decisions during the 1980s and 1990s, the U.S. Supreme Court ruled that police officers have the power to conduct warrantless searches of bus passengers, car interiors, mobile homes, fenced private property and barns, luggage, and trash cans. In *Minnesota v. Dickerson,* 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993), the Court held that no warrant was needed to seize narcotics that are recognizable by "plain feel" while an officer is frisking a suspect for concealed weapons.

In contrast, the Court restricted the power of state and federal governments to use civil fines and civil forfeiture of property as penalties in drug cases. In a 1989 case that had a substantial bearing on prosecutorial initiative in drug

enforcement, the Court held that the government could not recover both a criminal fine and a civil penalty in separate proceedings (*United States v. Halper,* 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487). In 1993, the Court curtailed civil forfeiture laws by ruling that confiscation of property is subject to the Eighth Amendment's protections against excessive fines (*Austin v. United States,* 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488).

### Movement to Legalize Marijuana for Medical and Other Purposes

For many decades, the federal government has classified marijuana as a controlled substance that cannot be used legally except for scientific research projects. Although state governments continue to make the possession, distributions, and use of marijuana a crime, nine states have legalized the use of the drug for medicinal use. Through the use of ballot initiatives, voters approved these so-called "medical marijuana" laws in eight of these states, including California. Advocates contend that persons who are afflicted with serious illnesses such as AIDS, cancer, and multiple sclerosis are helped by smoking marijuana. The federal government contested the constitutionality of these laws, believing that federal drug laws prevent the states from making exceptions.

The federal government's efforts to end the distribution of medical marijuana in California led to a U.S. Supreme Court decision, *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001). The Court agreed with the federal government, concluding that the federal Controlled Substances Act did not recognize the use of marijuana for medical purposes.

The case grew out of a 1996 vote in California. Citizens had brought about an initiative called the Compassionate Use Act of 1996. The law sought to provide seriously ill persons with legal clearance to purchase marijuana for medicinal use. It permitted patients and their primary caregivers to possess or to cultivate marijuana for medical purposes if approved by a physician. Following the law's enactment, numerous organizations started "medical cannabis dispensaries" to distribute marijuana to eligible patients. The Oakland Cannabis Buyers' Cooperative was one of those organizations. The nonprofit cooperative employed a doctor and registered nurses to screen prospective members through a personal interview and a review of the treating physician's written statement. If the person met the requirements, the cooperative issued the person an identification card that entitled him or her to purchase marijuana from the organization.

The federal government sued the cooperative in 1998 and asked the federal district court to issue an INJUNCTION banning the cooperative from distributing and manufacturing marijuana. The court agreed that the cooperative had violated the federal controlled-substance law and issued the injunction. On appeal, the Ninth Circuit Court of Appeals reversed the lower court's decision. It ruled that a "medical necessity exemption" existed and that the district court could apply its equitable discretion and permit the cooperative to assert such an exemption.

Subsequently, the U.S. Supreme Court reversed the Ninth Circuit in an 8-0 decision. Justice CLARENCE THOMAS, writing for the Court, looked to the provisions of the Controlled Substances Act to determine whether the courts could make medical necessity a defense. Thomas noted that marijuana is classified as a schedule I substance. The only express exception to the unlawfulness of possession, manufacture, or distribution is for government-approved research projects. Taking these provisions into account, Justice Thomas concluded that there was clearly no statutory exemption.

Although certain groups continue to advocate making marijuana use legal, the movement has lost steam since the decision in *Oakland Cannabis*—especially those groups that advocate making marijuana use legal for *any* purpose, including recreational use. These individuals claim that marijuana is no more harmful than alcohol, which is regulated but has not been outlawed since Prohibition was reversed in the 1930s. This movement, generally led by some small liberal and radical groups, has never had backing among politicians and is even less likely to garner support in light of *Oakland Cannabis.*

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CROSS-REFERENCES

Criminal Law; Criminal Procedure; Education Law; Employment Law; Privacy; Schools and School Districts; Sports Law.

## DRUNKARD

*One who habitually engages in the overindulgence of alcohol.*

In order for an individual to be labeled a drunkard, drunkenness must be habitual or must recur on a constant basis. A person who regularly drinks heavily but is sometimes not under the influence of alcohol would be considered a drunkard, whereas a person who occasionally gets drunk would not. The test is the question of whether or not excessive drinking has become a frequent behavior pattern for a particular person.

## DRUNKENNESS

*The state of an individual whose mind is affected by the consumption of alcohol.*

Drunkenness is a consequence of drinking intoxicating liquors to such an extent as to alter the normal condition of an individual and significantly reduce his capacity for rational action and conduct. It can be asserted as a defense in civil and criminal actions in which the state of mind of the defendant is an essential element to be established in order to obtain legal relief.

## ❖ DU BOIS, WILLIAM EDWARD BURGHARDT

W. E. B. Du Bois was an African American intellectual, sociologist, poet, and activist whose fierce commitment to racial equality was the seminal force behind important sociopolitical reforms in the twentieth-century United States.

Although Du Bois may not have the same name recognition as FREDERICK DOUGLASS or MARTIN LUTHER KING JR., he is regarded by most historians as an influential leader. King himself praised Du Bois as an intellectual giant whose "singular greatness lay in his quest for truth about his own people." Reflecting on Du Bois's legacy, playwright Lorraine Hansberry noted that "his ideas have influenced a multitude who do not even know his name."

Born February 23, 1868, in Great Barrington, Massachusetts, during the Reconstruction period following the U.S. CIVIL WAR, Du Bois was of African, French, and Dutch descent. His tremendous potential was apparent to his fellow townspeople, who raised money in the local churches to send him to Tennessee's Fisk University, a predominantly African American school. Du Bois earned a bachelor of arts degree from Fisk in 1888. He then attended Harvard University, where his professors included George Santayana and WILLIAM JAMES. An outstanding student, Du Bois received three degrees from Harvard: a bachelor's in 1890, a master's in 1891, and a doctor's in 1895.

Du Bois traveled extensively in Europe during the early 1890s and did postdoctoral work at the University of Berlin, in Germany. It was there that he pledged his life and career to the social and political advancement of African Americans. When Du Bois returned to the United States, he accepted his first teaching position at Ohio's Wilberforce University. He later taught at the University of Pennsylvania and at Atlanta University.

Du Bois made his mark as an accomplished sociologist and historian, publishing groundbreaking studies on African American culture. In *The Philadelphia Negro* (1899), he interviewed 5,000 people to document the social institutions, health, crime patterns, family relationships, and education of African Americans in northern urban areas. In his 1903 book *The Souls of Black*

*Folk,* he published a beautifully written collection of essays on the political history and cultural conditions of African Americans.

Although his success in academe was well recognized, Du Bois chose to cut a bolder swath as a passionate social activist. He became a symbol of principled social protest on behalf of African Americans. Du Bois combined his scholarly endeavors with the profound outrage he felt over racial injustice and the South's discriminatory JIM CROW LAWS. He used his position as a respected intellectual to decry the unequal treatment of African Americans and to push for fundamental change. According to King, Du Bois knew it was not enough to be angry. The task was to organize people so that the anger became a transforming power. As a result, King said, "It was never possible to know where the scholar Du Bois ended and the organizer Du Bois began. The two qualities in him were a single unified force."

Du Bois was a contemporary of BOOKER T. WASHINGTON, the head of Alabama's famed Tuskegee Institute and the undisputed leader of the African American community at the turn of the twentieth century. A former slave, Washington was a powerful figure who favored the gradual acquisition of CIVIL RIGHTS for African Americans. He believed that the best route for African Americans was agricultural or industrial education, not college. Although Du Bois agreed with some of Washington's ideas, he eventually lost patience with the slow pace and agenda of Washington's program.

To Du Bois, Washington's Tuskegee Machine was much too accommodating to the white power structure. Du Bois favored a more militant approach to achieving full social and political justice for African Americans. Because of Du Bois's talent as a writer, he became an effective spokesperson for the opponents of Washington's gradualism. He became the unambiguous voice of indignation and activism for African Americans. Du Bois insisted on the immediate rights of all people of color to vote; to obtain a decent education, including college; and to enjoy basic civil liberties.

*W. E. B. Du Bois.*
FISK UNIVERSITY LIBRARY

"THE COST OF LIBERTY IS LESS THAN THE PRICE OF REPRESSION."
—W. E. B. DU BOIS

His beliefs led to the creation of the Niagara movement in 1905. This organization was formed by like-minded African Americans to protest Washington's compromising approach to the so-called Negro problem. Du Bois preached power through achievement, self-sufficiency, racial solidarity, and cultural pride. He came up with a plan called the Talented Tenth, whereby a select group of African Americans

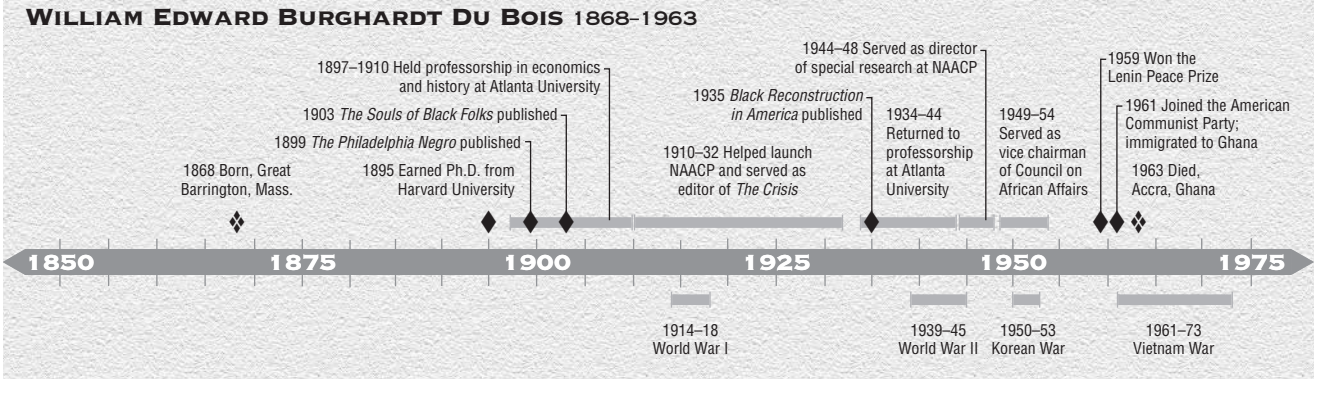

would be groomed for leadership in the struggle for equal rights. The Niagara movement lasted until 1910 when Du Bois became involved in a new national organization.

In 1910, Du Bois helped launch the biracial National Association for the Advancement of Colored People (NAACP). He became the group's director of research and the editor of the NAACP publication *The Crisis.* Du Bois's work on *The Crisis* provided a wide audience for his views on racial equality and African American achievement. His writings influenced scores of African Americans who eventually made their demands for full citizenship heard in the nation's legislatures and courtrooms. Du Bois was a guiding force in the NAACP until 1934 when his interest in COMMUNISM led him to leave the organization.

On September 9, 1963, the NAACP Board of Directors recognized Du Bois's contributions to the CIVIL RIGHTS MOVEMENT in the following resolution: "It was Dr. Du Bois who was primarily responsible for guiding the Negro away from accommodation to racial SEGREGATION to militant opposition to any system which degraded black people by imposing upon them a restricted status separate and apart from their fellow citizens."

Du Bois was also a proponent of Pan-Africanism, a movement devoted to the political, social, and economic empowerment of people of color throughout the world. Later, he became active in trade unionism, WOMEN'S RIGHTS, and the international peace movement. Never one to shy away from controversy, Du Bois also embraced SOCIALISM and communism at a time when they were especially unpopular in the United States. He joined the American Communist party in 1961, after winning the Lenin Peace Prize in 1959 from the former Soviet Union.

Du Bois became increasingly disenchanted with the United States, and emigrated to Ghana in 1961. He was a citizen of that country at the time of his death in 1963.

Du Bois's influence on U.S. law was indirect but powerful. He spoke out eloquently against injustice and inspired generations of African Americans to work for racial equality. With 21 books to his credit and a zeal for organizing social protest, he helped plant the seeds for the civil rights and black power movements in the United States during the 1950s and 1960s. His unswerving commitment to equal rights helped bring about changes in the laws governing education, voting, housing, and public accommodations for racial minorities.

In 1900, Du Bois wrote *Credo,* a statement of his beliefs and his desire for social change. The poet in him was revealed when he wrote,

> I believe in Liberty for all men: the space to stretch their arms and their souls, the right to breathe and the right to vote, the freedom to choose their friends, enjoy the sunshine, and ride on the railroads, uncursed by color; thinking, dreaming, working as they will in a kingdom of beauty and love.

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## DUAL NATIONALITY

*An equal claim, simultaneously possessed by two nations, to the allegiance of an individual.*

This term is frequently perceived as synonymous with dual citizenship, but the latter term encompasses the concept of state and federal citizenship enjoyed by persons who are born or naturalized in the United States.

Under INTERNATIONAL LAW, the determination of citizenship when dual nationality is involved is governed by treaty, an agreement between two or more nations.

A person who possesses dual citizenship generally has the right to "elect," or to choose, the citizenship of one nation over that of another, within the applicable age limit or specified time period. A person could be a U.S. citizen because of his or her birth in the United States and a citizen of a foreign country because his or her immigrant parents returned with their child to their native land. Foreign law could deem the child to be a citizen of the parents' native land, but it cannot divest the child of U.S. citizenship.

Under federal law, a native-born or naturalized U.S. citizen relinquishes his or her U.S. citizenship if the individual procures naturalization in a foreign state through a personal application, or pursuant to an application filed in his or her behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody. An exception, however, provides that the individual will not lose his or her U.S. citizenship as the consequence of the naturalization of a parent or parents while he or she is under twenty-one years of age, or as the result of a naturalization obtained on his or her behalf while under twenty-one years of age by a parent, guardian, or authorized agent, unless the individual fails to enter the United States to establish a permanent residence prior to the twenty-fifth birthday.

The treaty between the United States and the foreign nation determines whether the individual may maintain the dual citizenship if he or she elects to retain the U.S. citizenship, or may lose his or her foreign citizenship and remain only a U.S. citizen.

## DUCES TECUM

*[*Latin, Bring with you.*] Commonly called a* SUBPOENA DUCES TECUM*, a type of legal writ requiring one who has been summoned to appear in court to bring some specified item with him or her for use or examination by the court.*

A person served with a *subpoena duces tecum* might be required to present documents, such as business records or other pieces of physical evidence, for the inspection of the court.

## DUE

*Just; proper; regular; lawful; sufficient; reasonable, as in the phrases* due care, due process of law, due notice.

*Owing; payable; justly owed. That which one contracts to pay or perform to another; that which law or justice requires to be paid or done. Owed, or owing, as distinguished from payable. A debt is often said to be* due *from a person where he or she is the party owing it, or primarily bound to pay, whether the time for payment has or has not arrived. The same thing is true of the phrase* due and owing.

The term *due* is essentially contextual in nature and has various legal applications, all of which involve the sufficiency or reasonableness of an action or obligation.

*Due care* is the use of the requisite amount of caution needed in a particular set of circumstances based upon what a reasonably prudent person would do under similar circumstances. Exercising due care while driving might mean obeying traffic regulations.

*Due consideration* is the proper weight or significance given to a matter or a factor as circumstances mandate. It may also have application in sufficiency of consideration in the law of contracts.

## DUE DATE

*The particular day on or before which something must be done to comply with law or contractual obligation.*

## DUE NOTICE

*Information that must be given or made available to a particular person or to the public within a legally mandated period of time so that its recipient will have the opportunity to respond to a situation or to allegations that affect the individual's or public's legal rights or duties.*

Due notice is not a fixed period of time in every instance but varies from case to case, depending upon the facts and the applicable statutory requirements. In some situations, it might be a specified time; in others, it might be considered a reasonable time, thereby presenting a QUESTION OF FACT in a lawsuit to determine if timely notice has been given.

## DUE PROCESS OF LAW

*A fundamental, constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one's life, liberty, or property. Also, a constitutional guarantee that a law shall not be unreasonable,* ARBITRARY*, or capricious.*

The constitutional guarantee of due process of law, found in the Fifth and Fourteenth Amendments to the U.S. Constitution, prohibits all levels of government from arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, liberty, and property. The DUE PROCESS CLAUSE of the FIFTH AMENDMENT, ratified in 1791, asserts that no person shall "be deprived of life, liberty, or property, without due process of law." This amendment restricts the powers of the federal government

and applies only to actions by it. The Due Process Clause of the FOURTEENTH AMENDMENT, ratified in 1868, declares, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law" (§ 1). This clause limits the powers of the states, rather than those of the federal government.

The Due Process Clause of the Fourteenth Amendment has also been interpreted by the U.S. Supreme Court in the twentieth century to incorporate protections of the BILL OF RIGHTS, so that those protections apply to the states as well as to the federal government. Thus, the Due Process Clause serves as the means whereby the Bill of Rights has become binding on state governments as well as on the federal government.

The concept of due process originated in English COMMON LAW. The rule that individuals shall not be deprived of life, liberty, or property without notice and an opportunity to defend themselves predates written constitutions and was widely accepted in England. The MAGNA CHARTA, an agreement signed in 1215 that defined the rights of English subjects against the king, is an early example of a constitutional guarantee of due process. That document includes a clause that declares, "No free man shall be seized, or imprisoned . . . except by the lawful judgment of his peers, or by the law of the land" (ch. 39). This concept of the law of the land was later transformed into the phrase "due process of law." By the seventeenth century, England's North American colonies were using the phrase "due process of law" in their statutes.

The application of constitutional due process is traditionally divided into the two categories of SUBSTANTIVE DUE PROCESS and procedural due process. These categories are derived from a distinction that is made between two types of law. SUBSTANTIVE LAW creates, defines, and regulates rights, whereas procedural law enforces those rights or seeks redress for their violation. Thus, in the United States, substantive due process is concerned with such issues as FREEDOM OF SPEECH and privacy, whereas procedural due process is concerned with provisions such as the right to adequate notice of a lawsuit, the right to be present during testimony, and the right to an attorney.

### Substantive Due Process

The modern notion of substantive due process emerged in decisions of the U.S. Supreme Court during the late nineteenth century. In the 1897 case of *Allgeyer v. Louisiana,* 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed. 832, the Court for the first time used the substantive due process framework to strike down a state statute. Before that time, the Court generally had used the COMMERCE CLAUSE or the Contracts Clause of the Constitution to invalidate state legislation. The *Allgeyer* case concerned a Louisiana law that proscribed the entry into certain contracts with insurance firms in other states. The Court found that the law unfairly abridged the right to enter into lawful contracts, as guaranteed by the Due Process Clause of the Fourteenth Amendment.

The next 40 years after *Allgeyer* were the heyday of what has been called the freedom-of-contract version of substantive due process. During those years, the Court often used the Due Process Clause of the Fourteenth Amendment to void state regulation of private industry, particularly regarding terms of employment such as maximum working hours or minimum wages. In one famous case from that era, LOCHNER V. NEW YORK, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), the Court struck down a New York law (N.Y. Laws 1897, chap. 415, art. 8, § 110) that prohibited employers from allowing workers in bakeries to be on the job more than ten hours per day and 60 hours per week. The Court found that the law was not a valid exercise of the state's POLICE POWER. It wrote that it could find no connection between the number of hours worked and the quality of the baked goods, thus finding that the law was arbitrary.

In *Allgeyer* and *Lochner* and in other cases like them, the Court did not find that state legislatures had failed to enact their laws using the proper procedures—which would present an issue of procedural due process. Instead, it found that the laws themselves violated certain economic freedoms that inhered in the Due Process Clause, specifically its protection of liberty and what the Court described as freedom or liberty of contract. This freedom meant that individuals had the right to purchase or to sell labor or products without unreasonable interference by the government.

This interpretation of the Due Process Clause put the Court in direct opposition to many of the reforms and regulations passed by state legislatures during the Progressive Era of the early twentieth century. Justices who were opposed to the Court's position in such cases, including OLIVER WENDELL HOLMES JR. and

JOHN M. HARLAN, saw such rulings as unwarranted judicial activism in support of a particular free-market ideology.

During the 1930s, the Court used the doctrine of substantive due process to strike down federal legislation as well, particularly legislation associated with President FRANKLIN D. ROOSEVELT'S NEW DEAL. In 1937, Roosevelt proposed a court-packing scheme in which Roosevelt would have sought to overcome Court opposition to his programs by appointing additional justices. Although the plan was never adopted, the Court quickly changed its position on substantive due process and other issues and began to uphold NEW DEAL legislation. Now, a majority on the Court, including Chief Justice CHARLES E. HUGHES and Justice BENJAMIN N. CARDOZO, abandoned the freedom-of-contract version of substantive due process.

Even before the Court abandoned the freedom-of-contract approach to substantive due process, it began to explore using the Due Process Clause of the Fourteenth Amendment to re-evaluate state laws and actions affecting civil freedoms protected by the Bill of Rights. Since the 1833 case of BARRON V. BALTIMORE, 32 U.S. (7 Pet.) 243, 8 L. Ed. 672, the Court had interpreted the Bill of Rights as applying only to the federal government. Beginning in the 1920s, however, it began to apply the Bill of Rights to the states through the incorporation of those rights into the Due Process Clause of the Fourteenth Amendment. In GITLOW V. NEW YORK, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925), the Court ruled that the liberty guarantee of the Fourteenth Amendment's Due Process Clause protects FIRST AMENDMENT free speech from STATE ACTION. In NEAR V. MINNESOTA, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931), the Court found that FREEDOM OF THE PRESS was also protected from state action by the Due Process Clause, and it ruled the same with regard to freedom of religion in *Cantwell v. Connecticut,* 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

Because incorporation has proceeded gradually, with some elements of the Bill of Rights still unincorporated, it has also been called *selective incorporation.* Nevertheless, during the twentieth century, most of the provisions of the Bill of Rights were incorporated by the Due Process Clause of the Fourteenth Amendment, thereby protecting individuals from arbitrary actions by state as well as federal governments.

By the 1960s, the Court had extended its interpretation of substantive due process to include rights and freedoms that are not specifically mentioned in the Constitution but that, according to the Court, extend or derive from existing rights. These rights and freedoms include the freedoms of association and nonassociation, which have been inferred from the First Amendment's FREEDOM-OF-SPEECH provision, and the right to privacy. The right to privacy, which has been derived from the First, Fourth, and Ninth Amendments, has been an especially controversial aspect of substantive due process. First established in GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), the Court later used it to protect a woman's decision to have an ABORTION free from state interference, in the first trimester of pregnancy (ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 [1973]).

In several recent decisions, the U.S. Supreme Court has considered the application of substantive due process in light of actions taken by law enforcement officers. It often has determined that police actions have not violated a defendant's due process rights. In *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998), for example, the Court determined that high-speed chases by police officers did not violate the due process rights of the suspects whom the officers were chasing. In that case, two police officers had engaged in a pursuit of two young suspects at speeds of more than 100 miles per hour through a residential neighborhood. One of the young men died, while the other suffered serious injuries. A unanimous Court held that the officers' decision to engage in the pursuit had not amounted to "governmental arbitrariness" that the Due Process Clause protects due to the nature of the judgment used by the officers in such a circumstance.

The Court in *City of West Covina v. Perkins*, 525 U.S. 234, 119 S. Ct. 678, 142 L. Ed. 2d 636 (1999) again held in favor of law enforcement officers in a claim that police had violated the plaintiff's due process rights. After seizing PERSONAL PROPERTY, including cash savings, of two owners of a home they had searched during a murder investigation, the police retained the property at the police station. When the homeowners sought to have the property returned, the police failed to provide the homeowners with detailed information about how the owners

*A crowd demonstrates before a federal courthouse in Seattle, Washington, in June 1999, prior to a hearing in which five detainees of the Immigration and Naturalization Service claimed that indefinite detention violates the constitutional guarantee of due process.*

AP/WIDE WORLD PHOTOS

could have their property returned. The homeowners then filed a 42 U.S.C.A. § 1983 action against the police, claiming deprivation of CIVIL RIGHTS under the Due Process Clause. The Supreme Court held that because information about the proper procedures to retrieve this property under state law was readily available to the plaintiffs, the police had not deprived the homeowners of their due process rights.

The U.S. Supreme Court is more likely to find due process violations where the actions of a government official are clearly arbitrary. In *City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999), for example, it struck down a Chicago anti-gang ordinance as unconstitutional on due process grounds. The ordinance allowed police officers to break up any group of two or more persons whom they believed to be loitering in a public place, provided that the officer also believed that at least one member of the group was a gang member. The ordinance had led to more than 43,000 arrests. Because the ordinance did not draw the line between innocent and guilty behavior and failed to give guidance to police on the matter, the ordinance violated the due process rights of the subjects of these break-ups. The Court held that since the ordinance gave absolute discretion to the police officers to determine what actions violated the ordinance, it was an arbitrary restriction on personal liberty in violation of the Due Process Clause.

In 2002, the Court found that arbitrary actions by a trial judge in a murder case violated the due process rights of the defendant (*Lee v. Kemna*, 534 U.S. 362, 122 S. Ct. 877, 151 L. Ed. 820 [2002]). In that case, the defendant was charged with first-degree murder for driving the getaway car for a man who had pled guilty to a murder charge in Kansas City, Missouri. The defendant claimed that he had been in California at the time of the murder, and four family members were to testify at trial that the defendant was not in Kansas City at the time of the murder. However, the family members left before they were expected to testify, and the defense could not locate them. The defense asked the court for a short CONTINUANCE of one or two days, but the judge refused due to personal conflicts and a conflict with another trial. Without the testimony of the family members, the defendant was convicted of murder. The high court held that the judge's arbitrary actions violated the defendant's due process rights, and it vacated the defendant's conviction.

### Procedural Due Process

The phrase "procedural due process" refers to the aspects of the Due Process Clause that apply to the procedure of arresting and trying persons who have been accused of crimes and to any other government action that deprives an individual of life, liberty, or property. Procedural due process limits the exercise of power by the state and federal governments by requiring that they follow certain procedures in criminal and civil matters. In cases where an individual has claimed a violation of due process rights, courts must determine whether a citizen is being deprived of "life, liberty, or property," and what procedural protections are "due" to that individual.

The Bill of Rights contains provisions that are central to procedural due process. These protections give a person a number of rights and freedoms in criminal proceedings, including freedom from unreasonable SEARCHES AND SEIZURES; freedom from DOUBLE JEOPARDY, or being tried more than once for the same crime; freedom from SELF-INCRIMINATION, or testifying against oneself; the right to a speedy and public trial by an impartial jury; the right to be told of the crime being charged; the right to cross-examine witnesses; the right to be represented by an attorney; freedom from CRUEL AND UNUSUAL PUNISHMENT; and the right to

demand that the state prove any charges BEYOND A REASONABLE DOUBT. In a series of U.S. Supreme Court cases during the twentieth century, all of these rights were applied to state proceedings. In one such case, GIDEON V. WAINWRIGHT, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), the Court ruled that the Due Process Clause of the Fourteenth Amendment incorporates the SIXTH AMENDMENT right to have an attorney in "all criminal prosecutions," including prosecutions by a state. The case proved to be a watershed in establishing indigents' rights to legal counsel.

Procedural due process also protects individuals from government actions in the civil, as opposed to criminal, sphere. These protections have been extended to include not only land and personal property, but also entitlements, including government-provided benefits, licenses, and positions. Thus, for example, the Court has ruled that the federal government must hold hearings before terminating WELFARE benefits (*Goldberg v. Kelly,* 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 [1970]). Court decisions regarding procedural due process have exerted a great deal of influence over government procedures in prisons, schools, SOCIAL SECURITY, civil suits, and public employment.

The U.S. Supreme Court in *Lujan v. G&G Firesprinklers, Inc.*, 532 U.S. 189, 121 S. Ct. 1446, 149 L. Ed. 2d 391 (2000) held that a state is not required to hold a hearing before withholding money and imposing penalties on a building contractor. The California Division of Labor & Standards Enforcement determined that a building subcontractor had failed to pay the prevailing wage to workers who installed fire sprinklers in state buildings. The California agency, without providing notice or a hearing, fined the general contractor, which in turn withheld money from the subcontractor. The subcontractor, G&G Firesprinklers, Inc., sued the California agency, claiming that the agency had violated the company's procedural due process rights. The Court disagreed, holding that because the company could sue the agency for breach of contract, the fine did not constitute a due process violation.

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CROSS-REFERENCES

Criminal Procedure; Incorporation Doctrine; Judicial Review; Labor Law; Right to Counsel.

## DUELING

*The fighting of two persons, one against the other, at an appointed time and place, due to an earlier quarrel. If death results, the crime is murder. It differs from an affray in this, that the latter occurs on a sudden quarrel, while the former is always the result of design.*

In dueling, the use of guns, swords (rapiers), or other harmful weapons resolves quarrels through trial by combat. Duels used to occur commonly between opposing individuals seeking restitution or satisfaction outside the court system. In early U.S. history, some members of law enforcement attempted to treat dueling as a crime, but the practice went mostly unpunished. However, with the results of one duel especially—between AARON BURR and ALEXANDER HAMILTON—the practice lost prestige in the northern states. Along with growing public sentiment against dueling, new laws in the mid-1800s finally treated the form of confrontation as outright or attempted HOMICIDE. In states that have not incorporated dueling into their homicide statutes, dueling is now a crime punishable by a fine or imprisonment, or both. It is also an offense in some states merely to give or accept a challenge to engage in a duel.

Around the time of the Revolutionary War, dueling occurred in every state of the nation—in some areas, regularly—for even relatively slight offenses, such as insults, or to resolve gambling disputes. Few laws prohibited this tradition inherited from the Old World, which continued to evolve, even in Europe. Although no binding set of rules governed the proceedings of a duel in the United States—largely, no doubt, because dueling was outside the law—U.S. citizens adopted the European rules from their ancestors.

U.S. citizens based their dueling codes on the Code Duello of Ireland. This Irish code of 1777 contained twenty-six commandments covering all aspects of a duel. It included ways to avert a duel, such as the manner in which to apologize when one had committed a duel-provoking

*A depiction of the duel between Alexander Hamilton and Aaron Burr on July 11, 1804. Hamilton intentionally missed Burr, but Burr's shot wounded Hamilton, who died the next day.*

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offense. If a duel could not be avoided, the scenario was a familiar one: usually, opponents would stand back-to-back, then pace a set number of steps away from each other, turn, and shoot. The Code Duello declared, "The aggressor must either beg pardon in expressed terms . . . or fire on until a severe hit is received by one party or the other." In the United States, less strict variations of the Code Duello allowed the contest to end without bodily injury, providing for some form of public mockery for the contestant who sought to end the duel.

Sometimes, U.S. politicians made dueling a sensational event. Critics, such as **THOMAS JEFFERSON** and **THOMAS PAINE**, wanted to make the practice punishable by law with the death penalty. But others insisted on resorting to duels in order to uphold their political reputation.

Perhaps the most famous duel in U.S. history was fought in 1804 between the Federalist leader Alexander Hamilton and New England politician Aaron Burr. The two had confronted and spoken harshly to each other for several years, beginning in 1791. Hamilton became furious with Burr during Burr's unsuccessful campaign for a New York senate seat in 1792. He claimed that Burr had used dirty politics, and ridiculed Burr as "unprincipled and dangerous," casting him as a power-hungry "embryo Caesar." When Burr aspired to become president in the 1800 election, Hamilton voted for Thomas Jefferson—an opponent of his own Federalist party—just for the principle of voting against Burr. Burr settled for the vice presidency, and held a grudge for Hamilton's disparaging treatment.

After serving as vice president, Burr challenged Hamilton to a duel. Hamilton knew that Burr was a much better sharpshooter than himself, but because of unwritten codes of honor that pressured him not to back out of a duel, he accepted Burr's challenge. On July 11, the two and their seconds (seconds who would take the place of their principal if he could not show) met at the predetermined site of Weehawken, New Jersey, overlooking the Hudson River. (Though both men lived in New York, New Jersey had fewer legal restrictions on dueling than did New York.) Major Nathaniel Pendleton, one of Hamilton's friends, recited the accepted rules of dueling before the firing of shots. After both parties said they were ready for the duel, by declaring themselves present, their final confrontation began. When Pendleton shouted, "Fire," Burr pulled his trigger first. The bullet hit Hamilton in his side and pierced his liver. Burr was unharmed. About thirty-six hours later, Hamilton died from his wound.

Even though Burr had killed an elder and respected political leader, neither New Jersey nor New York issued a warrant for his arrest. New York, ignoring the case of murder, pressed misdemeanor charges for breaking the state's minor restrictions on duels. New Jersey charged Burr with murder, but the case never went to trial. Thus, the only punishment Burr received was a public outcry against him, which was enough to end his political career.

Some, especially those in the North who were upset with the loss of Hamilton, began to cast the practice of dueling as barbaric and absurd. Drastic legislation in Pennsylvania and several New England states, including New York, followed. Farther west, the new state of Illinois, in 1819, hung a man for killing a neighbor in a rifle duel at the range of twenty-five paces. Most states, however, still did not have laws against dueling.

Dueling continued, especially in the South, where notions of individual honor remained deep. In 1838, Governor John Lyde Wilson, of South Carolina, wrote the first official U.S. adaptation of the Irish Code Duello. As an innovation on the Irish code, Wilson's Code Duello formalized the U.S. principle that required satis-

faction to follow a confrontation: if a person challenged to a duel, or that person's second, refused to raise arms, public insults would follow, such as postings on walls declaring the individual a coward, a poltroon, a puppy, or worse. Although Wilson did not proclaim enthusiastic support of duels, he did believe that in certain instances, they were necessary and proper; dueling, he felt, served as a logical recourse for any individual seeking satisfaction in a case where the law could not provide it. Wilson's sixteen-page pamphlet remained popular and was reprinted until 1858.

After a fatal duel between two legislators, Jonathan Cilley and William J. Graves, Congress passed an anti-dueling law. HENRY CLAY, of Kentucky, an opponent of duels, made his support of the bill known by explaining, "When public opinion is renovated and chastened by reason, religion and humanity, the practice of dueling will be discountenanced." The bill banned dueling in the District of Columbia beginning on February 20, 1839. In the next decades, various states followed Congress's lead. Members of the clergy and concerned politicians continued to give impassioned speeches further criticizing the "peculiar practice."

Although dueling persisted into the early 1800s, and reached its height during that period, by the middle of the century it had largely disappeared. Historians attribute the decline to an increase in the number of laws banning it, and in the penalties for dueling. These laws reflected a change in attitude toward the practice, which came to be viewed as barbarous, rather than honorable. The Code Duello's unyielding, Old World conception of honor was discredited by younger generations. Outlawed and outmoded, dueling remains an interesting chapter in the history of dispute resolution in the United States.

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## DUI

See DWI.

## ♦ DULLES, JOHN FOSTER

John Foster Dulles served as U.S. SECRETARY OF STATE from 1953 to 1959. A prominent New York City attorney, Dulles participated in international affairs for much of his legal career. His term as secretary of state occurred during the height of the COLD WAR and was marked by his strong anti-Communist policies and rhetoric.

"THE ABILITY TO GET TO THE VERGE OF WAR WITHOUT GETTING INTO THE WAR IS THE NECESSARY ART . . . IF YOU ARE SCARED TO GO TO THE BRINK, YOU ARE LOST."
—JOHN F. DULLES

Dulles was born in Washington, D.C., on February 25, 1888, at the home of his maternal grandfather, John W. Foster, secretary of state under President BENJAMIN HARRISON. Dulles was raised in Watertown, New York, where his father, the Reverend Allen M. Dulles, served as a Presbyterian minister. Known as Foster, the young Dulles was a precocious student, graduating from high school at age fifteen and attending Princeton University at age sixteen. He graduated in 1908 and then entered GEORGE WASHINGTON University Law School. Again, he worked quickly, and graduated in two years.

Through the efforts of his well-connected grandfather, Dulles joined the New York City law firm of Sullivan and Cromwell, which has been called the greatest corporate law firm of the early twentieth century. In 1919 family friend and international financier Bernard M. Baruch invited Dulles to be his aide at the Paris Peace Conference. This conference, which was convened to negotiate the terms of peace to end WORLD WAR I, stimulated Dulles's interest in international politics and diplomacy.

In the 1920s Dulles quickly moved ahead at Sullivan and Cromwell. In 1926, at the age of only thirty-eight, Dulles was made head of the firm. Representing many of the largest U.S. corporations, Dulles became a very wealthy man. As

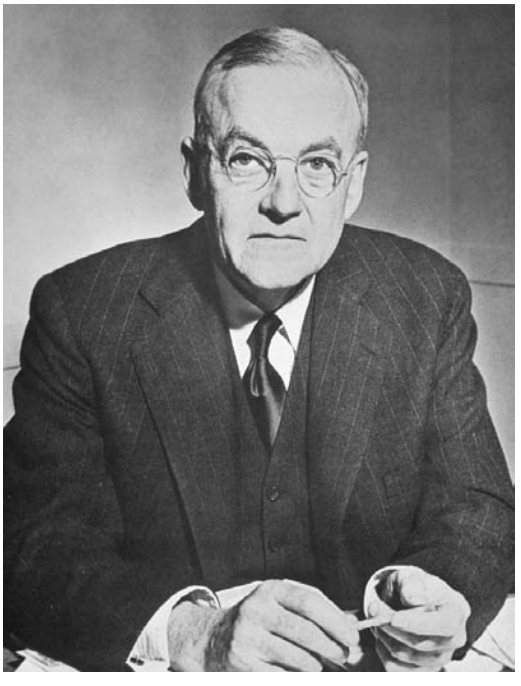

*John F. Dulles.*
COURTESY OF JOHN FOSTER DULLES

his stature rose, he became a prominent figure in the REPUBLICAN PARTY. A confidant of New York governor THOMAS E. DEWEY, Dulles was promised the position of secretary of state if Dewey was elected president in 1948, but Dewey was unsuccessful and Dulles lost that opportunity.

Dulles was an active participant in the effort to reshape foreign relations after WORLD WAR II. He helped form the UNITED NATIONS and was a U.S. member to the General Assembly from 1945 to 1949. He performed the duties of U.S. ambassador-at-large and was the chief author of the 1951 Japanese peace treaty. He also negotiated the Australian, New Zealand, Philippine, and Japanese security treaties in 1950 and 1951.

In 1949 he filled a vacancy in the Senate created by the death of Senator ROBERT WAGNER, of New York, but was unsuccessful in his attempt the same year to win election to a six-year term. Dulles's political fortunes im proved when he aligned himself with the 1952 presidential candidacy of DWIGHT D. EISENHOWER. He helped Eisenhower defeat conservative senator Robert Taft, of Ohio, at the nominating convention and was rewarded with his long-desired appointment as head of the STATE DEPARTMENT.

As secretary of state, Dulles exhibited a rigid opposition to COMMUNISM. He advocated going to the brink of war to achieve results—a position that led to the coinage of the term *brinkmanship* to describe his foreign policy.

Dulles is also remembered for his doctrine of "massive retaliation," which warned the Soviet Union that the United States would react instantaneously with NUCLEAR WEAPONS to even the smallest provocation. Dulles believed that such a policy would discourage aggressive acts, though many allies were concerned that it would turn small wars into much larger and much more destructive ones.

Dulles died May 24, 1959, in Washington, D.C.

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#### CROSS-REFERENCES

Cold War.

## DUMMY

*Sham; make-believe; pretended; imitation. Person who serves in place of another, or who serves until the proper person is named or available to take his*

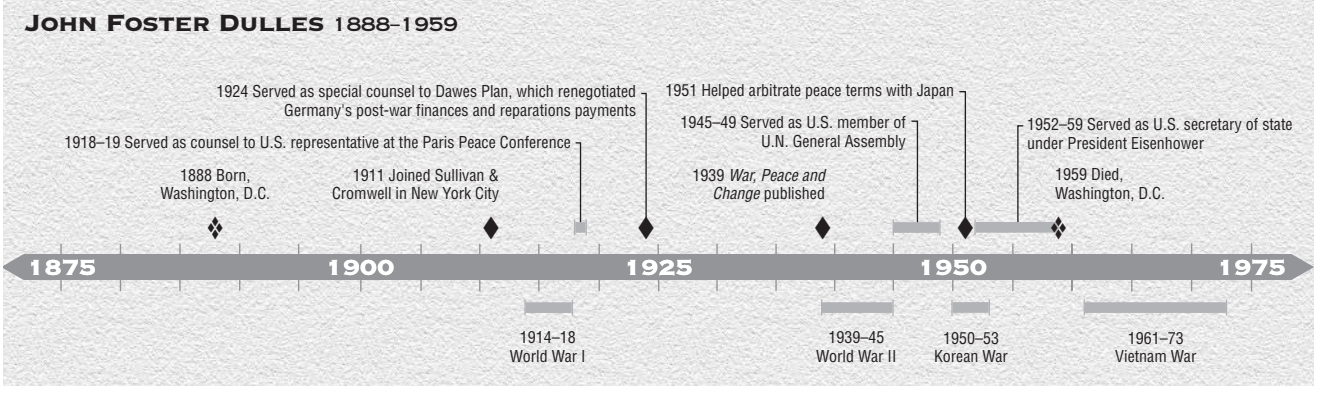

*place (e.g., dummy corporate directors; dummy owners of real estate).*

## DURESS

*Unlawful pressure exerted upon a person to coerce that person to perform an act that he or she ordinarily would not perform.*

Duress also encompasses the same harm, threats, or restraint exercised upon the affected individual's spouse, child, or parent.

Duress is distinguishable from UNDUE INFLUENCE, a concept employed in the law of wills, in that the latter term involves a wrongdoer who is a fiduciary, one who occupies a position of trust and confidence in regard to the testator, the creator of the will.

Duress also exists where a person is coerced by the wrongful conduct or threat of another to enter into a contract under circumstances that deprive the individual of his or her volition.

As a defense to a civil action, the federal Rules of CIVIL PROCEDURE require that duress be pleaded affirmatively.

Except with respect to HOMICIDE, a person who is compelled to commit a crime by an unlawful threat from another person to injure him, her, or a third person, will generally not be held responsible for its commission.

CROSS-REFERENCES

Threats.

## DURHAM RULE

*A principle of* CRIMINAL LAW *used to determine the validity of the* INSANITY DEFENSE *asserted by an accused, that he or she was insane at the time of committing a crime and therefore should not be held legally responsible for the action.*

The *Durham* rule was created in 1954 by Judge David L. Bazelon, of the U.S. Court of Appeals for the District of Columbia, in *Durham v. United States,* 214 F.2d 862. The rule, as stated in the court's decision, held that "an accused is not criminally responsible if his unlawful act was the product of mental disease." It required a jury's determination that the accused was suffering from a mental disease and that there was a causal relationship between the disease and the act. Because of difficulties in its implementation, the *Durham* rule was rejected by the same court in the 1972 case *United States v. Brawner,* 471 F.2d 969 (en banc).

The *Durham* rule replaced a nineteenth-century test of criminal responsibility called the M'NAGHTEN RULE. The *M'Naghten* rule, or "right-wrong" test, required the acquittal of defendants who could not distinguish right from wrong. This rule was supplemented by the "irresistible impulse" test, added in the District of Columbia in 1929, which allowed a jury to inquire as to whether the accused suffered from a "diseased mental condition" that did not allow him or her to resist an "insane impulse."

By the mid-twentieth century, these early legal tests of insanity came under increasing criticism. Critics of the *M'Naghten* rule, for example, charged that it was outdated and did not take into consideration the broad range of mental disorders that had been identified by modern science. Commentators also claimed that these earlier rules did not allow expert witnesses to communicate fully the findings of modern psychology and psychiatry to a jury.

The *Durham* rule sought to overcome these problems. It attempted to create a simple and open-ended insanity test that would, Judge Bazelon later wrote, "open up the courtroom to all the information and analysis available to the scientific community about the wellsprings of human behavior." Bazelon hoped that the new rule would allow experts to bring to the jury and the public new insights into "the physiological and cultural, as well as individual psychological, factors contributing to criminal behavior." Bazelon intended it to be not a precise test but rather a loose concept comparable to the legal definition of NEGLIGENCE. Thus, he compared the term *fault* in the negligence context to the term *responsibility* in the *Durham* context. The meaning of such terms, he argued, would have to be determined by a jury in light of the facts relevant to each case.

Implementation of the *Durham* rule ran into serious difficulties. The rule did not elicit the detailed courtroom discussion of mental illness and criminal behavior that Judge Bazelon and others had hoped for. Instead, just as expert witnesses had before been asked the yes-or-no question, "Was the accused capable of distinguishing right from wrong?" experts were now asked the simple yes-or-no question, "Was the accused's act a product of mental disease or defect?" The *Durham* rule, therefore, perpetuated the dominant role of EXPERT TESTIMONY in determining criminal responsibility, a task that many critics felt was best left to a jury.

As a result of such difficulties, the District of Columbia Circuit unanimously rejected the *Durham* rule in the 1972 *Brawner* case. The court replaced it with a standard developed by the American Law Institute: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law" (MODEL PENAL CODE § 4.01[1]).

This new test has been described as a more subtle and less restrictive version of the pre-*Durham* right-wrong and IRRESISTIBLE IMPULSE tests. In coming to its conclusion, however, the court in *Brawner* emphasized that no particular formulation of words provides an easy solution to the difficult problems involved in assessing the sanity of a person accused of committing a criminal act. Instead, the court asserted that criminal responsibility in such trials is best assessed by a properly informed jury that is not overly dominated by expert testimony. To help juries make such assessments, the court required experts to explain the underlying reasons for their opinions rather than giving yes-or-no answers to simplistic questions.

## DUTY

*A legal obligation that entails mandatory conduct or performance. With respect to the laws relating to* CUSTOMS DUTIES, *a tax owed to the government for the import or export of goods.*

A fiduciary, such as an executor or trustee, who occupies a position of confidence in relation to a third person, owes such person a duty to render services, provide care, or perform certain acts on his or her behalf.

In the context of NEGLIGENCE cases, a person has a duty to comport himself or herself in a particular manner with respect to another person.

## DUTY OF TONNAGE

*A fee that encompasses all taxes and* CUSTOMS DUTIES, *regardless of their name or form, imposed upon a vessel as an instrument of commerce for entering, remaining in, or exiting from a port.*

Conceptually, a duty of tonnage is assessed for the privilege of transacting business in a port.

## ♦ DUVALL, GABRIEL

Gabriel Duvall was born December 6, 1752. He was admitted to the Maryland bar in 1778. Duvall served in the militia before beginning his government career in 1783, serving on the Maryland Governor's Council from 1783 to 1784, and in the Maryland House of Delegates from 1787 to 1794.

From 1794 to 1796, Duvall acted as a representative from Maryland to the U.S. House of Representatives. He returned to Maryland as chief justice of the Maryland General Court in 1796 and remained on the bench until 1802. Duvall then returned to federal service, and from 1802 to 1811 served as first comptroller of the U.S. Treasury under President THOMAS JEFFERSON.

Duvall was appointed to the Supreme Court by President JAMES MADISON to replace SAMUEL CHASE. He served on the Court from 1811 to 1835, mainly writing minor opinions on COMMERCIAL LAW and maritime law. Though he tended to vote with chief justice JOHN MAR-

"IT WILL BE UNIVERSALLY ADMITTED THAT THE RIGHT TO FREEDOM IS MORE IMPORTANT THAN THE RIGHT OF PROPERTY."
—GABRIEL DUVALL

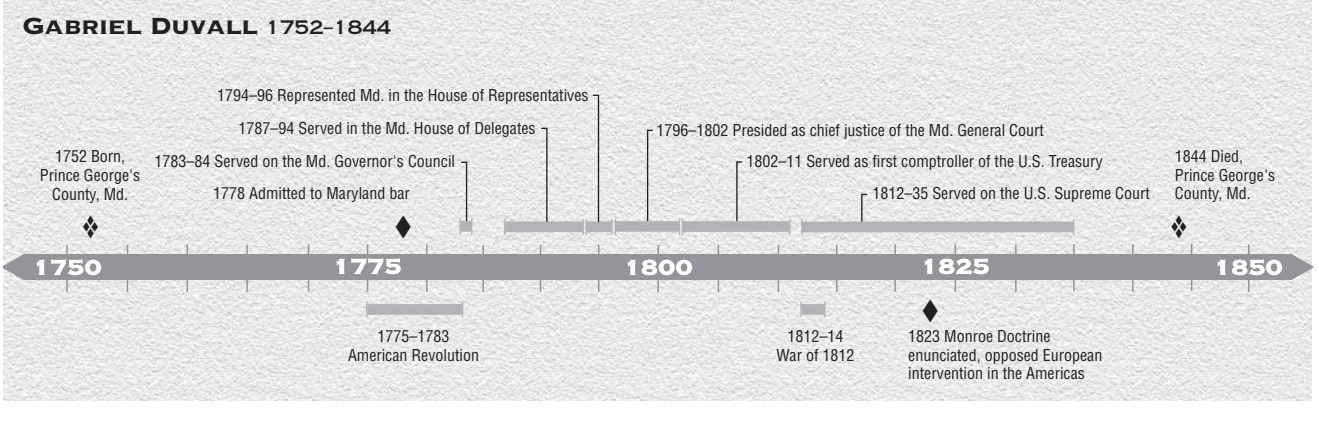

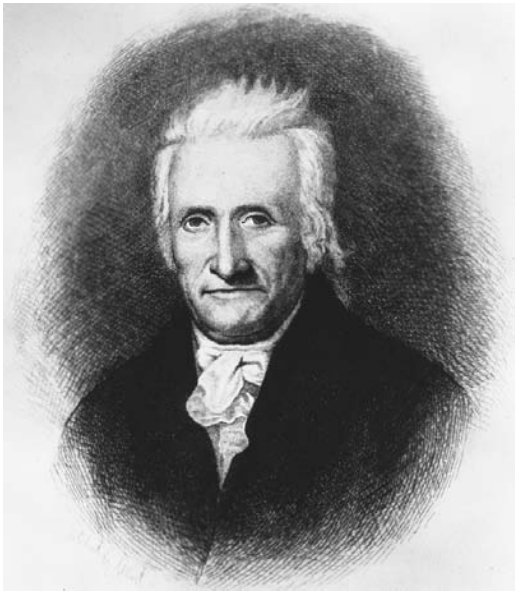

*Gabriel Duvall.*
ETCHING BY ALBERT ROSENTHAL. THE GRANGER COLLECTION, NEW YORK

SHALL, Duvall was a strong opponent of SLAVERY. He wrote a memorable dissent in *Mima Queen and Child v. Hepburn,* 11 U.S. 290 (1813), a case argued for the plaintiffs by Francis Scott Key. The majority disallowed HEARSAY evidence to prove a purported slave was free. Duvall opined that hearsay should be admitted to prove freedom whenever the facts are so old that living testimony cannot be procured.

Duvall died on March 6, 1844.

## DWI

*An abbreviation for* driving while intoxicated, *which is an offense committed by an individual who operates a motor vehicle while under the influence of alcohol or* DRUGS AND NARCOTICS. *An abbreviation for* died without issue, *which commonly appears in genealogical tables.*

A showing of complete intoxication is not necessary for a charge of driving while intoxicated. State laws indicate levels of blood-alcohol content at which an individual is deemed to be under the influence of alcohol.

Laws against drunk driving vary slightly from state to state. In the majority of states, a person's first DWI charge (also referred to as Driving Under the Influence, or DUI, in some states) results in an automatic suspension of the violator's license. The length of the suspension in the various states ranges from 45 days to one year. Forty-three states require offenders to install ignition interlocks on their vehicles in order to drive. These devices are capable of analyzing a driver's breath, and the ignition is unlocked only if the driver has not been drinking. In 29 states, violators may be required to forfeit their vehicles that they have driven while impaired.

States have made efforts to strengthen their drunk driving laws since the 1980s. They have imposed longer prison sentences, and many have turned DWI into a felony-level crime for repeat offenders. However, the more controversial issue in this national debate has been the effort to reduce the blood-alcohol concentration (BAC) that is needed to charge a person with DWI, from .10 percent to .08 percent. Proponents have argued that such a reduction is the most effective way to prevent drunk-driving deaths. Opponents contend that the .08 percent standard is too low and that it will ensnare drivers who are not truly impaired. Although many states had adopted the .08 percent standard, proponents sought a national solution, winning a victory in October 2000, when Congress enacted, and then-President WILLIAM JEFFERSON CLINTON signed, the Transportation Appropriation Bill. Included in the act was a provision that requires states to enact a .08 percent BAC as the legal limit or lose part of their federal highway funding. Since this enactment, 36 states and the District of Columbia have reduced their BAC standard to .08 percent, while the others have maintained a .10 percent standard.

Evidence suggests a strong correlation between a BAC greater than .05 percent and risk of serious injury or death while operating a motor vehicle. After a person's BAC reaches .08 percent or more, the probability of a crash climbs rapidly. The National Highway Traffic Safety Administration (NHTSA) estimated that in 1998, alcohol played a part in 39 percent of all fatal crashes and seven percent of all traffic accidents. NHTSA also predicted that three out of ten Americans will be involved in an alcohol-related crash at some time during their lives.

The Clinton administration supported a national approach to establishing a drunk-driving standard but met congressional resistance. The .08 percent BAC law passed in the

# DWI: Should Punishment Be Stricter for Repeat Offenders?

In 2001, alcohol-related auto accidents took the lives of 17,448 people across the United States. Statistics show that nearly 80 percent of those fatal accidents were caused by drivers with a history of driving while intoxicated (DWI). There is no shortage of horror stories in which innocent people have been killed by a drunk driver who later turns out to have a prior record for DWI offenses. The question of whether repeat offenders should be subject to stricter punishment is hardly new, but it is a complex question even though it seems to tackle an issue that has no gray areas.

Typical repeat DWI offenders will have a blood alcohol level of up to three times the legal limit by the time they get behind the wheel. Three-fourths of repeat offenders can be classified as alcohol abusers or alcohol dependent. Their consumption of alcohol is frequent and chronic. Perhaps most alarming, however, is that most of these drivers are neither remorseful for the damage they inflict nor deterred by the threat of arrest or loss of driving privileges. Either they believe they can escape getting caught, or else they believe their punishment will turn out to be minimal. Not even the threat to their own physical safety (many drunk drivers end up as fatalities themselves) seems to inhibit them.

In the past, repeat DWI offenders might be given **PROBATION** or minimal time in jail, along with a suspended driver's license. In some cases, the punishment might be a specified period of community service. The **NATIONAL TRANSPORTATION SAFETY BOARD** (NTSB) has called for states to eliminate community service as a punishment, in part because it keeps prosecutions off offenders' records and makes repeat offenses more likely.

Treatment for alcohol abuse works in some but not all cases. It is certainly worth trying, but in many cases repeat offenders are not interested in being helped. They will go through a treatment program if it is required by law, but positive effects may be short-lived.

Partly in response to the federal government's call for tougher laws and partly in response to groups such as **MOTHERS AGAINST DRUNK DRIVING** (MADD), state governments are working to make DWI laws stricter and more than just an inconvenience for recidivists. In Massachusetts, for example, a new law went into effect on November 28, 2002, that allows judges to consider DWI convictions that are more than ten years old when sentencing a repeat offender. Under the old law they could not be considered, and a driver whose earlier conviction had been classified a "youthful indiscretion" could be treated as a first-time offender. The 2002 law requires that anyone who

Senate in 1998, but it failed to pass in the House of Representatives. As a compromise, Congress provided $500 million of incentive grants over six years to states that have enacted, and that are enforcing, a .08 BAC law. Congress agreed to adopt the .08 limit only after adjusting the timing and severity of penalties for states that refuse to lower their legal limits. States that refuse to lower their limits by October 1, 2003 will lose two percent of their federal highway construction funding. This percentage will increase to four percent in 2004, six percent in 2005, and eight percent in 2006. If states lose funding in 2003, they will have four years to pass the .08 BAC standard. If they do so, the money withheld will be returned to them.

Lowering the BAC percentage is not the only action that states have taken to curb drunk driving. In many states, a refusal to submit to a BAC test is admissible in court. Most states permit police to establish sobriety checkpoints in order to identify drunk drivers. Moreover, in the vast majority of states, vehicular **HOMICIDE** involving drunk driving is a felony.

## ❖ DWORKIN, ANDREA

Andrea Dworkin is a radical feminist writer and activist concerned with illuminating and clarifying sexual and social values, who seeks to create a world in which men have no dominion over women. Famous for making pointed statements such as "I am a feminist . . . not the fun kind," Dworkin is considered an extremist by most people familiar with her work, including many of her fellow feminists. She has zealously advocated the **CENSORSHIP** of all **PORNOGRAPHY**, which, she says, degrades women, discriminates against them as a class, and incites men to sexual violence.

With Professor Catherine MacKinnon of the University of Michigan Law School, Dworkin has championed antipornography ordinances for several cities in the United States. The two also

receives a second conviction faces two years probation, a suspended license, and 14 days at an in-patient alcohol treatment program.

Other measures include the use of technology. Ignition interlock devices, which require the driver to pass a breath test before the car will start, have met with positive results. A study in Maryland showed that DWI repeat offenders who used ignition interlock devices had a **RECIDIVISM** rate one-third lower than those who did not. Some municipalities have tried electronic monitoring. In Los Angeles, electronic monitoring lowered the recidivism rate for DWI offenders and also cut jail costs significantly.

Some states have pushed to be able to charge repeat DWI offenders in fatal crashes with felony murder. In some municipalities, bartenders who serve people who are knowingly inebriated and allow them to drive have been subject to criminal charges.

Even strict measures are not 100 percent effective. The National Commission Against Drunk Driving (NCADD) estimates that up to 80 percent of DWI offenders will take the risk of driving with a suspended license. Lynwood Anthony Vrba of Waco, Texas had eight DWI convictions, including two felonies, before he swerved in front of another car and earned a ninth conviction. (The driver of that car happened to be an agent of the Texas Alcoholic Beverage Commission). His prior felonies allowed a judge to sentence him to 60 years in prison in early 2000. The system may have worked on one level, but the truth is that if Vrba had not been stopped that day, he may have had yet another serious accident.

A driver who wishes to thwart the law can usually do so. DWI offenders are often able, for example, to determine the exact locations of police roadblocks based on established patterns and avoid them by traveling an alternate route. People who have ignition interlock devices in their cars can have a sober friend start the car for them. The trick for law enforcement officials is to stay one step ahead of the criminals. The police can easily vary their patterns and stop cars randomly on different roads. As for technology, interlock devices can be equipped with a restart option that requires the driver to take a breath test several times during a car trip, even if the car is still running. This arrangement keeps the offender from drinking while driving. Moreover, if those who serve liquor or who allow drunk drivers behind the wheel know that they can face criminal charges, it stands to reason that they will be more careful about letting a drunk person get behind the wheel of a car.

Ultimately, the most effective way to deal with repeat DWI offenders may be a combination of these measures. It may not be possible to keep DWI recidivists off the road completely, but making it increasingly difficult for them to remain on the road can yield positive results.

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Alcohol; Recidivism.

helped author the **VIOLENCE AGAINST WOMEN ACT** (S. 11, 103d Cong., 1st Sess. [1993]), a federal law signed by President **BILL CLINTON** as part of a larger crime bill in September 1994, which makes sex-based violence a **CIVIL RIGHTS** violation and allows victims to sue for compensatory and **PUNITIVE DAMAGES** and attorney's fees (42 U.S.C.A. § 13981 [Supp. V 1993]). The Canadian Criminal Code adopted the MacKinnon-Dworkin definition of pornography Criminal Code R.S.C., ch. C-34, § 159 (8) (1970) (Can.), and the Canadian Supreme Court unanimously affirmed the constitutionality of that definition, which was transferred to § 163 in 1985. *Butler v. The Queen* (1 S.C.R. 452) in February 1992, making the shipment and sale of pornographic materials in Canada more difficult for that country's booksellers. MacKinnon and Dworkin define pornography as any material whose "dominant characteristic is the undue exploitation of sex or of sex and any one or more of the following subjects, namely crime, horror, cruelty and violence."

Dworkin was born September 26, 1946, in Camden, New Jersey, the daughter of Harry Spiegel and Sylvia Spiegel. She has devoted much of her adult life to fighting what she sees as the most visible signs of men's need to control and do violence to women: pornography, prostitution, **INCEST**, **DOMESTIC VIOLENCE**, **SEXUAL HARASSMENT**, **STALKING**, and rape.

Although much has been written about Dworkin, little of the coverage has dealt with her early life. However, Dworkin's admittedly autobiographical novel *Mercy* (1991) may provide insight into some of the events that helped to shape this controversial feminist crusader: the book chronicles the sexual victimization—including molestation and rape—faced by the protagonist, Andrea, as a child, a rebellious teenager, and a young woman.

Dworkin was drawn toward the law after graduating from high school in 1964, but she did not pursue a legal career because she believed law schools at the time were run by

*Andrea Dworkin.*
AP/WIDE WORLD PHOTOS

people who didn't think women should be there. She joined the embryonic anti–Vietnam War movement; graduated from Bennington College, of Vermont; and spent the late 1960s living overseas. While in Amsterdam, she married a political radical, who beat her repeatedly.

Having been a waitress, receptionist, secretary, typist, salesperson, and factory worker, Dworkin fully embarked on a career as a radical feminist after her marriage ended and she returned to the United States in 1972. In the 1970s, she began speaking and writing about the politics of sexuality and her affinity for women. Her early books include *Woman Hating: A Radical Look at Sexuality* (1974) and a compilation of essays called *Our Blood: Prophecies and Discourses on Sexual Politics* (1976), which called for an abandonment of women's quest for sexual equality in favor of more radical solutions necessary to achieve a complete social realignment of the sexes. During the time she was publishing these works, Dworkin gained notoriety for her assertions that all sex is rape and all sexually explicit materials are evidence of rape.

After the 1991 Anita Hill–Clarence Thomas hearings, Dworkin wrote an introduction to a book called *Sexual Harassment: Women Speak Out* (Sumrall and Taylor, eds., 1993), in which she shared some of her experiences with sexual harassment.

Dworkin met MacKinnon, a graduate of Yale Law School and also an avid feminist, in 1977. They began giving speeches and LOBBYING together for antipornography ordinances. In the fall of 1983, they attracted attention when they teamed up to teach a course on pornography at the University of Minnesota Law School, the first class of its kind. As a result of the course, several members of the city council in Minneapolis asked the pair to write an antipornography ordinance for the city. In the resulting ordinance, Dworkin and MacKinnon defined pornography as "the graphic sexually explicit subordination of women, whether in picture or in words." The law would have allowed female rape victims to sue producers and distributors of erotic materials for damages if their attacker claimed that pornography made him do it, even if no criminal charges were filed.

Following two days of explosive public hearings on the issue, the city council adopted the

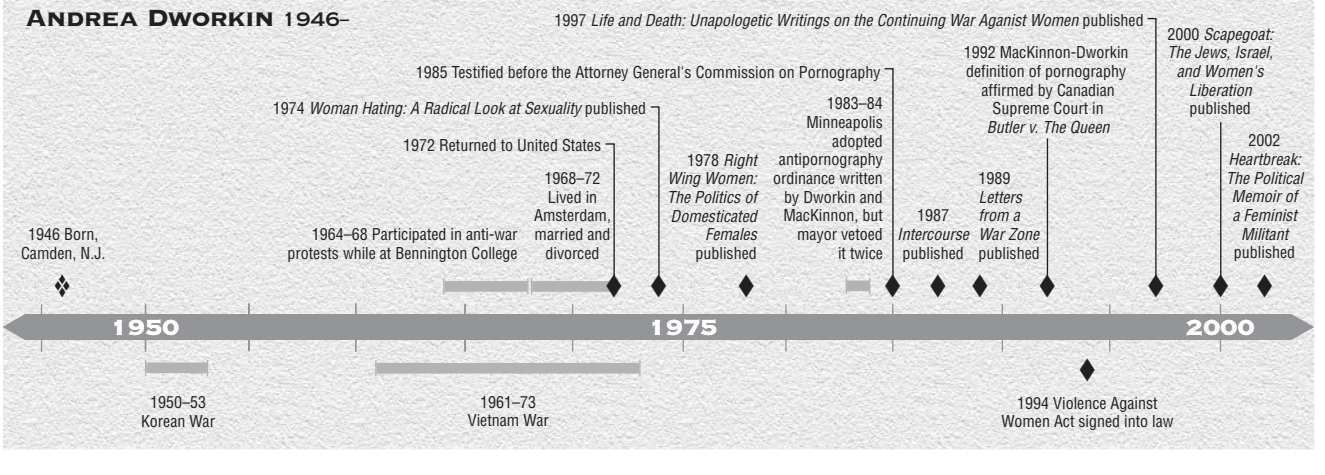

ordinance in late 1983, only to have the mayor VETO it. In 1984, a new Minneapolis city council again adopted the same ordinance, and the mayor again vetoed it. A Dworkin-MacKinnon supporter in Minneapolis doused herself with gasoline and set herself ablaze amidst the controversy.

Dworkin and MacKinnon subsequently proposed the same type of ordinance in Indianapolis, but after booksellers and readers challenged its constitutionality, the U.S. Court of Appeals for the Seventh Circuit ruled that the ordinance discriminated on the grounds of free speech (*American Booksellers Ass'n v. Hudnut,* 771 F.2d 323 [1985]). In the late 1980s, Dworkin again coauthored a similar ordinance, this time for Bellingham, Washington. Although voters in Bellingham endorsed the concept by ballot in November 1988, the AMERICAN CIVIL LIBERTIES UNION (ACLU) persuaded a federal judge to invalidate the ordinance in February 1989 on FIRST AMENDMENT FREEDOM-OF-THE-PRESS grounds. In the early 1990s, Dworkin and MacKinnon introduced yet another similar initiative in Cambridge, Massachusetts, which was opposed by the ACLU and ultimately struck down.

In addition to leading antiporn legislative efforts in several states, Dworkin also looked for change at a national level. In 1985, she testified before Attorney General EDWIN MEESE III's Commission on Pornography—established at President Ronald Reagan's behest to assess pornography's social effects—about the causal link between pornography and violence against women. As part of her evidence that pornography provides a "blueprint for male domination over women," she cited serial killer Ted Bundy's admission, on the eve of his execution, that pornography had made him kill women.

The resulting bill, officially called the Pornography Victims' Compensation Act (S. 1521, 102d Cong., 2d Sess.)—but nicknamed the Bundy Bill—would have allowed victims of sex crimes to sue producers and distributors of sexual material if the victims could prove that the material incited the crimes. The bill did not pass in Congress. Dworkin went on to consult with Senator Joseph R. Biden Jr. (D-Del.) who sponsored a related bill in 1990 (S. 2754, 101st Cong., 1st Sess.). A version of this bill was ultimately incorporated into President Clinton's crime bill and passed as the Violence Against Women Act (108 Stat. 1902 to 1955).

In the 1990s and into the 2000s, Dworkin continued to advocate her controversial theories of feminism. She has lectured at COLLEGES AND UNIVERSITIES and appeared at rallies throughout the United States and numerous foreign countries. She has produced a number of works, including essays, books, and poetry, among them: *Intercourse* (1987), *Life and Death: Unapologetic Writings on the Continuing War Against Women* (1997), *Scapegoat: The Jews, Israel, and Women's Liberation* (2000), and *Heartbreak: The Political Memoir of a Feminist Militant* (2002).

In 2002, Dworkin donated her papers to the Schlesinger Library of the Radcliffe Institute for Advanced Study at Harvard University. The collection includes traditional types of material, including personal and professional correspondence, drafts of writings and speeches, transcripts of interviews, reviews of her work, and newspaper clippings. In addition, she donated teaching materials, photographs, and audio and videotapes from her public life.

"WOMAN IS NOT BORN: SHE IS MADE. IN HER MAKING, HER HUMANITY IS DESTROYED. SHE BECOMES SYMBOL OF THIS, SYMBOL OF THAT: MOTHER OF EARTH, SLUT OF THE UNIVERSE; BUT SHE NEVER BECOMES HERSELF BECAUSE IT IS FORBIDDEN FOR HER TO DO SO."
—ANDREA DWORKIN

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Women's Rights.

## ❖ DWORKIN, RONALD MYLES

Ronald Myles Dworkin is a leading international legal and moral theorist and advocate of AFFIRMATIVE ACTION who has kindled fierce political and judicial debate concerning his views. A law professor at New York University (NYU) School of Law, Dworkin is also a Fellow of the British Academy and a member of the American Academy of Arts and Sciences. He is considered to be one of the leading contemporary experts on JURISPRUDENCE, the science of law.

Dworkin, who was born December 11, 1931, received a B.A. from Harvard University in 1953 and from Oxford University in 1955. He earned a master's degree at Yale University and received an LL.B. from Harvard Law School in 1957. He clerked for the eminent Judge LEARNED HAND. After his clerkship, he became associated with the New York law firm of Sullivan and Cromwell.

"OF COURSE THE MORAL READING ENCOURAGES LAWYERS AND JUDGES TO READ AN ABSTRACT CONSTITUTION IN THE LIGHT OF WHAT THEY TAKE TO BE JUSTICE. HOW ELSE COULD THEY ANSWER THE MORAL QUESTIONS THAT ABSTRACT CONSTITUTION ASKS THEM?"
—RONALD DWORKIN

From 1962 to 1969, he was a law professor at Yale University Law School. In 1969, he was appointed to the Chair of Jurisprudence at Oxford University and later became a Fellow of University College. He holds a joint appointment at University College and at NYU where he is a professor in the Philosophy Department and the Frank Henry Sommer Professor of Law.

A prolific writer, Dworkin has authored dozens of articles for philosophical and legal journals and has written on legal and political topics for the *New York Review of Books.* His focus is on **HEALTH CARE** issues, equality, affirmative action, **COMMON LAW**, and constitutional interpretation. Dworkin has also written numerous books, several of which have been translated into major European languages as well as Japanese and Chinese. Among his best-known works are: *Taking Rights Seriously* (1977), *Law's Empire* (1986), *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (1993), and *Sovereign Virtue: The Theory and Practice of Equality* (2000). Unlike many of his contemporaries, Dworkin has ventured beyond the academic audience in many of his writings. For example, *Life's Dominion* is an earnest attempt to engage readers on all sides of the **ABORTION** debate.

In *Taking Rights Seriously,* Dworkin lays the groundwork for his philosophy by criticizing two leading theories of law: the positivist theory (and its main proponent, H. L. A. Hart), which holds that laws of a community are rules that have been established by the conventions of a community, and that there is no connection between morality and legality; and **UTILITARIANISM**, the idea that laws are in place for the good of the majority. Instead, Dwarkin espouses the view that the basic purpose of the law is to foster equality tempered by personal responsibility; the most important goal of the law is for judicial decisions and statutes to be internally consistent and logically flow the best interpretation of society's political and legal order, a concept Dworkin refers to as "integrity."

Dworkin expands on his philosophy in what some consider to be his legal epic, *Law's Empire.* He discounts the conventionalist notion that law is based strictly on tradition and established authority, arguing that judges must interpret past legal decisions rather than mechanically apply the law based on precedence. Dworkin's integrity-based approach to law has drawn strong support from liberals and those who espouse a judicial activist point of view while igniting a firestorm of reproach and criticism from conservatives and strict conventionalists, who contend that Dworkin's theory would place too much discretion in the hands of judges, essentially changing law to partisan politics.

Dworkin is also co-chair of the **DEMOCRATIC PARTY** Abroad, a member of the Council of Writers and Scholars Educational Trust, and a **HUMAN RIGHTS** consultant to the Ford Foundation. He and his wife, Betsy Celia Ross, have two children and live in Connecticut.

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Ethics, Legal; Legal Positivism.

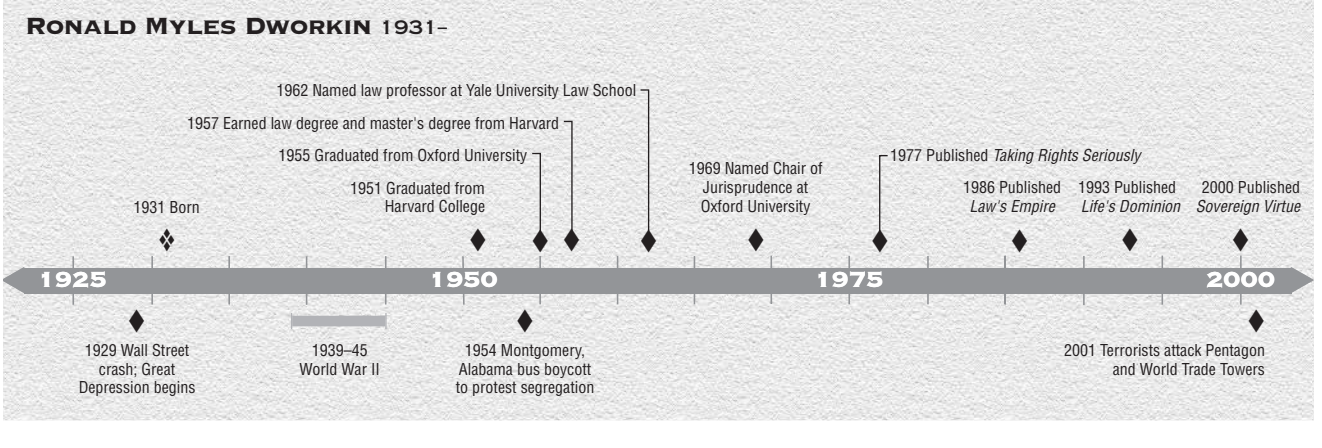

## DYER ACT

The Dyer Act, also called the National Motor Vehicle Theft Act (18 U.S.C.A. § 2311 et seq.), was enacted in 1919 to impede the interstate trafficking of stolen vehicles by organized thieves.

There are three elements that must be established BEYOND A REASONABLE DOUBT if an accused is to be convicted of the offense: (1) a vehicle is stolen, (2) the defendant knows that the vehicle is stolen, and (3) the defendant transports the vehicle in interstate or foreign commerce. A person who aids and abets in the commission of this offense is equally culpable as a principal who has actually committed the crime.

The punishment for conviction under the Dyer Act is an unspecified fine, imprisonment of no longer than ten years, or both.

## DYING DECLARATION

*A statement by a person who is conscious and knows that death is imminent concerning what he or she believes to be the cause or circumstances of death that can be introduced into evidence during a trial in certain cases.*

A dying declaration is considered credible and trustworthy evidence based upon the general belief that most people who know that they are about to die do not lie. As a result, it is an exception to the HEARSAY rule, which prohibits the use of a statement made by someone other than the person who repeats it while testifying during a trial, because of its inherent untrustworthiness. If the person who made the dying declaration had the slightest hope of recovery, no matter how unreasonable, the statement is not admissible into evidence. A person who makes a dying declaration must, however, be competent at the time he or she makes a statement, otherwise, it is inadmissible.

A dying declaration is usually introduced by the prosecution, but can be used on behalf of the accused.

As a general rule, courts refuse to admit dying declarations in civil cases, even those for WRONGFUL DEATH, or in criminal actions for crimes other than the HOMICIDE of the decedent.

State and FEDERAL RULES OF EVIDENCE govern the use of dying declarations in their respective proceedings.

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## EARL WARREN LEGAL TRAINING PROGRAM

The Earl Warren Legal Training Program was begun in 1972 for the purpose of increasing the number of black attorneys in the United States. The program provides financial aid on the basis of need to qualified law students for the three full years of law school. Emphasis is placed on scholarships for applicants who wish to enroll in law schools in the South. The program seeks to retain professional and personal relations with minority lawyers and holds training institutes for young and experienced minority lawyers. Begun as a special project of the NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, the program is now a separate corporation (The Earl Warren Training Program, Inc.).

The program was founded by JACK GREENBERG, professor of law at Columbia Law School, who served as director-counsel of the NAACP Legal Defense and Education Fund at the time (1961–1984). In 2001, Greenberg was the recipient of the Annual Award for Leadership in Human Rights, presented by the *Columbia Human Rights Law Review.*

CROSS-REFERENCES

Warren, Earl.

## EARNED INCOME

*Sources of money derived from the labor, professional service, or entrepreneurship of an individual taxpayer as opposed to funds generated by investments, dividends, and interest.*

Wages, salaries, and fees are types of earned income that, if below a statutorily determined amount, entitle a taxpayer to a reduction of INCOME TAX liability.

## EARNEST MONEY

*A sum of money paid by a buyer at the time of entering a contract to indicate the intention and ability of the buyer to carry out the contract. Normally such earnest money is applied against the purchase price. Often the contract provides for* FORFEITURE *of this sum if the buyer defaults. A deposit of part payment of purchase price on sale to be consummated in future.*

## EASEMENT

*A right of use over the property of another. Traditionally the permitted kinds of uses were limited, the most important being rights of way and rights concerning flowing waters. The easement was normally for the benefit of adjoining lands, no matter who the owner was (an easement appurtenant), rather than for the benefit of a specific individual (easement in gross).*

Easements frequently arise among owners of adjoining parcels of land. Common examples of easements include the right of a property owner who has no street front to use a particular segment of a neighbor's land to gain access to the road, as well as the right of a MUNICIPAL

CORPORATION to run a sewer line across a strip of an owner's land, which is frequently called a right of way.

Easements can be conveyed from one individual to another by will, deed, or contract, which must comply with the STATUTE OF FRAUDS and can be inherited pursuant to the laws of DESCENT AND DISTRIBUTION.

An easement is a nonpossessory interest in another's land that entitles the holder only to the right to use such land in the specified manner. It is distinguishable from a profit a prendre that is the right to enter another's land and remove the soil itself or a product thereof, such as crops or timber.

An *easement appurtenant* attaches to the land permanently and benefits its owner. In order for it to exist, there must be two pieces of land owned by different individuals. One piece, the *dominant* estate or tenement, is the land that is benefited by the easement. The other piece, known as the *servient estate* or *tenement,* is the land that has the burden of the easement. An easement appurtenant is a COVENANT running with the land since it is incapable of a separate and independent existence from the land to which it is annexed. A common example would be where one landowner—A—is the owner of land that is separated from a road by land owned by B. If B sells A a right of way across his or her land, it is a right that is appurtenant to A's land and can only be used in connection thereof.

An easement *in gross* is not appurtenant to any estate in land. It arises when a servient piece of land exists without a dominant piece being affected. This type of easement is ordinarily personal to the holder and does not run with the land. For example, if A has a number of trees on his or her property and B contracts with A to enter A's land to remove timber, B has both an easement in gross and a profit. At COMMON LAW, an easement in gross could not be assigned; however, most courts currently allow certain types of easements in gross to be transferred.

Easements are categorized as being either *affirmative* or *negative.* An *affirmative easement* entitles the holder to do something on another individual's land, whereas a *negative easement* divests an owner of the right to do something on the property. For example, the owner of land might enter into an agreement with the owner of an adjoining piece of land not to build a high structure that would obstruct the light and air that go onto the adjoining owner's land. This easement of light and air deprives the property owner who gives it up from enjoying ownership rights in the land to the fullest possible extent and is labeled a negative easement.

There are various ways in which easements are created. An *express easement* is clearly stated in a contract, deed, or will. An easement by *implication* occurs when the owner of a piece of land divides such land into smaller pieces and sells a smaller piece to another person, retaining a right to enter such piece of land. For example, a seller divides his or her property and sells half to a purchaser. The piece that the purchaser buys has a sewer pipe beneath it that serves both pieces of property. The seller has an implied easement to use the sewer pipe that runs under the purchaser's land.

An *easement by prescription* arises through an individual's use of land as opposed to the possession thereof. An easement of this nature will be recognized in these instances: (1) the easement is adverse or contrary to the interests, and absent the permission, of the landowner; (2) it is open and notorious; (3) it is continuous and uninterrupted; and (4) it exists for the period of time prescribed by state statute. If for a period of time beyond the prescribed statutory period A creates and openly uses a right of way across B's land without B's permission then an easement by prescription is created.

An easement can either be terminated through the expiration of its term as determined upon its creation or by one of several events occurring subsequent to creation. Events that can extinguish an easement include these: (1) the same individual becoming the owner of the dominant as well as the servient estate when an appurtenant easement existed; (2) the owner of an easement in gross obtaining ownership of the servient estate; (3) the owner of the dominant tenement executing a deed or will releasing the easement in favor of the owner of the servient tenement; and (4) the ABANDONMENT of an easement.

## ♦ EASTMAN, CRYSTAL

Crystal Eastman was a leading American writer, labor lawyer, and activist for WOMEN'S RIGHTS and for civil liberties. During her life she worked to improve working conditions for U.S. laborers, helped establish the AMERICAN CIVIL LIBERTIES UNION (ACLU), and lobbied for the enactment

of the EQUAL RIGHTS AMENDMENT. In many of her exploits she partnered with her younger brother Max. Max Eastman gained fame as a Marxist writer and journalist who later rejected SOCIALISM and became a supporter of the virulently anti-communist senator, JOSEPH MCCARTHY. In contrast, Crystal Eastman was a consistent supporter of socialist politics, the suffragist movement, and feminism throughout her life.

Eastman was born on June 25, 1881, in Glenora, New York, to Samuel Eastman and Annis Ford Eastman. Both her parents were ordained church ministers and ardent believers in women's rights, beliefs that Eastman absorbed. In a 1927 autobiographical essay written for *Nation* magazine, Eastman talked about her father's support of her mother's goal of becoming a minister and his support of Crystal when she decided to study law. He even supported the rebellious Crystal when she led her teenage friends in revolt against the wearing of skirts and stockings as part of the swimming attire of proper young ladies. Her father knew that he would not want to wear a skirt and stockings when he went swimming, she wrote, so he could see why his daughter would not want to either. Eastman also credited her mother with encouraging Crystal and her two brothers to be independent thinkers and to advocate for the causes that were most important to them.

Eastman graduated from Vassar College in 1903 and earned a master's degree in sociology from Columbia University in 1904. She attended New York City School of Law where she graduated second in her class in 1907. Until 1911, Eastman lived in a Greenwich Village commune that included her brother Max.

Paul Kellogg, social work advocate and editor of a publication called *Charities and the Commons,* hired the young attorney as part of a team charged with investigating conditions among steel workers in Pittsburgh, Pennsylvania. The resulting survey, published between 1909 and 1914, was a groundbreaking six-volume study that was the first to combine the collection of scientific data with management techniques. Eastman's portion of the survey, a report titled *Work Accidents and the Law,* was published in 1910. The report, which focused on unsafe working environments and the corruption of officials and others, was a startling revelation to many politicians and citizens. In 1909, Eastman became the first woman appointed to the Employer's Liability Commission. In that role she drafted the first workers' compensation law for the state of New York.

Eastman married Walter Benedict and moved to Milwaukee, Wisconsin, where she continued be involved in women's suffrage issues. Eastman eventually separated from her husband and moved back to New York where she became an investigating attorney for the U.S. Commission on Industrial Relations in 1913. That same year, Eastman, along with suffragist ALICE PAUL and several others, helped to found the militant Congressional Union for Woman Suffrage that was a forerunner of the National Woman's Party. In 1915, Eastman joined over three thousand women for a meeting in Washington, D.C., where they founded the Woman's Peace Party with famed social worker JANE ADDAMS as chair. Eastman became president of the New York branch of the party which, in 1921, was renamed the Women's International League for Peace and Freedom. That organization, which exists to this day, supports disarmament, women's rights, civil liberties, and abolition of CAPITAL PUNISHMENT.

"I AM NOT INTERESTED IN WOMEN JUST BECAUSE THEY'RE WOMEN. I AM INTERESTED, HOWEVER, IN SEEING THAT THEY ARE NO LONGER CLASSED WITH CHILDREN AND MINORS."
—CRYSTAL EASTMAN

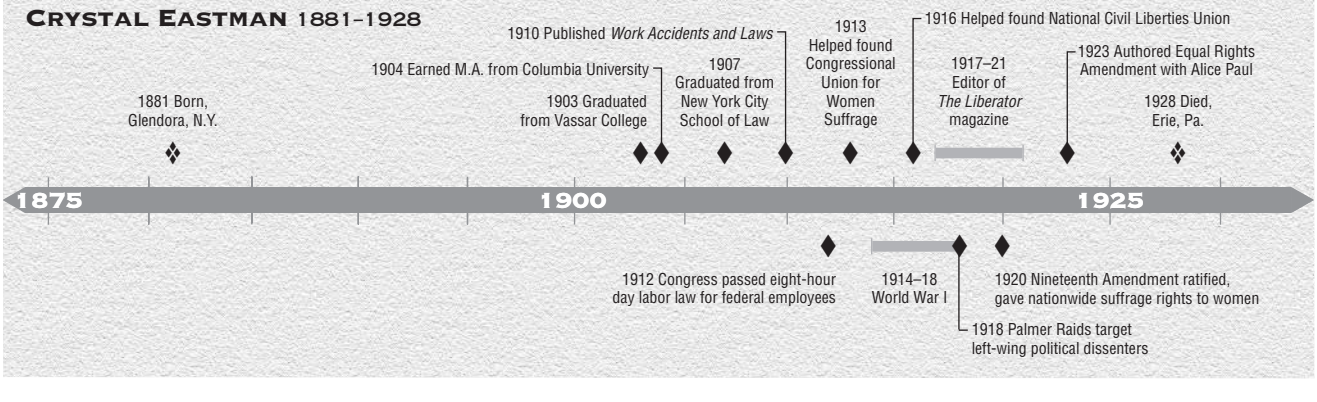

Eastman also served as executive director of the American Union against Militarism (AUAM), an organization that lobbied to keep the United States from entering into war against Mexico in 1916 and to support American neutrality during **WORLD WAR I**. Within the AUAM, Eastman along with social reformers **ROGER BALDWIN** and Norman Thomas established a subsection called the National Civil Liberties Bureau (NCLB) whose primary purpose was to advocate for and protect the **BILL OF RIGHTS**.

Eastman worked on the left-wing political journal *The Masses* with her brother Max who was editor. When that periodical was closed down due to lawsuits, Eastman and her brother joined with several others to found a similar journal, *The Liberator.* Eastman was editor of the magazine from 1917 to 1921. In 1922, *The Liberator* was taken over by the Communist Party, which later renamed it *The Workers' Monthly.*

Eastman had always been a passionate defender of free speech, but her support for the concept strengthened in the face of the suppression of antiwar activists during and after World War I. President Woodrow Wilson's attorney general **A. MITCHELL PALMER** and Palmer's special assistant **J. EDGAR HOOVER** used the **ESPIONAGE ACT OF 1917** and the 1918 **SEDITION** Act to commence a campaign against those perceived to be radicals or members of left-wing organizations. Palmer and Hoover conducted Palmer Raids, casting a large net that involved the arrest, in over 30 cities around the country, of thousands of suspected anarchists and supporters of socialism and **COMMUNISM**. Arrests were often made without warrants and several hundred, including noted feminist and radical **EMMA GOLDMAN**, were deported.

In 1920, the NCLB, which had been established with the aim of protecting the Bill of Rights against encroachments such as those encompassed by the Palmer Raids, became the American Civil Liberties Union (ACLU). The purpose of the organization was to advocate for **FIRST AMENDMENT** rights including **FREEDOM OF SPEECH**, freedom of religion, and **FREEDOM OF THE PRESS**, as well as **EQUAL PROTECTION** and **DUE PROCESS** rights, and the right to privacy. In 2003, the ACLU, which remains headquartered in New York City, had grown from a roomful of activists to an organization with over 300,000 members, and supporters and offices all over the country.

In the 1920s, Eastman traveled between New York and London where her second husband, British poet and peace activist Walter Fuller, had gone to look for work. During this period she worked as a journalist, writing columns for several U.S. periodicals including the *Nation* and Alice Paul's *Equal Rights,* and British publications such as the *Daily Herald* and a British feminist weekly called *Time and Tide.*

Shortly after women gained the right to vote, Eastman, along with Alice Paul, became one of the authors of the Equal Rights Amendment (ERA), which proposed amending the U.S. Constitution to invalidate numerous state and federal laws that discriminated against women while purporting to "protect" them. No action was taken on the ERA when it was introduced in Congress in 1923, and it languished until 1966 when the **NATIONAL ORGANIZATION FOR WOMEN** (NOW) revived interest in it. The amendment was approved by Congress in 1972 and given a seven-year deadline for ratification by 38 states. The amendment was ratified by 30 states within one year of Senate approval. But opposition from conservative political and religious groups halted the momentum. Despite an extension of the deadline to 1982 and ratification by five more states, the amendment failed to be ratified by the required three-fourths and did not become law.

After her husband's death in 1927, Eastman returned to live permanently in the United States. She died just one year later, in July 1928, at her brother's home in Erie, Pennsylvania. She was 48 years old. In 2000, Eastman, along with 19 other distinguished American women, was inducted into the National Women's Hall of Fall in Seneca Falls, New York, the birthplace of the women's rights movement.

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## ❖ EATON, DORMAN BRIDGMAN

Dorman Bridgman Eaton was born June 27, 1823, in Hardwick, Vermont. He was a successful

lawyer who achieved prominence for his work in the establishment of the U.S. Civil Service Commission.

After receiving a doctor of laws degree from the University of Vermont in 1848, Eaton attended Harvard Law School in 1850 and was admitted to the New York bar, practicing law there until 1870.

Eaton was a staunch believer in a merit system as opposed to a spoils system in the acquisition of local or national government employment. In 1873, he became the chairperson of the U.S. Civil Service Commission, an organization that embodied the ideas of the merit system. He served until 1875, when funding for the commission ceased, and he subsequently went to England to examine the structure of the English Civil Service Commission. In 1883, he formulated the Pendleton Act (5 U.S.C.A. § 1101 et seq. [1883]), which provided for the foundation of the permanent Civil Service Commission. He performed the duties of chairperson of this new commission from 1883 to 1886. Eaton died December 23, 1899, in New York City.

In 1880, Eaton wrote the publication *The Civil Service in Great Britain: A History of Abuses and Reforms and their Bearing upon American Politics.*

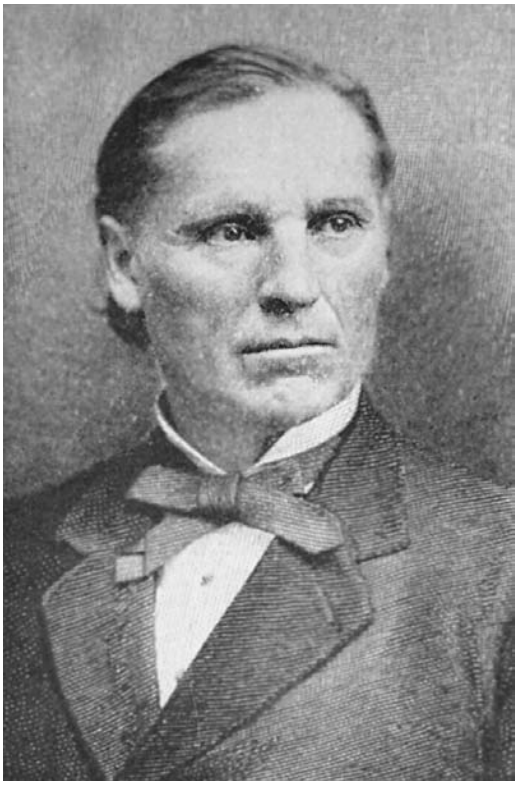

*Dorman B. Eaton.*
LIBRARY OF CONGRESS

## ECCLESIASTICAL COURTS

*In England, the collective classification of particular courts that exercised jurisdiction primarily over spiritual matters. A system of courts, held by authority granted by the sovereign, that assumed jurisdiction over matters concerning the ritual and religion of the established church, and over the rights, obligations, and discipline of the clergy.*

## EDELMAN, MARIAN WRIGHT

During her career, MARIAN WRIGHT EDELMAN has appeared in Mississippi jail cells, Capitol Hill offices, and on TV talk shows, with the same objective: to help poor or disenfranchised U.S. citizens. Best known as the founder and president of the CHILDREN'S DEFENSE FUND (CDF), Edelman is a lawyer, lobbyist, author, and mentor to former first lady, now U.S. senator, HILLARY RODHAM CLINTON. Edelman began her

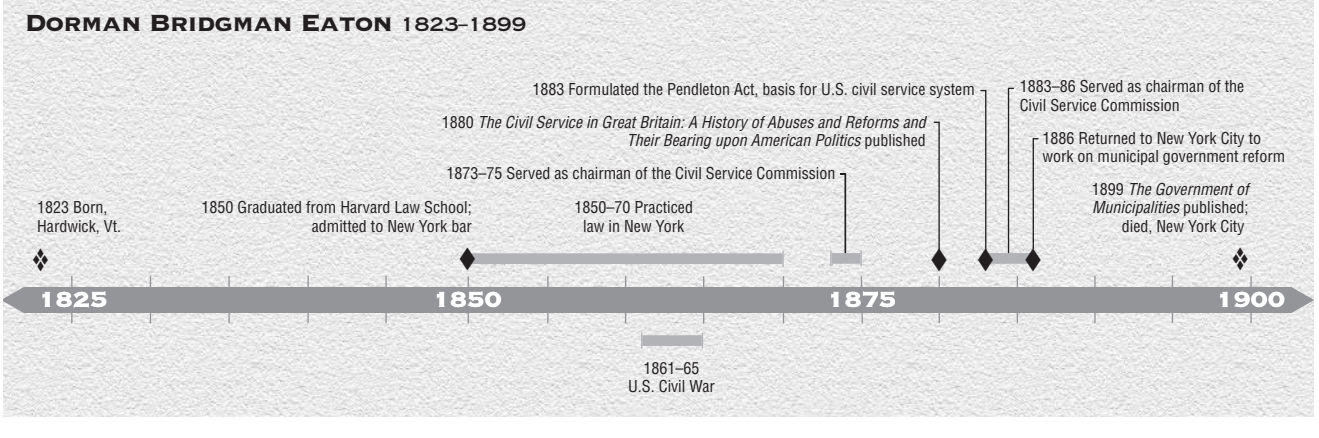

career as a CIVIL RIGHTS attorney in the Deep South during the 1960s. While working on voter registration campaigns—and keeping demonstrators out of jail—Edelman vowed to do something about the plight of children in the United States. Improving children's lives seemed like a logical starting point for improving all of society. By the mid-1990s, Edelman's influence extended from day care centers to the Oval Office as she helped shape the future for the youngest citizens of the United States.

"WE MUST NOT, IN TRYING TO THINK ABOUT HOW WE CAN MAKE A BIG DIFFERENCE, IGNORE THE SMALL DAILY DIFFERENCES WE MAKE WHICH, OVER TIME, ADD UP TO BIG DIFFERENCES THAT WE OFTEN CANNOT FORESEE."
—MARIAN WRIGHT EDELMAN

Edelman was born June 6, 1939, in Bennettsville, a small, segregated town in South Carolina. Her father, Arthur Jerome Wright, was a Baptist minister, and her mother, Maggie Leola Wright, was the director of the Wright Home for the Aged. Named after singer Marian Anderson, Edelman recalls a childhood of hard work and high expectations. She was an outstanding student whose parents instilled in her a strong sense of purpose and social awareness. Edelman's parents extolled the virtues of self-reliance and personal initiative, and lived their own counsel when they established the Wright Home, the first African American residence for elderly people in South Carolina. Edelman's parents founded the nursing home because they saw a need and felt obliged to fill it. Given the example set by them, it is no surprise that Edelman chose a life of self-directed social activism.

After high school, Edelman attended well-respected Spelman College, in Atlanta. Edelman planned a career in the foreign service and took preparatory courses at the Sorbonne, in Paris, and at the University of Geneva, in Switzerland. After spending a summer in Moscow, Edelman returned to the United States for her senior year at Spelman. Before long, she was caught up in the emerging CIVIL RIGHTS MOVEMENT. After a campus visit by MARTIN LUTHER KING JR., and considerable soul-searching, Edelman dropped her plans for the foreign service and joined other African Americans in the struggle for equal rights.

To make herself more valuable to the movement, Edelman decided to attend law school. After earning a degree from Yale University Law School in 1963, she became counsel for the Legal Defense and Educational Fund of the National Association for the Advancement of Colored People (NAACP). In New York, Edelman received NAACP training in civil rights law for one year. She moved to Jackson, Mississippi, in 1964 and became the first African American woman ever admitted to the Mississippi bar. (At the time, Mississippi had a grand total of three African American lawyers.)

Edelman's first assignment was the Mississippi Summer Project. This was an African American voter registration drive conducted by volunteers and college students from the North. Edelman also served as the attorney for the Child Development Group of Mississippi, where one of her proudest accomplishments was helping to reinstate federal funding for Head Start, a successful program that encourages the intellectual and social development of poor, at-risk children.

When Senator ROBERT F. KENNEDY toured Mississippi in 1967, Edelman showed him the wretched poverty endured by thousands of African American children. Many credit her with opening Kennedy's eyes to the reality of hunger in the United States.

In 1968, Edelman married Peter B. Edelman, a Harvard-trained lawyer who was Senator Kennedy's legislative assistant. The couple moved to Washington, D.C., where eventually they had three sons. Edelman hoped a move to the nation's capital would enable her to focus national attention on the poverty she witnessed in Mississippi.

Edelman's first job in Washington, D.C., was as congressional and federal agency liaison for the 1968 Poor People's Campaign. Also during 1968, Edelman founded the Washington Research Project, an advocacy and research group that lobbied Congress for an expansion in Head Start services. In 1971, Edelman and her family moved to Boston for her to complete a two-year stint as director of the Center for Law and Education at Harvard University. Her husband served as vice president of the University of Massachusetts at the same time. Upon their return to Washington, D.C., in 1973, Edelman created an offshoot of her Washington Research Project, which she called the Children's Defense Fund.

Edelman's CDF began as a small, nonprofit organization interested in children's issues and funded entirely by private foundation grants. In CDF's early days, Hillary Rodham Clinton worked as a staff attorney and later became a member of the CDF board of directors. In 1999, with a staff of 130 and a budget of $10 million, CDF had grown considerably in size and stature

but remained committed to its original goal: providing hope and social change for the poor, neglected, and abused children in the United States. CDF conducts research, drafts legislation, lobbies, and provides educational support on issues affecting children. It has buttonholed elected officials on issues including childhood diseases and immunizations, homelessness, CHILD ABUSE, education, and foster care. Edelman lobbied for a national CHILD CARE bill, increases in MEDICAID spending, and, of course, additional spending for her cherished Head Start programs.

Edelman's productivity and stamina are legendary. In addition to LOBBYING, she gives an average of 50 speeches a year and has made frequent appearances on popular talk shows. Edelman has received more than 65 honorary degrees and awards including the Albert Schweitzer Humanitarian Prize, the H. John Heinz Award, and a MacArthur Foundation Prize Fellowship. In 2000, President BILL CLINTON awarded Edelman the Presidential Medal of Freedom, the nation's highest civilian award.

Edelman has also been a prolific writer; among her books are *Families in Peril: An Agenda for Social Change* (1987); *The Measure of Our Success: A Letter to My Children and Yours* (1992), which sold over 1.25 million copies and appeared on the best-seller list; a children's book titled *Stand for Children* (1998); and *I'm Your Child, God: Prayers for Children and Teenagers* (2002).

In 1996, Edelman founded Stand for Children, a grassroots organization that advocates for CHILDREN'S RIGHTS throughout the country with a focus on early childhood education, after-school programs, and HEALTH CARE. In 2000, the Children's Defense Fund took note of the fact that presidential candidate GEORGE W. BUSH had adopted the fund's slogan Leave No Child Behind for his campaign. In early 2003, Edelman accused the Bush administration of "waging a budget war against poor children" based on proposed tax cuts. The Children's Defense Fund later released a state-by-state report showing that states experiencing fiscal crisis were making cuts in vital child-care, early education, and after-school programs.

*Marian Wright Edelman.*
AP/WIDE WORLD PHOTOS

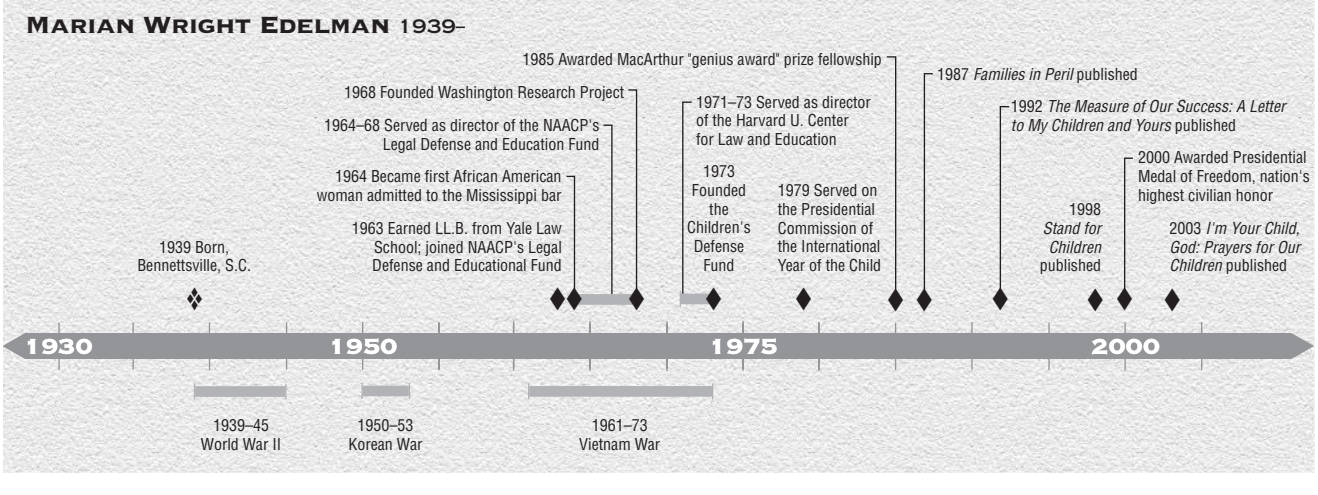

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## EDICT

*A decree or law of major import promulgated by a king, queen, or other sovereign of a government.*

An edict can be distinguished from a public proclamation in that an edict puts a new statute into effect whereas a public proclamation is no more than a declaration of a law prior to its actual enactment.

Under ROMAN LAW, an edict had different meanings. It was usually a mandate published under the authority of a ruler that commanded the observance of various rules or injunctions. Sometimes, however, an edict was a citation to appear before a judge.

## EDUCATION DEPARTMENT

Created in 1980, the U.S. Department of Education (DOE) is the cabinet-level agency that establishes policy for, administers, and coordinates most federal assistance to education. It is directed by the secretary of education, who assists the president of the United States by executing policies and implementing laws enacted by Congress.

The DOE has six major responsibilities: (1) providing national leadership and building partnerships to address critical issues in U.S. education; (2) serving as a national clearinghouse of ideas on schools and teaching; (3) helping families pay for college; (4) helping local communities and schools meet the most pressing needs of their students; (5) preparing students for employment in a changing economy; and (6) ensuring non-discrimination for recipients of federal education funds.

Although the current DOE has existed for only a short time, its history dates back to 1867, when President ANDREW JOHNSON signed legislation creating the first education department as a non-cabinet-level, autonomous agency. Within one year, the department was demoted to the office of education because Congress feared that it would exercise too much control over local schools. Since the Constitution did not specifically mention education, Congress declared that the secretary of education and other officials should be prohibited from exercising direction, supervision, or control over the curriculum, instructional programs, administration, or personnel of any educational institution. Such matters are the responsibility of states, localities, and private institutions.

Over the next several decades the office of education remained small, operating under different titles and housed in various government agencies, including the U.S. DEPARTMENT OF THE INTERIOR and the former U.S. Department of Health, Education, and Welfare (now the U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES).

Beginning in 1950, political and social changes resulted in greatly expanded federal aid to education. The Soviet Union's successful launch of the satellite Sputnik in 1957 resulted in an increase in aid for improved education in the sciences. President Lyndon B. Johnson's War on Poverty in the 1960s involved many programs to improve education for poor people. In the 1970s, these programs were expanded to include members of racial minorities, women, individuals with disabilities, and non-English-speaking students.

In October 1979, Congress passed the Department of Education Organization Act (93 Stat. 668 [20 U.S.C.A. § 3508]), which established the current Department of Education. Since that time, the DOE has continued to expand its duties by taking an active role in education reform. In 1983, the DOE published *A Nation at Risk,* a report that described the deficiencies of U.S. schools, stating that mediocrity, not excellence, was the norm in public education. This led to the development in 1990 of a long-range plan to reform U.S. education by the year 2000.

Called America 2000: An Educational Strategy, the plan has eight goals: (1) all children will start school ready to learn by participating in preschool programs; (2) the high-school graduation rate will increase to at least 90 percent; (3) all students will leave grades 4, 8, and 12 having demonstrated competency in English, mathematics, science, foreign languages, civics and government, economics, art, history, and geography; (4) teachers will have opportunities to acquire the knowledge and skills needed for preparing students for the twenty-first century; (5) students will be first in the world in mathe-

matics and science achievement; (6) every adult will be literate and will possess the knowledge and skills necessary to compete in a global economy; (7) every school will be free of drugs, violence, and the unauthorized presence of firearms and alcohol; and (8) every school will promote partnerships to increase parental involvement in the social, emotional, and academic growth of children.

Many of the goals of this educational initiative were praised by some educators, although the initiative was not without its skeptics. Its proposals called for revolutionary reforms in educational systems across the United States at a relatively low cost. Proponents of the program also claimed the program would end complacency in the educational systems, would allow employers to hire more qualified teachers, and would dramatically increase student achievement.

One aspect of the America 2000 program was that federal spending on K-12 education increased from over $9 billion in 1990 to almost $18 billion in 2000. Nevertheless, the promise of massive improvements in student achievement never came to fruition. Mathematics and reading scores only increased slightly from 1996 to 2000, while proficiency in science actually decreased during the same time period.

President GEORGE W. BUSH premised much of his campaign in 2000 on educational reform. Among the more striking statistics he cited related to the teachers in American schools. For instance, only about forty percent of mathematics teachers had studied math in college, while one-fifth of the nation's students in English classes were taught by instructors who did not hold a major or minor in English.

On January 8, 2002, Bush signed into law the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (20 U.S.C.A. §§ 6301 et seq.). Supporters of the act promised a major reform in national educational policy. The overall goal of the Act is to "ensure that all children have a fair, equal, and significant opportunity to obtain high-quality education. . ." Moreover, the Act is designed to allow children to achieve higher proficiency on achievement tests and other assessments.

The act requires every state to test students in grades three through eight in mathematics and reading. By 2007, states will be required to test science as well. Testing has been a major issue among educators due in part to the anxiety it causes among students. Moreover, many claim that achievement tests are often flawed and that they may disfavor minorities and low-income children. Proponents of the Act, however, point out that testing is one of the few recognized methods for measuring student abilities, and that standardized testing ensures that children are not failing because they attend a failing school.

Additional provisions provide funding to prepare and train teachers and principals. The act also promotes use of scientifically-based reading instruction and stresses the importance of using established instructional methods. These provisions have likewise been subject to criticism, as detractors claim that forcing schools to adopt stringent educational models inhibits development of effective methods by individual teachers. Supporters note that many independent efforts fail and that the people that suffer from such failures are the students.

Additional provisions of the No Child Left Behind initiative focus upon safer schools, including provisions that allow parents to remove children from unsafe schools; improvements of academic achievement of the disadvantaged; enhancements in language instruction; promotion of informed parental choices; and flexibility and accountability in education.

In the 1860s, federal education had a budget of $15,000 and 4 employees to handle education fact-finding. By 1965, the Office of Education employed 2,113 employees and had a budget of $1.5 billion. In 1995, the DOE administered about $33 billion, or about two percent of all federal spending, and had 4,900 employees, making it the smallest cabinet agency.

The DOE's elementary and secondary education programs annually serve fifteen thousand local school districts and almost 50 million students attending more than eighty-four thousand public schools and twenty-four thousand private schools. Approximately 7 million post-secondary students receive grant, loan, and work-study assistance. From 1975 to 1995, approximately 40 million students attended college on student financial aid programs. An additional 4 million adults received assistance each year to attend literacy classes and upgrade their skills to further their employment goals.

Although the nation spends about $500 billion a year on education for elementary to post-secondary education, the federal government

contributes only eight percent of that amount. Federal funding helps approximately one of every two students pay for post-secondary education, and approximately four of five disadvantaged elementary and secondary school students receive special assistance.

### Structure

The organizational structure of the DOE is made up of the offices of a number of administrative officials, including a secretary, deputy secretary, and under secretary; seven program offices; and seven staff offices. Reporting directly to the secretary are the deputy secretary, undersecretary, general counsel, inspector general, and public affairs director. All other staff offices and program offices are under the jurisdiction of the deputy secretary.

### Offices of the Secretary

The secretary of education advises the president of the United States on federal education plans, policies, and programs. The secretary directs department officials in carrying out these programs and activities and serves as the chief spokesperson for public affairs, promoting public understanding of the DOE's goals, objectives, and programs.

The secretary also performs certain federal responsibilities for four federally aided corporations. The American Printing House for the Blind in Louisville, Kentucky, distributes Braille books, talking books, and other educational aids without cost to educational institutions for blind people. Gallaudet University, in Washington, D.C., provides a liberal arts education for deaf persons. Howard University, also in Washington, D.C., is a comprehensive university that offers instruction in seventeen schools and colleges, and was established primarily to support African-American students. The National Technical Institute for the Deaf, a division of the Rochester Institute of Technology, located in Rochester, New York, provides educational programs that focus on careers and are geared towards helping hearing-impaired individuals obtain marketable skills in a society that increasingly relies on technology.

The deputy secretary serves as the principal policy adviser to the secretary on all major program and management issues and is responsible for the department's internal management and daily operations. The deputy oversees the Executive Management Committee and the Reinvention Coordination Council, coordinates federal-state relations, and serves as acting secretary in the secretary's absence.

The undersecretary advises the secretary on matters relating to program plans and budget.

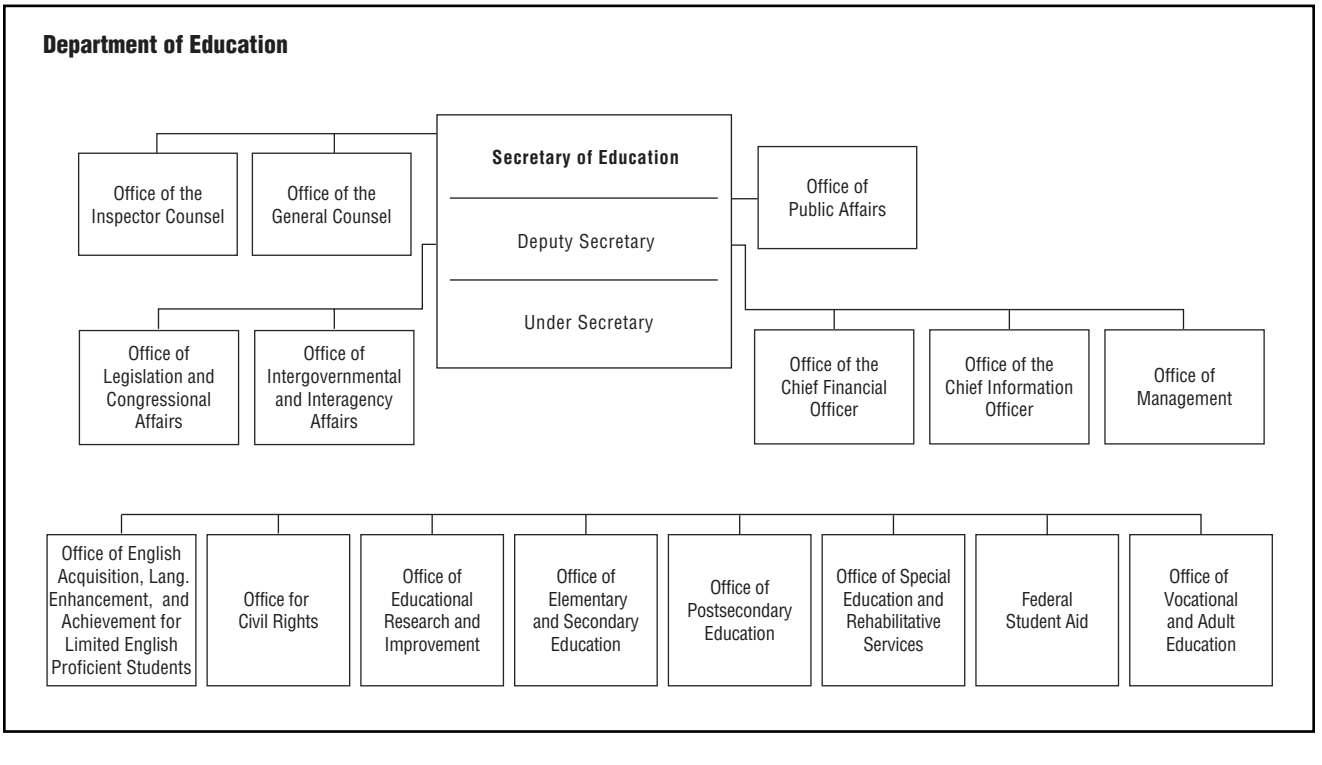

Through the Planning and Evaluation Service and the Budget Service, this officer directs, coordinates, and recommends policy and administers analytical studies on the economic, social, and institutional effect of existing and proposed policies, legislative proposals, and program operations.

### Program Offices

**Bilingual Education and Minority Languages Affairs** The Office of Bilingual Education and Minority Languages Affairs funds programs designed to help persons with limited English proficiency participate effectively in classrooms and work environments in which English is the primary language. This is accomplished through fourteen grant programs and one formula grant program, as well as through contracts for research and evaluation, technical assistance, and clearinghouse activities.

**Civil Rights** The Civil Rights Office enforces federal statutes that prohibit discrimination based on race, color, national origin, sex, age, or handicapping condition in education programs receiving federal financial assistance. Civil rights laws extend to a wide range of educational institutions, including every school district, college, and university as well as proprietary schools, libraries, museums, and correctional facilities.

**Educational Research and Improvement** The primary function of the Office of Educational Research and Improvement is to gather, analyze, and make available to the public statistical and other types of information about the condition of U.S. education. This is accomplished through the dissemination of information and research findings about successful education practices, student achievements, and nationally significant model projects. The office also supports a wide range of research and development activities and promotes the use of technology in education.

**Elementary and Secondary Education** The Office of Elementary and Secondary Education formulates policy for, directs, and coordinates activities relating to preschool, elementary, and secondary education. Grants and contracts are awarded to state educational agencies, local school districts, post-secondary schools, and nonprofit organizations for compensatory, migrant, and Indian programs; drug-free programs; other school improvement programs; and impact aid, which compensates school districts for the loss of property taxes for students who live on federally owned property such as military bases or Indian reservations.

**Post-secondary Education** The Post-secondary Education Office formulates policy and directs and coordinates programs for assistance to post-secondary institutions and to students who need financial assistance to attend college or a vocational training center. Financial aid is awarded in the form of grants, loans, and jobs. In addition, this office provides support for institutional development, student services, housing and facilities, veterans' affairs, cooperative education, international and graduate education, colleges for African-Americans, foreign language and area studies, and innovative teaching methods and practices.

**Special Educational and Rehabilitation Services** The Office of Special Educational and Rehabilitation Services supports programs that help educate children with special needs, provides for the rehabilitation of youths and adults with disabilities, and supports research to improve the life of individuals with disabilities regardless of age. Programs include support for the training of teachers and other professional personnel; grants for research; financial aid to help states initiate, expand, and improve their resources; and media services and captioned films for hearing-impaired individuals.

**Vocational and Adult Education** Grant, contract, and technical assistance programs for vocational-technical education and adult education and literacy are administered through the Office of Vocational and Adult Education. This office also works with the DEPARTMENT OF LABOR in administering the School-to-Work Opportunities Initiative, which helps states and localities design and build innovative systems to prepare youths for college and careers.

### Staff Offices

**Assistant Secretary for Management** The assistant secretary for management provides the deputy secretary with advice and guidance on administrative management and is responsible for activities involving personnel, training, grants and procurement management, management evaluation, automated data processing, and other support functions.

**Chief Financial Officer** The chief financial officer manages grants and contract services and oversees financial management, financial control and accounting, and program analysis.

**Assistant Secretary of Intergovernmental and Interagency Affairs** The assistant secretary of intergovernmental and interagency affairs acts as a liaison to state and local governments and other federal agencies and oversees the DOE's ten regional offices.

**Inspector General** The inspector general audits and investigates programs and operations to promote their efficiency and effectiveness and to detect and prevent FRAUD, waste, and abuse. This officer seeks to recover misused federal funds through courts and administrative procedures and, in cooperation with the DEPARTMENT OF JUSTICE, prosecutes wrongdoers.

**General Counsel** As the chief legal adviser to the secretary and other department officials, the general counsel directs, coordinates, and recommends policy for activities involving the preparation of legal documents and department rules and regulations, including proposed or pending legislation.

**Public Affairs Director** The public affairs director, who reports directly to the secretary, develops and coordinates public affairs policy and serves as the chief public information officer.

**Assistant Secretary for Legislation and Congressional Affairs** The assistant secretary for legislation and congressional affairs serves as the principal adviser to the deputy secretary on the DOE's legislative program and congressional relations.

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CROSS-REFERENCES

Colleges and Universities; School Desegregation; Schools and School Districts.

## EDUCATION LAW

*The body of state and federal constitutional provisions; local, state, and federal statutes; court opinions; and government regulations that provide the legal framework for educational institutions.*

The laws that control public education can be divided into two categories: those written exclusively for schools and those pertaining to society in general. Federal statutes regarding the education of children with disabilities are an example of the former, and Title VII (CIVIL RIGHTS ACT OF 1964, §§ 701 et seq., as amended, 42 U.S.C.A. §§ 2000e et seq.), a federal statute that covers employment in schools and elsewhere, is an example of the latter. Much of the litigation, legislation, and debate in education law has concerned nine main issues: student speech and expression; searches of students; the separation of church and state; racial SEGREGATION; the education of disabled children; EMPLOYMENT LAW; employee SEXUAL HARASSMENT and abuse of students; instructional programming; and the financing of public education.

### History

Throughout United States history, government, in one form or another, has expressed an interest in education. Indeed, this interest predates the American Revolution by more than 100 years. In 1647, the General Court of the Colony of Massachusetts Bay passed the Old Deluder Satan Act. Section 2 of that act provided that "when any town increased to one hundred families or households, a grammar school would be established with a master capable of preparing young people for university level study." The Massachusetts Bay Colony was not unique in its concern for education: Other colonies also gave unrestricted aid through land grants and appropriations of money. Both forms of support were adopted later by the CONTINENTAL CONGRESS and the CONGRESS OF THE UNITED STATES.

The first measure enacted by the federal government in support of education came when the Continental Congress passed the Ordinance of 1785, which disposed of lands in the Western Territory and reserved section 16 of each congressional township for the support of schools. Two years later, the same Congress passed the NORTHWEST ORDINANCE, which was the first policy statement by Congress with respect to education. Its third article recognizes knowledge as being essential to good government and to the public welfare, and it encourages happiness of mankind, schools, and the means of education.

These early acts by the colonies, and support from the federal Congress, forged a partnership in public education that continues to this day.

This partnership has thrived despite the absence of any explicit reference to education in the Constitution. The legal authority for the intrusion of the federal government into education is based on an interpretation given to the GENERAL WELFARE Clause of the Constitution, which reads, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises to pay the Debts and provide for the common Defence and general Welfare of the United States" (art. I, § 8).

The TENTH AMENDMENT to the Constitution provides the basis in legal theory for making education a function of the states. It reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Although this amendment does not specifically direct the states to assume the responsibility for providing education, its effect has been no less. Each state constitution provides for the establishment of a statewide school system. Some state constitutions define in detail the structure for organizing and maintaining a system of public education; others merely accept that responsibility and delegate authority for its implementation to the state legislature. The U.S. Supreme Court and the state courts have consistently ruled that education is a function of the states.

### Student Speech and the First Amendment

In the mid-twentieth century, the U.S. Supreme Court began to recognize that children do not give up their constitutional rights as a condition of attending public school. The Court acknowledged that the public school is an appropriate setting in which to instill a respect for these rights. Freedom of expression is perhaps the most preciously shielded of individual liberties, and the Court has noted that it must receive "scrupulous protection" in schools "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes" (*West Virginia Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 [1943]).

The Court also has recognized that schools function as a "marketplace of ideas" and that the "robust exchange of ideas is a special concern of the First Amendment" (*Keyishian v. Board of Regents,* 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 [1967]).

Nevertheless, the right to free expression can be restricted. As Justice OLIVER WENDELL HOLMES JR. noted, FREEDOM OF SPEECH does not allow an individual to yell "Fire!" in a crowded theater when there is no fire (SCHENCK V. UNITED STATES, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 [1919]). A determination that specific conduct communicates an idea does not ensure constitutional protection. The judiciary has recognized that defamatory, obscene, and inflammatory expression may fall outside the protections of the FIRST AMENDMENT. Moreover, the U.S. Supreme Court has acknowledged that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings" (*Bethel Sch. Dist. 403 v. Fraser,* 478 U.S. 675, 106 S. Ct. 3159, 92 L.Ed. 2d 549 [1986]). Accordingly, students' rights to free expression may be restricted by policies that are reasonably designed to take into account the special circumstances of the educational environment.

It was not until 1969 that the U.S. Supreme Court specifically addressed the scope of students' freedom of expression in public schools. Its landmark decision in this area, TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), often is referred to as the MAGNA CHARTA of students' rights. *Tinker* arose from an incident in which students were suspended for wearing black armbands to protest the VIETNAM WAR. Concluding that school authorities had suspended the students for expression that was not accompanied by any disorder or disturbance, the U.S. Supreme Court ruled that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."

For almost two decades, lower courts interpreted the *Tinker* mandate broadly, applying it to controversies involving a range of expressive activities by students, school-sponsored and otherwise. Although *Tinker* has not been overturned, the Court limited the application of its principle in the late 1980s and early 1990s, beginning with the 1986 decision of *Bethel School Dist. 403 v. Fraser.* In *Fraser,* the Court upheld disciplinary action taken against a student for using a sexual metaphor in a nominating speech during a student government assembly. The Court recognized that the inculcation of fundamental values of civility is an important objective of public schools and that a

Tinker v. Des Moines *addressed the scope of students' freedom of expression in public schools. The case arose from an incident in which students, including Mary Beth and John Tinker (pictured), were suspended for wearing black armbands in protest of the Vietnam War.*

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school board has the authority to determine what manner of speech is inappropriate in classes and assemblies.

Two years after *Fraser,* the Court affirmed the right of a school principal to delete two pages from the school newspaper because of the content of articles on **DIVORCE** and teenage pregnancy (*Hazelwood v. Kuhlmeier,* 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 [1988]). The Court acknowledged school authorities' broad discretion to ensure that expression appearing to bear the school's imprimatur is consistent with educational objectives. Further, the Court expansively interpreted the category of student expression that is subject to **CENSORSHIP** as that which occurs in school publications and in all school-sponsored activities. In both *Hazelwood* and *Fraser,* the Court indicated that school authorities could determine for themselves the expression that is consistent with their schools' objectives.

Although many questions remain unanswered concerning the application of the First Amendment guarantee of free speech in the unique forum of the public school, the law does seem to be settled in the following areas:

- School officials may discipline students whose speech or expression materially and substantially disrupts the educational environment (*Bethel School Dist. 403 v. Fraser*).
- School administrators may reasonably regulate the content and distribution of printed material at school (*Hazelwood School Dist. v. Kuhlmeier*).
- The Equal Access Act (Pub. L. 98-377, Title VIII, Aug. 11, 1984, 98 Stat. 1302 [20 U.S.C.A. §§ 4071 et seq.]) requires a school to permit religious student groups to meet during non-instructional time if the school permits other extracurricular groups to meet in the same or a similar manner (*Board of Education v. Mergens,* 496 U.S. 226, 110 S. Ct. 2356, 110 L. Ed. 2d 191 [1990]).
- School officials have far more control and flexibility in selecting and rejecting curricular materials than they do in deciding about library books and magazines (*Board of Education v. Pico,* 457 U.S. 853, 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982), 4 Ed. Law Rep. 1013 [1982]).
- School officials may make judgments on the appropriateness of student speech in school, based on the content of the speech, when that speech is vulgar or otherwise offensive in nature (*Bethel School Dist. 403 v. Fraser*).
- School officials may reasonably regulate student speech and expression when its exercise either intrudes on the rights of others or is in some way inconsistent with a school's overall curricular mission (see *Fraser*).

### Searches of Students and Lockers

The **FOURTH AMENDMENT** to the U.S. Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable **SEARCHES AND SEIZURES**, shall not be violated, and no Warrants shall issue, but upon probable cause." This provision is made applicable to the states through the **DUE PROCESS CLAUSE** of the **FOURTEENTH AMENDMENT.**

The Supreme Court has stated that the **BILL OF RIGHTS** (the first ten amendments to the Constitution) is applicable to children, even in a classroom setting. To paraphrase the Court in *Tinker,* students do not shed their rights at the schoolhouse gates. Does the *Tinker* ruling suggest that the Fourth Amendment protection from unreasonable searches extends to public schools? Must a principal obtain a warrant before searching students or their lockers? Are principals to be held to the "probable cause" standard that is generally required by the Fourth Amendment? These are important questions because evidence of wrongdoing that is obtained in an illegal search is generally inadmissible; that is, it must be excluded from consideration—at trial. The issue of admissibility of evidence is especially critical when school officials are searching for drugs, alcohol, or weapons.

The U.S. Supreme Court addressed these questions in 1985, in *New Jersey v. T.L.O.,* 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720. The case involved a 14-year-old girl, T.L.O., and a female companion, whom a teacher observed smoking in the girls' restroom in violation of school rules. T.L.O. denied smoking on that occasion and claimed she did not smoke at all. The assistant principal opened T.L.O.'s purse and found a pack of cigarettes. While searching the purse, he also discovered evidence of marijuana possession, use, and sale. He then called the police. T.L.O. subsequently admitted her involvement in selling marijuana to other students, but she sought to have the evidence excluded in criminal court on the ground that the search violated her rights under the New Jersey Constitution and the Fourth Amendment to the U.S. Constitution.

This issue was litigated at three levels in the New Jersey courts and finally decided by the U.S. Supreme Court. The Court held that a warrant was not needed for the assistant principal to search T.L.O. and that the reduced standard of "reasonable suspicion" governs school searches. The Court established a two-pronged test of reasonableness: (1) the search must be justified at its inception; and (2) as conducted, the search must be reasonably related in scope to the circumstances. The Court weighed T.L.O.'s interest in privacy against the school's need to obtain evidence of violations of school rules and of the law. The result tipped the scale in favor of broad school discretion in searching for contraband in students' pockets, purses, and lockers.

State and federal courts have expanded the scope of *T.L.O.* since it was decided in 1985. The reasonable-suspicion standard has survived student challenges in searches of lockers, desks, and cars in school parking lots.

A 1995 ruling by the U.S. Supreme Court continued the erosion of students' Fourth Amendment rights that began with the *T.L.O.* decision. In *Vernonia School District 471 v. Acton,* 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564, the Court rejected a constitutional challenge to a public school district's random urinalysis testing program for students who participate in interscholastic athletics. In examining the "nature of the privacy interest" at stake, the Court explained that public-school children generally have diminished privacy interests because they require constant supervision and control. Athletes further have their privacy interests diminished, the Court wrote, because they regularly undergo physical exams and routinely experience conditions of "communal undress" in locker rooms. The district's random testing program was held to be minimally intrusive because it required urine collection under conditions that were virtually identical to those that students confront in public-school restrooms. Finally, the Court found several goals of the school district to be sufficiently compelling to justify random testing: deterring drug use in schoolchildren, maintaining the functioning of the schools, and protecting athletes from drug-related injury. The Court's ruling will enable school systems that follow the procedures approved in *Vernonia* to test student athletes randomly for drugs. It remains unclear, however, whether school districts may conduct drug testing of students who are not involved in athletics.

Will the scope of *Vernonia* expand in the years ahead, as has that of *T.L.O.*? If drug problems continue in schools, courts will likely determine that the Fourth Amendment rights of students may be restricted further. Additional limitations on those rights may include random sampling of all students for evidence of drug use.

Drugs are not the only items that are subject to searches by schools, and searches are not limited to high-school students. In *Jenkins v. Talladega City Board of Education*, 115 F.3d 821 (11th Cir. 1997), the Eleventh Circuit Court of Appeals held that two eight-year-old girls who were subject to two strip searches could not recover under theories that the teachers who had conducted the searches had violated state and federal law. Both teachers, along with the superintendent of the school district, were protected by qualified IMMUNITY, which applies when a state actor's conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."

The case arose when a schoolteacher in Talladega, Alabama, suspected that two second-grade girls had stolen money from a classmate. The teacher, along with a guidance counselor, subjected the girls to two strip searches in the girls' restroom at the school. Both searches proved fruitless. The parents of the children later brought an action alleging that the teachers had violated the girls' rights under the First and Fourteenth Amendments of the U.S. Constitution, Title IX of the Education Amendments of 1972 (20 U.S.C.A. § 1681), and Alabama law.

The U.S. District Court for the Northern District of Alabama granted SUMMARY JUDGMENT in favor of the defendants, holding that they were immune from the suit as state actors acting within their official capacities.

Although a panel of the Eleventh Circuit reversed part of the district court's decision, the full court affirmed the dismissal of the case. The case law governing these types of searches was T.L.O., but the U.S. Supreme Court's decision, according to the majority in *Jenkins*, was not defined clearly enough to put defendants on notice that their actions were unconstitutional or contrary to the law. For example, *T.L.O.* did not clarify whether a search of a younger student was more intrusive than one of an older student; whether a search of a girl was more intrusive than a search of a boy; or what kind of infraction is serious enough to warrant a strip search. Without this information, held the *Jenkins* majority, the defendants could not have known that their actions were unconstitutional. They were therefore immune from suit.

### Separation of Church and State

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The First Amendment has been incorporated into the Fourteenth Amendment and applies to the states and their subdivisions. The first provision is called the Establishment Clause; the second, the Free Exercise Clause. Thus, the guarantee of religious freedom has a double aspect. The Establishment Clause prohibits laws requiring that anyone accept any belief or creed or the practice of any form of worship. Courts have relied on the Establishment Clause to nullify numerous practices in public schools, such as offering school-prescribed prayers in classrooms and at commencement exercises, posting the Ten Commandments in classrooms, requiring Bible reading, displaying religious symbols, observing moments of silence, studying Scientific Creationism, and distributing Bibles.

The Free Exercise Clause safeguards the freedom to engage in a chosen form of religion. Again, practices in the public schools have produced a host of litigation on this clause of the First Amendment. Parents with strong religious convictions have brought numerous suits alleging that a part of the science, health, or reading curriculum included content that was contrary to the family's religious convictions and values, thus restricting the family's right to engage in its chosen religion.

Likewise, a series of state and federal statutes has been challenged on separation-of-church-and-state grounds. The courts have ruled that the following practices do not violate the First Amendment religion clauses:

- Transportation of students to private, sectarian schools at public expense
- Public purchase of secular textbooks for use in religious schools
- Use of school facilities by religious organizations pursuant to policies that allow nonreligious groups to use such facilities
- Release of students from public schools to attend religious instruction classes
- Provision of a signer at public expense for a deaf student in a religious school
- Permission for student-organized religious clubs to meet on school property during the noninstructional part of the day

Practices that have been prohibited by the courts include these:

- Sending public school teachers into private, sectarian schools to provide remedial instruction
- Providing a publicly funded salary supplement to teachers in religious schools

### Racial Segregation

The U.S. Supreme Court's 1954 ruling in BROWN V. BOARD OF EDUCATION, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, held unconstitutional the deliberate segregation of schools by law on account of race. *Brown* overruled the 1896 case of PLESSY V. FERGUSON, 163 U.S. 537, 16 S. Ct. 1138, in which the Court had recognized as valid the separation of black and white school children. The principles enunciated in *Brown* provided the foundation for new federal laws that expand access to education and other public services to previously unserved populations, such as disabled students and adults.

In *Brown,* four separate cases—from Delaware, Kansas, South Carolina, and Virginia—were consolidated for argument before the U.S. Supreme Court. The Court framed the issue before it as being whether "segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprives the children of the minority group of equal educa-

tional opportunity." The Court answered in the affirmative, holding that the Fourteenth Amendment's Equal Protection Clause forbids state-imposed segregation of races in public schools, and stating, "In the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

The Court further stated, "[education] . . . is a right which must be made available to all on equal terms"—not a privilege that is granted to some and denied others. This statement of public policy opened the public schools to minorities and to other populations who previously had been denied access. For example, advocates for better access to schools for disabled students seized upon this language to press Congress into passing the Education for All Handicapped Children Act (EAHCA) in 1975 (Pub. L. 94-142, Nov. 29, 1975, 89 Stat. 773 [20 U.S.C.A. §§ 1232, 1400 et seq.]).

Numerous lawsuits have alleged violation of *Brown* since 1954. Although the efforts to desegregate the schools have not been uniformly successful, de jure segregation in public schools—the practice addressed specifically in *Brown*—does not exist in the United States today. However, the goal of creating an integrated public-school system has not been achieved. Most minority children still attend schools where they are the majority of students, or where their numbers are disproportionately high, as compared to the area population. The location of public housing, middle-class flight from inner-city areas, economic deprivation of minorities, and a host of other variables have frustrated legislative and judicial efforts to fully integrate public schools.

### Affirmative Action Programs in Higher Education

One of the most heated debates in higher education has focused on AFFIRMATIVE ACTION programs in higher education. Advocates for these programs cite statistics that minorities have been traditionally underrepresented in COLLEGES AND UNIVERSITIES. During the 1960s and 1970s, schools began to address these issues by implementing programs that required a certain percentage of enrollment by minorities. The programs were quickly subject to lawsuits by those who had been rejected by the schools, often claiming that the schools had violated their constitutional and statutory rights.

A fiercely-divided U.S. Supreme Court in REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978), held that a program at a state-sponsored school that reserved 16 seats out of a class of 100 for certain disadvantaged and minority groups violated the EQUAL PROTECTION CLAUSE and Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d (Supp. 2003). The plaintiff in the case was a white applicant who had been denied admission to the medical school at the University of California at Davis. The student's credentials were superior to some of those who had been admitted to the 16 seats reserved for the minority or disadvantaged applicants.

Although a majority of the justices agreed that the program was unlawful, a majority could not agree as to the rationale for its judgment. Justice LEWIS POWELL, who wrote the opinion of the Court, found that the use of quotas to admit minorities and disadvantaged students was illegal, but also found that schools could consider race as a factor in their admissions. Other justices disagreed, stating that schools that consider race as a factor violated constitutional guarantees.

Lower courts have struggled for years with affirmative action admissions programs that considered race as a factor. The Court agreed to consider the issue again when it granted certioari in the case of *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002). The Sixth Circuit Court of Appeals case upheld the constitutionality of an admissions program at the University of Michigan School of Law that considered race and ethnicity in its admissions policies. The case had a massive following, fueled by comments by President GEORGE W. BUSH, who voiced his opposition to the program.

The Court affirmed the 6th Circuit's decision in *Grutter v. Bollinger,* 539 U.S. ___, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003). The opinion, drafted by Justice SANDRA DAY O'CONNOR, found that Michigan's law school had a compelling state interest in attaining a diverse student body, and the admissions program was narrowly tailored to achieve this interest. However, in a companion case, *Gratz v. Bollinger,* 539 U.S. ___, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003), the Court found the University of Michigan's undergraduate admissions program was not narrowly tailored to achieve diversity in its class. Writing for the majority, Chief Justice WILLIAM REHNQUIST found that the university's

practice of adding ARBITRARY points to the application of any racial minority, without considering the individual application, violated the EQUAL PROTECTION Clause.

### Education of Children with Disabilities

Congress passed the Individuals with Disabilities Education Act (IDEA) (20 U.S.C.A. §§ 1400 et seq.)—formerly the EAHCA—in 1975 to address the failure of state education systems to meet the educational needs of children who have disabilities. Congress's enactment of IDEA was, in part, a response to two well-publicized federal court cases: *Mills v. Board of Education,* 348 F. Supp. 866 (D.D.C. 1972), and *Pennsylvania Ass'n of Retarded Children v. Commonwealth of Pennsylvania,* 343 F. Supp. 279 (E.D. Pa. 1972). The courts in both cases found that children with disabilities were denied access to public schools because of their disabilities. For example, school laws in Pennsylvania and in the nation's capital permitted schools to deny entry to children whose IQ was below 70 (100 is classified as average intelligence), until such children reached the age of eight. Once admitted to school, many of these children were expelled because they could not learn how to read.

IDEA defines the types of disabilities covered and limits coverage to children who are educationally disabled. The act provides for matching funds to be available to states that have federally approved plans. To qualify for those funds, a state plan must ensure a free appropriate public education (FAPE) for all qualifying children and must guarantee access to a complex DUE PROCESS procedure for a parent

**Individuals with Disabilities Education Act**

**CHILDREN AGE 6–21, BY DISABILITY, 1999–2000 SCHOOL YEAR**

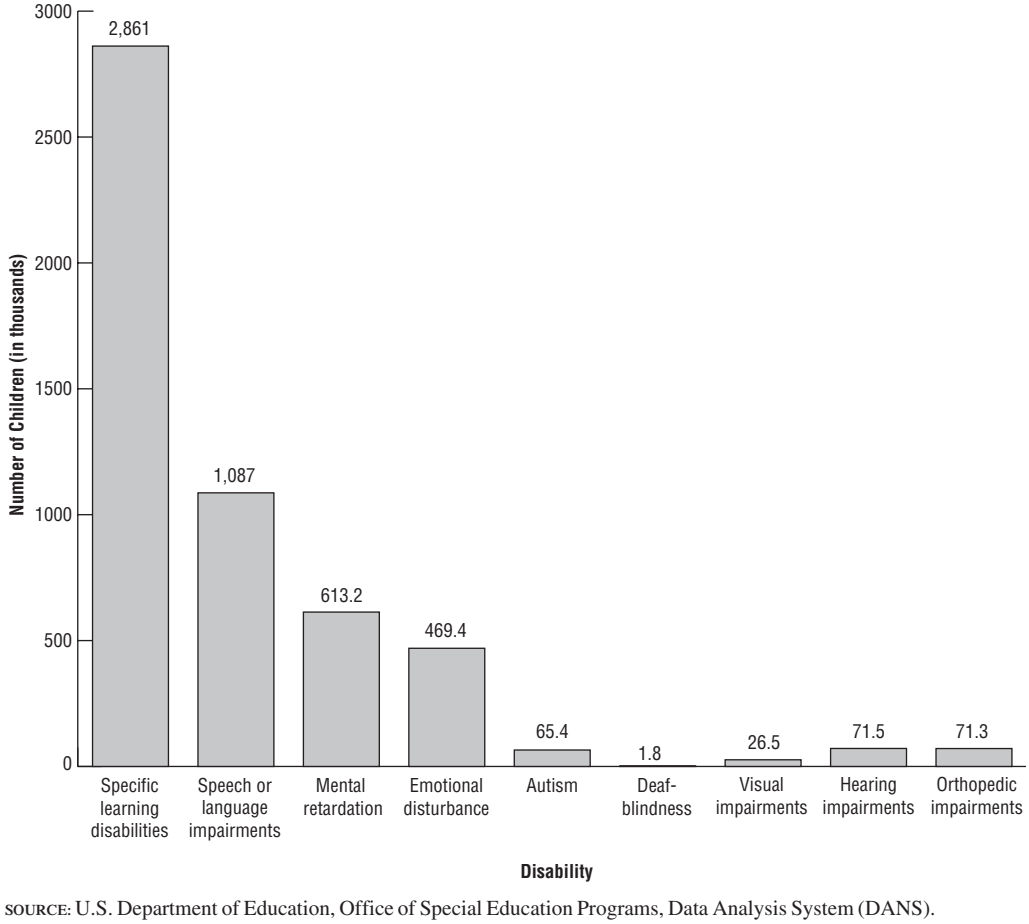


SOURCE: U.S. Department of Education, Office of Special Education Programs, Data Analysis System (DANS).

or guardian who wishes to challenge a child's FAPE.

IDEA differs from most legal provisions for public education in one important aspect: The parent of a disabled child has been elevated to the level of equal partner with school officials in shaping an educational experience for the child, whereas the parent of a child without disabilities is expected by law to be a passive participant in the public education that is provided by the teachers and school officials. This empowerment of parents of children with disabilities has generated countless and endless legal challenges of school officials' decisions and practices. Each case is decided on narrow factual grounds, with little generalizability.

### Employment Law

The myriad federal and state laws and regulations that control public employment in general apply with equal force to public-school employment. In addition, all states have statutes that control the school board–employee relationship. These state laws pertain to contracts, tenure, certification, retirement, and other matters of special interest to teachers. Despite the similarities of the issues covered in state statutes, there is very little reciprocity between and among states, thus making generalizations across state lines almost meaningless.

In contrast, federal statutes pertaining to public employment are enforceable throughout the nation. For example, Title VII makes it "an unlawful employment practice" to discriminate against any individual with respect to "compensation, terms, conditions, or privileges of employment" because of race, color, religion, sex, or national origin (42 U.S.C.A. § 2000e-2(a)(1)). In 1986, the Supreme Court decided a case concerning sexual harassment and the interpretation of Title VII. In *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49, the defendant, Meritor Savings Bank, argued that the discrimination prohibited by the statute concerned economic loss and not "purely psychological" aspects of the workplace environment. Because the female employee who filed the lawsuit had suffered no economic loss, her employer argued that there were no grounds for a lawsuit under Title VII. The Court disagreed. After ruling that Title VII protection is not limited to economic discrimination, the Court quoted with approval an appeals court opinion: "One can readily envision environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of employees."

The principles enunciated in *Meritor* were refined by the Supreme Court's 1992 ruling in *Harris v. Forklift Systems,* 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295. The Court in *Harris* was asked to set a standard of review in cases alleging the newly discovered "hostile environment" theory of sexual harassment. Justice Sandra Day O'Connor, writing for the majority, explained that simply uttering an "epithet which engenders offensive feelings in an employee" does not sufficiently affect the conditions of employment to implicate Title VII. The Court was equally clear in rejecting the employer's argument that Title VII requires a showing that the harassment "seriously affects the plaintiff's well-being." Rather, O'Connor wrote, the statute is violated when the workplace environment "would reasonably be perceived and is perceived as hostile and abusive." Further, the Court wrote, four circumstances (in addition to psychological harm) should be considered: "[t]he frequency of the conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Continuing, O'Connor wrote that the appropriate standard was that of a "reasonable victim," thus departing from the traditional "reasonable person" standard that is typically applied in cases involving alleged acts of commission or omission that result in an injury or damage to an individual's body, reputation, or property.

### Employee Sexual Harassment and Abuse of Students

Two federal statutes, Title IX of the Education Amendments of 1972 (§§ 901–909, as amended, 20 U.S.C.A. §§ 1681–1688) and SECTION 1983 of the Civil Rights Act of 1964 (42 U.S.C.A. § 1983), provide students with potentially powerful tools of redress for and protection against sexual harassment and abuse perpetrated by school employees. Title IX provides, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Section 1983 prohibits the deprivation of federal constitutional and statutory rights "under color of state law."

The most notable ruling on the application of Title IX has been the U.S. Supreme Court's 1992 decision in *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208. In that landmark case, the Court held that a female high-school student who had been subjected to SEXUAL ABUSE by her teacher could receive money damages under Title IX. The Court implicitly accepted as "sexual harassment" the type of behavior that existed in *Franklin,* which involved coercive sexual activity between a male high-school teacher–coach and a female student. Accordingly, sexual harassment, in all its forms, is SEX DISCRIMINATION prohibited by Title IX. As defined by the Office of Civil Rights, "[s]exual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent . . . that denies, limits, provides different, or conditions the provision of aid, benefits, or services or treatment protected under Title IX."

Under Section 1983 (42 U.S.C.A. § 1983), the violation of a student's right to bodily security (as against a school district) implicates SUBSTANTIVE DUE PROCESS rights under the Fourteenth Amendment. However, in order to demonstrate liability, the plaintiff must show that the school had notice of a pattern of unconstitutional conduct. This standard is difficult to meet. For example, a handful of complaints received by various school officials that a bus driver had kissed or fondled several handicapped children were insufficient to support a Section 1983 claim (*Jane Doe A v. Special School Dist. of St. Louis County,* 908 F.2d 642, 60 Ed. Law Rep. 20 [8th Cir. 1990]).

Litigation involving claims of sexual abuse by teachers is expanding rapidly. The courts are creating new legal avenues of redress, and students are becoming more willing to confront their abusers. Further, some state courts have waived statutory time limits on the filing of claims in cases involving sexual abuse of minors, permitting lawsuits many years after an alleged abuse.

### Instructional Programming

Contemporary debate on the school curriculum by advocates of a return to the basics, multicultural studies, and a range of educational approaches continues to attract public attention as those advocates press their claims in courts and legislative chambers. With some notable exceptions, courts generally give state legislative and local administrative authorities wide latitude to tailor curriculum to keep abreast of ever-expanding concepts of education. In every state, local districts must offer a curriculum that the state prescribes. Because the federal Constitution has delegated the responsibility for public education to the several states, the power of the state legislature over public schools is said to be plenary, limited only by the state constitution and some provisions in the federal Constitution. Accordingly, the local school board selects its curriculum on the basis of the extent of authority delegated by the state. Most state legislatures have chosen to prescribe a small number of course offerings in all public schools in the state, and delegate to local school authorities the balance of authority to control the curriculum. The curricular choices of local school boards might not satisfy some constituents and taxpayers, but displeasure alone will not persuade a court to substitute its judgment for that of a school board. Critics of the local choices pertaining to school curriculum, textbooks, library holdings, and teaching methods generally must take their complaints to their local school board and the state legislature for remedy.

Although the federal government traditionally has not intervened in the local educational process, the debate for the reform of education in the United States has been prevalent. On January 8, 2002, President Bush signed into law the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (20 U.S.C.A. §§ 6301 et seq.), which promises an effort to reform national educational policy. Like other federal educational legislation, this Act provides funding for a myriad of educational programs. The Act also includes several provisions regarding testing of grade-school students, which is an issue of controversy among educators. Critics claim that standardized testing can cause anxiety among students and that they do not always accurately reflect the students' competencies. Proponents counter that objective testing has long been used to determine the abilities of students and to test the competencies of schools to teach their students effectively.

### Financing of Public Education

Public schools in the United States are financed through a system of fiscal federalism—that is, the funds used for their operation have been appropriated on the federal, state, and local levels. Nationally, from the mid-1970s to the

**Local Funding of Public Elementary and Secondary Schools, by State, 2001–02**

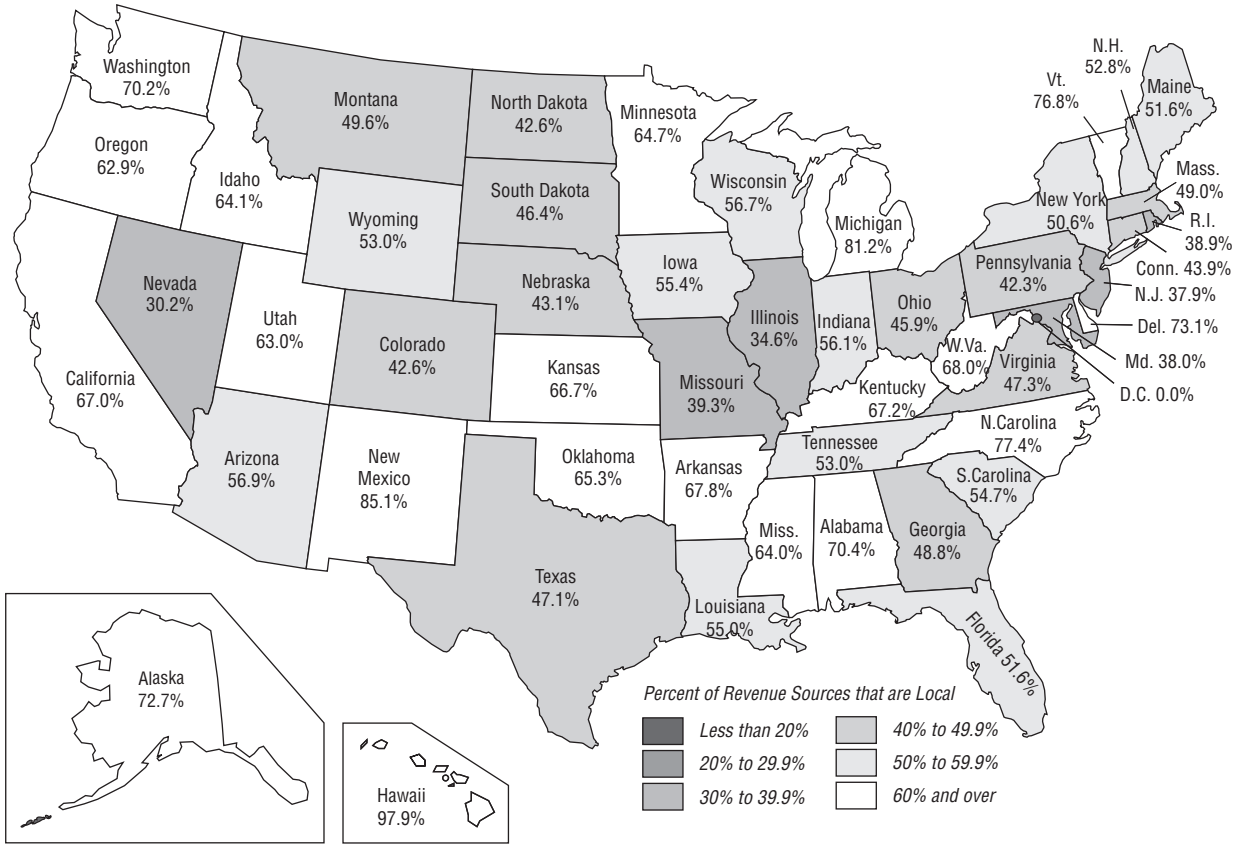


SOURCE: National Education Association, *Ranking & Estimates: Ranking of the States 2001 and Estimates of School Statistics 2002.*

mid-1990s, the combined federal and state support for public education accounted for slightly less than 50 percent of all operating expenses, with the federal treasury providing less than ten percent of the total cost of public education. Therefore, approximately one-half of the money required by school districts has come from local sources, primarily local property taxes. States have constructed myriad property classifications and state-aid distribution formulas in attempts to equalize educational opportunities for students in property-rich and -poor school districts. Further, most states provide special funding for school transportation, for the education of students with disabilities, and for other high-cost services and programs.

As state creations, school boards may only exercise the fiscal powers delegated to them by the state, so they depend heavily on direct state subsidies and legislative authorization to levy school district taxes. The states' options to limit and allocate direct state assistance to different classes of school districts, to fix the sources and limits of school district revenues, and even to transfer school-district funds place the ultimate control of school finance in state legislatures and not in local school boards. Financially stressed school districts and citizen groups have, therefore, resorted to constitutional challenges to overturn state laws that they deem to be unduly restrictive or unfair. These challenges have not fared well under the federal Constitution and have met with mixed success under state constitutions.

The U.S. Supreme Court, in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1993), upheld the use of local property-tax systems to support public schools, against the claim that such systems violate the Fourteenth Amendment

equal protection rights of children in impoverished areas. The Court further declared that public education is not a fundamental constitutional interest.

Following *Rodriguez,* litigation has proceeded in about half of the states, under the equal protection and education clauses of state constitutions. The state constitutional challenges do not have a uniform thrust. The themes of equality (equal protection) and quality (efficient public education) may, depending on the wording and construction of each state's constitution, lead toward different policies and results. Despite adverse court rulings, the school-finance litigation has inspired a trend of legislative reform in many states. The new laws are calculated to balance educational opportunities for all children, regardless of the wealth of their school districts or the income of their parents.

### Bilingual Education

Bilingual education purports to make use of both the English language and a child's native language for educational instruction. It is premised upon the belief that this approach enables children to grasp the tenets of basic mathematics, science, and social studies in their own language, while simultaneously being exposed to English instruction. In theory it works, but in reality, children have reverted to their native language or have resisted communicating in English, much to the growing frustration of educators and the taxpayers who are saddled with the financial burdens brought to them by poor academic performance in the school systems.

After sinking millions of taxpayer dollars into bilingual education, many taxpayers in California decided to express their opinions at the voting booths. The California Department of Finance estimated that for the 1997-98 school year, California had spent 70 percent of its $385 million earmarked for economically disadvantaged children in bilingual programs.

California's Proposition 227 in 1998 mandated the termination of California's bilingual education program. Although passed into law by California voters with a resounding 61-39 percent victory in June 1998, the new law was immediately challenged in a CLASS ACTION suit filed in federal district court by the Mexican-American Legal Defense and Education Fund, the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE of Los Angeles, and several other parties. But within the first eight weeks of the election, legal challenges in both northern and southern federal district courts were resolved in favor of Proposition 227, and on July 31, 1998, the U.S. Court of Appeals for the Ninth Circuit upheld the Northern District's opinion.

Although the minority of states specially require bilingual education, the majority provide some sort of funding for these programs. Three states, including Arkansas, Delaware, and Nebraska, specifically forbid bilingual education. Because more than three million students in the United States speak little or no English, this issue has remained heated into the new millennium.

### Conclusion

The history of education law is characterized by a series of landmark court opinions and legislative acts that, with some exceptions, express the public policy preference for universality in public education. The major exception is the U.S. Supreme Court's 1896 "separate-but-equal" ruling in *Plessy v. Ferguson.* From the early days of the Old Deluder Satan Act to the present, the trend has been toward inclusion, not exclusion. Examples of significant expansions of this concept of universality are the enactment of compulsory attendance laws in all 50 states in the twentieth century; the *Brown* decision in 1954; and the 1975 enactment of the EAHCA, now IDEA.

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*Abington School District v. Schempp*; Colleges and Universities; Disability Discrimination; Drugs and Narcotics; Education Department; *Engel v. Vitale*; Flag; In Loco Parentis; School Desegregation; School Prayer; Schools and School Districts; Search and Seizure.

## EFFECT

*As a verb, to do; to produce; to make; to bring to pass; to execute; enforce; accomplish. As a noun,*

*that which is produced by an agent or cause; result; outcome; consequence. The result that an instrument between parties will produce in their relative rights, or which a statute will produce upon the existing law, as discovered from the language used, the forms employed, or other materials for construing it. The operation of a law, of an agreement, or an act. The phrases* take effect, be in force, *and* go into operation, *are used interchangeably.*

*In the plural, a person's effects are the real and* **PERSONAL PROPERTY** *of someone who has died or who makes a will.*

## EFFECTIVE COUNSEL

See **RIGHT TO COUNSEL.**

## EFFECTIVE RATE

*Another name for annual percentage rate that refers to the amount of yearly interest to be charged by a lender on the money borrowed by a debtor.*

*In federal* **INCOME TAX** *law, the actual tax rate that an individual taxpayer pays based upon his or her taxable income.*

Federal income tax laws increase the rate of taxation as a taxpayer reaches certain marginal income levels. For example, taxpayers might pay a tax rate of 20 percent on the first $10,000 of taxable income. Thereafter, any increase in income up to an additional $5,000 might be taxable at a rate of 22 percent on that $5,000. The effective rate of tax is computed by dividing the total amount of tax paid by the total of the person's taxable income, adding the tax paid on the person's first $10,000 at a 20 percent rate to the tax paid on the next $5,000 that is at a 22 percent rate. The effective rate is not an average of the tax rates imposed since the average does not take into account the differences in the marginal income levels. A taxpayer's effective tax rate is, however, more than the person's bottom marginal rate but less than his or her top marginal rate.

## EFFICIENT CAUSE

*That which actually precipitates an accident or injury.*

The term *efficient cause* is frequently used interchangeably with proximate cause—the immediate act in the production of a particular effect—or the cause that sets the others in operation.

## E.G.

*An abbreviation for* exempli gratia *[*Latin, for the sake of an example*].*

The phrase *e.g.* is frequently used in law books in lieu of the phrase "for example."

## EIGHTEENTH AMENDMENT

The Eighteenth Amendment to the U.S. Constitution reads:

> *Section 1.* After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> *Section 2.* The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.
>
> *Section 3.* This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

The Eighteenth Amendment was passed in 1919 and subsequently repealed in 1933.

The **VOLSTEAD ACT** (41 Stat. 305 [1919]) was enacted pursuant to the Eighteenth Amendment to provide for enforcement of its **PROHIBITION**. The 1933 ratification of the **TWENTY-FIRST**

*A woman displays an anti-Prohibition slogan printed on an automobile tire cover. Ratified in January 1919, the Eighteenth Amendment was repealed by the ratification of the Twenty-first Amendment in December 1933.*

LIBRARY OF CONGRESS

AMENDMENT in 1933 resulted in the repeal of the Eighteenth Amendment and the Volstead Act.

CROSS-REFERENCES

Alcohol.

## EIGHTH AMENDMENT

The Eighth Amendment to the U.S. Constitution reads:

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

The Eighth Amendment to the U.S. Constitution, ratified in 1791, has three provisions. The CRUEL AND UNUSUAL PUNISHMENTS CLAUSE restricts the severity of punishments that state and federal governments may impose upon persons who have been convicted of a criminal offense. The Excessive Fines Clause limits the amount that state and federal governments may fine a person for a particular crime. The Excessive Bail Clause restricts judicial discretion in setting bail for the release of persons accused of a criminal activity during the period following their arrest but preceding their trial.

Courts are given wide latitude under the Excessive Fines Clause of the Eighth Amendment. Fines imposed by a trial court judge or magistrate will not be overturned on appeal unless the judge or magistrate abused his or her discretion in assessing them (*United States v. Hyppolite,* 65 F.3d 1151 [4th Cir. 1995]). Under the "abuse-of-discretion" standard, appellate courts may overturn a fine that is ARBITRARY, capricious, or "so grossly excessive as to amount to a deprivation of property without due process of law" (*Water-Pierce Oil Co. v. Texas,* 212 U.S. 86, 111, 29 S. Ct. 220, 227, 53 L. Ed. 417 [1909]). Fines are rarely overturned on appeal for any of these reasons.

Trial court judges are given less latitude under the Excessive Bail Clause. Bail is the amount of money, property, or bond that a defendant must pledge to the court as security for his or her appearance at trial. If the defendant meets bail or is able to pay the amount set by the court, the defendant is entitled to recover the pledged amount at the conclusion of the criminal proceedings. However, if the defendant fails to appear as scheduled during the prosecution, then he or she forfeits the amount pledged and still faces further criminal penalties if convicted of the offense or offenses charged.

When fixing the amount of bail for a particular defendant, the court takes into consideration several factors: (1) the seriousness of the offense; (2) the WEIGHT OF EVIDENCE against the accused; (3) the nature and extent of any ties, such as family or employment, that the accused has to the community where he or she will be prosecuted; (4) the accused's ability to pay a given amount; and (5) the likelihood that the accused will flee the jurisdiction if released.

In applying these factors, courts usually attempt to set bail for a reasonable amount. Setting bail for an unreasonable amount would unnecessarily restrict the freedom of a person who only has been accused of wrongdoing; who is presumed innocent until proven otherwise; and who is entitled to pursue a living and to support a family. At the same time, courts are aware that bail needs to be set sufficiently high to ensure that the defendant will return for trial. Defendants are less likely to flee the jurisdiction when they would forfeit large amounts of money as a result. Courts are also aware that they must protect communities from the harm presented by particularly dangerous defendants. In this regard, the U.S. Supreme Court has permitted lower courts to deny bail for defendants who would create abnormally dangerous risks to the community if released.

Appellate courts usually defer to lower courts' decisions when a criminal penalty is challenged under the Excessive Fines and Excessive Bail Clauses of the Eighth Amendment. They give much closer scrutiny to criminal penalties that are challenged under the Cruel and Unusual Punishments Clause. State and federal governments are prohibited from inflicting cruel and unusual punishments on a defendant, no matter how heinous the crime committed. The prohibition against CRUEL AND UNUSUAL PUNISHMENT by states derives from the doctrine of incorporation, through which selective liberties contained in the BILL OF RIGHTS have been applied to the states by the U.S. Supreme Court's interpretation of the DUE PROCESS and EQUAL PROTECTION Clauses of the FOURTEENTH AMENDMENT.

The Eighth Amendment requires that every punishment imposed by the government be commensurate with the offense committed by the defendant. Punishments that are disproportionately harsh will be overturned on appeal. Examples of punishments that have been overturned for being unreasonable are two Georgia

statutes that prescribed the death penalty for rape and KIDNAPPING (*Coker v. Georgia,* 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 [1977]; *Eberheart v. Georgia,* 433 U.S. 917, 97 S. Ct. 2994, 53 L. Ed. 2d 1104 [1977]).

The U.S. Supreme Court has also ruled that criminal sentences that are inhuman, outrageous, or shocking to the social conscience are cruel and unusual. Although the Court has never provided meaningful definitions for these characteristics, the pertinent cases speak for themselves. For example, the Georgia Supreme Court explained that the Eighth Amendment was intended to prohibit barbarous punishments such as castration, burning at the stake, and quartering (*Whitten v. Georgia,* 47 Ga. 297 [1872]). Similarly, the U.S. Supreme Court wrote that the Cruel and Unusual Punishments Clause prohibits crucifixion, breaking on the wheel, and other punishments that involve a lingering death (*In re Kemmler,* 136 U.S. 436, 10 S. Ct. 930, 34 L. Ed. 519 [1890]). The Court also invalidated an Oklahoma law (57 O.S. 1941 §§ 173, 174, 176–181, 195) that compelled the state government to sterilize "feeble-minded" or "habitual" criminals in an effort to prevent them from reproducing and passing on their deficient characteristics (*Skinner v. Oklahoma,* 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 [1942]). Significantly, however, the Court had let stand, fifteen years earlier, a Virginia law (1924 Va. Acts C. 394) that authorized the sterilization of mentally retarded individuals who were institutionalized at state facilities for the "feeble-minded" (BUCK V. BELL, 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1000 [1927]).

A constitutional standard that allows judges to strike down legislation that they find shocking, but to let stand other legislation they find less disturbing, has an inherently subjective and malleable quality. A punishment that seems outrageous to one judge on one particular day might seem sensible to a different judge on the same day or to the same judge on a different day. For example, in *Hudson v. McMillian,* 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992), the U.S. Supreme Court reviewed a case in which a prisoner had been handcuffed by two Louisiana corrections officers and beaten to the point where his teeth were loosened and his dental plate was cracked. Seven U.S. Supreme Court justices ruled that the prisoner had suffered cruel and unusual punishment under the Eighth Amendment. Two justices, ANTONIN SCALIA and CLARENCE THOMAS, disagreed.

Another amorphous measure by which the constitutionality of criminal sentences is reviewed allows the high court to invalidate punishments that are contrary to "the evolving standards of decency that mark a maturing society" (*Trop v. Dulles,* 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 [1958]). Under the *Trop* test, the Court must determine whether a particular punishment is offensive to society at large, not merely shocking or outrageous to a particular justice. In determining which criminal sentences are offensive to society, the Court will survey state legislation to calculate whether they are authorized by a majority of jurisdictions. If most states authorize a particular punishment, the Court will not invalidate that punishment, as it is not contrary to "evolving standards of decency."

Applying this test, the Court ruled that the death penalty may be imposed upon 16-year-old U.S. citizens who have been convicted of murder, because a national consensus, as reflected by state legislation, supported CAPITAL PUNISHMENT for juveniles of that age (*Stanford v. Kentucky,* 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 [1989]). Under the same reasoning, the Court permitted the state of Texas to execute a mentally retarded person who had been convicted of murder, despite claims that the defendant's handicap minimized his moral culpability (*Penry v. Lynaugh,* 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 [1989]).

In the years after the Court decided *Penry*, several states, including Texas, exempted mentally retarded individuals from their death-penalty statutes. Moreover, very few states that did not proscribe such executions actually executed mentally retarded defendants, meaning those individuals with IQs of lower than 70. In 2002, the Court reviewed its conclusion in *Penry* in ATKINS V. VIRGINIA, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). Because so few states allowed execution of the mentally retarded, the practice had indeed become "unusual." Moreover, justifications for the death penalty, such as retribution on the part of the defendant and deterrence of capital crimes by prospective offenders, did not apply to the mentally retarded. Accordingly, the Court categorically excluded the mentally retarded from execution under the Eighth Amendment.

*Atkins* demonstrated that the Eighth Amendment, like other constitutional provisions, evolves as society evolves. Nevertheless, Justice Antonin Scalia, in a scathing dissent in *Atkins,* attacked

the majority opinion as lacking in precedent. He noted, "Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members." According to Scalia, the abolition of executions of mildly mentally retarded individuals by 18 states did not amount to a "national consensus" that such executions were so "morally repugnant as to violate our national 'standards of decency.'" Moreover, Scalia noted that execution of mildly retarded individuals in 1791, when the Eighth Amendment was adopted, would not have been considered "cruel and unusual." Rather, only the severely and profoundly retarded were historically protected.

Another test that the Court employs to evaluate the constitutionality of particular punishments is somewhat less pliable, but still controversial. Popularly known as the originalist approach, this test permits the U.S. Supreme Court to invalidate punishments that the Framers "originally" intended to remove from legislative fiat. In attempting to ascertain which punishments the Framers disapproved of, the Court has developed a simplistic formula: If a particular punishment was prohibited by the states at the time they ratified the Eighth Amendment in 1791, then that particular punishment is necessarily cruel and unusual; if a particular punishment was permitted by most states, or at least some states, in 1791, then the Framers did not intend to remove that punishment from the legislative arena.

The narrow, originalist formula has been criticized on a number of grounds. Some critics argue that a state representative's vote to ratify the Eighth Amendment need not mean that representative believed that all the punishments authorized by the government comported with the Cruel and Unusual Punishments Clause. The representative might not have considered whether a particular punishment was in any way cruel or unusual as he cast his vote for ratification. Conversely, the representative might have cast his vote for ratification primarily because he believed that a certain punishment would be deemed cruel and unusual under the Eighth Amendment. No documentary evidence from the state ratification proceedings reflects which punishments particular representatives found permissible or impermissible under the Eighth Amendment.

Nor is there much evidence indicating that the Framers intended their understanding of the Constitution to be binding on subsequent generations. JAMES MADISON, who was the primary architect of the Bill of Rights, believed that the thoughts and intentions of the Framers should have no influence on courts when they interpret the provisions of the Constitution. "As a guide in expounding and applying the provisions of the Constitutions," Madison wrote, "the debates and incidental decisions of the [Constitutional] Convention can have no authoritative character." For this reason, Madison refused to publish his *Notes of the Debates in the Federal Convention* during his lifetime.

Another criticism of the narrow, originalist approach emanates from the language of the Eighth Amendment itself. Proponents of this viewpoint observe that the Eighth Amendment is written in very abstract language. It prohibits "excessive" bail and "excessive" fines, and does not set forth any specific amount that judges may use as a yardstick when setting bail or imposing fines. Although it prohibits cruel and unusual punishments, it does not enumerate which criminal penalties should be abolished.

The Framers could have drafted the Eighth Amendment to explicitly outlaw certain barbaric punishments. They obviously were familiar with ways to draft constitutional provisions with such specificity. For example, Article I, Section 9, of the Constitution provides that "[n]o Bill of Attainder or EX POST FACTO LAW shall be passed." No clearer or more precise language could have been used in this provision. The Framers could have employed similar concrete language for the Eighth Amendment, some critics reason, but did not choose to do so.

Although there is not enough evidence to determine conclusively the appropriate manner in which the Framers expected or hoped that the Constitution would be interpreted, the origins of the Eighth Amendment are fairly clear. The notion that the severity of a punishment should bear some relationship to the severity of the criminal offense is one of the oldest in Anglo-Saxon law. In 1215, the MAGNA CHARTA, the ancient charter of English liberties, provided, "A free man shall not be [fined] for a small offense unless according to the measure of the offense, and for a great offense he shall be [fined] according to the greatness of the offense" (ch. 20).

By the seventeenth century, England had extended this principle to punishments that called for incarceration. In one case, the King's

Court ruled that "imprisonment ought always to be according to the quality of the offence" (*Hodges v. Humkin,* 2 Bulst. 139, 80 Eng. Rep. 1015 [K.B. 1615] [Croke, J.]). In 1689, the principle of proportionality was incorporated into the English Bill of Rights, which used language that the Framers of the U.S. Constitution later borrowed for the Eighth Amendment: "[E]xcessive bail ought not to be required, nor excessive fines imposed, or cruel and unusual punishments inflicted." Nine states adopted similar provisions for their own constitutions after the American Revolution.

The concerns underlying the Eighth Amendment were voiced in two state-ratification conventions. In Massachusetts, one representative expressed "horror" that Congress could "determine what kind of punishments shall be inflicted on persons convicted of crimes" and that nothing restrained Congress "from inventing the most cruel and unheard-of punishments" that would make "racks" and "gibbets" look comparatively "mild" (as quoted in **FURMAN V. GEORGIA**, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 [1972]). In Virginia, **PATRICK HENRY** was worried that Congress might legalize torture as a method of coercing confessions from criminal defendants, and that the government should be prevented from employing such "cruel and barbarous" tactics (as quoted in *Furman*).

The concerns expressed by these representatives were legitimate in light of the punishments authorized by many states at the time the Eighth Amendment was ratified. These punishments ranged from whipping, branding, and the pillory to various methods of mutilation, including the slitting of nostrils and the removal of body parts. The death penalty was also prevalent. If James Madison or the other Framers intended to preserve these forms of punishment, they kept their intentions to themselves.

The U.S. Supreme Court continues to consider specific instances of punishment in order to determine whether they violate the Eighth Amendment. In *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002), the Court considered a case where Alabama prison officers had handcuffed a prisoner to a hitching post on two occasions, once for more than seven hours without water or a restroom break. Use of a hitching post, according to the Court, violated the Eighth Amendment.

The prisoner in *Hope* brought a civil action against the officers, who claimed that they were protected by the doctrine of qualified **IMMUNITY**, which applies when state actors are not put on notice that their conduct violates judicial precedent or other federal or state law. Precedent from the Eleventh Circuit Court of Appeals, which includes the state of Alabama, was clear that this type of punishment was unlawful. Moreover, the **DEPARTMENT OF JUSTICE** had submitted a report to the Alabama Department of Corrections (ADOC), informing the state agency that the use of hitching posts violated the constitution, and the ADOC had issued regulations forbidding that form of punishment. Because the officers had had notice that their actions were unlawful, qualified immunity did not apply.

Other punishments that have been the subject of Eighth Amendment challenges are the so-called "three strikes and you're out" laws, which increase punishment for repeat offenders. Under such laws, when an offender commits his or her third crime, the severity of the crime is elevated. Several defendants, particularly in California, have been sentenced to lengthy prison terms after committing relatively minor offenses.

In *Lockyer v. Andrade*, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003), the U.S. Supreme Court held that the **THREE-STRIKES LAWS** did not violate the Eighth Amendment. In that case, the defendant had stolen a total of nine video tapes worth a total of $153, usually a misdemeanor offense under California law. However, the defendant had received two previous convictions, and when he was convicted on two counts of petty theft, the counts were considered his "strikes" three and four. The trial court elevated the charges to felonies and sentenced the defendant to life in prison with no possibility of **PAROLE** for 50 years. The Court allowed the sentence to stand, reversing a decision by the Ninth Circuit Court of Appeals.

On the same day it decided *Lockyer,* the Court ruled that a sentence of 25 years to life given to a defendant who had stolen three golf clubs worth $399 apiece was not cruel and unusual punishment. The case of *Ewing v. California*, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003), unlike *Lockyer*, was an appeal from a California state court that had found nothing unconstitutional about the three-strikes law in California. The two rulings made it clear that states may prescribe elevated punishment for repeat offenders without violating the Eighth Amendment, even if the punishment does not meet the actual crime that led to the punishment.

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CROSS-REFERENCES

Criminal Law; Criminal Procedure; Original Intent; Prisoners' Rights.

## ♦ EISENHOWER, DWIGHT DAVID

"YOU DON'T PROMOTE THE CAUSE OF PEACE BY TALKING ONLY TO PEOPLE WITH WHOM YOU AGREE."
—DWIGHT EISENHOWER

Dwight David Eisenhower achieved prominence in military and political careers and was the thirty-fourth president of the United States.

Eisenhower was born October 14, 1890, in Denison, Texas. A graduate of West Point Military Academy in 1915, he served during WORLD WAR I as officer in charge of Camp Colt, which was located at Gettysburg, Pennsylvania, and which served as the center of training for the U.S. Army Tank Division.

From 1922 to 1924, Eisenhower was assigned to a post in the Panama Canal Zone. Five years later, he served as an administrator in the Assistant Secretary of War Office and acted in this capacity until 1933. In 1935, he was stationed in the Philippine Islands, and, for the next five years, he displayed his exceptional military expertise. As a result of his achievements, Eisenhower—promoted to general—became chief of operations in Washington, D.C., in 1942.

Throughout the years of WORLD WAR II, Eisenhower continued to demonstrate his military proficiency. In 1942, he was in charge of the battle operations in Europe. He subsequently directed the U.S. maneuvers in North Africa and, in 1943, commanded the Allied armies there. Later that year, he supervised the victorious attacks on Sicily and the mainland of Italy. As a result of these successes, he was transferred to England to serve as supreme commander of the Allied Expeditionary Force. He was instrumental in coordinating the ARMED SERVICES of the Allies and in directing the use of land, sea, and air battle units in the war maneuvers in Europe.

In 1944, Eisenhower was awarded the prestigious rank of five-star general. He was assigned to Germany the following year, and, subsequently, became Army chief of staff.

Eisenhower resigned as chief of staff in 1948 and entered the education field, serving as president of Columbia University. Two years later, he returned to the military and established a defense corps as part of the NORTH ATLANTIC TREATY ORGANIZATION, which was composed of countries determined to prevent Soviet aggression.

In 1952, Eisenhower officially ended his association with the military and began a brilliant political career. As a Republican, he campaigned for the office of U.S. president against Democrat ADLAI STEVENSON; he was victorious, primarily because of his impressive military achievements and his pledge to end the war in Korea. As president, Eisenhower was instrumental in the achievement of peace in Korea in 1953. His main concern was the growing threat of the spread of COMMUNISM, and he adopted a policy—similar to that of predecessor Harry S. Truman—to keep communism in check. As part of this program, the United States formed defense treaties with South Korea and Formosa,

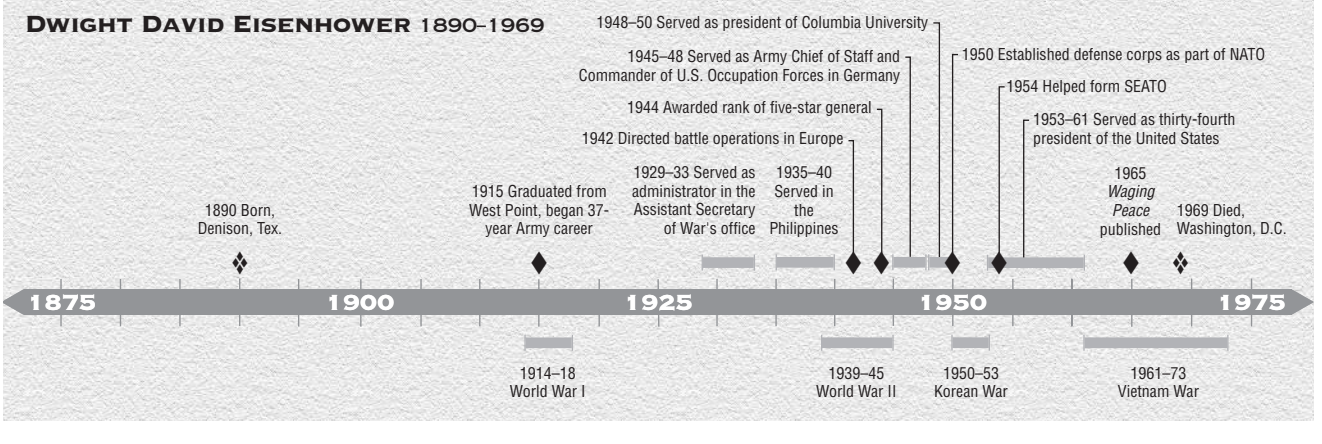

now Taiwan; South Vietnam received military assistance; and, in 1954, the **SOUTHEAST ASIA TREATY ORGANIZATION** (SEATO) was created to prevent the spread of communism in Far Eastern countries.

Despite Eisenhower's intent to stop the growth of communism, he sought to reach a harmonious relationship with the Soviets, as was evidenced by his speeches at the 1955 Geneva Summit Conference. Participants included Eisenhower, Nikolai Bulganin, and Chairman Nikita Krushchev from the Soviet Union, Anthony Eden from Great Britain, and Edgar Faure from France. No agreements were reached, but foreign relations were strengthened.

In 1956, Eisenhower again defeated Adlai Stevenson for the presidency. During this administration he became a proponent of the **CIVIL RIGHTS MOVEMENT** and ordered the federal militia to Little Rock, Arkansas, in 1957 to ensure the enforcement of desegregation of schools; in addition, he was responsible for **CIVIL RIGHTS** legislation.

Eisenhower's second administration was again hampered by global tensions, and he issued the Eisenhower Doctrine in response to these pressures. This program, drafted in 1957, provided that any country in the Middle East requiring military and economic assistance to counteract the threat of communism would receive it upon request. In 1958, the doctrine was put to its first test in Lebanon when the U.S. Marine Corps was dispatched to that country.

World tensions continued through the latter years of his second term, and in 1960, Eisenhower was criticized publicly by Soviet leader Krushchev for condoning **ESPIONAGE** flights over Soviet territory. A year later, Eisenhower severed relations with Cuba after Communist leader Fidel Castro assumed Cuban leadership.

In addition to his presidential and military achievements, Eisenhower wrote three noteworthy publications: *Crusade in Europe* (1948), a chronicle of the defeat of Germany in World War II by the Allies; *Mandate for Change* (1963), an account of his years as president; and *Waging Peace* (1965). Eisenhower died March 28, 1969, in Washington, D.C.

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## EJECTMENT

*One of the old* **FORMS OF ACTION** *for recovery of the possession of real property.*

Originally the ownership of land in England could be passed to another only by delivering the actual possession of the land. The present owner passed title to another by picking up a clod of dirt on the land and handing it to the other person in front of others from the community. This ceremonial act from ancient times was called **LIVERY OF SEISIN**, or delivery of possession. Instead of a clod, a twig or a key could be handed over as a symbol of ownership, but only later was it permissible to deliver the symbol of ownership anywhere but on the land itself. As time passed and writing became more common, a written deed could symbolize the delivery of ownership. The purpose of the ceremony was to make the acquiring of land a public act generally known in the community, so that disputes were less likely to arise.

Everyone in old England was tied to the land. The feudal land tenement system determined social, economic, political, and legal rights. The stability of the system was founded on the security of each person's right to possess or own a parcel of land. For this reason the first kinds of lawsuits were those allowing the assertion of rights in land. By the end of the thirteenth century, the

action of TRESPASS was allowed against one who intruded on property possessed by the plaintiff. The action of ejectment branched off from this as another action for the relief of one whose possession had been disturbed. By it, the plaintiff might claim that he or she had been in possession of a certain parcel of land and that the land had been taken by the defendant. The plaintiff could do this by obtaining from the clerk of the court a writ of entry—a command from the king telling the defendant to let the plaintiff go back on the land taken by the defendant or to appear in court to answer the charge. The defendant could then appear and deny that the plaintiff had been dispossessed or show that as the defendant, he or she had a prior and better right to hold the land. A trial was held to settle the issue. If it were found that the defendant had wrongfully withheld possession of the property from the plaintiff, he or she could be made to pay an amercement, or fine. This fine became a precedent for the later practice of awarding money damages to the successful plaintiff in addition to restoring possession of the land.

Originally, the action of ejectment was intended to protect the rights of a tenant who leased the land. Ultimately, it came to be the principal method for determining the ownership of real property. When the question of title to land became the issue, it was essential to describe the property as carefully as it would be described in a deed to a purchaser. This led to enforcement of very strict technicalities by the court, and the action of ejectment became less attractive to plaintiffs because of the chance that the case would be lost on a point of procedure. The old action of ejectment does not exist today, but every state has a statute that outlines a modern procedure for recovering the possession of real property. Modern ejectment actions still are somewhat slow and expensive. They are most often used by landlords trying to recover possession of their premises from stubborn tenants. States generally have another law that permits the efficient ousting of a tenant by summary proceedings, but a landlord can pursue the simpler procedure only when the tenant has broken the lease in certain specified ways. The details of ejectment and summary proceedings to dispossess vary greatly from state to state.

## ELDER LAW

*As of the early 2000s a relatively new specialty devoted to the legal issues of* SENIOR CITIZENS, *including estate planning,* HEALTH CARE, *planning for incapacity or mental incompetence, the receipt of benefits, and employment discrimination.*

The genesis of elder law can be found in the convergence of several profound social developments. One phenomenon is a rapid increase in the elderly population. According to statistics from the 2000 U.S. census, more than 12 percent of the population in the United States was over the age of 65; and that percentage was expected to rise to 20 percent by the year 2050. Another phenomenon is that generally, older U.S. citizens in the early 2000s are wealthier and better educated than ever before. These two circumstances have led to a rise in the collective political clout of older U.S. citizens. This newfound political strength has coincided with a trend toward cutting the government benefits and entitlements on which many elderly U.S. citizens depend. At the same time, HEALTHCARE costs have skyrocketed. As a result of this confluence, more and more elderly U.S. citizens are seeking legal assistance to protect their financial interests.

Another phenomenon behind the elder law specialization is that older people in the United States are subjected to AGE DISCRIMINATION by a populace obsessed with youth and afraid of aging. Ageism stigmatizes the process of growing old and leads to abuse and neglect of some elderly persons. It also leads to discrimination against older workers by employers who perceive them as less productive than younger workers. These same older workers often receive higher pay because of their years with the company. For these reasons, employers often try to replace older workers with younger workers, who may produce more and work for less compensation. Elder law addresses these and other special legal problems of the elderly.

A primary issue for older people is planning for final medical care. Many people, especially older individuals, write a LIVING WILL. This document gives individuals advance control over their final medical situation. Through a living will, a person may direct the termination of life support in the event of terminal illness, permanent unconsciousness, or brain death.

An elderly person may wish to place healthcare decision making in the hands of a trusted third party, with an advance healthcare directive. All states allow this directive for property management, but not all states allow it for health management. The legislative trend favors the allowance of advance healthcare directives

through a durable POWER OF ATTORNEY. This legal document allows an elderly person to appoint a trusted third party to make major healthcare decisions in case of mental incapacity.

Without a durable power of attorney, a guardian will be appointed, in the event of mental incapacity, to make healthcare decisions. A conservator will be appointed to manage property. The appointment of a guardian and a conservator is accomplished by a judicial proceeding. This proceeding is involuntary, and the court is free to appoint whoever will act in the best interests of the person who is mentally incompetent. A court appointee may or may not be a friend or relative, so the durable power of attorney is a more effective way to ensure that a person's healthcare wishes will be followed in case of sudden mental incapacity.

Older persons must also prepare for the possibility of living in a nursing home. Nursing homes are regulated by the Nursing Home Reform Act (NHRA) (42 U.S.C.A. § 1396), enacted as part of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100–203, 101 Stat. 1330. The NHRA covers a host of requirements for the licensing of nursing homes. It also contains a list of the rights of nursing home residents. These rights include privacy, confidentiality, and freedom from abuse and restraints.

Many older people are forced to move into nursing homes to convalesce from surgery or to receive long-term custodial care. Without adequate planning, the financial consequences can be devastating. Nursing homes are very expensive, ranging in cost from $2,000 to $6,000 a month. Most older individuals are unable to make such payments and must rely on the federal government programs MEDICARE and MEDICAID for support.

Medicare (42 U.S.C.A. § 1395 et seq.) is authorized by the U.S. Congress to provide for the acute health care of older citizens. Any person who is age 65 or older and is eligible for SOCIAL SECURITY benefits is entitled to Medicare coverage. Medicaid (42 U.S.C.A. § 1396 et seq.) pays for the medical expenses of low-income individuals who are aged, blind, or disabled.

Medicare is more available than Medicaid, but it generally provides less coverage. For example, Medicare covers nursing-home care for only a short period of time, whereas Medicaid provides extended nursing-home care but requires that the recipient be impoverished to qualify. In other words, elderly persons with property and income have to deplete their own resources before qualifying for Medicaid's coverage of long-term health maintenance. Seniors who need custodial care but do not qualify for Medicaid often buy private long-term care insurance. This type of insurance pays for nursing-home care and home health care and is governed by state statutes.

The issues surrounding Medicare and Medicaid are complex, amorphous, and political. The coverage under these programs is subject to numerous exceptions and caveats, and many people, politicians and others, dispute the wisdom of public funding of health care for seniors. Medicare and Medicaid exist only so long as Congress maintains the statutes that enable them, and the statutes can be changed to increase or decrease eligibility and coverage.

After retirement, seniors rely on a variety of benefits for financial support. One common source is OLD-AGE SURVIVORS AND DISABILITY INSURANCE (42 U.S.C.A. § 401 et seq.), a part of the Social Security program. Social Security provides lifetime monthly payments after age 65, derived from payroll taxes collected from

**Old-Age, Survivors, and Disability Insurance (OASDI) Benefits and Beneficiaries, December 2000**

Total beneficiaries: 45,414,762

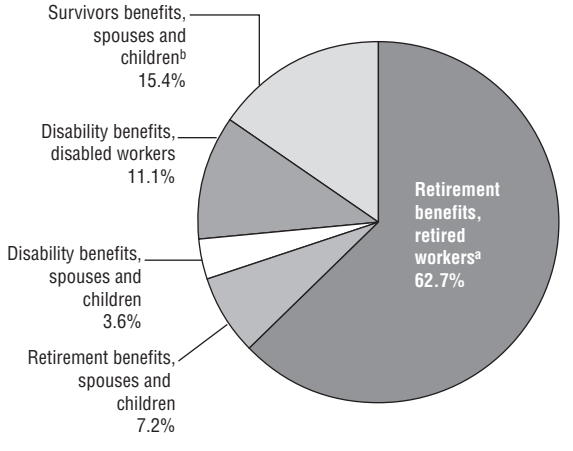


[a]Includes special age-72 beneficiaries.
[b]Includes non-disabled widows and widowers, disabled widows and widowers, widowed mothers and fathers, and parents.

SOURCE: U.S. Department of Health and Human Services, Social Security Administration.

employees and employers. The amount of the applicant's monthly payment is based on her or his earnings history.

Eligibility for Social Security benefits is determined by a measure called quarters of coverage. Generally, the applicant must have earned a specified minimum amount of wages within a three-month period at least 40 times. Anyone over age 65 who has earned 10 years, or 40 quarters, of coverage qualifies for Social Security. Social Security also provides benefits for surviving spouses and children under age 18, and disability benefits for those unable to work until an expected retirement age.

Monthly Social Security benefits will be adjusted up or down if older workers postpone retirement or retire early, respectively. Wages earned after retirement and above a certain amount will lower monthly Social Security benefits, and benefits may be taxed by the federal government if a recipient gains income from another source. A dispute over qualification or payments must be heard by the SOCIAL SECURITY ADMINISTRATION before it can go to court.

Many seniors receive income from other sources. Military personnel wounded in action qualify for veterans' benefits. The amounts of these benefits vary with the severity of the disability. Veterans' benefits are also available to parents, children, and spouses of deceased veterans. The Veterans Benefits Administration processes claims and oversees the dispersal of veterans' benefits. Appeals must proceed through administrative hearings and reviews before they can be heard in court.

About half of all older people receive benefits from PENSION plans. A pension is compensation paid by an employer to an employee upon retirement. Pensions are not a general public benefit paid by the government, and thus, pension disputes are not required to pass through any administrative hearings and instead go directly to court. Unionized companies, large employers, and the government typically provide pensions for their workers. The Pension Benefit Guaranty Corporation, a federal agency authorized by the U.S. Congress, provides insurance to workers whose employers are unable to redeem pension plans.

Supplemental Security Income (SSI) is a federal program created to provide cash payments to aged, blind, or DISABLED PERSONS living below the poverty line. An elderly person with no income and no Social Security payments can benefit from SSI. Any senior who qualifies for SSI automatically qualifies for Medicaid. A denial-of-benefits or denial-of-payment dispute must be heard by the Social Security Administration before it can be heard in court.

Elder law is also concerned with protecting older workers. The primary piece of legislation in this area is the Age Discrimination in Employment Act (ADEA), 29 U.S.C.A. §§ 621–634 (1996). Originally enacted by Congress in 1967, the ADEA protects workers age 40 and over from discrimination in hiring, firing, compensation, and conditions of employment. The purpose of the ADEA is to promote the employment of older persons, prohibit ARBITRARY age discrimination in employment, and encourage solutions to the problems associated with aging workers.

However, not all workers over age 40 are protected by the ADEA. Workers in a business with fewer than 20 employees are not protected. Moreover, executives and policy makers are excluded if they have nonforfeitable retirement benefits of at least $44,000 a year.

To establish a case of discrimination in hiring, generally, a person must (1) be age 40 or over; (2) apply for and be qualified for a job for which the employer was seeking applicants; (3) be rejected for the job; and (4) show that the position remained open after the rejection, and that the employer sought applicants with similar qualifications or filled the position with a younger person possessing comparable qualifications. In case of discharge, a worker must gather information showing that the reason for the discharge was old age. A worker may also use statistics to try to prove a pattern of discrimination in hiring or firing.

A clause in the ADEA allows employers to defend an age discrimination suit by showing that the refusal to hire or the discharge was based on "reasonable factors other than age" (29 U.S.C.A. § 623(f)(1)). Thus an employer may discharge an elderly worker for lack of production, even if age is contributing to the lack of production. Employers may facially (with obvious intent) discriminate based on age if youth is a "bona fide occupational qualification reasonably necessary to the normal operations of the particular business" (29 U.S.C.A. § 623(f)). This defense is effective where a position calls for physically strenuous activity or involves public safety, such as that of airplane pilot, air traffic controller, or bus driver.

The U.S. Supreme Court has noted that older people do not constitute a discrete and insular group. Instead, they form a fluid group of which everyone with a normal life span will be a member. According to the Supreme Court, this means that older individuals, as a group, do not need "extraordinary protection from the majoritarian process" (*Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed 2d 520 [1976]). Because aging necessarily involves some physical and mental deterioration, age discrimination in employment receives less judicial scrutiny than does either racial or SEX DISCRIMINATION.

Many state bar associations have formed elder law sections. These sections consist of attorneys who volunteer time to keep older people abreast of changes in the law that affect them as a group. The challenge for the law is to find and enforce the rights of older citizens, being ever mindful that the human frailties that make elder law necessary await us all.

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## ELECTION CAMPAIGN FINANCING

Election campaigns for public office are expensive. Candidates need funding for support staff, advertising, traveling, and public appearances. Unless they are independently wealthy, most must finance their campaigns with contributions from individuals and from businesses and other organizations. Today, state and federal laws set limits on campaign contributions; create contribution disclosure requirements; and impose record-keeping requirements for candidates seeking elective office.

Before 1974, most election campaigns were financed by corporations and small groups of wealthy donors. In 1972, for example, insurance executive W. Clement Stone contributed approximately $2.8 million directly to the re-election campaign committee of President RICHARD M. NIXON. Such contributions raised concerns of UNDUE INFLUENCE on the selection of available candidates and on subsequent legislation. Many in Congress felt the need to limit the influence of money in political campaigns in order to regain the confidence of the public in the wake of the WATERGATE scandal, a series of events that ultimately led to charges of abuse of power and OBSTRUCTION OF JUSTICE involving Nixon's campaign activities.

In 1974, Congress made radical changes to the Federal Election Campaign Act of 1971 (FECA) (2 U.S.C.A. §§ 431–456 [1996]). In its amended form, FECA limited contributions to individual candidates and political parties; personal spending by candidates; overall campaign spending for federal office; and independent spending by groups not directly associated with a candidate's campaign. The act also created a check-off box on federal tax forms, allowing taxpayers to contribute a dollar to a presidential campaign fund, and it devised a formula for payments from the fund.

James L. Buckley, who was running for the U.S. Senate from New York, and other candidates for federal office challenged FECA in federal court. In 1976, the Supreme Court struck down the act's spending limits in *Buckley v. Valeo,* 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). According to the high court, setting mandatory limits on the amount of money a candidate may spend in a campaign violated the FIRST AMENDMENT. However, the Court upheld the act's disclosure requirements, private contribution limits, and provision for the public funding of qualified presidential candidates.

FECA has been the subject of additional litigation. The U.S. Supreme Court, in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 116 S. Ct. 2309, 135 L. Ed. 2d 795 (1996), struck down spending limits under the FECA imposed on political parties that were deemed independent expenditures—in other words, spending that was not coordinated with a candidate's congressional campaign. The 1996 case did not resolve the issue of whether the federal provision that limited expenditures by

# SHOULD CAMPAIGN FINANCING BE REFORMED?

The 1996 presidential and congressional elections revealed the growing amount of private money that businesses, unions, and individuals contribute to political campaigns. Congressional hearings in 1997 revealed that the Democratic National Committee had solicited and received contributions from questionable sources. Despite these revelations, many members of Congress did not see any reason to reform federal campaign finance laws. Nevertheless, Congress considered a series of bills proposed by **JOHN MCCAIN** (R-AZ), a presidential candidate himself in 2000, and Russ Feingold (D-WI) from 1998 through 2002 that finally led to the enactment of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2 U.S.C.A. § 431 et seq.), commonly known as the McCain-Feingold bill.

The debate over campaign financing was initially framed by the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 912, 46 L. Ed. 2d 659 (1976). The Court ruled that provisions of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C.A. §§ 431–456, which sets mandatory limits on the amount of money a candidate may spend in a campaign, violated the **FIRST AMENDMENT**. Though the Court upheld the provisions of FECA that set disclosure requirements, private contribution limits, and public funding of qualified presidential candidates, the elimination of mandatory spending limits meant that campaign costs and the funds to pay for them steadily escalated thereafter.

**Soft Money** The most troubling issue for reformers has been the growing importance of soft money (money given to a party to further the party rather than a particular candidate). U.S. corporations and unions provided unprecedented amounts of soft-money contributions during the 1996 and 2000 election cycles. At the same time, the **FEDERAL ELECTION COMMISSION** had its budget cut, making the commission virtually helpless to prevent the parties from skirting existing campaign finance laws. In light of the impact soft money made on elections, reformers believed soft money must either be eliminated or severely limited.

The McCain-Feingold legislation imposed a soft money ban on all federal elections. It also limited the amount of soft money contributors may give to state, district, and local committees. The ban on soft money was one of the highlights in the legislation, but it was expected to come under attack in light of *Buckley v. Valeo*. Critics of the soft-money ban argue that the contribution of money to political parties is a form of free speech protected by the First Amendment. In December 2003, the U.S. Supreme Court upheld the constitutionality of these limits by a vote of 5–4.

The McCain-Feingold legislation actually increased the amount of "hard" money that individuals and other supporters could contribute. The amount of money individuals might contribute to state parties in federal elections increased from $5000 to $10,000. The total amount these individuals might contribute to federal candidates, parties, and other organizations increased from $25,000 to $30,000.

**Campaign Spending Limits** Expenditures for advertisements on television and radio have steadily increased. Some reformers believe that government-licensed forms of communications should provide significant amounts of free airtime to candidates. Free airtime, reformers argue, would reduce the cost of campaigns and dramatically ease the need to raise millions of dollars. Televisions and radio stations are adamantly opposed to such a proposal, contending that it would be unfair to place the burden of reform on their industry.

Some reformers believe limiting private campaign contributions or spending political parties for spending done in coordination with a candidate's campaign violated the First Amendment.

After more litigation in the lower courts, the Court again considered the case in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 121 S. Ct. 2351, 150 L. Ed. 2d 461 (2001). The second case concerned whether the FECA's restrictions on coordinated expenditures by political parties violated the First Amendment. The Court characterized coordinated expenditures by political parties as the functional equivalent of campaign contributions by individuals and non-party groups, ruling against arguments by the Colorado Republican Federal Campaign Committee that such expenditures were essential to its support of a candidate. The Court, in an opinion written by Justice **DAVID H. SOUTER**, found that the limitations on coordinated expenditures comported with First Amendment free speech and associational guarantees.

is not the best way to improve the political system. These reformers advocate full disclosure of all funding sources. Politicians would have to document on a daily basis the source and size of every contribution, including donated labor and equipment.

Critics of the full disclosure requirements have stated their beliefs that this approach is unrealistic, because it could create a serious record-keeping problem. Documenting all contributions costs time and money and could be particularly hard on smaller groups that cannot afford to hire legal advisors and support staffs to track donations on a daily basis.

**PAC Reform** Many advocates of reform, including liberal public interest groups and politicians, argue that a ban or strict limitations be placed on money that comes from **POLITICAL ACTION COMMITTEES** (PACs). One of the reasons for limiting or banning PAC money is that PAC campaign contributions are biased toward incumbents, which has serious implications for competitiveness in elections. PAC contributors are more likely to give to incumbents because they want to preserve an existing relationship or create a new one. Because of the high cost of campaigns, PACs give incumbents a head start over challengers.

Critics of placing more restrictions on PACs, or banning them completely, contend that such "reform" would further concentrate power in the hands of government, particularly those already in office. Campaign contributions can be viewed as "protection" money, according to these observers. Without PAC dollars, politicians would have less incentive to look at issues put forward by individuals and interest groups.

One form of contribution on media outlets began to appear in the form of advertisements paid for by unions and corporations. Many of these advertisements were not covered by the FECA because they did not explicitly endorse a candidate for office. These entities spent large amounts of money on these advertisements without disclosure. The McCain-Feingold legislation placed disclosure requirements on all contributors who spend more than $10,000 on commercials showing the name or likeness of a candidate within a prescribed period of time prior to an election.

**Foreign Contributions** Reformers also seek better ways to prevent the possible influence of foreign business interests on the federal government. The disclosures about the way foreign contributions were obtained during the 1996 election cycle have led reformers to seek a complete ban on foreign gifts.

Critics of an outright ban on foreign contributions point out that this complex issue was considered and rejected by the Federal Election Commission (FEC) in 1991. The FEC rejected a proposal to prohibit companies that were more than 50 percent foreign owned from establishing corporate PACs. The commission reasoned that with businesses becoming more global, it is difficult to judge whether a company is foreign or domestic. U.S. companies may have ownership in a foreign business, which then has a U.S. subsidiary, making it unclear whether the subsidiary is a foreign or a domestics company. Enforcement would be difficult and a ban would raise a constitutional issue. U.S. citizens working for a foreign subsidiary in the United States are entitled to participate as fully in the U.S. political process as their colleagues working for a company that is completely U.S.-owned. Workers at a U.S. Ford plant should not have more rights than workers at a U.S. Honda plant the FEC concluded.

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Congress has not given up on its efforts to reform campaign finance law. From 1998 through 2002, **JOHN MCCAIN** (R.-Az.) and Russ Feingold (D.-Wisc.) introduced a series of bills, each referred to McCain-Feingold bills. These efforts were finally successful when, in 2002, Congress approved the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2 U.S.C.A. §§ 431 et seq.). The new statute amends the FECA by adding new restrictions and regulations on soft money donated to a political party; independent and coordinated expenditures; hard-money contributions; and communications that take place during elections.

Litigation attacking the constitutionality of the new statute commenced shortly after its enactment. In May 2003, the U.S. District Court for the District of Columbia found that some of the new restrictions under the statute were unconstitutional under the First Amendment to the U.S. Constitution. *McConnell v. FEC,* 251 F. Supp. 2d 176 (D.D.C. 2003). In September 2003,

the U.S. Supreme Court heard oral arguments in the case of *McConnell v. FEC* (02-1674).

### Private Funding of Federal Election Campaigns

FECA illustrates the way that election-campaign-finance laws work. FECA requires that candidates for federal office form a campaign committee and a campaign fund, and that they disclose campaign contributions to the FEDERAL ELECTION COMMISSION. A candidate is subject to these requirements if the candidate or his or her authorized agent has received campaign contributions totaling more than $5,000 or has made campaign expenditures totaling more than $5,000. Most campaigns for federal office cost considerably more than $5,000, so most candidates are subject to the financial-reporting requirements set by the act.

FECA places dollar limits on campaign contributions. No person may contribute more than $1,000 a year to a candidate's campaign committee. No person may contribute more than $20,000 in one calendar year to a candidate through the candidate's national political committee, and no more than $5,000 may be contributed to other political committees (§ 441a(2)(3)). The act also places special limits on contributions by national banks, corporations, labor organizations, and government contractors (§§ 441b, 441c).

A person may contribute unlimited sums of money to the state and national committees of a political party, but only if those sums are for the benefit of the party in general. If a contribution is intended to fund a candidate's campaign directly, the contribution will be subject to the limits set by the act.

FECA makes several exceptions to the limits on contributions made directly to a candidate's campaign committee. It excludes from the definition of *contribution* assistance such as the donation of real property, of services, and of funds to buy promotional materials like bumper stickers, handbills, and posters (§ 431(8)(B)).

The act also creates a limited exception to limits for contributions to state and national committees of a political party. Under § 441a (d)(1)(2), the national committee of a political party may contribute to its presidential candidate an amount equal to two cents multiplied by the number of people of voting age in the United States. The national and state committees of a political party may contribute to a Senate candidate an amount equal to two cents multiplied by the number of people of voting age in the candidate's home state, or at least $20,000. A House of Representatives candidate may receive $10,000 from the national and state committees of his or her political party.

Critics argue that FECA strengthens the domination of the two major political parties. By limiting an individual's direct contributions to a candidate, the act prevents minor parties from amassing enough funds to gain ground on the two major parties. The Democratic and Republican parties can survive such limitations because they have large numbers of contributors. According to some critics, they have large numbers of contributors because they have the power to give political favors. Minor parties, by definition, begin their missions with fewer supporters and have no political favors to bestow. With contribution limits on their few supporters, minor parties have few opportunities to mount serious challenges to the major-party candidates.

Other critics of FECA focus on the reporting and bookkeeping responsibilities required by the act and the sheer complexity of the law. Minor parties, with their meager funds, have difficulty in managing the detailed records and reporting requirements, and in paying for the legal assistance that they need in order to comply with the law. By comparison, major parties possess enough experience and support staff to surmount the demands of the act.

"Soft" money is another concern for critics of FECA. In the context of political campaigns, soft money is cash that is given to a political party, not directly to a candidate. There is no limit to the amount that a person or organization may give to a political party. Political parties may use the contributions that they receive to benefit themselves generally; they may not use those contributions to benefit one particular candidate. There are, however, effective detours around this roadblock. For example, a party may run a television advertisement that criticizes the opponent of a particular candidate. The money spent by the party on such a commercial will not be listed as a direct contribution to the party's candidate if the advertisement does not mention the party's own candidate. Major-party candidates, with this kind of help from the national and state committees of their party, benefit from this practice more frequently than do minor-party candidates.

Defenders of FECA note that the major parties are subjected to the same requirements as are the minor parties. They also point out that nothing in the act prevents the large numbers of people who contribute to the major parties from switching and contributing to minor parties.

### Public Funding of Presidential Campaigns

Some presidential candidates may receive federal tax dollars to fund their campaigns. Federal funding for presidential campaigns comes in three forms: general-election grants, given to individual candidates; matching funds, given to nominated candidates for primary campaigns; and funding provided to parties for their nominating conventions.

Under the Presidential Election Campaign Fund Act (Fund Act) (26 U.S.C.A. §§ 9001–9013), presidential candidates must meet certain standards in order to obtain federal tax money for their campaigns. The Fund Act distinguishes between major-party candidates and minor-party candidates. For purposes of the act, a major party is defined as any political party that received at least 25 percent of the popular vote in the previous presidential election. A minor party is defined as a political party that received less than 25 percent but more than five percent of the popular vote in the previous presidential election.

Under the Fund Act, a presidential candidate from a major party is entitled to a general-election grant of $20 million plus cost-of-living expenses. In 1996, this amount totaled over $60 million each for President BILL CLINTON and REPUBLICAN PARTY nominee BOB DOLE. This number increased to more than $67.5 million for the 2000 presidential election between GEORGE W. BUSH and AL GORE. The FEC estimate that each party will receive $74.4 million from this grant for the 2004 presidential elections.

Minor-party presidential candidates may receive a general-election grant only if their party had a candidate on the ballot in at least ten states in the previous presidential election, and if that candidate won at least five percent of the popular vote. If a minor-party candidate qualifies, the election grant is equal to the total amount of the general-election grants received by the major-party candidates in the previous presidential election, multiplied by the percentage of popular votes received by the minor-party candidate, divided by the percentage of popular votes received by the two major-party candidates. To illustrate, assume that each of the two major-party candidates received $50 million under the act in the previous election. The minor-party candidate received five percent of the popular vote, and the major-party candidates together received 95 percent of the popular vote. The minor-party candidate will receive $1 for every $19 received by the major-party candidates, or about $5.3 million.

Presidential candidates do not receive general-election grants until after the election.

Some presidential candidates may qualify for additional taxpayer funding for their campaigns. Under 26 U.S.C.A. §§ 9031–9042, the Federal Election Commission may authorize funds to presidential candidates who participated in their party primaries. Under the act, the presidential-campaign fund matches every contribution of $250 or less that was given to the candidate during the primaries. To qualify for these matching funds, a presidential candidate must receive at least $5,000 in contributions from contributors in at least 20 different states. Only contributions of $250 or less may be counted in reaching the $5,000 threshold.

Under the matching-funds provision, no candidate may spend more than a specified amount in each state's primary election campaign. If a presidential candidate is eligible for matching funds and decides to claim them, the candidate may spend no more than $50,000 of his or her own money on the campaign. Candidates must keep specific records and must submit them to the commission for audit. No distinction is made between major and minor parties in determining whether a candidate qualifies for federal matching funds.

Finally, under Section 9008, a political party may receive taxpayer funds to pay for its political convention. Major parties are entitled to $4 million of public funds for their conventions. A minor party is entitled to the same amount that its candidate received under the Fund Act. For the vast majority of minor political parties, this amount is zero, because most minor-party presidential candidates receive less than five percent of the popular vote.

Like private funding, public funding for presidential campaigns is criticized as being biased toward the two major parties. Under the Fund Act, major-party candidates and their parties receive more money than do minor-party

candidates and their parties. With more money, major-party candidates can spend more on support staff, advertising, traveling, and personal appearances. By creating these advantages, the federal funding scheme, according to critics, ensures the continued success of the two major parties in presidential campaigns and the continued failure of minor-party candidates.

Generally, advocates of the funding scheme for presidential candidates concede that it favors the two major parties. However, they insist that it should not be expensive for popular candidates to run for president, and that public funding is necessary to ensure that it is not. Defenders note further that the funding scheme does not restrict access to ballots and that it does not prevent people from voting for the candidate of their choice.

Finally, according to defenders of the funding scheme, any claim that the scheme is responsible for the inability of minor parties to win presidential elections is speculative. As the Supreme Court stated in *Buckley,* "[T]he inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions."

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CROSS-REFERENCES

Democratic Party; Elections; Independent Parties; Republican Party.

## ELECTION OF REMEDIES

*The liberty of choosing (or the act of choosing) one out of several means afforded by law for the redress of an injury, or one out of several available* FORMS OF ACTION. *An* election of remedies *arises when one having two coexistent but inconsistent remedies chooses to exercise one, in which event she or he loses the right to thereafter exercise the other. Doctrine provides that if two or more remedies exist that are repugnant and inconsistent with one another, a party will be bound if he or she has chosen one of them.*

The doctrine of the election of remedies was developed to prevent a plaintiff from a double recovery for a loss, making the person pursue only one remedy in an action. Although its application is not restricted to any particular CAUSE OF ACTION, it is most commonly employed in contract cases involving FRAUD, which is a MISREPRESENTATION of a material fact that is intended to deceive a person who relies on it. A plaintiff can sue for either damages, thereby acknowledging the contract and recovering the difference between the contract price and the actual value of the subject of the contract, or rescission—annulment—of the contract and the return of what has been paid under its provisions, restoring the plaintiff to the position he or she would occupy had the contract never been made. If a plaintiff sought both damages and RESCISSION, the person would be asking a court to acknowledge and enforce the existence of a contract while simultaneously requesting its unmaking—two inconsistent demands. The granting of both remedies would result in the plaintiff recovering the difference between the contract price and actual value as well as what was paid to the defendant. The person would, therefore, earn a profit by the defendant's wrongful conduct against him or her, since the person would have more than he or she had when entering the contract.

Once a plaintiff elects a remedy, he or she precludes the pursuit of other inconsistent methods of relief. Not all jurisdictions require a plaintiff to elect remedies, and many have abolished this requirement because of its sometimes harsh effects. In the jurisdictions that retain the election of remedies, a plaintiff usually must choose a remedy early in the action. Since an election can be made by conduct, a plaintiff who does not take affirmative steps in designating a remedy is often deemed to have done so by inactivity. For example, a court may preclude a plaintiff from rescission if there has been an unreasonable lapse of time from the time of injury until the time of the commencement of the action. The only remedy available to the person in such a situation is to seek damages.

Although a revocation would not adversely affect the rights of a defendant, a plaintiff cannot revoke an election and seek another means of relief. In some jurisdictions, an election does not

compensate a plaintiff for all his or her losses. A plaintiff who elects to rescind a contract—as opposed to suing for damages for its breach—might not recover any expenses incurred in the transaction that were not paid to the defendant. Such expenses would be considered damages, a remedy from which the plaintiff is precluded by his or her election of the remedy of rescission.

## ELECTIONS

*The processes of voting to decide a public question or to select one person from a designated group to perform certain obligations in a government, corporation, or society.*

Elections are commonly understood as the processes of voting for public office or public policy, but they also are used to choose leaders and to settle policy questions in private organizations, such as corporations, LABOR UNIONS, and religious groups. They also take place within specific government bodies. For example, the U.S. House of Representatives and state legislatures elect their own leaders.

In elections, a candidate is a person who is selected by others as a contestant. A ballot is anything that a voter uses to express his or her choice, such as a paper and pen or a lever on a machine. A poll is the place where a voter casts his or her ballot.

For government policy and leadership, a general election is commonly understood as a process of voting that regularly occurs at specified intervals. For national elections, Congress has designated the first Tuesday after the first Monday in November as election day. A special election is held under special circumstances. For example, if an elected official dies or resigns from office during her or his term, a special election may be held before the next scheduled general election for the office.

The free election of government leaders is a relatively recent practice. Until the eighteenth century, leaders gained political power through insurrection and birthright. Political thought changed dramatically in eighteenth-century Europe, where industrial progress inspired the reconsideration of individual rights and government. The notion that government leaders should be chosen by the governed was an important product of that movement.

The United States held its first presidential election on February 4, 1789. In that election, GEORGE WASHINGTON was chosen U.S. president by a small, unanimous vote of electors. Since its infancy, the United States has held elections to decide who will assume public offices, such as the offices of the president and vice president, U.S. senators and representatives, and state and local legislators. Individual states have also held elections for a wide range of other government officials, such as judges, attorneys general, district attorneys, public school officials, and police chiefs.

Elections for public offices are governed by federal and state laws. Article I of the U.S. Constitution requires that a congressional election be held every two years and that senators be elected every six years. Article II provides that a president and a vice president shall be elected for a four-year term. In 1951, the states ratified Amendment 22, which provides that no person may serve as president more than twice.

For the federal oversight of national elections for public office, Congress created the FEDERAL ELECTION COMMISSION (FEC) with 1974 amendments to the Federal Election Campaign Act of 1971 (2 U.S.C.A. §§ 431 et seq.). The FEC provides for the public financing of presidential elections. It also tracks and reveals the amounts and sources of money used by candidates for national office and their POLITICAL ACTION COMMITTEES (PACs). The FEC enforces the limits on financial contributions to, and expenditures of, those candidates and committees. To receive FEC funding, PACs must register with the FEC.

States regulate many aspects of government elections, including eligibility requirements for candidates, eligibility requirements for voters, and the date on which state and local elections are held. U.S. citizens have the right to form and operate political parties, but the state legislature may regulate that right. For example, a candidate may not be placed on an election ballot unless he or she has registered with the state election board. Many states maintain stringent requirements for would-be candidates, such as sponsorship by a certain number of voters on a petition. A monetary deposit also might be required. Such a deposit may be forfeited if the candidate fails to garner a certain proportion of the vote in the election.

Some states have sought to place limitations on contributions received by individual political candidates. In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 327, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000), the U.S. Supreme Court

upheld limitations that the state of Missouri had placed upon contributions to individual candidates for state office, against a challenge that the limitations violated the contributors' and candidates' FIRST AMENDMENT rights. (See also ELECTION CAMPAIGN FINANCING).

No state may abridge voting guarantees of the U.S. Constitution. Under the Constitution's TWENTY-FOURTH AMENDMENT, for example, no state may make the payment of a poll tax or other tax a requirement for voting privileges. Under the FIFTEENTH AMENDMENT, states may not deny the right to vote based on "race, color, or previous condition of servitude." The NINETEENTH AMENDMENT prevents states from denying or abridging the right to vote based on sex.

In the early 1990s, 15 states passed legislation that limited the tenure of U.S. senators and representatives. In 1995, these "term-limit" measures were declared unconstitutional by the U.S. Supreme Court. In *United States Term Limits v. Thornton,* 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995), the state of Arkansas had amended its constitution to preclude persons who had served a certain number of terms in the U.S. Congress from placing their names in future U.S. Congress elections. Arkansas cited Article I, Section 4, Clause 1, of the U.S. Constitution for support. This clause allows that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." Arkansas further argued that its amendment merely restricted ballot access and was not an outright disqualification of congressional incumbents.

The Supreme Court disagreed with Arkansas. In a 5–4 opinion, the Court rejected the constitutionality of any term-limits legislation. According to the majority, the only qualifications for U.S. congressional office were contained in two constitutional clauses. Article I, Section 2, Clause 2, of the U.S. Constitution provides that a representative shall be at least 25 years of age, a citizen of the United States for at least seven years, and a resident of the represented state at the time of the election. Article I, Section 3, Clause 3, states that a senator shall be at least 30 years of age, a citizen of the United States for at least nine years, and an inhabitant of the represented state when elected. These provisions, according to the Court, were designed to be the only qualifications for U.S. congressional office, and any additional qualifications are unconstitutional.

Although the Constitution prohibits term limits for the U.S. Congress, it does not prevent states from setting term limits for their own legislatures.

### Administration of Government Elections

Voters register with a precinct, which is a local voting district. Registration must be accomplished in the manner prescribed by state statute. The polling place may be any structure authorized by the state to serve as such. All states allow ABSENTEE VOTING for persons who cannot be present in their precinct on election day. Voting is secret, whether by absentee ballot or at the polls.

Election officials are charged with the supervision of voting. In some states, voters indicate their preferences by pulling a lever in a voting machine; in other states, they use a paper and pen. At the end of the voting day, election officials count, or canvass, the results and report them to city or county officials or to the state board of elections. The complete results are filed with the SECRETARY OF STATE or some other designated state-government official. The candidate with the most votes is then declared the winner of the election. This process is called a direct election because the winner is determined by a straight count of the popular vote.

The election of a president and vice president usually occurs by indirect election. That is, the winner is usually determined not by a popular vote but by an electoral vote. Each state has a certain number of electors, is equal to the total number of senators and representatives to which the state is entitled in Congress. In theory, an elector may vote for whomever he or she wants, but in practice, electors vote for the winner of the popular vote in their state.

### Primaries and Conventions

A political party is entitled to nominate candidates for public office, subject to regulation by Congress and state legislatures. The nominating process is accomplished through a system of primaries, caucuses, and nominating conventions. The process varies from state to state, but generally, primaries and caucuses produce delegates who later cast votes at a nominating convention held several weeks or months before Election Day. Political parties hold nominating conventions at the local, state, and national levels to choose candidates for public office in the upcoming elections.

**Percent of Voting-Age Population Reporting They Registered to Vote in 2000, by Age**

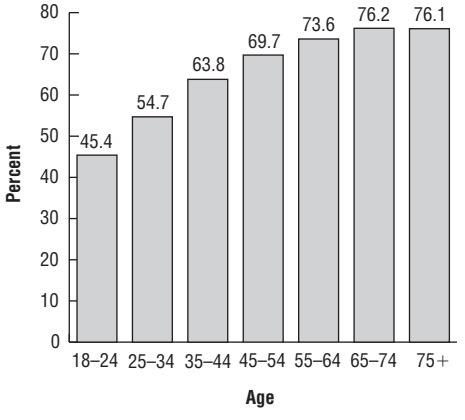


SOURCE: U.S. Census Bureau.

**Percent of Voting-Age Population Reporting They Voted in 2000, by Age**

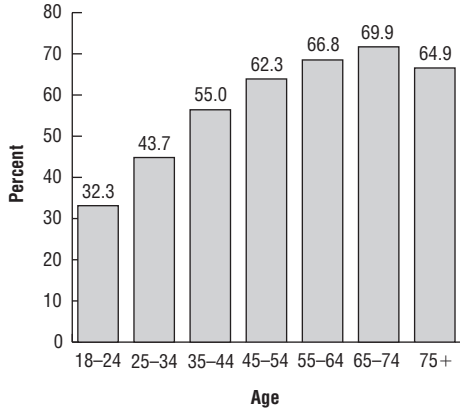


SOURCE: U.S. Census Bureau.

A primary is a preliminary election held by a political party before the actual election, to determine its candidates. A primary may be open or closed. An open primary is one in which all registered voters may participate. The number of delegates a candidate receives is then based on the candidate's performance. In some states, the winner of the popular vote wins all the delegates available to the state at the nominating convention. In other states, candidates receive a portion of delegates based on their respective showings.

In a closed primary, only voters who have declared their allegiance to the party may vote. Closed primaries may be indirect or direct. In an indirect, closed primary, party voters only elect delegates who later vote for the party's candidates at a nominating convention. In a direct, closed primary, party voters actually decide who will be the party's candidates, and then choose delegates only to communicate that decision at the nominating convention.

In some states (e.g., Iowa), political parties use a *caucus* system, instead of a primary system, to determine which candidates to support. A caucus is a local meeting of registered party members. The manner in which delegates are chosen at these caucuses varies widely from state to state. In some states, each party member who attends the caucus is entitled to one vote for each office. The caucus then produces an allotment of delegates based on the popular vote in the caucus, and these delegates later represent the caucus in the county, legislative district, state, and national conventions. In other states, those who attend the caucus vote for delegates who pledge their support for certain candidates. These delegates then represent the caucus at the party's nominating conventions.

At a convention, delegates vote to determine who will emerge as the party's candidate. Usually, if no candidate wins a majority of the delegates on the first round, delegates are free to vote for a candidate other than the one whom they originally chose to support. More often than not, candidates have garnered sufficient delegates in the primaries and caucuses before the nominating convention to win the nomination. Where particular nominations are assured prior to the convention, the convention becomes a perfunctory celebration of the party policies, and an advertising vehicle for the nominated candidates.

Conflicts over nomination procedures often arise within a political party. In 1991, the Freedom Republicans, a group representing minority members of the REPUBLICAN PARTY, launched an attack on the party's allocation of delegates among the states. Since 1916, the Republican Party had employed a bonus-delegate system as a method of determining delegate representation at its national convention for nominating presidential candidates. Under that system, each state received a number of delegates equal to three times its ELECTORAL COLLEGE vote. States that elected Republican

presidents, senators, representatives, and governors then received an additional allotment of delegates. The bonus delegate system gave certain Republican-dominated states a greater say in choosing the party's presidential candidate.

According to the Freedom Republicans, the bonus-delegate system reduced the representation of minority interests within the party because minority members often came from Democrat-dominated states. The largely rural, Republican-dominated, western states contained small minority populations, so minorities were poorly represented in the Republican delegate system. The Freedom Republicans sued the FEC under title VI of the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000d) in an attempt to stop FEC funding of the Republican National Convention.

The U.S. District Court for the District of Columbia ordered the FEC to create and enforce regulations governing the selection of delegates to the publicly funded national nominating conventions of political parties. On appeal by the FEC, the U.S. Court of Appeals for the District of Columbia Circuit vacated the order. The appeals court held that the connection between the FEC funding and the Republican delegate scheme was insufficient to hold the FEC accountable for the delegate scheme. According to the court, it was also unlikely that the Republican party would change its delegate scheme if funding were withheld (*Freedom Republicans, Inc. v. Federal Election Comm'n,* 13 F. 3d 412 [D.C. Cir. 1994]).

The First Amendment protects against a state's intrusion on the governance or structure of a political party. However, courts have held that states have the right to enact reasonable regulations of parties, elections, and campaign-related disorder. The U.S. Supreme Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997) held that states may lawfully prohibit candidates from appearing on a ballot as the candidate of more than one political party.

In 1994, Minnesota State Representative Andy Dawkins ran unopposed for office. Two different political parties, the Democratic-Farmer-Labor party and NEW PARTY, wanted him to run on their ballots, which he agreed to do. Local election officials, citing so-called "anti-fusion" laws, refused to place Dawkins on the ballot under the "fused" parties. The New Party, a minor political party, brought suit, alleging that the anti-fusion law violated its First Amendment associational rights.

Although the U.S. Court of Appeals for the Eighth Circuit agreed that the system was unconstitutional, the U.S. Supreme Court reversed, finding that the state of Minnesota had "important regulatory interests" in forbidding a candidate from appearing on the same ballot. The Court, per Chief Justice WILLIAM REHNQUIST, noted that a party does not have the absolute right to have its nominee appear on the ballot as a candidate, and that the anti-fusion law did not impose a severe burden on the New Party. The Court also rejected the New Party's contention that this law interfered with the ability of a minor party to take part in the election process.

### Initiatives and Referendums

The voting results on important questions of public policy are commonly known as referendums or propositions. These results decide whether a policy becomes law or whether a state constitution will be revised or amended. An initiative is the bringing about of legislative or constitutional changes through the filing of formal petitions. If an initiative is supported by a certain percentage of the population, it may be included on an election ballot for public approval. Referendums and initiatives allow for the development of legislation independent of formal legislative processes. Not all state constitutions provide for referendums and initiatives.

The U.S. Supreme Court, in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999), considered the constitutionality of a series of controls on the petition process for placing initiatives on the ballot in the state of Colorado. The controls included requirements that the individuals who circulated petitions were registered voters and that those who circulated petitions wear badges indicating whether they were volunteers or paid employees (and, if they were paid employees, the names and telephone numbers of their employers). Although states may place certain limitations on these ballots and initiatives, the Court held that the particular limitations in Colorado violated the First Amendment associational rights of the petitioners.

### Campaigns

A campaign is the time preceding an election that a candidate uses for promotion. Election campaigns for public offices in the United States have evolved into complex, expensive affairs. Candidates rely on a variety of support, from financial contributions to marketing and cam-

paign specialists. Elections for national office require large sums of money for advertising and travel. Local elections also favor candidates who are well financed. Historically, the money needed for successful campaigns has come from major political parties, such as the Republican and Democratic parties.

### Criminal Aspects

The U.S. Congress and state legislatures prohibit a wide variety of conduct in connection with elections. It is criminal conduct, for example, for a candidate to promise an appointment to public office in return for campaign contributions (18 U.S.C.A. § 599). Numerous laws prohibit the coercion of voters, including the solicitation of votes in exchange for money, interference with VOTING RIGHTS by armed forces personnel and other government employees, and the intimidation of voters.

The enforcement of criminal laws can face the odd challenge on election day. In *State v. Stewart,* 869 S.W.2d 86 (Mo. App. 1993), Robbin Stewart was stopped for speeding as he returned from voting in a primary election. Stewart argued that the case against him should have been dismissed because article VIII, section 4, of the Missouri Constitution provided that voters should be "privileged from arrest while going to, attending and returning from elections, except in case of TREASON, felony or breach of the peace."

The Missouri Court of Appeals for the Western District rejected Stewart's argument. The appeals court noted that in the past, the Missouri Committee on Suffrage and Elections had entertained the idea that the clause cited by Stewart should apply to primary elections as well as general elections, and that the committee had refused to adopt the expansion. In a footnote, the court advised that the U.S. Supreme Court had construed the phrase "treason, felony or breach of the peace" as including all criminal offenses (*Williamson v. United States,* 207 U.S. 425, 28 S. Ct. 163, 52 L. Ed. 278 [1908]). Such a reading would seem to nullify the objective of Missouri's constitutional clause. Nevertheless, the existence of such an election-day privilege is a testament to the importance of free elections in the United States.

The 2000 presidential election was one of the most controversial in U.S. history, where GEORGE W. BUSH won the election by defeating former Vice President ALBERT GORE JR. in the electoral college despite the fact that Gore had won the popular vote. Although much of the attention of the country focused upon contested election returns in the state of Florida, the election also involved other controversies. In 2000, a resident of Illinois, James Baumgartner, opened a web site called Voteauction.com, which purported to allow voters to sell their absentee ballots over the INTERNET to the highest bidders. Although a court in Illinois quickly closed it down, the site reopened in several other states. State and federal law enforcement officials hounded Baumgartner, who finally sold the site to an Austrian, Hans Bernhard.

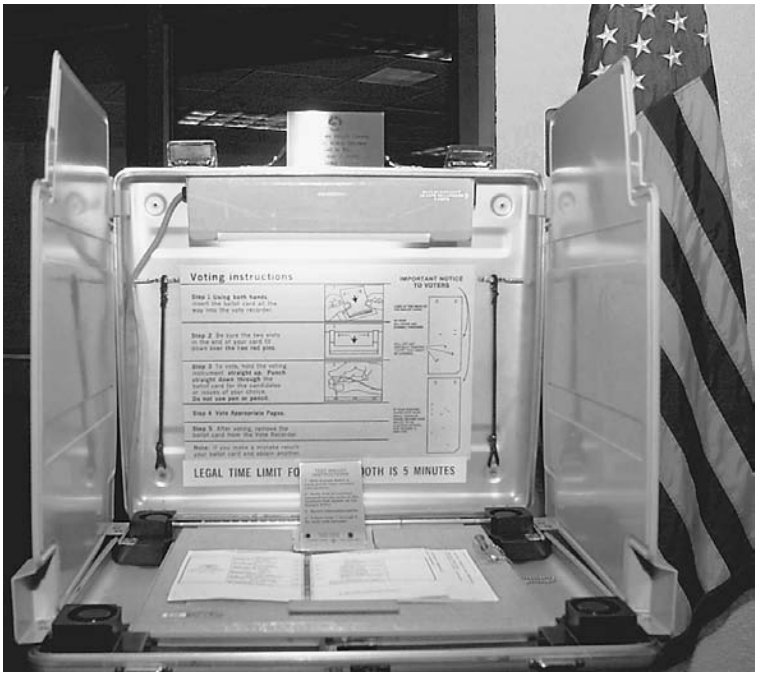


*A voting machine used in the 2000 presidential election on display at the West Palm Beach County Government Center.*

AP/WIDE WORLD PHOTOS

Baumgartner claimed that he had opened the site as a publicity stunt to raise awareness of FRAUD in government. Bernhard, on the other hand, maintained that he operated the site for the purpose of making a profit. Several state and local agencies brought actions against him immediately, seeking to have the site shut down before the November 7, 2000 election. Moreover, Bernhard faced a CONTEMPT charge for violating a court order in Illinois requiring him to shut the site down. Bernhard's Internet service provider eventually shut down the site before the election.

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CROSS-REFERENCES

Election Campaign Financing; Gerrymander; Voting Rights Act of 1965.

## ELECTIVE SHARE

*Statutory provision that a surviving spouse may choose between taking that which is provided in the will of the deceased spouse or taking a statutorily prescribed share of the estate. Such election may be presented if the will leaves the spouse less than he or she would otherwise receive by statute. This election may also be taken if the spouse seeks to set aside a will that contains a provision to the effect that an attempt to contest the will defeats the rights of one to take under the will.*

## ELECTOR

*A voter who has fulfilled the qualifications imposed by law; a constituent; a selector of a public officer; a person who has the right to cast a ballot for the approval or rejection of a political proposal or question, such as the issuance of bonds by a state or municipality to finance public works projects.*

*A member of the electoral college—an association of voters elected by the populace of each state and the District of Columbia—which convenes every four years to select the president and vice president of the United States.*

## ELECTORAL COLLEGE

*Nominated persons, known as electors, from the states and the District of Columbia, who meet every four years in their home state or district and cast ballots to choose the president and vice president of the United States.*

In the popular election, the American people actually vote for electors, not for the candidates themselves. The candidate who receives the majority of votes from electors takes office. Although the Constitution allows the electors to vote for any candidate, they usually vote for the candidate of the political party that nominated them. In a limited number of instances, the structure of the Electoral College has led to unusual election results.

The republican basis of the Electoral College stems from the Constitution. When the founders of the United States set out to secure a system of political representation, many among them feared mob rule. Elections based on representative blocks of votes would implement checks within the system. The Framers took into consideration that large numbers of regional candidates could appeal to the interests of various select groups, and thus the populace could be divided widely, and disturbances in the succession of power could ensue. They surmised that Congress should have the power to settle issues that are not resolved in a popular election, and thus they created the Electoral College. As a contributor to this system, ALEXANDER HAMILTON said that it made sure "the office of President will seldom fall to the lot of any man who is not in eminent degree endowed with the requisite qualifications." Rogue politicians, riding any waves of popular sentiments, would need to meet a higher approval before their election. The Electoral College thus ensured an orderly transfer of power, especially in the two-party system that the United States developed.

Electors receive their appointments from a wide and various informal circuit of possible electoral candidates during election times and are nominated in many states according to the guidelines of individual state legislatures. The procedures for nominating electors, whether at party conventions, primary elections, or party organizational meetings, differ throughout the United States. The terms of electors are generally not set by statute, and in some states parties adopt their own criteria for selecting the college's members. However, the Constitution provides that "no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector" (U.S. Const. art. II, § 1, cl. 2).

In most states, only the names of the presidential and vice presidential candidates—not the names of the electors—appear on election ballots. The party that gains the most popular votes in a state receives one electoral vote for each of its electors. In each state, each party nominates the same number of electors as there are representatives and senators for that state in Congress.

On the first Monday after the second Wednesday in December following the popular election, the electors from each state's victorious party cast their ballots. The structure of the Electoral College was established in Article II, Section 1, of the U.S. Constitution. Under the original provision, each elector of the college

cast two votes for president, and the candidate who received the second-highest number of votes assumed the vice presidency. In 1804, the TWELFTH AMENDMENT modified the original plan to separate the votes cast for the president and the vice president. The electors may choose to vote for another candidate—as West Virginia's electors did in the 1916 race between CHARLES EVANS HUGHES and WOODROW WILSON. However, this occurs only rarely, and even less often does it sway the results of an election. As the electoral system is designed, generally, all of the electoral votes from each state go to the winner of the state's popular vote. Only Maine does not use the winner-takes-all system; it uses the district plan (discussed below).

The electors sign, seal, and certify lists of their ballots. These lists go to Washington, D.C., where the president of the Senate, in the presence of the Senate and the House of Representatives, opens them. The votes are counted. If the electors fail to cast a majority vote, the House of Representatives chooses the U.S. president and vice president by ballot. In 1824, JOHN QUINCY ADAMS was chosen as president by the House. Although the recipient of the majority of the electoral votes is determined by the college, Congress retains the power of verifying the results and makes official the election of president and vice president.

Although the workings of the Electoral College have not gone unchallenged, significant challenges are infrequent. However, the 2000 presidential election between GEORGE W. BUSH and ALBERT GORE JR. inspired calls to reform or eliminate the national Electoral College. The election on November 7, 2000, was one of the closest in U.S. history, and several media organizations erroneously announced Gore as the predicted winner before the election booths had closed. Bush gained significant ground, and by the end of the evening on November 7, it appeared he had won the vote through the Electoral College, even though Gore likely had won the national popular vote.

The Electoral College consisted of 538 electors in 2000, one for each of the 435 members of the House of Representatives and 100 Senators, and three for the District of Columbia. According to the U.S. Office of the Federal Register, for the 2000 election, 26 states and the District of Columbia had laws in effect that bound their electors to vote for the same candidate as the majority of the general populace in that elector's state, and 24 did not. In most states, the presidential candidate who won the most popular votes then received all electoral votes from that state, referred to as the "winner-takes-all" feature. Only two states, Maine and Nebraska, allocated their electoral votes proportionally according to the popular vote.

On December 18, 2000 (the second Wednesday in December), the electors met in their respective states and went through the formality of casting their votes for the candidates from the party that elected them. Each state then reported its totals to Congress, utilizing "Certificates of Ascertainment," which list names of the electors and the number of votes received by each, and "Certificates of Votes," which list all persons voted for as president and vice president and the number of electors voting for each person.

The battle over the 2000 election focused on Florida's 25 electoral votes. Questions arose in several Florida counties about the accuracy of the election results from polls in those counties. Soon after the election, officials from the Florida counties began to call for a recount of the ballots. After about a month of litigation and tense national debate, the U.S. Supreme Court, in BUSH V. GORE, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000), ordered a halt to the manual recounting. Florida is a "winner-takes-all" state, and the election potentially hinged upon the popular vote in a single county in that state. If a recount were to show that Gore had received more popular votes than Bush in Florida, Gore would have received the 25 votes and would have won the election.

In the months following the 2000 election, many states reconsidered their methods for appointing electors and also looked at instituting changes directed toward more control over electors' votes. One of the areas for potential reform has focused on the differences in the requirements that electors cast their ballots for the same candidate who garnered a majority of the vote in the general populace in that state. A second area is the "winner-takes-all" feature in the majority of states. Although a few states have introduced bills to modify their systems, calls for reform have died down significantly. At the federal level, no electoral reform has progressed through Congress since 1804, when adoption of the Twelfth Amendment required electors to specify separate candidates for president and vice-president. Any reform would likely occur at the state level rather than the federal level.

**Number of Electoral Votes by State**

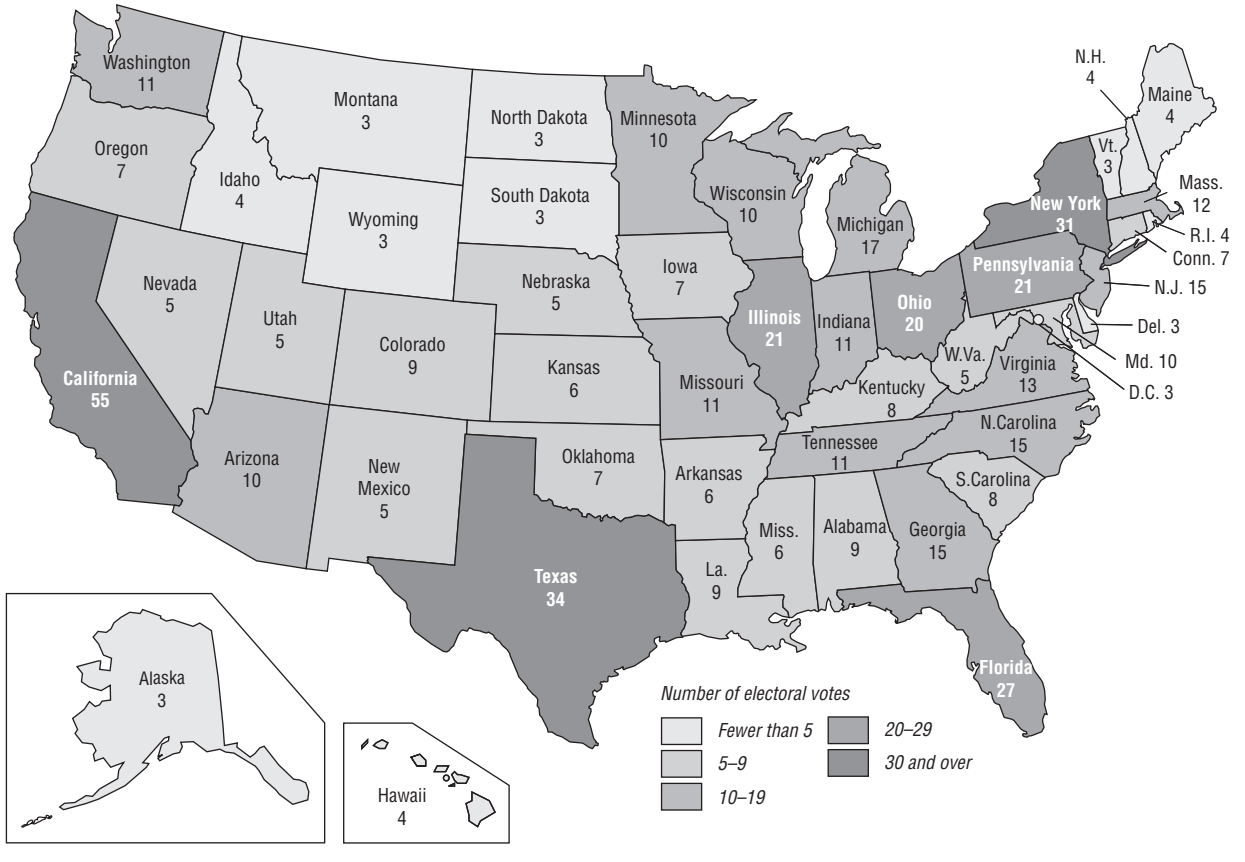


SOURCE: U.S. Census Bureau.

The 2000 election was certainly not the first to cause controversy. The presidential election of 1876 pitted Republican RUTHERFORD B. HAYES, a former governor of Ohio, against Democrat SAMUEL J. TILDEN, a former governor of New York. Reacting against the Reconstruction measures of Republicans in the South, Tilden received strong support from Southern Democrats. When the election returns came in on November 7, 1876, Tilden had clearly received the majority of the popular votes. However, Republicans determined that if they challenged the outcome of the voting in key areas of Florida, Louisiana, and South Carolina, Hayes could win. The Republicans sought victory at all costs and went all-out to claim the electoral votes from those states as their own.

The Republicans waged a publicity campaign through the national press, suppressing the tallies of the popular vote. Republican election committees managed to demonstrate that several key counties contained discrepancies in population figures, voter registration, and ballots cast. Democrats, for obvious reasons, contested the Republicans' tactics. The parties agreed to let an electoral commission, appointed by Congress, determine the winner of the disputed electoral votes. The commission consisted of 15 members from the Supreme Court, the House, and the Senate. In the end, a Republican justice, JOSEPH P. BRADLEY, swayed the outcome of the commission's findings. With less than 48 hours before Tilden's scheduled inauguration, the commission announced that Hayes had won the necessary electoral votes. On March 3, 1877, Hayes was inaugurated.

The results of the election posed issues for proponents and critics alike. Defenders of the electoral system claimed that the problems surrounding the 1876 election had less to do with

the college than with political corruption. They maintained that the election could have resulted in a greater debacle if the constitutional structure of the college had not finally settled the contested issues. Critics countered that direct elections would fit the wishes of the people better than did what looked like oligarchic manipulations of the college.

In following years, critics added more ammunition to their attack with the election race between BENJAMIN HARRISON and GROVER CLEVELAND in 1888. With an unusual demographic breakdown of ballots, Harrison became president with the majority of electoral votes but with fewer popular votes than Cleveland. Throughout the next century, many wondered how such confused elections could take place.

Proposed alternatives to the current Electoral College system generally fall into three categories. In the first, the candidate with the most popular votes in a state would automatically receive those electoral votes. This system would eliminate independent voting among electors. In the second proposed alternative, a proportionality scheme, the breakdown of popular votes would correlate directly with the breakdown of electoral votes. This plan would abandon the winner-takes-all structure of the college. In the third alternative, the district plan used in Maine, individual congressional districts would be treated as representative of a single electoral vote, and the two electoral votes that each state receives for its two senators would go to the winner of the majority of the districts. To some advocates, there also exists a fourth option: abolishing the Electoral College altogether and letting a direct vote of the people determine who wins the offices of president and vice president.

Despite two controversial elections and occasional calls for change, the electoral system has more or less secured an extended series of peaceable transfers of power in the United States. Absent drastic changes in the political landscape, its role in selecting the U.S. president and vice president seems secure.

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## ELECTRICITY

Electricity has been known since ancient times, but scientists could not make use of it safely until the eighteenth century. Thomas Edison's invention of the electric lightbulb in 1879 sparked the demand for electric power that continues to this day, ultimately resulting in the need for legislative and regulatory controls on the electric-power-generating industry.

### History

By the end of the nineteenth century, the United States had completed its transition from using wood as a major energy source to using coal, and the next transition from coal to oil and natural gas was just beginning. By the early twentieth century, both homes and businesses increased their demand for electric power, and electric utilities obtained long-term franchises from municipalities.

In 1920, the Federal Power Act (FPA), 16 U.S.C.A. §§ 791a–828c, was passed in response to increased competition between electric utilities and a lack of consistent service to rural areas. The Federal Power Act gave the Federal Power Commission the authority to license hydroelectric plants. Later, President FRANKLIN D. ROOSEVELT encouraged Congress to create part II of the act, which gave the Federal Power Commission the power to regulate the transmission of electric energy (16 U.S.C.A. §§ 824–824m). This legislation was necessary to guard against potential abuses of the utility companies' monopolistic structure and to ensure adequate and consistent service nationwide.

As more and larger electric generating plants were constructed and as more electric power lines were strung, legislators believed that through economies of scale, electric utility monopolies could actually offer lower costs to consumers than could competition between smaller utilities. Because of the capital-intensive nature of providing electric power, and the sunken costs of building plants and stringing lines, it is more cost-effective to spread these

costs over the large and consistent customer base provided by a MONOPOLY.

### Structure of the Industry

Modern electric utilities have three major organizational components: generation (power plants), transmission (high-voltage bulk power between utilities), and distribution (low-voltage power to ultimate consumers). Modern electric utilities not only produce the power they need for their consumers but also pool and coordinate excess electricity with other utilities.

In 2001, the United States had the ability to produce over 788 million megawatts of electrical energy. Pooling and coordination of electrical energy take place through high-voltage wires that are maintained and referred to as the national grid; high-voltage wires are used because they allow transmission at a lower current, which generates less heat and results in less energy loss. At regional distribution centers closer to the ultimate consumers, the electrical energy is transformed into the low-voltage, higher-current electricity delivered to homes and businesses.

Major electric utilities produce electric power by burning coal, harnessing the hydroelectric energy produced by dams, and initiating and maintaining nuclear fission. Smaller, independent power producers use hydroelectric energy in addition to wood energy, geothermal energy, and biomass, which are all forms of renewable energy. Nuclear electric generating plants were constructed after the passage of the Atomic Energy Act (42 U.S.C.A. § 2011), which removed the government's monopoly over NUCLEAR POWER, in 1946, and the Price-Anderson Act (42 U.S.C.A. § 2210), which allowed for private ownership of uranium, in 1957.

Commercial nuclear energy expanded in the 1960s and the early 1970s, and most consumers welcomed what was thought to be a safe and inexpensive source of energy. From the late 1970s to the 1990s, the dangers of nuclear energy and the expense of environmental contamination and lack of safe waste storage contributed to the end of nuclear power plant construction. No U.S. nuclear power plants have been ordered since 1978. Coal and hydroelectric energy continue to be the principal sources of commercial electric power.

### Modern Legislation and Regulation of the Industry

The generation, transmission, and distribution of electric power are heavily regulated. At the federal level, the transmission of electric power between utilities is governed by the PUBLIC UTILITIES Regulatory Policies Act (PURPA) (Pub. L. No. 95-617 [codified in various sections of U.S.C.A. tits. 15, 16]). In PURPA, Congress gave the Federal Energy Regulatory Commission (FERC) jurisdiction over energy transmission. PURPA requires that independent power producers (IPPs) be allowed to interconnect with the distribution and transmission grids of major electric utilities. In addition, PURPA protects IPPs from paying burdensome rates for purchasing backup power from major utilities, and sets the rate at which the utilities can purchase power from IPPs at the major utilities' "avoided cost" (market cost minus the production costs "avoided" by purchasing from another utility) of producing the power.

The primary regulation of the generation, distribution, and transmission of electric power occurs at the state level through various state public utility commissions. Because the production of electric energy is connected with a public interest, states have a vested interest in overseeing it and working to guarantee that electricity will be produced in a safe, efficient, and expedient manner. In exchange for a monopoly in a particular geographic region, an electric utility must agree to supply electricity continuously and has a duty to avert unreasonable risks to its consumers. Electric utility companies must provide electricity at applicable lawful rates, and must file rate schedules with the public service commissions. Sometimes these rates are challenged, and administrative hearings are held to allow the utilities to petition for rate increases. Electricity rates must be high enough to cover the cost of production and must allow a fair return on the current value of capital investment. Rates that would allow significantly more than a fair return may be struck down as unreasonably high.

The regulatory landscape began to change in the late 1990s, as FERC endorsed the concept of greater competition in the sale of electricity. Advocates of competition contended that the production and delivery of electricity were two distinct activities that should not be bundled into one charge for energy consumer. Instead, they argued for a free market system where electricity could be bought and sold at the wholesale level for the lowest price and then delivered anywhere in the country. National energy producers and wholesalers sought to end the dominance of state and regional utility companies, which con-

trolled the power lines through which these new competitors wanted to transmit electricity.

FERC issued an order in 1996 that opened up the electrical transmission lines owned by state power utilities to other wholesalers of electricity. The order required that utility companies break out their wholesale electricity rates to show how much was being charged for the generation of power, the transmission of electricity, and other ancillary services. In addition, whatever these companies charged to transmit their own electricity was the maximum amount they could charge other companies that wanted to use their transmission lines.

These regulations were also extended to the retail transmission of electricity in interstate commerce. However, FERC rejected the calls of energy resellers (such as the Texas-based Enron Corporation) to permit this same type of open access to retail power sales. This would have meant that consumers and businesses could obtain their power from an out-of-state provider, much like they can choose their long-distance telephone provider. FERC rejected this approach because it feared that it would be costly and difficult to administer.

The order led some states to deregulate their utilities to permit competition in this new legal environment. However, New York and eight other states objected to the order, believing it usurped state authority. They filed suit in federal court challenging the legality of the order. Enron also filed suit, challenging FERC's denial of access to the retail transmission of electricity. The two lawsuits were consolidated and heard by the Circuit Court of Appeals for the District of Columbia. The appellate court rejected the arguments of the states and Enron, concluding that FERC had authority under the FPA to issue such an order.

The Supreme Court, in *New York v. Federal Energy Regulatory Commission*, 535 U.S. 1, 122 S.Ct. 1012, 152 L.Ed.2d 47 (2002), upheld the circuit court decision. The Court concluded that although the states had regulated electricity for 60 years, this did not mean they had the underlying authority to make such decisions. The federal government had merely allowed these practices to continue. FERC had the authority to issue the order and had exercised this power lawfully. Though FERC had the authority to allow Enron and other companies to enter the retail sales market, the Court held that FERC had acted within its administrative powers in declining to exercise its jurisdiction at this time. FERC's decision not to claim jurisdiction over the retail market could be changed in the future.

The likelihood of FERC changing its mind anytime soon seemed unlikely. In 2001, the state of California was in the midst of an electricity crisis. A shortage of electricity led to skyrocketing prices, blackouts and brownouts, and expensive long-term contracts by the state to secure a supply of electricity into the future. The price of electricity jumped from $30 per megawatt hour to $361 per megawatt hour. However, within months, allegations surfaced that wholesalers such as Enron had manipulated the market to create artificial shortages, which led to the sale of electricity at inflated prices. A FERC administrative judge ruled in November 2002 that rates in California had been too high and that the state should receive a $1.8 billion refund. This was considerably less than the $8.9 billion refund the state sought.

**Electricity**

**U.S. ELECTRIC UTILITIES REVENUE, 1999**

**Sales**

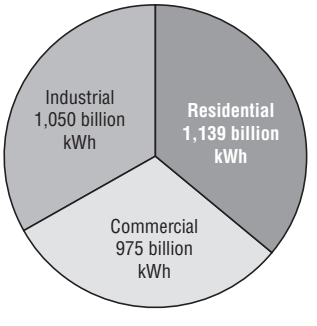


**Average Price**

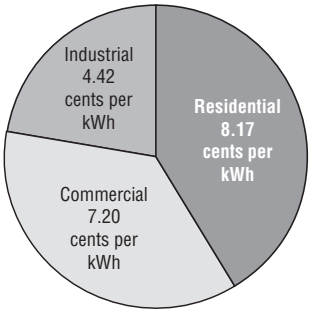


SOURCE: U.S. Census Bureau, *Statistical Abstract of the United States*, 2000.

### Dangers and Liabilities

Electricity, especially at high voltages or high currents, is a dangerous commodity. Faulty wiring, power lines that are close to trees and buildings, and inadequate warning signs and fences around transformer stations and over buried electrical cables can subject an individual to electric shock or even electrocution. Because of the ultrahazardous nature of providing electric power, states have many statutes and regulations in place to protect the public from electric shock.

Other dangers from electricity include stray voltage and electromagnetic field radiation. Stray voltage affects farm animals, especially dairy cattle. On dairy farms, it occurs when cattle drink from electric feeding troughs or are attached to electric milking machines, and small electric shocks pass through the cattle, through their hooves, and into the ground. Repeated shocks can inhibit or destroy the milk-producing capability of dairy cattle. Liability for stray voltage on farms can be attributed to public utilities when wiring is faulty or negligently connected to a farmer's equipment. Some juries have awarded thousands of dollars to farmers whose cattle have been damaged by this phenomenon.

Electromagnetic fields are created whenever current moves through power lines. The strength of these fields drops off exponentially as the distance from the power lines increases. Individuals whose homes or businesses are close to power wires must live and work in these fields. Some individuals who live or work near high-voltage power lines have developed brain cancer and leukemia, and blame their condition on the constant exposure to electromagnetic field radiation. Studies have shown a correlation between electromagnetic fields and cancer, but many of the studies have been challenged as methodologically flawed. By the mid-1990s, no conclusive SCIENTIFIC EVIDENCE proved an epidemiological relationship between cancer and the electromagnetic fields produced by high-voltage power lines.

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## ELECTRONIC FRONTIER FOUNDATION

The Electronic Frontier Foundation (EFF) is a nonprofit organization that seeks to increase the understanding of civil liberties and other legal issues in cyberspace, or what it calls the electronic frontier. Concerned with preserving the principles embodied in the U.S. Constitution and BILL OF RIGHTS, EFF defends the rights of computer users, network users, and members of the online community.

Widely recognized for its expertise in legal matters related to computer networks and electronic media, EFF has become a leading resource for those seeking to better understand the complex issues associated with new communications technology. As part of its civil liberties mission, EFF seeks to ensure that the creators of electronic communications have the same political freedoms as the creators of newspapers, books, journals, and other traditional media.

EFF was founded on July 10, 1990, by Mitchell D. Kapor, the founder of Lotus Development Corporation and ON Technology, and John Perry Barlow, a writer and lyricist. Kapor and Barlow formed the organization after becoming alarmed by what they saw as misguided and unconstitutional actions by state and federal law enforcement officials against individual computer users. Initial funding for EFF came from Kapor, Steve Wozniak, cofounder of Apple Computer, and other computer and technology entrepreneurs.

Among EFF's first efforts were the defense of several hackers, or computer enthusiasts, in cases brought by the government. EFF has continued to sponsor lawsuits when it has felt that individuals' online civil liberties have been violated. EFF also submits advisory reports, called AMICUS CURIAE briefs, to courts and arranges for the charitable donation of attorneys' services for individuals who cannot afford their own legal counsel.

As part of its effort to promote laws that better accommodate new technology, EFF monitors

legislation and lobbies for changes in the law. It also creates and distributes legal analyses to companies, utilities, governments, and other organizations, and it maintains a free telephone hotline for use by those in the online community who have questions regarding their legal rights. EFF runs a speakers' bureau, which disseminates the organization's views to law enforcement organizations, attorneys' associations, universities, and other groups.

EFF promotes improved intellectual property laws, including patent and COPYRIGHT laws, for electronic media. It also encourages the creation of policies that will promote the distribution of electronic information by public and private providers. EFF sponsors summits and working groups that bring together people from business, government, education, and nonprofit organizations.

Specific proposals advanced by EFF include a "common carriage" approach to free speech on electronic networks. Under a common-carrier scheme, network providers must carry all speech, regardless of its content, but are not liable for the actions of users. EFF has called for an electronic freedom-of-information act to allow broader public access to information, and it has set forth specific proposals that promote wider access to computer networks such as the INTERNET.

EFF publishes the *EFFector Online,* an electronic bulletin; the *EFFector,* a hard-copy newsletter; and various pamphlets and books. It maintains several communications forums on the Internet, including a web site and news group forums on Usenet and on private online systems.

**CROSS-REFERENCES**

Computer Crime; E-Mail; Freedom of Speech.

## ELECTRONIC SURVEILLANCE

*Observing or listening to persons, places, or activities—usually in a secretive or unobtrusive manner—with the aid of electronic devices such as cameras, microphones, tape recorders, or wire taps. The objective of electronic surveillance when used in law enforcement is to gather evidence of a crime or to accumulate intelligence about suspected criminal activity. Corporations use electronic surveillance to maintain the security of their buildings and grounds or to gather information about competitors.*

*Cameras are used for traffic surveillance in the Manhattan neighborhood of Chelsea.*

AP/WIDE WORLD PHOTOS

Electronic surveillance permeates almost every aspect of life in the United States. In the public sector, the president, Congress, judiciary, military, and law enforcement all use some form of this technology. In the private sector, business competitors, convenience stores, shopping centers, apartment buildings, parking facilities, hospitals, banks, employers, and spouses have employed various methods of electronic eavesdropping. Litigation has even arisen from covert surveillance of restrooms.

Three types of electronic surveillance are most prevalent: WIRE TAPPING, bugging, and videotaping. Wire tapping intercepts telephone calls and telegraph messages by physically penetrating the wire circuitry. Someone must actually "tap" into telephone or telegraph wires to accomplish this type of surveillance. Bugging is accomplished without the aid of telephone wires, usually by placing a small microphone or other listening device in one location to transmit conversations to a nearby receiver and recorder. Video surveillance is performed by conspicuous or hidden cameras that transmit and record visual images that may be watched simultaneously or reviewed later on tape.

Electronic eavesdropping serves several purposes: (1) enhancement of security for persons and property; (2) detection and prevention of

criminal, wrongful, or impermissible activity; and (3) interception, protection, or appropriation of valuable, useful, scandalous, embarrassing, and discrediting information. The law attempts to strike a balance between the need for electronic surveillance and the privacy interests of those affected.

### Constitutional Law

The FOURTH AMENDMENT to the U.S. Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." It further provides that "no Warrants shall issue, but upon PROBABLE CAUSE, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Electronic surveillance did not exist in 1789, when this amendment was written and was probably not contemplated by the Founding Fathers. But the colonists were familiar with unbridled methods of law enforcement. British officials conducted warrantless SEARCHES AND SEIZURES, and made arrests based on mere suspicion. Even when a search was made pursuant to a warrant, the warrant was often general in nature, vesting British officials with absolute discretion to determine the scope and duration of the search.

The Fourth Amendment was carefully drafted in response to this colonial experience. It provides two basic protections. First, it prohibits government officials, or persons acting under color of law, from performing unreasonable searches and seizures. Second, it forbids magistrates from issuing warrants that are not supported by probable cause or that fail to specify the persons, places, and things subject to search and seizure. The Supreme Court has held that searches performed without a warrant are presumptively unreasonable. When a search is presumptively unreasonable, evidence seized by the police during the search will not be admissible against the defendant at trial unless the prosecution demonstrates that the evidence seized falls within an exception to the warrant requirement such as the "good faith" exception.

The Supreme Court first considered the Fourth Amendment implications of electronic surveillance in OLMSTEAD V. UNITED STATES, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928). In *Olmstead,* federal agents intercepted incriminating conversations by tapping the telephone wires outside the defendant's home without a warrant or his consent. In a 5 to 4 decision, the Court ruled that electronic eavesdropping involves neither a search nor a seizure, within the meaning of the Fourth Amendment. The Court reasoned that no search took place in *Olmstead* because the government intercepted the conversations without entering the defendant's home or office and thus without examining any "place." No seizure occurred because the intercepted conversations were not the sort of tangible "things" the Court believed were protected by the Fourth Amendment. In a prescient dissent, Justice LOUIS D. BRANDEIS argued that nonconsensual, warrantless eavesdropping offends Fourth Amendment privacy interests without regard to manner or place of surveillance.

The Supreme Court whittled away at the *Olmstead* holding for the next forty years, finally overruling it in *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). In *Katz,* the police attached a listening device to the outside of a public telephone booth where the defendant was later recorded making inculpatory statements. The Court declared this type of warrantless surveillance unconstitutional. The Court emphasized that the Fourth Amendment protects persons, not places, and held that the amendment's protections extend to any place where an individual maintains a reasonable expectation of privacy. The Court determined that in *Katz,* the defendant maintained a reasonable expectation of privacy in both the particular conversation he had and the public telephone booth where it took place. *Katz* made government electronic surveillance, and legislation authorizing it, subject to the strictures of the Fourth Amendment.

As technology continues to develop, the Court has had to consider new methods of investigation by law enforcement officials. In *Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2035, 150 L. Ed. 2d 94 (2001), the Court considered the constitutionality of the use of a thermal imaging device during surveillance of a home. An agent of the U.S. INTERIOR DEPARTMENT suspected that the defendant, Danny Kyllo, was growing marijuana in his home. The officer knew that indoor marijuana growth requires use of high-intensity lamps, and the officer sought to discover the presence of these lamps through the use of the thermal imaging device. The device demonstrated that the defendant was likely using a high-intensity lamp, and the agent

then sought a SEARCH WARRANT from a federal magistrate judge. A subsequent search of the home discovered marijuana.

The Supreme Court, per Justice ANTONIN SCALIA, found that the use of the device to survey the inside of the defendants home constituted a "search" for Fourth Amendment purposes. The government argued that because the device only sensed heat emanating from the exterior of the house, use of the device was not an unlawful intrusion on the defendant. Scalia disagreed, noting that *Katz* forbids a mechanical application of the Fourth Amendment that focuses only upon the physical capability of a surveillance device. He noted, "Reversing that approach [in *Katz*] would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home." Because the agent had not obtained a warrant until after he conducted a search of Kyllo's home, the search violated Kyllo's Fourth Amendment rights.

### Legislation

One year after *Katz,* Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968 (Pub. L. 90-351, June 19, 1968, 82 Stat. 197; Pub. L. 90-462, § 1, Aug. 8, 1968, 82 Stat. 638; Pub. L. 90-618, Title III, Oct. 22, 1968, 82 Stat. 1236). Title III of the act governs the interception of wire and oral communications in both the public and private sectors. Electronic surveillance is used in the public sector as a tool of criminal investigation by law enforcement, and in the private sector as a means to obtain or protect valuable or discrediting information. Many of the fifty states have enacted legislation similar to Title III.

**Public Sector** Title III outlines detailed procedures the federal government must follow before conducting electronic surveillance. Pursuant to authorization by the attorney general or a specially designated assistant, federal law enforcement agents must make a sworn written application to a federal judge specifically describing the location where the communications will be intercepted, the reasons for the interception, the duration of the surveillance, and the identity of any persons whose conversations will be monitored. The application must also explain whether less intrusive investigative techniques have been tried. Electronic surveillance may not be used as a first step in criminal investigation when less intrusive means are likely to succeed without creating a significant danger to law enforcement personnel or the public.

A federal judge must then review the surveillance application to ensure that it satisfies each of the statutory requirements and establishes probable cause. The surveillance must be executed as soon as practicable, terminate after fulfillment of its objective, and in no event last longer than thirty days without further judicial approval. Federal agents must also take steps to minimize the interception of communications not relevant to the investigation. Evidence obtained in violation of Title III or of the Fourth Amendment is generally not admissible in court and may give rise to civil and criminal penalties.

Courts have interpreted Title III to cover information intercepted from satellite unscrambling devices, cellular telephones, and pagers. However, Title III does not cover information intercepted from pen registers, which record the telephone numbers of outgoing calls, or caller identification, which displays the telephone numbers of incoming calls, because neither intercepts conversations of any sort. Although Title III does not regulate photographic interception, some federal courts have used it as a guide when reviewing the constitutionality of video surveillance.

The procedural requirements of Title III are not without exception. Where there are exigent circumstances involving conspiratorial activities that threaten national security, Title III permits federal law enforcement agents to conduct electronic surveillance for up to forty-eight hours before seeking judicial approval. At one time, many observers believed that Title III also sanctions warrantless electronic surveillance by the EXECUTIVE BRANCH for national security purposes. In 1972, the Supreme Court ruled to the contrary, holding that presidential surveillance of domestic organizations suspected of national security breaches during the Nixon administration had to comply with the Fourth Amendment's warrant requirement (*United States v. United States District Court for Eastern District of Michigan, Southern Division,* 407 U.S. 297, 92 S. Ct. 2125, 32 L. Ed. 2d 752).

Congress attempted to clarify the murky area of covert presidential surveillance by passing the Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. 95-511, Oct. 25, 1978, 92 Stat. 1783. FISA regulates the federal government's surveillance of foreign officials, emissaries, and agents within the United States, but

has no application to such surveillance abroad. Similar to Title III, FISA sets forth specific application procedures that a federal judge must review for probable cause before any form of eavesdropping may commence. Unlike Title III, FISA has been interpreted to govern video surveillance as well.

**Private Sector** Electronic surveillance is most common in two areas of the private sector: employment and domestic relations. In addition to legislation in many of the fifty states, Title III governs these areas as well. It prohibits any person from intentionally using or disclosing information knowingly intercepted by electronic surveillance, without the consent of the interested parties. The intent element may be satisfied if the person knew or had reason to know that the information intercepted or disclosed was acquired by electronic surveillance; it is not satisfied if the person inadvertently intercepted or disclosed such information.

Sixty-eight percent of all reported wiretapping involves DIVORCE cases and custody battles. Spouses, attempting to obtain embarrassing or discrediting information against each other, have planted video recording and listening devices throughout the marital home. Spousal surveillance most commonly involves telephone taps and bedroom bugs but has also included videotaping of activities as innocuous as grocery shopping and movie-going. The fruits of interspousal electronic eavesdropping have been offered in court to reveal extramarital affairs, illegal drug use, and other criminal or deviant activity.

If interspousal surveillance is the most pervasive form of electronic eavesdropping, employer surveillance is the fastest growing. Employers videotape employee movement throughout the workplace, search employee computer files, and monitor employee phone calls. Reasons for such surveillance range from deterring theft and evaluating performance to protecting trade secrets.

The advent of electronic mail (E-MAIL) has provided employers with a new playground for mechanical snooping. By the year 2000, 40 million people were expected to send 60 billion pieces of e-mail correspondence annually. As with telephone calls, employees may send personal messages while they are at work. Although Congress considered the surveillance of workplace e-mail when it broadened Title III protections in 1986, no federal court as of 2003 had confronted the issue. However, courts have permitted employers to eavesdrop surreptitiously on employee phone calls for legitimate and significant business purposes, and courts may also apply this rationale to employer surveillance of e-mail.

### Common Law

State COMMON LAW provides a third avenue of legal protection against electronic surveillance. Throughout the twentieth century, common law increasingly recognized a sphere of private activity beyond public consumption. The sometimes-amorphous right to privacy consists of three discrete interests: secrecy, seclusion, and autonomy. The right to secrecy prevents nonconsensual public disclosure of valuable, confidential, embarrassing, or discrediting information. The right to seclusion creates a realm of personal solitude upon which society may not trammel. The right to autonomy represents the freedom to determine one's own fate unfettered by polemical publicity.

Common law protects these distinct privacy interests by imposing civil liability upon anyone who publicizes private facts; besmirches someone's reputation; profits from another's name, likeness, or ideas; or otherwise intrudes upon an individual's private affairs. Common-law protection of privacy interests is broader than Title III because it is not limited to wiretapping and bugging but extends to photographic and video surveillance as well. Thus, video surveillance of restrooms, locker rooms, and dressing rooms may give rise to a claim for invasion of privacy under common law but not under Title III.

At the same time, common law is narrower than Title III because liability is only established by proof that the published information was sufficiently private to cause outrage, mental suffering, shame, or humiliation in a person of ordinary sensibilities. Title III creates liability for any nonconsensual, intentional disclosure of electronically intercepted information, thus establishing a much lower threshold. For example, a newspaper would not be liable under the common-law invasion-of-privacy doctrine for accurately reporting that someone had engaged in criminal conduct. However, the nonconsensual, electronic interception of such information would give rise to liability under Title III.

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CROSS-REFERENCES

Criminal Law; Criminal Procedure; Exclusionary Rule; Search Warrant.

## ELEMENT

*A material factor; a basic component.*

The term is used to mean one of several parts that unite to form a whole, as in elements of a criminal action or civil action. In the TORT of ASSAULT AND BATTERY, an essential element of the offense would be unwanted physical contact. An element of the crime of rape is lack of consent on the part of the victim.

## ELEVENTH AMENDMENT

The Eleventh Amendment to the U.S. Constitution reads:

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

The text of the Eleventh Amendment limits the power of federal courts to hear lawsuits against state governments brought by the citizens of another state or the citizens of a foreign country. The Supreme Court has also interpreted the Eleventh Amendment to bar federal courts from hearing lawsuits instituted by citizens of the state being sued and lawsuits initiated by the governments of foreign countries. For example, the state of New York could invoke the Eleventh Amendment to protect itself from being sued in federal court by its own residents, residents of another state, residents of a foreign country, or the government of a foreign country.

The Eleventh Amendment is rooted in the concept of FEDERALISM, under which the U.S. Constitution carefully enumerates the powers of Congress to govern at the national level, while safeguarding the power of states to govern locally. By limiting the power of federal courts to hear lawsuits brought against state governments, the Eleventh Amendment attempts to strike a balance between the sovereignty shared by the state and federal governments.

"The object and purpose of the Eleventh Amendment [is] to prevent the indignity of subjecting a state to the coercive process of [federal] judicial tribunals at the instance of private parties" (*Ex parte Ayers,* 123 U.S. 443, 8 S. Ct. 164, 31 L. Ed. 216 [1887]). The Eleventh Amendment highlights an understanding that the state governments, while ratifying the federal Constitution to form a union, "maintain certain attributes of sovereignty, including sovereign immunity" from being sued in federal court (*Hans v. Louisiana,* 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 [1890]).

However, the Eleventh Amendment does not bar all lawsuits brought against state governments in federal court. Four major exceptions have been recognized by the Supreme Court. First, the Eleventh Amendment does not apply to lawsuits brought against a state's political subdivisions. Accordingly, counties, cities, and municipalities may be sued in federal court without regard to the strictures of the Eleventh Amendment.

The second exception to the Eleventh Amendment permits a state government to waive its constitutional protections by consenting to a lawsuit against it in federal court. For example, Minnesota could waive its Eleventh Amendment protections by agreeing to allow a federal court to hear a lawsuit brought against it.

The third exception permits Congress to abrogate a state's IMMUNITY from being sued in federal court by enacting legislation pursuant to its enforcement powers under the EQUAL PROTECTION and Due Process Clauses of the FOURTEENTH AMENDMENT (*Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614 [1976]). Congressional intent to abrogate a state's Eleventh Amendment immunity must be "unmistakably clear" (*Atascadero State Hospital*

*v. Scanlon,* 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171 [1985]). Evidence of this intent may be found in the legislative floor debates that precede a congressional enactment (*Quern v. Jordan,* 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 [1979]).

In 1996, the Supreme Court ruled that Congress may not abrogate a state's SOVEREIGN IMMUNITY from being sued in federal court pursuant to its regulatory powers under the Indian COMMERCE CLAUSE contained in Article I, Section 8, of the Constitution (*Seminole Tribe v. Florida,* 517 U.S.44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). *Seminole* overruled *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1 (1989), which held that Congress may abrogate a state's immunity under the Interstate Commerce Clause, which adjoins the Indian Commerce Clause in Article I.

Although *Seminole* involved the Indian Gaming Regulatory Act (18 U.S.C.A. §§ 1166 to 1168, 25 U.S.C.A. § 2701 et seq.), which governs certain gambling activities of Native American tribes, the Court's decision calls into question the continuing power of federal courts to hear lawsuits against state governments seeking to enforce environmental statutes, BANKRUPTCY laws, INTELLECTUAL PROPERTY legislation, and scores of other business regulations that have been enacted pursuant to congressional power under the Commerce Clause.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. § 9601 et seq.) is one federal law passed pursuant to congressional power under the Commerce Clause. This act makes states liable in federal court for costs incurred from cleaning up hazardous waste sites. (See *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1 [1989]). The Court's decision in *Seminole* could affect thousands of lawsuits filed each year under this statute alone.

The final exception to the Eleventh Amendment permits citizens of any state to seek an INJUNCTION against state officials in federal court to "end a continuing violation of federal law" (*Green v. Mansour,* 474 U.S. 64, 106 S. Ct. 423, 88 L. Ed. 2d 371 [1985]; *Ex parte Young,* 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 [1908]). For example, residents of Ohio are permitted to bring a lawsuit in federal court seeking to compel the state's governor to construct housing in compliance with the Americans with Disabilities Act (42 U.S.C.A. § 12101 et seq.), a federal statute designed to protect the rights of handicapped U.S. citizens (see *Martin v. Voinovich,* 840 F. Supp. 1175 S.D. Ohio [1993]). However, such a lawsuit would be barred by the Eleventh Amendment if the remedy sought were not injunctive relief but money damages to be paid out of the state's treasury.

The Supreme Court has distinguished permissible lawsuits seeking prospective equitable relief, such as the injunctive remedy sought by the Ohio residents, from impermissible lawsuits seeking money damages for past actions: "[F]ederal court[s] may award an injunction that governs [a state] official's future conduct, but not one that awards retroactive monetary relief" (*Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 [1984]). The distinction between prospective injunctive relief and retroactive money damages can be traced back to the Framers' original understanding of the Eleventh Amendment.

Ratified in 1795, the Eleventh Amendment was drafted to overrule the Supreme Court's decision in CHISHOLM V. GEORGIA, 2 U.S. (2 Dall.) 419, 1 L. Ed. 440 (1793), which held that a citizen of one state may sue the government of another state in the U.S. Supreme Court. *Chisholm* created a maelstrom across the United States. At the close of the American Revolution, each state was greatly indebted to foreign creditors for financial and other assistance received during the war. Congressional representatives feared that *Chisholm* would permit these foreign creditors to ask federal courts to force the fiscally troubled state treasuries to bear the burden of these debts.

Representatives also expressed concern that British loyalists who had been dispossessed of their homes and personal belongings by the colonies during the revolution could now sue the state governments to recover their property. JOHN JAY, the chief justice of the Supreme Court, exacerbated these concerns by advocating the full restoration of Loyalist property. A defiant Georgia House of Representatives passed a resolution providing that any person who attempted to collect a Revolutionary War debt or recover property pursuant to *Chisholm* "shall be declared guilty of a felony and . . . suffer death without benefit of clergy, by being hanged."

Two days after *Chisholm* was handed down by the Supreme Court, an anonymous senator submitted to Congress a proposal that later

became the Eleventh Amendment to the Constitution. From its inception, the Eleventh Amendment has fueled heated discussions among judges and lawyers about the appropriate manner in which it should be interpreted.

Federal courts derive their power to hear lawsuits from Article III of the Constitution. Section 2 of Article III specifies particular "Cases" and "Controversies" that can be decided by the federal judiciary. These cases and controversies fall into two general categories: those identified by their subject matter and those identified by their parties.

Federal courts have jurisdiction to hear cases whose subject matter "aris[es] under" the U.S. Constitution, an **EXECUTIVE ORDER** promulgated by the president, a federal law enacted by Congress, or a treaty between the United States and another country (U.S. Const. art III, § 2). Such cases are said to present federal questions because they involve legal issues based on one of these species of federal law. For example, cases involving free speech claims under the **FIRST AMENDMENT** or discrimination claims under the **CIVIL RIGHTS ACT** of 1871 (42 U.S.C.A. § 1983) present federal questions and confer upon federal courts the **SUBJECT MATTER JURISDICTION** to resolve them.

Federal courts also have jurisdiction to hear cases based on the parties involved in the lawsuit. Under what is sometimes called party-based jurisdiction, federal judges have the power to decide cases affecting "Ambassadors" and "other public Ministers and Consuls." The federal judiciary may also entertain disputes "between two or more States," "between Citizens of different states," or *"between a State and Citizens of another State*" (U.S. Const. art. III, § 2). The italicized clause contemplates federal jurisdiction extending to cases between state governments and citizens of other states and provided the basis for the Supreme Court's decision in *Chisholm.*

Although the Eleventh Amendment was clearly adopted in response to the Supreme Court's interpretation of Article III in *Chisholm,* it has not been applied in a clear or uniform manner by the courts. Four alternative theories of interpretation have been advanced by lawyers and judges.

The first theory of interpretation, espoused by Justice **THURGOOD MARSHALL**, insists that the Eleventh Amendment protects states from being sued in federal court without their consent. It "had been widely understood prior to ratification of the Constitution," Marshall said, "that the provision in Art[icle] III, Section 2 . . . would not provide a mechanism for making states unwilling defendants in federal court" (*Department of Public Health & Welfare v. Department of Public Health & Welfare,* 411 U.S. 279, 93 S. Ct. 1614, 36 L. Ed. 2d 251 [1973]). Marshall believed that the Eleventh Amendment did not change this original understanding of federal jurisdiction. For Marshall, then, the meaning of the Eleventh Amendment was simple: A state could not be sued in federal court under any circumstances in which the state did not consent.

According to the second theory of interpretation, the Eleventh Amendment applies only to party-based jurisdiction and not to subject matter jurisdiction. This theory, advanced by Justice **WILLIAM J. BRENNAN JR.**, permits federal courts to hear lawsuits against states that present federal questions, such as those "arising under" the Constitution, but bars federal judges from deciding cases in which the plaintiff lives in a different state than the one being sued. Adherents of this theory point out that *Chisholm,* the Supreme Court decision that was overruled by the Eleventh Amendment, involved party-based jurisdiction and was not subject matter jurisdiction.

The third theory of interpretation relies on the text of the Eleventh Amendment itself. Again, the language of the Eleventh Amendment suggests that federal courts may hear only two types of lawsuits against state governments: those brought by citizens of another state and those brought by citizens of another country. Under this theory, federal courts can entertain lawsuits seeking to vindicate a federal constitutional or statutory right only if the plaintiff lives in a different state from the one he or she is suing or is the citizen of a foreign country. If the plaintiff resides in the state he or she is suing, only a state court may hear the case.

The fourth theory of interpretation also focuses on the language of the Eleventh Amendment, but in a different way. This theory stresses that the Eleventh Amendment explicitly limits the "Judicial power of the United States" but makes no mention of federal legislative power (U.S. Const. art. III, § 2). In this light, the Eleventh Amendment explicitly restricts the power of federal judges to hear cases against state governments and implicitly permits Congress to abrogate a state's sovereign immunity from being sued in federal court. This theory

permits citizens of any state, including the state being sued, to file a lawsuit against a state government in federal court to enforce a legal right delineated by congressional legislation. Many advocates of this theory argue that Congress's authority to enact such legislation derives from any of its constitutionally enumerated powers, and not just its powers under the Fourteenth Amendment as the Supreme Court concluded in *Seminole.*

The diversity of these theories demonstrates the complexity of Eleventh Amendment JURISPRUDENCE, as does the Supreme Court's decision in *Seminole,* which overruled a case less than eight years old. Yet, most adherents to these various theories would agree on one point: There is an advantage, however slight, to filing a lawsuit in federal court rather than state court. A federal court is more likely to render an impartial verdict than is a judge or juror who resides in the state being sued. For this reason, plaintiffs, and the lawyers representing them, will continue to sue state governments in federal court and argue vociferously for the most narrow interpretation of the Eleventh Amendment's sovereign immunity.

In *Lapides v. Bd. of Regents*, 535 U.S. 613, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002), the petitioner, a professor in the Georgia state university system, filed a state-court suit against the system's BOARD OF REGENTS and university officials alleging that the officials had violated state TORT LAW and 42 U. S. C. §1983 when they placed SEXUAL HARASSMENT allegations in his personnel files. The defendants removed the case to federal district court and then sought dismissal. Conceding that a state statute had waived Georgia's sovereign immunity from state-law suits in state court, the State claimed Eleventh Amendment immunity from suit in the federal court. The Supreme Court found that a State waives its Eleventh Amendment immunity when it removes a case from state court to federal court.

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CROSS-REFERENCES

Ambassadors and Consuls; Equity; Federal Question; Gaming; Immunity; Legislative History.

## ELLIS, GEORGE WASHINGTON

George Washington Ellis was born May 4, 1875, in Weston, Missouri. He earned a bachelor of laws degree from the University of Kansas in 1893, attended Howard University in Washington, D.C., for two years where he studied psychology and philosophy, and graduated from Gunton's Institute of Economics and Sociology in New York in 1900.

After practicing law for several years, Ellis worked in the Census Department in Washington in 1900. He served as secretary of the American legation to the Republic of Liberia for eight years beginning in 1902.

In 1910, Ellis returned from Liberia and established a legal practice in Chicago, earning a reputation as a prestigious counselor. From 1917 to 1919, he served as assistant corporation counsel for Chicago.

Ellis's interest in Africa continued throughout his life, and his experiences in Liberia influenced his career as a writer and lecturer. He investigated the social structure and folklore

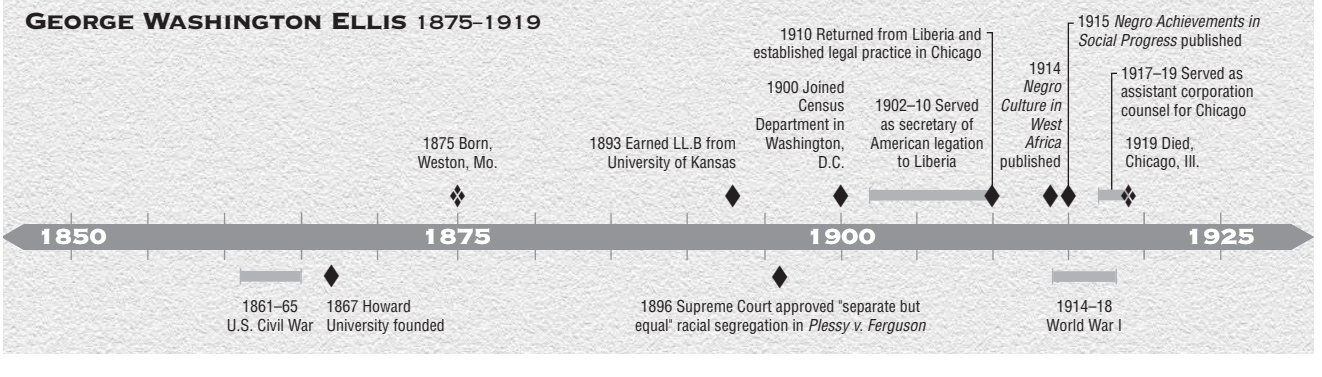

history of that nation and presented speeches concerning Africa and the question of race. He was an editor of the *Journal of Race Development,* and authored several publications, including *Negro Culture in West Africa* (1914); *Negro Achievements in Social Progress* (1915); and *The Leopard's Claw* (1917).

Ellis died November 26, 1919, in Chicago, Illinois.

## ELLSWORTH, OLIVER

Oliver Ellsworth served as the third chief justice of the U.S. Supreme Court. Though his tenure on the Court was undistinguished, Ellsworth played an important part in shaping the political and legal structure of the United States as a representative at the Constitutional Convention and as a U.S. senator.

Ellsworth was born April 29, 1745, in Windsor, Connecticut, into a prosperous and distinguished family. He attended Yale College (now Yale University), then transferred to Princeton, where he graduated in 1766. Ellsworth entertained thoughts of becoming a minister but decided to enter the legal profession. He was admitted to the Connecticut bar in 1771 and was quickly recognized as an able attorney.

Politics soon attracted Ellsworth. A proponent of American independence, he served in the Connecticut General Assembly in 1775. From 1777 to 1783 he was a member of the CONTINENTAL CONGRESS and from 1780 to 1784 he sat on the Connecticut Governor's Council. Ellsworth also served as a trial judge during this period.

Ellsworth advocated a strong national government and aligned himself with the FEDERALIST PARTY. When the Constitutional Convention convened in 1787, Ellsworth served as a representative from Connecticut. During the writing of the Constitution Ellsworth contributed the phrase "United States." More important, Ellsworth and ROGER SHERMAN convinced the convention to adopt their Connecticut Compromise (sometimes called the Great Compromise), which resolved the nature of the federal legislature.

*Oliver Ellsworth.*
ARCHIVE PHOTOS, INC.

The convention had been divided over this issue. EDMUND RANDOLPH offered the Virginia Plan, which was supported by the more populated states. This plan provided for a bicameral (two-chambered) legislature with representation based on each state's population. WILLIAM

"INSTITUTIONS WITHOUT RESPECT, LAWS VIOLATED WITH IMPUNITY, ARE, TO A REPUBLIC, THE SYMPTOMS AND SEEDS OF DEATH."
—OLIVER ELLSWORTH

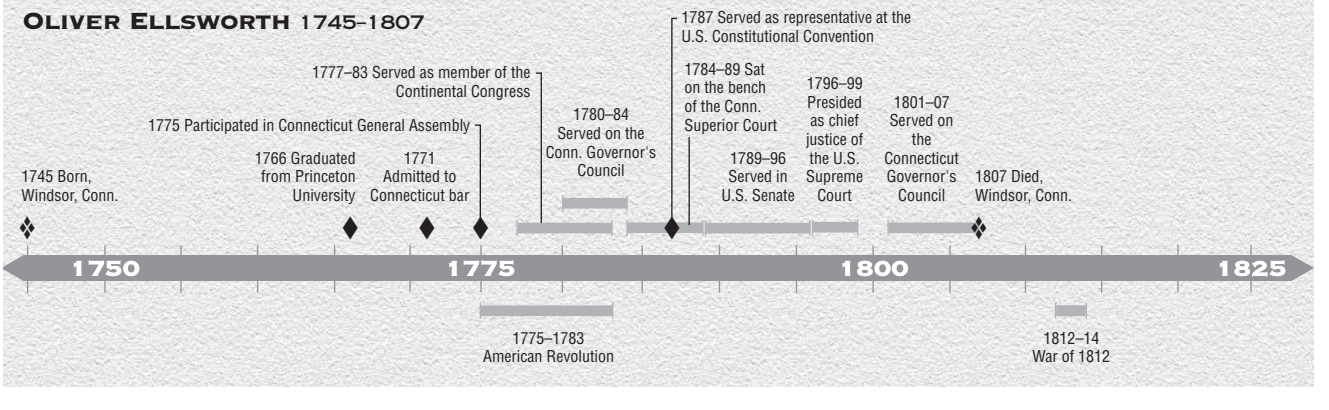

PATERSON of New Jersey put forward his New Jersey Plan, which was favored by the smaller states. This plan called for equal representation for each state, regardless of population. Ellsworth and Sherman proposed a compromise: the legislature would be bicameral, with the lower house based on proportional representation and the upper house based on equal representation, and all revenue bills would originate in the lower house. The Connecticut Compromise was approved July 16, 1787. The structure proposed in the compromise has proved to be an important check and balance, giving smaller states equality in the upper house, called the Senate.

Ellsworth learned firsthand about the Senate as he served in that institution from 1789 to 1796. He was the leader of the Federalists in the Senate and drafted the conference report that recommended the adoption of the amendments to the Constitution that became known as the BILL OF RIGHTS. He also helped write the JUDICIARY ACT OF 1789 (1 Stat. 73). The JUDICIARY ACT implemented the vague language of Article III of the Constitution by organizing the federal court system into the Supreme Court, circuit courts of appeal, and district courts. The basic structure of the federal courts has remained substantially the same since 1789.

President GEORGE WASHINGTON appointed Ellsworth chief justice of the Supreme Court in 1796. Once on the Court, Ellsworth proved generally ineffective. Because of illness and the undertaking of diplomatic assignments, he had little time or energy to devote to Court business.

*Senator Charles Schumer of New York, shown displaying his unsolicited e-mail, introduced legislation in April 2003 that would restrict spam as well as create criminal and civil penalties for spammers.*

AP/WIDE WORLD PHOTOS

Ellsworth resigned in 1799 following an arduous trip to France. President JOHN ADAMS had sent him there to negotiate a trade agreement with Napoléon. The trip aggravated his illness.

Ellsworth did not abandon public life. He sat on the Connecticut Governor's Council for a second time, serving from 1801 to 1807. In 1807 he was appointed chief justice of Connecticut. He died on November 26 of that year, in Windsor, before taking his seat.

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## E-MAIL

Electronic mail, or e-mail, developed as part of the revolution in high-tech communications during the mid 1980s. Although statistics about the number of e-mail users is often difficult to compute, the total number of person-to-person e-mails delivered each day has been estimated at more than ten billion in North America and 16 billion worldwide. Faster and cheaper than traditional mail, this correspondence is commonly sent over office networks, through many national services, and across the INTERNET.

E-mail is less secure than traditional mail, even though federal law protects e-mail from unauthorized tampering and interception. Under the Electronic Communications Privacy Act of 1986 (ECPA), Pub. L. No. 99-508, 100 Stat. 1848, third parties are forbidden to read private e-mail. However, a loophole in the ECPA that allows employers to read their workers' e-mail has proven especially controversial. It has provoked several lawsuits and has produced legislative and extralegal proposals to increase e-mail privacy.

Congress intended to increase privacy by passing the ECPA. Lawmakers took note of increasingly popular communications devices that were readily susceptible to eavesdropping—cellular telephones, pagers, satellite dishes, and e-mail. The law updated existing federal criminal codes in order to qualify these emerging technologies for constitutional protection under the FOURTH AMENDMENT. In the case of e-mail, Congress gave it most of the protection already accorded by law to traditional mail. Just as postal employees may not divulge information about private mail to third parties, neither may e-mail services. The law provides criminal and civil penalties for violators: In cases of third-party interception, it establishes fines of up to $5,000

and prison sentences of up to six months. In cases of industrial espionage—where privacy is invaded for purposes of commercial advantage, malicious destruction, or private commercial gain—it establishes fines of up to $250,000 and prison sentences of up to one year.

Commentators have noted that cases involving employers reading their employees' e-mails tend to favor the employers, especially where the employer owns the equipment that stores the e-mail. Many companies also provide written policies regarding the ownership of stored e-mail messages, indicating whether the employer considers stored e-mail to be the property of the employer.

E-mail raises additional issues of privacy in the context of communications between an attorney and client. Because communications between attorney and client must remain confidential, questions have arisen about whether sending unencrypted e-mail messages by attorneys to clients could pose ethical problems. In 1999, the AMERICAN BAR ASSOCIATION issued its opinion that the mere use of unencrypted messages does not pose ethical problems.

E-mail raises some evidentiary problems as well. Commentators have noted that the origin of some e-mail messages might be difficult to authenticate, while messages might constitute HEARSAY. Nevertheless, many courts have admitted e-mail messages into evidence. To protect against disclosure of private or sensitive information, some attorneys advise employers and employees to exercise caution with e-mail, as it can be subpoenaed. Some experts have advised users to delete their e-mail regularly, and even to avoid saving it in the first place. Still others advocate the use of encryption software, which scrambles messages and makes them unreadable without a digital password.

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## EMANCIPATION

*The act or process by which a person is liberated from the authority and control of another person.*

The term is primarily employed in regard to the release of a minor by his or her parents, which entails a complete relinquishment of the right to the care, custody, and earnings of such child, and a repudiation of parental obligations. The emancipation may be express—pursuant to a voluntary agreement between parent and child—or implied from conduct that denotes consent. It may be absolute or conditional, total or partial. A partial emancipation disengages a child for only a portion of the period of minority, or from only a particular aspect of the parent's rights or duties.

There is no determinate age when a child becomes emancipated; it usually, but not automatically, occurs upon the attainment of the age of majority.

CROSS-REFERENCES

Parent and Child.

## EMANCIPATION PROCLAMATION

The Emancipation Proclamation, formally issued on January 1, 1863, by President ABRAHAM LINCOLN is often mistakenly praised as the legal instrument that ended slavery—actually, the THIRTEENTH AMENDMENT to the Constitution, ratified in December 1865, outlawed SLAVERY. But the proclamation is justifiably celebrated as a significant step toward the goal of ending slavery and making African Americans equal citizens of the United States. Coming as it did in the midst of the Civil War (1861–65), the proclamation announced to the Confederacy and the world that the ABOLITION of slavery had become an important goal of the North in its fight against the rebellious states of the South. The document also marked a shift in Lincoln's mind toward support for emancipation. Just before signing the final document in 1863, Lincoln said, "I never, in my life, felt more certain that I was doing right than I do in signing this paper."

In the text of the proclamation—which is almost entirely the work of Lincoln himself—Lincoln characterizes his order as "an act of justice, warranted by the Constitution upon military necessity." These words capture the essential character of Lincoln's work in the document. On the one hand, he perceived the proclamation as a kind of military tactic that would aid the Union in its difficult struggle against the Confederacy. As such, it was an extraordinary measure that carried the force of

law under the powers granted by the Constitution to the president as commander in chief of the U.S. military forces. But on the other hand, Lincoln saw the proclamation as "an act of justice" that announced the intention of the North to free the slaves. In this respect, it became an important statement of the intent to abolish slavery in the United States once and for all, as well as a vital symbol of human freedom to later generations.

Lincoln had not always regarded emancipation as a goal of the Civil War. In fact, he actively resisted emancipation efforts early in the war, as when he voided earlier emancipation proclamations issued by the Union generals John C. Frémont and David Hunter in their military districts. Lincoln also failed to enforce provisions passed by Congress in 1861 and 1862 that called for the confiscation and emancipation of slaves owned by persons supporting the rebellion.

Antislavery sentiment in the North, however, grew in intensity during the course of the Civil War. By the summer of 1862, with the Union faring poorly in the conflict, Lincoln had begun to formulate the ideas he would eventually express in the proclamation. In particular, he reasoned that emancipation would work to the military advantage of the North by creating a labor shortage for the Confederacy and providing additional troops for the Union. While Lincoln was increasingly sympathetic to abolitionists who wished to end slavery, he was reluctant to proclaim emancipation on a wider scale, out of fear that it would alienate the border slave states of Kentucky, Maryland, and Missouri, which had remained part of the Union. Already stung by military setbacks, Lincoln did not want to do anything to jeopardize the ultimate goal of victory in the war. Even if he had wished to proclaim emancipation on a wider scale, such an act probably would not have been constitutionally legitimate for the presidency.

Lincoln's cabinet was nervous about the effect of issuing the proclamation, and it advised him to wait until the Union had won a major victory before releasing it. As a result, the president announced the preliminary proclamation on September 22, 1862, five days after the Union victory at the Battle of Antietam. In language that would be retained in the final version of the proclamation, this preliminary order declared that on January 1, 1863, all the slaves in the parts of the country still in rebellion "shall be . . . thenceforward and forever, free." It also pledged that "the executive government of the United States, including the military . . . will recognize and maintain the freedom" of ex-slaves. But this preliminary proclamation also contained language that was not included in the final docu-

*This engraving depicts the first reading of the Emancipation Proclamation before President Abraham Lincoln's cabinet in 1862.*

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ment. For example, it recommended that slave owners who had remained loyal to the Union be compensated for the loss of their slaves.

The final version of the proclamation specified the regions still held by the Confederacy in which emancipation would apply: all parts of Arkansas, Texas, Mississippi, Alabama, Florida, Georgia, South Carolina, and North Carolina, and parts of Louisiana and Virginia. It also asked that freed slaves "abstain from all violence" and announced that those "of suitable condition will be received into the armed service of the United States." This last provision led to a significant practical effect of the proclamation: by 1865, over 190,000 African Americans had joined the U.S. ARMED SERVICES in the fight against the Confederacy.

News and copies of the proclamation quickly spread through the country, causing many people, especially African Americans, to celebrate. At one gathering, the African American abolitionist FREDERICK DOUGLASS made a speech in which he pronounced the proclamation the first step on the part of the nation in its departure from the servitude of the ages. In following years, many African Americans would continue to celebrate the anniversary of the signing of the proclamation.

However, many abolitionists were disappointed with the limited nature of the proclamation. They called for complete and immediate emancipation throughout the entire country, and they criticized the proclamation as the product of military necessity rather than moral idealism.

Although the practical effects of the proclamation were quite limited, it did serve as an important symbol that the North now intended not only to preserve the Union but also to abolish the practice of slavery. For Lincoln, the proclamation marked an important step in his eventual support of complete emancipation. Later, he would propose that the REPUBLICAN PARTY include in its 1864 platform a plank calling for the abolition of slavery by constitutional amendment, and he would sign the Thirteenth Amendment in early 1865.

The copy of the proclamation that Lincoln wrote by hand and signed on January 1, 1863, was destroyed in a fire in 1871. Early drafts and copies of the original, including the official government copy derived from Lincoln's own, are held at the National Archives, in Washington, D.C.

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## EMBARGO

*A proclamation or order of government, usually issued in time of war or threatened hostilities, prohibiting the departure of ships or goods from some or all ports until further order. Government order prohibiting commercial trade with individuals or businesses of other specified nations. Legal prohibition on commerce.*

*The temporary or permanent* SEQUESTRATION *of the property of individuals for the purposes of a government, e.g., to obtain vessels for the transport of troops, the owners being reimbursed for this forced service.*

## EMBARGO ACT

*A legislative measure enacted by Congress in 1807 at the behest of President Thomas Jefferson that banned trade between U.S. ports and foreign nations.*

The Embargo Act was intended to use economic pressure to compel England and France to remove restrictions on commercial trading with neutral nations that they imposed in their warfare with each other. Napoleon decreed under his Continental system that no ally of France or any neutral nation could trade with Great Britain, in order to destroy the English economy. In retaliation, England caused a blockade of the northern European coastline, affecting nations that had remained neutral in the dispute between France and England. These vindictive measures hurt neutral American traders, prompting Congress to take action to safeguard the economic interests of the United States. The first enactment was the Nonimportation Act of

1806 (2 Stat. 379), which prohibited the import of designated English goods to stop the harsh treatment of American ships caught running the blockade. The Embargo Act of 1807 (2 Stat. 451) superseded this enactment and expanded the prohibition against international trade to all nations. A later amendment in 1809 (2 Stat. 506) extended the ban from American ports to inland waters and overland transactions, thereby stopping trade with Canada, and mandated strict enforcement of its provisions.

The American public opposed the act, particularly those segments dependent upon international trade for their livelihoods. This opposition eventually led to the enactment of the Non-Intercourse Act (2 Stat. 528 [1809]), which superseded the stringent provisions of the Embargo Act. Under that act, only trade with England and France was proscribed, but the measure was ineffectual.

Subsequently, in 1810, Nathaniel Macon proposed a measure, called Macon's Bill No. 2, which Congress enacted despite solid Federalist opposition, that empowered the president to resume commerce with the warring nation that lifts its restrictions on neutral trade.

## EMBEZZLEMENT

*The fraudulent conversion of another's property by a person who is in a position of trust, such as an agent or employee.*

Embezzlement is distinguished from swindling in that swindling involves wrongfully obtaining property by a false pretense, such as a lie or trick, at the time the property is transferred, which induces the victim to transfer to the wrongdoer title to the property.

### Nature

There was no crime of embezzlement under the COMMON LAW. It is a statutory crime that evolved from LARCENY. Whereas larceny requires a felonious trespassory taking of property at the outset, embezzlement is a wrongful appropriation subsequent to an originally lawful taking. Embezzlement is, therefore, a modification of larceny designed to cover certain fraudulent acts that do not come within its scope. Although they are mutually exclusive crimes, larceny and embezzlement do overlap slightly under statutes in some states.

Embezzlement was created by the English legislature, which designated specific persons who might be liable for the offense. These were essentially persons entrusted with another's property, such as agents, attorneys, bankers, and corporate officers.

The English definition of the offense is followed in the United States. Statutes do not usually list the persons who might be liable but, instead, generally describe the offender as a person entrusted with, or in possession of, another's property.

### Property

The type of property that must be converted is governed by statute. Generally, property is defined as including money, goods, chattels, or anything of value. Intangible PERSONAL PROPERTY; COMMERCIAL PAPER, such as checks, promissory notes, bonds, or stocks; and written documents, such as deeds or contracts, may also be the subject of embezzlement.

Under some statutes, property consists of anything that can be the subject of larceny. In other states, however, the property requirement for embezzlement is broader. For example, the statute might punish the conversion of both real and personal property.

In some states, the embezzlement of public property or public funds is a separate offense. The offense is characterized by the manner in which the money is received. A court clerk who receives bail money is a recipient of public money and the person can be liable if such money is wrongfully converted by him or her.

The property subject to embezzlement must have some value, even though value is not an element of the offense. Although a check without a required endorsement does not have value, the fact that the endorsement can be forged gives it sufficient value to make it a subject of embezzlement.

### Elements

Statutes governing the offense vary widely throughout the states. To determine exactly what elements comprise the offense, it is necessary to examine the particular statute applicable.

Elements common to embezzlement are as follows: (1) the property must belong to a person other than the accused, such as an employer or principal; (2) the property must be converted subsequent to the defendant's original and lawful possession of it; (3) the defendant must be in a position of trust, so that the property is held by him or her pursuant to some fiduciary duty; and (4) the defendant must have an intent to defraud the owner at the time of the conversion.

**Ownership** The principal or employer must be the owner of the property embezzled by an agent or employee at the time the offense is committed. Under many statutes, the ownership requirement is expressed as the property of another. It is sufficient if any person, other than the defendant, owns the property and it does not matter who has title to it or that it is owned by more than one person.

Jurisdictions differ on the question of whether a person can embezzle funds belonging to a spouse. In states that retain the spousal privilege, a person can be prevented from testifying to a crime against a spouse; therefore, spousal embezzlement will not be prosecuted.

Unless a statute provides otherwise, co-owners of property, such as joint tenants or tenants in common, cannot be guilty of the offense with respect to the property that is jointly owned. A co-owner who wrongfully transfers jointly owned property converts his or her own property as opposed to that of another; therefore, there is no conversion. If a person has any interest in property held jointly with another, the person cannot be convicted of the offense relating to that property. For example, a co-owner of an automobile cannot be guilty of embezzling it if both owners have an equal right to possession. A number of states, however, have statutes punishing embezzlement by co-owners, such as partners who wrongfully convey partnership assets.

In most states, an agent authorized to collect money for his or her principal and to keep a certain amount as commission is guilty of embezzlement if he or she wrongfully transfers the entire sum collected.

**Possession or Custody of Property** Possession is the essential element for distinguishing between embezzlement and larceny. While larceny requires that the thief take the property out of the victim's possession, the person must lawfully possess the property at the time that it is converted for embezzlement.

It is not necessary for the defendant to have physical or exclusive possession. It is sufficient if the person has constructive possession, a form of possession that is not actual but that gives the holder power to exercise control over the property either directly or through another person. Alternatively, mere custody is insufficient for embezzlement. If a master puts a servant in charge of property for purposes of guarding or caring for it, the master is considered to have constructive possession of such property while the servant has mere custody. A servant who wrongfully converts property over which he or she has custody may be guilty of larceny, but not embezzlement.

The fact that an accused person lawfully receives property at different times will not negate an embezzlement charge provided all other elements of the offense are met.

**Trust Relationship** Since the offense is aimed at punishing persons who convert property for their own use when possession is lawfully acquired, prosecution is limited to instances where the parties are in a fiduciary, or trust, relationship.

Generally, a debtor and a creditor, or an agent and a BROKER, do not have a fiduciary relationship sufficient for the offense. There must be some further indication that one person has a duty to care for and exert some control over the other's property. The most common type of trust relationships are those existing among corporate officers, partners, and employers and their employees.

### Conversion of Property

Conversion is an act that interferes with an owner's right of possession to his or her property. For purposes of embezzlement, conversion involves an unauthorized assumption of the right of ownership over another's property. It may, for example, occur when a person is entrusted with property for one purpose and uses it for another purpose without the consent of the owner. Generally, any type of conversion that occurs after a person obtains lawful possession of property is sufficient.

Although a failure to return property is evidence of conversion, it does not necessarily constitute embezzlement—absent proof of criminal intent. However, if a statute imposes an absolute duty to return property, the failure to do so is embezzlement, provided all other elements are met.

In certain circumstances, a demand is required before a person can claim that his or her property has been converted. Usually, no demand is required if it would be futile, such as when an accused has fled the jurisdiction with the property. If, however, there is no definite time specified for the return of the property, a demand might be necessary. The demand is

merely a request that the wrongdoer return the property. The request does not have to be formal, and there is no requirement that the word *demand* be used.

When an agent is given authority to sell property and thereafter converts the proceeds of the sale, he or she is guilty of embezzlement of the proceeds, as distinguished from the property sold. A person with authority to cash a check but who converts the cash is, likewise, guilty of embezzlement of the cash and not of the check. The person, might, however, be guilty of embezzling the check if at the time of cashing it, the person has a fraudulent intent to convert it.

**Intent** In a majority of jurisdictions, a fraudulent intent to deprive the owner of his or her property is necessary for embezzlement. It is characterized as intent to willfully and corruptly use or misapply another's property for purposes other than those for which the property is held. The defendant's motive is not relevant to the intent element.

Although it is not essential that the intent exist at the time possession is first taken, it must be formed at the time the property is converted. The offense is not committed if there is an intent to return the specific property taken within a reasonable period of time. If, however, there is a fraudulent intent at the time the property is converted, a subsequently formed intent to return the property will not excuse the crime. An offer to restore the property will not bar a prosecution for embezzlement. Some courts have held, however, that an offer of restoration can be considered on the question of intent.

**Persons Arrested for Embezzlement by Age, 2001**

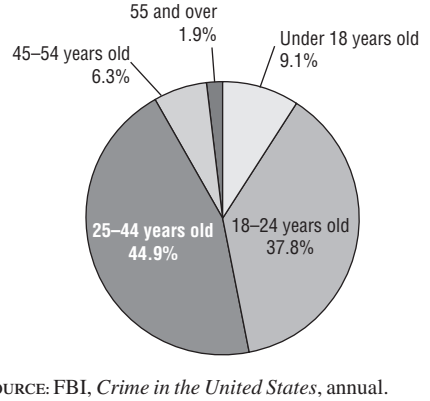


SOURCE: FBI, *Crime in the United States*, annual.

A person who believes that the property to be transferred is his or hers is considered to act pursuant to a claim of right. The possibility that the belief is mistaken, or unreasonable, is not important. If one has a GOOD FAITH belief that one has a right to withhold property or devote it to one's own use, the conversion cannot be fraudulent, and there is no embezzlement.

The validity of a claim of right is a QUESTION OF FACT determined from CIRCUMSTANTIAL EVIDENCE. It is not sufficient if the person merely states he or she acted honestly. If circumstances evince that there was a willful and knowingly wrongful taking, a claim of right defense will not succeed.

### Persons Liable

One or more persons may be guilty of embezzlement. If there is a conspiracy to embezzle, parties to the agreement are liable as principals. A person who aids and abets in the conversion can also be guilty of the offense.

### Punishment

Since the offense is defined differently in several jurisdictions, the punishment for embezzlement can vary. Generally, the penalty is a fine, imprisonment, or both.

Some states distinguish between grand embezzlement and petit embezzlement on the basis of the value of the property stolen. The former involves property of a greater value and is punishable as a felony, while the latter involves property of a lesser value and is punishable as a misdemeanor.

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CROSS-REFERENCES

Fiduciary; Fraud; Joint Tenancy; Larceny; Tenancy in Common.

## EMBLEMENTS

*Crops annually produced by the labor of a tenant. Corn, wheat, rye, potatoes, garden vegetables, and*

*other crops that are produced annually, not spontaneously, but by labor and industry. The doctrine of emblements denotes the right of a tenant to take and carry away, after the tenancy has ended, such annual products of the land as have resulted from the tenant's care and labor.*

## EMBRACERY

*The crime of attempting to influence a jury corruptly to one side or the other by promises, persuasions, entreaties, entertainments, and the like. The person guilty of it is called an* embraceor. *This is both a state and federal crime, and is commonly included under the offense of obstructing justice.*

In order for the offense of embracery to be committed, it is essential that the accused individual have an improper intent. If an individual makes statements that would be likely to influence the verdict of a juror while the individual is unaware that such juror is present, such conduct is not embracery.

It is not generally a prerequisite for the juror to have been impaneled and sworn, provided the person's name has been drawn and published as a juror or grand juror.

The intent to influence a juror must be coupled with an attempt to use improper influence, which can be through word or conduct and is the only OVERT ACT necessary. The juror can either be approached personally by the individual or through an agent. Words intended to influence a juror need not be spoken to the person directly but can be communicated in a manner designed to be overheard by the juror and prejudice his or her decision.

A party to the action, an individual undergoing GRAND JURY investigation, a witness, or an individual who has no connection with the proceeding can be charged with embracery.

Since the crime of embracery itself only constitutes an attempt, there is no such crime as the *attempt to commit embracery.* It is, however, a crime to solicit another to commit embracery.

Embracery is punishable by a fine, imprisonment, or both, depending upon statute.

## EMBRYONIC STEM CELL RESEARCH

See FETAL TISSUE RESEARCH.

## EMERGENCY DOCTRINE

*A principle that allows individuals to take action in the face of a sudden or urgent need for aid, without being subject to normal standards of reasonable care. Also called* imminent peril doctrine, *or* sudden peril doctrine.

The emergency doctrine allows people to act in critical situations that call for quick action—a fire, an automobile crash, a collapsing building—without danger of recrimination. An example of someone who might be covered under the emergency doctrine is a person who performs cardiopulmonary resuscitation on a heart attack victim and in so doing breaks several of the victim's ribs. Another example is when a driver, surprised by a pedestrian who steps out from between two parked cars, swerves to miss the pedestrian but then hits another car.

The emergency doctrine also covers situations in which an individual acted in GOOD FAITH when disaster seemed imminent even though ultimately it was not. There is, however, a fine distinction between the emergency doctrine and the rescue doctrine, which requires that one who places a person in peril or in a situation with the appearance of imminent peril owes a duty of reasonable care to one attempting to rescue the person from the peril or appearance of peril. In *Harris v. Oaks Shopping Center,* Cal. App. 4th 206 (1999), a sand sculpture being installed in a mall appeared to be about to collapse. Harris, a mall employee, rushed over to push a woman and her small child out of the way. In his rush, he fell and injured his back. He filed suit, but the jury found that since the sculpture did not fall, there was no imminent danger; moreover, there was no evidence of NEGLIGENCE on the part of the mall or the sand sculptors. Harris appealed, stating that the jury should have been instructed that since he acted on what he saw as an imminent threat, he had no obligation to prove actual negligence. He reasonably believed that the sculpture was about to collapse. The appellate court agreed and sent the case back to trial court for a new trial, in which the jury was to consider whether Harris acted reasonably under the circumstances. The court did, however, note that it was the rescue doctrine that applied in this case because the plaintiff's injuries stemmed from the attempted rescue, not an actual collapsed structure.

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**CROSS-REFERENCES**

Good Samaritan Doctrine.

## EMIGRATION

*The act of moving from one country to another with intention not to return. It is to be distinguished from expatriation, which means the* **ABANDONMENT** *of one's country and renunciation of one's citizenship in it, while emigration denotes merely the removal of person and property to another country. Expatriation is usually the consequence of emigration.* Emigration *is also sometimes used in reference to the removal from one section to another of the same country.*

## EMINENT DOMAIN

*The power to take private property for public use by a state, municipality, or private person or corporation authorized to exercise functions of public character, following the payment of just compensation to the owner of that property.*

Federal, state, and local governments may take private property through their power of eminent domain or may regulate it by exercising their **POLICE POWER.** The **FIFTH AMENDMENT** to the U.S. Constitution requires the government to provide just compensation to the owner of the private property to be taken. A variety of property rights are subject to eminent domain, such as air, water, and land rights. The government takes private property through condemnation proceedings. Throughout these proceedings, the property owner has the right of **DUE PROCESS.**

Eminent domain is a challenging area for the courts, which have struggled with the question of whether the regulation of property, rather than its acquisition, is a taking requiring just compensation. In addition, private property owners have begun to initiate actions against the government in a kind of proceeding called inverse condemnation.

*Emigration is the act of leaving one's country to live somewhere else. These men emigrated from Italy to the United States in 1911.*

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### History

The concept of eminent domain is not new. It has existed since biblical times, when King Ahab of Samaria offered Naboth compensation for Naboth's vineyard. In 1789, France officially recognized a property owner's right to compensation for taken property, in the French Declaration of the Rights of Man and of the Citizen, which reads, "Property being an inviolable and sacred right no one can be deprived of it, unless the public necessity plainly demands it, and upon condition of a just and previous indemnity."

Shortly after the French declaration, the United States acknowledged eminent domain in the Fifth Amendment to the Constitution, which states, ". . . nor shall private property be taken for public use, without just compensation."

The Fifth Amendment grants the federal government the right to exercise its power of eminent domain, and the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT makes the federal guarantee of just compensation applicable to the states. State governments derive the power to initiate condemnation proceedings from their state constitutions, except North Carolina, which gains its power through statute. The constitutional and statutory provisions require federal, state, and local governments and subdivisions of government to pay an owner for property taken for public use at the time the property is taken.

The power of eminent domain was created to authorize the government or the condemning authority, called the condemnor, to conduct a compulsory sale of property for the common welfare, such as health or safety. Just compensation is required, in order to ease the financial burden incurred by the property owner for the benefit of the public.

### Elements of Eminent Domain

To exercise the power of eminent domain, the government must prove that the four elements set forth in the Fifth Amendment are present: (1) private property (2) must be taken (3) for public use (4) and with just compensation. These elements have been interpreted broadly.

**Private Property** The first element requires that the property taken be private. Private property includes land as well as fixtures, leases, options, stocks, and other items. The rifle that was used to kill President JOHN F. KENNEDY was considered private property in an eminent domain proceeding.

**Taking** The second element refers to the taking of physical property, or a portion thereof, as well as the taking of property by reducing its value. Property value may be reduced because of noise, accessibility problems, or other agents. Dirt, timber, or rock appropriated from an individual's land for the construction of a highway is taken property for which the owner is entitled to compensation. In general, compensation must be paid when a restriction on the use of property is so extensive that it is tantamount to confiscation of the property.

Some property rights routinely receive constitutional protection, such as WATER RIGHTS. For example, if land is changed from waterfront

*A jet descends over a residential neighborhood near New York City's La Guardia Airport. Low altitude flights over private property may be deemed a taking (an element of eminent domain) if they occur with enough frequency to interfere with a property owner's use.*

MARK PETERSON/ CORBIS

to inland property by the construction of a highway on the shoreline, the owners of the affected property are to be compensated for their loss of use of the waterfront.

Another property right that is often litigated and routinely protected is the right to the reasonable and ordinary use of the space above privately owned land. Specifically, aircraft flights over private property that significantly interfere with the property owner's use may amount to a taking. The flights will not be deemed a taking unless they are so low and so frequent as to create a direct and immediate interference with the owner's use and enjoyment of the property.

Actions by the government that courts do not consider takings include the publication of plans or the plotting, locating, or laying out of public improvements, including streets, highways, and other public works, even though the publicity generated by such actions might hinder a sale of the land.

The courts have traditionally not recognized the regulation of property by the government as a taking. Regulating property restricts the property owner's use and may infringe on the owner's rights. To implement a regulation, the state exercises its police power and is able to control the use of the property. Although the courts recognized a regulation as a taking in 1922, they have been inconsistent in their later rulings on this issue. In *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922), the U.S. Supreme Court ruled that coal mining under an owner's property was not a taking, despite a subsidence, or settling, of the property's surface. In 1987, the Court stated that regulations that are excessive require compensation under the Fifth Amendment (*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 [1987]). More recently, the Court determined that regulations that strip property of value or that do not substantially advance legitimate state interests are takings for which compensation is required (*Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 [1987]).

In a case examining a MORATORIUM imposed on development in the Lake Tahoe area, the U.S. Supreme Court has decided that a moratorium on development is not necessarily a taking, and that regulatory takings cases must be decided on a case-by-case basis rather than on categorical rules, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (U.S., Apr 23, 2002) (NO. 00-1167). In that case, the Tahoe Regional Planning Agency had imposed a moratorium on construction and development that lasted almost three years while the agency devised rules to protect the water quality of Lake Tahoe on the California-Nevada border. Some of the property owners sued, claiming that the moratorium constituted a categorical taking because they were deprived of all economically beneficial use of the property during the period of the moratorium. In a 6–3 decision, the Court held that because the regulation was temporary, it could not constitute a categorical taking.

**Public Use** The third element, public use, requires that the property taken be used to benefit the public rather than specific individuals. Whether a particular use is considered public is ordinarily a question to be determined by the courts. However, if the legislature has made a declaration about a specific public use, the courts will defer to legislative intent (*Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186 [1984]). Further, "[t]he legislature may determine what private property is needed for public purpose . . . but when the taking has been ordered, then the question of compensation is judicial" (*Monongahela Navigation Co. v. United States,* 148 U.S. 312, 13 S. Ct. 622, 37 L. Ed. 463 [1893]).

To determine whether property has been taken for public use, the courts first determined whether the property was to be used by a broad segment of the general public. The definition of public use was later broadened to include anything that benefited the public, such as trade centers, municipal civic centers, and airport expansions. The U.S. Supreme Court continued to expand the definition of public use to include aesthetic considerations. In *Berman v. Parker,* 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954), the Court ruled that slums could be cleared in order to make a city more visually attractive. The Court in *Berman* stated further that it is within legislative power to determine whether a property can be condemned solely to beautify a community.

State courts have also expanded the definition of public use. The Michigan Supreme Court even allowed property to be condemned for the private use of the General Motors Company, under the theory that the public would benefit from the economic revitalization a new plant

would bring to the community (*Poletown Neighborhood Council v. City of Detroit,* 410 Mich. 616, 304 N.W.2d 455 [1981]).

**Just Compensation** The last element set forth in the Fifth Amendment mandates that the amount of compensation awarded when property is seized or damaged through condemnation must be fair to the public as well as to the property owner (*Searl v. School District No. 2 of Lake County,* 133 U.S. 553, 10 S. Ct. 374, 33 L. Ed. 740 [1890]). Because no precise formula for determining it exists, just compensation is the subject of frequent litigation.

The courts tend to emphasize the rights of the property owner in eminent domain proceedings. The owner usually has not initiated the action but has been brought into the litigation because his or her property is needed for public use. The owner must participate in the proceedings, which can impose an emotional and financial burden.

The measure of damages is often the fair market value of the property that is harmed or taken for public use. The market value is commonly defined as the price that reasonably could have resulted from negotiations between an owner who was willing to sell it and a purchaser who wanted to buy it. The value of real property is assessed based on the uses to which it reasonably can be put. Elements for consideration include the history and general character of the area, the adaptability of the land for future buildings, and the use intended for the property after its taking. Generally, the best use of the land is considered to be its use at the time it was condemned, even though the condemnor might not intend to use the land in the same manner as the owner. Crops, grass, trees, minerals, rental income, and all other items that fairly enter into the question of value are taken into consideration when determining just compensation. The amount of compensation should be measured by the owner's loss rather than by the condemnor's gain, and the owner should be placed in as good a financial position as he or she would have been in had the property not been taken (*Monongahela*). The compensation should be paid in cash, and the amount is determined as of the date title vests in the condemnor. Interest is paid on the award until the date of payment.

### Condemnation Proceedings

Condemnation proceedings vary according to individual state and federal laws. In general, the proceedings should be conducted as quickly as possible. A proceeding does not require court involvement if the condemnor and landowner enter into a contract for the taking of the property for a public use. A seizure pursuant to such a contract is as effective as if it were done through formal condemnation proceedings.

Condemnation usually consists of two phases: proceedings that relate to the right of the condemnor to take the property, and proceedings to set the amount of compensation to be paid for the property taken. The commencement of the proceedings does not curtail ordinary use of the condemned property by the owner as long as the use does not substantially change the condition of the property or its value.

States require special procedures for certain cases, categorized by either the purpose for which the property is sought or the character of the party seeking to take it. For example, a special procedure is required when property is to be taken for a street, highway, park, drain, levee, sewer, canal, or waterway. In a procedure called a quick taking, the condemnor is permitted to take immediate possession and use of the property, and the owner must receive cash compensation in advance of the proceeding.

The owner has the right to due process during condemnation proceedings. He or she must be notified in a timely manner and must be given a reasonable opportunity to be heard on the issues of whether the use for which the property is expropriated is public and whether the compensation is just. Due process considerations mandate that the landowner receive an opportunity to present evidence and to confront or cross-examine witnesses. The owner has an automatic right to appeal.

Due process does not require a jury trial in condemnation proceedings, although various state constitutions and statutes provide for assessment by a jury. Absent contrary state provisions, a court has the discretionary power to grant or refuse a motion for view of the premises by a jury. A condemnation judgment or order must be recorded.

### Inverse Condemnation

An increase in environmental problems has resulted in a new type of eminent domain proceeding called inverse condemnation. In this proceeding, the property owner, rather than the condemnor, initiates the action. The owner alleges that the government has acquired an interest in his or her property without giving

compensation, such as when the government floods a farmer's field or pollutes a stream crossing private land. An inverse condemnation proceeding is often brought by a property owner when it appears that the taker of the property does not intend to bring eminent domain proceedings.

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## EMOLUMENT

*The profit arising from office, employment, or labor; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites. Any perquisite, advantage, profit, or gain arising from the possession of an office.*

## EMPLOYEE RETIREMENT INCOME SECURITY ACT

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.A. § 1001 et seq. (1974), is a federal law that sets minimum standards for most voluntarily established PENSION and health plans in private industry to provide protection for individuals enrolled in these plans. ERISA regulates the financing, vesting, and administration of pension plans for workers in private business and industry. The 1974 enactment of ERISA by Congress was intended to preserve and protect the rights of employees to their pensions upon retirement by establishing statutory requirements that govern such matters.

ERISA requires retirement plans to provide participants with information including important details about plan features and funding. ERISA also describes fiduciary responsibilities for those who manage and control plan assets, requires plans to establish a grievance and appeals process for participants seeking benefits from their plans, and gives participants the right to sue for benefits and breaches of fiduciary duty. A number of amendments to ERISA expand the protections that are available to health-benefit-plan participants and beneficiaries. One important amendment, the Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 U.S.C. §§ 1161–1168 (1994), provides some workers and their families with the right to continue their health coverage for a limited time after certain life events, such as the loss of a job. Another amendment to ERISA, the Health Insurance Portability and Accountability Act (HIPAA), 29 U.S.C. §§ 1181–1182, provides important new protection for working Americans and their families who have preexisting medical conditions or who might otherwise suffer discrimination in health coverage based on factors related to health. Other important amendments include the Newborns' and Mothers' Health Protection Act, the Mental Health Parity Act, and the Women's Health and Cancer Rights Act. In general, ERISA does not cover group health plans established or maintained by government entities, churches, or plans that are maintained solely to comply with applicable workers compensation, unemployment, or disability laws. ERISA also does not cover plans maintained outside the United States primarily for the benefit of non-resident ALIENS or unfunded excess benefit plans.

CROSS-REFERENCES

Employment Law.

## EMPLOYERS' LIABILITY ACTS

*State and federal laws that define or restrict the grounds under which, and the extent to which, the owner of a business who hires workers can be held liable for damages arising from injuries to such workers that occur during the course of the work.*

Statutes such as the Federal Employers' Liability Act (10 U.S.C.A. § 51 et seq. [1908]) and

WORKERS' COMPENSATION laws abrogate the principle of COMMON LAW that an employer is not liable to employees who have been injured by the fault or NEGLIGENCE of a fellow worker during the course of employment.

## EMPLOYMENT AT WILL

*A common-law rule that an employment contract of indefinite duration can be terminated by either the employer or the employee at any time for any reason; also known as terminable at will.*

Traditionally, U.S. employers have possessed the right to discharge their employees at will for any reason, be it good or bad. The "at-will" category encompasses all employees who are not protected by express employment contracts that state that they may be fired only for good cause. "Good cause" requirements are typically a part of collective bargaining agreements negotiated by employee unions; nonunion workers rarely have this form of protection. The at-will doctrine also does not apply to contracts for a specified term, such as an employment contract that contemplates the employee providing service for a expressly designated number of years.

The United States is the only major industrial power that maintains a general employment-at-will rule. Canada, France, Germany, Great Britain, Italy, Japan, and Sweden all have statutory provisions that require employers to show good cause before discharging employees.

Beginning in the 1980s, employment at will came under challenge in the United States. Employees had grown increasingly dissatisfied with the rule for a variety of reasons. For one thing, a decline in the number of self-employed individuals—due, in part, to a continuing decline in the number of farmers—meant that most U.S. citizens worked for someone else. For another, a typical worker who was discharged currently lost more than in the past in terms of PENSION, insurance, and other benefits.

As a result, a greater number of discharged workers brought suits alleging WRONGFUL DISCHARGE from employment. By the 1980s, as concepts of job security expanded, employees became increasingly successful in such suits. In 1987, California juries ruled in favor of the employees in over two-thirds of such cases and granted an average award of $1.5 million. In some successful cases, the courts have created exceptions to the employment-at-will practice. Thus far, these exceptions have fallen into three broad categories: (1) breach of contract by the employer, (2) breach of an implied COVENANT of GOOD FAITH and fair dealing, and (3) violation of public policy by the employer. Employers and legislatures have responded in a variety of ways.

*U.S. employers, such as the owners of this candy manufacturing plant, have the right to discharge employees at will for any reason under the common-law rule of employment at will.*

AP/WIDE WORLD PHOTOS

### Breach of Contract

Approximately half of the states have allowed exceptions to employment at will on the basis of an express or implied promise by the employer. Typically, a wrongful discharge action alleging the breach of an employer's promise is based on a statement by the employer that expressly or implicitly promises employees a degree of job security. Ordinarily, such statements are found in employee handbooks or in policy memorandums given to employees when they are hired. Some courts have interpreted such statements as unilateral contracts in which the employer promises not to discharge the employees except for JUST CAUSE and in accordance with certain procedures (*Duldulao v. Saint Mary of Nazareth Hospital Center,* 115 Ill. 2d 482, 106 Ill. Dec. 8, 505 N.E.2d 314 [Ill. 1987]). Courts were more reluctant to find exceptions to the employment-at-will practice in cases that involved an oral promise of long-term employment.

### Breach of an Implied Covenant of Good Faith and Fair Dealing

In wrongful dismissal cases based on an implied covenant of good faith and fair dealing, the discharged employee typically contends that the employer has indicated in various ways that the employee has job security

and will be treated fairly. For example, long time employees who have consistently received favorable evaluations might claim that their length of service and positive performance reviews were signs that their job would be secure as long as they performed satisfactorily.

Courts that have recognized good-faith-and-fair-dealing exceptions have found either covenants implied in fact or covenants implied in law. Covenants implied in fact have been found in "objective manifestations," including repeated promotions and pay increases, that might reasonably give an employee cause to believe that he or she has job security and will be treated fairly (*Dare v. Montana Petroleum Marketing,* 687 P.2d 1015 [Mont. 1984]; *Kerr v. Gibson's Products Co.,* 733 P.2d 1292 [Mont. 1987]).

A few jurisdictions have recognized implied-in-law covenants of good faith and fair dealing. California courts have ruled that every employment contract carries with it an implied covenant that neither party will impede the other from receiving the benefits of the agreement. In deciding whether such a covenant is to be inferred, a court looks at such factors as whether the company properly followed its stated personnel policies, the length of the person's employment, any job security assurances that may have been made, a presence or lack of prior criticism of performance, and basic notions of fairness.

In *Khanna v. Microdata Corp.,* 170 Cal. App. 3d 250, 215 Cal. Rptr. 860 (1985), for example, a California court of appeals ruled that a company violated an implied covenant when it fired a leading salesman who had brought suit against the company for unpaid commissions. The court found that a breach of an implied-in-law covenant is established whenever an employer engages in a bad-faith action outside a contract and attempts to frustrate an employee's enjoyment of her or his contract rights.

### Violation of Public Policy

Several public policy exceptions to the employment-at-will practice have been recognized by courts in some jurisdictions. In public policy cases, the employee alleges that he or she has been discharged in violation of a policy found in a statutory right of the employee, statutes containing penalties, constitutional provisions, and judicial opinions. Courts have generally been more willing to recognize a public policy exception when the policy in question has a statutory basis than when it does not.

Courts in many jurisdictions have been willing to recognize public policy exceptions for employees who were discharged because they asserted a statutory right. For example, in *Firestone Textile Co. Division, Firestone Tire & Rubber Co. v. Meadows,* 666 S.W.2d 730 (1983), the Supreme Court of Kentucky ruled that an employer could not discharge an employee simply because he had filed a workers' compensation claim.

A public policy exception to employment at will has also been found in cases where an employee was fired for refusing to violate a statute. Wrongful discharge has been found in instances where employees were dismissed for refusing to dispose of waste in a place where doing so is prohibited by federal law, for refusing to commit perjury, and for giving testimony in compliance with a court order.

Courts have much less frequently been willing to recognize exceptions to employment at will owing to constitutional provisions. Nevertheless, in *Novosel v. Nationwide Insurance Co.,* 721 F.2d 894 (3d Cir. 1983), a federal appeals court made a public policy exception for an employee who was dismissed for refusing to join a company's LOBBYING effort because he privately opposed the company's stance on the issue. The court found that the free speech provisions of the Pennsylvania Constitution and the U.S. Constitution's FIRST AMENDMENT protected the employee's refusal. In *Borse v. Piece Goods Shop,* 963 F.2d 611 (1992), a federal circuit court of appeals ruled that Pennsylvania law may protect at-will employees from being fired for refusing to take part in drug-testing programs if the employees' privacy is unreasonably invaded.

### The Response by Employers and Legislatures

Legal guidelines relating to the status of employment at will are still developing or remain unclear in many states. The evolving judgments of legislatures and courts on this issue reflect a continuing debate over how to protect wrongfully discharged at-will employees while allowing employers the freedom to make personnel decisions.

The rising number of wrongful-dismissal suits has alarmed many employers. Faced with the threat of high legal fees, court costs, and huge potential damage awards in such cases, more companies have begun to add express employment-at-will clauses to employment

contracts. Many employers have deleted potentially troublesome statements from their handbooks and instructed recruiters to make no promises about just cause or the term of employment. Companies are also turning more frequently to severance pay settlements, in which discharged employees receive a reasonably generous compensation package in exchange for waiving all future claims based on the employment or its termination.

The decline of the power of employee unions and COLLECTIVE BARGAINING has provided many employers with the freedom to insert the new contract clauses. In many instances, companies are concerned more with losing expensive termination lawsuits than with inciting union action or public boycotts.

Whereas employers claim they are simply reasserting their rights under the traditional at-will doctrine, employee advocates believe that many companies may be attempting to cheat workers out of the job security gains they have achieved through several decades of wrongful-dismissal lawsuits. They propose legislation that would protect at-will employees from unjust discharge and provide for arbitrators to handle disputes. This solution, they suggest, would be fair to employees and employers alike. Such legislation would protect at-will employees, not just those who fall under the exceptions and who can afford to pursue a lawsuit that may take years to complete. Businesses would benefit not only because employee morale might improve, but also because relief could be limited to back pay and reinstatement rather than possibly including punitive and COMPENSATORY DAMAGES.

Some state legislatures have enacted legislation that struggles to balance the rights of the employee and the employer. In 1987, Montana passed the Montana Wrongful Discharge from Employment Act (Mont. Code Ann. § 39-2-901). This law limits the rights of employees claiming wrongful discharge, by restating the principle that at-will employees may be dismissed for "any reason considered sufficient by the terminating party." However, a discharge could be considered wrongful even under this principle if it was in retaliation for the employee's refusal to violate public policy, if it was not for good cause, or if the employer violated the express provisions of the employer's own personnel policy.

The Montana statute limits the remedies of a discharged employee who sues the former employer. The employee may be awarded lost wages and fringe benefits but only for a period not to exceed four years, and PUNITIVE DAMAGES may be sought only when there is clear and convincing evidence that the employer engaged in actual FRAUD or malice in the wrongful discharge. In addition, any earnings that were or could have been accrued following the discharge must be deducted from the amount awarded in lost wages. The Montana Supreme Court upheld the constitutionality of the act in *Meech v. Hillhaven West,* 776 P.2d 488 (1989).

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Covenant; Employment Law; Fraud; Good Faith; Malice.

## EMPLOYMENT LAW

*The body of law that governs the employer-employee relationship, including individual employment contracts, the application of* TORT *and contract doctrines, and a large group of statutory regulation on issues such as the right to organize and negotiate collective bargaining agreements, protection from discrimination, wages and hours, and health and safety.*

Beyond establishing an economic relationship between employer and employee, work provides a powerful structure for organizing social and cultural life. The employment relationship is more than the exchange of labor for money. In U.S. society, self-worth, dignity, satisfaction, and accomplishment are often achieved by one's employment responsibilities, performance, and rewards. The development of employment law demonstrates the importance of work. Since the 1930s, employees have acquired more legal rights as federal and state governments

# Company Obligations to Work-at-Home Employees

The purpose of the **OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970** (OSH Act), 29 U.S.C.A. §§ 651 et seq, is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." (Section 2(b)). The OSH Act applies to a private employer who has any employees doing work in a workplace in the United States. It requires these employers to provide employment and a place of employment that are free from recognized, serious hazards, and to comply with Occupational Safety and Health Act (OSHA) standards and regulations (Sections 4 and 5 of the OSH Act). By regulation, OSHA does not cover individuals who, in their own residences, employ persons for the purpose of performing domestic household tasks.

OSHA has never conducted inspections of home offices, and such an inspection would, in fact, be contrary to OSHA policy. OSHA will not hold employers liable for employees' home offices and does not expect employers to inspect the home offices of their employees. If OSHA receives a complaint about a home office, the complainant will be advised of OSHA policy. If an employee makes a specific request, OSHA may informally let employers know of complaints about home office conditions but will not follow-up with the employer or employee.

OSHA will, however, conduct inspections of other home-based worksites, such as home manufacturing operations, when OSHA receives a complaint or referral that indicates that a violation of a safety or health standard exists that threatens physical harm or that an imminent danger exists, including reports of a work-related fatality. The scope of the inspection in an employee's home will be limited to the employee's work activities. Employers are responsible in home worksites for hazards caused by materials, equipment, or work processes which the employer provides or requires to be used in an employee's home.

In April 2001 the Bush administration announced plans to call for an amendment to the Occupational Safety and Health Act to preclude home office inspections when employees primarily work on the telephone, computer, and/or with other electronic devices. As part of the administration's larger New Freedom Initiative, the move was intended to help disabled workers buy computers and other equipment needed to work at home, without OSHA intervention, in return for tax incentives to encourage employers to provide such equipment.

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**CROSS-REFERENCES**

Occupational Safety and Health Act of 1970.

have enacted laws that give them the power and authority to unionize, to engage in COLLECTIVE BARGAINING, and to be protected from discrimination based on race, gender, or disability.

## History

English COMMON LAW, and subsequently early U.S. law, defined the relationship between an employer and an employee as that of MASTER AND SERVANT. The master-and-servant relationship arose only when the tasks performed by the servant were under the direction and control of the master and were subject to the master's knowledge and consent.

With the rise of industrialization and mass production in the 1800s, the U.S. economic structure changed dramatically. Employers needed masses of employees to run the equipment that produced capital and consumer goods. By the end of the nineteenth century, the U.S. economy was attracting millions of immigrants. In addition, migration from country to city accelerated.

Nineteenth-century employment law was based on the concept of liberty of contract: a worker had the freedom to bargain with an employer for terms of employment. This concept was challenged when workers organized into unions and engaged employers in collective bargaining. The U.S. legal and economic systems at the time were opposed to the idea of collective bargaining. Union organizers noted the inequality of bargaining power between a prospective employee and an employer.

Judges were hostile to attempts by state governments to regulate the hours and wages of employees. In **LOCHNER V. NEW YORK**, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), the U.S. Supreme Court, on a 5–4 vote, struck down a New York State law (N.Y. Laws 1897, chap. 415, art. 8, § 110) that specified a maximum 60-hour week for bakery employees. The Court ruled that the law was a "meddlesome interference" with business, concluding that the regulation of work hours was an unjustified infringement on "the right to labor, and with the right of freedom of contract on the part of the individual, either as employer or employee."

The U.S. labor movement's persistent attempts to break free of the freedom-of-contract doctrine ultimately led to major changes in employment law. The **NEW DEAL** era of the 1930s brought federal recognition of the right of workers to organize themselves as unions and to bargain collectively with management. The passage of the **WAGNER ACT**, also known as the National Labor Relations Act of 1935 (29 U.S.C.A. § 151 et seq.), established these rights and also proscribed **UNFAIR LABOR PRACTICES** (i.e., actions taken by employers that interfere with the union rights of employees). The act also established the **NATIONAL LABOR RELATIONS BOARD**, a federal **ADMINISTRATIVE AGENCY**, to administer and enforce its provisions.

Since the 1950s, the federal government has led the way in providing employees more rights concerning the employment relationship.

### Physical Safety

Federal and state statutes regulate workplace hazards to avoid or minimize employee injury and disease. These laws concern problems such as dangerous machinery, hazardous materials, and noise. A more recent trend has been the banning of smoking in the workplace. All of these laws place the burden on employers to maintain a safe and healthy workplace.

*Employees photographed in a Troy, New York, shirt factory around 1907, a time when many employees were hired under the concept of liberty of contract.*

RARE BOOKS AND SPECIAL COLLECTIONS DIVISION. LIBRARY OF CONGRESS

The federal government's main tool in workplace safety is the **OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970** (OSHA) (29 U.S.C.A. §§ 651–678 [1988]). OSHA attempts to balance the employee's need for a safe and healthy working environment against the employer's desire to function without undue government interference. OSHA issues occupational safety and health standards, and employers must meet these standards or face civil and, in rare occurrences, criminal penalties.

When an employee is injured on the job, the employee may file a compensation claim with the state **WORKERS' COMPENSATION** system. Prior to **WORLD WAR I**, an injured employee had to sue his or her employer in state court, alleging a tort violation. This avenue rarely proved successful, as employees were reluctant to testify about work conditions and thus risk the possible loss of their job. Without witnesses, an employee had little chance of recovery. In addition, employers were protected by legal defenses to **NEGLIGENCE** that usually allowed them to escape liability.

Dissatisfaction with this situation led the states to enact workers' compensation laws, which set up an administrative process for compensating employees for work-related injuries. These systems provide compensation while a worker is physically unable to work (i.e., temporary disability), provide retraining if the employee can no longer perform the same job, and provide compensation indefinitely if the worker has been severely injured (i.e., total disability). Medical benefits are paid for treatment of work-related injuries. Depending on the state, employers fund this system by making state-regulated contributions to a workers' compensation insurance fund, paying insurance

premiums to a private insurance company, or assuming the risk through self-insurance.

### Discrimination

Since the 1960s, employment law has changed most radically in the protection that it gives employees against discrimination in the workplace. Although the federal government banned RACIAL DISCRIMINATION in the making of contracts in the CIVIL RIGHTS ACTS of 1870 and 1871 (42 U.S.C.A. §§ 1981, 1983), the federal courts narrowly construed the provisions to prevent their being used in the employment context. Not until the 1970s did federal courts allow those provisions to be applied to complaints of discrimination by individual employees (*McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 96 S. Ct. 2574, 49 L. Ed. 2d 493 [1976]).

Federal legislation in the 1960s provided employees with more avenues to challenge alleged discrimination. The 1963 Equal Pay Act (29 U.S.C.A. § 216 (d)) requires employers to pay men and women equal wages for equal work. The CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000e et seq.) contains broad prohibitions against discrimination on the basis of race, color, religion, national origin, or sex. Discrimination against persons ages 40 and over was banned in 1967 by the Age Discrimination in Employment Act (29 U.S.C.A. § 621 et seq.).

Major amendments to the general civil rights acts were passed in 1972, extending coverage to federal and state employees; in 1978, clarifying the protection of pregnant women; and in 1991, overruling a series of decisions by the U.S. Supreme Court that had restricted the reach of antidiscrimination statutes.

In 1990, Congress passed the Americans with Disabilities Act (ADA) (42 U.S.C.A. § 12101 et seq.), forbidding discrimination against qualified individuals with disabilities and requiring reasonable efforts to accommodate persons with disabilities in some situations.

With the growth of federal antidiscrimination statutes, many states have passed laws banning employment discrimination. A number of cities have enacted their own programs, as well. Some states and cities address issues that are not covered by the federal statutes, such as discrimination on the basis of sexual orientation.

### Termination of Employment

Historically, employment law has limited an employee's right to challenge an employer's unfair, adverse, or damaging practices. The law has generally denied any redress to an employee who is arbitrarily treated, unless the employee is represented by a union or has rights under a written employment contract. Absent these two conditions, or a statutory provision, the general rule has been that an employee or an employer can terminate the employment relationship at any time, for any or no reason, with or without notice. This rule forms the core of the "at-will" employment doctrine.

The at-will doctrine was articulated and refined by state courts in the 1800s. It provided employers with the flexibility to control the workplace by terminating employees as economic demand slackened. For employees, it provided a simple way of leaving a job if a better employment prospect became available or if working conditions were intolerable.

Courts and legislatures have modified the at-will employment doctrine. A public policy exception recognizes that an employee should not be terminated because he or she refused to act in an unlawful manner, attempted to perform a duty prescribed by statute, exercised a legal right, or reported unlawful or improper employer conduct ("whistle-blowing").

At-will employees may be protected even if no written contract exists. Many state courts now recognize employee rights that are contained in personnel policies or employee handbooks. As businesses grow larger, formal rules and procedures are needed in order to streamline administrative issues. A handbook or employment-policy manual usually contains rules of expected employee behavior, disciplinary or termination procedures that apply if the rules are violated, and compensation and benefit information. An employer must follow the rules for firing an employee that are set out in the handbook or manual, or risk a lawsuit for wrongful termination.

If an employer terminates an employee, the employer must be prepared to show "good cause" for the firing. With the many statutes that forbid discrimination in the workplace, the employer has the burden of showing a nondiscriminatory reason. Good cause can include inadequate job performance, job-related misconduct, certain types of off-the-job conduct, and business needs.

### Privacy and Reputation

When an individual seeks employment, he or she surrenders some privacy rights. To become employed, the individual will be asked

to disclose personal information and may be required to submit to continuing evaluation. Current or prospective employees may be asked to submit to a physical examination, a POLYGRAPH examination, a psychological evaluation, a test for use of illegal drugs, or a test for HIV. Employers have the right to search lockers or to frisk employees even if no reasonable suspicion of theft exists. The modern workplace can be checked by an employer through the monitoring of phone lines and personal computers.

Courts and legislatures have expressed increasing concern about the improper use of information that employers collect on employees. Employers who distribute information more widely than necessary, reveal confidential medical or personal information about an employee, or intrude on an employee's personal, off-work behavior risk lawsuits for invasion of privacy.

The issue of DEFAMATION also affects employment law. Defamation is subdivided into the torts of LIBEL, which involves a writing, and slander, which involves speech. Liability for defamation may be imposed if an employer makes a statement about an employee that is false and hurts the reputation of the employee. Employers have been successfully sued for defamation for communicating unfavorable job recommendations about a former employee. As a result, employers are reluctant to give more than basic employment history when asked for a job reference. Twenty-five states have enacted "good faith" job-reference laws, which protect employers who divulge employee job-performance information to a prospective employer.

### Wage and Hour Regulations

The FAIR LABOR STANDARDS ACT (FLSA) (29 U.S.C.A. § 201 et seq.) imposes minimum-wage standards and overtime standards on most employers. The minimum hourly wage is a means of ensuring that a full-time worker can maintain a minimum standard of living. Overtime standards mandate that an employer pay employees at least time and a half for working more than eight hours per day. The FLSA does not pre-empt states or localities from setting a higher MINIMUM WAGE. An employer operating in a state or locality with a higher minimum wage than that set by the FLSA must abide by the higher standard.

### Employee Retaliation

In *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2d 808 (U.S. Md., Feb 18, 1997) (NO. 95-1376), a former employee sued Shell Oil after he was fired. Robinson filed an employment-discrimination charge with the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) under Title VII of the Civil Rights Act of 1964. While that charge was pending, he applied for a job with another company, which contacted the respondent for an employment reference. Claiming that respondent gave him a negative reference in retaliation for his having filed the EEOC charge, Robinson filed suit under §704(a) of Title VII, which makes it unlawful for an employer to discriminate against any of his employees or applicants for employment who have availed themselves of Title VII's protections. The U.S. Supreme Court held that the term "employees," as used in §704(a) of Title VII, does include former employees, and so Robinson could sue for the allegedly retaliatory post employment actions.

In *Haddle v Garrison,* 525 U.S. 121, 119 S.Ct. 489, 142 L.Ed.2d 502 (U.S.Ga., Dec 14, 1998) (NO. 97-1472), Petitioner Michael Haddle cooperated with federal agents in an investigation

**Employment Law**

**CIVILIAN LABOR FORCE PARTICIPATION RATES, 1980–2000**

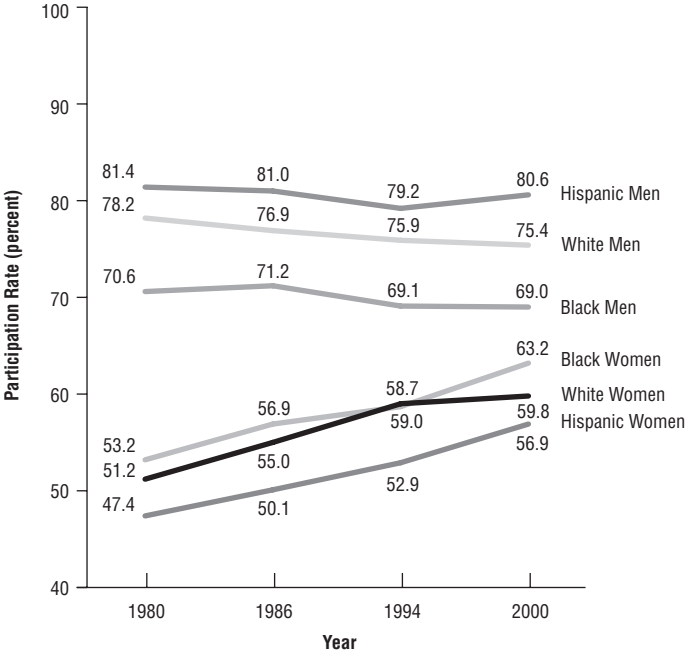


SOURCE: U.S. Bureau of Labor Statistics.

that lead to the indictment of his employer, Healthmaster, Inc. and respondents Jeanette Garrison and Dennis Kelly for MEDICARE FRAUD. Haddle was subpoenaed to testify before the GRAND JURY, and although he did appear, he did not testify, due to time constraints. Additionally, Haddle was expected to appear as a witness in the criminal trial resulting from the indictment. Garrison and Kelly subsequently conspired with a remaining Healthmaster officer to have Haddle fired, both in retaliation for assisting with the federal proceedings, and also to intimidate him. Haddle then sued for damages under 42 U.S.C. §1985(2) (which prohibits conspiracies to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified), alleging a conspiracy to intimidate him from testifying in the upcoming criminal trial, and a conspiracy to retaliate against him for appearing before the grand jury. Garrison and Kelly moved to dismiss for FAILURE TO STATE A CLAIM upon which relief can be granted because §1985 requires that complainants allege an injury in their person or property in order to recover damages. Under the authority of an earlier case, the U.S. Court of Appeals for the Eleventh Circuit accepted the respondents' argument that because Haddle was an at-will employee, he had no constitutionally protected interest in continued employment, and therefore could not allege an injury. The U.S. Supreme Court rejected the Eleventh Circuit's position that there must be injury to a "constitutionally protected property interest" to state a claim for damages under §1985. Section 1985 is intended to redress intimidation or retaliation against witnesses in federal court proceedings. Limiting causes of action under the statute to restoration of property misses the point and improperly limits the statute's effect. Instead, the Court analyzed "injured in his person or property" in the context of tort-law, which recognizes third-party interference with at-will employment as a breed of the traditional tort of intentional interference with contractual relations and intentional interference with prospective contractual relations.

The U.S. Equal Employment Opportunity Commission (EEOC) has issued comprehensive guidance on the prohibition against retaliation aimed at individuals who file charges of employment discrimination or who participate in the investigation of an EEOC charge.

### Pensions and Other Employee Benefits

The federal government regulates employee benefit plans under the EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA), 29 U.S.C.A. § 1001 et seq., passed in 1974. Title I of the act (29 U.S.C.A. § 1011 et seq.) provides rules with respect to participation, vesting and funding of benefits plans, fiduciary responsibility, reporting and disclosure, and administration and enforcement. Title II contains tax law provisions as amendments to the INTERNAL REVENUE CODE of 1954 (26 U.S.C.A. § 401 et seq.). Title III concerns jurisdiction, administration, and enforcement (29 U.S.C.A. § 1201 et seq.). Title IV creates the PENSION Benefit Guaranty Corporation and establishes a system of employee-plan-termination insurance (29 U.S.C.A. § 1301 et seq.).

ERISA does not require an employer to provide employee-benefit plans. However, if an employer sets up a qualified plan (i.e., one that meets ERISA's standards), the employer may take a tax deduction for the employer's contribution. The employer also may deduct the full amount of an employee group-health plan that meets tax code standards.

The Family and Medical Leave Act of 1993 (FAMLA) (29 U.S.C.A. § 2601 et seq.) establishes the right of employees to take unpaid leave for family reasons. FAMLA applies to employers of 50 persons or more. It entitles an employee to take up to 12 weeks of leave during a 12-month period because of the birth of a child to the employee, the placement of a child with the employee for ADOPTION or foster care, the serious health condition of a family member of the employee, or the employee's own serious health condition.

CROSS-REFERENCES

Age Discrimination; Civil Rights; Disability Discrimination; E-Mail; Employment at Will; Gay and Lesbian Rights; Labor Law; Labor Union; Pension; Sex Discrimination; Sexual Harassment; Whistleblowing.

## EN BANC

*[*Latin, French. In the bench.*]* *Full bench. Refers to a session where the entire membership of the court will participate in the decision rather than the regular quorum. In other countries, it is common for a court to have more members than are*

*usually necessary to hear an appeal. In the United States, the Circuit Courts of Appeal usually sit in panels of judges but for important cases may expand the bench to a larger number, when the judges are said to be sitting* en banc. *Similarly, only one of the judges of the* U.S. TAX COURT *will typically hear and decide on a tax controversy. However, when the issues involved are unusually novel or of wide impact, the case will be heard and decided by the full court sitting* en banc.

**Enabling Clause**

**Amendment XIX [1920]**

[1] The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

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

*An example of an enabling clause is Clause 2 of the Nineteenth Amendment.*

## ENABLING CLAUSE

*The section of a constitution or statute that provides government officials with the power to put the constitution or statute into force and effect.*

Seven of the amendments to the U.S. Constitution contain clauses that give Congress the power to enforce their provisions by appropriate legislation.

## ENABLING STATUTE

*A law that gives new or extended authority or powers, generally to a public official or to a corporation.*

## ENACT

*To establish by law; to perform or effect; to decree.*

Enact, sometimes used synonymously with adopt, is generally applied to legislative rather than executive action.

## ENCROACHMENT

*An illegal intrusion in a highway or navigable river, with or without obstruction. An encroachment upon a street or highway is a fixture, such as a wall or fence, which illegally intrudes into or invades the highway or encloses a portion of it, diminishing its width or area, but without closing it to public travel.*

In the law of EASEMENTS, where the owner of an easement alters the dominant tenement so as to impose an additional restriction or burden on the servient tenement, he or she is said to commit an *encroachment.*

## ENCUMBER

*To burden property by way of a charge that must be removed before ownership is free and clear.*

Property subject to an encumbrance may have a lien or mortgage imposed upon it.

## ENCUMBRANCE

*A burden, obstruction, or impediment on property that lessens its value or makes it less marketable. An encumbrance (also spelled incumbrance) is any right or interest that exists in someone other than the owner of an estate and that restricts or impairs the transfer of the estate or lowers its value. This might include an* EASEMENT, *a lien, a mortgage, a mechanic's lien, or accrued and unpaid taxes.*

## ENDANGERED SPECIES ACT

The federal Endangered Species Act of 1973 (ESA) (16 U.S.C.A. §§ 1531 et seq.) was enacted to protect animal and plant species from extinction by preserving the ecosystems in which they survive and by providing programs for their conservation.

The act classifies species as either endangered or threatened. It defines an endangered species as one "in danger of extinction throughout all or a significant portion of its range" (§ 1532). A threatened species is one that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range" (§ 1532). A current detailed listing of endangered and threatened animal and plant species is provided in the CODE OF FEDERAL REGULATIONS (see 50 C.F.R. §§ 17.11–.12). As of March 2003, the code listed approximately 1,260 endangered and threatened species (up from 1,000 in 1996). Between the years of 1995 and 2002, 12 species were removed from the list.

The ESA is administered by two agencies: the National Marine Fisheries Service, which designates marine fish and certain marine mammals, and the U.S. Fish and Wildlife Service, which has jurisdiction over all other wildlife. These agencies may list a species on their own initiative, or any interested person may submit a petition to have a species considered for listing. In either case, the act requires that the decision

*A sample enabling statute.*

## Minnesota Enabling Statutes

**84.027 Powers and duties.**

Subdivision 1. **Powers and duties.** The commissioner of natural resources shall be the administrative and executive head of the department. Subject to the provisions hereof and other applicable laws, the commissioner shall have the powers and duties herein prescribed. The enumeration of specific powers and duties herein shall not limit or exclude other powers or duties.

Subd. 2. **General.** The commissioner shall have charge and control of all the public lands, parks, timber, waters, minerals, and wild animals of the state and of the use, sale, leasing, or other disposition thereof, and of all records pertaining to the performance of the commissioner's functions relating thereto.

Subd. 3. **Former powers and duties of commissioner of conservation.** The commissioner shall have all the powers and duties prescribed for the commissioner of conservation by Laws 1931, chapter 186, all the powers and duties therein prescribed for the conservation commission except the power to appoint a commissioner, and all other powers and duties now prescribed by law for the commissioner of conservation, the conservation commission, the department of conservation, its divisions, or the director of any division.

Subd. 4. **Certain powers and duties of state auditor.** The commissioner shall have all existing powers and duties now or heretofore vested in or imposed upon the state auditor in any capacity and not heretofore transferred to any other officer or agency with respect to the public lands, parks, timber, waters, and minerals of the state, and the records thereof; provided, that nothing herein shall divest the state auditor of any power or duty otherwise prescribed by law with respect to auditing, accounting, disbursement, or other disposition of funds pertaining to the matters herein specified, nor of any power or duty expressly vested in or imposed upon the state auditor by the following provisions of law:

(1) The provisions of Mason's Minnesota Statutes 1927, section 76, so far as the same pertain to the crediting of payments on account of state lands, timber, or other products to the proper funds, or to the depositing and keeping of conveyances and abstracts of title; also all other provisions pertaining to the filing or keeping of deeds, grants, or conveyances to the state or abstracts or other evidence of title to state property;

(2) All provisions pertaining to escheated property;

(3) Mason's Minnesota Statutes 1927, sections 2220, 6442 to 6449, 6646, 6660, and 8223.

Subd. 5. **Descriptions of lands.** The commissioner shall have all the powers and duties prescribed for the state auditor by Mason's Supplement 1940, sections 5620-1 to 5620-13, 6452-1 to 6452-13, and 4031-75 to 4031-88, with respect to the receipt, filing, keeping, and certification of reports, lists, and records of descriptions of lands, reserving to the state auditor all other powers and duties therein prescribed for the state auditor. The county auditor shall make and transmit to the state auditor all the certificates and reports therein required except certificates and reports of land descriptions, which shall be made and transmitted to the commissioner.

Subd. 6. **Land sales and conveyances.** The commissioner shall have all the powers and duties prescribed for the state auditor by Mason's Supplement 1940, sections 5620-13 1/2 to 5620-13 1/2j, as amended, and 2139-27b to 2139-27k, as amended, with respect to the receipt, filing, and keeping of reports of sales of land and the execution of conveyances, reserving to the state auditor all other powers and duties therein prescribed for the state auditor. The county auditors shall make and transmit to the commissioner all the certificates and reports therein required to be made to the state auditor with respect to such sales and conveyances. The county treasurers shall make all reports of collections thereunder in duplicate and shall transmit a copy of each report to the commissioner of finance and the commissioner.

Subd. 7. **Limitation of powers.** Except as otherwise expressly provided, nothing herein shall confer on the commissioner any authority over any property of the state devoted pursuant to law to any specific purpose under any officer or agency of the state other than the commissioner or the department of natural resources or its divisions.

Subd. 8 **Selection of lands for certain purposes.** The commissioner of natural resources may select from any available lands owned by the United States in this state such lands as the commissioner deems suitable in lieu of any deficiencies which may have occurred in grants of school lands or other lands heretofore made to the state under any act of Congress, and may, with the approval of the executive council, accept on behalf of the state any grants or patents of lands so selected issued by the United States to the state.

This subdivision shall not be deemed to amend, supersede, or repeal any existing law, but shall be supplementary thereto.

Subd. 9. **Condemnation with landowner's consent.** If authorized by law to acquire any interest in real estate, the commissioner of natural resources may acquire by condemnation with the written consent of the landowner, that real estate which the commissioner deems to be in the best interests of the state. This subdivision shall apply only in those situations where condemnation is not otherwise authorized for the acquisition.

Subd. 10. **Sale of surplus lands to local governments for recreational or natural resources purposes.**

(a) The commissioner, with the approval of the state executive council, may sell the class of land or interest in land under paragraph (b) to a county, home rule charter or statutory city, town, or other governmental subdivision of the state for public use, including recreational or natural resource purposes.

(b) The commissioner may sell the class of land or interest in land that has been acquired by gift, purchase, or eminent domain and the commissioner has declared surplus. The commissioner shall declare land surplus in writing and state the reasons why the land or interest in land is no longer needed.

(c) The commissioner shall appraise the land or interest in land before the land or interest in land is sold, and may sell the land or interest in land for less than the appraised value if the commissioner determines, in writing, that it is in the public interest.

[continued]

*A sample enabling statute (continued).*

**Minnesota Statutes**

(d) The commissioner shall convey the state's interest in the name of the state by quitclaim deed in a form approved by the attorney general. The deed must reserve to the state minerals and mineral rights in the manner provided in sections 93.01 and 93.02, and provide that the land or interest in land reverts to the state if the governmental subdivision acquiring the land or interest in land:

(1) fails to provide the public use intended on the property;

(2) allows a public use other than the public use agreed to by the commissioner at the time of conveyance without the written approval of the commissioner; or

(3) abandons the public use of the property.

Subd. 11. **Federal conservation grants.** The commissioner of natural resources shall receive and administer grants under the land and water conservation grant program authorized by Congress in the Land and Water Conservation Fund Act of 1965, as amended.

Subd. 12. **Property disposal; gift acknowledgment; advertising sales.**

(a) The commissioner may give away to members of the public items with a value of less than $10 that are intended to promote conservation of natural resources or create awareness of the state and its resources or natural resource management programs. The total value of items given to the public under this paragraph may not exceed $25,000 per year.

(b) The commissioner may recognize the contribution of money or in-kind services on plaques, signs, publications, audio-visual materials, and media advertisements by allowing the organization's contribution to be acknowledged in print of readable size.

(c) The commissioner may accept paid advertising for departmental publications. Advertising revenues received are appropriated to the commissioner to be used to defray costs of publications, media productions, or other informational materials. The commissioner may not accept paid advertising from any elected official or candidate for elective office.

Subd. 13. **Game and fish rules.**

(a) The commissioner of natural resources may adopt rules under sections 97A.0451 to 97A.0459 and this subdivision that are authorized under:

(1) chapters 97A, 97B, and 97C to set open seasons and areas, to close seasons and areas, to select hunters for areas, to provide for tagging and registration of game, to prohibit or allow taking of wild animals to protect a species, and to prohibit or allow importation, transportation, or possession of a wild animal;

(2) sections 84.093, 84.15, and 84.152 to set seasons for harvesting wild ginseng roots and wild rice and to restrict or prohibit harvesting in designated areas; and

(3) section 84D.12 to designate prohibited exotic species, regulated exotic species, unregulated exotic species, and infested waters.

(b) If conditions exist that do not allow the commissioner to comply with sections 97A.0451 to 97A.0459, the commissioner may adopt a rule under this subdivision by submitting the rule to the attorney general for review under section 97A.0455, publishing a notice in the State Register and filing the rule with the secretary of state and the legislative coordinating commission, and complying with section 97A.0459, and including a statement of the emergency conditions and a copy of the rule in the notice. The notice may be published after it is received from the attorney general or five business days after it is submitted to the attorney general, whichever is earlier.

(c) Rules adopted under paragraph (b) are effective upon publishing in the State Register and may be effective up to seven days before publishing and filing under paragraph (b), if:

(1) the commissioner of natural resources determines that an emergency exists;

(2) the attorney general approves the rule; and

(3) for a rule that affects more than three counties the commissioner publishes the rule once in a legal newspaper published in Minneapolis, St. Paul, and Duluth, or for a rule that affects three or fewer counties the commissioner publishes the rule once in a legal newspaper in each of the affected counties.

(d) Except as provided in paragraph (e), a rule published under paragraph (c), clause (3), may not be effective earlier than seven days after publication.

(e) A rule published under paragraph (c), clause (3), may be effective the day the rule is published if the commissioner gives notice and holds a public hearing on the rule within 15 days before publication.

(f) The commissioner shall attempt to notify persons or groups of persons affected by rules adopted under paragraphs (b) and (c) by public announcements, posting, and other appropriate means as determined by the commissioner.

(g) Notwithstanding section 97A.0458, a rule adopted under this subdivision is effective for the period stated in the notice but not longer than 18 months after the rule is adopted.

Subd. 14. **Mission; efficiency.** It is part of the department's mission that within the department's resources the commissioner shall endeavor to:

(1) prevent the waste or unnecessary spending of public money;

[continued]

*A sample enabling statute (continued).*

**Minnesota Statutes**

(2) use innovative fiscal and human resource practices to manage the state's resources and operate the department as efficiently as possible;

(3) coordinate the department's activities wherever appropriate with the activities of other governmental agencies;

(4) use technology where appropriate to increase agency productivity, improve customer service, increase public access to information about government, and increase public participation in the business of government;

(5) utilize constructive and cooperative labor-management practices to the extent otherwise required by chapters 43A and 179A;

(6) report to the legislature on the performance of agency operations and the accomplishment of agency goals in the agency's biennial budget according to section 16A.10, subdivision 1; and

(7) recommend to the legislature appropriate changes in law necessary to carry out the mission and improve the performance of the department.

Subd. 15. **Electronic transactions.**

(a) The commissioner may receive an application for, sell, and issue any license, stamp, permit, registration, or transfer under the jurisdiction of the commissioner by electronic means, including by telephone. Notwithstanding section 97A.472, electronic and telephone transactions may be made outside of the state. The commissioner may:

(1) provide for the electronic transfer of funds generated by electronic transactions, including by telephone;

(2) assign a license identification number to an applicant who purchases a hunting or fishing license by electronic means, to serve as temporary authorization to engage in the licensed activity until the license is received or expires;

(3) charge and permit agents to charge a fee of individuals who make electronic transactions and transactions by telephone, including the issuing fee under section 97A.485, subdivision 6, and an additional transaction fee not to exceed $3.50;

(4) select up to four volunteer counties, not more than two in the metropolitan area, to participate in this pilot project and the counties shall select the participating agents;

(5) upon completion of a pilot project, implement a statewide system and select the participating agents; and

(6) adopt rules to administer the provisions of this subdivision.

(b) A county shall not collect a commission for the sale of licenses or permits made by agents selected by the participating counties under this subdivision.

(c) Establishment of the transaction fee under paragraph (a), clause (3), is not subject to the rulemaking procedures of chapter 14.

(d) Money received from fees and commissions collected under this subdivision, including interest earned, is annually appropriated from the game and fish fund and the natural resources fund to the commissioner for the cost of electronic licensing.

HIST: 1943 c 60 s 2; 1953 c 382 s 1; 1969 c 1129 art 10 s 2; 1976 c 96 s 1; 1986 c 444; 1988 c 628 s 1; 1993 c 172 s 32; 1994 c 509 s 1; 1995 c 233 art 2 s 39; 1995 c 248 art 11 s 6; 1996 c 385 art 2 s 1; 1997 c 7 art 1 s 20; 1997 c 216 s 58; 1998 c 366 s 53; 1999 c 92 s 1; 1999 c 231 s 83

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to include a species must be based solely on the "best scientific and commercial data available," following a review of the status of the species that takes into account any conservation efforts being made to protect the species (§ 1533 (b)(1)(A)).

If an emergency poses a significant risk to the well-being of a species of fish, wildlife, or plant, the secretary of the interior may bypass standard listing procedures and issue regulations that take effect immediately upon publication in the *Federal Register.* Emergency regulations remain in force for 240 days. To issue an emergency regulation, the secretary must publish detailed reasons why the regulation is necessary and notify the appropriate state agency in each state where the species is found (§ 1533 (b) (7)).

### Critical Habitat

The ESA requires that at the same time the decision is made to list a species, the secretary of the interior must develop a recovery plan for the species and, with certain exceptions, designate the critical habitat of the species. Critical habitat consists of "the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." Critical habitat must be designated on the basis of the best scientific data available and after taking into consideration the economic impact of the designation. An area may be excluded from designation if the benefits of the exclusion outweigh the benefits of the designation, unless the failure to designate will result in the extinction of the species (§ 1533 (b)(2)).

In June 1978 the Supreme Court ruled that provisions of the federal Endangered Species Act prohibited the TENNESSEE VALLEY AUTHORITY from completing the controversial Tellico Dam. The 6–3 decision was a victory for the snail darter, the tiny endangered fish whose spawning area in the Little Tennessee River would be ruined by the IMPOUNDMENT of a lake. *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d. 117, 11 ERC 1705, 8 Envtl. L. Rep. 20,513 (1978)(NO. 76-1701).

The issue of the economic impact of designating critical habitat was addressed in *Bennett v. Plenert,* 63 F.3d 915 (9th Cir. 1995). In *Plenert,* Oregon ranchers and irrigation districts sued regulators under the ESA over a proposal to change water flow at reservoirs in Oregon and California in order to protect the habitat of two endangered species, the Lost River sucker and the shortnose sucker. They claimed that the proposal did not take economic impact into consideration before designating critical habitat. The district court dismissed the suit. The U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal, holding that because the ranchers and irrigation districts had no interest in preserving the fish under the ESA, they were not within the "zone of interest" protected by the act. As a result, said the court, they lacked standing (a legally protectable interest) to bring a citizen suit.

### Taking

Once a fish or wildlife species is listed as endangered or threatened under the ESA, the act prohibits anyone from taking the species; plants are protected under separate provisions of the act. To "take" a species means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" (§ 1532 (19)).

The federal courts have disagreed about the term *harm* in the ESA definition of taking which includes the detrimental modification of a species' habitat. For example, the U.S. COURTS OF APPEALS for the Fifth and Ninth Circuits had interpreted the taking prohibition to include habitat modification (*Palila v. Hawaii Department of Land & Natural Resources,* 639 F.2d 495 [9th Cir. 1981]; *Sierra Club v. Yeutter,* 926 F.2d 429 [5th Cir. 1991]). But the U.S. Court of Appeals for the District of Columbia Circuit, in *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt,* 17 F.3d 1463 (1994), invalidated regulations that included habitat modification within the definition of taking. On appeal of the *Sweet Home* decision, the U.S. Supreme Court resolved this split, holding that habitat destruction that "actually kills or injures" an endangered or threatened species constitutes a violation of the ESA (*Sweet Home,* 515 U.S. 687, 115 S. Ct. 2407, 132 L. Ed. 2d 597). In 1999, the ESA published its final rule defining the term *harm* in the FEDERAL REGISTER (64 FR 607277).

Violations of the ESA can result in criminal penalties of up to one year in prison and $50,000 in fines. Civil penalties of up to $25,000 for each

violation may also be imposed. Private citizens may bring actions against other individuals or government entities for violations of the ESA.

The ESA allows certain exceptions to prohibited activities. For example, the secretary of the interior may issue a permit for a taking of a listed species that is "incidental" to an otherwise lawful activity. The applicant must prepare a conservation plan specifying the probable impact of the taking and the steps the applicant will take to minimize the impact. In the early 1990s, the DEPARTMENT OF THE INTERIOR relied on this exception when it began negotiating voluntary habitat conservation agreements with timber companies in the Pacific Northwest. Under these agreements, the landowners can set aside habitat for endangered or threatened species and, in return, avoid prosecution for the incidental taking of a species by ACCIDENTAL KILLING or other harm. By 1995, the agency had begun negotiating more than forty such plans, covering 5.4 million acres, in Washington and Oregon. For example, Murray Pacific Corporation, a timber company in Tacoma, Washington, negotiated an agreement to set aside 10 percent of its 54,000-acre tree farm and provide buffers to protect spotted owls, salmon, and other species. Plum Creek Timber Company, the second largest private landowner in the Northwest, developed a far-reaching plan to set aside up to 170,000 acres of habitat that was expected to help protect an estimated 284 species of wildlife, including grizzly bears, gray wolves, moles, fishers, and several different kinds of frogs, fish, and birds.

*During the 1990s there was an attempt to reintroduce gray wolves into Yellowstone National Park and central Idaho with the goal of removing the wolves from the endangered species list by 2002.*

AP/WIDE WORLD PHOTOS

### Experimental Populations

In 1982, the ESA was amended to allow the reintroduction of experimental populations of threatened or endangered species into their historic ranges without requiring compliance with many of the act's restrictions (§ 1539 (j)). Currently designated experimental populations are listed in the Code of Federal Regulations (see 50 C.F.R. §§ 17.81–.82). As of March 2003, 35 species were designated as experimental populations, including the red wolf and the gray wolf. The experimental population designation relaxed existing ESA regulations by allowing reintroduced species to be managed or controlled; for example, ranchers could kill reintroduced wolves that threatened livestock.

In the 1990s, the federal government began a program to restore an experimental population of gray wolves to Yellowstone National Park and central Idaho. The program projected the transfer of 90 to 150 Canadian gray wolves into Yellowstone National Park and central Idaho over three to five years. In early 1995, 29 gray wolves from Canada were released into Wyoming and Idaho. The release of the experimental population of gray wolves was controversial and created conflict and lawsuits between environmentalists and livestock ranchers. The goal of the wolf recovery program was to remove wolves from the endangered species list by 2002. This did not happen. As of March 2003, the gray wolf remained listed as a "dual status" species (both threatened and endangered) but delisted status was pending, based on taxonomic revisions.

### Proposed Reform

In 1995, Congress, intent on rewriting the ESA to loosen restrictions on private landowners, imposed a MORATORIUM on all new-species listings and critical habitat designations. The moratorium, passed as a rider to the Emergency Supplemental Appropriations and Rescissions for the DEPARTMENT OF DEFENSE to Preserve and Enhance Military Readiness Act of 1995 (Pub. L. No. 104-6, 109 Stat. 73), prohibited Secretary of the Interior Bruce Babbitt from spending funds to identify and list any additional endangered or threatened species.

The 1995 freeze created a backlog of nearly 250 plants and animals awaiting decision on protected status under the ESA. In 1996, as part of an agreement on federal spending for the current fiscal year, Congress agreed to waive the moratorium, and the President BILL CLINTON administration began resolving the backlog,

focusing first on species facing immediate extinction, then on species that biologists determined would be most likely to recover if given full protection under the law.

In latter 2000, the National Marine Fisheries Service and the U.S. Fish and Wildlife Service jointly published their final policy, effective October 20, 2000, for the controlled propagation of listed species, pursuant to organized and approved recovery plans, or as necessary to prevent extinction of a species. As of March 2003, 561 distinct approved recovery plans were listed, some of which covered more than one species.

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CROSS-REFERENCES

Environmental Law; Environmental Protection Agency.

## ENDORSE

*To sign a paper or document, thereby making it possible for the rights represented therein to pass to another individual. Also spelled* indorse.

## ENDORSEMENT

*A signature on a* COMMERCIAL PAPER *or document.*

An endorsement on a negotiable instrument, such as a check or a promissory note, has the effect of transferring all the rights represented by the instrument to another individual. The ordinary manner in which an individual endorses a check is by placing his or her signature on the back of it, but it is valid even if the signature is placed somewhere else, such as on a separate paper, known as an allonge, which provides a space for a signature.

The term *endorsement* is also spelled *indorsement.* For examples of different types of endorsements, see INDORSEMENT.

## ENDOWMENT

*A transfer, generally as a gift, of money or property to an institution for a particular purpose. The bestowal of money as a permanent fund, the income of which is to be used for the benefit of a charity, college, or other institution.*

A classic example of an endowment is money collected in a fund by a college. The college invests the endowment so that a regular amount of income is earned for the school. Typically, the monies for the endowment are derived from donations by alumni of the college.

Often, an endowment is designed to support a particular activity, such as the construction of

**Endangered and Threatened Wildlife and Plant Species, 2003**

| | Mammals | Birds | Reptiles | Amphibians | Fishes | Snails | Clams | Crustaceans | Insects | Arachnids | Plants |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **Endangered Species** | | | | | | | | | | | |
| Total | 316 | 253 | 78 | 20 | 82 | 22 | 64 | 18 | 39 | 12 | 599 |
| U.S. only | 65 | 78 | 14 | 12 | 71 | 21 | 62 | 18 | 35 | 12 | 598 |
| Foreign only | 251 | 175 | 64 | 8 | 11 | 1 | 2 | — | 4 | — | 1 |
| **Threatened Species** | | | | | | | | | | | |
| Total | 26 | 20 | 37 | 10 | 44 | 11 | 8 | 3 | 9 | — | 149 |
| U.S. only | 9 | 14 | 22 | 9 | 44 | 11 | 8 | 3 | 9 | — | 147 |
| Foreign only | 17 | 6 | 15 | 1 | — | — | — | — | — | — | 2 |

SOURCE: U.S. Fish and Wildlife Service, Threatened and Endangered Species System, *Summary of Listed Species*, 2003.

a new wing by a hospital. Each donor sets up an endowment fund sufficiently large to earn income to pay the expenses of one room or a different part of the wing, such as a library.

The Uniform Management of Institutional Funds Act (7A U.L.A. 233 [West Supp. 1992]), which was first created in 1972 and has since been adopted as law in many states, regulates spending and investment decisions related to such endowments.

The term *endowment* is also used to describe the act of putting aside the amount of property that a wife is lawfully due to inherit from her spouse. At COMMON LAW, a woman was "endowed at the church door," upon marriage, when she acquired her DOWER right—the right to use one-third of her husband's land upon his death for the remainder of her life.

## ENEMY COMBATANT

*Captured fighter in a war who is not entitled to prisoner of war status because he or she does not meet the definition of a lawful combatant as established by the* GENEVA CONVENTION*; a saboteur.*

The U.S. war against TERRORISM that began after the SEPTEMBER 11, 2001, ATTACKS led to the invasion of Afghanistan, the toppling of the Taliban regime, and the aggressive dismantling of al-Qaeda terrorist strongholds within that country. Although many Taliban soldiers were released after the conclusion of the conflict, the United States took into custody over five hundred individuals they labeled *enemy combatants.* This designation, which is also referred to as *unlawful combatants,* gives detainees fewer rights than those conferred on prisoners of war by the Third Geneva Convention (1949).

According to the articles of the convention, a lawful combatant must be part of an organized command structure; wear openly visible emblems to identify themselves as non-civilians; carry arms out in the open; and respect the RULES OF WAR, which would include not taking hostages. President GEORGE W. BUSH and his administration maintained that the five hundred detainees did not meet these criteria. Therefore, they could be tried for crimes by military tribunals; moreover, the individuals could be held incommunicado for as long as the war lasted, with no access to the U.S. legal system. The confinement of these prisoners at Camp X-Ray at the U.S. naval base in Guantanamo Bay, Cuba, raised questions about the U.S. government's interpretation of enemy combatant status. The fact that two detainees were U.S. citizens complicated matters, as both sought to use the U.S. courts to gain their freedom.

During the last months of 2001, the United States took into custody suspected al-Qaeda terrorists. These detainees included Afghan nationals, Pakistanis, Saudis, Yemenis, and others from different parts of the world. Members of the U.S. military screened and interrogated detainees to identify persons who might be prosecuted or detained, or who might have useful information about the terrorist network. In January 2002, 482 of these detainees were flown to Cuba, where they were incarcerated at Camp X-Ray. The conditions were at best spartan, which drew criticism from HUMAN RIGHTS organizations. Over time the United States upgraded the facilities and by early 2003, a small number of detainees had been returned to their country of origin, having satisfied U.S. officials that they had no terrorist ties.

One detainee, Yaser Esam Hamdi, informed his captors that he had been born in the United States before his family returned to the Middle East. This information led the U.S. military to transfer Hamdi from Camp X-Ray to the Norfolk, Virginia, Naval Station in early 2002. His father filed a HABEAS CORPUS petition (a legal writ that requires a person be brought before a court) in the U.S. District Court of Virginia, demanding that the government release his son. The district court judge ruled that Hamdi had the right to see an attorney, and the court appointed a public defender to represent him. The DEFENSE DEPARTMENT, however, challenged the ruling, declaring that Hamdi, as an enemy combatant, did not have the RIGHT TO COUNSEL. The Fourth U.S. Circuit Court of Appeals agreed and reversed the order. Nevertheless, the district court still raised doubts whether Hamdi, as a U.S. citizen, could be held as an enemy combatant. The Fourth Circuit finally settled the matter in *Hamdi v. Rumsfeld,* 316 F.3d 450 (4th Cir. 2003), when it ruled that a U.S. citizen captured with enemy forces during a combat operation in a foreign country could be held as an enemy combatant.

Another detainee raised objections in federal court about his enemy combatant status. In May 2002, Jose Padilla, a U.S. citizen, was arrested in Chicago as he disembarked from a flight from Pakistan. Attorney General JOHN ASHCROFT announced that Padilla was a "dirty bomber," an al-Qaeda terrorist trained to make and explode

a low-grade nuclear device. He was arrested under a judicial warrant, which made it necessary for him to make a court appearance. A lawyer was appointed to represent Padilla, but then the U.S. government changed its mind. It informed the judge that Padilla had been classified as an enemy combatant in a military order signed by President Bush. Confined to military custody in a South Carolina brig, Padilla's requests to see his lawyer were refused. This led to a series of hearings and orders in which the U.S. district court judge in New York urged the government to relent and let Padilla consult with his attorney. In December 2002, the judge issued an order directing the government to allow attorney visits (*Padilla ex rel, Newman v. Bush,* 233 F.Supp.2d 564 [S.D.N.Y.2002]). The government continued to object, leading the judge, in April 2003, to finalize his order so the government could appeal the issue.

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CROSS-REFERENCES

Deportation; Due Process of Law; International Law.

## ENERGY

Laws and regulations concerning the production and distribution of energy have existed for over one hundred years in the United States. Energy law became recognized as a specialty following the energy crises of the 1970s. It focuses on the production, distribution, conservation, and development of energy resources like coal, oil, natural gas, NUCLEAR POWER, and hydroelectric power.

In 1876, the U.S. Supreme Court, in *Munn v. Illinois,* 94 U.S. (Otto) 113, 24 L. Ed. 77, held that "natural monopolies" could be regulated by the government. *Munn* concerned grain elevators but stood more generally for the principle that the public must be allowed to control private property committed to a use in which the public has an interest. This legal recognition of natural monopolies provides the basis for much of the legal and regulatory control the government exercises over utility companies.

The regulation of energy in the late 1800s was on a local and regional level, and was primarily market driven. The transition from using wood as a primary source of energy to using coal was almost complete, and a second transition from coal to natural gas and oil was beginning.

In 1900, Standard Oil Company controlled 90 percent of the oil market; within a few years, antitrust litigation had reduced its market share to 64 percent. Aside from antitrust enforcement, the federal government was content to let the market control the energy industry. Oil, coal, and natural gas found their greatest structural impediment in the "bottleneck" of distribution—pipelines for oil and natural gas, and railways for coal. The dominant model of energy policy that emerged from this period and existed unchanged until the 1970s was one of support for conventional resources and regulation of industries whose natural monopolies required some government oversight to ensure that their public purpose served a public interest.

On October 17, 1973, the Organization of Petroleum Exporting Countries (OPEC) announced an embargo of oil exports to all countries, including the United States, that were supporting Israel in the Yom Kippur War. Only approximately 10 percent of the United States' oil imports were affected, but the perception of a major oil shortage motivated the next three presidential administrations to exert a strong federal influence over energy.

President Richard M. Nixon created the Federal Energy Office (Exec. Order No. 11,930, 41 Fed. Reg. 32, 399) and appointed an "energy czar" to oversee oil supplies. President Gerald R. Ford's administration saw the passage of the Strategic Petroleum Reserve (42 U.S.C.A. § 6234) and the promulgation of minimum efficiency regulations for automobiles. In 1977, Jimmy Carter's administration created the DEPARTMENT OF ENERGY (42 U.S.C.A. § 7101), which was the framework for the coordination, administration, and execution of a comprehensive national energy program.

The goal of a comprehensive national energy program was achieved with the passage of the National Energy Act of 1978, which consisted of five distinct pieces of legislation. The National Energy Conservation Policy Act (42 U.S.C.A. § 8201 et seq.) set standards and provided financing for conservation in buildings. The Powerplant and Industrial Fuel Use Act (42 U.S.C.A. § 8301 et seq.) encouraged the transition from oil

*Energy law concerns the production, distribution, and development of energy resources. In recent decades, renewable resources such as solar power have gained support.*
LIBRARY OF CONGRESS

and gas to coal in boilers. The PUBLIC UTILITIES Regulatory Policies Act (15 U.S.C.A. § 2601) granted Congress authority over the interstate transmission of electric power. The Natural Gas Policy Act (15 U.S.C.A. § 3301) unified the gas market and promoted the deregulation of the natural gas industry. The Energy Tax Act (26 U.S.C.A. § 1 et seq.) approved tax credits to promote conservation.

The administration of RONALD REAGAN set policies that marked a significant change in the national energy policy, away from the Carter administration's centralized, governmentally regulated energy plan, which set ambitious goals for market stabilization and energy conservation through government intervention. The Reagan administration favored a more market-driven approach to achieve these goals. Although unsuccessful in its goal to abolish the Department of Energy, the Reagan administration was able to deregulate the natural gas industry through administrative initiatives (under the Federal Energy Regulatory Commission) and the Wellhead Decontrol Act of 1989 (15 U.S.C.A. § 3301).

The administration of GEORGE H. W. BUSH also favored a market-driven approach to the regulation of energy, but the Persian Gulf War against Iraq in 1991 required Congress to respond to volatile conditions in the oil-exporting Middle East. The National Energy Policy Act of 1992 (42 U.S.C.A. § 13201) addressed issues such as competition among electric power generators and tax credits for wind and biomass energy production systems.

The National Energy Policy Plan, issued in 1995 during Bill Clinton's administration, continued the market-focused approach of the Reagan and Bush administrations. Citing as its primary goal a "sustainable energy policy," the plan states that the "administration's energy policy supports and reinforces the dominant role of the private sector" in achieving this goal.

The mid-1990s focus of market-driven, private sector regulation of energy development, conservation, and distribution may have to change in the years ahead. The energy needs of industrialized nations are intensifying, and the developing countries of the world are increasing their energy demands at a rate of 4.5 percent a year. Oil demand in Asia alone grew 50 percent from 1985 to 1995.

Energy policies in the future are likely to include emphasis on the development of more efficient, sustainable sources of energy. Many countries are already exploring the energy potential of biomass, wind, hydroelectric, and solar power.

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#### CROSS-REFERENCES

Electricity; Energy Department; Environmental Law; Mine and Mineral Law; Public Utilities.

## ENERGY DEPARTMENT

The Department of Energy (DOE) is an executive agency of the federal government. It was created in response to the early 1970s energy shortages, long lines at the gas pumps, and rising prices to name a few. Its many duties include the administration of federal energy policies and functions, research and development (R&D) of energy technology, marketing of federally produced power, promotion of energy conservation, oversight of the NUCLEAR WEAPONS program, regulation of energy production and consumption, and collection and analysis of energy-related data. The department's web site can be found at www.energy.gov.

The DOE was created in 1977 under the Department of Energy Organization Act (42 U.S.C.A. § 7131). The act brought together all

major federal energy responsibilities into one cabinet-level department. The DOE divides itself into three major programs, or divisions: energy programs, weapons/waste clean-up programs, and science and technology programs. It also oversees five power administrations and includes the Federal Energy Regulatory Commission. Many of the department's research, development, testing, and production activities are performed by contractors who operate government-owned facilities.

### Office of the Secretary

The secretary of energy provides overall leadership for the department, decides major energy policy, advises the president on energy

**Department of Energy**

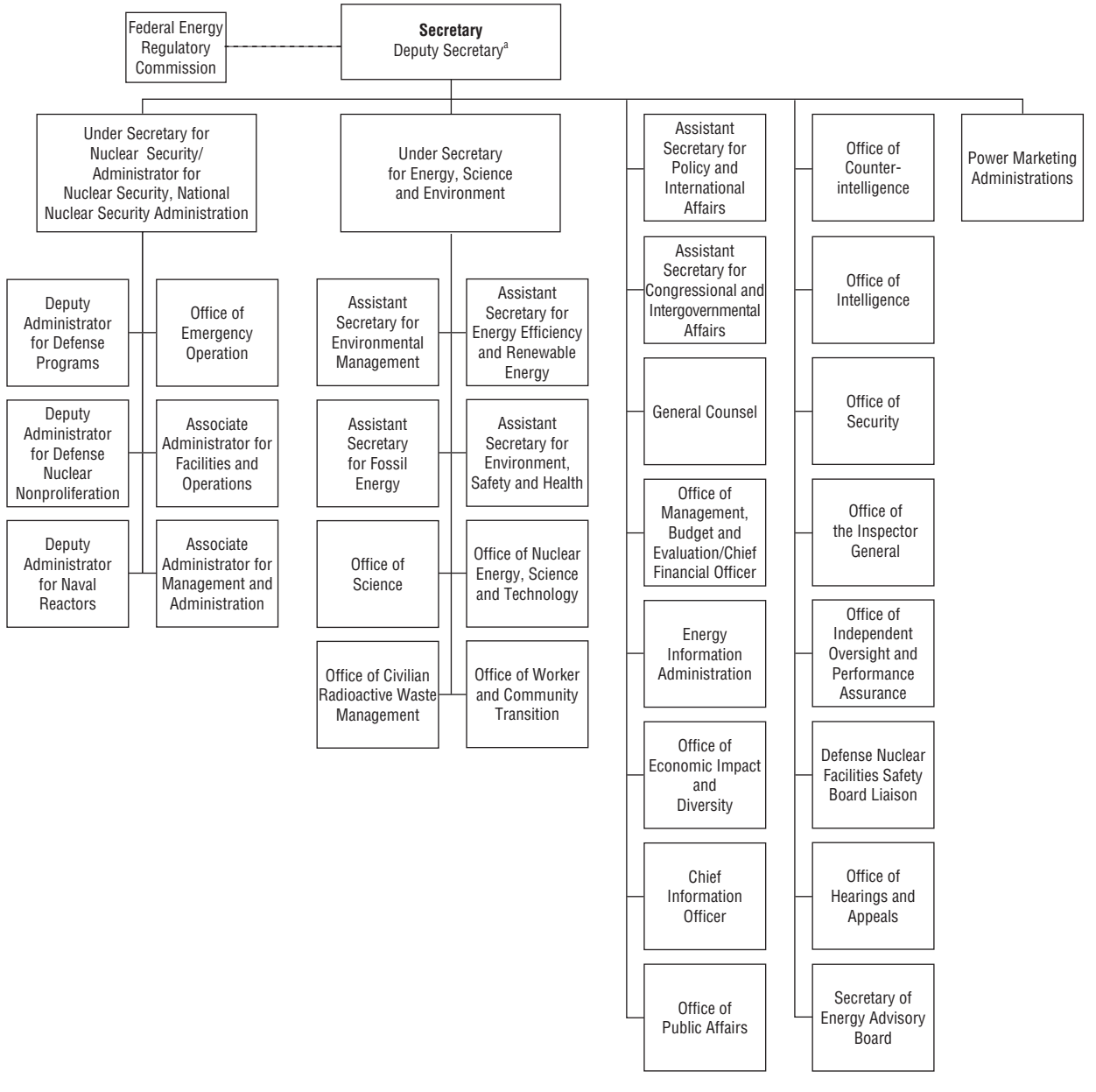


[a] the Deputy Secretary also serves as the Chief Operating Officer.

issues, and acts as the principal spokesperson for the department. The deputy secretary oversees the department's energy programs, and the undersecretary has responsibility for the weapons/waste clean up programs and science and technology programs.

### Energy Programs

The DOE energy programs consist of five offices: Energy Efficiency and Renewable Energy, Fossil Energy, Nuclear Energy, the Energy Information Administration, and Civilian Radioactive Waste Management.

The Office of Energy Efficiency and Renewable Energy directs efforts to increase the production and utilization of renewable power sources such as solar, biomass, wind, geothermal, and alcohol fuels. It also works to improve the energy efficiency of transportation, buildings, and industrial systems. The office supports research and development related to these areas. In addition, it provides financial assistance for state energy planning, weatherizes housing for poor and disadvantaged people, and implements energy conservation measures by government and public institutions.

The Office of Fossil Energy supports research and development programs related to the fossil fuels: coal, petroleum, and gas. It conducts and funds long-term, high-risk research to help the private sector commercialize advanced concepts in fossil fuel energy. The assistant secretary for fossil energy also manages the Clean Coal Technology Program, Strategic Petroleum Reserve, Naval Petroleum and Oil Shale Reserves, and Liquefied Gaseous Fuels Spill Test Facility.

The Office of Nuclear Energy oversees the department's research and development in nuclear fission technology, including nuclear reactor development. This office manages the Remedial Action Program, which performs decontamination work at DOE surplus sites. The office also coordinates efforts to prevent the proliferation of nuclear technology and evaluates new and potential advances in nuclear technology.

The Energy Information Administration collects, processes, and publishes data related to energy production, demand, consumption, distribution, technology, and resource reserves. In addition, the administration helps governmental and nongovernmental users to understand energy trends.

The Office of Civilian Radioactive Waste Management manages the Nuclear Waste Fund and other federal programs that are related to the storage and disposal of high-level radioactive waste and spent nuclear fuel.

The Department of Energy's role in managing nuclear weapons and storage sites received increased scrutiny after the terrorist attacks of September 11, 2001. Concern was raised that the DOE's sites were not properly secured in light of the attacks. In response, the DOE assured critics that the sites were safe, and requested increased funding for them.

Another domestic nuclear issue that the DOE has been involved with is storage of nuclear waste. In a controversial decision, the DOE recommended the use of Yucca Mountain in Nevada as the nation's first long-term geologic repository for high-level radioactive waste. Despite the strong disagreement of most Nevada residents, the president and Congress approved the decision in 2002.

### Weapons/Waste Clean Up Programs

The weapons/waste clean up programs include the Offices of Defense Programs, Environmental Restoration and Waste Management, and Intelligence and National Security.

The Office of Defense Programs directs U.S. nuclear weapons research, development, testing, production, and surveillance; manages defense nuclear waste and by-products; and coordinates research in inertial confinement nuclear fusion.

The Office of Environmental Restoration and Waste Management assesses and cleans up the waste sites of inactive nuclear weapons and of other weapons and related materiel.

The Office of Intelligence and National Security meets the intelligence information requirements of the DOE and makes departmental expertise and information available to the intelligence community. The office secures classified information and manages the department's policies relating to ARMS CONTROL, nuclear nonproliferation, and export controls.

The Department of Energy has been involved with securing Russian nuclear materials and with helping Russian nuclear scientists to find employment. The Department works with its Russian counterparts to improve measures on nuclear materials physical protection, control and accounting, as well as preventing illegal trafficking and handling of nuclear and radioactive materials. The DOE and Russian

officials recently agreed to upgrade their cooperation in connection with these issues.

### Science and Technology Programs

The science and technology programs include the Offices of Energy Research, Science Education and Technical Information, and Laboratory Management.

The Office of Energy Research advises the secretary on DOE energy research and development programs. It manages the basic energy sciences, high-energy physics, and fusion-energy research programs. It also administers grants to university and industry researchers.

The Office of Science Education and Technical Information develops and implements DOE policy for science education programs at secondary and post-secondary schools; manages the collection and dissemination of department research and development activities; and represents the United States in international organizations such as the INTERNATIONAL ATOMIC ENERGY AGENCY and the International Energy Agency.

The Office of Laboratory Management administers DOE laboratories and formulates laboratory research programs and policies.

The Office of Advanced Automotive Technologies (OAAT), a part of the Office of Transportation Technologies (OTT), was established in 1996 to consolidate all of the U.S. Department of Energy's (DOE) light vehicle technology research and development (R&D) activities. To meet legislated vehicle energy goals and emissions regulations, OAAT's research focuses on eliminating the most serious technological barriers to the development of energy-efficient automotive technologies. The office was given responsibility for the new Freedom CAR initiative, an attempt to come up with a viable hydrogen-powered car.

### Power Administrations

The DOE oversees five power administrations that market and transmit electric power produced at federal hydroelectric projects: the Bonneville Power Administration, in the Pacific Northwest; the Alaska Power Administration; the Southeastern Power Administration, serving West Virginia, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, and Kentucky; the Southwestern Power Administration, in Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and Texas; and the Western Area Power Administration, serving 15 midwestern and western states.

*The Federal Energy Regulatory Commission is responsible for establishing rates for the transportation of oil by pipeline, such as the Trans-Alaska pipeline (pictured).*

AP/WIDE WORLD PHOTOS

### Federal Energy Regulatory Commission

The DOE also includes the Federal Energy Regulatory Commission (FERC), an independent commission made up of five members. The commission took over many of the functions of the former Federal Power Commission, including the setting of rates and charges for the sale of natural gas and electricity. The commission also establishes rates for the transportation of oil by pipeline.

FERC's role in managing the nations power supply has proved somewhat controversial. Critics accused it of not doing enough to prevent California's power crisis in 2001, though FERC eventually did impose price controls to mitigate the crisis. In 2003, FERC determined that energy suppliers manipulated the market and that California was owed $3.3 billion in refunds.

### Transferals to Homeland Security

After the passage of the Homeland Security bill (6 USCA § 101 et seq.), several DOE functions were transferred to the HOMELAND SECURITY DEPARTMENT. These functions included activities relating to chemical/biological R&D, nuclear weapons SMUGGLING, national security, energy security and assurance, and nuclear threat assessment capability. The DOE also cooperates with the new Homeland Security Department in a variety of areas where the DOE still has primary responsibility for security, including the security of nuclear and laboratory sites and other power sources.

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## ENFEOFFMENT

*Also known as feoffment. Complete surrender and transfer of all land ownership rights from one person to another. In old* ENGLISH LAW*, an enfeoffment was a transfer of property by which the new owner was given both the right to sell the land and the right to pass it on to heirs, evidenced by* livery of seisin*, a ceremony for transferring the possession of real property from one individual to another.*

## ENFRANCHISEMENT

*The act of making free (as from* SLAVERY*); giving a franchise or freedom to; investiture with privileges or capacities of freedom, or municipal or political liberty. Conferring the privilege of voting upon classes of persons who have not previously possessed such.*

## ENGAGE

*To become involved with, do, or take part in something.*

To be engaged in something, such as a type of employment, implies a continuity of action. It is used in reference to an occupation or anything in which an individual habitually participates.

A person can also be engaged to do a particular activity by contract or other agreement.

When two people become engaged to marry, they are bound together by an agreement or promise to marry one another.

## ENGAGEMENT

*A binding, pledging, or coming together. A mutual pact, contract, or agreement.*

An *engagement to marry* is a BILATERAL CONTRACT between two people whereby they mutually promise to marry one another. Formerly, a breach of the engagement to marry was a CAUSE OF ACTION in several jurisdictions, but this is not true today.

An *engagement letter* is a clear delineation of an agreement that covers a particular project or employment. An attorney can require a client to sign such a letter to indicate that the person has been employed to perform specifically designated tasks.

## ENGEL V. VITALE

In 1962, the Supreme Court struck down a state-sponsored prayer in New York public schools in *Engel v. Vitale,* 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601, the first in a line of decisions banning school prayer. In finding a 22-word voluntary prayer unconstitutional, the Court opened a Pandora's box. For the next four decades, public anger brought many calls for a constitutional amendment to restore what *Engel* took away. On the other hand, the ruling was a landmark victory for church-state separationists who marked it as the beginning of a new era in FIRST AMENDMENT doctrine.

The origins of the case lay in a controversial education project in the early 1950s, started by the New York BOARD OF REGENTS, a bipartisan citizen commission appointed by the New York State Legislature to oversee state schools. The regents set out to recommend a plan for "moral education," the most controversial part of which included prayer. Religious leaders naturally differed over the wording of a proposed prayer intended to be recited by students each morning, but in 1951, a compromise resulted in what they hoped would be an inoffensive solution. Included as part of the regents' *Statement on Moral and Spiritual Training in the Schools,* the prayer went: "Almighty God, we acknowledge our dependence upon Thee, and we Beg Thy blessings upon us, our parents, our teachers and our country."

Going out of their way to avoid trouble, the regents made the prayer entirely optional. Both local school boards and parents could decide if it would be used. Nevertheless, its authors had not written it only to try their hand at prayer making. "We believe," they wrote, "that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program." But fearing religious and legal controversy, New York school districts shunned the prayer. They had good reason: not only was the state quite ethnically and religiously diverse, but also religious instruction in public schools had been declared unconstitutional by the U.S. Supreme Court in 1948 (*McCollum v. Board of Education,* 333 U.S.

203, 68 S. Ct. 461, 92 L. Ed. 549). Most school districts followed the lead of New York City, deciding against adopting the prayer. Only about 10 percent of them were using it by the late 1950s.

In 1958, the prayer provoked a lawsuit (*Engel*). Five parents of students in the small suburb of New Hyde Park, Long Island, brought suit to stop its use in their schools. Two parents were Jewish, the third was Unitarian, the fourth was a member of the Ethical Culture Society, and the fifth was a self-professed atheist. They believed that the school system was coercing their children into saying the regents' prayer, even though individually, their children could be excused from participating. The difficulty of granting children the permission to step out of the room during recitation of the prayer had, they argued, made the prayer effectively compulsory. Furthermore, voluntary or not, they said, the prayer violated the Establishment Clause of the First Amendment ("Congress shall make no law respecting an establishment of religion"). The parents received substantial help in their suit from the AMERICAN CIVIL LIBERTIES UNION (ACLU), which had been advocating strict separation of church and state for many years.

At first, the lawsuit failed. The plaintiffs asked the New York State Supreme Court—acting as a trial court—to stop use of the prayer. It refused. Justice Bernard S. Meyer found the prayer clearly religious, but not a violation of the First Amendment. Instead, he ordered school districts to set up safeguards against "embarrassments and pressures" upon children who did not wish to participate. The New York Appellate Division upheld the decision. So did the state's Court of Appeals, by a vote of 5–2. It said the nation's founders had designed the Establishment Clause to prohibit adopting an official religion or favoring a particular religion. "They could not have meant to prohibit mere professions of belief in God," the court held, "for if that were so, they themselves in many ways were violating the rule when and after they adopted it."

After agreeing to review the case, the U.S. Supreme Court heard oral arguments on April 3, 1962. Attorney William J. Butler made the following case for the plaintiffs: all state support to religion violates the First Amendment, and the prayer constituted the "teaching of religion in a public institution" and should therefore be banned. Several powerful groups joined the plaintiffs by filing FRIEND-OF-THE-COURT briefs. These included the ACLU; the American Jewish Committee, joined by the ANTI-DEFAMATION LEAGUE of B'nai B'rith; the Synagogue Council of America, joined by the National Community Relations Advisory Council; and the American Ethical Union. These organizations took different positions. The American Ethical Union saw the prayer as "governmental preference for theism in violation of the First and Fourteenth Amendments." The Synagogue Council argued that any school prayer was unconstitutional—even if voluntary—because it constituted "state aid to religion."

The school board defended the prayer on several grounds. It cited the second part of the First Amendment's religious guarantees, the Free Exercise Clause ("or prohibiting the free exercise thereof"). The prayer was an example of free exercise, Attorney Bertram B. Daiker argued, that fell far short of establishing a religion because it was optional, not compulsory. Daiker also found authority in the nation's traditions, calling the prayer "fully in accord with the tradition and heritage that has been handed down to us." Like the plaintiffs, the school board had powerful friends in court. Briefs supporting the prayer came from 19 state attorneys general who also saw religious and national tradition under attack. The attorneys general said the nation's founders "would be profoundly shocked" by the lawsuit.

On June 25, 1962, the groundbreaking decision was delivered. By a 7–1 majority, the Supreme Court found the prayer unconstitutional (the ninth justice, BYRON R. WHITE, did not participate because he did not assume his seat on the court until two weeks after the case had been argued). Justice HUGO L. BLACK's majority opinion called the prayer "wholly inconsistent" with the Establishment Clause. A considerable series of precedents existed from 1940 on for the ruling, but Black did not cite them. Instead, he recalled the bitter history of church-state conflict in England and colonial America, noting that by the time the Constitution was written, "there was a widespread awareness among many Americans of the dangers of a union of church and state." The First Amendment was added to prevent that union, which "tends to destroy government and to degrade religion." Black scorned the school board's claim that the regents' prayer was harmless. Neither its brevity nor its voluntary nature nor its nondenominational status could protect it from the

Constitution. "One of the greatest dangers to the freedom of the individual to worship in his own way lies in the government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services," wrote Black.

Critics immediately blasted the *Engel* decision. In a move that seemed to anticipate this response, Black wrote,

> It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong. . . . It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance. The Court's message to government was simple: stay out of the prayer business, and leave it to religious leaders.

In a sole dissent, Justice **POTTER STEWART** argued that the majority had overstated the meaning of the Establishment Clause: it prevented only the creation of official religions. "I cannot see how an 'official religion' is established by letting those who want to say a prayer say it," he wrote, and his view was prophetic. For the next 30 years, advocates of school prayer could not see how, either. By 1985, when the school prayer ban reached a new level in **WALLACE V. JAFFREE**, 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29, Justice **WILLIAM H. REHNQUIST** argued similarly in his dissent to the majority ruling banning a so-called moment of silence in the classroom.

*The 1962* Engel v. Vitale *ruling spurred much dissent, as seen in this image of Texas high school students beginning the day in prayer two days after the Court's decision.*

BETTMANN/CORBIS

*Engel* was only the first ban against prayer in public schools; a year later, the Court returned to the issue in **ABINGTON SCHOOL DISTRICT V. SCHEMPP**, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844, with even more far-reaching results—the banning of the Lord's Prayer and Bible reading in public schools.

Despite these rulings many school boards continued to offer prayers at school events, such as graduation ceremonies and athletic events. As a result, the Supreme Court revisited the issue of school prayer a number of times since *Engel*. In 1992, the Supreme Court in **LEE V. WEISMAN**, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467, held that a high school principal, acting in accord with school board policy, violated the Establishment Clause by inviting a local clergyman to deliver a nonsectarian prayer at graduation. In response to this ruling, school boards around the United States reconsidered their policies but others remained adamant about permitting prayers at school events.

In a Texas case, the school board allowed the student council chaplain to lead prayers over the public-address system before each high school football game. After former students filed a lawsuit challenging this practice, the school modified its policy. The school board allowed elected student representatives, no longer called chaplains, to give a "message or invocation" before the games. The students were free to say whatever they chose, as long as it promoted good sportsmanship. The policy did not require that the invocations be nonsectarian.

The Supreme Court rejected this approach in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000). The Court ruled that the school had sponsored a religious message that was impermissible under the First Amendment. The facts of the case indicated that the prayer had been sanctioned by school policy, delivered over a school microphone by a student, and supervised by a school faculty member. These facts led to the conclusion that the prayer was public speech and subject to the Establishment Clause.

The Santa Fe decision made it clear that the *Engel* reasoning applied to school events. The school district had argued that students were not compelled to attend the football games and therefore there was no coercion. The Court

found otherwise, pointing out that some students, such as cheerleaders, football players, and members of the band had to attend. The Court concluded that the "Constitution demands that schools not force on students the difficult choice between whether to attend these games or to risk facing a personally offensive religious ritual."

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## ENGLISH LAW

*The system of law that has developed in England from approximately 1066 to the present.*

The body of English law includes legislation, COMMON LAW, and a host of other legal norms established by Parliament, the Crown, and the judiciary. It is the fountain from which flowed nearly every facet of U.S. law during the eighteenth and nineteenth centuries.

Many of the concepts embodied in the U.S. Constitution—such as the separation and delegation of powers between three branches of government and the creation of an elective national assembly representing the will of the people—trace their roots to English law. Fundamental legal procedures applied in the U.S. civil and criminal justice systems also originated in England. The jury system, for example, slowly matured into its modern form over several hundred years of English history. The antecedents of many substantive areas of U.S. law, including the ubiquitous system of state and federal taxation, may be found in English history as well.

The story of English CONSTITUTIONAL LAW prior to the American Revolution, which is inextricably intertwined with the development of English law as a whole during this period, can be told in three parts: the centralization of power in the monarchy, the creation of Parliament as a limitation on the absolute power asserted by the monarchy, and the struggle for supremacy between Parliament and the monarchy. In large part, the American Revolution resulted from Parliament's failure to check the monarchy's sovereignty and establish itself as the supreme lawmaking body representing the people of England and its colonies.

When William, duke of Normandy, also known as William the Conqueror, vanquished England in 1066, there was no English law as the Americans of 1776 came to know it. No national or federal legal machinery had yet been contemplated. Law was a loose collection of decentralized customs, traditions, and rules followed by the Anglians and Saxons, among others. Criminal cases were indistinguishable from civil cases, and both secular and spiritual disputes were resolved at the local level by community courts. Trials in the modern sense did not exist, nor did juries. Guilt and innocence were determined by compurgation and ordeal.

Compurgation was a ritualistic procedure in which accused persons might clear themselves of an alleged wrongdoing by taking a sworn oath denying the claim made against them, and corroborating the denial by the sworn oaths of 12 other persons, usually neighbors or relatives. If an accused person failed to provide the requisite number of compurgators, he or she lost. The number of compurgators was the same as the number of jurors later impaneled to hear criminal cases under the common law. In the United States, the SIXTH AMENDMENT to the Constitution required that all criminal trials be prosecuted before 12 jurors—until 1970, when the Supreme Court ruled that six-person juries were permissible (*Williams v. Florida,* 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446).

Trial by ordeal was a superstitious procedure administered by clerics who subjected accused persons to physical torment in hopes of uncovering divine signs of guilt or innocence. The most common forms of ordeal involved boiling or freezing waters and hot irons. In the ordeal of freezing water, accused persons were thrown into a pool to see if they would sink or float. If they sank, the cleric believed they were innocent, because the water would presumably reject someone with an impure soul. Of course, persons who sank to the bottom and drowned during this ordeal were both exonerated of their alleged misbehavior, and dead.

# Dr. Bonham's Case

*Dr. Bonham's Case,* 8 Co. Rep. 114 (Court of Common Pleas [1610]), stands for the principle that legislation passed by the English Parliament is subordinate to the common-law decisions made by trial and appellate court judges, and any statute that is contrary to "common right and reason" must be declared void (Thorne 1938).

The decision in this case, which was written by **SIR EDWARD COKE** sitting as chief justice for the Court of Common Pleas in England, spawned the concept of **JUDICIAL REVIEW** under which courts of law, as the primary oracles of the **COMMON LAW** in the British and U.S. systems of justice, are authorized to invalidate laws enacted by the executive and legislative branches of government. The power of judicial review, which was first recognized by the U.S. Supreme Court in **MARBURY V. MADISON**, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60, is invoked by courts every day across the United States but has since been rendered obsolete in England.

IN FOCUS

*Bonham's Case* arose from a dispute regarding the unlicensed practice of medicine. Dr. Thomas Bonham had received a degree in physic medicine from the University of Cambridge. In 1606, Bonham was discovered practicing such medicine in London without a license, and was summoned to appear before the censors at the London College of Physicians, who maintained jurisdiction in that city over the practice of medicine.

Bonham was examined by the college censors in a number of areas regarding his professional practice, and provided answers "less aptly and insufficiently in the art of physic" (Stoner 1992, 49). As a result, Bonham was determined unfit to practice medicine in this field, and was ordered to desist from such practice in London. When Bonham was later discovered flouting this order, he was arrested and placed in the custody of the censors.

Bonham refused to undergo further examination. As a graduate of Cambridge, he asserted that the London College of Physicians had no jurisdiction over him and thus possessed no authority to arrest or fine him. Promising to continue his practice of physic medicine if released, Bonham was immediately jailed.

The case came before the Court of Common Pleas when Bonham claimed that his continued detention by the college amounted to **FALSE IMPRISONMENT**. As a defense, the college relied on its statute of incorporation, which authorized it to regulate all physicians in London and to punish practitioners not licensed by the college. The statute also entitled the college to one-half of all the fines imposed by it.

The Honorable Justice Coke, also a Cambridge graduate, sided with his fellow alumnus. After singing the praises of their alma mater, Coke argued that because the college censors were entitled to receive a portion of the fine they imposed on Bonham, the statute made them prosecutor, plaintiff, and judge in the dispute: "The censors cannot be judges, ministers and parties; judges . . . give sentence or judgment; ministers . . . make summons; and parties . . . have moiety [half] of the **FORFEITURE**, because no person may be a judge in his own cause . . . and one cannot be judge and attorney for any of the parties." Coke suggested that the impartiality of a judge is compromised when the judge is also the plaintiff who will benefit financially from any fines imposed on the defendant, or the prosecutor who is the advocate responsible for seeking such fines. Although the parliamentary statute in question clearly contemplated that London College would wear all three of these hats, Coke observed,

> [I]t appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of

Battle was another form of primitive trial that was thought to involve divine intervention on behalf of the righteous party. The combatants were armed with long staffs and leather shields, and fought savagely until one party cried, "Craven," or died.

Trial by battle, though in many ways as barbaric as trial by ordeal, foreshadowed modern trials in several ways. The combatants fought in an adversarial arena before robed judges who presided over the battle. The accused person was required to put on a defense, quite literally in the physical sense, against an opponent who was trying to prove the veracity of his or her claims. Some parties to a battle, particularly women, children, and older individuals, were entitled to hire stronger, more able champions to fight on their behalf. This last practice sheds light on the more recent phrase *hired guns,* which is sometimes used to describe U.S. trial attorneys.

William the Conqueror understood the importance of revenue, and that is where he began building the English empire. In 1086, William initiated the Domesday Survey, which

> Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.

Coke placed the judiciary in the middle of what was becoming a titanic struggle for power between Parliament and the ruler of England. Until the seventeenth century, the English monarchy enjoyed nearly absolute power over all political and legal matters that concerned the country as a whole. Despite the growing popularity and importance of Parliament during the fifteenth and sixteenth centuries, the monarchy's autocratic power, which King James I (1603–25) asserted was divine in origin, included the prerogative to enact laws without parliamentary consent.

By the close of the seventeenth century, however, the pendulum of power had swung in favor of Parliament. The Glorious Revolution of 1688 subordinated the power of the English Crown and judiciary to parliamentary sovereignty. In 1765, English jurist **SIR WILLIAM BLACKSTONE** described "the power of Parliament" to make laws in England as "absolute," "despotic," and "without control."

The American Revolution, which began eleven years after Blackstone's pronouncement of Parliament's unfettered power, was commenced in response to the coercive legislation passed in the colonies by what had become a despotic Parliament. **THOMAS JEFFERSON**, **JAMES MADISON**, and their contemporaries believed that a legislative despot was no better than a monarchical despot. In 1787, the U.S. Constitution established the judiciary as a check on the legislative and executive branches of government, a check that was foreshadowed by Coke's opinion in *Bonham's Case.*

James I was cognizant of the dangers *Bonham's Case* presented to his claims of divine royal prerogative. The king understood that the "common law," which *Bonham's Case* said controlled acts of Parliament, was really just a decision made by a court of law, or, more particularly, by a judge or panel of judges. James also understood that if the judiciary were allowed to assert the power to review acts of Parliament, it was only a short step away from passing judgment on actions taken by the Crown.

Accordingly, King James removed Coke from the Court of Common Pleas in 1613, appointing him chief justice of the King's Bench. This constituted a promotion in name only, since Coke was now under closer scrutiny by the Crown.

Much to the Crown's chagrin, Coke's replacement on the Court of Common Pleas, Sir Henry Hobart, expanded the concept of judicial review intimated by *Bonham's Case.* In *Day v. Savadge,* Hob. 84 (K.B. 1614), Hobart declared that "an act of parliament made against natural **EQUITY**, as to make a man judge in his own cause, is void in itself" (as quoted in *American General Insurance Co. v. FTC,* 589 F.2d 462 [9th Cir. 1979]). Where did the new chief justice derive the court's power to invalidate the laws of Parliament? Hobart said, "[B]y that liberty and authority that judges have over laws, especially . . . statute laws, according to reason and best convenience, to mould them to the truest and best use" (*Sheffield v. Ratcliff,* Hob. (K.B. 1615), as quoted in Plucknett 1926, 50).

Exasperated by such further attempts to limit his prerogative, James I dismissed Coke from the King's Bench, and ordered him to "correct" his decision in *Bonham's Case,* which had subsequently been published in England's case law reporter known as *The Reports.* Coke refused to accede to the king's demands.

The importance of Coke's opinion in *Bonham's Case* is sometimes downplayed by some scholars who point to England's later recognition of Parliament as the country's supreme sovereign entity. However, this criticism overlooks the indelible imprint left by *Bonham's Case* on U.S. law.

The American colonists were intimately familiar with the writings of Lord Coke. Coke's *Reports* first came to America on the *Mayflower,* and the Massachusetts General Court ordered two complete sets from England in 1647. Coke's opinion in *Bonham's Case* was among his most popular writings.

In *Paxton's Case of the Writ of Assistance,* Quincy 51 (Mass. 1761), colonist **JAMES OTIS** challenged Massachusetts's

*(continued)*

sought to determine the amount and value of property held in England, for the purpose of assessing taxes against the owners. The Domesday Survey was conducted by eight panels of royal commissioners who traveled to every county in the country, where they collected information through sworn inquests. Although the survey began as a method of recording real property held in the kingdom, one contemporary Saxon chronicler moaned "that there was not a single hide . . . nor . . . ox, cow or swine" omitted (Trevelyan 1982). The Court of Exchequer served as auditor, accountant, and tax collector for William, and provided a venue to settle disputes between the Crown and taxpayers, becoming the earliest **DEPARTMENT OF STATE.**

William's system for revenue collection began a process that gradually replaced the community courts of justice with a legal system that emanated from a central location, the king's castle in Westminster. One symbol of powerful centralized government in the United States is the **INTERNAL REVENUE SERVICE.** For many U.S. citizens, paying taxes is a necessary evil. Taxes are

## DR. BONHAM'S CASE (CONTINUED)

authority to issue writs of assistance, general search warrants that empowered local sheriffs to enter private homes and businesses to seize smuggled goods. Otis told the colonial court that he objected to such writs, which were created by a parliamentary act in 1662, because they violated the principle of *Bonham's Case:* "As to acts of parliament, an act against the Constitution is void. An act against natural equity is void; and if an act of parliament should be made in the very words of this petition, it would be void. The Executive Courts must pass such acts into disuse."

**JOHN ADAMS**, who was in the Boston courtroom where Otis made his argument for the colonial application of *Bonham's Case,* later exclaimed, "Then and there the child Independence was born." Adams might also have exclaimed that the seeds of judicial review had been planted in the American colonies by Otis, who was unequivocally assigning to "Executive Courts" the responsibility of invalidating parliamentary legislation that violated constitutional precepts.

Four years later, the colonies again relied on the principle of *Bonham's Case,* this time in their opposition to the **STAMP ACT**, a parliamentary statute that taxed everything from newspapers to playing cards. Thomas Hutchinson, lieutenant governor of Massachusetts, encouraged the "friends of liberty" and opponents of the Stamp Act to "take advantage of the **MAXIM** they find in Lord Coke that an act of parliament against Magna Carta or the peculiar rights of Englishmen is *ipso facto void.*"

In 1786, the Superior Court of Rhode Island relied on *Bonham's Case* to strike down a statute that denied the right to trial by jury for certain crimes, because "Lord Coke" held that such statutes were "repugnant and impossible" (*Trevett v. Weeden* [Newport Super. Ct. Judicature], as quoted in Plucknett 1926, 66).

The U.S. acceptance of the legal principles enunciated in *Bonham's Case* culminated in 1803 when the U.S. Supreme Court handed down its decision in *Marbury,* which established the power of judicial review by authorizing federal judges to invalidate unconstitutional laws enacted by the coordinate branches of government. Nowhere in *Marbury* does the Supreme Court cite *Bonham's Case* or expressly quote Lord Coke. But the influence of both Coke and his opinion cannot be missed.

Chief Justice **JOHN MARSHALL**, writing for a unanimous Court, began his opinion in *Marbury* with two premises: the "constitution controls any legislative act repugnant to it," and "an act of the legislature repugnant to the constitution is void." Congress cannot be entrusted to determine the constitutionality of legislation passed by the House and Senate, Marshall implied, for the same reason the London College censors could not be allowed to judge their own cause.

"To what purpose are the powers [of Congress] limited" by the federal Constitution, Marshall asked, "if these limits may, at any time, be passed by those intended to be restrained?" In a passage that harkens back to Chief Justice Hobart's opinion in *Sheffield v. Ratcliff,* Marshall concluded that only the judicial branch of government can be entrusted with such an overreaching power: "It is emphatically the duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret the rule. If two laws conflict with each other, the court must decide on the operation of each."

Although Chief Justice Marshall's opinion in *Marbury* extended to the United States the principles of judicial review first intimated in *Bonham's Case,* judges, lawyers, and laypersons still debate the legitimacy of allowing unelected (appointed) judges to invalidate legislation enacted by representative institutions in a democratic country.

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necessary to keep the government, and its justice system, afloat. At the same time, they take away individuals' money.

**HENRY II** (1154–89) further strengthened the central government by enlarging the power and jurisdiction of the royal system of justice. During his reign, any crime that breached the ruler's peace was tried before a royal court sitting in Westminster, or by royal itinerant justices who traveled to localities throughout England to hear disputes. Heretofore, the royal court heard only cases that directly threatened the monarch's physical or economic interests. Most other complaints, except for those heard by the Catholic Church, were leveled by private individuals, who were also responsible for proving their accusations. By increasing the sphere of what the government considered public wrongs, Henry II laid the groundwork for the modern U.S. criminal justice system, where attorneys for the federal, state, and local governments are invested with the authority to prosecute persons accused of criminal wrongdoing.

Henry II also laid the groundwork for the common-law method of deciding cases, whereby judges make decisions in accordance with other decisions they have rendered in similar matters. The royal system of justice was governed by a single set of legal rules and principles, which was applied evenhandedly to litigants presenting claims to the monarch's justices. This system superseded one that applied the often inconsistent customary laws of neighboring communities of different ethnic backgrounds. Because the monarch's law was applied in a uniform manner, it became "common" to every shire in the land. This "common-law" system of adjudication was adopted by the American colonies and continues to be applied in nearly all of the 50 states of the Union.

In addition to becoming more prevalent, the royal system of justice was becoming more popular. Its popularity stemmed from the rational legal procedures and reliable modes of evidence developed by the King's Court, which slowly supplanted their superstitious, ritualistic, and dangerous predecessors, compurgation, ordeal, and battle. One new rational procedure was trial by jury, which Henry II made available in land disputes between laypersons and the clergy. The juries comprised 12 sworn men who possessed some knowledge of the property dispute, and were asked to announce a verdict to the royal justices based on this knowledge. The trial-by-jury system employed by Henry II, though only an embryonic form, reflected society's growing understanding that verdicts based on personal knowledge of a dispute were more reliable than verdicts based on ordeals of freezing water and contests of brawn and agility.

Henry II also made the law more impersonal and less vindictive. In 1166, the Assize of Clarendon prohibited the prosecution of anyone who had not first been accused by a "presenting jury" of 12 to 16 men from the community in which the crime occurred. The presenting jury foreshadowed the modern **GRAND JURY** as an accusatory body that identified persons for prosecution but made no determination as to guilt or innocence. The presenting jury was seen as a more neutral and detached alternative to the system it replaced, which required the alleged victims, some of whom were waging a personal vendetta against the accused person, to identify alleged criminals for prosecution.

The writ *de odio et atia* provided additional safeguards for defendants wrongfully accused of criminal activity, by permitting the defendant to appeal legal issues to the King's Court in cases where the complainant was proceeding out of spite or hatred. This writ of appeal was an early precursor to the modern appellate system in the United States, which similarly permits parties to appeal legal issues they believe did not receive appropriate consideration at the trial level.

The presenting jury and writ of appeal underpin two beliefs that have been crucial to the development of the English and U.S. systems of justice. The first is the belief that a wrongfully accused person is no less a victim than is the target of civil or criminal malfeasance. The second is the belief that the legal system must provide an impartial forum for seeking the truth in disputed legal claims. These two beliefs paved the way for an assortment of procedural and evidentiary protections that have evolved to protect innocent persons from being unjustly convicted in criminal cases, and to keep prejudices from biasing judges and jurors in civil cases.

However, the English monarchy did not centralize its power without cost. Frequently, English rulers abused their enlarged power to such an extent that they met with popular resistance. One of the earliest such confrontations occurred in 1215, and produced the first great charter of constitutional liberties, the **MAGNA CHARTA**. The Magna Charta can best be understood as a peace treaty between three rival jurisdictions of political and legal power: the Crown, the church, and the barons.

In the thirteenth century, the king's system of justice competed for influence with ecclesiastical and manorial courts. The ecclesiastical courts were run by the Catholic Church, with the pope presiding as the spiritual head in Rome. Manorial courts were run by barons, who were powerful men holding large parcels of land from the king, known as manors. Each baron, as lord of his manor, retained jurisdiction over most legal matters arising among his tenants, also called vassals, who agreed to work on the land in exchange for shelter and security. The jurisdictions of the Crown, the church, and the barons overlapped and each depended on the others for support.

The tyranny of King John (1199–1216) alienated the church and the barons, converting them into adversaries of the Crown. John was excommunicated by the pope, church services and sacraments were suspended in England, and the barons renounced homage to the Crown.

*In 1215, King John approved the Magna Charta, which guaranteed fundamental liberties to the church and to individuals.*

CORBIS-BETTMANN

Spearheaded by Stephen Langton, archbishop of Canterbury, the barons confronted King John on the battlefield at Runnymede, where they won recognition for certain fundamental liberties contained in the 63 clauses that make up the Magna Charta.

The Magna Charta granted the church freedom from royal interference except in a limited number of circumstances, establishing in nascent form the separation of church and state. The Great Charter required that all fines bear some relationship to the seriousness of the offense for which they were imposed, establishing the principle of proportionality between punishment and crime, which the U.S. Supreme Court still applies under the CRUEL AND UNUSUAL PUNISHMENT Clause of the EIGHTH AMENDMENT to the U.S. Constitution.

Most important the Magna Charta prohibited any "free man" from being "imprisoned, or disseised, . . . or exiled, . . . except by the lawful judgment of his peers, or by the law of the land" (ch. 39). The phrase "law of the land" was later equated with "due process" in the American colonies and received constitutional recognition in the Fifth and Fourteenth Amendments to the U.S. Constitution. The Supreme Court has described DUE PROCESS as the "most comprehensive of liberties" guaranteed in the Constitution (ROCHIN V. CALIFORNIA, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 [1952]), and has relied on the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT to make most of the freedoms contained in the BILL OF RIGHTS applicable to the states.

Fifty years after Magna Charta, Parliament was created to serve as an additional check on the ARBITRARY power of the monarchy. In 1265, Parliament was a very small body, consisting of two knights from each shire, two citizens from each city, and two burgesses from each borough. By the fourteenth century, Parliament was being summoned to advise the monarch, vote on financial matters, and supervise the excesses of local officials. Representatives for the barons, later known collectively as the House of Lords, wielded more power than did representatives for the commoners, later known collectively as the House of Commons, who were summoned merely to assent to royal will.

It was not long, however, before the Commons realized that its approval carried a measure of authority. In 1309, the Commons granted a subsidy to King Edward II (1307–27) on condition that he redress its grievances. During the reign of Edward III (1327–77), Parliament asserted three claims that would be echoed with minor variation in the American colonies: taxes assessed without approval from both houses of Parliament were void, legislation passed by only one house of Parliament lacked legal effect, and the Commons reserved the right to investigate and remedy any abuses by the royal administration. A century later, during the reign of Henry VIII (1509–47), the Commons asserted the power of the purse, arguing that all money bills must originate in its house.

These claims, although fairly innocuous when originally asserted by the Commons, were interpreted by subsequent Parliaments to mean that no one could rule without the consent of Parliament, and royal officials who abused their power, including the ruler, could be impeached and removed from office. When the English civil war known as the War of the Roses (1455–85) substantially depleted the ranks of the barons, the voice of the Commons grew louder as the representatives of the commoners were left to fend almost for themselves against a monarchical power that, culminating in the reign of James I (1603–25), claimed to be divine in origin and absolute in nature.

The struggles between Parliament and the crown for authority over England in the seventeenth century were a prelude to the struggles between Parliament and the colonists for con-

trol over the American colonies in the eighteenth century. The monarchy maintained that its power to govern England derived directly from God and thus overrode any earthly power, including that of Parliament and common law. Parliament, on the other hand, maintained that "the people, under God, were the source of all just power, and that Parliament represented the people."

Parliament and the monarchy waged battle on three fronts: military, political, and legal. The military struggle for power began in 1642 when England again erupted into civil war. The political battles constituted a series of muscle-flexing exercises conducted by Parliament and the monarchy. The Commons impeached several of the king's top advisers and demanded redress of the grievances it summarized in the 1628 Petition of Right. The monarchy, in turn, dismissed Parliament on a number of occasions, and attempted to govern without requesting revenue from the Commons.

These political struggles came to a crescendo when King Charles I (1625–49) and Thomas Wentworth, the commander of the king's largest army, were tried, convicted, and executed for subverting Parliament and the **RULE OF LAW**. The indictment against the king reads much like the Declaration of Independence:

> Whereas it is notorious, That Charles Stuart, the now king of England, not content with those many encroachments which his predecessors had made upon the people in their rights and freedoms, hath had a wicked design totally to subvert the ancient and fundamental laws and liberties of this nation, and in their place to introduce an arbitrary and tyrannical government; and that besides all other evil ways and means to bring this design to pass, he hath prosecuted with fire and sword, levied and maintained a cruel war in the land against the parliament and kingdom, whereby the country hath been miserably wasted, the public treasure exhausted, trade decayed, thousands of people murdered, and infinite other mischiefs committed.During the sentencing phase of the trial, the president of the High Court of Justice instructed the king, in language that resonates through the U.S. Constitution, "[T]he Law is your Superior," and the only thing superior to the law is the "Parent or Author of Law, [which] is the people of England."

In 1689, Parliament achieved victory in its constitutional struggle with the monarchy when William and Mary (1689–1702) agreed to govern England as king and queen subject to a bill of rights. This English Bill of Rights, a forerunner to the U.S. Bill of Rights, which was submitted to Congress exactly one hundred years later, declares that the monarchy's "pretended power of suspending of laws or the execution of laws by regal authority without consent of Parliament is illegal." It also guarantees the right of each English subject to "petition the king" for redress of grievances, and acknowledges Parliament's role in "amending, strengthening, and preserving . . . the laws" of the country.

Although the English Bill of Rights ended England's seventeenth-century constitutional struggle between Parliament and the monarchy, America's eighteenth-century constitutional struggle with these two branches of government had not yet begun. By 1765, the pendulum of power had swung fully toward Parliament, prompting eminent English jurist **SIR WILLIAM BLACKSTONE** to write that "[s]o long as the English constitution lasts . . . the power of Parliament" is "absolute," "despotic," and "without control." Because England had no written constitution that constrained the legislative power of Parliament, "every act of Parliament was in a sense part of the [English] constitution, and all law . . . was thus constitutional."

The American colonists soon discovered that a legislative despot was just as tyrannical as a monarchical despot. The U.S. Constitution put an end to the notion of absolute power resting with any one sovereign, by separating the powers of government into three branches—executive, legislative, and judicial—and carefully delegating the powers of each. Although these safeguards against government-run-amok were the product of the violent American Revolution, they allowed for the tranquil and uneventful **INTEGRATION** of many ordinary English legal principles into the U.S. system of justice, including early **BANKRUPTCY** and **WELFARE** laws during the nineteenth century.

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**CROSS-REFERENCES**

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## ENGLISH-ONLY LAWS

*Laws that seek to establish English as the official language of the United States.*

The movement to make English the official language of the United States gained momentum at both the state and federal levels in the mid 1990s. In 1995 alone, more than five bills designating English as the official language of the United States were introduced in the U.S. Congress. In September 1995, Representative John T. Doolittle (R-Cal.) proposed an amendment to the U.S. Constitution that would establish English as the official language of the United States (H.R.J. Res. 109, 104th Cong., 1st Sess., 141 Cong. Rec. H9670-04 [1995]). The proposed amendment states, in part,

> The English language shall be the official language of the United States. As the official language, the English language shall be used for all public acts including every order, resolution, vote or election, and for all records and judicial proceedings of the Government of the United States and the governments of the several States.

Related legislation considered in the U.S. House of Representatives included the National Language Act of 1995 (H.R. 1005, 104th Cong., 1st Sess., 141 Cong. Rec. H1967-04 [1995]), introduced by Representative Peter T. King (R-N.Y.), and the Declaration of Official Language Act of 1995 (H.R. 739, 104th Cong., 1st Sess., 141 Cong. Rec. H889-02 [1995]), introduced by Representative Toby Roth (R-Wis.). Roth's bill would abolish section 203 of the **VOTING RIGHTS ACT OF 1965** (42 U.S.C.A. § 1973aa-1a), which requires bilingual ballots, and the federal Bilingual Education Office, which is funded through the Bilingual Education Act of 1968 (20 U.S.C.A. §§ 3281 et seq. [1988]). English-only advocates favor the elimination of these programs, arguing that earlier immigrants to the United States learned English without such government help.

In the U.S. Senate, Senator Richard C. Shelby (R-Ala.) introduced the Language of Government Act of 1995 (S. 356, 104th Cong., 1st Sess., 141 Cong. Rec. S2124-04 [1995]). This legislation states, in part,

> [I]n order to preserve unity in diversity, and to prevent division along linguistic lines, the United States should maintain a language common to all people; . . . the purpose of this Act is to help immigrants better assimilate and take full advantage of economic and occupational opportunities in the United States; . . . by learning the English language, immigrants will be empowered with the language skills and literacy necessary to become responsible citizens and productive workers in the United States.

By the end of 1995, more than 20 states had passed their own laws declaring English to be the official state language. Most state English-only laws have been established since the mid 1980s, although Louisiana's was enacted in 1812. Many of the laws are largely symbolic and lack an enforcement mechanism. For example, the California measure, CA Const. art. 3, § 6 (West), a state constitutional amendment approved in 1986, simply states,

> The Legislature and officials of the State of California shall take all steps necessary to insure that the role of English as the common language of the State of California is preserved and enhanced. The Legislature shall make no law which diminishes or ignores the role of English as the common language of the State of California.

Some versions of the proposed English Language Amendment would void almost all state and federal laws that require the government to provide services in languages other than English. The services affected would include health, edu-

cation and social WELFARE services, job training, translation assistance to crime victims and witnesses in court and administrative proceedings; voting assistance and ballots, drivers' licensing exams, and AIDS-prevention education. English-only laws apply primarily to government programs. However, such laws can also affect private businesses. For example, several Southern California cities have passed ordinances that forbid or restrict the use of foreign languages on private business signs. English-only advocates have opposed a telephone company's use of multilingual operators and multilingual directories, FEDERAL COMMUNICATIONS COMMISSION licensing of Spanish-language radio stations, and bilingual menus at fast food restaurants.

Those who oppose English-only laws point out that naturalization for U.S. citizenship does not require English literacy for people over 50, nor for those who have been in the U.S. for 20 years or more. Thus, there are many elderly immigrant citizens whose ability to read English is limited, and who cannot exercise their right to vote without bilingual ballots and other voter materials. Moreover, these advocates maintain that bilingual campaign materials and ballots foster a more informed electorate by increasing the information that is available to people who lack English proficiency.

Advocates of English-only legislation argue that having one official language will serve as a unifying force in the United States. They point to the findings of the 1990 census that 32 million U.S. citizens live in a non-English-speaking household and that of these, 14 million persons do not speak English very well. In a 1995 Labor Day address to the AMERICAN LEGION Convention in Indianapolis, printed in 141 Cong. Rec. E 1703-01 (1995), U.S. Republican presidential candidate and Senate Majority Leader BOB DOLE, of Kansas, echoed this unification theme, stating,

> [I]f we are to return this country to greatness, we must do more than restore America's defenses. We must return as a people to the original concept of what it means to be American. . . . For example, English must be recognized as America's official language. . . . Lacking the centuries-old, primal bonds of other nations, we have used our language, our history and our code of values to make the American experiment work. . . . These are the forces that have held us together—allowing us to . . . absorb untold millions of immigrants while coming the closest any country ever has to the classless, upwardly mobile society of our ideals.

**States That Enacted English-Only Laws, 2002**

**"English Only" States**

| | |
|---|---|
| Alabama (1990) | Mississippi (1987) |
| Alaska (1998) | Missouri (1998) |
| Arkansas (1987) | Montana (1995) |
| California (1986) | Nebraska (1920) |
| Colorado (1988) | New Hampshire (1995) |
| Florida (1988) | North Carolina (1987) |
| Georgia (1986 & 1996) | North Dakota (1987) |
| Hawaii (1978) | South Carolina (1987) |
| Illinois (1969) | South Dakota (1995) |
| Indiana (1984) | Tennessee (1984) |
| Iowa (2002) | Utah (2000) |
| Kentucky (1984) | Virginia (1981 & 1996) |
| Louisiana (1811) | Wyoming (1996) |
| Massachusettes (1975) | |

**Arizona's 1998 Official English Amendment was overturned by the Arizona State Supreme Court in 1998.**

SOURCE: U.S. English, Inc.

Members of U.S. English, an advocacy group founded in 1983, claim that English should be the primary, but not exclusive, language of government. They believe that all official documents and proceedings should be in English, but would make exceptions for the use of other languages in such places as hospitals, emergency rooms, police stations, and tourist sites. Actually, a 1995 study of government print communications, conducted by the GENERAL ACCOUNTING OFFICE, found that only a small percentage were in a language other than English. The study, requested by advocates of English as the official language of the government, examined titles released by the GOVERNMENT PRINTING OFFICE and an agency of the U.S. COMMERCE DEPARTMENT over a five-year period. Of approximately 400,000 titles examined, only 265, or less than 0.06 percent, were in a foreign language. The study excluded foreign language communications issued by the DEPARTMENT OF STATE and the DEPARTMENT OF DEFENSE, which most English-only advocates consider to be a legitimate use of languages other than English.

Critics argue that English-only laws are a hostile reaction to the ongoing influx of immigrants to the United States. In a September 1995 address to the Congressional Hispanic Caucus, President BILL CLINTON attacked the English-only movement, stating,

> Of course English is the language of the United States. . . . That is not the issue. The issue is whether children who come here, while they are learning English, should also be able to learn other things. The issue is whether American citizens who work hard and pay taxes and who haven't been able to master English yet should be able to vote like other citizens.

In May 1995, Governor Parris N. Glendening, of Maryland, vetoed a bill passed by the state legislature that would have made English the official language of state government. He said the legislation's anti-immigrant sentiment would divide the state's citizens. In Arizona, critics of a constitutional provision making English the official language sued the state, the governor, and other state officials to stop its enforcement.

In *Yniguez v. Arizonans for Official English,* 69 F.3d 920 (1995), the U.S. Court of Appeals for the Ninth Circuit upheld a lower court's ruling that the provision, which bars state and local employees from using any language other than English in performing official duties, violates free speech rights and that it is unconstitutionally overbroad. This ruling was later overturned, *Arizonans for Official English v. Arizona,* 520 U.S. 43, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997). The case began in October 1987, when an organization called Arizonans for Official English began a petition drive to amend the Arizona Constitution to prohibit the government's use of languages other than English. The drive resulted in the 1988 passage of Article XXVIII of the Arizona Constitution, titled English as the Official Language. Article XXVIII provides that English is the official language of the state of Arizona, and that the state and its political subdivisions—including all government officials and employees performing government business—must act only in English.

When the article was passed, Maria-Kelley Yniguez, a Latina, was employed by the Arizona Department of Administration, where she handled MEDICAL MALPRACTICE claims. She was bilingual in Spanish and English and communicated in Spanish with Spanish-speaking claimants and in a combination of English and Spanish with bilingual claimants. Because state employees who fail to obey the Arizona Constitution are subject to employment sanctions, Yniguez stopped speaking Spanish on the job immediately upon passage of Article XXVIII, because she feared that she would be disciplined. In November 1988, Yniguez filed an action against the state of Arizona and various state officials, including the governor and the attorney general, in federal district court. She sought an INJUNCTION against state enforcement of Article XXVIII and a declaration that the provision violated the First and Fourteenth Amendments to the U.S. Constitution, as well as federal CIVIL RIGHTS laws. The district court interpreted the provision as barring state officers and employees from using any language other than English in performing their official duties, except with certain limited exceptions, and ruled that it infringed on constitutionally protected speech in violation of the FIRST AMENDMENT.

Arizona voters passed an English-only law as an Amendment to the Arizona Constitution adopted through a petition drive that culminated in a general election in November 1988. The Amendment provides that English was the official language of the State of Arizona, and that the State and its political subdivisions must "act" only in English. In April 1998, the Arizona Supreme Court held that the amendment violated the First Amendment to the U.S. Constitution in that it adversely impacted the constitutional rights of non-English speaking persons regarding access to their government, and that it limited political speech of elected officials and public employees. The court also held that the amendment violates the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT to the United States Constitution in that it unduly burdens core First Amendment rights of a specific class without materially advancing a legitimate STATE INTEREST. Plaintiffs in the case were four elected officials, five state employees, and one public school teacher. All plaintiffs are bilingual and regularly communicated in both Spanish and English as private citizens and during the performance of government business. The court noted that although 21 states and 40 municipalities have official English statutes, most of those provisions are substantially less encompassing and less proscriptive than Arizona's Amendment. In mid January 1998, the U.S. Supreme Court denied review of the case, then known as *Ruiz v. Hull,* 191 Ariz. 441, 957 P.2d 984 (1998).

Utah became the twenty-sixth state to declare English as its official language, in November of 2000, when voters approved a measure that lawmakers had failed to pass on three previous occasions. That law provided for several exceptions, allowing languages other than English, for example, when required by law,

for public health and safety, and in public education. Concerned that the measure would be read generally to prohibit the government and the people from communicating in any language other than English, the AMERICAN CIVIL LIBERTIES UNION of Utah filed a suit on behalf of elected and appointed officials, government employees, nonprofit organizations, and an individual plaintiff challenging the constitutionality of the initiative. After a trial in January 2001, the Utah district court issued a 15-page ruling that dramatically limited the law. According to the court, in order to pass constitutional muster, the law cannot be read to prohibit government employees and elected officials from communicating in languages other than English. Similarly, the court concluded that the law's exceptions must be broadly construed to permit the government to provide essential services, including driver's license exams, in languages other than English.

On April 24, 2001, the U.S. Supreme Court, by a 5–4 vote, rejected a legal challenge to Alabama's Official ENGLISH LAW, which was a tremendous victory for Official English. In *Sandoval v. Alexander* 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (U.S., Apr 24, 2001) (NO. 99-1908), Sandoval claimed that because it was a recipient of federal financial assistance, the Alabama Department of Public Safety was subject to Title VI of the CIVIL RIGHTS ACT OF 1964. Since Section 601 of Title VI prohibits discrimination based on race, color, or national origin, Sandoval brought a CLASS ACTION suit to enjoin the department from administering state driver's license examinations only in English. Sandoval argued that the English-only policy violated the DOJ regulation because it had the effect of subjecting non-English speakers to discrimination based on their national origin. The Court disagreed and ruled that there was no private right to sue the state under the federal antidiscrimination law. The majority, led by Justice ANTONIN SCALIA, held that private citizens were never authorized to sue under the title's disparate-impact regulations. The Court declared that Congress only prohibited intentional discrimination when it wrote Title VI, but left it up to the federal government to apply the discrimination ban to practices that have unintended discriminatory effects. Thus, unless Sandoval could prove that the Alabama driver's test intentionally discriminated against her, she had no grounds to sue the state.

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## ENGROSS

*To print a final copy of a document. In archaic* CRIMINAL LAW*, engrossment was the process of forcing higher the price of a good by buying it up and creating a* MONOPOLY.

Engrossment was used in ancient law where the method of drawing up a written deed or contract involved working out a rough draft and then having the final terms of the instrument copied legibly onto parchment paper. Today the term denotes modern forms of copying, including engraving or any other such form of printing that will provide a legible final copy.

Engrossment is also used to describe a step in the enactment of statutes. During the legislative process, a bill may be debated, read, altered, or amended until it is ultimately passed in a final form. The process of engrossing is the printing of an act in its final form and its enrollment.

## ENGROSSED BILL

*A legislative proposal that has been prepared in a final form for its submission to a vote of the lawmaking body after it has undergone discussion and been approved by the appropriate committees.*

## ENHANCEMENT

*Increase in value; improvement.*

Enhancement is generally used to mean an increase in the market value of property that is the result of an improvement.

The enhancement of a criminal penalty means the increase of punishment, such as by increasing a jail sentence. This type of enhancement might be affected when the criminal's motive is found to be particularly depraved.

## ENJOIN

*To direct, require, command, or admonish.*

Enjoin connotes a degree of urgency, as when a court enjoins one party in a lawsuit by

ordering the person to do, or refrain from doing, something to prevent permanent loss to the other party or parties. This type of order is known as an INJUNCTION.

## ENJOYMENT

*The exercise of a right; the possession and fruition of a right or privilege. Comfort, consolation, contentment, ease, happiness, pleasure, and satisfaction. Such includes the beneficial use, interest, and purpose to which property may be put, and implies right to profits and income therefrom.*

## ENOCH ARDEN DOCTRINE

The Enoch Arden doctrine consists of the legal principles involved when a person leaves his or her spouse under such circumstances and for such a period of time as to make the other spouse believe that the first spouse is dead, with the result that the remaining spouse marries another, only to discover later the return of the first spouse. Generally, in most states, it is safer for the remaining spouse to secure a DIVORCE before marrying again.

The Enoch Arden doctrine is named from the title of the famous poem of Alfred, Lord Tennyson, which recounted the story of a sailor who after being shipwrecked for ten years returned home to discover that his wife remarried. The sailor, however, refused to disrupt the remarriage. Jurisdictions recognized the need to deal with Enoch Arden marriages since, traditionally, a person can lawfully be married to only one spouse at a time. In an Enoch Arden situation, the spouse who has remarried does so based upon the GOOD FAITH belief that the absent spouse is dead. Nevertheless, he or she could be legally charged with, and prosecuted for, bigamy. Under both canon and COMMON LAW, the remarriage was regarded as void ab initio and any children born of it were considered illegitimate. In some jurisdictions, the spouse who remarried could also be sued by the new spouse for ANNULMENT or divorce on the ground of bigamy. These harsh results led state courts and legislatures to resolve such cases.

Many jurisdictions passed statutes based upon one enacted in 1603 during the reign of King James I of England, which barred the conviction of a spouse on bigamy charges if he or she remarried seven years after the absent spouse disappeared without any knowledge that the absent spouse was alive. Such statutes transformed the probability of the death of the absent spouse into a legal certainty. States subsequently liberalized the original statute by permitting remarriage after a five-year period as opposed to a seven-year period.

Such statutes do not, however, endow the remarriage with legal status if the absent spouse is alive. Additional legislation was necessary to provide a means for legal recognition of the remarriage. A spouse who plans to remarry can commence an action for divorce based upon desertion, if he or she can establish that the absent spouse intended not to resume their marital relationship and willingly left home without justification for the requisite time period.

The facts of many Enoch Arden cases do not establish desertion, however. Legislatures have taken a variety of approaches to solve this difficulty. Some statutes provide for the judicial dissolution of a marriage, provided a spouse has been absent for five consecutive years without any knowledge that he or she is alive, the spouse who commences the dissolution proceeding believes that the absent spouse is dead, and a diligent search was undertaken but there was no evidence that the absent spouse is alive. A spouse must obtain a dissolution of the marriage by the court before he or she can legally remarry or else the remarriage will be void as a bigamous marriage. Statutes usually require the spouse who initiates the proceedings to place a notice for a specified time in a newspaper judicially regarded as most likely to give notice to the absent spouse. Such SERVICE OF PROCESS by publication satisfies the constitutional requirements of DUE PROCESS OF LAW in regard to the dissolution of the marriage, but it does not necessarily affect property or other rights.

Another statutory approach involves a court inquiry made when the spouse planning to remarry applies for a marriage license. The absent spouse receives notice by publication, and the outcome of the proceeding is a court finding of the death of the absentee, provided a diligent search was conducted. Although such a procedure recognizes the common-law presumption of death after seven years' unexplained absence, it permits a finding of death where the absence has been for a shorter time. Once the court makes a finding that the absent spouse is dead, the appropriate agency can issue a marriage license to the applicant and the remarriage is and remains valid, even if the absent spouse returns.

Other jurisdictions dispense with the requirement of legal proceedings and recognize the validity of a remarriage when the spouse is absent and there is no knowledge that he or she is alive for a statutory time period. A few states modify this general rule by either refusing to treat the remarriage as valid if the absent spouse and his or her survivor agreed to separate or if the survivor has not made reasonable inquiries to locate the missing person.

CROSS-REFERENCES

Marriage.

## ENROLLED BILL

*The final copy of a bill or joint resolution that has passed both houses of a legislature and is ready for signature. In legislative practice, a bill that has been duly introduced, finally passed by both houses, signed by the proper officers of each, approved by the governor (or president), and filed by the* SECRETARY OF STATE.

Under the enrolled bill rule, once an election for the adoption of a statute is held, the procedural method by which the measure was placed on the ballot cannot be challenged with a lawsuit since judicial inquiry into legislative procedure is barred as an intrusion into the internal affairs of the lawmaking body. In addition, this rule enhances the stability of statutory enactments. Citizens can reasonably rely on the legality of filed enactments. As a result, an enrolled bill is the most authoritative source of statutory law in a jurisdiction.

## ENTAIL

*To abridge, settle, or limit succession to real property. An estate whose succession is limited to certain people rather than being passed to all heirs.*

In real property, a fee tail is the conveyance of land subject to certain limitations or restrictions, namely, that it may only descend to certain specified heirs.

## ENTER

*To form a constituent part; to become a part or partaker; to penetrate; share or mix with, as tin* enters *into the composition of pewter. To go or come into a place or condition; to make or effect an entrance; to cause to go into or be received into.*

*In the law of real property, to go upon land for the purpose of taking possession of it. In strict usage, the entering is preliminary to the taking possession but in common parlance the entry is now merged in the taking possession.*

*To place anything before a court, or upon or among the records, in a formal and regular manner, and usually in writing as in to* enter an appearance, *or to* enter a judgment. *In this sense the word is nearly equivalent to setting down formally in writing, in either a full or abridged form.*

## ENTERTAINMENT LAW

*The areas of law governing professionals and businesses in the entertainment industry, particularly contracts and* INTELLECTUAL PROPERTY*; more particularly, certain legal traditions and aspects of these areas of law that are unique to the entertainment industry.*

The entertainment industry includes the fields of theater, film, fine art, dance, opera, music, literary publishing, television, and radio. These fields share a common mission of selling or otherwise profiting from creative works or services provided by writers, songwriters, musicians, and other artists.

### Contracts

The entertainment industry exists in a state of economic uncertainty. Entertainment companies continually form, merge, re-form, and dissolve. Furthermore, consumer tastes in artistic products can change quickly, thrusting certain artists or artistic movements to the heights of popularity and reducing others to obscurity. Because of this instability, the entertainment industry relies on complex contracts, which usually are drafted to protect entertainment companies against economic risk.

**Personal Service Agreements** The PERSONAL SERVICE agreement is a primary legal instrument in the entertainment industry. It is negotiated between an artist and a company that manufactures, promotes, and distributes the artist's goods or services. The agreement often binds the artist to produce for one company for a certain period of time. Personal service agreements are often governed by statutes and are often the subject of litigation because they restrict the rights of artists to perform or create for any entity except for the company with whom they have contracted.

Artists generally do not have the resources necessary to manufacture, market, and distribute their goods or services. Instead, they must find an appropriate entertainment company to do so. Entertainment producers (e.g., book publishers,

# The Fiduciary Duty of Entertainment Attorneys: Joel v. Grubman

An attorney has a duty to act solely in the client's best interests, to disclose any potential conflict of interest, and to withdraw if a conflict would impair the attorney's ability to represent the client. In 1992 pop singer Billy Joel sued his former attorney Allen J. Grubman and Grubman's law firm for $90 million, claiming that Grubman had committed **FRAUD** and breach of contract. The suit alleged that while representing Joel throughout the 1980s, Grubman had defrauded the singer out of millions of dollars by negotiating secret deals with Joel's manager, Francis Weber, and by allowing Weber to control the law firm's representation, often in direct conflict with Joel's best interests. Joel claimed that if the firm had notified him of Weber's actions, Joel could have prevented millions of dollars in losses to his manager. The singer claimed that the law firm was concerned primarily with enhancing its own reputation by keeping him on its client roster, and did not want to risk losing Joel as a client by angering Weber.

Joel also alleged that Grubman failed to disclose that the law firm represented Joel's label, Sony Music, and that such representation was an inherent conflict of interest that biased Grubman's judgment during contract negotiations.

The law firm claimed that it had done nothing illegal or unethical in its representation of Joel, and stated that it was hired by Joel only to negotiate contracts, not to monitor the business ventures of Joel's manager. Furthermore, the firm claimed that Joel had earned millions of dollars as a result of his recording contract, proof that its advice to him during negotiations with the label were not affected by the firm's relationship with Sony.

The case sent shock waves through the entertainment industry, where it is not uncommon for attorneys to represent both sides of a contract negotiation, or at least have ongoing client relationships with both sides, and it is also not uncommon for an attorney to respect the decisions of an artist's manager even though the attorney's client is the artist. Joel and Grubman settled the case without disclosing the terms of settlement.

**CROSS-REFERENCES**

Attorney Misconduct; Conflict of Interest.

record companies, movie studios, and theaters) often invest large amounts of time and money in promoting and selling artists' talents or products to consumers. Most artists will fail to earn a profit for their producer. A few, however, will earn enormous sums. To ensure that artists who generate a profit will remain with the company, producers use personal service agreements to bind artists for a certain time, during which the producers attempt to recover their investment in the artist, make a profit, and cover losses from less successful artists.

In some entertainment industries, personal service agreements are structured using options. Options give a producer the right to extend an agreement for several time periods. For example, a record company may contract with a musician to provide one album during the first year of the agreement, with an option to extend the contract. After one year, if the record company feels that it would be economically wise to release a second album by the musician, the record company may exercise its option and require the musician to provide the second album. Under option contracts such as this, producers can keep artists on their roster for many years, or as long as the artists remain profitable.

Some option contracts can be disastrous for the artist. For example, musicians sometimes sign an option agreement without a provision that they may break the agreement if the record company fails to release their works. Many recording artists have been held in professional limbo by record companies that refuse to release their music and also refuse to allow them to record for another company. This practice, known as shelving, is used by some record companies to prevent economically risky artists

from becoming valuable assets to other record companies.

Other entertainment industries use short-term personal service agreements rather than option agreements. For example, film studios often contract with actors, directors, screenwriters, and other creative artists on a one-film basis. Short-term agreements allow studios to avoid paying guaranteed fees to artists whose market might dissipate overnight. In the early days of the film industry, studios bound stars to long-term agreements. That system changed in the 1940s, when certain stars demanded fees that were higher than studios were willing to pay. Those stars then demanded, and received, one-film contracts for their services, which became the standard. The television industry, on the other hand, still uses long-term agreements for its talent in many areas.

Litigation over personal service agreements is common in the entertainment industry. Often, an artist who is relatively unknown is willing to enter into an agreement that drastically favors the company with which he or she is signing. Once the artist achieves success and sees the profits that the company is making from his or her services, the artist may demand higher fees or ROYALTIES, or to be released from the contract. Conflicts such as this often end up in court, where companies often demand that the court order that the artist not perform for anyone else while the contract is in dispute. (This type of order is known as a negative injunction.) Whether the contract will be enforced and the artist required to perform under the agreement is usually determined by whether the contract meets certain legal requirements based on the state laws that govern it.

**Contract for Rights** Another primary type of contract in the entertainment industry is the contract for rights. This contract often involves a transfer of COPYRIGHT ownership or a license to use certain creative property (e.g., a song or photo).

Many times, a contract for rights is combined with a personal service agreement. The agreement often will state that any work created by the artist during the term of the agreement is considered a work for hire. The company with whom the artist has contracted often receives automatic ownership of the copyright to a work for hire. For a work for hire to exist, the artist must either be an employee of the company or create the work pursuant to a valid written agreement—and even then, the work must fall within a few specific categories defined by copyright law.

*Most artists, such as musician Bob Dylan, do not have the resources to produce, manufacture, market, and distribute their own works. As a result, they make contracts with entertainment companies to promote and sell their work to consumers.*

AP/WIDE WORLD PHOTOS

A license is a contract through which the artist or copyright holder grants certain rights to another party and promises not to sue them for certain activities. For instance, a novelist might grant a license to a film studio to create a screenplay based on a novel. A license specifies the fee or royalty to be paid to the artist, the exact scope of use of the copyrighted material, and the time period for which the company may use the material, as well as any other conditions that the parties agree to attach to the license.

### Unique Aspects of Entertainment Industry Contracts

**Complex Royalty and Payment Provisions** Because entertainment companies often risk large losses, the contracts they use often contain clauses that artists may consider to be unnecessarily complex or one-sided. For example, film studios often base payments to talent in part on net profits. The calculations that are necessary to determine net profits, as defined in a typical contract, can be mystifying to those who represent the talent. A screenwriter or an actor who receives bonuses or royalties on net profits might be paid little or nothing on a film that has earned hundreds of millions of dollars but is still showing a loss according to the net-profits calculation. Net-profits clauses have resulted in several high-profile lawsuits, including *Buchwald v.*

*Paramount Pictures Corp.* (13 U.S.P.Q.2d [BNA] 1497 [Cal. Super. Ct. 1990]), *Garrison v. Warner Bros., Inc.* (No. CV 95-8328 [C.D. Cal. filed Nov. 17, 1995]), and *Batfilm Productions, Inc. v. Warner Bros.* (Nos. B.C. 051653 & B.C 051654 [Cal. Super. Ct. Mar. 14, 1994]).

Record companies also use complex contractual formulas to determine royalty payments to their artists. Companies typically offer seemingly large royalty percentages to artists. Various clauses in the recording agreements then are used to reduce the royalty percentages, reduce the number of units on which royalties are paid, and delay payment for many months. Although a few small record companies have made some effort to simplify the structure of recording agreements, the major record companies and their smaller affiliates have fought to maintain the more complex, formula-based agreements.

**Advances** Many entertainment contracts are structured with advances. Advances are payments made to an artist before any actual income is received by the company that manufactures or delivers the artist's products or services. For example, an author might receive an advance of $50,000 when a manuscript is approved by the publisher. This advance is normally nonrefundable, even if the publisher never earns money from the publication of the author's work. However, the publisher will keep any royalties that would have been payable to the author, until the author's advance and other expenses have been recouped by the publisher.

**Contracts with Minors** Contract law in many states requires that specific steps be taken in, or clauses added to, a contract with a minor, to ensure that the contract is valid. Often, companies will require that the minor's parents execute a valid release, under which they guarantee the services of the child and agree to be held liable for damages if the child fails to perform under the terms of the contract.

**Contracts with Intermediaries** Successful artists are surrounded by many individuals who are responsible for enhancing and protecting their career. Unknown artists use the services of such intermediaries to help them become known to more powerful figures in the entertainment industry. Intermediaries have various names and functions, but all serve to promote an artist's visibility and success in the industry. For this service, they generally take a percentage of an artist's earnings or a portion of the artist's property rights in the artist's creations.

**Agents** Agents are individuals who procure employment and other opportunities for artists. In film production, agents find actors roles or pitch screenwriters' works to studios, producers, and actors. In music production, agents procure live engagements for musicians. In book publishing, agents attempt to secure publishing agreements for authors. For their services, agents often receive between five and 25 percent of an artist's revenues that are obtained through the agents' efforts. Agents nearly always require an artist to use only their services, while they usually serve many artists. Agents are strictly regulated in some states, especially states with large and successful entertainment enterprises. Agents have become powerful figures in the entertainment industry.

**Personal Managers** Personal managers are individuals who guide various aspects of an artist's career. In the early stages of an artist's career, the manager might act as agent, publicist, contract negotiator, and emotional counselor. As an artist gains in stature and income, the personal manager's primary tasks are to choose and to direct specialists to handle various aspects of the artist's career. For these services, personal managers often receive 10 to 20 percent of an artist's income from all sources.

**Attorneys** Attorneys in the entertainment industry perform many standard legal functions such as conducting litigation, giving business advice, protecting intellectual property, and negotiating contracts. Entertainment attorneys also serve as industry intermediaries, promoting their clients in order to procure contracts for the artists' products and services. For these services, entertainment attorneys are paid either an hourly fee or a percentage of an artist's income.

Entertainment attorneys often face difficult conflicts of interest. For example, an attorney who has represented a record company is often pursued by a recording artist to shop the artist's material to that company. The artist knows that the company will often trust the attorney's opinion of the artist's marketability, which gives the artist a better chance of obtaining a recording contract. The attorney, however, is often privy to confidential information about the record company, or still represents the company in related negotiations. Attorneys and artists have been involved in several high-profile disputes because of such conflicts of interest.

### Intellectual Property

The entertainment industry's primary product is intellectual property, protected by copyrights, TRADEMARKS, and the right of publicity. A majority of the terms in entertainment contracts concern the ownership and use of this property.

Songs, plays, films, works of fine art, books, and even some choreographed works are copyrightable. The contractual terms that define the ownership and use of these works are often negotiated for months, with both the artist and the entertainment company vying for as much control of the intellectual property as possible.

U.S. copyright law contains provisions that are specifically directed at the entertainment industry. For example, the songwriter—or the copyright holder, if the songwriter has transferred the song's copyright or created the song as a work for hire—decides who can first record a song for publication. However, once the song has been recorded and published, the copyright holder may no longer limit who may record the song. If a song's copyright owner has previously granted permission to someone to record a song, or if the songwriter has recorded and commercially released a recording of the song, the copyright holder is required by copyright law to grant a license to anyone else who wants to record that song. This is called a compulsory license. A licensee who records a song under a compulsory license is required to follow strict statutory guidelines for notification of its use and reporting sales and royalties to the copyright holder. The fee for a compulsory license is set by Congress at a few cents per recording manufactured and is adjusted for inflation every few years.

A separate copyright exists in each legally recorded version of a song. Therefore, when a musician records a song after receiving the appropriate license from the owner of the song's copyright, that musician owns a separate copyright in the recorded version of the song.

Copyright law also directly addresses the unique needs of dance, theater, and other performing arts. A creator of choreography may claim a copyright for that choreography once it has been fixed in a tangible form, such as on a video recording. The choreography then may be used only with the permission of the copyright holder.

One key aspect of copyright law as applied to the entertainment industry is that of derivative works. A copyright holder initially controls who may create a work based on the artist's original work. For instance, a film studio generally may create a screenplay based on a novel only with the novelist's, or other copyright holder's, written permission. This control is critical to authors and screenwriters, whose works can be adapted to several other media—films and sequels, television series and movies, audiotapes, toys, games, T-shirts, and other products derived from the work. An author can forgo millions of dollars of potential income simply by allowing a publisher to own and control the rights to create and license any such derivative works based on the author's work.

Entertainment company names, band names, performers' pseudonyms, and, more rarely, performers' legal names, can be protected under U.S. TRADEMARK LAWS. Like other businesses, entertainment entities have an interest in preventing others from using names that are so similar to theirs as to cause confusion among consumers as to exactly who is delivering certain products or services. Therefore, many entertainment entities register their names with the U.S. PATENT AND TRADEMARK OFFICE and claim the exclusive right to use their names. In most cases, such names will be registered as service marks, rather than as trademarks. For instance, bands who register their band name as a TRADEMARK typically will register for performance of entertainment services. Once an entity receives a registration from the U.S. Patent and Trademark Office, no other entity may use the name, or a confusingly similar name, to provide services similar to those provided by the registrant.

Use and ownership of trademarks by members of a band or other entertainment company can be a source of great controversy when the entity dissolves. If, prior to dissolution, the owners or members of the entity have not agreed as to who may use the trademark after dissolution, lengthy legal battles can result as different members or factions try to use, and prevent the other members from using, the trademark.

### Electronic Copyright

A new format known as MP3 (Motion Picture Experts Group-1 Audio Layer 3), which can compress and store high-quality, digital music in one-tenth of the space in which a CD can store

it, has recently caused considerable legal ramifications in the entertainment industry. Access to this digitized music is widespread and growing rapidly. Electronic distribution and the digitization of music has the potential to radically reduce royalties to artists.

**Napster** In early 1999, Shawn Fanning, who was only 18 at the time, began to develop an idea as he talked with friends about the difficulties of finding the kind of MP3 files they were interested in. He thought that there should be a way to create a program that combined three key functions into one. These functions included a search engine, file sharing, (i.e., the ability to trade MP3 files directly, without having to use a centralized server for storage) and an INTERNET Relay Chat (IRC), which was a means to find and chat with other MP3 users while online. Fanning spent several months writing the code that would become the utility later known world-wide as Napster. Napster became a nonprofit on-line music-trading program that became especially popular among college students, who typically had access to high-speed Internet connections.

In April 2000, the heavy metal rock group Metallica sued Napster for copyright infringement. Several universities were also named in this suit. Metallica claimed that these universities violated Metallica's music copyrights by permitting their students to access Napster and to illegally trade songs using university servers. A number of universities already had banned Napster prior to April 2000 because of concerns about potential copyright infringement and/or because traffic on the Internet was slowing university servers down. Yale University, which was named in the suit, immediately blocked student access to Napster.

Metallica argued that Napster facilitated illegal use of digital audio devices, which they alleged was a violation of the RACKETEERING Influenced and Corrupt Organizations (RICO) act. Napster responded that copying a song from a CD to a personal computer—when that CD was lawfully purchased—is a reasonable use of the copyrighted material according to the fair use doctrine. They argued further that if this file happens to be accessible on the Internet, then others can access or download it without being guilty of a crime, or civilly liable for copyright infringement. Napster further claimed that since it made no profit from the trades, it owed no money in royalties. Among other things, when courts determine whether fair use has occurred, they assess how much of the copyrighted material was used and the economic effect this use has on the copyright owner. The U.S. Court of Appeals for the Ninth Circuit held that Napster's operation constituted copyright infringement.

### Personal Rights

A successful artist's name and image can become valuable commodities. Use of the artist's name and likeness by another party can infringe on rights held by the artist. The legitimacy of such uses is often unclear and is based on several areas of law that overlap and sometimes contradict each other, such as right to privacy, right to publicity, UNFAIR COMPETITION, DEFAMATION, and FIRST AMENDMENT law.

Concerns about long-term contracts and record labels taking advantage of rock stars have caused major stars to lobby Congress. Don Henley, Sheryl Crow and Alanis Morissette have spoken before Congress on the need for rock stars to represent their own interests, without so much interference or control from record companies. Singer-songwriter Don Henley, co-founder of the Recording Artists Coalition, which represents dozens of stars, including Eric Clapton, Joni Mitchell, Q-Tip, and Peggy Lee, said of the movement, "Record companies have been screwing artists for ages. It's time we organize and fight back. We've got our own trade group now. We're going to Washington."

FURTHER READINGS

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CROSS-REFERENCES

Art Law.

## ENTICE

*To wrongfully solicit, persuade, procure, allure, attract, draw by blandishment, coax, or seduce. To lure, induce, tempt, incite, or persuade a person to do a thing. Enticement of a child is inviting, persuading, or attempting to persuade a child to enter any vehicle, building, room, or secluded place with intent to commit an unlawful sexual act upon or with the person of said child.*

## ENTIRETY

*The whole, in contradistinction to a moiety or part only. When land is conveyed to* HUSBAND AND WIFE*, they do not take by moieties, but both are seised of the* entirety. *Parceners, on the other hand, have not an* entirety *of interest, but each is properly entitled to the whole of a distinct moiety.*

The word is also used to designate that which the law considers as one whole, and not capable of being divided into parts. Thus, a judgment, it is held, is an *entirety,* and, if void as to one of the two defendants, cannot be valid as to the other. Also, if a contract is an *entirety,* no part of the consideration is due until the whole has been performed.

## ENTITLEMENT

*An individual's right to receive a value or benefit provided by law.*

Commonly recognized entitlements are benefits, such as those provided by SOCIAL SECURITY or WORKERS' COMPENSATION.

## ENTITY

*A real being; existence. An organization or being that possesses separate existence for tax purposes. Examples would be corporations, partnerships, estates, and trusts. The accounting entity for which accounting statements are prepared may not be the same as the entity defined by law.*

Entity *includes corporation and foreign corporation; not-for-profit corporation; profit and not-for-profit unincorporated association;* BUSINESS TRUST*, estate, partnership, trust, and two or more persons having a joint or common economic interest; and state, U.S., and foreign governments.*

*An existence apart, such as a corporation in relation to its stockholders.*

*Entity includes person, estate, trust, governmental unit.*

## ENTRAPMENT

*The act of government agents or officials that induces a person to commit a crime he or she is not previously disposed to commit.*

Entrapment is a defense to criminal charges when it is established that the agent or official originated the idea of the crime and induced the accused to engage in it. If the crime was promoted by a private person who has no connection to the government, it is not entrapment. A person induced by a friend to sell drugs has no legal excuse when police are informed that the person has agreed to make the sale.

The rationale underlying the defense is to deter law enforcement officers from engaging in reprehensible conduct by inducing persons not disposed to commit crimes to engage in criminal activity. In their efforts to obtain evidence and combat crime, however, officers are permitted to use some deception. For example, an officer may pretend to be a drug addict in order to apprehend a person suspected of selling drugs. On the other hand, an officer cannot use chicanery or FRAUD to lure a person to commit a crime the person is not previously willing to commit. Generally, the defense is not available if the officer merely created an opportunity for the commission of the crime by a person already planning or willing to commit it.

The defense of entrapment frequently arises when crimes are committed against willing victims. It is likely to be asserted to counter such charges as illegal sales of liquor or narcotics, BRIBERY, SEX OFFENSES, and gambling. Persons who commit these types of crimes are most easily apprehended when officers disguise themselves as willing victims.

Most states require a defendant who raises the defense of entrapment to prove he or she did not have a previous intent to commit the crime. Courts determine whether a defendant had a predisposition to commit a crime by examining the person's behavior prior to the commission of the crime and by inquiring into the person's past criminal record if one exists. Usually, a predisposition is found if a defendant was previously involved in criminal conduct similar to the crime with which he or she is charged.

When an officer supplies an accused with a tool or a means necessary to commit the crime, the defense is not automatically established. Although this factor may be considered as evidence of entrapment, it is not conclusive. The more important determination is whether the official planted the criminal idea in the mind of the accused or whether the idea was already there.

Entrapment is not a constitutionally required defense, and, consequently, not all states are bound to provide it as a defense in their criminal codes. Some states have excluded it as a defense, reasoning that anyone who can be talked into a criminal act cannot be free from guilt.

## ENTRY

*The act of making or entering a record; a setting down in writing of particulars; or that which is entered; an item. Generally synonymous with* recording.

*Passage leading into a house or other building or to a room; a vestibule.*

*The act of a merchant, trader, or other businessperson in recording in his or her account books the facts and circumstances of a sale, loan, or other transaction. The books in which such memoranda are first (or originally) inscribed are called* books of original entry, *and are* PRIMA FACIE *evidence for certain purposes.*

*In* COPYRIGHT *law, depositing with the register of copyrights the printed title of a book, pamphlet, and so on, for the purpose of securing copyright on the same.*

*In immigration law, any coming of an alien into the United States, from a foreign part or place or from an outlying possession, whether voluntary or otherwise.*

*In* CRIMINAL LAW, *entry is the unlawful making of one's way into a dwelling or other house for the purpose of committing a crime therein. In cases of* BURGLARY, *the least entry with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, is sufficient to complete the offense.*

*In customs law, the entry of imported goods at the custom house consists in submitting them to the inspection of the revenue officers, together with a statement or description of such goods, and the original invoices of the same, for the purpose of estimating the duties to be paid thereon.*

*In real property law, the right or authority to assert one's possessory interest or ownership in a piece of land by going onto the land.*

## ENTRY OF JUDGMENT

*Formally recording the result of a lawsuit that is based upon the determination by the court of the facts and applicable law, and that makes the result effective for purposes of bringing an action to enforce it or to commence an appeal.*

Entering judgment is a significant action because it establishes permanent evidence of the rendition by the court of a judgment. Under some statutes and court rules, judgment is entered when it is filed with the appropriate official; under others, it must actually be noted in the judgment book or civil docket.

The entry of a judgment is not the same as the rendition of a judgment. Rendition is a judicial act by a court in pronouncing the sentence of law based upon the facts in controversy. Entry occurs after the rendition of judgment and is a ministerial act that consists of recording the ultimate conclusion reached by the court in the action and providing concrete evidence of the judicially imposed consequences. It serves as a memorial of the action.

## ENUMERATED

*This term is often used in law as equivalent to* mentioned specifically, designated, *or* expressly named or granted; *as in speaking of* enumerated *governmental powers, items of property, or articles in a tariff schedule.*

## ENVIRONMENTAL LAW

*An amalgam of state and federal statutes, regulations, and common-law principles covering* AIR POLLUTION, WATER POLLUTION, *hazardous waste, the wilderness, and endangered wildlife.*

Almost every aspect of life in the United States is touched by environmental law. Drinking water must meet state and federal quality standards before it may be consumed by the public. Car manufacturers must comply with emissions standards to protect air quality. State and federal regulations govern the manufacture, storage, transportation, and disposal of the hazardous chemicals used to make deodorants, hair sprays, perfumes, makeup, fertilizers, herbicides, pesticides, detergents, cleansers, batteries, and myriad other common goods and products.

### Common Law

Under the COMMON LAW, environmental litigation revolves around six doctrines: NUISANCE, TRESPASS, NEGLIGENCE, STRICT LIABILITY, prior appropriation, and riparian rights.

**Nuisance** Modern environmental law traces its roots back to the common-law TORT of nuisance. A nuisance is created when an owner or occupier of land unreasonably uses that land in a way that substantially interferes with the rights of others in the area. A nuisance is sometimes referred to as the right thing in the wrong place, like a pig in a parlor instead of the barnyard.

Nuisances can be public or private. A public nuisance interferes with a right or interest common to the general public, such as the public's interest in healthful drinking water. A private

nuisance interferes with a right or interest of a private individual, such as a homeowner's right to the QUIET ENJOYMENT of her land.

The primary practical difference between the two types of nuisance is that a government department, such as a state or federal environmental agency, traditionally brings suit to enjoin a public nuisance, whereas only private citizens and organizations may sue to stop a private nuisance. The two concepts can also overlap. A nuisance that interferes with a private use of property can simultaneously interfere with a public interest. For example, factory smoke that diminishes the value of neighboring property is a private nuisance, and it is at the same time a public nuisance if it also endangers surrounding wildlife.

Courts engage in a BALANCING test to determine whether a particular activity amounts to a public or private nuisance. A particular activity is declared a nuisance when its usefulness is outweighed by its harmfulness. The harmfulness of an activity is measured by the character and severity of the harm imposed, the social value of the jeopardized interest, the appropriateness of protecting the interest in a particular locality, and the burden to the community or individual in avoiding the harm. An activity's usefulness is measured by the activity's social utility, its suitability to a particular community, and the practicality or expense of preventing the harm it inflicts. Because there is no exact or universally agreed-upon value for each of the competing interests, it is often difficult for judges to apply the balancing test in a consistent fashion.

***Gravity of the injury*** Although courts apply the balancing test for nuisance actions on a case-by-case basis, judges generally follow certain principles. The injury in question must be real and appreciable; the law does not concern itself with trifles. An occasional whiff of smoke, a temporary muddying of a well, a modest intrusion by roots or branches, and intermittent odors of sauces and stews will not rise to the level of a nuisance.

Courts also consider whether the alleged nuisance is of a continuing nature or has produced permanent or long-lasting effects. Nuisance law may excuse an isolated invasion of drifting pesticides, a single overflow of a sewer outlet, or a debris-burning incident lasting only a few days, and some courts have held that recurrence is a necessary prerequisite to a nuisance determination. For example, one court denied a prison inmate's nuisance claim that he was poisoned by pesticide delousing, because it occurred on only one occasion. In such cases, plaintiffs may have a viable claim for trespass or negligence (discussed later in this article) but not for nuisance.

In suits over POLLUTION, courts also consider which party arrived first in the particular community, the polluter or the landowner alleging harm. The law has permitted polluters to escape liability by proving that a landowner alleging harm moved next to a preexisting nuisance with knowledge of its harmful activities. The rationale for this defense is that the landowner who "comes to the nuisance" generally pays less for the property because the nuisance has reduced its value. If such a landowner were then permitted to remove the nuisance, a windfall would inure to her or his benefit. Increasingly, however, courts place less weight on priority of arrival when evaluating a nuisance claim.

Nuisance claims have traditionally been evaluated from an objective point of view. If an "average" or "normal" person in the relevant community would be offended or annoyed by a certain intrusion, then the intrusion is considered real and appreciable. The idiosyncracies of a hypersensitive plaintiff are generally discounted. Persons with extreme personal tastes and aesthetic sensitivity are usually denied relief under this objective standard. Persons with abnormal physical vulnerabilities, such as those with heart conditions, breathing problems, and tender eardrums, are usually denied relief as well.

In recent years, however, nuisance law has offered greater protection to society's vulnerable members. People are not necessarily abnormal, courts have held, merely because they enjoy spending time outdoors, sleeping with the windows open, or cultivating crops near smoke-billowing smelters. These activities are increasingly viewed as normal activities deserving protection. Many courts are also becoming more sympathetic to plaintiffs with preexisting health conditions or genetic frailties.

Two cases illustrate this trend. In the first, *Lunda v. Matthews,* 46 Or. App. 701, 613 P.2d 63 (1980), a cement plant was held liable for emitting debris, dust, and fumes that encompassed a landowner's house and aggravated his bronchitis and emphysema. The court reached this determination despite arguments that the landowner's illness made him more vulnerable to debris and dust than would be persons of ordinary health. The court also held that the cement plant could not escape liability merely

because it was complying with state pollution standards.

In the second case, *Kellogg v. Village of Viola*, 67 Wis. 2d 345, 227 N. W. 2d 55 (1975), a landowner was permitted to recover for the loss of mink kittens who were eaten by their skittish mother after being frightened by noises and odors from a nearby dump. The court was not persuaded that the mink were abnormally squeamish or that the landowner was primarily responsible for their death because he had chosen to move next to the dump with full knowledge of its activities.

Aesthetic nuisances are another area where courts have produced inconsistent results. On June 25, 1927, a Pennsylvania court wrote that "[i]n this age, persons living in a community or neighborhood must subject their personal comfort to the necessities of carrying on trade or business," and when an "individual is affected only in his tastes, his personal comfort, or pleasure, or preferences, these he must surrender for the comfort and preferences of the many" (*Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Sun Co.,* 290 Pa. 404, 138 A. 909, 55 A.L.R. 873).

This attitude was expressed more recently when a federal court denied the U.S. government's request that the court enjoin (prohibit) the construction of high-rise office buildings on the Virginia side of the Potomac River—even though the buildings would blight the Washington Monument, Lincoln Memorial, and other national landmarks (*United States v. County Board,* 487 F. Supp. 137 [E.D. Va. 1979]). These cases reflect judges' reluctance to hold themselves out as standard-bearers for good taste.

Yet aesthetic nuisances are still recognized by courts as viable claims when the extent of the injury is more serious. Judges distinguish between minor vibrations and bone-shaking tremors, normal barnyard smells and sickening stenches, and puffs of dust and blizzards of topsoil. An activity that overcomes extreme defensive measures taken by neighboring properties will be declared a nuisance. Nocturnal noises interfering with sleep can also sound the death knell for a particular activity, especially when there is evidence of widespread community dissatisfaction and not just a single complaint.

***Utility of the activity*** An environmental injury will not be declared a nuisance unless it outweighs the utility of the activity. Determining the weight of a particular harm is often difficult for courts. Judges are human, and humans disagree on just about everything, including nuisance law. The easiest type of case for a judge involves an injury inflicted solely for the purpose of causing harm. A fence constructed with the intent to obstruct a neighbor's view will always be declared a nuisance. No socially redeemable value is assigned to animus and hostility.

Most cases, however, do not involve a nuisance created by adverse motivations. For instance, polluters usually produce useful products integral to a local economy, and the market value of an injured property is rarely greater than the business investments made by the polluter. But dollar figures are not always of paramount importance to judges.

Two leading cases illustrate the different results reached by courts in weighting utility. In the first, *Madison v. Ducktown Sulfur, Copper, & Iron Co.,* 113 Tenn. 331, 83 S.W. 658 (1904), the court denied a landowner's requested relief, stating,

> In order to protect by injunction several small tracts of land, aggregating in value less than $1,000, we are asked to destroy other property worth nearly $2,000,000, and wreck two great mining and manufacturing enterprises. . . . The result would be practically a confiscation of the [polluter's] property . . . for the benefit of the [landowner]—an appropriation without compensation.

In the second case, *Hulbert v. California,* 161 Cal. 239, 118 P. 928 (1911), the court granted the landowner's request for an injunction, over the polluter's claim of greater hardship, saying, "If the smaller interest must always yield to the larger, all small property rights, and all small and less important enterprises . . . would sooner or later be absorbed by the large and more powerful few."

Some environmentalists maintain that the law must protect the environment at any cost, whereas extreme advocates of the free market believe that business must be allowed to expand unhindered by governmental regulation. Certain results reached by particular judges may appear unreasonable to both extremes, but courts have attempted to strike a moderate balance over the long run.

Technology has often provided the means to moderation. Requiring businesses to shut down and relocate, or homeowners to endure a nuisance or move, are remedies not favored by the

law. Courts avoid such remedies by exerting pressure on companies to develop technologies to make their operation safer for the environment. For example, one court ordered a smelting business to install specific arsenic control measures to abate a nuisance, instead of closing down the business as requested by the landowner (*American Smelting & Refining Co. v. Godfrey,* 158 F. 225 [8th Cir. 1907]).

Many nuisances can be remedied without state-of-the-art technology. For example, airports have been forbidden to authorize low-level flights over certain residences, and farmers have been ordered to confine foul odors to particular buildings. Other nuisances can only be abated by the best available technology. Sometimes, however, it is economically impractical or prohibitively expensive for a polluter to use such technology.

Courts disagree about what should be done when a polluter can do nothing short of ceasing operations to lessen an injury. Many courts deny injunctive relief if the polluter is already using the most modern pollution control methods available. Some courts grant an injunction ordering the polluter to shut down when state-of-the-art controls hold no further promise of relief. Other courts award damages for a nuisance that occurs despite the use of the best available technology.

**Trespass and Negligence** Nuisance actions deal primarily with continuing or repetitive injuries. Trespass and negligence actions provide relief even when an injury results from a single event. A polluter who spills oil, dumps chemicals, or otherwise contaminates neighboring property on one occasion might avoid liability under nuisance law but not under negligence or trespass law.

Trespass involves an intentional interference with the property interest of an owner or occupier of land. Negligence occurs when a defendant fails to exercise the amount of care that would be exercised by a reasonably prudent person under the circumstances. Whereas trespass requires the injury to result from deliberate misconduct, negligence results from the accidental and inadvertent.

Under nuisance law, liability is based on an unreasonable and substantial interference with the legal interests of a landowner's property. Conversely, trespass is proved by evidence of any tangible invasion of a landowner's property, however slight. Similarly, pollution resulting from negligence need not produce a substantial injury in order for a landowner to recover. However, a landowner who suffers only minor injuries from the negligence or trespass of a polluter will receive only nominal damages.

**Strict Liability** The doctrine of strict liability for abnormally dangerous activities provides a fourth remedy for those suffering environmental harm. To recover under this doctrine, the landowner must demonstrate that a condition or activity qualifies as abnormally dangerous and was in fact the cause of the environmental injury. Many common activities have been decreed abnormally dangerous, including collecting large quantities of water in hydraulic power mains, storing gas in large amounts, and transmitting high-powered electricity under city streets.

Courts sometimes struggle in determining when something rises to the level of abnormally dangerous, and liability generally also attaches for extraordinary, abnormal, exceptional, and nonnatural activities or conditions. Examples of such activities are oil well drilling, crop dusting, pile driving, and blasting.

**Prior Appropriation and Riparian Rights** A riparian proprietor is the owner of land abutting a stream of water or river and, as such, has a qualified right in the soil to divert the stream as permitted by law. Generally, a riparian owner has the right to all the useful purposes to which a stream passing through the land may be put. Specifically, the rights of riparian owners have been divided into two discrete categories.

The first category is known as prior appropriation. Under the principles of prior appropriation, the law provides that whoever first appropriates stream water for a beneficial purpose acquires a vested right to the continued diversion and use of that water against all claimants who might later do the same. Courts often describe prior appropriation as the principle "first in time is first in right."

Prior appropriation places downstream owners at a distinct disadvantage because it permits upstream owners to completely divert or contaminate stream water so long as they do so for a beneficial purpose. Early cases suggested that no beneficial purpose was served when water was diverted for reasons other than commerce or profit, such as for mere personal pleasure. Today, however, courts permit riparian

owners to appropriate water for almost any aesthetic, recreational, preservational, or pollution control purpose.

Prior appropriation principles are followed in many western states where water is scarce, and efficient and economic uses for streams and rivers are necessary. In the eastern states, the doctrine of riparian rights is followed. This doctrine has two strains. The first provides that each riparian owner has an absolute right to the flow of stream water uninterrupted by any unnatural (i.e., human) causes. The second strain provides that each riparian proprietor has a right to any reasonable use of the stream water passing through his or her land, and is protected from unreasonable uses upstream. This doctrine does not encourage the economically efficient use of water, as does the doctrine of prior appropriation—but water is not scarce in the eastern states where riparian rights theory is applied.

### Statutory Law

Much of the early environmental legislation at the federal level was drafted in response to the shortcomings of the common law, and the inadequate and inconsistent protection of the environment by the states. The common law was slow to respond to changes in technology, and often provided inadequate or antiquated remedies. By nature, common-law doctrines were developed only in response to lawsuits filed between the disputing parties. The initial disagreements were often protracted in nature, and litigation was usually the last resort. As a result, by the time a lawsuit was filed, a particular environmental hazard may have become so pervasive or problematic that no common-law remedy could adequately address it.

Even when an appropriate common-law remedy was available, many state courts refused to enjoin larger businesses from polluting, out of concern that the polluters might harm the local economy by laying off employees or increasing prices. Although some states enacted pollution control statutes, many did not. The states that did enact such statutes varied in the level of protection provided and in the quality of enforcement. Thus, an activity might be deemed impermissible under the environmental legislation of one state, but permissible under the legislation of another. Federal air, water, and soil pollution standards and national wilderness and wildlife preservation regulations were drafted largely in response to these problems.

The NATIONAL ENVIRONMENTAL POLICY ACT (NEPA), 42 U.S.C.A. §§ 4321 et seq., is the fulcrum for these federal pollution and preservation regulations. NEPA, passed in 1969, requires the federal government to give environmental issues priority when planning major projects. It was created to establish councils and agencies that, in cooperation with state and local governments and public and private interest groups, would use all practicable means to monitor and protect the environment.

The Council on Environmental Quality (CEQ) and the ENVIRONMENTAL PROTECTION AGENCY (EPA) were both created under the auspices of NEPA. The CEQ prepares an ANNUAL REPORT that discloses the quality and condition of the country's environment, evaluates federal programs that may affect the environment, and recommends specific policies to foster environmental protection and improvement. The EPA administers these policies and most federal environmental statutes. Each of the fifty states has drafted environmental regulations similar to those written on the federal level, and the state and federal regulations work together to address the various environmental issues.

**Air Pollution** Air pollutants are divided into five main classes: carbon monoxide, particulates, sulfur oxide, nitrogen oxide, and hydrocarbons. Carbon monoxide is a colorless, odorless, and poisonous gas produced by the burning of carbon in many fuels. Motor vehicles are one source of this pollutant.

Particulates are solid or liquid particles produced largely by stationary fuel combustion and industrial processes.

Sulfur oxides are acrid, corrosive, and poisonous gases produced by burning fuel containing sulfur. Electrical utilities and industrial plants are their principal sources.

Nitrogen oxides are produced when fuel is burned at very high temperatures, as is the case with stationary combustion plants and motor vehicles. Once emitted into the air, nitrogen oxides can be chemically converted into sulfates and nitrates, which may return to earth as components of precipitation, known as acid rain.

Hydrocarbons, which are produced by cars, motorboats, and power plants, form smog when combined with nitrogen oxides in the atmosphere under the influence of sunlight.

Each of these pollutants is a threat to human health. Acute cases of air pollution have caused

marked increases in illness and death, especially among older people and among those with respiratory and cardiac conditions. Such pollutants also contribute to the health problems of society's less vulnerable members, increasing the incidence of emphysema and bronchitis among the general population. For instance, smokers living in polluted cities are more likely to contract lung cancer than are smokers in rural areas.

Federal regulation of air pollution is controlled primarily by the Clean Air Act (CAA) and its amendments. Air pollution is broadly defined by the act to mean any air pollution agents or combination of agents. The act directs the EPA to establish the National Ambient Air Quality Standards (NAAQS) for air pollutants that endanger public health or welfare. The EPA may consider not the economic or technological feasibility of attaining NAAQS, but only whether the standards are set at levels necessary to protect the public.

States are not divested of the authority to regulate air pollution under the CAA. They retain "primary responsibility for assuring air quality" within their boundaries. Yet, following the promulgation of NAAQS, each state must submit for EPA approval a state implementation plan (SIP) designed to develop and maintain the air quality standards within its jurisdiction. SIPs that are found lacking may be amended by the EPA. States are also required to comply with the minimum national thresholds created by the CAA. These national thresholds permit state governments and their subdivisions to enact more stringent air pollution regulations than those enacted by the federal government, but not less stringent ones.

The CAA has three titles. Title I governs stationary sources of air pollution, including all buildings, structures, facilities, and installations emitting air pollutants. Title II governs mobile sources of air pollution, such as automobiles, trucks, and aircraft. Both titles prescribe the amount of pollution that may be emitted into the air without violating the act.

Title III outlines procedures for the enforcement of the act through legal or administrative proceedings. State and federal governments may enforce the act, as may private individuals in so-called citizen suits. The CAA provides a variety of administrative, equitable (nonmonetary), civil, and criminal penalties, ranging from informal measures such as violation notices to more formal measures such as injunctive relief (a court order to perform or refrain from performing a particular act), money damages, and fines.

*Air pollution from factories is regulated by Title I of the Clean Air Act.*
AP/WIDE WORLD PHOTOS

International attention has focused on three particular forms of air pollution: acid rain, global climate changes, and ozone depletion. Acid rain is created when sulfur from fossil fuels is emitted into the air and converted into a pollutant through oxidation, later mixing with rain or snow and returning to the earth as a component of precipitation. Although the CAA has commissioned a number of federally sponsored studies on the subject, scientists still disagree on the severity of the problems presented by acid rain.

Scientists also disagree about whether air pollution can influence the global climate. Some scientific studies conclude that air pollution has caused the average temperature on earth to

increase during the last twenty-five years or so, resulting in a condition called global warming; some conclude that the average temperature has decreased, resulting in global cooling. Other studies indicate that the global climate remains unaffected by air pollution and will continue to do so. Because of the discord in the scientific community, the CAA has commissioned federally sponsored studies to investigate the relationship between air pollution, acid rain, and the global climate.

The CAA has also commissioned federally sponsored studies regarding the relationship between air pollution and the destruction of the ozone layer. The ozone layer shields the earth from the harmful effects of the sun's radiation, and may be depleted by the release of chlorofluorocarbons (CFCs) into the atmosphere. CFCs serve as a coolant for refrigerators and air conditioners, as a foaming agent for insulation, as a solvent for computer chips, and as a propellant for aerosol products. The CAA bans nonessential uses of CFCs, but leaves room for judicial interpretation as to what the phrase *nonessential uses* might mean.

Noise pollution is another form of air pollution regulated by the federal government. The rumbling sounds of eighteen-wheelers on the highway, 747s in the air, and jackhammers in the street are all familiar to the modern era. The Noise Control Act of 1972 (NCA) (42 U.S.C.A. § 4901 et seq.) was created to eliminate or reduce such noises when they pose problems to public health and welfare. Under the NCA, the EPA conducts studies on industrial areas with excessive noise, and establishes noise emissions standards. Airports, airplanes, railroads, trains, and trucks have all been required to reduce noise levels through the development of quieter motors, engines, and equipment. Any citizen may bring legal action to enforce the provisions of the NCA, but the EPA retains the right to intervene. Remedies include injunctive relief, fines, and criminal penalties.

In the late 1980s and early 1990s, the regulation of air pollution moved indoors. Studies conducted during the late 1980s and early 1990s have shown that people are exposed to higher concentrations of air pollution for longer periods of time inside buildings than outdoors. One prevalent source of indoor air pollution is cigarettes. Many states restrict or prohibit smoking in a variety of public places, including indoor stadiums, restaurants, theaters, grocery stores, buses, trains, and airplanes. The federal government, through the OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA), 29 U.S.C.A. § 651 et seq., protects employees from "occupational diseases caused by breathing air contaminated with harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors."

On February 27, 2001, the U.S. Supreme Court issued its decision in *Whitman, Administrator of Environmental Protection Agency, et al. v. American Trucking Associations, Inc., et al,* a case which challenged the EPA's revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter. The Court, in a unanimous decision, held that Section 109(b) of the Clean Air Act (CAA) prohibits the EPA from considering implementation costs when the agency sets NAAQS; that Section 109(b)(1) of the CAA does not delegate legislative powers to the EPA; therefore, the EPA did not violate the non-delegation doctrine in issuing its revised ozone and particulate matter standards pursuant to this section; and that the EPA's implementation strategy was an unreasonable agency interpretation of an ambiguous statutory scheme, and is therefore unlawful. The issue was therefore returned to the EPA so that it could develop a reasonable implementation strategy.

**Water Pollution** Like clean air, healthy water is indispensable to human existence. Humans depend on water for drinking, cooking, swimming, fishing, and farming. Discharges of organic wastes, heated water, nutrients, sediments, toxic chemicals, and other hazardous substances can all make water unfit for human use. Organic wastes, produced by animals and humans, decompose through the use of oxygen. If a body of water spends too much oxygen during the decomposition of organic wastes within it, certain types of fish will not survive. Aquatic life can also be harmed by the discharge of heated water into lakes and streams, because the increased temperatures accelerate biological and chemical processes that reduce the water's ability to retain oxygen.

The release of nutrients and sediments, such as detergents and fertilizers, can also harm bodies of water. Eutrophication, the natural process by which lakes evolve into swamps and eventually dry land over the course of thousands of years, is accelerated by the discharge of nutrients that make lakes more biologically productive. Discharges of toxic chemicals, heavy metals, and other hazardous material can render both the

water and its aquatic life unsafe for human consumption. The three major sources of these types of water pollution are industry, municipal activity, and agriculture.

Federal regulation of water pollution begins with the Federal Water Pollution Control Act (FWPCA) (Pub. L. 87-88, July 20, 1961, 75 Stat. 204, 33 U.S.C.A. §§ 1151 et seq.; 43 U.S.C.A. § 3906). The FWPCA was designed to make waters "fishable and swimmable" and to eliminate the discharge of pollutants into **NAVIGABLE WATERS**. The act delineates water quality standards, requiring many water polluters to implement the best practicable control technology or the best available technology economically achievable. Pursuant to the FWPCA, the EPA is required to maintain a list of toxic substances and to establish separate limitations for each of them based on public health rather than technological or economic feasibility. Although the primary responsibility for the enforcement of the act was left with the states, the federal government and private citizens are also authorized to pursue remedies.

In 1977, the FWPCA was amended by the Clean Water Act (CWA) (Pub. L. No. 95-217, Dec. 27, 1977, 91 Stat. 1566, 33 U.S.C.A. §§ 1251 et seq.). Under the CWA, conventional water pollutants, such as oil, grease, and fecal coliform bacteria, are to be measured by the best conventional pollutant control technology. The CWA requires the EPA to weigh "the reasonableness of the . . . costs of attaining a reduction in [pollution and the] benefits derived." No cost-benefit analysis was permitted for toxic substances and nonconventional pollutants such as ammonia, chlorides, and nitrates. Civil and criminal penalties, including fines of up to $25,000 a day, are authorized under the CWA.

Oil spills and ocean dumping present two troubling problems for clean-water advocates in the international arena. Section 311 of the FWPCA announces that "it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States [or] adjoining shorelines." The same section later prohibits the discharge of any harmful quantity of a hazardous substance into any navigable waters of the United States.

In accordance with this provision, the EPA, on behalf of the president of the United States, has determined that discharges of harmful quantities of oil include, with some minor exceptions, any discharge that discolors or leaves a film on the water or adjoining shorelines. Since the discharge of even a few gallons of oil can leave a film, this provision is tantamount to a no-discharge policy.

*The Federal Water Pollution Control Act was designed to make waters, such as Mystic River in Massachusetts, fishable and swimmable.*

AP/WIDE WORLD PHOTOS

It also represents a strict liability standard. There is no escape from liability for a harmful discharge of oil that results from negligence, even if the accident could not have been prevented. By contrast, previous federal legislation prohibited only oil spills that were knowingly discharged. Courts have broadly interpreted the CWA to cover oil discharged by trucks, pipelines, vessels, drilling platforms, and both onshore and offshore facilities. A civil penalty of not more than $5,000 is prescribed for each offense, and some penalty must be imposed for every violation regardless of its severity.

Accompanying the civil penalty scheme are cleanup provisions. These include (1) preparation and publication of a national contingency plan for the removal of hazardous substances and the prevention of spills; (2) authorization for the United States to take summary action (including the removal or destruction of a vessel) whenever a marine disaster creates a substantial threat to the nation's environment, including threats to fish, wildlife, shorelines, and beaches; (3) authorization for the U.S. attorney general, under the direction of the president, to abate any "imminent or substantial" marine disaster through legal action; and (4) imposition of costs for cleanup upon the owner or operator.

The Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA) (27 U.S.C.A. § 1401 et. seq.), popularly known as the Ocean Dumping Act, is the second piece of federal legislation drafted in response to these two international water pollution problems. The MPRSA has three titles. Title I establishes a permit program, administered by the EPA, for dumping materials into and transporting them through ocean waters. Title II creates a research program, under the auspices of the secretary of commerce, to determine ways in which ocean dumping can be reduced or eliminated. Under title III, the secretary of commerce may designate certain parts of ocean water as marine sanctuaries to preserve and restore recreational, ecological, or aesthetic interests.

The MPRSA flatly prohibits any dumping of radiological, chemical, or biological warfare agents into ocean waters. The Coast Guard is responsible for surveillance under the act. Violators face civil penalties of up to $50,000 for each violation. Criminal penalties and injunctive relief may also be pursued by the government. Private citizens harmed by ocean dumping may seek relief as well.

Permits for ocean dumping may be granted in certain circumstances. Both the administrator of the EPA and the secretary of the Army have the power to dispense permits, but the administrator may VETO permits issued by the secretary. The considerations in evaluating permit requests include the need for dumping material into ocean waters, other possible methods of disposal, and the appropriateness of the chosen dumping location. Generally, permits are granted when ocean dumping will not "unreasonably degrade or endanger human health, welfare, amenities or the marine environment, ecological systems or economic potentialities."

On January 9, 2001, in a 5–4 decision, the U.S. Supreme Court struck down the *Migratory Bird Rule,* which was the basis of jurisdictional authority for the U.S. Army Corps of Engineers over a non-navigable, isolated, intrastate water of the U.S. The Migratory Bird Rule stems from a 1986 interpretation by the U.S. Army Corps of Engineers of its regulatory definition for "navigable waters," the statutory limit to the Corps' jurisdiction under the Clean Water Act (CWA). The property at issue in the decision was a 553-acre abandoned sand and gravel mine, which contained water-filled excavation trenches that were used by approximately 121 bird species. The area did not qualify as "wetlands." The U.S. Army Corps of Engineers found the site jurisdictional based on its use by migratory birds. The Court of Appeals for the Seventh Circuit upheld the U.S. Army Corps of Engineers' jurisdiction over the site. The petitioners, a consortium of 23 suburban Chicago cities and villages who intended to fill the site as a sanitary landfill, appealed to the Supreme Court, claiming that: (1) the Migratory Bird Rule exceeded the Corps' authority under the CWA and (2) the exercise of such jurisdiction was inconsistent with the COMMERCE CLAUSE, U.S. Constitution, Art. 1 § 8, cl. 3. The Supreme Court reversed the Court of Appeals decision by supporting petitioner's first assertion and declined to make a judicial determination on the validity of the second assertion. Specifically, the Court did not overturn its prior decision in *U.S. v Riverside Bayview Homes,* 474 U.S. 121 (1985), which affirmed the Corps' jurisdiction over wetlands adjacent to open water bodies. The Court distinguished between wetlands, which actually abut a navigable waterway, and an isolated, abandoned sand and gravel pit. The Court clarified that although the *Riverside Bayview Homes* decision established that the navigable requirement was of "limited import," the requirement has some meaning, particularly when applied to water bodies that are decidedly not wetlands.

**Toxic and Hazardous Substances** The federal government uses various forms of legislation to regulate the manufacture, storage, disposal, sale, and discharge of hazardous substances, which include toxic substances. States have also enacted hazardous substance laws with varying success results.

After the supertanker *Torrey Canyon* spilled crude oil off the coast of England in 1967, both Congress, in the Port and Waterways Safety Act of 1972 (PWSA), and the State of Washington enacted more stringent regulations for tankers and provided for more comprehensive remedies in the event of an oil spill. The ensuing question of federal PREEMPTION of the State's laws was addressed in *Ray v. Atlantic Richfield Co.,* 435 U.S. 151. In 1989, the supertanker *Exxon Valdez* ran aground in Alaska, causing the largest oil spill in U.S. history. Again, both Congress and Washington responded. Congress enacted the Oil Pollution Act of 1990 (OPA). The State created a new agency and directed it to establish standards to provide the "best achievable protection" (BAP) from oil spill damages. That agency

promulgated tanker design, equipment, reporting, and operating requirements, giving the state of Washington stricter standards than those required by federal law. In *United States v. Locke*, 120 S.Ct. 1135 (2000), the United States Supreme Court unanimously struck down a Washington State oil tanker law and held that the state's safety and environmental standards were preempted by the comprehensive federal regulatory scheme governing oil tankers.

***Pesticide regulation*** The sale and distribution of pesticides in the United States are governed by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (Pub. L. No. 100-532, Oct. 25, 1988, 102 Stat. 2654, 7 U.S.C.A. §§ 136 et seq.). Under the FIFRA, no pesticide may be introduced into the stream of commerce without approval by the administrator of the EPA. If the administrator finds that a pesticide will "cause unreasonable adverse effects on the environment," the pesticide will not receive approval. An unreasonable adverse effect on the environment is defined as "any unreasonable risk to [humans] or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide."

Once a pesticide is approved by and registered with the EPA, registration may be suspended by the administrator upon proof that continued use would "likely result in unreasonable adverse effects on the environment." Before suspension, the registrant is entitled to an expedited administrative hearing during which the danger and usefulness of the pesticide are measured. In emergency circumstances, the administrator may suspend registration prior to a hearing on the merits.

***Chemical manufacturing regulation*** The manufacture of chemicals is regulated on the federal level by the Toxic Substance Control Act (TSCA) (15 U.S.C.A. 2601 et seq.). The TSCA is underpinned by three policy considerations. First, industry has the primary responsibility for ascertaining the environmental effects of the chemicals it is manufacturing. Second, the government should have the authority to prevent unreasonable risks of injury to the environment, especially imminent risks. Third, the government should not exercise this authority in a manner that places unreasonable economic barriers to technological innovation. As with most of the statutory law in the environmental arena, the relative weights given to each value are balanced against each other.

The central provisions of the TSCA are sections 4, 5, and 6. Section 4 empowers the EPA to adopt rules requiring a manufacturer to test each substance that may "present an unreasonable risk" to the environment, "enter the environment in substantial quantities," or present a likelihood of "substantial human exposure." Section 5 requires manufacturers to give the EPA notice before producing new chemical substances. New chemicals covered by section 4 must then be tested. New chemicals not covered by section 4 but listed by the EPA as potentially hazardous are evaluated at a hearing provided under section 6.

***Resource Conservation and Recovery Act*** The Resource Conservation and Recovery Act (RCRA), Pub. L. No. 94-580, Oct. 21, 1976, 90 Stat. 2795, 42 U.S.C.A. § 6901 et seq., was passed in 1976 as a response to a growing public awareness of problems relating to the disposal of hazardous waste. In 1981 the EPA estimated that 290 million tons of hazardous waste were produced in the United States annually, 90 percent of which would have been improperly disposed of before the RCRA became law. The chemical, petroleum, and metal industries were the nation's leading generators of hazardous waste during this period. In 1983 government studies indicated that as many as fifty thousand inactive disposal sites contained hazardous waste, with as many as twenty-five hundred posing a serious threat to groundwater and to public drinking supplies.

Hazardous waste was traditionally disposed of on the land of the generator. Occasionally, the generator would transport the waste to an off-site disposal area. During the twenty-year active life of a disposal site, ownership and operation frequently changed hands. Very few records were kept at the disposal sites, leaving many subsequent owners and operators without any indication of their prior use.

The RCRA attempted to answer these problems by providing "cradle-to-grave" regulation of hazardous materials. The RCRA requires the EPA to promulgate criteria for identifying hazardous waste in light of a substance's toxicity, persistence, degradability, corrosiveness, flammability, and potential for accumulation in organic tissues. Standards are prescribed for the generators and transporters of hazardous materials as well as for storage and disposal sites.

Generators and transporters are subject to record-keeping, reporting, and labeling requirements, with transporters also being subject to

the strictures of the Hazardous Materials Transportation Act. Sites for underground storage tanks containing petroleum products, pesticides, and other hazardous products are governed by RCRA provisions that enable the detection, correction, and prevention of leaks. Disposal sites are regulated by a permit system in which the EPA is given broad powers to inspect a site, issue compliance orders, institute civil actions against violators, and seek injunctive relief. Criminal penalties may also be imposed for violation of the permit system.

In 1984, Congress amended the RCRA, shifting the focus of hazardous waste management from safe land disposal to treatment alternatives. Under the 1984 amendments, land disposal is now the last alternative, and is permitted only when the waste is pretreated to meet standards issued by the EPA, or when the EPA determines "to a reasonable degree of certainty that there will be no migration of hazardous constituents from the disposal unit . . . for as long as the wastes remain hazardous."

When land disposal is deemed permissible, new landfills must use double liners and groundwater monitoring systems, unless the EPA finds that an alternative design or operating practice would be equally effective in preventing the migration of hazardous waste. In addition to providing for EPA regulation and enforcement actions, the RCRA authorizes private citizens to institute legal proceedings against violators of its provisions.

***Comprehensive Environmental Response, Compensation, and Liability Act*** The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the Superfund, was passed in 1980 to clean up hazardous waste disposal sites (42 U.S.C.A. §§ 9601 et seq.). The act consists of four elements. First, CERCLA establishes a system for gathering information to enable federal and state governments to characterize chemical dump sites and develop priorities for response actions. The administrator of the EPA is required to issue regulations designating which chemicals would be hazardous to the public if released into the environment. The owners and operators of hazardous waste storage, treatment, and disposal sites are required to notify the EPA of the amount and types of hazardous substances on-site, and of any known, suspected, or likely releases into the environment. Based on this information, the EPA develops a national priorities list (NPL), which ranks the nation's hazardous waste sites in order of importance.

Second, CERCLA establishes federal authority to respond when hazardous waste has been discharged into the environment. The president is authorized to provide removal and remedial actions consistent with a national contingency plan (NCP), which establishes procedures for cleaning up such discharges. Removal actions are short-term responses to emergencies, whereas remedial actions are intended to offer long-term solutions. The federal government's response actions at sites appearing on the NPL are limited to cases in which the responsible parties cannot be found or fail to take the necessary actions.

Third, CERCLA creates a class of persons who are potentially responsible parties (PRPs), who will be held liable for cleanup and restitution costs. The act provides that all generators and transporters of hazardous materials, and every owner and operator of a disposal or treatment facility, shall be liable for all removal and remedial costs incurred by the state and federal government not inconsistent with the NCP, as well as any other necessary response costs such as consulting fees or attorney fees in certain situations. In each case, CERCLA imposes strict liability upon the responsible party, independent of traditional notions of culpability such as intent and recklessness.

Fourth, the act creates the multi-billion-dollar Hazardous Substance Trust Fund to pay for removal and remedial actions. Money for the fund is raised through federal appropriation and through taxes paid by some disposal site owners and operators. The fund cannot be used to remedy environmental injuries from hazardous waste that "occurred wholly before the enactment of this Act." Private claims may be made against the fund only if the PRPs cannot be found or are insolvent.

The stickiest legal questions arise when courts assign liability for cleanup. For example, lending institutions regularly foreclose, take title, and resell property without any knowledge or indication that the property was previously used as a hazardous waste site. Such institutions clearly fall within CERCLA's definition of a landowner, yet they assume no traditional responsibilities of land ownership.

Early CERCLA cases imposed liability upon lending institutions in these circumstances, even

when the costs of cleanup exceeded the value of the property (see *United States v. Maryland Bank & Trust Co.,* 632 F. Supp. 573 [D. Md. 1986]). Although Congress later amended CERCLA to protect such "innocent landowners," courts still impose liability if the lending institution "had reason to know" of the hazardous waste disposal or failed to make "all appropriate inquiry" into the previous ownership before acquiring the property.

Liability under CERCLA is joint and several liability, which means that once it is established among a group of defendants, any one of the defendants can be held responsible for the entire cost of cleanup. Although defendants are permitted to offer evidence that they are responsible for only part of an environmental injury, the commingling of chemicals at dump sites makes such a defense difficult to prove. Defendants may also seek reimbursement from codefendants who were primarily responsible for a hazardous discharge, but this relief proves futile when a responsible codefendant has disappeared or filed BANKRUPTCY. Thus, wealthy landowners are often left paying the costs of the CERCLA cleanup.

**Preservation of Wilderness and Wildlife** NEPA requires the government to "fulfill the responsibilities of each generation as trustee for succeeding generations" to ensure "safe, healthful, productive and aesthetically pleasing surroundings" and protect "important aspects" of the "national heritage."

The federal government has three land preservation categories: the National Park System, the National Wilderness Preservation System, and the National Wildlife Refuge. National parks include forested areas, recreational areas, and places of historical importance. Wilderness preserves are not intended for use, and are primarily found in Alaska and the Florida Keys. A wildlife refuge is a sanctuary for fish and game. Federal legislation protects each of these three areas from spoliation, degradation, and misuse.

In addition to establishing sanctuaries and refuges for wilderness and wildlife, Congress has passed the ENDANGERED SPECIES ACT, 16 U.S.C.A. §§ 1531 et seq., which charges the DEPARTMENT OF THE INTERIOR with the protection of animals teetering on the brink of extinction. The U.S. Supreme Court has interpreted this act very broadly, as reflected by the snail darter case (*Tennessee Valley Authority v. Hill,* 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117 [1978]).

The snail darter, a plain-looking, three-inch-long fish, was an endangered species inhabiting the rivers of Tennessee when the TENNESSEE VALLEY AUTHORITY began the construction of a $100 million dam that would have destroyed its habitat. After noting that Congress deemed all species to have incalculable value and finding that the Endangered Species Act "admit[ted] of no exception[s]," the Supreme Court held that the dam could not be completed.

### Environmental Justice

The field of Environmental Justice sprung from grassroots organizations formed to combat environmental racism. In the 1970s, groups of minorities organized to protest the disproportionate number of waste producing and polluting industries located in areas where minorities or poor people lived. These groups included African Americans, Latinos and Native Americans. This effort against environmental racism was viewed as outside the broader Environmental Movement, which had white middle to upper class backing.

In the 1980s, the environmental racism movement reorganized and became known as the Environmental Justice movement, which focused on the equitable distribution of environmental health and risk. At that time their efforts began to receive more mainstream attention and recognition. Since that time, the topic of Environmental Justice has been addressed by COLLEGES AND UNIVERSITIES, as well as environmental and religious groups. The field has begun to move beyond issues of equitable distribution to include concerns about reducing and stopping environmental risk. This later aspect may be called ecological justice and deems that the earth and the environment have intrinsic value.

**Environmental Racism** Environmental racism has been defined by environmentalists as the deliberate targeting of communities of color for discriminatory treatment in governmental policy and corporate practices. Placement of toxic waste facilities in low income neighborhoods and nuclear waste dumps in indigenous territory have been cited as examples of this practice. Community activists have challenged what they believe is inherent and explicit racism in corporate strategies and discriminatory treatment in enforcement of environmental regulations.

**Private Title VI Lawsuits and Environmental Racism** Title VI of the CIVIL RIGHTS ACT has been one of the most commonly used statutes in Environment Justice lawsuits in recent times. Some of this is due to the failures from other statutes and some of it is the uncertainty about the viability of Title VI as a remedy for environmental racism. Title VI has two main parts to it, section 601 and section 602. One of the main differences in the two sections is whether it gives a private right of action to plaintiffs. A private right of action determines whether ordinary citizens have the right to bring the case based on the statute before a court to determine the validity of the claims. Section 601 has been determined by the United States Supreme Court to hold a private right of action for lawsuits. Section 602 however has not been interpreted as to whether or not it holds a private right of action within it. The issue of intent is defined differently in the two sections. Section 601 has a model of proving intent based on the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT. This model is that of proving purposeful discriminatory intent by a government agency or other group who is discriminating. This very strict interpretation of the statute has served to quell any Environmental Justice lawsuits under section 601. For cases where discriminatory intent is obvious, section 601 is a good alternative since it allows for more punishment than section 602, which can only terminate funding. This allows corporate defendants to use reasons such as economic impacts and geographical situation to explain away unjust allocation of environmental burdens. Section 602, however, allows for disparate impacts to be used instead of intentional discrimination as a means of implicating defendants in the violations.

In February of 1994, President BILL CLINTON signed an EXECUTIVE ORDER which brought together several federal agencies and offices in a battle against discrimination. This order was an outline of what each agency was required to do to promote Environmental Justice in its policies and practices and what each agency needed to do to ensure the continued compliance with Title VI. The EPA has used this order as a staging point for their new wave of Environmental Justice focuses. An Environmental Justice Strategy has been formed by the EPA for the evaluation of Environmental Justice concerns brought to the EPA. The Executive Order is very limited in its scope and enforceability and has been widely criticized despite the fact that it facilitated the creation of the EPA Title VI policy.

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CROSS-REFERENCES

Tobacco; Water Rights.

## ENVIRONMENTAL PROTECTION AGENCY

The purpose of the Environmental Protection Agency (EPA) is to protect and enhance the environment in the present and for future generations to the fullest extent possible under the laws enacted by Congress. The mission of the agency is to control and abate POLLUTION in the areas of air, water, solid waste, noise, radiation, and toxic substances. The mandate of the EPA is to mount an integrated, coordinated attack on environmental pollution in cooperation with state and local governments.

The Environmental Protection Agency was established in the EXECUTIVE BRANCH as an independent agency pursuant to REORGANIZATION PLAN No. 3 of 1970, effective December 2, 1970. The EPA was created to permit coordinated and effective governmental action on behalf of the environment. The EPA endeavors to abate and control pollution systematically, by proper integration of a variety of research, monitoring, standard setting, and enforcement activities. As a complement to its other activities, the EPA coordinates and supports research and antipollution activities by state and local governments, private and public groups, individuals, and educational institutions. The EPA also reinforces efforts among other federal agencies with respect to the impact of their operations on the environment, and it is specifically charged with publishing its determinations when those hold that a proposal is unsatisfactory from the standpoint of public health or welfare or environmental quality. In all, the EPA is designed to

serve as the advocate of the public for a livable environment.

### Air, Noise, and Radiation Programs

The air quality activities of the agency include development of national programs, technical policies, and regulations for AIR POLLUTION control; development of national standards for air quality; emission standards for new stationary sources and emission standards for hazardous pollutants; technical direction, support, and evaluation of regional air quality activities; and provision of training in the field of air pollution control. Related activities include study, identification, and regulation of noise sources and control methods; technical assistance to states and agencies having radiation protection programs; and a national surveillance and inspection program for measuring radiation levels in the environment.

### Water and Waste Management Programs

The water quality activities of the EPA represent a coordinated effort to restore the waters of the nation. The functions of this program include development of national programs, technical policies, and regulations for WATER POLLUTION control and water supply; water quality standards and effluent guidelines development; technical direction, support, and evaluation of regional water activities; development of programs for technical assistance and technology transfer; and provision of training in the field of water quality.

### Solid Waste Emergency Response Programs

The Office of Solid Waste and Emergency Response provides policy, guidance, and direction for the agency's solid waste and emergency response programs. The functions of these programs include development of program policy; development of hazardous waste standards and regulations; enforcement of applicable laws and regulations; guidelines and standards for land disposal of hazardous wastes; analyses on the recovery of useful energy from solid waste; and provision of technical assistance in the development, management, and operation of waste management activities.

### Legal and Enforcement Counsel

The Office of the Assistant Administrator for Enforcement has the following functions: (1) provides policy direction to enforcement activities in air, water, toxic substances, hazardous and solid waste management, radiation, and noise control programs; (2) plans and coordinates enforcement conferences, public hearings, and other legal proceedings; and (3) engages in other activities related to enforcement of standards to protect the environment of the nation.

### Pesticides and Toxic Substances Programs

The Office of Assistant Administrator for Toxic Substances is responsible for development of national strategies for the control of toxic substances; criteria for assessing chemical substances, standards for test protocols for chemicals, rules and procedures for industry reporting, and regulations for the control of substances deemed to be hazardous to man or the environment; and evaluation and assessment of the impact of new chemicals and chemicals with new uses to determine the hazard and, if needed, develop appropriate restrictions. It also coordinates with the activities of other agencies under the Toxic Substances Control Act (15 U.S.C. 2601 et seq. [1976]) for the assessment and control of toxic substances. Additional activities include control and regulation of pesticides and reduction in their use to ensure human safety and protection of environmental quality; establishment of tolerance levels for pesticides that occur in or on food; monitoring of pesticide residue levels in food, humans, and nontarget fish and wildlife and their environments; and investigation of pesticide accidents.

### Research and Development

The Office of the Assistant Administrator for Research and Development is responsible for a national research program in pursuit of technological controls of all forms of pollution. It directly supervises the research activities of the national laboratories of the EPA and gives technical policy direction to those laboratories that support the program responsibilities of the regional offices of the EPA. Close coordination of the various research programs is designed to yield a synthesis of knowledge from the biological, physical, and social sciences that can be interpreted in terms of total human and environmental needs. General functions include management of selected demonstration programs; planning for agency environmental quality monitoring programs, coordination of agency monitoring efforts with those of other federal agencies, the states, and other public

bodies; and dissemination of agency research, development, and demonstration results.

### Major Developments

During the late 1990s, the EPA under the administration of President WILLIAM JEFFERSON CLINTON pursued diverse goals with mixed results. One of its most noted efforts involved ambitious enforcement of the Clean Air Act through the New Source Review (NSR) program, which saw the EPA requiring industries to install new anti-pollution equipment. The administration also sued about fifty power companies for violations. But frequently the agency's plans met with resistance and litigation from industry. Plaintiffs successfully challenged EPA regulatory authority over such matters as setting drinking water targets for chloroform, requiring ethanol minimums in reformulated gasoline, and mandating certain regional electric car sales.

Under President GEORGE W. BUSH, the EPA shifted its approach on some issues. The agency proposed to roll back its predecessor's air pollution regulations. But the agency backed down after public criticism over its apparent readiness to scuttle standards for arsenic levels in drinking water, and in 2000 it also released data critical of the administration's laissez-faire policy toward global warming. Moreover, in 2001, the EPA continued to pursue the agency's decades-old Superfund case against General Electric Co., seeking to have the company pay for a $360 million project to dredge contaminated sediment from the Hudson River.

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CROSS-REFERENCES

Environmental Law; Regulation.

## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission (EEOC) is the federal agency charged with eliminating discrimination based on race, color, religion, sex, national origin, disability, or age, in all terms and conditions of employment. The EEOC investigates alleged discrimination through its 50 field offices, makes determinations based on gathered evidence, attempts conciliation when discrimination has taken place, and files lawsuits. The EEOC also oversees compliance and enforcement activities relating to equal employment opportunity among federal employees and applicants, including discrimination against individuals with disabilities.

The EEOC was created by title VII of the CIVIL RIGHTS ACT OF 1964, 42 U.S.C.A. § 2000e-4. Title VII was amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, Mar. 24, 1972, 86 Stat. 103; the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, Oct. 31, 1978, 92 Stat. 2076, codified at 42 U.S.C.A. § 2000e(K); and the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. On July 1, 1979, responsibility for enforcement of the EQUAL PAY ACT OF 1963, 29 U.S.C.A. §§ 201 et seq., and the Age Discrimination in Employment Act of 1967, 29 U.S.C.A. §§ 626 et seq., in private industry as well as state and local governments, was transferred from the DEPARTMENT OF LABOR to the EEOC. The Equal Pay Act prohibits gender-based pay differences for substantially equal work requiring equal skill and responsibility; the Age Discrimination Act prohibits employment discrimination against workers or applicants 40 years of age or older. Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C.A. §§ 12101 et seq. has been enforced by the EEOC since July 1992. Title I governs private employers, state and local governments, employment agencies, labor organizations, and joint labor-management committees. The ADA prohibits employment discrimination against qualified individuals with disabilities and requires that employers make reasonable accommodations for these individuals.

### Complaints under Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, or national origin, by private employers, state and local governments, educational institutions with 15 or more employees, the federal government, private and public employment agencies, labor organizations, and joint labor-management committees for appren-

ticeship and training. Charges of title VII violations outside the federal sector must be filed with the EEOC within 180 days of the alleged violation or in states with fair employment practices agencies, within 300 days. The EEOC is responsible for notifying the persons charged, within 10 days after receiving a charge. Before investigation, charges must be deferred for 60 days to state or local fair employment practices agencies in localities with a fair employment practices law covering the alleged discrimination. If the agency has been operating less than one year, the charges must be deferred for 120 days.

Under work-sharing agreements between the EEOC and state and local fair employment practices agencies, the EEOC routinely assumes authority over certain charges of discrimination and proceeds with its investigation. If reasonable cause exists to believe that a charge is true, the district, area, or local office uses informal conciliation conferences to try to remedy the unlawful practices. If an acceptable agreement cannot be reached, the case is submitted to the EEOC for possible litigation. If litigation is approved, the EEOC brings suit in federal district court.

Under title VII, the attorney general brings suit when a state or local government or political subdivision is involved. If litigation is not approved or if a finding of no reasonable cause is made, the charging party is allowed to sue within 90 days in federal district court. The EEOC may intervene in such actions if the case is of general public interest.

### Complaints under the Americans with Disabilities Act of 1990

The Americans with Disabilities Act of 1990 incorporates the remedies and procedures contained in title VII of the Civil Rights Act of 1964. Employment discrimination charges based on disability may be filed at any of the EEOC's field offices. The EEOC investigates and attempts to conciliate the charges using the same procedures as for charges filed under title VII. The litigation procedures under title VII also apply to charges filed under the ADA.

The progress in creating a genetic "map" for humans in the 1990s was hailed by scientists who hoped a better understanding of genetic makeup might someday help prevent debilitating diseases including cancer and Alzheimer's disease. Along with that promise came the fear that employers might use a person's genetic information to deny employment. In February 2000 President BILL CLINTON signed EXECUTIVE ORDER 13145, which prohibits federal departments and agencies from using protected genetic information to make hiring decisions.

### Complaints under the Age Discrimination in Employment Act of 1967 and Equal Pay Act of 1963

The Age Discrimination in Employment Act of 1967 and Equal Pay Act of 1963 cover most employees and job applicants in private industry and in the federal, state, and local governments. An age discrimination charge must be filed with the EEOC within 180 days of the alleged violation, or where the action took place in a state that has an age discrimination law and an authority administering that law, within 300 days of the violation or 30 days after receiving the notice of termination of state proceedings, whichever is earlier. A lawsuit must be filed within two years of the alleged discriminatory act or within three years in cases of a willful violation of the law.

Under the Civil Rights Act of 1991, a lawsuit must be filed within 90 days of the plaintiff's receipt of a notice of final action. The EEOC first attempts to end the alleged unlawful practice through informal conciliation. If conciliation fails, the EEOC may sue. Individuals may sue on their own behalf 90 days after filing a charge with the EEOC and the appropriate state agency. If the EEOC takes legal action, an individual covered by the lawsuit may not file a private action.

A lawsuit under the Equal Pay Act of 1963 may be filed by the EEOC or by the complainant. There are no prerequisites for bringing a private action under this law. Wages may be recovered for a period of up to two years prior to the filing of a suit, except in a case of willful violation, for which three years' back pay may be recovered. The name of the individual filing the complaint may be kept confidential at the administrative level.

### Complaints against the Federal Government

Federal employees or job applicants who want to file complaints of job discrimination based on race, color, national origin, sex, religion, age, or physical or mental disability must first consult an equal employment opportunity counselor with the employees' or applicants' agency within 45 days of the alleged discriminatory action. If the complaint cannot be resolved

informally, the person may file a formal complaint within 15 days of receiving a notice of the right to file a complaint. An accepted complaint is investigated by the agency, and the complainant has a right to a hearing before an EEOC administrative judge before the agency issues its final decision. An individual who wishes to file a complaint under the Equal Pay Act of 1963 must follow these procedures. An individual may also elect to file suit under the Equal Pay Act of 1963 without prior resort to the agency or to the EEOC.

A complaint under the Age Discrimination in Employment Act of 1967, against a federal agency or department, must be filed with the head of the agency, director of equal employment opportunity, head of an EEOC field installation, or other designated official. Federal employees may bypass the administrative complaint process and file a civil action directly in a federal district court, by first notifying the EEOC within 180 days of the alleged discriminatory act and then waiting 30 calendar days before filing suit. A federal employee may appeal a decision of an agency, an arbitrator, or the Federal Labor Relations Authority, with the EEOC's Office of Federal Operations, at any time up to 30 calendar days after receiving the agency notice of final decision. A petition for review of a MERIT SYSTEMS PROTECTION BOARD decision may be filed within 30 days of the date that the board decision becomes final. A request for reconsideration of any EEOC decision must be made in writing within 30 days of receiving the decision.

### Other Activities

The EEOC publishes data on the employment status of women and members of minority groups. Through six employment surveys covering private employers, apprenticeship programs, LABOR UNIONS, state and local governments, elementary and secondary schools, and COLLEGES AND UNIVERSITIES, the EEOC tabulates data on employees' ethnic, racial, and gender makeup. The EEOC distributes this information to various federal agencies and makes it available for public use.

Eliminating a large backlog of discrimination charges has been a continuing problem for the EEOC, but efforts to streamline have been effective; by fiscal year 2001 the inventory of charges had been reduced to 32,481, in contrast to a record 120,000 charges in mid-1995.

In 1999 the EEOC launched a National Mediation Program as an alternative to the traditional complaint process. Professionals trained in mediation work with employers and employees to determine whether a mutually agreeable resolution can be reached. By 2003 the EEOC had resolved 29,000 charges through mediation. In March 2003 the EEOC added a mediation pilot program, a "referral back" program that allows the agency to give charges back to a company's internal dispute resolution program in the hopes of mediating its own agreement.

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#### CROSS-REFERENCES

Affirmative Action; Civil Rights; Disability Discrimination; Employment Law; Sex Discrimination.

## EQUAL PAY ACT OF 1963

In an effort to end gender-based discrimination in labor wages, Congress enacted the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C.A. § 206(b)). The act established the requirement that women should receive "equal pay for equal work." However, the average wages given to women are still lower than those of men, and some critics have deemed the Equal Pay Act as a failure.

Congress had attempted on a number of occasions prior to 1963 to enact similar legislation. The idea for the statute arose during WORLD WAR II, when many women entered the workforce while men were overseas. The War Labor Board established a policy of "equal pay for women." According to its policy, women were to receive equal pay for work that was of "comparable quality and quantity" to the responsibilities of men. When members of Congress introduced legislation called the Women's Equal Pay Act of 1945, it contained the phrase

"comparable work." This provision was the subject of a heated debate, and the bill failed to pass.

In the years that followed World War II, men reemerged as dominant figures in the workforce and attempts in Congress to enact an equal pay law stalled. During the early 1960s, however, Congress reconsidered the issue. When the phrase "equal work" was employed instead of "comparable work," the legislation garnered sufficient support to be enacted into law. The act amended the Fair Labor Standard Act of 1938, 29 U.S.C.A. §§ 201-209 (2000).

Congress stated that its intent in enacting the Equal Pay Act was to establish a "broad charter of women's rights," designed to remedy a "serious and endemic" problem of SEX DISCRIMINATION in the workplace. Under the act, employers are prohibited from discriminating against women on the basis of sex when women perform jobs requiring "equal skill, effort, and responsibility, and which are performed under similar working conditions" as jobs performed by men. In order to recover under the act, a woman must prove that (1) an employer paid higher wages to men than to women; (2) male and female employees conduct an equal amount of work that requires substantially equal skill, effort, and responsibility; and (3) men and women performed the work under similar working conditions.

The act establishes four main defenses for employers. An employer may pay a male employee more than a female employee if the employer can establish that payment is based upon (1) a seniority system, (2) a merit system, (3) a system whereby earnings are based upon the quantity and quality of production by the employees, or (4) a differential based upon any other factor other than the sex of the employees. Although the first three of these defenses have been the subjects of litigation, the fourth exception has been litigated more frequently.

Lower federal courts have struggled with the so-called factor-other-than-sex defense, and the U.S. Supreme Court has rendered few decisions on the issue. In *Corning Glass Works Co. v. Brennan* 417 U.S. 188, 94 S. Ct. 2223, 41 L. Ed. 2d 1 (1974), the Court ruled that an employer's policy of paying men who worked during a night shift more than women who worked the same jobs during the day shift violated the act. The Court found that the policy was related to gender because the employer knew that women would work for less money. Three years later, in *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 98 S. Ct. 7370, 55 L. Ed. 2d 657 (1977), the Court ruled that a policy requiring women to contribute more to their PENSION funds than men violated the act. The employer in the case based its policy on mortality tables indicating that women had a longer life span than men, so the women were required to pay higher rates for their pension funds. Since this policy was based on gender, the Court ruled that the employer had violated the act.

Lower federal courts have established a number of tests to determine whether an employer has adopted a wage policy based on a factor other than sex. Some circuits require an employer to demonstrate a gender-neutral wage policy that accounts for disparity in wages between men and women. Other circuits require an employer to show that the gender-neutral system of wages is based upon the performance of a woman's job duties or that a gender-neutral system was adopted to serve a legitimate business reason.

The application of the act is limited for other reasons as well. Several courts have noted that the Equal Pay Act does not establish a system of "comparable worth," because the act specifically applies to "equal work." *EEOC v. Madison Community Unit School District No. 12*, 818 F.2d 577 (7th Cir. 1987). Accordingly, courts must generally compare the wages of men and women performing the same jobs for the same company when considering a complaint brought under the act.

The limitations of the Equal Pay Act has led a number of commentators to criticize its provision and the application of the act in the courts. Many critics note that the wages of women are still significantly lower than those of men, even though employers have become more willing to hire women. In 1997, President BILL CLINTON declared April 11, 1997 to be the "National Pay Inequity Awareness Day," which signified to these critics that serious problems in pay inequities still existed.

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CROSS-REFERENCES

Civil Rights Acts; Equal Protection; Equal Rights Amendment; Women's Rights.

## EQUAL PROTECTION

*The constitutional guarantee that no person or class of persons shall be denied the same protection of the laws that is enjoyed by other persons or other classes in like circumstances in their lives, liberty, property, and pursuit of happiness. The Declaration of Independence states:*

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

The concept of equal protection and equality in the United States is as old as the country itself. In 1776, THOMAS JEFFERSON and the American colonists boldly announced the "self-evident" truth of human equality. Yet the meaning of equality was neither obvious nor clearly defined. The "peculiar institution" of SLAVERY was intricately woven into U.S. economic, social, and political fabric. Many Americans owned slaves, and most, including Jefferson himself, believed in the inferiority of the black race. JAMES MADISON and the other Founding Fathers drafted a national constitution that protected the slave trade and recognized the rights of slave owners. Article I, Section 2, of the Constitution counted a slave as only three-fifths of a person for the purposes of representation in Congress.

Slave codes permitted slave masters to buy, sell, and lease blacks like PERSONAL PROPERTY. Slaves owed their masters an unqualified duty of obedience. Slave owners, on the other hand, were free to do as they pleased, short of murdering their slaves. Only community mores, common sense, and individual conscience restrained slave owners. Very few laws protected slaves from abusive or maniacal masters, and those that did were seldom enforced. In 1857, the U.S. Supreme Court placed its stamp of approval on the institution of slavery, holding that slaves were not "citizens" within the meaning of the Constitution, but only "property" lacking any constitutional protection whatsoever (DRED SCOTT V. SANDFORD, 60 U.S., 15 L. Ed. 691 [19 How.] 393).

From the inception of the United States, then, a gulf has separated the Jeffersonian ideal of human equality from the reality of racial inequality under the law. The tension separating the aspirations of the Declaration of Independence from the barbarism of slavery ultimately erupted in the U.S. CIVIL WAR. The victory won by the North in the War between the States ended the institution of slavery in the United States and commenced the struggle for CIVIL RIGHTS that was to continue into the twenty-first century. This struggle began with the ratification of the Thirteenth (1865), Fourteenth (1868), and Fifteenth (1870) Amendments during the Reconstruction period following the Civil War.

The THIRTEENTH AMENDMENT abolished slavery and INVOLUNTARY SERVITUDE, except when imposed as punishment for a crime. The FIFTEENTH AMENDMENT did not expressly grant black citizens the right to vote, but it prohibited state and federal governments from denying this right based on "race, color, or previous condition of servitude." Each amendment gave Congress the power to enforce its provisions with "appropriate legislation."

Although both of these amendments were important, the FOURTEENTH AMENDMENT has had the greatest influence on the development of civil rights in the United States. Section 1 of the Fourteenth Amendment provides that

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

The first clause emasculated the *Dred Scott* decision by bestowing national citizenship upon all blacks born or naturalized in the United States, making them eligible for federal protection of their civil rights. The PRIVILEGES AND IMMUNITIES CLAUSE, once believed a potential source for civil rights, was narrowly interpreted by the Supreme Court in 1873 and has since remained dormant (SLAUGHTER-HOUSE CASES, 83 U.S., 21 L. Ed. 394 [16 Wall.] 36).

The EQUAL PROTECTION CLAUSE was also narrowly interpreted by the Supreme Court in the nineteenth century, but it still became the centerpiece of the CIVIL RIGHTS MOVEMENT after WORLD WAR II (1939–45). It spawned desegregation, INTEGRATION, and AFFIRMATIVE ACTION and it promoted equal treatment and

concern for the races under state law. It also provided the country with a starting point for a meaningful dialogue regarding the problems of inequality and discrimination. This dialogue has manifested itself in U.S. constitutional, statutory, and COMMON LAW.

### Constitutional Law

**Inequalities during Reconstruction** The ratification of the Fourteenth Amendment occurred during a period in U.S. history known as the Reconstruction. In this era, the South was placed under military occupation by the North, and African Americans realized some short-term benefits. KU KLUX KLAN violence was temporarily curbed. BLACK CODES, passed by southern states after the Civil War to replace slavery with a segregated system based on social caste, were dismantled. Blacks were elected to state and federal office. Some achieved prominent status in legal circles, including one African American who obtained a seat on the South Carolina Supreme Court.

But Reconstruction was not a substitute for civil rights, and the improvements realized by African Americans proved evanescent. By 1880 the North's passion for equality had atrophied, as had its interest in the fate of African Americans. In the vacuum left by federal withdrawal, southern racism flourished and Klan TERRORISM burgeoned. Labor codes were passed relegating blacks to virtual serfdom. These codes made it illegal for anyone to lure blacks away from their job for any reason, including better working conditions and wages. Some codes provided criminal penalties for African Americans who quit their job, even when no debt was owed to their employer.

Advancements made during Reconstruction were further eroded when the Supreme Court invalidated the CIVIL RIGHTS ACT of 1875 (*Civil Rights* cases, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 [1883]). This act proclaimed "the equality of all men before the law" and promised to "mete out equal and exact justice" to persons of every "race, color, or persuasion" in public or private accommodations alike. In striking down the law, the Supreme Court said that when

> a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be a special favorite of the law.

The Court was not persuaded that this act was the type of "appropriate legislation" contemplated by the Fourteenth Amendment.

**The Rise and Fall of Separate but Equal** The Supreme Court's laissez-faire attitude toward racial inequality was also reflected in the area of SEGREGATION. As Reconstruction collapsed, southern states gradually passed statutes formally segregating the races in every facet of society. Public schools, restaurants, restrooms, railroads, real property, prisons, and voting facilities were all segregated by race. The Supreme Court placed its imprimatur on these forms of racial apartheid in the landmark decision PLESSY V. FERGUSON, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896).

Homer Plessy, who was seven-eighths Caucasian and one-eighth African, was prohibited from traveling on a railway coach for whites, under a Louisiana statute requiring "equal but separate accommodations" for black and white passengers. The Supreme Court, in an 8 to 1 decision, said this statute did not violate the Equal Protection Clause of the Fourteenth Amendment: "The object of the Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but . . . it could not have been intended to abolish distinctions based upon color, or to enforce . . . a commingling of the two races upon terms unsatisfactory to either." The Fourteenth Amendment, the Court concluded, was "powerless to eradicate racial instincts or to abolish distinctions based on physical differences."

Following *Plessy,* the "separate-but-equal" doctrine remained the lodestar of Fourteenth Amendment JURISPRUDENCE for over half a century. Legally prescribed segregation was upheld by the Court in a litany of public places, including public schools. As Adolf Hitler rose to power in Germany during the 1930s, however, many U.S. citizens began to reconsider their notions of equality. Nazi policies of Aryan superiority, racial purity, ethnic cleansing, and extermination made many U.S. citizens view segregation in a more negative light. The juxtaposition of the Allied powers fighting totalitarianism in World War II and the citizenry practicing RACIAL DISCRIMINATION in the United States seemed hypocritical to many, especially when segregated African American troops were sacrificing their lives on the battlefield.

A series of Supreme Court decisions began to limit the scope of the SEPARATE-BUT-EQUAL

doctrine. The first hint of the Court's changing perspective came in the footnote to an otherwise forgettable case, *United States v. Carolene Products,* 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938). In *Carolene Products,* the Court upheld a federal statute regulating commerce, applying a presumption of constitutionality to legislation in this area. However, in FOOTNOTE 4, the Court cautioned that this presumption may not apply to legislation "directed at national . . . or racial minorities . . . [where] prejudice against discrete and insular minorities may be a special condition, which tends to seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial scrutiny."

The Court employed a "more searching judicial scrutiny" in *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337, 59 S. Ct. 232, 83 L. Ed. 208 (1938). This case involved a black applicant who was denied admission to the University of Missouri Law School solely because of his color. The state of Missouri, which had no law school for blacks, attempted to fulfill its separate-but-equal obligations by offering to pay for the black applicant's tuition at a comparable out-of-state law school. The Supreme Court held that this arrangement violated the applicant's Fourteenth Amendment rights. The Court ruled that Missouri was required to provide African American law students with equal educational opportunities within its own borders, and could not shirk this responsibility by relying on educational opportunities offered in neighboring states.

When states did offer black students a separate LEGAL EDUCATION, the Supreme Court closely examined the quality of the educational opportunities afforded to each race in the segregated schools. In *Sweatt v. Painter,* 339 U.S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 (1950), the Court ruled that the segregated facilities offered to black and white law students in Texas were not substantially equal. The Court determined that the faculty, library, and courses offered at the African American law school were patently inferior and denied the black students equal protection of the laws.

On the same day *Sweatt* was decided, the Court invalidated Oklahoma's attempt to segregate graduate students of different races within a single educational facility (*McLaurin v. Oklahoma State Regents,* 339 U.S. 637, 70 S. Ct. 851, 94 L. Ed. 1149 [1950]). Black law students at the

**Equal Protection: Educational Attainment, in 2000**

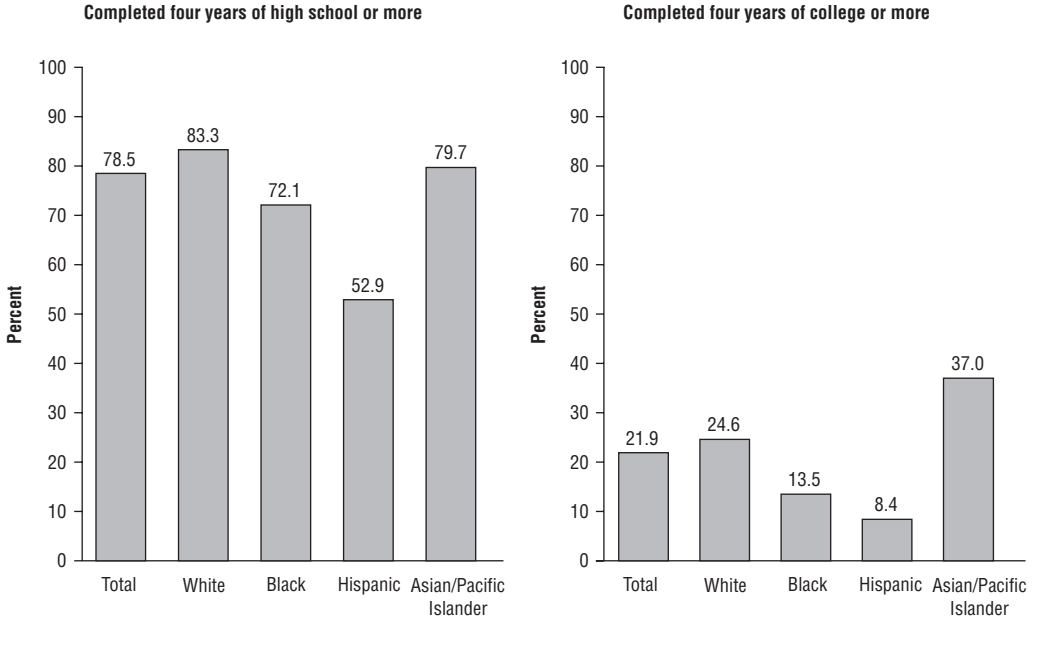


SOURCE: U.S. Census Bureau.

University of Oklahoma were required to attend class in an anteroom designated for "coloreds only," study on the mezzanine of the library, and eat in the cafeteria at a different time than white students. The Court struck down these arrangements, determining that segregation impaired the students' "ability to study, engage in discussions, exchange views . . . and in general, learn [the] profession." According to the Court, the Fourteenth Amendment required the integration of black and white graduate students.

***Brown v. Board of Education*** *Plessy, Carolene Products,* and so forth, foreshadowed the watershed equal protection decision handed down by the U.S. Supreme Court in 1954, **BROWN V. BOARD OF EDUCATION**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873. *Brown* reviewed four consolidated cases in which local governments segregated public schools by race. In each case, black students were denied admission on an integrated basis. The question before the Court was not whether the segregated educational facilities were of a similar quality. Instead, the question was whether, under any circumstances, segregated educational opportunities could ever be equal, or substantially equal, in nature. In a resounding, unanimous opinion, the Court said that separate-but-equal education is "inherently unequal" and "has no place" in the field of public education.

Citing *Sweatt* and *McLaurin,* the Court reiterated that students' ability to learn is stunted without exposure to the viewpoints of different races. The Court also underscored the sociological and psychological harm segregation inflicts on minority children, finding that segregation "is usually interpreted as denoting the inferiority of the Negro group." The Court added, "Segregation with the sanction of law . . . has a tendency to [retard] the educational and mental development of Negro children and deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

When the *Brown* decision was announced, observers realized that the rationale applied by the Court had far-reaching consequences. If segregation in public schools denoted the inferiority of African Americans, so did segregation elsewhere in society. If integration enhanced educational opportunities for U.S. citizens of every race, then perhaps integration could spur economic growth and social development. Observers also realized that if segregation in public schools violated the Equal Protection Clause, then all forms of government-imposed segregation were vulnerable to constitutional attack.

*Relying on the 1954* Brown v. Bd. of Ed. *decision, the U.S. Supreme Court struck down state laws that segregated public transportation. Many Southern states resisted, as evident in this 1961 photo taken in a McComb, Mississippi, bus station.*

AP/WIDE WORLD PHOTOS

**Modern Equal Protection Jurisprudence** Over the next forty years, the Supreme Court demonstrated that the principles enunciated in *Brown* were not limited to racial segregation and discrimination. In addition to striking down most legislative classifications based on race, the Court closely examined classifications based on length of state residency, U.S. citizenship, and gender. The Court looked carefully at legislation denying benefits to children born out of wedlock. Government classifications denying any group a fundamental right were also reviewed with judicial skepticism.

The Supreme Court has recognized that nearly all legislation classifies on the basis of some criteria, bestowing benefits or imposing burdens on one group and denying them to another. For example, the government offers veterans, indigent people, and elderly people free or low-cost medical services that are not available to the rest of society. Progressive tax rates impose higher rates of taxation on the wealthy. Few such classifications are perfectly drawn by the legislature.

Most classifications are either overinclusive or underinclusive. An overinclusive classification contains all persons who are similarly situated and also persons who should not be included. Legislation that is intended to protect poor and fragile elderly people but actually extends to all **SENIOR CITIZENS** is overinclusive. An underinclusive classification excludes some

similarly situated persons from the intended legislative benefit or detriment. Legislation that is designed to eliminate FRAUD in government but actually excludes EXECUTIVE BRANCH employees from its regulatory grasp is underinclusive. Some classifications can be both underinclusive and overinclusive.

Although most plaintiffs contend they are members of a historically vulnerable group to which the Supreme Court has given special protection, this is not always the case. In *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000), the Supreme Court ruled that anyone who claims to have been singled out for adverse, irrational government action may bring a lawsuit based on the violation of the Equal Protection Clause. In effect, a person can become a "class of one."

The Supreme Court has developed a three-tiered approach to examine all such legislative classifications. Under the first tier of scrutiny, known as STRICT SCRUTINY, the Court will strike down any legislative classification that is not necessary to fulfill a compelling or overriding government objective. Strict scrutiny is applied to legislation involving suspect classifications and fundamental rights. A SUSPECT CLASSIFICATION is directed at the type of "discrete and insular minorities" referred to in the *Carolene Products* footnote. A fundamental right is a right that is expressly or implicitly enumerated in the U.S. Constitution, such as FREEDOM OF SPEECH or assembly. Most legislation reviewed by the Supreme Court under the strict scrutiny standard has been invalidated, because very few classifications are necessary to support a compelling government objective.

The second tier of scrutiny used by the Court to review legislative classifications is known as heightened, or intermediate, scrutiny. Legislation will not survive heightened scrutiny unless the government can demonstrate that the classification is substantially related to an important societal interest. Gender classifications are examined under this middle level of review, as are classifications that burden extramarital children.

The third tier of scrutiny involves the least amount of judicial scrutiny and is known as the rational relationship test. The Supreme Court will approve legislation under this standard so long as the classification is reasonably related to a legitimate government interest. The rational relationship test permits the legislature to employ any classification that is conceivably or arguably related to a government interest that does not infringe upon a specific constitutional right. An overwhelming majority of social and economic laws are reviewed and upheld by courts using this minimal level of scrutiny.

**Classifications Based on Race** Applying strict scrutiny, the Supreme Court has consistently struck down legislative classifications based on race. Relying on the *Brown* decision, the Court struck down a series of state laws segregating parks, playgrounds, golf courses, bathhouses, beaches, and public transportation. Because the Fourteenth Amendment protects against only government discrimination, discrimination by private individuals or businesses is not proscribed under the Equal Protection Clause unless the government is significantly involved in the private activity. Although the Equal Protection Clause does not offer protection against discriminatory laws promulgated by the president, Congress, or federal administrative agencies, the Supreme Court has interpreted the DUE PROCESS CLAUSE of the FIFTH AMENDMENT to provide such protection (*Bolling v. Sharpe,* 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 [1954]).

The equal protection guarantee extends not only to laws that obviously discriminate on their face as did the laws that intentionally segregated races in public schools, but also to government action having a discriminatory purpose, effect, or application. Governmental activity with a discriminatory purpose, also known as purposeful discrimination, may occur when a prosecutor exercises a PEREMPTORY CHALLENGE (the right to exclude a juror without assigning a reason or legal cause) to exclude a member of a minority race from a jury (*Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 [1986]). If the prosecutor is unable to articulate a reason for striking the juror that is unrelated to race, the peremptory challenge will be nullified by the court.

The discriminatory impact of a race-neutral classification may also doom legislation under the Fourteenth Amendment. For example, following the demise of Reconstruction, many former Confederate states enacted legislation requiring residents to pass literacy tests before they could register to vote, but exempted persons who had been qualified to vote at an earlier time when blacks were disenfranchised slaves (i.e., Caucasians). This "grandfather clause" exemp-

tion was struck down by the Supreme Court because of its discriminatory impact on African Americans. The Court also struck down other voting restrictions, including "white primaries," which excluded African Americans from participating in a state's electoral process for selecting delegates to a political party convention.

A law can be neutral on its face or in purpose, but still be applied in a discriminatory manner. In YICK WO V. HOPKINS, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886), the Supreme Court struck down a San Francisco ordinance banning the operation of hand laundries in wooden buildings, because local officials were closing down only laundries owned by persons of Asian descent. White owners of such institutions were permitted to keep their businesses open.

Proof of discriminatory purpose, effect, or application can be difficult. Courts will search the LEGISLATIVE HISTORY of a particular classification for discriminatory origins. Courts also consider specific discriminatory actions taken by state officials in the past. Statistical evidence is relevant as well, but insufficient to establish discrimination by itself (*McCleskey v. Kemp,* 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 [1987]).

*McCleskey* involved a black man who was convicted and sentenced to death for killing a white police officer. On appeal, attorneys for the defendant relied on a sophisticated statistical analysis indicating that blacks were significantly more likely to receive the death penalty for killing a white person than were whites convicted of killing a black person. In a 5 to 4 decision, the Supreme Court said this evidence was not enough to demonstrate that the defendant had been denied equal protection. The majority held that the defendant could have prevailed under the Fourteenth Amendment only if he had shown a discriminatory purpose on the part of the Georgia legislature when it enacted the death penalty legislation, or on the part of the jurors in his trial when they imposed the death sentence.

**Racial Classifications Surviving Judicial Scrutiny** Classifications based on race usually sound the death knell for the legislation containing them, with two notable exceptions. The first involves the internment of Americans with Japanese ancestry during World War II, and the second comes in the area of affirmative action.

***Japanese American Internment*** Pursuant to concurrent presidential, congressional, and military action, over one hundred thousand Japanese Americans were confined to "relocation camps" throughout the United States during World War II. Despite Justice Hugo L. Black's assertion that all race-based legal classifications are "immediately suspect" and subject to the "most rigid scrutiny," the Supreme Court ruled in *United States v. Korematsu,* 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944), that the internment did not violate the Equal Protection Clause. Deferring to the combined war powers of the president and Congress, the Court said relocation of these U.S. citizens was a "military urgency" in the war against Japan, justified by concern over domestic ESPIONAGE, sabotage, and subversion. Justices OWEN J. ROBERTS, FRANK MURPHY, and ROBERT H. JACKSON dissented, arguing that no evidence of disloyalty had been produced against any of the interned Japanese Americans. *Korematsu* stands as the only case in which the Supreme Court has upheld a racial classification under the strict scrutiny standard.

***Affirmative Action*** Affirmative action, sometimes called benign discrimination because it is considered less harmful than other forms of discrimination, is represented by government programs created to remedy past discrimination against blacks, women, and members of other protected groups. These programs include special considerations given to minorities competing against the rest of society for jobs, promotions, and admission to COLLEGES AND UNIVERSITIES. Opponents of affirmative action characterize it as reverse discrimination because it often excludes individuals with ostensibly superior credentials, solely on account of their race or gender.

The Supreme Court has vacillated on what level of scrutiny applies to affirmative action programs. In REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978), in which there was no majority opinion, four justices applied heightened scrutiny in holding that a university may consider racial criteria as part of a competitive admission process, so long as it does not use fixed quotas. But in *Richmond v. J. A. Croson Co.,* 488 U.S. 469 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989), five justices applied strict scrutiny to invalidate an affirmative action program intended to increase the number of minority-owned businesses awarded city construction contracts.

As of 2003, it appears that a majority of justices favor application of strict scrutiny to cases involving benign discrimination (not obvious or

intentional). When the more stringent level of scrutiny has been applied in these cases, the Court has held that a general legislative desire to correct past injustices was not sufficiently compelling to warrant a racial preference for minorities. Instead, the Court has ruled, benign racial preferences will be tolerated under the Fourteenth Amendment only when the government can demonstrate that they are narrowly tailored to correct specific discriminatory practices by the government itself or by some private sector entity within its jurisdiction.

Lower federal courts and state courts have struggled with the proper analysis of affirmative action programs in light of the line of Supreme Court decisions. Some of the more high profile cases have focused upon affirmative actions in state universities. In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), the Fifth Circuit Court of Appeals found that a program at the University of Texas School of Law that provided "substantial" racial preferences to African and Mexican Americans in its admissions policies violated the Fourteenth Amendment. The school based its admission of prospective students on the students' undergraduate grade point averages and scores on the Law School Admission Test (LSAT). Requirements for entry for minority candidates were lower than those for other "non-preferred" candidates, including Caucasians.

The Fifth Circuit held that the university's program failed to serve a compelling state interest and, even if it had, it was not narrowly tailored to serve any compelling STATE INTEREST. The case garnered national attention and was heavily criticized by minority groups. The Supreme Court denied certiorari in the case, allowing the ruling to stand. Thus, schools in Texas, Mississippi, and Louisiana are forbidden from using race as a consideration in admissions policies. Litigation in the case continued for several years following the decision.

Other circuits have reached opposite results, often explicitly rejecting the *Hopwood* analysis. The Ninth Circuit, in *Smith v. University of Washington, Law School*, 233 F.3d 1188 (9th Cir. 2000), found that a properly designed and operated race-conscious admissions program would not violate the Fourteenth Amendment. The law school at the University of Washington employed an affirmative action program when it considered the admission of law students. Although the Ninth Circuit eventually held that the case was moot because the law school had voluntarily stopped using race as a criteria, the court noted that *Bakke* continued to have vitality, thus allowing race to be used as a criterion so long as schools did not establish quotas.

**Classifications Based on Gender** The Supreme Court has established that gender classifications are subject to intermediate scrutiny. The seminal case in this area is *Craig v. Boren,* 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), which involved an Oklahoma law permitting females between the ages of eighteen and twenty to purchase 3.2 percent beer, but restricting males from purchasing such beer until they reached age twenty-one. The state defended the statute by introducing traffic statistics that suggested that men were more likely than women to be arrested for drunk driving before age twenty-one. The Court agreed that enhanced traffic safety was an "important" government interest but disagreed that the gender line drawn by the state would "substantially" serve this interest.

Although many cases regarding classifications based on gender have involved discriminatory actions against women, some men have successfully brought cases alleging SEX DISCRIMINATION in violation of the Equal Protection Clause. For example, in *Hill v. Ross*, 183 F.3d 586 (7th Cir. 1999), the Seventh Circuit determined that a school's decision not to hire a male university professor solely on the grounds of his gender could be a violation of the Equal Protection Clause and federal statutory law. In *Hill*, a university department refused to hire either of two male candidates because it wished to maintain a certain proportion of women on its faculty. The court reversed a SUMMARY JUDGMENT granted by the district court because an issue of material fact existed as to whether prior instances of discrimination based on sex necessitated the university's policy.

**Alienage, State Residency, and Legitimacy Classifications** The Supreme Court has held that legislation discriminating against ALIENS who are properly within the United States is considered suspect and will be upheld only if the classification is necessary to serve a compelling government interest. In at least one alienage case, however, the Court has applied only heightened scrutiny to invalidate a state law preventing undocumented children from enrolling in the Texas public school system (*Plyler v. Doe,* 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 [1982]). The Court continues to call classifica-

tions based on alienage suspect but may not always apply the most rigorous scrutiny to such legislation.

State laws that condition government benefits on length of state residency have also been deemed suspect by the Supreme Court. In *Shapiro v. Thompson,* 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), the Court ruled that legislation denying government benefits to persons residing in a state for less than a year violated the Equal Protection Clause. Although states may restrict WELFARE, educational, and other government benefits to bona fide residents, the Court wrote, they may not restrict the dispensation of government benefits in a way that would unduly burden the right to interstate travel or deprive interstate travelers of the right to be treated as equal to other state residents. Since *Shapiro,* the Supreme Court has occasionally applied more moderate scrutiny to legislation burdening interstate travelers, prompting critics to assail the Court for its inconsistent application of the three-tiered analysis.

State laws that discriminate against children born out of wedlock are subject to heightened scrutiny. State legislation has been struck down for denying illegitimate children inheritance rights, welfare benefits, and CHILD SUPPORT when such rights were offered to legitimate children. Although ILLEGITIMACY is not a suspect classification subject to strict scrutiny, courts do provide meaningful review of such statutes. The Supreme Court is sensitive to penalizing children for their extramarital status when the children themselves are not responsible for that status.

**Classifications Involving Sexual Preference** In ROMER V. EVANS, 517 U.S. 620, 116 S. Ct. 1620, L. Ed. 2d (1996), the U.S. Supreme Court reviewed a Colorado state constitutional amendment that prohibited any branch of the state or local governments from taking action designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation." The immediate effect of the amendment, known popularly as "Amendment 2," was to repeal all existing statutes, regulations, ordinances, and governmental policies that barred discrimination based on sexual preference. Under Amendment 2, state officials and private entities would have been permitted to discriminate against gays and lesbians in a number of areas, including insurance, employment, housing, and welfare services.

The state of Colorado defended Amendment 2 by arguing that it did nothing more than place homosexuals on a level playing field with all other state residents. The amendment, Colorado submitted, simply denied gays and lesbians any "special rights." The Supreme Court disagreed, holding that Amendment 2 violated the Equal Protection Clause because it "identifies persons by a single trait and then denies them protection across the board," which is something "unprecedented in our Jurisprudence."

Writing for a six-person majority, Justice ANTHONY KENNEDY explained that "Equal Protection of the laws is not achieved through indiscriminate imposition of inequalities." The associate justice said that "[r]espect for this principle" demonstrates "why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare." Amendment 2 is unconstitutional, Kennedy concluded, because any law that generally makes it "more difficult for one group of citizens than all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."

**Classifications Involving Fundamental Rights** A fundamental right is a right expressly or implicitly enumerated by the U.S. Constitution. In *Palko v. Connecticut,* 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937), Justice BENJAMIN N. CARDOZO wrote that these freedoms represent "the very essence of a scheme of ordered liberty . . . principles so rooted in the traditions and conscience of our people as to be ranked as fundamental." During the nation's first century, freedom of contract and various property rights were deemed fundamental. In the twentieth century, more personal liberties have been recognized as such. These freedoms include most of those explicitly contained in the BILL OF RIGHTS, such as freedom of speech, freedom of religion, freedom of assembly, RIGHT TO COUNSEL, right against unreasonable SEARCH AND SEIZURE, right against SELF-INCRIMINATION, right against DOUBLE JEOPARDY, right to a jury trial, and right to be free from CRUEL AND UNUSUAL PUNISHMENT. They also include freedoms specifically mentioned elsewhere in the Constitution, such as the right to vote. In the late twentieth century, the Supreme Court began to find that fundamental rights embodied freedoms that were not expressly enumerated by the Constitution but that may be fairly inferred by one of its provisions, such as the rights to personal autonomy and privacy.

Relying on the doctrine of incorporation, the Supreme Court has made these fundamental constitutional principles applicable to the states through the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court has concluded, in a series of decisions, that these freedoms are so important to the preservation of liberty that they must be equally conferred upon the citizens of every state. No state may provide its residents with less protection of these fundamental rights than is offered under the federal Constitution. The Fourteenth Amendment thus guarantees state citizens equal protection under the laws, by creating a minimum federal threshold of essential freedoms each state must recognize.

In *Gideon v. Wainright,* 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), Clarence Earl Gideon was charged with entering a poolroom with the intent to commit a misdemeanor. Before trial, Gideon, an indigent, asked the judge to appoint an attorney to represent him because he could not afford one. The court denied Gideon's request, and a jury later convicted him. Gideon's request for a court-appointed counsel in a misdemeanor case would have been denied in many states at that time. The Supreme Court held that all states must thereafter provide court-appointed counsel at every critical stage of a criminal proceeding, whether the proceeding concerned a misdemeanor, felony, or capital offense. The right to counsel is too fundamental for any state to ignore.

The year after *Gideon* was decided, the Supreme Court handed down another groundbreaking decision in the area of fundamental rights. **REYNOLDS V. SIMS**, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), involved the dilution of **VOTING RIGHTS** through legislative **APPORTIONMENT** in Alabama. Legislative apportionment refers to the manner in which a state, county, or municipality is divided for purposes of determining legislative representation. Some states are divided into voting precincts, whereas others are divided into wards or districts.

In *Reynolds,* the voting subdivisions were so unevenly apportioned that a distinct minority of Alabama voters were electing a majority of the state legislators. As a result, voters in less populated electoral subdivisions had more voting power than did voters in more populated electoral subdivisions. The Supreme Court struck down this arrangement under the Fourteenth Amendment, holding that every voter has a fundamental right to cast a ballot of equal weight. The Court had earlier applied this **ONE-PERSON, ONE-VOTE** principle to federal congressional districts, requiring that all such districts be as nearly equal in population as practicable (*Wesberry v. Sanders,* 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 [1964]).

In addition to the Fourteenth Amendment of the U.S. Constitution, most state constitutions provide equal protection guarantees and enumerate certain fundamental rights. In many of the states with these constitutions, courts also employ a three-tiered analysis similar to that developed by the U.S. Supreme Court. State courts can interpret their own constitution to provide more, but not less, protection than that offered under the federal Equal Protection Clause.

### Legislation

The Fourteenth Amendment authorizes Congress to enact "appropriate legislation" to enforce the Equal Protection Clause. The **COMMERCE CLAUSE** provides Congress with the authority to enact legislation that affects interstate commerce, an even broader power. Pursuant to these clauses, Congress has enacted major pieces of legislation that have extended protection against discrimination beyond that contained in the Constitution.

The Civil Rights Act of 1871 (42 U.S.C.A. § 1983 et seq.) was an early piece of such legislation. **SECTION 1983** of the act, passed when Ku Klux Klan violence was widespread, created a federal remedy, namely money damages, for individuals whose constitutional rights had been violated by state officials. Although this statute has been influential and frequently litigated, no relief will be granted under it unless "state action" can be demonstrated.

The term, "state action," refers to a discriminatory act committed by a government official or agent. Such action may be taken by a legislative, executive, judicial, or administrative body, or some other person or entity acting under "color of law." Section 1983 does not apply to wholly private or nongovernmental conduct. If action is taken by a private individual cloaked with some measure of state authority, courts will find **STATE ACTION** if one of four tests is satisfied: (1) public function test—state action is found where the government has delegated its traditional responsibilities, such as police protection, to a private party or agency; (2) nexus test—state action is found where there is a sufficiently close connection between the government and a private actor,

such as where the state owns or leases property on which private discrimination occurs; (3) state compulsion test—state action is found where the government coerces or significantly encourages private conduct, such as where federal regulations require private railways to conduct urinalysis after accidents; (4) joint action test—state action is found where the government is a willful participant in discrimination by a private actor.

Other congressional legislation prohibits discrimination in the private sector. Title VII of the 1964 Civil Rights Act prohibits employers from hiring or firing employees on the basis of race, color, sex, or national origin (42 U.S.C.A. § 2000e-2 et seq.). Federal courts have interpreted Title VII to prohibit hostile work environments involving SEXUAL HARASSMENT, even when the perpetrator and victim are the same gender. The Age Discrimination in Employment Act (29 U.S.C.A. § 623 et seq.) extends Title VII protections to employment decisions based on age and is applicable to persons between the ages of forty and seventy. Under both statutes, employers may defend their actions by demonstrating nondiscriminatory reasons for a particular decision, such as the dishonesty or INCOMPETENCY of a discharged employee.

The Americans with Disabilities Act (ADA) (42 U.S.C.A. § 1211 et seq.) prohibits discrimination against "qualified individuals" based on a "physical or mental impairment that substantially limits one or more" of an individual's "major life activities." Title I of the ADA applies to employers and requires them to make "reasonable accommodations" for disabled employees who are otherwise qualified to perform a job, unless such accommodations would cause undue hardship to the business. Such accommodations can include making existing facilities more accessible, permitting part-time or modified work schedules, and reassigning jobs.

Title II applies to public entities, including any department, agency, or other instrumentality of a state or local government. The ADA does not apply to the federal government, but other legislation does protect disabled federal employees. Title III of the ADA governs public accommodations such as restaurants, theaters, museums, stores, daycare centers, and hospitals. The word *disability* includes terminal illnesses and prevents HEALTH CARE facilities from failing to treat patients diagnosed with AIDS or HIV.

Many state statutes also promote equal protection by prohibiting discrimination. Legislation from several states combines many of the federal protections under a single category of HUMAN RIGHTS law. Depending on the particular jurisdiction and issue at stake, state human rights legislation, and the court decisions interpreting it, may provide broader protection than that offered under similar federal laws.

### The Common Law

The notion of equal protection or equal treatment is rooted in the Anglo-Saxon common law. When HENRY II ascended the throne in 1154, England was divided into political subdivisions consisting of villages, hundreds, shires, and towns. The king, feudal lords, and local assemblies all wielded power to some extent. But there were no effective national executive, legislative, or judicial institutions that could administer laws in a uniform and organized manner. Henry II changed this condition by creating a royal common law, which his officials disseminated throughout the kingdom. Thus, the king's law was made "common" to citizens of the entire realm.

The idea of equality under the law is also rooted in the RULE OF LAW and in the principle that no one is above the law, including the king and the members of Parliament. This principle found expression in Bonham's case, 8 Co. 107a, 77 Eng. Rep. 638 (K.B. 1608), in which eminent English jurist SIR EDWARD COKE wrote that "the common law will . . . controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."

In 1761, JAMES OTIS, an American colonist, relied on Coke in the WRITS OF ASSISTANCE CASE, in which he stated that any act of Parliament "against the constitution is void" and that it was the duty of the courts to "pass such acts into disuse" because they contravened "the reason of the common law." In a recent application of this principle, President RICHARD M. NIXON lost his battle with the rule of law when the Supreme Court forced him to surrender the infamous WATERGATE tapes against his assertion of EXECUTIVE PRIVILEGE (UNITED STATES V. NIXON, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 [1974]).

Courts have also relied on the concept of equal treatment in explaining the common doctrine of STARE DECISIS. When a court has laid down a principle of law in one case, stare decisis requires the court to apply that principle to

future cases involving a similar set of facts. Some commentators have suggested that stare decisis serves two policy considerations: continuity and predictability in the law. But this doctrine also promotes equal treatment, federal courts have reasoned, by permitting all similarly situated litigants to obtain the same results under the law.

The American Revolution was sparked by the idea of equality. In 1776, the colonists declared themselves independent of the British Empire, in which the government often acted as if it were above the law. Jefferson and the other revolutionaries announced their steadfast adherence to the rule of law and the idea of human equality. But the idea of equality has always been ambiguous and controversial. U.S. citizens still disagree about whether the Equal Protection Clause of the Fourteenth Amendment guarantees equality of condition, equality of result, or equality of treatment and concern under the law. This disagreement manifests itself in state and federal courthouses and the halls of Congress.

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## EQUAL RIGHTS AMENDMENT

The Equal Rights Amendment (ERA) was the most highly publicized and debated constitutional amendment before the United States for most of the 1970s and early 1980s. First submitted by Congress to the states for ratification on March 22, 1972, it failed to be ratified by its final deadline of June 30, 1982. If ratified, the ERA would have become the TWENTY-SEVENTH AMENDMENT to the Constitution. The proposed addition would have read, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

The ERA was written by ALICE PAUL, of the National Woman's Party, and was first introduced in Congress in 1923. No action on the amendment was taken until the NATIONAL ORGANIZATION FOR WOMEN, which was founded in 1966, revived interest in it.

When the amendment was first submitted to the states in 1972, Congress prescribed a deadline of seven years for ratification. Because an amendment must be ratified by the legislatures or conventions of three-fourths of the states, the ERA required approval by thirty-eight states.

Advocates of the ERA intended it to give women constitutional protection beyond the EQUAL PROTECTION Clauses of the Fifth and Fourteenth Amendments. They believed that the ERA would compensate for inadequate statutory protections for women and sluggish judicial enforcement of existing laws. According to a report that accompanied passage of the ERA resolution in the House, the ERA was necessary because "our legal system currently contains the vestiges of a variety of ancient COMMON LAW principles which discriminate unfairly against women" (H.R. Rep. No. 92-359, 92d Cong. [1971]). These vestigial principles, the report argued, gave preferential treatment to husbands over wives, created a double standard by giving men greater freedom than women to depart from moral standards, and used "obsolete and irrational notions of chivalry" that "regard women in a patronizing or condescending light."

The ERA encountered significant opposition, particularly in southern states. Opponents of the amendment held that certain inequalities between men and women are the result of biology and that some legislation and state policies must necessarily take this fact into account. Some also contended that the ERA would undermine the social institutions of marriage and family. Others argued that women already had sufficient constitutional protections and that the ERA was made unnecessary by recent liberal Supreme Court decisions, including FRONTIERO V. RICHARDSON, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973), which struck

down a federal law that gave preferential treatment to married males over married females in securing salary supplements while in the **ARMED SERVICES.**

*Frontiero* also serves as an example of the way in which the ERA influenced the Supreme Court. In a concurring opinion, Justice **LEWIS F. POWELL JR.** cited the pending ERA ratification as a reason to delay gender-related constitutional interpretation. He favored waiting for the results of the ERA's ratification process so that the political process might guide the Court's constitutional interpretation.

By 1973, less than two years after its submission to the states, thirty states had ratified the ERA, and the success of the measure seemed likely. Only five more states ratified the measure, however, by the end of the seven-year deadline, leaving it three states short in its bid to become law. In June 1979, Congress extended the ratification deadline to June 30, 1982. During the extension, ERA supporters organized economic boycotts of states that failed to ratify the amendment. Despite all these efforts, and even though public opinion polls indicated that a majority of U.S. citizens supported the measure, no more states ratified the ERA.

Supporters of the ERA reintroduced the amendment in Congress yet again on July 14, 1982. The House of Representatives voted down the proposal on November 15, 1983.

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**CROSS-REFERENCES**

Equal Protection; Women's Rights.

## EQUITABLE REMEDY

*Court-ordered action that directs parties to do or not to do something; such remedies include injunctive relief and* **SPECIFIC PERFORMANCE.** *Alternatively, a non-monetary remedy, such as an* **INJUNCTION** *or specific performance, obtained when a legal remedy such as money damages cannot adequately redress the injury.*

*Supporters of the Equal Rights Amendment carry a banner during a march in Washington, D.C., on August 26, 1977.*

AP/WIDE WORLD PHOTOS

## EQUITY

*In its broadest sense, equity is fairness. As a legal system, it is a body of law that addresses concerns that fall outside the jurisdiction of* **COMMON LAW.** *Equity is also used to describe the money value of property in excess of claims, liens, or mortgages on the property.*

Equity in U.S. law can be traced to England, where it began as a response to the rigid procedures of England's law courts. Through the thirteenth and fourteenth centuries, the judges in England's courts developed the common law, a system of accepting and deciding cases based on principles of law shaped and developed in preceding cases. **PLEADING** became quite intricate, and only certain causes of action qualified for legal redress. Aggrieved citizens found that otherwise valid complaints were being dismissed for failure to comply with pleading technicalities. If a complaint was not dismissed, relief was often denied based on little more than the lack of a controlling statute or precedent.

Frustrated plaintiffs turned to the king, who referred these extraordinary requests for relief to a royal court called the Chancery. The Chancery was headed by a chancellor who possessed the power to settle disputes and order relief according to his conscience. The decisions of a chancellor were made without regard for the common law, and they became the basis for the law of equity.

Equity and the common law represented opposing values in the English legal system. The common law was the creation of a judiciary independent from the Crown. Common-law courts believed in the strict interpretation of statutes and precedential cases. Whereas the

common law provided results based on years of judicial wisdom, equity produced results based on the whim of the king's chancellor. Common-law judges considered equity ARBITRARY and a royal encroachment on the power of an independent judiciary. Renowned seventeenth-century judge JOHN SELDEN called equity "a roguish thing" and noted that results in equity cases might well depend on the size of a chancellor's foot.

Despite this kind of opposition, equity assumed a permanent place in the English legal system. The powers of the Chancery became more defined; equity cases came to be understood as only claims for which monetary relief was inadequate. By the end of the seventeenth century, the chancellor's opinions became consistent enough to be compiled in a law reporter.

Because of its association with the king, equity was viewed with suspicion in the American colonies. Nonetheless, colonial legislatures understood the wisdom of allowing judges to fashion remedies in cases that were not covered by settled common law or statutes. The Framers of the U.S. Constitution recognized the providence of equity by writing in Article III, Section 2, Clause 1, that the "judicial Power shall extend to all Cases, in Law and Equity." All states eventually allowed for the judicial exercise of equity, and many states created SPECIAL COURTS of equity, which maintained procedures distinct from those of courts of law.

In 1938, the Federal Rules of CIVIL PROCEDURE established one system for processing both law and equity cases. Soon after, most states abolished the procedural distinctions between law and equity cases. In federal courts and most state courts, all civil cases now proceed in the same fashion, regardless of whether they involve legal or equitable redress.

The most important remaining distinction between law and equity is the right to a jury trial in a civil case. Where the plaintiff seeks a remedy of money damages, the plaintiff is entitled to a jury trial, provided the amount sought exceeds an amount specified by statute. Where the plaintiff seeks a remedy that is something other than money, the plaintiff is not entitled to a jury trial. Instead, the case is decided by one judge. If a plaintiff asks for both equitable and monetary relief, a jury will be allowed to decide the claims that ask for monetary relief, and a judge will decide the equity claims. Judges are guided by precedent in equity cases, but in the spirit of equity, they have discretion and can rule contrary to apparent precedent.

Delaware and Mississippi are among the few jurisdictions that still separate law and equity cases. In Delaware, equity cases are heard in a separate court of equity called the Court of Chancery. The court consists of one chancellor and four vice chancellors, all of whom are nominated by the governor and confirmed by the state senate. The court hears cases involving internal corporate disputes, as well as guardianship and trust management cases.

In any court, equity or otherwise, a case or issue may be referred to as equitable. This generally means that the relief requested by the plaintiff is not a money award. Whether to grant equitable relief is left to the discretion of the judge. By contrast, other civil actions theoretically entitle a plaintiff to a prescribed remedy (usually money damages) from either a judge or a jury if, based on the evidence, the defendant is unable to defeat the plaintiff's case.

### Equitable Relief

Equitable relief comes in many forms. It may be a RESTRAINING ORDER or an INJUNCTION, which are court orders directing a party to do or not do something. An accounting may be requested by a plaintiff who seeks to know how his or her money is being handled. A trust or CONSTRUCTIVE TRUST can be ordered by a judge to place the care and management of property with one person for the benefit of another. A partition is an order dividing property held between two or more persons. *Declaratory relief* is granted when a judge declares the rights of certain parties. The effect of a DECLARATORY JUDGMENT is to set future obligations between the parties.

Under the remedy of SPECIFIC PERFORMANCE, a judge may order one party to perform a specific act. This type of relief is often used to resolve contractual disputes involving unique property. For example, the purchaser of a house may not wish to obtain money damages if the seller breaks a contract for sale of the house. This may be so because a house is considered unique and thus the damage is irreparable—that is, it cannot be fully redressed by mere money damages. If the court agrees that money damages would be inadequate redress for the buyer, the judge may order a completion of the sale to the buyer, instead of money damages, for the seller's breach of contract.

Equitable contract remedies offer a judge an array of choices. RESCISSION discharges all parties to a contract from the obligations of the contract. The remedy of rescission restores the parties to the positions they held before the formation of the contract. Restitution is an order directing one party to give back something she or he should not be allowed to keep. These two remedies may be sought together. For example, if a buyer purchases an antique piano on credit and later discovers it is a fake, the buyer may sue for rescission and restitution. Under such a dual remedy, the buyer would return the piano to the seller, and the seller would return any payments made by the buyer.

Reformation is an equitable way to remedy a contractual mistake. Suppose, for example, that a buyer agrees to order 5,000 units of a product but mistakenly signs a contract ordering the shipment of 50,000 units. If the seller refuses to provide fewer than 50,000 units and demands payment for 50,000, the buyer may sue the seller for reformation of the contract. In such a case, the court may change the terms of the contract to reflect the amount of product actually agreed upon.

Equitable relief has long been considered an extraordinary remedy, an exception to the general rule of money damages. Modern courts still invoke the rule that equitable relief is available only where money damages are inappropriate; in practice, however, courts rarely insist on monetary relief when equitable relief is requested by a plaintiff.

### Equitable Defenses

The doctrine of *clean hands* holds that the plaintiff in an equity claim should be innocent of any wrongdoing or risk dismissal of the case. LACHES proposes that a plaintiff should not "sleep on his or her rights"—that is, if the plaintiff knows of the defendant's harmful actions but delays in bringing suit, and the delay works against the rights of the defendant, the plaintiff risks dismissal of the case. Under modern law, such defenses are available in any civil case. They are nevertheless considered equitable because they invoke notions of fairness; are not provided in statutes; and are decided only by a judge, not by a jury.

### Other Equitable Doctrines

Many of the equitable doctrines listed here are codified in statutes. This does not make the issues they concern "legal" as opposed to "equitable." Such issues, whether codified by statute or not, are left to the discretion of a judge, who makes a decision based on principles of fairness.

**Equitable Adoption** Equitable ADOPTION is the adoption of a child that has not been formally completed but that the law treats as final for some purposes. Generally, a child cannot be adopted without the fulfillment of certain procedures. However, it is sometimes fair and in the best interests of the child to imply that an adoption has taken place. If an adult has performed parental duties and has intended to adopt the child but has failed to fulfill formal adoption procedures, a court may order that for some purposes, the child should be considered part of the adult's family. The most common purpose of an equitable adoption is to give a child the right to inherit from the estate of an equitably adoptive parent.

**Equitable Conversion** Equitable conversion completes a land sale when the death of a seller occurs between the signing of the sale agreement and the date of the actual sale. In such a case, a judge will convert the title to the purchaser. This is in fulfillment of the time-honored MAXIM that "Equity looks upon that as done which ought to have been done."

**Equitable Distribution** Equitable distribution can describe a fair allotment of anything. In the law, *equitable distribution* is a TERM OF ART that describes a method used to divide the property of a HUSBAND AND WIFE upon DIVORCE. Under this method, the needs and contributions of each spouse are considered when property is divided between them. This differs from the process used under the COMMUNITY PROPERTY method, where all marital property is simply divided in half.

**Equitable Estoppel** Under the doctrine of EQUITABLE ESTOPPEL, a person is prevented, or estopped, from claiming a legal right, out of fairness to the opposing party. For example, suppose that a person willfully withholds information in order to avoid defending a lawsuit. If the withheld information causes the lawsuit to be brought later than the STATUTE OF LIMITATIONS requires, the person may be estopped from asserting a statute-of-limitations defense.

**Equitable Lien** A lien is an interest in property given to a creditor to secure the satisfaction of a debt. An equitable lien may arise from a written contract if the contract shows an intention to charge a party's property with a debt or

obligation. An equitable lien may also be declared by a judge in order to fairly secure the rights of a party to a contract.

**Equitable Recoupment** Equitable recoupment prevents a plaintiff from collecting the full amount of a debt if she or he is holding something that belongs to the defendant debtor. It is usually invoked only as a defense to mitigate the amount a defendant owes to a plaintiff. For example, if a taxpayer has failed to claim a tax refund within the time period prescribed by the statute of limitations, the taxpayer may regain, or recoup, the amount of the refund in defending against a future tax claim brought by the government.

**Equitable Servitude** An equitable servitude is a restriction on the use of land or a building that can be continually enforced. When a land buyer is aware of an agreement that restricts the use of the land, the buyer may be held to the terms of the restriction, regardless of whether it was written in the deed.

**Equity in Property** Equity in property is the value of real estate above all liens or claims against it. It is used to describe partial ownership. For example, suppose the fair market value of a home is $80,000. If the homeowner has a mortgage and owes $50,000 on the mortgage, the equity amount is $30,000. The recognition of equity in property allows a property owner to borrow against a portion of the property value, even though the owner cannot claim complete and final ownership.

**Equity of Redemption** Equity of redemption is the right of a homeowner with a mortgage (a mortgagor) to reclaim the property after it has been forfeited. Redemption can be accomplished by paying the entire amount of the debt, interest, and court costs of the foreclosing lender. With equity of redemption, a mortgagor has a specified period of time after default and before foreclosure, in which to reclaim the property.

**Equity Financing** When a corporation raises capital by selling stock, the financing is called equity financing because the corporation is offering stockholders a partial interest in its ownership. By contrast, debt financing raises capital by issuing bonds or borrowing money, neither of which conveys an ownership in the corporation. An equity security is an equitable ownership interest in a corporation, such as that accompanying common and preferred shares of stock.

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CROSS-REFERENCES

Discretion in Decision Making.

## EQUITY OF REDEMPTION

*The right of a mortgagor, that is, a borrower who obtains a loan secured by a pledge of his or her real property, to prevent foreclosure proceedings by paying the amount due on the loan, a mortgage, plus interest and other expenses after having failed to pay within the time and according to the terms specified therein.*

This right is based upon the equitable principle that it is only fair that a borrower have a final opportunity to keep his or her property even if he or she has failed to make payments on the mortgage, since the property is to be sold in foreclosure proceedings.

The equity of redemption must be exercised by a mortgagor within a certain time after having defaulted on an obligation. It exists only from the time of default to the time that foreclosure proceedings are commenced.

## ERGO

Latin, therefore; hence; because.

## ERIE RAILROAD CO. V. TOMPKINS

A 1938 landmark decision by the Supreme Court, *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, that held that in an action in a federal court, except as to matters governed by the U.S. Constitution and acts of Congress, the law to be applied in any case is the law of the state in which the federal court is situated.

Harry J. Tompkins was walking on a footpath alongside railroad tracks on land owned by the Erie Railroad Company when he was struck and injured by a passing train. He claimed that his injuries resulted from the NEGLIGENCE of the railroad in operating the train.

Tompkins wanted to sue the railroad and recover monetary damages for his injuries. He

was a citizen of Pennsylvania, and the Erie Railroad Company was a New York corporation. He instituted an action in federal court, which was empowered, by virtue of its diversity jurisdiction, to hear the case because the plaintiff and the defendant were citizens of different states.

The issue before the court was what law to apply in deciding the case. The court would have applied a federal statute to decide whether Tompkins was entitled to damages, but none existed. The court would have applied a state statute since there was no federal statute, but Pennsylvania did not have one.

The highest court of Pennsylvania had established a rule to be followed in state courts whenever a case like this occurred. The Pennsylvania rule was that people who use pathways along railroad right-of-ways, not railroad crossings, are trespassers to whom railroads were not to be held liable unless the trespassers were intentionally injured by the reckless and wanton acts of the railroads.

The trial judge refused to apply the Pennsylvania rule. He found that **SWIFT V. TYSON**, 41 U.S. (16 Pet.) 1, 10 L. Ed. 865 (1842), which held that there was a body of federal **COMMON LAW** to be applied in such cases, gave federal judges the right to ignore state rules that were not enacted as statutes by their state legislatures. He held that it was more important for all federal courts to follow a uniform rule, rather than for each federal court to apply local state rules when there was no statute to resolve the case. He allowed a jury to decide whether the railroad company was negligent, and the jury returned a verdict of $30,000 for Tompkins.

The Supreme Court reversed the decision and struck down the rule that allowed federal judges to ignore state court decisions in diversity cases. Although this rule had been followed since **SWIFT V. TYSON** was decided in 1842, the Supreme Court ruled that it was inequitable. According to the old rule, Tompkins could obtain monetary damages if he sued in federal court, but not if he initiated his lawsuit a few blocks away in the Pennsylvania state court. If the plaintiff and defendant were citizens of different states, the plaintiff could take advantage of the right to sue in federal court. There the plaintiff might win, even if he or she had been trespassing on railroad property. If the plaintiff and defendant were both citizens of Pennsylvania, the plaintiff could not sue in federal court. Pennsylvania courts would all be bound to follow the rule that prevented recoveries for those who used paths alongside railroad tracks. The Supreme Court held that it was unjust for the plaintiff's chances of winning to depend on the fact that the railroad was a Pennsylvania corporation.

The new rule of **ERIE RAILROAD CO. V. TOMPKINS** provided that federal courts do not have the power to formulate their own **RULES OF LAW**. The federal courts must apply appropriate federal statutes in diversity cases. When there is no federal law to resolve the question in a lawsuit, they must follow the law of the state that is involved. That includes state statutes and controlling decisions made by the highest court of that state.

As a result of this case, the decisions of federal courts are truly uniform only when a question of federal law is involved. Otherwise, the states are free to develop their own law and have it applied to state questions that come into federal court because the parties are from different states.

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**CROSS-REFERENCES**

Diversity of Citizenship.

## ERRATUM

*[*Latin, Error.*] The term used in the Latin formula for the assignment of mistakes made in a case.*

After reviewing a case, if a judge decides that there was no error, he or she indicates so by replying, "*In nollo est erratum,*" which means, "no error was committed." The plural is errata.

## ERROR

*A mistake in a court proceeding concerning a* **MATTER OF LAW** *or fact, which might provide a ground for a review of the judgment rendered in the proceeding.*

The nature of the error dictates the availability of a legal remedy. Generally speaking, mistaken or erroneous application of law will void or reverse a judgment in the matter. Conversely, errors or mistakes in facts, upon which a judge or jury relied in rendering a judgment or verdict, may or may not warrant reversal, depending upon other factors involved in the error.

However, appellate decisions make a distinction—not so much between fact and law, but rather, between *harmless error* and *reversible error*—in deciding whether to let stand or vitiate a judgment or verdict.

In litigation, a **HARMLESS ERROR** means that, despite its occurrence, the ultimate outcome of the case is not affected or changed, and the mistake is not prejudicial to the rights of the party who claimed that the error occurred. In other words, the party claiming error has failed to convince an appellate court that the outcome of the litigation would have been different if the error had not occurred. Most harmless errors are errors of fact, such as errors in dates, times, or inconsequential details to a factual scenario.

On the other hand, error that is deemed *harmful* in that it biased the ultimate decision of a jury or judge, constitutes reversible error, i.e., error that warrants reversal of a judgment (or modification, or retrial). A reversible error usually refers to the mistaken application of a law by a court, as where, for example, a court mistakenly assumes jurisdiction over a matter that another court has exclusive jurisdiction over. A court may erroneously apply laws and rules to admit (or deny the admission of) certain crucial evidence in a case, which may prove pivotal or dispositive to the outcome of the trial and warrant reversal of the judgment. Occasionally, a court may charge the jury with an instruction that applies the wrong law, or with an improper interpretation of the correct law. If the party claiming error can prove that the error was prejudicial to the outcome of the case or to the party's rights, the error will most likely be deemed reversible.

An example of potential harmful or reversible error of both law and fact might involve the age of a rape victim in a criminal trial for *statutory rape,* (where guilt is premised upon the actual age of the victim, and not on whether the sexual conduct was consensual).

In appellate practice, a party may not appeal an error that it induced a court to make (as by petitioning or moving the court to make a ruling which is actually erroneous). Appellate decisions refer to this as an *invited error* and will not permit a party to take advantage of the error by having the decision overruled or reversed.

The general use of the term error is often distinct from the use of the word mistake, especially in the law of contracts. In such cases, a **MISTAKE OF LAW** or fact (in the making of a contract, or performance thereupon) might result in a *finding* of harmless or reversible error, but the terms are not transitional.

**CROSS-REFERENCES**

Clerical Error; Plain-Error Rule.

"THERE IS NOTHING IN THE CONSTITUTION THAT AUTHORIZES OR MAKES IT THE OFFICIAL DUTY OF A PRESIDENT TO HAVE ANYTHING TO DO WITH CRIMINAL ACTIVITIES."
—SAMUEL J. ERVIN JR.

## ERVIN, SAMUEL JAMES, JR.

Samuel J. Ervin Jr. had a long career in law and politics including twenty years in the U.S. Senate. He is most famous, however, for presiding over the Senate Select Committee on Presidential Campaign Activities, popularly known as the **WATERGATE** Committee.

Ervin was born September 27, 1896, in Morganton, North Carolina. He received an A.B. from the University of North Carolina in 1917 and served as an infantryman in France during **WORLD WAR I**. When he returned from France,

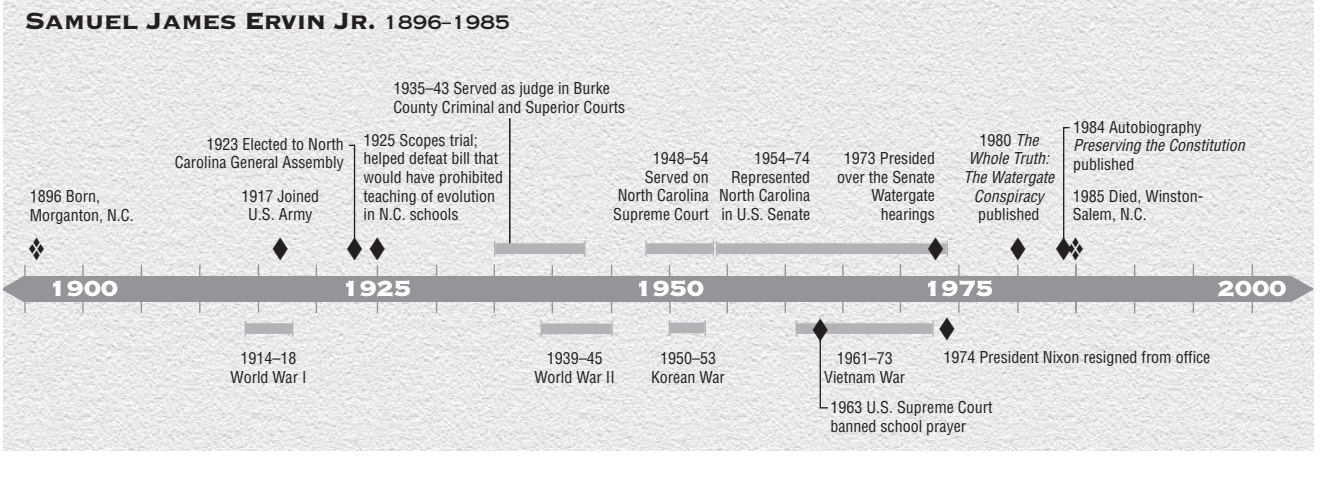

he went to Harvard Law School where he received an LL.B. in 1922.

After law school, Ervin returned to North Carolina where for the next thirty years he practiced law, ventured into politics, and served as a county and state judge. Ervin's political career began in 1923 when he was elected to the North Carolina General Assembly; he served two more terms in the legislature in 1925 and 1931. His most notable achievement in the legislature came in 1925 when he helped defeat a bill that would have prohibited the teaching of the theory of evolution in North Carolina public schools.

From 1935 until 1937, Ervin served as a judge in the Burke County Criminal Court and, from 1937 until 1943, in the Superior Court. He resigned the latter post to return to his law practice. In 1946–47 he served part of a term in the U.S. House of Representatives, completing the term of his brother who had died after being elected to office. Ervin chose not to run for reelection when the term was over and returned to North Carolina. In 1948 he became a judge on the North Carolina Supreme Court, a position that he held until 1954.

In 1954 the governor of North Carolina appointed Ervin to complete the term of a U.S. senator who had died. Ervin continued to be elected to the Senate until his retirement in 1974.

As a senator, Ervin fought against measures that he believed would endanger individual liberty. This led him to oppose most **CIVIL RIGHTS** legislation—which he believed would confer freedom on some at the expense of others—as well as to be instrumental in stopping a proposed constitutional amendment that would have permitted prayer in the public schools. For the same reason, he opposed a government proposal to maintain computerized files on persons who participated in political protests. Such records, said Ervin, raised the specter of a police state. On social issues, he usually voted with the more conservative members of the Senate. He opposed the **EQUAL RIGHTS AMENDMENT**, and, as a member of the Senate Armed Services Committee, he supported U.S. involvement in Vietnam.

Ervin was widely respected in the Senate for his knowledge of the Constitution, which he described as one of the greatest works in the English language and said should be taken like mountain whiskey—undiluted and untaxed.

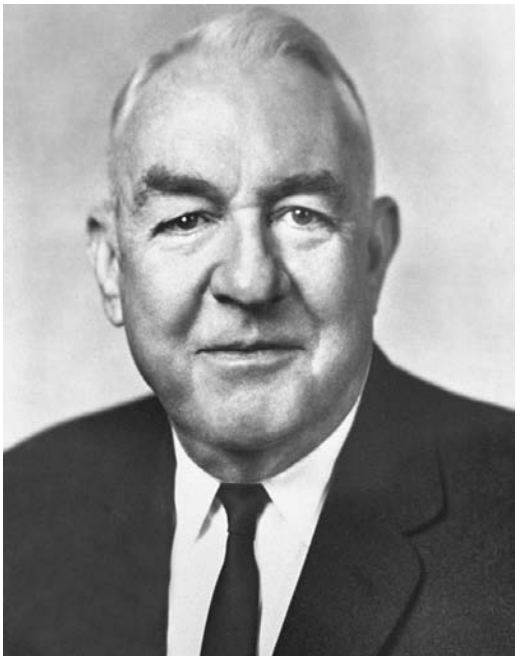

*Samuel J. Ervin Jr.*
LIBRARY OF CONGRESS

Nonetheless, he might not have become a national figure had it not been for his role in the Senate Watergate hearings in 1973. As Ervin presided over the nationally televised hearings, he became familiar to millions of viewers.

Known among his fellow senators for his wit and erudition, Ervin liked to describe himself as "just an ol' country lawyer." He published several books including *The Whole Truth: The Watergate Conspiracy* (1980); *Humor of a Country Lawyer* (1983); and an autobiography titled *Preserving the Constitution* (1984). Ervin died April 23, 1985, in Winston-Salem, North Carolina.

**CROSS-REFERENCES**

Nixon, Richard Milhous; Watergate.

## ESCALATOR CLAUSE

*A stipulation contained in a union contract stating that wages will be raised or lowered, based upon an external standard such as the cost of living index. A term, ordinarily in a contract or lease, that provides for an increase in the money to be paid under certain conditions.*

Escalator clauses frequently appear in business contracts to raise prices if the individual providing a particular service or type of merchandise is forced to pay more for labor or materials.

Such clauses are also often part of contracts or leases executed subject to price-control regulations. When this type of provision is in a lease,

a landlord has the power to collect the maximum amount of rent allowed under rent regulations that are in effect at the time of the lease. The escalator clause provides that if the rent regulations are altered during the time of the lease, the tenant must pay the new rental fee computed pursuant to the revised regulations.

## ESCAPE

*The criminal offense of fleeing legal custody without authority or consent.*

In order for an individual who has been accused of escape to be convicted, all elements of the crime must be proved. Such elements are governed by the specific language of each state statute. The general common-law principles may be incorporated within a statute, or the law may depart from them in various ways. Federal statutes also make it a crime to escape from federal custody.

Ordinarily, the crime of escape is committed either by the prisoner or by the individual who has the responsibility for keeping the prisoner in custody. The custodian of the prisoner is not ordinarily a warden for the entire prison, but is generally the person who has immediate responsibility for guarding the prisoner. Certain states currently punish negligent guards administratively, such as by divesting them of their rank or seniority, or by firing them. Criminal punishment is generally reserved for guards who actively cooperate in facilitating a prisoner's escape.

An escape takes place when the prisoner is able to remove himself or herself from the lawful control of an authorized custodian. An individual can be found guilty of escape even in the event that his or her initial arrest was wrongful, since an unlawful arrest must properly be argued in court. The theory is that in order for the process of justice to operate in an orderly manner, a prisoner must not be given the privilege of determining whether or not he or she should be confined. If an arrest is totally unlawful, however, an individual cannot be guilty of escape. This might occur, for example, if a store security guard has no grounds to arrest a shoplifter but does so anyway.

In order to prove that a criminal escape took place, it is ordinarily unnecessary to show that the accused party was actually confined within prison walls. Once an arrest has taken place, the prisoner cannot leave of his or her own volition. Frequently, the degree of the crime is increased when the escape is from a particular kind of confinement. For example, the law might deal more harshly with an individual who escapes from armed prison guards while working on a chain gang than with an individual who runs away while an arresting officer interrogates witnesses. In other jurisdictions, the degree of criminal escape is dependent upon the nature of the crime that initially precipitated the prisoner's confinement.

It is ordinarily necessary to prove that an escaped prisoner was actually attempting to evade legal confinement. For example, if the prisoner went to the wrong place by mistake, he or she will probably not be found guilty of a criminal escape.

Other crimes are related to escape, such as the offense of *aiding escape,* which is committed by a person who, for example, smuggles a prisoner out of jail. Ordinarily a conviction for aiding escape is punishable by a sentence for the number of years specified by the criminal statute.

In some states it is a separate crime to *harbor or conceal an escaped prisoner.* To obtain a conviction against the individual accused of this crime, it must be shown that the individual believed that he or she was aiding an escaped prisoner with the intent to help him or her get clear of lawful custody. It does not constitute a defense to assert that the prisoner never should have been arrested.

*Prison breach* is an escape committed through the use of force and is more heinous than simple escape. It is not a separate crime, however, and the state may regard it as a more serious degree of criminal escape.

An attempt to commit escape or any of the related crimes is punishable, even though such an attempt might not have been successful.

## ESCHEAT

*The power of a state to acquire title to property for which there is no owner.*

The most common reason that an escheat takes place is that an individual dies intestate, meaning without a valid will indicating who is to inherit his or her property, and without relatives who are legally entitled to inherit in the absence of a will. A state legislature has the authority to enact an escheat statute.

In feudal England, escheat was a privilege exclusively given to the king. The policy of inher-

itance was to preserve the wealth of noble families by permitting one individual to inherit an entire estate. There was no writing of wills that would leave property to several heirs because that would have the effect of breaking up the estate. In addition, the law established a hierarchy of heirs who stood in line to inherit the estate. If there was no living person of a designated class to inherit, the king took the property by escheat.

Historically, reasons existed for escheat apart from the absence of heirs to inherit a decedent's property. When corporations were subject to strict regulation, it was unlawful for a corporation to own property in any way not permitted by its state-granted charter. Any property beyond that needed by the corporation for the operation of its business, or in excess of the amount designated in its charter, or held for a period of time beyond that which was permitted, was subject to escheat.

Certain states mandated escheat of property belonging to religious societies that either promoted POLYGAMY or neglected to incorporate as required by law. Additionally, where public lands were provided for settlers, statutes frequently made provisions for escheat when one individual took possession of more than the permitted acreage or did not properly cultivate the homestead.

### Dissimilarities

Escheat is distinguishable from FORFEITURE even though both terms refer to a relinquishment of property. Forfeiture can be applied to any type of property interest, including possession, the right to inherit, or the right of reversion. In addition, forfeiture often is used as a penalty against an individual who has an interest in property, for an illegal act. An escheat takes place due to the lack of any person with a valid interest in the property, and is not usually linked to any illegality or wrongdoing.

Succession is the passing of a decedent's property to his or her heirs. Escheat is not treated in law like succession; the two concepts are completely separate.

### Property Subject to Escheat

Ordinarily, the property subject to escheat is all the property within the state belonging to the original owner upon his or her death. Although initially the doctrine was applicable solely to real property, it presently extends to PERSONAL PROPERTY, including such intangibles as bank accounts and shares of stock. Certain other types of property can be the subject of escheat for lack of a known owner. The determination is contingent upon state law.

Unclaimed or abandoned property escheats to the state under some statutes. However, the state cannot merely declare property abandoned and appropriate it. Such laws must function within constitutional limits by observing the requirements imposed by DUE PROCESS. The state is required to adopt a routine procedure for notifying the public and must provide potential claimants an opportunity to argue that the property might belong to them. Without declaring that certain abandoned property has been escheated, the state may lawfully possess the property and hold it for a period of time so that claims can be asserted. A state is not mandated to take over unclaimed property but may choose to exercise the power to escheat only when the value of the property does not exceed the expense of legal proceedings.

Items subject to escheat under various statutes include abandoned bank accounts, deposits left with utility companies, stock dividends whose owners cannot be found; unpaid wages; unclaimed legacies from the estate of a deceased relative; insurance money to unknown beneficiaries; and unclaimed money retained by employers or public officials.

Certain statutes specify that the property of charitable or religious institutions escheats upon dissolution if its donors have not retained the right to recover it when it is no longer used for religious or charitable objectives.

### Procedure

Escheat statutes vary by state, but all prescribe a procedure for location of the rightful owner. In some states title to certain types of property automatically passes to the state when it escheats for lack of a proper claimant. In other states, a required period of time must elapse prior to the commencement of escheat proceedings. This does not bar a claimant from stating his or her claim before completion of the escheat proceedings. Some laws require claimants to assert their rights within a period of time or forfeit them. Often, states mandate that individuals administering estates notify the state government of the existence of property that might be subject to escheat.

The primary burden of proving that there is no proper individual entitled to own the property in question rests with the state, and the

general rules regarding the admissibility of evidence are applicable. Rules of presumption, such as the common-law presumption of death after a seven-year disappearance, can be used to support the case of the state. After the state has proved a legally sufficient case, any individual claiming a right to the property has an opportunity to go forward and argue against the evidence submitted by the state.

Some states offer money to *informers* who notify the state of property that might be subject to escheat. Informers might be required to provide evidence and pursue the case to a conclusion before they will be entitled to a fee. Other states provide compensation for an *escheater,* a person appointed by the court to manage the claim of the state for escheat. An escheater is entitled to be paid a reasonable amount even if he or she does not succeed in recovering the property for the state.

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## ESCOBEDO V. ILLINOIS

One of three important cases decided by the U.S. Supreme Court in the 1960s on the subject of the RIGHT TO COUNSEL, *Escobedo v. Illinois* 378 U.S. 478, 4 Ohio Misc. 197, 84 S.Ct. 1758, 12 L.Ed.2d 977 (U.S.Ill. 1964), was a far-reaching decision which held for the first time that defendants had a right to counsel even before they were indicted for a particular crime. However, the decision was overshadowed by the high court's Miranda decision two years later, and later decisions by both the Supreme Court and lower courts indicated the application of the decision in *Escobedo* was to be limited to its facts. Nevertheless, the Supreme Court has never directly overruled *Escobedo.*

The case involved Danny Escobedo, who was arrested on the night of January 19, 1960, for the murder of his brother-in-law, but was released after contacting his lawyer. The lawyer told him not to answer any more questions if the police rearrested him. Ten days later, he was arrested a second time and made a request to contact his attorney repeatedly. This request was denied.

His attorney then arrived at the police station and requested to see Escobedo but was refused permission to see him. The police then told Escobedo that his alleged coconspirator in the shooting of his brother-in-law had confessed and implicated Escobedo. Escobedo demanded to confront his coconspirator, and when he was brought face-to-face with him he said, "I didn't shoot Manuel (Escobedo's brother-in-law), you did it." After this admission of his involvement in the crime, police were able to obtain a more elaborate written confession, and Escobedo was eventually convicted of murder. Escobedo appealed his conviction, claiming his confession was obtained without his lawyer being present in violation of his right to counsel, and should be thrown out.

Escobedo's case reached the Supreme Court at a precipitous time. Just six weeks before, the high court had decided MASSIAH V. UNITED STATES, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (U.S.N.Y. 1964), in which the Court ruled for the first time that the SIXTH AMENDMENT right to counsel attaches once an individual has been indicted. That case involved a defendant who made a statement to an ACCOMPLICE after he had been indicted, gotten an attorney, and had been released on bail. Unknown to the defendant, his accomplice was working with the police. The Court held that the defendant's Sixth Amendment rights had been violated because the police had used the accomplice to elicit incriminatory statements after the right to counsel had attached.

The Supreme Court in *Escobedo* reached a similar result in a 5 to 4 decision. Writing for the majority, Justice ARTHUR GOLDBERG first stated that Escobedo's right to counsel did not depend on whether, at the time of interrogation, the authorities have secured a formal indictment. In overturning Escobedo's conviction and ruling that his right to counsel had been violated, Goldberg then enunciated a somewhat complicated holding that set out numerous benchmarks in determining whether a defendant's Sixth Amendment right to counsel had been violated.

Wrote Goldberg: "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the sus-

pect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'The Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

The high court decision in *Escobedo* had many observers theorizing the Court would try to establish a broad right to counsel utilizing the Sixth Amendment whenever police took a suspect into custody. However, two years later, the high court changed course in MIRANDA V. ARIZONA 384 U.S. 436, 10 Ohio Misc. 9, 86 S.Ct. 1602, 16 L.Ed.2d 694 (U.S.Ariz. 1966), using the FIFTH AMENDMENT right against SELF-INCRIMINATION to hold that statements obtained from defendants during incommunicado interrogation in a police-dominated atmosphere, without full warning of constitutional rights, were inadmissible. *Miranda* made the crucial question whether a defendant was in custody or otherwise significantly deprived of his freedom of movement, rather than the "focus of investigation" test enunciated in *Escobedo.*

Since the *Miranda* decision, most Supreme Court and lower court cases mentioning the right to counsel have relied on the Fifth Amendment and *Miranda,* and those that have relied on the Sixth generally lean on the earlier *Massiah* decision, rather than the more complex tests of *Escobedo. Escobedo* has been limited by the Supreme Court and lower courts to only apply to the facts of its case, and since those facts were unusual, it is rarely invoked by a court as primary law when determining whether the right to counsel exists.

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**CROSS-REFERENCES**

Prisoners' Rights.

## ESCROW

*Something of value, such as a deed, stock, money, or written instrument, that is put into the custody of a third person by its owner, a grantor, an obligor, or a promisor, to be retained until the occurrence of a contingency or performance of a condition.*

An escrow also refers to a writing deposited with someone until the performance of an act or the occurrence of an event specified in that writing. The directions given to the person who accepts delivery of the document are called the *escrow agreement* and are binding between the person who promises and the person to whom the promise is made. The writing is held *in escrow* by a third person until the purpose of the underlying agreement is accomplished. When the condition specified in the escrow agreement is performed, the individual holding the writing gives it over to the party entitled to receive it. This is known as the *second delivery.*

Any written document that is executed in accordance with all requisite legal formalities may properly be deposited in escrow. Documents that can be put in escrow include a deed, a mortgage, a promise to pay money, a bond, a check, a license, a patent, or a contract for the sale of real property. The term *escrow* initially applied solely to the deposit of a formal instrument or document; however, it is popularly used to describe a deposit of money.

The escrow agreement is a contract. The parties to such an agreement determine when the agreement should be released prior to making the deposit. After the escrow agreement has been entered, the terms for holding and releasing the document or money cannot be altered in the absence of an agreement by all the parties.

A *depositary* is not a party to the escrow agreement, but rather a custodian of the deposit who has no right to alter the terms of the agreement or prevent the parties from altering them if they so agree. The only agreement that the depositary must make is to hold the deposit, subject to the terms and conditions of the agreement. Ordinarily, the depositary has no involvement with the underlying agreement; however, an interested party may, in a few states, be selected to be a depositary if all parties are in agreement. In all cases, a depositary is bound by the duty to act according to the trust placed in him or her. If the depositary makes a delivery to the wrong person or at the wrong time, he or she is liable to the depositor.

*A sample escrow agreement for bulk sales.*

## Escrow Agreement for Bulk Sales

**ESCROW AGREEMENT FOR BULK SALES**

Date:

To:

Pursuant to the terms and provisions of that certain Agreement for the sale of the business of _____ between _____ , hereinafter referred to as "Seller" and _____, hereinafter referred to as "Buyer", a copy of which Agreement is attached there is deposited with you the following:

_____

_____,

hereinafter called the "Fund". The Fund is to be held and administered by you, subject to the following terms and conditions:

_____

_____

1. The Fund shall be invested from time to time in an interest bearing account.

2. If, prior to the termination time (as hereinafter defined), Buyer shall notify you in writing of any breach of warranty with respect to the indebtedness of Seller to its creditors under the terms and provisions of the Agreement and such notice shall specify the amount which Buyer shall claim is due and owing to Buyer by virtue of such breach or claim of breach, you shall, within _____ days from and after the receipt of such notice from Buyer, notify Seller in writing of such claim by sending written notice thereof by registered mail, return receipt requested, to Buyer at the following address: _____ _____, and if Seller shall not have delivered to you, prior to the close of business on the 15th day from and after the date on which you shall have notified Seller of the claim of Buyer, sufficient funds from Seller's own sources other than the Fund to pay and discharge the amount of the claim asserted by Buyer in consequence of a breach, or alleged breach, of warranty by Seller under the Agreement with respect to the indebtedness of Seller to its creditors under the Agreement, you shall, out of the assets and moneys held by you in the Fund, pay to Buyer the amount claimed by Buyer in the notice which it shall have first sent to you under the terms and provisions of this paragraph.

3. In lieu of delivering to you, from its own sources other than the Fund, sufficient moneys to pay and discharge any claim asserted by Buyer in the manner provided in Paragraph No. 2 hereof, Seller may furnish to you, prior to the close of business on the 15th day following the day on which you shall have mailed notice to Seller of a claim asserted by Buyer under Paragraph No. 2 hereof, a written acknowledgment signed by Buyer that the asserted claim has been discharged to the satisfaction of Buyer.

4. Not later than thirty days from and after the close of business on the _____ day of _____ , _____ , which date is referred to herein as the "termination time", you shall distribute to Buyer any and all moneys and other assets then remaining in the Fund. Prior to such time you shall, however, out of the Fund, deduct all of your reasonable fees and expenses in administering the Fund.

5. You may resign by mailing written notice thereof to Buyer at _____ and to Seller at _____. In the event of any such resignation, Buyer may appoint by written notice delivered to Seller at the above specified address, a successor escrow which shall be a national bank doing business in _____ . Any successor or successors shall have all of the rights, obligations and immunities granted to you by the terms and provisions hereof.

6. Nothing herein contained shall constitute a limitation of any obligations of either Buyer or Seller under the Agreement otherwise.

7. This instrument and all of the terms, provisions and covenants herein set forth shall be binding upon Buyer and Seller and their respective heirs, executors, administrators, successors and assigns and shall inure to your benefit and to the benefit of your successors and assigns. No assignment by Seller of any rights hereunder or of any rights in and to the Fund shall be effective for any purpose and, notwithstanding any purported assignment by Seller, you shall be fully entitled to disregard any such purported assignment in administering the Fund and your responsibilities hereunder.

DATED this _____ day of _____ , _____ .

We hereby acknowledge receipt of the following: _____ referred to in the above and foregoing letter and agree to hold, administer and distribute the same in accordance with all of the terms and provisions thereof.

By: _____

**Warning:**

**These forms are provided AS IS. They may not be any good. Even if they are good in one jurisdiction, they may not work in another. And the facts of your situation may make these forms inappropriate for you. They are for informational purposes only, and you should consult an attorney before using them.**

The document or the money is only in escrow upon actual delivery to the depositary. Ordinarily, courts are strict in their requirement that the terms of the agreement be completely performed before the deposit is released. A reasonable amount of time must generally be allotted for performance. Parties may, however, make the agreement that time is of the essence, and in such a case, any delay beyond the period specified in the agreement makes the individual who is obligated to act forfeit all his or her rights in the property in escrow.

## ESPIONAGE

*The act of securing information of a military or political nature that a competing nation holds secret. It can involve the analysis of diplomatic reports, publications, statistics, and broadcasts, as well as spying, a clandestine activity carried out by an individual or individuals working under secret identity to gather classified information on behalf of another entity or nation. In the United States, the organization that heads most activities dedicated to espionage is the* CENTRAL INTELLIGENCE AGENCY *(CIA).*

Espionage, commonly known as spying, is the practice of secretly gathering information about a foreign government or a competing industry, with the purpose of placing one's own government or corporation at some strategic or financial advantage. Federal law prohibits espionage when it jeopardizes the national defense or benefits a foreign nation (18 U.S.C.A. § 793). Criminal espionage involves betraying U.S. government secrets to other nations.

Despite its illegal status, espionage is commonplace. Through much of the twentieth century, international agreements implicitly accepted espionage as a natural political activity. This gathering of intelligence benefited competing nations that wished to stay one step ahead of each other. The general public never hears of espionage activities that are carried out correctly. However, espionage blunders can receive national attention, jeopardizing the security of the nation and the lives of individuals.

Espionage is unlikely to disappear. Since the late nineteenth century, nations have allowed each other to station so-called military attachés in their overseas embassies. These "attachés" collect intelligence secrets about the armed forces of their host country. Attachés have worked toward the subversion of governments, the destabilization of economies, and the assassination of declared enemies. Many of these activities remain secret in order to protect national interests and reputations.

The centerpiece of U.S. espionage is the CIA, created by the National Security Act of 1947 (50 U.S.C.A. § 402 et seq.) to conduct covert activity. The CIA protects national security interests by spying on foreign governments. The CIA also attempts to recruit foreign agents to work on behalf of U.S. interests. Other nations do the same, seeking to recruit CIA agents or others who will betray sensitive information. Sometimes a foreign power is successful in procuring U.S. government secrets.

One of the most damaging instances of criminal espionage in U.S. history was uncovered in the late 1980s with the exposure of the Walker spy ring, which operated from 1967 to 1985. John A. Walker Jr. and his son, Michael L. Walker, brother, Arthur J. Walker, and friend, Jerry A. Whitworth, supplied the Soviets with confidential U.S. data including codes from the U.S. Navy that allowed the Soviets to decipher over a million Navy messages. The Walker ring also sold the Soviets classified material concerning Yuri Andropov, secretary general of the Communist party until 1984; the Soviet shooting of a Korean Airlines jet in 1983; and U.S. offensives during the VIETNAM WAR.

John Walker pleaded guilty to three counts of espionage. He claimed that he had become an undercover informant for the thrill of it, rather than for the money. He was sentenced to a life term in federal prison, with eligibility for PAROLE in ten years. Michael Walker pleaded guilty to aiding in the supply of classified documents to the Soviets. He was able to reach a plea bargain under which he was sentenced to twenty-five years in prison. Arthur Walker was convicted of espionage in Norfolk, Virginia. His conviction was affirmed in *United States v. Walker,* 796 F.2d 43 (4th Cir. 1986). Like John Walker, he was sentenced to a life term in federal prison. Jerry Whitworth received a sentence of 365 years for stealing and selling Navy coding secrets (upheld in *United States v. Whitworth,* 856 F.2d 1268 [9th Cir. 1988]).

The ring's ample opportunity to exploit the lax security of the Navy left a legacy of damage. The armed forces frantically scrapped and rebuilt their entire communications system, at a cost to taxpayers of nearly $1 billion. The U.S.

DEPARTMENT OF DEFENSE (DOD) had to withdraw security clearances from approximately 2 million military and civilian personnel worldwide. The DOD also reduced the number of classified documents in order to limit the number of remaining security clearances.

These reforms only addressed the tip of larger, underlying problems. The exploits of Aldrich Hazen Ames brought security problems within the CIA to the fore. As a double agent, Ames sold secrets to Moscow from 1985 to the end of the COLD WAR and beyond. As a CIA agent and later a CIA official, Ames was responsible for, among other things, recruiting Soviet officials to do undercover work for the United States. His position put him in contact with Soviet officials at their embassy in Washington, D.C. While in the embassy, he discussed secret matters related to U.S. intelligence. The CIA's lack of security measures, which usually consisted of no more than the collection of questionable lie detector data, gave Ames the opportunity to illegally acquire a fortune.

In 1986, the CIA suspected the presence of a mole (a double agent with the objective of rising to a key position) in the system. Investigators could not be certain of the mole's identity but determined that something in their operations had gone awry. Two officers at the Soviet Embassy who had been recruited as double agents by the FEDERAL BUREAU OF INVESTIGATION (FBI) had been recalled to Moscow, arrested, tried, and executed. Years later, a major blunder on Ames's part led the CIA to suspect him of leaking information that may have contributed to the death of the agents. Ames had told his superiors in October 1992 that he was going to visit his mother-in-law in Colombia. He actually went to Venezuela, where he met a Soviet contact. His travels were under surveillance, and the CIA took note of the discrepancy.

By May 1993, Ames had become the focus of a criminal investigation dubbed Nightmover. Investigators found that Ames's continued activity with the Soviets had led to the execution of at least ten more agents. Ames's continuing financial struggle necessitated that he continue to sell secrets. While criminal espionage brought him more than $2.5 million from the Kremlin, Ames's carelessness with the money led to his demise. According to court documents, Ames and his wife spent nearly $1.4 million from April 1985 to November 1993. Ames's annual CIA salary never exceeded $70,000.

When Ames pleaded guilty on April 28, 1994, to a two-count criminal indictment for espionage and TAX EVASION, government prosecutors sought to negotiate the plea to avoid a long trial. A trial, they feared, could force intelligence agencies to disclose secrets about the Ames case, which had already embarrassed the CIA. Escaping the ordeal of a drawn-out trial, Ames was sentenced to life in prison.

As a result of the Ames case, the CIA made a number of changes, including requiring CIA employees to make annual financial disclosures and tightening the requirements for top security clearance.

Several espionage cases since the 1980s have caused the United States additional embarrassment. In 1985, Jonathan Pollard, an American Jew, was arrested for spying for Israel. Pollard served as an intelligence-research specialist for the Navy's Field Operational Intelligence Office during the 1980s. He provided Israel with about 360 cubic feet of documentation in exchange for about $50,000 in cash. He was eventually arrested by U.S. officials, and, in 1987, pleaded guilty to spying on the United States. Pollard claimed that his actions were acceptable because Israel was an ally and because the Israeli agent with whom he exchanged documents already received sensitive information from the United States. Nevertheless, Pollard received a life sentence.

Pollard in 1995 was granted Israeli citizenship while he continued to serve in a U.S. prison. In 1998, then President WILLIAM JEFFERSON CLINTON committed a potential blunder when he agreed upon the request of Israeli Prime Minister Benjamin Netanyahu to review Pollard's case. The promise sparked a heated debate in the United States among analysts. Clinton was able to avoid the issue when Netanyahu was replaced as prime minister in 1999.

Another incident in late 1999 also caused embarrassment to the Clinton administration. In December of that year, 60 year-old Wen Ho Lee was arrested and charged with mishandling classified nuclear secrets at Los Alamos National Laboratory in New Mexico. The charge followed months of controversial investigations by the FBI and the U.S. JUSTICE DEPARTMENT into what some government officials believed was a spy operation supported by China. Considered a security risk, Lee was placed, by the government, in guarded solitary confinement for nine months in a Santa Fe, New Mexico, county jail cell with no opportunity to raise the $1 million

bail. Lee was held on 59 counts of illegally copying design secrets as well as destroying seven tapes, to which his plea was not guilty. The government then offered Lee a plea bargain if he pleaded guilty to one count of downloading classified data to a non-secure computer. Lee finally agreed to plead guilty to this minor felony charge. As part of the plea bargain, Lee was also required to provide detailed information as to what happened to the tapes.

The **JUSTICE DEPARTMENT** soon came under fire for its treatment of Lee. U.S. District Judge James A. Parker, the presiding federal judge in New Mexico who had been assigned the case, questioned why the government had chosen not to pursue a voluntary **POLYGRAPH** test or allow Lee to make statements about why he had downloaded such sensitive material onto an unsecured computer or destroyed certain tapes. Even President Clinton, who had appointed then-Attorney General **JANET RENO**, disagreed with her about Lee being denied bail for so long. Both Clinton and Parker agreed that if these things were provided, the previous nine months would have been much less taxing for Lee.

The FBI endured yet another humiliating incident in 2001 with the arrest of a high-ranking counterintelligence officer for the bureau, Robert Hanssen. Hanssen received hundreds of thousands of dollars in cash and diamonds from Russia in exchange for U.S. secrets. U.S. officials indicated that Hanssen's spying reached a peak during the 1980s, and his actions caused the deaths of at least three American spies overseas. According to the federal prosecutor in the case, Hanssen used the United States' "most critical secrets" as "personal merchandise." A U.S. district judge in 2002 sentenced Hanssen to life in prison.

*From 1985 until his arrest in 2001, Robert Hanssen, a high-ranking FBI counterintelligence agent, sold over 6,000 pages of secret and top secret documents to the Soviet Union and, later, Russia.*

AP/WIDE WORLD PHOTOS

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**CROSS-REFERENCES**

Central Intelligence Agency; Federal Bureau of Investigation; Hiss, Alger; Justice Department; Rosenbergs Trial.

## ESPIONAGE ACT OF 1917

One of the most controversial laws ever passed in the United States, the Espionage Act of 1917 (ch. 30, tit. I § 3, 40 Stat. 217, 219), and an amendment to it passed in 1918 sometimes referred to as the Sedition Act, were an attempt to deal with the climate created in the country by **WORLD WAR I**. While most of the Espionage Act was straightforward and non-controversial, parts of this legislation curtailed **FREEDOM OF SPEECH** in such a way as to draw an outcry from civil libertarians. It resulted in several important U.S. Supreme Court decisions regarding freedom of speech that continue to be studied.

With World War I raging in 1917, the administration of President **WOODROW WILSON** decided that there needed to be a law protecting the United States against "the insidious methods of internal hostile activities." While the United States had **ESPIONAGE** laws already on the books,

it had not had a law against seditious expression since the ALIEN AND SEDITION ACTS of 1798 expired. But Wilson and his cabinet had begun to express concern about what Attorney General THOMAS GREGORY referred to as "warfare by propaganda."

Thus the Wilson administration proposed and Congress passed the "Espionage Act of 1917." Much of the act simply served to supersede existing espionage laws. Sections of the act covered the following: vessels in ports of the United States, interference with foreign commerce by violent means, seizure of arms and other articles intended for export, enforcement of neutrality, passports, counterfeiting government seals, and search warrants.

The part of the act dealing specifically with espionage contained standard clauses criminalizing "obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States" or obtaining such things as code books, signal books, sketches, photographs, photographic negatives, and blue prints with the intention of passing them on to the enemy. While more comprehensive, these passages were not much different than what had been in previous laws against spying and espionage.

But the Espionage Act went further. It deemed a criminal anyone who, "when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States." The act said such individuals would "be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years or both." The act also declared that any mailing that violated the above provision of the act was illegal, and it also banned any mailings advocating or urging TREASON, insurrection, or forcible resistance to any law of the United States. Finally, the act declared it unlawful for any person in time of war to publish any information that the president, in his judgment, declared to be "of such character that it is or might be useful to the enemy."

The 1918 amendment to the act, also called the Sedition Act, went further. The act made it illegal to do the following:

- "To make or convey false reports, or false statements, or say or do anything except by way of bona fide and not disloyal advice to an investor . . . with intent to obstruct the sale by the United States of bonds . . . or the making of loans by or to the United States, or whoever, when the United States is at war";
- To "cause . . . or incite . . . insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States";
- To "utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag . . . or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government . . . or the Constitution . . . or the military or naval forces . . . or the flag . . . of the United States into contempt, scorn, contumely, or disrepute";
- To "willfully display the flag of a foreign enemy";
- To "urge, incite, or advocate any curtailment of production in this country of any thing or things . . . necessary or essential to the prosecution of the war."

The passage of the Espionage Act and the 1918 amendment engineered much argument and disagreement. One congressional representative, Martin Madden of Illinois, noted that "while we are fighting to establish the democracy of the world, we ought not to do the thing that will establish autocracy in America." Despite this sort of objection, the act and its amendment passed by large majorities in both houses.

More surprisingly, the act was upheld by the Supreme Court on the occasions when it reached the high court. In three cases SCHENCK V. UNITED STATES, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470, (U.S.Pa 1919); *Frohwerk v. United States*, 249 U.S. 204, 39 S.Ct. 249, 63 L.Ed. 561 (U.S.Mo. 1919); and *Debs v. United States*, 249 U.S. 211, 39 S.Ct. 252, 63 L.Ed. 566, (U.S.Ohio 1919), the Supreme Court unanimously upheld

the convictions under the Espionage Act. Another case, ABRAMS V. UNITED STATES, 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173, (U.S.N.Y. 1919), which was brought under the 1918 sedition amendment to the act, also resulted in the Supreme Court upholding a conviction. *Abrams* is chiefly remembered for a famous dissent by Justice OLIVER WENDELL HOLMES, who clarified his CLEAR AND PRESENT DANGER TEST when he wrote, "Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.'"

The Espionage Act was eventually superseded by a less onerous Espionage Act passed after WORLD WAR II. However, remnants of the act, particularly the non-controversial parts, continue to exist in American law as of 2003 (e.g. 18 U.S.C.A. § 793). The act is still cited by many civil libertarians as a law that went too far in its restrictions on freedom of speech.

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CROSS-REFERENCES

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## ESQ.

*An abbreviation for esquire, which is a title used by attorneys in the United States. The term* esquire *has a different meaning in* ENGLISH LAW. *It is used to signify a title of dignity, which ranks above* gentleman *and directly below* knight.

In the United States, Esq. is written after a lawyer's name, for example: John Smith, Esq.

## ESSEX JUNTO

In April 1778, a number of men gathered at Ipswich in Essex County, Massachusetts, to discuss the drafting of a new Massachusetts constitution. Composed of lawyers and merchants, the majority of the group were residents of Essex County, from which the assembly derived its name. Included among its members were politicians George Cabot and Timothy Pickering, and jurist THEOPHILUS PARSONS.

The Essex Junto began as a small, independent faction of prominent, educated men but developed into a strong section of the FEDERALIST PARTY, which exerted political influence for many years. It advocated the acceptance of the U.S. Constitution and the financial policies of ALEXANDER HAMILTON. The junto staunchly opposed the ideologies of President THOMAS JEFFERSON, and the EMBARGO ACT of 1807, which prohibited the exportation of American goods to France and England in an effort to compel those countries to ease their restrictions on U.S. trade. The opposition to this act was so vehement that it was repealed.

The Essex Junto was opposed to the WAR OF 1812. It convened, in secrecy, the Hartford Convention in 1814, which proved to be nothing but an airing of grievances without any serious solutions. The war ended shortly thereafter, and many of the junto members were ridiculed and threatened with TREASON for the closed-door tactics at the Hartford Convention. The junto soon lost much of its power with the signing of the Treaty of Ghent, which signified the end of the much-opposed War of 1812.

CROSS-REFERENCES

Constitution of the United States "Federalists vs. Anti-Federalists" (In Focus); Massachusetts Constitution of 1780.

## ESTABLISH

*This word occurs frequently in the Constitution of the United States, and it is used there in different meanings: (1) to settle firmly, to fix unalterably; as in to establish justice, which is the avowed object of the Constitution; (2) to make or form; as in to establish uniform laws governing naturalization or* BANKRUPTCY*; (3) to found, to create, to regulate; as in "Congress shall have power to establish post offices"; (4) to found, recognize, confirm, or admit; as in "Congress shall make no law respecting an establishment of religion"; and (5) to create, to ratify, or confirm, as in "We, the people . . . do ordain and establish this Constitution."*

*To settle, make, or fix firmly; place on a permanent footing; found; create; put beyond doubt or dispute; prove; convince. To enact permanently. To bring about or into existence.*

## ESTABLISHMENT CLAUSE

See RELIGION.

## ESTATE

*The degree, quantity, nature, and extent of interest that a person has in real and* PERSONAL PROPERTY. *Such terms as estate in land, tenement, and hereditaments may also be used to describe an individual's interest in property.*

*When used in connection with probate proceedings, the term encompasses the total property that is owned by a decedent prior to the distribution of that property in accordance with the terms of a will, or when there is no will, by the laws of inheritance in the state of domicile of the decedent. It means, ordinarily, the whole of the property owned by anyone, the realty as well as the personalty.*

*In its broadest sense, the social, civic, or political condition or standing of a person; or, a class of persons grouped for social, civic, or political purposes.*

There are several types of estates that govern interests in real property. They are freehold estates, nonfreehold estates, concurrent estates, specialty estates, future interests, and incorporeal interests.

### Freehold Estates

A freehold estate is a right of title to land that is characterized by two essential elements: *immobility,* meaning that the property involved is either land or an interest that is attached to or has been derived from land, and *indeterminate duration,* which means there is no fixed duration of ownership.

There are three kinds of freehold estates: a fee simple, a fee tail, and a life estate.

**Fee Simple Absolute** A fee simple absolute is the most extensive interest in real property that an individual can possess, since it is limited completely to the individual and his or her heirs and assigns forever, and it is not subject to any limitations or conditions.

For example, an individual might purchase a plot of land for which the deed states that the grantor transfers the property "to grantee and his or her heirs," which would have the legal effect of creating a fee simple absolute. The grantee has the right to immediate and exclusive possession of the land, and he or she can do whatever he or she wants with it, such as grow crops, remove trees, build on it, sell it, or dispose of it by will. This type of estate is deemed to be perpetual. Upon the death of the owner, if no provision has been made for its distribution, the land will automatically be inherited by the owner's heirs.

**Fee Simple Determinable** A fee simple determinable, which is also referred to as a *base fee* or *qualified fee,* is one that continues until the occurrence of a specified event. When such an event occurs, the estate will terminate automatically by operation of law, at which time the ownership reverts to the grantor or his or her heirs.

For example, a grantor makes the following conveyance: "To grantee and his or her heirs so long as it is used for school purposes." The grantor's intent is clearly indicated when he or she creates the estate. When the grantee ceases to use the land for school purposes, the grantor has the right to immediate possession. The grantee's estate is restricted to the period during which the land is used for school purposes.

The interest of the grantor is known as a *possibility of reverter.* Ordinarily the words *until* or *as long as* indicate the creation of a special limitation.

**Fee Simple Subject to a Condition Subsequent** A fee simple subject to a condition subsequent is an estate that terminates only upon the exercise of the power of termination, or right of reentry, for the violation of a particular condition. It differs from a fee simple determinable in that the latter expires automatically, by operation of law, upon the happening of the event specified. A fee simple subject to a condition subsequent continues even after the occurrence of the event until the grantor divests the estate or ends it through the exercise of his or her power to terminate.

For example, the grantor conveys land "to grantee and his or her heirs, but if the premises are used for commercial purposes other than the sale of antiques, then the grantor has the right to reenter and repossess the property."

The grantor has the power to end the grantee's fee through his or her reentry onto the premises if the condition is violated. Reentry, however, is totally at the option of the grantor. The grantee's estate continues until the grantor either enters the land or brings an action to recover possession. When the grantor does reenter the land, the remaining portion of the grantee's estate is forfeited.

Ordinarily, the words used in conveyance to create an estate subject to a condition subsequent are *upon condition that, provided that,* or *but if,* together with a provision for reentry by the grantor.

**Fee Simple Subject to Executory Limitation** At English COMMON LAW, a grantor was not able to create a freehold estate that was to begin in futuro, at a subsequent time, because LIVERY OF SEISIN (actual possession) was essential. If actual possession of the land was given to the grantee, the estate would be immediately effective, contrary to the grantor's intent. The only manner in which an estate that was to begin in the future could be created was through the use of a remainder. For example, if a grantor wished to give the grantee a future interest in the land, he might make the following conveyance, "to transferee for life, remainder to grantee and his or her heirs." Livery of seisin was thereby made to the transferee, who held the estate for life, and upon the transferee's death the seisin passed to the grantee.

In 1535, however, the STATUTE OF USES was passed, which allowed the creation, by deed, of *springing interests,* or *executory interests.* A grantor could, thereby, give the grantee a present right to the future interest in the land. The grantor might, for example, convey the land "to grantee and his heirs, grantee's interest to commence five years from the date of the deed."

A grantor can also convey an estate subject to a shifting interest. For example, the grantor might make the following conveyance: "To grantee and his or her heirs, but in the event that grantee dies without issue upon his or her death, then to transferee and his or her heirs." The grantee is thereby given a fee simple subject to an executory limitation, which is the interest of the transferee.

**Fee Tail** A fee tail is an estate subject to limitations concerning who may inherit the property, which is ordinarily created by a deed or a will.

Two significant historical developments were instrumental in the creation of this type of freehold estate. The first was recognition by the court of the fee simple conditional, and the second was the passing of the Statute De Donis Conditionalibus, commonly known as the Statute De Donis, in 1285 by Parliament.

Prior to 1285, the provision "to grantee and the heirs of his body" was interpreted by the courts as providing the grantee with the power to convey a fee simple in the property if and when he sired a child. An estate of this nature was referred to as a fee simple conditional, since it was a fee simple contingent upon offspring being born to the grantee. The grantee was thereby able to terminate any rights that the heirs of his body might have in the land. In addition, he was able to terminate the possibility of reverter which the grantor had in the land.

The Statute De Donis was subsequently passed in order to keep family land in a family, provided there was a family or issue. A grantee could not convey land in such manner as to terminate the right of heirs of his body to inherit the land upon his death nor could he convey so as to terminate the grantor's reversionary interest. If the grantee conveyed property "to transferee and his heirs," and then died, leaving a child, the child could take the land from the transferee. If the grantee died with no surviving heirs of the body, the grantor could take the land away from the transferee.

The grantor of a fee tail was permitted to limit the inheritance to a specific group of lineal descendants of the grantee. He could create a fee tail general, for example, to transferee and "the heirs of his body begotten," regardless of the number of wives by whom the transferee had children. Alternatively, he could create a fee tail special, to transferee and "the heirs of his body on Ann, his now wife, to be begotten," which specifies that only issue of the marriage of the transferee and Ann, and no other marriage, could inherit. A grant to a man and his male bodily heirs, for example, created a fee tail male while a fee tail female restricted transfer of land to the transferee and the female heirs of his or her body only.

**Life Estate** A life estate is an interest in property that does not amount to ownership, since it is limited by a term of life, either of the individual in whom the right is vested or some other person. It may also last only until the occurrence or nonoccurrence of an uncertain event. A life estate *pur autre vie* is an estate that the grantee holds for the life of another person.

A life estate is generally created by deed but can be created by lease. No special language is required provided the grantor's intent to create such an estate is clear. The grantee of a life estate is called the *life tenant.*

A life tenant can use the land, take any fruits stemming from the land (i.e., crops), and dispose of his or her interest to another person. The power to dispose includes the right to mortgage the property, and to create liens, EASEMENTS, or other rights in the property, provided they do not extend beyond the period of the tenant's life.

The holder of a life estate cannot do anything that would injure the property or cause waste, or in any way interfere with the reversionary interest of the grantee. The life tenant has the right to exclusive possession subject to the rights of the grantor to (1) enter the property to ascertain whether or not waste has been committed or is in the process of being committed; (2) collect any rent that is due; (3) come upon the property to make any necessary repairs; (4) move timber that has been severed and belongs to him or her; and (5) do any acts that will prevent the termination of his or her reversion.

The life tenant is permitted to use the property in the same manner as the owner of a fee simple, except that he or she must leave the property in reasonably good condition for the individual who will succeed to the possession. The life tenant has an obligation to maintain the property in good repair and must pay taxes and interest on any mortgage on the premises when the life estate begins. The life tenant has the right to the issues and profits from the land, and any crop planted prior to the termination of the life estate can be harvested by the tenant's PERSONAL REPRESENTATIVE. In addition, any fixtures placed on the ground by the tenant can be removed by him or her. If the property is harmed, the life tenant can obtain a recovery for the injury to his or her interest.

In a typical life estate for the life of an individual other than the tenant, the grantor conveys the property "to grantee for the life of A." The grantee is thereby given an estate for the life span of another person. In this type of conveyance, A is the measuring life. At common law, if the grantee died before the individual whose life measured the estate, the property was regarded as being without an owner. The first individual to obtain possession, known as the *common occupant,* was entitled to the estate until the death of the person whose life measured the duration of the estate. An estate pur autre vie could not be inherited by the heirs of the deceased grantee, nor could it be reclaimed by the grantor since he or she had conveyed his or her interest for the life of another person who was still living. No one had the right to evict the common occupant.

Some grantors made conveyances that provided for the heirs of the grantee. For example, "to grantee and his heirs for the life of A." If the grantee died during A's lifetime, an heir of the grantee would take as a *special occupant* rather than by descent. Some modern statutes have made the property interest between the death of the grantee and the measuring life a chattel real, making the provision that the grantee's personal representative takes the property as personal property.

A life estate is alienable, and therefore, the life tenant can convey his or her estate. The grantee of the life tenant would thereby be given an estate pur autre vie. The life tenant is unable, however, to convey an estate that is greater than his or her own.

### Nonfreehold Estates

Nonfreehold estates are interests in real property without seisin and which are not inheritable. The four main types of nonfreehold estates are an estate for years, an estate from year to year, a tenancy at will, and a tenancy at sufferance.

**Estate for Years** The most significant feature of an estate for years is that it must be of definite duration, that is, it is required to have a definite beginning and a definite ending. The most common example of an estate for years is the arrangement existing between a LANDLORD AND TENANT whereby property is leased or rented for a specific amount of time. In this type of estate the transferor leases the property to the transferee for a certain designated period, for example: "Transferor leases Blackacre to transferee for the period of January 1, 1998, to January 1, 2003, a period of five years."

During the five-year period, the transferee has the right to possess Blackacre and use and enjoy the fruits that stem from it. He or she is required to pay rent according to the terms of the rental agreement and is not permitted to commit waste on the premises. If the transferee dies during the term of the lease, the remainder of such term will pass to the transferee's personal representative for distribution pursuant to a will or the laws of DESCENT AND DISTRIBUTION, since a leasehold interest is regarded as personal property or a chattel real.

**Estate from Year to Year** The essential distinguishing characteristic of an estate from year to year is that it is of indefinite duration. For example, a landlord might lease Blackacre to a tenant for a two-year period, from January 1, 2003, to January 1, 2005, at a rental of $600 per month, payable in advance on or before the ninth day of each month. The tenant might hold possession beyond January 1, 2005, and on or before January 9, 2005, give the landlord $600. If

the landlord accepts the rent, the tenant has thereby been made a tenant from year to year. An estate of this nature continues indefinitely until one of the parties gives notice of termination. The terms of the original lease are implied to carry over to the year-to-year lease, except for the term that set forth the period of the lease.

Notice of termination is an important component of this type of periodic tenancy. In the preceding example, either party would be able to terminate the tenancy by providing notice at least six months preceding the end of the yearly period. Statutory provisions often abridge the length of notice required to end periodic tenancies. Such tenancies may come within requirements set forth by the STATUTE OF FRAUDS.

**Tenancy at Will** A tenancy at will is a rental relationship between two parties that is of indefinite duration, since either may end the relationship at any time. It can be created either by agreement, or by failure to effectively create a tenancy for years.

A tenancy at will is terminated by either individual without notice and ends automatically by the death of either party or by the commission of voluntary waste by the lessee. It is not assignable and is categorized as the lowest type of chattel interest in land.

**Tenancy at Sufferance** A tenancy at sufferance is an estate that ordinarily arises when a tenant for years or a tenant from period to period retains possession of the premises without the landlord's consent. This type of interest is regarded as naked and wrongful possession.

In this type of estate, the tenant is essentially a trespasser except that his or her original entry onto the property was not wrongful. If the landlord consents, a tenant at sufferance may be transformed into a tenant from period to period, upon acceptance of rent.

### Concurrent Estates

Concurrent estates are those that are either owned or possessed by two or more individuals simultaneously. The three most common types of concurrent estates are JOINT TENANCY, TENANCY BY THE ENTIRETY, and TENANCY IN COMMON.

**Joint Tenancy** A joint tenancy is a type of concurrent ownership whereby property is acquired by two or more persons at the same time and by the same instrument. A typical conveyance of such a tenancy would be "Grantor conveys Blackacre to A, B, and C and their heirs in fee simple absolute." The main feature of a joint tenancy is the RIGHT OF SURVIVORSHIP. If any one of the joint tenants dies, the remainder goes to the survivors, and the entire estate goes to the last survivor.

In a joint tenancy, there are four unities, those of interest, time, title, and possession.

*Unity of interest* means that each joint tenant owns an undivided interest in the property as a whole. No one joint tenant can have a larger share than any of the others.

*Unity of time* signifies that the estates of each of the joint tenants is vested for exactly the same period.

*Unity of title* indicates that the joint tenants hold their property under the same title.

*Unity of possession* requires that each of the joint tenants must take the same undivided possession of the property as a whole and enjoy the same rights until one of the joint tenants dies.

**Tenancy by the Entirety** A tenancy by the entirety is a form of *joint tenancy* arising between a HUSBAND AND WIFE, whereby each spouse owns the undivided whole of the property, with the *right of survivorship.*

A tenancy by the entirety can be created by will or deed but not by descent and distribution. It is distinguishable from a joint tenancy in that neither party can voluntarily dispose of his or her interest in the property. There is unity of title, possession, interest, time, and person.

**Tenancy in Common** A tenancy in common is a form of concurrent ownership that can be created by deed or will, or by operation of law, in which two or more individuals possess property simultaneously. A typical conveyance of this type of tenancy would be "Grantor, owner of Blackacre in fee simple absolute, grants to A, B, and C, and their heirs—each taking one-third interest in the property."

In the preceding illustration, A, B, and C are tenants in common. There is no right of survivorship in such a tenancy, and each grantee has the right to dispose of his or her share by deed or by will.

In a tenancy in common, one of the tenants may have a larger share of the property than the others. In addition, the tenants in common may take the same property by several titles. The only unity present in a tenancy in common is unity of possession.

### Future Interests

Future interests are interests in real or personal property, a gift or trust, or other things in

**Federal Estate and Gift Tax Receipts, 1970 to 2001**

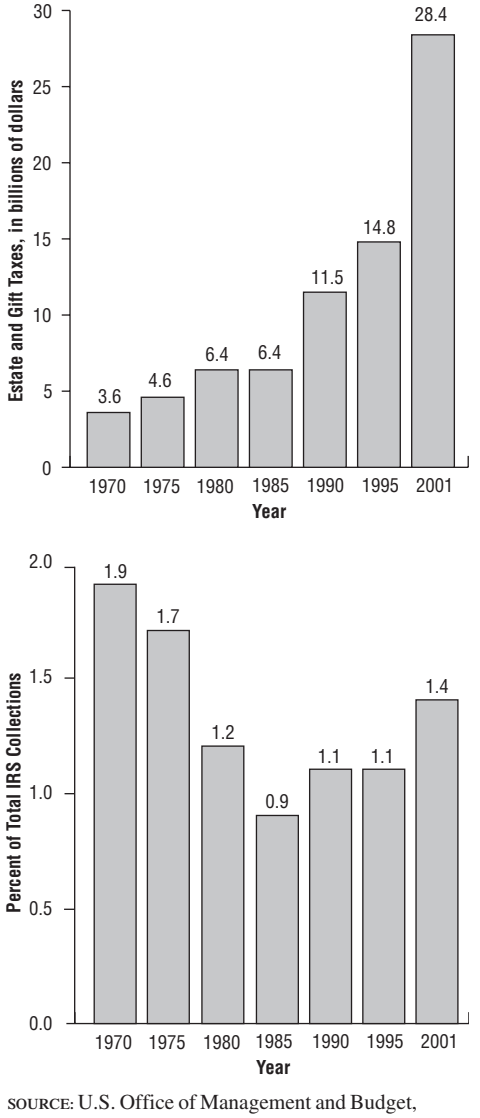


SOURCE: U.S. Office of Management and Budget, *Historical Tables,* annual.

which the privilege of possession or of enjoyment is in the future and not the present. They are interests that will come into being at a future point in time. There are five classes of future interests: *reversions; possibilities of reverter; powers of termination,* also known as *rights of reentry for condition broken; remainders*, and *executory interests.*

### Incorporeal Interests

Incorporeal interests in real property are those that cannot be possessed physically, since they consist of rights of a particular user, or the right to enforce an agreement concerning use. The five major types of incorporeal interests are easements; profits; covenants running with the land; equitable servitudes; and licenses.

FURTHER READINGS

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CROSS-REFERENCES

Equity; Servitude.

## ESTATE AND GIFT TAXES

*A combined federal tax on transfers by gift or death.*

When property interests are given away during life or at death, taxes are imposed on the transfer. These taxes, known as estate and gift taxes, apply to the total transfers that an individual may make over a lifetime.

Estate and gift tax law is primarily statutory. Although the TREASURY DEPARTMENT issues regulations governing the interpretation of the revenue laws, and although state and federal courts contribute their interpretations of statutory law, the foundation of the transfer taxes rests in chapters 11 and 12 of the INTERNAL REVENUE CODE. To understand the complex statutory framework requires a basic understanding of the concepts underlying the estate and gift tax system. The transfer tax laws apply to all gratuitous shifts in property interests. But although administered similarly, the estate tax and gift tax have somewhat different goals. The gift tax reaches the gratuitous ABANDONMENT of ownership or control in favor of another person during life, whereas the estate tax extends to transfers that take place at death, or before death, as substitutes for dispositions at death. Both taxes are intended to limit the concentration of familial or dynastic wealth.

Estate and gift taxes became a source of political debate in the late 1990s, as many members of Congress pressed for an end to these taxes. They argued that such "death taxes" were unfair and forced small businesses and family farmers to sell off their assets to pay the estate taxes. Opponents of repeal noted that even though the potential tax rate was quite high, at 55 percent, most individuals never paid any

estate or gift tax. Under the tax system that had been in place since 1986, every person could transfer a combined $600,000 worth of property during life and at death without paying tax. This tax-free allowance corresponded to $192,800 worth of federal tax savings and is known as the "unified credit against estate tax." This unified credit was sufficient to satisfy taxes on transfers by all but the richest five percent of U.S. citizens. Defenders of estate and gift taxes maintained that these taxes were guided by an important government and social policy: the prevention of large concentrations of dynastic wealth. Moreover, they pointed out that estate tax collections typically constitute less than two percent of total INTERNAL REVENUE SERVICE collections.

The debate on this issue culminated in the Economic Growth and Tax Relief Reconciliation Act of 2001. The top estate tax rate was reduced from 55 percent to 50 percent in 2002 (together with the repeal of the 5 percent surtax on estates over $10 million), 49 percent in 2003, 48 percent in 2004, 47 percent in 2005, 46 percent in 2006, and to 45 percent in years 2007 through 2009. The credit-level exemption was raised from $675,000 to $1 million in 2002, $1.5 million in 2004, $2 million in 2006, and $3.5 million in 2009. Most importantly, the estate tax was to be repealed in 2010. However, the law contains a "sunset" provision. If Congress does not extend the law beyond 2010, the new law will end on December 31, 2010, and the previous estate law will be in effect again. Since the political landscape undoubtedly will have changed, it is impossible to predict what will happen to the estate tax.

The gift tax was not repealed, but it was modified. The new law increases the total gift tax exemption from $675,000 in 2001 to $1,000,000 in 2002 and thereafter. After 2009, the gift tax is retained at the top INCOME TAX rate for the applicable year, which is currently 35 percent. The retention of the gift tax is meant to discourage transfers to lower income beneficiaries to minimize capital gains taxes.

With few exceptions, the individual making the transfer is responsible for any transfer tax owed (whereas, in contrast, the individual receiving income is responsible for any income tax owed). Thus, the executor of an estate, as the estate's representative, is responsible for paying any estate tax due, and the donor of a gift is responsible for paying any gift tax due.

## Gifts

The Internal Revenue Code defines a gift as a "transfer . . . in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible." Generally, a gift is any completed transfer of an interest in property to the extent that the donor has not received something of value in return, with the exception of a transfer that results from an ordinary business transaction or the discharge of legal obligations, such as the obligation to support minor children. This definition of gifts does not require the intent to make a gift. An individual may make gifts of both present interests (such as life estates) and future interests (such as remainders) in property (26 U.S.C.A. § 2503(b)).

From a tax standpoint, gifts have two principal advantages over transfers at death. First, gifts allow a donor to transfer property while its value is low, allowing future appreciation in property value to pass to others free of additional gift or estate tax. Second, provided that the gift is of a present interest in property, a donor may transfer up to $11,000 exempt from tax to each donee every calendar year, which allows the donor to reduce the size of the estate remaining at death without any transfer tax consequences.

To constitute a gift, a transfer must satisfy two basic requirements: It must lack consideration, in whole or in part (that is, the recipient must give up nothing in return); and the donor must relinquish all control over the transferred interest. To constitute a tax-exempt gift, a transfer also must constitute a present interest in property. (A present interest is something that a person owns at the present time, whereas a future interest is something that a person will come to own in the future, such as the proceeds of a trust.)

**Lack of Consideration** A transfer is not a gift if the transferor receives consideration, or something of value, in return for it. For example, if A sells B a used car worth $5,000 and receives $5,000 in exchange, the transfer is not a gift because it is supported by "adequate and full consideration" (26 U.S.C.A. § 2512(b)). But if A sells B the same car for only $2,000, the transfer constitutes a gift of $3,000 because A exchanges $3,000 worth of car for nothing. Finally, if A gives B the car without receiving anything in return, the transfer constitutes a gift of $5,000. Although consideration may be whole or partial, not all transfers for partial or insufficient

consideration result in gifts. An arm's-length sale—that is, a sale free of any special relationship between buyer and seller—will not be considered a gift where no intent to make a gift exists, even if the consideration is not adequate. This limit on the definition of gifts excludes bad business deals and forced sales from gift tax treatment.

**The Completeness Requirement** A transfer constitutes a gift for tax purposes only if the donor has parted with the ability to exercise "dominion and control" over the property transferred. Many transfers of property satisfy this condition. For example, if A takes B out for a birthday dinner, the act of purchasing the dinner is a gift because A cannot regain control over the food that B consumes, or revoke the acts of purchasing and consuming the meal. When the donor has not relinquished absolutely the ability to control or manage the property or its use, however, the "gift" may not be complete for tax purposes. The most common example of an incomplete transfer is a transfer of property to a revocable trust, in which the donor retains the right, as trustee, to alter, amend, or rescind the trust. The gift is not completed because the donor could restore ownership in the trust property to himself or herself, or change his or her mind about who will enjoy or later receive the property.

This distinction between complete and incomplete transfers determines whether property will be included in an estate at death, as well as the value of that property. The value of property that was incompletely transferred during life will be included in the gross estate at death (26 U.S.C.A. §§ 2035–2038). Therefore, any appreciation in the value of incompletely transferred property will be included and taxed in the estate, whereas none of the value of completely transferred property will be included in the estate. Accordingly, if A transfers 1,000 shares of XYZ stock outright to B when it is worth $10 per share, the value of the transfer subject to tax equals zero because A can take advantage of the annual exclusion described in the following section. If A transfers the same stock to a revocable trust for B's benefit, however, and that stock is worth $100 per share on the date of A's death, the entire $100,000 is included and taxable in A's estate. Moreover, any income distributions from the trust after the transfer of property to the revocable trust are taxable gifts to B for which A must pay tax.

Sometimes people make incomplete transfers, rather than completed gifts, in order to retain control over the property, even though appreciation in property value is taxed as a consequence of an incomplete transfer. For various reasons, a person might not want to give up that control. An individual might wish to control the distribution of income from a gift to a trust, or even to receive the income distributions from a trust. Or an individual may create a trust for non-gift reasons, such as to ensure property or investment management. Parents might not trust their children to manage gifts of stock or cash effectively, and thus might retain control to ensure that transfers are not squandered. Occasionally, donors mistakenly believe that revocable trusts are effective devices to avoid paying estate taxes, and simply do not realize that transfers to revocable trusts are incomplete for gift purposes.

**Present versus Future Interests: The Annual Exclusion** Each individual may make tax-exempt gifts of up to $11,000 to each donee every year. To qualify for this so-called annual exclusion, a gift must be of a present interest in property (26 U.S.C.A. § 2503(b)). Completed transfers of future interests, such as remainder interests in real estate or the vested right to the distribution of trust principal on the donor's death, constitute gifts for tax purposes but do not qualify for the annual exclusion.

Only the unrestricted right to use, enjoy, or possess property in whole or in part constitutes a present interest. For example, if A transfers a life estate in his home to B, with a remainder to C, only the life estate to B, which is a present interest in the home, qualifies for the annual exclusion. The remainder interest to C is a completed gift, but does not qualify for the annual exclusion because it is a gift of a future interest. A more subtle and common illustration of this principle involves trust property. For example, A creates an irrevocable trust giving B, the trustee, complete discretion over the distribution of income to C for ten years, at which time the trust will terminate and the entire trust corpus and accumulated income will be paid to C. In this case, A has made a completed gift of the entire trust corpus, but the gift does not qualify for the annual exclusion because C has no present right to the trust income.

### Testamentary Transfers

The gross estate is the measure of the interests an individual is considered capable of trans-

ferring at the time of death, and provides the starting point for computing the estate tax (26 U.S.C.A. § 2031). The gross estate is an artificial concept, in part because it may include interests that the individual did not actually own at death (§§ 2035–2038). From the gross estate are deducted expenses of administering the estate, the decedent's legal obligations at death, the value of property passing to a surviving spouse, and the value of bequests to charity (§§ 2053–2056). The remainder is known as the taxable estate and is the value on which the estate tax is computed.

Conventional interests in property, such as ownership of real estate, stocks and bonds, cash, automobiles, art, and PERSONAL PROPERTY, must be included in the gross estate and valued at their fair market value on the date of death. In addition, interests in life insurance, annuities, and certain death benefits are included to the extent that the decedent was able to confer an interest in them on another person. Finally, three somewhat artificial ownership attributes, including the power to change beneficial enjoyment and the power to revoke or change the type and time of enjoyment, are included in the gross estate to the full extent of the property to which the power applies. The value of property included in the gross estate is equal to its fair market value on the date of death.

**Designation of Beneficiaries** Life insurance, annuities, and certain death benefits are substitutes for dispositions at death, and are included in the gross estate to the extent that the decedent owned or could exercise "incidents of ownership" over them until the time of death. Thus, the value of a life insurance policy payable to the decedent's estate on death is included in the decedent's gross estate (26 U.S.C.A. § 2042(a)(1)). In addition, life insurance is includable in the gross estate even though neither the decedent nor the decedent's estate actually owned it, if the decedent possessed any incidents of ownership over the policy. Incidents of ownership encompass the rights to change the distribution of the economic benefit flowing from the insurance policy. For example, if A purchases a life insurance policy that is payable to B on A's death, the value of that policy is includable in A's gross estate if she retained, at the time of her death, the ability to change the policy beneficiary to C. If the decedent had no rights to direct or affect economic benefits at the time of her death, then the proceeds of the policy are not includable in the gross estate.

**Powers of Appointment** Frequently, an individual owns the power to designate who will enjoy an item of property. This power may be considered an attribute of ownership sufficient to be included in the gross estate. The provision 26 U.S.C.A. § 2038, discussed later under retained power, addresses these powers of appointment that individuals reserve to themselves when creating property rights for another individual. Section 2041, in contrast, includes in the gross estate the value of property subject to a "general" power of appointment that the decedent acquired from another person. A general power of appointment is one that individuals may exercise in their own favor or in favor of their estate, their creditors, or the creditors of their estate. If the decedent may only exercise the power in conjunction with either the creator of the power or a person having an adverse interest in the property subject to the exercise of the power, then the power is not considered a general power of appointment because the decedent cannot freely control the transfer of the property at the decedent's death, and the property subject to the power is not included in the gross estate. For example, if A dies and leaves B the right to income in a trust, as well as the right to appoint the trust in whatever manner he wishes, then the entire value of the trust is included in B's estate when B dies. If, by contrast, A leaves B the right to income from the trust as well as the right to appoint the trust only to C or C's heirs, then no portion of the trust is includable in B's estate when B dies.

A power that is limited by an ascertainable standard is not a general power, even if it otherwise appears to be a general power. Ascertainable standards include health, education, support, and maintenance. Accordingly, if A dies and leaves B the power to appoint trust principal to herself if it is required for her health, education, support, or maintenance, B's power is limited by an ascertainable standard, and the value of the trust is not included in the gross estate. But if B may invade the trust principal for her "comfort and happiness," B's power is not limited by an ascertainable standard, and the value of the trust is included in B's estate.

**Artificial Aspects of the Estate Tax System** Before 1976, the gross estate included the value of all gifts made in contemplation of death. Because determining whether a gift was in

contemplation of death turned out to be subjective, difficult to prove, and somewhat morbid, a 1976 amendment to the estate tax law automatically included any gift that a decedent made within three years of death (26 U.S.C.A. § 2035(a)). Unfortunately, the effect of § 2035(a) was to include in the gross estate the full value of the transferred property at the date of death, including any appreciation in value since the transfer. Thus, if A transferred $3,000 worth of stock to B in 1978 and died in 1980, when the stock was worth $25,000, the stock's full value of $25,000 was included in the gross estate, defeating much of A's pre-death tax planning.

In 1981, sweeping tax changes eliminated from the gross estate most transfers made within three years of death. Even so, three specific types of transfers—transfers with a retained life estate, transfers with retained powers, and transfers effective on death—are included in the gross estate because the decedent owned an interest in the property at the time of death. Moreover, the value of property once subject to certain retained interests is included in the gross estate if the release or lapse of the retained interest takes place within three years of death, because the disposition of the retained interest is considered a substitute for disposition at death.

***Transfers with a retained life estate*** Transfers with a retained life estate are covered in 26 U.S.C.A. § 2036. For purposes of the estate tax laws, the term *life estate* includes more than just an expressly retained life interest in property. For example, if A creates a trust for the benefit of B but retains the right to receive the income from the trust for the rest of her life, her retained income interest clearly is a retained life estate in the property. But the retention of the right to change the economic benefit derived from the property also constitutes a retained life estate, as when A reserves the right to change the trustee and appoint herself the trustee. It also might include retained life estates by tacit agreement, such as when A transfers her home to B, with the understanding that A and not B will live there for the rest of her life.

The mere *possession* of a life estate in property is insufficient to bring it into the gross estate under § 2036. The life interest must be retained by the decedent and must apply to an interest in property that the decedent transferred. Thus, a life income interest created by someone other than the decedent is not includable in the gross estate under § 2036.

***Transfers with retained powers*** Transfers in which the decedent owns, at the time of death, the power to alter, amend, revoke, or terminate the enjoyment of the property are covered in 26 U.S.C.A. § 2038(a)(1). In contrast to § 2041, which allows general powers of appointment, § 2038 includes only powers associated with a property interest that the decedent gave away during his or her lifetime. The most commonly encountered retained powers are the powers applicable to a revocable trust. A revocable trust is a legal instrument through which an individual relinquishes legal ownership over the property to the trustee of a trust, either retaining to himself or herself beneficial enjoyment of the property, such as the right to income, or granting it to another individual. As its name indicates, the revocable trust is set up so that the creator, known as the grantor, the settlor, or the trustor, may revoke the trust entirely, may change the terms of the trust, or may change the beneficial ownership in the trust.

The creation of, or an addition to, a revocable trust almost never constitutes a gift. A gift must be completed in order to be taxable; the creation of or an addition of property to a revocable trust is, by definition, incomplete because the creator may change the beneficial enjoyment at some time, effectively withdrawing the "gift." Distributions from a revocable trust may, however, constitute completed gifts. For example, if A transfers $2 million to a revocable trust that pays income to B, the transfer of the $2 million is not a completed gift, but the annual payment of $100,000 in interest to B is a taxable gift when it takes place. Upon A's death, the entire value of the property subject to the power, including both the trust corpus and undistributed income payable to B, is included in the gross estate. And, because the property is valued as of the date of death, any increases or decreases in the value of the property since the transfer will appear in the gross estate.

***Transfers effective on death*** The provision 26 U.S.C.A. § 2037 includes in the gross estate the value of transfers that take effect on death. Although at a distance § 2037 seems to apply to all property transfers that occur as a result of an individual's death, the stipulated transfers are rarely encountered. To meet the requirements of § 2037, the beneficiary must be able to acquire an interest in the property *only* by surviving the decedent. Furthermore, the decedent must have expressly retained a reversionary interest in the

property that is worth at least five percent of the property's value at the time of death. Both conditions are difficult to meet. In the first place, the requirement that the beneficiary obtain an interest in the property solely by surviving the decedent is exclusive: If the beneficiary could have obtained an interest in any other way, such as by surviving another individual, satisfying a condition, or outlasting a term of years, the property is not includable under § 2037. In the second place, the requirement that the decedent's retained reversionary interest exceed five percent of the property's value is difficult to satisfy because most retained reversions represent remote interests that reach fruition only if the primary, secondary, and all contingent beneficiaries die first or fail to satisfy the conditions of ownership.

***Release or lapse of rights*** The gratuitous relinquishment or lapse, within three years of death, of a retained life estate under 26 U.S.C.A. § 2036, a retained reversion under § 2037, a retained power under § 2038, or an interest in life insurance under § 2042 will subject the value of the property, subject to the retained interest, to inclusion in the gross estate. This result is a remnant of the pre-1981 policy that transfers "in contemplation of death" should be included in the gross estate. Under § 2035(d)(2), the release or relinquishment of a retained interest within three years of death is conclusively presumed to be "in contemplation of death." Thus, if A transfers his home to B in 1985, retaining the right to live there for life, but abandons that right at the end of 1991, a gift of the remainder interest in the property takes place in 1985, followed by a gift of the relinquished life estate in 1991. But if A dies before the end of 1994, both the 1985 and 1991 gift tax returns will be ignored for estate tax purposes, and the entire value of the home will be included in A's gross estate.

As with the retained life estate, the relinquishment or release within three years of death of a power of appointment retained under § 2038 will cause inclusion of the full value of the property at its date-of-death value. For example, if A creates a revocable trust in 1982, then amends it to make it irrevocable at the end of 1992, a gift will result in 1992 when the trust becomes irrevocable. If A dies before the end of 1995, the entire value of the trust, including any appreciation in value, will be included in A's estate, and the 1992 gift will be ignored. Finally, the release or lapse of ownership or any incidents of ownership over a life insurance policy will cause the entire value of that policy to be included in the gross estate.

### Deductions

Once the value of the gross estate has been computed, the estate is entitled to take deductions. Expenses associated with administering the estate, such as funeral expenses, executors' commissions, and attorneys' fees, as well as debts the decedent owed at death, are deductible because they necessarily reduce the value of the property that the decedent actually is capable of transferring (26 U.S.C.A. § 2053(a), (b)). The two most important deductions for tax purposes are the marital deduction and the charitable deduction.

**The Marital Deduction** The marital deduction applies to certain interests in property passing from the first spouse to die, to the surviving spouse. It permits an estate to deduct the value of certain property included in the estate from the value of the gross estate, thus eliminating the estate tax with respect to that property. The rationale behind the marital deduction is simple: that a husband and a wife should be considered a single unit for purposes of wealth transfer. Accordingly, as a general rule, the marital deduction will be allowed with respect to certain property passing to a surviving spouse, provided that it will be included and taxed in the estate of that spouse on his or her death.

To qualify for the marital deduction, property must satisfy three basic requirements. First, the surviving spouse must be a U.S. citizen. Second, the interest in the property must pass directly from the first spouse to die, to the surviving spouse. Third, the interest generally must not be terminable (26 U.S.C.A. § 2056). The concept of a terminable interest is complex and technical, but for the most part, an interest is terminable for tax purposes if another interest in the same property passes to someone other than the surviving spouse by reason of the decedent's death, allowing that other person to enjoy the property after the surviving spouse's interest terminates. For example, if A leaves to her husband, B, a life estate in her property, with a remainder to their children, her bequest to B does not qualify for the marital deduction. B's interest terminates automatically on his death, and the children, by reason of the termination, will then enjoy the property.

If no one else can enjoy the property following the termination of the surviving spouse's interest, the property interest is not considered

terminable for tax purposes, and a deduction will be allowed. For example, if A leaves to her husband, B, her interest in a patent, and dies while the patent has ten years of life left, the patent interest qualifies for the marital deduction, because no one else will enjoy it after it expires.

Whether an interest is terminable must be determined at the time of death. Therefore, even if an event following the first spouse's death makes the termination of the surviving spouse's interest impossible, the marital deduction will not be allowed if it technically was terminable at the time of death.

Congress in 1981 created an important exception to the general rule that a terminable interest does not qualify for the marital deduction. This exception, called the qualified terminable interest property (QTIP) exception, is a sophisticated statutory rule allowing the estate to deduct the value of a terminable interest that passes to the surviving spouse as long as the transfer meets five requirements:

1. the surviving spouse receives all or a specific portion of the income for life from the interest
2. the income from the QTIP . . . is paid at least annually
3. the surviving spouse has the power to appoint the interest to himself or his estate
4. the power must be exercisable in all events
5. no other person has the power to appoint the interest to anyone other than the surviving spouse (26 U.S.C.A. § 2056(b)(7)) In return for the marital deduction, the estate must agree that the QTIP will be included in the estate of the surviving spouse at death, to the extent that the surviving spouse has not disposed of the property during his or her life (§ 2044).

**The Charitable Deduction** The charitable deduction permits an estate to deduct the entire value of bequests to any of a number of public purposes, including the following:

- any corporation or association organized for religious, charitable, scientific, literary, or educational purposes
- the United States
- a state or its political subdivisions, and the District of Columbia
- a foreign government, if the bequest is to be used for charitable purposes
- selected amateur sports organizations (26 U.S.C.A. § 2055(a)).

The charitable deduction is intended to provide wealthy individuals a tax incentive to benefit the public interest. Only bequests passing directly from the decedent's estate to the charitable entity qualify for the deduction. Therefore, if A leaves $100,000 to her son C, who gives $50,000 to the Red Cross immediately after A's death, A's estate cannot receive a charitable deduction for the sum given to the charity (§ 2518(b)(4)).

### Computation of Tax

The estate and gift taxes are progressive and unified taxes, meaning that each taxable transfer taking place after 1976 is taken into consideration when computing the tax on subsequent transfers. For example, if A makes a taxable gift of $500,000 in 1990, the marginal tax rate on the gift is 34 percent. If A makes another taxable gift of $200,000 in 1992, the tax is computed on $700,000, the sum of the post-1976 gifts. Because the first $600,000 of transfers during life and at death are tax free, a unified credit of $192,800 is deducted from the tax on A's 1992 gift. If A dies in 1995 leaving an estate worth $2 million, the tax is computed on $2.7 million, the sum of the value of the estate and the lifetime gifts; the value of the unified credit and the taxes actually paid on the 1992 gift are deducted.

Progressivity in the estate and gift tax system ensures that individuals cannot avoid increased tax rates by making a series of small transfers. If the taxes were not progressive, then $1 million parceled out into ten annual gifts of $100,000 would be taxed at the marginal rate of 26 percent for each gift, whereas under the progressive tax system, the gifts are taxed at the marginal rate of 39 percent. Similarly, unification between the transfer tax systems ensures that individuals cannot avoid paying higher estate tax rates at death simply by giving away most of their property interests during life. Thus, in the case of A above, the marginal tax rate on A's estate is 49 percent, computed on $2.7 million of total lifetime and death transfers, rather than 45 percent, computed only on the value of the gross estate.

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## ESTIMATED TAX

*Federal and state tax laws require a quarterly payment of estimated taxes due from corporations, trusts, estates, non-wage employees, and wage employees with income not subject to withholding. Individuals must remit at least 100 percent of their prior year tax liability or 90 percent of their current year tax liability in order to avoid an underpayment penalty. Corporations must pay at least 90 percent of their current year tax liability in order to avoid an underpayment penalty. Additional taxes due, if any, are paid on taxpayer's annual tax return.*

Typically, non-wage earners pay estimated tax since their incomes are not subject to withholding tax to the same extent as the income of a salaried worker. Persons who receive a certain level of additional income, apart from their salaries, must also pay estimated tax.

The calculation and payment of estimated tax are preliminary stages to the filing of a final INCOME TAX return. Under federal and most state laws, estimated tax is paid in quarterly installments. The tax paid is applied to the tax owed when the taxpayer files a final return. Any overpayment of estimated tax will be refunded after the filing of the final return. If no tax is owed, a taxpayer is still required under federal law, and many state laws, to file a final return. When tax is due upon the filing of the final return, the taxpayer must pay the outstanding amount. Depending upon the amount due and the reasons for the miscalculation, a taxpayer might be liable under federal and state law for interest imposed upon the deficiency, as well as being subject to a penalty.

## ESTOPPEL

*A legal principle that bars a party from denying or alleging a certain fact owing to that party's previous conduct, allegation, or denial.*

The rationale behind estoppel is to prevent injustice owing to inconsistency or FRAUD. There are two general types of estoppel: equitable and legal.

### Equitable Estoppel

EQUITABLE ESTOPPEL, sometimes known as estoppel in pais, protects one party from being harmed by another party's voluntary conduct. Voluntary conduct may be an action, silence, ACQUIESCENCE, or concealment of material facts. One example of equitable estoppel due to a party's acquiescence is found in *Lambertini v. Lambertini*, 655 So. 2d 142 (Fla. 3d Dist. Ct. App. 1995). In the late 1950s, Olga, who was married to another man, and Frank Lambertini met and began living together in Argentina. Olga and Frank hired an attorney in Buenos Aires, who purported to DIVORCE Olga from her first husband and marry her to Frank pursuant to Mexican law. The Lambertinis began what they thought was a married life together, and soon produced two children. In 1968, they moved to the United States and became Florida residents.

In 1992, Olga sought a divorce from Frank. She petitioned the Florida court for sole possession of the marital home and temporary ALIMONY, which the court granted. Frank sought a rehearing, arguing that the Mexican marriage was not a valid legal marriage and was therefore void. Though Frank won with this argument in the trial court, the appellate court reversed, holding that Frank was equitably estopped from arguing that the Mexican marriage was invalid. According to the appellate court, Frank and Olga had held themselves out as a married couple for more than 30 years, lived together, raised two children, and owned property jointly. Both Frank and Olga apparently believed all along that the Mexican marriage was legal, and it was only when Olga filed for divorce that Frank discovered and chose to rely on its invalidity. The appellate court granted Olga her divorce, the house, and the temporary alimony. Frank's acquiescence for three decades—holding himself out as being married to Olga—prevented him from denying the marriage's existence.

There are several specific types of equitable estoppel. *Promissory estoppel* is a contract law doctrine. It occurs when a party reasonably relies on the promise of another party, and because of the reliance is injured or damaged. For example, suppose a restaurant agrees to pay a bakery to make 50 pies. The bakery has only two employees. It takes them two days to make the pies, and they are unable to bake or sell anything else during that time. Then, the restaurant decides not to buy the pies, leaving the bakery with many more pies than it can sell and a loss of profit from the time spent baking them. A court will likely apply the PROMISSORY ESTOPPEL doctrine and require the restaurant to fulfill its promise and pay for the pies.

An *estoppel certificate* is a written declaration signed by a party who attests, for the benefit of another party, to the accuracy of certain facts described in the declaration. The estoppel certificate prevents the party who signs it from later challenging the validity of those facts. This type of document is perhaps most common in the context of mortgages, or home loans. If one bank seeks to purchase mortgages owned by another bank, the purchasing bank may request the borrowers, or homeowners, to sign an estoppel certificate establishing (1) that the mortgage is valid, (2) the amount of principal and interest due as of the date of the certificate, and (3) that no defenses exist that would affect the value of the mortgage. After signing this certificate, the borrower cannot dispute those facts.

*Estoppel by laches* precludes a party from bringing an action when the party knowingly failed to claim or enforce a legal right at the proper time. This doctrine is closely related to the concept of STATUTES OF LIMITATIONS, except that statutes of limitations set specific time limits for legal actions, whereas under LACHES, generally there is no prescribed time that courts consider "proper." A defendant seeking the protection of laches must demonstrate that the plaintiff's inaction, MISREPRESENTATION, or silence prejudiced the defendant or induced the defendant to change positions for the worse.

The court applied the doctrine of laches in *People v. Heirens,* 648 N.E.2d 260 (Ill. 1st Dist. Ct. App. 1995). William Heirens pleaded guilty, in 1946, to three murders, for which he received three consecutive life terms in prison. Heirens sought court relief numerous times in the ensuing years. In 1989, 43 years after his conviction, Heirens filed his second postconviction petition seeking, among other things, relief from his prison sentence due to ineffective counsel and the denial of DUE PROCESS at the time of his arrest. The court found that all the witnesses and attorneys involved in Heirens's case had since died. Laches precluded Heirens from bringing his action because, according to the court, it would be "difficult to imagine a case where the facts are more remote and where the state might be more prejudiced by the passage of time."

### Legal Estoppel

Legal estoppel consists of *estoppel by deed* and *estoppel by record.* Under the doctrine of estoppel by deed, a party to a property deed is precluded from asserting, as against another party to the deed, any right or title in derogation of the deed, or from denying the truth of any material fact asserted in the deed. For example, suppose a father conveys a plot of land to his son by deed. Unbeknownst to the son, the father actually does not own the plot of land at the time of the conveyance; the father acquires title to the property only after the conveyance. Technically, the son is not the legal owner of the property because his father did not own and did not have the right to transfer the real estate at the time of the conveyance. But under the doctrine of estoppel by deed, the court may "make good" the imperfection of the poorly timed conveyance by finding the son to be the rightful owner of the plot of land (*Zayka v. Giambro,* 32 Mass. App. Ct. 748, 594 N.E.2d 894 [1992]).

The doctrine of estoppel by record precludes a party from denying the issues adjudicated by a court of competent jurisdiction (COLLATERAL ESTOPPEL) or any matter spelled out in a judicial record (judicial estoppel).

Collateral estoppel, sometimes known as estoppel by judgment, prevents the re-argument of a factual or legal issue that has already been determined by a valid judgment in a prior case involving the same parties. For example, suppose Ms. Jones, who owns a business next to Mr. Smith's, sues Mr. Smith for damage to her property caused by the digging of a hole. Mr. Smith defends by arguing that the hole is on his land. After considering all the evidence, the court determines that Mr. Smith owns the land. Later that year, after a late night at work, Mr. Smith cuts across the back lot, falls into the hole, and is injured. He then sues Ms. Jones for negligent maintenance of her property. In this situation, the court will apply collateral estoppel, preventing Mr. Smith from re-litigating an issue that was already decided between the same parties in the prior proceeding.

The related doctrine of judicial estoppel binds a party to his or her judicial declarations, such as allegations contained in a lawsuit complaint or testimony given under oath at a previous trial. Judicial estoppel protects courts from litigants' using opposing theories in the attempt to prevail twice. For instance, a tenant trying to avoid liability to a property owner may not, in the tenant's BANKRUPTCY case, successfully represent to a court that the property agreement is a lease and then later, when the property owner sues for nonpayment of rent, declare that the

agreement is a mortgage rather than a lease (*Port Authority v. Harstad,* 531 N.W.2d 496 [Minn. Ct. App. 1995]).

Estoppel by record is frequently confused with the related doctrine of RES JUDICATA (a matter adjudged), which bars re-litigation of the same CAUSE OF ACTION between the same parties once there has been a judgment. For example, if Mr. Chen sues Ms. Lopez for breach of contract and the court returns a decision, Ms. Lopez cannot later sue Mr. Chen for breach of the same contract. Ms. Lopez has the right to appeal the first decision, but she cannot bring a new lawsuit that raises the same claim.

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## ET AL.

*An abbreviated form of* et alia, *Latin for "and others." When affixed after the name of a person,* et al. *indicates that additional persons are acting in the same manner, such as several plaintiffs or grantors.*

When *et al.* is used in a judgment against defendants, it means that the quoted words are applicable to all the defendants.

CROSS-REFERENCES

Court Opinion.

## ET SEQ.

*An abbreviation for the Latin* et sequentes *or* et sequentia, *meaning "and the following."*

The phrase *et seq.* is used in references made to particular pages or sections of cases, articles, regulations, or statutes to indicate that the desired information is continued on the pages or in the sections following a designated page or section, as "p. 238 *et seq.*" or "section 43 *et seq.*"

The abbreviation *et seq.* is sometimes used to denote a reference to more than one following page or section.

CROSS-REFERENCES

Court Opinion.

## ETHICS IN GOVERNMENT ACT OF 1978

Passed in 1978 in the shadow of the WATERGATE scandal, the Ethics in Government Act affects many different aspects of federal government employment. Its most famous provision was the Independent Counsel Law, which gave impetus to very public investigations of officials in three presidential administrations and resulted in the IMPEACHMENT trial of President BILL CLINTON in 1999. That provision has since been allowed to lapse, but many other provisions of the act remained valid through 2003.

When Congress first debated the Ethics and Government Act in the late 1970s, it seemed as if the nation had been through a long nightmare of ethics scandals, with Watergate being only the most prominent and devastating. The purpose of the act was to increase public confidence in the level of integrity of federal government officials, to deter conflicts of interest from arising, and to stop unethical person from entering public service. Generally, the act made provisions for the authority and functions of the Office of Government Ethics, and set up administrative provisions, rules and regulations, and appropriations to enforce federal government ethics. It became law in 1978.

**Conflict of Interest Provisions** Conflict of interest was one of the chief areas dealt with by the Ethics in Government Act. The act sets forth financial disclosure requirements for federal personnel. (5 USCA Appx 4 § 101 et seq). The applicable provisions detail which persons are required to file financial reports, the information which must be provided in the reports, the requirements for filing the reports, and custody of, and public access to, the reports. Civil action and civil liability provisions allow actions to be brought for the failure to file the reports required or for the filing of false reports.

The act also sets up the Office of Government Ethics with a directory appointed by the president, with consent of the Senate for a term of five years. (5 U.S.C.A. App. 4 § 401). The director provides, in consultation with the Office of Personnel Management, the overall direction of EXECUTIVE BRANCH policies related to preventing conflicts of interest on the part of officers and employees of any executive agency. Upon the request of the director, each executive agency is obliged to make its services, personnel, and facilities available to the director to the greatest practicable extent for the performance

of functions under this act; and except when prohibited by law, furnish to the director all information and records in its possession which the director may determine to be necessary for the performance of his duties.

The act also sets government-wide limitations on outside earned income and employment. (5 U.S.C.A. app. 4 § 501) It sets specific income limits based on the government official's level of pay. It also prohibits honoraria, but that prohibition was called into question by the U.S. Supreme Court in *U.S. v. National Treasury Employees Union,* 513 U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (U.S.Dist.Col.,1995). In that case, the High Court determined that the honoraria prohibition imposed a significant burden on expressive activity and was the kind of burden that abridges speech under the FIRST AMENDMENT; and that the government's interest in assuring that federal officers not misuse or appear to misuse power by accepting compensation for their unofficial and nonpolitical writing and speaking activities was not served by the prohibition. However, the Court also limited relief to parties before the Court, i.e., lower level executive branch employees, and said the ruling would not be extended to senior executive branch employees. The Court reasoned senior employees received salary increases to offset an honoraria ban disincentive to speak and write, and, furthermore, government might advance a different justification for an honoraria ban limited to senior executives. Thus, the honoraria ban still applies to senior executive branch employees.

Finally in regards to conflict of interest provisions of the act, it sets up an office of Senate Legal Counsel (2 U.S.C.A. § 288). Among other duties, the Senate Legal Counsel is charged with defending the Senate as a whole, or a committee, subcommittee, member, officer, or employee of the Senate, in a court of law or against any action taken against them. The counsel also enforces Senate subpoena or orders and serves in an advisory role on various legal proceedings.

Many state statutes have been passed that follow the Ethics in Government Act in regard to disclosure by government officials. New York and California have particularly strict laws. States such as Florida, Alabama, Hawaii and Pennsylvania have also enacted ethics in government laws. The state laws generally have similar provisions to the federal government laws, though some are stricter in their requirements and penalties.

**Independent Counsel Provisions** Perhaps the most controversial section of the Ethics in Government Act was the provisions for INDEPENDENT COUNSEL (28 U.S.C.A. § 591). This provided in certain limited circumstances for a panel of judges to appoint an independent counsel to investigate and, if necessary, prosecute high-ranking federal officials. It was done to prevent another "Saturday Night Massacre," the name for what took place in 1973 when President RICHARD NIXON fired Special Prosecutor ARCHIBALD COX to try to stifle his Watergate investigations.

The independent counsel sections were the only provision of the Ethics in Government Act that had to be reauthorized. A sunset clause provided that the entire chapter of the U.S. code dealing with the Independent Counsel expired within a certain time frame. Thus the act was reauthorized in 1983 and again in 1987, with slight changes made to its provisions each time.

The chief criticism made of the independent counsel statute was that since the president could not directly fire the independent counsel, the attorney general could only remove the counsel for good cause, physical or mental disability, or any other condition that substantially impaired the performance of the independent counsel's duties. The independent counsel had too much power and resources for investigating the target, thus leading to long and involved inquiries which were expensive for the target of the investigation even if no wrongdoing was found.

Nonetheless, the Supreme Court upheld the independent counsel provision in *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (U.S.Dist.Col. 1988). In 1992, following strong Republican criticism over the investigation of the IRAN-CONTRA scandal by independent counsel Lawrence Walsh, the independent counsel provision was allowed to lapse. However, it was revived in 1994 by a Democratic controlled Congress.

This decision led to the most controversial independent counsel investigation of them all: independent counsel Ken Starr's inquiry into President Bill Clinton's involvement in the WHITEWATER real estate scandal. Starr's investigation led to the unsuccessful impeachment trial of Clinton and became the longest and most expensive independent counsel investigation in history. The results of the Clinton case were divisive to both Republicans and Democrats and led to much criticism of Starr and his methods.

Perhaps because of this episode, the independent counsel provision of the Ethics and Government Act was allowed to expire in 1999. The duties of the independent counsel were taken over by the JUSTICE DEPARTMENT. As of 2003, no attempt to revive the provision had been made.

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CROSS-REFERENCES

Watergate; Whitewater.

## ETHICS, LEGAL

*The branch of philosophy that defines what is good for the individual and for society and establishes the nature of obligations, or duties, that people owe themselves and one another. In modern society, ethics define how individuals, professionals, and corporations choose to interact with one another.*

The word *ethics* is derived from the Greek word *ethos,* which means "character," and from the Latin word *mores,* which means "customs." ARISTOTLE was one of the first great philosophers to study ethics. To him, ethics was more than a moral, religious, or legal concept. He believed that the most important element in ethical behavior is knowledge that actions are accomplished for the betterment of the common good. He asked whether actions performed by individuals or groups are good both for an individual or a group and for society. To determine what is ethically good for the individual and for society, Aristotle said, it is necessary to possess three virtues of practical wisdom: temperance, courage, and justice.

The need to control, regulate, and legislate ethical conduct at the individual, corporate, and government levels has ancient roots. For example, one of the earliest law codes developed, the CODE OF HAMMURABI, made BRIBERY a crime in Babylon during the eighteenth century B.C. Most societies share certain features in their ethical codes, such as forbidding murder, bodily injury, and attacks on personal honor and reputation. In modern societies, the systems of law and public justice are closely related to ethics in that they determine and enforce definite rights and duties. They also attempt to repress and punish deviations from these standards.

Laws can be neutral on ethical issues, or they can be used to endorse ethics. The prologue to the U.S. Constitution states that ensuring domestic tranquility is an objective of government, which is an ethically neutral statement. CIVIL RIGHTS laws, on the other hand, promote an ethical as well as legal commitment. Often laws and the courts are required to resolve strong ethical dilemmas in society, as in the controversial issues of ABORTION (ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147), AFFIRMATIVE ACTION (UNIVERSITY OF CALIFORNIA V. BAKKE, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750), and SEGREGATION (BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873).

Laws also permit many actions that will not bear ethical scrutiny. In other words, what the law permits or requires is not necessarily what is ethically right. For instance, laws allow disloyalty toward friends, the breaking of promises that do not have the stature of legal contracts, and a variety of deceptions. Laws sometimes require gross immoralities, as did the FUGITIVE SLAVE ACT OF 1850, which required citizens to return runaway slaves to their masters, and the U.S. Supreme Court's DRED SCOTT decision, which in 1857 declared that slaves were not citizens but property (60 U.S. 393, 19 How. 393, 15 L. Ed. 691).

Local, state, and federal regulatory acts influence the conduct of some professions. Business executives are faced with two types of ethical issues in conducting their day-to-day affairs, and the law holds them accountable for their actions in these areas. Micromanagement issues include conflicts of interest, employee rights, fair performance appraisals, SEXUAL HARASSMENT, proprietary information, discrimination, and accepting or offering gifts. Macromanagement issues include corporate social responsibility, PRODUCT LIABILITY, environmental ethics, COMPARABLE WORTH, layoffs and downsizings, employee screening tests, employee rights to privacy in the workplace, and corporate accountability.

Although the law does influence the conduct of some professions, many ethical issues cannot be settled by the courts. The ethics of a particular act is many times determined independently of the legality of the conduct. In fact, decisive answers cannot always be given for many ethical

issues because there are no enforceable standards or reliable theories for resolving ethical conflicts.

The response of many professions to the challenging and demanding problem of institutionalizing business ethics is to implement codes of ethics, develop statements of corporate goals, sponsor training and educational programs in ethics, install internal judiciary bodies that hear cases of improprieties, and create telephone hot lines through which employees can anonymously report possible ethical violations. A code of ethics provides members of a profession with standards of behavior and principles to be observed regarding their moral and professional obligations toward one another, their clients, and society in general. The primary function of a code of ethics is to provide guidance to employers and employees in ethical dilemmas, especially those that are particularly ambiguous.

A code of ethics is often developed by a professional society within a particular profession. The higher the degree of professionalism required of society members, the stronger and, therefore, more enforceable the code. For instance, in medicine, the behavior required is more specific and the consequences are more stringent in the code of ethics for physicians than in the code of ethics for nurses. In addition, professions that require licensure from a state-authorized board, which guarantees both the competency and the moral efficacy of its members, place a duty on the licensed professional to help prevent **UNAUTHORIZED PRACTICE** by unlicensed providers as a means of protecting the public.

*Medical professionals must adhere to a high standard of ethics. The American Medical Association has an enforceable, written code.*

AP/WIDE WORLD PHOTOS

Decisions in ethical situations can be made more easily if the code is specific, gives detailed directions on what actions should or should not be taken, and spells out explicit penalties for unethical behavior. Therefore, some large and influential professional associations have developed highly detailed and enforceable codes for their membership. The American Medical Association's (AMA's) Principles of Medical Ethics has seven provisions, supplemented by numerous interpretive opinions of a judicial council. The Model Rules of Professional Conduct of the **AMERICAN BAR ASSOCIATION** (ABA) contains eight sections, construed according to 138 ethical considerations and implemented by a comparable number of parallel disciplinary rules. The Rules of Conduct of the American Institute of Certified Public Accountants has six major principles, each with numerous specifications. The American Psychological Association's Ethical Principles of Psychologists and Code of Conduct contains six principles, with several provisions under each.

Other professions with codes of responsibility include dentistry, social work, education, government service, engineering, journalism, real estate, advertising, architecture, banking, insurance, and human resources management. However, because some of these professions are not licensed, anyone can claim their title and perform their function—thus making it difficult to find legal recourse to claims of unethical conduct.

All professional codes can be considered quasi-public because of the effect they may have on legal judgments during litigation. Many states adopt accrediting associations' codes of ethics, thereby establishing those standards as public codifications. Failure to comply with a code can, in some professions, result in expulsion from the profession. The AMA's Principles of Medical Ethics, for example, are not laws per se, but the maximum penalty for violation of the principles is expulsion from the AMA. In addition, the ABA's Model Rules of Professional Conduct provide evidence of professional standards of loyalty and care, and they become directly enforceable public law when they or their variants are adopted as binding upon lawyers admitted to practice within a state.

The most common violations of ethics codes that are brought before state professional associations and the legal system are breach of contract, including that resulting from incompetent behavior or decisions or from failure to exercise

GOOD FAITH; FRAUD, or an intent to deceive; and professional MALPRACTICE, or NEGLIGENCE, which include incompetence and the performance of unnecessary services.

Since the legal profession is more self-regulating (i.e., regulated by attorneys and judges themselves rather than by government or outside agencies) than most professions, every state supreme court or legislature has a committee authorized to enforce the state rules of professional legal conduct. The state conduct committees make factual determinations on whether to privately reprimand a lawyer, publicly censure him or her, suspend the attorney's license to practice, or permanently revoke the license (i.e., disbar the attorney, or permanently disqualify the attorney from practicing law in the state).

Specific procedures on discipline in the legal profession vary from state to state, but every state allows for court review of the conduct committee's recommendations. If a license is revoked, the lawyer may petition the committee for readmission to the bar after a period of time specified by the state rules. Not every violation results in disbarment. This drastic measure is most commonly reserved for theft or misuse of client funds.

Besides laws based on professional bar association codes of ethics, separate federal and state laws define ATTORNEY MISCONDUCT and empower judges to discipline unethical conduct by attorneys. For example, rule 11 of the Federal Rules of CIVIL PROCEDURE (28 U.S.C.A.) requires sanctions for lawyers and clients who file frivolous or abusive claims in court.

Courts may restrict lawyers in some cases from making public statements that would otherwise be protected by the FIRST AMENDMENT. A U.S. court of appeals held in the case *In re Morrissey*, 168 F.3d 134 (4th Cir. 1999) that lawyers, under certain circumstances, may be constitutionally prohibited from making pre-trial statements to the press in criminal cases if there is a "reasonable likelihood" that those statements would interfere with a fair trial. The appeals court continued a line of cases holding that similar restrictions upon a lawyer's speech are constitutional in the appropriate circumstances.

The attorney in *Morrissey* was convicted of criminal CONTEMPT for his out-of-court public statement, which violated a local court rule prohibiting certain statements during potential or imminent criminal litigation. Other circuit courts of appeals and the U.S. Supreme Court have reached similar results when reviewing similar restrictions, but some, such as the Seventh Circuit in *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), have reached opposite results. Accordingly, the permissible bounds for the restriction of a lawyer's speech remain somewhat vague.

Although every state has adopted either the ABA's Model Rules or one of its predecessors, the interpretation of each state's law regarding lawyer conduct is left to the courts and ethics commissions of the various states. Like other areas of laws, these interpretations vary from state to state. In 1999, the American Law Institute (ALI) approved the RESTATEMENT OF LAW Governing Lawyers, which was designed as a CODIFICATION of the rules derived from decisions of state courts, ethics commissions, and similar agencies. The Restatement is not binding upon any court, but like other Restatements, such as those governing contracts and property, it is a highly persuasive body of work.

The Restatement includes provisions regarding the regulation of the legal profession, the relationship between lawyer and client, civil liability of lawyers, treatment of confidential client information, representation of clients, and conflicts of interest. Development of the Restatement's provisions took several years, and the ALI considered a number of drafts before approving the final draft in 1999. State courts have already begun to interpret its provisions.

For example, in *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.2d 92 (Tex. 2001), the Texas Supreme Court looked to the Restatement to determine whether an attorney's fee under a contract that provided for a CONTINGENT FEE arrangement should be offset by a counterclaim against the client. The Restatement resolved the dispute, and the Texas Supreme Court held that the law firm in the case should only recover a percentage of the amount recovered by the client after the counterclaim. Similarly, other state courts have applied the Restatement to resolve disputes regarding, for instance, ATTORNEY-CLIENT PRIVILEGE.

Judges must comply with the CODE OF JUDICIAL CONDUCT, which was formulated by the ABA in 1972. This code is not considered law; however, federal and state governments have adopted it, and its violations are used as the basis for punitive action against judges. Any per-

son may lodge a complaint of misconduct against a judge with the appropriate JUDICIAL REVIEW council. Punitive actions include public or private reprimand and suspension from office.

New fields of ethics, such as bioethics, engineering ethics, and environmental ethics, have arisen with the rapid social change and technological developments of modern society. New areas of concern have also opened up, not just for the professions involved but for society as well. For instance, physicians, who have taken the Hippocratic Oath to save life, cure disease, and alleviate suffering, are now faced with whether to use medical devices that can prolong life at the cost of increasing suffering or to follow patients' requests to be allowed to die without extraordinary lifesaving precautions or to be provided with medications or devices that will end life. As such professions grapple with expanding their codes of responsibility to keep up with technological advances and societal pressures for stricter business ethics, changes in laws governing business ethics are bound to change too. Since societal ethics has evolved through the law, it mirrors the ethical norms agreed on by the majority.

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## ♦ ETTELBRICK, PAULA LOUISE

Paula Louise Ettelbrick is a lawyer and activist for lesbian and gay rights, and a lifelong advocate of public service. She was the first staff attorney for Lambda Legal Defense and Education Fund, and served as its legal director from 1988 to 1993.

Ettelbrick was born October 2, 1955, on a U.S. Army base in Stuttgart, Germany. Growing up in a devout Catholic family, she was taught by her parents that each person has an obligation to society and to the greater world, and that all people should be treated equally. Ettelbrick's convictions initially led her to social work after she had graduated from Northern Illinois University in 1978 with a bachelor of arts degree in history. She held several social services positions, working primarily for the women's shelter at the Harbor Light Center, in Boston, which assists alcoholic and homeless adults. Through her work, in which she sought public benefits, housing, and employment for low- and no-income women, Ettelbrick came to believe that the system doesn't work for the underrepresented—namely, the poor.

With an interest in labor and EMPLOYMENT LAW, Ettelbrick enrolled in law school at Wayne State University, in Detroit, Michigan, where she wrote for the *Wayne Law Review* and clerked for several legal employers, including the United Auto Workers (UAW) Union. Working for the UAW, Ettelbrick was exposed to a variety of LABOR LAW and public policy issues, and helped draft a statement from the union's vice president to the U.S. Congress on why the EQUAL RIGHTS AMENDMENT should be reintroduced to Congress—a meaningful assignment in light of her growing interest in feminist and lesbian issues. In 1984, she graduated cum laude and took an associate position doing commercial litigation at Miller, Canfield, Paddock, and Stone, a large law firm in Detroit.

Two years later, in keeping with her original desire to do public interest work, she left the law firm and joined the Lambda Legal Defense and Education Fund, an organization founded in New York City, in 1973, that advocates gay and lesbian CIVIL RIGHTS.

Hoping to challenge legal assumptions about gay and lesbian people, Ettelbrick litigated a variety of cases, many related to the heightening legal crisis accompanying AIDS. Within a year, Lambda hired a second staff attorney to do AIDS work, and Ettelbrick was freed up to develop what Lambda called its Sexual Orientation Docket, working with cases involving families, employment, and the military. In 1988, with a staff of seven, she was appointed Lambda's legal director. Soon after, under Ettelbrick's

guidance and vision, Lambda opened an office in Los Angeles and created a network of four hundred cooperating attorneys around the United States.

After seven years of high-intensity work at Lambda, Ettelbrick was ready for a change, and in March 1993, she left the organization. Shortly thereafter, the National Center for Lesbian Rights hired her as its director of public policy, where she continued her work on family issues. One of her many accomplishments in this position was helping to draft a new employment discrimination bill introduced in Congress to add sexual orientation to the list of prohibited categories under employment and housing laws. She also worked to develop policies for lesbian HEALTH CARE.

Ettelbrick continued to litigate on behalf of lesbians, and in 1993 and 1994 was involved in the high-profile custody case *Bottoms v. Bottoms,* 18 Va. App. 481, 444 S.E. 2d 276 (Va. App. Jun 21, 1994). The case involved a lesbian, Sharon Lynne Bottoms, whose mother, Pamela Kay Bottoms, had petitioned for custody of Sharon's child owing to Sharon's admitted homosexuality. After Sharon lost custody of the child at the trial court level, she and Ettelbrick appealed and won custody in the Court of Appeals of Virginia. The appeals court held that the mere fact that Sharon was a lesbian and had a live-in female companion did not render her an unfit parent. In a SPLIT DECISION, the Supreme Court of Virginia reversed the court of appeals, reinstating custody in the child's grandmother (457 S.E.2d 102 [1995]).

Beginning in 1990, Ettelbrick taught a course at New York University Law School on sexuality and the law, in addition to continuing her other work. In 1994, she left the National Center for Lesbian Rights to teach at the University of Michigan Law School. There she offered Sexuality and the Law, a survey course that asks questions such as "What are the commonalities between the way the law treats prostitution, rape, and gay and lesbian issues?" and "How far is the government entitled to go to reach into these areas?" The course is designed to bridge the gap between the way FEMINIST JURISPRUDENCE or women-in-the-law courses are taught and the way sexual orientation in the law is taught. Ettelbrick has also taught at Barnard College, Wayne State University Law School, and Columbia Law School. She commutes from her base in Manhattan.

From 1999 to 2001, Ettelbrick was the family policy director of the Policy Institute of the NATIONAL GAY AND LESBIAN TASK FORCE. In March 2003, she became the executive director of the nonprofit International Gay and Lesbian Human Rights Commission (IGLHRC). The organization was founded in 1990 to address, on an international basis, issues involving discrimination and persecution of gays, lesbians, and persons living with HIV and AIDS.

Ettelbrick's professional successes are many, as a teacher, a litigator, and an advocate for a segment of the population that has been historically marginalized and denied rights taken for granted by the rest of society.

"WE'RE TALKING ABOUT OVERHAULING A WHOLE SYSTEM THAT WAS BASED ON THE 1930S FAMILY CONSISTING OF A MALE WAGE-EARNER, A NONWORKING WIFE, AND SOME KIDS."
—PAULA ETTELBRICK

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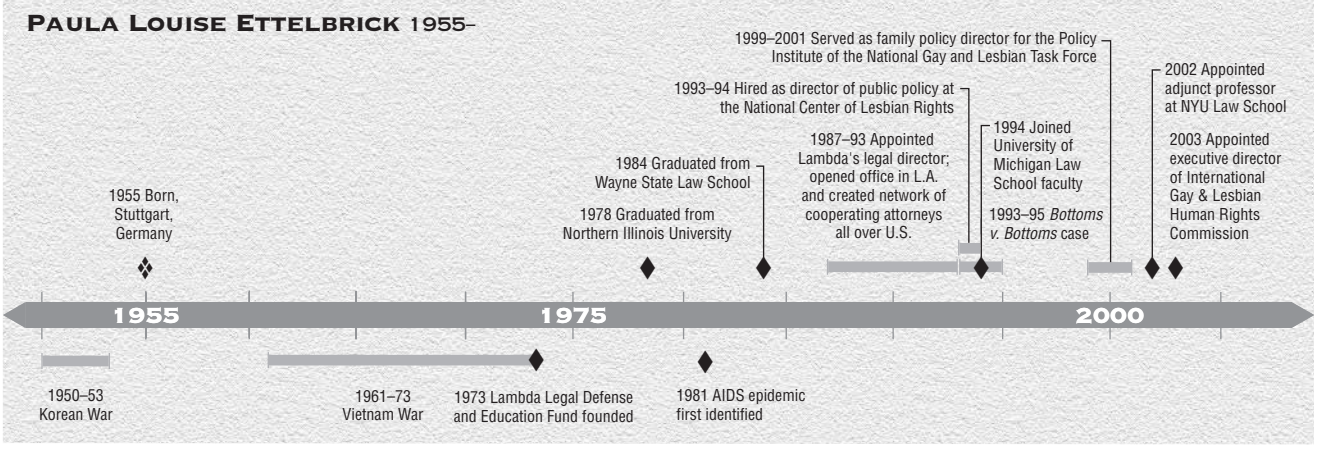

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## EUTHANASIA

*[*Greek, good death.*] The term normally implies an intentional termination of life by another at the explicit request of the person who wishes to die. Euthanasia is generally defined as the act of killing an incurably ill person out of concern and compassion for that person's suffering. It is sometimes called mercy killing, but many advocates of euthanasia define mercy killing more precisely as the ending of another person's life* without *his or her request. Euthanasia, on the other hand, is usually separated into two categories:* passive euthanasia *and* active euthanasia. *In many jurisdictions, active euthanasia can be considered murder or* MANSLAUGHTER, *whereas passive euthanasia is accepted by professional medical societies, and by the law under certain circumstances.*

### Passive Euthanasia

Hastening the death of a person by altering some form of support and letting nature take its course is known as passive euthanasia. Examples include such things as turning off respirators, halting medications, discontinuing food and water so as to allowing a person to dehydrate or starve to death, or failure to resuscitate.

Passive euthanasia also includes giving a patient large doses of morphine to control pain, in spite of the likelihood that the painkiller will suppress respiration and cause death earlier than it otherwise would have happened. Such doses of painkillers have a dual effect of relieving pain and hastening death. Administering such medication is regarded as ethical in most political jurisdictions and by most medical societies.

These procedures are performed on terminally ill, suffering persons so that natural death will occur sooner. They are also commonly performed on persons in a persistent vegetative state; for example, individuals with massive brain damage or in a coma from which they likely will not regain consciousness.

### Active Euthanasia

Far more controversial, active euthanasia involves causing the death of a person through a direct action, in response to a request from that person. A well-known example of active euthanasia was the death of a terminally ill Michigan patient on September 17, 1998. On that date, Dr. JACK KEVORKIAN videotaped himself administering a lethal medication to Thomas Youk, a 52-year-old Michigan man with amyotrophic lateral sclerosis. CBS broadcast the videotape on *60 Minutes* less than a week later. Authorities subsequently charged Kevorkian with first-degree premeditated murder, criminal assistance of a suicide, and delivery of a controlled substance for administering lethal medication to a terminally ill man. There was no dispute that the dose was administered at the request of Mr. Youk, nor any dispute that Mr. Youk was terminally ill. A jury found Kevorkian guilty of second-degree murder in 1999. He was sent to prison.

### Physician-Assisted Suicide

Somewhat of a hybrid between passive and active euthanasia is physician-assisted suicide (PAS), also known as voluntary passive euthanasia. In this situation, a physician supplies information and/or the means of committing suicide (e.g., a prescription for lethal dose of sleeping pills, or a supply of carbon monoxide gas) to a person, so that that individual can successfully terminate his or her own life.

Physician-assisted suicide received greater public attention after Dr. Kevorkian, a retired pathologist from Michigan, participated in his first such procedure in 1990. Kevorkian set up a machine that allowed a 54-year-old woman suffering from Alzheimer's disease (a degenerative neurological condition) to press a button that delivered a lethal poison into her veins. Kevorkian went on to assist in the suicides of dozens of individuals suffering from terminal, debilitating, or chronic illnesses. In 1992, Michi-

gan passed an assisted-suicide bill (Mich. Comp. Laws § 752.1021) that was specifically designed to stop Kevorkian's activities, but technicalities and questions as to its constitutionality delayed its implementation, thus allowing Kevorkian to continue assisting suicides—often in direct opposition to court injunctions.

Kevorkian was charged with murder several times but was not initially found guilty. When murder charges were brought against him for his first three assisted suicides, for example, they were dismissed because Michigan, at that time, had no law against assisted suicide. In 1994, Kevorkian was tried and found not guilty of assisting in the August 1993 suicide of Thomas W. Hyde Jr. In December 1994, however, Michigan's supreme court ruled in *People v. Kevorkian,* 447 Mich. 436, 527 N.W. 2d 714, that there is no constitutional right to commit suicide, with or without assistance, and upheld the Michigan statute that made assisted suicide a crime. The following year, the U.S. Supreme Court refused to hear Kevorkian's appeal from the state supreme court's ruling.

Observers disagree about the humanity of Kevorkian's activities. Some see him as a hero who sought to give suffering people greater choice and dignity in dying. Others point to his lack of procedural precautions and fear that the widespread practice of assisted suicide will lead to the unnecessary death of people who could have been helped by other means, including treatment for depression. Many opponents of assisted suicide find the same faults in the practice that they see in other forms of euthanasia. They envision its leading to a devaluation of human life and even to a genocidal killing of vulnerable or so-called undesirable individuals.

The U.S. Supreme Court has made two important rulings on assisted suicide. In WASHINGTON V. GLUCKSBERG, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772, 65 (1997), three terminally ill patients, four physicians, and a nonprofit organization had brought action against the state of Washington for DECLARATORY JUDGMENT, that a statute banning assisted suicide violated DUE PROCESS CLAUSE. On June 26, 1997, the Supreme Court unanimously upheld the right of states to prohibit assisted suicide, holding that: (1) asserted right to assistance in committing suicide was not a fundamental liberty interest protected by due process clause, and (2) Washington's ban on assisted suicide was rationally related to legitimate government interests. In *Vacco v. Quill,* 521 U.S. 793, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997), physicians challenged the constitutionality of New York statutes making it a crime to aid a person in committing suicide or attempting to commit suicide. The Supreme Court held that New York's prohibition on assisting suicide did not violate the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT.

### Involuntary Euthanasia

The term involuntary euthanasia is used to describe the killing of a person who has not explicitly requested aid in dying. This term is most often used with respect to patients who are in a persistent vegetative state and who probably will never recover consciousness.

### Euthanasia Considerations

Euthanasia is a divisive topic, and different interpretations of its meaning, practice, and morality abound. Those who favor active euthanasia and a patient's right to die, do not acknowledge a distinction between active and passive euthanasia. They assert that the withdrawal of life-sustaining treatment cannot be distinguished in principle from affirmative steps to hasten a patient's death. In both situations, they argue, a person intends to cause the patient's death, acts out of compassionate motives, and causes the same outcome. In their view, turning off a life-sustaining respirator switch and giving a lethal injection are morally equivalent actions.

Opponents of active euthanasia argue that it undermines the value of, and respect for, all human life; erodes trust in physicians; desensitizes society to killing; and contradicts many people's religious beliefs. Moreover, they maintain that the intentions and natures of active and passive euthanasia are not essentially the same. In active euthanasia, a person *directly intends* to cause death and uses available means to achieve this end. In passive euthanasia, a person decides against using a certain form of treatment and then directs that such treatment be withdrawn or withheld, *accepting but not intending* the patient's death, which is caused by the underlying illness.

While people cite differing reasons for choosing to end their own lives, those suffering from a terminal illness typically state that a serious disorder or disease has adversely affected their quality of life to the point where they no

# Euthanasia and Physician-Assisted Suicide

Imagine that you are suffering from a disease that is terminal, debilitating, and very painful. Should you have the right to die when you wish rather than live in continued agony? Should your doctor be legally free to help you take your own life, perhaps by prescribing some pills and telling you their fatal dosage? Or should the law forbid anyone—including doctors—to assist in the suicide of another human being? These are just some of the questions that surround the issue of physician-assisted suicide, a widely debated ethical issue in modern medicine.

Physician-assisted suicide is a form of voluntary euthanasia. In other words, it involves a patient voluntarily acting to end his or her life. Physician-assisted suicide differs from conventional suicide in that it is facilitated by a physician who confirms the patient's diagnosis, rules out conditions such as depression that may be clouding the patient's judgment, and finally provides the means for committing suicide. Such action usually consists of taking a lethal overdose of prescription medication. However, the over 130 patients who were assisted by Dr. **JACK KEVORKIAN** between 1990 and 1998 chose to press a button which delivered a lethal poison into their veins, or to put on a mask that emitted carbon monoxide into their lungs. Assisted suicide is a felony offense in most states and is also expressly forbidden in the American Medical Association's (AMA's) Code of Medical Ethics. In 1999, Kevorkian was found guilty of second-degree murder in an assisted suicide case. He was sentenced to serve 10 to 25 years.

The debate surrounding physician-assisted suicide in the United States has been influenced by medical practices in other countries, particularly the Netherlands, which legalized both active euthanasia and physician-assisted suicide, in April 2001 (effective 2002). Physician-assisted suicide in the Netherlands is conducted within strict guidelines that include the following requirements: the patient's request for assisted suicide must be voluntary, the patient must be experiencing intolerable suffering, all other alternatives for treatment must have been explored, and the physician must consult another independent physician before proceeding. A study commissioned by the Dutch government indicated that, in 2001, about 3,500 deaths, or 2.5 percent of the 140,000 death cases that were reported in the Netherlands that year, occurred by active euthanasia. The study, known as the Remmelink Report, defined euthanasia as the termination of life at the patient's request. Figures also indicated that 300 deaths, or 0.2 percent, were caused by physician-assisted suicide.

In the United States, the debate on legalizing assisted suicide began in earnest in the 1970s. On one side of the debate have been **PATIENTS' RIGHTS** groups who have lobbied for what they call the right to die—or the right to choose to die, as some have clarified it—of terminally ill patients. The strongest opposition to the legalization of physician-assisted suicide has come from physicians' groups such as the AMA and from religious groups that are morally opposed to the practice.

One person who has done much to make the case for physician-assisted suicide is Derek Humphry, a former journalist who founded the Hemlock Society, in 1980, after seeing the pain and suffering his first wife experienced when she died from cancer. In 2003, the organ-

longer wish to continue living. Under such circumstances, patients may have been diagnosed with a degenerative, progressive illness such as ALS, Huntington's disease, multiple sclerosis, AIDS, or Alzheimer's disease. Patients with such illnesses often fear, with good reason, a gradual loss of the quality of life in the future as the disease or disorder progresses, or they might already have lost a good deal of their independence and thus might require continuous care. Some feel that this loss of autonomy causes an unacceptable loss of personal dignity. Others realize that they will be dying in the near future and simply want to have total control over the process. Some point out that in addition to physical considerations, they do not want to diminish their assets by incurring large medical costs as their death approaches. They feel that they ought to have the option to die sooner and to pass on their assets to their beneficiaries.

Some patients who decide that they wish to commit suicide are unable or unwilling to accomplish the act without assistance from their physician. Physician-assisted suicide helps them to die under conditions, and at the time, that they wish. PAS is currently legal in the U.S., only in the state of Oregon, under severe restrictions. In other states, a terminally ill patient who wishes to die must continue living until their body eventually collapses, or until a family member or friend commits a criminal act by helping them to commit suicide.

ization changed its name to End-of-Life Choices, which encompasses more clearly the issues supported by its members. With a new name and a new motto, "Dignity Compassion Control," the organization continues to advocate for the right of terminally ill people to choose voluntary euthanasia, or what Humphry has termed self-deliverance.

Humphry has written several books on the subject of voluntary euthanasia, including *Jean's Way* (1978), which recounts his struggle to assist his wife's death in 1975; *Final Exit: The Practicalities of Self-Deliverance and Assisted Suicide for the Dying* (1991), a controversial book that gives detailed advice on how terminally ill people may take their own life; and *Lawful Exit: The Limits of Freedom for Help in Dying* (1993), which contains Humphry's own recommendations for legislation that would legalize physician-assisted suicide and active voluntary euthanasia. In Humphry's words, the "right to choose to die" is "the ultimate civil liberty."

Humphry presents physician-assisted suicide as a merciful, dignified option for people whose illness has eroded their quality of life beyond the limits of tolerance. He also points out that what he calls beneficent euthanasia occurs every day in medical facilities as physicians make decisions regarding the end of life. Others, including some medical ethicists, go so far as to claim that a decision to withhold antibiotics, oxygen, or nutrition from a terminally ill patient is no less "active" a form of euthanasia than is administering a fatal dose of morphine. Indeed, they see the common practice of withholding life support as more open to potential abuse than the practice of physician-assisted suicide. The former, they argue, is a less visible, less easily regulated decision. Proponents of physician-assisted suicide also claim that diseases kill people in far more cruel ways than would any means of death that a physician might provide for an irreversibly ill patient. As a result, they see the action of assisting in suicide as entirely compatible with the physician's duty to the patient.

However, Humphry has been an open critic of Kevorkian's work. He has described Kevorkian's theory and practice of assisted suicide as open-ended euthanasia. Noting Kevorkian's lack of precautionary measures such as the use of waiting periods and second opinions, Humphry sees any wider application of Kevorkian's methods as potentially leading to abuse and tragedy. "The thinking people in our movement are appalled by it," Humphry said. "If you have Kevorkian's type of euthanasia, it will be a slippery slope. Kevorkian's is a recipe for skiing down a glacier."

Detractors of physician-assisted suicide also use the familiar "slippery slope" argument, proposing that once physician-assisted suicide is legalized, other forms of euthanasia will more likely be practiced as well. They see assisted suicide as potentially leading to situations in which elderly, chronically ill, and handicapped people, along with others, are killed through active, nonvoluntary euthanasia. Related to this idea is the view that widespread practice of physician-assisted suicide might claim the lives of those whose intolerable suffering is caused by treatable depression. They point out that terminally ill people or others in pain are often also suffering from depression, and that despite their illness, their feelings of hopelessness can often be addressed through means such as counseling and antidepressant medication.

The Catholic Church is one of many religious organizations that opposes euthanasia and assisted suicide. In Pope John Paul II's words, medical killings such as those caused by assisted suicide are "crimes which no human law can claim to legitimize." Basing its arguments on passages from the Bible, Catholic theology has for many centuries opposed all forms of suicide. Catholicism argues that innocent human life may not be destroyed for any reason whatsoever.

The debate over physician-assisted suicide eventually reached the Supreme Court. In 1994, an advocacy group known as Compassion in Dying filed two lawsuits (*Compassion in Dying et al v.*

*(continued)*

## Historical Considerations

Traditional Christian beliefs concerning all forms of suicide were well documented by Thomas Aquinas during the thirteenth century. He condemned all suicide (whether assisted or not) on the theory that it violated one's natural desire to live. Among European writers, Michel de Montaigne was the first major dissenter on this issue. During the sixteenth century, he wrote a series of essays arguing that suicide should be a matter of personal choice, a human right. He concluded it to be a rational option under certain circumstances.

Attempting to commit suicide was once a criminal act. It has been decriminalized for many decades in most jurisdictions. However, assisted suicide remains a criminal act throughout the United States, with the exception of the state of Oregon. In that state, it is permitted under tightly controlled conditions.

## Oregon's Euthanasia Law

In 1994, voters in the state of Oregon approved a ballot measure that would have legalized euthanasia under limited conditions. Under the Death With Dignity law, a person who sought physician-assisted suicide would have to meet certain criteria:

- The person must be terminally ill.
- The person must have six months or less to live.

## EUTHANASIA AND PHYSICIAN-ASSISTED SUICIDE (CONTINUED)

*Washington* and *Quill et al v. Vacco*) challenging the constitutionality of state laws banning assisted dying in Washington and New York. Compassion in Dying won in the District Court in Washington. Chief Judge Barbara Rothstein wrote, "There is no more profoundly personal decision, nor one which is closer to the heart of personal liberty, than the choice which a terminally ill person makes to end his or her suffering and hasten an inevitable death." In New York, Compassion in Dying lost and filed an appeal in the Second Circuit.

In 1995, Washington's *Compassion* ruling was overturned by the Ninth Circuit Court of Appeals, reinstating the anti-suicide law. In 1996, however, after reconsideration, the Ninth Circuit Court of Appeals issued a reversal decision in *Compassion v. Washington.* That decision held that assisted dying was protected by liberty and privacy provisions of the U.S. Constitution. The majority wrote that, "Those who believe strongly that death must come without physician assistance are free to follow that creed, be they doctors or patients. They are not free, however, to force their views, their religious convictions, or their philosophies on all the other members of a democratic society, and to compel those whose values differ with theirs to die painful, protracted, and agonizing deaths."

In April 1996, the Second Circuit joined the Ninth in recognizing constitutional protection for assisted dying in the *Quill* case, holding that the New York statutes criminalizing assisted suicide violate the **EQUAL PROTECTION CLAUSE** of the **FOURTEENTH AMENDMENT**. However, on June 26, 1997, the U.S. Supreme Court reversed both the Ninth and Second Circuit Court in **WASHINGTON V. GLUCKSBERG,** 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) and *Vacco v. Quill,* 521 U.S. 743, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997). The Court ruled that state laws against assisting a suicide are not unconstitutional, but also stated that patients have a right to aggressive treatment of pain and other symptoms, even if the treatment hastens death. The Court wrote, "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality and practicality of physician assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."

Ultimately then, the voters and representatives of the states and the legal system itself will have to decide whether or not physician-assisted suicide will be legalized. Regardless of what side prevails in the debate, the exchange of ideas that it creates may lead to a greater understanding of the difficult choices surrounding death in our time.

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Death and Dying; Physicians and Surgeons.

- The person must make two oral requests for assistance in dying.
- The person must make one written request for assistance in dying.
- The person must convince two physicians that he or she is sincere and not acting on a whim, and that the decision is voluntary.
- The person must not have been influenced by depression.
- The person must be informed of "the feasible alternatives," including, but not limited to, comfort care, hospice care, and pain control.
- The person must wait for 15 days.

Under the proposed law, a person who met all requirements could receive a prescription of a barbiturate that would be sufficient to cause death. Physicians would be prohibited from inducing death by injection or carbon monoxide.

The **NATIONAL RIGHT TO LIFE COMMITTEE,** supported by the Roman Catholic Church, obtained a court **INJUNCTION** to delay implementation of the measure. The law stalled in the appeals process. In the meantime, the measure was not enacted. In 1997, there was a second public **REFERENDUM**, and the law was enacted. Within 24 hours of the announcement of the results, state officials had forms for physicians to record instances of assisted suicide. These were later distributed to physicians in the state. The form is entitled "Request for Medication to End My Life in a Humane and Dignified Manner."

Immediately after the law was affirmed, Thomas Constantine, the administrator of the

federal DRUG ENFORCEMENT ADMINISTRATION (DEA), wrote a policy statement which said that prescribing drugs to help terminally ill patients kill themselves would be a violation of the Controlled Substances Act. Nevertheless, on March 26, 1998, a woman in her mid-eighties died from a lethal dose of barbiturates, which had been prescribed by her doctor under the Oregon law. She was the first person to publicly use the law to commit suicide. She had been fighting breast cancer for 20 years and recently had been told by her doctor that she had less than two months to live. She had been experiencing increased difficulty breathing. She made a tape recording in which she stated, "I'm looking forward to it. I will be relieved of all the stress I have." Her personal doctor would not help her end her life, so she turned to an advocacy group, Compassion in Dying. That group located a doctor to assist her. She fell into a deep sleep about five minutes after taking the lethal dose of pills, and she died peacefully about 25 minutes later. Attorney General JANET RENO officially reversed Constantine's ruling a few weeks later, stating that doctors who use the law to prescribe lethal drugs to terminally ill patients will not be prosecuted and that drug laws were intended to block illegal trafficking in drugs, not to cover situations like the Oregon suicide law.

Despite significant controversy, by the end of 1998, one prediction of the anti-choice forces had not materialized: there was no rush of people to Oregon to seek an easy end to life. While it was predicted that many would take advantage of the law, of the 23 terminally ill individuals who applied to end their own lives in 1998, 15 committed suicide, usually within a day of receiving the prescription. Six died from their illnesses without using the medication. Two remained alive at the end of 1998. From 1998 to 2002, 129 people have opted for physician assisted suicide.

In early 2001, Oregon state senator Ron Wyden wrote Attorney General JOHN ASHCROFT asking that the GEORGE W. BUSH administration not mount an attack on the state law permitting assistance in suicide. Ashcroft wrote a letter to Asa Hutchinson, chief of the Drug Enforcement Administration. He declared that assisting a terminally ill patient to commit suicide is not a "legitimate medical purpose" for federally controlled drugs. He said that physicians who use drugs to help patients die face suspension or revocation of their licenses to prescribe federally controlled drugs. This was contrary to the position taken by Janet Reno, his predecessor. The attorney general of Oregon, Hardy Myers, quickly initiated a lawsuit to have the Ashcroft's directive declared unconstitutional. The federal district court in Oregon issued a temporary injunction, which prevents the federal government from enforcing Ashcroft's interpretation of the Controlled Substances Act (CSA). The state of Oregon requested that the court block the federal DEPARTMENT OF JUSTICE from taking legal action against Oregon doctors who prescribe medication to help their patients commit suicide. A federal judge ruled in favor of the state law in 2002, and the Department of Justice appealed the decision to the U.S. Court of Appeals for the Ninth Circuit. Both sides have stated that they will appeal the decision if they lose.

### Other States

According to the online website, Euthanasia.com, 35 states have legislated against assisted suicide, while nine other states have cited it as a crime under COMMON LAW. Still more states have introduced or passed statutes criminalizing assisted suicide. These statutes forbid a person to knowingly assist or aid another in committing suicide. Some also prohibit soliciting, advising, or encouraging another to commit suicide. Some statutes penalize assisted suicide under guidelines established for murder or manslaughter, whereas others make it a unique offense with separate penalties. Few courts have interpreted the assisted-suicide statutes, because prosecutions for assisted suicide are rare. In cases of assisted suicide, a state usually prosecutes individuals for murder or manslaughter. The Ohio state supreme court, however, ruled in 1996 that assisted suicide is not a crime.

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*William M. Evarts.*
LIBRARY OF CONGRESS

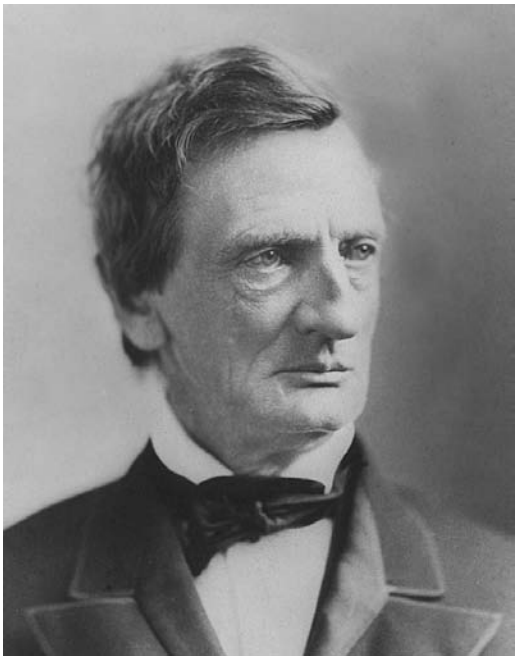

"TRUTH IS TO THE MORAL WORLD WHAT GRAVITATION IS TO THE MATERIAL."
—WILLIAM M. EVARTS

## ❖ EVARTS, WILLIAM MAXWELL

William Maxwell Evarts served as attorney general of the United States during the last year of the administration of President ANDREW JOHNSON. Evarts was a distinguished and powerful New York attorney who successfully defended President Johnson at his IMPEACHMENT trial, represented the REPUBLICAN PARTY before an electoral commission during the disputed presidential election of 1876, served as SECRETARY OF STATE during the administration of President RUTHERFORD B. HAYES, and ended his public career as a U.S. senator.

Evarts was born February 16, 1818, in Boston. He graduated from Yale University in 1837 and then attended Harvard Law School. He was admitted to the New York bar in 1841 and subsequently established a successful legal practice. From 1849 to 1853, Evarts acted as assistant district attorney for the New York District.

Evarts entered public service during the U.S. CIVIL WAR. He participated in diplomatic activities as a member of the Secretary of Defense Committee for the Union. In 1863 he went to England as a Union delegate to convince England to stop providing war vessels and equipment to the Confederacy.

Following the end of the Civil War, Evarts returned to his law practice. He was drawn back to Washington, D.C., in 1868 to help defend President Johnson at his impeachment trial. The charges against Johnson were weak and politically motivated, yet the mood in the Senate appeared to favor conviction. Evarts proved instrumental in obtaining an acquittal, though by a margin of only one vote. Johnson rewarded Evarts by appointing him attorney general. Evarts served in that position until the end of the Johnson administration in March 1869.

Evarts then returned to New York government. He led the New York City Bar Association for ten years and was an advocate for political reform in the city, which was dominated by the corrupt Democratic political machine led by the "Tweed Ring." The ring was named after William Marcy "Boss" Tweed, the New York City DEMOCRATIC PARTY leader who ran the party organization popularly known as TAMMANY HALL. Tweed and his associates used their political connections and political offices to gain a foothold in city and county government. Once formed, the Tweed Ring misappropriated government funds through such devices as faked

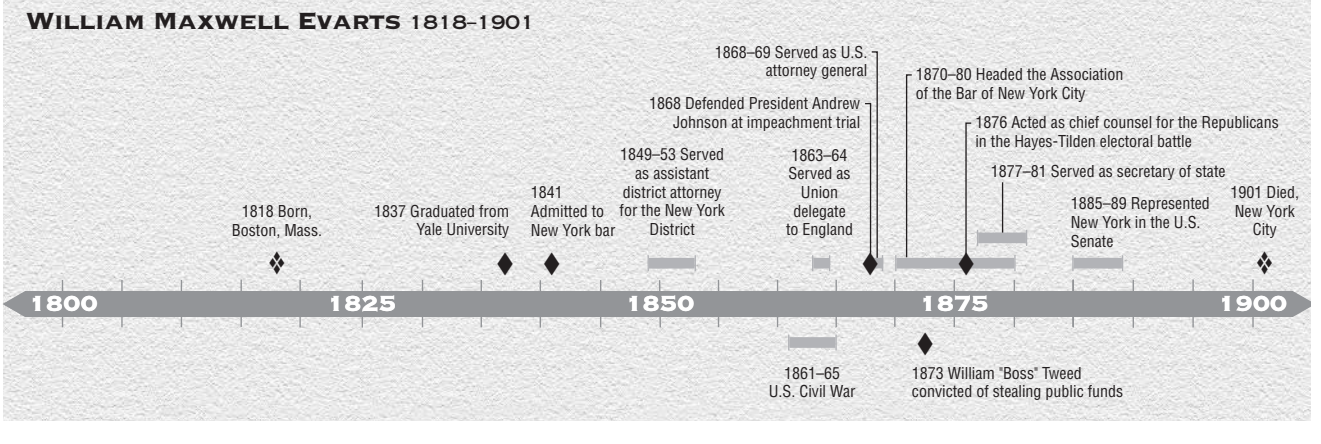

leases, padded bills, false VOUCHERS, unnecessary repairs, and overpriced goods and services bought from suppliers controlled by the ring.

In 1876 Evarts reentered the national political arena, this time as the chief counsel of the national Republican party. The presidential election of 1876 between Democrat SAMUEL J. TILDEN and Republican Rutherford B. Hayes ended in disputes involving the voting returns of Florida, Louisiana, and South Carolina. Two sets of returns were submitted from each of these states, one favoring Tilden, the other Hayes. If Hayes were awarded the electoral votes from these states, and one more from a disputed Oregon elector, he would defeat Tilden in a vote of 185–184.

Congress appointed an electoral commission to decide which returns to accept. In the end Evarts and the Republican members of the commission were able to convince commission member and Supreme Court Justice JOSEPH P. BRADLEY to cast his vote, which was the deciding vote, for the Hayes electors and Hayes was awarded the presidency. Tilden agreed to the result out of fear that violence would ensue if he disputed it. In return the Republicans made a side agreement with southern Democrats that led to President Hayes in 1877 removing federal occupation troops from the former states of the Confederacy. Evarts was also a key player in these affairs.

President Hayes, like President Johnson before him, rewarded Evarts, appointing him secretary of state in 1877. Evarts served in this capacity during the four years of the Hayes administration. In 1885 he was elected a U.S. senator from New York. He served in the Senate until 1889. In failing health he retired from politics and the law in 1891.

Evarts died February 28, 1901, in New York City.

## ♦ EVERS, MEDGAR WILEY

Shortly before his death, CIVIL RIGHTS activist Medgar Wiley Evers was described in the *New York Times* as the movement's "quiet integrationist." Although his contemporary MARTIN LUTHER KING JR. achieved greater fame for organizing nonviolent demonstrations and boycotts, Evers was an equally dedicated reformer, whose reports of civil rights abuses in Mississippi helped to force social and political changes in the Deep South.

From 1954 to 1963, Evers was state field secretary for the National Association for the Advancement of Colored People (NAACP). Courageous, methodical, and devoted to his work, Evers sought to dismantle a decades-old system of SEGREGATION. His approach was to create public outrage over the treatment of African Americans by documenting cases of brutality and injustice. Although Evers fought tirelessly against discriminatory laws and conduct, he rejected violence as a means of improving the plight of his people.

By antagonizing powerful white supremacists, Evers put himself in constant danger in his home state. When he was shot and killed by a sniper on June 12, 1963, many Mississippians were not surprised. Upon his death, Evers became an early martyr in the African American struggle for equal rights. More than thirty years later, when Byron de la Beckwith finally was convicted of Evers's assassination, Evers became a symbol of U.S. justice—delayed, but not denied.

"YOU CAN KILL A MAN BUT YOU CAN'T KILL AN IDEA."
—MEDGAR EVERS

Evers was born July 2, 1925, in Decatur, Mississippi, the younger of two sons born to James Evers, a sawmill worker, and Jessie Evers, a devout Christian who encouraged young Medgar to succeed. The Evers family was hard-working but poor. Townspeople remember Evers as an upright, sympathetic young man who chafed under the inequities of segregation.

During WORLD WAR II, Evers served in an all–African-American unit of the U.S. Army. Although the military's racial policies infuriated him, he fought with distinction and was decorated for his bravery in the Normandy Invasion. During his tour of duty, Evers experienced in Europe a more tolerant, racially integrated society, which inspired his hope for changes in his native Mississippi.

After the war, Evers attended Mississippi's Alcorn A&M College, where he participated in football, track, debate, and choir. He also met his future wife, Myrlie Evers, with whom he had three children. After graduation, Evers worked as a sales agent for Magnolia Mutual, an African American–owned life insurance company. Assigned a rural territory, Evers witnessed African American poverty and debasement on such a large scale that he could no longer abide Mississippi's RACIAL DISCRIMINATION. He took a job with the NAACP in 1954, determined to make a difference.

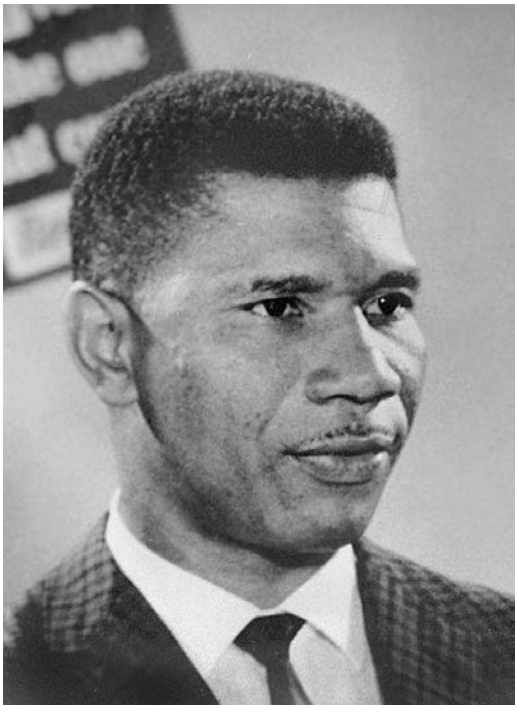

*Medgar Evers.*
LIBRARY OF CONGRESS

As an NAACP field representative, Evers handled routine administrative duties such as setting up chapters, recruiting new members, and collecting dues. But more importantly, Evers filed detailed public reports of LYNCHINGS, beatings, and other race-related atrocities in Mississippi. His work attracted national attention. Evers also encouraged voter registration for African Americans and, in some instances, boycotts.

Because he signaled the end of the era of white power, Evers was despised by southern bigots. He bravely endured their taunts and death threats. Organizations opposed to INTEGRATION, such as the White Citizens Council, branded Evers an enemy. Ironically, as African Americans became impatient with the slow pace of social change, Evers's work was overshadowed by more militant civil rights strategies.

On the night of his murder, Evers attended a local rally. Around midnight, he returned to his Jackson, Mississippi, home, where an assassin waited for him in nearby honeysuckle bushes. Evers got out of his car and walked up the driveway, carrying shirts that read Jim Crow Must Go, a reference to laws conferring second-class citizenship on African Americans. The assassin shot him in the back with an Enfield 30.06 rifle. Evers's wife and their young children, Darrell, Reena, and James, heard the gunshot and rushed to his side. Evers could not be saved.

As news of Evers's death spread, riots erupted in Jackson. The nation was stunned by the killing. President JOHN F. KENNEDY denounced the assassination, sending Evers's wife his condolences and praising Evers's devotion to civil rights. The FEDERAL BUREAU OF INVESTIGATION (FBI) was called in to conduct a criminal investigation. Evers was buried in Arlington National Cemetery, in Washington, D.C.

The trail of the FBI's investigation led quickly to white supremacist Byron de la Beckwith, a fertilizer sales representative affiliated with the KU KLUX KLAN. Charged with murder, de la Beckwith appeared guilty to most observers, but the racial climate in Mississippi prevented a sure conviction. During his trial, de la Beckwith acted clownish and unrepentant. At one point, Mississippi governor Ross Barnett entered the courtroom and hugged the defendant in full view of the all-white jury. Despite compelling evidence from the prosecution—

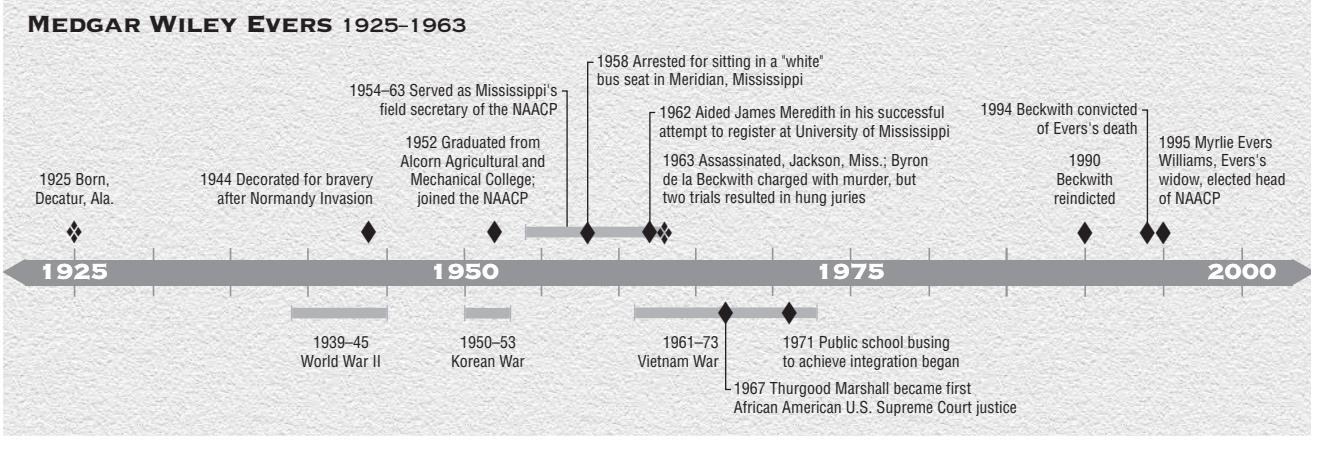

de la Beckwith's public boasting about the murder, his fingerprints on the rifle scope, his well-known ability as a marksman, and reports that his white Plymouth Valiant was parked near Evers's home at the time of the killing—the trial resulted in a hung jury. Astonishingly, a second trial also ended in a hung jury.

Evers's widow, who had remarried, refused to let the matter drop. Myrlie Evers-Williams lobbied long and hard to have de la Beckwith tried for a third time for Evers's killing. A third prosecution was possible in this case for two reasons. First, there is no STATUTE OF LIMITATIONS for murder, so the passage of time was not a consideration. Second, de la Beckwith had not been exonerated (with a hung jury, the defendant is neither acquitted nor convicted), so DOUBLE JEOPARDY, the constitutional guarantee against multiple prosecutions, was not an issue. Evers-Williams's determination to see justice done, as well as a change in Mississippi politics, made a third trial of de la Beckwith possible.

Facing testimony from new and former witnesses, de la Beckwith was reindicted in 1990. A trial was conducted by District Attorney Ed Peters. On February 21, 1994, a jury of eight African Americans and four whites in Hinds County, Mississippi, found de la Beckwith, by then 73 years old, guilty of the 1963 murder of Evers. The Mississippi Supreme Court upheld his conviction in 1997. De la Beckwith died in prison in 2001. Although the third trial was a painful experience for Evers-Williams, she was relieved that the Mississippi criminal justice system had finally brought closure to a personal and public tragedy.

In life and death, Evers played an important role in the fight for racial equality. He inspired in others, including his family, a commitment to the same social, political, and economic goals for African Americans. Evers's brother, Charles Evers, was elected mayor of Fayette, Mississippi, in 1969, and ran unsuccessfully for governor of the state in 1971. In 1995, Evers-Williams was elected to head the NAACP, the organization to which Evers had dedicated his life.

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## ♦ EVERS-WILLIAMS, MYRLIE

Myrlie Evers-Williams achieved national prominence as the chairwoman of the National Association for the Advancement of Colored People (NAACP). She was narrowly elected to the post in 1995 as part of an effort to reform an organization rocked by scandal and allegations of financial mismanagement.

Evers-Williams was born March 17, 1933, in Vicksburg, Mississippi. She became part of the modern CIVIL RIGHTS MOVEMENT through her marriage to Medgar Evers, who was the state field secretary for the Mississippi NAACP. Her world changed dramatically on June 12, 1963, when her husband was shot to death outside their home in Jackson, Mississippi. White supremacist Byron de la Beckwith was charged with the murder, but two trials in the 1960s ended in hung juries. After the second trial, Evers-Williams vowed to bring de la Beckwith to justice.

"NEVER LOSE SIGHT OF YOUR GOALS. WE ARE LIVING IN A TIME WHEN WE MUST TAKE INTO OUR HANDS OUR DESTINIES AND OUR FUTURES." —MYRLIE EVERS-WILLIAMS

Following her husband's assassination, Evers-Williams assumed his position as NAACP field secretary. Then, in 1964, she decided to move with her three young children to Claremont, California, and begin a new life. In 1967, she published *For Us the Living,* a memoir of her life with her late husband. She earned a degree in sociology at Pomona College in 1968, and then became director of planning for the Claremont Colleges system.

In 1970, she ran for a seat in Congress in what was then the 24th congressional district in California. Though she lost the election, it was a turning point for Evers-Williams. She was publicly transformed from Mrs. Medgar Evers to Myrlie Evers. In the 1970s and 1980s, she worked in the corporate arena, serving as director of consumer affairs for the Atlantic Richfield Company. In 1976, she married Walter Williams, a California longshoreman and CIVIL RIGHTS activist.

In 1987, Evers-Willams became the first African American woman to serve on the Los Angeles Board of Public Works. She and her husband moved to Bend, Oregon, in 1989.

When Mississippi prosecutors failed to try de la Beckwith a third time for the murder of Medgar Evers, Evers-Williams mounted a campaign to generate public opinion in favor of a retrial. When she was told that no transcripts of

*Myrlie Evers-Williams.*
AP/WIDE WORLD PHOTOS

the original trial were to be found, she produced an original that she had held in a safe deposit box since the 1960s. In 1994, her efforts succeeded, and de la Beckwith was convicted of the 1963 crime. He was sentenced to life in prison, where he died in 2001. In 1996, Evers-Williams served as a consultant to the movie *Ghosts of Mississippi,* which recounts the story of the retrial and conviction of de la Beckwith. Actress Whoopi Goldberg portrays Evers-Williams in the movie.

Despite the many changes and activities in her life, Evers-Williams remained committed to the NAACP. Serving on the national board of directors in the 1990s, she observed firsthand the problems that were engulfing the once dominant civil rights organization. A growing dissatisfaction with the leadership of Executive Director Benjamin F. Chavis Jr. culminated in August 1994, when he was fired for committing more than $330,000 in NAACP funds, without the board's approval, to settle a SEX DISCRIMINATION suit filed against him. The focus then shifted to Chairman William F. Gibson, who was accused of misappropriating NAACP funds for personal use.

Evers-Williams was approached to challenge Gibson at the 1995 board election. She hesitated to run because her second husband was dying from prostate cancer. However, Walter Williams urged her to take up the fight. She was elected to the chair in February 1995, winning by a one-vote margin; Evers-Williams was the first woman elected to that position. Her husband died shortly after her election.

The precarious state of the NAACP soon became clear to Evers-Williams. Membership had declined from five hundred thousand to three hundred thousand, while the organization's debt had risen to over $4 million. Corporate support had also dropped, forcing severe staff reductions at the national headquarters in Baltimore.

Evers-Williams moved quickly to restore trust. The board hired an accounting firm to audit financial records and directed its attorney to seek restitution from Gibson. Evers-Williams renewed contact with financial contributors, crisscrossing the United States in search of support. By the end of 1995, she had substantially reduced the NAACP's debt. New programs were

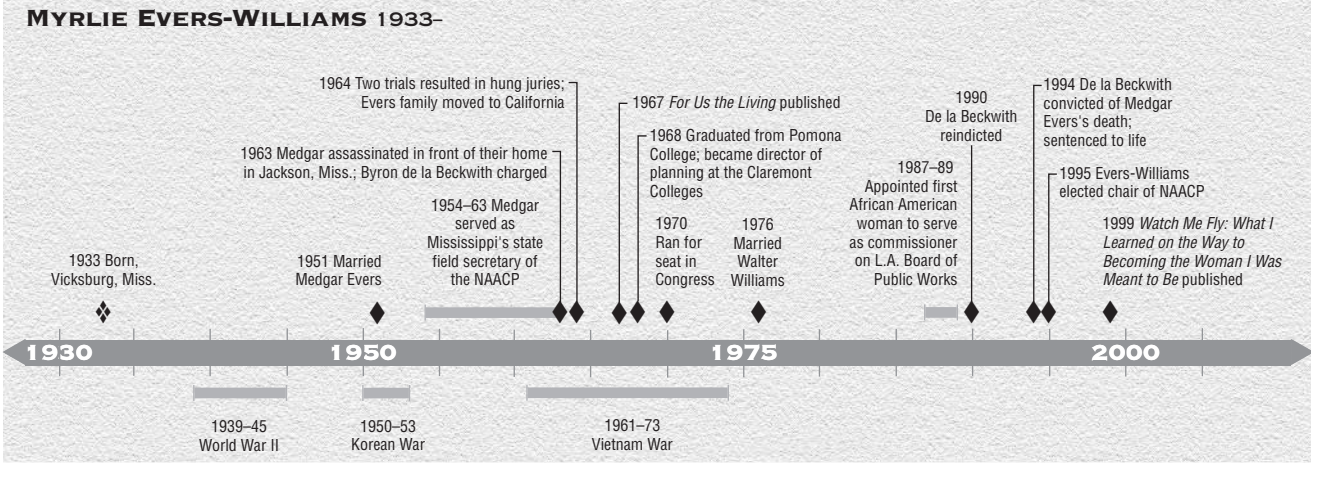

started with the goal of reinvigorating the NAACP and attracting younger members. In December 1995, the board approved the appointment of Representative Kweisi Mfume (D-Md.) as president and executive director, capping a frenetic year for Evers-Williams.

Evers-Williams served as chair of the NAACP until 1998. She then began work on the Medgar Evers Institute, headquartered in Jackson, Mississippi, which promotes civil rights and economic development. In 2003, the institute partnered with Oregon State University to establish a western regional office in Bend, home of Evers-Williams.

Evers-Williams continues to be a well-received speaker and author. In 1999, she published a memoir, titled *Watch me Fly: What I Learned on the Way to Becoming the Woman I Was Meant to Be,* with Melinda Blau. She has also received numerous honorary degrees and awards including the U.S. Congressional Black Caucus Achievement Award, the NAACP's Image Award for Civil Rights, and the Woman of the Year Award from the state of California. In March 2003, Ever-Williams visited Mississippi in order to participate in a tribute by the Mississippi Legislature to honor the accomplishments of the late Medgar Evers and Myrlie Evers-Williams.

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## EVICTION

*The removal of a tenant from possession of premises in which he or she resides or has a property interest done by a landlord either by reentry upon the premises or through a court action.*

Eviction may be in the form of a physical removal of a person from the premises or a disturbance of the tenant's enjoyment of the premises by disrupting the services and amenities that contribute to the habitability of the premises, such as by cutting off all utilities services to an apartment. The latter method is known as constructive eviction. An action of EJECTMENT is a legal process by which a landlord or owner of land may seek the eviction of his or her tenant.

## EVIDENCE

*Any matter of fact that a party to a lawsuit offers to prove or disprove an issue in the case. A system of rules and standards that is used to determine which facts may be admitted, and to what extent a judge or jury may consider those facts, as proof of a particular issue in a lawsuit.*

Until 1975, the law of evidence was largely a creature of the COMMON LAW: Evidence rules in most jurisdictions were established by cases rather than by organized, official codifications. Legal scholars long pushed for legislation to provide uniformity and predictability to the evidentiary issues that arise during litigation. Following a lengthy campaign begun by the American Law Institute, which drafted its Model RULES OF EVIDENCE in 1942, and the National Conference of Commissioners on Uniform State Rules, which drafted the Uniform Rules of Evidence in 1953, Congress in 1975 adopted the FEDERAL RULES OF EVIDENCE. The Federal Rules of Evidence are the official rules in federal court proceedings. Most states now also have codified rules of evidence based on these federal rules. Both state and federal rules of evidence serve as a guide for judges and attorneys so that they can determine whether to admit evidence—that is, whether to allow evidence to be observed by the judge or jury making factual conclusions in a trial.

One important benchmark of admissibility is relevance. Federal Rule of Evidence 402 states, in part, "All relevant evidence is admissible, except as otherwise provided." The goal of this rule is to allow parties to present all of the evidence that bears on the issue to be decided, and to keep out all evidence that is immaterial or that lacks PROBATIVE value. Evidence that is offered to help prove something that is not at issue is immaterial. For example, the fact that a defendant attends church every week is immaterial, and thus irrelevant, to a charge of running a red light. Probative value is a tendency to make the existence of any material fact more or less probable. For instance, evidence that a murder defendant ate spaghetti on the day of the murder would normally be irrelevant because people who eat spaghetti are not more or less likely to commit murder, as compared with other people. However, if spaghetti sauce were found at the murder scene, the fact that the defendant ate spaghetti that day would have probative value and thus would be relevant evidence.

### Witnesses

The most common form of evidence is the testimony of witnesses. A witness can be a person who actually viewed the crime or other event at issue, or a witness can be a person with other relevant information—someone who heard a dog bark near the time of a murder, or who saw an allegedly injured plaintiff lifting weights the day after his accident, or who shared an office with the defendant and can describe her character and personality. Any competent person may testify as a witness, provided that the testimony meets other requirements, such as relevancy.

The Federal Rules of Evidence contain broad competency requirements. To testify, a witness must swear or affirm that he or she will testify truthfully; possess personal knowledge of the subject matter of the testimony; have the physical and mental capacity to perceive accurately, record, and recollect fact impressions; and possess the capacity to understand questions and to communicate understandably, with an interpreter if necessary. When an issue of state law is being determined, the state rules of evidence govern the competency of a witness. States that have not adopted the Federal Rules of Evidence may have other grounds for INCOMPETENCY, such as mental incapacity, immaturity, religious beliefs, and criminal convictions. The Federal Rules of Evidence and most jurisdictions state that jurors and presiding judges are not competent to testify in the case before them.

To be admissible, testimony must be limited to matters of which the witness has personal knowledge, meaning matters that the witness learned about using any of his or her senses. Second, the witness must declare under oath or affirmation that the testimony will be truthful. The purpose of this requirement is to "awaken the witness' conscience and impress the witness' mind with the duty to [be truthful]" (Fed. R. Evid. 603). The oath or affirmation requirement also serves as a ground for perjury if the witness does not testify truthfully. Although the oath frequently invokes the name of God, the witness need not possess any religious beliefs; a secular affirmation is sufficient.

Witnesses may be called to testify by any party to the lawsuit. The party who calls a witness to testify generally questions the witness first, in what is known as direct examination. The judge may exercise reasonable control over the questioning of witnesses in order "(1) to make the interrogation and presentation effective for the ascertainment of the truth; (2) to avoid needless consumption of time, and (3) to protect the witnesses from harassment, or undue embarrassment" (Fed. R. Evid. 611(a)). Thus, the judge may prevent a witness from rambling in a narrative fashion and may require an attorney to ask specific questions in order to ascertain the truth quickly and effectively.

The federal rules and most jurisdictions discourage the use of leading questions on direct examination. These are questions that are designed to elicit a particular answer by suggesting it. For example, the question "Didn't the defendant then aim the gun at the police officer?" is a leading question, and normally it would not be permitted on direct examination. By contrast, "What did the defendant do next?" is a nonleading question that would be permitted on direct examination. In most cases, questions that can be answered with either "Yes" or "No" are considered to be leading questions. Courts generally will permit leading questions during direct examination if the witness is adverse or hostile toward the questioning party.

Leading questions are permitted, and are common practice, during cross-examination. Once a party conducts a direct examination, the opposing party is entitled to cross-examine the same witness. The scope of questions asked during cross-examination is limited to the subject matter that was covered during direct examination, and any issues concerning the witness's credibility. Attorneys use cross-examination for many purposes, including eliciting from a witness favorable facts; having the witness modify, explain, or qualify unfavorable versions of disputed facts elicited during direct examination; and impeaching, or discrediting, the witness.

If a witness is a lay witness (i.e., not testifying as an expert), the witness generally may testify as to facts and not as to opinions or inferences, unless the opinions or inferences are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue" (Fed. R. Evid.). For example, a witness may not testify that she smelled marijuana unless she can sufficiently establish that she knows what marijuana smells like. Lay witnesses commonly testify about such things as the speed that a car was going, or someone's approximate age, but these types of inferences are less likely to be permitted the more closely they address critical issues in the case.

### Expert Witnesses

"If scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise" (Fed. R. Evid. 702). The admissibility of EXPERT TESTIMONY hinges on whether such testimony would help the judge or jury, and whether the witness is properly qualified as an expert. Expert witnesses may, and usually do, testify in the form of an opinion. The opinion must be supported by an adequate foundation of relevant facts, data, or opinions, rather than by conjecture. Thus, an expert frequently relies on firsthand or secondhand observations of facts, data, or opinions perceived prior to trial, or presented at trial during testimony or during a hypothetical question posed by an attorney. Courts do not require experts to have firsthand knowledge of facts, data, or opinions because experts in the field do not always rely on such firsthand knowledge. For instance, physicians routinely make diagnoses based on information from several sources, such as hospital records, X-ray reports, and opinions from other physicians.

When an expert offers a scientific fact as substantive evidence or as the basis of his or her opinion, the court must determine the reliability of the scientific fact by looking at such things as the validity of the underlying scientific principle, the validity of the technique applying that principle, adherence to proper procedures, the condition of instruments used in the process, and the qualifications of those who perform the test and interpret the results. Issues frequently arise over such scientific tools and techniques as lie detectors, DNA testing, and hypnosis. Some scientific tests, such as drug tests, radar, and PATERNITY blood tests, generally are accepted as reliable, and their admissibility may be provided for by statute.

In *Kumho Tire Co. v. Carmichael* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (U.S.Ala., Mar 23, 1999) (NO. 97-1709), a tire on the vehicle driven by Carmichael blew out, and the vehicle overturned, killing one passenger and injuring others. The survivors and decedent's representative brought a diversity suit against Kumho, the tire's maker, and its distributor. Their claim that the tire was defective relied mainly upon the depositions of a tire-failure analyst, whose expert testimony was to have been that a defect in the tire's manufacture or design caused the blow-out. The expert's opinion was based upon an inspection of the tire and upon the theory that in the absence of certain symptoms indicating tire abuse, a failure of the sort that occurred was caused by a defect. Kumho moved to exclude the expert's testimony, claiming that his methodology failed to satisfy Federal Rule of Evidence 702, which does not distinguish between "scientific" knowledge and "technical" or "other specialized" knowledge. The U.S. Supreme Court disagreed and ruled that the trial judge has the power to test the reliability of all expert testimony, whether by a scientific expert or by an expert who is not a scientist. The court held that Rule 702 does not address the testimony of scientists only, but that it applies to any type of expert testimony.

The AMERICAN MEDICAL ASSOCIATION maintains guidelines for physicians who testify both as treating physician experts and as nontreating expert witnesses. Many state medical associations also have guidelines for doctors who testify.

### Hearsay

The credibility of any witness's testimony depends upon three factors: (1) whether the witness accurately perceived what he or she described; (2) whether the witness retained an accurate memory of that perception; and (3) whether the witness's narration accurately conveys that perception. In order to be allowed to testify, the witness generally must take an oath, must be personally present at the trial, and must be subjected to cross-examination. These conditions promote the factors that lend themselves to the witness's credibility. The rule against HEARSAY further bolsters the oath, personal presence, and cross-examination requirements.

Hearsay is a statement, made out of court, offered in court to prove the truth of the matter asserted. The statement may be oral or written, or it may be nonverbal conduct intended as an assertion, such as pointing to a crime suspect in a police line-up. The act of pointing in response to a request for identification is the same as stating, "He did it." Not all nonverbal conduct is intended as an assertion, of course. For example, a person usually opens an umbrella to stay dry, not to make the assertion, "It is raining."

Sometimes, statements made out of court are not hearsay because they are not offered for the purpose of proving the truth of the matter asserted. For example, suppose that a man who

# Objections

### Evidentiary Objections

At every trial or hearing requiring the admission of evidence, attorneys have the duty to object to evidence that the rules of court deem inadmissible. Objections must be made in a timely fashion, as soon as the witness or opposing party attempts to improperly introduce evidence. An attorney who fails to immediately recognize and object to inadmissible evidence faces serious consequences: the evidence may be admitted for the judge or jury to consider, and should the case be appealed, the appellate court will allow it to stand as admitted. On the other hand, an attorney who makes frequent objections to proper, admissible evidence runs the risk of alienating the jury or angering the judge. A trial lawyer therefore must learn to quickly recognize and correctly object to inadmissible evidence.

Once an attorney objects, the judge must decide whether to sustain the objection and disallow the evidence, or overrule the objection and permit the evidence. To assist this decision, the attorney must generally tell the judge the legal basis for the objection.

### Objections to Questions

| Objection | Legal Basis |
|---|---|
| Calls for an *irrelevant* answer | The answer to the question would not make the existence of any consequential fact more or less probable. |
| Calls for an *immaterial* answer | The answer to the question would have no logical bearing on an issue in the case. |
| Is asked of an *incompetent* witness | The witness is disqualified by statute from testifying, owing to age, lack of knowledge, or mental illness. |
| Violates the *best evidence rule* | The original document, rather than testimony, contains the best evidence. |
| Calls for *privileged* communication | The information sought is **PRIVILEGED COMMUNICATION**, such as that between attorney and client, physician and patient, or husband and wife, and is barred from disclosure. |
| Calls for a *conclusion* | The question improperly asks the witness to reach a legal conclusion, which is a job reserved for the judge or jury. |
| Calls for an *opinion.* | Generally, only expert witnesses may render their opinions; lay witnesses must testify only regarding their observations. |
| Calls for a *narrative answer.* | Witnesses must respond concisely to individual questions, not give a long, rambling explanation. |
| Calls for *hearsay* | The answer would be inadmissible hearsay. |
| Is *leading.* | The questioning attorney may not frame a question in such a way that it suggests the answer. |
| Is *repetitive* (or has already been *asked and answered*) | The question has already been asked and answered. |
| Is *beyond the scope* | On cross-examination, questions normally may not address matters not covered on direct examination. |
| Assumes *facts not in evidence* | Part of the question assumes that certain facts are true, when such facts have not been admitted into evidence or their existence is in dispute. |
| Is *confusing* (or *misleading* or *ambiguous* or *vague* or *unintelligible*) | A question must be posed in a manner that is specific and clear enough that the witness reasonably knows what information the examiner seeks. |
| Calls for *speculation* | Questions that ask the witness to guess or speculate are improper. |
| Is *compound* | The question brings up two or more separate facts, and any simple answer would be unclear. |
| Is *argumentative* | The question is essentially an argument to the judge or jury; it elicits no new information but rather states a conclusion and asks the witness to agree with it. |

| Objection | Legal Basis (continued) |
|---|---|
| Is an *improper characterization* | For example, the question calls the defendant a spoiled brat, greedy pig, or frenzied dog; characterization is something the jury or judge, not a witness or attorney, should infer. |
| *Mistakes evidence* (or *misquotes the witness*) | Misstating or distorting evidence, or misquoting a witness, is improper. |
| Is *cumulative* | When numerous witnesses testify to the same facts or numerous exhibits demonstrate the same things, without adding anything new, the evidence is objectionable. |
| Constitutes an *improper impeachment* | Rules surrounding the impeachment of a person's character or credibility are highly technical. For example, evidence of a prior inconsistent statement made by a witness may be used only if the statement is materially inconsistent and is offered in the proper context. |
| Violates the *parol evidence rule* | The **PAROL EVIDENCE** rule bars evidence of oral, or verbal, modifications or contradictions of a written contract that is complete and clear on its face. |
| Is *unresponsive* (or *volunteered*) | An answer that does not directly respond to a question is objectionable as unresponsive; an answer that goes beyond what is necessary to answer the question is objectionable as volunteered. Only the attorney who called the witness may object on these grounds. |

**Objections to Answers**

Is *irrelevant*
Is *immaterial*
Is *privileged*
Is a *conclusion*
Is improper *opinion*
Is *hearsay*
Is *narrative*
Is improper *characterization*

**Objections to Exhibits**

| Objection | Legal Basis |
|---|---|
| Lacks proper *foundation* (or lacks *foundation,* or has no *foundation*) | Before exhibits can be admitted into evidence, attorneys must establish the necessary foundation, or the facts that indicate the exhibit is what it purports to be. For a photograph of a crime scene, this might include calling the person who took the picture as a witness and asking whether she was at the crime scene, had a camera, and took a picture, and whether the exhibit is that picture. |
| Lacks *authentication* | Writings and conversations must be authenticated, or shown to have been executed by a party or that party's agent. For example, before testifying about a telephone conversation, a witness must demonstrate his knowledge of who was speaking on the other end of the telephone. |
| Is *prejudicial* | The exhibit's prejudicial effect outweighs its **PROBATIVE** value. This objection is often raised with photo exhibits. A color photo of a murder victim may so prejudice the jury, without adding information helpful to determining the murderer, that the judge may disallow the photo as evidence. |
| Contains *inadmissible matter* | Exhibits in the forms of charts, diagrams, and maps must not disclose otherwise inadmissible material to the jury. For example, in most jurisdictions, evidence that a defendant in a personal injury case has insurance that may pay for the plaintiff's damages is inadmissible. A chart, shown to the jury, that conveys the name of the defendant's insurance company is improper and objectionable. |
| Is *irrelevant* | |
| Is *immaterial* | |
| Contains *hearsay* | |

*(continued)*

# Objections
(CONTINUED)

### Nonevidentiary Objections

Attorneys may also object to situations that arise during a trial or hearing that do not concern matters of evidence. During **VOIR DIRE**, or jury selection, attorneys may not argue to prospective jurors the law or the facts that will arise at trial; if they do, they will likely receive an objection from opposing counsel. Likewise, attorneys often object to arguments made during opening statements, because opening statements are limited to a discussion of the evidence that will be presented during the trial. An attorney's personal opinion on any evidentiary matter is also objectionable because it places the attorney's credibility directly at issue. And a personal attack by an attorney against a party, witness, or opposing counsel is unprofessional and will almost always result in a sustainable objection.

#### FURTHER READINGS

Park, Roger C. 2001. *Trial Objections Handbook 2d.* St. Paul, Minn.: West Group.

claims that a collision between his car and a truck rendered him unconscious files a lawsuit against the truck driver for NEGLIGENCE. The truck driver wishes to introduce as evidence a statement that the man made seconds after the accident: "I knew I should have gotten my brakes fixed; they haven't been working for weeks!" If the purpose of offering the statement is only to prove that the man was conscious and talking following the accident, the statement is not hearsay. However, if the statement is offered to prove that the man's brakes were not working and therefore that he caused the accident, then the statement is offered for its truth, and it is hearsay.

The Federal Rules of Evidence state generally that hearsay is not admissible evidence. The reason is that it is impractical, and in most cases simply impossible, to cross-examine the declarant of an out-of-court statement, or to have the declarant take an oath prior to making the statement. Thus, the credibility of an out-of-court statement cannot be easily ascertained. But the hearsay doctrine is extremely complex. Under the federal rules, for example, most admissions of guilt are not considered hearsay and are therefore admissible, even though they might be stated out of court and then offered as evidence. The federal rules list more than 25 exceptions to the general hearsay prohibition. These exceptions apply to circumstances believed to produce trustworthy assertions.

Some exceptions to the hearsay rule require that the person who made the statement be unavailable to testify at trial. One example of this is when a person who is mortally wounded makes a statement about the cause of her death, just before dying. Under this hearsay exception, the victim's statement assigning guilt or causation is made admissible because the victim is not available to testify at trial, and the need for the information is given greater weight than the fear that she lied. Some have argued that the DYING DECLARATION exception exists at least in part because of the belief that persons would not waste their last breaths to utter a falsehood. One federal court commented, "More realistically, the dying declaration is admitted because of compelling need for the statement, rather than any inherent trustworthiness" (*United States v. Thevis,* 84 F.R.D. 57 [N.D. Ga. 1979]). This exception proved noteworthy in the October 1995 trial and ultimate conviction of Yolanda Saldivar, who was accused of gunning down tejana singing star Selena Quintanilla Perez in a Corpus Christi, Texas, motel. Motel employees testified that Selena's last words before collapsing and dying were, "Lock the door! She'll shoot me again!" and "Yolanda Saldivar in Room 158." Saldivar received a sentence of life in prison following her conviction of murdering the 23-year-old recording artist.

Under some circumstances, the availability of the declarant to testify is immaterial. For example, the excited-utterance exception to the hearsay rule allows the admission of an out-of-court statement "relating to a startling event or condi-

tion made while the declarant was under the stress of excitement caused by the event or condition" (Fed. R. Evid.803(2)). The premise for this exception is that excitement caused by the event or condition leaves a declarant without sufficient time or capacity for reflection to fabricate, thus the statement is considered truthful. An example of an admissible excited utterance is the statement, "Look out! That green truck is running a red light and is headed toward that school bus!" Other examples of hearsay exceptions include statements of medical diagnosis, birth and marriage certificates, business records, and statements regarding a person's character or reputation.

### Authentication and Identification

Evidence is not relevant unless its authenticity can be demonstrated. A letter in which the defendant admits her guilt in a tax-fraud trial is inadmissible unless the prosecution can first show that the defendant actually wrote it. Blood-stained clothing is irrelevant without some connection to the issues of the trial, such as evidence that the clothing belonged to the accused murderer. The process of linking a piece of evidence to a case—of authenticating or identifying the evidence—is frequently referred to as laying a foundation. Under the Federal Rules of Evidence, a foundation is sufficient if a reasonable juror would find it more probably true than not true that the evidence is what the party offering it claims it to be.

The most basic way to lay an evidentiary foundation is to demonstrate that a witness has personal knowledge. For example, the witness may testify that he wrote the letter, or that he saw the plaintiff sign the contract, or that he found the bullet in the kitchen. When the evidence is an object, the witness must testify that the object introduced at the trial is in substantially the same condition as it was when it was witnessed.

Objects that are not readily identifiable often must be authenticated through chain-of-command testimony. In the case of a blood sample, a proper foundation would include testimony from each individual who handled the blood—from the nurse who drew the blood, to the lab technician who tested it, to the courier who delivered it to the courthouse for trial. Unless each individual can testify that the blood sample's condition remained substantially the same from the time it was drawn until the time it was offered as evidence (accounting for any loss in amount, due to testing), the court could sustain an objection from the other side. The sample then would be inadmissible for lack of authentication.

Under the Federal Rules of Evidence, some evidentiary items are self-authenticating and need no additional authentication before being admitted. Documents containing the official seal of a government unit within the United States, and certified copies of public records such as birth certificates, are self-authenticating, as are newspapers and congressional documents.

### Polygraph Tests

In *United States v. Scheffer,* 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (U.S., Mar 31, 1998) (NO. 96-1133), the U. S. Supreme Court upheld a military court evidence rule, Rule 707, which prohibits the use of POLYGRAPH, or lie detector, test results in military trials. Scheffer, a military investigator, took a routine urine test, which came back positive for amphetamines. Scheffer then asked for, and was given, a polygraph test which showed that he had no knowledge of amphetamine use. At his trial on drug-use charges based on the urine test, Scheffer tried to introduce evidence of his favorable lie-detector results. The court refused to admit this evidence on the basis of military evidence Rule 707. Scheffer appealed, claiming that he should have been able to introduce the test results as part of his constitutional right "to prepare a defense". The Court upheld the exclusion of the lie-detector test on the grounds that there is too much controversy about the reliability of lie-detector test results; that lie-detector tests might undercut the role of the jury in assessing witness credibility; and that lie-detector tests create too much possibility of side issues about the reliability of the test.

### The Best-Evidence Rule

*The Best-evidence rule* is a misleading name for the courts' preference for original writings, recordings, and photographs over copies, when the contents are sought to be proved. The purpose of this rule at common law was to avoid the potential for inaccuracies contained in handmade copies. The current rule contained in the Federal Rules of Evidence requires the use of original writings, recordings, and photographs (including X-rays and motion pictures), but the rule defines original to include most photocopies or prints from the same negative. The risk of inaccuracies from these types of duplicates is almost non-existent. When the original evidence is lost, destroyed, unobtainable, or in the posses-

# Journalists' Privilege

In 1972, information leaked to the *Washington Post* by a confidential informant, set the stage for the fall of a U.S. president. A source they called "Deep Throat," told journalists Bob Woodward and Carl Bernstein that several improprieties, including a break-in at the Democratic National Committee headquarters in Washington, D.C., had been orchestrated by a committee to reelect President **RICHARD M. NIXON**. News articles that Woodward and Bernstein wrote based on that information marked the beginning of **WATERGATE**, a scandal that led to Nixon's resignation in 1974 in the face of **IMPEACHMENT**. Almost 30 years later, the true identity of Deep Throat remains unknown.

Reliance on anonymous news sources can create problems when lawyers, judges, or juries seek information during a judicial proceeding. It is a basic principle in the U.S. legal system that "the public has a right to every [person's] evidence" (8 J. Wigmore, *Evidence* § 2192 [McNaughton rev. 1961]). With very few exceptions, individuals who possess knowledge or information that may help a judge or jury, must testify or produce the information in court. Journalistic privilege, where recognized, is the right of journalists to withhold from the court certain sources, notes, or materials used to gather news. It is not among the privileges commonly recognized by courts, such as **ATTORNEY-CLIENT PRIVILEGE** or marital privilege.

Since the 1850s, journalists have sought a privilege to protect the identity of news sources or to protect the news-gathering process from discovery at trial. As the number of reporters subpoenaed (ordered by a court to testify) increased dramatically in the 1960s and 1970s, so did their efforts. Reporters argue that to effectively gather vital information and disseminate it to the public, they must have the legal right to withhold the identity of a source. Without such a privilege, sources who fear the disclosure of their name will be less likely to talk with reporters. Reporters who fear **REPRISAL**, or who simply do not wish to testify or hire a lawyer, will be less likely to print or broadcast sensitive information. Journalists argue that this chilling effect on reporters' willingness to print or broadcast sensitive information will ultimately harm the public, which relies on reporters to relay even the most sensitive and secretive news and information.

In resisting subpoenas, journalists usually invoke the **FIRST AMENDMENT**, which prohibits laws abridging a free press. Unlike the **FIFTH AMENDMENT**, which explicitly grants individuals the right to refuse to testify against themselves, the First Amendment contains no explicit language protecting journalists from having to testify. Nonetheless, reporters have long argued that the purpose of the First Amendment is to allow the news media to freely gather and report the news, without encumbrances by the government. Forcing reporters to testify, they argue, violates the First Amendment.

A divided U.S. Supreme Court rejected this argument in the landmark decision *Branzburg v. Hayes,* 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972). *Branzburg* involved the appeals of three reporters who had been ordered in three separate incidents to testify before a **GRAND JURY** (a jury convened to determine whether to indict a criminal suspect). In all three cases, prosecutors wanted to know what the reporters had observed or to whom they had spoken. One reporter had written an article about the process of converting marijuana into hashish; the other two were covering the militant Black Panther organization, believed to be planning guerrilla warfare to support its cause. In all three cases, the reporters had promised to keep their sources' identities secret or not to divulge their observations. The reporters refused to answer certain questions and provide certain information, arguing that doing so would jeopardize or destroy their working relationships with news sources and, ultimately, their ability to disseminate vital information to the public. The Supreme Court pointed out that the duty to testify has roots as deep as the First Amendment's guarantee of a free press, and refused to find a First Amendment privilege protecting reporters from being forced to testify before a grand jury.

According to the Court in *Branzburg,* the First Amendment does not override all other public interests, or exempt reporters from the same obligations to testify imposed on other citizens, merely because the news-gathering process may become more difficult if confidential sources are revealed. "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability," the Court stated. The Court also acknowledged the importance of a free press to the country's welfare, and recognized that to be effective, the First Amendment must protect not only the dissemination of information but the news-gathering process itself. Yet, the Court made the point that a requirement to testify or otherwise disclose information to a judicial body is not a prohibition on the press's ability to

sion of the opponent, the court will not require a party to produce the original.

### Judicial Notice

Some matters that are relevant to a trial are so obvious that a court will not require evidence to prove them—for example, that it is dark outside at midnight, or that April 30, 1995, fell on a Sunday. To prevent wasting a court's time, the rules of evidence permit courts to take **JUDICIAL NOTICE** of such matters; that is, to accept them as true without formal evidentiary proof. Courts

employ confidential sources. The Court stated, "[N]o attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request."

Justices **POTTER STEWART**, **WILLIAM J. BRENNAN JR.**, and **THURGOOD MARSHALL** dissented in *Branzburg,* emphasizing that the independence of the press becomes threatened when journalists are called upon as "an investigative arm of government." When reporters are forced to testify in courtrooms, the three justices found, their constitutionally protected functions are impaired. Such impairment will, "in the long run, harm rather than help the administration of justice." The Court's dissenters stressed that the Constitution protects journalists not for the benefit of journalists but for the benefit of society. "Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society," stated the dissenting opinion.

The *Branzburg* decision held that the First Amendment does not protect journalists from grand jury subpoenas seeking evidence in criminal cases, and that there is no testimonial privilege for reporters who witness crimes. The decision did not address whether the Constitution protects reporters' notes, tape recordings, or other news-gathering items; whether there can be a privilege if there is no reason to think the reporter observed illegal activity; and whether reporters are entitled to a privilege in civil actions or other legal proceedings besides grand juries.

Despite the uncertainty, reporters since *Branzburg* have successfully invoked privileges. In some jurisdictions, they have been helped by **SHIELD LAWS**, which are statutes allowing journalists to withhold certain information. Even in state jurisdictions without shield laws, many courts have upheld a reporter's claim of privilege using a three-part test championed in the *Branzburg* dissent: a reporter may be forced to reveal confidences only when the government demonstrates (1) that there is **PROBABLE CAUSE** to believe that the journalist has information clearly relevant to a specific legal violation, (2) that the same information is not available by alternative means less destructive to the First Amendment, and (3) that there is a compelling and overriding interest in the information. Yet other courts have interpreted *Branzburg* as prohibiting state courts from creating reporter privileges at all (*Caldero v. Tribune Publishing Co.,* 98 Idaho 288, 562 P.2d 791 [1977]; *In re Roche,* 381 Mass. 624, 411 N.E.2d 466 [1980]).

More than half the states have passed shield laws, making the reporters' privilege statutory. Shield laws range in their coverage: some protect only the identities of confidential sources; others protect everything from sources, notes, videotapes, and film negatives to the reporter's thought processes. At least 14 states and most federal jurisdictions recognize the privilege based on **COMMON LAW**, state **CONSTITUTIONAL LAW**, or the First Amendment. These jurisdictions generally apply a version of the three-part test outlined in the *Branzburg* dissent. Even where the privilege is recognized, it is rarely absolute. Courts may order reporters to disclose information under certain compelling circumstances, and a reporter who refuses to obey the court faces a charge of **CONTEMPT** and fines or imprisonment.

Journalists react differently to the threat of incarceration. Los Angeles radio station manager Will Lewis, in 1973, initially refused to comply with a federal grand jury subpoena seeking the originals of a letter and a tape recording sent to him by radical groups claiming inside knowledge of the **KIDNAPPING** of **PATTY HEARST**. Lewis was held in contempt and sent to Terminal Island Federal Prison, where he spent 16 days in solitary confinement before being released pending his appeal. He lost (*In re Lewis,* 377 F. Supp. 297 [C.D. Cal. 1974], *aff'd* 501 F.2d 418 [9th Cir.]). Faced with returning to prison, Lewis turned over the documents.

But William Farr, a reporter for the *Los Angeles Herald-Examiner,* spent two months in jail rather than name his source. Farr had received a copy of a deposition transcript from a prosecuting attorney in the case of serial murderer Charles Manson. The judge in the case had forbidden officers of the court to publicize the case, which contained particularly gruesome facts. When the judge ordered Farr to name the individual who leaked the information, Farr refused (*Farr v. Superior Court of Los Angeles County,* 22 Cal. App. 2d 60, 99 Cal. Rptr. 342 [Ct. App. 1971]).

Many reporters and their attorneys view the threat of contempt as an opportunity to educate the public on the issue. In 1990, Tim Roche was a 21-year-old reporter for a Florida newspaper, the *Stuart News,* when he was subpoenaed to disclose the name of a confidential source who had shown him a sealed (confidential) court order in a **CHILD CUSTODY** battle. Roche refused to comply, maintaining that he had promised the source confidentiality. He was found in contempt of court and received a 30-day jail sentence.

Attorneys for Roche appealed, but both the Florida Supreme Court and the U.S. Supreme Court declined to hear the case. Roche then sought clemency (an act to lower or moderate the sentence) from Governor Lawton M. Chiles, of Florida. Chiles refused the plea for clemency, but offered Roche three hundred hours of community service as an alternative to jail. Roche declined the offer, stating that he would not compromise his principles, as he had done nothing wrong. The governor

*(continued)*

may take judicial notice of facts that are generally known to be true (e.g., that gasoline is flammable) or facts that are verifiable from dependable sources (e.g., that Des Moines, Iowa, is in Polk County, which can be verified on a map). As a matter of course, courts judicially notice the contents of laws of and within the United States.

### Privileges

It is a basic tenet in U.S. **JURISPRUDENCE** that "the public . . . has a right to every [person's]

## JOURNALISTS' PRIVILEGE (CONTINUED)

retorted that he also would not compromise his principles, and that no one is above the law. On March 16, 1993, Roche entered the Martin County Jail, where he served 19 days. National publicity surrounding Roche's plight led to the introduction and passage of a Florida bill designed to protect reporters and their confidential sources. Chiles, however, vetoed the Tim Roche Bill on May 14, 1993.

Vanessa Leggett holds the dubious distinction of being the journalist incarcerated for the longest period of time in United States history over such an issue. In 2001 and 2002, Leggett spent 168 days in federal detention in Texas, a state without a shield law, for refusing to comply with a sweeping subpoena for confidential source materials. Leggett had been working on a nonfiction book about the killing of Houston socialite Doris Angleton, who was found shot to death in April 1997. Mrs. Angleton's millionaire husband, Robert, was accused of paying his brother, Roger, to kill his wife. Both brothers were charged with capital murder. In the course of her research, Leggett conducted a series of prison interviews with Roger Angleton, who subsequently committed suicide.

Leggett initially turned over tapes of her interviews with Roger to a grand jury. However, after Robert Angleton was acquitted in state court, a federal investigation into his activities was launched. In November 2000, the **FEDERAL BUREAU OF INVESTIGATION** (FBI) contacted Leggett about becoming an informant. She declined, citing a possible loss of her integrity and objectivity as a reporter, and expressed a concern over the loss of confidentiality with her sources. Leggett was then subpoenaed to testify in front of the grand jury. She agreed to do so after the FBI assured her she would not have to reveal the sources of her information. However, the federal grand jury subpoenaed all of Leggett's tape-recorded conversations with anyone she had interviewed about the Angleton case. She claimed reporter's privilege protected her from being forced to disclose confidential sources. On July 6, 2001, U.S. District Judge Melinda Harmon ruled that the Fifth Circuit does not recognize such a privilege as protecting a journalist from divulging confidential or nonconfidential information in a criminal case. Leggett was ruled in contempt, and on July 20, 2001, was ordered imprisoned without bail for 18 months or until termination of the grand jury.

In August 2001, while avoiding the question of whether Leggett is a journalist entitled to a reporter's privilege (the government had argued she was not), the Court of Appeals for the Fifth Circuit upheld the ruling that no reporter's privilege exists against a grand jury subpoena. In November 2001, the same court declined to reconsider the case or release Leggett on bond until she had exhausted her appeals. On January 2, 2002, Leggett's attorney filed an appeal on her behalf to the U.S. Supreme Court. Two days later, Leggett was released after the federal grand jury completed its term, in compliance with her original sentence.

Leggett's ordeal raised several important legal issues, including the definition of who is and who is not a journalist for purposes of claiming the privilege, the extent to which journalists are able to protect confidential sources in stories relating to criminal proceedings, the differences among state shield laws, and the lack of shield protection under federal law. Leggett also proved that journalists will risk jail sentences to protect their reputation as well as their sources: a reporter who is known to have identified a source after promising confidentiality may have a difficult time obtaining information from other sources in the future.

Opponents of the reporters' privilege, however, argue that journalists who ignore requests for evidentiary information breach other important societal interests. For example, the **SIXTH AMENDMENT** guarantees a criminal defendant the right to a fair trial. This right is lost when a reporter who possesses information that may help prove the defendant's innocence refuses to testify. The same argument applies to society's interest in prosecuting criminals, who may go free when incriminating evidence is withheld by a journalist.

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### CROSS-REFERENCES

Freedom of the Press.

evidence," and that parties in litigation should avail themselves of all rational means of ascertaining truth (*Trammel v. United States,* 445 U.S. 40, 100 S. Ct. 906, 63 L. Ed. 2d 186 [1980]). Yet courts view certain interests and relationships to be of such importance that they protect those interests and relationships from certain efforts to gather evidence. These protections, or exclusions from the general rule of free access to evidence, are known as privileges.

Federal courts recognize several types of privileges. To encourage clients to communicate freely with their lawyers and to fully disclose any information that may enable their lawyers to provide appropriate legal advice, courts allow clients to refuse to disclose and to prevent any

other person from disclosing confidential communications made when seeking legal services. This privilege applies to clients' communications with their attorneys and with the attorneys' office staff. It protects only confidential communications, not communications made to friends or acquaintances in addition to an attorney.

The ATTORNEY-CLIENT PRIVILEGE applies to the client, not the attorney. Thus, the client, but not the attorney, has the right to waive the privilege and to testify regarding protected communications. The privilege does not terminate even when the attorney-client relationship does. The privilege does not apply to a client's allegations of a breach of duty by the attorney.

To promote open communication within marital relationships, the rules of evidence also recognize a marital privilege. In criminal cases, a person has the privilege to refuse to testify against a spouse. This privilege covers only evidentiary matters that would incriminate the non-testifying spouse (i.e., the defendant), as other matters are not likely to jeopardize the marriage relationship. The non-testifying spouse does not have the right to assert the privilege; the privilege belongs only to the testifying spouse.

In criminal and civil cases, testimony about any confidential communications between spouses is also afforded a privilege. Either spouse, not just the testifying spouse, may assert this privilege. Unlike the testifying-spouse privilege, the confidential-marital-communications privilege survives the termination of the marriage by death or DIVORCE, but it does not apply to permanently separated spouses.

Courts also recognize a political-vote privilege, a clergy-penitent privilege, and qualified privileges for trade secrets, state secrets, and the identity of an informant. Some courts also recognize a physician-patient privilege, an accountant-client privilege, and a privilege granted to journalists seeking to protect their news sources.

### Past Bad Acts

Generally, evidence of past bad acts by a criminal defendant is not admissible to prove that the defendant is a bad person and therefore committed the crime charged. However, evidence of past bad acts will be admitted for other purposes such as to show motive, intent, preparation, plan, knowledge, identity, or absence of a mistake or accident. Such evidence is also admissible for IMPEACHMENT purposes, (for example, if a defendant takes the stand) and when a defendant seeks to introduce the evidence in his or her defense.

In *Ohler v. United States*, 529 U.S. 753, 120 S.Ct. 1851, 146 L.Ed.2d 826 (U.S.Cal., May 22, 2000) (NO. 98-9828), the defendant Ohler was tried for importation of marijuana and possession of marijuana with the intent to distribute. After the trial court granted the government's motion to admit evidence of her previous conviction for methamphetamine possession, as impeachment evidence under Federal Rule of Evidence 609(a)(1), Ohler decided to bring out her prior conviction under direct examination, in order to "remove the sting" from the prosecutor's possible elicitation of the conviction on cross-examination. (Under the trial court's ruling, the prior conviction was only admissible in the event that Ohler testified.) The jury convicted Ohler on both counts, and she appealed, claiming that the trial court erred in admitting her prior conviction. The U.S. Court of Appeals for the Ninth Circuit and the United States Supreme Court affirmed her conviction, holding that Ohler had waived her objection to the evidence by introducing it herself.

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#### CROSS-REFERENCES

Attorney-Client Privilege; Best Evidence; Character Evidence; Circumstantial Evidence; Cumulative Evidence; Derivative Evidence; Direct Evidence; DNA Evidence; Documentary Evidence; Exclusionary Rule; Extrinsic Evidence; Forensic Science; Parol Evidence; Privileged Communication; Polygraph.

## EX DIVIDEND

*A phrase used by stockbrokers that denotes that a stock is sold without the purchaser receiving the right to own its recently declared dividend which has not yet been paid to the stockholders.*

The seller of a stock sold *ex dividend* retains the right to receive payment of the declared dividend. The purchaser of such a stock usually

buys it at a price that is reduced by the amount of the dividend to be paid to the seller.

## EX OFFICIO

*[*Latin, From office.*] By virtue of the characteristics inherent in the holding of a particular office without the need of specific authorization or appointment.*

The phrase *ex officio* refers to powers that, while not expressly conferred upon an official, are necessarily implied in the office. A judge has *ex officio* powers of a conservator of the peace.

## EX PARTE

*[*Latin, On one side only.*] Done by, for, or on the application of one party alone.*

An ex parte judicial proceeding is conducted for the benefit of only one party. Ex parte may also describe contact with a person represented by an attorney, outside the presence of the attorney. The term *ex parte* is used in a case name to signify that the suit was brought by the person whose name follows the term.

Under the **FIFTH AMENDMENT** to the U.S. Constitution, "No person shall . . . be deprived of life, liberty, or property, without **DUE PROCESS** of law." A bedrock feature of due process is fair notice to parties who may be affected by legal proceedings. An ex parte judicial proceeding, conducted without notice to, and outside the presence of, affected parties, would appear to violate the Constitution. However, adequate notice of judicial proceedings to concerned parties may at times work irreparable harm to one or more of those parties. In such a case, the threatened party or parties may receive an ex parte court hearing to request temporary judicial relief without notice to, and outside the presence of, other persons affected by the hearing.

Ex parte judicial proceedings are usually reserved for urgent matters where requiring notice would subject one party to irreparable harm. For example, a person suffering abuse at the hands of a spouse or significant other may seek ex parte a **TEMPORARY RESTRAINING ORDER** from a court, directing the alleged abuser to stay away from him or her. Ex parte judicial proceedings are also used to stop irreparable injury to property. For example, if two neighbors, Reggie and Veronica, disagree over whose property a tree stands on, and Reggie wants to cut down the tree whereas Veronica wants to save it, Veronica can seek an ex parte hearing before a judge. At the hearing, she will ask the judge for a temporary **RESTRAINING ORDER** preventing Reggie from felling the tree. She will have to show the judge that she had no reasonable opportunity to provide Reggie with formal notice of the hearing, and that she might win the case. The court will then balance the potential hardships to Reggie and Veronica, in considering whether to grant Veronica's request.

A court order from an ex parte hearing is swiftly followed by a full hearing between the interested parties to the dispute. State and federal legislatures maintain laws allowing ex parte proceedings because such hearings balance the right to notice against the right to use the legal system to avert imminent and irreparable harm. Far from violating the Constitution, the ex parte proceeding is a lasting illustration of the elasticity of due process.

Ex parte contact occurs when an attorney communicates with another party outside the presence of that party's attorney. Ex parte contact also describes a judge who communicates with one party to a lawsuit to the exclusion of the other party or parties, or a judge who initiates discussions about a case with disinterested third parties. Canon 3(A)(4) of the **AMERICAN BAR ASSOCIATION** (ABA) Model **CODE OF JUDICIAL CONDUCT** discourages judges from such ex parte communications. Under rule 4.2 of the ABA Model Rules of **PROFESSIONAL RESPONSIBILITY**, a lawyer should refrain from contacting a party who the lawyer knows is represented by another attorney, unless the lawyer has the consent of the other attorney or is authorized by law to do so.

In a case name, *ex parte* signifies that the suit was initiated by the person whose name follows the term. For example, *Ex parte Williams* means that the case was brought on Williams's request alone. Many jurisdictions have abandoned *ex parte* in case names, preferring English over Latin terms (e.g., *Application of Williams* or *Petition of Williams*). In some jurisdictions, *ex parte* has been replaced by *in re,* which means "in the matter of" (e.g., *In re Williams*). However, most jurisdictions reserve the term *in re* for proceedings concerning property.

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## EX POST FACTO LAWS

*[*Latin, "After-the-fact" laws.*] Laws that provide for the infliction of punishment upon a person for some prior act that, at the time it was committed, was not illegal.*

Ex post facto laws retroactively change the RULES OF EVIDENCE in a criminal case, retroactively alter the definition of a crime, retroactively increase the punishment for a criminal act, or punish conduct that was legal when committed. They are prohibited by Article I, Section 10, Clause 1, of the U.S. Constitution. An ex post facto law is considered a hallmark of tyranny because it deprives people of a sense of what behavior will or will not be punished and allows for random punishment at the whim of those in power.

The prohibition of ex post facto laws was an imperative in colonial America. The Framers of the Constitution understood the importance of such a prohibition, considering the historical tendency of government leaders to abuse power. As ALEXANDER HAMILTON observed, "[I]t is easy for men . . . to be zealous advocates for the rights of the citizens when they are invaded by others, and as soon as they have it in their power, to become the invaders themselves." The desire to thwart abuses of power also inspired the Framers of the Constitution to prohibit bills of attainder, which are laws that inflict punishment on named individuals or on easily ascertainable members of a group without the benefit of a trial. Both ex post facto laws and bills of attainder deprive those subject to them of DUE PROCESS of law—that is, of notice and an opportunity to be heard before being deprived of life, liberty, or property.

The Constitution did not provide a definition for ex post facto laws, so the courts have been forced to attach meaning to the concept. In *Calder v. Bull,* 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798), the U.S. Supreme Court provided a first and lasting interpretation of the Ex Post Facto Clause. The focus of the *Calder* case was a May 1795 resolution of the Connecticut legislature that specifically set aside a March 1793 probate court decree. The resolution allowed the defeated party in the probate contest a new hearing on the matter of the will. The Court in *Calder* ruled that the Connecticut resolution did not constitute an ex post facto law because it did not affect a vested property right. In other words, no one had complete ownership of the property in the will, so depriving persons of the property did not violate the ex post facto clause. The Court went on to list situations that it believed the clause did address. It opined that an ex post facto law was one that rendered new or additional criminal punishment for a prior act or changed the rules of evidence in a criminal case.

In *Calder,* the Court's emphasis on criminal laws seemed to exclude civil laws from a definition of ex post facto—that is, it implied that if a statute did not inflict criminal punishment, it did not violate the Ex Post Facto Clause. Twelve years later, the U.S. Supreme Court held that a civil statute that revoked land grants to purchasers violated the Ex Post Facto Clause (FLETCHER V. PECK, 10 U.S. (6 Cranch) 87, 3 L. Ed. 162 [1810]). However, in 1854, faced with another opportunity to define ex post facto, the Court retreated from *Fletcher* and limited the prohibition to retroactively applied criminal laws (*Carpenter v. Pennsylvania,* 58 U.S. (17 How.) 456, 15 L. Ed. 127 [1854]).

In *Carpenter,* the Court noted that the esteemed legal theorist SIR WILLIAM BLACKSTONE (1723–80) had described ex post facto in criminal terms. According to Blackstone, an ex post facto law has been created when, "after an action (indifferent in itself) is committed, the legislature then for the first time declares it to have been a crime, and inflicts punishment upon the person who has committed it." Using this as the understanding of ex post facto in 1789, the Court reasoned that it must have been the Framers' intent to limit the clause to criminal laws. However, notes from the Constitutional Convention indicate that the clause should cover the retroactive application of all laws, including civil laws. The only exception for ex post facto laws discussed at the Constitutional Convention was in case of "necessity and public safety" (Farrand, 1937).

Since the *Carpenter* ruling, the Supreme Court has struck down some retroactive civil laws, but only those intended to have a punitive intent. This construction of the Ex Post Facto

Clause has done little more than raise another question: What is punitive intent? The answer lies, invariably, with the U.S. Supreme Court.

Court members have agreed unanimously on ex post facto arguments, but it have also split over the issue. In *California Department of Corrections v. Morales,* 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995), Jose Ramon Morales challenged a 1981 amendment (Cal. Penal Code Ann. Sec. 3041 [West 1982]) to California's PAROLE statute that allowed the California Board of Prison Terms to defer for three years the parole hearings of multiple murderers (1977 Cal. Stats. ch. 165, sec. 46). Before the amendment, California law stated that a prisoner eligible for parole was entitled to a parole hearing every year. Morales had two convictions for murder, his second conviction coming in 1980, one year before passage of the amendment.

In 1989, the board denied parole to Morales and scheduled Morales's next hearing for 1992. Morales filed suit, arguing that the amendment was retroactive punishment and therefore unconstitutional. The district court disagreed. However, on appeal, the U.S. Court of Appeals for the Ninth Circuit reversed that decision, holding that the law effectively increased punishment for Morales, thus offending the Ex Post Facto Clause.

By a vote of 7 to 2, the U.S. Supreme Court reversed the Ninth Circuit. Justice CLARENCE THOMAS, writing for the majority, noted that the law only "introduced the possibility" that a convict would receive fewer parole hearings and serve more prison time than he or she expected. The board was required to formally find "no reasonable probability . . . for parole in the interim period" before it could defer a parole hearing for three years. According to the majority in *Morales,* the evident focus of the California law was " 'to relieve the [board] from the costly and time consuming responsibility of scheduling parole hearings' " (quoting *In re Jackson,* 39 Cal. 3d at 473, 216 Cal. Rptr. at 765, 703 P.2d at 106 [quoting legislative history]). The majority noted further that any assertion that the law might actually increase incarceration for those affected by it was largely "speculative."

Justices JOHN PAUL STEVENS and DAVID H. SOUTER dissented. The dissent warned of legislative overreaching, arguing that "the concerns that animate the Ex Post Facto Clause demand enhanced, and not (as the majority seems to believe) reduced, judicial scrutiny." To Stevens and Souter, the majority's own opinion was speculative, and "not only unpersuasive, but actually perverse."

The Supreme Court has continued to be divided on issues related to this clause. In *Carmell v. Texas,* 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000), the Court ruled, in a 5 to 4 decision, that several criminal convictions of a SEX OFFENDER could not stand because the state of Texas had changed the rules of evidence after he had committed the offenses. The defendant, Scott Carmell, was sentenced to life in prison for fifteen counts involving various SEXUAL OFFENSES against his stepdaughter. The victim was twelve- to sixteen-years old during the period that the offenses occurred. In 1993, the Texas Legislature changed its rules of evidence so that a person could be convicted based only on the testimony of the victim if the victim was less than eighteen years old at the time of the offense. The previous age limit in Texas for a victim was fourteen years old.

Carmell challenged the convictions for offenses that occurred when the victim was older than fourteen, but younger than eighteen, because the change in the rules of evidence amounted to an ex post facto law. The Supreme Court, per Justice John Paul Stevens, agreed with the defendant. According to the majority, "laws that lower the BURDEN OF PROOF and laws that reduce the quantum of evidence necessary to meet the burden are indistinguishable in all meaningful ways relevant to the concerns of the Ex Post Facto Clause."

The following year, the Court again considered the application of the clause in *Rogers v. Tennessee,* 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001). The Court examined the relation of the clause to the Fourteenth Amendment's DUE PROCESS CLAUSE and to COMMON LAW rules. It ruled that the clause did not apply to a state supreme court decision that abolished a common law rule dating back to medieval England.

The debate over ex post facto interpretation continues. Critics of contemporary ex post facto interpretation argue that legislatures circumvent the ex post facto prohibition by casting in civil terms laws that provide additional punishment for convicted criminals. For example, they have passed laws that require certain convicted SEX OFFENDERS to register with local authorities and

thus make public their continued presence in a community. By virtue of the **VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994** (42 U.S.C.A. § 14071(a)(1)(A)), such laws are required of states that wish to receive certain anti-drug funds.

Sex offender registration laws, or community notification laws, do not provide for retroactive additional incarceration. They do, however, provide additional consequences for a sex offender who was not, at the time the offense was committed, subject to such a constraint. Courts have held that such laws do not run afoul of the Ex Post Facto Clause, because, in part, the requirement is defined as civil regulation; that is, the law does not require extra prison time or exact an excessive fine. Also, such statutes are enacted for the protection of the public, which is an exception to ex post facto prohibition. Dissenters maintain that sex offender registration laws inflict additional punishment and therefore violate the Ex Post Facto Clause. Only one state, Alaska, has found such a law unconstitutional (*Rowe v. Burton,* 884 F. Supp. 1372 [D. Alaska 1994]).

The line between punitive measure and civil regulation can be thin. So long as legislatures pass laws that provide extra punishment for, or regulation of, conduct already committed, there will be arguments that the government is abusing its power in violation of the Ex Post Facto Clause.

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## EXAMINATION

*A search, inspection, or interrogation.*

*In* **CRIMINAL PROCEDURE,** *the* **PRELIMINARY HEARING** *held to decide whether a suspect arrested for a crime should be brought to trial.*

*In trial practice, the interrogation of a witness to elicit his or her testimony in a civil or criminal action, so that the facts he or she possesses are presented before the trial of fact for consideration.*

*In the law governing real property transactions, an investigation made into the history of the ownership of and conditions that exist upon land so that a purchaser can determine whether a seller is entitled to sell the land free and clear of any claims made by third persons.*

*In patent law, an inquiry made at the* **PATENT AND TRADEMARK OFFICE** *to determine the novelty and utility of an invention for which a patent application has been filed and whether the invention interferes with any other invention.*

## EXAMINER

*An official or other person empowered by another—whether an individual, business, or government agency—to investigate and review specified documents for accuracy and truthfulness.*

*A court-appointed officer, such as a* master *or referee, who inspects evidence presented to resolve controverted matters and records statements made by witnesses in the particular proceeding pending before that court.*

*A government employee in the* **PATENT AND TRADEMARK OFFICE** *whose duty it is to scrutinize the application made for a patent by an inventor to determine whether the invention meets the statutory requirements of patentability.*

*A federal employee of the* **INTERNAL REVENUE SERVICE** *who reviews income tax returns for accuracy and truthfulness.*

## EXCEPTION

*The act of excepting or excluding from a number designated or from a description; that which is excepted or separated from others in a general rule or description; a person, thing, or case specified as distinct or not included; an act of excepting, omitting from mention, or leaving out of consideration. Express exclusion of something from operation of contract or deed. An* exception *operates to take something out of a thing granted that would otherwise pass or be included.*

*Objection to an order or ruling of a trial court. A formal objection to the action of the court, during the trial of a case, in refusing a request or overruling an objection; implying that the party excepting does not acquiesce in the decision of the*

*court, but will seek to procure its reversal, and that he or she means to save the benefit of his or her request or objection in some future proceeding. Under rules practiced in the federal and most state courts, the need for claiming an exception to evidence or to a ruling to preserve appellate rights has been eliminated in favor of an objection.*

## EXCHANGE

*An association, organization, or group of persons, incorporated or unincorporated, that constitutes, maintains, or provides a marketplace or facilities for bringing together purchasers and sellers of* SECURITIES *or commodities futures.*

A security is a written proof of ownership of an investment, usually in the form of shares of stock, which are fractional units of ownership in a company. Commodities are raw materials, like wheat, gasoline, or silver, that are sold either on the spot market, where cash is paid "on the spot," or through futures contracts, where a price for a contract is set in advance, not to be changed even if the market price for the commodity increases or decreases by the time the contract comes due.

### Stock Exchanges

The New York Stock Exchange (NYSE) and the American Stock Exchange are located on Wall Street, in New York City. Wall Street (named for a stockade built to protect the original settlers) is the busiest hub of securities trading in the United States. There are five other, smaller, regional exchanges: the Pacific (in Los Angeles), Cincinnati, Chicago, Philadelphia (at the site of the first stock exchange in the United States), and Boston. These stock exchanges are private associations that sell memberships (seats) for a price, which can fluctuate based on the price of stocks and the volume of trading.

*Traders buy and sell commodity futures on the floor of the Kansas City Board of Trade in 2001.*

AP/WIDE WORLD PHOTOS

The SECURITIES AND EXCHANGE COMMISSION, which was established pursuant to the Securities Act of 1933 (15 U.S.C.A. §§ 78a et seq., 78d), regulates the activities of securities exchanges (defined at 15 U.S.C.A. § 78c(a)(1)). Private associations such as the NYSE and the National Association of Securities Dealers (NASD) initiate and execute a significant amount of self-regulation and disciplinary activities with the full support of the Securities and Exchange Commission.

### Futures Exchanges

Futures contracts for commodities are traded on one of 11 commodities exchanges in the United States, or on other exchanges throughout the world. Each futures contract is tied to the exchange that issued it. Exchanges specialize in various commodities, including currency and financial futures. For example, the Chicago Mercantile Exchange deals in meat, livestock, and currency, and the Minneapolis Grain Exchange focuses exclusively on grain. Other exchanges include the Chicago Board of Trade and boards of trade and exchanges in Philadelphia; Kansas City, Missouri; and New York City.

The COMMODITIES FUTURES TRADING COMMISSION, which was established pursuant to the Commodity Exchange Act (7 U.S.C.A. §§ 1 et seq., 4a(a)), regulates the activities of boards of trade, defined as associations or exchanges established to trade commodities futures. Private organizations such as the Chicago Board of Trade and the National Futures Association provide significant self-regulation to the commodities futures trading market.

### The Auction Market Principle

The floor of a stock or futures exchange operates on the "auction market" principle, whereby brokers meet face-to-face on the floor of the exchange to execute buy and sell orders.

Futures exchanges operate on a pure auction system, often referred to as the open outcry system, where all trading takes place on the floor of the exchange, or "in the pit." Buyers and sellers

in the pit use hand signals and oral communications to place buy and sell orders simultaneously, acting for themselves and as agents for others.

Securities exchanges operate on an auction-style system, where the market prices for securities are set by buyers and sellers meeting on the floor of the exchange. In contrast to futures exchanges, securities exchanges also employ specialists, who stand ready to buy or sell orders at market prices when there is, for example, a seller and no buyer for a particular security. In this capacity, specialists act as dealers, using their own capital to make bids and offers for stock. They can also act as brokers, holding limit orders (requests to buy or sell a security when it reaches a predetermined market price) for other brokers and executing those orders when the market moves up or down to the desired price. Specialists permit for a more orderly and continuous securities market and prevent wild price fluctuations due to imbalances in supply and demand.

### Computerized and Over-the-Counter Trading

Computer technology has been introduced in the major exchanges to automate certain aspects of transactions, but the auction process remains the predominant method of trading securities in these forums. In fact, the statutory definition of an exchange in the Securities Exchange Act has been consistently interpreted *not* to include computerized trading.

Stocks not traded on an exchange have historically been termed over-the-counter (OTC) stocks because they are sold over the counter (or desk or telephone) of individual brokers. The NASD once published the quotes of willing buyers and sellers of OTC stocks in what were called pink sheets. In the early 1970s, the NASD computerized this service and called it the National Association of Securities Dealers Automated Quotations System. This decentralized method of trading stocks has grown in efficiency and popularity in the decades since its introduction, but it has never been held to constitute an exchange because it does not facilitate the physical meeting of buyers and sellers. Like specialists in stock exchanges, who often are called upon to "make the market" (purchase and sell securities with their own money) in the absence of willing buyers and sellers, multiple "market makers" in the OTC market use their own capital to respond to fluctuations in the market.

One of the more recent developments in the exchange of stocks has been the use of Electronic Communications Networks (ECNs), which became popular in the United States and Europe in the late 1990s. ECNs are similar to stock exchanges in that they allow for stock transactions through a third party. They match orders to buy and sell at specified prices. They are also faster and more efficient than the traditional stock exchange. In 2000, the NYSE repealed a rule that limited member firms to trade only in stocks listed on the exchange. This has allowed securities listed on ECNs to become more competitive with stocks from larger companies. ECNs are required to register with the Securities and Exchange Commission as broker-dealers.

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#### CROSS-REFERENCES

Broker; Commodity Futures Trading Commission; Securities; Securities and Exchange Commission.

## EXCHANGE OF PROPERTY

*A transaction wherein parties trade goods, or commodities, for other goods, in contrast with a sale or trading of goods for money.*

An exchange of property is a type of barter contract, applicable only to agreements relating to goods and services, not to agreements involving land.

## EXCISE

*A tax imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege. A tax on the manufacture, sale, or use of*

*goods or on the carrying on of an occupation or activity, or a tax on the transfer of property. In current usage the term has been extended to include various license fees and practically every internal revenue tax except the* INCOME TAX *(e.g., federal alcohol and tobacco excise taxes).*

## EXCLUSIONARY CLAUSE

*A term in a sales contract that limits the remedies available to one or both parties to it in an action for breach of* WARRANTY*, statements made as to the quality of the goods sold. A provision of an insurance contract that prohibits recovery pursuant to its terms if certain designated circumstances occur.*

The exclusionary clause contains the exceptions to insurance coverage upon which the insurer and insured have agreed prior to the execution of the policy.

## EXCLUSIONARY RULE

*The principle based on federal* CONSTITUTIONAL LAW *that evidence illegally seized by law enforcement officers in violation of a suspect's right to be free from unreasonable* SEARCHES AND SEIZURES *cannot be used against the suspect in a criminal prosecution.*

The exclusionary rule is designed to exclude evidence obtained in violation of a criminal defendant's FOURTH AMENDMENT rights. The Fourth Amendment protects against unreasonable searches and seizures by law enforcement personnel. If the search of a criminal suspect is unreasonable, the evidence obtained in the search will be excluded from trial.

The exclusionary rule is a court-made rule. This means that it was created not in statutes passed by legislative bodies but rather by the U.S. Supreme Court. The exclusionary rule applies in federal courts by virtue of the Fourth Amendment. The Court has ruled that it applies in state courts although the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT. (The Bill of Rights—the first ten amendments—applies to actions by the federal government. The Fourteenth Amendment, the Court has held, makes most of the protections in the BILL OF RIGHTS applicable to actions by the states.)

The exclusionary rule has been in existence since the early 1900s. Before the rule was fashioned, any evidence was admissible in a criminal trial if the judge found the evidence to be relevant. The manner in which the evidence had been seized was not an issue. This began to change in 1914, when the U.S. Supreme Court devised a way to enforce the Fourth Amendment. In *Weeks v. United States,* 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914), a federal agent had conducted a warrantless search for evidence of gambling at the home of Fremont Weeks. The evidence seized in the search was used at trial, and Weeks was convicted. On appeal, the Court held that the Fourth Amendment barred the use of evidence secured through a warrantless search. Weeks's conviction was reversed, and thus was born the exclusionary rule.

The exclusionary rule established in *Weeks* was constitutionally required only in federal court until MAPP V. OHIO, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). In *Mapp,* Cleveland police officers had gone to the home of Dollree Mapp to ask her questions regarding a recent bombing. The officers demanded entrance into her home. Mapp called her attorney and then refused to allow the officers in without a warrant. The officers became rough with Mapp, handcuffed her, and searched her home. They found allegedly obscene books, pictures, and photographs.

Mapp was charged with violations of OBSCENITY laws, prosecuted, convicted, and sentenced to seven years in prison. The Ohio Supreme Court affirmed the conviction, but the U.S. Supreme Court overturned it.

In *Mapp,* the Court held that the exclusionary rule applied to state criminal proceedings through the Due Process Clause of the Fourteenth Amendment. Before the *Mapp* ruling, not all states excluded evidence obtained in violation of the Fourth Amendment. Since *Mapp,* a defendant's claim of unreasonable SEARCH AND SEIZURE has become a matter of course in most criminal prosecutions.

A criminal defendant's claim of unreasonable search and seizure is usually heard in a suppression hearing before the presiding judge. This hearing is conducted before trial to determine what evidence will be suppressed, or excluded from trial.

The exclusionary rule is still regularly invoked by criminal defendants, but its golden age may have passed. Since the 1980s, the U.S. Supreme Court has severely limited its application. According to the Court, this rule was not devised to cure all Fourth Amendment viola-

tions. Rather, it was designed primarily to deter POLICE MISCONDUCT. This construction led to the GOOD FAITH exception to Fourth Amendment violations established in *United States v. Leon,* 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

In *Leon,* police officers searched the Burbank, California, home of Alberto A. Leon, and arrested Leon after they found a large quantity of drugs in his possession. The search was executed pursuant to a warrant that was later determined to be invalid. The information provided by the police in their AFFIDAVIT in support of the warrant had been stale, which meant that too much time had passed between the observations that prompted it and the application for the warrant. No evidence suggested that a police officer had lied about facts. Rather, the staleness of the affidavit had simply been overlooked by the magistrate.

The drug evidence seized from Leon's home was excluded from trial by the U.S. District Court for the Central District of California, and the Ninth Circuit Court of Appeals affirmed the ruling. On appeal, the U.S. Supreme Court reversed, holding that evidence gathered in a search executed pursuant to a warrant later found to be defective should not be excluded from trial.

The majority in *Leon* opened its analysis by noting that the Fourth Amendment "contains no provisions expressly precluding the use of evidence obtained in violation of its commands." The exclusionary rule, according to the majority, was not designed to be a personal right. It was created by the Court "to deter police misconduct rather than to punish the errors of judges and magistrates." Under this interpretation, excluding evidence obtained through an honest mistake would serve no purpose. The Court's ruling in *Leon* meant that evidence obtained in violation of a person's Fourth Amendment rights would not be excluded from trial if the law enforcement officer, although mistaken, acted reasonably.

Justice JOHN PAUL STEVENS dissented, arguing that the facts of the case did not warrant such a sweeping exception to the exclusionary rule. In a separate dissenting opinion, Justices WILLIAM J. BRENNAN, Jr and THURGOOD MARSHALL conceded that, "as critics of the exclusionary rule never tire of repeating," the Fourth Amendment does not contain an express provision calling for the exclusion of evidence seized in violation of its commands. Brennan and Marshall dismissed this argument by noting that the Constitution is stated in general terms, and that the U.S. Supreme Court regularly creates doctrines designed to enforce its simple terms.

Brennan and Marshall maintained that "the chief deterrent function of the [exclusionary] rule is" far beyond the simple prevention of police misconduct, "the tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally." In other words, if a SEARCH WARRANT is found defective at any point in the prosecution, the evidence should be excluded, even if the defect is due to an honest mistake. This, according to Brennan and Marshall, would preserve the integrity of both law enforcement and the Fourth Amendment. Brennan and Marshall concluded that the majority's reliance on the deterrence rationale "robbed the [exclusionary] rule of legitimacy."

In 1995, the U.S. Supreme Court revisited the good faith exception to the exclusionary rule. In *Arizona v. Evans,* 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995), the error of a court employee mistakenly listed Isaac Evans as the subject of a misdemeanor arrest warrant. A police officer had stopped Evans for a traffic violation, searched Evans pursuant to the faulty warrant information, and found marijuana.

On trial for possession of marijuana, Evans moved to suppress the marijuana evidence. The Maricopa County Superior Court granted the motion. The state of Arizona appealed, and the Arizona Court of Appeals reversed. The Supreme Court of Arizona then heard the case and held that the evidence should be excluded.

On appeal by the state of Arizona, the U.S. Supreme Court reversed, holding that evidence seized in violation of the Fourth Amendment as a result of clerical error need not be excluded from trial. In so holding, the Court emphasized that the Fourth Amendment exists only to guard against unreasonable police intrusions. According to the Court, "[The] use of the fruits of a past unlawful search or seizure 'works no new Fourth Amendment wrong'" (*Evans,* quoting *Leon,* quoting *United States v. Calandra,* 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 [1974]).

The good faith exception established in *Leon* is just one exception that renders the exclusionary rule inoperable. Evidence seized by private parties is not excluded from trial if the search

was not at the direction of law enforcement officers. If a criminal defendant testifies in her or his own defense, illegally seized evidence may be used to impeach the defendant's testimony. Evidence seized in violation of a person's Fourth Amendment rights may be used in GRAND JURY proceedings and civil proceedings. In a grand jury proceeding, however, illegally seized evidence may not be used if it was obtained in violation of the federal WIRE TAPPING statute (18 U.S.C.A. § 2510 et seq.).

Few legal observers express complete satisfaction with the exclusionary rule. Some commentators criticize the U.S. Supreme Court for limiting the scope of the rule with the good faith exception. Others contend that the rule should be abolished because it impedes law enforcement. Some members of Congress have even proposed legislation to abolish the exclusionary rule in federal court. To date, no such legislation has been adopted.

The U.S. Supreme Court has continued to look at the application of the exclusionary rule to various types of searches and seizures. In *Florida v. White*, 526 U.S. 559, 119 S. Ct. 1555, 143 L. Ed. 2d 748 (1999), the Court gave police more discretion to search and seize without violating the Fourth Amendment's warrant requirement and thereby triggering the exclusionary rule. In that case, police did not need to obtain a warrant before seizing an automobile from a public place under laws that require FORFEITURE of property tied to crime. The Court rejected the argument that absent "exigent circumstances," police must obtain a warrant before seizing property that has been used in violation of the state forfeiture act. It pointed to its tradition of allowing police "greater latitude in exercising their duties in a public place." Although a warrant is generally required for a felony arrest in a suspect's home, the Fourth Amendment permits warrantless arrests in public places where police have PROBABLE CAUSE to believe that a felony has occurred.

In a surprising departure from its Fourth Amendment JURISPRUDENCE, the U.S. Supreme Court ruled that an anonymous tip by itself does not give police officers the authority to STOP AND FRISK a person for a weapon. *Florida v. J.L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000). A police officer may stop and frisk a person for a firearm if the officer reasonably concludes that criminal activity may be contemplated and that the person may be armed and dangerous. However, if the search is based only on a anonymous tip, the seized weapon may not be offered into evidence, due to the exclusionary rule.

The U.S. Supreme Court also invoked the exclusionary rule in *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). It set out a new rule for police when they want to use new types of ELECTRONIC SURVEILLANCE, including thermal imaging, to examine the inner workings of a home. The Court held that police must apply for a warrant from a court before using a device that can obtain details of a private home that would have been unknowable without physical intrusion. If police fail to secure a warrant, the search will be regarded as "presumptively unreasonable" and the evidence that the search produced will be inadmissible at trial under the exclusionary rule.

The Court noted that the degree of privacy guaranteed by the Fourth Amendment had been affected by technological developments. The question became "what limits there are upon this power of technology to shrink the realm of guaranteed privacy?" Individuals had a "minimum expectation of privacy" that the interiors of their homes were not subject to warrantless police searches. Thus, the use of "sense-enhancing technology" that could obtain information that would otherwise only be obtainable by a physical search was a "search." This meant that any information obtained by the thermal imager was the product of a search, and a search was unreasonable and could only be justified if it was made pursuant to a warrant.

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**CROSS-REFERENCES**

Criminal Law; Criminal Procedure; Fruit of the Poisonous Tree; Incorporation Doctrine.

## EXCLUSIVE

*Pertaining to the subject alone, not including, admitting, or pertaining to any others. Sole. Shutting out; debarring from interference or participation; vested in one person alone. Apart from all others, without the admission of others to participation.*

For example, if a court has been granted exclusive jurisdiction over cases relating to a particular subject matter, no other court is able to entertain cases concerning that particular subject.

## EXCLUSIVE AGENCY

*Grant to an agent of exclusive right to sell within a particular market or area. A contract to give an* exclusive agency *to deal with property is ordinarily interpreted as not precluding competition by the principal generally, but only as precluding him or her from appointing another agent to accomplish the result. The grant of an* exclusive agency to sell, *that is, the exclusive right to sell the products of a wholesaler in a specified territory, ordinarily is interpreted as precluding competition in any form within the designated area.*

## EXCULPATE

*To clear or excuse from guilt.*

An individual who uses the excuse of justification to explain the lawful reason for his or her action might be exculpated from a criminal charge. Exculpatory evidence is evidence that works to clear an individual from fault.

## EXCUSE

*The explanation for the performance or nonperformance of a particular act; a reason alleged in court as a basis for exemption or relief from guilt.*

An excuse is essentially a defense for an individual's conduct that is intended to mitigate the individual's blameworthiness for a particular act or to explain why the individual acted in a specific manner. A driver sued for NEGLIGENCE, for example, might raise the defense of excuse if the driver was rushing an injured person to a hospital, or if some unforeseen illness or mechanical failure made safe operation of the vehicle impossible.

## EXECUTE

*To complete; to make; to sign; to perform; to do; to carry out according to its terms; to fulfill the command or purpose of. To perform all necessary formalities, as to make and sign a contract, or sign and deliver a note.*

Execute is the opposite of executory, incomplete or yet to be performed.

## EXECUTION

*The carrying out of some act or course of conduct to its completion. In* CRIMINAL LAW*, the carrying out of a death sentence.*

*The process whereby an official, usually a sheriff, is directed by an appropriate judicial writ to seize and sell as much of a debtor's nonexempt property as is necessary to satisfy a court's monetary judgment.*

*With respect to contracts, the performance of all acts necessary to render a contract complete as an instrument, which conveys the concept that nothing remains to be done to make a complete and effective contract.*

With regard to seizures of property, executions are authorized in any action or proceeding in which a monetary judgment is recoverable and in any other action or proceeding when authorized by statute. For example, the victim of a motor vehicle accident may institute a civil lawsuit seeking damages from another party. If the plaintiff wins the lawsuit and is awarded money from the defendant as a part of the verdict, the court may authorize an execution process to pay the debt to the plaintiff.

Ordinarily, execution is achieved through a legal device known as a writ of execution. The writ serves as proof of the property owed by the defendant, who is called the JUDGMENT DEBTOR, to the plaintiff, or JUDGMENT CREDITOR. The writ of execution commands an officer of the court, usually a sheriff, to take the property of the debtor to satisfy the debt. Ordinarily, a writ of execution cannot be issued until after an appropriate court issues a judgment or decree determining the rights and liabilities of the parties involved.

Any type of PERSONAL PROPERTY is subject to seizure under an execution, provided existing laws do not prescribe specific exemptions. Such property may include jewelry, money, and stocks. In most states, real property, including land, is also subject to execution. INTELLECTUAL PROPERTY, which includes PATENTS, copyrights, and TRADEMARKS, is generally immune to execution.

An execution on a judgment is typically issued by the clerk of the court in which the judgment was rendered. The clerk cannot issue an execution unless directed to do so by the judgment creditor or the judgment creditor's attorney. The time within which an execution must issue varies from one jurisdiction to another. The writ must be delivered to the sheriff or his or her deputy before it can properly be said that the writ has been issued.

The levy of the execution is the act by which the officer of the court appropriates the judgment debtor's property to satisfy the command of the writ. The levy must be made by an officer duly qualified to act under the terms of the writ. In most states, the judgment debtor has the right to select and indicate to the officer the property upon which the levy is to be made.

An execution creates a lien that gives the judgment creditor qualified control of the judgment debtor's property. In most jurisdictions, an execution lien binds all property, personal or real, that is subject to levy. It is sometimes called a general lien because it attaches to all the defendant's property.

After the sheriff has levied, it is her or his duty to sell the property seized. An execution sale is a sale of property by a sheriff as an officer acting under the writ of execution. An execution sale should be conducted so as to promote competition and obtain the best price. If necessary, the sheriff can employ an auctioneer as an agent to sell the property, in order to procure the most favorable price and to collect the proceeds.

### Body Executions

Execution against a person is by writ of *capias ad satisfaciendum* (Latin for "to take the body to court to pay the debt"). Under this writ, the sheriff arrests and imprisons the defendant until the defendant satisfies the judgment or is discharged from doing so. Such an execution is not intended as punishment for failure to pay the judgment. It is permitted for the purpose of compelling the debtor to reveal property fraudulently withheld from his or her creditor and from which the judgment can be satisfied.

In most jurisdictions, defendants in lawsuits based on contracts are not subject to body executions unless they have committed FRAUD. Under the statutes in some jurisdictions, imprisonment for debt has been abolished entirely.

Statutes providing for the issuance of body executions to enforce judgments handed down in civil suits ordinarily do not conflict with provisions against imprisonment for debt. Among the civil, or TORT, actions in which the writ is generally allowed are those involving fraud or deceit, and those for neglect or misconduct in office or professional employment. A body execution is also generally proper in actions to recover for injuries to person or reputation, including LIBEL AND SLANDER, and in actions to recover for MALICIOUS PROSECUTION.

FURTHER READINGS

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CROSS-REFERENCES

Capital Punishment.

## EXECUTIVE BRANCH

*The branch of the U.S. government that is composed of the president and all the individuals, agencies, and departments that report to the president, and that is responsible for administering and enforcing the laws that Congress passes.*

The U.S. government is composed of three branches: legislative, judicial, and executive. The legislative branch consists of the U.S. Congress, which is responsible for creating laws. The judicial branch is composed of the federal courts, which are responsible for ruling on the validity of the laws that Congress passes and applying them in individual cases. The executive branch differs from both in scope and function.

### The Executive Branch and the Constitution

The executive branch has undergone tremendous changes over the years, making it very different from what it was under GEORGE WASHINGTON. Today's executive branch is much larger, more complex, and more powerful than it was when the United States was founded.

When the writers of the Constitution were initially deciding what powers and responsibilities the executive branch—headed by the president—would have, they were heavily influenced by their experience with the British government under King George III. Having seen how the king and other European monarchs tended to abuse their powers, the designers of the Constitution wanted to place strict limits on the power that the president would have. At the same time, they wanted to give the president enough power to conduct foreign policy and to run the federal

government efficiently without being hampered by the squabbling of legislators from individual states. In other words, the Framers wanted to design an executive office that would provide effective and coherent leadership but that could never become a tyranny.

The Framers outlined the powers and duties of the executive branch in Article II of the Constitution. The specific powers given to the president are few, and the language that is used to describe them is often brief and vague. Specifically, the president has the authority to be commander in chief of the armed forces; to grant pardons; to make treaties; and to appoint ambassadors, Supreme Court justices, and other government officers. More generally, the president is responsible for making sure "that the Laws be faithfully executed" (§ 3), though the Framers did not specify how the president was to accomplish this goal. The Framers also made no specific provisions for a staff that would assist the president; the Constitution says only that the president may "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices" (§ 2).

To ensure that the president could never become too powerful, the Framers made many PRESIDENTIAL POWERS dependent upon the will of Congress. For example, the president is given the power to make treaties with foreign countries, but those treaties must be approved by the Senate by a two-thirds majority. Similarly, the power of Congress is limited by the need for presidential approval. Congress can create laws, but those laws generally must be signed by the president; if the president refuses to sign a bill, it still can become law if Congress votes to override the president's VETO by a two-thirds majority. The Framers did not divide powers among the branches so much as they required the separate branches to share power, resulting in a complex system of checks and balances that prevents any one branch from gaining power over the others.

Modern presidents have greater powers than did their predecessors, as the executive branch has grown over the years to take on more tasks and responsibilities. For the most part, however, the power of the executive branch at any given time has depended on the leadership skills of the current president; the particular events and crises faced by the president; and the country's desire for, or resistance to, strong executive branch power at that point in history. Though the executive branch does have specific legal powers, the principal power of each president is simply that individual's ability to persuade others—primarily those in Congress—to follow recommendations. Whereas early presidents were selected by a small number of electors, modern presidents are selected by hundreds of electors who represent citizens nationwide; as a result, they have the advantage of a popular mandate, giving them a bully pulpit that no member of Congress can match.

### Divisions of the Executive Branch

The lack of specific, detailed language in the Constitution describing the power and responsibilities of the executive branch has given presidents a great deal of flexibility to increase its size and scope over the years, in terms of both the range of its authority and the number of people, offices, and agencies employed to carry out its responsibilities. Today, the executive branch consists of well over 3 million people who work in one of three general areas: the Executive Office of the President (EOP); the cabinet and 15 executive departments; and an extensive collection of federal agencies and corporations responsible for specific areas of the government, such as the ENVIRONMENTAL PROTECTION AGENCY and the U.S. POSTAL SERVICE.

**Executive Office of the President** The Executive Office of the President (EOP) is not a single office or department, but a collection of agencies that are all directly responsible for helping the president to interact with Congress and to manage the larger executive branch. Specific elements have changed over the years; currently, the EOP consists of nine separate divisions: the White House Office, the OFFICE OF MANAGEMENT AND BUDGET (OMB), the Council of Economic Advisers, the NATIONAL SECURITY COUNCIL (NSC), the Office of Policy Development, the OFFICE OF THE U.S. TRADE REPRESENTATIVE (USTR), the Council on Environmental Quality, the Office of Science and Technology Policy, and the OFFICE OF ADMINISTRATION.

In contrast to modern presidents, early presidents had few people to help them, because the Constitution contained no specific provision or allowance for presidential staff. As a result, presidents became overworked and exhausted. THOMAS JEFFERSON, for example, wrote that the presidency "brings nothing but unceasing

drudgery and daily loss of friends." In many cases, presidents used their own money to hire their sons, nephews, or in-laws to work as clerks or secretaries. In 1825, President JAMES MONROE requested that Congress appropriate funds for presidential staff, but Congress was unwilling to spend the money. It was not until 1857 that Congress approved a specific appropriation for the president to hire a private secretary. Throughout the rest of the nineteenth and early twentieth centuries, Congress slowly appropriated more money for presidential staff, allowing the president to hire a greater number of secretaries, clerks, and other assistants, such as stenographers and messengers.

The crisis of the Great Depression in the 1930s created a need for the presidential staff to be fundamentally reorganized and expanded. Whereas presidents of the nineteenth century had functioned with very limited powers, President FRANKLIN D. ROOSEVELT took on a much stronger role, developing his collection of NEW DEAL programs to try to grapple with the tremendous social and economic problems facing the country. These programs resulted in a much larger and more complex federal bureaucracy that was difficult to manage, leading Roosevelt to create the Committee on Administrative Management, popularly known as the Brownlow Committee. Headed by Louis Brownlow, the task of the Brownlow Committee was to study the organization of the executive branch and to suggest solutions to the problem of administrative management.

The Brownlow report, completed in 1937, made several recommendations, including the creation of the Executive Office of the President, which would bring together agencies concerned with executive branch activities, such as budgeting, efficiency, personnel, and planning. Though Congress rejected other proposals contained in the Brownlow report, it approved the creation of the EOP, by passing the Reorganization Act in April 1939 (3 U.S.C.A. § 106, 31 U.S.C.A. §§ 701, 1101). As a result, key managerial agencies, such as the Bureau of the Budget and the National Resources Planning Board, were moved into the EOP; the benefit of this move was that crucial management functions could be performed by staff working directly under the president, completing the routine tasks necessary for the government to function. Though the specific elements of the EOP have changed since Roosevelt's presidency, the Brownlow report laid the foundations for the basic administrative structure that allows presidents to manage the numerous and diverse parts of the executive branch.

**The Cabinet and Executive Departments**

The cabinet consists of the president, the vice president, the heads of the 15 executive departments, and any other government officials the president wishes to include, such as the head of the OMB or the head of the NSC. In theory, cabinet members serve as expert advisers to the president, but in practice they more often operate as advocates for their departments and are seldom involved in actual presidential decision making.

The Constitution makes no specific reference to a president's cabinet; rather, the cabinet is an institution that has evolved over the years. The first executive departments (the Departments of State, War, and the Treasury) were created in 1789 by Washington, who frequently held conferences with their heads (Jefferson, Henry Knox, and ALEXANDER HAMILTON, respectively). By 1793, JAMES MADISON was using the term *cabinet* to refer to these conferences. The name and the institution took hold, and the cabinet became a fixed element of the executive branch.

Presidents have used their cabinets in widely different ways. During the nineteenth century, cabinet appointments were often made for political reasons, rather than because a president knew or trusted the particular individuals selected. As a result, some presidents had trouble controlling their cabinet, and others met with their cabinet only infrequently. ANDREW JACKSON, for example, virtually ignored his official cabinet in favor of his kitchen cabinet, a close circle of personal friends whom he trusted for information and advice. During the twentieth century, cabinets have most often served as a forum for the president to discuss issues and to collect opinions; rarely, if ever, have they served as a decision-making body. Instead, the White House staff members frequently function as primary advisers to the president.

The largest organizational units within the executive branch are the 15 executive departments: Agriculture, Commerce, Defense, Education, Energy, HEALTH AND HUMAN SERVICES, Homeland Security, HOUSING AND URBAN DEVELOPMENT, Interior, Justice, Labor, State, Transportation, the Treasury, and Veterans

Affairs. These departments, which vary greatly in size and function, are responsible for administering the great majority of the federal government's activities and programs.

The HOMELAND SECURITY DEPARTMENT is the newest division of the executive branch. This powerful new department was created in November 2002, and its creation was spurred by the SEPTEMBER 11TH TERRORIST ATTACKS of 2001. President GEORGE W. BUSH first objected to the idea of establishing this department, but he then became a strong advocate for it. The birth of the department was the largest federal government reorganization since the creation of the DEFENSE DEPARTMENT in 1947. Homeland Security is divided into four divisions: border and transportation security; emergency preparedness and response; chemical, biological, radiological and nuclear countermeasures; and information analysis and infrastructure protection. Existing agencies that have moved to the new department are the Immigration and Naturalization Service, the Coast Guard, Customs, the Border Patrol, the FEDERAL EMERGENCY MANAGEMENT AGENCY, the SECRET SERVICE, the Transportation Security Administration, and the border inspection authority of the Animal and Plant Health Inspection Service. Homeland Security will analyze intelligence from sources such as the CENTRAL INTELLIGENCE AGENCY, the National Security Agency, the FEDERAL BUREAU OF INVESTIGATION, the DRUG ENFORCEMENT ADMINISTRATION, the ENERGY DEPARTMENT, the Customs Service, and the DEPARTMENT OF TRANSPORTATION.

**Agencies and Corporations** The executive branch includes a large number of agencies for which the president is responsible. Some of these agencies function independently; others are connected to an executive department but still may function as largely autonomous units. These agencies manage specific areas of government operations and have little in common except that they lie outside of the traditional management structure of the executive departments. In general, they come in three types: regulatory agencies, independent executive agencies, and government corporations.

*Members of President George W. Bush's cabinet in April 2001. The cabinet consists of the president, vice president, the heads of the 14 executive departments, and any other government official the president wishes to include.*

AP/WIDE WORLD PHOTOS

Regulatory agencies and commissions control certain economic activities and consumer affairs. They include the SECURITIES AND EXCHANGE COMMISSION and the Occupational Safety and Health Administration. Regulatory agencies and commissions are created by Congress when members believe that certain economic or commercial activities need to be regulated. They accomplish the task of regulation in various ways, depending on their mandate from Congress. Typical methods of regulation include requiring licensing for specific professions and requiring products to be labeled accurately. Some regulatory agencies operate independently, some are governed by bipartisan commissions, and some report to an executive department.

Independent executive agencies are not part of any executive department; rather, they report directly to the president. These agencies include the National AERONAUTICS and Space Administration (NASA) and the GENERAL SERVICES ADMINISTRATION. Frequently, Congress makes such agencies independent so that they can operate without the burden of bureaucratic regulations or the influence of particular executive departments. For example, NASA was made an independent agency so that it could be created more quickly, function more freely, and avoid the demands and influence of the DEPARTMENT OF DEFENSE.

Government corporations are a unique type of agency in that they function like businesses, providing necessary public services that would be too expensive or unprofitable for private companies to provide. They include the U.S. Postal Service; Amtrak; and the TENNESSEE VALLEY AUTHORITY, which was created to develop electric power in the Tennessee Valley region. Corporations have more independence than do agencies of any other type. They can buy and sell real estate, and they can sue and be sued. They are not dependent on annual appropriations from Congress, and they retain their own earnings. Congress does provide long-term funding for government corporations, however, so it retains a certain amount of control over their operations.

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CROSS-REFERENCES

Administrative Agency; Congress of the United States; Constitution of the United States; Federal Budget; Separation of Powers.

## EXECUTIVE ORDER

*A presidential policy directive that implements or interprets a federal statute, a constitutional provision, or a treaty.*

The president's power to issue executive orders comes from Congress and the U.S. Constitution. Executive orders differ from presidential proclamations, which are used largely for ceremonial and honorary purposes, such as declaring National Newspaper Carrier Appreciation Day.

Executive orders do not require congressional approval. Thus, the president can use them to set policy while avoiding public debate and opposition. Presidents have used executive orders to direct a range of activities, including establishing migratory bird refuges; putting Japanese-Americans in internment camps during WORLD WAR II; discharging civilian government employees who had been disloyal, following World War II; enlarging national forests; prohibiting RACIAL DISCRIMINATION in housing; pardoning VIETNAM WAR draft evaders; giving federal workers the right to bargain collectively; keeping the federal workplace drug free; and sending U.S. troops to Bosnia.

Historically, executive orders related to routine administrative matters and to the internal operations of federal agencies, such as amending Civil Service Rules and overseeing the administration of public lands. More recently, presidents have used executive orders to carry out legislative policies and programs. As a result, the executive order has become a critical tool in presidential policy making. For example, President JOHN F. KENNEDY used an executive order to eliminate racial discrimination in federally funded housing (Exec. Order No. 11,063, 3

*A sample executive order.*

**Executive Order**

the
*White House*
President George W. Bush

For Immediate Release
Office of the Press Secretary
September 14, 2001

**President Orders Ready Reserves of Armed Forces to Active Duty**
Executive Order
Ordering the Ready Reserve of the Armed Forces to Active Duty And
Delegating Certain Authorities to the Secretary of Defense And
the Secretary of Transportation

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the National Emergencies Act (50 U.S.C. 1601 et seq.) and section 301 of title 3, United States Code, and in furtherance of the proclamation of September 14, 2001, Declaration of National Emergency by Reason of Certain Terrorist Attacks, which declared a national emergency by reason of the terrorist attacks on the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States, I hereby order as follows:

Section 1. To provide additional authority to the Department of Defense and the Department of Transportation to respond to the continuing and immediate threat of further attacks on the United States, the authority under title 10, United States Code, to order any unit, and any member of the Ready Reserve not assigned to a unit organized to serve as a unit, in the Ready Reserve to active duty for not more than 24 consecutive months, is invoked and made available, according to its terms, to the Secretary concerned, subject in the case of the Secretaries of the Army, Navy, and Air Force, to the direction of the Secretary of Defense. The term "Secretary concerned" is defined in section 101(a)(9) of title 10, United States Code, to mean the Secretary of the Army with respect to the Army; the Secretary of the Navy with respect to the Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Navy; the Secretary of the Air Force with respect to the Air Force; and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

Sec. 2. To allow for the orderly administration of personnel within the armed forces, the following authorities vested in the President are hereby invoked to the full extent provided by the terms thereof: section 527 of title 10, United States Code, to suspend the operation of sections 523, 525, and 526 of that title, regarding officer and warrant officer strength and distribution; and sections 123, 123a, and 12006 of title 10, United States Code, to suspend certain laws relating to promotion, involuntary retirement, and separation of commissioned officers; end strength limitations; and Reserve component officer strength limitations.

Sec. 3. To allow for the orderly administration of personnel within the armed forces, the authorities vested in the President by sections 331, 359, and 367 of title 14, United States Code, relating to the authority to order to active duty certain officers and enlisted members of the Coast Guard and to detain enlisted members, are invoked to the full extent provided by the terms thereof.

Sec. 4. The Secretary of Defense is hereby designated and empowered, without the approval, ratification, or other action by the President, to exercise the authority vested in the President by sections 123, 123a, 527, and 12006 of title 10, United States Code, as invoked by sections 2 and 3 of this order.

Sec. 5. The Secretary of Transportation is hereby designated and empowered, without the approval, ratification, or other action by the President, to exercise the authority vested in sections 331, 359, and 367 of title 14, United States Code, when the Coast Guard is not serving as part of the Navy, as invoked by section 2 of this order, to recall any regular officer or enlisted member on the retired list to active duty and to detain any enlisted member beyond the term of his or her enlistment.

Sec. 6. The authority delegated by this order to the Secretary of Defense and the Secretary of Transportation may be redelegated and further subdelegated to civilian subordinates who are appointed to their offices by the President, by and with the advice and consent of the Senate.

Sec. 7. Based upon my determination under 10 U.S.C. 2201(c) that it is necessary to increase (subject to limits imposed by law) the number of members of the armed forces on active duty beyond the number for which funds are provided in appropriation Acts for the Department of Defense, the Secretary of Defense may provide for the cost of such additional members as an excepted expense under section 11(a) of title 41, United States Code.

Sec. 8. This order is intended only to improve the internal management of the executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Sec. 9. This order is effective immediately and shall be promptly transmitted to the Congress and published in the Federal Register.

GEORGE W. BUSH

THE WHITE HOUSE, September 14, 2001.

C.F.R. 652 [1959–1963], *reprinted in* 42 U.S.C.A. § 1982 app. at 6-8 [1982]); President LYNDON B. JOHNSON acted through an executive order to prohibit discrimination in government contractors' hiring practices (Exec. Order No. 11,246, 3 C.F.R. 339 [1964–1965], *reprinted in* 42 U.S.C.A. § 2000e app. at 28-31 [1982], *amended by* Exec. Order No. 11,375, 3 C.F.R. 684 [1966–1970], *superseded by* Exec. Order No. 11,478, 3 C.F.R. 803 [1966–1970], *reprinted in* 42 U.S.C.A. § 2000e app. at 31-33 [1982]); and President RICHARD M. NIXON used an executive order to set a ninety-day freeze on all prices, rents, wages, and salaries in reaction to rising inflation and unemployment (Exec. Order No. 11,615, 3 C.F.R. 602 [1971–1975], *amended by* Exec. Order No. 11,617, 3 C.F.R. 609 [1971–1975], *superseded by* Exec. Order No. 11,627, 3 C.F.R. 621 [1971–1975]).

Most executive orders are issued under specific statutory authority from Congress and have the force and effect of law. Such executive orders usually impose sanctions, determine legal rights, limit agency discretion, and require immediate compliance. Federal courts consider such orders to be the equivalent of federal statutes. In addition, regulations that are enacted to carry out these executive orders have the status of law as long as they reasonably relate to the statutory authority. An administrative action that is carried out under a valid executive order is similar to an agency action that is carried out under a federal statute. In each case, the agency's authority to enact rules and to issue orders comes from Congress.

Absent specific statutory authority, an executive order may have the force and effect of law if Congress has acquiesced in a long-standing executive practice that is well-known to it. For example, in *Dames v. Regan,* 453 U.S. 654, 101 S. Ct. 2972, 69 L. Ed. 2d 918 (1981), the U.S. Supreme Court upheld various executive orders that suspended claims of U.S. nationals arising out of the Iranian hostage crisis, citing Congress's ACQUIESCENCE in a 180-year-old practice of settling U.S. citizens' claims against foreign governments by executive agreement. In describing the situation before it, the Court stated,

> We freely confess that we are obviously deciding only one more episode in the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances.

Executive orders also may be authorized by the president's independent constitutional authority (*Cunningham v. Neagle,* 135 U.S. 1, 10 S. Ct. 658, 34 L. Ed. 55 [1890]). Various clauses of the U.S. Constitution have been cited to support the issuance of executive orders. Among them are the Vestiture Clause, which states, "The executive Power shall be vested in a President of the United States of America" (art. II, § 1, cl. 1); the Take Care Clause, which states that the president "shall take Care that the Laws be faithfully executed" (art. II, § 3); and the Commander in Chief Clause, which states that the president "shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States" (art. II, § 2, cl. 1).

Executive orders often omit citing a specific constitutional provision as authority. For example, Executive Order No. 11,246 (3 C.F.R. 339 [1964–1965 Comp.]), which prohibits discrimination in federal employment, simply states, "Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows . . ."

Some executive orders issued pursuant to the president's independent constitutional authority have been criticized as implementing what has been called essentially executive managerial policy. Although this type of order is directed toward public officials, it also may affect private interests, through the actions of such officials. For example, Executive Order No. 11,246, which prohibits discrimination in federal procurement and employment, affects the interests of federal contractors and their employees; Executive Order No. 10,988 (3 C.F.R. 521 [1959–1963 Comp.]), which extends COLLECTIVE BARGAINING to the federal workforce, affects federal workers; and Executive Order No. 12,291 (3 C.F.R. 127 [1982]), which imposes controls on administrative rule making, affects individuals who are subject to administrative regulations.

Lawsuits that are brought in order to force federal agencies to comply with executive orders are usually dismissed by the courts on the ground that the orders do not provide a CAUSE

OF ACTION (i.e., a right to judicial relief). For example, in *Acevedo v. Nassau County,* 500 F.2d 1078 (2d Cir. 1974), low-income minority groups claimed that the GENERAL SERVICES ADMINISTRATION had violated Executive Order No. 11,512 (35 Fed. Reg. 3,979 [1970]) by planning a federal office building without considering the adequacy of low-income housing in the area. The federal court of appeals refused to decide the claim because the plaintiffs lacked standing (i.e., a legally protectible interest). In *Manhattan-Bronx Postal Union v. Gronouski,* 350 F.2d 451 (D.C. Cir. 1965), the court denied a claim against the postmaster general for violating Executive Order No. 10,988 (3 C.F.R. 521 [1959–1963]), because the president had not granted a right of action. In *Independent Meat Packers Ass'n v. Butz,* 526 F.2d 228 (8th Cir. 1975), the appellate court stated that to infer a cause of action would create "a serious risk that a series of protracted lawsuits brought by persons with little at stake would paralyze the rulemaking functions of federal administrative agencies."

Similarly, the courts generally reject claims against private defendants for violations of executive orders. For example, in *Cohen v. Illinois Institute of Technology,* 524 F.2d 818 (7th Cir. 1975), 425 U.S. 943, 96 S. Ct. 1683, 48 L. Ed. 2d 187 (1976), the appellate court denied a professor's claim against a university to recover damages for SEX DISCRIMINATION in violation of Executive Order No. 11,246, stating that the executive order could not give rise to an independent private cause of action.

To have the effect of law, executive orders must appear in the *Federal Register,* the daily publication of federal rules and regulations. Executive orders are also compiled annually and are published in the *Code of Federal Regulations.* Selected orders are published with related statutes in *U.S. Code Annotated* and *U.S. Code Service.*

Executive orders have been used to influence issues in hundreds of areas. War-related activities are among the most frequently addressed. For example, in September 1939, President FRANKLIN D. ROOSEVELT prescribed regulations governing the enforcement of the neutrality of the United States "in the war then being fought between Germany and France; Poland; and the United Kingdom, India, Australia, and New Zealand" (Exec. Order No. 8,233, 4 Fed. Reg. 3,822). By February 1942, the United States had joined World War II, and Roosevelt had ordered the confinement of Japanese-Americans to internment camps following the bombing of Pearl Harbor in January 1941 (Exec. Order No. 9,066, 7 Fed. Reg. 1,407). In March 1947, following the war, President HARRY S. TRUMAN established loyalty review boards to discharge civilian government employees who had been disloyal during the war (Exec. Order No. 9835, 3 C.F.R. 627 (1943–1948), *revoked by* Exec. Order No. 10,450, 3 C.F.R. 936 (1949–1953). In January 1977, following the Vietnam War, President JIMMY CARTER directed the U.S. attorney general to cease investigating and indicting Vietnam War draft evaders (Exec. Order No. 11,967, 42 Fed. Reg. 4,393). In December 1995, President BILL CLINTON ordered the U.S. reserve armed forces into active duty to augment the active armed forces' operations in and around the former Yugoslavia (Bosnia) (Exec. Order No. 12,982, 60 Fed. Reg. 63,895).

Following the SEPTEMBER 11TH TERRORIST ATTACKS on the United States, President GEORGE W. BUSH used his authority to issue a number of executive orders. Following his declaration of a national emergency on September 14, 2001, he called members of the armed forces' Ready Reserve to active duty (Exec. Order No. 13,223, 66 Fed. Reg. 48201). Ten days later, he issued an executive order that blocked the financing of terrorist organizations (Exec. Order No 13,224, 66 Fed Reg. 49079). President Bush also created the HOMELAND SECURITY DEPARTMENT by executive order, before Congress authorized this cabinet-level department (Exec. Order No. 12,228, 66 Fed.Reg. 51812).

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Administrative Acts; Administrative Agency; Constitution of the United States; Federal Register; Japanese American Evacuation Cases; Presidential Powers.

## EXECUTIVE PRIVILEGE

*The right of the president of the United States to withhold information from Congress or the courts.*

Historically, presidents have claimed the right of executive privilege when they have information they want to keep confidential, either because it would jeopardize national security or because disclosure would be contrary to the interests of the EXECUTIVE BRANCH.

The Constitution does not specifically enumerate the president's right to executive privilege; rather, the concept has evolved over the years as presidents have claimed it. As the courts have ruled on these claims, their decisions have refined the notion of executive privilege and have clarified the instances in which it can be invoked. The courts have ruled that it is implicit in the constitutional SEPARATION OF POWERS, which assigns discrete powers and rights to the legislative, executive, and judicial branches of government. In reality, however, the three branches enjoy not separate but shared powers, and thus are occasionally in conflict. When the president's wish to keep certain information confidential causes such a conflict, the president might claim the right of executive privilege.

The term *executive privilege* emerged in the 1950s, but presidents since GEORGE WASHINGTON have claimed the right to withhold information from Congress and the courts. The issue first arose in 1792, when a congressional committee requested information from Washington regarding a disastrous expedition of General Arthur St. Clair against American Indian tribes along the Ohio River, which resulted in the loss of an entire division of the U.S. Army. Washington, concerned about how to respond to this request and about the legal precedent his actions would set, called a cabinet meeting. Although no official record was kept of the proceedings, THOMAS JEFFERSON described the deliberations in his diary. The participants, Jefferson wrote, concluded that Congress had the right to request information from the president and that the president "ought to communicate such papers as the public good would permit & ought to refuse those the disclosure of which would injure the public." In the case at hand, they agreed that "there was not a paper which might not be properly produced," so Washington provided all the documents that Congress had requested. This event, though notable as the first recorded deliberation concerning executive privilege, did not carry precedential value until after 1957, when Jefferson's notes were discovered. In 1958, Attorney General William P. Rogers cited Jefferson's remarks as precedent for an absolute presidential privilege. Legal scholar Raoul Berger declaimed Rogers's arguments as "at best self-serving assertions by one of the claimants in a constitutional boundary dispute." Instead, Berger argued, Washington's willingness to turn over the requested documents shows his recognition of Congress's right to such materials.

In subsequent incidents, however, Washington and his successors did choose to withhold requested information from Congress, citing various reasons. In 1794, for example, the Senate requested from Washington the correspondence of Gouverneur Morris, the U.S. ambassador to France, who was suspected of aiding the French aristocrats against the revolutionaries despite the United States' official stance of neutrality. Washington provided the letters, but he censored them first, acting on the advice of officials such as Attorney General WILLIAM BRADFORD, who said that the president should "communicate to the Senate such parts of the said correspondence as upon examination he shall deem safe and proper to disclose: withholding all such, as any circumstances, may render improper to be communicated." The following year, Washington refused to provide the House with information relating to Ambassador John Jay's negotiation of a treaty with Great Britain, arguing that the House had no constitutional right to participate in the treaty making process and so had no right to request materials associated with it.

The judiciary, like Congress, can also request information from the president. When AARON BURR was indicted on charges of TREASON, for example, both Congress and the judiciary asked President Jefferson to provide correspondence from General James Wilkinson, a Burr confidant and aide. Jefferson argued that it was wrong to ask him to provide private letters, written to him, containing confidential information. Chief Justice JOHN MARSHALL, presiding over the Burr trial, *United States v. Burr,* 25 Fed. Cas. 187, 191 (C.C. Va. 1807), did not ultimately force Jefferson to turn over each requested document, but he did maintain the right of the judiciary to request such information from the president, writing that "the President of the United States may be . . . required to produce any paper in his possession" and adding that "[t]he occasion for demanding it ought, in such a case, [to] be very

strong, and to be fully shown to the court before its production could be insisted on."

As the power of the president's office grew over the nineteenth and twentieth centuries, presidents attempted more frequently to use executive privilege to shield themselves and their subordinate officials from investigation. In 1836, for example, a House committee requested personnel rosters and salary information from President ANDREW JACKSON. He declined to fulfill the request, stating that he would "repudiate all attempts to invade the just rights of Executive Departments, and of the individuals composing the same." Similarly, in 1909, President THEODORE ROOSEVELT took personal possession of FEDERAL TRADE COMMISSION documents requested by Congress, claiming IMMUNITY for the materials since they were under presidential control. In both cases, Congress failed to pursue its investigations.

During the presidency of DWIGHT D. EISENHOWER, executive privilege underwent three major developments. First, in the area of national security, the Supreme Court ruled in *United States v. Reynolds,* 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953), that the military may refuse to divulge requested information when national security is at stake. While warning that such requests could not be simply left to the "caprice of executive officers," the Court maintained that there would be times when "there is a reasonable danger that the compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."

The second development in the use of executive privilege became known as the candid interchange doctrine. In an attempt to shield the executive branch from the bullying investigative tactics of Senator JOSEPH R. MCCARTHY, President Eisenhower directed that executive privilege be applied to all communications and conversations between executive branch employees; without the assurance of confidentiality, he claimed, they could not be completely candid. This doctrine marked a tremendous change in the scope of executive privilege, extending it from the president and the president's top advisers to the myriad offices and agencies that make up the executive branch.

Finally, the third development in executive privilege resulted from *Kaiser Aluminum & Chemical Corp. v. United States,* 157 F. Supp. 939, 141 Ct. Cl. 38 (Cl. Ct. 1958). In this case, Kaiser sought documents containing executive branch employees' opinions regarding the sale of aluminum manufacturing plants. The court ruled that it was ultimately up to the courts "to determine executive privilege in litigation," adding that "the privilege for intradepartmental advice would very rarely have the importance of diplomacy or security." The opinion in this case contains the first recorded use of the phrase *executive privilege.*

The use of executive privilege decreased during the 1960s, but it became the crux of the constitutional crisis created by WATERGATE, a series

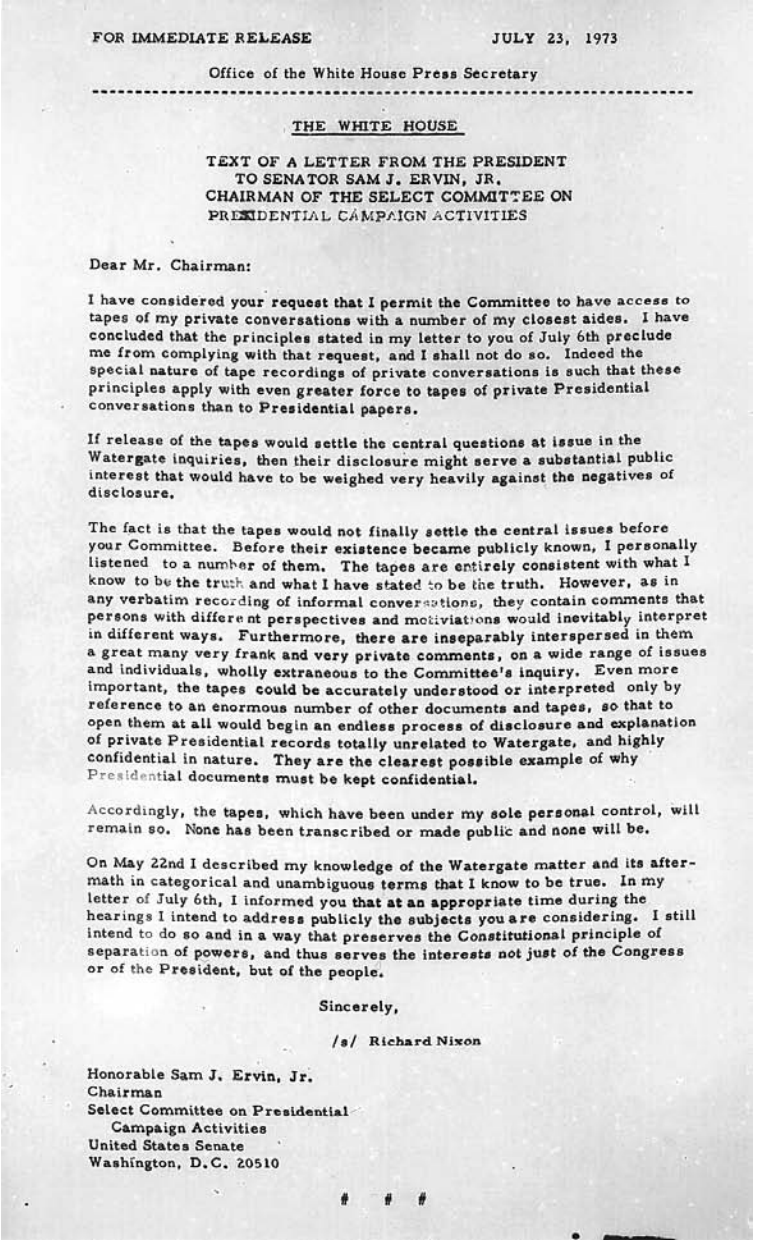

FOR IMMEDIATE RELEASE JULY 23, 1973

Office of the White House Press Secretary

THE WHITE HOUSE

TEXT OF A LETTER FROM THE PRESIDENT
TO SENATOR SAM J. ERVIN, JR.
CHAIRMAN OF THE SELECT COMMITTEE ON
PRESIDENTIAL CAMPAIGN ACTIVITIES

Dear Mr. Chairman:

I have considered your request that I permit the Committee to have access to tapes of my private conversations with a number of my closest aides. I have concluded that the principles stated in my letter to you of July 6th preclude me from complying with that request, and I shall not do so. Indeed the special nature of tape recordings of private conversations is such that these principles apply with even greater force to tapes of private Presidential conversations than to Presidential papers.

If release of the tapes would settle the central questions at issue in the Watergate inquiries, then their disclosure might serve a substantial public interest that would have to be weighed very heavily against the negatives of disclosure.

The fact is that the tapes would not finally settle the central issues before your Committee. Before their existence became publicly known, I personally listened to a number of them. The tapes are entirely consistent with what I know to be the truth and what I have stated to be the truth. However, as in any verbatim recording of informal conversations, they contain comments that persons with different perspectives and motivations would inevitably interpret in different ways. Furthermore, there are inseparably interspersed in them a great many very frank and very private comments, on a wide range of issues and individuals, wholly extraneous to the Committee's inquiry. Even more important, the tapes could be accurately understood or interpreted only by reference to an enormous number of other documents and tapes, so that to open them at all would begin an endless process of disclosure and explanation of private Presidential records totally unrelated to Watergate, and highly confidential in nature. They are the clearest possible example of why Presidential documents must be kept confidential.

Accordingly, the tapes, which have been under my sole personal control, will remain so. None has been transcribed or made public and none will be.

On May 22nd I described my knowledge of the Watergate matter and its aftermath in categorical and unambiguous terms that I know to be true. In my letter of July 6th, I informed you that at an appropriate time during the hearings I intend to address publicly the subjects you are considering. I still intend to do so and in a way that preserves the Constitutional principle of separation of powers, and thus serves the interests not just of the Congress or of the President, but of the people.

Sincerely,

/s/ Richard Nixon

Honorable Sam J. Ervin, Jr.
Chairman
Select Committee on Presidential
Campaign Activities
United States Senate
Washington, D.C. 20510

# # #

*President Richard Nixon cited executive privilege when he refused to release tapes of his conversations in the Oval Office to the Senate committee investigating the Watergate burglary and cover-up.*

AP/WIDE WORLD PHOTOS

of scandals involving President RICHARD M. NIXON and his associates. When Congress sought to obtain White House tapes containing Oval Office conversations, Nixon refused to turn them over, claiming that the tapes were subject to absolute executive privilege and asserting that the judiciary had no authority to order their production or inspection. Eventually the dispute reached the Supreme Court, where, in UNITED STATES V. NIXON, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), the Court ruled against Nixon. While acknowledging the importance of the president's claims, the Court stated that "neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances." In its opinion, therefore, the Court explicitly recognized the president's authority to assert executive privilege but ruled that the use of executive privilege is limited, not absolute. Furthermore, the Court maintained that the judiciary, not the president, has the power to determine the applicability of executive privilege. While the Court affirmed the use of executive privilege, therefore, it determined that in this case, the right of the U.S. people to full disclosure outweighed the president's right to secrecy. This momentous decision soon led to Nixon's resignation from the office of president.

Executive branch officials under presidents WILLIAM JEFFERSON CLINTON and GEORGE W. BUSH have sought to limit dissemination of information through executive privilege, though these efforts were often unsuccessful. When Clinton was investigated by Independent Counsel KENNETH W. STARR about whether Clinton lied in a deposition regarding an affair with a former White House intern, Starr subpoenaed SECRET SERVICE agents to testify before a GRAND JURY about Clinton's actions. Several agents refused to testify. This forced Starr to file a motion in the U.S. District Court for the District of Columbia to compel their testimony. The agents asserted they were protected by a "protective function" privilege that allowed them to conceal what they observe in the protection of the president.

U.S. District Judge Norma Holloway Johnson declined to recognize the privilege, holding that there was no support for it in the U.S. Constitution, federal statute, or the COMMON LAW. Johnson cited federal statutes that require the president to accept Secret Service protection and require executive branch personnel, which includes Secret Service agents, to report criminal activity that they observe. The absence of a protective function privilege in those statutes suggested that Congress did not intend to create one. She rejected the argument that without the privilege, presidents would push away their protectors.

Officials in the Bush administration have also been criticized for failing to release information in an investigation of an energy taskforce led by Vice President Richard B. Cheney. A federal judge ordered the release of the information under the FREEDOM OF INFORMATION ACT, but administrators stalled when delivering the information. Although the case against Cheney's energy group was later dismissed, several liberal and conservative interest groups have criticized the Bush administration for its policy of controlling information. In October 2001, Attorney General JOHN DAVID ASHCROFT issued a memorandum to government agencies suggesting that the U.S. JUSTICE DEPARTMENT would defend an agency if it chose to withhold certain records requested through the FOIA.

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## EXECUTORS AND ADMINISTRATORS

*Those who are designated by the terms of a will or appointed by a court of probate to manage the assets and liabilities of the estate of the deceased.*

When a person dies leaving property, that property, called an estate, is usually settled or administered under the supervision of SPECIAL COURTS. Depending on the state, such courts are called probate, surrogate, or ORPHANS' COURTS. They are typically county courts with jurisdiction and powers defined by state laws.

States require court supervision for the settlement of estates for a number of reasons. Courts ensure that the assets of an estate will be properly collected, preserved, and assessed; that all relevant debts of the deceased and taxes will be paid; and that remaining assets will be distributed to the heirs according to the provisions of the will or applicable laws.

The duty of settling and distributing the estate of a decedent (one who has died) is

## Liability Considerations for Executors and Administrators

Your Aunt Lillian has just called to ask if you will serve as executor for her estate after her death. You are honored that she has considered you for this important responsibility, but you also know that there are risks associated with becoming an executor or administrator.

The most potentially damaging risk is liability for actions undertaken on behalf of the estate. The estate's beneficiaries, who are likely your relatives, may sue you if any of the following situations occur:

- You fail to properly secure and insure the assets of the estate, and it suffers a loss as a result.
- You diminish the estate through imprudent investments or inadequate record keeping.
- You fail to pay taxes on the estate, in which case you may be personally liable for interest and penalties.
- You sell an asset of the estate without authority to do so.
- You delay settlement of the estate unnecessarily or are tardy in executing important transactions.
- You engage in actions that constitute a conflict of interest.
- You improperly delegate decisions to others who have no legal authority over the estate.
- You approve a coexecutor's or coadministrator's breach of duty.

Fortunately, you can usually avoid these problems by taking a few simple steps:

- Most important of all, stay in touch with the estate's beneficiaries. Keep them informed of your actions and the general condition of the estate.
- Promptly meet all required deadlines.
- Maintain accurate records of all estate transactions and document all decisions made. Keep receipts of distributions made to beneficiaries.
- Obtain the written consent of all beneficiaries when changing estate investments.
- Obtain a court order from the probate court for significant estate transactions. Petition the court if the will is unclear regarding particular items.
- Keep affairs of the estate confidential.
- Avoid conflicts of interest. Do not put your own interests ahead of the interests of the estate's beneficiaries, and do not use assets of the estate for your own gain or profit.

By using common sense and following these guidelines, you can effectively settle an estate and avoid potential lawsuits.

assigned to personal representatives of the decedent. A PERSONAL REPRESENTATIVE may be an executor (male or female) or executrix (female), or administrator (male or female) or administratrix (female). An executor or executrix is the person named in a will to administer the estate. An administrator or administratrix is a person appointed by the court to administer the estate of someone who died without a will.

Executors and administrators act as officers of the court because they derive their authority from court appointments. They are also considered the fiduciaries, or trusted representatives, of the deceased. As such, they have an absolute duty to properly administer the estate solely for its beneficiaries.

Probate is the process by which the court establishes that a will is valid. The first step in the probate process is to file the will in the appropriate court with a petition to admit it to probate and to grant letters testamentary to the person designated as executor of the will. Letters testamentary are the formal instruments of authority and appointment given to an executor by the probate court, empowering that person to act as an executor.

If an executor is unable or refuses to serve, if there is no will, or if the will is deemed to be inauthentic or invalid, the court appoints an administrator. LETTERS OF ADMINISTRATION are the formal court papers that authorize a person to serve as an administrator of an estate that lacks a valid will.

No administrator is needed if a person dies without a will, possesses no assets, and owes no debts. Where a person dies leaving an estate, but there are no known living heirs, the state usually receives the property under the doctrine of ESCHEAT. In such cases, administration is not required, unless debts must be paid from the estate's assets before the state takes its interest.

The administration of a decedent's estate is controlled by statute. The probate court is authorized by statute to determine the fundamental facts essential to the administration of an estate.

As a general rule, the place of the decedent's last legal residence determines which probate court shall have jurisdiction over settlement of the estate.

### Executors

A person making a will—called a testator—should find out whether his or her choice of executor is willing to serve in that role. This small but sensible courtesy can prevent the spending of needless time and money in administration of the estate. A person named as an executor in a will is free to accept or reject the position within a reasonable time following the testator's death. If it is rejected, the court then must appoint another representative, causing a delay in the settlement of the estate and its final distribution to the heirs, and incurring greater legal fees for the estate.

Many people choose their surviving spouse as executor, since that person usually has the greatest knowledge of their financial affairs as well as the family situation. Some people name several persons to serve as coexecutors, to ensure that the estate will be handled fairly and honestly. Frequently, those making a will choose a professional such as an attorney or trust company to act as a coexecutor and to assist with complex issues of the estate.

It is also prudent for a testator to name an alternative executor to serve in the event the designated executor is unable or refuses to serve. A testator may change an executor as long as the change is recorded properly in the will.

Anyone who is capable of making a will is capable of becoming an executor. Courts can disqualify as executors persons who are legally incompetent or unsuitable. When this occurs, the court appoints either an alternative executor, if the will has named one, or an administrator. A person cannot be disqualified as an executor merely because he or she might inherit part of the estate.

### Administrators

A court usually appoints an administrator when a person dies without leaving a will. In most jurisdictions, courts are required by statute to name the spouse of the decedent as administrator. Where no spouse is involved, administration is usually assigned to the next of kin, such as parents, brothers and sisters, nieces and nephews, or cousins. Special laws, called statutes of DESCENT AND DISTRIBUTION, determine the next of kin who are entitled to serve as administrators.

### Terms of Office

As a general rule, executors and administrators are required to take an oath as prescribed by statute before beginning their duties. The taking of the oath constitutes acceptance of the office.

In some jurisdictions, statutes require the executor or administrator of an estate to file a bond to protect those interested in the estate. The amount of an executor's or administrator's bond will be forfeited if the representative is found to have deliberately mismanaged the estate.

The authority of an executor or administrator terminates only when the estate has been completely administered or the executor dies, resigns, or is suspended or removed. An executor can be removed from office for grounds specified by law, such as mismanagement, waste (abuse or destruction of the property), disloyalty, improper administration, NEGLIGENCE, or other misconduct in the administration of the estate. A representative can also be removed for failure to file a proper inventory, accounts, or tax returns within the required time; for failure to comply with a court order requiring him or her to furnish a bond; or for bankrupting the estate. The representative should be removed where personal interests conflict with official duties or where there is such enmity between the personal representative and the beneficiaries that it might interfere with proper management of the estate.

### General Duties

The general and primary duties of the administrator or executor are to administer the estate in an orderly and proper manner to the best advantage of all concerned, and to settle and distribute the assets of the estate as quickly and reasonably as is practicable.

Executors must submit the will to probate court, then dispose of the estate according to the will. Both executors and administrators must make an inventory and appraisal of the estate, then file that information with the court. Executors and administrators are held liable for the debts and taxes of the estate, as well as any losses resulting from unauthorized or improper investments of estate funds.

Executors and administrators are, as a rule, allowed a reasonable compensation for the services they perform in the administration of a decedent's estate. This right arises from and is controlled by statute, unless the will specifically provides the amount of an executor's compensation. Commissions are the most common form of compensation to executors and administrators.

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## EXECUTORY

*That which is yet to be fully executed or performed; that which remains to be carried into operation or effect; incomplete; depending upon a future performance or event. The opposite of* executed.

## EXEMPLIFICATION

*An official copy of a document from public records, made in a form to be used as evidence, and authenticated or certified as a true copy.*

Such a duplicate is also referred to as an exemplified copy or a certified copy.

## EXERCISE

*To put into action, practice, or force; to make use of something, such as a right or option.*

To exercise dominion over land is to openly indicate absolute possession and control.

To exercise discretion is to choose between doing and not doing something, the decision being based on sound judgment.

## EXHAUSTION OF REMEDIES

*The exhaustion-of-remedies doctrine requires that procedures established by statute,* COMMON LAW, *contract, or custom must be initiated and followed in certain cases before an aggrieved party may seek relief from the courts. After all other available remedies have been exhausted, a lawsuit may be filed.*

Most commonly, exhaustion of remedies applies where an ADMINISTRATIVE AGENCY has been established by Congress to handle grievances that occur under its purview. For example, if a dispute arises over a provision in a labor contract, the parties may be required to follow specific grievance procedures administered by the NATIONAL LABOR RELATIONS BOARD (NLRB). After the parties have satisfied each requirement of the grievance process, and the NLRB has reached its final decision, they may appeal the decision to a higher tribunal.

The rationale behind requiring parties to exhaust their administrative remedies is that the agencies have the specialized personnel, experience, and expertise to sort and decide matters that arise under their jurisdiction. Also, the doctrine of SEPARATION OF POWERS dictates that an agency created by Congress should be allowed to carry out its duties without undue interference from the judiciary.

The exhaustion-of-remedies doctrine also applies in certain classes of cases where state remedies must be exhausted before a party may pursue a case in federal court. In these situations, exhaustion of remedies is a rule of comity, or courtesy, by which federal courts defer to state courts to make the initial determination as to all claims, federal or state, raised in a case. For example, petitions for HABEAS CORPUS (release from unlawful imprisonment) by an inmate of a state prison are not heard by a federal court until after all state remedies are exhausted (see *Darr v. Burford,* 339 U.S. 200, 70 S. Ct. 587, 94 L. Ed. 761 [1950]).

As with most legal doctrines, there are exceptions to the exhaustion-of-remedies requirement. A party bringing a CIVIL RIGHTS action under 42 U.S.C.A. § 1983 is not required to exhaust state remedies before filing suit in federal court. In *Patsy v. Board of Regents,* 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982), the Supreme Court held that the plaintiff—who claimed she was denied employment by a state university because of her race and her sex—was not required to exhaust her state administrative

*This .22-caliber revolver used by John Hinckley in his assassination attempt against President Ronald Reagan was submitted as evidence in Hinckley's 1982 trial. An exhibit is tangible evidence submitted to a court for inspection during the course of trial proceedings.*

AP/WIDE WORLD PHOTOS

remedies before filing her suit in federal court, because such a requirement would be inconsistent with congressional intent in passing civil rights legislation.

Similarly, a criminal defense exception has been carved out by the Court. It allows a criminal defendant to raise the defense of improper administrative procedure even in cases where the defendant failed to exhaust all available administrative remedies. For example, in *McKart v. United States,* 395 U.S. 185, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969), the defendant—who was charged with failure to report for induction into the armed services—was allowed to claim that his draft classification was invalid even though he had failed to pursue administrative remedies.

Finally, courts may allow an exception to the exhaustion-of-remedies doctrine where administrative remedies are inadequate or would cause irreparable harm. In a case involving a claim of WRONGFUL DISCHARGE from employment, the Supreme Court held that the plaintiff—who may have had to wait up to ten years to be heard by the administrative agency—was not required to exhaust available administrative remedies before commencing a court action (*Walker v. Southern Ry.,* 385 U.S. 196, 87 S. Ct. 365, 17 L. Ed. 2d 294 [1966]).

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**CROSS-REFERENCES**

Administrative Law and Procedure.

## EXHIBIT

*As a verb, to show or display; to offer or present for inspection. To produce anything in public, so that it may be taken into possession. To present; to offer publicly or officially; to file of record. To administer; to cause to be taken, as medicines. To submit to a court or officer in the course of proceedings.*

*As a noun, a paper or document produced and exhibited to a court during a trial or hearing, or to a person taking depositions, or to auditors or arbitrators as a voucher, or in proof of facts, or as otherwise connected with the subject matter, and which, on being accepted, is marked for identification and annexed to the deposition, report, or other principal document, or filed of record, or otherwise made a part of the case.*

*A paper, document, chart, map, or the like, referred to and made a part of an* AFFIDAVIT, PLEADING, *or brief. An item of physical, tangible evidence that is to be or has been offered to the court for inspection.*

## EXONERATION

*The removal of a burden, charge, responsibility, duty, or blame imposed by law. The right of a party who is secondarily liable for a debt, such as a surety, to be reimbursed by the party with primary liability for payment of an obligation that should have been paid by the first party.*

## EXPATRIATION

*The* VOLUNTARY ACT *of abandoning or renouncing one's country and becoming the citizen or subject of another.*

## EXPECTANCY

*A mere hope, based upon no direct provision, promise, or trust. An expectancy is the possibility of receiving a thing, rather than having a vested interest in it.*

The term has been applied to situations where an individual hopes and expects to receive something, generally property or money, but has no founded assurance of possession. A person named in a will as an heir has only an expectancy to inherit under the will, since there

exists a possibility that the will may be altered so as to disinherit him or her.

## EXPERT TESTIMONY

*Testimony about a scientific, technical, or professional issue given by a person qualified to testify because of familiarity with the subject or special training in the field.*

Generally speaking, the law of evidence in both civil and criminal cases confines the testimony of witnesses to statements of concrete facts within their own observation, knowledge, and recollection. Testimony must normally state facts perceived by the witnesses' use of their own senses, as distinguished from their opinions, inferences, impressions, and conclusions drawn from the facts. Opinion testimony that is based on facts is usually considered incompetent and inadmissible, if the factfinders are as well qualified as the witness to draw conclusions from the facts.

In certain instances, however, the law allows witnesses to provide opinion evidence, and such evidence is divided into two classes, lay opinion and expert opinion. A lay witness may give his or her opinion when that opinion is (1) rationally based on the perception of the witness; (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and (3) not based on scientific, technical, or other specialized knowledge within the scope of expert testimony discussed below. Thus, lay witnesses who have had an opportunity to observe a particular vehicle in motion are normally permitted to testify that it was traveling at *a great rate of speed* or *was going pretty fast.* Lay witnesses are also normally allowed to give their opinion as to the height, weight, quantity, and dimensions of things, even if their testimony is not precise. By definition, a lay witness is any witness who is not qualified to testify as an expert on a particular subject.

Expert witnesses are persons who are qualified, either by actual experience or by careful study, to form definite opinions with respect to a division of science, a branch of art, or a department of trade. The law deems persons having no such experience or training to be incapable of forming accurate opinions or drawing correct conclusions. Thus, if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case. In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149-152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), the U.S. Supreme Court further observed that the reliability of a scientific technique may turn on whether the technique can be and has been tested; whether it has been subjected to peer review and publication; and whether there is a high rate of error or standards controlling its operation.

Courts do not apply a rigid rule in determining whether a particular witness is qualified to testify as an expert. Instead, an expert's qualifications are normally evaluated on a witness-by-witness basis, according to the facts and issues of each case. Several courts have stated that the true criterion in determining the qualification of expert witnesses is not whether they employ their knowledge and skill professionally or commercially, but whether the jury can receive appreciable help from them on the particular subject in issue. Many courts also require the witness to exhibit sufficient knowledge of the subject matter before his or her opinion to go to the jury.

The qualifications of an expert witness must be carefully scrutinized by courts to guard against charlatans who may give erroneous testimony without a sound foundation. Most courts will more closely scrutinize the qualifications of witnesses seeking to testify as experts if they have never been found qualified to give expert testimony on a prior occasion. However, primary reliance is not placed on the fact that it may be the expert's first time on the witness stand. Conversely, the fact that a witness has been previously qualified to give expert testimony on the subject matter in question is typically irrelevant to his or her qualifications for giving such testimony in a subsequent case.

There are two general classes of matters as to which expert testimony is admissible: (1) matters as to which the conclusions to be drawn by the jury depend on the existence of facts that are not common knowledge and that are specifically within the knowledge of persons whose experience or study enables them to testify with authority on the subjects in question; and (2) matters as to which the conclusions to be drawn

from the facts stated, as well as knowledge of the facts themselves, depend on professional or scientific knowledge not within the range of ordinary training or intelligence. In the first class, the facts are stated by the experts, and the conclusion is drawn by the jury. In the second class, the expert sets forth the facts and states a conclusion in the form of an opinion which may be accepted or rejected by the jury.

Accident reconstruction experts typically give testimony that falls into the first class of expert testimony. Such experts may testify as to the speed at vehicles were traveling, the distance before impact at which each driver began applying the breaks, and what, if any, accident-avoidance precautions each driver took. But accident reconstruction experts are not allowed to give their opinion as to which driver was responsible for the accident or testify as to the standard of care required to be exercised by the drivers. Both types of questions are ultimate issues that only a jury can determine. By contrast, in MEDICAL MALPRACTICE cases physicians may provide the jury with testimony regarding the underlying facts of the legal dispute and may aid the jury by describing the standard of care for diagnosis and treatment.

The general rule excluding opinion evidence concerning matters of common knowledge or experience, while clear as a matter of principle, is frequently difficult to apply. As a result, courts are given wide latitude in determining whether the opinions of an expert or lay witness are admissible, and appellate courts will not interfere with a lower court's ruling unless in making that ruling the trial court manifestly abused its discretion to the prejudice of the complaining party.

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## EXPLOSIVES

The law of explosives covers dangerously volatile substances, including gasoline, oil, dynamite, and blasting caps filled with highly explosive compounds. Under the POLICE POWER given to the states through the TENTH AMENDMENT to the U.S. Constitution, state and local governments may regulate the storing, handling, transportation, and use of explosive substances.

All states require a person or business to obtain a permit before using explosives, such as for a fireworks display or the demolition of a building. State laws and local ordinances criminalize the unlicensed use, storage, sale, and transportation of explosives. Most states provide that unlicensed explosives may be subject to FORFEITURE, and their possessors subject to fines or incarceration, or both.

States delegate some explosives regulation to municipalities. A MUNICIPAL CORPORATION may enact provisions for the inspection of explosives and their storage spaces. It may also prescribe the maximum quantity of particular explosives that are allowed to be kept in a particular location.

The U.S. Congress has the authority to regulate explosives in interstate commerce. Under 18 U.S.C.A. § 841 et seq., Congress requires a license to import, manufacture, distribute, or store explosive materials that cross state lines. The BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, a division of the U.S. JUSTICE DEPARTMENT, is charged with primary enforcement of the federal laws and regulations regarding explosives.

Explosives are a necessity in a developing world. They allow building contractors to excavate land and clear pathways for road building. However, explosives are inherently dangerous, and, despite strict government regulation, even the authorized use of explosives may cause injuries or property damage. When injury or damage occurs, an aggrieved person may seek redress in civil court.

Under TORT LAW, explosives are considered abnormally hazardous and are subject to STRICT LIABILITY standards. Under strict liability, an explosives operator may be liable for injuries resulting from an explosion regardless of NEGLIGENCE. Not all explosions give rise to this standard. Strict liability may be mandated by statute for injuries resulting from unlicensed explosions. For licensed explosions and accidental explosions, strict liability will be applied where the activity was exceptionally dangerous. For example, a landowner who stores gasoline in a densely populated residential neighborhood may be subject to strict liability, but a

business that stores gasoline in an industrial area may not.

Strict liability is not imposed on most licensed explosions. A plaintiff suing for damages resulting from a licensed explosion must prove that the operator did not observe a standard of care commensurate with the danger. This can be proved by showing that the operator failed to comply with statutes or regulations. The plaintiff must also show that the explosion was the proximate dominant, producing, or moving cause for the injury or property damage.

A seller of explosives may be held liable for damage or injury resulting from their use. Manufacturers are held to a higher standard of care than wholesalers or retailers because they are usually more familiar with the formula of the explosive compound and are thus more capable of giving instructions needed for the safe handling, storage, and use of the product. Manufacturers, wholesalers, and retailers must warn buyers of an explosive's dangerous nature by labeling the packaging and including instructions. A manufacturer, wholesaler, or retailer that sells explosives in violation of a statute may be liable to subsequent purchasers of the explosives. For example, a manufacturer or merchant that sells to a minor will be responsible for any injuries resulting from the explosives.

Transporters of explosives may be held liable for damage or injury caused in transit, if they are negligent. Carriers must exercise utmost caution in transporting explosives and follow regulations established by the states. A shipper who hires a carrier for transport may be liable for damage and injury caused by the shipment if the damage and injury were the result of the shipper's negligence. The chain of manufacturer, seller, shipper, and carrier often leads to civil court battles in which each defendant seeks to prove that the others were negligent.

As in any civil case, a defendant in an explosives case may use the defense of "contributory negligence" if the injured party was negligent in some way. For instance, a defendant may invoke contributory negligence if an operator has been adequately instructed but mishandles the explosives. In a small minority of states, contributory negligence by a plaintiff precludes any recovery. In most states, "comparative negligence" statutes

*Fireworks are regulated by state and local governments as explosives or as dangerously volatile substances.*

HULTON ARCHIVE/GETTY IMAGES

allow an amount of recovery reduced by a measure of the plaintiff's negligence. For example, if the plaintiff and defendant were equally at fault, the plaintiff may recover 50 percent of the claim.

A defendant may also seek to argue "assumption of the risk." This means that the injured party was informed of risks but chose to disregard the warnings. For example, a licensed explosives operator who posted notices and warnings according to regulations may escape liability if the plaintiff ignored the signs and entered the explosion site and was subsequently injured in an explosion on the site.

Fireworks are a popular, colorful form of low-impact explosives whose regulation varies from state to state. Minnesota, for example, bans all fireworks except for licensed displays and toy pistols and toy guns containing a negligible amount of explosive compound (Minn. Stat. Ann. § 624.20 [West]). Other states are more permissive. Alabama, for example, allows fireworks containing up to 130 milligrams of explosive composition for aerial devices and 50 milligrams for nonaerial devices. Sparklers containing chlorate or perchlorate salts may not exceed a weight of five grams (Ala. Code § 8-17-217).

CROSS-REFERENCES

Assumption of Risk; Dominant Cause; Producing Cause; Proximate Cause.

## EXPORT-IMPORT BANK OF THE UNITED STATES

The Export-Import Bank of the United States, commonly known as Eximbank, facilitates and helps to finance exports of U.S. goods and services. Eximbank has implemented a variety of programs to meet the needs of the U.S. exporting community, according to the size of the transaction. These programs take the form of direct lending, or the issuance of guarantees and insurance so that exporters and private banks can extend appropriate financing without incurring undue risks. The direct lending program of Eximbank is limited to larger sales of U.S. products and services around the world. The guarantees, insurance, and discount programs have been designed to assist exporters in smaller sales of products and services.

Eximbank began as the Export-Import Bank of Washington, authorized in 1934 as a banking corporation organized under the laws of the District of Columbia (Exec. Order No. 6581 [Feb. 2, 1934]), 12 C.F.R. § 401, reprinted in 12 U.S.C.A. § 635. The bank was continued as an agency of the United States by acts of Congress passed in 1935, 1937, 1939, and 1940. It was made an independent agency of the government by the Export-Import Bank Act of 1945 ([12 U.S.C.A. § 635]), which was subsequently amended in 1947 to reincorporate the bank under federal charter. The name was changed to Export-Import Bank of the United States by the Act of March 13, 1968 (82 Stat. 47). In 2002, Congress reauthorized Eximbank for a four-year period.

The mission of Eximbank is to help U.S. exporters to meet government-supported competition from other countries and to correct market imperfections so that commercial export financing can take place. The bank considers aiding in the export financing of U.S. goods and services when there is a reasonable assurance of repayment. Eximbank does not compete with private financing, but instead supplements it when adequate funds are not available in the private sector. As stated in the Export-Import Act of 1945, as amended, the loans provided are generally for specific purposes and at rates based on the average cost of money to the bank as well as the mandate of the bank to provide competitive financing, and offer reasonable reassurance of repayment. The act further states that financing should be provided for U.S. exports at rates and on terms that are competitive with financing provided by the principal foreign competitors of the United States. Furthermore, in authorizing loans or guarantees, account should be taken of any serious adverse effects upon the competitive position of U.S. industry, the availability of materials that are in short supply in the United States, and employment in the United States.

The bank is authorized to have outstanding at any one time loans, guarantees, and insurance in an aggregate amount not to exceed $75 billion. The bank is also authorized to have a capital stock of $1 billion and may borrow from the U.S. Treasury up to $6 billion outstanding at any one time. Subsidy costs of the bank's programs are appropriated on an annual basis.

Eximbank operates a loan program and a guarantee program for medium- and long-term export transactions. Both programs provide up to 85 percent financing, operate on the basis of preliminary and final commitments, and are open to any responsible party. Eximbank loans also carry the minimum interest rate allowed by

the Organization for Economic Cooperation and Development.

To reduce the risks of buyer default for U.S. exporters, Eximbank offers a variety of insurance programs. These policies insure against the risk of default in export transactions and are available in a variety of plans that are tailored to the special needs of different types of exporters and financial institutions.

Eximbank offers other programs designed primarily to benefit small-business exporters, including the Working Capital Guarantee Program, a loan-guarantee program designed to provide access to working capital loans from commercial lenders. The bank also sponsors the Engineering Multiplier Program, which provides financing to support feasibility studies that have the potential for generating further procurement of U.S. exports.

The bank has moved to use technology to improve the delivery of services. Beginning in 2002, customers could apply online for letters of interest as well as Eximbank's working-capital guarantee. Automating insurance applications and processing will soon be implemented.

FURTHER READINGS

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*U.S. Government Manual* Website. Available online at <www.gpoaccess.gov/gmanual> (accessed November 10, 2003).

## EXPOSITORY STATUTE

*A law executed to explain the actual meaning and intent of a previously enacted statute.*

Courts have stated that Congress has the power to declare the proper construction of a statute by subsequent legislation. Courts are generally bound to apply subsequent legislative construction in lawsuits involving transactions that occurred after the enactment of the legislation. Provisions of expository statutes may be litigated due to the potential for a retroactive effect. For example, in *Personal Finance Co. of Braddock v. United States*, 86 F. Supp. 779 (D. Dela. 1949), Congress had enacted an expository statute clarifying a definition in a tax statute. The plaintiff sought a refund under the statute, claiming that it would have recovered the refund based upon judicial interpretations of the original statute. The U.S. District Court for the District of Delaware held that the statute, as amended by the expository legislation, could not be interpreted to have a retroactive effect because the plaintiff's right vested prior to the enactment of the expository act.

CROSS-REFERENCES

Law; Statute.

## EXPRESS

*Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with* implied.

That which is express is laid out in words, such as an *express* WARRANTY, which is an oral or written affirmation from a seller to a buyer of goods that certain standards will be met. Such a warranty may include the promise that any defect which occurs during a certain specified time period will be remedied at the seller's expense. This is distinguishable from an IMPLIED WARRANTY, which is neither written nor based on any specific oral statement from seller to buyer but is implied through the sale itself. A common example is the implied warranty of merchantability, which implies that an item is fit for the usual purposes for which it was purchased.

*Express authority* is plainly or distinctly delegated power to an agent by a principal. For example, the owner of a store may expressly give employees the authority to accept deliveries in the owner's name.

## EXPROPRIATION

*The taking of private property for public use or in the public interest. The taking of U.S. industry situated in a foreign country, by a foreign government.*

Expropriation is the act of a government taking private property; EMINENT DOMAIN is the legal term describing the government's right to do so. In the United States, this right is granted, indirectly, by the FIFTH AMENDMENT to the Constitution, which states, in part, that "private property [shall not] be taken for public use, without just compensation." The courts have interpreted this clause's limitation of the power to expropriate as implying the existence of the power itself.

*President Truman issued an executive order to expropriate 88 steel mills, including this one in Youngstown, Ohio. The Supreme Court held in* Youngstown Sheet & Tube Co. v. Sawyer *that the president did not have the power to take private property to settle a labor dispute.*

Two well-known cases of the U.S. government's expropriating private property occurred during labor troubles after **WORLD WAR II**. In the spring of 1946, President **HARRY S. TRUMAN** found it necessary to seize control of the nation's railroads to postpone an imminent strike. He justified this action by declaring that the welfare of the country was at stake. Five days after the president's action, the workers went on strike for three days, until union and management reached an agreement. Truman hastened the agreement by threatening to draft all railway employees who refused to go back to work.

In 1952, faced with an impending strike by steelworkers, President Truman signed **EXECUTIVE ORDER** No. 10340, 17 Fed. Reg. 3139, expropriating eighty-eight steel mills across the country. Again, the president defended his action by declaring that the welfare of the country was at stake. He supported this argument by stressing the demands of the war in Korea. He believed that a steel strike would endanger the lives of U.S. soldiers. This time, Truman's action caused a constitutional crisis that went to the U.S. Supreme Court. In **YOUNGSTOWN SHEET & TUBE CO. V. SAWYER**, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952), the Supreme Court ruled 6–3 that the president did not have the power to take private property to settle a labor dispute. The steelworkers' strike began the same day as the ruling and lasted seven weeks.

**INTERNATIONAL LAW** recognizes the right of countries to seize private property to further national welfare, but it requires that both citizens and **ALIENS** be treated in the same manner. The issue of just compensation in return for expropriated property differs from country to country. The United States and most Western countries maintain that the expropriating country should pay prompt, adequate, and effective compensation.

U.S. businesses were expropriated by the governments of both Cuba and Chile during socialist movements in those foreign countries. In May 1959, after Fidel Castro took over the Cuban government, the seizure of many large U.S. properties began. Before the revolution, U.S. corporations had controlled most of Cuba's resources and over half of its sugar production. In 1960, the first shipment of Soviet oil arrived in Cuba. Under the advice of the U.S. **TREASURY DEPARTMENT**, U.S. oil companies on the island refused to refine it. These refineries were then taken over by the Cuban government. The expropriation of U.S. property in Cuba and Cuba's alliance with the Soviet Union eventually led to the United States' breaking off all diplomatic relations and instituting an embargo.

In 1971, the Chilean people elected a socialist president, Salvador Allende. Soon afterward, the Chilean government began to expropriate U.S. businesses located in Chile. The primary U.S. business in Chile at this time was copper mining. When U.S.-owned mines were seized, in most cases, their owners were provided with adequate and prompt compensation. The El Teniente mine of the Kennecott Company was seized by the government for a much higher price than the book value. In 1970, government control over the industrial sector in Chile had been at 10 percent. One year after the election of President Allende, it was at 40 percent. By 1973, private banks; U.S. copper mines; the steel, cement, and coal industries; and all other vital areas of industry were in the hands of the Chilean state.

In both Cuba and Chile, the seized properties remain under the control of the foreign government.

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CROSS-REFERENCES

Presidential Powers.

## EXPUNGE

*To destroy; blot out; obliterate; erase; efface designedly; strike out wholly. The act of physically destroying information—including criminal records—in files, computers, or other depositories.*

## EXTENSION

*An increase in the length of time specified in a contract.*

*A part constituting an addition or enlargement, as in an annex to a building or an extension to a house. Addition to existing facilities.*

*An allowance of additional time for the payment of debts. An agreement between a debtor and his or her creditors, by which they allow the debtor further time for the payment of liabilities. A creditor's indulgence by giving a debtor further time to pay an existing debt.*

*The word* extension, *when used in its proper and usual sense in connection with a lease, means a prolongation of the previous leasehold estate. The distinction between extension and* renewal *of lease is chiefly that, in the case of renewal, a new lease is requisite, while, in the case of extension, the same lease continues in force during an additional period upon performance of a stipulated act. An option for renewal implies giving a new lease on the same terms as those of an old lease, while an option for extension contemplates a* CONTINUANCE *of an old lease for a further period.*

*Request for additional time to file an income tax return beyond the due date.*

## EXTENUATING CIRCUMSTANCES

*Facts surrounding the commission of a crime that work to mitigate or lessen it.*

Extenuating circumstances render a crime less evil or reprehensible. They do not lower the degree of an offense, although they might reduce the punishment imposed.

Extenuating circumstances might include *extraordinary circumstances,* which are unusual factors surrounding an event, such as the very young age of a defendant in a murder case.

CROSS-REFERENCES

Mitigating Circumstances.

## EXTINGUISHMENT

*The destruction or cancellation of a right, a power, a contract, or an estate.*

*Extinguishment* is sometimes confused with *merger,* though there is a clear distinction between them. *Merger* is only a mode of extinguishment, and applies to estates only under particular circumstances, but *extinguishment* is a term of general application to rights, as well as estates. *Extinguishment* connotes the end of a thing, precluding the existence of future life therein; in *mergers* there is a carrying on of the substance of the thing, except that it is merged into and becomes a part of a separate thing with a new identity.

Two ways in which the extinguishment of a debt can occur are by release or by payment. *Extinguishment of legacy* takes place where what has been bequeathed by will ceases to exist. *Extinguishment of rent* may take place by the tenant purchasing the rented property from the landlord or by grant, release, or surrender of the rental agreement.

## EXTORT

*To compel or coerce, as in a confession or information, by any means serving to overcome the other's power of resistance, thus making the confession or admission involuntary. To gain by wrongful methods; to obtain in an unlawful manner, as in to compel payments by means of threats of injury to person, property, or reputation. To exact something wrongfully by threatening or putting in fear. The natural meaning of the word* extort *is to obtain money or other valuable things by compulsion, by actual force, or by the force of motives applied to the will, and often more overpowering and irresistible than physical force.*

## EXTORTION

*The obtaining of property from another induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.*

Under the COMMON LAW, extortion is a misdemeanor consisting of an unlawful taking of money by a government officer. It is an oppressive misuse of the power with which the law clothes a public officer.

Most jurisdictions have statutes governing extortion that broaden the common-law definition. Under such statutes, any person who takes money or property from another by means of illegal compulsion may be guilty of the offense. When used in this sense, extortion is synonymous with blackmail, which is extortion by a private person. In addition, under some statutes a corporation may be liable for extortion.

### Elements of Offense

Virtually all extortion statutes require that a threat must be made to the person or property of the victim. Threats to harm the victim's friends or relatives may also be included. It is not necessary for a threat to involve physical injury. It may be sufficient to threaten to accuse another person of a crime or to expose a secret that would result in public embarrassment or ridicule. The threat does not have to relate to an unlawful act. Extortion may be carried out by a threat to tell the victim's spouse that the victim is having an illicit sexual affair with another.

Other types of threats sufficient to constitute extortion include those to harm the victim's business and those to either testify against the victim or withhold testimony necessary to his or her defense or claim in an administrative proceeding or a lawsuit. Many statutes also provide that any threat to harm another person in his or her career or reputation is extortion.

Under the common law and many statutes, an intent to take money or property to which one is not lawfully entitled must exist at the time of the threat in order to establish extortion. Statutes may contain words such as "willful" or "purposeful" in order to indicate the intent element. When this is so, someone who mistakenly believes he or she is entitled to the money or property cannot be guilty of extortion. Some statutes, however, provide that any unauthorized taking of money by an officer constitutes extortion. Under these statutes, a person may be held strictly liable for the act, and an intent need not be proven to establish the crime.

Statutes governing extortion by private persons vary in content. Many hold that a threat accompanied by the intent to acquire the victim's property is sufficient to establish the crime; others require that the property must actually be acquired as a result of the threat. Extortion by officials is treated similarly. Some statutes hold that the crime occurs when there is a meeting of the minds between the officer and the party from whom the money is exacted.

### Extortion by Public Officers

The essence of extortion by a public officer is the oppressive use of official position to obtain a fee. The officer falsely claims authority to take that to which he or she is not lawfully entitled. This is known as acting under color of office. For example, a highway department officer who collects money from a tax delinquent automobile owner in excess of the authorized amount on the pretense of collecting a fine is extorting money under color of office. The victim, although consenting to payment, is not doing so voluntarily but is yielding to official authority.

There are four basic ways in which a public officer commits extortion. The officer might demand a fee not allowed by law and accept it under the guise of performing an official duty. He or she might take a fee greater than that allowed by law. In this case the victim must at least believe that he or she is under an obligation to pay some amount. A third method is for the officer to receive a fee before it is due. The crime is committed regardless of whether the sum taken is likely to become due in the future. It is not criminal, however, for an officer to collect a fee before it is due if the person paying so requests. Finally, extortion may be committed by the officer's taking a fee for services that are not performed. The service refrained from must be one within the official capacity of the officer in order to constitute extortion.

### Other Crimes Distinguished

As a crime of theft, extortion is closely related to ROBBERY and FALSE PRETENSES.

Robbery differs from extortion in that the property is taken against the will and without the consent of the victim, unlike extortion, where the victim consents, although unwillingly, to surrender money or property. Another distinguishing factor is that the nature of the threat for robbery is limited to immediate physical harm to the victim or his or her home. Extortion, on the other hand, encompasses a greater variety of threats.

False pretenses is another crime that is similar to extortion. The main difference is that in the case of false pretenses, the property is obtained by a lie rather than a threat.

### Defenses

A person who acts under a claim of right (an honest belief that he or she has a right to the

money or property taken) may allege this factor as an AFFIRMATIVE DEFENSE to an extortion charge. What constitutes a valid claim of right defense may vary from one jurisdiction to another. For example, M, a department store manager, accuses C, a customer, of stealing certain merchandise. M threatens to have C arrested for LARCENY unless C compensates M for the full value of the item. In some jurisdictions it is only necessary for M to prove that he or she had an honest belief that C took the merchandise in order for M to avoid an extortion conviction. Other jurisdictions apply a stricter test, under which M's belief must be based upon circumstances that would cause a reasonable person to believe that C took the item. Another, more stringent, test requires that C in fact owe the money to M. Finally, some states entirely reject the claim of right defense on the theory that M's threat is an improper means of collecting a debt.

### Punishment

Extortion is generally punished by a fine or imprisonment, or both. When the offense is committed by a public officer, the penalty may include FORFEITURE of office. Under some statutes, the victim of an extortion may bring a civil action and recover pecuniary damages.

### Federal Offenses

Extortion is also a federal offense when it interferes with interstate commerce. It is punishable by a fine, imprisonment, or both. Another federal statute makes it a crime to engage in extortionate credit transactions.

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CROSS-REFERENCES

Blackmail; Civil Action; False Pretenses; Robbery.

## EXTRA

*[*Latin, Beyond, except, without, out of, outside.*]* *Additional.*

An extra in a contract would include anything outside of, beyond, or not called for by the contract, such as additional materials.

## EXTRADITION

*The transfer of an accused from one state or country to another state or country that seeks to place the accused on trial.*

Extradition comes into play when a person charged with a crime under state statutes flees the state. An individual charged with a federal crime may be moved from one state to another without any extradition procedures.

Article IV, Section 2, of the U.S. Constitution provides that upon the demand of the governor of the prosecuting state, a state to which a person charged with a crime has fled must remove the accused "to the State having Jurisdiction of the Crime." When extraditing an accused from one state to another, most states follow the procedures set forth in the Uniform Criminal Extradition Act, which has been adopted by most jurisdictions. A newer uniform act, the Uniform Extradition and Rendition Act, is designed to streamline the extradition process and provide additional protections for the person sought, but by 1995, it had been adopted by only one state.

Extradition from one state to another takes place on the order of the governor of the ASYLUM state (the state where the accused is located). The courts in the asylum state have a somewhat limited function in extraditing the accused to the state where she or he is charged with a crime. They determine only whether the extradition documents are in order (e.g., whether they allege that the accused has committed a crime and that she or he is a fugitive) and do not consider the merits of the charge, since the trial of the accused will take place in the state demanding extradition.

In some cases, courts considering extradition from one state to another may go beyond the procedural formalities and look at the merits of the criminal charge or at allegations by the accused that extradition will lead to harmful consequences beyond a prison term. These cases are rare because under the U.S. Constitution, states are not given the power to review the

*A sample requisition for extradition.*

## Requisition for Extradition

| | **Distribution: No Extradition Ordered** | **Distribution: Extradition Ordered** | |
|---|---|---|---|
| | Original - Court | Original - Court | 3rd copy - Sheriff/DOC |
| | 1st copy - Defendant (Fugitive) | 1st copy - Governor | 4th copy - Defendant (Fugitive) |
| Approved, SCAO | 2nd copy - Prosecutor | 2nd copy - Prosecutor | 5th copy - Agent of demanding state |

| **STATE OF MICHIGAN**<br>**JUDICIAL DISTRICT**<br>**JUDICIAL CIRCUIT** | **ORDER REGARDING EXTRADITION** | **CASE NO.** |
|---|---|---|

**Court address** **Court telephone no.**

In the Matter of _____
Defendant's (Fugitive's) name Date of birth

_____
Address City State Zip Telephone no.

NOTE: This order may be used for either Uniform Extradition Act or Interstate Agreement on Detainers proceedings when either a Governor's Warrant or Interstate Agreement on Detainer forms have been filed.

**ORDER**

☐ 1. The defendant has until _____ to file a petition for writ of habeas corpus challenging the
Date
legality of his/her arrest or he/she will be ordered extradited. The petition must specify the grounds for the challenge. A hearing on the petition is scheduled for _____ at _____ at
Day and date Time
_____ .
Location

☐ 2. The defendant has not shown his/her arrest is illegal and is to be turned over to the agents of _____

County, _____ .
State

☐ 3. The defendant has shown that his/her arrest is illegal and is to be released from this charge.

_____ _____
Date Judge Bar no.

This order must be sealed with the seal of the court.

Send Governor's copy to:

Governor's Office
Attention: Extradition Officer
Legal Division
Olds Plaza
111 S. Capitol
Lansing, Michigan 48933

**MC 270** (10/99) **ORDER REGARDING EXTRADITION** MCL 780.9; MSA 27.1285(9)

underlying charge. This problem occurred in *New Mexico ex rel. Ortiz v. Reed*, 524 U.S. 151, 118 S. Ct. 1860, 141 L. Ed. 2d 131 (1998), in which the state of New Mexico refused to return a fugitive to the state of Ohio.

The Supreme Court has identified that a court considering an extradition case can only decide four issues: (1) whether the extradition documents on their face are in order, (2) whether the petitioner has been charged with a crime in the demanding state, (3) whether the petitioner is the person named in the request for the extradition, and (4) whether the petitioner is a fugitive. The New Mexico Supreme Court in *Reed* determined that the person subject to the extradition, Manuel Ortiz, was not a "fugitive," and refused to honor the extradition order from the state of Ohio. The Supreme Court found that New Mexico courts had overstepped their authority and ordered the New Mexico Supreme Court to return the fugitive.

Extradition from one nation to another is handled in a similar manner, with the head of one country demanding the return of a fugitive who is alleged to have committed a crime in that country. Extradition between nations is usually based on a treaty between the country where the accused is currently located and the country seeking to place him or her on trial for an alleged crime. The United States has entered into extradition treaties with most countries in Europe and Latin America, and with a few countries in Africa and Asia.

To determine whether an individual can be extradited pursuant to a treaty, the language of the particular treaty must be examined. Some treaties list all the offenses for which a person can be extradited; others provide a minimum standard of punishment that will render an offense extraditable. The extradition treaties of most countries fall into the second category, since treaties in the first category must be revised completely if an offense is added to the list.

Even if they do not specifically say so, most treaties contemplate that for an offense to be subject to extradition, it must be a crime under the law in both jurisdictions. This is called the doctrine of double criminality. The name by which the crime is described in the two countries need not be the same, nor must the punishment be the same; simply, the requirement of double criminality is met if the particular act charged is criminal in both jurisdictions (*Collins v. Loisel,* 259 U.S. 309, 42 S. Ct. 469, 66 L. Ed. 956 [1922]).

The doctrine of specialty is also often applied even when not specifically stated in a treaty. It means that once a person has been surrendered, he or she can be prosecuted or punished only for the crimes for which extradition was requested, and not for any other crimes committed prior to the surrender. The doctrine was first established over a hundred years ago, in *United States v. Rauscher,* 119 U.S. 407, 7 S. Ct. 234, 30 L. Ed. 425 (1886). In *Rauscher,* the defendant, a U.S. citizen, was extradited from Great Britain for the beating death of a ship's crew member on a U.S. vessel but was indicted and tried on a charge of CRUEL AND UNUSUAL PUNISHMENT based on the same act. Although the specialty principle was not specifically enumerated in the treaty that allowed the extradition, the U.S. Supreme Court held that an accused "shall not be arrested or tried for any other offense than that with which he was charged in those proceedings."

Extradition treaties often provide exceptions under which a nation can refuse to surrender a fugitive sought by another nation. Many nations will not extradite persons charged with certain political offenses, such as TREASON, SEDITION, and ESPIONAGE. Refusal to extradite under such circumstances is based on the policy that a nation that disagrees with or disapproves of another nation's political system will be reluctant to return for prosecution a dissident who likewise has been critical of the other nation. But, of course, not every criminal act will necessarily be protected. For example, some treaties provide that certain crimes, such as the assassination of a head of a foreign government, do not constitute political offenses that are exempt from extradition. The rise in airplane HIJACKING, TERRORISM, and hostage taking in the late twentieth century led many nations to enter into multilateral conventions in which the signing countries mutually agreed to extradite individuals who committed such crimes.

Since the 1980s, the international extradition process has been viewed by law enforcement authorities as too time-consuming, expensive, and complicated. It has also been criticized for frequently failing to bring fugitives to justice. As a result, some countries, including the United States, have turned to abduction to return a fugitive to a nation to be tried. Although its legality is questionable, abduction

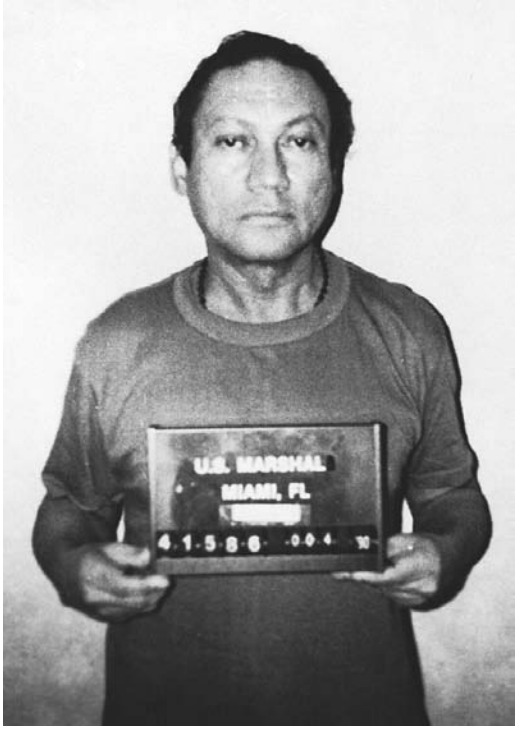


*Manuel Noriega was brought to the United States to stand trial after a U.S. invasion of Panama, not through standard extradition procedures.*

AP/WIDE WORLD PHOTOS

has sometimes been justified to combat drug trafficking and to ensure national security. In 1989, for example, the United States invaded Panama in an attempt to bring General Manuel Noriega to the United States to face charges related to drug trafficking. The GEORGE H. W. BUSH administration asserted that the invasion was necessary to protect national interests in the Panama Canal and to prevent an armed attack by Panama.

Noriega was eventually brought to the United States to stand trial, where he contested the validity of the federal district court's jurisdiction over him (*United States v. Noriega,* 746 F. Supp. 1506 [S.D. Fla. 1990]). The court rejected his contention, holding that Noriega could be tried in the United States, despite the means that were used to bring him to trial. The court declined to address the underlying legality of Noriega's capture, concluding that, as an unrecognized head of state, Noriega lacked standing (the legal right) to challenge the invasion as a violation of INTERNATIONAL LAW in the absence of protests from the legitimate government of Panama over the charges leveled against him.

In *United States v. Alvarez-Machain,* 504 U.S. 655, 112 S. Ct. 2188, 119 L. Ed. 2d 441 (1992), the Supreme Court held that Humberto Alvarez-Machain's forcible abduction did not prohibit his criminal trial in the United States. Alvarez, a citizen of Mexico and a physician, was accused by the U.S. government of participating in the KIDNAPPING, torture, and murder of a U.S. DRUG ENFORCEMENT ADMINISTRATION agent and the agent's airplane pilot, and was indicted for these crimes. Alvarez was later KIDNAPPED from his office and flown by private plane to El Paso, Texas. The Mexican government objected to the abduction and protested it as a violation of the extradition treaty between the United States and Mexico. It asked that the law enforcement agents responsible for the kidnapping be extradited to Mexico, but the United States refused to do so.

Alvarez sought to dismiss the indictment, claiming that the federal district court lacked jurisdiction to try him because his abduction violated the extradition treaty. The district court agreed and dismissed the indictment. The U.S. Court of Appeals for the Ninth Circuit affirmed, holding that the abduction violated the treaty's underlying purpose of providing a legal means for bringing a person to the United States to face criminal charges. On appeal, the U.S. Supreme Court rejected the lower courts' use of the treaty as the basis for prohibiting Alvarez's trial. Justice WILLIAM H. REHNQUIST, writing for the majority, found in the treaty no provisions stating that abductions were forbidden. He further maintained that the treaty was "not the only way in which one country may gain custody of a national of the other country for the purposes of prosecution." Thus, he concluded, the abduction did not prohibit Alvarez's trial in a U.S. court on criminal charges. Justice JOHN PAUL STEVENS filed a strong dissenting opinion in which Justices HARRY BLACKMUN and SANDRA DAY O'CONNOR joined. According to the dissent, Alvarez's abduction was a gross violation of international law, intruding on the territorial integrity of Mexico.

Other nations have also struggled with high-profile extradition cases. For example, in 2000, officials in Britain refused to extradite former Chilean dictator Augusto Pinochet to Spain where he would face trial for thousands of murders and other atrocities during his rule from 1973 to 1990. While, Pinochet had absolute IMMUNITY from prosecution in Chile, other nations, including Spain, were free to charge him with his alleged crimes. When Britain refused to extradite him, he was able to return to Chile and avoid prosecution.

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CROSS-REFERENCES

Fugitive from Justice; Jurisdiction; Presidential Powers; Trial.

## EXTRAJUDICIAL

*That which is done, given, or effected outside the course of regular judicial proceedings. Not founded upon, or unconnected with, the action of a court of law, as in extrajudicial evidence or an extrajudicial oath.*

*That which, though done in the course of regular judicial proceedings, is unnecessary to such proceedings, or interpolated, or beyond their scope, as in an extrajudicial opinion.*

An *extrajudicial statement* is an out-of-court utterance, either written or oral. When offered into court as evidence, it is subject to the HEARSAY rule and its exceptions.

An *extrajudicial oath* is one that is not taken during judicial proceedings but taken formally before a proper officer or magistrate, such as a NOTARY PUBLIC.

## EXTRAORDINARY REMEDY

*The designation given to such writs as* HABEAS CORPUS, MANDAMUS, *and* QUO WARRANTO, *determined in special proceedings and granted only where absolutely necessary to protect the legal rights of a party in a particular case, as opposed to the customary relief obtained by the maintenance of an action.*

Most states have eliminated extraordinary remedies. The relief formerly provided by them can be sought through an ordinary action.

## EXTRATERRITORIALITY

*The operation of laws upon persons existing beyond the limits of the enacting state or nation but who are still amenable to its laws. Jurisdiction exercised by a nation in other countries by treaty, or by its own ministers or consuls in foreign lands.*

In INTERNATIONAL LAW, extraterritoriality exempts certain diplomatic agencies and persons operating in a foreign country from the jurisdiction of the host country. Instead, the agency or individual remains accountable to the laws of the native country. The effects of extraterritoriality extend to troops in passage, passengers on war vessels, individuals on mission premises, and other agencies and persons.

The concept of extraterritoriality stems from the writings of French legal theorist and jurist Pierre Ayraut (1536–1601), who proposed the theory that certain persons and things, while within the territory of a foreign sovereign, remained outside the reach of local judicial process. Classical writers such as HUGO GROTIUS (1583–1645) and Samuel von Pufendorf (1632–94) gave Ayraut's ideas greater circulation. In 1788, the multilingual translation of Georg Friederich von Martens's *Summary of the Law of Nations* put the actual word *extraterritoriality* into the international vocabulary.

Extraterritoriality for ambassadors and other diplomatic representatives gained widespread acceptance during the reign of Queen Anne of Great Britain (1665–1714). In this period, British officials arrested a Russian ambassador who had run up substantial debt to the British government. An international incident ensued as Russian officials and others throughout the world objected to Britain's disregard for the diplomat's IMMUNITY. Because of the outcry, Britain passed the Act Preserving the Privileges of Ambassadors in 1708. Other nations followed Britain's example, and the United States enacted an essentially identical statute in 1790.

In the modern world, the UNITED NATIONS has held a key position in upholding extraterritorial law. In a 1961 agreement made in Vienna, the U.N. Conference on Diplomatic Intercourse and Immunities extended exemption from the laws of host countries to the staff and family of DIPLOMATIC AGENTS. In addition, officials of the United Nations and the members of the delegations of its member states receive extensive procedural, fiscal, and other immunities from the jurisdiction of the host country. Separate and special arrangements govern the United States and Switzerland because the United States hosts the U.N. headquarters and Switzerland has U.N. offices in Geneva.

The general laws binding nations to extraterritorial agreements still rest on principle more than established order. The modern, global mar-

ketplace has put an additional dimension into extraterritoriality. The United States has consistently held that unless international jurisdiction conflicts are managed or mitigated, they have the potential to interfere seriously with the smooth functioning of international economic relations. The United States has therefore declared that it cannot disclaim its authority to act where needed in defense of its national security, foreign policy, or law enforcement interests.

The policies of the United States with respect to extraterritoriality have caused crises in other nations. In 2002, two U.S. servicemen allegedly killed two young girls in a traffic accident in South Korea. Despite protests from South Koreans to have the servicemen tried in a Korean court, the soldiers were tried—and acquitted—by a U.S. military court. The treatment of the men caused anti-American protests throughout South Korea.

FURTHER READINGS

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CROSS-REFERENCES

Ambassadors and Consuls; Diplomatic Agents; Diplomatic Immunity.

## EXTREMIS

*A description of the state of being ill beyond the hope of recovery, with death imminent.*

An individual who is so seriously ill as to be dying is said to be *in extremis.*

## EXTRINSIC EVIDENCE

*Facts or information not embodied in a written agreement such as a will, trust, or contract.*

Extrinsic evidence is similar to *extraneous evidence,* which is not furnished by the document in and of itself but is derived from external sources. In contract law, PAROL EVIDENCE is extrinsic evidence since it is not within a contract but, rather, is oral and outside the instrument.

CROSS-REFERENCES

Parol Evidence.

## EYEWITNESS

*An individual who was present during an event and is called by a party in a lawsuit to testify as to what he or she observed.*

The state and FEDERAL RULES OF EVIDENCE, which govern the admissibility of evidence in civil actions and criminal proceedings, impose requirements that must be met before the testimony of an eyewitness can be presented during trial. For example, an eyewitness must be competent (legally fit) and qualified to testify in court. A witness who was intoxicated or insane at the time the controverted event occurred will be prevented from testifying, regardless of whether he or she was the only eyewitness to the occurrence.

## FACE

*The external appearance or surface of anything; that which is readily observable by a spectator. The words contained in a document in their plain or obvious meaning without regard to external evidence or facts.*

The term is applied most frequently in business law to mean the apparent meaning of a contract, paper, bill, bond, record, or other such legal document. A document might appear to be valid on its face, but circumstances may modify or explain it, and its meaning or validity can be altered.

## FACE VALUE

*A readily ascertainable amount of money determinable from the words of a written instrument alone without the aid of any other source.*

The face value of an instrument such as a financial document is only the amount shown on it, without the inclusion of interest or fees customarily added or reference to its actual market value.

## FACSIMILE

*An exact replica of a document that is copied so as to preserve all its original marks and notations.*

## FACT

*Incident, act, event, or circumstance. A fact is something that has already been done or an action in process. It is an event that has definitely and actually taken place, and is distinguishable from a suspicion, innuendo, or supposition. A fact is a truth as opposed to fiction or mistake.*

A QUESTION OF FACT in litigation is concerned with what actually took place. During a trial, questions of fact are generally left for the jury to determine after each opposing side has presented its case. By contrast, a QUESTION OF LAW is ordinarily decided by a judge, who must deal with applicable legal rules and principles that affect what transpired.

## FACT AND LAW

*A term used to denote issues or events that have taken place and the legal jurisdiction that governs how they are viewed. Fact in legal terms, is the event, while law refers to the actual rules that determine how facts are viewed by the courts. Lawyers and courts may separate fact and law to differentiate them; thus, a* QUESTION OF FACT *concerns the actual events of a case as they might be examined by a jury, while a* QUESTION OF LAW *focuses on the legal rules and principles as determined by a judge, and applied to the facts by a jury.*

## FACT SITUATION

*A concise description of all the occurrences or circumstances of a particular case, without any discussion of their consequences under the law. The fact situation, sometimes referred to as a* fact pattern, *is a summary of what took place in a case*

*for which relief is sought. The fact situation of one case is almost always distinguishable from that of another case.*

When one case with a particular fact situation has been decided, an attorney may use it as precedent and relate it to another similar case on which he or she is currently working.

## FACTOR

*An event, circumstance, influence, or element that plays a part in bringing about a result.*

A factor in a case contributes to its causation or outcome. In the area of NEGLIGENCE law, the *factors*, or *chain of causation*, are important in determining whether liability ensues from a particular action done by the defendant.

## FACTORS

*People who are employed by others to sell or purchase goods, who are entrusted with possession of the goods, and who are compensated by either a commission or a fixed salary.*

A factor is a type of agent who sells goods owned by another, called a principal. The factor engages more frequently in the sale of merchandise than the purchase of goods. A factor is distinguished from a mere agent in that a factor must have possession of the principal's property, while an agent need not. The factor-principal relationship is created by a contract. Both parties are expected to comply with the terms of the agreement. The contract is terminable by the factor, by the principal, or by operation of law.

The merchandise entrusted to the factor is called a consignment, and a factor is often synonymously called a consignee. The factor is sometimes referred to as a commission merchant when his or her compensation is based on a percentage of the sale price. Factorage is defined as the compensation paid to factors.

A home factor is the name given to a factor who resides in the same state or country as the principal; a foreign factor is one who lives in a state or country other than that of the principal.

### Factor-Principal Relationship

Absent any special authority, a factor can bind the principal only in the ordinary course of business. The factor cannot delegate his or her duty to another individual without the knowledge and consent of the principal, unless custom and usage allow otherwise. He or she has the implied power to do everything reasonably necessary to sell the goods entrusted to him or her, and may even make the sale in his or her own name without disclosing the name of the principal. The factor has the power to receive payment and to give a receipt to the purchaser. There is no authority given to the factor to use the goods for personal benefit, to make an exchange for other merchandise, to cancel a completed sale, or to extend the time of payment after a sale.

A factor must exercise reasonable care, skill, and diligence in selling the goods and is responsible for losses resulting from failure to meet this standard. He has a duty to act with GOOD FAITH and loyalty for the protection and advancement of the interests of the principal and may not make a secret profit for himself. Unless the principal agrees, the factor may not purchase the merchandise.

The factor must faithfully execute the principal's instructions and is liable for any loss resulting from failure to do so. No liability will be imposed if the instructions are vague, ambiguous, impossible to perform, or illegal, or if the factor is obstructed from following them due to no fault of his or her own. The factor has a duty to inform the principal of any events that necessitate taking protective measures to ensure the safety of the goods; this stems from the obligation to care for the goods. A factor who cares for the merchandise in a reasonable manner is not responsible for business losses not due to his fault. He must not mingle the principal's goods with his own or with those of other people. The factor has the authority to insure the goods and may do so in his name. He must obtain insurance when instructed to do so by the principal, by the purchaser, or when custom imposes that obligation and must exercise reasonable prudence and diligence in securing adequate insurance coverage.

In the absence of specific instructions, a factor may sell in such a manner and on such terms as he considers appropriate, generally within a reasonable time and at his business establishment. When the time and location of the sale are specified in the agreement, the factor must exercise reasonable diligence to sell within the allotted time or at the authorized place. If the principal fails to designate a desired price, the factor then has an obligation to sell with reasonable skill and diligence so as to obtain the highest price possible in the current market. When

instructed to sell at a specified price, he must do so, barring some unforeseeable event.

Goods are generally sold for cash upon delivery. When instructed to sell on credit, a factor must exercise reasonable care and secure collateral to ensure payments. He is not liable for any loss with regard to payment that occurs through no fault of his own, unless he specifically is made liable in the contract with the principal. Authority to arrange credit terms customary in the market in which the goods are sold is implied. The factor must ascertain the financial stability of a purchaser on credit and must diligently advise the principal of any adverse change in the creditor's financial standing. He has no duty to divulge the name of a purchaser who buys on credit unless the information is needed for the principal to act on the sale.

Reasonable care and diligence must be taken in collecting the price of merchandise sold on credit. A factor must account to the principal for the proceeds and apply them in the instructed manner. He or she must not commingle the proceeds with his or her own money or with the funds of another, unless there is an existing custom of commingling to which the principal consents. The proceeds are held subject to the principal's direction and, unless required by agreement or prior course of dealing, it is not necessary for the factor to immediately tender them.

A factor is liable to the principal when he deals with the goods in a manner that is inconsistent with the right of the principal. A violation of instructions, breach of duty, misconduct, and FRAUD are grounds upon which the principal may recover for damages incurred. Interest is recoverable if the factor delays in remitting payment for goods after a sale.

There is a duty to keep regular and accurate accounts of all transactions, and the principal has a right to inspect the accounts. A factor has no authority to settle a claim against the principal, to submit a claim to ARBITRATION, or to reship goods to another market in order to sell them. He may, however, give a WARRANTY with respect to the quality of the goods.

States regulate the activities of a factor by requiring licenses and imposing taxes. To ensure the diligent performance of duties, some states have a factor post a bond before being allowed to conduct his business. The primary purpose of the regulation is to protect persons who deal with factors against dishonest or unscrupulous persons.

### Compensation for Services

Compensation is a contractual right, and, subject to the terms and conditions of the agreement, commissions are paid when a sale is made. When an express agreement or statute does not fix the amount of compensation, the factor is entitled to the just and reasonable remuneration customarily charged for these services. In the absence of a customary rate, the factor has a right to receive a fee that is fair and reasonable. Acts of fraud, misconduct, gross negligence, and breach of contract would cause the factor to forfeit the right to compensation.

The advancement of money due for the cost of freight depends on the contract or course of dealing between the factor and principal. When a factor advances funds in connection with the goods in his care and is not reimbursed by the principal, the factor has a right to sell the goods in order to satisfy the expenditures. Any excess must be returned to the principal. The factor is entitled to interest on any advances but forfeits the right to reimbursement and interest if his NEGLIGENCE, fraud, or misconduct results in a loss for the principal.

### Enforcement

A factor has a general lien for all commissions due him and for all expenditures, including advances plus interest, properly incurred. A factor's lien secures the compensation, expenses, advances, and liabilities incurred by him for the principal. A factor is not entitled to a lien unless he has fulfilled all contractual and statutory requirements. He must have actual or constructive possession of the goods before the lien attaches; and if the factor has constructive possession of the goods, he must have control over the property before a lien attaches. Once attached, a lien is waived only by express terms or by clear implication, such as when the factor acts in a manner that is inconsistent with its CONTINUANCE. Fraud or misconduct in transacting the principal's business are other grounds for waiving a lien. A factor may enforce his lien by retaining the entrusted property until his claims are liquidated, or he may sell the goods in order to satisfy his claims, returning any excess to the principal.

## FACTUM

*[*Latin, Fact, act, or deed.*] A fact in evidence, which is generally the central or primary fact upon which a controversy will be decided.*

## FAILURE OF CONSIDERATION

*As applied to contracts, this term does not necessarily mean a want of consideration, but implies that a consideration, originally existing and good, has since become worthless or has ceased to exist or been extinguished, partially or entirely. It means that sufficient consideration was contemplated by the parties at the time the contract was entered into, but either on account of some innate defect in the thing to be given, or nonperformance in whole or in part of that which the promisee agreed to do, nothing of value can be or is received by the promisee.*

## FAILURE OF ISSUE

*Dying without having any children or without surviving children.*

Children are commonly referred to at law as *issue of a marriage.* Whether or not a person has any issue becomes important in determining the heirs upon his or her death.

*The Tudor line of English monarchs ended in 1603 when Queen Elizabeth I died without issue. She was succeeded by her cousin, King James VI of Scotland, who became James I of England.*

LIBRARY OF CONGRESS

## FAILURE TO STATE A CLAIM

*Within a judicial forum, the failure to present sufficient facts which, if taken as true, would indicate that any violation of law occurred or that the claimant is entitled to a legal remedy.*

Failure to state a claim is frequently raised as a defense in civil litigation. In some jurisdictions, such as California, the defense is called a demurrer. The successful invocation of this defense will result in the dismissal of the case.

Courts will not dismiss a complaint in which the plaintiff has a legal basis for a claim but has made a technical error that renders the complaint invalid. In such a case, courts allow the petitioner to amend the complaint.

The defense of failure to state a claim is provided for in Federal Rule of Civil Procedure 12(b)(6) and in similar state court rules. Rule 12(b) states that defenses should be presented in the defendant's response to the complaint. However, the rule allows some defenses to be asserted in a separate motion to the court, including the defense that the plaintiff does not state a claim upon which relief can be granted. The purpose of these exceptions is to allow a defendant to respond to procedural flaws in the filing of the complaint without responding to the merits of the case. Allowing the defendant to respond in a separate motion also allows the court to dismiss quickly civil claims that are without legal merit.

*Dawson v. Wilheit,* 735 P.2d 93 (1987), illustrates the dismissal of a suit for failure to state a claim. In *Dawson,* the plaintiff brought suit against Farmington, New Mexico, police officers as well as the city of Farmington and a vehicle-towing service. The suit was based on a chain of events that had begun on November 20, 1983, when the son of the plaintiff had been killed by two men, who had placed his body in the trunk of a car owned by one of the men. Shortly thereafter, the car owner had been arrested for driving while intoxicated.

Under police department policy, a police officer should have conducted an inventory of the vehicle with an employee of the towing service, but this did not happen. After his release from jail on the drunk-driving charge, the car owner drove away from the lot and dumped the body in a remote area, where it was not discovered for six months.

The plaintiffs sued, seeking COMPENSATORY DAMAGES for negligent infliction of emotional distress caused by the failure to conduct an inventory and the resulting delay in finding the body. The district court dismissed the complaint on the ground that the plaintiffs had failed to state a claim. On appeal, the Court of Appeals of New Mexico affirmed the dismissal.

Under basic NEGLIGENCE law, no person may be liable for the injuries of another unless he or she breached a duty of care owed to the victim. According to the state's high court, the police department's inventory policy was in place to protect the police and towing company from claims of theft, and the police owed no duty to the plaintiffs to find a body when they were unaware of a killing. Thus, the plaintiffs had no basis for their complaint, and their case had been rightly dismissed for failure to state a claim.

## FAIR COMMENT

*A form of qualified privilege applied to news media publications relating to discussion of matters that are of legitimate concern to the community as a whole because they materially affect the interests of all the community. A term used in the defense of* LIBEL *actions, applying to statements made by a writer (e.g., in the news media) in an honest belief in their truth, relating to official acts, even though the statements are not true in fact. Fair comment must be based on facts truly stated, must not contain imputations of corrupt or dishonorable motives except as warranted by the facts, and must be an honest expression of the writer's real opinion.*

Fair comment is a privilege under the FIRST AMENDMENT to the Constitution and also applies to invasions of the right of privacy.

In order for a statement to fall into the category of a fair comment, it must not extend beyond matters of concern to the public. It must be a mere expression of the opinion of the commentator.

CROSS-REFERENCES

Freedom of the Press.

## FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act (FCRA) is legislation embodied in title VI of the CONSUMER CREDIT PROTECTION ACT (15 U.S.C.A. § 1681 et seq. [1968]), which was enacted by Congress in 1970 to ensure that reporting activities relating to various consumer transactions are conducted in a manner that is fair to the affected individual, and to protect the consumer's right to privacy against the informational demands of a credit reporting company.

FCRA represents the first federal regulation of the consumer reporting industry, covering all credit bureaus, investigative reporting companies, detective and collection agencies, lenders' exchanges, and computerized information reporting companies.

The consumer is guaranteed several rights under the FCRA, including the right to a notice of reporting activities, the right of access to information contained in consumer reports, and the right to the correction of erroneous information that may have been the basis for a denial of credit, insurance, or employment. When a consumer is denied an extension of credit, insurance, or employment owing to information contained in a credit report, the consumer must be given the name and address of the credit bureau that furnished the credit report. Consumers are also entitled to see any report that led to a denial, but agencies are not required to disclose risk scores to them. Risk scores (or other numerical evaluation, however named) are assigned by consumer reporting agencies to help clients interpret the agency's report. Credit agencies may not report adverse information older than seven years or bankruptcies older than ten years.

The provisions of the FCRA apply to any report by an agency relating to a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. The FCRA covers information that is used or expected to be used in whole or part as a factor in establishing the consumer's eligibility for one of four purposes: (1) employment; (2) credit or insurance for personal, family, or household use; (3) government benefits and licenses to operate particular businesses or practice a profession; and (4) other legitimate business needs. Under the FCRA, an agency may also furnish a report in response to a court order or a federal GRAND JURY subpoena, to a written authorization from the consumer, or to a summons from the INTERNAL REVENUE SERVICE.

The FCRA creates civil liability for consumer reporting agencies and users of consumer reports that fail to comply with its requirements. For example, the Joneses, owners and operators

of a real estate appraisal business, sued a consumer reporting agency under the FCRA. The Joneses claimed that the agency incorrectly reported a judgment against their business. The Supreme Court of Appeals upheld a jury's award, which included compensatory and PUNITIVE DAMAGES (*Jones v. Credit Bureau of Huntington, Inc.,* 184 W.Va. 112, 399 S.E.2d 694 [1990]). A consumer reporting agency includes any person or corporation that, for monetary fees, dues, or on a cooperative nonprofit basis, regularly assembles or evaluates credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports. A retail department store or another comparable business that furnishes information to consumer reporting agencies based on its experience with consumers is not considered a consumer reporting agency under the FCRA (*DiGianni v. Stern's,* 26 F.3d 346 [2d Cir. 1994], *cert. denied,* 513 U.S. 897, 115 S. Ct. 252, 130 L. Ed. 2d 173).

Since its enactment, the FCRA has not undergone major reform. However, legislation has been proposed to address the issues that have arisen from a technological explosion created by a large increase in consumer debt and the information that it generates. In addition, states have enacted comparable statutes covering consumer's rights.

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CROSS-REFERENCES

Consumer Credit; Consumer Protection.

## FAIR HEARING

*A judicial proceeding that is conducted in such a manner as to conform to fundamental concepts of justice and equality.*

During a fair hearing, authority is exercised according to the principle of DUE PROCESS OF LAW. Fair hearing means that an individual will have an opportunity to present evidence to support his or her case and to discover what evidence exists against him or her.

In CRIMINAL LAW, when an individual is arrested, a fair hearing means the right to be notified of the charge being brought against him or her and the chance to meet that charge.

In order for a hearing to be fair and comply with DUE PROCESS requirements, it must be held before an impartial tribunal; however, a hearing can be unfair without any intention that it be that way. A fair hearing must provide a reasonable opportunity for an individual to be present at the designated time and place, during which time he or she may offer evidence, cross-examine opposition witnesses, and offer a defense. Formalities of a court action need not be strictly complied with in order for a proceeding to be considered a fair hearing.

A fair hearing is not necessarily a fair trial. The hearing might be an administrative one before the Immigration Board or the NATIONAL LABOR RELATIONS BOARD, for example, but fairness is still required.

CROSS-REFERENCES

Administrative Law and Procedure.

## FAIR HOUSING ACT OF 1968

The Fair Housing Act of 1968 (FHA) (42 U.S.C.A. §§ 3601-3631) is also known as Title VIII of the CIVIL RIGHTS ACT of 1968. Congress passed the act in an effort to impose a comprehensive solution to the problem of unlawful discrimination in housing based on race, color, sex, national origin, or religion. The Fair Housing Act has become a central feature of modern CIVIL RIGHTS enforcement, enabling persons in the protected classes to rent or own residential property in areas that were previously segregated. The

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD) is charged with enforcement of the act. It issues regulations and institutes investigations into discriminatory housing practices.

The passage of the Fair Housing Act came after the failure of two earlier federal initiatives. A 1962 EXECUTIVE ORDER directed all departments of the EXECUTIVE BRANCH to take appropriate action to prevent discrimination in all federally administered housing programs. The CIVIL RIGHTS ACT OF 1964 contained language in Title VI that prohibited housing discrimination in any program receiving federal financial assistance. Although Title VI provided that a recipient of funding who was found in violation could be prevented from continuing receipt of governmental assistance, this sanction was rarely used.

The Fair Housing Act prohibits discriminatory conduct by a variety of legal entities. The act defines "person" to include one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, receivers, and fiduciaries. In addition, municipalities, local government units, cities and federal agencies are subject to the law.

The act explicitly defines a list of prohibited practices involving housing, including sales, rentals, advertising, and financing. Its primary prohibition makes it unlawful to refuse to sell, rent to, or negotiate with any person because of that person's race, color, religion, sex, familial status, handicap, or national origin. The Fair Housing Amendments Act of 1988 added extensive provisions that apply to discrimination against DISABLED PERSONS and families with children 18 years of age and under.

It is illegal under the Fair Housing Act to discriminate in the sale or rental of a dwelling because of the disability of (1) the buyer or renter, (2) a person who will reside in the dwelling after it is sold or rented, or (3) any person associated with the buyer or renter. It is not illegal, however, to refuse to rent or sell housing to an individual, with or without a disabling condition, whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others. Newly constructed multi-family dwellings must be designed so that the public and common-use portions are accessible to people with disabilities.

The Fair Housing Act also prohibits discriminatory advertising practices in the sale or rental of housing. Advertising may not disclose a "preference, limitation or discrimination" based on any of the protected categories of persons. The media company that runs an offensive advertisement or other statement may be held liable, as may the advertiser. Subtle advertising strategies, such as the selective use of minority-identified media for the marketing of segregated and overpriced housing to minorities, and the use of code words, such as "exclusive" neighborhood, in the text of the realty classified advertisements, violate the act. The law reaches unpublished statements including discriminatory expressions and conduct, such as a landlord's instruction to his rental agent, superintendent, or other employees that they should either not rent to blacks or that they should give a preference to whites or certain ethnic groups.

The law makes it illegal for an owner or his agent to represent to any member of any statutorily protected class that a dwelling is unavailable for inspection, rental, or sale, when, in fact, it actually is available. The act has been found to have been violated by a realty firm that posted "sold" signs on the lawns of a white neighborhood in an attempt to discourage minorities from purchasing houses in the neighborhood.

The Fair Housing Act also sought to end a practice called "blockbusting": the practice by realtors of frightening homeowners by telling them that people who are members of a particular race, religion, or other protected class are moving into their neighborhood and that they should expect a decline in the value of their property. The purpose of this scheme is to get homeowners to sell out at a deflated price. In alleged blockbusting cases, the courts have focused on what was heard, rather than what was said. Even in the absence of wrongful intent by the real estate salesman, or explicit reference to a protected class, liability will attach if the reasonable homeowner believes that the salesman is trading on his assumed fear of minorities to stimulate that homeowner to list his house for sale.

Although the primary focus of the law is to protect prospective renters and buyers of real estate, the Fair Housing Act also protects real estate agents who are members of the protected classes. Real estate brokerages may not set different fees for membership in multiple listing services, and may not deny or limit benefits accruing

to members in real estate brokers' organizations. In addition, brokerages may not establish geographic boundaries, office location, or residence requirements for access to, or membership in, any real estate-related organization, based on an individual's membership in any of the statutorily protected categories.

Congress worked to identify all components of the housing industry that might discriminate against persons in the protected classes. This explains why the Fair Housing Act governs the housing financing industry. Banks and financial institutions may not discriminate when financing the purchase, construction, improvement, repair, or maintenance of a house. This section of the act also applies to the selling, brokering, or appraising of residential real estate.

Despite the apparent breadth of the law, Congress did exempt several classes of defendants from coverage. It does not apply to single-family homeowners if they sell or rent their homes without the use of a real estate agent or other person who is in the business of selling and renting homes. In addition, the homeowner must not use advertising that indicates a discriminatory preference. This exemption applies to only one sale within a 24-month period. Multiple-family homeowners are exempt if no more than four families reside in a dwelling, including the owner. The act also grants exemptions to religious organizations, private clubs, and SENIOR CITIZENS, subject to some limitations.

The provisions of the Fair Housing Act may be enforced by HUD and through "pattern and practice" lawsuits brought by the attorney general. A person who alleges discrimination may file a complaint with HUD. If the department believes that the claim has merit, the matter will be referred to an ADMINISTRATIVE LAW judge for a hearing. The judge is empowered to award actual damages, equitable relief, and attorneys' fees to the prevailing party. The judge also may assess civil penalties against the violators, which can range from $25,000 to $50,000. The judge may not award PUNITIVE DAMAGES nor require AFFIRMATIVE ACTION of the violator, however. In addition, a private citizen may also file a civil lawsuit in federal court against the alleged violator of the act. Finally, the attorney general may file a civil lawsuit when there is evidence of a pattern or practice by the alleged violator that extends beyond one or two victims. When the attorney general prevails in these types of lawsuits, the act allows the awarding of injunctive relief and monetary damages to the aggrieved party. In addition, the court may assess civil penalties against the violator up to $50,000 for a first violation and up to $100,000 for any subsequent violation.

FURTHER READINGS

The Fair Housing Act of 1968 (FHA) (42 U.S.C.A. §§ 3601-3631).

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## FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act of 1938 (29 U.S.C.A. § 201 et seq.) was federal legislation enacted in 1938 by Congress, pursuant to its power under the COMMERCE CLAUSE, that mandated a MINIMUM WAGE and maximum 40-hour work week for employees of those businesses engaged in interstate commerce.

Popularly known as the "Wages and Hours Law," the Fair Labor Standards Act was one of a number of statutes making up the NEW DEAL program of the presidential administration of FRANKLIN DELANO ROOSEVELT. Aside from setting a maximum number of hours that a person could work for the minimum wage, it also established the right of the eligible worker to at least "time and a half"—or one and one-half times the customary pay—for those hours worked in excess of the statutory maximum.

Other provisions of the act forbade the use of workers under the age of 16 in most jobs and prohibited the use of workers under the age of 18 in those occupations deemed dangerous. The act was also responsible for the creation of the Wage and Hour Division of the LABOR DEPARTMENT.

Over the years, the Fair Labor Standards Act has been subject to amendment but continues to play an integral role in the U.S. workplace.

CROSS-REFERENCES

Employment Law; Labor Department.

## FAIR MARKET VALUE

*The amount for which real property or* PERSONAL PROPERTY *would be sold in a voluntary transaction between a buyer and seller, neither of whom is under any obligation to buy or sell.*

The customary test of fair market value in real estate transactions is the price that a buyer is

willing, but is not under any duty, to pay for a particular property to an owner who is willing, but not obligated, to sell.

Various factors can have an effect on the fair market value of real estate, including the uses to which the property has been adapted and the demand for similar property.

Fair market value can also be referred to as *fair cash value* or *fair value.*

## FAIR-TRADE LAWS

*State statutes enacted in the first half of the twentieth century permitting manufacturers to set minimum, maximum, or actual selling prices for their products, and thus to prevent retailers from selling products at very low prices.*

Manufacturers have an interest in establishing and maintaining good will toward their products. This means assuring consumers that the manufacturers' goods are quality products. Good will is promoted by advertising and other sales efforts. Manufacturers in the early 1900s believed that commanding minimum retail prices was necessary to preserve good will, and that uncontrolled price-cutting by retailers would be detrimental to good will. Specifically, manufacturers feared that consumers would become skeptical if a particular retailer began to sell for a lower price a product that had had a relatively consistent price over the years: the lower price would undercut any claim by the manufacturer that the higher price was necessary to maintain the product's quality, and purchasers at the higher price would feel cheated.

The Great Depression following the STOCK MARKET crash of 1929 started a movement toward state involvement in product price controls. State lawmakers believed that allowing manufacturers to dictate resale prices to retailers would help stabilize price levels and markets.

In 1931, California became the first state to pass fair-trade laws. These laws made it legal for a manufacturer to enter an agreement whereby the purchasing retailer, the signor, could resell a product only at a prescribed minimum price. In 1933, California amended these laws to make such an agreement binding on nonsignors. The amendments made minimum-price agreements enforceable against any retailer who had knowledge of another retailer's agreement with the manufacturer.

The setting of minimum resale prices, which state fair-trade laws legalized, was precisely the sort of vertical price-fixing that the federal SHERMAN ANTI-TRUST ACT OF 1890 (15 U.S.C.A. § 1) had been intended to prohibit. While the courts wrestled with the conflicting state and federal laws, Congress passed first the Miller-Tydings Act (50 Stat. 693 [Aug. 17, 1935]), which amended the Sherman Act to exempt state fair-trade laws, and then the McGuire Act (66 Stat. 632 [1952]), which allowed states to pass fair-trade laws making minimum price agreements enforceable against nonsignors as well.

After the enactment of Miller-Tydings and McGuire, state fair-trade laws and federal antitrust laws were no longer in conflict, and as many as forty-five states enacted fair-trade laws. As time passed, though, state courts whittled away at the fair-trade laws, often finding them to be in violation of the state's constitution. The perceived importance of allowing manufacturers to set minimum prices deteriorated as it became evident that the laws were harming the free market. In 1975, Congress, with support of the Ford administration, passed the Consumer Goods Pricing Act (Pub. L. No. 94-145), which repealed the Miller-Tydings and McGuire Acts, putting state fair-trade laws back within the prohibitions of the Sherman Act.

Today, the computer and electronics industries face retail price-cutting issues. Volume discount retailers sell name brand computers and electronics at prices far below those initially established in the market. With fair-trade laws off the books, retailers and the market determine at what prices goods will be sold.

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## FAIRNESS DOCTRINE

*The doctrine that imposes affirmative responsibilities on a broadcaster to provide coverage of issues of public importance that is adequate and fairly reflects differing viewpoints. In fulfilling its fairness doctrine obligations, a broadcaster must provide free time for the presentation of opposing views if a paid sponsor is unavailable and must initiate programming on public issues if no one else seeks to do so.*

Between the 1940s and 1980s, federal regulators attempted to guarantee that the broadcasting

industry would act fairly. The controversial policy adopted to further that attempt was called the fairness doctrine. The fairness doctrine was not a statute, but a set of rules and regulations that imposed controls on the content of the broadcasting media. It viewed radio and television as not merely industries but servants of the public interest. Enforced by the FEDERAL COMMUNICATIONS COMMISSION (FCC), the fairness doctrine had two main tenets: broadcasters had to cover controversial issues, and they had to carry contrasting viewpoints on such issues. Opponents of the doctrine, chiefly the media themselves, called it unconstitutional. Although it survived court challenges, the fairness doctrine was abolished in 1987 by deregulators in the FCC who deemed it outdated, misguided, and ultimately unfair. Its demise left responsibility for fairness entirely to the media.

The fairness doctrine grew out of early regulation of the radio industry. As the medium of radio expanded in the 1920s, its chaotic growth caused problems: for one, broadcasters often overlapped on each other's radio frequencies. In 1927, Congress imposed regulation with its passage of the Radio Act (47 U.S.C.A. § 81 et seq.). This landmark law established the Federal Radio Commission (FRC), reestablished in 1934 as the Federal Communications Commission. Empowered to allocate frequencies among broadcasters, the FRC essentially decided who could broadcast, and its mandate to do so contained the seeds of the fairness doctrine. The commission was not only to divvy up the limited number of bands on the radio dial; Congress said it was to do so according to public "convenience, interest, or necessity." Radio was seen as a kind of public trust: individual stations had to meet public expectations in return for access to the nation's airwaves.

In 1949, the first clear definition of the fairness doctrine emerged. The FCC said, in its *Report on Editorializing*, "[T]he public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies . . . to all discussion of issues of importance to the public." The doctrine had two parts: it required broadcasters (1) to cover vital controversial issues in the community and (2) to provide a reasonable opportunity for the presentation of contrasting viewpoints. In time, additional rules were added. The so-called personal attack rule required broadcasters to allow opportunity for rebuttal to personal attacks made during the discussion of controversial issues. The "political editorializing" rule held that broadcasters who endorsed a candidate for political office had to give the candidate's opponent a reasonable opportunity to respond.

Enforcement was controversial. Complaints alleging violations of the fairness doctrine were to be filed with the FCC by individuals and organizations, such as political parties and unions. Upon review of the complaint, the FCC could take punitive action that included refusing to renew broadcasting licenses. Not surprisingly, radio and TV station owners resented this regulatory power. They grumbled that the print media never had to bear such burdens. The fairness doctrine, they argued, infringed upon their FIRST AMENDMENT rights. By the late 1960s, a First Amendment challenge reached the U.S. Supreme Court, in *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969). The Court upheld the constitutionality of the doctrine in a decision that only added to the controversy. The print and broadcast media were inherently different, it ruled. In the broadcast media, the Court said, "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . it is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."

Although the fairness doctrine remained in effect for almost two more decades following *Red Lion,* the 1980s saw its abolishment. Anti-regulatory fervor in the administration of President RONALD REAGAN brought about its end. The administration, which staffed the FCC with its appointees, favored little or no restrictions on the broadcast industry. In its 1985 *Fairness Report* (102 F.C.C.2d 145), the FCC announced that the doctrine hurt the public interest and violated the First Amendment. Moreover, technology had changed: with the advent of multiple channels on CABLE TELEVISION, no longer could broadcasting be seen as a limited resource. Two years later, in August 1987, the commission abolished the doctrine by a 4–0 vote, intending to extend to radio and television the same First Amendment protections guaranteed to the print media. Congress had tried to stop the FCC from killing the fairness doctrine. Two months earlier, it had sent President Reagan the Fairness in Broadcasting Act of 1987 (S. 742, 100th Cong., 1st Sess. [1987]), which would have codified the doctrine in federal law. The president vetoed it.

President Reagan's VETO of the 1987 congressional bill to establish the fairness doctrine as law did not end the controversy, however. Even into the mid-1990s, proponents continued to call for its reinstatement.

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## FALSE ADVERTISING

*"Any advertising or promotion that misrepresents the nature, characteristics, qualities or geographic origin of goods, services or commercial activities"* (LANHAM ACT, *15 U.S.C.A. § 1125(a)).*

### Proof Requirement

To establish that an advertisement is false, a plaintiff must prove five things: (1) a false statement of fact has been made about the advertiser's own or another person's goods, services, or commercial activity; (2) the statement either deceives or has the potential to deceive a substantial portion of its targeted audience; (3) the deception is also likely to affect the purchasing decisions of its audience; (4) the advertising involves goods or services in interstate commerce; and (5) the deception has either resulted in or is likely to result in injury to the plaintiff. The most heavily weighed factor is the advertisement's potential to injure a customer. The injury is usually attributed to money the consumer lost through a purchase that would not have been made had the advertisement not been misleading. False statements can be defined in two ways: those that are false on their face and those that are implicitly false.

### Development of Regulations

One early attempt to create advertising industry standards was made in 1911 when the trade journal *Printer's Ink* proposed that false advertising be classified as a crime. As a result, false advertising became a misdemeanor in 44 states. Statutes were based on the model statute suggested by *Printer's Ink.* These statutes are still in effect; however, they are rarely used because it requires proving that the false advertising exists BEYOND A REASONABLE DOUBT, a difficult standard to meet.

In place of the *Printer's Ink* statute, states adopted the Uniform Deceptive Trade Practices Act of 1964 (revised 1966), which lists a dozen different items that are prohibited in the advertising trade. The only remedy available under this act is injunctive relief—a court order that admonishes the guilty party for its actions—which may explain the low number of states that have adopted it. (As of 2003, only 12 states have adopted the statute in some form.) Other states have different statutes regarding false advertising. Most of these statutes require the courts to interpret state laws using federal guidelines provided by the FEDERAL TRADE COMMISSION (FTC). According to the FTC, which amended its standards to help regulate cigarette labeling, three elements are necessary to show that an advertisement is false or unfair. The ad has to offend public policy; be immoral, unethical, oppressive, or unscrupulous; and substantially injure consumers.

### Types of False Advertising

Today's regulations define three main acts that constitute false advertising: failure to disclose, flawed and insignificant research, and product disparagement. The majority of these regulations are outlined in the Lanham Act of 1946 (15 U.S.C.A. § 1051 et seq), which contains the statutes that govern TRADEMARK law in the United States.

**Failure to Disclose** It is considered false advertising under the Lanham Act if a representation is "untrue as a result of the failure to disclose a material fact." Therefore, false advertising can come from both misstatements and partially correct statements that are misleading because they do not disclose something the consumer should know. The Trademark Law Revision Act of 1988, which added several amendments to the Lanham Act, left creation of the line between sufficient and insufficient disclosure to the discretion of the courts.

*American Home Products Corp. v. Johnson & Johnson,* 654 F. Supp. 568, S.D.N.Y. 1987, is an example of how the courts use their discretion

in determining when a disclosure is insufficient. In this case, Johnson and Johnson advertised a drug by comparing its side effects to those of a similar American Home Products drug, leaving out a few of its own side effects in the process. Although the Lanham Act does not require full disclosure, the court held the defendant to a higher standard and ruled the advertisement misleading because of the potential health risks it posed to consumers.

**Flawed and Insignificant Research** Advertisements based on flawed and insignificant research are defined under section 43(a) of the Lanham Act as "representations found to be unsupported by accepted authority or research or which are contradicted by prevailing authority or research." These advertisements are false on their face.

*Alpo Pet Foods v. Ralston Purina Co.,* 913 F.2d 958 (D.C. Cir. 1990), shows how basing advertising claims on statistically insignificant test results provides sufficient grounds for a false advertising claim. In this case, the Ralston Purina Company claimed that its dog food was beneficial for dogs with canine hip dysplasia, demonstrating the claims with studies and tests. Alpo Pet Foods brought a claim of false advertising against Purina, saying that the test results could not support the claims made in the advertisements. Upon looking at the evidence and the way the tests were conducted by Purina, the court ruled not only that the test results were insignificant but also that the methods used to conduct the tests were inadequate and the results could therefore not support Purina's claims.

**Product Disparagement** Product disparagement involves discrediting a competitor's product. The 1988 amendment to the Lanham Act extends claims for false advertising to misrepresentations about another's products.

### Trademark Infringement

Trademark infringement is similar to product disparagement, and is described in section 32(1) of the Lanham Act. This section states that:

> anyone who shall, without the consent of the registrant—(a) use in commerce any reproduction, counterfeit, copy or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution or advertising of any goods or services or in connection with which such use is likely to cause confusion, or cause mistake, or to deceive . . . shall be liable in a civil action by the registrant.

A trademark is a symbol, phrase, or some other device that distinguishes ownership of a product or service. A trademark also stands as a mark of quality, which means that consumers rely on TRADEMARKS when making purchases. If one company adopts a trademark similar to a competing company, the public may think the trademark's owner either sponsored or approved the use of the trademark. Therefore, the reputation of the original holder of the trademark is compromised and consumers are deceived and confused by false advertising.

In determining whether there is a likelihood of confusion under the Lanham Act, the courts use the *Polaroid* test, which includes eight factors established in *Polaroid Corp. v. Polara Electronics Corp.,* 287 F. 2d 492 (2nd Cir. 1961). They are the strength of the plaintiff's mark, similarity of uses, proximity of the products, likelihood that the prior owner will expand into the domain of the other, actual confusion, defendant's good or bad faith in using the plaintiff's mark, quality of the junior user's product, and sophistication of consumers. These eight factors do not all have to be satisfied to prove a case; the major factor the courts focus on is the potential to confuse consumers.

The *Polaroid* test is for cases that involve commercial exploitation. When an advertising dispute involves FIRST AMENDMENT violations, the issue at hand is often the use of PARODY.

### Parody

For parody cases, a BALANCING test that is more useful than the *Polaroid* test was established by *Cliffs Notes v. Bantam Doubleday Dell Publishing Group,* 886 F.2d 490 (2nd Cir. 1989). The court held that Bantam's production of *Spy Notes,* which was a parody of *Cliffs Notes* study guides, was not a violation of the Lanham Act because Bantam clearly conveyed in advertising that *Spy Notes* was a parody. Therefore, there was no confusion. As a result, the balancing test used by the court in *Cliffs Notes* requires that "a parody must convey two simultaneous—and contradictory—messages: that it is the original, but also that it is not the original and is instead a parody." If a parody does not have both messages, it is likely to confuse the consumers.

Another claim involving parody is the 1995 case of *Hormel Foods Corp. v. Jim Henson Productions,* 73 F.3d 497 (2nd Cir. 1996). In this case, Hormel brought Jim Henson Productions to court for trademark infringement and false

advertising under the Lanham Act. At the time the case was initiated, Henson was producing the movie *Muppet Treasure Island* with a new character: an exotic wild boar named Spa'am. Henson's intention was to make the audience laugh at the intended parody between the Muppet's wild boar and Hormel's tame luncheon meat.

Hormel's claims of false advertising and trademark infringement under the Lanham Act and its common-law claims of trademark dilution and deceptive practices were all denied by the court for several reasons, the main one being that Henson had clearly, in all his advertising, identified Spa'am as a character from a Muppet motion picture. This usage was not confusing under the *Polaroid* test and therefore was not a solid basis for a false advertising or trademark infringement claim. Henson's usage also satisfied the balancing test requirements set up by *Cliffs Notes.*

## Remedies for False Advertising

Had Hormel won its claim against Henson, three remedies would have been available to it: injunctive relief, corrective advertising, and damages.

**Injunctive Relief** Injunctive relief is granted by the courts upon the satisfaction of two requirements. First, a plaintiff must demonstrate a "likelihood of deception or confusion on the part of the buying public caused by a product's false or misleading description or advertising" (*Alpo*). Second, a plaintiff must demonstrate that an "irreparable harm" has been inflicted, even if such harm is a decrease in sales that cannot be completely attributed to a defendant's false advertising. It is virtually impossible to prove that sales can or will be damaged; therefore, the plaintiff only has to establish that there exists a causal relationship between a decline in its sales and a competitor's false advertising. Furthermore, if a competitor specifically names the plaintiff's product in a false or misleading advertisement, the harm will be presumed (*McNeilab, Inc. v. American Home Products Corp.,* 848 F.2d 34 [2nd. Cir. 1988]).

**Corrective Advertising** Corrective advertising can be ruled in two different ways. First, and most commonly, the court can require a defendant to launch a corrective advertising campaign and to make an affirmative, correcting statement in that campaign. For example, in *Alpo,* the court required Purina to distribute a corrective release to all of those who had received the initial, false information.

Second, the courts can award a plaintiff monetary damages so that the plaintiff can conduct a corrective advertising campaign to counter the defendant's false advertisements. For example, in *U-Haul International v. Jartran, Inc.*, 793 F.2d 1034 (9th Cir. 1986), the plaintiff, U-Haul International, was awarded $13.6 million—the cost of its corrective advertising campaign.

**Damages** To collect damages, the plaintiff generally has to show either that some consumers were actually deceived or that the defendant used the false advertising in bad faith. Four types of damages are awarded for false advertising: profits the plaintiff loses when sales are diverted to the false advertiser; profits lost by the plaintiff on sales made at prices reduced as a demonstrated result of the false advertising; the cost of any advertising that actually and reasonably responds to the defendant's offending advertisements; and quantifiable harm to the plaintiff's good will to the extent that complete and corrective advertising has not repaired that harm (*Alpo*).

## Consumer Protection

Although most false advertising claims brought against advertisers are by competitors, consumers can also file such claims. No hard-and-fast rules exist for all consumer-initiated cases; courts deal with claims brought by consumers on more of a case-by-case basis than they do with claims brought by competitors. The issues surrounding consumer rights were discussed during the drafting of the 1988 Trademark Law Revision Act, but were not resolved.

In cases where consumers have sued, they have most often been held to the same standards as competitors: they need to show that they have a reasonable interest in order to be protected. This standard was demonstrated by the CLASS ACTION lawsuit of *Maguire v. Sandy Mac,* 138 F.R.D. 444 (D.N.J. 1991). In that case, the class included both resellers, who had purchased a ham product from the defendant, and consumers, who had ultimately bought the ham products. The lawsuit claimed that the defendant sold ham products falsely represented as meeting U.S. DEPARTMENT OF AGRICULTURE standards. The court ruled for the plaintiffs, saying that "the plaintiff and the proposed class, the consumers, have a reasonable interest in being protected from criminal misrepresentations."

Another way consumers are protected is by state laws on deceptive trade practices. Some state laws define these practices as showing

goods or services with the intention of not actually selling them as advertised. In *Affrunti v. Village Ford Sales,* 232 Ill. App. 3d 704, 597 N.E.2d 1242 (3rd. Dist. Ct. App. 1992), a consumer filed a lawsuit against an automobile dealership that sold him a car for more money than it was actually advertised for. Ronald Affrunti went to Village Ford Sales, a used-car lot, and looked at a blue 1986 Celebrity with 29,000 miles on the odometer. The car did not have a sticker price, so he asked the salesman, Fred Galaraza, for a price. Galaraza answered that he would have to check in his office. After showing Affrunti several other used cars, and without going to his office, Galaraza quoted a price of $8,600 for the Celebrity. Affrunti and Galaraza settled on a final price of $8,524, which included a trade-in and a discount for a front-end alignment. Upon returning home, Affrunti came across an advertisement by Village Ford Sales for a 1986 blue Celebrity with 29,999 miles on the odometer for $6,995. Affrunti called the dealership. Galaraza checked and said, "By God, it's the same!" Affrunti asked to redo the deal based on the advertised price. Galaraza put him on hold. When Galaraza came back on the line, he said the car in the ad had been sent to auction, and they could not redo the deal because it was not the same car.

At trial, the sales manager testified that prices listed in advertisements are not necessarily the listed cars' actual prices; dealers can sell the cars for higher prices. After hearing the evidence, the judge ruled that the dealer had an obligation to inform the plaintiff of the advertised price of the car, and awarded Affrunti the difference between the purchase price and the advertised price, which amounted to $1,529. On appeal, the Illinois Appellate Court ruled that "the defendant's failure to disclose the advertised sale price constituted deceptive conduct under the CONSUMER FRAUD Act." The appellate court also added attorneys' fees to Affrunti's award, bringing the total up to $1,937.50.

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CROSS-REFERENCES

Injunction.

## FALSE ARREST

*A* **TORT** *(a civil wrong) that consists of an unlawful restraint of an individual's personal liberty or freedom of movement by another purporting to act according to the law.*

The term *false arrest* is sometimes used interchangeably with that of the tort of **FALSE IMPRISONMENT**, and a false arrest is one method of committing a false imprisonment. A false arrest must be perpetrated by one who asserts that he or she is acting pursuant to legal authority, whereas a false imprisonment is any unlawful confinement. For example, if a sheriff arrests a person without any **PROBABLE CAUSE** or reasonable basis, the sheriff has committed the torts of false arrest and false imprisonment. The sheriff has acted under the assumption of legal authority to deprive a person unlawfully of his or her liberty of movement. If, however, a driver refuses to allow a passenger to depart from a vehicle, the driver has committed the tort of false imprisonment because he or she unlawfully restrains freedom of movement. The driver has not committed false arrest, however, since he or she is not claiming to act under legal authority. A person who knowingly gives police false information in order to have someone arrested has committed the tort of **MALICIOUS PROSECUTION.**

An action can be instituted for the damages ensuing from false arrest, such as loss of salary while imprisoned, or injury to reputation that results in a pecuniary loss to the victim. Ill will and malice are not elements of the tort, but if these factors are proven, **PUNITIVE DAMAGES** can be awarded in addition to **COMPENSATORY DAMAGES** or nominal damages.

## FALSE DEMONSTRATION

*An inaccurate or erroneous description of an individual or item in a written instrument.*

With respect to testamentary gifts, where the description of an individual or item in a will is partly true and partly false, in the event that the true portion describes the subject or object of the gift with adequate certainty, the untrue part may be rejected under the doctrine of false demonstration, and the gift upheld and enforced.

## FALSE IMPRISONMENT

*The illegal confinement of one individual against his or her will by another individual in such a manner as to violate the confined individual's right to be free from restraint of movement.*

To recover damages for false imprisonment, an individual must be confined to a substantial degree, with her or his freedom of movement totally restrained. Interfering with or obstructing an individual's freedom to go where she or he wishes does not constitute false imprisonment. For example, if Bob enters a room, and Anne prevents him from leaving through one exit but does not prevent him from leaving the way he came in, Bob has not been falsely imprisoned. An accidental or inadvertent confinement, such as when someone is mistakenly locked in a room, also does not constitute false imprisonment; the individual who caused the confinement must have intended the restraint.

False imprisonment often involves the use of physical force, but such force is not required. The threat of force or arrest, or a belief on the part of the person being restrained that force will be used, is sufficient. The restraint can also be imposed by physical barriers or through unreasonable duress imposed on the person being restrained. For example, suppose a shopper is in a room with a security guard, who is questioning her about items she may have taken from the store. If the guard makes statements leading the shopper to believe that she could face arrest if she attempts to leave, the shopper may have a reasonable belief that she is being restrained from leaving, even if no actual force or physical barriers are being used to restrain her. The shopper, depending on the other facts of the case, may therefore have a claim for false imprisonment. False imprisonment has thus sometimes been found in situations where a storekeeper detained an individual to investigate whether the individual shoplifted merchandise. Owing to increasing concerns over shoplifting, many states have adopted laws that allow store personnel to detain a customer suspected of shoplifting for the purpose of investigating the situation. California law, for example, provides that "[a] merchant may detain a person for a reasonable time for the purpose of conducting an investigation . . . whenever the merchant has PROBABLE CAUSE to believe the person . . . is attempting to unlawfully take or has unlawfully taken merchandise" (Cal. Penal Code § 490.5 [West 1996]).

False arrest is a type of false imprisonment in which the individual being held mistakenly believes that the individual restraining him or her possesses the legal authority to do so. A law enforcement officer will not be liable for false arrest where he or she has probable cause for an arrest. The arresting officer bears the burden of showing that his or her actions were supported by probable cause. Probable cause exists when the facts and the circumstances known by the officer at the time of arrest lead the officer to reasonably believe that a crime has been committed and that the person arrested committed the crime. Thus, suppose that a police officer has learned that a man in his forties with a red beard and a baseball cap has stolen a car. The officer sees a man matching this description on the street and detains him for questioning about the theft. The officer will not be liable for false arrest, even if it is later determined that the man she stopped did not steal the car, since she had probable cause to detain him.

An individual alleging false imprisonment may sue for damages for the interference with her or his right to move freely. An individual who has suffered no actual damages as a result of an illegal confinement may be awarded nominal damages in recognition of the invasion of rights caused by the defendant's wrongful conduct. A plaintiff who has suffered injuries and can offer proof of them can be compensated for physical injuries, mental suffering, loss of earnings, and attorneys' fees. If the confinement involved malice or extreme or needless violence, a plaintiff may also be awarded PUNITIVE DAMAGES.

An individual whose conduct constitutes the TORT of false imprisonment might also be charged with committing the crime of KIDNAPPING, since the same pattern of conduct may provide grounds for both. However, kidnapping may require that other facts be shown, such as

the removal of the victim from one place to another.

False imprisonment may constitute a criminal offense in most jurisdictions, with the law providing that a fine or imprisonment, or both, be imposed upon conviction.

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## FALSE PERSONATION

*The crime of falsely assuming the identity of another to gain a benefit or avoid an expense.*

The crime of falsely assuming the identity of another person in order to gain a benefit or cause harm to the other person can be referred to as false personation or false IMPERSONATION. False personation laws have been enacted at both the state and federal levels to protect the dignity, reputation, and economic well-being of the individual being impersonated. Further, these statutes deter criminals by discouraging the impersonator's pursuit of benefits.

A false impersonator need not alter her or his voice, wear a disguise, or otherwise change her or his characteristics or appearance in order to be found guilty. False personation simply involves passing oneself off as another person. For example, an individual who misrepresents herself to be someone else in order to wrongfully cash that person's paycheck commits false personation.

The person impersonated must be real, not fictitious. If a police officer pulls a driver over for speeding, and the driver pretends to be his brother, the driver is guilty of false personation. His brother is an actual person, and the crime of false personation is designed to take advantage of his brother's reputation and driving record. If the driver pretends to be Dick Tracy, a fictitious person, he is not guilty of false personation. Harming Dick Tracy's fictitious reputation and driving record is not an intended function of the crime. However, in this situation, the driver may be guilty of a different crime such as FRAUD or giving false information to a police officer.

The benefit or harm sought by impersonators may take many forms. Some are obvious, some are not. In the example of the driver who was pulled over for speeding and impersonated his brother, an obvious benefit is to avoid paying a speeding ticket. A less obvious benefit is to keep this offense off the driver's record. Even less obvious, the driver may have set up the whole situation in order to tarnish his brother's driving record or reputation.

False personation statutes may prohibit false personation of another generally, or they may specify a particular group, office, or profession. There are federal statutes that specifically prohibit the false personation of a U.S. citizen; an officer or employee of the United States in pursuit of money or other valuables; an officer or employee of the United States attempting to arrest or search a person or building; a creditor of the United States; a foreign diplomat or official; a 4-H Club member or agent; or a member or agent of the Red Cross. Many states have statutes prohibiting the impersonation of police officers, firefighters, married people, or voters.

## FALSE PRETENSES

*False representations of material past or present facts, known by the wrongdoer to be false, and made with the intent to defraud a victim into passing title in property to the wrongdoer.*

Suppose Reba tells Alberto that a synthetic gemstone is a valuable diamond that she will give to Alberto in exchange for Alberto's truck. Alberto thinks this sounds like a good deal and transfers title of his truck to Reba. If Reba knows that the stone is a synthetic gemstone, she is guilty of false pretenses.

A truthful statement that causes someone to give up rights in property does not constitute criminal false pretenses; a representation must be false at the time the potential victim is about to pass title. If the representation was false when made, but changing circumstances made it true by the time the victim passed title, false pretenses did not arise. Also, if the alleged wrongdoer thought his or her statement was a lie, but the statement was in fact true, the crime of false pretenses was not committed. For example, if Reba thinks the stone is synthetic, but it actually is a diamond, her statement to Alberto claiming that it is a diamond is true (even if she doesn't know it). Therefore, Reba is not guilty of false pretenses.

A false representation can be a verbal, written, or implied statement. For example, if a statement suggests that the wrongdoer has the

authority, power, or ability to perform what is represented, but the wrongdoer does not have that authority, power, or ability, the implication is a false representation.

A false representation can also occur when the wrongdoer says or does nothing. This is the case when someone knowingly conceals information that the victim should be made aware of. For example, if Reba tells Alberto that she will trade her valuable sports car for Alberto's truck, knowing that the sports car does not have a motor, she must tell Alberto about the missing motor or her nondisclosure will be a false representation.

The false representation supporting false pretenses must be about a material fact. A material fact is one that would be important to the victim in his or her decision-making process. For example, it is important for Alberto to know that Reba's sports car does not have a motor, because without a motor, the car is less valuable and cannot be driven. It is less important for him to know that the tire pressure is low, because that fact does not affect the value of the car, and thus Reba would not be guilty of false pretenses for failing to mention that the tires need air.

The representation must concern a past or present fact; a false representation of a future fact does not constitute criminal false pretenses. A car salesperson who claims that a car will run great in ten years is representing a future fact. An exaggerated expression of opinion, like a sales pitch, may not be entirely true but is not a criminal false representation. However, a promise about the future that, at the time it is made, the promisor does not intend to keep, is a criminal false representation of a material fact. If the salesperson promises to buy the car back if it is not running great in ten years, but he does not intend to satisfy the promise, the false promise is a false representation.

When a representation is in fact false, the wrongdoer must know it is false. If an alleged wrongdoer believed the statement was true—whether that belief was reasonable or unreasonable—he or she did not commit false pretenses because they did not knowingly make a false representation. If Reba believes that the synthetic stone is in fact a diamond, then she does not commit false pretenses when she tells Alberto it is a diamond. However, if the wrongdoer is not sure or does not care if a statement is false, and makes the statement with reckless indifference for truthfulness, the statement is a false representation.

It is important to determine why the wrongdoer told the lie. The wrongdoer must intend the false representation to defraud the victim. Intention to defraud the victim exists where the wrongdoer planned to unjustly acquire title to the victim's property by means of the untruth. That is, the wrongdoer will have planned the false representation in advance and will have calculated to deceive the victim into transferring title by way of the false statement. Telling an untruth, in and of itself, will not subject the liar to prosecution for false pretenses.

The victim of false pretenses must have relied on the false representation. The false representation must be the reason, or one of the reasons, that the victim passed title to the wrongdoer. It does not matter how gullible or naive the victim would seem for believing the representation; the wrongdoer is still guilty. On the other hand, to rely on a false statement, the potential victim must believe it to be true. An individual who does not believe a false representation but passes title to the statement maker anyway does not rely on the representation, and the statement maker will not be guilty.

Conviction of false pretenses requires the wrongdoer to obtain more than possession of the property; the wrongdoer must also obtain title to the property. A wrongdoer who gains possession of property but not title to the property is guilty of a different crime often referred to as **LARCENY**. For example, a wrongdoer who breaks a truck's window and hot-wires the truck acquires only possession of the truck and is guilty of larceny.

Other laws may require the delivery of the possession of property in order to complete a transfer of title. In such cases, the wrongdoer may have to obtain title as well as possession of the property to be guilty of false pretenses. Imagine that the laws of the state where Alberto and Reba live require a party to take possession in order to obtain a valid transfer of title. Alberto signs the paper title over to Reba, but before Reba drives the truck away, Alberto figures out the scam, and Reba runs off. No transfer of title has occurred, because the state's laws require possession in addition to paper title, and Reba is not guilty of false pretenses.

Title does not have to pass directly to the wrongdoer. A wrongdoer can cause a victim to pass title to someone other than the wrongdoer

and still benefit from the transfer. A transfer of title to a family member or a corporation in which the wrongdoer has an interest constitutes a transfer of title for purposes of false pretenses.

In many states, crimes relating to theft of property, including false pretenses, have been combined and consolidated into one offense. Statutory consolidation usually does not change the essential elements of false pretenses, but instead ensures smoother prosecution so that wrongdoers cannot avoid criminal consequences by finding legal loopholes to slip through.

A number of crimes are very similar to false pretenses. For example, when an individual attempts to pass a bad check, there is intent to defraud because he or she is attempting to obtain money or property by issuing checks from an account that does not exist or has insufficient funds. MAIL FRAUD is a crime reasonably calculated to deceive victims, and accomplishes the deception by using the U.S. mail. A scheme to defraud using the mail is actionable whether or not any false representation was made. SECURITIES registration laws prohibit a wrongdoer from knowingly furnishing false information in connection with the sale or registration of securities. Forgery can be likened to false pretenses in that it is a crime where the genuineness of a document is falsely represented.

In addition to being criminally accountable for obtaining property by false pretenses, the wrongdoer may also be liable in a civil court. Liability for tortuous fraudulent MISREPRESENTATION, or deceit, closely parallels liability for criminal fraudulent misrepresentation. A wrongdoer who fraudulently misrepresents a fact in order to induce another to act or refrain from acting in reliance upon it may be liable for pecuniary loss caused to the victim by the victim's justifiable reliance upon the misrepresentation.

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## FAMILY CAR DOCTRINE

*A* RULE OF LAW *applied in particular cases of* NEGLIGENCE *that extends liability to the owner of an automobile for damage done by a family member while using the car.*

The family car doctrine, also known as the family purpose doctrine, is based on the premise that a car is provided by the head of the household for the family's use and, therefore, the operator of the car acts as an agent of the owner. For example, if a husband is the owner of a car and his wife uses the car for one of the purposes for which it was purchased, such as grocery shopping, then the wife is acting as the husband's agent in carrying out such purpose. Under the family car doctrine, the owner of the family car (in this case, the husband) is legally responsible for any damage caused by the family member driving the car (in this case, the wife) if the owner knew of and consented to the family member's use of the car. The courts of approximately 20 states follow this doctrine.

Liability under the doctrine is contingent upon control and use of the automobile. An individual upon whom liability is sought to be imposed must own, provide, or maintain the automobile. In addition, in order to successfully initiate an action within the meaning of the doc-

**Family Car Doctrine**

**LICENSED DRIVERS, BY AGE, IN 2001**

Total drivers: 191,275,719

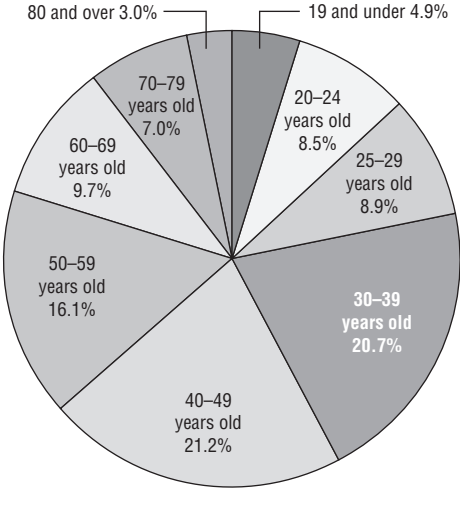


SOURCE: U.S. Department of Transportation, Federal Highway Administration, *Highway Statistics 2001.*

trine, it must be proven that the automobile existed for family use and pleasure. If an automobile was purchased and is used for business purposes, it might come within the doctrine, provided it is also used for family purposes and was used for such purposes at the time of the accident.

Some insurance carriers attempt to avoid the application of the family car doctrine by asking policyholders for the ages of household members, and listing teenagers as "excluded" drivers on their parents' policy.

## FAMILY LAW

*Statutes, court decisions, and provisions of the federal and state constitutions that relate to family relationships, rights, duties, and finances.*

The law relating to family disputes and obligations has grown dramatically since the 1970s, as legislators and judges have reexamined and redefined legal relationships surrounding DIVORCE, CHILD CUSTODY, and CHILD SUPPORT. Family law has become entwined with national debates over the structure of the family, gender bias, and morality. Despite many changes made by state and federal legislators, family law remains a contentious area of U.S. law, generating strong emotions from those who have had to enter the legal process.

### Historical Background

Most of the changes made in family law in the late twentieth century have been based on overturning concepts of marriage, family, and gender that go back to European FEUDALISM, canon (church) law, and custom. During Anglo-Saxon times in England, marriage and divorce were private matters. Following the Norman conquest in 1066, however, the legal status of a

**Presence of Parents in Home for Children Under 18 Years Old, 1980 and 1998**

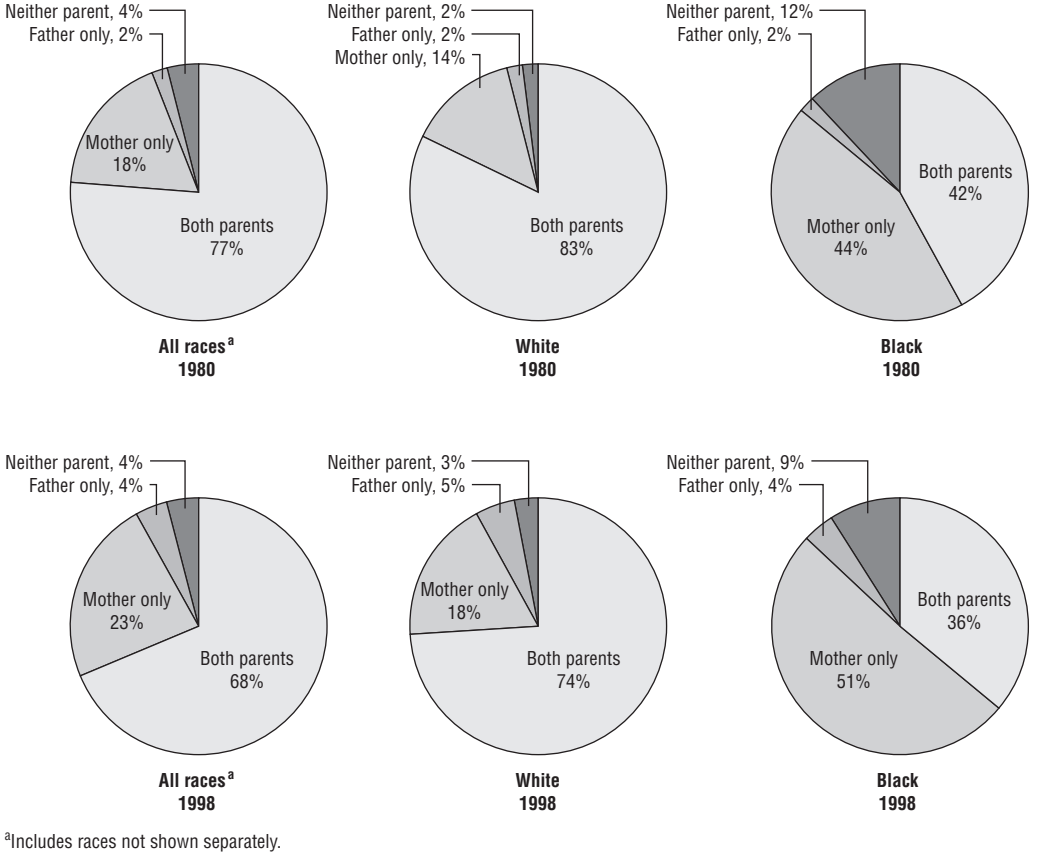


[a]Includes races not shown separately.

SOURCE: U.S. Census Bureau, *Statistical Abstract of the United States*, 2000.

married woman was fixed by COMMON LAW, and CANON LAW prescribed various rights and duties. The result was that the identity of the wife was merged into that of the husband; he was a legal person but she was not. Upon marriage, the husband received all the wife's PERSONAL PROPERTY and managed all the property owned by her. In return, the husband was obliged to support the wife and their children.

This legal definition of marriage continued in the United States until the middle of the nineteenth century, when states enacted married women's property acts. These acts conferred legal status upon wives and permitted them to own and transfer property in their own right, to sue and be sued, and to enter into contracts. Although these acts were significant advances, they dealt only with property a woman inherited. The husband, by placing title in his name, could control most of the assets acquired during marriage, thus forcing the wife to rely on his bounty.

Divorce law has also changed over time. In colonial America, divorce was extremely rare. This was partly because obtaining a divorce decree required legislative action, a process that was time-consuming and costly. Massachusetts in 1780 was the first state to allow judicial divorce. By 1900, every state except South Carolina provided for judicial divorce.

Even with availability, divorce remained a highly conflicted area of law. The Catholic Church labeled divorce a sin, and Protestant denominations saw it as a mark of moral degeneration. The adversarial process presented another roadblock to divorce. In the nineteenth century, consensual divorce was not known. For a couple to obtain a divorce, one party to the marriage had to prove that the other had committed a wrong of such weight that the marriage must be ended. The need to find fault was a legacy of family law that was not changed until the 1970s.

Finally, the issue of divorce raised the topic of child custody. Traditionally, fathers retained custody of their children. This tradition weakened in the nineteenth century, as judges fashioned two doctrines governing child custody. The "best-interests-of-the-child" doctrine balanced a new right of the mother to custody of the child against the assessment of the needs of the child. The "tender years" doctrine arose after the Civil War, giving mothers a presumptive right to their young children.

### Divorce

Beginning in the 1960s, advocates of divorce reform called for the legal recognition of no-fault divorce. Under this concept, a divorce may be granted on grounds such as incompatibility, irreconcilable differences, or an irretrievable breakdown of the marriage relationship. The court examines the condition of the marriage rather than the question of whether either party is at fault. This type of proceeding eliminates the need for one party to accuse the other of a traditional ground for divorce, such as ADULTERY, cruelty, alcoholism, or drug addiction.

By 1987, all fifty states had adopted no-fault divorce, exclusively or as an option to traditional fault-grounded divorce. No-fault divorce has become a quick and inexpensive means of ending a marriage, especially when a couple has no children and moderate property assets. In fact, the ability to end a marriage using no-fault procedures has led to criticism that divorce has become too easy to obtain, allowing couples to abandon a marriage at the first sign of marital discord.

The division of marital property has also undergone significant change since the 1970s. Courts now consider the monetary and nonmonetary contributions of a spouse as a homemaker, parent, and helper in advancing the career or career potential of the other party—as, for example, when one spouse works so that the other may go to school. In distributing marital assets and setting ALIMONY and maintenance, the homemaker's contributions are significant factors, although there is disagreement as to their valuation. On the other hand, courts no longer look at alimony as a long-term remedy. Alimony is now often awarded for a fixed term, so as to enable a divorced spouse to acquire education or training before entering the workforce.

### Child Custody

During a marriage, all custodial rights are exercised by both parents. These include decision-making power over all aspects of upbringing, religion, and education, as long as the parental decisions and conduct stay clear of the neglect, abuse, and dependency laws. Upon divorce, that power traditionally went solely to one parent who obtained custody. Traditionally, the VISITATION RIGHTS given to the noncustodial parent constituted little more than a possessory interest. This made the custody decision upon divorce a significant one: the relationship between the noncusto-

dial parent and her or his children would change, as the parent would lose the ability to shape decisions affecting the children.

In the United States, since the nineteenth century, mothers traditionally gained custody of children. In the late twentieth century, changes in marital and social roles have led to fathers assuming duties once thought to be the exclusive province of mothers. This in turn has led to fathers showing more interest in claiming custody and to courts granting fathers custody. Yet the vast majority of custody dispositions still go to the mother.

From a dissatisfaction with custody decisions has emerged the concept of joint custody. Under joint custody, legal custody (the decision-making power over the child's conduct of life) remains with both parents, and physical custody goes to one or the other or is shared. The concept has met with mixed reactions. If both parents are reasonable, both may be able to participate fully in decisions that would have been denied one of them. On the other hand, joint custody is likely to be harmful if the parents play out any lingering animosity, or confuse the child with conflicting directions, or are simply unwilling to agree on basic issues involving the child's welfare.

Beginning in 1980, the laws governing custody disputes have been guided by federal statutes. A 1980 amendment to the **JUDICIARY ACT** (28 U.S.C.A. § 1738A) authorized federal rules that control the enforcement and modification of custody decrees. When in conflict, these rules supersede state statutes, including the Uniform Child Custody Jurisdiction Act (UCCJA), which all states have enacted in some version. The UCCJA was created to deal with interstate custody disputes. Before it was passed, a divorced parent who was unhappy with one state's custody decision could sometimes obtain a more favorable ruling from another state. This led to divorced parents' **KIDNAPPING** their children and moving to another state in order to petition for custody.

The **UNIFORM LAW COMMISSIONERS** strengthened the original UCCJA in 1997 when it approved the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Many of the provisions are the same as those in the original statute, but the new uniform law strengthened the enforcement procedures from the original UCCJA. Several of the new provisions are designed to expedite proceedings for determining proper jurisdiction in different states, including communication between judges in the two states. Thirty states have adopted the updated UCCJEA.

Despite the enactment of the original UCCJA, the problem persisted. In 1980, Congress passed the Parental Kidnapping Prevention Act (28 U.S.C.A. § 1738A), which aids enforcement and promotes finality in child custody decisions, by providing that a valid custody decree must be given full legal effect in other states. In an international context, in 1986, the United States adopted the 1980 Hague Convention on the Civil Aspects of International Child Abduction (42 U.S.C.A. § 11603). The convention was designed to facilitate the return of abducted children and the exercise of visitation rights across international boundaries.

With the growing number of disputes among parents regarding custody and visitation of children to the marriage, states have recognized that grandparents often play an important role in the lives of their grandchildren. Surveys by the **AMERICAN ASSOCIATION OF RETIRED PERSONS** (AARP) suggest that more than 80 percent of grandparents responding said that they had seen their grandchildren within the previous month. Each of the 50 states has adopted provisions in their family laws allowing visitation for grandparents under certain circumstances.

Such laws have come under attack by parents, who argue that giving grandparents visitation rights infringes on their right to raise their children as they see fit. The U.S. Supreme Court, in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), addressed this

*Jennifer and Gary Troxel, shown outside the Supreme Court building in January 2000, used a Washington state child visitation statute to sue for the right to visit their grandchildren.*

AP/WIDE WORLD PHOTOS

issue for the first time. The court ruled that the state of Washington's grandparent visitation statute violated the Fourteenth Amendment's DUE PROCESS CLAUSE, as it interfered with the rights of parents to make decisions concerning the care, custody, and control of their children.

The State of Washington, under section 26.10.160(3) of its Revised Code, permitted "any person" at "any time" to petition a state family court for visitation rights whenever "visitation may serve the best interest of the child." Jenifer and Gary Troxel used this statute to petition a Washington court in 1993 for the right to visit their grandchildren, Isabelle and Natalie Troxel. Tommie Granville, the mother of the children, opposed the petition. Brad Troxel, the son of Jenifer and Gary, had shared a relationship with Tommie that ended in 1991. Though they never married, they had Isabelle and Natalie. After they broke up, Brad brought his daughters to his parents for weekend visits. When Brad committed suicide in 1993, his parents sought to continue the weekend visitations. Tommie refused, however, allowing them one short visit per month. This led to the filing of the visitation petition in which the Troxels asked for two weekends of visitation per month and two weeks of visitation per summer. The family court ultimately ordered visitation one weekend per month and one week during the summer, along with four hours on each grandparent's birthday.

The Washington Court of Appeals and the Washington Supreme Court both found that the statute unconstitutionally infringed upon the fundamental right of parents to rear their children. It noted that the U.S. Constitution allows the state to interfere with this right only to prevent harm to the children. The Washington statute did not require a showing of harm. In addition, the statute permitted "any person" to file a visitation petition. The Washington courts found that this provision was too broad. In their view, parents have a right to limit visitation of their children with third persons.

The Troxels appealed to the U.S. Supreme Court, which upheld the decisions of the Washington courts. Justice SANDRA DAY O'CONNOR, writing for the majority, acknowledged that the demographics of the American family had changed in the past one hundred years. In 1998, almost 4,000,000 children lived with their grandparents and 28 percent of all children under 18 lived in single-parent households. Though she noted that these changes helped explain the extension of statutory visitation right, there were "obvious costs" that came with these changes. The primary cost was the "substantial burden" placed on the "traditional parent-child relationship." Invoking the recognized liberty interests of parents "in the care, custody, and control of their children," the Court found that the statute unconstitutionally interfered with the parent's DUE PROCESS rights.

The Court in *Troxel* noted that the decision did not invalidate all grandparent visitation statutes. The breath of the Washington statute—for example, the fact that any person could seek visitation—was primarily responsible for the Court rendering it unconstitutional. As the AARP and other groups condemned the decision, state legislatures in 2001 and 2002 sought aggressively to amend their statutes to comport with the *Troxel* decision. Each of the 50 states still has a statue providing for visitation, but many now require grandparents to demonstrate harm to the child if visitation is not allowed or to show that one of the parents to the marriage is deceased.

### Child Support

In most cases, a divorce decree will require the noncustodial parent, usually the father, to pay child support. The failure of parents to pay child support has significant consequences. Lack of support may force the custodial parent to apply for welfare, which in turn affects government budgets and ultimately taxes. This problem has resulted in increasingly more aggressive collection efforts by the government.

The Uniform Reciprocal Enforcement of Support Act (URESA) exists in all states in some form. URESA allows an individual who is due alimony or child support from someone who lives in a different state to bring action for receipt of the payments in the home state. This measure circumvents such problems as expense and inconvenience inherent in traveling from one state to another in pursuit of support.

In response to federal legislation that mandates a more aggressive approach, states have become more creative in extracting money from those who fail to pay child support—who, because they are usually fathers, have come to be labeled deadbeat dads. In 1975, Congress enacted a provision that created the Office of Child Support Enforcement in the DEPARTMENT OF HEALTH AND HUMAN SERVICES (42 U.S.C.A. § 651). The office was charged with developing ways of collecting child support.

In 1984, the law was amended to strengthen enforcement powers. State laws now must require employers to withhold child support from the paychecks of parents who are delinquent for one month. Employers are to be held responsible if they do not comply fully. State laws must provide for the imposition of liens against the property of those who owe support. Unpaid support must be deducted from federal and state INCOME TAX refunds. Expedited hearings are required in support cases.

### Other Areas

Family law has grown beyond the boundaries of marriage, divorce, and child custody and support. New areas of law have been created that deal with the legal rights of persons who have not been legally married.

**Palimony** The colloquial term *palimony* entered the U.S. lexicon in 1976, with the lawsuit *Marvin v. Marvin,* 18 Cal.3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (Cal.). The term refers to alimony paid out of a nonmarital union. In *Marvin,* the California Supreme Court ruled that although public policy is to encourage and foster the institution of marriage, an equitable distribution of property accumulated during a nonmarital relationship is not precluded. In this case, Michelle Triola Marvin, who had cohabited with film actor Lee Marvin for seven years without a formal marriage, brought an action to enforce an oral contract under which she was entitled to half the property accumulated during the seven-year period, along with support payments. Though the facts of the case ultimately led to Michelle Marvin's not recovering any palimony, the case established the right of a cohabitant to obtain a PROPERTY SETTLEMENT.

**Same-Sex Marriage** Despite court challenges, marriage can occur only between persons of the opposite sex. In *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 (1971), *cert. denied,* 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972), the Minnesota Supreme Court sustained a clerk's denial of a marriage license to a homosexual couple.

The possibility of homosexual marriage was revived by the 1993 decision of the Hawaii Supreme Court in *Baehr v. Lewin,* 74 Haw. 530, 852 P.2d 44. In *Baehr,* the court held that a state law restricting legal marriage to parties of the opposite sex establishes a sex-based classification, which is subject to strict constitutional scrutiny when challenged on EQUAL PROTECTION grounds. Although the court did not recognize a constitutional right to same-sex marriage, it indicated that if the state prohibited such marriages, it would have a difficult time proving that gay and lesbian couples were not being denied equal protection of the laws. The debate over homosexual marriage continues at both the federal and state levels.

Although gay and lesbian partners have been unable to persuade states to recognize their unions as "marriage" in the traditional sense, an increasing number of states have passed laws allowing unmarried couples, including homosexual and heterosexual couples, to register as "domestic partners." A registry identifying these partners has been established in dozens of American cities, and other cities and states now extend certain benefits to domestic partners even if the city or state does not provide a registry. The ordinances and statutes also provide certain procedures for property settlement and resolution of other issues if the partners separate.

The movement has been most popular in cities in the state of California, where many municipalities and counties provide benefits to domestic partners, domestic partner registries, or both. Although several of the cities across the United States that have extended these rights to same-sex couples are larger, urban areas, some smaller counties and cities have also extended such rights.

**Artificial Conception and Surrogate Motherhood** Modern technology has created opportunities for conceiving children through ARTIFICIAL INSEMINATION, in vitro fertilization, and embryo transplantation. Combined with these techniques is the practice of SURROGATE MOTHERHOOD. These new techniques have also created legal questions and disputes new to family law.

The most important legal question goes to the child's status, which encompasses the child's rights against, and claims on, the various actors in the child-bearing scenario. These actors might include one or more of the following: (1) the married mother's husband when the child was conceived by artificial insemination with semen donated by a third party; (2) a surrogate mother who carried the child to term and gave birth to the child, where the pregnancy resulted from either (*a*) her artificial insemination or (*b*) her receipt of a fertilized ovum (embryo) from another woman; (3) the donor of the semen; and (4) the donor of the ovum or embryo.

***Artificial insemination*** Where a married woman, with the consent of her husband, has conceived a child by artificial insemination from a donor other than her husband, the law will recognize the child as the husband's legitimate child.

***In vitro fertilization and ovum transplantation*** The technique of in vitro fertilization gained international attention with the birth of Louise Brown in England in 1978. This technique involves the fertilization of the ovum outside the womb. Where the ovum is donated by another woman, the birth mother will be treated in law as the legitimate mother of the child.

***Surrogate motherhood*** In surrogate motherhood, women agree to be artificially inseminated or to have a fertilized ovum inserted into their uterus, and to carry the child to term for another party. Where women do this to assist members of their own family, few legal complications arise. However, where women have agreed to the procedure for financial compensation, controversy has followed.

The most famous case involved "Baby M" (IN RE BABY M, 109 N.J. 396, 537 A.2d 1227 [1988]). In 1987, Mary Beth Whitehead agreed to be the surrogate mother for sperm-donor William Stern. Stern agreed to pay Whitehead $10,000 for carrying the child. Whitehead signed the contract agreeing to turn the child over to Stern and his wife, Elizabeth Stern. Whitehead began to show attachment to the child when she was born, naming the child Sara Elizabeth Whitehead at the hospital. The Sterns, on the other hand, had prepared to take custody of the child, naming her Melissa. When Whitehead refused to turn over the baby, Stern went to court seeking custody of the girl.

The New Jersey Supreme Court held that the surrogate contract was against public policy and that the right of procreation did not entitle Stern and his wife to custody of the child. Nevertheless, based on the best interests of the child, the court awarded custody to the Sterns and granted Whitehead visitation rights.

### Court Procedures

Family law has been governed by the adversarial process. This process is geared to produce a winner and a loser. In divorce and child custody cases, the process has increased tensions between the parties, tensions that do not go away after the court process is completed.

States have begun to explore non-adversarial alternatives, including family mediation. Court systems are also experimenting with more informal procedures for handling family law cases, in hopes of diffusing the emotions of the parties.

### Conclusion

Family law has become a major component of the U.S. legal system. Attorneys seeking ADMISSION TO THE BAR are being tested on family law subjects, and law schools provide more courses in this field. Many of the social and cultural issues U.S. society debates will ultimately be played out in its family courts.

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CROSS-REFERENCES

Adversary System; Alternative Dispute Resolution; Child Abuse; Children's Rights; Cohabitation; Domestic Violence; Fetal Rights; Gay and Lesbian Rights; Husband and Wife; Parent and Child.

## FAMILY MEDICAL LEAVE

*Federal, state, and local laws that authorize employees to take paid or unpaid leave for a defined period of time for major health-related medical issues affecting their immediate family.*

Beginning in the 1990s, federal and state family medical leave laws were passed, allowing employees to take unpaid leaves of absence from work for major, family-related medical issues without first obtaining permission from their employers. Business managers worried that family medical leave would make personnel management very difficult and ultimately drive costs up. However, by 2002, studies had shown that the federal medical leave program had not unduly hurt U.S. businesses. California began the next stage in 2002, when it enacted a law that will provide employees with paid leaves of absence.

Some state and local governments enacted family medical leave laws in the 1980s, but advocates of this policy argued that a federal law was needed. Congress passed a family medical leave law twice in the early 1990s, but both times President GEORGE H. W. BUSH vetoed the legislation. In February 1993, President BILL CLINTON signed into law the Family and Medical Leave Act of 1993 (FMLA), (29 U.S.C.A. § 2601 et seq.). The act permits employees to take up to 12 weeks of unpaid leave each year for family illness, childbirth, or ADOPTION. It mandates that employers

maintain the employees' insurance benefits and give them their jobs back when they return.

The drive for a federal statute was caused in part by changes in the workforce. Young mothers and single parents joined the workforce and needed options that generally were not required by the traditional male breadwinner. These new employees struggled to keep their jobs when they needed to remain at home during the workday when their children became sick. Employees who missed too much work because their children had serious medical problems often lost their jobs. The federal law sought to provide more security to employees who found themselves in this predicament.

The FMLA, which took effect in August 1993, applies to all businesses and government agencies that have 50 or more employees. Employees become eligible for leave after one year of employment at the business and after working at least 1,250 hours in the previous 12 months. Employees are entitled to take up to 12 workweeks during a 12-month period. The leave can be continuous and can be exhausted after 12 straight weeks, or the employee may take intermittent leave. Intermittent leave is typically taken when the employee or a family member is fighting a serious illness during a chemotherapy or other treatment cycle. In addition, intermittent leave can take the form of a reduced work schedule.

The FMLA limits the scope of the act to an individual, immediate family, and parents. It also describes the types of life situations that merit mandatory leave. These situations include childbirth, adoption, or the placement of a child with a parent for foster care. Fathers, as well as mothers, are permitted to exercise their leave rights for these situations. Leave also can be taken in order to care for a seriously ill spouse, child, or parent. However, if both spouses work for the same employer, they are jointly entitled to a combined total of 12 weeks of leave for the above situations. In addition, an employee is authorized to take leave to fight a serious health problem.

Employees or employers may choose to use accrued paid leave (sick or vacation leave) to cover some or all of the FMLA leave. The employer must designate whether an employee's use of paid leave counts as FMLA leave, based on information from the employee. Employers also have the right to request health certification before granting leave. Disputes over eligibility can be pursued through second and third medical opinions at the employer's expense, with a third opinion considered binding.

Employers must pay their contributions to employees' HEALTH CARE insurance. If employees also contribute to the insurance plan, they must make these payments while on leave. Employers have recourse if employees do not return to their jobs following a medical leave. Employers can demand repayment of health care premiums that they had paid during the leave period.

Job security is generally guaranteed under the FMLA, but not in all cases. If a company lays workers off, it also may eliminate the position of the person who is on leave. In such instances, the employer has the burden of proving that the employee would not otherwise have been employed at the time the reinstatement was sought. Another provision of the FMLA concerns key employees, who are defined at the highest-paid 10 percent of a company's workforce. Key employees are not guaranteed reinstatement and must be informed of this fact when they apply for leave. Employers may deny reinstatement to key employees if granting leave would cause substantial and serious economic injury to the company.

Although businesses feared added costs and great disruptions from the FMLA, LABOR DEPARTMENT statistics have shown that the statute has not been costly or disruptive, with less than four percent of the workforce annually taking family medical leave. Many analysts believe that the reason why more workers do not take advantage of the law is that it provides unpaid leave, and many workers simply cannot afford to take advantage of the law. Some also speculate that psychological pressures keep employees from applying for leave, and that they believe that their supervisors will view them as less-serious workers.

In 2002, California became the first state to tackle the question of paid family medical leave by mandating up to six weeks of paid family and medical leave. Beginning in 2004, the Family Temporary Disability Pay Law will require employees to contribute a small amount from each paycheck to fund a medical leave program. The annual deduction ranges from $11.24, for MINIMUM WAGE earners, to a maximum of $70, for those persons earning $72,000 or more. Persons who take leave will receive 55 percent of their pay, up to a maximum of $728 per week.

FURTHER READINGS

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CROSS-REFERENCES

Employment Law.

## FANNIE MAE

See FEDERAL NATIONAL MORTGAGE ASSOCIATION.

## FARM CREDIT ADMINISTRATION

The Farm Credit Administration (FCA) is an independent agency of the EXECUTIVE BRANCH of the federal government. It supervises and coordinates the Farm Credit System, which is a centralized banking system designed to serve U.S. agricultural interests by granting short- and long-term credit through regional banks and local associations. Although initially capitalized by the federal government, the banks and associations that make up the Farm Credit System are now financed entirely through stock that is owned by members, borrowers, or the associations. The FCA ensures the safe operation of these lending institutions and protects the interests of their borrowers.

The Farm Credit System was established in 1916 in response to the unique credit needs of farmers. Federal land banks were established to provide adequate and dependable credit to farmers, ranchers, producers or harvesters of aquatic products, providers of farm services, rural homeowners, and agricultural associations. During the 1930s, the Depression and falling farm prices increased debt delinquencies and led to a serious decline in farm values. Many loan companies and credit institutions failed. In 1933, President FRANKLIN D. ROOSEVELT directed Congress to create the FCA to oversee the entities that grant credit to farmers and ranchers. All government farm credit programs, including the land banks and intermediate credit banks, were unified under the new agency, which was established by the Farm Credit Act of 1933 (U.S. Pub. Law 73-76, 48 Stat. 257).

The modern FCA derives its authority from the Farm Credit Act of 1971 (12 U.S.C.A. § 2241 et seq.), which superseded all prior authorizing legislation. The FCA examines the lending institutions that constitute the Farm Credit System to certify that they are sound. It also ensures compliance with the regulations under which the Farm Credit institutions operate. To that end, it is authorized to issue cease-and-desist orders, levy civil monetary penalties, remove officers and directors, and impose financial and operating reporting requirements. It may directly intervene in the management of an institution whose practices violate the Farm Credit Act or its regulations. It also may step in to correct an unsafe practice or to assume formal conservatorship over an institution.

The FCA is managed by the Farm Credit Administration Board, whose three full-time members are appointed to six-year terms by the President of the United States, with the advice and consent of the Senate. The board meets monthly to set policy objectives and to approve the rules and regulations that govern the FCA's responsibilities.

The FCA also manages the Federal Agricultural Mortgage Corporation, known as Farmer Mac. According the FCA web site, Farmer Mac provides a secondary market for agricultural real estate and rural housing mortgages. It guarantees prompt payment of principal and interest on SECURITIES representing interests in, or obligations backed by, mortgage loans secured by first liens on agricultural real estate or rural housing. It also guarantees securities backed by the guaranteed portions of farm ownership and operating loans, rural business and community development loans, and certain other loans guaranteed by the U.S. DEPARTMENT OF AGRICULTURE.

As of January 1, 2003, according to the FCA web site, the Farm Credit System was composed of Five Farm Credit Banks that provide loan funds to 81 Agricultural Credit Associations (ACAs), and 13 Federal Land Credit Associations (FLCAs). ACAs make short-, intermediate-, and long-term loans, and FLCAs make long-term loans. The Farm Credit System also had one Agricultural Credit Bank (ACB), which has the authority of an FCB and provides loan funds to five ACAs. In addition, the ACB makes loans of all kinds to agricultural, aquatic, and public utility cooperatives and is authorized to finance U.S. agricultural exports and provide international banking services for farmer-owned cooperatives.

The Farm Credit Administration web site offers extensive information about its roles and duties at www.fca.gov.

CROSS-REFERENCES

Agricultural Law.

## FATAL

*Deadly or mortal; destructive; devastating.*

A *fatal error* in legal procedure is one that is of such a substantial nature as to harm unjustly the person who complains about it. It is synonymous with *reversible error*, which, in appellate practice, warrants the reversal of the judgment before the appellate court for review. A fatal error can warrant a new trial.

A *fatal injury* is one that results in death. It is distinguished from a disability in accident and disability insurance policies, which includes those injuries that prevent the insured from doing his or her regular job but do not result in his or her death.

## FAULT

*Neglect of care; an act to which blame or censure is attached. Fault implies any* NEGLIGENCE*, error, or defect of judgment.*

Fault has been held to embrace a refusal to perform an action that one is legally obligated to do, such as the failure to make a payment when due.

## FEASANCE

*The performance of an act.*

Malfeasance is the commission of an illegal act. Misfeasance is the inadequate or improper performance of a lawful act. NONFEASANCE is the neglect of a duty or the failure to perform a required task.

## FEDERAL

*Relating to the general government or union of the states; based upon, or created pursuant to, the laws of the Constitution of the United States.*

The United States has traditionally been named a *federal* government in most political and judicial writings. The term *federal* has not been prescribed by any definite authority but is used to express a broad opinion concerning the nature of the form of government.

A recent tendency has been to use the term *national* in place of *federal* to denote the government of the Union. Neither settles any question regarding the nature of authority of the government.

The term *federal* is generally considered to be more appropriate if the government is to be viewed as a union of the states. *National* is used to reflect the view that individual state governments and the Union as a whole are two distinct and separate systems, each of which is established directly by the population for local and national purposes, respectively.

In a more general sense, *federal* is ordinarily used to refer to a league or compact between two or more states to become joined under one central government.

## FEDERAL APPENDIX

*A legal reference source containing federal courts of appeals decisions that have not been selected by the court for publication.*

The first volume of the *Federal Appendix* was published September 1, 2001. Coverage began with decisions handed down after January 1, 2001. The *Federal Appendix* is an appendix to the *Federal Reporter,* Third Series (F.3d). However, unpublished opinions from the Fifth and Eleventh Circuits are not included in the *Federal Appendix*.

The *Federal Appendix* is part of Thomson West's National Reporter System. The cases contain the West enhancements of case summaries, headnotes, and topics and key numbers. A citation to a Federal Appendix opinion gives, first, the volume, then the abbreviation of the publication, and finally the page number on which the opinion begins. A sample citation looks like this: 2 *Fed.Appx.* 386 (4th Cir. 2001). In 2002, *Federal Appendix* citations began to appear in the *Federal Practice Digest* Fourth Series, and also in some state digests.

Generally, unpublished opinions have no precedential value. And across jurisdictions there are inconsistent court rules regarding citation of unpublished opinions. In 2001 the American Bar Association House of Delegates expressed its approval of federal courts of appeals granting access to unpublished opinions and allowing citation to unpublished opinions (ABA Resolution 01A115). And The Judicial Conference of the United States's Advisory Committee on Appellate Rules has considered amendments to the Federal Rules of Appellate Procedure dealing with citation of non-precedential unpublished decisions.

CROSS-REFERENCES

Judicial Conference of the United States.

## FEDERAL AVIATION ADMINISTRATION

Half a century after Wilbur and Orville Wright flew an airplane for 12 seconds in Kitty Hawk, North Carolina, on December 17, 1903—becoming the first U.S. residents to successfully fly a powered aircraft—Congress established the Federal Aviation Agency, later renamed the Federal Aviation Administration (FAA), with the Federal Aviation Act of 1958 (49 U.S.C.A. § 106). Under the act, the FAA became responsible for all the following:

- Regulating air commerce to promote its development and safety and to meet national defense requirements
- Controlling the use of navigable airspace in the United States and regulating both civil and military operations in that airspace in the interest of safety and efficiency
- Promoting and developing civil AERONAUTICS, which is the science of dealing with the operation of civil, or nonmilitary, aircraft
- Consolidating research and development with respect to air navigation facilities
- Installing and operating air navigation facilities
- Developing and operating a common system of air traffic control and navigation for civil and military aircraft
- Developing and implementing programs and regulations to control aircraft noise, sonic booms, and other environmental effects of civil aviation

A component agency of the DEPARTMENT OF TRANSPORTATION ever since the Department of Transportation Act was passed in 1967 (49 U.S.C.A. § 1651), the FAA engages in a variety of activities to fulfill its responsibilities. One vital activity is safety regulation. The FAA issues and enforces rules, regulations, and minimum standards relating to the manufacture, operation, and maintenance of aircraft. In the interest of safety, the FAA also rates and certifies people working on aircraft, including medical personnel, and certifies airports that serve air carriers. The agency performs flight inspections of air navigation facilities in the United States and, as required, abroad. It also enforces regulations under the Hazardous Materials Transportation Act (49 U.S.C.A. app. 1801) as they apply to air shipments. In 1994, the FAA employed 2,500 safety inspectors, who oversaw 7,300 planes operated by scheduled airlines, 200,000 other planes, 4,700 repair stations, 650 pilot training schools, and 190 maintenance schools. FAA inspectors use a six-inch-thick book called the *Airworthiness Inspector's Handbook* in their work. They have significant power, including the ability to delay or ground aircraft deemed non-airworthy and to suspend the license of pilots and other flight personnel who break FAA rules.

Another primary activity of the FAA is to manage airspace and air traffic, with the goal being to ensure the safe and efficient use of the United States' navigable airspace. To meet this goal, the agency operates a network of airport traffic control towers, air route traffic control centers, and flight service stations. It develops air traffic rules and regulations and allocates the use of airspace. It also provides for the security control of air traffic to meet national defense requirements.

The FAA also oversees the creation, operation, maintenance, and quality of federal visual and electronic aids to air navigation. The agency operates and maintains voice and data communications equipment, radar facilities, computer systems, and visual display equipment at flight service stations, airport traffic control towers, and air route traffic control centers.

Research, engineering, and development activities of the agency help provide the systems, procedures, facilities, and devices needed for a safe and efficient system of air navigation and air traffic control to meet the needs of civil aviation and the air defense system. The FAA also performs aeromedical research to apply knowledge gained from its work and the work of others to the safety and promotion of civil aviation and the health, safety, and efficiency of agency employees. The agency further supports the development and testing of improved aircraft, engines, propellers, and appliances.

The FAA is authorized to test and evaluate aviation systems, subsystems, equipment, devices, materials, concepts, and procedures at any phase in their development, from conception to acceptance and implementation. The agency may assign independent testing at key decision points in the development cycle of these elements.

The agency maintains a national plan of airport requirements and administers a grant program for the development of public-use airports, to ensure safety and to meet current

and future capacity needs. The FAA also evaluates the environmental effects of airport development; administers an airport noise compatibility program; develops standards and technical guidance on airport planning, design, safety, and operation; and provides grants to assist public agencies in airport planning and development.

The FAA registers aircraft and records documents related to the title or interest in aircraft, aircraft engines, propellers, appliances, and spare parts.

Under the Federal Aviation Act of 1958 and the International Aviation Facilities Act (49 U.S.C.A. app. 1151), the agency promotes aviation safety and civil aviation abroad by exchanging aeronautical information with foreign aviation authorities; certifying foreign repair stations, aviators, and mechanics; negotiating bilateral airworthiness agreements to facilitate the import and export of aircraft and components; and providing technical assistance and training in all areas of the agency's expertise. The agency provides technical representation at international conferences, including those of the International Civil Aviation Organization and other international organizations.

Finally, the agency conducts miscellaneous activities such as administering the aviation insurance and aircraft loan guarantee programs; assigning priority and allocating materials for civil aircraft and civil aviation operations; developing specifications for the preparation of aeronautical charts; publishing current information on airways and airport services and issuing technical publications for the improvement of safety in flight, airport planning, and design; and serving as the executive administration for the operation and maintenance of the Department of Transportation's automated payroll and personnel systems.

No stranger to controversy, the FAA has been at the center of a variety of national debates during its existence. In the early 1980s, 11,000 air traffic controllers went on strike to protest stressful working conditions. When President RONALD REAGAN ordered them fired, the FAA pledged to replace many of them by overhauling and modernizing the system that guides planes from takeoff to landing. Fifteen years later, some critics of the FAA contended that the agency had yet to create a modern air traffic control system, causing delays that cost the airline industry up to $5 billion a year. Speaking on the subject in January 1996, Senator William S. Cohen (R-MA), a member of the Committee on Governmental Affairs, said, "The FAA is a victim of its own poor management. If the agency devoted more time to managing itself and less time to defending its deficiencies, the air traffic control system would have been replaced years ago."

In the 1980s, the FAA supported drug-testing for commercial airline pilots and air traffic controllers. Though drug-testing is a form of search, implicating FOURTH AMENDMENT concerns, these drug tests are routinely upheld as a permissible invasion of privacy in light of the public safety concerns associated with air travel.

With U.S. air traffic increasing by almost 130 percent from 1978 to 1994, fatal aircraft accidents also increased. Critics of the FAA say that the agency failed to increase its number of inspectors at a rate comparable to the rate of growth in air traffic; in fact, the agency had only 12 percent more inspectors in 1994 than it did in 1978. The FAA also came under scrutiny for the safety of smaller aircraft after a succession of fatal commuter jet crashes in the 1980s and early to mid-1990s. In 1988, for example, an AVAir plane crashed in Raleigh, North Carolina, killing 12 people. In the two months before the accident, AVAir had another accident, filed for BANKRUPTCY, shut down, and restarted. In that time, AVAir's FAA inspector never visited the airline's headquarters, observed a pilot check ride, or met the training director.

Together with Federico F. Peña, secretary of the U.S. TRANSPORTATION DEPARTMENT, David R. Hinson, administrator of the FAA, set what he called an ambitious new goal at a January 1995 aviation safety summit: zero accidents. In September of 1995, he defended his agency on the safety issue by saying that of the 173 safety initiatives developed at the summit, more than two-thirds were already complete. Calling perfect safety a shared responsibility, Hinson asked for a "hands-on, eyes-open commitment of every person who designs, builds, flies, maintains and regulates aircraft." The same month, the FAA announced plans to train air traffic controllers with computer simulators. In early 1996, the federal government enacted new rules intended to make small commuter turboprop planes as safe as big jets. As part of the change, the FAA began requiring small airlines to follow

**Federal Aviation Administration**

**FATAL ACCIDENTS ON SCHEDULED COMMERCIAL AIR CARRIERS, 1982 TO 2001**

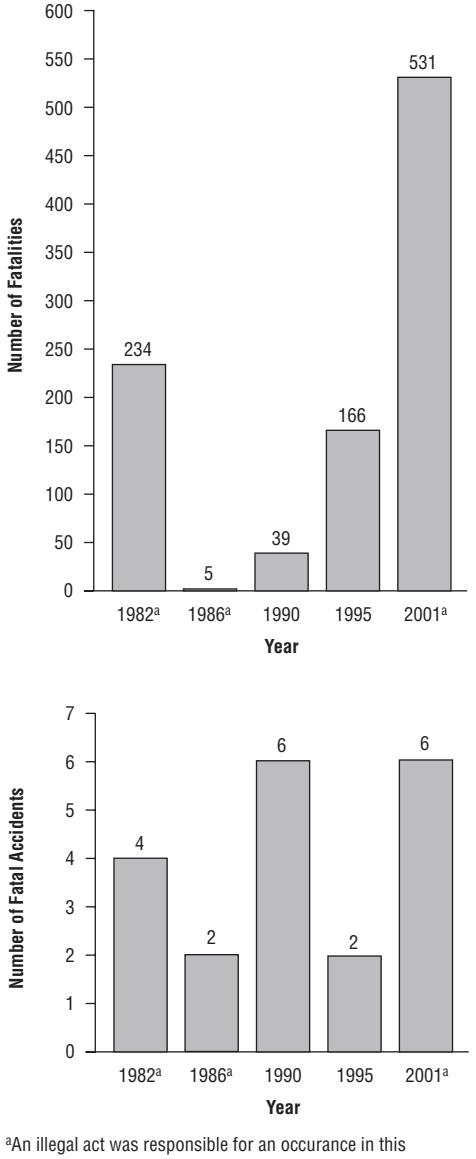


[a]An illegal act was responsible for an occurance in this category. These acts, such as suicide and sabotage, are included in the totals for accidents and fatalities.

SOURCE: National Transportation Safety Board.

the same rules for training and operations as do major airlines.

In the wake of the **SEPTEMBER 11TH ATTACKS** of 2001, in which terrorists used commercial airplanes to destroy the World Trade Center in New York and seriously damage the Pentagon in Washington, D.C., the FAA shifted much of its focus to airline and airport security. Shortly after the attacks on the morning of September 11th, the FAA ordered the grounding of all aircraft in the United States. About 1100 planes were rerouted to new destinations in the first 15 minutes after the order was issued. Throughout the chaotic day, about 4,500 planes eventually landed. The FAA required the planes to remain grounded for several days after the attacks.

The FAA immediately began considering new rules and regulations for protecting airports and airlines from further attacks. Airport security was tightened considerably. Air carriers are now required to check each ticketed passenger for government-issued identification. Baggage is checked more thoroughly at screening points, and only ticketed passengers may pass beyond the screening area. The regulations also restricted the ability of passengers to use the curbs outside of the airports.

More restrictions were placed on items that may be brought aboard a flight by passengers. Because the terrorist attacks on September 11 were perpetrated largely through the use of household goods—box cutters—the FAA identified a number of potentially dangerous items that are now restricted from being carried on board by passengers. Such items include firearms, knives and other cutting or puncturing instruments, corkscrews, athletic equipment such as baseball bats or golf clubs, fireworks and other explosive devices, and flammable liquids or solids.

Additionally, the FAA required all cockpit doors and framing on about 7,000 domestic aircraft to be replaced with a tougher access system by April of 2003. In an effort to comply with this regulation, most commercial airlines installed bombproof and/or bulletproof cockpit doors. Additionally, Before September 11, 2001, fewer than 50 air marshals flew, primarily on international flights. After the attacks, however, FAA officials expanded the program. Although the precise number of marshals flying is classified, the program had grown to slightly more than 4,000 marshals by 2003.

**FURTHER READINGS**

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## FEDERAL BANK ACTS

The National Bank Act, 12 U.S.C.A. § 21 et seq. (1864), was enacted to provide the federal government with an agent to handle its financial affairs through the incorporation of the BANK OF THE UNITED STATES, which also carried on general banking business. Created by a statute passed by Congress in 1791 the Bank of the United States became the central bank for the newly formed government.

The bank had a 20-year charter that expired in 1811, but it was not renewed due to the political climate of the country. The financing problems of the WAR OF 1812, however, highlighted the need for a central bank, motivating Congress to enact legislation to establish the Second Bank of the United States. That bank also had a 20-year charter, but the bank was closed prior to the charter expiration due to political opposition led by U.S. President ANDREW JACKSON.

## FEDERAL BAR ASSOCIATION

The Federal Bar Association (FBA) has more than 16,000 members. It was founded in 1920 to advance the science of JURISPRUDENCE and promote the administration of justice; to uphold a high standard for the federal judiciary, attorneys representing the U.S. government, and attorneys appearing before the courts, agencies, and departments of the United States; to encourage friendly relations among members of the legal profession; and to promote the welfare of attorneys. CONTINUING LEGAL EDUCATION and professional and community services are among association activities. FBA is affiliated with the National Lawyers Club and the Foundation of the Federal Bar Association. Publications include *Federal Bar News* (monthly), a monthly placement newsletter, *Federal Bar Journal* (quarterly), and *Legislative Update.* The association holds annual meetings in late summer.

The FBA gives its members a chance to meet at regional and national conferences, become active in informed discussion of SUBSTANTIVE LAW issues, assume leadership positions at the local and national level, and network with other professionals in the field of federal law.

### FURTHER READINGS

Federal Bar Association. Available online at <www.fedbar.org> (accessed August 9, 2003).

### CROSS-REFERENCES

American Bar Association; Jurisprudence.

## FEDERAL BUDGET

*An annual effort to balance federal spending in such areas as forestry, education, space technology, and the national defense, with revenue, which the United States collects largely through federal taxes.*

Of the three branches of the U.S. government, Congress has the power to determine federal spending, pursuant to Article I, Section 9, of the U.S. Constitution, which states, "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The drafters of the Constitution sought to secure the federal SPENDING POWER with legislators rather than the president, to keep separate the powers of purse and sword. In *The Federalist* No. 58, JAMES MADISON wrote, "This power of the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people."

Still, the Constitution reserved for the president some role in legislative decisions regarding federal spending. The president may recommend budget allowances for what he considers "necessary and expedient," and if Congress does not heed these recommendations, the president may assert his qualified VETO power. But the ultimate determinations of federal expenditures belong to Congress.

When the federal government spends more money than it collects in a given year, a deficit occurs. By the mid-1990s, annual budget deficits were exceeding $200 billion, which alarmed the public and caused debate over how to balance the federal budget. President WILLIAM JEFFERSON CLINTON was successful in the latter years of his administration to provide a budget surplus, which reduced the national debt (the total amount the government owes after borrowing from the population, from foreign governments, or from international institutions) by several billion dollars. In 2000, Clinton announced a record $230 billion surplus, which exceeded the previous record surplus of $122.7 million set in 1999. However, the deficit returned under President GEORGE W. BUSH. In 2003, Bush announced an estimated $304 billion deficit, which established yet another record. He anticipated a deficit for 2004 of $307 billion.

To encourage better communication and cooperation between the president and Congress on matters concerning the federal budget, Congress has enacted laws formalizing the budget-making process. The first such law was

## Government Shutdown

Legal commentators have argued that by keeping separate the powers of purse and sword, drafters of the U.S. Constitution encouraged battles between Congress and the president. This friction between government branches is part of the constitutionally created system of checks and balances. Discord over federal budget priorities usually resolves in short order—no politician wants the reputation of jeopardizing the national or world economy. But on rare occasions in the 1990s, budget fights led to federal government shutdowns.

In October 1990, when Democrats in Congress sought to reduce the federal deficit by implementing a surtax on the income of millionaires, Republican President **GEORGE H. W. BUSH** followed through on a threat to **VETO** any budget legislation that included tax increases. The veto effectively shut down several federal agencies. The closures lasted only three days and occurred on a weekend. Fearing negative fallout from a more extensive government shutdown, Congress and the president reached a compromise plan to reduce the federal deficit without the surtax.

Major differences in political ideologies again surfaced in the fall of 1994, when control of Congress shifted from Democrats to Republicans. The new Congress set a goal of balancing the federal budget by the year 2002, a feat that had not occurred since 1969.

Republicans, buoyed by public sentiment favoring this goal, attempted to implement their balanced budget plan in the fall of 1995. But they faced opposition from many Democrats, among them President **BILL CLINTON**. Although agreeing with the necessity of a balanced budget, Clinton opposed proposed cuts to entitlement programs such as **MEDICARE**, **MEDICAID**, and **WELFARE**. The dispute divided the branches of government as well as political parties, and in November 1995, an impasse led to the expiration of federal funding. Without adequate funding, much of the federal government—including agencies, museums, national parks, and research laboratories—ground to a halt. Some 800,000 government employees deemed "nonessential" were sent home.

Politicians on both sides of the issue faced disapproval from their constituents. Compromises were reached, and a week after it started, the shutdown was over.

Although ideological differences continued, Congress and the White House achieved a budget surplus of $69 billion in 1998. The surplus occurred three years after another partial government shutdown in December 1995 that lasted 21 days. The budget surplus increased to $122.7 billion in 1999 and $230 billion in 2000. Economists projected that the United States could pay off its debts by 2013 if the budget surpluses continued. Those surpluses, however, ended during the administration of President **GEORGE W. BUSH**. The Bush administration announced a record $304 billion deficit in 2003 and projected that the deficit in 2004 would be about $307 billion.

**FURTHER READINGS**

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Schick, Allen. 2000. *The Federal Budget: Politics, Policy, and Process.* Washington, D.C.: Brookings Institute.

passed in response to an enormous national debt following WORLD WAR I. The Budget and Accounting Act of 1921 (31 U.S.C.A. § 501 et seq.) required the president to submit to Congress an annual budget outlining recommendations, or budget aggregates. Within budget aggregates recommended by the president, Congress then was to assign priorities. The 1921 act did not change the balance of powers assigned by the Constitution: Congress retained the right to ignore the president's recommendations, and the president retained the right to veto spending legislation. Rather, the act formalized and codified the roles of each branch.

As may be expected, the president and members of Congress do not always agree on federal budget issues. In the early 1970s, President RICHARD M. NIXON claimed IMPOUNDMENT, which is an executive power to refuse to spend funds appropriated by Congress. Although Nixon argued that he had the right to impound in instances he believed were in the country's best interest, the U.S. Supreme Court affirmed a ruling by the Second Circuit Court of Appeals requiring

Nixon to expend federal funds appropriated for the protection of the environment (*Train v. New York,* 420 U.S. 35, 95 S. Ct. 839, 43 L. Ed. 2d 1 [1975]). However, this ruling was based on the terms of a federal WATER POLLUTION law; the Court declined to address specifically whether the EXECUTIVE BRANCH had the general power to impound funds appropriated by Congress.

Congress responded with the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C.A. § 190a-1 note et seq.; 31 U.S.C.A. § 702 et seq.). This act sought to restore and strengthen legislative control of the budget by requiring the approval of both the Senate and the House of Representatives for presidential *recisions,* or current-year cuts in funds appropriated by Congress. The 1974 act also established a budget committee in each congressional house and the CONGRESSIONAL BUDGET OFFICE to provide technical information and support. Finally, this act required that Congress adopt budget resolutions setting limits on budget aggregates and allowing debates on spending priorities within those aggregates.

The 1974 act greatly reduced the president's role in the budget process—in particular, the president's responsibility of determining and recommending budget aggregates to Congress. Now, legislators could more readily ignore the president's recommendations and instead create for themselves, through budget resolutions, generous limits on budget aggregates. This arrangement allowed politicians more flexibility in setting spending priorities within the budget aggregates, thus pleasing their constituents. Not surprisingly, federal budget deficits grew.

In 1985, Congress reacted to the rising deficits by enacting the Balanced Budget and Emergency Deficit Control Act (popularly known as the Gramm-Rudman-Hollings Act) (Pub. L. No. 99-177, 99 Stat. 1038) (codified as amended in scattered sections of 2, 31, and 42 U.S.C.A.). The Gramm-Rudman-Hollings Act encouraged congressional conformity to deficit reduction targets specifically prescribed by the act. If, after the budget process has been completed, the budget exceeds deficit reduction targets, spending cuts are ordered by the president's OFFICE OF MANAGEMENT AND BUDGET. The Gramm-Rudman-Hollings Act limited this executive power by providing congressionally mandated formulas for the spending cuts.

The Budget Enforcement Act of 1990 (2 U.S.C.A. § 601 et seq.; 15 U.S.C.A. § 1022) revised Gramm-Rudman-Hollings to make deficit targets flexible, not fixed. The 1990 act further required that reductions in defense and foreign spending cannot be used to increase domestic spending and vice versa. This requirement is known as the *firewall.* In addition, the 1990 act required that either revenue increases or spending cuts must balance increases in spending for entitlements, such as Aid to Families with Dependent Children. This requirement is known as *pay-as-you-go.*

The current federal budget process is extremely complex. Confusion and misunderstandings about the process contribute to disagreements over how to resolve the federal deficit. A very basic description of the process follows.

First, the president sends budget recommendations to Congress. Congress, which has the ultimate power to appropriate federal funds, may follow or ignore the president's recommendations.

Second, the House and Senate together devise an overall budget resolution, usually debating their differences at a conference committee.

**Federal Budget, 1950–2001**

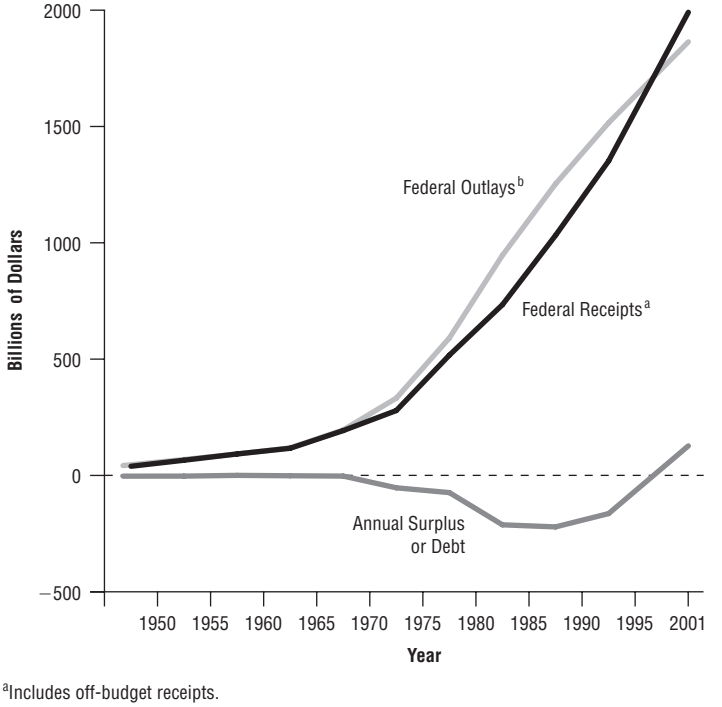


[a]Includes off-budget receipts.
[b]Includes off-budget outlays.

SOURCE: U.S. Office of Management and Budget, *Historical Tables*, annual.

Following the guidelines of the budget resolution, House and Senate committees recommend spending for each of thirteen substantive areas. For the House of Representatives, these committees, which loosely correspond with the thirteen substantive areas, include Agriculture; Banking, Finance and Urban Affairs; Education and Labor; Energy and Commerce; Interior and Insular Affairs; Judiciary; Merchant Marine and Fisheries; Post Office and Civil Service; Public Works and Transportation; Science, Space, and Technology; Veterans Affairs; and Ways and Means. For the Senate, the committees, which also loosely correspond with the thirteen substantive areas, are Agriculture, Nutrition, and Forestry; Banking, Housing, and Urban Affairs; Commerce, Science, and Transportation; Energy and Natural Resources; Environment and Public Works; Finance; Governmental Affairs; Judiciary; Labor and Human Resources; and Veterans' Affairs. The full House and Senate together vote on the recommendations of the committees, following debate in a conference committee if necessary. The House and Senate then jointly send an authorization bill for each of the thirteen substantive areas to the president for signing. These bills merely establish guidelines for spending; they do not actually authorize spending.

Next, the House and Senate Appropriations Committees together draft thirteen separate appropriations bills, which correspond to the authorization bills. The full House and Senate together approve or disapprove each appropriation, conduct debates in conference committees to resolve differences, and amend appropriations if necessary. They then jointly send the thirteen appropriations bills to the president to be signed. If the bills are signed, spending is approved.

Upon congressional funds appropriations, the branches and agencies of the federal government are required to spend the funds on the functions for which they were appropriated. Congress may supplement budget appropriations if conditions change following the budget process, but supplemental appropriation in excess of authorization bills must be accounted for with spending cuts, amendment of the individual authorization bills, or amendment of the overall budget bill containing all the individual authorization bills.

Several wrinkles complicate the federal budget process. For example, Congress and the president enact as law permanent authorization and spending appropriations for entitlement programs such as MEDICARE and MEDICAID. Thus, appropriations for entitlement programs become automatic, requiring no further congressional action during the annual budget process.

Appropriations funding the principal and interest owed on the national debt are, practically speaking, also automatic. Unlike appropriations for entitlement programs, those for the national debt must be approved annually by Congress. But approval for funding this debt is always granted; to allow the United States to default would severely damage the national and world economies. In the debate over how to balance the federal budget, politicians and citizens often overlook automatic federal spending.

Also complicating the budget process is the method of accounting used by the federal government, known as the *cash method.* The cash method of accounting calculates expenditures based upon the date they are paid. This method differs from the *accrual method* of accounting, which calculates expenditures based on the date the obligation is incurred. Although this may seem to be a subtle distinction, the cash method by its nature leaves more room for error in budget appropriations, some of which is corrected by a government statistic called the National Income and Product Accounts. Economists, politicians, and concerned U.S. citizens disagree over which accounting method, cash or accrual, would better serve the U.S. budget and the national economy. Moreover, economics is an inexact science whose complexities are not well understood by the average voter.

Added to the public's general confusion is the difficulty in estimating the federal budget, both revenues and expenditures, before the start of a fiscal year. Future unemployment, inflation, and growth in the gross national product are variables that will affect actual federal spending. And although the TREASURY DEPARTMENT and the Senate Finance Committee estimate future revenues, no accurate determination will be available until the fiscal year has already ended.

Largely because the budget process is so complex, there is little agreement as to how to balance the federal budget. As the federal deficit lingers each year, so does public support of a constitutional amendment requiring a balanced budget. Yet several attempts at such legislation—in 1984, 1990, 1992, and 1994—have failed to pass in Congress. One vocal proponent of a bal-

anced budget amendment is Texas businessman H. Ross Perot, who ran unsuccessfully for president in 1992. Perot denounced mushrooming deficits, blaming politicians who approve current spending to appease constituents at the expense of future taxpayers: "[I]n 1992 alone we will add over $330 billion to the $4 trillion we've already piled on our children's shoulders. . . . The weight of that debt may destroy our children's futures."

Yet a balanced budget amendment would not be without obstacles. One problem is defining a balanced budget, especially given the confusion over federal accounting methods, automatic expenditures, and inaccurate estimates of revenue and spending. For example, a federal budget employing the cash method of accounting may show a far greater deficit than the same budget employing the accrual method of accounting.

Another problem is that of the enforceability of a balanced budget amendment, which hinges in part on taxpayer standing, or legal entitlement to sue. Would all taxpayers have standing to enforce a balanced budget amendment, or would only taxpayers who could demonstrate actual damage as a result of an unbalanced budget? Further, courts are reluctant to make determinations of what they consider **POLITICAL QUESTIONS**, or issues best decided by the legislative or executive branch of government. Many commentators consider the judicial branch incapable of effectively analyzing and deciding issues concerning the federal budget.

Perhaps the greatest impediments to a balanced budget amendment, or any other meaningful reform of the federal budget, are the sacrifices faced by U.S. citizens: to have their taxes raised and their spending programs cut. Whether Congress, the president, and the public will make these sacrifices to reduce and perhaps eliminate the federal deficit is an engaging **POLITICAL QUESTION**.

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CROSS-REFERENCES

Accrual Basis; Cash Basis; Congress of the United States; Constitution of the United States; Independent Parties; Reform Party; Separation of Powers.

## FEDERAL BUREAU OF INVESTIGATION

The Federal Bureau of Investigation (FBI) is the principal investigative unit of the U.S. **DEPARTMENT OF JUSTICE** (DOJ). The FBI gathers and reports facts, compiles evidence, and locates witnesses in legal matters in which the United States is or may be a party in interest. In addition, the bureau assists both U.S. and **INTERNATIONAL LAW** enforcement agencies in crime investigation and personnel training.

The FBI investigates all violations of federal law except those specifically assigned to other federal agencies. The bureau's jurisdiction covers a wide range of crimes, from **KIDNAPPING** and drug trafficking to the unauthorized use of the Woodsy Owl emblem, the U.S. Forest Service's antipollution mascot (18 U.S.C.A. § 711a). The FBI's authority derives from 28 U.S.C.A. § 533, which enables the attorney general to "appoint officials to detect . . . crimes against the United States." The bureau also conducts noncriminal investigations, such as background security checks. The FBI does not prosecute crimes, but it assists other law enforcement agencies in investigations that lead to prosecution.

The FBI traces its origins to 1908 when President **THEODORE ROOSEVELT** instructed Attorney General Charles J. Bonaparte to create a force of special agents to work as investigators within the DOJ. In 1909, Attorney General **GEORGE W. WICKERSHAM** named the elite group the Bureau of Investigation. In 1935, following a series of name changes, the bureau was officially termed the Federal Bureau of Investigation.

In its early days, the FBI investigated the relatively small number of federal crimes that existed. These included **BANKRUPTCY** frauds and antitrust violations. During **WORLD WAR I**, it was responsible for investigating **ESPIONAGE**, sabotage, **SEDITION**, and violations of the **SELECTIVE SERVICE** Act of 1917 (Act May 18, 1917, c. 15, 40 Stat. 76 [Comp. Stat. 1918, § 2044a-2044k]). In 1919, the bureau broadened its scope to include the investigation of motor vehicle thefts.

The FBI established its reputation as a tenacious investigative force during **PROHIBITION**, in

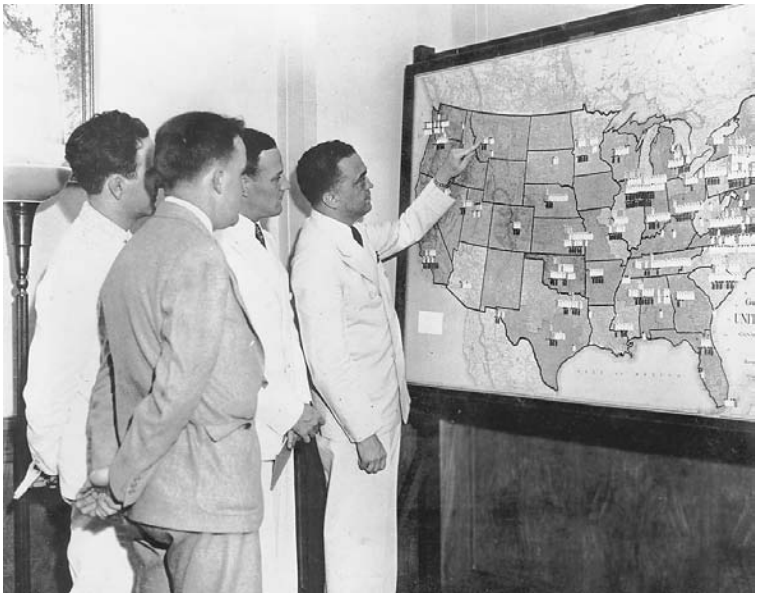

*J. Edgar Hoover points to a crime map of the United States. He served as FBI director for 48 years, during which the bureau grew in size and expertise, though he was criticized for abuse of power and harrassment of suspects.*

AP/WIDE WORLD PHOTOS

the 1930s. Its many undercover probes throughout that era led to the arrests of notorious crime figures such as John Dillinger and AL CAPONE. With the onset of WORLD WAR II and the advent of the atomic age, the FBI increased its size and scope to include domestic and foreign intelligence and counterintelligence probes, background security checks, and investigations of internal security matters for the EXECUTIVE BRANCH.

During the 1960s, the bureau's chief concerns were CIVIL RIGHTS violations and ORGANIZED CRIME operations. Counterterrorism, WHITE-COLLAR CRIMES, illegal drugs, and violent crimes were its focus during the 1970s and 1980s.

The modern FBI divides its investigations among seven major areas: applicant matters (background checks on applicants and candidates for federal positions), civil rights, counterterrorism, foreign counterintelligence, drugs and organized crime, violent crimes and major offenders, and white-collar crimes. It has nine divisions in three offices located at its headquarters in Washington, D.C. These divisions provide program direction and support services to 56 field offices, 400 satellite offices (known as resident agencies), and 4 specialized field installations within the United States, as well as 22 liaison posts outside the United States. The bureau employs approximately 10,000 special agents and over 13,000 support personnel.

In addition to its investigative work on federal crimes, the FBI provides investigative and training support to other law enforcement agencies. The FBI Laboratory, one of the largest and most comprehensive crime laboratories in the world, is the only full-service federal forensic lab. FBI examiners perform crime scene searches, surveillance, fingerprint examinations, and other scientific and technical services. They also train state and local crime laboratory and law enforcement personnel. Through the Criminal Justice Information Services (CJIS), the FBI provides sophisticated identification and information services to local, state, federal, and international law enforcement agencies. Among the aids available through CJIS is a state-of-the-art automated fingerprint identification system. The bureau also offers extensive training programs to FBI employees and other law enforcement personnel at the FBI Academy, in Quantico, Virginia.

The FBI is headed by a director, the first and most famous of whom was J. EDGAR HOOVER. Appointed in 1924 at the age of 29, Hoover led the bureau for 48 years, until his death in 1972. He is credited with building a highly disciplined force of efficient and respected investigators. During Hoover's tenure, the FBI established its centralized fingerprint file, crime laboratory, and training center for police officers. But Hoover was criticized as an autocrat who wielded his power against anyone he considered a threat to U.S. security. He was obsessively anti-Communist, and critics charge that his single-minded quest to root out all political dissent led to the harassment of suspects and suspension of their civil liberties.

L. Patrick Gray III became acting director upon Hoover's death. He was succeeded in 1973 by another acting director, William D. Ruckelshaus, who was replaced later that year by Clarence M. Kelley, a former FBI agent. Kelley is credited with modernizing the bureau, curbing ARBITRARY investigations, and opening the special agent ranks to women and minorities. He presided over the bureau until 1978 when William H. Webster was appointed director. Webster was replaced by acting director John E. Otto in 1987. Otto stepped down later that year and was replaced by William S. Sessions.

During Sessions's tenure, African American and Hispanic agents charged the bureau with RACIAL DISCRIMINATION and harassment. Sessions settled these claims with the groups and instituted policies to increase the number of women and minorities in the agency. In 1993,

Sessions was dismissed from his post by President BILL CLINTON amid allegations of unethical conduct. Then Clinton appointed a former FBI agent and federal judge, Louis J. Freeh.

A number of controversies have plague the FBI in recent years, including the handling of the confrontation with white separatist Randall Weaver at Ruby Ridge, Idaho, in 1992; questions on the handling of the Branch Davidian standoff near Waco, Texas, in 1993; issues with the interrogation of Richard Jewell after the 1996 Olympic Park bombing in Atlanta during the 1996 Olympics; and problems uncovered at the FBI's crime laboratory in 1997. Between 2000 and 2002, three cases caused the FBI additional headaches: the FBI's belated release of documents related to the Oklahoma City bombing; mishandling of the espionage investigation of Wen Ho Lee, nuclear scientist at Los Alamos National Laboratory in New Mexico; and the damage caused by the actions of long-term Russian and Soviet spy, FBI agent Robert Hanssen.

The FBI came under fire for its investigation of Wen Ho Lee, a naturalized U.S. citizen born in Taiwan, and a NUCLEAR WEAPONS specialist with the U.S. ENERGY DEPARTMENT at Los Alamos, New Mexico. Fired in March 1999 and arrested months later on 59 counts of mishandling classified nuclear data, he was never officially charged with espionage. In 2000, he pleaded guilty to one charge of downloading nuclear weapons design secrets to a nonsecure computer. The government dropped the remaining charges. Lee was sentenced to time served. He had been held nine months without bail in solitary confinement. A report by the JUSTICE DEPARTMENT called the FBI's investigation of the Lee case "deeply and fundamentally flawed," *The New York Times* reported.

In January 2001 the FBI was criticized for its handling of the Oklahoma City bombing investigation after FBI employees discovered that more than 1000 documents related to Timothy McVeigh's and Terry Nichols's trials for the bombing of the Murrah Federal Building in Oklahoma City on April 19, 1995, had not been released. Once informed of the problem, FBI managers failed to promptly notify FBI headquarters or prosecutors. The blunder led to a one-month postponement of McVeigh's execution in May 2001. Nichols sought to have his convictions for MANSLAUGHTER and conspiracy overturned based upon the FBI's gaffe, but the Tenth Circuit Court of Appeals ruled that nothing in the documents would have changed the outcome of Nichol's case.

The revelation of the espionage activities of the FBI's own agent, Robert Hanssen, was one of the most embarrassing incidents in the bureau's recent history. In 1979, about three years after he started working for the FBI, Hanssen began selling secrets to the Soviets. He continued spying off and on for 22 years until the time of his arrest. Some have called Hanssen the most damaging spy in U.S. history, turning over an estimated 26 diskettes and 6,000 pages of classified documents to the Soviet Union and Russia in exchange for cash and jewelry. He was sentenced in 2002 to life in prison. A subsequent probe initiated by Attorney General JOHN ASHCROFT showed serious deficiencies in the FBI's internal security programs.

In response to the SEPTEMBER 11TH ATTACKS and the terrorist threats against the United States, the FBI stepped up its counterterrorism measures to hunt down and capture suspected terrorists. The bureau works with the newly established HOMELAND SECURITY DEPARTMENT to protect U.S. citizens from the dangers of terrorist activities within the country's borders. FBI Director Robert S. Mueller called the fight against TERRORISM the bureau's top priority.

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## FEDERAL COMMUNICATIONS COMMISSION

The Federal Communications Commission (FCC) regulates interstate and foreign communications by radio, television, wire, satellite, and CABLE TELEVISION. The FCC oversees the development and operation of broadcast services and the provision of nationwide and worldwide telephone and telegraph services. It also oversees the use of communications for promoting the safety of life and property and for strengthening the national defense. The FCC maintains a comprehensive web site: www.fcc.gov.

The FCC was created by the Communications Act of 1934 (47 U.S.C.A. § 151 et seq.) to regulate interstate and foreign communications by wire and radio in the public interest. The scope of its regulation includes radio and television broadcasting; telephone, telegraph, and cable television operation; two-way radio and radio operation; and satellite communication. The FCC is composed of five members who are appointed by the president. Only three of the commissioners may be members of the same political party at any given time. A review board and an office of general counsel assist the commission. In addition, ADMINISTRATIVE LAW judges conduct evidentiary adjudicatory hearings and write initial decisions. In January 2002, the FCC announced a major restructuring of several of its bureaus, reducing the number of bureaus from seven to six and renaming several of them.

### Media Bureau

The Media Bureau combines the functions of the Mass Media and Cable Services Bureaus. The Mass Media Bureaus regulates the following services: amplitude modulation (AM), frequency modulation (FM), television, low-power television, translator, instructional television and related broadcast auxiliary, and direct-broadcast satellite. The Media Bureau issues construction permits, operating licenses, and renewals or transfers of such broadcast licenses except for broadcast auxiliary services. The bureau also oversees compliance by broadcasters with statutes and FCC policies.

The division of the Media Bureau (formerly organized as the Cable Services Bureaus) develops, recommends, and administers policies and programs for the regulation of cable television systems. It advises the FCC on the development and regulation of cable television. Among its other responsibilities, the bureau investigates complaints from the public; coordinates with state and local authorities in matters involving cable television systems; and advises the public, other government agencies, and industry groups on cable television regulation and related matters.

### Wireline Competition Bureau

The Common Carrier Bureau was renamed the Wireline Competition Bureau in 2002. This Bureau regulates interstate common carrier communications by telephone. Common carriers include companies, organizations, and individuals providing communications services to the public for hire, which must serve all who wish to use them at established rates. In providing interstate communications services, common carriers may employ landline wire or electrical or optical cable facilities.

### Wireless Telecommunications Bureau

The Wireless Telecommunications Bureau administers all domestic commercial and private wireless TELECOMMUNICATIONS programs and policies. Commercial wireless services include cellular, paging, personal, specialized mobile radio, air-ground, and basic exchange telecommunications. Private wireless services include land mobile radio (including public safety, industrial, land transportation, and business), broadcast auxiliary, operational fixed microwave and point-to-point microwave, and special radio telecommunications. The Wireless Telecommunications Bureau also implements laws and treaties covering the use of radio for the safety of life and property at sea and in the air, and administers commercial and amateur radio operator programs.

### International Bureau

The International Bureau manages all FCC international telecommunications and satellite programs and policies, and represents the FCC at international conferences, meetings, and negotiations. The International Bureau consists of three divisions: Telecommunications, Satellite and Radiocommunication, and Planning and Negotiations.

The Telecommunications Division develops and administers policies, rules, and procedures for the regulation of telecommunications facilities and services under section 214 of the Communications Act (47 U.S.C.A. § 153 et seq.) and Cable Landing License Act (47 U.S.C.A. § 34 et seq.). In addition, the division develops and administers regulatory assistance and training programs in conjunction with the administration's Global Information Infrastructure initiative.

The Satellite and Radiocommunication Division develops and administers policies, rules, standards, and procedures for licensing and regulating satellite and earth station facilities, both international and domestic.

The Planning and Negotiations Division represents the FCC in negotiations with Mexico, Canada, and other countries on international agreements that coordinate radio frequency assignments to prevent and resolve international radio interference involving U.S. licensees.

### Consumer and Governmental Affairs Bureau

The Consumer Information Bureau was renamed the Consumer and Governmental Affairs Bureau in 2002. This bureau is a one-stop-shopping place for information regarding FCC policies, programs and, activities. The Consumer Centers, located in Washington, D.C., and Gettysburg, Pennsylvania, also help individuals file informal complaints on a variety of issues, including: slamming (switching services without customer approval or knowledge); cramming (unauthorized, misleading, or deceptive charges for services not requested or not received); and disability access. The Consumer Education Office (CEO) works with consumer organizations and government agencies concerned with FCC regulatory activities. CEO prepares informational materials and conducts forums to educate the public about important FCC regulatory programs and to solicit feedback on issues regulated by the commission. This office also arranges briefings and seminars for educational institutions, consumer organizations, and other interested groups. The Disability Rights Office (DRO) ensures that FCC actions and policies enable people with disabilities to have the same access as everyone else to telecommunications. DRO helps to implement mandates for nationwide telephone-relay services; access to telecommunications wireline and wireless products and services; televised emergency access; and closed captioning on television programming.

### Office of Engineering and Technology

The Office of Engineering and Technology administers the Table of Frequency Allocations, which specifies the frequency ranges that various radio services may use. The office also administers the Experimental Radio Service and the Equipment Authorization Program. The Experimental Radio Service permits the public to experiment with new uses of radio frequencies. This allows the development of radio equipment and exploration of new radio techniques prior to licensing under other regulatory programs. The Equipment Authorization Program includes procedures for agency approval of radio equipment importation, marketing, and use.

### Compliance

Much of the investigative and enforcement work of the FCC is carried out by the commission's field staff. The Field Operations Bureau has six regional offices and 35 field offices. It also operates a nationwide fleet of mobile radio direction-finding vehicles for technical enforcement purposes. The field staff detects radio violations and enforces rules and regulations. The radio spectrum is under continuous surveillance to detect unlicensed operation and activities or nonconforming transmissions, and to furnish radio bearings on ships and planes in distress. The Field Operations Bureau also administers public service programs aimed at educating FCC licensees, industry, and the general public to improve compliance with FCC rules and regulations.

*President Bill Clinton signs the Telecommunications Act of 1996 into effect on February 8.*

AP/WIDE WORLD PHOTOS

### Telecommunications Act of 1996

In a sweeping overhaul of the Communications Act of 1934, Congress passed the Telecommunications Act of 1996 (47 U.S.C.A. § 51 et seq.) in February 1996. The legislation was designed to deregulate the $500-billion-per-year telecommunications industry and to encourage competition, thus freeing telephone companies, broadcasters, and cable television operators to enter one another's markets in order to secure lower prices and higher-quality services for U.S. consumers. Critics of the legislation charged that it would increase the cost of cable TV and telephone service and would encourage monopolization of the media. Supporters of the legislation claimed that it would foster competition and make available new services such as advanced wireless communications, home banking, and interactive television. By 2002,

both sides could claim that parts of their predictions had come true.

Critics of the act have noted that the cable television industry has gone through a steady stream of MERGERS AND ACQUISITIONS, resulting in just a few major cable companies dominating the cable industry in the United States. Cable bills have steadily risen since the passage of the 1996 act. Advocates of deregulation point out that wireless communication has continued to grow in a competitive marketplace and that consumers have more choices and lower costs. As for radio, critics have charged that the relaxation of ownership rules by the FCC has resulted in the acquisition of many stations in one market by just one company. As a consequence, local programming has given way to national programming for entire radio chains.

The 1996 act contained provisions that went beyond deregulation to include restrictions on the distribution of indecent material. For example, Title V of the act, known as the Communications Decency Act of 1996 (CDA) (47 U.S.C.A. § 223(a)–(h)), forbade the transmission of indecent material over computer networks such as the INTERNET unless steps were taken to keep the material away from children, and required that new television sets be equipped with an electronic block that would allow viewers to prevent children from viewing objectionable programming. In February 1996, two separate actions were filed in U.S. district court in Philadelphia challenging the constitutionality of the CDA. The first suit, *ACLU v. Reno,* No. Civ. A. 96-963, 1996 WL 65464 (E.D. Pa.), was filed by the AMERICAN CIVIL LIBERTIES UNION and 19 other plaintiffs. The second action, *American Library Ass'n v. United States Department of Justice,* No. Civ. A. 96-1458 (E.D. Pa.), was brought by the American Library Association and 26 other plaintiffs. The other plaintiffs in both actions included civil libertarians, computer businesses, online services, newspapers, and librarians.

The lawsuits were consolidated for hearing before a special three-judge panel, authorized under the CDA and consisting of two federal district court judges and the chief judge of the U.S. Court of Appeals for the Third Circuit. The plaintiffs sought a preliminary injunction to prevent enforcement of the CDA pending the outcome of a trial of their lawsuit. They challenged section 223 of the CDA, which states, in part, that any person in interstate or foreign communications who "by means of a telecommunications device knowingly . . . makes, creates, or solicits and . . . initiates the transmission of . . . any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing the recipient of the communication is under 18 years of age" may be fined or imprisoned. In addition, section 223 makes it a crime to use an "interactive computer service" to transmit to persons under 18 years of age any material that, in context, "depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication." The plaintiffs argued that the CDA violates the FIRST AMENDMENT because it bans a substantial category of protected speech from most parts of the Internet. The government responded that shielding minors from access to indecent materials is a compelling interest that justifies the restrictions imposed by the act.

The court noted that the CDA was not narrowly tailored to further the government's interest in protecting minors, noting that "it is either technologically impossible or economically prohibitive for many of the plaintiffs to comply with the CDA without seriously impeding their posting of online material which adults have a constitutional right to access." According to the court,

> The Internet is a far more speech-enhancing medium than print. . . . Because it would necessarily affect the Internet itself, the CDA would necessarily reduce the speech available for adults on the medium. This is a constitutionally intolerable result. . . . As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion.The court granted the plaintiffs' request for a preliminary injunction to prevent enforcement of the disputed sections of the CDA pending trial (*Reno,* 929 F. Supp. 824 [E.D. Pa. 1996]).

In another lawsuit, Playboy Entertainment Group, owner of the Playboy cable television channels, challenged the act's requirement that cable companies block audio and video transmissions of sexually explicit programs. Section 561 of the act states, in part,

> In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a

> multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

In *Playboy Entertainment Group v. United States,* 918 F. Supp. 813 (D. Del. 1996), the district court issued a TEMPORARY RESTRAINING ORDER blocking the enforcement of section 561. Playboy had argued that the blocking and time requirements imposed on cable operators violated the First Amendment and EQUAL PROTECTION. When Playboy applied for an injunction, the same court dissolved the RESTRAINING ORDER and upheld the law. On appeal, the U.S. Supreme Court affirmed.

The pace of deregulation by the FCC continued through 2002, with the promise of more consolidation of companies in the cable, broadcast, radio, and telecommunications sectors.

FURTHER READINGS

*U.S. Government Manual* Website. Available online at <www.gpoaccess.gov/gmanual> (accessed November 10, 2003).

CROSS-REFERENCES

Censorship; Fairness Doctrine.

## FEDERAL COURTS

*The U.S. judicial tribunals created by Article III of the Constitution, or by Congress, to hear and determine* JUSTICIABLE *controversies.*

The Constitution created the Supreme Court and empowered Congress, in Article I, Section 8, to establish inferior federal courts. The authority of federal courts is limited to that given to them by the federal statutes that created them. Federal courts exist independently of the system of courts in each state that adjudicate controversies that arise pursuant to the laws of that state.

### Legislative and Constitutional Courts

Constitutional courts are established pursuant to Article III of the Constitution, which states, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." These courts have only the powers specified in Article III. They can hear only cases or controversies; their judges hold office for life, as long as they are not guilty of judicial misconduct; and their judges' salary cannot be reduced while those judges serve in office.

The Supreme Court, the U.S. courts of appeal (including the U.S. Court of Appeals for the Federal Circuit), the U.S. district courts, and the Court of International Trade are constitutional, or Article III, courts.

Legislative courts are known as Article I courts because they are created pursuant to the authority given to Congress in Article I, Section 8, Clause 9, of the Constitution. That section empowers Congress "To constitute Tribunals inferior to the Supreme Court." No restrictions exist as to the type of court that must be created. Such courts can possess whatever jurisdiction Congress deems appropriate. Judges can be appointed by specific terms of years, and salaries can be adjusted in response to the changing economy.

In earlier times, legislative courts were the best means to bring justice into the territories. Territorial courts heard all kinds of cases that the constitutional courts could not hear, such as DIVORCE cases. Once a territory became a state, cases that fell within the jurisdiction of the federal court would be transferred to the federal court established in the new state; all other cases would be heard in the courts of the newly created state.

The U.S. TAX COURT and the U.S. Court of Federal Claims are legislative courts. Although the Court of Military Appeals was created pursuant to Article I, it is not part of the judiciary but functions as a military tribunal to make rules, to regulate the ARMED SERVICES, and to review courts-martial.

### Structure

District courts function as general trial-level courts in the federal system. An appeal from a judgment rendered in a district court is taken to the court of appeals in the judicial circuit in which the district court sits. The Supreme Court hears appeals from a court of appeals pursuant to its mandatory jurisdiction, certiorari jurisdiction, and its rarely used jurisdiction to decide QUESTIONS OF LAW certified to it by the court of appeals. In addition, specialized federal courts such as the U.S. Court of Federal Claims, the U.S. Court of International Trade, the U.S. Court of Appeals for the Federal Circuit, and the U.S. TAX COURT entertain and determine cases that involve only certain areas of law.

### Geographic Organization

Every judicial district has at least one district court judge, and most have from one to three

**The U.S Federal Court System**

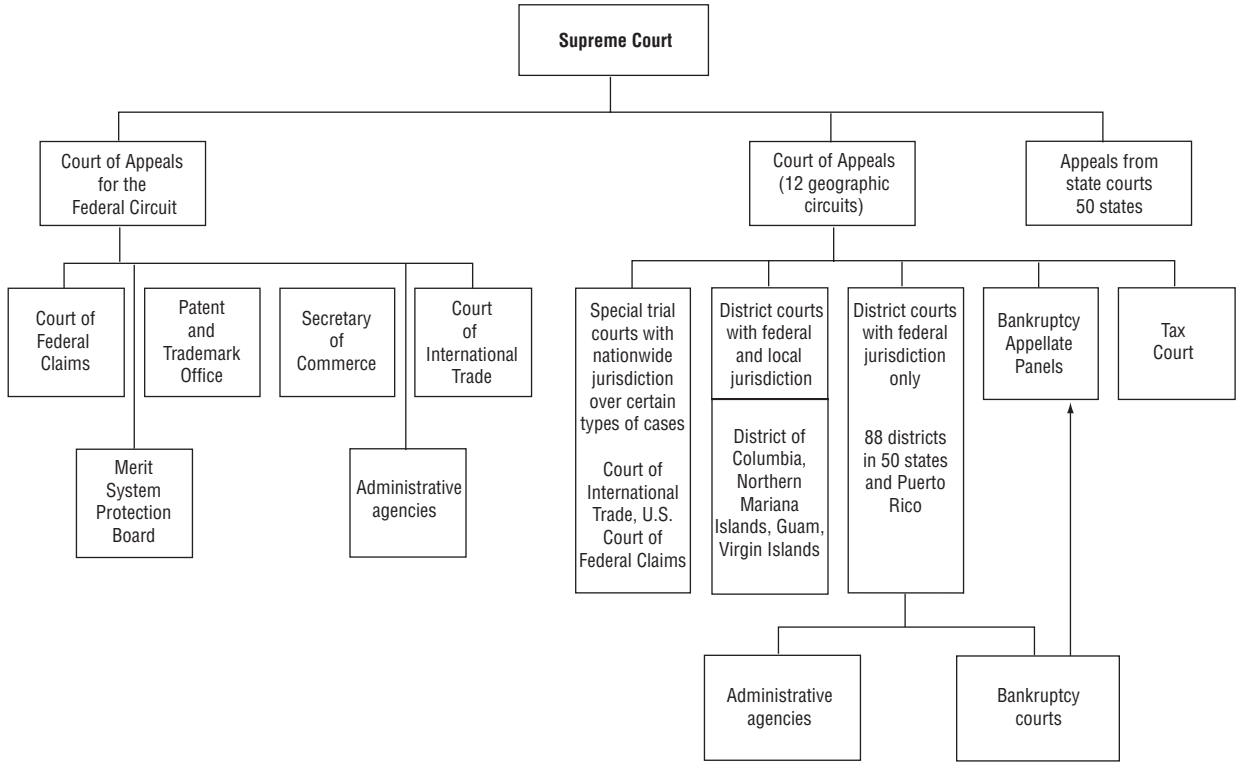


district court judges. The number of judges can be changed by Congress when the need exists. Each judge may preside alone, or, when there are two or more judges, all may hold sessions of court at the same time.

The decisions made in federal district courts are reviewable by the court of appeals in each circuit. All the territory of the United States, Puerto Rico, Guam, and the Virgin Islands is divided into 12 judicial circuits.

These 12 circuits are further subdivided into judicial districts. Every state has at least one judicial district. All the territory of Idaho except Yellowstone National Park makes up one judicial district, for example. All of Yellowstone National Park is within the judicial district of Wyoming, including the parts of the park that are in Idaho. The number of districts in each circuit depends on the size of the area and the number of people living within it. Large states require more than a single district. California, New York, and Texas, for example, include four judicial districts. Judicial districts for large areas are further separated into divisions.

Federal law establishes the number of circuit judges and the place where court is held in each circuit. Congress can change both the number and location at any time because the courts of appeals, like the district courts, are created by Congress. The Federal Courts Improvement Act of 1982 (Pub. L. 97–164, Apr. 2, 1982, 96 Stat. 25) created the U.S. Court of Appeals for the Federal Circuit, which hears appeals not based on regional boundaries like the other courts of appeal, but involving special topics, such as public contracts and PATENTS, where the uniform application of legal principles nationwide is highly desirable.

The 12 regional courts of appeals hear appeals from the district courts and many decisions of federal administrative agencies. Cases are usually heard by three judges, but each circuit arranges to hear some cases en banc, with all the circuit judges of that circuit sitting together, hear-

ing or rehearing the case and ruling by majority vote. A majority of the judges in regular active service in the circuit can order a case heard en banc at any time. This order occurs usually if the decision in the case is likely to have a significant effect on issues in pending cases, such as when the case involves an important question of constitutionality, jurisdiction, or the right to appeal.

The Court of Appeals for the Federal Circuit has appellate jurisdiction derived from the merger of the former Court of Claims and the Court of Customs and Patent Appeals in cases involving actions against the government, public contracts, and patents. It also hears appeals from the Court of International Trade, the PATENT AND TRADEMARK OFFICE, the Merit System Protection Board, and other agencies. This court is intended to provide for the uniform application and enforcement of law in cases that Congress deems should be treated uniformly, but which under the former appellate system were often decided differently from circuit to circuit. As a result of its topical appellate jurisdiction, the Court of Appeals for the Federal Circuit significantly reduces the number of appeals from such decisions to the Supreme Court.

The Supreme Court is empowered to hear cases on appeal that originate anywhere in the United States or its territories.

### Jurisdiction

Jurisdiction is a broad legal term that means the authority of a court to hear and determine a controversy (SUBJECT MATTER JURISDICTION) as well as its authority to bind the parties in the action (PERSONAL JURISDICTION). Before a court can exercise subject matter jurisdiction, it must have personal jurisdiction of the parties; otherwise, any judgment rendered by it is null and void. The jurisdiction of a court is derived from constitutional provisions or from statute. Federal courts are courts of limited jurisdiction. They can exercise only the jurisdiction they were specifically given by the Constitution or federal law. Article III of the Constitution establishes the exclusive jurisdiction of federal courts in all cases, whether based on law or EQUITY, that arise under the Constitution or laws or treaties of the United States; that involve ambassadors, consuls, and other public ministers, ADMIRALTY and maritime claims, or the United States as a party; or that arise between two or more states, between a state and a citizen of another state, between citizens of the same state claiming lands under grants of different states, or between a state or its citizens and foreign states, citizens, or subjects. This article specifically gives the Supreme Court original jurisdiction to try cases affecting ambassadors, public ministers, and consuls and cases in which a state is a party. In all other cases, the Supreme Court has appellate jurisdiction: it can review the decisions rendered by courts in which the action was tried or subsequently heard on appeal.

The power of a federal court to hear matters arising under the Constitution, federal law, or treaty is called federal question jurisdiction. Its diversity-of-citizenship jurisdiction empowers it to determine controversies between parties who are citizens of different states. The controversy must have a value of more than $75,000 in order for the court to exercise either federal question or diversity jurisdiction. The $75,000 figure is known as the jurisdictional amount. Federal district courts have original jurisdiction to try these disputes.

As of the early 2000s federal district courts have original and exclusive jurisdiction to entertain BANKRUPTCY cases and prize cases, which determine the rights in ships and cargo captured at sea. Other controversies that are within the jurisdiction of federal courts include INTERPLEADER actions involving citizens of different states where the item in dispute is worth $500 or more; postal matters; and COPYRIGHT, patent, and TRADEMARK cases based on federal law. Federal district courts are also authorized by statute to remove actions from state courts to themselves when the disputes could have been brought in such courts originally.

The regional courts of appeals have statutory appellate jurisdiction to review final decisions and specified INTERLOCUTORY orders rendered by district courts and administrative determinations made by federal agencies. Interlocutory orders are reviewable in the following situations: when they (1) affect existing injunctions in cases where there is no direct review in the Supreme Court; (2) appoint receivers, refuse to do so, or affect the sale or disposal of property; (3) determine the rights and liabilities of parties in admiralty cases in which appeals from final decree are permissible; or (4) are issued in a bankruptcy action. The courts of appeals also review judgments in civil actions for patent infringement that are final except for an accounting, and judgments rendered in bankruptcy cases. The U.S. Court of Appeals for the

Federal Circuit has specialized appellate jurisdiction.

No federal court has jurisdiction to entertain POLITICAL QUESTIONS or to issue ADVISORY OPINIONS, since neither constitutes a case or a controversy, one of which must exist if a federal court is to exercise its jurisdiction. Federal courts are also powerless to determine matters that are beyond the scope of their jurisdiction, such as cases involving domestic relations or wills, which are exclusively within the jurisdiction of state courts.

### Bankruptcy Courts

In the late 1970s, Congress enacted comprehensive legislation that significantly revised bankruptcy law. Among its various provisions, the Bankruptcy Reform Act of 1978 (11 U.S.C.A. § 101 et seq.) reorganized the structure of the bankruptcy courts. Bankruptcy matters are now heard by a bankruptcy judge. Bankruptcy courts serve as adjuncts to U.S. district courts and have jurisdiction to administer and enforce federal bankruptcy law. A bankruptcy court operates in each federal district. Appeals from this court go to the district court or, if the parties agree, directly to the court of appeals that has jurisdiction over the district.

The Bankruptcy Reform Act of 1994, Pub. L. 103–394, Oct. 22, 1994, 108 Stat. 4106, authorizes bankruptcy judges to hold status conferences to determine the progress of a case and to attempt to expedite the case's conclusion. Pursuant to a status conference, a judge may issue orders that prescribe limitations and conditions necessary to ensure the economic handling of the case. The act also authorizes bankruptcy judges to conduct jury trials with the consent of all parties.

Bankruptcy judges are appointed by the circuit court for the judicial district in which the judges will sit. They serve for a term of 14 years.

### Court of Federal Claims

Congress created the former Court of Claims to safeguard the financial stability of the government by not permitting a multitude of claims to deplete the public treasury. Traditionally, persons whose rights were violated by the federal government could seek congressional enactment of a private bill authorizing a payment of money to compensate for the loss. Private bills were addressed to the conscience of the government; therefore, their passage depended on political factors.

Inconsistencies in the passage of private bills and an increase in their number put pressure on legislators and caused serious delay in the completion of the legislative agenda. To ameliorate the situation, Congress enacted a law in 1855 creating the Court of Claims, which was empowered to hear claims against the government and report its findings to Congress along with proposals for solving the problem in each case.

Initially, the Court of Claims could hear only claims and determine whether they had merit. By the end of 1861, Congress was still overburdened by the need to review claims that had already been considered by the Court of Claims. President ABRAHAM LINCOLN recommended that judgments made by the Court of Claims be considered final without any further action on the part of Congress. In 1863, Congress accepted the suggestion. The decisions of the Court of Claims were made final with no further action by Congress necessary to give them effect. Appeals, when permitted, were made directly to the Supreme Court.

In 1982, the Federal Courts Improvement Act (28 U.S.C.A. § 1 et seq.) established the U.S. Claims Court, a trial court that inherited almost all the trial jurisdiction of the former Court of Claims. The court's name was changed to U.S. Court of Federal Claims by the Federal Courts Administration Act of 1992 (106 Stat. 4516 [28 U.S.C.A. § 1 note]). The court hears lawsuits against the United States based on the Constitution, federal laws, or contracts, or for damages in actions other than TORTS. It also has jurisdiction to determine cases concerning the salaries of public officers or agents, damages for someone who was unjustly convicted of a federal crime and imprisoned, and some American Indian claims. The Court of Appeals for the Federal Circuit has appellate jurisdiction regarding Court of Federal Claims decisions.

The court's jurisdiction is nationwide. Trials are conducted at locations that are most convenient and least expensive to taxpayers.

### Court of International Trade

Congress created the Court of International Trade, formerly known as the Customs Court, to have exclusive jurisdiction in actions involving the imposition of CUSTOMS DUTIES by customs officials. The court can consider the classification of merchandise for customs purposes, the rate charged under the applicable tariff law, or the refusal of the officials of the DEPARTMENT OF

THE TREASURY to make refunds that are allegedly due.

The history and development of the Court of International Trade are intertwined with those of the former Court of Customs and Patent Appeals. At the end of the nineteenth century, the Board of General Appraisers was responsible for the classification of items for import and export and the determination of the rate of customs duties to be imposed. The federal circuit courts, pursuant to their general power to hear appeals, reviewed these decisions from 1890 to 1909. Congress created the Court of Customs Appeals in 1909 to assume the review of appeals from the decisions of the Board of General Appraisers. This specialized court developed expertise in adjudicating the complex and technical issues that arose in customs actions and functioned as a speedy and efficient vehicle for dispensing with such matters, since it could not hear any other cases. It provided sure and uniform administration of justice in such matters, since it was the only court in the United States with exclusive jurisdiction over such matters.

The Board of General Appraisers became the U.S. Customs Court in 1926 and was renamed the Court of International Trade in 1981. The Court of Customs Appeals was designated the Court of Customs and Patent Appeals in 1929 because its jurisdiction was expanded to include review of the decisions of the Patent and Trademark Office. The functions of this court were assumed by the U.S. Court of Appeals for the Federal Circuit in 1982.

The Court of International Trade consists of nine judges, who serve for life unless they are guilty of misconduct; one is named chief judge by the president. Although one judge can hear a case, a panel of three judges usually entertains cases that have significant constitutional ramifications in the customs field. The court is located in New York City because of the importance of the city as a port of entry. The chief judge can dispatch any judges to other ports to hear an action when it is economical, efficient, and fair to do so. A hearing can even be held in a foreign country if that country so permits.

### District of Columbia Courts

Historically, the local District of Columbia courts were considered part of the federal court system, since they were created by an act of Congress. The U.S. district court was the usual forum for the adjudication of controversies that arose under District of Columbia as well as federal laws. Owing to a number of judicial reorganizations, however, the District of Columbia as of the early 2000s has its own court system, separate from the federal court system, to hear and determine local disputes. Federal courts still retain authority over any matters that fall within the scope of their designated jurisdiction.

### Tax Court

The U.S. Tax Court is a unique tribunal. It was originally created as the U.S. Board of Tax Appeals and functioned as an independent agency in the EXECUTIVE BRANCH of the government. Pursuant to the TAX REFORM ACT OF 1969 (83 Stat. 730), its name was changed to U.S. Tax Court, and as of the early 2000s it is an independent judicial body in the legislative branch. Nineteen judges, appointed by the president, serve on the court; although the court is headquartered in Washington, D.C., the judges travel to other specially designated cities to conduct trials.

The Tax Court adjudicates various controversies involving overpayments or underpayments of taxes. Unlike the district courts, the Tax Court does not require a citizen to pay the amount of tax in dispute and file a claim for a refund before it hears and decides the matter. The taxpayer must, however, request and receive from the INTERNAL REVENUE SERVICE a statutory notice of deficiency that states the disputed sum. The Tax Court has no jurisdiction unless the notice has been issued and a petition for a hearing has been filed within a specified time.

Simplified procedures are available for small tax cases where the amount in controversy does not exceed $50,000. The decision of the Tax Court in such a case is final and is not subject to review by any court.

The Tax Court has jurisdiction to render declaratory judgments in many areas, such as the qualification of retirement plans, the tax-exempt status of charitable organizations, and the status of interest on certain government obligations. In addition, the Tax Court may issue injunctions in certain assessment cases and decide taxpayers' appeals from denial of administrative costs by the Internal Revenue Service.

All Tax Court decisions, except those in small tax cases, are subject to review by the courts of appeals and, by writ of certiorari, by the U.S. Supreme Court.

### Court of Appeals for the Armed Forces

The Court of Appeals for the Armed Forces is the final appellate tribunal that reviews COURT-MARTIAL proceedings of the armed services. Established in 1950 (10 U.S.C.A. § 867), it is presided over by five civilian judges who are appointed for 15-year terms by the president. Rulings of the Court of Appeals for the Armed Forces are subject only to certiorari review by the Supreme Court.

### Court of Appeals for Veterans Claims

The U.S. COURT OF APPEALS FOR VETERANS CLAIMS was established in 1988 (102 Stat. 4105 [38 U.S.C.A. § 4051]). Originally called the U.S. Court of Veterans Appeals, it was renamed in March 1999 as part of the Veterans Enhancement Act of 1998 (Pub. L. No. 105–368). It has exclusive jurisdiction to review decisions of the Board of Veterans Appeals. The court may not review the schedule of ratings for disabilities or the policies underlying the schedule. Decisions of the court may be appealed to the U.S. Court of Appeals for the Federal Circuit. Seven judges serve on this Court; they are appointed by the president and serve for 15-year terms.

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U.S. Tax Court. 2003. Available online at <www.ustaxcourt.gov> (accessed October 14, 2003).

## FEDERAL DEPOSIT INSURANCE CORPORATION

The Federal Deposit Insurance Corporation (FDIC) was created on June 16, 1933, under the authority of the Federal Reserve Act, section 12B (12 U.S.C.A. § 264(s)). It was signed into law by President FRANKLIN D. ROOSEVELT to promote and preserve public confidence in banks at the time of the most severe banking crisis in U.S. history. From the STOCK MARKET crash of 1929 to the beginning of Roosevelt's tenure as president in 1933, over 9,000 banks closed their doors, resulting in losses to depositors of $1.3 billion. The FDIC was established in order to provide insurance coverage for bank deposits, thereby maintaining financial stability throughout the United States.

The FDIC is an independent agency of the federal government. Its management was established by the Banking Act of 1933. It consists of a board of directors numbering three members, one the comptroller of the currency, and two appointed by the president with approval of the Senate. The two appointed members serve six-year terms, and one is elected by the members to serve as chair of the board. The headquarters of the FDIC is located in Washington, D.C., and the corporation has 13 regional offices. Most of its employees are bank examiners.

The FDIC does not operate on funds from Congress. The capital necessary to start the corporation back in 1933 was provided by the U.S. Treasury and the 12 Federal Reserve banks. Since then, its major sources of income have been assessments on deposits held by insured banks and interest on its portfolio of U.S. Treasury SECURITIES.

Besides administering the Bank Insurance Fund, the FDIC is also responsible for the Savings Association Insurance Fund (SAIF), which was established on August 9, 1989, under the authority of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIREA) (12 U.S.C.A. § 1821 (2)). The SAIF insures deposits in savings and loan associations.

The FDIC also insures, up to the statutory limitation, deposits in national banks, state banks that are members of the Federal Reserve System, and state banks that apply for federal deposit insurance and meet certain qualifications. If an insured bank fails, the FDIC pays the claim of each depositor, up to $100,000 per account.

The FDIC may make loans to, or purchase assets from, insured depository institutions in order to facilitate mergers or consolidations, when such action for the protection of depositors will reduce risks or avert threatened loss to the agency. It will prevent the closing of an insured bank when it considers the operation of that institution essential to providing adequate banking.

The FDIC may, after notice and a hearing, terminate the insured status of a bank that continues to engage in unsafe banking practices. The FDIC will regulate the manner in which the

depository institution gives the required notice of such a termination to depositors.

From 1980 to 1990, a total of 1,110 banks failed, principally owing to bad loans in a slowly weakening real estate market and risky loans to developing countries. The FDIC found itself in such financial straits that in 1990, Chairman L. William Seidman testified before Congress, "The insurance fund is under considerable stress" and is "at the lowest point at anytime in modern history."

The FIRREA and the FDIC Improvement Act of 1991 (codified in scattered sections of 12 U.S.C.A.) came as reactions to the savings and loan crisis and to a banking crisis of the 1980s, which together cost the U.S. taxpayers hundreds of billions of dollars.

FIRREA gave the FDIC the authority to administer the SAIF, replacing the Federal Savings and Loan Insurance Corporation (FSLIC) as the insurer of deposits in savings and loan associations. The FDIC Improvement Act placed new restrictions on the way that the corporation repaid lost deposits. Before the law's enactment, the FDIC deemed it necessary to repay all deposits, whether or not they were at an insured bank or over $100,000, in order to protect public confidence in the nation's financial institutions. Since the law's enactment, it must take a "least-cost" method of case resolution. The act stipulates that the FDIC will not be permitted to cover uninsured depositors unless the president, the secretary of the treasury, and the FDIC jointly determine that not doing so would have serious adverse effects on the economic conditions of the nation or community.

The FDIC has worked with Congress on legislative proposals for deposit insurance reform. Although the FDIC has not proposed immediately raising the amount of insurance from $100,000 per account, it has recommended that the amount should be indexed for inflation using the Consumer Price Index every five years. The FDIC has proposed that such an indexing adjustment be made in 2005. In addition, it has recommended that the limit should not decline if the price level falls.

Website: <www.fdic.gov>.

**FURTHER READINGS**

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**Federal Deposit Insurance Corporation**

**BANK INSURANCE FUND-INSURED COMMERCIAL AND SAVINGS BANKS CLOSED OR ASSISTED DUE TO FINANCIAL DIFFICULTIES, AND PROBLEM BANKS, 1997 TO 2002**

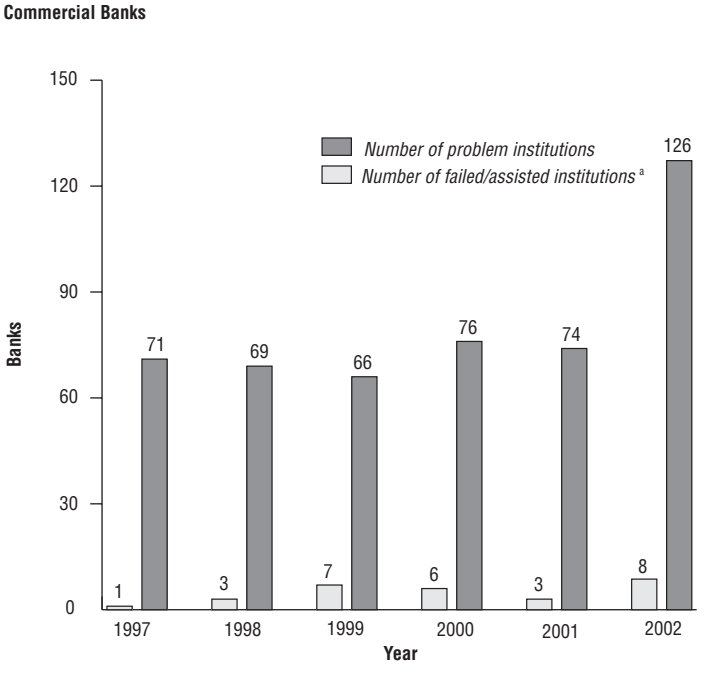


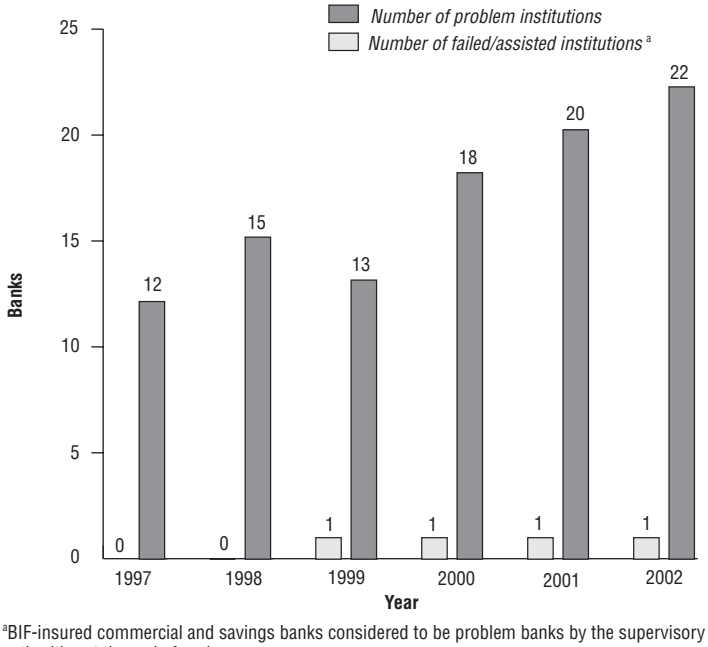


[a]BIF-insured commercial and savings banks considered to be problem banks by the supervisory authorities at the end of each year.

SOURCE: U.S. FDIC, *The FDIC Quarterly Banking Profile,* Third Quarter, 2002.

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CROSS-REFERENCES

Banks and Banking; Federal Reserve Board.

## FEDERAL ELECTION COMMISSION

The Federal Election Commission (FEC) is an independent agency that was established by the 1974 amendments to the Federal Election Campaign Act of 1971 (88 Stat. § 1280 [2 U.S.C.A. § 431 et seq.]). The 1974 amendments—passed after President RICHARD M. NIXON resigned in the wake of the WATERGATE scandals, which included charges of abuse of power and OBSTRUCTION OF JUSTICE involving campaign contributions—set out financial rules governing campaigns for federal office. The FEC was designed to act both as a clearinghouse for information on federal campaign laws and as the enforcer of campaign laws.

The FEC is composed of six commissioners who are appointed by the president with the advice and consent of the Senate. The act also provides for three statutory officers—the staff director, the general counsel, and the inspector general—who are appointed by the commission.

**Federal Election Commission**

**MAJOR POLITICAL PARTY FUNDRAISING, 1992 TO 1998**

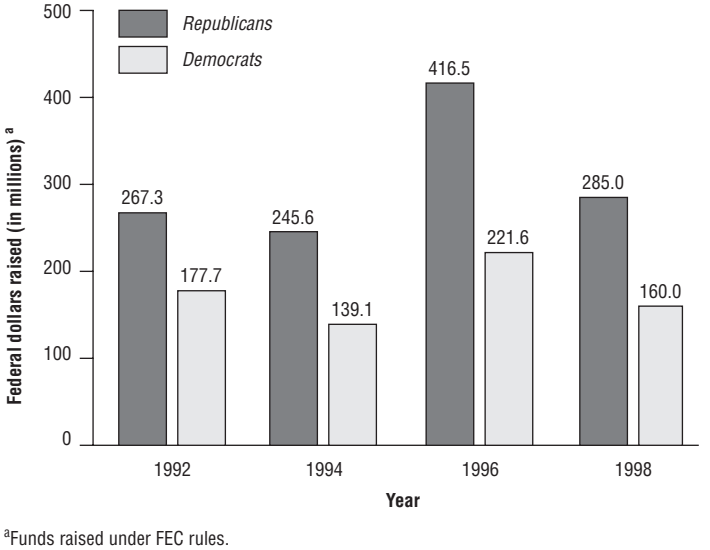


[a]Funds raised under FEC rules.

SOURCE: Federal Election Commission website.

The FEC's main responsibility is to enforce federal campaign financing laws. Thus, its scope is limited to overseeing the financing of congressional, senatorial, and presidential election campaigns. The Federal Election Campaign Act, as amended in 1974, was intended to limit severely the amount of financial contributions made by wealthy individuals, and to place limits on the amounts that candidates could spend on their campaigns. In addition, the law required public disclosure of all campaign contributions and established public financing for presidential campaigns.

Since the law was enacted in 1971, the FEC has been faced with lawsuits challenging the constitutionality of its campaign-financing provisions. The U.S. Supreme Court, in *Buckley v. Valeo,* 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), complicated the work of the FEC when it ruled that the 1974 act's limitation on campaign expenditures was unconstitutional. The Court did uphold the limit of $1,000 for individual contributions, but ruled that candidates could spend as much as they wished of their personal fortunes on their campaigns.

Because of loopholes in the law and the *Buckley* decision, there has been a tremendous growth in POLITICAL ACTION COMMITTEES (PACs) as vehicles for major campaign spending. PACs are special organizations formed by labor, industry, the professions, and other interest groups that are not identified with individual candidates. PACs are not bound by the individual-contribution restriction; therefore, their political influence has risen with their large contributions.

The FEC administers and enforces the law with respect to limits and prohibitions on contributions and expenditures made to influence federal elections. In addition, it enforces the requirement that candidates must disclose where campaign money comes from and how it is spent. This requirement has created a complex set of rules that the FEC must administer. The FEC places reports on the public record within 48 hours after they have been received, and computerizes the data contained in the reports.

If the FEC discovers irregularities or violations of the law, either through its own internal audits or through a complaint filed by the public, it has the authority to seek civil enforcement of the law. The FEC first seeks compliance

through conciliation, but it may file a lawsuit when conciliation fails.

The FEC administers the public funding of presidential elections. It certifies federal payments to primary candidates, general election nominees, and national nominating conventions. It also audits recipients of federal funds and may require repayment to the U.S. Treasury if a candidate makes nonqualified campaign expenditures.

Because of the complexity of the disclosure requirements and the concern that these requirements discourage some individuals from running for federal office, the FEC provides information through a toll-free telephone line; a web site, (www.fec.gov) publications; seminars; regulations, which clarify the law; and ADVISORY OPINIONS, which interpret the law in specific, factual situations.

The legitimacy of the Federal Election Commission to enforce campaign finance law and the provisions of the FECA was recently upheld by the Supreme Court in Federal Elections Commission v. Colorado Republican Federal Campaign Committee. 533 U.S. 431, 121 S.Ct. 2351 (2001). In that case, the Federal Election Commission (FEC) sued the Colorado state REPUBLICAN PARTY for violating the spending limits of Federal Election Campaign Act. The Party counterclaimed, asserting constitutional challenge to FECA, arguing that the FEC's attempts to limit independent expenditures in connection with a senatorial campaign violated free speech rights.

By a 5-4 majority, the Court held that FECA limits on parties' coordinated expenditures are not unduly burdensome to parties. The Court also found the expenditure limits comported with First Amendment's free speech and associational guarantees. Finally, the Court found that coordinated expenditure limits should be treated the same as FECA's limits on individuals' and nonparty groups' cash contributions when determining their validity.

This was the most important case the Supreme Court has handed down since *Buckley* concerning the powers of the FEC to enforce campaign finance laws. Despite the concern of many observers that the high court might strike down the ability of the FEC to regulate campaign contributions, the Court in the *Colorado* case affirmed the FEC's power. The decision reaffirmed *Buckley's* contribution/expenditure distinction while simultaneously reinforcing the government's power to control furtive contributions.

This decision has important implications concerning the FEC's ability to enforce the new campaign-finance reform act passed in 2002. Popularly known as McCain-Feingold, after the sponsors of the legislation, the Bipartisan Campaign Reform Act (BCRA) of 2002 (Pub.L. 107-155, Mar. 27, 2002, 116 Stat. 81) imposes new restrictions on the financing of political parties and candidates in the United States. The primary goal of the BCRA is to ban soft money, which is money given by corporations and other large donors for party-building and electioneering communications, and the FEC would have the responsibility to put the BCRA into effect. Senator JOHN MCCAIN, the chief sponsor of BCRA, said of the *Colorado* case, "Clearly, this decision demonstrates that McCain-Feingold restrictions on campaign contributions are constitutional, and our opponents will have to find some other excuse not to enact laws to restore Americans' confidence in our political system."

While the Court's *Colorado* decision seems to bode well for the FEC's ability to enforce the BCRA, there are still questions whether the act will be effectively enforced. Since its inception, the FEC has been a lightening rod for criticism from both parties. Campaign finance reform opponents and proponents alike question whether the nature of the FEC will prevent it from successfully implementing the law. Senator McCain has already suggested that the FEC was trying to "emasculate" the law through the efforts of commissioners appointed by President GEORGE W. BUSH, who signed the BCRA legislation reluctantly.

Others have suggested that the problem with FEC goes beyond its ability to enforce existing election laws, and that since it is normally a panel that is split evenly between Republican and DEMOCRATIC PARTY members, it is inherently biased against third parties. But while suggestions have been made to change the nature of the FEC by making it more independent or eliminating it altogether, it remained the nation's primary enforcer of state and federal election laws at the end of the twentieth century. It has entered the twenty-first century by establishing a web site with extensive information, by making campaign data from past elections more easily accessible, and developing a new electronic filing system.

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CROSS-REFERENCES

Democratic Party; Republican Party.

## FEDERAL EMERGENCY MANAGEMENT AGENCY

The Federal Emergency Management Agency (FEMA) is the federal agency responsible for coordinating emergency planning, preparedness, risk reduction, response, and recovery. The agency works closely with state and local governments by funding emergency programs and providing technical guidance and training. These coordinated activities at the federal, state, and local levels ensure a broad-based emergency program to insure public safety and protect property. FEMA is prepared to respond to all types of emergencies, including natural disasters such as hurricanes, floods, and earthquakes, and human-caused events such as toxic chemical spills, problems at NUCLEAR POWER plants, and nuclear war.

FEMA came into the national spotlight in the aftermath of the SEPTEMBER 11TH ATTACKS, where terrorists destroyed the World Trade Center in New York City and seriously damaged the Pentagon in Washington, D.C. Shortly after those attacks, FEMA fully activated the Federal Response Plan. The agency's Emergency Response Team was immediately deployed to the attack sites.

In the weeks following the attacks, FEMA employees worked relentlessly in a massive rescue and recovery effort at the World Trade Center site. More than 1,500 employees of FEMA and more than 6,500 other federal employees took part in the effort. Tens of thousands of tons of debris were removed from the site in New York and taken to a landfill on Staten Island. Several hundred bodies were discovered, although few people were found alive in the first days following the attack. The clean-up effort continued into 2002.

FEMA also established programs to assist victims of the attacks. The agency designated more than $11 million for crisis counseling funds to assist victims and others affected by the attacks in New York City. FEMA likewise established assistance and benefits programs for victims of the attacks, including mortgage and rental assistance for those who suffered financial hardships due to the attacks. In March 2003, the agency announced it had released $250 million in grant money to state and local government agencies for costs associated with pensions given to the surviving spouses and children of police officers and firefighters killed in the collapse of the World Trade Center.

FEMA was established in the EXECUTIVE BRANCH as an independent agency pursuant to REORGANIZATION PLAN No. 3 of 1978 (43 Fed. Reg. 41, 943), and Executive Orders No. 12,127 (March 31, 1979) (Federal Emergency Management Agency) and No. 12,148 (July 20, 1979) (Federal Emergency Management).

FEMA has ten regional offices, which are the primary means by which the agency's programs are carried out at the state and local levels. The regional directors are the FEMA director's principal representatives in contacts and relationships with federal, state, regional, and local agencies; industry; and other public and private groups. They are responsible for accomplishing within their region the national program objectives established by the agency, and they work with the director to develop national policy.

FEMA developed the Federal Response Plan, a program for quickly responding to any type of catastrophic disaster. When, for example, an earthquake causes substantial damage and dislocation to a city or region, FEMA moves emergency teams into the area and coordinates efforts to restore public services and to provide food and shelter for those displaced by the natural disaster. FEMA's TELECOMMUNICATIONS and computer systems are used as a hub operation providing support services for day-to-day emergency activities. FEMA also works with state and local governments to develop emergency response plans and to provide training and technical support to these agencies through its Emergency Management Institute.

FEMA includes the Federal Insurance Administration (FIA), which administers the National Flood Insurance Program (NFIP) and the National Crime Insurance Program (NCIP). The NFIP makes flood insurance available to res-

idents of communities that adopt and enforce the program's floodplain management regulations to reduce future flood losses. Over 18,000 communities participate in NFIP, a self-supporting program requiring no taxpayer funds to pay claim or operating expenses. The NCIP authorizes the FIA to sell crime insurance at affordable rates in any eligible state. The NCIP offers protection to home and business owners against financial loss from **BURGLARY** and **ROBBERY**.

The U.S. Fire Administration (USFA) is another FEMA agency. The USFA provides leadership, coordination, and support for FEMA's activities in the areas of fire prevention and control, hazardous materials, and emergency medical services. The USFA develops and disseminates fire safety information to the fire service and the general public. Through its National Fire Academy, the USFA develops and delivers training and education programs to fire service personnel. The USFA is also responsible for the activities of the National Fire Data Center, and for the management of the National Emergency Training Center, in Emmitsburg, Maryland. The USFA works closely with the public and private sectors to reduce fire deaths, injuries, and property losses.

FEMA's External Affairs directorate serves as the focal point of contact for the public, the media, public interest groups, state and local government organizations, Congress, and foreign governments. The directorate provides the director, the director's staff, and the agencies within FEMA with advice on how to develop and execute programs in the areas of congressional affairs and public and intergovernmental affairs.

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## FEDERAL JUDICIAL CENTER

The Federal Judicial Center (FJC) was created by Congress in 1967 (28 U.S.C.A. § 620) to enhance the growth of **JUDICIAL ADMINISTRATION** in federal courts. It has become the judicial branch's agency for planning and policy research, systems development, and continuing education for judges and court personnel. It is located in the Thurgood Marshall Federal Judiciary Building, in Washington, D.C.

Because of increasing caseloads and the growing complexity of the law, court administration has become an important part of the judicial branch. Congress gave the FJC a broad mandate to improve the performance of the courts and judges through research, planning, and education.

The FJC conducts research on the operation of federal courts and coordinates similar research with other public and private persons and agencies. The FJC works with its state-court counterpart, the National Center for State Courts, which is located in Williamsburg, Virginia, on issues that are common to state and federal courts. The staff of the FJC has conducted research on the workings of different rules of federal procedure and on topics such as the role of court-appointed experts. The FJC also conducts empirical studies on the courts, analyzing the ways in which different federal courts process certain types of cases. In addition, it provides support to judicial systems in foreign countries.

The research and planning efforts of the FJC extend to providing support for the **JUDICIAL CONFERENCE OF THE UNITED STATES**. The Judicial Conference is composed of the chief justice of the U.S. Supreme Court, the chief judge from each circuit court of appeals, the chief judge of the Court of International Trade, and a district judge from each circuit. The conference is the federal judiciary's central policy-making organ and the federal court's chief liaison with Congress. It meets twice per year and functions through a system of twenty-five committees that focus on particular judicial and administrative issues. The FJC's research support to these committees is critical to their effectiveness.

The FJC has also has had a role in the introduction of computers and automated data processing to the court system. It has developed materials to help courts around the United States move from tracking cases in large ledger books to using computer database systems.

Continuing education for judges and court personnel is another major responsibility of the FJC. The FJC presents seminars and other types of training that help the federal courts prepare for legislative changes in criminal and **CIVIL LAW**. Topical programs in areas such as immigration law and sentencing guidelines are

among the FJC's educational offerings. The FJC also prepares handbooks and other written materials to teach new judges and court personnel how to carry out their duties fairly and efficiently.

The FJC's basic policies and activities are determined by its board, which includes two judges of the circuit courts of appeals, three judges of the district courts, and one BANKRUPTCY judge. The Judicial Conference elects these members for four-year terms. The chief justice of the Supreme Court acts as chair, and the director of the ADMINISTRATIVE OFFICE OF THE U.S. COURTS is also a non-elected member.

As of 2002, the FJC had an annual budget of $20 million and a staff of 142 people. It has relied increasingly on the use of broadcasting to deliver educational and informational programming through its Federal Judicial Television Network. By 2001, it was presenting over 2,000 hours of televised programming through this network to 300 federal court locations. In addition, the FJC has begun to distribute computer-based instructional programs.

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## FEDERAL JURISDICTION

See JURISDICTION.

## FEDERAL MARITIME COMMISSION

The Federal Maritime Commission (FMC) regulates the waterborne foreign and domestic offshore commerce of the United States; ensures that U.S. international trade is open to all nations on fair and equitable terms; and protects against unauthorized activity in the waterborne commerce of the United States. The FMC reviews agreements made by groups of common carriers (those who operate ships for commercial purposes), ensures that carriers charge rates on file with the FMC, and guarantees equal treatment to carriers and those who ship their goods. The FMC also ensures that adequate levels of financial responsibility are maintained for the indemnification of passengers who sail on commercial passenger ships. The commission comprises a chairman and four commissioners, who are appointed by the president.

The FMC was established by REORGANIZATION PLAN No. 7 of 1961 (5 U.S.C.A. app.), effective August 12, 1961. It is an independent agency that regulates shipping under the following statutes: the Shipping Act of 1984 (46 U.S.C.A. app. at 1701–1720); the Shipping Act, 1916; the Merchant Marine Act, 1920; the Foreign Shipping Practices Act of 1988 (46 U.S.C.A. app. at 1710a); the Intercoastal Shipping Act, 1933 (46 U.S.C.A. app. at 843 et seq.); and certain provisions of the Act of November 6, 1966 (46 U.S.C.A. app. at 817(d), 871(e)).

The commission reviews agreements made by common carriers, terminal operators (i.e., those who operate the docking facilities in harbors), and other persons subject to the shipping statutes. The FMC also monitors activities under all effective or approved agreements, for compliance with the provisions of the law and its rules, orders, and regulations.

The FMC accepts or rejects tariff filings, including filings dealing with service contracts, of common carriers engaged in foreign and domestic offshore commerce of the United States, or conferences of such carriers. The FMC regulates the rate of return of carriers in domestic offshore trades. It has the authority to grant exemptions from tariff requirements.

The commission issues licenses to persons, partnerships, corporations, and associations desiring to engage in ocean freight forwarding activities. Shipowners and the operators of passenger ships that carry more than fifty passengers are required to obtain certificates from the FMC that demonstrate that they have the financial resources and responsibility to pay judgments for personal injury or death, or to refund fares in the event that voyages are canceled.

When a violation of the shipping laws is alleged or suspected, the FMC is authorized to investigate and may take administrative action to start formal proceedings, to refer matters to other government agencies, or to bring about voluntary agreement between the parties. It also may conduct formal investigations and hearings on its own motion and may adjudicate formal complaints.

The FMC promulgates rules and regulations to interpret, enforce, and ensure compliance with shipping and related statutes by common carriers and other persons subject to those statutes.

The staff of the FMC administers programs to ensure compliance with the provisions of the

shipping statutes. These programs include the submission of information, and field investigations and audits of activities and practices of common carriers, terminal operators, and others subject to the shipping statutes. The FMC also conducts rate analyses, studies, and economic reviews of current and future trade conditions, including the extent and nature of competition in various trade areas.

The FMC conducts investigations of practices by foreign governments and foreign carriers that adversely affect the U.S. shipping trade. The commission works with the DEPARTMENT OF STATE to eliminate discriminatory practices on the part of foreign governments against U.S.-flag shipping and to promote fairness between the United States and its trading partners.

The FMC has sought to become more efficient by implementing an electronic filing system. By 2002, it was able to issue service on companies electronically, which proved crucial during the fall of 2001, when the anthrax crisis prevented the delivery of mail by the U.S. POSTAL SERVICE in some areas. In addition, it now posts filings of important public proceedings on its web site.

FURTHER READINGS

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## FEDERAL MEDIATION AND CONCILIATION SERVICE

The Federal Mediation and Conciliation Service (FMCS) is an independent agency of the U.S. government that seeks to prevent or settle disputes between LABOR UNIONS and management that affect interstate commerce. The FMCS was established by the 1947 LABOR-MANAGEMENT RELATIONS ACT (61 Stat. 153 [29 U.S.C.A. § 172]), better known as the TAFT-HARTLEY ACT. Mediators for the FMCS have no law enforcement authority and must rely on their own persuasive techniques.

The Labor-Management Relations Act requires that parties to a labor contract must file a notice with the FMCS if agreement is not reached within 30 days before a contract termination or reopening date. The FMCS is required by the act to avoid mediation of disputes that would have only a minor effect on interstate commerce. However, in seeking to promote labor peace through the encouragement and development of long-term, stable relationships between labor and management, the FMCS has taken a broad view of its statutory mandate and has involved itself in disputes that have little effect on interstate commerce.

The FMCS provides both mediation and conciliation services. Most of its interventions involve mediation, which is a voluntary, nonbinding form of dispute resolution. A mediator attempts to facilitate an agreement by conducting meetings and coordinating discussions. A mediator may make substantive suggestions as an active participant to help the parties reach a voluntary agreement.

FMCS mediators must be neutral and must have a minimum of seven years' experience in bargaining methods and tactics. Mediators must maintain strict confidentiality of both sides' positions and may be removed for bias or a failure to maintain confidences. The FMCS employs over 200 mediators, who typically handle about 30,000 cases every year.

Conciliation is a different form of dispute resolution. A conciliator acts as a neutral third party, serving as a resource person for both sides. Generally, a conciliator will not participate in any joint meetings between the parties. Instead, a conciliator will present each party's position to the other in separate sessions. The conciliator may also suggest solutions, especially when negotiations have reached a stalemate.

The FMCS will also provide ARBITRATION support. Arbitration is an informal method of adjudication, in which both parties present their side of the case, and an arbitrator decides who will prevail. Upon the joint request of a union and an employer, the FMCS will help to select arbitrators from a roster of private citizens.

The agency also employs preventive mediation techniques once an agreement is reached. These techniques include the organization of or participation in labor-management committees, which serve as outlets for discussing problems, and the training of labor and management in ALTERNATIVE DISPUTE RESOLUTION techniques. This training is often presented through conferences and seminars.

By 2002, the FMCS had developed web technology that provided the public with comprehensive information. More importantly, FMCS

has shifted much of the work done by mediators from paper to electronic documents, which are accessible through its web site. It has ambitious plans for making the mediation process an online activity for parties who need dispute-resolution services.

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## FEDERAL NATIONAL MORTGAGE ASSOCIATION

The Federal National Mortgage Association (known colloquially as Fannie Mae) is the largest U.S. corporation. With an overall value of nearly $1 trillion, the federally chartered Fannie Mae holds a unique place in the national mortgage market. Established by federal law in 1934, it was originally a NEW DEAL program. Since the 1970s, it has been a privately owned, for-profit corporation that is regulated and overseen by the federal government. Its chief purpose is to buy federally guaranteed home mortgages on the secondary market, thus freeing lending institutions to make more funds available for new mortgages for low- to middle-income home buyers. Tighter federal regulation began in the early 1990s, even as critics in Washington, D.C., argued that Fannie Mae should be completely privatized.

A broad federal response to the Great Depression gave rise to Fannie Mae. In the 1930s, the national housing market was devastated when a tight supply of money, coupled with a failure of banks, made mortgage financing extremely difficult to secure. Congress responded first in 1934 by creating the Federal Housing Administration (FHA), a body charged with stabilizing the mortgage market by insuring home loans (National Housing Act of 1934, subch. II [12 U.S.C.A. §§ 1707–1715z-11 (1980)]). This measure was not enough to salvage the mortgage market, however. In 1935, lawmakers created the Reconstruction Finance Corporation (15 U.S.C.A. § 601 [1983], *repealed by* REORGANIZATION PLAN of 1957 No. 1 [5 U.S.C.A. § 903 note (1977)]), and in 1938, they added a subsidiary, Fannie Mae (Federal National Mortgage Association Charter Act [12 U.S.C.A. §§ 1716–1723h (1980)]). Fannie Mae's federal charter required it to buy FHA-insured loans from mortgage lenders, thus increasing the supply of mortgage funds available for lending.

Fannie Mae played a major role in the post–World War II boom years in housing. Its portfolio grew after it was authorized to purchase VETERANS ADMINISTRATION (VA) loans in addition to FHA loans, a measure that fueled an enormous expansion of housing in the late 1940s and 1950s. In 1954, the federal government began issuing stock in Fannie Mae as part of a plan to share responsibility for the corporation's financial health with lending institutions. It issued preferred stock to the TREASURY DEPARTMENT and nonvoting common stock to mortgage lenders. For the latter, purchase of stock became a prerequisite for selling mortgages to Fannie Mae.

A shift to private ownership began in 1968. First, Congress split Fannie Mae into two entities: One retained the name Fannie Mae, and the other was called the GOVERNMENT NATIONAL MORTGAGE ASSOCIATION (GNMA), under authority of title III of the National Housing Act (12 U.S.C.A. §§ 1716–1716b [1983]). Whereas GNMA, also known as Ginnie Mae, was chartered to provide funding for federally assisted housing programs, the new Fannie Mae retained its original mission but with a new source of funding: Lawmakers wanted it to become self-sustaining through fees and SECURITIES. In 1970, the federal government sold its share of stock to Fannie Mae for $216 million, severing its last financial tie to the corporation. Two years later, Fannie Mae expanded the scope of its investments by purchasing non-federally guaranteed loans as well.

Despite its financial independence, the corporation remains closely linked by its charter to the federal government. Federal oversight remained, as did Fannie Mae's mission to provide services to low-, moderate-, and middle-income homebuyers. During the 1970s and 1980s, the corporation grew enormously, particularly through the securities market, where it sold so-called mortgage-backed securities, which are pools of mortgage loans acquired from lenders for which the acquiring corporation earns guarantee fees. Its stock was actively sought, primarily because of profitability and a sense on Wall Street that the federal government would always back up the corporation in bad

times. In fact, the enormous flow of money through Fannie Mae rivaled that of the nation's major lending institutions. Fannie Mae voluntarily registered its common stock with the SECURITIES AND EXCHANGE COMMISSION (SEC) in 2003, thus requiring it to file periodic financial disclosures with the SEC under the Securities Exchange Act of 1934.

Calls for reform of Fannie Mae began in the 1980s. The anti-regulatory administration of President RONALD REAGAN suggested privatizing it completely. But action only followed a scandal of the savings and loan industry, in which greed and mismanagement plunged many of the nation's thrifts into insolvency—at a cost to taxpayers of hundreds of billions of dollars.

Motivated to protect the federal government from suffering such losses again, Congress in 1992 passed the Federal Housing Financial Enterprises Safety and Soundness Act (Pub. L. No. 102-550, § 1301, 12 U.S.C.A. § 4501). The law tightened regulations governing Fannie Mae and related federally chartered financial institutions. Specifically, it requires these institutions to pass periodic review to ensure that they maintain adequate capital according to risk criteria determined by Congress. This oversight is conducted by the Office of Federal Housing Enterprise, a part of the DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. Under law, such a corporation must submit a plan to restore its capital levels if it fails review. Significant undercapitalization can lead to the appointment of a conservator to run the corporation. Congress also prohibited excessive executive and staff salaries. At the same time, it gave Fannie Mae additional responsibility for helping low-income home buyers.

Fannie Mae has sought to provide consumers with comprehensive information about securing home mortgages. It provides lists of lenders, mortgage calculators, glossaries of terms and worksheets through its web site. In addition, Fannie Mae has developed programs to promote home ownership by people who traditionally have been cut off from financing. It has made a $2 trillion pledge to increase homeownership rates and to serve 18 million targeted American families.

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CROSS-REFERENCES

Housing and Urban Development Department.

## FEDERAL PROCEDURE

See CIVIL PROCEDURE.

## FEDERAL QUESTION

*An issue directly involving the U.S. Constitution, federal statutes, or treaties between the United States and a foreign country.*

Application of these kinds of law to particular cases or interpretation of the meanings of these laws is a power within the authority of the federal courts. The authority to hear lawsuits that turn on a point of federal law is called federal question jurisdiction. Under 28 U.S.C.A. § 1331 (1993), U.S. district courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Unlike federal jurisdiction based upon DIVERSITY OF CITIZENSHIP under 28 U.S.C.A. § 1332 (Supp. 2003), federal question jurisdiction is not dependent on the parties meeting a prescribed amount in controversy.

CROSS-REFERENCES

Jurisdiction; Treaty.

## FEDERAL REGISTER

*A daily publication that makes available to the public the rules, regulations, and other legal notices issued by federal administrative agencies.*

Executive Orders and agency regulations were promulgated at a furious pace in the early days of the NEW DEAL under President FRANKLIN D. ROOSEVELT, but there was no requirement that these regulations be centrally filed or regularly published. It became increasingly difficult to know which rules were in effect at any one time. Two important cases were pursued all the way to the U.S. Supreme Court before it was discovered that the administrative regulations that the defendants were accused of violating were no longer in effect. Newspapers all over the country castigated the government for prosecuting people under nonexistent laws.

The furor led to enactment in 1935 of the Federal Register Act, now part of 44 U.S.C.A. § 1501 et seq., a law that established the *Federal Register* as a daily gazette for the government. Orders from federal agencies or the EXECUTIVE BRANCH do not become effective until they have been published in the *Federal Register.* In 1937, the act was amended to create the CODE OF FEDERAL REGULATIONS, a set of paperback books that arrange effective regulations from the *Federal Register* by subject.

The *Federal Register* includes (1) presidential proclamations and executive orders; (2) other documents that the president from time to time determines to have general applicability and legal effect; (3) documents that are required by an act of Congress to be published; and (4) other documents selected for publication by the director of the *Federal Register.* Documents are placed on file for public inspection at the Office of the Federal Register in Washington, D.C., on the day before they are published, unless an earlier filing is requested by the agency issuing them.

The *Federal Register* has been published continuously since March 14, 1936, and it provides the only complete history of the regulations of the federal government with the text of all changes. Regulations are published in the order in which they are filed, but specific documents can be located by consulting a table of contents in each daily issue or in the monthly index. Separate guides are prepared, to note which regulations have been changed in an issue ("List of C.F.R. Parts Affected in This Issue") and the regulations changed at any time since the beginning of the month ("Cumulative List of C.F.R. Parts Affected During April," for example). A separate pamphlet is published along with the monthly index that lists references to all the changes in regulations since the last time the affected title of the Code of Federal Regulations was revised. All references are made to the Code of Federal Regulations because it is the topically organized version of the regulations that are published daily in the *Federal Register.*

The text of any document in the *Federal Register* can be shown as good and sufficient evidence that the document was properly filed and that it is, therefore, good law. If a regulation has not been published in the *Federal Register,* a governmental agency would have to show that an individual actually knew about it before it could prosecute the person for violating it. This encourages the agencies to be sure that their regulations are published in the one place where everyone can expect to find them.

As of July 31, 2003, the database for Federal Register for each year subsequent to 1995, (and subsequent to Volumes 60), was available and searchable online at http://www.gpoaccess.gov/fr/index.html. Documents may be retrieved in ASCII format (full text, graphics omitted), Adobe Portable Document Format, "PDF" (full text with graphics), and "SUMMARY" format (abbreviated text). The 1994 Federal Register (Volume 59) database was also available but did not have the same search capabilities, as it contains no fields or section identifiers. It is also possible to browse the current issue of the *Federal Register* at the same site. Also accessible is an online History of Line Item Veto Notices (as published in the *Federal Register*) prior to U.S. Supreme Court Opinion No. 97-1374 (argued April 27, 1998—decided June 25, 1998.

## FEDERAL REGULATION

See ADMINISTRATIVE AGENCY; REGULATION.

## FEDERAL REPORTER®

*A legal reference source primarily covering published decisions of federal appellate courts.*

The decisions are published in paperback *Federal Reporter* pamphlets (ADVANCE SHEETS) shortly after they are handed down and then are issued in a hardbound volume when enough cases have accumulated to fill a book. The hardbound volumes are consecutively numbered as they are published. After 300 volumes had been issued, a second series was started in 1924. Following the release of 999 volumes in the second series, the third series started in 1993.

A case may be found in the *Federal Reporter* in the volume whose number is that given first in the citation for the case. If the case was decided after 1924, the citation will refer to the second series of the *Federal Reporter.* For example, the case of *O'Connor v. Lee-Hy Paving Co.,* decided by the U.S. Court of Appeals for the Second Circuit in 1978, is cited as 579 F.2d 194. It can be located on page 194 of volume 579 in the *Federal Reporter,* second series.

The *Federal Reporter* covers decisions by (1) the circuit court of appeals, the district courts, the former U.S. Court of Customs and Patent Appeals, the former U.S. Court of Claims, and

the Court of Appeals of the District of Columbia for the years from 1880 to 1932; (2) the U.S. COURTS OF APPEALS and the former U.S. Court of Customs and Patent Appeals for the years beginning with 1932; (3) the U.S. Emergency Court of Appeals from 1942 to 1961 and the U.S. TEMPORARY EMERGENCY COURT OF APPEALS from 1972 to the present; and (4) the former U.S. Court of Claims from 1960 to the fall of 1982; thereafter it became the U.S. Claims Court.

CD-ROM format is available. Other federal court opinions are published in a series called the federal supplement.

CROSS-REFERENCES

Reporter.

## FEDERAL RESERVE BOARD

The Federal Reserve System, established by the Federal Reserve Act (12 U.S.C.A. § 221), is the central BANK OF THE UNITED STATES. The Federal Reserve is charged with making and administering policy for the nation's credit and monetary affairs and helps to maintain the banking industry in sound condition.

The Federal Reserve Board of Governors, or Federal Reserve Board, has broad supervisory powers over the functions of the Federal Reserve System. It determines general monetary, credit, and operating policies for the Federal Reserve System and formulates the rules and regulations that are necessary to carry out the purposes of the Federal Reserve Act. A primary function of the board is to influence credit conditions, such as interest rates, in the nation's marketplace. The board regulates the amount of credit that may be initially extended and subsequently maintained on any SECURITIES, in order to prevent an excessive use of credit for their purchase or carrying.

The Federal Reserve Board office is located in Washington, D.C. The board is composed of seven members, appointed by the president of the United States with the advice and consent of the Senate. The chair of the board must be chosen from among the seven governors and serves a four-year renewable term. Other board members serve one nonrenewable fourteen-year term, with one governor's term expiring every other January. By EXECUTIVE ORDER, the chair of the board is also a member of the National Advisory Council on International Monetary and Financial Policies.

*Alan Greenspan became chair of the Federal Reserve Board in 1987. The board determines monetary and credit policies and influences national interest rates.*

AP/WIDE WORLD PHOTOS

Following the passage of the Federal Reserve Act, Congress attempted to claim exclusive control over the management of monetary policy. It asserted that this was the proper function of Congress, as the constitutionally appointed keeper of the nation's purse. The Banking Act of 1935 curbed Congress's claims by increasing the power of the executive branch's appointees to the board. In the 1970s, the Humphrey Hawkins Act (Pub. L. No. 95-253, 15 U.S.C.A. § 3101 et seq.) reformed the Federal Reserve to require biannual congressional oversight hearings on monetary policy and the decisions of the board. Reports on these hearings are presented to Congress by the chair of the board of governors.

In 1999, Congress passed the Financial Services Modernization Act (PL 106-102, November 12, 1999, 113 Stat. 1338). This legislation rewrote banking laws that had prevented commercial banks, securities firms, and insurance companies from merging their businesses. In addition, the law directed the Federal Reserve Board to accept existing reports that a bank has filed with other federal and state regulators, thus reducing time and expense for the bank. Moreover, the Federal Reserve Board may examine the insurance and brokerage subsidiaries of a bank only if reasonable cause exists to believe that the subsidiary is engaged in activities that pose a material risk to bank depositors. The act contained many more such provisions that restrict the ability of the Federal Reserve Board to regulate the new type of bank that the law contemplated.

The board of governors interacts with the other parts of the Federal Reserve System, including the twelve Federal Reserve banks, their twenty-five branches situated throughout the United States, other member commercial banks, the powerful Federal Open Market Committee (FOMC), the Federal Advisory Council, and the Consumer Advisory Council. Through these arms of the Federal Reserve System, board members help to maintain a commercial banking system that responds to the needs of the nation.

### Federal Reserve Banks and Their Branch Members

The 12 Federal Reserve banks are located in Boston, New York, Philadelphia, Cleveland, Richmond, Atlanta, Chicago, St. Louis, Minneapolis, Kansas City, Dallas, and San Francisco. The powers of these central banks include transferring funds, handling government deposits and debt issues, supervising and regulating banks, and acting as lenders of last resort. The 25 branches of these banks are located throughout the country. Along with supervising these member banks, the board has jurisdiction over the administration of other state banks and trust companies. The board may also grant authority to member banks to establish branches in foreign countries or dependencies or insular possessions of the United States.

The board of governors elects directors and officers of the Reserve banks. These representatives are divided into three classes. Class A directors and officers represent the Federal Reserve's stockholding member banks. Class B directors and officers are elected from various industries or banks within their districts to represent the interests of their districts' economies. The six Class A and six Class B directors are elected by the stockholding member banks. Class C directors hold no office or position in any bank. They are elected by the board of governors to terms in office that are arranged to expire, in conjunction with the terms of office in the A and B classes, in alternating years. Class C directors work in consultation with the other directors and fill vacancies as necessary.

### The Federal Open Market Committee

As part of the FOMC, the board works with other bank representatives to develop key policies for the Federal Reserve. The open market operations of the FOMC determine the control of the nation's money supply and the prevailing economic conditions of the country. Twelve voting members form this committee. Seven members are the governors from the board, and five members are presidents of district banks. The board, therefore, has the majority of the votes within the committee. The chair of the board of governors also presides as the chair of the FOMC. When the FOMC meets, approximately eight times a year, the board makes suggestions and policy surrounding the purchase and sale of securities in the open market. Such transactions supply bank reserves to support the credit and money that is needed for long-term economic growth, to offset cyclical economic swings, and to accommodate seasonal demands of businesses and consumers for money and credit.

### The Federal Advisory Council

The board of governors confers with the Federal Advisory Council on general business conditions throughout the nation. The Federal Advisory Council advises the board on matters within the board's jurisdiction. The council is composed of 12 members, one from each Federal Reserve district. It meets in Washington, D.C., at least four times per year, and more often if the board of governors calls it to do so.

### The Consumer Advisory Council

The board of governors confers with the Consumer Advisory Council on the responsibilities of the board in the field of CONSUMER CREDIT protection. Congress established the council in 1976 when it restructured the Advisory Committee on Truth in Lending, initially established under the TRUTH IN LENDING ACT (15 U.S.C.A. § 1601 et seq. [1968]). The council is composed of approximately 30 members from across the country. It represents consumer and creditor interests and advises the board on its responsibilities under laws such as Truth in Lending, Equal Credit Opportunity (88 Stat. 1521, 15 U.S.C.A. 1691 et seq.), and Home Mortgage Disclosure (89 Stat. 1125, 12 U.S.C.A. 2801 et seq.).

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**CROSS-REFERENCES**

Bank of the United States; Banks and Banking; Glass-Steagall Act.

## FEDERAL RULES DECISION®

*A reporter that reprints decisions rendered by federal district courts that interpret or apply the Federal Rules of Civil, Criminal, and Appellate Procedure and also the* **FEDERAL RULES OF EVIDENCE.**

The full-text decisions that appear in the Federal Rules Decisions, commonly abbreviated F.R.D., are not published in the Federal Supplement.

## FEDERAL RULES OF EVIDENCE

*The Federal Rules of Evidence generally govern civil and criminal proceedings in the courts of the United States and proceedings before U.S.* **BANKRUPTCY** *judges and U.S. magistrates, to the extent and with the exceptions stated in the rules. Promulgated by the U.S. Supreme Court and amended by Congress from time to time, the Federal Rules of Evidence are considered legislative enactments that have the force of statute, and courts interpret them as they would any other statute, employing traditional tools of statutory construction in applying their provisions.*

The rules are designed to secure fairness in **JUDICIAL ADMINISTRATION**, to eliminate unjustifiable expense and delay, and to promote the growth and development of the law of evidence so that truth may be ascertained and proceedings justly resolved. *Huff v. White Motor Corporation*, 609 F.2d 286 (7th Cir. Ind. 1979). But the rules are not intended to result in an exhaustive search for a total and complete understanding of every civil and criminal case that comes before a federal court. Rather, the rules are meant to assist lawyer-adversaries and common sense triers-of-fact in resolving particularized legal disputes. Accordingly, the rules give courts authority to adapt the laws of evidence to circumstances as they arise.

The Federal Rules of Evidence were adopted by order of the Supreme Court on November 20, 1972, transmitted to Congress by Chief Justice **WARREN E. BURGER** on February 5, 1973, and became effective on July 1, 1973. In enacting these rules, the Supreme Court and Congress did not intend to wipe out years of **COMMON LAW** development in the field of evidence. To the contrary, the Federal Rules of Evidence largely incorporate the judge-made, common law evidentiary rules in existence at the time of their adoption, and where the federal rules contain gaps or omissions, courts may answer unresolved questions by relying on common law precedent. Like their common law predecessors, the federal rules govern the overall admissibility of evidence, the limitations of relevant evidence, the definition of prejudicial and cumulative evidence, the admissibility of **HEARSAY**, lay and **EXPERT TESTIMONY**, the nature of evidentiary presumptions, the grounds for authentication and identification of documentary evidence, and the scope of evidentiary privileges, like the work product, attorney-client, and doctor-patient privileges.

The Federal Rules of Evidence apply to (1) the U.S. district courts, including the federal district court in Washington, D.C.; (2) the federal district courts located in Puerto Rico, Guam, the Virgin Islands, and the Northern Mariana Islands; (3) the **U.S. COURTS OF APPEALS**; (4) the U.S. Claims Court; (5) U.S. bankruptcy courts and U.S. magistrates. Although the rules do not specify whether they apply to the U.S Supreme Court, that Court has applied the rules as if they do. Pursuant to **EXECUTIVE ORDER**, military courts-martial are required to apply rules of evidence that substantially conform to the Federal Rules of Evidence. Executive Order No. 12473. However, the Federal Rules of Evidence do not generally apply to administrative agencies.

The Federal Rules of Evidence apply to most civil actions, including **ADMIRALTY** and mar-

itime cases, to most criminal proceedings, and to CONTEMPT proceedings, except contempt proceedings in which the court may act summarily. But the rules do not apply to criminal proceedings to issue an arrest warrant, a SEARCH WARRANT, or a summons, to preliminary examinations in criminal cases, such as hearings on motions to suppress evidence, to proceedings for EXTRADITION or rendition, to sentencing hearings, to PROBATION hearings, or to hearings to set bail. FRE Rule 1101.

Nor do the Federal Rules of Evidence generally apply in GRAND JURY proceedings. A grand jury may compel the production of evidence or the testimony of witnesses as the grand jury considers appropriate, and its operation generally is unrestrained by technical, procedural, and evidentiary rules governing the conduct of criminal trials. However, the rules governing privileges generally do apply at grand jury proceedings, and thus grand-jury witnesses may refuse to disclose information on the grounds that it is protected by ATTORNEY-CLIENT PRIVILEGE, for example.

In some instances the Federal Rules of Evidence apply only to the extent that they have not been superseded by statute or other Supreme Court rules governing certain proceedings in particular areas of law. For example, the Federal Rules of Evidence do not fully apply to the trial of misdemeanors and other petty offenses before U.S. magistrates, to the review of orders by the Secretary of Agriculture under the Perishable Agricultural Commodities Act of 1930 (7 U.S.C.A. 499f, 499g), to naturalization proceedings under the Immigration and Nationality Act (8 U.S.C.A. 1421-1429), to prize proceedings in admiralty under 10 U.S.C.A. sections 7651-7681, or to proceedings reviewing the orders of the Secretary of the Interior under 15 U.S.C.A 522.

In 1974, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Rules of Evidence, which were designed to be identical to the Federal Rules of Evidence. Cases interpreting the Federal Rules of Evidence are helpful in the analysis of state rules that are based on the Federal Rules of Evidence. In fact, some jurisdictions have held that a rule of evidence patterned after a Federal Rule of Evidence should be construed in accordance with federal court decisions interpreting the federal rule. Thus, state courts in these jurisdictions will look at the federal rule's history and purposes in interpreting the provisions of an identical state rule of evidence. However, at least one state court has held that because rules of evidence, to the extent that they do not impinge upon U.S. constitutional guarantees, are a matter of state law, federal decisions interpreting the federal rules are not of controlling precedential significance. *State v. Outlaw*, 108 Wis.2d 112, 321 N.W.2d 145 (Wis., Jul 02, 1982)

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## FEDERAL SUPPLEMENT®

*A set of legal reference books containing decisions of federal courts in chronological order.*

The first volume of the *Federal Supplement* was published in 1933, and successive volumes have been numbered consecutively. Volume 900 was published in 1994. A citation to an opinion printed in the *Federal Supplement* gives, first, the volume and then the page number on which the case begins. For example, 465 F.Supp. 1286 means that the case can be found in volume 465 on page 1286.

The *Federal Supplement* was created as a reporter of trial-level decisions by federal district courts. It contains the decisions of U.S. district courts from 1932 to the present, decisions of the former U.S. Court of Claims between 1932 and 1960, and the decisions of the U.S. Customs Court from 1949 to 1980. The U.S. Customs Court was renamed the U.S. Court of International Trade in 1980, and its decisions will now be carried under its new designation. In 1969, it started carrying rulings of the Judicial Panel on MULTIDISTRICT LITIGATION. Decisions of the U.S. COURTS OF APPEALS and of the former U.S. Court of Customs and Patent Appeals and certain other federal courts are printed in the FEDERAL REPORTER.

## FEDERAL TORT CLAIMS ACT

Enacted in 1946 the Federal Tort Claims Act (FTCA) (60 Stat. 842) removed the inherent IMMUNITY of the federal government from most TORT actions brought against it and established

the conditions for the commencement of such suits.

The FTCA permits persons to sue the government of the United States in federal court for

> money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. (28 U.S.C.A. § 1346(b))

In passing the FTCA, Congress allowed the federal government to be sued. Congress also made specific exceptions to the act, and the U.S. Supreme Court has interpreted one provision broadly, both actions resulting in the dismissal of many plaintiffs' lawsuits.

In consenting to be sued, the federal government waived the **SOVEREIGN IMMUNITY** it had enjoyed in the past. Justice **OLIVER WENDELL HOLMES JR.**, in *Kawananakoa v. Polyblank,* 205 U.S. 349, 27 S. Ct. 526, 51 L. Ed. 834 (1907), explained that a "sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." As early as the 1821 case of *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 5 L. Ed. 257, the Supreme Court recognized the sovereign immunity of the United States.

Nevertheless, during the nineteenth century, Congress consented to let the federal government be sued in several causes of action. Congress established the Court of Claims in 1855 (28 U.S.C.A. § 171) to entertain contract actions against the United States. The passage of the **TUCKER ACT** (28 U.S.C.A. § 1346[a] [2], 1491) in 1887 broadened that court's jurisdiction to include designated nontort actions, including **EMINENT DOMAIN** cases. But, until 1946, there was no readily accessible remedy for tort actions brought by citizens of the United States. The routine recourse was for members of Congress to introduce private bills for constituents who had been injured by government **NEGLIGENCE**. Congress eventually recognized that the private bill method was not an effective way to deal with the problem and passed the FTCA.

Now a person who alleges that an employee of the federal government has caused injury must commence a lawsuit pursuant to the FTCA. Once filed, the FTCA lawsuit becomes the plaintiff's exclusive remedy, regardless of any statute that expressly or impliedly permits actions against a designated agency. A federal judge hears the case without a jury.

Congress did not categorically waive sovereign immunity in the FTCA. The act contains 13 exceptions, which release the federal government from any liability for, among other things, enforcing unconstitutional statutes, losing letters in the post office, actions of the military in time of war, damages caused by the fiscal operations of the **TREASURY DEPARTMENT** or regulation of the monetary system, collecting custom duties, claims arising in a foreign country, and most intentional torts (28 U.S.C.A. § 2680).

The most important and troublesome exception has been the FTCA discretionary function exception. Under this provision, the waiver of immunity does not apply to any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused" (28 U.S.C. § 2680[a]). In *Dalehite v. United States,* 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953), the U.S. Supreme Court broadly interpreted the discretionary function exception to include all situations involving the formulation or execution of plans that were drawn at a high level of government and that entailed exercise of judgment. In *Dalehite,* federal government workers in Texas were negligent in packing and shipping explosive material, and their negligence resulted in the death of 536 people. The Court ruled that the workers were following specifications prepared by superiors in Washington, D.C., who were exercising their discretion. Therefore, the discretionary function exception applied and the government was immune from suit. The Court distinguished between decisions made at the planning and policy stage and those conducted at the lower, or "operational," levels that implement the policy decisions, even if some judgment or discretion is exercised in carrying out such decisions.

The *Dalehite* decision has limited the effectiveness of the FTCA for persons injured by the government. Some commentators have criticized the Court for allowing the discretionary function exception to swallow the FTCA. Many

cases center on whether the alleged tortious conduct involved the exercise of discretion or was merely ministerial (carrying out a designated act), although virtually any act by a government employee is either directly or indirectly the outcome of an exercise of discretion.

The Supreme Court has placed other limitations on the scope of the FTCA. In *Feres v. United States,* 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950), the Court interpreted the FTCA to bar claims by members of the armed forces and their families for injuries arising out of or in the course of activity related to military service. In *Laird v. Nelms,* 406 U.S. 797, 92 S. Ct. 1899, 32 L. Ed. 2d 499 (1972), the Court held that the requirement of a "wrongful" act means the United States is not liable under any state rule imposing **STRICT LIABILITY**.

The FTCA's exception for intentional torts, such as assault, **BATTERY**, **FALSE IMPRISONMENT**, false arrest, and **LIBEL**, was modified in 1974, in response to the Supreme Court's ruling in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). In *Bivens* the Court held that federal law enforcement officers could be sued personally for violation of a person's constitutional rights. The FTCA was subsequently amended to make actionable conduct "of investigative or law enforcement officers of the United States Government" involving assault, battery, false imprisonment, false arrest, **ABUSE OF PROCESS**, or **MALICIOUS PROSECUTION**. This inclusion does not repeal the personal liability of the officers themselves, but it does make it more likely that a plaintiff will seek to sue the government, because the government has more money than its employees. The government is also liable for torts such as **TRESPASS** and invasion of privacy.

In 1988, the Supreme Court significantly altered the balance between the public interest in granting federal employees immunity from personal suits and the right to sue those employees personally for damages caused by their conduct. In *Westfall v. Erwin,* 484 U.S. 292, 108 S. Ct. 580, 98 L. Ed. 2d 619 (1988), the Court ruled that a federal employee is not absolutely immune for official actions "unless the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature." *Westfall* denied most rank-and-file federal employees immunity from lawsuits against them personally for common-law torts committed in the scope of employment.

In response, Congress quickly passed the Federal Employees Reform and Tort Compensation Act of 1988 (102 Stat. 4563) as an amendment to the FTCA. The act overruled *Westfall* by broadening the class of activities given immunity. Originally limited to the operation of motor vehicles, the act gave immunity to any wrongful or negligent act that an employee commits while acting within the scope of his or her office or employment. Congress required the government to accept sole responsibility for its employees' actions in the scope of employment, leaving those employees free to administer government policies without fear of personal liability.

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## FEDERAL TRADE COMMISSION

The Federal Trade Commission (FTC) is an independent federal regulatory agency charged with the responsibility of promoting fair competition among rivals in the marketplace by preventing unfair and deceptive trade practices and restraining the growth of monopolies that tend to lessen free trade.

The Federal Trade Commission was established on September 26, 1914, by the Federal Trade Commission Act (15 U.S.C. 41 et seq). Created by Congress at the urging of President **WOODROW WILSON**, the FTC was designed to regulate trusts and prevent **UNFAIR COMPETITION** in interstate commerce. The FTC suc-

ceeded the Bureau of Corporations as the federal agency in charge of regulating unfair and non-competitive trade practices.

The FTC's creation was supported both by anti-monopolists seeking to halt "unfair competition" that resulted from the trust building actions of larger corporations and by businessmen seeking "fairness" as a basis for greater order and stability in the marketplace.

The FTC is composed of five commissioners appointed by the President of the United States, with the advice and consent of the Senate, for a term of seven years. Not more than three of the commissioners may be members of the s ame political party. One commissioner is designated by the president as chairman of the commission and is responsible for its administrative management.

Generally speaking, the FTC is bestowed with the power to oversee, issue, and enforce federal rules, regulations, and laws governing unfair competition among businesses in the United States. Under the SHERMAN ANTITRUST ACT (15 U.S.C. § 1) and CLAYTON ANTITRUST ACT (15 U.S.C. § 18), the FTC is charged with the duty of applying the so-called "Rule of Reason" to disputes of unfair competition. Under this rule, restraints of trade are deemed unlawful only to the extent they are "unreasonable."

Specifically, the FTC's functions include: (1) promoting competition through the prevention of general trade restraints such as price-fixing agreements, boycotts, illegal combinations of competitors, and other unfair methods of competition; (2) stopping corporate mergers, acquisitions, or joint ventures that substantially lessen competition or tend to create a MONOPOLY; (3) preventing interlocking directorates (an interlocking director is a director who simulaneously serves on the boards of two or more corporations that deal with each other or have allied interests.) that may restrain competition; (4) preventing the dissemination of false or deceptive advertisements of consumer products and services; (5) ensuring the truthful labeling of products; (6) promoting electronic commerce by stopping FRAUD on the INTERNET and developing policies to safeguard online privacy of personal information; (7) stopping fraudulent telemarketing schemes and protecting consumers from abusive and deceptive telephone tactics; (8) requiring creditors to disclose in writing certain cost information, such as the annual percentage rate, before consumers enter into credit transactions; (9) protecting consumers against circulation of inaccurate or obsolete credit reports and ensuring that credit bureaus, consumer reporting agencies, credit grantors, and bill collectors exercise their responsibilities in a manner that is fair and equitable; (10) educating consumers and businesses about their rights and responsibilities under FTC rules and regulations; and (11) gathering factual data concerning economic and business conditions and making it available to the Congress, the president, and the public.

The FTC discharges many of these responsibilities by holding hearings, soliciting public and expert feedback, and conducting investigations in areas of concern to consumers. Based on the formal testimony and other informal information provided at these hearings and gathered during investigations, the FTC will issue a temporary or proposed rule, after which it will normally solicit more feedback either in writing or again through additional hearings. If a significant portion of the public disapproves of the temporary or proposed rule, the FTC may modify the rule to accommodate the public's concerns. Otherwise, the FTC will issue a subsequent order making the temporary or proposed rule a final regulation.

The commission ensures compliance with its rules and regulations by systematic and continuous review of business practices in the marketplace and by issuing cease-and-desist orders when violations are discovered. All respondents against whom such orders have been issued are required to file reports with the FTC to substantiate their compliance. In the event compliance is not obtained, or the order is subsequently violated, civil penalty proceedings may be instituted.

Compliance is also ensured through voluntary and cooperative action by private companies in response to miscellaneous FTC guidance procedures, including non-binding staff advice, formal ADVISORY OPINIONS, and policy statements delineating legal requirements as to particular business practices. Through these procedures, business and industry may obtain authoritative direction and a substantial measure of certainty as to what they may do under the laws administered by the FTC. As a result, smart businesses can plan ahead to prevent being found in violation of federal trade laws.

FTC investigations may originate through complaints made by a consumer or a competitor,

the Congress, or from a federal, state, or municipal agency. The commission itself may also initiate an investigation into possible violations of the laws it administers. No formality is required in submitting a complaint. A letter giving the facts in detail, accompanied by all supporting evidence in possession of the complaining party, is sufficient.

As a last resort, the FTC will commence formal litigation. Formal litigation is instituted either by issuing an administrative complaint or by filing a federal district court complaint charging a person, partnership, or corporation with violating one or more of the laws administered by the commission. If the charges leveled in an administrative complaint are not contested or are found to be true after a contested case, the FTC may issue an order requiring discontinuance of the unlawful practices.

In addition to or in lieu of an administrative proceeding initiated by a formal complaint, the FTC may request that a U.S. district court issue a preliminary or permanent INJUNCTION to halt the use of allegedly unfair or deceptive practices, to prevent an anticompetitive merger from taking place or to prevent violations of any statute enforced by the commission.

As with actions taken by most other federal agencies acting pursuant to federal ADMINISTRATIVE LAW, parties aggrieved by an FTC action may seek review in a U.S. district court. In evaluating the lawfulness of action taken by the FTC, federal district courts have alternatively applied various standards of review, including the *abuse of discretion, arbitrary and capricious,* and *substantial evidence* standards.

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**Unemployment Rate During the Great Depression (1929–1940)**

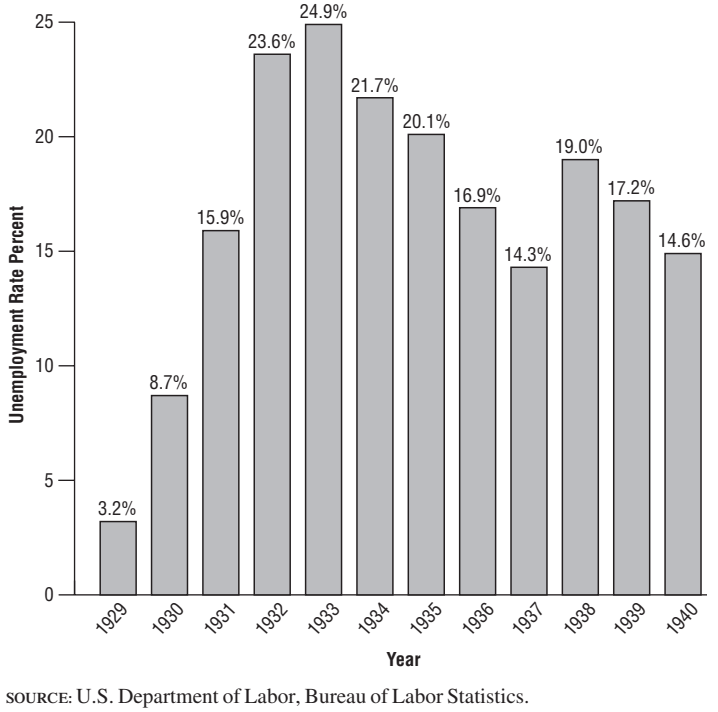


SOURCE: U.S. Department of Labor, Bureau of Labor Statistics.

## FEDERAL UNEMPLOYMENT COMPENSATION ACT

The Federal Unemployment Compensation Act (FUCA) was enacted by Congress to care for workers who in times of economic hardship and through no fault of their own lose their job and are unable to find new employment. FUCA was first enacted in 1939, underwent substantial revision in 1954, and has been amended over the years, most recently in 1988 (42 U.S.C.A. §§ 501–504, 1101–1105). The act, originally titled the Federal Unemployment Tax Act, is designed to encourage and aid the establishment of state unemployment funds and payments to those funds. The act provides that an employer pay an annual excise tax in the amount of a designated percentage of the total wages paid during that year. Employers with fewer than eight employees, or operating in the field of agricultural labor or domestic service, are exempt from this requirement.

The unemployment insurance system in the United States and FUCA had their origins in the Great Depression of the 1930s, when high unemployment occurred. The unemployment system has three principal objectives. The first is to enhance employment opportunities through a network of employment services where job

seekers and job openings can be matched efficiently. The second is to stabilize employment by encouraging employers to retain employees during short periods of economic downturn. The third is to minimize the economic loss of unemployment by paying benefits to persons who are unemployed.

UNEMPLOYMENT COMPENSATION is a joint federal-state program. In 1995, the federal statute imposed a tax of 6.2 percent on payrolls. That tax was reduced to less than one percent if the employer was covered by a state unemployment compensation law that met standards set out in FUCA. These standards address both substantive matters, such as what should be the conditions of eligibility for benefits, and the procedures by which benefits are to be paid.

The typical tax rates paid under state law in 1995 were lower than five percent for most employers, thus creating a substantial incentive for states to participate. An argument that this type of incentive is an unconstitutional coercion of the states by the federal government was rejected by the U.S. Supreme Court in *Chas. C. Steward Machine Co. v. Davis,* 301 U.S. 548, 57 S. Ct. 883, 81 L. Ed. 1279 (1937).

This federal-state sharing of responsibility has generally worked well, but it has made it necessary to work out a number of multistate agreements to handle certain administrative problems.

**Unemployment Rate in the United States, 1950–1995**

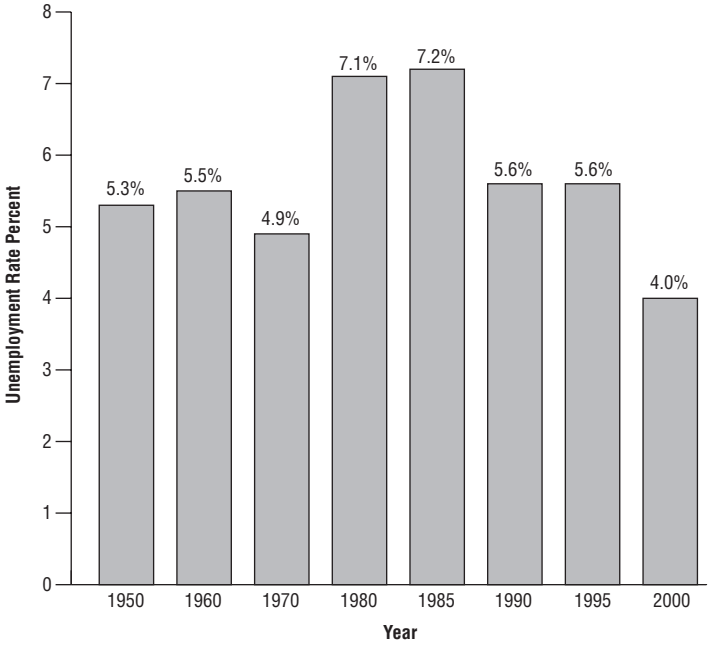


SOURCE: U.S. Department of Labor, Bureau of Labor Statistics.

## FEDERALISM

A *principle of government that defines the relationship between the central government at the national level and its constituent units at the regional, state, or local levels. Under this principle of government, power and authority is allocated between the national and local governmental units, such that each unit is delegated a sphere of power and authority only it can exercise, while other powers must be shared.*

The term *federalism* is derived from the Latin root *foedus,* which means "formal agreement or covenant." It includes the interrelationships between the states as well as between the states and the federal government. Governance in the United States takes place at various levels and branches of government, which all take part in the decision-making process. From the U.S. Supreme Court to the smallest local government, a distribution of power allows all the entities of the system to work separately while still working together as a nation. Supreme Court justice HUGO L. BLACK wrote that federalism meant

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate State governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. (*Younger v. Harris,* 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 [1971])

The Constitution lists the legislative powers of the federal government. The TENTH AMENDMENT protects the residual powers of the states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

### Checks and Balances

In TEXAS V. WHITE, 74 U.S. (7 Wall.) 700, 19 L. Ed. 227 (1868), Justice SALMON CHASE explained the necessity for the constitutional limitations that prevent concentration of power on either the state or national level: "[T]he preservation of the States, and the maintenance

# Supreme Court Tilting Toward States' Rights?

**Introduction** The U.S. Constitution establishes a system of *federalism* that allocates power, authority, and sovereignty between the federal government at the national level and its constituent units at the state and local levels. However, nowhere in the Constitution does the word *federalism* appear, so the term remained undefined. Nonetheless, Articles I through III expressly delegate certain powers to the three branches of the federal government, while the **TENTH AMENDMENT** expressly reserves to the states those powers not delegated to the federal government. The **EQUAL PROTECTION** and **DUE PROCESS** Clauses of the **FOURTEENTH AMENDMENT** have been interpreted to make most of the **BILL OF RIGHTS** applicable to the states, while the **NINTH AMENDMENT** preserves for "the people" those rights not enumerated in the Constitution.

So while the term *federalism* is nowhere to be found in the text of the U.S. Constitution, the principles underlying this theory of government are deeply embedded throughout the national charter. The Framers left it for subsequent generations of Americans to work out the details, allowing them, in effect, to provide their own definition of *federalism* in what best can be described as an ongoing national dialogue. Over the last 200 plus years, Americans have carried out this dialogue by speaking to each other through their state and federal institutions and by amending the Constitution as a last resort.

The most visible federal institutions participating in this national dialogue have been the U.S. Supreme Court and Congress. Typically, cases involving federalism-related issues have come before the Supreme Court after Congress has enacted a law that a state believes encroaches on its sovereignty. Until the late twentieth century, the Supreme Court leaned heavily in favor of allocating power to Congress at the expense of state sovereignty, and not surprisingly the states often took issue. But from 1993 to 2003, the jurisprudential pendulum of the Supreme Court took a very noticeable swing back in favor of **STATES' RIGHTS**. To understand just how pronounced this swing has been, it is important to place a spate of Supreme Court cases in historical context.

**The First 200 Years of Federalism in the United States** In **CHISHOLM V. GEORGIA**, 2 U.S. 419, 2 Dall. 419, 1 L.Ed. 440 (U.S. 1793), the Supreme Court ruled that Article III of the federal Constitution gives the Court original jurisdiction over lawsuits between a state government and the citizens of another state, even if the state being sued does not consent. The decision generated immediate opposition from 12 states, and led to the ratification of the **ELEVENTH AMENDMENT**, which gives states **SOVEREIGN IMMUNITY** from being sued in federal court by citizens of other states without the consent of the state being sued. Thirty-eight years later the Court again overstepped its bounds when it invalidated a Georgia state law regulating Cherokee Indian lands on the grounds that the law violated several U.S. treaties. Georgia ignored the Supreme Court's decision, and President **ANDREW JACKSON**, an ardent states' rights proponent, refused to deploy federal troops to enforce the Court's order. *Cherokee Nation v. Georgia*, 30 U.S. 1, 5 Pet. 1, 8 L.Ed. 25 (U.S. 1831).

Allocation of power to the federal government probably reached its zenith under the Supreme Court's expansive interpretation of congressional lawmaking power exercised pursuant to the **COMMERCE CLAUSE**, which gives Congress authority to regulate matters affecting interstate commerce. In **GIBBONS V.**

of their governments, are as much within the design and care of the Constitution, as the preservation of the Union. . . . The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

### The Federalist Papers: The History of Federalism

The strongest arguments for federalism were written during the ratification of the U.S. Constitution. ***THE FEDERALIST PAPERS,*** a set of 85 essays written by **ALEXANDER HAMILTON, JAMES MADISON**, and **JOHN JAY**, were originally published in 1787 in New York under the pen name Publius. They were meant to explain the advantages of the Constitution and to persuade New York citizens to ratify it. The essays pointed out that the Constitution would allow the principle of popular sovereignty to continue and would help prevent internal dissolution and uneven distribution of power—problems that contributed to the failure of the **ARTICLES OF CONFEDERATION**.

The key to the endurance of the Constitution, according to Madison, was that even in a democracy, the majority must not be allowed too much power; it needs to be held in check so that individual and state freedoms will be preserved. Indeed, English writer **EDMUND BURKE**

**OGDEN**, 22 U.S. 1, 6 L.Ed. 23, 9 Wheat. 1 (U.S. 1824), the Supreme Court ruled that the Commerce Clause power of Congress is "supreme, unlimited, and plenary," acknowledging "no limitations, other than those prescribed in the Constitution." More than a hundred years later Congress applied this plenary power to regulate a farmer's personal consumption of his own privately grown wheat because Congress had found that the effects of such use, when aggregated with that of other farmers, would have a substantial effect on prices in the national wheat market. The Supreme Court ruled that Congress had not exceeded the bounds of its authority under the Commerce Clause. *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (U.S. 1942).

The Supreme Court deviated from its pattern of enlarging the powers of the federal government in decisions involving race relations. In **DRED SCOTT V. SANDFORD**, 60 U.S. 393, 19 How. 393, 15 L.Ed. 691 (U.S. 1856), the Court invalidated the Missouri Compromise, a federal law that outlawed **SLAVERY** in the northern Louisiana Territory, on the grounds that under the Constitution Congress was intended "to be carefully limited in its powers, and to exercise no authority beyond those expressly granted by the Constitution, or necessarily to be implied from [it]." This decision exacerbated the antagonism between the slaveholding states, the free states, and the territories, antagonism that eventually culminated in the **U.S. CIVIL WAR**. Similarly, the Supreme Court deferred to local lawmakers in **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (U.S. 1896), which upheld the constitutionality of **JIM CROW LAWS** that had created a legal regime of racial **SEGREGATION** in the South.

**Federalism Since 1990** Beginning in the 1990s, however, the Supreme Court began revisiting the relationship between the state and federal governments on issues other than race-relations. In *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (U.S. 1992), the state of New York brought a suit challenging parts of the Low-Level Radioactive Waste Policy Amendments Act. 42 U.S.C.A. § 2021e(d)(2)(C). The Supreme Court held that the act's "take title" provision, which required states either to regulate low-level radioactive waste according to congressional regulations or to take ownership of the waste, was unconstitutional. The Court reasoned that the "take title" provision was outside the authority delegated to Congress under the Constitution and that the regulation was an attempt to "compel the States to enact or administer a federal regulatory program." Such attempts to compel state behavior, the Court said, violate the federal structure of the government as embodied in the Tenth Amendment.

Three years later the Supreme Court invalidated the Gun-Free School Zones Act in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (U.S. 1995). The act had made it a federal offense for any individual to knowingly possess a firearm in a place that the individual knows or has reasonable cause to believe is a school zone. 18 U.S.C. § 922(q). Without explicitly overruling *Wickard v. Filburn,* the Court ruled that Congress exceeded its authority under the Commerce Clause, since possession of gun in a local school zone was not economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce, and the statute contained no jurisdictional element to ensure, through a case-by-case inquiry, that possession of firearm had any concrete tie to interstate commerce.

In *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (U.S. 1997), a sheriff sought to enjoin provisions of the Brady Handgun Violence Prevention Act. Pub.L. 103-159, 107 Stat. 1536. The act established a system of national instant background checks. Local authorities were required to participate in the system by performing background checks on behalf of the federal government. The Supreme Court ruled that Congress had no authority under the Commerce Clause to enlist local authorities to enforce the provisions of a federal law.

That same year the Supreme Court continued chipping away at Congressional power in *Seminole Tribe of Florida*

*(continued)*

said that in a "democracy, the majority of citizens is capable of exercising the most cruel oppression on the minority."

One check in the political process supported by the Constitution is provided by the Supreme Court, which is politically insulated. This check, as explained by Madison, "guarantee[s] the right of individuals, even the most obnoxious, to vote, speak and to be treated fairly and with respect and dignity." The function of the judicial branch, then, was to preserve the liberty of the citizens and the states. The principle of federalism states that the greatest danger to liberty is the majority. These rights were decided "according to the rules of justice and the rights of the minor party, [not] by the superior force of an interested and overbearing majority" (*The Federalist* no. 10, p. 77). Although the Supreme Court is part of the federal government, it is separate from the legislative and executive branches, and it functions as a check on the federal and state governments.

The Constitution was influenced by two major philosophies: federalism and nationalism. The federalists believed in a noncentralized government. They supported the idea of a strong national government that shared authority and power with strong state and local governments.

## SUPREME COURT TILTING TOWARD STATES' RIGHTS? (CONTINUED)

*v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (U.S. 1997), a case in which an Indian tribe filed suit against Florida to compel the state to negotiate under the federal Indian Gambling Regulatory Act. 25 U.S.C. § 2710(d)(7). The act required states to negotiate in **GOOD FAITH** towards the creation of a compact between the tribe and the state allowing for certain gambling activities. States could be sued in federal court for violating the act and compelled by federal courts to comply with its mandates. The Supreme Court found that, while Congress intended to abrogate the states' sovereign immunity in the statute, the "Eleventh Amendment prohibits Congress from making the states capable of being sued in federal court."

Scholars, historians, and other commentators disagree over the long-term impact of the Court's recent decisions that revisit the concept of federalism. *New York Times* Supreme Court reporter Linda Greenhouse responded to several of the federalism-related decisions by opining that "it is only a slight exaggeration to say that . . . the Court [is] a single vote shy of reinstalling the Articles of Confederation." Joseph Biden (D-Del.) took to the Senate floor to proclaim that "the imperialist course upon which the Court has embarked constitutes a danger to our established system of government."

Other commentators contend that these decisions are likely to have minimal lasting effect. Congress has at its disposal, these commentators argue, a variety of mechanisms by which it can blunt the effects of these rulings. For example, Congress can fund studies that will offer proof that the subject matter of proposed federal laws intimately touch upon interstate commerce, thereby defeating in advance any arguments to the contrary. In the wake of the September 11, 2001, terrorist attacks in New York City and Washington, D.C., other commentators have predicted that the pendulum of federalism would swing in the other direction to allow the federal government to more adequately address concerns over homeland security.

Amid these competing views over the Court's direction, one thing remains certain: each year the court is asked to review an increasing number of decisions relating in one way or another to federalism. Sometimes the Court can influence the balance of power between the state and federal governments even by declining to grant certiorari. For example, in December 2002 the Court refused to intervene after the New Jersey Supreme Court allowed Democrat Frank Lautenberg to replace U.S. Senator Robert Torricelli on the fall ballot, even though the state's legal deadline had passed. *Forrester v. New Jersey Democratic Party, Inc.*, ___ U.S. ___, 123 S.Ct. 673 , 154 L. Ed. 2d 582 (2002). By declining review, the Court allowed the state leeway in interpreting its own laws. Such "federalism" issues are bound to resurface in other cases, including one that had not yet reached the court: Attorney General **JOHN ASHCROFT**'s bid to prosecute doctors assisting in suicides under Oregon law. *Oregon v. Ashcroft*, 192 F.Supp.2d 1077 (D.Or. 2002).

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### CROSS-REFERENCES

States' Rights.

The nationalists, or neofederalists, believed there should be a strong central government with absolute authority over the states.

When the founders were developing the Constitution, they had four goals. First, they wanted the government to be responsive to the citizens. Second, they wanted the political system to enhance, not discourage, interaction between the government and the governed. Third, they wanted the system to allow for the coexistence of political order and liberty. And finally, they wanted the system to provide a fair way of ensuring that civil justice and morality would flourish.

The Constitution as eventually ratified was labeled a bundle of compromises because it allowed for a strong central government but still conceded powers to the individual states. In *The Federalist,* no. 45, Madison said, "The powers delegated by the proposed Constitution to the Federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."

The constitutional role of the states in the federal government is determined by four factors: (1) the provisions in the federal and state constitutions that either limit or guarantee the powers of the states in relation to the federal

government; (2) the provisions in the Constitution that give the states a role in the makeup of the government; (3) the subsequent interpretation of both sets of provisions by the courts, especially the Supreme Court; and (4) the unwritten constitutional traditions that have informally evolved and have only recently been recognized by the federal or state constitutions or the courts.

### Judicial Review

In the early 1990s and early 2000s, the U. S. Supreme Court continued to revisit and reshape the concept of federalism in cases pitting the powers and prerogatives of the state and federal government against each other. Perhaps the biggest changes had occurred in the judicial branch, with its power of JUDICIAL REVIEW. Judicial review allows the courts to invalidate acts of the legislative or executive branches if the courts determine that the acts are unconstitutional. The Supreme Court first exercised judicial review of national legislation in the landmark case of MARBURY V. MADISON, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803). The decision, written by Chief Justice JOHN MARSHALL, followed the principles of Publius in *The Federalist,* no. 78. *The Federalist Papers* were based on the principle that the Articles of Confederation were inadequate. The ideas set forth in *The Federalist Papers* challenged those articles and proposed a new governmental style for the Union.

Judges have five sources of guidance for interpreting the Constitution: the original intention of the founders; arguments based on the theory of the Constitution; arguments based on the Constitution's structure; arguments based on judicial precedent; and arguments based on moral, social, and political values. Across the centuries, several justices have attempted to interpret the original, often vague intention of a document written in the late 1700s. Justice BENJAMIN N. CARDOZO said, "The great generalities of the constitution have a content and a significance that vary from age to age." Justice JOSEPH MCKENNA wrote, "Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions" (*Weems v. United States,* 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 [1910]).

Although it may seem unlikely that a federal body would favor states' rights over federal, it is not uncommon. For example, in the 1991 case of *Coleman v. Thompson,* 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640, the Supreme Court chose not to interfere with a state's jurisdiction. Roger Keith Coleman had received a death sentence, which he challenged in the Virginia state and federal courts on the basis that he was an innocent man being executed for a crime he did not commit. The case reached the U.S. Supreme Court, where the majority said, "This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." The Court ruled that because the state court's decision against Coleman was based on independent and adequate state grounds, it would not review the determination. This deference to state laws is based on the idea that states are separate sovereigns with autonomy that must be taken into consideration.

### Separation of Powers and The Plain Statement Rule

Another key element of federalism is the principle of SEPARATION OF POWERS. The Constitution's definition of separation of powers is not specific, and the Supreme Court has struggled to interpret it. Separation of powers is based on the premise that there are three branches of federal government, each with its own enumerated powers. For example, the EXECUTIVE BRANCH, which includes the president, has VETO power; the Senate and Congress make up the legislative branch and have the power of advice and consent over the appointment of executive and judicial officers; and the courts make up the judicial branch and have the power of judicial review.

The SEPARATION-OF-POWERS principle has had two interpretations. The first, formalism, is rooted in the idea that the Constitution's goal was to divide the new federal government into three defined categories, each with its own set of powers. The second interpretation, functionalism, is based on the belief that the three branches of government are not clearly delineated. Functionalists believe that the goal of separation of powers is to ensure that each branch retains only as much power as is necessary for it to act as a check on the other branches.

Although the interpretations appear similar, they differ in terms of what constitutes a breach of the separation of powers. A breach under formalism would be a breach under functionalism

only if the power in question either infringed on the core function of another branch or increased another branch's power.

In *Gregory v. Ashcroft,* 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991), Justice SANDRA DAY O'CONNOR wrote that the Constitution establishes a system of dual sovereignty that balances the power between the states and the federal government. At the same time, however, the *Supremacy Clause* (U.S. Const. art. VI, § 2) gives the federal government "a decided advantage in this delicate balance" by guaranteeing that Congress can make the states do what it wants if it acts within its constitutional delegation of power. O'Connor also said that the Court must assume that Congress does not "exercise lightly" this "extraordinary power" to legislate, even in areas traditionally regulated by the states. The people of a state establish the structure of their government and the qualifications of those who exercise governmental authority. Such decisions are of the most "fundamental sort for a sovereign entity."

The Court in *Gregory* also applied the plain statement rule, requiring Congress to state clearly its intent when creating laws that may interfere with state government functions. The plain statement rule, under *Gregory,* serves as a check against federal regulation of the states. This rule has two tiers of inquiry: (1) Congress must clearly intend to extend a law to the states as states, and (2) Congress must outline which state activities and functions it is targeting within the sweep of federal law.

### Conclusion

Federalism is the oldest form of government in the United States. The timelessness of the Constitution and the strength of the arguments presented by *The Federalist Papers* offer a clue to its endurance: the Founders wrote the Constitution so that it would always remain open to interpretation. Federalism's AMBIGUITY has contributed to its longevity.

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CROSS-REFERENCES

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## FEDERALIST PAPERS

*A collection of eighty-five essays by* ALEXANDER HAMILTON *(1755–1804),* JAMES MADISON *(1751–1836), and* JOHN JAY *(1745–1829) that explain the philosophy and defend the advantages of the U.S. Constitution.*

The essays that constitute *The Federalist Papers* were published in various New York newspapers between October 27, 1787, and August 16, 1788, and appeared in book form in March and May 1788. They remain important statements of U.S. political and legal philosophy as well as a key source for understanding the U.S. Constitution.

*The Federalist Papers* originated in a contentious debate over ratification of the U.S. Constitution. After its completion by the Constitutional Convention on September 17, 1787, the Constitution required ratification by nine states before it could become effective. A group known as the Federalists favored passage of the Constitution, and the Anti-Federalists opposed it.

To secure its ratification in New York State, Federalists Hamilton, Madison, and Jay published the *Federalist* essays under the pseudonym Publius, a name taken from Publius Valerius Poplicola, a leading politician of the ancient Roman republic. Their purpose was to clarify and explain the provisions of the Constitution, expounding its benefits over the existing system of government under the ARTICLES OF CONFEDERATION.

# Federalist, No. 78, and the Power of the Judiciary

"We proceed now to an examination of the judiciary department of the proposed government." So begins *Federalist,* no. 78, the first of six essays by **ALEXANDER HAMILTON** on the role of the judiciary in the government established by the U.S. Constitution.

Hamilton made two principal points in the essay. First, he argued for the independence of the judiciary from the other two branches of government, the executive and the legislative. In presenting a case for the judiciary, he reached his second major conclusion: that the judiciary must be empowered to strike down laws passed by Congress that it deems "contrary to the manifest tenor of the Constitution."

In presenting his argument for the independence of the judiciary, Hamilton claimed that it was by far the weakest of the three branches. It did not, he said, have the "sword" of the executive, who is commander in chief of the nation's armed forces, nor the "purse" of the legislature, which approves all the tax and spending measures of the national government. It had, according to Hamilton, "neither FORCE nor WILL but merely judgment."

As a result of this weakness, the U.S. Constitution protects the judiciary from the other two branches by what Hamilton called "permanency in office." Article III, Section 1, of the Constitution declares, "Judges . . . shall hold their Offices during good Behaviour." By making the tenure of federal judges permanent and not temporary, Hamilton argued, the Constitution ensures that judges will not be changed according to the interests or whims of another branch of government. According to Hamilton, permanent tenure also recognizes the complexity of the law in a free society. Few people, he believed, will have the knowledge and the integrity to judge the law, and those deemed adequate to the office must be retained rather than replaced.

The judiciary must also be independent, according to Hamilton, so that it may fulfill its main purpose in a constitutional government: the protection of the "particular rights or privileges" of the people as set forth by the Constitution. Here, Hamilton made his second major point. To protect those rights, he proclaimed, the judiciary must be given the power of **JUDICIAL REVIEW** to declare as null and void laws that it deems unconstitutional.

Critics of the Constitution claimed that judicial review gave the judiciary power superior to that of the legislative branch. Hamilton responded to them in *Federalist,* no. 78, by arguing that both branches are inferior to the power of the people and that the judiciary's role is to ensure that the legislature remains a "servant" of the Constitution and the people who created it, not a "master":

> There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves.

Although judicial review is not explicitly mentioned in the Constitution, the U.S. Supreme Court established the legitimacy of the concept when it struck down an act of Congress in the 1803 case *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L. Ed. 60. The courts had embraced judicial review by the twentieth century, leading some critics to maintain that the overly active use of judicial review had given the courts too much power. Whether or not the courts have demonstrated "judicial activism" by striking down legislation, Hamilton was correct in foreseeing that the U.S. Supreme Court and lower courts would protect the rights defined by the people in their Constitution.

**CROSS-REFERENCES**

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Hamilton, a New Yorker who served as treasury secretary under President GEORGE WASHINGTON from 1789 to 1795, was the principal architect of *The Federalist Papers.* Hamilton conceived the idea for the book and enlisted the aid of Madison and Jay. He is thought to have written fifty-one of the essays: numbers 1, 6–9, 11–13, 15–17, 21–36, 59–61, and 65–85. Madison, who served two terms as the president of the United States, from 1809 to 1817, probably authored twenty-six of the papers: 10, 14, 37–58, and 62–63. Madison and Hamilton probably wrote papers 18–20 together. Jay, who sat as the first chief justice of the U.S. Supreme Court, from 1789 to 1795, wrote five essays: 2–5 and 64.

The essays presented a number of arguments with great importance for the founding of the U.S. government. They forcefully made the case for a strong union between the states (numbers 1–14); the ineffectiveness of the Articles of Confederation (15–22); the advantages of a strong, or "energetic," central government (23–36); and a republican government's ability to provide political stability as well as liberty (35–51). The later essays examined the roles of the three branches of government—the legislative (52–66), the executive (67–77), and the judicial (78–83)—as well as the issue of a bill of rights (84). The last essay consists of a closing summary (85). In making their arguments, the authors also discussed the benefits of FEDERALISM, under which the state and federal governments would each have a distinct sphere of power.

Several of the essays have been especially influential in U.S. political history and philosophy. The most famous, *Federalist,* no. 10, by Madison, concerns the dangers and remedies of factionalism for a republican government. Madison, seeking a "republican remedy for the diseases most incident to republican government," argued that a large republic of the kind envisioned by the Constitution will be less likely to fall victim to disputes between different factions than will a small republic. Here and in essay 51, Madison claimed that the diversity, or "plurality," of interests that exist in a large commercial republic will prevent any one faction from uniting to deprive the rights of a smaller faction.

The essays on the role of the federal judiciary have had a lasting influence on U.S. law. Essay 78 contains an important defense of the principle of JUDICIAL REVIEW, the power that allows the U.S. Supreme Court to strike down laws passed by Congress. In number 80, Hamilton argued for the establishment of a system of federal courts separate from state courts, an idea that was realized several years later.

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## FEDERALIST PARTY

The Federalist Party was an American political party during the late eighteenth and early nineteenth centuries. It originated in the loosely affiliated groups advocating the creation of a stronger national government after 1781 and culminated with the laws and policies established by Federalist lawmakers from 1789 to 1801. These laws and policies laid the foundation for a strong central government in the United States, thereby securing the transition from the provisional national government established during the Revolutionary War and continuing under the ARTICLES OF CONFEDERATION to the intricate system of checks and balances contemplated for the three branches of government in the U.S. Constitution.

The Federalist party's early leaders included ALEXANDER HAMILTON, JOHN JAY, JAMES MADISON, and GEORGE WASHINGTON. These men provided much of the impetus and organization behind the movement to draft and ratify the federal Constitution. Their support came from the established elites of old wealth in the commercial cities and in the less rapidly developing rural regions.

Even before the Articles of Confederation were ratified by the original 13 states in 1781, prominent Americans were criticizing the document for having failed to create a strong *federal government.* In 1783, George Washington, as

commander in chief of the army, sent a circular to state governors discussing the need to add *tone to our federal government.* Three years later Washington and his political allies were referring to those who opposed strengthening the power of the central government under the Articles of Confederation as *antifederal.*

At the Constitutional Convention in 1787, those favoring a stronger central government drafted a Constitution that greatly increased the powers of Congress and the executive. Debate over ratification of the Constitution sharpened the lines separating those who called themselves *federalists* and those who called themselves *antifederalists.* Much of this debate was formalized in *The Federalist*, later called *The Federalist Papers.*

Originally written as 85 tracts under the name *Publius*, the pro-Federalist essays were published in New York City newspapers between October 27, 1787, and May 28, 1788. Each essay was written to persuade the people of New York to elect delegates who would ratify the federal Constitution in the forthcoming state convention. Alexander Hamilton and James Madison were the principal authors, while John Jay wrote five essays. The *Federalist Papers* are today considered America's most important political treatise and the most authoritative source for understanding the ORIGINAL INTENT of the Founding Fathers.

After the Constitution was ratified, the Federalist party dominated the national government until 1801. The Federalists believed that the Constitution should be loosely interpreted to build up federal power. They were generally pro-British, favored the interests of commerce and manufacturing over agriculture, and wanted the new government to be developed on a sound financial basis. Accordingly, Secretary of Treasury Hamilton proposed tax increases and the establishment of a national bank.

During their 12-year reign, the Federalist party settled the problems of the revolutionary debt, sought closer relations with Great Britain in Jay's Treaty of 1794, and tried to silence their domestic critics with the ALIEN AND SEDITION ACTS of 1798. These repressive laws cost the Federalist party much of its support, including that of Madison, who with THOMAS JEFFERSON organized the DEMOCRATIC-REPUBLICAN PARTY.

The Democratic-Republicans, also known as just the *Republicans*, opposed the policies and laws of the Federalist party at every turn. Republicans were generally pro-French and pro-agriculture. They believed that the Constitution should be strictly interpreted, favored strong, independent states at the expense of the federal government, and opposed the creation of a national bank.

The Federalist party lost control of the national government when Jefferson became president in 1801. The Federalists continued to diminish in popularity for the next 20 years. The party's last significant political victory came in the IMPEACHMENT trial of SAMUEL CHASE, associate justice to the U.S. Supreme Court and staunch Federalist, who had been impeached by a Republican-controlled House of Representatives for what they called *judicial misconduct.* However, in his trial before the Senate, Chase and his attorney convinced enough Senators that the impeachment charges boiled down to little more than partisan politics and that convicting Chase would imperil the independence of the federal judiciary. Chase was thus acquitted on all eight ARTICLES OF IMPEACHMENT.

The Federalist party ceased to exist as a national organization after the election of 1816, in which Republican JAMES MONROE defeated Federalist Rufus King. However, the party remained influential in a number of states until it disappeared completely during the 1820s. Most Federalists, such as DANIEL WEBSTER, joined the National REPUBLICAN PARTY in the 1820s and later the WHIG PARTY in the 1830s.

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CROSS-REFERENCES

Republican Party; Whig Party.

## FEDERATION

*A joining together of states or nations in a league or association; the league itself. An unincorporated association of persons for a common purpose.*

## FEE

*A compensation paid for particular acts, services, or labor, generally those that are performed in the line of official duties or a particular profession. An interest in land; an estate of inheritance.*

An estate is an interest in land, and a fee, in this sense, is the shortened version of the phrase fee simple. A fee simple is the greatest estate that an individual may have in the land because it is total ownership of the land including all structures attached thereto. It is complete ownership absent all conditions, limitations, or restrictions upon alienation, which is its sale or transfer to another.

## FEE SIMPLE

*The greatest possible estate in land, wherein the owner has the right to use it, exclusively possess it, commit waste upon it, dispose of it by deed or will, and take its fruits. A fee simple represents absolute ownership of land, and therefore the owner may do whatever he or she chooses with the land. If an owner of a fee simple dies intestate, the land will descend to the heirs.*

The term *fee* used independently is an adequate designation of this type of estate in land. The term *simple* is added to distinguish clearly this estate from other interests in real property.

## FEE TAIL

*An estate in land subject to a restriction regarding inheritance.*

A fee tail is an interest in real property that is ordinarily created with words such as "to A and the heirs of his body." It may be limited in various ways, such as to male or female heirs only, or to children produced by a particular spouse.

A fee tail is passed by inheritance from generation to generation to the heirs of the body of the initial owner. Since no one is an heir of the living, the children of the owner of a fee tail are merely *heirs apparent.* Such children, therefore, have no transferable interest during their lifetimes.

A fee tail can endure until the holder dies without surviving issue, but it cannot be passed on to collateral heirs. A reversion remains in the original owner whenever a fee tail is created. Thus, if a tenant in fee tail dies without heirs, the property reverts back to the original grantor who initially created the fee tail estate.

The power of the holder of a fee tail is limited, since the holder can use the land during the course of his or her lifetime but cannot prohibit its passing to his or her bodily heirs if any exist upon his or her death.

Many jurisdictions have abolished the fee tail estate since it restricts the ready alienation, or transfer, of property. Such states have transformed it into a fee simple through statute.

## FELLATIO

*A sexual act in which a male places his penis into the mouth of another person.*

At COMMON LAW, fellatio was considered a crime against nature. It was classified as a felony and punishable by imprisonment and/or death. Presently it is a crime in some states, sometimes punishable as a form of the more encompassing crime of SODOMY, the act of unnatural sexual relations between two persons or between a person and an animal.

Under both the common law and present-day statutes, there must be actual insertion of the male organ into the mouth of another for the crime to be committed. Any penetration, however slight, is sufficient. Emission is not a necessary element of the offense under most modern statutes.

If the offense is committed by two persons who mutually consent to engage in the act, both are guilty of the offense. If one party is below the age of consent, only the adult is guilty.

The U.S. Supreme Court has held that the regulation of unnatural sexual conduct or activity is within the POLICE POWER of the state. The penalty for fellatio in many states is a fine, imprisonment, or both. Some states, however, do not treat it as an offense. In New York, a penal law prohibiting consensual sodomy was held unconstitutional by the highest state court on the grounds that it violated the constitutional rights of privacy and EQUAL PROTECTION of the law.

Statutory definitions of fellatio may exempt from prosecution spouses who engage in such sexual conduct within the confines of their marriage. Fellatio is among several sexual acts that remain illegal in many jurisdictions, but are rarely prosecuted when consensual and engaged in in private.

## FELLOW-SERVANT RULE

*A common-law rule governing job-related injuries that prevents employees from recovering damages from employers if an injury was caused by the* NEGLIGENCE *of a coworker.*

In the mid-nineteenth century, a rise in industrial accidents brought to U.S. law an English idea about responsibility. The fellow-servant rule said simply, workers who are hurt by a coworker—a fellow servant—should blame the responsible coworker, not their employer. After first appearing in a U.S. decision in 1842, the rule had a powerful effect on the law for the next century. Its tough-luck notion of fairness protected employers and doomed injured employees, who often had no other hope for recovering damages after serious accidents. In allowing employers to invoke the defense, courts wanted to help the nation's industries grow at a time of vast expansion, when the dangerous jobs of factory work and railroad building needed bodies that could be injured without repercussions to employers. Only in the early and mid-1900s did lawmakers undermine the rule, through passage of federal and state WORKERS' COMPENSATION laws.

The fellow-servant rule broke from general common-law principles of liability. Traditionally, courts had treated cases of job-related accidents under TORT LAW (a TORT is a civil wrong that causes harm to a person or property). Specifically, these claims came under the tort of negligence—the failure to do what a reasonable person would do under the same circumstances. Certain suits were seen as acceptable. For example, if a man named John were injured by a negligent worker named Bill, and Bill worked for an employer with whom John had no preexisting relationship, John could readily sue the employer for Bill's negligence. But everything changed if John and Bill worked for the same employer; then, the employer could invoke the fellow-servant rule as his defense, and courts would dismiss the suit.

The fellow-servant rule first appeared in 1837, in Great Britain, in *Priestly v. Fowler* (150 Eng. Rep. 1030 [1837]). In that case, an overloaded delivery van driven by one employee overturned and fractured the leg of another employee. The injured employee's lawsuit against their common employer succeeded, but it was overturned by the Court of Exchequer. The magistrate, Lord Abinger, scoldingly held that the injured employee "must have known as well as his master, and probably better" about the risks he undertook in van delivery. Moreover, concerns about the public good steeled the magistrate against the plaintiff. If suits such as *Fowler* were permitted against employers, workers would soon forget about their duty not to hurt themselves.

U.S. law was quick to learn this lesson in employers' IMMUNITY to liability. Only five years later, in 1842, the Supreme Judicial Court of Massachusetts announced it in the landmark case *Farwell v. Boston & Worcester R.R.,* 45 Mass. (4 Met.) 49. The case came during the nation's greatest burst of industrial development, as it transformed from an agrarian society to an industrial society. Few state judges appreciated this shift as keenly as the Massachusetts court's chief justice, LEMUEL SHAW (1781–1861). Nearing the end of a remarkable life in law, Shaw grasped economic considerations better than social ones, and his plainspoken opinions were tremendously influential.

Chief Justice Shaw's decision in *Farwell* had blunt logic. Although a railroad employee had lost his hand through the negligence of a fellow worker, Shaw looked beyond the loss of limb to the dangerous precedent that a finding of employer liability would pose to growing industries at a crucial moment in history. He wanted to encourage this growth. So he imported the fellow-servant rule, justifying it in purely economic terms. Whereas Lord Abinger had reminded employees of their duty to be cautious, Shaw observed that employee alertness was also compensated: workers in more dangerous jobs would be taken care of by the market, through higher wages. Furthermore, employees entered such jobs voluntarily and therefore chose to put themselves at risk. Thus, a contract of employment existed, and it could not place liability on the employer's shoulders except when the employer was personally responsible—and certainly not when a fellow employee was clearly to blame for the injury.

The reverberations of this decision were felt throughout the rest of the nineteenth century. Shaw was not the only judge whose sympathies lay with industry. As more courts adopted the fellow-servant rule, the doctrine had a drastic effect on workers. An 1858 Illinois Supreme Court decision succinctly echoed Shaw's reasoning: "[E]ach servant, when he engages in a particular service, calculates the hazards incident to it, and contracts accordingly. This we see every day—dangerous service generally receiving higher compensation than a service unattended with danger or any considerable risk of life or limb" (*Illinois Central R.R. v. Cox,* 21 Ill. 20).

The industrial revolution was not an age of safety: laborious work, long hours, crude training, and rough tools led to accidents involving workers. Injured workers sued their employers because employers arguably bore some responsibility and always had deeper pockets than fellow workers. But employers needed only to point out that a coworker's negligence was partly or wholly the cause of the injury, and the nation's courts stood ready to uphold the fellow-servant rule.

Injured employees could rarely win these suits. A slight hope existed: if an employer was notified of a careless worker's behavior but failed to take disciplinary or corrective action, the employer became directly liable for mishaps that the careless worker caused. But to prove this in court required testimony. Who would intervene? Worried about losing jobs, few coworkers would testify. Thus, the fellow-servant rule along with two related defenses, contributory negligence and ASSUMPTION OF RISK, came to be dubbed "the three wicked sisters of the common law," because together they left the burden on the injured and powerless employee (48 Vand. L. Rev. 1107 [May 1995]).

The twentieth century brought change. Even by the early 1900s, the fellow-servant rule had begun to crumble. Courts had new ideas. The mere existence of a rule safeguarding employers' interests had failed to stop workers from having accidents and bringing compelling cases. To permit certain lawsuits to proceed, courts created exceptions to the fellow-servant defense. Some courts permitted suits where the coworker was a supervisor; others limited the defense to employees working in the same department. As a result, employers could at last be held liable for some on-the-job injuries caused by coworkers.

Through the efforts of the labor movement, two further reactions against the fellow-servant rule sapped it of most of its force. The first was a change in federal law. In 1908, Congress passed the Federal Employers' Liability Act (45 U.S.C.A. § 51 et seq.), designed to protect railroad employees. Its protections were extended to maritime workers with the JONES ACT (46 U.S.C.A. § 688). The major development to undermine the fellow-servant rule was the passage of workers' compensation laws in states, which ensured that employees would receive compensation for injury or illness incurred at work. By 1949, every state had passed workers' compensation laws.

By the late twentieth century, the fellow-servant rule was largely dead, although a few loopholes remained in some occupations, chiefly farming. At that point, the rule's rare appearance in court provoked surprise, as in the 1989 case of *Pomer v. Schoolman,* 875 F.2d 1262, 7th Cir., which moved federal appellate judge RICHARD A. POSNER to remark in his opinion, "[I]t is up to Illinois to plug what to many observers will seem an anachronistic and even cruel gap in the state's law of industrial accidents."

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## FELON

*An individual who commits a crime of a serious nature, such as* BURGLARY *or murder. A person who commits a felony.*

## FELONIOUS

*Done with an intent to commit a serious crime or a felony; done with an evil heart or purpose; malicious; wicked; villainous.*

An aggravated assault, such as an assault with an intent to murder, is a felonious assault. A simple assault, such as one done with an intent to frighten, is not felonious.

## FELONY

*A serious crime, characterized under federal law and many state statutes as any offense punishable by death or imprisonment in excess of one year.*

Under the early COMMON LAW, felonies were crimes involving moral turpitude, those which violated the moral standards of a community. Later, however, crimes that did not involve mortal turpitude became included in the definition of a felony.

Presently many state statutes list various classes of felonies with penalties commensurate with the gravity of the offense. Crimes classified as felonies include, among others, TREASON, ARSON, murder, rape, ROBBERY, BURGLARY, MANSLAUGHTER, and KIDNAPPING.

## FELONY-MURDER RULE

*A* RULE OF LAW *that holds that if a killing occurs during the commission or attempted commission of a felony (a major crime), the person or persons responsible for the felony can be charged with murder.*

Generally an intent to kill is not necessary for felony-murder. The rule becomes operative when there is a killing during or a death soon after the felony, and there is some causal connection between the felony and the killing.

The felony-murder rule originated in England under the COMMON LAW. Initially it was strictly applied, encompassing any death that occurred during the course of a felony, regardless of who caused it. Therefore, if a police officer attempting to stop a ROBBERY accidentally shot and killed an innocent passerby, the robber could be charged with murder.

Today most jurisdictions have limited the rule by requiring that the felony must be a dangerous one or that the killing is foreseeable, or both. Statutes that restrict the application of the rule to dangerous felonies usually enumerate the crimes. BURGLARY, KIDNAPPING, rape, and robbery are typical felonies that invoke the rule. Under a number of statutes, the felony must be a proximate cause of the death. In other words, the killing must have been a natural and direct consequence of the felony.

Felony-murder cannot be charged if all the elements of the felony are included in the elements of murder. This is known as the merger doctrine, which holds that if the underlying felony merges with the killing, the felony cannot constitute felony-murder. For example, all of the elements of ASSAULT AND BATTERY with a deadly weapon are included in murder. If a killing, therefore, occurred during the course of this crime, the accused would be charged with murder.

The future of the felony-murder rule is in doubt. Some jurisdictions have abolished the rule and others continue to limit its application. In the 1982 case of *Enmund v. Florida,* 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140, the Supreme Court ruled that the imposition of the death penalty upon an ACCOMPLICE who neither kills, attempts to kill, or intends that a killing occur or lethal force be used in the commission of a felony-murder constitutes CRUEL AND UNUSUAL PUNISHMENT. In those states that have retained the offense, it is usually classified as murder in the first degree, for which the penalty might be death or imprisonment.

## FEMINIST JURISPRUDENCE

*A philosophy of law based on the political, economic, and social equality of the sexes.*

### Overview

*Feminist jurisprudence* is a burgeoning school of legal thought that encompasses many theories and approaches to law and legal issues. Each strain of feminist jurisprudence evaluates and critiques the law by examining the relationship between gender, sexuality, power, individual rights, and the judicial system as a whole. As a field of legal scholarship and theory, feminist JURISPRUDENCE had its beginnings in the 1960s. By the 1990s it had become an important and vital part of the law, informing many debates on sexual and DOMESTIC VIOLENCE, inequality in the workplace, and gender-based discrimination at all levels of U.S. society.

Feminist jurisprudence intersects with a number of other forms of critical theories, most notably critical race theory and the study of GAY AND LESBIAN RIGHTS. Moreover, the form of feminist thought that focuses on legal theory draws from feminism in other disciplines, including sociology, political science, history, and literature. Leaders in the feminist jurisprudence camps thus do not focus exclusively upon purely legal aspects of feminism.

### A Brief History of Feminism

The feminist political movement began in the nineteenth century with a call for female suffrage. At a convention in Seneca Falls, New York, in 1848, a group of women and men drafted and approved the Declaration of Rights and Sentiments. This document, modeled on the language and structure of the Declaration of Independence, was a bill of rights for women, including the right to vote. Throughout the late 1800s, feminist leaders SUSAN B. ANTHONY and ELIZABETH CADY STANTON were persistent critics of male society's refusal to grant women political and social equality. In the mid-nineteenth

century, many state legislatures passed married women's separate property acts. These acts gave women the legal right to retain ownership and control of property they brought into the marriage. Until these enactments a husband was permitted to control all property, which often led to the squandering of a wife's estate. Finally, when the NINETEENTH AMENDMENT to the U.S. Constitution was ratified in 1920, women gained VOTING RIGHTS in the United States.

The modern feminist movement began in the 1960s. In 1966 BETTY N. FRIEDAN, author of *The Feminine Mystique* (1963), organized the first meeting of the NATIONAL ORGANIZATION FOR WOMEN (NOW). In 1968 NOW staged a protest at the Miss America Pageant. By 1970 Robin Morgan had enough material on feminism to publish a popular anthology, *Sisterhood Is Powerful.* Women who had become CIVIL RIGHTS and antiwar activists in the 1960s soon turned their attention to gender discrimination and inequality. The decision in ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), which defined the choice of ABORTION as a fundamental constitutional right, became a touchstone for feminists who argued that women must have reproductive rights.

To many feminists, *Roe v. Wade* meant more than the choice to have an abortion. The Court recognized the fundamental right of choice, albeit with limitations, concerning a woman's right to make decisions regarding her body. Maternity, noted the Court, "may force upon the woman a distressful life and future," including psychological, mental, and physical health factors. The holding was a dramatic shift from traditional male-dominated jurisprudence which often sought to protect women in a paternal sense but did not recognize the rights of women to make fundamental choices on matters concerning their own well-being.

Accordingly, feminists have remained staunchly supportive of the *Roe v. Wade* decision, despite a heated national debate regarding abortion. Nineteen years after *Roe*, feminists rallied to support the decision when the Supreme Court reconsidered its decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). Although the Court permitted certain restrictions upon abortions, it held intact the fundamental right of choice announced in *Roe.*

The 1960s and 1970s also saw a revival in the interest in adopting a constitutional amendment to provide greater protection of women's rights than those in the Fifth and Fourteenth Amendments of the U.S. Constitution. The EQUAL RIGHTS AMENDMENT, which was originally conceived in the early 1920s, was introduced to the states in 1972. The text of the amendment read: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." Supporters of the amendment believed it would overcome weaknesses in federal statutes and judicial interpretations of the Constitution with regard to the protection of women's rights. The proposal eventually failed to garner the necessary votes from three-fourths of the states.

With the rise of the women's movement and a growing percentage of women attending law school, feminist critiques of the law soon emerged. One criticism concerned the way history was written. According to feminists, traditional historians wrote from the male point of view and excluded that of the female. These historians did not inquire into women's role in making history, structuring society, and living their own lives. Feminists point out that male-written history has created a male bias regarding concepts of human nature, gender potential, and social arrangements.

### Scholarship in Feminist Jurisprudence

Feminists also criticize mainstream jurisprudence as patriarchal. They say that male-dominated legal doctrine defines and protects men, not women. By discounting gender differences, the prevailing conceptions of law perpetuate patriarchal power. Because men have most of the social, economic, and political power, they use the system to subordinate women in the public spheres of politics and economics as well as in the private spheres of family and sex. The language, logic, and structure of the law are male created, which reinforces male values. Most troubling, these concepts and values are presented as and are widely perceived to be both neutral and objective.

For example, in determining liability in NEGLIGENCE actions, the law crafted the "reasonable man" test. This "man" was a hypothetical creature whose hypothetical action, reaction, or inaction in any situation was the law's standard of reasonable conduct for real people in similar circumstances. The gender-biased term *man* has been replaced by *person* in the name for this test, which might seem to resolve the problem. But

some feminist legal scholars have argued that a gender-neutral label merely avoids the fact that the test is based on assumptions of what a male would do in a situation. They propose that when an action involves a female, a court should apply a "reasonable woman" test. By doing so, the court would recognize the differences in how males and females react to situations.

Feminists challenge biological determinacy, the belief that the biological makeup of men and women is so different that certain behavior can be attributed on the basis of sex. They believe that biological determinacy curtails women's power and their options in society. They argue that gender is created socially, not biologically. Sex determines matters such as genitalia and reproductive capacity but not psychological, moral, or social traits.

In analyzing the workings of gender in the law, feminist scholars share certain common commitments. Politically, they seek equality between men and women. Analytically, they make gender a category by which to reconstitute legal practices that have excluded women's interests. Methodologically, they use women's experiences to describe the world and to demonstrate the need for change. They rely primarily on an experiential discourse for analyzing gender hierarchy, sexual objectification, and social structures.

Though feminists have much in common, they are not uniform in their approaches. One school of feminist legal thought views women as individual human beings and is based on the desire to promote equal opportunity. Employing the concepts of rationality, rights, and equal opportunity, this school makes arguments similar to those against RACIAL DISCRIMINATION. It asserts that women are just as rational as men and therefore should have equal opportunity to make their own choices. This school challenges the assumptions of male authority, and it seeks to erase gender-based distinctions recognized in the law, thus enabling women to compete equally in the marketplace. It has caused legislatures and the courts to change many discriminatory laws. Its approach works, proponents argue, because it speaks the language the legal system understands. In addition, this approach attracts nonfeminists who agree that non-sex-specific legal solutions are preferable to sex-specific laws. RUTH BADER GINSBURG, first as an attorney and later as a justice of the U.S. Supreme Court, has exemplified supporters of this liberal feminist approach.

Another school of feminist legal thought focuses on the differences between men and women and celebrates those differences. Deeply influenced by the research of psychologist Carol Gilligan, this group of feminist thinkers observes that men and women speak in different voices. Women emphasize the importance of relationships, contexts, and reconciliation of conflicting interpersonal positions, whereas men emphasize abstract principles of rights and logic. The objective of this school is to give equal recognition to women's moral voice. Proponents seek changes in the existing conditions so that the law will recognize women-valued relationships such as that between mother and child. In stressing this different voice of caring and communal values, this school of feminism criticizes possessive individualism, which, it is claimed, is integral to the maintenance of women in stereotypical roles.

Like the liberal feminist school of thought, radical feminism focuses on inequality. But radical feminism views women as a class, not as individual human beings. It asserts that men, as a class, have dominated women, creating gender inequality. This inequality is the consequence of a systematic subordination rather than irrational discrimination. Thus, heterosexuality is a social arrangement in which men are dominant and women submissive. For radical feminists, gender is a question of power. Therefore, this school is not satisfied with creating legal categories that promise equal opportunity and fair treatment. It sees these as false categories that mask the entrenched power of the male-dominant structure. What is needed, argue radical feminists, is an abandonment of traditional approaches that take maleness as their reference point: sexual equality must be constructed on the basis of woman's difference from man, not a mere accommodation of that difference.

Radical feminists have targeted sexual and domestic violence. They view PORNOGRAPHY as an instrument of sexual subordination rather than as a creative expression deserving FIRST AMENDMENT protection. In the 1980s law professor CATHARINE A. MACKINNON and writer ANDREA DWORKIN proposed that women be permitted to sue pornographers for damages under civil rights laws. Though their viewpoint has not been accepted by the U.S. courts, their work changed the nature of the debate over pornography.

### Current Issues in Feminist Jurisprudence

While the different camps of feminists in legal theory have focused upon different agendas, feminist jurisprudence has changed the way legislators and judges look at issues. By asking the "woman question," feminists have identified gender components and gender implications of laws and practices that are claimed to be neutral. Moreover, this school of thought has brought needed changes in the law to protect certain rights of women that have not been protected adequately in the past.

One of the most pressing issues in women's rights is the protection of women from domestic violence. According to some statistics, as many as four million women per year are the victims of domestic violence, and three out of four will be the victims of domestic violence in their lifetimes. Led by women's groups and other supporters outraged by these numbers, Congress enacted the VIOLENCE AGAINST WOMEN ACT as Title IV of the VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994 (Pub. L. No. 103-322, 108 Stat. 1796 [codified as amended in scattered sections of 18 and 42 U.S.C.A.]).

The act provides programs for research and education of judges and judicial staff members geared to enhance their knowledge and awareness of domestic violence and sexual assault. Moreover, it funds police training and shelters for victims of domestic violence, increases penalties for perpetrators of domestic violence and rape, and enhances privacy protection for victims. One of the most controversial aspects of the act was a provision making gender-motivated crimes a violation of federal civil rights law. This provision was struck down as unconstitutional in *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000).

Feminists have remained determined to provide greater protection for women against domestic and other violence. Feminist jurisprudence has also focused on eliminating SEXUAL HARASSMENT in the workplace, another issue that has caused a major debate in the United States. Sexual harassment, which includes unwanted sexual advances and requests for sexual favors, as well as verbal and physical conduct of a sexual nature that tends to create hostile or offensive work environment, has been a major issue in women's rights because of the effect it has upon women in the workplace. Persons, usually women, who are the victims of sexual harassment may sue under Title VII of the CIVIL RIGHTS ACT OF 1964, 42 U.S.C.A. § 2000e.

Feminist advocates support a broad interpretation of the types of advances that constitute sexual harassment. To many feminists, sexual harassment represents the domination men seek to exert over women and should be strictly prohibited. The issue has caused controversy because in some cases it is difficult to determine whether sexual advances are welcomed or not. Moreover, some cases have arisen because an employer or supervisor has told a dirty joke or displayed a sexually explicit photograph to a female employee. Women's groups maintain that sexual harassment laws should be liberally construed, even in these types of cases.

With most law schools teaching the subject, feminist legal analysis holds a significant place in U.S. law and legal thought. Several prominent U.S. law schools, including those at Yale University and the University of California at Berkeley, produce scholarly journals devoted specifically to feminist legal theory. Commentary by feminist legal analysts is commonplace in U.S. media, and the views of many feminist scholars are sought when new laws are considered and drafted. Although feminists point out that much work remains to ensure equality among men and women, the work of these individuals has sparked revolutionary change in the U.S. legal system.

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Equal Protection; Ireland, Patricia; Sex Discrimination; Women's Rights.

## FENCES

*Enclosures composed of any substance that will present an adequate blockade around a field, yard, or other such expanse of land for the purpose of prohibiting intrusions from outside.*

A landowner is entitled to construct a fence along the boundaries of his or her property, but statutes may regulate the building and maintenance of fences. The laws of some states make provisions for the establishment of fence districts to erect and maintain fences. Fence districts are sometimes given the authority to levy taxes to absorb the costs of building and maintaining the fences.

Generally a landowner has the right to construct a partition fence on the border of the property adjoining his or her land. Owners of adjoining land may enter into agreements setting forth their rights and liabilities regarding the erection, maintenance, and repair of partition fences. State statutes sometimes govern landowners' obligations with respect to such fences. Such statutes differ from one jurisdiction to another regarding what lands come within the scope of their regulation. Some of these statutes apply solely to agricultural lands, whereas others also control fences between urban lots. Unless otherwise provided by statute or agreement to the contrary, both parties share equally the duty to maintain the entire partition fence. Neither may allege that the other was neglectful. Various statutes permit a landowner to construct or repair the partition fence in its entirety upon a failure of an adjacent owner to build or repair his or her portion. Subsequently, the one owner may bring an action against the neighbor for a contribution toward the expenses incurred. Generally recovery is limited to half the expense of the fence. Some fence statutes provide that the amount recoverable from a defaulting property owner is made a lien on that owner's land.

Theoretically, the ideal location for a partition fence is along the boundary line between adjacent lands. Practically, substantial compliance with this requirement is adequate. An equal and reasonable amount of each owner's property may be used for construction of the structure.

A partition fence built on the boundary is deemed the joint property of adjacent landowners. For this reason, a property owner may not eliminate a partition fence without first obtaining the neighbor's consent. The laws of some states make removal of a partition fence by an owner of adjoining land contingent upon formal notice to other landowners. A landowner may bring an action for whatever damages are suffered if a fence has been improperly removed or destroyed. The standard for measuring damages for such removal or destruction is its value at the time, which is determined by replacement costs minus depreciation for age and use.

A property owner who causes injury to livestock through negligent maintenance of a fence will be held liable for resulting damages. A landowner who erects a barbed wire fence is not automatically liable to one whose livestock suffer injury. If, however, a barbed wire fence is so negligently maintained as to become a trap for passing livestock, the owner will be held liable for injuries even if the fence is entirely on his or her own property. A landowner who leaves barbed wire on the ground without protection after erecting a fence is liable to the owner of the adjacent land for injury to that owner's livestock.

If someone builds a fence on another person's land without any authority to do so, the landowner may remove or destroy such fence. An individual may not, however, remove or destroy a fence on another individual's land. A number of states impose criminal penalties on an individual who unlawfully fences the land of another.

CROSS-REFERENCES

Adjoining Landowners.

## ♦ FENWICK, MILLICENT VERNON HAMMOND

Millicent Vernon Hammond Fenwick represented New Jersey's Fifth District in Congress from 1975 to 1983. A woman who defied conventional political labels, she distinguished herself as an outspoken crusader for HUMAN RIGHTS.

Fenwick was born February 25, 1910, in Manhattan, to a wealthy and prominent family. Her father, Ogden H. Hammond, was a successful financier. Her mother, Mary Picton Stevens Hammond, descended from a distinguished early American family whose forebears included a colonel in the Revolutionary Army. The family was committed to public service. Fenwick's father carried out this commitment by serving two terms in the New Jersey House of Representatives and later as Calvin Coolidge's ambassador to Spain. Her mother was on a mission of mercy to establish a hospital for WORLD WAR I victims in Paris when she perished in the 1915 sinking of the passenger ship *Lusitania.*

Fenwick's formal education was fragmentary. She attended the Foxcroft School, in Virginia, until age 15, when she left school to

*Millicent Fenwick.* AP/WIDE WORLD PHOTOS

"WE MUST HAVE GOVERNMENT, BUT WE MUST WATCH THEM LIKE A HAWK." —MILLICENT FENWICK

accompany her father to Spain. While there, she briefly attended a convent school. After she returned to the United States she took courses at Columbia University's extension school. In the late 1930s, Fenwick studied philosophy with Bertrand Russell at the New School for Social Research. In part because of her travels, she was fluent in Spanish, French, and Italian.

She fell in love with a married businessman named Hugh Fenwick, who divorced his wife to marry her in 1934. The union did not last, and in 1938, Fenwick found herself divorced with two small children and facing her ex-husband's considerable debts. The Depression had devastated his assets, and Fenwick was forced to find a job in order to pay her creditors and support her children. She worked occasionally as a model for *Harper's Bazaar* before joining the writing staff of *Vogue* magazine, where she worked for 14 years as a writer and editor. In 1948, she published Vogue's *Book of Etiquette,* which sold more than a million copies.

Fenwick's financial situation had improved dramatically by the time she left *Vogue* in 1952. She had always been interested in politics, and decided to expand her public service activities by running for the Bernardsville, New Jersey, Borough Council. She won a seat and served for six years, from 1958 to 1964. Her concern for CIVIL RIGHTS was reflected in her decision not to run for reelection to the council. Instead, she accepted an appointment to the New Jersey Advisory Committee to the U.S. COMMISSION ON CIVIL RIGHTS. She was the committee's vice chair from 1958 to 1972.

By the mid-1960s, Fenwick was also vice chair of the New Jersey Republican State Committee and was, by her own admission, longing to run for the New Jersey Legislature. However, at the time, she lacked the assertiveness to call attention to her accomplishments. Although she was anxious to be a candidate, and felt she had the qualifications and experience to win, she was reluctant to openly seek the candidacy. Instead, she hoped someone in the party would suggest that she run. She was passed over and was left to contemplate how to handle the next election. In 1969, she shed her modesty and asked for help from the Republican organization; she was elected that year, and began her term in 1970.

Fenwick quickly established herself as an advocate of civil rights, consumer interests, prison reform, and conservation. In the legisla-

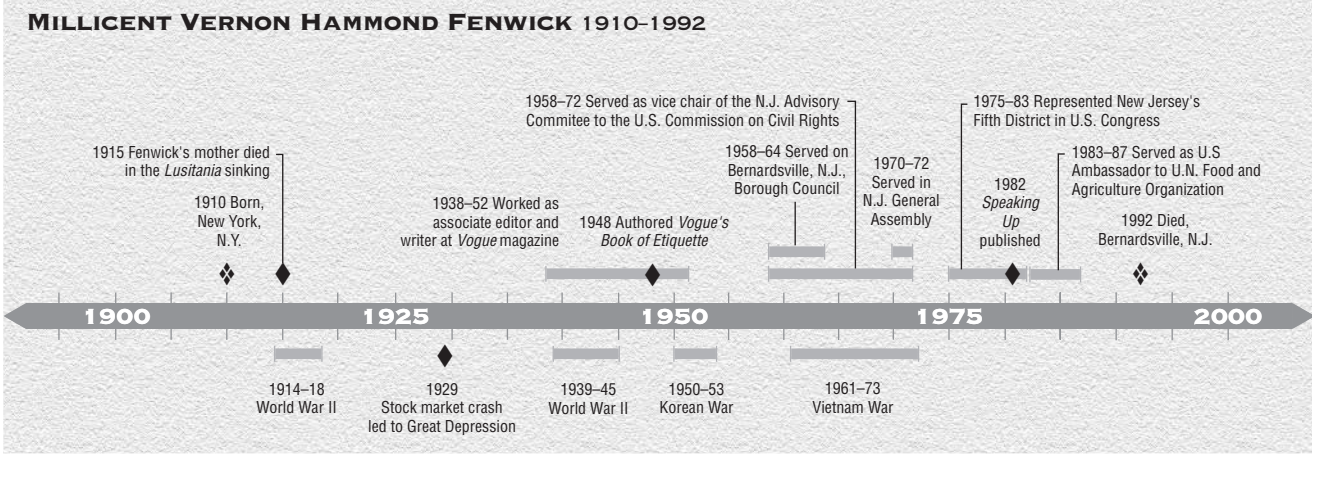

ture, her quick wit and sharp intellect became legendary. When she proposed an EQUAL RIGHTS AMENDMENT for women, a male colleague rose and said, "I just don't like this amendment. I've always thought of women as kissable, cuddly and smelling good." Fenwick replied, "That's the way I feel about men, too. I only hope you haven't been disappointed as often as I have."

In 1972, Fenwick resigned from the state assembly to become director of New Jersey's Division of Consumer Affairs. She embraced the job wholeheartedly, visiting supermarkets to check on the accuracy of labels on canned goods and talking with ordinary consumers about their problems and concerns. She unnerved the Bureau of Professional Boards by insisting that members of the general public be included on the boards in order to ensure impartial regulation of professional conduct.

In the spring of 1974, Fenwick left her post with the New Jersey Division of Consumer Affairs to seek the Republican nomination for the House of Representatives from the Fifth District. She carried the primary by a mere 83 votes but won the general election by a comfortable margin. She was 64 years old when she took her seat in the 94th Congress in 1975, but she quickly proved that she had all the vigor and commitment of any of her younger colleagues. She assumed assignments on the Committee on Banking, Currency, and Housing and on the Committee on Small Business, a favorite area of interest. During her tenure in the House, she regularly worked 12 to 14 hours a day and gained a reputation for diligence and commitment.

Fenwick earned respect in Congress through her support of equal opportunities, individual rights, and workplace safety. She worked tirelessly on behalf of poor people and advocated prison reform, strip-mining controls, reduction of military spending, urban renewal, campaign spending limits, GUN CONTROL, and restrictions on CAPITAL PUNISHMENT. Perhaps her proudest achievement was being the lead sponsor of a resolution calling for the creation of the Helsinki Commission, charged with monitoring the 1975 Helsinki human rights accords. She also served as a member of the commission.

Fenwick was a staunch feminist and strong supporter of the Equal Rights Amendment. Yet she was wary of a "women's agenda." "What after all would we think if men all got together and kept doing things that were supposed to be in the interest of men?" she once commented. She disliked women's organizations and was opposed to AFFIRMATIVE ACTION quotas. Fenwick felt that the women's movement had made a serious mistake by advancing the notion that women must pursue a career, and she defended those who chose the more traditional roles of wife and mother.

In spite of her frequent support of liberal causes, Fenwick was a loyal Republican who favored calling on the state as protector and benefactor "only as a last resort." When asked what made her a Republican and not a Democrat, she said she was a Republican because deep down she did not trust government.

Fiercely independent and outspoken, Fenwick was nonetheless charming and gracious. A former aide once described her as the Katharine Hepburn of politics. Fenwick was also noted for her own unique style—she was an unabashed pipe smoker. Her unconventional and idiosyncratic personality inspired the Lacey Davenport character in Garry Trudeau's *Doonesbury* cartoons. Asked what she would want on her tombstone, Fenwick replied, "I suppose the hope of furthering justice is really my main thing. That and the feeling that we're all in this together . . . and somehow we've got to try to work out a just and a peaceful society."

Fenwick died at home in Bernardsville, New Jersey, on September 16, 1992, at the age of 82.

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## FEOFFMENT

*Total relinquishment and transfer of all rights of ownership in land from one individual to another.*

A feoffment in old England was a transfer of property that gave the new owner the right to sell the land as well as the right to pass it on to his heirs.

An essential element of feoffment was *livery of seisin,* a ceremony for transferring the possession of real property from one person to another.

Feoffment is also known as enfeoffment.

## FERAE NATURAE

*[*Latin, Of a wild nature or disposition.*]*

Animals that are wild by nature are called *ferae naturae,* and possession is a means of acquiring title to such animals. The mere chasing of an animal *ferae naturae* does not give one party the right to title against another party who captures it through intervention. If, however, a wild animal is either killed or caught in a trap so that the capture is certain, the individual who traps or mortally wounds it acquires a vested right to possession and title that is not defeatable by another's intervention.

Animals *ferae naturae* differ from those that are tame or domesticated, or *domitae,* in which an individual can have an absolute property right.

## FERES DOCTRINE

*A doctrine that bars claims against the federal government by members of the armed forces and their families for injuries arising from or in the course of activity incident to military service.*

The U.S. Supreme Court decided in 1950, in *Feres v. United States,* 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152, that the federal government could not be held liable under the statute known as the FEDERAL TORT CLAIMS ACT (28 U.S.C.A. §§ 1291, 1346(b), (c), 1402(b), 2401(b), 2402, 2671-80) for injuries to members of the armed forces arising from activities incident to military service. The Federal Tort Claims Act allows persons intentionally or negligently wronged by a government employee to sue the government for their injuries. The Supreme Court's decision barring suits involving injuries to members of the armed forces became known as the *Feres* doctrine. The doctrine remains in force, as the Supreme Court has rejected attempts to overrule the decision.

*Feres* involved a suit brought by the executor of a soldier who had died when his barracks caught fire. The executor charged that the United States had been negligent in housing the soldier in barracks whose defective heating system was known to be unsafe. First, the Supreme Court rejected the argument that such a suit could be brought under the Federal Tort Claims Act of 1946, which had waived the government's traditional IMMUNITY from claims in many circumstances. Noting that the statute said that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances" (28 U.S.C.A. § 2674), the Court concluded that the relationship between the government and members of its armed forces is "distinctively federal in character." Therefore, it would be anomalous to have the government's liability depend on the law of the state where the soldier was stationed. Second, the Court observed that in several enactments, Congress had established a "no-fault" compensation plan that provides pensions to injured members of the ARMED SERVICES.

Commenting on the *Feres* doctrine in *United States v. Brown,* 348 U.S. 110, 75 S. Ct. 141, 99 L. Ed. 139 (1954), the Court emphasized that discipline and "[t]he peculiar and special relationship of the soldier to his superiors" might be affected if suits were allowed under the Tort Claims Act "for negligent orders given or negligent acts committed in the course of military duty." This view became one of the bedrock justifications for the doctrine in the years following *Brown.*

The U.S. Supreme Court has stressed that the *Feres* doctrine "cannot be reduced to a few bright-line rules," but rather "each case must be examined in light of the [Tort Claims Act] as it has been construed in *Feres* and subsequent cases" (*United States v. Shearer,* 473 U.S. 52, 105 S. Ct. 3039, 87 L. Ed. 2d 38 [1985]).

The doctrine does not bar a claim arising from an independent injury committed by the government after a soldier has been discharged (*Brown*). In *Brown,* an injury suffered by a veteran during treatment at a VETERANS ADMINISTRATION hospital for a prior injury that he had sustained during military service was not barred by *Feres.* The Court distinguished *Brown* from *Feres* on the ground that in *Brown,* the second injury did not arise from or in the course of military service.

The doctrine did apply, however, to a suit involving the death of a soldier who was off the military base on authorized leave when he was kidnapped and murdered by a fellow soldier with a known history of violence (*Shearer*). The mother of the murdered soldier charged that the Army had been negligent in failing to warn the other soldiers that the murderer was dangerous and in failing to restrict the murderer's movements while his discharge was being processed. The Supreme Court denied her claim under the *Feres* doctrine on the ground that the suit would require a civilian court to second-guess military decisions that are directly involved in the man-

agement of the armed forces. If such suits were allowed, "commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions." As a result, military discipline would suffer the detrimental effects that the *Feres* doctrine was designed to prevent.

The doctrine also applies to third parties seeking indemnity from the federal government. In *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 97 S. Ct. 2054, 52 L. Ed. 2d 665 (1977), an injured NATIONAL GUARD officer brought a suit against Stencel, the manufacturer of the ejection system in his fighter aircraft. Stencel then filed a cross-claim against the United States for indemnity (reimbursement for damages that it might pay to the officer), alleging that any malfunction of the ejection system was due to faulty government specifications and components. The Supreme Court held that the same reasoning that prevented a member of the armed services from recovering under the Tort Claims Act would limit a third party from recovering in an indemnity action.

The *Feres* doctrine was challenged in two cases decided by the Supreme Court in 1987. The doctrine had long been criticized as unfair to service members. In *United States v. Johnson,* 481 U.S. 681, 107 S. Ct. 2063, 95 L. Ed. 2d 648, the United States was sued for injuries sustained by a service member as the result of the NEGLIGENCE of air traffic controllers, who are civilian employees of the federal government. On a 5–4 decision, the Court reaffirmed the application of the *Feres* doctrine. The Court noted that civilian employees may also "play an integral role in military activities. In this circumstance, an inquiry into the civilian activities would have the same effect on military discipline as a direct inquiry into military judgments."

In *United States v. Stanley,* 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987), the United States was sued not only under the Federal Tort Claims Act but also directly under the Constitution. The Court rejected this attempt to circumvent *Feres.* It affirmed the lower court's decision to dismiss the lawsuit because of the principles set out in the *Feres* decision.

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## FERGUSON, COLIN

See INSANITY DEFENSE "Colin Ferguson" (Sidebar).

## ♦ FERRARO, GERALDINE ANNE

As the first woman candidate for vice president of the United States in a major party, Geraldine Anne Ferraro expanded opportunities for women in national politics. Her place on the Democratic ticket as Walter F. Mondale's running mate in 1984 broke a gender barrier that had lasted for over two hundred years. Although Mondale and Ferraro lost to RONALD REAGAN and GEORGE H. W. BUSH, Ferraro proved herself a capable and dynamic campaigner. Her selection came on the strength of a highly visible three terms in the House of Representatives, from 1978 to 1984, during which she championed liberal positions, wrote legislation aimed at establishing economic EQUITY for women, and oversaw the drafting of the Democratic party's 1984 presidential platform. Charges that she had violated congressional rules on financial disclosure hampered her run for the vice presidency, and controversy over business investments helped sink a Senate campaign in 1992. She later headed the U.S. delegation to the UNITED NATIONS Human Rights Commission.

Ferraro was born August 26, 1935, in Newburgh, New York, the fourth child of a tight-knit family enjoying prosperity. The good life did not last. When she was eight, her father, Dominick Ferraro, an Italian immigrant and successful restaurant and dime-store owner, died of a heart attack. Two of Ferraro's brothers had preceded him in death. Bad investments left her mother, Antonetta L. Corrieri, nearly broke. The three

"GOVERNMENT CAN BE MORAL—AND IT MUST BE MORAL—WITHOUT ADOPTING A RELIGION. LEADERS CAN BE MORAL—AND THEY SHOULD BE MORAL—WITHOUT IMPOSING THEIR MORALITY ON OTHERS."
—GERALDINE FERRARO

surviving family members—Ferraro, her mother, and a brother—moved into a small apartment in the Bronx. Ferraro's mother supported them by crocheting, and managed to give Ferraro an education at the exclusive Catholic school for girls, Marymount. The bright girl excelled, and a scholarship to Marymount College followed, where she earned a bachelor's degree in English in 1956. For the next four years, she taught in Queens public schools by day and took classes at Fordham University Law School by night.

The next two decades laid the groundwork for Ferraro's political future. She earned her law degree in 1960, married, and set aside her ambitions in order to raise children. Occasionally, she did part-time law work for the very successful real estate business run by her husband, developer John Zaccaro. But her main outlet for professional development was membership in local **DEMOCRATIC PARTY** clubs. She worked on her cousin Nicholas Ferraro's state senate campaign. When he later became district attorney for Queens County, he made her an assistant district attorney. It was 1974, and Ferraro, at the age of 39, had her first full-time job. Assigned to the Special Victims Bureau, she prosecuted cases of rape, **CHILD ABUSE**, and **DOMESTIC VIOLENCE** so disturbing that she lost sleep at night. Even though she won praise for her fairness and persuasiveness in court, she was frustrated. She earned less than her male colleagues simply because she was a married woman. By 1978, more liberal in outlook than before, politics beckoned to her.

Ferraro ran for the U.S. House of Representatives. The Ninth Congressional District was a conservative, blue-collar section of Queens, and it was hardly surprising that the local Democratic machine did not support this liberal feminist. Her Republican opponent, Alfred A. DelliBovi, a three-term assemblyman, hammered at her political inexperience. But she won anyway, on a platform of law and order, support for labor and **SENIOR CITIZENS**, and neighborhood preservation, which she summed up in the campaign slogan "Finally . . . a Tough Democrat." She had help—her cousin's connections, and her husband's wealth, which in time would come back to haunt her. Meanwhile, she set about making good on her promises and opened a plain storefront congressional office.

Ferraro quickly scaled Capitol Hill. In just two terms, she transformed herself from a meat-and-potatoes politician into a noticeable congressional leader. The change was accomplished by party loyalty: she voted with the Democratic Party 78 percent of the time in her first term, and even more often in her successive terms. But she did not forget her own philosophy. By 1981, she cosponsored the Economic Equity Act, a bipartisan measure aimed at increasing women's economic rights that has been reintroduced in Congress several times. She took personal leadership of two sections that provided women with greater access to private **PENSION** plans and individual retirement accounts. Ferraro's personal style—tough yet compromising—won her a reputation for playing by the rules. In a short time, she came to the attention of the most powerful Democrat in Congress, Speaker of the House **THOMAS P. ("TIP") O'NEILL JR.** The Speaker liked her politics and hard work, and her reward was key assignments that tradition-

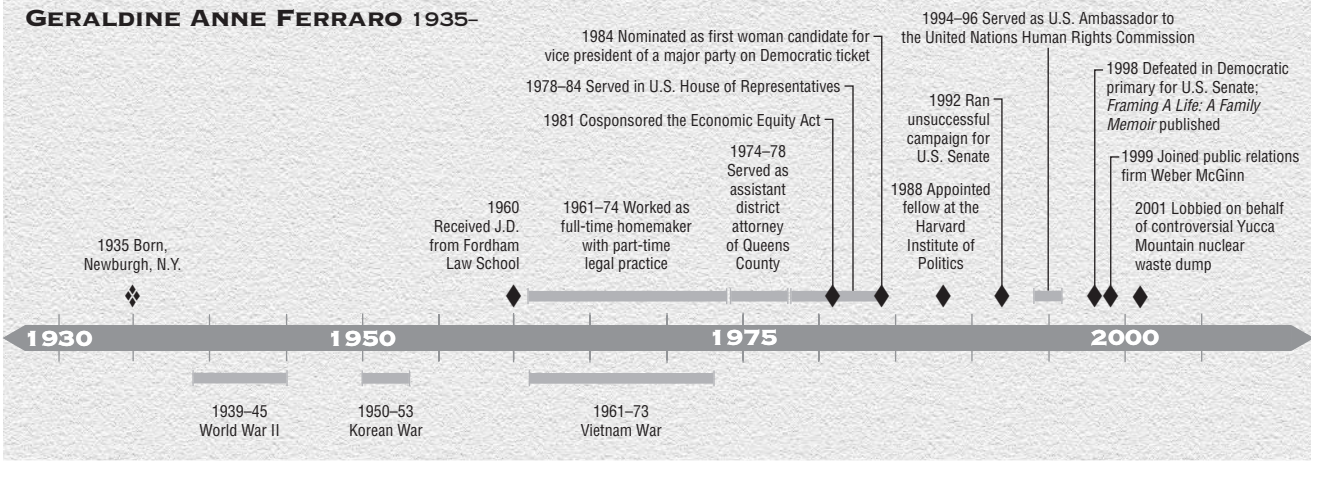

ally went to older, more seasoned leaders: an appointment to the Budget Committee in 1983; a position helping to draft rules for the Democratic National Convention; and the biggest prize of all, chair of the 1984 Democratic platform committee, drafting the party's positions in the forthcoming election. An extraordinary career leap, the chair of the platform committee meant real power and extra visibility.

The moment was ripe for even more success. Many Democrats wanted a woman nominated to the presidential ticket. Some viewed the issue as one of fairness; others thought it would capture women voters. By spring 1984, as Mondale emerged as the clear favorite for the presidential nomination, party leaders began urging him to pick Ferraro. The Woman's National Democratic Club endorsed her. O'Neill followed suit. By June, members of the National Women's Political Caucus argued that an analysis of voting trends showed that a woman on the ticket would be a winner. The cover of *Time* magazine pictured Ferraro and the other leading contender, San Francisco mayor Dianne Feinstein, under the heading "And for Vice President . . . Why Not a Woman?"

In terms of strategic advantage, Ferraro offered more than her gender. She was an Italian American Catholic from the East with working-class roots, an identity that her supporters thought would give the Democratic ticket regional and ethnic balance. But objections came from some party members who viewed her as a pork barrel politician, too brash to be widely popular and, worse, inexperienced.

The Mondale-Ferraro campaign faced a tremendous challenge in offering an alternative to an appealing incumbent. President Reagan enjoyed great popular support, buoyed by love of his personal style and the economic recovery that had begun in 1983. The Democrats stressed negatives: Reagan's economic policies were built on huge federal deficits, they charged, which would force him to cut SOCIAL SECURITY benefits and raise taxes in a second term. Reagan responded that the United States was "standing tall" again in the eyes of the world and warned that Mondale and Ferraro would return the nation to the high inflation and unemployment that had plagued the presidency of JIMMY CARTER.

In speeches, Ferraro gave as good as she got. She blasted Ronald Reagan's penchant for tailoring facts to fit his positions, as constituting

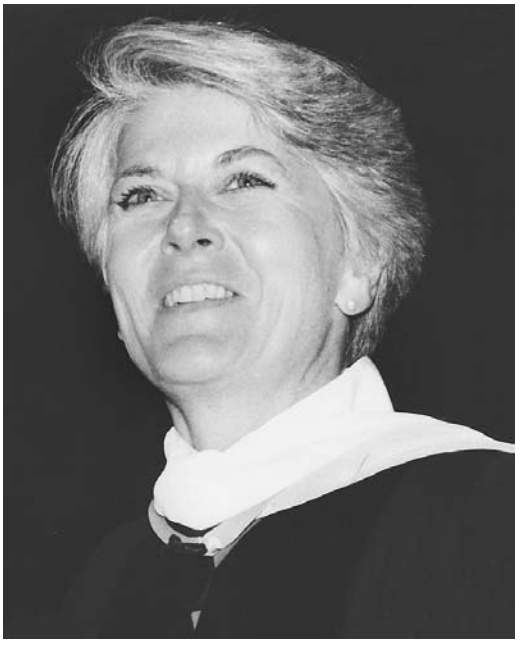

*Geraldine Ferraro.*
AP/WIDE WORLD PHOTOS

"an anecdotal presidency." Since the Democrats were reaching out for their traditional base of organized labor and the underprivileged, she seized on opportunities to present the Republicans as the party of the rich. One opportunity came after George H. W. Bush made a point about taxes by asking if his audience knew what wins elections; he pulled out his wallet and said the election came down to who puts money into it and who takes money out. Ferraro told a crowd of supporters,

> That single gesture of selfishness tells us more about the true character of this Administration than all their apple pie rhetoric. There's nothing in George Bush's wallet that says we should care about the disadvantaged. There's nothing in his wallet that tells us to search for peace. There's nothing in his wallet that says in the name of humanity let's stop the arms race.

But the voters did not respond. Democratic Party polls showed that Ferraro's negative ratings increased as she attacked Reagan. Mondale, hurt by an image of weakness, was doing no better. Reagan won by a landslide, with the greatest electoral vote margin in history, even capturing 55 percent of women voters. Ferraro's candidacy had changed history, but she had some regrets.

Ferraro's chief complaint was the Republicans' charges about her and her husband's finances. As far back as 1979, the FEDERAL ELECTION COMMISSION (FEC) had ruled that she violated the law by borrowing money from her husband for her first congressional race; she

repaid it. The issue was revived in the 1984 race, along with new charges that she failed to fully disclose her family finances under the Ethics in Government Act (2 U.S.C.A. § 701). The newest accusations arose when the Washington Legal Foundation, a conservative group, filed a complaint against her with the JUSTICE DEPARTMENT and the House Committee on Standards of Official Conduct. She then admitted owing back taxes amounting to $53,459, blamed them on simple errors, and paid up. Yet not until after the election did the investigations in the Justice Department, Congress, and the FEC come to an end.

Although Ferraro was cleared of any wrongdoing, the inquiries hurt her political career. She later claimed that the Justice Department, under Reagan appointee Attorney General EDWIN MEESE III, bullied her into dropping plans to run for the Senate in 1986. She waited until 1992 to mount a Senate race in New York. Yet the charges of corruption resurfaced just as she was leading a three-way race for the Democratic nomination. Ferraro denied the allegations, calling them anti-Italian slurs. But her opponents exploited the charges and she lost the nomination.

In addition to being the managing partner of a New York law firm, Ferraro occasionally surfaced in national politics in the mid-1990s. She worked as a lobbyist for the American Association for Marriage and Family Therapy, arguing that family therapy should be covered under any NATIONAL HEALTH CARE system. In 1994, President BILL CLINTON appointed her as ambassador to head the U.S. delegation at the fiftieth annual meeting of the United Nations Human Rights Commission. Among other issues, she raised concerns about the treatment of women in the former Yugoslavia.

Ferraro served on the commission until 1996. After she stepped down, she served as a commentator on CNN's *Crossfire*, a political debate program. She also served as a partner in the consulting firm CEO Perspective Group, which advises corporate executives. She ran unsuccessfully for the Senate again, in 1998, losing in the New York senatorial primary to Representative Charles Schumer. After the defeat, she announced that her political career was over.

In 2001, Ferraro disclosed to the *New York Times* that she was battling multiple myeloma, a form of blood cancer. She was diagnosed with the rare form of cancer in 1998, and was one of the first patients to be treated with the controversial drug, thalidomide. With the cancer in remission, Ferraro commented, "This is a race I may not win, but I've lost other races before, so it's not the end of the world." Ferraro testified before Congress about her illness, and continues to speak publicly in a variety of engagements.

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*A ferry is considered a continuation of a highway from one side of a body of water to another. This ferry transports people and vehicles across the Potomac River between Maryland and Virginia.*

PAUL A. SOUDERS/ CORBIS

## FERRY

*A specially constructed vessel to bring passengers and property across rivers and other bodies of water from one shoreline to another, making contact with a thoroughfare at each terminus. The landing place for a boat. A right or privilege to maintain a vessel upon a body of water in order to transport people and their vehicles across it in exchange for payment of a reasonable toll.*

Technically a ferry is considered a continuation of a highway from one side of the body of water that it passes over to the other.

The privilege of handling a ferry is called a franchise. A ferry franchise is a permit from the state to a specifically named individual giving that person the authority to operate a ferry. It is a general prerequisite to the lawful establishment of a public ferry. The operator of a ferry is not relieved of the duty to obtain a franchise by formation of

a company, since the franchise becomes a contract between the owner and the state.

Usually the grant of a ferry franchise implicitly gives the recipient the power to collect tolls. *Ferriage* is the fare that the ferry operator may charge. The unauthorized establishment of another ferry within competing distance of an already existing one constitutes an infringement of the ferry franchise, even in the absence of physical interference.

A ferry franchise can be terminated either by expiration of its term or by revocation by the licensing authorities. It is generally subject to renewal, for which the original owner is usually given a preference.

A public ferry is for use by the public at large, whereas a private ferry is operated solely for the benefit of its proprietor.

The state has intrinsic authority to regulate and control ferries that operate within its borders. It may exercise such power by law or by contract with the operator. The state may regulate the transportation of dangerous articles, the nature and frequency of service, and the location of terminals. In addition, it may impose a license fee or tax on the operation of ferries within its boundaries.

## FETAL RIGHTS

*The rights of any unborn human fetus, which is generally a developing human from roughly eight weeks after conception to birth.*

Like other categories such as CIVIL RIGHTS and HUMAN RIGHTS, fetal rights embraces a complex variety of topics and issues involving a number of areas of the law, including criminal, employment, HEALTH CARE, and FAMILY LAW.

Historically, under both English COMMON LAW and U.S. law, the fetus has not been recognized as a person with full rights. Instead, legal rights have centered on the mother, with the fetus treated as a part of her. Nevertheless, U.S. law has in certain instances granted the fetus limited rights, particularly as medical science has made it increasingly possible to directly view, monitor, diagnose, and treat the fetus as a patient.

The term *fetal rights* came into wide usage following the landmark 1973 ABORTION case ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147. In that case, the Supreme Court ruled that a woman has a constitutionally guaranteed unqualified right to abortion in the first trimester of her pregnancy. She also has a right to terminate a pregnancy in the second trimester, although the state may limit that right when the procedure poses a health risk to the mother that is greater than the risk of carrying the fetus to term. In making its decision, the Court ruled that a fetus is not a person under the terms of the FOURTEENTH AMENDMENT to the U.S. Constitution. However, the Court also maintained that the state has an interest in protecting the life of a fetus after viability—that is, after the point at which the fetus is capable of living outside the womb. As a result, states were permitted to outlaw abortion in the third trimester of pregnancy except when the procedure is necessary to preserve the life of the mother.

*A doctor performs an ultrasound examination on a pregnant woman. The legal status of a fetus remains unclear. Although an unborn child does have some rights under the law, those rights sometimes conflict with the rights of the mother.*

AMY ETRA/PHOTOEDIT

*Roe* evoked impassioned responses from those who were morally or religiously opposed to abortion, and in the years following that case, abortion became one of the most contentious issues in U.S. law. Those opposed to the procedure became a powerful political lobby in the United States. Their efforts to promote the rights of unborn humans have had a significant effect on the law.

However, the cause of fetal rights has been greeted with suspicion by those who are concerned that the state may protect fetal rights at the expense of women's rights. For this reason, many feminists have been highly critical of claims regarding fetal rights. Such claims, they argue, can work to significantly diminish women's rights to self-determination and bodily autonomy.

At the same time, most legal experts recognize an increasing need to clarify the legal status

of the fetus, particularly as technology has made it possible to regard the fetus as a patient independent of the mother. Some scholars have even gone so far as to ask that a model fetal rights act be passed so that states—which now exhibit a wide variety of approaches to fetal rights—may develop a more coherent legislative approach to the issue of fetal rights, one that will give courts more direction in deciding relevant cases.

The specific issues in which legal claims have been made regarding the rights of the fetus usually require a careful consideration of the sometimes competing rights of the woman and the fetus.

### Forced Cesarean Sections

Because of improvements in fetal monitoring and surgical techniques, physicians increasingly recommend that women give birth by cesarean section, a surgical technique that involves removing the fetus through an incision in the woman's abdomen. In many cases, cesarean section improves the chance that the fetus will be delivered safely. By 1990, cesarean sections accounted for almost 23 percent of U.S. childbirths.

Some women choose not to undergo a physician-recommended cesarean section. They may do so for a variety of reasons, including a concern about their own risk of harm, including death, from the surgery; a desire to avoid repeated cesarean sections; or sincere religious, cultural, or moral beliefs. This situation has led to a number of legal questions, such as should a woman be forced to undergo a cesarean section or other surgery in the interest of the health of the fetus? To what extent is a woman obligated to follow the advice of her physician regarding the medical care of her fetus?

The 1980s saw an increasing number of cases in which hospitals and physicians sought court orders to force women to give birth by cesarean section. From 1981 to 1986, fifteen such cases were reported, and in thirteen of them, courts decided to require cesarean section. In a 1981 case, *Jefferson v. Griffin Spalding County Hospital Authority,* 247 Ga. 86, 274 S.E.2d 457, the Georgia Supreme Court held that an expectant mother in her last weeks of pregnancy did not have the right to refuse surgery or other medical treatment if the life of the unborn child was at stake. As has happened in a number of other instances, the pregnant woman named in the case avoided the procedure and later delivered a healthy child by natural birth.

Later court decisions, however, increasingly recognized a pregnant woman's right to refuse medical treatment. In a 1990 case, *In re A. C.,* 573 A.2d 1235, the District of Columbia Court of Appeals ruled that a physician must honor the wishes of a competent woman regarding a cesarean section. The court's opinion was written after the woman involved in the case, Angela Carder, and her fetus died following a cesarean section forced by a lower court.

A 1994 Illinois case, *Doe v. Doe,* 260 Ill. App. 3d 392, 198 Ill. Dec. 267, 632 N.E.2d 326, involved a woman (called Doe to protect her anonymity) who was thirty-five weeks pregnant. Her doctor conducted tests that indicated her fetus was not receiving adequate oxygen. He therefore recommended that the fetus be delivered by cesarean section. Doe objected to the surgical procedure on the basis of her religious beliefs. The doctor and his hospital then contacted the Cook County state's attorney, who petitioned for a court order requiring the woman to undergo the cesarean procedure.

The case eventually reached the Illinois Appellate Court, which upheld Doe's right to refuse the cesarean section. The court held that a physician must recognize a woman's right to refuse a cesarean section. It found no statute or Illinois case to support the state's request to force a cesarean on a competent person. It also dismissed the state's argument that *Roe*'s protections of a viable fetus authorized a forced cesarean.

The court also noted the position of the AMERICAN MEDICAL ASSOCIATION (AMA) on the issue. The AMA has reminded physicians that their duty is to ensure that a pregnant woman is provided with the necessary and appropriate information to enable her to make an informed decision about her fetus and that that duty does not extend to attempting to influence her decision or attempting to force a recommended procedure upon her. The court assessed the action of the physicians in the *Doe* case to be in direct opposition to the AMA's clear edict.

Shortly after the court's decision, Doe gave birth to a healthy baby boy. The Supreme Court later declined to review the case. New types of fetal surgery now made possible by medical science promise to raise questions very similar to those found with forced cesarean sections.

### Drug Use by the Mother

The use of illegal drugs such as cocaine and heroin can have a devastating effect on the health of a fetus. By the early 1990s, it was estimated that 375,000 children were born annually in the United States suffering from the effects of illegal drugs taken by their mother.

As a result, some states have held women criminally liable for any use of illegal drugs that harms their fetus. Prosecutors in many states have sought to deter such behavior by charging women with a number of crimes against their fetus, including delivery of drugs, criminal CHILD ABUSE, assault with a deadly weapon, and MANSLAUGHTER. *Johnson v. State,* 578 So. 2d 419 (Fla. 1991), demonstrates the controversial aspects of such prosecutions. In this case, a Florida district court of appeal upheld a lower court's conviction of a woman for the delivery of a controlled substance by umbilical cord to two of her four children. The decision was the first appellate ruling to uphold such a conviction.

Jennifer Johnson, a twenty-three-year-old resident of Seminole County, Florida, had been arrested in 1989 after two successive instances in which a child born to her tested positive for cocaine immediately after birth. Cocaine is especially harmful to a fetus, often causing premature birth, significant deformities and ailments, and even death. After Johnson's conviction in the Seminole County Circuit Court in 1989, the AMERICAN CIVIL LIBERTIES UNION (ACLU) appealed the case with backing from an unusual alliance of medical and civil rights organizations, including the AMA, the American Public Health Association, the Florida Medical Association, and the National Abortion Rights Action League, all of which had different reasons for supporting the appeal.

The AMA stated that it opposed the use of criminal prosecutions against mothers. Imposing criminal sanctions, it said, does not prevent damage to fetal health and may violate the privacy laws between doctors and women, making doctors and hospitals agents of prosecution. The ACLU echoed the AMA, arguing that prosecutions of drug-addicted women for harm to their children will greatly damage women's health, their relationship to the HEALTHCARE community, and their ability to control their own body. It also maintained that the policies enacted against Johnson should be made by a state legislature and not the courts, and it pointed out that many more minority women than white women are reported for child abuse after testing positive for drugs.

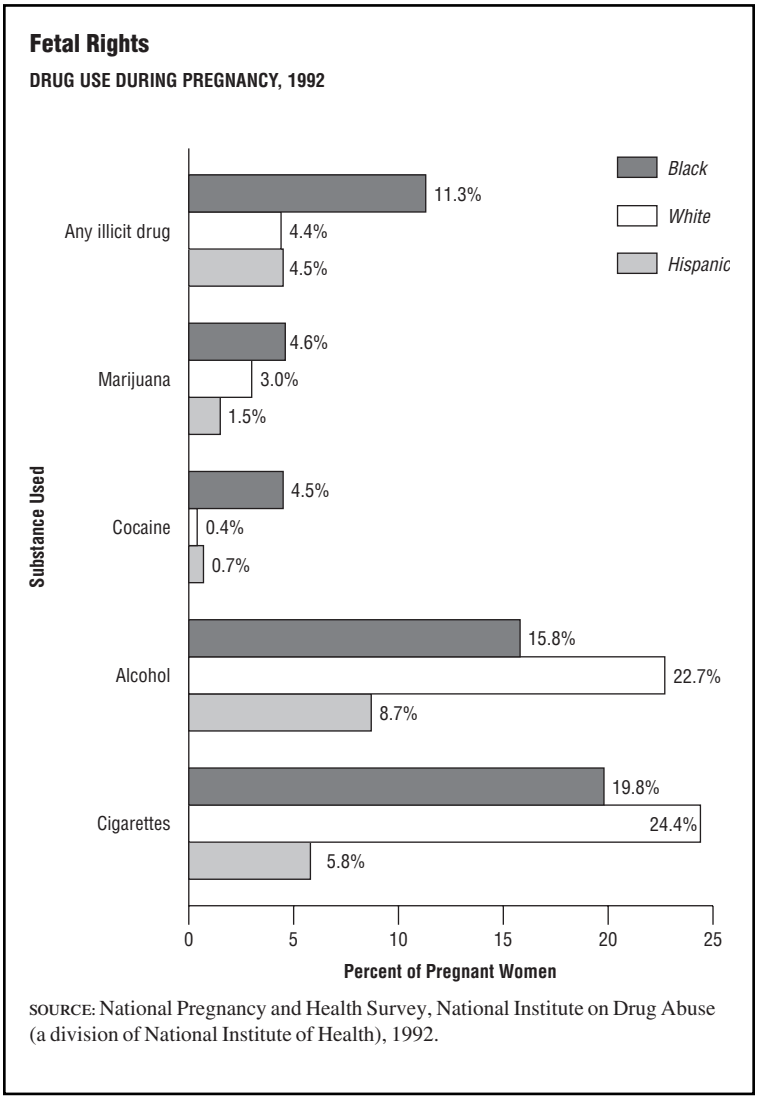


SOURCE: National Pregnancy and Health Survey, National Institute on Drug Abuse (a division of National Institute of Health), 1992.

Other critics argued that most child abuse statutes do not specifically mention drug use by pregnant women as an offense, thereby raising the question as to whether prosecutions on charges of drug use involve a denial of DUE PROCESS. Still others said that increased funding for substance abuse treatment programs was a much better approach to the drug problem. They saw prosecutions on drug abuse charges as doing little to treat the underlying addiction and argued that such prosecutions deter at-risk women from seeking prenatal care, increasing the likelihood of harm to the fetus.

# Willow Island, West Virginia, Women Paid the Price of Fetal Protection Policies

The 1991 U.S. Supreme Court ruling that declared fetal protection policies to be a violation of **CIVIL RIGHTS** laws came too late for five women from West Virginia who were forced by their employer to choose between undergoing a sterilization procedure to avoid health risks associated with their higher paying jobs, remaining fertile but moving to lower paying jobs, or quitting their jobs altogether (*International Union, UAW v. Johnson Controls, Inc.,* 499 U.S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158 [1991]). The women worked at an American Cyanamid factory in Willow Island, a poor region where decent-paying jobs were scarce. They were all among the first women to work in these factories, which, before 1974, had employed only men.

In 1978 the company introduced a policy that no fertile women would be allowed to work in its lead pigments department. The company claimed that hazardous chemicals in that department might harm women's reproductive system. Fertile women under age 50 would have to be sterilized or take jobs in other areas of the company, virtually all of which paid less. Men, whose reproductive system might also be damaged by lead, were not subject to restrictions.

The seven women then employed in the lead pigments department found themselves facing an agonizing choice: whether to reduce or sacrifice their income or undergo a surgical procedure that would render them unable to bear children. Five of the women chose sterilization.

The **LABOR UNION** to which the women belonged eventually took the women's case to court, claiming that the company's fetal protection policy represented a violation of federal occupational safety standards because it required an individual to be sterilized in order to be eligible for work. The union lost the case in the federal appeals court (*Oil, Chemical, & Atomic Workers International Union v. American Cyanamid Co.,* 741 F.2d 444 [D.C. Cir. 1984]). However in the 1991 Supreme Court ruling, this decision was reversed.

**CROSS-REFERENCES**

Abortion; Civil Rights Acts; Women's Rights.

Despite these arguments, the Fifth District Court of Appeals, in Florida, upheld Johnson's conviction. It agreed with the prosecution's argument that Johnson's umbilical cord had delivered cocaine to her children after their birth but before the cord was cut, thereby violating a Florida statute against the delivery of a controlled substance to a minor (Fla. Stat. Ann. § 893.13(1)(c) [West 1991]).

States will continue to struggle with this issue as they seek to achieve the best balance between maternal and fetal rights. States will also have to consider whether or not to hold criminally liable women whose use of legal substances such as alcohol or tobacco harms the fetus.

### Fetal Protection Policies

Fetal protection policies bar fertile women from specific jobs out of fear that those jobs may cause harm to any embryos or fetuses the women might be carrying. These policies came into widespread use by many companies during the 1970s and 1980s, before a 1991 U.S. Supreme Court decision, *UAW v. Johnson Controls,* 499 U.S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158, declared them a form of sexual discrimination that violates Title VII of the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000e et seq. [1982]). Despite the Court's decision in *Johnson Controls,* those critical of fetal protection policies feared that the policies would be continued in more subtle forms.

*Johnson Controls* grew out of a fetal protection policy created in 1982 by Johnson Controls, an automobile battery manufacturer. The company's policy excluded pregnant women and women capable of bearing children from battery manufacturing jobs. The company maintained

that the jobs in its manufacturing plant exposed women to levels of lead that might harm any embryo or fetus they might be carrying.

In 1984, a group of Johnson Controls employees, together with their LABOR UNION, the United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), filed a CLASS ACTION suit in federal court challenging the company's policy. They charged that the policy constituted SEX DISCRIMINATION in violation of federal civil rights law.

In the final ruling on the case, the U.S. Supreme Court held that fetal protection policies unfairly discriminate against women because they do not demand that men make a similar choice regarding the preservation of their reproductive health in a potentially hazardous workplace.

Companies that have created fetal protection policies argue that they are necessary to protect their employees. Critics of fetal protection policies maintain that they effectively exclude all women aged 15 to 50 from well-paying jobs unless the women can prove they have been sterilized. They also contend that such policies raise privacy questions because they often require women to provide proof that they cannot have children in order to take specific jobs. Critics also point to instances in which women have undergone sterilization procedures because they faced the loss of high-paying jobs. Other critics argue that male reproductive organs may also be affected by hazardous substances in such a way that a fetus might be harmed. Nevertheless, no company has created similar policies for men.

FOURTH AMENDMENT SEARCH AND SEIZURE cases can also touch on fetal rights. In *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d. 205 (2001), the Supreme Court ruled on a case concerning nonconsensual drug testing of pregnant women. In *Ferguson* the state argued that the drug testing was performed as a measure to help protect unborn fetuses and that these searches fell under the "special needs" exception to the Fourth Amendment. Cases recognizing the exception have employed a BALANCING test weighing the harm caused by the warrantless intrusion on the individual's privacy interest against the "special needs" that supported the intrusion. The court held that the South Carolina state hospital's drug testing of pregnant patients to obtain evidence for law enforcement purposes does in fact violate the Fourth Amendment. The majority rejected the state's argument that testing fell within the "special needs" exception to the Fourth Amendment. The court said the state's interest in using the threat of criminal sanctions to deter pregnant women from using drugs does not justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant. The court further held that the drug tests, conducted by the Medical University of South Carolina, constituted an unreasonable search if the patient had not consented to the procedure.

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CROSS-REFERENCES

Child Abuse; Drugs and Narcotics; Fetal Tissue Research; Parent and Child; Physicians and Surgeons.

## FETAL TISSUE RESEARCH

*Scientific experimentation performed upon or using tissue taken from human fetuses.*

Although fetal tissue research has led to medical advances, including the development of the polio and rubella vaccines in the 1950s, it has also generated controversy because of its use of fetuses from elective ABORTIONS. Fetal tissue research has been subject to strict government regulation and periodic moratoriums on federal funding. The National Institutes of Health (NIH) Revitalization Act of 1993 (Pub. L. No. 103-43 [42 U.S.C.A. §§ 289g-1, -2]) regulates many aspects of fetal tissue research.

### History

Fetal tissue research has been conducted in the United States since the middle of the twentieth century. Its practice became more common as the amount of biomedical research increased

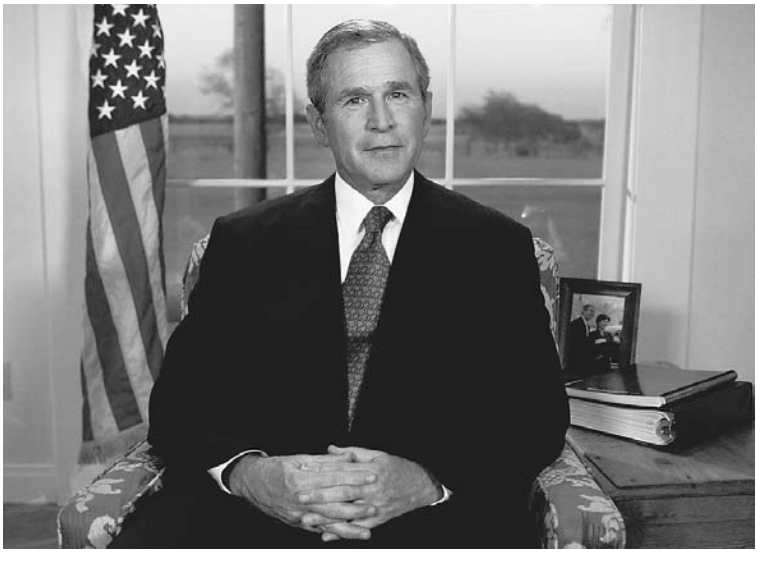

*In an August 2001 address to the nation, President Bush announced a policy of continued, though restricted, federal funding for embryonic stem cell research limited to 60 existing genetic lines.*

AP/WIDE WORLD PHOTOS

and as restrictions on the availability of abortion decreased. Research on fetal tissue led to significant advances in the scientific understanding of fetal development and in the diagnosis and treatment of fetal diseases and defects, including the development of amniocentesis as a diagnostic tool. It also played a role in advancing the scientific understanding of cancer, immunology, and transplantation.

Because fetal tissue grows more rapidly, is more flexible than other human tissue, and is less likely to be rejected by the immune system, it has also been used to treat diseases through transplantation. Fetal tissue transplantation usually involves the injection of fetal cells into a diseased organ such as the brain or pancreas. Many scientists believe that fetal tissue transplantation will lead to significant new developments in medical science. Researchers have already had limited success in using fetal tissue transplants to treat patients with Parkinson's disease, diabetes, Alzheimer's disease, and other illnesses. Although most medical ethicists agree that these new procedures hold great promise, they warn that the use of fetal tissue must be strictly regulated in order to avoid ethical abuses.

### Law

Fetal tissue research became a subject of controversy in U.S. law following the 1973 U.S. Supreme Court decision in ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, which protects the right of a woman to have an abortion in the first and second trimesters of pregnancy. After *Roe,* research performed on fetuses obtained from elective abortions came under close scrutiny.

In 1974, the National Research Act (Pub. L. No. 93-348) created a national commission to oversee research that involves fetuses. This body released research guidelines and also placed restrictions on what types of fetal research might be allowed to receive federal funding.

In 1988, NIH scientists requested approval from the DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS) to begin transplantation experiments using fetal brain tissue. Because the administration of President RONALD REAGAN was concerned about the link between fetal tissue research and abortion, the HHS imposed a temporary MORATORIUM on federal funds for research in fetal tissue transplantation. Although a 21-member NIH panel later approved the use of human fetal tissue for transplantation and disagreed with the contention that such research would cause more abortions, the moratorium was extended indefinitely by Secretary Louis W. Sullivan, of the HHS, in 1989.

In subsequent years, legislation to overturn the moratorium repeatedly failed in Congress. Then, shortly after taking office in 1993, President BILL CLINTON ordered the end of the moratorium (58 Fed. Reg. 7457). Later in 1993, Congress passed the NIH Revitalization Act, which permits the tissue from any type of abortion to be used for fetal tissue research. The law includes elaborate consent and documentation requirements that attempt to separate the mother's decision to abort from the decision to donate fetal remains. It also criminalizes the sale or purchase of fetal tissue and the designation of the recipient of fetal tissue.

Soon after President GEORGE W. BUSH took office in January 2001, the controversy over fetal tissue research found itself again in the public spotlight. In a nationally televised speech during prime time, the president presented new national policies involving embryonic stem cell research. An embryonic stem cell is a kind of master cell taken from a 5-day-old embryo that can develop into virtually any type of body tissue. Researchers believe those specialized cells could then be transplanted into patients to correct disorders such as diabetes, Alzheimer's, heart disease and spinal cord paralysis.

In his speech on embryonic stem cell research, the president announced a policy of

continued—though severely limited—federal funding for embryonic stem cell research. This approval is strictly limited to 60 existing genetic lines of embryonic stem cells. Additionally, the president announced the creation of a council to develop federal guidelines and monitor embryonic stem cell research. He expressed concern over the conduct of embryonic stem cell research that had been privately funded, often done in secret, and conducted without regulation. But the limits imposed by the president, particularly those excluding new stem cell lines developed from embryos, will slow the pace of scientific discovery in this area.

### The Debate

Those opposed to fetal tissue research have made a number of arguments against the use of fetuses from elective abortions. Morally opposed to abortion itself, they argue that the fetal tissue researcher is complicit in the destruction of the fetus and that fetal tissue research will create incentives for more abortions. Moreover, they maintain that a woman who has an abortion cannot legally authorize research on the aborted fetus because she has abandoned her parental responsibility through the act of abortion. They also argue that fetal tissue research can and should be restricted to fetuses from spontaneous abortions and ectopic pregnancies.

Those who favor fetal tissue research contend that it has already led to significant medical gains that have saved and improved many lives, and will continue to do so. They argue that researchers have an ethical duty to relieve suffering and cure diseases and that fetal tissue research contributes greatly to this cause. They also contend that researchers must continue to have access to ethically obtained fetuses. They hold that the tissue of fetuses from elective abortions has far fewer defects and is much easier to obtain than that of fetuses from nonelective abortions or ectopic pregnancies.

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CROSS-REFERENCES

Fetal Rights; Women's Rights.

## FEUDALISM

*A series of contractual relationships between the upper classes, designed to maintain control over land.*

Feudalism flourished between the tenth and thirteenth centuries in western Europe. At its core, it was an agreement between a lord and a vassal. A person became a vassal by pledging political allegiance and providing military, political, and financial service to a lord. A lord possessed complete sovereignty over land, or acted in the service of another sovereign, usually a king. If a lord acted in the service of a king, the lord was considered a vassal of the king.

As part of the feudal agreement, the lord promised to protect the vassal and provided the vassal with a plot of land. This land could be passed on to the vassal's heirs, giving the vassal tenure over the land. The vassal was also vested with the power to lease the land to others for profit, a practice known as subinfeudation. The entire agreement was called a fief, and a lord's collection of fiefs was called a fiefdom.

The feudal bond was thus a combination of two key elements: fealty, or an oath of allegiance and pledge of service to the lord, and homage, or an ACKNOWLEDGMENT by the lord of the vassal's tenure. The arrangement was not forced on the vassal; it was profitable for the vassal and made on mutual consent, and it fostered the allegiance necessary for royal control of distant lands.

The bond between a lord and a vassal was made in a ceremony that served to solemnize the fief. The vassal knelt before the lord and placed his hands between those of the lord as a sign of subordination. Immediately afterward, the lord raised the vassal to his feet and kissed him on the mouth to symbolize their social equality. The vassal then recited a predetermined oath of fealty, and the lord conveyed a plot of land to the vassal.

In the seventeenth century, more than three centuries after the death of this particular social practice, English scholars began to use the term *feudalism* to describe it. The word was derived by English scholars from *foedum,* the Latin form of *fief.* The meaning of feudalism has expanded

since the seventeenth century, and it now commonly describes servitude and hierarchical oppression. However, feudalism is best understood as an initial stage in a social progression leading to private ownership of land and the creation of different estates, or interests in land.

Before feudalism, the European population consisted only of wealthy nobility and poor peasants. Little incentive existed for personal loyalty to sovereign rulers. Land was owned outright by nobility, and those who held land for lords held it purely at the lords' will. Nevertheless, the feudal framework was preceded by similar systems, so its exact origin is disputed by scholars. Ancient Romans, and Germanic tribes in the eighth century, gave land to warriors, but unlike land grants under feudalism, these were not hereditary.

In the early ninth century, control of Europe was largely under the rule of one man, Emperor Charlemagne (771–814). After Charlemagne's death, his descendants warred over land ownership, and Europe fell apart into thousands of *seigniories,* or kingdoms run by a sovereign lord. Men in the military service of lords began to press for support in the late ninth century, especially in France. Lords acquiesced, realizing the importance of a faithful military.

Military men, or knights, began to receive land, along with peasants for farmwork. Eventually, knights demanded that their estates be hereditary. Other persons in the professional service of royalty also began to demand and receive hereditary fiefs, and thus began the reign of feudalism.

In 1066, William the Conqueror invaded England from France and spread the feudal framework across the land. The feudal relationship between lord and vassal became the linchpin of English society. To become a vassal was no disgrace. Vassals held an overall status superior to that of peasants and were considered equal to lords in social status. They took leadership positions in their locality and also served as advisers for lords in feudal courts.

The price of a vassal's power was allegiance to the lord, or fealty. Fealty carried with it an obligation of service, the most common form being knight service. A vassal under knight service was obliged to defend the fief from invasion and fight for a specified number of days in an offensive war. In wartime, knight service also called for guard duty at the lord's castle for a specified period of time. In lieu of military service, some vassals were given *socage,* or tenure in exchange for the performance of a variety of duties. These duties were usually agricultural, but they could take on other forms, such as personal attendance to the lord. Other vassals were given *scutage,* in which the vassal agreed to pay money in lieu of military service. Priests received still other forms of tenure in exchange for their religious services.

A lord also enjoyed incidental benefits and rights in connection with a fief. For example, when a vassal died, the lord was entitled to a large sum of money from the vassal's heirs. If the heir was a minor, the lord could sell or give away custody of the land and enjoy its profits until the heir came of age. A lord also had the right to reject the marriage of an heiress to a fief if he did not want the husband as his vassal. This kind of family involvement by the lord made the feudal relationship intimate and complex.

The relationship between a lord and a vassal depended on mutual respect. If the vassal refused to perform services or somehow impaired the lord's interests, the lord could file suit against the vassal in feudal court to deprive him of his fief. At the same time, the lord was expected to treat the vassal with dignity, and to refrain from making unjust demands on the vassal. If the lord abused the vassal, the vassal could break faith with the lord and offer his services to another lord, preferably one who could protect the vassal against the wrath of the defied lord.

Predictably, the relationship between lord and vassal became a struggle for a reduction in the services required by the fief. Lords, as vassals of the king, joined their own vassals in revolt against the high cost of the feudal arrangement. In England, this struggle culminated in the MAGNA CHARTA, a constitutional document sealed by King John (1199–1216) in 1215 that signaled the beginning of the end for feudalism. The Magna Charta, forced on King John by his lords, contained 38 chapters outlining demands for liberty from the Crown, including limitations on the rights of the Crown over land.

Other circumstances also contributed to the decline of feudalism. As time passed, the power of organized religion increased, and religious leaders pressed for freedom from their service to lords and kings. At the same time, the development of an economic wealth apart from land led to the rise of a bourgeoisie, or middle class.

The middle class established independent cities in Europe, which funded their military with taxes, not land-based feudal bonds. Royal sovereigns and cities began to establish parliamentary governments that made laws to replace the various rules attached to the feudal bond, and feudal courts lost jurisdiction to royal or municipal courts. By the fourteenth century, the peculiar arrangement known as feudalism was obsolete.

Feudalism is often confused with manorialism, but the two should be kept separate. Manorialism was another system of land use practiced in medieval Europe. Under it, peasants worked and lived on a lord's land, called a manor. The peasants could not inherit the land, and the lord owed them nothing beyond protection and maintenance.

Feudalism should also be distinguished from the general brutality and oppression of medieval Europe. The popular understanding of feudalism often equates the bloody conquests of the medieval period (500–1500) with feudalism because feudalism was a predominant social framework for much of the period. However, feudalism was a relatively civil arrangement in an especially vicious time and place in history. The relationship of a vassal to a lord was servile, but it was also based on mutual respect, and feudalism stands as the first systematic, voluntary sale of inheritable land.

The remains of feudalism can be found in contemporary law regarding land. For example, a rental agreement is made between a landlord and a tenant, whose business relationship echoes that of a lord and a vassal. State property taxes on landowners resemble the services required of a vassal, and like the old feudal lords, state governments may take possession of land when a landowner dies with no will or heirs.

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## FIAT

*[*Latin, Let it be done.*] In old English practice, a short order or warrant of a judge or magistrate directing some act to be done; an authority issuing from some competent source for the doing of some legal act.*

*One of the proceedings in the English* **BANKRUPTCY** *practice: a power, signed by the lord chancellor and addressed to the court of bankruptcy, authorizing the petitioning creditor to prosecute his complaint before that court. By the statute 12 & 13 Vict., c. 116, fiats were abolished.*

*Arbitrary or authoritative order or decision.*

## F.I.C.A.

*An abbreviation for the Federal Insurance Contributions Act (26 U.S.C.A. § 3101 et seq. [1954]), which established the* **SOCIAL SECURITY** *tax on income received in the form of wages from employment.*

## FICTION

*An assumption made by a court and embodied in various legal doctrines that a fact or concept is true when in actuality it is not true, or when it is likely to be equally false and true.*

A legal fiction is created for the purpose of promoting the ends of justice. A common-law action, for example, allowed a father to bring suit against his daughter's seducer, based on the legal fiction of the loss of her services. Similarly, the law of **TORTS** encompasses the legal fiction of the rule of **VICARIOUS LIABILITY**, which renders an employer responsible for the civil wrongs of his or her employees that are committed during their course of employment. Even though the employer generally is uninvolved in the actual act constituting the tort, the law holds the employer responsible since, through a legal fiction, he or she is deemed to be in direct control of the employee's actions. A seller of real estate might, for example, be liable in an action for **FRAUD** committed by his or her agent in the course of a sale.

## FICTITIOUS

*Based upon a fabrication or pretense.*

A fictitious name is an assumed name that differs from an individual's actual name. A *fictitious* action is a lawsuit brought not for the adjudication of an actual controversy between the parties but merely for the purpose of obtaining the opinion of the court on a particular point of law.

## FIDELITY BOND

*An insurance device in the form of a personal guaranty that protects against loss resulting from disreputable or disloyal employees or other individuals who possess positions of confidence.*

A bank might, for example, insure itself against losses deliberately or negligently caused by their officers and staff through the execution of a fidelity bond. If such losses occur, the amount of the bond is forfeited to reimburse the losses.

## FIDELITY INSURANCE

*An agreement whereby, for a designated sum of money, one party agrees to guarantee the loyalty and honesty of an agent, officer, or employee of an employer by promising to compensate the employer for losses incurred as a result of the disloyalty or dishonesty of such individuals.*

## FIDUCIARY

*An individual in whom another has placed the utmost trust and confidence to manage and protect property or money. The relationship wherein one person has an obligation to act for another's benefit.*

A fiduciary relationship encompasses the idea of faith and confidence and is generally established only when the confidence given by one person is actually accepted by the other person. Mere respect for another individual's judgment or general trust in his or her character is ordinarily insufficient for the creation of a fiduciary relationship. The duties of a fiduciary include loyalty and reasonable care of the assets within custody. All of the fiduciary's actions are performed for the advantage of the beneficiary.

Courts have neither defined the particular circumstances of fiduciary relationships nor set any limitations on circumstances from which such an alliance may arise. Certain relationships are, however, universally regarded as fiduciary. The term embraces legal relationships such as those between attorney and client, BROKER and principal, principal and agent, trustee and beneficiary, and executors or administrators and the heirs of a decedent's estate.

A fiduciary relationship extends to every possible case in which one side places confidence in the other and such confidence is accepted; this causes dependence by the one individual and influence by the other. Blood relation alone does not automatically bring about a fiduciary relationship. A fiduciary relationship does not necessarily arise between parents and children or brothers and sisters.

The courts stringently examine transactions between people involved in fiduciary relationships toward one another. Particular scrutiny is placed upon any transaction by which a dominant individual obtains any advantage or profit at the expense of the party under his or her influence. Such transaction, in which UNDUE INFLUENCE of the fiduciary can be established, is void.

## FIELD AUDIT

*A systematic investigation by the* INTERNAL REVENUE SERVICE *of a taxpayer's financial records and his or her tax return that is conducted at the taxpayer's place of business or at the office of the individual who prepared the return.*

A field audit differs from a correspondence audit and an office audit in the location where it occurs.

CROSS-REFERENCES

Income Tax.

## FIELD CODE OF NEW YORK

*The first code of* CIVIL PROCEDURE *that established simplified rules for* PLEADING *an action before a court, which was proposed by* DAVID DUDLEY FIELD *in 1848 for the state of New York and enacted by the state legislature.*

The Field Code served as the prototype for other states in codifying and revising the rules of civil practice in their respective courts. Prior to the code, no uniform rules existed for the commencement of an action. Each common-law form of action and each EQUITY action had its own rigid procedural requirements to be satisfied and the language of such pleadings was highly formalized and verbose. A plaintiff's allegation rarely was stated in simple, clear language.

The Field Code was a radical departure from the procedures of the past. As a result of its merger of law and equity actions into one action, the code provided a uniform set of rules of pleading to be used in each type of case. The pleadings were to be in simple, concise language that set forth only the facts of the dispute between the two parties.

This clarification of procedure was a significant factor in bringing about a more efficient system of justice. Within twenty-five years of the enactment of the Field Code, about one-half of the states enacted comparable codes. The Field Code was also influential in ENGLISH LAW, its principles drafted into the JUDICATURE ACTS of 1873 and 1875.

The term CODE PLEADING is derived from the Field Code, although code pleading can refer to compliance with the requirements of either a legislative enactment or a rule of the court.

## ♦ FIELD, DAVID DUDLEY

David Dudley Field secured a place in the nineteenth century as a commanding legal reformer. The primary achievement of the New York lawyer was his CODIFICATION of the common laws of the United States. In addition, Field was among the most successful commercial and constitutional lawyers in New York. The cases he took on often anticipated those of the modern, made-for-hire corporate lawyer. Field also made contributions to the national political scene. In different capacities, both before and after the Civil War, he managed to represent the constitutional interests of both the Democratic and Republican Parties. As a Northern opponent of SLAVERY, still sympathetic to the rights of Southerners, he pursued a fight for justice for the common person on legal and moral grounds. At the same time, his somewhat radical belief in the need to streamline law incited considerable resistance. During and after his lifetime, lawyers and others remembered him as a champion for the progress of procedural law throughout the United States. His lifelong goal of extending justice to the common person left a lasting impression on the U.S. legal system and, to some degree, on the rest of the world.

Field was born February 13, 1805, in Haddam, Connecticut, into a remarkable, aristocratic family. Nearly all the Fields of that era achieved a degree of success. Field's grandfather Captain Timothy Field, of Guilford, Connecticut, set the standard by fighting in the Revolutionary War. Field's father, the Reverend Dr. David Dudley Field, was educated at Yale College, became a minister, and received his doctorate at the prestigious Williams College. Field's three brothers also obtained influence; in particular, STEPHEN J. FIELD became a justice of the U.S. Supreme Court.

Field followed his father's lead by also studying at Williams. He left the school in 1825 and began the study of law in the office of Hermanus Bleecker of Albany, New York. In 1828, he was admitted to the bar as an attorney, and in 1830, he was appointed a counselor. He went on to practice law with his former teachers from Williams, Henry Sedgwick and Robert Sedgwick.

The tasks Field took on as a lawyer indicated a daring side. JEREMY BENTHAM, an English economic and legal philosopher and contemporary of Field's, characterized the legal system of the

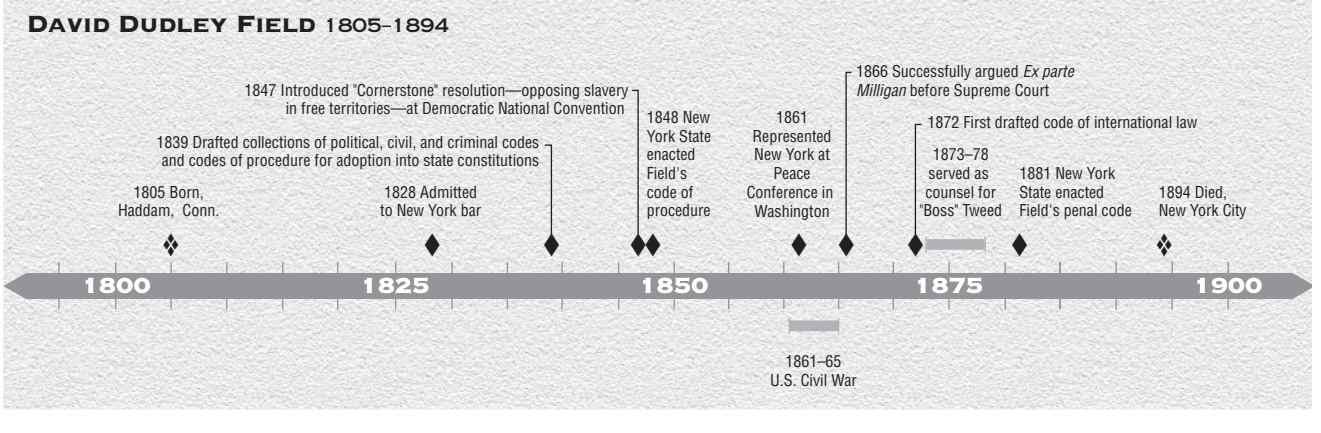

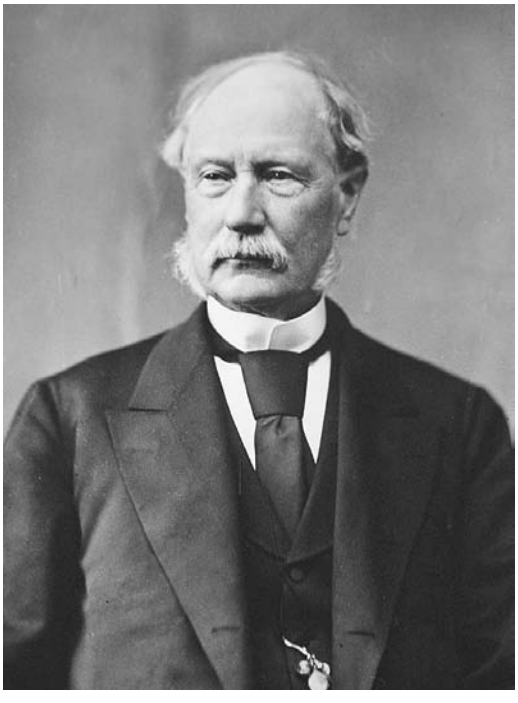

*David Dudley Field.*
LIBRARY OF CONGRESS

day when he quipped, Do you know how judges make the common law?—Just as a man makes laws for his dog. Before Field's initiatives, the only way for persons to know the state of the law was to look through collections of court opinions. Field, Bentham, and others found this recourse unsatisfactory.

With his goal "to bring justice within the reach of all men," Field set out to put the RULES OF LAW into a single book, through which persons could determine their rights. His proposals for procedural codes rested on four basic principles: One, pleadings are meant to state facts truthfully and to then prove those facts by trial. Two, equitable defenses and counterclaims are available in all trial proceedings. Three, the court holds the power (formerly held by the chancellor) to compel parties to testify and to produce evidence. Four, evidence at the trial that varies from the PLEADING is a ground for the dismissal of the action. The development of these principles introduced a new set of procedural standards that he hoped the legal system would follow.

"NEVER IS IT SAFE TO ENTRUST ANY MAN OR SET OF MEN WITH THE ABSOLUTE GOVERNMENT OF OTHER MEN."
—DAVID DUDLEY FIELD

In 1839, Field drafted a collection of codes intended for adoption into state constitutions. The codes comprised 371 sections, filling fewer than 70 pages. The groupings of legal principles under a code of procedure, a political code, a civil code, a code of CRIMINAL PROCEDURE, and a penal code treated law in the essential terms of CIVIL RIGHTS and due remedies.

Ironically, Field's codes faced their strongest resistance in New York. Lawyers throughout the East feared that the codes would interfere with the progress of law as they knew it. Nevertheless, New York enacted Field's code of procedure in 1848. In 1881, the state also passed his penal code. The rest of Field's codes, although passed by both houses of the New York Legislature, were never signed into law. The codes did better elsewhere, particularly in the West. There and throughout the United States, 24 states enacted them. California enacted the civil code in 1872, aided by the LOBBYING efforts of Field's brother Stephen, then a practicing lawyer in the state.

Meanwhile, Field did even more to establish his reputation as a controversial figure. He had been a Democrat through much of his early life. Starting in the 1840s, however, he broke sharply with party lines over the annexation of Texas. Democrats sought to expand slavery by permitting it in that state. Field objected and instead supported antislavery Republicans. In fact, some politicians credited Field with contributing a key influence in the nomination of ABRAHAM LINCOLN as the Republican presidential candidate in 1860.

However, labels could not stick to Field. Even as an opponent of slavery, he defended the rights of Southerners after the Civil War by challenging certain Republican Reconstruction laws. In EX PARTE MILLIGAN, 71 U.S. (4 Wall.) 2, 18 L. Ed. 281 (1866), Field argued successfully that a Reconstruction military commission could not constitutionally convict a Southern civilian, Lamdin B. Milligan, of previous actions as a Confederate. And in *Cummings v. Missouri,* 71 U.S. (4 Wall.) 277, 18 L. Ed. 356 (1867), he successfully argued against a Missouri Constitution provision that would have prevented former Confederates from holding office.

In addition to legal reform, Field established himself as a representative of other unpopular causes. He continued in this role while representing James Fisk and Jay Gould. His clients faced accusations of manipulating the Erie Railroad system for illegal profit. The case drew considerable attention in the late 1860s from Field's critics around the nation. Fisk and Gould had already become notorious from charges of corruption thrown at them. Field's record of serving in heated cases added to his detractors' ire.

In successfully defending the two, he faced criticisms of implementing his own legal codes for personal gain. Newspapers charged him with unethical abuse of the legal system. A group of lawyers even threatened Field with punitive action. However, only the formation of the Association of the Bar of the City of New York ensued. The association, the first of its kind, sought to raise the professional standards of lawyers because the founding members believed Field had demeaned the profession.

In 1873, Field began representation of William M. "Boss" Tweed, one of New York City's notorious city bosses. Tweed served as a member of Congress, a New York State Senator, an alderman, and in several other roles. He also became the "boss" of the DEMOCRATIC PARTY of the city and state of New York, developing a political machine known as TAMMANY HALL. The organization controlled most of the New York government by the late 1860s, yielding an estimated $200 million of criminal funds through a variety of corrupt practices. Field represented Tweed when the latter was brought to trial for corruption. After the first trial resulted in a hung jury, Tweed was convicted after a second trial and sentenced to 12 years in prison, though he died in 1878.

Field's influence extended beyond the United States. Traveling extensively throughout his life, Field also created a code of INTERNATIONAL LAW, first drafted in 1872. Great Britain received the code with the most welcome. The country adopted substantial aspects of Field's American Code of Procedure. Other sets of codes went on to influence countries throughout Europe and the rest of the world. In fact, Field was surprised to discover, during a trip to Asia in 1874, that the Indian legal system had implemented his procedural doctrine.

Field served briefly as a member of Congress in 1877, filling out the unexpired term of Smith Ely, who had been elected as mayor of New York City. Field continued to give speeches and draft papers through the 1880s. He died in New York City, at the age of 89, on April 3, 1894.

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CROSS-REFERENCES

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## ♦ FIELD, STEPHEN JOHNSON

Stephen Johnson Field served as associate justice of the U.S. Supreme Court from 1863 to 1897, making him the second longest serving justice in the history of the Court. Field was a conservative who consistently upheld the interests of business. He became the prime advocate of the theory of "substantive due process," which favored private property rights over attempts by state and federal government to regulate the economy. Conservatives on the Court used SUBSTANTIVE DUE PROCESS to strike down regulatory legislation until the 1930s.

"THE PRESENT ASSAULT UPON CAPITAL IS BUT THE BEGINNING. IT WILL BE BUT THE STEPPING-STONE TO OTHERS, LARGER AND MORE SWEEPING, 'TIL OUR POLITICAL CONTESTS WILL BECOME A WAR OF THE POOR AGAINST THE RICH; A WAR CONSTANTLY GROWING IN INTENSITY AND BITTERNESS."
—STEPHEN J. FIELD

Field was born in Haddam, Connecticut, on November 4, 1816. His family moved to Stockbridge, Massachusetts, when he was a young child. At thirteen he was sent to Turkey to live with his sister and her missionary husband. They later moved to Athens, Greece, where Field remained until entering Williams College in 1833. After graduating in 1837 he read the law with his older brother, DAVID DUDLEY FIELD, who had emerged as a prominent New York City attorney and legal reformer.

In 1849 Field left New York City for the Gold Rush in northern California. He speculated in land, developed a thriving legal practice involving property and mineral rights, and organized the town of Marysville. He became Marysville's mayor and judge. In 1850 he was elected to the state legislature. He was instrumental in organizing standards of procedure for civil and CRIMINAL LAW and he also drafted mining laws. He ran for the state senate in 1851 but was defeated.

Field was elected to the California Supreme Court in 1857. He became chief justice in 1859 and served until 1863. He concentrated his efforts on cases dealing with titles to land and mineral rights. In 1863 President ABRAHAM LINCOLN, a Republican, appointed Field to the U.S. Supreme Court. Though Field was a Democrat, he was a loyal Unionist during the Civil War and a well-respected state judge.

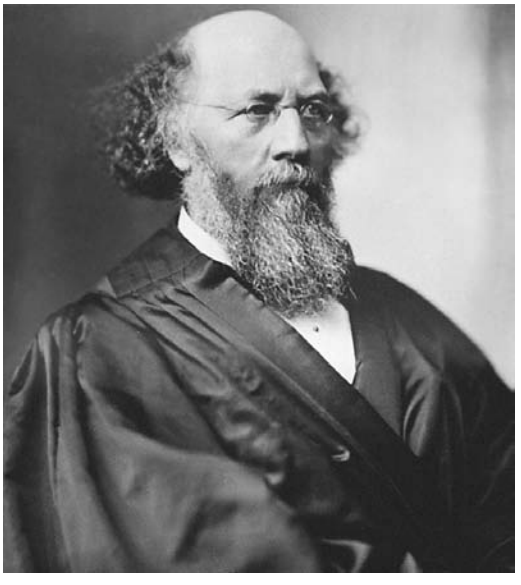

*Stephen J. Field.*
LIBRARY OF CONGRESS

Field established his opposition to government interference with business in the **SLAUGHTER-HOUSE CASES**, 83 U.S. (16 Wall) 36, 21 L. Ed. 394 (1873). The case involved a Louisiana state law that allowed one meat company the exclusive right to slaughter livestock in New Orleans. Other packing companies were required to pay a fee for using the slaughterhouses. These companies filed suit, claiming that the law violated the **PRIVILEGES AND IMMUNITIES CLAUSE** of the **FOURTEENTH AMENDMENT.**

The Court upheld the Louisiana **MONOPOLY** law, ruling that the Privileges and Immunities Clause had limited effect as it only reached privileges and immunities guaranteed by U.S. citizenship, not state citizenship. Field wrote a dissent, maintaining that "the privileges and immunities designated are those which of right belong to the citizens of all free governments." He saw the clause as a powerful tool to keep state government out of the affairs of business and the economy.

Field saw an opportunity to use the Fourteenth Amendment's **DUE PROCESS CLAUSE** to curtail government interference with business. He first articulated the idea of substantive due process in his dissent in **MUNN V. ILLINOIS**, 94 U.S. 113, 24 L. Ed. 77 (1876). The majority upheld the Illinois legislature's right to fix maximum storage rates charged by grain elevators and public warehouses and to require licenses to operate these facilities.

Field contended that the regulations violated due process and that under the U.S. system of government the legislature lacked the power "to fix the price which anyone shall receive for his property of any kind." By 1890 he had convinced the majority of the Court that his view of the Due Process Clause was correct and had extended its reach to the Fifth Amendment's Due Process Clause, using it to invalidate federal legislation that regulated business. Until the 1930s the Court overturned a succession of state and federal laws that attempted to regulate business and labor.

Field voted to strike down a federal **INCOME TAX** in **POLLOCK V. FARMERS' LOAN AND TRUST CO.**, 157 U.S. 429, 15 S. Ct. 673, 39 L. Ed. 759 (1895), seeing the tax as a plot against capitalism. In his concurring opinion, Field warned, "The persistent assault upon capital is but the beginning. It will be a stepping stone to others larger and more sweeping till our political contests will become a war of the poor against the rich, a war constantly growing in intensity and bitterness."

Field entertained political ambitions while on the Court. In 1880 he sought the **DEMOCRATIC PARTY** presidential nomination but did poorly at the nominating convention. He

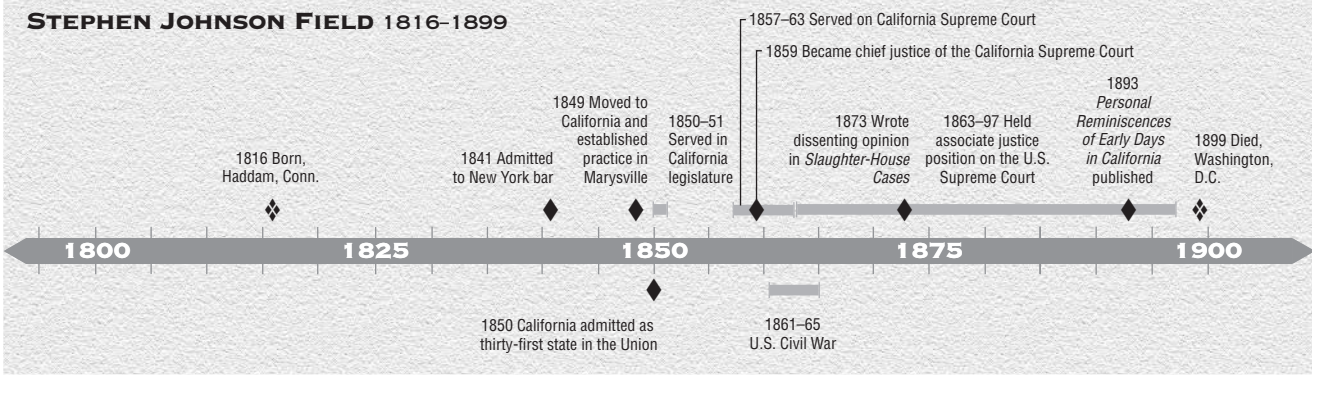

became increasingly infirm during the 1890s and did little work. He was determined, however, to break John Marshall's record of thirty-three years on the Court. He achieved that record in 1896 (later to be surpassed by WILLIAM O. DOUGLAS) and retired in 1897. He died in Washington, D.C., on April 9, 1899.

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## FIERI FACIAS

*[*Latin, Cause (it) to be done.*] The name of a writ of execution that directs a sheriff to seize and sell the goods and chattels of a* JUDGMENT DEBTOR *in order to satisfy the judgment against the debtor.*

In its original form, the writ directed the seizure and sale of goods and chattels only, but eventually was enlarged to permit levy on real property, too; largely synonymous with a modern writ of execution.

## FIFO

*An abbreviation for first-in, first-out, a method employed in accounting for the identification and valuation of the inventory of a business.*

FIFO assumes that the first goods purchased are the first sold. As a consequence, the items that remain in the inventory at the end of the year are assumed to be those purchased last.

CROSS-REFERENCES

LIFO.

## FIFTEENTH AMENDMENT

The Fifteenth Amendment to the U.S. Constitution reads:

> *Section 1.* The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> *Section 2.* The Congress shall have power to enforce this article by appropriate legislation.

The Fifteenth Amendment was ratified by the states in 1870 and also gave Congress the power to enforce such rights against governments that sought to undermine this guarantee through the enactment of appropriate legislation. Enforcement was, however, difficult as states employed grandfather clauses and other eligibility requirements to maintain RACIAL DISCRIMINATION in the electoral process.

CROSS-REFERENCES

Elections; Voting.

## FIFTH AMENDMENT

The Fifth Amendment to the U.S. Constitution reads:

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

The BILL OF RIGHTS, which consists of the first ten amendments to the U.S. Constitution, enumerates certain basic personal liberties. Laws passed by elected officials that infringe on these liberties are invalidated by the judiciary as unconstitutional. The Fifth Amendment to the Constitution, ratified in 1791, represents five distinct liberties the that Framers attempted to safeguard from majoritarian impulses: (1) the

*First-in, first-out (FIFO) is a method of inventory control that means the inventory bought first is sold first.*

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right to be indicted by an impartial GRAND JURY before being tried for a federal criminal offense, (2) the right to be free from multiple prosecutions or punishments for a single criminal offense, (3) the right to remain silent when prosecuted for a criminal offense, (4) the right to have personal liberties protected by DUE PROCESS OF LAW, and (5) the right to receive just compensation when the government takes private property for public use.

The Framers of the Fifth Amendment intended that its provisions would apply only to the actions of the federal government. However, after the FOURTEENTH AMENDMENT was ratified, most of the Fifth Amendment's protections were made applicable to the states. Under the INCORPORATION DOCTRINE, most of the liberties set forth in the Bill of Rights were made applicable to state governments through the U.S. Supreme Court's interpretation of the Due Process and EQUAL PROTECTION Clauses of the Fourteenth Amendment. As a result, all states must provide protection against DOUBLE JEOPARDY, SELF-INCRIMINATION, deprivation of due process, and government taking of private property without just compensation. The Grand Jury Clause of the Fifth Amendment has not been made applicable to state governments.

### Double Jeopardy Clause

The Double Jeopardy Clause of the Fifth Amendment prohibits state and federal governments from reprosecuting for the same offense a defendant who has already been acquitted or convicted. It also prevents state and federal governments from imposing more than one punishment for the same offense.

For more than a century, courts have wrestled with the question of what constitutes an acquittal such that a person has already been placed in jeopardy for a particular offense. However, all courts agree that the Double Jeopardy Clause applies only to legal proceedings brought by state and federal governments in criminal court. It does not apply to legal proceedings instituted by purely private individuals in civil court.

The U.S. legal system has two primary divisions, criminal and civil. Criminal actions are designed to punish individuals for wrongdoing against the public order. Civil actions are designed to compensate victims with money damages for injuries suffered at the hands of another. An individual who has been acquitted in criminal court of murder can, without violating the Double Jeopardy Clause, be required in civil court to pay money damages to the family of a victim. Thus, the successive criminal and civil trials of O. J. SIMPSON, regarding the deaths of Nicole Brown Simpson and Ronald Goldman, did not constitute double jeopardy.

The Fifth Amendment's prohibition against double jeopardy is rooted in Anglo-Saxon JURISPRUDENCE. Yet, in England, the Crown sometimes ignored the right against double jeopardy. In certain important cases where an acquittal undermined royal interests, the defendant was tried again in a different manner or by a different court. The protection against double jeopardy was also extremely narrow under ENGLISH LAW. It applied only to capital crimes, in which the defendant would be subject to the death penalty if convicted. It did not apply to lesser offenses such as noncapital felonies and misdemeanors.

Massachusetts was the first colony that recognized a right against double jeopardy. Its colonial charter provided, "No man shall be twise [sic] sentenced by Civil Justice for one and the same Crime, offence, or Trespasse" (as quoted in *United States v. Halper,* 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 [1989]). This charter, which served as a model for several other colonies, expanded the protection against double jeopardy to all crimes and offenses, not just capital felonies. Nonetheless, when the Bill of Rights was ratified in 1791, the constitutions of only two states expressly afforded double jeopardy protection. Thus, when JAMES MADISON submitted his proposal for the Fifth Amendment to Congress, he wanted to be sure that the right against double jeopardy would not be abused by the government, as it had been in England, or altogether forgotten, as it had been in the constitutions of eleven states.

Although Congress and the state ratifying conventions said very little about the Fifth Amendment's Double Jeopardy Clause, the U.S. Supreme Court has identified several concerns that the Framers were trying to address when they drafted it: (1) preventing the government from employing its superior resources to wear down and erroneously convict innocent persons; (2) protecting individuals from the financial, emotional, and social consequences of successive prosecutions; (3) preserving the finality and integrity of criminal proceedings, which would be compromised were the state allowed to arbitrarily ignore unsatisfactory outcomes;

(4) restricting prosecutorial discretion over the charging process; and (5) eliminating judicial discretion to impose cumulative punishments not authorized by the legislature.

### Self-Incrimination Clause

The Fifth Amendment's right against self-incrimination permits an individual to refuse to disclose information that could be used against him or her in a criminal prosecution. The purpose of this right is to inhibit the government from compelling a confession through force, coercion, or deception. The Self-Incrimination Clause applies to any state or federal legal proceeding, whether it is civil, criminal, administrative, or judicial in nature. This privilege is frequently invoked during the trial phase of legal proceedings, where individuals are placed under oath and asked questions on the witness stand.

The privilege is also asserted with some frequency during the pretrial phase of legal proceedings. In the pretrial phase of criminal cases, it is usually asserted in response to pointed questions asked by law enforcement agents, prosecutors, and other government officials who are seeking to determine the persons responsible for a particular crime. During the pretrial phase of civil cases, parties may assert the right against self-incrimination when potentially damaging questions are posed in depositions and interrogatories.

The right against self-incrimination largely took hold in English law with the seventeenth-century trial of John Lilburne. Lilburne was a Puritan agitator who opposed British attempts to impose Anglican religious uniformity across England. In 1637, Lilburne was prosecuted for attempting to smuggle several thousand Puritan pamphlets into England. Before the STAR CHAMBER (an English court with jurisdiction to extinguish nonconformity in the realm), Lilburne refused to take an oath requiring him to answer truthfully any question asked of him. He said that he could see that the court was trying to ensnare him, and he claimed that the law of God and the law of the land supported his right against self-accusation. Lilburne was whipped and pilloried for refusing to take the oath. Parliament later declared his punishment illegal, abolished the Star Chamber, and ultimately recognized the right against self-incrimination.

The American colonists, particularly the Puritans in Massachusetts, were familiar with the plight of Lilburne. Nonetheless, the Massachusetts Body of Liberties, a collection of rules of conduct for the Puritan colonists taken nearly verbatim from the Bible, permitted the use of torture to extract confessions from defendants who were accused of capital crimes. Many other colonies subjected political and religious dissenters to inquisitorial judicial proceedings not unlike those employed in England. In many of these proceedings, the accused persons were not entitled to remain silent but were often asked to provide evidence of their innocence. Even after the Revolution, the constitutions of four states offered no protections against self-incrimination. As Madison drafted the original version of the Fifth Amendment, the lessons of English and colonial history were firmly in his mind.

The U.S. Supreme Court has interpreted the Self-Incrimination Clause more broadly than many of the Framers probably would have. MIRANDA V. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), illustrates this point. In *Miranda* the Court held that any statements made by defendants while in police custody before trial will be inadmissible during prosecution unless the police first warn the defendants that they have (1) the right to remain silent, (2) the right to consult an attorney before being questioned by the police, (3) the right to have an attorney present during police questioning, (4) the right to a court-appointed attorney if they cannot afford one, and (5) the right to be informed that any statements they do make can and will be used in their prosecution. Although the *Miranda* warnings are not provided in the Fifth Amendment's Self-Incrimination Clause, the Court has ruled that they constitute an essential part of a judicially created buffer zone that is necessary to protect rights that are specifically set forth in the Constitution.

In *Dickerson v. United States* 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed.2d 405 (2000), the U.S. Supreme Court concluded that the *Miranda* decision was based on Fifth Amendment principles and therefore that it could not be overturned legislatively. Congressional anger at the Miranda decision had led to the passage in 1968 of a law, 18 U.S.C.A. § 3501, that had restored voluntariness as the test for admitting confessions in federal court. However, the United States DEPARTMENT OF JUSTICE, under attorneys general of both major political parties, has refused to enforce the provision, believing the law to be unconstitutional. The law lay dormant until the Fourth Circuit Court of Appeals ruled

in 1999 that Congress had the constitutional authority to pass the law. Chief Justice WILLIAM REHNQUIST, a frequent critic of the *Miranda* decision, joined the majority in rejecting the Fourth Circuit interpretation. Although members of the Court might not agree with the reasoning and the rule of *Miranda*, Rehnquist acknowledged the essential place that *Miranda* has in U.S. law and society. He pointed out the importance that the judicial system places on STARE DECISIS, a concept that counsels courts to honor judicial precedents to ensure stability and predictability in decision-making. A court should only overrule its case precedents if there is, in Rehnquist's words, "special justification." The Court in Dickerson concluded there were no special justifications.

Despite this decision the controversy over *Miranda* has not abated. In 2002 the Supreme Court took up the matter again when it reviewed *Martinez v. Chavez*, 270 F.3d 852 (9th Cir. 2001). The Court must decide whether the Fifth Amendment conveys a constitutional right to be free of coercive interrogation, or merely a right not to have forced confessions used against them at trial.

### Due Process Clause

The Fifth Amendment's Due Process Clause has two aspects: procedural and substantive. Procedural due process is concerned with the process by which legal proceedings are conducted. It requires that all persons who will be materially affected by a legal proceeding receive notice of its time, place, and subject matter so that they will have an adequate opportunity to prepare. It also requires that legal proceedings be conducted in a fair manner by an impartial judge who will allow the interested parties to present fully their complaints, grievances, and defenses. The Due Process Clause governs civil, criminal, and administrative proceedings from the pretrial stage through final appeal, and proceedings that produce ARBITRARY or capricious results will be overturned as unconstitutional.

SUBSTANTIVE DUE PROCESS is concerned with the content of particular laws that are applied during legal proceedings. Before WORLD WAR II, the U.S. Supreme Court relied on substantive due process to overturn legislation that infringed on a variety of property interests, including the right of employers to determine the wages their employees would be paid and the number of hours they could work. Since World War II, the Court has relied on substantive due process to protect privacy and autonomy interests of adults, including the right to use contraception and the right to have an ABORTION.

The line separating procedure from substance is not always clear. For example, procedural due process guarantees criminal defendants the right to a fair trial, and substantive due process specifies that 12 jurors must return a unanimous guilty verdict before the death penalty can be imposed. The concepts of substantive and procedural due process trace back to English law. The MAGNA CHARTA provided, "No free man shall be seized, or imprisoned, or disseised, or outlawed, or exiled, or injured in any way . . . except by the lawful judgment of his peers, or by the law of the land" (art. 39). According to eminent English jurist SIR EDWARD COKE, *law of the land* and *due process of law* were interchangeable terms that possessed both procedural and substantive meaning.

The American colonists followed the English tradition of attributing substantive and procedural qualities to the concepts of due process and the law of the land. Maryland and Massachusetts, for example, equated the two concepts with colonial COMMON LAW and legislation regardless of their procedural content. On the other hand, Virginia, Pennsylvania, and Vermont all passed constitutional provisions identifying the *law of the land* with specific procedural safeguards, including the right against self-incrimination. Thus, when the Due Process Clause was submitted to the state conventions for ratification, it was popularly understood to place procedural requirements on legal proceedings as well as substantive limitations on the law applied in those proceedings.

### Eminent Domain Clause

When the government takes PERSONAL PROPERTY for public use, the law calls it a taking and protects it under the EMINENT DOMAIN CLAUSE of the Fifth Amendment. The Eminent Domain Clause permits the government to appropriate private property, both real estate and personal belongings, for a public purpose so long as the owner receives just compensation, which is normally equated with the fair market value of the property. The Fifth Amendment attempts to strike a balance between the needs of the public and the property rights of the owner.

The power of eminent domain was first recognized in England in 1215. Article 39 of the

Magna Charta read, "no free man shall be . . . disseised [deprived] of his freehold . . . except by the lawful judgment of his peers, or by the law of the land." No compensation was awarded to owners whose property was taken by the government for public use. Instead, English law merely required that the government obtain ownership of private property through existing legal channels, such as parliamentary legislation. This principle was followed in England for several centuries, and was later adopted by the American colonies.

Uncompensated takings of private property by colonial governments generally involved unimproved land (i.e., land that had not been built on). Colonial governments often appropriated private land to build roads and bridges in order to develop America's frontiers. During the American Revolution, the power of eminent domain was used to seize the land of colonists who were loyal to Great Britain, and to obtain various goods for military consumption. Compensation was rarely given to individual owners who were deprived of their property by colonial governments because making personal sacrifices for the common good, including forfeiting personal property, was considered an essential duty of every colonist.

Not everyone in the colonies believed that personal property interests should always be sacrificed for the greater good of society. Many colonists expressed distress over legislatures that were abusing their power of eminent domain. New York, for example, regularly failed to recognize title to real estate in its colony that was held by residents of Vermont. Other colonies also discriminated in favor of their own residents, and against persons whose patriotism was questionable during the Revolution. It was in this context that the Eminent Domain Clause of the Fifth Amendment was drafted.

During the twentieth century, the U.S. Supreme Court has enlarged the protection against uncompensated takings of private property by state and federal governments. The Eminent Domain Clause has been interpreted to protect not only owners whose property is physically taken by the government, but also owners whose property value is diminished as a result of government activity. Thus, compensable takings under the Fifth Amendment result from ZONING ordinances that deny property owners an economically viable use of their land (*Agins v. City of Tiburon,* 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 [1980]), environmental regulations that require the government to occupy an owner's land in order to monitor groundwater wells (*Hendler v. United States,* 952 F.2d 1364 [Fed. Cir. 1991], land-use regulations that curtail mining operations (*Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 [1992]), and government-owned airports that lower property values in adjacent neighborhoods (*United States v. Causby,* 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 [1946]).

The U.S. Supreme Court, in *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed.2d 592 (2001), declared that property owners may file lawsuits without filing additional permit applications. Most importantly, the Court overturned a ruling that barred property owners from filing suit if they took possession of the property after the environmental regulations had been enacted. It made no sense to allow a state to avoid suit simply because of a transfer of legal title to the property. Thus, the state "would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land."

### Grand Jury Clause

A grand jury is a group of citizens who are summoned to criminal court by the sheriff to consider accusations and complaints leveled against persons who are suspected of engaging in criminal conduct. Grand juries do not determine guilt or innocence. Instead, they determine whether PROBABLE CAUSE exists to believe that the accused has committed a crime, and they return an indictment (i.e., a formal charge against the accused) if they do find probable cause. In common law, a grand jury consisted of not fewer than 12, and not more than 23, men. Today, grand juries impaneled before a federal district court must consist of not fewer than 16, and not more than 23, men and women.

Potential jurors are usually drawn from lists of qualified residents. Persons who are below the age of majority, who have been convicted of certain crimes, who or are biased toward the accused are ineligible to serve as grand jurors.

The grand jury originated in England during the reign of HENRY II (1154–89). In 1166, a statute called the Assize of Clarendon was enacted. The assize provided that no person could be prosecuted unless four men from each township and 12 men from each hundred

appeared before the county court to accuse the individual of a specific crime. This compulsory process, called a presenting jury, foreshadowed the grand jury as an accusatory body that identified individuals for prosecution but made no finding as to guilt or innocence.

As the grand jury system developed in England and colonial America, it protected innocent persons who faced unfounded charges initiated by political, religious, and personal adversaries. The impartiality of grand juries is essential. This is a significant reason why the proceedings are convened in secrecy; otherwise, public scrutiny and similar prejudicial influences could affect their decision-making process. Although grand juries must be impartial, accused persons have no constitutional right to present evidence on their behalf or to cross-examine witnesses, and HEARSAY evidence may be introduced against them.

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CROSS-REFERENCES

Criminal Law; Criminal Procedure; Custodial Interrogation.

## FILE

*A record of the court. A paper is said to be filed when it is delivered to the proper officer to be kept on file as a matter of record and reference. But in general the terms* file *and* the files *are used loosely to denote the official custody of the court or the place in the offices of a court where the records and papers are kept. The file in a case includes the original complaint and all pleadings and papers belonging thereto.*

A clerk files a document by endorsing it on the date it is received and retaining it in his or her office for inspection by the parties that it might concern.

## FILIATION PROCEEDING

*A process whereby a court determines the* PATERNITY *of an illegitimate child in order to establish the father's duty to provide support for the child.*

A filiation proceeding is also referred to as a bastardy proceeding or an affiliation proceeding.

CROSS-REFERENCES

Illegitimacy.

## FILIBUSTER

*A tactic used by a legislative representative to hinder and delay consideration of and action to be taken on a proposed bill through prolonged, irrelevant, and procrastinating speeches on the floor of the House, Senate, or other legislative body.*

A filibuster is stopped by cloture, a legislative procedure that enables a vote to be taken on the proposed measure.

## FILIUS NULLIUS

*[*Latin, A son of nobody.*] An illegitimate child who had few legal rights under the* COMMON LAW.

Laws have broadened the legal rights of illegitimate children who, in the language of some statutes, are referred to as nonmarital children.

CROSS-REFERENCES

Illegitimacy.

## ♦ FILLMORE, MILLARD

Millard Fillmore was a Whig, a member of the New York Assembly, a member of the U.S. Congress, vice president of the United States under ZACHARY TAYLOR, and the 13th president of the United States. Despite a personal dislike of SLAVERY, he signed into law the FUGITIVE SLAVE ACT OF 1850, among other bills that originated in the COMPROMISE OF 1850. His administration supported trade with foreign countries, forging one of the first trade agreements with Japan, but Fillmore was opposed to expansionism and refused to support an attempted annexation of Cuba in 1851.

Fillmore was born January 7, 1800, in Locke, New York. His father, Nathaniel Fillmore, was a farmer who wanted Fillmore to escape a life of poverty. Fillmore left school at an early age to become apprenticed, but a judge recognized his talents and ambition and persuaded him to study law. He was admitted to the bar at the age

of 24 and soon became a leading lawyer in the state of New York.

In 1828, Fillmore was elected to the New York Assembly, and in 1832, he was elected to Congress, where he served three terms. In 1844, he ran unsuccessfully for governor of New York State. In 1848, the WHIG PARTY nominated him for vice president to run with the Mexican War hero Taylor. Fillmore and Taylor won the election by appeasing both northern and southern voters, taking the position that although slavery was evil, it was a problem that had to be solved by the states.

Fillmore was disappointed with his lack of power and voice as vice president. The country was facing a crisis over the issues of slavery and the admittance of Texas, California, and New Mexico into the Union. The Compromise of 1850, written by Senator HENRY CLAY, was an omnibus that recommended that California be admitted to the Union as a free state, the rest of Mexican cession be formed without restrictions on slavery, Texas end its boundary dispute with New Mexico, and a new fugitive slave law be passed. As president of the Senate, Fillmore was involved in the debate over the compromise but found himself unable to influence its course.

President Taylor was seen as the greatest obstacle to the compromise because he refused to sign it as one comprehensive piece of legislation, wanting to consider separately the issue of California's admission into the Union as a free state. The South feared that if California was admitted as a free state, other western territories would eventually become free states, thereby giving the antislavery movement a more powerful voice in Congress. In the summer of 1850,

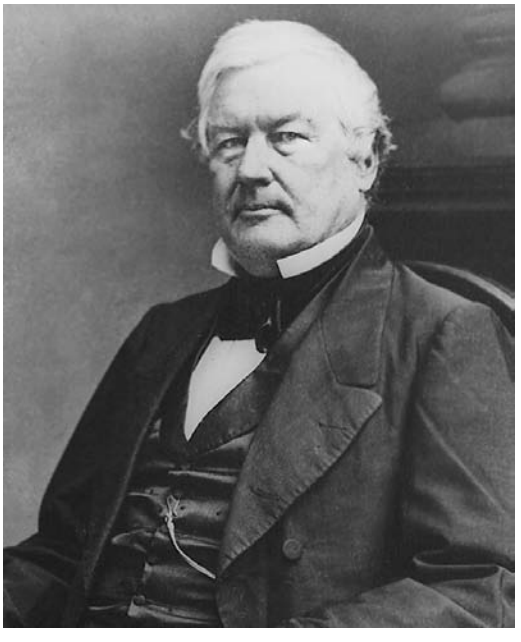

*Millard Fillmore.*
LIBRARY OF CONGRESS

Taylor became even more hostile to the South when he threatened to lead the U.S. Army against the Texas militia, which was trying to spread slavery westward by threatening Texas's boundary with the territory of New Mexico. This never transpired because on July 9, 1850, Taylor died suddenly and Fillmore was sworn in as president.

Fillmore supported the compromise, but he too wanted the legislation divided into separate bills. With the departure from the Senate of the compromise's strongest supporters—Clay, DANIEL WEBSTER, and John C. Calhoun—and the maneuvering of new leaders such as STEPHEN A. DOUGLAS, Jefferson Davis, and

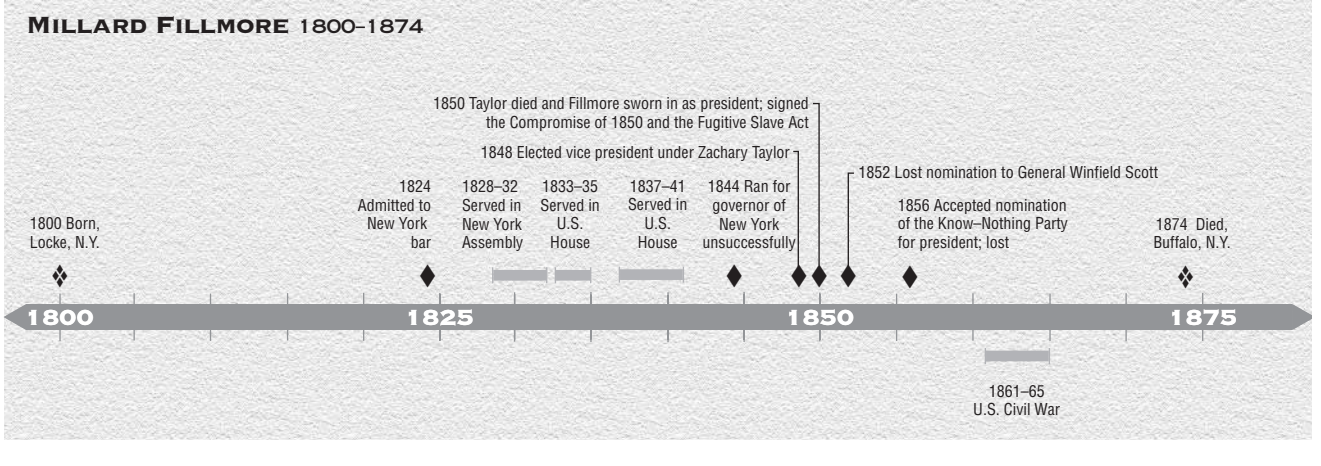

William H. Seward, the bill was split up. Only three months after Taylor's death, all the separate bills were passed by Congress and signed into law by Fillmore.

Fillmore was opposed to slavery and had difficulty signing one of the bills, the Fugitive Slave Act of 1850. The act forbade both government and individuals to help slaves escape from their masters. It also made the federal government responsible for recovering and returning runaway slaves. Fillmore believed it was his constitutional responsibility to enforce the law even though he disagreed with it. In a letter to Webster, he wrote,

> God knows I detest slavery, but it is an existing evil, for which we are not responsible, and we must endure it and give it such protection as is guaranteed by the constitution, till we get rid of it without destroying the last hope of free government in the world.

"LET US REMEMBER THAT REVOLUTIONS DO NOT ALWAYS ESTABLISH FREEDOM. OUR OWN FREE INSTITUTIONS WERE NOT THE OFFSPRING OF OUR REVOLUTION. THEY EXISTED BEFORE."
—MILLARD FILLMORE

In the area of foreign policy, the Fillmore administration achieved one of the first trade agreements ever reached between the empire of Japan and a foreign country. This agreement opened up new sources of coal to power the United States's seagoing steamers, and it helped establish a Pacific trade route between the United States and Asia. Fillmore opposed the popular nineteenth-century philosophy of Manifest Destiny, which regarded U.S. expansion into the Pacific as the inevitable will of God. He thought seizing another nation's land was dishonorable. In August 1851, he refused to give military support to an attempted annexation of Cuba by four hundred U.S. citizens, mostly veterans of the Mexican War. The invasion of the Spanish colony failed, and most of the invaders, including their leader, Narciso Lopez, were captured and executed.

Early in his presidency, Fillmore had determined that he would not seek reelection, but in the months leading up to the 1852 election, it became clear that the southern Whigs would support only Fillmore. Even though he did not desire his party's nomination, Fillmore left his name on the convention ballot to prevent the nomination of General Winfield Scott. Fillmore knew the general would be a hopeless candidate in the South because of his connections with abolitionists like Seward. But on the fifty-third ballot, Scott was nominated. As Fillmore predicted, Scott lost the general election to Democrat **FRANKLIN PIERCE**.

Fillmore's last venture into politics came in 1856 when he accepted the presidential nomination of the **KNOW-NOTHING PARTY**. This political party was formed as a result of a division in the Whig Party between those who favored national expansion and those who were against slavery. The Know-Nothings, created by the national Whigs, used their opposition to mass immigration from Europe to unite northern and southern voters. U.S. citizens never took the party seriously, and Fillmore lost the election to southern Democrat **JAMES BUCHANAN**.

After the election, Fillmore settled down in Buffalo, New York, and became the city's leading citizen. He participated in many committees and supported institutions such as the University of Buffalo and the Orphan Asylum. When the nation fell into civil war in 1861, he pledged his support to the Union cause and worked to enlist Buffalo men in the war effort. His support dwindled as the war raged on, and in 1863, he publicly denounced Abraham Lincoln's administration's handling of the conflict and supported George B. McClellan in the 1864 presidential election.

On February 13, 1874, Fillmore suffered a stroke, which was followed by a second stroke on February 26. He died on March 8, 1874, at the age of 74.

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## FINAL DECISION

*The resolution of a controversy by a court or series of courts from which no appeal may be taken and that precludes further action. The last act by a lower court that is required for the completion of a lawsuit, such as the handing down of a final judgment upon which an appeal to a higher court may be brought.*

## FINANCE CHARGE

*The amount owed to a lender by a purchaser-debtor to be allowed to pay for goods purchased over a series of installments, as opposed to one lump sum at the time of the sale or billing.*

A finance charge, sometimes called the cost of credit, is expressed as an annual interest rate

levied upon the purchase price. It does not include any amounts that the lender might require for insurance premiums, delinquency charges, attorney's fees, court costs, collection expenses, or official fees that might be incurred should the debtor default in the repayment of the debt.

Federal and state "truth-in-lending" laws mandate that the complete cost of finance charges be fully disclosed on credit agreements and billing statements.

CROSS-REFERENCES

Consumer Credit Protection Act.

## FINANCIAL RESPONSIBILITY ACTS

*State statutes that require owners of motor vehicles to produce proof of financial accountability as a condition to acquiring a license and registration so that judgments rendered against them arising out of the operation of the vehicles may be satisfied.*

CROSS-REFERENCES

Automobiles.

## FINANCIAL STATEMENT

*Any report summarizing the financial condition or financial results of a person or an organization on any date or for any period. Financial statements include the balance sheet and the income statement and sometimes the statement of changes in financial position.*

## FINDER

*An intermediary who contracts to find, introduce, and bring together parties to a business opportunity, leaving ultimate negotiations and consummation of business transaction to the principals. With respect to a* SECURITIES *issue, refers to one who brings together an issuer and an underwriter; in connection with mergers, refers to one who brings two companies together. May also refer to one who secures mortgage financing for a borrower, locates a particular type of executive or professional for a corporation, or locates a particular type of business acquisition for a corporation.*

## FINDING

*The result of the deliberations of a jury or a court. A decision upon a* QUESTION OF FACT *reached as the result of a judicial examination or investigation by a court, jury, referee,* CORONER, *etc. A recital of the facts as found. The word commonly applies to the result reached by a judge or jury.*

## FINDING LOST GOODS

*The discovery of* PERSONAL PROPERTY *that has been unintentionally removed from its owner's possession through his or her neglect or inadvertence.*

The fact that an owner has involuntarily parted with the property and that he or she is ignorant of its location sufficiently establishes that the property is lost. *Mislaid property* is property that an owner intentionally places somewhere so that it can eventually be found again, but he or she subsequently forgets where it was placed. The right to possess the property rests in the issue of whether the property is to be considered lost or mislaid. This issue must be determined upon examination of the particular facts and circumstances of any given case.

*Abandoned property* is property to which the owner has purposefully relinquished all rights as an owner thereto. Since such property is ownerless, it can be owned by the first person who takes it with the intent to claim it as his or her property.

The place where the property is discovered is an important factor in determining whether it is lost or mislaid.

When property is in someone's possession, it cannot be found within the meaning of lost property. An article in the possession and protection of the owner of the place where it is found is not legally considered lost. Similarly, an owner of land is considered to have possession of all articles on the land even though he or she may be unaware of their presence. If the finder of lost property is an employee of the owner of the land, the owner's right to custody of the property is superior to that of the employee.

Property found in a public or semipublic place—where the public is ordinarily invited and expected to be—may be considered lost, since the owner or manager of the location does not represent its owner.

*Treasure trove* is any gold or silver in coin, plate, or bullion hidden in the earth or other private place by an unknown owner for a long time. The property is not treasure trove unless the identity of the owner is unascertainable. Ordinarily, the treasure must be in the form of coin

*Treasure trove, such as these coins from the Spanish ship* Juno, *which sank near Assateague Island, Va., in 1802, is the property of the person who takes possession of it.*

AP/WIDE WORLD PHOTOS

or bullion, but it may also include paper currency—particularly when such currency is discovered with both these precious metals.

An individual who finds lost property does not acquire absolute ownership of the property. In order to obtain title to, or rights in, the lost property, the finder must intentionally take possession and control over it.

The individual who acquires possession of a lost or mislaid article has superior rights to the item over anyone except the true owner. This person is only the apparent owner. The finder's title to the property may be forfeited upon discovery of the true owner, whose title in it is unaffected by the fact that the article has been lost. A finder's title is contingent upon the potential discovery of the true owner. He or she may not, therefore, transfer title to another individual.

If the true owner of lost property dies before his or her identity is discovered, the title and right to the lost article passes to the executor or administrator of the owner's estate for distribution to his or her heirs pursuant to the terms of his or her will or the laws of **DESCENT AND DISTRIBUTION.**

As between the finder of treasure trove and its true owner, the true owner prevails. It has been held, however, that the finder of treasure trove has greater rights to it than the heirs of the individual who concealed it.

The true owner of lost property is responsible for paying all reasonable expenses incurred by a finder in the discovery and preservation of lost property. The finder may also be entitled to a small compensation for his or her time and effort; however, the finding party does not acquire a lien against the property. The finder cannot receive reimbursement for his or her expenses and time with use of the property, nor is the individual entitled to a reward for finding it unless one has been offered.

Some state statutes provide that a finder of lost goods is entitled to recover expenses that were necessary to preserve the property and to a reward for holding it. These statutes are consistent with statutes providing that the finder must return the property to its true owner and that a finder who is aware of the identity of the true owner is guilty of **LARCENY** if he or she keeps the goods. Such statutes are enacted in order to aid the finding of lost property.

An individual who finds and takes possession of lost property ordinarily has the right to possess it over everyone but the true owner. Some statutes provide that if the true owner neglects to appear and claim the property within a certain time period after the finding of the article has been published in a local newspaper, the finder is entitled to retain part of the property or part of its value while the remaining portion passes to the state, or one of its departments or agencies.

The finder of treasure trove, under early **COMMON LAW**, took title to it over everyone except the true owner. This doctrine was changed in England by a statute that granted title to the crown, subject to the claims of the true owner. In the United States, the law regarding treasure trove has largely been combined into the law governing lost property. Some cases still hold, however, that the old treasure trove law is not merged into the statutory law relating to lost property. The common law of early England has also been held to apply in the absence of a statute governing treasure trove.

In either instance, the title to treasure trove belongs to the finder over all other people except the true owner, unless otherwise provided by statute. If there is a conflict as to ownership between the true owner and the state, the owner is entitled to treasure trove.

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## FINES

*Monetary charges imposed upon individuals who have been convicted of a crime or a lesser offense.*

A fine is a criminal sanction. A civil sanction, by contrast, is called a penalty. The term *fine* is sometimes used to describe a penalty, but the terms *fine* and *penalty* should be kept separate because the consequences are different: nonpayment of a criminal fine can result in incarceration, whereas nonpayment of a civil penalty cannot.

Federal and state criminal statutes authorize fines for certain offenses. Depending on the crime, a fine may be imposed in addition to incarceration, restitution, community service, or PROBATION. The amount of a fine varies with the severity of the offense. State and federal criminal codes generally break down felonies and misdemeanors into classes or degrees. In Kentucky, for example, the fine for a violation or a class B misdemeanor may not exceed $250. For a class A misdemeanor, the fine may not exceed $500 (Ky. Rev. Stat. Ann. § 534.040). For a felony conviction, Kentucky courts are bound by statute to fine the defendant not less than $1,000, and not more than $10,000 or double the gain from the commission of the offense, whichever is greater (Ky. Rev. Stat. Ann. § 534.030). Two or more felonies committed through a single act may be fined separately in Kentucky, but the aggregate may not exceed $10,000 or double the amount of the illicit gain, whichever is greater.

In federal court, a felony is subject to a fine of not more than $250,000. A fine of $250,000 is also authorized for a misdemeanor resulting in death. Fines for class A misdemeanors not resulting in death may reach $100,000, and similar class B and C misdemeanors may result in a fine of up to $5,000 (18 U.S.C.A. § 3571). Federal law also allows a court to fine a defendant who has financially benefited from a crime, an amount twice that illicitly gained.

Federal and state laws authorize fines of similarly scaled amounts for organizations. The maximum fine for organizations is much higher than that for individuals. For instance, under 18 U.S.C.A. § 3571, an organization guilty of a felony may be fined as much as $500,000. Kentucky also doubles the fine limit for organizations. For example, an organization in Kentucky that commits a felony may be fined $20,000, up from $10,000 for an individual (Ky. Rev. Stat. Ann. § 534.050).

*A California roadside sign warns of a fine for littering. The amount of a fine typically varies with the severity of the offense. In California, for example, a person convicted of littering must pay a mandatory fine of no less than $100 and no more than $1,000 for a first time offense.*

CHROMOSOHM INC./CORBIS

States also authorize fines for specific crimes. In Kentucky, for example, a fine of not more than $2,500 and not less than $1,000 is required for the illegal sale of tobacco to a minor (§ 438.313). Statutes fix the maximum fine for a given offense, and statutes can be changed, so fine amounts can change.

In state courts, sentencing is usually left to the discretion of the judge. If a defendant is found by a court to be indigent, the court generally will not impose a fine (see, e.g., Ky. Rev. Stat. Ann. §§ 534.030, 534.040). A determination of indigence generally involves an examination of several factors, including income, earning capacity, financial resources, the burden the fine may impose on persons dependent on the defendant, and the need to deprive the defendant of any illegally obtained gains. Where an indigent defendant is convicted of an offense that calls for incarceration, the court generally will not impose a fine in addition to the incarceration.

Federal courts must sometimes follow prison sentences mandated by federal statute, but the decision of whether to impose a fine in addition to any sentence is generally within the

judge's discretion. Both state and federal courts may later reduce the amount of a fine. The statutory repayment period of a fine may be extended upon request of the court, and payments may be allowed in installments.

The U.S. Supreme Court has placed limits on incarceration for nonpayment of fines. In *Williams v. Illinois,* 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970), the defendant, Willie E. Williams, was convicted of petty theft and sentenced to one year in prison and a $500 fine, the maximum sentence allowed under the applicable statute. When Williams was unable to pay the fine upon completing his year in jail, he was kept incarcerated to "work off" the fine at a rate of $5 a day. Williams appealed, and the U.S. Supreme Court ruled that, under the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT, no state may increase the sentence of a defendant beyond the maximum period specified by statute for failure to pay a fine.

Shortly after the *Williams* case, the Supreme Court ruled that a state may not convert a fine into incarceration if the conviction warrants only a fine. In *Tate v. Short,* 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971), the defendant, Preston A. Tate, was unable to pay $425 in fines for traffic offenses and was committed to prison to work off his fine at a rate of $5 a day. The Supreme Court ruled that a state may not "impos[e] a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."

Neither the *Williams* ruling nor the *Tate* ruling prevents a court from imprisoning a defendant who is able, but refuses, to pay a fine. The court may do so after finding that the defendant was somehow responsible for the failure to pay and that alternative forms of punishment would be inadequate to meet the state's interest in punishment and deterrence (*Bearden v. Georgia,* 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 [1983]).

In a case of willful nonpayment, the court may order incarceration for a period of time specified under statute. In Kentucky, a prison term of up to six months may be ordered if the unpaid fine was imposed for the conviction of a felony. Nonpayment of a misdemeanor fine may result in a prison term of up to one-third the maximum authorized term for the offense committed. For a violation, the maximum term is ten days. This amount can be cumulative. For example, if a person refuses to pay the fines for ten violations, that person can be incarcerated for one hundred days (Ky. Rev. Stat. Ann. § 534.060).

Fines are often used to pay for incarceration and other sentencing costs. In 1984, Congress passed the Comprehensive CRIME CONTROL ACT (codified in scattered sections of 5, 8, 29, 41, 42, and 50 App. U.S.C.A.), which established the U.S. Sentencing Guidelines Commission. According to section 5E1.2 of the act, a federal court shall impose a fine that is at least sufficient to pay the costs of imprisonment, probation, or supervised release order. Many states have followed suit, and fines are increasingly used to defray the costs of punishment.

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## FINGERPRINTS

*Impressions or reproductions of the distinctive pattern of lines and grooves on the skin of human fingertips.*

Fingerprints are reproduced by pressing a person's fingertips into ink and then onto a piece of paper. Fingerprints left on surfaces can be obtained and examined through a dusting process and other processes conducted by forensics experts.

The lines and grooves in fingertips are unique personal characteristics, and thus no two persons have identical fingerprints. Although various scientists had earlier observed the intricate and varying patterns of fingerprints, their use as evidence in trials is undocumented in

Anglo-American law before the nineteenth century. In 1880 Henry Faulds, a Scottish physician, suggested in a letter to the British journal *Nature* that fingerprints could be used for identification purposes in a criminal investigation. Courts in the United States began to accept fingerprints as identification evidence in legal cases in the early twentieth century.

Fingerprints may be used in both civil and criminal courts when they are relevant to a case. They are most common in criminal prosecutions, where they may be used to identify the defendant and connect the defendant to the crime. In a murder prosecution, for example, the defendant's fingerprints on the murder weapon may be offered as evidence tending to show that the defendant committed the crime.

The taking of fingerprints from a criminal defendant raises no FIFTH AMENDMENT concerns. Under the Fifth Amendment to the U.S. Constitution, no person may be compelled to be a compulsory witness against himself or herself. However, this provision generally applies only to involuntary confessions and forced testimony. A person suspected of a crime does not have the right to be free from the taking of fingerprints. Criminal suspects may also be required to surrender other personal information, such as physical appearance and measurements, handwriting and voice samples, teeth bites, normal walking gait, and normal standing posture. Unlike most of these characteristics, fingerprints cannot be easily changed.

Fingerprints are also used outside of court for a variety of purposes. Federal, state, and local lawmakers use them to help manage government resources. For instance, many states fingerprint the recipients of public assistance to ensure that only qualified recipients receive assistance. In many jurisdictions a set of fingerprints or a thumbprint is taken from a person who is arrested and then released before her or his court date. This gives law enforcement authorities an identifying characteristic to use in apprehending the defendant in case the defendant does not appear in court for the prosecution.

In Georgia, liquor manufacturers, distributors, wholesalers, and retailers must send a set of fingerprints to the Georgia Bureau of Investigation when they apply for a license to conduct business in the state. The fingerprints are checked against those of convicted criminals as part of a background check on the applicant (Ga. Code Ann. § 3-3-2 [1996]).

Fingerprint information is easily accessible to police departments across the United States. Under 28 U.S.C.A. § 531 (1996), Congress appropriates funds for the creation and maintenance of a national computer database containing the fingerprints of convicted criminals and former criminal suspects. The database is called the Integrated Automated Fingerprint Identification System. Any state that requires persons convicted of SEX OFFENSES to submit DNA samples qualifies for the funding and federal support needed to implement the system.

DNA fingerprinting, or profiling, identifies the chemical pattern in an individual's genetic material. It is a very complex analysis. Nevertheless, it is widely accepted by courts in the United States and generally is considered to yield results that are as accurate as those of regular fingerprinting.

There has been some recent controversy over the admission of fingerprints in criminal cases. At least 40 challenges have been filed against the admission of fingerprints in courts, most of them in the past 10 years, and one was upheld. U.S. District Court Judge Louis Pollak ruled against the use of fingerprints in a murder trial in Philadelphia in 2002, but reversed himself two months later. A book questioning the reliability of fingerprints, *Suspect Identities: A History of Fingerprinting and Criminal Identification* by Simon Cole, was published in 2001.

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**CROSS-REFERENCES**

DNA Evidence; Forensic Science.

## FIRE

*The primary result of combustion. The juridical meaning does not differ from the vernacular meaning.*

It is a crime to burn certain types of property under particular circumstances, both under the COMMON LAW and a number of state statutes. Some of these crimes are regarded as ARSON, but ordinarily, arson relates specifically to buildings and their contents.

The act of willfully and maliciously setting fire to property belonging to another person—such as stacks of hay or grain, grasses, fences, or wood—is ordinarily punishable as a misdemeanor. Some jurisdictions grade the offense as a felony.

Statutes relating to fires ordinarily define the acts required for conviction. Under these statutes, *willfully* is defined as meaning with an evil or malicious intent or malevolent motive.

An individual who willfully or negligently sets fire to his or her own woods, prairie land, or other specified areas might be guilty of a misdemeanor. In addition, it is a misdemeanor to burn such areas without first giving proper notice to adjacent landowners or for an individual to allow a fire kindled on his or her wood or prairie to escape and burn adjoining property.

Some statutes relate to burning cultivated ground. Such legislation exists to prevent disastrous fires, and they do not apply to ordinary acts of agriculture that are properly conducted, such as the setting of fire to an area of land to prepare for planting.

Under some statutes that prohibit or regulate the setting of fires, a monetary penalty is imposed on people who violate their provisions. Frequently an agency—such as a state board of forest park preservation commissioners—is named specifically in the statute to bring an action to collect the penalty. Some statutes impose liability on an individual who allows fire to escape from his or her own property even though such escape is not willful, while other statutes provide that a landowner who sets a fire as a result of necessity—such as a back fire used to subdue another fire—will not be held liable. An individual is usually free from liability when he or she is lawfully burning something on his or her own farm and the fire accidentally spreads to an adjacent farm or woods.

There is civil liability for damages at common law imposed upon anyone who willfully and intentionally sets a fire. Some statutes under which criminal liability is imposed for setting certain types of fires also make express provisions that the individual whose property is damaged by the fire may initiate a civil action to recover any loss. Generally, the limit of damages is the loss actually incurred by the fire. Some statutes, however, provide for the recovery of double or treble damages.

## FIRE STATUTE

*In* ADMIRALTY LAW, *a federal law that exempts the owner of a vessel from liability to any person for loss of, or damage to, merchandise shipped, taken in, or put on board such vessel as a result of a fire, unless the fire was intentionally or negligently caused by the owner.*

## FIRM OFFER

*A definite and binding proposal, in writing, to enter into a contractual agreement.*

A firm offer generally states that it will remain open for a certain set time period during which it is incapable of being revoked.

Firm offers are frequently made by merchants who wish to buy or sell goods and are governed by the UNIFORM COMMERCIAL CODE.

## FIRST AMENDMENT

The First Amendment to the U.S. Constitution reads:

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

At first glance, the First Amendment appears to be written in clear, unequivocal, and facile terms: "Congress shall make *no* law" (emphasis added) in contravention of certain religious and political principles. After a closer reading, and upon further reflection, the amendment's underlying complexities rise to the surface in the form of persistent questions that have nagged the legal system over the last two centuries.

What kind of law "respect[s] the establishment of religion"? Does the First Amendment include here only laws that would establish an official national religion, as the Anglican Church was established in England prior to the Ameri-

can Revolution? Or does it also include laws that recognize or endorse religious activities such as the celebration of Christmas? More importantly, can people agree on what is meant by the word *religion* so that judges may know when religion is being "established" or when the right to its "free exercise" has been infringed?

In the area of free speech, does the right to speak your mind include the right to use offensive language that could start a fight or incite a riot? Is FREEDOM OF SPEECH synonymous with freedom of expression, such that the right to condemn the U.S. government extends to offensive symbolic actions involving no written or spoken words, like burning the U.S. flag? Does FREEDOM OF THE PRESS protect the right to publish scurrilous, defamatory, and libelous material? If not, can the government prohibit the publication of such material before it goes to print?

The U.S. Supreme Court has confronted most of these questions. Its answers have not always produced unanimous, or even widespread, agreement around the United States. But the Court's decisions have provided a prism through which U.S. citizens have examined the appropriate limitations society may place on the freedoms protected by the First Amendment, and have sparked colorful and spirited discussions among friends and family members, as well as politicians and their constituents.

*Burning a U.S. flag to protest government policies is protected as symbolic expression under the First Amendment.*

AP/WIDE WORLD PHOTOS

### Freedom of Speech

The Founding Fathers were intimately familiar with government suppression of political speech. Prior to the American Revolution, the Crown imprisoned, pilloried, mutilated, exiled, and even killed men and women who belonged to minority political parties in England, in order to extinguish dissenting views. Many of these dissenters left England in search of more freedom in the New World, where they instead found colonial governments that stifled political dissidence with similar fervor. Maryland, for example, passed a law prohibiting "all speeches, practices and attempts relating to [the British Crown], that shall be thought mutinous and seditious," and provided punishments that included whipping, branding, fines, imprisonment, BANISHMENT, and death. The Free Speech Clause of the Constitution was drafted to protect such political dissenters from a similar fate in the newly founded United States.

In light of this background, the U.S. Supreme Court has afforded dissident political speech unparalleled constitutional protection. However, all speech is not equal under the First Amendment. The high court has identified five areas of expression that the government may legitimately restrict under certain circumstances. These areas are speech that incites illegal activity and subversive speech, fighting words, OBSCENITY and PORNOGRAPHY, commercial speech, and symbolic expression.

The Court has also made clear that states cannot restrict the free speech rights of candidates for judicial office. Unlike federal judges, most state judges must stand for election. in their codes of judicial conduct, states have imposed restrictions on what candidates or sitting judges may say about issues, in hopes of preserving judicial independence and assuring the public that the justice system is impartial. The Court, in *Republican Party of Minnesota v.*

*White*, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed.2d 694 (2002), rejected this approach as incompatible with the First Amendment. The restrictions were unconstitutional because they regulated speech based on content and burdened an important category of speech.

**Speech that Incites Illegal Activity and Subversive Speech** Some speakers intend to arouse their listeners to take constructive steps to alter the political landscape. Every day in the United States, people hand out leaflets imploring neighbors to write to Congress about a particular subject, or to vote in a certain fashion on a REFERENDUM, or to contribute financially to political campaigns and civic organizations. For other speakers, existing political channels provide insufficient means to effectuate the type of change desired. These speakers may encourage others to take illegal and subversive measures to change the status quo. Such measures include resisting the draft during wartime, threatening public officials, and joining political organizations aimed at overthrowing the U.S. government.

The U.S. Supreme Court has held that government may not prohibit speech that advocates illegal or subversive activity unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (*Brandenburg v. Ohio,* 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 [1969]). Applying the *Brandenburg* test, the Court ruled that the government could not punish an antiwar protester who yelled, "[W]e'll take the fucking street later," because such speech "amounted to nothing more than advocacy of illegal action at some indefinite future time" (*Hess v. Indiana,* 414 U.S. 105, 94 S. Ct. 326, 38 L. Ed. 2d 303 [1973]). Nor could the government punish someone who, in opposition to the draft during the VIETNAM WAR, proclaimed, "[I]f they ever make me carry a rifle, the first man I want in my sights is [the president of the United States] L.B.J." (*Watts v. United States,* 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 [1969]). Such politically charged rhetoric, the Court held, was mere hyperbole and not a threat intended to be acted on at a definite point in time.

**Fighting Words** Fighting words are words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace" or have a "direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed" (*Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 [1942]). Whereas subversive advocacy exhorts large numbers of people to engage in lawless conduct, fighting words are directed at provoking a specific individual. Generally, only the most inflammatory and derisive epithets will be characterized as fighting words.

Fighting words also should be distinguished from speech that is merely offensive. Crude or insensitive language may be heard in a variety of contexts—at work, on television, even at home. The U.S. Supreme Court has ruled that speech that merely offends, or hurts the feelings of, another person—without eliciting a more dramatic response—is protected by the First Amendment. The Court has also underscored the responsibility of receivers to ignore offensive speech. Receivers can move away or divert their eyes from an offensive speaker, program, image, or message. In one case, the Court ruled that a young man had the right to wear, in a state courthouse, a jacket with the slogan Fuck the Draft emblazoned across the back, because persons at the courthouse could avert their eyes if offended (*Cohen v. California,* 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 [1971]). "One man's vulgarity," the Court said, "is another's lyric," and the words chosen in this case conveyed a stronger message than would a sublimated variation such as Resist the Draft.

**Obscenity and Pornography** State and federal laws attempt to enforce societal norms by encouraging acceptable depictions of human sexuality and eliding unacceptable portrayals. Over the years, libidinous books such as *Lady Chatterly's Lover* (1951–1975) and adult movies such as *Deep Throat* (1972) have rankled communities, which have struggled to determine whether such works should be censored as immoral, or protected as art.

The U.S. Supreme Court has always had difficulty distinguishing obscene material, which is not protected by the First Amendment, from material that is merely salacious or titillating. Justice POTTER STEWART admitted that he could not define obscenity, but quipped, "I know it when I see it." Nonetheless, the Court has articulated a three-part test to determine when sexually oriented material is obscene. Material will not be declared obscene unless (1) the average person, applying contemporary community standards, would find that its pre-

dominant theme appeals to a "prurient" interest; (2) it depicts or describes sexual activity in a "patently offensive" manner; and (3) it lacks, when taken as a whole, serious literary, artistic, political, or scientific value (MILLER V. CALIFORNIA, 413 U.S. 15 93 S. Ct. 2607, 37 L. Ed. 2d 419 [1973]).

Although the U.S. Supreme Court has failed to adequately define words like *prurient, patently offensive,* and *serious artistic value,* literary works that involve sexually related material are strongly protected by the First Amendment, as are magazines like *Playboy* and *Penthouse.* More difficult questions are presented in the area of adult cinema. Courts generally distinguish hard-core pornography, which graphically depicts copulation and oral sex, from soft-core pornography, which displays nudity and human sexuality short of these sex acts. In close cases that fall somewhere in the gray areas of pornography, the outcome may turn on the community standards applied by a jury in a particular locale. Thus, pornography that could be prohibited as obscene in a small rural community might receive First Amendment protection in Times Square.

The reach of the INTERNET has led to the distribution of sexually explicit materials through cyberspace. The federal government has sought to regulate this material, but the U.S. Supreme Court has found First Amendment violations. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed.2d 403 (2002), the Court struck down provisions of the Child Pornography Prevention Act of 1996 (CPPA) because they censored legally protected speech as well as unprotected speech. It noted that the law sought to ban "virtual child pornography," which is produced through computer-generated imaging or youthful-looking adults. The greatest constitutional problems came from the failure of Congress to comply with each element of the *Miller* test. Congress had not required that the material be "offensive" or that it "appealed to prurient interests" in order to violate the law. This made the law overbroad under the First Amendment because all material depicting sexual conduct of persons under 18 years of age would be prohibited, despite any underlying merit or value.

**Commercial Speech** Commercial speech, such as advertising, receives more First Amendment protection than fighting words and obscenity, but less protection than political oratory. Advertising deserves more protection than the first three categories of expression because of the consumer's interest in the free flow of market information (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 [1976]). In a free-market economy, consumers depend on information regarding the quality, quantity, and price of various goods and services. Society is not similarly served by the free exchange of obscenity.

The U.S. Supreme Court has continued to review commercial speech restrictions with a wary eye. In *Lorillard Tobacco Corp. v. Reilly,*, 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed.2d 532 (2001), it struck down state regulations that sought to restrict outdoor and indoor tobacco advertising that targeted minors. The Court found that the provisions were too broad and that they did not advance the state's interests in discouraging tobacco consumption. In another case, *Thompson v. Western States Medical Center,*, 535 U.S. 357, 122 S. Ct. 1497, 152 L. Ed.2d 563 (2002), the Court struck down advertising restrictions on pharmacies and pharmacists, imposed by FOOD AND DRUG ADMINISTRATION (FDA) regulations. The Court found that the FDA had other means of regulating certain products and that regulating speech should be the last option rather than the first. In *U.S. v. United Foods,* 533 U.S. 405, 121 S. Ct. 2334, 150 L. Ed.2d 438 (2001), the Court barred a government-sponsored agricultural product board from assessing fees from producers to be used in product advertisement. It concluded that the First Amendment not only addresses the banning of speech; it also prevents the government from forcing persons to express views they not agree with.

At the same time, commercial speech deserves less protection than do political orations because society has a greater interest in receiving accurate commercial information and may be less savvy in flushing out false and deceptive rhetoric. The average citizen is more prone, the U.S. Supreme Court has suggested, to discount the words of a politician than to discount the words of a Fortune 500 company. The average citizen may be more vulnerable to misleading advertising as well. Even during an election year, most people view more commercial advertisements than political advertisements, and they rely on those advertisements when

purchasing the clothes they wear, the food they eat, and the automobiles they drive. Thus, the U.S. Supreme Court permits government regulation of commercial speech that is intended to prevent misleading and deceptive advertising.

**Symbolic Expression** Not all forms of expression involve words. The nod of a head, the wave of a hand, and the wink of an eye all communicate something without language. The television image of a defenseless Chinese student facing down a line of tanks during protests in support of democracy near Tiananmen Square in 1989 will be forever seared into the minds of viewers.

Not all symbolic conduct is considered speech for First Amendment purposes. If an individual uses a symbolic expression with the intent to communicate a specific message and under circumstances in which the audience is likely to understand its meaning, the government may not regulate that expression unless the regulation serves a significant societal interest unrelated to the suppression of ideas (*Spence v. Washington,* 418 U.S. 405, 94 S. Ct. 2727, 41 L. Ed. 2d 842 [1974]; *United States v. O'Brien,* 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 [1968]). Applying this standard, the U.S. Supreme Court overturned the conviction of a person who had burned the American flag in protest over the policies of President RONALD REAGAN (TEXAS V. JOHNSON, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 [1989]), and reversed the suspension of a high-school student for wearing a black armband in protest of the Vietnam War (TINKER V. DES MOINES INDEPENDENT SCHOOL DISTRICT, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 [1969]), but upheld federal legislation that prohibited the burning of draft cards (*O'Brien*). Of the government interests asserted in these three cases, maintaining the integrity of the SELECTIVE SERVICE SYSTEM was the only interest of sufficient weight to overcome the First Amendment right to engage in symbolic expression.

In *City of Erie v. Pap's A. M.*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed.2d 265 (2000), the U.S. Supreme Court ruled that a ZONING ordinance that barred nude-dancing establishments did not violate the First Amendment, again using the symbolic-expression standard. In that case, the city of Erie, Pennsylvania, had not sought to ban the expressive conduct itself (nude dancing), thus the zoning law was content-neutral. The city had a right under its POLICE POWERS to protect public health and safety. It also had a legitimate reason for the law: the harmful, secondary effects of nude dancing establishments in a community. Finally, the government interest was unrelated to the suppression of free expression,

## Freedom of the Press

The American Revolution was a revolution of literature as well as politics. The colonists published a profusion of newspaper articles, books, essays, and pamphlets in opposition to various forms of British tyranny. Thomas Paine's *Common Sense* (1776) and Thomas Jefferson's Declaration of Independence (1776) are two well-known and influential examples of revolutionary literature published in the colonies. A free press, the Founding Fathers believed, was an essential check against despotism, and integral to advancing human understanding of the sciences, arts, and humanities.

The Founding Fathers did not agree on how best to protect the press from ARBITRARY government action. A majority of the Founding Fathers adhered to the English common-law view that equated a free press with the doctrine of no PRIOR RESTRAINT. This doctrine provided that no publication could be suppressed by the government before it is released to the public, and that the publication of something could not be conditioned upon judicial approval before its release. On the other hand, the English COMMON LAW permitted prosecution for libelous and seditious material after publication. Thus, the law protected vituperative political publications only insofar as the author was prepared to serve time in jail or to pay a fine for wrongful published attacks.

A minority of Founding Fathers adhered to the view articulated by JAMES MADISON: "The security of the freedom of the press requires that it should be exempt, not only from previous restraint of the executive, as in Great Britain; but from legislative restraint also; and this exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws." Madison was concerned that authors would be deterred from writing articles that assailed government activity if the government were permitted to prosecute them following release of their works to the public.

Before 1964, the Madisonian concept of a free press found very little support among the fifty states. Not only was subsequent punishment permitted for seditious and libelous publi-

cations, but in many states, truth was not a defense to allegations of DEFAMATION. If a story tended to discredit the reputation of a public official, the publisher could be held liable for money damages even if the story were accurate. In states where truth was allowed as a defense, the publisher often carried the burden of demonstrating its veracity. Newspapers and other media outlets soon flooded the courts with lawsuits alleging that these LIBEL laws violated their First Amendment rights by "chilling" the pens of writers with the specter of civil liability for money damages.

In the seminal case NEW YORK TIMES V. SULLIVAN, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), the U.S. Supreme Court extended First Amendment protection for print and electronic media far beyond the protection envisioned by the English common law. Before money damages can be assessed against a member of the media for a libelous or defamatory statement, the Court held, the injured party, not the publisher, must demonstrate by "clear and convincing" evidence that the statement not only was false but also was published with "actual malice." Actual malice may be established only by proof that the media member recklessly published a statement without regard to its veracity or that it had actual knowledge of its falsity. In arriving at this standard, the Court balanced society's need for an uninhibited flow of information about public figures, particularly elected officials, against an individual's right to protect the integrity and value of his or her reputation.

The twentieth century also saw the U.S. Supreme Court strengthen the doctrine of no prior restraint. In NEAR V. MINNESOTA, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931), the Court ruled that there is a constitutional presumption against prior restraint that may not be overcome unless the government can demonstrate that CENSORSHIP is necessary to prevent a "clear and present danger" of a national security breach. In NEW YORK TIMES V. UNITED STATES, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971), the Court applied this presumption against the U.S. DEPARTMENT OF JUSTICE, which had sought an INJUNCTION to prevent the publication of classified material that would reveal the government's secrecy and deception behind the U.S. involvement in the Vietnam War. If this classified material, also known as the Pentagon Papers, had threatened U.S. troops by disclosing their location or movement, the Court said, publication would not have been permitted.

In *Bartnicki v. Vopper,* 532 U.S. 514, 121 S. Ct. 1753, 149 L. Ed.2d 787 (2001), Court confronted an intriguing issue involving the privacy of wireless phone conversations and the right of the press to report these conversations. It had to consider whether the government could punish the publication because the information was obtained in violation of the WIRETAPPING laws. The government had argued that the laws sought to protect the privacy and to minimize the harm to persons whose conversations had been illegally intercepted. The Court ultimately concluded that these privacy interests were outweighed by the "interest in publishing matters of public importance." Because the people involved in the intercepted call were public figures, engaged in public matters, they had surrendered some of their privacy rights.

### Freedom of Religion

**Establishment Clause** Prior to the American Revolution, the English designated the Anglican Church as the official church of their country. The church was supported by taxation, and all English people were required to attend its services. No marriage or baptism was sanctioned outside of the church. Members of religious minorities who failed to abide by the strictures of the church were forced to endure civil and criminal penalties, including banishment and death. Some American colonies were also ruled by persecutorial theocrats, such as the Puritans in Massachusetts.

These English and colonial experiences influenced the Founding Fathers, including Jefferson and Madison. Jefferson supported a high wall of separation between church and state. Furthermore, Jefferson, a student of the Enlightenment (an eighteenth-century philosophical movement whose members rejected traditional values and embraced rationalism), opposed religious influence on the business of government. In turn, Madison, a champion of religious minorities, opposed government interference with religion. For Madison, the establishment of a national church differed from the Spanish Inquisition "only in degree," and he vociferously attacked any legislation that would have led the colonies down that path. For example, Madison led the fight against a Virginia bill that would have levied taxes to subsidize Christianity.

The thoughts and intentions of Madison have been the subject of rancorous discord among the U.S. Supreme Court justices who have attempted to interpret the Establishment Clause in a variety of contexts. Some justices, for example, cite Madison's opposition to the Virginia bill as evidence that he opposed only discriminatory government assistance to particular religious denominations, but that he favored nonpreferential aid in order to cultivate a diversity in faiths. Thus, the left posterity with three considerations regarding religious establishments: (1) a wall of separation that protects government from religion and religion from government; (2) a separation of church and state that permits nondiscriminatory government assistance to religious groups; and (3) government assistance that preserves and promotes a diversity of religious beliefs.

The U.S. Supreme Court attempted to incorporate these three considerations under a single test in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). In *Lemon,* the Court held that state and federal government may enact legislation that concerns religion or religious organizations so long as the legislation has a secular purpose, and a primary effect that neither advances nor inhibits religion nor otherwise fosters an excessive entanglement between church and state. Under this test, the U.S. Court of Appeals for the Fifth Circuit invalidated a Mississippi statute that permitted public school students to initiate nonsectarian prayers at various compulsory and noncompulsory school events (*Ingebretsen v. Jackson Public School District,* 88 F.3d 274 [1996]). By contrast, the Court has permitted state legislatures to open their sessions with a short prayer—because, the Court says, history and tradition have secularized this otherwise religious act (*Marsh v. Chambers,* 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 [1983]).

The Court has made seemingly inconsistent rulings in other areas, as well. For instance, it permitted a municipality to include a Nativity scene in its annual Christmas display (*Lynch v. Donnelly,* 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 [1984]), whereas it prohibited a county courthouse from placing a crèche on its staircase during the holiday season (*Allegheny v. ACLU,* 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 [1989]). In *Allegheny,* the Court said that nothing in the county courthouse indicated that the crèche was anything other than a religious display, whereas in *Lynch,* the Nativity scene was part of a wider celebration of the winter holidays. Such inconsistencies will continue to plague the Court as the justices attempt to reconcile the language of the Establishment Clause with the different considerations of the Founding Fathers.

**Free Exercise Clause** The Establishment Clause and the Free Exercise Clause represent flip sides of the same coin. Whereas the Establishment Clause focuses on government action that would create, support, or endorse an official national religion, the Free Exercise Clause focuses on the pernicious effects that government action may have on an individual's religious beliefs or practices. Like the Establishment Clause, the Free Exercise Clause was drafted in response to the Framers' desire to protect members of religious minorities from persecution.

The Framers' understanding of the Free Exercise Clause is illustrated by the NEW YORK CONSTITUTION OF 1777, which stated,

> [T]he free exercise and enjoyment of religious . . . worship, without discrimination or preference, shall forever . . . be allowed . . . to all mankind: *Provided,* that the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State. (N.Y. Const. Art. 1 § 3)

The New Hampshire Constitution of 1784 similarly provided that "[every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt . . . in his person, liberty or estate for worshipping God" in a manner "most agreeable" to those dictates, "provided he doth not disturb the public peace" (N.H. Const. Pt. 1, Art. 5).

These state constitutional provisions not only provide insight into the Founding Fathers' original understanding of the First Amendment, but they also embody the fundamental tenets of modern free exercise JURISPRUDENCE. The U.S. Supreme Court has identified three principles underlying the Free Exercise Clause: (1) no individual may be compelled by law to accept any particular religion or form of worship; (2) all individuals are constitutionally permitted to choose a religion freely in accordance with their conscience and spirituality, and the government may not inhibit their religious practices; and (3) the government may enforce its criminal norms

against persons whose religious practices would thwart a compelling societal interest.

Rarely is a law that infringes upon someone's religious beliefs or practices supported by a compelling state interest. The U.S. Supreme Court has held that no compelling societal interest would be served by actions that conflict with deeply held religious beliefs, such as coercing members of the Jehovah's Witnesses to salute the U.S. flag in public schools (*West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 [1943]); denying unemployment benefits to Seventh-Day Adventists who refuse to work on Saturdays (*Sherbert v. Verner,* 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 [1963]); or requiring Amish families to keep their children in state schools until the age of 16 (*Wisconsin v. Yoder,* 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 [1972]). However, a compelling government interest is served by the federal revenue system, so no member of any religious sect can claim exemption from taxation (*United States v. Lee,* 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 [1982]).

A different question is presented when the government disputes whether a particular belief or practice is religious in nature. This typically happens when conscientious objectors resist the federal government's attempt to conscript them during wartime. Some draft resisters object to war on moral or ethical grounds that are unrelated to orthodox or doctrinal religions. If a CONSCIENTIOUS OBJECTOR admits to being atheistic or agnostic, the government asks, then how can that objector avoid CONSCRIPTION by relying on the First Amendment, which protects the free exercise of religion?

In an effort to answer this question, the U.S. Supreme Court explained that the government cannot "aid all religions against non-believers," any more than it can aid one religion over another (*Torasco v. Watkins,* 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 [1961]). Thus, as long as a person "deeply and sincerely holds beliefs which are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs" are protected by the First Amendment (WELSH V. UNITED STATES, 398 U.S. 333, 90 S. Ct. 1792, 26 L. Ed. 2d 308 [1970]). A belief—religious, moral, or ethical—that manifests itself in a person's selective opposition to only certain wars or military conflicts is not protected by the Free Exercise Clause.

*The Supreme Court has interpreted the Free Exercise Clause of the First Amendment to mean that only a compelling state interest may override the religious beliefs of individuals. For example, Amish children cannot be compelled to attend state schools until the age of 16.*

AP/WIDE WORLD PHOTOS

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**CROSS-REFERENCES**

*Abington School District v. Schempp*; *Engel v. Vitale*; School Prayer.

## FIRST IMPRESSION

*The initial presentation to, or examination by, a court of a particular* QUESTION OF LAW.

A case is labeled *of the first impression* when it sets forth a completely original issue of law for decision by the court. Such a case cannot be decided by reliance on any existing precedent, law formulated in a prior case decided on a comparable question of law, or similar facts.

## FIRST INSTANCE

*The initial trial court where an action is brought.*

A court of first instance is distinguishable from an appellate court, which is a court of last

instance. In the federal court system, a federal district court is a court of *first instance,* whereas the Supreme Court is the court of *last instance.*

## FISCAL

*Relating to finance or financial matters, such as money, taxes, or public or private revenues.*

A *fiscal agent* is a bank engaged in the business of collecting and disbursing money. Such a bank also serves as a place for the deposit of private and public funds on behalf of others.

A *fiscal year* is a period of twelve months that does not necessarily correspond with the traditional calendar year. During this time period, appropriations are made and expenditures are authorized. At the end of the year, accounts are composed and the books are balanced. It is an accounting year frequently used by a state or large business, the first day of which is usually April, July, or October 1.

*Fiscal officers* are those individuals whose role it is to collect and distribute public money, such as state revenues or the revenues of a county or MUNICIPAL CORPORATION. The title is also used to describe officers in a private corporation who have the duty to oversee financial transactions. Fiscal officers of a corporation include a treasurer and a comptroller.

## FISH AND FISHING

State and federal governments share authority over the regulation and management of fish and fishing in the United States. Although states must defer to the U.S. government in areas preempted by federal regulators, state governments nonetheless play a primary role in the day-to-day management of fish and wildlife. The federal government oversees the actions taken by states in this area, funds state programs, and resolves disputes that might involve conflicting state interests, the rights and powers of Native American tribes, or INTERNATIONAL LAW.

From earliest times, fish and fishing have played a crucial role in the life of the people of North America. Native Americans of all tribes depended heavily on fish to eat and to trade, and fishing also held an important place in native cultural practices and religious rites. Beginning in the sixteenth century, and possibly even earlier, European adventurers were drawn to the rich fishing grounds off the coast of New England, and the settlers who followed them eagerly harvested the tremendous stocks of fish they found in America's lakes, rivers, and coastal areas. Fish were considered to be an inexhaustible resource, a common property available to all.

As early as the late eighteenth century, however, it became clear that the rush to exploit fish and other species of wildlife was jeopardizing the continued survival of several species. Eventually, state governments passed laws regulating hunting and fishing practices, and established fish and game agencies to enforce those laws. Because these state laws met with very limited success, the federal government soon stepped in and passed legislation designed to strengthen them and make them more enforceable. Over time, the federal government's role in managing and protecting fish and wildlife grew, occasionally conflicting with state authority. The question of wildlife jurisdiction was ultimately resolved by the Supreme Court, which found the federal government to be the ultimate authority in the area of fish and wildlife management.

Though states must ultimately defer to federal authority, state governments continue to play the primary role in fish and wildlife management, determining details such as harvesting seasons, methods, and limits. The federal government plays a broader role in protecting and managing wildlife, including funding state wildlife programs, regulating the commercial harvesting of fish, managing national forests and wildlife refuges, and negotiating international treaties involving ocean fisheries. Finally, the federal government has played a principal role in adjudicating the fishing rights of Native American tribes, determining what rights are guaranteed by the treaties signed between the tribes and the federal government, and working to ensure that those rights are protected.

### The Evolution of U.S. Wildlife Law

The evolution of U.S. laws governing the management of fish and fishing is complex. The different types of fishing practiced in the United States—commercial and recreational, for example—have required different types of laws and regulations. In addition, many of the general provisions of wildlife law, such as those addressing the question of state versus federal authority, apply not only to fish but also to birds and fur-bearing animals, whereas other provisions, such as those regulating ocean fisheries, apply only to fish and fishing.

**Fish and Fishing**

**SPORT PARTICIPATION, IN 2002[a]**

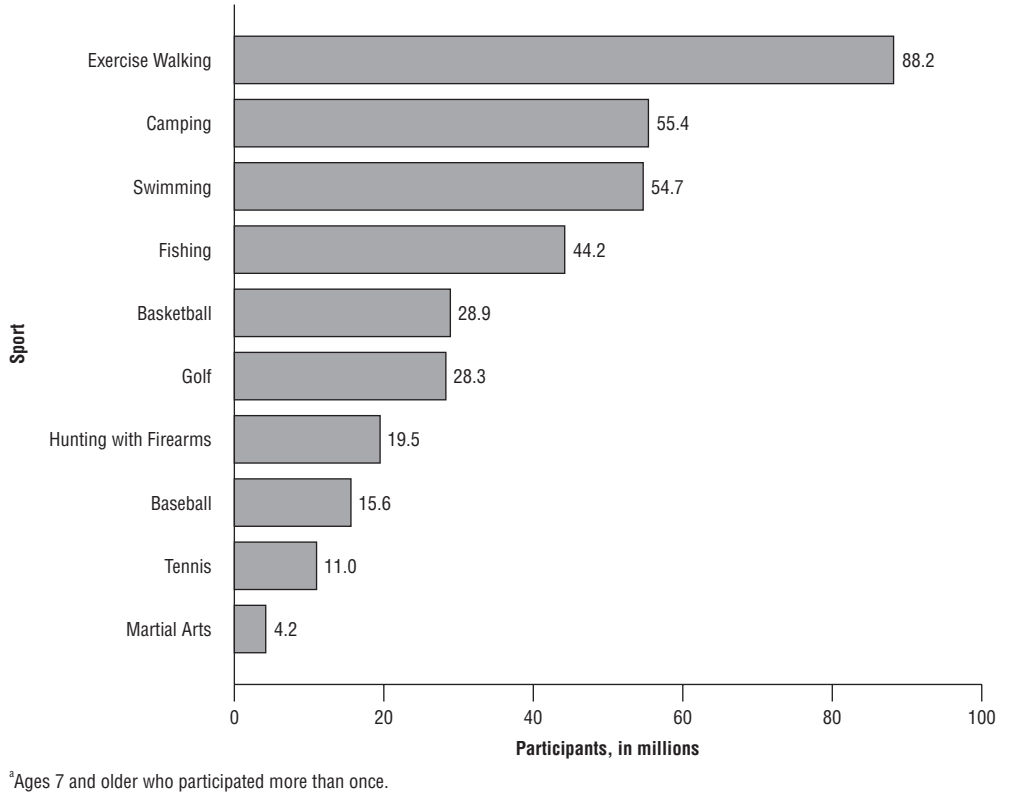


[a]Ages 7 and older who participated more than once.

SOURCE: National Sporting Goods Association.

In general, the objective of wildlife law has been to regulate the taking of fish and other wildlife species in order to ensure their continued survival. Early attempts by the states to regulate fish and wildlife were based on the state ownership doctrine. This doctrine declared that the authority over wildlife rested with each state, which held the resource as a public trust.

Despite states' efforts, state wildlife laws often provided too little protection too late. Over the last part of the nineteenth century, it became clear that the states were unable to enforce effectively the laws they had passed, and migrations and movements of fish and animals across state lines made it difficult for states to regulate harvests in any rational way. Wildlife populations dwindled, and recreational fishers and hunters began to pressure the federal government to take action. George Grinnell, a prominent sportsman and editor of *Forest and Stream* magazine, led the way, establishing interest groups to lobby Congress on behalf of wildlife. In 1886, Grinnell founded the National Audubon Society, and in 1888, he founded the Boone and Crockett Club, both of which were instrumental in securing passage of the Lacey Act of 1900 (ch. 553, 31 Stat. 187 [current, amended version at 16 U.S.C.A. §§ 701, 3371–3378, and 18 U.S.C.A. § 42 (1985)]), which was the first federal wildlife statute.

The Lacey Act prohibited the interstate shipment of wildlife taken in violation of state law. This provision did not ban the taking of wildlife, but used Congress's power to regulate interstate commerce as a way to enforce state game laws. It effectively put market hunters—hunters who took great numbers of game for commercial purposes—out of business. In addition, the act gave real authority to the U.S. Biological Survey, which was a predecessor to the U.S. Fish and

*Recreational fishing is regulated differently from commercial fishing, but both sets of laws attempt to ensure the continued survival of many species.*

AP/WIDE WORLD PHOTOS

Wildlife Service (FWS). The original purpose of the survey, established in 1885, was to carry out a national biological survey as well as various bird studies. The Lacey Act gave greater powers to the agency, charging it with administering and implementing the act's provisions, thus marking the beginning of an active role for the federal government in protecting and managing wildlife resources.

As passed, the Lacey Act referred to "wild animals and birds," categories which were construed to include only fur-bearing animals and game birds. In the 1920s, Congress became concerned about the nation's fish—particularly the smallmouth and largemouth bass, whose numbers had dwindled after years of overfishing throughout the country. State bag limits had failed to prevent excessive catches, and commercial restrictions were ineffective in preventing the illegal interstate transport of mismarked or concealed fish. To prevent the extinction of these species, Congress passed the Black Bass Act of 1926 (16 U.S.C.A. §§ 851–856). This act was fashioned after the Lacey Act in that it sought to enforce state wildlife laws by prohibiting certain interstate shipments of bass. The Black Bass Act was amended several times in the following years: in 1947, to apply to all game fish, as each state defined them; in 1952, to apply to all fish; and in 1969, to apply to fish taken in violation of the law of a foreign country. The Black Bass Act was repealed in 1981, and its provisions were consolidated into the Lacey Act amendments of that year (Pub. L. No. 97-79, 95 Stat. 1073). In general, these amendments significantly broadened and strengthened the Lacey Act and the provisions of the former Black Bass Act.

Throughout the twentieth century, federal authority over fish and wildlife expanded, while state authority became much more limited. The doctrine of state ownership was progressively invalidated as the federal government established provisions to protect various fish and wildlife species, asserting that such species were the property of the federal government, and not the states.

Though the states no longer retain ultimate legal authority over wildlife, they continue to play the primary role in managing and regulating local wildlife populations, even on federal lands. The states set hunting seasons and bag limits, specify harvest methods, and regulate the size and gender of game that can be taken. The states also have important wildlife management programs designed to ensure that sufficient numbers of animals, birds, and fish are available for recreational and subsistence hunting and fishing. Though state laws are ultimately subject to constitutional limits, the federal government has exercised its PREEMPTION authority very sparingly. The assumption is that state law is in force until preempted by federal law.

### The Federal Government's Role in the Conservation of Fish and Wildlife

The federal government has played an extensive role in working to conserve the habitats of fish and wildlife. Conservation became an important theme in the late nineteenth century, when people began to believe that wildlife and wild places should be protected not only for utilitarian reasons but because they had their own intrinsic value and were important national resources. Influenced by the writings of HENRY DAVID THOREAU and following the lead of wildlife advocates such as John Muir, the federal government began to establish national parks, forests, and wildlife refuges. One of the first wildlife refuges was created by President BENJAMIN HARRISON in 1892 when he reserved Afognak Island, in Alaska, for the protection and preservation of "salmon and other fish and sea animals and other animals and birds" (Proclamation No. 39, 27 Stat. 1052). Though most of the refuges established were specifically designed for waterfowl and fur-bearing species, the need to protect fish habitats was recognized in 1972 when Congress passed the Marine Protection, Research, and Sanctuaries Act (16 U.S.C.A. §§ 1431–1445). This act authorizes the

secretary of commerce, with the approval of the president, to designate as marine sanctuaries areas of the Great Lakes and the oceans, extending out to the edge of the continental shelf, when the secretary determines that that action is necessary for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or esthetic values. Fish and wildlife refuges are administered by the Fish and Wildlife Service, which is housed in the Department of Interior.

In addition to establishing wildlife refuges and sanctuaries, the federal government provides states with financial assistance to fund projects pertaining to fish. This funding was created by the Federal Aid in Fish Restoration Act (16 U.S.C.A. § 777-777k), more commonly known as the Dingell-Johnson Act, which was passed in 1950. This act directs that funds derived from the federal excise tax on fishing rods, creels, reels, and artificial lures, baits, and flies be annually apportioned among the states, 40 percent on the basis of geographic area and 60 percent on the basis of the number of persons holding paid fishing licenses. These funds can be used by the states for "fish restoration and management projects" or, since 1970, for "comprehensive fish and wildlife resource management plans." The Dingell-Johnson Act specifies that its provisions are to apply only to "fish which have material value in connection with sport or recreation in the marine and/or fresh waters of the United States." With the Fish and Wildlife Conservation Act of 1980 (16 U.S.C.A. §§ 2901–2911), commonly referred to as the Nongame Act, a similar funding program was provided for the protection of nongame fish and wildlife. The FWS is responsible for maintaining and administering these trust funds.

The most extensive federal efforts to protect endangered fish and wildlife species have been generated through the ENDANGERED SPECIES ACT of 1973 (16 U.S.C.A. §§ 1531–1543). The Endangered Species Act provides much broader coverage than did previous wildlife legislation, defining the fish or wildlife to be protected as including "any member of the animal kingdom," and expressing the goal of preserving plant life as well. The Endangered Species Act also differs from previous wildlife laws in that it is founded not on a primarily utilitarian view of wildlife but on the philosophy that wildlife has intrinsic value for the nation and its citizens. The act declares, for example, that endangered wildlife

*Fishermen weigh a catch of redfish. Federal fisheries management is a responsibility of the National Marine Fisheries Service.*

PHOTOGRAPH BY ALLEN M. SHIMADA, NMFS

"are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."

### Ocean Fisheries Law

With over one hundred thousand miles of linear coastline bordering some of the richest marine fisheries in the world, the United States has always been heavily involved in the ocean fishing industry. Marine fishing is an important contributor to the U.S. economy. In 1990, for example, commercial fisheries contributed $16.6 billion to the U.S. gross national product. Ocean fisheries in the United States are officially managed by the secretary of commerce, though actual fisheries management responsibilities have been delegated first to the administrator of the National Oceanic and Atmospheric Administration (NOAA), and within NOAA to the National Marine Fisheries Service (NMFS), which is primarily responsible for federal fisheries management. The NMFS, which is made up largely of biologists and fishery managers, has a staff of about 2,200, which is divided among its headquarters in Washington, D.C., and its five major regional offices.

Traditionally, marine fishers operated independently and fishing businesses were small,

family owned, and locally operated. The great range of fish species and harvesting practices in the United States encouraged this independence and small scale, as diverse practices, conditions, and locales kept fishers from organizing themselves or combining their efforts.

These traditions dominated the U.S. industry until well into the 1970s. In many areas, fishing businesses continue to operate as they always have. However, some aspects of the U.S. marine fishing industry have changed tremendously since the 1970s, primarily owing to the activities of foreign fishing fleets off U.S. coasts and to international treaties and agreements the United States has entered into regarding ocean fishing.

Historically, the right of all nations to fish on the high seas has been recognized as a fundamental principle of international law. Even so, disputes have frequently arisen over whether specific areas are part of the high seas or part of a particular nation's territorial sea. Until relatively recently, such disputes were generally handled by the parties involved.

Within the United States, the years prior to **WORLD WAR II** were marked by a predominance of state controls over ocean fisheries. Though the federal government had broad management authority to regulate these resources, its involvement was very limited, and individual states exercised much of the responsibility for fisheries management, particularly within the territorial sea. On the high seas, state authority was recognized when the state had a legitimate enforcement or conservation interest, and when the state had a sufficient basis for asserting **PERSONAL JURISDICTION** over the fisher, based on the landing of fish at a state port, the state citizenship of the fisher, or a minimum level of contact between the state and the fisher. State controls were limited to the extent that they could not unduly burden interstate commerce, discriminate against noncitizens in favor of citizens, or override federal laws to the contrary.

After the end of World War II, the traditional freedom to fish anywhere on the high seas began to be limited by international agreements. The first development in this area was what came to be known as the Truman Proclamation of 1945 (Proclamation No. 2667, 10 Fed. Reg. 12,303, *reprinted in* 59 Stat. 84). In this proclamation, President **HARRY TRUMAN** declared that the United States would move

> to establish conservation zones in those areas of the high seas contiguous to the coast of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale . . . and all fishing activities in such zones shall be subject to regulations and control.

This statement did not establish a conservation zone, but instead announced that the United States would seek to negotiate agreements with foreign countries fishing in nearby waters. Even so, many countries interpreted this proclamation to mean that the United States recognized the right of a coastal nation to establish unilaterally a special "conservation zone" between its **TERRITORIAL WATERS** and the high seas, in which it would regulate all fishing activities. Chile was one such country, immediately responding to Truman's proclamation by declaring its own two-hundred-mile conservation zone.

At the 1958 Convention on Fishing and Conservation of the Living Resources of the High Sea, the Truman Proclamation was ratified internationally, with delegates declaring that "[a] coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea" (art. 6, § 1 [17 U.S.T. 138, T.I.A.S. No. 5969]). The convention encouraged nations to negotiate agreements concerning the use of their adjacent waters, adding that countries could take unilateral conservation measures if such negotiations were unsuccessful. The convention did not specify the size of the area in which such unilateral measures could be taken, nor did it define the limits of the territorial sea.

Following the convention, the United States entered into a series of agreements with other nations concerning the fishery resources off its coasts, including agreements over tuna, New England groundfish, halibut, herring, and salmon. In addition, in 1964, Congress passed the Bartlett Act (Pub. L. No. 88-308, 78 Stat. 194), which excluded foreign vessels from fishing within the United States' territorial sea, defined as all ocean waters within three miles from the coast. Two years later, Congress passed the Contiguous Fisheries Zone Act (Pub. L. No. 89-658, 80 Stat. 908), which created a nine-mile contiguous zone extending out from the three-mile limit, from which foreign fishing vessels would be excluded.

These acts and treaties failed to protect U.S. fisheries in ways they were intended to. The

Bartlett Act provided no authority for federal management measures, limiting the federal government's role to data collection and law enforcement against foreign fishers. Other nations also found their fisheries to be suffering, as most treaties provided no means of enforcement against nations who had not chosen to enter into an agreement. As a result, several countries moved to extend the area of their marine jurisdiction. By 1975, of the parties involved in ongoing law-of-the-sea negotiations, 60 nations including the United States, favored a 12-mile territorial sea and a 200-mile resource conservation zone.

In the United States, government officials and fishing industry representatives had been considering just such an extension in marine jurisdiction. From 1950 on, foreign fishing near U.S. waters had expanded dramatically, as integrated harvesting and processing vessels, called factory trawlers, came from areas such as the Soviet Union, Eastern Europe, and Japan to take advantage of the rich groundfish fisheries off the New England and Alaska coasts. Because these vessels had stayed outside the United States' territorial sea, they had been beyond the reach of U.S. authority.

Alarmed by the effect of these foreign fishing fleets on the U.S. fishing industry, Congress in 1976 passed the Fishery Conservation and Management Act (U.S.C.A. §§ 1801–1882), otherwise known as the Magnuson Act for its author, Senator Warren Magnuson (D.) of Washington. This act declared a new, two-hundred-mile U.S. fishery conservation zone (FCZ), thereby terminating the freedom of foreign fishing fleets to operate off U.S. shores. Within the FCZ, the act asserts for the United States exclusive management authority over not only fish but also "all other forms of marine animal and plant life other than marine mammals, birds, and highly migratory species." Soon after the Magnuson Act became effective on March 1, 1977, the great foreign factory trawler fleets largely disappeared from the fishing grounds off New England. In other areas, it took longer for foreign vessels to vacate U.S. waters. However, as the U.S. factory trawler fleet grew, it displaced its foreign competitors, and the last foreign trawlers left U.S. fishing areas in 1991.

The Magnuson Act requires that the various fish and other marine species within the FCZ be managed in accordance with comprehensive plans drawn up by regional fishery management councils, composed of both state and federal officials. Whereas general responsibility for implementing the Magnuson Act is vested in the secretary of commerce, acting through NOAA and the NMFS, planning decisions are entrusted to these regional councils. Eight such councils were created, each having authority over the fisheries seaward of the states represented on the council. The voting members of each council include the principal official with marine fishery management responsibility from each state in the region, the regional director of the NMFS for the area, and four to 12 persons appointed by the secretary of commerce from lists of qualified people submitted to him or her by the state governors in the region.

Each council is responsible for creating a management plan for each fishery within its jurisdiction. In preparing their plans, the councils are required to hold public hearings. When complete, the plans are submitted to the secretary of commerce, who must approve them or return them to the councils for modification. The plans are expected to meet seven national conservation and management measures, the most important being that they prevent overfishing and ensure an optimum yield from each fishery. The act defines optimum yield very broadly, describing it as the amount of fish that "will provide the greatest overall benefit to the Nation" and that is based on the "maximum sustainable yield" from each fishery.

The Magnuson Act generally applies only beyond waters under state jurisdiction, which in most places extends to three miles from the coast. The act specifically preserves the rights of states to regulate all fishing within their boundaries, and even specifies that management plans created for fisheries within the FCZ may incorporate "the relevant fishery conservation and management measures of the coastal States nearest to the fishery." In only rare instances may the secretary of commerce preempt a state's authority to regulate fishing in its waters.

In general, the Magnuson Act marked a new era in U.S. fisheries. A principal goal of Magnuson was Americanization, which means the development and promotion of the U.S. fishing industry. A second goal was full domestic utilization, which means the elimination of foreign fishing operations within U.S. jurisdiction. Since the act was passed in 1976, it has been amended several times to try to increase the levels of Americanization and full domestic utilization.

The federal government and the ocean fishing industry have increasingly recognized, however, that laws encouraging these priorities alone are not enough to secure productive fisheries. Rather, effective conservation requires international cooperation, as many important species are highly migratory or are found in fisheries that straddle national boundaries.

### Native American Fishing Rights

Just as the United States has entered into treaties with foreign countries specifying certain fishing rights and privileges, so also has it entered into treaty agreements with many Native American tribes concerning fishing and hunting rights. In theory, U.S. treaties with foreign countries and with sovereign Indian nations are the same, as both represent negotiated agreements with independent nations that the parties are bound to honor. In reality, however, treaties involving Native American fishing and hunting rights are much more controversial and complicated, as their provisions often conflict with state and federal wildlife efforts as well as with the interests of non-Indian fishers and hunters. Though many legal developments in the area of Native American fishing rights have broad application, treaty rights pertaining to fishing often vary from tribe to tribe and depend on the language and historical context of the treaties involved.

Historically, fishing has always been an important activity for Native American tribes. Fish constituted a major portion of most Indians' diets, and dried fish were traded in large quantities. Religious rites were performed to ensure the return of local fish species each year, and tribes planned their own movements around the annual migrations of fish populations.

When Indian tribes signed treaties with the U.S. government to relinquish their lands—as nearly all did at some point—they often received assurance, either in the treaties or in statutes, that they could continue to hunt, fish, and gather food on their reservation and often in traditional locations off the reservation as well. In the mid-nineteenth century, when most of these treaties were signed, government officials willingly included such provisions because few non-Indians lived in frontier lands and because fish were thought to be an inexhaustible resource. Since then, the demand for fish has come to outstrip the supply, leading to battles over how to interpret and enforce treaty provisions guaranteeing Native Americans certain fishing rights.

Many of the treaties by which Indian tribes relinquished land to the United States expressly guaranteed the tribes' fishing and hunting rights. Even when treaties did not specifically mention fishing and hunting, those rights were considered to be retained. As the Supreme Court explained in the 1905 case *United States v. Winans,* 198 U.S. 371, 25 S. Ct. 662, 49 L. Ed. 1089, a treaty is not a grant of rights to the Indians but a taking of rights from them, and any right not specifically removed by a treaty is assumed to remain with the tribe. Though Congress has the power to extinguish Indian hunting and fishing rights, it must do so clearly and explicitly; rights cannot be considered extinguished based on ambiguous language or assumptions. Even when a tribe is officially "terminated" by Congress, its rights are retained unless Congress explicitly declares that it is terminating them. In *Menominee Tribe v. United States,* 391 U.S. 404, 88 S. Ct. 1705, 20 L. Ed. 2d 697 (1968), for example, Congress had terminated the Menominee tribe, but the Supreme Court ruled that the tribe's hunting and fishing rights were not affected because the termination statute did not explicitly mention those rights.

In many cases, Indian tribes have also retained the right to fish at locations off the reservation. In the Pacific Northwest, for example, many Indian tribes signed treaties guaranteeing them the right to take fish at their traditional fishing locations, whether those locations were on or off the newly created reservations. This right was upheld by the Supreme Court in *Winans,* in which the Court ruled that tribal members were entitled to "tak[e] fish at all usual and accustomed places," even though those places might be on privately owned land.

Though the fishing rights cases from the Pacific Northwest apply to specific parties and situations, they have had a broad effect on Indian fishing rights cases in other parts of the country.

The U.S. government's efforts to protect the environment and regulate its resources have given rise to tensions between the government and Native American tribes that claim exceptions to federal regulations based on legal, historical, and cultural rights to certain resources. Occasionally, disputes arise between Native

Americans and foreign governments or intergovernmental organizations. One such case concerns an agreement between the U.S. government and the Makah Tribe of Washington's Olympic Peninsula regarding rights to hunt whales. In this case, the U.S. government was assertively promoting the rights of Native Americans to hunt whales, even in the face of strong national and international criticism.

On March 22, 1996, the National Oceanic and Atmospheric Administration (NOAA) entered into a formal written agreement with the Makah Tribe providing that NOAA, through the U.S. commissioner to the International Whaling Commission (IWC), would make a formal proposal to the IWC for a quota of gray whales for subsistence and ceremonial use by the Makah Tribe. The agreement provided for cooperation between NOAA and the Makah Tribal Council in managing the harvest of gray whales. NOAA agreed: (1) to monitor the hunt; (2) to assist the Council to collect data on the whales, including body length and sex of the landed whales; length and sex of any fetus in a landed whale; whether a whale that was struck, but not landed, suffered a potentially fatal wound from a harpoon or bomb emplacement); and (3) to collect tissue samples from landed whales. Finally, the agreement provided that within 30 days of IWC approval of a quota, "NOAA will revise its regulations to address subsistence whaling by the Makah Tribe, and the Council will adopt a management plan and regulations to govern the harvest. . . ." The agreement was signed by the chairman of the Makah Tribal Council, Hubert Markishtum, and the under secretary for Oceans and Atmosphere, D. James Baker.

Pursuant to the agreement, the United States presented the IWC with a proposal to the IWC for a quota of gray whales for the Makah Tribe. Several member nations supported the Makah whaling proposal, while others expressed concerns and indicated that they would vote against it. The proposal quickly became controversial. Concurrent to the IWC's meeting, the U.S. House of Representatives Committee on Resources unanimously passed a resolution, introduced by Representatives Jack Metcalf (R-Washington) and George Miller (D-California), opposing the proposal. The U.S. delegation to the IWC subsequently realized that it did not have the three-quarters majority required to approve the Makah hunting quota, and the proposal was withdrawn.

On October 13, 1997, NOAA and the Makah entered into a new written agreement, which was nearly identical to the agreement signed in 1996. Unlike the earlier agreement, however, the 1997 agreement included a provision intended to underscore the intention to hunt only migratory whales. Although considerable controversy attended this second proposal, the Makah eventually were permitted to resume limited whaling for cultural and subsistence purposes.

Today, case law in states such as Wisconsin, Minnesota, and Michigan are consistent with these cases in terms of Indian off-reservation fishing rights, the allocation of fish between Indians and non-Indians, and the relationship between tribal and state regulatory schemes. Rather than rely on the court system to resolve disputes, tribes and states now frequently attempt to reach negotiated settlements.

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**CROSS-REFERENCES**

Environmental Law; Interior Department; Native American Rights.

## FISHING EXPEDITION

*Also known as a "fishing trip." Using the courts to find out information beyond the fair scope of the lawsuit. The loose, vague, unfocused questioning of a witness or the overly broad use of the discovery process. Discovery sought on general, loose, and vague allegations, or on suspicion, surmise, or vague guesses. The scope of discovery may be restricted by protective orders as provided for by the Federal Rules of Civil Procedure.*

## FISHING VESSELS

Customary INTERNATIONAL LAW provides that coastal fishing boats and small boats engaged in trade, as distinguished from seagoing fishing boats and large traders, are immune from attack and seizure during war. This IMMUNITY is lost if fishing vessels take part in the hostilities. To prevent such involvement many nations have agreed not to take advantage of the peaceful character of such vessels in their war effort.

## FIXED ASSET

*Property, such as machinery or buildings, utilized in a business that will not be used or liquidated during the current fiscal period.*

## FIXED CHARGES

*Costs that do not vary with changes in output and would continue even if a firm produced no output at all, such as most management expenses, interests on bonded debt, depreciation, property taxes, and other irreducible overhead.*

## FIXTURE

*An article in the nature of* PERSONAL PROPERTY *which has been so annexed to the realty that it is regarded as a part of the real property. That which is fixed or attached to something permanently as an appendage and is not removable.*

*A thing is deemed to be affixed to real property when it is attached to it by roots, imbedded in it, permanently resting upon it, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.*

*Goods are fixtures when they become so related to particular real estate that an interest in them arises under real estate law, e.g. a furnace affixed to a house or other building, counters permanently affixed to the floor of a store, or a sprinkler system installed in a building.*

*Fixtures possess the attributes of both real and personal property.*

*Fixtures, such as ovens, stoves, and cabinets, are considered part of the real property and not personal property once they have been installed.*

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### Types

Fixtures are generally classified as agricultural, domestic, ornamental, or trade. Agricultural fixtures are articles that are annexed for the purpose of farming. Domestic and ornamental fixtures are objects that a tenant may attach to a unit in order to render it more habitable. Stoves, shelves, and lighting equipment are types of domestic fixtures. Ornamental fixtures include curtains, chimney grates, blinds, and beds fastened to walls.

Trade fixtures are articles affixed to rented buildings by merchants, in order to pursue the business for which the premises are occupied. They encompass those items that merchants annex to the premises to facilitate the storage, handling, and display of their stock for sale to the public—such as booths, bars, display cases and lights—that are usually removable without material damage to the premises. The objective of this rule is to promote trade and industry. A tenant, however, has no right to disengage a trade fixture if its detachment would cause substantial damage to the premises.

### Requirements

The article must be physically annexed to the realty or something appurtenant thereto in order for it to become a fixture. Annexation to land occurs when the object is permanently affixed to the property through the application of plaster, cement, bolts, screws, nuts, or nails.

The attached article must also be adapted to the intended use or purpose of the realty so that it effectively becomes inseparable from the land itself.

The intention of the person who attaches the article determines whether or not the article is a fixture. The individual is not required to verbalize the intent, although the courts will evaluate such expressions. The courts consider the tenant's intent, which is inferred from all of the facts and circumstances concerning the actual annexation of the object, such as the nature of the article affixed, the method of annexation, and the extent to which the object has been integrated into the real estate.

### Agreement of the Parties

The parties may enter into an agreement in regard to the nature of an item to be utilized with realty. Statutes confer this right in some jurisdictions, and these agreements are enforceable whenever the rights of third persons are not violated.

The terms of a lease often define the rights of a LANDLORD AND TENANT in regard to fixtures. If the lease unequivocally stipulates that the tenant has the right to remove particular articles, the fact that the removal will damage the rented premises is immaterial.

Fixtures are usually attached to rented premises for the tenant's benefit without any intention of increasing the value of the landlord's property. Generally when no agreement exists between the parties, articles annexed by the tenant may be detached by the tenant, during the term of the tenancy, provided such can be done without damaging the premises.

The law favors the tenant's position that certain articles should be regarded as personal property rather than as part of the realty. Such improvements are those made to the rented premises by a tenant for personal enjoyment and use and, therefore, should retain their character as personal property.

### Time of Removal

If a trade fixture is not removed from the premises within the period specified in the lease, it becomes part of the realty and the landlord acquires title to it. A tenant's failure to remove domestic fixtures within the proper period will usually have the same result. The tenant is presumed to have abandoned the fixtures by failing to remove them.

The amount of time allotted to the tenant to remove the fixtures varies. In some jurisdictions, the objects must be removed during the term of the tenancy. The right to remove the articles terminates with tenancy, in some states; whereas, in others, the tenant may remove the articles within a reasonable time after the expiration of the tenancy. The facts and circumstances of each case determine what period constitutes a "reasonable time."

The landlord can expressly consent to the tenant's removal of the fixtures even after the conclusion of the lease term or the surrender of possession. If the owner persuades the tenant to leave fixtures on the premises for some particular objective, he or she cannot acquire title to the fixtures because the tenant has postponed their removal.

In most states, if a tenant accepts a new lease that contains no provisions concerning articles attached during tenancy under the prior lease, the tenant will lose the right to remove them. At the expiration of the initial lease, the fixtures become part of the realty. By accepting the new lease, the tenant acquires a temporary interest in both the fixtures and the land.

Generally, an extension of the original lease does not deprive the tenant of the right to remove fixtures. The tenant's right of removal is lost, however, if he or she merely stays or holds over without extending the current lease.

If the landlord prevents the tenant from detaching fixtures to which he or she is entitled, the time for removal is extended until it can be accomplished. If the landlord wrongfully ends the tenancy and the tenant is ousted, the tenant has a reasonable time in which to remove his or her fixtures.

After the tenancy expires, a landlord can order the tenant to unfasten unwanted fixtures. If the tenant fails to do so, the landlord can have the fixtures removed and charge the tenant for expenses incurred in their removal.

## FLAG

*The official banner of a state or nation, often decorated with emblems or images that symbolize that state or nation.*

On the U.S. flag, 13 horizontal stripes (in red and white) represent the original 13 colonies. The union is represented by 50 white stars, for the 50 states, arrayed on a field of blue. The U.S. flag is sometimes called the Stars and Stripes, Old Glory, or the Red, White, and Blue.

Titles 4 and 36 of the U.S. Code govern when, where, and how a flag may be displayed; how a flag may be used; and the proper means of disposing of a worn or soiled flag.

The Stars and Stripes became a popular and revered symbol of the United States during and after the Civil War. The Union's victory over the Confederacy and the return to a united country engendered patriotic fervor that was embodied in this symbol. When large numbers of immigrants entered the United States during the late nineteenth and early twentieth centuries, the flag was appropriated as a symbol of nationalism and

# What is the Appropriate Use of the Confederate Flag?

After months of open and contentious debate, the General Assembly of the State of South Carolina agreed in May 2000 that the Confederate Flag would be taken from the State House dome and placed at the Confederate Soldiers' Monument. State Governor Jim Hodges signed the bill, which was supported by the South Carolina Chamber as part of the Business Agenda and the Courage to Compromise coalition, on May 30. "Today, we bring this debate to an honorable end. Today, the descendants of slaves and the descendants of Confederate soldiers join together in the spirit of mutual respect," Hodges stated in a speech just prior to the signing. The actual relocation of the flag on July 1, 2000, complete with pomp and circumstance, was attended by 3,000 people. The official ceremony lasted eight minutes. The fallout lasted for eight months.

In 1994, Jim Folsom, Jr., the governor of Alabama, decided to move a Confederate flag from the state capitol's room to a nearby war memorial. His decision was partially a response to pressure from the National Association for the Advancement of Colored People (NAACP). Afterward, South Carolina was the only former member of the Confederate States of America to fly the Confederate flag on its capitol building, though some Southern states still used it as part of their flag design. The issue waxed and waned in South Carolina's legislature for the next several years without resolution. In late 1999, the NAACP again mobilized, calling for a boycott of all state tourism, athletic contests, cultural events, and film-making in South Carolina until the flag was removed.

Benedict College, an historically black institution, canceled its September 2, 2000, football game with South Carolina State University after the latter refused to move the game from its campus in Orangeburg, South Carolina, to Charlotte, North Carolina. This event was followed by Bryn Mawr College, Haverford College, and Swarthmore College all canceling spring-break trips to South Carolina's coast. Furthermore, the National Collegiate Athletic Association's Division I Board of Directors threatened to move games in the men's basketball tournament out of South Carolina if the flag was not removed from the state dome.

The issue returned to the state legislature's general assembly, where, following several weeks of emotional and grueling battle, a compromise agreement was reached in May 2000 by a House vote of 66-43 and a Senate vote of 35-8. The flag came down and took up its new home at the Solders' Memorial. Senator Arthur Ravenel claimed, "The only people that seem to be unhappy are the extremists."

The NAACP, however, took umbrage with the new location, complaining that the flag had become more visible than ever. It sent out mailings, urging the continuation of its state boycott and arguing that the flag also should be removed from all state grounds, including the Soldiers' Memorial. State Senator Robert Ford, a black supporter of the compromise, defended its new location, stating that, contrary to the NAACP's contentions, the flag was not "in anybody's face" in its new location. House majority leader Rick Quinn remarked that the NAACP had "essentially become professional agitators and I think someone needs to stand up to them." Several hundred flag supporters gathered at the ceremony and vowed that the flag would again rise above the state capitol.

After the flag's removal in South Carolina, Georgia followed. In January 2001, Georgia governor Ray Barnes persuaded lawmakers to shrink the Confederate battle emblem prominently displayed on the state flag to a small box in the corner of the flag. The Confederate battle emblem had been added in 1956 while Georgia schools were segregated. Sonny Perdue defeated Barnes in an

patriotism by groups that felt that the cultures and customs of the new citizens threatened national unity and security. During the same period, as the advertising industry grew along with rapid industrialization, the flag was commonly used for commercial purposes. Flags or images of flags were used to promote everything from toilet paper to chewing gum. The flag was also appropriated for political gain. In 1896, the campaign manager for Republican presidential candidate WILLIAM MCKINLEY distributed millions of flags for use at McKinley's rallies. The McKinley campaign also distributed buttons bearing the likeness of a flag, as symbols of support for the candidate.

The turn of the century saw the beginnings of a movement to protect and honor the flag. In the early part of the twentieth century, schools commonly required students to salute the flag each morning. Some students refused to participate in the salute, mainly on religious grounds. By 1940, at least 200 public school students had been expelled in 16 states for refusing to salute the flag. Many of them were Jehovah's Wit-

upset victory in 2002, due in no small part to the flag controversy. In April 2003, Perdue endorsed a new flag that employs the so-called "stars and bars," another historic Confederate banner. However, **CIVIL RIGHTS** groups, including the NAACP and Rainbow/PUSH, heavily criticized Perdue's stance, demanding that the flag have no Confederate symbols. On April 25, 2003, Georgia's legislature approved a flag that looks similar to the Confederate battle emblem but does not have the Dixie cross or other Confederate symbols.

Other states have had mixed reactions to the flag controversy. Florida quietly removed its Confederate flag from the state capitol in 2001. Mississippi, however, the last bastion of the old South, has held its ground. In April 2001, by a two-thirds division along mostly racial lines, voters overwhelmingly rejected a bill to replace the state's "Southern Cross" on its flag, which dates back to 1894. Mississippi, the poorest state in the Union, showed little concern for any threatened boycotts.

The flag controversy revolves around the intended meaning of the flag. Clearly, if a state's flag represents "symbolic speech," there must be an intent to convey a particular message that is understood by those who view it, in order to invoke **FIRST AMENDMENT** consideration. Under these conditions, the time, place, and manner of display may be controlled if it can be proven that its display would cause violence or mayhem. According to the NAACP, the Confederate battle flag and emblem "have been embraced as the primary symbols for the numerous modern-day groups advocating white supremacy." The NAACP has referred to the flag as a "banner of secession and slavery." Some Southern whites see it as a banner of honor, however, for the Confederate soldiers who lost their lives during the **U.S. CIVIL WAR**. Furthermore, they interpret the war to have been more about state and federal power and states' rights to secede from a union that they had joined voluntarily and less as a war to end the institution of **SLAVERY**. Still further, others see the flag as a banner of "treason against the United States government."

The flag's significance on the state building seems to send two messages. Some have charged that it was more than coincidence that the South Carolina Confederate flag first flew over the state capitol in the early 1960s: it was raised in a centennial celebration of the Civil War. Others believe it was also meant to send a message to the grassroots **CIVIL RIGHTS MOVEMENT**, which was just beginning to mobilize. In a country where historians continued to debate the reasons for the Civil War, the flag's message has been interpreted according to passing ideological or economic battles.

Issues regarding Southern heritage and the Confederate flag also were fought over in schools. In October 2000, the **SUPREME COURT OF THE UNITED STATES** declined review of the Eleventh Circuit's decision in *Denno v. School Board of Volusia County, Fla.*, 218 F. 3d 1267 (11th Cir. (Fla.), Jul 20, 2000) which upheld a school's right to discipline a student for displaying a small Confederate flag at school. The school had argued that the flag was such a controversial symbol that its display invited disruption. The Eleventh Circuit panel first issued an opinion allowing the student to proceed with his case against the school board then later withdrew its opinion and issued a dismissal.

Students in Kentucky, North Carolina, and Virginia also have been disciplined in the early 2000s for wearing Confederate symbols or flags on their clothing. Notwithstanding, in March 2001, the U.S. Court of Appeals for the Sixth Circuit remanded to the trial court a suit by two Kentucky students who were suspended for wearing Hank Williams Jr. shirts with the Confederate flag. (*Castorina v. Madison County School Board,* 246 F. 3d 536 [6th Cir. (Ky.), Mar 08, 2001]). The appellate court stated that the school needed to explain its reason for the ban, such as whether any racial violence had occurred at the school.

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### CROSS-REFERENCES

States' Rights.

nesses, who maintained that any salute to the national flag constituted an act of idolatry and thus violated their religious beliefs. The expulsion of two Jehovah's Witnesses was challenged in *Minersville School District v. Gobitis,* 310 U.S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940). In *Gobitis,* a father sued to enjoin the school district from prohibiting his children's attendance at school after they refused to salute the flag. The U.S. district court granted the **INJUNCTION** allowing the children to return to school, and the U.S. Court of Appeals for the Third Circuit affirmed the district court. On appeal, the Supreme Court reversed the lower courts, holding that the school district's requirement that students salute the flag did not unconstitutionally infringe their religious freedoms. Writing for the 8–1 majority, Justice **FELIX FRANKFURTER** said the salute requirement was constitutional as long as the students' "right to believe as they please, to win others to their way of belief, and their right to assemble in their chosen places of worship for the devotional ceremonies of their faith, are fully respected."

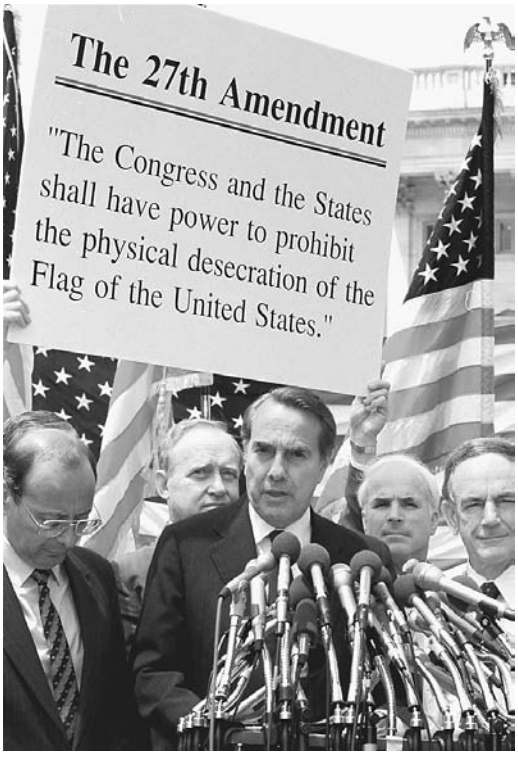


*A group of senators, including former Senator Bob Dole, speak in support of a constitutional amendment banning flag desecration during a June 1990 press conference.*
AP/WIDE WORLD PHOTOS

A few years later, the Court reversed its position, in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), another challenge to mandatory flag salutes brought by members of Jehovah's Witnesses. In *Barnette,* the Court held that the school board could not require public school teachers and students to salute the flag. The Court said FREEDOM OF THE PRESS, of assembly, and of worship may be restricted "only to prevent grave and immediate danger to interests which the state may lawfully protect." In a companion case, *Taylor v. Mississippi,* 319 U.S. 583, 63 S. Ct. 1200, 87 L. Ed. 1600 (1943), the Court overturned the convictions of two people found guilty under a state statute that forbade the dissemination of information advocating refusal to salute, honor, or respect the flag. The Court held that the statute infringed FREEDOM OF SPEECH and freedom of the press. The *Barnette* and *Taylor* decisions signaled the Court's emerging support of the notion that freedom of speech extends to symbolic as well as oral and written speech.

Also during the early 1900s, numerous state laws were passed prohibiting the desecration of the flag or the use of the flag in advertising. Some of these laws were struck down by state courts, but in 1905, the U.S. Supreme Court upheld their validity when it affirmed a lower court that had refused to strike down a Nebraska statute prohibiting the use of the flag in advertising (*Halter v. Nebraska,* 205 U.S. 34, 27 S. Ct. 419, 51 L. Ed. 696 [1907]). The Court said the flag, as an emblem of national authority and an object of patriotic fervor, should not be associated with personal or commercial interests. It held that the Nebraska statute did not infringe personal property rights or individual freedom.

For 80 years, *Halter* was cited as precedent in cases upholding flag desecration statutes, and these laws stood solidly intact through most of the twentieth century. The laws were invoked frequently to prosecute demonstrators who burned flags to protest U.S. involvement in the VIETNAM WAR. Between 1965 and the end of the war in 1973, as many as one thousand arrests were made under various state laws prohibiting the desecration of the flag.

The Supreme Court addressed the constitutionality of flag desecration laws again in TEXAS V. JOHNSON, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989). During the 1984 Republican National Convention, in Dallas, the defendant, Gregory Lee Johnson and one hundred others staged a protest outside the convention hall. During the demonstration, Johnson burned a U.S. flag. He was later arrested for violating the Texas Venerated Objects Law (Tex. Penal Code Ann. § 42.09(a)(3) [Vernon 1974]), which outlawed intentionally or knowingly desecrating a flag in a way that some observer might find seriously offensive. Johnson was convicted, but his conviction was overturned by the Texas Court of Criminal Appeals (*Johnson,* 755 S.W.2d 92 [Tex. Crim. App. 1988]). The state appealed to the U.S. Supreme Court. In a 5–4 decision, the Court affirmed the court of criminal appeals, holding that Johnson's conduct was expressive communication, a form of speech that requires FIRST AMENDMENT protection. Addressing Texas's claim that it had a legitimate interest in preventing a breach of the peace, the Court observed that no disturbance of the peace occurred or was threatened by Johnson's burning of the flag. The Court also held that the venerated objects statute was subject to the strictest constitutional scrutiny because it restricted Johnson's freedom of expression based on the content of the message he sought to convey. The Court concluded, "We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents."

Many people were outraged by the *Johnson* decision. President **GEORGE H. W. BUSH** denounced flag burning and proposed a constitutional amendment to overturn *Johnson.* The Senate and the House of Representatives passed numerous resolutions calling for a constitutional amendment outlawing flag burning. When it became clear that a constitutional amendment was probably not feasible, Congress instead passed the Flag Protection Act of 1989 (Pub. L. No. 101-131, 103 Stat. 777 [amending 18 U.S.C.A. § 700]), which made it a criminal offense to mutilate, deface, or burn a flag; place a flag on the floor or ground; or walk on a flag. The act did not mention the motive of the actor or the effect on observers of the act. With these omissions, the statute was designed to be content neutral and to pass the most stringent constitutional scrutiny.

The Flag Protection Act was tested in *United States v. Eichman,* 496 U.S. 310, 110 S. Ct. 2404, 110 L. Ed. 2d 287 (1990). In *Eichman,* the defendants were arrested for burning a flag in a protest. They moved to dismiss the charges on the ground that the Flag Protection Act violated the First Amendment. The district court dismissed the charges, and the government appealed directly to the Supreme Court. Affirming the district court's findings, the Court reasserted its position that flag burning is expressive conduct protected by the First Amendment. The Court conceded that the federal act differed from the Texas statute in *Johnson* because it did not appear to regulate the content of the message conveyed by the prohibited acts. Nonetheless, the Court held that the government's interest in preserving the flag as a national symbol was implicated under the act only when a person's treatment of the flag communicated a message that opposed the government's ideals. In effect, the act did regulate the content of protected speech. The Court concluded that the government may not prohibit the expression of an idea, no matter how disagreeable or offensive that idea may be.

The *Eichman* decision prompted President Bush to renew his efforts to gain passage of a constitutional amendment banning flag desecration. The measure came to a vote in June 1990. By then, public and political interest in the issue had dissipated, and many members of Congress who had voted for the Flag Preservation Act were unwilling to support a change to the Constitution. The proposed amendment failed by a vote of 254–177 in the House of Representatives and 58–42 in the Senate.

During the mid-1990s and early 2000s, the House of Representatives continued to consider constitutional amendments that would allow Congress to enact legislation prohibiting the desecration of the flag. In 2003, the House passed a proposed amendment that reads, "The Congress shall have the power to prohibit the physical desecration of the flag of the United States." H.R.J. Res. 4 (108th Cong., 1st Sess.). According to one of the amendment's supporters, Representative Steve Chabot (R-OH), "If we allow [the flag's] defacement, we allow our country's gradual decline." The House approved the resolution by a vote of 300 to 125.

Although the amendment was still officially under consideration by the Senate in October 2003, similar measures in 1995, 1997, 1999, and 2001 failed to pass in the Senate. In order to be passed, the proposed amendment must receive a two-thirds majority in both the House and the Senate, plus approval from three-fourths of the states. In 1995 and 2001, similar measures received 63 votes, four shy of the required two-thirds majority. Democrats opposed to the amendment have called the bi-annual legislation a "rite of spring" for House Republicans who support the measure.

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**CROSS-REFERENCES**

Censorship; Religion.

## FLAG SALUTE CASES

Within a span of four years, the U.S. Supreme Court took two different stands on whether disciplining students who refused to salute the American flag violated their FIRST AMENDMENT rights of FREEDOM OF SPEECH and religion. In *Minersville School District v. Gobitis,* 310 U.S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940), the Court upheld the constitutionality of a Pennsylvania regulation that permitted the expulsion of children for not saluting the flag or reciting the Pledge of Allegiance to it. However, in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), the Court reversed itself and overturned a West Virginia law that compelled public school children to salute the flag and recite the Pledge of Allegiance. The two decisions have come to be known as the *Flag Salute cases* and are important for the First Amendment issues that were raised and decided.

In the first case, Lillian and William Gobitis, ages ten and twelve, were expelled from the Minersville, Pennsylvania public schools in 1935 for failing to salute the flag and recite the Pledge of Allegiance. The school district had required the salute and pledge since WORLD WAR I, but the Gobitis children were the first to challenge the practice. They refused because they were members of the Jehovah's Witnesses, a religious group whose members believe that it is blasphemous to worship, serve, or pledge allegiance to any secular image because such idolatry interferes with their undivided loyalty to God. As a result of their expulsion, their father had to pay for them to enroll in a private school. Their parents filed a lawsuit, claiming that the children's DUE PROCESS rights had been violated by the school district.

The U.S. Supreme Court, in an 8–1 decision, upheld the right of the school district to mandate the salute and pledge, concluding that school district's interest in creating national unity was enough to allow them to require students to salute the flag. Justice FELIX FRANKFURTER, in his majority opinion, rejected the idea that the freedom to follow religious conscience under the First Amendment was unlimited. Therefore, the Court needed to determine what standard to apply when reviewing religious-freedom issues. The Court opted for a BALANCING test, pitting the state's secular interests against the religious interests of the children.

In this case, the school district's interest in creating national unity was more important than the rights of the students to refuse to salute the flag. Justice Frankfurter noted that national unity is the basis of national security. To allow children not to salute the flag or to recite the Pledge of Allegiance would weaken the effect of the collective patriotic exercise and thereby injure national unity and security. In his view, "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." Despite the fact that members of the Court disagreed that a compulsory flag salute was the best way to create national unity, the school district's error in judgment was not sufficient to declare their practice unconstitutional. In addition, the Court concluded that students would not be pulled away from their faith by reciting the pledge, because their parents had a much greater influence than the school in their religious faiths.

Justice HARLAN F. STONE, in his dissenting opinion, argued that it was the task of the courts to demand a reasonable accommodation between the interests of government and the interests of liberty. He concluded that the state "seeks to coerce these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions." The government may suppress religious practices that are dangerous to morals and the public safety, "but it is a long step, and one which I am unable to take, to the position that government may, as a supposed educational measure and as a means of disciplining the young, compel public affirmations which violate their religious conscience."

The U.S. entry into WORLD WAR II after the Japanese attack on Pearl Harbor on December 7, 1941, was followed with renewed public displays of patriotism. *Barnette* arose in 1942, when the West Virginia State Board of Education responded to events by adopting a resolution requiring all public school children to salute the American flag and recite the Pledge of Allegiance as part of the official activities carried out by teachers of kindergarten through twelfth grade. Students who failed to salute the flag or to recite the Pledge of Allegiance at appropriate times were subject to discipline, including expulsion from school and detention at state institutions for juvenile delinquents. Parents

were subject to prosecution for the nonconforming behavior of their children.

A lawsuit was filed on behalf of the Jehovah's Witnesses, whose children had been disciplined in West Virginia schools for refusing to salute the flag or to recite the Pledge of Allegiance. In addition, a number of parents had been prosecuted for allowing their children to engage in such unpatriotic demonstrations. The West Virginia federal district court issued an INJUNCTION restraining the state from continuing to enforce the school board's resolution. *Barnette v. West Virginia State Board of Education,* 47 F.Supp. 251 (1942). The school board then appealed the case directly to the U.S. Supreme Court.

In a 6–3 decision, the Court struck down the resolution because it contravened the First Amendment to the United States Constitution. The dramatic shift came, in part, with the replacement of three justices on the Court after *Gobitis.* Justice ROBERT JACKSON, in his majority opinion, wrote that the resolution violated the students' freedom of speech and freedom of religion. "The very purpose of a Bill of Rights," the Court explained, is "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities. . . ." The Court emphasized that under the BILL OF RIGHTS, neither freedom of speech nor freedom of worship may be curtailed by the popular vote of a legislative assembly, unless it is through the amendment process set forth in Article V of the U.S. Constitution, and then only with the approval of three-fourths of the states.

Justice Jackson observed that the Founding Fathers "set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent." Saluting the American flag and reciting the Pledge of Allegiance are forms of symbolic expression, the Court ruled. Refusing to salute the flag or recite the Pledge of Allegiance may be a form of political protest, the Court pointed out, or it may reflect a conscientious decision made by a person of devout religious belief. In either case, the Court concluded, such symbolic expression is protected by the First Amendment. "If there is any fixed star in our constitutional constellation," the Court wrote, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

In overruling *Gobitis,* the Supreme Court questioned that case's premise that national security is contingent upon national unity. The Court noted that *Gobitis* had been subjected to much criticism, and cited a number of civic organizations that compared the mandatory flag salute regulations in the United States to similar laws that had been promulgated in Nazi Germany. The Court in *Barnette* stated that national security is hardly vindicated by permitting the government to expel a handful of children from school.

The government may instruct children on the value of patriotism, and it may acquaint students with the historical importance of the American flag, but the Court cautioned that government must not become a partisan of any religion, class, or faction in doing so. When states are fulfilling their crucial mission of educating impressionable children, the Court stressed, public schools must not "strangle the free mind at its source, and teach youth to discount important principles of government as mere platitudes."

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Symbolic Speech.

## FLAGRANTE DELICTO

*[*Latin, In the act of perpetrating the crime.*]*

## FLETCHER V. PECK

An 1810 decision by the U.S. Supreme Court, *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87, 3 L. Ed. 162, held that public grants were contractual obligations that could not be abrogated without fair compensation, even though the state legislature that made the grant had been corrupted and a subsequent legislature had passed an act nullifying the original grant.

The plaintiff, Robert Fletcher, brought suit against John Peck for breach of COVENANT on land that Fletcher had purchased in 1803. This land was part of a tract of 35 million acres in the area of the Yazoo River (Mississippi and Alabama) that the state of Georgia had taken from the Indians and then sold in 1795 to four land companies for a modest sum ($500,000) for so much land. The land companies then

broke up the tract and resold parcels for enormous profits.

When a new Georgia legislature learned in 1796 that some of the legislators who had voted to sell the land had been stockholders in the companies that purchased the tract and that many of the legislators who had authorized the sale had received bribes from the land speculators, it rescinded the original sale on the grounds that it had been attended by FRAUD and corruption.

The property in question had passed through several hands before Peck purchased it in 1800. Three years later, he sold the land to Fletcher with a deed stating that all the previous sales had been legal. Fletcher, however, contended that the original sale to the land companies was void and that Peck was guilty of breach of covenant because the land was not legally his to sell. After a circuit court found in favor of Peck, the case came before the U.S. Supreme Court on a writ of error.

Speaking for the Court, Chief Justice JOHN MARSHALL deplored the corruption that had found its way into the state legislature but found that the validity of a law cannot depend on the motives of its framers. Nor can private individuals be expected to conduct an inquiry into the probity of a legislature before they enter into a private contract on the basis of a statute enacted by that legislature.

Marshall then turned to the question of whether the statute enacted in 1796 could nullify rights and claims established under the bill that had authorized the land sale in 1795. Although he agreed that as a general principle "one legislature is competent to repeal any act which a former legislature was competent to pass," Marshall held that actions taken under a law cannot be undone by a subsequent legislature. If the law in question is a contract, he reasoned, repeal of the law cannot divest rights that have vested under the contract. To hold otherwise would be tantamount to seizing without compensation property that an individual had acquired fairly and honestly.

In addition to basing his argument on such general considerations, Marshall found that the original grant was a contract within the meaning of the Contract Clause of the U.S. Constitution, which provides that "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . ." (Art. I, § 10, clause 1). Reasoning that the Constitution did not distinguish between contracts between individuals and contracts to which a state was a party, Marshall held that the Framers of the Constitution intended the clause to apply to both. The purpose of the clause, he explained, was to restrain the power of the state legislatures over the lives and property of individuals.

Under the act rescinding the bill of 1795, however, Fletcher would forfeit the property "for a crime not committed by himself, but by those from whom he purchased." Thus the rescinding act "would have the effect of an ex post facto law" and would therefore be unconstitutional. Accordingly Marshall concluded that in spite of the profits reaped by the dishonesty of the land speculators, both general principles and the U.S. Constitution prevented a state legislature from rendering a contract null and void.

*Fletcher v. Peck* was the first case in which the Supreme Court invalidated a state law as contrary to the Constitution. It also exemplified the protective approach of the Marshall court toward business and commercial interests. In *Fletcher* and later in the *Dartmouth College* case (TRUSTEES OF DARTMOUTH COLLEGE V. WOODWARD, 17 U.S. [4 Wheat.], 518, 4 L. Ed. 629 [1819]), the Court expanded the scope of the term *contract* and limited the degree to which the states could encroach upon property rights and contractual obligations.

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## FLOATING CAPITAL

*Funds retained for the purpose of paying current expenses as opposed to fixed assets.*

Floating capital is also known as circulating capital. It encompasses (1) the raw materials consumed in each phase of manufacturing; (2) money designated for wages; and (3) products stored in the warehouses of manufacturers or merchants.

## FLOATING LIEN

*A security interest retained in collateral even when the collateral changes in character, classification, or location. An inventory loan in which the lender receives a security interest or general claim on all of a company's inventory. A security interest under*

*which the borrower pledges security for present and future advances.*

### FLOTSAM

*A name for the goods that float upon the sea when cast overboard for the safety of the ship or when a ship is sunk. Distinguished from jetsam (goods deliberately thrown over to lighten ship) and ligan (goods cast into the sea attached to a buoy).*

### F.O.B.

*An abbreviation for free on board, which means that a vendor or consignor will deliver goods on a railroad car, truck, vessel, or other conveyance without any expense to the purchaser or consignee.*

### FOLLOW

*To conform to, comply with, or be fixed or determined by; as in the expression "costs follow the event of the suit." To go, proceed, or come after. To seek to obtain; to accept as authority, as in adhering to precedent.*

## ♦ FOLTZ, CLARA SHORTRIDGE

Clara Shortridge Foltz has been called California's First Woman. The first woman on the Pacific Coast to pass the bar, she did so after successfully LOBBYING the legislature to change a law that denied women the right to become lawyers. She was the first woman to serve as clerk of the judiciary committee of the state assembly, to be selected as a trustee of the State Normal School, to serve on the California State Board of Charities and Corrections, to serve as a deputy district attorney in Los Angeles, and to run for governor. She was the first woman to argue a motion in the New York City courts. And, in 1893, she was the first person to propose a model public defender bill—the blueprint for the system that remains in place today. Her efforts resulted in the passage of the bill in more than thirty states.

Foltz was born July 16, 1849, in New Lisbon, Henry County, Indiana, the second of five children, and the only girl, to Elias Willets Shortridge and Telitha Cumi Harwood Shortridge, both of Indiana. Her father was at times a druggist, a lawyer, and a preacher in the Campbellite Church.

The Shortridges moved to Dalton Township, Wayne County, Indiana, the next year. By the time Clara was eleven years old, the family was living in Mount Pleasant, Iowa. There, she received her only formal education, at Howe's Academy, a progressive school whose mission and purposes were coeducation, WOMEN'S RIGHTS, and the ABOLITION of SLAVERY. She earned honors in Latin, philosophy, history, and rhetoric. At age fourteen, she accepted a teaching post near Keithsburg, Illinois, which she held for only one term because, at age fifteen, on December 30, 1864, she eloped with a Union soldier, Jeremiah Richard Foltz.

The Foltzes lived on a farm in Iowa, where they had the first three of their five children. In 1871, Foltz's husband moved to Oregon; in 1872, Foltz and their four children (the youngest being nine weeks old) followed. She found him working as a clerk for miniscule pay. To support her family, she went to work as a dressmaker and took in boarders.

"THEY CALLED ME THE LADY LAWYER . . . A DAINTY SOBRIQUET THAT ENABLED ME TO MAINTAIN A DAINTY MANNER AS I BROWBEAT MY WAY THROUGH THE MARSHES OF IGNORANCE AND PREJUDICE."
—CLARA FOLTZ

In 1875, Foltz and her family moved to San Jose, California. Although her marriage ended there in 1877, her public life began. Foltz became involved in the suffrage movement, attending, and then giving, lectures. Foltz also began her legal career in San Jose. She attempted to study with the preeminent member of the legal community Francis Spencer, but he refused her request. Foltz then turned to C. C. Stephens, who was a friend, an occasional legal partner, and a fellow silver prospector of her father's. Stephens accepted her as a student at his firm, Black and Stephens.

In 1877, California law allowed only white males over twenty-one years of age and of good moral character to become lawyers. Foltz wrote a proposed amendment to section 275 of the Code of Civil Procedure, changing "white male" to "person." Foltz and her sister suffragist Laura deForce Gordon lobbied throughout the twenty-second session of the California Legislature for the Woman Lawyer's Bill. It easily passed the senate but met strong opposition in the assembly. Foltz's ally, the senate sponsor of the bill, Grove L. Johnson, switched his aye vote to nay in order to move for reconsideration of the defeated bill. After a heated debate at the very end of the legislative session, the Woman Lawyer's Bill passed the assembly. The bill nearly died until Foltz managed a last-minute audience with Governor William Irwin. In the waning hours of the session, on the last possible day, March 29, 1878, the governor signed the bill.

Foltz and Gordon divided their responsibilities the summer of 1878. Foltz studied and was the first woman to take advantage of their recent legislative success, taking the bar examination. Gordon, although she was not a delegate, attended the first California constitutional convention as a member of the press, and successfully lobbied for the inclusion of two clauses that she and Foltz had a hand in drafting. The first clause prohibited restrictions to any business, vocation, or profession based on sex; the second prohibited SEX DISCRIMINATION in college faculty hiring. Foltz passed the bar examination and became California's first female lawyer on September 5, 1878.

In January 1879, Foltz and Gordon registered for classes at Hastings, California's first law school. However, after only a few days of classes, Foltz received a letter from the Hastings Law School Board, informing her that the directors had resolved not to admit women. Foltz and Gordon filed suit to compel the college, as a state institution, to admit women. The district court judge, who reportedly did not believe in women lawyers, nevertheless found these women lawyers to be correct in the law, and ordered Hastings to admit them. Hastings appealed, and the case went to the California Supreme Court (*Foltz v. Hoge,* 54 Cal. 28 [1879]). Although Foltz and Gordon were victorious again, the time for Foltz to attend law school had passed. She went to Sacramento to serve as clerk, or counsel, to the judiciary committee of the state assembly. Foltz nevertheless considered the Hastings victory to be her finest moment.

Foltz had a long and successful career as an attorney, first in San Francisco and then in Los Angeles. She practiced probate, criminal, family, and corporate law. Some of her very first cases, in 1878, heard in justice court, involved reclaiming the property of young women put in vulnerable circumstances by desertion, illness, or an ex-employer.

Throughout her career, in addition to conducting a thriving practice, she worked for suffrage and women's rights. She actively encouraged the participation of women in the legal profession. In 1893, she organized the Portia Law Club in San Francisco. She taught women the law at her offices in San Francisco and in Los Angeles, where she relocated in 1906. In 1918, she helped found the Women Lawyers' Club in Los Angeles. She was responsible for California laws allowing qualified women to act as administrators, executors, and notaries public.

Foltz was a primary force behind improving the criminal defense system. In 1893, she represented the California bar at the National Congress of Jurisprudence and Law Reform, held in conjunction with the Chicago World's Fair. It was there that she first introduced the Foltz Public Defender Bill. This proposal was subsequently adopted, owing in large part to her lobbying, in over thirty states.

The Foltz Public Defender Bill proposed a defender system in which salaried lawyers would devote all or a substantial part of their time to the specialized practice of representing indigent defendants, as opposed to the existing system, in which the court appointed lawyers on an ad hoc basis from the bar at large. The model bill proposed that public defenders meet certain qualifications, receive a salary, have clearly defined job responsibilities, and serve for a term of

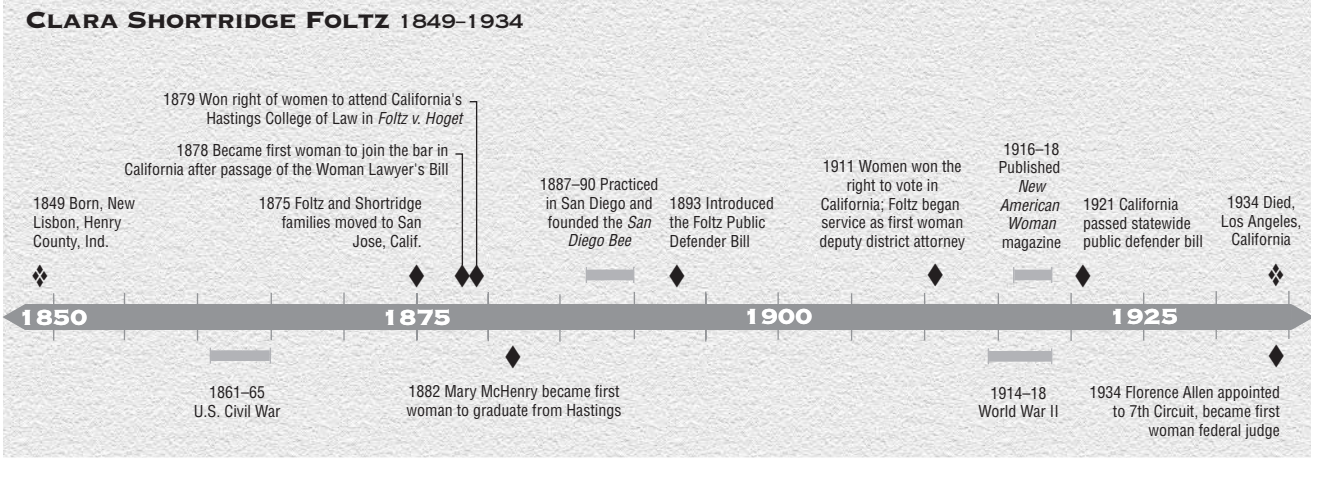

office. A public defender would be a county officer who would defend, without expense to them, all persons who were not financially able to employ counsel and who were charged with the commission of any CONTEMPT, misdemeanor, felony, or other offense.

Nearly two decades passed before the first public defender office was actually established in Los Angeles County in 1914, where Foltz was then living. In fact, she had already served as the first woman deputy district attorney, in 1911. It was 1921 before California passed a statewide public defender bill.

Foltz was also an active writer and publisher. She founded the weekly newspaper *The San Diego Bee.* She also published a feminist weekly, *The Mecca,* during a brief stay in Colorado, and a magazine, *The New American Woman.* She also contributed articles to other papers and magazines throughout her life.

Foltz died in Los Angeles on September 4, 1934. The pallbearers for her funeral included the governor and several prominent federal and state judges.

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## FOOD AND DRUG ADMINISTRATION

One of the oldest U.S. CONSUMER PROTECTION agencies, the Food and Drug Administration (FDA) protects the public from unsafe foods, drugs, medical devices, cosmetics, and other potential hazards. As part of the DEPARTMENT OF HEALTH AND HUMAN SERVICES, the FDA annually regulates over $1 trillion worth of products, which account for one-fourth of all consumer spending in the United States. It also protects the rights and safety of patients in clinical trials of new medical products, monitors the promotional activities of drug and device manufacturers, regulates the labeling of all packaged foods, and monitors the safety of the nation's blood supply.

To ensure compliance with its regulations, the FDA employs over 1,000 investigators and inspectors who visit over 15,000 food-processing, drug-manufacturing, and other facilities each year. If it finds violations of law, the FDA first encourages an offending company to voluntarily correct the problem or to recall a faulty product from the market. If the firm does not voluntarily comply with the law, the FDA may take it to court and seek criminal penalties against it. The FDA may also seize faulty products, order product recalls, seek injunctive relief, impose fines, and take other types of enforcement action. Each year, the FDA declares about 3,000 products and 30,000 import shipments to be unacceptable in various ways.

The FDA employs over 2,000 scientists—including 900 chemists and 300 microbiologists—who provide the SCIENTIFIC EVIDENCE to back up its regulatory and inspection duties. These scientists analyze samples of products for purity and review test results of new products. The FDA itself does not do research for a new medical product. Instead, it evaluates the results of studies undertaken by the manufacturer.

### History

Food production in the United States has been regulated since the late eighteenth century. Colonies and, later, states passed laws banning impurities from selected foods. In 1848, the United States began regulating imported drugs, under the Drug Importation Act (Ch. LXX, 9 Stat. 237). The enforcement of food and drug laws was first assigned to the Chemical Division of the new U.S. DEPARTMENT OF AGRICULTURE (USDA) in 1862 (12 Stat. 387).

The need for laws to regulate food and drug purity became increasingly urgent in the late nineteenth century, when substances such as opium, cocaine, and heroin were commonly added to medicinal elixirs and tonics. The need for government regulation was also made evident in Upton Sinclair's book, *The Jungle*, which exposed the unsanitary conditions of Chicago's meatpacking industry and shocked the nation. On June 30, 1906, Congress, with the support of President THEODORE ROOSEVELT, passed two landmark pieces of Progressive Era legislation

# How the FDA Approves New Drugs

The process by which the Food and Drug Administration (FDA) approves drugs as safe and effective is generally long and complicated, though it may vary according to the type of drug and the nature of the illness for which it is being developed. The FDA refers to drugs under development as investigational new drugs, or INDs.

The evaluation of new drugs requires the skills of many different FDA scientists and professionals performing a wide variety of tasks. Biochemists and molecular biologists evaluate the basic chemistry and biology of new chemical compounds and molecular structures. Toxicologists assess the potential harm of proposed drugs, and pharmacologists study how these drugs affect the body and are broken down and absorbed by it. Computer scientists create electronic models that aid in the understanding of new chemicals. Physicians evaluate the results of clinical trials, assessing both the beneficial and adverse effects of the drugs. And statisticians evaluate the design and results of controlled studies.

It is an expensive and time consuming process, particularly for the company developing the drug, called a drug sponsor. A sponsor spends an average of $359 million for each new drug brought to market. Typically, the process takes eight and a half years and may be divided into roughly three stages: preclinical trials, involving animal and other laboratory tests (lasting one and a half years on average); clinical trials, involving tests on humans (five years); and FDA review (two years).

**Preclinical Trials** Once a sponsor has developed a drug, it must test the drug on animals in the laboratory. In doing so, the drug sponsor must follow FDA guidelines and regulations. These tests, also called preclinical trials, are usually done on more than one species of animals. FDA guidelines call for the inspection of animal laboratories every two years to ensure that they are being operated according to the administration's regulations.

After short-term lab testing has been performed and the sponsor has deemed its results adequate, the sponsor submits test data and plans for future clinical trials to the FDA. FDA scientists, together with a local institutional review board composed of scientists, ethicists, and nonscientists, then conduct a thirty-day safety review to decide whether to allow testing on humans. The vast majority of new drugs tested in the laboratory are rejected by either the sponsor or the FDA because they are unsafe or ineffective.

If the FDA indicates approval, the drug sponsor may begin clinical testing on humans. Even if a drug is approved for clinical trials, the sponsor continues animal testing of the drug in order to better understand the drug's long-term effects.

**Clinical Trials** Clinical trials are scientifically controlled studies in which the drug being tested is given to one group of patients, while another treatment, often a placebo (an inactive substance that looks like the drug being tested), is given to another group. Ideally, neither group of patients knows which is receiving the new drug and which is receiving the placebo.

The clinical trials, like the animal tests, examine what happens to the drug in the body, including whether it is changed,

that strengthened the government's ability to protect consumers: the Food and Drug Act (34 Stat. 768 [21 U.S.C.A. § 1–15]) and the Meat Inspection Act (21 U.S.C.A. § 601 et seq.). The former prohibited interstate commerce in misbranded and adulterated foods, drinks, and drugs, and the latter addressed the unsanitary conditions and use of poisonous preservatives and dyes in the meatpacking industry.

In 1927, Congress authorized the creation of the Food, Drug, and Insecticide Administration within the U.S. Department of Agriculture. In 1930, the agency's name was changed to the current one, Food and Drug Administration (Agriculture Appropriation Act, 46 Stat. 976).

In 1937, 107 people died after taking the elixir sulfanilamide, a supposedly healing tonic. This tragedy prompted the passage of the next major reform of food and drug law, the Federal Food, Drug, and Cosmetic Act of 1938 (21 U.S.C.A. § 301 et seq.). The FDA was then entrusted with the regulation of cosmetics and therapeutic devices and was authorized to do factory inspections. Even more importantly, the act required new drugs to be tested on animals and humans for safety before being marketed. In 1957, the Food Additives Amendment (Pub. L. 85-250, Aug. 31, 1957, Stat. 567) required the evaluation of food additives to establish safety, and in the following year, the Delaney Clause (Pub. L. 85-929, Sept. 6, 1958, 72 Stat. 1784) forbade the use in food of substances found to cause cancer in laboratory animals.

In 1962, the Kefauver-Harris Drug Amendments (Pub. L. 87-781, Oct. 10, 1962, 76 Stat. 780) were passed. These laws required drug

or metabolized, in the body, how much of it is absorbed into the blood, and how long it remains in the body. If human tests produce unexpected results, researchers may conduct further animal tests to better understand the drug.

Clinical trials proceed in three phases: Phase 1 involves testing primarily for safety and dosage level. Twenty to one hundred healthy patients are assessed over several months. If the results are within FDA safety guidelines, the trials proceed to phase 2.

Phase 2 involves a greater number of patients—up to several hundred—who have the condition that the drug is intended to treat. During this stage, which lasts from several months to two years, researchers attempt to determine the drug's effectiveness in achieving its stated purpose, as well as its safety. At the end of this phase, sponsors meet with FDA officials to discuss the best way to conduct the next phase of testing.

In phase 3, the most crucial stage of testing, the number of patients is expanded still further, to several hundred to several thousand, and the length of the study is increased to one to four years. This phase establishes the correct dosage of the drug and how it will be labeled, and provides further evidence regarding its safety and effectiveness.

Of one hundred drugs submitted for testing in humans, an average of seventy will pass phase 1. Of these seventy, on average, only thirty-three will remain after phase 2 testing, and twenty-five to thirty after phase 3. Finally, an average of only twenty will actually receive FDA approval.

Once the drug sponsor has completed clinical trials, it submits a new drug application (NDA) to the FDA, requesting approval to market the drug. This application consists of documentation detailing the chemical composition of the drug, the design of the trials, the results of the trials, and the means by which the drug is made and packaged.

**FDA Review** In assessing an NDA, the FDA undertakes its closest scrutiny of all during the drug approval process. Its principal goal during review is to determine whether the benefits of the new drug outweigh the risks. To reach this determination, the FDA examines the documentation provided by the sponsor and looks at samples of the drug.

If inadequacies are discovered in the NDA, the FDA may require additional information, further testing, or modified labeling. In cases where it is difficult to establish clearly whether the benefits of the drug outweigh the risks, a panel of outside experts is often consulted.

If the FDA approves the drug, the sponsor may begin manufacturing and marketing the drug immediately.

The FDA does not stop monitoring a drug once it has been marketed. It continues to evaluate the drug's safety and effectiveness through its program of postmarket surveillance. This program consists of surveys, the testing of product samples, and the analysis of reported adverse reactions.

**Speeding Drugs to Those Who Need Them** The FDA has longstanding policies allowing what it calls the compassionate use of new drugs for those in desperate need. Innovative cancer treatments, for example, have been made available to patients since the 1970s through the National Cancer Institute.

However, during the 1980s, the FDA came under increasing fire for its slow approval of new drugs. Particularly with the emergence of AIDS during the 1980s, the public outcry for fast delivery of innovative new drugs strengthened. As science produces ever more pharmaceuticals, the FDA is called on to review drug applications as quickly as is reasonably possible.

In response to the growing demand for speedy drug evaluation, the FDA has made significant changes in its review

*(continued)*

manufacturers not only to show that their drugs were safe but also to prove that their drugs achieved the effects claimed. That same year, FDA regulations were shown to be effective after the drug thalidomide, for which the FDA had delayed approval, caused thousands of birth defects in western Europe.

In 1979, the FDA was made part of the Department of Health and Human Services (96 Stat. 668, 695). Other laws with major implications for the FDA's activities include the 1990 Nutrition Labeling and Education Act (Pub. L. 101-535, Nov. 8, 1990, 104 Stat. 2353), which requires all packaged foods to carry labels with nutrition information, and the Prescription Drug User Fee Act of 1992 (Pub. L. 102-571, Title 1, Oct. 29, 1992, 106 Stat. 4491 to 4500), which requires drug and biologics manufacturers to pay fees that support FDA assessment of their products.

Effective October 2002, the FDA implemented its National Organic Program (NOP) under the Organic Foods Production Act of 1990 (OFPA), 7 U.S.C. 6501 et. seq. The NOP sets the first national standards for the use of the label term *organic* on food items and products. Products that qualify as "100 percent organic" under NOP rules may use the "USDA Organic" seal on their principal display panel. The rules specifically prohibit the use of GENETIC ENGINEERING methods, ionizing radiation (irradiation), and sewage sludge for fertilization. In addition, all agricultural products that are labeled organic must originate from farms or handling operations that have been certified by a state or private agency accredited by the USDA.

## How the FDA Approves New Drugs (continued)

protocols. In 1987, for example, the agency adopted "expanded access" regulations, which permit certain drugs to be designated as treatment INDs. A treatment IND may be administered to patients even while it is still undergoing clinical trials. This program allows patients with no other alternatives to undergo a treatment that may benefit their health. By August 1994, twenty-nine agents had been designated treatment INDs, and by 1995, more than seventy-five thousand patients had received access to new therapies through this program. New drugs used to treat patients with AIDS are made available through a similar process known as the parallel track approach.

Identifying priorities is another method the FDA uses to provide more rapid access to promising new treatments. AIDS drugs, drugs that treat life-threatening or severely debilitating illnesses, and drugs that appear to offer significant improvements over existing therapies are classified as priority drugs and receive faster review than those classified as standard drugs. With priority drugs, the FDA typically becomes involved earlier in the development process, and is thereby able to more quickly review the relevant applications.

Drugs are also classified as to chemical type, so that those closely similar in structure to existing drugs will receive less intensive review than those with a molecular structure that has never been marketed before.

Accelerated approval is another mechanism for faster review of promising new drugs. Under this program, created in 1991, a product may be approved for limited use if it has been shown in trials to achieve particular results—such as lowering blood pressure or cholesterol. Drugs approved under this program include didanosine for AIDS, interferon beta-1B for multiple sclerosis, and DNase for cystic fibrosis.

The Prescription Drug User Fee Act of 1992 (Pub. L. 102-571, Title 1, Oct. 29, 1992, 106 Stat. 4491 to 4500) has also enabled the FDA to speed drug review. Under this law, fees paid by drug manufacturers are used by the agency to hire hundreds of additional review staff and buy improved equipment, including computers that make review more efficient.

The FDA is also attempting to streamline red tape and bureaucracy. In 1995, President **BILL CLINTON** and Vice President **ALBERT GORE**, Jr., announced that twenty-one separate product license applications used by the FDA would be consolidated into one simplified form. This form would also be available in an electronic format, making it easier to distribute, prepare, and review.

Results indicate that these changes have led to faster approval of important new drugs. One signal success of FDA reform was the prompt approval of taxol, a treatment for advanced ovarian cancer that was approved in December 1992 after a record 5 months. By 1994, all new drugs were being approved by the FDA in a median time of 19 months, and priority drugs with important therapeutic uses were approved in an average of 10.4 months. In the late 1980s, by comparison, the FDA took an average of 27 months to approve new drugs.

In 1995, President Clinton established even more ambitious new goals for FDA approval. These goals, to be met by 1997, require the FDA to approve priority drugs within 6 months and standard drugs within 12 months.

### Organization

The FDA carries out its activities through a number of subdivisions. The Center for Drug Evaluation and Research regulates the safety, effectiveness, and labeling of all prescription and over-the-counter drugs intended for human use. It also monitors drug advertising for accuracy, ensures the safety and rights of patients in drug studies, and distributes information on drug products to the medical community and the public.

The Center for Biologics Evaluation and Research regulates biological products, which include blood, vaccines, human tissues, and drugs derived from living organisms. It coordinates an AIDS program, which works to develop an AIDS vaccine and AIDS diagnostic tests. It also conducts research on the safety of blood and blood products and inspects manufacturing plants to ensure compliance with FDA standards.

The Center for Food Safety and Applied Nutrition develops regulations related to food, food additives and colorings, and cosmetics. The Center for Devices and Radiological Health seeks to ensure the safe use of potentially hazardous radiation such as that produced by X rays. It conducts research into the effects of exposure to radiation-producing medical devices and develops manufacturing standards for such devices.

The Center for Veterinary Medicine evaluates the safety of drugs and devices used on animals. The National Center for Toxicological Research assesses the biological effects of toxic chemical substances.

# AZT: An Agent of Change for the FDA

Azidothymidine (AZT) is a celebrated example of speedy FDA approval of a new drug. The unusually swift approval of AZT during the early years of the AIDS (**ACQUIRED IMMUNE DEFICIENCY SYNDROME**) epidemic led to the creation of a new FDA category, treatment investigational new drug (treatment IND), that established new procedures for more rapid and flexible drug approval.

The pharmaceutical company Burroughs Wellcome first presented AZT as a new drug to the FDA in June 1985. Public fear of AIDS had increased dramatically during the previous few years, as had protests by AIDS activists who complained of slow FDA movement with regard to promising new treatments. Keenly aware of the need for swift decision making in the face of the deadly AIDS disease, the FDA approved phase 1 clinical trials of the drug within one week of the initial application.

Phase 1 testing of AZT, between July and December 1985, was promising, and phase 2, involving 300 patients in placebo-controlled trials, began in February 1986. After six months, 19 of the 137 patients in the group taking the placebo had died, whereas only 1 of 145 in the group taking AZT had died. The results were encouraging enough for the FDA to forgo further testing. The group taking the placebo was switched to AZT, and phase 3 testing, traditionally the most important step in clinical trials, was deemed unnecessary.

In September 1986, the FDA authorized the treatment of patients who wanted access to AZT, even before it had given approval to the drug. By the time approval for general public use came in March 1987, some 4,000 patients had already been treated with AZT, and thus the drug was already potentially extending the lives of hundreds of people.

Taking an example from its handling of AZT, the FDA in May 1987 created the treatment IND classification to facilitate faster approval and wider distribution of promising new therapies for life-threatening diseases. The rapid approval of AZT also proved greatly encouraging to the pharmaceutical industry, which could now hope to bring AIDS drugs to market much more rapidly and at lower cost.

**CROSS-REFERENCES**

Acquired Immune Deficiency Syndrome.

Other offices of the FDA include the Office of Policy, the Office of External Affairs, the Office of Management and Systems, the Office of AIDS Coordination, the Office of Orphan Products Development, and the Office of Biotechnology. The administration operates six field offices, 21 district offices, and 135 resident inspection posts throughout the United States and Puerto Rico.

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## FOOTNOTE 4

Footnote 4 is a footnote to *United States v. Carolene Products Co.,* 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938), in which the U.S. Supreme Court upheld the constitutionality of the Filled Milk Act, 42 Stat. 1486, which Congress passed in 1923 to regulate certain dairy products. Written by Justice HARLAN F. STONE, footnote 4 symbolizes the end of one era of constitutional JURISPRUDENCE and the dawning of another.

In upholding the constitutionality of the Filled Milk Act, the Supreme Court drew a distinction between legislation that regulates ordinary economic activities and legislation that curtails important personal liberties. The constitutional authority of state and federal legislatures over economic matters is plenary, the Court said, and laws passed to regulate such matters are entitled to a presumption of constitutionality when reviewed by the judicial branch of government.

Courts must pay great deference to legislation that is principally aimed at economic affairs, the Court continued, and judges should refrain from questioning the wisdom or policy judgments underlying such legislation. Although some commercial laws may seem undesirable or unnecessary to a particular judge, the Court cautioned, the judicial branch may not overturn them unless they fail to serve a rational or legitimate purpose.

This deferential posture toward the legislative branch represents the crux of judicial self-restraint, a judicial philosophy that advocates a narrow role for courts in U.S. constitutional democracy. Because state and federal legislatures are constitutionally authorized to make the law, proponents of judicial self-restraint argue, courts must limit their role to interpreting and applying the law, except in the rare instance where a piece of legislation clearly and unequivocally violates a constitutional provision, in which case they may strike it down.

In footnote 4 the Supreme Court indicated that this presumption of constitutionality might not apply to certain categories of noneconomic legislation. Legislation that restricts political processes, discriminates against minorities, or contravenes a specifically enumerated constitutional liberty, the Court said, may be subject to "more searching judicial scrutiny."

Legislation that limits the right to assemble peaceably, the freedom to associate, or the liberty to express dissenting viewpoints, the Court suggested, tends to obstruct ordinary political channels that average citizens traditionally rely on to participate in the democratic process. By the same token, the Court suggested that legislation discriminating against racial, religious, and ethnic minorities tends to marginalize groups that are already politically weak and vulnerable.

The Court also reasoned that legislation contravening a specifically enumerated constitutional right should be given less deference by the judiciary than legislation that purportedly contravenes an unenumerated right. This passage in the Court's opinion alluded to its decision in an earlier case, LOCHNER V. NEW YORK, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), which has been maligned throughout the twentieth century.

In *Lochner* the Supreme Court recognized an unenumerated freedom of contract that is loosely derived from the Fifth and Fourteenth Amendments to the U.S. Constitution. Based on this freedom, the Court struck down a New York law (N.Y. Laws 1897, chap. 415, art. 8, § 110) that regulated the number of hours employees could work each week in the baking industry. The Court said employers and employees enjoy an unwritten constitutional right to determine their wages, hours, and working conditions without government interference.

Over the next thirty-two years, state and federal courts relied on *Lochner* to invalidate scores of statutes that attempted to regulate employment relations, business affairs, and various property interests. At the same time, the Supreme Court was upholding legislation that restricted specifically enumerated constitutional liberties, such as the FREEDOM OF SPEECH. For example, in SCHENCK V. UNITED STATES, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919), the Supreme Court upheld the ESPIONAGE ACT OF 1917, 40 Stat. 217, which prohibited the circulation of printed material that encouraged resistance to the military draft during WORLD WAR I.

The reasoning of footnote 4 helped bring an end to the *Lochner* era and a reversal of the judicial standards of review for economic and noneconomic legislation. Before *Carolene Products,* legislation that in any way touched upon an economic interest was subject to judicial scrutiny. During the same period, state and federal courts gave leeway to legislation touching upon noneconomic freedoms, even the personal freedoms expressly contained in the BILL OF RIGHTS.

Since *Carolene Products,* state and federal legislatures have been given wide latitude to regulate the workplace, commercial interests, and other economic matters. Conversely, laws that have hindered access to political processes, discriminated against minorities, or impinged on fundamental freedoms contained in the Bill of Rights, as made applicable to the states through the FOURTEENTH AMENDMENT, have been deemed suspect, and subject to strict judicial scrutiny. Such laws are typically invalidated by the judiciary unless the government can demonstrate that they serve a compelling interest.

The legacy of footnote 4 can be observed in cases where the Supreme Court has expanded the class of minorities who are protected by heightened judicial scrutiny. In addition to the racial, ethnic, and religious minorities referenced in footnote 4, women, illegitimate children, and other "discrete and insular" minorities have received increased constitutional protection by the Supreme Court since 1938.

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CROSS-REFERENCES

Judicial Review; Strict Scrutiny.

## FORBEARANCE

*Refraining from doing something that one has a legal right to do. Giving of further time for repayment of an obligation or agreement; not to enforce claim at its due date. A delay in enforcing a legal right. Act by which creditor waits for payment of debt due by a debtor after it becomes due.*

*Within* USURY *law, the contractual obligation of a lender or creditor to refrain, during a given period of time, from requiring the borrower or debtor to repay the loan or debt then due and payable.*

## FORCE

*Power, violence, compulsion, or constraint exerted upon or against a person or thing. Power dynamically considered, that is, in motion or in action; constraining power, compulsion; strength directed to an end. Commonly the word occurs in such connections as to show that unlawful or wrongful action is meant, e.g., forcible entry.*

*Power statically considered, that is, at rest, or latent, but capable of being called into activity upon occasion for its exercise. Efficacy; legal validity. This is the meaning when we say that a statute or a contract is* in force.

*Reasonable force* is that degree of force that is appropriate and not inordinate in defending one's person or property. A person who employs such force is justified in doing so and is neither criminally liable nor civilly liable in TORT for the conduct.

DEADLY FORCE is utilized when a person intends to cause death or serious bodily harm or when he or she recognizes personal involvement in the creation of a substantial risk that death or bodily harm will occur.

## FORCE MAJEURE

*[*French, A superior or irresistible power.*] An event that is a result of the elements of nature, as opposed to one caused by human behavior.*

The term *force majeure* relates to the law of insurance and is frequently used in construction contracts to protect the parties in the event that a segment of the contract cannot be performed due to causes that are outside the control of the parties, such as natural disasters, that could not be evaded through the exercise of due care.

*A force majeure, like an act of God, is an event that is the result of the elements of nature. This image shows some of the damage caused by Hurricane Georges, which struck the Florida Keys in September 1998.*

AP/WIDE WORLD PHOTOS

## FORCED SALE

*An involuntary transaction that occurs in the form and at the time specified by law for the purpose of applying the proceeds to satisfy debts, such as a mortgage or a tax lien, incurred by the owner of the property.*

A forced sale results from the execution of a judgment previously rendered by a court.

## FORCIBLE DETAINER

*A summary and expeditious statutory remedy used by a party entitled to actual possession of premises to secure its possession, where the occupant initially in lawful possession of it refuses to relinquish it when his or her right to possession ends.*

CROSS-REFERENCES

Forcible Entry and Detainer.

## FORCIBLE ENTRY AND DETAINER

*A summary proceeding to recover possession of land that is instituted by one who has been wrongfully ousted from, or deprived of, possession.*

Forcible entry and detainer, one aspect of which is known as UNLAWFUL DETAINER, alludes to two separate misdeeds and two divergent remedies of statutory origin.

The forcible intrusion into another person's peaceable possession constitutes one type of infraction. Even if it is unlawful, peaceable possession cannot be terminated by violence. In many jurisdictions, even the rightful owner is held liable for damages, which as provided by statutes are often multiple in nature, if he or she employs excessive force in ousting one in peaceful possession. In such instances, the offense involved is the force itself and not the actual dispossession.

The second form of misdeed entails the initiation of legal proceedings by the rightful owner against a squatter without title or a tenant who declines to depart. Force in such instances might be inconsequential, figurative, or nonexistent. Damages are avoidable, but the restoration of the lawful owner to possession of the property by eviction of the defendant is also within the purview of the remedy. This remedy, which awards both damages and possession, resembles EJECTMENT, which also entails the recoupment of possession of property by the person entitled to it, but significant differences exist.

In addition to historical dissimilarities, the summary nature of the forcible entry and detainer action is unlike the nature of an ejectment action. The trial and eviction can be accomplished within a few days after SERVICE OF PROCESS. Statutes frequently provide, however, that the decision in forcible entry or unlawful detainer is not binding as to title. If title is seriously disputed, a second and more comprehensive suit in ejectment or TRESPASS is warranted.

The forcible entry or unlawful detainer action is restricted to cases in which the plaintiff's right to possession is unequivocal, since summary proceedings would not be justified under any other circumstances. A minority of jurisdictions, however, limit the action to the eviction of those who have actually entered by force.

A forcible entry suit, although burdensome in nature, functions not merely as a method of prompt relief but also affects a subsequent ejectment action. Since the BURDEN OF PROOF is imposed upon the plaintiff who has been dispossessed in the ejectment suit, in regard to his or her own paramount title, the issue of possession determined in the forcible entry suit affects the ultimate burden of proof. It would be inequitable to permit this to be manipulated by those who forcibly enter, or perhaps even by holdover tenants. The forcible entry action, in dispossessing the occupant where his or her title is patently invalid, influences the ejectment action by its principle that the plaintiff never prevails on the basis of the possessor's defective title, but must instead recover on the validity of his or her own title.

The supposition that unlawful detainer involves possession and not title, whereas ejectment entails title, is somewhat inaccurate. Both ejectment and unlawful detainer actions are possessory in nature, and title is nearly always the basis of possessory rights. The differences in the two actions reside in the summary character of forcible entry, the restricted class of person against whom it can be instituted, and its lack of RES JUDICATA effect on title issues.

These forcible entry and detainer, or summary eviction, statutes are primarily utilized by landlords attempting to regain possession of premises from recalcitrant tenants. The Supreme Court has upheld the validity of such statutes, regardless of the limited number of issues triable and the brief period between summons and trial.

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## ♦ FORD, GERALD RUDOLPH

Without winning a single vote in a presidential election, Gerald Rudolph Ford became chief executive of the United States on August 9, 1974. Ford's ascent to the White House began on October 12, 1973, when he was appointed by President RICHARD M. NIXON to succeed Vice President Spiro T. Agnew. Agnew left office on October 10, 1973, after PLEADING nolo contendere (I will not contest it) to felonious TAX EVASION. Ford was a popular Republican congressman from Grand Rapids, Michigan, and the minority leader of the U.S. House of Representatives. The Nixon administration was on the brink of collapse as evidence of its criminal involvement in the WATERGATE break-in and cover-up mounted. The scandal ultimately destroyed the Nixon White House, forcing the president to resign from office to avoid IMPEACHMENT. As a result, on August 9, 1974, Ford was sworn in as the nation's 38th president—and the first chief executive to be appointed to office.

Named Leslie Lynch King Jr., when born July 14, 1913, in Omaha, Nebraska, Ford spent most of his childhood in Grand Rapids, where his mother settled in 1914 after divorcing his father. When Ford was three years old, his mother remarried, and the future president was adopted by and renamed after his stepfather, Gerald Ford Sr.

Ford was a gifted athlete in high school and a college all-star on championship football teams at the University of Michigan. After graduating from Michigan in 1935, he turned down offers to play professional football and instead coached football and boxing at Yale University for five years. Ford attended Yale Law School during this time, and graduated in 1941 in the top third of his class.

After briefly practicing law in Grand Rapids, he enlisted in 1942 for a four-year tour with the Navy during WORLD WAR II. When the war ended, Ford returned to Grand Rapids and reestablished his law practice. He married Elizabeth ("Betty") Bloomer Warren in 1948, and by 1957, the couple had four children.

*Gerald R. Ford.*
LIBRARY OF CONGRESS

Ford was first elected to the U.S. House of Representatives from Michigan's Fifth Congressional District in 1948. He served in the House for 25 years, consistently winning reelection in his home district by 60 percent or more of the vote. A domestic affairs moderate and a fiscal conservative, Ford was assigned to the Public Works Committee during his first term in Congress. In 1951, he managed to transfer committees, and subsequently served on the influential House Appropriations Committee until 1965. Ford supported large defense budgets and a strong foreign policy, and opposed federal spending for several domestic social programs.

"TRUTH IS THE GLUE THAT HOLDS OUR GOVERNMENT TOGETHER.. . . OUR LONG NATIONAL NIGHTMARE IS OVER. OUR CONSTITUTION WORKS."
—GERALD R. FORD

After the 1963 assassination of President JOHN F. KENNEDY, Ford was selected to serve on the WARREN COMMISSION, a bipartisan task force set up to investigate Kennedy's murder. Later, Ford coauthored a book supporting the Warren Commission's report that Kennedy was killed by lone gunman Lee Harvey Oswald.

In 1963, Ford became chair of the House Republican Conference, and in 1964, he was named minority leader of the House of Representatives. At this stage in Ford's political career, his greatest ambition was to become Speaker of the House. However, because Congress was controlled by a majority of Democrats, Ford's goal was unattainable.

Ford was a GOP loyalist who campaigned tirelessly for other Republican candidates. An accomplished fund-raiser, he was given credit

for helping elect 47 new Republicans to the House of Representatives in 1966. In addition to campaigning and performing his congressional duties, Ford served as permanent chair of both the 1968 and 1972 Republican National Conventions. After the GOP's victory in the 1968 presidential election, Ford could be counted on to support vigorously Nixon's foreign and domestic programs in Congress.

When it became clear in 1973 that Vice President Agnew's legal and ethical problems would force him out of the Nixon White House, the president turned to Ford as a logical replacement. The TWENTY-FIFTH AMENDMENT to the U.S. Constitution allows the president to nominate a vice president in the event of a vacancy. Ford was a plausible choice because of his solid track record in the House, his popularity with Congress and the public, and his loyalty to Nixon. After Agnew's resignation, Ford publicly accepted Nixon's offer and was confirmed by a majority vote of both houses of the U.S. Congress. He was sworn in during a joint session of Congress on December 6, 1973.

Ford knew that he was joining a doomed, scandal-plagued administration and that in all likelihood he would become president. For eight months, he performed his vice presidential duties and waited as the Watergate investigators closed in on Nixon. With Nixon's resignation inevitable, Ford prepared what he hoped would be a reassuring speech to his weary country. On August 9, 1974, the day Nixon resigned and Ford was sworn in, Ford spoke to the nation on television, telling citizens that the U.S. system worked and that "our long national nightmare is over."

At the beginning of Ford's term as president, members of Nixon's cabinet, including SECRETARY OF STATE Henry Kissinger, agreed to stay on in the interest of continuity. Ford appointed Nelson A. Rockefeller, former governor of New York, to serve as his vice president. As the transition from Nixon to Ford was made, key Nixon appointees departed, and the Ford administration floundered.

The nation's economy was a pressing problem, with both inflation and unemployment running high. To combat inflation, Ford proposed a voluntary program, Whip Inflation Now (WIN), which was neither an economic nor a popular success. Without mandatory controls to keep prices and wages in check, the program was ineffective. Although other measures introduced by Ford eventually helped stabilize the economy, unemployment remained high, reaching more than nine percent in May 1975.

Clearly the most damaging event during Ford's two-and-a-half years in office occurred about a month after he was sworn in. On September 8, 1974, Ford granted Nixon a full pardon for any possible crimes committed during the Watergate cover-up. Although Ford pardoned Nixon out of compassion and a desire to move the nation from its Watergate paralysis, he suffered tremendously in the public opinion polls for his action. Many U.S. citizens opposed special treatment for Nixon, believing that the former president should be fully prosecuted for the crimes that toppled his administration. Some historians believe that Ford's unconditional pardon of Nixon cost him the 1976 presidential election.

Another misstep was Ford's AMNESTY proposal for young men who had dodged the draft during the VIETNAM WAR. Although the program did not offer automatic reentry into U.S. soci-

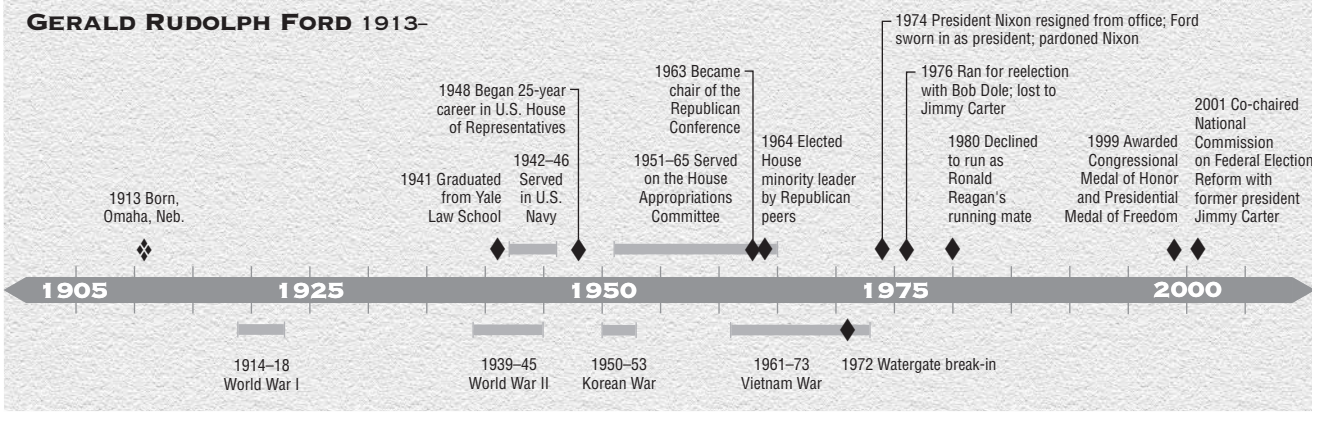

ety—it did require two years of public service—it was unpopular with conservative groups and with the very men it was supposed to help. The amnesty program received applications from only 20 percent of eligible U.S. citizens and was discontinued after two years.

In foreign affairs, Ford continued Nixon's policies of détente with the Soviet Union and negotiations for a Middle East peace accord. Perhaps the most newsworthy event of international importance during Ford's term was the *Mayaguez* incident. When the U.S. merchant ship *Mayaguez* was seized off the coast of Cambodia in 1975, Ford sent in U.S. troops to retrieve the crew and ship. The operation was an unmitigated success for Ford because bloodshed was avoided and his leadership qualities were demonstrated in the international arena.

During his brief term, Ford made one U.S. Supreme Court appointment, nominating Justice JOHN PAUL STEVENS, a moderate, to replace retiring Justice WILLIAM O. DOUGLAS in 1975. Ford became the first U.S. president to travel to Japan on an official visit, in 1974, and the first chief executive to survive two assassination attempts.

Initially, Ford considered himself an interim president. As he grew accustomed to the White House, he changed his mind and decided to run for his party's presidential nomination in 1976. Although Ford was opposed at the Republican convention by California governor RONALD REAGAN, he managed to win the nomination on the first ballot. He selected Senator BOB DOLE, of Kansas, as his running mate.

JIMMY CARTER, governor of Georgia and the 1976 Democratic presidential nominee, made personal integrity and honesty in government the central themes of his campaign. Carter criticized Ford's association with the tainted Nixon administration and stressed his own reputation for moral rectitude. In a tight race, Carter and running mate Walter F. Mondale, from Minnesota, won the election, receiving half the popular votes and 297 ELECTORAL COLLEGE votes.

In 1980, Ford was asked to run as Reagan's vice presidential candidate; he declined. Since then, he has remained in the public eye, lecturing at over 170 COLLEGES AND UNIVERSITIES and speaking out on political issues via television documentaries and newspaper opinion pieces. He participates in many of the activities sponsored by the Gerald R. Ford Library in Ann Arbor, Michigan, and the Gerald R. Ford Museum in Grand Rapids, Michigan, which were established in 1981. Ford serves on the board of directors of a number of national corporations and charities, and has been the recipient of numerous honorary degrees and awards.

In 1999, President BILL CLINTON awarded Ford the Presidential Medal of Freedom, the nation's highest civilian award, for guiding the nation through turbulent times. The same year, President and Mrs. Ford were awarded the Congressional Gold Medal for dedicated public service. Also, in 1999, the University of Michigan officially renamed its Institute of Public Policy Studies the Gerald R. Ford School of Public Policy.

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## FORECLOSURE

*A procedure by which the holder of a mortgage—an interest in land providing security for the performance of a duty or the payment of a debt—sells the property upon the failure of the debtor to pay the mortgage debt and, thereby, terminates his or her rights in the property.*

*Statutory foreclosure* is foreclosure by performance of a power of sale clause in the mortgage without need for court action, since the foreclosure must be done in accordance with the statutory provisions governing such sales.

Strict foreclosure refers to the procedure pursuant to which the court ascertains the amount due under the mortgage; orders its payment within a certain limited time; and prescribes that in default of such payment a debtor will permanently lose his or her equity of redemption, the right to recover the property upon payment of the debt, interest, and costs. The title of the property is conveyed absolutely to the creditor, on default in payment, without any sale of the property.

*A sample order for a mortgage foreclosure.*

## Order for Mortgage Foreclosure

**FORECLOSURE BY SALE**
**COMMITTEE DEED**
JD-CV-74 Rev. 12-02

STATE OF CONNECTICUT
**SUPERIOR COURT**
www.jud.state.ct.us

*INSTRUCTIONS TO COMMITTEE: If this form does not suit the situation, you may manuscript your own, however, all elements of this deed must be incorporated.*

WHEREAS, by judgment of Foreclosure by Sale rendered on (date) _____ , by the Superior Court for the Judicial District of _____ , being Docket No. CV _____ , wherein

_____ is Plaintiff and _____

_____ is Defendant,

brought by complaint dated _____ claiming a foreclosure of a mortgage/lien on premises known as (*street, lot #, or other*) _____

_____ , Connecticut,

_____ of Connecticut was duly appointed Committee ("Committee") and directed to sell the premises and convey the same to the purchaser, and

WHEREAS, the Committee has sold the premises in all respects pursuant to the Judgment to

_____ of _____

_____ , for the sum of

_____ ($ _____ ) DOLLARS, and

WHEREAS, the sale has been ratified and confirmed by the Superior Court, which appears of record in the file in the Superior Court, to which reference is herein made.

NOW KNOW YE, THAT I, _____ Committee, pursuant to the authority and direction given to me as aforesaid and in consideration of the sum of

_____ ($ _____) DOLLARS received to my full satisfaction of

_____ , ("Grantee(s)"), do hereby bargain, sell, transfer and convey unto

_____ and unto his/her/their successors and assign forever a parcel of land, together with the improvements thereon, known as (*street, lot #, other*) _____

Connecticut, and being more particularly bounded and described on Exhibit A, attached hereto and made a part thereof.

To have and to hold the above granted and bargained premises, with the appurtenances thereof, unto the Grantee(s), his/her/their successors and assigns forever to his/her/their and his/her/their own proper use and behoof.

And I, the Committee do covenant with the Grantee(s), his/her/their successors and assigns forever, that I have full power and authority as a Committee to grant and convey the above-described premises in manner and form aforesaid.

The premises are conveyed to the Grantee(s) free and clear of the mortgage/lien being foreclosed, and of all claims subsequent in right thereto, the holders of which are bound by this action.

Said premises are conveyed subject to (a) all prior liens and encumbrances which are prior in right to the mortgage/lien foreclosed; (b) all taxes, sewer assessments and sewer use charges (if any); (c) all building, building line and zoning regulations of the Town of _____ and all other governmental regulations and provisions of any public or private law; and (d) such state of facts that an accurate survey or personal inspection of the premises would disclose.

[continued]

**Order for Mortgage Foreclosure**

Signed subject to the approval of the Superior Court this _____ day of _____ 20 _____

***Signed in the presence of:***

**X** _____ ***Print name of signer*** _____

**X** _____ ***Print name of signer*** _____

***Committee:*** _____ ***Print name of committee*** _____

**STATE OF CONNECTICUT**
**COUNTY OF** _____ ss. _____

The foregoing instrument was acknowledged before me this _____ day of _____ 20 _____

by _____, COMMITTEE

Signed _____ _____ _____
*Commissioner of the Superior Court/Court Clerk/Notary* *Print name of person signing at left* *Date your commission expires*

The foregoing committee deed is approved this _____ day of _____ 20 _____

Judge of the Superior Court: _____

JD-CV-74 Rev. 12-02

*A sample order for a mortgage foreclosure (continued).*

## FOREIGN

*That which belongs to, or operates in accordance with, another nation, territory, state, or jurisdiction, as in the case of nonresident trustees, corporations, or persons.*

## FOREIGN AFFAIRS POWER

*Under* INTERNATIONAL LAW *a state has the right to enter into relations with other states. This power to conduct foreign affairs is one of the rights a state gains by attaining independence. The division of authority within a government to exercise its foreign affairs power varies from state to state. In the United States that power is vested primarily in the president, although the Congress retains important express and implied powers over international affairs.*

## FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

In 1978, Congress enacted the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C.A. §§ 1800–1829 (West 2003) to prescribe separate procedures for federal agents to follow when conducting foreign surveillance. FISA created two courts with special jurisdiction: the Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review (FISCR). Until 2002, the FISC had never published an opinion, and the FICSR had never convened.

In 1972, the U.S. Supreme Court admonished Congress that the latter should consider enacting legislation that differentiated between criminal investigations and intelligence surveillance designed to provide for domestic security. *United States v. U.S. District Court*, 407 U.S. 297, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972). When Congress enacted FISA, it sought to give the government greater power to conduct foreign intelligence without the heightened requirements of criminal investigations under the FOURTH AMENDMENT. The FISC was empowered to grant warrants only to the government, and FISC cases have generally been held in secret.

The FISC consists of 11 federal district court judges from the several circuits. These judges are designated by the chief justice of the U.S. Supreme Court and serve staggered terms. This lower court meets during two days each month.

The FISCR consists of three judges named by the chief justice. Under FISA, the FISCR has jurisdiction to hear appeals when the FISC has denied an application submitted by the government. Between 1979 and 2002, however, no appeal had ever been filed with the review court.

The FISC may grant requests from federal governmental officials to conduct ELECTRONIC SURVEILLANCE and to conduct physical searches. The U.S. JUSTICE DEPARTMENT reviews requests submitted by the various agencies, which are then forwarded to the U.S. attorney general. The attorney general must personally approve each application that is submitted to the FISC for approval. FISA requires that each application satisfy a number of requirements, including the requirement that the purpose of the proposed surveillance or search is foreign intelligence information. This information relates to the ability of the United States to protect itself against potential hostile acts, TERRORISM, or intelligence activities of a foreign power or an agent of a foreign power.

Prior to 1994, FISA authorized only electronic surveillance. In 1994, Congress amended FISA to allow physical searches. FISA also requires that federal officials minimize contact between agents who conduct foreign intelligence surveillance and criminal investigations. These minimization procedures were designed to ensure that the federal government did not circumvent the requirements of the Fourth Amendment by using information found in foreign intelligence gathering as part of a criminal investigation. These strict procedures were considered to establish a "wall" between the intelligence gathering and criminal investigations.

In 1995, attorney general JANET RENO approved new procedures that allowed for more sharing of information between agents conducting intelligence surveillance and those conducting criminal investigations. These procedures were expanded further in 2000 by the attorney general. In 2001, when Congress approved the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT), Pub. L. No. 107-56, 115 Stat. 277, it eliminated the requirement that the primary target of the surveillance had to be an agent of a foreign power.

Following the attacks on the United States by terrorists on September 11, 2001, the United States stepped up its intelligence operations. Attorney General JOHN ASHCROFT has openly advocated increased use of intelligence surveillance within the United States in order to identify terrorists who may be living within the country. The application of FISA is somewhat difficult in the investigation of suspected terrorists because the terrorists may not identify themselves with any particular nationality. Moreover, terrorists may live within the United States as legal residents.

In 2002, Ashcroft submitted a request to the FISC to reduce the minimization procedures and allow for greater sharing of information between agents gathering foreign intelligence and agents conducting criminal investigations. The instance marked the first time that the FISC heard a case en banc, meaning that all of the judges were present. The government in the case urged the court to accept the lowered minimization procedures, but the court rejected this request in its first-ever published opinion. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611 (2002).

The government then decided to appeal the case to the FISCR. The appeal was unprecedented, and the only party to the appeal was the federal government. The court allowed the AMERICAN CIVIL LIBERTIES UNION (ACLU) and the National Association of Criminal Defense Lawyers to participate as amici curiae, against the objections of the government. On appeal, the government claimed that the dichotomy between foreign intelligence gathering and criminal investigations was an illusion and that developments in FISA should allow the Justice Department to loosen the procedures regarding the sharing of information.

The court agreed with the government's claims. *In re Sealed Case*, 310 F.3d 717 (2002). The court found that definition of foreign intelligence information includes such crimes as ESPIONAGE and terrorism, so differentiating between investigating these crimes and providing intelligence surveillance was difficult. Moreover, the court found that the USA PATRIOT Act allows the government to conduct wiretaps and searches of U.S. citizens and to share these results with prosecutors. The only requirement under the act is that the government must allege that a significant purpose in the investigation is to gather foreign intelligence information.

The ACLU and other organizations decried the court's decision, saying that it gave the gov-

ernment too much leeway in conducting foreign intelligence surveillance. Although the ACLU petitioned the U.S. Supreme Court to review the case, legal commentators did not expect the Court to accept the appeal. The only party to the appeal was the government, so no adversary actually lost in the appeal.

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CROSS-REFERENCES

Search and Seizure.

## FORENSIC

*Belonging to courts of justice.*

## FORENSIC ACCOUNTING

Forensic accounting, sometimes called investigative accounting, involves the application of accounting concepts and techniques to legal problems. Forensic accountants investigate and document financial FRAUD and WHITE-COLLAR CRIMES such as EMBEZZLEMENT. They also provide litigation support to attorneys and law enforcement agencies investigating financial wrongdoing.

Many different organizations consult forensic accountants. Corporations hire forensic accountants to investigate allegations of fraud on the part of their employees, suppliers, or customers. Attorneys consult forensic accountants to obtain estimates of losses, damages, and assets related to specific legal cases in many areas of the law, including PRODUCT LIABILITY, shareholder disputes, and breaches of contract. In criminal investigations, forensic accountants analyze complex financial transactions such as those in STOCK MARKET manipulations and price fixing schemes. They also help governments achieve compliance with various forms of regulation.

Forensic accountants typically become involved in financial investigations after fraud auditors have discovered evidence of deceptive financial transactions. After conducting an investigation, they write and submit a report of their findings. When a case goes to trial, they are likely to testify as expert witnesses.

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## FORENSIC SCIENCE

*The application of scientific knowledge and methodology to legal problems and criminal investigations.*

Sometimes called simply forensics, forensic science encompasses many different fields of science, including anthropology, biology, chemistry, engineering, genetics, medicine, pathology, phonetics, psychiatry, and toxicology.

The related term *criminalistics* refers more specifically to the scientific collection and analysis of physical evidence in criminal cases. This includes the analysis of many kinds of materials, including blood, fibers, bullets, and fingerprints. Many law enforcement agencies operate crime labs that perform scientific studies of evidence. The largest of these labs is run by the FEDERAL BUREAU OF INVESTIGATION.

Forensic scientists often present EXPERT TESTIMONY to courts, as in the case of pathologists who testify on causes of death and engineers who testify on causes of damage from equipment failure, fires, or explosions.

Modern forensic science originated in the late nineteenth century, when European criminal investigators began to use fingerprinting and other identification techniques to solve crimes. As the field of science expanded in scope throughout the twentieth century, its application to legal issues became more and more common. Because nearly every area of science has a potential bearing on the law, the list of areas within forensic science is long.

### Forensic Medicine and Psychology

Forensic medicine is one of the largest and most important areas of forensic science. Also called legal medicine or medical JURISPRUDENCE, it applies medical knowledge to criminal and CIVIL LAW. Areas of medicine that are commonly involved in forensic medicine are anatomy, pathology, and psychiatry.

# Forensic Science in the Federal Bureau of Investigation

Since its establishment in 1932, the FBI Laboratory has been a world leader in the scientific analysis of physical evidence related to crime. From its location in the J. Edgar Hoover FBI Building, in Washington, D.C., the laboratory provides a wide range of free forensic services to U.S. law enforcement agencies. The laboratory is divided into several major departments: the Document Section, Scientific Analysis Section, Special Projects Section, Latent Fingerprint Section, and Forensic Science Research and Training Center.

The laboratory's Document Section examines paper documents, ink, shoe and tire tread designs, and other forms of evidence related to a wide variety of crimes, including forgery and **MONEY LAUNDERING**. It performs linguistic analysis of documents to determine authorship. It also evaluates the validity and danger of written threats. Its Computer Analysis and Response Team recovers evidence, including encrypted information, from computer systems—evidence that is crucial to the prosecution of **WHITE-COLLAR CRIME**. The Document Section also maintains files of bank **ROBBERY** notes, anonymous **EXTORTION** letters, and office equipment specifications.

The Scientific Analysis Section has seven divisions: Chemistry Toxicology, DNA Analysis/Serology, Elemental and Metals Analysis, Explosives, Firearms-Toolmarks, Hairs and Fibers, and Materials Analysis. This section's analysis of blood, semen, and saliva assists the investigation of violent crimes such as murder, rape, assault, and hit-and-run driving. Its research also provides insight into many other crimes, including bombings, **ARSON**, drug tampering, and poisoning.

The services provided by the Special Projects Section include composite sketches of suspects, crime scene drawings and maps, videotape and audiotape analysis and enhancement, and analysis of electronic devices such as wiretaps and listening devices.

The Latent Fingerprint Section examines evidence for hidden fingerprints, palm prints, footprints, and lip prints.

The Forensic Science Research and Training Center offers classes to law enforcement officials from the United States and other countries. These classes cover DNA analysis, the detection and recovery of human remains, arson and bomb blast investigation, and many other topics.

To better perform its research, the laboratory maintains files on many kinds of physical evidence, including adhesives, ammunition, paint, and office equipment. The laboratory also provides experts who will furnish testimony on the nature of the evidence.

The laboratory publishes the *Handbook of Forensic Science* to explain its forensic services to law enforcement agencies. The handbook outlines procedures for safely and effectively gathering evidence from crime scenes and shipping it to the laboratory for analysis.

Many law enforcement agencies employ a forensic pathologist, sometimes called a medical examiner, who determines the causes of sudden or unexpected death. Forensic toxicologists, who study the presence of poisons or drugs in the deceased, often help forensic pathologists. Forensic odontologists, or dentists, analyze dental evidence to identify human remains and the origin of bite marks.

Forensic medicine is often used in civil cases. The cause of death or injury is considered in settling insurance claims or MEDICAL MALPRACTICE suits, and blood tests often contribute to a court's decision in cases attempting to determine the PATERNITY of a child.

Mental health and psychology professionals have contributed a great deal to the legal understanding of issues such as the reliability of EYEWITNESS testimony, responsibility for criminal behavior, and the process of decision making in juries. These professionals include those with a medical degree, such as psychiatrists, neurologists, and neuropsychologists, as well as individuals without a medical degree, such as psychologists.

Mental health professionals are frequently consulted in civil and criminal cases to help determine an individual's state of mind with regard to a crime, the validity of testimony before a court, or an individual's competence to stand trial or make a legal decision. Their input may also be vital to legal procedures for deciding whether to commit a person to an institution because of mental illness, or to allow a person to leave an institution for those who are mentally ill.

Forensic neuropsychology is a specialized area of forensic medicine that applies the functioning of the nervous system and brain to legal issues involving mind and behavior. Equipped with an improved understanding of how the brain works and influences behavior, neuropsychologists have increasingly been asked to provide testimony to courts attempting to determine whether a criminal act is a result of a nervous system dysfunction. They also testify as to the reliability of witness testimony given by VICTIMS OF CRIME, the competency of individuals to stand trial, the likelihood that a condition of mental retardation or brain injury predisposed an individual to commit a crime, the possibility that an individual has verifiable memory loss, and various aspects of dementias and other brain disorders caused by AIDS, head injuries, and drugs, alcohol, and other chemicals.

In civil cases, the work of neuropsychologists has been used to determine whether a defendant's wrongdoing caused a plaintiff's injury. In family courts, neuropsychologists assess brain damage in children who have been physically abused.

Forensic psychologists provide expert testimony that touches on many of the same areas as that given by forensic psychiatrists and neuropsychologists. In addition, psychologists consult with the legal system on issues such as correctional procedures and crime prevention. In 1962, a U.S. court of appeals issued an influential decision that established the ability of a psychologist to testify as an expert witness in a federal court of law (*Jenkins v. United States,* 113 U.S. App. D.C. 300, 307 F.2d 637 [D.C. Cir. 1962]). Before that time, expert testimony on mental health was largely restricted to physicians.

### Other Areas of Forensic Science

Forensic engineers provide courts with expertise in areas such as the design and construction of buildings, vehicles, electronics, and other items. Forensic linguists determine the authorship of written documents through analyses of handwriting, syntax, word usage, and grammar. Forensic anthropologists identify and date human remains such as bones. Forensic geneticists analyze human genetic material, or DNA, to provide evidence that is often used by juries to determine the guilt or innocence of criminal suspects. Forensic phoneticians deal with issues such as the validity of tape-recorded messages, the identification of speakers on recorded messages, the enhancement of recorded messages, the use of voiceprints, and other aspects of ELECTRONIC SURVEILLANCE.

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## FORESEEABILITY

*The facility to perceive, know in advance, or reasonably anticipate that damage or injury will probably ensue from acts or omissions.*

In the law of NEGLIGENCE, the foreseeability aspect of proximate cause—the event which is the primary cause of the injury—is established by proof that the actor, as a person of ordinary intelligence and circumspection, should reasonably have foreseen that his or her negligent act would imperil others, whether by the event that transpired or some similar occurrence, and regardless of what the actor surmised would happen in regard to the actual event or the manner of causation of injuries.

## FORFEIT

*To lose to another person or to the state some privilege, right, or property due to the commission of an error, an offense, or a crime, a breach of contract, or a neglect of duty; to subject property to confiscation; or to become liable for the payment of a penalty, as the result of a particular act. To lose a franchise, estate, or other property, as provided by the applicable law, due to* NEGLIGENCE*, misfeasance, or omission.*

This nonconsensual deprivation transfers the property to another person or restores it to the original grantor.

## FORFEITURE

*The involuntary relinquishment of money or property without compensation as a consequence of a breach or nonperformance of some legal obligation or the commission of a crime. The loss of a corporate charter or franchise as a result of illegality, malfeasance, or* NONFEASANCE*. The surrender by an owner of his or her entire interest in real property, mandated by law as a punishment for illegal conduct or* NEGLIGENCE*. Under old* ENGLISH LAW*, the release of land by a tenant to the tenant's lord due to some breach of conduct, or the loss of goods or chattels (articles of* PERSONAL PROPERTY*) assessed as a penalty against the perpetrator of some crime or offense and as a recompense to the injured party.*

*Forfeiture* is a broad term that can be used to describe any loss of property without compensation. A forfeiture may be privately arranged. For example, in a contractual relationship, one party may be required to forfeit specified property if the party fails to fulfill its contractual obligations. Courts are often called upon to resolve disputes regarding a forfeiture of property pursuant to a private contract. They may examine these cases to see whether they are fair and not the result of duress, deception, or other nefarious tactics.

The forfeitures that inspire the most discussion in the U.S. are those that are exercised by the state or federal government. Congress and state legislatures maintain statutes that allow law enforcement to seize property on suspicion of certain criminal activity. The property can be forfeited to the government upon conviction. In many cases, forfeiture to the government occurs without criminal prosecution.

The general concept of forfeiture in the United States can be traced to the English COMMON LAW, or court decisions. English courts recognized three types of forfeiture: ESCHEAT upon attainder, deodand, and statutory forfeiture. Under the doctrine of escheat upon attainder, a person's property reverted to the government upon that person's conviction for a felony or TREASON. This doctrine was premised on the theory that the sovereign government possessed a superior property interest.

The doctrine of deodand, or guilty property, allowed English courts to strip a person of property if the property was involved in a certain offense. This doctrine allowed a court to seize property regardless of the owner's culpability. For example, if a horse caused the death of a person, the owner would lose that horse, even if he had been completely blameless.

Statutory forfeiture, or forfeiture based on written laws, was the only kind of English forfeiture recognized in the American colonies. In other words, the colonies did not order the forfeiture of property unless it was required pursuant to a law passed by the legislature. However, the written laws in the colonies sustained the concept of deodand, and this concept survives to the present day.

Although forfeiture laws have existed in the United States since the colonial period, they have not always been favored. Early cases of forfeiture usually involved extraordinary circumstances, such as the seizure of pirate ships or warring ships. After the Civil War, forfeitures were used for tax-revenue violations, but government-imposed forfeiture was a rarity.

In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act (21 U.S.C.A. § 881), also known as the Forfeiture Act. The Forfeiture Act authorized federal prosecutors to bring civil forfeiture actions against certain properties that were owned by persons who had been convicted in federal court of dealing drugs. This act was seldom used because it limited forfeiture to the property of persons who had been convicted of participating in continuing criminal enterprises.

In 1978, Congress amended the Forfeiture Act to allow the forfeiture of anything of value used or that was intended to be used by a person to purchase illegal drugs (Psychotropic Substances Act of 1978 [Pub. L. No. 95-633, tit. III, § 301(a), 92 Stat. 3768, 3777 (codified as amended at 21 U.S.C.A. § 8821(a)(6))]). This change expanded the Forfeiture Act to allow the

forfeiture of all proceeds and property that were traceable to the purchase of an illegal drug. Under the 1978 amendments, the federal government was authorized to proceed in rem against property. In rem forfeiture actions are taken against the property itself, not against its owner. In such proceedings, the guilt or innocence of the property owner regarding any criminal activity is irrelevant. Thus, under the Forfeiture Act, the government may remove property from persons it suspects of a crime, without ever charging them with a crime. The basis of this kind of forfeiture is traced back to the deodand doctrine of the English common law.

The Forfeiture Act was again amended in 1984, when the Comprehensive **CRIME CONTROL ACT** (Pub. L. No. 98-473, § 306, 98 Stat. 1837, 2050 [codified as amended at 21 U.S.C.A. § 881(a)(7)]) expanded it to authorize the in rem forfeiture of real property, or land and buildings. Under the 1984 act, federal authorities may seize any real property that is purchased, used, or intended to be used to facilitate narcotics trafficking. Although the **LEGISLATIVE HISTORY** of the 1984 act suggests that Congress intended real property forfeiture to apply only to drug manufacturing or storage facilities, courts have construed the act to allow the seizure of any real property, including fraternity houses, hotels, ranches, and private residences. Furthermore, courts have allowed real property forfeiture regardless of whether the property was used to store or manufacture drugs.

Forfeiture under the Forfeiture Act begins with either the constructive or actual seizure of property after a district court has issued a warrant. This warrant must be based on a reasonable belief that the property was used in a crime subject to forfeiture, but this reasonable belief can be based entirely on **HEARSAY** and **CIRCUMSTANTIAL EVIDENCE**. After the property is seized, the court holds it until the case is resolved.

Forfeiture proceedings may be either criminal or civil. If the government seeks forfeiture pursuant to criminal charges, it must establish the defendant's guilt **BEYOND A REASONABLE DOUBT**. If acquitted, the defendant is entitled to retrieve the seized property.

To initiate a civil forfeiture proceeding, the government need only show reasonable grounds to believe that the property was used in, or derived from, certain prohibited activities. If the defendant fails to rebut the showing of **PROBABLE CAUSE** with sufficient evidence, the government may keep the property. At trial, the government's standard in a civil forfeiture is proof by a **PREPONDERANCE OF THE EVIDENCE**, a lesser burden than a criminal case's **REASONABLE DOUBT STANDARD**.

*The Forfeiture Act allows law enforcement officials to seize property used in or derived from illegal activities, such as purchasing or selling drugs. This New York lot is filled with cars forfeited by a Bronx drug dealer.*

AP/WIDE WORLD PHOTOS

The Forfeiture Act also allows law enforcement agencies to receive a portion of the proceeds from property forfeiture. Many legal scholars claim that this is a perversion of the police function because it detracts from the more compelling, traditional police function of fighting violent crime. These critics also argue that law enforcement agencies may become financially dependent on the very drug activity that they are supposed to curtail. Proponents of this budgetary scheme argue that drug activity is the source of much violent crime. They further note that the proceeds both benefit community programs and increase the capacity to fight violent crime.

The Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C.A. §§ 1961 et seq.) is another vehicle for forfeiture in federal court. Enacted as title IX of the Organized Crime Control Act of 1970 (Pub. L. No. 91-452, 84 Stat. 922), RICO allows federal authorities to seize the property of persons engaged in a pattern of **RACKETEERING**. Persons who commit murder, **KIDNAPPING**, perjury, **EXTORTION**, **ARSON**, **ROBBERY**, **BRIBERY**, gambling, or narcotics offenses two or more times within a ten-year period thus may be forced to forfeit all property that is traceable to the crimes. In a 1984 amendment, Congress added the violation of federal and state **OBSCENITY** laws to the list of racketeering offenses.

The case against Ferris Alexander illustrates the way in which federal authorities exercise the forfeiture provisions of RICO (*Alexander v. United States,* 509 U.S. 544, 113 S. Ct. 2766, 125 L. Ed. 2d 441 [1993]). Alexander, the owner of more than a dozen stores and theaters offering sexually explicit materials in Minneapolis, was charged in 1989 with operating a racketeering enterprise in violation of RICO. He was convicted based on the jury's determination that four magazines and three videotapes from his enterprises were obscene. The trial court sentenced Alexander to six years in prison, fined him $100,000, and ordered him to pay the cost of his prosecution, incarceration, and supervised release.

After the conviction, federal authorities sought the forfeiture of all assets related to Alexander's businesses. The jury made findings to identify precisely what was owned by Alexander. Based on those findings, the trial court ordered Alexander to forfeit $8.9 million in cash and inventory, ten bookstores valued at a total of $2 million, his interests in 18 other businesses, and proceeds from 15 other businesses. Law enforcement officers later burned the merchandise from Alexander's businesses.

Alexander appealed to the U.S. Court of Appeals for the Eighth Circuit, which affirmed. On appeal to the U.S. Supreme Court, Alexander argued, in part, that the forfeiture had been excessive. He also argued that the forfeiture was a form of **PRIOR RESTRAINT**, in violation of his free speech rights. According to the Court, the forfeiture did not violate Alexander's free speech rights because it did not prevent him from publishing non-obscene material in the future. However, the Court also held that the amount of the forfeiture should have been examined to see whether it violated the Eighth Amendment's **PROHIBITION** of excessive fines.

The U.S. Supreme Court remanded the case to the Eighth Circuit for review on the excessive-fines issue. The appeals court sent the case to the trial court. In March 1996, the district court affirmed the original forfeiture of approximately $8.9 million in property.

To many scholars, the *Alexander* case stands as a serious threat to **FREEDOM-OF-SPEECH** rights. Although Alexander's businesses dealt specifically in **PORNOGRAPHY**, the decision nevertheless puts artists who create material with a sexual content in danger of losing their property. Many legal analysts also maintain that the forfeiture was excessive when compared with the offenses for which Alexander was convicted. Proponents maintain that the forfeiture helped to create cleaner, safer city neighborhoods.

Most states maintain statutes allowing forfeiture upon conviction of certain crimes. For example, Volume 15 of the Maine Revised Statutes Annotated, section 5821, authorizes the forfeiture of prohibited drugs; materials related to prohibited drugs; property that is used to contain, defend, protect, guard, or secure prohibited drugs; firearms; and vehicles used in the violation of litter laws. Real property used in connection with illegal drugs is also subject to forfeiture under section 5821, with the exception of real property connected to marijuana offenses.

Maine does not provide for the forfeiture of property that is used for prostitution or the solicitation of prostitution, but many states do. For example, section 600.3801 of the Michigan Compiled Laws Annotated authorizes state law enforcement to seize property that has been used to support or to solicit prostitution. In the 1990s, the application of this statute inspired a challenge that went all the way to the U.S. Supreme Court (*Bennis v. Michigan*, 516 U.S. 442, 116 S. Ct. 994, 134 L. Ed. 2d 68 [1996]).

In *Bennis v. Michigan,* Tina B. Bennis brought suit against the state of Michigan after it seized the 1977 Pontiac that she owned jointly with her husband, John Bennis. Her husband had been arrested and convicted in Michigan state court of gross indecency in connection with his encounter with a prostitute. The county prosecutor filed a complaint alleging that the Pontiac was a public **NUISANCE** and subject to abatement, or forfeiture. An order of abatement was entered by the trial court. On appeal by Bennis, the appeals court reversed. On subsequent appeal by the state of Michigan, the Michigan Supreme Court also reversed. Bennis appealed to the U.S. Supreme Court.

The high court affirmed the decision of the Michigan Supreme Court. Bennis argued that the forfeiture was a violation of the **DUE PROCESS CLAUSE** of the **FOURTEENTH AMENDMENT** because she had not known that the Pontiac would be used for prostitution. The Court cited a long line of cases supporting the proposition that a person may be deprived of property if it has been put to criminal use, regardless of the owner's knowledge or participation.

The Court also dismissed Bennis's argument that the forfeiture violated the Fifth Amendment's Takings Clause, which generally requires compensation for property seized by the government. According to the Court, the government is under no obligation to reimburse a person for property it has seized pursuant to government authority other than the power of EMINENT DOMAIN. Ultimately, Bennis lost her ownership of the Pontiac, despite being innocent of any wrongdoing. In a strong dissent, Justice JOHN PAUL STEVENS argued that "neither logic nor history supports the Court's apparent assumption that [a person's] complete innocence imposes no constitutional impediment to the seizure of their property simply because it provided the locus for a criminal transaction."

Defendants have cultivated several defenses to forfeiture, and some have been successful. If the initial seizure is not preceded by notice and a hearing before a court, a defendant may argue that a forfeiture violates the Due Process Clause of the Fifth and Fourteenth Amendments. Despite the decision in the *Alexander* case, if a massive, estate-depleting forfeiture is disproportionate to the offense that gave rise to it, it may be found to violate the Excessive Fines Clause of the EIGHTH AMENDMENT.

In addition, Congress has enacted an "innocent owner" defense in civil drug forfeitures (21 U.S.C.A. § 881(a)(6) [2000]). These are cases in which forfeiture is sought without prosecution of the owner. A defendant in a civil forfeiture case may invoke this defense if the property was connected with the illegal drugs without the owner's knowledge or consent.

Supporters of forfeiture laws cite the laws' effectiveness in fighting crime and stripping criminals of their resources. Many legal observers argue that the increasing use of government forfeiture is a flagrant violation of several constitutional rights. The state of forfeiture in contemporary law has been compared to "an Orwellian nightmare" (Aznavoorian 1995, 553), creating a climate that has "turned police agencies into bounty hunters, who, in their quest for cash, have harmed innocent citizens or those guilty of only minor offenses" (Henry 1994, 52). By the early 1990s, the federal government was prosecuting only 20 percent of the individuals from whom they had seized property through forfeiture. Congress finally responded by passing the Civil Asset Forfeiture Reform Act of 2000 (Pub.L. No. 106-185, 114 Stat. 202), which requires federal prosecutors to show a substantial connection between the property and the crime. In addition, it allows the property to be released by the district court pending final disposition of the case when the owner can demonstrate that possession by the government causes a hardship to the owner. Finally, the law permits property owners to sue the government for any damage to the property if they prevail in a civil forfeiture action.

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Drugs and Narcotics.

## FORGERY

*The creation of a false written document or alteration of a genuine one, with the intent to defraud.*

Forgery consists of filling in blanks on a document containing a genuine signature, or materially altering or erasing an existing instrument. An underlying intent to defraud, based on knowledge of the false nature of the instrument, must accompany the act. Instruments of forgery may include bills of exchange, bills of lading, promissory notes, checks, bonds, receipts, orders for money or goods, mortgages, discharges of mortgages, deeds, public records, account books, and certain kinds of tickets or passes for transportation or events. Statutes define forgery as a felony. Punishment generally consists of a

fine or imprisonment, or both. Methods of forgery include handwriting, printing, engraving, and typewriting. The related crime of uttering a forged document occurs when an inauthentic writing is intentionally offered as genuine. Some modern statutes include this crime with forgery.

Perhaps the most famous case of forgery in the twentieth century took place in 1983 with the "discovery" of the Hitler diaries. The diaries supposedly contained passages written by German dictator ADOLF HITLER between 1932 and 1945. Gerd Heidemann, a German reporter for *Stern* magazine, had claimed the writings as genuine and sold them. He had obtained them from Konrad Kujau, a Stuttgart dealer in military memorabilia and documents. The magazines *Newsweek* and *Paris Match,* along with other media, paid more than $5 million for the documents. Major news sources around the world quickly published major stories detailing the historical information that the diaries allegedly contained. Investigative experts from around the world later conducted forensic examinations on the diaries and found the documents to be fake. Kujau then admitted forging the diaries, and news sources immediately retracted their coverage. Both Kujau and Heidemann were sentenced to four and a half years in a German prison—but not before Kujau embarrassed the media even further by forging Hitler autographs for spectators at his circuslike trial.

In the United States, the Mormon Bible forgeries resulted in more extreme consequences. Beginning in the early 1980s, Mark Hofmann, a disillusioned Salt Lake City Mormon and part-time dealer in historical documents, forged documents of major importance to Mormon history. He sold most of the creations to the MORMON CHURCH and to others interested in Mormon religious history. Hofmann reaped hundreds of thousands of dollars from his FRAUD. His boldest forgery, the White Salamander letter, cast doubt on the credibility of the Mormon Church's founder, Joseph Smith. In this letter, Hofmann portrayed Smith as a dabbler in folk magic and the occult, which greatly distressed the Mormon community. When individuals within Hofmann's ring of buyers raised doubts about the authenticity of one of his later creations, Hofmann murdered one buyer and the spouse of another before their suspicions became public.

Hofmann was charged with murder and fraud. Prosecutors relied on EXPERT TESTIMONY regarding the authenticity of the documents. When the experts declared that the documents were worthless, Hofmann's attorneys offered to plea bargain on the counts of forgery and second-degree murder. The prosecution agreed to negotiate the charges to avoid an embarrassing trial for the Mormon Church. Hofmann pleaded guilty to murder. In January 1988, the Utah Board of Pardons sentenced Hofmann to life in prison without PAROLE.

Most forgeries are less sensational than those in the Hitler diaries and Mormon Bible cases. Common forgery usually involves manufacturing or tampering with documents for economic gain. The intent to defraud remains essential.

Counterfeiting, often associated with forgery, is a separate category of fraud involving the manufacture, alteration, or distribution of a product that is of lesser value than the genuine product.

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## FORM

*A prototype of an instrument to be employed in a legal transaction or a judicial proceeding that includes the primary essential matters, the appropriate technical phrases or terms, and any additional material required to render it officially accurate, arranged in suitable and systematic order, and conducive to* ADAPTATION *to the circumstances of the particular case.*

The expression *form of the statute* signifies the language or structure of a statute, and, therefore, the restriction or command that it might include, as used in the phrase in criminal PLEADING "against the form of statute in that case made and provided."

A *matter of form,* as distinguished from a *matter of substance*—with respect to pleadings, affidavits, indictments, and other legal instruments—entails the method, style, or form of relating the applicable facts; the selection or arrangement of terms; and other such matters without influencing the essential sufficiency or validity of the instrument, or without reaching the merits.

## FORMAL PARTY

*A person who has no interest in the dispute between the immediate litigants but has an interest in the subject matter that can be expeditiously settled in the current proceedings and thereby prevent additional litigation.*

The rules of CIVIL PROCEDURE of the various states determine who constitutes a formal party and define the rights and obligations of other categories of parties.

## FORMED DESIGN

*In* CRIMINAL LAW*, and especially in regard to* HOMICIDE*, the killing of one human being by the instigation, act, or omission of another, who has a deliberate and fixed intention to kill, whether or not directed against a certain person.*

## FORMS OF ACTION

*The old common-law patterns for different kinds of lawsuits.*

A plaintiff could start an action only if it was possible to state the claim in words that followed one of the forms. The forms of action governed all COMMON-LAW PLEADING.

### Origin of the Forms of Action

The common-law forms of action were not planned and enacted like a statute, but they developed over hundreds of years out of the struggle to centralize justice in England. They were the first writs by which the king's courts took notice of a dispute and asserted its authority to resolve it. When William the Conqueror first established the English throne in 1066 there were already local courts that handled most legal disputes. The king's courts began to hear cases involving the assertion of royal rights and disputes between high noblemen.

In time, dissatisfied litigants from the community courts appealed to the king's courts for review of the decisions. The king's courts became one of his tools for consolidating his power, and the scope of the authority of the court reflected political struggles through the centuries.

A person who thought he had been wronged had to serve notice on the defendant, but something more was needed to engage the legal process that led to judgment. A court would examine the substance of the claim only if it were cast in the correct form. As courts were organized beyond the local level in medieval England, writs were designed to give recognition to the sort of disputes that were most important to the king. The possibility of obtaining relief, then, depended on the plaintiff's ability to fit his grievance into one of the available writs.

### Real Actions

Royal power was first and most vigorously asserted in disputes involving land because all of society was organized under the land tenure system of the feudal law. The foundation of this system was the principle that no one should be deprived of his interest in real property without a fair judgment against him, and no one should be made to answer a challenge to his rights without the king's command in a writ. The protection of these individual rights was so important to the stability of the society that the procedures for resolving land disputes became very formal. The forms for these lawsuits, called real actions, determined the way facts could be presented to constitute a legal CAUSE OF ACTION, the defenses to such claims, and the remedies available for a successful plaintiff.

### Personal Actions

By the early part of the thirteenth century, personal actions were allowed. A litigant could sue for money due on an account, make a demand for a certain sum of money, or demand a specific item of PERSONAL PROPERTY. The action of REPLEVIN appeared for the recovery of personal goods wrongfully taken or withheld from the plaintiff. The action of covenant covered disputes arising from agreements under seal, originally covering leases of land but eventually contributing to the development of all contract law.

The most important form of action, the action of TRESPASS, appeared later in the thirteenth century. The great legal scholar FREDERIC WILLIAM MAITLAND once called trespass "that fertile mother of actions." It might have had its

roots in the CRIMINAL LAW, a sort of appeal to redress the harm caused by the defendant's violence. The action of trespass became very popular because a form allowing the claim that force had been wrongfully used could cover a wide variety of injuries.

By the fourteenth century, forms were firmly established for trespass *vi et armis* ("with force and arms") for injuries to the plaintiff or his property, trespass *de bonis asportatis* ("for goods carried away"), and trespass *quare clausum fregit* ("whereby he broke the close") for an unlawful entry on the premises. The jurisdiction of the courts was thus enlarged and the chance of finding legal relief substantially increased.

The justification for extending the authority of the royal courts to cover personal actions for private wrongs was the claim that the trespass was committed *vi et armis et contra pacem Domini Regis* ("with force and arms and against the peace of the Lord King"). During the fifteenth century, this principle supported an additional form of action for cases where the plaintiff's injury was a more indirect result of the defendant's conduct. This action was called trespass on the case, action on the case, a trampling on the plaintiff's legal rights, or his case. Sometimes the action was simply called "case," and different forms were used for special circumstances, for deceit and for DEFAMATION, for example. This form gave birth to our entire modern system of NEGLIGENCE law.

The next important innovation was the action of TROVER, by which the ownership of personal property could be challenged. Originally, the claim was good only when the plaintiff had lost his goods and the defendant had found them, but later the action required no more than a claim that the defendant refused to turn over personal property that belonged to the plaintiff.

By the sixteenth century the action of ASSUMPSIT took over as the dominant form of action for recovering damages for a broken contract that was not under seal. Special assumpsit was an action brought on an express contract or promise, and general assumpsit allowed monetary damages for the failure to perform an obligation that arose out of the facts of the situation and was implied by the law. Our modern law of contracts developed from the old action of assumpsit.

### Forms of Action in the United States

American colonies under English rule were less restrained by complicated distinctions among the various forms of action, probably because legal systems in the United States were less formal until a time when dissatisfaction with the technicalities of the forms was beginning to peak. For example, there were lawsuits where both trespass and case were used for the recovery of real property and for specific items of personal property. Trover and assumpsit frequently were used interchangeably.

As a result of the Federal Rules of Civil Procedure applicable in federal courts and adopted to a large degree by many state courts, there is only one form of action, a civil action.

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#### CROSS-REFERENCES

Action on the Case; Civil Procedure; Feudalism.

## FORNICATION

*Sexual intercourse between a man and a woman who are not married to each other.*

Under the COMMON LAW, the crime of fornication consisted of unlawful sexual intercourse between an unmarried woman and a man, regardless of his marital status. If the woman was married, the crime was ADULTERY.

Today, statutes in a number of states declare that fornication is an offense, but such statutes are rarely enforced. On the theory that fornication is a victimless crime, many states do not prosecute persons accused of the offense.

Under modern-day legislation, if one of the two persons who engage in sexual intercourse is married to another person, he (or she) is guilty of adultery. Statutes in some states declare that if the woman is married, the sexual act constitutes adultery on the part of both persons, regardless of the man's marital status.

Fornication is an element of a number of SEX OFFENSES such as rape, INCEST, and seduction.

Although penalties are seldom enforced, they usually consist of a fine, imprisonment, or both. In November of 1996 an Idaho prosecutor brought fornication charges against a teenage couple in an effort to curb teen pregnancy.

## FORSWEAR

*In* CRIMINAL LAW, *to make oath to that which the deponent knows to be untrue. This term is wider in its scope than perjury, for the latter, as a technical term, includes the idea of the oath being taken before a competent court or officer and relating to a material issue, which is not implied by the word* forswear.

## ♦ FORTAS, ABE

Abe Fortas served as a justice of the U.S. Supreme Court from 1965 to 1969. A renowned and powerful Washington, D.C., attorney before he joined the Court, Fortas resigned from the bench in disgrace after allegations of unethical behavior led to calls for his IMPEACHMENT.

Fortas was born June 19, 1910, in Memphis, to English immigrant Jews. He graduated from Southwestern College, in Memphis, in 1930 and received a law degree from Yale Law School in 1933. An outstanding student at Yale, Fortas became a protégé of WILLIAM O. DOUGLAS, a member of the school's faculty and a future Supreme Court justice. Following graduation Fortas divided his time between Yale and Washington, D.C., serving as an assistant professor at the school and working in several federal government agencies.

Fortas's arrival in Washington, D.C., coincided with President FRANKLIN D. ROOSEVELT's NEW DEAL administration. Under Roosevelt the federal government greatly expanded as it assumed more regulatory power over the national economy. Fortas severed his connections with Yale in 1937 and went to work full-time for the SECURITIES AND EXCHANGE COMMISSION, which was chaired by Douglas.

Fortas proved to be an effective administrator. He joined the DEPARTMENT OF THE INTERIOR in 1939 and soon became a confidant of Secretary of the Interior Harold L. Ickes. Ickes, a powerful member of the Roosevelt administration, named Fortas undersecretary in 1942. Fortas served in that position until 1946, when he left government to start a private law firm.

Fortas and Thurman W. Arnold, a former law professor and chief of the Antitrust Division of the JUSTICE DEPARTMENT, created the firm of Arnold and Porter to help corporations and other powerful interest groups deal with the new federal bureaucracy. Fortas knew his way around the halls of power and became an influential lobbyist and interpreter of government regulations in post-World War II Washington, D.C.

*Abe Fortas.*
AP/WIDE WORLD PHOTOS

His path to the Supreme Court began in 1948, when he led the legal team that fought to place Lyndon B. Johnson's name on the Texas election ballot for U.S. senator. Johnson, a Texas congressman in the 1940s, got to know Fortas while Fortas was at the Department of the Interior. The 1948 Texas Democratic primary election gave Johnson an 87-vote margin of victory, but his opponent, Coke R. Stevenson, alleged that Johnson's supporters had stuffed the ballot box with phony ballots. After Stevenson filed suit in federal court, a judge removed Johnson's name from the final election ballot, pending an investigation into the alleged election irregularities. Fortas convinced Justice HUGO L. BLACK of the Supreme Court to order the restoration of Johnson's name, pursuant to Black's judicial power to review the actions of the federal courts in Texas. Johnson was elected to the Senate and became majority leader in 1955. He was elected vice president of the United States in 1960 and became president on November 22, 1963, following the assassination of President JOHN F. KENNEDY.

Though Fortas served the powerful, he also provided PRO BONO (unpaid) legal services to those with pressing legal issues. His most famous pro bono case was GIDEON V. WAINWRIGHT, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). A Florida court had convicted

"FOR A JUSTICE OF THIS ULTIMATE TRIBUNAL [THE U.S. SUPREME COURT], THE OPPORTUNITY FOR SELF-DISCOVERY AND THE OCCASION FOR SELF-REVELATION IS GREAT."
—ABE FORTAS

Clarence Gideon, a drifter and small-time gambler, of breaking into a poolroom and removing the change from a vending machine. Gideon could not afford an attorney and the court would not appoint one. Gideon prepared his own appeal to the U.S. Supreme Court, arguing that denial of legal counsel because a person could not afford an attorney was unconstitutional. The Court accepted his appeal and appointed Fortas to serve as his attorney.

Fortas convinced the Court to overrule its precedent in *Betts v. Brady,* 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942), in which the Court held that an ordinary person charged with a felony could do an adequate job of representing himself or herself and was not entitled to the appointment of an attorney. In his majority opinion for *Gideon,* Justice Black ruled that an indigent defendant in a criminal trial has a constitutional right to a court-appointed attorney. In so ruling, the Court incorporated through the FOURTEENTH AMENDMENT the Sixth Amendment's RIGHT TO COUNSEL, thus making that right applicable to state as well as federal criminal proceedings.

When Johnson assumed the presidency, he looked to Fortas as a confidential adviser. Johnson wished to appoint Fortas to the Supreme Court, but there were no vacancies. He convinced Justice ARTHUR J. GOLDBERG to resign from the Court in 1965 to become U.S. ambassador to the UNITED NATIONS. Goldberg left the Court reluctantly, and Johnson nominated Fortas to fill its so-called Jewish seat. The "Jewish seat" began with the 1939 appointment of FELIX FRANKFURTER, who was Jewish, to succeed Justice BENJAMIN CARDOZO, also Jewish. It was assumed that for political reasons, Democratic presidents would appoint a Jewish person to that vacancy. This tradition ended with the appointment of Fortas.

Fortas fit in well with the liberal Court, then headed by Chief Justice EARL WARREN. Concerned with policy more than precedent, Fortas was a strong defender of CIVIL RIGHTS and civil liberties. His two most significant opinions dealt with the rights of children. The 1967 landmark case IN RE GAULT, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, changed the nature of the JUVENILE LAW system. Fortas and the Court essentially made the juvenile courts adhere to standards of DUE PROCESS, applying most of the procedural safeguards enjoyed by adults accused of crimes. Under *Gault* juvenile courts were to respect the right to counsel, the right to freedom from compulsory SELF-INCRIMINATION, and the right to confront hostile witnesses.

TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), accorded juveniles FIRST AMENDMENT rights. Des Moines high school officials had suspended students for wearing black armbands to school to protest U.S. involvement in the VIETNAM WAR. On appeal Fortas rejected the idea that the school's response was reasonable because it was based on the fear that a disturbance would result from the wearing of armbands. Fortas ruled that the wearing of armbands was "closely akin to 'pure speech' which . . . is entitled to comprehensive protection under the First Amendment." He added that public school officials could not ban expression out of the "mere desire to avoid discomfort and unpleasantness that always accompany an unpopular viewpoint."

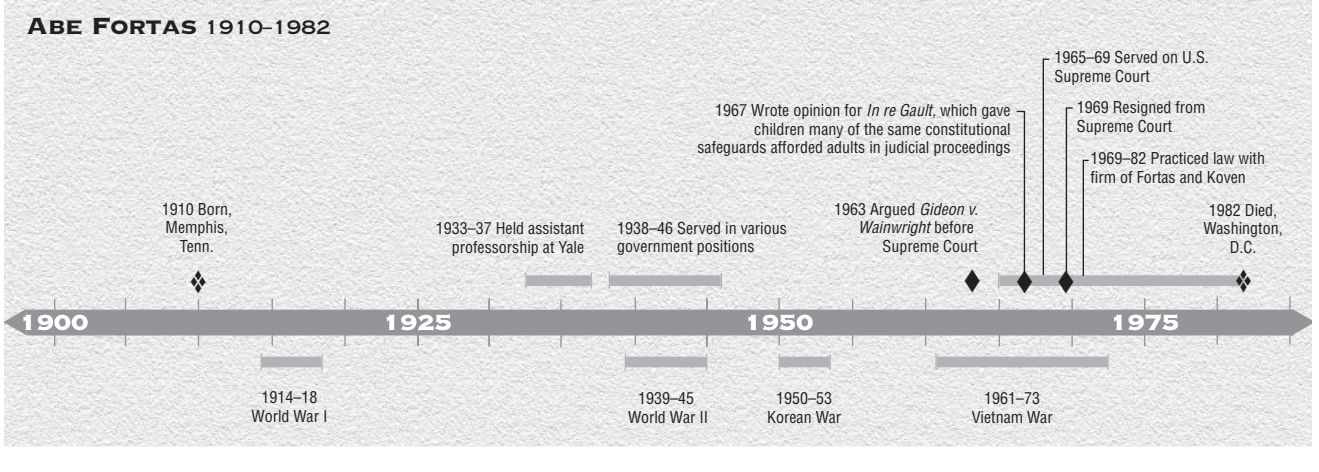

In June 1968, Chief Justice Warren announced that he would retire. President Johnson nominated Fortas to succeed Warren, but the political mood of the Senate was hostile to the nomination. It had been an open secret in Washington, D.C., that Fortas continued to advise the president after joining the Court. Fortas was a key participant in Vietnam War policymaking. Some senators were troubled by his breach of the SEPARATION OF POWERS; others, especially conservatives, attacked his liberal voting record on the Court. Republicans hoped to derail the nomination so as to give RICHARD M. NIXON, then running for the presidency, the opportunity to appoint a more conservative chief justice. Johnson, who had already announced he would not run for reelection, was a lame duck and could do nothing to help Fortas. Opponents conducted a filibuster when the appointment was brought to the Senate floor. In October, Fortas, sensing defeat, asked that his name be withdrawn from consideration. Warren remained on the Court until 1969, when President Nixon appointed WARREN E. BURGER as chief justice.

Matters worsened for Fortas, in 1969, when *Life* magazine reported that he had accepted a $20,000 fee from a foundation established by the family of Louis Wolfson, a financier under federal investigation for SECURITIES violations. The fee was the first of a series of annual payments that were to be made to Fortas for the duration of his life, and thereafter to his widow until her death, in exchange for Fortas's guidance of the foundation's programs. The arrangement was terminated in 1966 when Fortas returned the money upon Wolfson's indictment.

Despite Fortas's ultimate return of the money, his initial acceptance of it troubled many senators. It was alleged that Fortas had done more than foundation work, giving Wolfson legal advice. The *Life* article noted that Wolfson had used Fortas's name in the hope of helping himself. Fortas issued an ambiguous statement that did not resolve the situation. The Nixon administration and Republican senators hinted that Fortas should be impeached for his actions, which were contrary to the ethical provision that judges must be free of the appearance of impropriety. Fortas ended the controversy by resigning from the Court May 14, 1969, though he contended he had done nothing wrong. This was the first time in U.S. history that a justice resigned under the threat of impeachment.

Following his resignation Fortas sought to return to his old law firm. When the firm refused to take him back, he set up his own law practice, Fortas and Koven. He resumed advising corporate clients on how to do business in Washington, D.C., and he continued his pro bono work.

Fortas continued to practice law until he died from a ruptured aorta on April 5, 1982, in Washington, D.C.

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Children's Rights.

## FORTHWITH

*Immediately; promptly; without delay; directly; within a reasonable time under the circumstances of the case.*

## 44 LIQUORMART V. RHODE ISLAND

See LIQUORMART V. RHODE ISLAND.

## FORUM

*A court of justice where disputes are heard and decided; a judicial tribune that hears and decides disputes; a place of jurisdiction where remedies afforded by the law are pursued.*

The appropriate forum for a lawsuit depends upon which court has jurisdiction over the parties and the subject matter of the case, a matter governed mostly by statutes and court rules. For example, rules of procedure provide that disputes involving a certain dollar amount or disputes between citizens of different states may be heard in a particular court. When a contract is the subject of the litigation, the parties may have included in the contract a forum selection clause that designates the court where any disputes arising from the contract may be heard. A forum selection clause will generally be upheld by a court unless the party resisting it can show that enforcement of the clause would be unfair or unreasonable under the circumstances of the particular case.

When more than one court is the appropriate forum to hear a dispute, the plaintiff may engage in forum shopping. In this situation, the

plaintiff seeks to have a dispute heard in the court that the plaintiff believes will render the most favorable verdict or judgment, regardless of whether that forum imposes hardship or inconvenience on the opposing party. The defendant may even be unable to appear in the forum selected by the plaintiff, thus permitting the plaintiff to win the action by default.

Forum shopping is frowned upon by the courts. Many federal and state procedural rules, as well as federal and state statutes, discourage this practice by limiting a plaintiff's choice of forum to locations reasonably convenient to both parties. The Uniform Child Custody Jurisdiction Act, for example, limits the exercise of jurisdiction over CHILD CUSTODY decrees to the home state of the child.

A court that has jurisdiction may decline to exercise it when the parties and the interests of justice would benefit if the action were heard in another court that also has jurisdiction over the matter. This is called the doctrine of *forum non conveniens* (Latin for "forum not convenient"). A defendant seeking to invoke the doctrine of forum non conveniens must make a motion to have the action dismissed even though the original forum has jurisdiction to hear the action. The court, in its discretion, will consider a number of factors in deciding whether to grant or deny the motion, including whether the necessary witnesses can be compelled to attend the proceedings and the cost of obtaining their attendance; ease of access to evidence pertinent to the dispute, including the distance from the site of the events that resulted in the litigation; and any other practical factors that would facilitate the trial of the lawsuit. For instance, if a lawsuit is brought in Alaska but all the witnesses live in Washington State, and the property that is the subject of the dispute is also in Washington, then the court may conclude that it is more convenient to litigate the case in Washington than in Alaska. In some states, however, the court will rarely dismiss an action on the grounds of forum non conveniens when the plaintiff is a resident of the forum state. In addition, to protect the plaintiff's interests, a court will permit dismissal of the action only if the plaintiff consents to the trial of the lawsuit in the more convenient forum.

In the federal court system and within many states, statutes have been enacted to allow a court to transfer a case to another court that operates within the same system or state and where the case might have been brought in the first place. Thus, the court to which the case is transferred must also have jurisdiction over the matter. Unlike a forum non conveniens motion, a transfer request may be made by either party and does not require that the action be dismissed and then reinstituted in the new court. In addition, to obtain a transfer, the requesting party needs to show a lesser degree of inconvenience than that required before a court will grant a forum non conveniens motion. For example, federal law provides that a case may be transferred from one federal forum to another "[f]or the convenience of parties and witnesses" and "in the interest of justice" (28 U.S.C.A. § 1404(a) (West Supp. 1995)). But, since transfers are limited to courts within the same system or state, a defendant who wants to change from a federal forum to a state court, or to a court in another country, or from a state court of one state to a state court of another state, must still bring a motion to dismiss the action based on forum non conveniens.

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## FORWARDING FEE

*A payment of money made by one attorney who receives a client to another attorney who referred the client.*

The Code of Professional Responsibility, which has been established by the AMERICAN BAR ASSOCIATION to regulate the professional conduct of attorneys, proscribes the payment of forwarding fees—sometimes called referral fees—to an attorney who has merely secured the employment of another attorney without rendering any services or assuming any responsibility to the client in the matter. An apportionment of reasonable fees between attorneys is proper only when the client is cognizant of, and consents to, this arrangement, and when the allocation is in proportion to the services rendered and the responsibility assumed by each attorney.

The Code of Professional Responsibility has been adopted by many state bar associations. If an attorney accepts a forwarding fee without providing any services, or undertaking any responsibility, the bar association may institute disciplinary proceedings against the individual for his or her unethical behavior.

## FOUNDATION

*A permanent fund established and maintained by contributions for charitable, educational, religious, research, or other benevolent purposes. An institution or association given to rendering financial aid to colleges, schools, hospitals, and charities and generally supported by gifts for such purposes.*

*The founding or building of a college or hospital. The incorporation or endowment of a college or hospital is the foundation, and those who endow it with land or other property are the founders.*

*Preliminary questions to a witness to establish admissibility of evidence.* Laying a foundation *is a prerequisite to the admission of evidence at trial. It is established by testimony that identifies the evidence sought to be admitted and connects it with the issue in question.*

## FOUR CORNERS

*The document itself; the face of a written instrument.*

The term is ordinarily included in the phrase *within the four corners of the document,* which denotes that in ascertaining the legal significance and consequences of the document, the parties and the court can only examine its language and all matters encompassed within it. Extraneous information concerning the document that does not appear in it—*within its four corners*—cannot be evaluated.

## FOURTEENTH AMENDMENT

The Fourteenth Amendment to the U. S. Constitution reads:

> *Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> *Section 2.* Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."
>
> *Section 3.* No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."
>
> *Section 4.* The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void."
>
> *Section 5.* The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The Fourteenth Amendment, ratified in 1868, has generated more lawsuits than any other provision of the U.S. Constitution. Section 1 of the amendment has been the centerpiece of most of this litigation. It makes "All persons born or naturalized in the United States" citizens of the United States and citizens of the state in which they reside. This section also prohibits state governments from denying persons within their jurisdiction the PRIVILEGES OR IMMUNITIES of U.S. citizenship, and guarantees to every such person DUE PROCESS and EQUAL PROTECTION OF THE LAWS. The Supreme Court has ruled that any state law that abridges FREEDOM OF SPEECH, freedom of religion, the right to trial by jury, the RIGHT TO COUNSEL, the right against

SELF-INCRIMINATION, the right against unreasonable SEARCHES AND SEIZURES, or the right against CRUEL AND UNUSUAL PUNISHMENTS will be invalidated under section 1 of the Fourteenth Amendment. This holding is called the INCORPORATION DOCTRINE.

Sections 2 to 5 have been the subject of far fewer lawsuits. Some of these sections seem anachronistic today because they reflect the immediate concerns of the Union's political leadership following the North's victory over the South in the Civil War (1861–65). Section 2, for example, penalized any state that attempted to abridge the VOTING RIGHTS of its black male residents by reducing the state's representation in Congress (no female resident of any race was afforded the constitutional right to vote in the United States until 1920). Section 3 prohibited from holding state or federal office any person who engaged in "insurrection or rebellion" or otherwise gave "aid or comfort to the enemies" during the Civil War. Section 4 reaffirmed the United States' commitment to pay its Civil War debt, while declaring all debts and obligations incurred by the Confederate government "illegal and void." Section 5 enabled, and continues to enable, Congress to pass "appropriate legislation" to enforce the provisions of the Fourteenth Amendment.

The Fourteenth Amendment was drafted to alleviate several concerns harbored by many U.S. citizens prior to its ratification. The most obvious concern related to the status of the recently freed slaves. Five years before hostilities commenced in the Civil War, the Supreme Court declared that people of African descent living in the United States were not "citizens" of the United States, but merely members of a "subordinate and inferior class of human beings" deserving no constitutional protection whatsoever (DRED SCOTT V. SANDFORD, 60 U.S. [19 How.] 393, 15 L. Ed. 691 [1856]). The Fourteenth Amendment vitiated the Supreme Court's holding in *Dred Scott* by making all blacks "born or naturalized in the United States" full-fledged citizens entitled to the same constitutional rights provided for every other U.S. citizen.

The racist attitudes expressed in *Dred Scott* also manifested themselves after the Civil War. In 1865, the southern states began enacting the BLACK CODES, which deprived African Americans of many basic rights afforded to white Americans, including the right to travel, bear arms, own property, make contracts, peaceably assemble, and testify in court. The Black Codes also authorized more severe punishments for African Americans than would be imposed on white persons for committing the same criminal offense. The Fourteenth Amendment offered an antidote to these discriminatory laws by guaranteeing to members of all races "due process of law," which requires the legal system to provide fundamentally fair trial procedures, and "equal protection of the laws," which requires the government to treat all persons with equal concern and respect.

*Dred Scott* was not the only Supreme Court decision that influenced the framers of the Fourteenth Amendment. *Barron v. City of Baltimore,* 32 U.S. (7 Pet.) 243, 8 L. Ed. 672 (1833), also played a significant role. This case involved a Maryland wharf owner who brought a lawsuit against the city of Baltimore for violating the Fifth Amendment's EMINENT DOMAIN CLAUSE, which prohibits the government from taking private property without "just compensation." Baltimore defended against the wharf owner's lawsuit by arguing that the FIFTH AMENDMENT only provides relief against action taken by the federal government and offers no protection against state governments or their political subdivisions. The Supreme Court agreed with Baltimore.

Writing for the Court, Chief Justice JOHN MARSHALL asserted that the Constitution created the federal government, and the provisions of the Constitution were designed to regulate the activity of the federal government. The people of each state enacted their own constitution, Marshall contended, to regulate the activities of their state and local governments. Thus, Marshall reasoned that the U.S. Constitution operates only as a limitation on the powers of the federal government, unless one of its provisions expressly restricts the powers of state governments, as does Article I, Section 10.

Article I, Section 10, provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation," or "pass any Bill of Attainder, EX POST FACTO LAW, or Law impairing the Obligation of Contracts." This wording, Marshall maintained, demonstrates that the Framers understood the type of clear and unequivocal language that must be used to make a provision of the federal Constitution binding on the states. Because the first eight amendments to the Constitution do not contain language that restricts

the powers of state governments, Marshall concluded that the BILL OF RIGHTS was inapplicable to the states.

The Supreme Court's decision in *Barron* weighed heavily on the mind of JOHN BINGHAM, the Republican representative from Ohio who was the primary architect of Section 1 of the Fourteenth Amendment. Bingham said he "noted . . . certain words in the opinion of Marshall" when he was "reexamining that case of *Barron*." The chief justice, Bingham stressed, denied the wharf owner's claim because the Framers of the Bill of Rights, unlike the Framers of Article I, Section 10, had not chosen the type of explicit language that would clearly make the Bill of Rights applicable to state governments. "Acting upon" Marshall's "suggestion" in *Barron,* Bingham said, he "imitated" the Framers of Article I, Section 10: "As [these Framers had written] 'no state shall . . . pass any Bill of Attainder . . .' I prepared the provision of the first section of the fourteenth amendment."

Bingham's remarks shed light on the Supreme Court's decision to make most of the provisions contained in the Bill of Rights applicable to state governments through the doctrine of incorporation. Under this doctrine, the Supreme Court has ruled that every protection contained in the Bill of Rights—except for the right to bear arms, the right to indictment by GRAND JURY, the right to trial by jury in civil cases, and the right against quartering soldiers—must be protected by state governments under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

The Supreme Court has explained that each of these incorporated rights is "deeply rooted in the nation's history" and "fundamental" to the concept of "ordered liberty" represented by the Due Process Clause (*Palko v. Connecticut,* 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 [1937]). Any state that denies one of these rights is violating its duty to provide the "equal protection of the laws" guaranteed to the residents of every state by the Fourteenth Amendment.

Although a state may provide more constitutional protection to its residents than is conferred by the Bill of Rights, the Fourteenth Amendment prohibits any state from providing less protection. For example, the Supreme Court upheld the constitutionality of sobriety checkpoints, which authorize police officers to stop motor vehicles to determine if the driver has been consuming alcohol, regardless of whether the stop was based on PROBABLE CAUSE or made pursuant to a SEARCH WARRANT as required by the FOURTH AMENDMENT (*Michigan v. Sitz,* 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 [1990]). The Minnesota Supreme Court reached the opposite conclusion, invalidating arrests made during traffic stops at sobriety checkpoints because they did not comport with the state's constitutional provisions prohibiting unreasonable searches and seizures (*Ascher v. Commissioner of Public Safety,* 519 N.W.2d 183 [Minn. 1993]).

Whereas the Due Process and Equal Protection Clauses have given rise to a panorama of legal claims such as the sobriety checkpoint cases, the PRIVILEGES AND IMMUNITIES CLAUSE has produced only a few lawsuits since the end of the 1800s. Like most other legal terms in the Bill of Rights, the phrase *privileges or immunities* is not defined in the Constitution. Nor does the phrase possess a meaning that is self-evident. However, some insight into the meaning of the Privileges and Immunities Clause may be gleaned from statements made by the man who drafted it, Congressman Bingham.

Bingham said the "privileges and immunities of citizens of the United States . . . are chiefly defined in the first eight amendments to the Constitution of the United States. . . . These eight articles . . . never were limitations upon the power of the states until made so by the Fourteenth Amendment" (quoted in *Adamson v. California,* 332 U.S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 [1947] [Murphy, J., dissenting]). Senator Jacob Howard echoed these thoughts, stating that "these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—[include] . . . personal rights . . . such as the freedom of speech and of the press, [and] the right of the people to peaceably assemble and petition the government for redress of grievances." Similarly, Representative JAMES WILSON made it clear that the "privileges and immunities of the citizens of the United States" include "[f]reedom of religious opinion" and "freedom of speech and press."

Notwithstanding the statements made by these congressmen, the Supreme Court has limited the application of the Fourteenth Amendment's Privileges and Immunities Clause to provide only negligible protection against the

state and federal governments. In the SLAUGHTER-HOUSE CASES, 83 U.S. (16 Wall.) 16, 21 L. Ed. 268 (1873), a group of New Orleans butchers brought a lawsuit to invalidate a Louisiana law that granted a MONOPOLY to a local slaughterhouse. The butchers alleged that the state-chartered monopoly violated their "privileges and immunities" to pursue gainful employment free from unlawful restraints.

In an extremely narrow reading of the Fourteenth Amendment, the Supreme Court rejected the butchers' argument. The Court held that the Privileges and Immunities Clause protects only rights derived from U.S. citizenship, such as the right to HABEAS CORPUS and interstate travel and not rights derived from state law, such as the common-law rights of TORT and property asserted by the New Orleans butchers. The Supreme Court has neither overruled its decision in the *Slaughter-House* cases nor expanded its narrow interpretation of the Privileges and Immunities Clause. Most constitutional scholars have since pronounced this clause a dead letter.

If the Supreme Court has provided a more conservative interpretation of the Privileges and Immunities Clause than envisioned by the Framers of the Fourteenth Amendment, it has provided a more liberal interpretation of the Equal Protection Clause. In BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the Supreme Court ruled that the doctrine of "separate but equal," in which the black and white races were segregated in public schools and other places of public accommodation, was "inherently unequal" and denied African Americans "equal protection of the laws." The ambit of the Equal Protection Clause was later enlarged by the Supreme Court beyond racial SEGREGATION to cover an assortment of gender discrimination claims asserted by women.

The Court made these rulings in spite of evidence that racial segregation was prevalent at the time the Fourteenth Amendment was adopted and that women were treated like second-class citizens during most of the nineteenth century. In 1868, for example, racial segregation of public schools was permitted throughout the South and in eight northern states. The gallery of the U.S. Senate was itself segregated by race during the debate of the Equal Protection Clause. During the first half of the nineteenth century, every state proscribed married women from devising a will, owning or inheriting property, entering into a contract, or exercising almost any other basic civil right afforded to women in the modern United States. Indeed, the COMMON LAW recognized no existence for married women independent from their husbands. By marriage, the HUSBAND AND WIFE became one person in law, and that person was the husband.

Thus, the Framers' original understanding of the Fourteenth Amendment has not provided a useful yardstick to measure the Supreme Court's interpretation of the Due Process and Equal Protection Clauses. Since the mid-1940s, the Supreme Court has strayed further from the Framers' original understanding, recognizing controversial privacy rights to use contraceptives (GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 [1965]), obtain ABORTIONS prior to the third trimester of pregnancy (ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 [1973]), and view obscene pornographic material in the privacy of one's own home (*Stanley v. Georgia,* 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 [1969]). In 1996 the Supreme Court held that the Equal Protection Clause had been violated by an amendment to the Colorado constitution prohibiting legislative, judicial, or executive action at the state or local level from protecting homosexual persons from discrimination in ROMER V. EVANS, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).

The Supreme Court has extended the reach of the Fourteenth Amendment to private actors when they become so entwined with state or local government that they become, in effect, state actors. In *Brentwood Academy v. Tennessee Secondary School Athletic Association,* 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001), the Court held that a state athletic association was so closely connected with the public schools as to become a state actor. The association sought to curtail the alleged football recruiting abuses of Brentwood Academy, a private school with a very successful football program.

Brentwood Academy sued the association and alleged that it had violated the Fourteenth Amendment. The association was not a part of state government, but the Supreme Court held that the state had delegated authority to regulate school athletic programs to the organization. The Court applied the general principle where there is such a "close nexus between the State and the challenged action," seemingly private behavior "may be fairly treated as that of the State itself."

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Gay and Lesbian Rights.

## FOURTH AMENDMENT

The Fourth Amendment to the U.S. Constitution reads:

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

The American Revolution was fought, in part, to create a system of government in which the **RULE OF LAW** would reign supreme. The rule of law is often identified with the old saying that the United States is a nation of laws and not of men. Under the rule of law, the actions of government officials are prescribed by the principles and laws that make up the U.S. legal system and do not reflect the **ARBITRARY** whims and caprices of the government officials themselves.

A distinction is sometimes drawn between power and authority. Law enforcement officers are entrusted with the powers to conduct investigations, to make arrests, and occasionally to use lethal force in the line of duty. But these powers must be exercised within the parameters authorized by the law. Power exercised outside of these legal parameters transforms law enforcers into lawbreakers, as happened when Los Angeles police officer Laurence Powell was convicted for using excessive force against **RODNEY KING**, who had been stopped for speeding. Powell repeatedly struck King with his nightstick even though King was in a submissive position, lying prone on the ground.

The Fourth Amendment was intended to create a constitutional buffer between U.S. citizens and the intimidating power of law enforcement. It has three components. First, it establishes a privacy interest by recognizing the right of U.S. citizens to be "secure in their persons, houses, papers, and effects." Second, it protects this privacy interest by prohibiting **SEARCHES AND SEIZURES** that are "unreasonable" or are not authorized by a warrant based upon probable cause. Third, it states that no warrant may be issued to a law enforcement officer unless that warrant describes with particularity "the place to be searched, and the persons or things to be seized."

The Framers drafted the Fourth Amendment in response to their colonial experience with British officials, whose discretion in collecting revenues for the Crown often went unchecked. Upon a mere suspicion held by British tax collectors or their informants, colonial magistrates were compelled to issue general warrants, which permitted blanket door-to-door searches of entire neighborhoods without limitation as to person or place. The law did not require magistrates to question British officials regarding the source of their suspicion or to make other credibility determinations.

The writ of assistance was a particularly loathsome form of general warrant. The name of this writ derived from the power of British authorities to enlist local peace officers and colonial residents who might "assist" in executing a particular search. A writ of assistance lasted for the life of the king or queen under whom it was issued, and it applied to every officer and subject in the British Empire. In essence, such a writ was a license for customs officers tracking smugglers and illegally imported goods.

Colonial opposition to general warrants was pervasive and kinetic. In Paxton's Case (also known as the **WRITS OF ASSISTANCE CASE**), 1 Quincy 51 (Mass. 1761), **JAMES OTIS**, appearing on behalf of colonists who opposed the issuance of another writ of assistance, denounced general warrants as instruments of "slavery," "villainy," and "arbitrary power." These writs, Otis continued, were "the most destructive of English liberty" because they placed the freedom of every person "in the hands of a petty officer" (as quoted in *O'Rourke v. City of Norman,* 875 F.2d 1465 [10th Cir. 1989]). In order to be valid, Otis railed, a warrant must be "directed to specific

officers, and to search certain houses" for particular goods, and may only be granted "upon oath made" by a government official "that he suspects such goods to be concealed in those very places he desires to search" (as quoted in *Illinois v. Krull,* 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 [1987]).

Although Otis lost the case, his arguments fueled angry colonial crowds that subsequently interfered with British customs and revenue agents who attempted to seize miscellaneous goods pursuant to general warrants. Some provincial courts began declining to issue writs of assistance, and other courts issued writs with greater specificity. Colonial newspapers complained that British officers were ransacking the colonists' houses, violating the sanctity of their bedrooms, and plundering their privacy under the auspices of general warrants. On the night before the Declaration of Independence was published, JOHN ADAMS cited the "argument concerning the Writs of Assistance . . . as the commencement of the controversy between Great Britain and America."

The American Revolution answered the questions surrounding writs of assistance, but the Fourth Amendment raised other questions in the newly founded republic. If a police officer's suspicion is no longer sufficient to obtain a SEARCH WARRANT, as it was in colonial America, where should the line be drawn separating suspicion from probable cause? Although general warrants are now clearly prohibited, how detailed must warrants be to pass constitutional muster? The Fourth Amendment expressly forbids "unreasonable" searches and seizures, but what criteria should be considered in evaluating the reasonableness of a search? The Fourth Amendment also leaves open the question of who should review warrant applications—the judiciary or some other branch of government. The answers to these questions were explored and developed in criminal litigation over the next two centuries.

Fourth Amendment questions arise during criminal litigation in the context of a suppression hearing. This hearing is prompted by a defendant who asks the court to review the method by which the police obtained evidence against him or her, and to determine whether that evidence survives constitutional scrutiny. If the evidence was obtained in violation of the Fourth Amendment, it usually will be excluded from trial, which means the prosecution will be unable to present it to the jury. The legal doctrine under which illegally obtained evidence is suppressed is known as the EXCLUSIONARY RULE, and its purpose is to deter POLICE MISCONDUCT and to protect defendants from it.

The exclusionary rule requires the suppression not only of evidence that was the direct product of illegal police work but also of any evidence that is derived from a tainted source. The suppression of tainted derivative evidence, also known as FRUIT OF THE POISONOUS TREE, typically occurs when the police obtain a confession after an illegal arrest or pursuant to an unconstitutional search. Although the manner in which the confession itself was obtained may have been perfectly constitutional, the confession is still suppressed because the law does not permit the government, which the prosecution represents at a criminal trial, to benefit from its own misconduct.

Before a court may exclude any evidence, it first must determine whether the Fourth Amendment even applies to the case under consideration. Two requirements must be met before a particular search or seizure will give rise to Fourth Amendment protection. First, the search or seizure must have been conducted by a government agent or pursuant to government direction. Thus, the actions of state and federal law enforcement officers or private persons working with law enforcement officers will be subject to the strictures of the Fourth Amendment. Bugging, WIRE TAPPING, and other related eavesdropping activities performed by purely private citizens, such as private investigators, will not receive Fourth Amendment protection.

Second, a defendant must be able to demonstrate that he or she had a "reasonable expectation of privacy" in the place that was searched or the thing that was seized (*Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 576 [1967]). In *Katz,* the U.S. Supreme Court explained that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

Applying this principle, the Court has ruled that U.S. citizens maintain a reasonable expectation of privacy in the "curtilage" immediately surrounding their home, but not in the "open fields" and "wooded areas" extending beyond

this area (*Hester v. United States,* 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 [1924]). A person may have a reasonable expectation of privacy in the automobile that he or she is driving, but not in items that are in "plain view" from outside the vehicle (*Coolidge v. New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 564 [1971]). Nor do people have reasonable expectations of privacy in personal characteristics (*United States v. Dionisio,* 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 [1973]). Thus, the police may require individuals to give handwriting and voice exemplars as well as fingerprint samples, without complying with the Fourth Amendment's warrant or reasonableness requirements.

In *Minnesota v. Carter*, 525 U.S. 83, 119 S. Ct. 469, 142 L. Ed.2d 373 (1998), the U.S. Supreme Court considered whether a police officer who had looked in an apartment window through a gap in a closed window blind had violated the privacy of the drug dealers in the apartment because they had an expectation of privacy that is protected by the Fourth Amendment. The Court held that the police officer had not violated the Fourth Amendment because the occupants of the apartment had not had an expectation of privacy. This was due to the fact the drug dealers had merely used the apartment to consummate business transactions and that they had no personal relationship with the occupant of the apartment.

However, the high court looked at the issue differently when the drug courier's contraband was discovered on a bus by an officer who thought that a bag felt peculiar. In *Bond v. U.S.*, 529 U.S. 334, 120 S. Ct. 1462, 146 L. Ed.2d 365 (2000), it ruled that police cannot squeeze the luggage of bus passengers in order to try to find illegal drugs. The ruling forces law enforcement to modify the way they inspect luggage and packages that are carried by, or in the custody of an individual.

The U.S. Supreme Court has made clear that there are limits to high-tech government snooping when the government has the ability to use sophisticated technology to monitor criminal suspects. In *Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed.2d 94 (2001), the Court ruled that police could not use evidence obtained through the use of thermal imaging without first obtaining a search warrant. It declared that a warrantless search would be regarded as "presumptively unreasonable" and that the evidence that the search produced will be inadmissible at trial. The police had received a tip that Danny Kyllo was growing marijuana inside his home. Because marijuana cultivation requires the use of high-intensity lamps, police used a thermal imager to scan Kyllo's residence. The imager detects infrared radiation, which is invisible to the naked eye. The machine converts the radiation into images based on relative warmth. The police conducted the scan across the street from Kyllo's home, accomplishing the task in just a few minutes. The scan disclosed that one part of his house was substantially hotter than any other unit in his triplex. Based on the scan, utility bills, and tips from informants, police secured a search warrant and found that Kyllo had indeed been growing marijuana.

The U.S. Supreme Court noted that the degree of privacy guaranteed by the Fourth Amendment had been affected by technological developments. The question became "what limits there are upon this power of technology to shrink the realm of guaranteed privacy." In its view, individuals had a "minimum expectation of privacy" that the interiors of their homes were not subject to warrantless police searches." Thus, the use of "sense-enhancing technology" that could obtain information that would otherwise only be obtainable by a physical search constituted a "search." Accordingly, any information obtained by the thermal imager was the product of a search. The Court's analysis led to the legal conclusion that such a search was unreasonable and that it could be justified only if it were made pursuant to a warrant.

Once a court has determined that the Fourth Amendment is an issue in a particular case, it next must decide whether law enforcement complied with the amendment's requirements. When making this decision, a court begins with the premise that the Constitution expresses a preference for searches made pursuant to a warrant (*Mincey v. Arizona,* 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 [1978]). Searches performed without a warrant are presumptively invalid, and evidence seized during a warrantless search is suppressed unless the search was reasonable under the circumstances.

The U.S. Supreme Court has ruled that warrantless searches may be deemed reasonable in certain situations. First, no warrant is required for searches incident to a lawful arrest (*United States v. Watson,* 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 [1976]). If a police officer has probable cause to believe that a crime has occurred,

the Fourth Amendment permits the officer to arrest the suspect and to conduct a search of the suspect's person and clothing and of all areas within the suspect's immediate reach. Second, a police officer who possesses an "articulable" and "reasonable" suspicion that an automobile has violated a state or local traffic law may stop the driver and conduct a search of the vehicle's interior, including the glove compartment (*Delaware v. Prouse,* 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 [1979]). The trunk of a vehicle cannot be searched unless an officer has probable cause to believe that it contains contraband or the instrumentalities of criminal activity.

Third, an officer who reasonably believes "that criminal activity may be afoot" in a public place may stop an individual who is suspected of wrongdoing and "conduct a carefully limited search of [the suspect's] outer clothing" for weapons that may be used against the officer (TERRY V. OHIO, 392 U.S. 1, 88 S. Ct. 1868, 21 L. Ed. 889 [1968]). Fourth, officers who are in "hot pursuit" of "fleeing felons" or are gathering "evanescent" evidence (evidence that could readily disappear—e.g. blood samples from drunken drivers) are also permitted to act without first obtaining a search warrant.

These four exceptions to the warrant requirement are based on the need to facilitate law enforcement during unforeseen or emergency circumstances in which criminal activity is strongly suspected but police officers lack sufficient time to complete an application for a search warrant and to testify before a magistrate. These exceptions also reflect a need to protect police officers from hidden weapons and to preserve evidence that easily could be destroyed or compromised.

When law enforcement does obtain a warrant before conducting a search, the warrant must comply with the Fourth Amendment before evidence from the search will be admissible in court. A warrant may be defective if it is not supported by probable cause that is established by a detailed, sworn statement made by a law enforcement officer appearing before a magistrate.

No definition of *probable cause* has ever satisfied both prosecutors and defense attorneys. But the U.S. Supreme Court has said that probable cause exists where "the facts and circumstances within [the police officer's] knowledge" are of a "reasonably trustworthy" basis to "warrant a man of reasonable caution" to believe that an offense has been or is about to be committed (*Carroll v. United States,* 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 [1925]). Probable cause can be established by out-of-court statements of reliable police informants even though the credibility of those statements cannot be tested by a magistrate (*Illinois v. Gates,* 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 [1983]). However, probable cause will not be found where the only evidence of criminal activity is an officer's "good information" or "belief" (*Aguilar v. Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 [1964]).

The Fourth Amendment requires not only that search warrants be supported by probable cause but also that they "particularly" describe the person or place to be searched. A warrant must provide enough detail so that an "officer with the search warrant can, with reasonable effort, ascertain and identify the place [or person] intended" (*Steele v. United States,* 267 U.S. 498, 45 S. Ct. 414, 69 L. Ed. 757 [1925]). For most residences, a street address usually satisfies the particularity requirement. However, if a warrant designates an apartment complex, hotel, or other multiple-unit building, the warrant must describe the specific sub-unit that will be searched. When a warrant designates that a person will be searched, it must include a description that provides enough detail so that the suspect's identity can be ascertained with reasonable certainty.

Probable cause must be established by testimony made under oath by a law enforcement officer appearing before a magistrate. The testimony can be oral or written, and it cannot contain any "knowingly" or "intentionally" false statements, or statements made in "reckless disregard for the truth" (*Franks v. Delaware,* 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 [1978]). Inaccuracies due to NEGLIGENCE or innocent omission do not jeopardize a warrant's validity.

The magistrate before whom an officer applies for a warrant must be "neutral and detached" (*Coolidge v. New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 [1971]). This means that the magistrate must be impartial and not a member of the "competitive enterprise" of law enforcement (*California v. Acevedo,* 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 [1991]). Thus, police officers, prosecutors, and attorneys general are disqualified from the role of magistrate. However, judges, lawyers, and court clerks all potentially qualify as "neutral and detached," and therefore may become magistrates. The

requirements that states set for becoming a magistrate vary widely, from having an attorney's license to having a high-school diploma to simply being literate.

If a search is performed pursuant to a defective warrant, any evidence obtained as a result of the search is usually suppressed. An exception to this rule arises when an officer has obtained evidence pursuant to a defective warrant that the officer relied on in "good faith" (*United States v. Leon,* 468 U.S. 897, 104 S. Ct. 3430, 82 L. Ed. 2d 677 [1984]). For this exception to apply, the warrant must have been issued by a magistrate and then later ruled defective for a valid reason, and the defect must not have been the result of willful police deception. If these two requirements are satisfied, law enforcement was entitled to rely on the warrant in conducting the search, and any evidence obtained during the search is admissible against the defendant.

This exception was created to ensure that police officers would not be punished for blunders made by magistrates when issuing search warrants. Again, the primary reason courts suppress illegally obtained evidence is to deter future police misconduct. No deterrent value is served by excluding evidence obtained by an honest police officer who acted pursuant to an ostensibly valid warrant that was later ruled defective owing to an error by the magistrate.

The U.S. Supreme Court also has been asked to determine whether the way in which a search with a warrant is conducted can violate the Fourth Amendment. One troublesome area has been the question of whether police must knock on a suspect's door and announce that they have a warrant, in order to enter the premises lawfully. The general rule is that police may make a "no-knock" entry if there are reasonable grounds for such a course of action. In *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 615 (1997), the U.S. Supreme Court was confronted with a decision of the Wisconsin Supreme Court that announced a blanket exception to the knock-and-announce requirement for felony drug investigations. The high court unanimously ruled that such an exception violated the Fourth Amendment and that it undermined the ability of a reviewing court to determine whether a particular no-knock entry had been reasonable. In making this ruling, the Court rejected the idea that the violent world of narcotics traffickers justified a departure from Fourth Amendment JURISPRUDENCE.

One year later, the U.S. Supreme Court clarified the standards to which police will be held when they execute "no-knock" searches, in *U.S. v. Ramirez*, 523 U.S. 65, 118 S. Ct. 992, 140 L. Ed.2d 191 (1998). It held that the Fourth Amendment does not hold officers to a higher standard when a "no-knock" entry results in the destruction of property. In *Ramirez*, a federal district court suppressed two weapons that had been seized as evidence because the police officers had violated the Fourth Amendment and 18 U.S.C.A. § 3109, which permits federal law enforcement officers to damage property in certain instances. The Court acknowledged that excessive or unnecessary destruction of property during a search could be a violation of the Fourth Amendment "even though the entry itself is lawful and the fruits of the search not subject to suppression." However, in that case, the officers' actions had been reasonable, based on an informant's information, as the officers had not wanted the suspect to seek out the weapons.

Police often justify a search and seizure by stating that the suspect consented. Again, the U.S. Supreme Court has had to determine the boundaries of consent. In *U.S. v. Drayton,* 536 U.S. 194, 122 S. Ct. 2105, 153 L. Ed.2d 242 (2002), the Court reviewed an Eleventh Circuit Court of Appeals decision that invalidated the pat-down search of two defendants who had been on a cross-country bus trip, even though both defendants had consented to the search. The appeals court concluded that the circumstances surrounding the search had not been sufficiently free of coercion to serve as a constitutional basis for the search. The high court reversed the decision, holding that police officers on public transportation do not need to inform each passenger that they have the right to refuse a search, pat-down, or questioning in order for the investigation to remain constitutional. It deemed the distinction between the confines of a bus and the open spaces of the street to be immaterial to the reasons why citizens choose to cooperate or not. Presumably, citizens "know that their participation enhances their own safety and the safety of those around them."

Individuals who are on PROBATION typically sign an agreement that allows police to enter their homes in order to ensure that they are complying with the terms of probation. Questions have arisen over when police may search a probationer for another crime if the person has signed a probation agreement that permits such

searches. Police and government officials have argued that they may conduct a search without a warrant if they believe that the suspect has committed a new crime. Criminal defendants have argued that probation agreements that require them to submit to searches at anytime only apply to searches that have a probationary purpose rather than an investigatory purpose. The U.S. Supreme Court, in *United States v. Knights*, 534 U.S.112, 122 S. Ct. 587, 151 L. Ed.2d 497 (2002), declined to issue a bright-line rule on this dispute but concluded that when police have reasonable suspicion and the probation agreement authorizes searches, the search is reasonable under the Fourth Amendment. Instead, the Court applied its traditional analysis for judging whether a warrantless search was reasonable. This "totality of the circumstances" approach looks at the intrusion of individual privacy and contrasts it with "legitimate governmental interests."

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CROSS-REFERENCES

Criminal Law; Criminal Procedure; *Mapp v. Ohio*; Stop and Frisk.

## FRANCHISE

*A special privilege to do certain things that is conferred by government on an individual or a corporation and which does not belong to citizens generally of common right, e.g., a right granted to offer* **CABLE TELEVISION** *service.*

*A privilege granted or sold, such as to use a name or to sell products or services. In its simplest terms, a franchise is a license from the owner of a* **TRADEMARK** *or* **TRADE NAME** *permitting another to sell a product or service under that name or mark. More broadly stated, a* franchise *has evolved into an elaborate agreement under which the franchisee undertakes to conduct a business or sell a product or service in accordance with methods and procedures prescribed by the franchisor, and the franchisor undertakes to assist the franchisee through advertising, promotion, and other advisory services.*

*The right of suffrage; the right or privilege of voting in public elections. Such right is guaranteed by the Fifteenth, Nineteenth, and Twenty-fourth Amendments to the U.S. Constitution.*

*As granted by a professional sports association,* franchise *is a privilege to field a team in a given geographic area under the auspices of the league that issues it. It is merely an incorporeal right.*

### Government Franchises

The consideration that is given by a person or corporation in order to receive a franchise from the government can be an agreement to pay money, to bear some burden, or to perform a public duty. The primary objective of all grants of franchises is to benefit the public; the rights or interests of the grantee, the franchisee, are secondary. A corporation is a franchise, and the various powers conferred on it are also franchises, such as the power of an insurance corporation to issue an insurance policy. Various types of business—such as water companies, gas and electric companies, bridge and tunnel authorities, taxi companies, along with all types of corporations—operate under franchises.

The charter of a corporation is also called its general franchise. A franchise tax is a tax imposed by the state on the right and privilege of conducting business as a corporation for the purposes for which it was created and in the conditions that surround it.

**Power to Grant** The power to grant franchises is vested in the legislative department of the government, subject to limitations imposed by the state constitution. A franchise can be derived indirectly from the state through the agency that has been duly designated for that purpose, such as the local transportation agency that can grant a franchise for bus routes. Franchises are usually conferred on corporations, but natural persons can also acquire them. The grant of a franchise frequently contains express conditions and stipulations that the grantee, or holder, of the franchise must perform.

Not every privilege granted by a governmental authority is a franchise. A franchise differs

from a license, which is merely a personal privilege or temporary permission to do something; it can be revoked and can be derived from a source other than the legislature or state agencies. A franchise differs from a lease, which is a contract for the possession and profits of property in exchange for the payment of rent.

**Regulation** Once a franchise is granted, its exercise is usually subject to regulation by the state or some duly authorized body. In the exercise of police power—which is the authority of the state to legislate to protect the health, safety, welfare, and morals of its citizens—local authorities or the political subdivisions of the state can regulate the grant or exercise of franchises.

**Right to Compete** While a franchise can be exclusive, exclusiveness is not a necessary element of it. Nonexclusive franchises—including those to function or operate as a public utility—do not include the right to be free of competition. The grant of such a franchise does not prevent the grant of a similar franchise to another entity, or lawful competition on the part of public authorities. The holder of a nonexclusive franchise is entitled to be free from the competition of an entity that does not have a valid franchise to compete. The holder can institute a proceeding for an injunction—a court order that commands or prohibits a certain act—and monetary damages for the unlawful invasion of the franchise.

**Duration** The legislature can prescribe the duration of a franchise. The powers of local authorities or political subdivisions of the state depend upon the statute that confers the power to make grants and upon any constitutional limitation.

A franchise can be terminated by the mutual agreement of the state that is the franchisor, and the grantee or the franchisee. It can be lost by ABANDONMENT, such as when a corporation dissolves because of its fiscal problems. A mere change in the government organization of a political subdivision of a state does not divest franchise rights that have been previously acquired with the consent of local authorities. A franchise cannot be revoked arbitrarily unless that power has been reserved by the legislature or proper agency.

**Forfeiture** A franchise can be subject to FORFEITURE due to nonuse. Misuse or failure to provide adequate services under the franchise can also result in its loss. The remedy for nonuse or misuse lies with the state. Persons other than the state or public authorities cannot challenge the validity of the exercise of a franchise unless they can demonstrate that they have a peculiar interest in the matter distinct from that of the general public.

*The 15th, 19th, and 24th Amendments to the U.S. Constitution guarantee the rights of franchise, or suffrage, to all citizens.*

AP/WIDE WORLD PHOTOS

**Invasion of the Franchise** A person or corporation holding a valid franchise can obtain an INJUNCTION to prevent the unlawful invasion of the franchise rights and can sue for monetary damages if there has been financial loss as a result of the infringement.

**Transfer of Franchises** Subject to applicable constitutional or statutory limitation, franchises can be sold or transferred. Where the franchises involve public service, they cannot be sold or transferred unless there is authorization by the state. The person or corporation purchasing the franchise in an authorized sale takes it subject to its restrictions.

## Private Franchises

Certain written contractual agreements are sometimes loosely referred to as franchises, although they lack the essential elements in that they are not conferred by any sovereignty. The franchise system, or method of operation, has

had a phenomenal growth in particular consumer product industries, such as automobile sales, fast foods, and ice cream. The use of a franchise in this manner has enabled individuals with minimal capital to invest to become successful members of the business community.

Under the most common method of operation, the cornerstone of a franchise system must be a trademark or trade name of a product. A franchise is a license from an owner of a trademark or trade name permitting another to sell a product or service under the name or mark. A franchisee agrees to pay a fee to the franchisor in exchange for permission to operate a business or sell a product or service according to the methods and procedures prescribed by the franchisor as well as under the trade name or trademark of the franchisor. The franchisee is usually granted an exclusive territory in which he or she is the only distributor of the particular goods or services in that area. The franchisor is usually obligated by contract to assist the franchisee through advertising, promotion, research and development, quantity purchasing, training and education, and other specialized management resources.

Before 1979 few state legislatures had enacted laws to protect prospective franchisees from being deceived by the falsehoods of dishonest franchisors. These laws, known as franchise disclosure laws, mandated that anyone offering franchises for sale in the state had to disclose material facts—such as the true costs of operating a franchise, any recurring expenses, and substantiated reports of profit earned—that would be instrumental in the making of an informed decision to purchase a franchise.

In states that did not have such legislation, the unsophisticated investor was at the mercy of the franchisor's statements. A victimized franchisee could sue a franchisor for breach of contract, but this was an expensive proposition for someone who typically had invested virtually all of his or her financial resources in an unprofitable franchise. Franchisors confronted with numerous lawsuits often would declare BANKRUPTCY so that the franchisees had little possibility of recouping any of their investments.

The FEDERAL TRADE COMMISSION (FTC) received numerous complaints about inequitable and dishonest practices in the sale of such franchises. In late 1978, it issued regulations, effective October 21, 1979, that require franchisors and their representatives to disclose material facts necessary to make an informed decision about the proposed purchase of a franchise and that establish certain practices to be observed in the franchisor-franchisee relationship. These rules are collectively known as the Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, or more simply, the Franchise Rule.

A franchisor must disclose the background of the company—including the business experience of its high-level executives—for the previous five years; and whether any of its executives, within the last seven years, have been convicted of a felony, have pleaded nolo contendere to FRAUD, have been held liable in a civil action for fraud, are subject to any currently effective court order or ADMINISTRATIVE AGENCY ruling concerning the franchise business or fraud, or have been involved in any proceedings for bankruptcy or corporate reorganization for insolvency during the previous seven years.

In addition, there must be a factual description of the franchise as well as an unequivocal statement of the total funds to be paid, such as initial franchise fees, deposits, down payments, prepaid rent on the location, and equipment and inventory purchases. The conditions and time limits to obtain a refund, as well as its amount, must be clear as well as the amount of recurring costs, such as ROYALTIES, rents, advertising fees, and sign rental fees. Any restrictions imposed—such as on the amount of goods or services to be sold, the types of customers with which the franchisee can deal—the geographical area, and whether the franchisee is entitled to protection of his or her territory by the franchisor must be discussed. The duration of the franchise, in addition to reasons why the franchise can be terminated or the franchisee's license not renewed when it expires, also must be explained. The number of franchises voluntarily terminated or terminated by the franchisor must be reported. The franchisor must disclose the number of franchises that were operating at the end of the previous year, as well as the number of company-owned outlets. The franchisee must also be supplied with the names, addresses, and telephone numbers of the franchisees of the ten outlets nearest the prospective franchisee's location, so that the prospective franchisee can contact them to obtain a realistic perspective of the daily operations of a franchise.

If the franchisor makes any claims about the actual or projected sales of its franchises or their

actual or potential profits, facts must be presented to substantiate such statements.

All of these facts—embodied in an accurately, clearly, and concisely written document—must be given to the prospective franchisee at the first personal meeting or at least ten days before any contractual relationship is entered or deposit made, whichever date is first. The purpose of this disclosure statement is to provide the potential investor with a realistic view of the business venture upon which he or she is about to embark. Failure to comply with the FTC regulation could result in a fine of up to $10,000 a day for each violation.

Some states have also enacted laws that prohibit a franchisor from terminating a franchise without good cause, which usually means that the franchisee has breached the contract. In such a case, the franchisor is entitled to reacquire the outlet—usually by repurchasing the franchisee's assets, such as inventory and equipment.

In states without "good cause" laws, franchisees claim that they are being victimized by franchisors who want to reclaim outlets that have proven to be highly profitable. They allege that the franchisor imposes impossible or ridiculous demands that cannot be met to harass the franchisee into selling the store back to the franchisor at a fraction of its value. Company-owned outlets yield a greater profit to the franchisor than the royalty payments received from the franchisee. Other franchisees claim that their licenses have been revoked or not renewed upon expiration because they complained to various state and federal agencies of the ways in which the franchisors operate. Such controversies usually are resolved in the courtroom.

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## ♦ FRANK, JEROME NEW

Jerome New Frank had a distinguished career as a judge but won perhaps even more renown as a legal philosopher and author.

Frank was born September 10, 1889, in New York City. He received a Ph.B. from the University of Chicago in 1909 and a law degree from the University of Chicago Law School in 1912. His next twenty years were spent in private practice where he specialized in the reorganization of corporations.

During the 1930s, Frank became involved in several of the agencies established as part of President FRANKLIN D. ROOSEVELT'S NEW DEAL. In 1933 FELIX FRANKFURTER, then a law professor at Harvard, recommended Frank for the position of general counsel to the Agricultural Adjustment Administration (AAA) and the Federal Surplus Relief Corporation. In 1935, however, Frank and several of his staff were fired because they insisted that benefits provided to cotton growers under AAA contracts should be shared with sharecroppers. Almost immediately, Roosevelt appointed Frank as special counsel to the Reconstruction Finance Corporation. From there Frank went to the Public Works Administration (PWA) where he took an active part in the litigation that surrounded Roosevelt's public power program. In his most notable case for the PWA, Frank prepared the government's case in a suit that involved federal construction of electricity distribution systems. The Supreme Court upheld the government's position in *Alabama Power Co. v. Ickes,* 302 U.S. 464, 58 S. Ct. 300, 82 L. Ed. 374 (1938).

"THE EFFORTS OF MEN PLANNING TO ACHIEVE A CERTAIN GOAL HAVE FREQUENTLY HAD RESULTS WHICH THOSE MEN DID NOT INTEND, WHICH INDEED WERE THE VERY OPPOSITE OF THEIR INTENTIONS."
—JEROME FRANK

After a brief return to private practice, Frank reentered public service in 1937 when Roosevelt appointed him to the SECURITIES AND EXCHANGE COMMISSION (SEC) at the request of the commission's chairman, WILLIAM O. DOUGLAS. After Douglas's appointment to the Supreme Court in 1939, Frank succeeded him as chairman of the SEC. Two years later in 1941, Frank was appointed to the U.S. Court of Appeals for the Second Circuit, a position that he held until his death.

Frank's opinions were praised for their literary quality as well as for their legal analysis. Characteristically, they drew from a wide range of subjects—history, philosophy, art and literature, sociology, and psychology, to name but a few—as well as from the more standard legal sources. In his concurring opinion in *United States v. Roth,* 237 F.2d 796 (1956), an OBSCENITY case, Frank cited scientific, psychological, and economic evidence to support his conclusions.

Another theme that runs through Frank's opinions was his concern for persons who are weak and lacking in influence. In *United States ex rel. Caminito v. Murphy,* 222 F.2d 698, 706 (1955); *cert. denied*, 350 U.S. 896, 76 S. Ct. 155,

100 L. Ed. 788, he wrote that the "test of the moral quality of a civilization is its treatment of the weak and powerless." In his dissent in *United States v. Johnson,* 238 F.2d 565, 568 (1956), he argued that a defendant with a meritorious case should not suffer a penalty "because he is guilty of the crime of being poor." On appeal, the Supreme Court accepted Frank's position and reversed the appeals court's decision (352 U.S. 565, 77 S. Ct. 550, 1 L. Ed. 2d 593 [1957]).

Frank's reputation as a jurist was equaled, if not exceeded, by his fame as a legal philosopher. In 1930 he published *Law and the Modern Mind.* Through this book and his later publications, Frank became known as one of the leading exponents of LEGAL REALISM, a movement that flourished during the 1920s and 1930s.

Legal realism began as a reaction against analytical POSITIVISM with its formalism and emphasis on logic that had dominated legal thought at the turn of the century. In contrast to the positivists who claimed that judges could apply known rules to the available facts and arrive with certainty at their decisions, Frank stressed the uncertainty of the decision-making process. He argued that psychological forces, including personal biases buried so deep in the unconscious that the judge was unaware of their existence, might influence the decision.

Frank was also troubled by the difficulty of determining what was fact and what was not. He observed that courts receive their information months or even years after events occurred from witnesses who may be biased or may simply lack complete knowledge of the events they recount. The possibility that an innocent person might be convicted worried Frank and led him to suggest reforms in the methods for ascertaining certain facts. His last book *Not Guilty,* in which his daughter collaborated, dealt with cases in which innocent people had been convicted.

Frank also played a role in LEGAL EDUCATION, most notably at the Yale Law School. In 1932 he became a research associate at the Yale Law School and held the position of visiting lecturer at Yale from 1946 until his death. In addition, in 1931 and in 1946–47 he was a visiting lecturer in law and anthropology at the New School for Social Research in New York City. At Yale Frank advocated changes in legal education including adding more social studies to the curriculum. He also argued that legal education had strayed too far from law as it was actually practiced.

In addition to the works mentioned earlier, Frank's books included *Save America First* (1938); *If Men Were Angels* (1942); *Fate and Freedom* (1945); and *Courts on Trial* (1949), a major discussion—and criticism—of the U.S. trial system. Frank died January 13, 1957, in New Haven, Connecticut.

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## ♦ FRANKFURTER, FELIX

Felix Frankfurter served as a government attorney in the early nineteenth century and then taught law at Harvard Law School. In the 1920s and 1930s, he supported a number of liberal causes, including President FRANKLIN D. ROOSEVELT'S NEW DEAL. In 1939, he was appointed to the U.S. Supreme Court as an associate justice. Throughout his twenty-three years on the Court, he was known for consistently applying the theory of judicial self-restraint.

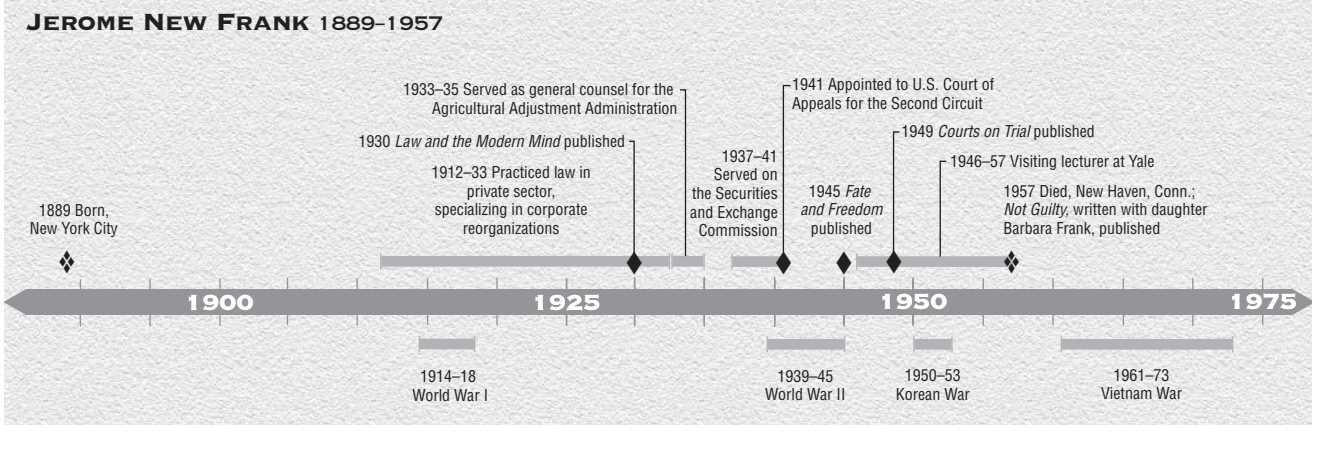

Frankfurter was born November 15, 1882, in Vienna. At the age of twelve, he emigrated from Vienna to the United States with his parents and four siblings. The Frankfurters, like many other Jews in Vienna, had lived in Leopoldstadt, the center of the Jewish Ghetto, where they faced an undercurrent of hostility and a future of economic uncertainty. Along with 18 million other Europeans who immigrated to the United States between 1890 and 1920, the family sought a fresh start.

Upon his arrival in the Lower East Side of Manhattan in 1894, Frankfurter could not speak a word of English. Yet, twelve years later, after earning his undergraduate degree from City College, in New York, Frankfurter graduated first in his class from Harvard Law School. Following a short stint with a private law firm on Wall Street, where he represented corporate interests, Frankfurter was appointed to serve for the next four years as assistant U.S. attorney in the Southern District of New York, prosecuting white-collar criminals. In 1911, he was named solicitor to the federal Bureau of Insular Affairs.

Frankfurter enjoyed working as an attorney for the government much more than representing corporations in private practice. He stressed that "the American lawyer should regard himself as a potential officer of his government and a defender of its laws and Constitution." He predicted that "if the time should ever come when this tradition ha[s] faded out and the members of the bar . . . become merely the servants of business, the future of our liberties would be gloomy indeed."

In 1914, Frankfurter returned to his alma mater Harvard Law School, as professor of law. Frankfurter's tenure as professor was marked by his intellectual honesty and rigor. Teaching only students of high academic standing, he tirelessly explored the law's complexities and reveled in its nuances, helping his classes see both the gray areas and the bright lines. He also took a personal interest in his students, helping many of them obtain a clerkship with one of the United States' leading judges, including **OLIVER WENDELL HOLMES JR.**, **LOUIS D. BRANDEIS**, and **LEARNED HAND**.

Brandeis, a Supreme Court justice from 1916 to 1939, was one of Frankfurter's closest friends. The two met after a lecture Brandeis gave before the Harvard Ethical Society during Frankfurter's days as a law student. Brandeis, who never had a son of his own, acted as a father and mentor to Frankfurter, who was twenty-six years his junior. During the 1930s, acting as an informal adviser to President Roosevelt, Frankfurter cajoled the president into supporting liberal causes espoused by Brandeis.

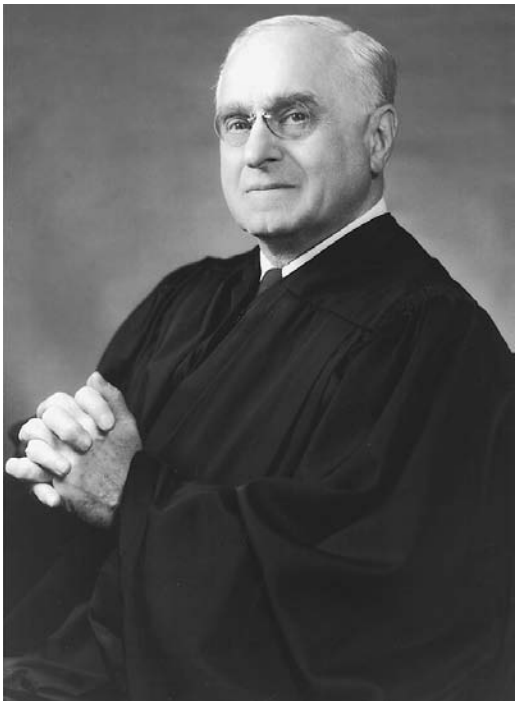

*Felix Frankfurter.*
PHOTOGRAPH BY HARRIS & EWING. COLLECTION OF U.S. SUPREME COURT

Although Frankfurter claimed that he was not a member of any political party, he supported many liberal causes. In 1920, he became a charter member of the newly founded **AMERICAN CIVIL LIBERTIES UNION**, an organization created to protect the constitutional rights of members of ethnic, religious, and racial minorities. During the 1930s, Frankfurter served as an adviser to the National Association for the Advancement of Colored People (**NAACP**). Frankfurter also helped develop many aspects of President Roosevelt's New Deal programs. For example, he brought together the legislative engineers who drafted the Securities Act of 1933 (15 U.S.C.A. § 77a to 77z, 77aa), which today remains a prominent piece of federal law regulating the trading of stocks and bonds.

Frankfurter's contribution to the case of Nicola Sacco and Bartolomeo Vanzetti identified him as an activist for liberal causes in the mind of many U.S. citizens. **SACCO AND VANZETTI**, two Italian immigrants who spoke only broken English, were indicted for killing a guard and a paymaster from a shoe company in Massachusetts in 1920. The physical evidence presented

"THE HISTORY OF LIBERTY HAS LARGELY BEEN THE HISTORY OF THE OBSERVANCE OF PROCEDURAL SAFEGUARDS."
—FELIX FRANKFURTER

against Sacco and Vanzetti was tenuous. For the jurors who heard the case, the most incriminating information may have been the defendants' radical political beliefs: both were known anarchists who opposed the military draft. Sacco and Vanzetti were convicted and executed for the two murders.

Writing an article for the *Atlantic Monthly,* a venerable national publication with a wide readership, Frankfurter accused the prosecuting attorney and trial judge of appealing to the jurors' prejudice against the defendants' political activities and immigrant status. Frankfurter also accused the prosecutor of conspiring with the government's ballistics expert to mislead the jury. Finally, Frankfurter suggested that the court-appointed interpreter nefariously misrepresented the defendants' testimony in order to enhance the prosecution's case. Frankfurter supported each accusation with passages from the trial record. His article was later published as a book titled *The Case of Sacco and Vanzetti* (1927). The article and the book have served as a starting point for subsequent generations examining the role that passion, prejudice, and politics played in the trial of Sacco and Vanzetti, as well as in the trials of members of other unpopular minorities in the United States.

In light of Frankfurter's unyielding support for CIVIL RIGHTS and individual liberties, as a lawyer and professor of law, many liberals rejoiced when President Roosevelt appointed him to serve as an associate justice on the U.S. Supreme Court in 1939. However, by the time Frankfurter retired twenty-three years later, many of these same liberals were disappointed by his failure to embrace every religious and political minority that presented a claim before the Supreme Court. In retrospect, Frankfurter's actions as a Supreme Court justice cannot adequately be characterized as liberal or conservative but are most accurately described as exhibiting a consistent pattern of judicial self-restraint.

Judicial self-restraint is a theory by which a judge decides cases according to the express legal rules contained in constitutional and statutory provisions as well as common-law precedent, independent of the judge's own personal predilections. According to this theory, state and federal legislatures are the only legitimate government bodies empowered to make laws under the U.S. Constitution, which separates the powers delegated to each branch of government.

The role of the judiciary in this system of checks and balances is simply to interpret and apply the laws passed by legislatures, and decide cases based on politically neutral principles regardless of how insensitive the outcome may seem. Advocates of judicial self-restraint believe that judges, many of whom are appointed to the bench for life and are therefore not accountable to the electorate, upset the democratic authority of the people when they overturn laws passed by elected officials in order to achieve politically palatable results.

Many observers point to the two FLAG SALUTE CASES—*Minersville School District v. Gobitis,* 310 U.S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940), and *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943)—as evidence that Frankfurter was a steadfast adherent to the philosophy of judicial self-restraint. Separated by only three years, the two cases presented the same issue: whether the government could compel schoolchildren who were Jehovah's Witnesses to salute the U.S. flag in violation of their religious beliefs, which prohib-

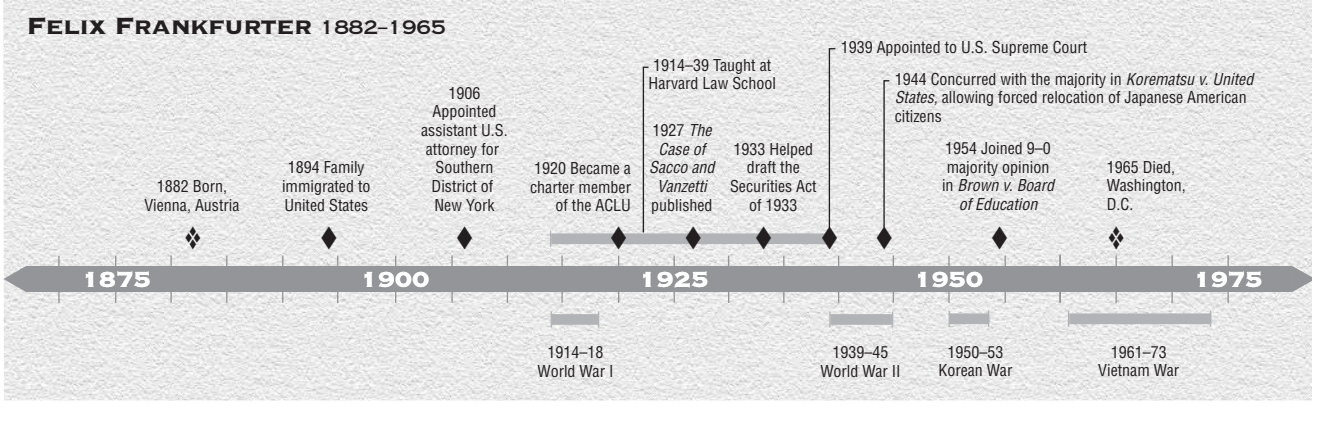

ited them from engaging in any form of idolatry other than worshipping the Almighty. In both cases, Frankfurter resolved the issue in favor of the government. In the first case, only one justice dissented from Frankfurter's majority opinion, which upheld the expulsion of students who had refused to salute the flag. In the second case, Frankfurter was one of three justices dissenting from the Supreme Court's invalidation of a state law requiring all schoolchildren to salute the flag.

Writing for the majority in *Gobitis,* Frankfurter recognized the **FIRST AMENDMENT** right of members of religious minorities to exercise their religious beliefs free from government intimidation or coercion. But "the mere possession of religious convictions," Frankfurter cautioned, "does not relieve the citizen from discharge of political responsibilities." He reasoned, "National unity is the basis of national security," and exempting some schoolchildren from their duty to salute the flag "might introduce elements of difficulty into the school discipline . . . [and] cast doubts into the minds of other children." Because he saw no indication that the Framers of the First Amendment explicitly intended to protect the Jehovah's Witness children in these circumstances, Frankfurter concluded that the legislature, not the judiciary, must be permitted to select the "appropriate means" to establish "the binding tie of cohesive sentiment" that forms the "ultimate foundation of a free society."

In *Barnette,* the Supreme Court overruled *Gobitis* and held that the First Amendment prohibits the government from compelling schoolchildren to salute the U.S. flag when such activity violates their religious beliefs. Many observers attribute the shift in the Court's opinion to a decrease in the perceived need for patriotic obeisance: the outcome of **WORLD WAR II**, which was in doubt when *Gobitis* was decided in 1940, was clearer when *Barnette* was decided in 1943, as the Allied powers moved closer to victory.

Yet Frankfurter, who had been excoriated in the newspapers and by his former colleagues in academia for his decision in *Gobitis,* remained unwavering in his commitment to judicial self-restraint. In a vituperative dissenting opinion to *Barnette,* Frankfurter wrote,

> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should whole-heartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. . . . In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review.

Frankfurter was again assailed for his failure to protect political minorities, in **KOREMATSU V. UNITED STATES**, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944), where he concurred with the Court's majority opinion permitting the U.S. government to confine over one hundred thousand U.S. citizens of Japanese descent to "relocation centers" (essentially concentration camps) across the United States during World War II. These relocation centers were authorized pursuant to joint presidential and congressional action initiated as part of an effort to tighten internal security in the United States following the December 7, 1941, Japanese attack on Pearl Harbor. The Court's determination that these centers represented a "reasonably expedient" exercise of the government's power "to wage war successfully," Frankfurter wrote, "d[id] not carry with it [the justices] approval of that which Congress and the Executive did" because "[t]hat is their business, not ours."

Frankfurter retired from the Supreme Court in 1962, and died three years later on February 22, 1965, in Washington, D.C. His legal career spanned over 50 years. Perceived as an advocate of liberal causes at the beginning of his career, Frankfurter is now remembered as much for his conservative judicial style. Regardless of political labels, Frankfurter remains one of the most respected Supreme Court justices in U.S. history.

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## ♦ FRANKLIN, BENJAMIN

As the only person to have signed the three most significant founding documents of the United States—the DECLARATION OF INDEPENDENCE (1776), the TREATY OF PARIS (1783), and the U.S. Constitution (1787)—Benjamin Franklin holds a revered place in the history of U.S. law. Through his great success as a newspaper publisher, journalist, writer, civic leader, scientist, politician, and diplomat, and as an inventor, Franklin became an international celebrity in his day and an icon of the American character to later generations.

Franklin's varied career had a lasting effect on U.S. law and politics. As a leading local figure, he established and shaped many of the fundamental institutions of Philadelphia and colonial Pennsylvania. Before the Revolutionary War (1775–83), Franklin served as envoy to Great Britain for several colonies. Though he first advocated reconciliation with Britain, he eventually supported the cause of American independence. He was assigned the task of securing an alliance with France during the war, and his political skill and prestige helped gain vital support for his young country as it fought the world's greatest military power. After the war, Franklin used his diplomatic ingenuity to negotiate a successful peace treaty with Britain. Franklin also helped persuade the Constitutional Convention of 1787 to reach important compromises on the particulars of the Constitution, and his support of that document greatly improved its chances of ratification.

Franklin was born January 17, 1706, in Boston, into a devout Puritan household. His only formal education consisted of two years of grammar school, after which he began work for his father, who was a tallow chandler, or candle maker. At age twelve, he was apprenticed to his half-brother, James Franklin, a printer and the founder of the *New England Courant,* the fourth newspaper established in the British colonies. In his teenage years, Franklin began to improve himself by reading on his own, including the works of such authors as John Bunyan, Plutarch, Daniel Defoe, Cotton Mather, Joseph Addison, and JOHN LOCKE. Franklin employed his literary talents early, and wrote for the *Courant* articles satirizing Boston life and politics. He became a manager of the newspaper, but then abruptly moved to Philadelphia in 1723 after disagreements with his brother.

Franklin arrived in Philadelphia at age seventeen with only one Dutch dollar and a copper shilling in his pocket. He found work in a print shop and prospered enough to start his own printing business in 1728. In 1730, Franklin became sole owner of the *Pennsylvania Gazette,* which he transformed from a failing enterprise

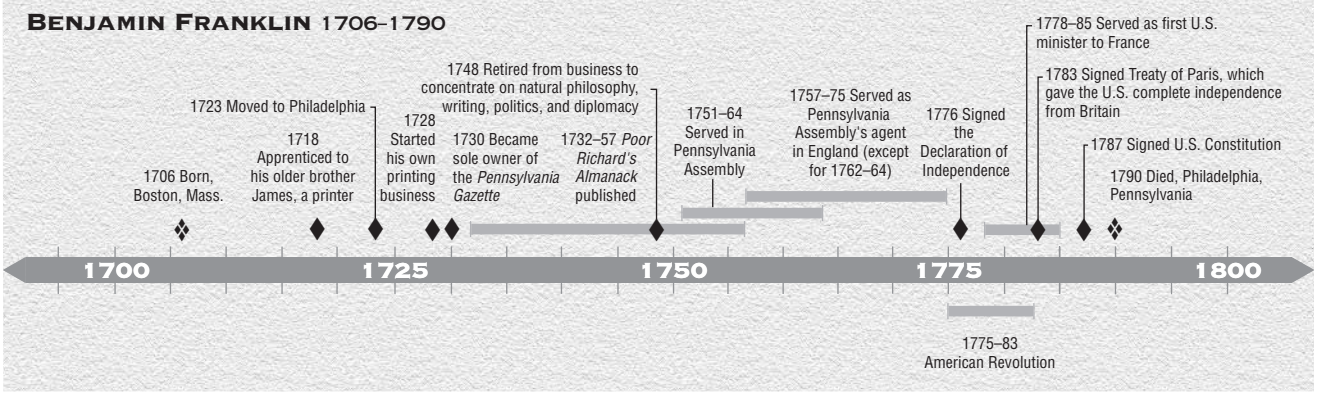

into a very influential newspaper. He also had success in other publishing ventures, including *Poor Richard's Almanack* (1732–57), an annual that presented practical information, satire, proverbs, and aphorisms. In 1730, Franklin married Deborah Read, with whom he had two children. He also had two illegitimate children, one of whom, William Franklin, later became governor of New Jersey.

In 1727, still a rising young businessman, Franklin formed a club of tradesmen called the Junto, which met each week for discussion. This group became highly influential in the life of Philadelphia and Pennsylvania. Under his leadership, it founded a circulating library, the first of its kind in the colonies, in Philadelphia in 1731; the American Philosophical Society in 1743; a city hospital in 1751; and an academy that developed into the University of Pennsylvania. Franklin led the group in making many other civic improvements as well.

In 1748, now wealthy from his printing and publishing interests, Franklin retired from business. He devoted the rest of his life to natural philosophy, writing, politics, and diplomacy. In the area of natural philosophy, or science, Franklin's ingenuity and curiosity gained him world renown as both an inventor and a theoretician. He designed an improved stove, later dubbed the Franklin stove, that was widely used, as well as bifocal glasses and a new type of clock. He began to study electricity in 1746. His ideas and experiments on this subject—including the famous experiment that involved a kite with a metal key attached to it—identified the electrical nature of lightning. His work with electricity gained him many honorary degrees, including membership in the Royal Society in 1756 and in the French Academy of Sciences in 1772. He also developed a theory of heat absorption and was among the first to describe the Gulf Stream ocean current.

Franklin's study of natural philosophy was interrupted by an involvement in politics and diplomacy that ultimately dominated the last part of his life. In Pennsylvania, he was a member of the Quaker party, which sought to democratize the colony's politics and wrest power from its original founders, the Penn family. He served as a representative to the Pennsylvania Assembly from 1751 to 1764. In 1754, he represented Pennsylvania at the Albany Congress, which had been called to unite the colonies in a war against the French and Indians. There, he unsuccessfully presented the Plan of Union, which would have established partial self-government for the colonies. The British did not approve of Franklin's plan because they felt it gave too much power to the colonies, and the colonial assemblies rejected it because they felt it gave the British monarch too much power. Franklin also shared with another person the office of deputy postmaster for the colonies, from 1753 to 1774. In this office, he did a great deal to increase the frequency and efficiency of mail delivery.

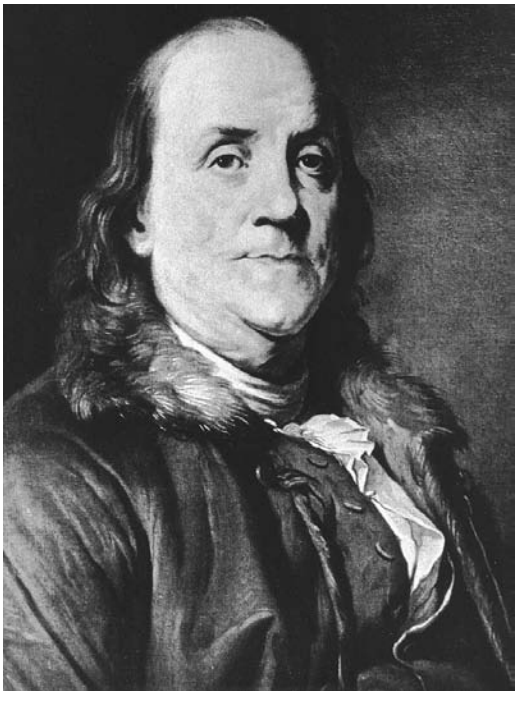

*Benjamin Franklin.*
LIBRARY OF CONGRESS

Franklin began a long and successful diplomatic career when he went to England in 1757 as the agent of the Pennsylvania Assembly. He remained in Britain through 1762 and met many leading figures of British society, including the philosopher DAVID HUME and the author Dr. Samuel Johnson. After spending two more years in Pennsylvania, he returned to England in 1764 to serve again as the Pennsylvania Assembly's agent, and remained in Britain as an agent for various colonies in turn, until 1775. During his years abroad, he witnessed firsthand the growing rift between Britain and the colonies.

In the controversy over the 1765 STAMP ACT, Franklin emerged as the American colonies' chief spokesperson and defender. The act imposed a tax on publications and papers and provoked an outrage in the colonies. As the first of a series of major disputes between the colonies and Britain, the

"THOSE WHO WOULD GIVE UP ESSENTIAL LIBERTY, TO PURCHASE A LITTLE TEMPORARY SAFETY, DESERVE NEITHER LIBERTY OR SAFETY."
—BENJAMIN FRANKLIN

Stamp Act catalyzed the American colonies' desire for independence and united them in opposition to Britain. Franklin opposed the Stamp Act before Britain's House of Commons. His articulate answers before Parliament were published widely and earned him much admiration in America and abroad. Franklin also opposed such controversial acts of Parliament as the TOWNSHEND ACTS (1767) and the Tea Act (1773). Although he originally worked for reconciliation with Britain, Franklin left for America in March 1775 convinced of the need for American independence.

Immediately upon his return to Philadelphia, Franklin was chosen to be a member of the Second CONTINENTAL CONGRESS. He again sketched a plan of union for the colonies. He also was one of a committee of five, including JOHN ADAMS and THOMAS JEFFERSON, appointed in 1776 to draft the Declaration of Independence, the document that formally announced the colonies' break from Britain. Franklin signed the document, thereby becoming a revolutionary at age seventy. Soon after, the Continental Congress sent Franklin and two others to negotiate a critical treaty with France. Before he left, the wealthy Franklin also loaned the struggling Congress several thousand pounds.

Franklin was greeted as a hero in France, where translations of his scientific and literary works had gained him much admiration. He was treated by all classes of society as a great oracle, and his image was reproduced widely in prints, medallions, jewelry, and snuffboxes. "His reputation in Europe," Adams commented, "was more universal than that of Leibnitz or Newton, Frederick or Voltaire, and his character more beloved and esteemed than any or all of them."

During the first years of the Revolutionary War, Franklin worked in France to secure war supplies and build credibility with the French, who were reluctant at first to cast their lot with an untested new country. France and the United States finally signed an alliance in 1778, after which Franklin became the first U.S. minister to France. Fulfilling the myriad duties of that office with great diplomatic skill, he continued to gain crucial supplies and money for the U.S. cause. In 1781, after defeat at the Battle of Yorktown had persuaded the British to give up the war, Franklin participated in delicate peace talks with Britain. He had much to do with the favorable terms of peace set forth in the Treaty of Paris, which finally gave the United States complete independence from Britain.

Franklin returned to the United States in 1785. After serving three years as president of the Executive Council of Pennsylvania, he was chosen as a member of the Constitutional Convention, which met in Philadelphia in 1787. Now eighty-one, he attended the convention regularly for over four months and served as unofficial host to the delegates. Although Franklin's calls for a single national legislative chamber and for an executive board (as opposed to a president) were not honored, his arguments helped the convention reach the important compromises that were necessary to secure agreement on the document. In particular, Franklin called for mutual compromise on the sticky issue of the number of representatives to be allotted to each state in the national legislature. Of this disagreement, which pitted small states against large states, Franklin commented,

> If a property representation takes place, the small states contend that their liberties will be in danger. If an equality of votes is to be put in its place, the large states say their money will be in danger. When a broad table is to be made, and the edges of the planks do not fit, the artist takes a little from both, and makes a good joint.

Later, Franklin urged other members of the convention to approve the final version of the Constitution. "I consent, Sir, to this Constitution," he declared to the convention, "because I expect no better, and because I am not sure that it is not the best. The Opinions I have had of its Errors, I sacrifice to the Public Good." In the following battle for ratification of the Constitution, Franklin used his considerable reputation to promote its success.

For the last few years of his life, Franklin retired to Philadelphia. In his last public act, he signed a memorial to Congress for the ABOLITION of SLAVERY. He died in Philadelphia on April 17, 1790, at the age of eighty-four. Among his many lasting literary works is his autobiography.

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## FRAUD

*A false representation of a matter of fact—whether by words or by conduct, by false or misleading allegations, or by concealment of what should have been disclosed—that deceives and is intended to deceive another so that the individual will act upon it to her or his legal injury.*

Fraud is commonly understood as dishonesty calculated for advantage. A person who is dishonest may be called a fraud. In the U.S. legal system, fraud is a specific offense with certain features.

Fraud is most common in the buying or selling of property, including real estate, PERSONAL PROPERTY, and intangible property, such as stocks, bonds, and copyrights. State and federal statutes criminalize fraud, but not all cases rise to the level of criminality. Prosecutors have discretion in determining which cases to pursue. Victims may also seek redress in civil court.

Fraud must be proved by showing that the defendant's actions involved five separate elements: (1) a false statement of a material fact, (2) knowledge on the part of the defendant that the statement is untrue, (3) intent on the part of the defendant to deceive the alleged victim, (4) justifiable reliance by the alleged victim on the statement, and (5) injury to the alleged victim as a result.

These elements contain nuances that are not all easily proved. First, not all false statements are fraudulent. To be fraudulent, a false statement must relate to a material fact. It should also substantially affect a person's decision to enter into a contract or pursue a certain course of action. A false statement of fact that does not bear on the disputed transaction will not be considered fraudulent.

Second, the defendant must know that the statement is untrue. A statement of fact that is simply mistaken is not fraudulent. To be fraudulent, a false statement must be made with intent to deceive the victim. This is perhaps the easiest element to prove, once falsity and materiality are proved, because most material false statements are designed to mislead.

Third, the false statement must be made with the intent to deprive the victim of some legal right.

Fourth, the victim's reliance on the false statement must be reasonable. Reliance on a patently absurd false statement generally will not give rise to fraud; however, people who are especially gullible, superstitious, or ignorant or who are illiterate may recover damages for fraud if the defendant knew and took advantage of their condition.

Finally, the false statement must cause the victim some injury that leaves her or him in a worse position than she or he was in before the fraud.

A statement of belief is not a statement of fact and thus is not fraudulent. Puffing, or the expression of a glowing opinion by a seller, is likewise not fraudulent. For example, a car dealer may represent that a particular vehicle is "the finest in the lot." Although the statement may not be true, it is not a statement of fact, and a reasonable buyer would not be justified in relying on it.

The relationship between parties can make a difference in determining whether a statement is fraudulent. A misleading statement is more likely to be fraudulent when one party has superior knowledge in a transaction, and knows that the other is relying on that knowledge, than when the two parties possess equal knowledge. For example, if the seller of a car with a bad engine tells the buyer the car is in excellent running condition, a court is more likely to find fraud if the seller is an auto mechanic as opposed to a sales trainee. Misleading statements are most likely to be fraudulent where one party exploits a position of trust and confidence, or a fiduciary relationship. Fiduciary relationships include those between attorneys and clients, physicians and patients, stockbrokers and clients, and the officers and partners of a corporation and its stockholders.

A statement need not be affirmative to be fraudulent. When a person has a duty to speak, silence may be treated as a false statement. This can arise if a party who has knowledge of a fact fails to disclose it to another party who is justified in assuming its nonexistence. For example, if a real estate agent fails to disclose that a home is built on a toxic waste dump, the omission may be regarded as a fraudulent statement. Even if

the agent does not know of the dump, the omission may be considered fraudulent. This is constructive fraud, and it is usually inferred when a party is a fiduciary and has a duty to know of, and disclose, particular facts.

Fraud is an independent criminal offense, but it also appears in different contexts as the means used to gain a legal advantage or accomplish a specific crime. For example, it is fraud for a person to make a false statement on a license application in order to engage in the regulated activity. A person who did so would not be convicted of fraud. Rather, fraud would simply describe the method used to break the law or regulation requiring the license.

Fraud resembles theft in that both involve some form of illegal taking, but the two should not be confused. Fraud requires an additional element of FALSE PRETENSES created to induce a victim to turn over property, services, or money. Theft, by contrast, requires only the unauthorized taking of another's property with the intent to permanently deprive the other of the property. Because fraud involves more planning than does theft, it is punished more severely.

Federal and state criminal statutes provide for the punishment of persons convicted of fraudulent activity. Interstate fraud and fraud on the federal government are singled out for federal prosecution. The most common federal fraud charges are for mail and wire fraud. Mail and wire fraud statutes criminalize the use of the mails or interstate wires to create or further a scheme to defraud (18 U.S.C.A. §§ 1341, 1342).

Tax fraud against the federal government consists of the willful attempt to evade or defeat the payment of taxes due and owing (I.R.C. § 7201). Depending on the defendant's intent, tax fraud results in either civil penalties or criminal punishment. Civil penalties can reach an amount equal to 75 percent of the underpayment. Criminal punishment includes fines and imprisonment. The degree of intent necessary to maintain criminal charges for tax fraud is determined on a case-by-case basis by the INTERNAL REVENUE SERVICE and federal prosecutors.

There are other federal fraud laws. For example, the fraudulent registration of ALIENS is punishable as a misdemeanor under federal law (8 U.S.C.A. § 1306). The "victim" in such a fraud is the U.S. government. Fraud violations of banking laws are also subject to federal prosecution (18 U.S.C.A. §§ 104 et seq.).

The Federal Sentencing Guidelines recommend consideration of the intended victims of fraud in the sentencing of fraud defendants. The guidelines urge an upward departure from standard sentences if the intended victims are especially vulnerable. For example, if a defendant markets an ineffective cancer cure, that scheme, if found to be fraudulent, would warrant more punishment than a scheme that targets persons generally, and coincidentally happens to injure a vulnerable person. Federal courts may require persons convicted of fraud to give notice and an explanation of the conviction to the victims of the fraud (18 U.S.C.A. § 3555).

All states maintain a general criminal statute designed to punish fraud. In Arizona, the statute is called the fraudulent scheme and artifice statute. It reads, in pertinent part, that "[a]ny person who, pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions" is guilty of a felony (Ariz. Rev. Stat. Ann. § 13-2310(A)).

States further criminalize fraud in a variety of settings, including trade and commerce, SECURITIES, taxes, real estate, gambling, insurance, government benefits, and credit. In Hawaii, for example, fraud on a state tax return is a felony warranting a fine of up to $100,000 or three years of imprisonment, or both, and a fraudulent corporate tax return is punished with a fine of $500,000 (Haw. Rev. Stat. § 231-36). Other fraud felonies include fraud in the manufacture or distribution of a controlled substance (§ 329-42) and fraud in government elections (§ 19-4). Fraud in the application for and receipt of public assistance benefits is punished according to the illegal gain: fraud in obtaining over $20,000 in food coupons is a class B felony; fraud in obtaining over $300 in food coupons is a class C felony; and all other public assistance fraud is a misdemeanor (§ 346-34). Alteration of a measurement device is fraud and is punished as a misdemeanor (§ 486-136).

In civil court, the remedy for fraud can vary. In most states, a plaintiff may recover "the benefit of the bargain." This is a measure of the difference between the represented value and the actual value of the transaction. In some states, a plaintiff may recover as actual damages only the value of the property lost in the fraudulent transaction. All states allow a plaintiff to seek PUNITIVE DAMAGES in addition to actual damages.

This right is exercised most commonly in cases where the fraud is extremely dangerous or costly. Where the fraud is contractual, a plaintiff may choose to cancel, or rescind, the contract. A court order of RESCISSION returns all property and restores the parties to their precontract status.

Fraud is also penalized by administrative agencies and professional organizations that seek to regulate certain activities. Under state statutes, a professional may lose a license to work if the license was obtained with a false statement.

One particularly well publicized area of fraud is CORPORATE FRAUD. Corporate fraud cases are largely governed by the Securities Exchange Act of 1934 (15 USCA §§ 78a et seq.), along with other rules and regulations propagated by the SECURITIES AND EXCHANGE COMMISSION. These laws were a response to the market turmoil during the 1930s and well-publicized corporate fraud cases.

The Securities Exchange Act and the SEC regulate anything having to do with the trading or selling of securities and stocks. They govern fraudulent behavior ranging from stock manipulation to insider trading. They also provide for civil and criminal penalties for corporate fraud.

Despite the act and the SEC, in the early part of the twenty-first century, corporate fraud began to seem endemic. Such well-known companies as energy trader Enron, TELECOMMUNICATIONS company WorldCom, cable provider Adelphia, and other lesser-known firms went into BANKRUPTCY as a result of corporate fraud. In light of these events, Congress decided to tighten up corporate fraud requirements with the passages of the SARBANES-OXLEY ACT OF 2002 (U.S. PL 107-204).

Among other features, Sarbanes-Oxley required expanded and more frequent disclosure by public companies of their finances to prevent fraud. It created a Public Company Accounting Oversight Board to register and regulate accounting firms and accounting practices. It also enhanced the SEC's power to monitor and investigate compliance with securities laws, adding stiff penalties for fraudulent behavior by corporations, their officers, and their accountants.

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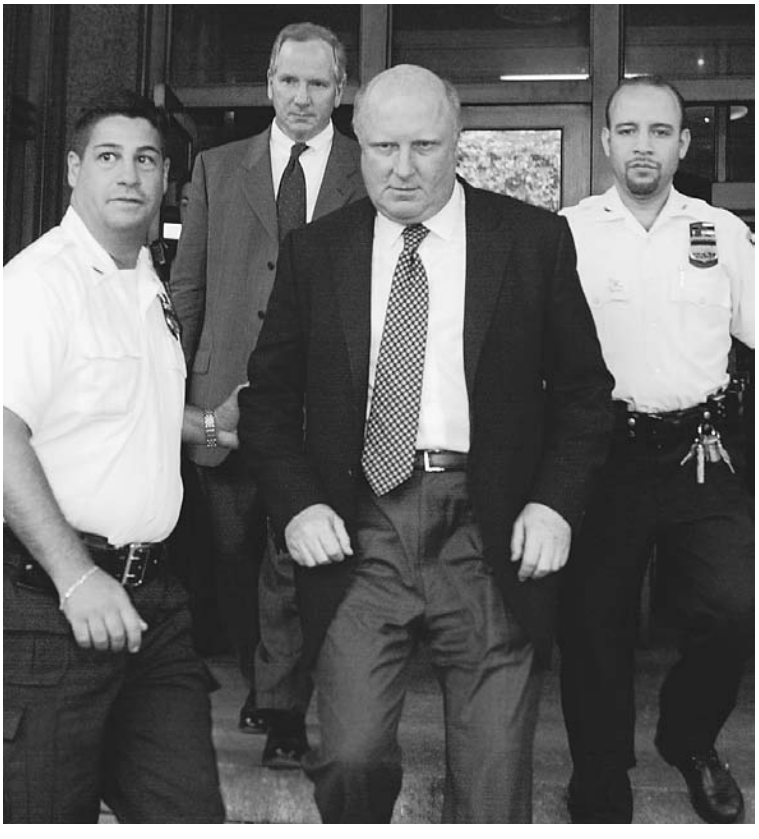

*The SEC provides for civil and criminal penalties for corporate fraud. In September 2002 the SEC filed fraud charges against Dennis Kozlowski, former CEO of Tyco International, for failing to disclose millions of dollars of corporate loans.*

AP/WIDE WORLD PHOTOS

## FRAUDULENT

*The description of a willful act commenced with the* SPECIFIC INTENT *to deceive or cheat, in order to cause some financial detriment to another and to engender personal financial gain.*

## FRAUDULENT CONVEYANCE

*A transfer of property that is made to swindle, hinder, or delay a creditor, or to put such property beyond his or her reach.*

For example, a man transfers his bank account to a relative by putting the account in the relative's name. He informs the relative that he has not relinquished ownership of the funds, but merely wants to isolate the money from the reach of his creditors. This is a fraudulent conveyance that can be set aside by the court at the request of the defrauded creditor.

A creditor who seeks to set aside a fraudulent conveyance must comply with state statutes. Most states have adopted some version of either the Uniform Fraudulent Transfer Act (UFTA) or the older Uniform Fraudulent Conveyance Act (UFCA). Generally, the individual must acquire a lien (a right or claim) or a judgment (a court decision) against a debtor's property. A judgment is usually required to show with certainty the existence of a valid and enforceable debt, but it can be dispensed with, depending upon the particular circumstances of the case. In many jurisdictions, a court will not set aside the conveyance if the debtor owns property, other than that which has been fraudulently conveyed, that is sufficient to pay the debt.

### Fraudulent Intent

Just because an individual in debt makes a conveyance of his or her property does not mean that it is a fraudulent conveyance. Whether a transaction constitutes a fraudulent conveyance depends upon the existence of the intent to defraud at the time that the challenged transfer was made. Because it may be difficult for the courts to determine an individual's intent, rules have been established to help in the process. Such rules are called "badges of fraud." For example, if the TRANSFER OF ASSETS was concealed, an inference of FRAUD can be made. The failure to record a conveyance, such as a deed to land, might indicate the existence of fraud. Another example is if the transfer included virtually all of the debtor's assets.

If a voluntary conveyance renders a debtor insolvent or leaves the debtor without the means of paying the debts existing at the time of the conveyance, it is fraudulent and without any legal effect, regardless of the intent of the parties.

### Family Relationships

A conveyance by one spouse to the other based upon a fictitious or nominal consideration is generally treated as fraudulent if it is made to defeat the spouse's creditor's claims. However, if one spouse pays the other the market value of the property, the transfer is valid and will not be set aside as a fraudulent conveyance. Where a conveyance between spouses is made in consideration of love and affection, it is voluntary and fraudulent if it renders the debtor spouse unable to pay existing personal debts.

Property purchased in the name of one spouse (e.g., the wife), but paid for with the funds of the other (e.g., the husband), can be challenged by the husband's existing creditors. A bona fide debt due by one spouse to the other, which can be established by showing that the spouses dealt with each other as debtor and creditor, is sufficient consideration to support a conveyance of property in payment of a debt as long as the debt bears a reasonable proportion to the value of the property conveyed.

Creditors will lose their attack upon a conveyance between family members unless the transfer is for a grossly inadequate consideration and is surrounded by other circumstances that establish fraud.

### Preferences

A debtor, although insolvent or in failing financial circumstances, can prefer one or more of his creditors by paying these persons first, provided no fraudulent intent exists to cheat the other creditors. The debtor's motives for a preference among the creditors are immaterial unless they establish fraudulent intent. The property transferred must not unreasonably exceed the amount of the claim, and the transaction must not provide for special benefits to the creditor. A debtor can give a preference to his creditors because as absolute owner of his PERSONAL PROPERTY, the debtor can do with it as he pleases, as long as the law is not violated. By law, however, certain debts—such as those owed to the United States, or debts created by secured transactions—must be satisfied before any others.

The existence of a family relationship between the debtor and preferred creditor does not, in itself, affect the validity of a preference. The relationship between the parties is just one factor to be considered, and is given commensurate weight, along with other factors, in determining the GOOD FAITH of the transaction. A transaction involving a family relationship, however, will be more closely examined than if it had taken place between strangers.

### Remedies

Once a conveyance is declared void because of fraud, the court can do full justice by ordering a sale of property under its direction. Every kind of property that can be used for the payment of debts can be reclaimed by creditors in a proper case. By statute many states exempt personal items—such as clothing, kitchen appliances, and household furniture— from being reached by creditors to satisfy debts.

The proceeds are used to pay off the costs of the lawsuit and to provide restitution to the creditors who brought the claims before the court. A debtor who has fraudulently transferred property to cheat his or her creditors might also be subject to statutory penalties and criminal prosecution, depending upon the law in the debtor's home state.

### Bankruptcy

In the context of BANKRUPTCY law, a fraudulent conveyance can be the basis for an objection to discharge (the legal elimination of debt). Federal law denies a discharge to a debtor who transfers property with intent to hinder, delay, or defraud within the 12 months immediately prior to the filing of the bankruptcy petition or after the filing of bankruptcy petition.

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## FREE AGENCY

*A legal status that allows a professional athlete to negotiate an employment contract with the team of his or her choosing instead of being confined to one team. Athletes may become free agents after they have served a specific amount of time under contract with a team.*

Free agency allows athletes who are at the peak of their careers to shop themselves out to teams that are willing to pay top dollar and offer the most comprehensive benefits and perks. In 1975, professional BASEBALL was the first major sport to adopt a formal free agency policy; football, basketball, and hockey followed. Before free agency existed, sports franchises generally held complete control over individual players. Their contracts contained reserve clauses, which specifically bound them to one team. Players who grew unhappy with their team had little leverage; sometimes they might be released from a contract, but their only real hope was that they might be traded to another team.

Star athletes can benefit significantly from free agency. When their contract is up, they may get lucrative offers from rival teams (often multiyear contracts worth millions of dollars). For athletes who are less successful, free agency means that if their contract is not renewed, they may be unable to find a spot on another team. Still, the free agent system has helped athletes across the board because it forced teams to raise salaries for all players, not just free agents.

From a team's point of view, free agency can be problematic because it makes it easier to lose star players; those same players also can demand higher salaries. Teams bid for free agents, who usually sign with the highest bidder. In "restricted" free agency, a player is allowed to become a free agent subject to certain requirements. For example, a team might retain the right of first refusal, meaning that it can retain the player if it chooses to match a rival team's offer. Free agents can be restricted on the basis of years served, or age. In professional hockey, for example, a player may become a free agent after completing four seasons, but they hold restricted status if they are under 31 years of age.

In recent years, the term *free agent* has been used to describe individuals who work for themselves in a variety of situations— independent contractors, home office workers, and temporary employees, for example. Even in-house employees whose skills are so specialized that they are especially attractive to other companies have been called free agents. Strictly speaking, these people are not true free agents. Independent contractors, like free agents, are allowed to sign on with any client or customer of their choosing. Usually, however, they are not contractually bound to any one client the way professional athletes are. A freelance writer, for example, may contract with several clients at the same time. While some clients might ask the writer to sign a promise not to divulge proprietary information, in most cases the writer is not actually prohibited from working with specific companies. Temporary workers have slightly more in common with free agents. They contract with an employment agency, and they are restricted from accepting job offers from the agency's client companies. Usually, however, temporary workers are allowed to sign up with more than one agency.

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**CROSS-REFERENCES**

Employment Law; Independent Contractor; Sports Law.

## FREE EXERCISE CLAUSE

See RELIGION.

## FREE SOIL PARTY

The Free Soil Party evolved in the 1840s in response to the growing split between pro- and anti-slavery movements in the United States. National politics was controlled primarily by two parties, Democratic and Whig. Within both parties there were supporters and opponents of SLAVERY, and the issue became more heated as the U.S. added territory. Proponents of slavery wanted to extend it into the newly acquired territories, while opponents wanted the territories to remain free. The issue grew especially heated among members of the state DEMOCRATIC PARTY in New York. Two groups emerged: the "Barnburners," who opposed slavery, and the "Hunkers," who supported slavery or were neutral on the question.

In 1844, the Barnburners pushed for the nomination of former president and fellow New Yorker MARTIN VAN BUREN. Southern Democrats supported JAMES K. POLK, who was more sympathetic to their views, and although the New York Democrats were well organized they could not defeat a strong Southern bloc. Polk won the Democratic nomination and beat the Whig candidate, HENRY CLAY, in the general election.

The Mexican War, which began in 1846, further exacerbated the slavery question. DAVID WILMOT, a Democratic congressman from Pennsylvania, introduced what became known as the WILMOT PROVISO. It called for a prohibition of slavery in any territory acquired by the United States in the war with Mexico. The Wilmot Proviso came up for a vote several times; it was routinely passed by the House and defeated by the Senate.

Democrats and Whigs wanted to avoid party division in the election of 1848, so they virtually ignored the slavery question. The Democrats nominated Lewis Cass, who was sympathetic to Southern slaveholders. In defiance, anti-slavery

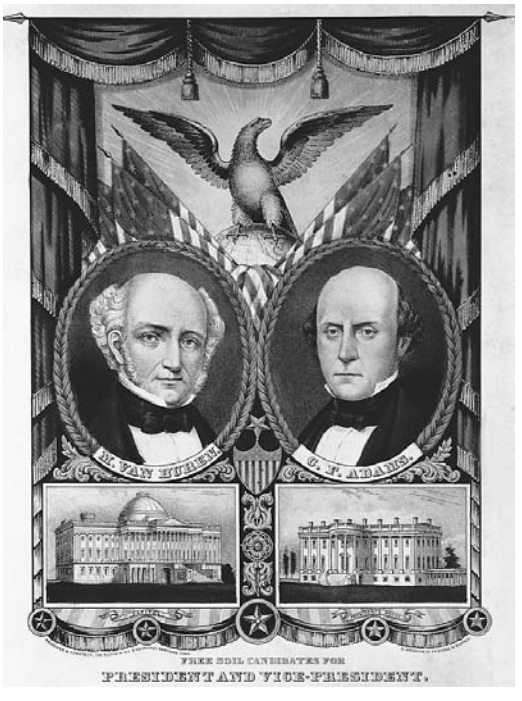


*Martin Van Buren and C. F. Adams were the Free Soil Party's candidates for president and vice president in the 1848 election. Van Buren received 291,616 votes.* CORBIS

Democrats joined with the Barnburners in New York to create the Free Soil party. The party held its convention in Buffalo, New York, in August 1848 and adopted the slogan, "Free soil, free speech, free labor, and free men." The Free Soilers nominated Van Buren for president and Charles Francis Adams of Massachusetts for vice president.

The Free Soilers had a mixed reception. Many people saw them as a cynical group of Van Buren loyalists who had no real desire to abolish slavery but merely to take votes away from the major parties. Senator DANIEL WEBSTER, the statesman from Massachusetts (and himself a Whig), derisively called the party the "Free Spoilers." Yet the party drew a surprising amount of support from abolitionists, including FREDERICK DOUGLASS.

Hostilities even among different state Free Soil organizations kept the party from building enough strength to win the presidency, although the Free Soilers did make their presence known. Van Buren received 291,616 votes, not enough to regain the White House—but enough to take votes away from Cass and ultimately ensure a Whig victory for ZACHARY TAYLOR. The Free

Soil party did respectably in Congress, electing 13 representatives and two senators.

The slavery question continued to divide the country, although the COMPROMISE OF 1850 attempted to provide a framework that everyone could accept by legislating which states and territories would be free and which would be slave. To those who had strong feelings about slavery, the Compromise of 1850 solved no problems, and the Free Soilers nominated John Parker Hale, an abolitionist from New Hampshire, as their candidate for president in 1852. By then, however, interest in the Free Soil party had dwindled. Hale received only about five percent of the popular vote.

By 1854 the Free Soil party had disappeared, but many of its supporters and former members still held sway in national politics. Well-known figures formerly tied to the Free Soilers included politicians such as Schuyler Colfax, CHARLES SUMNER, and SALMON P. CHASE, as well as newspaper editor Horace Greeley. These influential men became key figures in the creation of the REPUBLICAN PARTY, whose 1860 candidate for president was ABRAHAM LINCOLN.

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CROSS-REFERENCES

Independent Parties; Republican Party; Slavery.

## FREEDOM OF ASSOCIATION AND ASSEMBLY

*The right to associate with others for the purpose of engaging in constitutionally protected activities.*

The right to associate is not an independent constitutional right but is derived from and dependent on the FIRST AMENDMENT guarantees of FREEDOM OF SPEECH and expression. It is protected only to the extent that it is asserted in conjunction with a First Amendment right. However, some legal scholars maintain that freedom of association is more fundamental than the rights enumerated in the Constitution because without it those other rights have little meaning.

One early case to recognize freedom of association was *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). In *Patterson,* the Supreme Court held that a lower court's order compelling the NAACP to disclose records containing the names and addresses of its Alabama members violated the group's right to associate freely. The Court recognized freedom of association as an adjunct to the NAACP's free speech rights and held that the freedom to associate for the advancement of beliefs and ideas is inseparable from the freedom of speech.

General types of association unrelated to First Amendment rights are not protected by the Constitution. For instance, in *City of Dallas v. Stanglin,* 490 U.S. 19, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989), the Court held that a city ordinance limiting adult entrance into teenage dance halls did not violate the associational rights of either the adults or the minors. The association of adults and minors in a social setting does not fall within the purview of any rights protected by the First Amendment and therefore is not a constitutionally protected activity.

The activities of groups organized to pursue economic activity are sometimes protected if the individuals have come together to advance beliefs or ideas. Generally, the Court's decisions in this area depend on whether the economic activities are found to be sufficiently expressive to invoke First Amendment protection. In *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), the NAACP was held not liable for economic damage suffered by merchants in a boycott it had sponsored. The boycott was a legal, nonviolent action against white merchants to pressure them to comply with CIVIL RIGHTS laws. The Court found that though clearly an economic activity, it was primarily designed to advance the NAACP's political beliefs in civil rights. This added purpose gave the boycott an expressive character sufficient to warrant First Amendment protection. On the other hand, an economic boycott that is not intended to express political ideas or beliefs is not protected under the First Amendment. In *FTC v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990), the Court found that a boycott organized by trial lawyers in an effort to secure increased compensation for their representation of indigent clients was a fundamentally economic activity that did not rise to the level of expressive conduct contemplated by the First Amendment.

During the 1940s and 1950s, a number of cases tested the constitutionality of the Alien Registration Act (also known as the SMITH ACT) (18 U.S.C.A. § 2385), which makes it a crime to conspire to overthrow the government or promote doctrines that advocate SEDITION. The act was sometimes used to prosecute individuals merely for their membership in organizations suspected of promoting insurrection. The general principle that evolved from these cases is that an individual cannot be punished for membership in an organization that is committed to illegal conduct, unless he or she is an active member with knowledge of the organization's illegal objectives and SPECIFIC INTENT to further those objectives. (See *Noto v. United States,* 367 U.S. 290, 81 S. Ct. 1517, 6 L. Ed. 2d 836 [1961]; *Scales v. United States,* 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 782 [1961]). This principle has also been applied to invalidate blanket prohibitions on government employment or membership in organizations such as a state bar because of an individual's past associations. The government may inquire into past associations but must limit the inquiry to the person's actual knowledge of illegal activity and intent to further it. (See *Schware v. Board of Bar Examiners,* 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 [1957]; *United States v. Robel,* 389 U.S. 258, 88 S. Ct. 419, 19 L. Ed. 2d 508 [1967]).

The outcome of cases challenging indirect government regulation of freedom of association has been somewhat inconsistent. In general, the Court has balanced the individual's associational interests against the state's interests. In the early twentieth century, the Supreme Court held that a KU KLUX KLAN membership list had to be disclosed because the members' freedom of association was subordinate to the state's interest in controlling the Klan's illegal activities (*New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 49 S. Ct. 61, 73 L. Ed. 184 [1928]). Similarly, in 1961 the Court upheld a forced disclosure of the Communist party's membership because of the perceived dangers posed by the party's activities (*Communist Party of the United States v. Subversive Activities Control Board,* 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed. 2d 625 [1961]). Conversely, in 1958, in *Patterson,* the Court had struck down the state's order that the NAACP disclose its membership, distinguishing *Bryant* on the grounds that the Klan was involved in illegal activities, whereas the NAACP was not. A similar rationale was applied in *Communist Party.* In the late twentieth century, the Court moved away from the BALANCING approach toward a STRICT SCRUTINY standard that made it more difficult for the government to impinge indirectly on freedom of association.

In general, freedom of association includes the right to be free from compelled association. In *Wooley v. Maynard,* 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977), and *Abood v. Detroit Board of Education,* 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977), the Court held that freedom of association is unconstitutionally burdened where the state requires an individual to support or espouse ideals or beliefs with which he or she disagrees. Similarly, in *Keller v. State Bar,* 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), the Court held that mandatory state bar membership dues could not be used to further ideological causes with which some members might disagree, unless the state could show that the expenditures were incurred for the purpose of regulating the legal profession or improving the quality of legal service.

When the right to be free from compelled association is exercised on the basis of race, gender, religion, or sexual orientation, competing constitutional rights clash. Such was the dilemma faced by the Court in ROBERTS V. UNITED STATES JAYCEES, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). The Jaycees is a national organization whose bylaws limited full membership to men age eighteen to thirty-five. When a group of women challenged their exclusion, this policy was held unconstitutional. The Court found that the state's interest in eliminating gender discrimination outweighed the male Jaycees' interest in freedom from compelled association. Although the Court reiterated its position that freedom of association is fundamental, it also stated that such freedom is not absolute: "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."

During the late 1990s several lawsuits were filed against the Boy Scouts of America (BSA) contesting the BSA's rules against allowing gay scout leaders and troop members. In *Curran v. Mount Diablo Council of the Boy Scouts of America,* 17 Cal.4th 670, 952 P.2d 218, 72 Cal.Rptr.2d 410 (1998), the California Supreme Court

rejected a claim that the BSA violated a California anti-discrimination law. The key issue was whether the BSA was a business establishment and thus a place of public accommodation. Previous decisions had found that country clubs met this definition and were subject to the law.

The court ruled that the scout organization was not a place of public accommodation. It was true that the Boy Scouts conducted extensive business activities involving nonmembers through its retail shops and stores and through the licensing of its insignia. However, the court ruled that these business activities differed from those of a country club. The Boy Scouts are an "expressive social organization whose primary function is the inculcation of values in its youth members, and whose small social-groups structure and activities are not comparable to those of a traditional place of public accommodation or amusement." Unlike the country club, the Boy Scouts did not sell to nonmembers "access to the basic activities or services offered by the organization." Nonmembers could not purchase entry to scout meetings, overnight hikes, the national jamboree, or to training and education programs.

As for the Boy Scout retail stores, the court found that while these were business establishments, the business transacted at these stores was "distinct from the Scouts' core functions" and did not demonstrate that the organization had become a "commercial purveyor of the primary incidents and benefits of membership of the organization." Therefore, the Boy Scouts were not a "public accommodation subject to the anti-discrimination law."

The U.S. Supreme Court ended the dispute over the BSA and gay membership in **BOY SCOUTS OF AMERICA V. DALE**, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000). The New Jersey Supreme Court had ruled that the BSA had violated both the *Roberts,* decision and New Jersey anti-discrimination laws; it ordered the BSA to allow gay membership. The U.S. Supreme Court rejected this decision, finding that the state supreme court had mistakenly applied the *Roberts* decision when it should have applied *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). In *Hurley*, the Court ruled that the sponsor of Boston's St. Patrick's Day parade could not be forced to let a group of gays and lesbians participate. The Court held that parades are a form of expression and that the sponsors could not be forced to include "a group imparting a message the organizers do not wish to convey." The Court, in a 5 to 4 decision, held that forcing the organization to accept gay troop leaders would violate the BSA rights of free expression and free association under the First Amendment. Thus, it accepted the BSA argument and rejected the New Jersey Supreme Court's application of public accommodations law to the case.

The Court has also recognized a constitutional right to freedom of intimate association, the fundamental human right to create and maintain intimate human relationships. Freedom of intimate association is generally included within the right of privacy as enunciated in cases such as **GRISWOLD V. CONNECTICUT**, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), invalidating a state statute forbidding use of contraception; **ROE V. WADE**, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), holding a Texas law criminalizing **ABORTION** unconstitutional; and *Carey v. Population Services International,* 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977), holding limits on distribution of contraceptives and contraceptive information unconstitutional.

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**CROSS-REFERENCES**

Club; Communism; NAACP.

## FREEDOM OF INFORMATION ACT

The Freedom of Information Act (FOIA) (5 U.S.C.A. § 552 et seq.) provides for the disclosure of information held by administrative agencies to the public, unless the documents requested fall into one of the specific exemptions set forth in the statute. FOIA was implemented to prevent federal agencies from abusing their discretionary powers by forcing them to make certain information about their work

available to the public. The law was regarded as a great milestone because it guarantees the right of people to learn about the internal workings of their government. Almost all agencies of the EXECUTIVE BRANCH of the federal government have issued regulations implementing FOIA. These regulations inform the public where certain types of information are kept, how the information may be obtained on request, and what appeals are available if a member of the public is denied requested information.

A person requesting information under FOIA must generally send a letter to the head of the agency maintaining the documents that are sought, identifying the records as clearly as possible. If the request for information is denied, a letter of appeal may be filed, citing, if possible, court rulings explaining why the agency's decision to withhold the information is inappropriate. If the agency denies the appeal, the individual may seek JUDICIAL REVIEW of the agency's action.

Exemptions to FOIA are designed to allow an agency to withhold records in situations in which disclosure would cause harm to an important government function or private interest. FOIA explicitly exempts from disclosure a variety of different types of information, including materials that have been classified as secret in the interest of national defense or foreign policy; information related solely to the internal personnel rules and practices of an agency; TRADE SECRETS and commercial or financial information; and personnel and medical files and similar files for which disclosure would constitute an unwarranted invasion of personal privacy (5 U.S.C.A. § 552(b)). Although the exemptions appear to run counter to the public interest in gaining access to information, they serve certain important national policy interests, including those of national defense, foreign policy, civilian cooperation with law enforcement, and the efficient operation of government agencies. Courts have held that, consistent with the purpose of FOIA, these exemptions must be narrowly construed.

Most litigation under FOIA has occurred when an agency refuses to release government information, citing one or more of the exemptions set forth in the statute. In *United States Department of Justice v. Landano,* 508 U.S. 165, 113 S. Ct. 2014, 124 L. Ed. 2d 84 (1993), for example, the U.S. Supreme Court held that the FEDERAL BUREAU OF INVESTIGATION (FBI) does not have a blanket exemption under FOIA from disclosing the identity of FBI informants. Instead, the Court ruled, the bureau must justify, on a case-by-case basis, why informants' identities must not be disclosed. Thus, the Court performed the difficult task of reconciling two important but opposing interests: FOIA policy of favoring the fullest disclosure possible versus the interest of law enforcement agencies in protecting their cooperative sources. Writing for the Court, Justice SANDRA DAY O'CONNOR stated, "Although we recognize that confidentiality often will be important to the FBI's investigative efforts, we cannot say that the government's sweeping presumption comports with common sense and probability." Instead, she maintained, the agency must be able to demonstrate that it was reasonable to infer under the circumstances that the information had been provided with an expectation of confidentiality.

Requests for intelligence information has likewise been the subject of litigation under the Freedom of Information Act. In 1996, President BILL CLINTON authorized Congress to make public disclosure of the "bottom line" intelligence budget appropriation for the CENTRAL INTELLIGENCE AGENCY, following a recommendation of an intelligence commission. The government divulged the government's intelligence budgets in 1997 and 1998, but former CIA director George Tenet in 1999 determined that this information could be used to assist foreign countries in countering U.S. intelligence efforts. The Federation of American Scientists, an advocacy group, brought suit in the U.S. District Court for the District of Columbia in 1999 to compel disclosure of the budget figures, but the court denied these requests. Congress held hearings about disclosure of this information in 2000, but the group's requests for budget information in 2000 were similarly denied by the CIA.

Since FOIA was enacted in 1966, over a half million requests for information have been filed with government agencies. Although initially envisioned as a means to make the federal government more accessible to citizens, FOIA has been used extensively by reporters and news-gathering agencies, corporations, and even foreign governments.

When the act was first passed, most government data were stored primarily on paper, microfilm, and microfiche. With the advent of

**Freedom of Information Act**

**Request Letter Under the Freedom of Information Act**

Your Name

Address

Telephone Number

Date

Name of Director or Official

Specify Agency

Address

RE: My File (specify)

Dear (specify name):

Please be advised that pursuant to the federal Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C. 552a), I hereby request a copy of (specify, such as "all documents maintained by your agency about me").

If it is determined that a portion of the file is exempt from release, I request that you release all documents that are not exempt and inform me as to those specific records that cannot be released, and the reasons why. If I disagree with your decision, I understand that I have the right to formally appeal same.

In the event it is determined that none of the file can be released, please identify what specific documents cannot be released and the reasons why.

Finally, since the law permits you to waive or reduce fees when providing such information is primarily in the public interest, I request that you waive all fees since my case fits this exception.

Please contact me directly at (address) in writing or by calling me by phone (list your daytime phone number) if you have any questions concerning this request. Thank you for your prompt attention and assistance in this matter.

Very truly yours

Your name

—Send certified mail, return receipt requested.

*A sample letter requesting information under the Freedom of Information Act.*

the computer age, more information is available to more people than ever before, creating the need for new guidelines in disseminating government information. In particular, computer technology raises questions about what constitutes a reasonable request for information under the act and about how information should be disclosed. The act does not mention computerized records, but the Computer Security Act of 1987 (Act of Jan. 8, 1988, Pub. L. No. 100-235, 101 Stat. 1724 [1988]) prohibits agencies from withholding computerized records from the

public if the records would be available under FOIA as paper documents. Nevertheless, some groups seeking government information have been concerned that government agencies may release large volumes of paper records when more manageable and convenient computer records may be available.

The policies of the administration of GEORGE W. BUSH with respect to disclosure of information have come under attack from groups seeking to protect this information. The SEPTEMBER 11TH ATTACKS against the United States spawned a great deal of concern in the country regarding security measures, including secrecy with respect to information. In October 2001, Attorney General JOHN ASHCROFT issued a directive to federal agencies that emphasized withholding of public records if the agency could demonstrate a sound legal basis for doing so. Ashcroft has since supported withholding of information from these agencies. Although the memorandum was issued after the terrorist attacks, it had reportedly been in the works prior to September 11.

The Homeland Security Act of 2002 created additional restrictions on the release of government information. The act allows private parties to refuse to disclose information about "critical infrastructure" by voluntarily submitting this information to the HOMELAND SECURITY DEPARTMENT. Members of Congress have criticized this measure, and advocacy groups have threatened litigation to demand the release of this information, but release of certain records could take years. Although government officials claim that Bush's policies have not hindered the release of information to a considerable extent, examples of limitations include restrictions of the media's access in the war in Afghanistan in 2001, as well as the refusal to disclose the names of more than 1,000 non-citizens held for immigration violations. Nevertheless, when the United States attacked Iraq in March 2003, the media had considerable access, comparable to the level of access in the Gulf War of 1991.

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## FREEDOM OF SPEECH

*The right, guaranteed by the* FIRST AMENDMENT *to the U.S. Constitution, to express beliefs and ideas without unwarranted government restriction.*

Democracies have long grappled with the issue of the limits, if any, to place on the expression of ideas and beliefs. The dilemma dates back at least to ancient Greece, when the Athenians, who cherished individual freedom, nevertheless prosecuted Socrates for his teachings, claiming that he had corrupted young people and insulted the gods.

The Framers of the Constitution guaranteed freedom of speech and expression to the citizens of the United States with the First Amendment, which reads, in part, "Congress shall make no law . . . abridging the freedom of speech." Almost since the adoption of the BILL OF RIGHTS, however, the judiciary has struggled to define speech and expression and the extent to which freedom of speech should be protected. Some, like Justice HUGO L. BLACK, have believed that freedom of speech is absolute. But most jurists, along with most U.S. citizens, agree with Justice OLIVER WENDELL HOLMES JR., who felt that the Constitution allows some restrictions on speech under certain circumstances. To illustrate this point, Holmes wrote, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic" (SCHENCK V. UNITED STATES, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 [1919]).

During the two centuries since the adoption of the First Amendment, the U.S. Supreme Court has held that some types of speech or expression may be regulated. At the same time, the Court has granted protection to some areas of expression that the Framers clearly had not contemplated.

### Public Forum Regulation

When the government attempts to regulate the exercise of speech rights in traditional public forums, such as parks or public sidewalks, the U.S. Supreme Court examines whether the regulation restricts the content of the speech or merely regulates the time, manner, and place in which the speech is delivered.

If the law regulates the content of the expression, it must serve a compelling state interest and must be narrowly written to achieve that interest (*Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 103 S. Ct. 948, 74 L.

Ed. 2d 794 [1983]). Restrictions on speech in a public forum also may be upheld if the expressive activity being regulated is of a type that is not entitled to full First Amendment protection, such as OBSCENITY.

Laws that regulate the time, manner, and place, but not content, of speech in a public forum receive less scrutiny by the Court than do laws that restrict the content of expression. These so-called content-neutral laws are permissible if they serve a significant government interest and allow ample alternative channels of communication (see *Perry*). It is not necessary that a content-neutral law be the least restrictive alternative, but only that the government's interest would be achieved less effectively without it (*Ward v. Rock against Racism,* 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 [1989]).

An important distinction is drawn between public premises that serve as traditional public forums and those that constitute limited public forums. For example, state fair grounds are public premises that have not traditionally served as public forums. The government may impose more restrictions on free speech in limited public forums than in traditional public forums. In *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981), the Court upheld regulations limiting the sale or distribution of religious materials to fixed locations on state fair grounds.

The Court reaffirmed in *Thomas v. Chicago Park Dist.,* 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed.2d 783 (2002) that local governments do not violate the First Amendment when they require the obtaining of a permit before individuals can hold large-scale rally events in public parks. In this case, the Chicago Park District denied a rally permit to a group that had sought to hold a "Hempfest." The park district denied the permit because of violations of park rules at previous events run by the organizers. The group challenged the denial, arguing that the park district could use its unfettered discretionary power to deny permits to those who held unpopular or controversial political views, such as support for the legalization of marijuana. The U.S. Supreme Court held that the park district's ordinance was a constitutionally permissible "content-neutral" regulation of time, manner, and place. It was directed toward all activity in a public park, not just toward communicative or political activity. It did not constitute subject-matter CENSORSHIP

*A Hare Krishna follower speaks to men in a public park, a traditional public forum in which freedom of speech is protected. In a 1981 decision, the Court upheld limitations on the distribution of religious material in limited public forums such as state fair grounds.*

ADAM WOOLFITT/ CORBIS

in any way. The Court explained that the park district's object was to coordinate multiple uses of limited space; to assure preservation of park facilities; to prevent dangerous, unlawful, or impermissible uses; and to assure financial accountability for damages caused by an event.

Although it seems reasonable to assume that public premises owned and operated by the government are public forums, some are not. In *Adderley v. Florida,* 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966), the U.S. Supreme Court upheld the TRESPASS conviction of students who demonstrated on the grounds of a jail. Although jailhouse grounds are public property, they have not been used traditionally as public forums: "No less so than a private owner of property, the state has the power to preserve the property under its control for the use to which it is lawfully dedicated." Later cases challenging restricted access to public premises focused on whether the government, in creating the premises, had intended to create a public forum. In *United States v. Kokinda,* 497 U.S. 720, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990), the Court upheld a postal-service regulation that bars the solicitation of contributions on a post office's sidewalk, because that sidewalk lacked the characteristics of a general public sidewalk. Similarly, it

*A member of the Ku Klux Klan at a 1997 rally held in Pennsylvania. Freedom of speech is guaranteed to groups that many people may find offensive.*

AP/WIDE WORLD PHOTOS

declared an airport terminal to be a nonpublic forum because "the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity" (*International Society for Krishna Consciousness v. Lee,* 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541 [1992]).

When private property rights conflict with the public-forum doctrine, the Court examines whether the regulation in question is narrowly tailored to serve a significant government interest. A law may not prohibit all canvassing or solicitation of, or distribution of handbills to, homeowners in a residential neighborhood, because a public street is a traditional public forum. However, it may limit specific types of speech activity that target particular individuals. In *Frisby v. Schultz,* 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988), the Court upheld an ordinance that prohibited the picketing of individual residences. The law had been narrowly drawn to serve the government's interest in precluding the picketing of captive householders, and allowed picketers ample alternative means of expression.

### Inciting, Provocative, or Offensive Speech

Laws that limit inciting or provocative speech, often called fighting words, or offensive expressions such as PORNOGRAPHY, are subject to STRICT SCRUTINY. It is well established that the government may impose content regulations on certain categories of expression that do not merit First Amendment protection. To illustrate this point, the Court stated in *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942), "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise constitutional problems."

With the increase of activity in cyberspace, individuals can distribute questionable speech throughout the U.S. and the world. In *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists,* 290 F.3d 1058 (9th Cir. 2002), a federal appeals court ruled that an anti-abortion web site was not protected by the First Amendment. The web site posted photos, names, addresses, and other information pertaining to ABORTION providers, their family members, and others who were perceived as supporting abortion rights. Although neither the site nor the posters made explicit threats against the abortion providers, violence at clinics that provided abortions had followed poster distribution in the past. Planned Parenthood sued the group under the Freedom of Access to Clinic Entrances Act of 1994 (FACE), 18 U.S.C. § 248, and other laws. The trial judge instructed the jury that if the defendants' statements were "true threats," the First Amendment would not protect them. The jury awarded the plaintiff a multimillion-dollar verdict. The Ninth Circuit stated that a jury could conclude that the postings constituted a true threat under FACE, which removed any First Amendment protection for the defendants.

The Court has also upheld laws that regulate speech activity if those laws do not limit the content of speech and impose only an indirect burden on freedom of speech. In such cases, the Court applies a less stringent test and balances the individual's free speech interests against the government's interest that is furthered by the law in question. In *O'Brien v. United States,* 393 U.S. 900, 89 S. Ct. 63, 21 L. Ed. 2d 188 (1968), the Court held that a statute prohibiting the destruction of draft cards did not violate the First Amendment, because the government's interest in maintaining a viable selective-service pool outweighed the statute's incidental infringement of free expression.

Since the 1980s, a number of laws have been passed that attempt to regulate or ban "hate speech," which is defined as utterances, displays, or expressions of racial, religious, or sexual bias. The U.S. Supreme Court has generally invalidated such laws on the ground that they infringe First Amendment rights. In *R.A.V. v. City of*

*St. Paul,* 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), the Court invalidated the city of St. Paul's hate-crime ordinance, ruling that it unconstitutionally infringed free speech. The defendant in that case had been prosecuted for burning a cross on the lawn of an African-American family's residence.

The Minnesota Supreme Court held that the ordinance was limited to restricting conduct that amounted to *Chaplinksky* "fighting words." Therefore, the ordinance was not impermissibly content-based because it was "narrowly tailored" to further the "compelling governmental interest in protecting the community against bias-motivated threats to public safety and order." The U.S. Supreme Court disagreed. Justice ANTONIN SCALIA, in his majority opinion, wrote that, even assuming that the cross burning was proscribable under the "fighting words" doctrine, the ordinance was, on its face, unconstitutional. It violated the First Amendment because it prohibited "otherwise permitted speech solely on the basis of the subjects the speech addresses." Scalia agreed that the government may constitutionally proscribe content such as LIBEL, but that it may not proscribe only libel that is critical of the government. In Scalia's view, the unprotected features of "fighting words" are their "nonspeech" element of communication. Thus, fighting words are like a noisy sound truck: each is a mode of speech, and both can be used to convey an idea, but neither has a claim on the First Amendment. The government cannot, however, regulate fighting words or a sound truck based on "hostility-or favoritism-towards the underlying message expressed."

In addition, the ordinance was not overbroad but underinclusive. The content limitation was impermissible because it displayed "the city council's special hostility towards the particular biases thus singled out." An ordinance not restricted "to the favored topics" would have the same effect the city desired, but without the discrimination against unpopular views. Justice Scalia also noted that the city could have prosecuted the defendant under traditional CRIMINAL LAW statutes, including ARSON, trespass, and terroristic threats. In his view, the city had other means to address the problem "without adding the First Amendment to the fire."

This decision did not end the debate over HATE CRIMES. The Court took up the issue again in *Virginia v. Black*, 538 U.S. 343, 123 S. Ct.1536. 155 L. Ed.2d 535 (2003). This case also involved a cross burning aimed at terrorizing an African-American family. A Virginia criminal statute had outlawed cross burning "on the property of another, a highway or other public place . . . with the intent of intimidating any person or group." In a 6-3 decision, the Court upheld the statute. It emphasized that the First Amendment would protect some types of cross burnings, such as one held at a political rally. However, when the cross burning was targeted at individuals for the purposes of criminal intimidation, freedom of speech would not protect the cross burners.

Like fighting words, materials that are judged obscene are not protected by the First Amendment. The three-part *Miller* test stands as the yardstick for differentiating material that is merely offensive and therefore protected by the First Amendment, from that which is legally obscene and therefore subject to restriction (MILLER V. CALIFORNIA, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 [1973]). The Miller test determines that material is obscene if (1) the average person, applying contemporary community standards, would find that it appeals to shameful or morbid sexual interests; (2) it depicts or describes patently offensive sexual conduct; and (3) it lacks serious literary, artistic, political, or scientific value.

The Seventh Circuit Court of Appeals ruled in *Kendrick v. American Amusement Machine Association,* 244 F.3d 572 (7th Cir. 2001) that a city ordinance that prohibited minors from playing violent or sexually explicit video arcade games was unconstitutional. The court noted that the city had not sought to regulate video games because they were "offensive" under *Miller.* Rather, the ordinance premised its restriction on the belief that violent fantasy video games led to real-world harm. The appeals court found no real difference between the content of the allegedly "violent" video games and generally available, unrestricted literature that depicted the same level of violence. They were both examples of "a children's world of violent adventures." The court, therefore, found that the ordinance impermissibly restricted minors' freedom of expression without any offsetting justification.

### Prior Restraint

The Court uses a stringent standard when it evaluates statutes that impose a PRIOR RESTRAINT on speech. The test that is most frequently employed asks whether the prohibited activity poses a CLEAR AND PRESENT DANGER of resulting

in damage to a legitimate government interest. Most often, the clear-and-present-danger doctrine has applied to prior restraints on the publication of materials thought to threaten national security. This test was first expressed by Justice Holmes in the *Schenck* case. Charles T. Schenck had been charged with violating the Espionage Act (Tit. 1, §§ 3, 4 [Comp. St. 1918, §§ 10212c, 10212d]) by distributing pamphlets that urged insubordination among members of the military. The Court held that his activities created "a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." The government's interest in maintaining national security and preventing dissension among the troops outweighed Schenck's interest in free speech.

The clear-and-present-danger test was extended during the 1950s, when widespread fear of COMMUNISM led to the passage of the SMITH ACT, 18 U.S.C.A. § 2385, which prohibited advocating the overthrow of the government. The act was challenged as a prior restraint on speech. It was upheld by the U.S. Supreme Court, which stated that the clear-and-present-danger test does not require the government to prove that a threat is imminent or that a plot probably would be successful (*Dennis v. United States,* 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 [1951]).

The *Dennis* decision was criticized as weakening the clear-and-present-danger test and allowing the government too much freedom to restrict speech. These results were remedied somewhat in *Brandenburg v. Ohio,* 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), in which the Court invalidated a statute that punished the advocacy of violence in industrial disputes. The Court held that the government cannot forbid the advocacy of the use of force unless that advocacy is directed to inciting imminent illegal activity and is likely to succeed.

### Expressive Conduct

In *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), Justice ROBERT H. JACKSON wrote that symbols are "a short cut from mind to mind." Expressive conduct or SYMBOLIC SPEECH involves communicative conduct that is the behavioral equivalent of speech. The conduct itself is the idea or message. Some expressive conduct is the equivalent of speech and is protected by the First Amendment.

In TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), the U.S. Supreme Court held that it was unconstitutional to suspend high-school students for wearing black armbands to protest the VIETNAM WAR, because their conduct was "akin to pure speech" and did not interfere with the work of the school or the rights of other students.

In *Good News Club v. Milford Central School,* 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed.2d 151 (2001), the U.S. Supreme Court ruled that a private Christian organization could not be denied use of the public school space for after-school activities. The Court emphasized that the Establishment Clause could not serve as a barrier to the organization's exercise of its free speech rights. Justice CLARENCE THOMAS, in his majority opinion, addressed the freedom-of-speech argument. He noted that the school was a limited public forum and that the state therefore was not required to permit persons "to engage in every type of speech." However, the state's ability to restrict speech was not unlimited. In addition, the state could not discriminate against speech on the basis of viewpoint. Justice Thomas wrote that the school district decision had unlawfully imposed this requirement. He pointed to recent Court decisions that had forbidden states to prevent religious groups from using public facilities or to receive funding for an undergraduate organization.

Statutes that prohibit the desecration of the U.S. flag have been found to restrict free expression unconstitutionally. In TEXAS V. JOHNSON, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989), the Court overturned Gregory L. Johnson's conviction for burning a U.S. flag during a demonstration. Johnson's actions were communicative conduct that warranted First Amendment protection, even though they were repugnant to many people. Similarly, in *United States v. Eichman,* 496 U.S. 310, 110 S. Ct. 2404, 110 L. Ed. 2d 287 (1990), the Court struck down the federal Flag Protection Act of 1989, 103 Stat. 777, 18 U.S.C.A. § 700, stating that the government's interest in passing the act had been a desire to suppress free expression and the content of the message that the act of flag burning conveys.

The U.S. Supreme Court has generally struck down prohibitions on nudity and other erotic, but nonobscene, expressive conduct. However,

in *Barnes v. Glen Theatre,* 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991), the Court upheld a ban on totally nude dancing, on the ground that it was part of a general ban on public nudity. While recognizing that nude dancing generally has been considered protected expressive conduct, the justices pointed out that such activity is only marginally within the perimeter of First Amendment protection.

In *City of Erie v. Pap's A. M.*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000), the U.S. Supreme Court upheld a local ZONING ordinance that banned nude-dancing clubs within the city. It found that freedom of speech had not been unconstitutionally restricted because the ordinance did not ban the expressive conduct of nude dancing but only the means for expressing it within the city. It found that the city had good grounds for banning nude-dancing clubs; these were secondary effects on the community rather than the dancing itself. Therefore, the city had the authority to restrict the location of such clubs.

### Commercial Speech

Commercial speech, usually in the form of advertising, enjoys some First Amendment protection, but not to the same degree as that which is given to noncommercial forms of expression. Generally, the First Amendment protects commercial speech that is not false or misleading and that does not advertise illegal or harmful activity. Commercial speech may be restricted only to further a substantial government interest and only if the restriction actually furthers that interest. In *Central Hudson Gas & Electric Co. v. Public Service Commission,* 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), the U.S. Supreme Court held that a statute banning promotional advertising by PUBLIC UTILITIES was unconstitutional. That case set forth a "general scheme for assessing government restrictions on commercial speech." Commercial speech will be protected by the First Amendment if (1) it concerns lawful activity and is not misleading; (2) the asserted government interest is not substantial; (3) the regulation does not directly advance the asserted governmental interest; and (4) the regulation is more extensive than is necessary to serve that interest. The U.S. Supreme Court has struck down bans on drug advertising, (*Thompson v. Western States Medical Center,*, 535 U.S. 357, 122 S. Ct. 1497, 152 L. Ed. 2d 563 (2002) and tobacco advertising, *Lorillard Tobacco Corp. v. Reilly,*, 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001), using this test.

### Defamation and Privacy

In NEW YORK TIMES V. SULLIVAN, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), the U.S. Supreme Court declared that the First Amendment protects open and robust debate on public issues, even when such debate includes "vehement, caustic, unpleasantly sharp attacks on government and public officials." In *Sullivan,* a public official claimed that allegations about him that had appeared in the *New York Times* were false, and he sued the newspaper for libel. The Court balanced the plaintiff's interest in preserving his reputation against the public's interest in freedom of expression, particularly in the area of political debate. It decided that, in order to recover damages, a public official must prove actual malice, which is knowledge that the statements were false or that they were made with reckless disregard of whether they were false.

Where the plaintiff in a DEFAMATION action is a private citizen who is not in the public eye, the law extends a lesser degree of constitutional protection to the statements at issue. Public figures voluntarily place themselves in positions that invite close scrutiny, whereas private citizens have a greater interest in protecting their reputation. A private citizen's reputational and privacy interests tend to outweigh free speech considerations and therefore deserve greater protection from the courts (see *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 [1974]).

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Broadcasting; Censorship; E-Mail; Fairness Doctrine; Freedom of the Press; Hate Crime; Movie Rating; Overbreadth Doctrine; Privacy; *Roth v. United States*; Symbolic Speech; X Rating.

## FREEDOM OF THE PRESS

*The right, guaranteed by the* FIRST AMENDMENT *to the U.S. Constitution, to gather, publish, and distribute information and ideas without government*

*restriction; this right encompasses freedom from* PRIOR RESTRAINTS *on publication and freedom from* CENSORSHIP.

The First Amendment to the U.S. Constitution reads, in part, "Congress shall make no law . . . abridging the FREEDOM OF SPEECH, or of the press." The courts have long struggled to determine whether the Framers of the Constitution intended to differentiate press freedom from speech freedom. Most have concluded that freedom of the press derives from freedom of speech. Although some cases and some legal scholars, including Justice POTTER STEWART, of the U.S. Supreme Court, have advocated special press protections distinct from those accorded to speech, most justices believe that the Freedom of the Press Clause has no significance independent of the Freedom of Speech Clause.

The Court explained its reasoning in *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978). According to Chief Justice WARREN E. BURGER, conferring special status on the press requires that the courts or the government determine who or what the press is and what activities fall under its special protection. Burger concluded that the free speech guarantees of the First Amendment adequately ensure freedom of the press, and that there is no need to distinguish between the two rights:

> Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination.

The Court has generally rejected requests to extend to the press PRIVILEGES AND IMMUNITIES beyond those available to ordinary citizens. In *Branzburg v. Hayes,* 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972), it held that a journalist's privilege to refuse to disclose information such as the names of informants is no broader than that enjoyed by any citizen. As long as an inquiry is conducted in GOOD FAITH, with relevant questions and no harassment, a journalist must cooperate.

Justice Stewart's dissent in *Branzburg* urged the Court to find that a qualified journalistic privilege exists unless the government is able to show three things: (1) PROBABLE CAUSE to believe that the journalist possesses information that is clearly relevant; (2) an inability to obtain the material by less intrusive means; and (3) a compelling interest that overrides First Amendment interests. In an unusual break with tradition, several circuit courts have applied Stewart's test and ruled in favor of journalists seeking special First Amendment protection. Nonetheless, the Supreme Court has steadfastly held to its decision in *Branzburg,* and shows no sign of retreating from its position that the First Amendment confers no special privileges on journalists.

Laws that affect the ability of the press to gather and publish news are suspect, but not automatically unconstitutional. In *Cohen v. Cowles Media Co.,* 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991), reporters for two Twin Cities newspapers were sued for breach of contract when they published the name of their source after promising confidentiality. The reporters claimed that the law infringed their First Amendment freedom to gather news unencumbered by state law. The Court held that the law did not unconstitutionally undermine their rights because its enforcement imposed only an incidental burden on their ability to gather and report information. Writing for the majority, Justice BYRON R. WHITE said that laws that apply to the general public and do not target the press do not violate the First Amendment simply because their enforcement against members of the press has an incidental burden on their ability to gather and report the news: "Enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." The *Cohen* decision indicates the Court's continued unwillingness to extend special First Amendment protection to journalists.

Generally, the First Amendment prohibits prior restraint, that is, restraint on a publication before it is published. In a landmark decision in NEAR V. MINNESOTA, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931), the Court held that the government could not prohibit the publication of a newspaper for carrying stories that were scandalous or scurrilous. The Court identified three types of publications against which a prior restraint might be valid: those that pose a threat to national security, those that contain obscene materials, and those that advocate violence or the overthrow of the government.

The government argued that publication of certain material posed a threat to national security in the so-called *Pentagon Papers* case, NEW

YORK TIMES CO. V. UNITED STATES, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971). There, the government sought an INJUNCTION against newspapers that were planning to publish classified material concerning U.S. policy in Vietnam. The Court found that the government had not proved an overriding government interest, or an extreme danger to national security if the material were to be published. The justices reiterated their position that a request for a prior restraint must overcome a heavy presumption of unconstitutionality.

The Court is steadfast in its holding that prior restraints are among the most serious infringements on First Amendment freedoms and that attempts to impose them must be strictly scrutinized. In *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976), the Court overturned a state court's attempt to ban the press from a criminal trial. The Court held that gag orders, although not per se invalid, are allowable only when there is a CLEAR AND PRESENT DANGER to the administration of justice.

Freedom of the press, like freedom of speech, is not absolute. Notwithstanding the limitations placed on it, the press exercises enormous power and influence, and is burdened with commensurate responsibility. Because journalists generally have access to more information than does the average individual, they serve as the eyes, ears, and voice of the public. Some legal scholars even argue that the press is an important force in the democratic system of checks and balances.

In the wake of the SEPTEMBER 11TH ATTACKS in 2001, the White House placed pressure on the five major television networks not to broadcast videotaped statements by terrorist mastermind Osama bin Laden and his associates. The networks had shown a videotape of bin Laden, and this angered the White House. In early October 2001, the networks agreed not to show such statements again without reviewing them first. The decision came after a conference call among U.S. national security adviser Condoleezza Rice and the heads of the networks. The White House feared that broadcasts from suspected terrorists could contain anything from incitement to coded messages. This agreement aroused concerns that the press was forfeiting its responsibility to report all of the news. Commentators noted that the rest of the world would see the bin Laden tapes via television and the INTERNET, and that the security concerns raised by the U.S. government thus would have little impact.

The balance between restraint and responsibility continued to be tested during the war against TERRORISM and the 2003 invasion of Iraq. In contrast to the 1991 Gulf War, where the press was kept away from the battlefield, the war in Iraq featured "embededded" journalists, who traveled and reported in real time among the U.S. forces. However, the press was restricted to disclosing only certain types of information due to security concerns.

FURTHER READINGS

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CROSS-REFERENCES

Broadcasting; Cameras in Court; Evidence "Journalists' Privilege" (In Focus); Fairness Doctrine; Federal Communications Commission; Libel and Slander; Mass Communications Law; *New York Times Co. v. Sullivan*; Pretrial Publicity; Sheppard, Samuel H.; Shield Laws; Trial.

## FREEHOLD

*A life estate, an interest in land the duration of which is restricted to the life or lives of a particular person or persons holding it, or an estate in fee, an interest in property that is unconditional and represents the broadest ownership interest recognized by law.*

In order to be categorized as a freehold, an estate must possess the characteristics of (1) immobility—in the sense that the property must be either land, or some interest derived from or affixed to land—and (2) indeterminate duration.

Determinable freeholds are life estates created by language that provides that the estate is to terminate automatically upon the occurrence of a specified event.

## FREIGHT

*The price or compensation paid for the transportation of goods by a carrier.* Freight *is also applied to the goods transported by such carriers.*

The liability of a carrier for freight damaged, lost, or destroyed during shipment is determined by contract, statute, or TORT LAW.

The responsibility for the payment of freight is a subject of a term of a sales contract between

the buyer and seller of the goods to be shipped. When a contract contains a c.f. & i. provision, the buyer accepts liability for paying the cost of freight in addition to the costs of the goods and insurance on them.

## FREIGHT FORWARDER

*An individual who, as a regular business, assembles and combines small shipments into one lot and takes the responsibility for the transportation of such property from the place of receipt to the place of destination.*

The role of a freight forwarder is to collect and consolidate shipments that are less than a carload or truckload and obtain common carrier transportation for the long-haul transport of the property, which is owned by individual carload or truckload shippers. Such a forwarder ordinarily has the same liability for loss as a common carrier.

CROSS-REFERENCES

Shipping Law.

## ♦ FREUND, ERNST

Ernst Freund was a brilliant legal scholar who oversaw the development of U.S. ADMINISTRATIVE LAW at the turn of the twentieth century. A social reformer, Freund was an early proponent of social research as a means of shaping the content of U.S. law. As a political progressive, he also was an articulate supporter of free speech rights under the FIRST AMENDMENT of the U.S. Constitution.

"THE STATE TAKES PROPERTY BY EMINENT DOMAIN BECAUSE IT IS USEFUL TO THE PUBLIC, AND UNDER POLICE POWER BECAUSE IT IS HARMFUL."
—ERNST FREUND

Freund was born in New York City on January 30, 1864, to German American parents. He attended the University of Berlin and the University of Heidelberg, receiving a law degree from the latter in 1884. He went to New York and practiced law there from 1886 to 1894.

Freund entered academe in 1892 when he became professor of administrative law and municipal corporations at Columbia University. (He was also a doctoral student at Columbia's School of Political Science; he received his Ph.D. in 1897.) In 1894, he began a long association with the University of Chicago, accepting a position in the political science department as a professor of ROMAN LAW and JURISPRUDENCE. In 1903, he joined the faculty of the university's newly opened law school. Freund taught courses in social legislation and proposed a new field, the "science of legislation," to underscore the connection between political science and law.

Freund became a prominent figure at the law school and served as the John P. Wilson Professor of Law from 1929 to 1932. One of his many achievements was the establishment of the University of Chicago's highly regarded graduate-level social services program, the first such program in the nation. Involved in several professional organizations, Freund served as president of the American Political Science Association in 1915.

Freund's renown in legal circles grew as a result of his cogent writing on the function and parameters of administrative law (the body of statutes, regulatory rules and regulations, and court decisions implemented by administrative and government agencies). Freund's most famous publication on the subject was *Police Power: Public Policy and Constitutional Rights,* published in 1904. Freund analyzed the limitations imposed on legislative power by the FOURTEENTH AMENDMENT of the U.S. Constitution. He advocated a system of legal regulations that balanced individual rights against business and property rights.

Freund's interest in statutory drafting led to a position on the Commission on Uniform State

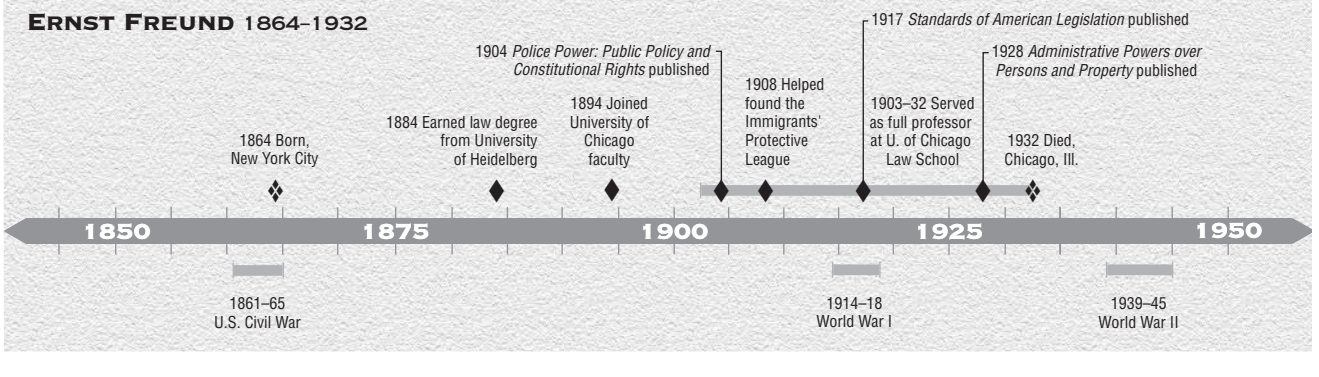

Laws in 1908. Freund created model statutes to bolster the CIVIL RIGHTS of married women, and offered commentary on DIVORCE, guardianship, ILLEGITIMACY, LABOR LAW, and child labor. He also produced a handbook on legislative drafting in 1921 and offered drafting instructions to the AMERICAN BAR ASSOCIATION.

In 1928, Freund published *Administrative Powers over Persons and Property,* a treatise on the distinctions between the power held by government, individuals, and property. In other works, Freund wrote about the necessity of protecting what he termed the dependent class, the less privileged members of society who were vulnerable to exploitation. A man of action, he helped organize the Immigrants' Protective League in 1908 and served as president of that organization for several terms.

A staunch supporter of free speech, Freund published articles on the specific rights guaranteed by the First Amendment of the U.S. Constitution. He believed that the open discussion of public affairs was a crucial underpinning of U.S. society.

Freund married Harriet Walton on May 13, 1916. The couple had two children, Nancy Freund and Emily Lou Freund. In 1931, Freund was awarded an honorary doctor of laws degree from the University of Michigan. He died the following year, in Chicago, on October 20, 1932.

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# Abbreviations

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|---|---|
| A. | Atlantic Reporter |
| A. 2d | Atlantic Reporter, Second Series |
| AA | Alcoholics Anonymous |
| AAA | American Arbitration Association; Agricultural Adjustment Act of 1933 |
| AALS | Association of American Law Schools |
| AAPRP | All African People's Revolutionary Party |
| AARP | American Association of Retired Persons |
| AAS | American Anti-Slavery Society |
| ABA | American Bar Association; Architectural Barriers Act of 1968; American Bankers Association |
| ABC | American Broadcasting Companies, Inc. (formerly American Broadcasting Corporation) |
| ABM | Antiballistic missile |
| ABM Treaty | Anti-Ballistic Missile Treaty of 1972 |
| ABVP | Anti-Biased Violence Project |
| A/C | Account |
| A.C. | Appeal cases |
| ACAA | Air Carrier Access Act |
| ACCA | Armed Career Criminal Act of 1984 |
| ACF | Administration for Children and Families |
| ACLU | American Civil Liberties Union |
| ACRS | Accelerated Cost Recovery System |
| ACS | Agricultural Cooperative Service |
| ACT | American College Test |
| Act'g Legal Adv. | Acting Legal Advisor |
| ACUS | Administrative Conference of the United States |
| ACYF | Administration on Children, Youth, and Families |
| A.D. 2d | Appellate Division, Second Series, N.Y. |
| ADA | Americans with Disabilities Act of 1990 |
| ADAMHA | Alcohol, Drug Abuse, and Mental Health Administration |
| ADC | Aid to Dependent Children |
| ADD | Administration on Developmental Disabilities |
| ADEA | Age Discrimination in Employment Act of 1967 |
| ADL | Anti-Defamation League |
| ADR | Alternative dispute resolution |
| AEC | Atomic Energy Commission |
| AECB | Arms Export Control Board |
| AEDPA | Antiterrorism and Effective Death Penalty Act |
| A.E.R. | All England Law Reports |
| AFA | American Family Association; Alabama Freethought Association |
| AFB | American Farm Bureau |
| AFBF | American Farm Bureau Federation |
| AFDC | Aid to Families with Dependent Children |
| aff'd per cur. | Affirmed by the court |
| AFIS | Automated fingerprint identification system |
| AFL | American Federation of Labor |

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| AFL-CIO | American Federation of Labor and Congress of Industrial Organizations |
| AFRes | Air Force Reserve |
| AFSC | American Friends Service Committee |
| AFSCME | American Federation of State, County, and Municipal Employees |
| AGRICOLA | Agricultural Online Access |
| AIA | Association of Insurance Attorneys |
| AIB | American Institute for Banking |
| AID | Artificial insemination using a third-party donor's sperm; Agency for International Development |
| AIDS | Acquired immune deficiency syndrome |
| AIH | Artificial insemination using the husband's sperm |
| AIM | American Indian Movement |
| AIPAC | American Israel Public Affairs Committee |
| AIUSA | Amnesty International, U.S.A. Affiliate |
| AJS | American Judicature Society |
| ALA | American Library Association |
| Alcoa | Aluminum Company of America |
| ALEC | American Legislative Exchange Council |
| ALF | Animal Liberation Front |
| ALI | American Law Institute |
| ALJ | Administrative law judge |
| All E.R. | All England Law Reports |
| ALO | Agency Liaison |
| A.L.R. | American Law Reports |
| ALY | *American Law Yearbook* |
| AMA | American Medical Association |
| AMAA | Agricultural Marketing Agreement Act |
| Am. Dec. | American Decisions |
| amdt. | Amendment |
| Amer. St. Papers, For. Rels. | American State Papers, Legislative and Executive Documents of the Congress of the U.S., Class I, Foreign Relations, 1832–1859 |
| AMS | Agricultural Marketing Service |
| AMVETS | American Veterans (of World War II) |
| ANA | Administration for Native Americans |
| Ann. Dig. | Annual Digest of Public International Law Cases |
| ANPA | American Newspaper Publishers Association |
| ANSCA | Alaska Native Claims Act |
| ANZUS | Australia-New Zealand-United States Security Treaty Organization |
| AOA | Administration on Aging |
| AOE | Arizonans for Official English |
| AOL | America Online |
| AP | Associated Press |
| APA | Administrative Procedure Act of 1946 |
| APHIS | Animal and Plant Health Inspection Service |
| App. Div. | Appellate Division Reports, N.Y. Supreme Court |
| Arb. Trib., U.S.-British | Arbitration Tribunal, Claim Convention of 1853, United States and Great Britain Convention of 1853 |
| Ardcor | American Roller Die Corporation |
| ARPA | Advanced Research Projects Agency |
| ARPANET | Advanced Research Projects Agency Network |
| ARS | Advanced Record System |
| Art. | Article |
| ARU | American Railway Union |
| ASCME | American Federation of State, County, and Municipal Employees |
| ASCS | Agriculture Stabilization and Conservation Service |
| ASM | Available Seatmile |
| ASPCA | American Society for the Prevention of Cruelty to Animals |
| Asst. Att. Gen. | Assistant Attorney General |
| AT&T | American Telephone and Telegraph |
| ATFD | Alcohol, Tobacco and Firearms Division |
| ATLA | Association of Trial Lawyers of America |
| ATO | Alpha Tau Omega |
| ATTD | Alcohol and Tobacco Tax Division |
| ATU | Alcohol Tax Unit |
| AUAM | American Union against Militarism |
| AUM | Animal Unit Month |
| AZT | Azidothymidine |

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| BAC | Blood alcohol concentration |
| BALSA | Black-American Law Student Association |
| BATF | Bureau of Alcohol, Tobacco and Firearms |
| BBS | Bulletin Board System |
| BCCI | Bank of Credit and Commerce International |
| BEA | Bureau of Economic Analysis |
| Bell's Cr. C. | Bell's English Crown Cases |
| Bevans | United States Treaties, etc. *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled under the direction of Charles I. Bevans, 1968–76) |
| BFOQ | Bona fide occupational qualification |
| BI | Bureau of Investigation |
| BIA | Bureau of Indian Affairs; Board of Immigration Appeals |
| BID | Business improvement district |
| BJS | Bureau of Justice Statistics |
| Black. | Black's United States Supreme Court Reports |
| Blatchf. | Blatchford's United States Circuit Court Reports |
| BLM | Bureau of Land Management |
| BLS | Bureau of Labor Statistics |
| BMD | Ballistic missile defense |
| BNA | Bureau of National Affairs |
| BOCA | Building Officials and Code Administrators International |
| BOP | Bureau of Prisons |
| BPP | Black Panther Party for Self-defense |
| Brit. and For. | British and Foreign State Papers |
| BSA | Boy Scouts of America |
| BTP | Beta Theta Pi |
| Burr. | James Burrows, *Report of Cases Argued and Determined in the Court of King's Bench during the Time of Lord Mansfield* (1766–1780) |
| BVA | Board of Veterans Appeals |
| c. | Chapter |
| $C^3I$ | Command, Control, Communications, and Intelligence |
| C.A. | Court of Appeals |
| CAA | Clean Air Act |
| CAB | Civil Aeronautics Board; Corporation for American Banking |
| CAFE | Corporate average fuel economy |
| Cal. 2d | California Reports, Second Series |
| Cal. 3d | California Reports, Third Series |
| CALR | Computer-assisted legal research |
| Cal. Rptr. | California Reporter |
| CAP | Common Agricultural Policy |
| CARA | Classification and Ratings Administration |
| CATV | Community antenna television |
| CBO | Congressional Budget Office |
| CBS | Columbia Broadcasting System |
| CBOEC | Chicago Board of Election Commissioners |
| CCC | Commodity Credit Corporation |
| CCDBG | Child Care and Development Block Grant of 1990 |
| C.C.D. Pa. | Circuit Court Decisions, Pennsylvania |
| C.C.D. Va. | Circuit Court Decisions, Virginia |
| CCEA | Cabinet Council on Economic Affairs |
| CCP | Chinese Communist Party |
| CCR | Center for Constitutional Rights |
| C.C.R.I. | Circuit Court, Rhode Island |
| CD | Certificate of deposit; compact disc |
| CDA | Communications Decency Act |
| CDBG | Community Development Block Grant Program |
| CDC | Centers for Disease Control and Prevention; Community Development Corporation |
| CDF | Children's Defense Fund |
| CDL | Citizens for Decency through Law |
| CD-ROM | Compact disc read-only memory |
| CDS | Community Dispute Services |
| CDW | Collision damage waiver |
| CENTO | Central Treaty Organization |
| CEO | Chief executive officer |
| CEQ | Council on Environmental Quality |

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| CERCLA | Comprehensive Environmental Response, Compensation, and Liability Act of 1980 |
| cert. | *Certiorari* |
| CETA | Comprehensive Employment and Training Act |
| C & F | Cost and freight |
| CFC | Chlorofluorocarbon |
| CFE Treaty | Conventional Forces in Europe Treaty of 1990 |
| C.F. & I. | Cost, freight, and insurance |
| C.F.R | Code of Federal Regulations |
| CFNP | Community Food and Nutrition Program |
| CFTA | Canadian Free Trade Agreement |
| CFTC | Commodity Futures Trading Commission |
| Ch. | Chancery Division, English Law Reports |
| CHAMPVA | Civilian Health and Medical Program at the Veterans Administration |
| CHEP | Cuban/Haitian Entrant Program |
| CHINS | Children in need of supervision |
| CHIPS | Child in need of protective services |
| Ch.N.Y. | Chancery Reports, New York |
| Chr. Rob. | Christopher Robinson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (1801–1808) |
| CIA | Central Intelligence Agency |
| CID | Commercial Item Descriptions |
| C.I.F. | Cost, insurance, and freight |
| CINCNORAD | Commander in Chief, North American Air Defense Command |
| C.I.O. | Congress of Industrial Organizations |
| CIPE | Center for International Private Enterprise |
| C.J. | Chief justice |
| CJIS | Criminal Justice Information Services |
| C.J.S. | Corpus Juris Secundum |
| Claims Arb. under Spec. Conv., Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| CLASP | Center for Law and Social Policy |
| CLE | Center for Law and Education; Continuing Legal Education |
| CLEO | Council on Legal Education Opportunity; Chief Law Enforcement Officer |
| CLP | Communist Labor Party of America |
| CLS | Christian Legal Society; critical legal studies (movement); Critical Legal Studies (membership organization) |
| C.M.A. | Court of Military Appeals |
| CMEA | Council for Mutual Economic Assistance |
| CMHS | Center for Mental Health Services |
| C.M.R. | Court of Military Review |
| CNN | Cable News Network |
| CNO | Chief of Naval Operations |
| CNOL | Consolidated net operating loss |
| CNR | Chicago and Northwestern Railway |
| CO | Conscientious Objector |
| C.O.D. | Cash on delivery |
| COGP | Commission on Government Procurement |
| COINTELPRO | Counterintelligence Program |
| Coke Rep. | Coke's English King's Bench Reports |
| COLA | Cost-of-living adjustment |
| COMCEN | Federal Communications Center |
| Comp. | Compilation |
| Conn. | Connecticut Reports |
| CONTU | National Commission on New Technological Uses of Copyrighted Works |
| Conv. | Convention |
| COPA | Child Online Protection Act (1998) |
| COPS | Community Oriented Policing Services |
| Corbin | Arthur L. Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (1950) |
| CORE | Congress on Racial Equality |
| Cox's Crim. Cases | Cox's Criminal Cases (England) |
| COYOTE | Call Off Your Old Tired Ethics |

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| CPA | Certified public accountant |
| CPB | Corporation for Public Broadcasting, the |
| CPI | Consumer Price Index |
| CPPA | Child Pornography Prevention Act |
| CPSC | Consumer Product Safety Commission |
| Cranch | Cranch's United States Supreme Court Reports |
| CRF | Constitutional Rights Foundation |
| CRR | Center for Constitutional Rights |
| CRS | Congressional Research Service; Community Relations Service |
| CRT | Critical race theory |
| CSA | Community Services Administration |
| CSAP | Center for Substance Abuse Prevention |
| CSAT | Center for Substance Abuse Treatment |
| CSC | Civil Service Commission |
| CSCE | Conference on Security and Cooperation in Europe |
| CSG | Council of State Governments |
| CSO | Community Service Organization |
| CSP | Center for the Study of the Presidency |
| C-SPAN | Cable-Satellite Public Affairs Network |
| CSRS | Cooperative State Research Service |
| CSWPL | Center on Social Welfare Policy and Law |
| CTA | *Cum testamento annexo* (with the will attached) |
| Ct. Ap. D.C. | Court of Appeals, District of Columbia |
| Ct. App. No. Ireland | Court of Appeals, Northern Ireland |
| Ct. Cl. | Court of Claims, United States |
| Ct. Crim. Apps. | Court of Criminal Appeals (England) |
| CTI | Consolidated taxable income |
| Ct. of Sess., Scot. | Court of Sessions, Scotland |
| CU | Credit union |
| CUNY | City University of New York |
| Cush. | Cushing's Massachusetts Reports |
| CWA | Civil Works Administration; Clean Water Act |
| DACORB | Department of the Army Conscientious Objector Review Board |
| Dall. | Dallas's Pennsylvania and United States Reports |
| DAR | Daughters of the American Revolution |
| DARPA | Defense Advanced Research Projects Agency |
| DAVA | Defense Audiovisual Agency |
| D.C. | United States District Court; District of Columbia |
| D.C. Del. | United States District Court, Delaware |
| D.C. Mass. | United States District Court, Massachusetts |
| D.C. Md. | United States District Court, Maryland |
| D.C.N.D.Cal. | United States District Court, Northern District, California |
| D.C.N.Y. | United States District Court, New York |
| D.C.Pa. | United States District Court, Pennsylvania |
| DCS | Deputy Chiefs of Staff |
| DCZ | District of the Canal Zone |
| DDT | Dichlorodiphenyltricloro-ethane |
| DEA | Drug Enforcement Administration |
| Decl. Lond. | Declaration of London, February 26, 1909 |
| Dev. & B. | Devereux & Battle's North Carolina Reports |
| DFL | Minnesota Democratic-Farmer-Labor |
| DFTA | Department for the Aging |
| Dig. U.S. Practice in Intl. Law | Digest of U.S. Practice in International Law |
| Dist. Ct. | D.C. United States District Court, District of Columbia |
| D.L.R. | Dominion Law Reports (Canada) |
| DMCA | Digital Millennium Copyright Act |
| DNA | Deoxyribonucleic acid |
| Dnase | Deoxyribonuclease |
| DNC | Democratic National Committee |
| DOC | Department of Commerce |
| DOD | Department of Defense |
| DODEA | Department of Defense Education Activity |
| Dodson | Dodson's Reports, English Admiralty Courts |
| DOE | Department of Energy |

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| DOER | Department of Employee Relations |
| DOJ | Department of Justice |
| DOL | Department of Labor |
| DOMA | Defense of Marriage Act of 1996 |
| DOS | Disk operating system |
| DOT | Department of Transportation |
| DPT | Diphtheria, pertussis, and tetanus |
| DRI | Defense Research Institute |
| DSAA | Defense Security Assistance Agency |
| DUI | Driving under the influence; driving under intoxication |
| DVD | Digital versatile disc |
| DWI | Driving while intoxicated |
| EAHCA | Education for All Handicapped Children Act of 1975 |
| EBT | Examination before trial |
| E.coli | Escherichia coli |
| ECPA | Electronic Communications Privacy Act of 1986 |
| ECSC | Treaty of the European Coal and Steel Community |
| EDA | Economic Development Administration |
| EDF | Environmental Defense Fund |
| E.D.N.Y. | Eastern District, New York |
| EDP | Electronic data processing |
| E.D. Pa. | Eastern-District, Pennsylvania |
| EDSC | Eastern District, South Carolina |
| EDT | Eastern daylight time |
| E.D. Va. | Eastern District, Virginia |
| EEC | European Economic Community; European Economic Community Treaty |
| EEOC | Equal Employment Opportunity Commission |
| EFF | Electronic Frontier Foundation |
| EFT | Electronic funds transfer |
| Eliz. | Queen Elizabeth (Great Britain) |
| Em. App. | Temporary Emergency Court of Appeals |
| ENE | Early neutral evaluation |
| Eng. Rep. | English Reports |
| EOP | Executive Office of the President |
| EPA | Environmental Protection Agency; Equal Pay Act of 1963 |
| ERA | Equal Rights Amendment |
| ERDC | Energy Research and Development Commission |
| ERISA | Employee Retirement Income Security Act of 1974 |
| ERS | Economic Research Service |
| ERTA | Economic Recovery Tax Act of 1981 |
| ESA | Endangered Species Act of 1973 |
| ESF | Emergency support function; Economic Support Fund |
| ESRD | End-Stage Renal Disease Program |
| ETA | Employment and Training Administration |
| ETS | Environmental tobacco smoke |
| et seq. | *Et sequentes* or *et sequentia* (“and the following”) |
| EU | European Union |
| Euratom | European Atomic Energy Community |
| Eur. Ct. H.R. | European Court of Human Rights |
| Ex. | English Exchequer Reports, Welsby, Hurlstone & Gordon |
| Exch. | Exchequer Reports (Welsby, Hurlstone & Gordon) |
| Ex Com | Executive Committee of the National Security Council |
| Eximbank | Export-Import Bank of the United States |
| F. | Federal Reporter |
| F. 2d | Federal Reporter, Second Series |
| FAA | Federal Aviation Administration; Federal Arbitration Act |
| FAAA | Federal Alcohol Administration Act |
| FACE | Freedom of Access to Clinic Entrances Act of 1994 |
| FACT | Feminist Anti-Censorship Task Force |
| FAIRA | Federal Agriculture Improvement and Reform Act of 1996 |
| FAMLA | Family and Medical Leave Act of 1993 |
| Fannie Mae | Federal National Mortgage Association |
| FAO | Food and Agriculture Organization of the United Nations |
| FAR | Federal Acquisition Regulations |

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| FAS | Foreign Agricultural Service |
| FBA | Federal Bar Association |
| FBI | Federal Bureau of Investigation |
| FCA | Farm Credit Administration |
| F. Cas. | Federal Cases |
| FCC | Federal Communications Commission |
| FCIA | Foreign Credit Insurance Association |
| FCIC | Federal Crop Insurance Corporation |
| FCLAA | Federal Cigarette Labeling and Advertising Act |
| FCRA | Fair Credit Reporting Act |
| FCU | Federal credit unions |
| FCUA | Federal Credit Union Act |
| FCZ | Fishery Conservation Zone |
| FDA | Food and Drug Administration |
| FDIC | Federal Deposit Insurance Corporation |
| FDPC | Federal Data Processing Center |
| FEC | Federal Election Commission |
| FECA | Federal Election Campaign Act of 1971 |
| Fed. Cas. | Federal Cases |
| FEHA | Fair Employment and Housing Act |
| FEHBA | Federal Employees Health Benefit Act |
| FEMA | Federal Emergency Management Agency |
| FERC | Federal Energy Regulatory Commission |
| FFB | Federal Financing Bank |
| FFDC | Federal Food, Drug, and Cosmetics Act |
| FGIS | Federal Grain Inspection Service |
| FHA | Federal Housing Administration |
| FHAA | Fair Housing Amendments Act of 1998 |
| FHWA | Federal Highway Administration |
| FIA | Federal Insurance Administration |
| FIC | Federal Information Centers; Federation of Insurance Counsel |
| FICA | Federal Insurance Contributions Act |
| FIFRA | Federal Insecticide, Fungicide, and Rodenticide Act |
| FIP | Forestry Incentives Program |
| FIRREA | Financial Institutions Reform, Recovery, and Enforcement Act of 1989 |
| FISA | Foreign Intelligence Surveillance Act of 1978 |
| FISC | Foreign Intelligence Surveillance Court of Review |
| FJC | Federal Judicial Center |
| FLSA | Fair Labor Standards Act |
| FMC | Federal Maritime Commission |
| FMCS | Federal Mediation and Conciliation Service |
| FmHA | Farmers Home Administration |
| FMLA | Family and Medical Leave Act of 1993 |
| FNMA | Federal National Mortgage Association, "Fannie Mae" |
| F.O.B. | Free on board |
| FOIA | Freedom of Information Act |
| FOMC | Federal Open Market Committee |
| FPA | Federal Power Act of 1935 |
| FPC | Federal Power Commission |
| FPMR | Federal Property Management Regulations |
| FPRS | Federal Property Resources Service |
| FR | Federal Register |
| FRA | Federal Railroad Administration |
| FRB | Federal Reserve Board |
| FRC | Federal Radio Commission |
| F.R.D. | Federal Rules Decisions |
| FSA | Family Support Act |
| FSB | Federal'naya Sluzhba Bezopasnosti (the Federal Security Service of Russia) |
| FSLIC | Federal Savings and Loan Insurance Corporation |
| FSQS | Food Safety and Quality Service |
| FSS | Federal Supply Service |
| F. Supp. | Federal Supplement |
| FTA | U.S.-Canada Free Trade Agreement of 1988 |
| FTC | Federal Trade Commission |
| FTCA | Federal Tort Claims Act |
| FTS | Federal Telecommunications System |
| FTS2000 | Federal Telecommunications System 2000 |
| FUCA | Federal Unemployment Compensation Act of 1988 |

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| FUTA | Federal Unemployment Tax Act |
| FWPCA | Federal Water Pollution Control Act of 1948 |
| FWS | Fish and Wildlife Service |
| GAL | Guardian ad litem |
| GAO | General Accounting Office; Governmental Affairs Office |
| GAOR | General Assembly Official Records, United Nations |
| GAAP | Generally accepted accounting principles |
| GA Res. | General Assembly Resolution (United Nations) |
| GATT | General Agreement on Tariffs and Trade |
| GCA | Gun Control Act |
| Gen. Cls. Comm. | General Claims Commission, United States and Panama; General Claims United States and Mexico |
| Geo. II | King George II (Great Britain) |
| Geo. III | King George III (Great Britain) |
| GHB | Gamma-hydroxybutrate |
| GI | Government Issue |
| GID | General Intelligence Division |
| GM | General Motors |
| GNMA | Government National Mortgage Association, "Ginnie Mae" |
| GNP | Gross national product |
| GOP | Grand Old Party (Republican Party) |
| GOPAC | Grand Old Party Action Committee |
| GPA | Office of Governmental and Public Affairs |
| GPO | Government Printing Office |
| GRAS | Generally recognized as safe |
| Gr. Br., Crim. Ct. App. | Great Britain, Court of Criminal Appeals |
| GRNL | Gay Rights-National Lobby |
| GSA | General Services Administration |
| Hackworth | Green Haywood Hackworth, *Digest of International Law* (1940–1944) |
| Hay and Marriott | Great Britain. High Court of Admiralty, *Decisions in the High Court of Admiralty during the Time of Sir George Hay and of Sir James Marriott, Late Judges of That Court* (1801) |
| HBO | Home Box Office |
| HCFA | Health Care Financing Administration |
| H.Ct. | High Court |
| HDS | Office of Human Development Services |
| Hen. & M. | Hening & Munford's Virginia Reports |
| HEW | Department of Health, Education, and Welfare |
| HFCA | Health Care Financing Administration |
| HGI | Handgun Control, Incorporated |
| HHS | Department of Health and Human Services |
| Hill | Hill's New York Reports |
| HIRE | Help through Industry Retraining and Employment |
| HIV | Human immunodeficiency virus |
| H.L. | House of Lords Cases (England) |
| H. Lords | House of Lords (England) |
| HMO | Health Maintenance Organization |
| HNIS | Human Nutrition Information Service |
| Hong Kong L.R. | Hong Kong Law Reports |
| How. | Howard's United States Supreme Court Reports |
| How. St. Trials | Howell's English State Trials |
| HUAC | House Un-American Activities Committee |
| HUD | Department of Housing and Urban Development |
| Hudson, Internatl. Legis. | Manley Ottmer Hudson, ed., *International Legislation: A Collection of the Texts of Multipartite International Instruments of General Interest Beginning with the Covenant of the League of Nations* (1931) |
| Hudson, World Court Reps. | Manley Ottmer Hudson, ea., *World Court Reports* (1934– ) |
| Hun | Hun's New York Supreme Court Reports |
| Hunt's Rept. | Bert L. Hunt, *Report of the American and Panamanian General Claims Arbitration* (1934) |
| IAEA | International Atomic Energy Agency |
| IALL | International Association of Law Libraries |

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| IBA | International Bar Association |
| IBM | International Business Machines |
| ICA | Interstate Commerce Act |
| ICBM | Intercontinental ballistic missile |
| ICC | Interstate Commerce Commission; International Criminal Court |
| ICJ | International Court of Justice |
| ICM | Institute for Court Management |
| IDEA | Individuals with Disabilities Education Act of 1975 |
| IDOP | International Dolphin Conservation Program |
| IEP | Individualized educational program |
| IFC | International Finance Corporation |
| IGRA | Indian Gaming Regulatory Act of 1988 |
| IJA | Institute of Judicial Administration |
| IJC | International Joint Commission |
| ILC | International Law Commission |
| ILD | International Labor Defense |
| Ill. Dec. | Illinois Decisions |
| ILO | International Labor Organization |
| IMF | International Monetary Fund |
| INA | Immigration and Nationality Act |
| IND | Investigational new drug |
| INF Treaty | Intermediate-Range Nuclear Forces Treaty of 1987 |
| INS | Immigration and Naturalization Service |
| INTELSAT | International Telecommunications Satellite Organization |
| Interpol | International Criminal Police Organization |
| Int'l. Law Reps. | International Law Reports |
| Intl. Legal Mats. | International Legal Materials |
| IOC | International Olympic Committee |
| IPDC | International Program for the Development of Communication |
| IPO | Intellectual Property Owners |
| IPP | Independent power producer |
| IQ | Intelligence quotient |
| I.R. | Irish Reports |
| IRA | Individual retirement account; Irish Republican Army |
| IRC | Internal Revenue Code |
| IRCA | Immigration Reform and Control Act of 1986 |
| IRS | Internal Revenue Service |
| ISO | Independent service organization |
| ISP | Internet service provider |
| ISSN | International Standard Serial Numbers |
| ITA | International Trade Administration |
| ITI | Information Technology Integration |
| ITO | International Trade Organization |
| ITS | Information Technology Service |
| ITT | International Telephone and Telegraph Corporation |
| ITU | International Telecommunication Union |
| IUD | Intrauterine device |
| IWC | International Whaling Commission |
| IWW | Industrial Workers of the World |
| JAGC | Judge Advocate General's Corps |
| JCS | Joint Chiefs of Staff |
| JDL | Jewish Defense League |
| JNOV | Judgment *non obstante veredicto* ("judgment nothing to recommend it" or "judgment notwithstanding the verdict") |
| JOBS | Jobs Opportunity and Basic Skills |
| John. Ch. | Johnson's New York Chancery Reports |
| Johns. | Johnson's Reports (New York) |
| JP | Justice of the peace |
| K.B. | King's Bench Reports (England) |
| KFC | Kentucky Fried Chicken |
| KGB | Komitet Gosudarstvennoi Bezopasnosti (the State Security Committee for countries in the former Soviet Union) |
| KKK | Ku Klux Klan |
| KMT | Kuomintang (Chinese, "national people's party") |
| LAD | Law Against Discrimination |

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| LAPD | Los Angeles Police Department |
| LC | Library of Congress |
| LCHA | Longshoremen's and Harbor Workers Compensation Act of 1927 |
| LD50 | Lethal dose 50 |
| LDEF | Legal Defense and Education Fund (NOW) |
| LDF | Legal Defense Fund, Legal Defense and Educational Fund of the NAACP |
| LEAA | Law Enforcement Assistance Administration |
| L.Ed. | Lawyers' Edition Supreme Court Reports |
| LI | Letter of interpretation |
| LLC | Limited Liability Company |
| LLP | Limited Liability Partnership |
| LMSA | Labor-Management Services Administration |
| LNTS | League of Nations Treaty Series |
| Lofft's Rep. | Lofft's English King's Bench Reports |
| L.R. | Law Reports (English) |
| LSAC | Law School Admission Council |
| LSAS | Law School Admission Service |
| LSAT | Law School Aptitude Test |
| LSC | Legal Services Corporation; Legal Services for Children |
| LSD | Lysergic acid diethylamide |
| LSDAS | Law School Data Assembly Service |
| LTBT | Limited Test Ban Treaty |
| LTC | Long Term Care |
| MAD | Mutual assured destruction |
| MADD | Mothers against Drunk Driving |
| MALDEF | Mexican American Legal Defense and Educational Fund |
| Malloy | William M. Malloy, ed., *Treaties, Conventions International Acts, Protocols, and Agreements between the United States of America and Other Powers* (1910–1938) |
| Martens | Georg Friedrich von Martens, ea., *Noveau recueil général de traités et autres actes relatifs aux rapports de droit international* (Series I, 20 vols. [1843–1875]; Series II, 35 vols. [1876–1908]; Series III [1909– ]) |
| Mass. | Massachusetts Reports |
| MCC | Metropolitan Correctional Center |
| MCCA | Medicare Catastrophic Coverage Act of 1988 |
| MCH | Maternal and Child Health Bureau |
| MCRA | Medical Care Recovery Act of 1962 |
| MDA | Medical Devices Amendments of 1976 |
| Md. App. | Maryland, Appeal Cases |
| M.D. Ga. | Middle District, Georgia |
| Mercy | Movement Ensuring the Right to Choose for Yourself |
| Metc. | Metcalf's Massachusetts Reports |
| MFDP | Mississippi Freedom Democratic party |
| MGT | Management |
| MHSS | Military Health Services System |
| Miller | David Hunter Miller, ea., *Treaties and Other International Acts of the United States of America* (1931–1948) |
| Minn. | Minnesota Reports |
| MINS | Minors in need of supervision |
| MIRV | Multiple independently targetable reentry vehicle |
| MIRVed ICBM | Multiple independently targetable reentry vehicled intercontinental ballistic missile |
| Misc. | Miscellaneous Reports, New York |
| Mixed Claims Comm., Report of Decs | Mixed Claims Commission, United States and Germany, Report of Decisions |
| M.J. | Military Justice Reporter |
| MLAP | Migrant Legal Action Program |
| MLB | Major League Baseball |
| MLDP | Mississippi Loyalist Democratic Party |
| MMI | Moslem Mosque, Incorporated |
| MMPA | Marine Mammal Protection Act of 1972 |
| Mo. | Missouri Reports |
| MOD | Masters of Deception |
| Mod. | Modern Reports, English King's Bench, etc. |

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| Moore, Dig. Intl. Law | John Bassett Moore, *A Digest of International Law,* 8 vols. (1906) |
| Moore, Intl. Arbs. | John Bassett Moore, *History and Digest of the International Arbitrations to Which United States Has Been a Party,* 6 vols. (1898) |
| Morison | William Maxwell Morison, *The Scots Revised Report: Morison's Dictionary of Decisions* (1908–09) |
| M.P. | Member of Parliament |
| MP3 | MPEG Audio Layer 3 |
| MPAA | Motion Picture Association of America |
| MPAS | Michigan Protection and Advocacy Service |
| MPEG | Motion Picture Experts Group |
| mpg | Miles per gallon |
| MPPDA | Motion Picture Producers and Distributors of America |
| MPRSA | Marine Protection, Research, and Sanctuaries Act of 1972 |
| M.R. | Master of the Rolls |
| MS-DOS | Microsoft Disk Operating System |
| MSHA | Mine Safety and Health Administration |
| MSPB | Merit Systems Protection Board |
| MSSA | Military Selective Service Act |
| N/A | Not Available |
| NAACP | National Association for the Advancement of Colored People |
| NAAQS | National Ambient Air Quality Standards |
| NAB | National Association of Broadcasters |
| NABSW | National Association of Black Social Workers |
| NACDL | National Association of Criminal Defense Lawyers |
| NAFTA | North American Free Trade Agreement of 1993 |
| NAGHSR | National Association of Governors' Highway Safety Representatives |
| NALA | National Association of Legal Assistants |
| NAM | National Association of Manufacturers |
| NAR | National Association of Realtors |
| NARAL | National Abortion and Reproductive Rights Action League |
| NARF | Native American Rights Fund |
| NARS | National Archives and Record Service |
| NASA | National Aeronautics and Space Administration |
| NASD | National Association of Securities Dealers |
| NATO | North Atlantic Treaty Organization |
| NAVINFO | Navy Information Offices |
| NAWSA | National American Woman's Suffrage Association |
| NBA | National Bar Association; National Basketball Association |
| NBC | National Broadcasting Company |
| NBLSA | National Black Law Student Association |
| NBS | National Bureau of Standards |
| NCA | Noise Control Act; National Command Authorities |
| NCAA | National Collegiate Athletic Association |
| NCAC | National Coalition against Censorship |
| NCCB | National Consumer Cooperative Bank |
| NCE | Northwest Community Exchange |
| NCF | National Chamber Foundation |
| NCIP | National Crime Insurance Program |
| NCJA | National Criminal Justice Association |
| NCLB | National Civil Liberties Bureau |
| NCP | National contingency plan |
| NCSC | National Center for State Courts |
| NCUA | National Credit Union Administration |
| NDA | New drug application |
| N.D. Ill. | Northern District, Illinois |
| NDU | National Defense University |
| N.D. Wash. | Northern District, Washington |
| N.E. | North Eastern Reporter |
| N.E. 2d | North Eastern Reporter, Second Series |
| NEA | National Endowment for the Arts; National Education Association |

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| NEH | National Endowment for the Humanities |
| NEPA | National Environmental Protection Act; National Endowment Policy Act |
| NET Act | No Electronic Theft Act |
| NFIB | National Federation of Independent Businesses |
| NFIP | National Flood Insurance Program |
| NFL | National Football League |
| NFPA | National Federation of Paralegal Associations |
| NGLTF | National Gay and Lesbian Task Force |
| NHL | National Hockey League |
| NHRA | Nursing Home Reform Act of 1987 |
| NHTSA | National Highway Traffic Safety Administration |
| Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| NIEO | New International Economic Order |
| NIGC | National Indian Gaming Commission |
| NIH | National Institutes of Health |
| NIJ | National Institute of Justice |
| NIRA | National Industrial Recovery Act of 1933; National Industrial Recovery Administration |
| NIST | National Institute of Standards and Technology |
| N.J. | New Jersey Reports |
| N.J. Super. | New Jersey Superior Court Reports |
| NLEA | Nutrition Labeling and Education Act of 1990 |
| NLRA | National Labor Relations Act |
| NLRB | National Labor Relations Board |
| NMFS | National Marine Fisheries Service |
| No. | Number |
| NOAA | National Oceanic and Atmospheric Administration |
| NOC | National Olympic Committee |
| NOI | Nation of Islam |
| NOL | Net operating loss |
| NORML | National Organization for the Reform of Marijuana Laws |
| NOW | National Organization for Women |
| NOW LDEF | National Organization for Women Legal Defense and Education Fund |
| NOW/PAC | National Organization for Women Political Action Committee |
| NPDES | National Pollutant Discharge Elimination System |
| NPL | National priorities list |
| NPR | National Public Radio |
| NPT | Nuclear Non-Proliferation Treaty of 1970 |
| NRA | National Rifle Association; National Recovery Act |
| NRC | Nuclear Regulatory Commission |
| NRLC | National Right to Life Committee |
| NRTA | National Retired Teachers Association |
| NSA | National Security Agency |
| NSC | National Security Council |
| NSCLC | National Senior Citizens Law Center |
| NSF | National Science Foundation |
| NSFNET | National Science Foundation Network |
| NSI | Network Solutions, Inc. |
| NTIA | National Telecommunications and Information Administration |
| NTID | National Technical Institute for the Deaf |
| NTIS | National Technical Information Service |
| NTS | Naval Telecommunications System |
| NTSB | National Transportation Safety Board |
| NVRA | National Voter Registration Act |
| N.W. | North Western Reporter |
| N.W. 2d | North Western Reporter, Second Series |
| NWSA | National Woman Suffrage Association |
| N.Y. | New York Court of Appeals Reports |
| N.Y. 2d | New York Court of Appeals Reports, Second Series |
| N.Y.S. | New York Supplement Reporter |

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| N.Y.S. 2d | New York Supplement Reporter, Second Series |
| NYSE | New York Stock Exchange |
| NYSLA | New York State Liquor Authority |
| N.Y. Sup. | New York Supreme Court Reports |
| NYU | New York University |
| OAAU | Organization of Afro American Unity |
| OAP | Office of Administrative Procedure |
| OAS | Organization of American States |
| OASDI | Old-age, Survivors, and Disability Insurance Benefits |
| OASHDS | Office of the Assistant Secretary for Human Development Services |
| OCC | Office of Comptroller of the Currency |
| OCED | Office of Comprehensive Employment Development |
| OCHAMPUS | Office of Civilian Health and Medical Program of the Uniformed Services |
| OCSE | Office of Child Support Enforcement |
| OEA | Organización de los Estados Americanos |
| OEM | Original Equipment Manufacturer |
| OFCCP | Office of Federal Contract Compliance Programs |
| OFPP | Office of Federal Procurement Policy |
| OIC | Office of the Independent Counsel |
| OICD | Office of International Cooperation and Development |
| OIG | Office of the Inspector General |
| OJARS | Office of Justice Assistance, Research, and Statistics |
| OMB | Office of Management and Budget |
| OMPC | Office of Management, Planning, and Communications |
| ONP | Office of National Programs |
| OPD | Office of Policy Development |
| OPEC | Organization of Petroleum Exporting Countries |
| OPIC | Overseas Private Investment Corporation |
| Ops. Atts. Gen. | Opinions of the Attorneys-General of the United States |
| Ops. Comms. | Opinions of the Commissioners |
| OPSP | Office of Product Standards Policy |
| O.R. | Ontario Reports |
| OR | Official Records |
| OSHA | Occupational Safety and Health Act |
| OSHRC | Occupational Safety and Health Review Commission |
| OSM | Office of Surface Mining |
| OSS | Office of Strategic Services |
| OST | Office of the Secretary |
| OT | Office of Transportation |
| OTA | Office of Technology Assessment |
| OTC | Over-the-counter |
| OTS | Office of Thrift Supervisors |
| OUI | Operating under the influence |
| OVCI | Offshore Voluntary Compliance Initiative |
| OWBPA | Older Workers Benefit Protection Act |
| OWRT | Office of Water Research and Technology |
| P. | Pacific Reporter |
| P. 2d | Pacific Reporter, Second Series |
| PAC | Political action committee |
| Pa. Oyer and Terminer | Pennsylvania Oyer and Terminer Reports |
| PATCO | Professional Air Traffic Controllers Organization |
| PBGC | Pension Benefit Guaranty Corporation |
| PBS | Public Broadcasting Service; Public Buildings Service |
| P.C. | Privy Council (English Law Reports) |
| PC | Personal computer; politically correct |
| PCBs | Polychlorinated biphenyls |
| PCIJ | Permanent Court of International Justice |
| | Series A-Judgments and Orders (1922–30) |
| | Series B-Advisory Opinions (1922–30) |
| | Series A/B-Judgments, Orders, and Advisory Opinions (1931–40) |

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| PCIJ (cont'd.) | Series C-Pleadings, Oral Statements, and Documents relating to Judgments and Advisory Opinions (1923–42) |
| | Series D-Acts and Documents concerning the Organization of the World Court (1922 –47) |
| | Series E-Annual Reports (1925–45) |
| PCP | Phencyclidine |
| P.D. | Probate Division, English Law Reports (1876–1890) |
| PDA | Pregnancy Discrimination Act of 1978 |
| PD & R | Policy Development and Research |
| Pepco | Potomac Electric Power Company |
| Perm. Ct. of Arb. | Permanent Court of Arbitration |
| PES | Post-Enumeration Survey |
| Pet. | Peters' United States Supreme Court Reports |
| PETA | People for the Ethical Treatment of Animals |
| PGA | Professional Golfers Association |
| PGM | Program |
| PHA | Public Housing Agency |
| Phila. Ct. of Oyer and Terminer | Philadelphia Court of Oyer and Terminer |
| PhRMA | Pharmaceutical Research and Manufacturers of America |
| PHS | Public Health Service |
| PIC | Private Industry Council |
| PICJ | Permanent International Court of Justice |
| Pick. | Pickering's Massachusetts Reports |
| PIK | Payment in Kind |
| PINS | Persons in need of supervision |
| PIRG | Public Interest Research Group |
| P.L. | Public Laws |
| PLAN | Pro-Life Action Network |
| PLC | Plaintiffs' Legal Committee |
| PLE | Product liability expenses |
| PLI | Practicing Law Institute |
| PLL | Product liability loss |
| PLLP | Professional Limited Liability Partnership |
| PLO | Palestine Liberation Organization |
| PLRA | Prison Litigation Reform Act of 1995 |
| PNET | Peaceful Nuclear Explosions Treaty |
| PONY | Prostitutes of New York |
| POW-MIA | Prisoner of war-missing in action |
| Pratt | Frederic Thomas Pratt, *Law of Contraband of War, with a Selection of Cases from Papers of the Right Honourable Sir George Lee* (1856) |
| PRIDE | Prostitution to Independence, Dignity, and Equality |
| Proc. | Proceedings |
| PRP | Potentially responsible party |
| PSRO | Professional Standards Review Organization |
| PTO | Patents and Trademark Office |
| PURPA | Public Utilities Regulatory Policies Act |
| PUSH | People United to Serve Humanity |
| PUSH-Excel | PUSH for Excellence |
| PWA | Public Works Administration |
| PWSA | Ports and Waterways Safety Act of 1972 |
| Q.B. | Queen's Bench (England) |
| QTIP | Qualified Terminable Interest Property |
| Ralston's Rept. | Jackson Harvey Ralston, ed., *Venezuelan Arbitrations of 1903* (1904) |
| RC | Regional Commissioner |
| RCRA | Resource Conservation and Recovery Act |
| RCWP | Rural Clean Water Program |
| RDA | Rural Development Administration |
| REA | Rural Electrification Administration |
| Rec. des Decs. des Trib. Arb. Mixtes | G. Gidel, ed., *Recueil des décisions des tribunaux arbitraux mixtes, institués par les traités de paix* (1922–30) |
| Redmond | Vol. 3 of Charles I. Bevans, *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled by C. F. Redmond) (1969) |
| RESPA | Real Estate Settlement Procedure Act of 1974 |
| RFC | Reconstruction Finance Corporation |

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| RFRA | Religious Freedom Restoration Act of 1993 |
| RIAA | Recording Industry Association of America |
| RICO | Racketeer Influenced and Corrupt Organizations |
| RLUIPA | Religious Land Use and Institutionalized Persons Act |
| RNC | Republican National Committee |
| Roscoe | Edward Stanley Roscoe, ed., *Reports of Prize Cases Determined in the High Court Admiralty before the Lords Commissioners of Appeals in Prize Causes and before the judicial Committee of the Privy Council from 1745 to 1859* (1905) |
| ROTC | Reserve Officers' Training Corps |
| RPP | Representative Payee Program |
| R.S. | Revised Statutes |
| RTC | Resolution Trust Corp. |
| RUDs | Reservations, understandings, and declarations |
| Ryan White CARE Act | Ryan White Comprehensive AIDS Research Emergency Act of 1990 |
| SAC | Strategic Air Command |
| SACB | Subversive Activities Control Board |
| SADD | Students against Drunk Driving |
| SAF | Student Activities Fund |
| SAIF | Savings Association Insurance Fund |
| SALT | Strategic Arms Limitation Talks |
| SALT I | Strategic Arms Limitation Talks of 1969–72 |
| SAMHSA | Substance Abuse and Mental Health Services Administration |
| Sandf. | Sandford's New York Superior Court Reports |
| S and L | Savings and loan |
| SARA | Superfund Amendment and Reauthorization Act |
| SAT | Scholastic Aptitude Test |
| Sawy. | Sawyer's United States Circuit Court Reports |
| SBA | Small Business Administration |
| SBI | Small Business Institute |
| SCCC | South Central Correctional Center |
| SCLC | Southern Christian Leadership Conference |
| Scott's Repts. | James Brown Scott, ed., *The Hague Court Reports*, 2 vols. (1916–32) |
| SCS | Soil Conservation Service; Social Conservative Service |
| SCSEP | Senior Community Service Employment Program |
| S.Ct. | Supreme Court Reporter |
| S.D. Cal. | Southern District, California |
| S.D. Fla. | Southern District, Florida |
| S.D. Ga. | Southern District, Georgia |
| SDI | Strategic Defense Initiative |
| S.D. Me. | Southern District, Maine |
| S.D.N.Y. | Southern District, New York |
| SDS | Students for a Democratic Society |
| S.E. | South Eastern Reporter |
| S.E. 2d | South Eastern Reporter, Second Series |
| SEA | Science and Education Administration |
| SEATO | Southeast Asia Treaty Organization |
| SEC | Securities and Exchange Commission |
| Sec. | Section |
| SEEK | Search for Elevation, Education and Knowledge |
| SEOO | State Economic Opportunity Office |
| SEP | Simplified employee pension plan |
| Ser. | Series |
| Sess. | Session |
| SGLI | Servicemen's Group Life Insurance |
| SIP | State implementation plan |
| SLA | Symbionese Liberation Army |
| SLAPPs | Strategic Lawsuits Against Public Participation |
| SLBM | Submarine-launched ballistic missile |
| SNCC | Student Nonviolent Coordinating Committee |
| So. | Southern Reporter |
| So. 2d | Southern Reporter, Second Series |
| SPA | Software Publisher's Association |
| Spec. Sess. | Special Session |
| SPLC | Southern Poverty Law Center |
| SRA | Sentencing Reform Act of 1984 |

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| SS | *Schutzstaffel* (German, "Protection Echelon") |
| SSA | Social Security Administration |
| SSI | Supplemental Security Income |
| START I | Strategic Arms Reduction Treaty of 1991 |
| START II | Strategic Arms Reduction Treaty of 1993 |
| Stat. | United States Statutes at Large |
| STS | Space Transportation Systems |
| St. Tr. | State Trials, English |
| STURAA | Surface Transportation and Uniform Relocation Assistance Act of 1987 |
| Sup. Ct. of Justice, Mexico | Supreme Court of Justice, Mexico |
| Supp. | Supplement |
| S.W. | South Western Reporter |
| S.W. 2d | South Western Reporter, Second Series |
| SWAPO | South-West Africa People's Organization |
| SWAT | Special Weapons and Tactics |
| SWP | Socialist Workers Party |
| TDP | Trade and Development Program |
| Tex. Sup. | Texas Supreme Court Reports |
| THAAD | Theater High-Altitude Area Defense System |
| THC | Tetrahydrocannabinol |
| TI | Tobacco Institute |
| TIA | Trust Indenture Act of 1939 |
| TIAS | Treaties and Other International Acts Series (United States) |
| TNT | Trinitrotoluene |
| TOP | Targeted Outreach Program |
| TPUS | Transportation and Public Utilities Service |
| TQM | Total Quality Management |
| Tripartite Claims Comm., Decs. and Ops. | Tripartite Claims Commission (United States, Austria, and Hungary), Decisions and Opinions |
| TRI-TAC | Joint Tactical Communications |
| TRO | Temporary restraining order |
| TS | Treaty Series, United States |
| TSCA | Toxic Substance Control Act |
| TSDs | Transporters, storers, and disposers |
| TSU | Texas Southern University |
| TTBT | Threshold Test Ban Treaty |
| TV | Television |
| TVA | Tennessee Valley Authority |
| TWA | Trans World Airlines |
| UAW | United Auto Workers; United Automobile, Aerospace, and Agricultural Implements Workers of America |
| U.C.C. | Uniform Commercial Code; Universal Copyright Convention |
| U.C.C.C. | Uniform Consumer Credit Code |
| UCCJA | Uniform Child Custody Jurisdiction Act |
| UCMJ | Uniform Code of Military Justice |
| UCPP | Urban Crime Prevention Program |
| UCS | United Counseling Service |
| UDC | United Daughters of the Confederacy |
| UFW | United Farm Workers |
| UHF | Ultrahigh frequency |
| UIFSA | Uniform Interstate Family Support Act |
| UIS | Unemployment Insurance Service |
| UMDA | Uniform Marriage and Divorce Act |
| UMTA | Urban Mass Transportation Administration |
| U.N. | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCTAD | United Nations Conference on Trade and Development |
| UN Doc. | United Nations Documents |
| UNDP | United Nations Development Program |
| UNEF | United Nations Emergency Force |
| UNESCO | United Nations Educational, Scientific, and Cultural Organization |
| UNICEF | United Nations Children's Fund (formerly United Nations International Children's Emergency Fund) |
| UNIDO | United Nations Industrial and Development Organization |
| Unif. L. Ann. | Uniform Laws Annotated |
| UN Repts. Intl. Arb. Awards | United Nations Reports of International Arbitral Awards |

| | |
|---|---|
| UNTS | United Nations Treaty Series |
| UPI | United Press International |
| URESA | Uniform Reciprocal Enforcement of Support Act |
| U.S. | United States Reports |
| U.S.A. | United States of America |
| USAF | United States Air Force |
| USA PATRIOT Act | Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act |
| U.S. App. D.C. | United States Court of Appeals for the District of Columbia |
| U.S.C. | United States Code; University of Southern California |
| U.S.C.A. | United States Code Annotated |
| U.S.C.C.A.N. | United States Code Congressional and Administrative News |
| USCMA | United States Court of Military Appeals |
| USDA | U.S. Department of Agriculture |
| USES | United States Employment Service |
| USF | U.S. Forestry Service |
| USFA | United States Fire Administration |
| USGA | United States Golf Association |
| USICA | International Communication Agency, United States |
| USMS | U.S. Marshals Service |
| USOC | U.S. Olympic Committee |
| USSC | U.S. Sentencing Commission |
| USSG | United States Sentencing Guidelines |
| U.S.S.R. | Union of Soviet Socialist Republics |
| UST | United States Treaties |
| USTS | United States Travel Service |
| v. | *Versus* |
| VA | Veterans Administration |
| VAR | Veterans Affairs and Rehabilitation Commission |
| VAWA | Violence against Women Act |
| VFW | Veterans of Foreign Wars |
| VGLI | Veterans Group Life Insurance |
| Vict. | Queen Victoria (Great Britain) |
| VIN | Vehicle identification number |
| VISTA | Volunteers in Service to America |
| VJRA | Veterans Judicial Review Act of 1988 |
| V.L.A. | Volunteer Lawyers for the Arts |
| VMI | Virginia Military Institute |
| VMLI | Veterans Mortgage Life Insurance |
| VOCAL | Victims of Child Abuse Laws |
| VRA | Voting Rights Act |
| WAC | Women's Army Corps |
| Wall. | Wallace's United States Supreme Court Reports |
| Wash. 2d | Washington Reports, Second Series |
| WAVES | Women Accepted for Volunteer Service |
| WCTU | Women's Christian Temperance Union |
| W.D. Wash. | Western District, Washington |
| W.D. Wis. | Western District, Wisconsin |
| WEAL | *West's Encyclopedia of American Law,* Women's Equity Action League |
| Wend. | Wendell's New York Reports |
| WFSE | Washington Federation of State Employees |
| Wheat. | Wheaton's United States Supreme Court Reports |
| Wheel. Cr. Cases | Wheeler's New York Criminal Cases |
| WHISPER | Women Hurt in Systems of Prostitution Engaged in Revolt |
| Whiteman | Marjorie Millace Whiteman, *Digest of International Law,* 15 vols. (1963–73) |
| WHO | World Health Organization |
| WIC | Women, Infants, and Children program |
| Will. and Mar. | King William and Queen Mary (Great Britain) |
| WIN | WESTLAW Is Natural; Whip Inflation Now; Work Incentive Program |
| WIPO | World Intellectual Property Organization |
| WIU | Workers' Industrial Union |
| W.L.R. | Weekly Law Reports, England |
| WPA | Works Progress Administration |
| WPPDA | Welfare and Pension Plans Disclosure Act |

| | |
|---|---|
| WTO | World Trade Organization |
| WWI | World War I |
| WWII | World War II |
| Yates Sel. Cas. | Yates's New York Select Cases |
| YMCA | Young Men's Christian Association |
| YWCA | Young Women's Christian Association |

# WEST'S ENCYCLOPEDIA *of* AMERICAN LAW

2ND EDITION

# How to Use This Book

❚1❚ Article Title

❚2❚ Definition in italics with Latin translation provided

❚3❚ First-level subhead

❚4❚ Timeline for subject of biography, including general historical events and life events

❚5❚ Sidebar expands upon an issue addressed briefly in the article

❚6❚ Quotation from subject of biography

❚7❚ Biography of contributor to American law

❚8❚ Internal cross-reference to entry within WEAL

❚9❚ In Focus article examines a controversial or complex aspect of the article topic

❚10❚ Cross-references at end of article

❚11❚ Full cite for case

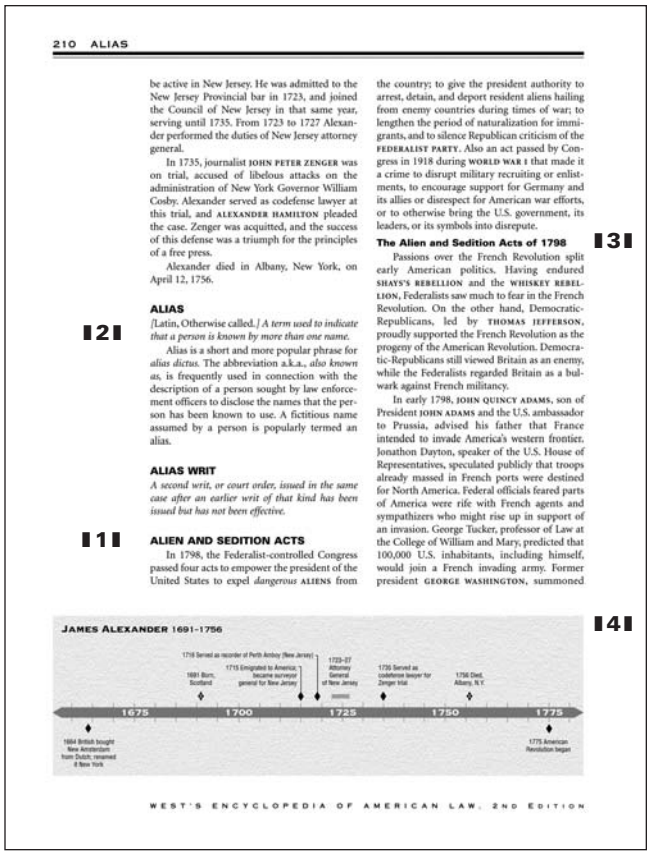



be active in New Jersey. He was admitted to the New Jersey Provincial bar in 1723, and joined the Council of New Jersey in that same year, serving until 1735. From 1723 to 1727 Alexander performed the duties of New Jersey attorney general.

In 1735, journalist JOHN PETER ZENGER was on trial, accused of libelous attacks on the administration of New York Governor William Cosby. Alexander served as codefense lawyer at this trial, and ALEXANDER HAMILTON pleaded the case. Zenger was acquitted, and the success of this defense was a triumph for the principles of a free press.

Alexander died in Albany, New York, on April 12, 1756.

**ALIAS**

❚2❚ *[Latin, Otherwise called.] A term used to indicate that a person is known by more than one name.*

Alias is a short and more popular phrase for *alias dictus.* The abbreviation a.k.a., *also known as,* is frequently used in connection with the description of a person sought by law enforcement officers to disclose the names that the person has been known to use. A fictitious name assumed by a person is popularly termed an alias.

**ALIAS WRIT**

*A second writ, or court order, issued in the same case after an earlier writ of that kind has been issued but has not been effective.*

❚1❚ **ALIEN AND SEDITION ACTS**

In 1798, the Federalist-controlled Congress passed four acts to empower the president of the United States to expel *dangerous* ALIENS from the country; to give the president authority to arrest, detain, and deport resident aliens hailing from enemy countries during times of war; to lengthen the period of naturalization for immigrants, and to silence Republican criticism of the FEDERALIST PARTY. Also an act passed by Congress in 1918 during WORLD WAR I that made it a crime to disrupt military recruiting or enlistments, to encourage support for Germany and its allies or disrespect for American war efforts, or to otherwise bring the U.S. government, its leaders, or its symbols into disrepute.

❚3❚ **The Alien and Sedition Acts of 1798**

Passions over the French Revolution split early American politics. Having endured SHAYS'S REBELLION and the WHISKEY REBELLION, Federalists saw much to fear in the French Revolution. On the other hand, Democratic-Republicans, led by THOMAS JEFFERSON, proudly supported the French Revolution as the progeny of the American Revolution. Democratic-Republicans still viewed Britain as an enemy, while the Federalists regarded Britain as a bulwark against French militancy.

In early 1798, JOHN QUINCY ADAMS, son of President JOHN ADAMS and the U.S. ambassador to Prussia, advised his father that France intended to invade America's western frontier. Jonathon Dayton, speaker of the U.S. House of Representatives, speculated publicly that troops already massed in French ports were destined for North America. Federal officials feared parts of America were rife with French agents and sympathizers who might rise up in support of an invasion. George Tucker, professor of Law at the College of William and Mary, predicted that 100,000 U.S. inhabitants, including himself, would join a French invading army. Former president GEORGE WASHINGTON, summoned

❚4❚

❚5❚

## The First Payments of Social Security

After the enactment of the Social Security Act of 1935 (42 U.S.C.A. § 301 et seq.) and the creation of the Social Security Administration (SSA), the federal government had a short time to establish the program before beginning to pay benefits. Monthly benefits were to begin in 1940. The period from 1937 to 1940 was to be used both to build up the trust funds and to provide a minimum period for participation for persons to qualify for monthly benefits.

From 1937 until 1940, however, Social Security paid benefits in the form of a single, lump-sum payment. The purpose of these one-time payments was to provide some compensation to people who contributed to the program but would not participate long enough to be vested for monthly benefits.

The first applicant for a lump-sum benefit was Ernest Ackerman, a Cleveland motorman who retired one day after the Social Security Program began. During his one day of participation in the program, five cents was withheld from Ackerman's pay for Social Security, and upon retiring, he received a lump-sum payment of seventeen cents.

Payments of monthly benefits began in January 1940. On January 31, 1940, the first monthly retirement check was issued to Ida May Fuller of Ludlow, Vermont, in the amount of $22.54. Fuller died in January 1975 at the age of one hundred. During her thirty-five years as a beneficiary, she received more than $20,000 in benefits.

tions to Social Security. There is no financial need requirement to be satisfied. Once a worker qualifies for protection, his family is also entitled to protection. The entire program is geared toward helping families as a matter of social policy.

Two large funds of money are held in trust to pay benefits earned by people under OASDI: the Old Age and Survivors Trust Fund and the Disability Insurance Trust Fund. As workers and employers make payroll contributions to these funds, money is paid out in benefits to people currently qualified to receive monthly checks.

The OASDI program is funded by payroll taxes levied on employees and their employers and on the self-employed. The tax is imposed upon the employee's taxable income, up to a maximum taxable amount, with the employer contributing an equal amount. The self-employed person contributes twice the amount levied on an employee. In 2003 the rate was 6.2 percent, levied on earned income up to a maximum of $87,000.

**Old Age Benefits** A person becomes eligible for Social Security old age benefits by working a minimum number of calendar quarters. The number of quarters required for full insurance increases with the worker's age. Forty quarters is the maximum requirement. The individual is credited for income up to the maximum amount of money covered by Social Security for those years. This amount is adjusted to reflect the impact of inflation on normal earnings and ensure that a worker who pays increasing Social Security contributions during his or her work life will receive retirement benefits that keep pace with inflation.

Persons born before 1950 can retire at age 65 with full benefits based on their average income during their working years. For those born between 1950 and 1960, the retirement age for full benefits has increased to age 66. Persons born in 1960 or later will not receive full retirement benefits until age 67. Any person, however, may retire at age 62 and receive less than full benefits. At age 65, a worker's spouse who has not contributed to Social Security receives 50 percent of the amount paid to the worker.

Since 1975 Social Security benefits have increased annually to offset the corrosive effects of inflation on fixed incomes. These increases, known as cost of living allowances (COLAs), are based on the annual increase in consumer prices. Allowing benefits to increase automatically ended the need for special acts of Congress, but it has also steadily increased the cost of the Social Security Program.

have the same inheritance rights as other children. The ruling was believed to be the first on the controversial issue by any state supreme court.

Also in January 2002, Marshall addressed the Massachusetts Bar Association Conference, where she called for "a revolution in the administration of justice" stating that the court system needed to improve its management system as well as its staffing and budget controls. In March 2002, her discussion of the court system's problems were amplified in a 52-page report that was published by a blue-ribbon panel appointed by Marshall.

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**16**

*THE GOVERNMENT [THAT THE FRAMERS OF THE CONSTITUTION] DEVISED REQUIRED SEVERAL AMENDMENTS, A CIVIL WAR, AND MOMENTOUS SOCIAL TRANSFORMATION TO ATTAIN THE SYSTEM OF CONSTITUTIONAL GOVERNMENT, AND ITS RESPECT FOR THE INDIVIDUAL FREEDOMS AND HUMAN RIGHTS, THAT WE HOLD AS FUNDAMENTAL TODAY.*
*THURGOOD MARSHALL*

## MARSHALL PLAN

After **WORLD WAR II**, Europe was devastated and urgently needed an organized plan for reconstruction and economic and technical aid. The Marshall Plan was initiated in 1947 to meet this need.

The originator of the plan, U.S. Secretary of State George C. Marshall, introduced it in a speech at Harvard University on June 5, 1947. He pointed out two basic reasons for providing aid to Europe: the United States sought the reestablishment of the European countries as independent nations capable of conducting valuable trade with the United States; and the threat of a Communist takeover was more prevalent in countries that were suffering economic depression.

In 1947 a preliminary conference to discuss the terms of the program convened in Paris. The Soviet Union was invited to attend but subsequently withdrew from the program, as did other Soviet countries.

Sixteen European countries eventually participated, and, in July 1947, the Committee for European Economic Cooperation was established to allow representatives from member countries to draft a report that listed their requirements for food, supplies, and technical assistance for a four-year period.

The Committee for European Economic Cooperation subsequently became the Organization of European Economic Cooperation, an expanded and permanent organization that was responsible for submitting petitions for aid. In 1948, Congress passed the Economic Cooperation Act (62 Stat. 137), establishing funds for the Marshall Plan to be administered under the Economic Cooperation Administration, which was directed by Paul G. Hoffman.

Between 1948 and 1952, the sixteen-member countries received more than $13 billion dollars in aid under the Marshall Plan. The plan was generally regarded as a success that led to industrial and agricultural production, while stifling the Communist movement. The plan was not without its critics, however, and many Europeans believed the **COLD WAR** hostilities between the Soviet nations and the free world were aggravated by it.

**17**

## ◊ MARSHALL, THURGOOD

Thurgood Marshall, the first African American to serve on the U.S. Supreme Court, saw law as a catalyst for social change. For nearly 60 years, as both a lawyer and a jurist, Marshall worked to dismantle the system of **SEGREGATION** and improve the legal and social position of minorities.

Marshall was born July 2, 1908, in Baltimore, the son of a Pullman porter and a schoolteacher. He was a graduate of Lincoln University, a small, all-black college in Pennsylvania, and Howard University Law School in Washington, D.C. At Howard, Marshall excelled under the guidance of Vice Dean **CHARLES HAMILTON HOUSTON**, the first African American to win a case before the U.S. Supreme Court. Houston encouraged his students to become not just lawyers but "social engineers" who could use the legal system to improve society. Marshall graduated first in his law class in 1933.

Marshall's attendance at predominantly black Howard University illustrates the barriers faced by African Americans during the early twentieth century. Although Marshall wished to attend law school at the University of Maryland (a public institution in his home town of Baltimore), he was prohibited by law from doing so because of his race. This injustice helped set Marshall on a course of opposing all forms of official segregation that denied equal opportunities to African Americans.

After law school, Marshall set up a practice in Baltimore, representing indigent clients in civil rights cases. In 1936, his mentor Houston offered him a position with the National Association for the Advancement of Colored People (**NAACP**),





and in 1940, Marshall became director of the **NAACP LEGAL DEFENSE AND EDUCATIONAL FUND**, a position he held until 1961. Determined to eliminate segregation, Marshall coordinated a nationwide campaign to integrate higher education. He filed several successful lawsuits against public graduate and professional schools that refused to accept African-American students. These suits paved the way for similar cases at the high school and elementary school levels. Marshall also journeyed throughout the deep South, traveling fifty thousand miles a year to fight **JIM CROW LAWS** (a series of laws that provided for racial segregation in the South) and to represent criminal defendants.

Marshall argued 32 cases before the U.S. Supreme Court and won 29 of them. No doubt his most famous and far-reaching triumph before the High Court was **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). In that case, the father of African-American student Linda Brown sued the school board of Topeka, Kansas, over its segregation policy. Brown was required by law to attend an all African-American school several blocks from her home even though an all white public school was located in her own neighborhood. Under Kansas law, cities of more than 15,000 people, such as Topeka, could choose to operate segregated schools. Marshall argued that these segregated schools, defended by officials as "separate but equal," were unconstitutional.

**18**

The **SEPARATE-BUT-EQUAL** doctrine originated in **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), a case allowing segregated public accommodations for whites

*Thurgood Marshall.*
LIBRARY OF CONGRESS

and blacks. In a plainspoken argument, Marshall dismissed as fallacy the notion that segregated schools offered the same educational experiences to black and white students. Sociological and psychological studies demonstrated that black children were in fact harmed by the policy of school segregation. The students' self-esteem was damaged and their future diminished when they were forced to accept inadequate facilities, equipment, and educational opportunities. Marshall argued that the only purpose segregation served was to perpetuate the myth of African-Americans' inferiority. A unanimous Court agreed and struck down the separate-but-equal doctrine, a

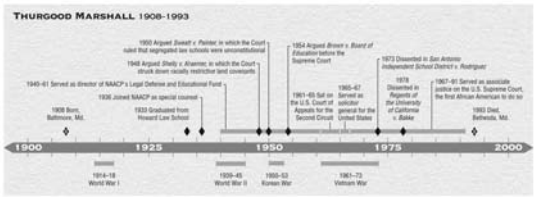






# THE FUTURE OF SOCIAL SECURITY

**19**

The payment of **OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE** (OASDI) benefits has been a cornerstone of U.S. social welfare policy since the establishment of the **SOCIAL SECURITY ADMINISTRATION** in 1935. At the same time, the long-term financial stability of OASDI has been a constant worry. In the early years of the twenty-first century, concerns about Social Security mounted as policy makers assessed the impact of the retirement of the "Baby Boom" generation. Many younger people raised the issue of "generation equity." They express doubt that Social Security benefits will be available when they retire, and anger that they will be forced to pay, through payroll taxes, for the baby boomers' retirement benefits.

Reform of the Social Security system has always been a political hot potato. Retirees and those approaching retirement form a strong **LOBBYING** force, and they zealously protect their benefits. Employers and employees are equally vocal in their opposition to higher payroll taxes to fund OASDI. Thus, changes in Social Security required bipartisan support, which materialized in the face of an impending Social Security crisis. The 1982–83 National Commission on Social Security Reform successfully secured from Congress the short-term financing of OASDI. As a result, Congress passed a series of laws meant to accumulate surpluses as a hedge against future burdens. The Social Security surplus is the amount by which revenue from the federal payroll tax exceeds the amount of Social Security benefits paid out.

IN FOCUS

Shortly after these new laws went into effect, Social Security began running a surplus. Surplus Social Security revenue can be used to fund other government programs and to help retire the national debt. During the favorable economic climate of the late 1990s, Congress began to use the surplus to pay down the federal debt, hoping to better position the government to meet its obligations to future retirees. And, in 2000, the federal government generated enough revenue so that the entire Social Security surplus was available for paying off debt.

The state of Social Security became a major campaign issue in the 2000 elections, with both Republicans and Democrats attempting to appear as though they were guardians of Social Security assets. Candidates from both parties promised to create a "lockbox," meaning that the Social Security surplus would be spent entirely on debt retirement. With the advent of fiscally lean years in the early 2000s, the lockbox approach was largely disregarded by politicians who advanced other ideas about what to do with Social Security surpluses. These ideas included using the surplus to help offset decreases in revenues brought about by tax cuts and using the surplus to fund new or expanded spending initiatives.

Analysts argue that the real issue often is clouded. It is not how to spend the surplus now, but how to maintain the long-term solvency of the Social Security trust fund. Planners estimate that the income from the trust fund will exceed expenses each year until 2020. The trust fund balances will then start to decline as investments are redeemed to meet the increased expenses from a swelling retired workforce. Although it is estimated that 75 percent of the costs would continue to be met from current payroll and income taxes, in the absence of any changes, full benefits could not be paid beginning in 2030.

In its 1996 report, the Social Security Administration's Advisory Council looked at various long-term financing options for OASDI. The council could not reach consensus on a specific long-term plan, but it did suggest several types of financing that represent a marked departure from previous efforts to fund Social Security. The council noted that past efforts have generally featured cutting benefits and raising tax rates on a "pay-as-you-go" basis. The council agreed that this approach must be changed and offered three ways of restoring financial solvency.

One approach, called Maintenance of Benefits (MB), calls for an increase in income taxes on OASDI benefits, a redirection of some revenue from other trust funds, and, most importantly, the adoption of a plan allowing the federal government to invest a portion of the trust fund assets directly in common stocks. Rates of returns on stocks have historically exceeded those on federal government bonds, where all Social Security

A person who continues to work past the retirement age may lose some benefits because Social Security is designed to replace lost earnings. If earnings from employment do not exceed the amount specified by law, the person receives the full benefits. If earnings are greater than that amount, one dollar of benefit is withheld for every two dollars in wages earned above the exempt amount. Once a person reaches age 70, however, he does not have to report earnings to the SSA, and the benefit is not reduced.

**Survivors' Benefits** Survivors' benefits are paid to family members when a worker dies. Survivors can receive benefits if the deceased worker was employed and contributed to Social





momentous victory for Marshall, affecting public schools in twenty-one states.

Marshall was appointed to the U.S. Court of Appeals for the Second Circuit in 1961, and served there until 1965 when he was named **SOLICITOR GENERAL** for the United States. He was appointed to the U.S. Supreme Court in 1967 by President **LYNDON B. JOHNSON** and served as an associate justice for 24 years.

While on the Court, Marshall was known more for his impassioned dissents than for his majority opinions. In particular, as a staunch opponent of **CAPITAL PUNISHMENT**, he regularly voiced his disagreement with the majority in death penalty cases. He was also a firm backer of **AFFIRMATIVE ACTION** and contributed one of his most famous dissents in **REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE**, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In that case, Marshall criticized the high court's ruling that a public medical school's policy of reserving 16 of 100 spots for minority students was unconstitutional. Marshall also dissented in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), disagreeing with the majority view that a Texas property tax system used to fund public education was acceptable, even though it allowed wealthier districts to provide a better school system for students in those districts than less wealthy districts could provide. Marshall objected strongly to the property tax arrangement, claiming that it deprived poor children of an equal education.

Marshall wrote the majority opinion in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968), in which the Court declared that a shopping center was a public forum from which picketers could not be barred by private owners.

Marshall retired from the Court in 1991, but continued his criticism of government policies that were detrimental to African Americans or other disenfranchised groups.

Marshall died on January 24, 1993, in Bethesda, Maryland. Upon Marshall's death, nearly 20,000 mourners filed by his casket during the 12 hours it lay in state in the Great Hall of the U.S. Supreme Court.

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CROSS-REFERENCES

**10**

*Civil Rights Movement; Integration; School Desegregation.*

## MARTIAL LAW

*The exercise of government and control by military authorities over the civilian population of a designated territory.*

**11**

Martial law is an extreme and rare measure used to control society during war or periods of civil unrest or chaos. According to the Supreme Court, the term *martial law* carries no precise meaning (*Duncan v. Kahanamoku*, 327 U.S. 304, 66 S. Ct. 606, 90 L. Ed. 688 [1946]). However, most declarations of martial law have some common features. Generally, the institution of martial law contemplates some use of military force. To a varying extent, depending on the martial law order, government military personnel have the authority to make and enforce civil and criminal laws. Certain civil liberties may be suspended, such as the right to be free from unreasonable **SEARCHES AND SEIZURES**, **FREEDOM OF ASSOCIATION**, and freedom of movement. And the writ of **HABEAS CORPUS** may be suspended (this writ allows persons who are unlawfully imprisoned to gain freedom through a court proceeding).

In the United States, martial law has been instituted on the national level only once, during the Civil War, and on a regional level only once, during **WORLD WAR II**. Otherwise, it has been limited to the states. Uprisings, political protests, labor strikes, and riots have, at various times, caused several state governors to declare some measure of martial law.

Martial law on the national level may be declared by Congress or the president. Under

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## DEDICATION

*West's Encyclopedia of American Law (WEAL)* is dedicated to librarians and library patrons throughout the United States and beyond. Your interest in the American legal system helps to expand and fuel the framework of our Republic.

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# PREFACE

The U.S. legal system is admired around the world for the freedoms it allows the individual and the fairness with which it attempts to treat all persons. On the surface, it may seem simple, yet those who have delved into it know that this system of federal and state constitutions, statutes, regulations, and common-law decisions is elaborate and complex. It derives from the English common law, but includes principles older than England, along with some principles from other lands. The U.S. legal system, like many others, has a language all its own, but too often it is an unfamiliar language: many concepts are still phrased in Latin. The second edition of *West's Encyclopedia of American Law (WEAL)* explains legal terms and concepts in everyday language, however. It covers a wide variety of persons, entities, and events that have shaped the U.S. legal system and influenced public perceptions of it.

## MAIN FEATURES OF THIS SET

### Entries

This encyclopedia contains nearly 5,000 entries devoted to terms, concepts, events, movements, cases, and persons significant to U.S. law. Entries on legal terms contain a definition of the term, followed by explanatory text if necessary. Entries are arranged alphabetically in standard encyclopedia format for ease of use. A wide variety of additional features, listed later in this preface, provide interesting background and supplemental information.

**Definitions** Every entry on a legal term is followed by a definition, which appears at the beginning of the entry and is italicized. The Dictionary and Indexes volume includes a glossary containing all the definitions from *WEAL*.

**Further Readings** To facilitate further research, a list of Further Readings is included at the end of a majority of the main entries.

**Cross-References** *WEAL* provides two types of cross-references, within and following entries. Within the entries, terms are set in small capital letters—for example, LIEN—to indicate that they have their own entry in the encyclopedia. At the end of the entries, related entries the reader may wish to explore are listed alphabetically by title.

Blind cross-reference entries are also included to direct the user to other entries throughout the set.

### In Focus Essays

In Focus essays accompany related entries and provide additional facts, details, and arguments on particularly interesting, important, or controversial issues raised by those entries. The subjects covered include hotly contested issues, such as abortion, capital punishment, and gay rights; detailed processes, such as the Food and Drug Administration's approval process for new drugs; and important historical or social issues, such as debates over the formation of the U.S. Constitution.

### Sidebars

Sidebars provide brief highlights of some interesting facet of accompanying entries. They

complement regular entries and In Focus essays by adding informative details. Sidebar topics include the Million Man March and the branches of the U.S. armed services. Sidebars appear at the top of a text page and are set in a box.

### Biographies

*WEAL* profiles a wide variety of interesting and influential people—including lawyers, judges, government and civic leaders, and historical and modern figures—who have played a part in creating or shaping U.S. law. Each biography includes a timeline, which shows important moments in the subject's life as well as important historical events of the period. Biographies appear alphabetically by the subject's last name.

## ADDITIONAL FEATURES OF THIS SET

**Enhancements** Throughout *WEAL*, readers will find a broad array of photographs, charts, graphs, manuscripts, legal forms, and other visual aids enhancing the ideas presented in the text.

**Indexes** *WEAL* features a cases index and a cumulative index in a separate volume.

### Appendixes

Three appendix volumes are included with *WEAL*, containing hundreds of pages of documents, laws, manuscripts, and forms fundamental to and characteristic of U.S. law.

### Milestone Cases in the Law

A special Appendix volume entitled Milestones in the Law, allows readers to take a close look at landmark cases in U.S. law. Readers can explore the reasoning of the judges and the arguments of the attorneys that produced major decisions on important legal and social issues. Included in each Milestone are the opinions of the lower courts; the briefs presented by the parties to the U.S. Supreme Court; and the decision of the Supreme Court, including the majority opinion and all concurring and dissenting opinions for each case.

### Primary Documents

There is also an Appendix volume containing more than 60 primary documents, such as the English Bill of Rights, Martin Luther King Jr.'s Letter from Brimingham Jail, and several presidential speeches.

### Citations

Wherever possible, *WEAL* entries include citations for cases and statutes mentioned in the text. These allow readers wishing to do additional research to find the opinions and statutes cited. Two sample citations, with explanations of common citation terms, can be seen below and opposite.

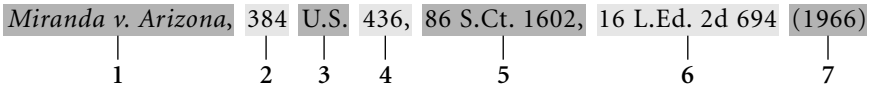


1. *Case title.* The title of the case is set in i and indicates the names of the parties. The suit in this sample citation was between Ernesto A. Miranda and the state of Arizona.
2. *Reporter volume number.* The number preceding the reporter name indicates the reporter volume containing the case. (The volume number appears on the spine of the reporter, along with the reporter name).
3. *Reporter name.* The reporter name is abbreviated. The suit in the sample citation is from the reporter, or series of books, called *U.S. Reports,* which contains cases from the U.S. Supreme Court. (Numerous reporters publish cases from the federal and state courts.)
4. *Reporter page.* The number following the reporter name indicates the reporter page on which the case begins.
5. *Additional reporter page.* Many cases may be found in more than one reporter. The suit in the sample citation also appears in volume 86 of the *Supreme Court Reporter*, beginning on page 1602.
6. *Additional reporter citation.* The suit in the sample citation is also reported in volume 16 of the *Lawyer's Edition*, second series, beginning on page 694.
7. *Year of decision.* The year the court issued its decision in the case appears in parentheses at the end of the cite.

*Brady Handgun Violence Prevention Act*, Pub. L. No. 103–159, 107 Stat. 1536 (18 U.S.C.A. §§ 921–925A)

1 2 3 4 5 6 7 8

1. *Statute title.*
2. *Public law number.* In the sample citation, the number 103 indicates this law was passed by the 103d Congress, and the number 159 indicates it was the 159th law passed by that Congress.
3. *Reporter volume number.* The number preceding the reporter abbreviation indicates the reporter volume containing the statute.
4. *Reporter name.* The reporter name is abbreviated. The statute in the sample citation is from *Statutes at Large.*
5. *Reporter page.* The number following the reporter abbreviation indicates the reporter page on which the statute begins.
6. *Title number.* Federal laws are divided into major sections with specific titles. The number preceding a reference to the U.S. Code stands for the section called Crimes and Criminal Procedure.
7. *Additional reporter.* The statute in the sample citation may also be found in the *U.S. Code Annotated.*
8. *Section numbers.* The section numbers following a reference to the *U.S. Code Annotated* indicate where the statute appears in that reporter.

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# F (cont.)

## ♦ FRIEDAN, BETTY NAOMI GOLDSTEIN

In 1963, author Betty Naomi Goldstein Friedan's first book, *The Feminine Mystique,* launched the feminist movement, which eventually expanded the lifestyle choices for U.S. women. By the 1990s, she had also become a spokesperson for older and economically disadvantaged people and was recognized and honored by women outside the United States for her global leadership and influence on women's issues.

She was born Elizabeth Naomi Goldstein on February 4, 1921, in Peoria, Illinois. Her father, Harry Goldstein, was a successful storeowner who emigrated from Russia. Her mother, Miriam Horowitz Goldstein, graduated from Bradley Polytechnic Institute and wrote society news as a Peoria newspaper journalist. Friedan entered Smith College in 1939, majored in psychology, and served as editor of the college newspaper. After graduating summa cum laude in 1942, she interviewed for the only type of job available to women journalists at the time: researcher for a major U.S. news magazine. But the position of researcher amounted to doing all the work while someone else received the byline, and Friedan was not interested in that. Instead, she wrote for a Greenwich Village news agency, covering the labor movement.

When WORLD WAR II ended, Friedan lost her job to a returning veteran. (Returning veterans were guaranteed their prewar jobs.) Friedan then thought of going to medical school, a choice very few women could pursue. But instead, she followed the traditional path, marrying returning veteran Carl Friedan in 1947 and starting a family. After her first child was born, she worked for another newspaper, but was fired when she became pregnant with her second child. She protested to the newspaper guild, as no one had ever questioned her ability to perform her job, but was told that losing her job was "her fault" because she was pregnant. At that time, the term *sex discrimination* did not exist.

While she was a mother and housewife living in suburban New York, Friedan wrote articles for women's magazines such as *McCall's* and *Ladies' Home Journal* on a freelance basis. Tapped by *McCall's* to report on the state of the alumnae of the Smith class of 1942 as they returned for their fifteenth reunion in 1957, Friedan visited the campus and was struck by the students' lack of interest in careers after graduation. This disinterest in intellectual pursuits contrasted greatly with Friedan's perception of her Smith classmates of the 1930s and 1940s.

Extensive research over the next several years brought Friedan to the conclusion that women's magazines were at fault because they defined women solely in relationship to their husbands and children. This had not always been the case; the magazines had evolved in the postwar years from promoters of women's independence into paeans to consumerism, bent on keeping U.S. housewives in the home by selling them more and more household products.

"MEN WEREN'T REALLY THE ENEMY—THEY WERE FELLOW VICTIMS SUFFERING FROM AN OUTMODED MASCULINE MYSTIQUE THAT MADE THEM FEEL UNNECESSARILY INADEQUATE WHEN THERE WERE NO BEARS TO KILL."
—BETTY FRIEDAN

*Betty Friedan.*
LIBRARY OF CONGRESS

Not surprisingly, Friedan was unable to get her work on this issue published in an acceptable format by the women's magazines she was criticizing. Her report was published in book form in 1963 as *The Feminine Mystique,* in which she chronicled the dissatisfaction of suburban housewives, dubbing it "the problem with no name." The book struck a common chord among U.S. women, who recognized themselves in the women she described in its pages. For the first time since the women's suffrage movement ended successfully with the passage of the NINETEENTH AMENDMENT granting women the right to vote, women gathered together on a large scale to work for equal rights with men, a concept that at the time was nothing less than revolutionary.

In 1966, with Kathryn Clarenbach, Friedan cofounded the NATIONAL ORGANIZATION FOR WOMEN (NOW). NOW's original statement of purpose was written by Friedan: "Women want feminism to take the actions needed to bring women into the mainstream of American society, now; full equality for women, in fully equal partnership with men." Friedan served as NOW's president until 1970. Under her leadership, NOW propelled the women's movement from middle-class suburbia to nationwide activism. Friedan also helped organize the National Abortion Rights Action League (now NARAL PRO-CHOICE AMERICA) in 1969, and the National Women's Political Caucus in 1971. All three organizations were still active participants in U.S. politics and culture into the 2000s.

On August 26, 1970, the fiftieth anniversary of the ratification of the Nineteenth Amendment, the Women's Strike for Equality took place. Friedan's brainchild, this WOMEN'S RIGHTS demonstration was the largest that had ever occurred in the United States. Thousands of U.S. women marched in the streets for a day rather than working as housewives, secretaries, and waitresses, to show how poorly society would fare without women's labor and to demand three things for women: equal opportunity in employment and education, 24-hour CHILD CARE centers, and legalized abortion. Although the media at the time portrayed the strike as frivolous or a result of female hysteria, their compulsion to pay the event any attention at all was a step forward for the women's movement.

By the 1980s, it was apparent that Friedan's feminism differed from that of other U.S. feminists such as GLORIA STEINEM and KATE

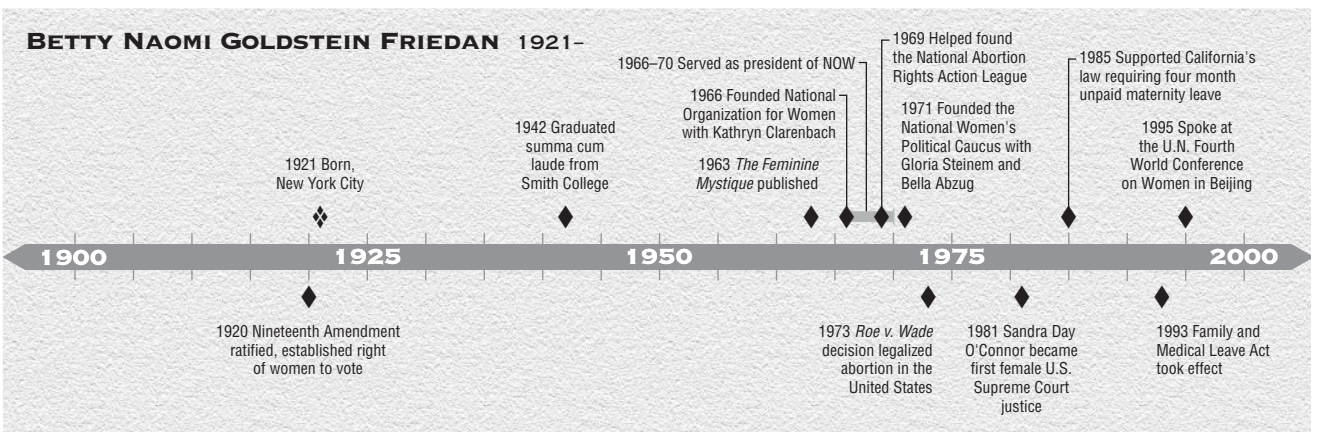

MILLETT. When other feminist leaders were saying women could "have it all," meaning a successful career, fulfilling marriage, and happy children, Friedan, who had been divorced from her husband since 1969, wrote articles such as "Being 'Superwoman' Is Not the Way to Go" (*Woman's Day,* Oct. 1981) and "Feminism's Next Step" (*New York Times Magazine,* July 1981). Rather than focusing on sexual violence and abortion rights, Friedan's writings emphasized the necessity of working with other groups to improve the plight of children, members of minorities, and economically disadvantaged people.

In her 1981 book *The Second Stage,* Friedan called for an open discussion of traditional feminism's denial of the importance of family and of women's needs to nurture and be nurtured. She predicted that the women's movement would die out if feminists did not take the issues of children and men more seriously. It was not surprising that this position was roundly criticized as antifeminist by many of Friedan's contemporaries.

Another position that was at odds with NOW surfaced in 1986 when she declared her support for a California law requiring employers to grant up to four months of unpaid leave for women who were disabled by pregnancy or childbirth. The 1980 law (West's Ann. Cal. Gov. Code § 12945) was the subject of a U.S. Supreme Court case, *California Federal Savings and Loan Ass'n v. Guerra,* 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1987). NOW opposed the law as a dangerous singling out of women for special treatment; Friedan called it outrageous that feminists would side with employers who were trying to evade offering women important and needed benefits. These opinions, among other things, caused Friedan to lose support within the women's movement as well as an audience in the media.

Another reason for Friedan's fall from media attention was her style, which, like her philosophy, also differed from that of other feminist spokespersons, most notably Steinem. Whereas Steinem was a favorite of the media and actively courted their attention, Friedan did not seek out media attention and often railed against what she saw as the stereotyping of women. Her stormy relationship with the media contributed to an image of her as old, unattractive, and out of touch with modern feminism.

By 1990, although Friedan was moving away from what was considered mainstream feminism, she had earned a permanent place in history. That year, *Life* magazine named her one of the one hundred most important people of the twentieth century.

In September 1995, a new generation of journalists seemed surprised at Friedan's extensive international influence, which was demonstrated at the Non-Governmental Organization Forum on Women, an unofficial gathering at the U.N. Fourth World Conference on Women. Friedan attended the forum as one of only a few women who had participated in all four U.N. women's conferences since the first one was held in Mexico City in 1975. Women of all nationalities and ages sought her out, listened to her speeches, and attended her workshops.

Friedan's focus was to move the women's movement away from conflict with men and toward economic policies that benefited both sexes, such as shorter workweeks and higher minimum wages. As she saw it, policies that were pro-women alone were portrayed in the media and by opponents as anti-family and anti-men. Poor economic conditions and shrinking job opportunities often resulted in the treatment of women's developing economic power as a scapegoat for difficulties suffered by men or families. In Friedan's opinion, this unnecessary tension between men and women diverted attention from the issues that really threatened the well-being of women and families: poverty, unemployment, lack of education and HEALTH CARE, and crime. To combat these problems, she supported a proposal put forth by distinguished academics and public policy researchers that would provide low-income parents, not just women on WELFARE, with HEALTH INSURANCE and child care.

Friedan's focus on more gender-neutral policies was an outgrowth of her research into gerontology and the issues facing aging people. The 1993 publication of *The Fountain of Age* had put Friedan back in the media spotlight as the spokesperson of her generation, an advocate for freeing older people from damaging stereotypes, just as she had previously done for women. Friedan brought to her advocacy for older people her philosophy of cooperation, developed during her decades of work in the women's movement. A delegate to the Fourth White House Conference on Aging in 1995, she fought

against the polarization of young and older U.S. citizens that some politicians encouraged in order to increase their political power. She eschewed the idea of forced retirement, instead arguing for older workers to voluntarily and gradually cut down their work schedules and to explore job sharing and consultant work. At the same time, Friedan vowed to save programs such as SOCIAL SECURITY, MEDICARE, and MEDICAID, which were under attack by fiscal conservatives. With that full plate of issues, it was clear that she was not ready to stop her advocacy work.

In the late 1990s, Friedan continued to speak at schools and other forums around the country and throughout the world. She wrote for a number of publications and taught at several schools, including the University of California, New York University, and Mount Vernon College in Washington, D.C, where she was the Distinguished Professor of Social Evolution. She has also served as an adjunct scholar at the Smithsonian Institution's Wilson International Center for Scholars. In 2000, she published her autobiography, *Life So Far*.

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Evans, Sara. 1980. *Personal Politics: The Roots of Women's Liberation in the Civil Rights Movement and the New Left.* New York: Random House.

Horowtiz, Daniel. 2000. *Betty Friedan and the Making of "The Feminine Mystique": The American Left, the Cold War, and Modern Feminism.* Boston: Univ. of Massachusetts Press.

CROSS-REFERENCES

Age Discrimination; Ireland, Patricia; Sex Discrimination.

## FRIEND OF THE COURT

*A person who has a strong interest in a matter that is the subject of a lawsuit in which he or she is not a party.*

A friend of the court may be given permission by the court to file a written statement of his or her views on the subject, ostensibly to bolster the case of one party but even more to persuade the court to adopt the party's views. The Latin translation, AMICUS CURIAE, is used most often for a friend of the court; the written argument that he or she files may be called an amicus curiae brief.

## FRIENDLY FIRE

*Fire burning in a place where it was intended to burn, although damages may result. In a military conflict, the discharge of weapons against one's own troops.*

A fire burning in a fireplace is regarded as a friendly fire, in spite of the fact that extensive smoke damage might result therefrom. Ordinarily, when an individual purchases fire insurance, the coverage does not extend to damages resulting from a friendly fire but only to loss resulting from an uncontrollable hostile fire.

## ♦ FRIENDLY, HENRY JACOB

Henry Jacob Friendly served for 27 years on the U.S. Court of Appeals for the Second Circuit, where he won a wide reputation for his scholarly, well-crafted opinions.

Friendly was born July 3, 1903, in Elmira, New York. He graduated summa cum laude from Harvard College in 1923 and from Harvard Law School in 1927. In law school he studied under Professor FELIX FRANKFURTER, later a U.S. Supreme Court Justice, who recommended Friendly for a clerkship with Supreme Court Justice LOUIS D. BRANDEIS. After his clerkship Friendly entered private practice where he specialized in railroad reorganizations and corporate law. He later became a vice president and general counsel for Pan American Airways.

In 1959, President DWIGHT D. EISENHOWER appointed Friendly to the U.S. Court of Appeals for the Second Circuit, where he remained until his death. Although Friendly was a semi-retired senior judge during his last years on the court, he remained an active participant and was involved in more than one hundred cases each year. He served as chief judge of the court from 1971 to 1973. In 1974, Friendly took on the additional duties of the presiding judge of the Special Railroad Court, which was established to deal with the reorganization of rail service in the Northeast and the Midwest that resulted from the BANKRUPTCY of the Penn Central Railroad and the former Conrail.

Friendly wrote nearly a thousand judicial opinions as well as a number of notes and articles on a wide range of issues, but he is probably best known for his work in the areas of diversity jurisdiction, CRIMINAL PROCEDURE, and SECURITIES LAW. Diversity jurisdiction refers to the jurisdiction that federal courts have over lawsuits in which the plaintiff and the defendant are residents of different states. Friendly first became interested in the subject when he was in

law school, and one of his first articles was "The Historic Basis of Diversity Jurisdiction," 41 *Harvard Law Review,* 1928. Later, after the U.S. Supreme Court had established a new precedent for cases involving diversity jurisdiction (*Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817 82 L. Ed. 1188 [1938]). Friendly wrote, "In Praise of *Erie*—and of the New Federal Common Law," 39 *New York University Law Review,* 1964. A few years later he provided an overview of federal jurisdiction in *Federal Jurisdiction: A General View* (1973).

During the 1960s Friendly became involved in the debate over changes in criminal procedure that were occurring as the U.S. Supreme Court, in a series of decisions, held that many of the rights guaranteed in the BILL OF RIGHTS applied to the states. In "The Bill of Rights as a Code of Criminal Procedure," *Benchmarks* (1967), Friendly expressed doubts about some of the Court's decisions and worried that they would cut off debate in Congress and the state legislatures that might have proved fruitful in developing new solutions to the problems of criminal procedure. He also criticized the decision in MIRANDA V. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), on the ground that it was predicated on the unfounded assumption that all CUSTODIAL INTERROGATIONS are inherently coercive.

In the area of securities law, Friendly wrote more than one hundred opinions, several of them in the relatively new field of transnational law, which deals with corporations that have activities in several countries. He was also notably unsympathetic toward white-collar criminals who perpetrated financial frauds; in *United States v. Benjamin,* 328 F.2d 854 (1954), he observed that "[i]n our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar."

Friendly's colleagues respected him for his scholarship, his reasoning, and his self-restraint. In 1977, he received the Presidential Medal of Freedom from President GERALD R. FORD for having brought "a brilliance and a sense of precision to American Jurisprudence, sharpening its focus and strengthening its commitment to the high goal of equal and exact justice for every American citizen." As another federal jurist, JOHN MINOR WISDOM, put it, Friendly was "unsurpassed as a judge—in the power of his reasoning, the depth of his knowledge of the law, and his balanced judgment in decision-making."

In 1985, Sophie Stern, Friendly's wife of 55 years, died. Despondent over her death and plagued by failing eyesight, Friendly took his own life in his New York City apartment on March 11, 1986.

FURTHER READINGS

Norman, Michael. 1986. "Henry J. Friendly, Federal Judge in Court of Appeals, Is Dead at 82." *New York Times* (March 12).

## FRIENDLY SUIT

*A lawsuit brought by an executor or administrator of the estate of a deceased person in the name of a creditor as if that creditor had initiated the action. The executor or administrator brings the suit against himself or herself in order to compel the creditors to take an equal distribution of the assets of the estate. An action brought by parties who agree to submit some doubtful question to the court in order to obtain an opinion on that issue.*

"THE QUESTION OF HOW JUDGES GO ABOUT THE BUSINESS OF JUDGING CONTINUES TO HOLD INTEREST—ALTHOUGH APPARENTLY MORE FOR LAWYERS AND LAW PROFESSORS THAN FOR JUDGES."
—HENRY FRIENDLY

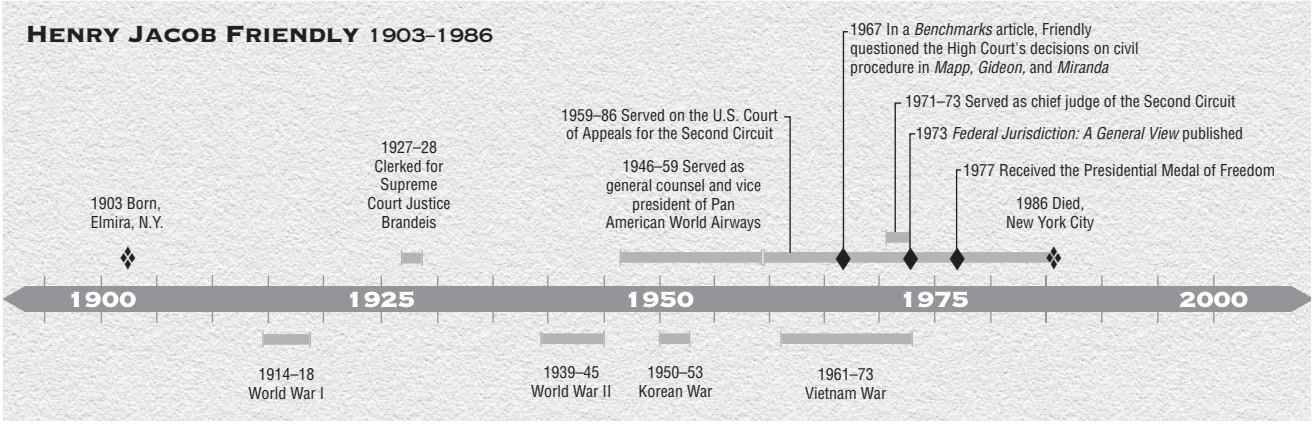

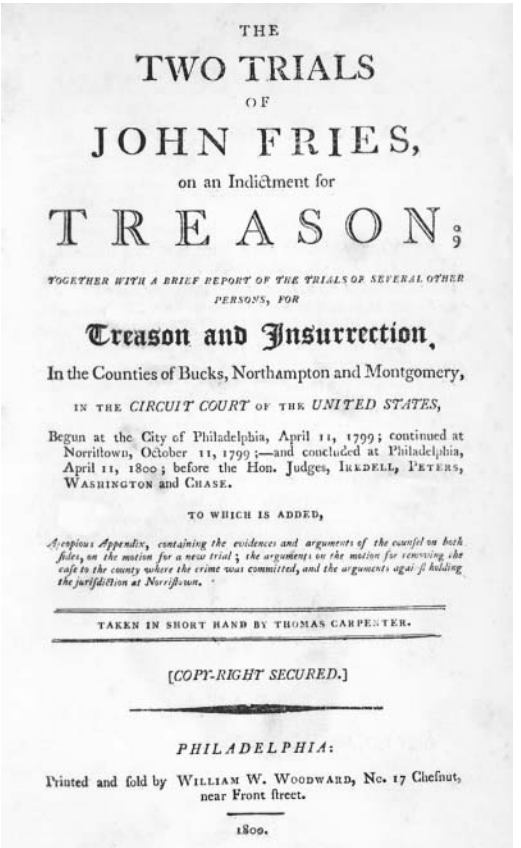

THE
TWO TRIALS
OF
JOHN FRIES,
on an Indictment for
TREASON;
TOGETHER WITH A BRIEF REPORT OF THE TRIALS OF SEVERAL OTHER PERSONS, FOR
Treason and Insurrection,
In the Counties of Bucks, Northampton and Montgomery,
IN THE CIRCUIT COURT OF THE UNITED STATES,
Begun at the City of Philadelphia, April 11, 1799; continued at Norrittown, October 11, 1799;—and concluded at Philadelphia, April 11, 1800; before the Hon. Judges, IREDELL, PETERS, WASHINGTON and CHASE.
TO WHICH IS ADDED,
A copious Appendix, containing the evidences and arguments of the counsel on both sides, on the motion for a new trial; the arguments on the motion for removing the case to the county where the crime was committed, and the arguments against holding the jurisdiction at Norrifstown.
TAKEN IN SHORT HAND BY THOMAS CARPENTER.
[COPY-RIGHT SECURED.]
PHILADELPHIA:
Printed and sold by WILLIAM W. WOODWARD, No. 17 Chesnut, near Front street.
1800.

*In 1800 William W. Woodword, a Philadelphia publisher, used shorthand notes taken by Thomas Carpenter to produce a report of John Fries's two trials for treason.*

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## FRIES'S REBELLION

John Fries was an auctioneer from rural Pennsylvania who led a small group of tax protesters in what came to be known as Fries's Rebellion. He was tried and convicted of TREASON but was eventually pardoned.

Fries served as a captain in the Continental Army during the WHISKEY REBELLION of 1794. He then returned to Pennsylvania to resume his life there. In 1798, Congress authorized the collection of property taxes to replenish funds depleted by the Whiskey Rebellion and to finance an anticipated war with France. Revenue officers were sent to all parts of the United States to assess the value of homes, land, and slaves for taxation. The tax assessment was well publicized and understood in urban areas, where most residents paid little attention to the assessors' activities. However, in the rural regions of northeastern Pennsylvania, where many residents spoke and read only German, many people were unaware of Congress's action and were resentful and fearful of the inquisitive assessors. They responded by attacking the revenue officers, both verbally and physically. Their treatment of the assessors was dubbed the Hot Water War, after an incident in which a woman dumped a bucket of hot water on a revenue agent.

The Pennsylvanians' protests escalated until a group of residents took several revenue officers captive and held them until they had satisfactorily explained their actions. Upon their release, the officers arrested twenty-three men for insurrection. Fries and a group of men who believed that the property tax was a deprivation of liberty took up arms and liberated their detained comrades. When the group resisted orders from President JOHN ADAMS to disperse and to allow the federal officers to carry out their duties, Fries and its other leaders were arrested for treason.

Fries was brought to trial in 1799, before Judge Richard Peters, of the Pennsylvania District Court, and Justice JAMES IREDELL, of the Supreme Court. Fries's defense counsel argued that their client's offense was a simple protest that perhaps could be characterized as SEDITION, but certainly did not rise to the level of treason, a capital crime. They contended that, in a free republic, the treason charge should be reserved for the most extreme cases of armed attempt to overthrow the government.

Defense counsel's pleas for freedom of expression of political sentiment did not convince members of the jury, who were probably influenced by Iredell's and Peters's instructions. In those instructions, Peters equated opposing or preventing the implementation of a law with treason, and Iredell agreed with him. Fries was found guilty, but was granted a new trial when the court learned that before the trial began, one juror had expressed a belief in his guilt.

Fries's second trial took place in April 1800, before Justice SAMUEL CHASE, of the Supreme Court, and Judge Peters. Determined to expedite the second trial, Chase took the unprecedented step of preparing an opinion on the law of the case. Before the trial began, he distributed copies of his summary to the defense attorneys, the district attorney, and the jury. Chase made it clear that his opinion represented the court's view of the law of treason and that the defense would not be permitted to present lengthy arguments to the contrary, as it had in the first trial.

Outraged that the court had prejudged their client's case, Fries's attorneys withdrew from the case. Fries chose to proceed to trial without benefit of LEGAL REPRESENTATION. He was again found guilty and sentenced to death by hanging.

However, after studying the case, President Adams pardoned him and the other insurgents. Soon after his pardon, Fries was promoted from captain to lieutenant colonel in the Montgomery County, Pennsylvania, militia.

Justice Chase's conduct in Fries's second trial was harshly criticized as indirectly depriving Fries of counsel. The justice's actions were used against him in 1805, in an unsuccessful IMPEACHMENT proceeding.

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CROSS-REFERENCES

Whiskey Rebellion.

## FRISK

*A term used in* CRIMINAL LAW *to refer to the superficial running of the hands over the body of an individual by a law enforcement agent or official in order to determine whether such individual is holding an illegal object, such as a weapon or narcotics. A frisk is distinguishable from a search, which is a more extensive examination of an individual.*

CROSS-REFERENCES

Stop and Frisk.

## FRIVOLOUS

*Of minimal importance; legally worthless.*

A *frivolous suit* is one without any legal merit. In some cases, such an action might be brought in bad faith for the purpose of harrassing the defendant. In such a case, the individual bringing the frivolous suit might be liable for damages for MALICIOUS PROSECUTION.

A *frivolous appeal* is one that is completely lacking merit, since no reviewable question has been raised therein.

## FROLIC

*Activities performed by an employee during working hours that are not considered to be in the course of his or her employment, since they are for the employee's personal purposes only.*

The doctrine of RESPONDEAT SUPERIOR makes a principal liable for the TORTS of his or her agent occurring during the course of employment. This is based on the concept that a principal has control over his or her agent's behavior. If an agent was hired to drive from point A to point B, and, through reckless driving, hit a pedestrian along the way, the principal would ordinarily be held liable. If, however, the agent was engaged in frolic, the principal would not be liable. This might occur, for example, if an employee were hired to transport goods from point A to point B and made several detours along the way for personal reasons. If the employee became involved in an accident while on a frolic, the employer would not be liable unless it could be established that he or she was negligent in the hiring or supervision of the employee.

## FRONTIERO V. RICHARDSON

The fight to end gender discrimination in the U.S. began in the nineteenth century with the women's suffrage movement and the enactment of laws that protected the property that women brought into marriages. By the 1960s, the focus had shifted to ending pay and benefit discrimination based on gender. By the early 1970s, Congress had passed the EQUAL RIGHTS AMENDMENT (ERA) of the U.S. Constitution, which proclaimed equality between the genders. Ratification appeared close by 1973, as 38 states had ratified the ERA. The court system also became an arena for the issue of gender discrimination. The U.S. Supreme Court began to consider cases of gender discrimination but hesitated to place gender in the same category as race or ethnicity as a SUSPECT CLASSIFICATION inviting the most rigorous constitutional review. However, a plurality of the court endorsed gender as a suspect classification in *Frontiero v. Richardson*, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed.2d 583 (1973). This important case pushed the Court, and society in general, to recognize the legal disabilities that women had lived with for centuries. Though not a landmark decision, *Frontiero* signaled the willingness of the high court to take gender issues seriously.

The facts of the case illustrated the disparate treatment built into U.S. society concerning the role of women. Sharron Frontiero was a U.S. Air Force officer who was married to Joseph Frontiero, a full-time student at a college near the Alabama base where Sharron was stationed. Congress had passed a law that provided fringe

benefits to members of the armed forces in the hopes that they would re-enlist and pursue a military career. Under this law, a member of the armed forces with dependents was entitled to an increased housing allowance and comprehensive dependent medical and dental care. However, the law made a distinction between male and female members. A serviceman could claim his wife as a dependent simply by certifying that they were married. A servicewomen like Frontiero, however, could not claim her husband as a dependent unless she proved that he was dependent upon her for more than one-half of his support. Joseph Frontiero's living expenses totaled $354 per month, but he received $250 per month in veteran's benefits. Therefore, he was not dependent on his wife for more than one-half of his support. Based on these calculations, the Air Force denied Sharron Fronteiro the additional benefits.

Frontiero sued the Air Force, alleging that the difference in treatment was unconstitutional discrimination under the Fifth Amendment's **DUE PROCESS CLAUSE**. A three-judge panel from the U.S. Court for the Middle District of Alabama rejected this claim, with one judge dissenting. Frontiero, with the help of the **AMERICAN CIVIL LIBERTIES UNION** (ACLU) and its attorney, **RUTH BADER GINSBURG**, took the case to the U.S. Supreme Court.

The Court, in an 8–1 decision, overturned the lower ruling and held that the salary supplement law violated the Due Process Clause. However, the justices could not agree on the constitutional standard of review that should be applied to allegations of gender discrimination. In a plurality opinion for four justices, Justice **WILLIAM BRENNAN** concluded that gender, like race, was a suspect classification. The suspect classification standard holds that laws which classify people according to race, ethnicity, or religion are inherently suspect and that they are subject to the **STRICT SCRUTINY** test of **JUDICIAL REVIEW**. Strict scrutiny requires the state to provide a compelling interest for the challenged law and to demonstrate that the law has been narrowly tailored to achieve its purpose. If a suspect classification is not involved, the Court will apply the **RATIONAL BASIS TEST**, which requires the state to provide any type of reasonable ground for the legislation. Under strict scrutiny, the government has a difficult burden to meet, while under the rational basis test, most laws will be upheld.

In 1971, the Court, in *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed.2d 225, extended the application of the **EQUAL PROTECTION CLAUSE** of the **FOURTEENTH AMENDMENT** to gender-based discrimination. However, the Court had used the rational basis test. Nevertheless, Justice Brennan argued that *Reed* implied that gender was a suspect classification and that strict scrutiny should apply. There were four reasons in his view for making gender a suspect class. First, gender was, like race, an "immutable" accident of birth that was irrelevant to the purpose of the federal law. Second, Brennan pointed to the long history in the U.S. of discrimination based on gender. He noted that statute books had been filled with "gross, stereotyped distinctions between the sexes." Although women had seen their lot improve in modern America, they still faced "pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena." In addition, gender, like race, was a highly visible trait. Finally, Brennan acknowledged the ERA, which made clear that gender classifications were "inherently invidious."

Based on these factors, Brennan had no trouble ruling the law unconstitutional. The government could not show a compelling interest for the benefit discrimination. It claimed that administrative efficiency justified the law, as most members of the armed forces were men. It would have cost more to process applications required from Frontiero and the small percentage of women in uniform. This was not a compelling interest for Brennan and the plurality.

Justice **LEWIS POWELL**, in a concurring opinion joined by Chief Justice **WARREN BURGER** and Justice **HARRY BLACKMUN**, agreed that the law was unconstitutional. Powell disagreed with the plurality's conclusion that strict scrutiny was warranted. He contended that the Court should not make that conclusion while the ratification of the ERA was pending. By declaring gender a suspect clarification, the judicial branch would, in effect, trump the ERA. In his view, it was better to allow the states to determine whether gender should be regarded as a suspect class. The seven-year ratification period had run for just one year, so the Court should refrain from ruling. Powell concluded that the rational basis test applied in *Reed* worked in this case as well. The government did not have a reasonable justification for unequal treatment of service members.

Justice WILLIAM REHNQUIST dissented, citing the reasoning of the lower court to show that the administrative savings from not requiring men to justify dependent benefit eligibility provided a rational basis for the law.

By failing to gain a majority, the court did not establish gender as a suspect classification requiring strict scrutiny. By the end of the decade, the ERA was losing support. The time period for ratification was extended until 1982, but that deadline passed and the ERA died. The Court, in *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed.2d 397 (1976), settled on an "intermediate scrutiny" standard for gender discrimination. Therefore, classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.

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CROSS-REFERENCES

Women's Rights.

## FRUIT OF THE POISONOUS TREE

*The principle that prohibits the use of secondary evidence in trial that was culled directly from primary evidence derived from an illegal* SEARCH AND SEIZURE.

The "fruit of the poisonous tree" doctrine is an offspring of the EXCLUSIONARY RULE. The exclusionary rule mandates that evidence obtained from an illegal arrest, unreasonable search, or coercive interrogation must be excluded from trial. Under the fruit of the poisonous tree doctrine, evidence is also excluded from trial if it was gained through evidence uncovered in an illegal arrest, unreasonable search, or coercive interrogation. Like the exclusionary rule, the fruit of the poisonous tree doctrine was established primarily to deter law enforcement from violating rights against unreasonable searches and seizures.

The name *fruit of the poisonous tree* is thus a metaphor: the poisonous tree is evidence seized in an illegal arrest, search, or interrogation by law enforcement. The fruit of this poisonous tree is evidence later discovered because of knowledge gained from the first illegal search, arrest, or interrogation. The poisonous tree and the fruit are both excluded from a criminal trial.

Assume that a police officer searches the automobile of a person stopped for a minor traffic violation. This violation is the only reason the officer conducts the search; nothing indicates that the driver is impaired by drugs or alcohol, and no other circumstances would lead a reasonable officer to believe that the car contains evidence of a crime. This is an unreasonable search under the FOURTH AMENDMENT to the U.S. Constitution.

Assume further that the officer finds a small amount of marijuana in the vehicle. The driver is subsequently charged with possession of a controlled substance and chooses to go to trial. The marijuana evidence culled from this search is excluded from trial under the exclusionary rule, and the criminal charges are dropped for lack of evidence.

Also suppose that before the original charges are dismissed, the police officers ask a magistrate or judge for a warrant to search the home of the driver. The only evidence used as a basis, or PROBABLE CAUSE, for the warrant is the small amount of marijuana found in the vehicle search. The magistrate, unaware that the marijuana was uncovered in an illegal search, approves the warrant for the home search.

The officers search the driver's home and find a lawn mower stolen from a local park facility. Under the fruit of the poisonous tree doctrine, the lawn mower must be excluded from any trial on theft charges because the search of the house was based on evidence gathered in a previous illegal search.

The Supreme Court first hinted at the fruit of the poisonous tree doctrine in *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920). In *Silverthorne,* defendant Frederick W. Silverthorne was arrested on suspicion of federal violations in connection with his lumber business. Government agents then conducted a warrantless, illegal search of the Silverthorne offices. Based on the evidence discovered in the search, the prosecution requested more documents, and the court ordered Silverthorne to produce the documents. Silverthorne refused and was jailed for CONTEMPT of court.

On appeal, the Supreme Court reversed the contempt judgment. In its argument to the High

Court, the government conceded that the search was illegal and that the prosecution was not entitled to keep the documents obtained in it. However, the government held that it was entitled to copy the documents and use knowledge gained from the documents for future prosecution. The Court rejected this argument. According to the Court, "[T]he essence of forbidding the acquisition of evidence in a certain way is that . . . it shall not be used at all." *Silverthorne* concerned only evidence gained in the first illegal search or seizure, but the wording of the opinion paved the way for the exclusion of evidence gained in subsequent searches and seizures.

The term *fruit of the poisonous tree* was first used in *Nardone v. United States,* 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939). In *Nardone,* Frank C. Nardone appealed his convictions for SMUGGLING and concealing alcohol and for conspiracy to do the same. In an earlier decision, the High Court had ruled that an interception of Nardone's telephone conversations by government agents violated the Communications Act of 1934 (47 U.S.C.A. § 605). The issue before the Court was whether the trial court erred in refusing to allow Nardone's lawyer to question the prosecution on whether, and in what way, it had used information obtained in the illegal WIRE TAPPING.

In reversing Nardone's convictions, the Court stated that once a defendant has established that evidence was illegally seized, the trial court "must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree." The *Nardone* opinion established that evidence obtained in violation of a statute was subject to exclusion if it was obtained in violation of a statutory right.

The fruit of the poisonous tree doctrine was first held applicable to Fourth Amendment violations in the landmark case *Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The Court in *Wong Sun* also set forth the test for determining how closely derivative evidence must be related to illegally obtained evidence to warrant exclusion.

In *Wong Sun,* a number of federal narcotics agents had arrested Hom Way in San Francisco at 2:00 A.M. on June 4, 1959, on suspicion of narcotics activity. Although the agents had been watching Way for six weeks, they did not have a warrant for his arrest. Way was searched, and the agents found heroin in his possession. After his arrest, Way stated that he had bought an ounce of heroin the night before from Blackie Toy, the proprietor of a laundry on Leavenworth Street.

Though Way had never been an informant for the police, the agents cruised Leavenworth Street. At 6:00 A.M., they stopped at Oye's Laundry. The rest of the agents remained out of sight while Agent Alton Wong rang the bell. When James Wah Toy answered the door, Wong said he was there for laundry and dry cleaning. Toy answered that he did not open until 8:00 A.M. and started to close the door. Wong then identified himself as a federal narcotics agent. Toy slammed the door and began to run down the hallway, through the laundry, and to his bedroom, where his wife and child were sleeping. Again without a warrant, Wong and the other agents broke open the door, followed Toy, and arrested him. A search of the premises uncovered no illegal drugs.

While Toy was in handcuffs, one of the agents told him that Way had said Toy sold Way narcotics. Toy denied selling narcotics, but then said he knew someone who had. When asked who, Toy answered that he knew the man only as "Johnny." Toy told the officers that "Johnny" lived on Eleventh Avenue, and then he described the house. Toy also volunteered that "Johnny" kept about an ounce of heroin in his bedroom, and that he and "Johnny" had smoked some heroin the night before.

The agents left and located the house on Eleventh Avenue. Without a search or an arrest warrant, they entered the home, went to the bedroom, and found Johnny Yee. After a "discussion" with the agents, Yee surrendered a little less than one ounce of heroin.

The same morning, Yee and Toy were taken to the office of the Bureau of Narcotics. While in custody there, Yee stated that he had gotten the heroin about four days earlier from Toy and another person he knew as "Sea Dog." The agents then asked Toy about "Sea Dog," and Toy identified "Sea Dog" as Wong Sun. Some of the agents took Toy to Sun's neighborhood, where Toy pointed out Sun's house. The agents walked past Sun's wife and arrested Sun, who had been sleeping in his bedroom. A search of the premises turned up no illegal drugs.

Toy and Yee were arraigned in federal court on June 4, 1959, and Sun was arraigned the next day. All were released without bail. A few days

later, Toy, Yee, and Sun were interrogated separately at the Narcotics Bureau by Agent William Wong. Sun and Toy made written statements but refused to sign them.

Sun and Toy were tried jointly on charges of transporting and concealing narcotics in violation of 21 U.S.C.A. § 174. Way did not testify at the trial. The government offered Yee as its principal witness, but Yee recanted his statement to Agent William Wong and invoked his **FIFTH AMENDMENT** right against **SELF-INCRIMINATION**. With only four items in evidence, Sun and Toy were convicted by the court in a bench trial. The Court of Appeals for the Ninth Circuit affirmed the convictions (*Wong Sun,* 288 F.2d 366 (9th Cir. 1961)). Sun and Toy appealed to the U.S. Supreme Court.

The Supreme Court accepted the case and reversed the convictions. The Court began its analysis by noting that the court of appeals had held that the arrests of both Sun and Toy were illegal. The question was whether the four items in evidence against Sun and Toy were admissible despite the illegality of the arrests. The four pieces of evidence were the oral statements made by Toy in his bedroom at the time of his arrest, the heroin surrendered to the agents by Yee, Toy's unsigned statement to Agent William Wong, and Sun's unsigned statement to Agent William Wong.

The government submitted several theories to support the proposition that the statements made by Toy in his bedroom were properly admitted at trial. The Court rejected all the arguments. According to the Court, the arrest was illegal because the agents had no evidence supporting it other than the word of Way, an arrestee who had never been an informer for law enforcement. The officers did not even know whether Toy was the person they were looking for. Furthermore, Toy's flight did not give the officers probable cause to arrest Toy: Agent Alton Wong had first posed as a customer, and this made Toy's flight ambiguous and not necessarily the product of a guilty mind. Thus, under the exclusionary rule, the oral statements made by Toy in his bedroom should not have been allowed at trial.

The Court then turned to the actual drug evidence seized from Yee. The Court, in deference to *Nardone,* stated, "We need not hold that all evidence is 'fruit of the poisonous tree.'" Instead, the question in such a situation was "'whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"

According to the Court, the narcotics in *Wong Sun* were indeed "come at" by use of Toy's statements. Toy's statements were, in fact, the only evidence used to justify entrance to Yee's bedroom. Since the statements by Toy were inadmissible, the narcotics in Yee's possession were also inadmissible, as fruit of the poisonous tree. The Court went on to hold that Sun's written statements about Toy should also have been excluded as **HEARSAY**, and the Court ultimately overturned Toy's conviction.

The Court did not reverse Sun's conviction. The heroin in Yee's possession was admissible at trial, as was Sun's own statement. According to the Court, "The exclusion of narcotics as to Toy was required solely by their tainted relationship to information unlawfully obtained from Toy, and not by any official impropriety connected with their surrender by Yee." The Court did, however, grant Sun a new trial, because it was unable to conclude that Toy's statements, erroneously admitted at trial as evidence against Sun, had not affected the verdict. The Court advised that on remand and in similar cases, "particular care ought to be taken . . . when the crucial element of the accused's possession is proved solely by his own admissions."

In determining whether evidence is fruit of a poisonous tree, the trial court judge must examine all the facts surrounding the initial seizure of evidence and the subsequent gathering of evidence. This determination is usually made by the judge in a suppression hearing held before trial. In this hearing, the judge must first determine that an illegal search or seizure occurred and then decide whether the evidence was obtained as a result of the illegal search or seizure.

The Supreme Court found such a causal connection lacking in *United States v. Ceccolini,* 435 U.S. 268, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978). In *Ceccolini,* Ralph Ceccolini was found guilty of perjury by a district court in New York. However, the court set aside the verdict after it threw out testimony by Lois Hennessey against Ceccolini. According to the district court, Hennessey's testimony was tied to an illegal search conducted a year earlier. The government

appealed to the U.S. Court of Appeals for the Second Circuit. The appeals court affirmed, and the government appealed to the U.S. Supreme Court.

According to the High Court, the exclusion of Hennessey's testimony was an error because sufficient time had elapsed to separate the illegal search from the testimony. Furthermore, Hennessey's testimony was not coerced by law enforcement officials as a result of the illegal search. An officer had questioned Hennessey four months after the search without specifically referring to the illegal search, and Hennessey volunteered the incriminating evidence against Ceccolini. The Court reversed, reasoning that the exclusion of testimony such as Hennessey's would not have a deterrent effect on misconduct by law enforcement officers.

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CROSS-REFERENCES

Criminal Law; Criminal Procedure.

## FRUSTRATION

*In the law of contracts, the destruction of the value of the performance that has been bargained for by the promisor as a result of a supervening event.*

Frustration of purpose has the effect of discharging the promisor from his or her obligation to perform, in spite of the fact that performance by the promisee is possible, since the purpose for which the contract was entered into has been destroyed. For example, an individual reserves a hall for a wedding. In the event that the wedding is called off, the value of the agreement would be destroyed. Even though the promisee could still literally perform the obligation by reserving and providing the hall for the wedding, the purpose for which the contract was entered into was defeated. Apart from a nonrefundable deposit fee, the promisor is ordinarily discharged from any contractual duty to rent the hall.

In order for frustration to be used as a defense for nonperformance, the value of the anticipated counterperformance must have been substantially destroyed and the frustrating occurrence must have been beyond the contemplation of the parties at the time the agreement was made.

## FUGITIVE FROM JUSTICE

*An individual who, after having committed a criminal offense, leaves the jurisdiction of the court where such crime has taken place or hides within such jurisdiction to escape prosecution.*

A fugitive from justice who flees from one state to another may be subjected to EXTRADITION in the state to which he or she has fled.

## FUGITIVE SLAVE ACT OF 1850

The Fugitive Slave Act of 1850 mandated that states to which escaped slaves fled were obligated to return them to their masters upon their discovery and subjected persons who helped runaway slaves to criminal sanctions. The first Fugitive Slave Act was enacted by Congress in 1793 but as the northern states abolished SLAVERY, the act was rarely enforced. The southern states bitterly resented the northern attitude toward slavery, which was ultimately demonstrated by the existence of the Underground Railroad, an arrangement by which abolitionists helped runaway slaves obtain freedom.

To placate the South, the Fugitive Slave Act of 1850 (9 Stat. 462) was enacted by Congress as part of the COMPROMISE OF 1850. It imposed a duty on all citizens to assist federal marshals to enforce the law or be prosecuted for their failure to do so. The act also required that when a slave was captured, he or she was to be brought before a federal court or commissioner, but the slave would not be tried by a jury nor would his or her testimony be given much weight. The statements of the slave's alleged owner were the main evidence, and the alleged owner was not even required to appear in court.

Northern reaction against the Fugitive Slave Act was strong, and many states enacted laws that nullified its effect, making it worthless. In cases where the law was enforced, threats or acts of mob violence often required the dispatch of federal troops. Persons convicted of violating the act were often heavily fined, imprisoned, or

both. The refusal of northern states to enforce the Fugitive Slave Act was alleged by South Carolina as one reason for its secession from the Union prior to the onset of the Civil War.

The acts of 1793 and 1850 remained legally operative until their repeal by Congress on June 28, 1864 (13 Stat. 200).

## ♦ FULBRIGHT, JAMES WILLIAM

James William Fulbright served as a U.S. senator from Arkansas from 1945 to 1974. Fulbright played an important role in shaping U.S. foreign policy as chairman of the Senate Foreign Relations Committee. His opposition to the VIETNAM WAR and to unbridled PRESIDENTIAL POWER in foreign affairs contributed to major shifts in the conduct of U.S. foreign relations.

Fulbright was born in Sumner, Missouri, on April 9, 1905, the son of a prosperous Arkansas businessman. Fulbright was the youngest of four children born to Jay and Roberta Waugh Fulbright. His father was a banker, farmer, and businessman. His mother wrote a column for the family-owned Fayetteville newspaper. He entered the University of Arkansas at the age of 16, and graduated in 1925. From 1925 to 1928, Fulbright attended Oxford University, in England, as a Rhodes Scholar. This educational experience deepened his intellectual interests and provided a strong background for public life. He graduated from George Washington University Law School in 1934, and then taught at that school for two years. In 1936, he accepted a teaching position at the University of Arkansas. In 1939, he was appointed president of the University of Arkansas. At age 34, he was the youngest college president in the United States. His tenure was short, however, as a new governor dismissed him in 1941.

Fulbright then turned his focus to politics. As a Democrat he was elected to the U.S. House of Representatives in 1942. In 1945, he was elected to the U.S. Senate. His previous time as a Rhodes Scholar led him to sponsor the Fulbright Act of 1946, 22 U.S.C.A. § 245 et seq., which awards scholarships to U.S. citizens for study and research abroad and to citizens from other nations for study in the United States. The establishment of the Fulbright Scholarship exchange program has proved to be an enduring legacy.

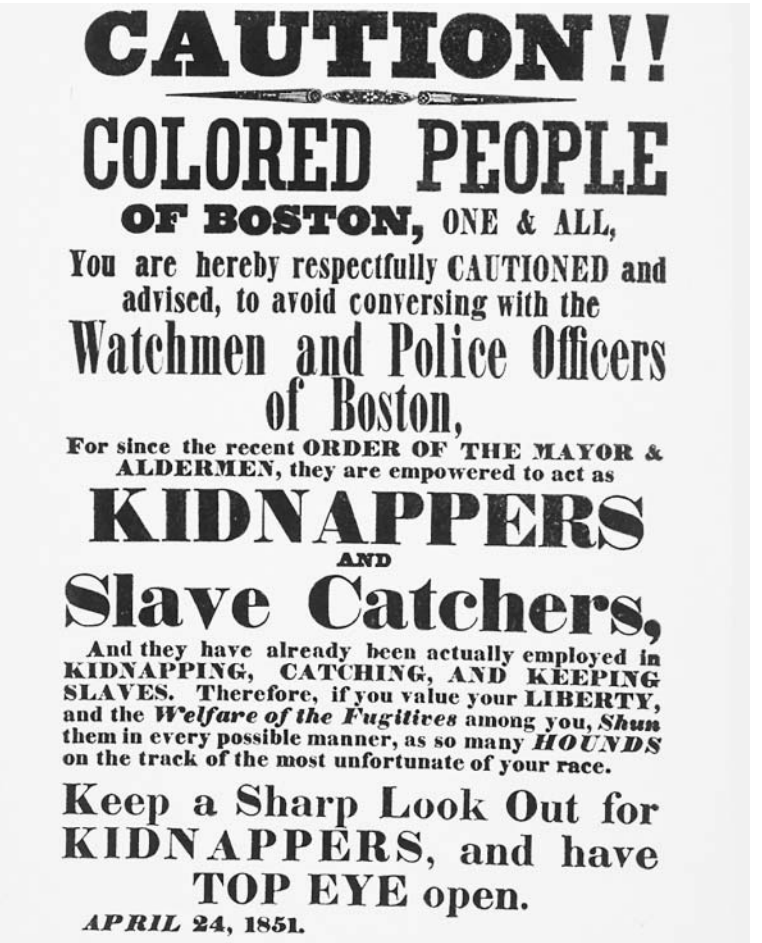
CAUTION!!

COLORED PEOPLE

OF BOSTON, ONE & ALL,

You are hereby respectfully CAUTIONED and advised, to avoid conversing with the

Watchmen and Police Officers of Boston,

For since the recent ORDER OF THE MAYOR & ALDERMEN, they are empowered to act as

KIDNAPPERS AND Slave Catchers,

And they have already been actually employed in KIDNAPPING, CATCHING, AND KEEPING SLAVES. Therefore, if you value your LIBERTY, and the *Welfare of the Fugitives* among you, *Shun* them in every possible manner, as so many *HOUNDS* on the track of the most unfortunate of your race.

Keep a Sharp Look Out for KIDNAPPERS, and have TOP EYE open.

*APRIL* 24, 1851.

*The Compromise of 1850 included the Fugitive Slave Act, which mandated that citizens assist in the capture of runaway slaves. Pictured here is a handbill warning African Americans in Boston to avoid law enforcement agents empowered to enforce the act.*

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Fulbright, although personally a moderate on matters of race, believed in the 1950s that he needed to move to the right on race issues to protect his political future in Arkansas. This led him to sign the Southern Manifesto, a 1956 document signed by southern senators and representatives that expressed their displeasure at the Supreme Court's decision in BROWN V. BOARD OF EDUCATION (*Brown I*), 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), which struck down state-sponsored racially segregated public school systems, and *Brown v. Board of Education (Brown II),* 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), in which the Court directed that schools be desegregated with "all deliberate speed." The manifesto condemned these decisions as abuses of judicial power and approved of Southern resistance, by all legal means, to the demand for desegregation. Fulbright doomed his national political prospects by signing the manifesto.

In the 1950s, Fulbright became a close friend and colleague of Senate Majority Leader LYNDON

*James W. Fulbright.*
LIBRARY OF CONGRESS

"POWER TENDS TO CONFUSE ITSELF WITH VIRTUE AND A GREAT NATION IS PECULIARLY SUSCEPTIBLE TO THE IDEA THAT ITS POWER IS A SIGN OF GOD'S FAVOR."
—JAMES W. FULBRIGHT

B. JOHNSON, a Democrat from Texas. In 1959, Johnson engineered Fulbright's elevation to chairman of the Senate Foreign Relations Committee. Following the election of JOHN F. KENNEDY as president in 1960, Johnson, now vice president, urged Kennedy to appoint Fulbright SECRETARY OF STATE. Johnson's efforts failed, in large part because Fulbright had supported the Southern Manifesto and racial SEGREGATION.

During the Kennedy administration, Fulbright opposed the United States's indirect involvement in the 1961 Bay of Pigs invasion, in which Cuban exiles made a futile attempt to overthrow the premier of Cuba, Fidel Castro. When the Vietnam War escalated under President Johnson, Fulbright became a consistent critic of presidential foreign policy. Fulbright had supported Johnson's Vietnam policy in the early part of the conflict, sponsoring the GULF OF TONKIN RESOLUTION in 1964, Pub. L. No. 88-408, 78 Stat. 384, which allowed Johnson to wage war without seeking a congressional declaration. Within a year, however, Fulbright had become convinced that Johnson had misled him about events that had brought about the 1964 resolution.

Fulbright used the Foreign Relations Committee as a platform to criticize Vietnam policy. In January 1966, he held televised hearings on Vietnam. Leading opponents of the war testified that the conflict was going badly and that the United States did not have a legitimate role to play in Vietnam. Fulbright called Secretary of State Dean Rusk to appear three times during the hearings, repeatedly asking hard questions about U.S.-Asian policy. These hearings and additional ones in 1967 gave credibility to the antiwar movement and damaged the Johnson administration's credibility.

Skeptical about U.S. foreign policy and the attitudes of those who conduct it, Fulbright criticized policy makers in his books, *Old Myths and New Realities* (1964) and *The Arrogance of Power* (1967). His opposition continued during the Nixon administration.

In 1974, Fulbright was defeated by Dale L. Bumpers in the Democratic primary election. He served as a Washington lobbyist following his defeat and remained active in the Fulbright Scholarship program. In 1993, President BILL

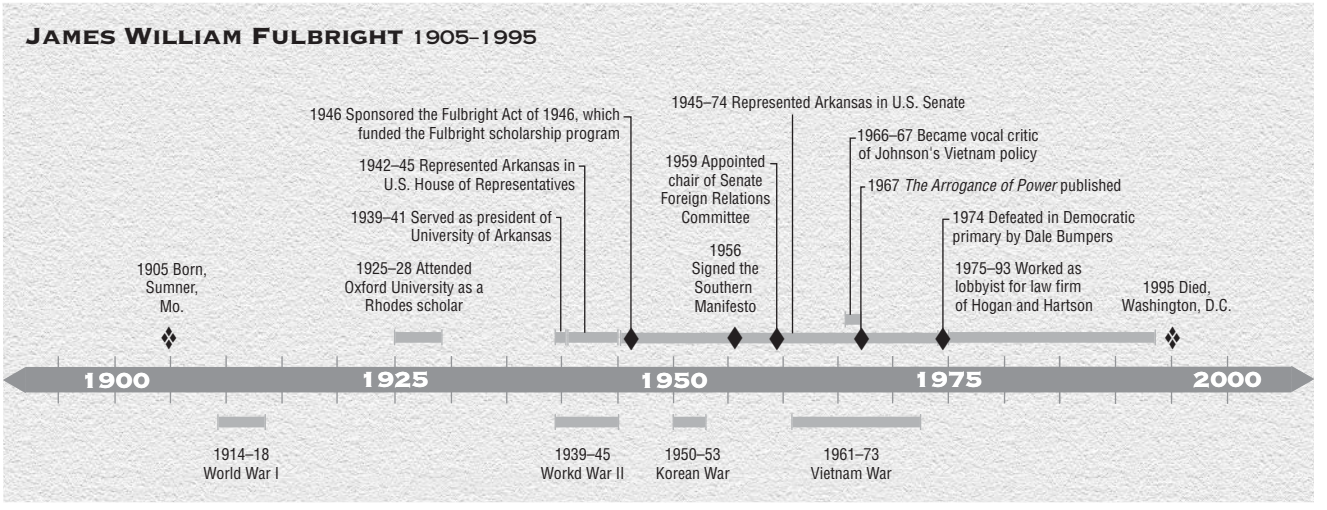

CLINTON awarded to Fulbright the Presidential Medal of Freedom, the highest award given to a civilian by the federal government, in honor of Fulbright's dedication to public service. Fulbright died of a stroke in Washington, D.C., on February 9, 1995.

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Cuban Missile Crisis; Vietnam War.

## FULL FAITH AND CREDIT CLAUSE

The Full Faith and Credit Clause—Article IV, Section 1, of the U.S. Constitution—provides that the various states must recognize legislative acts, public records, and judicial decisions of the other states within the United States. It states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The statute that implements the clause, 28 U.S.C.A. § 1738, further specifies that "a state's preclusion rules should control matters originally litigated in that state." The Full Faith and Credit Clause ensures that judicial decisions rendered by the courts in one state are recognized and honored in every other state. It also prevents parties from moving to another state to escape enforcement of a judgment or to relitigate a controversy already decided elsewhere, a practice known as forum shopping.

In drafting the Full Faith and Credit Clause, the Framers of the Constitution were motivated by a desire to unify their new country while preserving the autonomy of the states. To that end, they sought to guarantee that judgments rendered by the courts of one state would not be ignored by the courts of other states. The Supreme Court reiterated the Framers' intent when it held that the Full Faith and Credit Clause precluded any further litigation of a question previously decided by an Illinois court in *Milwaukee County v. M. E. White Co.,* 296 U.S. 268, 56 S. Ct. 229, 80 L. Ed. 220 (1935). The Court held that by including the clause in the Constitution, the Framers intended to make the states "integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin."

The Full Faith and Credit Clause is invoked primarily to enforce judgments. When a valid judgment is rendered by a court that has jurisdiction over the parties, and the parties receive proper notice of the action and a reasonable opportunity to be heard, the Full Faith and Credit Clause requires that the judgment receive the same effect in other states as in the state where it is entered. A party who obtains a judgment in one state may petition the court in another state to enforce the judgment. When this is done, the parties do not relitigate the issues, and the court in the second state is obliged to fully recognize and honor the judgment of the first court in determining the enforceability of the judgment and the procedure for its execution.

The Full Faith and Credit Clause has also been invoked to recognize the validity of a marriage. Traditionally, every state honored a marriage legally contracted in any other state. However, in 1993, the Hawaii Supreme Court held that Hawaii's statute restricting legal marriage to parties of the opposite sex establishes a sex-based classification, which is subject to STRICT SCRUTINY if challenged on EQUAL PROTECTION grounds (*Baehr v. Lewin,* 852 P.2d 44, 74 Haw. 530). Although the court did not recognize a constitutional right to same-sex marriage, it raised the possibility that a successful equal protection challenge to the state's marriage laws could eventually lead to state-sanctioned same-sex marriages. In response to the *Baehr* case, Congress in 1996 passed the Defense of Marriage Act (110 Stat. § 2419), which defines marriage as a union of a man and a woman for federal purposes and expressly grants states the right to refuse to recognize a same-sex marriage performed in another state.

During the 1980s and 1990s, the Full Faith and Credit Clause was applied to new matters. CHILD CUSTODY determinations had historically fallen under the jurisdiction of state courts, and before the 1970s, other states did not accord them full faith and credit enforcement. As a result, a divorced parent who was unhappy with one state's custody decision could sometimes obtain a more favorable ruling from another state. This was an incentive for a dissatisfied parent to KIDNAP a child and move to another state

in order to petition for custody. In response to this situation, the Uniform Child Custody Jurisdiction Act (UCCJA) was adopted by the National Conference of Commissioners on Uniform State Laws in 1968. By 1984, every state had adopted a version of the UCCJA. In 1980, Congress passed the Parental Kidnapping Prevention Act (28 U.S.C.A. § 1738A), which aids enforcement and promotes finality in child custody decisions by providing that valid custody decrees are entitled to full faith and credit enforcement in other states. The VIOLENCE AGAINST WOMEN ACT OF 1994 (Pub. L. No. 103-322 [codified in scattered sections of 8 U.S.C.A., 18 U.S.C.A., 42 U.S.C.A.]) extends full faith and credit to the enforcement of protective orders, which previously were not enforced except in the state where they were rendered. This gave a new measure of protection to victims who moved to a different state after obtaining a protective order in one state.

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## ♦ FULLER, MELVILLE WESTON

Melville Weston Fuller served as chief justice of the U.S. Supreme Court from 1888 to 1910. Fuller's term as chief justice was marked by many decisions that protected big business from federal laws that sought to regulate interstate commerce. In addition, the Fuller Court's restrictive reading of the FOURTEENTH AMENDMENT led it to render the infamous separate but equal racial SEGREGATION decision in PLESSY V. FERGUSON, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896).

Fuller was born February 11, 1833, in Augusta, Maine. He grew up in the household of his maternal grandfather, the chief justice of the Maine Supreme Judicial Court. Following his graduation from Bowdoin College in 1853, he apprenticed in his uncles' law offices and briefly attended Harvard Law School. Even though he did not receive a law degree, he was the first chief justice of the U.S. Supreme Court to serve with significant academic legal preparation. Fuller moved to Chicago in 1856 and established a law practice. An active member of the DEMOCRATIC PARTY, he served in the Illinois Constitutional Convention of 1861 and for one term (1862–64) in the state house of representatives. He attended as a delegate every national Democratic convention between 1864 and 1880.

Fuller withdrew from day-to-day politics after he married Mary Ellen Coolbaugh, the daughter of a prominent Chicago banker, in 1866. His law practice thrived because of this family connection, and with his new wealth, he invested in real estate. Fuller specialized in appellate practice, appearing before the U.S. Supreme Court many times.

Fuller's appointment to the Court in 1888 was driven by presidential politics and his long service to the Democratic Party. President GROVER CLEVELAND, a Democrat who believed that it would be essential to win the state of Illinois as part of his re-election bid, nominated Fuller as chief justice to replace MORRISON R. WAITE, who had died in March 1888. Fuller and Cleveland were friends and political colleagues. At the time, the press described Fuller as "the most obscure man ever appointed Chief Justice" (Baker 1991, 360). Others were more unkind, dubbing him "the fifth best lawyer from the City of Chicago" (review of *The Chief Justiceship of Melville W. Fuller* 1996, 109).

Fuller's 22-year term as chief justice was distinguished by his skillful handling of often contentious Court conferences. Justice OLIVER WENDELL HOLMES, JR. thought highly of Fuller's ability to maintain collegiality. At the end of his own legal career, Holmes ranked Fuller as the best chief justice under whom he had served. Fuller was an energetic jurist who also served on the Permanent Court of Arbitration, at The Hague, Netherlands. That international organization, comprising jurists from various countries, ruled on world disputes. In 1899, Fuller arbitrated a boundary dispute between Venezuela and British Guyana.

The U.S. economy grew rapidly while Fuller served as chief justice. This expansion led to the concentration of economic power in certain industries by a small number of individuals and corporations. The federal government's efforts to regulate interstate commerce and to curtail the power of monopolies and trusts met fierce opposition from both the affected businesses and those who believed in a restricted role for the national government. Opponents of national power argued for continued adherence to the doctrine of FEDERALISM. That doctrine has many facets, including a fundamental assumption that the national government must not intrude on the power of the states to manage their affairs.

Fuller believed in federalism, and he demonstrated this belief in his votes with the conservative majority on the Court. Writing for the majority in *United States v. E. C. Knight Co.,* 156 U.S. 1, 15 S. Ct. 249, 39 L. Ed. 325 (1895), Fuller took the teeth out of the SHERMAN ANTI-TRUST ACT of July 2, 1890, which had declared illegal "every contract, combination in the form of a trust, or conspiracy in restraint of trade and commerce among the several states" (26 Stat. 209, c. 647). Finding in favor of the Sugar Trust, a corporation that controlled virtually all sugar refining, Fuller held that a MONOPOLY of manufacturing was not a monopoly of trade or commerce prohibited by the Sherman Act, as the manufacture of a product for sale is not commerce. It was up to each state, not the federal government, to protect its citizens from monopolistic business practices. The mere fact that goods were transported in interstate commerce was not sufficient to give Congress, under the COMMERCE CLAUSE, the authority to regulate business. The holding in *Knight* survived until the NEW DEAL era of the 1930s, when power shifted to the federal government.

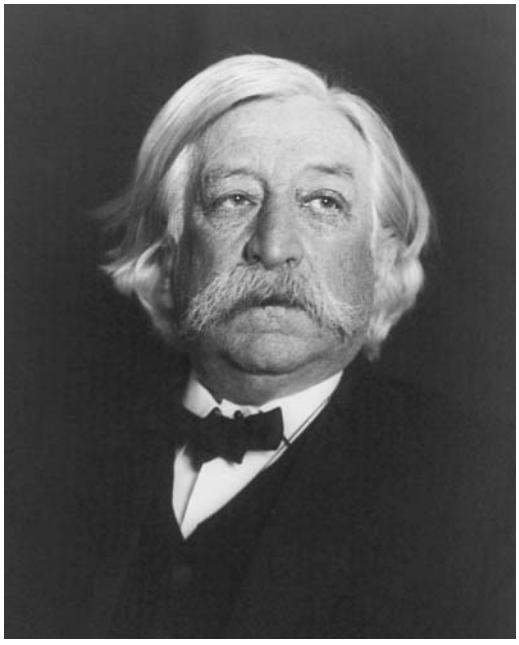

*Melville W. Fuller.*
LIBRARY OF CONGRESS

Fuller's belief in a limited role for the federal government was also demonstrated in POLLOCK V. FARMERS' LOAN & TRUST CO., 157 U.S. 429, 15 S. Ct. 673, 39 L. Ed. 759 (1895). In *Pollock,* Fuller ruled invalid a federal law that imposed a two-percent tax on incomes of more than $4,000. Article I of the Constitution requires that "direct taxes shall be apportioned among the several states . . . according to their respective numbers." In a 5–4 vote, Fuller's Court held that the new INCOME TAX was a direct tax insofar as it was based on incomes derived from land and, as such, it had to be apportioned among the states. As the law did not provide for APPORTIONMENT, it was unconstitutional.

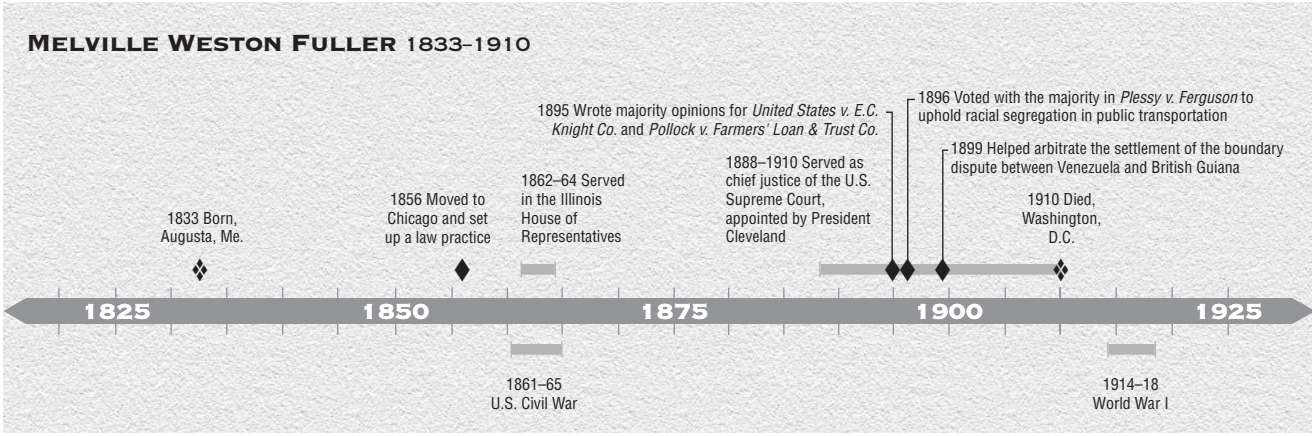

Decisions such as *Knight* and *Pollock* led critics to call Fuller and the conservative members of the Court the puppets of business interests and the protectors of wealth. In response to *Pollock,* the SIXTEENTH AMENDMENT was ratified by the states in 1913, authorizing the collection of a federal income tax.

Fuller's most dubious distinction is that he voted with the majority in *Plessy* to uphold racial segregation in public transportation. At issue in *Plessy* was an 1890 Louisiana law that required passenger trains that operated within the state to provide "separate but equal" accommodations for the "white and colored races." By a 7–1 vote, with one judge abstaining, the Court rejected the idea that the Fourteenth Amendment, enacted after the Civil War to preserve the CIVIL RIGHTS of newly freed slaves, "could have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either."

"IF THE PROVISIONS OF THE CONSTITUTION CAN BE SET ASIDE BY AN ACT OF CONGRESS, WHERE IS THE COURSE OF USURPATION TO END?" —MELVILLE WESTON FULLER

With its focus on a limited national government and support of legally enforced racial segregation, the 22-year period of the Fuller Court has, in the words of legal historian Richard A. Epstein, "often been regarded as a black hole of American Constitutional law." With the conservative political and legal renaissance of the 1980s and 1990s, however, Fuller came back into favor, being regarded by some legal scholars as a jurist who was committed to economic development, market institutions, and limited government.

Fuller died July 4, 1910, in Sorrento, Maine.

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## FUND

*A comprehensive term for any money that is set aside for a particular purpose or that is accessible for the satisfaction of debts or claims.*

The term *public funds* is a colloquial label for the revenue of a government, state, or MUNICIPAL CORPORATION.

## FUNDAMENTAL LAW

*The constitution of a state or nation; the basic law and principles contained in federal and state constitutions that direct and regulate the manner in which government is exercised.*

## FUNGIBLE

*A description applied to items of which each unit is identical to every other unit, such as in the case of grain, oil, or flour.*

Fungible goods are those that can readily be estimated and replaced according to weight, measure, and amount.

## FURMAN V. GEORGIA

In *Furman v. Georgia,* 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the U.S. Supreme Court struck down three death sentences, finding that they constituted CRUEL AND UNUSUAL PUNISHMENT in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. Hailed, at the time, as a victory for opponents of the death penalty, *Furman* actually helped states rewrite their death penalty laws to pass constitutional muster.

The path to *Furman* began in 1962 with ROBINSON V. CALIFORNIA, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758. In *Robinson,* the U.S. Supreme Court ruled that the Cruel and Unusual Punishments Clause could be applied to the states through the FOURTEENTH AMENDMENT. Opponents of the death penalty saw this ruling as an opportunity to litigate the constitutionality of state death penalty cases in federal court.

*Furman* centered on the convictions and death sentences of three African American men: William Henry Furman was convicted in Georgia for murder, Lucius Jackson was convicted in Georgia for rape, and Elmer Branch was convicted in Texas for rape. The juries in each of the cases were not mandated by law to vote for the death penalty, nor were they given specific criteria to evaluate in making their penalty decisions.

The U.S. Supreme Court issued a per curiam opinion, on a 5–4 vote to reverse the death sentences. The Court typically issues its decisions with a majority opinion written and signed by one the justices. On rare occasions the Court will issue a per curiam decision, which takes the form of a brief, unsigned opinion. A per curiam decision signifies that the Court was deeply divided over the reasons that went into its ultimate decision to either affirm or reverse the lower court.

All nine justices wrote a separate opinion to articulate their reasoning. Although five justices voted to reverse the death sentences, their concurring opinions revealed that it was a shaky coalition. Justices **WILLIAM O. DOUGLAS**, **WILLIAM J. BRENNAN JR.**, and **THURGOOD MARSHALL** doubted that any application of the death penalty could avoid being a cruel and unusual punishment.

Justice Douglas concluded that the death penalty was disproportionately applied to people who were poor and socially disadvantaged. This disproportion suggested that the Equal Protection Clause of the Fourteenth Amendment must be applied to strike down the death penalty because any inequality of application was cruel and unusual punishment. Douglas's opinion raised the possibility that proportionate application would make **CAPITAL PUNISHMENT** constitutional.

Justices Brennan and Marshall staked out an absolutist position, finding the death penalty per se cruel and unusual punishment, given the "evolving standards of decency" they saw in contemporary U.S. society. This meant that no matter the fact situation, no matter the proper application of **DUE PROCESS** and **EQUAL PROTECTION**, capital punishment was inherently unconstitutional.

The most influential opinion came from Justice **POTTER STEWART**:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Stewart held that because death was different from any other punishment, it had to be administered rationally and fairly. He rejected the absolutist position of Brennan and Marshall, yet still voted to reverse the penalties of Furman, Jackson, and Branch because he believed their death sentences were imposed capriciously.

Stewart looked at the circumstances surrounding the imposition of the three death sentences. The juries in these cases had been given unbridled discretion to do what they wished in deciding whether to impose capital punishment. The result, in Stewart's view, was that the death penalty was "wantonly and . . . freakishly imposed." These death sentences were "cruel and unusual in the same way that being struck by lightning is cruel and unusual."

*Elmer Branch, one of the plaintiffs in* Furman v. Georgia, *holds out a newspaper to another death row inmate after the Supreme Court held that the death penalty constituted cruel and unusual punishment.*
AP/WIDE WORLD PHOTOS

Justice **BYRON R. WHITE** took a slightly different tack, concluding that the infrequency of execution prevented the penalty from serving as an effective deterrent and from consistently meeting legitimate social needs for retribution.

Chief Justice **WARREN E. BURGER** dissented, as did Justices **HARRY A. BLACKMUN**, **LEWIS F. POWELL JR.**, and **WILLIAM H. REHNQUIST**. The dissenters argued that the Court was straying into an area properly delegated to the judgment of state legislatures. The private opinions of justices about the morality of capital punishment, they opined, should not be presented as public policy in a court of law.

The *Furman* decision stopped all executions then pending in the 39 states that authorized the death penalty. More than six hundred persons

were awaiting execution at the time. Faced with a splintered Supreme Court decision, states had three options: develop mandatory death sentences for crimes that were carefully defined by statute, develop jury guidelines to reduce juror discretion, or abolish capital punishment.

The state of Georgia chose to develop guidelines for jurors. Once a person is convicted in a capital trial, the jury must determine, in the penalty phase, whether any unique aggravating and MITIGATING CIRCUMSTANCES should be considered before the court decides whether to impose a death sentence. In 1976, the U.S. Supreme Court upheld these jury guidelines in GREGG V. GEORGIA, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859. With the *Gregg* decision, the four-year MORATORIUM on the death penalty ended and, according to some, launched the modern era of capital punishment.

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CROSS-REFERENCES

Incorporation Doctrine.

## FUTURE ACQUIRED PROPERTY

*Property that is received or obtained by a borrower subsequent to the date that he or she executes a loan agreement which offers property currently owned as collateral.*

Future acquired property, which is also known as after-acquired property, encompasses both PERSONAL PROPERTY and real property and provides additional collateral to ensure that a loan will be satisfied. There must, however, be a provision in the loan agreement between the borrower and the lender that gives the lender a right to the specific property of the borrower that he or she acquires subsequent to the execution of the agreement.

SECURED TRANSACTIONS frequently involve the treatment of personal property as future acquired property. For example, a debtor who owns a retail store might accept a future acquired property provision in a security agreement with a creditor in order to obtain funds to buy additional inventory. The purchase of new inventory constitutes additional collateral that ensures the satisfaction of the loan. Language commonly used to phrase a future acquired property term in a contract is "any or all obligations covered by the security agreement are to be secured by all inventory now or hereafter acquired by the debtor."

Mortgages, particularly those affecting commercial properties, involve the treatment of real property as future acquired property. The mortgagee (who is the lender) will include in the mortgage an after-acquired property clause which provides that the mortgagee will have an equitable lien, which is a right to have property used to repay a debt, in all the real property that the mortgagor (who is the borrower) obtains after the mortgage is executed. For example, ABC Co. owns Blackacre and borrows funds from XYZ Bank. ABC executes a note and mortgage on Blackacre to XYZ, which XYZ records. The mortgage also contains an after-acquired property clause. When ABC subsequently purchases Whiteacre to serve as its warehouse, XYZ automatically obtains an equitable lien in Whiteacre. Since a mortgage with an after-acquired property clause cannot be traced through an examination of the chain of title of the after-acquired property, anyone who subsequently buys or has a lien against the mortgagor's property has no notice of the equitable lien of the mortgagee. Such purchasers or lienors might, therefore, have greater rights to the property than the mortgagee if they took the property in GOOD FAITH and without notice. The mortgagee must take additional steps to protect the priority of his or her lien in future acquired property. It is a common practice for mortgage lenders to require that the mortgagor execute a recordable amendment to his or her mortgage describing in detail the future acquired property immediately after its acquisition.

The treatment of future acquired property varies, however, from jurisdiction to jurisdiction.

## FUTURE EARNINGS

*Earnings that, if it had not been for an injury, could have been made in the future, but which were lost as result of the injury.*

## FUTURE INTEREST

*A claim on property, real or personal, that will begin at some point in the future. A future interest allows the grantor to retain the right to use that property until the specified transfer date. Future interest agreements are often used by donors for tax purposes. For example, a person may grant a future interest in his or her home to a charity, with the stipulation that he will retain use of the home for the remainder of his life, also called a "life estate." Although the charity will not receive the property until the donor's death, the donor can claim a tax deduction the same year the future interest is granted. Also called* future estate.

CROSS-REFERENCES

Bequest; Will.

## FUTURES

*Contracts that promise to purchase or sell standard commodities at a forthcoming date and at a fixed price.*

This type of contract is an extremely speculative transaction and ordinarily involves such standard goods as rice or soybeans. Profit and loss are based upon promises to deliver—as opposed to possession of—the actual commodities.

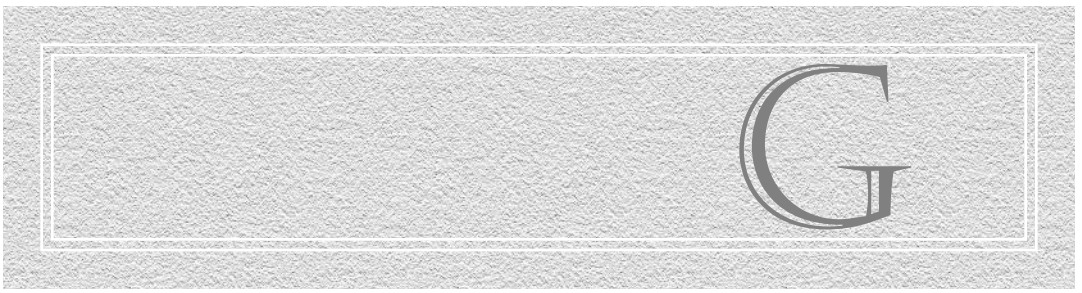

## GAG ORDER

*A court order to gag or bind an unruly defendant or remove her or him from the courtroom in order to prevent further interruptions in a trial. In a trial with a great deal of notoriety, a court order directed to attorneys and witnesses not to discuss the case with the media—such order being felt necessary to assure the defendant of a fair trial. A court order, directed to the media, not to report certain aspects of a crime or criminal investigation prior to trial.*

Unruly defendants who disrupt trials are very rarely literally gagged in modern courts. However, the U.S. Supreme Court has upheld the constitutionality of the practice in cases where a defendant is particularly disruptive. In *Illinois v. Allen,* 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970), the Court affirmed that gagging or binding the defendant, or removing him or her from the courtroom, does not violate the Confrontation Clause of the SIXTH AMENDMENT to the U.S. Constitution, which holds, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." According to Associate Justice HUGO L. BLACK, who wrote the Court's opinion,

> [A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

Of the three methods that the Court found available to a judge when faced with a disruptive defendant—gag and shackles, citation for CONTEMPT of court, and physical removal—the Court held that a gag and shackles should be considered the option of last resort. According to the Court,

> Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.

One of the few modern instances of literal gagging occurred in the 1968 CHICAGO EIGHT trial (sometimes called the Chicago Seven trial because one defendant was removed). In that trial, federal judge Julius J. Hoffman ordered BLACK PANTHERS leader BOBBY SEALE bound and gagged after Seale and Hoffman engaged in vociferous argument during the trial. Seale still managed to disrupt the proceedings. He was then removed from the trial and tried separately.

Courts may attempt to control prejudicial publicity by restricting the information that trial participants can give to the press both before

and during a trial. This remains the type of gag order most frequently used by courts.

Another type of gag order was for a while used by courts to restrict the press from reporting certain facts regarding a trial. This gag order became more common after the Supreme Court's 1966 decision in *Sheppard v. Maxwell,* 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600, in which it reversed a criminal conviction on the grounds that PRETRIAL PUBLICITY had unfairly prejudiced the jury against the defendant and denied him his Sixth Amendment right to a fair trial. However, in a 1976 decision, *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683, the Court held that pretrial gag orders on the press are unconstitutional. It ruled that such orders represent an unconstitutional PRIOR RESTRAINT and violate the FIRST AMENDMENT, which guarantees the FREEDOM OF THE PRESS.

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## GAG RULE

*A rule, regulation, or law that prohibits debate or discussion of a particular issue.*

Between 1836 and 1844, the U.S. House of Representatives adopted a series of resolutions and rules that banned petitions calling for the ABOLITION of SLAVERY. Known as gag rules, these measures effectively tabled antislavery petitions without submitting them to usual House procedures. Public outcry over the gag rules ultimately aided the antislavery cause, and the fierce House debate concerning their future anticipated later conflicts over slavery.

The submission of petitions to Congress has been a feature of the U.S. political system ever since its inception. The FIRST AMENDMENT to the U.S. Constitution guarantees "the right of the people . . . to petition the Government for a redress of grievances." First used in England, petitions have been considered an important means for the people to communicate grievances to their representatives or other public officials.

When the first gag rule was instituted in 1836, House protocol required that the first thirty days of each session of Congress be devoted to the reading of petitions from constituents. After those thirty days, petitions were read in the House every other Monday. Each petition was read aloud, printed, and assigned to an appropriate committee, which could choose to address or ignore it. This traditional procedure had been interrupted in 1835, when the House began to receive a large number of petitions advocating the abolition of slavery. Many of the petitions were organized by the American Anti-Slavery Society, which had formed in 1833.

Southern representatives, many of whom were slave owners and entertained no thoughts of abolishing slavery, were outraged by the antislavery petitions. In December 1835, southerners, uniting with northern Democrats, won a vote to table a petition that called for the abolition of slavery in the District of Columbia. Breaking established precedent, the pro-slavery faction also won a vote to deny the petition its usual discussion, printing, and referral to committee.

This procedure for the "gagging" of abolition petitions was made into a formal resolution by the House on May 26, 1836: "All petitions, memorials, resolutions, propositions, or papers, relating in any way, or to any extent whatsoever, to the subject of slavery or the abolition of slavery, shall, without being either printed or referred, be laid on the table and . . . no further action whatever shall be had thereon." The resolution incited strong opposition from many northerners, who perceived it as a violation of their time-honored CIVIL RIGHTS. JOHN QUINCY ADAMS, a former president and now a representative from Massachusetts, emerged as the leader of an effort to revoke the new resolution. JOHN C. CALHOUN (D-S.C.), although a member of the Senate rather than the House, orchestrated the battle to preserve it.

The pro-slavery faction succeeded in renewing the gag resolution, which expired at the end of each session of Congress, in both sessions of the Twenty-fifth Congress (1837–39). On January 28, 1840, it succeeded again when it won a vote to turn the resolution into House Rule 21 (in later versions, Rules 23 and 25):

> No petition, memorial, resolution, or other paper praying the abolition of slavery in the

District of Columbia, or any State or Territory, or the slave trade between the States or **TERRITORIES OF THE UNITED STATES**, in which it now exists, shall be received by this House, or entertained in any way whatever. As a formal House rule rather than a resolution, the gag rule was now a permanent part of House procedure and did not have to be renewed by vote each session.

This new gag rule provoked even stronger opposition. Whereas the previous gag resolution tabled antislavery petitions after they were received, the new gag rule did not allow petitions to be received. It was also more extreme than the Senate's approach, which was to receive such petitions but answer them in the negative. As a result of these changes, northerners who had previously supported the gag now joined Adams in opposing it. Several years later, on December 3, 1844, those opposed to the gag rule finally succeeded in rescinding it.

The term *gag rule* has also been applied to presidential regulations banning **ABORTION** counseling by employees of family planning clinics that received a particular type of federal funding.

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Congress of the United States.

## GAME

*Wild birds and beasts. The word includes all game birds and game animals.*

The state, in its sovereign power, owns game for the benefit of the general public. The only manner in which a private individual can acquire ownership in game is by possessing it lawfully such as by hunting and killing it under a license.

Generally, every individual has the right to hunt and take game in any public place where his or her presence is lawful, so long as the person neither violates statutory regulations nor injures or infringes upon the rights of others. A hunter does not acquire an absolute right to a wild animal by mere pursuit alone, and the individual forfeits any potential ownership by abandoning the chase prior to capture. The exclusive right to hunt or take game on privately owned property vests in the owner or his or her grantees. This property right of the owner is limited by the right of the state to regulate and preserve the game for public use. A suit for **TRESPASS** may be brought against one who interferes with another's right to hunt.

*An Ohio hunter displays a trophy buck taken during deer hunting season. Game laws govern the killing or taking of birds and beasts.*

AP/WIDE WORLD PHOTOS

A statute that proscribes the hunting of game without a license, and that requires the payment of a fee for such license, constitutes a proper exercise of the **POLICE POWER** of the state.

Game laws govern the killing or taking of birds and beasts. Game wardens ordinarily can arrest violators, seize illegally taken game, bring actions for trespass, or institute prosecutions for violations of the game laws.

Under a number of game laws, it is a penal offense to kill or take certain types of game in certain seasons of the year or without a license. A hunter is required to exhibit a license when properly called on to do so, and it constitutes a legal violation if the person cannot do so.

In a situation where an individual has lawfully obtained possession of game—enclosing and caring for them as domestic animals—the person can kill one or more of them if necessary for care and management or for humane purposes. In addition, an individual might be justified in killing game in violation of the law if it were necessary for the protection of persons or

**Hunting Participation in 1996**

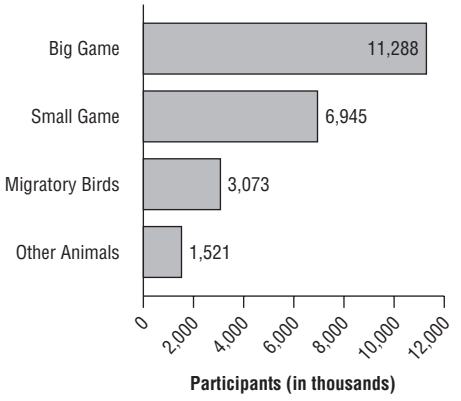


SOURCE: U.S. Census Bureau, *Statistical Abstract of the United States*, 2000.

property. It sometimes constitutes an offense to export game beyond the limits of the nation or state in which it was killed or captured, to ship it for sale in a certain manner, or to absent certain information upon the package.

The United States has entered into treaties with other countries, including Great Britain and Mexico, for the protection and preservation of migratory birds and game animals. It constitutes an offense to violate statutes that were enacted to implement such treaties. For example, a regulatory statute might limit the number of birds that can be killed by any individual each day, and it would be an offense to exceed such limit.

The federal government, subject to the consent of the state, can establish a game refuge for the protection of game and migratory birds and proscribe all hunting in the vicinity. The U.S. Fish and Wildlife Service is administered by the INTERIOR DEPARTMENT, to conserve and preserve fish and game in wildlife refuges and game ranges.

CROSS-REFERENCES

Endangered Species Act; Fish and Fishing.

## GAMING

*The act or practice of gambling; an agreement between two or more individuals to play collectively at a game of chance for a stake or wager, which will become the property of the winner and to which all involved make a contribution.*

Since the early 1990s, gaming laws have been in a constant state of flux. Regulation of gaming is generally reserved to the states, but the U.S. Congress became involved in it in 1988 with the passage of the Indian Gaming Regulatory Act (Gaming Act) (Pub. Law. No. 100-497, 102 Stat. 2467 [25 U.S.C.A. § 2701 et seq.] [Oct. 17, 1988]), which brought tribal gaming under the regulation of state and federal governments.

Before the 1990s, most gaming was illegal in a majority of states. Since the passage of the Gaming Act, many state legislatures have approved gaming in a variety of forms. Some states still outlaw all but charitable gambling, but most have expanded their definition of legal gaming operations to promote economic development.

The LEGAL HISTORY of gambling in the United States is marked by dramatic swings between prohibition and popularity. In colonial times, games of chance were generally illegal except for state and private lotteries. Other gaming was considered a sin and not fit for discussion in polite society. In the early nineteenth century, the popular belief changed from seeing gaming as a sin to seeing it as a vice. Gamblers were no longer considered fallen in the eyes of God but were now seen as simply victims of their own weaknesses.

Gaming came under renewed attack during the presidency of ANDREW JACKSON (1829–37). Part of the "Jacksonian morality" of the period revived the view of gambling as sinful. By 1862, gaming was illegal in all states except Missouri and Kentucky, both of which retained state lotteries.

After the Civil War, legal gaming experienced a brief renaissance, only to fall out of favor again in the 1890s. At this point, it was outlawed even in the western territories, where card games such as poker and blackjack had become a regular diversion in frontier life. By 1910, the United States was again virtually free of legalized gaming. Only Maryland and Kentucky allowed gambling, in the sole form of horse race betting.

In 1931, Nevada re-legalized casino gaming. Many states followed this lead in the 1930s by legalizing pari-mutuel betting, wherein all bets are pooled and then paid, less a management fee, to the holders of winning tickets. In 1963, New Hampshire formed the first STATE LOTTERY since the 1910s. By the 1990s, gaming was the

largest and fastest growing segment of the U.S. entertainment industry. In 1992, for example, U.S. citizens spent approximately four times more on gaming than on movies. Gaming is still illegal in some states, but most states have at least one form of legal gambling, most commonly a state-run lottery. In fact, instead of prohibiting gaming, many states now actively promote it by sponsoring lotteries and other games of chance.

Gaming laws vary from state to state. Idaho, for example, declares that "gambling is contrary to public policy and is strictly prohibited except for" pari-mutuel betting, bingo and raffle games for charity, and a state lottery (Idaho Const. art. III, § 20). Like lotteries in other states, the purpose of the one in Idaho is to generate revenue for the state. The lottery is run by the Idaho State Lottery Commission, which oversees all aspects of the game, including expenses and advertising.

In addition to lotteries, some states with direct access to major river systems or lakes expanded their venues for gaming to include riverboats. On July 1, 1989, Iowa became the first state to authorize its Racing and Gaming Commission to grant a license to qualified organizations for the purpose of conducting gambling games on excursion boats in counties where referendums have been approved. Illinois quickly followed Iowa with its Riverboat Gambling Act (230 ILCS 10), which went into effect on February 7, 1990. Four more states subsequently passed legislation permitting licensing for riverboat casinos: Indiana, Louisiana, Mississippi, and Missouri. Some riverboat gambling vessels are permanently docked while others embark on brief cruises and return to their docks after several hours of gaming, dining, and entertainment for passengers.

Alabama is one of the few states that prohibit all gambling except for charitable gaming. Alabama maintains no state lottery and punishes gambling through criminal statutes. Under the Code of Alabama, sections 13A-12-24 and 13A-12-25 (1975), the possession of gambling records is a class A misdemeanor, which carries a penalty of not more than one year in jail or a $2,000 fine, or both.

Nevada is the most permissive state for gambling. Its public policy of gaming holds that "[t]he gaming industry is vitally important to the economy of the state and the GENERAL WELFARE of the inhabitants" (Nev. Rev. Stat. § 463.0129). Nevada statutes allow the broadest range of gaming activities, including pari-mutuel betting, betting on sports competitions and other events, and the full panoply of casino games. Gambling is heavily regulated by the Nevada Gaming Commission, and a wide range of criminal statutes are designed to ensure cooperation with the regulations of the commission.

New Jersey is another active promoter of gaming. In 1976, New Jersey voters passed a REFERENDUM approving casino gaming, and that

*Patrons of this South Dakota casino can play blackjack and slot machines. Regulation of gaming is generally reserved to the states.*

DEADWOOD GULCH RESORT AND CASINO. DEADWOOD, SOUTH DAKOTA

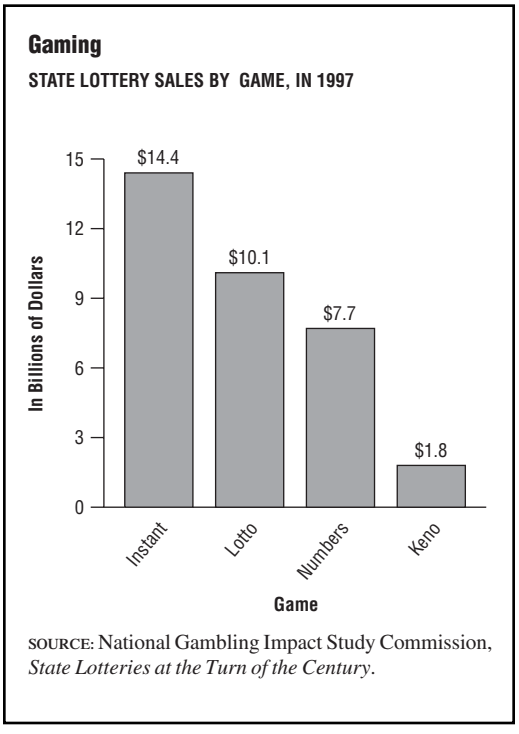


SOURCE: National Gambling Impact Study Commission, *State Lotteries at the Turn of the Century*.

decision was codified in the Casino Control Act (N.J. Stat. Ann. § 5:12-1 et seq.). Gaming is limited to Atlantic City, and it does not include betting on sports events other than horse and dog races. However, like Nevada, New Jersey offers the full array of casino games.

The Gaming Act divides all gambling into three classes. Class I includes all traditional Indian games performed as a part of, or in connection with, tribal ceremonies or celebrations. Class II is limited to bingo, pull tabs, and card games not explicitly prohibited by the laws of the state. Class III encompasses all other forms of gambling, such as slot machines, poker, blackjack, dice games, off-track betting (where bets may be placed by persons not at the race track) and pari-mutuel betting on horses and dogs, and lotteries.

An Indian tribe may operate a class I game without restrictions. It may offer class II games with the oversight of the National Indian Gaming Commission, and class III games only if it reaches an agreement with the state in which it resides.

The Gaming Act provides that Native American tribes may operate high-stakes casinos only if they reach an agreement with the state in which they reside. Under the act, a state is required to enter into GOOD FAITH negotiations with a federally recognized tribe to allow class III gaming that was legal in the state before the negotiations began. For example, if a state has legalized blackjack but not poker, blackjack is available for negotiations but not poker. Furthermore, when a state approves a new form of gambling, the state must make the new game available in negotiations with native tribes.

Native American groups have criticized the Gaming Act as interfering with tribal sovereignty. Indeed, a primary purpose of the act was to reconcile state interests in gaming with those of the tribe's. Before the act, some Native American tribes ran sizable gambling operations on their land without regulation by the federal or state governments.

The Gaming Act has also created opposition in some states that seeks to minimize gambling within their boundaries. Maine, for example, refused to give the Passamaquoddy tribe a license to conduct class III gaming operations on tribal land in Calais, near the Canadian border. The tribe sued the state for the right to conduct the high-stakes gaming. However, several years earlier, Maine had given the tribe land in exchange for the tribe's agreement to submit to state jurisdiction. In *Passamaquoddy Tribe v. Maine,* 1996 WL 44707, 75 F. 3d 784 (1st Cir. 1996), the First Circuit Court of Appeals ruled against the tribe. The court noted that Congress had been aware of Maine's agreement with the tribe and that Congress could have added to the Gaming Act, but chose not to, language making the act applicable to the state of Maine. According to the court, the gaming statute did not erase the 1980 agreement between the tribe and the state, and Maine had the right to refuse the tribe's request.

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Native American Rights; State Lottery.

## ♦ GANDHI, MOHANDAS KARAMCHAND

Widely known as Mahatma or "Great Soul," Mohandas Karamchand Gandhi is considered one of history's great political pacifists. He is remembered nearly as much for his austere persona (frail, bespectacled, clad only in a draped loincloth) as his political achievements. Gandhi played a major role in leading India to independence from British rule, in 1947, following WORLD WAR II.

The quintessential nonviolent activist, Gandhi dedicated his life to political and social reform. His teachings and example were to later influence such leaders as MARTIN LUTHER KING JR. and Nelson Mandela, who also utilized passive resistance and conversion rather than confrontation to bring about social change. Gandhi's signature marks were what he called Satyagraha (the force of truth and love) and the ancient Hindu ideal of Ahisma, or nonviolence toward all living things.

Gandhi was born in western India in 1869. Just 11 years earlier (in 1858), Britain had declared India a loyal colony. The young Gandhi completed a British-style high school education and was greatly impressed with British manners, genteel culture, and Christian beliefs. He aspired

to become a barrister at law, but was prohibited from doing so by the local head of his Hindu caste in Bombay. His first act of public defiance was his decision to assume the role of an "outcaste" and leave for London to study law.

While studying in England, Gandhi first read (and was inspired by) the Bible and the Bhagavad Gita, a Hindu religious poem. The story of the Sermon on the Mount in the Christian New Testament stirred in him an interest in passive resistance, and he also became intrigued with the ethical basis of vegetarianism after befriending a few enthusiasts at a local restaurant. He would later use dietary fasting as a means to draw attention to social causes.

But it was an incident in 1893 that put into motion Gandhi's focused role in history. While on a legal assignment in South Africa, he was traveling on a train near Johannesburg when he was ordered to move from his first-class compartment to the "colored" car in the rear of the train. He refused. At the next station, he was thrown from the train and spent the night at the station. The experience triggered his lifelong dedication to CIVIL RIGHTS and to the improvement of the lives of those with little political voice.

By 1906, he had taken on his first major political battle, confronting the South African government's move to fingerprint all Indians with publicized passive resistance. His efforts failed to provoke legal change, but he gained a wider following and influence.

Returning to India in 1915, Gandhi began a succession of political campaigns for independence in his homeland. He orchestrated widespread boycotts of British goods and services, and promoted peaceful noncooperation and nonviolent strikes. He is widely remembered for his 1930 defiance of the British law forbidding Indians to make their own salt. With 78 followers, he started on a march to the sea. Soon more than 60,000 supporters were arrested and jailed, but Britain was forced to negotiate with the gentle and powerful little man. Gandhi himself was arrested several times by the British, who considered him a troublemaker, and all total, spent about seven years of his life in jail.

Although his unrelenting efforts played a major role in India's independence in 1947, the victory was bittersweet for Gandhi. Britain announced not only the independence of India, but also the creation of the new Muslim state of Pakistan. With all his power and influence, Gandhi could not undo the years of hatred between the Hindus and Muslims. On January 30, 1948, while arriving for evening prayers, he was gunned down by a Hindu fanatic who blamed the formation of Pakistan on Gandhi's tolerance for Muslims. Gandhi was 78 at his death.

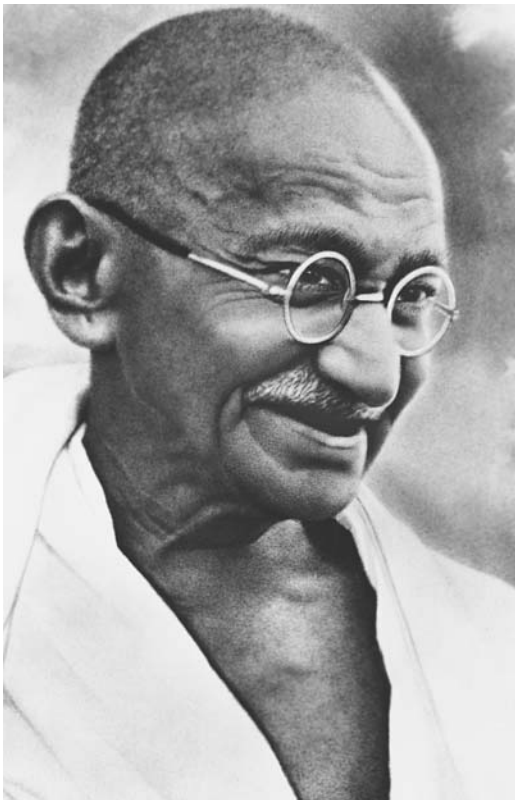

*Mohandas Gandhi.*
CORBIS-BETTMANN

"AN UNJUST LAW IS ITSELF A SPECIES OF VIOLENCE. ARREST FOR ITS BREACH IS MORE SO."
—MOHANDAS GANDHI

The legacy of Ghandi, and his call for "conversion, not coercion," spread worldwide. Passive resistance, peace marches, sitdown strikes, and silent noncooperation became common means of nonviolent activism through much of the latter twentieth century, especially influencing demonstrators during the civil rights and VIETNAM WAR eras. Governmental entities accustomed to punishing violent protesters were forced to revamp their response to demonstrations in which the only violence was coming from police or guards. The U.S. Supreme Court was inundated with cases clarifying the limitations on FIRST AMENDMENT rights of speech and association. To this day, passive resistance remains a principal form of protestation for those seeking attention for their cause(s).

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## GANGS

The rise in gang violence since the 1980s caused lawmakers to seek a variety of methods to curb the formation and activities of these gangs. According to statistics from the National Youth Gang Center, more than 24,500 gangs, consisting of more than 770,000 members, exist in about 3,330 cities in the United States. Congress spends as much as $20 billion per year in HEALTH CARE costs treating victims of gunshot wounds, and many of the incidents involving guns also involve street and other types of gangs.

A gang is sometimes difficult to define, especially in legal terms. Although gangs typically involve a congregation of individuals, primarily young males, certainly not all congregations or informal gatherings of young individuals constitute gangs. Definitions of gangs or street gangs vary among the laws governing them. Alabama law, for example, defines a "streetgang" as, "[A]ny combination, confederation, alliance, network, conspiracy, understanding, or similar arrangement in law or in fact, of three or more persons that, through its membership or through the agency of any member, engages in a course or pattern of criminal activity." Ala. Code § 13A-6-26 (2002).

Congress, state legislatures, and municipal governments have responded to the growing tide of gangs by considering a variety of bills addressing gang violence. Although efforts at the federal level have largely been unsuccessful, many states and municipalities have enacted laws designed to deter gang-related violence. Several of these statutes and ordinances have been fashioned as anti-loitering statutes, which often raise FIRST AMENDMENT concerns. The U.S. Supreme Court in 1999 made it more difficult for municipalities to draft gang loitering ordinances when it found that an ordinance such as this in the city of Chicago was unconstitutional. *City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999).

### Background

Activities of gangs predate the formation of the United States, though the common perception of these gangs has changed over time. The level of violence among street gangs is a relatively new phenomenon. Because different organizations and individuals define the term gang differently, accurate statistics are often difficult to compile. Many of the crimes committed by gangs are violent crimes, including HOMICIDE. Moreover, many of the gang members are juveniles or young adults.

According to the 1999 *National Youth Gang Survey*, 90 percent of gang members are male. Seventy-one percent of these members are between the ages of 15 and 24, and 16 percent are age 14 or under. About 79 percent of the gang members, according to this survey, are Hispanic or black, while only 14 percent are white. Because of the large discrepancy in the number of minorities, some commentators have suggested that young minority males are unfairly stereotyped, leading to RACIAL PROFILING of groups consisting of these young minority males.

Until the late 1980s, public and law enforcement agencies perceived gangs as racially and ethnically segregated, loosely organized fighting groups. However, a 1988 study of two major Los Angeles gangs, the Crips and the Bloods, showed that these gangs had become highly organized and entrepreneurial. These gangs had begun to engage in drug trafficking and had expanded their operations to multiple cities and states. As the gangs' interest in drug trade increased, so too did the level of violence perpetrated by their members. Between 1984 and 1993, the number of homicides committed by juveniles increased by 169 percent, representing a sharp increase in the number of gang-related crimes. Gang membership also increased markedly during this time. Between 1989 and 1995, the number of students reporting a gang presence at their school increased from 15 to 28 percent.

In response to the concerns caused by gang violence, several states and cities enacted statutes and ordinances designed to address street crime. In 1988, California enacted the Street Terrorism Enforcement and Prevention Act (STEP Act), Cal. Pen. Code §§ 186.20–.33 (2001). Since that time, at least 28 other states have enacted similar legislation. Cities with traditional gang strongholds, such as Chicago and Los Angeles, enacted a series of ordinances that enabled law enforcement to take a more proactive approach in fighting street gangs in those cities.

Boston, which experienced the most number of homicides in its history in 1990 due in large part to gang violence, initiated a community-based strategy designed to target at-risk youth

before they considered joining a gang. It also developed strategies for youth intervention and enforcement of GUN CONTROL laws. Due to this initiative, youth homicides dropped 80 percent from 1990 to 1995. Similarly, Salinas, California, experienced a 200 percent increase in the total number of homicides from 1984 to 1994. After receiving federal funding, the city improved it anti-gang task force and developed a series of additional programs. As a result of these programs, gang related assaults decreased by 23 percent, and the homicide rate fell by 62 percent.

### Federal Law

In his 1997 state of the union address, President BILL CLINTON requested that Congress "mount a full-scale assault on juvenile crime, with legislation that declares war on gangs," including more prosecutions and tougher penalties. The same year, Congress considered two bills under the title Anti-Gang Youth Violence Act of 1997 (S. 362, H.R. 810, 105th Cong.). Despite initial support for this legislation, which would have provided $200 million in funding for local programs, neither bill passed through its respective committee.

Although Congress has been unable to enact comprehensive anti-gang legislation, other federal law and actions of federal authorities have been used in the effort to curb gang violence. Federal prosecutors have relied upon the RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO) statute to prosecute gang members. In the 1990s, the number of RICO prosecutions against gang members more than doubled. Federal authorities have also assisted local law enforcement through a variety of funding programs. For example, in February 2003, the Los Angeles City/County Community Law Enforcement and Recovery (CLEAR) anti-gang program received $2.5 million in federal funding for its efforts in reducing gang-related violence.

### State Law

State legislatures have approached the problems related to gang violence through the enactment of a number of different statutes. Due to rulings by the courts within the various states, some legislatures are more restricted than others in enacting these types of legislation because of potential violations of state constitutional provisions.

**Gang Participation** A number of states proscribe participation in criminal street gangs, though these statutes vary from state to state. In Georgia, for instance, it is unlawful "for any person employed by or associated with a criminal street gang to conduct or participate [in such a gang] through a pattern of criminal gang activity." Ga. Code Ann. § 16-15-4 (1998). Likewise, in Texas, a person commits an offense "if, with an intent to establish, maintain, or participate in a combination of or in the profits of a combination of or as a member of a street gang, he commits or conspires to commit" one of several crimes, including violent crimes or distribution of controlled substances. Tex. Pen. Code Ann. § 71.02 (Vernon 1997).

**Gang Recruitment** Several states make it a crime for a person to recruit another to join a

**Demographic Profile of Gang Members, in 1995[a]**

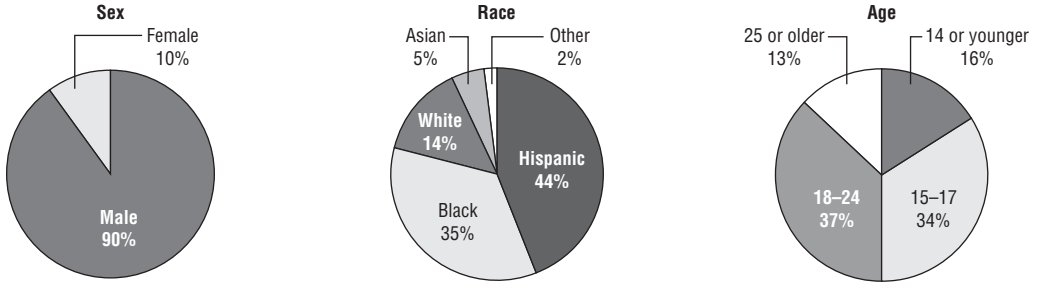


[a]846,000 total gang members.

SOURCE: National Center for Juvenile Statistics, *Juvenile Offenders and Victims: 1999 National Report*.

# Do Anti-gang Laws Violate the Constitution?

The national aversion to gangs has sparked debate over **FIRST AMENDMENT** rights of gang members versus citizens' safety at home and on the streets. Anti-gang injunctions and the enactment of anti-gang loitering ordinances are the two most prominent legal weapons currently employed against gangs. Critics of these efforts, most notably the **AMERICAN CIVIL LIBERTIES UNION** (ACLU), contend that these initiatives violate the First Amendment's right of free association. Defenders of anti-gang initiatives reply that society's rights to peace and quiet and to be free from harm outweigh the gang members' First Amendment associational rights.

Critics reject the idea that public safety allows the government to tell citizens they may not associate with each other. As long as citizens are not committing a crime, the state cannot tell them not to stand on a street corner together or walk down the street. The Supreme Court has recognized that **FREEDOM OF ASSOCIATION** is on par with **FREEDOM OF SPEECH** and **FREEDOM OF THE PRESS**.

The Court has allowed municipalities to require permits for parades, sound trucks, and demonstrations, in the interest of public order. However, the courts have been careful not to abridge the right of unpopular assemblies or protests. In 1977, the largely Jewish suburb of Skokie, Illinois, enacted three ordinances designed to prevent a march through the city by the American Nazi Party. The ACLU sued the city, and a federal court ruled that Skokie had violated the First Amendment by denying the Nazis a permit to march (*Collin v. Smith*, 578 F.2d 1197 [7th Cir. 1978]).

Critics of anti-gang laws also argue that just because gang members are unpopular to a large segment of society does not give society the right to restrict their right to association. Why, for example, should the **KU KLUX KLAN** be allowed to march through an African-American neighborhood while persons in that neighborhood cannot congregate on a playground to talk or play sports?

Critics believe there are better alternatives to controlling illegal gang activity than loitering laws and community injunctions. The ACLU contends that anti-gang injunctions do not work and may even make things worse. The resources of law enforcement are concentrated in one area, causing the shift of criminal activity into other neighborhoods. In addition, arresting a gang member for violating a loitering ordinance will not change the underlying dynamic of gang activity in urban areas. Critics argue that these anti-gang efforts are a cynical, political ploy that has more to do with creating a tough-on-crime appearance than with effective law enforcement.

As an alternative, critics would emphasize community policing, increased

criminal gang. In Florida, an individual "who intentionally causes, encourages, solicits, or recruits another person to join a criminal street gang that requires as a condition of membership or continued membership the commission of any crime" commits a third degree felony. Fla. Stat. Ann. § 874.05 (1999). In Kentucky, an individual who solicits or entices another person to join a criminal gang is guilty of the crime of criminal gang recruitment. Ky. Rev. Stat. Ann. § 506.140 (2000).

**Gang-Related Apparel** A number of states permit schools to prescribe a dress code, and several of these states specifically allow the schools to prevent gang members from wearing their gang apparel at the schools. For example, under New Jersey law, "a board of education may adopt a dress code policy to prohibit students from wearing, while on school property, any type of clothing, apparel, or **ACCESSORY** which indicates that the student has membership in, or affiliation with, any gang associated with criminal activities." N.J. Rev. Stat. § 18A:11-9 (1999). Tennessee law allows similar restrictions for students in grades six through twelve. Tenn. Code Ann. § 49-6-4215 (1998).

**Enhanced Penalties for Gang-Related Activities** Some states now allow courts, including juvenile courts, to enhance the sentences of individuals convicted of gang-related activities. In Illinois, if a juvenile age 15 or older commits an offense in furtherance of criminal activities by an organized gang, then a juvenile court is required to enter an order to try the juvenile as an adult under the criminal laws of the state. 705 Ill. Comp. Stat. § 405/5-805 (1999). An organized gang under the statute is defined as "an association of 5 or more persons, with an established hierarchy, that encourages members of the association to perpetrate crimes or provides

resources for law enforcement, and efforts to improve the economic status of urban areas. They note that crime prevention and effective enforcement of criminal laws will do more to make a community safe than telling a suspected gang member to leave a street corner. In time, they believe, both the public and law enforcement will realize that solid, everyday police work produces better results.

Defenders of anti-gang initiatives contend that although First Amendment rights should be protected as much as possible, no constitutional right is absolute. In the case of gangs, the violence and criminal activity in certain parts of urban areas have reached a stage where normal law enforcement techniques do not work. Although the ACLU may say that individual rights must be protected, such a claim rings hollow when a gang can take over a neighborhood through violence and intimidation and yet evade law enforcement. In a crisis situation, additional steps must be taken to restore public confidence in the police and local government.

Restricting gang activity is not unconstitutional, argue defenders of the laws, because the Supreme Court has made it clear that no group of persons has the right to associate for wholly illegal aims. Moreover, associations engaging in both legal and illegal activities may still be regulated to the extent they engage in illegal activities. Defenders emphasize that the mere existence of an association is not sufficient to bring all that association's activities within scope of the First Amendment. Therefore, nonexpressive gang activities can be regulated.

Defenders also emphasize that injunctions and loitering ordinances are constitutional because they serve significant, and often compelling, government interests by reducing the threat to public health and safety caused by gang activities. They note that in the case of an **INJUNCTION**, gang members are free to conduct their expressive activities outside of the geographic area defined in the injunction. Thus, the injunction is likely to be upheld because it is narrowly tailored.

Though defenders believe these anti-gang initiatives will become important weapons for law enforcement, they acknowledge the danger of guilt by association. They believe, however, that this problem can be avoided if law enforcement officials adhere to constitutional standards in determining who should be subjected to anti-gang provisions. Judges must also carefully review evidence for each defendant to make sure the person has not been unfairly prosecuted.

Despite criticisms leveled by the ACLU and others, proponents of anti-gang laws adamantly support their use. While some of these initiatives may prove ineffective, law enforcement should be given the chance to test new ways of addressing destructive elements within their communities. Modifications can be made, and new initiatives plotted, but proponents insist that the law is necessary to protect the health and safety of citizens.

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support to members of the association who do commit crimes."

## Local Ordinances

Municipalities have enacted a variety of measures designed to curb gang violence. Some ordinances contain provisions similar to state statutes. For example, the city of Albuquerque, New Mexico, enacted an anti-gang recruitment ordinance to protect its citizens from the fear, intimidation, and physical harm caused by the criminal activities of gangs. The ordinance provides a laundry list of offenses that are considered gang crimes and prohibits individuals from recruiting members to join criminal street gangs.

One of the most common forms of municipal ordinances aimed at reducing gang activities appears in the form of anti-loitering laws. The use of these laws to reduce unwanted elements within a city has a long history. Many cities have enacted such laws to allow police to arrest vagrants and others deemed to be menaces to society. Several cities adapted these laws to apply specifically to gang members. However, some courts have determined that these laws are unconstitutional either on their face or as applied to particular defendants.

Local governmental entities have also enacted public **NUISANCE** laws designed to allow local law enforcement to enjoin criminal activities. Like the anti-loitering ordinances, these laws have come under attack on a variety of constitutional grounds.

## Constitutionality of Anti-Gang Laws

Laws aimed specifically at prosecuting members of gangs have come under attack due to a variety of constitutional theories. Anti-loitering laws have been challenged on several grounds, including First Amendment prohibitions against vagueness and overbreadth, **FOURTH AMEND-**

MENT proscriptions of unreasonable SEARCHES AND SEIZURES, and constitutional provisions that prevent the government from punishing individuals merely because of their status.

Vagueness has been the primary reason why the Supreme Court has determined that antiloitering statutes have been unconstitutional. In *Coates v. Cincinnati*, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971), the Court determined that an ordinance prohibiting people from assembling on a sidewalk in such a way that it would be annoying to passersby was unconstitutionally vague because its application was based on sole discretion of police officers to determine what was "annoying." One year later, in *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972), the Court held that an ordinance which encouraged ARBITRARY and erratic arrests was also unconstitutionally vague. Likewise, in *Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983), the Court held that a California statute that allowed police to arrest individuals who could not show credible and reliable identification and account for their presence at a particular location was unconstitutional due to vagueness.

The Chicago City Council in 1992 enacted the Gang Congregation Ordinance that prohibited loitering among criminal street gang members at any public place. The ordinance allowed police officers to order any group of individuals who were congregated "with no apparent purpose" to disperse if the officer believed one of the group was a street gang member. In three years, Chicago police issued more than 89,000 dispersal orders and made more than 42,000 arrests under the ordinance.

In *City of Chicago v. Morales*, the Supreme Court, per Justice JOHN PAUL STEVENS, determined that the ordinance was unconstitutional due to vagueness for two primary reasons. First, according to the Court, the ordinance failed to provide fair notice of prohibited conduct. Noted the Court, "It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an 'apparent purpose'" under the ordinance. Accordingly, citizens, even those who appeared in public with a gang member, were not provided fair notice of the type of conduct proscribed under the ordinance. Second, the ordinance failed to provide minimum guidelines for enforcement. The determination of whether individuals were standing around with no apparent purpose was based on the discretion of the officer.

After the 1992 gang ordinance was declared unconstitutional the city of Chicago enacted a second Gang Congregation Ordinance in 2000. The second ordinance authorizes police to command gang members to disperse when they are congregated on streets for the purpose of establishing control over certain areas of the city.

Other efforts to curb gang violence have been ruled constitutional. In *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997), the city of San Jose successfully requested an INJUNCTION against local gangs based on violations of state public nuisance laws. The gang members brought suit, challenging that both the statute and the injunction violated the First Amendment. The California Supreme Court determined that neither the injunction nor the statute violated the gang members' associational rights and that the gang members' conduct qualified as a public nuisance under the statute. Several cities in California have sought and received temporary and permanent injunctions against local gangs preventing the gang members from congregating in public places.

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CROSS-REFERENCES

Racketeering; Vagrancy.

## GAOL

The old English word for jail.

## ♦ GARFIELD, JAMES ABRAM

James Abram Garfield was a soldier and congressman who became the twentieth president of the United States. His inability to perform the duties of office following an assassination attempt on July 2, 1881, raised, for the second time in U.S. history, the question of presidential succession.

Garfield was born November 19, 1831, in a log cabin near the town of Orange in Cuyahoga County, Ohio. He was the fourth and final child of Abram Garfield and Eliza Ballou Garfield. Garfield's father's ancestors were among the original settlers of the Massachusetts Bay Colony. In 1827 the father carried their pioneering spirit to Ohio, where he worked on an Ohio Canal construction crew. By the time Garfield was born, his father was a struggling farmer and a founding member of the local Disciples of Christ church. In 1833, when Garfield was just two years old, his father died suddenly, leaving the family in poverty.

Garfield's mother, a descendant of an old Rhode Island family, was a remarkable woman. After her husband's death, she ran the small family farm on her own and saw to it that Garfield and his siblings worked hard, attended church, and finished school.

After completing his studies at the local school in Orange, Garfield enrolled at the Western Reserve Eclectic Institute (later Hiram College), at Hiram, Ohio. He eventually went on to Williams College, in Massachusetts. After graduating from Williams with the class of 1856, he returned to the institute at Hiram and assumed the duties of teacher and later principal. On November 11, 1858, he married Lucretia Rudolph, his childhood friend, fellow student, and pupil.

In addition to teaching and tending to the administration of the institute, Garfield frequently served as a lay speaker in Disciples of Christ churches throughout northern Ohio. Like many members of his church, Garfield advocated free-soil principles and was a firm supporter of the newly organized **REPUBLICAN PARTY**. (Free-Soilers were opposed to the expansion of **SLAVERY** in the western states and territories.)

With his natural speaking ability, Garfield soon found himself in the political arena. In 1859 he was elected to the Ohio state senate. As the United States neared civil war, Garfield put his speaking abilities to work for the Union, recruiting men and raising troops for battle.

In the summer of 1861, he followed his own advice and recruited a group of volunteers from his former school. He assembled the Forty-second Ohio Volunteer Infantry, and served as the unit's lieutenant colonel and later colonel. Though he had no military experience, Garfield did have a voracious appetite for knowledge and

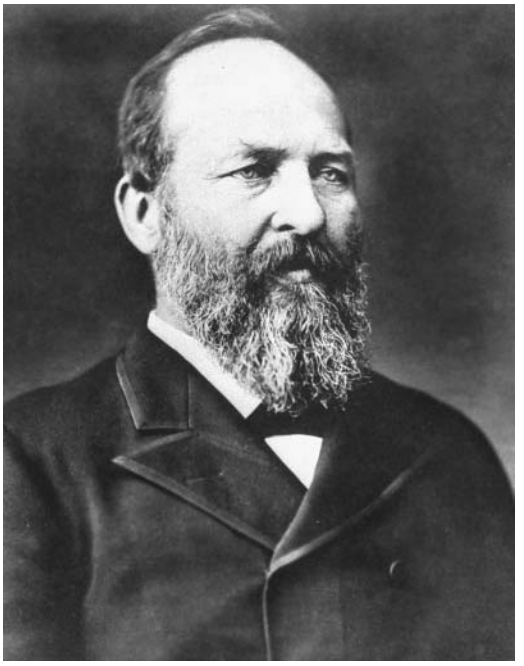

*James A. Garfield.*
LIBRARY OF CONGRESS

access to books that could guide his command. He and his men fought at the Battle of Shiloh, in western Tennessee. Garfield left the field when he became ill. After recovering he returned as chief of staff under Major General William S. Rosencrans, with whom he fought at Chickamauga, Georgia.

After Chickamauga, Garfield was promoted to brigadier general of volunteers, and he was elected, in absentia, to a seat in the U.S. House of Representatives. It has been suggested that Garfield was reluctant to surrender his command and take the seat, but he acquiesced when President **ABRAHAM LINCOLN** pointed out that brigadier generals were in far greater supply than administration Republicans.

In December 1863 Garfield took his seat in the Thirty-eighth Congress as the Republican representative from the nineteenth congressional district of Ohio. When the Republicans became the minority party in the House after the election of 1864, Garfield and Congressman James G. Blaine, of Maine, emerged as minority party leaders. Garfield distinguished himself as chairman of the committee on appropriations, and he established himself as an expert on the budget. He also focused his attention on legislation related to Reconstruction policies in the South, protective tariff issues, and the maintenance of a sound currency. When Blaine was elected to the Senate in 1876, Garfield became

the House minority leader—a position he held for the remainder of his congressional service.

Garfield held his House office for eighteen years, for the most part easily winning the nomination of his party and the vote of the electorate as each term concluded. Only once during his time in the House was his reelection in question. In the early 1870s, the Republican party was discredited by allegations of scandal in the administration of President Ulysses S. Grant—including the Crédit Mobilier scandal. Crédit Mobilier of America was a construction company established to build the Union Pacific Railroad. It became known that Garfield was among a group of congressmen who had accepted stock in Crédit Mobilier, in exchange for legislative consideration. Garfield ultimately refused the stock, but it took him two years to do so. His critics maintained that he decided not to take the stock only because the issue had placed him in political hot water.

During the same period, Garfield accepted a retainer for legal services from a Washington, D.C., company seeking to supply paving materials in the nation's capital. He argued that because he had no direct connection to city government, there was no conflict of interest. Not everyone shared his opinion.

Though many public servants of the day conducted personal business while in office, Garfield found it increasingly difficult to distinguish clients who wanted his legal advice from those who wanted his political influence. Garfield was reelected in 1874, despite the controversy, but to avoid future problems, he ceased taking outside legal clients. The incident also fueled Garfield's desire to eliminate political patronage in the civil service system.

Garfield took an active role in the 1876 presidential election of RUTHERFORD B. HAYES. When Senator JOHN SHERMAN, of Ohio, was named to the Hayes cabinet, Garfield expressed an interest in filling his vacant Senate seat. Needing Garfield in the House, Hayes discouraged him from pursuing the matter. Near the close of Hayes's term, there was talk that Sherman would seek to regain his Senate seat, but he chose instead to seek his party's nomination for the presidency. It was widely presumed that Sherman supported Garfield's election to the Senate in exchange for Garfield's support at the Republican convention, but no such deal was struck.

In due course the Ohio legislature elected Garfield to the U.S. Senate for a six-year term to begin in 1881, and he attended the 1880 Republican National Convention in Chicago as head of the Ohio delegation. Because of home state support for Sherman, Garfield reluctantly agreed to act as Sherman's floor manager and to canvass for delegates on his behalf—even though Senator Blaine, Garfield's old friend and colleague, was also seeking the party's nomination.

Garfield was a formidable and well-known figure at the convention. His persuasive skill on the floor did not go unnoticed. He kept Sherman's chances alive by fighting for the delegates' freedom to vote their choice, and by opposing a unit rule that forced delegations to cast all their votes for the candidate holding the majority of votes within a state delegation. Former president Grant, who was also running for nomination, and his supporters, called the Stalwarts, supported the unit rule because Grant held the majority in many delegations.

Garfield managed to block the nominations of Blaine and Grant, but he could not secure a majority for Sherman. With the convention deadlocked, twenty Wisconsin delegates made a bold move on the thirty-fifth ballot and, in protest, cast twenty votes for Garfield.

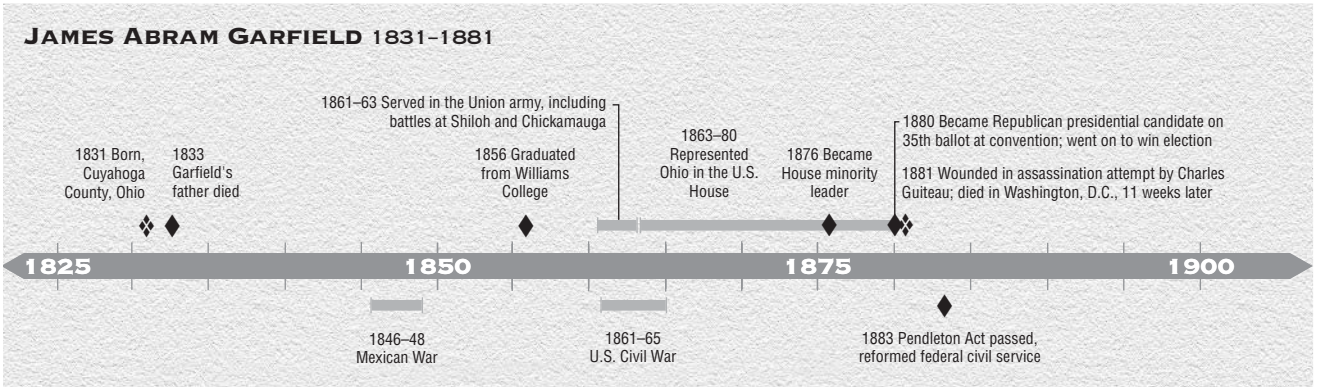

On the next ballot, Garfield found himself the unanimous choice of the convention and the unwitting beneficiary of his own floor maneuvering. CHESTER A. ARTHUR was named his running mate. Blaine followers supported the ticket, and most Sherman followers were willing to overlook the manner in which the nomination had been secured, but Grant's forces never forgave Garfield for his opposition.

Garfield pacified unhappy Sherman supporters by surrendering his new Senate seat, enabling Sherman to return to his old post. Throughout the summer of 1880, Garfield attempted to meet with the national committee and with Grant supporters, but he was never given an audience. In November Garfield returned to his farm in Mentor, Ohio, to wait them out.

Finally, on the eve of the election, Grant was persuaded to recognize Garfield as the party's choice. Grant and his followers were invited to the Garfield farm for a historic meeting, often called the Mentor Summit. What was said at the meeting—and what was promised—has been the subject of much debate. Grant thought he had extracted a personal promise from Garfield that, in exchange for Grant's support, the Stalwarts would be named to influential posts in the new administration.

With the help of Grant's supporters, Garfield won the election by a narrow margin over Democrat Winfield Scott Hancock. Between the election and the inauguration, Garfield busied himself with the selection of his cabinet. All factions of the party called on the president-elect to lobby for their preferred nominees, but Grant Stalwarts remained assured that Garfield would bow to their influence. Garfield's first known appointment, making Blaine SECRETARY OF STATE, caused an uproar among the Grant faction and was viewed as a breach of the promises made at Mentor. Garfield nevertheless remained committed to building a conciliation cabinet that would balance everyone's interests and eliminate political patronage jobs—and kept the rest of his choices well guarded until inauguration day, March 4, 1881.

The first months of his term continued to be plagued with appointment and confirmation battles. Grant supporters continued to believe that he should have been the party's presidential nominee and that in an election deal Garfield had agreed to consult Grant about appointments. Those in the Senate who supported Grant rallied to systematically reject undesirable appointments, but Garfield was equally stubborn. Of the Stalwarts' attempt to derail his nomination for collector of customs for the port of New York City, Garfield said, "They may take him out of the Senate head first or feet first, but I will never withdraw him."

Though confirmation battles consumed a majority of Garfield's time, he also carried out other presidential duties and commitments. On July 2, 1881, he was en route to a speaking engagement at his alma mater Williams College, when lawyer Charles J. Guiteau shot him at a Washington, D.C., railroad station. Described as an erratic character, Guiteau shouted to a crowd at the railroad station that he was a Stalwart.

Garfield lingered for eleven weeks. Daily reports from physicians showed that he was unable to carry out his responsibilities. By August the question of Garfield's succession was being discussed in the press and debated by constitutional scholars. It was agreed that the vice president was constitutionally allowed to assume the president's powers and duties, but it was not clear whether he should serve as acting president until Garfield recovered, or assume the office itself and displace Garfield altogether. The pertinent provision of the Constitution—Article II, Section 1, Clause 6—was ambiguous, and expert opinion was still divided over the precedent set by JOHN TYLER, who had taken the oath of office in 1841 after the death of President WILLIAM H. HARRISON, rather than merely assuming Harrison's duties until the next election.

"ALL FREE GOVERNMENTS ARE MANAGED BY THE COMBINED WISDOM AND FOLLY OF THE PEOPLE."
—JAMES GARFIELD

Because Congress was not in session, the issue could not be debated there, but it was addressed by Garfield's cabinet members on September 2, 1881. They agreed that it was time for the vice president to assume Garfield's duties, but they too were divided as to the permanence of the vice president's role. The problem was never resolved because Garfield died September 19, 1881, before any action was taken by the cabinet or the vice president. Following the precedent set by Tyler, Arthur took the oath of office and assumed the presidency, following Garfield's death.

Garfield's unexpected nomination, bitter election, and tragic death often overshadow his previous accomplishments and his presidential agenda. His efforts to build a conciliation cabinet and to purge administrative agencies of old patronage jobs made him a strong advocate of civil service reforms. Ironically, the appointment

battles preceding his murder probably caused Congress to pass civil service reforms in 1883 that were far broader in reach and scope than anything Garfield had envisioned.

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## GARLAND, AUGUSTUS HILL

Augustus Hill Garland served as attorney general of the United States from 1885 to 1889 under President GROVER CLEVELAND.

Garland was born June 11, 1832, in Tipton County, Tennessee. His parents, Rufus K. Garland and Barbara Hill Garland, settled in Hempstead County, Arkansas, when he was an infant. Garland was educated at local schools in Hempstead County, and at St. Joseph's College, in Bardstown, Kentucky. He graduated from St. Joseph's in 1851 and was admitted to the bar in 1853. Garland's first practice was established in Washington, Arkansas. He eventually moved to Little Rock, Arkansas, where he earned a reputation as one of the best lawyers in the South. He married Sarah Virginia Sanders in Little Rock. She died early in their marriage, and Garland's mother ran his household for most of his life.

"WE, AS ATTORNEYS, GET LITERALLY WRAPPED UP IN OUR CLIENT'S CAUSE . . . AND SEE NOTHING BUT HIS SIDE OF THE CASE . . . AND DECLARE THAT THE COURT CAN DECIDE IT ONLY OUR WAY."
—AUGUSTUS GARLAND

At the outbreak of the Civil War, Garland opposed the secession of Arkansas, but he eventually supported his state when the ordinance of secession was passed. He was elected to the Confederate provisional congress, in Montgomery, Alabama, and to the first and second Confederate congresses, in Richmond.

In an effort to unify the North and South after the war, President ANDREW JOHNSON granted a full pardon to Garland (and others) for wartime service to the Confederacy. The president's actions were not widely supported; Congress enacted a number of laws that continued to punish the pardoned Southerners for their wartime allegiances by restricting their ability to participate in their former businesses or professions. Two restrictions, enacted in 1865, required attorneys to swear a test (loyalty) oath affirming that they had not participated in the rebellion, as a condition for appearing before the U.S. Supreme Court, the district and circuit courts, and the Court of Claims (13 Stat. 424). Attorneys who could not take the oath were denied the right to appear before the high courts—and thereby prevented from practicing law.

Garland challenged the law in 1867. He argued that the law was unconstitutional, and that even if the law were constitutional, he would be released from compliance with its provisions by his presidential pardon. The Supreme Court found the law to be unconstitutional because it violated the president's power to pardon. "When a pardon is full," the majority opinion said, "it releases the punishment, and blots out of existence the guilt" (*Ex parte Garland,* 71 U.S. [4 Wall.] 333, 18 L. Ed. 366 [1866]). The case restored Garland's right to practice law before the nation's high courts and established him as a nationally recognized constitutional lawyer. It also reestablished him as a political force in the South.

In 1867, Garland was elected to the U.S. Senate by the legislature of Arkansas, only to be denied a seat because Congress found that his state had not been sufficiently rehabilitated. For the next few years, he used his abilities to return his state to favor. By 1874, he was elected governor of the state; his administration is credited with bringing order out of the chaos that permeated Arkansas during the Reconstruction era.

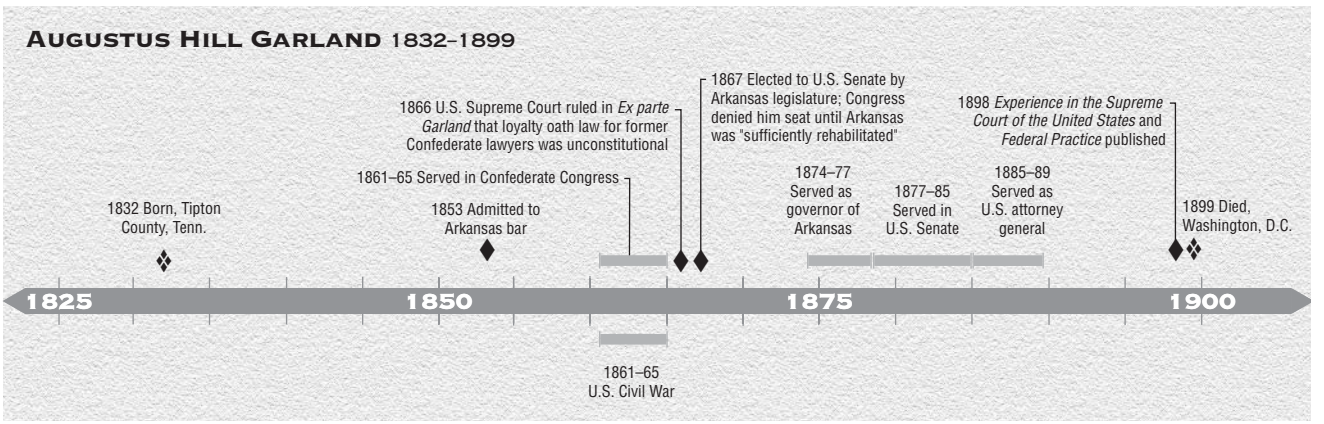

In 1877, Garland was finally allowed to take his seat in the U.S. Senate. He was reelected in 1883 and became a ranking member of the Senate's Judiciary Committee.

Garland resigned his Senate seat on March 4, 1885, to accept the position of attorney general in President Cleveland's cabinet. As attorney general, he was frequently consulted on issues of CONSTITUTIONAL LAW. He was known as an advocate who insisted on the enforcement of constitutional freedoms for all citizens.

He also worked to earn the trust of those who condemned him for his Confederate service. As a U.S. senator and cabinet officer, Garland was wary of both individuals and institutions who sought to influence his opinions and actions. It is said that he steadfastly avoided society events and that he refused to read daily newspapers. Even so, he was once called back from a holiday by an angry President Cleveland to explain his ownership of stock in a company that would have been helped by a JUSTICE DEPARTMENT lawsuit. (The lawsuit was eventually withdrawn.)

In 1889 Garland returned to the PRACTICE OF LAW, and he maintained an active caseload until the end of his life. He also began to record his life's work for publication. His *Experience in the Supreme Court of the United States* and *Federal Practice* were published in 1898.

Having fought so hard to retain his right to appear before the nation's high courts, Garland's final hour was fitting: he died while arguing a case before the SUPREME COURT OF THE UNITED STATES on January 26, 1899.

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## GARNISHEE

*An individual who holds money or property that belongs to a debtor subject to an attachment proceeding by a creditor.*

For example, when an individual owes money but has for a source of income only a salary, a creditor might initiate GARNISHMENT proceedings. If the creditor is successful, a certain portion of the debtor's salary will be automatically sent to the creditor from each paycheck. In such case, the debtor's employer is the garnishee.

## GARNISHMENT

*A legal procedure by which a creditor can collect what a debtor owes by reaching the debtor's property when it is in the hands of someone other than the debtor.*

Garnishment is a drastic measure for collecting a debt. A court order of garnishment allows a creditor to take the property of a debtor when the debtor does not possess the property. A garnishment action is taken against the debtor as defendant and the property holder as garnishee. Garnishment is regulated by statutes, and is usually reserved for the creditor who has obtained a judgment, or court order, against the debtor.

A debtor's property may be garnished before it ever reaches the debtor. For example, if a debtor's work earnings are garnished, a portion of the wages owed by the employer go directly to the JUDGMENT CREDITOR and is never seen by the debtor.

Some property is exempt from garnishment. Exemptions are created by statutes to avoid leaving a debtor with no means of support. For example, only a certain amount of work income may be garnished. Under 15 U.S.C.A. § 1673, a garnishment sought in federal court may not exceed 25 percent of the debtor's disposable earnings each week, or the amount by which the debtor's disposable earnings for the week exceed thirty times the federal minimum hourly wage in effect at the time the earnings are payable. In Alaska, exemptions include a burial plot; health aids necessary for work or health; benefits paid or payable for medical, surgical, or hospital care; awards to victims of violent crime; and assets received from a retirement plan (Alaska Stat. § 09.38.015, .017).

Because garnishment involves the taking of property, the procedure is subject to DUE PROCESS requirements. In *Sniadatch v. Family Finance Corp. of Bay View,* 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969), the U.S. Supreme Court struck down a Wisconsin statute that allowed pretrial garnishment of wages without an opportunity to be heard or to submit a defense. According to the Court, garnishment without prior notice and a prior hearing violated fundamental principles of due process.

Garnishment may be used as a provisional remedy. This means that property may be garnished before a judgment against the debtor is entered. This serves to protect the creditor's interest in the debtor's property. Prejudgment

garnishment is usually ordered by a court only when the creditor can show that the debtor is likely to lose or dispose of the property before the case is resolved. Property that is garnished before any judgment is rendered is held by the third party, and is not given to the creditor until the creditor prevails in the suit against the debtor.

Garnishment is similar to lien and to attachment. Liens and attachments are court orders that give a creditor an interest in the property of the debtor. Garnishment is a continuing lien against nonexempt property of the debtor. Garnishment is not, however, an attachment. Attachment is the process of seizing property of the debtor that is in the debtor's possession, whereas garnishment is the process of seizing property of the debtor that is in the possession of a third party.

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## ⟡ GARRISON, WILLIAM LLOYD

William Lloyd Garrison, publisher of the antislavery newspaper *The Liberator* and founder of the American Anti-Slavery Society, was one of the most fiery and outspoken abolitionists of the Civil War period.

Garrison was born in Newburyport, Massachusetts, on December 10, 1805. In 1808, Garrison's father abandoned his family leaving them close to destitute. At age 13, after working at a number of jobs, Garrison became an apprentice to Ephraim Allen, editor of the *Newburyport Herald.*

Garrison later moved to Boston where he became editor of the *National Philanthropist* in 1828. At that time, Garrison became acquainted with the prominent Quaker Benjamin Lundy, editor of the Baltimore-based antislavery newspaper, the *Genius of Universal Emancipation.* In 1829, Garrison became co-editor of Lundy's publication and began his vigorous advocacy for abolishing SLAVERY. Shortly thereafter, Garrison was sued by a merchant engaged in the slave trade. He was convicted of LIBEL and spent seven weeks in prison, an experience that strengthened his conviction that all slaves should be set free.

After his release from jail in 1830, Garrison returned to Boston where he joined the American Colonization Society, an organization that promoted the idea that free blacks should emigrate to Africa. When it became clear that most members of the group did not support freeing slaves, but just wanted to reduce the number of free blacks in the United States, Garrison withdrew from membership.

In January 1831, Garrison founded *The Liberator,* which he published for 35 years and which became the most famous antislavery newspaper of its era. Although he was a pacifist, Garrison struck a formidable stance in the very first issue in which he proclaimed, "I do not wish to think, or speak, or write, with moderation . . . I will not retreat a single inch—AND I WILL BE HEARD." *The Liberator,* which never had a paid circulation greater than three thousand became one of the most widely disseminated, consistent, and dominating voices of the ABOLITION movement.

Antislavery advocates of the day, or abolitionists, were widely divergent in their views of

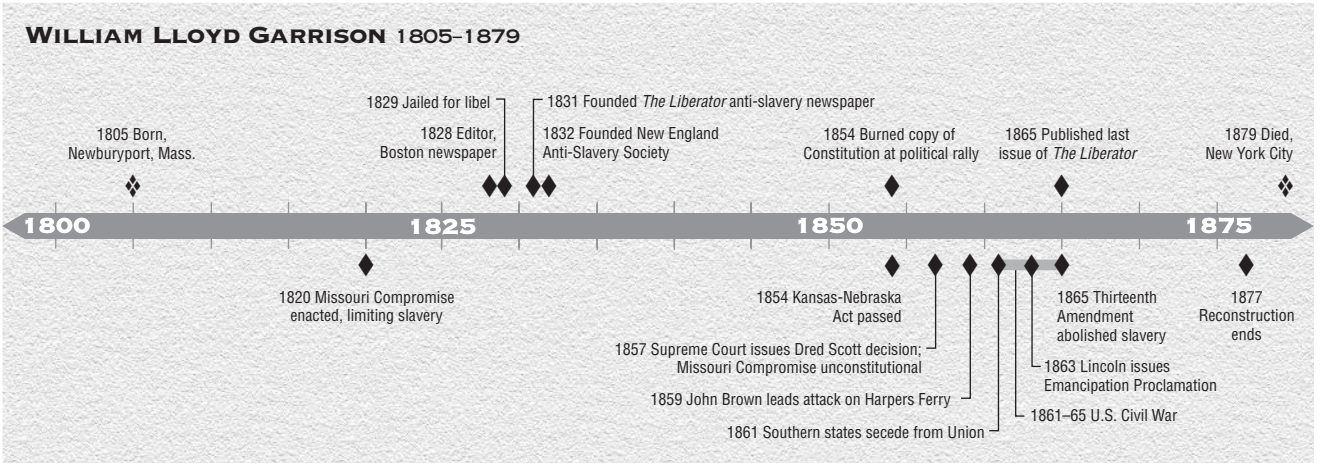

how and when slavery should be ended and what should happen to freed slaves after emancipation. Garrison was part of a group which believed that abolition of slavery must happen as quickly as possible. Those who sought "immediatism," however were divided on how to achieve this goal. Garrison, though searing in his language and unyielding in his beliefs, believed only in civil disobedience, and opposed any method of active resistance.

In 1832, Garrison founded the country's first immediatist organization, the New England Anti-Slavery Society. The following year, in 1833, he helped organize the American Anti-Slavery Society. He wrote the society's constitution and became its first corresponding secretary. He befriended fellow abolitionist and writer FREDERICK DOUGLASS, and made him an agent of the Anti-Slavery Society. Over the next several years Garrison came to reject the teachings of established churches and the government of the United States, which he viewed as supporting slavery. Increasingly hewing to a philosophy of moral absolutism, Garrison embraced not only the cause of nonviolent resistance, but temperance, WOMEN'S RIGHTS, and Christian perfectionism.

In 1840, Garrison's views precipitated a split in the Anti-Slavery Society between the minority who supported his radical beliefs and the majority who disapproved of his views regarding religion, government, and the participation of women in the struggle for emancipation. When Garrison's supporters voted to admit women, a group seceded from the society and formed the rival American and Foreign Anti-Slavery Society. Another group, interested in continuing to seek reform through political activity, later left to start the Liberty party.

Over the next two decades, Garrison's influence declined as his radicalism became more pronounced. In the 1850s, *The Liberator* hailed John Brown's raid on Harpers Ferry while denouncing the COMPROMISE OF 1850, the KANSAS-NEBRASKA ACT, and the U.S. Supreme Court's decision in DRED SCOTT V. SANDFORD. He continued to support secession of the anti-slavery states and publicly burned a copy of the U.S. Constitution at an abolitionist rally in 1854.

After the Civil War began, Garrison put aside his PACIFISM to support President ABRAHAM LINCOLN and the Union Army. He welcomed the EMANCIPATION PROCLAMATION and the passing of the THIRTEENTH AMENDMENT, which outlawed slavery. In 1865, Garrison published the last issue of *The Liberator,* although he continued to advocate for women's rights, temperance, and pacifism. Garrison died on May 24, 1879, in New York City.

*William Lloyd Garrison.*
LIBRARY OF CONGRESS

"I DO NOT WISH TO THINK, OR SPEAK, OR WRITE, WITH MODERATION. . . . I AM IN EARNEST—I WILL NOT EQUIVOCATE—I WILL NOT EXCUSE—I WILL NOT RETREAT A SINGLE INCH—AND I WILL BE HEARD."
—WILLIAM LLOYD GARRISON

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CROSS-REFERENCES

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## ♦ GARVEY, MARCUS MOZIAH

Marcus Garvey was a charismatic leader who preached black pride and economic self-sufficiency. He is internationally recognized as the organizer of the first significant movement of black nationalism in the United States.

Marcus Moziah Garvey was born on August 17, 1887, in St. Ann's Bay, Jamaica, to Marcus Moziah Garvey, a stonemason, and Sarah Jane Richards, a domestic and farmer. He and his sister Indiana were the only two of the eleven Garvey offspring to reach adulthood. As a child, he used his father's extensive library to educate himself. When Garvey was 14, he went to work as a printer's apprentice. In 1908, he participated

in the country's first Printers Union strike; when the strike failed, the union disbanded. Because he had been one of the strike leaders, Garvey found himself blacklisted. He began working at the GOVERNMENT PRINTING OFFICE and briefly published his own small journal, *Garvey's Watchman.* Garvey then traveled through Central America and lived in London from 1912 to 1914, where he attended Birkbeck College. During this period he was exposed to the problems engendered by RACIAL DISCRIMINATION and first began to think about ways to help black persons become economically self-sufficient.

Garvey returned to Jamaica in 1914 and established the Universal Negro Improvement Association (UNIA). He cofounded the UNIA with Amy Ashwood, who was the association's first secretary, and who would later become Garvey's first wife. At the time, most of Africa's countries were colonies under the domination of European nations. The purpose of the UNIA, whose motto was "One God, One Aim, One Destiny," was to promote black nationalism throughout the world by establishing an African country where blacks would run their own government.

"DAY BY DAY WE HEAR THE CRY OF AFRICA FOR THE AFRICANS. THIS CRY HAS BECOME A POSITIVE, DETERMINED ONE. IT IS A CRY THAT IS RAISED SIMULTANEOUSLY THE WORLD OVER BECAUSE OF THE UNIVERSAL OPPRESSION THAT AFFECTS THE NEGRO."
—MARCUS GARVEY

In 1916, Garvey moved to the United States and toured the country, espousing the Back-to-Africa movement. In 1917, he started a chapter of UNIA in New York City, setting up headquarters in Harlem. To build economic self-reliance, the UNIA started several businesses including the Negro Factories Corporation (NFC) and a steamship company called the Black Star Line. Garvey also began publishing the *Negro World,* in 1918, a journal that advocated his ideas for African nationalism and served as the voice of the UNIA.

Around this same time, the UNIA achieved one of its most ambitious goals—it reached an agreement with the African nation of Liberia to make land available for black people who would come to that country from the United States and the Caribbean, as well as from countries in Central and South America. In Garvey's view, Liberia would be a beacon of hope drawing new groups of settlers who would create their own culture and civilization.

In 1920, the UNIA held its first international convention at Madison Square Garden in New York City, during which Garvey laid out his plans for an African nation-state. The association adopted a constitution, a Declaration of Rights of the Negro Peoples of the World, as well as a national flag. The UNIA also elected officials for its provisional government, with Garvey serving as Provisional President of Africa.

By the early 1920s, the UNIA developed an ardent following, with 700 branches in 38 states and more than 2 million members. The association drew adherents not only from the United States, but also from Canada, Caribbean countries, and throughout the African continent. A consummate showman, Garvey loved to put on parades and street celebrations in Harlem where he and other members of the UNIA "nobility" appeared in elaborate military uniforms, along with banners and vividly decorated automobiles. From the outset, however, Garvey ran into opposition from both whites who were frightened at the idea of black solidarity and blacks who viewed INTEGRATION into the American mainstream as the key to progress.

Before the UNIA could move forward with its resettlement plans, problems began to mount. The Liberian government withdrew its approval for repatriating the new settlers. In 1922, Garvey was convicted for MAIL FRAUD concerning the Black Star Line and, in 1925, he

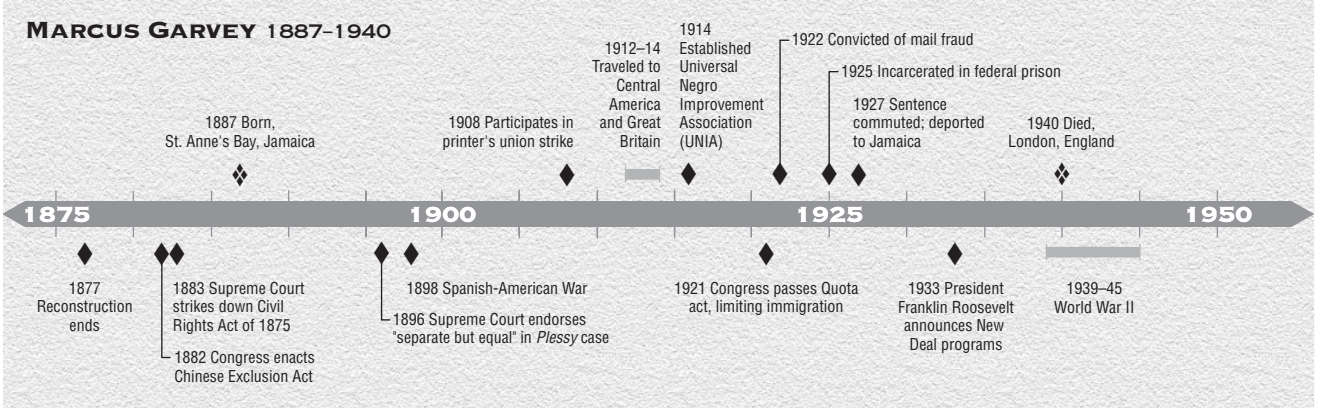

was jailed in Atlanta, Georgia. In 1927, President CALVIN COOLIDGE commuted Garvey's five-year sentence. Garvey was labeled an undesirable alien and deported to Jamaica.

In 1929, Garvey toured Canada and Europe giving lectures. In 1930, he ran in the general election for a seat in Jamaica's legislature, but was defeated. Further attempts to launch a newspaper and a magazine met with failure as did his creation of an organization that was supposed to provide job opportunities for the poverty-stricken rural inhabitants of Jamaica.

In 1935, Garvey moved to England. He continued to hold UNIA conventions and to make speeches to dwindling numbers of people. Garvey died in London on June 10, 1940. Although Garvey was mostly ignored toward the end of his life, his dedication to black pride and self-sufficiency made him a national hero in Jamaica. Garvey and his movement were celebrated in the music of such reggae stars as Bob Marley and Burning Spear. Adherents of the BLACK POWER MOVEMENT of the 1960s acknowledged their debt to Garvey's nationalist crusade as did blacks fighting for independence from colonial rule in Africa. As of 2002, the UNIA still functioned with Garvey's son, Marcus Garvey Jr., as president.

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## GAS

Various legal issues arise concerning the use and distribution of gas.

### Supply

A MUNICIPAL CORPORATION does not have the duty to supply gas to its population. In the event that a city assumes the performance of such function, it is acting merely as a business corporation.

The charter of a gas company is a franchise granted by the state. The manufacture of distribution of gas for light, fuel, or power is a business of a public character, and, therefore, a gas company is ordinarily considered to be a public or quasi-public corporation or a business affected with a public interest. A state may regulate gas companies for the protection of the public and may delegate its regulatory powers to municipal corporations in which gas companies operate. In a number of states, gas companies are subject to a public service commission or other such agency. The jurisdiction of the commission ordinarily includes the power to establish rates and to set forth rules and regulations affecting the service, operation, management, and conduct of the business.

### Consumer Supply

Upon obtaining a franchise to supply gas to a particular geographic area, a gas company is bound to fulfill its obligation; it cannot withdraw its service from an area merely because it is dissatisfied with the rates permitted there. Once the franchise of a company has expired, it may withdraw the service. A court may, in certain

**U.S. Production, Import, and Consumption of Natural Gas: 1960 to 2000**

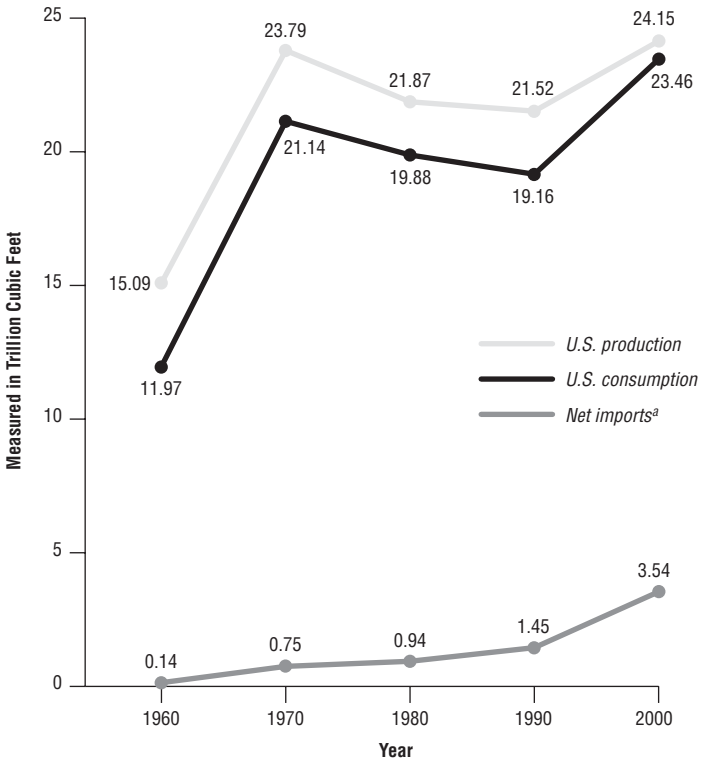


[a]Net imports equals imports minus exports.

SOURCE: U.S. Department of Energy, Energy Information Administration, *Annual Energy Review 2001*.

instances, enjoin the discontinuance of service for a reasonable period—to circumvent undue hardship and inconvenience to the residents of the area.

A gas company has the duty to serve all those who are within the franchise area who desire service and subscribe to the reasonable rules that it may set forth. A municipality or corporation supplying gas may make reasonable rules and regulations to secure the payment of bills, such as eliminating service to the consumer. If there is a genuine controversy about the amount owed, a company is not permitted to discontinue service. A gas company may not require the owner or occupant of a building to pay overdue and unpaid bills by a former owner or occupant before it continues service to the building. Some statutes require that gas companies install a meter on the premises, in order to register the consumption of gas by each customer; and where a customer tampers with the meter and uses a significant amount of unmetered gas, the company can discontinue service and refuse to restore it until the customer pays the amount due for the unmetered gas taken.

A gas company that wrongfully refuses to supply a customer with gas is liable for damages. There are also statutory penalties in some states for such wrongful refusal.

### Injuries

A gas company is under the obligation to exercise ordinary care in the construction of its works and the conduct of its business in order to protect life and property.

Gas has a highly dangerous and volatile character and tends to escape. A gas company must, therefore, exercise care to avoid harm to others and is liable for its NEGLIGENCE that results in injury to others by reason of the escape or explosion of gas. It must exercise reasonable care in the inspection of its pipes to ensure that leaks may be discovered promptly; and if leaks or defects in the pipes of the company occur due to faulty construction or maintenance, the company is liable for resulting injuries, even though it did not know about the leak.

In the event that the company has taken due care in the inspection of its pipes and a defect or a break occurs through natural causes or by the act of a third person, the gas company must be given notice of the defect and reasonable time to repair it before liability accrues. A gas company subject to notice that gas is escaping is under an obligation to shut off the gas supply until the necessary repairs have been made.

A gas company has a property right in the mains and pipes and other appliances, and where there is unauthorized interference with, or damage to, this property, the company is entitled to recover damages and an INJUNCTION if the circumstances so warrant.

### Rates

A gas company has a legal obligation to charge reasonable rates. One of the main purposes of the regulation of gas companies is to prescribe fair and reasonable rates for the selling of gas to the public. Rate increases are permitted only following an impartial and complete investigation—with the object of doing justice to the gas company as well as the public. Relief can be sought in the courts if gas rates are unreasonable—to determine whether the rate making body acted beyond the scope of its power or against the weight of the evidence. The courts, however, cannot decide what rates are reasonable, nor can they put those rates into effect.

CROSS-REFERENCES

Public Utilities.

## GAULT, IN RE

Originally, juvenile court was a place for the informal resolution of a broad range of matters concerning children. The hearings were not adversarial. Instead, they focused on the juvenile's best interests. A juvenile was brought to the juvenile court, the prosecution presented evidence, the juvenile and other witnesses gave testimony, and the juvenile court judge made a decision based on the perceived best interests of the juvenile.

In the same spirit of informality, juvenile courts provided fewer procedural protections than did adult courts. Juveniles did not have the right to a court-appointed attorney or to notice of charges of criminal behavior. They did not have the right to confront accusers and cross-examine witnesses. They did not have the right to a written record of the proceedings or to appeal the juvenile court judgment.

The problem with this lack of procedural protections was that a juvenile risked losing his or her liberty for several years. The best interests of the child usually involved placement in a secure reformatory or some other secure facility until the age of eighteen or, in some states, twenty-one.

This amounted to a deprivation of liberty similar to that resulting from a prison sentence.

In 1967 the U.S. Supreme Court issued a decision that would change dramatically the character of juvenile courts. In *In re Gault,* 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, fifteen-year-old Gerald Gault was committed to a reform school until age twenty-one for allegedly making an obscene phone call to a neighbor. Gault had been found delinquent without receiving notice of the charges or the assistance of an attorney. In addition, Gault had been interviewed by a PROBATION officer without having an attorney present, and the statements made in this interview were submitted as proof that Gault had made the obscene phone call.

The U.S. Supreme Court ruled that Gault's commitment to the reformatory constituted a deprivation of liberty. This meant that Gault should have been provided with most of the procedural protections afforded to adults in criminal prosecutions. According to the Court in *Gault,* "[U]nbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."

The purpose of the *Gault* decision was to make juvenile proceedings more fair to the juvenile. The decision accomplished this, but it also made juvenile proceedings more adversarial. With the increased procedural protections, juveniles became more capable of resisting commitment to secure reformatories, and it became more difficult for the juvenile courts summarily to obtain control over juveniles.

The adversarial tenor in contemporary juvenile courts is thus an unfortunate by-product of the decision in *Gault.* Prosecutors must now work harder to persuade the juvenile court to find in favor of the state so that the system may take control of the juvenile. They must shift the focus of juvenile court proceedings away from the needs of the juvenile and onto the offense. This shifted focus is similar to the focus of proceedings in adult criminal court, and it amounts to a reversal of the traditional emphasis in juvenile court.

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CROSS-REFERENCES

Adversary System; Children's Rights; Criminal Procedure; Juvenile Law.

## GAY AND LESBIAN RIGHTS

*The goal of full legal and social equality for gay men and lesbians sought by the gay movement in the United States and other Western countries.*

The term *gay* originally derived from slang, but it has gained wide acceptance in recent years, and many people who are sexually attracted to others of the same sex prefer it to the older and more clinical term *homosexual.* The drive for legal and social equality represents one aspect of a broader gay and lesbian movement that, since the late 1960s, has worked to change attitudes toward homosexuality, develop gay community institutions, and improve the self-image of gay men and lesbians.

Although homosexuality has been recorded in every historical period and culture, the gay and lesbian rights movement developed only with the emergence of a self-conscious, gay-identified subculture that was willing to openly assert its demands for equality. Until the 1960s, virtually all lesbians and gay men were secretive about their sexual orientation and frequently shared the attitude of the general society that homosexuality was sick, sinful, or both. The phrase "in the closet" refers to gay men and lesbians who hide their sexual orientation.

The first national gay organizations in the United States were the Mattachine Society (1951) and the Daughters of Bilitis (1956). The emergence of the CIVIL RIGHTS MOVEMENT of the 1960s energized gay and lesbian groups, and the development of the women's movement of the late 1960s made explicit the link between political activities and personal identity.

The watershed moment for gay men and lesbians occurred in 1969 when the patrons of the Stonewall Inn, a gay bar in New York City's Greenwich Village, forcefully resisted arrest by city police officers who had raided the bar. Stonewall became a symbol for a new set of attitudes on the part of younger gay men and lesbians who resisted discrimination and negative stereotyping. As gay men and lesbians became more open and decided to "come out of the closet," U.S. society was challenged to question assumptions about homosexuality.

Though most gay and lesbian rights activity remains local, national organizations such as the National Gay Task Force, the Lambda Defense and Education Fund, and the Human Rights Campaign have played a significant role in challenging discriminatory treatment. For example, in 1974, the National Gay Task Force successfully lobbied the American Psychiatric Association to remove homosexuality from its list of mental disorders.

The recognition of gay and lesbian rights has been accomplished through both court challenges and legislative action. The ability of gay and lesbian organizations to make significant financial contributions to political candidates has helped lead to more sympathetic hearings in the legislative arena.

### Criminal Prohibitions on Sexual Activity

Most gay men and lesbians remained in the closet until the modern movement for equality because homosexual behavior has been a crime throughout U.S. history. Homosexual activity includes anal sex and oral sex, which have been labeled SODOMY. Criminal laws against sodomy date from the colonial period, when a conviction for a "crime against nature" could lead to a death sentence. Although few if any people have ever been executed for sodomy, the penalties for this crime have remained heavy, and the act is as of 2003 classified as a felony in states that have sodomy statutes (Arkansas, however, classified sodomy as a Class A misdemeanor).

Advocates of gay and lesbian rights have made the repeal of sodomy statutes a leading goal. Twenty-seven states have repealed these statutes, usually as part of a general revision of the criminal code and with the recognition that heterosexuals as well as homosexuals engage in oral and anal sex.

The Supreme Court has found that state laws prohibiting homosexual sodomy are not unconstitutional. In *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), the Court upheld the Georgia sodomy statute (Ga. Code Ann. § 16-6-2 [1984]). Michael Hardwick was arrested and charged with committing sodomy with a consenting male adult in the privacy of his home. Although the state prosecutor declined to prosecute the case, Hardwick brought suit in federal court, seeking a declaration that the statute was unconstitutional.

The Court rejected the argument that previous decisions such as the Court's rulings on ABORTION and contraception had created a right of privacy that extends to homosexual activity. The Court also rejected the argument that a fundamental right to engage in homosexual activity can be found in the DUE PROCESS CLAUSES of the Fifth and Fourteenth Amendments. To the argument that homosexual activity should be protected when it occurs in the privacy of a home, Justice BYRON R. WHITE, writing for the majority, said that "otherwise illegal conduct is not always immunized whenever it occurs in the home." For example, the possession of drugs or stolen goods is not protected because it occurs at home.

*Hardwick* was a setback to the gay and lesbian rights movement, as it allowed opponents to argue that it was absurd to grant CIVIL RIGHTS to persons who engage in criminal acts.

In December 2002, the Supreme Court agreed to reconsider the constitutionality of sodomy laws. As of 2003, 14 states still have active sodomy laws. In four of these states, including Texas, these sodomy laws apply only to homosexual conduct.

In 1998, John Lawrence and Tyron Garner were convicted on charges of sodomy under Tex. Pen. Code § 21.06 (Vernon 2003). Officers, responding to a false report that the two men had possession of illegal weapons, entered an apartment and found the men engaged in sex. Upon conviction for sodomy, they were each fined $200. They appealed their convictions to a Texas appellate court, which found that the sodomy law did not violate either the U.S. or the Texas constitutions. LAWRENCE V. TEXAS, 41 S.W.3d 349 (Tex. App. 2001). The Texas Court of Criminal Appeals denied a petition for discretionary review, but the U.S. Supreme Court granted certiorari. In June 2003 the Court reversed the judgment of the lower court. Justice Kennedy, writing the majority opinion, stated: "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." Thus the Court overruled *Bowers v. Hardwick*.

### Antidiscrimination Laws

Advocates of gay and lesbian rights have sought the passage of legislation that prohibits discrimination in employment, housing, public

accommodations, or public service on the basis of sexual orientation. Many U.S. cities have passed gay rights ordinances that accomplish these objectives. In 1982, Wisconsin became the first state to pass gay rights legislation.

At the national level, gay men and lesbians fought legal battles in the 1980s and 1990s to allow them to serve in the ARMED SERVICES. A series of lawsuits were filed that sought to overturn military regulations that mandated discharge for disclosing a homosexual orientation.

In *Meinhold v. United States Department of Defense,* 34 F.3d 1469 (9th Cir. 1994), a three-judge panel ruled that Petty Officer Keith Meinhold, of the U.S. Navy, could not be discharged for stating on a national television broadcast that he was gay. In the discharge proceedings, the Navy had taken the position that Meinhold should be discharged even though the Navy had not proved that Meinhold had committed any act of homosexual conduct.

The Ninth Circuit Court of Appeals concluded that a Navy policy against homosexual conduct was constitutional, as it was based on the Navy's professional judgment that homosexual conduct "seriously impairs the accomplishment of the military mission." However, the court of appeals ruled that Meinhold's statement that he was gay was not grounds for discharge. In the court's view, Meinhold had not demonstrated "a concrete, expressed desire to commit homosexual acts." Thus, the focus for the armed services must be on prohibited conduct and persons who are likely to engage in prohibited conduct.

The issue moved into the political arena following President Bill Clinton's election in November 1992. Clinton promised to honor his campaign pledge to exercise his authority as commander in chief of the armed forces and remove the military ban against gays. But the Joint Chiefs of Staff, headed by General Colin L. Powell, and many other senior Pentagon officers strenuously objected to Clinton's plan, claiming that ending the ban would interfere with military order, discipline, and morale. Led by Senator Sam Nunn (D-GA), chairman of the powerful Armed Services Committee, Congress demanded an opportunity to comment on the policy.

Faced with increasing pressure at the beginning of his administration, Clinton agreed to a six-month delay in lifting the ban. He agreed to establish a temporary policy developed by Nunn, and issued a directive ordering the military to stop asking new recruits about their sexual orientation; stop investigations to ferret out gays in uniform; and suspend current cases seeking to discharge gays, as long as those cases were based solely on homosexual status rather than on improper conduct. This policy, dubbed "don't ask, don't tell," became permanent when Congress wrote it into law in September 1993 (Pub. L. No. 103-160, 1993 H.R. 2401 § 571[a]). With this policy, gay men and lesbians were directed to keep their sexuality hidden if they intended to pursue a military career.

*Keith Meinhold was reinstated in the U.S. Navy in 1993 following a Ninth Circuit Court ruling that he could not be discharged for stating on a national television broadcast that he was gay.*
CORBIS SYGMA

Congress has also considered laws that would include homosexuals as a protected class in some instances. However, these laws have met with strong resistance. For instance, in 1999, a bipartisan congressional group reintroduced the Hate Crimes Prevention Act of 1999 (H.R. 1082, 106th Cong.), which would have given federal authorities the power to investigate and prosecute crimes based on sexual orientation, as well as other forms of hate crimes. Despite the fact that the bill had 192 cosponsors, it did not pass through Congress. Current law limits prosecution of hate crimes to instances where the victim is targeted for engaging in certain federally protected activities, such as serving on a jury, voting, or attending public school.

### Legal Recognition of Gay and Lesbian Relationships

Gay and lesbian activists have pressed for legal recognition of homosexual relationships. Under current law, a gay couple is treated differently

*Rev. Kevin Coffey looks on as Joe and Michael Galluccio exchange wedding vows at an Episcopal Church in New Jersey. Following the U.S. Supreme Court's decision in* Lawrence v. Texas *(2003), attention turned to the legal recognition of such unions.*

AP/WIDE WORLD PHOTOS

than a married heterosexual couple. Thus, the benefits of probate and tax law are denied same-sex couples. For example, if a partner in a same-sex relationship dies, under law, the surviving partner is not entitled to any of the deceased's property, unless the deceased provided for such an entitlement in a will.

With the appearance of ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS), health benefits became particularly important to gay couples. Unless a company or government unit makes specific provisions for same-sex couples, an employee's same-sex partner who is not employed by the organization will not be allowed to join the employee's health plan.

Faced with these disparities, gay and lesbian activists first focused their attention on "domestic partnership" laws that would allow unmarried couples to register their relationship with a municipality. Attempts to implement domestic partnership failed in several cities, but New York City; Madison, Wisconsin; Takoma Park, Maryland; and Berkeley, San Francisco, Santa Cruz, and West Hollywood, California, have enacted this type of ordinance.

A more radical attempt to redefine the family and domestic relationships occurred in Hawaii, where gay and lesbian couples filed a lawsuit when they were refused a marriage license. The issue of same-sex marriage reached the Hawaii Supreme Court in *Baehr v. Lewin,* 74 Haw. 530, 852 P.2d 44 (1993). The court ruled that prohibiting same-sex couples from marrying was a violation of Hawaii's constitutional ban on SEX DISCRIMINATION. The court remanded the case for a determination of whether the state had a compelling interest to preclude the granting of licenses.

Subsequently in *Baehr v. Mike*, 1196 WL 694235 (1996), the Hawaii trial court ruled that prohibiting same-sex couples from marrying was not justified for any reason, much less a compelling reason as specified by the Supreme Court. The court further ruled that these couples should therefore be allowed to marry. As the case was heading to the Hawaii Supreme Court, a REFERENDUM was passed by the voters of Hawaii to amend the constitution to allow the state Legislature to restrict marriage to men and women only. As a result, Hawaii's couples lawsuit was ended and the state restricted marriage solely to that of men and women.

Similar lawsuits have been filed in other jurisdictions, as well. In *Brause v. Bureau of Vital Statistics*, 1998 WL 88 743 (1998), an Alaskan trial court ruled that choosing a marital partner is a fundamental right and cannot be interfered with by the state absent a compelling reason. Later that year, the voters amended the Alaska Constitution to require that all marriages be between a man and a woman which, like Hawaii, ended the Alaskan couples lawsuit. In Massachusetts, in *Goodridge v. Dept. of Health*, Mass.L.Rptr. 591, 2002 WL 1299135, gay and lesbian couples filed a state court lawsuit seeking the right to marry. The suit was dismissed by the trial court and as of late 2003 is on appeal.

The issue of same-sex marriage is of national interest because states traditionally accord FULL FAITH AND CREDIT (full legal recognition) to marriages performed in other states. Faced with the prospect of gay and lesbian couples flying to Hawaii to marry and then demanding legal recognition of their union in their home states, several state legislatures passed laws that forbid recognition. Congress responded by enacting the Defense of Marriage Act, 1 U.S.C.A. 7. The act denies certain federal benefits and entitlements to same-sex marriage partners by defining marriage as a legal union between a man and a woman. It also allows states to ban same-sex marriages within their

borders and to not recognize such marriages performed in other states.

In contrast to the national focus on issues such as same-sex marriage, local gay and lesbian groups have spent their energies helping defend lesbian mothers and gay fathers faced with the loss of their children in custody cases. In the Virginia case of *Bottoms v. Bottoms,* 18 Va. App. 481, 444 S.E.2d 276 (1994), a trial judge awarded custody of Sharon Bottoms's son to her mother, solely because Bottoms is a lesbian. The Virginia Court of Appeals reversed the decision as an abuse of the court's discretion and returned custody to the mother. This case indicates the problems gay men and lesbians have in court. The National Center for Lesbian Rights estimates that only approximately one hundred homosexuals gained parental rights through the courts between 1985 and 1994.

Despite the efforts of these local groups, several courts have continued to uphold legislation and judicial rulings that disfavor homosexuals as parents. For example, in 2001, the U.S. District Court for the Southern District of Florida upheld a 1977 Florida law that prohibits homosexuals from adopting children. *Lofton v. Kearney*, 157 F. Supp. 2d 1327 (S.D. Fla. 2001). Similarly, in 2002, the Alabama Supreme Court ruled unanimously to award custody of three teenagers to their father instead of to their lesbian mother. *Ex parte H.H.*, 830 So. 2d 21 (Ala. 2002).

### Backlash

As the same-sex marriage issue demonstrates, the efforts of gay men and lesbians to achieve social and legal equality have generated a backlash from those who oppose their agenda. Domestic partnership acts and gay rights ordinances have been rejected by voters in a number of cities and municipalities, including Irvine and Concord, California. At the state level, the voters of Oregon in 1988 approved a referendum that repealed an executive order by former governor Neil Goldschmidt that had prohibited state agencies from discrimination based on sexual orientation. Measure 8, as the referendum was labeled, never went into effect, as the Oregon Court of Appeals ruled it unconstitutional (*Merrick v. Board of Higher Education,* 116 Or. App. 258, 841 P.2d 646 [1992]).

Undaunted by this court decision, the anti-gay Oregon Citizens Alliance placed a referendum on the 1992 Oregon ballot called Measure 9. Measure 9 was a strongly worded initiative that would have prohibited civil rights protection based on sexual orientation and required state and local governments and school districts to discourage homosexuality. Proponents of the initiative believed that homosexuality was abnormal and perverse. The referendum was rejected on November 3, 1992, by a margin of 57 to 42 percent.

In contrast, voters in Colorado signaled a distinct displeasure with gay and lesbian rights. In November 1992, Colorado took the unprecedented step of amending the state constitution to prohibit state and local governments from enacting any law, regulation, or policy that would, in effect, protect the civil rights of gays, lesbians, and bisexuals. The amendment, known as Amendment 2, did not go into effect, as a lawsuit was filed challenging the constitutionality of the new provision.

This lawsuit—ROMER V. EVANS, 517 U.S.620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996)—reached the U.S. Supreme Court. In a landmark and controversial decision, the Supreme Court struck down the amendment as unconstitutional. Justice ANTHONY M. KENNEDY, writing for the majority, declared that the Colorado provision violated the Equal Protection Clause of the FOURTEENTH AMENDMENT. The Court found that the amendment did more than repeal state and municipal gay rights laws. The amendment prohibited "all legislative, executive or judicial action at any level of state or local government designed to protect . . . gays and lesbians." Under this provision, the only way gay men and lesbians could secure their civil rights was through amendment of the state constitution. This approach was too limited. Kennedy concluded that "[i]t is not within our constitutional tradition to enact laws of this sort." The Colorado amendment classified gay men and lesbians "not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do."

The *Romer* decision was a major advance for gay and lesbian rights, as in it, the Supreme Court made clear that states cannot use a broad brush to limit civil rights. The political process cannot be changed to prevent gay men and lesbians from using the political and legal tools afforded all other citizens. The decision did suggest, however, that it is not unconstitutional to repeal specific legislation that favors gay rights.

# Same-Sex Marriage: A Civil Right or a Moral Wrong?

Since the birth of the U.S. gay and lesbian rights movement in the late 1960s, members of the movement have sought to attain **CIVIL RIGHTS** already granted to racial and ethnic minorities. These attempts at legal change have met with some success, yet a fundamental issue for gay and lesbian couples, that of same-sex marriage, has found strong resistance, even from supporters of gay rights.

Same-sex marriage is controversial not only because it would require legal change but also because it raises a host of issues surrounding the definitions of marriage and family. The issue is packed with social and cultural beliefs and symbols that force parties to the debate to examine basic assumptions about how social life should be ordered. Though the overwhelming majority of opposition comes from heterosexuals, there are also some gays and lesbians who have doubts about the wisdom of same-sex marriage.

Advocates of same-sex marriage argue that many same-sex couples consider themselves married for all intents and purposes. The only thing lacking is legal recognition by the government—in this case, the state government—that such marriages exist. The denial of legal recognition constitutes sexual discrimination, resulting in the loss of legal rights and benefits afforded heterosexual marriages. Thus, unless a surviving member of a same-sex couple has been named in the deceased partner's will, the survivor has no legal right to any portion of the deceased's probate estate—whereas in heterosexual marriages, a surviving spouse has a legal right to such assets. In addition, same-sex couples lose out on **HEALTH CARE** benefits extended to heterosexual married couples.

The legal arguments for same-sex marriage are grounded in the constitutional concepts of **EQUAL PROTECTION** and due process. Proponents of same-sex marriage point to the U.S. Supreme Court's decision in *Loving v. Virginia,* 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), which ruled that state laws that prohibited interracial marriages (anti-miscegenation laws) were unconstitutional. The case established that it is a denial of **DUE PROCESS OF LAW** to forbid marriages on the basis of race and that the creation of such classifications denied couples equal protection of the law because the classifications had "no legitimate purpose independent of invidious racial discrimination."

For advocates of same-sex marriage, *Loving* was an example of the proper modern legal response to irrational racial prejudice. The Hawaii Supreme Court's decision in *Baehr v. Lewin,* 74 Haw. 530, 852 P.2d 44 (1993), which held that the state must have a compelling state interest in order to ban same-sex marriage, used *Loving* as a controlling legal precedent.

Opponents of same-sex marriage make three main arguments against it: the definition-of-marriage argument, the moral tradition argument, and the pragmatism argument.

The definition-of-marriage argument goes to basic social and cultural assumptions. Opponents claim that marriage is necessarily the union of heterosexual couples and therefore cannot include same-sex couples. Thus, any statute that describes marriage could have only contemplated heterosexual couples, even if the statute does not use the specific terms *husband* and *wife.* In *Jones v. Hallahan,* 501 S.W.2d 588 (1973),

### Legislative and Judicial Responses after *Romer v. Evans*

State and local governments did not respond uniformly to *Romer.* A significant number of governmental entities expanded the legal rights of gays and lesbians. By the year 2000, ten states, the District of Columbia, 27 counties, and more than 150 cities had passed laws protecting gays and lesbians from discrimination. Most laws were limited to prohibiting discrimination against homosexuals in the workplace. A few laws went further, however, barring gay discrimination by public accommodations, credit institutions, **HEALTHCARE** providers, educational facilities, and landlords.

Conversely, other state and local governments enacted measures restricting homosexuals' civil rights. Unlike Amendment 2 in Colorado, these measures did not generally attempt to completely exclude gays and lesbians from seeking legal redress for discrimination. Instead, some state and local governments tried to prevent gays and lesbians from exercising particular legal rights traditionally exercised only by heterosexuals. The right to marry and the right to adopt children continue to be the two most frequent targets of these anti-gay laws.

In 1993, voters in Cincinnati, Ohio, passed an initiative amending its city charter to prohibit the city from adopting or enforcing any

the Kentucky Court of Appeals used this line of reasoning to prohibit same-sex marriage, noting that "marriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary."

Proponents of same-sex marriage argue that courts have not been presented with "authority to the contrary" because gays and lesbians have been ignored by historians. Major research on gay and lesbian history and anthropology has led some historians and legal scholars to conclude that Western and non-Western cultures have recognized same-sex relationships. In European history, stigmatizing and closeting of gays and lesbians started at the end of the medieval period and the beginning of the growth of nation-states. Thus, the North American continent was colonized at a time when same-sex relationships had lost their cultural and legal protection.

Opponents of same-sex marriage who make the moral tradition argument state that defining marriage to include only heterosexual couples is justified to preserve family values and traditional ethical notions. They point to passages in the Bible that either affirm heterosexual marriages (Adam and Eve) or denounce homosexual practices (Sodom and Gomorrah). The Judeo-Christian moral tradition formed the basis of **ENGLISH LAW**; thus, it must be assumed that religious teachings against homosexual relationships informed the law. The U.S. Supreme Court echoed the moral tradition argument in its ruling that criminal **SODOMY** laws are not unconstitutional, suggesting that "millennia of moral teaching" supported a state's right to forbid homosexual acts (*Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 [1986]). This case was overruled by **LAWRENCE V. TEXAS**, 539 U.S. ___, 123 S. Ct. 2472, ___L. Ed. 2d ___ (2003); the Supreme Court overruled its prior decision in *Bowers v. Hardwick* and held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to adult males who had engaged in consensual act of sodomy in the privacy of home.

Another argument often raised with moral tradition is that heterosexual marriage is based on the need to procreate, something that same-sex couples cannot do. Proponents of same-sex marriage point out that heterosexual couples who cannot procreate are not denied a marriage license. Elderly, disabled, and infertile individuals may choose to marry for reasons other than procreation. In addition, both heterosexual and homosexual couples have taken advantage of advances in technologies such as **ARTIFICIAL INSEMINATION** and in vitro fertilization to overcome physical limitations on procreation. Critics of the moral tradition argument contend that it is based on misguided readings of the Bible and history. They note that many religious leaders support same-sex marriage and that many same-sex couples solemnize their relationship in a religious ceremony performed by a minister or rabbi.

The pragmatism argument against same-sex marriage is typically made by those who support gay and lesbian rights generally but stop short of endorsing same-sex marriage. The call for marriage, they maintain, will create a backlash against the entire gay and lesbian rights movement. In addition, permitting same-sex marriage would be interpreted as legitimizing homosexuality. The pragmatic position is that gays and lesbians should be tolerated and protected; it does not extend to support the recognition of an alternative lifestyle or the expansion of the traditional concept of marriage.

Along with homosexual opponents who advance these arguments, some gays and lesbians are less than enthused with the prospect of same-sex marriage. This group believes that heterosexual marriage is not a good model for gays and lesbians, as it has traditionally established a hierarchical relationship that has produced the subordination of women. The structure of marriage has fostered domestic abuse, economic disempowerment, and other forms of social dysfunction.

*(continued)*

ordinance, regulation, rule, or policy that entitled gays, lesbians, or bisexuals the right to claim minority or protected status. Gay and lesbian groups challenged the constitutionality of the amendment in federal court, arguing that it denied them **EQUAL PROTECTION** of the law.

In *Equality Foundation of Greater Cincinnati v. Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994), the U.S. District Court for the Southern District of Ohio granted the plaintiffs a permanent **INJUNCTION** that precluded the charter amendment from going into effect. The District Court's decision was overturned on appeal in *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997). The Sixth Circuit Court of Appeals said that Cincinnati's charter amendment was different from Colorado's Amendment 2 because the charter amendment did not deprive gays and lesbians of all legal redress in the entire state.

The Sixth Circuit found that the charter amendment's scope was limited to the confines of the city and that homosexuals' fundamental right to participate in the state's political process was not affected by the local law. Thus, the court concluded that the charter amendment was rationally related to the city's valid interest in conserving public costs that are incurred from investigating and adjudicating sexual orientation discrimination complaints. The Supreme

## Same-Sex Marriage: A Civil Right or a Moral Wrong? (CONTINUED)

Another argument against same-sex marriage is that it will assimilate gays and lesbians into the dominant culture and drain off the radicalism implicit in the gay and lesbian lifestyle. In LOBBYING for same-sex marriage, gay and lesbian leaders will put forward couples who most resemble their mainstream, heterosexual counterparts. This argument has been met with skepticism as romanticizing the movement. All gays and lesbians cannot be grouped as radicals, and it is to be expected that many gays and lesbians would enjoy the legal protection that same-sex marriage would bring.

When the debate has moved into the legal arena, reaction has been strong and swift. In the 1990s, proponents of same-sex marriage scored victories after courts ruled against state bans on such marriages in both Hawaii in 1993 (*Baehr v. Lewin*, 852 P. 2d 44 [Hawaii 1993]) and Alaska in 1998 (*Brause v. Bureau of Vital Statistics*, 21 P. 3d 357 [2001]). In both states, a backlash ensued. Hawaiian voters ratified a state constitutional amendment authorizing lawmakers to define marriage only as a union between a man and a woman. Similarly, Alaskans voted by a 2–1 margin in favor of a similar amendment, while proposals were also floated for subjecting judicial nominees to a legislative vetting process that would weed out those sympathetic to same-sex marriages.

Politicians are responsive to such public sentiment. In Congress and state legislatures, same-sex marriage has been vigorously opposed, and by the late 1990s both federal lawmakers and many state legislatures had adopted outright bans. In 1996, Congress passed the Defense of Marriage Act (DOMA) to give states the right to refuse to recognize same-sex marriages performed in other states. DOMA offered a strong rebuke to proponents by creating the first explicit federal definitions of "marriage" and "spouse" in strictly heterosexual terms, and its very name implied that the institution of marriage needed protection from them.

Despite arguably no movement nationally toward broader acceptance of same-sex marriages, gays and lesbians have enjoyed some related legal gains in the early 2000s. More municipalities, including New York City, extended insurance and health benefits to domestic partners. Following this trend in 2000, Vermont legislators passed a historic civil union law conferring on gays and lesbian partners a status similar to marriage. Although stopping short of legitimizing same-sex marriages, the civil union law cleared the way for partners to secure statewide benefits.

Perhaps unavoidably, the debate over same-sex marriage becomes heated because of the fundamental issues at stake. Proponents see marriage as socially constructed and therefore open to changes that society wishes to make. Opponents see less flexibility, citing tradition, morality, and the integrity of the family.

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### CROSS-REFERENCES

Civil Rights; Marriage; Privacy.

Court surprised many legal observers when it denied certiorari to consider the Sixth Circuit's decision. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 525 U.S. 943, 119 S. Ct. 365, 142 L. Ed. 2d 302 (1998).

Anti-gay discrimination state legislation has often been met with opposition. In 1998, voters in the state of Maine repealed the state's gay rights law by a narrow margin, marking the first time that a state has repealed a gay rights law. The law, which never went into effect, was repealed by a "people's veto" referendum that was initiated by a petition campaign.

The repeal thwarted a 20-year effort by Maine's Lesbian-Gay Political Alliance to secure civil rights protections. In May 1997, the Maine legislature passed the amendment to the Maine Human Rights Act, 5 Me. Rev. Stat. Ann. § 4552 (West Supp. 2003). The amendment banned discrimination in housing, employment, public accommodations, and credit based on sexual orientation. Governor Angus King, a strong supporter of the legislation, signed the bill into law that May.

The new law aroused immediate opposition. A conservative group led by members of the Christian Civil League of Maine and the state chapter of the CHRISTIAN COALITION organized volunteers to collect signatures on petitions calling for a state referendum on the law. In February 1998, voters chose to overturn the law by a 51 to 49 percent margin.

Other state legislation survived both court challenges and political sparring. In 2000, the

Vermont legislature passed a law allowing homosexuals the legal benefit of marriage by entering into civil unions. Shortly before the law became effective that year, a group of plaintiffs filed a lawsuit to have it overturned.

The Vermont legislation stemmed from a decision in the Vermont Supreme Court, *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999), in which the court held that preventing homosexual couples from getting the public benefits that flow from marriage violates the Common Benefits Clause of the Vermont Constitution. The provision states, "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community."

Following the decision, the legislature responded by passing An Act Relating to Civil Unions, Vt. Stat. Ann., title 18, §§ 5160–5169 (2001), which requires town clerks to issue civil union licenses to homosexual couples who complete a form and satisfy other requirements. These couples must then have the union certified by a member of the clergy or a JUSTICE OF THE PEACE. Dissolving a civil union requires family court proceedings similar to those for a DIVORCE. Several plaintiffs, including town clerks required to issue licenses under the new law, brought suit to challenge the legislation. However, a lower court dismissed the lawsuit, and the Vermont Supreme Court affirmed the dismissal.

Other plaintiffs have sought, though ultimately unsuccessfully, to challenge discrimination under a variety of state laws. Policies of the Boy Scouts of America, an organization that refuses to admit homosexuals, have been the subject of several of these lawsuits. In 1998, the California Supreme Court ruled that the state's human rights act did not apply to the Boy Scouts because the organization was not a business establishment. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218 (Cal. 1998).

The plaintiff in the case, Timothy Curran, was a Boy Scout from 1975 to 1979, when he was 14 to 18 years of age. He had a distinguished scout career, attaining the rank of Eagle Scout and earning numerous honors. After he had left the organization upon turning 18, he appeared in a series of articles in an Oakland newspaper about gay teenagers. When he later applied to become an assistant scoutmaster, scout officials denied his application due to his homosexual lifestyle. He first filed suit in 1982, but the original trial did not take place until 1990. Both the trial court and a California court of appeals held, similar to the later ruling by the California Supreme Court, that because the Boy Scouts was not a business establishment, the human rights law did not apply to them.

The California Supreme Court's decision was the opposite of decisions by courts in New Jersey. James Dale had been involved in the Boy Scouts from the age of eight. Like Timothy Curran, Dale was an exemplary member, earning the rank of Eagle Scout. Dale was later approved for adult membership. However, while he attended Rutgers University, he became the co-president of the university gay and lesbian campus organization and appeared in an article where he admitted to being a homosexual. The Boy Scouts then revoked his membership based on his homosexuality.

The New Jersey Superior Court's Appellate Division, in *Dale v. Boy Scouts of America*, 706 A.2d 270 (N.J. Super. 1998), determined that the Boy Scouts' policy violated the state's public accommodation law under New Jersey's Law Against Discrimination, N.J. Stat. Ann. § 10:5-1 et seq. The case was eventually appealed to the New Jersey Supreme Court, which agreed with the superior court's decision. *Dale v. Boy Scouts of America*, 734 A.2d 1196 (N.J. 1999). These decisions were initially considered major victories for gay and lesbian rights supporters.

However, the U.S. Supreme Court reversed the decisions of the New Jersey courts in BOY SCOUTS OF AMERICA V. DALE, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000). The Court, in a 5 to 4 decision, held that forcing the organization to accept gay troop leaders violates the Boy Scouts' right of free expression and free association under the FIRST AMENDMENT.

Prior decisions by the Court had reached similar holdings. In *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995), the Court ruled that the sponsor of Boston's St. Patrick's Day parade could not be forced to allow a group of gays and lesbians to participate. The Court held that parades are a form of expression and that the sponsors could not be forced to include "a group imparting a message the organizers do not wish to convey."

In *Dale*, the Court, per Chief Justice WILLIAM H. REHNQUIST, found that the Boy

Scouts similarly engage in expressive activity. More specifically, the Court recognized that the Boy Scout oath and creed, which include provisions admonishing scouts to be "morally straight" and "clean," were the types of expressive conduct protected by the First Amendment. The Boy Scouts in the case proclaimed that the organization did not wish to admit homosexuals because it did not want to "promote homosexual conduct as a legitimate form of behavior." Because the Boy Scouts could not be forced to convey a message contrary to one they did not want to convey, they could not be forced to allow homosexuals to become members.

Gay and lesbian rights groups, who decried the decision in *Dale*, have continued to strive for equality. These groups have sought to put pressure on such organizations as the Boy Scouts of America. For example, the Broward County School Board in Florida voted to ban the Boy Scouts from each of the 215 schools in the district due to the organization's discriminatory policies regarding homosexuals. In another form of protest, some Eagle Scouts, both gay and straight, returned their Eagle badges to the Boy Scouts' headquarters.

Because gay and lesbian rights advocates have had only limited success in the courts, state legislatures and local governmental entities have sought to achieve these rights by changing society's perceptions of homosexuality in general. The United States nevertheless remains fractioned in the debate, as many conservative groups strongly oppose recognition of homosexuality as a civil right. The nation will likely continue to hear both sides of this debate, and the U.S. legal system is likely to see many more legal challenges involving gay and lesbian rights.

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## GENERAL ACCOUNTING OFFICE

The General Accounting Office (GAO), created by the Budget and Accounting Act, 1921 (31 U.S.C.A. 41), was vested with all powers and duties of the six auditors and the comptroller of the Treasury, as stated in the act of July 31, 1894 (28 Stat. 162), and other statutes extending back to the original Treasury Act of 1789 (1 Stat. 65). The 1921 act broadened the audit activities of the government and established new responsibilities for reporting to Congress.

The scope of the activities of the GAO was further extended by the Government Corporation Control Act (31 U.S.C.A. 841 [1945]), the Legislative Reorganization Act of 1946 (31 U.S.C.A. 60), the Accounting and Auditing Act of 1950 (31 U.S.C.A. 65), the Legislative Reorganization Act of 1970 (31 U.S.C.A. 1151), the Congressional Budget and Impoundment Control Act of 1974 (31 U.S.C.A. 1301), the General Accounting Office Act of 1974 (31 U.S.C.A. 52c), and other legislation.

The GAO is under the control and direction of the comptroller general of the United States and the deputy comptroller general of the United States, who are appointed by the president with the advice and consent of the Senate for terms of 15 years.

The GAO has the following basic purposes: to assist Congress, its committees, and its members in carrying out their legislative and oversight responsibilities, consistent with its role as an independent, nonpolitical agency in the legislative branch; to carry out legal, accounting, auditing, and claims-settlement functions with respect to federal government programs and operations as assigned by Congress; and to make recommendations that are designed to provide for more efficient and effective government operations.

### Direct Assistance to Congress

The GAO directly assists Congress and its committees, members, and officers upon request. This assistance can come in any of the forms described in the following paragraphs.

Legislation may be enacted to direct the GAO to examine a specific matter; special audits, surveys, and reviews may be performed for the committees, members, or officers of Congress; professional staff members may be assigned to assist committees in conducting studies and investigations; the comptroller general or his or her representatives may testify before committees on matters considered to be within the special competence of the GAO; and committees or members may request comments on, or assistance in, drafting proposed legisla-

tion or other advice in legal and legislative matters. Further, the GAO responds to numerous requests from congressional sources for information relating to, or resulting from, its work, and it provides advice on congressional, administrative, and financial operations.

The Congressional Budget and Impoundment Control Act of 1974 specified numerous additional ways in which the GAO is to assist Congress: (1) provide information, services, facilities, and personnel (as mutually agreed) to the CONGRESSIONAL BUDGET OFFICE; (2) assist congressional committees in developing statements of legislative objectives and goals and methods for assessing and reporting actual program performance; (3) assist such committees in analyzing and assessing federal agency program reviews and evaluation studies; (4) develop and recommend methods for review and evaluation of government programs; (5) conduct a continuing program to identify needs of committees and members of Congress for fiscal, budgetary, and program-related information; (6) assist congressional committees in developing their information needs; (7) monitor recurring reporting requirements of the Congress; (8) develop, in cooperation with the Congressional Budget Office, the Treasury, and the OFFICE OF MANAGEMENT AND BUDGET, an up-to-date inventory and directory of sources and information systems for fiscal, budgetary, and program-related information; (9) help committees and members to obtain information from such sources and to appraise and analyze it; (10) develop, with the Congressional Budget Office, a central file of data and information to meet recurring requirements of Congress for fiscal, budgetary, and program-related information; (11) review and report to Congress on deferrals and rescissions of budget authority proposed by the president; and (12) bring suit, where necessary, to ensure the availability for obligation of budget authority.

### Auditing

In general, the audit authority of the GAO extends to all departments and agencies of the federal government. Exceptions to this audit authority principally involve funds that relate to certain intelligence activities.

Where audit authority exists, the GAO has the right of access to, and examination of, any books, documents, papers, or records of the departments and agencies. The law provides that departments and agencies must furnish to the comptroller such general information as he or

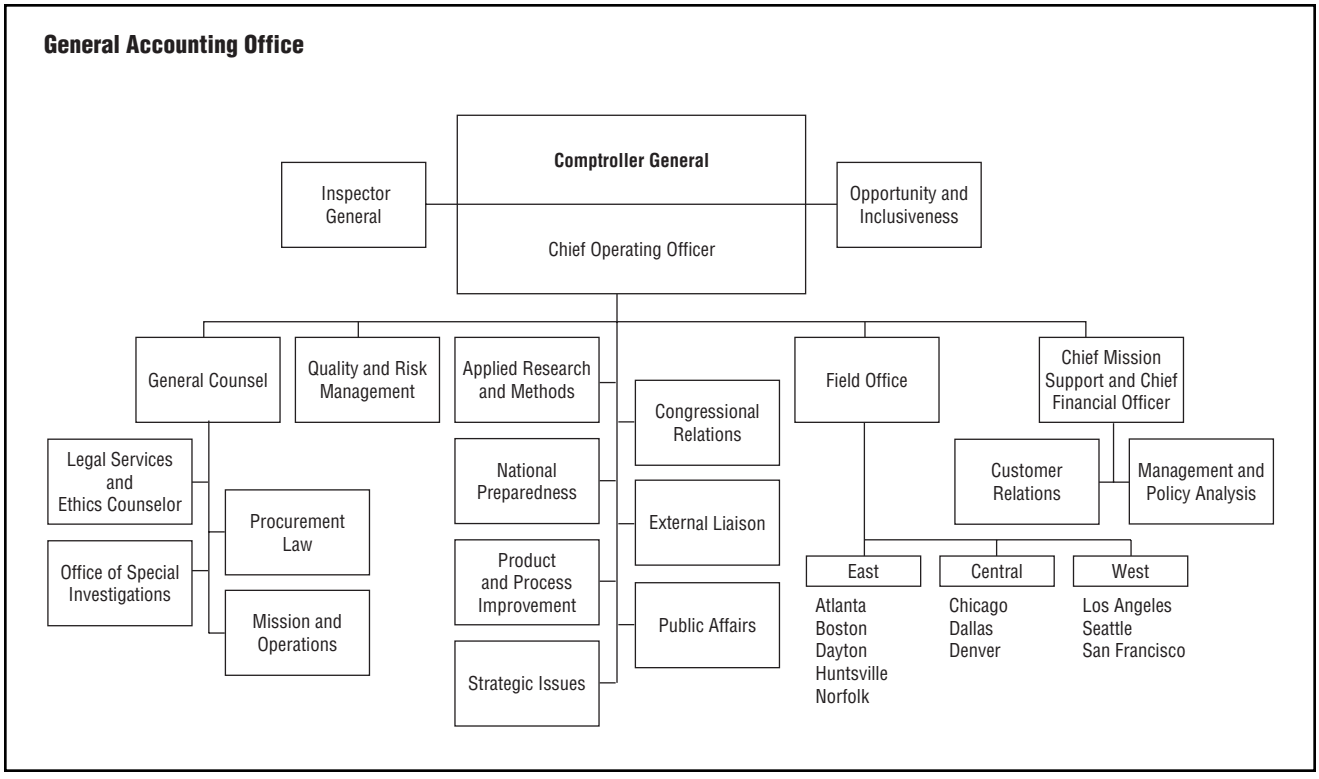

she may require, including that which is related to their powers, duties, activities, organization, financial transactions, and methods of business.

The GAO has statutory authority to investigate all matters relating to the receipt, disbursement, and application of public funds. Additionally, the audit authority of the GAO covers wholly and partially owned government corporations and certain nonappropriated fund activities. By law, it is authorized and directed to make expenditure analyses of executive agencies in order to enable Congress to determine whether public funds are efficiently and economically administered and expended, and to review and evaluate the results of existing government programs and activities.

The scope of the audit work of the GAO extends not only to the programs and activities that the federal government itself conducts, but also to the activities of state and local governments, quasi-governmental bodies, and private organizations in their capacity as recipients under, or administrators for, federal aid programs that are financed by loans, advances, grants, and contributions. The interest of the GAO also extends to certain activities of those parties that have negotiated contracts with the government.

The audit activities of the GAO also include examining and settling accounts of the certification, disbursement, and collection officers of the federal government, including determinations involving accountability for improper or illegal expenditures of public funds. Balances that the comptroller general certifies are binding on the EXECUTIVE BRANCH; however, any settled account can be reviewed on motion by the comptroller general or another interested party.

In its audit work, the GAO makes recommendations for greater economy and efficiency in government operations and for improving the effectiveness of government programs. Within this audit authority is a responsibility to report significant matters to Congress for information and use in carrying out its legislative and executive branch surveillance functions.

### Accounting

The comptroller general has the following statutory responsibilities with respect to the accounting systems of federal agencies:

- Prescribe the accounting principles, standards, and related requirements to be followed by the agencies
- Cooperate with federal agencies in developing their accounting systems
- Approve agency accounting systems when they are deemed adequate and meet prescribed principles, standards, and related requirements
- Review, from time to time, agency accounting systems in operation
- Conduct—jointly with the Office of Management and Budget, the TREASURY DEPARTMENT, and the Office of Personnel Management—a continuous program to improve accounting and financial reporting in the federal government

By law, the comptroller general cooperates with the secretary of the Treasury and the director of the Office of Management and Budget in developing for use by all federal agencies standardized information and data-processing systems and also standard terminology, definitions, classifications, and codes for federal fiscal, budgetary, and program-related data and information.

### Legal Services and Decisions

The legal work of the GAO is centered at the headquarters office in its Office of the General Counsel.

The comptroller general makes final determinations as to the legality of actions taken by federal departments and agencies with regard to accountability for the use of public funds. These determinations are made in connection with actions that are already taken and on an advance basis upon request by certain responsible officers of the government. Decisions of the comptroller general concerning the legality of payments may arise from the audit work of the GAO or may be applied for by the heads of departments or agencies or by certifying and disbursing officers with regard to payments to be made or as a result of congressional inquiries.

The comptroller general also considers questions that arise in connection with the award of government contracts and certain contracts under government grants. Statutory and regulatory procedures precisely define the manner in which these government awards are to be made, and those competing for such awards who believe that requirements have not been met in any particular instance may apply to the comptroller general for a determination.

The legal work of the GAO also covers a wide range of advisory services—to Congress,

its committees, and members, with respect to the legal effect of statutory provisions and implications of proposed legislation as well as assistance in drafting legislation; to the JUSTICE DEPARTMENT, primarily in the form of litigation reports on court cases generated by, or related to, the work of the GAO; and to the courts in connection with cases involving the award of government contracts. In addition, there is daily coordination between the staff of the Office of the General Counsel and the audit and operating staffs with regard to the legal consequences of issues raised in the course of reviews of government activities.

### Claims Settlement and Debt Collection

The GAO settles claims by and against the United States as required by law. Claims may involve individuals; business entities; or foreign, state, and municipal governments as claimant or debtor. Settlement of these claims by the GAO is binding upon executive branch agencies. However, the comptroller general may review any settled claim on his or her own initiative or at the request of an interested party. Claimants and debtors have further recourse to the Congress or to the courts.

Where an ADMINISTRATIVE AGENCY has been unable to collect a debt due the government, the debt is certified to the GAO as uncollectible. After determining the amount due the United States, the GAO superintends its recovery, and ultimately makes final settlement and adjustment.

### Energy Data Verification

Under the Energy Policy and Conservation Act (42 U.S.C.A. 6201), approved December 22, 1975, the comptroller general is empowered to conduct verification examinations of energy-related information developed by private business concerns under certain circumstances delineated in the act. For the purpose of carrying out this authority, the comptroller general may issue subpoenas, require written answers to interrogatories, administer oaths, inspect business premises, and inspect and copy specified books and records. Certain enforcement powers are provided, including, for some types of noncompliance, the power to assess civil penalties and to collect such penalties through civil action.

### Rules, Regulations, and Decisions

The comptroller general makes such rules and regulations as deemed necessary for carrying on the work of the GAO, including those for the admission of attorneys to practice before it. Under the seal of the office, he or she furnishes copies of records from books and proceedings thereof, for use as evidence in accordance with the act of June 25, 1948 (62 Stat. 946; 28 U.S.C.A. 1733).

The GAO Personnel Act of 1980, approved February 15, 1980 (94 Stat. 27; 31 U.S.C.A. 52-1), requires the comptroller general to establish an independent personnel management system for employees of the GAO. The system would not be subject to regulation or oversight of executive branch agencies. Employee rights, such as appeals from adverse actions, are protected by creation of a GAO Personnel Appeals Board.

The GAO "Policy and Procedures Manual for Guidance of Federal Agencies" is the official medium through which the comptroller general promulgates principles, standards, and related requirements for accounting to be observed by the federal departments and agencies; uniform procedures for use by the federal agencies; and regulations governing the relationships of the

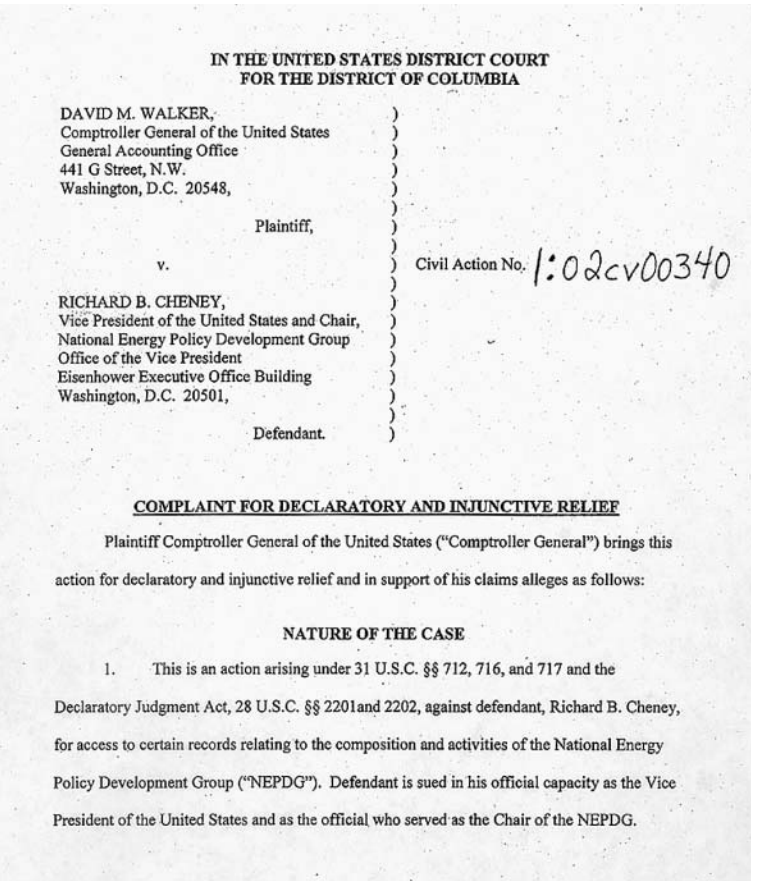

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. WALKER,
Comptroller General of the United States
General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548,

Plaintiff,

v.

Civil Action No. 1:02cv00340

RICHARD B. CHENEY,
Vice President of the United States and Chair,
National Energy Policy Development Group
Office of the Vice President
Eisenhower Executive Office Building
Washington, D.C. 20501,

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Comptroller General of the United States ("Comptroller General") brings this action for declaratory and injunctive relief and in support of his claims alleges as follows:

NATURE OF THE CASE

1. This is an action arising under 31 U.S.C. §§ 712, 716, and 717 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201and 2202, against defendant, Richard B. Cheney, for access to certain records relating to the composition and activities of the National Energy Policy Development Group ("NEPDG"). Defendant is sued in his official capacity as the Vice President of the United States and as the official who served as the Chair of the NEPDG.

*In 2002, Comptroller General David M. Walker filed suit against Vice President Dick Cheney in order to force the release of the administration's energy task force information.*
AP/WIDE WORLD PHOTOS

GAO with other federal agencies and with individuals and private concerns doing business with the federal government.

All decisions of the comptroller general of general import are published in monthly pamphlets and in annual volumes.

### GAO Reports

As required by law, a list of GAO reports issued or released during the previous month is furnished monthly to Congress, its committees, and its members.

Copies of GAO reports are provided without charge to members of Congress and congressional committee staff members; officials of federal, state, local, and foreign governments; members of the press; college libraries, faculty members, and students; and nonprofit organizations.

Since the late 1990s, the GAO has worked to place more information on its web site. It has placed a large archive of its reports online and publishes current reports to the web site. In addition, it has placed its bid-protest docket online and has established FraudNet, which allows persons to file allegations of government FRAUD online.

FURTHER READINGS

General Accounting Office Website. Available online at <www.gao.gov> (accessed November 10, 2003).

CROSS-REFERENCES

Congress of the United States; Federal Budget; Office of Management and Budget; Treasury Department.

## GENERAL AGREEMENT ON TARIFFS AND TRADE

The General Agreement on Tariffs and Trade (GATT) originated with a meeting of 22 nations meeting in 1947 in Geneva, Switzerland. By 2000, there were 142 member nations, with another 30 countries seeking admission. The detailed commitments by each country to limit tariffs on particular items by the amount negotiated and specified in its tariff schedule is the central core of the GATT system of international obligation.

The obligations relating to the tariff schedules are contained in Article II of GATT. For each commodity listed on the schedule of a country, that country agrees to charge a tariff that will not exceed an amount specified in the schedule. It can, if it wishes, charge a lower tariff.

The World Trade Organization (WTO) heavily influences the workings of the GATT treaties through the efforts of various committees. Representatives of member countries of the WTO comprise the Council for the Trade in Goods (Goods Council), which oversees the work of 11 committees responsible for overseeing the various sectors of GATT. The committees focus on such issues as agriculture, sanitary measures, subsidies, customs valuation, and rules of origin.

FURTHER READINGS

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CROSS-REFERENCES

Commodity; Tariff.

## GENERAL APPEARANCE

*The act by which a defendant completely consents to the jurisdiction of the court by appearing before it either in person or through an authorized representative thereby waiving any jurisdictional defects that might be raised except for that of the competency of the court.*

A general appearance differs from a special appearance in which a defendant agrees to submit to the jurisdiction of the court for a restricted purpose, such as to test whether the SERVICE OF PROCESS made upon him or her was legally sufficient.

## GENERAL CREDITOR

*An individual to whom money is due from a debtor, but whose debt is not secured by property of the debtor. One to whom property has not been pledged to satisfy a debt in the event of nonpayment by the individual owing the money.*

## GENERAL EXECUTION

*A court order commanding a public official, such as a sheriff, to take the* PERSONAL PROPERTY *of a defendant to satisfy the amount of a judgment awarded against such defendant.*

When such officer is given the authority to seize only particular property or types of property, the writ or order is sometimes known as a *special execution.*

## GENERAL INTENT

*In* CRIMINAL LAW *and* TORT LAW, *a mental plan to do that which is forbidden by the law.*

Unlike offenses that require a SPECIFIC INTENT, it is not necessary that the accused intend the precise harm or result. It is sufficient if the person meant to do the act that caused the harm or result. For example, BATTERY is a general intent offense. If a defendant commits a battery that results in harm to the victim, it does not matter if the defendant did not intend the harm.

## GENERAL JURISDICTION

*The legal authority of a court to entertain whatever type of case comes up within the geographical area over which its power extends.*

General jurisdiction differs from special or limited jurisdiction, which is the power of a court to hear only certain types of cases, or those in which the amount in controversy is below a certain sum or that is subject to exceptions.

## GENERAL LEGACY

*A monetary gift, payable out of the collective assets of the estate of a testator—one who makes a will—and not from a designated source.*

Unlike a specific legacy, a general legacy is not subject to ADEMPTION, extinction that results when a testator revokes his or her intention to leave designated property to another either by altering the property or removing it from the estate.

## GENERAL SERVICES ADMINISTRATION

The General Services Administration (GSA) was established by section 101 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C.A. § 751). The GSA sets policy for and manages government property and records. More specifically, GSA duties include the construction and operation of buildings; procurement and distribution of supplies; utilization and disposal of property; management of transportation, traffic, and communications; and management of the government's automatic data processing resources program. Like a large business conglomerate, the GSA conducts business in many different areas and operates on different levels of organization: the central Washington, D.C., office, 11 regional offices, and field activities.

The GSA is a large organization, the structure of which consists of several tiers of administrators, offices, bureaus, and support agencies. The first level in the hierarchy of the GSA consists of the administrator, the deputy administrator, and the chief of staff. The administrator is the principal director for the entire organization, assisted by a deputy and chief of staff.

The second tier in the GSA organization consists of four main offices: the Federal Supply Service, Federal Technology Service, Public Buildings Service, and the Office of Governmentwide Policy. These four offices oversee the majority of the agency's work and collectively form the public face of the GSA.

The Federal Supply Service (FSS) provides low-price, quality goods and services to federal departments and agencies. Its services include governmentwide programs for the management of transportation, mail, and travel; audits of transportation; management of a federal fleet; and management of aircraft owned or operated by civilian agencies in support of government missions.

The FSS provides over $25 billion annually in common-use goods and services to federal agencies. It emphasizes purchasing environmentally safe products, and services and supplies over 3,000 environmentally oriented products to the federal government, such as retread tires, shipping boxes made with recycled materials, and water-saving devices.

The service also coordinates a worldwide program for the management of government property, through the Office of Property Disposal, which is responsible for allocating excess PERSONAL PROPERTY among the agencies and donating or disposing of property through public sales.

The FSS Interagency Fleet Management Program controls approximately 185,000 vehicles, purchasing over 58,000 new vehicles annually. The FSS also acts as the government's civilian freight manager by providing rating and routing services to customer agencies and overnight delivery of small packages at reduced rates, and managing the postpayment audit of freight and passenger transportation bills.

**Information Technology Service** The Federal Technology Service (FTS) directs governmentwide programs for automated data processing and local TELECOMMUNICATIONS equipment and services, coordinates programs for federal records and information management practices, and provides information to the public through the Federal Information Center.

**General Services Administration**

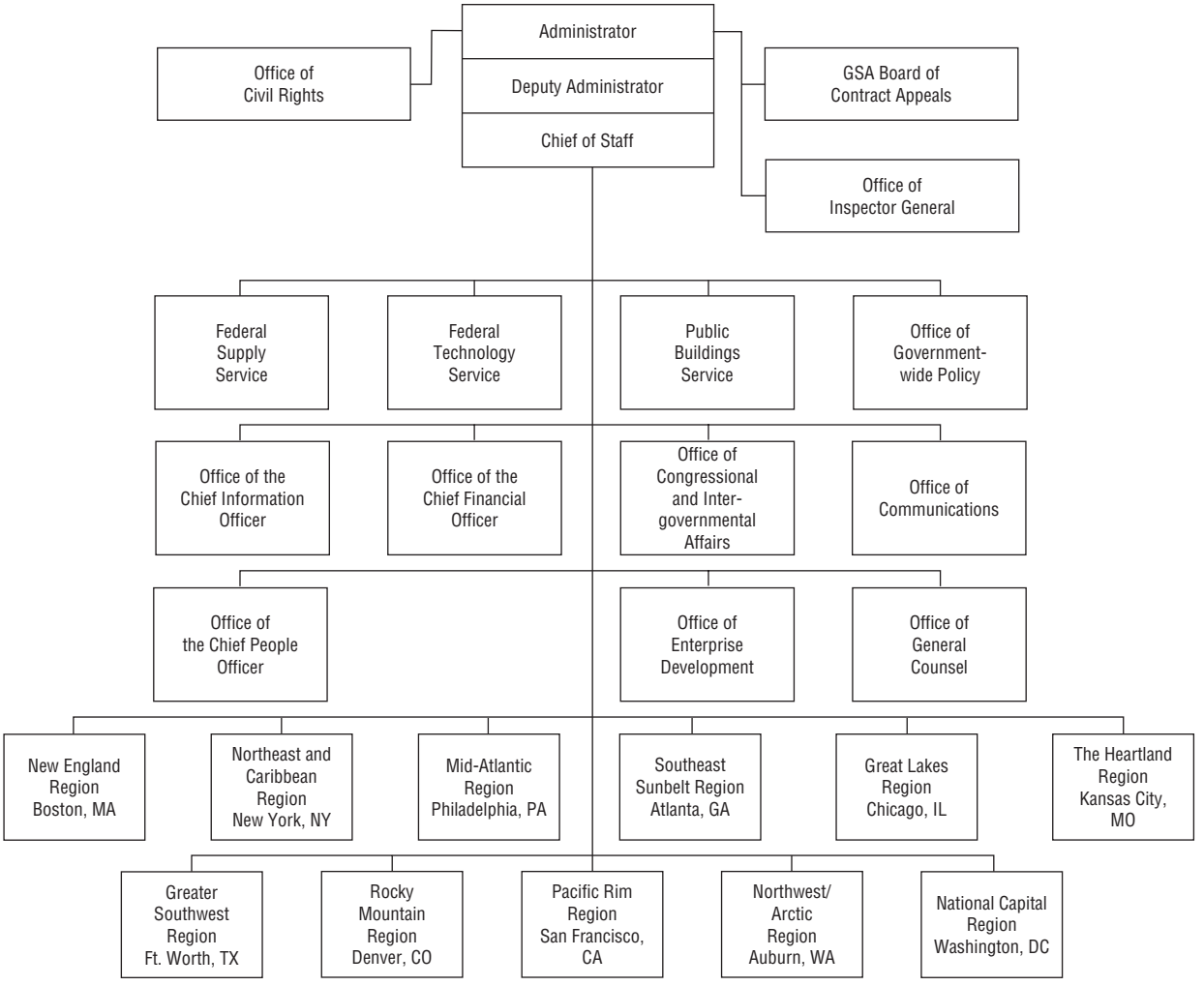


The FTS helps federal agencies manage information resources through the Office of Information Technology Integration (ITI). The ITI provides assistance through three programs: the Federal Systems Integration and Management System, Federal Computer Acquisition Center, and Federal Information System Support Program. The ITS also procures automatic data processing and telecommunications hardware, software, and services involving information resources of governmentwide agencies.

In addition to technical assistance, the service provides various management assistance programs and policies to governmentwide agencies concerning information-related functions and activities. It is in charge of the GSA's governmentwide telecommunications service and assists with the interagency Information Resources Management infrastructure. It also provides internal information systems management for the GSA.

The FTS's Office of Information Security supports all government activities conducting sensitive and classified national security, diplomatic, and DEFENSE DEPARTMENT missions.

Another program overseen by FTS is the Federal Information Center Program, which is a clearinghouse for information about the federal government. The center answers questions regarding government programs and refers peo-

ple to the appropriate agency. Depending upon their geographic location, residents may be able to access the center through a toll-free telephone number. Another resource, the Federal Domestic Assistance Catalog Program, provides information on federally operated programs that offer domestic assistance, such as loans, grants, and insurance, to interested persons.

The FTS also offers the Federal Information Relay Service to help hearing-impaired and speech-impaired individuals communicate with the government. The service manages numerous programs that maintain information on equipment, goods, and services bought by the government. The information is available to the public.

The Public Buildings Service (PBS) designs, builds, leases, repairs, and maintains approximately 7,300 federally controlled buildings in the United States. The service is also responsible for property management information systems throughout the government and for the maintenance of PUBLIC UTILITIES and their costs.

The Office of Governmentwide Policy (OGP) functions to ensure that governmentwide policies allow and encourage agencies to develop and utilize the best, most cost effective management practices for the conduct of their specific programs. The OGP consolidates GSA governmentwide policy-making activities within one central office. These activities include the government's plans for acquiring some $200 billion a year in goods and services, the $8 billion a year the government spends on government travel, and the tens of billions of dollars spent each year on internal administrative management systems. The OGP is focused on re-engineering the traditional policy development model to emphasize collaborative development.

The third tier in the organizational structure of the GSA contains 11 regional offices: New England Region, Northeast and Caribbean Region, Mid-Atlantic Region, Southeast Sunbelt Region, Great Lakes Region, The Heartland Region, Greater Southwest Region, Rocky Mountain Region, Pacific Rim Region, Northwest/Arctic Region, and the National Capitol Region. These offices are distributed to facilitate the work of the GSA in diverse areas of the country.

The fourth level in the structural hierarchy of the GSA consists of ten offices that support all GSA services: the Offices of the Chief Financial Officer, Office of the Chief People Officer, Office of Congressional & Intergovernmental Affairs, Office of Services and Communications, Office of the Chief Information Officer, Office of Small Business Utilization, Office of Performance Improvement, Office of General Counsel, Office of Civil Rights, Office of Inspector General, along with the GSA Board of Contract Appeals.

The Office of Portfolio Management manages all aspects of the portfolio management business line at the national level.

FURTHER READINGS

General Services Administration. Available online at <www.gsa.gov> (accessed July 26, 2003).

*U.S. Government Manual* Website. Available online at <www.gpoaccess.gov> (accessed November 10, 2003).

CROSS-REFERENCES

Personal Property; Telecommunications.

## GENERAL TERM

*A sitting of the court en banc, with the participation of the entire membership of the court rather than the regular quorum. A phrase used in some jurisdictions to signify the ordinary session of a court during which the trial determination of actions occur.*

General term is distinguishable from special term, in that the latter entails the hearing of motions, which are applications for court orders, arguments, the disposition of various types of formal business, or the trial of a special list or class of cases.

## GENERAL VERDICT

*A decision by a jury that determines which side in a particular controversy wins, and in some cases, the amount of money in damages to be awarded.*

## GENERAL WARRANTY DEED

Another name for a WARRANTY DEED.

## GENERAL WELFARE

*The concern of the government for the health, peace, morality, and safety of its citizens.*

Providing for the welfare of the general public is a basic goal of government. The preamble to the U.S. Constitution cites promotion of the general welfare as a primary reason for the creation of the Constitution. Promotion of the general welfare is also a stated purpose in state constitutions and statutes. The concept has

sparked controversy only as a result of its inclusion in the body of the U.S. Constitution.

The first clause of Article I, Section 8, reads, "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." This clause, called the General Welfare Clause or the Spending Power Clause, does not grant Congress the power to legislate for the general welfare of the country; that is a power reserved to the states through the TENTH AMENDMENT. Rather, it merely allows Congress to spend federal money for the general welfare. The principle underlying this distinction—the limitation of federal power—eventually inspired the only important disagreement over the meaning of the clause.

According to JAMES MADISON, the clause authorized Congress to spend money, but only to carry out the powers and duties specifically enumerated in the subsequent clauses of Article I, Section 8, and elsewhere in the Constitution, not to meet the seemingly infinite needs of the general welfare. ALEXANDER HAMILTON maintained that the clause granted Congress the power to spend without limitation for the general welfare of the nation. The winner of this debate was not declared for 150 years.

In *United States v. Butler,* 56 S. Ct. 312, 297 U.S. 1, 80 L. Ed. 477 (1936), the U.S. Supreme Court invalidated a federal agricultural spending program because a specific congressional power over agricultural production appeared nowhere in the Constitution. According to the Court in *Butler,* the spending program invaded a right reserved to the states by the Tenth Amendment.

Though the Court decided that *Butler* was consistent with Madison's philosophy of limited federal government, it adopted Hamilton's interpretation of the General Welfare Clause, which gave Congress broad powers to spend federal money. It also established that determination of the general welfare would be left to the discretion of Congress. In its opinion, the Court warned that to challenge a federal expense on the ground that it did not promote the general welfare would "naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress." The Court then obliquely confided, "[H]ow great is the extent of that range . . . we need hardly remark." "[D]espite the breadth of the legislative discretion," the Court continued, "our duty to hear and to render judgment remains." The Court then rendered the federal agricultural spending program at issue invalid under the Tenth Amendment.

With *Butler* as precedent, the Supreme Court's interest in determining whether congressional spending promotes the general welfare has withered. In *South Dakota v. Dole,* 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987), the Court reviewed legislation allowing the secretary of transportation to withhold a percentage of federal highway funds from states that did not raise their legal drinking age to twenty-one. In holding that the statute was a valid use of congressional spending power, the Court in *Dole* questioned "whether 'general welfare' is a judicially enforceable restriction at all."

Congress appropriates money for a seemingly endless number of national interests, ranging from federal courts, policing, imprisonment, and national security to social programs, environmental protection, and education. No federal court has struck down a spending program on the ground that it failed to promote the general welfare. However, federal spending programs have been struck down on other constitutional grounds.

FURTHER READINGS

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CROSS-REFERENCES

Congress of the United States; Constitution of the United States; Federal Budget; Federalism.

## GENERALLY ACCEPTED ACCOUNTING PRINCIPLES

*The standard accounting rules, regulations, and procedures used by companies in maintaining their financial records.*

Generally accepted accounting principles (GAAP) provide companies and accountants with a consistent set of guidelines that cover both broad accounting principles and specific practices. For example, accountants use GAAP standards to prepare financial statements.

In response to the STOCK MARKET crash of 1929 and the ensuing Great Depression, Congress passed the Securities Act in 1933 and the Securities Exchange Act in 1934. Among other things, these acts established a methodology for standardizing accounting practices among pub-

licly held companies. The task of creating and maintaining accounting standards was handled by the American Institute of Certified Public Accountants (AICPA) from 1936 until 1973. In 1973, the responsibility was taken over by the Financial Accounting Standards Board (FASB), which was established the same year.

The Financial Accounting Standards Advisory Council (FASAC), which is composed of 33 members from both the public and private sectors, advises the FASB on matters that may affect or influence GAAP rules. These 33 individuals meet quarterly to discuss accounting issues and gather information, which they then present to FASB. Essentially, FASAC serves as FASB's sounding board. FASAC is overseen by the Financial Accounting Foundation, an independent organization whose 16-member board of trustees chooses FASAC's 33 members. The FASB is also monitored by the Corporation Finance division of the **SECURITIES AND EXCHANGE COMMISSION** (SEC). Among the organizations that influence GAAP rules are the AICPA and the **INTERNAL REVENUE SERVICE** (IRS).

Other countries have their own GAAP rules, which are set by their versions of the FASB. For example, the Canadian Institute of Chartered Accountants (CICA) sets GAAP standards in Canada.

Publicly held companies are required to conform to GAAP standards. Specifically, the Securities Act and the Securities Exchange Act established a requirement that publicly held companies must undergo an external audit by an independent accountant once a year. In the 2000s, companies faced increased scrutiny in light of the widely publicized cases involving such major corporations as Enron and WorldCom, along with the firm of Arthur Andersen, one of the world's largest accountancy firms. In the case of Enron, for example, the company manipulated its financial information to give the appearance that revenues were much higher than they actually were. After the company declared **BANKRUPTCY** in 2001, Arthur Andersen came under attack because its auditors had signed off on Enron's financials despite numerous misgivings. Andersen was found guilty of **OBSTRUCTION OF JUSTICE** by a jury in Houston, Texas, in June 2002.

In July 2002, President **GEORGE W. BUSH** signed the **SARBANES-OXLEY** Act, which established new regulations for accounting reform and investor protection. Among the provisions of Sarbanes-Oxley was the creation of the five-member Public Company Accounting Oversight Board, overseen by the SEC. Accounting firms that audit publicly held companies are required to register with the board, which has the authority to inspect audits. Sarbanes-Oxley also requires chief executive officers and chief financial officers of publicly held companies to provide a statement attesting to the veracity of their financial statements.

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## GENETIC ENGINEERING

*The human manipulation of the genetic material of a cell.*

Genetic engineering involves isolating individual DNA fragments, coupling them with other genetic material, and causing the genes to replicate themselves. Introducing this created complex to a host cell causes it to multiply and produce clones that can later be harvested and used for a variety of purposes. Current applications of the technology include medical investigations of gene structure for the control of genetic disease, particularly through antenatal diagnosis. The synthesis of hormones and other proteins (e.g., growth hormone and insulin), which are otherwise obtainable only in their natural state, is also of interest to scientists. Applications for genetic engineering include disease control, hormone and protein synthesis, and animal research.

### International Codes and Ethical Issues for Society

An international code of ethics for genetic research was first established in the World Medical Association's Declaration of Helsinki in 1964. The guide prohibited outright most forms of genetic engineering and was accepted by numerous U.S. professional medical societies, including the **AMERICAN MEDICAL ASSOCIATION** (AMA).

In 1969 the AMA promulgated its own ethical guidelines for clinical investigation, key provisions of which conflicted with the Helsinki Declaration. For example, the AMA guidelines proposed that when mentally competent adults were found to be unsuitable subjects for genetic engineering studies, minors or mentally incompetent subjects could be used instead. The Helsinki Declaration did not condone testing on humans.

The growth of genetic engineering in the 1970s aroused international concern, but only limited measures were taken by governments and medical societies to control it. Concern focused on the production of dangerous bacterial mutants that could be used as harmful eugenics tools or weapons. The Genetic Manipulation Advisory Group was established in England based on the recommendations of a prominent medical group, the Williams Committee. Scientists were required to consult this group before carrying out any activity involving genetic manipulation in England. Additional measures required scientific laboratories throughout the world to include physical containment labs to prevent manipulated genes from escaping and surviving in natural conditions. These policies were subsequently adopted in the United States.

### The Breakdown of Regulation: Genetic Inventions and Patents in the United States

In 1980 the Supreme Court created an economic incentive for companies to develop genetically engineered products by holding that such products could be patented. In *Diamond v. Chakrabarty,* 447 U.S. 303, 100 S. Ct. 2204, 65 L. Ed. 2d 144, the Court held that a patent could be issued for a novel strain of bacteria that could be used in the cleanup of oil spills. In 1986, the U.S. DEPARTMENT OF AGRICULTURE approved the sale of the first living genetically altered organism. The virus was used as a pseudorabies vaccine, from which a single gene had been cut. Within the next year, the U.S. PATENT AND TRADEMARK OFFICE announced that nonnaturally occurring, nonhuman, multicellular living organisms, including animals, were patentable under the Patent Act of 1952 (35 U.S.C.A. § 101).

The Department of Agriculture formally became involved in genetic engineering in April of 1988, when the Patent and Trademark Office issued the first animal patent, granted on a genetically engineered mouse used in cancer research. U.S. scientists began experiments with the genetic engineering of farm animals, such as creating cows that would give more milk, chickens that would lay more eggs, and pigs that would produce leaner meat. These developments only raised more objections from critics who believed that genetic experimentation on animals violated religious, moral, and ethical principles. In spite of the controversy, the U.S. House of Representatives approved the Transgenic Animal Patent Reform bill on September 13, 1988. The bill would have allowed exempted farmers to reproduce, use, or sell patented animals, although it prohibited them from selling germ cells, semen, or embryos derived from animals. However, the Senate did not vote on the act and so it did not become law.

### Significant State Laws

Certain states have passed laws restricting genetic engineering. By the early 1990s, six states had enacted laws designed to curb or prohibit the spread of genetically engineered products in the marketplace (see Ill. Ann. Stat. ch. 430, § 95/1 [Smith-Hurd 1995]; Me. Rev. Stat. Ann. tit. 7, § 231 et seq. [West 1995]; Minn. Stat. Ann. § 116C.91 et seq. [West 1995]; N.C. Gen. Stat. § 106-765-780 [Supp. 1991]; Okla. Stat. Ann. tit. 2, §§ 2011–2018 [West 1996]; Wis. Stat. Ann. § 146.60 [West 1996]). North Carolina's law sets the most comprehensive restrictions on genetic engineering. Resembling the earlier measures proposed by organizations such as England's Genetic Manipulation Advisory Group, it requires scientists to hold a permit for any release of a genetically engineered product outside a closed-containment enclosure. The North Carolina statute has been cited as a possible model for advocates of comprehensive federal regulations.

### Recent Developments

In the mid 1990s the international guidelines established by the Declaration of Helsinki were modified to allow certain forms of cell manipulation in order to develop germ cells for therapeutic purposes. Scientists are also exploring genetic engineering as a means of combating the HIV virus.

In 1997 the cloning of an adult sheep by Scottish scientist Ian Wilmut brought new urgency to the cloning issue. Prior to this development, cloning had been successful only with immature cells, not those from an adult animal. The break-

through raised the prospect of human cloning and prompted an international debate regarding the ethical and legal implications of cloning.

Since the cloning of the sheep, nicknamed "Dolly," scientists have found the process of cloning to be more difficult than expected. Since Dolly, scientists have cloned such animals as cows, pigs, monkeys, cats, and even rare and endangered animals. The process of cloning is complex, involving the replacement of the nucleus of an egg cell with the nucleus of a cell from the subject that will be cloned. This process is meticulous, and the failure rate is high.

In November 2001, scientists first successfully inserted the DNA from one human cell into another human egg. Although the eggs began to replicate, they died shortly after the procedure. Human cloning has caused the most intense debate on the issue, with the debate focusing upon scientific, moral, and religious concerns over this possibility. Scientists do not expect that human cloning will be possible for several years.

Evidence suggests that cloned animals have experienced significant health problems, leading to concerns about the vitality of the entire process. Cloned animals tend to be larger at birth, which could cause problems for the female animals giving birth to them. The cloned organisms also tend to become obese at middle age, at least in the case of experimental cloned mice. Moreover, evidence suggests that cloned animals have died because they do not have sufficient IMMUNITY defenses to fight disease.

Dolly lived for six years before dying in February 2003, which is about half of the normal life expectancy of a sheep. Proponents of the cloning experiments suggest that cloning opens a number of possibilities in scientific research, including the nature of certain diseases and the development of genetically-enhanced medications. Scientists have also successfully cloned endangered animals. In 2001, an Italian group cloned an endangered form of sheep, called the European mouflon. About a year and a half earlier, an American company, Advanced Cell Technology, tried unsuccessfully to clone a rare Asian ox. The cloning was initially successful, but the animal died of dysentery 48 hours after birth.

In 2000, a group of 138 countries, including the United States, approved the Cartagena Protocol on Biosafety Environment. International concerns over the handling of genetically modified organisms (GMOs) prompted the passage of the protocol. It governs such issues as the safe transfer, handling, use, and disposals of GMOs among member countries.

*In 1997 a team of scientists at the Roslin Institute in Edinburgh, Scotland, cloned the first adult mammal, a sheep named Dolly.*

AP/WIDE WORLD PHOTOS

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**CROSS-REFERENCES**

Genetic Screening.

## GENETIC SCREENING

*The scientific procedure of examining genetic makeup to determine if an individual possesses genetic traits that indicate a tendency toward acquiring or carrying certain diseases or conditions. In 2001, scientists first published the complete human genome map (a human's genetic blueprint), greatly advancing the capability and use of genetic screening, manipulation, and replication.*

Genetic testing of humans facilitates the discovery and treatment of genetic defects, both before and after birth. CIVIL RIGHTS proponents, employers, and those who suffer from genetic diseases have debated genetic screening because the procedure poses practical and theoretical legal, economic, and ethical problems. Some theorists, for example, have suggested that genetic screening could improve society if it were made mandatory before hiring or marriage. Others say that this practice would be unconstitutional. Genetic screening is a dynamic rather than static field of medical and scientific experimentation and application that clearly involves scientific, legal, and ethical interests which may differ or compete. Accordingly, each new milestone or discovery warrants commensurate review of these interests for both beneficial and potentially detrimental consequences.

### Federal and State Legislation

The earliest national and state legislation concerning genetic screening was enacted in the 1970s. The legislation focused on voluntary genetic testing. The laws generally protect the interests of those who suffer from genetic disease, offer federal and state subsidies for counseling, and support research in genetic diseases.

Congress enacted in 1976 the National Sickle Cell Anemia, Cooley's Anemia, Tay-Sachs, and Genetic Diseases Act (42 U.S.C.A. § 300b-1 et seq.), which permitted the use of public funds for voluntary genetic screening and counseling programs. State legislatures passed measures, with certain exceptions, requiring genetic screening of school-age children for sickle cell anemia. New York enacted a law that provides for premarital testing to identify carriers of the defective sickle cell gene (N.Y. Dom. Rel. Law §13aa [McKinney 1977]). Other states provided for voluntary premarital testing for the sickle cell disease (e.g., Cal. Health & Safety Code § 325-331 [West 1978]); Ga. Code Ann. § 19-3-40 [1974]). Such legislation often included provisions for voluntary, funded counseling (see Va. Code Ann. § 32.1-68 [Michie]).

With the advent of new technology in genetics came increasing concern about its application. In 1996, Congress passed the all-encompassing Health Insurance Portability and Accountability Act (P.L.104-191). One key provision barred group insurance plan administrators from using individual employees' genetic information as a factor when writing group policies (unless such information already resulted in the diagnosis of a illness). However, the bill addressed neither individual policies and premiums nor the use of genetic information in the workplace.

Consequently, in 2000, President BILL CLINTON signed EXECUTIVE ORDER 13145, prohibiting discrimination in federal employment based on genetic information. As of early 2003, no similar federal law covered the private sector workplace. However, according to the National Human Genome Research Institute (a division of the National Institutes of Health), 39 states had enacted bills addressing genetic discrimination in health insurance (see, e.g. Alabama Code §27–53–2,4; Alaska Statutes Annotated §21.54.100; Louisiana Revised Statutes Annotated §22.213.6,7, and so on). Another 27 states had passed bills addressing genetic discrimination in the workplace.

### The Constitution, Civil Rights, and Scientific Theory

In 1981 and again in 2002, Congress held hearings to identify potential problems of widespread genetic screening. Subsequent legal and medical discussion has focused on the ethics of certain practices such as eugenics, a form of GENETIC ENGINEERING that involves the systematic programming of genes to create a specific life form or the use of living animals for experimentation. Both House and Senate committees had pending bills before Congress (S 318, S 382) hoping to create national legislation addressing prohibited uses of genetic screening.

One potential problem with genetic screening arises in its use by employers. Although an employer considering hiring an individual with a genetic disease often relies primarily on economic issues, the practice of screening prospective employees and eliminating those with defective genes may be discriminatory because some genetic diseases afflict certain ethnic and racial groups more often than others. G-6-PD deficiency, for example, occurs most frequently

in blacks and persons of Mediterranean descent. If screening excludes persons with G-6-PD deficiency, it will have a stronger effect on those groups. This practice could violate Title VII of the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. §§ 2000e et seq.).

In early 2001, the first federal court lawsuit of its kind was filed against a private company alleging violations under the Americans with Disabilities Act (ADA), P.L. 101-336 and several state laws. According to the suit, employer Burlington Sante Fe Railroad began furtively testing the blood of workers with carpal tunnel syndrome. At least 18 employees claimed to have been subjected to nonconsensual genetic testing. Still, other courts have permitted limited use of genetic screening as an adjudicatory aid in disputes. In a South Carolina CHILD CUSTODY case, a judge ordered a woman to undergo genetic testing for Huntington's Disease, because the result could impact her ability to care for the children. While some experts would argue that these factors are important to proper legal and personal decision making, others question where the line will be drawn.

Nevertheless, some legal scholars maintain that compulsory genetic screening programs violate the Constitution. They assert, for example, that taking a child's blood sample constitutes a physical invasion of the body in violation of the FOURTH AMENDMENT. Compulsory counseling programs for parents, they say, interfere with the fundamental rights to marry and procreate. The critics of screening propose that less intrusive voluntary programs together with education could accomplish the same objectives.

Even though genetic screening involves at least a minor intrusion into an individual's body and may involve a search within the meaning of the Fourth Amendment, proponents of genetic science maintain that such searches are not unreasonable if executed in a proper manner and justified by a legitimate STATE INTEREST (see *Schmerber v. California,* 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 [1966] [holding that a compulsory blood test to determine intoxication of an automobile driver is not an unreasonable search]). Proponents of mandatory screening and counseling agree that these practices could interfere with the right to procreate. However, they suggest that the state's interests in improving the quality of a population's genetic pool in order to minimize physical suffering and reduce the number of economically dependent persons justifies the infringement on the civil liberties of individuals.

### Amniocentesis and the Abortion Debate

A specific form of genetic screening known as amniocentesis raised fundamental constitutional issues when first introduced; in the twenty-first century, however, it is considered standard operating procedure for older women to undergo amniocentesis when they have conceived for the first time. Amniocentesis consists of inserting a needle through the abdominal wall of a pregnant woman into the amniotic sac containing the fetus, withdrawing a sample of the sac fluid, analyzing it for genetic characteristics, and determining whether the fetus has certain genetic defects. If amniocentesis reveals a genetically defective fetus, the parents may choose to abort it or carry it to term. Children born with genetic defects have brought legal claims against their parents for the TORT of WRONGFUL LIFE, or WRONGFUL BIRTH.

Before the advent of amniocentesis, wrongful life actions generally failed (*Pinkney v. Pinkney,* 198 So. 2d 52, [Fla. App. 1967] [refusing to recognize tort of wrongful life for extramarital child plaintiff against father]; and *Zepeda v. Zepeda,* 41 Ill. App. 2d 240, 190 N.E.2d 849 [1963], *cert. denied,* 379 U.S. 945, 85 S. Ct. 444, 13 L. Ed. 2d 545 [1964]). The development of procedures such as amniocentesis, coupled with a shift in societal attitudes toward ABORTION, has led to successful claims for wrongful life. For example, in *Haymon v. Wilkerson,* 535 A.2d 880 (D.C. App. 1987), a mother brought a

*A doctor and patient discuss genetic screening for Down's syndrome. As a result of cases such as* Haymon v. Wilkerson, *doctors have increased their use of genetic counseling and fetal screening.*
PHOTOEDIT

wrongful birth action against a physician after her child was born with Down's syndrome. The court of appeals held that the mother was entitled to recover extraordinary medical and HEALTH CARE expenses incurred as a result of the child's mental and physical abnormalities. As a result of cases such as *Haymon,* doctors have increased their use of genetic counseling and prenatal testing.

### The Future of Genetic Screening

In 1993, the Nobel Prize for chemistry was awarded to Kary Mullis for his development of a technique known as polymerase chain reaction, a method for rapidly isolating and copying any DNA sequence out of a sample that may contain thousands of other genes. This technology is rapidly developing for application not only in eugenics but also for gene manipulation to correct defective gene sequences in many diseases or conditions (nanotechnology). Researchers at Oxford University's Wellcome Trust Centre for Human Genetics announced in 2003 the development of a methodology for concurrently evaluating the functional significance of millions of noncoding polymorphisms that exist in the human genome. This development is expected to contribute greatly to the determination of genetic susceptibility to disease and assessing future health risk through genetic screening.

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American Medical Association; Disability Discrimination; Employment Law; Fetal Rights; Privacy; Search and Seizure.

## GENEVA CONVENTIONS, 1949

The horrors of WORLD WAR II led nations to recognize that existing rules governing the conduct of warfare were inadequate to cover a prolonged and expanded conflict. The resulting efforts to codify new restrictions on belligerent conflict led to the four conventions concluded at Geneva, Switzerland, in 1949. These four treaties related to (1) the treatment of prisoners of war; (2) the alleviation of the suffering of wounded and sick combatants in the field; (3) the alleviation of the suffering of the wounded, sick, and shipwrecked members of the armed forces at sea; and (4) the protection of civilian persons during war.

The International Committee of the Red Cross was active in organizing the conferences and preparing draft treaties that resulted in the final conventions. In addition, the International Red Cross assumed responsibility under portions of the conventions to serve as a neutral party to observe compliance with the conventions and to perform humanitarian tasks.

According to Swedish researchers, 95 percent of all deaths in WORLD WAR I were suffered by soldiers. In World War II, the figure dropped to 50 percent—the remaining deaths were those of civilians when their cities (e.g., London, Coventry, Dresden, Hiroshima, Nagasaki) were bombed. Unfortunately, the statistics worsened. The civilian deaths from the Korean War is usually estimated at two to three million, and estimates place the number of civilian deaths from the VIETNAM WAR at approximately 365,000. Between 1974 and 1977, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, meeting in Geneva, adopted two protocols to be added to the 1949 Geneva Conventions. One applies to international armed conflicts and the other to

non-international armed conflicts. Both significantly provide for enhanced protection of the non-combatant, civilian populations.

Yet another concern for the effectiveness of the Geneva Conventions surfaced over the years. It became increasingly evident that, despite "grave breaches" of protocols, the Geneva Conventions lacked enforcement power. Moreover, those nations ratifying the conventions (59 initial signatories in 1949) were usually not the offenders. (With the end of the COLD WAR and the collapse of the Soviet Union, each of the newly independent states that succeeded the former Soviet Union has adhered to the conventions and, excepting Lithuania and Azerbaijan, the additional protocols.) Many of the crimes against humanity were (and are) being committed by warring factions within a country, resulting in genocides, ethnic or religious antagonism, and ultimately the collapse of state structures. In these circumstances, ratification by the prior state entity means little.

With a world community that, in 2000, comprised more than 180 sovereign states, a major overhaul of the Geneva Conventions remained elusive. However, the world community has united to create newer entities such as the International Criminal Tribunal for the Former Yugoslavia in 1993 and the adoption in Rome of the Statute of the International Criminal Court in 1998. These entities have adjudication and sentencing authority, which gives some enforcement power to prosecute and punish those who commit the crimes against humanity outlined in the conventions and protocols. However, the power to identify, pursue, and apprehend suspected violators varies, depending on the circumstances.

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CROSS-REFERENCES

International Court of Justice; International Law.

## GENOCIDE

*The crime of destroying or conspiring to destroy a national, ethnic, racial, or religious group.*

Genocide can be committed in a number of ways, including killing members of a group or causing them serious mental or bodily harm, deliberately inflicting conditions that will bring about a group's physical destruction, imposing measures on a group to prevent births, and forcefully transferring children from one group to another.

Genocide is a modern term. Coined in 1944 by Polish scholar of INTERNATIONAL LAW Raphael Lemkin, the word is a combination of the Greek *genos* (race) with the Latin *cide* (killing). In his book, *Axis Rule in Occupied Europe*, Lemkin offered the definition of "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves" (Lemkin 1944, 79). The book studied in particular detail the methodology of the Nazi German genocide against European Jews, among whom were his parents. Later, he served as an advisor to both the U.S. War Department and the NUREMBERG TRIALS of Nazi leaders for WAR CRIMES. He dedicated his life to the development of international conventions against genocide.

The contemporary archetype of modern genocide is the Holocaust, in which German Nazis starved, tortured, and executed an estimated six million European Jews, as well as millions of other ethnic and social minorities, as part of an effort to develop a master Aryan race. Immediately upon coming to power in Germany in 1933, the Nazis began a systematic effort to eliminate Jews from economic life. The Nazis defined persons with three or four Jewish grandparents as being Jewish, regardless of their religious beliefs or affiliation with the Jewish community. Those with one or two Jewish grandparents were known as Mischlinge, or mixed-breeds. As non-Aryans, Jews and Mischlinge lost their jobs and their Aryan clients, and were forced to liquidate or sell their businesses.

With the onset of WORLD WAR II in 1939, the Germans occupied the western half of Poland, forcing nearly two million Jews to move into crowded, captive ghettos. Many of these Jews died of starvation and disease. In 1941, Germany invaded the Soviet Union. The Nazis dispatched 3,000 troops to kill Soviet Jews on the spot, most often by shooting them in ditches or ravines on the outskirts of cities and towns. Meanwhile, the Nazis began to organize what they termed a final solution to the Jewish question in Europe. German Jews were required to wear a yellow star stitched on their clothing and were deported to

ghettos in Poland and the Soviet Union. Death camps equipped with massive gas chambers were constructed at several sites in occupied Poland, and large crematories were built to incinerate the bodies. Ultimately, the Nazis transported millions of Jews to concentration camps, in crowded freight trains. Many did not survive the journey. Once at the death camps, many more died from starvation, disease, shooting, or routine gassings, before Allied forces liberated the survivors and forced the Nazis to surrender in 1945.

Following the exterminations of World War II, the UNITED NATIONS passed a resolution in an effort to prevent such atrocities in the future. Known as the Convention on the Prevention and Punishment of the Crime of Genocide (78 U.N.T.S. 278 [Dec. 9, 1948]), the resolution recognized genocide as an international crime and provided for its punishment. Proposed and partially formulated by Lemkin, who had lobbied nations tirelessly for its adoption, the convention also criminalized conspiracy to commit genocide, direct and public incitement to commit genocide, attempted genocide, and complicity in genocide. Its definition of genocide specified that a person must intend to destroy a national, ethnic, racial, or religious group. Thus, casualties of war are not necessarily victims of genocide, even if they are all of the same national, ethnic, racial, or religious group. The convention requires signatory nations to enact laws to punish those found guilty of genocide, and allows any signatory state to ask the United Nations to help prevent and suppress acts of genocide.

*The bodies of Rwandan genocide victims before burial in a mass grave. In just 100 days in 1994, an estimated 800,000 Tutsis and moderate Hutus were killed by members of the Hutu majority.*

AP/WIDE WORLD PHOTOS

The convention was, by itself, ineffective. Article XI of the convention requires the United Nations' member countries to ratify the document, which many did not do for nearly 50 years. The United States did not ratify the convention until 1988. Before doing so, it conditioned its obligations on certain understandings: (1) that the phrase *intent to destroy* in the convention's definition of genocide means "a SPECIFIC INTENT to destroy"; (2) that the term *mental harm* used in the convention as an example of a genocidal tactic, means "permanent impairment of mental faculties through drugs or torture"; (3) that an agreement to grant EXTRADITION, which is part of the convention, extends only to acts recognized as criminal under both the country requesting extradition and the country to which the request is made; and (4) that acts in the course of armed conflict or war do not constitute genocide unless they are performed with the specific intent to destroy a group of people.

On November 4, 1988, the United States passed the Genocide Implementation Act of 1987 (18 U.S.C.A. § 1091 [1994]). This act created "a new federal offense that prohibits the commission of acts with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial or religious group; and to provide adequate penalties for such acts" (S. Rep. No. 333, 100th Cong., 2d Sess. 1 [1988], *reprinted in* 1988 U.S.C.C.A.N. 4156).

In 1990 the U.S. Congress passed the Immigration and Nationality Act (INA) (8 U.S.C.A. § 1182), a comprehensive reform of immigration laws. As part of this reform, Congress mandated that ALIENS guilty of genocide are excluded from entry into the United States, or deported when discovered. However, the INA lacks a clear definition of genocide, referring only to the U.N. convention drafted more than 40 years earlier.

The unclear definition of genocide makes its prevention and punishment difficult. Whether massive, and often barbaric, loss of life within ethnic, national, religious, or racial groups rises to the crime of genocide—or is simply an unpleasant by-product of war—is open to debate. Until international trials in the late 1990s, the Holocaust of Nazi Germany was the only example recognized throughout the international community as genocide.

Apart from the Holocaust, there have been a number of other events that at least some com-

mentators have described as genocide. These include the devastation of numerous Native American tribes through battles with European settlers and exposure to their diseases; the killing of some 1.5 million Armenians by the Turks during and after WORLD WAR I; the deaths of approximately 1.7 million Cambodians under the Khmer Rouge regime in Cambodia between 1975 and 1979; the killing of hundreds of thousands of civilians during the VIETNAM WAR; the deaths of more than 20,000 Christian Orthodox Serbs, Muslims, and Roman Catholic Croats in "ethnic cleansing" arising out of the civil war in Croatia and Bosnia-Herzegovina during the early 1990s; and the deaths of more than one million Rwandan civilians in ethnic clashes between the Hutu and Tutsi peoples, also during the early 1990s.

During the 1990s, the United Nations Security Council twice convened international tribunals to prosecute genocide and other flagrant humanitarian violations. The International Criminal Tribunals for Former Yugoslavia (ICTY) and Rwanda (ICTR) were convened in 1993 in the Hague, the Netherlands, and in 1995 in Arusha, Tanzania, respectively. As the first courts of their type since World War II, their work, which sought to fix personal responsibility for mass murder, continued into the new millennium.

Given the vast scope and complicated nature of trying crimes of genocide, neither body has moved swiftly. By 2003, the ICTR had indicted 52 people and had completed nine trials stemming from the Rwanda slaughter, while also becoming the first international court in history to hand down a conviction for genocide. By comparison, the ICTY had indicted 87 people and had concluded 23 trials. During 2002, worldwide attention focused upon the opening of the ICTY's long-awaited trial of former Serbian President Slobodan Milosevic, accused of ordering atrocities in Bosnia, Croatia, and Kosovo at various times between 1991 and 2001. Arrested after flouting the tribunal's indictment for two years, Milosevic's delivery to the Hague in 2001 made him the highest-ranking European leader since the Nazi era to face trial for war crimes.

Humanitarians, politicians, and international legal scholars are struggling to find an effective way to prevent and punish genocide. Many have called for revising the genocide convention to better meet the needs of the current political, social, and economic environment, by creating a broader definition of genocide and establishing procedural guidelines. Still others have proposed international military intervention in order to prevent or stop genocide.

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## GENTLEMEN'S AGREEMENT

Although agreements between individuals often create legally binding commitments, instances may arise in which mutual promises yield no legally enforceable agreement. Sometimes called "gentlemen's agreements," parties may honor them because moral obligations compel observance or because future relations will be more difficult if the present arrangement is broken. International organizations likewise may depend on such informal arrangements so as to maintain comity among members.

Occasionally the enabling treaties that create an international organization will leave some procedural or voting matter unresolved. Rather than amend the formal document, which is usually a difficult task, an informal working agreement will develop to resolve a particular problem. As long as the consensus holds to honor the informal agreement, there is no need to embody it into a legal document.

## GERRYMANDER

*The process of dividing a particular state or territory into election districts in such a manner as to accomplish an unlawful purpose, such as to give one party a greater advantage.*

State constitutions or amendments to those constitutions empower state legislatures, and sometimes state or federal courts, to apportion and reapportion election districts. This generally means that states may draw and redraw the lines around election districts for offices ranging from local to congressional. It can also mean that states may calculate and recalculate the numbers of representatives in election districts. Any form of unfair APPORTIONMENT may be called gerrymandering, but generally, a gerrymander is understood to be invalid redistricting.

Redistricting is usually used to adjust the populations of election districts to achieve equality in representation among those districts. Sometimes, however, it is used for unlawful ulterior motives. Then it crosses the line to become gerrymandering.

The classic example of a gerrymander is a legislative redistricting scheme designed to benefit the party in power. Assume that a state legislature has redrawn its voting districts to divide and fold all communities that vote predominantly Democratic into larger communities that vote Republican. This is a political gerrymander. Such redistricting decreases the likelihood of Democratic representation in the state legislature because the Democratic vote in each new district is diluted by the predominant Republican vote.

The term *gerrymander* was inspired by an 1812 Massachusetts redistricting scheme that favored the party of Governor Elbridge Gerry. Portraitist Gilbert C. Stuart noted that one new election district had the shape of a salamander. Stuart drew an outline of the district, put a salamander's head on one end, and called the creature a Gerry-mander.

The gerrymander has been used by state legislatures ever since. It thrived all the way through the 1950s, when many southeastern states were reapportioned in an effort to weaken the voting power of African Americans. This usually involved the drawing of complex, irregularly shaped election districts. A legislature could divide and fold predominantly African American communities into surrounding districts with large blocs of white voters. Such schemes diluted the vote of African Americans, placed their representation in faraway communities, and effectively prevented African Americans from expressing their collective will in elections.

In 1960, the U.S. Supreme Court struck down the first gerrymander scheme it reviewed, in *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960). In *Gomillion,* the Alabama legislature altered the city limits of Tuskegee to remove all but four of the city's 400 African American voters. It changed the city limits of Tuskegee, for election purposes, from a square to, according to the Court, "an uncouth twenty-eight-sided figure." According to the Court, the redistricting discriminated against African Americans and violated the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT.

*Gomillion* did not establish that the drawing of election districts was always a proper matter for the courts. Before *Gomillion,* the Court had refused to review gerrymandering claims, holding that the issue of reapportionment was political and beyond the reach of the courts. The Court heard *Gomillion* only because the issue of RACIAL DISCRIMINATION lifted the controversy out of the arena traditionally beyond the power of the courts.

In 1962, the U.S. Supreme Court took the first step in establishing its right to review all districting, with its decision in BAKER V. CARR, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663. At issue in *Baker* was a decades-old Tennessee apportionment. According to urban Tennessee voters, the outdated apportionment was a "silent gerrymander" or a "malapportionment." Although the population in urban election districts had increased, Tennessee had made no changes to reflect this population shift; thus, sparsely populated rural districts had the same representation in the state legislature as did densely populated urban districts. The Court in *Baker* did not reach a decision on the validity of the Tennessee districting; *Baker* established only that the issue of districting was JUSTICIABLE and not merely a POLITICAL QUESTION.

The Court next established the "one person, one vote" requirement for federal elections, in *Wesberry v. Sanders,* 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964). This requirement, which held that voting districts should be roughly equal in population, was extended to the states in REYNOLDS V. SIMS, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). In *Wesberry,* the Court struck down a Georgia redistricting statute (Ga.

Code § 34-2301) because its voting districts were unequal in population. Georgia's Fifth Congressional District, largely populated by African Americans, was two to three times the size of other districts in the state. As a result, the African Americans in the Fifth District received less representation in Congress than persons in the other districts. According to the Court, this violated Article I, Section 2 of the U.S. Constitution, which states that U.S. Representatives were to be "apportioned among the several States . . . according to their respective Numbers" (*Wesberry*).

Since these seminal cases, courts have become intimately involved in the review of apportionment, reapportionment, and redistricting. In their review of districting schemes, courts use census figures to compare election district populations for equality of representation. Courts also examine census figures for racial populations and compare overall percentages with percentages in election districts.

Courts have developed redistricting principles that favor compact, contiguous election districts that respect already existing municipal boundaries. Gerrymanders may be easy to recognize because they usually produce election districts that are irregularly shaped. However, not all irregularly shaped election districts are the result of gerrymanders. Indeed, Congress has encouraged the creation of "majority-minority" voting districts, which often call for an inventive drawing of election districts. Majority-minority districts are those in which racial minorities constitute the majority of votes.

Under section 4(b) of the **VOTING RIGHTS ACT** (79 Stat. 438, *as amended* [42 U.S.C.A. § 1973b(b)]), some states, or specified counties in some states, may need to preclear redistricting plans with the attorney general or the U.S. District Court for the District of Columbia. The states subject to preclearance are those that have historically used constraints such as **POLL TAXES** and literacy tests in an effort to exclude minority voters.

Section 4(b) of the Voting Rights Act presses the issue of redistricting based on race. The Supreme Court has responded by questioning the constitutionality of the provision. In *Shaw v. Reno,* 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993), a group of white North Carolina voters challenged the creation of two North Carolina majority-minority districts, which had the approval of the attorney general. One of the districts at issue had the shape of a "bug splattered on a windshield" (*Shaw*). The other district was so thin in parts that one legislator remarked, "If you drove down the interstate with both car doors open, you'd kill most of the people in the district" (*Shaw*). According to the Court, the redistricting was a racial gerrymander because it could not be explained by anything other factor than race. The holding of the Court emphasized that redistricting based entirely on race, with no respect for other redistricting principles, was a violation of the Equal Protection Clause and therefore invalid.

*Portraitist Gilbert C. Stuart's depiction of an 1812 Massachusetts redistricting scheme favoring the political party of Governor Elbridge Gerry was the inspiration for the term gerrymander.*
LIBRARY OF CONGRESS

The Supreme Court reaffirmed and extended the *Shaw* holding in *Miller v. Johnson,* 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995). In *Miller,* the state of Georgia had complied with the redistricting provisions of the Voting Rights Act, but still found its redistricting scheme struck down by the U.S. Supreme Court as a racial gerrymander. As a designated state under the act, Georgia reapportioned three times before the attorney general accepted a plan. In its first two plans, Georgia drew two districts in which the majority of the voting population was African American. The scheme eventually accepted by the attorney general contained three congressional districts in which the majority of the voting population was African American. According to the Court, the redistricting was a racial gerrymander because its guiding principle was racial division, even though the new election districts were not bizarrely shaped.

The controversy over the North Carolina redistricting plan considered in *Shaw v. Reno*

continued throughout the decade, even after the Court's decision in *Miller v. Johnson*. Three years after the Court ruled in *Shaw*, a three-judge panel in federal district court in North Carolina reviewed the state's districting plan, but again found it to be constitutional. The Supreme Court reversed the decision for a second time in SHAW V. HUNT, 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996) and found that the redrawing of the district into bizarre-looking shapes violated the Equal Protection Clause.

The North Carolina legislature constructed a new districting plan with a district 71 miles long, where African Americans comprised a 47 percent majority, compared with 57 percent in the original plan. White voters again contested the plan, and the three-judge panel in the North Carolina district court found that the plan violated the Equal Protection Clause because, according to the court, the legislature used race as a motivating factor in drawing the districts. The Supreme Court, per Justice CLARENCE THOMAS, however, disagreed. In *Hunt v. Cromartie*, 526 U.S. 541, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1991), the Court held that the motivation of the legislature was in dispute. The white plaintiffs were required to prove that the district was drawn "with an impermissible motive." Moreover, the plaintiffs had to prove that race was the "predominant factor" motivating the legislature. The plaintiffs had the burden of showing, through direct and CIRCUMSTANTIAL EVIDENCE, this racial motivation.

On remand, the three-judge panel conducted a full hearing to determine the intention of the legislature when it drafted the district. After the hearing the panel again ruled that the plan used race as a predominant factor, which is constitutionally impermissible. The Supreme Court reviewed the case for the fourth and final time in *Easley v. Cromartie*, 532 U.S. 234, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001), this time concluding that the three-judge panel's findings were clearly erroneous and must be reversed. The Court held that a largely black district is constitutional if it is drawn to satisfy political rather than racial motives.

The issues in North Carolina and Georgia are by no means unique to those states. In 1975, Congress enacted a law (Pub. L. No. 94-171) that requires the CENSUS BUREAU to provide redistricting data to each state after each decennial census, the last of which occurred in 2000. Between 1990 and 2000, the percentage of white Americans increased at a lower level than any other race or ethnicity, including African American, Hispanic American, Asian, American Indian, and Native Hawaiian. After the census figures were released, each state underwent a lengthy and costly process of redistricting, and many of these plans were contested in court.

Redistricting raises not only racial and ethnic concerns, but also concerns over the political motivation of these plans. Some claim that the system has become one in which politicians, through redistricting, now choose their voters before the voters choose their politicians. Partisanship is often at the core of these controversies. For example, due in large part to Republican-drafted districts in Texas, the Texas House of Representatives in 2002 came under control of Republicans for the first time in more than a century. Texas courts and those in many other states saw numerous lawsuits filed contesting these districting plans, and these contests were not expected to end for quite some time.

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Equal Protection; Voting.

## GI BILL

The GI Bill created a comprehensive package of benefits, including financial assistance for higher education, for veterans of U.S. military service. The benefits of the GI Bill are intended to help veterans readjust to civilian life following service to their country and to encourage bright, motivated men and women to volunteer for military duty. This legislation came in two parts: the

Servicemen's Readjustment Act of 1944 and the Montgomery GI Bill.

### Servicemen's Readjustment Act of 1944

The first GI Bill was proposed and drafted by the AMERICAN LEGION, led by former Illinois governor John Stelle, during WORLD WAR II. The public remembered a post-World War I recession, when millions of veterans returned to face unemployment and homelessness. Twice as many veterans would return from World War II, and widespread economic hardship was a real concern. A healthy postwar economy, it seemed, would depend on providing soldiers with a means to support themselves once they were back home.

Newspaper tycoon William Randolph Hearst became the bill's most ardent and vocal supporter. Hearst and his nationwide string of newspapers lobbied the public and members of Congress to support those who served their country, and his effort was a success. The bill unanimously passed both chambers of Congress in the spring of 1944. President FRANKLIN D. ROOSEVELT signed the bill into law on June 22, 1944, just days after the D-Day invasion of Normandy (Servicemen's Readjustment Act of 1944, ch. 268, 58 Stat. 284).

The original GI Bill offered veterans up to $500 a year for college tuition and other educational costs—ample funding at the time. An unmarried veteran also received a $50-a-month allowance for each month spent in uniform; a married veteran received slightly more. Other benefits included mortgage subsidies, enabling veterans to purchase homes with relative ease.

Despite initial misgivings over its success, the GI Bill proved to be enormously effective. Prior to its passage, detractors feared that paying the education expenses of veterans would lead to overcrowding at colleges, which before World War II were accessible predominantly to members of society's upper class. Critics were concerned that veterans would wreak havoc on

*A group of military veterans line up to purchase books under the GI Bill, which originally provided up to $500 a year for tuition, books, and supplies to veterans attending college after service in WWII.*

BETTMANN/CORBIS

educational standards and overburden campuses with their lack of preparation for the rigors of higher learning.

College campuses did become grossly overcrowded in the postwar years: approximately 7.8 million World War II veterans received benefits under the original GI Bill, and 2.2 million of those used the program for higher education. By 1947 half of all college students were veterans. Prefabricated buildings and Quonset huts were used as classrooms, and military barracks were often converted into dormitories. However, having spent a large part of their youth engaged in battle, World War II veterans were highly motivated. GIs in their late twenties and early thirties returned to the United States in droves, anxious to catch up with their nonmilitary peers, marry, settle down, and support a family. The benefits provided by the GI Bill facilitated these goals.

Veterans were not the only beneficiaries of the GI Bill. Colleges, with increased enrollments, received years of financial security following its enactment. Veterans demanded more practical college course work, and this need led to a changed concept of higher education, with more emphasis on degree programs like business and engineering. The lines of race, class, and religion blurred as higher education became attainable for all veterans. No longer was a college degree—and the higher paying jobs that normally follow it—limited to members of the upper class. Federal income increased as the average income of taxpayers in the United States increased, and as the veterans graduated from colleges, women and members of minorities enrolled to fill the gaps they left. The GI Bill's mortgage subsidies led to an escalated demand for housing and the development of suburbs. One-fifth of all single-family homes built in the 20 years following World War II were financed with help from the GI Bill's loan guarantee program, symbolizing the emergence of a new middle class.

### Montgomery GI Bill

Following the United States involvement in the VIETNAM WAR and the end of the military draft in 1973, the number of qualified young adults willing to voluntarily serve in the military declined. In 1984 Representative G. V. ("Sonny") Montgomery (D-MS), chairman of the House Veterans Affairs Committee, proposed a new GI Bill to encourage military service, even in times of peace. That year President RONALD REAGAN signed into law the Montgomery GI Bill (38 U.S.C.A. § 1401), which as of the early 2000s continues to provide optional benefits for qualified U.S. veterans.

The Montgomery GI Bill is a voluntary plan that requires a contribution from the soldier who chooses to take part. Upon entry into the ARMED SERVICES, including the NATIONAL GUARD and military reserves, participants may elect to have their military pay reduced by $100 each month of the first 12 months of service. This sacrifice makes them eligible to receive up to $400 a month for 36 months toward tuition and other educational expenses. To receive these benefits, soldiers must receive an honorable discharge, earn a high school diploma or its equivalent, and serve in active duty for the length of their enlistment. The federal government supplies funding but does not set standards or administer the plan; the VETERANS ADMINISTRATION determines whether a veteran is eligible, and the COLLEGES AND UNIVERSITIES (including religious and vocational schools) make admissions policies and keep track of expenditures.

### Effects of the GI Bill

The GI Bill, in both its versions, is widely regarded as a success. Military recruiters routinely promote its benefits as a way to attract and enlist the best and brightest young adults: in 1996, 95 percent of new armed services recruits were high school graduates and 94.8 percent of eligible recruits chose to enroll in the education program. (Three-fourths of all women and men who have enlisted since the program began have enrolled.)

In 2000, President BILL CLINTON signed an amendment to the Montgomery GI Bill that allows for a "Top-Up" benefit. This benefit, which equals the difference between the total cost of a particular course and the amount of tuition assistance paid by the military, effectively allows enrollees to receive 100 percent tuition assistance. In 2001, President GEORGE W. BUSH signed two additional bills. The Veterans' Opportunities Act of 2001 (Pub. L. 107-14) became law on June 5, 2001 and the 21st Century GI Enhancement Act (Pub. L. 107-103) became law on December 27, 2001. Both bills amended Title 38 to provide greater benefits to service men and women.

Beneficiaries of the GI Bill include Presidents GEORGE H. W. BUSH and GERALD R. FORD;

Vice President ALBERT GORE JR.; Chief Justice WILLIAM H. REHNQUIST and Justice JOHN PAUL STEVENS, both of the U.S. Supreme Court; Secretary of State Warren M. Christopher; journalists David Brinkley and John Chancellor; actors Clint Eastwood, Paul Newman, and Jason Robards Jr.; and former Dallas Cowboys football coach Tom Landry.

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CROSS-REFERENCES

Armed Services; Veterans Affairs Department.

## GIBBONS V. OGDEN

*Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23, was a landmark decision of the Supreme Court that defined the scope of power given to Congress pursuant to the COMMERCE CLAUSE of the Constitution.

In 1800, the state of New York enacted a statute that gave ROBERT LIVINGSTON and Robert Fulton a monopoly—an exclusive right—to have their steamboats operate on the state waterways. Aaron Ogden owned a steamboat company and had received a license from Livingston and Fulton to conduct a business between ports in New York City and New Jersey. Ogden had formerly been in business with Thomas Gibbons, who started his own steamship company that operated between New York and New Jersey, in direct competition with Ogden.

Ogden brought an action to enjoin Gibbons from continuing to run his steamships, which were licensed in the coastal trade under a 1793 act of Congress. The state courts granted Ogden the INJUNCTION, and the case was brought on appeal to the Supreme Court.

DANIEL WEBSTER, the attorney for Gibbons, argued that the issuance of the injunction was wrongful since the laws that authorized the MONOPOLY were enacted in violation of the Commerce Clause of the Constitution. This clause gave Congress, not the states, the power to regulate commerce among the states. The term *commerce* included not only buying and selling but also navigation necessary to bring about such transactions.

In the majority opinion drafted by Chief Justice JOHN MARSHALL, the Court agreed with this definition of commerce and then reasoned that since Congress was vested with the power to regulate commerce, there could be no infringement of this power other than that specified in the Constitution. States cannot act in this area without express permission of Congress. The actions of New York State were an unauthorized interference with the power of Congress to regulate commerce, and therefore, the Court reversed the decree of the state court and dismissed the injunction against Gibbons.

## GIDEON V. WAINWRIGHT

*Gideon v. Wainwright,* 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, is a 1963 U.S. Supreme Court decision that established an indigent criminal defendant's right, under the SIXTH AMENDMENT of the U.S. Constitution, to counsel in state criminal trials.

In 1961, Clarence Earl Gideon was charged in a Florida state court with breaking into and entering a poolroom with intent to commit a misdemeanor, a combination of offenses that constituted a felony under Florida law. He could not afford a lawyer, and he requested to have one appointed by the court. Nearly twenty years earlier, the U.S. Supreme Court had held in *Betts v. Brady,* 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942), that an ordinary person could do an adequate job of defending himself or herself. A court-appointed lawyer was required only if the defendant had mental or physical deficiencies, the case was unusually complicated, or the case involved "special circumstances." None of these exceptions applied to Gideon, the Florida trial court ruled, and thus his request for counsel was denied.

Gideon conducted his own defense and was found guilty of the charges. He then filed a handwritten petition with the Supreme Court of Florida, seeking to overturn his conviction on the ground that the trial court's refusal to appoint an attorney for him denied him the rights "guaranteed by the Constitution and the

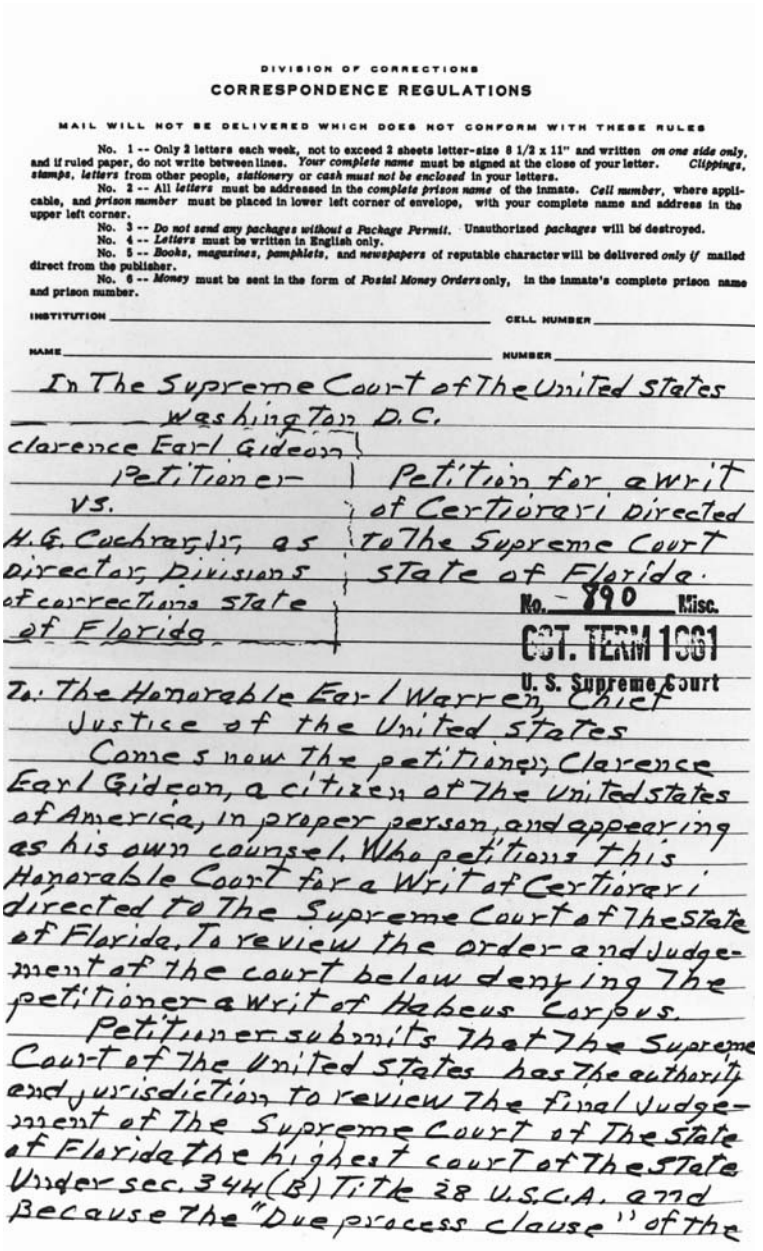

DIVISION OF CORRECTIONS

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INSTITUTION _____ CELL NUMBER _____

NAME _____ NUMBER _____

In The Supreme Court of The United States
Washington D.C.
Clarence Earl Gideon
Petitioner-
vs.
H.G. Cochran, Jr. as Director, Division of corrections State of Florida.
Respondent.

Petition for a writ of Certiorari Directed to The Supreme Court State of Florida.

No. 890 Misc.
OCT. TERM 1961
U. S. Supreme Court

To: The Honorable Earl Warren, Chief Justice of the United States

Comes now The petitioner; Clarence Earl Gideon, a citizen of The United States of America, in proper person, and appearing as his own counsel. Who petitions this Honorable Court for a Writ of Certiorari directed to The Supreme Court of The State of Florida, To review the order and Judgment of the court below denying The petitioner a writ of Habeus Corpus.

Petitioner submits That The Supreme Court of The United States has The authority and jurisdiction to review The final Judgment of The Supreme Court of The State of Florida The highest court of The State Under sec. 344(B) Title 28 U.S.C.A. and Because The "Due process clause" of the

*Clarence Earl Gideon's handwritten petition for a writ of certiorari filed with the U.S. Supreme Court in 1961.*

U.S. SUPREME COURT

BILL OF RIGHTS by the United States Government." The state supreme court denied Gideon's petition.

While in prison, Gideon, using law books available to him, drafted a petition for writ of certiorari to the U.S. Supreme Court. (The petition is the legal document in which a person requests the Supreme Court to hear an appeal. The Court has the discretion to accept or decline the appeal.) According to Anthony Lewis's acclaimed book on the case, *Gideon's Trumpet* (1964), in the handwritten petition Gideon stated that it "just was not fair" that he had no lawyer at his trial. The petition was granted, and ABE FORTAS, who would later serve as an associate justice on the Court, was appointed to argue Gideon's case.

In a unanimous decision, the Supreme Court overruled *Betts,* holding the guarantee of counsel to be a fundamental right under the U.S. Constitution. The Court ruled that the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT required that the Sixth Amendment, which guarantees indigent defendants the RIGHT TO COUNSEL in federal criminal proceedings, be interpreted to include indigent defendants in state criminal trials. In his majority opinion, Justice HUGO L. BLACK wrote, "[R]eason and reflection require us to recognize that in our . . . system of criminal justice, any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided." Black further pointed out that the government hires attorneys to prosecute defendants, and individuals charged with crimes who are financially unable to hire attorneys to defend themselves, both "strong indications . . . that lawyers in criminal courts are necessities, not luxuries."

Gideon was later retried with a court-appointed lawyer representing him and was found not guilty.

Following *Gideon,* it was unclear whether the decision applied only to indigent defendants facing felony convictions and not to individuals charged with lesser crimes. Nine years later, that issue was clarified in *Argersinger v. Hamlin,* 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972). In *Argersinger,* the Supreme Court expanded its holding in *Gideon,* ruling that the Sixth Amendment right to appointed counsel extended to misdemeanor cases in which the person charged may face imprisonment, unless the defendant makes a "knowing and intelligent waiver" of his or her right to counsel. The Court concluded that an accused in a misdemeanor trial likewise has a strong need for representation and that *Gideon* should apply "to any criminal trial, where an accused is deprived of his liberty."

*Argersinger* was limited a few years later by *Scott v. Illinois,* 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979). In *Scott,* the Supreme Court held that the Sixth Amendment right to counsel extends only to cases where "actual imprisonment" is imposed, and not to cases where the "mere threat of imprisonment" exists (where the crime charged authorizes a possible jail sentence).

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CROSS-REFERENCES

Criminal Procedure; Due Process of Law; Public Defender.

## GIFT

*A voluntary transfer of property or of a property interest from one individual to another, made gratuitously to the recipient. The individual who makes the gift is known as the donor, and the individual to whom the gift is made is called the donee.*

If a gratuitous transfer of property is to be effective at some future date, it constitutes a mere promise to make a gift that is unenforceable due to lack of consideration. A present gift of a future interest is, however, valid.

### Rules of Gift-Giving

Three elements are essential in determining whether or not a gift has been made: *delivery, donative intent,* and *acceptance* by the donee. Even when such elements are present, however, courts will set aside an otherwise valid gift if the circumstances suggest that the donor was, in actuality, defrauded by the donee, coerced to make the gift, or strongly influenced in an unfair manner. In general, however, the law favors enforcing gifts since every individual has the right to dispose of PERSONAL PROPERTY as he or she chooses.

**Delivery** Delivery of a gift is complete when it is made directly to the donee, or to a third party on the donee's behalf. In the event that the third person is the donor's agent, bailee, or trustee, delivery is complete only when such person actually hands the property over to the donee.

A delivery may be actual, implied, or symbolic, provided some affirmative act takes place. If, for example, a man wishes to give his grandson a horse, an actual delivery might take place when the donor hires someone to bring the horse to the grandson's farm. Similarly, the symbolic delivery of a car as a gift can take place when the donor hands the keys over to the donee.

Delivery can only occur when the donor surrenders control of the property. For example, an individual who expresses the desire to make a gift of a car to another but continues to drive the car whenever he or she wishes has not surrendered control of the car.

A majority of states are practical about the requirement of a delivery. Where the donor and the donee reside in the same house, it ordinarily is not required that the gift be removed from the house to establish a delivery. If the donee has possession of the property at the time that the donor also gives the person ownership, there is no need to pass the property back and forth in order to make a legal delivery. Proof that the donor relinquished all claim to the gift and recognized the donee's right to exercise control over it is generally adequate to indicate that a gift was made.

In instances where delivery cannot be made to the donee, as when the person is out of the country at the time, delivery can be made to someone else who agrees to accept the property for the donee. If the individual accepting delivery is employed by the donor, however, the court will make the assumption that the donor has not rendered control of the property and that delivery has not actually been made. The individual accepting delivery must be holding the property for the donee and not for the donor.

In situations where the donee does not have legal capacity to accept delivery, such delivery can be made to an individual who will hold it for him or her. This might, for example, occur in the case of an infant.

**Donative Intent** Donative intent to make a gift is essentially determined by the donor's words, but the courts also consider the surrounding circumstances, the relationship of the parties, the size of the gift in relation to the amount of the donor's property as a whole, and the behavior of the donor toward the property subsequent to the purported gift.

The donor must have the legal capacity to make a gift. For example, INFANTS or individuals judged to be unable to attend to their own affairs have a legal disability to make a gift.

In addition, an intent to make a gift must actually exist. For example, a landlord who rents a house to a tenant does not have the intent to give such premises to the tenant, even though the tenant takes possession for an extended period of time. Similarly, a gift to the wrong person will not take effect. If an individual mistakenly gives gold jewelry to an imposter who is believed to be a niece, the gift is invalid because there was no intention to benefit anyone but the niece.

The intent must be present at the time the gift is made. For example, if one person promises to give a house to an artist "someday," the promise is unenforceable because there is no intent to make an effective gift at the time the promise is made. The mere expectation that something will someday be given is not legally adequate to create a gift.

**Acceptance** The final requirement for a valid gift is acceptance, which means that the donee unconditionally agrees to take the gift. It is necessary for the donee to agree at the same time the delivery is made. The gift can, however, be revoked at any time prior to acceptance.

A court ordinarily makes the assumption that a gift has been accepted if the gift is beneficial, or unless some event has occurred to indicate that it is not.

### Types of Gifts

The two principal categories of gifts are inter vivos gifts and causa mortis gifts.

**Inter vivos gifts** *Inter vivos* is Latin for "between the living" or "from one living person to another." A gift inter vivos is one that is perfected and takes effect during the lifetime of the donor and donee and that is irrevocable when made. It is a voluntary transfer of property, at no cost to the donee, during the normal course of the donor's life.

A gift inter vivos differs from a sale, a loan, or barter since something is given in exchange for the benefit in each of such transfers. Whether the value given is a money price, a percentage interest or an equivalent item of property, or a promise to repay, the element of exchange makes such transfers something other than a gift.

There are a number of special types of inter vivos gifts. Forgiveness of a debt is a gift of the amount of money owed, and delivery can be accomplished by destroying the promissory note signed by the debtor and handing it over to him or her. A share of stock in a corporation may ordinarily be given to someone else by having ownership transferred to the person on the books of the corporation or by having a new stock certificate issued in the person's name. A life insurance policy can generally be given to someone by delivering the policy, but it is more expedient to express in writing that all interest in the policy is assigned, or transferred, to the donee and to notify the insurance company to that effect. Certain states require these formalities since insurance is strictly regulated by state law. Gifts of land can only be made by written transfer.

A donor can limit an inter vivos gift in certain ways. For example, he or she might give someone a life estate in his or her property. When the donee dies, the property reverts to the donor. A donor cannot place other restrictions on a gift if the restrictions would operate to make the gift invalid. If, for example, the donor reserves the power to revoke a gift, there is no gift at all.

**Causa Mortis Gifts** A gift *causa mortis* (Latin for "in contemplation of approaching death") is one that is made in anticipation of imminent death. This type of gift takes effect upon the death of the donor from the expected disease or illness. In the event that the donor recovers from the peril, the gift is automatically revoked. Gifts causa mortis only apply to personal property.

A donor who is approaching death might make a gift by putting his or her intention in writing. This procedure is likely to be followed, when, for example, the donee is in another state, and personal delivery is thereby impractical. The delivery requirement is frequently relaxed when a causa mortis gift is involved, since a donor is less likely to be able to make an actual delivery as his or her death approaches. A symbolic delivery is frequently sufficient to show that a gift was made, provided at least some effort to make a delivery is exercised. The OVERT ACT aids a court in its determination as to whether a delivery has been made.

The difference between a gift causa mortis and a *testamentary gift* made by will is that a will transfers ownership subsequent to the death of the donor, but a gift causa mortis takes effect immediately. In most states, the donee becomes legal owner of the gift as soon as it is given, subject only to the condition that the gift must be returned if the donor does not actually die.

The requirements of a *causa mortis* gift are essentially the same as a gift *inter vivos.* In addition, such a gift must be made with a view toward the donor's death, the donor must die of the ailment, and there must be a delivery of the gift.

Gifts *causa mortis* are usually made in a very informal manner and are frequently made because dying people want to be certain that their dearest possessions go to someone they choose.

A donor who is approaching death might make a gift by putting his or her intention in writing. This procedure is likely to be followed, when, for example, the donee is in another state, and personal delivery is thereby impractical. The courts only permit the donee to keep the gift if the donor clearly intended the gift to take effect at the time it was made. If the gift is made in writing in a will and is intended to become effective only after the donor dies, the gift is a testamentary one. The law in each jurisdiction is very strict about the features that make a will valid. One requirement, for example, is that the will must be signed by witnesses. If the donor writes down that he or she is making a gift, but the writing is neither an immediate gift nor a witnessed will, the donee cannot keep the gift.

The delivery requirement is frequently relaxed when a *causa mortis* gift is involved, since a donor is less likely to be able to make an actual delivery as his or her death approaches. A symbolic delivery is frequently sufficient to show that a gift was made, provided at least some effort to make a delivery is exercised. The overt act aids a court in its determination as to whether a delivery has been made.

A gift *causa mortis* is only effective if the donor actually dies. It is not necessary that the donor die immediately, but the person must die of a condition or danger that existed when the gift was made and without an intervening recovery. The donee becomes legal owner of the property in most states from the time the gift is made. The person must, however, later return the gift if the donor does not actually die. If the donor changes his or her mind and revokes the gift, or recovers from the particular illness or physical injury, the gift is invalid. A donor also has the right to require that debts or funeral expenses be paid out of the value of the gift.

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## GIFTS TO MINORS ACT

The Gifts to Minors Act has been enacted in every state (with only minor variations) that facilitates the management of money given to INFANTS.

Initially, in 1955 and 1956, thirteen states enacted a law called an *Act Concerning Gifts of Securities to Minors.* The New York Stock Exchange and the Association of Stock Exchange Firms sponsored the development of the law, to make it possible to donate shares of stock to children without the creation of a formal trust. The scope of the law was subsequently expanded to encompass all gifts to minors.

The law allows the individual giving the property to choose an adult in whom he or she has confidence to serve as custodian of the property for the infant. The custodian has authority to collect, hold, manage, invest, and reinvest the property.

The custodian may pay out some of the money for the child's support, if necessary, and must manage the funds reasonably. The custodian must maintain accurate records of transactions and pay over the property when the child reaches majority. A custodian is not permitted to use any of the money personally or for anyone else except the child, nor can the person commingle the property with his or her own.

A professional custodian, such as a trust company or an attorney serving as guardian of the property for the minor, can be remunerated out of the child's property. Such a custodian is, however, held to a higher standard of care in management of the property. Other business people who deal with the custodian in management of the property are not responsible for ascertaining that the custodian has authority to act.

When a custodian resigns, dies, or is removed from the position by court order, another custodian can be appointed as a successor. Before dying, a custodian can designate who his or her successor will be, or a court may appoint one. A petition to appoint a new custodian can be filed in court by the individual who initially made the gift, by an adult member of the child's family, by a guardian, or generally by the child if the child is over fourteen years of age.

The age of majority varies from one state to another. Within some states, the age of majority is not the same for all purposes, so it is necessary to check the Gifts to Minors Act in the state in which the child resides.

## ♦ GIGNOUX, EDWARD THAXTER

During his 30-year career in the federal courts, Edward Thaxter Gignoux developed a reputation as an articulate, compassionate, and competent trial judge. He was also a leader in the fields of judicial ethics, court administration,

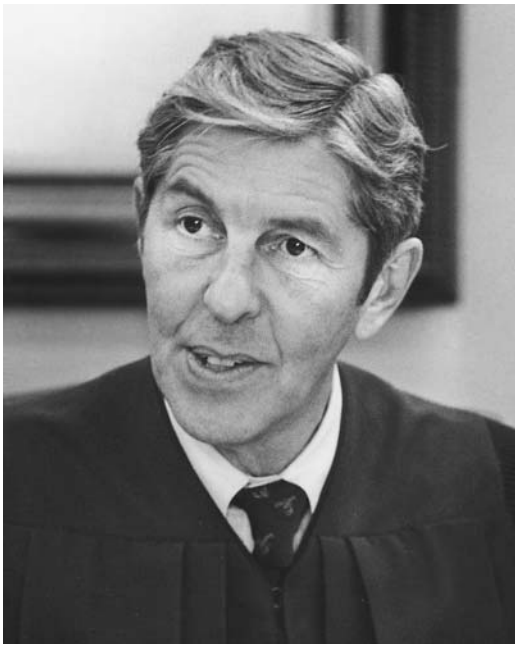

*Edward T. Gignoux.*
AP/WIDE WORLD PHOTOS

and trial practice and technique. He showcased his skills in a number of high-profile cases—including the CONTEMPT trial of Abbie Hoffman and other defendants known as the CHICAGO EIGHT (*In re Dellinger,* 370 F. Supp. 1304, N.D. Ill., E.D. [1973]).

Gignoux was born in Portland, Maine, on June 28, 1916. He graduated cum laude from Harvard College in 1937 and went on to Harvard Law School, where he was editor of the *Harvard Law Review.* He graduated magna cum laude from the law school in 1940 and began his legal career with the firm of Slee, O'Brian, Hellings, and Ulsh, in Buffalo. After a year in Buffalo, he joined the Washington, D.C., firm of Covington, Burling, Rublee, Acheson, and Shorb.

WORLD WAR II interrupted Gignoux's Washington, D.C., career after just a few months. In 1942, Gignoux joined the U.S. Army. During his three-year tour of duty with the First Cavalry Division in the Southwest Pacific, he rose to the rank of major and was awarded the Legion of Merit and the Bronze Star.

After the war, Gignoux returned to Covington, Burling, in Washington, D.C., to resume the PRACTICE OF LAW, but a bout with malaria, contracted during his years in service, forced a return to his native Maine for convalescence. As his health returned, Gignoux joined the Portland, Maine, firm of Verrill, Dana, Walker, Philbrick, and Whitehouse, and he married Hildegard Schuyler.

Gignoux and his wife had two children as they settled into life in Portland. In addition to practicing law, Gignoux was named assistant corporation counsel for the city of Portland, and he was twice elected to a three-year term on the Portland City Council, serving from 1949 to 1955.

By 1957, Gignoux was well-known and respected in Maine legal and political circles, and he was a logical choice to fill a vacancy on the federal bench. He was appointed U.S. district judge for the District of Maine in August 1957 by President DWIGHT D. EISENHOWER, and he served as Maine's only federal court judge for the next 20 years.

One of the first cases he heard as a federal judge was an antitrust action brought by the federal government against the Maine Lobstermen's Association—an important group in a very visible industry (*United States v. Maine Lobstermen's Ass'n,* 160 F. Supp. 115 [D. Me. 1957]). A jury found the lobstermen guilty, but Gignoux, showing both wisdom and compassion early on, managed to satisfy both parties when he imposed only a small fine on the defendants. Gignoux was also a central figure in Indian set-

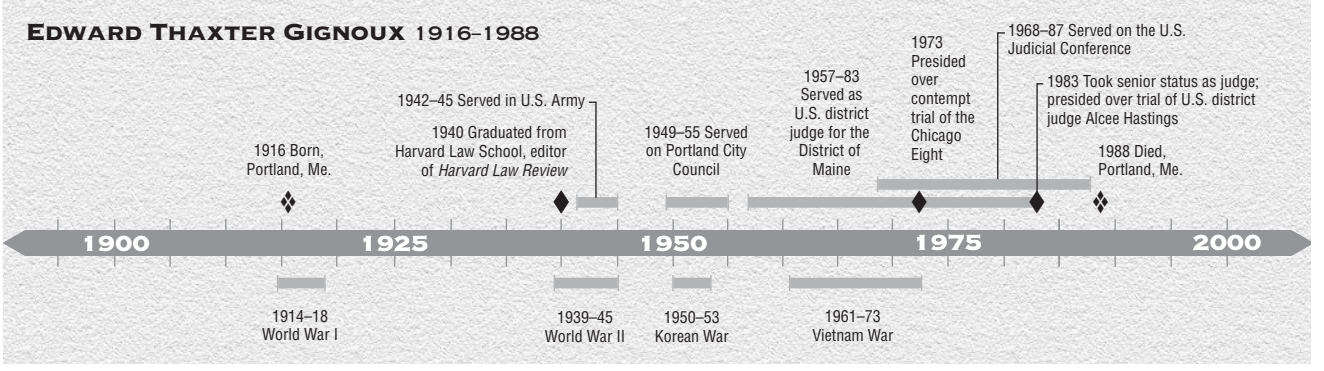

tlement claims in his native state, and he was instrumental in establishing that several tribes in Maine were "federal" rather than "colonial" Indians, thus making them eligible for millions of dollars each year in federal housing, education, and HEALTH CARE benefits (*Joint Tribal Council v. Morton,* 528 F.2d 370 [1st Cir. 1975]). Prior to the Gignoux decision, Maine Indians were considered "colonial" Indians and not the Indians of the frontier that Congress meant to protect in the Nonintercourse Act. Gignoux ruled in 1975 that the statute did apply, thus making some previous land transactions illegal and making the Maine tribes "federal" Indians.

Gignoux's reputation as a trial judge spread quickly. According to one of his former law clerks, lawyers and other judges packed his courtroom during their spare time to watch Gignoux's performance.

Gignoux was serious about the fair and equitable administration of justice. Throughout the 1960s and 1970s, he served the U.S. Judicial Conference. The Judicial Conference is the principal machinery through which the federal court system operates, establishing the standards policies governing the federal judiciary. In recognition of his efforts with the Conference, Gignoux recieved the Devitt Award in 1987.

Gignoux's work with the Judicial Conference brought him national recognition, and in 1970 he was considered for a nomination to the U.S. Supreme Court. Although he was not appointed, he did make an impression on future Court justice DAVID H. SOUTER. When Souter filled out a questionnaire in preparation for his confirmation hearing 20 years later, he noted a voting-rights case that he had argued in 1970 before Gignoux. He said, "It was one of the most gratifying events of my life, for the argument included a genuinely dialectical exchange between the great jurist and me."

As Gignoux's reputation grew, Chief Justice WARREN E. BURGER called on him to preside over some very political, and potentially explosive, cases. In 1973, Warren appointed him to preside over the contempt trial of Abbie Hoffman, BOBBY SEALE, Jerry Rubin, Tom Hayden, David Dellinger, Rennie Davis, Lee Weiner, and John Froines. These 1960s radicals known as the Chicago Seven (even though there were eight of them) had already been tried and convicted for their participation in violent demonstrations at the 1968 Democratic National Convention, in Chicago. Following their trial, contempt charges were filed against the individuals and their lawyer, WILLIAM M. KUNSTLER, for their behavior in court. Gignoux found only Hoffman, Rubin, Dellinger, and their lawyer to be in contempt, but he did not impose additional sentences on the parties involved, saying that their conviction and their previous time served were punishment enough.

On June 1, 1983, after 25 years on the federal bench, Gignoux took senior (or semiretired) status, but he continued to hear cases around the country and to serve on the TEMPORARY EMERGENCY COURT OF APPEALS, which heard cases from district courts on the Emergency Natural Gas Act of 1977. Gignoux's ability to uphold both the letter and the spirit of the law, against overwhelming political and social pressures, was still very much in evidence when, during his first year of "retirement," he was asked to preside over the trial of U.S. district judge Alcee L. Hastings (see IMPEACHMENT [sidebar]). Hastings, who was later acquitted of conspiracy to solicit a bribe and of OBSTRUCTION OF JUSTICE, was the first sitting U.S. judge to face criminal charges. Although pressured to drop the charges throughout the trial, Gignoux said that "the court is entirely persuaded that the government has submitted evidence that is sufficient to sustain a finding by the jury of guilty." Also during the *Hastings* trial, Gignoux rejected one of the first serious efforts to open a federal court trial to television coverage; Gignoux believed that he was prohibited by federal law from permitting cameras in the courtroom.

Gignoux died on November 4, 1988, in Portland, Maine. Shortly before his death, the city renamed the federal courthouse there in his honor. Gignoux was acknowledged by friend and circuit judge Frank M. Coffin as an "inspiration" and as a jurist who served honorably and well "in the most demanding and delicate of trial situations."

"TRIALS WHICH PROCEED IN ACCORDANCE WITH THE LAW, THE RULES OF EVIDENCE AND THE STANDARDS OF DEMEANOR NOT ONLY REAFFIRM THE INTEGRITY AND VIABILITY OF THE JUDICIAL PROCESS, BUT ALSO SERVE TO INSURE THE ABILITY OF EACH ONE OF US TO PROTECT THE RIGHTS AND LIBERTIES WE ENJOY AS CITIZENS."
—EDWARD GIGNOUX

## ♦ GILBERT, CASS

Cass Gilbert was the U.S. architect responsible for the traditional style and regal proportions seen in many of the nation's finest public buildings—including the Supreme Court Building, in Washington, D.C. His remarkable body of work included federal, state, municipal, educational, and religious structures as well as facilities designed for commercial, industrial, and private use. Gilbert believed strongly that architecture

should serve the established political and social order; much of his work continues to serve its public purpose decades after its conception and completion.

Gilbert was born November 24, 1859, in Zanesville, Ohio, where his grandfather, Charles Champion Gilbert, was the first mayor. He attended school in Zanesville until the death of his father, Samuel Augustus Gilbert, in 1868. At that time, his mother, Elizabeth Fulton Wheeler, apprenticed him to an architectural firm in St. Paul, Minnesota. There, he completed his education and trained as a surveyor. In 1878, Gilbert enrolled at the Massachusetts Institute of Technology, where he studied architecture for one year.

Income from occasional surveying work allowed Gilbert to embark, in 1879, on the customary grand tour of Europe, undertaken by many young men of his social standing and economic means. He traveled in England, France, and Italy and was exposed to many of the classic architectural styles that would later dominate his work.

Upon his return to the United States, Gilbert was employed as a draftsman by the New York architectural firm of McKim, Mead, and White, where he was influenced by name partner and noted architect Stanford White. His association with this firm gave him an opportunity to hone his skills and to learn the business side of running an architectural enterprise. Seeing his promise, the firm sent him to St. Paul in 1881 to oversee a building project.

"LET US PAY OUR ARCHITECTURAL DEBTS TO THE CREATORS OF THE PLAN OF WASHINGTON."
—CASS GILBERT

By December 1882, Gilbert had severed ties with McKim, Mead and formed a partnership with St. Paul architect James Knox Taylor. Together, Gilbert and Taylor pursued both institutional and residential work, but they were unable to succeed financially. The business partnership dissolved. Well organized and efficient, Gilbert found that he preferred to work alone; he did not form another professional partnership during his career. His architectural work from this period included the Dayton Avenue Church, St. Paul (1888); St. Martin's by the Lake, Minneapolis (1888); and the Lightner House, St. Paul (1893).

Gilbert did establish a personal partnership, on November 29, 1887, when he married Julia T. Finch. Their growing family—which ultimately included Emily, Elizabeth Wheeler, Julia Swift, and Cass, Jr.—added to the financial burdens of the struggling architect. To supplement his income from design work, Gilbert sold watercolors. He had begun painting during his European travels, and he was known locally as a talented artist.

In 1896, Gilbert landed the job that would launch him to national prominence: he was appointed architect for the Minnesota State Capitol Building, in St. Paul. The majestic domed structure that he created was immensely popular. Both its scale and detail were considered appropriate for its public purpose. His success convinced Gilbert that he was ready to compete in New York.

Shortly after moving to New York, Gilbert was among those invited to submit plans for the U.S. Custom House. He won the competition, but not without controversy. Other firms involved in the competition thought Taylor, then architect of the Treasury Building, in Washington, D.C., had unfairly influenced the choice of his former partner. Despite the controversy, Gilbert was eventually awarded other commissions, including the Union Club and the West Street Building, in New York, and the Essex County Courthouse, in Newark, New Jersey.

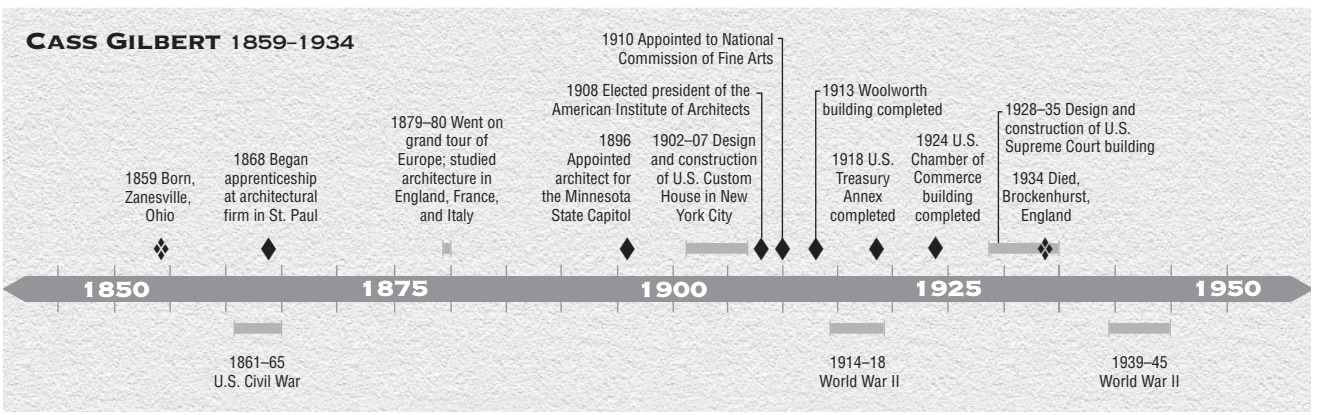

He also began to play a role in organizations associated with his profession, being elected president of the American Institute of Architects in 1908. At various points in his career, he was an active member of the Architectural League of New York, Academy of Design, National Institute of Arts and Letters, Academy of Arts and Letters, Royal Institute of British Architects, Royal Institute of Canada, Architectural Society of Liverpool, Royal Academy of Arts, and French Legion of Honor.

Although Gilbert entered, and won, a number of competitions during his career, most of his work came from his professional associations and his power of persuasion. His pursuit of the contract for the Woolworth Building, in New York, is just one example of his tenacious nature. Hearing that Frank W. Woolworth was going abroad before naming an architect for his new building, Gilbert booked passage on the same boat; he had a signed contract in hand before the boat docked.

The Woolworth Building, with its tremendous height and inventive use of terra-cotta, was a huge success. It was the tallest building in the world and it towered over the New York skyline for almost twenty years. The building made Gilbert a celebrity and substantially increased the demand for his professional services. The Scott Memorial Fountain, Detroit (1914); Detroit Public Library (1917); Brooklyn Army Terminal (1918); St. Louis Public Library (1921); and a host of other schools, banks, libraries, museums, and municipal structures were commissioned in the years following his completion of the Woolworth Building in 1913.

In 1910, Gilbert was appointed to the National Commission of Fine Arts by President **WILLIAM HOWARD TAFT**. He was reappointed for another term by President **WOODROW WILSON** in 1914. Through this association, Gilbert secured some of his most prestigious work, including the U.S. Treasury Annex (1918), **CHAMBER OF COMMERCE** (1924), and, finally, the Supreme Court Building.

In 1928, Chief Justice and former president William Howard Taft became chairman of the Supreme Court Building Commission, created by Congress to build a permanent home for the nation's High Court. Taft remembered Gilbert's work on the National Commission of Fine Arts and selected him to design the new Court building.

*Cass Gilbert.*
LIBRARY OF CONGRESS

The structure envisioned by Gilbert was a monumental temple of justice—one that evoked the power, authority, and solemnity of the Court. His design, which filled the square-block site, featured a neo-classical white marble structure with an enormous central hall housing the courtroom. Two symmetrical wings on either side of the central hall contained offices, libraries, and other Court functions. The focus of the Court chamber was an elevated bench, which looked out on seating for more than three hundred spectators.

The interior layout of the building separated the justices' private areas from the public areas, and was designed to facilitate grand entrances into the courtroom. The building's private areas contained three-room office suites, a robing room, underground parking and entrances, temperature- and humidity-controlled library and document storage facilities, and pressrooms.

Gilbert's architectural sketches were approved by the commission in 1929, and construction began in 1931. The building was not completed until after Gilbert's death in 1934; Gilbert's son, Cass, Jr., supervised the final stages of the project.

The Supreme Court Building opened its doors to the public on Monday, October 7, 1935. Initially, the building was criticized for both its size and its exterior embellishment. To a large

extent, the size was dictated by the site: Gilbert strove to complement the scale of the adjacent LIBRARY OF CONGRESS and of other buildings in the Capitol complex. Charges of wasted space in the halls and corridors, and excessive seating in the courtroom, have diminished with time. The building's exterior embellishment featured prominent legal figures and themes and was executed by some of the finest artists and sculptors of the day. It is said that one of the toga-clad figures depicted on the building bears the likeness of the architect himself.

As a space designed for hearing arguments and holding public discussion, the large courtroom was also criticized for its poor acoustics. Time and improved sound technology have diminished this criticism. Today, the Supreme Court Building is considered the pinnacle of Gilbert's work and is one of the nation's finest public buildings.

While developing the Supreme Court Building, Gilbert also continued to work in New York and across the country. During this period, he designed the New York Life Insurance Building, the U.S. Courthouse in New York City, the George Washington Memorial Bridge, and the state capitol buildings in Arkansas and West Virginia.

Biographer Egerton Swartwout described Gilbert as "purposely impressive in manner and rather pompous at times." This description could as easily be applied to the public buildings Gilbert designed. Gilbert's work stayed true to the traditional themes that inspired him as a young man traveling in Europe. Though his Woolworth Building and other commercial structures contributed to the evolution of the modern skyscraper, Gilbert was not a fan of the modern functional architecture that emerged in the 1920s. The turmoil of WORLD WAR I and the economic difficulties of the 1920s were said to have solidified Gilbert's commitment to classic traditional style.

Still much in demand by those who shared his architectural vision, Gilbert died suddenly May 17, 1934, on a golf holiday at Brockenhurst, England, at age seventy-five. He is buried in New York City. His personal and professional papers are housed at the Library of Congress—across the street from his Supreme Court Building.

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## ❖ GILLETT, EMMA MELINDA

Emma Melinda Gillett was a remarkable attorney who helped establish one of the first co-educational law schools in the United States. In 1896, Gillett and a colleague, ELLEN SPENCER MUSSEY, sponsored a series of lectures in Washington, D.C., for local women interested in law. Despite social pressures against women in the legal profession, Gillett and Mussey held the lectures for two years. They expanded their curriculum and created Washington College of Law, a co-educational institution that later became part of American University.

Gillett was born July 30, 1852, in Princeton, Wisconsin. After her father, Richard J. Gillett, died in 1854, Gillett moved to Girard, Pennsylvania, with her mother, Sarah Ann Gillett, and family. Like Mussey, Gillett attended Lake Erie Seminary in Painesville, Ohio. Upon graduation in 1870, Gillett became a public school teacher.

After ten years of teaching, she decided to move to Washington, D.C., to pursue a LEGAL EDUCATION and career. Her plans were thwarted by the refusal of most district law schools to admit women. Gillett overcame the obstacle by enrolling at Howard University Law College, a well-known, predominantly African American institution that did accept female students.

Gillett earned a law degree from Howard in 1882 and a master of law degree in 1883. She began a successful law practice in Washington, D.C., and became vice president of the D.C. region of the previously all-male AMERICAN BAR ASSOCIATION. She also was elected president of the Women's Bar Association of the District of Columbia.

Both Gillett and Mussey had been denied admission to the all-male, all-white law schools in Washington, D.C., which likely motivated the women to form the Washington College of Law. Three additional motivating factors have also been identified. First, women's voluntary associations had experienced significant growth during the latter part of the nineteenth century. Second, opportunities for women in higher education had expanded. Third, the women's suffrage movement had grown considerably.

Gillett and Mussey established a coeducational institution, rather than a women-only law school. They believed that admitting both men and women as students, as well as hiring male faculty and administrators, were necessary to promote gender equality. Perhaps as important, Gillett and Mussey knew that admitting men as students and employing men in faculty and administrative positions were necessary to promote the long-term success of the school. Fifteen years after its establishment, in fact, the number of men enrolled in the school outnumbered the number of women, due largely to the fact that two other law schools in Washington, D.C., began to admit women as students. Nevertheless, only women served as deans of the Washington College of Law until 1947. Washington College of Law earned accreditation from the American Bar Association in 1940 and became a part of American University in 1949.

Gillett succeeded Mussey as dean of the law school in 1913, heading the institution for ten years. Gillett died on January 23, 1927, in Washington, D.C., at the age of 74.

"THE MAJORITY OF THE [WOMEN] PRACTITIONERS WHO ARE STICKING TO THEIR WORK AND PLODDING ON [THEIR] WAY TO SUCCESS ARE UNMARRIED."
—EMMA GILLETT

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## GILPIN, HENRY DILWORTH

Henry Dilworth Gilpin served as attorney general of the United States from 1840 to 1841 under President MARTIN VAN BUREN. He was born April 14, 1801, in Lancaster, England. He and his parents, Joshua Gilpin and Mary Dilworth Gilpin, boarded a ship for the United States in 1802. The Gilpins were aristocratic and socially prominent, not a struggling immigrant family. Gilpin's grandfather Thomas Gilpin was a manufacturer and businessman who had been shipping goods to U.S. harbors since colonial days. He was among those who helped to plan and execute the construction of the Chesapeake and Delaware Canal (which connects the head of Chesapeake Bay with the Delaware River estuary and thereby shortens sea routes to Baltimore from the north and from Europe). Gilpin's father, an author and poet with published works in both England and the United States, dabbled in a number of artistic and business ventures in the United States. He eventually settled in Pennsylvania, where he ran a successful papermaking business.

Gilpin was brought up near Philadelphia and was educated at the University of Pennsylvania.

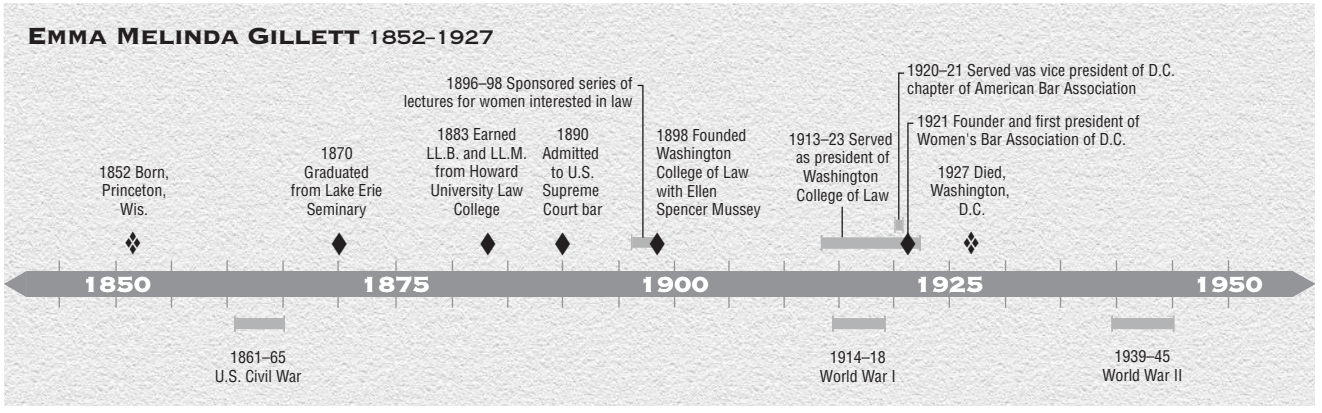

*Henry D. Gilpin.*
LIBRARY OF CONGRESS

"I KNOW FEW THINGS MORE STRIKING IN THE HISTORY OF HUMANKIND THAN THAT KINDLING ENTHUSIASM WHICH, SPRINGING FROM ONE INDIVIDUAL . . . SWAYS THE CONDUCT OF IMMENSE BODIES OF MEN."
—HENRY GILPIN

He graduated, as valedictorian of his class, in 1819 and began to study law with a local attorney. In 1822, he was admitted to the bar but he did not establish a practice. Instead, he went to work as an agent for the Chesapeake and Delaware Canal Company. The position allowed him to travel and to pursue the literary interests encouraged by his father. From 1826 to 1832, he wrote detailed accounts of his visits to Harper's Ferry, the Shenandoah Valley, Weyer's Cave, Natural Bridge, Lexington, Charlottesville, Fredericksburg, Washington, D.C., and other locations in the Atlantic and southern states. His writings were collected by his father and later published in a seven-volume work called *Atlantic Souvenirs* (1826–1832).

Gilpin's pedigree and business interests permitted him to mix with prominent citizens wherever he traveled. During this early period of travel, he met and married Eliza Johnson, of New Orleans. In 1826, he attended—and wrote a famous account of—President John Quincy Adams's inaugural ball and public reception. On subsequent trips to the nation's capital, he developed an interest in politics by writing profiles of men like HENRY CLAY, DANIEL WEBSTER, and ANDREW JACKSON.

Gilpin was a great admirer of Jackson and was active in Jackson's successful bid for the presidency in 1828. In appreciation for Gilpin's support, Jackson named him to the board of directors of the Second National Bank of the United States. The bank, located in Gilpin's hometown of Philadelphia, was established as the nation's central bank in 1816 during the financial crisis after the WAR OF 1812. It had opened in 1791 and closed in 1811 after its renewal charter was successfully challenged by agricultural interests who were not served by the bank's commercial focus.

Like its predecessor, the Second National Bank had strong opposition. Jackson believed that it had become too powerful, and he wanted to diminish its influence by withdrawing federal funds and depositing the money in selected state banks. The Bank War, as the debate over the bank's role in the federal economy came to be called, was a central issue in Jackson's second presidential campaign. Jackson's re-election, along with the presence of his ally Gilpin on the board, ensured the bank's demise. Gilpin successfully pressed Jackson's arguments against the institution, and the renewal of the bank's charter was rejected. The bank closed in 1836 when its charter expired.

Gilpin's willingness to act as Jackson's chief spokesman at the height of the Bank War resulted

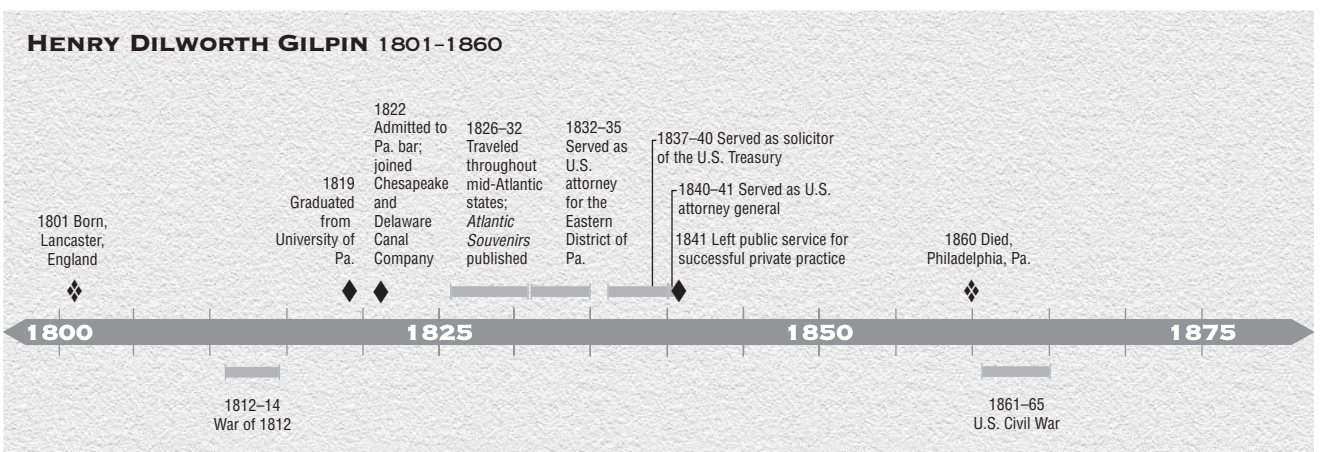

in his removal from the board in the bank's final years. To fill the void left by his removal, Gilpin renewed his interest in the PRACTICE OF LAW, and from 1832 to 1835 he served as U.S. attorney for the Eastern District of Pennsylvania. He also pursued a number of land-investment and business opportunities in the Michigan Territory.

Jackson named Gilpin territorial governor of Michigan in 1835, but the president's opponents in Congress blocked the confirmation. It was not until President Van Buren was elected a year later that Gilpin returned to a role in the federal government.

Van Buren named Gilpin to be solicitor of the U.S. Treasury in 1837 and elevated him to serve as attorney general of the United States from 1840 to 1841. As in his early years, Gilpin continued to chronicle his experiences. The *Gilpin Reports,* published in 1837, and the *Opinions of Attorneys-General of the United States,* published in 1840, record his service to the Van Buren administration.

Gilpin's term as attorney general increased the demand for his legal services, and after leaving the cabinet, he devoted the last 20 years of his life to the practice of law. He also continued to oversee development of the Chesapeake and Delaware Canal Company, where he rose to the positions of secretary and director.

Gilpin retained a lifelong interest in politics and the DEMOCRATIC PARTY and served as a delegate to the party's national convention in 1844. Gilpin tutored his younger brother, William, in the study of the law and was instrumental in launching the latter's political career. His brother went on to become the governor of Colorado.

Gilpin died on January 29, 1860, in Philadelphia, Pennsylvania.

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## ♦ GINGRICH, NEWTON LEROY

With his election as Speaker of the U.S. House of Representatives in January 1995, Newton Leroy Gingrich (R-Ga.) became a powerful politician. Assuming control of the first Republican majority in the House since 1952, Gingrich ruled that body during his first year with an authority not seen since the nineteenth century. The veteran congressman from Georgia used his new position to proclaim the arrival of an era in which his conservative agenda—including lower taxes, decentralized government, and deep cuts in social programs—would fundamentally alter the fabric of U.S. society.

Since his arrival on the Washington, D.C., scene in 1979 as a brash and combative new member of Congress, Gingrich has shaped and guided Republican efforts on Capitol Hill. With an affinity for both intellectual debate and backroom deal making, this white-haired former professor provided the vision, verve, and ideas that built a Republican majority. His opponents, however, accuse him of a lack of concern for poor and disadvantaged persons as well as an overly optimistic view of technology and the free market. Observers have described his actions in Congress as alternately brilliant and petty, leaving many to wonder whether he will be a passing footnote or a pivotal chapter in U.S. political history.

"WE MUST MAKE GOVERNMENT MORE EFFICIENT, MAKING SURE TAXPAYERS GET THEIR MONEY'S WORTH."
—NEWT GINGRICH

Gingrich was born June 17, 1943, in Harrisburg, Pennsylvania. His parents, Newton C. McPherson and Kathleen Daugherty McPherson, were separated after only three days of marriage. Gingrich's mother remarried three years after his birth, and her new husband, Robert Bruce Gingrich, adopted Gingrich. Gingrich's adoptive father was a career army officer, and the family moved frequently, living in Kansas, France, Germany, and Fort Benning, Georgia.

In 1958, the 15-year-old Gingrich accompanied his family on a trip to Verdun, France, site of the bloodiest battle of WORLD WAR I. Deeply moved by the story and scene of the battle, along with a visit to rooms filled with bones of the dead, Gingrich experienced an epiphany that he later described as "the driving force which pushed me into history and politics, and molded my life." The day after this visit, he told his family that he would run for Congress because politicians could prevent such senseless bloodshed. Later, as both a student and a young professor, he would tell others of his desire to become Speaker of the House.

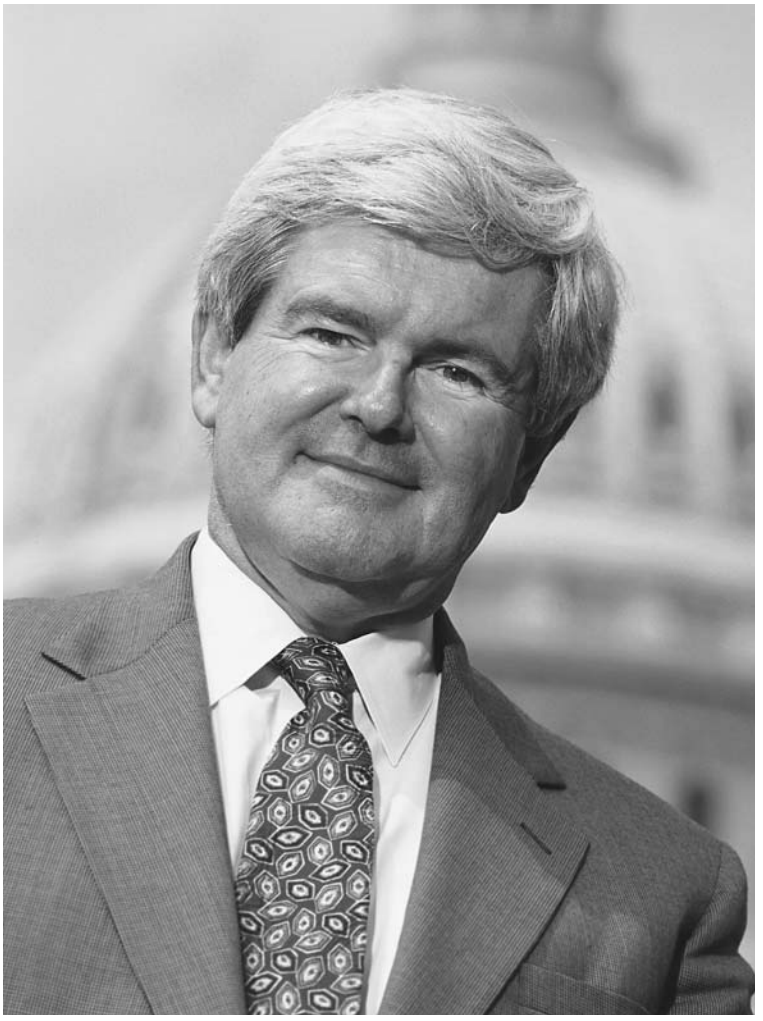

*Newt Gingrich.* WALLY MCNAMEE/CORBIS

At age 19, Gingrich, who was then an undergraduate at Emory University, married his former high school math teacher, Jackie Battley. The couple had two daughters, Linda Kathleen and Jacqueline Sue. Gingrich completed his bachelor of arts degree at Emory in 1965 and a doctor of philosophy degree in modern history at Tulane University in 1971. A liberal, reform-minded Republican in these years, Gingrich worked for Nelson A. Rockefeller's 1968 presidential campaign in Louisiana.

Gingrich took his first college teaching job at West Georgia College, in Carrollton, Georgia, with one eye toward an eventual seat in Congress. He nevertheless became a popular teacher at West Georgia, and founded environmental studies and future studies programs.

In 1974 and 1976, Gingrich ran for a seat in the U.S. House from Georgia's Sixth District, a rural and suburban region on the northern outskirts of Atlanta. Still voicing moderate and even liberal positions, he was endorsed in 1974 by the liberal newspaper the *Atlanta Constitution.* He narrowly lost both elections. In a move that some have called a calculated ploy to gain political office, Gingrich cast himself as a conservative for the 1978 election. In his platform, he called for lower taxes and opposed the Panama Canal Treaty. He beat the Democratic contender by 7,600 votes, earning a seat in the 96th Congress.

Shortly after his election, Gingrich and his wife separated. He married Marianne Ginther in 1981.

In Washington, D.C., Gingrich joined a number of Republican first-year Congress members eager to leave their mark on the political landscape. Unafraid of making enemies, he vigorously attacked Democrats and sometimes his own party, criticizing it for a complacent acceptance of its minority status in Congress. He called instead for an aggressive effort to build a Republican majority, a feat he would orchestrate 16 years later.

In February 1983, Gingrich began meeting regularly with other young conservatives in an organization they called the Conservative Opportunity Society—a name designed to contrast with "liberal WELFARE state," the favorite target for their ideological barbs. Gingrich and other young Republicans also gained notoriety for their creative use of the Cable-Satellite Public Affairs Network (C-SPAN), which broadcast live proceedings of the House. This group used the "special orders" period of the House, during which members of Congress may read items into the record, as a platform to denounce Democrats and advance their own views. Although they were actually reading their material before an empty House chamber, Gingrich and his colleagues attempted to create the impression that they were making unchallenged arguments to specific Democrats. House Speaker THOMAS P. ("TIP") O'NEILL JR. (D-Mass.) responded by ordering the C-SPAN cameras to periodically pan the empty chamber.

By 1984 Gingrich had developed the basic outlines of his conservative philosophy. He published his views in a book, *Window of Opportunity,* cowritten with his wife, Marianne, and David Drake. It remains an excellent guide to Gingrich's thought. In it, he exhibited, in addition to a strong belief in the efficacy of the free market, a strong devotion to technology as an

answer to social ills. He wrote of a "window of opportunity" represented by "breakthroughs in computers, biology, and space." Among his futuristic proposals was an ambitious space program, including a lunar research base by 2000.

He contrasted this vision of a bright future with a "window of vulnerability" that opened onto an alternative future of Soviet expansionism and U.S. decline. This dystopia was to be prevented by large-scale weapons programs such as Star Wars, also known as the Strategic Defense Initiative, and the dismantling of welfare programs and excessive taxation. The seventh chapter of the book, "Why Balancing the Budget Is Vital," foreshadowed a 1995–96 showdown with President BILL CLINTON over the FEDERAL BUDGET.

At the 1984 Republican National Convention in Dallas, Gingrich gained national attention as he led a move to make the party platform more conservative, successfully inserting planks against tax increases and ABORTION. He won still more influence in 1986, when he became chairman of GOPAC, a Republican POLITICAL ACTION COMMITTEE which is a principal source of funding for Republican candidates across the United States. The organization, which Gingrich once called "the Bell Labs of politics," also provided the means for him to spread his conservative gospel. GOPAC has distributed printed and audiovisual works by Gingrich to hundreds of Republican candidates. In the early and mid-1990s, it came under investigation by the FEDERAL ELECTION COMMISSION for alleged improprieties, including illegal assistance to Gingrich during his 1990 election campaign. Gingrich stepped down as the head of GOPAC in 1995.

In 1987, Gingrich took on a major Washington, D.C., figure when he accused House Speaker JIM WRIGHT (D-Tex.)—occupant of the very office Gingrich coveted—of ethics violations. Gingrich claimed that Wright had violated House rules in his dealings with a Texas developer and in the manner by which he had profited from sales of a book. Gingrich's foes immediately attacked him as an irresponsible upstart, but he remained unwavering in his attacks. As he later told a newspaper, "I didn't come here to pleasantly rise on an escalator of self-serving compromises." Gingrich won a major coup in 1989 when the House Ethics Committee formally charged Wright with 69 ethics violations and Wright resigned from the House.

That same year Gingrich lobbied for and won (by two votes) the position of House minority whip, making him the second highest ranking Republican in the House of Representatives. This victory represented an important step in his transformation from party pugilist to party leader. However, Gingrich himself soon became the object of a House Ethics Committee probe of alleged violations of House rules on outside gifts and income. The allegations focused on his earnings from two books, including *Window of Opportunity.* Later that year, Gingrich was investigated again by the same committee for improperly transferring congressional staff to work on his reelection campaigns. In both cases, the committee did not find sufficient grounds to reprimand Gingrich.

Gingrich nearly suffered defeat in the elections of 1990 and 1992, winning the former contest by fewer than 1,000 of the 156,000 votes cast. But these narrow victories were followed by a much wider reaching victory for both the man and his party in 1994.

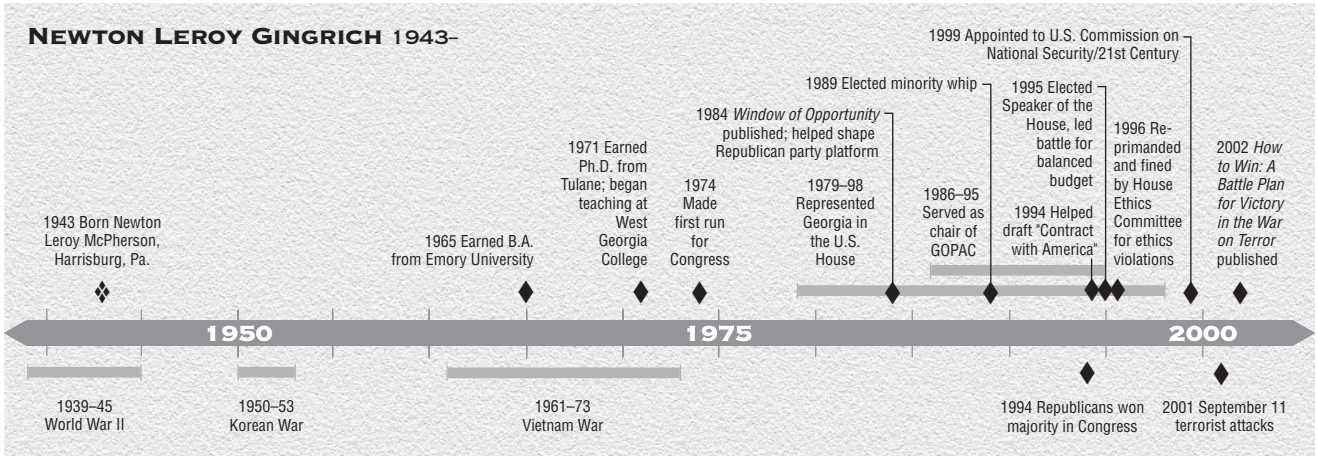

Gingrich had done much to lay the groundwork for this win, particularly through his organization of the CONTRACT WITH AMERICA, a ten-point plan of action that was intended to give Republicans a unified front against their Democratic opponents. The contract called for such measures as tax breaks, a balanced budget amendment to the Constitution, a presidential line-item VETO, term limits for members of Congress, get-tough proposals on crime, reduction of government regulations, welfare reform, military budget increases, and more. In September 1994, Gingrich gathered over three hundred Republican candidates for Congress to sign the contract on Capitol grounds.

The big GOP win in 1994 gave the party a gain of 54 seats and majority status in the House. In January 1995, Gingrich finally achieved his lifelong dream when he was voted Speaker of the House. His leadership soon led to a dramatic change in House protocol. Wresting control from committee chairs by placing loyal associates—many of them first-year Republican Congress members—on key committees, Gingrich became one of the most powerful speakers since the nineteenth century, at times virtually dictating the content of legislation.

Riding the crest of publicity attached to his new position, Gingrich published two books, *To Renew America* (1995) and *1945* (1995). *To Renew America* was a best-selling work communicating Gingrich's vision for the country. It presents a thesis that cultural elites have torn down the traditional culture of U.S. society. It also contains his already familiar calls to balance the federal budget and decentralize the federal bureaucracy by returning power to states and localities. The book *1945* is a "what if" novel that explores what the consequences would have been if Nazi Germany had been triumphant in WORLD WAR II.

Gingrich, eager to make his mark as Speaker, initiated a one hundred-day plan to enact the Contract with America into law. He passed nine of the ten items of the contract through the House, but only three—the Congressional Accountability Act (Pub. L. No. 104-1, 109 Stat. 3), the Unfunded Mandates Reform Act (Pub. L. No. 104-4, 109 Stat. 48), and the Paperwork Reduction Act (Pub. L. No. 104-13, 109 Stat. 163)—were signed into law by the president.

Gingrich fought especially hard for one element of the contract: a balanced budget amendment to the Constitution. After its defeat in the Senate, he organized a Republican plan to balance the federal budget in seven years. This plan included tax reductions and deep cuts in federal social programs. Most controversial were provisions requiring large cuts to such programs as MEDICARE and MEDICAID, which provide HEALTH CARE to elderly, disabled, and poor people. Over the course of 1995, President Clinton gradually adopted the goal of a seven-year balanced budget plan—a change of mind that symbolized the pervasive power of the Republican agenda.

When President Clinton vetoed the House budget plan late in 1995, Gingrich and his Republican colleagues refused to compromise their budget priorities. As a result, the federal government was forced to shut down nonessential services for lack of funding. The budget showdown forced national parks, agencies, and other elements of the federal government to close their doors. Gingrich came under fire as people complained of undelivered paychecks and other problems. The impasse ended in January 1996, when Gingrich and Clinton reached a compromise that allowed provisional funding of the federal government and abandoned the seven-year goal of balancing the budget.

In 1995, *Time* magazine named Gingrich its Man of the Year, a fitting recognition of the Speaker's large role in shaping the national political agenda. Such power had not translated into universal public approval for Gingrich, however, particularly given the unpopularity of the federal government shutdown.

President Clinton and Congress, despite their collective ideological differences, managed to achieve a budget surplus in 1998, years ahead of expectations. The surpluses grew from $69 billion in 1998 to $122.7 billion in 1999. Nevertheless, Gingrich's popularity dwindled during the late 1990s, due in large part to his policies and brash personality.

Republicans maintained control over Congress in the 1996 and 1998 elections, but the margin of the majority following the 1998 elections was the narrowest in more than 30 years. Fellow Republican members of Congress largely blamed Gingrich for the difficulties during the elections. Amid increasing dissension, Gingrich resigned both as the Speaker of the House and as a representative in 1999.

After he left politics, Gingrich founded the Gingrich Group, a communications and management consulting firm based in Atlanta. He

serves as a senior fellow for both the American Enterprise Institute in Washington, D.C., and at the Hoover Institution at Stanford University. In 2001, he was named a distinguished visiting scholar at the National Defense University. He has served as a political analyst in the media and is generally recognized for his expertise in such areas as world history, military issues, and international affairs.

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CROSS-REFERENCES

Contract with America; Election Campaign Financing.

## GINNIE MAE

See GOVERNMENT NATIONAL MORTGAGE ASSOCIATION.

## ♦ GINSBURG, DOUGLAS HOWARD

Douglas Howard Ginsburg became the chief judge of the U.S. Court of Appeals for the District of Columbia in 2001 after serving as an associate judge since 1986. In 1987, his nomination to the SUPREME COURT OF THE UNITED STATES was derailed by questions about his inexperience and about his personal life.

Ginsburg was born May 25, 1946, in Chicago. He grew up in Chicago, where he graduated from the prestigious Latin School in 1963. After high school, he entered Cornell University, in Ithaca, New York, but he left college in the mid-1960s to open the nation's first computerized dating service. After achieving success with the company, which was named Operation Match, Ginsburg sold his interest and returned to Cornell, earning his bachelor's degree in 1970. From there, he went to the University of Chicago Law School, where he received his doctor of JURISPRUDENCE degree in 1973.

Ginsburg served as a law clerk to U.S. circuit judge Carl McGowan from 1973 to 1974, and to Justice THURGOOD MARSHALL, of the U.S. Supreme Court, from 1974 to 1975. In 1975, he became an assistant professor of law at Harvard Law School, and in 1981, he was promoted to the rank of professor. He left academia to become a deputy assistant attorney general for regulatory affairs in the U.S. Department of Justice, Antitrust Division, in 1983. A year later, he was appointed administrator for information and regulatory affairs of the OFFICE OF MANAGEMENT AND BUDGET, where he served for one year before returning to the Antitrust Division of the JUSTICE DEPARTMENT in 1985. In 1986, President RONALD REAGAN named him a judge of the U.S. Court of Appeals for the District of Columbia Circuit.

"IT IS A CARDINAL PRINCIPLE OF OUR SYSTEM OF CRIMINAL LAW THAT THE FACTS ARE SETTLED BY THE TRIER OF FACT, BE IT A JURY OR A JUDGE, AND ARE NOT ORDINARILY TO BE DETERMINED BY A REVIEWING COURT."
—DOUGLAS GINSBURG

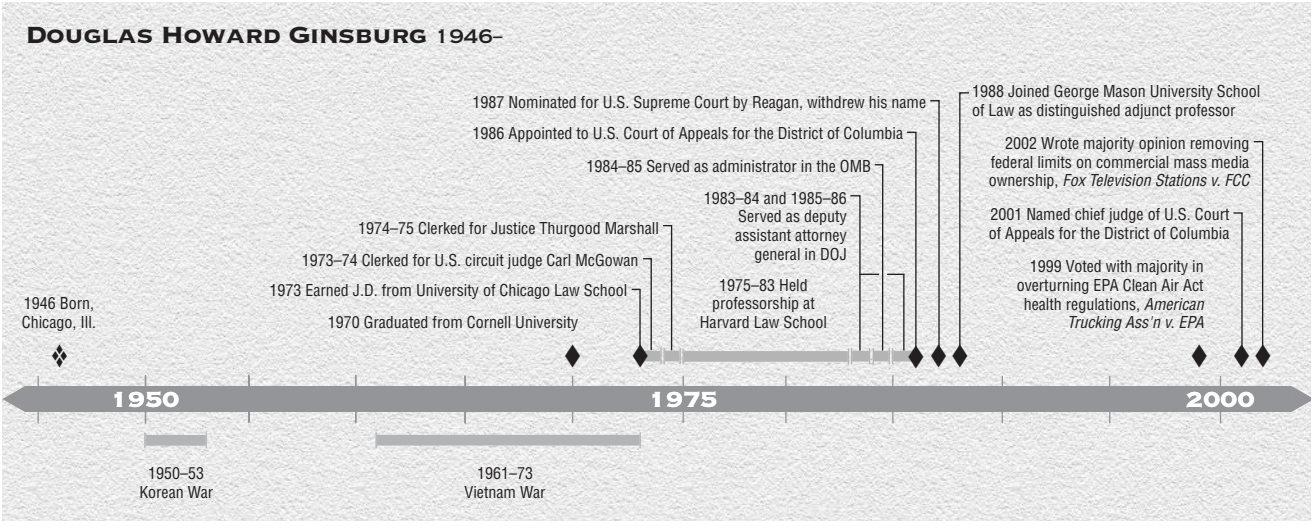

At this point in his career, Ginsburg seemed to be settling into a predictable future on the federal bench. But there was to be a short detour along the way. In 1987, to the surprise of almost everyone, Reagan nominated him to replace retiring Justice LEWIS F. POWELL JR. on the U.S. Supreme Court.

Ginsburg's nomination followed months of intense, sometimes acrimonious questioning by the SENATE JUDICIARY COMMITTEE of Judge ROBERT H. BORK, Reagan's first nominee. During these hearings, the Senate had departed from its traditional advice-and-consent role and closely questioned Bork on philosophical and doctrinal matters never before addressed in confirmation proceedings. Bork had a long paper trail, with years of scholarly writings that revealed him to be a strict, conservative constructionist on constitutional matters, just the type of Justice Reagan wanted on the Court to carry his vision of judicial restraint into the next century. However, members of the Senate, openly concerned with his conservative political ideologies, eventually rejected Bork's nomination.

Stung by the Senate's rejection of Bork, Reagan and his aides were determined to find a nominee who would fulfill their requirement of judicial restraint but who had no "history" that would make their choice vulnerable to attack. They thought they had just the person they needed in Ginsburg and, although Ginsburg had less than a year's experience as a judge, Reagan nominated him for the vacancy.

Ginsburg's nomination ran into difficulty almost immediately. Senators raised the obvious issues of his youth and inexperience and voiced concern about how his scanty judicial record made him a tabula rasa on constitutional matters. A conflict-of-interest question was raised when newspapers reported that at the Justice Department he had handled a major case involving the cable TV industry while he held a $140,000 investment in a Canadian cable TV company. Then, too, it began to look as if he might be opposed by some conservatives because his wife, a physician, had reportedly performed some ABORTIONS. The death knell for Ginsburg's nomination sounded when he admitted that he had smoked marijuana "on a few occasions" while he was a student and during his early days on the faculty at Harvard.

Faced with the embarrassment of backing a nominee who had admitted illicit drug use, the White House dispatched Secretary of Education William J. Bennett to urge Ginsburg to withdraw his name from consideration. Ginsburg complied, issuing a statement in which he said that the scrutiny of his personal life would continue to draw attention away from more relevant questions. "My views on the law and on what kind of Supreme Court justice I would make have been drowned out in the clamor," he stated. He commended Reagan and his wife, Nancy Reagan, for "leading the fight against illegal drugs," adding, "I fully support their effort and I hope that the young people of this country, including my own daughters, will learn from my mistake and heed their message."

The swift and unfortunate demise of Ginsburg's nomination was a sobering lesson for the Reagan administration. The president reacted by nominating an experienced and uncontroversial moderate, Judge ANTHONY M. KENNEDY, who was quickly and easily confirmed. Many feel that the Senate's handling of the Bork and Ginsburg nominations set a precedent for later investigations of presidential appointees and established a breadth and depth of scrutiny that some say are outside the scope allowed by the Constitution. The Senate continued its method of scrutiny with CLARENCE THOMAS in 1991.

After his withdrawal, Ginsburg returned to his position on the District of Columbia Circuit. In July 2001, after serving as an associate judge for nearly 15 years, he ascended to the position of chief judge. Ginsburg has also maintained an active interest in LEGAL EDUCATION, serving as a part-time instructor at Harvard University, Columbia University, the University of Chicago, and George Mason University in Virginia. He teaches courses in antitrust, ADMINISTRATIVE LAW, and jurisprudence. In addition, Ginsburg is the author of numerous legal casebooks and other texts, focusing primarily upon antitrust and economic regulation.

Ginsburg is married to Hallee Perkins Morgan Ginsburg, and has three children. He is a member of the Illinois State Bar Association, the Massachusetts State Bar Association, the American Economic Association, and the Honor Society of Phi Kappa Phi. Ginsburg is also an honorary member of the District of Columbia Bar Association.

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## ♦ GINSBURG, RUTH BADER

Ruth Bader Ginsburg was appointed associate justice of the U.S. Supreme Court in 1993. Ginsburg was the first person nominated to the Court by President BILL CLINTON, filling the vacancy created by the retirement of Justice BYRON R. WHITE. As an attorney prior to her appointment, Ginsburg won distinction for her advocacy of WOMEN'S RIGHTS before the Supreme Court.

Ginsburg was born March 15, 1933, in Brooklyn, daughter of Nathan Bader, a furrier and haberdasher, and Celia (Amster) Bader. Ginsburg attended New York public schools and then Cornell University. She married Martin Ginsburg after graduating from Cornell in 1954, and gave birth to a daughter, Jane Ginsburg, before entering Harvard Law School in 1956. Ginsburg was an outstanding student and was elected president of her class at the prestigious Harvard Law School. After her second year, she transferred to Columbia Law School, following her husband, who had taken a position with a New York City law firm. Ginsburg was elected to the Columbia Law Review and graduated first in her class. She was admitted to the New York bar in 1959.

Despite her academic brilliance, New York law firms refused to hire Ginsburg because she was a woman. She finally got a position as a law clerk to a federal district court judge. In 1961, Ginsburg entered the academic field as a research associate at Columbia Law School. In 1963, she joined the faculty of Rutgers University School of Law, where she served as a professor until 1972.

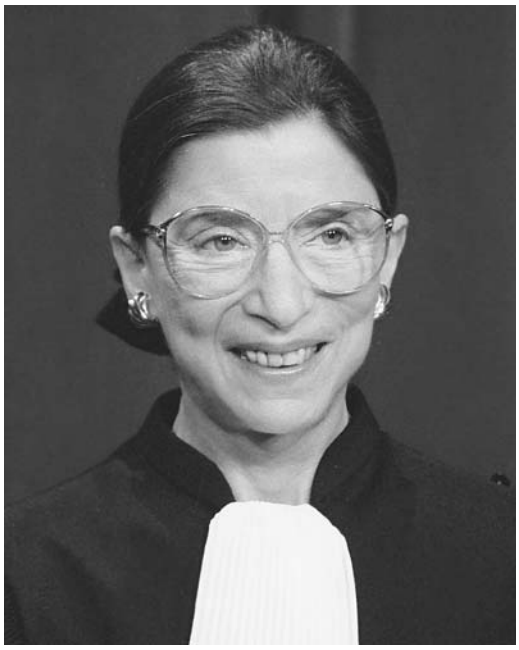

*Ruth Bader Ginsburg.*
AP/WIDE WORLD PHOTOS

In 1972, Ginsburg's career shifted to that of an advocate. As the director of the Women's Rights Project of the AMERICAN CIVIL LIBERTIES UNION, she developed and used a strategy of showing that laws that discriminated between men and women were often based on stereotypes that were unfair to both sexes. In the early to mid-1970s, Ginsburg argued six women's rights cases before the U.S. Supreme Court, winning five of them.

FRONTIERO V. RICHARDSON, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973), illustrates the

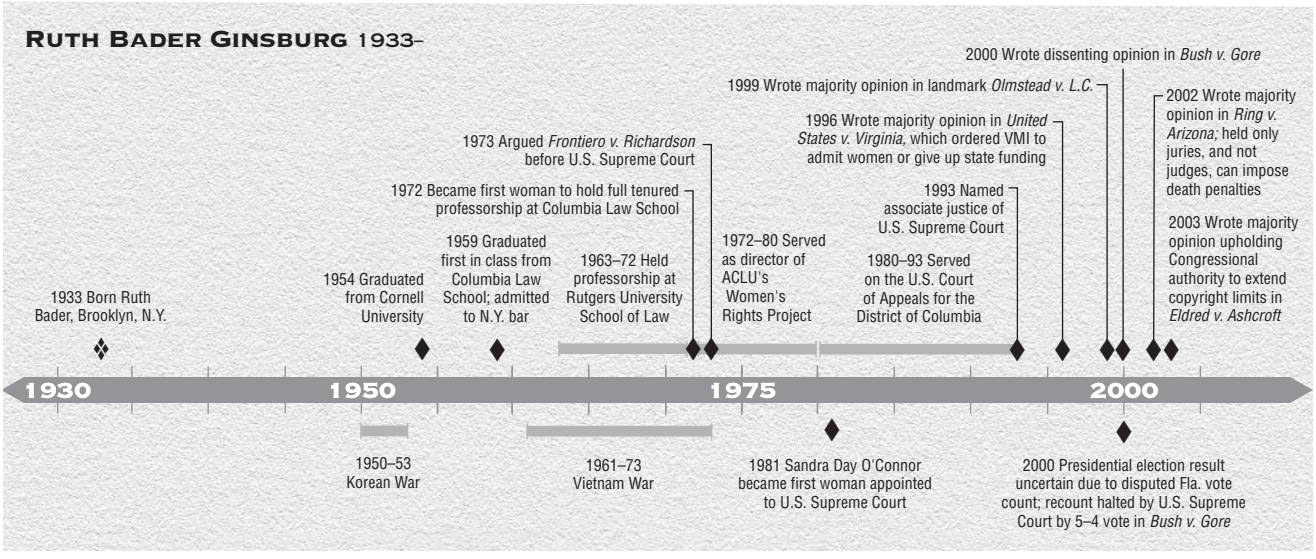

type of cases Ginsburg argued before the Court. In *Frontiero,* a female Air Force officer successfully challenged statutes (10 U.S.C.A. §§ 1072, 1076; 37 U.S.C.A. §§ 401, 403) that allowed a married serviceman to qualify for higher housing benefits even if his wife was not dependent on his income, while requiring a married servicewoman to prove her husband's dependence before receiving the same benefit. The Supreme Court voted 8–1 to overturn the law.

President **JIMMY CARTER** appointed Ginsburg to the U.S. Court of Appeals for the District of Columbia Circuit in 1980. In this position Ginsburg proved to be a judicial moderate, despite her reputation as a women's rights advocate. She supported a woman's right to choose to have an **ABORTION**, but disagreed with the framework of **ROE V. WADE**, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, the 1973 decision that gave women that right. She generally sided with the government in criminal cases, but supported **CIVIL RIGHTS** issues. She was a model of judicial restraint, preferring legislative solutions to social problems, instead of judge-made solutions.

"THE GREATEST FIGURES OF THE AMERICAN JUDICIARY HAVE BEEN INDEPENDENT THINKING INDIVIDUALS WITH OPEN BUT NOT EMPTY MINDS—INDIVIDUALS WILLING TO LISTEN AND LEARN."
—RUTH BADER GINSBURG

President Clinton nominated Ginsburg to the Supreme Court in 1993, and she was easily confirmed. Her tenure on the High Court has been consistent with her service on the court of appeals. She has remained a judicial moderate with a strong emphasis on protecting civil rights. In **UNITED STATES V. VIRGINIA**, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996), Ginsburg wrote the majority opinion, which ordered the all-male Virginia Military Institute (VMI) to admit women or give up state funding. This decision also affected the Citadel, South Carolina's state-run all-male military school, and was a decisive blow to state-sponsored **SEX DISCRIMINATION**. Ginsburg rejected a proposal by VMI that it establish a separate military program for women. Such a program would be unequal, Ginsburg concluded, because it would rely on stereotypes about women and would not provide an equal education. She stated, "Women seeking and fit for a VMI-quality education cannot be offered anything less under the state's obligation to afford them genuinely equal protection."

Ginsburg has written for the majority in nearly one hundred opinions. One of her most far-reaching opinions was the **INTELLECTUAL PROPERTY** case of *New York Times v. Tasini,* 533 U.S. 483, 121 L. Ed. 2d 2381, 150 L. Ed. 2d 500 (2001). The Tasini opinion upheld a 1999 federal appeals court decision, which found that the New York Times Company and its codefendants had violated the copyrights of Tasini and five other freelance writers by reproducing their work online on their own websites, and through subscription databases such as Lexis-Nexis. Ginsburg's opinion states that publishing the same article in print and on electronic formats are separate publishing events for purposes of **COPYRIGHT** law. Consequently, the authors should be compensated for each publishing event. The suit was brought forward by freelance writers who complained that their work was posted on the **INTERNET** without their permission and, in some cases, earned extra revenue for publishers who sold access to the archived material.

Ginsburg also has contributed nearly 40 dissenting opinions, including a strong dissent to the majority opinion in **BUSH V. GORE**, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000). The *Bush* opinion played a primary role in determining the outcome of the 2000 election in favor of **GEORGE W. BUSH**. Ginsburg's dissent in the *Bush* case rested on the notion that "federal courts [should] defer to state high courts' interpretations of their state's own law."

Justice Ginsburg holds honorary degrees from a number of institutions, including American University, Hebrew Union College, Amherst College, and Georgetown University. She has also been an active bar association member, serving on the Board of Editors of the **AMERICAN BAR ASSOCIATION** journal, and as secretary, board member, and executive committee member of the American Bar Foundation. In addition, Ginsburg is a well-respected author and editor, writing on such topics as conflict of laws, **CONSTITUTIONAL LAW**, and **CIVIL PROCEDURE**.

In 1999, at the age of 66, Justice Ginsburg was diagnosed with colorectal cancer. She received radiation and chemotherapy treatments, and underwent surgery in September 1999. Upon recovery, she returned to her duties on the bench.

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## GITLOW V. NEW YORK

*Gitlow v. New York,* 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138, is a 1925 decision by the Supreme Court that upheld the constitutionality of criminal ANARCHY statutes.

The defendant, Benjamin Gitlow, was a member of the Left Wing Section, a splinter group of the Socialist Party. The group formed in opposition to the party's dominant policy of "moderate socialism," and criticized the party for its insistence on introducing SOCIALISM through the legislative process. The Left Wing Section advocated change through militant and revolutionary means. It viewed mass industrial revolution as the mechanism by which the parliamentary state would be destroyed and replaced by a system of communist socialism.

Gitlow was responsible for publishing and disseminating the group's views. He did so in such pamphlets as the "The Left Wing Manifesto." The manifesto was also published in *The Revolutionary Age,* the official paper of the Left Wing. The opinions expressed in these publications formed the bases for the defendant's convictions under Sections 160 and 161 of the penal law of New York, which were the criminal anarchy statutes.

Section 160 defined criminal anarchy and prescribed that the verbal or written advocacy of the doctrine be treated as a felony. Section 161 delineated the conduct that constituted the crime of advocacy of criminal anarchy and stated that its punishment be imprisonment, a fine, or both. The proscribed conduct consisted of the verbal or written advertisement or teaching of the duty, necessity, or propriety of overthrowing organized government by violence, assassination, or other unlawful acts. A person was also prohibited from publishing, editing, knowingly circulating, or publicly displaying any writing embodying this doctrine.

There was a two-count indictment against Gitlow. The first charged that the defendant had advocated, advised, and taught the duty, necessity, and propriety of unlawfully overthrowing organized government through "The Left Wing Manifesto." The second count charged that he had printed, published, knowingly circulated, and distributed *The Revolutionary Age,* containing the writings set forth in the first count advocating the doctrine of criminal anarchy.

In his appeal, Gitlow argued that Left Wing publications had resulted in no real action. Because they were merely utterances, he contended that the New York state laws violated the right of free speech protected by the FIRST AMENDMENT. In sustaining the defendant's conviction, the U.S. Supreme Court assumed that the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT prevented the states from impairing the freedoms guaranteed by the First Amendment. The Court also noted that the statutes did not penalize the "utterance or publication of abstract doctrine or academic theory having no propensity to incite concrete action." It found that Gitlow's publications used language advocating, advising, or teaching the overthrow of organized government by unlawful means, and that such language implied an urging to action.

The Court reasoned that revolutionary actions called for in Gitlow's publications, including mass industrial uprisings and political mass strikes, implied the use of force and violence. Such actions are inherently unlawful in a democratic system of government. It ruled that freedom of expression does not grant an individual the absolute right to speak or publish, nor does it offer unqualified IMMUNITY from punishment for every possible utterance or publication. The state, in the exercise of its POLICE POWER, is allowed to punish anyone who abuses the FREEDOM OF SPEECH and press by utterances that are adverse to the public welfare, tend to corrupt public morals, incite to crime, or breach the public peace. As part of its primary and essential right of self-preservation, a state can penalize any expression that imperils the foundations of organized government and threatens its overthrow by unlawful means. The Court cautioned, however, that enforcement of state statutes cannot be ARBITRARY or unreasonable.

In subsequent cases (for example, *Brandenburg v. Ohio,* 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 [1969]; *Hess v. Indiana,* 414 U.S. 105, 94 S. Ct. 326, 30 L. Ed. 2d 303 [1973]), the Court rejected the "dangerous tendency" doctrine it formulated in *Gitlow,* that incitement to action is implicit in utterances that advocate unlawful acts. The Court subsequently held that states may only prohibit utterances that directly incite

lawless action or advocate individuals to imminently take lawless action.

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CROSS-REFERENCES

Anarchism; Communism; Due Process of Law; Incorporation Doctrine.

## ♦ GLANVILL, RANULF

English COMMON LAW developed partly in response to the pioneering work of Ranulf Glanvill. As chief justiciar, Glanvill was the legal and financial minister of England under HENRY II. He is commonly associated with the first important treatise on practice and procedure in the king's courts: *Tractatus de legibus et consuetudinibus regni Angliae* (Treatise on the laws and customs of the realm of England). Historians agree that Glanvill is probably not the author of the *Tractatus,* which first appeared circa 1188, but he is thought to have been instrumental in its creation. Early U.S. law owes much to ENGLISH LAW, which became greatly simplified and available to common people during Glanvill's tenure.

"THE LEGAL CONSTITUTION IS BASED ABOVE ALL ON EQUITY; AND JUSTICE, WHICH IS SELDOM ARRIVED AT BY BATTLE . . ., IS MORE EASILY AND QUICKLY ATTAINED THROUGH ITS USE."
—RANULF GLANVILL

Glanvill was probably born at Stratford St. Andrew, near Saxmundham, Suffolk, England. Although few details are known about his life, it is recorded that he had bumpy political fortunes. He was sheriff of Yorkshire from 1163 to 1170, but lost his authority following an official inquiry into the corruption of sheriffs. He regained it by helping raise troops against Scottish invaders in 1173–74, and his reward from King Henry II was a series of increasingly important appointments: justice of the king's court, itinerant justice in the northern circuit, and ambassador to the court in Flanders. In 1180, Glanvill's ascent to power seemed complete when he became legal and financial minister, but a new king, Richard I, threw him in prison. He ransomed his way out, and then died of illness on a Crusade at Acre, in what is now Israel, in 1190.

For a few centuries before Glanvill became influential, English law was mired in FEUDALISM. Under this political and military system, justice was administered in crude forms: trial by combat, which operated under the assumption that God would favor the righteous party, and trial by ordeal, which, in one of its forms, posed the question of innocence as a test of whether a person's wounds could heal within three days. By the twelfth century, feudalistic law was dying. The local courts still adhered to its methods, but the king's courts offered a superior form of justice that was at once less bloody and less superstitious. This was a writ-based, or formulary, system. It allowed litigants to frame a complaint in terms of a particular action, which had its own writ and established modes of PLEADING and trial. Although primitive by modern standards, the formulary system represented a considerable advance for its time. But such justice was chiefly available to great lords; commoners had to resort to the local courts.

As chief justiciar, Glanvill sought to extend the benefits of the king's courts to ordinary people. He accomplished this through a system of itinerant royal justices, and the results revolutionized English legal procedure. As the feudal forms fell into disuse, they were replaced with a dominant system of central courts that followed uniform procedure throughout the realm and made English law simpler and better.

The *Tractatus* played a crucial role in this improvement. In fourteen books, it covered each of the eighty distinct writs used in the king's courts. One important writ, for example, was the grand assize, a procedure for settling land

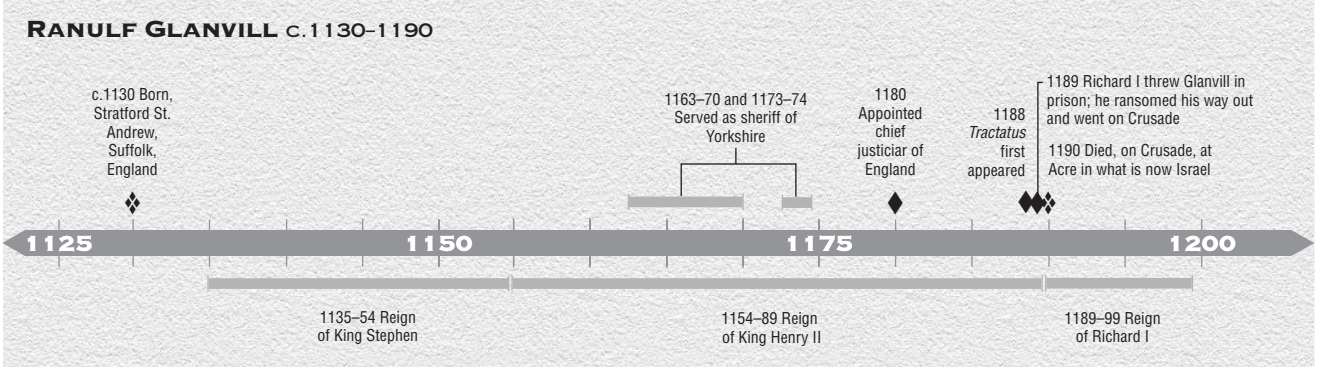

disputes that replaced the feudal practice of battle with a form of jury system. The treatise offered this commentary on its value: "It takes account so effectively of both human life and civil condition that all men may preserve the rights which they have in any free tenement, while avoiding the doubtful outcome of battle. In this way, too, they may avoid the greatest of all punishments, unexpected and untimely death." As with other writs, the *Tractatus* painstakingly spelled out how the grand assize worked. Directed at practitioners of law, the *Tractatus* sought to encourage them to adopt these new "royal benefit[s] granted to the people by the goodness of the king."

The simplicity and clarity of the *Tractatus* helped lead England to a common law. Although records from the period associate Glanvill with the treatise, scholars believe he is unlikely to have written it. The real author may have been his nephew, Hubert Walter, who was the archbishop of Canterbury, or even a later justiciar, Geoffrey Fitzpeter. However, its authorship is of secondary importance to its effect. Besides encouraging the spread of unified procedure, it provided the foundation for later classics, in particular Henry de Bracton's thirteenth-century treatise on English law and custom, *De legibus et consuetudinibus Angliae.*

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## ◆ GLASS, CARTER

Carter Glass sponsored important banking laws of the twentieth century, among them the GLASS-STEAGALL ACTS of 1932 and 1933 (48 Stat. 162). He wrote and sponsored the legislation that established the FEDERAL RESERVE System in 1913. He was also a key player in making amendments to the system during the decades following its establishment. A Virginia Democrat, he served as secretary of the treasury under WOODROW WILSON and was a member of the House of Representatives and the Senate.

Glass was born January 4, 1858, in Lynchburg, Virginia, the youngest of twelve children. His mother, Augusta Christian Glass, died when he was two years old, and Glass was raised by a sister ten years older than he. His father, Robert H. Glass, was the editor of the *Daily Republic.*

*Carter Glass.*
AP/WIDE WORLD PHOTOS

Following the Civil War, Glass's father turned down an offer of reappointment to his old position as postmaster general, because he did not want to be on the payroll of the nation he had just fought. Having lived through a financially strapped childhood during the Reconstruction period, Glass would as an adult consistently oppose strong centralized control by the federal government except in emergencies.

Glass left school at age fourteen to begin a printer's apprenticeship at his father's paper. He completed his apprenticeship in 1876 when the family moved to Petersburg, Virginia. Glass soon moved back to Lynchburg to work as an auditor for the railroad. In 1880 he became the city editor, and then the editor, of the *Lynchburg News.* With savings and the financial backing of friends, he purchased that newspaper in 1888. The same year he married Aurelia McDearmon Caldwell, a teacher. In the early 1890s, Glass bought and consolidated other Lynchburg newspapers.

In 1899 Glass was elected to the Virginia state senate, where he was put on the committee of finance and banking. During his career as a state legislator, he was an active debater on suffrage for African Americans, the subject of the Fourteenth and Fifteenth Amendments to the U.S. Constitution. He supported restricting VOTING RIGHTS for illiterate former slaves on the theory that these votes were used by those in power to maintain their power. He also argued in defense of the EIGHTEENTH AMENDMENT, prohibiting the sale of alcohol. In 1933, however, he voted for its

"THE MAIN PURPOSE OF THE [GLASS-STEAGALL] BILL . . . WAS TO PREVENT . . . THE USE OF THE FEDERAL RESERVE BANKING FACILITIES FOR STOCK-GAMBLING PURPOSES."
—CARTER GLASS

appeal on the grounds that it was futile to maintain a law that could not be enforced.

In 1902 Glass was elected to the U.S. House of Representatives, where he served until 1918. In 1904 he was appointed to the Banking and Currency Committee. He devoted the next several years to studying the topic of banking, and introduced few bills during this period.

The U.S. banking system of the late nineteenth and early twentieth centuries was unstable, leading to a series of banking panics over a thirty-four-year span. By the end of the nineteenth century, banks were largely independent from, and often in competition with, one another. The relatively young U.S. banking system was burdened primarily with a lack of flexibility in lending (or rediscounting) policies and currency availability, as well as weak supervision and inadequate check collection systems.

In the first decade of the twentieth century, Glass began crafting a bill to address the need for banking reform. In 1912 Democrat Wilson was elected president of the United States. Glass, now chair of the House Banking Committee, enlisted and got Wilson's support for his reform bill.

The Federal Reserve Act, 12 U.S.C.A. § 221 et seq., the most radical banking reform bill in U.S. history, was passed into law December 23, 1913. In presenting his bill to the House, Glass said in his closing remarks, "I have tried to reconcile conflicting views, to compose all friction and technical knowledge of the banker, the wisdom of the philosopher, and the rights of the people."

According to its preamble, Glass's bill was created to "provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting **COMMERCIAL PAPER**, to establish a more effective supervision of banking in the United States, and for other purposes." It provided the establishment of up to twelve Federal Reserve banks (district banks) to develop policy with the seven-member **FEDERAL RESERVE BOARD** in Washington, D.C. (This board's title was later changed to the Federal Reserve Board of Governors.) Glass's plan also required all nationally chartered banks to be members of the Federal Reserve System and weakened the power of private banks. Although the Federal Reserve System would be criticized for failing to stave off the Great Depression in the 1930s, it would be credited with helping control the effects of a 1987 stock plunge.

During the years leading up to **WORLD WAR I**, Glass headed a committee that investigated the act's effectiveness and made amendments as needed. Three test cases in 1923 and 1926 resulted in various changes in the act, which continues to be altered as circumstances dictate.

Glass was appointed Secretary of the Treasury in late 1918 and worked to develop and promote a new "Victory loan" under Wilson's administration (which was renamed "Fifth Liberty Loan" because the V looked like the Roman numeral for 5) as World War I drew to a close. These loans were bonds that the U.S. government encouraged Americans to buy to help generate revenue for war debts and for rebuilding war-torn Europe. In February 1920, Glass resigned as secretary and accepted a vacant seat in the U.S. Senate.

In early 1920, an election year, sentiments against Wilson grew. A movement took hold to select Glass as the Democratic presidential candidate. But Glass, a strong supporter and close friend of Wilson's throughout his lifetime, did not support the effort. **WARREN G. HARDING**, a critic of the Federal Reserve Board, was elected president in 1920.

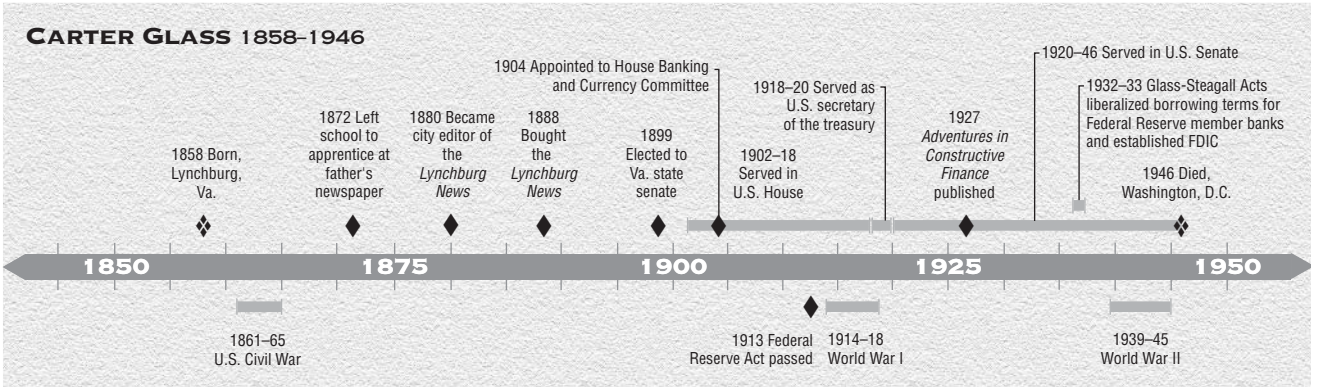

In the late 1920s, conditions began to develop that would lead to a STOCK MARKET crash and the subsequent Great Depression. In fall 1928 Glass wrote an article addressing his concern that the Reserve System was being misused for financial speculation. In early 1929 he gave a speech on the Senate floor warning of financial disaster and urging that action be taken against individuals abusing the system in gambling ventures.

Glass also began work on amendments to reduce the consequences of the disaster he suspected was coming. This work resulted in the Glass-Steagall Acts of 1932 and 1933, sponsored by Glass and Representative Henry B. Steagall. The Glass-Steagall Acts marked the third time in early U.S. history that a major crisis precipitated banking reform. (The first was the Civil War and the development of the National Banking System; the second was the panic of 1907 and the development of the Federal Reserve Act.)

The act of 1932 liberalized terms under which member banks could borrow from the Federal Reserve System. The act of 1933, also called the Banking Act of 1933, established the FEDERAL DEPOSIT INSURANCE CORPORATION. This institution guaranteed bank depositors' savings, separated commercial banking from investment banking and insurance underwriting, regulated interests on time deposits, and increased the power of the Federal Reserve Board.

Glass served in the Senate until 1946. He died May 28, 1946.

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## GLASS-STEAGALL ACT

The Glass-Steagall Act, also known as the Banking Act of 1933 (48 Stat. 162), was passed by Congress in 1933 and prohibits commercial banks from engaging in the investment business.

*A group of congressmen look on as President Franklin D. Roosevelt signs the Glass-Steagall Act on June 16, 1933. Senators Carter Glass (light suit) and Henry S. Steagall stand on either side of the president.*

BETTMANN/CORBIS

It was enacted as an emergency response to the failure of nearly 5,000 banks during the Great Depression. The act was originally part of President FRANKLIN D. ROOSEVELT'S NEW DEAL program and became a permanent measure in 1945. It gave tighter regulation of national banks to the Federal Reserve System; prohibited bank sales of SECURITIES; and created the FEDERAL DEPOSIT INSURANCE CORPORATION (FDIC), which insures bank deposits with a pool of money appropriated from banks.

Beginning in the 1900s, commercial banks established security affiliates that floated bond issues and underwrote corporate stock issues. (In underwriting, a bank guarantees to furnish a definite sum of money by a definite date to a business or government entity in return for an issue of bonds or stock.) The expansion of commercial banks into securities underwriting was substantial until the 1929 STOCK MARKET crash and the subsequent Depression. In 1930, the BANK OF THE UNITED STATES failed, reportedly because of activities of its security affiliates that created artificial conditions in the market. In 1933, all of the banks throughout the country were closed for a four-day period, and 4,000 banks closed permanently.

As a result of the bank closings and the already devastated economy, public confidence in the U.S. financial structure was low. In order to restore the banking public's confidence that banks would follow reasonable banking practices,

Congress created the Glass-Steagall Act. The act forced a separation of commercial and investment banks by preventing commercial banks from underwriting securities, with the exception of U.S. Treasury and federal agency securities, and municipal and state general-obligation securities. More specifically, the act authorizes Federal Reserve banks to use government obligations and COMMERCIAL PAPER as collateral for their note issues, in order to encourage expansion of the currency. Banks also may offer advisory services regarding investments for their customers, as well as buy and sell securities for their customers. However, information gained from providing such services may not be used by a bank when it acts as a lender. Likewise, investment banks may not engage in the business of receiving deposits.

A bank is defined as an institution organized under the laws of the United States, any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands, that both accepts demand deposits (deposits that the depositor may withdraw by check or similar means for payment to third parties or others) and is engaged in the business of making commercial loans (12 U.S.C.A. § 1841 (c)(1) [1988]). Investment banking consists mostly of securities underwriting and related activities; making a market in securities; and setting up corporate mergers, acquisitions, and restructuring. Investment banking also includes services provided by brokers or dealers in transactions in the secondary market. A secondary market is one where securities are bought and sold subsequent to their original issuance.

Despite attempts to reform Glass-Steagall, the legislature has not passed any major changes—although it has passed bills that relax restrictions. Banks may now set up brokerage subsidiaries, and underwrite a limited number of issues such as asset-backed securities, corporate bonds, and commercial paper.

The Glass-Steagall Act restored public confidence in banking practices during the Great Depression. However, many historians believe that the commercial bank securities practices of the time had little actual effect on the already devastated economy and were not a major contributor to the Depression. Some legislators and bank reformers argued that the act was never necessary, or that it had become outdated and should be repealed.

Congress responded to these criticisms in passing the Gramm-Leach-Bilely Act of 1999, which made significant changes to Glass-Steagall. The 1999 law did not make sweeping changes in the types of business that may be conducted by an individual bank, broker-dealer or insurance company. Instead, the act repealed the Glass-Steagall Act's restrictions on bank and securities-firm affiliations. It also amended the Bank Holding Company Act to permit affiliations among financial services companies, including banks, securities firms and insurance companies. The new law sought financial modernization by removing the very barriers that Glass-Steagall had erected.

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## GLEANING

*Harvesting for free distribution to the needy, or for donation to a nonprofit organization for ultimate distribution to the needy, an agricultural crop that has been donated by the owner.*

Gleaning raises legal liability issues, especially with respect to the quality of the food donated and any harmful effects that may come from donated food. A group of statutes known as Good Samaritan laws are meant to encourage the donation of food and groceries to nonprofit charitable agencies by minimizing the number of legal actions against donors and distributors of foods.

Prior to 1990, every state and the District of Columbia had some form of statutory protection from liability for charitable food donation and distribution. These statutes were exceptions to the COMMON LAW or statutory rule of STRICT LIABILITY for distributing food or any other defective product that causes injury. The statutes vary greatly from jurisdiction to jurisdiction. Some provide liability only for gleaners' or donors' gross negligence or intentional acts, while others provide liability for mere NEGLIGENCE. Others limit liability if the donor reasonably inspects the donated food at the time the donor makes the donation and has no actual or constructive knowledge of any defective condition.

But the inconsistency of the existing state laws prompted gleaners and donors who volunteer time and resources to help feed hungry people to express concern that their charitable work put themselves at legal risk. In 1996 Congress passed federal legislation providing uniform protection to gleaners, citizens, businesses, and nonprofit organizations that act in GOOD FAITH to donate, recover, and distribute excess food.

The Bill Emerson Good Samaritan Food Donation Act (the Act), P.L. 104-210 (October 1, 1996), was named in honor of the late congressman who supported efforts to expand food donations to the poor and to protect those who make donations. It converted the Model Good Samaritan Food Donation Act to permanent law and incorporated it into section 22 of the Child Nutrition Act of 1966 (P.L. 89-642, October 11, 1966). The Child Nutrition Act of 1966 was an anti-hunger initiative begun during the President LYNDON B. JOHNSON administration as part of its "War on Poverty" and has been amended numerous times.

Congress passed the act in late September 1996 and President BILL CLINTON signed the bill into law on October 1, 1996. The act encourages citizens to donate food and grocery products to nonprofit organizations such as homeless shelters, soup kitchens, and churches for distribution to needy individuals.

The act promotes food recovery by limiting donors' liability to cases of gross negligence or intentional misconduct. In the absence of gross negligence or intentional misconduct, donors, gleaners, and nonprofit organizations are not subject to civil or criminal liability arising from the nature, age, packaging, or condition of food that is apparently wholesome. It also establishes basic nationwide uniform definitions pertaining to donation and distribution of nutritious foods and helps to assure that donated foods meet quality and labeling standards of federal, state, and local laws and regulations.

The 1996 law encourages and protects gleaning by excluding from civil or criminal liability a person or nonprofit food organization that, in good faith, donates or distributes donated foods for food relief. The law does not supersede state or local health regulations and its protections do not apply to an injury or death due to gross neglect or intentional misconduct.

As a federal law, the act takes precedence over individual states' Good Samaritan laws, but it may not entirely replace such statutes. The act creates a uniform minimum level of protection from liability for donors and gleaners. But state Good Samaritan laws may still provide protection for donors and gleaners above and beyond that guaranteed in the federal statute.

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CROSS-REFERENCES

Good Samaritan Doctrine; Liability.

## GLOSS

*An annotation, explanation, or commentary on a particular passage in a book or document, which is ordinarily placed on the same page or in the margin to elucidate or amplify the passage.*

## GOING CONCERN VALUE

*The value inherent in an active, established company as opposed to a firm that is not yet established.*

*The value of the assets of a business considered as an operating whole.*

As a component of business value, going concern value recognizes the many advantages that an existing business has over a new business, such as avoidance of start-up costs and improved operating efficiency. In this sense, the going concern value of a firm represents the difference between the value of an established firm and the value of a start-up firm.

Going concern value also indicates the value of a firm as an operating, active whole, rather than merely as distinct items of property. U.S. BANKRUPTCY law, for example, has recognized the need to preserve going concern value when reorganizing businesses in order to maximize recoveries by creditors and shareholders (11 U.S.C.A. § 1101 et seq.). Bankruptcy laws seek to preserve going concern value whenever possible by promoting the reorganization, as opposed to the liquidation, of businesses.

Going concern value also implies a firm's ability to generate income without interruption, even when ownership has changed (*Butler v. Butler,* 541 Pa. 364, 663 A.2d 148 [Pa. 1995]).

Going concern value is distinguished from the concept of good will, which refers to the excess value of a business that arises from the favorable disposition of its customers. Good will may include the value of such business elements as trade names, trade brands, and established location.

"LAW NOT SERVED BY POWER IS AN ILLUSION; BUT POWER NOT RULED BY LAW IS A MENACE WHICH OUR NUCLEAR AGE CANNOT AFFORD."
—ARTHUR GOLDBERG

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## GOING PUBLIC

*Altering the organization of a corporation from ownership and control by a small group of people, as in a close corporation, to ownership by the general public, as in a publicly held corporation.*

When a corporation goes public, it opens up the sale of shares of its stock to the public at large.

## ♦ GOLDBERG, ARTHUR JOSEPH

Arthur Joseph Goldberg served as a justice of the U.S. Supreme Court from 1962 to 1965. A distinguished LABOR LAW attorney, Goldberg also served as secretary of labor in the administration of President JOHN F. KENNEDY from 1961 until his judicial appointment and as ambassador to the UNITED NATIONS from 1965 to 1968 during the administration of President LYNDON B. JOHNSON. Johnson persuaded a reluctant Goldberg to resign from the Supreme Court to accept the U.N. assignment.

Goldberg was born August 8, 1908, in Chicago, to Russian immigrants. He graduated from Northwestern University Law School in 1929 and entered the field of labor law in Chicago. Goldberg gained national attention in 1939 as counsel to the Chicago Newspaper Guild during a strike. He served in the Office of Strategic Services during WORLD WAR II and then returned to his labor practice in 1944.

In 1948 he became general counsel for the United Steelworkers of America, a position he held until 1961. The steelworkers union was an important union during a time when U.S. heavy industry was thriving. Strikes or the threat of strikes in the steel industry had national repercussions. Goldberg proved adept in his role as general counsel, skillfully negotiating strike settlements, consolidating gains through COLLECTIVE BARGAINING, and helping with public relations.

From 1948 to 1955, Goldberg also was general counsel for the Congress of Industrial Organizations (CIO), which contained most nontrade unions, such as those controlling manufacturing and mining jobs. The CIO had been created when the TRADE UNION members of the AMERICAN FEDERATION OF LABOR (AFL) showed no interest in organizing these industries. There was a great deal of friction between the CIO and the AFL, yet the leadership of both organizations realized that a unified labor movement was a necessity. Goldberg was a principal architect of the 1955 merger of the CIO and AFL into the AFL-CIO. He then served as a special counsel to the AFL-CIO's industrial union department from 1955 to 1961.

In 1961 President Kennedy appointed Goldberg secretary of labor. During the less than two years that Goldberg held this office, he saw congressional approval of an increase in the MINIMUM WAGE, and the reorganization of the Office of Manpower Administration (now the Employment and Training Administration). When Justice FELIX FRANKFURTER retired from the Supreme Court in 1962, Kennedy appointed Goldberg to the "Jewish seat." The so-called Jewish seat began with the 1939 appointment of Felix Frankfurter, who was Jewish, to succeed Justice BENJAMIN CARDOZO, also Jewish. It was assumed that for political reasons, Democratic presidents would appoint a Jewish person to that vacancy. This tradition ended with the appointment of ABE FORTAS.

The appointment of the liberal Goldberg, replacing the conservative Frankfurter, turned a four-justice liberal minority on the Court into a five-justice liberal majority, which was led by

Chief Justice EARL WARREN. Goldberg became known as an innovative judicial thinker who moved the Court toward liberal activism. He usually joined the majority of WARREN COURT justices in extending the Court's rulings into areas previously considered the realm of the states and of Congress. He was also an able negotiator within the Court, helping to smooth the way in reaching difficult and controversial decisions.

Goldberg was a firm supporter of CIVIL RIGHTS and civil liberties. His best-known opinion came in the areas of CRIMINAL LAW and CRIMINAL PROCEDURE, when he wrote the majority opinion in ESCOBEDO V. ILLINOIS, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964). In this case the Court struck down a murder conviction because the defendant had been denied the right to confer with his lawyer after his arrest. This decision was a major step toward the landmark decision in MIRANDA V. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), which gave suspects the right to be advised of their constitutional rights to remain silent, to have a lawyer appointed, and to have a lawyer present during interrogation.

Goldberg believed in the constitutional right of DUE PROCESS. In a dissenting opinion in *United States v. Barnett,* 376 U.S. 681, 84 S. Ct. 984, 12 L. Ed. 2d 23 (1964), he argued that federal judges should not be allowed to use their CONTEMPT power to send persons to jail. When punishment for contempt of court could be meted out, the person held in contempt should be entitled to a jury trial. Although he did not prevail in *Barnett,* his dissent drew attention to the abuses of this practice and helped reduce it.

In 1965 Goldberg appeared to have a promising judicial career. Yet he became one of the few justices to give up his lifetime appointment to the Supreme Court for a reason other than retirement. In the summer of 1965, President Johnson asked Goldberg to resign from the Court and accept the U.S. ambassadorship to the United Nations, promising a larger role in foreign policy than was traditionally given to the U.N. delegate. Goldberg did so reluctantly and regretfully. When Johnson appointed his friend and political confidant Abe Fortas to replace Goldberg, many believed this had been the primary motive in offering Goldberg the U.N. post.

*Arthur J. Goldberg.*
LIBRARY OF CONGRESS

Goldberg's major achievement as U.N. ambassador was his aid in drafting Security

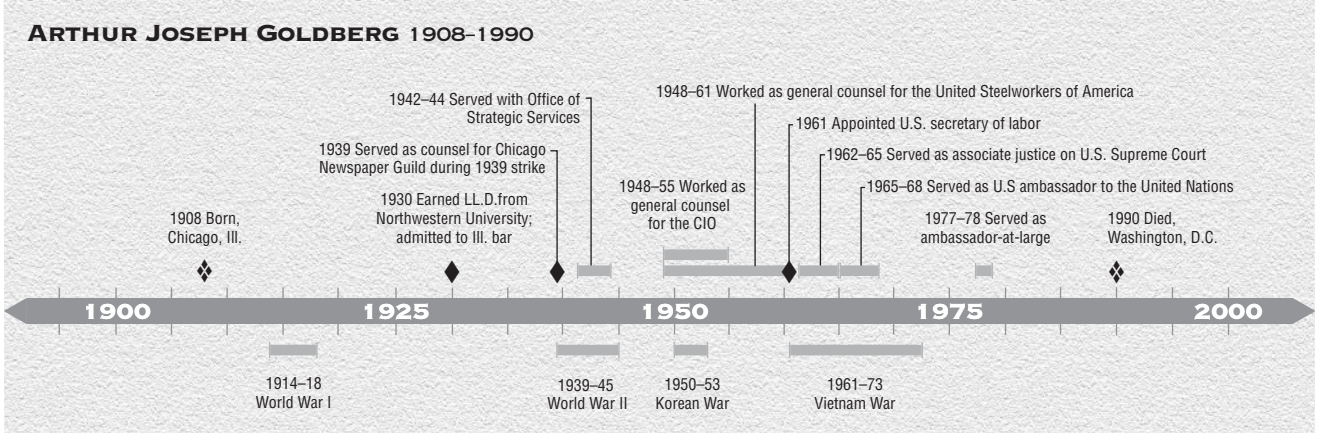

Council Resolution No. 242 (22 SCOR 8–9, U.N. Doc. S/INF/Rev. 2), passed in November 1967, concerning peace measures in the Middle East. Goldberg tried continually and unsuccessfully to make the United Nations play a role in a peace process that would end the VIETNAM WAR. His efforts were met with disfavor by Johnson and by Johnson's advisers. Frustrated and disappointed by the failure of these efforts and the escalation of the war, Goldberg resigned his U.N. position in 1968.

After his resignation Goldberg joined a New York City law firm and also served in 1968 and 1969 as president of the American Jewish Committee, a national HUMAN RIGHTS organization. He ran for governor of New York in 1970 as the Liberal-Democrat candidate, but incumbent Nelson A. Rockefeller soundly defeated him. He then returned to Washington, D.C., where he resumed a private law practice.

In 1977 and 1978, Goldberg was a U.S. ambassador-at-large in the administration of President JIMMY CARTER. Following this assignment, he became deeply involved in the international human rights movement, a cause he pursued until his death.

Goldberg wrote several books, including *AFL-CIO Labor United* (1956), *Defense of Freedom* (1966), and *Equal Justice: The Warren Era of the Supreme Court* (1972).

Goldberg died January 19, 1990, in Washington, D.C.

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## GOLDEN PARACHUTE

*An agreement that provides key executives with generous severance pay and other benefits in the event that their employment is terminated as a result of a change of ownership at their employer corporation; known more formally as a change-of-control agreement.*

Golden parachutes are provided by a firm's board of directors and, depending on the laws of the state in which the company is incorporated, may require shareholder approval. These agreements compensate executives in the event that they lose their job or quit because they have suffered a reduction in power or status following a change of ownership of their employer corporation. Some golden parachutes are triggered even if the control of the corporation does not change completely; such parachutes open after a certain percentage of the corporation's stock is acquired.

Golden parachutes have been justified on three grounds. First, they may enable corporations that are prime takeover targets to hire and retain high-quality executives who would otherwise be reluctant to work for them. Second, since the parachutes add to the cost of acquiring a corporation, they may discourage takeover bids. Finally, if a takeover bid does occur, executives with a golden parachute are more likely to respond in a manner that will benefit the shareholders. Without a golden parachute, executives might resist a takeover that would be in the interests of the shareholders, in order to save their own job.

As golden parachutes have grown increasingly lucrative, they have come under criticism from shareholders who argue that they are a waste of corporate assets. These shareholders point out that managers already have a fiduciary duty to act in the best interests of their shareholders and should not require golden parachutes as an incentive. Especially suspect are large parachutes that are awarded once a takeover bid has been announced. Critics charge that these last-minute parachutes are little more than going-away presents for the executives and may encourage them to work for the takeover at the expense of the shareholders.

As the practice of offering golden parachutes became more and more common in the 1980s, efforts to place restrictions on the agreements increased. Many of these efforts stemmed from the realization that the practice, which had once showed a positive stock return for shareholders, was now producing negative stock returns.

On February 6, 1996, the FEDERAL DEPOSIT INSURANCE CORPORATION (FDIC) issued a final rule that restricted troubled banks, thrifts, and holding companies from making golden parachute payments. Exceptions to the rule are allowed for individuals who have qualified for PENSION and retirement plans. Other exceptions permit the FDIC to enforce the spirit of the law by allowing legitimate payments but stopping payments that might be considered abusive or improper. The rule also prevents FDIC-insured institutions from paying the legal expenses of employees who are the subject of related enforcement proceedings. The rule went into effect on April 1, 1996.

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## ♦ GOLDMAN, EMMA

Emma Goldman was a crusader for ANARCHISM, feminism, and the labor movement. She was also an essayist and is best known as the first editor of *Mother Earth,* a magazine providing a forum for feminist and anarchist writers.

Goldman was born June 27, 1869, in Kaunas, Lithuania, a province of the Russian Empire, during the early stages of revolt against czarism and the rise in popularity of COMMUNISM. The seeds of the Bolshevik revolt were already being sown in the towns and villages throughout the country where discontent with czarist rule was strongest. Goldman, who described herself as a born rebel, came into the world as the third daughter of Abraham Goldman and Taube Goldman. Her parents' marriage, like many Jewish Orthodox unions of the time, had been arranged.

Goldman suffered the fate of being a female in a culture that valued males. When she was young, her father made no effort to disguise his disappointment at having still another daughter instead of the much-prized son he hoped for. He has been described as hot tempered and impatient, particularly with Goldman's rebelliousness, which she showed at an early age. He was a traditional Jewish father, and he planned to arrange a marriage for his daughter when she was 15. Goldman, however, had different ideas: she longed for an education and hoped someday to marry someone she loved. Goldman described her mother as cold and distant, but also strong and assertive, and she may have served as a role model for Goldman's own forthright manner.

*Emma Goldman.*
LIBRARY OF CONGRESS

After spending her childhood in Kaunas, Königsberg, and St. Petersburg, Goldman emigrated to the United States in 1885 with a sister. They joined another sister who had settled in Rochester, New York, where Goldman found work in a coat factory, sewing ten-and-a-half hours daily at a salary of $2.50 a week. She lived in a crowded apartment with her two sisters and her brother-in-law. Their working and living conditions, as well as those of others even more destitute, sparked her interest in anarchism and the labor movement, which was in its infancy.

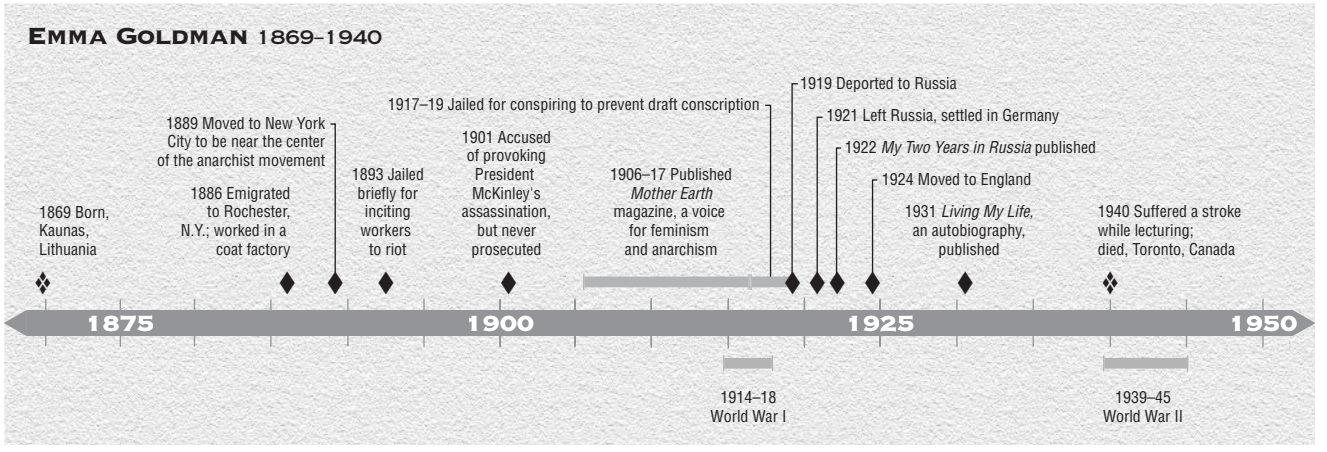

She joined radical groups agitating for an eight-hour workday and other improvements in factory conditions.

Goldman was intensely interested in the Haymarket Square incident in Chicago in 1886. A labor rally called by a small group of anarchists was interrupted by a bomb explosion and gunfire. When it was over, seven police officers and four spectators were dead and one hundred were injured. Eight anarchists were tried and convicted of inciting a riot. Four of the convicted were hanged, one committed suicide in prison, and the other three served prison sentences. Spurred by her outrage at this alleged injustice, Goldman began attending anarchist meetings and reading the militant anarchist newspaper *Die Freiheit* (Freedom). She felt herself irresistibly drawn to the movement, and in the summer of 1889, at the age of 20, she moved to New York City to be near the center of anarchist activity.

"ALL WARS ARE WARS AMONG THIEVES WHO ARE TOO COWARDLY TO FIGHT AND WHO THEREFORE INDUCE THE YOUNG MANHOOD OF THE WHOLE WORLD TO DO THE FIGHTING FOR THEM."
—EMMA GOLDMAN

After arriving in New York, Goldman befriended Johann J. Most, a well-known anarchist and publisher of *Die Freiheit.* She also met Alexander Berkman, who became her lover and with whom she remained close throughout her life. By this time, she was known as Red Emma, and she was followed by detectives wherever she went. She wrote, traveled, and lectured to promote anarchism and the labor movement. In 1893, she was briefly jailed for inciting workers to riot. After her release from jail, she traveled to Vienna to train as a nurse and midwife. She then returned to New York and resumed her lecturing. In 1901, she was accused of provoking the assassination of President WILLIAM MCKINLEY, because the assassin had attended one of her lectures. No charges were ever brought against her, but newspapers throughout the United States portrayed her as an evil traitor because of her controversial ideas.

In 1906, Goldman published the first issue of a magazine that was to serve as a platform for feminist and anarchist ideas. She called her venture *Mother Earth,* and within six months, it became a leading voice for feminism and anarchism. With Berkman, Goldman published the magazine until 1917, while she continued to travel, write, and lecture. During this time, she carried on an eight-year relationship with Ben Reitman, Chicago's King of the Hobos, a well-known anarchist and labor activist who became her manager. Goldman had long since given up her idealistic notions about marriage. She had been married twice to the same man, both times with disastrous results, and had carried on a number of love affairs. Goldman preferred the impermanence and freedom of short-term affairs and wrote in more than one essay that marriage was women's greatest enemy because it robbed them of their independence.

The entry of the United States into WORLD WAR I in 1917 precipitated a wave of hostility toward leftists, pacifists, anarchists, and foreigners. Legislation such as the Selective Service Act, the Espionage Act, and the Sedition Act were passed during 1917 and 1918 in order to suppress opposition to the war or the draft and to restrict certain civil liberties. Heedless of the repressive mood of the country, Goldman and Berkman, along with Leonard D. Abbott and Eleanor Fitzgerald, organized the No-Conscription League to oppose "all wars by capitalist governments." In the June 1917 issue of *Mother Earth,* they declared, "We will resist CONSCRIPTION by every means in our power, and we will sustain those who . . . refuse to be conscripted." As a result of their antiwar activities, Goldman and Berkman were arrested and charged with conspiring to prevent draft registration. They were tried and convicted and each received the maximum sentence of two years in prison and $10,000 in fines. In December 1919, in the wake of a RED SCARE that led to the arrest and deportation of hundreds of leftists, anarchists, and labor organizers, Goldman and Berkman were deported to Russia.

Goldman was optimistic about resuming life in Russia now that the czar had been toppled by the Bolsheviks, but her hopes quickly dissipated as the realities of the new government became apparent. In her opinion, "the old cruel regime . . . had simply been replaced by a new, equally cruel one." She and Berkman left Russia in 1921 and eventually went to Germany. During their years in Germany, Goldman lectured and wrote a book, *My Disillusionment in Russia* (1923), detailing her disillusionment with Bolshevik rule.

In 1924, Goldman moved to England, but she longed to return to the United States. Accepting an offer of marriage to James Colton, a staunch Scottish anarchist she had known for many years, provided her with an opportunity for British citizenship and the possibility of obtaining a British passport. She hoped to make her way to Canada and somehow gain entry into the United States. During the 1920s and 1930s, she traveled through Europe, writing and lectur-

ing, and in 1931, she published her autobiography, *Living My Life.*

Goldman's wish to return to the United States was granted for a brief 90-day lecture tour in 1934, after which she returned to Europe. In 1940, while on a trip to Canada to enlist support for the anti-Franco forces in Spain, Goldman suffered a stroke. She died several months later, on May 14, 1940, in Toronto. Her body was allowed to be returned to the United States for burial in Chicago near the graves of other anarchists she admired.

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## ♦ GOLDWATER, BARRY MORRIS

Barry Morris Goldwater was a former U.S. senator and presidential nominee. During almost 40 years in public life, he became the outspoken and controversial leader of the conservative wing of the REPUBLICAN PARTY.

Goldwater was born January 1, 1909, in Phoenix, Arizona. His paternal ancestors were Orthodox Jewish innkeepers who emigrated from Poland in the mid-1800s to join the California gold rush. Goldwater's father, Baron Goldwater, managed the family's general store in Phoenix. This store was the humble beginning of what would become an enormously profitable chain, Goldwater's Department Stores. Goldwater's mother, Josephine Williams, was a nurse who raised Goldwater and his siblings in her Episcopalian faith. A woman who loved outdoor activities, she took her children hiking and camping throughout Arizona and taught them the colorful history of the region. From her, Goldwater acquired an abiding love of the Southwest and a deep appreciation of its people and its beauty.

Goldwater was a mediocre student who preferred sports and socializing to studying. At Phoenix Union High School, he was elected president of his first-year class, but the principal advised his father that Goldwater should probably attend school elsewhere the following year. Against his strenuous objections, his parents sent him to Staunton Military Academy, in Virginia. There, he excelled at athletics and did better academically than anyone expected, being named best all-around cadet in 1928.

Goldwater loved the military and dreamed of attending West Point. But when he graduated from Staunton, his father was in ill health, and Goldwater instead enrolled at the University of Arizona, at Tucson, to be near his home. His father died before he had finished his first year in college. Goldwater left school a year later to enter the family business.

With his father gone, Goldwater turned to an uncle for advice and direction. He quickly worked his way up from junior clerk, to general manager in 1936, and to president in 1937. Under his leadership, Goldwater's became Phoenix's premier department store and leading specialty shop. Goldwater pioneered the five-day workweek and instituted many progressive fringe benefits for his employees, including health and life insurance, profit sharing, and use

"A GOVERNMENT THAT IS BIG ENOUGH TO GIVE YOU ALL YOU WANT IS BIG ENOUGH TO TAKE IT ALL AWAY."
—BARRY GOLDWATER

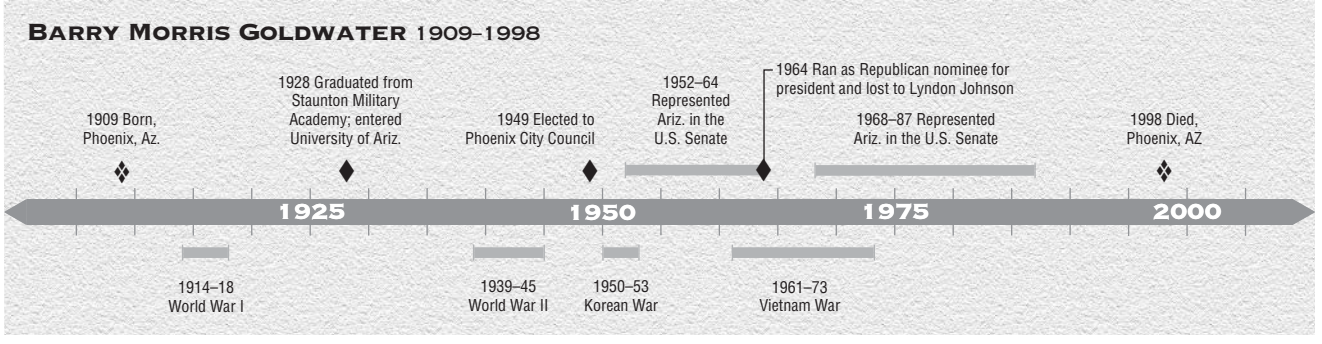

*Barry Goldwater.*
LIBRARY OF CONGRESS

by employees of a vacation ranch. Also, Goldwater's was the first Phoenix store to hire African Americans as salesclerks.

Goldwater entered politics in 1949 when he was elected to the Phoenix City Council as a reform candidate. He was surprised to find that he loved politics. In 1950, he managed Howard Pyle's successful campaign for governor of Arizona. In 1952, he was elected to the U.S. Senate on the strength of voter dissatisfaction with Democratic president HARRY TRUMAN and the KOREAN WAR. Elected as a Republican, Goldwater described himself as "not a me-too Republican" but one "opposed to the superstate and to gigantic, bureaucratic, centralized authority." He quickly developed a reputation for "outspoken unreliability" because even his Republican colleagues could not predict what he might say.

A maverick who spoke his mind regardless of consequences, Goldwater was the personification of the Western ideal of rugged individualism. He opposed any intrusion by the federal government in what he considered to be the state's domain. While in the Senate, he consistently opposed federal spending for social programs, argued that contributions to SOCIAL SECURITY should be voluntary, and contended that medical programs for poor and elderly people would lead to socialized medicine. "I do not undertake to promote WELFARE, for I propose to extend freedom," he said. Throughout his career, Goldwater sought to reduce the role of government in citizens' lives by eliminating unnecessary laws and social programs.

One of Goldwater's most controversial actions in the Senate was his staunch defense of Senator JOSEPH R. MCCARTHY, a notorious Communist hunter whose committee, through innuendo and guilt by association, ruined the lives and careers of many U.S. citizens by labeling them Communists or Communist sympathizers. Goldwater was criticized for trying to forestall a Senate vote on censuring McCarthy and then voting against the censure.

In 1958, Goldwater was easily reelected to the Senate despite a concerted campaign to defeat him by organized labor, a group he distrusted and criticized. By that time he had established himself as the outspoken leader of conservative Republicans. His statements were frequently off-the-cuff, sometimes contradictory, and always quotable. He has been credited with saying that Walter P. Reuther, a labor movement leader, was a bigger threat than the Communists; that Supreme Court chief justice EARL WARREN, noted for his liberal opinions, was a socialist; and that Cuban premier Fidel Castro was just another Communist who needed a shave. He was notoriously disdainful of what he called the Eastern establishment, who, according to him, were elitist and out of touch with the rest of the United States. He supported a strong military, and opposed efforts to lower defense spending and increase social spending. His detractors scoffed at him, but his followers were fiercely devoted, perhaps because his nonintellectual, candid style reflected their own values.

While in the Senate, Goldwater befriended JOHN F. KENNEDY, and, though they disagreed vehemently, they remained close friends until Kennedy's death. Goldwater had hoped to run against Kennedy in 1964; the two had discussed the possibility of traveling the country together on an old-fashioned debating tour. When Kennedy was assassinated, Goldwater lost his desire to run. He felt he could not beat LYNDON B. JOHNSON. Nonetheless, supporters persuaded him to run.

At the 1964 Republican convention in San Francisco, Goldwater was unanimously nominated after an intense floor fight. In his acceptance speech, he uttered the words that would haunt him during the coming campaign and paint him, perhaps unfairly, as a one-dimensional

warmonger. "I would remind you," he said, "that extremism in the defense of liberty is no vice. And let me remind you also that moderation in the pursuit of justice is no virtue." Johnson and the Democrats blasted Goldwater as a trigger-happy extremist who was willing to drop bombs whenever and wherever necessary to defend the interests of the United States.

Capitalizing on the country's growing unease with the war in Vietnam, the Johnson campaign developed a television commercial that many feel ushered in a new era of negative campaign advertising. The commercial showed a young girl standing in a field plucking petals from a daisy. A background voice recited an ominous countdown. Finally, the child evaporated in a mushroom cloud, and viewers were urged to vote for Johnson because, "The stakes are too high for you to stay home." Goldwater acknowledged later that the Johnson campaign effectively exploited the public's fear of his militancy. "In fact," he said with sardonic wit, "if I hadn't known Goldwater, I'd have voted against the s.o.b. myself."

Goldwater was defeated by Johnson in a landslide, carrying only Arizona and five southern states. He was unapologetic about his "extremism" speech, saying, "Protecting freedom is what this country has been about. We'll go to any extent to protect it. I know people were thinking 'nuclear' when I said [extremism,] but . . . I think it had to be said, and I never lost any sleep over it." The final irony, of course, is that Johnson escalated the war in Vietnam, and it dragged on until 1973. According to Goldwater, Johnson's Vietnam policy cost the country far more money and lives than if Goldwater, the supposed warmonger, had been elected.

After his loss to Johnson, Goldwater returned to Arizona and private life. Although his defeat was stunning, and he was treated like a pariah by other Republicans, he was undaunted. "Politics has never been the making or breaking point of my life," he said. "I worked hard to make Arizona a better state and my country a better country. If I failed, I've taken the criticism." He returned to politics in 1968 when he easily won the Senate seat vacated by retiring Democrat Carl Hayden. As an older and somewhat more moderate statesman, he relished his positions as chair of the Armed Services Committee, the Intelligence Committee, the Communications Subcommittee, and the Indian Affairs Committee. He continued to work against big government and in favor of a free market economy. Summing up his opposition to federal control, he said, "All the great civilizations fell when people lost their initiative because government moved in to do things for them."

Goldwater served in the Senate for almost twenty additional years and left with his reputation and his convictions intact. "I was luckier than hell—politics is mostly luck—and I made a lot of friends," he said. "It would be hard for me to name an enemy in Congress. People disagreed with me violently, but we remained very good friends." In addition to a loyal conservative following, Goldwater's friends included liberal Democrats Morris Udall, Daniel Inouye, EDWARD M. KENNEDY, Walter F. Mondale, and HUBERT H. HUMPHREY. One conservative Goldwater removed from his list of friends was RICHARD M. NIXON. Unable to accept Nixon's failings or forgive his deceptions during the WATERGATE crisis, Goldwater called the scandal "one of the saddest moments of my life. For twenty years or so, he and I worked hand in glove all over this land—not to help Nixon, not to help Goldwater, but to help the Republican Party and our country. But I was slow to see the real Nixon."

Goldwater retired from the Senate when his term ended in 1987 and returned to his home in Paradise Valley, Arizona, overlooking Phoenix. He remained active, although slowed somewhat by arthritis. In the 1990s, he took up an unlikely new cause: gay rights. "The big thing is to make this country . . . quit discriminating against people just because they're gay," he asserted. "You don't have to agree with it, but they have a constitutional right to be gay. And that's what brings me into it." Always a strict constructionist when it came to the Constitution, Goldwater felt that his defense of gay rights was consistent with his lifelong devotion to individual freedom. Then governor of Oregon Barbara Roberts said that because people do not expect someone like Goldwater to speak up for gay rights, they look at the issue in a new light when he does. "He causes people to focus on the real issue," she said. "Should the country that celebrates life, liberty and the pursuit of happiness allow discrimination for a group of Americans based on sexual preference?" Goldwater's position on gay rights put the former conservative standard-bearer squarely in conflict with religious conservatives who opposed any effort to outlaw discrimination against homosexuals.

Goldwater died at the age of 89 on May 29, 1998. He was a member of many organizations, including the Royal Photographic Society, the American Association of Indian Affairs, and the VETERANS OF FOREIGN WARS. He was honorary cochairman of Americans against Discrimination, a LOBBYING effort aimed at securing gay rights. He and his second wife, Susan Goldwater, lived in Paradise Valley, Arizona, at the time of his death.

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## ♦ GOMPERS, SAMUEL

Samuel Gompers, a founding member and longtime president of the AMERICAN FEDERATION OF LABOR (AFL), was instrumental in broadening the goals of the labor movement in the United States. He used his gifts as an organizer and speaker to consolidate numerous unions into one umbrella organization that lobbied successfully for improved working conditions for all tradesmen.

"I WONDER WHETHER ANY OF US CAN IMAGINE WHAT WOULD BE THE ACTUAL CONDITION OF THE WORKING PEOPLE OF OUR COUNTRY TODAY WITHOUT THEIR ORGANIZATIONS TO PROTECT THEM."
—SAMUEL GOMPERS

The son of Dutch immigrants, Gompers was born in London on January 26, 1850. He attended school briefly but began working at age 10. Initially apprenticed to a shoemaker, he chose instead to become a cigarmaker like his father. The family moved to New York in 1863, and within a year Gompers had joined the Cigar Makers' National Union.

At around this time many trades were beginning to form unions, but their power was limited because as small, individual groups they had little clout. By the 1880s, leaders of the various unions decided that by uniting in common cause they would make for a stronger political force. Late in 1881, several unions joined together to form the Federation of Organized Trades and Labor Unions (FOTLU). Gompers, who had proven himself an able leader in the cigarmakers' union, was elected an officer of FOTLU.

FOTLU was a first step for organizing unions but it was too loosely connected to have any real influence. In 1886, FOTLU was restructured into the American Federation of Labor (AFL), and Gompers was elected president. Except for a one-year hiatus in 1895, Gompers remained AFL president for the rest of his life.

As AFL president, Gompers steered the organization toward practical goals. He was interested in securing living wages for union members, an eight-hour work day, comprehensive CHILD LABOR LAWS, equal pay for women and men, and compulsory school attendance for children. To that end, he lobbied tirelessly for these and other improvements for working men and women.

Gompers steered clear of political issues (although in 1899 the AFL did endorse women's suffrage). Many left-wing labor leaders thought that Gompers was too timid and ineffective, too tied to the mainstream. Anarchist EMMA GOLDMAN wrote that the AFL had not "grasped the social abyss which separates labor from its masters, an abyss which can never be bridged by the struggle for mere material gains." But under Gompers's leadership, labor made significant sustainable gains at the state and federal level. Workers' compensation laws were enacted to

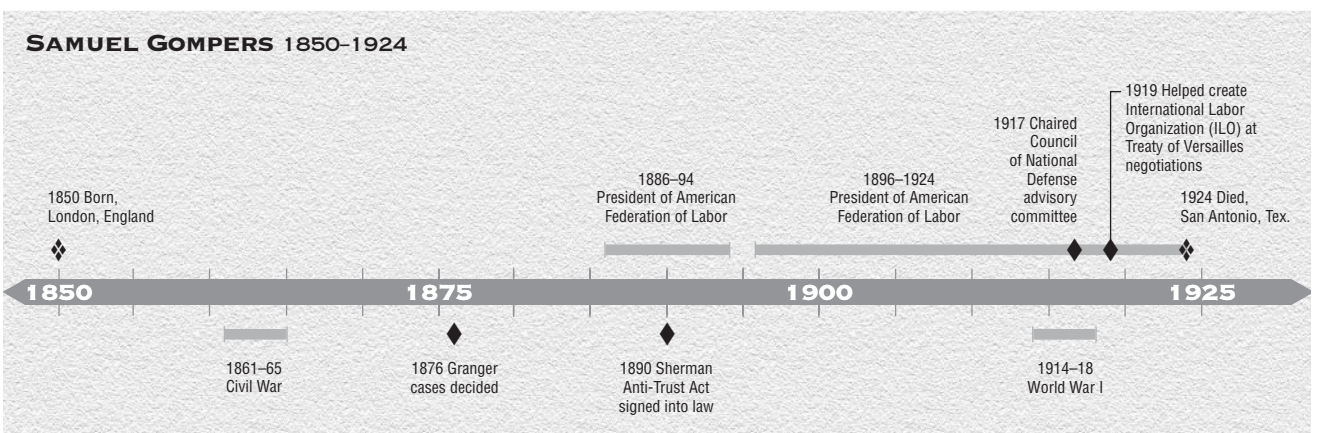

assist those injured on the job; wages were raised; and the eight-hour day became law for a growing number of workers (including federal employees in 1912). In 1913, the federal government created the LABOR DEPARTMENT, and, in 1914, it passed the CLAYTON ANTITRUST ACT, which protected union members from prosecution under the SHERMAN ANTITRUST ACT. That same year, industrialist Henry Ford initiated the eight-hour workday (at $5 per day) at his automobile plant.

When the United States entered WORLD WAR I in 1917, Gompers chaired an advisory committee of the Council of National Defense, which was created to coordinate industry and resources in wartime, and called on employers and employees to stand united and not take advantage of the war to make unreasonable demands. He traveled to Europe during the war to examine labor conditions, and after the war, in 1919, he attended the negotiations for the TREATY OF VERSAILLES, where he was instrumental in the creation of the International Labor Organization (ILO). He attended the Congress of the Pan-American federation of Labor in Mexico City in December 1924. He collapsed on December 8 and was brought to San Antonio, Texas, where he died on December 13.

*Samuel Gompers.*
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Craft Union; Industrial Union; Labor Union; Trade Union.

## GOOD BEHAVIOR

*Orderly and lawful action; conduct that is deemed proper for a peaceful and law-abiding individual.*

The definition of good behavior depends upon how the phrase is used. For example, what constitutes good behavior for an elected public officer may be quite different from that expected of a prisoner who wants to have his or her sentence reduced or to earn privileges.

The CONSTITUTION OF THE UNITED STATES provides that federal judges shall hold their offices during good behavior, which means that they cannot be discharged but can be impeached for misconduct.

## GOOD CAUSE

*Legally adequate or substantial grounds or reason to take a certain action.*

The term *good cause* is a relative one and is dependent upon the circumstances of each individual case. For example, a party in a legal action who wants to do something after a particular STATUTE OF LIMITATIONS has expired must show good cause, or justification for needing additional time. A serious illness or accident might, for example, constitute good cause.

An employee is said to be discharged for good cause if the reasons for the termination are work related. However, if the employer simply did not like the employee's personality, this would not ordinarily constitute good cause, unless the employee held a position, such as a salesperson, for which a likable personality was required.

## GOOD FAITH

*Honesty; a sincere intention to deal fairly with others.*

*Good faith* is an abstract and comprehensive term that encompasses a sincere belief or motive without any malice or the desire to defraud others. It derives from the translation of the Latin

term *bona fide,* and courts use the two terms interchangeably.

The term *good faith* is used in many areas of the law but has special significance in COMMERCIAL LAW. A good faith purchaser for value is protected by the UNIFORM COMMERCIAL CODE, which every state has adopted. Under sections 1-201(9) and 2-403 of the code, a merchant may keep possession of goods that were bought from a seller who did not have title to the goods, if the merchant can show he or she was a good faith purchaser for value. To meet this test, the person must be a merchant, must have demonstrated honesty in the conduct of the transaction concerned, and must have observed reasonable commercial standards of fair dealing in the trade. A buyer would likely meet these requirements if the purchase proceeded in the ordinary course of business. If, on the other hand, the purchase took place under unusual or suspicious circumstances, a court might conclude that the buyer lacked good faith.

Where a nonmerchant purchases property that the seller lacks legal title to convey, the issue of good faith is known both as the innocent purchaser doctrine and as the bona fide purchaser doctrine. If the purchaser acquires the property by an honest contract or agreement and without knowledge of any defect in the title of the seller, or means of knowledge sufficient to charge the buyer with such knowledge, the purchaser is deemed innocent.

In both commercial and noncommercial law, persons who in good faith pay a fraudulent seller valuable consideration for property are protected from another person who claims legal title to the property. If a court establishes the purchaser's good faith defense, the person who claims title has recourse only against the fraudulent seller. Strong public policy is behind the good faith defense. Good faith doctrines enhance the flow of goods in commerce, as under them, buyers are not required, in the ordinary course of business, to go to extraordinary efforts to determine whether sellers actually have good title. A purchaser can move quickly to close a deal with the knowledge that a fraudulent seller and a legitimate titleholder will have to sort the issue out in court. Of course, the purchaser will be required to demonstrate to the court evidence of good faith.

Good faith is also central to the COMMERCIAL PAPER (checks, drafts, promissory notes, certificates of deposit) concept of a holder in due course. A holder is a person who takes an instrument, such as a check, subject to the reasonable belief that it will be paid and that there are no legal reasons why payment will not occur. If the holder has taken the check for value and in good faith believes the check to be good, she or he is a holder in due course, with sole right to recover payment. If, on the other hand, the holder accepts a check that has been dishonored (stamped with terms such as "insufficient funds," "account closed," and "payment stopped"), she or he has knowledge that something is wrong with the check and therefore cannot allege the check was accepted in the good faith belief that it was valid.

In LABOR LAW, the National Labor Relations Act of 1935 (29 U.S.C.A. § 151 et seq.) mandates good faith bargaining by every union and employer in order to reach agreement. In corporate law, the BUSINESS JUDGMENT RULE is based on good faith. This principle makes officers, directors, managers, and other agents of a corporation immune from liability to the corporation for losses incurred in corporate transactions that are within their authority and power to make, when sufficient evidence demonstrates that those transactions were made in good faith. As in commercial law, the use of good faith in this case enhances corporate business practices, as agents of a corporation are free to act quickly, decisively, and sometimes wrongly to advance the interests of the corporation. Good faith insulates corporate officers from disgruntled shareholders.

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## GOOD SAMARITAN DOCTRINE

*A principle of* TORT LAW *that provides that a person who sees another individual in imminent and serious danger or peril cannot be charged with* NEGLIGENCE *if that first person attempts to aid or rescue the injured party, provided the attempt is not made recklessly.*

The Good Samaritan doctrine is used by rescuers to avoid civil liability for injuries arising from their negligence. Its purpose is to encour-

age emergency assistance by removing the threat of liability for damage done by the assistance. However, the assistance must be reasonable; a rescuer cannot benefit from the Good Samaritan doctrine if the assistance is reckless or grossly negligent.

Three key elements support a successful invocation of the Good Samaritan doctrine: (1) the care rendered was performed as the result of the emergency, (2) the initial emergency or injury was not caused by the person invoking the defense, and (3) the emergency care was not given in a grossly negligent or reckless manner.

Assume that a person has slipped on ice and broken a vertebra. The victim is unconscious, the accident has occurred in a desolate area, and the weather is dangerously cold. A passerby finds the injured person and moves the person to warmth and safety, but in the process aggravates the spinal injury. In a civil suit by the victim seeking damages for the additional injury, the passerby may successfully defeat the claims under the Good Samaritan doctrine.

The Good Samaritan doctrine is also used as a defense by persons who act to prevent or contain property damage. Assume that a passerby notices a fire has started just outside a cabin in the wilderness. If the passerby breaks into the cabin to look for a fire extinguisher, the passerby will not be liable for damage resulting from the forced entry. However, if the passerby runs down the cabin with a bulldozer to extinguish the fire, this will probably be considered grossly negligent or reckless, and the Good Samaritan doctrine will not provide protection from a civil suit for damages to the cabin.

The line separating negligence from gross negligence or recklessness is often thin. *Hardingham v. United Counseling Service of Bennington County,* 672 A. 2d 480 (Vt. 1995), illustrates the negligent acts that the Good Samaritan doctrine protects. In this case, the plaintiff, David Hardingham, sued United Counseling Service (UCS) when he became blind after drinking windshield wiper fluid. Hardingham, a recovering alcoholic, was employed by UCS as an emergency services counselor. When Hardingham began drinking again, employees of UCS went to his apartment and discovered him in an inebriated condition. During their visit, they saw Hardingham drink windshield wiper fluid. They called the police, who took Hardingham to a hospital. At the hospital, none of the UCS workers informed medical authorities that Hardingham had drunk the dangerous fluid. Doctors did not learn until the next day that Hardingham had overdosed on methanol, a component of windshield wiper fluid, and Hardingham eventually lost his sight.

Hardingham never got a chance to present his case to a jury. The Chittenden Superior Court granted **SUMMARY JUDGMENT** to UCS, holding that there was insufficient evidence to support an allegation of gross negligence by the organization. The Supreme Court of Vermont affirmed this decision. According to the court, the actions of the defendants "probably saved plaintiff's life." Although the defendants may have been negligent in failing to disclose that Hardingham had swallowed enough methanol to threaten his life, "no reasonable person could conclude that defendants showed indifference to plaintiff or failed to exercise even a slight degree of care."

Justice John Dooley dissented, arguing that the case presented a **QUESTION OF FACT** for a jury to decide. The defendants "failed to tell the emergency room physician the most significant fact that wasn't obvious from plaintiff's condition —that plaintiff had consumed windshield wiper fluid." Dooley lamented that "the greatest difficulty plaintiff faces in this case is to persuade us to accept that 'good samaritans' should ever be liable."

Section 324 of the Second Restatement of Torts describes the Good Samaritan doctrine in an inverse fashion. According to section 324, a person is subject to liability for physical harm resulting from the failure to exercise reasonable care if the failure increases the risk of harm, if the rescuer has a duty to render care, or if others are relying on the rescuer.

Many states are content to follow the Good Samaritan doctrine through their **COMMON LAW** or through similar previous cases. Some states have general statutes mandating the doctrine. Utah, for example, has a Good Samaritan act, which provides in part that

> [a] person who renders emergency care at or near the scene of, or during an emergency, gratuitously and in **GOOD FAITH**, is not liable for any civil damages or penalties as a result of any act or omission by the person rendering the emergency care, unless the person is grossly negligent or caused the emergency. (Utah Code Ann. § 78-11-22).

Some states have enacted statutes that protect specific emergency care or assistance. Indiana, for example, protects the emergency care of

veterinarians (Ind. Code § 15-5-1.1-31). Alabama provides IMMUNITY to those who assist or advise in the mitigation of the effects of the discharge of hazardous materials (Ala. Code § 6-5-332.1). Some states also provide protection to those participating in the cleanup of oil spills. In 1990, Congress passed the Oil Pollution Act (Pub. L. No. 101-380, 33 U.S.C.A. §§ 2701–2761 [1994]), which gave immunity from liability to persons who participate in oil cleanup efforts. Like any Good Samaritan law, the statute does not protect a person who is grossly negligent or reckless.

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## GOOD TIME

*The amount of time deducted from time to be served in prison on a given sentence, at some point after the prisoner's admission to prison, contingent upon good behavior or awarded automatically by the application of a statute or regulation. Good time can be forfeited for misbehavior. In some jurisdictions, prisoners may not earn good time during their first year of their sentence.*

## GOOD WILL

*The favorable reputation and clientele of an established and well-run business.*

The value of good will is ordinarily determined as the amount a purchaser will pay for a business beyond the monetary value of its tangible property and money owed to it.

Good will is regarded as a property interest in and of itself, although it exists only in connection with other property, such as the name or location of the operation. Good will exists even in a situation where the business is not operating at a profit. Certain courts refuse to recognize good will that arises out of the personal qualities of the owner. For example, a physician cannot sell good will when selling the office building and other physical assets of his or her practice, since the physician's reputation is based solely upon personal professional abilities.

A transfer of good will from one individual to another can take place as a bequest in a will or through a sale. Ordinarily, when an individual sells the property to which good will is connected, it is automatically transferred to the buyer. However, the buyer and seller can alter this arrangement or specify details in their sale agreement. A former owner of a business has no right to interfere with the subsequent owner's enjoyment of good will following a sale transferring good will, even in the event that the sales contract does not specifically so indicate. In the event that the purchaser wants to prevent the seller from establishing a competing business in the same vicinity, the purchaser must bargain for such a provision in the contract. An agreement not to compete, sometimes called RESTRICTIVE COVENANT, differs from good will. However, an individual who sells the good will of his or her business is not permitted to solicit former clients or customers or lead them to believe that he or she is still running the same business.

## GOODS

*Items; chattels; things; any* PERSONAL PROPERTY.

*Goods* is a term of flexible context and meaning and extends to all tangible items.

## ❖ GORE, ALBERT ARNOLD, JR.

He has been a reporter, an environmentalist, a congressman, and served as vice president of the United States, but Al Gore may go down in history as the unsuccessful candidate in possibly the most contested presidential race the United States has ever seen. Having spent the majority of his life in the political ring, Gore made two unsuccessful bids for the presidency. The first came in 1988, when he was a fledgling senator; the second was in 2000, following two terms as vice president under BILL CLINTON. In the protracted 2000 race, Gore won the popular vote, but lost the electoral vote to GEORGE W. BUSH. He became the third candidate in history to receive the greatest share of the popular vote, but lose the presidency. In 2002, Gore announced that he would not try for the office a third time, claiming, "there are many other exciting ways to serve."

Gore was born in Washington, D.C., on March 31, 1948. His father, Albert Gore Sr., at the time served as a Democratic member of the U.S. House of Representatives from Tennessee. The senior Gore was to serve in the House and the Senate for nearly three decades. His mother

was Pauline LaFon Gore. She had the distinction of being one of the first women to graduate from the law school at Vanderbilt University.

Gore attended St. Alban's Episcopal School for Boys in Washington, D.C., where he was an honor student and captain of the football team. In 1969, he received a B.A. with honors in government from Harvard University. He was interested in becoming a writer, rather than following his father's footsteps as a politician. After graduation he enlisted in the army, although he opposed the intervention of the United States in the VIETNAM WAR.

While stationed in Vietnam, Gore served as an army reporter. After Gore left the military service in 1971, the *Nashville Tennessean* hired him as an investigative reporter and, later, as an editorial writer. In addition to his journalism career, Gore was a home builder, a land developer, and a livestock and tobacco farmer.

Interested in religion and philosophy, Gore enrolled in the Graduate School of Religion at Vanderbilt University during the 1971–72 academic year. In 1974, he entered Vanderbilt's law school but left to enter elective office two years later.

In 1976, Gore ran for a seat in the U.S. House of Representatives. He won the primary election against eight other candidates and went on to win in the general election. He ran successfully in the three following elections. Gore claimed some early attention in 1980 when he was assigned to study nuclear arms as a member of the House Intelligence Committee. He researched and eventually published a comprehensive manifesto on arms restructuring for future security, which was published in the February 1982 issue of Congressional Quarterly. In 1984, Gore campaigned for a seat in the U.S. Senate that had just become vacant. He won that office with a large margin of votes.

While in Congress, Gore focused on several issues, including HEALTH CARE and environmental reform. He worked for nuclear ARMS CONTROL AND DISARMAMENT, as well as other strategic defense issues. He also stressed the potential of new technologies, such as biotechnology and computer development.

As the decade came to a close, Gore set his sights on the race for the 1988 presidential election. Only 39 years old at the time, he ran on traditional domestic Democratic views and was tough on foreign policy issues. He failed, however, to develop a national theme for his campaign and was criticized for changing positions on issues. Gore was successful in gaining public support in the primaries during the early spring and won more votes than any other candidate in southern states. However, he obtained only small percentages of votes in other states and withdrew from the presidential nomination campaigns in mid-April.

*Al Gore.*
LIBRARY OF CONGRESS

"NO MATTER HOW HARD THE LOSS, DEFEAT MIGHT SERVE AS WELL AS VICTORY TO SHAKE THE SOUL AND LET THE GLORY OUT."
—AL GORE

Two years later Gore won election to a second term in the U.S. Senate. He chose not to seek the presidency in 1992, citing family concerns (his son Albert had been hit by an automobile and was seriously injured). It was during this time that Gore wrote the book *Earth in the Balance: Ecology and the Human Spirit*, which expressed his concern, ideas, and recommendations on conservation and the global environment. In the book he wrote about his own personal and political experiences and legislative actions on the environmental issue. One of Gore's statements in the book that sums up his philosophy regarding the environment and human interaction is, "We must make the rescue of the environment the central organizing principle for civilization."

In the summer of 1992, Bill Clinton selected Gore as his vice presidential nominee. The choice startled many people because it ended a long-standing pattern of a candidate choosing a vice presidential nominee to "balance the ticket."

Both men were of the same age, region, and reputation and moderate in political outlook. Gore did balance Clinton's strength, however, by bringing to the ticket his experience in foreign and defense policy, expertise in environmental and new technology matters, and an image as an unwavering family man.

Clinton and Gore won the election in 1992, and Gore was inaugurated as the 45th vice president on January 20, 1993. At the age of 44 years, he became one of the youngest people to hold the position. Clinton and Gore were reelected in 1996, running against Republicans **BOB DOLE** and Jack Kemp.

During his time as vice president, Gore continued to stress environmental concerns. In 1997, the White House launched an effort to start producing a report card on the health of the nation's ecosystems. This project was carried out by an environmental think tank and initiated by Gore.

That same year, however, Gore's reputation was somewhat tarnished when he was accused of and admitted to making fund-raising telephone calls from the White House during the 1996 presidential campaign. Gore held a press conference on March 3, 1997, to defend his actions, saying there was nothing illegal about what he had done, although he admitted it may not have been a wise choice. Gore was also criticized for toasting Li Peng, initiator of the Tiananmen Square Massacre, during a trip to China. In September 1997, Buddhist nuns testified before the Senate panel investigating the abuses of campaign fund-raising. The nuns admitted that donors were illegally reimbursed by their temple following a fund-raiser attended by Gore, and that they had destroyed or altered records to avoid embarrassing their temple. Some believe these incidents further damaged Gore's reputation.

Despite questions of impropriety, Gore announced his candidacy for president in 1999. By early 2000, he had secured the majority of Democratic delegates for the 2000 elections. Gore chose Connecticut Senator Joseph Lieberman as his running mate to face Texas governor George W. Bush and Richard Cheney, former secretary of defense. Although Bush took an early lead in the polls, the Gore campaign closed the gap. Gore sought not only to demonstrate his compassion in a variety of speeches, but also to distance himself from Clinton. As the November 7 election approached, most observers predicted a deadlock.

During the afternoon of November 7, 2000, it appeared as if Gore would win the election, and several media outlets declared him the unofficial winner. However, vote tallies from the late afternoon and early evening revealed that Bush had closed the gap. By the evening of November 7, the totals showed that although Gore had won the popular vote, Bush won the **ELECTORAL COLLEGE**. Gore immediately requested a recount of the votes in the state of Florida, where voting procedures had caused a great deal of controversy. For the next month, the results of the election hung in the balance as both sides postured in a series of court disputes. However, the U.S. Supreme Court, in **BUSH V. GORE**, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000), overturned an order by the Florida Supreme Court requiring a recount of ballots in several counties. Gore then conceded the election to Bush.

In 2001, Gore accepted a position at the Columbia Graduate School of Journalism as a visiting professor. He has also accepted teaching positions at universities in his home state of Tennessee. Although many observers expected him to run again for president in the 2004 elections—and although a number of grassroots

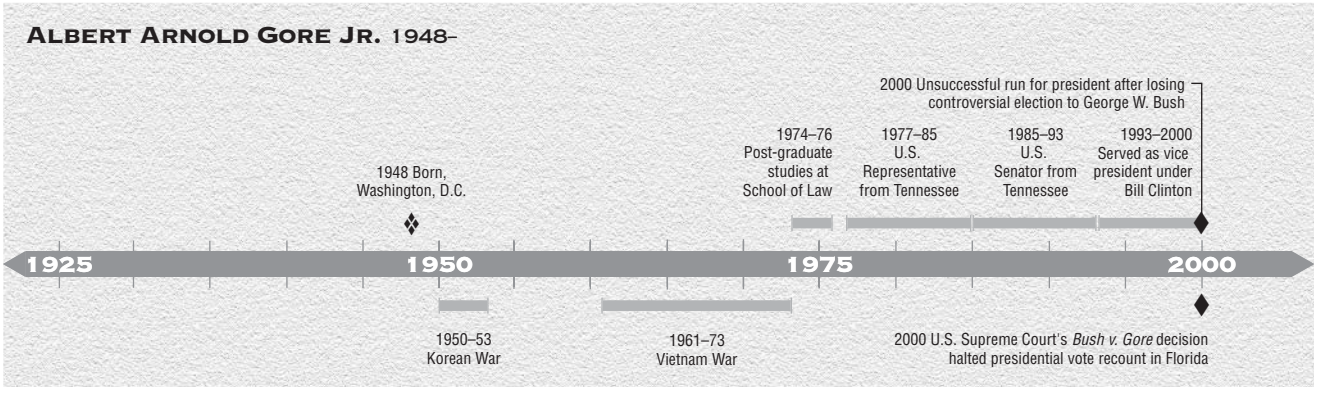

organizations have urged his running—Gore announced in December 2002 that he would not enter the race. "I personally have the energy and drive and ambition to make another campaign, but I don't think it's the right thing for me to do," he said in an interview with the CBS program *60 Minutes*. "I think that a campaign that would be a rematch between myself and President Bush would inevitably involve a focus on the past that would in some measure distract from the focus on the future that I think all campaigns have to be about."

Gore married his college sweetheart, Mary Elizabeth "Tipper" Aitcheson, in 1970. Tipper Gore holds a B.A. degree from Boston University and an M.A. in psychology from George Peabody College at Vanderbilt University. She is actively involved in a number of issues, including AIDS, education, and homelessness. She has also has been a longtime advocate for mental health, and gained national attention in the 1980s through her efforts to influence the record industry to rate and label obscene and violent lyrics. She was cofounder of the Parents' Music Resource Center, which monitors musical and video presentations that glorify casual sex and violence. The Gores have four children: Karenna, Kristin, Sarah, and Albert III.

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## GOVERNMENT INSTRUMENTALITY DOCTRINE

*A rule that provides that any organization run by a branch of the government is immune from taxation.*

## GOVERNMENT NATIONAL MORTGAGE ASSOCIATION

The Government National Mortgage Association (GNMA), also known as Ginnie Mae, is a corporation wholly owned by the federal government. Created by the Housing and Urban Development Act of 1968, 825 Stat. 491, GNMA is designed to support the federal government's housing programs by establishing a secondary market for the sale and purchase of residential mortgages.

During the late 1960s, the federal government expressed concern that available credit for low-income housing was insufficient to meet the growing demand. In response GNMA began issuing certificates to obtain additional funds for government-backed, low-income mortgages. GNMA certificates entitle their holders to receive a portion of the income derived from a residential mortgage pool approved by the government.

A residential mortgage pool consists of a group of mortgages that are issued by private lenders, including commercial banks and savings and loan institutions. The mortgages in this group have similar terms and interest rates. If the pool is approved by GNMA, it is placed into a trust, from which it is sold to investors by SECURITIES dealers. Some pools include more than one thousand residential mortgages.

The revenue generated by the sale of these pools helps make additional credit available for low-income residential mortgages insured by government agencies such as the Federal Housing Administration (FHA), the VETERANS ADMINISTRATION (VA), and the Farmers Home Administration. The HOUSING AND URBAN DEVELOPMENT DEPARTMENT, which is responsible for administering GNMA, oversees the entire program.

GNMA mortgage pools are considered stable investments by securities dealers and investors alike. The timely payment of principal and interest on each mortgage is guaranteed by GNMA and the FULL FAITH AND CREDIT of the federal government. GNMA enjoys unlimited authority to borrow funds from the U.S. Treasury in order to make good on this guarantee.

By developing a stable and viable secondary market for government-backed residential mortgages, GNMA has originated more than $1 trillion in securities trading. The revenue generated through this secondary market has enabled more than 19 million low-income families to purchase homes and provided the U.S. Treasury with annual receipts sometimes exceeding $400 million.

In 1994 President BILL CLINTON outlined the National Homeowners Strategy, which spurred GNMA to undertake an intense and sweeping review of its practices and programs. In addition, GNMA has been working to satisfy internal mandates that require it to enhance its customer service, improve its relations with

other businesses, and better market its securities. GNMA has incorporated the latest technology and automation to achieve these goals and has hired consultants to market its residential mortgage pools.

GNMA continues to streamline its documentation procedures and make efforts to eliminate paperwork, such as accepting electronic confirmation of insurance rather than relying on paper insurance certificates. It has begun an ambitious program to increase home ownership by minority families. Since its inception in 1968, GNMA has given more than 27 million families access to affordable mortgage costs. On November 20, 2002, GNMA announced that it had overseen the origination of $2 trillion in mortgage-backed securities.

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CROSS-REFERENCES

Corporations; Credit; Mortgage.

## GOVERNMENT PRINTING OFFICE

Since the mid-nineteenth century, one government establishment has existed to fill the printing, binding, and distribution needs of the federal government. Established on June 23, 1860, by Congressional Joint Resolution No. 25, the GOVERNMENT PRINTING OFFICE (GPO) has provided publication supplies and services to the U.S. Congress, the executive departments, and all other agencies of the federal government. The definition of the duties set forth in the 1860 resolution has stayed essentially the same over the years, with only one amendment in all that time, 44 U.S.C.A. § 101 et seq.

The GPO is overseen by the Congressional Joint Committee on Printing. The head of the GPO works under the title *public printer* and is appointed by the president of the United States with the consent of the Senate. The public printer is also legally required to be a "practical printer versed in the art of bookbinding" (44 U.S.C.A. § 301).

The GPO uses a variety of printing and binding processes, including electronic photo composition; letterpress printing; Linotype and hand composition; photopolymer platemaking; offset photography; stripping, platemaking, and presswork; and manual and machine bookbinding. The GPO also provides supplies like blank paper and ink to federal agencies, prepares catalogs, and sells and distributes some publications to civilians.

The GPO offers catalogs that detail publications available to the public. All catalogs are available from the superintendent of documents at the GPO. The *GPO Sales Publications Reference File,* which is issued biweekly on magnetic tape, lists the author, the title, and subject information for each new publication. A more comprehensive listing, the *Monthly Catalog of U.S. Government Publications,* serves as an index to all the publications handled by the GPO.

The GPO also offers two free catalogs for people who are interested in new or popular publications: *U.S. Government Books* and *New Books.* The first lists the titles of best-selling government publications, and the second is a bimonthly listing of government publications for sale.

The approximately 20,000 publications listed in these catalogs can be purchased by mail from the GPO's superintendent of documents. In addition, the books and catalogs published by the GPO can be purchased at the approximately two-dozen GPO bookstores open to the public. Most of the bookstores are located in government hub cities such as Washington, D.C., Atlanta, Chicago, Dallas, Houston, and Los Angeles. Publications are also available for public perusal at select depository libraries around the United States.

Owing to the large volume of documents produced by the various federal agencies, the GPO does not handle all of the printing and binding services for the government. In some instances, the GPO takes bids from commercial suppliers and awards contracts to those with the lowest bids. From there, the GPO serves as a connection between ordering agencies and contractors. The booklet *How to Do Business with the Government Printing Office* provides a background and instructions for contracting with the GPO and submitting bids. The booklet can be requested from any GPO regional printing

**Government Printing Office**

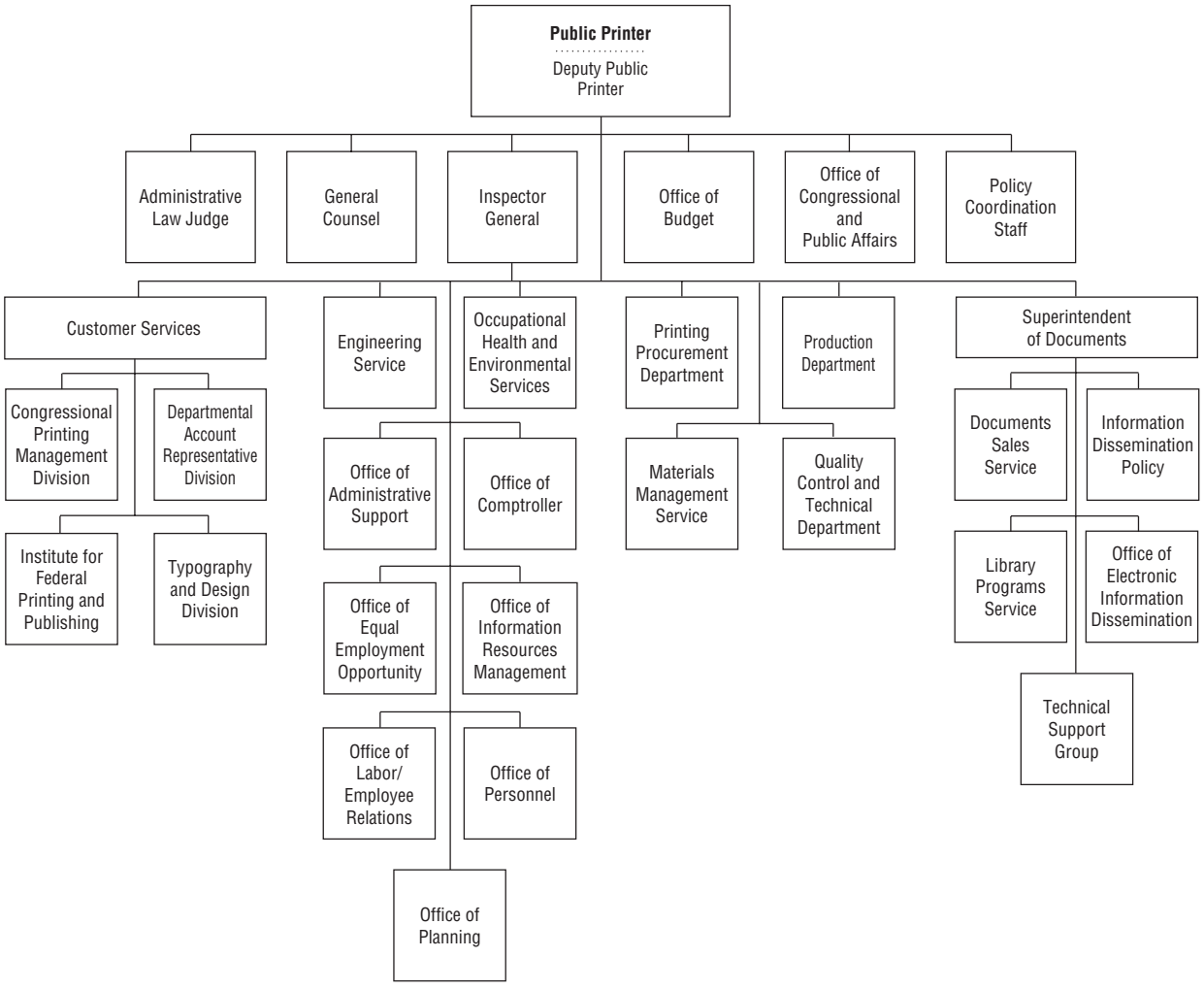


procurement office. Any printing or binding contract inquiries can be directed to one of thirteen offices, located in Atlanta; Boston; Chicago; Columbus, Ohio; Dallas; Denver; Hampton, Virginia; Los Angeles; New York; Philadelphia; St. Louis; San Francisco; and Seattle.

Since the mid-1990s, many of the documents published by the GPO have been available in electronic formats. During the mid-1990s, GPO distributed CD-ROM products containing government documents to thousands of American libraries. Many of these documents are now available through GPO's Web site, known as *GPO Access*. The site contains hundreds of thousands of individual documents from the various federal departments and agencies. It has become particularly useful for attorneys who need to locate such information as administrative regulations and LEGISLATIVE HISTORY of federal statutes.

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Congress of the United States; Legislative History.

## GRAB LAW

*State statutory provisions and common-law principles that govern the aggressive use of legal and equitable remedies, such as attachment and* GARNISHMENT, *by creditors to collect payment from debtors.*

State laws governing debtor and creditor transactions emphasize the importance of prompt action by creditors to ensure payment of the debtor's outstanding debts. For example, the first creditor to attach the debtor's property is most likely to be paid. The quicker the creditor acts to seize or "grab" the debtor's assets, the greater the chance the creditor's claims will be satisfied. As a result, grab law has come to designate aggressive, but legal, methods used by creditors to enforce their rights to payment against delinquent debtors.

## GRACE PERIOD

*In insurance law, a period beyond the due date of a premium (usually thirty or thirty-one days) during which the insurance is continued in force and during which the payment may be made to keep the policy in good standing. The grace period for payment of the premium does not provide free insurance or operate to continue the policy in force after it expires by agreement of the parties.* Grace period *may also refer to a period of time provided for in a loan agreement during which default will not occur even though a payment is overdue.*

## GRADUATED TAX

*Tax structured so that the rate increases as the amount of income of taxpayer increases.*

## GRAFT

*A colloquial term referring to the unlawful acquisition of public money through questionable and improper transactions with public officials.*

Graft is the personal gain or advantage earned by an individual at the expense of others as a result of the exploitation of the singular status of, or an influential relationship with, another who has a position of public trust or confidence. The advantage or gain is accrued without any exchange of legitimate compensatory services.

Behavior that leads to graft includes BRIBERY and dishonest dealings in the performance of public or official acts. Graft usually implies the existence of theft, corruption, FRAUD, and the lack of integrity that is expected in any transaction involving a public official.

## GRAND JURY

*A panel of citizens that is convened by a court to decide whether it is appropriate for the government to indict (proceed with a prosecution against) someone suspected of a crime.*

An American institution since the colonial days, the grand jury has long played an important role in CRIMINAL LAW. The FIFTH AMENDMENT to the U.S. Constitution says that a person suspected of a federal crime cannot be tried until a grand jury has determined that there is enough reason to charge the person. Review by a grand jury is meant to protect suspects from inappropriate prosecution by the government, since grand jurors are drawn from the general population. It has been criticized at times as failing to serve its purpose.

The grand jury system originated in twelfth-century England, when King HENRY II enacted the Assize of Clarendon in order to take control of the courts from the Catholic Church and local nobility. The proclamation said that a person could not be tried as a criminal unless a certain number of local citizens appeared in court to accuse him or her of specific crimes. This group of citizens, known as the grand assize, was very powerful: it had the authority to identify suspects, present evidence personally held by individual jurors, and determine whether to make an accusation. Trial was by ordeal, so accusation meant that conviction was very likely. (Trial by ordeal involved subjecting the defendant to some physical test to determine guilt or innocence. For example, in ordeal by water, a suspect was thrown into deep water: if he or she floated, the verdict was guilty; if the suspect sank, the verdict was innocent.)

The grand assize was not designed to protect suspects, and it changed very little over the next five hundred years. Then, in 1681, its reputation began to evolve. An English grand jury denied King Charles II's wish for a public hearing in the cases of two Protestants accused of TREASON for opposing his attempts to reestablish the Catholic Church. The grand jury held a private session and refused to indict the two suspects. This gave the grand jury new respect as a means of protection against government bullying (although ultimately in those particular cases, the king found a different grand jury willing to indict the suspects).

After this small act of rebellion, the grand jury became known as a potential protector of people facing baseless or politically motivated

## Hearsay Evidence: Admissible before a Grand Jury?

The **RULES OF EVIDENCE** prohibit the introduction of most **HEARSAY** evidence in a criminal trial. (Hearsay is evidence given by a person concerning what someone else said outside of court.) However, when Frank Costello, alias Francisco Castaglia, a notorious **ORGANIZED CRIME** figure of the 1940s and 1950s, argued that his conviction for federal income **TAX EVASION** should be overturned because the grand jury that indicted him heard only hearsay evidence, the Supreme Court rejected his claim (*Costello v. United States,* 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 [1956]).

Prior to his trial, Costello asked to inspect the grand jury record. He claimed there could have been no legal or competent evidence before the grand jury that indicted him. The judge refused the request. At trial, Costello's attorneys established that three investigating officers were the only witnesses to testify before the grand jury. These officers summarized the vast amount of evidence compiled by their investigation and introduced computations showing, if correct, that Costello had received far greater income than he had reported. Their summaries clearly constituted hearsay, since the three officers had no firsthand knowledge of the transactions upon which their computations were based. Therefore, Costello alleged a violation of the **FIFTH AMENDMENT**, and asked that hearsay evidence be barred from grand jury proceedings.

Justice **HUGO L. BLACK**, in his majority opinion, rejected these claims, noting that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act."

prosecution. The early colonists brought this concept to America, and by 1683, all colonies had some type of grand jury system in place. Over the next century, grand juries became more sympathetic to those who resisted British rule. In 1765, for example, a Boston grand jury refused to indict leaders of protests against the STAMP ACT, a demonstration of resistance to colonialism.

The grand jury was considered important enough to be incorporated into the U.S. Constitution, and has remained largely unchanged. Grand juries are used in the federal and most state courts. Federal grand juries use a standard set of rules. States are free to formulate their own pretrial requirements, and they vary greatly in the number of grand jurors they seat, the limits they place on the deliberations of those jurors, and whether a grand jury is used at all. Federal courts use a grand jury that consists of 23 citizens but can operate with a quorum of 16. Twelve jurors' votes are required for an indictment. States use a grand jury consisting of as few as five but no more than 23 members. Grand juries are chosen from lists of qualified state residents of legal age, who have not been convicted of a crime, and who are not biased against the subject of the investigation.

The usual role of a grand jury is to review the adequacy of evidence presented by the prosecutor and then decide whether to indict the suspect. In some cases, a grand jury decides which charges are appropriate. Generally, grand jurors do not lead investigations, but can question witnesses to satisfy themselves that evidence is adequate and usable. The prosecutor prepares a bill of indictment (a list explaining the case and possible charges) and presents evidence to the grand jury. The jurors can call witnesses, including the target of the investigation, without revealing the nature of the case. They call witnesses by using a document called a subpoena. A person who refuses to answer the grand jury's questions can be punished for CONTEMPT of court. However, no witness need answer incriminating questions unless that witness has been granted IMMUNITY. In federal courts, the jurors may accept HEARSAY and other evidence that is normally not admissible at trial.

# Should the Grand Jury Be Abolished?

Though the grand jury has existed in the United States since the colonial period, and the **FIFTH AMENDMENT** to the U.S. Constitution requires its use in federal criminal proceedings, it has come under increasing attack. Critics charge that it no longer serves the functions the Framers intended, and therefore should be abolished. Defenders admit there may be some problems with it today, but contend that these can be remedied.

Critics aim their attacks at both federal and state grand juries. They note that a grand jury has two functions. One is to review evidence of criminal wrongdoing and to issue an indictment if the evidence is sufficient. The other is to be an investigative arm of the government, helping the prosecutor gather evidence. Critics contend that in both areas contemporary grand juries have failed.

In reviewing evidence of criminal wrongdoing, a grand jury is supposed to act as a shield against ill-conceived or malicious prosecutions. Yet critics charge that grand juries typically rubber-stamp the prosecution's moves, indicting anyone the prosecutor cares to bring before it.

Historically the grand jury was not dominated by a professional prosecutor. Without a strong attorney leading the way, the grand jury was forced to be independent and diligent in reviewing evidence brought before it.

Critics note that many states abolished all or part of the grand jury's jurisdiction at the end of the nineteenth century, in large part because the process had come increasingly under the control of prosecutors. States acknowledged that a professional criminal prosecutor did not need a grand jury's assistance in the charging process. The prosecutor was capable of making an independent, disinterested review of the need to bring charges. Though forty-eight states have grand juries as part of their criminal justice system, many of these judicial bodies are now reserved for serious felonies, usually first-degree murder.

Those who favor **ABOLITION** of the grand jury argue that the domination of the prosecutor has led to a passivity that destroys the legitimacy of the grand jury concept. Most grand jurors have little background in law and must rely on the prosecutor to educate them about the applicable law and help them apply the law. In addition, at the federal level, there are very complex criminal laws, like the **RACKETEER** Influenced and Corrupt Organizations statute. Even lawyers find many of these laws difficult to fathom, yet grand jurors are expected to understand them and apply them to intricate fact situations. Not surprisingly,

If the grand jury agrees that there is sufficient reason to charge the suspect with a crime, it returns an indictment carrying the words *true bill.* If there is insufficient evidence to satisfy the grand jury, it returns an indictment carrying the words *no bill.*

Seldom do grand juries issue documents. However, when given a judge's permission to do so, they may use a report to denounce the conduct of a government figure or organization against whom an indictment is not justified or allowed. This occurred in 1973, when U.S. district court judge John J. Sirica allowed the grand jury investigating the **WATERGATE** scandals to criticize President Richard Nixon's conduct in covering up the involvement of his administration in the June 17, 1972, **BURGLARY** of the Democratic National Committee headquarters in the Watergate Apartment and Hotel complex. The judge recommended that the report be forwarded to the House Judiciary Committee to assist in proceedings to impeach the president. Many states allow the issuance of grand jury reports, but limit their use: the target must be a public official or institution who can be denounced only where statutory authority exists, and the resulting document can be released publicly only with a judge's approval.

In February 1996, for the first time in history, a first lady of the United States was required to appear before a grand jury. **HILLARY RODHAM CLINTON** testified for four hours before a federal grand jury on the disappearance and reappearance of billing records related to her representation of a failed investment institution that was under scrutiny when she was an attorney in Arkansas. Her testimony was part of the **WHITEWATER** investigation, which examined past financial dealings of Hillary Rodham Clinton, President **BILL CLINTON**, and others.

Critics have complained that the grand jury offers witnesses and suspected criminals insufficient protection. The cause of the controversy is the set of rules that govern the operation of federal grand juries. For example, a prosecutor manages the work of the grand jury, which some say is contradictory since the job of prosecutor is to prove a defendant's guilt. Another contradic-

charge the critics, the grand jury tends to follow the prosecution's advice.

Critics point out that though the Fifth Amendment requires a grand jury indictment for all federal crimes, the accused may waive this requirement and accept charges filed by a prosecutor alone on all but capital crimes. Waivers are frequent, and most prosecutions of even serious offenses are initiated by federal prosecutors. Therefore, critics argue that it makes no sense to take additional time and money for a grand jury to convene and participate in a hollow ritual.

For its critics the grand jury has declined from a proactive community voice to a passive instrument of the prosecution. Though the U.S. Supreme Court may talk about the historic importance of the grand jury in Anglo-American justice, few academics defend the institution based on its current performance. Faced with this poor performance, the critics argue that abolition is the best course. It would make the prosecutor directly accountable for the charging decision and remove the illusion that grand jurors are in control.

Defenders of the grand jury acknowledge that there are problems with the modern system, but insist the grand jury is worth saving. Despite its shortcomings the grand jury still allows citizens to help make important community decisions. Though critics may deplore prosecutorial domination of grand juries, they overgeneralize when they call the grand juries rubber stamps for the state. Congress recognized the competency and importance of citizen input when, in the Organized Crime Control Act of 1970 (18 U.S.C.A. §§ 3332–3333), it authorized the creation of "special" grand juries to investigate **ORGANIZED CRIME**, return indictments if warranted, and issue reports on the results of their investigations.

Supporters also believe that the critics overemphasize the importance of the grand jury in acting as a shield against government oppression. The key function of the grand jury is to enhance the legitimacy of the criminal charges that are returned. Prosecutors use the grand jury to gain community support for charges that might otherwise be perceived as based on racial bias, political motivation, or prosecutorial vindictiveness. A grand jury review may also help a prosecutor avoid bringing charges where the formal requisites of a crime are present but the community's moral sense would regard charges as unjust.

Some supporters of the grand jury admit that it could be improved by severing the close tie between prosecutor and jurors. They point out that Hawaii provides grand juries with their own attorney. Such a "grand jury counsel" provides independent legal advice and acts as a buffer between jurors and prosecutors. This, in turn, makes grand juries more independent and gives their indictments more credibility. Some scholars have argued that though using such a system nationwide would cost more, the added expense would be a small price to pay to reinvigorate the grand jury and restore it to its proper role as a voice of the community.

tion, according to critics, is that a defense attorney does not represent the suspect. Instead, prosecutors may be required in state grand jury proceedings to present, on behalf of the suspect, information that they feel is exculpatory (so strong that it could create a **REASONABLE DOUBT** that the suspect committed the crime); however, the U.S. Supreme Court has held that federal prosecutors are not required to do so in federal grand jury proceedings (*United States v. Williams,* 504 U.S. 36 [1992]). In arguing that a suspect should be charged, prosecutors may make arguments and use information that would normally not be admissible during a trial. Witnesses who are called before a grand jury are not allowed to have an attorney present when they testify. This holds true for a witness who may be a suspect. A final concern is that grand juries meet in secret, and a formal record of federal grand jury proceedings is not usually provided to the suspect even after indictment.

Critics of the current system claim that justice is ill served by these rules. They say that ambitious prosecutors may be tempted to misuse the powers of a nonprofessional grand jury to harass, trap, or wear down witnesses. For example, activists who opposed the **VIETNAM WAR** during the 1960s and 1970s accused the **JUSTICE DEPARTMENT** of abusing the grand jury system as it searched for information about political dissidents. The activists believed that the department used the power and secrecy of the grand jury to intimidate witnesses and fish for evidence. Members of the news media, the business community, and organized labor, have also criticized the institution.

Supporters of the current system say that the secrecy of the grand jury's work prevents several things, including a suspect from escaping, attempts to influence jurors, and the coaching or intimidation of witnesses. Supporters also contend that the system encourages candid testimony and protects the privacy of innocent suspects who are later cleared. Regarding witnesses' lack of **LEGAL REPRESENTATION**, supporters of the status quo point out that delay, disruption, and rehearsed testimony would lessen the efficiency of the grand jury's work and

would result in a MINITRIAL. Similar arguments have been made against limiting evidence that would not be admissible at trial. In addition, federal courts have held that because the rights of a suspect are adequately protected during trial, where the strength or weakness of evidence determines the verdict, no examination of grand jury indictment proceedings is necessary.

Grand juries also face criticism in the area of jury selection, especially with high-profile cases. Criticism focuses on bias and a lack of balance in the selection process. The requirement that grand juries be unbiased has evolved since 1807, when Vice President AARON BURR was indicted as a traitor. Burr insisted that the evidence against him be heard by an "impartial" jury as guaranteed in the SIXTH AMENDMENT to the Constitution. He successfully challenged many jurors on the all-Republican grand jury that had been selected. Burr was willing to accept jurors who were familiar with some details of his famous case but who claimed they had not drawn any conclusions about it. (Although he was indicted, Burr was eventually acquitted at trial.)

Today, an unbiased grand jury means one that comprises people who have no prior familiarity with the facts of the case. Critics of this requirement say that it greatly limits the quality of people who are chosen to sit, since many intelligent, engaged, and otherwise ideal candidates for a grand jury also follow the news. On June 24, 1994, a California state judge dismissed a grand jury that was considering whether to indict former athlete and media personality O. J. SIMPSON for the murder of his ex-wife and her friend. The judge was responding to concerns, of both the prosecutor and the defendant, that grand jurors had been exposed to PRETRIAL PUBLICITY that might prejudice them—such as transcripts of 911 calls made by Simpson's ex-wife after he broke down the back door to her house.

After numerous struggles to balance grand juries racially and by gender, federal case law provides that "a defendant may challenge the array of grand jurors . . . on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified" (*Estes v. United States,* 335 F.2d 609, *cert. denied,* 379 U.S. 964, 85 S. Ct. 656, 13 L. Ed. 2d 559).

There have been suggestions that the federal grand jury should be abolished, but this action seems unlikely because it would change the BILL OF RIGHTS for the first time. In addition, the investigative and indicting roles of the courts have to be performed by some entity, and an alternative entity may be less desirable than the grand jury. Some states have abolished grand juries or provided alternatives. For example, in some states, prosecutors are allowed to file an information, which is a formal list of charges, usually submitted with notice of some kind of PROBABLE CAUSE hearing.

Other suggestions for change at the federal level may experience more success. Among those promoted by groups such as the AMERICAN BAR ASSOCIATION are:

- Better instructions from judges to jurors about the grand jury's powers and its independence from prosecutors
- Reports by prosecutors on the performance of the grand jury system
- Increased access to grand jury transcripts for suspects who are eventually indicted
- Expanded safeguards against abuse of witnesses, including education about their rights and the presence of their attorneys
- Notification of targets of investigations that they are targets
- Optional rather than mandatory appearances by targets of investigations
- An end to the requirement that prosecutors present defense evidence, and replacement with a requirement that grand jurors be informed that the defense was not represented in the hearing.

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## GRAND LARCENY

*A category of larceny—the offense of illegally taking the property of another—in which the value of the property taken is greater than that set for petit larceny.*

At COMMON LAW, the punishment for grand larceny was death. Today, grand larceny is a statutory crime punished by a fine, imprisonment, or both.

## GRANDFATHER CLAUSE

*A portion of a statute that provides that the law is not applicable in certain circumstances due to preexisting facts.*

Grandfather clauses, which were originally intended to prevent black people from voting, were named for provisions adopted by the constitutions of some states. Such amendments sought to interfere with an individual's right to vote by setting forth difficult requirements. For example, common requirements were ownership of a large amount of land or the ability to read and write portions of the state and federal constitutions. The name *grandfather clause* arose from the exceptions that were made for veterans of the Civil War. If the veterans were qualified to vote prior to 1866, their descendants were also qualified. Thus, in effect, if a person's grandfather could vote, he could vote without further restrictions.

These statutes accomplished precisely what was intended, since nearly all slaves and their descendants were disqualified from voting because they could not satisfy the statutory requirements.

In the 1915 case of *Guinn v. United States,* 238 U.S. 347, 35 S. Ct. 926, 59 L. Ed. 1340, the SUPREME COURT OF THE UNITED STATES examined a GRANDFATHER CLAUSE that was added to the Oklahoma constitution shortly following its admission to the Union. The 1910 constitutional amendment required that prospective voters pass a literacy test in order to qualify to vote. However, anyone who was entitled to vote on January 1, 1866, or any time earlier under any form of government, or who at that time lived in a foreign country, was exempt from satisfying the literacy test requirement. The lineal descendants of such exempted persons also were exempt from such a requirement. In reality, the amendment recreated and perpetuated the very conditions that the FIFTEENTH AMENDMENT was intended to destroy, even though race was never mentioned as a voter qualification.

The Court held that the clause was in violation of the Fifteenth Amendment, which states that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Oklahoma argued that states had the power to set forth voter qualifications. Therefore, the statute in controversy did not violate the Fifteenth Amendment since race was not mentioned as a voter qualification. The Supreme Court was in agreement that states have the right to determine who is qualified to vote; however, they are permitted to do so only within constitutional limits. The limit that proscribes consideration of the race of voters extends to sophisticated as well as simpleminded discrimination, and equality under the law cannot be based upon whether a person's grandfather was a free man.

Oklahoma undertook to change its law following this decision. The revised statute said that everyone who was able to vote as a result of the grandfather clause automatically continued to be eligible and those who had been denied VOTING RIGHTS were given twelve days in 1916 to register to vote. If they were out of the county where they resided or if they were prevented from registering by sickness or unavoidable circumstances, they were given an additional fifty days in 1916 to register. After that time black persons who tried to register to vote were turned away, since the time to register outside the grandfather clause had ended in 1916.

In the 1939 case of *Lane v. Wilson,* 307 U.S. 268, 59 S. Ct. 872, 83 L. Ed. 1281, the Supreme Court rejected Oklahoma's new scheme, calling it another example of an attempt by a state to thwart equality in the right to vote regardless of race or color. The Court ruled that the proposed remedy, in the form of such a limited registration period, was inadequate. A group of citizens

who lacked the habits and traditions of political independence deserved a greater opportunity to register to vote.

The term *grandfather clause* in its current application refers to a legislative provision that permits an exemption based upon a preexisting condition. For example, through the application of grandfather clauses, certain prerogatives are extended to those regularly engaged in a particular profession, occupation, or business that is regulated by statute or ordinance. Such a clause might allow an individual, who has been in continuous practice in a particular profession for a specific period, to circumvent certain licensing requirements.

## GRANGER MOVEMENT

The Granger Movement was begun in the late 1860s by farmers who called for government regulation of railroads and other industries whose prices and practices, they claimed, were monopolistic and unfair. Their efforts contributed to a growing public sentiment against monopolies, which culminated in the passage of the Sherman Act (or SHERMAN ANTI-TRUST ACT) of 1890, 15 U.S.C.A. §§ 1–7.

In 1867, the American farmer was in desperate straits. Needing better educational opportunities and protection from exorbitant prices charged by middlemen, the farmers decided to form an independent group to achieve their goals.

*An 1873 Granger promotional poster printed in Cincinnati, Ohio. The Granger Movement experienced rapid growth following the Panic of 1873 and peaked by 1875.*

LIBRARY OF CONGRESS

Oliver Hudson Kelley, a former employee of the AGRICULTURE DEPARTMENT, organized a group called the Patrons of Husbandry. Membership was open to both men and women, and each local group was known as a Grange. Each Grange chose officers, and the goal of each meeting was to present news of educational value to the farmer.

Kelley traveled across the country establishing Granges; he found his greatest support in Minnesota. The Granges soon evolved into the national Granger Movement. By 1873, all but four states had Granges.

The main problems confronting the Granger Movement concerned corporate ownership of grain elevators (used for the storage of crops) and railroads. These corporations charged high prices for the distribution and marketing of agricultural goods, and the farmer had no recourse but to pay. By 1873, the movement was becoming political, and the farmers formed an alliance, promising to support only political candidates who shared the interests of farmers; if that failed, they vowed to form their own parties.

Granger-supported candidates won political victories, and, as a result, much legislation protective of their interests was passed. Their biggest gain occurred in 1876, when the U.S. Supreme Court decreed in MUNN V. ILLINOIS, 94 U.S. (4 Otto.) 113, 24 L. Ed. 77, that states had the right to intervene in the regulation of public businesses. The law affected the prices of elevator charges, grain storage, and other services vital to the livelihood of the farmers.

In addition to political involvement, the Grangers established stores and cooperative elevators and employed the services of agents who secured special prices for the Grangers. These endeavors were not as successful as their previous undertakings, and the attempt to manufacture farm machinery depleted the finances of the movement. As a result, the Granger Movement began to wane in 1876.

CROSS-REFERENCES

Agricultural Law.

## GRANT

*To confer, give, or bestow. A gift of legal rights or privileges, or a recognition of asserted rights, as in treaty.*

In the law of property, the term *grant* can be used in a deed to convey land, regardless of the

number and types of rights conferred or the promises made by the transferor to the transferee. It is a comprehensive term that encompasses more specific words of transfer, such as assign, bargain, and devise.

A *public land grant* is a conveyance of ownership or other rights and privileges in publicly owned property to members of the general public who come under the qualifications of the statute that makes the land available. Such a grant is ordinarily noted in a public record, such as a charter or patent. In order to properly trace the ownership of property, it is sometimes necessary to determine each successive owner following the first grant.

A *private grant* is a grant of public land by a public official to a private individual as a type of reward or prize.

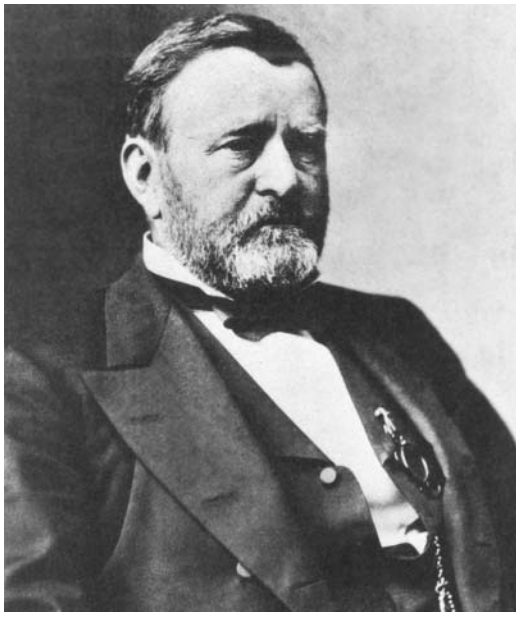

*Ulysses S. Grant.*
LIBRARY OF CONGRESS

## GRANT, ULYSSES SIMPSON

Ulysses Simpson Grant, originally known as Hiram Ulysses Grant, was a U.S. general, the commander of the Union army during the last part of the Civil War, and the president of the United States from 1869 to 1877. During his presidency Grant's reputation was tarnished by political corruption and scandal in his administration. Though he was never personally involved with any scandal, his failure to choose trustworthy advisers hurt his presidency.

Grant was born April 27, 1822, in Point Pleasant, Ohio. Raised in nearby Georgetown, he was educated at local and boarding schools. In 1839 he accepted an appointment to the Army's military academy at West Point, though he did not intend to become a soldier. The appointment allowed him to obtain the education he could not afford otherwise. He graduated in 1843 and began his military career with a tour of duty during the Mexican War of 1846–48, in which he distinguished himself in battle. After the war he was assigned to Fort Humboldt, California. During his time in California, Grant became lonely, and it has been alleged he had a drinking problem. He resigned his commission in 1854 and made several unsuccessful attempts at alternative careers, including farming and real estate. In 1860 he moved to Galena, Illinois, where he worked in his father's leather goods store.

With the outbreak of the Civil War in 1861, Grant returned to the military as a colonel in the Illinois Volunteers. He soon was promoted to brigadier general. Grant's first major victory came in February 1862, when his troops captured Forts Henry and Donelson, Tennessee, forcing General Simon B. Buckner, of the Confederacy, to accept unconditional surrender. As a result Grant was promoted to major general.

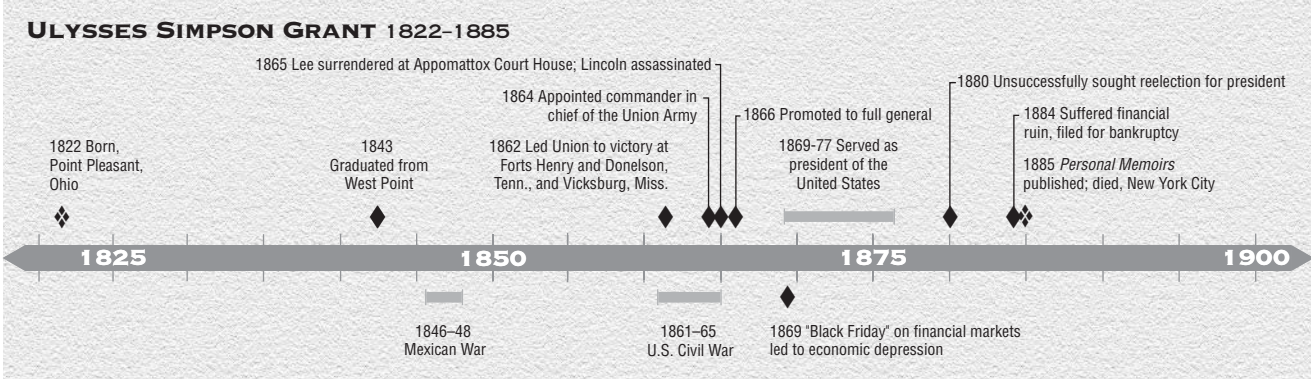

Grant fought in the Battles of Shiloh and Corinth before forcing the surrender of Vicksburg, Mississippi, on July 4, 1862. In 1863 his forces triumphed over those of General Braxton Bragg, of the Confederacy, at Chattanooga, Tennessee.

Grant's leadership was welcomed by President ABRAHAM LINCOLN, who had endured a succession of commanders of the Union army who refused to wage an aggressive war. In March 1864 Lincoln promoted Grant to lieutenant general and gave him command over the entire Union army. In that year Grant scored another major military triumph. He commanded the Army of the Potomac against the forces of General Robert E. Lee, of the Confederacy, in the Wilderness Campaign, a series of violent battles that took place in Virginia. Battles at Spotsylvania, Cold Harbor, Petersburg, and Richmond produced heavy Union casualties, but Lee's smaller army was devastated. On April 9, 1865, at Appomattox Courthouse, Lee surrendered his forces, signaling an end to the Civil War.

"THE WAR IS OVER—THE REBELS ARE OUR COUNTRYMEN AGAIN."
—ULYSSES S. GRANT

After the war Grant enforced the Reconstruction laws of Congress in the Southern military divisions. President ANDREW JOHNSON appointed him secretary of war in 1867, but Grant soon had a falling out with the president. Grant aligned himself with the REPUBLICAN PARTY and became its presidential candidate in 1868. He defeated Democrat Horatio Seymour, former governor of New York, by a small popular vote margin. At age forty-six, he was the youngest man yet elected president. He was reelected in 1872, easily defeating Horace Greeley.

Though Grant's intentions were good, it soon became clear that his political and administrative skills did not match his military acumen. Despite his interest in civil service reform, he followed his predecessors in using political patronage to fill positions in his administration. Many of his appointees were willing to use their office for personal profit.

Grant's reputation was first tarnished in 1869 when financiers Jay Gould and James Fisk attempted to corner the gold market and drive up the price. Their plan depended on keeping the federal government's gold supply off the market. They used political influence within the Grant administration to further their scheme. When Grant found out about it, he ordered $4 million of government gold sold on the market. On September 24, 1869, known as Black Friday, the price of gold plummeted, which caused a financial panic.

During Grant's second term, more scandal erupted. Vice President Schuyler Colfax was accused of taking bribes in the Crédit Mobilier scandal, which involved a diversion of profits from the Union Pacific Railroad. And Grant's private secretary, Orville E. Babcock, was one of 238 persons indicted in the Whiskey Ring conspiracy, which sought to defraud the federal government of liquor taxes. Babcock was acquitted after Grant testified on his behalf. Finally, Grant accepted the resignation of Secretary of War William W. Belknap shortly before Belknap was impeached on charges of accepting a bribe.

In domestic policy Grant attempted to resolve the tensions between North and South. He supported AMNESTY for Confederate leaders, and he tried to enforce federal CIVIL RIGHTS legislation that was intended to protect the newly freed slaves. In foreign policy he settled longstanding difficulties with Great Britain, in the 1871 Treaty of Washington.

After leaving office in 1877, Grant spent his time traveling and writing. He made a world tour in 1878 and 1879. In 1880 he unsuccessfully sought the Republican party's nomination for president. In 1881 he bought a home in New York City and became involved in the investment firm of Grant and Ward, in which his son, Ulysses S. Grant, Jr., was a partner. He invested his personal fortune with the firm and encouraged others to invest as well. In 1884 the firm collapsed. Partner Ferdinand Ward had swindled all the funds from the investors. Grant was forced to file for BANKRUPTCY.

Needing money, Grant contracted with his friend Mark Twain to write his memoirs. Despite the debilitations of throat cancer, Grant was able to complete his *Personal Memoirs* shortly before his death on July 23, 1885, in Mount McGregor, New York. His memoir was well received and is now recognized as a classic military autobiography. Grant and his wife, Julia Dent Grant, are buried in Grant's Tomb, in New York City, which was proclaimed a national memorial in 1959.

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## GRANTEE

*An individual to whom a transfer or conveyance of property is made.*

In a case involving the sale of land, the buyer is commonly known as the grantee.

## GRANTING CLAUSE

*The portion of an instrument of conveyance, such as a deed, containing the words that transfer a present interest from the grantor to the grantee.*

## GRANTOR

*An individual who conveys or transfers ownership of property.*

In real property law, an individual who sells land is known as the grantor.

## GRANTOR-GRANTEE INDEX

*A master reference book, ordinarily kept in the office of official records of a particular county, which lists all recorded deeds as evidence of ownership of real property.*

This index contains the volume and page number where an instrument can be found in the record books. The grantor-grantee index is frequently used to conduct a title search on property. By consulting the index, an individual can trace the conveyance history of the property and determine whether or not it is encumbered.

## GRATUITOUS

*Bestowed or granted without consideration or exchange for something of value.*

The term *gratuitous* is applied to deeds, bailments, and other contractual agreements.

A *gratuity* is something given by someone who has no obligation to give and can be used in reference to a bribe or tip.

## GRATUITOUS LICENSEE

*An individual who is permitted, although not invited, to enter another individual's property and who provides no consideration in exchange for such permission.*

For example, a person who obtains the permission of the owner of a parcel of land to park his or her car on such land for a few hours is a gratuitous licensee. Since the driver of the vehicle was not invited by the owner, he or she is not an invitee, and since the driver has obtained the owner's permission, he or she is not committing a TRESPASS. If the driver does not pay for the permission to park, the license to do so is thereby considered gratuitous.

## GRATUITY

*Money, also known as a tip, given to one who provides services and added to the cost of the service provided, generally as a reward for the service provided and as a supplement to the service provider's income.*

Legend suggests that the term "tip" originated from an innkeeper's sign, "To Insure Promptness." Traditionally, patrons gave gratuity to those providing services in order to ensure faster service. Gratuity has always been defined by local custom and etiquette, never by law. Individuals who work for gratuity include those who provide a wide variety of services, including, for example, waiters and waitresses, bartenders, hotel employees, and cab drivers.

Gratuity is customarily designed to ensure that patrons receive the best service possible. The custom allows service providers to be rewarded for providing good service and lets patrons penalize those who provide poor service. The amount of gratuity depends upon the type of service, though tips are usually determined by the total cost of service provided. Proper etiquette suggests that patrons should tip between ten to twenty percent of the total bill. Without gratuity, service providers may have no incentive to provide a higher level of service than necessary.

The system of tipping has been the subject of extensive commentary and debate. For example, ELEANOR ROOSEVELT suggested to those Americans traveling in foreign lands, "a fair tip, or one a little on the generous side, will leave a pleasant feeling and respect for you in the one who receives it. A lavish one will create a secret disrespect and add to the reputation Americans have for trying to buy their way into everything." Scholars have focused their attention on many aspects of tipping, including the satisfaction of the patron when he or she leaves a tip for the services provided.

Tips and other forms of gratuity constitute taxable income and must be reported by those who receive them. Although the current federal MINIMUM WAGE for most employees is $5.15 per hour, this number is reduced to $2.13 per hour for most tipped employees. Since these tipped

employees generally receive more than $3 per hour in compensation from gratuity, they seldom receive less than the minimum wage paid to other types of employees. However, if the combined amount of tips and wages comes to less than $5.15 per hour, the employer is required to make up the difference under regulations established by the U.S. LABOR DEPARTMENT. Employees must claim the amount of tips they receive to the employer and must report these amounts when they file their tax returns.

Patrons have, on occasion, brought suit over the practices of service providers of adding gratuity to bills. For example, in *Searle v. Wyndham International, Inc.*, 126 Cal. Rptr. 2d 231 (Cal. App. 2002), patrons of a hotel ordered room service, which included taxes, a seventeen percent service charge, and a room delivery charge. The bill also provided a line whereby the patrons could add gratuity to the bill, even though the service charge was gratuity paid to the server. The patrons sued the hotel, claiming that the practice was deceptive because it did not indicate that the service charge constituted gratuity and that the service charge constituted obligatory gratuity, which the patrons claimed should be voluntary. The court held that the practice was neither deceptive nor fraudulent, holding in favor of the hotel.

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CROSS-REFERENCES

Labor Department; Independent Contractor.

## GRAVAMEN

*The basis or essence of a grievance; the issue upon which a particular controversy turns.*

The gravamen of a criminal charge or complaint is the material part of the charge.

In English ecclesiastical law, the term *gravamen* referred to a grievance of which the clergy complained before the bishops in convocation.

## ♦ GRAY, HORACE

Horace Gray gained prominence as a Massachusetts jurist and a U.S. Supreme Court justice. In his fifty-three-year career as a lawyer and judge, Gray earned a reputation as an expert on LEGAL HISTORY and precedent.

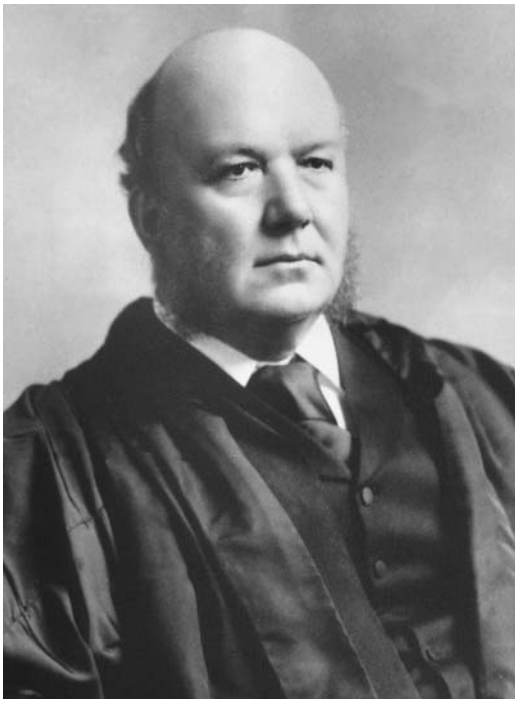

*Horace Gray.*
ARCHIVE PHOTOS, INC.

Gray was born in the prosperous Beacon Hill neighborhood of Boston on March 24, 1828. His grandfather, WILLIAM GRAY, was a prominent merchant and shipowner, and his father, Horace Gray, was a successful manufacturer. His uncle, Francis Calley Gray, gained fame for discovering the original Liberties of the Massachusetts Colony in New England, the first constitution of the colony, which was drawn up by NATHANIEL WARD and adopted in 1641.

Gray attended Harvard College, in Cambridge, Massachusetts. In 1848 he entered Harvard Law School; he received his law degree one year later. After two years of working in various law offices, Gray opened his own firm in Boston, where he practiced law until 1864. In addition to practicing law, Gray worked as reporter and editor of the *Massachusetts Reports,* a collection of court opinions and commentary on Massachusetts case law.

The position of reporter of the *Massachusetts Reports* traditionally led to a seat on the state supreme court, and that tradition played out for Gray. In 1864 he was named to the Supreme Judicial Court of Massachusetts by Governor John A. Andrew. At age thirty-six, Gray was the youngest appointee in the history of that court.

As a justice, Gray was formal and stern. He required conservative dress in his court, and he lectured lawyers on their conduct. He demanded that attorneys arrive prepared, and he asked frequent questions from the bench. Gray's opinions were thorough and well documented. In 1873 Gray assumed the position of chief justice of the Supreme Judicial Court of Massachusetts.

In 1881 President JAMES GARFIELD was looking for a nominee for the U.S. Supreme Court, to replace the ailing justice NATHAN CLIFFORD. Garfield was considering Gray and asked for copies of his opinions. Considering such self-promotion unseemly, Gray refused to send anything to Garfield. After Garfield's death in September 1881, Senator George F. Hoar recommended Gray to the new president, CHESTER A. ARTHUR, and Arthur nominated Gray as Clifford's replacement.

Gray authored many opinions on important issues of the day, including cases involving industry, immigration, and state-federal relations. One lasting opinion written by Gray involved the power of the federal government to issue paper money. In *Juilliard v. Greenman,* 110 U.S. 421, 4 S. Ct. 122, 28 L. Ed. 204 (1884), the High Court established that the United States, through Congress, had the power to issue paper money against its own credit during times of peace as well as times of war.

The *Juilliard* opinion revealed Gray's strong nationalist sentiment, which became a hallmark of Gray's service on the Court. Gray tended to promote the rights of the United States in its own endeavors and in its relations with other countries. He led the Court in upholding a federal law limiting the immigration of Chinese into the United States (*Nishimura Ekiu v. United States,* 142 U.S. 651, 12 S. Ct. 336, 35 L. Ed. 1146 [1892]). In *Fong Yue Ting v. United States,* 149 U.S. 698, 13 S. Ct. 1016, 37 L. Ed. 905 (1893), Gray dismissed the notion that resident ALIENS could claim the protection of the U.S. Constitution. Gray also wrote the opinion in *Hilton v. Guyot,* 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1895), in which the Court held that the United States did not have to recognize judgments obtained in France, because France did not recognize judgments obtained in the United States.

Gray never attained the legendary status enjoyed by some Supreme Court justices, perhaps because of his unwillingness to stray beyond the bounds of precedent and author far reaching opinions that change the course of the law.

Gray died September 15, 1902, in Nahant, Massachusetts.

"[I]T BEHOOVES THE COURT TO BE CAREFUL THAT IT DOES NOT UNDERTAKE TO PASS UPON POLITICAL QUESTIONS, THE FINAL DECISION OF WHICH HAS BEEN COMMITTED BY THE CONSTITUTION TO THE OTHER DEPARTMENTS OF THE GOVERNMENT."
—HORACE GRAY

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## ♦ GRAY, JOHN CHIPMAN

John Chipman Gray served as a member of the Harvard Law School faculty for more than four decades. He was an expert on the law of real property, and his works are still cited as persuasive authority today.

John Chipman Gray was born July 14, 1839, in Brighton, Massachusetts, son of Horace and Sarah Russell (Gardner) Gray. He was the grand-

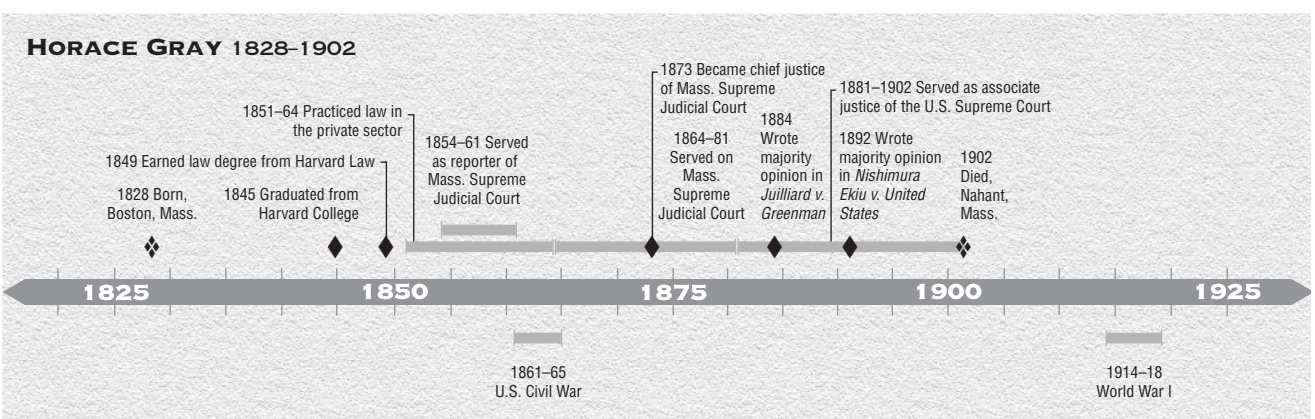

son of "Billy" Gray, shipowner and one-time lieutenant governor of the Commonwealth of Boston. Gray's older half-brother, HORACE GRAY, later became a Supreme Court justice.

When he was still a young boy, Gray's father experienced a financial setback. This did not, however, discourage Gray from seeking higher education. After attending Boston Latin School, he went to Harvard University, earning a bachelor of arts degree in 1859 and a bachelor of laws degree in 1861. Gray also received honorary doctor of laws degrees from Yale University in 1894 and Harvard in 1895.

After his ADMISSION TO THE BAR in 1862, Gray served a tour of military duty in the Civil War before establishing his legal practice in Boston in 1865. The law firm, Ropes & Gray, still exists and is a major national law firm, with offices in Boston, New York, Washington, D.C., and San Francisco. Four years after establishing the firm, Gray became a member of the faculty of the Harvard Law School. He served as a lecturer from 1869 to 1871 before becoming a law professor in 1875. He was named the Royall professor of law in 1883, a position he held until 1913. This chair is named after Isaac Royall, who funded the first chair in law at Harvard Law School, and it remains one of the most prestigious chairs of any law school in the United States.

Chipman's specialty was real PROPERTY LAW, and his works about future interests are still largely regarded as classic works. Among his more notable publications about future interests are *Restraints on the Alienation of Property* (1883) and *The Rule against Perpetuities* (1886), reprints of which are still available today. His most noteworthy publication, however, is *The Nature and Sources of the Law* (1909), which is widely considered one of the more significant works on the nature of COMMON LAW.

On February 25, 1915, two years after retiring from teaching, Gray died in Boston, Massachusetts.

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## GRAY PANTHERS

Founded in 1970, the Gray Panthers is a national organization dedicated to social justice for old and young people alike. However, the Gray Panthers is best known for work on behalf of older persons. It has lobbied and litigated against AGE DISCRIMINATION in the areas of retirement, housing, and HEALTH CARE. The group's broad liberal agenda reflects the politics of its founder, Margaret E. "Maggie" Kuhn (1905–1995), who built the fledgling organization into a powerful force in local and national politics. Kuhn's success as an organizer, leader, spokeswoman, and author left the Gray Panthers, at the time of her death in 1995, with 70,000 members in 85 chapters nationwide. Although the organization is strongest at the grassroots level, its relatively small seven-member national staff has effected significant changes in federal law.

The protest era of the VIETNAM WAR gave rise to the Gray Panthers. In 1970 the 65-year-old Kuhn was forced by the federal mandatory retirement law to end her 22-year career in the United Presbyterian Church. However, she did not want to retire. In response Kuhn helped form a loose-knit organization called Consultation of Older and Younger Adults for Social Change. Its primary goals were changing the mandatory retirement age and uniting people of all ages to seek an end to the Vietnam War. As the group gained recognition, the press coined the term "gray panthers," comparing it to the

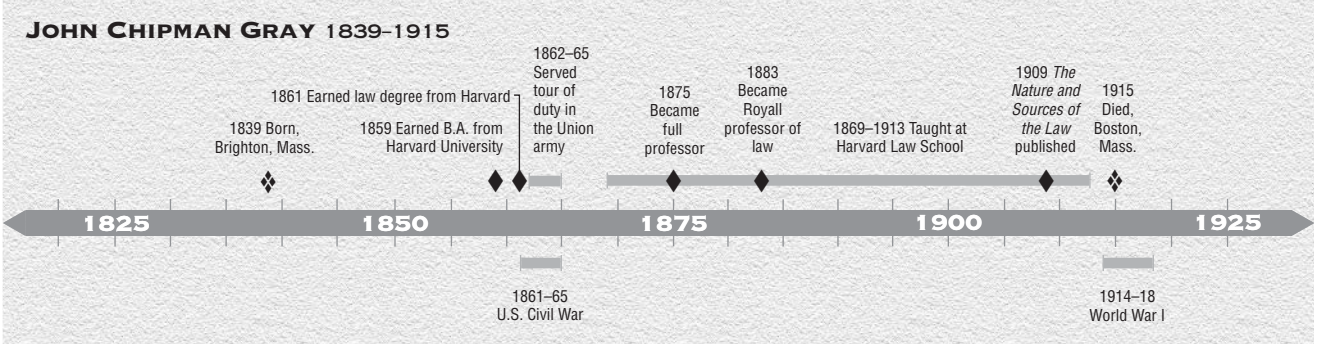

radical black activist group, the BLACK PANTHERS. Kuhn adopted the name in 1972.

The Gray Panthers developed a broad political agenda. Among its goals were affordable housing, the creation of a national health system, nursing home reform, and CONSUMER PROTECTION.

LOBBYING efforts soon established the group's reputation on Capitol Hill. In 1978 it helped secure passage of an amendment to the Age Discrimination in Employment Act of 1967, which raised the mandated retirement age from 65 to 70. In 1981, the Gray Panthers added a representative to the United Nations' Economic and Social Council.

Throughout the 1980s and early 1990s, the Gray Panthers backed efforts ranging from the passage of gay CIVIL RIGHTS legislation to the legalization of the medical use of marijuana by those who are ill. They also lobbied strongly during President BILL CLINTON's first term for the creation of a NATIONAL HEALTH CARE system.

The organization was also active in the courts. It joined numerous cases by filing FRIEND-OF-THE-COURT briefs and brought its own suits. Perhaps its most significant victory came in 1980, in *Gray Panthers v. Schweiker,* 652 F.2d 146 (D.C. Cir. 1980), a CLASS ACTION suit brought to change MEDICARE regulations. At issue was how the government informed older patients when Medicare reimbursements were denied: under federal law, benefits of less than $100 could be denied for reimbursement with only a form letter, which was thick with jargon (42 U.S.C.A. § 1395 et seq.). In 1979, the Gray Panthers contended that this notification scheme was an unconstitutional violation of their DUE PROCESS rights. The defendant, the Department of Health, Education, and Welfare, maintained that it had a congressional mandate to set restraints on the program; any further form of notification would be too expensive, it argued. After losing the initial court case, the Gray Panthers successfully argued on appeal for improved written communication and an oral hearing at which they could explain their side of the dispute.

In the late 1990s, the Gray Panthers launched a national campaign that targeted jobs and workers' rights and universal health care. In 2001 the organization launched "Stop Patient Abuse Now" (SPAN) a coalition of more than 125 national, state, and local organizations representing seniors, patients, and others. The purpose of SPAN is to make prescription drugs affordable to all consumers. The organization continues to advocate for more environmental and safety regulations and for the reduction of military costs. The Gray Panthers has also been in the forefront of those organizations urging corporate reform after the scandals involving CORPORATE FRAUD by such companies as Enron and WorldCom.

The Gray Panthers continues to hold monthly meetings in state chapters and to publish its bimonthly newsletter, *Network.*

*A member of the Gray Panthers takes part in a 1984 Boston rally calling for the elimination of mandatory retirement ages in public and private sector jobs. The Gray Panthers support a variety of issues including affordable housing and creation of a national health system.*

AP/WIDE WORLD PHOTOS

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## ♦ GRAY, WILLIAM HERBERT, III

From 1979 to 1991 William H. Gray served as U.S. representative from Pennsylvania's Second Congressional District. Gray, a liberal Democrat, chaired the powerful House Budget Committee during his last six years in Congress. In those years, he fought against the administrations of Republican presidents RONALD REAGAN and GEORGE H.W. BUSH to preserve Democratic spending priorities. An African American, Gray also became a leader on U.S. policy toward

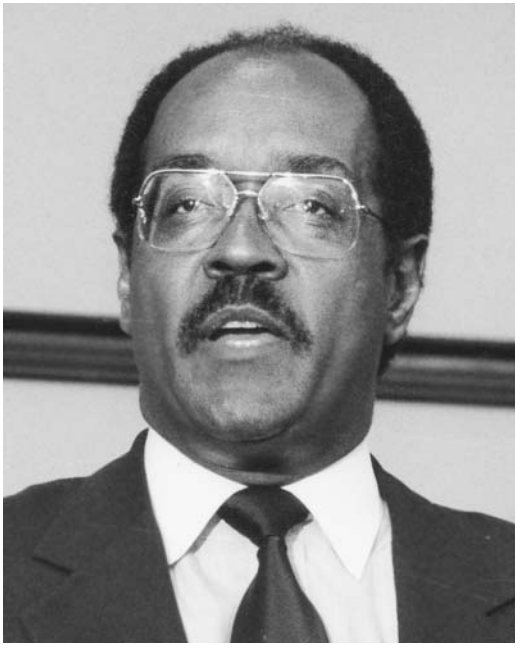

*William H. Gray III.*
AP/WIDE WORLD PHOTOS

Africa. He helped create and pass laws that imposed harsh sanctions on South Africa for its policies of apartheid.

William Herbert Gray III was born August 20, 1941, in Baton Rouge, Louisiana. His father was a clergyman and an educator who served as president of Florida Normal and Industrial College in St. Augustine and of Florida A&M College in Tallahassee. His mother, Hazel Yates Gray, worked as a high school teacher. In 1949, the family moved to Philadelphia, where Gray's father became pastor of Bright Hope Baptist Church. Gray's grandfather had served in the same post since 1925, and Gray would follow his grandfather and father to the Bright Hope pulpit in 1972.

Gray attended Franklin and Marshall College, in Lancaster, Pennsylvania, where he served an internship in the office of Representative Robert N. C. Nix Jr. (D-Pa.). Although Gray felt stimulated by his brief experience in politics, he followed his father and grandfather into the ministry after his graduation in 1963. In 1964, he became assistant pastor of the Union Baptist Church, in Montclair, New Jersey. He went on to earn a master of divinity degree from Drew Theological School, in Madison, New Jersey, in 1966, and a master of theology degree from Princeton Theological Seminary in 1970.

While working as a minister, Gray became active in community projects, winning particularly high praise for his efforts to improve housing for low-income African Americans. In 1970, he brought suit against a landlord in Montclair who had refused to rent to him because of his race. The New Jersey Superior Court awarded Gray financial damages in a decision that set a national precedent (*Gray v. Serruto Builders, Inc.,* 110 N.J. Super. 297, 265 A.2d 404 [1970]). Gray also served as a lecturer at several New Jersey colleges and as an assistant professor at Saint Peter's College, in Jersey City, New Jersey.

After his father's death in 1972, Gray became pastor of Bright Hope Baptist Church and continued his involvement in community politics. Convinced that he could accomplish more in a position of greater power, Gray decided to challenge his former employer, Nix, in 1976 for the Democratic nomination to represent Pennsylvania's Second Congressional District. He lost the primary by only 339 votes. In 1978, he challenged Nix in the primary again and won, and then earned a decisive victory over his Republican opponent in the general election.

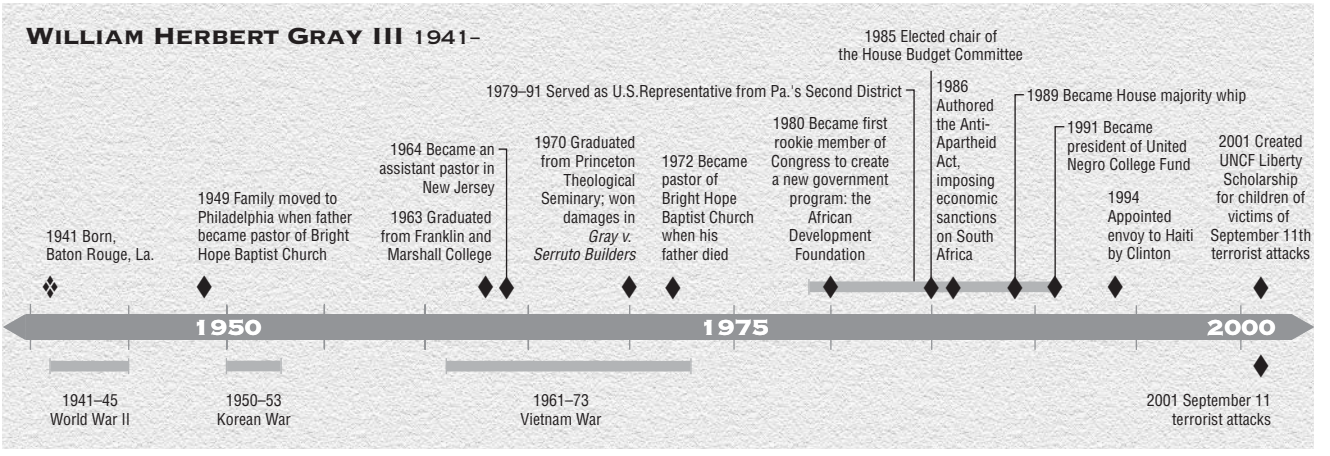

In the House, Gray became a member of the Foreign Affairs, District of Columbia, and Budget Committees and was an active member of the Congressional Black Caucus. On the Budget Committee, he brokered crucial budget compromises between the House and Senate and developed a keen understanding of the intricacies of the federal government's money matters. An unapologetic liberal, he fought doggedly against the conservative policies of President Reagan.

On January 4, 1985, Gray was elected chairman of the powerful Budget Committee. During budget negotiations that year, he salvaged many programs that the Reagan administration and the Republican-controlled Congress sought to cancel, including Urban Development Action grants and the Appalachian Development Program. He also froze the defense budget at the previous year's level in order to reduce the budget deficit. Gray opposed the Gramm-Rudman-Hollings Act, also known as the Balanced Budget and Emergency Deficit Control Act, 2 U.S.C.A. §§ 901 et seq., however, calling it a "flawed doomsday machine" that would destroy worthwhile programs. The law mandated automatic budget cuts unless specific deficit-reduction targets were met. Gray argued that the act led to budget padding and discouraged efficient management.

In 1987, Gray whittled the budget deficit down to $137 billion, $7 billion under the Gramm-Rudman-Hollings ceiling. He accomplished this through military spending reductions and tax increases. In negotiations for the budget of fiscal year 1989—the year in which the FEDERAL BUDGET first exceeded $1 trillion—Gray successfully lobbied for more tax increases to meet the Gramm-Rudman-Hollings targets.

Gray worked throughout his congressional career to increase aid to black Africa. In 1980, he became the first rookie member of Congress to create a new government program, when he sponsored the bill that established the African Development Foundation (22 U.S.C.A. §§ 290h-1). The foundation sent aid directly to African villages. In 1984, he sponsored legislation that sent emergency food aid to Ethiopia. Gray also exerted a great deal of influence over African affairs, authoring and promoting passage of the Anti-Apartheid Act (22 U.S.C.A. §§ 5001 et seq.), which imposed economic sanctions on South Africa for its policies of racial SEGREGATION. The act passed in 1986 over President Reagan's VETO. In addition, Gray worked to foster better relations between African and Jewish Americans.

As he rose in the House, Gray became increasingly influential in the DEMOCRATIC PARTY. In 1988, he chaired the panel that drafted the party platform at the Democratic National Convention. The following year, he was named to the powerful position of House majority whip.

Gray encountered difficulties when unconfirmed rumors of financial wrongdoing surfaced in 1988. He left Congress in 1991, surprising many who had predicted that he would continue to rise in the House. The same year, Gray became president and chief executive officer of the United Negro College Fund (UNCF), the nation's oldest higher education assistance organization for African Americans. More than half of the $1.8 billion raised throughout the organization's history (which spans more than 50 years) has taken place during Gray's tenure. He has been instrumental in establishing a number of new research and funding programs, and he has ensured that administrative costs remain below 15 percent of the fund's total revenues.

"THE DIFFERENCE BETWEEN MYSELF AND OLD-LINE FOLKS IS THAT I UNDERSTAND THAT THE POLITICAL PROCESS IS PUTTING TOGETHER COALITIONS."
—WILLIAM H. GRAY

In addition to his duties at UNCF, Gray has continued to be active in public affairs. In 1994, President BILL CLINTON appointed him envoy to Haiti. Gray advocated using economic sanctions against that country's military dictatorship in order to restore President Jean-Bertrand Aristide to power.

Throughout his career, Gray has received numerous awards, including the MARTIN LUTHER KING JR. Award for Public Service in 1985. And, in its December 1999 issue, *Ebony* magazine named him one of the 100 Most Important Blacks in the World in the 20th Century. Gray also has received honorary degrees from over 60 colleges. Despite his heavy work schedule over the years, he has continued to preach sermons at Bright Hope Baptist Church in Philadelphia at least two Sundays per month.

Gray married Andrea Dash in 1971. The couple has three sons.

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## GREAT SOCIETY

In May 1964, President LYNDON B. JOHNSON gave a speech at the University of Michigan in Ann Arbor in which he outlined his domestic agenda for the United States. He applauded the nation's wealth and abundance but admonished the audience that "the challenge of the next half century is whether we have the wisdom to use that wealth to enrich and elevate our national life, and to advance the quality of American civilization." Johnson's agenda was based on his vision of what he called "the Great Society," the name by which the agenda became popularly known.

Part of the Great Society agenda was based on initiatives proposed by Johnson's predecessor, JOHN F. KENNEDY, but Johnson's vision was comprehensive and far-reaching. Johnson wanted to use the resources of the federal government to combat poverty, strengthen CIVIL RIGHTS, improve public education, revamp urban communities, and protect the country's natural resources. In short, Johnson wanted to ensure a better life for all Americans. He had already begun his push toward this goal with his "War on Poverty," a set of initiatives announced in 1964 and marked by the passage of the Economic Opportunity Act of 1964. This act authorized a number of programs including Head Start; work-study programs for college students; Volunteers in Service to America (VISTA), a domestic version of the Peace Corps; and various adult job-training programs. Johnson's Great Society proposal was ambitious, even by his standards—as a seasoned politician, he had a well-earned reputation for getting things done. Not only that, he had to win the 1964 presidential election before he could enact his ideas.

Johnson sought affordable HEALTH CARE for all, stronger civil rights legislation, more benefits for the poor and the elderly, increased aid to education, economic development, urban renewal, crime prevention, and stronger conservation efforts. To many, Johnson's initiative seemed to be the most sweeping change in federal policy since FRANKLIN D. ROOSEVELT'S NEW DEAL in the 1930s.

The Great Society theme was the foundation of his campaign in the 1964 presidential election. Johnson's Republican opponent, BARRY GOLDWATER, campaigned on a promise of reducing the size and scope of the federal government. In the end, Johnson's campaign for the Great Society was convincing enough that he carried 46 states and won 61 percent of the popular vote in November.

Johnson outlined his Great Society programs during his State of the Union address in January 1965, and over the next several months progress followed quickly. MEDICARE was introduced to provide healthcare funding to SENIOR CITIZENS. The Elementary and Secondary Education Act was signed into law, guaranteeing increased funding to disadvantaged students. The HOUSING AND URBAN DEVELOPMENT (HUD) program was created to bring affordable housing to the inner cities. The Highway Beautification Act was signed, providing funding to clear the nation's highways of blight. Along with that went legislation to regulate air and water quality. The CIVIL RIGHTS ACT of 1965 prohibited discrimination on the basis of race, color, and gender.

Johnson chose John Gardner to head the Department of Health, Education, and Welfare (HEW). Gardner, who was sworn in on July 27, 1965, was a psychologist, an authority on education, and had previously been head of the Carnegie Corporation. Widely respected by members of both parties (he was a Republican) Gardner helped carry out Johnson's goals and agenda; in some circles he was known as the "engineer of the Great Society."

Johnson's Great Society made a genuine difference in the lives of millions of Americans, and many of its initiatives are still integral to U.S. society in the twenty-first century. But the programs were expensive, costing billions of dollars, and many of Johnson's opponents said that the programs only added new layers of bureaucracy to an already oversized government. A more pressing issue, however, was the VIETNAM WAR. What was supposed to have been a short-term exercise had now gone on for several years with financial and human cost. The war was highly unpopular with a large portion of American society, and the energy needed to keep the war effort going drained resources from the programs of the Great Society. The departure of Gardner from HEW was a blow to Johnson, especially since after Gardner left HEW he spoke out publicly against the war.

The 1960s also saw an upsurge in racial unrest. Despite the sweeping civil rights initiatives Johnson had launched, many poor blacks felt it was not enough. Racial unrest in major cities led to several riots, and it was clear that

there was a great deal of pent-up anger and frustration that could not simply be legislated away.

Faced with mounting criticism because of Vietnam, Johnson chose not to run for reelection in 1968. The shadow of Vietnam hung over him until his death five years after, and it was only later that the American people were able to appreciate fully the scope and importance of Johnson's role in shaping the Great Society.

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CROSS-REFERENCES

Civil Rights; Civil Rights Movement.

## GREEN CARD

*The popular name for the Alien Registration Receipt Card issued to all immigrants entering the United States on a non-temporary visa who have registered with and been fingerprinted by the Immigration and Naturalization Service. The name* green card *comes from the distinctive coloration of the card.*

CROSS-REFERENCES

Aliens.

## GREEN PARTY

The Green Party blossomed as an outgrowth of the environmental and conservation movement of the 1970s and 1980s. In 1970, Charles Reich published *The Greening of America,* a popular extended essay that effectively inserted environmentalism into politics. Reich, along with anarchist Murray Bookchin, helped inspire a worldwide environmental movement. Throughout the 1970s and 1980s, environmental activists, calling themselves Greens, began to work within the political system to advance environmental causes around the globe.

The Green party first achieved electoral success in Germany in the early 1980s. German Green party candidates were elected to public office on platforms that stressed four basic values: ecology, social justice, grassroots democracy, and nonviolence. In the mid-1990s, the Green party was established in over 50 countries, and Green party politicians held seats in approximately nine European parliaments.

In the United States, Greens originally were reluctant to move into electoral politics. Throughout the 1970s and most of the 1980s, they teamed with military and NUCLEAR POWER protesters to promote their agendas from outside the formal political system. In 1984, the Greens began to discuss the organization of a political party and, in 1985, the organization fielded its first candidates for elective office in North Carolina and Connecticut. The U.S. Greens became known as the Association of State Green Parties.

In 1996, in response to the need for a national Green presence, the organization's name changed to the Green party of the United States. The U.S. Green party also expanded the European platform to forge its own identity. According to its Website, the party offers a proactive approach to government based on ten key values: ecological wisdom; grassroots democracy; social justice and equal opportunity; nonviolence; decentralization; small-scale, community-based economics and economic justice; feminism and gender EQUITY; respect for diversity; personal and global responsibility; and future focus and sustainability. Each state and local chapter of the party adapts these goals to fit its needs.

The Green party of the United States also extended its reach in the 1990s and into the 2000s. In 1996, the party fielded candidates in 17 states and in the District of Columbia. It increased its national profile the same year by nominating RALPH NADER as its candidate for president. Nader accepted the nomination, but stipulated that he would not become a member of the Green party and that he did not feel

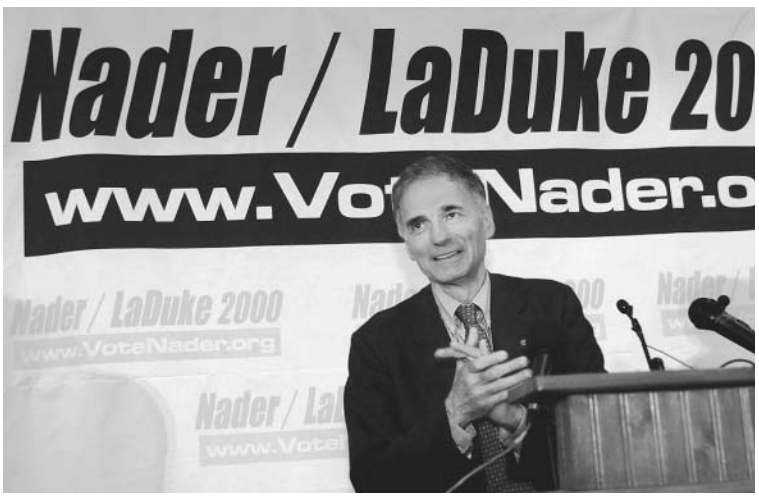


*Activist and author Ralph Nader ran for president in 1996 and 2000 as the Green Party candidate. In both elections his running mate was Winona LaDuke.*

AP/WIDE WORLD PHOTOS

obliged to follow faithfully its political platform. Nader ran a no-frills campaign, eschewing advertising and usually traveling alone to speak at various locales. He accepted no taxpayer money and spent approximately $5,000 on the campaign. With political activist Winona LaDuke as his running mate, Nader appeared on the ballot in 21 states and in the District of Columbia. The ticket also received write-in votes in all but five states. Nader and LaDuke lost to the Democratic incumbents, President BILL CLINTON and Vice President AL GORE.

Nader and LaDuke ran again in the 2000 presidential election, again on the Green party platform. Nader raised more than $8 million for the campaign, about $30 million less than REFORM PARTY candidate PAT BUCHANAN. Nader received the third highest number of votes with 2,882,955, representing 2.74 percent of the total vote. By comparison, Buchanan received a total of 448,895.

On the local level, the Green party has realized electoral success. For example, in 1996, Arcata, California, became the first town in the United States to be controlled by the Green party when Green party candidates won three of the five seats on the city council. And during the 2000 elections, the Green party entered 284 candidates in 35 states. Forty-eight of these candidates won their elections, mostly for local offices. The number grew to 552 candidates in 40 states by 2002. Seventy-four of these candidates successfully ran for office.

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CROSS-REFERENCES

Environmental Law; Independent Parties.

## ♦ GREENBERG, JACK

Jack Greenberg is a CIVIL RIGHTS attorney and professor of law who was on the front lines of the struggle to eliminate RACIAL DISCRIMINATION in U.S. society. He served for 35 years as an assistant counsel and as director-counsel of the NAACP LEGAL DEFENSE AND EDUCATIONAL FUND (LDF).

Greenberg was born December 22, 1924, in New York City. His parents, Bertha Rosenberg and Max Greenberg, were immigrants from Eastern Europe who stressed the importance of education for their children. Although they were not involved in Civil Rights or politics, they inculcated in their children a deep concern for disadvantaged people. This early awareness of the plight of society's less fortunate ignited Greenberg's desire to take up the civil rights cause.

Greenberg grew up in Brooklyn and the Bronx, and was educated at public elementary and high schools before receiving his bachelor of arts from Columbia University in 1945. He then entered the U.S. Navy and served in the Pacific as a deck officer, participating in the invasion of Iwo Jima. After the war ended, he enrolled at Columbia Law School and earned his bachelor of laws in 1948. While in law school Greenberg enrolled in a seminar called Legal Survey, which set the direction of his future career. The course offered students the opportunity to work for civil liberties and civil rights organizations, doing legal research and writing memorandums, complaints, and briefs. While taking the course, Greenberg became acquainted with THURGOOD MARSHALL, who at the time was the fund's director. When an LDF staff attorney resigned her position, Greenberg was recommended as a replacement. His career in civil rights, as well as his lasting friendship with Marshall, was launched.

Greenberg began his work at the LDF with only a vague idea about the types of cases he would handle. He was quickly plunged into the ugly reality of racial discrimination. His first cases required him to travel regularly to the South to defend African Americans against various racially motivated charges. On those trips, he experienced racial discrimination firsthand. The African American lawyers with whom he traveled were not allowed to stay at hotels for whites or eat at restaurants for whites. Greenberg, who is white, saw for himself the deplorable accommodations African Americans were forced to accept because of legal SEGREGATION.

Greenberg soon realized that the LDF had a definite plan underlying its apparently random selection of disparate cases. The fund's ambitious goal was nothing less than the complete repudiation of PLESSY V. FERGUSON, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, the infamous 1896 Supreme Court case that established the SEPARATE-BUT-EQUAL doctrine, which legitimized segregation at all levels of society.

During the 1930s and 1940s, NAACP and LDF lawyers concentrated on desegregating higher education. Greenberg was involved in important cases that allowed the INTEGRATION of professional schools in Maryland, Missouri, Oklahoma, Texas, Louisiana, North and South Carolina, and many other states. The LDF then set its sights on state-supported undergraduate schools. The first big case that Greenberg handled on his own involved the integration of the University of Delaware. The LDF's assault on segregated education culminated with the landmark 1954 Supreme Court decision in BROWN V. BOARD OF EDUCATION, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, in which Greenberg was a major participant.

Greenberg and the LDF argued on behalf of African Americans in countless cases, with Greenberg appearing before the U.S. Supreme Court more than 40 times. The fund launched a full-scale effort during the 1960s and 1970s to abolish the death penalty because of its disproportionate effect on blacks. The LDF was ultimately successful, but the victory was short-lived. By the 1980s, most states that had used CAPITAL PUNISHMENT before the Supreme Court outlawed it had reinstated it under new terms considered constitutionally acceptable. During the 1960s and 1970s, Greenberg also won important cases abolishing discrimination in housing, HEALTH CARE, employment, and public accommodations.

In 1961, when Marshall was appointed to the federal judiciary, Greenberg was named director-counsel of the LDF, a position he held until he resigned in 1984 to become a professor at Columbia Law School. During his last ten years at the LDF, he concentrated the group's energies on preventing the reversal of laws and court rulings that had finally outlawed discrimination in all forms. In 1989, Greenberg was named dean of Columbia College, a post he held until 1993, when he returned to the faculty of the law school.

Greenberg's position as one of a small number of white lawyers involved in the LDF's struggles against racial discrimination was not a point of contention until 1982, when he was asked to co-teach a course in race and legal issues at Harvard Law School. The Black Law Students Association picketed the opening of the course, protesting the use of a white lawyer to present it. Greenberg led the course as planned, although some students boycotted. He encountered similar hostility when he was slated to teach a similar course at Stanford the following year, and so he declined the Stanford position. The protests were apparently a reflection of the feelings of younger black students and lawyers that whites had no credibility to speak about the African American struggle for equality. Greenberg was unfazed by the objections.

Greenberg is a man of many and varied interests. He has written several books, including *Race Relations and American Law* (1959), *Judicial Process and Social Change* (1977), and *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (1994). He also has coauthored a cookbook, *Dean Cuisine, or the Liberated Man's Guide to Fine Cooking* (1990), and studies Mandarin Chinese. He was married from 1950 to 1969 to Sema Ann Tanzer, and they have four children. He lives in Manhattan with Deborah M. Cole, whom he married in 1970. They have two children.

Greenberg has received numerous awards throughout his career, including the Thurgood Marshall Award from the AMERICAN BAR ASSOCIATION in 1996. In recognition of his 50 years of defending civil and HUMAN RIGHTS, President BILL CLINTON, in January 2001, awarded

"I THINK THAT THE LAW HAS BEEN AN IMMENSE FORCE FOR SOCIAL CHANGE WITH REGARD TO RACE."
—JACK GREENBERG

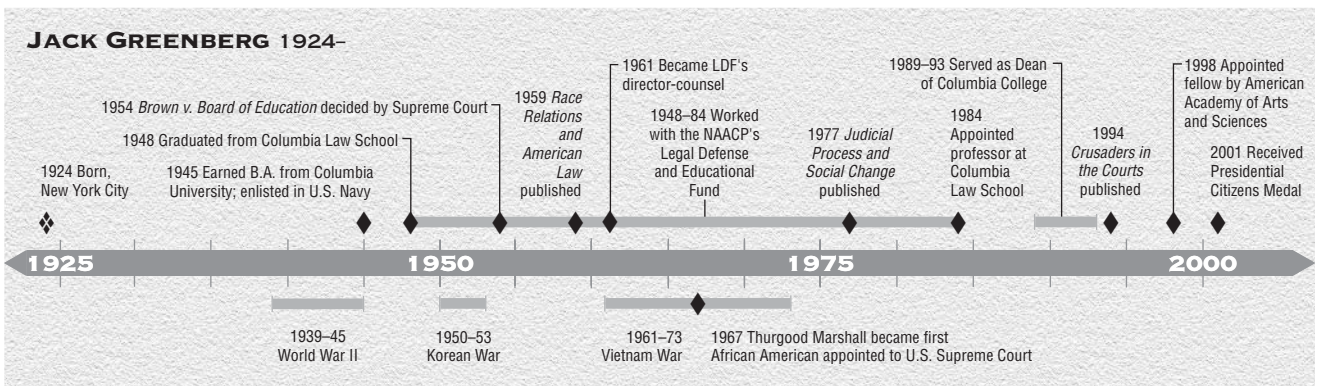

Greenberg the Presidential Citizens Medal. This award honors those individuals who have performed "exemplary deeds of service" to the United States in the areas of medicine and health, education, religion, disability advocacy, government service, the environment, civil rights, and human rights. Greenberg has served as a visiting professor at more than ten American and foreign universities and has earned a number of honorary law degrees.

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CROSS-REFERENCES

NAACP; School Desegregation.

## GREENMAIL

*A corporation's attempt to stop a takeover bid by paying a price above market value for stock held by the aggressor.*

Greenmail is a practice in corporate MERGERS AND ACQUISITIONS. Like blackmail, the concept after which it is named, greenmail is money paid to an aggressor to stop an act of aggression. In the case of greenmail, the aggressor is an investor attempting to take over a corporation by buying up a majority of its stock, and the money is paid to stop the takeover. The corporation under attack pays an inflated price to buy stock from the aggressor, known popularly as a corporate raider. After the greenmail payment, the takeover attempt is halted. The raider is richer; the corporation is poorer but retains control. During a great wave of corporate mergers in the 1980s, the practice of paying greenmail became controversial. Critics viewed it as harmful to U.S. business interests. Portraying the transaction as little more than a bribe, they argued that some corporate raiders began takeover bids simply to earn profits through greenmail. Corporate shareholders also protested the practice. By the mid-1990s, state legislatures had taken the lead in opposing greenmail through legislation.

The increase in corporate mergers in the 1980s made the hostile corporate takeover a familiar event. Before the decade's multi-billion-dollar takeovers, corporate mergers usually involved a mutual agreement. In contrast, hostile takeovers ignore the target corporation's management. One form of hostile takeover involves stock. Whoever owns the most stock controls the corporation. Instead of entering negotiations with management, corporate raiders go to the corporation's stockholders with offers to buy their stock. Not only the means but also the goals of these acquisitions differ from those of earlier acquisitions. Prior to the 1980s, mergers generally occurred when larger interests bought up smaller competitors in similar industries, with an eye toward dominating a particular market. In hostile takeovers, corporate raiders often intend to break up and sell a corporation after the takeover is complete. Their interest commonly lies in earning enormous short-term profits from selling a company's assets, motivating corporations to try to protect themselves against takeovers.

Greenmail is one of an array of strategies, ranging from changing corporate bylaws to acquiring debt that makes the corporation a less attractive target, used to deter raiders. It is an expensive alternative, as was illustrated when investor Saul P. Steinberg attempted to take over the Disney Corporation in 1984. Steinberg was known for his concerted efforts in the takeover field, having previously targeted Chemical Bank and Quaker State. In March 1984, his purchase of 6.3 percent of Disney's stock triggered concern at the corporation that a takeover was in progress. Disney management quickly announced an approximately $390 million acquisition of its own that would make the company less attractive. After this maneuver failed, Disney's directors ultimately bought Steinberg's stock to stop the takeover. Steinberg earned a profit of about $60 million.

The Disney case illustrates a major criticism of greenmail: other stockholders blame corporate directors for showing undue favoritism to corporate raiders, who are paid exorbitant sums for stock whereas the stockholders are not. This criticism formed the basis of a lawsuit that produced one of the few court decisions condemning greenmail outright. In 1984, Disney stockholders sued the corporation's directors as well as Steinberg and his fellow investors, seeking to recover the amount paid as greenmail. They won an INJUNCTION from the Superior Court of Los Angeles County, which placed Steinberg's profits from the sale in a trust. The verdict was upheld on appeal (*Heckmann v. Ahmanson,* 168 Cal. App. 3d 119, 214 Cal. Rptr. 177 [Cal. Ct. App. 1985]). In ordering the profits put in a trust, the court sought "to prevent

unjust enrichment" that would otherwise "reward [Steinberg] for his wrongdoing." In 1989, Steinberg settled with the plaintiffs for approximately $21.1 million.

Although greenmail's heyday was in the 1980s, it continued to be controversial in the 1990s. Criticism of greenmail grew out of a larger condemnation of the way in which corporate raiders had rewritten the rules of mergers and acquisitions in an avaricious, shortsighted manner. Some critics viewed this trend harshly. In his 1995 work on the subject, Professor David C. Bayne portrayed greenmail as a pact involving EMBEZZLEMENT by corporate directors and blackmail by corporate raiders. Bayne said greenmail is "nothing other than a recondite species of the broader genus Corporate Bribery, and as such is intrinsically illegitimate." States increasingly viewed greenmail in the same light. Most states had enacted antitakeover laws, and several had anti-greenmail provisions. The Ohio and Pennsylvania laws were among the toughest, requiring raiders to return greenmail profits to the target corporation (Ohio Rev. Code Ann. § 1707.043 [Anderson Supp. 1990]; 15 Pa. Cons. Stat. Ann. §§ 2571–2576 [Purdon Supp. 1991]). Some people doubt the constitutionality of these laws, and the issue of greenmail remains far from settled.

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## GREGG V. GEORGIA

Modern U.S. death penalty JURISPRUDENCE begins with the U.S. Supreme Court's decision in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed.2d 859 (1976). In that landmark case, the Court rejected the idea that CAPITAL PUNISHMENT is inherently CRUEL AND UNUSUAL PUNISHMENT under the EIGHTH AMENDMENT. In addition, it endorsed new state death penalty statutes that sought to address the criticisms that the Court had raised in FURMAN V. GEORGIA, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed.2d 346 (1972). These statutes split the criminal trial into a guilt phase and a penalty phase, gave jurors specific aggravating and mitigating factors to consider in deliberating the death penalty, and mandated appellate review with designated factors for the court to consider. Finally, the states removed capital punishment as a sentencing option for crimes other than murder. Since *Gregg*, the issues surrounding the death penalty have turned on procedural fairness rather than questions of societal values.

By the early 1970s, the death penalty had been removed from the statute books in many countries, including Austria, Denmark, Great Britain, Portugal, Switzerland, Brazil, and Venezuela. In the United States, criticism of the ARBITRARY administration of capital punishment and its application to crimes other than murder led to judicial challenges based on the Eighth Amendment's Cruel and Unusual Punishment proscription. The number of executions had dwindled, and public opinion polls suggested that the death penalty was no longer as popular. Therefore, opponents were optimistic when the U.S. Supreme Court struck down three death sentences in *Furman*. However, the Court's manner of deciding the case revealed a split in the way that the justices looked at the death penalty. *Furman*, which came on a 5–4 vote, was issued as a *per curiam* decision, which takes the form of a brief, unsigned opinion. Such a decision does not have as great a precedential value as a signed opinion, as it indicates that the court was deeply divided over the reasons that went into its ultimate decision either to affirm or reverse a decision. Each justice filed a separate opinion, with only Justices WILLIAM BRENNAN and THURGOOD MARSHALL declaring that the death penalty is intrinsically cruel and unusual punishment. Others on the Court who reversed the sentences indicated that capital punishment might be constitutional if the states administered it fairly and rationally so as to serve legitimate societal needs.

Georgia set out to address these concerns, and its legislature passed a comprehensive death-penalty-reform law. It established a bifurcated trial process, in which guilt or innocence is to be decided first. If the defendant were found guilty of a capital crime, the jury then entered a penalty phase. The state developed a list of 14 "aggravating circumstances," any one of which could justify the death penalty. The jury had to find

BEYOND A REASONABLE DOUBT that an aggravating circumstance applied. The defendant was also given the opportunity to present "mitigating circumstances" to the jury in hopes of overcoming the aggravating circumstances. These included the youth of the defendant, the defendant's cooperation with police, and the defendant's emotional state at the time of the crime. If the jury imposed the death penalty, the Georgia Supreme Court was mandated to review the decision. It was told to consider whether passion or prejudice influenced the sentence, whether the evidence of aggravating circumstances was sufficient, and whether the penalty was disproportional or excessive in comparison to similar cases and defendants.

The new law was applied at the trial of Troy Gregg for two counts each of armed ROBBERY and murder. Gregg was convicted, and during the penalty phase the prosecutor offered evidence of aggravating circumstances. The jury found beyond a reasonable doubt that Gregg had committed the murders during the commission of another capital crime and for the purpose of taking a victim's property. These two circumstances sustained the death-penalty verdict. On appeal, the Georgia Supreme Court upheld the sentence, finding that the verdict was fair, based on the three factors it was instructed to review. However, it sustained the death penalty on only the second aggravating circumstance. It threw out the armed-robbery circumstance because the death penalty had rarely been imposed for that crime. Gregg then appealed to the U.S. Supreme Court.

The U.S. Supreme Court upheld the decision on a 7–2 vote. Justice POTTER STEWART announced the judgment of the Court in an opinion joined by two other justices. Four justices agreed with the affirmance, but for different reasons. Stewart retraced the *Furman* decision and noted that only two justices had taken an absolutist position against the death penalty. The Court then declared that the death penalty was not inherently cruel and unusual punishment. The Eighth Amendment incorporated a "basic concept of dignity," which was consistent with the purposes of deterrence and of retribution. As long as it was proportional to the severity of the crime, the death penalty was not unconstitutional. Stewart also stated that legislatures do not have to prove that capital punishment deters crime; nor must they enact the least severe penalty possible. Finally, Stewart noted a telling change in U.S. public opinion, demonstrating that the public supported capital punishment. The rush of legislatures to modify their death penalty statutes did not take place in a vacuum.

Having disposed of the threshold issue, Stewart examined the Georgia statutory framework. He found the framework constitutional, as each element worked to prevent the arbitrary and disproportionate death sentences criticized in *Furman*. Gregg had argued that other elements undercut the statutory framework. These included prosecutorial discretion, plea-bargaining and executive clemency. Stewart rejected these arguments, noting that the Georgia law required the jury to consider aggravating and mitigating factors as applied to the individual defendant.

Justices Brennan and Marshall again dissented on absolutist grounds, arguing that the time had passed for the state to execute criminals.

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## ♦ GREGORY, THOMAS WATT

Thomas Watt Gregory served as attorney general of the United States under President WOODROW WILSON from 1914 to 1919. Because his term of office coincided with the entry of the United States into WORLD WAR I, Gregory's JUSTICE DEPARTMENT experienced tremendous growth. He presided over the creation of a war emergency division within the Department of Justice, and he watched the FEDERAL BUREAU OF INVESTIGATION (FBI) grow to five times its prewar size as he worked to enforce U.S. laws pertaining to ESPIONAGE, SEDITION, sabotage, trading with the enemy, and SELECTIVE SERVICE compliance —in addition to pursuing the general interests of the U.S. government.

It is fitting that Gregory's service to the United States came in a time of war. Born November 6, 1861, in Crawfordsville, Mississippi, he was, in many ways, a child of war. His father, Francis Robert Gregory, a physician and Confederate army captain, was killed during the early days of the Civil War. His mother, Mary Cornelia Watt Gregory, a delicate woman mourning the loss of her first child, was unable to cope with news of her husband's death. As she

drifted in and out of melancholy, the upbringing of her remaining child, Gregory, fell to her father, Major Thomas Watt, a Mississippi planter.

By all accounts, Gregory's grandfather was a stern taskmaster with a strong commitment to education. Gregory graduated from Southwestern Presbyterian University, in Clarksville, Tennessee, in 1883. Driven to please his grandfather, he had completed his course work in just two years. From 1883 to 1884, he studied law at the University of Virginia. In 1885, he received a bachelor of laws degree from the University of Texas. Later that year, he opened a law office in Austin, Texas.

In the early 1890s, Gregory began forming some important partnerships. On February 22, 1893, he married Julia Nalle, the daughter of Captain Joseph Nalle, an Austin native. They had two sons, Thomas Watt Gregory, Jr., and Joseph Nalle Gregory, and two daughters, Jane Gregory and Cornelia Gregory. He also formed a law partnership with Robert L. Batts. Together, they successfully represented the state of Texas against Waters-Pierce Oil Company, a subsidiary of Standard Oil of New York, charged with violating Texas ANTITRUST LAWS. The company was found guilty and enjoined from doing further business in Texas. The case was appealed, and was ultimately affirmed by the U.S. Supreme Court (*Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86, 29 S. Ct. 220, 53 L. Ed. 417 [1909]). The company paid a heavy fine and ceased to operate in Texas.

While partnered with Batts, Gregory also served as assistant city attorney of Austin, from 1891 to 1894. As his reputation grew, he was offered a number of political appointments, including the assistant attorney generalship of Texas in 1892 and a state judgeship in 1894.

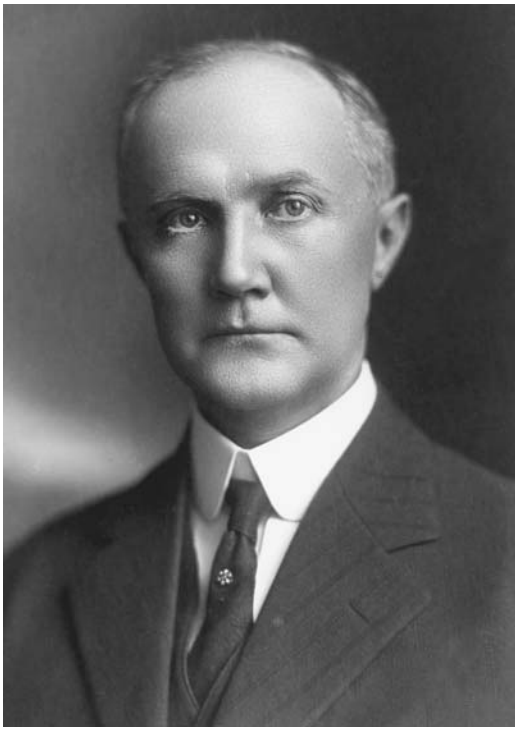

*Thomas W. Gregory.*
LIBRARY OF CONGRESS

Wanting to serve on a national level, he declined them all.

To further his personal and professional goals, Gregory served as a Texas delegate to the Democratic national conventions of 1904 and 1912. In 1910, he began working in DEMOCRATIC PARTY circles to secure a presidential nomination for Wilson. He actively promoted a Wilson candidacy throughout his state—and because of Gregory's considerable influence, Texas went on to elect a delegation that would hold fast for Wilson at the Baltimore convention. In 1913, Gregory was rewarded for his efforts. President Wilson's attorney general,

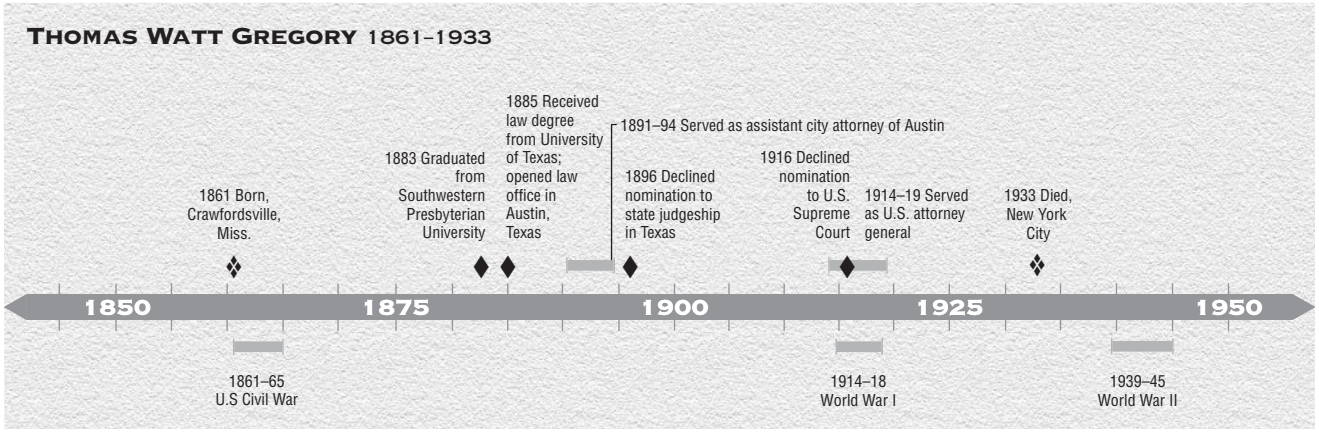

JAMES C. MCREYNOLDS, made Gregory a special assistant and asked him to spearhead an action against the New York, New Haven, and Hartford Railroad for monopolizing transportation in New England. Using his experience from the *Waters-Pierce* case in Texas, Gregory negotiated a settlement. As a result of his work, the railroad gave up control of several rail lines, trolley lines, and coastal shipping interests.

Gregory was named attorney general of the United States by President Wilson in 1914. McReynolds, his predecessor (and former University of Virginia classmate), created the vacancy by accepting Wilson's appointment to the U.S. Supreme Court.

When World War I broke out in Europe, the first act of the Department of Justice was to create a war emergency division responsible for circumventing the work of agents of foreign governments, and preventing or suppressing violations of U.S. neutrality. When the United States entered the war, the roles and responsibilities of the Department of Justice and the FBI were expanded to deal with the enforcement of espionage, sedition, sabotage, and trading-with-the-enemy laws. The passage of selective service legislation further increased the department's reach. Reports from Gregory's tenure reveal that his officers arrested sixty-three hundred spies and conspirators; detained twenty-three hundred ALIENS in Army detention camps; filed 220,747 actions against men who failed to comply with draft laws; and uncovered the activities of a group securing government and supply contracts through illegal means.

"CRITICISM OF THE COURTS FOR THEIR ADMINISTRATION OF THE WAR LAWS CAN HARDLY BE CALLED AN ATTACK ON THE FORM OF GOVERNMENT OF THE UNITED STATES."
—THOMAS GREGORY

Under Gregory, the Department of Justice also organized and oversaw the operations of a volunteer secret service called the American Protective League. In addition to his wartime responsibilities, Gregory continued to watch domestic issues. He initiated several antitrust suits, including actions against the International Harvester Company and anthracite coal operators. Gregory also secured reforms in the administration of federal prisons while in office.

Like his predecessor, Gregory was eventually offered a Supreme Court appointment by President Wilson; unlike his predecessor, he declined. In refusing the vacancy created by the resignation of Justice CHARLES E. HUGHES in 1916, Gregory cited his failing hearing and his inability to tolerate the confining life dictated by the position. Gregory liked to speak his mind and thought he would be unable to temper the expression of his opinions.

On March 4, 1919, Gregory resigned from the cabinet at the request of President Wilson. During the war, Gregory had treated pacifists and other opponents of the war ruthlessly; his tough, no-compromise demeanor had been suited to the times. But, as the war drew to a close, Wilson and others wanted to replace him with an attorney general more suited to postwar needs abroad and peacetime needs at home.

In a gesture of respect and esteem, President Wilson invited Gregory to attend the postwar Paris Peace Conference as an adviser. In the spirit of reconciliation, Gregory urged Wilson to enlist the support of Republican business leaders in the peace efforts and to include them on the advisory team.

Upon his return from the peace conference, Gregory remained in Washington, D.C., and returned to the PRACTICE OF LAW. But ill health and age forced a retirement after just a few years. He spent his last years in Houston, Texas, where he continued to advise local attorneys on antitrust matters and to lecture at the University of Texas.

Gregory died of pneumonia on February 26, 1933, in New York City, while on a trip to meet with president-elect FRANKLIN D. ROOSEVELT.

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## ♦ GRIER, ROBERT COOPER

Robert Cooper Grier served as an associate justice of the U.S. Supreme Court from 1846 to 1870. Grier is best remembered for his unusual actions during the deliberation of DRED SCOTT V. SANDFORD, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857).

Grier was born March 5, 1794, in Cumberland County, Pennsylvania. He graduated from Dickinson College in 1812 and was admitted to the bar in Bloomsburg, Pennsylvania, in 1817. A year later, he relocated to Danville, Pennsylvania, and established a successful law practice. In 1833, he was appointed judge of the Allegheny County, Pennsylvania, district court, where he remained until 1846.

With the death in 1844 of Supreme Court justice HENRY BALDWIN, who was a Pennsylva-

nia native, President JAMES POLK sought to appoint a Democrat from that state. After failing to find a candidate who could pass Senate confirmation, Polk turned in 1846 to the noncontroversial and relatively unknown Grier.

During his term on the Supreme Court, Grier held a centrist position. A strong believer in STATES' RIGHTS, he generally was opposed to federal legislation that intruded on state POLICE POWERS. This philosophy led him to side with the Southern states in upholding their right to keep slaves and to recapture runaway slaves who had escaped to Northern states.

Grier has been criticized for his actions during the deliberation of *Dred Scott,* generally recognized as the most important pre–Civil War case concerning the legitimacy of SLAVERY and the rights of African Americans. The circumstances of the ruling as well as the ruling itself increased the division between the Northern and Southern states.

Dred Scott was a slave owned by an army surgeon, John Emerson, who resided in Missouri. In 1836, Emerson took Scott to Fort Snelling, in what is now Minnesota but was then a territory in which slavery had been expressly forbidden by the Missouri Compromise legislation of 1820. In 1846, Scott sued for his freedom in Missouri state court, arguing that his residence in a free territory released him from slavery. The Missouri Supreme Court rejected his argument, and Scott appealed to the U.S. Supreme Court.

Grier and the other members of the Court heard arguments on *Dred Scott* in 1855 and 1856. A key issue was whether African Americans could be citizens of the United States, even if they were not slaves. Grier did not want to address the citizenship issue, but other justices who were Southerners wanted the Court's vote to transcend sectional lines. Justice JOHN CATRON took the unusual and unethical step of asking President JAMES BUCHANAN to lobby Grier on this issue. Buchanan wrote to Grier, who in turn breached the separation between the executive and judicial branches by replying to the president. Grier agreed to side with the majority, which held that there was no power under the Constitution to grant African Americans citizenship. Grier set out in detail how the Court would rule on the case. Buchanan, in his inaugural address on March 4, 1857, mentioned the case. When the decision was released two days later, opponents of the decision attributed the president's remarks to inside information provided by Chief Justice ROGER B. TANEY. In fact, Grier was the informer.

Although Grier was sympathetic to Southern concerns, he remained a Unionist. During

*Robert C. Grier.*
ENGRAVING BY H.S. SADD. THE GRANGER COLLECTION, NEW YORK

"THE EVIDENCE OF [FRAUD] IS ALMOST ALWAYS CIRCUMSTANTIAL. NEVERTHELESS . . . IT PRODUCES CONVICTION IN THE MIND OFTEN OF MORE FORCE THAN DIRECT TESTIMONY."
—ROBERT GRIER

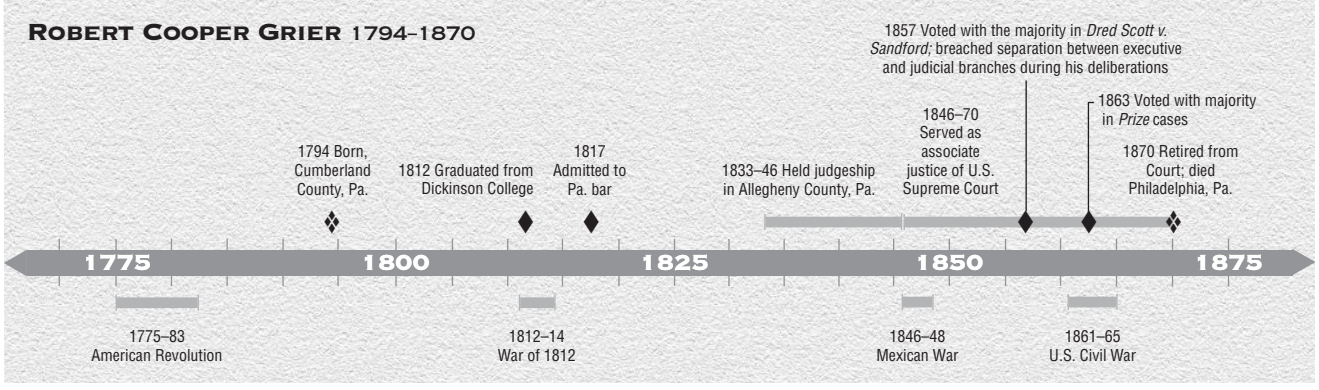

the Civil War, Grier voted to support the power of the president to enforce a blockade of the Confederate shoreline. The *Prize* cases, 67 U.S. 635, 17 L. Ed. 459; 70 U.S. 451, 18 L. Ed. 197; 70 U.S. 514, 18 L. Ed. 200; 70 U.S. 559, 18 L. Ed. 220 (1863), involved the disposition of vessels captured by the Union navy during the blockade of Southern ports ordered by President ABRAHAM LINCOLN in the absence of a congressional declaration of war. Under existing laws of war, the Union could claim the vessels as property only if the conflict was a declared war. The Supreme Court rejected prior law and ruled that the president has the authority to resist force without the need for special legislative action. Grier noted that the "[p]resident was bound to meet [the Civil War] in the shape it presented itself, without waiting for the Congress to baptize it with a name; and no name given to it by him or them could change the fact."

Grier's health began to fail in 1867. He retired in 1870, after members of the Court requested that he resign because he could no longer carry out his duties. He died on September 25, 1870, in Philadelphia.

## GRIEVANCE PROCEDURE

*A term used in* LABOR LAW *to describe an orderly, established way of dealing with problems between employers and employees.*

Through the grievance procedure system, workers' complaints are usually communicated through their union to management for consideration by the employer.

## ♦ GRIGGS, JOHN WILLIAM

John William Griggs was a prominent New Jersey lawyer and politician who served as attorney general of the United States under President WILLIAM MCKINLEY.

Griggs was born July 10, 1849, near Newton, Sussex County, New Jersey. His father, Daniel Griggs, descended from the colonial founders of Griggstown, New Jersey. His mother, Emeline Johnson Griggs, also had early roots in New Jersey; she descended from militiaman and Revolutionary War soldier Henry Johnson.

As a young man, Griggs attended the Collegiate Institute, in Newton. He later entered Lafayette College, and graduated in 1868. After college, he studied law in Newton with Representative Robert Hamilton, of New Jersey, and Socrates Tuttle. Griggs completed his legal studies in 1871 and entered into practice with Tuttle.

In 1874, Griggs was established well enough to marry Carolyn Webster Brandt, the daughter of a successful Newton businessman. They had three children.

Griggs's early association with Congressman Hamilton sparked a lifelong interest in politics. While working for Hamilton, Griggs established himself as an able campaigner and gifted speech maker. By 1874, Griggs had decided to stop campaigning for others and to throw his own hat into the ring. In 1875, he was elected to the New Jersey Assembly, the lower house of the New Jersey Legislature, where he became chairman of the Committee on the Revision of the Laws. Griggs's special area of expertise was the laws governing elections. He returned to the assembly for a final term in 1877.

At the end of his final term, Griggs opened a law office in Paterson, New Jersey, and resolved to take a break from politics. His resolve was short-lived. In 1879, he was appointed to the

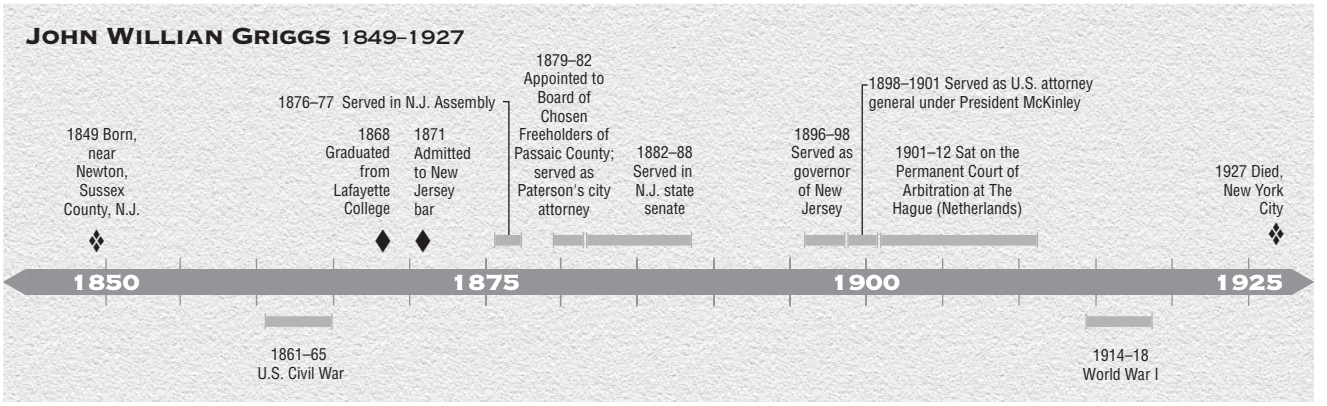

Board of Chosen Freeholders of Passaic County, and he served as legal counsel to the city of Paterson from 1879 to 1882.

In 1882, Griggs was elected to the first of two terms in the New Jersey state senate. He served as president of the senate in 1886, and in that capacity presided over several high-profile IMPEACHMENT trials resulting from allegations of corruption in state government.

As a state senator, Griggs worked to pass legislation forcing railroads and other large corporations to bear a larger share of the state's tax burden. He was known as a centrist who moderated many of the radical measures proposed by New Jersey's liberal Democratic governor Leon Abbett.

Griggs was a delegate to the Republican National Convention of 1888, and he worked actively to further the political agenda of presidential candidate BENJAMIN HARRISON. After the election, he was among those considered for a Supreme Court nomination by President Harrison. When the nomination did not materialize, Democratic governor George Theodore Werts offered him a seat on New Jersey's highest court. Historians have speculated that Griggs discouraged the Supreme Court nomination, and declined appointment to the New Jersey high court, because of his wife's ill health. She died in 1891.

In 1893, Griggs married Laura Elizabeth Price, with whom he eventually had two children. With the support of his new wife and of campaign manager Garret A. Hobart, Griggs made a run for the governor's office in 1894. In 1895, he became the first Republican to be elected governor of New Jersey since the Civil War.

The victory brought Griggs to national prominence. In 1898, he resigned his office to accept President McKinley's appointment as attorney general of the United States.

As attorney general, Griggs rendered early opinions on the controversial practice of presidential IMPOUNDMENT, which is an action or failure to act by the president that effectively prevents the use of congressionally appropriated funds and thereby thwarts the effectiveness of legislation that should have been funded. Griggs advised the president to look beyond a bill's specific language and consider the intent of Congress in determining whether an expenditure of funds was mandatory or discretionary.

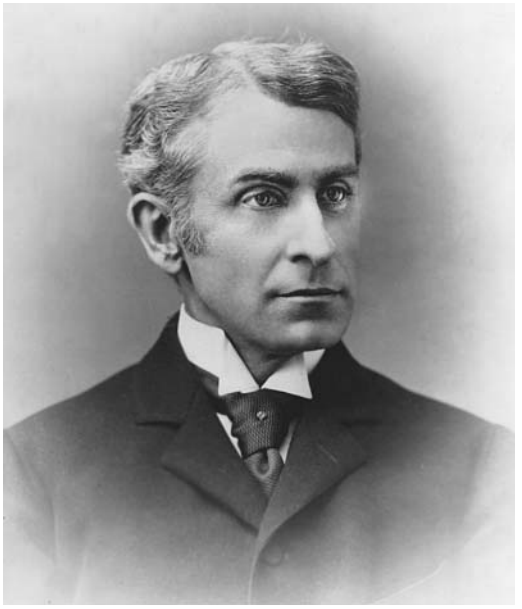

*John W. Griggs.*
LIBRARY OF CONGRESS

Upon examination of intent, Griggs often counseled against impoundment (see 22 Op. Att'y Gen. 295, 297 [1899]).

Griggs's work with a body of litigation known as the *Insular* cases established some of the guiding principles of INTERNATIONAL LAW by defining geographic limits to the protections afforded by the U.S. Constitution. (The *Insular* cases concerned disputes involving the island possessions of the U.S. government.)

Because of his expertise in the field of international law, Griggs was among the first members appointed to the Permanent Court of Arbitration at The Hague. He served, when called on, from 1901 to 1912. While on the court, he also maintained a law practice in New York City and was involved in many lucrative business ventures. Griggs served as president of the Marconi Wireless Telegraph Company prior to its dissolution, and he was general counsel and director of the Radio Corporation of America at the time of his death in New York City on November 28, 1927.

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## GRISWOLD V. CONNECTICUT

*Griswold v. Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), was a landmark Supreme Court decision that recognized that a married couple has a right of privacy that cannot be infringed upon by a state law making it a crime to use contraceptives.

Two Connecticut statutes provided that any person who used, or gave information or assistance concerning the use of, contraceptives was subject to a fine, imprisonment, or both. Estelle T. Griswold, an executive with the state Planned Parenthood League, and a physician who worked at a league center were arrested for violating these laws, even though they gave such information to married couples.

They were convicted and fined $100 each. The state appellate courts upheld their convictions and they appealed to the Supreme Court on the ground that the statutes violated the FOURTEENTH AMENDMENT. The Supreme Court recognized that the appellants had standing to raise the issue of the constitutional rights of married couples since they had a professional relationship with such people.

Addressing the propriety of its review of such legislation, the Court reasoned that although it is loath to determine the need for state laws affecting social and economic conditions, these statutes directly affected sexual relations between a married couple and the role of a physician in the medical aspects of such a relationship. Such a relationship is protected from intrusion by the government under the theory of a right to privacy. This right, while not specifically guaranteed by the Constitution, exists because it may be reasonably construed from certain amendments contained in the BILL OF RIGHTS.

The FIRST AMENDMENT guarantees of FREEDOM OF SPEECH and press implicitly create the right of FREEDOM OF ASSOCIATION since one must be allowed to freely associate with others in order to fully enjoy these specific guarantees. The THIRD AMENDMENT prohibition against the quartering of soldiers in a private home without the owner's consent is an implicit ACKNOWLEDGMENT of the owner's right to privacy. Both the FOURTH AMENDMENT protection against unreasonable SEARCHES AND SEIZURES and the FIFTH AMENDMENT SELF-INCRIMINATION Clause safeguard a person's privacy in his or her home and life against government demands. The NINTH AMENDMENT states that the enumerated constitutional rights should not be interpreted as denying any other rights retained by the people.

The Court created the right of privacy from the penumbras of these specific rights, which it deemed created zones of privacy. The statutory regulation of a marital relationship by the state was an invasion of the constitutional right of a married couple to privacy in such a relationship, a relationship that historically American law has held sacred. The means by which the state chose to regulate contraceptives—by outlawing their use, rather than their sale and manufacture—was clearly unrelated to its goal and would detrimentally affect the marital relationship. The question of enforcement of such statutes also was roundly criticized since it would mandate government inquiry into "marital bedrooms."

Because of the invalidity of such laws, the Supreme Court reversed the judgments of the state trial and appellate courts and the convictions of the appellants.

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"Griswold v. Connecticut" (Appendix, Primary Document); Husband and Wife; Penumbra.

## ♦ GROESBECK, WILLIAM SLOCOMB

Thrust into the national spotlight by the IMPEACHMENT trial of President ANDREW JOHNSON in 1868, defense attorney William Slocomb Groesbeck won wide renown for his stirring defense of the president. Prior to the trial, Groesbeck was known chiefly for his law practice in Ohio and for a single term in Congress. His friendship with Johnson led to his last-minute substitution on the president's defense team. Delivered while he was ill, Groesbeck's closing argument is remembered for its brilliance and passion.

Groesbeck was born July 24, 1815, in Schenectady, New York, and studied law at Miami University, in Ohio. After graduating in 1834, he began practicing at the age of 19 in Cincinnati. As a liberal Republican, he served in Congress from 1857 to 1859, but then lost his bid for reelection. He remained active in party politics as a leader of the Union Democrats, served as a delegate at the fruitless peace convention in 1861 that sought to prevent the Civil War, and

won election as a senator in the Ohio state legislature in 1862.

Groesbeck befriended Johnson during the war and became a natural choice for defending Johnson during his 1868 impeachment trial. Johnson trusted and respected the younger man. He had even briefly considered ousting treasury secretary Hugh McCulloch and giving McCulloch's job to Groesbeck. When the distinguished lawyer JEREMIAH SULLIVAN BLACK resigned from Johnson's impeachment defense team amid scandal, Johnson turned to Groesbeck.

Like the rest of Johnson's defense team, Groesbeck served without a fee. The task facing the attorneys was immense. After assuming the presidency in 1865 following Abraham Lincoln's assassination, Johnson had embarked on a moderate, slow-paced policy of reform. The bitter politics of the Reconstruction era, however, had sapped both his popularity and his power. Radical Republicans in Congress overruled his policies and, in 1867, with the stage set for a dramatic confrontation, they established the TENURE OF OFFICE ACT (14 Stat. 430) over his VETO. This law severely limited executive power. It required the president to ask the Senate for permission before removing any federal official whose appointment the Senate had approved, and it also provided that presidential cabinet members would serve one month past the expiration of the president's term.

In August 1867, Johnson rejected the authority of the act when he requested the removal of Secretary of War EDWIN M. STANTON, on the ground that Stanton had secretly conspired with Johnson's political enemies. Stanton refused to step down, so Johnson removed him from office and replaced him with ULYSSES S. GRANT. The Radical Republicans swiftly sought revenge. Three days later, the House of Representatives voted to impeach Johnson, making him the first president in U.S. history to stand trial on impeachment charges. The U.S. Senate then adopted 11 ARTICLES OF IMPEACHMENT, the most serious of which was violation of the Tenure of Office Act.

Groesbeck played a key role in trial preparation. Like his colleagues, he advised Johnson not to appear at trial—a recommendation the president followed. Groesbeck remained silent in the Senate until all the evidence had been presented, and on April 25 he delivered the second closing argument. (Because there was no precedent for an impeachment trial of a president, the Senate allowed several defense attorneys to present closing arguments.)

Groesbeck's speech was a masterpiece of simplicity and eloquence. He noted that there had only been five impeachment trials since the organization of the government, and urged the Senate to leave political judgments to the citizenry. Despite suffering from an illness, he deftly countered each of the 11 charges.

When Groesbeck addressed the Tenure of Office Act, he turned the tables on the Senate. He argued that the Senate had always had the power to deal with Stanton's dismissal and replacement without resorting to impeachment. What Johnson had done, argued Groesbeck, was simply to remove a member of the cabinet who had been unfriendly to him, both personally and politically. Johnson had made an ad interim (temporary) appointment to last for a single day, an appointment the Senate could have terminated whenever it saw fit. The Senate, argued Groesbeck, possessed the power to control the situation all along. Surely, in light of this, Johnson's act was no crime.

"EVEN IF [PRESIDENT ANDREW JOHNSON] HAD COMMITTED A CRIME AGAINST THE LAWS, HIS SERVICES TO THE COUNTRY ENTITLE HIM TO SOME CONSIDERATION."
—WILLIAM GROESBECK

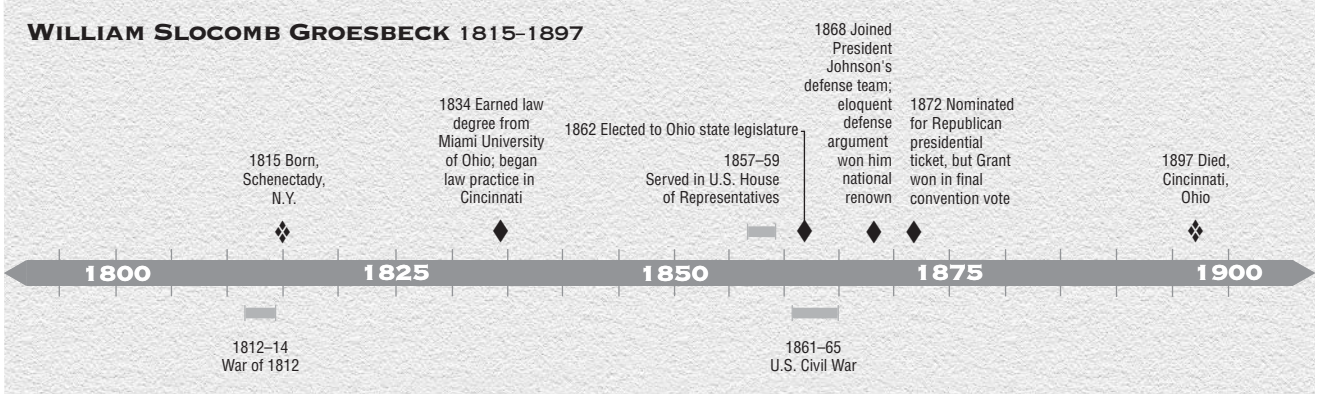

Groesbeck continued with a peroration comparing Johnson to Lincoln and even invoking Christ's crucifixion. Then he praised Johnson's contribution to the nation in time of war: "How his voice rang out in this hall for the good cause, and in denunciation of rebellion. But he . . . was wanted for greater peril, and went into the very furnace of the war . . . Who of you have done more? Not one."

The speech stunned the Senate. Supporters surrounded Groesbeck. His argument was praised in the national press, with the *New York Herald* calling it "the most eloquent . . . heard in the Senate since the palmy days of oratory" (as quoted in Bowers 1929, 189). Likewise, the *Nation* regarded it as the defense's most effective moment. Johnson, too, was deeply pleased, and Groesbeck assured him that he would be acquitted. When the Senate voted on May 16 and May 26, Johnson escaped impeachment by a margin of one vote.

Following the trial, Groesbeck's political fortunes briefly soared. In 1872, he was nominated for the presidency by liberal Republicans but failed to garner enough support. He died on July 7, 1897, in Cincinnati.

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## GROSS

*Great; culpable; general; absolute. A thing* in gross *exists in its own right, and not as an appendage to another thing. Before or without diminution or deduction. Whole; entire; total; as in the gross sum, amount, weight—as opposed to net. Not adjusted or reduced by deductions or subtractions.*

*Out of all measure; beyond allowance; flagrant; shameful; as a gross dereliction of duty, a gross injustice, gross carelessness or* NEGLIGENCE. *Such conduct as is not to be excused.*

## GROSS ESTATE

*All the real and* PERSONAL PROPERTY *owned by a decedent at the time of his or her death.*

The calculation of the value of the gross estate is the first step in the computation that determines whether any estate tax is owed to federal or state governments. Federal and state laws define gross estate for purposes of taxation. Under federal law, the gross estate includes proceeds of life insurance policies that are payable to the decedent's estate, as well as policies to which the decedent retained "incidents of ownership" until his or her death, such as the right to change beneficiaries or to borrow against the cash surrender value of the policy.

CROSS-REFERENCES

Estate and Gift Taxes.

## GROSS INCOME

*The financial gains received by an individual or a business during a fiscal year.*

For INCOME TAX purposes, gross income includes any type of monetary benefit paid to an individual or business, whether it be earned as a result of personal services or business activities or produced by investments and capital assets. The valuation of gross income is the first step in computing whether any federal or state income tax is owed by the recipient.

## GROSS NEGLIGENCE

*An indifference to, and a blatant violation of, a legal duty with respect to the rights of others.*

Gross negligence is a conscious and voluntary disregard of the need to use reasonable care, which is likely to cause foreseeable grave injury or harm to persons, property, or both. It is conduct that is extreme when compared with ordinary NEGLIGENCE, which is a mere failure to exercise reasonable care. Ordinary negligence and gross negligence differ in degree of inattention, while both differ from willful and wanton conduct, which is conduct that is reasonably considered to cause injury. This distinction is important, since contributory negligence—a lack of care by the plaintiff that combines with the defendant's conduct to cause the plaintiff's injury and completely bar his or her action—is not a defense to willful and wanton conduct but is a defense to gross negligence. In addition, a finding of willful and wanton misconduct usually supports a recovery of PUNITIVE DAMAGES, whereas gross negligence does not.

## GROTIUS, HUGO

Hugo Grotius, also known as Huigh de Groot, achieved prominence as a Dutch jurist and statesman and is regarded as the originator of INTERNATIONAL LAW.

Grotius was born April 10, 1583, in Delft, Netherlands. A brilliant student, Grotius attended the University of Leiden, received a law degree at the age of fifteen, and was admitted to the bar and began his legal practice at Delft in 1599. It was at this time that he became interested in international law, and, in 1609, wrote a preliminary piece titled *Mare liberum,* which advocated freedom of the seas to all countries.

In 1615, Grotius became involved in a religious controversy between two opposing groups, the Remonstrants, Dutch Protestants who abandoned Calvinism to follow the precepts of their leader, Jacobus Arminius, and the Anti-Remonstrants, who adhered to the beliefs of Calvinism. The dispute extended to politics, and when Maurice of Nassau gained control of the government, the Remonstrants lost popular support. Grotius, a supporter of the Remonstrants, was imprisoned in 1619. Two years later he escaped, seeking safety in Paris.

In Paris, Grotius began his legal writing, and, in 1625, produced *De jure belli ac pacis,* translated as "Concerning the Law of War and Peace." This work is regarded as the first official text of the principles of international law, wherein Grotius maintained that NATURAL LAW is the basis for legislation for countries as well as individuals. He opposed war in all but extreme cases and advocated respect for life and the ownership of property. The main sources for his theories were the Bible and history.

Grotius spent the remainder of his years in diplomatic and theological endeavors. From 1635 to 1645, he represented Queen Christina of Sweden as her ambassador to France. He pursued his religious interests and wrote several theological works. Grotius died August 28, 1645, in Rostock, Germany.

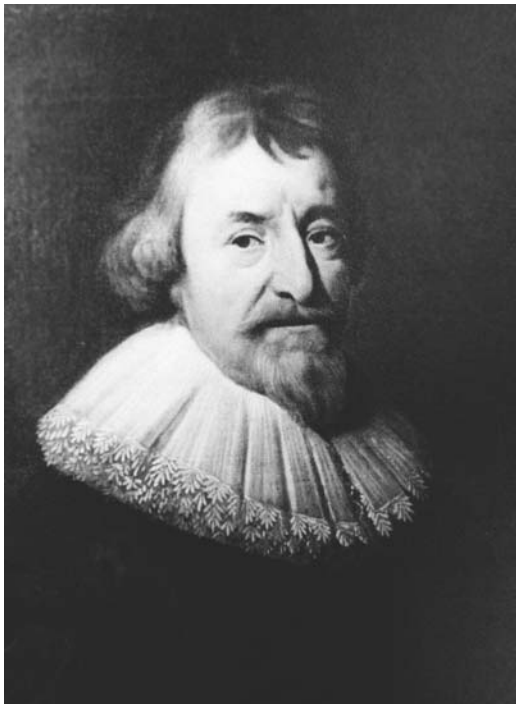

*Hugo Grotius.*
LIBRARY OF CONGRESS

"WHAT THE CONSENT OF ALL MEN MAKES KNOWN AS THEIR WILL IS LAW."
—HUGO GROTIUS

## GROUND RENT

*Perpetual consideration paid for the use and occupation of real property to the individual who has transferred such property, and subsequently to his or her descendants or someone to whom the interest is conveyed.*

Ground rent agreements have sometimes required the payment of rent for a term of ninety-nine years, with renewal at the option of the party who pays it. In this type of agreement, the lessor retains title to the property. Large structures, such as hotels and office buildings, are ordinarily built on land under ground rent leases.

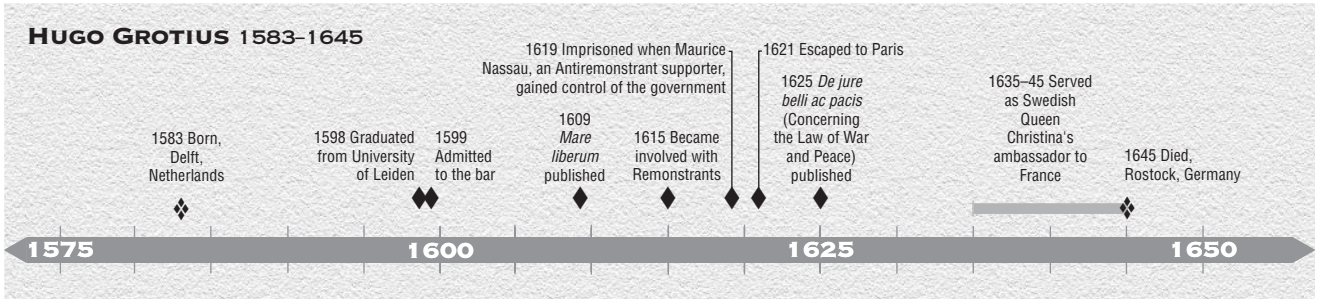

The concept of a ground rent arrangement is English in origin. Its original purpose was an attempt by feudal tenants to put themselves in the role of lords over lower tenants. This was proscribed by a law passed in 1290 that made every tenant a subject only to the overlord.

In the United States, the only states where the ground rent system has been used to any great extent are Maryland and Pennsylvania. These agreements were initially popular as a method of encouraging renters to improve the property, since they could own the buildings while paying rent on the land. The courts enforced the ground rent agreements, and they gained popularity with investors who purchased and sold shares in ground rent agreements.

Although the ground rent system was not used in New York, the state courts did recognize comparable *manorial* or *perpetual* leases. A deed setting up a ground rent arrangement might indicate that it is to last for ninety-nine years, but since most agreements are automatically renewable, ground rents can last forever.

An obligation to pay the rent can terminate if (1) the individual entitled to receive rent forfeits such a right in a deed or other instrument; (2) the land is taken by EMINENT DOMAIN and the individual entitled to receive rent is compensated for the loss; (3) the agreement setting up the rent is breached and is thereafter unenforceable; or (4) the landowner also becomes the individual entitled to receive the rent or buys back the right to receive rents.

Under the COMMON LAW, rents that were not demanded for a number of years could not be collected, since the law assumed that they had been paid.

The term *ground rent* is currently applied to a lease for land upon which the tenant constructs a building. While the landlord continues to own the land, the tenant owns all of the structures and pays rent for the ground only.

## GROUNDS

*The basis or foundation; reasons sufficient in law to justify relief.*

Grounds are more than simply reasons for wanting a court to order relief. They are the reasons specified by the law that will serve as a basis for demanding relief. For example, a woman may sue her neighbor for TRESPASS on the ground that his fence was erected beyond his boundary line. Her real reason for suing may be that she does not like the loud music that he plays on his stereo, and she wants to cause him trouble. If his fence actually encroaches on her property, however, she has grounds for a CAUSE OF ACTION based on the trespass.

## GROUP LEGAL SERVICES

*Legal services provided under a plan to members, who may be employees of the same company, members of the same organization, or individual consumers.*

Group legal services resembles group HEALTH INSURANCE. It is an all-purpose, general coverage: for an annual fee, members are entitled to low-cost or free consultation with an attorney. Several forms of group legal services exist, ranging from employee-provided benefits to commercially marketed plans. These vary in scope, price, and availability. The first plans appeared in the early 1970s, for unions, which negotiated for them as employee benefits and have remained their primary users. Over the following two decades, the concept expanded as lawyers saw an opportunity for a nontraditional way to market their services. By the mid-1980s, the rise of commercial plans aimed at other groups sparked considerable interest in the legal profession, the media, and the public. Approximately 10 percent of U.S. citizens belonged to some form of plan in the 1990s, and observers expected that percentage to increase as more vendors entered the market to cater to consumers.

For several decades, the legal profession resisted the plans and sought to restrict them. State bars opposed them because the organization of the plans requires the imposition of an intermediary between the attorney and the client, which they saw as violative of the traditional attorney-client relationship. As the first groups to realize the advantages of using the plans, unions encountered stiff opposition in several states. Beginning in the early 1960s, however, the CIVIL RIGHTS MOVEMENT and a series of U.S. Supreme Court decisions removed these barriers.

The Court's decision in *NAACP v. Button,* 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963), struck down a Virginia law that had prevented the National Association for the Advancement of Colored People (NAACP) from providing staff lawyer services to members. *Brotherhood of Railroad Trainmen v. Virginia ex*

*rel. Virginia State Bar,* 377 U.S. 1, 84 S. Ct. 1113, 12 L. Ed. 2d 89 (1964), struck down an **INJUNCTION** that prohibited legal services activities of the union on First and **FOURTEENTH AMENDMENT** grounds. In *United Mine Workers District 12 v. Illinois State Bar Ass'n,* 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967), the Court permitted the union to collectively sponsor legal services for members' **WORKERS' COMPENSATION** claims, holding that restrictions imposed by the Illinois State Bar Association were unconstitutional under the **FIRST AMENDMENT**. In response, the legal profession slowly loosened restrictions in its Model Code of Professional Responsibility and Model Rules of Professional Conduct. By the mid-1970s, most of the special restrictions were gone.

These trends cleared the way for a broad expansion of group legal services. The chief benefit of such plans is discounted legal fees. Legal advice is often expensive. As in group health insurance, volume produces savings: the buying power of a large membership can lower the costs to individuals. This feature figured prominently in an expansion of the plans into commercial markets in the 1980s. Moreover, although individuals with low incomes are sometimes entitled to legal aid, and affluent individuals can usually afford a lawyer, members of the middle class are often hit hard by legal bills. Thus, marketers of group legal services have tried to appeal to middle-class consumers through such outlets as banks and credit card companies.

Federal and state regulations govern plans for group legal services. Employer-provided plans fall under the **EMPLOYEE RETIREMENT INCOME SECURITY ACT** (ERISA) (29 U.S.C.A. § 1001 et seq.). Enacted in 1974, ERISA protects employees' **PENSION** rights and imposes strict fiduciary requirements on their group legal services. Other types of plans are subject to state laws, which generally impose light regulation and follow the legal profession's Model Rules of Professional Conduct in such areas as ethics and **ATTORNEY-CLIENT PRIVILEGE**.

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## ❖ GRUNDY, FELIX

Felix Grundy served as U.S. attorney general from 1838 to 1839. A prominent criminal attorney, Grundy also served as a judge, state legislator, and U.S. senator. His brief service as attorney general took place during the administration of President **MARTIN VAN BUREN**.

Grundy was born September 11, 1777, in Berkeley County, Virginia (now West Virginia). His family moved to Kentucky in 1780. Although he had little early formal education, he studied law and was admitted to the Kentucky bar in 1797. An able advocate, he soon developed a reputation as an outstanding criminal lawyer.

In 1799 he was elected a delegate to the Kentucky state constitutional convention, where he played a prominent role. In 1800 he was elected to the Kentucky House of Representatives. He served in the house until 1806, when he was appointed associate justice of the state supreme court of errors and appeals. He was made chief

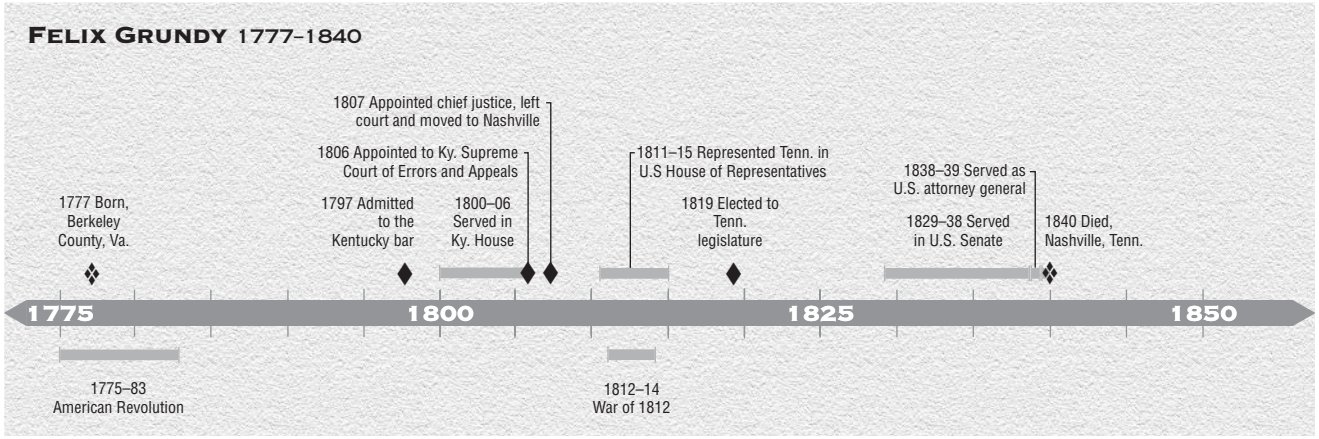

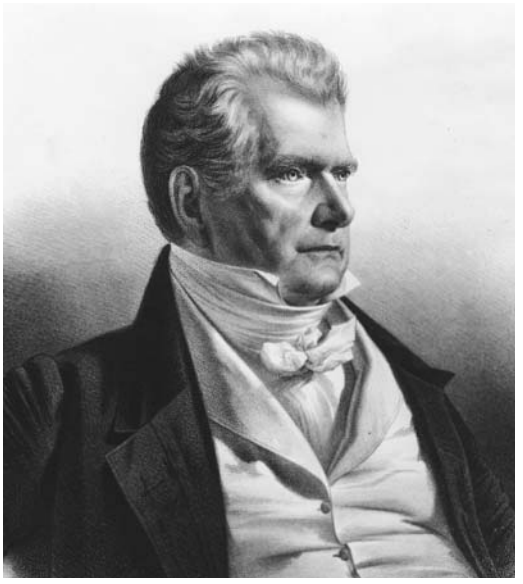

*Felix Grundy.*
LIBRARY OF CONGRESS

justice in 1807, but left the court that same year and moved to Nashville.

"THE PROSECUTOR'S STATEMENT WAS BUT ANOTHER ILLUSTRATION OF COLD-BLOODED YANKEE CHARACTER."
—FELIX GRUNDY

Grundy established a law practice in Nashville before politics again became paramount. He was elected to the U.S. House of Representatives in 1811 and was reelected in 1813. During these years in Congress, Grundy was a strong advocate of territorial expansion, seeking to add Florida and Canada to the United States. He was also a supporter of the **WAR OF 1812**, against Great Britain.

After resigning from Congress in 1815, Grundy returned to Nashville and his law practice. **JAMES POLK**, future president of the United States, apprenticed under Grundy during this period. In 1819 Grundy was elected to the Tennessee legislature, and in 1820 he acted as a commissioner to settle the boundary line between Kentucky and Tennessee.

During the 1820s Grundy concentrated on his law practice, while working to strengthen the **DEMOCRATIC PARTY** and to promote the candidacy of Tennessean **ANDREW JACKSON** for president. Though Jackson lost his first bid in 1824, he easily won in 1828 and 1832. In 1829 Grundy was appointed to a vacancy in the U.S. Senate, and in 1833 he was reelected.

Grundy remained in the Senate until 1838, when President Van Buren appointed him to serve as attorney general. Van Buren, who had been Jackson's vice president, had little success as president. An economic depression, called the Panic of 1837, crippled the U.S. economy for most of his four-year term. Grundy, sensing the fading political fortunes of Van Buren, resigned his position in December 1839 and returned to his seat in the Senate.

Grundy died in Nashville, December 19, 1840.

## GUARANTEE

*One to whom a guaranty is made. This word is also used, as a noun, to denote the contract of guaranty or the obligation of a guarantor, and, as a verb, to denote the action of assuming the responsibilities of a guarantor.*

## GUARANTY

*As a verb, to agree to be responsible for the payment of another's debt or the performance of another's duty, liability, or obligation if that person does not perform as he or she is legally obligated to do; to assume the responsibility of a guarantor; to warrant.*

*As a noun, an undertaking or promise that is collateral to the primary or principal obligation and that binds the guarantor to performance in the event of nonperformance by the principal obligor.*

A guaranty is a contract that some particular thing shall be done exactly as it is agreed to be done, whether it is to be done by one person or another, and whether there be a prior or principal contractor or not.

## GUARANTY CLAUSE

*A provision contained in a written document, such as a contract, deed, or mortgage, whereby one individual undertakes to pay the obligation of another individual.*

*The stipulation contained in Article IV, Section 4, of the U.S. Constitution, in which the federal government promises a republican form of government to every state and the defense and protection of the federal government if* **DOMESTIC VIOLENCE** *occurs.*

## GUARDIAN

*A person lawfully invested with the power, and charged with the obligation, of taking care of and managing the property and rights of a person who, because of age, understanding, or self-control, is considered incapable of administering his or her own affairs.*

*A sample guaranty*

**Guaranty**

FOR GOOD CONSIDERATION, and as an inducement for _____ (Creditor),

from time to time extend credit to _____ (Customer), it is hereby agreed that the undersigned does hereby guaranty to Creditor the prompt, punctual and full payment of all monies now or hereinafter due Creditor from Customer.

Until termination, this guaranty is unlimited as to amount or duration and shall remain in full force and effect notwithstanding any extension, compromise, adjustment, forbearance, waiver, release or discharge of any party obligor or guarantor, or release in whole or in part of any secuirty granted for said indebtedness or compromise or adjustment thereto, and the undersigned waives all notices thereto.

The obligations of the undersigned shall be at the election of Creditor be primary and not necessarily secondary and Creditor shall not be required to exhaust its remedies as against Customer prior to enforcing its rights under this guaranty against the undersigned.

The guaranty hereunder shall be unconditional and absolute and the undersigned waive all rights of subrogation and set-off until all sums under this guaranty are fully paid. The undersigned further waives all suretyship defenses or defenses in the nature thereof, generally.

In the event payments due under this guaranty are not punctually paid upon demand, then the undersigned shall pay all reasonable costs and attorney's fees necessary for collection, and enforcement of ths guaranty.

If there are two or more guarantors to this guaranty, the obligations shall be joint and several and binding upon and inure to the benefit of the parties, their successors, assigns and personal representatives.

The guaranty may be terminated by any guarantor upon fifteen (15) days written notice of terminination, mailed certified mail, return receipt requested to the Creditor. Such termination shall extend only to credit extended beyond said fifteen (15) day period and not to prior extended credit, or goods in transit received by Customer beyond said date, or for special orders placed prior to said date notwithstanding date of delivery. Termination of this guaranty by any guarantor shall not impair the continuing guaranty of any remaining guarantors of said termination.

Each of the undersigned warrants and represents it has full authority to enter into this guaranty.

This guaranty shall be binding upon and inure to the benefit of the parties, their successors, assigns and personal representatives.

This guaranty shall be construed and enforced under the laws of the State of _____.

Signed this _____ day of _____ , 20_____.

In the presence of:

_____ Witness

_____ Guarantor

_____ Witness

_____ Guarantor

## GUARDIAN AD LITEM

*A guardian appointed by the court to represent the interests of* INFANTS*, the unborn, or incompetent persons in legal actions.*

Guardians are adults who are legally responsible for protecting the well-being and interests of their ward, who is usually a minor. A guardian ad litem is a unique type of guardian in a relationship that has been created by a court order only for the duration of a legal action. Courts appoint these special representatives for infants, minors, and mentally incompetent persons, all of whom generally need help protecting their rights in court. Such court-appointed guardians figure in divorces, child neglect and abuse cases, paternity suits, contested inheritances, and so forth, and are usually attorneys.

The concept of guardian ad litem grew out of developments in U.S. law in the late nineteenth century. Until then, the COMMON LAW had severely restricted who could bring lawsuits in federal courts; it was easiest to sue in states through EQUITY courts. Changes in the 1870s relaxed these standards by bringing federal codes in line with state codes, and in 1938, the Federal Rules of CIVIL PROCEDURE removed the old barriers by establishing one system for civil actions. Rule 17(c) addresses the rights of children and incompetent persons in three ways. First, it permits legal guardians to sue or defend on the behalf of minors or incompetent individuals. Second, it allows persons who do not have such a representative to name a "next friend," or guardian ad litem, to sue for them. And third, it

states that federal courts "shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for [his or her] protection." In practice, the courts have interpreted this last provision broadly: the term *infants* is taken to mean unborn children and all minors. In addition, courts can exercise discretion; they are not required to appoint a guardian ad litem.

In the 1970s and 1980s, the importance of the guardian ad litem grew in response to increased concern about children's welfare. Two social developments brought about this growth: a rise in DIVORCE cases, and greater recognition of the gravity of CHILD ABUSE and neglect. Because states had generally modeled their civil court processes on the Federal Rules of Civil Procedure, the role of guardian ad litem was well established. But now, states began moving toward stronger legislation of their own. By the 1990s, many states had enacted laws specifying the guardians' qualifications, duties, and authority. Equally important, these laws spelled out requirements for the appointment of guardians ad litem in abuse cases. As a leader in the area, Florida enacted legislation in 1990 providing funding for the training of guardians ad litem (State of Florida Guardian Ad Litem Program Guidelines for Family Law Case Appointment, Fla. Stat. § 61.104). In 1993, after hearing an appeal in a particularly horrifying abuse case, the Supreme Court of West Virginia set forth guidelines for guardians ad litem in its decision (*In Re Jeffrey R. L.,* 190 W. Va. 24, 435 S.E.2d 162 [1993]).

Guardians ad litem have extensive power and responsibility. Their duties are greatest in cases involving children, where they investigate, attend to the child's emotional and legal needs, monitor the child's family, and seek to shield the child from the often bruising experience of a lawsuit. Their function as officers of the court is also extensive: in addition to compiling relevant facts, interviewing witnesses, giving testimony, and making recommendations to the court on issues of custody and visitation, they ensure that all parties comply with court orders. Given the rigors of the task, which is often voluntary or low paid, it is not surprising that courts have traditionally had difficulty finding adequate numbers of qualified individuals to serve as guardians ad litem.

In the mid-1990s, the role of guardian ad litem provoked new concerns. Whereas many attorneys perceived a need for guardians ad litem to be appointed in all CHILD CUSTODY proceedings, others expressed caution about the risk of lawsuits. Particularly for attorneys serving as guardians ad litem in divorce cases, this risk was high: parents upset with the result of a custody ruling might sue the guardian, just as a number of parties had in the 1980s brought action against government agencies involved in child welfare cases. Lawyers worried that the guardian ad litem system had become potentially dangerous for those whose rights it had been designed to protect, some of society's weakest members.

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Civil Procedure.

## GUARDIAN AND WARD

*The legal relationship that exists between a person (the guardian) appointed by a court to take care of and manage the property of a person (the ward) who does not possess the legal capacity to do so, by reason of age, comprehension, or self-control.*

The term *guardian* refers to a person appointed by a court to manage the affairs of another person who is unable to conduct those affairs on his or her own behalf. The term is most often applied to a person who is responsible for the care and management of an infant, which in legal terms is a person below the age of majority. Thus, children who have not reached adulthood (usually age 18 or 21) must, with some exceptions, have a legal guardian.

Courts also appoint guardians to supervise the property and personal well-being of adults

who cannot manage their affairs. Persons incapacitated because of mental or physical illness, drug or alcohol abuse, or other disability may require the appointment of a guardian to ensure the conservation of their PERSONAL PROPERTY and to oversee their day-to-day personal care. The term *conservator* is often used for a person designated to manage the property of an adult who is unable to do so.

The law of guardianship is based on the COMMON LAW and has been the province of state government. This law has been modified by state statutes. For example, Section V of the UNIFORM PROBATE CODE, a model set of procedures governing the administration of trusts and estates, contains rules that guide courts in managing guardianships. The Uniform Probate Code (1969), adopted by virtually every state, has done much to streamline probate law. In 1982, provisions of the code were updated via the Uniform Guardianship and Protective Proceedings Act (UGPPA). As legislation changed, and issues arose concerning the protection of wards, the UGPPA underwent scrutiny. The act was revised over the course of several years and, in 1997, it was officially approved by the National Conference of Commissioners on Uniform State Laws. The act updated procedures for appointing guardians and conservators and provided DUE PROCESS protection for adults who are incapacitated.

There are two basic types of guardians: of the person and of the property. A guardian of the person has custody of the ward and responsibility for the ward's daily care. A guardian of the property has the right and the duty to hold and manage all property belonging to the ward. A ward usually has a general guardian, who supervises both the person and the property, but in some circumstances it is necessary and convenient to divide responsibilities.

### Persons for Whom a Guardian Is Appointed

A guardian cannot be appointed for a person unless that person is in need of supervision by a representative of the court. The natural guardian of a child is the child's parent. A parent can lose this status by neglect or ABANDONMENT. In addition, when both parents die, leaving a minor child, the court will often appoint a guardian.

Guardians can also be appointed in medical emergencies. If a parent refuses to permit necessary treatment for a child, such as a blood transfusion or vaccination, the court can name a temporary guardian to consent to such treatment. An adult has the right to refuse medical treatment, even if his or her life is in immediate danger. However, if there is evidence that the adult is not thinking clearly or is not making the decision voluntarily, a guardian can be appointed to make the decision.

### Selection of a Guardian

Courts of general jurisdiction in most states have the authority to appoint guardians. Typically, probate courts and juvenile courts hear cases involving guardianship. Probate courts, which oversee the administration of the estates of decedents, are the most common forum for the appointment of guardians. Juvenile courts decide on the appointment of guardians when a child has been removed from the home because of abuse or neglect, or has been declared a ward of the court. Generally, a court can appoint a guardian for a minor wherever the child lives. If a child lives in one state and has title to real estate in another state, a guardian can be appointed where the property is, in order to manage it.

A parent can appoint a guardian, usually by naming the guardian in a will. Some state laws allow a child to choose his or her own guardian if the child is over a certain age, usually 14. A court must approve the choice if the proposed guardian is suitable, even if the court believes someone else would be a better choice. Before approving the child's choice, however, the court must satisfy itself that the child understands the effect of the nomination and that the choice is not detrimental to the child's interests or contrary to law.

Guardianship statutes specify which persons have the right to ask a court to appoint a guardian for a certain child. Most of these laws list people who would be expected to have an interest in the child's WELFARE, usually relatives. Some statutes are more general, permitting applications to be filed by "any person." A court must examine a petition to determine whether the person applying for appointment as guardian really has the child's interest at heart.

### Factors in Choosing a Guardian

The choice of a guardian for a child is guided by the needs of the ward. The ward's age, affections for certain people, education, and morals are all important considerations. Courts prefer

to allow a child to remain with a competent person who has been caring for the child rather than disrupt a stable home. Courts also examine the financial condition, health, judgment, morals, and character of the person who seeks guardianship of the ward. Although age alone is not a determining factor, it may be material to the individual's ability to fulfill the duties of guardian for the entire period of guardianship. Affluence is not a prerequisite for a guardian, although a guardian must be reasonably secure financially. As a rule, courts attempt to entrust the care of a child to someone with the same religious background as the child's.

A divorced parent is not disqualified from appointment as guardian of a child's property simply because the DIVORCE decree has awarded the other parent custody. The court almost always favors a parent over other relatives or someone not related to the child unless there is reason to believe the parent is not a fit guardian. A close family member is not disqualified from caring for a child whose property he or she is eligible to inherit, unless it appears that he or she is unkind to the child or concerned only with the wealth to be gained from the child's property.

Sometimes the responsibilities of guardianship are divided between two people. In one case, a mother continued to have custody of her children after her husband's death, but the court refused her request to be appointed guardian of the children's estates because she dissipated the family allowance. A parent can also be disqualified under different statutes for "notoriously bad conduct," by "willfully and knowingly abandoning the child," or for "failing to maintain the child" when he or she has the financial ability to contribute to the child's support.

### Manner and Length of Appointment

Once a guardian is selected, he or she can be required to take an oath of office before performing the duties of guardian. Statutes generally require a guardian to post a bond, that is, pay the court a sum of money out of which a ward can be reimbursed if the guardian fails to perform the duties faithfully. These laws also permit the court to waive this requirement if the ward's property is of relatively little value or if the guardian managing the property is a financial corporation, such as a bank or a trust company.

The formal appointment of a guardian is completed when the court issues the guardian a certificate called letters of guardianship. The naming of a guardian in a parent's will is only a nomination. The court must issue the letters of guardianship before a guardian has the legal authority to act.

Generally, a guardian's authority continues as long as the ward is below the legal age of majority. If the ward marries before reaching the age of majority, guardianship of the person ends. Under the law of some states, guardianship of the property continues until he or she reaches the age of majority. For an adult ward, guardianship ends when a court determines the ward no longer needs supervision.

A guardian can be divested of authority whenever a court is convinced that he or she has neglected the duties of guardian or mismanaged property. In some cases, courts have ordered partial removal. For example, a father who has squandered money that should have remained in his children's bank accounts can continue to have personal guardianship of them, while someone else acts as guardian of their property.

### Duties and Responsibilities of a Guardian

Generally, a guardian acts as guardian of both the person and the property of the ward, but in some circumstances these duties are split. When acting as guardian of the person, a guardian is entitled to custody and control of the ward. Some statutes make a specific exception when a child has a living parent who is suitable to provide daily care. The guardian then manages the child's property, and the parent retains custody. The rights and responsibilities associated with the child's daily care belong to the parent, but the guardian makes major decisions affecting long-term planning for the minor.

A guardian of the person of a child can prevent certain people from seeing the ward, but a court will not allow unreasonable restrictions. A guardian also has the right to move to a different state with the child, but can be required to appear in court prior to relocation and give assurances regarding the child's care. A guardian has the duty to provide for the child's support, education, and religious training. Courts permit a guardian to use income and interest earned by the child's assets to pay for the child's needs, but they are reluctant to permit the guardian to spend the principal. A parent is primarily responsible for the support of a child, so when a

parent is living, his or her money must be used before the child's resources are spent. The child has a right to receive all of his or her property upon reaching the age of majority, unless restrictions are imposed by a will or a trust instrument.

A general guardian or a guardian of the property is considered a fiduciary—a person who occupies a position of trust and is legally obligated to protect the interests of the ward in the same manner as his or her own interests. A guardian cannot invest the ward's money in speculative ventures, agree not to sue someone who owes the ward money, or neglect legal proceedings, tax bills, or the maintenance of land, crops, or buildings that are part of the ward's estate. In addition, a guardian cannot allow someone else to maintain a business that the ward inherited or permit someone else to hold on to property belonging to the ward, without supervising such transactions. A guardian must earn income from the ward's property by making secure investments.

A guardian must take inventory and collect all the assets of the ward. Where permitted by law, title is taken in the ward's name. Otherwise, the guardian owns the property "as guardian" for the ward, which indicates that the guardian has the legal right to hold or sell the property but must not use it for his or her personal benefit. The guardian must determine the value of the property and file a list of assets and their estimated value with the court. The guardian must collect the assets promptly, and is liable to the ward's estate for any loss incurred owing to a failure to act promptly.

In general, a guardian does not have the authority to make contracts for the ward without specific permission from the court. If the child is party to a lawsuit, a guardian cannot assent to a settlement without first submitting the terms to the court for approval. A guardian must deposit any money held for the ward into an interest-bearing bank account separate from the guardian's own money. A guardian is also prohibited from making gifts from the ward's estate.

Generally, a guardian cannot tie up the ward's money by purchasing real estate, but can lend the money to someone else buying real estate if the property is sufficient security for the loan. A guardian cannot borrow money for personal use from the ward's estate. A guardian can lease property owned by the ward, but ordinarily the lease cannot extend beyond the time the ward reaches the age of majority. A guardian cannot mortgage real property or permit a lien on personal property of the ward. A guardian can sell items of the ward's personal property, but must receive the permission of the court to sell the ward's real estate.

At the end of the guardianship period, a guardian must account for all transactions involving the ward's estate. The guardian is usually required to file interim reports periodically with the court, but a final report must be filed and all property turned over to the ward when the ward has reached the age of majority. If the guardian has not managed the property in an ethical manner, the ward, upon reaching adulthood, may sue for waste, conversion, or EMBEZZLEMENT. If the management of the ward's assets was not illegal but resulted in losses, the guardian must reimburse the ward. If the guardian has managed the assets correctly, the guardian is entitled to be paid out of the ward's estate for his or her services.

Finally, whenever a guardian participates in a lawsuit for the ward, he or she sues or is sued only "as guardian," and not personally. For example, if the ward sues a physician for MALPRACTICE and recovers damages, the money does not belong to the guardian even though he or she initiated the lawsuit for the ward. In the same way, if someone obtains a judgment for damages against the ward, the money must come from the ward's property, not from the guardian. If both the guardian and the ward are parties in one lawsuit, the guardian participates in the action as both a guardian and an individual.

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## GUEST STATUTES

Widely adopted in the 1920s and 1930s, guest statutes were state laws that strictly limited liability in car accidents. These laws curtailed the legal rights of "guests"—nonpaying passengers such as friends or neighbors—who brought lawsuits against drivers after being hurt. Generally speaking, they prevented guests from suing car drivers or owners except in cases of a very high degree of NEGLIGENCE. Mere ordinary carelessness was an insufficient ground for a suit: if a guest was injured when a driver momentarily failed to pay attention and crashed the car, most states would reject a lawsuit. The net effect of guest statutes was to protect drivers and insurance companies while leaving injured passengers, for the most part, out of luck. Constitutional challenges to the laws frequently appeared in state and federal courts throughout the middle of the twentieth century, but courts waited until the 1970s and 1980s to begin narrowing and ultimately striking down the statutes in wholesale numbers.

The first guest statutes appeared in 1927, in Connecticut and Iowa (1927 Conn. Pub. Acts 4404, ch. 308, § 1 [repealed 1937]; Iowa Code Ann. § 321.494 [Supp. 1983]). Coinciding with a burst in manufacturing that increased the number of automobiles produced, the laws arose to meet the growing number of suits resulting from car accidents. By 1939, the last year in which a guest statute was enacted, thirty-three states had such laws or court precedents of comparable effect. The rationale behind the statutes was that a driver's liability should be limited: mere carelessness was seen as so commonplace that drivers in all accidents would be held liable for hurting their passengers were that the standard. For an injured passenger to surmount the barriers of a guest statute, greater evidence would have to be shown. A lawsuit would have to prove that the driver's actions were much more than careless—that they were grossly or willfully negligent. Other states went further, setting the standard as willful or wanton misconduct. In essence, little short of an utter disregard for safety or a desire to run someone off the road would hold up in court in a civil suit.

Thus, in one typical 1943 case, the Iowa guest statute prevented a passenger from recovering for injury. On May 30, 1942, a four-door Plymouth carrying five teenagers along a narrow, twisty gravel road went out of control, hit a bridge, and turned over. Driving was seventeen-year-old Fabian Gehl. Seconds before the accident, Gehl had leaned over to pick up a cigarette from the floor of the car. John Neyens, an eighteen-year-old passenger who was injured in the accident, sued Gehl. Under the guest statute, Neyens had to convince a jury that Gehl's behavior was reckless. At trial, the jury ruled in favor of the defendant, finding that reaching down for a cigarette, smashing the car into a bridge, and rolling it over was something short of reckless. On appeal, Neyens lost again (*Neyens v. Gehl et al.,* 235 Iowa 115, 15 N.W. 2d 888 [1944]).

Over the years, guest statutes caused considerable controversy. When they were defended at all, it was to argue that they were needed to prevent drivers and passengers from colluding to bring fraudulent claims against insurers. Critics took a different tack: they argued that guest statutes unfairly protected drivers and insurance companies, while leaving injured passengers and the survivors of dead passengers with no compensation for their losses. The distinction between paying and nonpaying passengers seemed ARBITRARY: why should friends given a ride in a car be unable to recover damages when, for example, commuters riding in a bus were able to do so? In many states, even cattle being transported to market enjoyed greater legal protection than a guest in a car. But such arguments fell on deaf ears for many years. As early as 1929, the U.S. Supreme Court rejected a constitutional challenge to a guest statute on DUE PROCESS grounds (*Silver v. Silver,* 280 U.S. 117, 50 S. Ct. 57, 74 L. Ed. 221), and as late as 1977, it refused to hear another challenge because it did not pose a substantial federal question (*Hill v. Garner,* 434 U.S. 989, 98 S. Ct. 623, 54 L. Ed. 2d 486 [mem.]).

Nonetheless, the death knell for guest statutes began in the 1970s. As the concept of liability evolved, state legislatures began providing other means for passengers to seek compensation, and a few repealed their guest laws. Reacting to these changes, courts began to carve out exceptions in existing guest statutes, and ultimately to overturn the laws on constitutional grounds. Thus, the Supreme Court of Utah said, when striking down Utah's guest statute in 1984, "The original scope of the guest statute has been substantially narrowed, and its application to any particular guest is both problematic and irrational" (*Malan v. Lewis,* 693 P.2d 661). By 1996, only Alabama still had a guest statute (Ala. Code § 32-1-2).

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Appendix E: Letter from Friedrich K. Juenger to Harry C. Sigman, Esq., September 16, 1994. 1995. *Vanderbilt Journal of Transnational Law* (May).

## GUILTY

*Blameworthy; culpable; having committed a* TORT *or crime; devoid of innocence.*

An individual is guilty if he or she is responsible for a delinquency or a criminal or civil offense. When an accused is willing to accept legal responsibility for a criminal act, he or she pleads guilty. Similarly, a jury returns a verdict of guilty upon finding that a defendant has committed a crime. In the event that a jury is not convinced that a defendant has committed a crime, jurors can return a verdict of *not guilty,* which does not mean that the individual is innocent or that the jurors are so convinced, but rather that they do not believe sufficient evidence has been presented to prove that the defendant is guilty.

In civil lawsuits, the term *guilty* does not imply criminal responsibility but refers to misconduct.

## GUN CONTROL

*Government regulation of the manufacture, sale, and possession of firearms.*

The SECOND AMENDMENT to the U.S. Constitution is at the heart of the issue of gun control. The Second Amendment declares that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

To many, the language of the amendment appears to grant to the people the absolute right to bear arms. However, the U.S. Supreme Court has held that the amendment merely protects the right of states to form a state militia (*United States v. Miller,* 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206 [1939]).

Even before the *Miller* opinion interpreted the Second Amendment in 1939, Congress, state legislatures, and local governing bodies were passing laws that restricted the right to bear arms. Kentucky passed the first state legislation prohibiting the carrying of concealed weapons, in 1813. By 1993, firearms were regulated by approximately 23,000 federal, state, and local laws.

State and local firearms laws vary widely. Thirteen states prohibit only the carrying of concealed handguns. At the other end of the spectrum, three Chicago suburbs—Morton Grove, Oak Park, and Evanston—ban handgun ownership outright. Generally, firearms regulations are more restrictive in large metropolitan areas.

State and local firearms laws and ordinances include outright bans of certain firearms, prohibitions on the alteration of certain firearms, and restrictions on the advertising of guns. State gun-control laws also address the theft of handguns, the inheritance of firearms, the use of firearms as collateral for loans, the possession of firearms by ALIENS, the discharge of firearms in public areas, and the alteration of serial numbers or other identifying marks on firearms. States generally base their power to control firearms on the police-power provisions of their constitutions, which grant to the states the right to enact laws for public safety.

Congress derives its power to regulate firearms in the COMMERCE CLAUSE, in Article I, Section 8, Clause 3, of the U.S. Constitution. Under the Commerce Clause, Congress may regulate commercial activity between the states and commerce with foreign countries. In reviewing federal legislation enacted pursuant to the Commerce Clause, the U.S. Supreme Court has given Congress tremendous leeway. Congress may enact criminal statutes regarding firearms if the activity at issue relates to interstate transactions, affects interstate commerce, or is such that control is necessary and proper to carry out the intent of the Commerce Clause.

In 1927, Congress passed the Mailing of Firearms Act, 18 U.S.C.A. § 1715, which banned the shipping of concealable handguns through the mail. Congress followed this with the NATIONAL FIREARMS ACT OF 1934 (ch. 757, 48 Stat. 1236–1240 [26 U.S.C.A. § 1132 et seq.]), which placed heavy taxes on the manufacture and distribution of firearms. One year later, Congress prohibited unlicensed manufacturers and dealers from shipping firearms across state borders, with the Federal Firearms Act of 1938 (ch. 850, § 2(f), 52 Stat. 1250, 1251).

In 1968, after the assassinations of President JOHN F. KENNEDY, CIVIL RIGHTS activists MALCOLM X and MARTIN LUTHER KING JR., and Senator ROBERT F. KENNEDY, Congress responded to the public outcry by passing the Gun Control Act of 1968 (GCA) (Pub. L. No. 90-615, § 102, 82 Stat. 1214 [codified at 18 U.S.C.A. §§ 921–928]). This act repealed the Federal Firearms Act and replaced it with increased federal control

# Take That! And That! The Gun Control Debate Continues

Gun control motivates one of U.S. law's fiercest duels.

Arguments favoring control range from calls for regulation to support for total disarmament. At the most moderate point of the spectrum is the idea that government should regulate who owns guns and for what purpose, a position held by the lobby Handgun Control Incorporated (HGI), which helped write the Brady law. This kind of monitoring is far too little for one antigun group, the Coalition to Stop Gun Violence, which demands a complete ban on manufacturing and selling guns to the general public. The opposition leaves room for only very slight compromise. The **NATIONAL RIFLE ASSOCIATION** (NRA)—the most powerful opponent of gun control—generally fights any restrictive measure. The NRA has opposed efforts to ban so-called cop-killer bullets, which can pierce police safety vests. It has supported background checks at the time of purchase, yet only if these are done instantly so as not to inconvenience the vast majority of gun buyers. Even more adamant is the group Gun Owners of America, which opposes any legal constraints.

With so many laws on the books, the question of gun control's constitutionality would seem already settled. Yet this is where the gun control debate begins. The **SECOND AMENDMENT** reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Does this mean citizens have a constitutional right to own guns? The gun lobby says yes.

A minority of legal scholars believe that the framers of the **BILL OF RIGHTS** meant to include citizens along with "a well regulated Militia" in the right to bear arms. One supporter of this view is Professor Sanford Levinson, of the University of Texas, who argues that the Second Amendment is intended to tie the hands of government in restricting private ownership of guns. He charges that liberal academics who support gun control read only the Constitution's Second Amendment so narrowly.

The majority view is more restrictive in its reading. It pictures the Second Amendment as tailored to a specific

over firearms. Title I of the act requires the federal licensing of anyone manufacturing or selling guns or ammunition. Title I also prohibits the interstate mail-order sale of guns and ammunition, the sale of guns to minors or persons with criminal records, and the importation of certain firearms. Title II of the act imposes the same restrictions on other destructive devices, such as bombs, grenades, and other explosive materials.

Between 1979 and 1987, a total of 693,000 people in the United States were assaulted by criminals armed with handguns. Statistics such as this, as well as high-profile shootings, such as that of President **RONALD REAGAN** and his aide, James Brady, in 1981, led to pressure for further gun-control measures.

The congressional enactment in 1993 of the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536, marked the first significant federal gun-control legislation since the GCA in 1968. The act was named for James Brady, the White House press secretary who was critically and permanently injured in 1981 during an assassination attempt on President Ronald Reagan. The Brady Act amended the GCA, requiring U.S. attorney general to establish a national instant background check system and immediately put into place certain interim provisions until the federal system became operational. Under these interim provisions, a firearms dealer who sought to transfer a handgun was required to obtain from the proposed purchaser a statement, known as a Brady Form, that contained the name, address, and date of birth of the purchaser along with a sworn statement that the purchaser was not among those classes of persons prohibited from purchasing a handgun. The dealer was then required to verify the purchaser's identity and to provide the "chief law enforcement officer" (CLEO) within the jurisdiction with a copy of the Brady Form. With some exceptions, the dealer was required to wait five business days before completing the sale, unless the CLEO notified the dealer that there was no apparent reason to believe that the transfer would be illegal.

A number of CLEOs objected to these interim provisions. Jay Printz of Montana and Richard Mack of Arizona, both CLEOs, filed actions in federal court challenging the constitutionality of the parts of the Brady Act requiring

right, namely, that of states to equip and maintain a state **NATIONAL GUARD**. Harvard law professor Laurence Tribe argues that "[t]he Second Amendment's preamble makes it clear that it is not designed to create an individual right to bear arms outside of the context of a state-run militia."

This argument has a leading advantage over the minority position: it is what the U.S. Supreme Court has consistently held for over fifty years.

In the 1939 case of *United States v. Miller,* 307 U.S. 174; 59 S. Ct. 816, 83 L. Ed. 1206 (1939)—the only modern Supreme Court case to address the issue—a majority of the Court refused to find an individual constitutional right to bear arms.

Since the meaning of the Second Amendment seems well settled, the dispute has turned to pragmatics. How well does gun control work, if it works at all? Measuring lives saved by gun control is practically impossible; it is only possible to count how many lives are lost to gun violence. Advocates generally claim that the fact that lives are lost to guns and the possibility that even one life may be saved through gun control are justification enough for legislation. They can quantify gains of another sort under the Brady law. In early 1995, the **JUSTICE DEPARTMENT** estimated that background checks had kept forty thousand felons from buying handguns, a figure derived from information provided by the state and local authorities who ran the checks.

Opponents say gun control is a gross failure. They argue that it never has kept criminals from buying guns illegally. Instead, they say, prohibition efforts have only been nuisances for law-abiding gun owners: city ordinances like Chicago's that ban handgun sales send buyers to the suburbs, and the Brady law's five-day waiting period amounts to another unfair penalty. Moreover, opponents rebut arguments about gun violence by insisting that guns are actually used to protect their owners from harm. The NRA's chief lobbyist has argued that the **SELF-DEFENSE** effectiveness of guns is proved by "the number of crimes thwarted, lives protected, injuries prevented, medical costs saved and property preserved."

Settling the gun control debate is no more likely than solving the problem of crime itself. In fact, only the latter could ever bring about the former. After all, it is violent crime, more than accidental gun deaths involving children, that animates the gun control movement. On this point, the two sides agree briefly and then diverge once again. Both want tougher action on crime. The key difference is that gun control opponents want such measures to include almost every traditional means available—more police officers, more prisons, and longer prison sentences—except the control of guns. Advocates believe there can be no effective anticrime measures without gun control.

CLEOs to accept Brady Forms. In both cases, the district courts held that the provision requiring CLEOs to conduct background checks were unconstitutional. However, the U.S. Court of Appeals for the Ninth Circuit consolidated the two cases and reversed these decisions, finding none of the Brady Act's interim provisions unconstitutional.

The U.S. Supreme Court, in *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997), reversed the Ninth Circuit, ruling that the interim provisions were unconstitutional. The Court, per Justice **ANTONIN SCALIA**, believed that the interim provisions disturbed the separation and equilibrium of powers among the three branches of the federal government. Under the Constitution, the president is to administer the laws enacted by Congress. The Brady Act "effectively transfers this responsibility to thousands of CLEOs in the 50 states," leaving the president with no meaningful way of controlling the administration of the law. Accordingly, CLEOs could not be required to accept Brady Forms from firearms dealers.

Other provisions of the Brady Act have also come under attack in the courts on constitutional grounds. For example, in *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999), a former police officer challenged the act's prohibition of persons convicted of **DOMESTIC VIOLENCE** offenses from possessing a firearm in or affecting interstate commerce. Gerald Gillespie, the plaintiff in the suit, was convicted of domestic violence and, as a result, lost his job as a police officer. Although the U.S. Court of Appeals for the Seventh Circuit found that Gillespie had standing to bring the suit challenging the Brady Act, it noted that the Second Amendment was intended to ensure protection by a militia for the people as a whole. Because it could not find a reasonable relationship between ownership of a particular gun and the preservation and efficiency of a state militia, Gillespie's claim failed. Other lower federal courts have similarly held that the Second Amendment does not prohibit the federal government from imposing some restrictions on private gun ownership.

In August 1994, Congress passed legislation banning so-called assault weapons under Title XI of the Public Safety and Recreational Firearms Use Protection Act (Pub. L. No. 103-322,

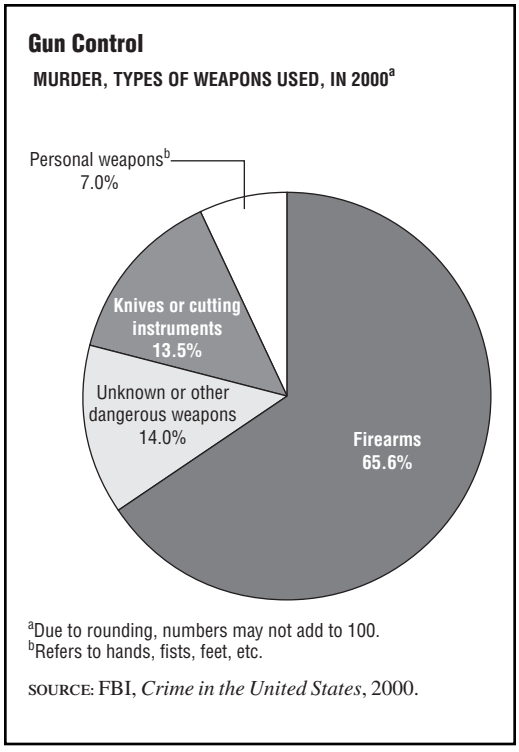


108 Stat. 1796 [codified as amended in scattered sections of 42 U.S.C.A.]). This act bans the manufacture, sale, and use of nineteen types of semiautomatic weapons and facsimiles, as well as certain high-capacity ammunition magazines.

In 1995, the U.S. Supreme Court set additional limits on gun control with its landmark decision in *United States v. Lopez,* 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626. In *Lopez,* the Court ruled that Congress had exceeded its authority under the Commerce Clause in passing a law that criminalized the possession of a firearm within 1,000 feet of a school (Gun-Free School Zones Act of 1990 [18 U.S.C.A. § 922(1)(1)(A)]). The Court held that because such gun possession was not an economic activity that significantly affected interstate commerce, it was beyond Congress's power to regulate.

The debate over gun control entered a new phase when, beginning in 1998, major U.S. cities brought lawsuits against the gun industry. Frustrated by decades of meager progress in gun control, as well as mounting costs in law enforcement and HEALTH CARE, mayors from such cities as New Orleans, Miami, Chicago, San Francisco, Cleveland, and Cincinnati looked beyond traditional regulation and tried litigation as a means to recoup the millions of dollars that the cities spend each year in coping with gun violence. The cities hoped to emulate the success of state governments in winning record settlements from the tobacco industry. In February 1999, they were encouraged when a federal jury returned the first-ever verdict holding gun makers liable for damages caused by the use of their products in a crime. But as many more cities considered filing suits, the gun industry fought back with LOBBYING and launched preemptive strikes in state legislatures against future lawsuits.

Many of the lawsuits were dismissed. The gun industry enjoyed two victories in 2000 as judges dismissed suits brought by the cities of Philadelphia and Chicago. Charging the industry with a public NUISANCE, both cities sought to recover the public costs of gun violence, including medical care, police protection, emergency services, and prison costs. The cities argued that gun manufacturers and distributors were responsible for these costs because they knowingly or negligently sold guns to dealers who then supplied them to criminals. A judge in the Cook County Circuit Court dismissed Chicago's claim because Chicago had failed to prove that gun manufacturers were responsible for public costs resulting from criminal gun violence. Likewise, a Pennsylvania judge dismissed Philadelphia's lawsuit because under the Pennsylvania Uniform Firearms Act—for which the gun industry lobbied—the state of Pennsylvania has the sole authority to regulate the industry.

State and federal appellate courts have generally held in favor of gun manufacturers as well. The California Supreme Court, in *Merrill v. Navegar, Inc.*, 28 P.3d 116 (Cal. 2001), held that gun manufacturers cannot be held legally responsible when their products are used for criminal activity. The closely watched case stemmed from a 1993 shooting rampage in a San Francisco office tower that left eight people dead and six wounded. Similarly, the U.S. Court of Appeals for the Third Circuit, in *Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001), upheld the dismissal of a suit brought by Camden County, New Jersey, which had accused several gun manufacturers of creating a public nuisance and acting negligently in its distribution of handguns. The Third Circuit also upheld the dismissal of the suit brought by the city of

Philadelphia in *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002).

Some lawsuits involving gun manufacturers were settled out of court. In March 2000, under pressure from many lawsuits nationwide, Smith & Wesson, the nation's oldest and largest manufacturer of handguns, entered into a settlement to end many of the cases. Under the agreement, Smith & Wesson agreed to place tamper-proof serial numbers on handguns to prevent criminals from scratching them off. It also promised to manufacture its handguns with trigger locks to prevent them from being fired by unauthorized users.

*A trigger lock in place on a Smith & Wesson .357 Magnum. In March 2000 the gun manufacturer settled a number of lawsuits by agreeing to, among other steps, supply such locks with its handguns.*

AP/WIDE WORLD PHOTOS

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Weapons.

## HABEAS CORPUS

*[*Latin, You have the body.*] A writ (court order) that commands an individual or a government official who has restrained another to produce the prisoner at a designated time and place so that the court can determine the legality of custody and decide whether to order the prisoner's release.*

A writ of habeas corpus directs a person, usually a prison warden, to produce the prisoner and justify the prisoner's detention. If the prisoner argues successfully that the incarceration is in violation of a constitutional right, the court may order the prisoner's release. Habeas corpus relief also may be used to obtain custody of a child or to gain the release of a detained person who is insane, is a drug addict, or has an infectious disease. Usually, however, it is a response to imprisonment by the criminal justice system.

A writ of habeas corpus is authorized by statute in federal courts and in all state courts. An inmate in state or federal prison asks for the writ by filing a petition with the court that sentenced him or her. In most states, and in federal courts, the inmate is given the opportunity to present a short oral argument in a hearing before the court. He or she also may receive an evidentiary hearing to establish evidence for the petition.

The habeas corpus concept was first expressed in the MAGNA CHARTA, a constitutional document forced on King John by English landowners at Runnymede on June 15, 1215. Among the liberties declared in the Magna Charta was that "No free man shall be seized, or imprisoned, or disseised, or outlawed, or exiled, or injured in any way, nor will we enter on him or send against him except by the lawful judgment of his peers, or by the law of the land." This principle evolved to mean that no person should be deprived of freedom without DUE PROCESS OF LAW.

The writ of habeas corpus was first used by the common-law courts in thirteenth- and fourteenth-century England. These courts, composed of legal professionals, were in competition with feudal courts, which were controlled by local landowners, or "lords." The feudal courts lacked procedural consistency, and on that basis, the common-law courts began to issue writs demanding the release of persons imprisoned by them. From the late fifteenth to the seventeenth centuries, the common-law courts used the writ to order the release of persons held by royal courts, such as the Chancery, ADMIRALTY courts, and the STAR CHAMBER.

The only reference to the writ of habeas corpus in the U.S. Constitution is contained in Article I, Section 9, Clause 2. This clause provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." President ABRAHAM LINCOLN suspended the writ in 1861, when he authorized his Civil War generals to arrest anyone they thought to be dangerous. In addition, Congress suspended it in 1863 to allow the Union army to

## Rubin "Hurricane" Carter

Federal courts grant writs of habeas corpus only when grave constitutional violations have occurred. The granting of Rubin "Hurricane" Carter's habeas petition in 1985 freed him from almost 20 years of imprisonment for a crime he maintains he did not commit.

Carter was a top-ranked middleweight boxer when he and John Artis were arrested in 1966 and charged with murdering three people in Paterson, New Jersey. Carter and Artis were African American; the victims were white. Carter and Artis claimed they were the victims of racism and a police frame-up, but they were convicted of murder and sentenced to life imprisonment.

Carter fought his conviction in state court, but the verdict was upheld. In 1974 he published *The Sixteenth Round: From Number 1 Contender to Number 45472.* The book became a national best-seller and drew attention to his case. In 1975 Bob Dylan wrote and recorded the song "Hurricane," which recounted Carter's arrest and trial and characterized Carter as an innocent man. This publicity, along with an investigation by the New Jersey public defenders' office, led to a motion for a new trial. The motion was granted, but Carter and Artis were convicted again in 1976. Carter remained imprisoned; Artis was paroled in 1981.

After all state appeals were exhausted, the only remaining avenue for relief was to file for a writ of habeas corpus in federal court. In November 1985 Judge H. Lee Sarokin ruled that the second murder trial convictions were unconstitutional because the prosecution had been allowed to imply that guilt could be inferred by the defendants' race and because the prosecution withheld **POLYGRAPH** evidence that could have been used to impeach the credibility of their "star witness" (*Carter v. Rafferty,* 621 F. Supp. 533 [D.N.J. 1985]). Judge Sarokin therefore granted habeas corpus, overturned the convictions, and ordered "Immediate release from custody with prejudice."

The State of New Jersey appealed to the Third Circuit Court of Appeals, asking to reverse Sarokin's ruling and requesting that Carter remain incarcerated until a final ruling. The Third Circuit rejected both appeals. New Jersey appealed to the U.S. Supreme Court, which also refused to overturn. The state chose not to attempt a third prosecution of Carter and Artis. Carter moved to Canada where he headed the Association for the Defense of the Wrongly Convicted.

hold accused persons temporarily until trial in the civilian courts. The Union army reportedly ignored the statute suspending the writ and conducted trials under MARTIAL LAW.

In 1789, Congress passed the JUDICIARY ACT OF 1789 (ch. 20, § 14, 1 Stat. 73 [codified in title 28 of the U.S.C.A.]), which granted to federal courts the power to hear the habeas corpus petitions of federal prisoners. In 1867, Congress passed the HABEAS CORPUS ACT of February 5 (ch. 28, 14 Stat. 385 [28 U.S.C.A. §§ 2241 et seq.]). This statute gave federal courts the power to issue habeas corpus writs for "any person . . . restrained in violation of the Constitution, or of any treaty or law of the United States." The U.S. Supreme Court has interpreted it to mean that federal courts may hear the habeas corpus petitions of state prisoners as well as federal prisoners.

The writ of habeas corpus is an extraordinary remedy because it gives a court the power to release a prisoner after the prisoner has been processed through the criminal justice system, with all its procedural safeguards and appeals. For this reason, the burden is initially on the petitioning prisoner to prove that he or she is being held in violation of a constitutional right. If the petitioner can meet this burden with sufficient evidence, the burden then shifts to the warden to justify the imprisonment.

A prisoner may file a petition for a writ of habeas corpus with the sentencing court only after exhausting all appeals and motions. Federal courts may receive a petition from a state prisoner, but not until the petitioner has attempted all available appeals and motions and habeas corpus petitions in the state courts. Federal pris-

oners must exhaust all available appeals and motions in the federal sentencing court and federal appeals courts before filing a habeas corpus petition with the sentencing court. If the first petition is denied, the inmate may petition the appeals courts.

A petition for a writ of habeas corpus is a civil action against the jailer. It is neither an appeal nor a continuation of the criminal case against the prisoner. It is not used to determine guilt or innocence. Rather, the purpose is solely to determine whether the confinement is in violation of a constitutional right. This is significant because it limits the scope of complaints that a petitioner may use as a basis for the writ.

Violation of the Due Process Clauses of the Fifth and Fourteenth Amendments is the most common basis for a writ of habeas corpus. Prosecutorial misconduct, juror malfeasance, and ineffective assistance of counsel are common due process grounds for the writ. FIFTH AMENDMENT grounds include failure of the police to give *Miranda* warnings before in-custody questioning, in violation of the right against SELF-INCRIMINATION, and multiple trials, in violation of the DOUBLE JEOPARDY prohibition. The EIGHTH AMENDMENT right against CRUEL AND UNUSUAL PUNISHMENT is another common ground for habeas corpus relief, especially in cases involving the death penalty or a lengthy prison term.

There are several notable restrictions on the writ's application. FOURTH AMENDMENT violations of the right against unreasonable SEARCH AND SEIZURE cannot be raised in a habeas corpus petition. Prisoners are not entitled to a court-appointed attorney for habeas corpus petitions. Newly developed constitutional principles will not be applied retroactively in habeas corpus cases except where doubt is cast on the guilt of the prisoner. Delay in filing a habeas petition may result in its dismissal if the government is prejudiced (i.e., made less able to respond) by the delay. In addition, the petitioner must be in custody to request a writ of habeas corpus. This rule prevents a prisoner from challenging a conviction through habeas corpus after serving out a sentence for the conviction.

The law of habeas corpus is ever changing. In the 1990s, the U.S. Supreme Court took steps to further limit the writ's application. In *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992), the Court held that a habeas corpus petitioner is not entitled to an evidentiary hearing in federal court unless she or he can show two things: a reason for failing to develop evidence at trial, and actual prejudice to the prisoner's defense as a result of the failure. In *Herrera v. Collins,* 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993), the Court held that a claim of actual innocence is not a basis for federal habeas corpus relief. This means that newly discovered evidence alone does not entitle a petitioner to federal habeas corpus relief.

The availability and import of habeas corpus in state courts is also subject to change through judicial decisions and new laws. For example, in 1995, the Texas Legislature passed a law that made the habeas corpus process concurrent with appeals (Tex. Crim. Proc. Code Ann. art. 11.071). This law effectively limited the number of times that a Texas state prisoner could challenge the disposition of a criminal case. Significantly, the law applied to all criminal defendants, including those facing the death penalty. Under the legislation, a death row inmate has only one round of review in Texas state courts before seeking relief in federal court.

In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA) (Pub. L. No. 104-132, 110 Stat. 1214). Congress sought to streamline post-conviction appeals proceedings and to curtail the time that prisoners could use to seek habeas corpus relief. Since the enactment of the law, the U.S. Supreme Court has been called upon to interpret a number of the AEDPA provisions; these rulings primarily have addressed technical details of the workings of the new law but the Court has endorsed the AEDPA and removed jurisdiction from the lower federal courts to hear many habeas petitions. The Court upheld the constitutionality of the AEDPA in *Felker v. Turpin*, 518 U.S. 651, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996).

The habeas corpus provisions represent a major shift in federal-state judicial relations, for Congress directed that federal courts generally defer to state court judgments on questions of federal CONSTITUTIONAL LAW in criminal cases. The AEDPA established a "deference" standard, which mandates that the federal courts, in reviewing state court convictions, defer to a state court ruling on the merits of any habeas corpus claim. This deferral includes QUESTIONS OF FACT and of law, as well as mixed questions of fact and law. A federal court must defer unless the state court adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established

*A sample form for use in applications for habeas corpus*

**Application for Habeas Corpus**

**STATE OF NORTH CAROLINA**

*File No.*

_____ County

In The General Court Of Justice
☐ District ☐ Superior Court Division

| **STATE VERSUS** | | | | **APPLICATION AND WRIT OF HABEAS CORPUS AD PROSEQUENDUM** |
|---|---|---|---|---|
| *Name of Defendant* | | | | |
| *Race* | *Sex* | *Date of Birth* | *Social Security No.* | |
| *Name of Agency in Whose Custody Defendant Confined* | | | | |
| ☐ *N.C. DOC* ☐ *Sheriff of* _____ *County* | | | | |

| **File No.** | **Offense(s)** | **CHARGES PENDING FOR TRIAL** |
|---|---|---|
| | | |

**APPLICATION**

**To Any Judge Of The Trial Division Named Above:**

The defendant named above is confined in the custody of the agency named above. The prosecutor requests that a Writ of Habeas Corpus Ad Prosequendum be issued to the agency, requiring that the defendant be delivered, on the court date and at the time and place shown below, to the court in which the charge referred to above are pending.

| *Court Date* | *Court Time* ☐ AM ☐ PM | *Date of Application* |
|---|---|---|
| *Location of Court* | | *Signature of Prosecutor* |

**WRIT**

**To the Agency Named Above:**
The defendant named above is confined in your custody. Upon application of the prosecutor named above, you are ORDERED to deliver the defendant to the custody of the sheriff of this county so that the defendant may be brought before this Court on the court date and at the time and place referred to above.

**To:** ☐ **The Sheriff of this County** ☐ **Other** _____
You are **ORDERED** to serve this writ upon the agency named above; to take the defendant into custody and bring him before this Court on the date and at the time and place shown above and, when the court proceeding has been completed and the defendant is released by the court, to return the defendant to the custody of that agency unless the court directs otherwise.

| *Date* | *Court* | *Name (Type or Print)* |
|---|---|---|
| | | *Signature* |
| ☐ *District Court Judge* | ☐ Superior Court Judge | |

**RETURN OF SERVICE**

I certify that this Writ was received and served as follows.

| *Date Writ Received* | *Date Writ Served on Custodian* | *Date of Return of Service* |
|---|---|---|
| *Name of Person Served* | | *Signature of Person Making Return of Service* |
| *Date Def. Received from Custodian* | *Date Def. Returned to Custodian* | ☐ Deputy Sheriff ☐ Other |

AOC-CR-223, Rev. 10/96
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Original-Custodian Copy-District Attorney Copy-File

federal law, as determined by the U.S. Supreme Court; or if the state conviction resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The AEDPA also contains a number of specific rules for habeas corpus review. The act provides for a one-year filing deadline for non-capital habeas corpus petitions. The time starts running at the conclusion of direct review or expiration of time for seeking such review. The law requires a certificate of appealability from a circuit judge or justice before a petitioner may appeal from denial of relief. The petitioner must make a substantial showing of denial of a constitutional right, and the certificate must be issue-specific. The AEDPA also allows federal courts to deny relief with respect to unexhausted claims but may not grant relief if the claim is unexhausted. The habeas petitioner can avoid exhaustion only if there is no available state remedy or the remedy is ineffective to protect the petitioner's rights. If there is no state remedy because of a procedural default, federal review is still prohibited.

The AEDPA also places restrictions on the ability of a petitioner to obtain an evidentiary hearing on a claim where the prisoner failed to develop the factual basis. Because state court fact-findings are presumed to be correct, the petitioner must rebut the presumption by clear and convincing evidence. To obtain an evidentiary hearing, the petitioner must show that the claim relies on a new rule made retroactive by the U.S. Supreme Court or that the factual predicate could not have been discovered earlier through due diligence. Moreover, in all cases, the petitioner must show by clear and convincing evidence that but for the alleged error for which a hearing is sought, no reasonable factfinder would have found petitioner guilty of the underlying offense. This is a steep hurdle for a habeas petitioner to overcome.

The AEDPA also seeks to prevent the abuse of habeas corpus by limiting the number of times a prisoner may ask for a writ. A successive habeas petition may not be filed in district court unless the petitioner is authorized to do so by a three-judge panel of the Court of Appeals. The U.S. Supreme Court, in *Felker*, characterized this provision as an acceptable "gatekeeping" mechanism. If petitioners make a PRIMA FACIE showing that they satisfy the exceptions against successive petitions they may proceed; otherwise the court must dismiss the petition. If a successive claim was presented in a prior petition, it must be dismissed; no exceptions are authorized by the AEDPA. Though the AEDPA provides some narrow exceptions to this rule, any claim must establish by clear and convincing evidence that but for the error no reasonable factfinder would have found the petitioner guilty of the underlying offense.

In habeas petitions from death row inmates, the AEDPA imposes additional rules beyond those already described. The rules apply to states that establish certain standards for competence of counsel. For states to benefit from these additional limitations, they must provide a mechanism for appointment and compensation of competent counsel in state post-conviction proceedings or for appointment of counsel to handle the appeal and post-conviction remedies in a unitary proceeding. Once the state court has made an appointment of counsel, a federal court that would have jurisdiction over the case may enter a stay of execution. The stay expires if a timely petition is not filed, if the prisoner properly waives the right to pursue federal habeas relief, or if relief is denied at any stage of federal review. Once a stay vacates under any of those circumstances, a new one may not be imposed unless the petitioner can overcome the presumption against successive petitions.

The AEDPA sets a time limit for habeas petition in capital cases: The petition must be filed within 180 days after final state court affirmance on direct review. In addition, the AEDPA requires that capital habeas cases be given priority over all non-capital matters, and it imposes time limits on resolution. These include a decision by the district court within 180 days after the petition is filed, although the court may extend its time by no more than 30 days. Failure by the district court to act within the time limits may be enforced by a petition for writ of mandate. More importantly, a court of appeals must decide the case within 120 days after the reply brief is filed; any petition for rehearing must be decided within 30 days after the petition is filed, or 30 days after any requested responsive pleading is filed. If rehearing or rehearing en banc is granted, the case must be decided within 120 days after the order granting such rehearing. In addition, the time limits are applicable to all first petitions, successive petitions, and habeas cases considered on remand from a court of appeals or the U.S. Supreme Court.

The AEDPA has changed the legal landscape for prisoners seeking writs of habeas corpus. Petitioners must act within set deadlines, and they must attempt to place all issues in dispute before the first habeas-reviewing federal court or risk the chance of being rejected in a successive petition.

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## HABEAS CORPUS ACT

The Habeas Corpus Act was an English statute enacted in 1679 during the reign of King Charles II. It was subsequently amended and supplemented by enactments of Parliament that permitted, in certain cases, a person to challenge the legality of his or her imprisonment before a court that ordered the person to appear before it at a designated time so that it could render its decision. The Habeas Corpus Act served as the precursor of HABEAS CORPUS provisions found in U.S. federal and state constitutions and statutes that safeguard the guarantee of personal liberty.

## HABENDUM CLAUSE

*The portion of a deed to real property that begins with the phrase* To have and to hold *and that provides a description of the ownership rights of the transferee of such property.*

Whereas a granting clause contains the words of transfer of an interest, a habendum clause defines the estate granted and declares the extent of the interest conveyed. For example, such a clause might say: "To have and to hold the premises herein granted unto the party of the second part, and to the female heirs of the party of the second part forever." This particular habendum clause qualifies the estate granted by limiting its inheritability to the female heirs of the grantee.

## HABITABILITY

*Fitness for occupancy. The requirement that rented premises, such as a house or apartment, be reasonably fit to occupy.*

A WARRANTY of habitability is an implied promise by a landlord of residential premises that such premises are fit for human habitation. It exists in a majority of states, either by statute or case law, and implies that the premises are free from any condition that is unsafe or unsanitary. A breach of this warranty would, for example, occur if none of the toilets were in working order or if the roof of a house was in total disrepair.

A warranty of habitability begins at the commencement of the tenancy and continues for its duration.

## HABITUAL

*Regular or customary; usual.*

A *habitual* drunkard, for example, is an individual who regularly becomes intoxicated as opposed to a person who drinks infrequently. A *habitual criminal* is a legal category that has been created by a number of state statutes by which serious penalties can be imposed on individuals who have been repeatedly convicted of a designated crime.

## HAGUE TRIBUNAL

The Hague Tribunal was an ARBITRATION court established for the purpose of facilitating immediate recourse for the settlement of international disputes. As of 1993, the term is often used to refer to the International Criminal Tribunal for the Former Yugoslavia (ICTY), which has prosecutorial and adjudicatory powers. Both entities are commonly referred to transitionally as the Hague Tribunal, although technically speaking, they are not the same.

The Hague Tribunal was established by the Hague Peace Conference in 1899 to provide a permanent court accessible at all times for the resolution of international differences. The court was granted jurisdiction over all arbitration cases, provided the parties thereto did not decide to institute a special tribunal. In addition, an international bureau was established to act as a registry for the tribunal and to serve as the channel of communications with respect to the meetings of the court.

The Hague Tribunal is considered permanent due to the fact that there is a permanent list

of members from among whom the arbitrators are chosen. In 1907 at the Second Hague Conference it was provided that of the two arbitrators selected by each of the parties, only one could be a national of the state appointing him or her.

In 1993, the UNITED NATIONS (UN) Security Council passed a resolution to establish within the Hague, Netherlands, an ad hoc international 14-judge court expressly mandated to prosecute and adjudicate WAR CRIMES, GENOCIDE, and crimes against humanity committed on the territory of the former Yugoslavia. This International Criminal Tribunal for the Former Yugoslavia (ICTY) is often referred to as the Hague Tribunal. (Subsequent resolutions have increased the court to 16 members as well as a special force of ad litem judges.) The tribunal is composed of three chambers and an appeal chamber. Judges are elected by the UN Assembly but are nominated for four-year terms by their respective countries.

The UN Security Council also chooses a prosecutor who, in the name of the tribunal, brings indictments. The tribunal has power to impose prison sentences up to life but has no power to impose the death penalty. Sentences meted by the tribunal are served in various prison systems of several nations with whom the tribunal has made formal arrangements. The tribunal has no policing power or police force and relies for these on the mandated cooperation of various states for arrests, documents, and compulsory producing of witnesses. It operates on an annual budget of approximately $100 million.

In its first ten years (1993–2003), the tribunal had indicted over 80 defendants (several in custody awaiting trial) and completed 34 trials, for which 29 persons were found guilty. (Of the 29 convictions, 18 were Serbs; nine were Croats; and two were Bosnian Muslims.) One of the more notorious defendants, former Yugoslav president Slobodan Milosevic, faced 66 separate charges of grave crimes, including genocide and other atrocities allegedly involving Slovenia, Bosnia, Croatia, Serbia, and Kosovo. His trial had been continuing for more than a year as of March 2003. Other completed trials included that of General Radislav Krystic, found guilty of genocide in the Srebrenica massacres of as many as 8,000 persons; Croatian General Tihomir Blaskic, found guilty of the massacre of villagers in Ahmici; and General Stanislav Galic, allegedly involved in the killing of civilians in Sarajevo. As of April 2003, two of the most wanted defendants remained at large: President Radovan Karadzic of the Bosnian Serb Republic, and Ratko Mladic, former commander of the Bosnian Serb army.

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Arbitration; International Court of Justice; International Law; Jurisdiction.

## ♦ HAMER, FANNIE LOU TOWNSEND

Fannie Lou Hamer worked for voter registration for African Americans in the U.S. South and helped establish the Mississippi Freedom DEMOCRATIC PARTY (MFDP), which successfully challenged the all-white Democratic party in Mississippi.

Hamer was born October 6, 1917, in Montgomery County, Mississippi. She was the twentieth and youngest child of Jim Townsend and Lou Ella Townsend, who were sharecroppers in rural Mississippi. Hamer grew up in a tar paper shack and slept on a cotton sack stuffed with dry grass. She first went into the cotton fields to work when she was six years old, picking thirty pounds of cotton a week. By the time she was thirteen years old, Hamer was picking two hundred to three hundred pounds of cotton each week. Because of her family's poverty, she was forced to end her formal education after the sixth grade.

"IF THIS IS A GREAT SOCIETY, I'D HATE TO SEE A BAD ONE." —FANNIE LOU HAMER

In 1944, when she was twenty-seven, Hamer married Perry ("Pap") Hamer, a sharecropper on a nearby plantation owned by the Marlowe family, near Ruleville, Mississippi. Hamer spent the next eighteen years working in the fields chopping cotton. Her husband also ran a small saloon, and they made liquor to sell.

In August 1962, Hamer attended a meeting sponsored by the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (SCLC) and the STUDENT NONVIOLENT COORDINATING COMMITTEE (SNCC, pronounced Snick). The SCLC was founded in 1957 by a group of black ministers led by MARTIN LUTHER KING, JR., and coordinated the CIVIL RIGHTS activities of ministers. SNCC was organized in 1960 by students and other young people, and SNCC workers had recently come to Ruleville to organize voter registration drives. At that time, only five percent of

*Fannie Lou Hamer.*
LIBRARY OF CONGRESS

African Americans in Mississippi who were old enough to vote had been allowed to register. Ten days later, a group of white men rode through the town and fired sixteen shots into the homes of those involved in the black voting drive. That night Hamer fled to her niece's house forty miles away. A few weeks later, SNCC workers brought her to the SNCC annual conference in Nashville. She later returned to the Marlowe plantation, where she found that her husband had been fired from his job and her family had lost its car, furniture, and house.

Hamer then became a field secretary for SNCC in Ruleville, earning $10 a week, and began organizing a poverty program. She worked with the local people, educating them about their right to vote, and she became an effective fund-raiser for SNCC, traveling to northern towns to speak about life as an African American in Mississippi, and participating in civil rights demonstrations across the country. Hamer and her associates were often harassed, intimidated, and even beaten.

Hamer helped found the Council of Federated Organizations, which brought large numbers of white northerners into Mississippi in the summer of 1964, known as Freedom Summer. These volunteers helped with voter registration and other civil rights activities, and their work focused national attention on the SEGREGATION still rampant in the South.

In April 1964, Hamer helped found the Mississippi Freedom Democratic party. The MFDP was organized as an alternative to the all-white Mississippi Democratic party, which barred African Americans from its activities. The MFDP planned to challenge the regular Democratic party's right to represent Mississippi at the Democratic National Convention in Atlantic City, New Jersey, in August 1964 and hoped to win the right to be seated as the state's legal delegation. Before leaving for Atlantic City, the MFDP held its own convention and elected sixty-four African Americans and four whites as delegates to the national convention. Hamer was elected vice chairwoman.

Democratic president LYNDON B. JOHNSON, who was running for reelection in 1964, became worried that the MFDP would disrupt party unity and cause him to lose the election to

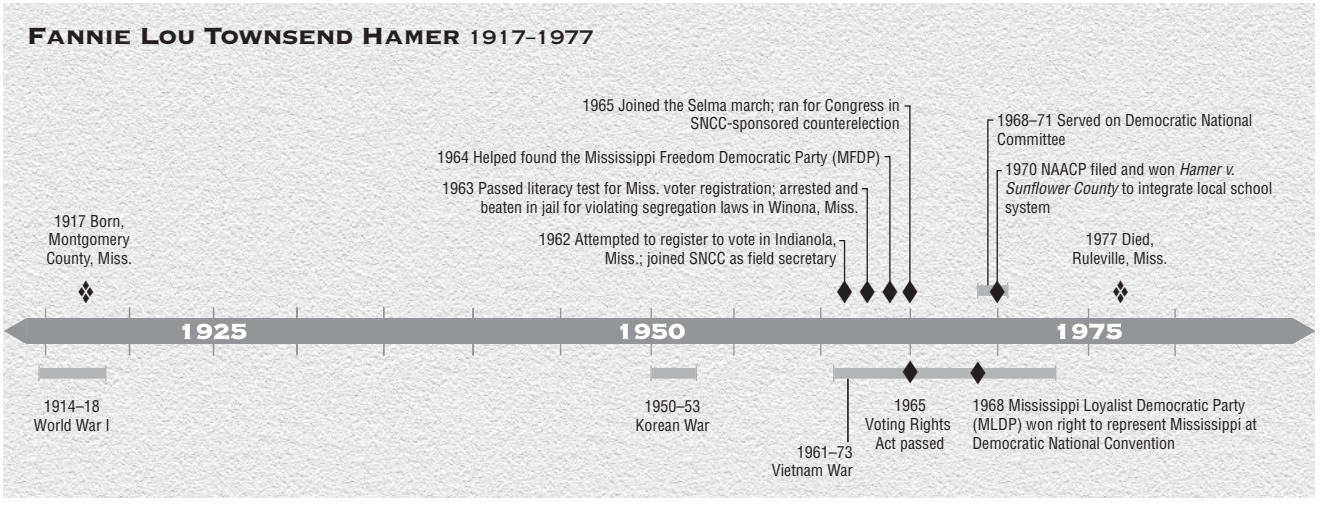

Republican senator BARRY M. GOLDWATER. Johnson went to work to stop the MFDP by having his supporters threaten and harass MFDP supporters on the Credentials Committee, which was scheduled to hear the MFDP's case at the convention. In nationally televised proceedings before the committee, Hamer testified about the difficult life of African Americans in Mississippi and how they were prevented from participating in the political process. She also described a brutal beating she received while in jail for violating segregation laws. The beating left Hamer nearly blind in one eye.

Following Hamer's testimony, viewers from across the United States telegrammed their delegates, urging them to support the MFDP. Realizing he would now have to deal with the new party, Johnson worked out a settlement that called for the seating of two at-large delegates from the MFDP and a pledge that segregated delegations would not be seated at the 1968 convention. Hamer spoke out strongly against the compromise, and the delegation voted to reject it.

Following the 1964 convention, Hamer continued her work in the CIVIL RIGHTS MOVEMENT. In March 1965, she joined King and hundreds of others in a fifty-four-mile march from Selma, Alabama, to Montgomery, Alabama. She also traveled with a SNCC delegation to Africa.

Back in Ruleville, Hamer and two other women ran for Congress against white congressmen in a special counterelection organized by SNCC. In the Democratic primary, their names were not on the ballot because the Mississippi election commission said they did not have enough signatures of registered voters on their petitions, and the white candidates won. In the SNCC election, however, the women's names were listed on the ballot, and they won. The women pressed their claim to be seated in Congress in Washington, D.C. They argued that Mississippi county registrars had refused to certify the signatures of black voters on their petitions. In September 1965, after nine months of investigation into their claim that the state had illegally obstructed their attempts to place their names on the ballot, the U.S. House of Representatives rejected their challenge by a margin of eighty-five votes.

In August 1968, Hamer again traveled to the Democratic National Convention in Chicago as a member of the alternative Mississippi delegation, renamed the Mississippi Loyalist Democratic party (MLDP). Again, the party went before the Credentials Committee seeking recognition, and again, a compromise was offered, this time to seat twenty-one members of each delegation. The MLDP refused to compromise, and this time, the regular delegation was unseated. When Hamer finally took her seat at the convention, she received a standing ovation.

Hamer went on to serve on the Democratic National Committee from 1968 until 1971. She also continued her civil rights work in Mississippi. In May 1970, Hamer and officials of the National Association for the Advancement of Colored People (NAACP) in Indianola filed a CLASS ACTION lawsuit in federal district court, claiming that the Sunflower County, Mississippi, school districts maintained a dual school system for black and white students and that black teachers and principals were not adequately protected against losing their jobs. The suit asked the court to order that one integrated school system be established and maintained. In *Hamer v. Sunflower County* (N.D. Miss., June 15, 1970), the district court, relying heavily on data in a report from a biracial committee headed by Hamer, ordered the county to merge its schools into one public school system. The U.S. Court of Appeals for the Fifth Circuit affirmed the district court in *United States v. Sunflower County School District,* 430 F.2d 839 (5th Cir. 1970).

Hamer continued to work for the poor in Ruleville, organizing poverty programs, raising money for low-income housing, and starting a day care center. Her favorite project was the Freedom Farm Cooperative. She started the farm with 40 acres, which eventually increased to 650 acres on which five thousand people grew their own food.

In 1976, Hamer was honored in Ruleville on Fannie Lou Hamer Day. She died March 14, 1977, in Mound Bayou, Mississippi, from heart disease, cancer, and diabetes. Engraved on the headstone of her grave in Ruleville are the words "I am Sick and Tired of Being Sick and Tired."

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Civil Rights Movement; Voting.

## ♦ HAMILTON, ALEXANDER

Alexander Hamilton, as a lawyer, politician, and statesman, left an enduring impression on U.S. government. His birth was humble, his death tragic. His professional life was spent forming basic political and economic institutions for a stronger nation. As a New York delegate at the Constitutional Convention, Hamilton advocated certain powers for the central government. His principles led to his rise as chief spokesperson for the FEDERALIST PARTY. The party had a short life span, but Hamilton's beliefs carried on through his famous FEDERALIST PAPERS. In these documents he advocated broad constitutional powers for the federal government, including national defense and finance. According to Hamilton, a lesser degree of individual human liberties and CIVIL RIGHTS would follow federal powers. His deemphasis of freedom put him at odds with other Founders, especially Thomas Jefferson's Democrats. However, he backed his beliefs with a strong record of public service from the Revolution onward. Through his contributions in the U.S. Army, in the TREASURY DEPARTMENT, and as a lawyer, many still recognize him as a commanding architect of the United States government.

"REAL LIBERTY IS NEITHER FOUND IN DESPOTISM OR THE EXTREMES OF DEMOCRACY, BUT IN MODERATE GOVERNMENTS."
—ALEXANDER HAMILTON

Hamilton was born January 11, 1757, on Nevis Island, in the West Indies. His parents never married. His father, the son of a minor Scottish noble, drifted to the West Indies early in his life and worked odd jobs throughout the Caribbean. His mother died in the Indies when he was eleven. Hamilton spent his early years in poverty, traveling to different islands with his father. At the age of fourteen, while visiting the island of St. Croix, he met a New York trader who recognized his natural intelligence and feisty spirit. The trader made it possible for Hamilton to go to New York in pursuit of an education.

Hamilton attended a preparatory school in New Jersey and developed contacts with men who had created a movement seeking colonial independence. When he later entered King's College (now Columbia University), he became active in the local patriot movement. The American Revolution had been brewing in the background, and Hamilton took a keen interest in the battles that flared between the colonists and the British around Boston in 1775. Instead of graduating from college, he opted to join a volunteer militia company.

He reported for orders to General GEORGE WASHINGTON's chief of artillery, Colonel Henry Knox. In his duties, Hamilton assisted in the famous crossing of the ice-jammed Delaware River on Christmas Night, 1776. Knox called Hamilton to Washington's attention. In March 1777, Hamilton was appointed aide to the commander in chief. With Washington, Hamilton learned his first lessons on the need for central administration in dealing with crises.

He also took advantage of his contacts with General Philip Schuyler, a wealthy and influential man within the military. In March 1780, Schuyler's young daughter, Elizabeth Schuyler, agreed to marry Hamilton. The relationship provided Hamilton with both additional contacts inside U.S. politics and generous financial gifts from his father-in-law.

Hamilton came to resent the limits of his position as aide to Washington and aspired to greater challenges. A minor reprimand afforded him the opportunity to resign from his services in April 1781. Hamilton had already received an education beyond anything that King's or any other college could have offered. However, he

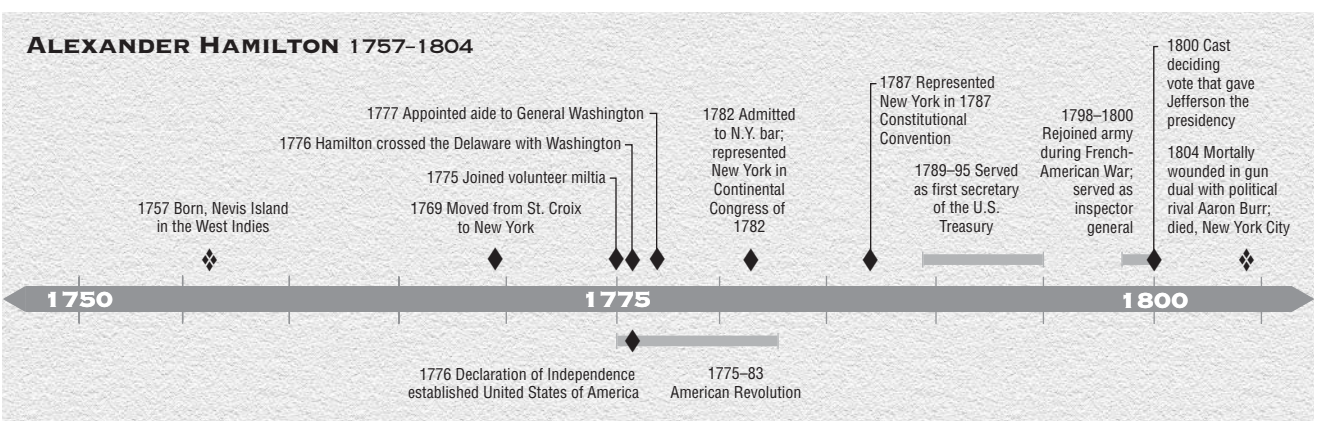

went to New York with his wife and took up the study of law in early 1782. In July of that year, he was admitted to the bar.

As a lawyer and as an intellectual who commanded growing respect, Hamilton represented New York in the CONTINENTAL CONGRESS of 1782, in Philadelphia. Here, he spoke with an ally, a young Virginian, JAMES MADISON. The two expounded on the merits of strong central administration. Most of the other delegates represented the common fears of citizens in the United States—apprehensions about the abusive tendencies of strong central powers and, more important, the possibility of oppression in the future. Hamilton and Madison failed to sway a majority of the delegates to vote for their ideas. In the end, the Congress adopted the ARTICLES OF CONFEDERATION, a body of principles intended to knit the new states into a union that was only loosely defined.

Hamilton left Philadelphia frustrated. He returned to New York, built a thriving law practice, and gained fame as a legal theorist. In 1787, he spent a term in the New York Legislature and joined the movement designed to create a new Constitution. During this time, Madison and JOHN JAY—a future chief justice on the U.S. Supreme Court—helped Hamilton draft a series of essays called *The Federalist Papers.* The essays stand as fundamental statements of U.S. political philosophy.

The Articles of Confederation had already begun to show inadequacies, as the federal government had no real power to collect the money necessary for its own defense. The authors of *The Federalist Papers* argued that a strong federal government would constitute not a tyranny but an improvement over the current system of relatively weak rule. Their arguments helped allay the commonly held fears about central power.

At the 1787 Constitutional Convention in Philadelphia, Hamilton again served as a delegate from New York. This time, his ideas were received with more favor. In the drafting of the new Constitution, and the creation of a more effective government, many of Hamilton's Federalist beliefs came into play. In the area of defense, for example, Article I, Section 8, of the Constitution read, "The Congress shall have Power . . . To raise and support Armies . . . To provide and maintain a Navy . . . To provide for organizing, arming, and disciplining, the Militia." The role of the government in raising finances to do these things would put Hamilton's ideas to the test.

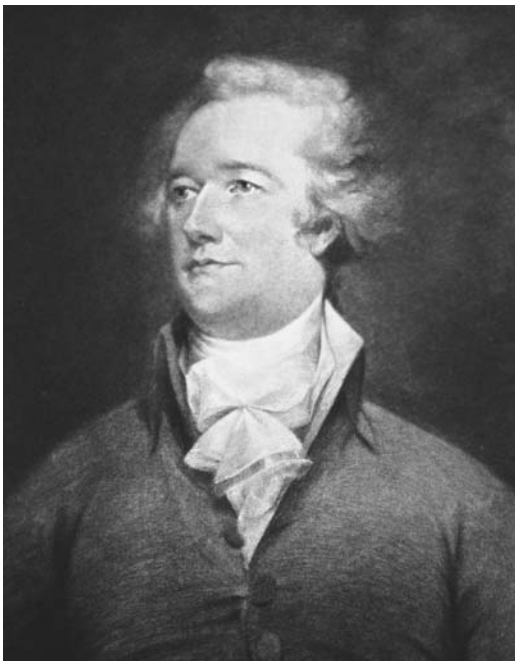

*Alexander Hamilton.*
LIBRARY OF CONGRESS

Hamilton took on the test personally. In 1789, when President Washington began to assemble the new federal government, he asked Hamilton to become the nation's first secretary of the treasury. For the following six years, Hamilton developed a fiscal and economic system based on a national coinage, a national banking system, a revenue program to provide for the repayment of the national debt, and measures to encourage industrial and commercial development. He sought a vigorous, diversified economy that would also provide the nation with the means to defend itself. He stirred a considerable amount of controversy with certain proposals, such as the need for tariffs on imports, several kinds of excise taxes, the development of natural resources, a friendship with England, and opposition to France during the French Revolution. However, without such a concrete agenda, many historians have argued, the United States could not have survived its years of initial development.

Because of Hamilton's decisive stance on some issues, a split occurred between, and even within, political parties. Hamilton and JOHN ADAMS spoke the ideas of the Federalists. Madison joined Jefferson in the DEMOCRATIC-REPUBLICAN PARTY. Even though Hamilton had previously worked alongside Secretary of State Jefferson,

the two were now, as Washington noted, "daily pitted in the cabinet like two cocks." Hamilton stressed the need for a strong central government, while Jefferson emphasized individuals' rights. Their rivalry, among the most famous political clashes in U.S. history, led to a significant and ongoing level of frustration for both sides. Because of the deadlock, Hamilton retired from his secretarial position in 1795 and returned to the practice of law.

Through his service in government and his connections with the Schuyler family, Hamilton became a prominent and prosperous lawyer. His practice extended to wealthy clients in New York and in other states, both individuals and partnerships. It resembled the practices of modern corporate lawyers, since he also represented banks and companies.

The bulk of his civil practice took place in maritime litigation, which boomed with European interests in the U.S. market. His most important ADMIRALTY case involved the sale and export to Europe of large quantities of cotton and indigo. Defendants Gouveneur and Kemble had incurred damages to the head merchant in their trade, Le Guen. Hamilton took on the case as attorney for Le Guen. He was assisted by AARON BURR, with whom he had worked in New York.

In *Le Guen v. Gouveneur,* Hamilton helped the merchant successfully sue his agents for $120,000—at the time, one of the largest awards in a personal damage suit. JAMES KENT, chancellor of the New York bar, remembered Hamilton's performance in the trial as displaying "his reasoning powers . . . his piercing criticism, his masterly analysis, and . . . his appeals to the judgment and conscience of the tribunal." A grateful Le Guen wanted to pay Hamilton a fee commensurate with the size of the judgment. Hamilton refused anything more than $1,500. Burr took a much larger fee at his own discretion. This was the beginning of strained developments between Hamilton and Burr that would result in a future, climactic confrontation.

As a private citizen, Hamilton had amassed considerable power. In letters to politicians and newspapers, he continued to make a number of government-related proposals. At least four of them figured into future developments in the U.S. political structure. First, he suggested dividing each state into judicial districts as subdivisions of the federal government's judicial branch. Second, he proposed consolidating the federal government's revenues, ships, troops, officers, and supplies as assets under its control. Third, he pushed for the enlargement of the legal powers of the government by making certain already existing laws permanent, particularly the law authorizing the government to summon militias to counteract subversive activities and insurrections. Finally, he proposed the addition of laws that would give the courts power to punish SEDITION. Through letters to leaders and citizens, as through his *Federalist Papers,* Hamilton's ideas were received, although not always easily, into the political mainstream.

In 1798 the United States prepared for war with France. Hamilton decided to rejoin the Army as a major general. He was assigned the additional duties of inspector general until 1800. In 1800, Jefferson campaigned for president with Hamilton's former partner in the Le Guen settlement, Burr, as his running mate. The two received identical numbers of electoral votes for the 1800 presidential election. At that time all candidates ran for the presidency. The winner became president and the individual in second place became vice president. Hamilton, an elector for New York, refused to go along with the Federalists' plans to deny Jefferson the presidency. Hamilton voted for Jefferson instead of Burr, partly because he could stand Burr even less than his ideological rival. Jefferson won the election.

In 1804, Burr ran for governor of New York and became embittered by more of Hamilton's insults during the campaign. When Burr lost again, he challenged Hamilton to a duel. On July 11, 1804, the two men met at Weehawken Heights, New Jersey. Hamilton received a mortal wound from Burr's pistol shot, and died in New York City the next day.

As the United States evolved in political, legal, and economic dimensions, Hamilton's contributions remained part of its basic structure. His legacy went on to affect the way the rest of the world interpreted the proper role of government. Numerous political experiments took place in the following centuries, but still, Hamilton's notions of a strong central government made other systems appear weak in comparison. In a letter to the *Washington Post* on January 28, 1991, biographer Robert A. Hendrickson asserted that Hamilton's doctrine lives up to its model status as "a beacon of freedom and financial success in the modern world. It has peacefully discredited agrarianism, COMMUNISM, and totalitarianism."

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## HAMMER V. DAGENHART

At the beginning of the twentieth century, U.S. reformers sought to end the practice of child labor. Young children were sent into factories and mines to work long hours for low wages. Aside from the physical demands placed upon children, labor robbed them of a chance to obtain an education. Some states enacted laws to regulate child labor, but others ignored these efforts and found competitive advantages in having a cheap supply of labor. Congress finally responded in 1916, when it passed the Keating-Owen Child Labor Act, of September 1, 1916, c. 432, 39 Stat. 675. The statute prohibited the use of interstate commerce for goods and materials made with child labor. Congress believed that the Constitution's COMMERCE CLAUSE permitted it to act to regulate child labor, but the U.S. Supreme Court thought differently. In *Hammer v. Dagenhart*, 247 U.S. 251, 38 S. Ct. 529, 62 L. Ed. 1101 (1918), the Court ruled the act unconstitutional, basing its decision on a constricted interpretation of the Commerce Clause and an expansive view of state governments' powers. The decision provoked Justice OLIVER WENDELL HOLMES to write one of the most significant dissenting opinions in the history of the U.S. Supreme Court.

Roland H. Dagenhart filed a lawsuit in North Carolina on behalf of his sons Reuben and John, challenging the Keating-Owen Act. Under the provisions of the law, his two sons would have been barred from working in a cotton mill, as one son was under 14-years old and the older son was under 16-years of age. Dagenhart asked the U.S. District Court to strike down the law as unconstitutional as a violation of the Commerce Clause and the TENTH AMENDMENT. The relevant part of the law prohibited the shipment of goods in interstate or foreign commerce if "within thirty days prior to the time of removal of such product" children had been employed or permitted to help make them. The law applied to children under the age of 16 who worked in mines; to children under the age of 14 who worked in mills, canneries, workshops, factories or manufacturing establishments; and to children between 14 and 16 years of age who worked more than eight hours per day, more than six days in any week, or after 7 P.M. or before 6 A.M. These provisions effectively barred the Dagenhart sons from working and thereby deprived the family of needed income. The district court agreed with Dagenhart and held the act unconstitutional.

The Supreme Court, in a 5-4 decision, upheld the district court's ruling. Justice WILLIAM DAY, in his majority opinion, agreed that the Commerce Clause gives Congress the power to regulate commerce among the states and with foreign countries. However, the power to regulate did not mean that Congress had the power to prohibit certain commerce. Day acknowledged that prior Court rulings had upheld federal laws that banned the movement of certain goods in interstate commerce but these decisions rested "upon the character of the particular subjects" at issue. In *Champion v. Ames*, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492 (1903), the Court had upheld a law that banned the movement of lottery tickets in interstate commerce. In *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364 (1911) the Court sustained the constitutionality of the Pure Food and Drug Act, which prohibited the shipping of impure foods and drugs in interstate commerce. The Court had also upheld the MANN ACT in *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523 (1913). This law prohibited the movement of women in interstate commerce for the purposes of prostitution. Finally, the Court had sustained a federal law that regulated the shipment of intoxicating liquors in interstate commerce. Justice Day noted that in this decision, *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326 (1917), the Court had

agreed that Congress could prohibit the shipment of liquor but only because of the "exceptional nature of the subject here regulated."

Advocates of the child LABOR LAW believed that all of these decisions supported the right of Congress to ban the products of child labor in interstate commerce, but Justice Day concluded otherwise. The key to the prior rulings was that interstate commerce was needed to accomplish the "harmful results." With the child labor law, the goods in question were harmless. The effect of the act was to regulate child labor rather than to regulate transportation in interstate commerce. In the Court's view, this was an impermissible effect because of its definition of "commerce." The manufacture of goods and the mining of coal were not commerce, only the transportation of such things were.

Justice Day was troubled by the expansive reading of the Commerce Clause by Congress. If the Court had upheld this law, "all manufacture intended for interstate shipment would be brought under federal control." He concluded that the framers of the Constitution would never have envisioned such a broad grant of authority, for it undercut the power of the states to regulate commerce within their borders. In addition, the Tenth Amendment reserved powers to the states' governments, which included regulations "relating to the internal trade and affairs of the States." Thus, the Court's reading of the Commerce Clause and the Tenth Amendment combined to defeat the constitutionality of the child labor law. It was up to the states to regulate child labor; Day noted that North Carolina had acted on the issue by prohibiting children younger than 12 years of age from working. A contrary interpretation would have had catastrophic consequences to the federal system of powers. Day concluded that "our system of government [would] be practically destroyed" if Congress could use the Commerce Clause to effect changes in work conditions within the states.

Justice Oliver Wendell Holmes, in a dissenting opinion joined by three other justices, could barely contain his CONTEMPT for the majority's interpretation. He faulted the Court for imposing personal values "upon questions of policy and morals." In a famous statement, Holmes declared: "I should have thought that if we were to introduce our own moral conceptions where, in my opinion, they do not belong, this was preeminently a case for upholding the exercise of all its powers by the United States." Holmes rejected the idea that Congress could not prohibit the movement of goods in interstate commerce, whether the products were judged harmful in themselves or the result of a harmful practice. He stated that "Regulation means the prohibition of something," and then referred to prior rulings where the Court had upheld federal laws that had prohibited actions contrary to the wishes of Congress. In his view, Congress had sufficient authority to regulate child labor. The states were free to regulate their internal affairs, but once goods crossed state lines, the Commerce Clause gave Congress the authority to regulate these shipments.

The U.S. Supreme Court reversed *Dagenhart* in *United States v. Darby*, 312 U.S. 100, 312 U.S. 657, 61 S. Ct. 451 (1941). In its ruling, the Court acknowledged the "powerful and now classic dissent of Mr. Justice Holmes."

## ♦ HAND, BILLINGS LEARNED

Learned Hand served as a U.S. district court judge from 1909 to 1924 and on the U.S. Circuit Court of Appeals from 1924 to 1951. Although he was a great and respected legal figure, he was never appointed to the U.S. Supreme Court.

Hand cannot be classified as a liberal or conservative because he did not allow his personal biases to affect his judicial positions. He was careful to base his decisions on public policy and laws as he understood them, and he did not believe it was the court's job to create public policy. To Hand's way of thinking, human values are relative. Although one value—such as protecting young people from obscenity—may prevail in a certain case, it might not prevail in another. And he felt that the role of court decisions should be to provide realistic guidelines on which to base future decisions.

Hand was born January 27, 1872, in Albany, New York. His was a distinguished family, with both his grandfather and his father being lawyers and Democrats. He was an only child, and his father died when he was fourteen. Hand attended private schools and graduated with honors and a degree in philosophy from Harvard in 1893. He graduated from Harvard Law School with honors in 1896. A year later he began practicing law in the state of New York.

In 1902 Hand married Frances A. Fincke and moved to New York City. Although successful, he found law practice to be boring. In 1909 newly elected president WILLIAM HOWARD TAFT

appointed Hand to a federal judgeship. At age thirty-seven, Hand was one of the youngest appointees ever. He served the court for 15 years.

A few years after his appointment, Hand supported THEODORE ROOSEVELT's Bull Moose party presidential candidacy against Taft and became the Progressive party's candidate for chief judge of the New York Court of Appeals. He undertook this first and last political venture of his career because of a concern that big business would control the nation. Whatever Hand's reasons, Taft never forgot Hand's "disloyalty," and many believe that this act cost Hand his first chance to serve on the Supreme Court in 1922. Taft, who was then the chief justice of the U.S. Supreme Court, urged President WARREN G. HARDING not to nominate Hand.

Throughout his career, Hand chose to follow his conscience while knowing he would forfeit promotions as a result. For example, in 1917 Hand decided *Masses Publishing Co. v. Patten,* 244 F. 535 (S.D.N.Y. 1917), *rev'd* 246 F. 24 (2d Cir. 1917). *Masses* was the first test of a new law, the ESPIONAGE ACT OF 1917 (Act of June 15, 1917, ch. 30, 40 Stat. 217). This act outlawed making "false statements with intent to interfere with the operation or success of the military or naval forces . . . when the United States is at war." It also allowed the U.S. mail to ban materials containing such statements. Editors of an antiwar magazine, *The Masses,* took the New York City postmaster, Thomas G. Patten, to court for refusing to distribute the magazine. Patten argued that the Espionage Act allowed him to ban the publication.

The *Masses* case came before the Second District at the beginning of WORLD WAR I, when the government viewed criticism of the war as a threat to national security. It came also when Hand was being considered for appointment to the Second Circuit Court of Appeals.

*Billings Learned Hand.*
LIBRARY OF CONGRESS

At that time, the legality of written or spoken words was usually judged by the probable result of the words—that is, if the words had the tendency to produce unlawful conduct, then they could be banned. Hand took a different approach: his solution focused on the words themselves, rather than on a guess at the public's reaction to them. He invented what became known as the incitement test: if the words told someone to break the law, if they instructed the person that it was a duty or interest to do so,

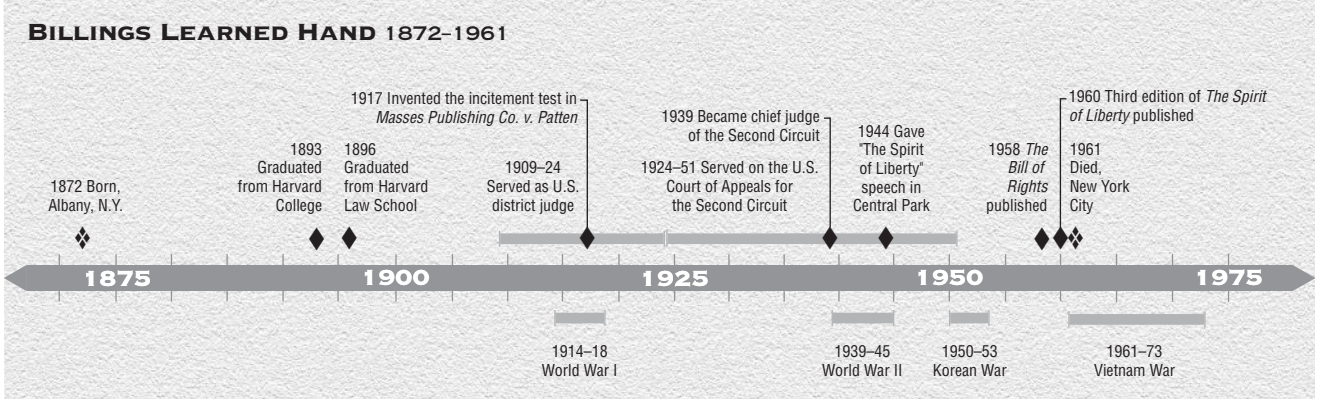

then they could be banned. *The Masses* magazine praised conscientious objectors and antiwar demonstrators, but it never actually told readers they should behave similarly. For this reason, Hand ruled that the postmaster could not ban the magazine.

*Masses* was just one of the many opinions Hand wrote that decided issues for which no precedent existed at the Supreme Court level. It is an early example of Hand's strong opinions about free speech—that it should be protected and defined as a critical ingredient to democracy. He struggled for the rest of his career to convince his colleagues of the importance and complexity of issues relating to the FIRST AMENDMENT to the U.S. Constitution.

Hand correctly predicted the consequences of his decision in *Masses* before he announced it. The decision was immediately appealed and reversed by the Second Circuit Court of Appeals, and he did not receive the appointment to that court. But over time the climate of the country and the courts would change, and in the late 1960s, the Supreme Court would adopt Hand's incitement test as the standard for evaluating whether speech threatened security.

"IF WE ARE TO KEEP OUR DEMOCRACY, THERE MUST BE ONE COMMANDMENT: THOU SHALT NOT RATION JUSTICE."
—BILLINGS LEARNED HAND

In 1924 Hand was appointed to the U.S. Circuit Court of Appeals for the Second Circuit. On the court, Hand served with many famous judges, including conservative judge Thomas Walter Swan, Hand's first cousin Augustus Noble Hand, Harrie Brigham Chase, Charles Edward Clark, and JEROME N. FRANK.

With his cousin and Swan, Hand made many widely respected decisions. Some observers credit the craftsmanship of these decisions to the use of preconference memos, which were unique to the Second Circuit at that time. Under this method, each judge reviewed each case and drafted a tentative opinion without consulting the others. Only after each judge had reached an independent conclusion did all the conferring judges exchange memos and meet to discuss the case. This process encouraged more diverse and thorough thinking than with the usual method of approaching cases, in which one judge took the lead early on and drafted a single opinion.

As a circuit court judge, Hand was limited to applying precedents of the Supreme Court and federal statutes in appeals before his court. He felt responsible to the precedents, and once he was sure he understood the basic reason for a law, he stood his ground despite any negative effects the decision might cause.

Hand was again considered for the Supreme Court in 1931, this time by President HERBERT HOOVER. But Hoover felt obliged to offer the position to CHARLES EVANS HUGHES first, with the intention of appointing Hand when Hughes refused. To Hoover's surprise, Hughes accepted.

Hand became senior circuit judge of the circuit court in 1939 when his predecessor, Martin T. Manton, was indicted and eventually imprisoned for accepting bribes. Nine years later, the office of "senior circuit judge" was renamed the office of "chief judge," pursuant to a revision in the federal judicial code. See Act of June 25, 1948, ch. 646, S 46(c), 62 Stat. 869, 871 (1948), codified as amended at 28 U.S.C. S 46(c) (1988). This was the highest position that Hand was to hold in the courts.

Hand's final close call with the Supreme Court came in 1942, when FRANKLIN D. ROOSEVELT was seeking a replacement for Justice James F. Byrnes, whom he had appointed to a cabinet position. Hand was in the running, and his colleagues organized a strong campaign to persuade the president to choose him. However, in January 1943—the month that Hand turned seventy-one—Roosevelt appointed WILEY B. RUTLEDGE, of Iowa: Rutledge was only forty-eight years old, and Roosevelt had insisted in 1937 that justices should not serve past age seventy. Ironically, Rutledge died in 1949, whereas Hand was still active and productive for another twelve years.

Hand influenced the Supreme Court profoundly, though he did not serve on it. He was quoted in Supreme Court opinions and widely cited in legal journals. Even during his lifetime, he was widely regarded as one of the greatest judges in the English-speaking world.

In 1944 Hand delivered a public speech that brought his thinking to the attention of people in nonlegal circles. His address, "The Spirit of Liberty," was delivered in New York's Central Park to more than 1 million people. The *New Yorker,* the *New York Times, Life,* and *Reader's Digest* all reprinted portions of his address. Hand also publicly denounced McCarthyism during an address in Albany in 1952.

Hand served on the council of the American Law Institute, a group of law professors, judges, and lawyers who organize and summarize the law in publications called the "Restatements of the Law" and "Model Codes," two bodies of legal authority designed to provide a clear, practice-

oriented exposition of legal rules, precedents, and principles.

When Hand retired from the Second Circuit in 1951, he had served as a federal judge longer than anyone else in U.S. history. During his career he had written almost three thousand legal opinions. They are famous for their careful construction and sharp understanding of all forces at work. He showed an ability to clarify legal concepts, even those in specialized areas such as ADMIRALTY (shipping) law, patent law, and immigration law.

After he retired, Hand still sat on the federal bench, wrote opinions, and handled a nearly full workload. Toward the end of his life, he complained to a friend that he was only writing 20 to 25 opinions a month, instead of his customary 50 to 60. *The Spirit of Liberty,* a collection of his papers and speeches originally published in 1952 had a third edition in 1960, while his 1958 OLIVER WENDELL HOLMES Lectures at Harvard were published as *The Bill of Rights* (1958).

Hand died of a heart attack in New York City on August 18, 1961, after more than 50 years of service on the federal bench.

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Criminal Law.

## HARBOR

*As a noun, a haven, or a space of deep water so sheltered by the adjacent land and surroundings as to afford a safe anchorage for ships.*

*As a verb, to afford lodging to, to shelter, or to give a refuge to. To clandestinely shelter, succor, and protect improperly admitted* ALIENS. *It may be aptly used to describe the furnishing of shelter, lodging, or food clandestinely or with concealment, and under certain circumstances may be equally applicable to those acts divested of any accompanying secrecy. Harboring a criminal is a crime under both federal and state statutes and a person who harbors a criminal is an* ACCESSORY *after the fact.*

## ◆ HARDING, GEORGE

George Harding is known as the greatest U.S. patent attorney of the late nineteenth century.

Harding was born in Philadelphia on October 26, 1827. He was the son of Jesper Harding, publisher of the *Pennsylvania Inquirer.* Harding attended public schools and graduated from the University of Pennsylvania in 1846. After graduating, he worked as an intern for John Cadwalader, who later became a U.S. district judge, before starting his own law practice.

Harding was admitted to the bar in 1849, and elected secretary of the Law Academy of Philadelphia the same year. Two years later he assisted EDWIN M. STANTON in *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 54 U.S. (13 How.) 518, 14 L. Ed. 249 (1852), before the Supreme Court. With this case he began to gain fame as a patent attorney.

Harding successfully represented Samuel F. Morse in lengthy litigation over Morse's telegraph patent (*O'Reilly v. Morse,* 56 U.S. [15

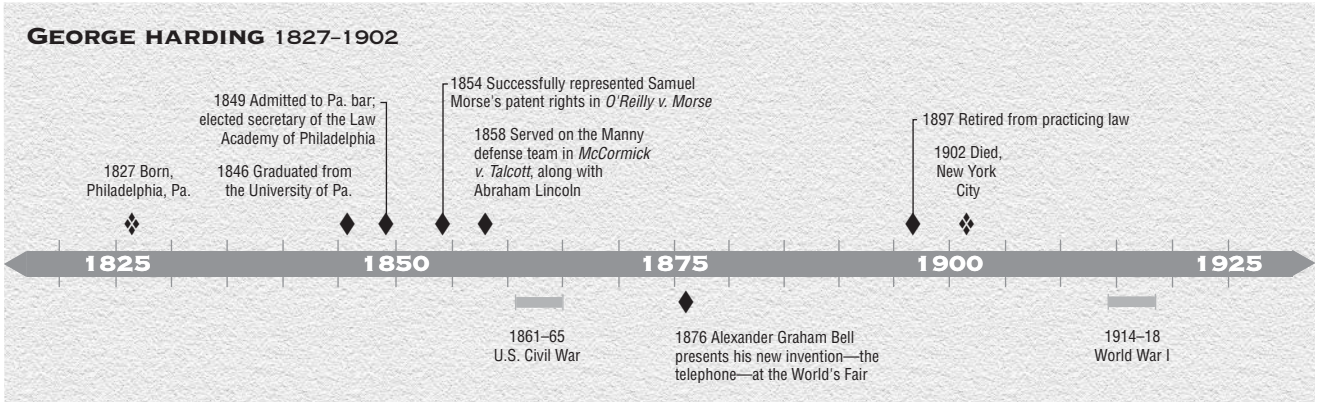

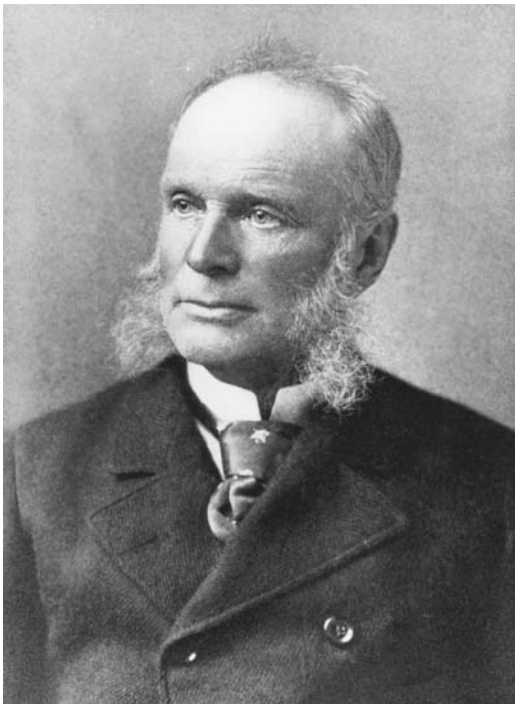

*George Harding.*
LIBRARY OF CONGRESS

How.] 62, 14 L. Ed. 601 [1854]). In this case Morse was found to be the "true and original inventor of the Electro-Magnetic Telegraph, worked by the motive power of electromagnetism, and of the several improvements thereon."

In the Cyrus H. McCormick reaper litigation, *McCormick v. Talcott,* 61 U.S. (20 How.) 402, 15 L. Ed. 930 (1858), the attorney on retainer for defendant John Manny was **ABRAHAM LINCOLN**. Harding and his associates, lead attorneys for the defense, considered Lincoln too inexperienced to handle the litigation but kept him on because they needed to have a local attorney of record. They promptly removed him to the status of little more than an observer. Historians report that Lincoln was devastated by the treatment he received from the famous lawyers from Philadelphia.

Relying on his expertise in mechanics and chemistry, Harding became known for his courtroom demonstrations. To explain some of the patent issues being litigated, he would perform chemical experiments or demonstrate working models of the machines in question. Some of the models he brought into the courtroom were a miniature telephone system, a miniature grain field and reaper, and a furnace. In *Burr v. Duryee,* 68 U.S. (1 Wall.) 531, 17 L. Ed. 650 (1864), Justice **ROBERT C. GRIER** noted that the "large museum of exhibits in the shape of machines and models" brought in by Harding were critical to giving the Court "a proper understanding of the merits of the controversy."

Harding was as much a showman as an orator and was able to use humor to create interest in patent litigation. He was listed as counsel in over one hundred cases heard before the federal circuit courts of appeal and the Supreme Court.

Harding retired from practice in 1897 at age seventy. He died five years later on November 17, 1902, in New York City.

## ♦ HARDING, WARREN GAMALIEL

Warren Gamaliel Harding served as the twenty-ninth president of the United States, from 1921 to 1923. Harding, who also served one term in the U.S. Senate, presided over an administration that achieved little and that was tainted by political corruption.

Harding was born November 2, 1865, on a farm at Caledonia (now Blooming Grove), Morrow County, Ohio, the eldest of eight children. He attended Ohio Central College. Harding then tried teaching, reading the law, selling insurance, and working as a journalist. He became the editor and publisher of the *Marion Star,* in Ohio, in 1884.

In 1891, Harding married Florence Kling DeWolfe, the daughter of a prominent Marion banker. DeWolfe was a divorcée, five years Harding's senior, with great ambitions for Harding. She helped build the *Marion Star* into a prosperous newspaper and encouraged Harding to enter **REPUBLICAN PARTY** politics.

Harding was elected to the Ohio Senate in 1898, and was elected lieutenant governor of the state in 1903. He ran unsuccessfully for governor in 1910. His national political standing rose over the next decade. At the Republican National Convention in 1912, he was selected to nominate President **WILLIAM HOWARD TAFT** for a second term. (In 1921, he would nominate Taft to serve as chief justice of the U.S. Supreme Court.) In 1914, he was elected to the U.S. Senate. Regarded as a fine public speaker, he gave the keynote address at the 1916 Republican National Convention.

As a U.S. senator, Harding was well liked by his colleagues but demonstrated little interest in the legislative process. He introduced no major bills during his six-year term, and was frequently absent. His politics followed the Republican mainstream: favoring high tariffs on imports

and opposing the LEAGUE OF NATIONS and the federal regulation of commerce.

At the 1920 Republican National Convention, in Chicago, most of the delegates favored Governor Frank O. Lowden, of Illinois; Major General Leonard Wood, formerly army chief of staff; or Senator Hiram W. Johnson, of California, for president. After four ballots, the convention was deadlocked. Early in the morning, in what Harding campaign manager HARRY M. DAUGHERTY called a smoke-filled room, the party leaders agreed on Harding as a compromise candidate. The convention agreed to the selection and nominated Governor CALVIN COOLIDGE, of Massachusetts, as Harding's vice presidential running mate.

Harding defeated the DEMOCRATIC PARTY nominee, Governor James M. Cox, of Ohio, in the November 1920 election. Harding campaigned from the front porch of his home in Marion, avoiding any specifics on his domestic political agenda. Instead, he promised the United States a return to "normalcy."

Harding's presidency was marked by the delegation of responsibilities to his cabinet chiefs. Rejecting the strong executive leadership style of Presidents THEODORE ROOSEVELT and WOODROW WILSON, Harding relied on a distinguished group of men, including Secretary of Commerce HERBERT HOOVER, Secretary of State CHARLES EVANS HUGHES, and Secretary of Agriculture Henry C. Wallace. These and other cabinet heads helped lead the government away from wartime emergency conditions. In 1921, Secretary Hughes convened the Washington Conference on Naval Disarmament. The members of the conference—England, France, Italy, Japan, and the United States—agreed to limit their naval warships in fixed ratios.

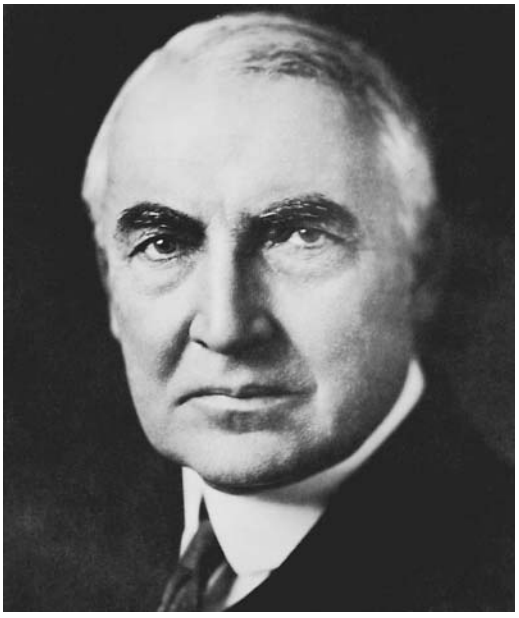

*Warren G. Harding.*
LIBRARY OF CONGRESS

In June 1923, Harding began a cross-country speaking tour, in hopes of reviving Republican party fortunes, which had taken a beating in the 1922 congressional election. On the trip, he received a secret telegram that disclosed an impending scandal for his administration concerning a Senate investigation of oil leases. In Seattle, Harding fell ill, presumably of food poisoning. His train stopped in San Francisco, where doctors reported Harding had pneumonia. On August 2, Harding died. No autopsy was made, leaving the exact cause of death unknown. Vice President Coolidge succeeded Harding as president.

"AMERICANS OUGHT EVER BE ASKING THEMSELVES ABOUT THEIR CONCEPT OF THE IDEAL REPUBLIC."
—WARREN G. HARDING

The scandals that stained the Harding administration largely became public after Harding's death. One involved Attorney General Daugherty, who in 1926 was tried twice on

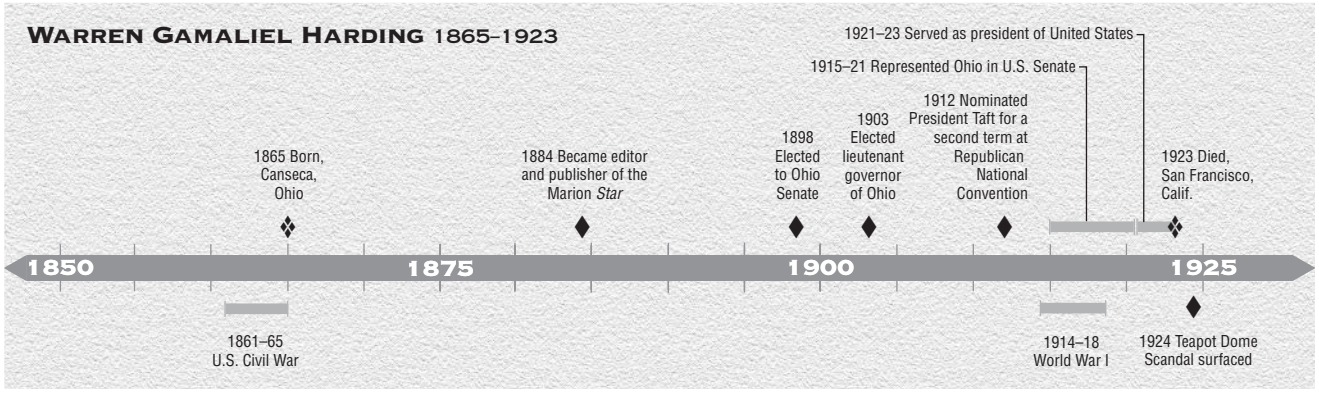

charges he had committed improprieties in administering the Office of the Alien Property Custodian. Both trials ended in a hung jury.

The TEAPOT DOME SCANDAL was the most troubling. Secretary of the Interior Albert B. Fall, a wealthy New Mexico attorney, had left the U.S. Senate in 1921 to join Harding's cabinet. In 1924, he was indicted for criminal conspiracy and BRIBERY. It was alleged that he accepted a $100,000 bribe from oil producers Harry F. Sinclair and Edward Doheny in exchange for leasing government-owned oil reserves at Teapot Dome, Wyoming, and Elk Hills, California, to the pair's oil companies at unusually favorable terms. Fall was acquitted of the conspiracy charge in 1926, but was convicted of accepting bribes in 1929. He served two years in prison and paid a fine.

President Harding's short term of office and the scandals that befell his political appointees have left his administration remembered more for its corruption than for its achievements.

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## ♦ HARLAN, JOHN MARSHALL

John Marshall Harlan served as an associate justice of the U.S. Supreme Court from 1877 to 1911. Harlan, a native of Kentucky, is best remembered for his dissenting opinions in cases that upheld restrictions on the CIVIL RIGHTS of African Americans, most notably in PLESSY V. FERGUSON, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896). Harlan's dissents served to enlarge his judicial reputation as attitudes and laws changed concerning state-mandated SEGREGATION.

Harlan was born in Boyle County, Kentucky, on June 1, 1833. The son of a prominent lawyer and politician, Harlan graduated from Centre College and then studied law at Transylvania University, both located in Kentucky. He was admitted to the Kentucky bar in 1853. As a young man, Harlan sought his own political career. He was elected a county judge in 1858, but relocated to Louisville in 1861 to establish a successful law practice.

With the beginning of the Civil War in 1861, Harlan joined the Union army as a lieutenant colonel and commanded a company of infantry volunteers. Upon the death of his father, he resigned his commission and returned to his law practice in Louisville. There, he became an active member of the REPUBLICAN PARTY. He made two unsuccessful efforts at getting himself elected governor of Kentucky, but proved more successful at helping others, securing the presidential nomination of RUTHERFORD B. HAYES at the 1876 Republican National Convention.

Hayes took office in 1877, after a difficult election. One of his first acts was to appoint Harlan to the U.S. Supreme Court. Harlan, at age forty-four, joined a Court that, for the length of his tenure, was economically conservative and philosophically opposed to the enlargement of federal power. In addition, the Court deferred to the policies of southern states on racial segregation.

During his long tenure on the bench, Harlan gained prominence as a frequent dissenter. With a temperament that was better suited to leading than following, Harlan did not have the ability to negotiate compromise. Instead, he relied on

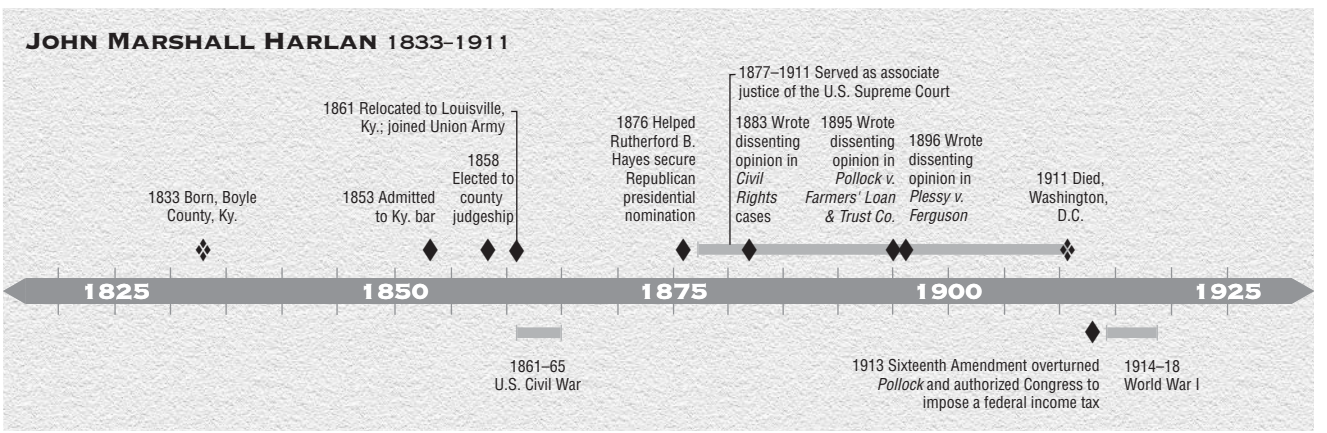

his dissenting opinions to voice his often prophetic judgments.

In **POLLOCK V. FARMERS' LOAN & TRUST CO.**, 157 U.S. 429, 15 S. Ct. 673, 39 L. Ed. 759 (1895), the Court held that the federal **INCOME TAX** was unconstitutional. Harlan dissented, arguing that the Court was ignoring precedent and acting as a legislator rather than a court. He noted that "the practical effect of the decision today is to give to certain kinds of property a position of favoritism and advantage." Harlan was vindicated in 1913 when the **SIXTEENTH AMENDMENT** overturned *Pollock* and authorized Congress to impose a federal income tax.

In 1883, the Supreme Court struck down Congress's attempt to outlaw **RACIAL DISCRIMINATION** in places of public accommodation, including hotels, taverns, restaurants, theaters, streetcars, and railroad passenger cars. The majority decided in the **CIVIL RIGHTS CASES**, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883), that the **CIVIL RIGHTS ACT** of 1875 violated the **FOURTEENTH AMENDMENT**. It determined that the amendment prohibited only official, state-sponsored discrimination and could not reach discrimination practiced by privately owned places of public accommodation.

Justice Harlan, in his dissent, argued that segregation in public accommodations was a "badge of slavery" for the recently freed African Americans, and that the act could be constitutionally justified by looking to the **THIRTEENTH AMENDMENT**. This amendment gave Congress the authority to outlaw all "badges and incidents" of **SLAVERY**. Harlan pointed out that before the Civil War, the Supreme Court protected the rights of slaveholders. Less than twenty years after the **ABOLITION** of slavery, the Court refused to extend its power and authority to protect the former slaves. Not until the passage of title II of the Civil Rights Act of 1964 (42 U.S.C.A. § 2000a et seq.) would the federal government ultimately achieve the desegregation of public accommodations.

Harlan's most famous dissent came in *Plessy.* At issue in this case was an 1890 Louisiana law that required passenger trains operating within the state to provide "equal but separate" accommodations for "white and colored races." The Supreme Court upheld the law on a 7–1 vote, thus putting a stamp of approval on all laws that mandated racial segregation. In his majority opinion, Justice **HENRY B. BROWN** concluded that the Fourteenth Amendment "could not have intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality."

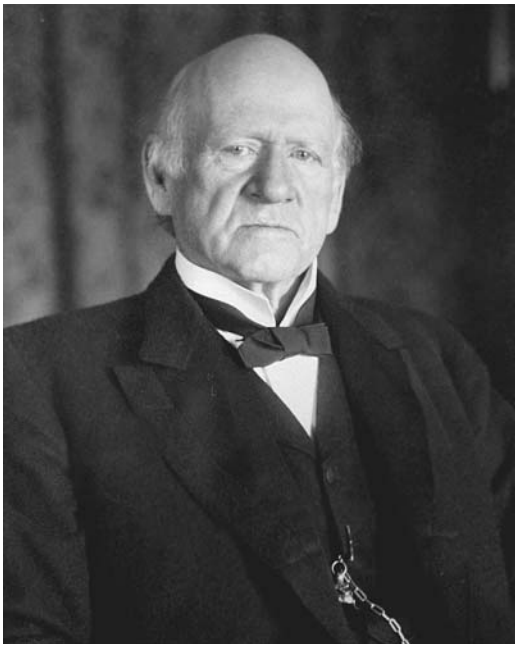

*John Marshall Harlan.*
LIBRARY OF CONGRESS

Justice Harlan, the lone dissenter, responded that the "arbitrary separation of citizens on the basis of race" was equivalent to the imposition of a "badge of servitude" on African Americans. He cut through the legal arguments to proclaim that the real intent of the law was not to give equal accommodations but to compel African Americans "to keep to themselves." He concluded that this was unacceptable because "our Constitution is color-blind, and neither knows nor tolerates classes among citizens."

Sixty years later, Harlan's vision was embraced by the Supreme Court in **BROWN V. BOARD OF EDUCATION**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), when it overturned *Plessy* and rejected the "separate-but-equal" doctrine. With *Brown,* the modern **CIVIL RIGHTS MOVEMENT** gained its first major victory, setting the stage for the dismantling of the **JIM CROW LAWS**, which had required racial discrimination in the South.

Justice Harlan also taught **CONSTITUTIONAL LAW** at Columbian University (now George Washington University) and served on the Bering Sea Arbitration Tribunal of 1893, which resolved a dispute between the United States and Great Britain over the hunting of seals inhabiting the Bering Sea area of Alaska.

"OUR CONSTITUTION IS COLOR-BLIND, AND NEITHER KNOWS NOR TOLERATES CLASSES AMONG CITIZENS. IN RESPECT OF CIVIL RIGHTS, ALL CITIZENS ARE EQUAL BEFORE THE LAW."
—JOHN MARSHALL HARLAN

Harlan died October 14, 1911. His grandson, JOHN MARSHALL HARLAN II, also served on the Supreme Court.

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## ♦ HARLAN, JOHN MARSHALL, II

John Marshall Harlan II served as an associate justice of the U.S. Supreme Court from 1955 to 1971. Harlan was the grandson of U.S. Supreme Court Justice JOHN MARSHALL HARLAN. He was a conservative voice during the WARREN COURT era, arguing for judicial restraint in the face of court decisions that changed the landscape of U.S. civil and CRIMINAL LAW.

"OUR CONSTITUTION IS NOT A PANACEA FOR EVERY BLOT UPON THE PUBLIC WELFARE NOR SHOULD THIS COURT, ORDAINED AS A JUDICIAL BODY, BE THOUGHT OF AS A GENERAL HAVEN FOR REFORM MOVEMENTS."
—JOHN MARSHALL HARLAN II

Harlan was born May 20, 1899, in Chicago. His father, John Maynard Harlan, was a successful lawyer and reform Republican politician who served as a Chicago alderman. Harlan was educated at boarding schools in Canada and Princeton University. After graduating from Princeton in 1920, he attended Oxford University on a Rhodes Scholarship and studied JURISPRUDENCE.

On his return to the United States, Harlan was hired by Root, Clark, Buckner, and Howard, a prominent New York City law firm. Emory Buckner, a partner in the firm and its chief litigator, encouraged Harlan to attend law school. Harlan graduated from New York Law School in 1924 and was admitted to the bar in 1925.

At Root, Clark, Harlan worked assiduously to master the fine points of litigation. His attention to detail and careful preparation won him Buckner's admiration. In 1925, when Buckner became U.S. attorney for New York's Southern District, Harlan joined his legal staff. One of Harlan's primary duties was enforcing the National Prohibition Act (aka the VOLSTEAD ACT, 41 Stat. 305, which outlawed the possession, sale, transportation of, and importation of intoxicating liquors.

Harlan returned to Root, Clark in 1927. During the 1930s, he emerged as the law firm's top trial attorney. He became the attorney of choice for many major U.S. corporations.

During WORLD WAR II, Harlan headed the Army Air Corps's operations analysis section, which developed ways of improving the accuracy of military bombings of Germany. Following the war, he returned to his law practice.

Harlan's connections with REPUBLICAN PARTY politicians, including President DWIGHT D. EISENHOWER's attorney general, HERBERT BROWNELL JR., led to a judicial career. In 1954, Eisenhower accepted Brownell's recommendation and appointed Harlan to the U.S. Court of Appeals for the Second Circuit.

Harlan's tenure on the circuit court of appeals was unremarkable and brief. When Justice ROBERT H. JACKSON died in October 1954, Eisenhower appointed Harlan to the U.S. Supreme Court. Harlan was confirmed by the U.S. Senate in 1955.

Harlan took his seat at a time when the Supreme Court, under Chief Justice EARL WAR-

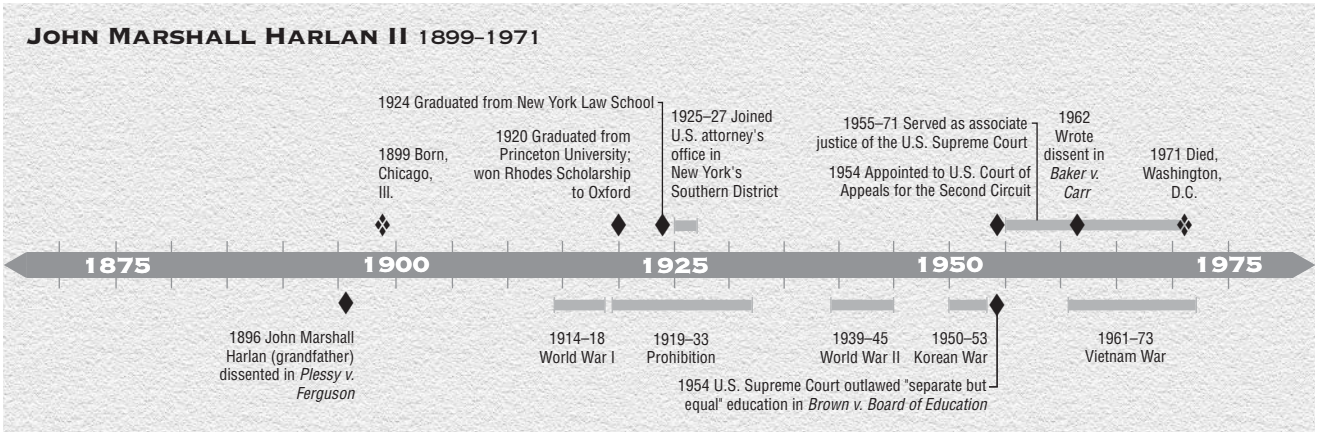

*John Marshal Harlan II.* AP/WIDE WORLD PHOTOS

REN, had aroused the anger of advocates of racial segregation. The previous year, in BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), a unanimous Court had rejected the concept of "separate but equal," signaling the end of the JIM CROW LAWS that had required RACIAL DISCRIMINATION throughout the South. The decision vindicated Harlan's grandfather, who had written the lone dissent to the Supreme Court's decision in PLESSY V. FERGUSON, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), upholding an 1890 Louisiana law requiring passenger trains to provide "equal but separate" accommodations for "white and colored races."

In his first years on the Court, Harlan and Justice FELIX FRANKFURTER often voted together, counseling judicial restraint. They believed in the concepts of FEDERALISM (the division of power between the state and federal governments) and SEPARATION OF POWERS (the division of power between the legislative, executive, and judicial branches of the federal government). After Frankfurter left the Court in 1962, Harlan became the lone advocate of these concepts. As the Warren Court reshaped U.S. law, Harlan often dissented, arguing that the Court was granting too much power to the federal government and to the judicial branch.

As a conservative jurist, Harlan respected precedent. He sought to limit the reach of decisions by linking constitutional interpretation with the facts of a case. In this way, lower courts would be restrained from applying an interpretation to other contexts. This refusal to overgeneralize an interpretation led him to dissent in the ONE-PERSON, ONE-VOTE case of BAKER V. CARR, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). The majority in *Baker* held that the federal district court had jurisdiction to consider a claim that a state statute apportioning state legislative districts violated the plaintiffs' right to EQUAL PROTECTION guaranteed by the FOURTEENTH AMENDMENT. Noting that the majority has disregarded considerable precedent, the dissent asserted that the claim was a nonjusticiable POLITICAL QUESTION.

Harlan died December 29, 1971, in Washington, D.C.

CROSS-REFERENCES

Apportionment; Judicial Review.

## HARMLESS ERROR

The legal doctrine of harmless error is found in the Federal Rules of Criminal Procedure, extensive case law, and state statutes. It comes into use when a litigant appeals the decision of a judge or jury, arguing that an error of law was made at trial that resulted in an incorrect decision or verdict. The appellate court then must decide whether the error was serious enough to strike down the decision made at trial. Review for harmless error involves a complicated test that applies to state and federal laws as well as rules of procedure. If an error is held to be serious, the appellate court is likely to set aside the decision of the trial court and may order a new trial. If it deems the error harmless, the appellate court affirms the lower court's decision. The doctrine of harmless error thus prevents an unnecessary new trial when the error alleged would not have affected the outcome at trial.

Harmless error JURISPRUDENCE grew out of a late-nineteenth-century development in ENGLISH LAW. Before 1873, English courts automatically reversed decisions in cases where an error was committed at trial. In 1873, Parliament put an end to this practice in civil cases by permitting reversals only in cases of substantial error. As the author Raymond A. Kimble has noted, U.S. law slowly adopted the idea in order to limit the number of retrials in U.S. courts.

In 1919, Congress first applied the harmless error doctrine to federal appellate courts, ordering

them "to give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties" (28 U.S.C.A. § 2811 [1988]). By the midtwentieth century, harmless error jurisprudence was growing. The U.S. Supreme Court first moved toward establishing harmless error analysis in the 1946 case of *Kotteakos v. United States,* 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557, but left doubt about its applicability to constitutional errors. It began to remove this doubt in 1967 in the landmark case of *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705. The Court in *Chapman* ruled that defendants were not necessarily entitled to a new trial simply because constitutional violations had occurred at trial. It directed appellate courts to dismiss arguments about certain constitutional errors when these "are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring automatic reversal of a conviction." However, the Supreme Court put an important condition on this analysis: the appellate court had to be certain BEYOND A REASONABLE DOUBT that the error did not affect the outcome of the case.

Even decades after *Chapman,* determining whether a constitutional error is harmless remains a complicated task. This is because harmless error has no single, uniform definition. Courts must resort to one of two distinct tests—and sometimes a third that combines both of them. The first test asks whether the error influenced the verdict. If the error did not have even a minimal effect on the verdict, it is harmless. The second test considers the evidence of guilt found in the trial record. If the evidence is overwhelming and untainted, the defendant's guilt is considered to be the most important factor, and the error is harmless. The third test is a BALANCING test in which the court weighs the error's effect on the verdict against the untainted evidence. The court may emphasize either element in this test, and the outcome of the test will reflect which is considered stronger.

The harmless error doctrine has continued to evolve since the late 1960s. For many years, there was still uncertainty about which constitutional errors at trial could be subject to harmless error analysis, but the Supreme Court has clarified this by allowing most constitutional errors to be reviewed under the doctrine. Some of its decisions have proved controversial. In the 1991 case of *Arizona v. Fulminante,* 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302, for example, it included coerced confessions under the scope of harmless error review. This decision curtailed the ability of criminal defendants to overturn their conviction by arguing that the police used physical or emotional force to win a confession. As a result, appellate courts are free to determine if the jury had enough evidence besides the challenged confession to convict a defendant. As part of a general trend, this expansion of the scope of harmless error analysis has raised complaints about the proper role of appellate review.

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## ♦ HARMON, JUDSON

Judson Harmon was an attorney, judge, and two-time Ohio governor with presidential aspirations. He served as attorney general of the United States under President GROVER CLEVELAND from 1895 to 1897.

Harmon was born February 3, 1846, in Newton, Hamilton County, Ohio, the oldest of eight children of Benjamin Franklin Harmon and Julia Bronson Harmon. Because his father was a teacher, the young Harmon was schooled at home. Later, when his father entered the ministry, Harmon attended public schools. An apt student, he was enrolled at Denison University by the age of sixteen, and he graduated in 1866.

The Civil War was an ever present intrusion on Harmon's college years. Funds for education were scarce, and young men were needed on the battlefield, not in the classroom. Harmon often earned money between terms by serving with local militia units responsible for defending his home district against Southern raids. He was profoundly affected by the assassination of President ABRAHAM LINCOLN in 1865. When Lincoln's body lay in state in Springfield, Ohio,

Harmon went through the line of mourners three times. Years later, he said that he had been in awe—and that he had never seen such a crowd of sad and disheartened people.

After graduating from college, Harmon moved to Columbus, Ohio, and followed his father into the teaching profession. He lasted a year. Upon deciding to pursue a legal career, he moved to Cincinnati and read law in the office of George Hoadly. He received his law degree at Cincinnati Law School in 1869, and he was admitted to the Ohio bar the following year. In June 1870, Harmon married Olivia Scobey, of Hamilton, Ohio, and settled into the life of a successful young attorney.

After seven years of practice, Harmon was elected judge of the COMMON PLEAS court in Cincinnati; two years later, he was elected to the local superior court. He left the bench in 1887 when his teacher and mentor, Hoadly, was elected governor of Ohio. To help his old friend with the transition to public office, Harmon assumed Hoadly's caseload at the firm of Hoadly, Johnson, and Colston. At Hoadly's urging, Harmon also took a greater interest in national politics. Though Harmon had originally supported the REPUBLICAN PARTY on war issues, he found himself unable to support its program of Reconstruction after the Civil War. By 1887, Harmon was closely associated with Hoadly's supporters, the conservative faction of the DEMOCRATIC PARTY in Ohio.

Harmon's ties to the governor and the state Democratic party reaped rewards. In June 1895, President Cleveland appointed Harmon to succeed RICHARD OLNEY as attorney general of the United States. In this office, Harmon established a national reputation as a lawyer. As attorney general, he directed several major antitrust prosecutions, including one against the Trans-Missouri Freight Association (*United States v. Trans-Missouri Freight Ass'n,* 166 U.S. 290, 17 S. Ct. 540, 41 L. Ed. 1007 [1897]) and one against the Addyston Pipe and Steel Company (*United States v. Addyston Pipe & Steel Co.,* 78 Fed. 712 [E.D. Tenn. 1897]).

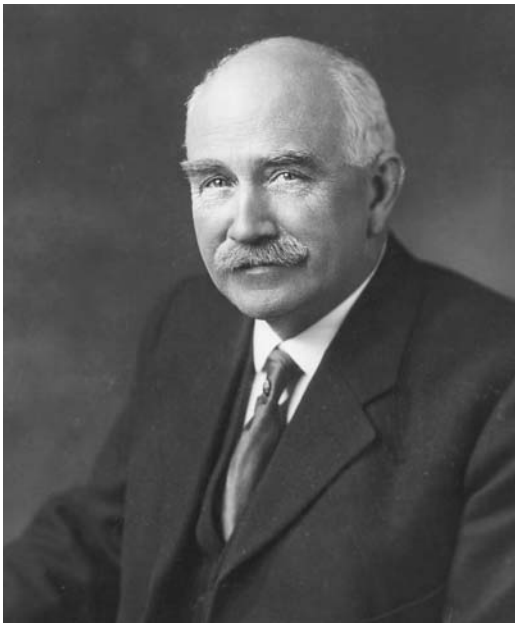

*Judson Harmon.*
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In *United States v. Texas,* 162 U.S. 1, 16 S. Ct. 725, 40 L. Ed. 867 (1896), a WATER RIGHTS case, he espoused a theory of absolute territorial sovereignty that has come to be known as the Harmon doctrine. Harmon said, "[T]he rules, principles and precedents of INTERNATIONAL LAW imposed no liability or obligation on the United States" to let parts of the waters that were diverted upstream by the United States flow to Mexico. According to Harmon, nations had exclusive jurisdiction and control over the uses of all waters within their boundaries. (Since Harmon's time, the Harmon doctrine has been

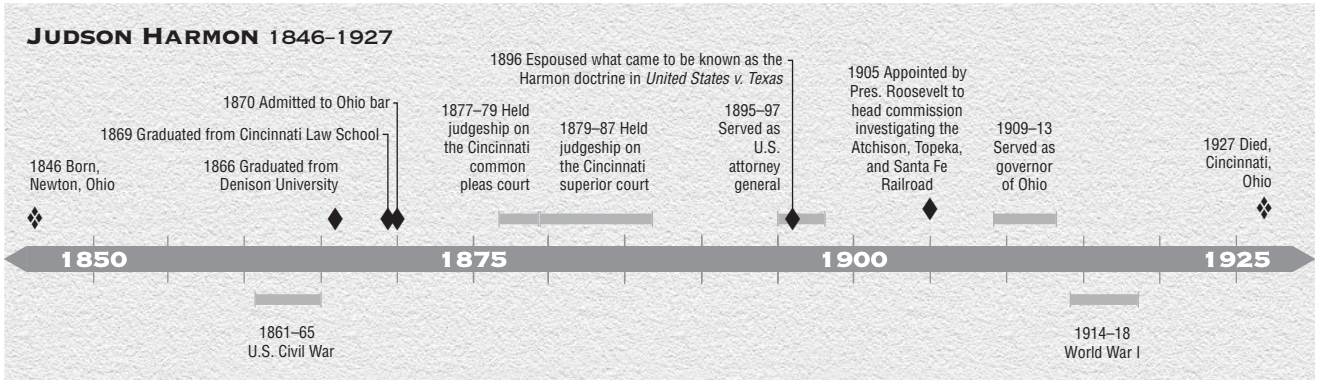

largely superseded by the concepts of state responsibility and global citizenship.)

Following his term as attorney general, Harmon resumed practice in Cincinnati, but he was never far from the national spotlight. In 1905, he was appointed by President THEODORE ROOSEVELT to head a commission investigating the business practices of the Atchison, Topeka, and Santa Fe Railroad. Harmon helped to trace a million dollars in kickbacks—or rebates, as they were then called—to a railroad traffic manager named Paul Morton. The commission's findings embarrassed the president because Morton had left the railroad to become Roosevelt's secretary of the Navy. Harmon urged prosecution of the responsible railroad officials, but Roosevelt interceded, and charges were never brought. Harmon was disappointed in the president's actions. He believed that individuals were accountable for their activities, even when those activities were carried out on behalf of a corporate entity. Harmon's observation that "guilt is always personal" became a theme in his subsequent political campaigns.

"THE FUNDAMENTAL PRINCIPLE OF INTERNATIONAL LAW IS THE ABSOLUTE SOVEREIGNTY OF EVERY NATION, AS AGAINST ALL OTHERS, WITHIN ITS OWN TERRITORY."
—JUDSON HARMON

By 1908, Harmon had reasserted himself in the politics of his home state. His reputation as a conservative Democrat made him the logical person to help the Democrats challenge the long-standing Republican control of Ohio state politics.

At the Ohio state Democratic convention of May 1908, Harmon became the nominee of his party. He went on to win the gubernatorial election over a Republican incumbent—even though a Republican presidential candidate, WILLIAM HOWARD TAFT, carried the state. In his first term as governor, Harmon waged war on corporate graft and corruption and created a state office of business administration.

Harmon won a second term easily—even though former president Roosevelt, still bearing a grudge from the Morton incident, came to Ohio to assist the opposition. In his second term, Harmon remained conservative but began to feel the pressures of the Progressive wave sweeping the nation. This Progressive movement was made up of those who supported more government involvement and oversight in programs aimed at helping ordinary citizens. Bowing to that pressure, his administration supported a number of popular measures, including a federal INCOME TAX amendment; a law consolidating boards overseeing the state's penal, benevolent, and reformatory institutions; and a corrupt practices act to safeguard against voting violations. Harmon's signature was also attached to a model WORKERS' COMPENSATION act, a measure for the direct popular election of U.S. senators, and a statute creating a public utility commission.

In 1912, Harmon decided to seek his party's nomination for president of the United States at the Democratic National Convention in Baltimore. After he declared his opposition to the statewide application of initiative and REFERENDUM in Ohio, many Progressive leaders in his home state doubted his viability as a national candidate. (Initiative is the power of the people to propose bills and laws and to enact or reject them at the polls independent of legislative assembly; referendum is the process of referring constitutional or legislative proposals to the electorate for decision.) WILLIAM JENNINGS BRYAN, leader of the national Progressive movement, denounced Harmon as a reactionary. Harmon nevertheless went to the national convention assured of support from both Ohio and New York delegates, but he failed to win the nomination.

By throwing his hat into the national ring, Harmon had given up the opportunity to run for a third term as governor of Ohio. The election of James M. Cox as governor later in 1912 marked the end of Harmon's political career.

Harmon returned to Cincinnati, resumed practice, and began teaching at Cincinnati Law School. He was often asked to reconsider his withdrawal from public life, but he firmly declined all opportunities to do so.

Harmon died in Cincinnati on February 22, 1927.

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## ❖ HARRISON, BENJAMIN

On March 4, 1889, Benjamin Harrison was sworn in as the twenty-third president of the United States. Forty-eight years to the day ear-

lier, his grandfather, WILLIAM H. HARRISON, had become the ninth U.S. president. His grandfather's presidency ended after only one month when he died from complications due to a pneumonia he developed after delivering his inaugural address in the rain. Harrison's presidency lasted a full four-year term, ushering in sweeping legislative changes, signaling a return of the REPUBLICAN PARTY to the White House, and laying the groundwork for the foreign policy of the late 1800s.

Harrison was born August 20, 1833, in Ohio. After graduating from Miami University, in Oxford, Ohio, he moved to Indianapolis to practice law. There he became involved in Republican politics, serving as city attorney, secretary of the Republican state committee, and supreme court reporter for Indiana. During the Civil War, he joined the Union Army. Within a month he was promoted to colonel and commanding officer of the Seventieth Indiana Regiment. He fought under General William T. Sherman and was promoted to brevet brigadier general in February 1865. After the war he returned to Indianapolis to pursue his legal career.

Harrison lost the race for governor of Indiana in 1876, but made a successful bid for a Senate seat in 1881. He held his Senate position for only one term, failing to win reelection in 1887. This loss did not deter ardent Republican supporters who wanted to see Harrison in the White House.

In 1888 Harrison ran against the incumbent Democratic president, GROVER CLEVELAND. Harrison was the surprise nominee of the Republican party, a second choice after James G. Blaine, who declined to run again after having lost to Cleveland in 1884. Following a very close race, Harrison won 233 electoral votes; although Cleveland took the popular vote, he won only 168 electoral votes.

*Benjamin Harrison.*
LIBRARY OF CONGRESS

In the 1888 election, the Republican party gained control of Congress. During the first two years of Harrison's presidency, Congress enacted into law almost everything contained in the 1888 Republican platform. This was one of the most active Congresses in history. The central themes of Harrison's campaign had been nationalism and tariff protection. The Democrats favored tariff reduction, whereas the Republicans steadfastly favored a system of protection. The tariff existing at the time Harrison took office produced more income than was needed to run the government and was the cause of much bipartisan debate. In 1889 Harrison signed the McKinley Tariff Act, which raised CUSTOMS DUTIES to an average of 49.5 percent, higher than any previous tariff. The act contained over four hundred amendments, including provisions for reciprocal trade agreements. It found favor with few Republicans, causing a rift within the party.

"THE BOTTOM PRINCIPLE . . . OF OUR STRUCTURE OF GOVERNMENT IS THE PRINCIPLE OF CONTROL BY THE MAJORITY. EVERYTHING ELSE ABOUT OUR GOVERNMENT IS APPENDAGE, IT IS ORNAMENTATION."
—BENJAMIN HARRISON

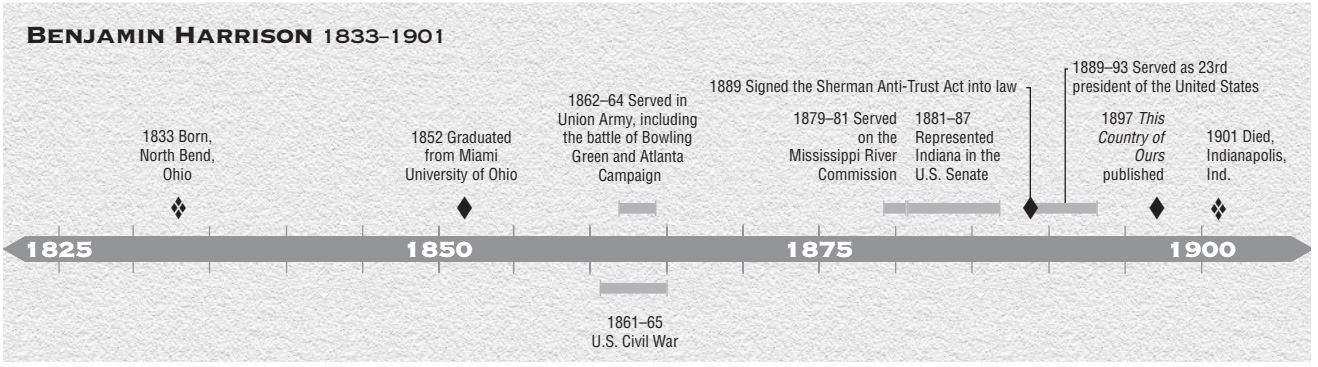

One issue in Harrison's term that enjoyed bipartisan support was antitrust legislation. During the late 1800s, business combinations known as trusts were created and began taking over large shares of the market. Both Republicans and Democrats perceived trusts as destructive of competition, and each party's platform was antimonopoly in 1888. In 1889 Senator JOHN SHERMAN introduced antitrust legislation to restrain interstate trusts. On July 2, 1889, Harrison signed the SHERMAN ANTI-TRUST ACT into law. This was the first major piece of legislation enacted during his term, and it remains in effect more than one hundred years after its adoption. Historians view the Sherman Anti-Trust Act as the most important piece of legislation of the Fifty-first Congress.

During Harrison's term legislation providing for federal supervision of all congressional elections was defeated several times. The legislation had been drafted to ensure the VOTING RIGHTS of blacks as mandated by the FIFTEENTH AMENDMENT. Harrison was a strong supporter of the bill and also of legislation to ensure education for southern blacks, which was also defeated. These were the last significant attempts to provide these CIVIL RIGHTS until the 1930s.

With regard to foreign policy, Harrison had an aggressive attitude and little patience for drawn-out diplomatic negotiations. He helped convince several European countries to lift their restrictions on the importation of U.S. pork products, thus increasing U.S. exports of pork from approximately 47 million pounds in 1891 to 82 million pounds in 1892. Harrison also played a part in solving disputes between the United States, England, and Canada regarding seal hunting in the Bering Sea. And his tenacity proved successful in avoiding a war with Chile in 1892. Harrison's attitude toward foreign relations was emulated by THEODORE ROOSEVELT and other politicians.

When Harrison sought reelection in 1892, Cleveland once again opposed him. This time Cleveland emerged the victor.

Harrison has been described as an aloof loner, lacking in personal magnetism, but a man of great intellect. After he failed to secure a second term as president, he was revered as an elder statesman, giving lectures and acting as chief counsel for Venezuela in a boundary dispute with British Guiana.

After a bout with pneumonia, Harrison died March 13, 1901, in Indianapolis, Indiana.

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## HARRISON, ROBERT HANSON

Robert Hanson Harrison was a lawyer and judge who was one of GEORGE WASHINGTON's original six appointments to the U.S. Supreme Court.

Harrison was born in 1745, in Charles County, Maryland. Though little has been written about his upbringing and education, it is known that he established a successful law practice in Alexandria, Virginia, where Washington became a client and close friend. Harrison later served as Washington's personal secretary throughout much of the Revolutionary War. He resigned from this post in March 1781 to become chief justice of the General Court of Maryland.

On September 24, 1789, President Washington signed the JUDICIARY ACT OF 1789 into law. This act established the Supreme Court, consisting of a chief justice and five associate justices.

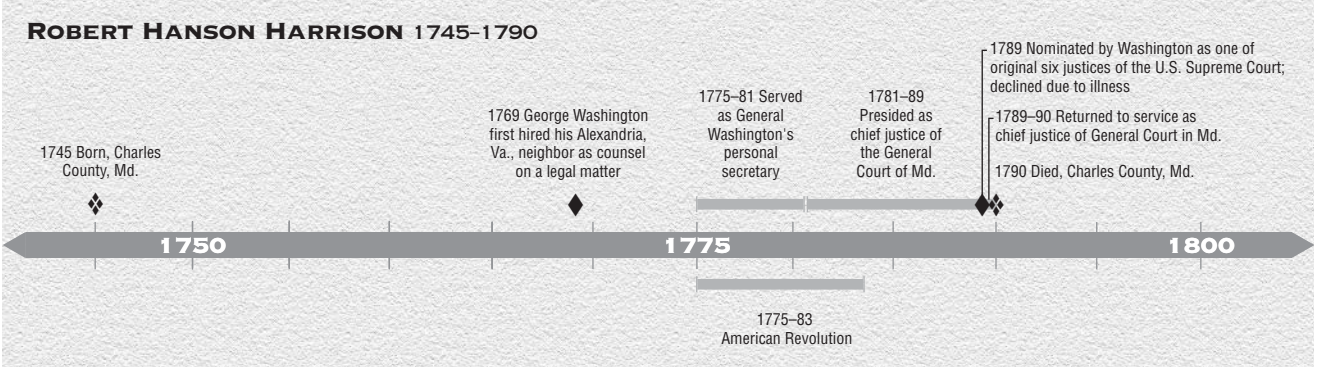

*Robert H. Harrison.* LIBRARY OF CONGRESS

The act also established lower federal circuit and district courts and gave the Supreme Court the power to review, as well as affirm or reverse, the rulings of those courts. On the day the law was enacted, Washington nominated his longtime friend Harrison to the Court.

The Senate confirmed Harrison's nomination two days later with little debate. Harrison initially declined the appointment because of poor health, but Washington persuaded him to accept the seat. A week after Harrison departed for New York City to begin work on the Court, he was stricken with a sudden illness and was forced to again decline the appointment. Washington eventually appointed JAMES IREDELL to the seat intended for Harrison.

Despite illness, Harrison remained chief justice of the General Court of Maryland until his death on April 2, 1790. During his tenure on the Maryland court, Harrison dealt mainly with real estate law and other legal matters; he had little opportunity to write about more sweeping issues of CONSTITUTIONAL LAW. As a result, his legal record indicates little about the effect he would have had if he had been able to serve his appointed term on the U.S. Supreme Court.

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## ❖ HARRISON, WILLIAM HENRY

William Henry Harrison was the ninth president of the United States. He served the shortest term of any U.S. president, dying just a month after assuming office.

Harrison was born February 9, 1773, in Charles City County, Virginia, the youngest of seven children in a distinguished plantation family. His father, Benjamin Harrison V, served in the House of Burgesses before the American Revolution, was later a member of the CONTINENTAL CONGRESS, and was a signer of the Declaration of Independence. Harrison was tutored at home in his early years. In 1787, at age fourteen, he entered Hampden-Sydney College for premedical studies, intending to become a doctor. In 1791, he enrolled at the University of Pennsylvania Medical School to study under Dr. BENJAMIN RUSH, a noted physician. Later that year, following his father's death and without funds to continue school, Harrison decided to enlist in the Army and was commissioned an ensign in the First Infantry, serving in the Northwest Territory.

"SEE THAT THE GOVERNMENT DOES NOT ACQUIRE TOO MUCH POWER. KEEP A CHECK UPON YOUR RULERS. DO THIS, AND LIBERTY IS SAFE."
—WILLIAM HENRY HARRISON

Harrison rose quickly through the ranks of the military, becoming a lieutenant in 1792 and acting as aide-de-camp to Major General Anthony ("Mad Anthony") Wayne, who was responsible for pacifying the Ottawa, Chippewa, Shawnee, and Pottawatomie tribes. At the Battle of Fallen Timbers, in August 1794, Harrison was responsible for holding the line against the tribes and received an official commendation from General Wayne for his efforts. He was later promoted to captain, but in 1798 resigned from the Army.

Following his distinguished military service, Harrison was appointed territorial secretary of the Northwest Territory by President JOHN ADAMS. The position paid well ($1,200 a year), but Harrison did not find it particularly challenging. In 1799, he was appointed the territory's first delegate to Congress, a nonvoting position that authorized him only to introduce legislation and participate in debate. Harrison made the most of his office, introducing and LOBBYING for passage of the Harrison Land Act of 1800, which opened the Northwest Territory

to settlers and offered land for sale in small, affordable tracts and on reasonable credit terms.

In 1800, Harrison was appointed governor of the Indiana Territory. In his twelve years in the post, Harrison successfully negotiated a number of Indian treaties that opened to white settlers millions of acres in southern Indiana and Illinois. Despite the treaties, the threat of uprisings continued, and in November 1811, Harrison led a force of a thousand men, largely militiamen and volunteers from Kentucky and Indiana, against the Indian confederacy. Harrison's troops, taken by surprise, were attacked by the confederacy forces in an early morning raid. In more than two hours of intense fighting, Harrison's men beat back their opponents, suffering more than two hundred casualties. The conflict, known as the Battle of Tippecanoe, put an end to Native American resistance to white settlement in the region—and earned Harrison the nickname Old Tippecanoe.

Soon after the WAR OF 1812 broke out, Harrison was again on the front lines of a major military operation. He was commissioned a major general of the Kentucky militia, then made a brigadier general in command of the Northwest frontier. In 1813, he was promoted to major general. Harrison's biggest battle of the war was at the Thames River, in Ontario, where he defeated a force of seventeen hundred British troops and secured the Northwest for the United States. Harrison was proclaimed a national hero and left the military to resume a career in politics.

In 1816, Harrison won a seat in the U.S. House of Representatives, where he served as chairman of the Militia Committee, advocating universal military training and sponsoring a relief bill for veterans and war widows. He also opposed laws that would restrict SLAVERY. In 1819, Harrison left the House to serve as an Ohio state senator. After a year in office, he ran for the U.S. Senate but was defeated. He also lost a close election for the U.S. House in 1822. In 1825, he was elected to the U.S. Senate. As a senator, Harrison once again focused on military issues, using his influence as chairman of the Committee on Military Affairs to lobby for increases in Army pay and an expansion of the Navy.

After three years in the Senate, Harrison turned to foreign service, accepting an appointment as minister to Colombia. Harrison's tenure in South America was brief, because of political instability within Colombia and concerns within the U.S. government that he was sympathetic to revolutionaries plotting to overthrow the Colombian president. He was recalled to Washington, D.C., in February 1830.

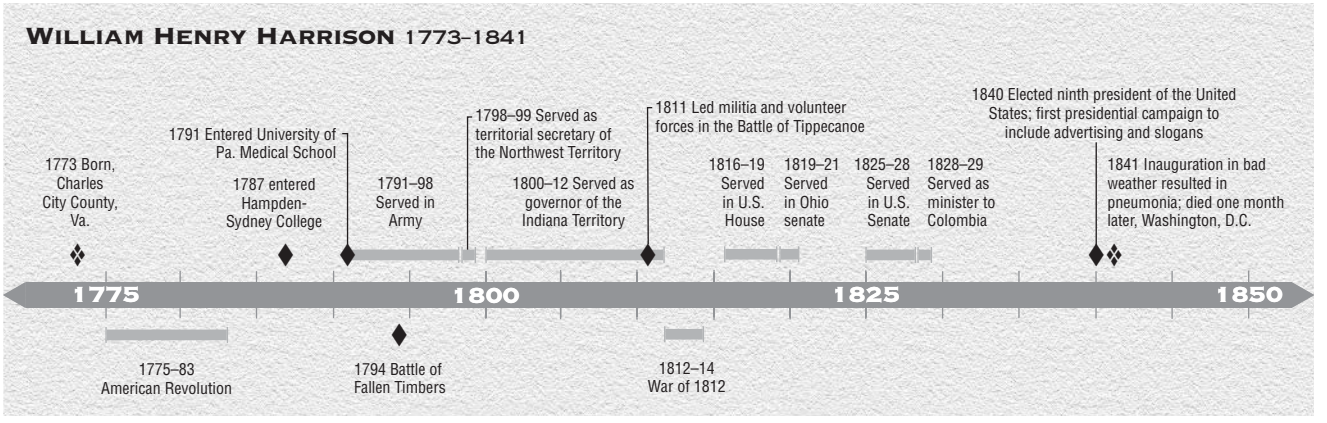

After returning to the United States, Harrison retired to his farm in Ohio and suffered a series of financial setbacks and family tragedies, including the death of his oldest son. But he remained interested in politics. In 1836, he ran unsuccessfully for president, losing to MARTIN VAN BUREN. In 1840, he again ran against Van Buren, with JOHN TYLER as his running mate. The race has been viewed by historians as the first modern presidential campaign, one with advertising and slogans, including the famous Tippecanoe and Tyler, Too, a reference to Harrison's strong military record on the frontier. Harrison and Tyler won the election with 53 percent of the popular vote.

Harrison was inaugurated amid great enthusiasm and gave one of the longest inaugural speeches in history (nearly an hour and a half) outdoors in early March without a hat, gloves, or an overcoat. He soon came down with a cold, which grew progressively worse and eventually developed into pneumonia. He died less than a month later, on April 4, 1841, in Washington, D.C., at age sixty-eight.

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## ❖ HASTIE, WILLIAM HENRY

William Henry Hastie was one of the twentieth century's leading African–American lawyers and jurists. He served on the U.S. Court of Appeals for the Third Circuit from 1949 to 1971, becoming the first African American to sit on a federal appellate court. Hastie also distinguished himself as an educator, a CIVIL RIGHTS attorney, and a public servant. He successfully argued major civil rights cases before the U.S. Supreme Court and was a leader in the effort to desegregate the U.S. military during WORLD WAR II. With CHARLES HAMILTON HOUSTON, his second cousin, Hastie dramatically improved the standing and reputation of Howard University Law School during the 1930s and 1940s.

*William H. Hastie.*
AP/WIDE WORLD PHOTOS

Hastie was born in Knoxville, Tennessee, on November 17, 1904. In 1916 his family moved to Washington, D.C., so that he could attend Dunbar High School. Thus began an education at the same schools Houston had attended before him. Hastie graduated from Dunbar as class valedictorian in 1921 and went on to distinguish himself at Amherst College, where he graduated in 1925, again as valedictorian.

After college Hastie spent two years teaching mathematics and science at a New Jersey school, then enrolled at Harvard Law School. There he served on the editorial board of the *Harvard Law Review,* becoming only the second African

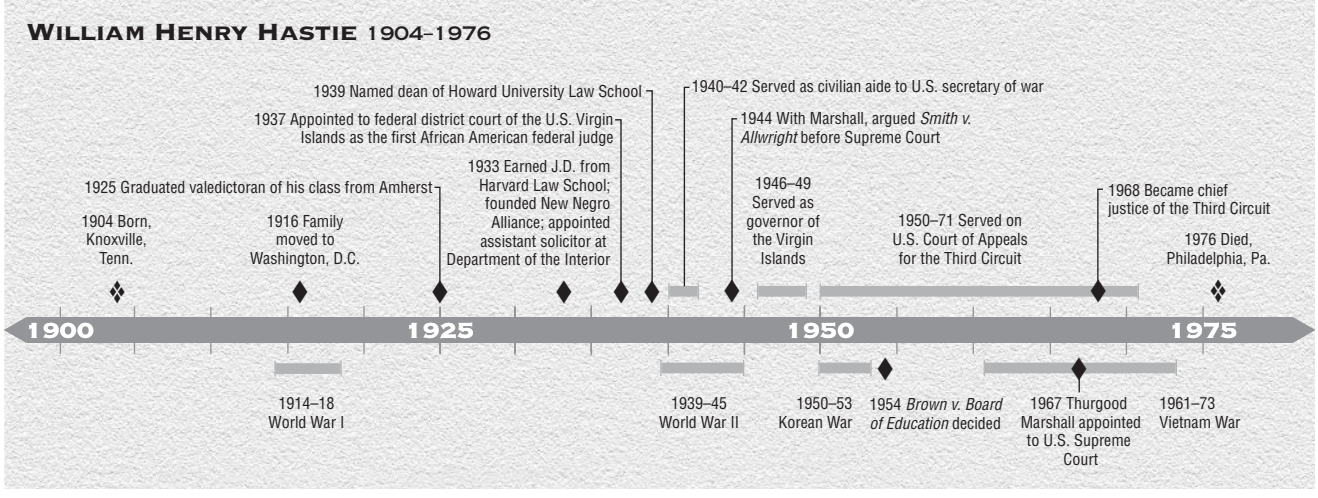

American to do so. He received a bachelor of laws degree from Harvard in 1930 and a doctor of JURISPRUDENCE degree in 1933.

Hastie then joined Houston's Washington, D.C., law firm. He also worked as an instructor at Howard University Law School, where Houston served as vice dean. Together, Hastie and Houston mentored scores of young black lawyers, including THURGOOD MARSHALL, who would become a leading civil rights lawyer and a U.S. Supreme Court justice.

Throughout the 1930s and 1940s, Hastie worked as an activist for African–American civil rights. In 1933 he founded the New Negro Alliance, a group that organized pickets and boycotts of white businesses to force increased hiring of African Americans. He worked with Houston, Marshall, and other members of the National Association for the Advancement of Colored People (NAACP) to devise legal strategies to fight racism in employment, housing, and education. With regard to SEGREGATION in schools, Hastie and his NAACP colleagues focused first on graduate education. Hastie unsuccessfully argued one of the first SCHOOL DESEGREGATION cases, *Hocutt v. Wilson* (N.C. Super. Ct. 1933), *unreported,* which involved the attempt of a student, Thomas R. Hocutt, to enter the University of North Carolina.

"ALWAYS BE PREPARED. YOUR OPPONENT WILL HAVE THE ADVANTAGE OF COLORLESSNESS."
—WILLIAM HENRY HASTIE

In 1933 Secretary of the Interior Harold L. Ickes recruited Hastie to work for the INTERIOR DEPARTMENT as assistant solicitor. While in that position, Hastie fought against segregated dining facilities in the department and helped draft the Organic Act of 1936 (48 U.S.C.A. § 1405 et seq.), which restructured the government of the Virgin Islands and gave that territory greater autonomy. In 1937, as a result of this work, he was appointed to the federal district court of the Virgin Islands, becoming the first African American to be named a federal judge.

Hastie left this position in 1939 when he was named dean of Howard University Law School. A year later he returned to government service as civilian aide to the secretary of war. Charged with rooting out RACIAL DISCRIMINATION in the military, Hastie identified and attacked discrimination against African Americans such as unequal promotion, segregation in unequal training facilities, and violent assaults by police officers and civilians. Unsatisfied with the government response to his proposals to eliminate discrimination, Hastie resigned from his position in protest in 1943. However, his reports on racism in the military attracted national notice, and in 1944 the Army high command ordered that African–American officers be trained alongside white officers.

Following his work in the military, Hastie continued to practice law and plead civil rights cases for the NAACP. Hastie and Marshall won several key cases before the U.S. Supreme Court. In *Smith v. Allwright,* 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 2d 987 (1944), Hastie and Marshall persuaded the Court that the practice of holding all-white party primaries, which effectively denied African Americans the right to vote, was unconstitutional. The case set a vital precedent for later Supreme Court civil rights decisions.

Hastie and Marshall won another major victory in *Morgan v. Virginia,* 328 U.S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317 (1946), in which the Court struck down a Virginia law (Virginia Code of 1942, §§ 4097z–4097dd) requiring racial segregation on buses. Hastie and Marshall argued that the law imposed an improper burden on interstate commerce. Despite this ruling de facto (actual) segregation continued on buses in the South.

From 1946 to 1949, Hastie served as governor of the Virgin Islands. In 1949 President HARRY S. TRUMAN appointed Hastie to the U.S. Court of Appeals for the Third Circuit. He was sworn in as an interim appointee that year and was confirmed by the Senate in 1950. In 1968 Hastie was named chief justice of the court of appeals. After retiring from the court in 1971, Hastie devoted himself to public interest law, including programs to provide legal aid for consumers, environmentalists, and minorities. He died April 14, 1976 in Philadelphia, Pennsylvania.

Hastie was awarded over twenty honorary degrees, including ones from Amherst and Harvard. He received the NAACP's Spingarn Medal in 1943 and was elected a fellow of the American Academy of Arts and Sciences in 1952.

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## HATCH ACT

Enacted in 1939, the Hatch Act (5 U.S.C.A. 7324) curbs the political activities of employees in federal, state, and local governments. The law's goal is to enforce political neutrality among civil servants: the act prohibits them from holding public office, influencing elections, participating in or managing political campaigns, and exerting UNDUE INFLUENCE on government hiring. Penalties for violations range from warnings to dismissal. The law's restrictions have always been controversial. Critics have long argued that the act violates the FIRST AMENDMENT freedoms of government employees. The U.S. Supreme Court has disagreed, twice upholding the law's constitutionality. Congress has amended the Hatch Act several times since 1939. In 1993, a number of amendments to the act sought to limit the effects of political patronage in federal hiring.

The Hatch Act grew out of nineteenth-century concerns about the political activities of federal employees. As early as 1801, President THOMAS JEFFERSON issued an EXECUTIVE ORDER that said federal workers should neither "influence the votes of others, nor take part in the business of electioneering." He saw such activities as "inconsistent with the spirit of the Constitution." Jefferson was primarily concerned with what government employees did while in office; subsequently, concerns developed in another area. Throughout the nineteenth century, appointments to the federal bureaucracy were viewed as the natural spoils of political success. The prevalent awarding of jobs for political loyalty created a so-called spoils system and, ultimately, a reaction against it.

The long process of neutralizing politics in federal employment continued into the twentieth century. Attempts began with the Pendleton Act of 1883 (22 Stat. 403), a comprehensive antipatronage law named after its sponsor, Senator GEORGE H. PENDLETON, who argued that "the spoils system needs to be killed or it will kill the republic" (14 Cong. Rec. 206 [1882]). The law sought to eliminate patronage by insulating federal employees from coercion. It provided that they could not be fired for refusing to work on behalf of a candidate or for choosing not to make campaign contributions. In 1907, President THEODORE ROOSEVELT instituted even broader controls through Executive Order 642. Its two major prohibitions addressed employees in the executive civil service and the larger class of federal civil servants. The former were forbidden to use their authority to interfere in elections, and the latter were barred from taking part in political management or campaigning. This order marked the first time that federal employees had limits placed on their First Amendment right to engage in political speech.

The passage of the Hatch Act in 1939 combined the prohibitions of earlier executive orders and the Pendleton Act. The act includes restrictions on political activity for the whole federal bureaucracy. The act stated, "[N]o officer or employee in the EXECUTIVE BRANCH of the Federal government, or in any agency or department thereof, shall take any active part in political management or in political campaigns" (ch. 410, § 9(a)). The measure received bipartisan support in a response to concern about the NEW DEAL—President FRANKLIN D. ROOSEVELT's economic program for relieving the effects of the Great Depression—which significantly increased the ranks of federal employees. Congress wanted to rein in Roosevelt's power, especially following allegations that he had used Works Progress Administration employees to influence the 1938 congressional elections. Opponents of patronage in general and enemies of Roosevelt in particular thought the New Deal represented an opportunity for the president to meddle with elections while perpetuating his hold on the White House.

Congress increased the scope of the Hatch Act in 1940 by extending its restrictions to employees of state and local governments that receive federal funds (Act of July 19, 1940, ch. 640, 54 Stat. 767), although it cut back certain applications of this measure in 1974. At various times it has also increased or decreased the penalties for Hatch Act violations—notably, by including suspension without pay as a lesser penalty. In 1993, Congress made yet more changes aimed at curtailing patronage in jobs: amendments to 5 U.S.C.A. § 3303 restricted elected officials from making unsolicited recommendations for job applicants seeking federal employment. States, meanwhile, have broadly incorporated the principles of the Hatch Act in their own statutes, which have also undergone revision over time.

Debate over the Hatch Act has been vigorous since its inception. Critics have portrayed it as an unfair restriction on the First Amendment rights of government employees, especially violative of their fundamental right to engage in political

*In 2002, Green Party candidate Roger Merle, a U.S. Postal Service employee, challenged the Hatch Act in an unsuccessful attempt to win a seat in the U.S. House of Representatives.*

AP/WIDE WORLD PHOTOS

speech. This argument formed the basis of an early suit that the U.S. Supreme Court heard in 1947, *United Public Workers of America v. Mitchell,* 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754. In sustaining the legality of the Hatch Act, the Court balanced individual speech rights against the "elemental need for order," and found the latter more important. The Court rejected another challenge to the law in 1973 in *United States Civil Service Commission v. National Ass'n of Letter Carriers,* 413 U.S. 548, 93 S. Ct. 2880, 37 L. Ed. 2d 796. Opponents continued to attack these rulings throughout the 1990s. "Unfortunately for those individuals who have chosen a career in the federal public service," argued author Michael Bridges in a 1993 law review article, "the Court has found that Congress may place an asterisk beside their First Amendment rights."

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## HATE CRIME

*A crime motivated by racial, religious, gender, sexual orientation, or other prejudice.*

Hate crimes are based, at least in part, on the defendant's belief regarding a particular status of the victim. Hate-crime statutes were first passed by legislatures in the late 1980s and early 1990s in response to studies that indicated an increase in crimes motivated by prejudice. Approximately 30 states and the federal government have some form of hate-crime statute. Many localities have also enacted their own hate-crime ordinances.

The precise definition of hate crime varies from state to state. Some states define a hate crime as any crime based on a belief regarding the victim's race, religion, color, disability, sexual orientation, national origin, or ancestry. Some states exclude crimes based on a belief regarding the victim's sexual orientation. Others limit their definition to certain crimes such as harassment, assault, and damage to property. In all states, the victim's actual status is irrelevant. For example, if a victim is attacked by someone who believes that the victim is gay, the attack is a hate crime whether or not the victim is actually gay.

Generally, there are three types of hate-crime statutes. Two provide for punishment; the third type mandates only the collection of hate-crime data. One version defines a hate crime as a discrete offense and provides stiff punishment for the offense. Under Ohio's statute, for example, any person who commits menacing, aggravated menacing, criminal damage or criminal endangerment, criminal mischief, or telephone harassment "by reason of the race, color, religion, or national origin of another person or group of persons" is guilty of the hate crime termed ethnic intimidation (Ohio Rev. Code Ann. § 2927.12 [Baldwin 1996]). The gravity of ethnic intimidation is always one degree higher than a base offense. For example, menacing is a misdemeanor of the fourth degree, but menacing based on ethnicity is a more serious offense, classified in Ohio as a misdemeanor of the third degree.

Another type of hate-crime law enhances punishment for certain offenses that are motivated by hate. In Wisconsin, for example, defendants who intentionally select their victims based at least in part on the victims' race, religion, color, disability, sexual orientation, national origin, or ancestry are subject to more severe penalties than they would receive in the absence of such hate-based intent (Wis. Stat. § 939.645 [1995]). Thus in Wisconsin, for a class A misdemeanor based on hate, the maximum

fine is $10,000, and the maximum period of imprisonment is two years in jail or prison (Wis. Stat. Ann. § 939.645(2)(a)), whereas an ordinary class A misdemeanor is punishable by a maximum fine of $10,000 or up to nine months in jail, or both (§ 939.51(3)(a)). For a class B misdemeanor, a less serious crime, the maximum fine is $1,000, and the maximum imprisonment is 90 days in jail. If the class B misdemeanor is a hate crime, the maximum fine is $10,000, and the maximum sentence is one year in jail.

A third type of hate-crime statute simply requires the collection of statistics. At the federal level, the Hate Crime Statistics Act of 1990 (Pub. L. No. 101-275, 104 Stat. 140 [28 U.S.C.A. § 534 (1990)]) requires the JUSTICE DEPARTMENT to collect statistics on crimes that manifest evidence of prejudice. Data must be acquired for crimes based on race, religion, disability, sexual orientation, or ethnicity. The purpose of the act is to provide the data necessary for Congress to develop effective policies against hate-motivated violence, to raise public awareness, and to track hate-crime trends.

Laws against hate crimes might conflict with rights under the FIRST AMENDMENT to the U.S. Constitution. Generally, the First Amendment protects a citizen's right to the free expression of thoughts. However, the courts have ruled that First Amendment rights may give way to the greater public good. For example, there is no First Amendment protection for someone who falsely yells "Fire!" in a crowded theater, because such speech endangers the safety of others. Such expression might give rise to a DISORDERLY CONDUCT charge or similar charge. In determining the constitutionality of hate-crime legislation, one primary question is whether the prohibited speech deserves First Amendment protection.

In 1997, the federal government documented 9,861 hate crimes based on the victims' religion, ethnicity, gender, sexual orientation, and disability. More than half of these crimes were motivated by racial bias, and more than 1,000 were based on sexual orientation. These statistics were illustrated in a pair of hate crimes that drew national attention. The deaths of James Byrd, Jr. and Matthew Shepard appeared to be quintessential hate crimes.

Byrd was walking along a street in his Jasper, Texas, community late at night in June 1998 when he was given a ride by three white men in a pick-up truck: The men beat him and chained him by his ankles (with a towing chain) to the back of their truck and dragged him for nearly three miles. Byrd was decapitated and dismembered as he was dragged behind the truck. He had been alive and conscious when it all began. All three of the perpetrators were on PAROLE at the time and had extensive criminal records. It was alleged that at least two of the men had affiliations with racist groups, such as the Aryan Nation and the KU KLUX KLAN, and displayed white-supremacist tattoos. All three were convicted of murder, and two were sentenced to death.

*Rev. Larry Hill looks over the remains of his Greenville, N.C., church in 1996. During the 1990s, arsonists targeted African–American churches in a rash of church burnings classified as racial hate crimes.*

AP/WIDE WORLD PHOTOS

**Hate Crime**

**NUMBER OF BIAS-MOTIVATED CRIME INCIDENTS REPORTED, IN 2001**

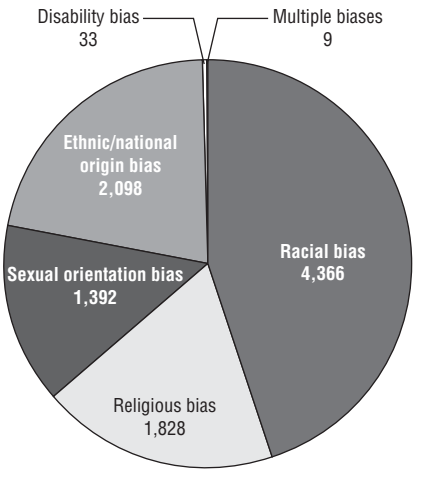


SOURCE: FBI, *Crime in the United States, 2001*.

# Do Hate-Crime Laws Restrict First Amendment Rights?

The U.S. Supreme Court's upholding of the state "hate-crime" law in *Wisconsin v. Mitchell,* 508 U.S. 476, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993), has not stopped some legal commentators from arguing that such laws violate the **FIRST AMENDMENT** of the U.S. Constitution. Though these critics generally admit that hate crimes are on the rise, they believe that laws that increase the severity of punishment on the basis of the motives of the perpetrator create a dangerous precedent for government interference with freedom of expression and thought. Defenders of hate-crime laws reject these fears, claiming that the laws deal with criminal conduct and are meant to send a message that discrimination will not be tolerated.

Critics of the laws have articulated a number of reasons for their opposition, some constitutional, some practical. The foremost concern is that hate-crime laws violate a person's right to freedom of thought. These statutes enhance the penalties for conduct already punished under state law when the perpetrator is motivated by a type of bigotry the legislature finds offensive. Therefore, if a rich man assaults a **HOMELESS PERSON** because he hates the poor, the rich man can be charged only with assault, because the legislature has not specifically found bigotry against the poor to be offensive. However, if a man assaults an African American because he hates persons of that race, he can be charged with assault and intimidation, which carries a more severe penalty, or his sentence for assault can be increased, because the legislature has penalized a racially discriminatory motive. For the critics of hate-crime laws, this result reveals that the legislature is regulating the defendant's thoughts, in violation of the First Amendment.

Critics also charge that the focus on motive distorts the traditional rules of **CRIMINAL LAW**. In the past, criminal law was interested in a defendant's mental state only to the extent that it would reveal whether the defendant had engaged in deliberate conduct. As a general rule, the motive of a crime has never been considered an element that must be proved at trial. Whether a person robbed a bank to buy food for a family or to pay back a gambling debt is considered

Mathew Shepard was a 21-year-old college student at the University of Wyoming in Laramie. On October 12, 1998, he died, in part, because he was a homosexual. On October 6, 1998, two men in their early twenties entered a local bar, where Shepard was already drinking. The men, pretending to be gay, approached Shepard who eventually left with them. The men then drove him to a deserted area, where they tied him to a fence and pistol-whipped him until his skull collapsed. They took his wallet and shoes and obtained his address so that they could rob his apartment. Shepard was discovered 18 hours later, still tied to the fence. He never regained consciousness. The pair were charged with first-degree murder, **KIDNAPPING**, and aggravated **ROBBERY**. Both men plead guilty to the charges and were sentenced to serve two consecutive life sentences, escaping a possible death sentence.

The U.S. Supreme Court has been called upon to examine the constitutionality of hate-crime laws. In 1992 the Court struck down a St. Paul, Minnesota, ordinance on the ground that it violated the First Amendment (*R.A.V. v. City of St. Paul,* 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 [1992]). In *R.A.V.* several juvenile defendants were tried and convicted after they allegedly assembled a crude, wooden cross and set it on fire in the yard of an African-American family in St. Paul. The teenagers were arrested and charged under St. Paul's Bias-Motivated Crime Ordinance (Minn. Legis. Code § 292.02). Under the ordinance, a person who placed "on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika" and who had reason to know that the display would arouse anger or alarm in others based on "race, color, creed, religion or gender" was guilty of a misdemeanor.

The trial court dismissed the charge on the grounds that it was overbroad and unconstitutionally content-based. Specifically, the court ruled that the statute criminalized too much behavior and infringed on First Amendment rights of free speech. The city of St. Paul appealed to the Minnesota Supreme Court, which reversed the trial court's ruling. The teenagers then appealed to the U.S. Supreme Court.

irrelevant. The key state-of-mind question is whether the person intended to rob the bank.

Some critics also ask what good the additional penalty will do for persons convicted of hate crimes. If a person is filled with prejudices, extra time spent in prison is not likely to help eradicate those beliefs; it may, in fact, reinforce them. These critics do not believe that hate-crime laws seek to deter criminal activity. They feel that instead such laws appear to seek retribution for acts of violence motivated by racism, sexism, anti-Semitism, and homophobia. The critics contend the retribution model is not compatible with the modern goals of the criminal and penal systems.

Another criticism is that hate-crime laws do not address deeper forces within society that create prejudice. Some social psychologists believe that prejudice and the behavior that may accompany it are caused by a combination of social, economic, and psychological conflicts. Adding more punishment for those who act on their prejudice may give the community the illusion it is dealing with the problem, but, in fact, hate-crime laws do little to help change thought and behavior.

Defenders of hate-crime laws reject the idea that they are taking away anyone's First Amendment rights. They note that in *Mitchell* the Supreme Court rejected as "too speculative a hypothesis" the "chilling effect" argument, which maintains that these laws chill, or inhibit, free thought and speech. The Court also cited precedent that permitted the "evidentiary use of speech to establish the elements of a crime or to prove motive or intent." This means that persons are free to express their ideas, no matter how repugnant, but when they engage in unlawful conduct based on these beliefs, they surrender their First Amendment rights.

Defenders also believe that hate-crime laws, like other criminal laws, are aimed at preventing harmful acts. The focus is not on stifling disagreeable and prejudicial beliefs or biases, but on preventing the particularly harmful effects of hate crimes. Even critics of the laws admit that hate-crime violence is often brutal and severe. Defenders argue that increasing the penalties for this type of behavior is therefore justified.

Supporters of hate-crime laws point out, as did the Supreme Court in *Mitchell,* that most of the statutes use the same language as title VII of the **CIVIL RIGHTS ACT OF 1964** (42 U.S.C.A. § 2000e et seq.). Why, they ask, is it acceptable to penalize employment discrimination that is based on racism and bigotry, but not criminal acts based on similar biases? The courts have long upheld federal and state discrimination laws as acceptable methods of penalizing conduct and promoting nondiscriminatory practices. Intentional employment discrimination requires a person to communicate his or her bias. Supporters conclude that once a person verbalizes a prejudice and acts on it, the state is free to regulate that conduct.

The high court was unanimous in striking down the St. Paul ordinance. However, it was divided in its legal reasoning. According to the majority opinion, the ordinance violated the First Amendment. Justice **ANTONIN SCALIA**, writing for the majority, declared the statute unconstitutional because it prohibited "otherwise permitted speech solely on the basis of the subjects the speech addresses." Scalia illustrated this point by noting that a government may proscribe libelous speech, but that it may not proscribe only libelous speech that is critical of the government. The St. Paul ordinance violated this constitutional rule by proscribing only hate speech delivered through symbols.

In a separate opinion, the concurring justices argued that the majority opinion weakened previous First Amendment **JURISPRUDENCE**. Specifically, the majority opinion protected fighting words, a form of speech that provokes hostile encounters and is not protected by the First Amendment. By holding that "lawmakers may not regulate some fighting words more strictly than others because of their content," the majority had forced legislatures to criminalize all fighting words in order to legally prohibit the most dangerous ones.

According to the concurring justices, the statute was merely overbroad—that is, it legitimately regulated unprotected speech, but it also impermissibly prohibited speech that can cause only hurt feelings or resentment. With more careful wording, the concurring justices argued, hate-crime laws could pass constitutional muster. However, under the Court's majority opinion, this did not seem possible.

In 1993, the Supreme Court revisited hate-crime legislation and unanimously adopted a coherent approach. In *State v. Mitchell,* 508 U.S. 476, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993), Todd Mitchell, a young black man from Kenosha, Wisconsin, was convicted of aggravated **BATTERY** and received an increased sentence under the Wisconsin hate-crime statute. The incident at issue began with Mitchell asking some friends, "Do you all feel hyped up to move on some white people?" Shortly thereafter, Mitchell spotted Gregory Reddick, a 14-year-old white male, walking on the other side of the street. Mitchell then said to the group, "You all

want to fuck somebody up? There goes a white boy; go get him." The group attacked Reddick. Reddick suffered extensive injuries, including brain damage, and was comatose for four days.

Mitchell appealed his conviction to the Wisconsin Supreme Court, which held that the hate-crime statute violated the First Amendment. The state of Wisconsin appealed to the U.S. Supreme Court, which reversed the Wisconsin Supreme Court's ruling. The high court ruled that the Wisconsin statute was constitutional because it was directed at conduct, not expression. The Court distinguished the *R.A.V.* case by explaining that the St. Paul ordinance was impermissibly aimed at expression. The primary purpose of the St. Paul ordinance was to punish specifically the placement of certain symbols on property. This violated the rule against content-based speech legislation. The Wisconsin law, by contrast, merely allowed increased sentences based on motivation, which is always a legitimate consideration in determining a criminal sentence.

Some states have mandated that a jury decide whether a defendant was motivated by bias, while others have authorized the trial judge to decide bias motivation. In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the U.S. Supreme Court examined a New Jersey statute that gave judges the power to decide bias. The Court ruled this practice unconstitutional, requiring that a jury decide the issue based on the reasonable-doubt standard of proof.

Vineland, New Jersey, police arrested Charles C. Apprendi Jr. in December 1994 after he fired eight shots into the home of an African–American family in his otherwise all-white neighborhood. No one was injured in the shooting, and Apprendi admitted that he had fired the shots. In his confession, he told police that he had wanted to send a message to the black family that they did not belong in his neighborhood. Later, however, Apprendi claimed that police had pressured him into making that statement. He contended that he had had no racial motivation for the shooting but rather fired into the house when its purple front door attracted his attention.

Apprendi pleaded guilty to a firearms charge and to having processed a bomb in his house. Although the offenses carried a maximum sentence of ten years in prison, the prosecutor invoked the New Jersey hate-crime law and asked that the judge increase the sentence. The judge agreed and imposed a 12-year prison term, stating that prosecutors had shown, by a PREPONDERANCE OF THE EVIDENCE, that Apprendi's act had been racially motivated. Apprendi appealed the sentence, arguing that he could be given such an enhanced sentence only if prosecutors presented evidence to a jury that proved, BEYOND A REASONABLE DOUBT, that he had fired the weapon out of racial bias. The prosecutor contended that the hate-crime law punished motive, which has been regarded as a sentencing issue for the judge to resolve.

The U.S. Supreme Court, on a 5–4 vote, reversed the New Jersey Supreme Court and found the hate-crime provision to be unconstitutional. Justice JOHN PAUL STEVENS, writing for the majority, stated that any factor, except for a prior conviction, "that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Justice Stevens based the Court's decision on the Fourteenth Amendment's DUE PROCESS CLAUSE and the Sixth Amendment's right to trial by a jury. Taken together, these two provisions entitle a criminal defendant to a jury determination that "he is guilty of every element of the crime, with which he is charged, beyond a reasonable doubt. Although judges do have the right to exercise discretion in sentencing, they must comply with sentencing provisions contained in state criminal statutes. Justice Stevens noted the "novelty of the scheme that removes the jury from the determination of a fact that exposes the defendant to a penalty exceeding the maximum he could receive if punished according to the facts reflected in the jury verdict alone."

The subject of cross burning returned to the U.S. Supreme Court again in *Virginia v. Black*,538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). The Court, in a ruling aimed primarily at the Ku Klux Klan, upheld a Virginia statute that made it a felony to burn a cross "on the property of another, a highway or other public place. . .with the intent of intimidating any person or group." The 6-3 decision meant that the state could prosecute and convict two white men who had burned a four-foot-high cross in the backyard of an African-American family. The family moved away after the incident. Justice SANDRA DAY O'CONNOR, in her majority opinion, held that the context of the cross burning determined whether it could be protected as constitutionally protected political speech. The First Amendment would

**Hate Crime**

**TYPES OF OFFENSES REPORTED IN HATE CRIME INCIDENTS, IN 2001**

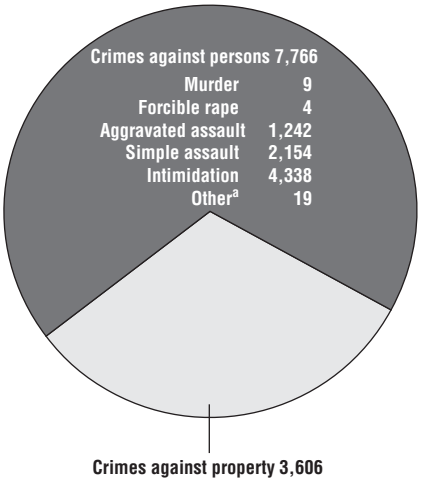


**Crimes against property 3,606**

| | |
|---|---|
| Destruction/Damage/Vandalism | 3,018 |
| Robbery or burglary | 307 |
| Arson | 90 |
| Larceny or motor vehicle theft | 164 |
| Other[a] | 27 |

[a]Includes offenses other than those listed that are collected in the National Incident-Based Reporting System

SOURCE: FBI, *Crime in the United States, 2001*.

protect a cross burning at a political rally, but it would not protect what had occurred in this case, which was criminal intimidation.

Hate-crime laws complicate the work of police officers by requiring them not only to capture criminals and to investigate their criminal acts, but also to conduct a broad investigation of their personal life to determine whether a crime was motivated by prejudice. This determination can be difficult to make, and most laws offer little assistance in defining motivation.

The extra investigative work required by hate-crime laws also touches on privacy issues and the boundaries of police investigations. Defendants who have been accused of a hate crime may have their home and workplace searched for information on group memberships, personal and public writings, and reading lists, and for other personal information that may have been inadmissible at trial before the advent of the hate-crime statute.

Advocates of hate-crime laws concede that those laws do not root out all hate crimes, but they note that no CRIMINAL LAW is completely effective. They also contend that the difficulty in determining prejudiced motivation is no different from the difficulty that judges and juries face every day in determining whether the evidence presented in a case supports the charge. Supporters dismiss free speech and privacy concerns by reminding detractors that protections for such categories of rights regularly give way when public safety requires their restriction. According to advocates of hate-crime laws, fighting hatred and prejudice is an important government function, especially when hatred and prejudice motivate victimization.

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CROSS-REFERENCES

Criminal Law; Freedom of Speech; Motive; Prejudice.

## HAVE AND HOLD

*The opening words, or habendum clause, found in a deed to real property, which describes the ownership rights of the individual to whom such property is being conveyed.*

## HAWKERS AND PEDDLERS

*A* hawker *is an individual who sells wares by carrying them through the streets. The person's ordinary methods of attracting attention include addressing the public, using placards, labels, and signs, or displaying merchandise in a public place.*

*A* peddler *is defined as a retail dealer who brings goods from place to place, exhibiting them for sale. The terms are frequently defined in state statutes or city ordinances and are often used interchangeably.*

An individual is ordinarily considered to be a peddler in the legal sense if he or she does not have a fixed place of conducting business, but regularly carries the goods for sale with himself or herself. The wares must be offered for immediate sale and delivery and must be sold to customers as opposed to dealers who sell such wares. The goods may be bartered rather than sold for cash.

A single act of selling is generally insufficient to make the salesperson a peddler. Such individual must be engaged in this type of selling as a regular occupation or business, although it need not be the person's sole or main business. In addition, the individual, in order to be considered a hawker or peddler, need not earn sufficient funds for support from the business, nor does the business need to gain a profit in order for the individual to be considered a hawker or peddler.

The business of peddling has traditionally been distinguished from the service delivery of perishable goods, such as eggs, milk, or bakery products. An individual who delivers this type of perishable goods to regular customers is not considered a peddler. When, however, an individual travels from house to house, and sells goods to different persons in small quantities, the person is a peddler, even though he or she might make daily sales to somewhat regular customers. For example, a person who sharpens knives or an ice cream truck driver might fall into this category.

The individual who actually engages in the solicitation, makes the sale, and delivers the goods is the peddler, irrespective of whether the person owns the goods or is an agent or employee of the owner. An agent who sells his or her principal's merchandise can be considered a peddler; however, a principal who does not make sales calls or deliver merchandise is not. Ordinarily, an individual who merely solicits orders or sells by sample but does not deliver the goods sold is not considered a peddler.

Municipalities are permitted to set forth reasonable regulations concerning hawking and peddling within their borders. It may be required for such salespeople to obtain licenses; however, municipalities cannot prohibit the business through the requirement of an excessive fee.

In situations where a license is required, a peddler or hawker must obtain it prior to the time when he or she begins to sell wares and it must be issued to the individual who is actually engaged in the peddling. It is not transferrable. In order for an applicant to obtain a license, the person must establish certain facts, such as acceptable moral character. Some statutes and ordinances require a person seeking a license to take a prescribed oath, give a bond, or deposit a particular amount of money.

Licensing statutes and ordinances often exempt certain individuals from their requirements; persons within the exempt classes need not obtain licenses. Such exemptions include persons selling goods or articles they have made themselves, honorably discharged or disabled veterans, poor or generally DISABLED PERSONS, and clergy. The exemption is personal and cannot be extended to agents or employees of the licensed person.

## ◆ HAYES, GEORGE E. C.

George E. C. Hayes was an attorney and CIVIL RIGHTS activist, and a member of the team of lawyers who argued the landmark SCHOOL DESEGREGATION cases before the U.S. Supreme Court in 1954.

Hayes was born July 1, 1894, in Richmond, and lived most of his life in Washington, D.C., where he attended public schools. He graduated from Brown University, in Providence, in 1915 and received his law degree from Howard University in 1918. While at Howard, he attained one of the highest academic averages on record there.

Hayes's involvement in the burgeoning CIVIL RIGHTS MOVEMENT began in the 1940s. As a member of the District of Columbia Board of Education from 1945 to 1949, he worked to desegregate the schools in the nation's capital. Through his efforts, he met the National Association for the Advancement of Colored People (NAACP) lawyers who were mounting desegregation battles in other states. Their work culminated in the U.S. Supreme Court's landmark decision in BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). Hayes was one of five NAACP lawyers, including THURGOOD MARSHALL and James Nabrit, Jr., who convinced the High Court that SEGREGATION in public schools was unconstitutional.

The *Brown* decision, repudiating the long-established "separate-but-equal" doctrine, marked the beginning of the end of segregation in all public accommodations. After the decision was handed down, Hayes and the other NAACP lawyers continued to press for immediate desegregation and urged the Court not to grant the states' appeals for a delay in implementation of the changes.

In 1954, Hayes clashed with Senator JOSEPH R. MCCARTHY, a Wisconsin Republican who headed the Senate Subcommittee on Investigations. McCarthy, looking into possible Communist infiltration of the ARMED SERVICES, accused Annie Lee Moss, a civilian employee of the Army Signal Corps, of Communist affiliation. Hayes defended Moss, who repeatedly denied the allegations against her. He sharply criticized McCarthy's investigative methods and presumption that Moss was guilty. Ultimately, Moss was cleared of the charges, and the secretary of defense restored her to a position with the Army.

Hayes has been described as independent and a "quiet pioneer." He was a lifelong Republican, choosing an unusual affiliation for an African–American civil rights activist. In 1955, President DWIGHT D. EISENHOWER appointed him to a post on the District of Columbia Public Utilities Commission, and Hayes thus became the first African American in nearly one hundred years to serve in a municipal agency in the District of Columbia. In 1962, the District of Columbia Bar Association named him to its board of directors, making him the first African American to hold office in that group.

Hayes had open and sometimes bitter differences with the younger, more militant activists who assumed leadership of the civil rights movement in the early 1960s. In 1966, they criticized him for accepting membership on the previously segregated board of directors of the Metropolitan Washington Board of Trade, one of the District of Columbia's most conservative groups. As Howard University counsel, he advised and assisted his friend Nabrit, then president of Howard, in his handling of the black power student uprising on the campus in 1967.

Hayes was highly respected among his colleagues, who knew him to be calm, diligent, modest, and unassuming. He was noted for his elegance in language, manner, and dress, and he projected an image of intelligence and confidence. In addition to holding a long tenure as counsel to Howard University, Hayes acted as counsel to the NAACP for many years. He died December 20, 1968, in Washington, D.C.

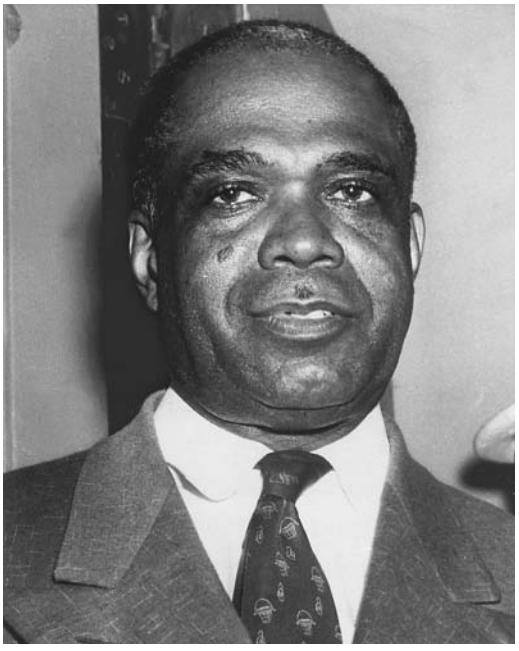

*George E. C. Hayes.*
AP/WIDE WORLD PHOTOS

"[THE COUNTENANCING OF SCHOOL SEGREGATION] BY FEDERAL LAWMAKERS . . . WAS A MATTER OF POLITICS . . . IT WAS DONE AS AN EXPEDIENT."
—GEORGE E. C. HAYES

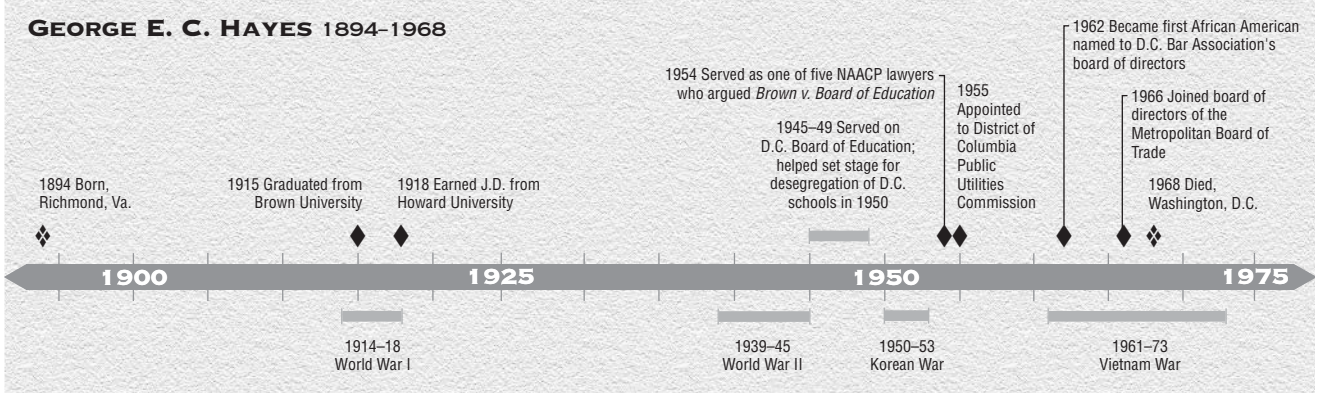

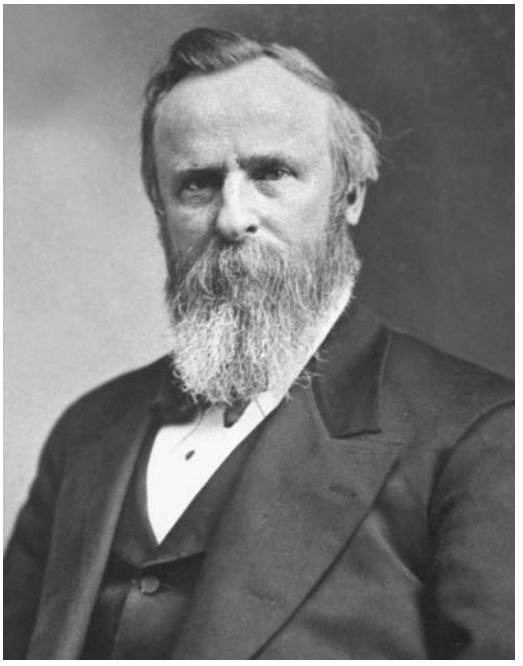

*Rutherford B. Hayes.*
LIBRARY OF CONGRESS

## HAYES, RUTHERFORD BIRCHARD

Rutherford Birchard Hayes was a respected and successful lawyer in his home state of Ohio. He achieved further success while serving in the Union Army during the U.S. CIVIL WAR, and he went on to gain prominence as a politician from Ohio. His service as governor of Ohio and as a member of the U.S. House of Representatives led to his election as the nineteenth president of the United States.

Hayes was born October 4, 1822, in Delaware, Ohio. His father, Rutherford Hayes, died before Hayes was born and Hayes was raised by his mother, Sophia Birchard Hayes, with the help of his uncle, Sardis Birchard, a bachelor. Hayes was enrolled at Norwalk Academy, a Methodist school in Ohio, in the spring of 1836. The next year he joined Isaac Webb's Preparatory School, in Middletown, Connecticut, where Sardis aided with his tuition. In 1838 Hayes enrolled at Kenyon College, in Gambier, Ohio. He graduated first in his class in August 1842 and delivered the valedictory address. After graduating he studied French and German on his own.

He went on to Harvard Law School in 1843 and was later admitted to the Ohio bar. He began practicing law in Lower Sandusky (now Fremont), Ohio, as a partner of Ralph P. Buckland, a leading legal figure in the town. He assumed an active role in politics in 1848 when he worked to elect ZACHARY TAYLOR, the Whig candidate for president. In 1849 he established a law office in Cincinnati, and eventually he became a prominent attorney in the city. In 1852 he was chosen to examine candidates for admission to the Ohio bar. Later that year he married Lucy Webb, whom he had known for nearly eight years.

Hayes developed into a leading and somewhat radical figure in Ohio politics. Like many Republicans he opposed SLAVERY but saw no need to punish the South. He chose other avenues in the fight to end slavery, offering his services to the Underground Railroad, which helped Southern slaves escape to freedom in the North. In 1853 he defended a number of escaped slaves in court. He went on to form a well-known Cincinnati law firm, Corwine, Hayes, and Rogers.

In the 1860 presidential campaign, he worked for the election of ABRAHAM LINCOLN, but with no great enthusiasm. After Lincoln's election at the beginning of the Civil War, Hayes wrote in his diary, "Six states have 'seceded.' Let them go." Nevertheless, when the war broke out, Hayes became active in the Union's military

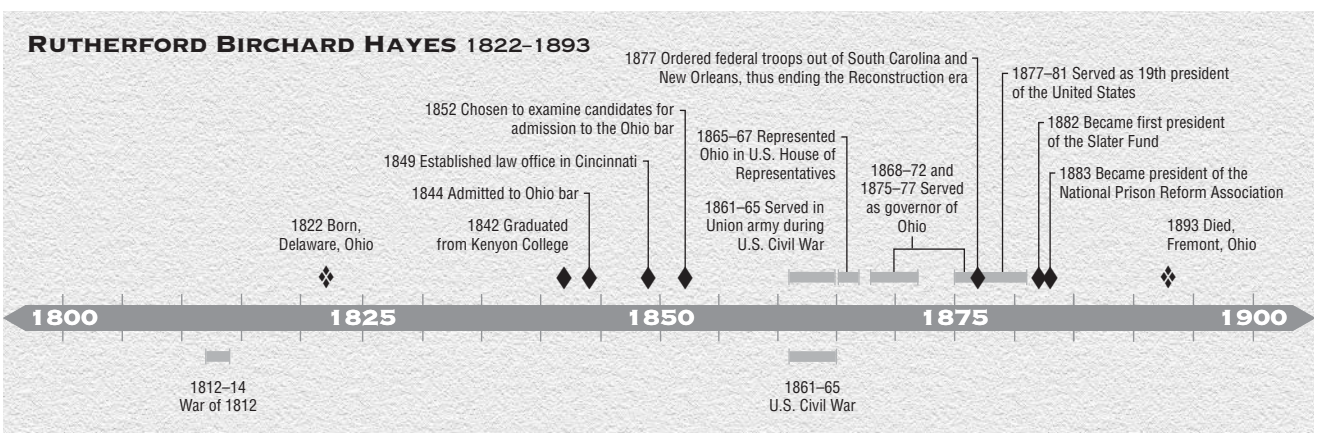

effort to unify the nation. In 1862 he was promoted to full colonel and given command of the Twenty-third Ohio Regiment. Hayes was wounded four times, once seriously, during the war. His composure in battle gained him the respect of those who served under him.

Hayes's popularity helped his political career. On October 19, 1864, he was elected to the U.S. House of Representatives for the Second Congressional District of Ohio. He was reelected in 1866. In 1867 the Ohio REPUBLICAN PARTY nominated Hayes as its candidate for governor. He gained considerable support from Radical Republicans who, like Hayes, opposed President Andrew Johnson's vetoes of legislation calling for MILITARY GOVERNMENT in the South. On January 13, 1868, Hayes was inaugurated as governor of Ohio. He was reelected governor in 1870 and again in 1875.

Hayes favored a sound fiscal policy with regard to the use of public money, and he opposed public funds for Catholic schools. These issues struck a chord with Republicans throughout the United States, who sought to extend his fiscal policies to the federal level. He received the Republican nomination for president in 1876, to run against SAMUEL J. TILDEN of New York.

Even before election results were in, Hayes wrote in his diary that he feared a contested election and perhaps even an armed conflict because of it. He apparently anticipated the most complicated election in the nation's history. On November 7, 1880, election results showed that Tilden had won 4.300 million popular votes to Hayes's 4.036 million, giving Tilden 184 electoral votes (one short of the needed majority) and Hayes 166.

A congressional election committee was designated to determine the winner of the election. After months of deliberation, Republicans managed to sway the committee by filling it with Republican loyalists. On March 2, 1877, Congress declared Hayes and his vice presidential candidate, William Almon Wheeler, of New York, the winners of the 1876 election.

In his inaugural address, Hayes stressed the importance of settling the problems left by Union occupation of Southern states. In April 1877 he ordered federal troops out of South Carolina and New Orleans. The era of the Reconstruction of the South initiated by former president ULYSSES S. GRANT was over.

During Hayes's administration he renewed the economic policy of satisfying the public debt with government currency, and he opposed measures passed by Congress to freely coin silver. Hayes reformed the process for appointing civil servants. He also signed legislation permitting women to practice law before the Supreme Court.

Hayes refused to run for reelection in 1880, and retired from politics. However, he continued to contribute to the landscape of American life. In 1882 he became the first president of the Slater Fund, founded to aid African American education programs in the South. He later gave a scholarship to a promising young man, W. E. B. DU BOIS, who went on to attend Fisk and Harvard Universities and ultimately became a leading figure in the National Association for the Advancement of Colored People (NAACP). In 1883 Hayes became the first president of the National Prison Reform Association, a post he held for nearly ten years. Hayes was also a trustee of Ohio Wesleyan and Ohio State Universities.

On January 14, 1893, Hayes suffered severe chest pain while in Cleveland on business for Western Reserve and Ohio State Universities. His son Webb C. Hayes accompanied him to Speigel Grove, in Fremont, Ohio, where his wife had been buried three years earlier. On January 17 Hayes died, at the age of seventy.

"POLITICS AND LAW ARE MERELY RESULTS, MERELY THE EXPRESSION OF WHAT THE PEOPLE WISH."
—RUTHERFORD B. HAYES

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## HAYMARKET RIOT

In the Haymarket Riot of May 4, 1886, the police clashed violently with militant anarchists and labor movement protesters in Chicago. Seven policemen and several protesters were killed, leading to murder convictions for seven

*The Haymarket Riot took place in Chicago on May 4, 1886. Seven policemen and several protesters were killed, and the event led to the execution of four radicals.*

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radicals, four of whom were executed. The strong public and state reaction against the Haymarket protesters has been called the first **RED SCARE** in U.S. history, and their trial has been widely critized for improper procedure and prosecutorial excess.

The Haymarket Riot grew out of labor unrest that had been brewing since the 1870s. Unhappy with difficult working conditions and feeling the pressure of economic depression, workers had engaged in periodic strikes. Strong, sometimes violent police opposition to these strikes led to greater labor militancy. Radicals became increasingly convinced that the struggle between labor and capital had come to a head and that the time for revolution was near. Many anarchists publicly advocated the use of explosives to bring down the capitalist system.

In 1886, a broad coalition of labor organizations joined to campaign for an eight-hour workday. On May 1, 1886, this coalition initiated a general strike throughout the United States, the effects of which were particularly strong in Chicago. On May 3, fighting broke out at the McCormick Reaper Works in Chicago, and at least two workers were killed by the police.

Outraged at these killings, anarchists, members of the labor movement, and other radicals met for a rally in Chicago's Haymarket Square on May 4. The rally was peaceable until the police attempted to disperse the crowd. Then a bomb was thrown into the police ranks, killing seven officers and wounding sixty more. The police fired in response, killing and wounding like numbers of participants.

In an ensuing crackdown against the labor movement, the police arrested hundreds of anarchists and other radicals. Two leading anarchist newspapers were put out of business, and their staffs were imprisoned. Finally, eight noted Chicago radicals and anarchists, including nationally known radical leaders August Spies and Albert Parsons, were indicted for the murder of one of the policemen at Haymarket Square. Public opinion turned swiftly against the protesters, in part because seven of the eight defendants in the case were foreign-born.

The trial in the criminal court of Cook County began on June 21, 1886. Despite a lack of evidence linking them directly to the bombing, seven of the eight were convicted of murder and sentenced to death, and the eighth was sentenced to fifteen years in prison. The defendants were held liable for the murder on the ground that they had incited the bombing through inflammatory public speech.

The defendants appealed their case to the Illinois Supreme Court which upheld the lower court's decision on September 14, 1887 (*Spies v. People,* 122 Ill. 1, 12 N.E. 865). Supporters of the defendants undertook a clemency campaign that gathered forty thousand petition signatures. Under pressure from all sides, Governor Richard Oglesby, of Illinois, pardoned two of the seven sentenced to death but sustained the sentences of the other five. One of the seven committed suicide shortly before the date of execution by detonating a small dynamite bomb smuggled to him by a friend. The other four, including Spies and Parsons, were hanged on November 11, 1887.

The three remaining Haymarket defendants were pardoned in 1893 by Governor John Peter Altgeld, of Illinois, who also issued a report condemning the trial as unfair. He noted that the presiding judge was clearly biased against the defendants, that the defendants were not proved to be guilty of the crime with which they were charged, and that the jury was "packed" by state prosecutors with members who were prejudiced against the defendants. Later legal scholars have supported Altgeld's conclusions.

The questionable jury selection practices in the Haymarket trial, which allowed the seating of jurors who were clearly prejudiced against the defendants, were struck down by a later decision of the Illinois Supreme Court (*Coughlin v. People,* 144 Ill. 140, 33 N.E. 1 [1893]).

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CROSS-REFERENCES

Anarchism; Darrow, Clarence Seward; Goldman, Emma; Labor Law; Labor Union.

## ♦ HAYNSWORTH, CLEMENT FURMAN, JR.

Clement Furman Haynsworth Jr. was a controversial judge on a federal appellate court who was nominated for a seat on the U.S. Supreme Court but failed to win confirmation.

Born October 30, 1912, in Greenville, South Carolina, and raised in South Carolina, Haynsworth graduated from Furman University in 1933 and from Harvard Law School in 1936. He then returned to his home state and practiced law there for nearly 20 years. In 1957, President DWIGHT D. EISENHOWER appointed Haynsworth to the U.S. Court of Appeals for the Fourth Circuit. Haynsworth became chief judge of the court in 1964.

In May 1969, Associate Justice ABE FORTAS, whose earlier nomination to become chief justice was withdrawn amid charges of financial impropriety and conflict of interest, resigned his seat on the U.S. Supreme Court after new charges of unethical conduct were raised. Later that summer, President RICHARD M. NIXON nominated Haynsworth to succeed Fortas.

Reaction to Haynsworth's nomination was mixed. Some commentators thought him to be a competent nominee, if not particularly distinguished, whereas others expressed disappointment at his conservative judicial views. No U.S. Supreme Court nominee had been denied confirmation since 1930, and it initially appeared that Haynsworth would be confirmed with little debate.

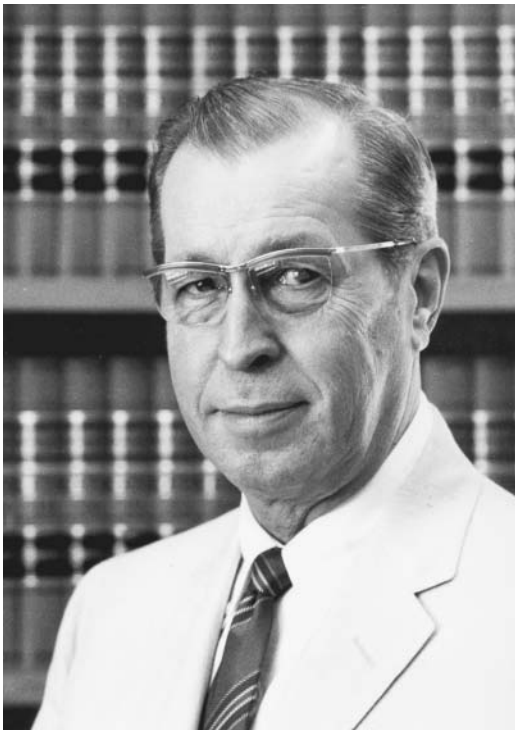

*Clement F. Haynsworth Jr.*
AP/WIDE WORLD PHOTOS

In the confirmation hearings that followed, however, Haynsworth faced serious conflict-of-interest allegations. It was disclosed that he had participated in two cases involving subsidiaries of companies in which he held stock. Senators opposing his nomination also revealed that Haynsworth had purchased stock in a corporation after he had voted in its favor in a decision but before the decision was announced by the court. In addition, labor and CIVIL RIGHTS groups voiced opposition to Haynsworth's nomination, contending that he did not support their causes. Nevertheless, the SENATE JUDICIARY

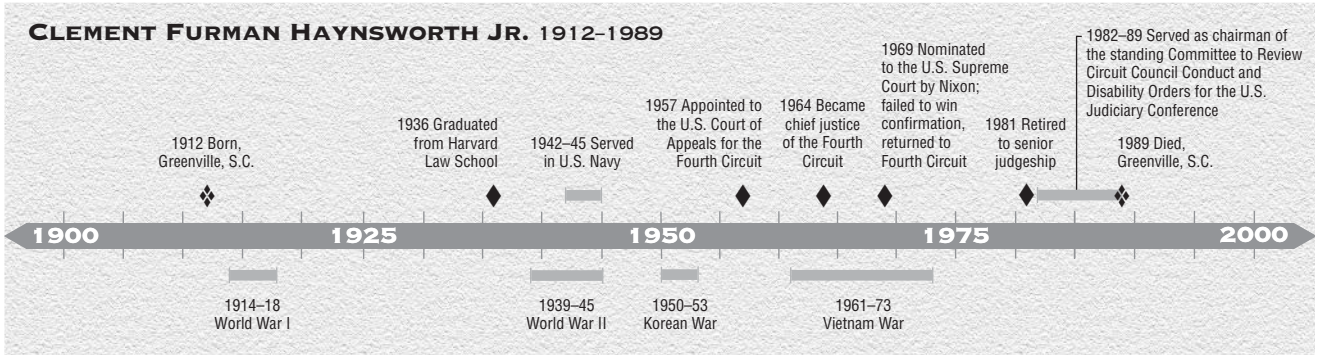

COMMITTEE narrowly approved Haynsworth's appointment in a 10–7 vote.

In November 1969, the full Senate, mindful of the controversy that had surrounded Fortas's ethical improprieties, rejected Haynsworth's nomination by a vote of 55–45. This was the widest margin of defeat ever for a Supreme Court nominee.

Haynsworth's failure to win confirmation was widely viewed as a major political setback for President Nixon. A second Nixon nominee for the Fortas seat, Judge G. HARROLD CARSWELL, another southern conservative, was widely viewed as unqualified for the Court and his nomination was also defeated. The vacancy was finally filled in May 1970 by Judge HARRY A. BLACKMUN, of the Eighth Circuit Court of Appeals, who was confirmed unanimously.

Following his defeat, Haynsworth returned to the court of appeals. He became a senior judge in 1981, and he remained with the court until his death November 22, 1989, at the age of 77.

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## ❖ HAYS, WILLIAM HARRISON

William Harrison Hays is mainly known for his establishment of the code through which motion picture producers regulated themselves, thereby avoiding outside CENSORSHIP.

Hays was born in Sullivan, Indiana, on November 5, 1879, to John T. Hays and Mary Cain Hays. He first gained attention through a series of increasingly important positions within the Indiana REPUBLICAN PARTY. In February 1918 his party career culminated in his appointment as chairman of the Republican National Committee. From that position he aided in the 1920 election of WARREN G. HARDING as president of the United States. As reward for his service, Harding appointed Hays U.S. postmaster general in March 1921, after which Hays relinquished his position as Republican chairman.

At this time a widely reported series of sex scandals contributed to a growing perception that the movie industry was out of control and out of step with U.S. society. With more than thirty state legislatures considering bills to censor movies, producers intervened to repair their image. In March 1922 they hired Hays, known as a teetotaler and an elder in the Presbyterian Church, to head the Motion Picture Producers and Distributors of America (MPPDA) at $100,000 a year. With his high political profile, his personal moral characteristics, and his connections with businesspeople, including Hollywood executives, Hays was seen as an outsider who could restore public confidence in the morality of the movie industry.

The effort to head off federal or local censorship through hiring Hays was successful. In 1930 the Hays Office, as it became commonly known, coordinated the Production Code among the producers of movies to provide rules for the film industry's self-regulation. The 1930 code had no enforcement mechanism. Still, the hiring of Hays, the goodwill implied in the code, and a lack of cooperation and agreement among

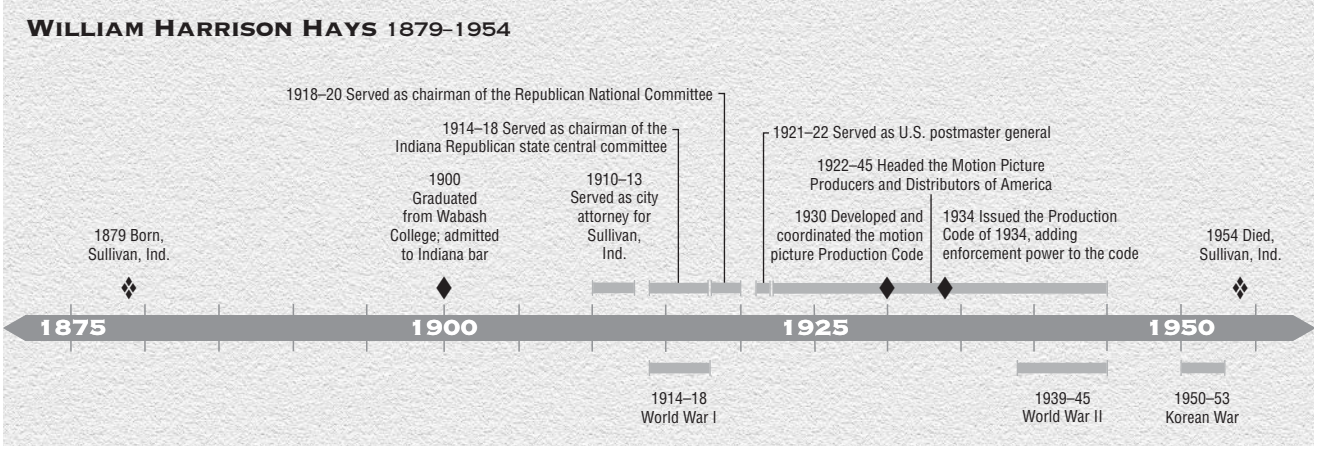

*William H. Hays.* BETTMANN/CORBIS

reformers, mainly Protestant, dissipated any danger of censorship in the early 1930s.

In 1934, with box office receipts down as the Great Depression widened, Hays responded to a renewed call for morality in the movies spearheaded by the Catholic Church's Legion of Decency. Operating with support from parish priests, from the church hierarchy, and from Protestant and Jewish reform groups, the Legion avoided efforts at government legislated censorship. Rather, it threatened to call for boycotts of films that failed to satisfy its requirements for moral behavior. Hays issued the Production Code of 1934, which added enforcement power to his earlier code. Though the 1934 code provided for fines and suggested that scripts should be preapproved by the Hays Office, its real strength lay in requiring that a film receive the Hays Code Purity Seal of Approval in order to be shown in any movie theater owned by the studios. With the movie industry vertically integrated, so that studios controlled both a large segment of film production and the most successful and profitable movie theaters nationwide, even foreign and nonstudio films were submitted for code approval.

The Hays code went through refinements and shifts in emphasis, both before and after the addition of enforcement in 1934. In general, it was designed to protect impressionable moviegoers by clamping down on sex, language, and violence on screen, with rules relating to sex being particularly stringent. One overarching rule was that sympathetic portrayals of sinners or criminals were prohibited; transgressors had to be punished appropriately for their sins by the end of each film.

Hays maintained his partnership in Hays and Hays, a law firm begun by his father, throughout his tenure with the MPPDA. In 1945 he left his position as head of the MPPDA. He died in Indiana on March 7, 1954.

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## ♦ HAYWOOD, MARGARET AUSTIN

Margaret Haywood is a senior judge for the Superior Court of the District of Columbia. She also was the first African–American woman to attain a top leadership position in a biracial U.S. church, the United Church of Christ.

Margaret Austin Haywood was born October 8, 1912, in Knoxville, Tennessee. When she was eight, she and her parents moved to Washington, D.C. Although she was aware of SEGREGATION, her loving home life helped her to grow up feeling secure and self-confident. Haywood's parents, Mayme F. Austin and J. W. M. Austin, were able to provide her with a relatively comfortable childhood, although her father lost his job in 1929. After two years, he found another job with the Works Progress Administration, helping people obtain public assistance. Reading the letters people wrote to her father detailing their plights, Haywood learned that it was necessary to listen to people in order to help them.

Haywood was always an independent decision maker. While she was in high school, her teachers

encouraged her to become a teacher, the best career option for black women in the 1930s. However, Haywood's interests were elsewhere, for reasons that were both practical and compelling. At the height of the Great Depression, in 1930, she came out of business school with no job and no money for college. She married and had a daughter, but the marriage, as she described it, "was disastrous." Before long, she found herself divorced and raising a child alone. "I wanted my daughter to have a good education, but I was earning only $15 a week as a secretary," she said. "That's when I began to think about going into law."

Determined to provide her daughter and herself with economic security, Haywood enrolled in Robert H. Terrell Law School, an institution for African–American students where she could attend classes at night and work during the day. During her first two years at Terrell, she was the only woman student; during the last two years, she was one of two woman students. This did not deter her, and she graduated from Terrell with her bachelor of laws degree in 1940.

After her admission to the District of Columbia bar in 1942, Haywood joined a well-known African–American law firm. She quickly realized that the firm expected her to specialize in domestic relations cases, whereas she was interested in practicing in other fields. Unwilling to compromise, she left the security of the firm and opened her own general practice, where she handled the full range of legal cases. In the early 1950s, she participated in the landmark CIVIL RIGHTS case DISTRICT OF COLUMBIA V. JOHN R. THOMPSON CO., 345 U.S. 921, 73 S. Ct. 784, 97 L. Ed. 2d 1353 (1953), which confirmed the validity of post–Civil War laws that prohibited segregation. For her efforts, Haywood received threats from the KU KLUX KLAN and was labeled a Communist.

Haywood had practiced law for more than 25 years before President LYNDON B. JOHNSON appointed her to a part-time post on the District of Columbia Council. She served in that capacity from 1967 to 1972, during a time when the governance of the district was being reevaluated and reorganized. The revamped system of government, including an elected mayor and the council on which Haywood served, was approved in 1974.

In 1972, President RICHARD M. NIXON appointed Haywood as associate judge for the Superior Court of the District of Columbia, the district's highest trial court. The following year,

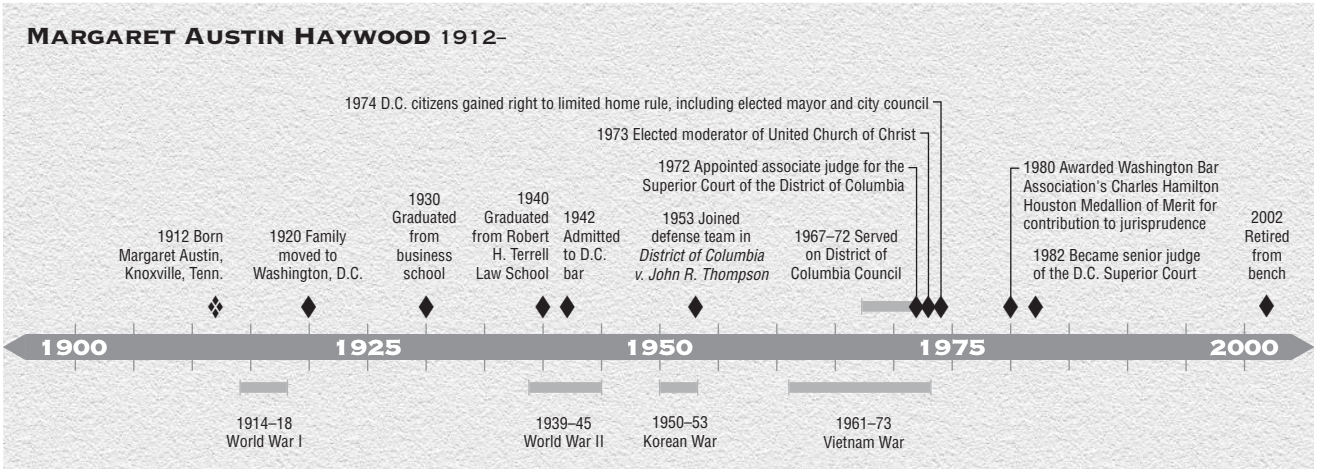

the United Church of Christ elected her its moderator, making her the first African–American woman to hold such a high position in a biracial U.S. church. As moderator, she presided over 728 delegates to the church's ninth biennial general synod, or governing council. Her position with the church was a two-year unsalaried post, which she combined with her duties on the court.

In 1982, Haywood achieved the rank of senior judge of the District of Columbia Superior Court. As a senior judge in the 2000s, Haywood continued to participate in judicial proceedings. Haywood retired in 2002.

Throughout her career, Haywood has received honorary degrees from several institutions, including Elmhurst College (1974), Carleton College (1975), Catawba College (1976), and Doane College (1979). In addition, she has been the recipient of many honors and awards. These include a National Association for the Advancement of Colored People (NAACP) trophy in 1950, the Women's Bar Association's Woman Lawyer of the Year award in 1972, induction into the District of Columbia Women's Commission Hall of Fame, and the Washington Bar Association's Charles Hamilton Medallion of Merit for contribution to JURISPRUDENCE in 1980. In October 2002, the Standing Committee on Fairness and Access to D.C. Courts presented Haywood with its Trailblazer Award for her contributions to her profession and her community and, in particular, her continued commitment to ensuring equal access to the court system.

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## HAYWOOD, WILLIAM DUDLEY

Labor leader Bill Haywood was regarded as a radical in the growing labor movement in the United States. A public figure throughout most of his life, Haywood was the central figure in two famous court cases.

Haywood was born in 1869 in Salt Lake City, Utah. In 1896, Haywood, a coal miner, became an active participant in the Western Federation of Miners. He rapidly rose to prominence in the federation, securing offices of leadership by 1904. His tactics were militant in nature, as was evidenced by the violence of the Cripple Creek strike that occurred in Colorado in 1904.

In 1905, former Idaho Governor Frank Steunenberg was killed by an explosion caused by a bomb hidden in his home by Harry Orchard. Orchard admitted his guilt and implicated three leaders of the Western Federation of Miners: President Charles H. Moyer, Secretary-Treasurer Haywood, and retired leader George A. Pettibone. These men were abducted from Denver and taken to Boise, Idaho, to stand trial. The Haywood-Moyer-Pettibone case took on national significance for two reasons: (1) it involved a radical labor organization, and (2) eminent attorney CLARENCE DARROW acted as defense attorney. The three men were subsequently acquitted (*Pettibone v. Nichols,* 203 U.S. 192, 27 S. Ct. 111, 51 L. Ed. 148 [1906]).

The INDUSTRIAL WORKERS OF THE WORLD (IWW) was established in 1905, and Haywood was the founder and director of this labor organization. He was a proponent of group action and class struggle, and he abhorred compromise. He continued to use violence in his fight for labor, and led two infamous textile

"IT IS THE HISTORIC MISSION OF THE WORKING CLASS TO DO AWAY WITH CAPITALISM."
—WILLIAM HAYWOOD

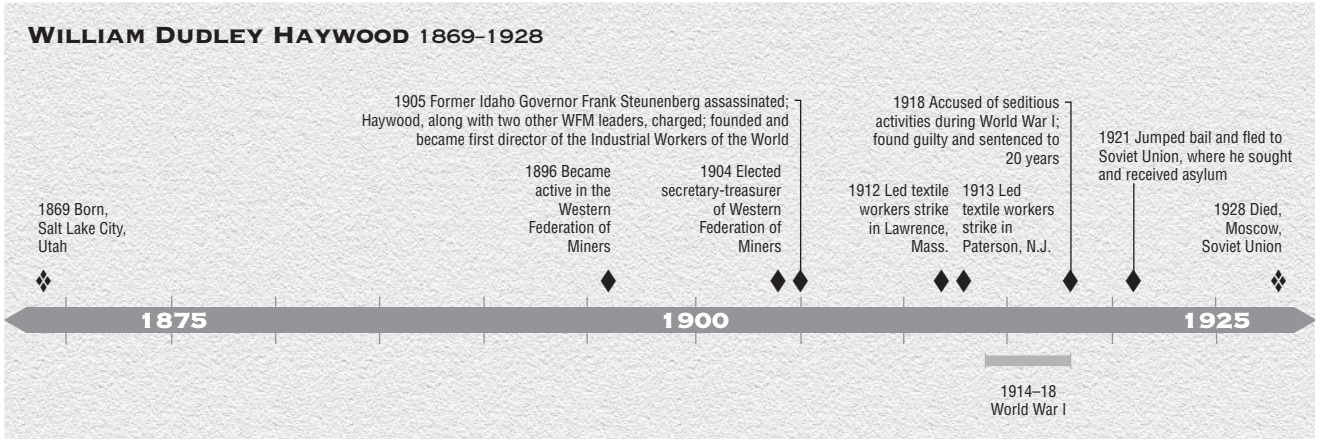

*William D. Haywood.*
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workers' strikes in Lawrence, Massachusetts (1912), and in Paterson, New Jersey (1913).

Haywood and other members of his IWW organization attempted to become members of the Socialist party but were rejected for their theories of violent action.

In 1918, Haywood was again on trial. One hundred sixty-five IWW leaders, including Haywood, were accused of seditious activities during WORLD WAR I. Haywood was found guilty and sentenced to spend the next twenty years in prison.

Haywood was free on bail in 1921, pending the date of a new trial, when he escaped and sought ASYLUM in the Soviet Union. He died in Moscow seven years later.

## H.B.

*An abbreviation for a* house bill, *a proposed law brought before the House of Representatives, as opposed to the Senate.*

House bills are usually designated by the initials H.R. plus a number—for example, H.R. 40637.

**CROSS-REFERENCES**

Congress of the United States.

## HEAD OF HOUSEHOLD

*An individual in one family setting who provides actual support and maintenance to one or more individuals who are related to him or her through* ADOPTION*, blood, or marriage.*

The designation *head of household,* also termed *head of family,* is applied to one whose authority to exercise family control and to support the dependent members is founded upon a moral or legal obligation or duty.

Head of household is also a filing status for federal income taxpayers. There are five basic categories of tax statuses: (1) single persons; (2) heads of households; (3) married taxpayers filing joint returns; (4) married taxpayers filing separate returns; and (5) surviving spouses. Each of these persons pays at different rates. The tax rates for single persons are ordinarily higher than rates for heads of household, while rates for a HUSBAND AND WIFE filing a joint return are lower.

In order for an individual to qualify as head of household for INCOME TAX purposes, the person need not be unmarried all year as long as the person is unmarried on the final day of the tax year. In addition, the person must support and maintain a household to the extent that his or her monetary contribution exceeds one-half of the total cost of maintenance. The person's home must be the main place of residence of one relative, with the exception of a mother and father, for the whole year. Relatives include children, grandchildren, stepchildren, brothers and sisters, half brothers or half sisters, and stepbrothers and stepsisters. The individual's parents need not reside in the same home as the taxpayer for him or her to claim this status, provided the person meets the support requirements specified.

Homestead exemption statutes, which have been passed in a majority of jurisdictions, permit a head of household to designate a house and land as a homestead and exempt it from execution for general debts in the event of BANKRUPTCY. In addition, some states make available property tax exemptions for homestead property. Such statutes often require the formal recording of a declaration of homestead.

## HEADNOTE

*A brief summary of a legal rule or a significant fact in a case that, among other headnotes that apply to the case, precedes the full text opinion printed in*

*the reports or reporters. A syllabus to a reported case that summarizes the points decided in the case and is placed before the text of the opinion.*

Each jurisdiction usually determines whether headnotes are part of the law or only an editorial device to facilitate research. Most headnotes are included by private publishers and do not constitute a part of an opinion. The most notable publisher that employs headnotes is the West Group in the National Reporter System, which publishes cases from practically every jurisdiction. Use of headnotes in the National Reporter System is generally consistent, regardless of the jurisdiction. The Reporter of Decisions for the United States Supreme Court also prepares a syllabus for Supreme Court decisions, when feasible, at the time an opinion is issued. The syllabus summarizes the points of law addressed in each case, but does not constitute a part of the opinion and does not constitute binding authority.

## HEALTH AND HUMAN SERVICES DEPARTMENT

The Department of Health and Human Services (HHS) is the cabinet-level department of the EXECUTIVE BRANCH of the federal government most involved with the health, safety, and welfare of the U.S. population. A wide variety of HHS agencies administer more than 300 programs, which focus on such initiatives as providing financial assistance, HEALTH CARE, and advocacy to those in need; conducting medical and social science research; assuring food and drug safety; and enforcing laws and regulations related to human services.

The HHS originated in the Department of Health, Education, and Welfare (HEW), which was created in 1953. In 1980, the Department of Education Organization Act (20 U.S.C.A. § 3508) redesignated HEW the Department of Health and Human Services.

The secretary of HHS advises the president of the United States on the federal government's health, welfare, and income security plans, policies, and programs. He or she directs HHS staff in carrying out department programs and activities and promotes public understanding of HHS goals, programs, and objectives. The secretary administers these functions through the Office of the Secretary and the individual agencies of the HHS: the Administration on Aging; Administration for Children and Families; the CENTERS FOR MEDICARE & MEDICAID SERVICES; the Agency for Healthcare Research and Quality; the Centers for Disease Control and Prevention; the Agency for Toxic Substances and Disease Registry; the FOOD AND DRUG ADMINISTRATION; the Health Resources and Services Administration; the Indian Health Service; the National Institutes of Health; the SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION; and the Program Support Center. The SOCIAL SECURITY ADMINISTRATION, once located within HHS, became an independent agency in 1995.

### Office of the Secretary

The Office of the Secretary of the HHS includes the offices of the Assistant Secretaries, the Inspector General, and the General Counsel. Individuals in these offices, along with other senior officials at HHS, assist the secretary with the overall management responsibilities of the HHS and aid in the day-to-day operations of the department. For example, the Program Support Center (PSC), which is part of the Office of the Assistant Secretary for Administration and Management, offers support services in such areas as human resources and financial management.

In addition, the Office for Civil Rights administers and enforces laws that prohibit discrimination in federally assisted health and human services programs. These laws include Title VI of the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000d et seq.), which prohibits discrimination with regard to race, color, or national origin in programs and activities receiving federal financial assistance; the Age Discrimination Act of 1975 (42 U.S.C.A. § 6101 et seq.); and the Americans with Disabilities Act of 1990 (42 U.S.C.A. § 12101 et seq.).

The secretary is accountable to Congress and to the public for departmental expenditures of taxpayers' money. Thus, the secretary and other members of the HHS staff spend a great deal of time testifying before congressional committees, making speeches before national organizations interested in and affected by HHS policy, and meeting with the press and the public to explain HHS actions. The secretary and the HHS staff also prepare special reports, sometimes at the request of the president, on national problems related to health and human services. In addition, the secretary is required by law to submit to the president and to Congress periodic reports that explain how tax money was spent to address

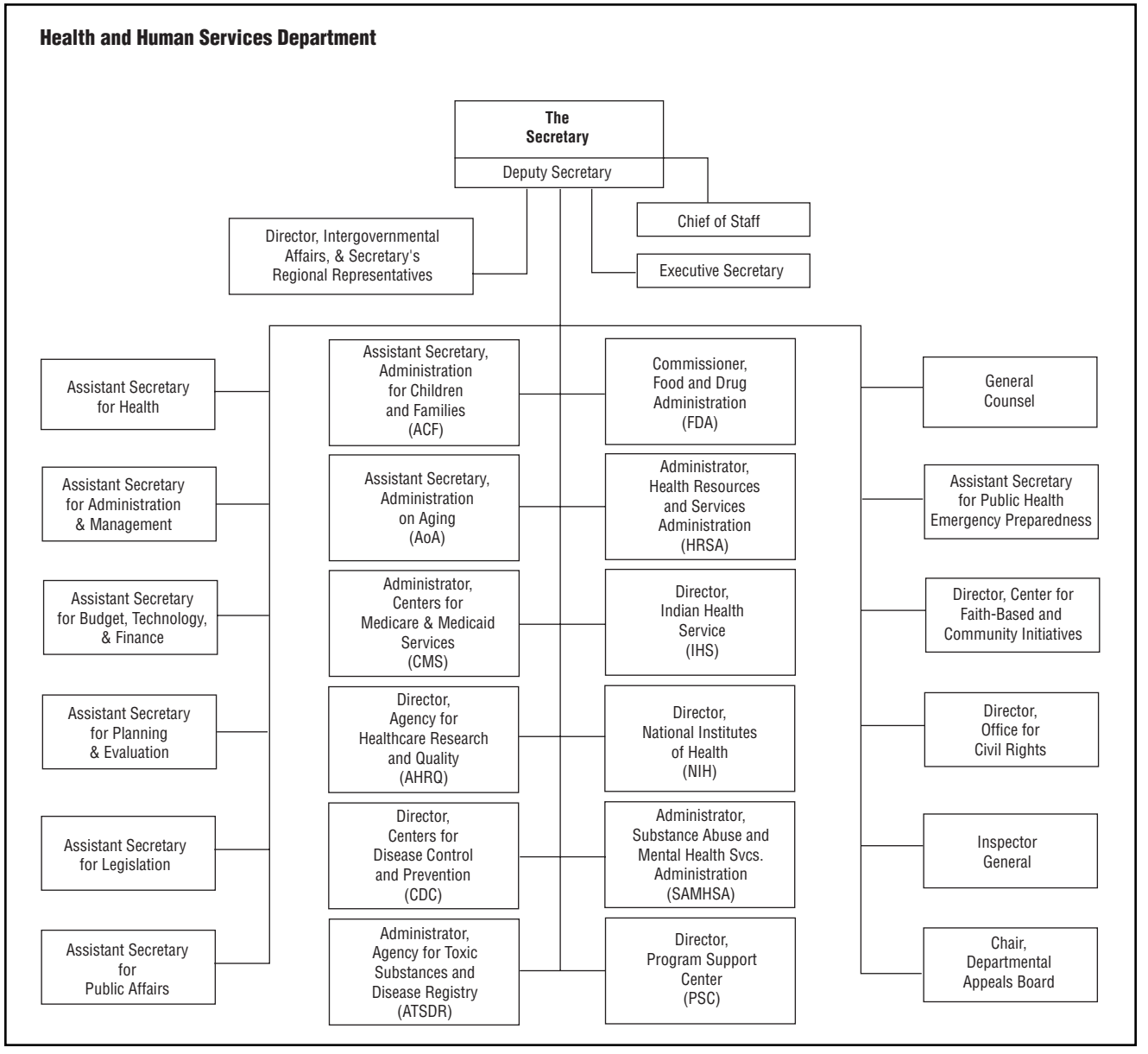


and solve a particular problem and whether progress on the problem was achieved.

The headquarters of the HHS department is located in Washington, D.C., and ten regional HHS offices are located throughout the United States. The regional directors of these offices represent the secretary in any official HHS dealings with state and local government organizations. They promote a general understanding of HHS programs, policies, and objectives; advise the secretary on the potential local effects of HHS policies and decisions; and provide administrative services and support to HHS programs and activities in the regions.

### Administration on Aging

The Administration on Aging (AOA) is the principal agency of the HHS designated to carry out the provisions of the Older Americans Act of 1965, as amended (42 U.S.C.A. § 3001 et seq.). The Older Americans Act was enacted to promote the well-being of older U.S. citizens by providing services and programs designed to help them live independently in their homes and communities. The act also empowers the federal government to distribute funds to the states for supportive services for older people. The AOA advises the secretary and other federal departments and agencies on the characteristics, circumstances, and needs

of older citizens; develops policies and programs to promote the welfare of older citizens and advocates for their needs in HHS policy development and planning; and administers to the states grants that establish at the state and local levels programs providing services to older citizens, such as group meals and nutrition education. The AOA also administers programs providing legal and protective services for older people.

### Administration for Children and Families

The Administration for Children and Families (ACF) was created in 1991 and is headed by the assistant secretary for children and families, who reports to the secretary of the HHS. The ACF consists of several component administrations, including the Administration on Children, Youth, and Families (ACYF), which advises the secretary, through the assistant secretary, on matters relating to the welfare of children and families, and administers grant programs to help the states provide child welfare services as well as foster care and ADOPTION assistance. The ACYF also administers state grant programs for the prevention of CHILD ABUSE; the Head Start Program, which appropriates funds for health, education, nutrition, social, and other services to economically disadvantaged children and their families; and programs providing services to prevent drug abuse among youth. In addition, the ACYF supports and encourages in the private and voluntary sectors programs for children, youth, and families.

Other components of the ACF include the Administration on Developmental Disabilities (ADD) and the Administration for Native Americans (ANA). ADD advises the secretary of the HHS on matters relating to persons with developmental disabilities and their families, and helps provide services to such individuals. ADD also helps the states provide services at the local level through grants and other programs. ANA represents the concerns of Native Americans and serves as the focal point within the HHS for providing developmental, social, and economic strategies to support Native American self-determination and self-sufficiency. ANA administers grant programs to Indian tribes and other Native American organizations in both urban and rural areas and acts as a liaison with other federal agencies on Native American affairs.

Yet another component of the ACF is the Office of Child Support Enforcement (OCSE), which advises the secretary on matters relating to child support enforcement and provides direction and guidance to state offices for child enforcement programs. The OCSE helps states develop programs establishing and enforcing support obligations by locating absent parents, establishing PATERNITY, and collecting child support payments.

### Medicare and Medicaid

The Centers for Medicare & Medicaid Services (CMS) replaced the former Health Care Financing Administration in 2001. It was created to oversee the Medicare Program and the federal portion of the Medicaid Program. Medicare provides HEALTH INSURANCE for U.S. citizens age 65 or older, for younger people receiving SOCIAL SECURITY benefits, and for persons needing dialysis or kidney transplants. Medicaid covers health care expenses for recipients of Temporary Assistance for Needy Families (formerly Aid to Families with Dependent Children), as well as for low-income pregnant women and other individuals whose medical bills qualify them as medically needy. Through these programs, the HCFA serves 68 million older, disabled, and poor U.S. citizens. In addition, a quality assurance program administered by the CMS develops health and safety standards for providers of health care services authorized by Medicare and Medicaid legislation.

### Public Health Service Agencies

The PUBLIC HEALTH SERVICE was first established in 1798 to create hospitals to care for U.S. merchant seamen. Over time, legislation has substantially broadened the number and scope of agencies that fall under the Public Health Service Division of the HHS, including the Agency for Healthcare Research and Quality, which produces and disseminates information about the quality, medical effectiveness, and cost of health care, and the Centers for Disease Control and Prevention (CDC), which provides leadership in the prevention and control of disease outbreak and responds to public health emergencies.

Other agencies within the Public Health Service Division include the Agency for Toxic Substances and Disease Registry, which carries out the health-related responsibilities of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (42 U.S.C.A. § 9601 et seq.), as well as the Food and Drug Administration (FDA), which is charged with

protecting the health of the nation against unsafe foods, drugs, cosmetics, and other hazards.

The Health Resources and Services Administration (HRSA) focuses on ensuring that people without resources, or living in underserved areas (e.g., rural areas), receive quality health care. There are more than three thousand HRSA-funded centers throughout the United States. The health status of Native Americans and Alaska Natives is the concern of the Indian Health Service. The Indian Health Service administers a comprehensive health care delivery system for these groups, developing and managing programs to meet their health needs.

The National Institutes of Health (NIH) is the principal biomedical research agency of the federal government. Included within the NIH are the National Cancer Institute; National Heart, Lung, and Blood Institute; National Institute of Child Health and Human Development; and other institutes conducting research in the areas of alcohol and drug abuse, mental health, communication and neurological disorders, and aging.

The Substance Abuse and Mental Health Services Administration (SAMHSA) provides national leadership in the prevention and treatment of addictive and mental disorders, through programs and services for individuals who suffer from these disorders. Within SAMHSA are several component centers designated to carry out its purposes, including the Center for Substance Abuse Prevention, Center for Substance Abuse Treatment, and Center for Mental Health Services. SAMHSA is also served by the Office of Management, Planning, and Communications, which is responsible for the financial and administrative management of SAMHSA components, monitors and analyzes legislation affecting these components, and oversees SAMHSA public affairs activities.

FURTHER READINGS

United States Department of Health and Human Services. Available online at <www.hhs.gov> (accessed July 23, 2003).

*U.S. Government Manual* Web site. Available online at <www.gpoaccess.gov/gmanual> (accessed November 10, 2003).

## HEALTH CARE FINANCING ADMINISTRATION

See CENTERS FOR MEDICARE & MEDICAID SERVICES.

## HEALTH CARE LAW

Health care law involves many facets of U.S. law, including TORTS, contracts, antitrust, and insurance. In 1990, the United States spent an estimated $500 billion on HEALTH CARE, which was more than 11 percent of the gross national product. According to statistics from the CENTERS FOR MEDICARE AND MEDICAID SERVICES (CMS), health care expenditures grew 6.5 percent per year from 1991 to 2001, and in 2001, the expenditures had grown to $1.4 trillion. The CMS predicts that these expenditures will grow by 7.3 percent annually and estimates that the U.S. will spend $3.1 trillion on health care in 2012.

### Medical Malpractice

One major area within health care law is MEDICAL MALPRACTICE, which is professional misconduct or lack of skill in providing medical treatment or services. The victims of medical malpractice seek compensation for their physical or emotional injuries, or both, through a NEGLIGENCE action.

A defendant physician may be found liable for medical malpractice if the plaintiff patient can establish that there was in fact a patient-physician relationship; that the physician breached (i.e., violated or departed from) the accepted standard of medical care in the treatment of the patient; that the patient suffered an injury for which he or she should be compensated; and that the physician's violation of the standard of care was the cause of the injury.

To protect themselves against the massive costs of such claims, physicians purchase malpractice insurance. Physicians' malpractice premiums total billions of dollars each year and add substantially to the cost of health care in the United States. In some specialties, such as obstetrics, 50 percent of the cost for medical services goes for the provider's malpractice premiums. Many physicians, faced with the rising tide of malpractice premiums, practice "defensive medicine" by ordering tests and procedures that might not be necessary, so that the records will show that they did all they could. Several studies have estimated the cost of defensive tests and procedures at tens of billions of dollars per year.

Medical malpractice liability can extend to hospitals and even to health maintenance organizations (HMOs). In the case of severe injuries, this can provide a plaintiff patient with an additional source of compensation. One complicating element is a historical doctrine that disallows

the corporate practice of medicine—which in effect, and sometimes in actuality through statutes, prohibits the employment of physicians. In states that disallow the corporate practice of medicine, plaintiffs may not bring medical malpractice claims against HMOs or hospitals based on a physician's treatment because the doctors are not considered employees.

Because every state prohibits the practice of medicine without a license, and because a corporate or business entity may not obtain a license to practice medicine, the historical model provided that all physicians were independent contractors (i.e., separate economic entities), even in their role on the medical staff of a hospital. Without an explicit employer-employee relationship, the liability of a physician for malpractice most likely could not be imputed (i.e., passed along to) a hospital.

The legal theory of *respondeat superior* holds an employer liable for the negligent acts of an employee who acts within the scope of employment. Historically, as most physicians were not employees, this theory of liability was often defeated in medical malpractice suits. Today, however, most courts look beyond the title given to the relationship, and to the control that the hospital or health care organization exerts over the physician in question, to determine whether the relationship is more like that of an employer and employee (e.g., where the processes and treatment decisions are tightly prescribed by the organization, and liability may be imputed) or whether it is truly that of an **INDEPENDENT CONTRACTOR** and a client (e.g., where the physician acts alone to accomplish a particular end result, and liability may not be imputed).

The legal theory of ostensible agency can also attach liability to a hospital or health care organization for an individual physician's malpractice. No employer-employee relationship needs to be shown here. Ostensible agency liability is created where the principal (the hospital or health care organization) represents or creates the appearance to third persons that the physician is an agent of the principal, subject to the principal's control. This theory focuses on the reasonable expectations and beliefs of the patient, based on the conduct of the hospital or health care organization. The actual relationship of the physician and the hospital or organization is immaterial.

Most states have enacted legislation that modifies the common law action of medical malpractice, in an attempt to stem the rising tide of lawsuits. Restrictions on plaintiff patients include shorter **STATUTES OF LIMITATIONS** (i.e., times within which a lawsuit must be filed after injury) than those provided for in common law actions, and a required **AFFIDAVIT** from a physician expert witness, certifying that the applicable standard of care in the particular case was violated by the defendant physician and that the violation caused the plaintiff patient's injuries.

Even with legislation in these states, the costs of medical malpractice liability have increased, and, in some parts of the country, skyrocketed. Doctors in some areas claim that liability insurance is so high that they refuse to accept patients, move their practice to another state, or even retire early. Insurance companies that provide malpractice insurance claim that multi-million-dollar judgments in medical malpractice cases, coupled with lawsuits deemed frivolous by the companies, have been the root cause of the increase in rates.

Several states have considered and passed legislation under the pretext of major tort reform. California law provides a model by which several states have followed. In 1975, the California legislature enacted the Medical Injury Compensation Reform Act (MICRA), which capped non-economic damages—which include damages for pain and suffering, and even death—at $250,000. Many states that have followed California's lead have limited such damages to between $250,000 and $350,000. President **GEORGE W. BUSH** has called for major reform on a national level, requesting that Congress enact legislation that could create a national cap of $250,000 on non-economic damages in all medical malpractice cases. The majority of medical associations, including the **AMERICAN MEDICAL ASSOCIATION**, have lobbied Congress and state legislatures to pass this type of law. Other proposals include limiting the recovery of attorney's fees in medical malpractice cases, restricting the liability of a doctor who provides emergency care, and limiting the recovery of attorneys in medical malpractice cases.

These efforts are not without their critics. Skeptics point out that in some states, the cap on non-economic damages has not resulted in lower premiums on malpractice insurance, and that bad business practices of insurance companies have been as or more responsible for the rise in liability insurance premiums as the multi-million-dollar judgments. Without major

insurance reform, say these critics, the local and national tort reform efforts will not provide what they promise.

### Physician Malpractice Records

In the past, it was very difficult for patients to discover malpractice information about their physicians. The federal government maintains the National Practitioners Data Bank, which lists doctors and malpractice claims in excess of $20,000, along with state disciplinary records. Its list is not made available to the public, but it is provided to state medical boards, hospitals, and other organizations that grant credentials. Because of the great demand by patients for this information, many states are enacting legislation that makes it readily available. For example, the state of Washington provides access to physician information through several sources: insurance company claims records, which are required by law to be reported to the state; the National Practitioners Data Bank; and the state board of medicine, which administers physician licensing and discipline. Massachusetts created a similar system, called the Physician's Profiles Project, and other states, including Florida, California, and New York, are considering the same kind of initiative.

### A Physician's Duty to Provide Medical Treatment

Medical malpractice dominates the headlines, but a more basic legal question involving medical care is the affirmative duty, if any, to provide medical treatment. The historical rule is that a physician has no duty to accept a patient, regardless of the severity of the illness. A physician's relationship with a patient was understood to be a voluntary, contracted one. Once the relationship was established, the physician was under a legal obligation to provide medical treatment and was a fiduciary in this respect. (A fiduciary is a person with a duty to act primarily for the benefit of another.)

Once the physician-patient relationship exists, the physician can be held liable for an intentional refusal of care or treatment, under the theory of ABANDONMENT. (Abandonment is an intentional act; negligent lack of care or treatment is medical malpractice.) When a treatment relationship exists, the physician must provide all necessary treatment to a patient unless the relationship is ended by the patient or by the physician, provided that the physician gives the patient sufficient notice to seek another source of medical care. Most doctors and hospitals routinely ensure that alternative sources of treatment—other doctors or hospitals—are made available for patients whose care is being discontinued.

The discontinuation of care involves significant economic issues. Reimbursement procedures often limit or cut off the funding for a particular patient's care. Under the diagnosis-related group (DRG) system of MEDICARE, part A, 42 U.S.C. § 1395c, a hospital is paid a pre-set amount for the treatment of a particular diagnosis, regardless of the actual cost of treatment. Patients who are covered by private insurance or HMOs may lose their coverage if they fail to pay premiums. Physicians and hospitals must act carefully when this happens, because the fiduciary nature of the relationship between provider and patient is not changed by a patient's unexpected inability to pay. Health care providers must notify a patient and even must help to secure alternative care when funds are not reimbursed as expected.

### A Hospital's Duty to Provide Medical Treatment

The historical rule for hospitals is that they must act reasonably in their decisions to treat patients. Hospitals must acknowledge that a common practice of providing treatment to all emergency patients creates among members of a community an expectation that care will be provided whenever a person seeks care in an "unmistakable emergency." Seeking alternative care in a time-sensitive emergency situation could result in avoidable permanent injury or death, so it is not surprising that hospitals are held to a more flexible "reasonable duty" standard in their admission of patients for treatment.

Owing to the high cost of emergency room care, many private hospitals in the early 1980s began refusing to admit indigent patients and instead had them transferred to emergency rooms at municipal or county hospitals. This practice, known as patient dumping, has since been prohibited by various state statutes, and also by Congress as part of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) (Public Law No. 99-272), in a section titled Emergency Medical Treatment and Active Labor Act (EMTALA) (§ 9121(b), codified at 42 U.S.C.A. § 1395dd). Under EMTALA, hospitals that receive federal assistance, maintain charitable nonprofit tax status, or participate in

Medicare are prevented from denying emergency treatment based solely on an individual's inability to pay. EMTALA allowed private enforcement actions (i.e., lawsuits by individuals) and civil penalties (i.e., fines) for hospitals that violate its provisions. Patients who must receive medical treatment include people whose health is in "serious jeopardy" and pregnant women in active labor. The EMTALA duty to provide treatment may be relieved only if a patient is stabilized to the point where a transfer to another hospital will result in "no material deterioration of [his or her] condition."

The U.S. Supreme Court in *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 119 S. Ct. 685, 142 L. Ed. 2d 648 (1999), ruled that patients who have an emergency medical condition who are transferred from a hospital before being stabilized may sue the hospital under the EMTALA. The Court interpreted EMTALA to allow any patient to sue under the stabilization requirement, even those who are not emergency room victims of patient dumping. Under the decision, a patient may recover if a hospital transfers the patient without stabilizing his or her condition, regardless of whether the doctor who signed the transfer order did so because the patient lacked HEALTH INSURANCE, or for any other improper purpose. Lower federal courts have conflicted over other aspects of the EMTALA, including whether the plaintiff must prove an improper motive when a hospital fails to screen an emergency patient. The high court has not resolved all of these conflicts.

Similar federal statutes require that hospitals treat all patients who have the ability to pay. Federal law prohibits discrimination on the basis of race, color, or national origin, by any program that receives federal financial assistance (42 U.S.C.A. § 2000d). Almost all hospitals receive this kind of funding, and many derive half or more of their revenue from Medicare or MEDICAID. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C.A. § 794) prohibits federally funded programs and activities (including hospitals that receive federal funds) from excluding any "otherwise handicapped individual . . . solely by reason of his handicap."

The broad definition of handicap is "physical or mental impairment that substantially limits one or more of a person's major life activities." This has been construed to include ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) and asymptomatic HIV. Thus, hospitals that receive federal aid may not deny treatment to patients who are HIV-positive or who have AIDS. At the state level, similar legislation protects access to all state-licensed health care facilities and to the services of treating physicians.

### Antitrust and Monopoly

The same antitrust and MONOPOLY laws that govern businesses and corporations apply to physicians, hospitals, and health care organizations.

**Sherman Act** The SHERMAN ANTI-TRUST ACT OF 1890 (15 U.S.C.A. § 1) prohibits conspiracies in restraint of trade that affect interstate commerce. Often, physicians who are denied admittance to, or who are expelled from, the medical staff of a hospital file a lawsuit in federal court, against the medical staff and the hospital, claiming violation of the Sherman Act.

To understand why this kind of federal action applies in this situation, one must first understand the unique relation of doctors to hospitals. Doctors generally do not work for a particular hospital, but instead enjoy staff, or "admitting," privileges at several hospitals. They are accepted for membership on a medical staff by the staff itself, pursuant to its bylaws. The process of selecting and periodically re-evaluating medical staff members (called credentialing or peer review) can result in a denial of admittance to, or expulsion from, the medical staff.

Physicians who are denied admittance to, or expelled from, a hospital's medical staff and file a claim of Sherman Act violation in federal court are essentially claiming that they are being illegally restrained from their trade (i.e., practicing medicine). It is the unique relation between doctors and hospitals, described earlier, that satisfies the first element of a Sherman Act violation, which is that a conspiracy must exist. Normally, a single business cannot conspire with itself to restrain trade—a conspiracy requires a concerted, or joint, effort between or among two or more entities. Because physicians, as independent contractors, constitute individual economic entities, when they vote as a medical staff to admit or expel a physician, they are acting in the concerted, or joint, fashion described by the statute.

The second element of a Sherman Act violation is that a restraint of trade must occur. One rule states that any restraint of trade, especially in the commercial arena, may be viewed as per se (i.e., inherently) illegal. However, courts often have resorted to comparative analysis to balance

the pro-competitive versus anticompetitive effects of a medical staff's decision. For example, if a physician has a history of incompetent or unethical behavior, then a denial of medical staff privileges can be independently justified. On the other hand, if there is only one hospital in a small town, and the physician in question meets all qualifications for ethics and competence, a denial of medical staff privileges may well constitute illegal restraint of trade.

The final element of a Sherman Act violation, that the action must substantially affect interstate commerce, is a jurisdictional requirement, which means that if it is not satisfied, the federal court has no jurisdiction to hear the dispute, and the Sherman Act does not apply. Courts are split as to whether a medical staff's decision to grant or deny medical staff privileges satisfies this element. Some courts view the practice of a single physician to have a minimal, as opposed to the required substantial, effect on interstate commerce, and hold that the jurisdictional element is not met. Other courts focus on the activity of the entire hospital (e.g., receipt of federal funds, purchase of equipment from other states, reimbursement from national insurance companies), and find that the jurisdictional element is met.

Challenged medical staffs and hospitals often raise the "state-action" exemption, which exempts from federal ANTITRUST LAW activities required by state law or regulations. Many states mandate the peer-review process, even at private hospitals, but in order for an exemption based on this mandate to negate a finding of a Sherman Act violation, the state must supervise the process closely.

**Clayton Act** Section 7 of the Clayton Anti-Trust Act of 1914 (15 U.S.C.A. § 18) prohibits mergers if they "lessen competition or tend to create a monopoly." To be valid, a merger must not give a few large firms total control of a particular market, because of the risks of price-fixing and other forms of illegal collusion. Market-share statistics control merger analysis, and they are based on a "relevant market." The CLAYTON ACT can prohibit a national hospital-management company from purchasing several hospitals in one town, and it even can prohibit joint ventures between hospitals and physicians or between formerly competing groups of practicing physicians.

Several exceptions apply to these prohibitions. If a hospital is on the verge of BANKRUPTCY and certain closure, but for the merger, then the merger will be allowed. Nonprofit hospitals long enjoyed complete exemption from Section 7 of the Clayton Act, but now federal district courts are split as to whether the act applies to nonprofit hospitals. In any case, a careful market analysis that shows that particular relevant markets do not overlap—and hence do not lessen competition or create a monopoly—can be used as evidence to uphold a merger decision between two or more health care entities.

**U.S. Health Expenditures, 1960 to 1999**

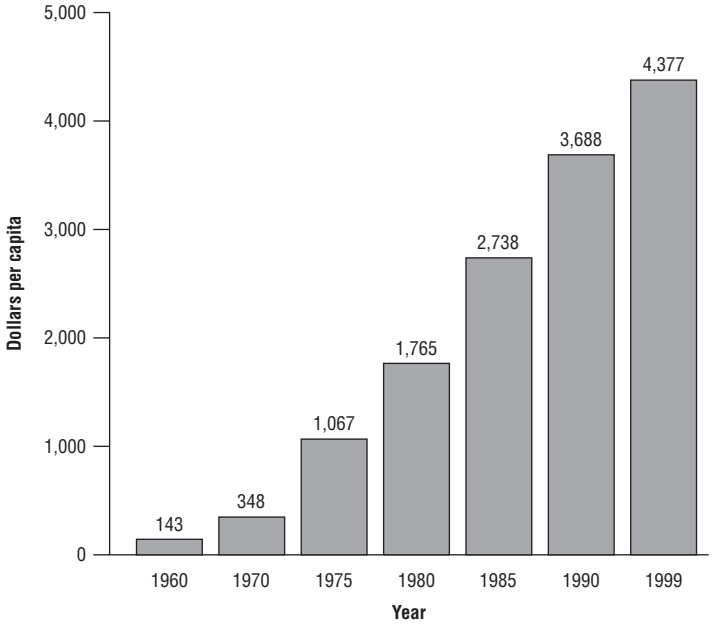


SOURCE: U.S. Department of Health and Human Services, Office of National Health Statistics, *Health, United States*, 2002.

## Health Care Insurance

A trend toward "managed care" and away from "fee-for-service" medicine has been sparked by significant changes in the health insurance industry. Health care insurance originated in the 1930s with Blue Cross (hospitalization coverage) and Blue Shield (physician services coverage). It traditionally has stayed out of the provision of health care services and has served as a third-party indemnitor for health care expenses; that is, in exchange for the payment of a monthly premium, a health care insurance company agrees to indemnify, or be

responsible for, its insured's health care costs pursuant to the specific provisions in the health insurance policy purchased.

Skyrocketing costs in health care spurred public and private reform. The federal Medicare Program introduced diagnosis-related-groups (DRGs) in 1983, which for the first time set predetermined limits on the amounts that Medicare would pay to hospitals for patients with a particular diagnosis. Employers seeking lower health care costs for employees have increasingly chosen MANAGED CARE options like HMOs and preferred provider organizations (PPOs), both of which use cooperation and joint efforts among patients, health care providers, and payers to manage health care delivery so as to reduce costs by eliminating administrative inefficiency as well as unnecessary medical treatment.

Health care law will continue to be affected by the country's move toward managed care as the predominant health care delivery model. For example, HMOs' potential liability for medical malpractice could increase because many HMOs operate on a "staff model" whereby physicians are explicitly hired as "employees," thus making it easier to demonstrate *respondeat superior* liability for the negligent acts of their physicians. In addition, many HMOs exercise greater control over the discretion of individual physicians with regard not only to primary care but also to specialist referrals and the prescribing of certain drugs. The historical bright line forbidding the corporate practice of medicine is thus blurred even further by managed care.

HMOs operate on a prepaid basis, making monthly capitation (i.e., per patient) payments to participating physicians and physician groups. PPOs operate on a reduced-fee schedule, offering lower fees for patients who seek care from a "preferred provider," who functions both as a primary care doctor and as a gatekeeper for such tasks as specialist referrals. Both use "networks" of physicians and health care providers. The standard duty to provide medical care applies to physicians in these networks, but new issues arise regarding the payment or reimbursement of expenses. Some managed-care plans offer limited "out-of-network" benefits, some offer none at all. Should an employer change health plans, an employee with an established physician-patient relationship might find that the treating physician is not part of the new provider's network. If the patient cannot or will not cover subsequent medical costs independently, who has the responsibility to secure alternative treatment for the patient? Who should pay for that treatment? These questions have not yet been resolved. Many patients in this situation start over again with a new physician, out of economic necessity, and many are not happy about that involuntary termination of the physician-patient relationship.

Another potential issue for physician networks and "integrated delivery systems" (which include primary care physicians, specialists, and hospitals) is price-fixing, which has traditionally been held to be per se illegal under the Sherman Act. PPOs are under particular scrutiny in this regard, as a PPO is a group of health care providers who agree to discounted fees in exchange for bulk business (e.g., medical care for all of a particular company's employees). These providers are individual economic entities, and as such they must exercise great care in the concerted, joint effort of setting prices and fees, in order to avoid accusations of conspiracy to restrain trade through illegal price-fixing. Likewise, integrated delivery systems must be ever mindful of Clayton Act prohibitions against monopolies, and they must carefully tailor their joint ventures and other agreements to minimize their anticompetitive effects on relevant markets.

Congress has sought unsuccessfully to pass so-called Patients' Bill of Rights—legislation to improve PATIENTS' RIGHTS under private health insurance plans, which cover as many as 169 million Americans. In 2000, Democrats in both houses of Congress pushed for legislative reforms to address perceived shortcomings in the HMO industry. They sought an appeals process to allow patients to challenge HMO decisions before a board of independent doctors. They also fought to give patients the right to sue HMOs in state court for damages resulting from delays and improper denials of treatment. Polls suggested that as many as 70 percent of Americans favored such reforms.

Senate Republicans and most House Republicans, however, feared that the reforms would increase the cost of health care, drive up insurance premiums, and thus add to the already 43 million Americans who are uninsured. Senate Republicans in 1999 and 2000 sought to pass their own patients' bill of rights, and although the bill garnered support in both houses, Democrats and Republicans were unable to

reach a compromise about specific portions of the bill.

With the subject reaching an impasse in Congress, as of 2003 at least 45 states have enacted their own versions of a patients' bill of rights. In April 2003, the U.S. Supreme Court, in *Kentucky Association of Health Plans v. Miller*, 538 U.S. 329, 123 S. Ct. 1471, 155 L. Ed. 2d 468 (2003), reviewed a provision of Kentucky's Health Care Reform Act that sought to regulate HMOs. The HMO in the case claimed that Kentucky's law was pre-empted by the EMPLOYEE RETIREMENT INCOME SECURITY ACT of 1974 (ERISA). The Court, per Justice ANTONIN SCALIA disagreed, holding that the Kentucky law regulated insurance, rather than an employee retirement plan, and thus that the ERISA preemption does not apply.

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## HEALTH INSURANCE

Health insurance originated in the Blue Cross system that was developed between hospitals and schoolteachers in Dallas in 1929. Blue Cross covered a pre-set amount of hospitalization costs for a flat monthly premium and set its rates according to a "community rating" system: Single people paid one flat rate, families another flat rate, and the economic risk of high hospitalization bills was spread throughout the whole employee group. The only requirement for participation by an employer was that all employees, whether sick or healthy, had to join, again spreading the risk over the whole group. Blue Shield was developed following the same plan to cover ambulatory (i.e., non-hospital) medical care.

The Blue Cross/Blue Shield plans were developed to complement the traditional method of paying for HEALTH CARE, often called fee-for-service. Under this method, a physician charges a patient directly for services rendered, and the patient is legally responsible for payment. The Blue Cross/Blue Shield plans are called indemnity plans, meaning they reimburse the patient for medical expenses incurred. Indemnity insurers are not responsible directly to physicians for payment, although physicians typically submit claims information to the insurers as a convenience for their patients. For insured patients in the fee-for-service system, two contracts are created: one between the doctor and the patient, and one between the patient and the insurance company.

Traditional property and casualty insurance companies did not offer health insurance because with traditional rate structures, the risks were great and the returns uncertain. After the Blue Cross/Blue Shield plans were developed, however, the traditional insurers noted the community rating practices and realized that they could enter the market and attract the healthier community members with lower rates than the community rates. By introducing health screening to identify the healthier individuals, and offering lower rates to younger individuals, these companies were able to lure lower-risk populations to their health plans. This left the Blue Cross/Blue Shield plans with the highest-risk and costliest population to insure. Eventually, the Blue Cross/Blue Shield plans also began using risk-segregation policies and charged higher-risk groups higher premiums.

During the 1960s, Congress enacted the MEDICARE program to cover health care costs of older patients and MEDICAID to cover health care costs of indigent patients (Pub. L. No. 81-97). The federal government administers the Medicare Program and its components: Part A, which covers hospitalization, and Part B, which covers physician and outpatient services. The federal government helps the states fund the Medicaid Program, and the states administer it. Medicare, Part A, initially covered 100 percent of hospitalization costs, and Medicare, Part B, covered 80 percent of the usual, customary, and reasonable costs of physician and outpatient care.

Under both the fee-for-service system of health care delivery, where private indemnity insurers charge premiums and pay the bills, and the Medicare-Medicaid system, where taxes

**Health Care Coverage for Persons Under 65, in 2000**

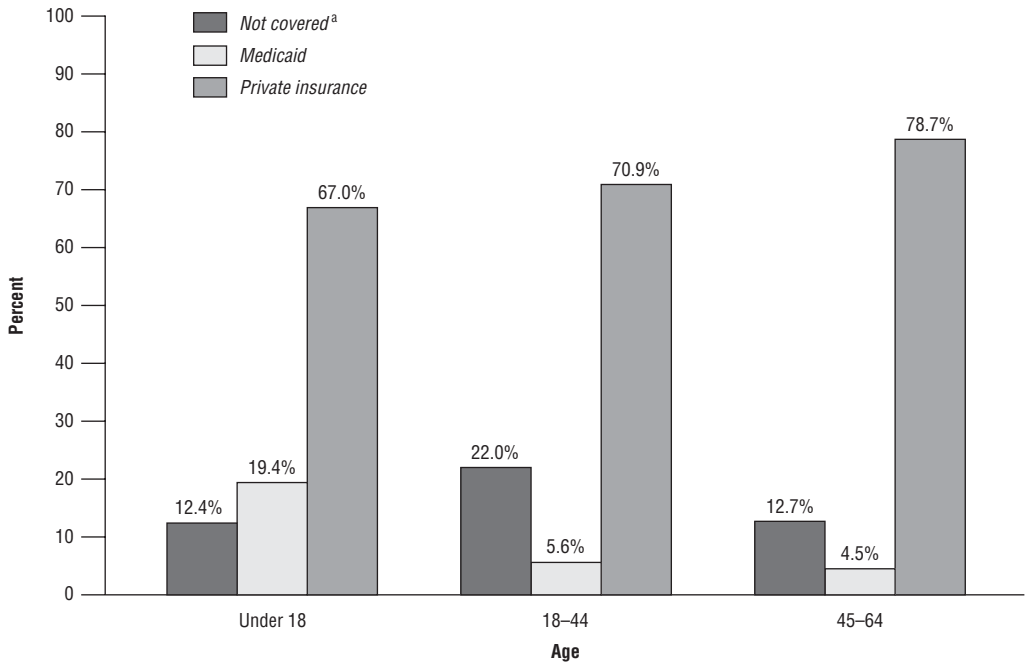


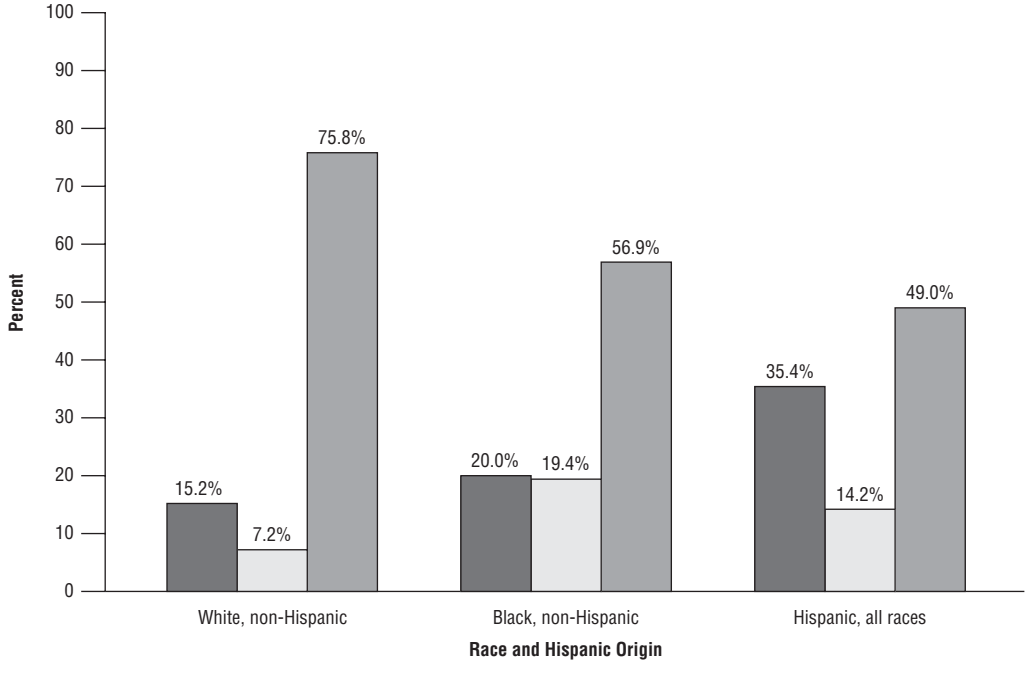


[a]Includes persons not covered by private insurance, Medicaid, Medicare, or military plans.

SOURCE: U.S. Department of Health and Human Services, National Center for Health Statistics, *Health, United States*, 2000.

fund the programs and the government pays the bills, the relationship between the patient and the doctor remains distinct. Neither the doctor nor the patient is concerned about the cost of various medical procedures involved, and fees for services are paid without significant oversight by the payers. In fact, if more services are performed by a physician under a fee-for-service system, the result is greater total fees.

From 1960 to 1990, per capita medical costs in the United States rose 1,000 percent, which was four times the rate of inflation. As a consequence, a different way of paying for health care rose to prominence. "Managed care," which had been in existence as long as indemnity health insurance plans, became the health plan of choice among U.S. employers who sought to reduce the premiums paid for their employees' health insurance.

MANAGED CARE essentially creates a triangular relationship among the physician, patient (or member), and payer. Managed care refers primarily to a prepaid health-services plan where physicians (or physician groups or other entities) are paid a flat per-member, per-month (PMPM) fee for basic health care services, regardless of whether the patient seeks those services. The risk that a patient is going to require significant treatment shifts from the insurance company to the physicians under this model.

Managed care is a highly regulated industry. It is regulated at the federal level by the Health Maintenance Organization Act of 1973 (Pub. L. No. 93-222) and by the states in which it operates. The health maintenance organization (HMO) is the primary provider of managed care, and it functions according to four basic models:

1. The staff-model HMO employs physicians and providers directly, and they provide services in facilities owned or controlled by the HMO. Physicians under this model are paid a salary (not fees for service) and share equipment and facilities with other physician-employees.
2. The group-model HMO contracts with an organized group of physicians who are not direct employees of the HMO, but who agree to provide basic health care services to the HMO's members in exchange for capitation (i.e., PMPM) payments. The capitation payments must be spread among the physicians under a pre-determined arrangement, and medical records and equipment must be shared.
3. The individual-practice-association (IPA) model HMO is based around an association of individual practitioners who organize to contract with an HMO, and as a result treat the HMO's patients on a discounted fee-for-service basis. Although there is no periodic limit on the amount of payments from the HMO, the physicians in an IPA must have an explicit agreement that determines the distribution of HMO receipts and sets forth the services to be performed.
4. The direct-service contract/network HMO model is the most basic model. Under this variation, an HMO contracts directly with individual providers to provide service to the HMO's patients, on either a capitated or discounted fee-for-service basis.

All four of these models share one very important feature of HMOs: The health care providers may not bill patients directly for services rendered, and they must seek any and all reimbursement from the HMO.

Another form of managed care is the preferred provider organization (PPO). A PPO does not take the place of the traditional fee-for-service provider (as does a staff–model HMO), and does not rely on capitated payments to providers. Instead, a PPO contracts with individual providers and groups to create a network of providers. Members of a PPO may choose any physician they wish for medical care, but if they choose a provider in the PPO network, their co-payments—predetermined, fixed amounts paid per visit, regardless of treatment received—are significantly reduced, thus providing the incentive to stay in the network. No federal statutes govern PPOs, but many states regulate their operations. There are three basic PPO models:

1. In a gatekeeper plan, a patient must choose a primary-care provider from the PPO network. This provider tends to most of the patient's health care needs and must authorize any referrals to specialists or other providers. If the patient "self-refers" without authorization, the cost savings of the PPO will not apply.
2. The open-panel plan, on the other hand, allows a patient to see different primary-care physicians and to self-refer within the PPO network. The financial penalties for seeking medical care out of the PPO network are much greater in this less-structured model than in the gatekeeper model.

3. The exclusive-provider plan shifts onto the patient all of the costs of seeking medical care from a non-network provider, and in this respect it is very similar to an HMO plan.

Other forms of health care delivery that encompass features of managed care include point-of-service (POS) plans and physician-hospital organizations (PHOs). A POS plan is a combination of an HMO and an indemnity insurance plan, allowing full coverage within the network of providers and partial coverage outside of it. A patient must choose one primary-care physician and might pay a higher monthly rate to the POS if the physician is not in the HMO network. Another version of the POS plan creates "tiers" of providers, which are rated by cost-effectiveness and quality of patient outcomes. A patient may choose a provider from any tier and then will owe a monthly premium payment set to the level of that tier.

A PHO is very similar to an IPA in that it is an organization among various physicians (or physician groups) and a hospital, set up to contract as a unit with an HMO. Physician-hospital networks, within HMOs or through PHO contracts, further the managed-care mission of "vertical integration," which is the coordination of health care (and payment for that care) from primary care through specialists to acute care and hospitalization.

Managed care has affected Medicare as well as private health care. In 1983, Congress changed the payment system for Medicare, Part A, from a fee-for-service-paid-retroactively system to a prospective payment system, which fixes the amount that the federal government will pay based on a patient's initial diagnosis, not on the costs actually expended (Pub. L. No. 98-369). Medical diagnoses are grouped according to the medical resources that are usually consumed to treat them, and from that grouping is determined a fixed amount that Medicare will pay for each diagnosis. Although this system is applicable only to the acute-care hospital setting, it is clearly an example of shifting the risk of the cost of health care from the payer (in this case, Medicare) to the provider, which is an important element of managed care. In addition, many HMOs now offer Medicare managed-care plans, and many older citizens opt for these plans because of their paperless claims and preset co-payments for physician visits and pharmaceuticals.

The most recent development in the area of health insurance is the medical savings account (MSA), a pilot program that was created by the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191). The premise behind the MSA is to take the bulk of the financial risk, and premium payments, away from the managed-care and indemnity insurers; and to allow individuals to save money, tax free, in a savings account for use for medical expenses. Individuals or their employers purchase major-medical policies, medical insurance policies with no coverage for medical expenses until the amount paid by the patient exceeds a predetermined maximum amount, such as $2,500 per year. These policies have extremely high deductibles and correspondingly low monthly premiums. The participants take the money that they would have spent on higher premiums and deposit it in an MSA. This money accrues through monthly deposits and also earns interest, and it can be spent only to pay for medical care. The major-medical policy applies if a certain amount equal to the high deductible is expended or if the account is depleted. MSAs do not incorporate any of the cost-controlling aspects of managed-care organizations, and instead depend on competition among providers for patients (who are generally more cost-conscious about spending their own money) to encourage efficient health-care delivery and to discourage unnecessary expense.

Litigation has resulted from insurance companies seeking to place limits for certain conditions. The decision by the U.S. Court of Appeals for the Seventh Circuit in *Doe and Smith v. Mutual of Omaha Insurance Co.,* 179 F.3d 557 (7th Cir. 1999), cert. denied, 120 S. Ct. 845 (2000), concerns AIDS caps insurance policies. At issue in the case was whether the Americans with Disabilities Act (ADA) covers the content of insurance policies. The plaintiffs, who sued under the pseudonyms JOHN DOE and Richard Smith, argued that Mutual of Omaha Company had discriminated against them by selling them insurance policies with lifetime caps on AIDS-related expenditures. John Doe's policy had a lifetime AIDS cap of $100,000, and Richard Smith's policy had a cap of $25,000. Other health insurance policies sold by the company had lifetime caps for other diseases of $1 million. The Seventh Circuit found that AIDS caps do not violate the ADA. The court found that Doe and Smith were not discriminated against,

because the company did offer them an insurance policy. The ADA, the court determined, would only prohibit Mutual of Omaha from singling out disabled people and refusing to sell them insurance. The court ruled that the ADA did not prohibit the company from offering disabled parties insurance policies with different terms and conditions from other people. The court held the plaintiffs were not denied a policy because they had AIDS but rather were denied coverage for certain AIDS treatments.

In August 2000, a federal appeals court upheld the dismissal of a class-action RICO suit against Aetna-U.S. Healthcare Inc. after finding that the plaintiffs had failed to allege a valid RICO injury and that they therefore lacked standing to sue. In *Maio v. Aetna Inc.*, 221 F.3d 472, 493 (3d Cir. 2000) the court found that the plaintiffs were unable to demonstrate that Aetna's policies gave less of a health care product than what Aetna had promised to deliver in terms of the level and quality of health care coverage under its HMO plan. The court found that without proof that systemic practices actually negatively affected the health care that Aetna provided to its HMO members through its participating providers, the case could not stand. The consumers who alleged that Aetna had lured them in with false promises of high-quality care, while secretly pressuring doctors to cut costs and to provide only minimal care, did not prevail in the suit.

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CROSS-REFERENCES

Health Care Law; Physicians and Surgeons.

## HEALTH MAINTENANCE ORGANIZATION

See HEALTH CARE LAW; HEALTH INSURANCE; MANAGED CARE.

## HEARING

*A legal proceeding where an issue of law or fact is tried and evidence is presented to help determine the issue.*

Hearings resemble trials in that they ordinarily are held publicly and involve opposing parties. They differ from trials in that they feature more relaxed standards of evidence and procedure, and take place in a variety of settings before a broader range of authorities (judges, examiners, and lawmakers). Hearings fall into three broad categories: judicial, administrative, and legislative. Judicial hearings are tailored to suit the issue at hand and the appropriate stage at which a legal proceeding stands. Administrative hearings cover matters of rule making and the adjudication of individual cases. Legislative hearings occur at both the federal and state levels and are generally conducted to find facts and survey public opinion. They encompass a wide range of issues relevant to law, government, society, and public policy.

Judicial hearings take place prior to a trial in both civil and criminal cases. Ex parte hearings provide a forum for only one side of a dispute, as in the case of a TEMPORARY RESTRAINING ORDER, whereas adversary hearings involve both parties. Preliminary hearings, also called preliminary examinations, are conducted when a person has been charged with a crime. Held before a magistrate or judge, a PRELIMINARY HEARING is used to determine whether the evidence is sufficient to justify detaining the accused or discharging the accused on bail. Closely related are detention hearings, which can also determine whether to detain a juvenile. Suppression hearings take place before trial at the request of an attorney seeking to have illegally obtained or irrelevant evidence kept out of trial.

Administrative hearings are conducted by state and federal agencies. Rule-making hearings evaluate and determine appropriate regulations, and adjudicatory hearings try matters of fact in individual cases. The former are commonly used to garner opinion on matters that affect the public—as, for example, when the ENVIRONMENTAL PROTECTION AGENCY (EPA) considers changing its rules. The latter commonly take place when an individual is charged with violating rules that come under the agency's jurisdiction—for example, violating a POLLUTION regulation of the EPA, or, if incarcerated, violating behavior standards set for prisoners by the Department of Corrections.

Some blurring of this distinction occurs, which is important given the generally more relaxed standards that apply to some administrative hearings. The degree of formality required of an administrative hearing is determined by the liberty interest at stake: the greater that interest, the more formal the hearing. Notably, rules limiting the admissibility of evidence are looser in administrative hearings than in trials. Adjudicatory hearings can admit, for example, HEARSAY that generally would not be permitted at trial. (Hearsay is a statement by a witness who does not appear in person, offered by a third party who does appear.) The Administrative Procedure Act (APA) (5 U.S.C.A. § 551 et seq.) governs administrative hearings by federal agencies, and state laws largely modeled upon the APA govern state agencies. These hearings are conducted by a civil servant called a HEARING EXAMINER at the state level and known as an ADMINISTRATIVE LAW judge at the federal level.

Legislative hearings occur in state legislatures and in the U.S. Congress, and are a function of legislative committees. They are commonly public events, held whenever a lawmaking body is contemplating a change in law, during which advocates and opponents air their views. Because of their controversial nature, they often are covered extensively by the media.

Not all legislative hearings consider changes in legislation; some examine allegations of wrongdoing. Although lawmaking bodies do not have a judicial function, they retain the power to discipline their members, a key function of state and federal ethics committees. Fact finding is ostensibly the reason for turning congressional hearings into public scandals. Often, however, critics will argue that these hearings are staged for attacking political opponents. Throughout the twentieth century, legislative hearings have been used to investigate such things as allegations of Communist infiltration of government and industry (the House Un-American Activities Committee hearings) and abuses of power by the EXECUTIVE BRANCH (the WATERGATE and WHITEWATER hearings).

CROSS-REFERENCES

Administrative Law and Procedure.

## HEARING EXAMINER

*An employee of an* ADMINISTRATIVE AGENCY *who is charged with conducting adjudicative proceedings on matters within the scope of the jurisdiction of the agency.*

Hearing examiners are employees of federal, state, and local administrative agencies who act as judges to resolve conflicts that are within the jurisdiction of their particular agency. Hearing examiners have also been called hearing officers, and since the 1980s, they are commonly referred to as ADMINISTRATIVE LAW judges (ALJs).

The growth of administrative law started with the creation of the federal INTERSTATE COMMERCE COMMISSION and the FEDERAL TRADE COMMISSION in the late nineteenth century. Administrative law burgeoned in the 1930s, as President FRANKLIN D. ROOSEVELT's NEW DEAL policies led to the establishment of EXECUTIVE BRANCH agencies that were charged with regulating the economy and overseeing social welfare policies. Since the 1930s, all levels of government have established administrative agencies.

ALJs are governed by the Administrative Procedure Act (5 U.S.C.A. § 551 et seq. [1966]). They are appointed through a professional merit selection system that requires high test scores and, in many instances, experience in the particular regulatory program in which they wish to serve. Once appointed, ALJs may not be removed or disciplined, except for good cause. These parameters are meant to shield administrative law from political appointments and political pressure.

Hearing examiners serve in different adjudicative areas and are involved in all types of government activity, from the administration of environmental regulations to the review of UNEMPLOYMENT COMPENSATION claims. For example, when an agency is charged with issuing permits, appropriate procedures are set out in administrative regulations. If there are objections to the granting of a permit, a hearing may be held to determine the merits of the application. A hearing examiner conducts the hearing, enforces appropriate RULES OF EVIDENCE and procedure, and issues a decision. This decision may be appealed to a higher level of authority in the agency, and if that does not resolve the issue, to a court proceeding in the judicial branch.

Even though they are not as insulated from political pressures as judicial branch judges, hearing examiners seek to maintain their independence. During the Reagan administration, in the 1980s, this independence was challenged in

the Social Security Administration's (SSA's) disability review section. SSA officials, concerned with perceived inconsistencies and inaccuracies in disability rulings, singled out for review federal ALJs who rendered the highest percentage of decisions favorable to claimants. The review program received much criticism for allegedly putting subtle pressure on the ALJs to rule against claimants more often. Though the most intrusive features of the program were abandoned, the program itself served as a reminder that ALJs were part of an administrative agency and not independent, judicial branch decision makers.

## HEARSAY

*A statement made out of court that is offered in court as evidence to prove the truth of the matter asserted.*

It is the job of the judge or jury in a court proceeding to determine whether evidence offered as proof is credible. Three evidentiary rules help the judge or jury make this determination: (1) Before being allowed to testify, a witness generally must swear or affirm that his or her testimony will be truthful. (2) The witness must be personally present at the trial or proceeding in order to allow the judge or jury to observe the testimony firsthand. (3) The witness is subject to cross-examination at the option of any party who did not call the witness to testify.

In keeping with the three evidentiary requirements, the Hearsay Rule, as outlined in the FEDERAL RULES OF EVIDENCE, prohibits most statements made outside a courtroom from being used as evidence in court. This is because statements made out of court normally are not made under oath, a judge or jury cannot personally observe the demeanor of someone who makes a statement outside the courtroom, and an opposing party cannot cross-examine such a declarant (the person making the statement). Out-of-court statements hinder the ability of the judge or jury to probe testimony for inaccuracies caused by AMBIGUITY, insincerity, faulty perception, or erroneous memory. Thus, statements made out of court are perceived as untrustworthy.

Hearsay comes in many forms. It may be a written or oral statement; it also includes gestures. Essentially anything intended to assert a fact is considered a statement for the purposes of the Hearsay Rule. A nodding of the head may be a silent assertion of the word *yes*. A witness pointing to a gun may be asserting, "That is the murder weapon." Even silence has been accepted as a statement, as when a passengers' failure to complain was offered to prove that a train car was not too cold (*Silver v. New York Central Railroad,* 329 Mass. 14, 105 N.E.2d 923 [1952]).

Not all out-of-court statements or assertions are impermissible hearsay. If an attorney wishes the judge or jury to consider the fact that a certain statement was made, but not the truthfulness of that statement, the statement is not hearsay and may be admitted as evidence. Suppose a hearing is held to determine a woman's mental competence. Out of court, when asked to identify herself, the woman said, "I am the pope." There is little question that the purpose of introducing that statement as evidence is not to convince the judge or jury that the woman actually is the pope; the truthfulness of the statement is irrelevant. Rather, the statement is introduced to show the woman's mental state; her belief that she is the pope may prove that she is not mentally competent. On the other hand, a defendant's out-of-court statement "I am the murderer," offered in a murder trial to prove that the defendant is the murderer, is hearsay.

The Federal Rules of Evidence outline the various types of statements that are excluded by the Hearsay Rule, and are thus admissible in court. These exceptions apply to circumstances believed to produce trustworthy assertions. Some hearsay exceptions are based on whether the declarant of the statement is available to testify. For example, a witness who has died is unavailable. A witness who claims some sort of testimonial privilege, such as the ATTORNEY-CLIENT PRIVILEGE, is also unavailable to testify, as is the witness who testifies to lack of memory regarding the subject matter, or is too physically or mentally ill to testify. These definitions fall under Rule 804 of the Federal Rules of Evidence. There are also situations where hearsay is allowed even though the declarant is available as a witness. These situations are outlined under Rule 803 of the Federal Rules of Evidence.

### Hearsay Exceptions: Availability of Declarant Immaterial

1. **Present Sense Impression.** "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately

# Nicole Brown Simpson's Journals: Inadmissible as Hearsay

During the 1995 criminal trial of **O. J. SIMPSON**, the prosecution argued that Simpson killed his former wife Nicole Brown Simpson, and that the murder was the culmination of a long pattern of **DOMESTIC VIOLENCE**. The prosecution discovered in a safe-deposit box journals that Brown Simpson had written concerning her problems with Simpson. The journals contained graphic language and described episodes of physical violence and threats committed by Simpson. They appeared to be a powerful demonstration of the couple's relationship, yet they were never entered into evidence at the criminal trial, and Simpson was acquitted in the killings of his former wife and her friend Ronald Lyle Goldman.

The journals were inadmissible because they constituted hearsay evidence. The **RULES OF EVIDENCE** are generally the same in every state and federal jurisdiction. In California, where Simpson's criminal trial was held, hearsay evidence cannot be admitted unless it meets the requirements of a well-defined exception.

Oral hearsay (what one person tells another about a third person) is the same as written hearsay. In her journal Brown Simpson told readers what Simpson did to her. With her death, there was no way for the defense to challenge her memory, perception, and sincerity about what she had written. The rules of evidence view such nonchallengeable out-of-court statements as unreliable when they are intended to prove the truth of the matter they assert—here, that Simpson had beaten Brown Simpson, stalked her, and made her fear for her life.

For the same reasons, the journals were not admitted at Simpson's civil trial in 1997, in which he was found liable for the **WRONGFUL DEATHS** of Brown Simpson and Goldman.

**CROSS-REFERENCES**

Simpson, O. J.

thereafter," is admissible hearsay (Fed. R. Evid. 803(1)). An example is the statement "That green pickup truck is going to run that red light."

2. **Excited Utterance.** "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible hearsay (Fed. R. Evid. 803(2)). For example, "The robber is pointing a gun at the cop!" is admissible.
3. **Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing intent, plan, motive, design, mental feeling, pain, or bodily health is admissible (Fed. R. Evid. 803(3)). Generally, however, a statement of memory or belief to prove the fact remembered or believed is not. For example, "After eating at that restaurant, I'm feeling rather ill" could be admitted under this exception. But the out-of-court statement "I believe Julie to be the murderer" would not be admitted under this exception.
4. **Statements for Purposes of Medical Diagnosis or Treatment.** A statement describing medical history, or past or present symptoms, pain, or sensations, or the general character of the cause or external source of those symptoms, is admissible (Fed. R. Evid. 803(4)). For example, this statement made to a physician following an accident is admissible: "I slipped and fell on the ice, and then my left leg became numb."
5. **Recorded Recollection.** "A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately" is admissible (Fed. R. Evid. 803(5)). The record must have been made when the matter was fresh in the witness's memory and must reflect

that knowledge correctly. One example is a detailed phone message.

6. **Business Records.** A record, report, or memo of a business activity made by an individual who regularly conducts the business activity is exempt from the hearsay prohibition under this rule (Fed. R. Evid. 803(6). Written minutes of a business meeting are a common example. The normal absence of information contained in these types of business records may also be excluded from the hearsay prohibition (Fed. R. Evid. 803(7)).
7. **Public Records and Reports.** A record, report, statement, or data compilation, in any form, of a public office or agency, setting forth the activities of the office or agency or matters for which there is a legal duty to report, is admissible. Voting records of a city council are an example. Matters observed by law enforcement personnel in criminal cases are excluded under this rule (Fed. R. Evid. 803(8)).
8. **Records of Vital Statistic.** A data compilation, in any form, of births, fetal deaths, other deaths, or marriages, if the report is made to a public office pursuant to requirements of the law, is a hearsay exception (Fed. R. Evid. 803(9)).
9. **Records of Religious Organizations.** A statement contained in a regularly kept record of a religious organization may be exempt from the prohibition against hearsay. Some examples are statements of birth, marriage, divorce, death, legitimacy, ancestry, relationship by blood or marriage, or similar facts of personal or family history (Fed. R. Evid. 803(11)).
10. **Marriage, Baptismal, and Similar Certificates.** "Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter," are admissible (Fed. R. Evid. 803(12)).
11. **Family Records.** "Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones" are hearsay exceptions (Fed. R. Evid. 803(13)).
12. **Records of Documents Affecting an Interest in Property.** A record purporting to establish or affect an interest in property, such as a notice of a tax lien placed on a house, is admissible hearsay if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.
13. **Statements in Ancient Documents.** A statement in a document in existence 20 years or more, the authenticity of which is established, is admissible hearsay. One example is a statement in a letter written 30 years ago, provided the letter's authenticity can be proved.
14. **Market Reports, Commercial Publications.** "Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations," are exceptions to the rule against hearsay (Fed. R. Evid. 803(17)).
15. **Learned Treatises.** Statements contained in a published treatise, periodical, or pamphlet on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of an expert witness, are admissible (Fed. R. Evid. 803(18)).
16. **Reputation Concerning Personal or Family History.** A reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning the person's birth, adoption, marriage, divorce, death, ancestry, or legitimacy is an exception to the rule against hearsay. For example, the out-of-court statement "My sister was adopted," although hearsay, is admissible (Fed. R. Evid. 803 (19)).
17. **Reputation Concerning Boundaries or General History.** "Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located," are admissible (Fed. R. Evid. 803(20)). For example, "Stein's land extends

south to the river" involves the reputation of a land's boundary and falls within this exception.

18. **Reputation as to Character.** The "reputation of a person's character among associates or in the community" is admissible hearsay (Fed. R. Evid. 803(21)). One example is the statement "Sergei has never said a dishonest word."
19. **Judgment of Previous Conviction.** A plea or judgment of guilt for a crime punishable by death or imprisonment of more than one year is admissible hearsay (Fed. R. Evid. 803(22)).

### Hearsay Exceptions When the Declarant Is Unavailable to Testify

1. **Former Testimony.** Testimony given as a witness at another hearing in the same or a different proceeding, or in a deposition, is admissible when the declarant is unavailable, provided the party against whom the testimony is now being offered had the opportunity to question or cross-examine the witness (Fed. R. Evid. 804(1)).
2. **A Statement Made Under the Belief of Impending Death.** A statement made by a declarant who, when making the statement, believed death to be imminent, is admissible to show the cause or circumstances of the death. For example, the statement "Horace shot me," made moments before the declarant died, is admissible for the purpose of proving that Horace committed murder (Fed. R. Evid. 804(2)).
3. **A Statement Against the Declarant's Interest.** A statement that, at the time of its making, was contrary to the declarant's pecuniary or proprietary interest, or that subjected the declarant to civil or criminal liability, is admissible if the declarant is unavailable to testify. For example, the statement "I never declare all my income on my tax returns" could subject the declarant to criminal tax fraud liability, and is thus an admissible statement against interest (Fed. R. Evid. 804(3)).
4. **A Statement of Personal or Family History.** A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, or similar fact of personal family history is admissible hearsay when the declarant is unavailable to testify (Fed. R. Evid. 804(4)).

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## ♦ HEARST, PATTY

In the 1990s, she could be seen in John Waters's motion picture *Crybaby,* and heard as an offscreen caller to a radio talk show on the TV series *Frasier.* She had appeared on the runways of Paris as a fashion model, wearing a sequined evening gown designed by friend Thierry Mugler. Her story had been told as a movie, *Patty Hearst,* in which she was played by Natasha Richardson, and even as an opera, Anthony Davis's *Tania.* Ever since the 1970s, Patricia Campbell Hearst has been very much in the public eye.

On February 4, 1974, Hearst, the nineteen-year-old daughter of Randolph A. Hearst and Catherine C. Hearst, of the Hearst newspaper chain, was KIDNAPPED by a tiny group of political extremists who called themselves the Symbionese Liberation Army (SLA). They locked Hearst in a closet for many weeks, where she was taunted, sexually assaulted, and raped repeatedly. The SLA held her for an unusual form of ransom: they demanded that the Hearst family distribute millions of dollars of food to poor and needy people of the San Francisco Bay area. Although the Hearsts complied with this and other SLA demands, the young woman did not return to her parents. Instead, she sent them a tape recording in which she announced that she had decided to become a revolutionary, join the SLA, and go underground.

On April 15, 1974, the members of the SLA, accompanied by Hearst, robbed the Hibernia Bank in San Francisco. A month later, a botched shoplifting attempt at a sporting goods store by SLA members Bill Harris and Emily Harris led

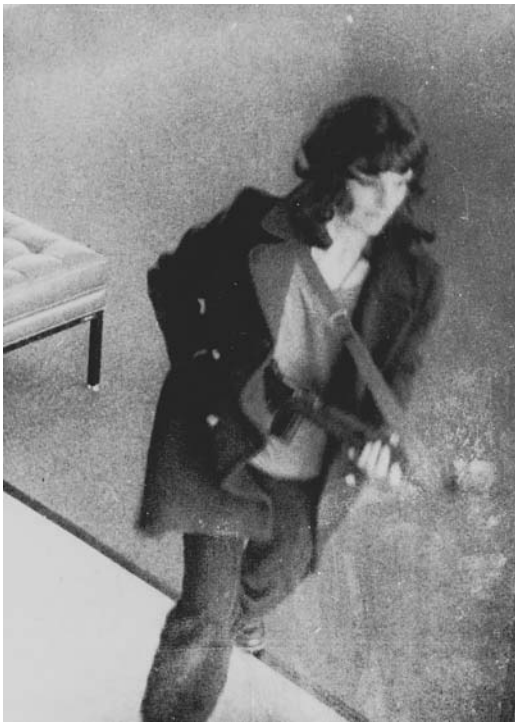

*Patty Hearst assisted the Symbionese Liberation Army (SLA) in 1974. When SLA members were later captured and Hearst was freed, she claimed she'd been brainwashed and hadn't participated in the robbery voluntarily.*

AP/WIDE WORLD PHOTOS

the police to the SLA hideout. A gunfight ensued, and all six SLA members inside at the time were killed. Only Hearst, the Harrises, and Wendy Yoshimura survived.

Sixteen months later, and eighteen months after her abduction, Hearst was arrested by the **FEDERAL BUREAU OF INVESTIGATION** after an investigation that had covered the entire United States. She was tried by jury for armed bank **ROBBERY**, convicted, and sentenced to seven years in prison. On February 1, 1979, after Hearst had served approximately two years of the original sentence, President **JIMMY CARTER**, stopping short of a full pardon, commuted her sentence.

Hearst claimed at her 1976 federal trial for armed bank robbery that she had, in fact, undergone no political conversion. She claimed that even as she stood in the Hibernia Bank cradling a rifle in her arms, she remained the same person who, only a few months earlier, had chosen the china and crystal patterns for her upcoming marriage. Her defense, orchestrated by her attorneys, **F. LEE BAILEY** and Albert Johnson, was that she had been brainwashed. This defense did not exist in law and had only been attempted in "collaboration-with-the-enemy" charges against U.S. prisoners of war during the **KOREAN WAR**. As in the Korean War cases, the Hearst attorneys were forced to add a defense that was allowed by law: duress. The crux of the defense's case was that Hearst, owing to brainwashing or coercion, had not had criminal intent when she participated in the bank robbery.

Three defense psychiatrists testified that the defendant had not been responsible for her actions; two prosecution psychiatrists testified that she had been responsible. The young woman testified that she had been in fear of her life as she stood inside the Hibernia Bank. The judge instructed the jurors,

> You are free to accept or reject the defendant's own account of her experience with her captors. . . . Duress or coercion may provide a legal excuse for the crime charged against her. But a compulsion must be present and immediate . . . a well-founded fear of death or bodily injury with no possible escape from the compulsion.

The jury found her guilty **BEYOND A REASONABLE DOUBT**, thereby implicitly stating its belief that she had acted intentionally and voluntarily in robbing the Hibernia Bank; she had been neither brainwashed nor forced to participate.

In August 1987 Hearst filed a petition for a pardon before President **RONALD REAGAN**. Her attorney, George Martinez, stated that "she wants to put it all behind her. And she wants to get some indication that there is now complete understanding by the government of the extraordinary circumstances under which she participated" in the Hibernia Bank robbery. In 1977, as governor of California, Reagan had called for executive clemency for Hearst; he was thus considered Hearst's best chance for a pardon. But Reagan left office in 1988 without granting the pardon. Hearst's petition then fell to **GEORGE H. W. BUSH**, who also failed to grant the pardon. Hearst finally received her pardon when she was among a list of controversial people, including Marc Rich, that President **BILL CLINTON** pardoned on his last day in office.

In 1996, Hearst was a member of the Screen Actors Guild and lived just fifty miles outside of Manhattan with her husband and former bodyguard, Bernard Shaw, and her two children.

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## HEART BALM ACTS

*Statutes that abrogate or restrict lawsuits brought by individuals who seek pecuniary damages to salve their broken hearts.*

Heart balm actions are founded on the precept that the law disfavors any intrusion with the marital relationship or family ties. Such suits include actions for BREACH OF MARRIAGE PROMISE, alienation of affection, criminal conversation, and seduction.

### Breach of Marriage Promise

Breach of promise actions are based on the theory that a promise made should be kept. A subscription to this principle, however, defeats the purpose of the engagement period prior to marriage that is designed to determine whether or not the couple is sufficiently compatible to get married. In certain situations, however, one party might take advantage of the other, as where a woman becomes engaged to a man merely for the purpose of gaining access to substantial wealth. In such cases, breach of promise actions can be utilized to compensate the individual who has been injured from such a relationship.

A number of states, however, have eliminated breach of marriage promise suits.

### Alienation of Affection and Criminal Conversation

A legal action may be brought against an individual who intrudes upon a marital relationship. Alienation of affection means interfering in such manner as to win away the love of a husband or wife from his or her spouse.

Criminal conversation is ADULTERY. Conversation is used to mean sexual relations in this context. These actions were designed to protect the sanctity of marriage and the family relationship. Today, suits for alienation of affection and criminal conversation have been abolished in most states.

### Seduction

The right to sue for seduction belonged to a father who could bring an action against a man who had sexual relations with his daughter.

At COMMON LAW, the daughter did not ordinarily have the right to sue on her own behalf. A woman who was seduced by a marriage promise could sue for breach of promise if the marriage did not take place. If she became sexually involved with a man due to force or duress, she might be able to bring action for rape or assault. The general rule was, however, that regardless of whether the woman was an adult or a minor, her seduction was regarded as an injury to her father.

In early cases, a father was permitted to be awarded pecuniary damages only as compensation for services that he lost as a result of the seduction. Subsequently, fathers were also allowed to recover COMPENSATORY DAMAGES for medical expenses, as well as damages for distress or sorrow.

Seduction suits are very seldom brought in modern times and have been abolished by some states. One of the primary reasons for this is that they publicize the individual's humiliation.

### Limitations on Heart Balm Actions

A majority of judges and legal scholars are in agreement that all heart balm suits should be eliminated. Most states have enacted heart balm statutes that place limitations upon the amount of recovery. The abolition of heart balm suits does not, however, prevent either individual from recovering gifts made in contemplation of marriage. Many states have ruled that gifts, such as engagement rings, must be recovered if the promise to marry is revoked.

## HEAT OF PASSION

*A phrase used in* CRIMINAL LAW *to describe an intensely emotional state of mind induced by a type of provocation that would cause a reasonable person to act on impulse or without reflection.*

A finding that a person who killed another acted in the heat of passion will reduce murder to MANSLAUGHTER under certain circumstances. The essential prerequisites for such a reduction are that the accused must be provoked to a point of great anger or rage, such that the person loses his or her normal capacity for self-control; the circumstances must be such that a reasonable person, faced with the same degree of provocation, would react in a similar manner;

and finally, there must not have been an opportunity for the accused to have "cooled off" or regained self-control during the period between the provocation and the killing.

The RULE OF LAW that adequate provocation may reduce murder to manslaughter was developed by the English courts. It was a means of avoiding the severity of the death penalty, a fixed punishment for murder under the COMMON LAW, when the act of killing was caused by natural human weakness.

The type of provocation considered serious enough to induce a heat of passion offense varies slightly from one jurisdiction to another, although the usual test is reasonableness. Depending upon the circumstances, assault, BATTERY, ADULTERY, and illegal arrest are illustrative of what may be held to be sufficient provocation.

In almost all cases, the reasonableness of a provocation is a decision made by a jury.

## ♦ HEGEL, GEORG WILHELM FRIEDRICH

Philosopher Georg Wilhelm Friedrich Hegel had a profound effect on modern thought. Hegel wrote his earliest work in 1807 and his groundbreaking *Philosophy of Right* in 1827. An idealist, he explored the nature of rationality in an attempt to create a single system of thought that would comprehend all knowledge. Among his chief contributions was developing the hegelian dialectic, a three-part process for revealing reason that ultimately influenced nineteenth- and twentieth-century theories of law, political science, economics, and literature. Especially in the late twentieth century, scholars debated the ideas of Hegel for their relevance to contemporary legal issues.

"THE HISTORY OF THE WORLD IS NONE OTHER THAN THE PROGRESS OF THE CONSCIOUSNESS OF FREEDOM."
—GEORG HEGEL

*Georg Hegel.* LIBRARY OF CONGRESS

Born August 27, 1770, in Stuttgart, Germany, Hegel achieved fame in his lifetime as a teacher and writer. The son of a German government official, he was originally a divinity student who later turned to philosophy. He worked as a tutor in his twenties, and later as a school principal and a professor at German universities in Heidelberg and Berlin. At the same time, he wrote far-ranging and lengthy books, including *Science of Logic* (1812–16) and *Encyclopedia of the Philosophical Sciences* (1817), which contains every element of his system of philosophy. He died November 14, 1831, in Berlin.

Hegel's theories arose partly in response to those of his predecessor, the Prussian philosopher IMMANUEL KANT. Believing that percep-

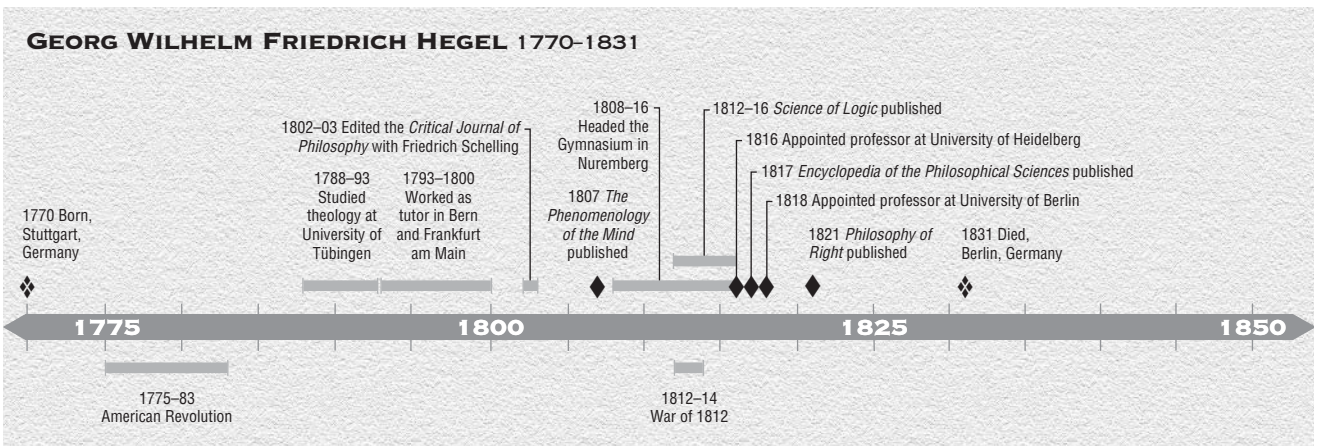

tion alone could determine what is real, Kant had provided a concept of reason that Hegel was able to use in building a complete theoretical system. In doing so Hegel created his own form of the dialectic (a method of critical reasoning), which he divided into three parts. Essentially, it held: (1) A thesis (idea) encourages the development of its reverse, or antithesis. (2) If these two combine, they form an entirely new thesis, or synthesis. (3) This synthesis is the beginning of a new series of developments. Hegel believed that life eternally forms itself by setting up oppositions.

Hegel's system has special implications for the progress of history, particularly the evolution of people and government. He believed that the ideal universal soul can be created through logic that is based on his dialectic. This, he argued, was the foundation of all development. Using his three-part dialectic, he laid out the development of society. Hegel's thesis was that the primary goal of persons is to acquire property, and the pursuit of property by all persons necessitates the antithesis of this goal, laws. The association of persons and laws produces a synthesis, called ethos, that combines the freedom and interdependence of the people and creates a state. According to Hegel, the state is above the individual. Allowed to reach its highest form of development, Hegel believed, the state evolves into a monarchy (a government ruled by a single person, often called a king or queen).

Hegel's view of government is at odds with the historical course pursued by the United States. In fact, he was a critic of the individualism at the heart of the American Revolution. But his ideas have nonetheless had an immeasurable effect on modern thought in the United States as well as Europe. He saw human history as the progression from bondage to freedom, attainable only if the will of the individual is made secondary to the will of the majority. This view shaped the development of the philosophy of idealism in the United States and Europe. Hegel's dialectic was also adapted by **KARL MARX** as the basis for Marx's economic theory of the struggle of the working class to achieve revolution over the owners of the means of production. In the twentieth century, Hegel inspired the academic methodology called deconstructionism, used in fields ranging from literature to law as a means to interpret texts.

Although Hegel was largely ignored or attacked by U.S. legal scholars for two centuries, the 1950s brought a new interest in his ideas that has grown in the ensuing decades. Generally speaking, scholars have examined his work for its views on liberalism and the concepts of freedom and responsibility. Hegelian thought has been used to address everything from historical problems such as **SLAVERY** to contemporary issues in contracts, property, **TORTS**, and **CRIMINAL LAW**. It has also influenced the **CRITICAL LEGAL STUDIES** movement.

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## HEIR

*An individual who receives an interest in, or ownership of, land, tenements, or hereditaments from an ancestor who has died intestate, through the laws of* **DESCENT AND DISTRIBUTION**. *At* **COMMON LAW**, *an heir was the individual appointed by law to succeed to the estate of an ancestor who died without a will. It is commonly used today in reference to any individual who succeeds to property, either by will or law.*

An *heir of the body* is an heir who was either conceived or born of the individual who has died, or a child of such heir. This type of heir is anyone who descends lineally from the decedent, excluding a surviving spouse, adopted children, and collateral relatives. Ordinarily, property can be given by will to anyone named or can be shared by all heirs, but historically, the owner of an entail could only pass his or her property on to heirs of the body. This type of inheritance is largely abolished by statute today.

## HELD

*In relation to the opinion of a court, decided.*

The holding in a particular case is the ultimate decision of a court of a JUSTICIABLE controversy.

## ♦ HELMS, JESSE ALEXANDER, JR.

The career of Jesse Alexander Helms Jr. is unique in post-World War II U.S. politics. Few legislators have fought as relentlessly, caused as much uproar, or arguably, had as much influence as the ultraconservative Republican from North Carolina. As a fiery radio editorialist in the 1960s, Helms waged a one-man war on liberalism. His notoriety helped him win an historic 1972 Senate race, a breakthrough in a state that had not elected a Republican in the twentieth century, and three reelections followed. He emerged not only as a party leader but as an independent legislator with his own tough agenda on social issues and foreign policy.

Born October 18, 1921, in the small segregated town of Monroe, North Carolina, Helms was named for his formidable father. Jesse Helms Sr. was the town's police and fire chief, and he exacted obedience from Monroe and his two sons alike. "My father was a six-foot, two-hundred pound gorilla," Helms affectionately said. "When he said, 'Smile,' I smiled." His mother, Ethel Mae Helms, marshaled her family off to the First Baptist Church twice a week. In Helms's childhood, Monroe still romantically celebrated Confederate Memorial Day, and patriotism, regional pride, religion, and racial separation were formative influences on the boy. He showed early promise in writing, by high school already reporting for the local newspaper.

Journalism held such interest for Helms that he quit Wake Forest College in 1939 to work on the *Raleigh News and Observer.* The 20-year-old moved up rapidly. By 1941, he was assistant city editor of the *Raleigh Times,* the city's smaller, more conservative paper. Then Pearl Harbor intervened. Accepted by the U.S. Navy for limited duty in recruitment and public speaking, Helms made a crucial discovery: he was good at broadcasting. Starting in 1948, he began a new career as a radio news director at station WRAL in Raleigh.

Helms soon moved from the role of political observer to that of political insider. His reporting in the vicious, racially divided 1950 Democratic primary race for the Senate led to accusations that he had doctored a photo of the wife of the loser, Frank Graham, so that she appeared to be dancing with a black man—a fatal blow to the candidate's chances in the segregated state. Helms denied it. The winner, Senator Willis Smith, took him to Washington as his administrative assistant in 1951. Working in the Senate propelled Helms closer to a political career.

From 1953 to 1960, Helms was a lobbyist and editorialist for the North Carolina Bankers Association. He had an opportunity to exercise his politics in a weekly column and at the same time held his first elective office, on the Raleigh City Council, where, although nominally a Democrat, he opposed virtually all taxes.

The great turning point in Helms's life came in 1960. As the executive vice president of the Capital Broadcasting Company, he began broadcasting fierce radio editorials on radio station WRAL. Here, for the next 12 years, he developed views that would last the rest of his life. These broadcasts were fire and brimstone. In much the same way that radio host Rush Limbaugh criticized liberals in the 1990s, Helms attacked liberal trends in the 1960s. He referred to the 1960s as "this time of the fast buck and the 'New Morality'—the age of apathy and indifference, the season of disdain for simple virtues and common honesty."

What riled Helms most was the CIVIL RIGHTS MOVEMENT. Carried across the state of North Carolina, Helms's attacks on desegregation were reprinted in newspapers under such titles as "Nation Needs to Know of Red Involvement in Race Agitation!" The liberal media were to blame, Helms reasoned, and if they would stop distorting the truth, then "there would be millions around the world who would change their minds about race relations in the South." Despite his own biases, Helms and WRAL survived repeated complaints to the FEDERAL COMMUNICATIONS COMMISSION.

It was only a matter of time before the conservative Helms gave up on the DEMOCRATIC PARTY. In 1972, he switched parties and ran for the U.S. Senate as a Republican. Helms liked to tell his radio listeners that he had never voted for a Democrat for president, and now, with the decidedly liberal George S. McGovern as the Democratic nominee, he had even more reason to sever his symbolic ties to the party. McGovern stood for everything that Helms detested: support for WELFARE and ABORTION, and

opposition to the war in Vietnam. To Helms, such views were typical of the way liberalism betrayed traditional values, and why he could not remain a Democrat.

When Helms jumped ship, he took an extreme gamble. North Carolina—indeed, the South as a whole—had been the Democratic Party's stronghold for generations. In fact, not since the late nineteenth century had the state elected a Republican senator. Helms changed everything. One key to his beating the favorite, Democrat Nick Galifianakis (by only 120,000 votes), was Helms's use of national politics. The presidential election offered excellent coattails upon which to ride. Helms allied himself with Republican candidate RICHARD M. NIXON, linking Galifianakis with the highly unpopular McGovern. Galifianakis saw a much different, and worse, kind of tarring at work. He accused the Helms campaign of using his Greek–American ethnicity to imply that he was not a loyal U.S. citizen.

Not surprisingly, Helms's first term in Washington, D.C., established the same hard-line politics of his broadcasting career. He was soon nicknamed Senator No for voting against federal spending—with the exception of support for the military and farmers. He opposed federal aid to education, food stamps for striking workers, government-subsidized abortion, and the creation of the Consumer Protection Agency.

Returning politics to traditional values would be the hallmark of his career, a philosophy outlined in his 1976 book, *When Free Men Shall Stand.* During his first term in the U.S. Senate, he introduced an amendment designed to circumvent the Supreme Court's decisions banning prayer in public schools. Although the effort failed, it paid personal dividends: Helms came to the attention of conservative organizations and contributors who would be increasingly supportive of him over the next two decades. He saw no conflict with his faith in opposing government aid to the needy. He believed it was the role of the private individual to help others, as he and his wife, Dorothy Helms, had done by adopting a nine-year-old orphan with cerebral palsy. In Congress he voted against federal aid to disabled people and against school lunch programs.

Unlike some social conservatives, Helms had an equal passion for foreign policy. He was

*Jesse Helms.*
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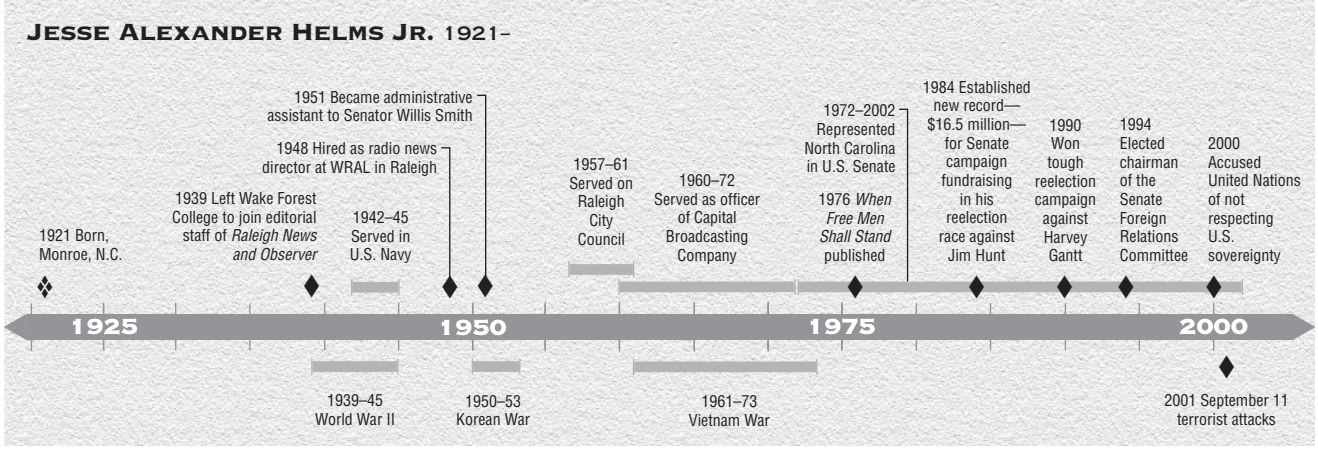

staunchly anti-communist, a belief that formed the basis for his opposition to any cooperation between the United States and left-wing governments. He opposed President Nixon's historic opening of ties to China. Supporting right-wing governments—even those associated with abuses of HUMAN RIGHTS, such as Turkey, or with all-white rule, such as Rhodesia and South Africa—made more sense to him.

Helms gained influence as his career progressed. By the late 1970s, he was already shaping the Republican presidential platform behind the scenes. In Senate votes, he could openly defy the party on nominations and policy decisions. Helms had little fear of the party leadership because he was building a national base of support. He did this with the help of a powerful insider in national politics, Richard A. Viguerie, publisher of the *Conservative Digest.* Viguerie was an early advocate of using direct-mail techniques, a marketing tool borrowed from business. As campaign manager for Helms in 1978, he blanketed the United States with letters asking for support. It worked, fantastically. Helms raised $6.2 million for his successful 1978 reelection, two-thirds of it from outside of North Carolina. Politicians of all kinds soon followed his lead in using this powerful technology.

"WE ARE LIVING IN AN AGE WHERE ANYTHING GOES."
—JESSE HELMS

In the 1980s, the importance of direct mail to Helms grew in proportion to the rise of conservative Christian politics. Analysts called this emerging constituency the New Right. It favored mandating school prayer, outlawing abortion, and preventing gays and lesbians from acquiring equal rights. Helms tapped its members with dramatic fund-raising letters. By 1982, Helms could count on great support for brash, independent actions in the Senate: FILIBUSTERING against the renewal of the VOTING RIGHTS ACT, for example, or attaching a school prayer amendment to the annual extension of the national debt.

The 1980s was a period of great activity for Helms in domestic policy. He railed against the National Endowment for the Arts (NEA) for funding art that he found offensive, chiefly that of the gay photographer Robert Mapplethorpe and of the artist Andres Serrano, whose work *Piss Christ* depicted a crucifix submerged in urine. The national controversy he engendered continued to divide liberals and conservatives well into the 1990s. He also led a highly publicized attempt to take over CBS, exhorting conservatives to buy up stock in order to end liberal bias in news reporting. He introduced antiabortion legislation that made him the leading enemy of pro-abortion forces, which began demonizing Helms in their own direct-mail campaigns. He was most successful in agriculture policy. Helms won continued backing for tobacco price supports, an issue key to one of his most active advocates, the tobacco industry.

In a combative 1990 reelection campaign, Helms nearly lost to African American Harvey Gantt. The former Democratic mayor of Charlotte was ahead of Helms until the last weeks of the campaign, when Helms's forces mailed 125,000 postcards to voters warning them that they could be prosecuted for FRAUD if they voted improperly. At least 44,000 cards were sent to black voters, according to the U.S. Department of Justice, which sent observers to the state to ensure fair elections. Helms edged out Gantt by just over 100,000 votes. In 1992, the JUSTICE DEPARTMENT ruled that the Helms campaign had violated federal CIVIL RIGHTS and voting laws by intimidating, threatening, and discouraging African Americans from voting. Helms's office denied that he was involved in the mailings.

Helms was an outspoken critic of President BILL CLINTON. The Republican takeover of Congress in November 1994 gave him chairmanship of the Foreign Relations Committee, a powerful post from which he could authorize money for foreign aid, make recommendations on ambassadors and foreign treaties, and control the budget of the STATE DEPARTMENT. Almost immediately, he blasted the president as unfit to conduct foreign policy and warned that Clinton "better have a bodyguard" if he planned to visit North Carolina military bases. Politicians from both parties denounced the remark, which came on the anniversary of the assassination of President JOHN F. KENNEDY. Helms called his statement a "mistake," but refused to apologize.

Despite surgery for serious health problems, Helms seemed eager to enter more battles. He was reelected to another term in 1996, again defeating Harvey Gantt. He served on the Foreign Relations Committee until 2001. During his tenure as chair, the committee approved 143 treatises (although some were later rejected or returned to the president), confirmed 477 presidential nominations for ambassadorships and other administrative posts, and conducted 597 hearings.

In 2001, after serving on the Senate for 30 years, Helms announced that he would not seek reelection in the 2002 elections. He continued, however, to spark controversy even in the final year of his term as senator. He allegedly made some racially charged comments to the press, not dissimilar to those made by Senator TRENT LOTT at the birthday celebration of Senator STROM THURMOND. (These comments eventually cost Lott his position as Senate majority leader). Helms also openly criticized the lifestyles of homosexuals. Nevertheless, many conservatives celebrated his numerous accomplishments prior to his retirement in 2003. And no one could deny the indelible imprint he left on U.S. politics.

Helms supported Elizabeth Dole, wife of former Senator BOB DOLE, as his successor in the 2002 senatorial election in North Carolina. Dole won a heated race in the nation's most expensive congressional campaign.

Helms married the former Dorothy Jane Coble in 1942. They are the parents of three children and the grandparents of seven grandchildren. They are also longtime cerebral palsy advocates, and are actively involved with the Jesse Helms Center in Wingate, North Carolina. The nonprofit center promotes free enterprise, representative democracy, and traditional values.

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## HENCEFORTH

*From this time forward.*

The term *henceforth,* when used in a legal document, statute, or other legal instrument, indicates that something will commence from the present time to the future, to the exclusion of the past.

## ♦ HENRY II OF ENGLAND,

King Henry II was born March 5, 1133, in Le Mans, France. He reigned from 1154 to 1189 and founded the Plantagenet dynasty of English rulers. Henry's many innovations in civil and CRIMINAL PROCEDURE had a lasting effect upon ENGLISH LAW and his expansion of the royal

*Henry II of England.*
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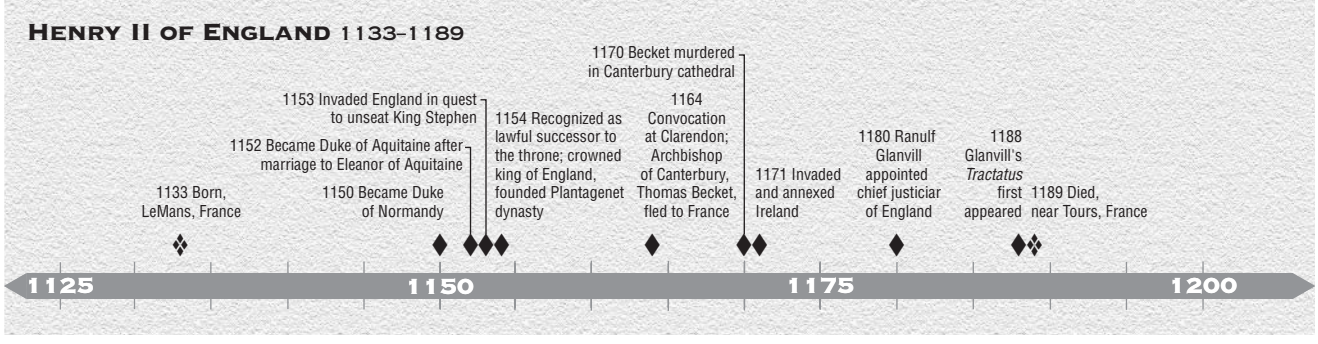

court system made royal justice available throughout England.

Building upon the earlier tradition of the inquest, Henry issued several assizes, or ordinances, that introduced the procedures that eventually developed into the GRAND JURY. He also developed a number of writs to bring cases from the feudal courts of the barons into the royal courts. In addition, Henry sent itinerant justices on regular circuits through the kingdom to make royal justice more easily obtainable.

Henry's expansion of royal justice did, however, bring him into conflict with THOMAS BECKET, the archbishop of Canterbury, who opposed the king's efforts to punish members of the clergy who had been convicted of crimes in ecclesiastical courts and removed from their clerical status. Becket was murdered in 1170 by some of the king's men, though apparently not at his command, and Henry thereafter gave up his efforts to punish members of the clergy. Henry died July 6, 1189, near Tours, France.

## ♦ HENRY, PATRICK

Patrick Henry was a leading statesman and orator at the time of the American Revolutionary War. Several of Henry's speeches have remained vivid documents of the revolutionary period, with "Give me liberty or give me death" his most remembered statement.

"THE BATTLE, SIR, IS NOT TO THE STRONG ALONE; IT IS TO THE VIGILANT, THE ACTIVE, THE BRAVE."
—PATRICK HENRY

Henry was born May 29, 1736, in Hanover County, Virginia. Though Henry attended public school for a short time, he was largely taught by his father, who had a good education. From 1751 to 1760, Henry was a storekeeper and farmer. When his business and farming ventures failed, he turned to the study of law, and received his license to practice in 1760.

Within three years, Henry had become a prominent attorney, owing in great measure to his oratorical skills. He was drawn to politics, and was elected to the Virginia House of Burgesses in 1765. In this colonial legislature, Henry became an outspoken critic of British policies toward the thirteen colonies. He introduced seven resolutions against the STAMP ACT, which levied a tax by requiring that stamps be affixed to documents and other papers. In one speech opposing the act, he stated, "If this be TREASON, make the most of it."

Henry's efforts led the Virginia House of Burgesses to pass five of the seven resolutions he introduced. All seven resolutions were reprinted in newspapers as the Virginia Resolves. Colonial businesspeople, in support of the resolves, agreed not to import British goods until the Stamp Act was repealed. Trade diminished, and business owners refused to use the stamps on business documents. Faced with organized resistance in the colonies, and the displeasure of British businesses that had lost trade, the British Parliament repealed the Stamp Act on March 4, 1766.

Henry grew more radical after the repeal of the act, arguing that the colonies should break away from Great Britain. In 1773, he joined with THOMAS JEFFERSON and Richard Henry Lee to form the Committee of Correspondence to transmit messages throughout the colonies. When the House of Burgesses was dissolved in 1774, he became a member of the Virginia Provincial Convention, which advocated revolution. Before this convention, he made his most famous remarks, words that became the clarion call that led the colonies into revolution: "I know not what course others may take, but as for me, give me liberty or give me death."

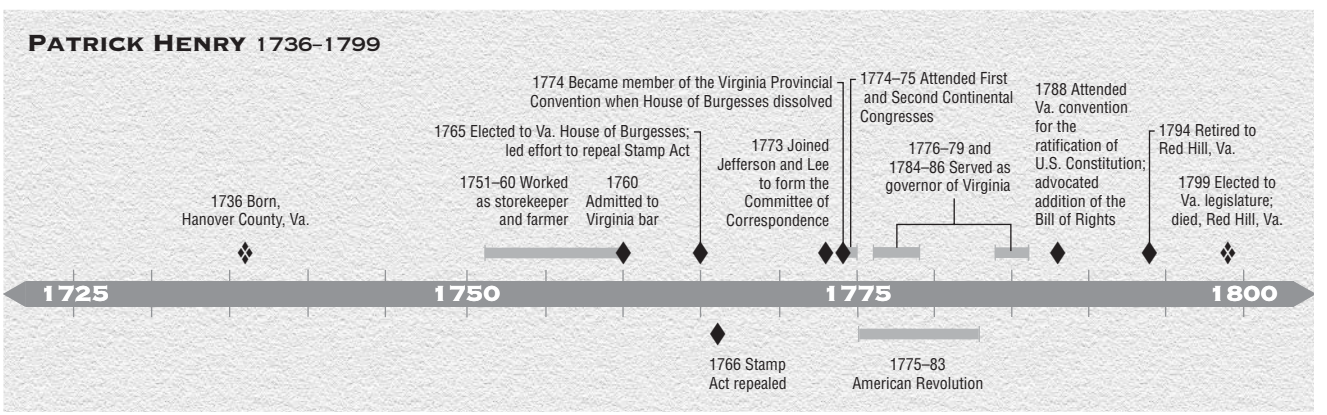

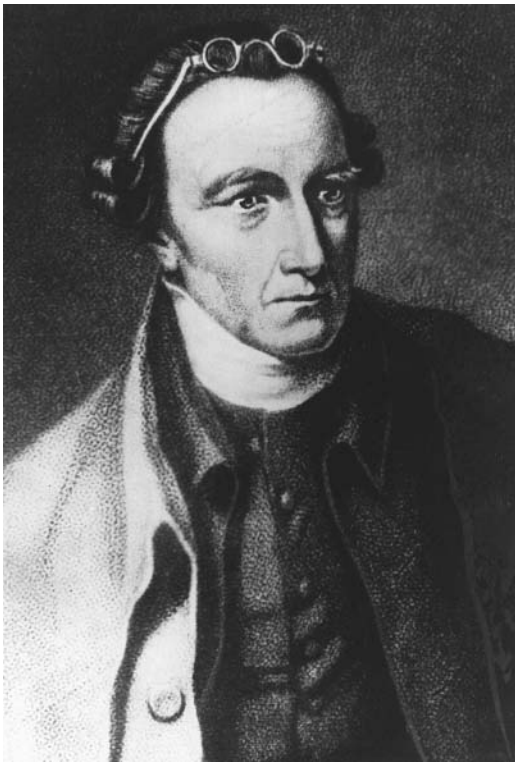

*Patrick Henry.* AP/WIDE WORLD PHOTOS

During 1774 and 1775, Henry attended the First CONTINENTAL CONGRESS as a member of the Virginia delegation, advocating military mobilization. When the Second Continental Congress convened in 1775, he helped draft the legislation that organized the Continental Army. In 1776 he also helped draft the Virginia Constitution.

In 1776 Henry was elected governor of the newly independent commonwealth of Virginia. A tireless administrator, Henry worked vigorously to meet the demands of the Revolutionary War. As commander in chief, he recruited the state's quota of six thousand men for the Continental Army, plus the state militia's allotment of five thousand soldiers.

After the war, Henry continued as governor, eventually serving five terms. During his second term, Henry provided supplies to George Rogers Clark for his expedition to the Northwest Territory. Clark rid the territory of British control.

In 1788, Henry attended the Virginia convention for the ratification of the U.S. Constitution. Henry opposed ratification, fearing that it imperiled the rights of states and individuals, but Virginia ratified it. Henry successfully advocated the addition of the BILL OF RIGHTS to the document. This first ten amendments to the Constitution protect the rights of states and individuals, allowing Henry to support the Constitution.

Following ratification, Henry was offered many government posts, but was forced to resume his Virginia law practice to rescue himself from personal debt. He quickly became a wealthy man, since his fame attracted many clients. In 1794, he retired to his estate at Red Hill, near Appomattox, Virginia. Despite his new wealth, Henry refused pleas to resume public service, turning down President GEORGE WASHINGTON's request to serve as chief justice of the U.S. Supreme Court.

Washington finally persuaded Henry to seek election to the Virginia legislature. Henry won election in 1799. He died June 6, 1799, before he could take office.

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## HEREAFTER

*In the future.*

The term *hereafter* is always used to indicate a future time—to the exclusion of both the past and present—in legal documents, statutes, and other similar papers.

## HEREDITAMENT

*Anything that can be passed by an individual to heirs.*

There are two types of hereditaments: corporeal and incorporeal.

A *corporeal hereditament* is a permanent tangible object that can be seen and handled and is confined to the land. Materials, such as coal, timber, stone, or a house are common examples of this type of hereditament.

An *incorporeal hereditament* is an intangible right, which is not visible but is derived from real or PERSONAL PROPERTY. An EASEMENT is a classic example of this type of hereditament, since it is the right of one individual to use another's property and can be inherited.

## HERITAGE FOUNDATION

The Heritage Foundation is a research and educational institute, popularly known as a "think tank," whose mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional values, and a strong national defense. Founded in 1973, the Heritage Foundation has proven to be effective, gaining national influence during the administrations of Presidents RONALD REAGAN and GEORGE H.W. BUSH. This influence grew in the 1990s, as conservative Republicans gained control of Congress in 1994. Speaker of the House NEWT GINGRICH of Georgia declared just after the 1994 election, "Heritage is, without question, the most far-reaching conservative organization in the country in the war of ideas, and one which has had a tremendous impact not just in Washington, but literally across the planet."

The Heritage Foundation is a nonpartisan, tax-exempt institution and is governed by an independent board of trustees. It relies on the private financial support of individuals, foundations, and corporations for its income and accepts no government funds and performs no contract work. Currently, it receives support from more than 200,000 contributors. Its headquarters are in Washington, D.C.

The staff of the Heritage Foundation includes policy and research analysts who examine issues in a wide variety of fields, including the legislative and executive branches of government, domestic policy, education, corporations, foreign policy, the UNITED NATIONS, Asian studies, and other areas of public concern. Once the researchers have made their findings, the foundation markets the results to its primary audiences: members of Congress, key congressional staff members, policy makers in the EXECUTIVE BRANCH, the news media, and the academic and policy communities.

The Heritage Foundation publicizes its work through weekly, monthly, and quarterly periodicals, including *Policy Review*. It also provides public speakers to promote its positions and convenes conferences and meetings on policy issues.

The Heritage Foundation has played an important role in advancing conservative ideas, especially after the election of Republican majorities in the U.S. House of Representatives and Senate in 1994. The Republican "Contract with America" agenda sought major changes in the size and power of the federal government. Heritage Foundation staff played a key role behind the scenes in helping to craft and refine legislative proposals. The overhaul of the system of agricultural subsidies and the first comprehensive rewriting of the TELECOMMUNICATIONS law embraced free-market approaches advocated by the foundation. Its research and proposals also shaped the 1996 WELFARE reform bill. This was followed by a period of intensive fundraising and recruitment of members in such initiatives as the Leadership for America campaign. This activity led to the Heritage Foundation exceeding its two-year goal of $85 million in donations. In 2001 the Heritage Foundation actively supported a program of sweeping federal tax reforms that were eventually signed into law by President GEORGE W. BUSH.

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### CROSS-REFERENCES

Lobbying.

## HIERARCHY

*A group of people who form an ascending chain of power or authority.*

Officers in a government, for example, form an escalating series of ranks or degrees of power, with each rank subject to the authority of the one on the next level above. In a majority of hierarchical arrangements, there are a larger number of people at the bottom than at the top.

Originally, the term was used to mean government by a body of priests. Currently, a hierarchy is used to denote any body of individuals arranged or classified according to capacity, authority, position, or rank.

## ♦ HIGGINBOTHAM, ALOYISUS LEON, JR.

A. Leon Higginbotham Jr. was an attorney, a scholar, and a federal judge. His distinguished judicial career culminated in his attaining the rank of chief judge of the U.S. Court of Appeals for the Third Circuit.

Higginbotham was born February 25, 1928, in Trenton, New Jersey. Although he attended segregated public schools, his mother was

determined that he would receive the same opportunities available to white students. "She knew that education was the sole passport to a better life," he said. No African–American student had been admitted to the academic high school program in Trenton because Latin, a requirement for the program, was not offered at the black elementary schools. But Higginbotham's mother fought for her son's right to enroll and finally convinced the principal to allow him into the program. Higginbotham had no doubt that his mother's advocacy made a difference in the outcome of his life. "When I see students who went to [elementary school] with me now working as elevator operators or on street maintenance," he said, "I often wonder what their future would have been if the school had offered Latin."

After finishing high school, Higginbotham decided to become an engineer and enrolled at Purdue University, in West Lafayette, Indiana. A winter spent sleeping in an unheated attic with 11 other African–American students caused him to rethink his career goals. "One night, as the temperature was close to zero, I felt that I could suffer the personal indignities and denigration no longer," he wrote in the preface to his book, *In the Matter of Color: The Colonial Period* (1978). He spoke to the university president, who told him the law did not require the university to "let colored students in the dorm." Higginbotham was advised to accept the situation or leave. "How could it be that the law would not permit twelve good kids to sleep in a warm dormitory?" he wondered. He decided then and there to abandon engineering and pursue a career in law.

Higginbotham left Purdue to attend Antioch College, in Ohio, where he studied sociology, earning his bachelor of arts degree in 1949. He went on to Yale Law School, and received his bachelor of laws degree in 1952. Another incident that helped galvanize his commitment to racial equality occurred shortly after his graduation from Yale. He was a job candidate for a prominent Philadelphia law firm that did not know he was black until he arrived for the interview. Although the partner who spoke with him praised his qualifications, he told Higginbotham

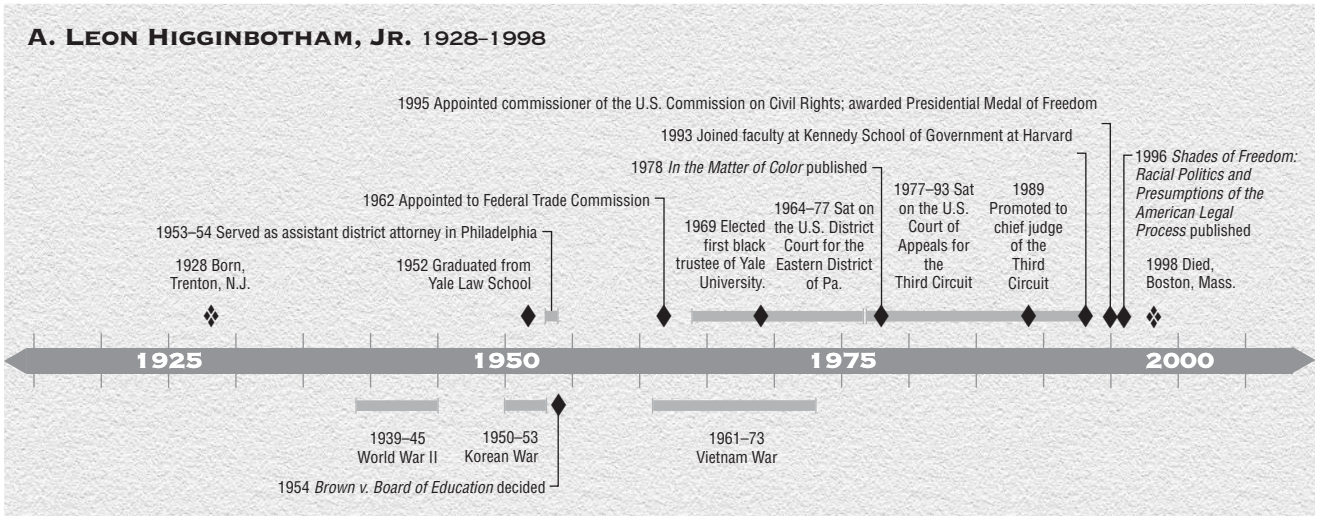

he could not do anything for him except direct him to local African–American law firms who might hire him.

Discouraged but not daunted, Higginbotham began his legal career as an assistant district attorney in Philadelphia and then became a partner in a law firm that handled business, church, and civil rights cases. President JOHN F. KENNEDY made him a commissioner with the FEDERAL TRADE COMMISSION in 1962; he was the youngest person ever appointed to the post and the first African American. The same year, the U.S. Junior CHAMBER OF COMMERCE named him one of its ten outstanding young men. In 1964, President LYNDON B. JOHNSON named him a U.S. district judge for the Eastern District of Pennsylvania; at age 36, he was the youngest federal judge to be appointed in three decades. In 1977, President JIMMY CARTER elevated him to the U.S. Court of Appeals for the Third Circuit, which encompasses Pennsylvania, New Jersey, Delaware, and the Virgin Islands.

"BROWN CHANGED THE MORAL TONE OF AMERICA; BY ELIMINATING THE LEGITIMIZATION OF STATE-IMPOSED RACISM IT IMPLICITLY QUESTIONED RACISM WHEREVER IT WAS USED."
—A. LEON HIGGINBOTHAM

Higginbotham's distinguished judicial career was capped in 1989 when he was promoted to chief judge for the Third Circuit Court of Appeals. At the time, he was the only African–American judge directing one of the federal judiciary's 12 circuits. His ascendancy was hailed by many who saw it as proof that the U.S. judicial system was becoming more inclusive. Guido Calabresi, dean of Yale Law School, praised him as "a first-rate judge, a sensitive judge, who is powerful in style and analytically strong." But some African–American lawyers felt that too much emphasis was placed on Higginbotham's skin color and on the racial import of his promotion. "There is no more significance to it than anybody else becoming Chief Judge," said THURGOOD MARSHALL, associate justice of the U.S. Supreme Court. "I think he is a great lawyer and a very great judge. Period."

Higginbotham was an outspoken proponent of CIVIL RIGHTS and racial equality. In 1990, he declined to officiate at a MOOT COURT competition at the University of Chicago Law School because, he said, Chicago was the only one of the top ten schools in the United States that "for two decades has not had even one black professor in either a tenured position or a tenure-track position."

Higginbotham's devotion to civil rights was evident in his criticism of Justice CLARENCE THOMAS, a conservative African American whose nomination to the U.S. Supreme Court in 1991 provoked criticism and controversy. In an article titled "An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague" (*U. Pa. L. Rev.,* Jan. 1992), Higginbotham called upon Thomas to remain cognizant of his responsibilities as an African American on the Supreme Court. He reminded Thomas of the discrimination both men's grandfathers had faced and of Thomas's debt to the CIVIL RIGHTS MOVEMENT, commenting that without the movement, "probably neither you nor I would be Federal judges today." He was also sharply critical of Thomas's record. He noted that after studying nearly all of Thomas's speeches and writings, "I could not find one shred of evidence suggesting an insightful understanding on your part of how the evolutionary movement of the Constitution and the work of the civil rights organizations have benefited you."

During his career, Higginbotham was awarded more than 60 honorary degrees; in 1969, he became the first African American elected to the board of trustees of Yale University. He was also a tireless lecturer, teaching at various times over the course of 20 years at the University of Pennsylvania, University of Michigan, Stanford, New York University, and Yale. In addition, Higginbotham was well known for his prolific writings, including more than one hundred articles. His book *In the Matter of Color* received several national and international awards. In 1996, he published *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process.*

In 1993, Higginbotham retired from the circuit court and formed an association with the law firm of Paul, Weiss, Rifkind, Wharton, & Garrison in New York City. In 1995, President BILL CLINTON awarded Higginbotham the Presidential Medal of Freedom, the nation's highest civilian award. In the same year, President Clinton appointed him to serve a six-year term as a commissioner of the U.S. COMMISSION ON CIVIL RIGHTS. Higginbotham died of a stroke on December 14, 1998, in Boston, Massachusetts.

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## HIGH CRIMES AND MISDEMEANORS

*The offenses for which presidents, vice presidents, and all civil officers, including federal judges, can be removed from office through a process called* IMPEACHMENT.

The phrase *high crimes and misdemeanors* is found in the U.S. Constitution. It also appears in state laws and constitutions as a basis for disqualification from holding office. Originating in English COMMON LAW, these words have acquired a broad meaning in U.S. law. They refer to criminal actions as well as any serious misuse or abuse of office, ranging from TAX EVASION to OBSTRUCTION OF JUSTICE. The ultimate authority for determining whether an offense constitutes a ground for impeachment rests with Congress.

The exact meaning of the phrase cannot be found in the Constitution itself. Article II, Section 4, establishes, "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, TREASON, BRIBERY, or other High Crimes and Misdemeanors." *Treason* and *bribery* are specific, but *high crimes and misdemeanors* is not. In fact, considerable debate occupied the Framers of the Constitution over the issue of impeachment, and the wording of the grounds for impeachment was itself controversial. A proposed offense of maladministration was rejected as being too vague and susceptible to political abuse. Finally, they chose to use a phrase from English common law that had no precisely settled meaning at the time yet at least connoted serious offenses.

The reason for the choice lies in the Framers' approach to the larger question of impeachment. Although borrowing language from the law they knew best, they explicitly chose not to imitate the English model of impeachment. Traditionally, this approach had allowed the British Parliament to conduct a simple review of charges and then remove officials by a majority vote. Instead, the Framers intended for removal from office to be the final step in a two-part process that began in the

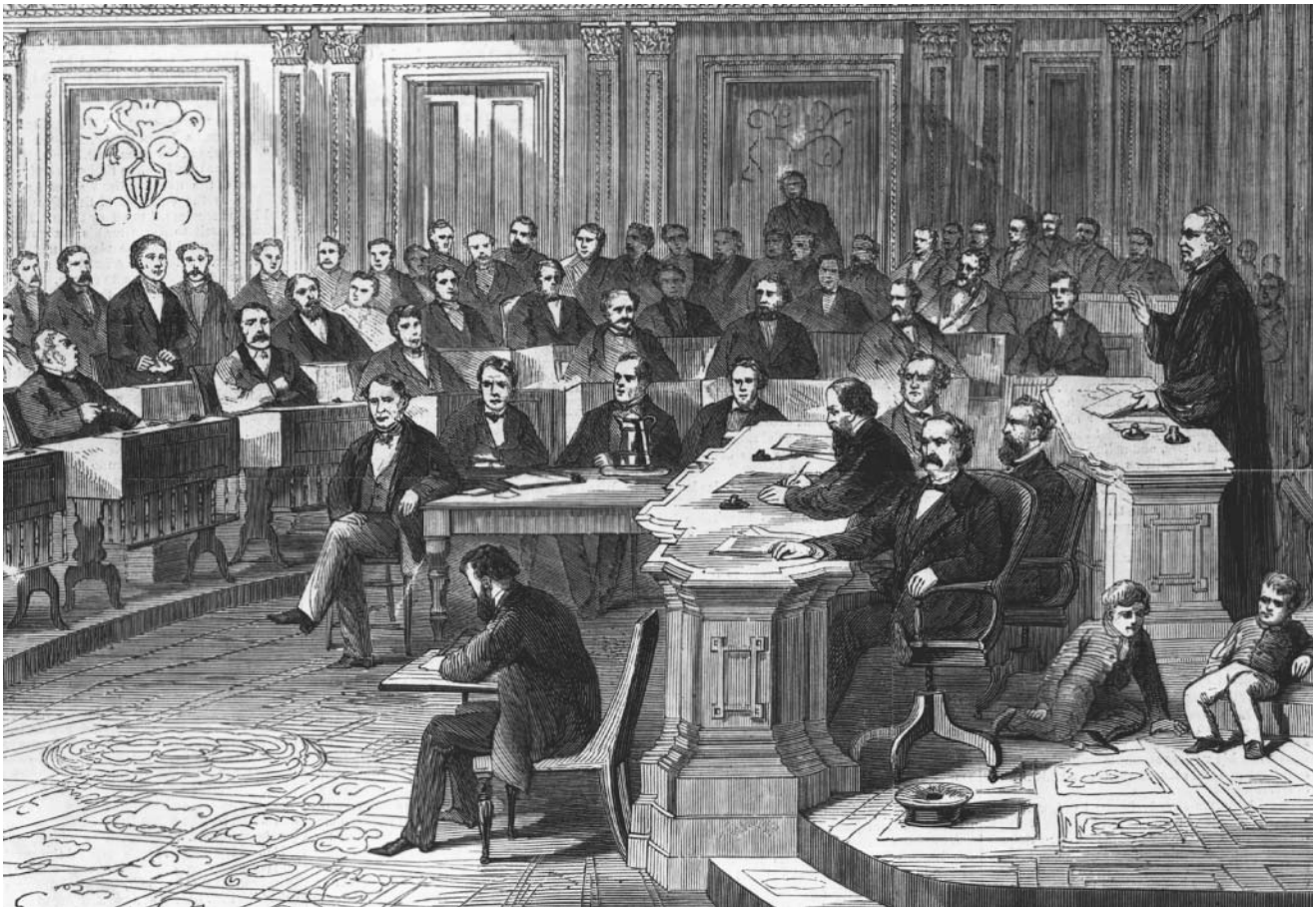

*A depiction of the 1868 impeachment proceedings against President Andrew Johnson. The Senate's vote on the 11th Article of Impeachment fell one vote short of the two-thirds majority needed to impeach Johnson. Two other articles were later defeated.*

LIBRARY OF CONGRESS

House of Representatives and, if charges should result, ended in a trial-like hearing before the U.S. Senate. Thus, two goals would be achieved: a full public inquiry into allegations, and, if necessary, the adjudication of those charges requiring a two-thirds majority for removal.

Generally, debate over the phrase *high crimes and misdemeanors* has split into two camps. The minority view is held by critics who undertake a literal reading of the Constitution. They maintain that *high crimes* means what it says—criminal activity—and argue that the Framers wanted only criminal activities to be the basis for impeachment. The generally accepted viewpoint is much broader. It defines high crimes and misdemeanors as any serious abuse of power—including both legal and illegal activities. Supporters of this reading believe that because impeachment is a public inquiry, first and foremost, it is appropriate to read the phrase broadly in order to provide the most thorough inquiry possible. Thus, a civil officer may face impeachment for misconduct, violations of oath of office, serious incompetence, or, in the case of judges, activities that undermine public confidence or damage the integrity of the judiciary.

The vagueness of the standard has left much interpretive power to Congress. In 1868, President ANDREW JOHNSON underwent impeachment proceedings when he ordered the firing of his secretary of war. His opponents charged that this order violated the TENURE OF OFFICE ACT, which set the tenure of certain officials. Johnson escaped conviction in the Senate by only one vote, but the attempt to impeach him quickly came to be seen as a politically motivated mistake. In 1974, the House Judiciary Committee recommended that the full House of Representatives approve ARTICLES OF IMPEACHMENT against President RICHARD M. NIXON. It did not cite any single impeachable offense, but instead found a broad pattern of wrongdoing: Nixon had conspired with his advisers to obstruct federal and congressional investigations of the WATERGATE break-in, the burglarizing of the Democratic National Committee headquarters in Washington, D.C., which was eventually linked to the Nixon administration. Nixon resigned from office before the process could continue.

The dispute over what constitutes a high crime or misdemeanor reemerged in 1998 when the House Judiciary Committee voted to recommend that the House begin impeachment proceedings against President BILL CLINTON. The House concurred with the recommendation, which included charges of perjury and obstruction of justice. Legal commentators debated for weeks about whether these charges were the type of high crimes and misdemeanors contemplated by the language of the Constitution, but the House nevertheless approved two of the four articles of impeachment. The trial then moved to the Senate, which failed to garner the necessary two-thirds majority to remove Clinton from office.

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## HIGHWAY

*A main road or thoroughfare, such as a street, boulevard, or parkway, available to the public for use for travel or transportation.*

The nature of a public way is determinable from its origin, as well as the intention and plans of the appropriate authorities and the use to which it has been put. If a particular road or highway is designated as private, its character will not be altered if it is actually a public road or highway. PRIVATE ROADS are intended for use by a few private individuals, as distinguished from highways that are for public use.

It is essential that a highway be established in a manner recognized by the particular jurisdiction, whether it be by extended use—prescription—or by dedication to the public by the owner of the property subject to the consent of public authorities. Prior to the time that any statutory procedure for the establishment of highways was devised, prescription and dedication were the methods used in common law. Currently, most highways are created by statute.

### Extended Use or Prescription

One method of establishing a highway or public road is through prescription—the

extended use of a piece of land for a certain length of time by the public, absent the owner's consent.

The actual number of persons using the road or the frequency or extent of such use is immaterial provided the property is openly and continuously used as a road with no restrictions. In addition, such public use must not be interrupted by acts of the owner that are designed to stop the use of his or her property as a public highway. For example, the posting of several "no trespassing" signs around the land and the erection of a fence would most likely prevent a highway from being recognized. Verbal objections alone, or unsuccessful attempts to curtail use as a highway, are ordinarily insufficient.

Any property subject to the right of the state to lay out a public way over it can become a highway by extended use if the conditions prescribed by statute are met. The public is given an EASEMENT in the land as a highway, and the width and extent of a highway are determined by the extent of its actual use for such purposes.

### Statute

The creation of highways is a function of the government that stems from its power of eminent domain—the authority to take private property for public use. The legislature makes the determination needed for public use and convenience and provides for establishment of highways by local boards or courts. In deciding whether the need for a highway exists, factors for consideration include topography, soil character, population, location, condition, convenience of highways already established or proposed, and the probable extent of use.

In the absence of statutory authorization, a highway cannot be constructed through lands of the state, or property that has already been designated for public use, such as a park. Additionally, some state laws proscribe the creation of highways through residences, buildings used for trade, gardens, or orchards.

### Public Authorities

Public officials, such as state highway commissioners, act on behalf of the particular county or MUNICIPAL CORPORATION upon which the state has conferred power to establish highways.

A highway and road district is a subdivision of the state, which the legislature creates to facilitate the administration of highways. The legislature defines and sets the territorial extent, limits, and boundaries of the road or highway district, and, generally, only lands that will be benefited are included. Highway boards and commissions are ordinarily responsible for the construction, improvement, and maintenance of highways.

### Abandonment, Alteration, and Vacation

The right of the public to use a highway may be forfeited by *abandonment.* Nonuse might be considered ABANDONMENT under statutory provisions. The evidence that a highway is in such a dangerous state of disrepair for a number of years that the public stops using it and a county fails to repair it constitutes abandonment in some jurisdictions. Where provided by statute, delay in opening a highway might be regarded as abandonment if it extends over an unreasonable length of time.

An *alteration* of a highway ordinarily refers to a change in its course that the state may effect in exercise of its POLICE POWER. A proceeding for a change or alteration in a public road generally will not be brought unless the change will further safety, convenience, or other public interests.

*Vacation* of a highway occurs when its existence is terminated by the direct action of public officials. The authority to vacate is generally delegated to the appropriate authorities or local agencies. Certain statutes make the provision that highways may be vacated by a vote of the town in a town meeting. Ordinarily, highways cannot be vacated unless they are useless, inconvenient, or burdensome, and the grounds are usually regulated by statutes. A highway that has been laid out but not constructed may be discontinued due to a change of circumstances, such as where a variation in traffic patterns makes the proposed highway unnecessary.

### Title

The public only acquires the right to use a highway, whereas title to the land remains with the owner, subject to the public's rights. When a highway is constructed, the public has the right of way as well as privileges incident thereto, including the right to construct, improve, and repair the highway. When a highway is abandoned or discontinued, however, total and unlimited ownership reverts to the true owner.

An individual whose land abuts a public highway might have special rights, including the

right to a reasonable passageway to the highway from his or her land.

### Construction and Maintenance

The construction and maintenance of highways are assumed by either the state, local communities, or a specifically designated agency. The actual plan of work in constructing, maintaining, or repairing highways is in the discretion of the highway authorities, whereas the state legislature determines their routes. The designation and location of a federally-aided state highway must be in accordance with federal and state law. A state, in its construction of a highway under the federal-aid primary system might be required to obtain the approval of federal agencies if the highway has a marked effect on the environment. The authorities may make provisions for the drainage of surface waters and for the building of ditches and culverts.

The construction and repair of public roads may be funded by general taxation, since the public roads are for a public purpose. The power to impose highway taxes vests in the legislature, and funds may be raised from vehicle taxes, gasoline taxes, property taxes, the sale of bonds, or by special assessments on the property for the amount necessary to cover the costs of construction or improvement.

In 1998 Congress enacted a law (Transportation Equity Act for the 21st Century, Public Law (105-178) that required states to enact .08 as the blood alcohol count (BAC) needed to constitute the crime of driving while intoxicated. States that do not lower their BAC to meet this standard would lose federal highway funds. By 2003 two-thirds of the states had met this new federal standard.

The U.S. TRANSPORTATION DEPARTMENT, established by Congress, works with the states to establish and maintain a national highway system (23 U.S.C.A. § 101 et seq.). Federal revenues pay for most of the national highway system. Congress may withhold portions of these funds if states do not enact certain laws related to highways or highway use and affecting interstate commerce. For example, Congress may withhold funding if a state does not set the minimum age for alcohol consumption at 21 years; suspend, for at least six months, the driver's license of persons convicted of drug offenses; or prohibit driving under the influence of alcohol.

### Obstruction

Any unauthorized obstruction that hinders the use of a public highway, such as a fence, gate, or ditch, is illegal and constitutes a NUISANCE. Officials may, however, lawfully obstruct highways temporarily under their jurisdictions for a reasonable period to make necessary repairs or improvements. Anyone who causes or allows an obstruction to be placed on a public highway is liable and may be enjoined to compel its removal.

In addition, the authorities or private individuals who have sustained special damages—financial or other losses that differ from those incurred by the public—may sue for damages against one who obstructs a highway. What constitutes special damages is dependent upon the facts of each case. Special injury might exist where the obstruction blocks access to the plaintiff's property. In a number of jurisdictions the obstruction of highways is a criminal offense.

### Use

The state has the power to control and regulate the use of public highways, provided its regulations do not constitute an unreasonable interference with the right of travel or impede interstate commerce. The state may determine the character of motor vehicles that use its highways and may properly exclude vehicles weighing in excess of a maximum set by statute. A reasonable tax may be imposed on vehicles based on their excess weight in order to compensate the state for the additional costs of maintaining the highway as a result of the severe wear and tear placed on the road by such vehicles. To protect the public health, the state may prohibit trucks that transport chemicals or explosives from driving through populated or residential areas. The secretary of transportation regulates the safety performance of all commercial motor carriers transporting explosives or dangerous articles, such as flammable or radioactive materials, in interstate or foreign commerce. The state may restrict the speed of vehicles, or proscribe parking alongside the highway except in emergencies. Bicycles used on highways may be subject to reasonable restrictions, such as the requirement that they be equipped with lights at night.

The *law of the road* is composed of a system of rules and regulations based upon the traditional practices and customs that govern safe

**Highway Mileage in the United States in 2000**

**FUNCTIONAL SYSTEMS OF U.S. HIGHWAYS**
**NUMBER OF MILES OF ROAD SURFACE**

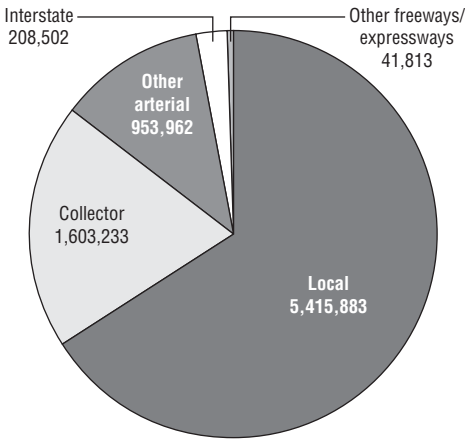


**URBAN VS. RURAL LOCATION OF HIGHWAY**
**NUMBER OF MILES OF ROAD SURFACE**

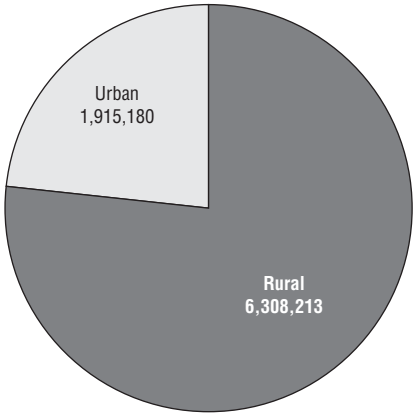


SOURCE: U.S. Department of Transportation, Federal Highway Administration, *Highway Statistics*, 2000.

travel on highways. The law is often embodied in statutes or government regulations and is regarded as being so well-known that there is a legal presumption that everyone knows it. Highway travelers, therefore, may properly make the assumption that other travelers will observe the law and comply with rules and regulations. When an individual fails to observe the law of the road without justification, he or she will be held liable for injuries precipitated by the NEGLIGENCE. A violation of a particular rule of the road may be justified by special circumstance.

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CROSS-REFERENCES

Automobiles; National Transportation Safety Board.

## HIJACKING

*The seizure of a commercial vehicle—airplane, ship, or truck—by force or threat of force.*

*Hijacking* is the modern term for "piracy." It is derived from the phrase "High, Jack!" which is a command to raise one's hands before being robbed. The word gained popular currency during PROHIBITION (1920–33), when bootleggers commandeered truckloads of liquor from each other, and reappeared when political activists began to seize commercial airplanes in the 1960s.

### Airplane Hijacking

The first U.S. airplane hijacking occurred in 1961. The number of such incidents, also known as skyjackings or air piracies, grew during the 1960s, with 40 attempts made in 1969. Many of the early hijacking incidents involved persons seeking to divert airplanes to Cuba, where they could gain ASYLUM. These hijackings became so numerous that the phrase "Take me to Havana" entered popular culture.

In 1973, the United States and Cuba were able to reach an agreement that allows either country to request the EXTRADITION of a hijacker. The agreement came about through an exchange of diplomatic notes. It was in Cuba's interest to make the agreement because many Cubans had hijacked planes from Cuba and forced them to fly to the United States. The agreement allows either country to take into account extenuating circumstances when the hijackers acted "for strictly political reasons and were in real and imminent danger of death without a viable alternative, provided there was no financial EXTORTION or physical injury" to crew, passengers, or other persons (12 *I.L.M.* 370–76, No. 2 [March 1973]).

In addition to this agreement, the United States, in 1961, made the hijacking of an airplane a federal crime. Under the Aircraft Piracy Act (18 U.S.C.A. § 32), the attempted or successful execution of the following actions is considered hijacking: damaging an aircraft; placing or bringing a destructive device or substance on an aircraft; damaging or interfering with an air navigation facility, or equipment and property used in connection with the operation of an aircraft; committing an act of violence against or otherwise injuring an individual on an aircraft; or making threats or statements that they know are false against or about the safety of an aircraft that is already in flight.

Hijacking has not been confined to the United States and Cuba. In 1970, hijackers seized more than 90 planes around the world. The growth of international TERRORISM, specifically in the Middle East, led to widely publicized hijackings. In these situations hijackers sought the satisfaction of political demands and a platform to air their views. In 1970, members of the Popular Front for the Liberation of Palestine hijacked three airliners and flew two of them to an airstrip in the desert near Amman, Jordan, while blowing up the third in Cairo, Egypt after releasing the passengers and crew. Several days later another plane was hijacked. The hijackers demanded the release of Palestinian prisoners in European prisons and in Israeli jails. When their demands were not met, they removed the passengers from the airliners and destroyed the planes one by one.

Faced with increased numbers of air hijackings, the international community sought to negotiate agreements that would prevent hijackers from finding safe haven. The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft (22 U.S.T. 1641, T.I.A.S. 7192 [effective in the United States in 1971]) deals specifically with the hijacking of aircraft in flight. The 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (24 U.S.T. 564, T.I.A.S. 7570 [effective in the United States in 1973]) addresses attacks on or sabotage of civil aircraft either in flight or on the ground, or destruction of or damage to air navigation facilities when this is likely to endanger the safety of aircraft in flight. Either the state of registration or the state in which the aircraft lands can exercise jurisdiction. The state having the hijackers in custody must prosecute or extradite them. A state may decline to extradite if it considers the offense political, or may prefer not to extradite to a state that imposes the death penalty, but in either of these cases, it is obligated to prosecute the offenders.

The United States passed the Antihijacking Act of 1974 (49 U.S.C.A. § 1301 et seq.) to implement these international conventions. This act seeks to prevent nations from adopting a permissive posture toward illegal activities such as the commandeering of aircraft, by providing penalties for hijackers and for nations that shield or fail to take adequate precautions against hijackers. The act gives the president the power to terminate air service between an offending nation and the United States if the president determines that the offending nation has acted inconsistently with its obligations under the antihijacking conventions. Since the signing of these international conventions in the 1970s, airplane hijacking fell sharply, especially in the United States.

Hijacking, however, reached a new level on September 11, 2001, when terrorists commandeered four commercial airplanes and crashed them into the World Trade Center in New York, the Pentagon in Washington, D.C., and a field in Pennsylvania. The United States was stunned and the definition of hijacking came into serious question. Prior to the attacks, experts generally found that if pilots adhered to the hijackers' demands, violence was less likely to occur. In this case, however, there was no negotiation. In effect, the hijackers proved that planes can be used as missiles, causing mass violence not only to those aboard a plane, but to thousands of others located in or near a target of terrorism. As a result, national security became an immediate priority, and regulations and security measures were quickly implemented in the hopes of preventing similar attacks.

Prior to September 11, airline security fell under the purview of the FEDERAL AVIATION ADMINISTRATION (FAA). After the attacks, Congress passed the Aviation and Transportation Act (Pub. L. No. 107-71; codifed at 49 U.S.C.A. §§ 40101 et. seq.), which among other things transferred this authority from the FAA to the Transportation Security Administration (TSA). One year later, Congress enacted the Homeland Security Act of 2002, Pub. L. No. 107-296 (codified in scattered sections of 6 U.S.C.A.), which included additional provisions for the prevention of hijacking. For example, Title XIV of the

act, known as the Arming Pilots Against Terrorism Act, qualified certain volunteer pilots as federal law enforcement officers in order to protect cockpits in the case of an attempted hijacking.

New approaches to the prevention of airline hijacking led to a tightening of security in U.S. airports. Persons using an airport must now generally show identification several times before boarding a plane. And, because the terrorists in the SEPTEMBER 11 ATTACKS used a common household item (box cutters), many articles that could potentially be used as a weapon are now prohibited or restricted.

### Ship Hijacking

Ship hijacking is rare, but the seizure of the *Achille Lauro* proved that it can happen. The Italian cruise ship was commandeered on October 7, 1985, by four members of a faction of the Palestine Liberation Organization. The hijackers boarded the ship posing as tourists, and waited until the ship was off the Egyptian coast before taking its crew and passengers hostage. They threatened to kill the hostages if Israel did not meet their demand to release 50 Palestinian prisoners. They also threatened to blow up the ship if anyone attempted a rescue mission. When the hijackers' demands were not met the next day, they shot and killed Leon Klinghoffer, a U.S. citizen who was partially paralyzed and used a wheelchair. They dumped Klinghoffer's body in the sea.

Denied access to a Syrian port, the hijackers sailed to Alexandria, where they surrendered to Egyptian authorities. The hijackers were allowed to leave Egypt for Italy to stand trial, where they were convicted for violating an Italian statute that made terrorist KIDNAPPING illegal. The hijacker who confessed to killing Klinghoffer was sentenced to 30 years in prison.

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## ♦ HILL, ANITA FAYE

A little-known law professor testifying before a U.S. Senate committee in 1991 became a cause célèbre when she accused a respected U.S. Supreme Court nominee of SEXUAL HARASSMENT. Anita Faye Hill became a household name during the televised confirmation hearings of U.S. Supreme Court candidate CLARENCE THOMAS, the second African American in U.S. history to be tapped for the High Court. Hill, who is also African American, was calm and articulate as she withstood an intense grilling by the all-male, all-white SENATE JUDICIARY COMMITTEE. Despite skepticism and open hostility from some of the senators, Hill stood firm on her account of sexually explicit remarks and behavior by Thomas, her former boss. Conservatives reviled Hill, feminists revered her—and by the end of the hearings, U.S. citizens of all political persuasions had a keener awareness of the problem of sexual harassment in the workplace.

Nothing in Hill's background prepared her for the unremitting media attention she received during and after the Thomas confirmation hearings. The youngest of Albert Hill and Erma Hill's 13 children, she was an extremely private person. Hill was born July 30, 1956, and raised on a struggling family farm near Morris, Oklahoma. Her religious parents emphasized the importance of hard work, strong moral values, and education. Intelligent and disciplined, Hill was valedictorian of her high school class and an honor student at Oklahoma State University, in Stillwater, where she graduated in 1977 with a degree in psychology. After college, Hill attended Yale University Law School on a scholarship from the National Association for the Advancement of Colored People (NAACP).

Hill graduated from law school with honors in 1980, and worked briefly for the Washington, D.C., law firm of Wald, Harkrader, & Ross. In 1981, she left private practice to become special counsel to the assistant secretary in the U.S. Department of Education's Office of Civil Rights. The assistant secretary was Thomas. It was during this time that Thomas asked her out and, according to Hill, sexually harassed her. In 1982, Thomas was appointed chair of the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC), and Hill moved to the EEOC with her boss in what she felt was a necessary career step.

In 1983, Hill decided to leave Washington, D.C., to became a law professor at Oral Roberts University. In 1986, she accepted a teaching position at the University of Oklahoma. Although full professorship and tenure are normally granted at Oklahoma after six years, Hill achieved both in just four years.

"WE NEED TO TURN THE QUESTION AROUND TO LOOK AT THE HARASSER, NOT THE TARGET. WE NEED TO BE SURE THAT WE CAN GO OUT AND LOOK AT ANYONE WHO IS A VICTIM OF HARASSMENT . . . AND SAY, 'YOU DO NOT HAVE TO REMAIN SILENT ANYMORE.'"
—ANITA HILL

Hill's transformation from legal scholar to feminist icon came about after Thomas was offered the career opportunity of a lifetime. President GEORGE H. W. BUSH nominated Thomas, then a federal appeals court judge, to fill an opening on the U.S. Supreme Court. During the mandatory Senate investigation of Thomas, Hill disclosed in private sessions the alleged incidents of sexual harassment by Thomas. Reports of Hill's private testimony were leaked to a National Public Radio reporter. When Hill's allegations became public, they stood as a potential roadblock to Thomas's confirmation.

During a live broadcast of the Senate hearings, Hill's personal motives, character, and politics were scrutinized relentlessly. Both Hill and Thomas brought in witnesses to support their separate versions of events. Thomas angrily denied Hill's charges and accused the senators of conducting a media circus and a "high tech lynching." Hill stood by her story, despite the accusations of some senators who suggested that she was delusional. Her testimony was detailed and graphic. In a clear, dispassionate manner, she described Thomas's alleged interest in pornographic films and bragging comments about his sexual performance. She steadfastly denied that she was lying or prone to fantasies.

Despite Hill's damaging testimony, Thomas weathered the hearings and received Senate confirmation by a narrow margin on October 15, 1991. Hill returned to the University of Oklahoma Law School and tried to resume her quiet private life.

Immediately after the Hill-Thomas hearings, only 24 percent of the registered voters who responded to a *Wall Street Journal*–NBC News poll indicated that they believed Hill; 40 percent thought Thomas was telling the truth. Just one year after Thomas's confirmation, public opinion had changed. In a 1992 *Wall Street Journal*–NBC News poll, 44 percent of the people interviewed sided with Hill and 34 percent believed Thomas. One possible explanation for this shift in loyalties was the nation's year-long posthearing examination of the nature and effects of sexual harassment. Perhaps as more people became aware of the problem and more women revealed their own encounters with sexual harassment, Hill's credibility increased.

To some, the Hill-Thomas hearings illustrated the almost insurmountable difficulty in bringing a sexual harassment claim; to others, they showed how vulnerable men are to false accusations by women with ulterior motives. Although some women were discouraged after witnessing Hill's treatment by the Senate panel, others found the courage to file their own sexual harassment complaints after watching Hill's example.

Hill left the University of Oklahoma in 1996. She served as a visiting professor at the University of California's Institute for the Study of Social Change before accepting a position as a professor at Brandeis University's Heller School for Social Policy and Management. She has published extensively in the areas of international COMMERCIAL LAW, BANKRUPTCY, and civil rights, and has engaged in a number of speaking engagements and other presentations. Hill also has offered commentary in such publications as *Newsweek*, *The New York Times*, and *The Boston Globe.* In 1997, she authored *Speaking Truth to Power,* in which she recounts her experiences as a witness in the confirmation hearing for Clarence Thomas.

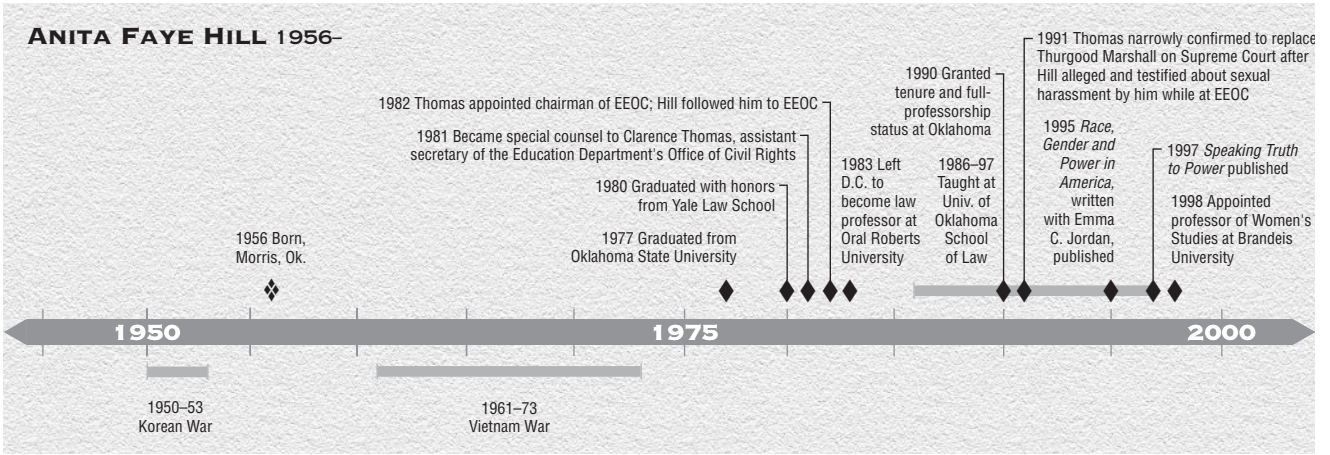

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## ♦ HILL, OLIVER WHITE, SR.

Oliver W. Hill is an African–American attorney who was instrumental in the CIVIL RIGHTS struggles of the 1950s and 1960s.

Oliver White Hill Sr. was born May 1, 1907, in Richmond, Virginia. He received his bachelor of art degree from Howard University in 1931, then continued at Howard and received his doctor of JURISPRUDENCE degree in 1933. The following year, he opened a law practice in Roanoke, Virginia, which he later moved to Richmond. He became active in such organizations as the National Association for the Advancement of Colored People (NAACP) and the Urban League as well as the local faction of the DEMOCRATIC PARTY. Hill served a two-year stint in the military from 1943 to 1945, then returned to private practice.

In August 1947, Hill ran for the Virginia House of Delegates. He lost that election by a mere 190 votes, missing an opportunity to become the first African American to occupy a seat in Virginia's general assembly since 1890. He returned to politics the following year, and on June 10, 1948, he was elected to a seat on Richmond's city council. With that victory, he became the first African American elected to office in Richmond since Reconstruction.

Hill's election was significant because at least two thousand of the nine thousand voters who backed him were white. Such racial crossover voting was unprecedented at the time, but Hill had made an effort to appeal to voters from all races. He shrewdly realized that many whites, some motivated by moral conviction and others by simple pragmatism, understood that change was imminent in the South. The treatment of African–American soldiers during WORLD WAR II had forced harsh scrutiny on a system that was coming to an end. "There is rising in the South a large body of white citizens who recognize the importance of extending constitutional guarantees to Negroes in order to strengthen their own economic and political security," he said.

During his stint on the Richmond council, Hill was voted the second-most-effective member of the nine-member body. But his triumph was short-lived: in 1950, he lost his bid for reelection. Later, he was a popular contender for appointment to a vacancy on the council, but because of his uncompromising position on civil rights, he was denied the appointment. African–American leaders in Richmond were angered by the rejection, and much of the racial tension that had characterized Richmond before Hill's 1948 victory was rekindled.

Hill returned to his law practice and joined the ranks of the pioneers in the fight for civil rights. During a career that has spanned six decades, he has been involved in many of the landmark cases that secured constitutional rights for minorities in housing, education, and employment. As a member of the Richmond Democratic Committee, he worked diligently to secure minority VOTING RIGHTS and to encourage involvement in political activity. From 1940 to 1961, Hill served as chairman of the Virginia Legal Commission of the NAACP and participated in such celebrated legal battles as BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), abolishing segregated public schools, and *Quarles v. Philip Morris,* 279 F. Supp. 505 (ED. Va.), a 1968 case establishing the right of minorities to equal employment opportunities. In August 1955, because of his participation in *Brown,* a fiery

"I DECIDED TO GO TO LAW SCHOOL TO SEE WHAT I COULD DO ABOUT TRYING TO GET THE SUPREME COURT TO CHANGE ITS MIND."
—OLIVER W. HILL

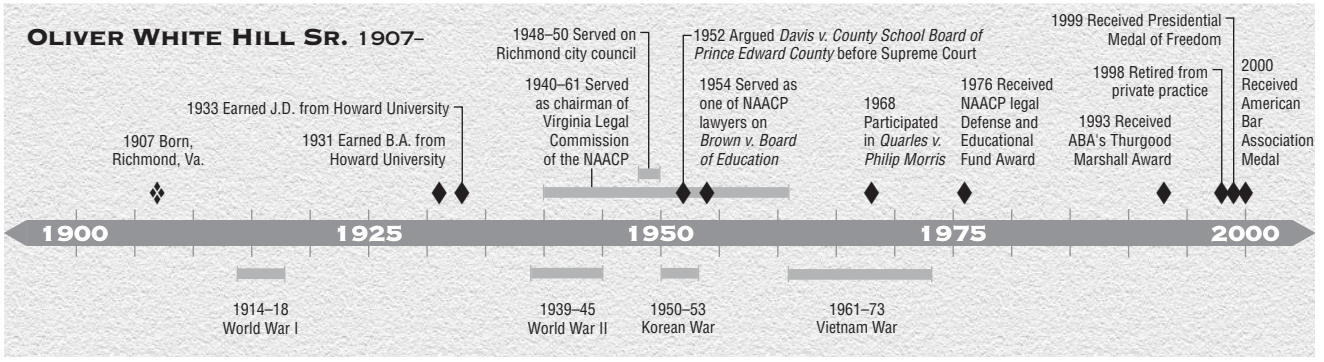

cross, the symbol of the KU KLUX KLAN, was burned on the front lawn of his home.

In 1952, President HARRY S. TRUMAN named Hill to the Committee on Government Contract Compliance. This organization was charged with policing the enforcement of federal contract clauses barring racial or religious discrimination in employment. Hill also served, under President JOHN F. KENNEDY, as assistant to the commissioner of the Federal Housing Administration. He returned to his law practice after Kennedy's death.

Hill has received numerous awards and recognitions during his long and distinguished career, including the Howard University Alumni Award (1950), National Bar Association Lawyer of the Year Award (1959), Washington Bar Association Charles H. Houston Medallion of Merit (1976), NAACP Legal Defense and Educational Fund Award (1976), NAACP William Ming Advocacy Award (1980), National Council of Christians and Jews Brotherhood Citation (1982), American Bar Association's Thurgood Marshall Award (1993), and Urban League of Richmond Lifetime Achievement Award (1994).

In 1999, Hill received the highest civilian award awarded in the United States, the Presidential Medal of Freedom. President BILL CLINTON said of Hill, "Throughout his long and rich life, he has challenged the laws of our land and the conscience of our country. He has stood up for equal pay, better schools, fair housing—for everything that is necessary to make America truly, one, indivisible and equal."

Hill retired from the full-time PRACTICE OF LAW in 1998, at the age of 91. In an interview with *Virginia Lawyer* in 1998, he said, "Most of the time you get your satisfaction when you find that people need your help and you voluntarily help them. We never turned down any cases. Even when we were supposed to get paid, and sometimes we didn't."

Hill and his late wife, Beresenia A. Walker Hill, have one son, Oliver W. Hill Jr., and three grandchildren.

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Hirohito was the emperor of Japan from 1926 to 1989. His reign encompassed a period of Japanese militarism that resulted in Japan's participation in WORLD WAR II, the United States' dropping of atomic bombs on Hiroshima and Nagasaki, and the United States' military occupation of Japan following Japan's defeat. After World War II, Hirohito's authority changed, and he was reduced to a ceremonial figure.

*Hirohito, emperor of Japan from 1926 to 1989, in his coronation robes.*

Hirohito was born in Tokyo on April 29, 1901, and was educated in Japan. He became emperor on December 25, 1926, at a time when Japanese parliamentary government suggested that democracy and international cooperation would continue to grow. However, forces within the military sought to dominate the government and embark on a course of expansionism within Asia. Though he had private misgivings about the rise of militarism, Hirohito took no action to stop the generals. His advisers were concerned that imperial opposition would lead to the military overthrow of the monarchy.

As the 124th direct descendant of Japan's first emperor, Jimmu, Hirohito was considered sacred and was referred to as Tenno Heika, meaning "son of heaven." Because Hirohito was unwilling to exercise his divine authority against the military, the Japanese army invaded China in 1937

and in 1940 joined in a military alliance with the Axis powers. The alliance led to Japan's participation in World War II and its attack on Pearl Harbor and the United States on December 7, 1941.

The attack on the United States led to severe consequences for Japanese Americans. On February 19, 1942, President FRANKLIN D. ROOSEVELT issued EXECUTIVE ORDER No. 9066, forcing the relocation of all 112,000 Japanese Americans living on the West Coast (including 70,000 U.S. citizens) to detention camps in places such as Jerome, Arkansas, and Heart Mountain, Wyoming. Roosevelt issued the order after U.S. military leaders, worried about a Japanese invasion, argued that national security required such drastic action.

The U.S. Supreme Court upheld the forced relocation in KOREMATSU V. UNITED STATES, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944). Justice HUGO L. BLACK noted that curtailing the rights of a single racial group is constitutionally suspect, but in this case military necessity justified the exclusion of Japanese Americans from the West Coast. In retrospect historians have characterized the removal and detention as the most drastic invasion of individual CIVIL RIGHTS by the government in U.S. history.

Hirohito gradually became more open, within the inner circles of government, about his desire to end the war, especially after the United States inflicted numerous military defeats on Japan. But many members of the military wished to fight until the very end. With the United States' dropping of atomic bombs on Hiroshima and Nagasaki in August 1945, Hirohito pushed for the surrender of Japan. On August 15 he broadcast Japan's surrender to the Allied forces. He broadcast to the Japanese people additional messages that were credited for the smooth transfer of power from Japan to the U.S. military occupation force, under the leadership of General Douglas MacArthur.

Although Hirohito was implicated in Japanese war plans, he was exonerated in the WAR CRIMES trials of 1946–48. He had changed the importance of the monarchy in 1946, when he publicly renounced his divine authority. The 1947 constitution that was written for Japan by MacArthur and his advisers had transformed Hirohito from a sovereign with supreme authority into a "symbol of the state," and placed control of the government in the hands of elected officials. Hirohito had endorsed the change, which reduced the emperor to a ceremonial figure.

Hirohito embraced the ceremonial role. He traveled widely and became more accessible. He also pursued his interest in marine biology. He died on January 7, 1989.

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## HISS, ALGER

For the United States, the prosecution of Alger Hiss was a pivotal domestic event of the COLD WAR. A former high-ranking federal official with a seemingly impeccable reputation, Hiss was accused in 1948 of having spied for the Soviet Union. The charges shocked the nation. Not only had Hiss held government positions of extreme importance, but he was also one of the architects of postwar international relations, having helped establish the UNITED NATIONS. He steadfastly maintained his innocence in hearings before the House Un-American Activities Committee (HUAC). But a relentless probe by the committee's lead investigator, Representative RICHARD M. NIXON, of California, led to a GRAND JURY investigation. In 1950, Hiss was convicted of two counts of perjury, for which he served forty-four months in prison. His case became a cause célèbre for liberals, who regarded him as a victim of the era's anti-Communist hysteria. It also fueled a passion for anti-Communist investigations and legislation that preoccupied Congress for the next several years.

Before coming under suspicion, Hiss had a meteoric rise in public service. A Harvard graduate in 1929, the INTERNATIONAL LAW specialist served in the Departments of Agriculture and Justice from 1933 to 1936. He then moved to the STATE DEPARTMENT, where he assumed the post of counselor at global conferences during WORLD WAR II. In 1945, Hiss advised President FRANKLIN D. ROOSEVELT at the Yalta Conference, at which the Allied powers planned the end of the war. He was forty-one years old. Next came a leading role in the establishment of the United Nations, appointment to the administration of the U.S. Office of Special Political Affairs, and, in 1946, election to the presidency of the Carnegie Endowment for International Peace. As a statesman, Hiss had proved himself in no

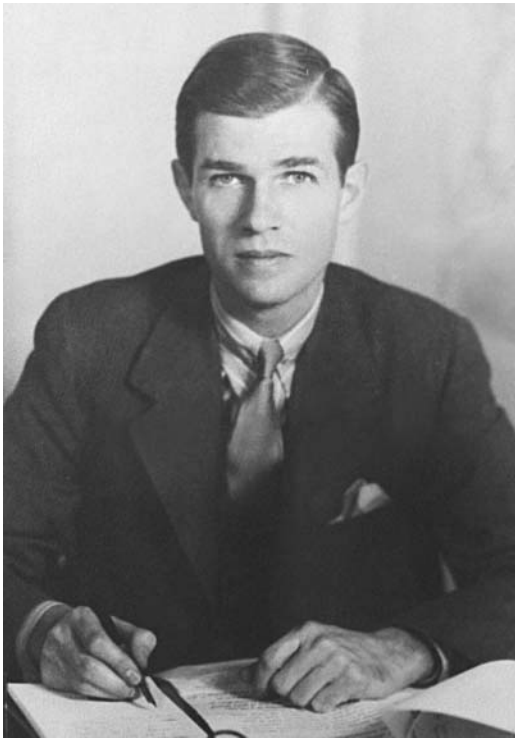

*In 1948 Alger Hiss was accused of spying on behalf of the Soviet Union. He was convicted in 1950 and sentenced to five years in prison.*
LIBRARY OF CONGRESS

small way; his career had earned him the highest confidence of his government in times of crisis.

But soon Hiss was swept up in a round of damaging public accusations. By the late 1940s, the U.S. House of Representatives had spent several years investigating Communist influence in business and government. This was the work of HUAC, first established in 1938 and increasingly busy in the years of suspicion that followed World War II. In August 1948, HUAC heard testimony from Whittaker Chambers, an editor at *Time* magazine, who had previously admitted to spying for the Soviet Union. Now Chambers fingered Hiss. He charged that Hiss had secretly been a Communist party member in the 1930s, and most dramatically, he accused Hiss of giving him confidential State Department documents to deliver to the Soviets in 1938.

Accusations of Communist affiliation were common at HUAC hearings—in a sense, they were its chief business. The process of naming names was triggered by the committee's threat of legal action against witnesses who did not cooperate. But even by HUAC's standards, the accusations against Hiss were spectacular. Furthermore, Chambers had evidence. He offered the committee microfilm of the confidential documents, which he claimed had been prepared on Hiss's own typewriter. The charges particularly excited committee member Nixon, a California freshman, who used them to establish his credentials as a tough anti-Communist. In a highly publicized event, Chambers took Nixon to his Maryland farm, where the microfilm was hidden in a hollow pumpkin. Hiss was soon called before HUAC to be grilled by Nixon. He denied Chambers's accusations and dramatically questioned Chambers himself in a vain attempt to clear his name.

A grand jury was impaneled and held hearings in December 1948. Because of the STATUTE OF LIMITATIONS, Hiss could not be tried on charges of ESPIONAGE in 1948 for allegedly passing documents to the Soviets in 1938. But the grand jury returned a two-count indictment of perjury: it charged that he had lied about giving Chambers the official documents in 1938, and when claiming that he had not even seen Chambers after January 1, 1937.

After his first trial in 1948 ended in a hung jury, Hiss was retried in 1950 (*United States v. Hiss,* 88 F. Supp. 559 [S.D.N.Y. 1950]). Hiss's defense hinged on portraying Chambers, the government's primary witness, as unreliable. He claimed that Chambers was a psychopathic personality prone to chronic lying. In what became the seminal ruling of its kind, the court admitted psychiatric evidence for the reason of discrediting the witness. But despite challenging Chambers's credibility, the validity of Chambers's testimony, and the accuracy of other evidence, Hiss was convicted. Sentenced to five years in prison, he served nearly four years. His career in law and public service was ruined. He spent the next two decades working as a salesman while writing books and giving lectures.

The question of Hiss's guilt has divided intellectuals for decades. Hiss always maintained his innocence—in 1957, when he published a memoir, *In the Court of Public Opinion,* and even more in 1975, when, with prominent help, he successfully sued for reinstatement to the bar of Massachusetts (*In re Hiss,* 368 Mass. 447, 333 N.E.2d 429). Since 1975, some wordsmiths have used FEDERAL BUREAU OF INVESTIGATION files to argue in favor of or against Hiss's guilt: notably, author Allan Weinstein in *Perjury* (1978) and editor Edith Tiger in *In Re Alger Hiss* (1979).

The *Hiss* case profoundly affected the politics of its era. It gave impetus to anti-Communist sentiment in Washington, D.C., which led to more hearings before HUAC as well as legisla-

tion such as the McCarran Act (50 U.S.C.A. § 781 et seq.), intended as a crackdown on the American Communist party. The case also helped launch the careers of Nixon and of Senator JOSEPH R. MCCARTHY, of Wisconsin, providing the latter with ammunition for an infamous crusade against alleged Communist infiltration of the federal government.

Hiss died November 15, 1996, in New York City.

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Cold War; Communism; Rosenbergs Trial.

## HITLER, ADOLF

Adolf Hitler ruled Germany as a dictator from 1933 to 1945. Hitler's National Socialist (Nazi) German Workers' party was based on the idea of German racial supremacy and a virulent anti-Semitism. Hitler's regime murdered more than 6 million Jews and others in concentration camps and started WORLD WAR II.

Hitler was born in Braunauam Inn, Austria, on April 20, 1889, the son of a minor government official and a peasant woman. A poor student, Hitler never completed high school. In 1907 he moved to Vienna and tried to make a living as an artist. He was unsuccessful and had to work as a day laborer to support himself. During this period Hitler immersed himself in anti-Jewish and antidemocratic literature. He was also a passionate German nationalist who believed that Austria should be merged with Germany so as to unite the German people.

In 1913 he moved to Munich. He gave up his Austrian citizenship and enlisted in the German army when WORLD WAR I began in 1914. He rose to lance corporal in his infantry regiment, won the Iron Cross, and was wounded in 1917. When Germany admitted defeat and signed the ARMISTICE terminating World War I in November 1918, Hitler was in a hospital, temporarily blinded by a mustard gas attack and suffering from shock. Outraged at the defeat, Hitler blamed Jews and Communists for stabbing the German army in the back.

Other members of the German army felt the same way. After his discharge from the hospital, Hitler was assigned to spy on politically subversive activities in Munich. In 1919 he joined a small nationalist party. The German Workers' party was transformed in 1920 by Hitler into the National Socialist German Workers' party. The Nazis advocated the uniting of all German people into one nation and the repudiation of the Versailles treaty, which the Allies had forced Germany to sign. This treaty imposed large reparations on Germany and restricted the size of its armed forces.

In 1923 the Nazis tried to capitalize on political and economic turmoil in Germany. On November 8 Hitler called for a Nazi revolution. The beer hall *putsch* (revolution), named for its place of origin, failed because Hitler had no military support. When he led two thousand storm troopers in revolt, the police opened fire and killed sixteen people. Hitler was arrested and sentenced to five years in prison for TREASON.

While in prison Hitler wrote *Mein Kampf* (My Struggle), a rambling book that was both an autobiography and a declaration of his political beliefs. He made his intentions plain: If he was to assume control of Germany, he would seek to conquer much of Europe and he would destroy the Jewish race. He rejected democracy and called for a dictatorship that would be able to withstand an assault by COMMUNISM.

Hitler served only nine months in prison, as political pressure forced the Bavarian government to commute his sentence. He was set free in December 1924.

From 1924 to 1928, Hitler and the Nazis had little political success. The Great Depression, which started in late 1929, was the catalyst for Hitler's rise to power. As the economy declined, Hitler railed against the Versailles treaty and a conspiracy of Jews and Communists who were destroying Germany. By 1932 the Nazis had become the strongest party in Germany. On January 30, 1933, Hitler was named chancellor, or prime minister, of Germany.

*Adolf Hitler salutes members of a Nazi youth organization during a gathering in Nuremberg, Germany, in 1938. Hitler ruled Germany as the nation's chancellor from 1933 to 1945.*

AP/WIDE WORLD PHOTOS

Many German leaders believed that Hitler could be controlled by industrialists and the German army. Instead, Hitler quickly moved to make Germany a one-party state and himself the führer (leader). He abolished LABOR UNIONS, imposed government CENSORSHIP, and directed that Nazi propaganda dominate the press and the radio. The gestapo, Hitler's secret police, waged a war of terror on Nazi opponents. Jews were fired from jobs, placed in concentration camps, and driven from Germany. By 1934 Hitler was securely in charge.

The majority of Germans supported Hitler enthusiastically. He restored full employment, rebuilt the German economy, and allowed Germans to escape the feelings of inferiority instilled after World War I.

Hitler broke the Versailles treaty and proceeded with a massive buildup of the German armed forces. In 1936 he reclaimed the Rhineland from French control, and in 1938 he annexed Austria to Germany. Also in 1938 he took over the German areas of Czechoslovakia, and in 1939 he annexed all of that country. When he invaded Poland on September 1, 1939, Great Britain and France declared war on Germany. World War II had begun.

During the early years of Hitler's regime, some prominent U.S. citizens had believed he was a positive force for Germany. As Hitler became more aggressive and war clouds appeared, U.S. isolationists argued against involvement. People such as aviator Charles A. Lindbergh argued for an America First policy.

Concerns about Nazism led in part to the SMITH ACT (54 Stat. 670) in 1940. Nazi sympathizers organized groups such as the Silvershirts and the German-American Bund, raising the specter of subversion. The Smith Act required ALIENS to register with and be fingerprinted by the federal government. More important, it made it illegal not only to conspire to overthrow the government, but to advocate or conspire to advocate to do so. The U.S. Supreme Court upheld the constitutionality of the act in *Dennis v. United States,* 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951).

Hitler's quick and easy conquest of western Europe in 1940 left Great Britain alone. With the Japanese attack on Pearl Harbor on December 7, 1941, the United States and Great Britain became allies in World War II. They were joined by the Soviet Union, which Hitler had invaded in June 1941. In 1942 the war turned against Hitler. North Africa and then Italy were lost to the Allies. In June 1944, the Allies invaded France and were soon nearing Germany. On the eastern front, the Soviet army moved toward Berlin. During these last years of the war, Hitler directed the extermination of Jews and other "undesirables" in concentration camps.

On July 20, 1944, Hitler escaped an assassination attempt. As the military situation crumbled, Hitler realized that defeat was inevitable. While Soviet troops entered Berlin in April 1945, Hitler married his longtime mistress, Eva Braun. On April 30 the two committed suicide. Their bodies were burned by Hitler's aides.

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## HOAR, EBENEZER ROCKWOOD

Ebenezer Rockwood Hoar served as attorney general of the United States from 1869 to 1870 under President ULYSSES S. GRANT.

Hoar was born February 21, 1816, in Concord, Massachusetts. His grandfather, Captain Samuel Hoar, was a Revolutionary War hero. His father, Samuel Hoar, Jr., was a Harvard graduate, a Massachusetts state senator, a U.S. representative—and a lifelong activist in partisan politics. Hoar's father was affiliated with the FEDERALIST PARTY until it disappeared after the WAR OF 1812, was associated with the WHIG PARTY in the 1830s, was an organizer of the Massachusetts Free-Soil party in the 1840s, and joined the REPUBLICAN PARTY toward the end of his life.

Hoar's educational path, professional career, and political interests closely mirrored those of his father. Hoar graduated from Harvard College in 1835 and from Harvard Law School in 1839. He was admitted to the bar in 1840 and he practiced law in Concord and Boston. His father's legal and political connections allowed him to try cases with leading attorneys of his day, including RUFUS CHOATE and DANIEL WEBSTER.

Like his father, Hoar began his political career at the state level. In the early 1840s, he was elected to the Massachusetts state senate. His chance remark that he would rather be a Conscience Whig than a Cotton Whig gave the former name to the antislavery arm of the Whig party. By 1848, he was working with his father to organize the Free-Soil party in Massachusetts. This party emerged in the late 1840s to oppose the extension of SLAVERY in newly acquired western territories and to curb the resulting legislative and electoral power that expansion would bring to southern cotton and tobacco interests.

From 1849 to 1855 Hoar served as a judge of the Massachusetts Court of Common Pleas. In 1859 he was named to the Supreme Judicial Court of Massachusetts. During his early years on the bench, Hoar took a special interest in the skills of the young lawyers who appeared before him. He was known to write to them—or their mentors—critiquing their courtroom appearances. After hearing OLIVER WENDELL HOLMES, JR., for the first time, Hoar wrote to Holmes's father, telling him that Holmes "made a very creditable appearance." Hoar also noted that the young Holmes's argument in the case at hand had been "a little savoring of experimental philosophy."

In March 1869, Hoar was named attorney general of the United States by President Grant. Hoar was popular with the public and thoroughly qualified to serve but he was also independent and outspoken. As attorney general, he severely alienated patronage-seeking senators when he insisted on filling nine new circuit judgeships with competent judges rather than using the positions as opportunities for political paybacks.

When a vacancy on the U.S. Supreme Court occurred shortly after Hoar became attorney general, President Grant offered him the seat. Hoar's formal nomination in December 1869 drew expected opposition from the Senate. Citing Hoar's effort to eliminate government patronage, as well as his opposition to the IMPEACHMENT of President ANDREW JOHNSON, conservative Republican senators were especially vocal in their disapproval.

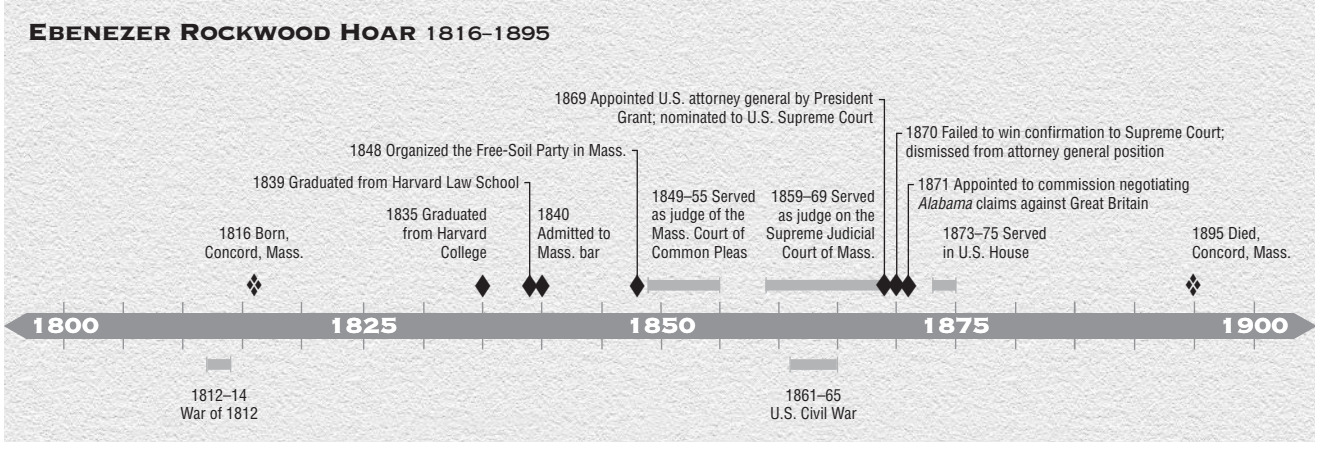

When a second vacancy on the High Court opened while Hoar's nomination was pending, the Senate moved quickly to see that President Grant named a candidate for that vacancy who was more to their liking. Their choice was the late president Abraham Lincoln's secretary of war, EDWIN M. STANTON. In exchange for Grant's nomination and support of Stanton, the Senate agreed to confirm Hoar.

The Senate pushed ahead on Stanton's nomination, confirming him in less than four hours, but Stanton never took his seat on the Court. Just four days after his confirmation, he suffered a fatal heart attack. Meanwhile, the Senate continued to debate Hoar's suitability for the position. "[R]egarding a dead Justice of its choosing to be an insufficient half of a bargain," it rejected Hoar by a vote of 33–24 on February 3, 1870.

The battle between President Grant and the Senate over Hoar's Supreme Court nomination remained a source of antagonism even after the vote. To end the fight and to cultivate Senate support for his other programs, Grant dismissed Hoar as attorney general in July 1870.

Hoar understood the political reasons for Grant's decision and he maintained a cordial relationship with the president. For his part, Grant remembered both Hoar's legal skills and his allegiance. Grant called on Hoar again in 1871 to serve on a joint commission to negotiate the treaty of ARBITRATION that eventually settled the United States' *Alabama* claims against Great Britain.

Following the Civil War, relations between the United States and Great Britain were jeopardized by U.S. claims that England should pay for damages done during the war by the *Alabama* and other Confederate ships—which had been accorded belligerency status by Great Britain. (In INTERNATIONAL LAW, belligerency refers to the status of de facto statehood attributed to a body of insurgents, by which their hostilities are legalized). Hoar served as the Grant administration's liaison with senators who urged a hard-line approach to settling the claims. He was influential in convincing Grant to deny belligerency status to insurgents in Cuba (as Britain had done to the Confederacy), because the action would weaken the U.S. bargaining position with England during the treaty negotiations.

Following his work on the treaty, Hoar returned to his home in Massachusetts. As a Republican candidate, he sought and won a seat in the U.S. House, which he subsequently held from December 1, 1873, to March 3, 1875. His brother, George Frisbie Hoar, was serving as a representative from Massachusetts at the same time, having been elected in 1868.

After leaving office, Hoar continued to be active in local and national Republican politics until his death, on January 31, 1895, in Concord.

## ♦ HOBBES, THOMAS

Sixteenth-century political theorist, philosopher, and scientist THOMAS HOBBES left a stark warning to succeeding generations: strong central authority is the necessary basis for government. In several influential works of legal, political, psychological, and philosophical theory, Hobbes's view of society and its leaders was founded on pessimism. He saw people as weak and selfish, and thus in constant need of the governance that could save them from destruction. These ideas profoundly affected the Federalists during the early formation of U.S. law. The Federalists turned to Hobbes's work for justification for passage of the U.S. Constitution as well as for intellectual support for their own movement in the years following that passage. Today, Hobbes is read not only for his lasting contributions to political-legal theory in general but for the ideas that helped shape U.S. history.

Born on April 5, 1588, in Westport, Wiltshire, England, the son of an Anglican clergyman, Hobbes was a prodigy. By the age of fifteen, he had entered Oxford University; by twenty, he was appointed tutor to a prominent family, a post he would later hold with the Prince of Wales. His considerable output of work began with English translations of FRANCIS BACON and Thucydides while he was in his late thirties. Soon, mathematics interested him, and his travels brought him into contact with some of the greatest minds of his age: Galileo and René Descartes. His writing canvassed many subjects, such as language and science, to arrive at a general theory of people and their leaders. The most influential works of this polymath came in the 1650s: *Leviathan, or the Matter, Form, and Power of a Commonwealth, Ecclesiastical and Civil* (1651), *De Corpore* (1655), and *Questions Concerning Liberty, Necessity, and Chance* (1656). Hobbes died December 4, 1679, at age 91.

Hobbes was a supreme pessimist. To him, people were inherently selfish; they struggled constantly against one another for survival.

"[T]he life of a man," he wrote in his masterwork, *Leviathan,* "is solitary, poor, nasty, brutish and short." Thus, people could not survive on their own in the state of nature. This foundation led him to a theory of the law: only by submitting to the protection of a sovereign power could individuals avoid constant ANARCHY and war. The sovereign's authority would have to be absolute. Law derived from this authority rather than from objective truth, which he argued did not exist. All citizens of the state were morally bound to follow the sovereign's authority; otherwise, law could not function. Hobbes chose the leviathan (a large sea animal) to represent the state, and he maintained that like a whale, the state could only be guided by one intelligence: its sovereign's.

The influence of Hobbes's ideas varied dramatically over the seventeenth and eighteenth centuries. English politicians and clerics derided him as a heretic. But his theories eventually lent support to loyalists who wanted to preserve the Crown's control over the American colonies: Thomas Hutchinson, the last royal governor of Massachusetts, viewed the upstart challengers to royal authority in a Hobbesian light. Later, Hobbes proved useful to the other side: after the American Revolution, his ideas influenced the Federalists in their arguments for adoption of the federal Constitution in 1787. Embracing Hobbes's pessimism, the Federalists saw the American people as unable to survive as a nation without a strong central government that would protect them from foreign powers.

Hobbes is still taught, and scholars continue to discuss contemporary legal issues in the light of his critique. Particularly relevant are his insights into the form of law and the interrelationship of law and politics, and his subtle explorations of language and meaning.

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"THE CONDITION OF MAN . . . IS A CONDITION OF WAR OF EVERYONE AGAINST EVERYONE."
—THOMAS HOBBES

## ♦ HOFFA, JAMES RIDDLE

One of the most powerful labor leaders in U.S. history, James Riddle Hoffa ruled with brawn and charisma for 14 years as president of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. From 1957 to 1971, Hoffa bound the loose-knit Teamsters into a cohesive organization that won higher wages and tremendous bargaining power for its members. Loved by his union rank and file, he was thought ruthless, cunning, and corrupt by his enemies, among them law enforcement leaders such as ROBERT F. KENNEDY. Federal investigators pursued Hoffa for several years because of his reputed ties to ORGANIZED CRIME. He dodged conviction until being found guilty in 1964 on unrelated charges of jury tampering and malfeasance in a real estate deal. He began serving a 13-year prison sentence in 1967, which President RICHARD M.

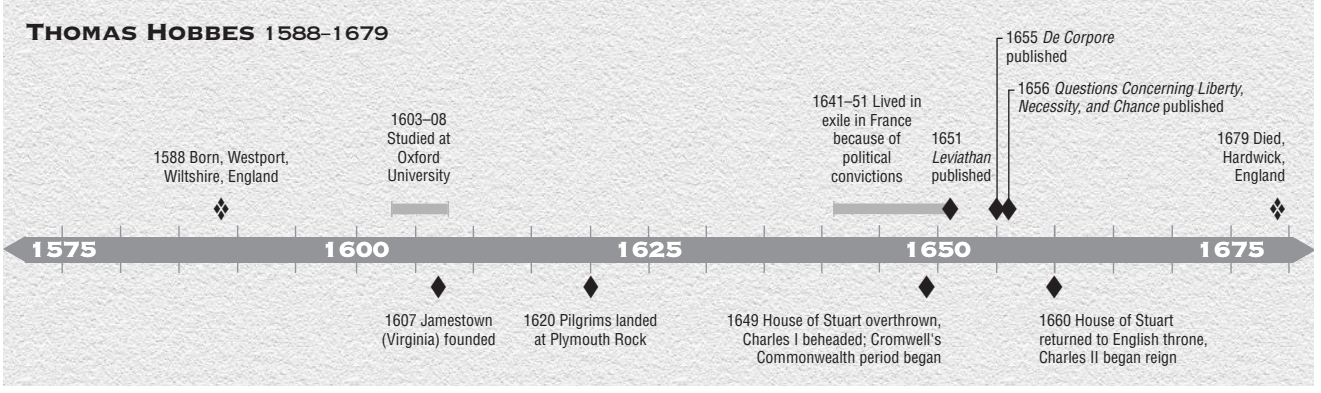

NIXON commuted in late 1971. In 1975, Hoffa disappeared mysteriously.

Hoffa rose from obscure origins to stand in the national spotlight. He was born February 14, 1913, in Brazil, Indiana, where his family lived by modest means. His father, a coal driller, died of an occupational respiratory disease when Hoffa was seven. The second of four children, Hoffa, an athletic, shy B-student, quit school after the ninth grade to work full-time as a stock boy in a department store.

In 1930, while still a teenager, Hoffa became a freight handler in a warehouse of the Kroger Grocery and Baking Company in Clinton, Indiana. Here came a turning point in his life, brought on by what he called a need for self-preservation in the face of meager pay and poor working conditions. The young man soon led the other warehousemen in a successful strike that would become a part of the Hoffa legend: by refusing to unload a shipment of perishable strawberries, they forced the company to accede to their demands. With his prowess as an organizer quickly recognized, Hoffa left the warehouse in 1932 to become a full-time Teamster organizer in Detroit, Michigan. The four coworkers who had helped him carry off the strike at Kroger left with him and remained on his staff throughout his career.

"IN THE OLD DAYS ALL YOU NEEDED WAS A HANDSHAKE. NOWADAYS YOU NEED FORTY LAWYERS."
—JIMMY HOFFA

Hoffa found his new work difficult in the beginning. During the 1930s, opposition to labor organizers was fierce and often violent. Clashes with management strikebreakers and police officers would turn bloody—Hoffa himself was beaten up 24 times, by his count, during his first year alone. Describing this "war" in his 1970 autobiography, *The Trials of Jimmy Hoffa,* he recalled, "Managements didn't want us around . . . and the police, recognizing who the big taxpayers were and responding to orders of politicians who knew quite well where the big contributions came from, seemed not only willing but anxious to shove us around." Tenacity, bullish strength, and a persuasive personal style were traits that helped him not only survive opposition but win new recruits to his side.

In the Depression era, the Teamsters were loosely organized in isolated areas. In 1937, Hoffa joined forces with the Trotskyite leader of the Minneapolis local Teamsters, Farrel Dobbs, a socialist who was successfully unionizing drivers in the Midwest. Hoffa helped Dobbs organize long-haul highway truck drivers under the Central States Drivers Council. However, Hoffa was never above using strong-arm tactics, and later, when it served him, he would help the federal government suppress the Trotskyites.

Whether with management or with rival unions, Hoffa's policy was toughness. By 1941, he was making his first contacts with organized crime figures, as his biographer, Arthur A. Sloane, documented: that year, he enlisted the help of Detroit mobsters—the so-called East Side Crowd—to drive a rival union out of town. Thereafter, dealings with mobsters became regular. Never admitting any illegality, Hoffa nonetheless did not hide these connections. In later years, he claimed, "I'm no different than the banks, no different than the insurance companies, no different than the politicians."

Hoffa ascended to power during the 1940s. He became vice president of the Central States Drivers Council, then president of the Michigan Conference of Teamsters, later an examiner of the Teamster's books, and eventually president of the Teamsters Joint Council 43 in Detroit. In 1952, he was elected an International Teamsters vice president. By 1953, as president of the Cen-

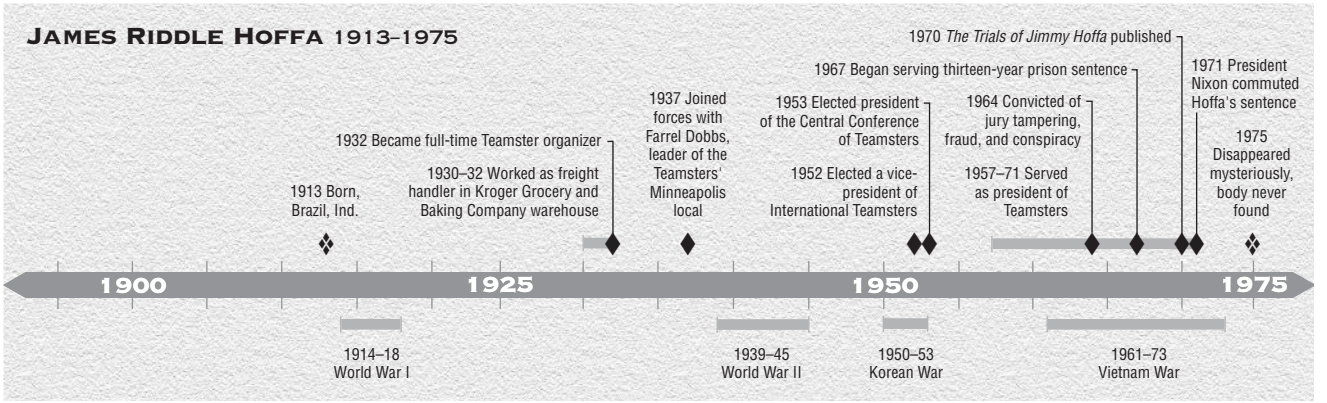

tral Conference of Teamsters, he was the chief negotiator for truck drivers in 20 states. Over the next decade, Hoffa set about centralizing the Teamsters. As his power grew, local union leaders were encouraged to call Hoffa for authorization to hold strikes. The national bargaining unit that he created amassed such clout that it forged the trucking industry's first national contract in January 1964.

Although his gains were resisted by industry leaders, Hoffa won a reputation for being faithful to contracts. Within the Teamsters, the rank and file respected the gains he won for them and regarded him with open affection. At rallies and in interviews, he employed a speaking style more polished than his ninth-grade education might have suggested, gravelly yet authoritative. Frequently referring to himself in the third person, he would often boast, "Hoffa can take care of Hoffa."

But Hoffa was also running into trouble. Prompted by allegations of labor **RACKETEERING**, the U.S. Senate began investigating several unions in January 1957. Nationally televised hearings were conducted by the Senate Select Committee on Improper Activities in the Labor or Management Field—popularly known as the McClellan Committee, after its presiding officer, Senator **JOHN LITTLE MCCLELLAN**. Over two years, the committee uncovered widespread corruption in the Teamsters. Teamster president Dave Beck resigned; he was later convicted of **LARCENY**, **EMBEZZLEMENT**, and income **TAX EVASION**. Hoffa, succeeding Beck as president, faced months of intense questioning by Senator **JOHN F. KENNEDY** and the committee's chief counsel, Robert Kennedy.

The committee alleged that Hoffa had used union funds for his own profit, accepted payoffs from trucking companies, and associated with convicted labor racketeer John Dioguardi. Pressed by the Kennedys during hearings that had an air of open animosity, Hoffa admitted nothing. Just before one of his scheduled appearances, **FEDERAL BUREAU OF INVESTIGATION** (FBI) agents arrested him on charges of trying to bribe a lawyer to leak confidential committee memos to him. Robert Kennedy announced he would jump off the dome of the Capitol building if the union leader was not convicted. When Hoffa was acquitted after a four-month trial, his attorney offered to send Kennedy a parachute.

The McClellan Committee report condemned Hoffa and the Teamsters. One result was the passage of more stringent legislation concerning unions; another was the expulsion of the Teamsters from the **AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS** (AFL-CIO). For Hoffa, the hearings marked the beginning of a feud between himself and Robert Kennedy that would deepen upon the latter's appointment in 1960 as attorney general. Kennedy devoted considerable resources within the U.S. Justice Department to prosecuting Hoffa, whom he described as heading a conspiracy of evil. Despite several indictments, Hoffa escaped conviction until 1964. First, he was convicted of jury tampering and sentenced to eight years in prison. The manner in which the conviction was obtained later brought a rebuke from U.S. Supreme Court chief justice **EARL WARREN**: the U.S. **JUSTICE DEPARTMENT** used a jailed Teamster member to trap Hoffa. At a second 1964 trial, Hoffa received an additional five years for **FRAUD** and conspiracy in the handling of a Teamster benefit fund.

*Jimmy Hoffa.*
AP/WIDE WORLD PHOTOS

In March 1967, with his appeals exhausted, Hoffa began serving his 13-year sentence in Lewisburg Federal Penitentiary, in Pennsylvania. Hoffa refused to relinquish control of the Teamsters. He was denied **PAROLE** three times. Then, in December 1971, President Nixon commuted his sentence on the condition that he refrain from union activities until the year 1980. His

attorneys worked to reverse the limitation, while he campaigned on behalf of prison reform. But he never regained power.

In 1975, Hoffa drove to a suburban Detroit restaurant to meet reputed crime figure Anthony ("Tony Pro") Provenzano. Hoffa's car was found later, but he was never seen again. For several years, the FBI maintained an open file on Hoffa, yet it never solved the mystery. Theories about his disappearance abound, including the belief that Hoffa was buried underneath the goalposts at the Meadowlands football stadium, in New Jersey. In the 1980s, Hoffa's daughter Barbara Ann Crancer, an associate circuit court judge in Missouri, filed a lawsuit to force the FBI to release the records of its investigation of Hoffa's death. She was unsuccessful in her efforts. In 1989, the retiring FBI chief in Detroit, Kenneth P. Walton, told the press that he knew the identity of Hoffa's killer. But Walton said the case would never be prosecuted because doing so would compromise the security of FBI sources and informants.

Hoffa's legacy is still controversial. Critics charged that the script for the 1993 film dramatization of his life, by screenwriter David Mamet, celebrated Hoffa while purposely ignoring the extent of his involvement with crime figures. Also in 1993, the longtime suspicion that Hoffa had been involved in a plot to assassinate President Kennedy generated renewed interest. Frank Ragano, a former mob lawyer, claimed that he personally delivered a message from Hoffa to two mobsters, which read "kill the president." Such speculation has never been substantiated, but another aspect of Hoffa's legacy is beyond doubt. Although he was enormously successful in building the Teamsters, his association with mobsters left a stain on the union that would linger for decades to come. Not until the late 1980s, when the federal government took control of the union's national elections, did the Teamsters begin to emerge from the shadow of organized crime.

In September 2001, *The Detroit News* reported that DNA EVIDENCE placed Hoffa in a car driven by a longtime friend on the day of his disappearance. The investigation was reopened but no further progress was made. In March 2002, the FBI announced that it would no longer continue its efforts to find and prosecute those who had caused Hoffa's disappearance and that the case would be referred to state officials for possible charges.

In 1998, Jimmy Hoffa's son, James Phillip Hoffa, carried on the family tradition when he was elected president of the Teamsters Union. He was sworn in by his sister, Barbara Ann, in May 1999. In 2001, Hoffa was reelected with almost a two-thirds majority vote.

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## ♦ HOFFMAN, WALTER EDWARD

Federal district judge Walter Edward Hoffman "single-handedly cleared a legendary backlog" of cases in the late 1950s by "working around the clock and seven days a week." A firm believer that justice delayed is often justice denied, Hoffman created the "rocket docket" system to move cases through his courtroom more efficiently. Hoffman's workaholic spirit came to characterize his court—and years after his retirement, the Eastern District of Virginia was still one of the fastest and most efficient courts in the United States. (Studies conducted in the 1980s by the ADMINISTRATIVE OFFICE OF THE U.S. COURTS showed that the Eastern District of Virginia consistently beat all other federal jurisdictions in elapsed time between the filing of litigants' papers and the start of a civil trial.) Owing in large part to the timesaving tactics developed by Hoffman, the Eastern District of Virginia, which stretches from Northern Virginia to the North Carolina line and includes Alexandria, Norfolk, and Richmond courts, in 1987 averaged only five months (compared with a national average of fourteen months) from the filing of a case to the start of its trial. The court also maintained one of the lowest reversal rates in the country.

Speed, efficiency, and the ability to juggle a wide variety of tasks simultaneously were lifelong character traits of the man who developed the rocket docket. He was born July 18, 1907, in Jersey City, New Jersey. After completing a bachelor of science degree in economics at the University

of Pennsylvania in 1928, Hoffman attended the Marshall-Wythe School of Law, at the College of William and Mary. He later transferred to Washington and Lee University School of Law, where he received a bachelor of laws degree in 1931.

In 1931, he joined the Norfolk law firm of Rumble and Rumble and also began teaching law on a part-time basis at the College of William and Mary. In 1935, he and a colleague established the law firm of Breeden and Hoffman; their partnership thrived until Hoffman was appointed to the federal bench in 1954. While practicing law, Hoffman continued to teach—and he took an active role in the Norfolk and Portsmouth Bar Association, serving as president in 1948. He also maintained memberships in the Virginia Bar Association and the AMERICAN BAR ASSOCIATION, serving on numerous committees and taking leadership roles when called upon to do so. His committee work brought Hoffman to the attention of the national legal community, and before long, he was considered for a federal judgeship.

Hoffman was named U.S. district judge for the Eastern District of Virginia on September 3, 1954. Soon after his appointment, the issue of SCHOOL DESEGREGATION came to his court. In 1958, he ordered the Norfolk School Board to admit seventeen black students to white secondary schools (*School Board v. Beckett,* 260 F.2d 18 [1958]). The schools were immediately closed under state laws intended to thwart INTEGRATION, and Hoffman became the target of segregationist attacks from around the country. Despite public and private pressure to do otherwise, Hoffman held firm in his order and in his denial of a request by the school to delay admitting the seventeen students until the following year.

In the late 1950s, both the volume of cases on his docket and their volatile nature prompted Hoffman to explore ways of delivering more timely justice in his jurisdiction. He made a personal commitment to clear his own backlog of cases and to put future trials on a tighter schedule. His marathon court sessions to achieve this goal are now judicial legend. As he worked to clear his backlog, Hoffman began to develop courtroom procedures and a philosophy for speeding justice. He also began to seek out professional colleagues with similar concerns. To that end, he volunteered to serve on the U.S. Judicial Conference Advisory Committee on Criminal Rules in 1960.

When Hoffman became chief judge in 1961, he put his theories into practice. On July 31 of that year, he wrote an open letter to attorneys in his jurisdiction: "[W]ith an excess of 750 civil and ADMIRALTY cases pending on the dockets . . . it is apparent that there must be a drastic change in procedure relating to the preparation of cases for trial." The next day, he issued a lengthy order that became the basis for the rocket docket system—an order that has sped up justice in Virginia ever since.

The foundation of Hoffman's system was setting firm trial dates and keeping them. Hearings and trials were scheduled early; and pretrial investigation was limited, as were the number of character and expert witnesses at trial. Stipulations were encouraged so that time would not be wasted proving facts that all parties agreed to accept. And Hoffman made it clear to all parties that delaying tactics would not be tolerated in his court. "We decided we didn't want to miss a single trial date," he recalled in 1987, "and we still don't."

Hoffman felt that delays are costly because "lawyers are less keen, witnesses are harder to locate, and every type of confusion and slip-up is more likely." Critics of Hoffman's approach

"FOR MANY, DEFENDANTS AS WELL AS PLAINTIFFS, JUSTICE DELAYED MAY BE JUSTICE DENIED OR JUSTICE MITIGATED IN QUALITY."
—WALTER HOFFMAN

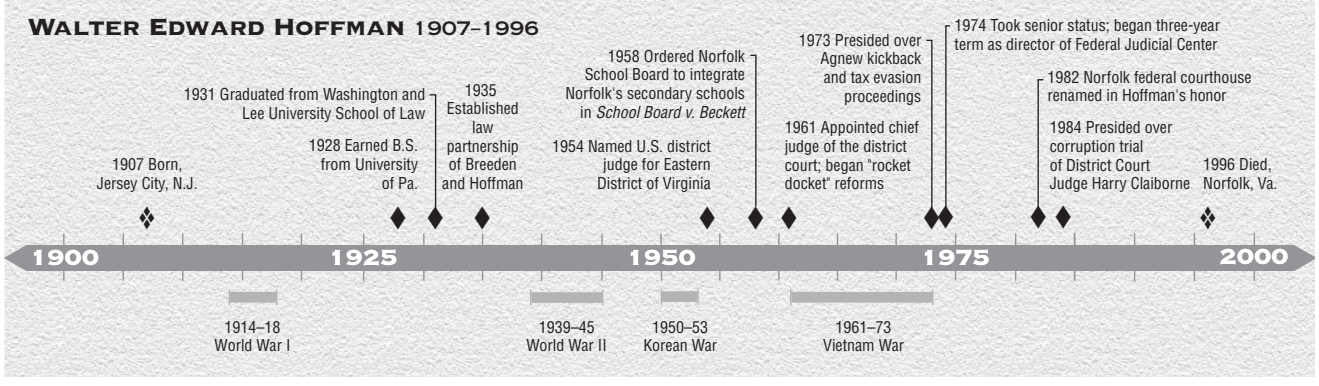

said that the pace of litigation in his court favored large law firms and businesses with access to vast legal resources, and that too often his system allowed little time to negotiate a settlement before trial. But the vast majority of litigators in Hoffman's jurisdiction praised his methods. In 1968, the Virginia Trial Lawyers Association presented him with its annual award, for his contributions to the advancement of justice in Virginia.

Although speedy justice was important to Hoffman, he also recognized that the quality of justice ultimately rested on the quality of judges and of judicial education. Perhaps for this reason, he joined the Board of Directors of the FEDERAL JUDICIAL CENTER in 1972, and served as director of the center from 1974 to 1977. As director, he was responsible for the development and delivery of seminars instructing new judges on both law and administrative issues. Hoffman took a central role in many of the seminars, drawing on his experience to lead discussions and alert attendees to the difficulties encountered, and errors made, by inexperienced judges.

Hoffman took senior (or semiretired) status in 1974. As a senior judge, he accepted assignments to district and circuit courts throughout the federal system. In his capacity as senior judge, he was involved in a number of high-profile cases, including the criminal prosecutions of former vice president Spiro T. Agnew for TAX EVASION, former U.S. district judge Harry E. Claiborne for tax evasion, former Charleston mayor Mike Roark for cocaine possession and OBSTRUCTION OF JUSTICE, and former West Virginia governor Arch A. Moore, Jr., for EXTORTION, MAIL FRAUD, tax fraud, and obstruction of justice.

Even at senior status, Hoffman often heard more cases than many of his younger colleagues. "He's regarded as one of the premier federal trial judges in the United States," said U.S. district judge John T. Copenhaver, Jr., at one of the many award ceremonies acknowledging Hoffman's lifelong contributions to the bench. In 1976, the American Judicature Society presented Hoffman with the Herbert Harley Award for aiding the effective administration of justice throughout the United States.

In 1977, the U.S. Judicial Conference passed a resolution commending Hoffman's past services to the judiciary, with special emphasis on his services as director of the Federal Judicial Center. Also in 1977, Hoffman began a fifteen-year tenure on the TEMPORARY EMERGENCY COURT OF APPEALS, and he returned to the College of William and Mary as a visiting professor. In 1982, the U.S. Senate voted to rename the federal courthouse in Norfolk in his honor. Hoffman responded by saying he doubted "that a single United States senator knew what he was voting for" that day.

In 1984, Hoffman became the second recipient of the Devitt Distinguished Service to Justice Award, which is administered by the American Judicature Society. This award—named for Edward J. Devitt, former chief U.S. district judge for Minnesota—acknowledges the dedication and contributions to justice made by all federal judges, by recognizing the specific achievements of one judge who has contributed significantly to the profession. Hoffman was acknowledged for improving the quality of justice through efficient JUDICIAL ADMINISTRATION.

In his late eighties, Hoffman had slowed his pace, but he continued to hear some cases in the nation's federal courts. Hoffman died November 21, 1996, in Norfolk, Virginia. He was married to Helen Caulfield Hoffman and was the father of two children.

FURTHER READINGS

*Almanac of the Federal Judiciary.*

## HOLD HARMLESS AGREEMENT

*An agreement or contract in which one party agrees to hold the other free from the responsibility for any liability or damage that might arise out of the transaction involved.*

For example, a company might agree in an employee's contract to pay the judgment if the person is successfully sued for injuries sustained by a plaintiff if the employee is acting within the scope of his or her authority on company time.

In certain cases, particular parties may not, however, be exempted from liability. For example, a provision exempting a common carrier from all liability for loss would ordinarily be void, as against public policy.

Hold harmless agreements are ordinarily contained in leases and EASEMENTS.

## HOLD OVER

*To continue in possession of an office and exercise the functions associated therewith following the expiration of the term thereof. To retain possession as a tenant of real property following the termination of the lease or tenancy at will.*

A *hold over tenant* is also known as a *tenant at sufferance,* since the tenant has no estate or title to the property but only possession thereof.

## HOLDER

*An individual who has lawfully received possession of a* COMMERCIAL PAPER*, such as a check, and who is entitled to payment on such instrument.*

A holder is distinguishable from a holder in due course since, in addition to possession of the instrument, the latter takes it for value, in GOOD FAITH, and in the absence of any notice that there is any claim against it or that it is overdue or has been dishonored, which means that payment of it has been refused.

## HOLDER IN DUE COURSE

*An individual who takes a* COMMERCIAL PAPER *for value, in* GOOD FAITH*, with the belief that it is valid, with no knowledge of any defects.*

The UNIFORM COMMERCIAL CODE (UCC) defines a holder in due course as one who takes an instrument for value in good faith absent any notice that it is overdue, has been dishonored, or is subject to any defense against it or claim to it by any other person.

## HOLDING

*A comprehensive term applied to the property, whether real, personal, or both, owned by an individual or a business. The legal principle derived from a judicial decision. That part of the written opinion of a court in which the law is specifically applied to the facts of the instant controversy. It is relied upon when courts use the case as an established precedent in a subsequent case.*

A holding is distinguishable from dicta, which is language in the opinion relating some observation or example that may be illustrative, but which is not part of the court's judgment in the case.

## HOLDING COMPANY

*A corporation that limits its business to the ownership of stock in and the supervision of management of other corporations.*

A holding company is organized specifically to hold the stock of other companies and ordinarily owns such a dominant interest in the other company or companies that it can dictate policy. Holding companies must comply with the federal ANTITRUST LAWS that proscribe the secret and total acquisition of the stock of one corporation by another, since this would lessen competition and create a MONOPOLY.

## HOLIDAY

*A day of recreation; a consecrated day; a day set apart for the suspension of business.*

A *legal holiday* is a day set aside by statute for recreation, the cessation of work, or religious observance. It is a day that is legally designated as exempt from the conduct of all judicial proceedings, SERVICE OF PROCESS, and the demand and protest of COMMERCIAL PAPER. A prohibition against conducting public business transactions on holidays does not, however, have an effect upon private business. Private transactions will not, therefore, be invalidated solely because they are conducted on a holiday.

## ♦ HOLMES, OLIVER WENDELL, JR.

Oliver Wendell Holmes Jr. was a justice of the U.S. Supreme Court and legal philosopher who has become a celebrated legal figure. His writings on JURISPRUDENCE have shaped discussions on the nature of law, and his court opinions have been studied as much for their style as for their intellectual content. Though Holmes has been widely praised, he does have critics who contend that he paid too much deference to the power of the state to control individual freedom.

Holmes was born March 8, 1841, in Boston. His father, Oliver Wendell Holmes Sr., was a well-known physician, a lecturer at Harvard Medical School, an author who was widely read in England and the United States, and a founder of the *Atlantic Monthly.* Holmes attended private school and then Harvard College, graduating in 1861. With the outbreak of the Civil War in 1861, Holmes enlisted as an officer in the Twentieth Massachusetts Volunteer Infantry.

His military service was difficult. Holmes was wounded three times, twice almost fatally, and suffered from dysentery. In 1863 he accepted a position as an aide to a Union general, and he served in that capacity until 1864. He resigned his commission before the end of the war and returned, exhausted, to Boston, where he began preparations for a legal career.

He attended Harvard Law School and graduated in 1866. He was admitted to the

Massachusetts bar in 1867. Because of inherited wealth Holmes had the financial luxury of pursuing his intellectual interests. He edited the twelfth edition of jurist James Kent's *Commentaries on American Law* (1873) and wrote many articles for the *American Law Review.* Following his marriage to Fanny Dixwell in 1873, Holmes joined a prominent Boston law firm, where he practiced COMMERCIAL LAW.

Holmes did not abandon his inquiries into the nature of law. He was invited to Boston to present a series of lectures on the law, which were published in 1881 as *The Common Law.* This volume is the most renowned work of legal philosophy in U.S. history. It allowed Holmes systematically to analyze, classify, and explain various aspects of U.S. COMMON LAW, ranging from TORTS to contracts to crime and punishment.

In *The Common Law,* Holmes traced the origins of the common law to ancient societies where liability was based on feelings of revenge and the subjective intentions of a morally blameworthy wrongdoer. For example, Holmes observed that in such societies creditors were permitted to cut up and divide the body of a debtor who had breached the terms of a contract. Advanced societies, Holmes noticed, no longer settle contractual disputes in such a barbaric fashion. These societies have evolved to the point where liability is now premised on objective and external standards that separate moral responsibility from legal obligation, and wholly eliminate concerns regarding the actual guilt of the wrongdoer. Holmes noted that common-law principles require judges and juries to interpret contractual relations from the perspective of an average person with ordinary intelligence, regardless of how a particular agreement may have actually been understood or performed by the parties themselves.

The importance of *The Common Law* rests in its rejection of the idea that law is a logical system and that legal systems obey the rules of logic. In his most famous quotation, Holmes concluded,

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Holmes's jurisprudence led to the conclusion that judges first make decisions and then come up with reasons to explain them. His approach, which has been characterized as cynical, touched a nerve with succeeding generations of legal scholars. He had a profound effect on the development of sociological jurisprudence and LEGAL REALISM. Sociological jurisprudence and legal realism were twentieth-century schools of thought that emphasized the need to examine social, economic, and political forces rather than confine the study of law to logic and abstract thought.

Holmes joined the faculty of the Harvard Law School in 1882, then left after one semester to accept an appointment as justice on the Supreme Judicial Court of Massachusetts, the highest tribunal in the state. In 1899 he was appointed chief justice of that court, and he served in that position until 1902, when President THEODORE ROOSEVELT named him to the U.S. Supreme Court.

His service on the Supreme Court gave Holmes the opportunity to apply his philoso-

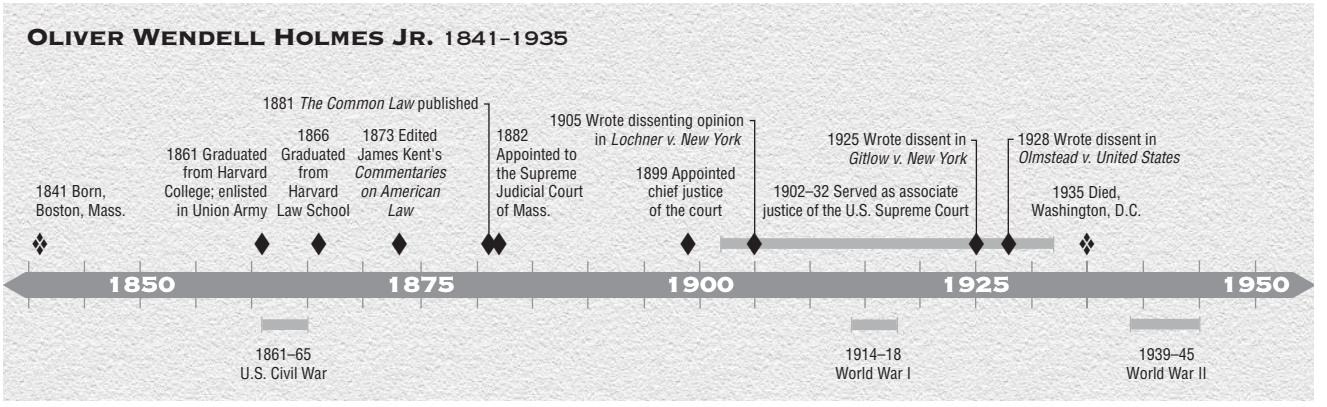

phy. He believed that judges should not impose their private beliefs on law, especially law created by a legislature. When reviewing the constitutionality of legislation, Holmes said a legislature can do whatever it sees fit unless a law it enacts is not justified by any rational interpretation of, or violates an express prohibition of, the Constitution (*Tyson & Brothers United Theatre Ticket Offices v. Banton,* 273 U.S. 418, 47 S. Ct. 426, 71 L. Ed. 718 [1927]). Holmes was skeptical about his ability to determine the "goodness or badness of laws" passed by the legislature, and felt that in most situations he had no choice but to practice judicial restraint and defer to the desires of the popular will.

Holmes's dissenting opinion in **LOCHNER V. NEW YORK**, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), is recognized as his most famous opinion. It is based on the idea of judicial restraint. In *Lochner* Holmes disagreed with the majority, which struck down a New York law that limited the number of hours a baker could work during a week. The majority held that the law violated the "liberty of contract" guaranteed by the **FOURTEENTH AMENDMENT**, which provides that no state is to "deprive any person of life, liberty, or property, without **DUE PROCESS** of law" (§ 1). In his dissent Holmes suggested that the majority had based its decision on its members' personal ideological preference for freedom of contract, and not on the Constitution. He said it was improper to overturn a legislative act simply because the Court embraced an economic theory antagonistic to government work regulations.

But Holmes rarely deferred to the popular will in cases raising free speech questions under the **FIRST AMENDMENT**. If the law must correspond to powerful interests in society, Holmes reasoned, then all facets of society must be given a fair opportunity to compete for influence through the medium of public speech. In **GITLOW V. NEW YORK**, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925), Holmes dissented from a decision upholding the conviction of a man who had been arrested for violating the New York Criminal Anarchy Law (N.Y. Penal Law §§ 160, 161 [ch. 88, McKinney 1909; ch. 40, Consol. 1909]) by advocating the establishment of a socialist government. In his dissent he argued for "the free trade in ideas" as the best way of testing the truth of particular beliefs. He stated that **FREEDOM OF SPEECH** must be permitted unless it is intended "to produce a clear and imminent danger." This "clear-and-imminent-danger" test for subversive advocacy was first labeled by Holmes as the "clear-and-present-danger" test in **SCHENCK V. UNITED STATES**, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919). It remains influential as a way of protecting what Holmes termed the marketplace of ideas.

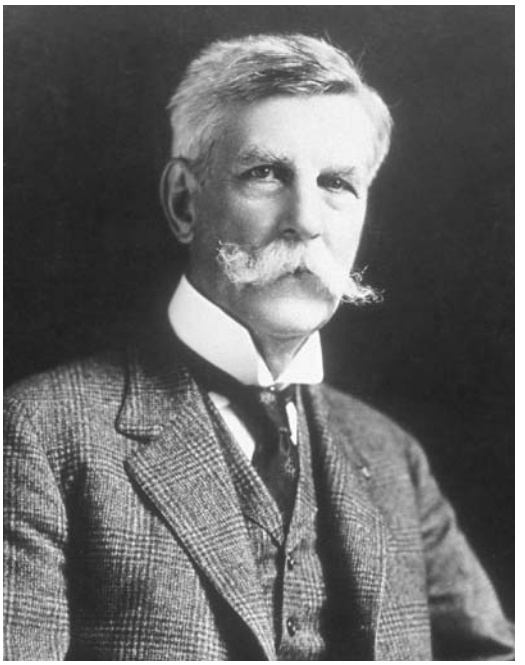

*Oliver Wendell Holmes.*
LIBRARY OF CONGRESS

Holmes also contributed to modern **FOURTH AMENDMENT** jurisprudence. In **OLMSTEAD V. UNITED STATES**, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928), the Supreme Court ruled that incriminating evidence illegally obtained by the police was admissible against a defendant during prosecution. Foreshadowing the Court's later recognition of an **EXCLUSIONARY RULE** that prohibits prosecutors from using illegally obtained evidence during trial, Holmes wrote that the "government ought not to use evidence" that is "only obtainable by a criminal act" of the police. While acknowledging the legitimate objectives of law enforcement, Holmes concluded that it was "a less[er] evil that some criminals should escape than that the government should play an ignoble part."

Despite Holmes's substantial reputation, he is not without critics. **BUCK V. BELL**, 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1000 (1927), is the case most frequently cited to point out faults in his jurisprudence. In his majority opinion in *Buck,* Holmes upheld the constitutionality of a state statute (Va. Law of March 20, 1924, ch. 394)

"IF THERE IS ANY PRINCIPLE OF OUR CONSTITUTION THAT MORE IMPERATIVELY CALLS FOR ATTACHMENT THAN ANY OTHER IT IS THE PRINCIPLE OF FREE THOUGHT—NOT FREE THOUGHT FOR THOSE WHO AGREE WITH US BUT FOR THE THOUGHT THAT WE HATE."
—OLIVER HOLMES HOLMES JR.

authorizing the sterilization of "feeble-minded" (mentally retarded) persons. Reviewing the family history of Carrie Buck, her mother, and her daughter, Holmes stated, "Three generations of imbeciles are enough." He believed that sterilization was the best way to end the procreation of mentally retarded persons, and in looking at these three generations of women he believed they were all mentally retarded. Later evidence suggested that none of the three were in fact mentally retarded. The case also suggested that deference to legislative acts, such as forced sterilization, was not an unfettered good and that questions of morality and justice have a place in the law, despite Holmes's protests to the contrary.

Holmes's jurisprudence also suggested that the law is what the government says it is. This approach, called LEGAL POSITIVISM, was called into question in the 1930s and 1940s with the rise of totalitarian regimes in Germany and Italy and the rule of Stalin in the Soviet Union. Many legal scholars criticized POSITIVISM as lacking a basis in morality and fundamental societal values.

Holmes retired from the Supreme Court in 1932. He died in Washington, D.C., on March 6, 1935, two days before his ninety-fourth birthday.

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## HOLOGRAPH

*A will or deed written entirely by the testator or grantor with his or her own hand and not witnessed.*

State laws vary widely in regard to the status of a holographic will. Some states absolutely refuse to recognize any will not in compliance with the formal statutory requirements pertaining to the execution of the will. Many states that do not recognize holographic wills executed by their own citizens within their borders will nevertheless admit a holographic will to probate if it was validly executed in accordance with the statutory requirements of another jurisdiction that recognizes such wills.

## HOME RULE

*The right to local self-government including the powers to regulate for the protection of the public health, safety, morals, and welfare; to license; to tax; and to incur debt.*

Home rule involves the authority of a local government to prevent state government intervention with its operations. The extent of its power, however, is subject to limitations prescribed by state constitutions and statutes.

When a municipality or other political subdivision has the power to decide for itself whether to follow a particular course of action without receiving specific approval from state officials, it acts pursuant to such powers. For example, a town exercises its home rule powers when it puts the issue of allowing the sale of alcoholic beverages within its borders on the ballot.

## HOMELAND SECURITY DEPARTMENT

There were gaps in the U.S. system for detecting and deterring terrorist acts in the homeland. That became clear September 11, 2001. The Department of Homeland Security is the GEORGE W. BUSH administration's plug for those gaps.

The department's main goal is to protect U.S. citizens against terrorists. It brings together people from 22 agencies to protect the nation's borders, help state and local safety officials better respond to catastrophes, research treatments against biological threats, and coordinate intelligence on terrorists. The administration's rationale: better communication is the key to achieving those goals; the Department of Homeland Security is the key to better communication.

Republicans drew up legislation January 23, 2002, to create the department. In November of that year, the U.S. House and Senate passed the Homeland Security Act, and President Bush signed it. The cabinet department melded 22 agencies as varied as the Coast Guard, Customs Service, the Immigration and Naturalization Service, and the Transportation Security Administration. It was the biggest change in U.S. government since the DEFENSE DEPARTMENT

was created in 1947. Former Pennsylvania governor and Vietnam veteran Tom Ridge became the first secretary of the department.

The department is divided into five teams, called directorates: Border and Transportation Security; Emergency Preparedness and Response; Science and Technology; Information Analysis and Infrastructure Protection; and Management.

The primary goal of the largest directorate, Border and Transportation Security, is to keep terrorists out of the United States. It has a dual focus: enforcing immigration laws and keeping the country's transportation systems safe. This division incorporates sectors of the Department of Immigration and Naturalization, U.S. Customs Service, the Animal and Plant Health Inspection Service, the Federal Law Enforcement Training Center and the Transportation Security Administration. One newly created agency within this directorate is to attend to visas, work permits, applications for citizenship, and new-citizen services. Another agency will handle border security against illegal immigration, drugs, and terrorists. Another agency is in charge of securing the nation's airports.

The Directorate of Emergency Preparedness and Response is charged with ensuring that the nation is prepared for and able to recover from terrorist attacks and natural disasters. This division is to work with the FEDERAL EMERGENCY MANAGEMENT AGENCY to coordinate the first response to catastrophes, often by local and state police and fire units. The division is also to develop a curriculum for training people at the local, state, and federal levels to respond to a terrorist act.

In case of a biological attack, the Directorate of Science and Technology is responsible for sponsoring the development of vaccines, antidotes, and treatments. This division will work with national laboratories and universities, channeling the nation's best resources to protect its people.

The Information Analysis & Infrastructure Protection directorate will fuse information from the nation's intelligence-gathering agencies, including the National Security Agency, the CIA, and FBI. This directorate's job is twofold: to gather and share information that can help the government prevent TERRORISM and catch terrorists; and to protect the nation's infrastructure, such as food supplies, information networks, and banking systems.

The first job is to use information efficiently. One of the often-heard criticisms of U.S. intelligence-gathering agencies is that they do not share information. The Information Analysis & Infrastructure Protection directorate is designed to solve that problem, and, ideally, this agency will ensure that information flows efficiently among state and local police, as well. The Homeland Security Advisory System is a key component of this information-sharing plan.

The advisory system uses designated colors to alert public safety officials and citizens to a possible terrorist threat. The system includes five degrees of danger: The first is green, or low risk of terrorist attacks. Second is blue, or general risk of attacks. The third degree is yellow, or significant risk of terrorist attacks. Fourth is orange, or high risk. The fifth degree, red, means there is a severe threat of a terrorist attack. The system serves two purposes: to warn the public and to standardize safety efforts of the nation's police, fire, health, and other safety agencies. The higher the degree of danger, the more protective measures safety officials are to take. The warning system spells out those measures. Some of the precautions to be taken during a red alert, for example, are closing public and government buildings and restricting transportation systems. During a green alert, however, safety agencies are advised to train employees on the Homeland Security Advisory System and determine where their communities are vulnerable to attack.

The Directorate of Information Analysis & Infrastructure Protection has another task, built

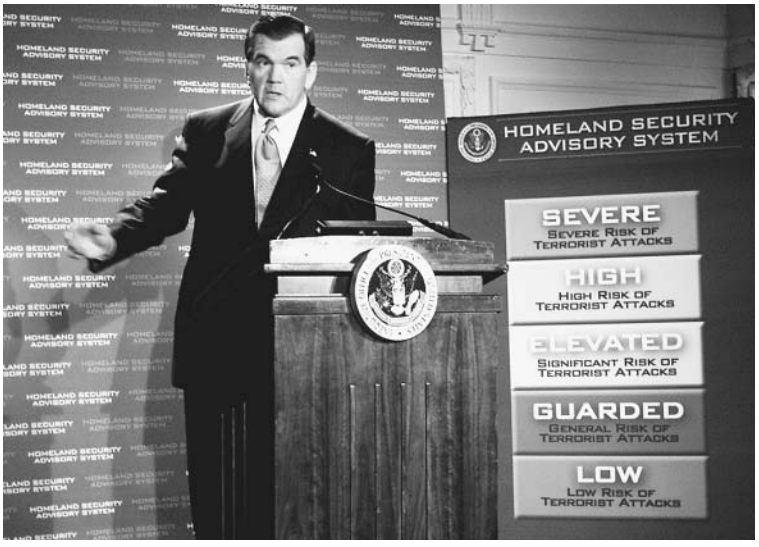


*Tom Ridge, director of the Department of Homeland Security, unveils the agency's five-level, color coded warning system on March 12, 2002.*

AP/WIDE WORLD PHOTOS

into its name: defending the nation's infrastructure. Infrastructure includes food and water; agriculture; emergency services; energy sources such as dams; transportation; information networks; and financial and postal systems. It is focusing largely on cyber communications because an attack on the INTERNET might have a far-reaching effect on other aspects of the infrastructure, such as the economy.

The final directorate, Management, is responsible for day-to-day budget and personnel issues for the 170,000 employees of the Homeland Security Department. Experts state it could take years for the department to work as planned.

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## HOMELESS PERSON

*An individual who lacks housing, including one whose primary residence during the night is a supervised public or private facility that provides temporary living accommodations; an individual who is a resident in transitional housing; or an individual who has as a primary residence a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.*

The number of homeless persons in the United States is estimated to be between 250,000 and three million. Unemployment, cutbacks in social service programs, a lack of affordable housing, and the deinstitutionalization of mentally ill patients are some of the circumstances that have led to people living in shelters or on the streets. There is no fair stereotype of homeless persons: they include the young and old, individuals and entire families, and all races and ethnicities. According to 2000 statistics published by the National Coalition for the Homeless in 2002, best estimates indicate that approximately 1 percent of the U.S. population (3.5 million persons) experience homelessness each year—more than one third of them children. The rights of these persons have become important societal and legal issues.

### Shelter

Although federal law provides for emergency shelter for homeless families in most states, there is no federal or constitutional right to shelter. In 1987, the Stewart B. McKinney Homeless Assistance Act (42 U.S.C.A. § 11301) was passed to provide public resources and programs to assist the homeless population. Under the act, the federal government is required to provide underutilized public buildings for use by people who are homeless. In *National Law Center v. United States Department of Veterans Affairs*, 964 F.2d 1210 (D.C. Cir. 1992), a homeless rights group sought to enforce compliance with the MCKINNEY ACT. The court agreed with the plaintiffs and held that the government must comply with the McKinney Act by allowing homeless people access to underused federal property.

Because the federal courts have refused to recognize a federal constitutional right to shelter, several states have enacted their own laws to recognize such a right. Many of these statutes require that cities provide shelter for people who are homeless, but they do not outline enforcement procedures. Although statutes require state agencies to provide shelter, the agencies often cannot keep up with the demand, citing expense and overcrowding. In *Atchison v. District of Columbia,* 585 A.2d 150 (D.C. App. 1991), a court imposed daily fines on a shelter for failure to provide services. The level of fines combined with the cost of litigation stimulated the adoption of an emergency act that allowed the agency to provide a shelter program based on the availability of funds.

### Economic Assistance

By the late 1990s, public assistance was a prominent political issue. As the government began cutting WELFARE programs, people who were homeless found it increasingly difficult to rise above the poverty level. In addition, substantial cuts to welfare programs created the possibility that more people would be forced into homelessness.

Existing public assistance programs often fail to help those who are homeless. Some programs require that recipients have temporary or permanent addresses, effectively eliminating otherwise eligible recipients. In some instances, money that could be spent providing permanent, affordable housing for people who are homeless is used to provide temporary housing in "welfare hotels." A welfare hotel is inexpensive housing that is used for temporary shelter by low-income or homeless persons. In 1995, legislation was introduced to control welfare spending and to reduce welfare dependence. (H.R. 1157, 104th Cong., 1st Sess.). The features of this legislation included discontinuing welfare benefits to certain groups and creating state demonstration projects to reduce the number of homeless families in welfare hotels.

### Education

One alarming aspect of the growth of the homeless population is the increasing numbers of families and children who have nowhere to live. Children are more strongly affected by homelessness than are adults because they are less able to overcome a lack of food, shelter, HEALTH CARE, and education. Many children in homeless families lack the transportation, documentation, and even clothing needed to attend public schools.

State residency guidelines typically require children to attend school within the district in which their parent or guardian lives. Homeless children cannot meet these residency requirements. Because education is often critical to overcoming poverty and homelessness, the McKinney Act specifically addresses the issue of education for children who are homeless. The act ensures that these children have every opportunity for a public school education. It requires states to revise their residency requirements in order to give such children a free education.

Another barrier to the education rights of children without a home is the inability to track education and medical records. Students can be refused enrollment if they have no documentation of previous schooling. The McKinney Act requires local education agencies to maintain records that can be readily available when a student moves to a new school district. Under the act, children must also have equal access to special-education programs in the public school system.

### Voting

The right to vote is expressly stated in the U.S. Constitution. Because most states require that a citizen have a permanent residence in order to vote, the right to vote is often denied to people who are homeless. The right to vote provides a way for a person who is homeless to be heard—by electing public officials who are sympathetic to the concerns of people who are without a home—and thus is an important right to protect.

New Jersey was one of the first states to allow people who are homeless the right to vote. The only requirement is that they meet the age and residency requirement of the state's constitution. They can satisfy the residency requirement by specifying a place they regard as home and providing the name of at least one contact who can verify their residence in that place.

By 1994, 13 states had legislation protecting the VOTING RIGHTS of people who are homeless. In *Collier v. Menzel*, 176 Cal. App. 3d 24, 221 Cal. Rptr. 110 (1985), three persons who were homeless listed a local park as their address on a voter-registration card. The court held that they had satisfied the residency requirement because they had indicated a fixed habitation in which they intended to remain for an extended period. In addition, even though a city ordinance prohibited camping and sleeping overnight in the park, the court held that denying the voter registration would violate EQUAL PROTECTION.

### Antihomeless Legislation

With an increased homeless population comes increased concern on the part of members of the general public when they find members of

*A homeless man sleeps on a park bench. Several states have enacted local laws recognizing the right to shelter, but state agencies, due to expense and overcrowding, often cannot keep up with the demand.*

AP/WIDE WORLD PHOTOS

that population loitering on the streets. VAGRANCY ordinances were passed to keep people who are homeless from staying too long in any one location. Many of these statutes have been labeled antihomeless legislation because they particularly target behavior over which some homeless people have no control.

In *Papachristou v. Jacksonville,* 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972), eight homeless people challenged their conviction for violating a vagrancy ordinance. The U.S. Supreme Court held that the ordinance was vague and that it criminalized otherwise innocent conduct. In this and similar cases, the Court has stated that these "crimes" do not cause any harm to others that outweighs the violation of the rights of the individuals arrested.

Protections against an illegal SEARCH AND SEIZURE also apply to people who are homeless and to their belongings, even though their belongings might not be located in a traditional home setting. In *State v. Mooney,* 218 Conn. 85, 588 A.2d 145 (1991), police officers searched belongings of a homeless man that were found under a bridge embankment. As a result of the search, the man was arrested and charged with ROBBERY and felony murder. The man appealed his conviction, claiming that it had been an illegal search because the police had lacked a warrant to search his home, a cardboard box. The court agreed with the man that he had a reasonable expectation of privacy in the contents of his belongings. It disagreed, however, with his contention that he had an expectation of privacy in the bridge abutment area.

When people without a home are arrested and jailed, their property is often destroyed or stolen while they are incarcerated. Laws that target people who are homeless are thus viewed as unreasonable searches and seizures of property. In *Pottinger v. City of Miami,* 810 F. Supp. 1551 (S.D. Fla. 1992), a CLASS ACTION suit was brought on behalf of thousands of homeless people. The court agreed that certain city ordinances unfairly targeted those people and that resulting arrests and seizures of property were in violation of their constitutional rights.

Finally, there appeared to be an increasing trend for many urban areas to enact legislation prohibiting the homeless from begging or panhandling among the general public. As of 2003, 46 of the nation's 50 largest cities had passed laws that either prohibited or regulated begging—not without some planned challenges.

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## HOMEOWNER'S WARRANTY

*An insurance protection program offered by a number of builders of residential dwellings in the United States.*

Homeowner's warranty, commonly known as HOW, was developed by the Home Owner's Warranty Corporation and protects the original homeowner of a new home for a period of ten years against major structural defects. If such defects occur, the builder, and not the original buyer, is financially responsible for their repair. In a number of states, similar warranty protection is afforded by statute.

## HOMESTEAD

*The dwelling house and its adjoining land where a family resides. Technically, and pursuant to the modern homestead exemption laws, an artificial estate in land, created to protect the possession and enjoyment of the owner against the claims of creditors by preventing the sale of the property for payment of the owner's debts so long as the land is occupied as a home.*

Laws exempting the homestead from liability for debts of the owner are strictly of U.S. origin. Under the English COMMON LAW, a homestead right, a personal right to the peaceful, beneficial, and uninterrupted use of the home property free from the claims of creditors, did not exist. Homestead rights exist only through the constitutional and statutory provisions that create them. Nearly every state has

enacted such provisions. The earliest ones were enacted in 1839 in the Republic of Texas.

Homestead exemption statutes have been passed to achieve the public policy objective of providing lodgings where the family can peacefully reside irrespective of financial adversities. These laws are predicated on the theory that preservation of the homestead is of greater significance than the payment of debts.

Property tax exemptions, for all or part of the tax, are also available in some states for homesteaded property. Statutory requirements prescribe what must be done to establish a homestead.

A probate *homestead* is one that the court sets apart out of the estate property for the use of a surviving spouse and the minor children or out of the real estate belonging to the deceased.

A *homestead corporation* is an enterprise organized for the purpose of acquiring lands in large tracts; paying off encumbrances, charges attached to and binding real property; improving and subdividing tracts into homestead lots or parcels; and distributing them among the shareholders and for the accumulation of a fund for such purposes.

## HOMESTEAD ACT OF 1862

The Homestead Act of 1862 was a landmark in the evolution of federal agriculture law. Passed by Congress during the Civil War, it had an idealistic goal: it sought to shape the U.S. West by populating it with farmers. The law's Northern supporters had pursued a vision of taming the rough frontier for several decades, as a means both to create an agrarian base there and to break the institution of SLAVERY that was entrenched in the South. To achieve this end, they engineered a vast giveaway of public lands. The Homestead Act provided 160 acres of land for a small filing fee and a modest investment of time and effort. The overly optimistic law failed in several ways. Most important, it was exploited by railroads and other powerful interests for profit. After making basic changes to it Congress finally repealed the law in 1977.

The Homestead Act arose from the struggle between the North and the South that culminated in the Civil War (1861–65). During this struggle, the nation followed two competing paths of agricultural development: the industrialized North favored giving public lands to individual settlers, while the South clung to its tradition of slave labor. From the early 1830s, Northern proponents of the free distribution of public land, organized around the Free-Soil party and later in the REPUBLICAN PARTY, had their ideas blocked by Southern opponents. The secession of Southern states in 1861 cleared the way for passage of the Homestead Act in 1862, against a backdrop of other important legislation that would define national agriculture policy for the next century: the Morrill Land-Grant College Act, the PACIFIC RAILROAD ACT, and the creation of the AGRICULTURE DEPARTMENT. The Homestead Act went into effect on January 1, 1863, just as President ABRAHAM LINCOLN signed the EMANCIPATION PROCLAMATION freeing slaves.

In this context of controversy and war, the Homestead Act offered a simple plan to achieve the goals of the North. As yet not fully settled, western states would be populated with a flood of homesteaders—individual farmers whose hard work would create a new agricultural industry. On its face, the law was generous. Anyone who was at least twenty-one years of age, the head of a family, or a military veteran was qualified to claim land; moreover, citizens and immigrants alike were entitled to participate. They paid a small filing fee in return for the temporary right to occupy and farm 160 acres. The land did not become theirs immediately; the law stipulated that it had to be improved, and only after living on and maintaining it for five years would the homesteader gain owner-

*Between the passage of the Homestead Act of 1862 and the year 1934, more than 1.6 million homestead applications were filed by settlers such as this family in Custer County, Nebraska (c. 1870–89).*

BETTMANN/CORBIS

ship. Proponents viewed the law with an almost utopian fondness: through the federal government's largesse, a new West would be created.

In actual application, the act did not achieve this happy outcome. Although the East offered sufficient rainfall, the West was unforgiving. There, harsh land and arid conditions made farming 160 acres a dismal prospect for the settlers, who lived in houses usually made of sod. Often, they simply needed more acreage in order to succeed. In addition, homesteaders seldom had the best land. By bribing residents who bought the land for them, or simply by filing fraudulent claims, speculators managed to reap the lion's share of land at public expense. It is estimated that only a quarter of the trillion acres made available through the Homestead Act ever served their intended purpose. The bulk of this land went to corporate interests, particularly in the railroad and timber industries, rather than individual settlers.

The Homestead Act left a complicated legacy to U.S. law. Its passage was a triumph for Northern states in their decades-long battle to control the destiny of national agricultural policy. But its limitations and its exploitation meant that the vision of those states could scarcely be realized. Congress made changes to the law during its 105-year history—chiefly, modifying the limits on acreage that it made available—but these amendments did little to alter the act's net effect on the course of national agricultural policy. The law was finally repealed in 1977. Popularly romanticized during the nineteenth century and even into the twentieth, the Homestead Act is now widely viewed by scholars as a failed experiment and a lesson in the contrasts between the intentions and outcomes of law.

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## HOMICIDE

*The killing of one human being by another human being.*

Although the term *homicide* is sometimes used synonymously with *murder,* homicide is broader in scope than murder. Murder is a form of criminal homicide; other forms of homicide might not constitute criminal acts. These homicides are regarded as justified or excusable. For example, individuals may, in a necessary act of SELF-DEFENSE, kill a person who threatens them with death or serious injury, or they may be commanded or authorized by law to kill a person who is a member of an enemy force or who has committed a serious crime. Typically, the circumstances surrounding a killing determine whether it is criminal. The intent of the killer usually determines whether a criminal homicide is classified as murder or MANSLAUGHTER and at what degree.

English courts developed the body of COMMON LAW on which U.S. jurisdictions initially relied in developing their homicide statutes. Early English common law divided homicide into two broad categories: felonious and non-felonious. Historically, the deliberate and premeditated killing of a person by another person was a felonious homicide and was classified as murder. Non-felonious homicide included justifiable homicide and excusable homicide. Although justifiable homicide was considered a crime, the offender often received a pardon. Excusable homicide was not considered a crime.

Under the early common law, murder was a felony that was punishable by death. It was defined as the unlawful killing of a person with "malice aforethought," which was generally defined as a premeditated intent to kill. As U.S. courts and jurisdictions adopted the English common law and modified the various circumstances that constituted criminal homicide, various degrees of criminal homicide developed. Modern statutes generally divide criminal homicide into two broad categories: murder and manslaughter. Murder is usually further divided into the first degree, which typically involves a premeditated intent to kill, and the second degree, which typically does not involve a premeditated intent to kill. Manslaughter typically involves an unintentional killing that resulted from a person's criminal negligence or reckless disregard for human life.

All homicides require the killing of a living person. In most states, the killing of a viable fetus is generally not considered a homicide unless the fetus is first born alive. In some states, however, this distinction is disregarded and the killing of

an unborn viable fetus is classified as homicide. In other states, statutes separately classify the killing of a fetus as the crime of feticide.

Generally, the law requires that the death of the person occur within a year and a day of the fatal injury. This requirement initially reflected a difficulty in determining whether an initial injury led to a person's death, or whether other events or circumstances intervened to cause the person's death. As FORENSIC SCIENCE has developed and the difficulty in determining cause of death has diminished, many states have modified or abrogated the year-and-a-day rule.

### Justifiable or Excusable Homicide

A homicide may be justifiable or excusable by the surrounding circumstances. In such cases, the homicide will not be considered a criminal act. A justifiable homicide is a homicide that is commanded or authorized by law. For instance, soldiers in a time of war may be commanded to kill enemy soldiers. Generally, such killings are considered justifiable homicide unless other circumstances suggest that they were not necessary or that they were not within the scope of the soldiers' duty. In addition, a public official is justified in carrying out a death sentence because the execution is commanded by state or federal law.

A person is authorized to kill another person in self-defense or in the defense of others, but only if the person reasonably believes that the killing is absolutely necessary in order to prevent serious harm or death to himself or herself or to others. If the threatened harm can be avoided with reasonable safety, some states require the person to retreat before using DEADLY FORCE. Most states do not require retreat if the individual is attacked or threatened in his or her home, place of employment, or place of business. In addition, some states do not require a person to retreat unless that person in some way provoked the threat of harm. Finally, police officers may use deadly force to stop or apprehend a fleeing felon, but only if the suspect is armed or has committed a crime that involved the infliction or threatened infliction of serious injury or death. A police officer may not use deadly force to apprehend or stop an individual who has committed, or is committing, a misdemeanor offense. Only certain felonies are considered in determining whether deadly force may be used to apprehend or stop a suspect. For instance, a police officer may not use deadly force to prevent the commission of LARCENY unless other circumstances threaten him or other persons with imminent serious injury or death.

Excusable homicide is sometimes distinguished from justifiable homicide on the basis that it involves some fault on the part of the person who ultimately uses deadly force. For instance, if a person provokes a fight and subsequently withdraws from it but, out of necessity and in self-defense, ultimately kills the other person, the homicide is sometimes classified as excusable, rather than justifiable. Generally, however, the distinction between justifiable homicide and excusable homicide has largely disappeared, and only the term *justifiable homicide* is widely used.

### Other Defenses

Other legal defenses to a charge of criminal homicide include insanity, necessity, accident, and intoxication. Some of these defenses may provide an absolute defense to a charge of criminal homicide; some will not. For instance, a successful defense of voluntary intoxication generally will allow an individual to avoid prosecution for a premeditated murder, but typically it

**Homicide Rate, by Age of Victim, 1970 to 2000**

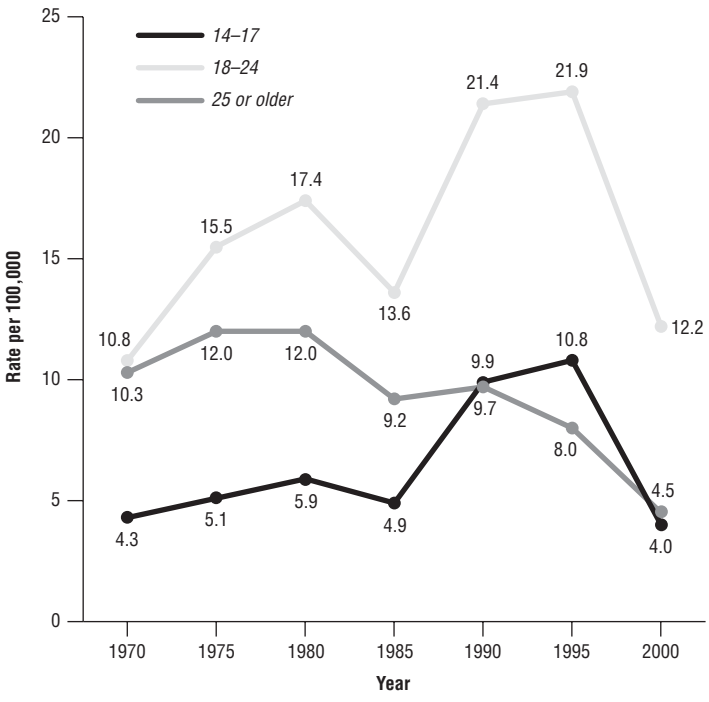


SOURCE: U.S. Department of Justice, Bureau of Justice Statistics.

will not allow an individual to escape liability for any lesser charges, such as second-degree murder or manslaughter. As with any defense to a criminal charge, the accused's mental state will be a critical determinant of whether he or she had the requisite intent or mental capacity to commit a criminal homicide.

### Euthanasia and Physician-Assisted Suicide

The killing of oneself is a suicide, not a homicide. If a person kills another person in order to end the other person's pain or suffering, the killing is considered a homicide. It does not matter if the other person is about to die or is terminally ill just prior to being killed; the law generally views such a killing as criminal. Thus, a "mercy killing," or act of EUTHANASIA, is generally considered a criminal homicide.

As medical technology advances and the medical profession is able to prolong life for many terminally ill patients, a person's right to die by committing suicide with the help of a physician or others has become a hotly contested issue. In the 1990s, the issue of physician-assisted suicide came to the forefront of U.S. law. Dr. JACK KEVORKIAN, a Michigan physician, helped approximately 130 patients to commit suicide. Michigan authorities prosecuted Kevorkian for murder on a number of occasions, but because aiding, assisting, or causing a suicide is generally considered to be separate from homicide, Kevorkian initially avoided conviction. Finally, in 1999, he was convicted of second-degree murder following the nationally televised broadcast of a videotape showing Kevorkian injecting a lethal drug into a patient. In 2000, the NEW ENGLAND JOURNAL OF MEDICINE revealed a study showing that 75 percent of the 69 Kevorkian-assisted deaths that were investigated were of victims who were not suffering from a potentially fatal disease; five had no discernible disease at all. Instead, it appeared that many of the suicides were the result of depression or psychiatric disorder.

As of early 2003, only one state (Oregon) permitted physician-assisted suicide. However, at that time, similar laws had been introduced in Arizona, Hawaii, and Vermont. U.S. Attorney General JOHN ASHCROFT sought a DECLARATORY JUDGMENT that prescribing federally controlled drugs for the purpose of assisting suicide was not legitimate medical practice. The U.S. Court of Appeals for the Ninth Circuit was expected to render a decision in the matter later that year.


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CROSS-REFERENCES

Death and Dying; Insanity Defense.


## HONOR

*As a verb, to accept a bill of exchange, or to pay a note, check, or accepted bill, at maturity. To pay or to accept and pay, or, where a credit so engages, to purchase or discount a draft complying with the terms of the draft.*

*As a noun, in old* ENGLISH LAW, *a seigniory of several manors held under one baron or lord paramount. Also those dignities or privileges, degrees of nobility, knighthood, and other titles that flow from the crown.*

*In the United States, the customary title of courtesy given to judges, and occasionally to some other officers, as, "his honor," "your honor," "honorable."*

## HONORARY TRUST

*An arrangement whereby property is placed in the hands of another to be used for specific noncharitable purposes where there is no definite ascertainable beneficiary—one who profits by the act of another—and that is unenforceable in the absence of statute.*

Trusts for the erection of monuments, the care of graves, the saying of Masses, or the care of specific animals, such as a cat, dog, or horse, are examples of honorary trusts. Honorary trusts for the benefit of specific animals differ from charitable trusts that have as a trust purpose the benefit of animals in general. In many jurisdictions, legislation validates special provisions for the upkeep of graves and monuments. Similarly, trusts for the saying of Masses are upheld as charitable trusts.

As a general rule, the designated trustee, one appointed or required by law to execute a trust, can effectuate the intent of the settlor—one who

creates a trust—if he or she chooses to do so. Since there is no beneficiary who can enforce the trust, the implementation of the purposes of the trust depends upon the honor of the trustee. If the person does not execute the trust duties, he or she holds the property for the settlor or the settlor's heirs on the theory of a RESULTING TRUST.

Jurisdictions differ as to the extent to which honorary trusts will be recognized, if at all. Honorary trusts are usually limited by considerations of public policy. For instance, they cannot exist beyond the period of the RULE AGAINST PERPETUITIES, and their amounts cannot be unreasonably large for the purpose to be accomplished. The purpose must also be that of a reasonably normal testator and cannot be capricious.

A settlor bequeaths $1,000 to a trustee to care for the settlor's cat and dog, and $1,000 for the purpose of maintaining the settlor's home in the same condition as of the instant of his death for twenty years thereafter, with all windows and doors blocked shut. Upon the settlor's death, the residuary legatee inherits any money that remains in the estate after all other claims are paid and makes claims to both sums of money under these testamentary provisions. A court will find that the residuary legatee has no right to the $1,000 left for the cat and dog unless the trustee refuses to fulfill the obligations of caring for the dog and cat. The residuary legatee is, however, entitled to the other $1,000. Neither of these provisions of the settlor's will created a private trust.

As a general rule, the beneficiary of a private trust must be competent to come into court either in person or by guardian and enforce the trust duties against the trustee. Neither the cat nor the dog can appear in court. Some states permit provisions for reasonable sums to specific animals to be valid honorary trusts as long as public policy is not violated. If the trustee fails to properly execute his or her duties, he or she holds the property in resulting trust for the heirs or next of kin of the decedent. In this example, if the trustee spends the $1,000 in caring for the dog and cat, he or she is not liable, but if he or she does not, a court will order the trustee to turn the money over to the residuary legatee as the beneficiary of a resulting trust. If the purpose of an intended honorary trust is capricious, the trust will fail. In this case, there is no legitimate end to be served by keeping the settlor's home boarded up for twenty years. The purpose is capricious and the trust fails. Therefore, the $1,000 set aside for this purpose is held by the trustee in resulting trust for the residuary legatee who must receive it.

## ♦ HOOKS, BENJAMIN LAWSON

CIVIL RIGHTS advocate Benjamin Lawson Hooks is best known as the forceful executive director of the National Association for the Advancement of Colored People (NAACP) from 1977 to 1993. Before he led the NAACP, Hooks made a virtual career out of shattering the United States' racial barriers. He was the first African American ever appointed to a Tennessee criminal court and the first African American named to the FEDERAL COMMUNICATIONS COMMISSION (FCC). Hooks has also achieved personal and professional success as an ordained minister, a television host and producer, a savings and loan administrator, a public speaker, and a fast-food executive.

"THERE WILL ALWAYS BE A NEED FOR THE NAACP. ONCE WE THOUGHT THERE WOULD COME A TIME WHEN OUR WORK WOULD BE FINISHED. BUT RACISM STILL EXISTS AND INEQUALITY IS STILL BUILT INTO THIS SOCIETY." —BENJAMIN L. HOOKS

Hooks was born January 31, 1925, in Memphis. As an African American living under JIM CROW LAWS, he experienced the daily indignities of southern SEGREGATION. His parents, Bessie Hooks and Robert B. Hooks, raised their seven children with high moral and academic standards. After high school, Hooks enrolled at LeMoyne College, in Memphis. His college career was interrupted by WORLD WAR II. Hooks was drafted into the U.S. Army in 1943 and rose to the rank of staff sergeant.

After his military service, Hooks attended Howard University, in Washington, D.C., and graduated with a bachelor of arts degree in 1944. Hooks then traveled to Chicago to study law at DePaul University. Although Hooks wanted to enroll in a Tennessee law school, he could not do so because law schools in Tennessee refused to admit African Americans. Hooks graduated with a doctor of laws degree from DePaul in 1948. In 1949, he moved back to Memphis and started his own law practice. In 1952, he married Frances Dancy, and later, they had one child, Patricia.

During the 1950s, Hooks became active in the growing national CIVIL RIGHTS MOVEMENT. Along with MARTIN LUTHER KING, JR., Hooks served on the Board of Directors for the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE. During this time, Hooks also became an ordained Baptist minister and accepted a call as pastor of

the Middle Baptist Church, in Memphis. Adding to an already busy life, Hooks became vice president of a SAVINGS AND LOAN ASSOCIATION he helped found in Memphis in 1955.

In 1961, Hooks took over as assistant public defender of Shelby County. His role led to an appointment by Governor Frank G. Clement, of Tennessee, in 1965, to the Shelby County Criminal Court. With this appointment, Hooks became the first African American to serve as judge on the Tennessee criminal bench. In 1966, he was elected on his own to a full eight-year term. In the meantime, Hooks became minister of the Greater New Mount Moriah Baptist Church, in Detroit. He flew to Detroit twice a month to lead his congregation.

In 1968, Hooks resigned his criminal court judgeship to become president of Mahalia Jackson Chicken Systems, a fast-food franchise. In 1972, he was appointed by President RICHARD M. NIXON to become a member of the previously all-white FCC, the federal agency that licenses and regulates radio, television, satellite communications, telephones, and telegraph transmissions. This position allowed him to focus public attention on the image of African Americans in radio and television and to increase minority jobs in broadcasting.

In 1977, Hooks assumed the position with which he is most commonly identified: executive director of the NAACP. Following in the footsteps of the retiring ROY WILKINS, Hooks accepted the job because he deeply respected the NAACP and because he wanted to complete some of the unfinished business of the equal rights movement. A tireless worker, Hooks spent long days in the NAACP Baltimore headquarters performing what he called the "killing job."

During Hooks's tenure, the NAACP expressed concern over homelessness, drug abuse, inadequate education, and neighborhood safety. Hooks lamented the rise of an intractable urban underclass and warned that the promise of jobs and economic independence for African Americans must be met soon.

Some of Hooks's proudest accomplishments with the NAACP include his work in convincing Congress to impose sanctions against South Africa's system of apartheid, for legislation creating fair housing rights, and for a federally recognized holiday to celebrate the life and work of Martin Luther King, Jr.

Hooks's achievements with the NAACP take on a special significance in view of the political conservatism that prevailed during his fifteen-year tenure as its head—a period when RONALD

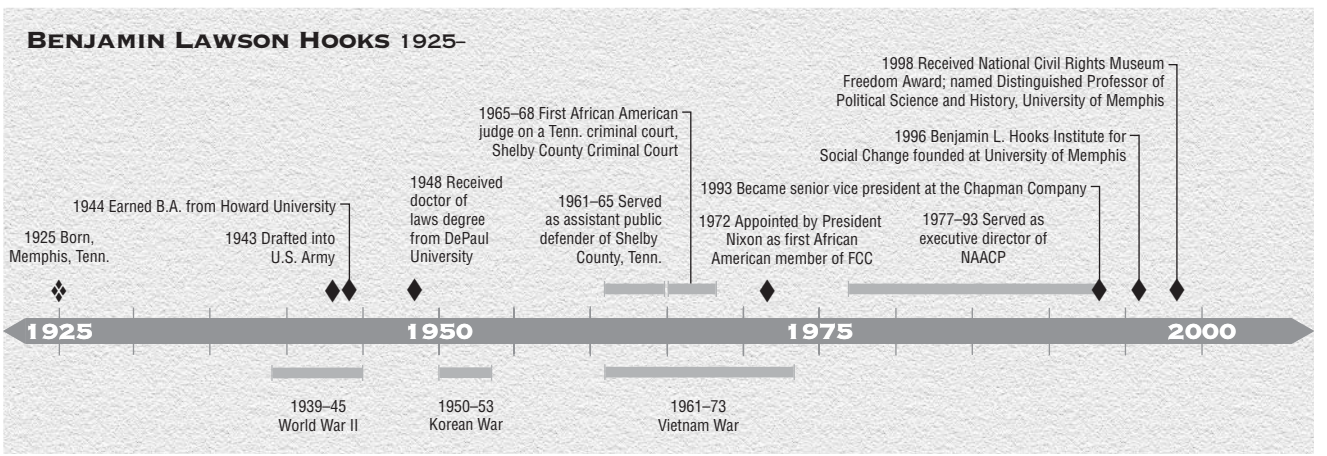

REAGAN and GEORGE H.W. BUSH were in the White House. Hooks vowed to keep the NAACP true to its progressive mission. In fact, under his leadership, the NAACP refused to endorse the nomination of African American CLARENCE THOMAS to the U.S. Supreme Court because Thomas's views were too conservative.

By the time Hooks retired from the NAACP in 1993, its membership had grown to over five hundred thousand people in over twenty-two hundred chapters across the United States. Hooks was gratified by the results of a 1992 survey in which the NAACP earned an 86 percent approval rating among those polled. The organization has worked hard to counter criticism that it is mired in the past and out of touch with African–American youths.

When Hooks retired from the NAACP post in April 1993, the sixty-four members of the NAACP Board of Directors elected Benjamin F. Chavis, Jr., as his successor. Hooks left the NAACP to embark on yet another career challenge—as a senior vice president at the Chapman Company, a minority controlled brokerage and investment banking firm with offices in seven cities.

The NAACP experienced turmoil in 1994 when a SEXUAL HARASSMENT lawsuit was filed against Chavis. Chavis resigned and was replaced in 1996 by Kweisi Mfume who functioned as president and CEO. Throughout the controversy Hooks remained supportive of the NAACP.

Since his retirement from the NAACP, Hooks has remained active. In addition to the Spingarn Medal, which he was awarded in 1986, Hooks has been the recipient of numerous awards and more than 25 honorary degrees, and he has served as president of the National Civil Rights Museum. In 2001 the Benjamin L. Hooks Institute for Social Change was established at the University of Memphis. The purpose of the Institute is to promote understanding of the civil rights movement and the quest for HUMAN RIGHTS. In the early 2000s Hooks continued to teach as a Distinguished Adjunct Professor of Political Science and History at the University of Memphis.

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## ❖ HOOVER, HERBERT CLARK

Herbert Clark Hoover was the thirty-first president of the United States, serving from 1929 to 1932. A wealthy mining engineer, Hoover directed humanitarian relief efforts during and after World Wars I and II. His presidency was devastated by the STOCK MARKET crash of 1929 and the ensuing Great Depression.

Hoover was born August 10, 1874, in West Branch, Iowa. His father and mother died when he was young, and he was raised by an uncle in Oregon. He entered the first first-year class at Stanford University and graduated in 1895 with a degree in mining engineering. He became an expert on managing and reorganizing mines throughout the world. He spent time in Australia and China before setting up his own engineering firm in London in 1908. By 1914 Hoover had become a millionaire.

"FREE SPEECH DOES NOT LIVE MANY HOURS AFTER FREE INDUSTRY AND FREE COMMERCE DIE."
—HERBERT HOOVER

Hoover became involved in relief work during WORLD WAR I. In 1914 he served as director of the American Relief Commission in England, which helped one hundred twenty thousand U.S. citizens return home after being stranded at the outbreak of the war. The British government then asked him to lead the Commission for Relief in Belgium. His main achievement during this period was the distribution of supplies to civilian victims of the war in Belgium and France.

After the United States entered the war in 1917, President WOODROW WILSON named Hoover U.S. food administrator. In this capacity Hoover coordinated the production and conservation of food supplies that could be used for the war effort. Hoover also chaired the European Relief and Reconstruction Commission, directing activities of numerous relief departments and organizing the distribution of provisions. After the war Hoover coordinated the American Relief Administration. This agency provided food to millions during the famine of 1921 in the Soviet Union.

Hoover's humanitarian efforts made him an international figure. Democrats and Republicans sought to make him a presidential candidate in 1920, but Hoover rejected their offers. Instead, in 1921 he accepted the position of secretary of commerce in the administration of President WARREN G. HARDING, a Republican.

*Herbert Hoover.*
LIBRARY OF CONGRESS

Hoover was an energetic administrator, reorganizing the department and expanding its oversight into commercial aviation, highway safety, and radio broadcasting. He chaired commissions that established the Hoover Dam and the St. Lawrence Seaway.

In 1928 Hoover won the Republican presidential nomination. He easily defeated Democrat Alfred E. Smith, on a platform of continued economic prosperity and support for **PROHIBITION**.

Hoover devoted the early days of his presidency to improving the economic conditions of farmers. He advocated foreign tariffs on imported farm products as a way to protect domestic farm prices. Congress went beyond Hoover's recommendation and in 1930 enacted the Hawley-Smoot Tariff Act (19 U.S.C.A. § 1303 et seq.), which placed tariffs on nonfarm products as well. The act severely damaged U.S. foreign trade.

The control of Prohibition pursuant to the **EIGHTEENTH AMENDMENT** and the **VOLSTEAD ACT** (41 Stat. 305 [1919]) had become a serious problem by 1929. **ORGANIZED CRIME** had seized the opportunity to sell illegal alcohol. The only way large-scale liquor and speakeasy traffic could flourish was with the cooperation of law enforcement, so state and local law enforcement agencies were tainted with corruption. In 1929 Hoover established the National Commission on Law Observance and Law Enforcement, appointing **GEORGE W. WICKERSHAM** to direct an investigation of the effectiveness of law enforcement practices in the United States. The **WICKERSHAM COMMISSION** report was an important inquiry into the practices of the U.S. criminal justice system. The report examined all facets of police work and, for the first time, discussed police brutality and the "third degree" method of interrogating suspects. The report called for the professionalization of police.

The U.S. economy appeared to be robust in 1929, but a rising stock market had been built on stock purchases financed by widespread borrowing. When the stock market crashed on October 29, individuals, banks, and other economic institutions were devastated. Hoover sought to inspire public confidence by meeting with business leaders and by proclaiming that the economic downturn would be brief.

Hoover's prediction was wrong. The United States slid into the worst economic depression in

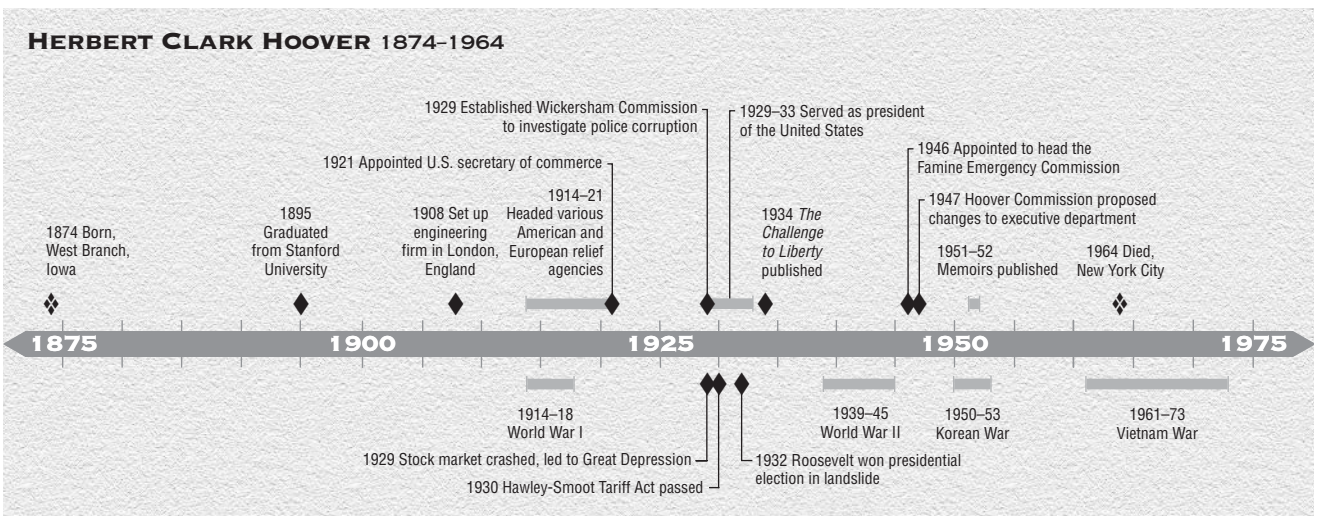

its history. Hoover resisted massive federal intervention because he believed that the economy would correct itself. He did approve some federal public works projects that provided jobs, but he opposed federal aid to the unemployed. In his view private charity should help those who had fallen on hard times.

In 1932, with 12 million people out of work and hundreds of banks failing, Hoover created the Reconstruction Finance Corporation (RFC) to extend loans to revitalize industry and to keep banks from going into BANKRUPTCY. Congress authorized the RFC to loan up to $300 million to states for relief. Many persons viewed these actions as too little and too late.

The troubles of the Hoover administration culminated in the Bonus Army March on Washington, D.C. In 1932 World War I veterans demanded monetary bonuses that had been promised them in 1924, even though the bonuses were not scheduled to be paid until 1945. The House of Representatives had passed a bill authorizing early payment, and the veterans sought to pressure the Senate to follow suit. More than fifteen thousand veterans, in desperate need of funds, organized a march on Washington, D.C., to secure immediate payment from the government. The "bonus army" constructed a makeshift city and declared that its members were ready to stay until their goal was achieved. Hoover dispatched federal troops to destroy the encampment and drive the veterans out of the nation's capital. For doing so he received nationwide criticism.

The REPUBLICAN PARTY nominated Hoover for a second term in 1932, but his candidacy attracted little enthusiasm. The DEMOCRATIC PARTY nominee, New York Governor FRANKLIN D. ROOSEVELT, mounted a vigorous campaign against Hoover's economic policies, calling for a "new deal" for U.S. citizens. Roosevelt promised to balance the budget, provide relief to the unemployed, help the farmer, and repeal Prohibition. He carried forty-two of the forty-eight states.

Hoover was angered by Roosevelt's NEW DEAL, which made the federal government the dominant player in the national economy. In 1934 he published *The Challenge to Liberty,* which attacked Roosevelt and his policies. He then withdrew from public life until 1946, when President HARRY S. TRUMAN asked him to return to relief work. Hoover subsequently directed the Famine Emergency Commission, which distributed food supplies to war-torn nations. In 1947 Truman authorized him to investigate the executive department of the U.S. government. The resulting Hoover Commission proposed changes in the EXECUTIVE BRANCH that saved money and streamlined government.

Hoover had a continuing interest in the Hoover Institution on War, Revolution, and Peace, which he founded at Stanford in 1919 and which remains an important research center. He published his memoirs in three volumes (1951–52) and *The Ordeal of Woodrow Wilson* (1958).

Hoover lived longer after leaving the presidency than did any other president. He died at age ninety on October 20, 1964, in New York City.

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## ♦ HOOVER, JOHN EDGAR

John Edgar Hoover served from 1924 to 1972 as the director of the FEDERAL BUREAU OF INVESTIGATION (FBI). During his long tenure, Hoover built the FBI into a formidable law enforcement organization, establishing standards for the collection and evaluation of information that made the FBI an effective crime fighting agency. However, Hoover's reputation was tarnished by his collection of damaging information on prominent politicians and public figures for his personal use, and by his aggressive investigation of CIVIL RIGHTS leaders and left-wing radicals.

"WE ARE A FACT-GATHERING ORGANIZATION ONLY. WE DON'T CLEAR ANYBODY. WE DON'T CONDEMN ANYBODY."
—J. EDGAR HOOVER

Hoover was born January 1, 1895, in Washington, D.C. Following graduation from high school, he turned down a scholarship from the University of Virginia, electing to stay home and study law at night at George Washington University. In 1916 he received a bachelor of laws degree. In 1917 he added a master of laws degree. Upon graduation from college, Hoover joined the U.S. JUSTICE DEPARTMENT.

Hoover started in a minor position, but his intelligence, energy, and mastery of detail were quickly noticed by his superiors. By 1919 he had risen to the rank of special assistant attorney general. During these early years, Hoover first became involved with the suppression of political radicals, assisting Attorney General A. MITCHELL PALMER in the arrest and deportation of left-wing ALIENS. In 1919 he was appointed

*J. Edgar Hoover.*
LIBRARY OF CONGRESS

chief of the department's General Intelligence Division (GID), a unit designated by Palmer to hunt down radicals. Within three months Hoover collected the names of 150,000 alleged subversives. Armed with this information, federal agents conducted nationwide dragnets, arresting more than ten thousand people. Critics argued that these Palmer Raids violated civil liberties. Nevertheless, thousands of persons were deported. By 1921 the GID had nearly half a million names of persons suspected of subversive activities.

In 1924 Hoover was appointed acting director of the Bureau of Investigation (BI), the forerunner of the FBI. The BI was a weak agency, hampered by limited investigatory powers, the inability of its agents to carry weapons, and the swelling of its rank with political appointments. After several scandals revealed the extent of the BI's problems, Attorney General HARLAN F. STONE appointed Hoover to clean up the agency.

Though only twenty-nine, Hoover met the challenge head-on. He began a thorough reorganization of the bureau, imposing strict discipline on his employees. Hoover's goal was to establish a professional law enforcement agency of unquestioned integrity. Between 1924 and 1935, he introduced a series of innovations that changed national law enforcement. Hoover established a national fingerprint collection, the first systematic database that federal, state, and local agencies could use to match fingerprints at crime scenes with those on file at the bureau. He also created a crime laboratory, which developed scientific procedures for obtaining forensic evidence. Finally, Hoover made a point of changing the character of his agents. He established a training academy for new agents, who were selected on the basis of their qualifications, not on their political connections. Agents were required to be college educated and to maintain the highest standard of personal and professional ethics.

As the agency became more professional, its jurisdiction increased. In 1935 President FRANKLIN D. ROOSEVELT signed crime bills giving agents the authority to carry guns and make arrests, and in the same year, the bureau officially became the FBI. During the 1930s Hoover moved from internal reorganization to external promotion of himself and his agency. The gangster era, from 1920 to 1935, ended in the arrest or killing of well-publicized hoodlums such as John Dillinger, Pretty Boy Floyd, and Bonnie and Clyde. Hoover and his G-men were celebrated for these exploits in newspapers, radio, newsreels, and Hollywood movies, establishing Hoover as the nation's leading crime fighter.

Hoover's focus shifted to political subversion and foreign ESPIONAGE during WORLD WAR II.

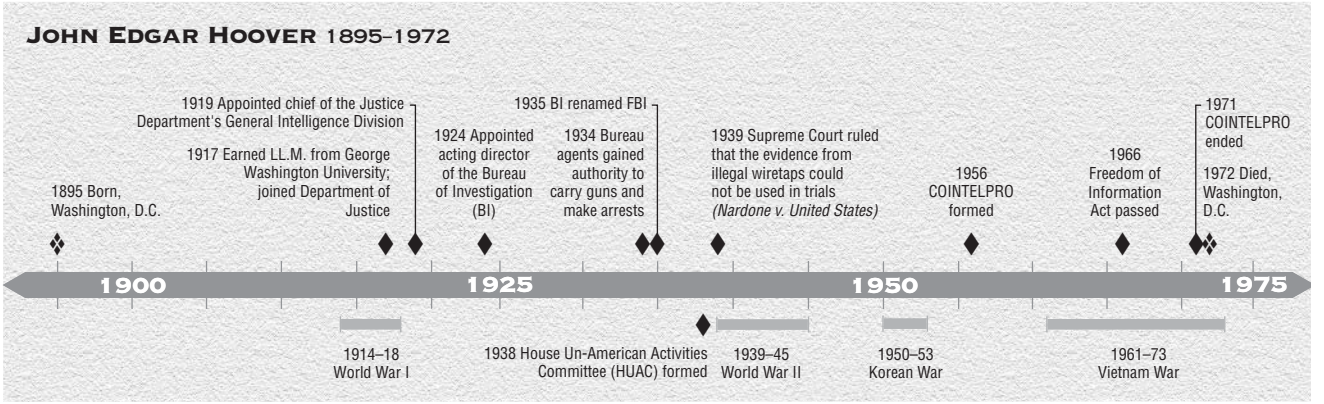

Again, the FBI was celebrated in the news media and popular culture, this time for tracking down Nazi saboteurs and spies. With the end of World War II and the beginning of the COLD WAR with the Soviet Union, Hoover directed his efforts at rooting out Communist subversives. Harkening back to his early work with Palmer, Hoover's zealousness for this task led him to make alliances with the House Un-American Activities Committee; anti-Communist politicians such as Representative RICHARD M. NIXON, of California, and Senator JOSEPH R. MCCARTHY, of Wisconsin; and members of the news media who were eager to print Hoover's inside information.

During the 1950s Hoover concentrated on anti-Communist initiatives, ignoring calls to investigate the growth of ORGANIZED CRIME. He published *Masters of Deceit* (1958), a book that articulated his views on what he perceived to be the Communist conspiracy to overthrow the U.S. government. He established the FBI's Counterintelligence Program (COINTELPRO) to disrupt the U.S. Communist party and to discredit its members through informants, disinformation, and anonymous letters and telephone calls. He also enlisted the cooperation of the INTERNAL REVENUE SERVICE to conduct selective tax audits of people he suspected of being Communists. Critics of Hoover argued—and continue to argue—that he went beyond law enforcement in these efforts, using so-called dirty tricks to undermine the reputation of persons he believed to be subversive.

Despite these charges Hoover remained a powerful federal official. His use of wiretaps on phones, and of other forms of ELECTRONIC SURVEILLANCE, provided him with a wealth of information on the private affairs of many prominent political figures. Hoover shared some of this information with his political allies, but much of it remained in his private files. Over time many politicians came to fear Hoover, who they believed might have incriminating information about them that could destroy their political careers. Armed with these files, Hoover enjoyed immense power in the 1950s and 1960s.

With the birth of the modern CIVIL RIGHTS MOVEMENT, Hoover discovered what he considered another subversive group. He became convinced that MARTIN LUTHER KING, JR., was a pawn of the Communist conspiracy. He had agents follow King and record sexual encounters in various hotel rooms. King's SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE offices were wiretapped and burglarized by the FBI many times, all in the hope of finding information that would discredit King. Though Hoover's efforts proved futile, they demonstrated his ability to use the FBI as his personal tool.

During the 1960s Hoover also had the FBI investigate the KU KLUX KLAN and other white supremacist groups. The same techniques used against King and other alleged subversives were also employed against right-wing radicals who threatened physical violence. And with the growth of opposition to the VIETNAM WAR in the 1960s, Hoover targeted war protesters.

Presidents LYNDON B. JOHNSON and Richard M. Nixon allowed Hoover to serve past the mandatory retirement age. During his last years, Hoover was criticized for his authoritarian administration of the FBI. Agents who displeased him could be banished to an obscure FBI field office or discharged. Perhaps most troubling was his refusal to investigate organized crime with the same resources expended on politically subversive organizations.

Hoover died May 2, 1972, in Washington, D.C.

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CROSS-REFERENCES

Communism; Forensic Science.

## ♦ HORNBLOWER, WILLIAM BUTLER

William Butler Hornblower was a noted corporate and trial lawyer who was nominated to the U.S. Supreme Court but failed to win confirmation.

Hornblower was born May 13, 1851, in Paterson, New Jersey, with an unusually distinguished family background. His great-grandfather was a member of the Congress of the Confederation and a judge, his grandfather was a chief justice of the Supreme Court of New Jersey, his father was a noted theologian and pastor, and his mother was a descendant of Revolutionary leaders and colonial judges. In addition, one of his uncles was JOSEPH P. BRADLEY, an associate justice of

the U.S. Supreme Court, and another was Lewis B. Woodruff, a highly respected federal circuit court judge.

Hornblower was first educated at prestigious preparatory schools and in 1871 graduated with honors from the College of New Jersey (later known as Princeton University). At the encouragement of Bradley and Woodruff, he then entered Columbia University to study law. In 1875, he graduated with distinction, was admitted to the bar, and became a trial lawyer with the New York City firm of Caton and Eaton, where he had been a clerk while a law student. In 1888, he founded the firm of Hornblower and Byrne. Throughout his legal career, Hornblower represented a number of major corporate clients, including the New York Life Insurance Company; the Chicago, Milwaukee, and St. Paul Railway Company; the New York Security and Trust Company; and several tobacco companies. He also served on many public commissions, held office in state and national bar associations, and was active in the DEMOCRATIC PARTY.

In 1893, President GROVER CLEVELAND nominated Hornblower to succeed SAMUEL BLATCHFORD, who had died, as an associate justice of the U.S. Supreme Court. Given his long and distinguished career, Hornblower appeared headed for easy confirmation, but a bitter political battle intervened to prevent Hornblower from taking the seat.

A year before his nomination to the Court, Hornblower had been appointed to a New York City Bar Association committee convened to investigate Judge Isaac H. Maynard. Maynard was accused of improper conduct in a contested election while he was deputy attorney general. The investigation ultimately led to Maynard's defeat for a seat on the New York Court of Appeals. David B. Hill, a powerful New York senator and a close friend of Maynard's, retaliated against Hornblower for his role in the investigation by vigorously campaigning against Hornblower's nomination. Hill's efforts were successful: the Senate rejected Hornblower's nomination by a vote of 30–24.

In 1895, President Cleveland nominated Hornblower for another vacancy on the Court. This time, Hornblower declined the nomination, citing the financial sacrifice he would incur if he left his very lucrative law practice.

In 1914, Hornblower was nominated to the New York Court of Appeals and was confirmed unanimously by the New York state senate. He took his seat on the court in March, but left after only one week owing to illness. He died two months later, on June 16, 1914, in Litchfield, Connecticut.

"[T]HE INDEPENDENCE OF THE JUDICIARY IS THE KEYSTONE OF OUR FORM OF GOVERNMENT, THAT IF THE KEYSTONE IS REMOVED THE WHOLE STRUCTURE IS IN DANGER OF DISINTEGRATION AND DESTRUCTION."
—WILLIAM HORNBLOWER

## HORNBOOK

*A primer; a book explaining the basics, fundamentals, or rudiments of any science or branch of knowledge. The phrase* hornbook law *is a colloquial designation of the rudiments or general principles of law.*

*A colloquial reference to a series of textbooks that review various fields of law in summary, narrative form, as opposed to casebooks, which are designed as primary teaching tools and include many reprints of court opinions.*

## HOSTAGES

*Persons taken by an individual or organized group in order to force a state, government unit, or community to meet certain conditions: payment of ransom, release of prisoners, or some other act.*

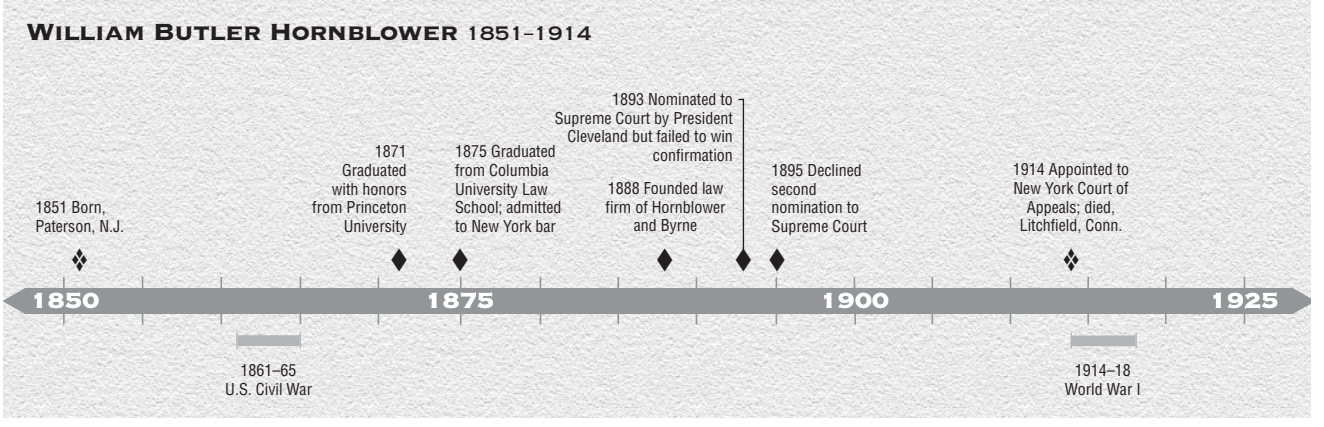

The taking of hostages, whether during wartime or periods of peace, is generally condemned under INTERNATIONAL LAW.

## HOSTILE FIRE

*In insurance law, a combustion that cannot be controlled, that escapes from where it was initially set and confined, or one that was not intended to exist.*

A hostile fire differs from a friendly fire, which burns in a place where it was intended to burn, such as one confined to a fireplace or furnace.

## HOSTILE WITNESS

*A witness at a trial who is so adverse to the party that called him or her that he or she can be cross-examined as though called to testify by the opposing party.*

The FEDERAL RULES OF EVIDENCE provide that witnesses who are hostile, or adverse, can be interrogated through the use of leading questions.

## HOT LINE AGREEMENT, 1971

The original "hot line" agreement was a memorandum of understanding between the United States and the Soviet Union reached in 1963 to establish a direct communications link between the governments of the two nations.

The need for such a communications channel was evident in the CUBAN MISSILE CRISIS of 1962 and its establishment was viewed as a means of forestalling an unnecessary resort to force. The 1971 hot line agreement updated the 1963 accord by increasing the communications capability between the two governments. It called for the addition of two separate circuits of communications employing a U.S. and a Russian satellite system.

CROSS-REFERENCES

Cold War.

## HOT PURSUIT

*A doctrine that provides that the police may enter the premises where they suspect a crime has been committed without a warrant when delay would endanger their lives or the lives of others and lead to the escape of the alleged perpetrator; also sometimes called fresh pursuit.*

Countless crime dramas have portrayed police officers in a high-speed chase barking into their radio that they are "in hot pursuit" of a suspect. This popular image says little about the legal rule of hot pursuit. As established by the U.S. Supreme Court, the rule is an important exception to the freedoms guaranteed by the FOURTH AMENDMENT. That constitutional provision safeguards citizens against excessive police intrusion into their life and property. Its foremost protection is the SEARCH WARRANT, which must be obtained from a judge or magistrate before the police can conduct most searches. Under special circumstances, the rule of hot pursuit gives the police extra powers to enter private property and conduct a search without a warrant. The rule recognizes practical limitations on Fourth Amendment rights in light of the realities of police work, especially in emergencies, but it stops far short of giving the police complete freedom to conduct warrantless searches.

As a powerful deterrent to the abuse of power, the Fourth Amendment is designed to prevent the rise of a police state. The requirement that police officers obtain search warrants prevents ARBITRARY violations of freedom, applying equally to federal and state authority. Yet this freedom is not absolute. In the twentieth century, the Supreme Court has carved out a few exceptions to its protections. These exceptions exist under "exigent circumstances": the emergencylike demands of specifically defined situations that call for immediate response by the police, who must have PROBABLE CAUSE to conduct a search. Generally, these are circumstances under which obtaining a search warrant would be impractical—ranging from those requiring officers to frisk suspects for weapons to those requiring officers to stop and search automobiles—as well as when suspects explicitly consent or imply consent to a search.

Hot pursuit is one such exigent circumstance. It usually applies when the police are pursuing a suspected felon into private premises or have probable cause to believe that a crime has been committed on private premises. The Supreme Court stated that "'hot pursuit' means some sort of a chase, but it need not be an extended hue and cry 'in and about the public streets'" (*United States v. Santana,* 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 [1976]). Hot pursuit also applies when the lives of police officers or others are in danger. Thus, the Court has recognized two specific conditions that justify warrantless searches under the rule of hot pursuit:

*The doctrine of hot pursuit provides that in certain cases police may enter, without a warrant, premises where they suspect a crime has been committed.*

CORBIS

the need to circumvent the destruction of evidence, and the need to prevent the loss of life or serious injury.

The Supreme Court enunciated the rule of hot pursuit in 1967, in *Warden v. Hayden,* 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782. It had used the term before, but in *Warden,* it explicitly condoned a certain form of this warrantless search. In this case, police officers pursuing a suspected armed robber were told that he had entered a dwelling moments before their arrival. They entered the dwelling, searched it and seized evidence, and then apprehended the suspect in bed. The man alleged in court that the warrantless search of the premises had violated his Fourth Amendment rights. When the case reached the Supreme Court, it disagreed, justifying the search under exigent circumstances.

Since *Warden,* lower courts have applied the rule to determine whether police officers acted reasonably or unreasonably when conducting a search without obtaining a search warrant. Other cases have permitted warrantless entry and arrest in hot pursuit under different circumstances: when the police saw a suspect standing in her doorway who retreated inside carrying a package that contained marked money from a drug sting (*United States v. Santana,* 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 [1976]); when the police had probable cause to arrest a suspect because he fit the description of an assailant who had threatened others and fled arrest (*United States v. Lopez,* 989 F.2d 24 (1st Cir. 1993), *cert. denied,* 510 U.S. 872, 114 S. Ct. 201, 126 L. Ed. 2d 158 [1993]); and when a police officer at the threshold of an apartment viewed a narcotics deal taking place inside (*United States v. Sewell,* 942 F.2d 1209 [7th Cir. 1991]).

Although hot pursuit expands the powers of the police to conduct warrantless searches, it does so under strict circumstances. Its purpose is grounded in practical necessity; it does not give law officers license to ignore constitutional safeguards. Courts make the final determination of whether a warrantless search is permissible, and they will reject misuses of the rule. One improper use of hot pursuit occurred in *O'Brien v. City of Grand Rapids,* 23 F.3d 990 (6th Cir. 1994). In this case, police officers pursued a suspect to his house, called for backup, surrounded the residence, and ultimately spent six hours in a standoff without seeking a search warrant. The court held that the suspect could not have fled the scene and that the officers had no fear of destruction of evidence or of a threat to safety. Thus, no exigent circumstances authorized their warrantless search.

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**CROSS-REFERENCES**

Search and Seizure.

## HOTCHPOT

*The process of combining and assimilating property belonging to different individuals so that the property can be equally divided; the taking into consideration of funds or property that have already been given to children when dividing up the property of a decedent so that the respective shares of the children can be equalized.*

## HOUSE ARREST

*Confinement to one's home or another specified location instead of incarceration in a jail or prison.*

House arrest has been used since ancient times as an alternative to criminal imprisonment, often imposed upon people who either were too powerful or too influential to be placed in an actual prison. Hereditary rulers, religious leaders, and political figures, whose imprisonment might spur a revolt by loyalists, would be confined to their homes where they could live comfortably and safely but without any influence. House arrest does not always lessen its victims' influence, however. Aung San Suu Kyi, a political leader from Myanmar, was placed under house arrest from 1989 to 1995, and again, from 2000 to 2002, by the nation's military junta. On both occasions the international community successfully exerted pressure on the government to release Suu Kyi, a peace activist and Nobel laureate.

The term *house arrest* can also refer to electronic monitoring programs in which a convicted criminal is sentenced to home confinement instead of prison, for a specified period. The criminal wears an electronic ankle bracelet (for which he usually bears maintenance costs) that monitors movement and sends a signal to a central computer if the house arrest is violated. Examples of crimes that could warrant house arrest include WHITE-COLLAR CRIMES such as FRAUD or EMBEZZLEMENT. This type of sentence can be a cost-effective way of punishing criminals who pose no threat to others and thus do not need to be imprisoned at the state's expense.

## HOUSE OF REPRESENTATIVES

*The lower chamber, or larger branch, of the U.S. Congress, or a similar body in the legislature of many of the states.*

The U.S. House of Representatives forms one of the two branches of the U.S. Congress. The House comprises 435 members who are elected to two-year terms. The U.S. Constitution vests the House with the sole power of introducing bills for raising revenue, making it one of the most influential components of the U.S. government.

### Members

According to Article I, Section 2, of the U.S. Constitution, a member of the House must be at least twenty-five years of age and a U.S. citizen for seven years before his or her election. In addition, representatives must reside in the state that they represent. Members of the House are generally called congressmen, congresswomen, or representatives.

During the First Congress (1789–91), the House had sixty-five members, each representing approximately 30,000 people. Until 1929 the law required the number of members in the House to increase in proportion to the national population. That year Congress passed the Permanent Apportionment Act (46 Stat. 21, 26, 27), which limited the size of the House to 435 representatives. During the 1990s each House member represented an average of 572,000 people.

Reapportionment or redistribution of House seats—a process whereby some states lose House representatives while others gain them—occurs after census figures have been collected. The Constitution requires that a census be conducted every ten years (art. 1, § 2). Each state must have at least one representative.

Puerto Rico elects a nonvoting resident commissioner to the House for a four-year term. Nonvoting delegates from American Samoa, the District of Columbia, Guam, and the Virgin Islands are elected to a two-year term. These special representatives are allowed to participate in debates and vote in committees.

### Committees

House committees are responsible for most of the work involved in the creation of new laws. After a bill is introduced in the House, it is referred to a committee. The committee studies the bill and may hold public hearings on it or suggest amendments. If the bill has the support of a majority of committee members, it is reported to the House, which then debates it and votes on it. The Committee on Rules determines how long a bill may be debated and the procedure by which it is amended.

The number of standing, or permanent, House committees has varied over time. In 1800 five standing committees existed. By 1910 the number of standing committees had increased to sixty-one. Between 1950 and the 1990s, the total stabilized at nineteen to twenty-two. During the 104th Congress (1995–97), there were nineteen standing committees in the House: Agriculture; Appropriations; Banking and Financial Services; Budget; Commerce; Economic and Educational Opportunities; Government Reform and Oversight; House Oversight; International Relations; Judiciary; National Security; Resources; Rules;

# The First U.S. House of Representatives, 1789–1791: Setting Precedent for Future Lawmakers

Today the U.S. House of Representatives is known as an institution with established traditions and procedures. It has 435 members, standing committees, rules for evaluating legislation, and well-defined relations with the Senate, the president, and the executive agencies of the federal government. However, the structure and operations of the House have not always been well established. In 1789, as it began the task of creating laws for a new nation, the House had no precedent to guide it.

The House of Representatives first convened April 1, 1789, in New York City. Representatives slowly made the long journey to New York, and the First House eventually reached a total of sixty-five members. Fifty-five representatives belonged to the **FEDERALIST PARTY**, and ten allied themselves with the Anti-Federalist party.

The new House members were not without experience in legislative matters. Fifty-two had served in a state legislature, the **CONTINENTAL CONGRESS**, or the Constitutional Convention. Their legislative experience proved invaluable during this First Congress, because the Constitution gave them only limited guidance on how to establish the House. It was up to the representatives to work out the details of an effective lawmaking body.

On its first day in session, the House elected its officers, choosing Frederick A. C. Muhlenberg, of Pennsylvania, as its first Speaker. On succeeding days it established rules relating to debate, legislation, committees, and cooperation with the Senate. It also defined the duties of the Speaker, modeling that position after the Speaker of the English House of Commons. The Speaker was to preside over House sessions, preserve order, resolve disputed points, and appoint certain committees.

The lack of precedent made operations difficult for the First House. **JAMES MADISON**, of Virginia, a principal Framer of the Constitution and a leading member of the First House, complained, "In every step the difficulties arising from novelty are severely experienced. . . . Scarcely a day passes without some striking evidence of the delays and perplexities springing merely from the want of precedents." Madison was confident that the House would resolve its problems, however, concluding, "Time will be a full remedy for this evil."

The House gradually found ways to improve the problems cited by Madison and others. One important solution was the development of committees. The first legislation passed by the House was created by the Committee of the Whole—that is, the entire House acting as one large committee. Representatives soon found that this was a cumbersome way to pass legislation. When meeting as the Committee of the Whole, they could consider only one piece of legislation at a time. Moreover, the chamber often became bogged down by seemingly endless debate as each member sought to join the argument.

The House responded to this predicament by creating temporary committees to research and draft legislation, forming a separate committee for each bill. This relieved the entire chamber of the necessity of debating every detail of each piece of legislation. The contemporary House, by contrast, has permanent, or standing, committees, each of which handles many bills. The sole standing committee to come out of the first House was the Committee on Elections.

With these and other changes, the First House of Representatives was able to accomplish many tasks of vital importance to the young nation. Together with the Senate, it passed sixty statutes, including laws that founded the Departments of War, Treasury, and Foreign Affairs. The House also established its power to give limited orders to executive agencies, such as when it requested Secretary of the Treasury **ALEXANDER HAMILTON** to report on issues such as the federal debt, plans to promote manufacturing, and the establishment of a national mint. No less important, under the leadership of James Madison, it drafted the first ten amendments to the Constitution, known as the **BILL OF RIGHTS**.

The House has changed greatly in more than two centuries, but the foundation built by the first representatives remains. Their innovations have become flexible traditions that allow the House to maintain order even as it evolves and adapts to new situations.

Science; Small Business; Standards of Official Conduct; Transportation and Infrastructure; Veterans' Affairs; and Ways and Means.

Each committee has an average of eight to ten subcommittees. Committee membership is determined by a vote of the entire House, and committee chairs are elected by the majority party. The House may also create special committees, including investigative committees.

### Officers

The Speaker of the House has the most powerful position in the House and is traditionally the leader of the majority party. The Speaker interprets and applies House rules and refers bills to committees. Party leadership positions in the House include the majority and minority leaders, or floor leaders, and the majority and minority whips.

The elected officers of the House include the clerk, the sergeant at arms, and the doorkeeper. The clerk oversees the major legislative duties of the House. He or she takes all votes and certifies the passage of bills, calls the House to order at the commencement of each Congress, administers legislative information and reference services, and supervises television coverage of House floor proceedings. The sergeant at arms, a member of the U.S. Capitol Police Board, is the chief law enforcement officer for the House. The sergeant maintains order in the House and arranges formal ceremonies such as presidential inaugurations and joint sessions of Congress. The doorkeeper monitors admission to the House and its galleries and organizes the distribution of House documents.

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CROSS-REFERENCES

Apportionment; Congress of the United States; Constitution of the United States.

## HOUSE UN-AMERICAN ACTIVITIES COMMITTEE (HUAC)

See COMMUNISM "House Un-American Activities Committee" (In Focus).

## HOUSEBREAKING

*The act of using physical force to gain access to, and entering, a house with an intent to commit a felony inside.*

In most states, housebreaking that occurs at night constitutes the crime of BURGLARY. Some statutes expand the definition of housebreaking to include breaking out of a house after entry has been achieved without the use of physical force, such as when access was gained under FALSE PRETENSES.

## HOUSEHOLD

*Individuals who comprise a family unit and who live together under the same roof; individuals who dwell in the same place and comprise a family, sometimes encompassing domestic help; all those who are under the control of one domestic head.*

For the purposes of insurance, the terms *family* and *household* are frequently used interchangeably.

CROSS-REFERENCES

Head of Household.

## HOUSING AND URBAN DEVELOPMENT DEPARTMENT

The Department of Housing and Urban Development (HUD) is the principal federal agency responsible for programs concerned with housing needs, fair housing opportunities, and improving and developing U.S. communities.

HUD was established in 1965 by the Department of Housing and Urban Development Act (42 U.S.C.A. § 3532–3537). Its major functions include insuring mortgages for single-family and multifamily dwellings and extending loans for home improvements and for the purchase of mobile homes; channeling funds from investors into the mortgage industry through the GOVERNMENT NATIONAL MORTGAGE ASSOCIATION; and making loans for the construction or rehabilitation of housing projects for older and handicapped persons. HUD also provides federal housing subsidies for low- and moderate-income families, makes grants to states and local communities for development activities related to housing, and promotes and enforces laws, policies, and regulations supporting fair housing and equal housing opportunities.

HUD is administered under the supervision and direction of a cabinet-level secretary appointed by the president. The secretary of HUD formulates recommendations for housing and community development policy and works with the Executive Office of the President and other federal agencies to ensure that housing

policies are consistent with other economic and fiscal policies of the government. In addition, the secretary encourages private enterprise to serve the housing and community development needs of the nation whenever possible and promotes the use of initiatives within the state, local, and private sectors to spur the growth of housing and community development resources. Equally important, the secretary ensures equal access to housing and promotes nondiscrimination. The secretary also oversees the FEDERAL NATIONAL MORTGAGE ASSOCIATION (FNMA). FNMA, also known as Fannie Mae, was chartered by Congress in the late 1960s as a stockholder-owned, privately managed corporation to provide a secondary market for home mortgages. Fannie Mae purchases home mortgages and then issues SECURITIES funded by the monthly principal and interest payments of homeowners.

Several program areas within HUD carry out the department's goals and functions. The assistant secretary for housing, who also acts as the federal housing commissioner, underwrites property improvement loans and loans for manufactured homes and administers programs that help provide housing for special groups, including the elderly, the disabled, and the chronically mentally ill. The assistant secretary also administers housing programs to assist low-income families who are having difficulties affording housing and to protect consumers against fraudulent practices of land developers and promoters.

The assistant secretary for community planning and development implements a number of programs, including the Community Development Block Grant (CDBG) Program for local communities. The CDBG Program was established in 1974 to meet a wide variety of community development needs, including the need to expand economic opportunities for persons of low and moderate income by helping to provide them with decent and affordable housing. Block grants can be used to revitalize neighborhoods in blighted areas as well as to meet other community development needs.

The assistant secretary for community planning and development also implements Hope for Ownership of Single Family Homes, which helps low-income persons become homeowners by providing federal assistance to help finance the purchase and rehabilitation of single-family homes at affordable prices. A similar program administered by the Community Planning and Development area of HUD is Home Investment in Affordable Housing, which also provides federal assistance to localities and Indian tribes for housing rehabilitation, assistance to first-time home buyers and funding for the new construc-

**Department of Housing and Urban Development**

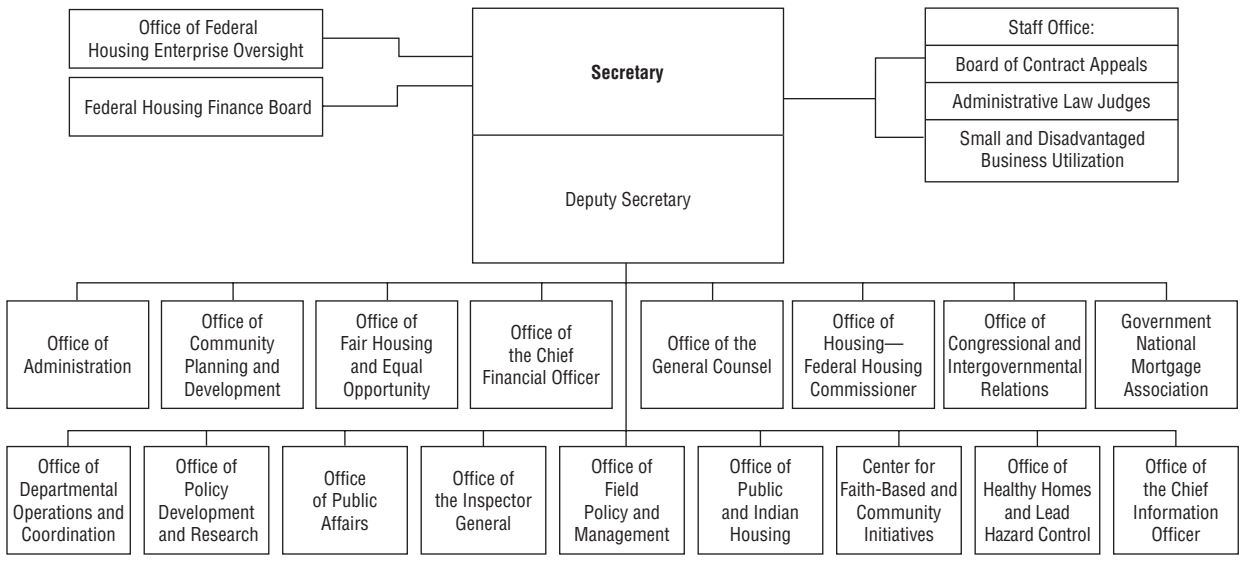

tion of rental housing in areas where such housing is needed. Other programs provide assistance for procuring both transitional and permanent housing for homeless people and for relocating property owners displaced by federal projects under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C.A. § 4601 et seq.).

The assistant secretary for community planning and development is also responsible for implementing the Neighborhood Development Demonstration Program, which was designed to determine the ability of neighborhood organizations to fund and implement neighborhood development activities. The program uses cooperative efforts and monetary support from individuals, businesses, and nonprofit organizations in conjunction with federal matching funds to encourage neighborhood organizations to become more self-sufficient in their development activities.

The assistant secretary for policy development and research evaluates and analyzes existing and proposed HUD programs and policies. The office of this secretary conducts field studies to determine the effectiveness of HUD programs through cost-benefit research and provides the secretary of HUD with economic, legal, and policy analyses of issues related to the department's oversight responsibilities.

The Office of Lead-Based Paint Abatement develops policy, conducts research, and drafts regulations to increase awareness of the dangers associated with lead-based paint poisoning and to develop safe and effective methods for the detection and abatement of lead-based paint poisoning. It also encourages state and local governments to develop programs for public education and hazard reduction surrounding such poisoning.

The assistant secretary for fair housing and equal opportunity administers fair housing laws and regulations prohibiting discrimination in public and private housing on the basis of race, color, religion, sex, national origin, handicap, or familial status. This assistant secretary thus acts as the principal adviser to the secretary of HUD on all matters relating to **CIVIL RIGHTS** and equal opportunity in housing. The assistant secretary also administers equal employment opportunity laws and regulations that prohibit discrimination on the basis of race, color, religion, sex, national origin, handicap, or age.

The assistant secretary for public and Indian housing administers a number of programs to help meet the housing needs of Native Americans. These programs include the Comprehensive Improvement Assistance Grant Program, which helps modernize and upgrade low-income housing projects; the Resident Initiatives Program, which supports resident participation in the management of properties, economic development, and other services, including programs to help ensure drug-free neighborhoods; and other programs that determine eligibility for public housing.

The Government National Mortgage Association (GNMA), another component of HUD, is a government corporation that guarantees mortgages issued by private lenders. In addition, through its mortgage-backed securities programs, Ginnie Mae, as it is known, works to promote and expand the housing market by increasing the supply of credit available for housing by channeling funds from the securities market into the mortgage market.

HUD headquarters are located in Washington, D.C., and ten HUD field offices are located throughout the United States. Each field office is headed by a secretary's representative, who is responsible for the management of the office and reports directly to the secretary. The representatives carry out the objectives of HUD as they relate to state and local governments and monitor the potential local effects of HUD policies and decisions.

In 1998, HUD opened the HUD Enforcement Center to take action against HUD-assisted multifamily property owners and other HUD fund recipients who violate laws and regulations. In the same year, Congress also approved Public Housing reforms to reduce **SEGREGATION** by race and income, encourage and reward work, bring more working families into public housing, and increase the availability of subsidized housing for very poor families. Subsequently, HUD increased its funding for low income family housing, as well as tax credits to developers of affordable single family homes.

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*Charles Hamilton Houston.*
FISK UNIVERSITY LIBRARY

## HOUSTON, CHARLES HAMILTON

Charles Hamilton Houston was a law professor and CIVIL RIGHTS lawyer who argued many landmark cases on behalf of the National Association for the Advancement of Colored People (NAACP).

Houston was born September 3, 1895, in Washington, D.C. His father, William Houston, was trained as a lawyer and worked for a while as a records clerk to supplement the family's income; his mother, Mary Ethel Houston, worked as a hairdresser. Houston's father eventually began practicing law full-time and later became a law professor at Howard University, a predominantly black institution located in Washington, D.C. An only child, Houston received his primary and secondary education in segregated Washington, D.C., schools. After graduating from high school, he received a full scholarship to the University of Pittsburgh. At the urging of his parents, he instead entered Amherst College, where he was the only black student enrolled. An outstanding student, he was elected Phi Beta Kappa, and graduated magna cum laude in 1915.

After Amherst, Houston taught English composition and literature at Howard for two years. In 1917, shortly after the United States entered WORLD WAR I, Houston left teaching for military service. He enrolled in an officer candidate school for blacks, established at Des Moines. After four months of training, Houston became a first lieutenant in the infantry and was assigned to duty at Camp Meade, Maryland. He later entered field artillery school, despite the widely held belief that blacks could not serve effectively as field artillery officers.

Houston served in France until 1919, then returned to the United States to enroll at Harvard Law School. He was one of the few black students admitted at that time. His outstanding academic record earned him a place on the editorial board of the *Harvard Law Review,* making him the first black student to be so honored. In 1922, he received a bachelor of laws degree cum laude. He remained at Harvard for an additional year of graduate study, and earned a doctor of juridical science degree in 1923. He then won a fellowship to study for a year at the University of Madrid, where he earned a doctor of CIVIL LAW degree.

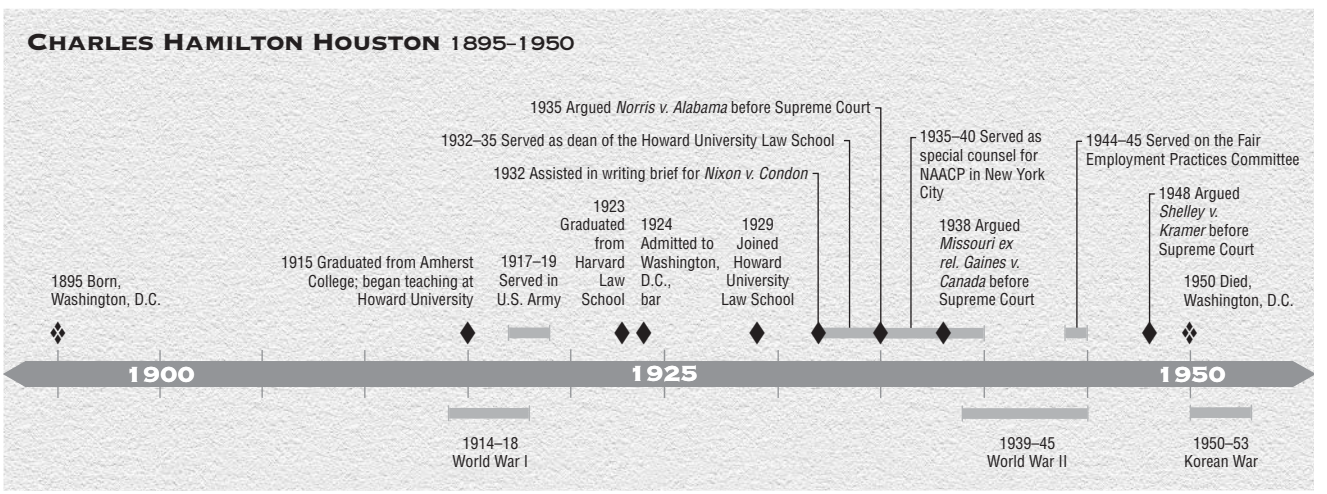

In 1924, his studies completed, Houston was admitted to the bar of the District of Columbia and became his father's partner in the law firm of Houston and Houston. He quickly developed a successful practice, specializing in trusts and estates, probate, and landlord-tenant matters. He also taught law part-time at Howard University. In 1929, he left law practice to become an associate professor and vice dean of the School of Law at Howard. In 1932, he became dean, a post he held until 1935.

While at Howard, Houston worked to upgrade the law school's facilities, reputation, and academic standards and was instrumental in securing full accreditation for the school. He also found time to participate in important civil rights cases. He helped write the brief for *Nixon v. Condon,* 286 U.S. 73, 52 S. Ct. 484, 76 L. Ed. 984 (1932), in which the U.S. Supreme Court held that a "whites-only" primary election was unconstitutional. He also helped argue *Norris v. Alabama,* 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 (1935), where the Court overturned the convictions of nine black men charged with rape, because Alabama's systematic exclusion of blacks from juries violated the FOURTEENTH AMENDMENT of the Constitution.

In 1935, Houston left Washington, D.C., to become the first special counsel for the NAACP, headquartered in New York City. As special counsel, Houston initiated legal challenges in support of civil rights and argued landmark cases before the U.S. Supreme Court, including *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337, 59 S. Ct. 232, 83 L. Ed. 208 (1938). In *Gaines,* the Supreme Court ruled that a state could not exclude a black applicant from a state-supported all-white law school. Houston also argued *Shelley v. Kraemer,* 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948). In the *Shelley* decision, the Court held that a clause in a real estate contract prohibiting the sale of property to nonwhites could not be enforced by state courts. Houston was widely praised for the thorough and sometimes painstaking preparation of his legal briefs and his impassioned oral arguments before the Court.

In 1940, Houston left the NAACP to return to private practice in Washington, D.C., though he remained a member of the NAACP's national legal committee. He was succeeded as special counsel by THURGOOD MARSHALL, a colleague at the NAACP whom he had taught at Howard and who later became the first African American justice on the U.S. Supreme Court. Houston remained active in civil rights work, winning before the U.S. Supreme Court two cases that struck down racially discriminatory practices by the railroads: *Steele v. Louisville and Nashville Railroad Company*, 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173 (1944), and *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 65 S. Ct. 235, 89 L. Ed. 187 (1944).

In 1944, Houston was appointed by President FRANKLIN D. ROOSEVELT to the Fair Employment Practices Committee (FEPC). He resigned the following year after a dispute with President HARRY S. TRUMAN over alleged discriminatory hiring practices on the part of the Capital Transit Company, of Washington, D.C. Capital Transit Company was the transportation system in Washington, D.C. Houston alleged that it engaged in discriminatory policies by not hiring black workers or promoting current black workers to positions as bus operators or streetcar conductors. The FEPC wanted to issue a directive ending discrimination. Truman did not respond to Houston's efforts to have the directive issued, so Houston resigned from the FEPC. Truman finally did respond, maintaining that, because Capital Transit had earlier been seized under the War Labor Dispute Act because of a labor dispute, enforcement of the order ending discrimination should be postponed.

After battling heart disease for several years, Houston died in Washington, D.C., on April 22, 1950, at the age of fifty-four.

"WHETHER ELECTED OR APPOINTED, PUBLIC OFFICIALS SERVE THOSE WHO PUT AND KEEP THEM IN OFFICE. WE CANNOT DEPEND UPON THEM TO FIGHT OUR BATTLES."
—CHARLES HAMILTON HOUSTON

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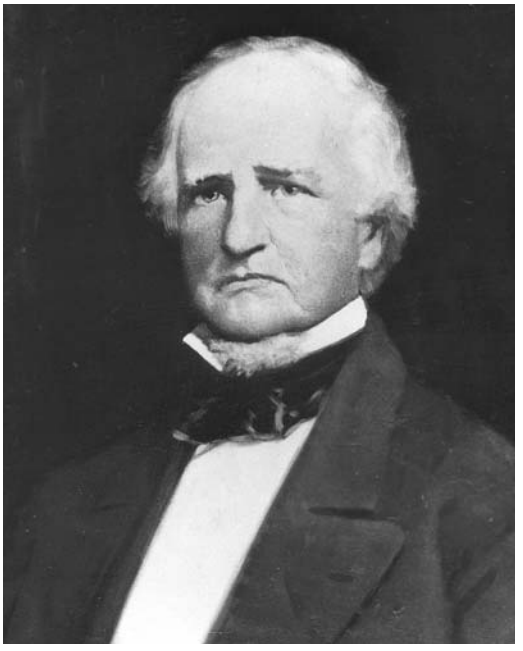

*Benjamin C. Howard.*
U.S. SUPREME COURT

## HOWARD, BENJAMIN CHEW

Benjamin Chew Howard was a lawyer who served as the Supreme Court reporter of decisions from 1843 to 1861.

Howard, born November 5, 1791, in Baltimore, was the son of a distinguished Revolutionary War officer and the grandson of the president of the Pennsylvania Court of Errors and Appeals before the Revolution. Howard earned bachelor's and master's degrees from the College of New Jersey (later known as Princeton University). In 1812, he began the study of law, which was interrupted by military service during the WAR OF 1812. Howard was a captain in the war and played a prominent role in the defense of Baltimore during the Battle of North Point, fought in September 1814.

Following the war, Howard resumed his legal studies. He was admitted to the Maryland bar in 1816. Active in the Maryland DEMOCRATIC PARTY, in 1820, he was elected to the Baltimore City Council, and in 1824, he won a seat in the Maryland House of Delegates. In 1829, he was elected to the U.S. Congress, where he served four terms. During his time in Congress, he was chairman of the House Foreign Relations Committee for several years. In 1840, he left Congress to return to Maryland state politics, serving as a senator in the Maryland General Assembly. In January 1843, he resigned before the expiration of his term, to become reporter of the U.S. Supreme Court, a position created by Congress in 1816.

As reporter, Howard was primarily responsible for editing, publishing, and distributing the Court's opinions. He replaced Richard Peters, who was fired after he disagreed with several of the justices about whether their opinions should be published in the reports. Howard, though highly praised for publishing thorough and well-edited reports, did create a controversy of his own when he refused to include the complete arguments raised by both sides in a fugitive slave case decided by the Court, thus calling his impartiality into question.

In Howard's day, the reporter was paid a modest yearly salary and usually earned additional income selling copies of the bound volume in which an important case appeared or printing the opinion separately in a pamphlet for sale to the public. When the *Dred Scott* decision outlawing SLAVERY was issued by the U.S. Supreme Court in 1857, the U.S. Senate sought to publicize it as broadly as possible and printed 20,000 copies for free distribution to the public (DRED SCOTT V. SANDFORD, 60 U.S. [19 How.]

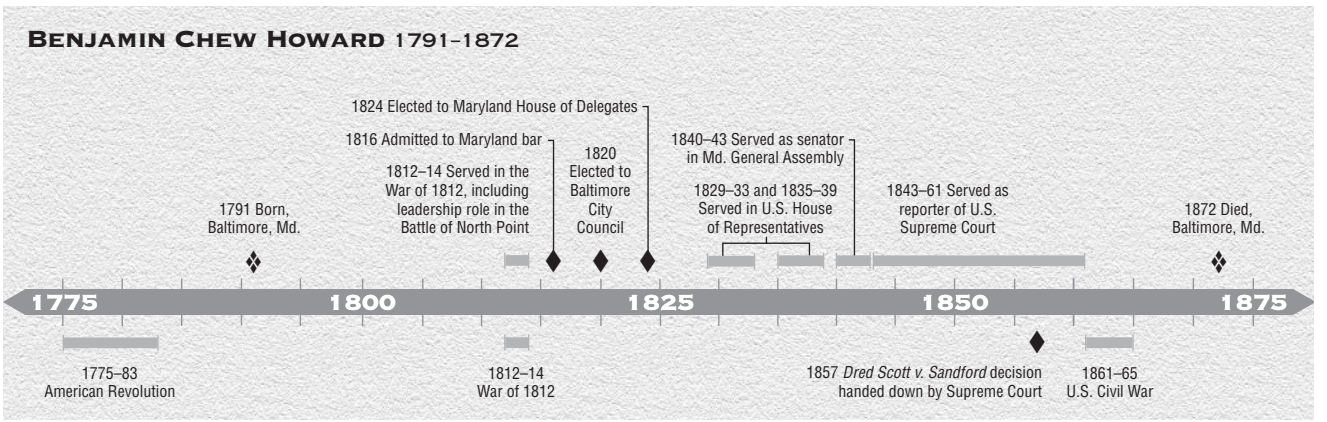

393, 15 L. Ed. 691 [1856]). Howard protested strongly that his income from the sale of the opinion would suffer from the competition. As a result, the Senate voted to pay him $1,500 in compensation and agreed not to distribute its version until Howard's bound volume and pamphlet version were made available.

Howard, who edited 24 volumes of reports, remained active in politics while Supreme Court reporter. He resigned from the Court in 1861 to run as the Democratic candidate for governor of Maryland. Following his defeat, Howard retired from public life. He died March 6, 1872, in Baltimore.

### H.R.

An abbreviation for the HOUSE OF REPRESENTATIVES.

### ◆ HUGHES, CHARLES EVANS

The long public career of Charles Evans Hughes prepared him to be a powerful chief justice of the U.S. Supreme Court. Hughes was a legal and political dynamo. Beginning as a lawyer and law professor in New York in the 1880s, he became known nationally for his role in investigating power utilities and the insurance industry. He went on to a career in national and international affairs—first as a two-term governor of New York, second as a Republican nominee for president, and third as SECRETARY OF STATE. He was twice appointed to the U.S. Supreme Court, serving as an associate justice from 1910 to 1916 and as chief justice from 1930 to 1941. His intellectual vigor and strong hand guided the Court through the critical period of the NEW DEAL era when it made significant changes in its views on the constitutional limits on government power.

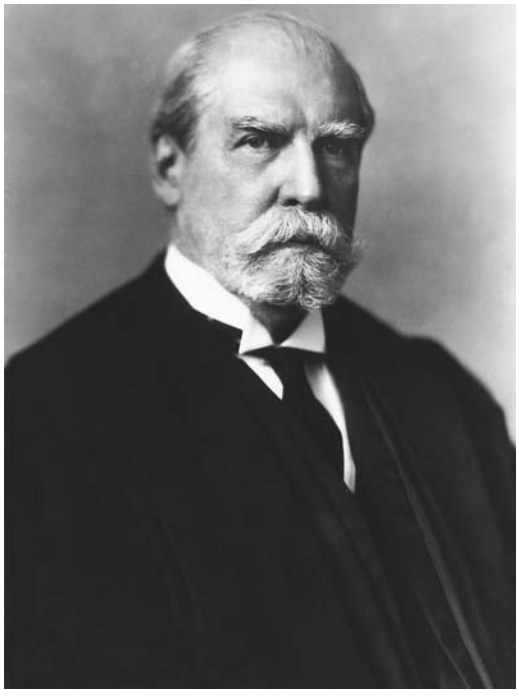

*Charles Evans Hughes.*
PHOTOGRAPH BY HARRIS & EWING. COLLECTION OF U.S. SUPREME COURT

Hughes was born April 11, 1862, in Glen Falls, New York. Educated at Columbia University Law School, he spent his twenties and thirties in private practice and teaching law at Columbia and Cornell Universities. His expertise was in COMMERCIAL LAW and by the time he was in his forties he had built a considerable reputation in that area. The New York state legislature chose him in 1905 to lead public investigations of the gas and electrical utilities in

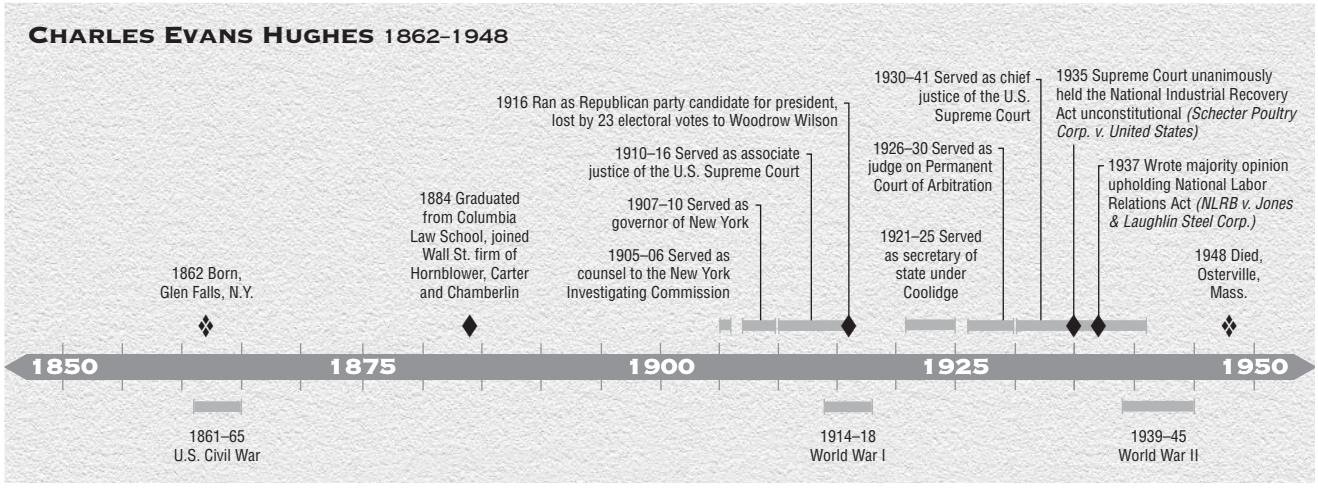

New York City and to probe the state's insurance industry. His work not only resulted in groundbreaking regulatory plans, later highly influential across the United States, but also catapulted Hughes into a political career. He immediately ran for governor of New York and twice won election to that office as a politician known for independence of mind and commitment to administrative reform. In 1910, his second term as governor had not yet expired when he stepped down and accepted President William Howard Taft's appointment to the Supreme Court.

This move characterized the lifelong tension between Hughes's attractions to the legal and political spheres. He left public office to join the Court; later he would leave the Court to run for office again, then return to the Court as chief justice. In his nearly seven years on the Court as an associate justice, he displayed a flexibility of thought that led him to side at times with liberals and at times with the conservative majority. His most significant opinions turned on the issue of federal power. In particular, these opinions weighed the extent to which the COMMERCE CLAUSE of the Constitution gave the federal government authority to regulate the national economy. The opinions were delivered in the *Minnesota* and *Shreveport Rate* cases, in which the Court's decisions laid the groundwork for the expansion of federal regulation in the years to come (*Simpson v. Shepard,* 230 U.S. 352, 33 S. Ct. 729, 57 L. Ed. 1511 [1913]; *Houston, East & West Texas Railway Co. v. United States,* 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 [1914]).

"WHEN WE LOSE THE RIGHT TO BE DIFFERENT, WE LOSE THE PRIVILEGE TO BE FREE."
—CHARLES EVANS HUGHES

The middle years of Hughes's career saw tumultuous change. In 1916, he stepped down from the Court to return to politics. Although he had not actively sought the Republican Party's nomination for president, the party drafted him, and he reluctantly agreed to run against WOODROW WILSON. Despite a hard-fought campaign, Hughes lost the close election and returned to private practice. His respite from public service was brief. In 1921, President WARREN G. HARDING appointed Hughes secretary of state, a difficult position because of the challenges facing the United States in the aftermath of WORLD WAR I: the war debt, reparations, the newly established Soviet Union, and especially relations with East Asia. Naval disarmament ranked high among Hughes's concerns. In 1921 and 1922, he organized the Washington Conference, which for nearly a decade curbed naval growth and brought stability to the western Pacific.

The final chapter in Hughes's career returned him to the Supreme Court. Hughes served as secretary of state to Harding's successor, CALVIN COOLIDGE, then resigned in 1925 to work in private practice. Between that and his next stint on the Court, he published a book-length work entitled *The Supreme Court of the United States: Its Foundation, Methods, and Achievements: An Interpretation* (1928, reprinted 2000). In 1930, President HERBERT HOOVER nominated him for chief justice. Bitter opponents voiced criticism of Hughes's political career and his resignation but failed to block his appointment in a confirmation vote of 52–26. At age 68, Hughes became the oldest man ever to be chosen chief justice.

The Hughes Court sat during a controversial period in U.S. legal history. The Depression years had brought misery and a radical federal response. President FRANKLIN D. ROOSEVELT's economic recovery plans, known collectively as the New Deal, met opposition in Congress and from the justices of the Court. Several pieces of New Deal legislation faced constitutional tests and failed. After unanimously holding unconstitutional the NATIONAL INDUSTRIAL RECOVERY ACT (48 Stat. 195 [1933]) in *Schechter Poultry Corp. v. United States,* 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935), the Court provoked a battle with the frustrated president. Roosevelt proposed an increase to the number of seats on the Court, hoping to then pack the Court with justices favorable to his views. Hughes wrote to the SENATE JUDICIARY COMMITTEE in a move to help thwart Roosevelt's plan.

By taking a largely dim view of both federal and state regulatory power, the Hughes Court differed little from its conservative predecessors. In 1937, this changed dramatically. In upholding the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., Hughes wrote a landmark opinion that greatly strengthened the labor movement (NLRB V. JONES & LAUGHLIN STEEL CORP., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 [1937]). Also that year the Court upheld a state MINIMUM WAGE law, in WEST COAST HOTEL V. PARRISH, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703. The *Parrish* decision was a striking departure from rulings of previous decades. Only 15 years earlier, for example, the Court had refused to force employers of adult women to pay a minimum wage, viewing such a requirement as an uncon-

stitutional infringement of the liberty of contract. The 1937 decisions together have been called a constitutional revolution because they marked a great change in JURISPRUDENCE that liberalized the Court's view of government power.

When Hughes retired at last in 1941, at age 80, he had made a powerful impression on the law and on the Court. During his tenure as chief justice, he had shown the same flexibility of mind that marked his period as an associate justice: siding alternately with liberal and conservative colleagues, he often cast the swing vote. He had clearly run the Court with a strong hand, not only in leading the discussion but frequently in persuading justices to vote with him. Justice FELIX FRANKFURTER, who served under Hughes, likened him to the conductor of an orchestra: "He took his seat at the center of the Court with a mastery, I suspect, unparalleled in the history of the Court."

Hughes died August 27, 1948, in Osterville, Massachusetts. Succeeding generations have compared his bold leadership to that of Chief Justice EARL WARREN, who headed the Court two decades later.

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Labor Law; Labor Union; Supreme Court of the United States.

## HUMAN RIGHTS

*Basic rights that fundamentally and inherently belong to each individual.*

Human rights are freedoms established by custom or international agreement that impose standards of conduct on all nations. Human rights are distinct from civil liberties, which are freedoms established by the law of a particular state and applied by that state in its own jurisdiction.

Specific human rights include the right to personal liberty and DUE PROCESS OF LAW; to freedom of thought, expression, religion, organization, and movement; to freedom from discrimination on the basis of race, religion, age, language, and sex; to basic education; to employment; and to property. Human rights laws have been defined by international conventions, by treaties, and by organizations, particularly the UNITED NATIONS. These laws prohibit practices such as torture, SLAVERY, summary execution without trial, and ARBITRARY detention or exile.

### History

Modern human rights law developed out of customs and theories that established the rights of the individual in relation to the state. These rights were expressed in legal terms in documents such as the English Bill of Rights of 1688, the U.S. Declaration of Independence of 1776, the U.S. Bill of Rights added to the U.S. Constitution in 1789, and the French Declaration of the Rights of Man and the Citizen added to the French Constitution in 1791.

Human rights law also grew out of earlier systems of INTERNATIONAL LAW. These systems, developed largely during the eighteenth and nineteenth centuries, were predicated on the doctrine of national sovereignty, according to which each nation retains sole power over its internal affairs without interference from other nations. As a result, early international law involved only relations between nation-states and was not concerned with the ways in which states treated their own citizens.

During the late nineteenth and early twentieth centuries, the notion of national sovereignty came under increasing challenge, and reformers began to press for international humanitarian standards. In special conferences such as the Hague Conference of 1899 and 1907, nations created laws governing the conduct of wars and handling of prisoners.

Not until after WORLD WAR II (1939–45) did the international community create international treaties establishing human rights standards. The United Nations, created in 1945, took the lead in this effort. In its charter, or founding document, the United Nations developed objectives for worldwide human rights standards. It called for equal rights and self-determination for all peoples, as well as "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (art. 55). The UNIVERSAL DECLARATION OF HUMAN RIGHTS, adopted by the U.N. General Assembly in 1948, also became an important human rights document.

To develop the U.N. Charter into an international code of human rights law, the international community created a number of multilateral human rights treaties. The two most significant of these are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, both put into effect in 1976. These treaties forbid discrimination on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. The two covenants, along with the U.N. Charter, the Universal Declaration of Human Rights, and an accord called the Optional Protocol to the Covenant on Civil and Political Rights (1976), constitute a body of law that has been called the International Bill of Human Rights.

The Covenant on Civil and Political Rights includes protections for the right to life, except after conviction for serious crime (art. 6); freedom from torture and other cruel and inhumane punishment (art. 7); freedom from slavery and prohibition from slave trade (art. 8); freedom from arbitrary arrest or detention (art. 9); humane treatment of prisoners (art. 10); freedom of movement and choice of residence (art. 12); legal standards, including equality before the law, fair hearings before an impartial tribunal, PRESUMPTION OF INNOCENCE, a prompt and fair trial, the RIGHT TO COUNSEL, and the right to review by a higher court; freedom of thought, conscience, and religion (art. 18); and FREEDOM OF ASSOCIATION, including association in trade unions (art. 22).

The Covenant on Economic, Social, and Cultural Rights protects additional rights, many of which have yet to be realized in poorer countries. These include the right to work (art. 6); to just wages and safe working conditions (art. 7); to social security and social insurance (art. 9); to a decent standard of living and freedom from hunger (art. 11); to universal basic education (art. 13); and to an enjoyment of the cultural life and scientific progress of the country.

The international community has also adopted many other human rights treaties. These include the Convention on the Prevention and Punishment of the Crime of Genocide (1948); the Convention on the Political Rights of Women (1953); the Convention to Suppress the Slave Trade and Slavery (revised 1953); the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment (1987); the Convention on the Rights of the Child (1990); and the Convention on Protection of the Rights of Migrant Workers (2003).

In addition to worldwide human rights agreements, countries have also established regional conventions. These include the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights.

### The United States and Human Rights

Although the United States was an active participant in the formation and implementation of international human rights organizations and treaties following World War II, and although it ratified selected treaties such as the Convention to Suppress the Slave Trade and Slavery in 1967 and the Convention on the Political Rights of Women in 1976, it did not ratify any of the major rights treaties until 1988, when it approved the Convention on the Prevention and Punishment of the Crime of Genocide. Four years later it ratified the International Covenant on Civil and Political Rights.

The U.S. Senate, which has authority to ratify all treaties, has been slow to review and approve human rights provisions, for a number of reasons. Senators have expressed concern about the effect of international treaties on U.S. domestic law. Article VI of the U.S. Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." Treaties therefore stand as federal law, though they are not considered to be law if they conflict with the Constitution (*Reid v. Covert,* 354 U.S. 1, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 [1957]).

Conservative senators blocked early ratification of human rights treaties largely out of concern that the treaties would invalidate racial SEGREGATION laws that existed in the United States until the 1960s. Many human rights advocates claimed that these laws violated existing international treaties. Some senators argued that human rights should fall under domestic authority only and should not be subject to international negotiations. Others contended that ratification of human rights treaties would federalize areas of law better left to the states.

Since the late 1960s, such objections in the Senate have been overcome by attaching to

treaties modifying terms called reservations, understandings, and declarations (RUDs). RUDs modify the treaties so that their effect on U.S. law will be acceptable to the two-thirds majority required for treaty ratification in the Senate. A reservation, for example, may state that the United States will not accept any element of a treaty found to be in conflict with the U.S. Constitution or existing laws, or that ratification will not federalize areas of law currently controlled by the states.

The U.S. Congress has also enacted its own human rights legislation. Under the leadership of Representative Donald M. Fraser (D-Minn.) during the 1970s, the House Committee on Foreign Affairs added language to the Foreign Assistance Act of 1973 (22 U.S.C.A. § 2151 et seq.) that required the president to cancel military and economic assistance to any government that "engages in a consistent pattern of gross violations of internationally recognized human rights," including torture and arbitrary detention without charges (§§ 2151n, 2304). This new legislation authorized the STATE DEPARTMENT to collect and analyze data on human rights violations. Congress has also passed laws that require cutting off or limiting aid to countries with significant human rights violations.

In 1977, Congress gave human rights greater priority within the EXECUTIVE BRANCH by creating a new State Department office, the Bureau on Human Rights and Humanitarian Affairs, headed by an assistant secretary of state (Pub. L. No. 95-105, 91 Stat. 846). In 1994, the administration of President BILL CLINTON renamed the office the Bureau for Democracy, Human Rights, and Labor. The bureau is charged with administering programs and policies to promote democratic institutions and respect for human rights and workers' rights around the world. It also presents to Congress an ANNUAL REPORT on the status of human rights all over the globe.

### Nongovernment Organizations

AMNESTY INTERNATIONAL, the CENTER FOR CONSTITUTIONAL RIGHTS, HUMAN RIGHTS WATCH, the International Commission of Jurists, and other international human rights organizations closely monitor states' compliance with human rights standards. These groups also publicize rights violations and coordinate world public opinion against offending states. In many cases they induce governments to modify their policies to meet rights standards.

Domestic human rights organizations such as the Vicaria de Solidaridad, in Chile, and the Free Legal Assistance Group of the Philippines also play a significant role as human rights watchdogs, often at great personal risk to their members.

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Civil Rights; Genocide; Nuremberg Trials; Tokyo Trial.

## HUMAN RIGHTS WATCH

Human Rights Watch (HRW) investigates HUMAN RIGHTS abuses throughout the world, publishing its findings in books and reports every year. These activities often generate significant coverage in local and international media. This publicity in turn prompts governments to change their policies and practices. In cases of extreme human rights abuses, HRW advocates for the withdrawal of military and economic support from governments that violate the rights of their people.

In international conflicts and other crises, HRW provides current information about conflicts—focusing on the human rights situation on the ground—while the conflicts or crises are underway. The purpose of HRW is to increase the price of human rights abuse, thereby helping to decrease the incidents of such abuses.

HRW is the largest human rights organization based in the United States. HRW employs lawyers, journalists, academics, and country experts of many nationalities and diverse backgrounds, and often leverages the force of allied human rights organizations by joining forces with them to achieve shared human rights goals. As of February 2002, Human Rights Watch employed 189 permanent staff plus short-term fellows and consultants.

Human Rights Watch is an independent, nongovernmental organization. It gains most of its support from contributions from private individuals and foundations worldwide. It accepts no government funds, directly or indirectly, from the United States or any other government. HRW is not an agency of the U.S. government, nor was it founded by the U.S. government. Although HRW frequently calls on the United States to support human rights in U.S. foreign policy, the organization also reports on human rights abuses inside the United States. HRW has made negative reports against the United States in areas such as prison conditions, police abuse, the detention of immigrants, and the imposition of the death penalty.

HRW maintains its headquarters in New York. It also maintains offices in Brussels, Bujumbura, Freetown (Sierra Leone), Kigali, Geneva, London, Los Angeles, Moscow, San Francisco, Santiago de Chile, Tashkent, Tbilisi, and Washington.

Most HRW research is carried out by sending fact-finding teams into countries where there have been allegations of serious human rights abuses. HRW examines the human rights practices of governments of all political stripes, of all geopolitical alignments, and of all ethnic and religious persuasions. HRW documents and denounces murders, disappearances, torture, ARBITRARY imprisonment, discrimination, and other abuses of internationally recognized human rights.

Not only does HRW encompass the entire globe for its activities, but HRW is interested in enormously complex and diverse issues. For example, HRW follows developments worldwide in women's rights, children's rights, and the flow of arms to abusive forces. Other HRW projects include ACADEMIC FREEDOM, the human rights responsibilities of corporations, international justice, prisons, drugs, and REFUGEES. The unique and independent nature of this international organization enables it to target any and all parties to conflict.

HRW pursues active investigations of human rights abuses in more than 70 countries. Its methods for obtaining human rights information has made it a credible source of information for individuals and governments concerned with human rights. To conduct research, Human Rights Watch sends members of its staff to interview people who have firsthand experience with alleged abuse. Researchers work with local activists and other specialists. Their findings are written up in reports.

HRW reports categorize and describe human rights violations, detail probable causes for the abuses, and make recommendations for ways to end the abuses. HRW has published more than a thousand reports dealing with human rights issues in more than one hundred countries worldwide. HRW has used its investigations to examine human rights violations associated in the following cases: Taliban massacres in Afghanistan; trafficking of Thai women in Asia; rape in U.S. prisons; refugees in Sierra Leone; and conflicts in Indonesia, Macedonia, Colombia, Russia, and the Congo.

Since its formation, HRW has focused mainly on upholding civil and political rights. HRW began in 1978 with the founding of its European division, Helsinki Watch (now Human Rights Watch/Helsinki). This was in response to a call for support from groups in Moscow, Warsaw, and Prague, which had been established to monitor compliance in Soviet Bloc countries with the human rights provisions of the landmark Helsinki accords. A few years later, the Reagan administration contended that human rights abuses by certain right-wing governments were more tolerable than those of left-wing governments. Thus, to counter charges of maintaining a double standard between the East and West, HRW formed Americas Watch (now Human Rights Watch/Americas).

By 1987, HRW had developed a powerful set of techniques for pursuing its agenda: painstaking documentation of abuses and aggressive advocacy in the press and with governments, and it employed these techniques all over the world. Over time, the organization grew to cover other regions of the world. Eventually, all the "Watch" committees were united in 1988 to form Human Rights Watch.

Between 1993 and 2003, HRW has increasingly addressed economic, social, and cultural rights as well. It is particularly attuned to situations in which its methods of investigation and reporting are most effective. These include cases in which arbitrary or discriminatory governmental conduct lies behind an economic, social and cultural rights violation. In addition to governments, its work also addresses significant economic players and such international financial institutions as the WORLD BANK and multinational corporations such as General Electric.

Today, HRW comprises seven major divisions: Africa, the Americas, Arms, Asia, Children, Women, the Middle East and North Africa, and Europe and Central Asia.

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## ♦ HUME, DAVID

David Hume was an eighteenth-century Scottish philosopher, historian, and social theorist who influenced the development of skepticism and empiricism, two schools of philosophical thought. Hume's economic and political ideas influenced Adam Smith, the Scottish economist and theorist of modern capitalism, and JAMES MADISON, the American statesman who helped shape the republican form of government through his work on the U.S. Constitution.

Hume was born August 25, 1711, in Chirnside, near Edinburgh, Scotland. He entered Edinburgh University when he was twelve. He left the university after several years of study and attempted to study law. He did not like the subject, and instead read widely in philosophy. In 1729 he suffered a nervous breakdown. After a prolonged recovery, he moved to France in 1734, where he wrote his first work, *A Treatise on Human Nature.* The book was not published until 1739 and was largely ignored. His next work, *Essays, Moral and Political* (1741), attracted favorable notice. Throughout the 1740s Hume's religious skepticism doomed his chances for a professorship at Edinburgh University. He spent the decade as a tutor and then as secretary to a Scottish general. During this period he wrote several more works of philosophy, including *An Enquiry Concerning the Principles of Morals* (1751).

In 1752 he was made librarian of the Faculty of Advocates Library at Edinburgh. From 1754 to 1762, he published his monumental *History of England,* which for many years was considered the basic text of English history. This work brought him international fame. He later served as secretary to the British counsel in Paris. He died August 25, 1776, in Edinburgh.

As a philosopher, Hume espoused a skeptical viewpoint, distrusting speculation. He believed that all knowledge comes from experience and that the mind contains nothing but a collection of perceptions, that all events are viewed and interpreted through the sensations of the mind. He attacked the principle of causality, which states that nothing can happen or exist without a cause. Hume was willing to admit that one event, or set of sense impressions, always precedes another, but he argued that this did not prove that the first event causes the second. A person can conclude that causality exists, but that conclusion is based on belief, not proof.

"THE HEART OF MAN IS MADE TO RECONCILE CONTRADICTIONS."
—DAVID HUME

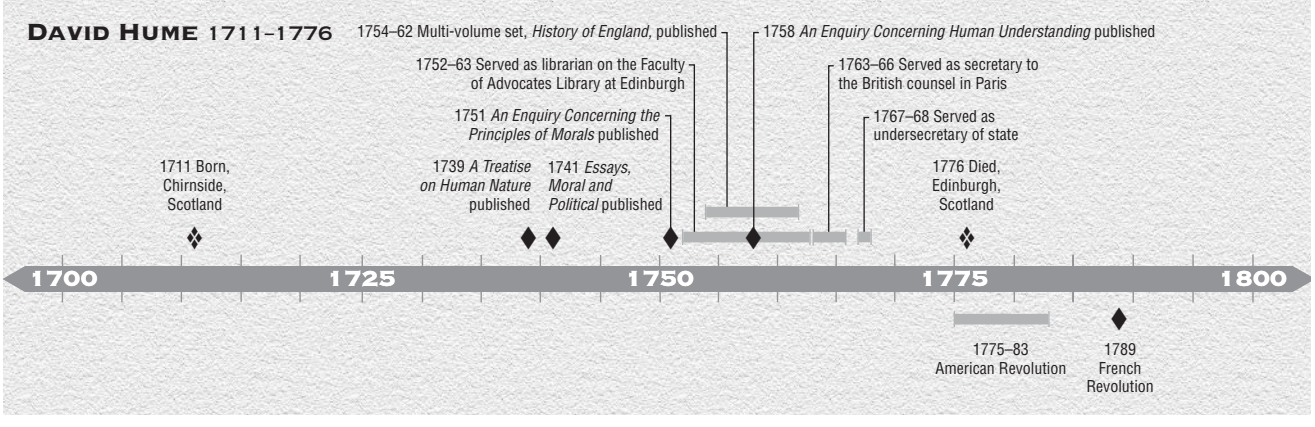

Therefore, a person cannot expect the future to be similar to the past, because there is no rational basis for that expectation.

Like his philosophical beliefs, Hume's essays on politics and economics were influential in his time. Historians have concluded that James Madison read Hume's *Essays, Moral and Political* and applied some of the ideas from this work while helping write the Constitution and *The Federalist Papers.* Hume was concerned about the formation of factions based on religion, politics, and other common interests. He concluded that a democratic society needs to prevent factions, which ultimately undermine the government and lead to violence. Madison agreed that factions can divide government but came to the opposite conclusion: the more factions the better. In Madison's view more factions made it less likely that any one party or coalition of parties would be able to gain control of government and invade the rights of other citizens. The system of checks and balances contained in the Constitution was part of Madison's plan for placing some limits on factions.

"THERE ARE NOT ENOUGH JAILS, NOT ENOUGH POLICEMEN, NOT ENOUGH COURTS TO ENFORCE A LAW NOT SUPPORTED BY THE PEOPLE."
—HUBERT H. HUMPHREY

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## ♦ HUMPHREY, HUBERT HORATIO

Hubert Horatio Humphrey served as a U.S. senator from Minnesota and as the thirty-eighth vice president of the United States. From his election to the U.S. Senate in 1948 to his death in 1978, Humphrey was the quintessential COLD WAR liberal. His unsuccessful presidential campaign in 1968 was weakened by his support of President LYNDON B. JOHNSON's Vietnam War policies.

Humphrey was born in Wallace, South Dakota, on May 27, 1911. He grew up in Doland, South Dakota, where his father ran the local drugstore. He received a degree from the Denver College of Pharmacy in 1933 and helped run the family drugstore before entering the University of Minnesota. After graduating from the University of Minnesota in 1939, he earned a master's degree from Louisiana State University. He taught at the University of Minnesota, Louisiana State University, and Macalester College, in St. Paul, Minnesota, before joining the federal Works Progress Administration in Minnesota in 1941.

Humphrey became a leader in Minnesota DEMOCRATIC PARTY politics during WORLD WAR II. After narrowly losing the Minneapolis mayoral election in 1943, he cemented his position in 1944 when he united the Minnesota Democratic and Farmer-Labor parties into the Democratic Farmer-Labor (DFL) party. The Farmer-Labor party had advocated more radical political policies in the 1930s and 1940s, and had gained national attention through Governor Floyd B. Olson, of Minnesota. In the 1930s Olson and the Farmer-Labor party had advocated more aggressive governmental intervention to deal with the Great Depression. Olson criticized President FRANKLIN D. ROOSEVELT for not doing enough to help the nation's unemployed. By the mid-1940s, the party had attracted many Communist-influenced members. In 1947 Humphrey and his allies forced the more radical Farmer-Labor members out of leadership positions and ultimately out of the DFL. On a national level, Humphrey helped form Americans for Democratic Action, a liberal organization that trumpeted its anti-Communist credentials.

His political leadership paid quick dividends. In 1945 he was elected mayor of Minneapolis by more than thirty thousand votes. He increased his margin of victory to fifty thousand in his 1947 reelection campaign. As mayor he rooted out political graft and corruption and began to implement pieces of his liberal agenda. He secured the passage of the first municipal fair employment act in the United States and gained additional funds for public housing and WELFARE.

Humphrey galvanized liberal Democrats in 1948 at the Democratic National Convention. Southern Democrats on the platform committee had rejected President HARRY S. TRUMAN's civil rights proposals. Humphrey, a delegate to the convention and a candidate for the U.S. Senate, led a fight from the convention floor to restore the CIVIL RIGHTS plank. His passionate

oratory helped bring back the proposals and fixed in the public mind the image of Humphrey as a fiery liberal, an image he would evoke the rest of his public career.

He was elected to the Senate in 1948, and found that his aggressive style clashed with the gentleman's-club atmosphere of that institution. A quick learner, he sought the mentorship of Lyndon Johnson, soon to be Senate majority leader. Humphrey was reelected to the Senate in 1954 and 1960. In 1960, along with Senator JOHN F. KENNEDY and Johnson, he sought the Democratic presidential nomination. Following victories by Kennedy in the Wisconsin and West Virginia primaries, Humphrey dropped out of the race and stood for reelection to the Senate.

During the Kennedy administration, Humphrey displayed his command of parliamentary procedure and political persuasion. He became assistant majority leader and helped pass the LIMITED TEST BAN TREATY of 1963. Following Kennedy's assassination in November 1963, Humphrey worked closely with President Johnson to pass the many pieces of social welfare legislation that Johnson dubbed his GREAT SOCIETY program. Humphrey's plan for providing federal medical insurance to older people, called MEDICARE, was enacted. Most important, Humphrey played a critical role in securing the passage of the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000a et seq.).

In 1964 Johnson selected Humphrey as his vice presidential running mate. Johnson's landslide victory over conservative Republican BARRY M. GOLDWATER promised more liberal legislation. Humphrey worked to enhance civil rights for minorities and increase economic opportunities. But the political climate turned sour with rising protests over Johnson's escalation of U.S. involvement in Vietnam. Humphrey, who initially doubted the wisdom of U.S. military intervention, became an energetic and unrepentant advocate of Johnson's policies.

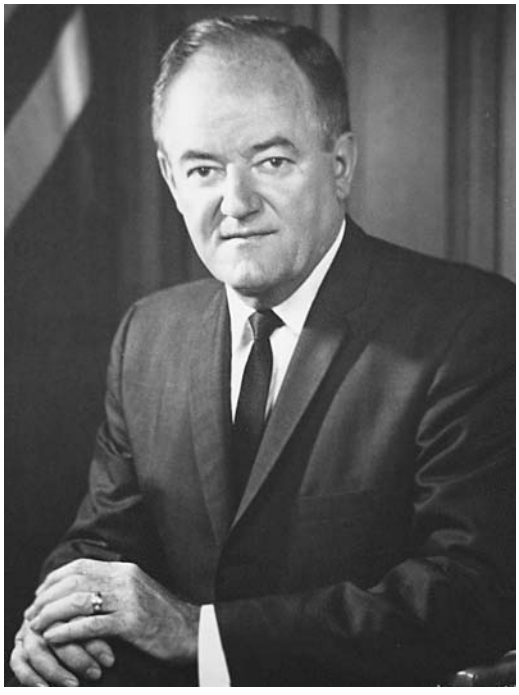

*Hubert H. Humphrey.*
LIBRARY OF CONGRESS

Humphrey had always dreamed of becoming president. When President Johnson announced in March 1968 that he would not seek reelection, Humphrey entered the race against Senator EUGENE MCCARTHY, of Minnesota, and Senator ROBERT F. KENNEDY, of New York. McCarthy, a longtime friend and ally of Humphrey's, opposed the VIETNAM WAR, as did Kennedy. Humphrey continued to support it. By May Humphrey had secured enough delegates to win the nomination. In June Kennedy was assassinated.

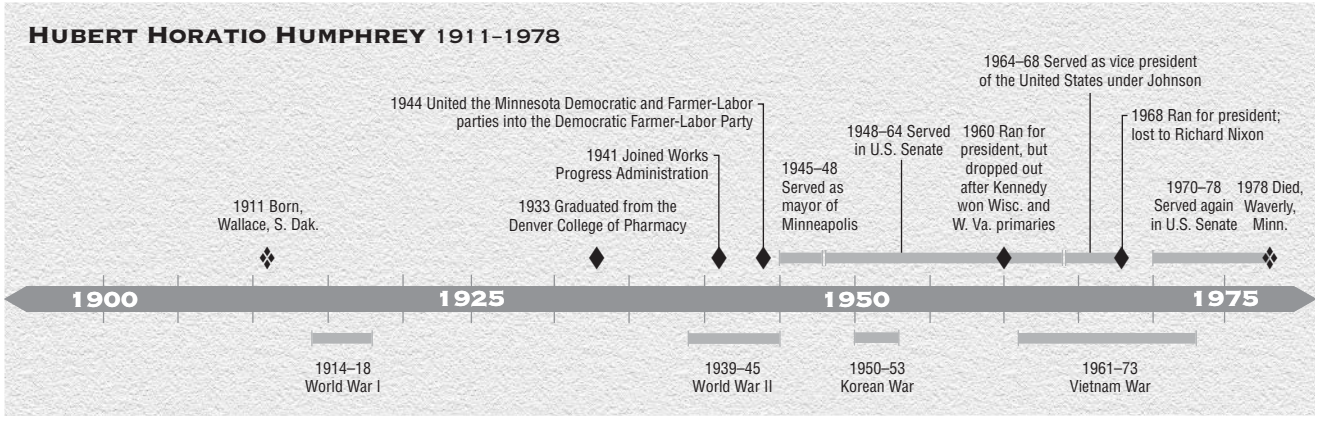

The Democratic National Convention, in Chicago, was a debacle. Confrontations between antiwar demonstrators and Chicago police officers led to a series of violent outbursts by the police. Though Humphrey won the nomination, he remained staunchly loyal to Johnson and refused to make a clean break on Vietnam policy, which would have won votes from disaffected Democrats. In November Republican RICHARD M. NIXON won the election with 301 electoral votes to Humphrey's 191. Humphrey lost the popular vote by less than one percent.

Following his defeat Humphrey returned to Minnesota and taught again at Macalester College. In 1970 he was reelected to the Senate. In 1972 he campaigned unsuccessfully for the Democratic presidential nomination. Reelected to the Senate again in 1976, Humphrey soon was engaged in a personal battle with cancer. He died at his home in Waverly, Minnesota, on January 13, 1978.

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## HUNDRED

*A political subdivision in old England.*

Under the Saxons, each shire or county in England was divided into a number of hundreds, which were made up of ten tithings each. The tithings were groups of ten families of freeholders. The hundred was governed by a high constable and had its own local court called the Hundred Court. The most remarkable feature of the hundred was the collective responsibility of all the inhabitants for the crimes or defaults of any individual member.

## HUNG JURY

*A trial jury duly selected to make a decision in a criminal case regarding a defendant's guilt or innocence, but who are unable to reach a verdict due to a complete division in opinion.*

When a jury has been given an adequate opportunity to deliberate and is unable to reach a verdict, a retrial takes place at the discretion of the prosecution. The subsequent trial does not constitute a violation of the constitutional prohibition of DOUBLE JEOPARDY.

## HUNT, WARD

The legal career of Ward Hunt peaked when he was appointed to the U.S. Supreme Court by President ULYSSES S. GRANT in 1873. Hunt held a seat on the High Court for nine years, until January 1882. Although he was well liked and respected as a diligent lawyer and jurist, Ward's tenure on the Court was unspectacular and marked by a forced retirement.

Hunt was born June 14, 1810, in Utica, New York, to Montgomery Hunt and Elizabeth Stringham Hunt. He studied at the Oxford Academy, in England and the Geneva Academy, in Switzerland. In 1828 he graduated with honors from Union College, in Schenectady, New York. He attended law school in Litchfield, Connecticut. He returned to Utica to work in a local law office, and was admitted to the bar in 1831.

Hunt married Mary Ann Savage in 1837, and they raised three children until her death in 1845. Eight years later he married Maria Taylor. With his partner, Hiram Denio, Hunt ran a successful law practice in Utica for thirty-one years. While practicing law Hunt became active in politics. He supported the policies of ANDREW JACKSON, who defended the interests of the middle class and served two terms as president. In 1838 Hunt was elected to the New York legislature, where he served one term, and in 1844 he was elected mayor of Utica.

In the 1840s Hunt came to differ with the DEMOCRATIC PARTY when he opposed the expansion of SLAVERY and the annexation of Texas. In 1848 Hunt supported the Free-Soil presidential candidacy of ex-Democrat and ex-president MARTIN VAN BUREN, who was defeated. Hunt ran for a spot on the New York Supreme Court in 1853, but he lost the election, a result that observers attributed to his defection from the Democratic party. In 1855 Hunt helped to form the REPUBLICAN PARTY in the state of New York. As a Republican he was elected to the New York Court of Appeals in 1865.

After three years on the New York Court of Appeals, Hunt was promoted to chief justice. A year later, in 1869, the New York court system was reorganized by an amendment to the state constitution, and Hunt was named commis-

sioner of appeals. He held that position for three years, until January 1873, when he replaced fellow New Yorker SAMUEL NELSON as an associate justice on the U.S. Supreme Court.

Hunt had strong ties to the Republican party, and he had risen in the judicial ranks along with the party. At that time the Republican party promoted expansive federal powers. These powers were critical to the ABOLITION of slavery and the defeat of the Confederate forces in the Civil War. However, by the mid-1870s, the nation's appreciation of federal power had waned, and the judiciary began to emphasize the rights of the states. Perhaps as a result of this shift, Hunt, with his Republican views, authored few major opinions.

Hunt delivered his most memorable opinion in *United States v. Reese,* 92 U.S. (2 Otto) 214, 23 L. Ed. 563 (1875). In *Reese* the High Court struck down parts of the Enforcement Act of 1870, a federal act passed to ensure that African Americans would be allowed to vote. The act had been passed by Congress pursuant to the FIFTEENTH AMENDMENT, which provides, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Reese* was brought by the U.S. government against two inspectors at a municipal election in Kentucky, alleging that they had refused to receive and count the vote of William Garner, an African American.

According to the majority in *Reese,* the Fifteenth Amendment did not confer on all adult citizens the right to vote. Rather, it merely prevented the state and federal governments from denying the right to vote based on race, color, or previous condition of servitude. Therefore, it was not within the power of the federal government to require that states give the vote to all adult citizens. Because parts of the Enforcement Act did not limit the application of criminal penalties to wrongful refusals based on race, the Court ruled that those parts unconstitutionally infringed on the powers of the states.

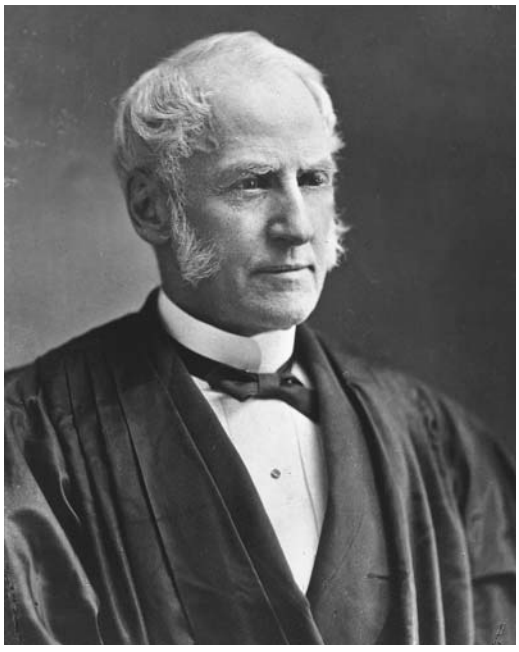

*Ward Hunt.*
THE GRANGER COLLECTION, NEW YORK

Hunt was the only dissenting justice. He argued that the Fifteenth Amendment was intended to confer on all persons the same political rights given to white persons. The guarantee of the right to vote, according to Hunt, was one of those rights. He declared that the persons affected in the case "were citizens of the United States" and that the subject of the case "was the right of these persons to vote, not at specified

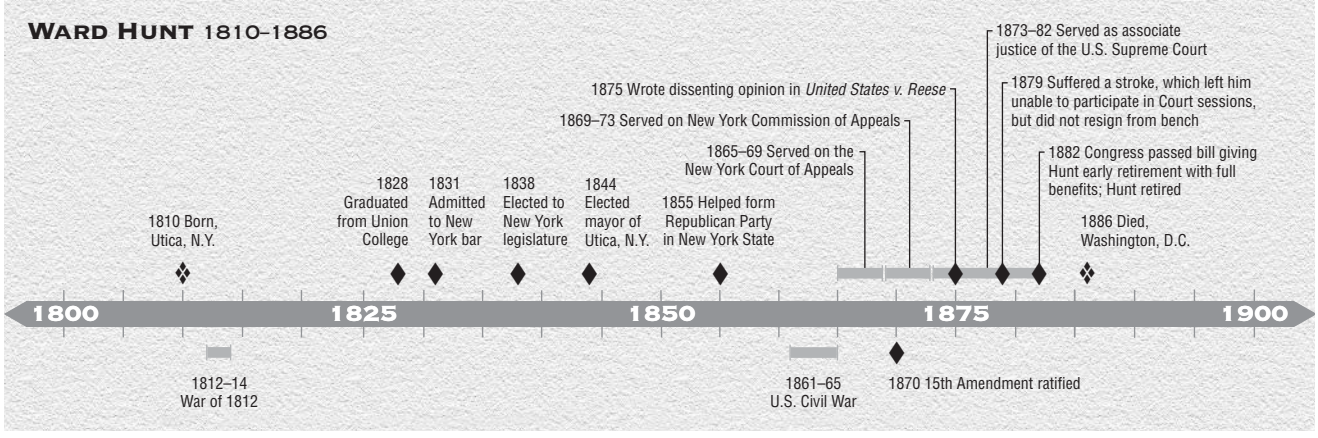

elections or for specified officers, not for federal officers or for state officers, but the right to vote in its broadest terms." Hunt mournfully concluded that the majority's holding brought "to an impotent conclusion the vigorous amendments on the subject of slavery."

Hunt's defense of African American rights appeared to be short-lived. In another case dealing with the Enforcement Act and decided the same month as *Reese,* he sided with the majority in refusing to enforce the rights of African Americans. In *United States v. Cruikshank,* 92 U.S. (2 Otto) 542, 23 L. Ed. 588 (1875), approximately one hundred defendants were alleged to have assaulted two African American men in an attempt to keep the men from voting in a Louisiana state election. This assault violated provisions of the Enforcement Act that made it a federal offense for persons to band together to prevent a person from exercising any right guaranteed by the Constitution or federal law.

"THE CITIZEN OF THIS COUNTRY WHERE NEARLY EVERYTHING IS SUBMITTED TO THE POPULAR TEST AND WHERE OFFICE IS EAGERLY SOUGHT, WHO POSSESSES THE RIGHT TO VOTE, HOLDS A POWERFUL INSTRUMENT FOR HIS OWN ADVANTAGE."
—WARD HUNT

The defendants were charged with violations of the Enforcement Act and convicted at trial, but their convictions were overturned by a U.S. circuit court. On appeal by the United States, the Supreme Court held that legislation concerning the right to free assembly under the FIRST AMENDMENT was a matter reserved to the states, not to the federal government, and that Congress did not have the right to pass legislation on the matter. In response to the federal government's argument that in this case the mob had intended to prevent the two men from voting on account of their race, the Court declared, "[W]e may suspect that race was the cause of the hostility; but it is not so averred." Hunt could have dissented based on the same reasoning he used in his dissent in *Reese,* but he did not.

Hunt's failure to dissent in the *Cruikshank* case can be explained, in part, by his devotion to precedent. Hunt firmly believed that cases should be decided in accordance with the reasoning employed in previous cases. Because the Court in *Reese* had already struck down portions of the Enforcement Act, further attempts to prosecute under the act would meet a similar fate.

Hunt fell ill with gout in 1877 and missed many Court sessions. In January 1879 he suffered a paralytic stroke that left him temporarily speechless and permanently disabled on one side of his body. Hunt became too sick to function as a justice, but he refused to resign because he had not served long enough to qualify for a PENSION. In addition, Hunt's sponsor, Senator ROSCOE CONKLING, of New York, was quarreling with President RUTHERFORD B. HAYES, and Hunt did not want to let Hayes appoint Hunt's successor to the Court. Finally, three years after his stroke, Congress passed a special retirement bill that gave Hunt a pension if he agreed to resign within thirty days. Hunt resigned in January 1882, on the day the bill became law. He died March 24, 1886, in Washington, D.C.

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## ♦ HUNTER, ELMO BOLTON

Elmo Bolton Hunter, a federal judge, has been a leader in national efforts to take party politics out of the state courts through the adoption of judicial merit selection programs. (Under most merit selection systems, a nonpartisan commission of lawyers and nonlawyers evaluates candidates for judicial vacancies and sends recommendations to, usually, a governor, who makes appointments.) In 1990, the American Judicature Society (AJS) funded the first national clearinghouse for information on merit selection; located at AJS headquarters in Chicago, it is known as the Elmo B. Hunter Center for Judicial Selection. The AJS also gives the Elmo B. Hunter Award annually to a person who has made significant improvement in the judicial selection process.

Hunter was born in St. Louis on October 23, 1915. He attended the University of Missouri—Columbia, receiving a bachelor of arts degree in 1936 and a bachelor of laws degree in 1938. Named Phi Beta Kappa as an undergraduate, he continued his academic excellence in law school. Hunter graduated first in his class and was elected to the ORDER OF THE COIF. He was also a member of the law review and author of numerous articles.

In his final year of law school, Hunter was chosen by the Board of Curators of the University of Missouri to receive the Judge Shepard Barclay Award for "the greatest contribution in moral leadership to the school." Also in 1938, Hunter was selected by the board to represent the University of Missouri—and the state of

Missouri—in the Rhodes Scholarship selection competition.

Hunter was admitted to the Missouri bar in 1938 and to the federal bar in 1939. He served as a law clerk to Judge Kimbrough Stone Sr., from 1938 to 1939. Following his ADMISSION TO THE BAR and clerkship, he accepted a position as senior assistant city counselor for Kansas City, Missouri. He left the position in 1940 to pursue graduate work in law, under a Cook Fellowship, at the University of Michigan.

In 1941, Hunter took a job as special assistant to the U.S. district attorney for the Western District of Missouri and Kansas, where he prosecuted war FRAUD cases. After a year, he joined the U.S. Army, and he served in military intelligence at the rank of first lieutenant from 1942 to 1945.

After WORLD WAR II, he joined the firm of Sebree, Shook, Hardy, and Hunter, and began the PRACTICE OF LAW. He also married Shirley Arnold during these years and fathered his only child, Nancy A. Hunter.

Hunter gave up the practice of law when he was appointed to the state circuit court by Governor Forrest Smith on December 12, 1951. Along with his new judicial duties, Hunter began a ten-year stint as a law instructor at the University of Missouri in 1952. For his work, he received the university's Outstanding Alumni Service Award in 1955.

In 1957, he was appointed to the Kansas City Court of Appeals. Following his appointment, Hunter served, by special order, as special judge to the Missouri Supreme Court, and he often sat with the Springfield Court of Appeals and the St. Louis Court of Appeals—and therefore has served on every appellate court in the state of Missouri. He also has seen every type and variation of political influence brought to bear on the judges and courts in Missouri. During his years of service in the Missouri courts, he developed an interest in both the judicial selection process and the improved administration of justice.

In August 1965, President LYNDON B. JOHNSON appointed Hunter U.S. district judge for the Western District of Missouri. It was as a federal judge that Hunter began his distinguished commitment to the AJS. He served on the board of the AJS in 1966 and was elected vice president in 1967. He went on to serve as president, and he is the only person in the history of the AJS to have served as both president and chairman of the board, which he did simultaneously in 1969–70. As an AJS leader, Hunter spearheaded the organization's national efforts to promote merit selection systems for judges. He traveled across the United States to promote the concept and practice of merit selection, and he participated in hundreds of citizen conferences to discuss the issue. In conjunction with his efforts to promote merit selection, he was largely responsible for the E. G. Marshall–narrated movie titled *Who Shall Judge* (1974). In recognition of the role he played in citizen education on this important issue, Hunter received the AJS's Herbert Harley Award in 1975.

As a federal judge, Hunter has also made his presence felt within the U.S. Judicial Conference, which establishes the standards and shapes the policies governing the federal judiciary. Hunter became a member of the Judicial Conference's Committee on Court Administration in 1969 and was named committee chairman in 1978. His appointment as chairman followed his term as chairman of the Subcommittee on Judicial

"IT IS APPARENT THAT THERE MUST BE A DRAMATIC CHANGE IN PROCEDURE RELATING TO THE PREPARATION OF CASES FOR TRIAL IN ORDER TO EFFECT A SAVING IN COURT TIME, JURY EXPENSE, LAST-MINUTE SETTLEMENT, EXPENSES OF EXPERT WITNESSES, AND MANY OTHER FACTORS."
—ELMO BOLTON HUNTER

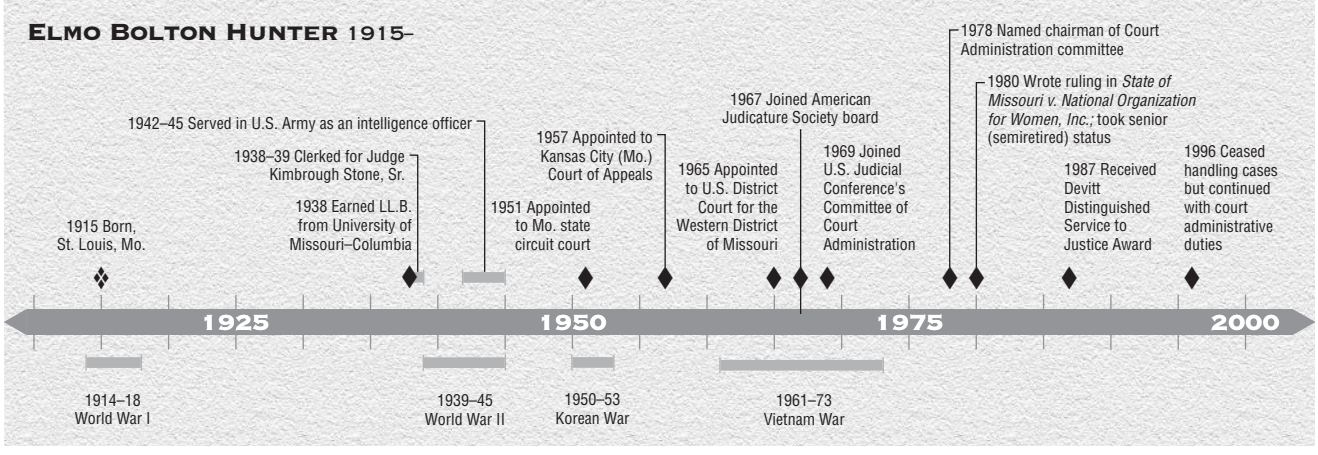

Improvements from 1976 to 1978. Former chief justice WARREN E. BURGER said Hunter was "a credit to all judges who recognize that the delivery of our product is at least as important as the quality of it."

Hunter took senior (or semiretired) status in 1980, shortly after handing down his noteworthy ruling that the NATIONAL ORGANIZATION FOR WOMEN was within its rights in promoting an economic boycott of Missouri because the state had not approved the proposed EQUAL RIGHTS AMENDMENT (*State of Missouri v. National Organization for Women, Inc.,* 620 F.2d 1301 [8th Cir. 1980]). As a senior judge, Hunter heard the case of a Los Angeles drug dealer caught with PCP at the Kansas City Airport. He sentenced the defendant to life in prison without PAROLE, marking the first time a federal judge applied the mandatory penalty under the United States's three-strikes drug law. 21 U.S.C.A. § 841 (2000). Though many said the law violated constitutional protection against CRUEL AND UNUSUAL PUNISHMENT, Hunter disagreed. "I thought about the constitutional aspects," said Hunter. "I am satisfied that the statute is lawful."

In 1987, Hunter received the Devitt Distinguished Service to Justice Award. This award—named for Edward J. Devitt, former chief U.S. district judge for Minnesota—acknowledges the dedication and contributions to justice made by all federal judges, by recognizing the specific achievements of one judge who has contributed significantly to the profession. Hunter was acknowledged for his devotion to public education and to the administration of justice. Devitt said, "[Hunter] has been the mainstay in the judiciary's self-improvement efforts for more than 20 years."

In 1991, the AJS established the Elmo B. Hunter Citizens Center for Judicial Selection. The center conducts and distributes empirical research on a wide range of issues related to judicial selection. In 2000, the AJS honored Hunter with its Distinguished Service Award, given for significant contributions to the AJS and the nation in promoting the effective administration of justice.

Hunter continues to serve the U.S. District Court for the Western District of Missouri, keeping a full criminal and civil docket. He also sits regularly on the Eighth Circuit Court of Appeals and accepts special sittings outside the circuit.

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CROSS-REFERENCES

Judicial Conference of the United States.

## HUNTING

The regulation of hunting is a matter reserved to the states as part of their POLICE POWER under the TENTH AMENDMENT to the U.S. Constitution (*Totemoff v. Alaska,* 905 P.2d 954 [Alaska 1995]). Congress maintains statutes that regulate hunting on federal land. States may further regulate the federal lands located within their boundaries so long as their laws do not conflict with federal laws.

South Dakota and Georgia illustrate the sort of hunting laws typically maintained by a state. In South Dakota hunting is regulated by Title 41 of the South Dakota Codified Laws Annotated, Section 41-1-1 et seq. Under Title 41 hunters must obtain from the game, fish, and parks commission a license for the privilege of hunting in South Dakota. Other states maintain similar commissions or boards to implement licensing procedures and policies.

Licensing parameters vary from state to state. Most states have minimum age requirements. In South Dakota, for example, no person under the age of 12 may obtain a license, but an 11-year-old may obtain a license to hunt between September 1 and December 31 if he or she will turn 12 in that period. A child under the age of 16 may obtain a basic game and fish license without cost, but only if he or she has completed a firearms safety course. A parent of the child must apply for the license, and the child may hunt only with a parent, guardian, or responsible adult (§ 41-6-13).

In Georgia any person over the age of 12 may hunt on his or her own land. If a person between the ages of 12 and 15 seeks to hunt, he or she must complete a hunter education course, and then may hunt only with a parent or guardian. This is true even for children between the ages of 12 and 15 who are hunting on the land of their parents or guardians. A person between the ages of 16 and 25 must also com-

plete a hunter education course before obtaining a hunting license.

States may make licensing exceptions for certain persons. In Georgia, for example, persons over the age of 65 may receive a hunting license without paying a fee. Furthermore, persons who are permanently and totally disabled may obtain a hunting or fishing license for free (Ga. Code Ann. § 27-2-4 [1996]).

In some states an additional license must be obtained to hunt certain animals whose populations are of concern to the state. In South Dakota these animals are small game, big game, fur-bearing animals, and migratory waterfowl. An additional license is required for these animals so that the commission can keep track of the number of persons hunting them and conserve their populations.

To control animal populations, state licensing commissions also allow the hunting of certain animals only at certain times of the year. These time periods are called open seasons, and they are set each year by the state regulatory commission. Open seasons limitations sometimes come with special exceptions. In South Dakota, for example, residents do not need a license to hunt game birds on their own land during an open season.

Most states place separate restrictions on resident versus nonresident licensing and hunting for certain animals. In South Dakota, for example, nonresidents may hunt only if they have obtained a special nonresident license. A nonresident may hunt small and big game, waterfowl, and wild turkey. A nonresident must obtain a nonresident predator license to hunt predators, but if the nonresident has a nonresident small-game, big-game, waterfowl, or wild turkey license, the nonresident may hunt predators in the animal group authorized by that license without a separate nonresident predator license (S.D. Codified Laws Ann. § 41-6-30). Predators include jackrabbits, prairie dogs, gophers, ground squirrels, coyotes, red foxes, gray foxes, skunks, crows, and porcupines.

States may place additional restrictions on the hunting of certain animals. In Georgia, for example, feral hogs may be hunted only in certain situations. For instance, a hunter may not shoot a feral hog during deer season unless the hunter and all persons accompanying the hunter are each wearing a total of at least five hundred square inches of daylight florescent orange material as an outer garment above the waistline. In

*A young hunter with a brace of pheasants. Many states have minimum age requirements for hunting licenses and require completion of a firearm safety course for young applicants.*
CORBIS

South Dakota fur-bearing animals are completely off-limits to nonresidents. No person may apply for a license to take protected fur-bearing animals unless he or she has lived in the state for 90 days prior to the application date (§ 41-6-24).

State hunting statutes also specify standards for firearm power. In South Dakota, for example, no one may hunt big game with a muzzle loading rifle that discharges a projectile less than forty-four hundredths of an inch in diameter. No one may hunt big game with buckshot, or with a single ball or rifled slug weighing less than one-half ounce. No self-loading or autoloading firearm that holds more than six cartridges may be used to hunt big game, and no fully automatic weapons may be used to hunt big or small game (§ 41-8-10, -13).

States may enact a variety of other restrictions on hunting. In Georgia, at night, no person may hunt any game bird or game animal except for raccoon, opossums, foxes, and bobcats. Those animals may be hunted at night, but only with a lantern or a light that does not exceed six volts (Ga. Code Ann. § 27-3-24). In South Dakota no dogs may be used in the hunting of big game, no person may use salt to entice big game, and no person may use artificial light in hunting (S.D. Codified Laws Ann. § 41-8-15, -16). However, an animal damage control officer may use an artificial light to take a NUISANCE

animal from land, with the landowner's written permission (§ 41-8-17[3]).

Most states consider hunting a right of residents and a valuable promotional tool for tourism. Many states even have hunter harassment statutes, which punish persons for intentionally distracting hunters. Under such statutes a person may be arrested and prosecuted for attempting to discourage hunters or drive away game.

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Fish and Fishing.

## HUNTLEY HEARING

*In New York state, a separate proceeding in a criminal action conducted solely for the purpose of determining the admissibility of the extrajudicial statements made by the defendant.*

The name *Huntley hearing* is derived from the case of *People v. Huntley,* 15 N.Y. 2d 72, 255 N.Y.S. 2d 838, 204 N.E. 2d 179 (1965), which set forth the hearing requirement.

## HURTADO V. CALIFORNIA

An 1884 decision of the Supreme Court, *Hurtado v. California,* 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232, held that states are not required to comply with the FIFTH AMENDMENT provision that a criminal prosecution be initiated by an indictment by a GRAND JURY.

The constitution of California and various penal statutes provided for the prosecution of a person charged with an offense by information after a PRELIMINARY HEARING before a magistrate with RIGHTS TO COUNSEL and to cross-examine witnesses, or by indictment with or without a preliminary hearing. In February 1882, the district attorney of Sacramento County filed an information against Joseph Hurtado, charging him with the murder of Jose Stuardo. Hurtado was arraigned, tried, convicted of the crime, and sentenced to death. He unsuccessfully appealed his conviction throughout state appellate courts and brought a writ of error before the SUPREME COURT OF THE UNITED STATES.

Hurtado alleged that his conviction and sentence were void because they were obtained in violation of his rights to DUE PROCESS OF LAW as guaranteed by the FOURTEENTH AMENDMENT. He was convicted and sentenced on the basis of an information, not an indictment or presentment by a grand jury as required by the Fifth Amendment and, therefore, was deprived by the state of his liberty without due process.

After reviewing English treatises and numerous cases construing the term *due process of law,* the Court affirmed Hurtado's conviction. Only persons accused of federal crimes are entitled to a presentment or indictment of a grand jury. The Court refused to declare the proceedings that led to Hurtado's conviction under state law as violative of due process of law. Like an indictment, the information was "merely a preliminary proceeding," which would bring about a final judgment only as a consequence of a regular trial. Since it served the substantial interest of the prisoner and protected the principles of liberty and justice in a manner comparable to an indictment or presentment by a grand jury, an information satisfied the requirements of due process as guaranteed by the Constitution.

The effect of this decision—that the Fourteenth Amendment guarantee of due process of law does not mandate that an indictment or presentment to a grand jury is necessary for a conviction under state criminal laws to be upheld as legally valid—is still the law after more than one hundred years.

## HUSBAND AND WIFE

*A man and woman who are legally married to one another and are thereby given by law specific rights and duties resulting from that relationship.*

The U.S. legal concept of marriage is founded in English COMMON LAW. Under common law, when a man and woman married, they became a single person in the eyes of the law—that person being the husband. The duties and benefits afforded a married woman, as well as

the restrictions on her freedom, reflected this view. Even today, although the Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the EQUAL PROTECTION of the laws" (U.S. Const. amend. 14, § 1), the U.S. Supreme Court has never interpreted this to mean that states must treat husbands and wives the same.

There is a strong public policy in favor of marriage. Because of this, a husband and wife are not always able to determine their duties and privileges toward one another; instead, these rights and responsibilities are set forth by special legal principles that define the parameters within which husbands and wives must act.

### Support

Under common law, because it was unusual for a wife to have a job and earn her own money, a husband was obliged to provide his wife with "necessaries"—which included food, clothing, and shelter—but only the necessities he deemed appropriate. Today, judges have taken the support obligation further and construed the term necessary to include any item in furtherance of an established standard of living.

Most jurisdictions make it a criminal offense for a spouse to fail to meet a support obligation. Criminal nonsupport statutes are created to prevent men and women from becoming public charges and are most frequently applied upon the dissolution of a marriage when a spouse does not meet ALIMONY and CHILD SUPPORT obligations. Actions for support are rarely initiated by men although today an equal obligation of support applies.

### Property

Historically, wives were at a disadvantage as property owners. At common law, when a woman married, her personal possessions were considered to be the property of her husband. In addition, the husband was entitled to use the land she owned or subsequently inherited, and to retain rents and profits obtained from it. A married woman's right to own property was not incorporated into U.S. law until the mid-nineteenth century, with the Married Women's Property Acts. These laws allowed husbands to permit their spouses to own separate property. Women were also granted the right to enter contracts, sell land, write wills, sue and be sued, work without their husband's permission and keep their earnings, and in certain jurisdictions sue for injuries caused by their husbands.

Ordinarily, questions of who owns what property are brought to court only when a couple is obtaining a DIVORCE. Courts are otherwise reluctant to become involved in property disputes between a husband and wife. Various systems exist in the United States to determine who owns property in a marriage: a majority of states recognize separate property, whereas some adhere to COMMUNITY PROPERTY or equitable distribution doctrines.

The rule in separate-property states is that each person owns whatever items are in his or her name. In these states, various types of joint spousal ownership are recognized. A TENANCY BY THE ENTIRETY is a form of joint ownership whereby the husband and wife own all the property together. This type of arrangement ordinarily applies to real estate. In a tenancy by the entirety, neither spouse can sell the property or his or her interest in it independently. If the husband or wife dies, the remaining spouse has full survivorship rights.

In states that adhere to community property laws, the husband and wife are each given an equal interest in everything they own with the exception of the separate property of either individual. A majority of the property obtained by a husband and wife during a marriage is considered community property. State law defines precisely what is considered separate property. In general, separate property includes whatever each party brought to the marriage and anything either spouse individually inherits during the marriage.

Equitable distribution is a method of property distribution that considers both the economic and noneconomic contributions of each spouse to the marital relationship, as well as each spouse's needs. It is based on the theory that a marriage should be regarded as a partnership of equal individuals.

Disputes over property ownership may arise when one spouse dies. A majority of jurisdictions have eliminated the common-law rights of DOWER and curtesy, which require that a spouse receive a specific portion of an estate. As an alternative, when one party leaves a will that disinherits her or his spouse, the survivor ordinarily has the right to acquire an elective share of the estate, which typically amounts to approximately one-third of its value. In some jurisdictions, this right is given only to a surviving wife. Elective shares do not prevent the dissipation of an estate prior to death.

In separate-property states, if a husband or wife dies intestate (without leaving a will), statutes provide for the surviving spouse to acquire a specified portion of the decedent's property. A statute might, for example, prescribe that the surviving spouse can acquire a one-half interest in the estate. The size of the portion depends on whether there are surviving children.

The distribution of property between a husband and wife might also be affected by a PREMARITAL AGREEMENT, also called an antenuptial or prenuptial agreement. Premarital agreements are typically entered into by a man and woman before they are married, to arrange for the distribution or preservation of property owned by each spouse in the event of divorce or death.

### Sexual Relationship

The most unique aspects of the relationship between a husband and wife are the legal sanctions attached to their sexual relationship. A number of states will grant a divorce based on the ground that a husband or wife was denied sex by his or her spouse. Similarly, an individual is ordinarily able to obtain an ANNULMENT if his or her spouse is unable to engage in sexual relations. The right of the state to interfere with the marital sexual relationship is limited by the U.S. Constitution as interpreted by the Supreme Court.

In the landmark case of GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), the Court held that state statutes cannot unreasonably intrude into the marital sexual relationship. In this case, Connecticut was not allowed to enforce a statute that made it a crime for a physician to counsel married people on BIRTH CONTROL. This was viewed as an unreasonable intrusion into the marital sexual relationship, since the sanctity of the marital relationship would be invaded if the statute were enforced. The Court emphasized the significance and constitutional considerations of privacy in marriage.

It was once thought that the degree of privacy to which a married couple is entitled could be restricted. Although some state statutes have used this reasoning to attempt to prohibit certain sex acts between a husband and wife, such as anal and oral sex, most courts have maintained that married couples have a constitutional privacy right over their marital sexual activities (*Lovisi v. Zahradnick,* 429 U.S. 977, 97 S. Ct. 485, 50 L. Ed. 2d 585 [1976] [mem]).

A husband and wife have the right to purchase and use birth control devices—although when an individual uses contraceptives or becomes sterilized contrary to his or her spouse's wishes, this might provide grounds for annulment or divorce.

ABORTION has been viewed as an additional restriction on the sexual rights of a husband and wife. A wife's right to choose abortion takes precedence over the husband-and-wife relationship. A husband may not preclude his wife from having a legal abortion, nor may he compel her to have one. The Supreme Court struck down statutory requirements that a husband must be notified of his wife's abortion, in *Planned Parenthood v. Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

At one time, a husband was allowed to have sexual relations with his wife with or without her consent, and for many years, courts supported a marital exception to laws against rape. Under current law, the fact that the accused party and the victim were husband and wife can no longer be used as a defense to criminal charges. Violent assaults on a spouse are illegal in all states. A savage rape attack by a husband on his wife might be subject to prosecution as an assault or, in some cases, as an attempted murder.

### Crimes

Common law put many restrictions on a husband and wife when crimes occurred between them or against the marriage relationship itself. At one time, the courts recognized lawsuits based on HEART BALM ACTS. In such an action, a husband asserted that a monetary recovery would salve the "broken heart" caused by a third party's intrusion into his marriage. The basis for many of these causes of action was that a husband was being denied his rights to the affections and services of his wife; these lawsuits did not extend to a wife.

A husband once had an actionable injury if anyone induced his wife to leave him, under the theory that he was entitled to sue for damages any person who divested him of a servant. Similarly, a husband was able to bring an action for criminal conversation if his wife voluntarily engaged in ADULTERY. The theory was that criminal conversation interferes with a husband's exclusive privilege to obtain sexual services from his wife. The basis of recovery is the public policy in favor of preserving marriage and the family. Alienation of affection is another

seldom prosecuted action. In this type of action, a husband must prove that another man won his wife away from him, thereby depriving him of love, comfort, and companionship.

Because of the theories that gave rise to such causes of action, very few jurisdictions recognize lawsuits based on heart balm acts. Yet, even today, TORT LAW retains some special rules for husbands and wives when an outsider causes injury to the marital or family relationship. Consortium is the marital relationship between two people that encompasses their mutual right to support, cooperation, and companionship. An action for loss of consortium is based on the inconvenience of having a debilitated spouse. Husbands and wives have won suits for damages for injuries to their spouse precipitated by such things as MEDICAL MALPRACTICE, automobile accidents, FALSE IMPRISONMENT, and WRONGFUL DEATH.

Under common law, a husband was held responsible for any crimes committed by his wife against a third party. Although a wife had responsibility for crimes she committed, there was a legal presumption that her husband compelled her to perform any act she undertook when he was present. Today, husbands and wives are equally liable for their own criminal actions.

### Privileged Communication

The law of evidence includes a privilege extended to a married couple so that neither a husband nor a wife can be compelled to testify against a spouse. This rule was designed to protect intrafamily relations and privacy. In addition, it was meant to promote communication between husbands and wives by making revelations between them strictly confidential.

In 1980, the U.S. Supreme Court, in *Trammel v. United States,* 445 U.S. 40, 100 S. Ct. 906, 63 L. Ed. 2d 186, held that husbands and wives were permitted to testify against one another voluntarily in a federal criminal prosecution. Many states now allow a spouse to testify against a husband or wife, but with the caveat that the testimony is subject to the accused spouse's consent. Other states view the spouse of an accused person as an ordinary witness who can be forced to testify against the accused person.

### Domestic Abuse

It was once presumed that a husband should have the right to exert physical control over his wife, if only to protect himself from liability for his wife's actions. Therefore, common law permitted a husband to discipline his wife physically. Interspousal TORT IMMUNITY made it impossible for a wife to succeed in an action against her husband. It was rare for a wife to accuse her husband of a crime, and a wife was forbidden to testify against her husband. Today, a wife is almost always permitted to testify against a husband who has been accused of causing intentional injury to her or their child. With interspousal tort immunity all but abrogated in most jurisdictions, husbands and wives can now recover in suits against one another under the theories of fraudulent MISREPRESENTATION, BATTERY, intentional infliction of emotional distress, and NEGLIGENCE.

The common-law right of a husband to discipline his wife combined with interspousal tort immunity prevented incidents of domestic abuse from becoming public. In addition, victims of domestic abuse often did not reveal the extent of their injuries for fear of reprisals. Little legal relief was available, as courts were hesitant to interfere in the husband-and-wife relationship. With the abrogation of interspousal tort immunity, the U.S. public has become aware of domestic abuse as a nationwide issue.

In some cases, victims of domestic abuse who have injured or killed their spouse as a means of SELF-DEFENSE against violence and abuse have been acquitted of criminal charges. The BATTERED SPOUSE SYNDROME is a defense these men and women have asserted. The syndrome, a subcategory of post-traumatic stress disorder, seeks to explain why some spouses remain in abusive relationships and others finally use violence to break out of such relationships. Because battered women are typically economically dependent on their husband, they hesitate to seek help until the violence escalates to the point where they believe the only way to free themselves is to kill their abuser.

### Same-Sex Marriage

In the 1980s and early 1990s, lawsuits were initiated to expand the traditional husband-and-wife relationship, and the rights and privileges that relationship conveys, to partners of the same sex. In a landmark case, *Baehr v. Lewin,* 74 Haw. 645, 852 P.2d 44 (1993), the Hawaii Supreme Court, although rejecting the idea that the Hawaii Constitution gives same-sex couples a fundamental right to marriage, held that Hawaii's marriage statute (Haw. Rev. Stat. § 572-1) discriminates on the basis of sex by barring

people of the same sex from marrying. As a result, such statutes are subject to STRICT SCRUTINY. However, in 1998 Hawaiian voters overwhelmingly approved a constitutional amendment that, while not banning same-sex marriage, gave the legislature the power to restrict marriages to opposite-sex couples.

In 1996, largely in response to *Baehr,* Congress passed the Defense of Marriage Act (110 Stat. § 2419), which defines *marriage* as "a legal union between one man and one woman as husband and wife." The term *spouse* is defined as a "person of the opposite sex who is a husband or a wife." In effect, the Defense of Marriage Act states that the federal government does not acknowledge same-sex marriages.

In 2001, however, Vermont became the first state to enact a law recognizing "civil unions" between same-sex couples (23 V.S.A. § 1201 et seq. [2000]). The 2000 law came in response to a 1999 Vermont Supreme Court ruling (*Baker v. Vermont,* 170 Vt. 194, 744 A.2d 864 [1999]), which found that the benefits and protections guaranteed by the Vermont Constitution for opposite-sex couples extend to same-sex couples. Benefits and protections include access to a spouse's medical, life, and disability insurance; hospital visitation, and other medical decision-making privileges; spousal support; and the ability to inherit property from a deceased spouse without a will.

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Domestic Violence; Family Law; Gay and Lesbian Rights.

## HYPOTHECATE

*To pledge property as security or collateral for a debt. Generally, there is no physical transfer of the pledged property to the lender, nor is the lender given title to the property, though he or she has the right to sell the pledged property in the case of default.*

## HYPOTHESIS

*An assumption or theory.*

During a criminal trial, a hypothesis is a theory set forth by either the prosecution or the defense for the purpose of explaining the facts in evidence. It also serves to set up a ground for an inference of guilt or innocence, or a showing of the most probable motive for a criminal offense.

## HYPOTHETICAL QUESTION

*A mixture of assumed or established facts and circumstances, developed in the form of a coherent and specific situation, which is presented to an expert witness at a trial to elicit his or her opinion.*

When a hypothetical question is posed, it includes all the facts in evidence needed to form an opinion and, based on the assumption that the facts are true, the witness is asked whether he or she can arrive at an opinion, and if so, to state it.

## IBID.

*An abbreviation of the Latin* ibidem, *meaning "in the same place; in the same book; on the same page."*

## IDEM

*[*Latin, The same.*] Used to indicate a reference that has previously been made and typically abbreviated "id." in legal and scholarly bibliographic citations.*

## IDENTITY THEFT

IDENTITY THEFT is the assumption of a person's identity in order, for instance, to obtain credit; to obtain credit cards from banks and retailers; to steal money from existing accounts; to rent apartments or storage units; to apply for loans; or to establish accounts using another's name. An identity thief can steal thousands of dollars in a victim's name without the victim even knowing about it for months or years. Identity thieves are able to accomplish their crimes by doing things such as opening a new credit card account with a false address, or using the victims's name, date of birth, and SOCIAL SECURITY number. When the thief uses the credit card and does not pay the resulting bills, the delinquent account is reported on the victim's credit report.

As increasing numbers of businesses and consumers rely on the INTERNET and other forms of electronic communication to conduct transactions, so too is illegal activity using the very same media on the rise. Fraudulent schemes conducted via the Internet are generally difficult to trace and to prosecute, and they cost individuals and businesses millions of dollars each year.

According to a JUSTICE DEPARTMENT web site devoted to the topic, INTERNET FRAUD refers to any type of scheme in which one or more Internet elements are employed in order to put forth "fraudulent *solicitations* to prospective victims, to conduct fraudulent transactions, or to transmit the proceeds of FRAUD to financial institutions or to others connected with the scheme." As pointed out in a report prepared by the National White Collar Crime Center and the FEDERAL BUREAU OF INVESTIGATION (FBI), "The Internet Fraud Complaint Center (IFCC) 2001 Internet Fraud Report: January 1, 2001–December 31, 2001," major categories of Internet fraud include, but are not limited to, auction or retail fraud, SECURITIES fraud, and identity theft.

Securities fraud, also called investment fraud, involves the offer of bogus stocks or high-return investment opportunities, market manipulation schemes, pyramid and *Ponzi schemes*, or other "get rich quick" offerings.

In its May 2002 issue, *Internet Scambusters* cited a study by GartnerG2 showing that online merchants lost $700 million to Internet fraud in 2001. By comparison, the report showed that "online fraud losses were 19 times as high as offline fraud." In fact, the study pointed out that

in the same year more than 5 percent of those who made purchases via the Internet became victims of credit card fraud.

The IFCC, in its 2001 Internet fraud report, released statistics of complaints that had been received and then referred to law enforcement or regulatory agencies for action. For the 12-month period covered by the report, the IFCC received over 17 million inquiries to its web site, with nearly 50,000 formal complaints lodged. It must be noted, however, that the number of complaints included reports of computer intrusions and unsolicited CHILD PORNOGRAPHY.

Significant findings in the report revealed that Internet auction fraud was the most reported offense, comprising 42.8 percent of referred complaints. Besides those mentioned above, top fraud complaints also involved nondelivery of merchandise or payment, credit/debit card fraud, and confidence fraud. While it may seem easy to dismiss these concerns as obvious, the schemes to defraud customers of money or valuable information have become increasingly sophisticated and less discernible to the unsuspecting consumer.

The "IFCC 2001 Internet Report" revealed that 81 percent of those committing acts of fraud were believed to be male, and that nearly 76 percent of those allegedly involved in acts of fraud were individuals. According to the report, California, Texas, Florida, New York, and Illinois were the states in which half of the perpetrators resided. The report also provided a shocking example of just how difficult a task tracking down those involved in Internet fraud can be. According to the report, out of the more than 1,800 investigations initiated from complaints during 2001, only three arrests were made.

One example of the growing sophistication of Internet fraud cases can be seen in a 1997 case brought by the FEDERAL TRADE COMMISSION (FTC). *FTC v. Audiotex Connection, Inc.*, CV-97 0726 (E.D.N.Y.), specifically concerned a scam in which Internet consumers were invited to view or to access free computer images. As reported in a February 10, 1998, FTC statement made before a Senate Subcommittee on Investigations of the Governmental Affairs Committee, when viewers attempted to access the images, their computer modems were surreptitiously disconnected from their local Internet Service Providers (ISPs) and were reconnected to the Internet through defendants' expensive international modem connections. Exorbitantly priced long-distance telephone charges continued to ACCRUE until the consumer turned off the computer, even if he or she had exited the defendants' web site and moved elsewhere on the Internet. Approximately 38,000 consumers fell for this scam, losing a collective $2.74 million

A U.S. Department of Justice web site that addresses the major types of Internet fraud reported the following examples of illegal activity carried out using the medium.

Two separate Los Angeles cases demonstrate the intricacies of securities fraud and market manipulation. In the first case, defendants bought 130,000 shares of bogus stock in NEI Webworld, Inc., a bankrupt company whose assets had been liquidated. Defendants in the case then posted E-MAIL messages on various Internet bulletin boards, claiming that NEI was being acquired by a wireless TELECOMMUNICATIONS company. Within 45 minutes of the posting, shares increased from $8 to $15 each, during which time defendants "cashed out." The remaining stock was worth 25 cents per share within a 30-minute period. The second example involves a case in which an employee of PairGain Technologies set up a fraudulent Bloomberg News web site and reported false information regarding the company's purchase by a foreign company. The employee then posted bogus E-mail messages on financial news bulletin boards that caused a 30 percent manipulation of PairGain stock prices within hours.

In another example of investment fraud, perpetrators used the Internet, along with telemarketing techniques, to mislead more than 3,000 victims into investing almost $50 million in fraudulent "'general partnerships' involving purported 'high-tech' investments, such as an Internet shopping mall and Internet access providers."

More than 100 U.S. military officers were involved in a case of identity theft. Defendants in the case illegally acquired the names and social security numbers of the military personnel from a web site, then used the Internet to apply for credit cards issued by a Delaware bank. In another case of identity theft and fraud, a defendant stole personal information from the web site of a federal agency, and then used the information to make applications for an online auto loan through a Florida bank.

Finally, the Department of Justice web site gives an example of a widely reported version of

credit card fraud. In the elaborate scheme, a perpetrator offers Internet consumers expensive electronics items, such as video cameras, at extremely low prices. As an incentive, they tell consumers that the item will ship before payment is finalized. When terms are agreed to, the perpetrator uses the consumer's name and address, but another party's illegally obtained credit card number, to purchase the item through a legitimate online vendor. Once the consumer has received the item, he or she authorizes credit card payment to the perpetrator. In the meantime, when the credit card holder, whose card number was used to purchase the item, stops payment on the unauthorized order, the vendor attempts to reclaim the merchandise from the consumer. The defrauded consumer, the victim of the credit card theft, and the merchant usually have no simple means of redress, because by the time they catch on, the perpetrator has usually transferred funds into untraceable accounts.

In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act of 1998 (Identity Theft Act) 18 U.S.C. § 1028 to address the problem of identity theft. Specifically, the Act amended 18 U.S.C. § 1028 to make it a federal crime when anyone: knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of federal law, or that constitutes a felony under any applicable State or local law. Violations of the act are investigated by federal investigative agencies such as the U.S. SECRET SERVICE, the FBI, and the U.S. Postal Inspection Service and are prosecuted by the Department of Justice.

The Federal Trade Commission (FTC) is the federal clearinghouse for complaints by victims of identity theft. Although the FTC does not have the authority to bring criminal cases, it assists victims of identity theft by providing them with information to help them to resolve the financial and other problems that can result from identity theft. The FTC also may refer victim complaints to other appropriate government agencies and private organizations for further action.

Consumers can protect themselves from this type of crime by protecting information such as credit card and social security numbers and by shredding mailed offers to obtain credit. They also can check their credit reports for unknown accounts. In the event of identify theft, an alert can be placed on a credit bureau that notifies consumers of potential fraudulent activity. Consumers who are victims can also write a statement that will appear on their credit reports explaining the criminal activity. Most banks and major credit card companies have fraud departments with staff who are trained to address these situations, but often the consumer feels that the onus is on him or her to prove lack of wrongdoing, and many victims report frustration at having their credit and lives destroyed by identity theft. A number of states have taken action to make identity theft a state crime.

**Identity Theft, by Type, in 2002**

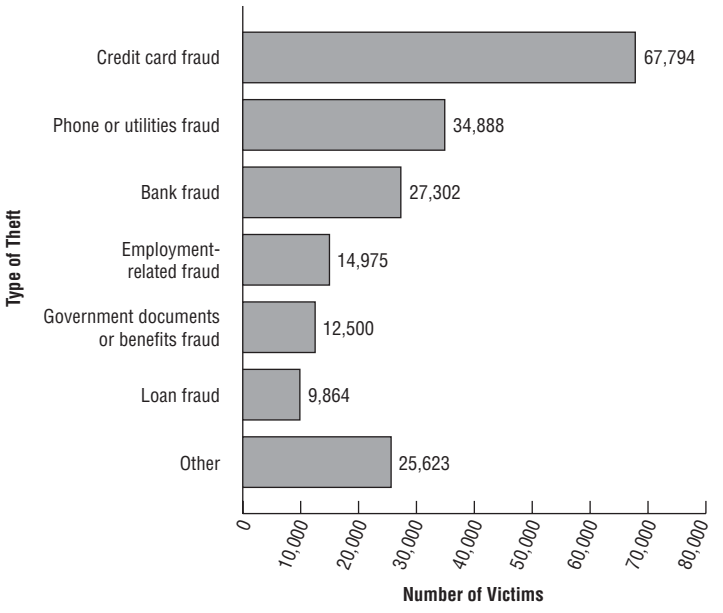


The total number of identity theft victims was 161,819. Approximately 22% of victims reported experiencing more than one type of identity theft.

SOURCE: Federal Trade Commission, *Consumer Sentinel Complaint Statistics and Trends*.

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## I.E.

*An abbreviation for the Latin* id est, "*that is to say, meaning.*"

## ILLEGAL ALIENS AND IMMIGRATION

See ALIENS.

## ILLEGITIMACY

*The condition before the law, or the social status, of a child whose parents were not married to each other at the time of his or her birth.*

The term *nonmarital child* is also used interchangeably with *illegitimate child.*

English COMMON LAW placed harsh penalties on an illegitimate child, denying the child inheritance and property rights. Modern law has given the nonmarital child more rights but still differentiates between the marital and nonmarital status. In addition, a rising level of out-of-wedlock births in the United States has drawn the attention of politicians and policy makers.

### Common Law and Illegitimacy

A child was considered to be illegitimate at common law if the parents were not married to each other at the time of the child's birth even though the parents were married later.

There was a common-law presumption that a child born of a married woman was legitimate. This presumption was rebuttable, however, upon proof that her husband either was physically incapable of impregnating her or was absent at the time of conception. In addition, a child born of a marriage for which an ANNULMENT was granted was considered illegitimate, since an annulled marriage is void retroactively from its beginning. Furthermore, if a man married a second time while still legally married to his first wife, a child born of the bigamous marriage was illegitimate.

At common law an illegitimate child was a FILLIUS NULLIUS (child of no one) and had no parental inheritance rights. This deprivation was based in part on societal and religious beliefs concerning the sanctity of the marital relationship, as well as the legal principles that property rights were determined by blood relationships.

## Robert L. Johnson's Son? The Rights of Illegitimate Heirs

Robert L. Johnson is an important figure in blues music. Though he recorded only twenty-nine songs before his death in 1938, at age twenty-seven, Johnson's songs, voice, and guitar playing have influenced many great musicians, including Muddy Waters, Keith Richards, and Eric Clapton. The Mississippi bluesman's recordings became a commercial success in the late 1960s, and by 1990 his collected works were released on compact discs.

Johnson married twice. Both wives died before he did and left no children. In 1974 Johnson's half-sister, Carrie Thompson, sold the copyrights of his songs and photographs, asserting that she was entitled to his estate. Upon her death in 1983, her half-sister Annye Anderson inherited her purported rights to Johnson's work.

When Anderson finally probated Johnson's estate in 1991, Claud L. Johnson filed a claim stating that he was the illegitimate son of Johnson and the sole heir of the bluesman. Claud Johnson produced a Mississippi birth certificate from 1931 that lists R. L. Johnson as his father.

But for the U.S. Supreme Court's ruling in *Trimble v. Gordon,* 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977), Claud Johnson could not have made his claim. Until *Trimble* Mississippi prohibited illegitimate children from inheriting from their father.

Anderson argued that Claud Johnson's claim should be dismissed because he had waited too long to file it. A county court agreed with Anderson, but the Mississippi Supreme Court reversed the lower court's decision, ruling that the intent of state law was to give the same rights to illegitimate as to legitimate children (*In re Estate of Johnson,* 1996 WL 138615 [Miss.]). The supreme court sent the case back to the county court, which is to determine whether Claud Johnson is the son of Robert Johnson. If so, he is entitled to Robert Johnson's estate.

The legal rights and duties of a person born of married parents could be ascertained more accurately than those of a child with an unknown or disputed father. Public policy in favor of maintaining solid family relationships contributed significantly to the preference for a legitimate child.

### Modern Law

The harsher aspects of the common law dealing with an illegitimate child have been eliminated, primarily through the application of the Equal Protection Clause of the FOURTEENTH AMENDMENT to the U.S. Constitution. In *Levy v. Louisiana,* 391 U.S. 68, 88 S. Ct. 1509, 20 L. Ed. 436 (1968), the Supreme Court ruled that a state statute (La. Civ. Code Ann. Art. 2315) that barred illegitimate children from recovering damages for the WRONGFUL DEATH of their mother, but allowed legitimate children to recover in similar circumstances, was invalid because it denied illegitimate children EQUAL PROTECTION of the law.

The Supreme Court also enhanced the right of an illegitimate child to inherit property. Whereas most states had given legitimate and illegitimate children the same right to inherit property from the mother and her family, a number of states did not allow an illegitimate child to inherit property from the father in the absence of a specific provision in the father's will. In *Trimble v. Gordon,* 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977), the Supreme Court ruled such provisions in an Illinois statute invalid.

A majority of states now subscribe to the theory that a child born of any union that has the characteristics of a formal marriage relationship is entitled to legitimate status. This theory includes children born of marriages that fail owing to legal technicalities as well as children of void or VOIDABLE marriages.

Some states still recognize the validity of COMMON-LAW MARRIAGE, which takes place when a man and woman cohabit for an extensive period, and hold themselves out to the public as being HUSBAND AND WIFE even though they were never formally married. In such states children born of such arrangements are considered legitimate. Common-law marriages were a convenient mechanism in the nineteenth century for establishing property rights and legitimating children. Frontier society accepted the economic necessity for permitting such marriages because it was difficult for people on the frontier to obtain a formal marriage license; without common-law marriages, many children would have been declared illegitimate.

### Legal Presumption of Legitimacy

The presumption of legitimacy is a strong legal presumption because public policy favors legitimacy to preserve stable family groupings. This presumption can be rebutted only if it can be clearly established that the child in question is illegitimate. A child born to a married couple is presumed to be their legitimate offspring in the absence of a clear demonstration that the husband could not possibly be the father.

Legitimation is the process whereby the status of a child is changed from illegitimate to legitimate. Some statutes provide that a child becomes legitimated upon an open ACKNOWLEDGMENT of PATERNITY by the alleged father. In some states an oral admission is sufficient, but in other states a written statement is required. A majority of states prescribe that an acknowledgment must be coupled with an act in order for the child to be declared legitimate. An adequate act in some states is the marriage of the child's natural parents. Once a child has been determined to be legitimate, he or she is entitled to the same rights and protections as any individual whose legitimacy has never been questioned.

### Paternity Actions

A paternity suit, or affiliation proceeding, may be brought against a father by an unmarried mother. This civil action is intended not to legitimate the child but to obtain support for the child and often to obtain the payment of bills incident to the pregnancy. Ordinarily, the mother starts the civil lawsuit, but some states allow public authorities to bring a paternity action for the mother if she refuses to do so. If the mother is on WELFARE, a paternity action is a vehicle for the local government agency to obtain financial assistance from the father.

A paternity action must start within the time prescribed by the STATUTE OF LIMITATIONS, or the mother's right to establish the putative father's paternity and corresponding support obligation will be lost. The evidence needed to establish paternity includes the testimony of the mother, blood and DNA tests, and in some states photographs from which to determine similar facial characteristics of the alleged father and the child.

**Illegitimacy**

**BIRTHS TO UNMARRIED WOMEN AS PERCENT OF ALL BIRTHS TO WOMEN AGED 15–44, 1970 TO 2000**

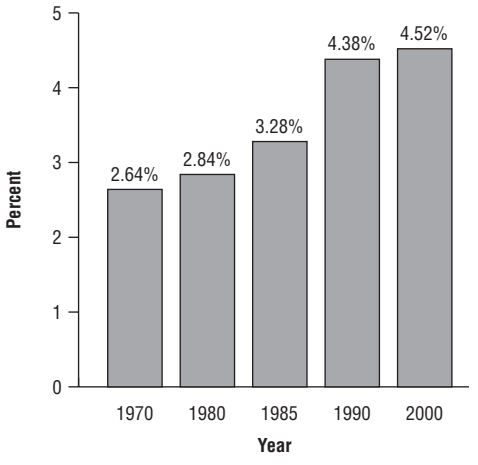


SOURCE: U.S. National Center for Health Statistics, *National Vital Statistics Reports*, 2002.

### Legal Rights of Fathers

Whether a father acknowledges paternity or is adjudged to be the father in a paternity action, he has more custody rights today than at common law. At common law fathers were assumed to have little concern for the well-being of their illegitimate offspring. Historically, in most jurisdictions, if a child was illegitimate, the child could be adopted with only the consent of his or her natural mother.

This assumption, as embodied in a New York statute (N.Y. Domestic Relations Law § 111), was challenged in *Caban v. Mohammed,* 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979). The key issue was whether the consent of an unwed biological father had to be obtained before an ADOPTION could be finalized. The Supreme Court ruled that a law depriving all unwed fathers of the right to decide against adoption, whether or not they actually took care of the children in question, was unconstitutional and a form of SEX DISCRIMINATION.

### Artificial Insemination

Legitimacy issues have arisen when a child is conceived by ARTIFICIAL INSEMINATION. This process involves impregnating a woman, without sexual intercourse, with the semen of a donor who might be her husband or another party. Some states adhere to traditional views and consider any child conceived in this manner to be illegitimate, regardless of whether the husband gave his consent to the procedure. Other courts declare that a child is legitimate if the husband consented. A child is most likely considered illegitimate when the mother was unmarried and was artificially inseminated by an unknown donor, and remains unmarried. In most cases of artificial insemination, the father has donated semen anonymously, and his identity is not known.

### Current Trends

The rate of illegitimate births in the United States has risen sharply since the early 1970s. In the 1940s fewer than five percent of the total births were out of wedlock. By the early 2000s, according to statistics compiled by the Center for Health Statistics at the U.S. HEALTH AND HUMAN SERVICES DEPARTMENT, births to unmarried mothers accounted for nearly one-third of all U.S. births.

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CROSS-REFERENCES

Child Custody; Child Support; DNA Evidence; Family Law; Parent and Child.

## ILLICIT

*Not permitted or allowed; prohibited; unlawful; as an illicit trade; illicit intercourse.*

## ILLUSORY PROMISE

*A statement that appears to assure a performance and form a contract but, when scrutinized, leaves to the speaker the choice of performance or nonperformance, which means that the speaker does not legally bind himself or herself to act.*

When the provisions of the purported promise render the performance of the person who makes the promise optional or completely within his or her discretion, pleasure, and control, nothing absolute is promised; and the

promise is said to be illusory. For example, a court decided that a promise contained in an agreement between a railroad and an iron producer whereby the railroad promised to purchase as much iron as its board of directors might order was illusory and did not form a contract.

## IMMATERIAL

*Not essential or necessary; not important or pertinent; not decisive; of no substantial consequence; without weight; of no material significance.*

## IMMEDIATE CAUSE

*The final act in a series of provocations leading to a particular result or event, directly producing such result without the intervention of any further provocation.*

For example, if an individual who was driving while intoxicated crashed his or her car and was killed, the immediate cause of death was the crash. The proximate cause, however, was the individual's state of intoxication.

## IMMIGRATION

*The entrance into a country of foreigners for purposes of permanent residence. The correlative term* emigration *denotes the act of such persons in leaving their former country.*

CROSS-REFERENCES

Aliens.

## IMMIGRATION AND NATURALIZATION

See ALIENS.

## IMMINENT

*Impending; menacingly close at hand; threatening.*

Imminent peril, for example, is danger that is certain, immediate, and impending, such as the type an individual might be in as a result of a serious illness or accident. The chance of the individual dying would be highly probable in such situation, as opposed to remote or contingent. For a gift *causa mortis* (Latin for "in anticipation of death") to be effective, the donor must be in imminent peril and must die as a result of it.

## IMMUNITY

*Exemption from performing duties that the law generally requires other citizens to perform, or from a penalty or burden that the law generally places upon other citizens.*

### Sovereign Immunity

SOVEREIGN IMMUNITY prevents a sovereign state or person from being subjected to suit without its consent.

The doctrine of sovereign immunity stands for the principle that a nation is immune from suit in the courts of another country. It was first recognized by U.S. courts in the case of *The Schooner Exchange v. M'Faddon,* 11 U.S. (7 Cranch) 116, 3 L. Ed. 287 (1812). At first, courts espoused a theory that provided absolute immunity from the jurisdiction of a U.S. court for any act by a foreign state. But beginning in the early 1900s, courts relied on the political branches of government to define the breadth and limits of sovereign immunity.

In 1952, the U.S. STATE DEPARTMENT reacted to an increasing number of commercial transactions between the United States and foreign nations by recognizing foreign immunity only in noncommercial or public acts, and not in commercial or private acts. However, it was easily influenced by foreign diplomats who requested absolute sovereign immunity, and the application of sovereign immunity became inconsistent, uncertain, and often unfair.

Complaints about inconsistencies led to the passage of the Foreign Sovereign Immunities Act of 1976 (28 U.S.C.A. §§ 1 note, 1330, 1332, 1391, 1441, 1602–1611). By that act, Congress codified the theory of sovereign immunity, listing exceptions for certain types of acts such as commercial acts, and granted the exclusive power to decide sovereign immunity issues to the courts, rather than to the State Department.

Indian tribes have been granted sovereign immunity status by the United States, and therefore they generally cannot be sued without the consent of either Congress or the tribe. This immunity is justified by two considerations: First, historically, with more limited resources and tax bases than other governments, Indian tribes generally are more vulnerable in lawsuits than are other governments. Second, granting sovereign nation status to tribes is in keeping with the federal policy of self-determination for Indians.

Indian tribes are immune from suit whether they are acting in a governmental or a proprietary capacity, and immunity is not limited to acts conducted within a reservation. However,

individual members of a tribe do not receive immunity for their acts; only the tribe itself is immune as a sovereign nation.

### Governmental Tort Immunity

Sovereign immunity may also apply to federal, state, and local governments within the United States, protecting these governments from being sued without their consent. The idea behind domestic sovereign immunity—also called governmental TORT immunity—is to prevent money judgments against the government, as such judgments would have to be paid with taxpayers' dollars. As an example, a private citizen who is injured by another private citizen who runs a red light generally may sue the other driver for NEGLIGENCE. But under a strict sovereign immunity doctrine, a private citizen who is injured by a city employee driving a city bus has no CAUSE OF ACTION against the city unless the city, by ordinance, specifically allows such a suit.

Governmental tort immunity is codified at the federal level by the FEDERAL TORT CLAIMS ACT (28 U.S.C.A. § 1291 [1946]), and most states and local governments have similar statutes. Courts and legislatures in many states have greatly restricted, and in some cases have abolished, the doctrine of governmental tort immunity.

### Official Immunity

The doctrine of sovereign immunity has its roots in the law of feudal England and is based on the tenet that the ruler can do no wrong. Public policy grounds for granting immunity from civil lawsuits to judges and officials in the EXECUTIVE BRANCH of government survive even today. Sometimes known as official immunity, the doctrine was first supported by the U.S. Supreme Court in the 1871 case of *Bradley v. Fisher,* 80 U.S. 335, 20 L. Ed. 646. In *Bradley,* an attorney attempted to sue a judge because the judge had disbarred him. The Court held that the judge was absolutely immune from the civil suit because the suit had arisen from his judicial acts. The Court recognized the need to protect judicial independence and noted that malicious or improper actions by a judge could be remedied by IMPEACHMENT rather than by litigation.

Twenty-five years later, in *Spalding v. Vilas,* 161 U.S. 483, 16 S. Ct. 631, 40 L. Ed. 780 (1896), the Court expanded the doctrine to include officers of the federal Executive Branch. In *Spalding,* an attorney brought a DEFAMATION suit against the U.S. postmaster general, who had circulated a letter that criticized the attorney's motives in representing local postmasters in a salary dispute. At that time, the postmaster general was a member of the president's cabinet. The Court determined that the proper administration of public affairs by the Executive Branch would be seriously crippled by a threat of civil liability and granted the postmaster general absolute immunity from civil suit for discretionary acts within the scope of the postmaster's authority. Federal courts since *Spalding* have continued to grant absolute immunity—a complete bar to lawsuits, regardless of the official's motive in acting—to federal executive officials, so long as their actions are discretionary and within the scope of their official duties.

Members of Congress and state legislators are absolutely immune from civil lawsuits for their votes and official actions. The U.S. Supreme Court, in *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998), extended absolute immunity to local legislators (e.g., city council members, and county commissioners) when they act in their legislative, rather than administrative, capacities.

Prosecutors are absolutely immune for their actions during a trial or before a GRAND JURY. However, during the investigatory phase, they are only granted qualified immunity. In *Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997), the U.S. Supreme Court ruled that a prosecutor was not entitled to absolute immunity with respect to her actions in making an allegedly false statement of fact in an AFFIDAVIT supporting an application for an arrest warrant. Policy considerations that merited absolute immunity included both the interest in protecting a prosecutor from harassing litigation that would divert his or her time and attention from official duties and the interest in enabling him or her to exercise independent judgment when deciding which suits to bring and in conducting them in court. These considerations did not apply when a prosecutor became an official witness in swearing to a statement.

However, in *Conn v. Gabbert*, 526 U.S. 286, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999), the U.S. Supreme Court held that prosecutors cannot be sued for having lawyers searched or for interfering with the ability to advise a client who is appearing before a grand jury. Prosecutors have a qualified immunity in this situation,

based on the two-step analysis that the courts apply to qualified-immunity issues. Under this two-part test, an Executive Branch official will be granted immunity if (1) the constitutional right that allegedly has been violated was not clearly established; and (2) the officer's conduct was "objectively reasonable" in light of the information that the officer possessed at the time of the alleged violation. The qualified-immunity test is usually employed during the early stages of a lawsuit. If the standard is met, a court will dismiss the case.

Police and prison officials may be granted qualified immunity. In *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002), the U.S. Supreme Court held that Alabama prison officials were not eligible for qualified immunity because they were on notice that their conduct violated established law even in novel factual circumstances. The officials were on notice that tying a prisoner to a hitching post in the prison yard constituted CRUEL AND UNUSUAL PUNISHMENT under the EIGHTH AMENDMENT. Prior court rulings and federal prison policies also made clear that law banning the practice had been clearly established. Therefore, the officials were not qualified for immunity.

In *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed.2d 272 (2001), the U.S. Supreme Court applied the qualified-immunity test to a claim that a U.S. SECRET SERVICE agent had used excessive force in removing a protester. The Court reasserted its general belief that law officers must be given the benefit of the doubt that they acted lawfully in carrying out their day-to-day activities. Moreover, one of the main goals of qualified immunity is to remove the defendant from the lawsuit as quickly as possible, thereby reducing legal costs. Justice ANTHONY KENNEDY restated the principle that immunity is not a "mere defense" to liability but an "immunity from suit." Therefore, immunity issues must be resolved as early as possible. As to the first step, Kennedy agreed that the case revealed a "general proposition" that excessive force is contrary to the FOURTH AMENDMENT. However, a more specific inquiry must take place to see whether a reasonable officer "would understand that what he is doing violates that right." As to this second step, Justice Kennedy rejected the idea that because the plaintiff and the officer disputed certain facts, there could be no short-circuiting of this step. He stated that the "concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." Officers have difficulty in assessing the amount of force that is required in a particular circumstance. If their mistake as to "what the law requires is reasonable, however, the officer is entitled to the immunity defense."

*Air Force analyst A. Ernest Fitzgerald sued President Nixon for firing him after Fitzgerald disclosed to Congress huge cost overruns in the Defense Department. The Supreme Court held that the president is immune from civil lawsuits arising from official acts performed while in office.*

AP/WIDE WORLD PHOTOS

In *Nixon v. Fitzgerald,* 457 U.S. 731, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982), the U.S. Supreme Court held that former U.S. president RICHARD M. NIXON was entitled to absolute immunity from liability predicated on his official acts as president. In *Nixon,* a weapons analyst, A. Ernest Fitzgerald, had been fired by the U.S. Air Force after he had disclosed to Congress certain cost overruns within the DEFENSE DEPARTMENT. Fitzgerald sued Nixon and two former presidential aides for wrongful retaliatory termination.

The Court emphasized the singular importance of the duties of the president, and noted that the diversion of the president's energies over concern for private lawsuits "would raise unique risks to the effective functioning of government." It also observed that the president, in view of the visibility of the office, would be an easy target for civil lawsuits. The ensuing personal vulnerability and distraction would prove harmful to the nation.

Despite the Court's grant of absolute immunity to the president for official actions, a president does not have immunity from civil lawsuits for actions that allegedly occurred before

becoming president. The Court, in *Clinton v. Jones*, 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997), ruled that President BILL CLINTON had to defend himself in a sexual-harassment lawsuit that was based on his alleged actions while governor of Arkansas. Clinton had contended that the lawsuit could not proceed until he left office, but the Court disagreed. The Court pointed out that grants of official immunity are based on a functional analysis, and it would not extend immunity to actions outside of an officeholder's official capacities. Moreover, it concluded that defending the lawsuit would not divert Clinton's energies.

### Immunity from Prosecution

State and federal statutes may grant witnesses immunity from prosecution for the use of their testimony in court or before a grand jury. Sometimes, the testimony of one witness is so valuable to the goals of crime prevention and justice that the promise of allowing that witness to go unpunished is a fair trade. For example, a drug dealer's testimony that could help law enforcement to destroy an entire illegal drug-manufacturing network is more beneficial to society than is the prosecution of that lone drug dealer. Although the FIFTH AMENDMENT to the U.S. Constitution grants witnesses a PRIVILEGE AGAINST SELF-INCRIMINATION, the U.S. Supreme Court has permitted prosecutors to overcome this privilege by granting witnesses immunity. Prosecutors have the sole discretion to grant immunity to witnesses who appear before a grand jury or at trial.

States employ one of two approaches to prosecutorial immunity: Use immunity prohibits only the witness's compelled testimony, and evidence stemming from that testimony, from being used to prosecute the witness. The witness still may be prosecuted so long as the prosecutor can obtain other physical, testimonial, or CIRCUMSTANTIAL EVIDENCE apart from the witness's testimony. Transactional immunity completely immunizes the witness from prosecution for any offense to which the testimony relates.

Congressional committees have the power to grant testimonial immunity to witnesses who testify before members of Congress. Congressional investigations into allegations of misconduct—such as the WATERGATE investigations in the 1970s and the IRAN-CONTRA investigations in the 1980s—rely heavily on witness testimony. Whereas prosecutors simply decide whether to grant immunity to a witness, congressional committees must follow more formal procedures. Immunity may be granted only after a two-thirds majority vote by members of the committee. Ten days before the immunized testimony is given, the committee must advise the JUSTICE DEPARTMENT or the INDEPENDENT COUNSEL of its intention to grant immunity.

### Family Immunity

At COMMON LAW, a child could sue a parent for breach of contract and for torts related to property. An adult could sue his or her parent for any tort, whether personal or related to property. In 1891, the Mississippi Supreme Court, in *Hewllette v. George,* 9 So. 885 (1891), held that a child could not seek compensation for personal injury that was caused by a parent's wrongdoing, so long as the PARENT AND CHILD were obligated by their family duties to one another. The decision was based not on precedent but rather on public policy: The court found that such a lawsuit would undermine the "peace of society and of the families composing society." Criminal laws, the court found, were adequate to protect children.

Other states fell in step with Mississippi, adopting parental immunity of varying degrees. Some parental-immunity laws prohibited only claims of negligence, whereas others prohibited lawsuits for intentional torts such as rapes and beatings. The rationale supporting parental-immunity laws includes the need to preserve family harmony and, with the availability of liability insurance, the need to prevent parents and the children from colluding to defraud insurance companies.

Unjust results have led courts in many states that espouse parental immunity to carve out exceptions to the rule. For example, a child usually can sue a parent for negligence when the parent has failed to provide food or medical care, but not when the parent has merely exercised parental authority. Most courts have abolished the parental-immunity defense for car accident claims, and many allow children to sue their parents for negligent business or employment actions. Courts normally permit WRONGFUL DEATH suits to be brought by a child against a parent or by a parent against a child, because death terminates the parent-child relationship. Moreover, most states allow a child to sue a parent for injuries suffered in utero owing to the negligence of the mother.

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CROSS-REFERENCES

Ambassadors and Consuls; Diplomatic Immunity; Feres Doctrine; Husband and Wife; Judicial Immunity.

## IMMUNIZATION PROGRAMS

In the 1950s, medical breakthroughs resulted in new vaccines to combat such diseases as polio and measles. States responded by requiring mandatory immunization for schoolchildren. One result was the near eradication of diseases that had previously been crippling or fatal. A second, unforeseen result was adverse side effects of the vaccines, which led to lawsuits against drug companies. Between the 1960s and late 1980s, millions of dollars in litigation forced drug manufacturers to retreat from the market and prompted government action to help protect companies and ensure their presence in the vaccine market. Concern has also been raised over this problem's effect on the development of a vaccine against AIDS.

The 1950s saw great successes in the battle against childhood diseases. For example, pioneering researchers Drs. Jonas E. Salk and Albert B. Sabin developed vaccines that brought the dreaded virus poliomyelitis under control. This revolutionary work meant that a once rampant disease now could be stopped with a simple inoculation. In 1952 alone, more than 57,000 cases of polio in the United States left approximately 21,000 people crippled; in 1985, only four cases of polio were reported in the nation. Measles was also effectively halted: it killed over 2,000 people in 1941 but only two in 1985. And by the end of the 1970s, smallpox was virtually eliminated around the world.

Not only the vaccines accomplished this success. Government action helped, by enabling the widespread inoculation of children. By the 1960s, states had begun administering vaccines to school-age children, and their programs ultimately became mandatory. As of 2003, each state requires parents to submit a proof of immunization before enrolling their child in school; thus, the majority of young children in the United States are inoculated against such diseases as measles, polio, mumps, meningitis, and diphtheria, pertussis, tetanus, and whooping cough.

Vaccines are never entirely safe. Side effects range from mild to serious—from swelling and fever to brain damage and death. These dangers were recognized early on. Between 1961 and 1963, federal agencies noted occasional serious side effects from polio vaccines. By 1964, the surgeon general's Special Advisory Committee on Oral Poliomyelitis Vaccine found that 53 cases of polio could apparently be linked to the three types of the vaccine.

Public health authorities have nevertheless consistently urged the continuation of vaccine programs, arguing that the extremely minor incidence of adverse side effects is far outweighed by the health and lives they preserve. The Centers for Disease Control estimates, for example, that 1 in 310,000 children is adversely affected by the diphtheria, pertussis, and tetanus (DPT) vaccine. According to the AMERICAN MEDICAL ASSOCIATION, one in 3.2 million doses of polio vaccine will cause paralysis, and one in 1 million doses of measles vaccine will cause brain damage.

Beginning in the 1960s, vaccine-related injuries produced expensive litigation. Aggrieved families brought suit against drug manufacturers, sometimes winning large damages awards. These suits proceeded on a number of theories: NEGLIGENCE, failure to warn, design defect, production defect, breach of WARRANTY, and STRICT LIABILITY. In 1970, for instance, Epifanio Reyes, the father of eight-month-old Anita Reyes, filed suit against Wyeth Laboratories, charging that the company's vaccine had transmitted paralytic polio to his daughter. He claimed strict PRODUCT LIABILITY, breach of warranty, and negligence. The jury returned an award of $200,000, and the verdict was upheld on appeal in *Reyes v. Wyeth Laboratories,* 498 F.2d 1264 (5th Cir., 1974), *cert. denied,* 419 U.S. 1096, 95 S. Ct. 687, 42 L. Ed. 2d 688 (1974).

The lawsuits increased costs for drug companies, which, even when successful in court, faced increased expenses in liability insurance. Fearing greater losses in court, manufacturers fled the vaccine market. Between the mid-1960s and early 1990s, the number of vaccine makers

shrank by half. The companies that remained drastically raised the price of vaccines: the DPT vaccine, for instance, sold for $1 a dose in the early 1980s, but had increased to $11 a dose by the end of the decade. The exodus of companies from the market left measles, mumps, and rubella vaccines each with only one manufacturer. This situation raised worries about the possibility of a critical shortage if one of these manufacturers left the market.

Companies were not the only target of lawsuits. In the mid-1970s, the federal government established a vaccine program called the National Swine Flu Immunization Program of 1976 (42 U.S.C.A. § 247 b(j)-(1), *amended by* Pub. L. No. 95-626, 92 Stat. 3574 [1978]), in anticipation of an onslaught of swine flu. To induce manufacturers to produce the drug, the act absolved them of all liability, and the federal government assumed all risk. The epidemic never materialized, but legal problems did. Plaintiffs alleging harmful side effects from the vaccine sued, and the government ended up paying out millions of dollars in settlements. In *Petty v. United States,* 740 F.2d 1428 (1984), for example, the Eighth Circuit upheld a damages award of some $200,000. The Court held that the warnings on the vaccine were inadequate.

Since the time of the swine flu immunization suits, courts and lawmakers have taken actions that have lessened the risks of liability facing drug manufacturers. Courts have restricted the grounds under which litigants can succeed in civil TORT actions. Where products are found to be unavoidably unsafe—having obvious benefits yet carrying certain risks—the courts have erected barriers to strict liability claims. The courts have presumed that certain vaccines are unavoidably unsafe and, in some jurisdictions, that warnings provided by drug companies are adequate as long as they meet FOOD AND DRUG ADMINISTRATION (FDA) standards. The Restatement (Second) of Torts mentions the rabies vaccine as one of the products that, "in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use," noting,

> Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. (§ 402A comment k [1965])

Courts in most jurisdictions now follow this standard in determining liability in vaccine cases.

The finding that a vaccine is unavoidably unsafe does not mean that manufacturers are completely absolved of liability. Plaintiffs may still overcome the two barriers of unavoidable danger and compliance with FDA standards. To prevail, they must show that vaccine-related injuries or deaths could have been prevented. Two chief means exist: they must show that the drugmaker engaged in illegal activity or that the drugmaker failed to exercise due care in preparing or marketing the vaccine. Although both are difficult matters to prove, they can be established, as in *Petty,* in which inadequate warnings on the swine flu vaccine were found to be more significant than the fact that the vaccine was unavoidably unsafe.

Congress used a similar liability standard in groundbreaking federal legislation passed in 1986, the National Childhood Vaccine Injury Act (42 U.S.C.A. § 300aa-1 et seq. [1990 Supp.]). The act established a federal no-fault compensation program for victims. It sought to stem civil litigation by providing an alternative: rather than sue drug companies, families alleging injury or death due to a child's compulsory inoculation could file suit in the federal Claims Court. This alternative reflected not only legal but commercial realities: Congress hoped to maintain an adequate national supply of vaccines by relieving drug companies of risk. The law set the maximum damages award at $250,000, and required plaintiffs to first file suit in the Claims Court. If successful, plaintiffs could accept the award or reject it in favor of filing a separate civil action. Like the evolving standard in courts, this law protected defendant drug companies: their compliance with federal production and labeling standards is an acceptable defense against civil lawsuits, and no strict liability claims are allowed.

Judicial and legislative solutions have thus partially ameliorated the liability risks of drug manufacturers. But by the mid-1990s, concerns remained about the potential for marketing an AIDS vaccine if one was discovered. Some observers called for federal legislation to protect potential manufacturers of an AIDS vaccine, and two states—California (Cal. Health & Safety

Code § 199.50 [West Supp. 1995]) and Connecticut (Conn. Gen. Stat. Ann. § 19a-591b [West Supp. 1994])—extended liability protection to them.

Despite the use of anthrax in October 2001 as a terror weapon, medical and national security experts have always considered the intentional spreading of smallpox to be a far greater danger. In the weeks after the terrorist attacks, the HEALTH AND HUMAN SERVICES DEPARTMENT sought emergency funding for bio-terrorist preparedness, which included urgent production of smallpox vaccine. Smallpox as a naturally occurring disease was declared eradicated in 1980 after worldwide inoculation programs had successfully defeated it. The United States halted smallpox inoculations in 1972, and those Americans who had them are probably no longer protected, according to medical experts. The active life of the vaccination was considered to be 10 years, though recent studies indicate protection may last longer. The GEORGE W. BUSH administration labored for months over the question of reinstituting vaccines. The vaccine itself can be deadly and is not advised for people with weak immune systems, people being treated for cancer, nursing mothers, pregnant women, very young children, or people who have or have ever had eczema or atopic dermatitis. People who live with someone at risk under any of these conditions also should not be vaccinated. Based on medical studies, experts estimate that 15 out of every 1 million persons vaccinated for the first time could face serious side effects. Several countries are suspected to have varying amounts of smallpox virus, including North Korea, Russia, China, Pakistan, and Iran. The United States had several vials of the virus, according to testimony before Congress, kept under tight security at the Centers for Disease Control and Prevention in Atlanta. A single infected person can spread smallpox. The last major outbreak in an industrialized nation was in Yugoslavia in 1972.

In December 2002, President Bush ordered a national smallpox vaccination program in the United States. Military personnel destined for deployment to the Persian Gulf, Central Asia, and Middle East regions were given the vaccine as states across the country prepared to vaccinate emergency medical and disaster personnel who might have to contend with an outbreak of

**Children Immunized Against Specific Diseases, 2002**

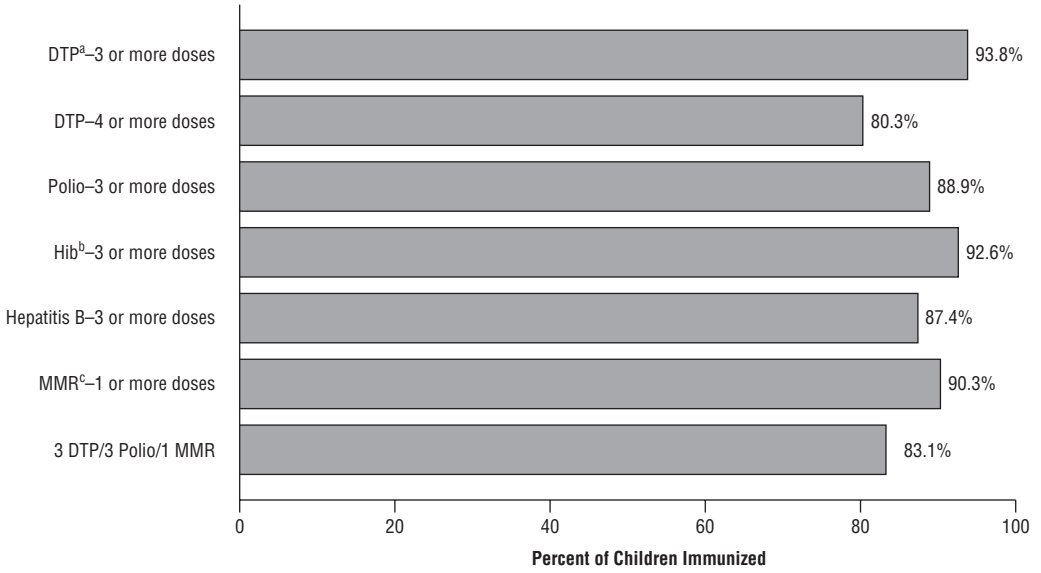


[a]Diphtheria-tetanus-pertussis
[b]*Haemophilus influenzae* B
[c]Measles-mumps-rubella

SOURCE: U.S. Center for Disease Control and Prevention, *National Immunization Program*.

the disease. Under the plan, there would be voluntary vaccinations of first responders, the fire fighters, police and emergency personnel who are first on the scene at a disaster. Government officials estimated that there were about 10 million first responders nationwide. Secretary of Health and Human Services Tommy Thompson said that there is a stockpile of nearly 15 million doses of an established and licensed vaccine that has been used in the United States for decades. These doses were expected to be administered to military and service personnel. There are some 85 million doses of a new vaccine that would not be licensed until 2004, and that could be used in case of emergency. The Association of American Physicians and Surgeons issued a statement of support for the president's program. The American Nurses Association, whose members would be some of the personnel offered inoculations in the first phased, said there was insufficient information about the risks for their members to make a clear decision. Some private citizens have been vaccinated under experimental programs, but as of June 2003, the vaccine was not available to the general public.

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Acquired Immune Deficiency Syndrome; Drugs and Narcotics.

## IMPANEL

*The act of the clerk of the court in making up a list of the jurors who have been selected for the trial of a particular cause. All the steps of ascertaining who shall be the proper jurors to sit in the trial of a particular case up to the final formation.*

## IMPARTIAL

*Favoring neither; disinterested; treating all alike; unbiased; equitable, fair, and just.*

## IMPEACH

*To accuse; to charge a liability upon; to sue. To dispute, disparage, deny, or contradict; as in to impeach a judgment or decree, or impeach a witness; or as used in the rule that a jury cannot* impeach its verdict. *To proceed against a public officer for crime or misfeasance, before a proper court, by the presentation of a written accusation called* ARTICLES OF IMPEACHMENT.

In the law of evidence, the testimony of a witness is impeached by earlier statements that the witness has made if they are inconsistent with the statements to which the witness testifies.

## IMPEACHMENT

*A process that is used to charge, try, and remove public officials for misconduct while in office.*

Impeachment is a fundamental constitutional power belonging to Congress. This safeguard against corruption can be initiated against federal officeholders from the lowest cabinet member, all the way up to the president and the chief justice of the U.S. Supreme Court. Besides providing the authority for impeachment, the U.S. Constitution details the methods to be used. The two-stage process begins in the House of Representatives with a public inquiry into allegations. It culminates, if necessary, with a trial in the Senate. State constitutions model impeachment processes for state officials on this approach. At both the federal and state levels, impeachment is rare: From the passage of the Constitution to the mid-1990s, only 50 impeachment proceedings were initiated, and only a third of these went as far as a trial in the Senate. The reluctance of lawmakers to use this power is a measure of its gravity; it is generally only invoked by evidence of criminality or substantial abuse of power.

The roots of impeachment date to ancient Athens. Its place in the U.S. Constitution was secured by the influence of English COMMON LAW on the Framers of the Constitution. Originally, any English subject, politician, or ruler could institute impeachment charges in Parliament. By the fourteenth century, this power became the exclusive domain of the House of Commons and the House of Lords. In 1776, the American colonies included much of the English tradition in state constitutions, but the delegates of the Constitutional Convention hotly debated how best to embody it in the federal Constitution. Their most contentious question

## A Challenge to Impeachment

In 1989, federal judge Alcee Hastings was removed from the bench by a Senate vote, becoming the first judge in U.S. history to be impeached after being acquitted in a criminal trial. Hastings vigorously proclaimed his innocence, challenged the proceedings in court, and alleged that racism drove the proceedings.

An appointee of President **JIMMY CARTER**, Hastings joined the U.S. District Court for the Southern District of Florida as its first African American judge in 1979. In 1981, federal prosecutors indicted him on conspiracy to accept a bribe from a **FEDERAL BUREAU OF INVESTIGATION** agent posing as a defendant in a case before him. They charged Attorney William A. Borders, president of the National Bar Association, with offering the agent a lenient sentence from Hastings in exchange for $150,000. Borders was convicted in 1982. Hastings was acquitted in February 1983.

Hastings's troubles soon deepened. In April 1983, the U.S. Court of Appeals for the Eleventh Circuit set in motion a three-year investigation into charges that Hastings had manufactured evidence for his defense. The probe concluded that he was guilty, and in March 1987, the **JUDICIAL CONFERENCE OF THE UNITED STATES** recommended impeachment. The House of Representatives agreed. On August 3, 1988, the full House voted 413–3 to send the case to the Senate with seventeen **ARTICLES OF IMPEACHMENT**, including false testimony, fabrication of false records, and improper disclosure of confidential law enforcement information.

Hastings brought suit, seeking a preliminary injunction from the U.S. District Court for the District of Columbia (*Hastings v. United States Senate,* 716 F. Supp. 38 [1989]). In his three-part complaint, Hastings claimed that (1) the impeachment hearing was procedurally flawed because his trial would be conducted by committee and not by the full body of the Senate; (2) the impeachment hearings violated his Fifth Amendment **DOUBLE JEOPARDY** rights against a second prosecution for the same crime; and (3) he was being denied **EFFECTIVE COUNSEL** and was entitled to attorneys' fees.

The suit failed. U.S. district judge Gerhard Gesell held that (1) rule XI of the governing Rules of Procedure and Practice in the Senate When Sitting on Impeachment authorizes a committee format but does not prevent the full participation of the Senate; (2) double jeopardy principles did not apply in this case because impeachment is not a criminal proceeding and because Hastings faced separate impeachment charges; and (3) no statute provides for attorneys' fees.

In August 1989, the Senate panel heard twenty-four days of testimony. On October 20, it convicted Hastings on eight of the impeachment articles and removed him from office. Hastings left the bench continuing to profess his innocence, attacking the Senate's handling of evidence, and maintaining that he was the victim of racism.

**CROSS-REFERENCES**

Double Jeopardy.

was over the offenses that should be considered impeachable.

The result of the Framers' debate was a compromise: They borrowed language from English common law but adapted the grounds of impeachment. These grounds are specified in Article II, Section 4: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, TREASON, BRIBERY, or other High Crimes and Misdemeanors." The choice of the phrase "High Crimes and Misdemeanors" left the exact definition of impeachable offenses open to interpretation by Congress. It has invited considerable debate, but it is generally read to mean both indictable offenses and other serious noncriminal misconduct. The latter has included corruption, dereliction of constitutional duty, and violation of limitations on the power of an office. Under the Constitution, federal judges are held to the most exacting standard: They may remain on the bench only "during good Behavior" (art. III, sec. 1).

# How Will the Trial of Bill Clinton Affect Future Impeachments?

Impeachment, the constitutional method for removing presidents, judges, and other federal officers who commit "Treason, Bribery, or other high Crimes and Misdemeanors," requires a majority vote by the House of Representatives, and then conviction by a two-thirds vote in the Senate. President **WILLIAM JEFFERSON CLINTON**'s impeachment trial was the fifteenth in U.S. history, and the second of a president. **ANDREW JOHNSON**, the other president to be impeached by the House of Representatives, was acquitted by the Senate in 1868 in a vote that mostly followed party lines. Especially in light of prior impeachments, seven of which ended with the removal of federal judges, Clinton's case will affect the future use of impeachment, the process of impeachment, and the definition of "high Crimes and Misdemeanors."

Clinton's experience, like Johnson's, shows that impeachment can be a tool of political warfare. Although the U.S. Constitution only requires a House majority for impeachment, many scholars and other commentators say it should be a bipartisan effort to remove a president who is dangerous to the nation. However, the world of academia differs from that of politics. In contrast, House Republicans pursued Clinton by disregarding polls that said two-thirds of the nation opposed impeachment. The vote in the House then fell mostly along party lines. Future House majorities could use this precedent to impeach a political opponent without substantial public support.

The price of the impeachment, however, was high for House Republicans. Speaker **NEWT GINGRICH** (R-Ga.) resigned after mid-term elections in November 1998, trimming the Republican House majority to six votes. Then, upon exposure of his own extramarital affair, Speaker-elect Robert L. Livingston (R-La.) resigned on the day of impeachment, urging Clinton to follow his example. Republicans and Democrats alike might hesitate to pursue another unpopular impeachment with so much at risk. However, when Democrats someday control the House of Representatives with a Republican in the White House, the human temptation for revenge will be great. As historian Benjamin Ginsberg observed, "The history of American politics over the last few decades is that the victims of a political attack denounce it as an illegitimate endeavor—but within a few years adopt it themselves. It's like an arms race."

As for the process of impeachment, Clinton's experience may affect the future use of witnesses and the viability of censure. The House Judiciary Committee declined to call a single witness to any of Clinton's misconduct, relying instead in the investigation by Independent Counsel **KENNETH W. STARR**. Democrats criticized this procedure, asking how the House could vote on impeachment without an independent investigation. (In fact, the only other time the House failed to conduct an investigation was when it impeached President Johnson, suggesting that such an approach is political.) During Clinton's trial in the Senate, however, Democrats themselves opposed calling witnesses, a political move motivated by fear that witnesses would reveal something leading to conviction. House managers running the prosecution, who now wanted 15 witnesses after calling none in the House, had to settle for just three. Everyone will remember that lesson next time.

As an alternative to impeachment, Democrats tried to introduce censure resolutions in both the House and Senate. Republicans defeated these efforts. Some said censure was not a legal option, as the U.S. Constitution provides for censure of members of Congress but not presidents. Democrats, however, pointed to past censures of Presidents **ANDREW JACKSON**, **JOHN TYLER**, and **JAMES BUCHANAN**, and suggested that Republican opposition stemmed from a desire to brand Democrats as supporting Clinton's misconduct during upcoming elections.

Any future impeachment, whether of a president, judge, or other civil officer, will revisit the question of what constitutes "high Crimes and Misdemeanors," which is undefined in the U.S. Constitution. Those in favor of impeaching Clinton argued that perjury and **OBSTRUCTION OF JUSTICE** of any kind are impeachable because they subvert the **RULE OF LAW**, making it impossible to expect lawful behavior from ordinary citizens and even future presidents, who are charged by the Constitution with taking "Care that the Laws be faithfully executed." Those who opposed

Impeachment is conducted in two stages. Impeachment proceedings begin in the House of Representatives (art. I, sec. 2). This stage satisfies the Framers' belief that impeachment should be a public inquiry into charges against an official, and it involves fact-finding at hearings. After accumulating all the evidence, the House votes on whether or not to impeach. A vote against impeachment ends the process. A vote to impeach formally advances the process to its second stage through what is called adoption of the **ARTICLES OF IMPEACHMENT**. Each article is a formal charge with conviction on any one article being sufficient for removal. The case

impeachment said that while perjury and obstruction of justice are wrong, they are not impeachable offenses unless they concern the president's official duties and present a danger to the nation.

Clinton's impeachment by the House and acquittal by the Senate thus will affect future interpretation of "high Crimes and Misdemeanors" in many ways. The House Judiciary Committee recommended impeachment for perjury in Clinton's deposition in a civil lawsuit, and for perjury in his criminal **GRAND JURY** testimony. The House voted to impeach only for the latter, suggesting that perjury in a criminal matter is impeachable, while perjury in a civil matter is not.

The Senate, however, voted to acquit Clinton of perjury and obstruction of justice even though most Republicans and Democrats believed Clinton lied under oath and tried to influence the testimony of other witnesses. As explained by Senator Richard H. Bryan (D-Nev.), "The president's conduct is boorish, indefensible, even reprehensible. It does not threaten the republic." This suggests that misconduct, even perjury, that is unrelated to the president's official duties and does not present a danger to the nation is not impeachable.

As such, Clinton's acquittal creates a double standard for impeachment of presidents and judges. In 1986, the House impeached and the Senate convicted Judge Harry E. Claiborne for filing false income tax returns. In 1989, the House impeached and the Senate convicted Judge Walter L. Nixon Jr., for lying under oath about conduct unrelated to his official duties. In neither case did anyone suggest that lying about personal conduct is not an impeachable offense. In fact, the House managers' report concerning Judge Nixon said, "It is difficult to imagine an act more subversive to the legal process than lying from the witness stand. A judge who violates his testimonial oath and misleads a grand jury is clearly unfit to remain on the bench. If a judge's truthfulness cannot be guaranteed, if he sets less than the highest standard for candor, how can ordinary citizens who appear in court be expected to abide by their testimonial oath." The Senate's acquittal of Clinton suggested that lying about private matters is an impeachable offense for judges, but not for presidents.

Finally, the most significant effect of Clinton's impeachment and acquittal may be to define "high Crimes and Misdemeanors" to mean whatever the public wants. Scholars and politicians argued that the term purposefully is vague and undefined to allow Congress to handle each instance in the best interests of the nation. According to constitutional scholar Laurence H. Tribe, "[u]nless the rights of individuals or minority groups are threatened, our governing institutions are structured to make the sustained will of a significant majority all but impossible to topple—as the failure of the effort to remove President Clinton will dramatically illustrate." Even Senator Orrin G. Hatch (R-Utah), who voted to convict Clinton, said, "It's not just law. It's politics. . . . And you have to combine those two and say—and this ought to be the prevailing question—what is in the best interest of our country, of our nation, of our people."

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Articles of Impeachment; Sexual Harassment.

is then sent to the Senate, which organizes the matter for trial (art. I, sec. 3).

During the trial, the Senate follows unique rules. There is no jury (art. III, sec. 2). Instead, the Senate is transformed into a **QUASI-JUDICIAL** body that hears the case, and the impeached official can attend or be represented by counsel. The vice president presides over the trial of any official except the president, and the chief justice of the U.S. Supreme Court presides over the trial of the president. To convict, a two-thirds majority is needed. The punishments for conviction are removal from office and disqualification from holding office again. No presidential par-

don is possible (art. II, sec. 2). Additional criminal charges can be brought against convicted officials, but these are pursued in court and are separate from the impeachment process.

Impeachment is not often pursued. President ANDREW JOHNSON was nearly impeached as a result of a bitter struggle in 1868 between his exercise of executive power and congressional will. He escaped an impeachment conviction in the Senate by a single vote. In 1974, President RICHARD M. NIXON, embroiled in the WATERGATE scandal, resigned rather than face almost certain impeachment. The House Judiciary Committee had recommended that the full House take up three articles of impeachment against Nixon: OBSTRUCTION OF JUSTICE; abuse of constitutional authority; and refusal to answer the committee's subpoenas.

Congress has adopted the articles of impeachment against one senator, William Blount; one cabinet member, William W. Belknap; and one Supreme Court justice, SAMUEL CHASE. It also has voted to impeach a small number of federal appeals and district court judges. In 1989, U.S. district court judge Alcee Hastings, of Miami, became only the twelfth federal judge in U.S. history to be impeached. His case was unique: He was the first African-American to be appointed to the Florida federal bench, and also the only judge to be impeached after an acquittal in a criminal trial. The House voted to adopt 17 articles of impeachment against him in 1988. After Hastings unsuccessfully challenged his impeachment in court in 1989, the Senate convicted him on eight of the articles and removed him from office.

*Chief Justice Rehnquist is sworn in by Senator Strom Thurmond on January 7, 1999, to preside over the Senate impeachment trial of President Clinton.*

AP/WIDE WORLD PHOTOS

The impeachment and trial of President BILL CLINTON in 1998 and 1999 demonstrated the difficulty of removing an official when the debate becomes politicized. The desire of the House of Representatives to impeach Clinton grew out of actions that had taken place in litigation involving Clinton and Paula Jones. Jones had filed a lawsuit against Clinton, alleging that he had sexually harassed her when he was governor of Arkansas and she was a state employee. Clinton sought to postpone the suit until he left office but the U.S. Supreme Court, in *Clinton v. Jones*, 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997), ruled that a sitting president does not have presidential *immunity* from suit over conduct unrelated to his official duties. Jones's attorneys then sought to obtain evidence for the trial. Clinton agreed to be deposed in Washington, D.C. on January 17, 1998, the first sitting president to do so. At the deposition, Jones's attorney asked Clinton whether he been involved in a sexual relationship with former White House intern Monica Lewinsky. He denied that there had been such a relationship and made other denials to questions about his conduct with Lewinsky. In written responses to interrogatories, Clinton made similar denials. Within days, the news media reported about allegations of a sexual affair between the president and the intern.

KENNETH STARR, the INDEPENDENT COUNSEL who was charged with investigating possible criminal activity by President Clinton and First Lady HILLARY RODHAM CLINTON in an Arkansas real estate deal ("Whitewater"), worked with Jones's attorneys to develop evidence that Clinton had lied about the affair with Lewinsky. Starr threatened to subpoena Clinton to testify before a GRAND JURY about possible perjury and obstruction of justice, but Clinton voluntarily agreed to appear before the grand jury. On August 17, 1998 Clinton changed his story when Starr questioned him before the grand jury. Clinton admitted that he had been alone with Lewinsky and that they had engaged in "inappropriate intimate contact." Much of Clinton's grand jury testimony contradicted the sworn testimony that he had given at the Jones deposition.

Starr prepared a 453-page report and submitted it to the House of Representatives on September 11, 1998. He accused Clinton of betraying his constitutional duty by engaging in a pattern of "abundant and calculating" lies

regarding his relationship with Lewinsky. The report, which contained explicit language, was released on the INTERNET a few days later. The Republican-controlled House Judiciary Committee began deliberating the possibility of impeaching Clinton. On Dec. 11, 1998, after seven days of hearings, the Judiciary Committee voted to recommend the impeachment of President Clinton. On a 21-to-16, straight, party-line vote, the committee approved an article of impeachment claiming that Clinton had committed perjury before the grand jury. The committee passed two more articles, alleging perjury in the Paula Jones suit and obstruction of justice. On December 12, it passed a fourth article, alleging that Clinton had abused his power. On December 19, the full House of Representatives impeached Clinton, charging him with "high crimes and misdemeanors" for lying under oath and obstructing justice by trying to cover up his affair with Lewinsky. The House voted largely along party lines to approve two of the four proposed articles of impeachment.

The Senate began the impeachment trial on January 14, 1999. Thirteen House members, acting as prosecutors, spent three days making opening statements, laying out the case for the Senate to convict President Clinton and to remove him from office. The team of lawyers representing President Clinton spent the following three days presenting their lines of defense. After the Senate questioned both sides for several days, it adjourned the trial until House prosecutors could be take depositions from Lewinsky and others who had been involved in the alleged perjury and obstruction of justice. The Senate, on a 70-30 vote, decided not to call Lewinsky as a witness but permitted videotape excerpts of her testimony to be played at the trial. Both sides played excerpts that it believed to be favorable to its position, which were shown to the U.S. public through the televised deliberations. Closing arguments then were presented, and the Senate moved into closed-door deliberations on February 9, 1999.

On February 19, 1999, the Senate acquitted President Clinton of the two articles of impeachment. Rejecting the perjury charge, ten Republicans and all 45 Democrats voted not guilty. On the obstruction-of-justice charge, the Senate split 50-50. After the verdict was announced, Clinton stated that he was "profoundly sorry" for the burden he had imposed on the Congress and the citizens of the United States.

Impeachment remains the ultimate check on the abuse of power. By providing this power to Congress, the Framers drew on a long tradition of democratic skepticism about leaders. These provisions ensure that leaders will serve the people only so long as they respect the law and their offices. In this sense, the power of impeachment also stands ready to thwart tyranny. Calls are occasionally made for reform that would streamline the impeachment process, but its rare invocation and tradition of service make such reform unlikely.

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## IMPEDIMENT

*A disability or obstruction that prevents an individual from entering into a contract.*

Infancy, for example, is an impediment in making certain contracts. Impediments to marriage include such factors as consanguinity between the parties or an earlier marriage that is still valid.

## IMPERSONATION

*The crime of pretending to be another individual in order to deceive others and gain some advantage.*

The crime of false impersonation is defined by federal statutes and by state statutes that differ from jurisdiction to jurisdiction. In some states, pretending to be someone who does not actually exist can constitute false impersonation. For example, suppose Bill attempts to evade prosecution for a crime by giving the arresting officer a fictitious name and address. In Colorado, where "[a] person who knowingly assumes a false or fictitious identity and, under that identity, does any other act intending

unlawfully to gain a benefit for himself is guilty of criminal impersonation," Bill could be charged with a crime (Colo. Rev. Stat. Ann. § 18-5-113[1] [West 1996]). In this situation, the benefit Bill hopes to realize is avoiding prosecution, so that element of the offense has been satisfied. To be charged, the defendant does not need to seek a monetary benefit from the impersonation.

In New York, giving only a fictitious name does not constitute false impersonation. Under New York law, criminal impersonation is committed when an individual "[i]mpersonates another and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another" (N.Y. Penal Law § 190.25 [McKinney 1996]). In other words, it is illegal to impersonate a real person, but not a fictitious one. Thus, if Carol forges Ann's name on checks made out to Ann so that Carol can cash the checks, Carol could be guilty of false impersonation—but only if Ann is a real person. Such laws are designed to protect innocent people from the losses they may incur owing to the wrongful acts of others and to restore any loss of dignity and reputation they may have suffered as a result of impersonation.

Most state laws also provide that the impersonation of a public official is a criminal act. In Texas, impersonating "a public servant with intent to induce another to submit to his pretended official authority or to rely on his pretended official acts" is a crime (Tex. Penal Code Ann. § 37.11 [West 1996]). Depending on the jurisdiction, the public servant being impersonated does not always have to actually exist. For example, suppose Carl pulls over a driver, shows her a fake police badge, and reprimands her for speeding but tells her that he will not arrest her if she pays him $50. Carl's actions constitute the crime of false impersonation, in addition to any other crimes, including EXTORTION, that may apply to the situation. Thousands of criminal reports are filed every year by individuals victimized in various ways by persons impersonating police officers.

Under federal law, pretending to be "an officer or employee acting under the authority of the United States" in order to demand or obtain "any money, paper, document, or thing of value" can result in a fine as well as imprisonment for up to three years (18 U.S.C.A. § 912). Like state false impersonation statutes, the federal law also seeks to protect interests such as the dignity and prestige of individuals, especially those who hold federal office. Federal statutes also prohibit other types of impersonation, including pretending to be a U.S. citizen; pretending to be a U.S. officer or employee attempting to arrest or search a person or search a building; pretending to be a creditor of the United States or a foreign official; and pretending to be an agent or member of 4-H or of the Red Cross.

## IMPERTINENCE

*Irrelevancy; the flaw of bearing no reasonable relationship to the issues or proceeding at hand.*

An *impertinent question* is one that is immaterial or has no logical relation to the issue or controversy before the court.

## IMPLEADER

*A procedural device used in a civil action whereby a defendant brings into the lawsuit a third party who is not already a party to the action but may ultimately be liable for the plaintiff's claim against the defendant.*

Impleader is most commonly used where the third party, often an insurance company, has a duty to indemnify, or contribute to the payment of, the plaintiff's damages. An insurance policy usually provides that if the insured is sued, the insurance company will defend him or her in court and pay any damages owed if he or she is found liable in the action. For example, suppose a person slips and falls on a homeowner's property, suffers an injury, and sues the homeowner. If the homeowner has a homeowner's policy, he may implead his insurance company by filing a third-party complaint for approval by the court. If the court permits the complaint, the insurer is brought into the action. The homeowner is now both the defendant in the action and a third-party plaintiff. If he is found liable and ordered to pay damages, the insurance company will be expected to pay all or part of those damages.

Impleader, which was known as vouching-in at COMMON LAW, is now governed by procedural rules on both the state and federal levels. "Vouching in" has its origins in the English common-law practice of "vouching to warranty." A defendant, sued by a plaintiff for the recovery of a certain piece of property, could "vouch in" another party who may have given a WARRANTY of title when the property was sold to the defendant. Similar types of third-party

actions began to appear in this country and eventually, in the interests of uniformity, a federal rule of civil procedure providing for impleader was adopted. Rule 14 of the Federal Rules of Civil Procedure provides that "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." State rules of civil procedure regulate the use of impleader in actions commenced in state courts. In Connecticut, for instance, "a defendant in any civil action may move the court for permission to serve a writ, summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him" (Conn. R. Super. Ct. 117). Both federal and state court impleader rules are designed to promote judicial economy by disposing of two or more trials in one action, thus eliminating the need for the defendant to sue the third party at a later time.

A third party who is brought into an action through impleader is entitled to defend herself or himself against the claims of both the plaintiff and the defendant, raising whatever defenses may be applicable. An insurance company may allege that the policy issued to the defendant does not cover the acts that gave rise to the lawsuit and thus led the defendant to implead the company. For example, suppose Ann has been sued for allegedly assaulting Susan and has filed an impleader to have her insurance company defend her and pay any damages against her. The insurance company may refuse to defend her on the ground that the policy does not cover intentional acts, such as assaulting another person. If the court agrees, the insurance company will not have to defend Susan or pay any damages that Ann is awarded by the court or a jury.

The court has a great deal of discretion in deciding whether a defendant may implead a third party. The court considers a number of factors, including whether joining the third party will unduly complicate the action, cause delay in deciding the main action (the original suit brought by the plaintiff against the defendant), adversely affect the plaintiff, or confuse the jury. If any of these factors is present, the court may refuse to permit the impleader. The court's decision to grant or deny the impleader will be overturned by an appellate court only if it appears that the lower court abused its discretion.

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## IMPLIED

*Inferred from circumstances; known indirectly.*

In its legal application, the term *implied* is used in contrast with express, where the intention regarding the subject matter is explicitly and directly indicated. When something is implied, its meaning is derived from the words or actions of the individuals involved. For example, when one individual gives another a gift, the recipient's acceptance is implied if he or she performs acts indicating ownership, such as using the gifts.

## IMPLIED CONSENT

*Consent that is inferred from signs, actions, or facts, or by inaction or silence.*

Implied consent differs from express consent, which is communicated by the spoken or written word.

Implied consent is a broadly based legal concept. Whether it is as valid as express consent depends on the situation and the applicable law. For example, the owner of a car generally is liable for an accident caused by someone who drove that car with his or her consent. In many states, that consent can be express or implied, and implied consent may arise from seemingly innocuous actions. For instance, a habit of leaving the keys in the car's ignition may under law imply that the owner consents to anyone else's—even a car thief's—driving the car.

Corporations that conduct business in a foreign state—that is, any state other than the state of incorporation—impliedly consent to be bound by the laws of the foreign state and to be subject to the foreign state's jurisdiction. The rationale supporting this application of the implied consent rule is basic: a corporation that reaps the benefits of conducting business in a state also should be subject to the laws and the courts of that state. The fact that the corporation has business in the foreign state is all that is needed for a finding of implied consent.

Implied consent as the result of inaction is most commonly found in litigation procedures. For instance, a party to a lawsuit may have the legal right to object to a court hearing that is

scheduled to occur before the party has obtained certain crucial documents. But if the party appears at the hearing and allows it to proceed without objecting, the party has waived the right to later object or appeal. By failing to take action to cancel or reschedule the hearing, the party is said to have implied its consent to the hearing.

Perhaps the best known—and most often litigated—application of implied consent involves laws prohibiting driving while intoxicated. Most states have legislation that subjects motorists suspected of driving while under the influence of alcohol or illicit drugs to blood, breath, or urine tests. These chemical tests can confirm the existence and the level of drugs or alcohol in a driver's body, and can be used as evidence against the driver. Pursuant to these state statutes, known as implied consent laws, anyone who drives on public roads or highways has, by that action, impliedly consented to such tests. Once stopped or arrested for suspicion of driving while impaired, a person must submit to a test or face revocation or suspension of his or her driver's license.

Implied consent statutes have been attacked for a variety of constitutional reasons, usually unsuccessfully. Courts have held that the statutes do not violate a driver's FOURTH AMENDMENT protection from unreasonable SEARCH AND SEIZURE, or FIFTH AMENDMENT right against SELF-INCRIMINATION. The statutes usually are upheld on DUE PROCESS grounds, although courts have struck down statutes that permit the revocation of a license without a hearing. Arguments that implied consent laws are an invasion of privacy or an undue burden on interstate commerce have also been rejected by the courts.

Courts generally look to one of two theories supporting the validity of implied consent laws. According to the first theory, driving on public roads and highways is a privilege, not a right. Only those who adhere to state laws, including laws prohibiting driving while intoxicated, are entitled to the driving privilege. Under the second theory, courts consider implied consent laws to be a reasonable regulation of driving pursuant to the state's POLICE POWER, so long as the laws do not violate due process. Courts have weighed the interests of society against the interests of individuals, and have determined that drunk or drug-impaired drivers are enough of a danger to society that a slight infringement on the liberty of individuals is justifiable.

The liberty of individuals is protected somewhat by the requirement that before a law officer can request a blood, urine, or breath test, the officer must have reasonable grounds to believe that the driver is intoxicated. What constitutes reasonable grounds is determined on a case-by-case basis. If a driver loses her or his license after refusing to comply with a chemical test and a court later finds that reasonable grounds for the test did not exist, the court can invalidate the revocation or suspension of the license.

Courts generally hold that a revocation or suspension of a license caused by a driver's refusal to test for drugs or alcohol is separate and distinct from a prosecution for driving while intoxicated. Therefore, in most states, it makes no difference whether a driver pleads guilty to, is convicted of, or is acquitted of the crime: refusing to take a test for chemical impairment may result in a revoked or suspended license, and this punishment must be paid despite a subsequent acquittal of driving while intoxicated or in addition to any punishment that comes as a result of a conviction.

Many states require that a law officer warn a driver of the consequences of refusing to take a chemical test, and if that warning is not given, the license cannot be revoked or suspended. Some states offer drivers a limited right to consult an attorney before deciding whether to take

*The most common application of implied consent is to laws prohibiting drunk driving. By using a public road, motorists imply consent to submit to tests measuring the existence of alcohol in their blood.*

RICHARD HUTCHINGS/CORBIS

a sobriety test. This right is not absolute, since a significant delay would render ineffective a blood, urine, or alcohol test. Several states offer drivers the opportunity for a second opinion—the right to have an additional test performed by the driver's choice of physicians.

States differ in their approach to implied consent laws, but their goal is the same: keeping dangerously impaired drivers off the roads. Courts and legislatures are reluctant to frustrate this goal.

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## IMPLIED WARRANTY

*A promise, arising by operation of law, that something that is sold will be merchantable and fit for the purpose for which it is sold.*

Every time goods are bought and sold, a sales contract is created: the buyer agrees to pay, and the seller agrees to accept, a certain price in exchange for a certain item or number of items. Sales contracts are frequently oral, unwritten agreements. The purchase of items like a candy bar hardly seems worth the trouble of drafting an agreement spelling out the buyer's expectation that the candy bar will be fresh and edible. Implied warranties protect the buyer whether or not a written sales contract exists.

### Implied Warranty of Merchantability

Implied warranties come in two general types: merchantability and fitness. An implied warranty of merchantability is an unwritten and unspoken guarantee to the buyer that goods purchased conform to ordinary standards of care and that they are of the same average grade, quality, and value as similar goods sold under similar circumstances. In other words, merchantable goods are goods fit for the ordinary purposes for which they are to be used. The UNIFORM COMMERCIAL CODE (UCC), adopted by most states, provides that courts may imply a WARRANTY of merchantability when (1) the seller is the merchant of such goods, and (2) the buyer uses the goods for the ordinary purposes for which such goods are sold (§ 2-314). Thus, a buyer can sue a seller for breaching the implied warranty by selling goods unfit for their ordinary purpose.

There is rarely any question as to whether the seller is the merchant of the goods sold. Nevertheless, in *Huprich v. Bitto,* 667 So.2d 685 (Ala. 1995), a farmer who sold defective horse feed was found not to be a merchant of horse feed. The court stated that the farmer did not hold himself out as having knowledge or skill peculiar to the sale of corn as horse feed, and therefore was not a merchant of horse feed for purposes of determining a breach of implied warranty of merchantability.

The question of whether goods are fit for their ordinary purpose is much more frequently litigated. Thomas Coffer sued the manufacturer of a jar of mixed nuts after he bit down on an unshelled filbert, believing it to have been shelled, and damaged a tooth. Coffer argued in part that the presence of the unshelled nut among shelled nuts was a breach of the implied warranty of merchantability. Unquestionably, Coffer was using the nuts for their ordinary purpose when he ate them, and unquestionably, he suffered a dental injury when he bit the filbert's hard shell. But the North Carolina appellate court held that the jar of mixed nuts was nonetheless fit for the ordinary purpose for which jars of mixed nuts are used (*Coffer v. Standard Brands,* 30 N.C. App. 134, 226 S.E.2d 534 [1976]). The court consulted the state agriculture board's regulations and noted that the peanut industry allows a small amount of unshelled nuts to be included with shelled nuts without rendering the shelled nuts inedible or adulterated. The court also noted that shells are a natural incident to nuts.

The policy behind the implied warranty of merchantability is basic: sellers are generally better suited than buyers to determine whether a product will perform properly. Holding the seller liable for a product that is not fit for its ordinary purpose shifts the costs of nonperformance from the buyer to the seller. This motivates the seller to ensure the product's proper performance before placing it on the market. The seller is better able to absorb the costs of a product's nonperformance, usually by spreading the risk to consumers in the form of increased prices.

The policy behind limiting the implied warranty of merchantability to the goods' ordinary use is also straightforward: a seller may not have sufficient expertise or control over a product to ensure that it will perform properly when used for nonstandard purposes.

### Implied Warranty of Fitness

When a buyer wishes to use goods for a particular, nonordinary purpose, the UCC provides a distinct implied warranty of fitness (§ 2-315). Unlike the implied warranty of merchantability, the implied warranty of fitness does not contain a requirement that the seller be a merchant with respect to the goods sold. It merely requires that the seller possess knowledge and expertise on which the buyer may rely.

For example, one court found that horse buyers who indicated to the sellers their intention to use the horse for breeding were using the horse for a particular, nonordinary purpose (*Whitehouse v. Lange,* 128 Idaho 129, 910 P.2d 801 [1996]). The buyers soon discovered that the horse they purchased was incapable of reproducing. Because the court found this use of the horse to be nonordinary, the buyers were entitled to an implied warranty of fitness.

Before a court will imply a warranty of fitness, three requirements must be met: (1) the seller must have reason to know of the buyer's particular purpose for the goods; (2) the seller must have reason to know of the buyer's reliance on the seller's skill and knowledge in furnishing the appropriate goods; and (3) the buyer must, in fact, rely on the seller's skill and knowledge. Even when these requirements are met, courts will not imply a warranty of fitness under certain circumstances. A buyer who specifies a particular brand of goods is not entitled to an implied warranty of fitness. Also, a buyer who has greater expertise than the seller regarding the goods generally is precluded from asserting an implied warranty of fitness, as is a buyer who provides the seller with specifications, such as a blueprint or design plan, detailing the types of material to be used in the goods.

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## IMPORT QUOTAS

Import quotas are a form of protectionism. An import quota fixes the quantity of a particular good that foreign producers may bring into a country over a specific period, usually a year. The U.S. government imposes quotas to protect domestic industries from foreign competition. Import quotas are usually justified as a means of protecting workers who otherwise might be laid off. They also can raise prices for the consumer by reducing the amount of cheaper, foreign-made goods imported and thus reducing competition for domestic industries of the same goods.

The GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT) (61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187), which was opened for signatures on October 30, 1947, is the principal international multilateral agreement regulating world trade. GATT members were required to sign the Protocol of Provisions Application of the General Agreement on Tariffs and Trades (61 Stat. A2051, T.I.A.S. No. 1700, 55 U.N.T.S. 308). The Protocol of Provisions set forth the rules governing GATT and it also governs import quotas. This agreement became effective January 1, 1948, and the United States is still bound by it. GATT has been renegotiated seven times since its inception; the most recent version became effective July 1, 1995, with 123 signatories.

Import quotas once played a much greater role in global trade, but the 1995 renegotiation of GATT has made it increasingly difficult for a country to introduce them. Nations can no longer impose temporary quotas to offset surges in imports from foreign markets. Furthermore, an import quota that is introduced to protect a domestic industry from foreign imports is limited to at least the average import of the same goods over the last three years. In addition, the 1995 GATT agreement identifies the country of an import's origin in order to prevent countries from exporting goods to another nation through a third nation that does not have the same import quotas. GATT also requires that all import quota trade barriers be converted into tariff equivalents. Therefore, although a nation cannot seek to deter trade by imposing ARBITRARY import quotas, it may increase the tariffs associated with a particular import.

In the United States, the decade from the mid-1980s to the mid-1990s saw import quotas placed on textiles, agricultural products, automobiles, sugar, beef, bananas, and even underwear—among other things. In a single session of Congress in 1985, more than three hundred protectionist bills were introduced as U.S. industries began voicing concern over foreign competition.

Many U.S. companies headquartered in the United States rely on manufacturing facilities outside of the country to produce their goods. Because of import quotas, some of these companies cannot get their own products back into the

United States. While such companies lobby Congress to change what they consider to be an unfair practice, their opposition argues that this is the price to be paid for giving away U.S. jobs to foreign countries.

Nearly every country restricts imports of foreign goods. For example, in 1996—even after the new version of GATT went into effect—Vietnam restricted the amount of cement, fertilizer, and fuel and the number of automobiles and motorcycles it would import. The import quotas of foreign countries can adversely affect U.S. industries that try to sell their goods abroad. The U.S. economy has suffered because of foreign import quotas on canned fruit, cigarettes, leather, insurance, and computers. In a market that has become overcrowded with U.S. entertainment, the European Communities have chosen to enforce import quotas on U.S.-made films and television in an effort to encourage Europe's own industries to become more competitive.

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## IMPOSSIBILITY

*A legal excuse or defense to an action for the breach of a contract; less frequently, a defense to a criminal charge of an attempted crime, such as attempted* **ROBBERY** *or murder.*

Historically, a person who entered a contract was bound to perform according to his or her promised duties, regardless of whether it became impossible to do so. Thus, early U.S. courts did not recognize the defense of impossibility of performance. Courts noted that if the parties to a contract had desired to take into account any events that may develop after they reached an agreement, then they should have accounted for such contingencies in the contract.

As contract law developed over the twentieth century—and in response to increasing commercial activities—courts began to recognize impossibility as a valid defense to an action for breach of a contract. This defense did not normally apply if one party found it unexpectedly difficult or expensive to perform according to the contract; rather, it applied only when the basis or subject matter of the contract was destroyed or no longer existed. In addition, the defense of impossibility became available only if objective impossibility existed. Objective impossibility occurred when the contractual obligation could not actually be performed. Objective impossibility is often referred to by the statement "The thing cannot be done." For example, if a musician promised to play a concert at a specific concert hall but the concert hall subsequently burned down, it would be impossible to perform according to the contractual agreement and the musician would be excused from performing at that particular venue. Subjective impossibility exists when only one of the parties to a contract subjectively believes that she or he cannot complete the required performance. For example, if a musician believed that he had not practiced sufficiently to perform a successful concert, this belief would not excuse the musician from performing the concert. The statement "I cannot do it" frequently refers to the state of mind present in a case involving subjective impossibility.

Modern U.S. law uses the term *impracticability* synonymously with the term *impossibility,* primarily because some things may not be absolutely impossible to perform but are nevertheless impracticable to complete. Thus, the general rule is that a thing may be impossible to perform when it would not be practicable to perform. A contractual obligation is impracticable "when it can only be done at an excessive and unreasonable cost" (*Transatlantic Financing Corp. v. United States,* 363 F.2d 312 [D.C. Cir. 1966]).

When a party raises the defense of impracticability, courts generally determine three things: first, whether something unexpected occurred after the parties entered the contract; second, whether the parties had assumed that this thing would not occur; and third, that the unexpected occurrence made performance of the contract impracticable. Some widely recognized occurrences that would normally provide a defense of impracticability are the death or illness of one of the necessary parties, the unforeseeable destruction of the subject matter of the contract (perhaps by an "act of God"), or a supervening illegality.

Impossibility has been used as a defense to charges of attempted crimes. Historically, courts recognized that a party could not be convicted of criminal attempt if the actual crime was legally impossible to accomplish. For example, if a person was accused of attempting to receive stolen property but the property was not actually stolen, the defense of legal impossibility could arise. Legal impossibility is distinguished from factual impossibility, where facts unknown to the person attempting to commit a crime render the crime factually impossible to complete. For example, if a pickpocket attempts to steal a wallet but no wallet is present, factual impossibility may exist. Courts generally have recognized legal impossibility as a defense to a criminal attempt, but not factual impossibility. They reasoned that since a person attempting to commit a crime had formed the required intent to commit the crime, it was irrelevant that the crime was factually impossible to complete.

Impossibility as a defense to a criminal attempt has largely been rejected by modern U.S. statutes and courts. The Model Penal Code—which many states have adopted since its introduction in 1962—expressly rejects impossibility as a defense to the charge of criminal attempt (§ 5.01 [1995]).

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## IMPOSTOR RULE

*Under* UNIFORM COMMERCIAL CODE, *Article 3, Sect. 404(a), a rule stating that if an impostor endorses a negotiable instrument and receives payment in* GOOD FAITH, *the drawer of the instrument is responsible for the loss. An example would be if an individual impersonates a person for whom a check has been cut or misrepresents himself as that person's agent. If the impostor receives the check, endorses it, and cashes it at the drawer's bank, the drawer is responsible for the loss, because the bank accepted the endorsement in good faith. The bank may be responsible for a percentage of the loss if it failed to exercise "ordinary care"; for example, if the bank did not check the impostor's identification. The imposter rule is based on the assumption that between the bank and the drawer, the drawer is in a better position to prevent the loss. Also spelled* imposter rule.

## IMPOSTS

*Taxes or duties; taxes levied by the government on imported goods.*

Although *impost* is a generic term, which can be used in reference to all taxes, it is most frequently used interchangeably with CUSTOMS DUTIES.

## IMPOUNDMENT

*An action taken by the president in which he or she proposes not to spend all or part of a sum of money appropriated by Congress.*

The current rules and procedures for impoundment were created by the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C.A. § 601 et seq.), which was passed to reform the congressional budget process and to resolve conflicts between Congress and President RICHARD M. NIXON concerning the power of the EXECUTIVE BRANCH to impound funds appropriated by Congress. Past presidents, beginning with THOMAS JEFFERSON, had impounded funds at various times for various reasons, without instigating any significant conflict between the executive and the legislative branches. At times, such as when the original purpose for the money no longer existed or when money could be saved through more efficient operations, Congress simply acquiesced to the president's wishes. At other times, Congress or the designated recipient of the impounded funds challenged the president's action, and the parties negotiated until a political settlement was reached.

### Changes During the Nixon Administration

The history of accepting or resolving impoundments broke down during the Nixon administration for several reasons. First, President Nixon impounded much greater sums than had previous presidents, proposing to hold back between 17 and 20 percent of controllable expenditures between 1969 and 1972. Second, Nixon used impoundments to try to fight policy initiatives that he disagreed with, attempting to terminate entire programs by impounding their

appropriations. Third, Nixon claimed that as president, he had the constitutional right to impound funds appropriated by Congress, thus threatening Congress's greatest political strength: its power over the purse. Nixon claimed, "The Constitutional right of the President of the United States to impound funds, and that is not to spend money, when the spending of money would mean either increasing prices or increasing taxes for all the people—that right is absolutely clear."

In the face of Nixon's claim to impoundment authority and his refusal to release appropriated funds, Congress in 1974 passed the Congressional Budget and Impoundment Control Act, which reformed the congressional budget process and established rules and procedures for presidential impoundment. In general, the provisions of the act were designed to curtail the power of the president in the budget process, which had been steadily growing throughout the twentieth century.

The Impoundment Control Act divides impoundments into two categories: deferrals and rescissions. In a deferral, the president asks Congress to delay the release of appropriated funds; in a RESCISSION, the president asks Congress to cancel the appropriation of funds altogether. Congress and the president must follow specific rules and procedures for each type of impoundment.

### Deferrals

To propose a deferral, the president must send Congress a request identifying the amount of money to be deferred, the program that will be affected, the reasons for the deferral, the estimated fiscal and program effects of the deferral, and the length of time for which the funds are to be deferred. Funds cannot be deferred beyond the end of the fiscal year, or for so long that the affected agency could no longer spend the funds prudently.

In the original Impoundment Control Act, the president was allowed to defer funds for any reason, including opposition to a specific program or for general policy goals, such as curtailing federal spending. Congress retained the right to review deferrals, and a deferral could be rejected if either the House or the Senate voted to disapprove it. In 1986, several members of Congress and a number of cities successfully challenged the constitutionality of these deferral procedures in *City of New Haven v. United States,* 809 F.2d 900 (D.C. Cir. 1987). *New Haven* was based on a 1981 case, *INS v. Chadha,* 454 U.S. 812, 102 S. Ct. 87, 70 L. Ed. 2d 80, in which the Supreme Court ruled that one-house vetoes of proposed presidential actions are unconstitutional. The *Chadha* ruling invalidated Congress's right to review and disapprove deferrals. In response, Congress took away most of the president's deferral power through provisions in the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987 (2 U.S.C.A. § 901 et seq.) (otherwise known as Gramm-Rudman-Hollings II). These provisions allow presidential impoundment for only three reasons: to provide for special contingencies, to achieve savings through more efficient operations, and when such deferrals are specifically provided for by law. The president can no longer defer funds for policy reasons.

Once the president sends a message to Congress requesting a deferral, the comptroller general must submit a report on the proposed deferral to Congress. A proposed deferral is automatically considered to be approved unless the House or the Senate passes legislation specifically disapproving it. If the president still refuses to spend appropriated funds after Congress has formally disapproved of a deferral, the comptroller general has the power to sue the president in federal court.

### Rescissions

The rules and procedures for rescissions are very similar to those for deferrals. As with a deferral, the president must send Congress a message proposing a rescission. In this message, the president must detail how much money is to be rescinded, the department or agency that was targeted to receive the money, the specific project or projects that will be affected by the rescission, and the reasons for the rescission. The comptroller general handles a rescission as she or he would a deferral, preparing a report on the rescission for Congress. Unlike a deferral, a rescission must be specifically approved by both houses of Congress within forty-five legislative days after the message requesting the rescission is received. Congress can approve all, part, or none of the proposed rescission. If either house disapproves the rescission or takes no action on it, the president must spend the appropriated funds as originally intended. If the president refuses to do so, the comptroller general can sue the president in federal court.

### Legislative Line Item Veto Act of 1995

The Legislative Line Item Veto Act of 1995 (Pub. L. No. 104-130, 110 Stat. 1200), signed by President BILL CLINTON on April 9, 1996, and made effective January 1, 1997, affects the way impoundments are handled. The Line Item Veto Act does not actually give the president the authority to veto individual line items, which would require a constitutional amendment. It does, however, give the president the functional equivalent, allowing the president to veto, or rescind, specific items in appropriations bills, as well as targeted tax breaks affecting one hundred or fewer people and new entitlement programs. The president proposes these rescissions to Congress and they become effective in thirty days unless Congress passes a bill rejecting them. The president can in turn veto any congressional bill of disapproval, and Congress can override that veto with a two-thirds vote in both houses. Under the Line Item Veto Act, therefore, Congress still retains the ultimate power to override the president's rescission requests, but the president enjoys significantly enhanced rescission authority.

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CROSS-REFERENCES

Congress of the United States; Federal Budget; Separation of Powers.

## IMPRACTICABILITY

*Substantial difficulty or inconvenience in following a particular course of action, but not such insurmountability or hopelessness as to make performance impossible.*

Rule 23 of the Federal Rules of Civil Procedure establishes impracticability as one of the grounds for permitting a CLASS ACTION in federal courts. "[T]he class is so numerous that JOINDER of all members is impracticable." In such a situation, the court will permit a few individuals who have made a motion to it to represent in one lawsuit a large number of persons who will be similarly affected by the legal outcome of the particular action. The group to be represented must be so large that there would be significant problems or impracticability in bringing each member before the court to appear as a party to the action. For purposes of certification as a class, the prospective representatives must show that joinder can be accomplished only with substantial difficulty, expense, and hardship, but not that such joinder cannot be done at all. State procedural rules also require that joinder of all prospective class members be impracticable before permitting the commencement of a class action in state courts.

In the law governing sales, the UNIFORM COMMERCIAL CODE allows either party to a contract to be excused from the legal obligations created by it where performance becomes impracticable because an unexpected event has occurred, such as a severe shortage of supplies due to unexpected and continual flooding.

CROSS-REFERENCES

Impossibility.

## IMPRIMATUR

*[*Latin, Let it be printed.*] A license or allowance, granted by the constituted authorities, giving permission to print and publish a book. This allowance was formerly necessary in England before any book could lawfully be printed, and in some other countries is still required.*

## IMPRISONMENT

*Incarceration; the act of restraining the personal liberty of an individual; confinement in a prison.*

Imprisonment can be effected without the application of physical restraint by verbal compulsion coupled with the display of available force. The TORT of FALSE IMPRISONMENT involves the illegal arrest or detention of an individual without a warrant, by an illegal warrant, or by an illegally executed warrant, either in a prison or any place used temporarily for such purpose, or by force and constraint without actual confinement.

## IMPROVEMENTS

*Additions or alterations to real property that increase the value thereof.*

Improvements to land, for example, might include the planting of crops, the construction of fences, and the digging of wells.

## IMPUTED

*Attributed vicariously.*

In the legal sense, the term *imputed* is used to describe an action, fact, or quality, the knowledge of which is charged to an individual based upon the actions of another for whom the individual is responsible rather than on the individual's own acts or omissions. For example, in the law of agency, the actions of an agent performed during the course of employment will be attributed to the agent's principal. The doctrine of imputed NEGLIGENCE makes one person legally responsible for the negligent conduct of another.

## IMPUTED KNOWLEDGE

*The comprehension attributed or charged to a person because the facts in issue were open to discovery and it was that person's duty to apprise himself or herself of them; more accurately described as knowledge.*

For example, if the stairway leading to a retail store is defective and a patron is injured on the stairway, the store owner cannot evade liability for the patron's injury by denying knowledge of the defect. Since the store owner is subject to a duty to discover and rectify the defect in an area known to be used by the public, knowledge of the defect is imputed to the store owner.

In the law of agency, notice of facts brought to the attention of an agent (a person authorized by another, known as a principal, to act for him or her), within the scope of the agent's authority or employment, is usually imputed to his or her principal.

## IMPUTED NOTICE

*Information regarding particular facts or circumstances that the law permits to affect the legal rights of a person who has no firsthand knowledge of them but who should have learned of them because his or her agent or representative had direct knowledge of that information and a duty to report it to him or her.*

## IN BLANK

*Absent limitation or restriction.*

The term *in blank* is used in reference to negotiable instruments, such as checks or promissory notes. When such COMMERCIAL PAPER is endorsed in blank, the designated payee signs his or her name only. The paper is not made payable to any one individual in particular, but anyone who presents it for payment is entitled to be paid.

## IN CAMERA

*In chambers; in private. A judicial proceeding is said to be heard* in camera *either when the hearing is had before the judge in his or her private chambers or when all spectators are excluded from the courtroom.*

## IN COMMON

*Shared in respect to title, use, or enjoyment; without apportionment or division into individual parts. Held by several for the equal advantage, use, or enjoyment of all.*

A TENANCY IN COMMON is ownership of real property by two or more persons, each of whom holds an undivided interest in such property.

## IN EVIDENCE

*Facts, documents, or exhibits that have been introduced before and accepted by the court for consideration as* PROBATIVE *matter.*

## IN EXTREMIS

*[*Latin, In extremity.*] A term used in reference to the last illness prior to death.*

A causa mortis gift is made by an individual who is in extremis.

## IN FORMA PAUPERIS

*[*Latin, In the character or manner of a pauper.*] A phrase that indicates the permission given by a court to an indigent to initiate a legal action without having to pay for court fees or costs due to his or her lack of financial resources.*

## IN KIND

*Of the same class, category, or species.*

A loan is repaid *in kind* when a substantially similar article is returned by the borrower to the lender.

## IN LIEU OF

*Instead of; in place of; in substitution of. It does not mean* in addition to.

## IN LOCO PARENTIS

*[*Latin, in the place of a parent.*] The legal doctrine under which an individual assumes parental*

*rights, duties, and obligations without going through the formalities of legal* ADOPTION.

In loco parentis is a legal doctrine describing a relationship similar to that of a parent to a child. It refers to an individual who assumes parental status and responsibilities for another individual, usually a young person, without formally adopting that person. For example, legal guardians are said to stand in loco parentis with respect to their wards, creating a relationship that has special implications for insurance and WORKERS' COMPENSATION law.

By far the most common usage of in loco parentis relates to teachers and students. For hundreds of years, the English common-law concept shaped the rights and responsibilities of public school teachers: until the late nineteenth century, their legal authority over students was as broad as that of parents. Changes in U.S. education, concurrent with a broader reading by courts of the rights of students, began bringing the concept into disrepute by the 1960s. Cultural changes, however, brought a resurgence of the doctrine in the twenty-first century.

Taking root in colonial American schools, in loco parentis was an idea derived from English COMMON LAW. The colonists borrowed it from the English ideal of schools having not only educational but also moral responsibility for students. The idea especially suited the puritanical values of the colonists, and after the American Revolution, it persisted in elementary and high schools, colleges, and universities. The judiciary respected it: like their English counterparts, U.S. courts in the nineteenth century were unwilling to interfere when students brought grievances, particularly in the area of rules, discipline, and expulsion.

In 1866, for instance, one court stated, "A discretionary power has been given, . . . [and] we have no more authority to interfere than we have to control the domestic discipline of a father in his family" (*People ex rel. Pratt v. Wheaton College,* 40 Ill. 186). Well into the twentieth century, courts permitted broad authority to schools and showed hostility to the claims of student plaintiffs. In dismissing a claim by a restaurant owner against a college, the Kentucky Supreme Court found that a college's duties under in loco parentis gave it the power to forbid students to patronize the restaurant (*Gott v. Berea College,* 156 Ky. 376, 161 S.W. 204 [1913]).

Two important shifts in society and law diminished the effect of the doctrine. One was the evolution of educational standards. Beginning in the late 1800s and advancing rapidly during the mid-1900s, the increasing secularization of schools brought an emphasis on practical education over moral instruction. At a slower rate, courts adapted to this change, according greater rights to students than were previously recognized.

The first to benefit were students in higher education, through rulings such as the landmark *Dixon v. Alabama State Board of Education,* 294 F.2d 150 (5th Cir. 1961). In *Dixon,* the U.S. Court of Appeals for the Fifth Circuit extended DUE PROCESS rights to students at tax-supported colleges, ruling that the Constitution "requires notice and some opportunity for hearing" before students can be expelled for misconduct. After *Dixon,* courts largely turned to contract law for adjudicating disputes between students and their institutions.

Other changes came as well. Partly in reaction to free speech movements, courts began to recognize that students at public COLLEGES AND UNIVERSITIES, as well as public secondary schools, were entitled to full enjoyment of their First and FOURTH AMENDMENT rights. For example, in ruling that high school students could not be expelled for wearing black armbands to protest the VIETNAM WAR, the U.S. Supreme Court held, in 1969, that students do not "shed their constitutional rights . . . at the schoolhouse gate" (TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731). In 1975, the Court held in *Goss v. Lopez,* 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725, that the suspension of high school students for alleged disruptive or disobedient conduct required some sort of notice of charges and a prior hearing.

But the underlying premise of in loco parentis did not disappear completely from public schools. For example, in 1977, the Supreme Court held that the disciplinary paddling of public school students was not a CRUEL AND UNUSUAL PUNISHMENT prohibited by the EIGHTH AMENDMENT (*Ingraham v. Wright,* 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711), and that students who were disciplined in a school setting were not denied due process under the FOURTEENTH AMENDMENT. Since then, several cases have challenged this ruling, and U.S. district courts have attempted to clarify the rights of students regarding CORPORAL PUNISHMENT (*Hall v. Tawney,* 621 F. 2d 607, 613 [4th Cir.

1980]; *Garcia v. Miera,* 817 F. 2d 650, 653 [10th Cir. 1987]; *Neal ex real. Neal v. Fulton County Board of Education* 229 F. 3d 1069 [11th Cir. 2000]).

In the 1980s, new issues involving the in loco parentis doctrine arose at public schools, colleges, and universities. The Reagan administration's war on drugs led to the passage of the Drug-Free Schools and Campuses Act of 1989 (Pub.L. 101-226, December 12, 1989, 103 Stat. 1928). The act bans the unlawful use, possession, or distribution of drugs and alcohol by students and employees on school grounds and college campuses. As a result, most campuses began to enforce **ZERO TOLERANCE** drug polices. In 1995, the Supreme Court ruled that high schools were permitted to conduct random drug testing of student athletes (*Vernonia School District v. Acton,* 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564). According to the Court, such testing does not violate the reasonable **SEARCH AND SEIZURE** clause of the Fourth Amendment because students in school are under state supervision, and as such, the state (and the school) is responsible for their well-being. The Court extended permissable drug testing to any student who wishes to participate in extracurricular activities in *Board of Education, Pottawatomie County v. Earls,* 536 U. S. 822, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002).

By the 1990s, and into the 2000s, the loco parentis doctrine seemed to be in full force as schools attempted to safeguard students. Many institutions enacted controversial rules governing dress codes and so-called hate speech, all in the name of protecting students. Violence on campuses, however, became a very real threat. In 1994, Congress enacted a federal policy toward weapons on school grounds when it passed the Gun-Free Schools Act of 1994 (Pub. L. 103-382, Title I, § 101, October 20, 1994, 198 Stat. 3907). According to the act, schools are required to expel students who are found in possession of a gun. After the 1999 Columbine, Colorado, shootings, reinforcement of this act escalated, and schools enforced zero tolerance policies toward the possession of any article that may pose a potential threat. As a result, students have been expelled from school for having such items as nail files, plastic knives, and model rockets. Although many students and parents filed lawsuits in protest, most cases were denied since, according to the courts, school authorities have the right to maintain school safety.

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**CROSS-REFERENCES**

Children's Rights; Colleges and Universities; Guardian and Ward; Infants; Juvenile Law; Schools and School Districts.

## IN MEDIAS RES

*[*Latin, Into the heart of the subject, without preface or introduction.*]*

## IN PARI DELICTO

*[*Latin, In equal fault.*] A descriptive phrase that indicates that parties involved in an action are equally culpable for a wrong.*

When the parties to a legal controversy are *in pari delicto,* neither can obtain affirmative relief from the court, since both are at equal fault or of equal guilt. They will remain in the same situation they were in prior to the commencement of the action.

## IN PARI MATERIA

*[*Latin, Upon the same subject.*] A designation applied to statutes or general laws that were enacted at different times but pertain to the same subject or object.*

Statutes *in pari materia* must be interpreted in light of each other since they have a common purpose for comparable events or items.

## IN PERPETUITY

*Of endless duration; not subject to termination.*

The phrase *in perpetuity* is often used in the grant of an **EASEMENT** to a utility company.

## IN PERSONAM

*[*Latin, Against the person.*] A lawsuit seeking a judgment to be enforceable specifically against an individual person.*

An *in personam* action can affect the defendant's personal rights and interests and substantially all of his or her property. It is based on the authority of the court, or jurisdiction, over the person as an individual rather than jurisdiction over specific property owned by the person. This contrasts with in rem jurisdiction, or actions that are limited to property of the defendant that is within the control of the court. A court with *in personam* jurisdiction in a particular case has enough power over the defendant and his or her property to grant a judgment affecting the defendant in almost any way.

## IN RE

*[*Latin, In the matter of.*] Concerning or regarding. The usual style for the name of a judicial proceeding having some item of property at the center of the dispute rather than adverse parties.*

For example, proceedings to determine various claims to the assets of a bankrupt company could be called *In re Klein Company,* or *In the matter of Klein Company.*

Sometimes *in re* is used for a proceeding where one party makes an application to the court without necessarily charging an adversary. This may be done, for example, where a couple seeks to adopt a child or an adult wants to change his or her name.

Such actions may instead use the English translation "in the matter of" or the Latin words ex parte. The final decision on the style to be used for a particular lawsuit is usually made by the clerk of the court.

## IN REM

*[*Latin, In the thing itself.*] A lawsuit against an item of property, not against a person (in personam).*

An action *in rem* is a proceeding that takes no notice of the owner of the property but determines rights in the property that are conclusive against all the world. For example, an action to determine whether certain property illegally imported into the United States ought to be forfeited can be captioned *United States v. Thirty-nine Thousand One Hundred and Fifty Cigars.* The object of the lawsuit is to determine the disposition of the property, regardless of who the owner is or who else might have an interest in it. Interested parties might appear and make out a case one way or another, but the action is *in rem,* against the things.

*In rem* lawsuits can be brought against the property of debtors in order to collect what is owed, and they are begun for the partition of real property, foreclosure of mortgages, and the enforcement of liens. They may be directed against real or PERSONAL PROPERTY. *In rem* actions are permitted only when the court has control of the property or where its authority extends to cover it. For example, the courts in Kansas may determine rights to a farm in Kansas, but not the ownership of a cannery in Texas. The *in rem* jurisdiction of a court may be exercised only after parties who are known to have an interest in the property are notified of the proceedings and have been given a chance to present their claim to the court.

## IN SPECIE

*Specific; specifically. Thus, to decree performance* in specie *is to decree* SPECIFIC PERFORMANCE. *In kind; in the same or like form. A thing is said to exist* in specie *when it retains its existence as a distinct individual of a particular class.*

## IN TERROREM

*[*Latin, In fright or terror; by way of a threat.*] A description of a legacy or gift given by will with the condition that the donee must not challenge the validity of the will or other testament.*

Conditions of such nature, labeled in terrorem clauses, are ordinarily regarded as threats, since the potential loss of the gift is thought to provoke fear or dread of litigation over the will in the recipient.

## INADMISSIBLE

*That which, according to established legal principles, cannot be received into evidence at a trial for consideration by the jury or judge in reaching a determination of the action.*

Evidence, for example, that is obtained as a result of an unlawful SEARCH AND SEIZURE is inadmissible, as is HEARSAY.

## INADVERTENCE

*The absence of attention or care; the failure of an individual to carefully and prudently observe the*

*progress of a court proceeding that might have an effect upon his or her rights.*

The term *inadvertence* is generally used in reference to a ground upon which a judgment may be set aside or vacated under the Rules of Federal Civil Procedure or state rules of civil procedure.

## INALIENABLE

*Not subject to sale or transfer; inseparable.*

That which is inalienable cannot be bought, sold, or transferred from one individual to another. The personal rights to life and liberty guaranteed by the CONSTITUTION OF THE UNITED STATES are inalienable. Similarly, various types of property are inalienable, such as rivers, streams, and highways.

## INC.

*An abbreviation for incorporated; having been formed as a legal or political entity with the advantages of perpetual existence and succession.*

CROSS-REFERENCES

Corporations.

## INCAPACITY

*The absence of legal ability, competence, or qualifications.*

An individual incapacitated by infancy, for example, does not have the legal ability to enter into certain types of agreements, such as marriage or contracts.

Under provisions of WORKERS' COMPENSATION laws, the term *incapacity* refers to the inability to find and retain employment due to a disease or injury that prevents the performance of the customary duties of a worker.

## INCARCERATION

*Confinement in a jail or prison; imprisonment.*

Police officers and other law enforcement officers are authorized by federal, state, and local lawmakers to arrest and confine persons suspected of crimes. The judicial system is authorized to confine persons convicted of crimes. This confinement, whether before or after a criminal conviction, is called incarceration. Juveniles and adults alike are subject to incarceration.

A jail is a facility designed to confine persons after arrest and before trial, or for a short period upon conviction for a lesser offense. A prison is built to house persons for longer periods of time following conviction for a more serious offense. Jails also may be called detention centers, and prisons may be called correctional facilities or penitentiaries. Regardless of their name, their function is generally the same: to lock up accused and convicted criminals.

The pretrial detention of accused criminals is an ancient practice. From the fifth century to the tenth century, persons accused of crimes in England were confined in jail through the end of trial unless they had property to pledge. If they pledged property, the court held it in order to ensure their appearance at trial, and they were released from jail. After the conquest of England by William the Conqueror in 1066, local sheriffs determined who deserved pretrial release. This practice continued until the thirteenth century, when widespread favoritism and abuse by the sheriffs led to the enactment of uniform procedures concerning pretrial release.

The custom of jailing criminal defendants was continued in the American colonies. The payment of bail as a condition of pretrial release was also adopted. In 1791, the EIGHTH AMENDMENT to the U.S. Constitution was ratified, stating in part that "[e]xcessive bail shall not be required . . . nor CRUEL AND UNUSUAL PUNISHMENTS inflicted." This language constituted the only provision in the Constitution directly addressing jails and incarceration.

There were no prisons in the United States before the Constitution was written in 1789. Convicted criminals were sentenced to forms of punishment more colorful than incarceration. Punishment for serious crimes included BANISHMENT from the community; public pillory, which was detention in a wood device that held the head and hands by closing around the neck and wrists; and CORPORAL PUNISHMENT, which was designed to disfigure the offender using measures such as whipping, branding, or slicing off the body part thought to be responsible for the crime. The most serious crimes were punishable by death.

The first prison in the United States was built in Philadelphia in 1790, when the WALNUT STREET JAIL added a new cell house to its existing jail and devoted the new cells to the confinement of convicted criminals. Established by the nonviolent Quakers as an alternative to CAPITAL PUNISHMENT, prison was originally intended to be a progressive setting for hard work, reflection, self-examination, and spiritual guidance. How-

ever, by the 1820s, prison had become the punishment most feared by criminal defendants. Federal, state, and local governments were free to confine convicts and accused criminals in the most inhumane of conditions. A convict was considered a slave of the state, with no rights other than to be kept alive.

Until the 1960s, courts were reluctant to review the procedures, conditions, and treatment of persons held in jails and prisons. At that time, perhaps inspired by progressive social discourse and a growing emphasis on rehabilitation over punishment, courts began to scrutinize the actions of jailers and prison officials. They found numerous constitutional violations, including violations of DUE PROCESS, of the FIRST AMENDMENT guarantee of FREEDOM OF SPEECH, and of the Eighth Amendment.

Violence against prisoners was commonplace. Prisoners were beaten with leather straps; forced to consume milk of magnesia; handcuffed to fences or cells for long periods in uncomfortable positions; made to stand, sit, or lie on crates or stumps for long periods; and shot at, to force them to keep moving or to remain standing. In one prison, officials made inmates strip naked, hosed them down with water, and then turned a fan on them while they were naked and wet (*Gates v. Collier,* 501 F.2d 1291 [5th Cir. 1974]).

Jail and prison inmates also had to endure brutal living conditions. The Charles Street Jail, in Boston, represented incarceration at its worst. Originally erected in 1848, Charles Street contained both pretrial detainees and convicts serving sentences of less than one year. The building was constructed of several tiers comprising long rows of cells. The cells were made of four walls of stone: three of them solid, and one with two small openings. Both wall openings were barred, and in some cases also had screens covering them. There were no heat vents in the cells; the only heat came from a blower at either end of the tier. One inmate commented that in winter, rain puddles that formed on the floor turned to ice.

The cells were eight feet wide, 11 feet long, and ten feet high. Each contained two beds, a sliver of open floor space between the beds, approximately one foot of open floor space at the end of one bed, and a sink and a toilet at the end of the other bed. The beds consisted of two iron slats covered by an old, soiled mattress with no protective cover. The sinks had no hot water. Many of the toilets had no seats, and many either leaked or did not flush. These conditions attracted cockroaches, water bugs, and rats. The electrical system was antiquated and lacked a backup generator, so power outages were common.

In 1971, inmates of the jail, then known as the Suffolk County Jail, sued the Suffolk County sheriff, the Massachusetts commissioner of correction, the mayor of Boston, and nine city councilors. The inmates claimed that the conditions in the jail amounted to punishment, and, because the detainees were presumed innocent, the punishment violated the Due Process Clause of the FOURTEENTH AMENDMENT. The inmates further argued that the conditions constituted cruel and unusual punishment in violation of the Eighth Amendment. The federal district court in Massachusetts agreed, ruling that the conditions unnecessarily and unreasonably infringed on the most basic liberties of presumptively innocent citizens (*Inmates of Suffolk County Jail v. Eisenstadt,* 360 F. Supp. 676 [1973]).

The *Suffolk County* decision was followed by several rounds of litigation. More than 25 years after the original complaint was filed, the matter of the Charles Street Jail was not finished. The major obstacle to improving the conditions was double-bunking, or the practice of placing two prisoners in a cell originally intended for one. Ultimately, the court allowed double-bunking in some cells, in an order that became final on June 14, 1999.

The procedures leading to incarceration in jail or prison vary, but certain procedural features are common to all jurisdictions. Many criminal defendants are released mere hours after being jailed if they agree to return for future proceedings. Other defendants are released after the first hearing before a judge, who orders them to return for future court dates. Still other defendants may be ordered by a judge to be held in jail until they pay a sum of money to secure their appearance at future proceedings. This sum of money is called bail. A defendant held on bail may obtain a release from jail by paying the full bail amount, or by paying a percentage of the bail amount to a licensed bail agent, who then pays the full amount to the court. If the defendant is unable to post bail, he or she is held in jail until the case is resolved.

The U.S. Supreme Court ruled in *Atwater v. City of Lago Vista*, 532 U.S. 318, 121 1536, 149 L. Ed. 2d 549 (2001) that police can arrest and temporarily incarcerate a person charged with a minor offense that is punishable by a fine and no

incarceration. Gail Atwater, a 16-year resident of Lago Vista, Texas was driving her pickup truck through a residential area of town. In the front seat with her were her 3-year-old son and 5-year-old daughter. Neither the children nor Atwater was wearing a seatbelt, for which Lago Vista police officer Bart Turek stopped Atwater. Turek, who had pulled Atwater over several months before, on a mistaken belief that her child was not seatbelted, approached the truck in an loud and abusive manner, stating that Atwater was going to jail for her offense. When she asked to take her frightened children to a friend's house nearby, Turek denied the request. After a neighbor saw what was happening and took the children to her house, Turek handcuffed Atwater, placed her in the squad car, and took to the police station. At the station, she removed her shoes, jewelry, and eyeglasses and emptied her pockets. Officers then took her "mug shot" and placed her in a jail cell. After an hour, she was taken before a magistrate and released on $310 bail. She later pleaded guilty to the seatbelt offenses and was fined $50.

Atwater sued under a federal CIVIL RIGHTS law, arguing that her arrest and incarceration were unconstitutional. Her lawsuit was dismissed by the lower federal courts, and the U.S. Supreme Court upheld these rulings in a 5–4 vote. Justice DAVID SOUTER, writing for the majority, concluded that neither COMMON LAW nor prior precedent provided any grounds for placing limits on police authority to arrest individuals for minor criminal offenses.

A person confined to jail while awaiting trial is called a pretrial detainee. Where the crime alleged is particularly heinous, the judge may deny bail and order the defendant held until the case is resolved. Depending on the size and complexity of the case, a pretrial detainee may be confined in jail for several months, or sometimes even years.

Juveniles are usually held in separate facilities, called juvenile detention centers. However, not all states provide special facilities to keep minors separate from adults. Furthermore, if a juvenile is certified to stand trial as an adult, he or she may be transferred from the juvenile detention center to an adult detention facility. If found guilty, a certified juvenile may be sentenced to adult prison.

If a criminal defendant is convicted, he or she may be sentenced to additional incarceration. Persons convicted of serious crimes are usually sentenced to at least one year in prison. For serious offenses, an inmate may receive a prison sentence of several years to life, or a life term without the possibility of PAROLE. For less-serious offenses, the sentence may consist of continued confinement in jail or in a similar secure facility for up to one year. In most states, a jail sentence does not exceed one year; other states allow jail sentences to last more than two years.

There are different levels of security within the jail and prison systems. Inmates in jail and prison are screened and then classified according to security concerns. For example, persons who present a danger to themselves or others may be placed in isolation under 24-hour surveillance, and persons with infectious diseases may be quarantined in a separate cell block.

Most jurisdictions operate minimum-, medium-, and maximum-security prisons: Security in these facilities ranges from relaxed to strict. The placement of a convict will depend on many factors, including the nature of the offense; perceived gang activity; and the defendant's personal and criminal history, sexual orientation, and physical and mental health. In some cases, a judge may order a defendant to serve time at a specific prison.

The security measures in jail and prison vary. They include inspection of mail, searches of body cavities, searches of the inmate's cell, short-term placement in restraints, administration of psychotropic drugs if no alternative methods for security are available, limitations on the possession of personal effects, and placement in solitary confinement.

Daily life in jail and prison is strictly regulated. Physical contact visits are usually reserved for well-behaved inmates in minimum- and medium-security facilities. In most facilities, inmates are not allowed to have physical contact with visitors. Visits are conducted through wire mesh, or through heavy glass by means of a telephone. Inmates are usually shackled at the hands and feet when they are moved from one part of the facility to another.

Federal and state laws address a minimum of issues concerning the operation of jails and prisons. Most legislatures and courts prefer to leave the matter of confinement to jail and prison administrators. Some prison administrators, or wardens, try to share political power with inmates, in order to avoid prison violence and uprisings. The general trend, however, is to limit

PRISONERS' RIGHTS and freedoms. Sometimes lawmakers regulate the warden-inmate relationship with a law or ordinance. For example, some municipalities have overruled prison officials by passing laws that grant gay pretrial detainees the right to visit with their same-sex partners.

In most jurisdictions, judges have a wide range of incarceration options. As an alternative to jail or prison, many states have created boot camps. These facilities, sometimes known as "shock camps," emphasize hard work and physical conditioning. They are generally reserved for first-time offenders. The theory advanced for boot camps is rehabilitation: They attempt to instill in inmates a sense of pride and capability. They also attempt to avoid turning youthful transgressors into experienced, hardened criminals by keeping them out of jail and prison, and therefore away from the influence of more serious offenders or career criminals.

Many states use home confinement as an alternative to institutional confinement. Home confinement allows a defendant to live at home and go to work while being monitored through an electronic bracelet. The bracelet is usually worn around the ankle and detects the defendant's whereabouts at all times. If the defendant fails to comply with the conditions of the home confinement, the court may resentence the defendant to jail or prison.

Some states have halfway houses to help inmates re-enter society after incarceration. These facilities are situated in communities. Their doors are not locked, but if an inmate fails to comply with the rules, she or he may be returned to jail or prison for the remainder of his or her sentence.

If a defendant needs drug or alcohol treatment, a judge may sentence the defendant to stay at a treatment center specializing in drug and alcohol dependency. This is another alternative to incarceration in a correctional facility. If the defendant fails to comply with the rules of the treatment center or fails to remain sober, the judge may resentence the defendant to jail or prison.

Jail and prison can be more difficult for some inmates than others. Persons who are accused or convicted of sexual assault on a minor are often targets of violence. Youthful inmates are commonly raped. Short of requiring solitary confinement for all detainees and convicts, officials have found few solutions to the violence that occurs when accused and convicted criminals are grouped together in small spaces.

**Incarcerated Population in the United States, 1980 to 2000**

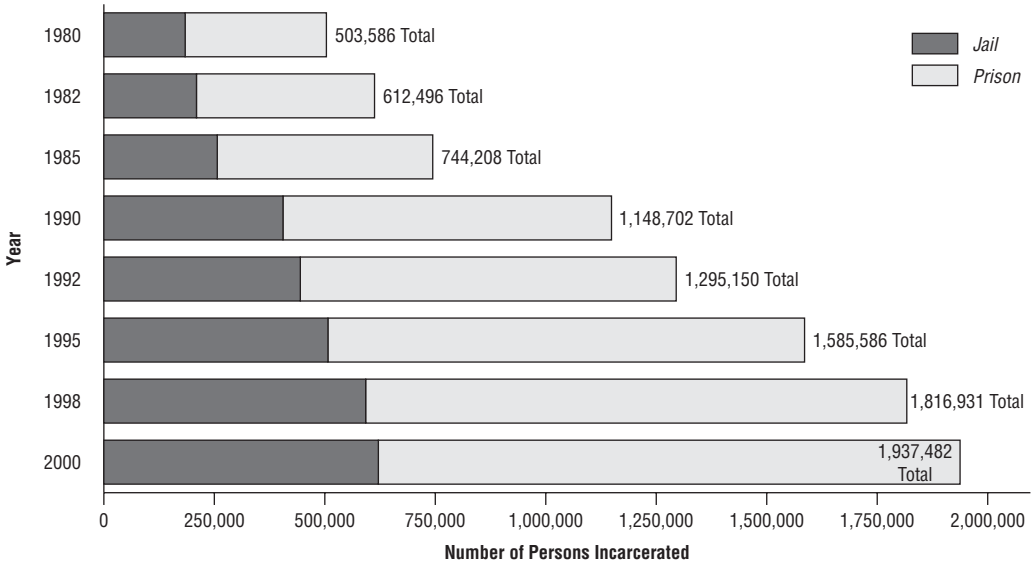


SOURCE: U.S. Department of Justice, Bureau of Justice Statistics.

Incarceration may severely disrupt the equilibrium of mentally or physically ill persons. Jail and prison officials are not liable for the death or injury of an inmate because of lack of HEALTH CARE unless the staff exhibited deliberate indifference to the needs of the inmate. An inmate may be forced to take psychotropic drugs if the drugs are the least intrusive means available to control violent behavior.

Hunger strikes are common in jail and prison. Some inmates who participate in these strikes want to die, whereas others wish to call attention to a particular issue. The chief legal issue in these situations is whether officials may force-feed an inmate. In most cases, courts uphold the right of the government to keep prisoners alive as being necessary to the effective administration of the criminal justice system. In other cases, courts have not upheld that right. In Georgia, for example, a prisoner's right to privacy includes the right to starve to death (*Zant v. Prevatte,* 248 Ga. 832, 286 S.E.2d 715 [1982]).

The United States imprisons more people per capita than any other country. By 2003, two million people were behind bars. The record prison population figures were driven by tough policies that mandate long terms for drug offenders and other criminals. Many critics of the increase in incarceration argue that confinement serves only to "dehabilitate" convicts and breed more crime. According to these critics, incarceration too often turns individuals capable of rehabilitation into angry, vindictive persons. By the time many inmates are released from incarceration, they have been deprived of a means of self-support. Stripped of self-respect and resources, many ex-convicts find it nearly impossible to lead anything other than a life of crime and despair.

Other critics of wholesale incarceration point out that jail and prison inmates are disproportionately African–American. In 1993, African–American men between the ages of 20 and 29, who constitute four percent of the U.S. population, made up 50 percent of the total prison population.

Still other critics emphasize the unfairness reflected in the disparity between the tremendous number of drug offenders in jail and prison, compared with the small number of white-collar criminals incarcerated. For example, in 1991 the federal courts sentenced more than 14,000 defendants to prison terms for drug offenses, compared with fewer than 5,500 persons for FRAUD, EMBEZZLEMENT, and RACKETEERING crimes.

*An African–American man incarcerated in one of New York's Rikers Island jails. Critics of wholesale incarceration point out that correctional facility inmates are disproportionately African–American.*

MICHAEL S. YAMASHITA/CORBIS

Despite a growing number of critics, the majority of the general public in the United States is content to combat crime with incarceration. Although crime rates continue to rise with incarceration rates, the legislative trend is to build more jails and prisons and to increase the length of jail and prison terms.

Following the SEPTEMBER 11TH ATTACKS in 2001, the federal government mobilized to fight a WAR ON TERRORISM. President GEORGE W. BUSH authorized the indefinite detention of ENEMY COMBATANTS in a 2002 military order. One person captured by U.S. forces in Afghanistan was Yaser Esam Hamdi, who claimed he was a U.S. citizen. Hamdi sought his release from indefinite incarceration in a military prison, but the Fourth Circuit Court of Appeals in *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), ruled that Hamdi could be held as an enemy combatant and that his citizenship did not change his status. In another case, *Padilla ex rel, Newman v. Bush* 233 F. Supp. 2d 564 (S.D.N.Y. 2002), a U.S. District Court judge ruled that a suspected terrorist incarcerated as an enemy combatant must be able to meet with his attorney, contrary to the protests of the gov-

ernment. The U.S. government has appealed that ruling.

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CROSS-REFERENCES

Juvenile Law; Sentencing.

## INCEST

*The crime of sexual relations or marriage taking place between a male and female who are so closely linked by blood or affinity that such activity is prohibited by law.*

Incest is a statutory crime, often classified as a felony. The purpose of incest statutes is to prevent sexual intercourse between individuals related within the degrees set forth, for the furtherance of the public policy in favor of domestic peace. The prohibition of intermarriage is also based upon genetic considerations, since when excessive inbreeding takes place, undesirable recessive genes become expressed and genetic defects and disease are more readily perpetuated. In addition, the incest taboo is universal in human culture.

Rape and incest are separate offenses and are distinguished by the fact that mutual consent is required for incest but not for rape. When the female is below the age of consent recognized by law, however, the same act can be both rape and incest.

The proscribed degrees of incest vary among the different statutes. Some include PARENT AND CHILD, brother and sister, uncle and niece, or aunt and nephew, and first cousins. In addition, intermarriage and sexual relations are also frequently prohibited among individuals who are related by half-blood, including brothers and sisters and uncles and nieces of the half-blood.

In a number of jurisdictions, incest statutes extend to relationships among individuals related by affinity. Such statutes proscribe sexual relations between stepfathers and stepdaughters, stepmothers and stepsons, or brothers- and sisters-in-law, and such relations are punishable as incest. It is necessary for the relationship of affinity to exist at the time the intermarriage or sexual intercourse occurs in order for the act to constitute incest. In the event that the relationship has terminated prior to the time that the act takes place, the intermarriage or sexual intercourse is not regarded as incest.

Affinity ordinarily terminates upon the DIVORCE or death of the blood relation through whom the relationship was formed. Following the divorce or death of his spouse, it is not a violation of incest statutes for a man to marry or have sexual relations with his stepdaughter or his spouse's sister.

Certain statutes require that the individual accused of incest have knowledge of the relationship. In such cases, both parties need not be aware that their actions are incestuous in order for the party who does know to be convicted.

When intermarriage is prohibited by law, it need not be proved that sexual intercourse took place in order for a conviction to be sustained, since the offense is complete on intermarriage. In statutes that define incest as the intermarriage or carnal knowledge of individuals within the prohibited degrees, incest can be committed either by intermarriage or sexual relations.

Some state laws provide that the crime of incest is not committed unless both parties con-

sent to it. When the sexual relations at issue were accomplished by force, the act constitutes rape, and the individual accused cannot be convicted of incest.

It is no defense to incest that the woman had prior sexual relations or has a reputation for unchastity. Similarly, voluntary drunkenness, moral insanity, or an uncontrollable impulse are insufficient defenses.

Punishment for a conviction pursuant to an incest statute is determined by statute.

## INCHOATE

*Imperfect; partial; unfinished; begun, but not completed; as in a contract not executed by all the parties.*

## INCIDENT OF OWNERSHIP

*Some aspect of the exclusive possession or control over the disposition or use of property that demonstrates that the person with such exclusive rights has not relinquished them.*

A person who has kept the right to change the beneficiaries on his or her life insurance policy has retained an incident of ownership and is, therefore, considered the owner of the policy.

## INCIDENTAL

*Contingent upon or pertaining to something that is more important; that which is necessary, appertaining to, or depending upon another known as the principal.*

Under WORKERS' COMPENSATION statutes, a risk is deemed incidental to employment when it is related to whatever a worker must do in order to fulfill the employment contract, but is not the primary function that the worker was hired to do.

## INCITE

*To arouse; urge; provoke; encourage; spur on; goad; stir up; instigate; set in motion; as in to* incite *a riot. Also, generally, in* CRIMINAL LAW *to instigate, persuade, or move another to commit a crime; in this sense nearly synonymous with* abet.

## INCOME

*The return in money from one's business, labor, or capital invested; gains, profits, salary, wages, etc.*

*The gain derived from capital, from labor or effort, or both combined, including profit or gain through sale or conversion of capital. Income is not a gain accruing to capital or a growth in the value of the investment, but is a profit, something of exchangeable value, proceeding from the property and being received or drawn by the recipient for separate use, benefit, and disposal. That which comes in or is received from any business, or investment of capital, without reference to outgoing expenditures.*

## INCOME SPLITTING

*The right, created by provisions of federal tax laws, given to married couples who file joint returns to have their combined incomes subject to an* INCOME TAX *at a rate equal to that which would be imposed if each had filed a separate return for one-half the amount of their combined income.*

Income splitting was devised as a result of legislation enacted by Congress in 1948 to equalize the federal taxation of married couples who lived in common-law states and who paid higher taxes than couples who lived in COMMUNITY PROPERTY states and, as a result, have the tax benefits of income splitting.

## INCOME TAX

*A charge imposed by government on the annual gains of a person, corporation, or other taxable unit derived through work, business pursuits, investments, property dealings, and other sources determined in accordance with the* INTERNAL REVENUE CODE *or state law.*

Taxes have been called the building block of civilization. In fact, taxes existed in Sumer, the first organized society of record, where their payment carried great religious meaning. Taxes were also a fundamental part of ancient Greece and the Roman Empire. The religious aspect of taxation in Renaissance Italy is depicted in the Brancacci Chapel, in Florence. The fresco *Rendering of the Tribute Money* depicts the gods approving the Florentine income tax. In the United States, the federal tax laws are set forth in the Internal Revenue Code and enforced by the INTERNAL REVENUE SERVICE (IRS).

### History

The origin of taxation in the United States can be traced to the time when the colonists were heavily taxed by Great Britain on everything from tea to legal and business documents that were required by the Stamp Tax. The colonists' disdain for this taxation without rep-

resentation (so-called because the colonies had no voice in the establishment of the taxes) gave rise to revolts such as the Boston Tea Party. However, even after the Revolutionary War and the adoption of the U.S. Constitution, the main source of revenue for the newly created states was money received from customs and excise taxes on items such as carriages, sugar, whiskey, and snuff. Income tax first appeared in the United States in 1862, during the Civil War. At that time only about one percent of the population was required to pay the tax. A flat-rate income tax was imposed in 1867. The income tax was repealed in its entirety in 1872.

Income tax was a rallying point for the Populist party in 1892, and had enough support two years later that Congress passed the Income Tax Act of 1894. The tax at that time was two percent on individual incomes in excess of $4,000, which meant that it reached only the wealthiest members of the population. The Supreme Court struck down the tax, holding that it violated the constitutional requirement that direct taxes be apportioned among the states by population (**POLLOCK V. FARMERS' LOAN & TRUST**, 158 U.S. 601, 15 S. Ct. 912, 39 L. Ed. 1108 [1895]). After many years of debate and compromise, the **SIXTEENTH AMENDMENT** to the Constitution was ratified in 1913, providing Congress with the power to lay and collect taxes on income without apportionment among the states. The objectives of the income tax were the equitable distribution of the tax burden and the raising of revenue.

Since 1913 the U.S. income tax system has become very complex. In 1913 the income tax laws were contained in eighteen pages of legislation; the explanation of the **TAX REFORM ACT OF 1986** was more than thirteen hundred pages long (Pub. L. 99-514, Oct. 22, 1986, 100 Stat. 2085). Commerce Clearing House, a publisher of tax information, released a version of the Internal Revenue Code in the early 1990s that was four times thicker than its version in 1953.

Changes to the tax laws often reflect the times. The flat tax of 1913 was later replaced with a graduated tax. After the United States entered **WORLD WAR I**, the War Revenue Act of 1917 imposed a maximum tax rate for individuals of 67 percent, compared with a rate of 13 percent in 1916. In 1924 Secretary of the Treasury Andrew W. Mellon, speaking to Congress about the high level of taxation, stated,

> The present system is a failure. It was an emergency measure, adopted under the pressure of war necessity and not to be counted upon as a permanent part of our revenue structure. . . . The high rates put pressure on taxpayers to reduce their taxable income, tend to destroy individual initiative and enterprise, and seriously impede the development of productive business. . . . Ways will always be found to avoid taxes so destructive in their nature, and the only way to save the situation is to put the taxes on a reasonable basis that will permit business to go on and industry to develop.

Consequently, the Revenue Act of 1924 reduced the maximum individual tax rate to 43 percent (Revenue Acts, June 2, 1924, ch. 234, 43 Stat. 253). In 1926 the rate was further reduced to 25 percent.

The Revenue Act of 1932 was the first tax law passed during the Great Depression (Revenue Acts, June 6, 1932, ch. 209, 47 Stat. 169). It increased the individual maximum rate from 25 to 63 percent, and reduced personal exemptions from $1,500 to $1,000 for single persons, and from $3,500 to $2,500 for married couples. The **NATIONAL INDUSTRIAL RECOVERY ACT OF 1933** (NIRA), part of President **FRANKLIN D. ROOSEVELT**'s **NEW DEAL**, imposed a five percent excise tax on dividend receipts, imposed a capital stock tax and an excess profits tax, and suspended all deductions for losses (June 16, 1933, ch. 90, 48 Stat. 195). The repeal in 1933 of the **EIGHTEENTH AMENDMENT**, which had prohibited the manufacture and sale of alcohol, brought in an estimated $90 million in new liquor taxes in 1934. The **SOCIAL SECURITY ACT OF 1935** provided for a wage tax, half to be paid by the employee and half by the employer, to establish a federal retirement fund (Old Age Pension Act, Aug. 14, 1935, ch. 531, 49 Stat. 620).

The Wealth Tax Act, also known as the Revenue Act of 1935, increased the maximum tax rate to 79 percent, the Revenue Acts of 1940 and 1941 increased it to 81 percent, the Revenue Act of 1942 raised it to 88 percent, and the Individual Income Tax Act of 1944 raised the individual maximum rate to 94 percent.

The post-World War II Revenue Act of 1945 reduced the individual maximum tax from 94 percent to 91 percent. The Revenue Act of 1950, during the **KOREAN WAR**, reduced it to 84.4 percent, but it was raised the next year to 92 percent (Revenue Act of 1950, Sept. 23, 1950, ch. 994, Stat. 906). It remained at this level until 1964, when it was reduced to 70 percent.

The Revenue Act of 1954 revised the Internal Revenue Code of 1939, making major changes that were beneficial to the taxpayer, including providing for CHILD CARE deductions (later changed to credits), an increase in the charitable contribution limit, a tax credit against taxable retirement income, employee deductions for business expenses, and liberalized depreciation deductions. From 1954 to 1962, the Internal Revenue Code was amended by 183 separate acts.

In 1974 the EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) created protections for employees whose employers promised specified pensions or other retirement contributions (Pub. L. No. 93-406, Sept. 2, 1974, 88 Stat. 829). ERISA required that to be tax deductible, the employer's plan contribution must meet certain minimum standards as to employee participation and vesting and employer funding. ERISA also approved the use of individual retirement accounts (IRAs) to encourage tax-deferred retirement savings by individuals.

The Economic Recovery Tax Act of 1981 (ERTA) provided the largest tax cut up to that time, reducing the maximum individual rate from 70 percent to 50 percent (Pub. L. No. 97-34, Aug. 13, 1981, 95 Stat. 172). The most sweeping tax changes since WORLD WAR II were enacted in the Tax Reform Act of 1986. This bill was signed into law by President RONALD REAGAN and was designed to equalize the tax treatment of various assets, eliminate tax shelters, and lower marginal rates. Conservatives wanted the act to provide a single, low tax rate that could be applied to everyone. Although this single, flat rate was not included in the final bill, tax rates were reduced to 15 percent on the first $17,850 of income for singles and $29,750 for married couples, and set at 28 to 33 percent on remaining income. Many deductions were repealed, such as a deduction available to two-income married couples that had been used to avoid the "marriage penalty" (a greater tax liability incurred when two persons filed their income tax return as a married couple rather than as individuals). Although the personal exemption exclusion was increased, an exemption for elderly and blind persons who itemize deductions was repealed. In addition, a special capital gains rate was repealed, as was an investment tax credit that had been introduced in 1962 by President JOHN F. KENNEDY.

The Omnibus Budget Reconciliation Act of 1993, the first budget and tax act enacted during the Clinton administration, was vigorously debated, and passed with only the minimum number of necessary votes (Pub. L. No. 103-66, Aug. 10, 1993, 107 Stat. 312). This law provided for income tax rates of 15, 28, 31, 36, and 39.6 percent on varying levels of income and for the taxation of SOCIAL SECURITY income if the taxpayer receives other income over a certain level. In 2001 Congress enacted a major income tax cut at the urging of President GEORGE W. BUSH. Over the course of 11 years the law reduces marginal income tax rates across all levels of income. The 36 percent rate will be lowered to 33 percent, the 31 percent rate to 28 percent, the 28 percent rate to 25 percent. In addition, a new bottom 10 percent rate was created. (Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38.)

Since the early 1980s, a flat-rate tax system rather than the graduated bracketed method has been proposed. (The graduated bracketed method is the one that has been used since graduated taxes were introduced: the percentage of tax differs based on the amount of taxable income.) The flat-rate system would impose one rate, such as 20 percent, on all income and would eliminate special deductions, credits, and exclusions. Despite firm support by some, the flat-rate tax has not been adopted in the United States.

**Individual Income Taxes Collected, 1980 to 2000**

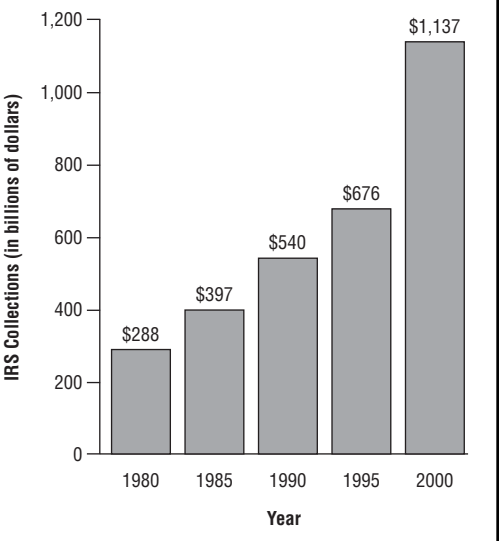


SOURCE: Internal Revenue Service, *Internal Revenue Gross Collections, by Type of Tax, Fiscal Years 1973–2002*.

### Computation of Income Tax

Regardless of the changes made by legislators since 1913, the basic formula for computing the amount of tax owed has remained basically the same. To determine the amount of income tax owed, certain deductions are taken from an individual's gross income to arrive at an adjusted gross income, from which additional deductions are taken to arrive at the taxable income. Once the amount of taxable income has been determined, tax rate charts determine the exact amount of tax owed. If the amount of tax owed is less than the amount already paid through tax prepayment or the withholding of taxes from paychecks, the taxpayer is entitled to a refund from the IRS. If the amount of tax owed is more than what has already been paid, the taxpayer must pay the difference to the IRS.

Calculating the gross income of restaurant employees whose income is partially derived from gratuities left by customers has led to disputes with the IRS and employers over how much they should contribute in FEDERAL INSURANCE CONTRIBUTION ACT (FICA) taxes. Although customers pay these tips directly to employees, federal law deems the tips to have been wages paid by the employer for FICA tax purposes. Employers are imputed to have paid large sums of money they never handled and for which they no way of ascertaining the exact amount. The Supreme Court, in *United States v. Fior D'Italia*, 536 U.S. 238, 122 S. Ct. 2117, 153 L. Ed. 2d 280 (2002), upheld the IRS "aggregate method" of reporting tip income. Instead of requiring the IRS to make individual determinations of unreported tips for each employee when calculating FICA tax, the Court held that the IRS could make employers report their gross sales on a monthly statement to help determine tip income. Employees also must report their tip income monthly on a form. The IRS then uses these two pieces of information to calculate what the employer needs to contribute in FICA tax.

**Gross Income** The first step in computing the amount of tax liability is the determination of gross income. Gross income is defined as "all income from whatever source derived," whether from personal services, business activities, or capital assets (property owned for personal or business purposes). Compensation for services in the form of money, wages, tips, salaries, bonuses, fees, and commissions constitutes income. Problems in defining income often arise when a taxpayer realizes a benefit or compensation that is not in the form of money.

An example of such compensation is the fringe benefits an employee receives from an employer. The Internal Revenue Code defines these benefits as income and places the burden on the employee to demonstrate why they should be excluded from gross income. Discounts on the employer's products and other items of minimal value to the employer are usually not considered income to the employee. These benefits (which include airline tickets at nominal cost for airline employees and merchandise discounts for department store employees) are usually of great value to the employee but do not cost much for the employer to provide, and build good relationships between the employee and the employer. As long as the value to the employer is small and the benefit generates goodwill, it usually is not deemed to be taxable to the employee.

The value of meals and lodging provided to an employee and paid for by an employer is not considered income to the employee if the meals and lodging are furnished on the business premises of the employer for the employer's convenience (as when an apartment building owner provides a rent-free apartment for a caretaker who is required to live on the premises). However, a cash allowance for meals or lodging that is given to an employee as part of a compensation package is considered compensation, and is counted as gross income. An employer's payment for a health club membership is also included in gross income, as are payments to an employee in the form of stock. An amount contributed by an employer to a pension, qualified stock bonus, profit-sharing, ANNUITY, or bond purchase plan in which the employee participates is not considered income to the employee at the time the contribution is made, but will be taxed when the employee receives payment from the plan. Medical insurance premiums paid by an employer are generally not considered income to the employee. Although military pay is taxable income, veterans' benefits for education, disability and pension payments, and veterans' insurance proceeds and dividends are not included in gross income.

Other sources of income directly increase the wealth of the taxpayer and are taxable. These sources commonly include interest earned on bank accounts; dividends; rents; ROYALTIES from copyrights, TRADEMARKS, and PATENTS;

proceeds from life insurance if paid for a reason other than the death of the insured; annuities; discharge from the obligation to pay a debt owed (the amount discharged is considered income to the debtor); recovery of a previously deductible item, which gives rise to income only to the extent the previous deduction produced a tax benefit (this is commonly referred to as the tax benefit rule and is most often used when a taxpayer has recovered a previously deducted bad debt or previously deducted taxes); gambling winnings; lottery winnings; found property; and income from illegal sources. Income from prizes and awards is taxable unless the prize or award is made primarily in recognition of religious, charitable, scientific, educational, artistic, literary, or civic achievement; the recipient was chosen, without any action on his or her part, to enter the selection process; and the recipient is not required to render substantial future services as a condition to receiving the prize or award. For example, recipients of Nobel Prizes meet these criteria and are not taxed on the prize money they receive.

In some situations a taxpayer's wealth directly increases through income that is not included in the determination of income tax. For example, gifts and inheritances are excluded from income in order to encourage the TRANSFER OF ASSETS within families. However, any income realized from a gift or inheritance is considered income to the beneficiary—most notably rents, interest, and dividends. In addition, most scholarships, fellowships, student loans, and other forms of financial aid for education are not included in gross income, perhaps to equalize the status of students whose education is funded by a gift or inheritance and of students who do not have the benefit of such assistance. Cash rebates to consumers from product manufacturers and most state UNEMPLOYMENT COMPENSATION benefits are also not included in gross income.

Capital gains and losses pose special considerations in the determination of income tax liability. Capital gains are the profits realized as a result of the sale or exchange of a capital asset. Capital losses are the deficits realized in such transactions. Capital gains and losses are determined by establishing a taxpayer's basis in the property. Basis is generally defined as the taxpayer's cost of acquiring the property. In the case of property received as a gift, the donee basically steps into the shoes of the donor and is deemed to have the same basis in the property as did the donor.

The basis is subtracted from the amount realized by the sale or other disposition of the property, and the difference is either a gain or a loss to the taxpayer.

Capital gains are usually included in gross income, with certain narrow exclusions, and capital losses are generally excluded from gross income. An important exception to this favorable treatment of capital losses occurs when the loss arises from the sale or other disposition of property held by the taxpayer for personal use, such as a personal residence or jewelry. When a capital gain is realized from the disposition of property held for personal use, it is included as income even though a capital loss involving the same property cannot be excluded from income. This apparent discrepancy is further magnified by the fact that capital losses on business or investment property can be excluded from income. Consequently, there have been many lawsuits over the issue of whether a personal residence, used at some point as rental property or for some other income producing use, is deemed personal or business property for income tax purposes.

Taxpayers age 55 or older who sell a personal residence in which they have resided for a specific amount of time can exclude their capital gains. This is a one-time exclusion, with specific dollar limits. Consequently, if future, greater gains are anticipated, a taxpayer age 55 or older may choose to pay the capital gains tax on a transaction that qualifies for the exclusion but produces smaller capital gains.

Even though a capital gain on a personal residence is realized, it may be temporarily deferred from inclusion in gross income if the taxpayer buys and occupies another home two years before or after the sale, and the new home costs the same as or more than the old home. The gain is merely postponed. This type of transaction is called a rollover. The gain that is not taxed in the year of sale will be deducted from the cost of the new home, thereby establishing a basis in the property that is less than the price paid for the home. When the new home is later sold, the amount of gain recognized at that time will include the gain that was not recognized when the home was purchased by the taxpayer.

**Deductions and Adjusted Gross Income** Once the amount of gross income is determined, the taxpayer may take deductions from

the income in order to determine adjusted gross income. Two categories of deductions are allowed. Above-the-line deductions are taken in full from gross income to arrive at adjusted gross income. Below-the-line, or itemized, deductions are taken from adjusted gross income and are allowed only to the extent that their combined amount exceeds a certain threshold amount. If the total amount of itemized deductions does not meet the threshold amount, those deductions are not allowed. Generally, above-the-line deductions are business expenditures, and below-the-line deductions are personal, or nonbusiness, expenditures.

The favorable tax treatment afforded business and investment property is also evident in the treatment of business and investment expenses. Ordinary and necessary expenses are those incurred in connection with a trade or business. Ordinary and necessary business expenses are those that others engaged in the same type of business incur in similar circumstances. With regard to deductions for expenses incurred for investment property, courts follow the same type of "ordinary-and-necessary" analysis used for business expense deductions, and disallow the deductions if they are personal in nature or are capital expenses. Allowable business expenses include insurance, rent, supplies, travel, transportation, salary payments to employees, certain losses, and most state and local taxes.

Personal, or nonbusiness, expenses are generally not deductible. Exceptions to this rule include casualty and theft losses that are not covered by insurance. Certain expenses are allowed as itemized deductions. These below-the-line deductions include expenses for medical treatment, interest on home mortgages, state income taxes, and charitable contributions. Expenses incurred for tax advice are deductible from federal income tax, as are a wide array of state and local taxes. In addition, an employee who incurs business expenses may deduct those expenses to the extent they are not reimbursed by the employer. Typical unreimbursed expenses that are deductible by employees include union dues and payments for mandatory uniforms. ALIMONY payments may be taken as a deduction by the payer and are deemed to be income to the recipient; however, CHILD SUPPORT payments are not deemed income to the parent who has custody of the child and are not deductible by the paying parent.

Contributions made by employees to an INDIVIDUAL RETIREMENT ACCOUNT (IRA) or by self-employed persons to KEOGH PLANS are deductible from gross income. Allowable annual deductions for contributions to an IRA are lower than allowable contributions to a Keogh account. Contributions beyond the allowable deduction are permitted; however, amounts in excess are included in gross income. Both IRAs and Keogh plans create tax-sheltered retirement funds that are not taxed as gross income during the taxpayer's working years. The contributions and the interest earned on them become taxable when they are distributed to the taxpayer. Distribution may take place when the taxpayer is 59 and one-half years old, or earlier if the taxpayer becomes disabled, at which time the taxpayer will most likely be in a lower tax bracket. Distribution may take place before either of these occurrences, but if so, the funds are taxable immediately and the taxpayer may also incur a substantial penalty for early withdrawal of the money.

**Additional Deductions and Taxable Income** Once adjusted gross income is determined, a taxpayer must determine whether to use the standard deduction or to itemize deductions. In most cases the standard deduction is used because it is the most convenient option. However, if the amount of itemized deductions is substantially more than the standard deduction and exceeds the threshold amount, a taxpayer will receive a greater tax benefit by itemizing.

After the standard deduction or itemized deductions are subtracted from adjusted gross income, the income amount is further reduced by personal and dependency exemptions. Each taxpayer is allowed one personal exemption. A taxpayer may also claim a dependency exemption for each person who meets five specific criteria: the dependent must have a familial relationship with the taxpayer; have a gross income that is less than the amount of the deduction, unless she or he is under nineteen years old or a full-time student; receive more than one-half of her or his support from the taxpayer; be a citizen or resident of the United States, Mexico, or Canada; and, if married, be unable to file a joint return with her or his spouse. Each exemption is valued at a certain dollar amount, by which the taxpayer's taxable income is reduced.

**Tax Tables and Tax Owed** Once the final deductions and exemptions are taken, the resulting figure is the taxpayer's taxable income. The

tax owed on this income is determined by looking at applicable tax tables. This figure may be reduced by tax prepayments or by an applicable tax credit. Credits are available for contributions made to candidates for public office; child and dependent care; earned income; taxes paid in another country; and residential energy. For each dollar of available credit, a taxpayer's liability is reduced by one dollar.

**Refund or Tax Owed** Finally, after tax prepayments and credits are subtracted, the amount of tax owed the IRS or the amount of refund owed the taxpayer is determined. The taxpayer's tax return and payment of tax owed must be mailed to the IRS by April 15 unless an extension is sought. Taxpayers who make late payments without seeking an extension will be charged interest on the amount due and may be charged a penalty. A tax refund may be requested for up to several years after the tax return is filed. A refund is owed usually because the taxpayer had more tax than necessary withheld from his or her paychecks.

**Tax Audits** The IRS may audit a taxpayer to verify that the taxpayer correctly reported income, exemptions, or deductions on the return. The majority of returns that are audited are chosen by computer, which selects those that have the highest probability of error. Returns may also be randomly selected for audit or may be chosen because of previous investigations of a taxpayer for TAX EVASION or for involvement in an activity that is under investigation by the IRS. Taxpayers may represent themselves at an audit, or may have an attorney, certified public accountant, or the person who prepared the return accompany them. The taxpayer will be told what items to bring to the audit in order to answer the questions raised. If additional tax is found to be owed and the taxpayer disagrees, she or he may request an immediate meeting with a supervisor. If the supervisor supports the audit findings, the taxpayer may appeal the decision to a higher level within the IRS or may take the case directly to court.

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CROSS-REFERENCES

Tax Avoidance; Tax Court; Taxpayer Bill of Rights.

## INCOMPATIBILITY

*The inability of a* HUSBAND AND WIFE *to cohabit in a marital relationship.*

## INCOMPETENCY

*The lack of ability, knowledge, legal qualification, or fitness to discharge a required duty or professional obligation.*

The term *incompetency* has several meanings in the law. When it is used to describe the mental condition of a person subject to legal proceedings, it means the person is neither able to comprehend the nature and consequences of the proceedings nor adequately able to help an attorney with his defense. When it is used to describe the legal qualification of a person, it means the person does not have the legal capacity to enter a contract. When it is employed to describe a professional duty or obligation, it means that the person has demonstrated a lack of ability to perform professional functions.

### Mental Incompetency

A person who is diagnosed as being mentally ill, senile, or suffering from some other debility that prevents them from managing his own affairs may be declared mentally incompetent by a court of law. When a person is judged to be incompetent, a guardian is appointed to handle the person's property and personal affairs.

The legal procedure for declaring a person incompetent consists of three steps: (1) a motion for a competency hearing, (2) a psychiatric or psychological evaluation, and (3) a competency hearing. Probate courts usually handle competency proceedings, which guarantee the allegedly incompetent person DUE PROCESS OF LAW.

In CRIMINAL LAW a defendant's mental competency may be questioned out of concern for the defendant's welfare or for strategic legal reasons. The defense may request a competency hearing so that it can gather information to use in PLEA BARGAINING, to mitigate a sentence, or to prepare for a potential INSANITY DEFENSE. The prosecution may raise the issue as a preven-

tive measure or to detain the defendant so that a weak case can be built into a stronger one.

A motion for a competency hearing must be made before sentencing takes place. In federal court a motion for a hearing will be granted "if there is a reasonable cause to believe that the defendant may be suffering from a mental disease or defect rendering him mentally incompetent" (18 U.S.C.A. § 4241 (a)). A psychiatric or psychological evaluation is then conducted, and a hearing is held on the matter. If the court finds that the defendant is incompetent, the defendant will be hospitalized for a reasonable period of time, usually no more than four months. The goal is to determine whether the defendant's competence can be restored.

This type of mental commitment is authorized by the U.S. Supreme Court only for defendants who "probably soon will be able to stand trial" (*Jackson v. Indiana,* 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 [1972]). The possibility that a defendant committed a serious crime does not warrant an extended commitment period, because that would violate the defendant's due process rights.

At the end of a four-month commitment, if it appears that the defendant's competence can be restored but more time is needed to do so, the defendant may be hospitalized for an additional 30 days to 18 months. The length of stay varies by state. If a hospital director certifies that the defendant's competence has been restored, the court holds another hearing. If the court agrees the defendant is competent, they are released and a criminal trial date is set. Such a competency ruling cannot be used as evidence against the defendant if they later pleads insanity as a defense in the criminal trial. (An insanity defense refers to the defendant's inability to know or appreciate right from wrong at the time of the alleged crime.)

The *Jackson* ruling also specified that "treatment must stop if there is no substantial probability that the defendant will regain trial competence in the near future." If that decision is reached, the defendant can continue to be detained only if they are declared permanently incompetent in a civil commitment proceeding.

The development of powerful drugs has given the government the opportunity to medicate mentally incompetent defendants to the point whre they are competent to stand trial. By 2003, the federal government was medicating hundreds of defendants each year but a small number objected to medication. The Supreme Court, in *Sell v. United States* 539 U.S. ___, 123 S. Ct., 2174, 156 L. Ed. 2d 197 (2003), issued a major setback to prosecutors, when it placed strict guidelines on medicating defendants accused of less serious, nonviolent crimes.

### Legal Incapacity

CIVIL LAW requires a person to be legally competent in order to enter a contract, sign a will, or make some other type of binding legal commitment. A person may be judged incompetent by virtue of age or mental condition.

In contract law a person who agrees to a transaction becomes liable for duties under the contract unless they are legally incompetent. A person under the age of 18 or 21 (depending on the jurisdiction) is not bound by the legal duty to perform the terms of a contract he signed and is not liable for breach of contract. Public policy deems it desirable to protect an immature person from liability for contracts that he or she is too inexperienced to negotiate.

If a party does not comprehend the nature and consequences of the contract when it is formed, they are regarded as having mental incapacity. A distinction must be made between persons who have been adjudicated incompetent by a court and had a guardian appointed, and persons who are mentally incompetent but have not been so adjudicated. A person who has been declared incompetent in a court proceeding lacks the legal capacity to enter into a contract with another. Such a person is unable to consent to a contract, since the court has determined that he does not understand the obligations and effects of a contract. A contract made by such a person is void and without any legal effect. If there has been no adjudication of mental incompetency, a contract made by a mentally incapacitated individual is VOIDABLE by them. This means that the person can legally declare the contract void, making it unenforceable. However, a voidable contract can be ratified by the incompetent person if the person recovers the capacity to contract.

Contract law also holds that a contract made by an intoxicated person is voidable, as the person was incompetent at the time the contract was formed.

A marriage contract may be annulled if one of the parties was legally incompetent. Grounds for incompetency include age (under the age of majority), mental incompetence such as insanity, and a preexisting marriage.

A person who executes a will must be legally competent. The traditional recital in a will states that the testator (the maker of the will) is of "sound mind." This language attempts to establish the competency of the testator, but the issue may be challenged when the will is probated.

### Professional Obligation

Lawyers, doctors, teachers, and other persons who belong to a profession are bound either by professional codes of conduct or by contracts that contain standards of conduct. A professional person who fails to meet the duties required of that profession may be judged incompetent. Such a ruling by a court, a professional disciplinary board, or an employer may result in professional discipline, including loss of a license to practice, demotion, or termination of employment.

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## INCOMPETENT EVIDENCE

*Probative matter that is not admissible in a legal proceeding; evidence that is not admissible under the* FEDERAL RULES OF EVIDENCE. *That which the law does not allow to be presented at all, or in connection with a particular matter, due to lack of originality, a defect in the witness or the document, or due to the nature of the evidence in and of itself.*

## INCONSISTENT

*Reciprocally contradictory or repugnant.*

Things are said to be inconsistent when they are contrary to each other to the extent that one implies the negation of the other. For example, a city ordinance might be inconsistent with a state statute; or two defenses to a crime, such as the defenses of alibi and SELF-DEFENSE, are inconsistent.

## INCONTESTABILITY CLAUSE

*A provision in a life or* HEALTH INSURANCE *policy that precludes the insurer from alleging that the policy, after it has been in effect for a stated period (typically two or three years), is void because of misrepresentations made by the insured in the application for it.*

An incontestability clause prevents an insurer from denying benefits on the ground of MISREPRESENTATION in the application. The clause applies only when the policy has been in effect for a specified period of time. This time period, the contestability period, is usually two or three years.

Most states maintain statutes that require an incontestability clause in life and health insurance contracts. The incontestability clause strikes a balance between providing predictable coverage and protecting the right of insurers to select the precise risks they seek to insure.

Most incontestability clauses are limited by a provision stating that the contestability period must be completed within the lifetime of the insured. With this nuance the insurer is able to contest a claim for benefits after the contestability period has lapsed if the insured dies before the end of that period. This protects insurers from providing benefits to someone who was already so ill at the inception of the policy that he or she died less than two years later. It means that the insurer may contest the flow of insurance benefits to the insured's heirs.

Another common caveat to incontestability clauses limits the period of disability. Under this provision any disability that begins prior to the expiration of the contestability period will toll the period. In other words, if an insured becomes physically disabled before the end of the contestability period, the clock stops ticking and the insurer may challenge claims during the illness and beyond. Without such language, an insured could always avoid contestability by waiting until the contestability period has expired before filing a claim.

Finally, some incontestability clauses contain a FRAUD exception. Such a clause might read, "After two years from the date of issue of this policy, only fraudulent misstatements made

by the applicant may be used to void the policy or deny a claim that commences after the expiration of the two-year period." Generally, fraud is a false representation calculated to deceive another into acting against her or his legal interest. Statements that are inaccurate but made without the intent to deceive are not fraudulent.

The difference between fraud and simple misstatement can only be found in the facts of a particular case. In *Paul Revere Life Insurance Co. v. Haas,* 137 N.J. 190, 644 A.2d 1098 (1994), the Paul Revere Company brought an action against Gilbert K. Haas, when it discovered that Haas had made false statements in his insurance application. Haas had received a policy on March 5, 1987, and on December 1, 1990, started a claim for disability payments related to a progressive eye disease. The company sought to rescind the policy or to secure a DECLARATORY JUDGMENT from the court that the policy did not cover Haas's disease.

The New Jersey law on incontestability clauses gave insurers two options: one reserving contestability in case of fraud, the other reserving contestability if the insured became disabled within the contestability period (N.J. Stat. Ann. § 17B:26-5 [West]). The Paul Revere Company chose to bring action under the disability provision.

The facts indicated that Haas had made false statements on his policy application. He had declared that he had not had "any surgical operation, treatment, special diet, or any illness, ailment, abnormality, or injury . . . within the past five years." Investigations by the insurance company revealed that Haas had been diagnosed and treated for retinitis pigmentosa as much as four years prior to applying for the policy. According to the New Jersey Supreme Court, neither incontestability option mandated in section 17:B-26-5 of the New Jersey Statutes Annotated could be construed to allow coverage for disabilities that an insured knew existed but concealed on the policy application. The court held that Haas's policy continued in effect because the insurer had not proved its case under the disability provision, but that the incontestability clause did not prevent the insurer from contesting Haas's claims under the fraud provision.

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## INCORPORATE

*To formally create a corporation pursuant to the requirements prescribed by state statute; to confer a corporate franchise upon certain individuals.*

## INCORPORATION BY REFERENCE

*The method of making one document of any kind become a part of another separate document by alluding to the former in the latter and declaring that the former shall be taken and considered as a part of the latter the same as if it were completely set out therein.*

It is common drafting practice to incorporate by reference an existing writing into a PLEADING, contract, or other legal document in order to save space. The incorporating document, rather than copying the exact words of the existing document, describes it, and a photocopy is often attached to the incorporating document. This standard practice, however, encounters difficulty with the requirements prescribed by law for a will. If the will is a holograph—a document disposing of property that is written with one's own hand and not witnessed—the attachment might not be in the handwriting of the deceased and, therefore, invalid. If the will is formal, an attachment might violate the requirement that the testator (one who makes a will) or the witnesses subscribe (sign at the end of the will) the attachment. If subscription is not required, the incorporated document raises the question whether the testator has declared it to be a part of the will if it was not present at the time the will was signed.

The document that is incorporated is usually not treated as a part of the will itself but as an external source from which the meaning of the will can be determined. This maintains the distinction between actual incorporation, an integration achieved by extensive copying of a document into the pages that constitute the will, and incorporation by reference, which is a figurative rather than literal integration. Incorporation by reference is treated as if it were actually integrated.

Fear of fraudulent substitutions is probably the basis for the legal insistence upon compliance with certain conditions in order to incorporate a document into a will by reference. Certain requirements exist for incorporation by reference into a will. The document to be incorporated must exist at the time the will is executed. The will must manifest the intention of the testator to incorporate the provisions of the incorporated document. The incorporated document must be sufficiently described to permit its identification. Some courts emphasize that the incorporated document comply with the description. Some, but not all, statutes require that the incorporating document refer to the incorporated document as being in existence in addition to the requirement mentioned earlier that it actually be in existence.

Most states presently allow incorporation by reference into wills upon compliance with the foregoing conditions. In the states that permit holographic wills, most allow the incorporation by reference of nonholographic material, even if actual incorporation would otherwise invalidate the will because it is not entirely in the handwriting of the deceased.

## INCORPORATION DOCTRINE

*A constitutional doctrine whereby selected provisions of the* BILL OF RIGHTS *are made applicable to the states through the* DUE PROCESS CLAUSE *of the* FOURTEENTH AMENDMENT.

The doctrine of selective incorporation, or simply the incorporation doctrine, makes the first ten amendments to the Constitution—known as the Bill of Rights—binding on the states. Through incorporation, state governments largely are held to the same standards as the federal government with regard to many constitutional rights, including the FIRST AMENDMENT freedoms of speech, religion, and assembly, and the separation of church and state; the FOURTH AMENDMENT freedoms from unwarranted arrest and unreasonable SEARCHES AND SEIZURES; the FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION; and the SIXTH AMENDMENT right to a speedy, fair, and public trial. Some provisions of the Bill of Rights—including the requirement of indictment by a GRAND JURY (Sixth Amendment) and the right to a jury trial in civil cases (Seventh Amendment)—have not been applied to the states through the incorporation doctrine.

Until the early twentieth century, the Bill of Rights was interpreted as applying only to the federal government. In the 1833 case *Barron ex rel. Tiernon v. Mayor of Baltimore,* 32 U.S. (7 Pet.) 243, 8 L. Ed. 672, the Supreme Court expressly limited application of the Bill of Rights to the federal government. By the mid-nineteenth century, this view was being challenged. For example, Republicans who were opposed to southern state laws that made it a crime to speak and publish against SLAVERY alleged that such laws violated First Amendment rights regarding FREEDOM OF SPEECH and FREEDOM OF THE PRESS.

For a brief time following the ratification of the Fourteenth Amendment in 1868, it appeared that the Supreme Court might use the PRIVILEGES AND IMMUNITIES CLAUSE of the Fourteenth Amendment to apply the Bill of Rights to the states. However, in the SLAUGHTER-HOUSE CASES, 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1873), the first significant Supreme Court ruling on the Fourteenth Amendment, the Court handed down an extremely limiting interpretation of that clause. The Court held that the clause created a distinction between rights associated with state citizenship and rights associated with U.S., or federal, citizenship. It concluded that the Fourteenth Amendment prohibited states from passing laws abridging the rights of U.S. citizenship (which, it implied, were few in number) but had no authority over laws abridging the rights of state citizenship. The effect of this ruling was to put much state legislation beyond the review of the Supreme Court.

Instead of applying the Bill of Rights as a whole to the states, as it might have done through the Privileges and Immunities Clause, the Supreme Court has gradually applied selected elements of the first ten amendments to the states through the Due Process Clause of the Fourteenth Amendment. This process, known as selective incorporation, began in earnest in the 1920s. In GITLOW V. NEW YORK, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925), one of the earliest examples of the use of the incorporation doctrine, the Court held that the First Amendment protection of freedom of speech applied to the states through the Due Process Clause. By the late 1940s, many civil freedoms, including freedom of the press (NEAR V. MINNESOTA, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 [1931]), had been incorporated into the Fourteenth Amendment, as had many of the rights that applied to

defendants in criminal cases, including the right to representation by counsel in capital cases (**POWELL V. ALABAMA**, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 [1931]). In 1937, the Court decided that some of the privileges and immunities of the Bill of Rights were so fundamental that states were required to abide by them through the Due Process Clause (*Palko v. Connecticut,* 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288).

In 1947, the Court rejected an argument that the Fifth Amendment's right against **SELF-INCRIMINATION** applied to the states through the Fourteenth Amendment (*Adamson v. People of the State of California*, 332 U.S. 46, 67 S. Ct. 1672, 91 L. Ed. 2d 1903 [1947]). However, in one of the most famous dissents in history, Justice **HUGO L. BLACK** argued that the Fourteenth Amendment incorporated all aspects of the Bill of Rights and applied them to the states. Justice **FELIX FRANKFURTER**, who wrote a concurrence in *Adamson,* disagreed forcefully with Black, arguing that some rights guaranteed by the Fourteenth Amendment may overlap with the guarantees of the Bill of Rights, but are not based directly upon such rights. The Court was hesitant to apply the incorporation doctrine until 1962, when Frankfurter retired from the Court. Following his retirement, most provisions of the Bill of Rights were eventually incorporated to apply to the states.

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CROSS-REFERENCES

Due Process of Law.

## INCORPOREAL

*Lacking a physical or material nature but relating to or affecting a body.*

Under **COMMON LAW**, incorporeal property were rights that affected a tangible item, such as a chose in action (a right to enforce a debt).

*Incorporeal* is the opposite of corporeal, a description of the existence of a tangible item.

## INCREMENTAL

*Additional or increased growth, bulk, quantity, number, or value; enlarged.*

*Incremental cost* is additional or increased cost of an item or service apart from its actual cost. When applied to the price of gas, the incremental cost includes the actual cost of gas to the distributors plus the expenses incurred in its transportation as well as any taxes imposed upon it.

## INCRIMINATE

*To charge with a crime; to expose to an accusation or a charge of crime; to involve oneself or another in a criminal prosecution or the danger thereof; as in the rule that a witness is not bound to give testimony that would tend to incriminate him or her.*

## INCULPATE

*To accuse; to involve in blame or guilt.*

When an individual who has committed a crime imputes guilt upon another individual, he or she is thereby inculpating such individual.

## INCUMBENT

*An individual who is in current possession of a particular office and who is legally authorized to discharge the duties of that office.*

## INCUR

*To become subject to and liable for; to have liabilities imposed by act or operation of law.*

Expenses are incurred, for example, when the legal obligation to pay them arises. An individual incurs a liability when a money judgment is rendered against him or her by a court.

## INDEFEASIBLE

*That which cannot be defeated, revoked, or made void. This term is usually applied to an estate or right that cannot be defeated.*

## INDEFINITE TERM

*A prison sentence for a specifically designated length of time up to a certain prescribed maximum, such as one to ten years or twenty-five years to life.*

## INDEMNIFY

*To compensate for loss or damage; to provide security for financial reimbursement to an individual in case of a specified loss incurred by the person.*

Insurance companies indemnify their policyholders against damage caused by such things as fire, theft, and flooding, which are specified by

the terms of the contract between the company and the insured.

## INDEMNITY

*Recompense for loss, damage, or injuries; restitution or reimbursement.*

An *indemnity* contract arises when one individual takes on the obligation to pay for any loss or damage that has been or might be incurred by another individual. The *right to indemnity* and the *duty to indemnify* ordinarily stem from a contractual agreement, which generally protects against liability, loss, or damage.

CROSS-REFERENCES

Damages.

## INDENTURE

*An agreement declaring the benefits and obligations of two or more parties, often applicable in the context of* BANKRUPTCY *and bond trading.*

The term *indenture* primarily describes secured contracts and has several applications in U.S. law. At its simplest, an indenture is an agreement that declares benefits and obligations between two or more parties. In bankruptcy law, for example, it is a mortgage or deed of trust that constitutes a claim against a debtor. The most common usage of indenture appears in the bond market. Before a bond is issued, the issuer executes a legally binding indenture governing all of the bond's terms. Finally, the concept of indenture has an ignominious place in the history of U.S. labor. Indentured servants of the seventeenth and eighteenth centuries were commonly European workers who contracted to provide labor for a number of years and in return received passage to the American colonies as well as room and board.

As an investment product that is used to raise capital, a bond is simply a written document by which a government, corporation, or individual promises to pay a definite sum of money on a certain date. The issuer of a bond, in cooperation with an underwriter (i.e., a financial organization that sells the bond to the public), prepares in advance an indenture outlining the terms of the bond. The issuer and the underwriter negotiate provisions such as the interest rate, the maturity date, and any restrictions on the issuer's actions. The last detail is especially important to corporate bonds because corporations ACCRUE liability upon becoming bond issuers and therefore seek to have the fewest possible restrictions placed on their business behavior by the terms of the indenture. As a consequence, potential buyers of corporate bonds should know what the indenture specifies before buying them.

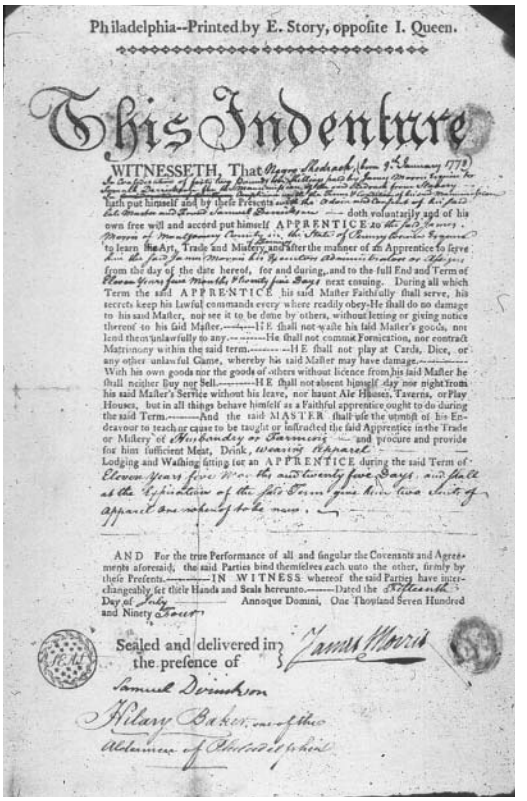
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This Indenture

WITNESSETH, That

hath put himself and by these Presents doth voluntarily and of his own free will and accord put himself APPRENTICE to the said

to learn the Art, Trade and Mistery, and after the manner of an Apprentice to serve from the day of the date hereof, for and during, and to the full End and Term of next ensuing. During all which Term the said APPRENTICE his said Master faithfully shall serve, his secrets keep his lawful commands every where readily obey—He shall do no damage to his said Master, nor see it to be done by others, without letting or giving notice thereof to his said Master.——HE shall not waste his said Master's goods, nor lend them unlawfully to any.——He shall not commit Fornication, nor contract Matrimony within the said term.——HE shall not play at Cards, Dice, or any other unlawful Game, whereby his said Master may have damage.—— With his own goods nor the goods of others without licence from his said Master he shall neither buy nor Sell.——HE shall not absent himself day nor night from his said Master's Service without his leave, nor haunt Ale Houses, Taverns, or Play Houses, but in all things behave himself as a Faithful apprentice ought to do during the said Term.——And the said MASTER shall use the utmost of his Endeavour to teach or cause to be taught or instructed the said Apprentice in the Trade or Mistery of and procure and provide for him sufficient Meat, Drink, Lodging and Washing fitting for an APPRENTICE during the said Term of

AND For the true Performance of all and singular the Covenants and Agreements aforesaid, the said Parties bind themselves each unto the other, firmly by these Presents.——IN WITNESS whereof the said Parties have interchangably set their Hands and Seals hereunto.——Dated the Day of Annoque Domini, One Thousand Seven Hundred and Ninety

Sealed and delivered in the presence of

Samuel Dennison

Hilary Baker one of the Aldermen of Philadelphia

*A 1794 indenture contract from Philadelphia for the apprenticeship of a 16-year-old freed male slave.*

ARCHIVE PHOTOS, INC.

Federal law governs these indentures. For 50 years, the Trust Indenture Act of 1939 (TIA) (15 U.S.C.A. § 77aaa) was the relevant law. Significant changes in financial markets prompted Congress to amend the TIA through the Securities Act Amendments of 1990 (Pub. L. No. 101-550, 1990; 104 Stat. 2713), which included the Trust Indenture Reform Act (Pub. L. No. 101-550, 104 Stat. 2713). The reforms simplified the writing of indentures, recognized the increasing internationalization of corporations by creating opportunities for foreign institutions to serve as trustees, and revised standards for conflicts of interest. The reforms also broadened the authority of the SECURITIES AND EXCHANGE COMMISSION.

In early American history, indenture was a form of labor contract. Beginning during the colonial period, employers in the largely agricultural economy faced a labor shortage. They addressed it in two ways: by buying slaves and by

hiring indentured servants. The former were Africans who were brought to the colonies against their will to serve for life; the latter were generally Europeans from England and Germany who had entered multiyear employment contracts. From the late sixteenth century to the late eighteenth century, approximately half of the 350,000 European immigrants to the colonies were indentured servants. During the seventeenth century, these servants outnumbered slaves.

An indentured servant agreed to a four- to seven-year contract, and in return received passage from Europe and guarantees of work, food, and lodging. Colonial courts enforced the contracts of indentured servants, which were often harsh. Employers were seen as masters, and the servants had not only to work for them but also to obey their orders in all matters. For some, indentured servitude was not a VOLUNTARY ACT. Impoverished women and children were pressed into servitude, as were convicts. Nevertheless, this servitude was not equivalent to SLAVERY. Slaves remained slaves for life, whereas indentured servants were released at the end of their contracts. Moreover, as parties to a contract, indentured servants had rights that slaves never enjoyed. The practice of indentured servitude persisted into the early nineteenth century.

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## INDEPENDENCE

One of the essential attributes of a state under INTERNATIONAL LAW is external sovereignty—that is, the right to exercise freely the full range of power a state possesses under international law. Recognition of a state as independent necessarily implies that the recognizing states have no legal authority over the independent state. The status of a fully independent state should be contrasted with that of dependent or vassal states, where a superior state has the legal authority to impose its will over the subject, or inferior, state.

## INDEPENDENT AUDIT

*A systematic review of the accuracy and truthfulness of the accounting records of a particular individual, business, or organization by a person or firm skilled in the necessary accounting methods and not related in any way to the person or firm undergoing the audit.*

## INDEPENDENT CONTRACTOR

*A person who contracts to do work for another person according to his or her own processes and methods; the contractor is not subject to another's control except for what is specified in a mutually binding agreement for a specific job.*

An independent contractor contracts with an employer to do a particular piece of work. This working relationship is a flexible one that provides benefits to both the worker and the employer. However, there are drawbacks to the relationship as well. The decision to hire or work as an independent contractor should be weighed carefully. Properly distinguishing between employees and independent contractors has important consequences, and the failure to maintain the distinction can be costly.

### Taxes

The status of independent contractor carries with it many tax ramifications. For example, an employee shares the costs of SOCIAL SECURITY and MEDICARE taxes with his or her employer; whereas an independent contractor is responsible for the entire amounts. Yet independent contractors generally qualify for more business deductions on their federal income taxes than do employees. Also, independent contractors must pay estimated taxes each quarter, whereas employees generally have taxes withheld from their paychecks by their employer.

One important disadvantage of working as an independent contractor is that standard employment benefits—such as health, life, dental, and disability insurance; funded retirement plans; paid vacation time; and paid maternity or PATERNITY leave—are not available. Independent contractors may fund their own benefits, but not on a tax-free basis—whereas many benefits provided by employers to employees are, by law, tax free.

### Labor Relations

Congress and the states have enacted numerous laws geared toward protecting employees. The National Labor Relations Act

(29 U.S.C.A. § 152(3)) protects employees and union members from unfair bargaining practices; Title VII of the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000 et seq.) protects employees from discrimination on the basis of race, sex, religion, and national origin; the Age Discrimination in Employment Act (20 U.S.C.A. § 623) protects employees from age discrimination; the FAIR LABOR STANDARDS ACT (29 U.S.C.A. § 203) establishes MINIMUM WAGE and overtime standards; the EMPLOYEE RETIREMENT INCOME SECURITY ACT of 1974 (29 U.S.C.A. § 1002) ensures the security of employee retirement funds; and the OCCUPATIONAL SAFETY AND HEALTH ACT (29 U.S.C.A. § 652) protects employees from environmental work hazards. Most states also have unemployment and WORKERS' COMPENSATION laws, which obligate employers to pay, directly or indirectly, for medical treatment or lost wages, or both, for employees who are injured while at work or who lose their job. None of these laws protect independent contractors. And because compliance often comes at great expense, employers can significantly reduce their liability and increase their profit margin by hiring independent contractors rather than employees.

### Economics and Social Policy

Although not protected by law to the extent of an employee, an independent contractor has far greater control over elements such as work hours and work methods. Unlike most employees, an independent contractor may opt to work at night or on weekends, leaving weekdays free. An independent contractor may choose to wear blue jeans or a business suit, take one week of vacation or 30 weeks, or interrupt work to attend a child's school play or to go to the beach. Moreover, although the other contracting party retains control over the finished work product, an independent contractor has exclusive control over the actual work process. Decisions such as whether to work for one person or several, whether to work a little or a lot, whether to accept or reject an undesirable work project, and how much money to charge are made by the independent contractor.

The other party, in turn, enjoys mainly profit-related advantages by hiring an independent contractor instead of an employee. For one thing, an employer need not provide an independent contractor with vacation time, PENSION, insurance, or other costly benefits. Management costs that ordinarily go toward training and overseeing large numbers of employees decrease when independent contractors do the work. Some say that because independent contractors benefit directly from their hard work, the quality of their work may be higher than it is for full-time employees who might be less motivated. And by hiring independent contractors, an employer enjoys the greater ease and flexibility to expand and contract the workforce as demand rises and falls.

### Tort Liability

The common-law doctrine of RESPONDEAT SUPERIOR holds an employer liable for the negligent acts of its employee. Generally, under COMMON LAW, the hiring party is not responsible for the NEGLIGENCE of an independent contractor. The Restatement (Second) of Torts identifies a few exceptions to this rule. The hiring party may be liable when, owing to its failure to exercise reasonable care to retain a competent and careful contractor, a third party is physically harmed. Also, when an independent contractor acts pursuant to orders or directions negligently given by the hiring party, the latter may be held liable. Notwithstanding the exceptions, the hiring party's risk of liability is greatly reduced by hiring independent contractors rather than employees.

### Defining the Independent Contractor

No consistent, uniform definition distinguishes an employee from an independent contractor. Some statutes contain their own definitions. The U.S. Supreme Court has held that when a statute contains the term *employee* but fails to define it adequately, there is a presumption that traditional agency-law criteria for identifying master-servant relationships apply (*National Mutual Insurance Co. v. Darden,* 503 U.S. 318, 112 S. Ct. 1344, 111 L. Ed. 2d 581 [1992]).

One comprehensive test that takes into account agency-law criteria and numerous other factors courts have created to define independent contractor status was developed by the INTERNAL REVENUE SERVICE (IRS). Known collectively as the 20-factor test, the enumerated criteria generally fall within three categories: control (whether the employer or the worker has control over the work performed), organization (whether the worker is integrated into the business), and economic realities (whether the

worker directly benefits from his or her labor). The 20 factors serve only as a guideline. Each factor's degree of importance varies depending on the occupation and the facts involved in a particular case.

**Twenty-factor Test**

1. A worker who is required to comply with *instructions* about when, where, and how he or she must work is usually an employee.
2. If an employer *trains* a worker—requires an experienced employee to work with the worker, educates the worker through correspondence, requires the worker to attend meetings, or uses other methods—this normally indicates that the worker is an employee.
3. If a worker's services are *integrated* into business operations, this tends to show that the worker is subject to direction and control and is thus an employee. This is the case particularly when a business's success or continuation depends to a large extent on the performance of certain services.
4. If a worker's services must be *rendered personally,* there is a presumption that the employer is interested in the methods by which the services are accomplished as well as in the result, making the worker an employee.
5. If an employer *hires, supervises, and pays assistants* for a worker, this indicates control over the worker on the job, making the worker an employee.
6. A *continuing relationship* between a worker and an employer, even at irregular intervals, tends to show an employer-employee relationship.
7. An employer who sets *specific hours of work* for a worker exhibits control over the worker, indicating that the worker is an employee.
8. If a worker is working *substantially full-time* for an employer, the worker is presumably not free to do work for other employers and is therefore an employee.
9. Work performed on an *employer's premises* suggests the employer's control over a worker, making the worker an employee. This is especially true when work could be done elsewhere. However, the mere fact that work is done off the employer's premises does not necessarily make the worker an independent contractor.
10. If a worker is required to perform services in an *order or sequence* set by an employer, the employer has control over the worker that demonstrates an employer-employee relationship.
11. A worker who is required to submit regular *oral or written reports* to an employer is likely an employee.
12. *Payment by the hour, week, or month* tends to indicate that a worker is an employee; payment made by the job or on a straight commission points to an independent contractor.
13. A worker is ordinarily an employee if an employer pays for the worker's *business or travel expenses.*
14. An employer who furnishes a worker with significant *tools, materials, or other equipment* tends to show that the worker is an employee.
15. A worker who *significantly invests* in facilities used to perform services and not typically maintained by employees (such as office space) is generally an independent contractor.
16. A worker who can *realize a profit or loss* resulting from his or her services is generally an independent contractor.
17. A worker who performs *for more than one firm at a time* is generally an independent contractor.
18. If a worker makes his or her *services available to the general public* on a regular and consistent basis, that worker is generally an independent contractor.
19. An employer's *right to discharge* a worker tends to show that the worker is an employee. An employee must obey an employer's instructions in order to stay employed; an independent contractor can be fired only if the work result fails to meet the agreed-upon specifications.
20. If a worker has the *right to terminate* his or her relationship with an employer at any time without incurring liability, such as breach of contract, that worker is likely an employee.

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## INDEPENDENT COUNSEL

*An attorney appointed by the federal government to investigate and prosecute federal government officials.*

Before 1988, independent counsel were referred to as special prosecutors. In 1988, Congress amended the ETHICS IN GOVERNMENT ACT OF 1978 (Ethics Act) (92 Stat. 1824 [2 U.S.C.A. §§ 701 et seq.]) to change the title to *independent counsel.* This change was made because lawmakers considered the term *special prosecutor* to be too inflammatory.

Independent counsel are attorneys who investigate and prosecute criminal activity in government. They hold people who make and implement laws accountable for their own criminal activity.

The need for independent counsel arises from the conflict of interest posed by having the established criminal justice system investigate government misconduct. Prosecutors and law enforcement agencies work under the authority of government leaders. When government leaders are accused of wrongdoing, these entities face conflicting duties: the duty to uphold the laws on the one hand, versus the duty of loyalty to superiors on the other. Independent counsels do not answer to the government officials they are assigned to investigate, and therefore they avoid much of this conflict of interest. One potential element for bias remains: the political affiliations of the accused government official and the independent counsel. The people rely on independent counsel's duty as a member of the bar to uphold the laws and the U.S. Constitution, to overcome any similarities or differences in political beliefs. Independent counsel who appear to be motivated by political or other bias may be dismissed.

President ULYSSES S. GRANT was the first to appoint independent counsel to investigate high-level federal government officials. In 1875 Grant's personal secretary, Orville E. Babcock, was indicted in federal district court on charges of accepting bribes. Babcock had allegedly arranged favorable tax treatment for a group of moonshiners who were known as the Whiskey Ring. Grant removed the federal district attorney and replaced him with an independent counsel, who finished the investigation and the trial.

In the early 1920s, another BRIBERY scandal, known as TEAPOT DOME, led to the appointment of an independent counsel. President WARREN G. HARDING appointed independent counsel to investigate the sale of oil-rich federal lands. The independent counsel's investigation led to the prosecution of Harding's secretary of the interior, Albert B. Fall.

In its later days, President HARRY S. TRUMAN's administration labored under allegations of corruption. Specifically, officials in the INTERNAL REVENUE SERVICE and the Tax Division of the JUSTICE DEPARTMENT were accused of giving favorable treatment to tax evaders. Attorney General J. HOWARD MCGRATH appointed a special assistant attorney to investigate. When the special prosecutor sought to investigate McGrath, McGrath fired him. Truman then fired McGrath and refused to pursue the matter.

The WATERGATE scandals of the 1970s gave Congress the incentive to create the first statutory framework for investigating government officials. In 1973, newspaper reports concerning a BURGLARY at the Democratic National Committee headquarters in the Watergate Hotel in Washington, D.C., implicated officials in the administration of President RICHARD M. NIXON. Attorney General ELLIOT L. RICHARDSON appointed ARCHIBALD COX, a Harvard law professor, as independent counsel to investigate the situation.

Cox endeavored to uncover the facts surrounding Watergate. As it became apparent that White House officials were involved in the episode, Cox was forced to investigate the president himself. When Cox asked Nixon for White House tape recordings, Nixon sought to have

Cox fired. One weekend in October 1973, in a turn of events later known as the Saturday Night Massacre, Richardson and Deputy Attorney General William D. Ruckelshaus resigned rather than carry out Nixon's order to fire Cox. That same night, Solicitor General ROBERT H. BORK, who had just become acting head of the Department of Justice, carried out Nixon's request and fired Cox.

Nixon then appointed LEON JAWORSKI to be the second independent counsel to investigate Watergate. Like Cox, Jaworski sought Nixon's White House tapes. After a court battle that reached the U.S. Supreme Court in UNITED STATES V. NIXON, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), Jaworski successfully subpoenaed the tapes. Nixon resigned the office of president shortly thereafter.

After the Saturday Night Massacre and the Watergate matter, it became obvious that independent counsel were necessary to check government misconduct. In 1978, Congress passed the Ethics Act to establish on the federal level a statutory scheme for policing the EXECUTIVE BRANCH.

### Ethics in Government Act

Under the Ethics Act, the process of appointing independent counsel began when the attorney general received information on criminal activity. The attorney general could investigate all violations of CRIMINAL LAW other than minor misdemeanors and minor violations. This permission included special ethics laws that applied to Executive Branch officials, such as laws that make it illegal for an Executive Branch official to receive money from a person if the official has arranged for that person to be employed by the federal government.

There had to be sufficient credible information of criminal activity to constitute grounds for an investigation, and the information had to pertain to the president, the vice president, a member of the president's cabinet, a high-level executive officer, a high-level Justice Department official, the director or deputy director of the CENTRAL INTELLIGENCE AGENCY, the commissioner of the Internal Revenue Service, any person with a personal or financial relationship with the attorney general or any other officer in the Department of Justice, or the president's campaign chair or treasurer.

Once the attorney general received credible inculpatory information, the attorney general had to decide within 30 days whether to investigate the matter. If the attorney general determined that the matter warranted an investigation, he had to begin an investigation. The attorney general could not conduct this initial investigation for more than 150 days. At the close of the investigation, the attorney general submitted a report to the Independent Counsel Division of the U.S. Court of Appeals for the District of Columbia Circuit. The members of this three-judge panel were appointed by the chief justice of the U.S. Supreme Court.

In the report, the attorney general requested or declined the appointment of independent counsel on the matter. A court could not review this decision. If the attorney general requested independent counsel, the panel appointed one and defined the scope of the investigation. Generally, the panel limited the counsel's investigation to certain persons or certain issues.

The appointment of independent counsel was unusual because the Department of Justice already is required to police the Executive Branch. In theory, the attorney general is an independent official. In practice, however, he usually is a political ally of the president. Like other Executive Branch officials, the attorney general is appointed by the president and reports to the president. Because the attorney general decided whether independent counsel should be appointed by the panel, an investigation could be influenced by the Executive Branch. An attorney general might have been reluctant to recommend the prosecution of a political ally. However, if enough sources exerted sufficient pressure, the attorney general could be forced to avoid the appearance of favoritism by requesting the appointment of independent counsel.

The appointment of independent counsel was often politically charged, in large part because independent counsel investigated Executive Branch officials and their political operatives. When politicians are investigated, an invariable response is that the investigation is politically motivated. Nevertheless, most politicians considered independent counsel to be crucial to conveying at least the appearance of propriety in the Executive Branch of government. The danger of independent counsel is that they may be called for on a regular basis by politicians who are opposed to the president, for the sole purpose of demoralizing the Executive Branch and gaining an electoral advantage.

Once appointed, independent counsel could proceed as any other prosecutor. Counsel filed criminal charges in the U.S. District Court for the District of Columbia and had the power to subpoena witnesses, and to grant IMMUNITY to witnesses.

Under the Ethics Act, only the attorney general could fire independent counsel. Independent counsel could be dismissed only for good cause or because a physical or mental condition prevents counsel from performing the position's duties. Dismissed independent counsel had the right to appeal to the U.S. District Court for the District of Columbia.

The first government officials investigated under the new Ethics Act were two officials in the administration of President JIMMY CARTER. After investigating allegations of drug use and conflict of interest, the independent counsel declined to file criminal charges.

In May 1986 an official in the administration of President RONALD REAGAN mounted a challenge to the Ethics Act. Theodore B. Olson, a former assistant attorney general in the administration (and now solicitor general), argued that the Executive Branch had the power to conduct all criminal investigations, and that it was unconstitutional for Congress to give the judiciary the power to appoint independent prosecutors. The U.S. Supreme Court disagreed, ruling that the Ethics Act was constitutional because the attorney general, an officer within the Executive Branch, had the power to remove independent counsel and therefore retained ultimate control (*Morrison v. Olson,* 487 U.S. 654, 108 S. Ct. 2597, 101 L. Ed. 2d 569 [1988]).

The list of federal government officials investigated or prosecuted by independent counsel under the Ethics Act is long and ever growing. In December 1987, Michael Deaver, former aide to President Reagan, was convicted of perjury after prosecution by independent counsel. In February 1988, Lyn Nofziger, another presidential aide, was convicted of ethical violations. Nofziger's conviction was later overturned on appeal. President Reagan's attorney general EDWIN MEESE III resigned in July 1988 after an investigation by independent counsel James McKay. Although Meese was not prosecuted, McKay stated in his report to the panel that he believed that Meese had broken the law by helping a company in which Meese owned stock, Wedtech Corporation, to solicit contracts with the U.S. military.

In December 1986, before he resigned, Meese appointed Lawrence E. Walsh as independent counsel to investigate and prosecute wrongdoing in the burgeoning IRAN-CONTRA SCANDAL, which involved trading arms to Iranians and diverting the proceeds to fund a covert war in Nicaragua. Walsh was able to obtain several convictions of high-level Reagan administration officials, but some of those were overturned on appeal.

The administration of President BILL CLINTON was heavily investigated by independent counsel. In 1994, Donald C. Smaltz was appointed as independent counsel to investigate Clinton's secretary of agriculture Mike Espy. The independent counsel was directed to investigate whether Espy had accepted gifts from organizations and individuals with business pending before the AGRICULTURE DEPARTMENT and whether Espy had committed any crimes connected to, or arising out of, the investigation, such as OBSTRUCTION OF JUSTICE and false testimony or statements.

In October 1994, just a few months after Smaltz began work, Espy resigned his office. Nevertheless, the investigation of Espy and several associates continued. Over the next four years, Smaltz spent more than $17 million to bring 30 counts of corruption against Espy. At Espy's 1998 trial, Smaltz produced 70 prosecution witnesses, yet a jury took just nine hours to acquit Espy on all 30 counts.

In January 1994, Robert Fiske Jr. was appointed as independent counsel to investigate the death of White House counsel Vincent Foster and alleged financial misconduct by Clinton and the first lady, HILLARY RODHAM CLINTON. Because the Ethics Act had lapsed, Attorney General JANET RENO herself chose Fiske. When Congress reauthorized the Ethics Act, Reno submitted the matter to the panel, which appointed a new independent counsel, KENNETH W. STARR.

Starr, a former U.S. solicitor general and U.S. district court judge, worked on the Clinton investigation until 1999. He obtained convictions against a number of Clinton associates, but it was not until 1998 that he ensnared President Clinton. Allegations of a sexual affair with a White House intern shifted Starr's work. In January 1998, Clinton was deposed for the SEXUAL HARASSMENT lawsuit filed by Paula Jones. At the deposition, Clinton denied that there had been a sexual relationship with intern Monica Lewinsky. In August 1998, he changed his story when

*Independent Counsel Ken Starr's report to the House of Representatives in 1998 led to the impeachment of President Clinton.*
AP/WIDE WORLD PHOTOS

called before Starr's GRAND JURY, but he still would not give details. In the fall, Starr sent his report to the House of Representatives and testified before a House panel. Starr accused the president of having had a sexual affair with the intern. The report, which contained graphic sexual descriptions from Lewinsky, claimed that Clinton had committed perjury and obstruction of justice, and that he had abused his PRESIDENTIAL POWER in an effort to keep the affair from coming to light. This report led to the House passing ARTICLES OF IMPEACHMENT in December 1998. Clinton was acquitted of the charges by the Senate in February 1999.

By the end of Starr's investigation, very few people in Congress or the White House had positive feelings about the Ethics in Government Act. The 1980s and 1990s had seen independent counsel spend years and millions of dollars on seemingly open-ended investigations of official misconduct, usually with little to show for it. Even Starr agreed that the law should expire, testifying to that effect before Congress in April 1999. With no congressional support for its continuation, the act was allowed to expire on June 30, 1999. Although bills have been introduced seeking to curtail the powers of future independent counsel while requiring greater accountability, Congress has not acted.

### Congress and Independent Counsel

When Congress is in session, independent counsel do not investigate or prosecute the criminal activities of members of Congress. Instead, Congress polices its members through ethics committees and can expel a member with a two-thirds vote of the member's house (U.S. Const. art. I, § 5, cl. 2). Members of Congress cannot be arrested while Congress is in session, except for TREASON, felony, or breach of the peace (§ 6, cl. 1). When Congress is not in session, members of Congress are not exempt, and they may be prosecuted in the jurisdiction where an alleged offense occurred.

Congress may also investigate official wrongdoing in the Executive Branch. When Congress and independent counsel are investigating the same persons or events, the matter can become a political tug-of-war, and one investigation can run afoul of the other. For example, if Congress grants immunity to a witness who is under investigation by independent counsel, it becomes difficult for independent counsel to prosecute the witness.

### State or Local Independent Counsel

Independent counsel also may be appointed at the state or local level. In Alaska, for example, executive branch officials may be investigated by independent counsel who is appointed by a special personnel board (Alaska Stat. § 39.52.310 [1995]).

In its broadest sense, the term *independent counsel* can describe any attorney who is appointed by one party to represent, prosecute, or bring suit against someone who is connected with that party. For example, in Alaska, a municipal school board is represented by a municipal attorney. If the municipal attorney has a conflict of interest in a particular matter, the school board may appoint independent counsel for that particular matter (§ 29.20.370). Thus, if the municipal attorney owns stock in a construction company that is hired by the school board, the school board might seek a different attorney to handle legal issues associated with that company, in order to avoid the appearance of collusion between government and private business. The new attorney would be called an independent counsel, to describe his or her independence in the matter.

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## INDEPENDENT PARTIES

Although the United States has a firmly established two-party system, independent parties play an important role in U.S. politics. Democrats and Republicans win the vast majority of federal, state, and local elections, but independent candidates often reflect popular attitudes and concerns. Most independent parties—also known as third parties—begin in response to a specific issue, candidate, or political philosophy.

The current two-party system of Democrats and Republicans evolved during the mid–nineteenth century. Before that, the Democrats squared off against the Whigs, led by HENRY CLAY and DANIEL WEBSTER. The WHIG PARTY was founded around 1834 to oppose the populist policies of Democratic president ANDREW JACKSON. Its members objected to Jackson's views on banking and the designation of federal funds, among other things.

Although Whig presidential candidates were successful in 1840 (WILLIAM HENRY HARRISON) and 1848 (ZACHARY TAYLOR), the party survived for less than 40 years. In the 1850s, the Republicans entered the political scene as independents. After Republican Abraham Lincoln's victory in the 1860 U.S. presidential race, the REPUBLICAN PARTY replaced the Whig party as the main party opposing the Democrats. Many northern Whigs joined the Republicans, whereas southern Whigs became aligned with the Democrats.

The platforms and purposes of independent parties, both past and present, vary tremendously. Some independent parties, such as the Socialist Party, the Communist Party, and the LIBERTARIAN PARTY, were formed to promote their political world views rather than a single issue or a charismatic leader. The Socialist Party, founded in 1901, has been relatively successful and long-lasting. Its heyday was around 1912, when its candidate EUGENE V. DEBS received about six percent of the popular vote in the presidential election. That same year, more than 1,000 Socialists held elected positions throughout the United States.

Other independent parties were founded by dissident progressives from one or both of the major parties. In 1912, progressives in the Republican Party broke off and formed the PROGRESSIVE PARTY, also known as the Bull Moose Party, naming former U.S. president THEODORE ROOSEVELT as its presidential candidate. Roosevelt lost to Democratic nominee WOODROW WILSON in the general election.

In 1924, another progressive party, called the League for Progressive Political Action, was launched. This party backed Senator ROBERT M. LA FOLLETTE, of Wisconsin, who received 16 percent of the popular vote while losing to Republican incumbent CALVIN COOLIDGE.

In 1948, progressives in the DEMOCRATIC PARTY formed still another Progressive Party. It supported Henry A. Wallace in an unsuccessful bid to unseat incumbent Democratic president HARRY S. TRUMAN.

Other offshoots of the two major parties include the Locofocos, or Equal Rights Party, and the Mugwumps. The Locofocos emerged from the Democratic Party in the early nineteenth century. They supported stricter bank regulation and ANTITRUST LAWS. The Mugwumps broke from the Republican Party in the 1884 presidential campaign and supported the Democratic nominee GROVER CLEVELAND. Their name was derived from the Algonquian word for *big chief*. The Mugwumps' defection contributed to the Democrats' victory.

Some independent candidates transcend their party affiliation. Billionaire H. Ross Perot caught the public's imagination during the 1992 presidential election, which was won by Democrat BILL CLINTON. Of the 19 million U.S. citizens who voted for Perot, few, if any, cast their ballot in support of his independent party. People voted for Perot, the person, as an alternative to Clinton and the Republican incumbent GEORGE H.W. BUSH. Perot ran again as an independent in 1996.

An independent candidate and a specific issue are often inextricably linked. This was the case in 1968, with Alabama governor GEORGE WALLACE and his American Independent Party. Wallace was a vocal opponent of CIVIL RIGHTS. His position on SEGREGATION and STATES' RIGHTS and his bold personality were the sum total of the party.

Other important social issues have spawned independent parties. The PROHIBITION PARTY was formed in 1869 by temperance activists who wanted to ban the sale and consumption of alcohol. Before the Civil War, the Liberty Party was created by abolitionists to outlaw SLAVERY. Similarly, the Free-Soil Party—which later became part of the Republican Party—was started in 1848 to prevent the extension of slavery into new U.S. territories and states.

On the other end of the ideological spectrum were the Dixiecrats. Led by STROM THURMOND, these were a group of southern Democrats who were opposed to President Truman's civil rights policies. The Dixiecrats splintered from the main party in 1948.

Bigotry was the driving force behind the Know-Nothing Party—also called the American Party—formed in 1849 to pursue discrimination against immigrants and Roman Catholics. The name referred to the secrecy surrounding the group: Members were instructed to say, "I don't know," if asked about the party.

The effect of an independent party on a presidential race varies. In 1912, independent candidate Theodore Roosevelt, of the Bull Moose party, won more votes than Republican nominee WILLIAM HOWARD TAFT, and in effect delivered the election to Democratic challenger Woodrow Wilson. In other presidential elections, independents made barely a ripple. For example, in 1872 the Prohibition party candidate received a mere 5,600 votes.

In the remarkable presidential election of 2000, independent candidates played prominent and controversial roles. On the political right, author and media commentator PATRICK BUCHANAN ran on the REFORM PARTY ticket, espousing a mixture of social conservatism, labor support, and international isolationism. On the left, progressive activist and consumer advocate RALPH NADER received the GREEN PARTY nomination. Declaring the two main parties to be almost identical, Nader appealed to liberals and youth with his idealistic speeches on corporate influence and the erosion of democracy.

Although neither third party candidate was invited to the official presidential debates between Democrat AL GORE and Republican GEORGE W. BUSH, no one foresaw their ultimate impact upon the election. After the bitter deadlock in Florida between Gore and Bush produced ballot disputes, recounts, and lawsuits, the totals in that critical state revealed that Nader had taken enough votes there and elsewhere to tip the decision to Bush. Furthermore, Buchanan also scored heavily in a Gore stronghold, leading the conservative candidate to explain that the votes were probably due to poorly designed ballots.

In terms of sheer votes, both Nader and Buchanan fared poorly. Nader captured only three percent of the vote, and Buchanan less than one percent. As a result, neither of their parties qualified for federal matching funds for the 2004 elections, a fate surely likely to hamper their effectiveness at a time when money is of major significance in running political campaigns.

Nader in particular earned the enmity of many Democrats who viewed him as a spoiler. Even his former allies took to the pages of *The Nation* and other liberal publications to denounce him for self-aggrandizingly undermining Gore's chances. Nader was unrepentant. In his 2002 book, *Crashing the Party: How to Tell the Truth and Still Run for President*, Nader defended his candidacy as an intellectually and morally superior choice to what he deemed the corruption of the Democrats and Republicans.

If the contemporary appeal of independent parties has proven underwhelming, their ability to influence close races is one argument for their significance. This impact is felt even more sharply in an age of vast voter apathy. For all of the hubbub that was generated by the 2000 election controversy, only 51 percent of voters bothered to vote that year. Independent parties may find that their ability to control slight percentage points in elections translates into broader political power to shape debate and even to nudge the mainstream parties toward their positions.

Some citizens are reluctant to vote for an independent candidate, believing that such a gesture is futile. Indeed, the odds of winning either the popular or electoral vote are slim. Still, the political dialogue generated by independent candidates is a meaningful contribution to the democratic process. Even when independent candidates lose the election, the public is treated

to ideas and perspectives that are seldom broached by the mainstream parties.

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CROSS-REFERENCES

Election Campaign Financing.

## INDETERMINATE

*That which is uncertain or not particularly designated.*

## INDEX

*A book containing references, alphabetically arranged, to the contents of a series or collection of documents or volumes; or a section (normally at the end) of a single volume or set of volumes containing such references to its contents.*

*Statistical indexes are also used to track or measure changes in the economy (for example, the Consumer Price Index) and movement in stock markets (for example, Standard & Poor's Index). Such indexes are usually keyed to a base year, month, or other period of comparison.*

*In mortgage financing, the term is used to determine adjustable-rate mortgage (ARM) interest rates after the discount period ends. Common indexes for ARMs are one-year Treasury* SECURITIES *and the national average cost of funds to savings and loan associations.*

## INDEX TO LEGAL PERIODICALS

*The set of volumes that lists what has appeared in print from 1926 to the present in the major law reviews and law-oriented magazines in various countries—usually organized according to author, title, and subject, and containing a table of cases.*

The *Index to Legal Periodicals,* published by the H. W. Wilson Company of New York, aids individuals who are conducting legal research by enabling them to search the contents of past and currently published periodicals, thereby providing access to secondary source materials. The index is bound every three years, with annual supplements and ADVANCE SHEETS for every month except September.

The *Index to Legal Periodicals* is now available in an on-line form through the Online Computer Library Center, Inc., based in Dublin, Ohio. The database contains records of articles from more than 900 journals and more than 1,400 monographs; the total number of records exceeds 500,000. The earliest articles date back to 1981.

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## INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act (ICWA), passed by Congress in 1978, intended to limit the historical practice of removing Native American children from their tribe and family and placing them in a non-Indian family or institution (25 U.S.C.A. §§ 1901–1963). The stated purpose of the act is to "[p]rotect the best interests of Indian children and to promote the stability and security of Indian tribes." The act seeks to achieve these goals through three principal methods: by establishing minimum federal standards for when Indian children can be removed from their family; by placing children who are removed in a foster or adoptive home that reflects the unique values of Indian culture; and by providing assistance to family services programs operated by Indian tribes.

The impetus behind the passage of the ICWA was a widespread recognition of the failure of the federal government's historical policy of removing Indian children from their family and tribe and attempting to assimilate them into white culture by placing them in a white family or institution. Since the late 1800s, a large percentage of Indian children had been taken from their home and placed in a boarding school off their tribal reservation in order to teach them white culture and practices. In many cases government authorities removed Indian children from their family because of vague allegations of neglect, when in fact the children's treatment reflected cultural differences in child rearing practices, and not neglect or abuse. In addition, the practice of removing Indian children from their tribe placed the very existence of the tribes in jeopardy.

The ICWA was written with the belief that it was in the best interests of Indian children for them to remain with their tribe and maintain their Indian heritage. To foster this goal, the ICWA enacts minimal federal standards for when Indian children can be removed from their family and seeks to ensure that children who are removed are placed in a foster or adoptive home that reflects the unique values of Indian culture. Examples of these standards include giving custodial preference to a child's extended family or tribal members, requiring remedial programs to prevent the breakup of Indian families, and requiring proof "beyond a reasonable doubt" that continued custody of a child will result in serious emotional or physical harm to the child.

To prevent a resumption of the practice of removing Indian children from their home, Congress, in the ICWA, gave tribal courts exclusive jurisdiction over the ADOPTION and custody of Indian children who reside or are domiciled within their tribe's reservation, unless some federal law provides to the contrary (*domiciled* refers to a permanent residence while *residing* may be in a temporary residence). One such contrary law is Public Law 280 (28 U.S.C.A. § 1360). This law made certain tribes in Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin subject to state jurisdiction. ICWA allows these tribes to reassume jurisdiction over CHILD CUSTODY proceedings by petitioning the secretary of the interior.

Tribes also have exclusive jurisdiction over such proceedings when they involve an Indian child who is a ward of the tribal court, regardless of where the child resides. Custody proceedings covered by the act include foster care placement, the termination of parental rights, and preadoptive and adoptive placement; the act does not govern custody proceedings in DIVORCE settlements. The ICWA applies both to children who are tribal members and to children who are eligible for tribal membership; eligibility for tribal membership is determined by individual tribes.

In cases involving Indian children who neither reside nor are domiciled within a tribal reservation, tribal courts and state courts possess concurrent jurisdiction. This question of jurisdiction has resulted in several important judicial interpretations of the ICWA. One significant interpretation was the 1989 U.S. Supreme Court decision *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29, which declared that because Congress had clearly enacted the law to protect Native American families and tribes, tribal jurisdiction preempted both state authority and the wishes of the parents of the children at issue. The case involved twins born off the reservation to unmarried parents, who voluntarily consented to having the children adopted by a non-Indian family. The Supreme Court ruled that children born to unmarried parents are considered to share the domicile of the mother, and since the mother in this case was domiciled on the reservation, the tribal court had jurisdiction over the placement of the children, even if it opposed the parents' wishes.

In a significant state case, the Minnesota Supreme Court in August 1994 followed the reasoning in *Holyfield,* rejecting a white couple's petition to adopt three Ojibwa (also called Chippewa or Anishinabe) sisters (*In re S. E. G.,* 521 N.W.2d 357). The court ruled in favor of the Leech Lake band of Chippewa, which had contested the adoption, holding that the ICWA dictated that adopted Indian children should be raised within their own culture. Although non-Indian families may adopt Indian children in very limited circumstances if they prove there is "good cause," the court held that such good cause cannot be based on the European value of family permanence.

In some cases, however, courts have given less weight to the provisions of the ICWA, instead ruling in favor of state jurisdiction over Indian children. In 1995, for example, the Illinois Supreme Court ruled that the ICWA does not mandate exclusive jurisdiction for tribal courts in custody hearings when the location of the children's domicile is in question. *In re Adoption of S. S. & R. S.,* 167 Ill. 2d 250, 212 Ill. Dec. 590, 657 N.E.2d 935, involved two children of an unmarried Indian mother and non-Indian father, who had been living with their father. When the father died, his sister and brother-in-law sought to adopt the children. The mother's tribe, the Fort Peck tribe in Montana, objected and claimed jurisdiction over the proceeding. The Illinois Supreme Court ruled against the tribe, holding that because the children had never been domiciled on the mother's reservation and because the mother had "abandoned" the children, state law preceded tribal court jurisdiction. The court thus limited the scope of the ICWA in Illinois.

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CROSS-REFERENCES

Child Custody; Native American Rights.

## INDICIA

*Signs; indications. Circumstances that point to the existence of a given fact as probable, but not certain. For example,* indicia of partnership *are any circumstances which would induce the belief that a given person was in reality, though not technically, a member of a given firm.*

The term is much used in CIVIL LAW in a sense nearly or entirely synonymous with CIRCUMSTANTIAL EVIDENCE. It denotes facts that give rise to inferences, rather than the inferences themselves.

## INDICTMENT

*A written accusation charging that an individual named therein has committed an act or omitted to do something that is punishable by law.*

An indictment is found and presented by a GRAND JURY legally convened and sworn. It originates with a prosecutor and is issued by the grand jury against an individual who is charged with a crime. Before such individual may be convicted, the charge must be proved at trial BEYOND A REASONABLE DOUBT.

The purpose of an indictment is to inform an accused individual of the charge against him or her so that the person will be able to prepare a defense.

## INDIRECT EVIDENCE

*Probative matter that does not proximately relate to an issue but that establishes a hypothesis by showing various consistent facts.*

CROSS-REFERENCES

Evidence.

## INDISPENSABLE PARTY

*An individual who has an interest in the substantive issue of a legal action of such a nature that a final decree cannot be handed down without that interest being affected or without leaving the controversy in a condition whereby its final determination would be totally* UNCONSCIONABLE.

For example, a HUSBAND AND WIFE seeking to dissolve a marriage are indispensable parties to their own DIVORCE action.

## INDIVIDUAL RETIREMENT ACCOUNT

*A means by which an individual can receive certain federal tax advantages while investing for retirement.*

The federal government has several reasons for encouraging individuals to save money for their retirement. For one, the average life span of a U.S. citizen continues to increase. Assuming that the average age of retirement does not change, workers who retire face more years of retirement and more years to live without a wage or salary.

Uncertainty over the future of the federal SOCIAL SECURITY system is another reason. U.S. workers generally contribute deductions from their paychecks to the Social Security fund. In theory, this money will come back to them, usually upon their retirement. But a substantial number of politicians, economists, and scholars contend that the Social Security fund is being drained faster than it is being filled, and that it will go broke in a number of years, leaving retirees to survive without government assistance.

Regardless of its future, many people consider the retirement benefits of Social Security to be inadequate, and they look for other methods of funding their retirement years. Many employers offer retirement plans. These plans vary in form but generally offer retirement funds that grow with continued employment. Yet this benefit is not always available to workers. A changing economy has caused some employers to cut back on retirement plans or to cut them out

*A sample indictment*

**Indictment**

**STATE OF NORTH CAROLINA**

*File No.*

_____ County

In The General Court Of Justice
Superior Court Division

| **STATE VERSUS** | **INDICTMENT** |
|---|---|
| *Name Of Defendant* | |

| **Offense(s)** | **Date Of Offense** | **G.S. No.** | **CL** |
|---|---|---|---|
| I. | | | |
| II. | | | |
| III. | | | |

I. The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did

II. And the jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did

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[continued]

*A sample indictment (continued)*

**Indictment**

III. And the jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did

| | *Signature Of Prosecutor* |
|---|---|
| | |

| **WITNESSES** | |
|---|---|
| ☐ | ☐ |
| ☐ | ☐ |
| ☐ | ☐ |
| ☐ | ☐ |

The Witnesses marked "X" were sworn by the undersigned Foreman of the Grand Jury and, after hearing testimony, this Bill was found to be:

☐ A TRUE BILL by twelve or more grand jurors, and I the undersigned Foreman of the Grand Jury, attest the concurrence of twelve or more grand jurors in this Bill of Indictment.

☐ NOT A TRUE BILL.

| *Date* | *Signature Of Grand Jury Foreman* |
|---|---|
| | |

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completely. Often, part-time, new, or temporary workers do not qualify for an employer's retirement plan. And individuals who are self-employed may not choose this job benefit.

To help people prepare for their retirement, Congress in 1974 established individual retirement accounts (IRAs) (EMPLOYEE RETIREMENT INCOME SECURITY ACT [ERISA] [codified in scattered sections of 5, 18, 26, and 29 U.S.C.A.]). These accounts may take a variety of forms, such as savings accounts at a bank, certificates of deposit, or mutual funds of stocks. Initially, IRAs were available only to people who were not participating in an employer-provided retirement plan. This changed in 1981, when Congress expanded the IRA provisions to include anyone, regardless of participation in an employer's retirement plan (Economic Recovery Tax Act [ERTA] [codified in scattered sections of 26, 42, and 45 U.S.C.A.]). The goal of ERTA was to promote an increased level of personal retirement savings through uniform discretionary savings arrangements.

A movement to bolster the FEDERAL BUDGET by eliminating many existing tax shelters prompted portions of the TAX REFORM ACT OF 1986 (codified in scattered sections of 19, 25, 26, 28, 29, 42, 46, and 49 U.S.C.A.) and another change in IRA laws. This time, Congress limited some of the IRA's tax advantages, making them unavailable to workers who participate in an employer's retirement plan or whose earnings meet or exceed a certain threshold. Yet, other tax advantages remain, and the laws still allow anyone to contribute to an IRA, making it a popular investment tool.

It is difficult to understand the advantages that an IRA offers without understanding a few basics about federal INCOME TAX law. Generally, a person calculating the amount of tax that he or she owes to the government first determines the amount of income received in the year. This is normally employment income. Tax laws allow the individual to deduct from this figure amounts paid for certain items, such as charitable contributions or interest on a mortgage. Some taxpayers choose to take a single standard deduction rather than numerous itemized deductions. In either case, the taxpayer subtracts any allowable deductions from yearly income and then calculates the tax owed on the remainder.

Taking deductions is only one of the ways in which a taxpayer may reduce taxes by investing in an IRA. But IRAs have proven to be popular with taxpayers. This popularity has prompted expansion of the federal tax rules to encourage additional savings and investment through IRAs. In 2003 there were 11 types of IRAs:

1. Individual Retirement Account
2. Individual Retirement Annuity
3. Employer and Employee Association Trust Account
4. Simplified Employee Pension (SEP-IRA)
5. Savings Incentive Match Plan for Employees IRA (SIMPLE IRA)
6. Spousal IRA
7. Rollover IRA (Conduit IRA)
8. Inherited IRA
9. Education IRA
10. Traditional IRA
11. Roth IRA

**IRA Plans, Value by Type of Holder, 1990 to 2000**

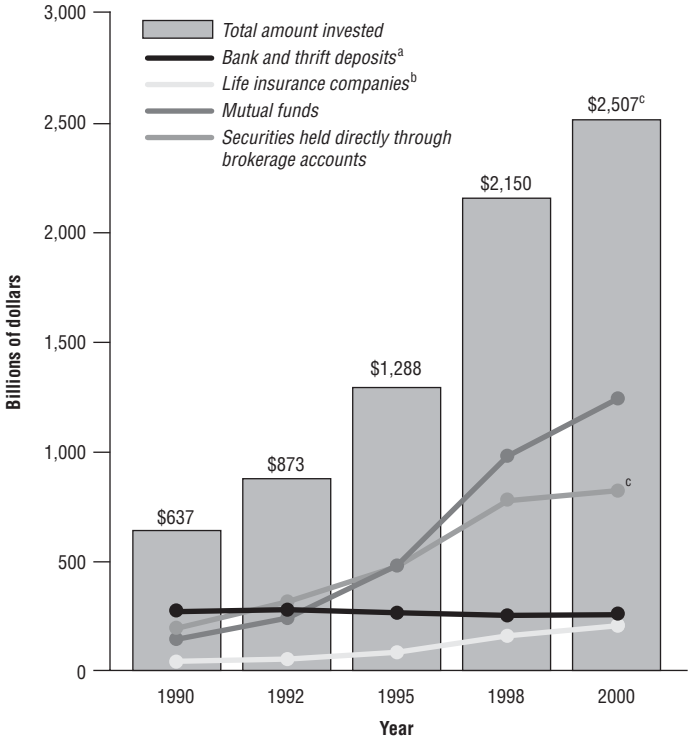


[a]Bank and thrift deposits include Keogh deposits.
[b]Annuities held by IRAs, excluding variable annuity mutual fund IRA assets.
[c]Estimated.

SOURCE: Investment Company Institute, Washington, DC, *Mutal Fund Fact Book*, 2002.

Despite the many variations, the two most important remain the traditional IRA and the Roth IRA.

In traditional IRAs, a single filer may deduct IRA contributions as long as his or her income is less than $95,000 (to qualify for a full contribution) or $95,000-$110,000 to qualify for a partial contribution. Joint filers may deduct IRA contributions as long as their adjusted gross income is less than $150,000 (to qualify for a full contribution). If their adjusted gross income is between $150,000 and $160,000, they may qualify for a partial contribution.

IRA contribution limits increased in 2002 and will increase over the next few years. For individual taxpayers, contributions are limited to $3,000 for tax years 2003 and 2004. In tax years 2005 through 2007, contributions are capped at $4,000. They are eventually capped at $5,000 for individual taxpayers in 2008 through 2010.

Various plans may constitute employer-maintained retirement plans, such as standard pension plans, profit-sharing or stock-bonus plans, annuities, and government retirement plans. Someone who does not participate in such a plan—whether by choice or not—is entitled to contribute to an IRA up to $3,000 a year or 100 percent of her or his annual income, whichever is less. The amount contributed during the taxable year may then be taken as a deduction.

A married taxpayer who files a joint tax return with a spouse who does not work may deduct contributions toward what is called a spousal IRA, or an IRA established for the spouse's benefit. If neither spouse is a participant in an employer-provided retirement plan, up to $4,000 may be deductible.

Taxpayers who contribute to Traditional IRAs usually realize tax benefits even when the law does not permit them to take deductions. That is because income earned on Traditional IRA contributions is not taxed until the funds are distributed, which usually occurs at retirement. Income that is allowed to grow, untaxed, for several years, grows faster than income that is taxed each year.

To avoid abuses and excessive tax shelters, Congress has placed limits on the extent to which IRAs can be used as a financial tool. Individuals with IRAs may currently make contributions limited to $3,000 a year; contributions exceeding that amount are subject to strict financial penalties by the INTERNAL REVENUE SERVICE each year until the excess is corrected. The owner of an IRA generally may not withdraw funds from that account until age 59½. Premature distributions are subject to a ten percent penalty in addition to regular income tax. Taxpayers may be able to avoid this premature distribution penalty by "rolling over," or transferring, the distribution amount to another IRA within 60 days.

An individual may elect not to withdraw IRA funds at age 59½. However, the law requires IRA owners to withdraw IRA money at age 70½, either in a lump sum or in periodic (at least annual) payments based on a life-expectancy calculation. Failure to comply with this rule can result in a 50 percent penalty on the amount of the required minimum distribution. Contributions to an IRA must stop at age 70½.

In 1997, Congress provided for a new type of IRA—the Roth IRA, named for former Senator William V. Roth, Jr. The Roth IRA was part of the Taxpayer Relief Act of 1997, Pub.L. No. 105-34, 111 Stat. 788 (codified as amended in scattered sections of 26 U.S.C.). Contributions to a Roth IRA are not deductible from gross income, and the Roth IRA allows no deductions for contributions. Instead, Roth IRAs provide a benefit that is unique among retirement savings schemes: If a taxpayer meets certain requirements, all earnings from the IRA are tax-free when the taxpayer or his or her beneficiary withdraws them. There are other benefits as well, such as no early distribution penalty on certain withdrawals, and no need to take minimum distributions after age 70½.

The chief advantage of the Roth IRA is the ability to have investment earnings escape taxation. However, taxpayers may not claim a deduction when they contribute to Roth IRAs. Whether it is more advantageous to use Roth IRAs or traditional IRAs depends on each taxpayer's personal situation. It also depends on what assumptions the taxpayer makes about the future, such as future tax rates and the taxpayer's earnings in the interim.

One may open a Roth IRA if he or she is eligible for a regular contribution to a Roth IRA or a rollover or conversion to a Roth IRA. A taxpayer is eligible to make a regular contribution to a Roth IRA even if he or she participates in a retirement plan maintained by his or her employer. These contributions may be as much as $3,000 ($3,500 if 50 or older by the end of the year). There are just two requirements: the taxpayer or taxpayer's spouse must have compensation or ALIMONY income equal to the amount

contributed; and the taxpayer's modified adjusted gross income may not exceed certain limits. These limits are the same as in traditional IRAs: $95,000 for single individuals and $150,000 for married individuals filing joint returns. The amount that a taxpayer may contribute is reduced gradually and then completely eliminated when the taxpayer's modified adjusted gross income exceeds $110,000 (single) or $160,000 (married filing jointly).

A traditional IRA may be converted to a Roth IRA if modified adjusted gross income is $100,000 or less, and if the taxpayer is either single or files jointly with his or her spouse. Although taxpayers converting traditional IRAs to Roth IRAs must pay tax in the year of the conversion, the long-term savings often greatly outweigh the conversion tax.

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## INDIVIDUALS WITH DISABILITIES EDUCATION ACT OF 1975

See DISABLED PERSONS.

## INDORSE

*To sign a paper or document, thereby making it possible for the rights represented therein to pass to another individual. Also spelled* endorse.

## INDORSEMENT

*A signature on a* COMMERCIAL PAPER *or document.*

An indorsement on a negotiable instrument, such as a check or a promissory note, has the effect of transferring all the rights represented by the instrument to another individual. The ordinary manner in which an individual endorses a check is by placing his or her signature on the back of it, but it is valid even if the signature is placed somewhere else, such as on a separate paper, known as an allonge, which provides a space for a signature.

The term *indorsement* is also spelled *endorsement.*

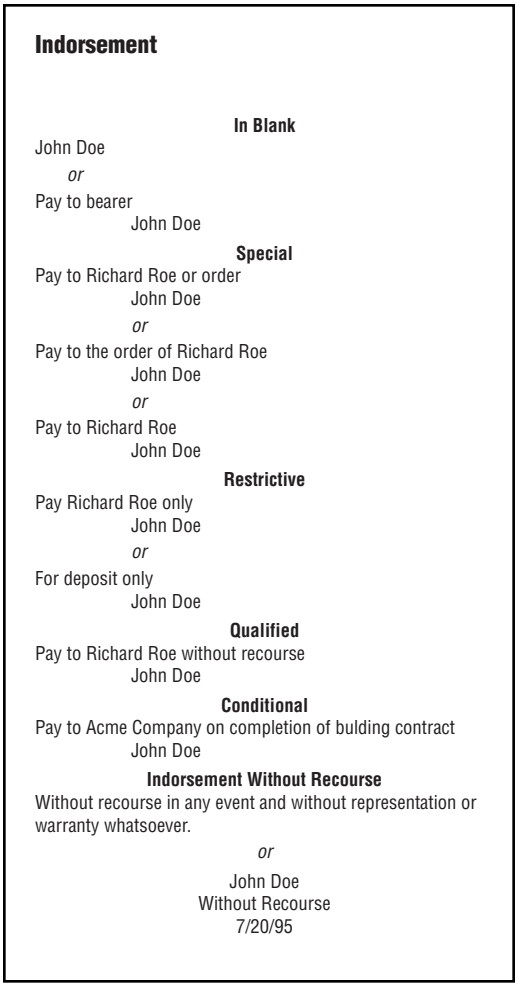


*Examples of indorsements*

## INDUCEMENT

*An advantage or benefit that precipitates a particular action on the part of an individual.*

In the law of contracts, the inducement is a pledge or promise that causes an individual to enter into a particular agreement. An *inducement to purchase* is something that encourages an individual to buy a particular item, such as the promise of a price reduction. Consideration is the inducement to a contract.

In CRIMINAL LAW, the term *inducement* is the motive, or that which leads an individual to engage in criminal conduct.

## INDUSTRIAL UNION

*A labor organization composed of members employed in a particular field, such as textiles, but*

*who perform different individual jobs within their general type of work.*

CROSS-REFERENCES

Labor Union.

## INDUSTRIAL WORKERS OF THE WORLD

The Industrial Workers of the World—also known as the IWW, or the Wobblies—is a radical LABOR UNION that had its beginnings in Chicago in 1905.

An outgrowth of the Western Federation of Mines, the IWW was created by WILLIAM D. HAYWOOD, EUGENE V. DEBS, and Daniel DeLeon. Its membership was open to all workers, skilled or unskilled, with no restrictions as to race, occupation, ethnic background, or sex. The Wobblies opposed the principles of capitalism and advocated SOCIALISM. They followed the tenets of syndicalism, a labor movement that evolved in Europe before WORLD WAR I. The syndicalists sought to control industry through labor organizations. In their view the state represented oppression, which had to be replaced by the union as the essential element of society. To achieve their goals, the syndicalists advocated practices such as strikes and slowdowns.

The Wobblies adopted many of the ideologies of syndicalism and employed direct-action methods, such as propaganda, strikes, and boycotts. They rejected more peaceful means of achieving labor's goals, such as ARBITRATION and COLLECTIVE BARGAINING.

From 1906 to 1928, the IWW was responsible for 150 strikes, including a miners' strike in Goldfield, Nevada, from 1906 to 1907; a textile workers' strike in Lawrence, Massachusetts, in 1912; a 1913 silk workers' strike in Paterson, New Jersey; and a miners' strike in Colorado from 1927 to 1928.

During World War I, the IWW began to lose much of its strength. Its members were against the military, and many were convicted of draft evasion, seditious activities, and ESPIONAGE. In addition, many members left the organization to join the Communist party. By 1930, the IWW was no longer regarded as an influential labor force. Nevertheless, it still exists today.

Despite its radicalism, the IWW was responsible for several gains for organized labor. It brought together skilled and unskilled workers into one union; it achieved better working conditions and a shorter work week in many areas of labor, particularly in the lumber field; and it set a structural example that would be followed by future labor unions.

## INFAMY

*Notoriety; condition of being known as possessing a shameful or disgraceful reputation; loss of character or good reputation.*

At COMMON LAW, infamy was an individual's legal status that resulted from having been convicted of a particularly reprehensible crime, rendering him or her incompetent as a witness at a trial. Infamy, by statute in certain jurisdictions, produces other legal disabilities and is sometimes described as civil death.

## INFANCY

*Minority; the status of an individual who is below the legal age of majority.*

At COMMON LAW, the age of legal majority was twenty-one, but it has been lowered to eighteen in most states of the United States. Infancy indicates the condition of an individual who is legally unable to do certain acts. For example, an infant might not have the legal capacity to enter into certain contracts. Similarly, infancy is a ground for ANNULMENT of a marriage in certain jurisdictions.

Although many states have lowered the age of majority for most purposes to eighteen, they frequently retain the right to mandate support of a child by a parent beyond that age in the aftermath of DIVORCE.

## INFANTS

*Persons who are under the age of legal majority—at* COMMON LAW, *21 years, now generally 18 years. According to the sense in which this term is used, it may denote the age of the person, the contractual disabilities that non-age entails, or his or her status with regard to other powers or relations.*

Modern laws respecting the rights, obligations, and incapacities of children are rooted in ancient customs and practices. In 1765, SIR WILLIAM BLACKSTONE, in his *Commentaries on the Laws of England,* wrote that parents owe their children three duties: maintenance, protection, and education. Today, these three duties continue, and have been expanded by judicial and legislative advancements. The notion of CHIL-

DREN'S RIGHTS has evolved into a highly controversial and dynamic area of law.

Common law held an infant, also called a minor or child, to be a person less than 21 years old. Currently, most state statutes define the age of majority to be 18. Although a person must attain the age of majority to vote, make a will, or hold public office, children are increasingly being recognized by society, legislatures, and the courts as requiring greater protections and deserving greater rights than they were afforded under common law. The law is caught in a tug-of-war between two equally compelling and worthy societal interests: the desire to protect children from harmful situations and from their own immaturity and lack of experience, and the desire to give children as much autonomy as they can bear as soon as they can bear it.

### Legal Rights of Children

Children do have the right to own and acquire property by sale, gift, or inheritance. Often property is given to a child as a beneficiary of a trust. In the trust situation, a trustee manages the trust assets for the child until the child reaches majority or otherwise meets the requirements specified in the trust for managing the property for herself or himself.

Children also have the right to enter into contracts. Because the law seeks to protect children from adverse consequences due to their lack of knowledge, experience, and maturity, an adult who enters into a contract with a child may be unable to enforce the contract against the child, whereas the child can enforce the contract against the adult if the adult breaches it. However, when a child enters into a contract for necessities (i.e., food, shelter, clothing, and medical attention) or with a bank, the child is legally bound and cannot later disaffirm or negate the contract. In addition, some state statutes provide that all contracts relating to a child's business are enforceable. This allows a child the opportunity to begin a business. Aside from these limited exceptions, a child may negate a contract before, and even sometimes soon after, reaching the age of majority.

**What It Costs to Raise a Child to Age 18**

A Two-Parent Family

| Earning | Will Spend |
|---|---|
| Under $39,700 a year | $127,080 |
| $39,700 to $66,900 a year | $173,880 |
| Over $66,900 a year | $254,400 |

SOURCE: U.S. Department of Agriculture, Center for Nutrition Policy and Promotion, *Expenditures on Children by Families*, 2002.

Children have the right to bring lawsuits seeking legal redress for injuries they have suffered or for rights that have been violated. Most jurisdictions require a child to have a representative during the litigation process. This representative, called a GUARDIAN AD LITEM, or NEXT FRIEND, advises and guides the child.

The right of a child to sue for personal injuries has been extended to cover prenatal injuries. Moreover, if an injured fetus is born alive and then dies as a result of her or his prenatal injuries, the child's parents may sue for the WRONGFUL DEATH of the child. Criminal sanctions may also apply. As of 2003, more than 20 states had enacted "fetal homicide" legislation creating a separate criminal offense for actions taken against a woman that result in the death of, or harm to, her fetus.

Notwithstanding, in civil suits for MEDICAL MALPRACTICE, such a legal premise is not as simple as it may appear. First, depending upon the stage of development of a fetus, it may or may not be a viable person—with its own independent legal rights—in the eyes of the law. This controversial issue was addressed in August 2002, when President GEORGE W. BUSH signed into law the Born-Alive Infants Protection Act, P.L. 107-207, ensuring that every infant born alive, including an infant who survives an ABORTION procedure, is considered a person under federal law. The significance of this trend (treating the fetus as a separate person) is in recognizing that the unborn infant has distinct and independent rights. In prior cases and in other jurisdictions, compensation for harm to a fetus has been granted to the mother (or parents) under the legal theory of a *derivative* right stemming from the legal duty owed to the mother.

A second essential element of a MALPRACTICE action is the need to show that a professional doctor-patient relationship existed between an allegedly injured patient and the treating physician: this establishes that a duty was owed by the physician to his patient. In matters of obstetrics, a doctor-patient relationship naturally exists between a pregnant woman and her treating physician. If she suffers harm or

injury as a result of alleged malpractice, and that harm or injury carries over to her unborn child, states permit recovery for both. But what if the mother suffers no harm or injury as a result of alleged malpractice, yet injury or harm is independently sustained by the developing fetus or newborn?

This issue has been addressed by several state courts. In the 2001 case of *Nold v. Binyon,* 31 P.3d 274, the Kansas Supreme Court held that a physician has a doctor-patient relationship with both mother and any developing fetus she intends to carry to a healthy full term. In *Nold,* the infant in question was born with hepatitis B, which was transmitted from her infected mother. Tests given to the mother prior to the baby's birth indicated that the virus was present. Normal treatment is to administer gamma globulin and a vaccine at birth; the infant received neither and so contracted the virus.

Although states may recognize a child's right to sue for prenatal injuries, the vast majority of states do not allow "wrongful life" actions. In a WRONGFUL LIFE lawsuit, the child sues a doctor for NEGLIGENCE or malpractice for failing to diagnose the child's mother with a disease that injured the child before birth or for failing to diagnose a severe, disabling condition of the child before birth. The argument continues that if the doctor had informed the child's parents of the child's condition, the mother would have had an abortion rather than deliver a child with such a debilitating condition. The child's theory in a wrongful life lawsuit is that life with the injury or debilitating condition is worse than no life at all and that he or she would have been better off having not been born.

As examples, the New Jersey Supreme Court has denied wrongful life claims, stating that "there is no precedent in appellate judicial pronouncements that holds a child has a fundamental right to be born as a whole, functional human being," and that it is almost impossible to calculate the damages in such a case (*Gleitman v. Cosgrove,* 49 N.J. 22, 227 A.2d 689 [1967]). In contrast, in *Curlender v. Bio-Science Laboratory,* 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980), a California court allowed a child with Tay-Sachs disease to recover for wrongful life, stating that to deny such a claim "permits a wrong with serious consequential injury to go wholly unaddressed." This court would not accept the "impossibility of measuring damages" as the sole reason to deny the child's claim.

A child may bring a lawsuit seeking emancipation from his or her parents. Emancipation is an ancient doctrine based on ROMAN LAW. An emancipated minor is a child who is entirely self-supporting and who has the legal right and duty to oversee his or her own behavior. An emancipated minor's parents surrender the right to the care, custody, and earnings of the child. Once emancipated, the child is precluded from demanding that his or her parents continue to support him or her. Historically, an express agreement between the PARENT AND CHILD, the marriage of the child, the entry of the child into the armed forces, or responsible conduct on the part of the child were all sufficient factors in seeking emancipation. Today, the doctrine is seen as a mechanism for ending troubled parent-child relationships and a way to alleviate the difficult task of finding foster families for older teenagers who have been taking care of themselves.

### Child Protection

Although children do not have a constitutional right to a safe home, a permanent, stable family, or quality care, significant strides have been made to better the lives of children. The right of a state to ensure the welfare of the children within its boundaries stems from the ancient concept of *parens patriae,* which means "the father of his country," and was used to describe the relationship between a king and his subjects. Today, this right is limited by the parents' legal right to be free from government intrusion in the raising and rearing of their children. The state's intervention is justified, however, if a parent is not living up to his or her responsibilities or when a child is endangered, neglected, or abused. The courts may then place the child in temporary foster care and require the parent to get assistance to remedy the problem, or may terminate the parent's rights to the child if that is found to be in the best interests of the child.

In 1960, the federal government spent only a few million dollars on child protective services. By 1980, this expenditure had risen to more than $325 million. This dramatic increase probably did not reflect an actual increase in the incidence of CHILD ABUSE but rather the effects of laws requiring HEALTH CARE and social workers to report any suspicions of child abuse, an increase in public awareness of the problem, and a broadening of the definition of child abuse.

Nevertheless, children were increasingly 'falling through the cracks' and not receiving timely or effective protection from the state, and in some instances, the state was found to be not responsible for these mistakes. For example, in 1989, the U.S. Supreme Court held that the DUE PROCESS CLAUSE did not impose an affirmative duty on the state to protect a four-year-old boy from his father's violence (*DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998). In that case, a young boy named Joshua was beaten so severely that half of his brain was destroyed and he now is permanently brain-damaged and profoundly retarded. A social worker assigned to the family had noted signs of past abuse and several trips to the emergency room, but had taken no action to remove Joshua from his family home. Chief Justice WILLIAM H. REHNQUIST stated that the Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."

In 2002, billions of state and federal dollars were spent on child protective services; federal expenditures were more than $20 billion in 2001. Reporting rates for abuse to children have risen from 4 per 1000 in 1975 to 31 per 1000 in 1985 and 47 per 1000 in 1994. While more agencies have been created to handle the increased caseload, many reports are still screened out and caseworkers must prioritize among the cases they do eventually receive. State and federal funds are also allotted for children whose parents are financially unable to provide for their basic needs, such as food, shelter and medical attention. The Temporary Assistance for Needy Families (TANF) program is one program that grants federal money to needy parents to provide these basic needs for their children.

While the U.S. Constitution does not in any way mention the right of children to an education, every state has adopted compulsory education laws. The strides in securing education for children occurred at the same time that CHILD LABOR LAWS were beginning to eradicate the exploitation of children in sweatshops. By the mid-1800s, several states had passed laws restricting the number of hours children could work and requiring children who worked to also attend school for a minimum number of months each year. However, because each state had different laws and competition was fierce among states eager to attract industry, many of the laws regarding child labor were not enforced. After several unsuccessful attempts at passing effective child LABOR LAWS, Congress passed the FAIR LABOR STANDARDS ACT (FLSA), 29 U.S.C.A. § 201 et seq., which places restrictions on the hours children may work and age limitations for children performing particular jobs and employed in certain hazardous occupations. Today, every state has child labor laws—most of which are patterned after the FLSA, although some differences do exist.

The same concern for children that brought about these protections was responsible for the creation of the juvenile justice system. From the founding of the United States until the end of the nineteenth century, children who were charged with a crime were treated the same as adults. The juvenile justice system arose from an emerging conviction that rehabilitation, not punishment, would better serve the child and the state. Today, juvenile court systems have been adopted by every state. These courts hear cases involving status offenses, abuse, dependency, neglect, and termination of parental rights. Status offenses are legal infractions based solely on the age of the person, such as truancy and curfew violations. Children in the juvenile justice system have the constitutional rights of notice, counsel, PRIVILEGE AGAINST SELF-INCRIMINATION, determination of guilt BEYOND A REASONABLE DOUBT, and protection against DOUBLE JEOPARDY. However, juveniles still do not have a federal constitutional right to a jury trial and are not generally afforded bail.

All state juvenile codes provide for a juvenile to be removed from the juvenile justice system and transferred to the adult criminal courts, depending on the offense the juvenile allegedly committed or the juvenile's prior history of delinquent behavior. Once this move is made, the juvenile is entitled to all the constitutional protections afforded adults accused of crimes, such as bail and the right to a trial by jury, which may be more sympathetic and less likely to convict than would a juvenile court judge.

### Constitutional Rights of Children in the Educational Setting

Traditionally, it was assumed that students would behave and express themselves in acceptable ways, and thus their Constitutional rights did not need to be recognized or protected in any official manner. Since the 1960s, this notion has gone by the wayside. The Supreme Court has

recognized that students do not shed their constitutional rights upon crossing the schoolhouse threshold. The Court has recognized that schools function as a "market-place of ideas" and that FIRST AMENDMENT rights must receive "scrupulous protection if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes" (TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 [1969]).

The rights of students to wear black armbands in protest of the VIETNAM WAR, to dance, and to use obscene and vulgar language on campus are but a few of the many First Amendment issues that have been litigated. In addition, debates over school prayer, religion in a public school curriculum, and government aid to parochial schools all affect the education children receive. Many court decisions limit the FOURTH AMENDMENT rights of students with regard to searches for drugs, to drug testing, and to searches of their lockers.

### Age of Legal Medical Consent

Traditionally, children have been deemed legally incapable of consenting to their own medical care or treatment. In general, parents have the authority to decide whether their minor children will receive medical treatment. Common law recognized an exception to the need for parental consent in cases of emergency. Statutory law has created more exceptions to this requirement, namely in cases where a child is emancipated, married, pregnant, or a parent. In addition, several states have enacted "minor treatment statutes," which typically provide that from 14 to 17 years old, a minor may consent to ordinary medical treatment. When a parent refuses to consent to medical attention for a seriously ill or dying child, even if on religious grounds, the states may act according to their PARENS PATRIAE power and obtain a court order to secure the necessary medical treatment.

Owing to a high incidence of venereal diseases among teenagers, all states have adopted statutes authorizing minors to consent to the treatment of sexually transmitted diseases. Similarly, most states have laws allowing a child to seek treatment for alcohol or drug abuse without parental consent.

Constitutional guarantees of the right to abortion extend to minors, as does the right to privacy. The Supreme Court has upheld state statutes that require the consent of only one parent if the statutes also offer an expeditious judicial bypass procedure (a hearing before a judge in which the minor requests that parental consent be waived). States can no longer absolutely require two-parent notification or consent before a minor may undergo an abortion.

### The Right to Testify

A child is permitted to testify in court if the judge believes that the child comprehends the meaning and importance of telling the truth, is sufficiently mature, and is able to recall and communicate her or his thoughts effectively. Most states do not have a specific age at which children are allowed to testify; consequently, even very young children are allowed to be placed under oath and testify in court if the judge determines that these requirements have been met.

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#### CROSS-REFERENCES

Adoption; Child Custody; Children's Rights; Child Support; Family Law; Fetal Rights; in Loco Parentis; Juvenile Law; Parent and Child; Schools and School Districts; Welfare; Wrongful Birth; Wrongful Pregnancy.

## INFERENCE

*In the law of evidence, a truth or proposition drawn from another that is supposed or admitted to be true. A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state*

*of facts, already proved or admitted. A logical and reasonable conclusion of a fact not presented by direct evidence but which, by process of logic and reason, a trier of fact may conclude exists from the established facts. Inferences are deductions or conclusions that with reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.*

## INFERIOR COURT

*This term may denote any court subordinate to the chief appellate tribunal in the particular judicial system (e.g., trial court); but it is also commonly used as the designation of a court of special, limited, or statutory jurisdiction, whose record must show the existence and attaching of jurisdiction in any given case.*

## INFIRMITY

*Flaw, defect, or weakness.*

In a legal sense, the term *infirmity* is used to mean any imperfection that renders a particular transaction void or incomplete. For example, if a deed drawn up to transfer ownership of land contains an erroneous description of it, an infirmity exists in the transaction.

## INFORMATION

*The formal accusation of a criminal offense made by a public official; the sworn, written accusation of a crime.*

An information is tantamount to an indictment in that it is a sworn written statement which charges that a particular individual has done some criminal act or is guilty of some criminal omission. The distinguishing characteristic between an information and an indictment is that an indictment is presented by a GRAND JURY, whereas an information is presented by a duly authorized public official.

The purpose of an information is to inform the accused of the charge against him, so that the accused will have an opportunity to prepare a defense.

## INFORMATION AGENCY

See U.S. INFORMATION AGENCY.

## INFORMATION AND BELIEF

*A standard phrase added to qualify a statement made under oath; a phrase indicating that a statement is made, not from firsthand knowledge but, nevertheless, in the firm belief that it is true.*

For example, an AFFIDAVIT may be needed at some point in a lawsuit even though the individual (whether a party to or a witness in the lawsuit) who has firsthand information is out of the country on business. In many such circumstances that individual's attorney may make an affidavit for him or her. The attorney must indicate that the individual is swearing only to facts that he or she has been told and believes to be true; in other words, on information and belief.

## INFORMED CONSENT

*Assent to permit an occurrence, such as surgery, that is based on a complete disclosure of facts needed to make the decision intelligently, such as knowledge of the risks entailed or alternatives.*

*The name for a fundamental principle of law that a physician has a duty to reveal what a reasonably prudent physician in the medical community employing reasonable care would reveal to a patient as to whatever reasonably foreseeable risks of harm might result from a proposed course of treatment. This disclosure must be afforded so that a patient—exercising ordinary care for his or her own welfare and confronted with a choice of undergoing the proposed treatment, alternative treatment, or none at all—can intelligently exercise judgment by reasonably* BALANCING *the probable risks against the probable benefits.*

## INFRA

*[*Latin, Below, under, beneath, underneath.*] A term employed in legal writing to indicate that the matter designated will appear beneath or in the pages following the reference.*

## INFRACTION

*Violation or infringement; breach of a statute, contract, or obligation.*

The term *infraction* is frequently used in reference to the violation of a particular statute for which the penalty is minor, such as a parking infraction.

## INFRINGEMENT

*The encroachment, breach, or violation of a right, law, regulation, or contract.*

The term is most frequently used in reference to the invasion of rights secured by COPYRIGHT, patent, or TRADEMARK. The unauthorized man-

*A sample informed-consent form*

**Informed Consent Form (4B)**

**Required for all subjects when more than minimal risk is determined by the IRB;**
**Strongly recommended for all projects involving human subjects. Use a separate form for each test subject.**

Student Researcher's Name _____ Grade _____

School, City & State _____

Title of Project _____

**To be completed by Student Researcher:**

1) What are the research procedures in which the subject will be involved?

2) What are the possible discomforts or risks that may reasonably be expected by participating in this research?

3) What procedures will be used to minimize risks?

**Attention: This project has been reviewed and approved by an Institutional Review Board.**

| | | |
|---|---|---|
| Institutional Review Board Chair Printed Name | Signature | Phone |
| Adult Sponsor's Printed Name | Signature | Phone |
| Qualified Scientist's Printed Name<br>(Required if more than minimal risk designated by the IRB) | Signature | Date Signed |
| Title | Institution | Phone |

**To be completed by human subject prior to experimentation:**

☐ I have read and understand the conditions stated above, and I consent to participate in this research procedure. I realize I am free to withdraw my consent and to withdraw from this activity at any time.

☐ I consent to use of visual images (e.g., photographs, videographs) involving my participation in this research project.

| | | |
|---|---|---|
| Participant's Printed Name | Signature | Date Signed |

**When informed consent is required and participant is under 18, parent/guardian signature is required.**

I have received and reviewed a copy of any test, survey or questionnaire used in the research.

☐ Yes ☐ No

| | | |
|---|---|---|
| Parent's/Guardian's Printed Name | Signature | Date Signed |

*International Rules 2002/2003* **full text of the rules and electronic copies of forms are available at www.sciserv.org/isef** Page 47

ufacture, sale, or distribution of an item protected by a copyright, patent, or trademark constitutes an infringement.

## INGROSSING

*The act of making a perfect copy of a particular instrument, such as a deed, lease, or will, from a rough draft so that it may be properly executed to achieve its purpose.*

## INHERENT

*Derived from the essential nature of, and inseparable from, the object itself.*

An object which is *inherently dangerous* is one that possesses potential hazard by its mere existence, such as explosives. By contrast, other objects are dangerous only when used in a negligent manner, such as a pipe wrench or baseball bat. The rule of STRICT LIABILITY is applied when accidents arise from objects that are inherently dangerous.

## INHERIT

*To receive property according to the state laws of intestate succession from a decedent who has failed to execute a valid will, or, where the term is applied in a more general sense, to receive the property of a decedent by will.*

## INHERITANCE

*Property received from a decedent, either by will or through state laws of intestate succession, where the decedent has failed to execute a valid will.*

## INITIATIVE

*A process of a participatory democracy that empowers the people to propose legislation and to enact or reject the laws at the polls independent of the lawmaking power of the governing body.*

The purpose of an initiative, which is a type of election commenced and carried out by the people, is to permit the electorate to resolve questions where their elected representatives fail to do so or refuse to proceed with a change that the public desires.

## INJUNCTION

*A court order by which an individual is required to perform, or is restrained from performing, a particular act. A writ framed according to the circumstances of the individual case.*

An injunction commands an act that the court regards as essential to justice, or it prohibits an act that is deemed to be contrary to good conscience. It is an extraordinary remedy, reserved for special circumstances in which the temporary preservation of the status quo is necessary.

An injunction is ordinarily and properly elicited from other proceedings. For example, a landlord might bring an action against a tenant for waste, in which the right to protect the landlord's interest in the ownership of the premises is at issue. The landlord might apply to the court for an injunction against the tenant's continuing harmful use of the property. The injunction is an ancillary remedy in the action against the tenant.

Injunctive relief is not a matter of right, but its denial is within the discretion of the court. Whether or not an injunction will be granted varies with the facts of each case.

The courts exercise their power to issue injunctions judiciously, and only when necessity exists. An injunction is usually issued only in cases where irreparable injury to the rights of an individual would result otherwise. It must be readily apparent to the court that some act has been performed, or is threatened, that will produce irreparable injury to the party seeking the injunction. An injury is considered irreparable when it cannot be adequately compensated by an award of damages. The pecuniary damage that would be incurred from the threatened action need not be great, however. If a loss can be calculated in terms of money, there is no irreparable injury. The consequent refusal by a court to grant an injunction is, therefore, proper. Loss of profits alone is insufficient to establish irreparable injury. The potential destruction of property is sufficient.

Injunctive relief is not a remedy that is liberally granted, and, therefore, a court will always consider any hardship that the parties will sustain by the granting or refusal of an injunction. The court that issues an injunction may, in exercise of its discretion, modify or dissolve it at a later date if the circumstances so warrant.

### Types of Injunction

**Preliminary** A *preliminary* or *temporary injunction* is a provisional remedy that is invoked to preserve the subject matter in its existing condition. Its purpose is to prevent dissolution of the plaintiff's rights. The main rea-

son for use of a preliminary injunction is the need for immediate relief.

Preliminary or temporary injunctions are not conclusive as to the rights of the parties, and they do not determine the merits of a case or decide issues in controversy. They seek to prevent threatened wrong, further injury, and irreparable harm or injustice until such time as the rights of the parties can be ultimately settled. Preliminary injunctive relief ensures the ability of the court to render a meaningful decision and serves to prevent a change of circumstances that would hamper or block the granting of proper relief following a trial on the merits of the case.

A motion for a preliminary injunction is never granted automatically. The discretion of the court should be exercised in favor of a temporary injunction, which maintains the status quo until the final trial. Such discretion should be exercised against a temporary injunction when its issuance would alter the status quo. For example, during the Florida presidential-election controversy in 2000, the campaign of GEORGE W. BUSH asked a federal appeals court for a preliminary injunction to halt the manual counting of ballots. It sought a preliminary injunction until the U.S. Supreme Court could decide on granting a permanent injunction. In that case, *Siegel v. Lepore*, 234 F.3d 1163 (11th Cir. 2000). the U.S. Court of Appeals for the Eleventh Circuit refused to grant the injunction, stating that the Bush campaign had not "shown the kind of serious and immediate injury that demands the extraordinary relief of a preliminary injunction."

**Preventive Injunctions** An injunction directing an individual to refrain from doing an act is *preventive, prohibitive, prohibitory,* or *negative.* This type of injunction prevents a threatened injury, preserves the status quo, or restrains the continued commission of an ongoing wrong, but it cannot be used to redress a consummated wrong or to undo that which has already been done.

The Florida vote count in the presidential election of 2000 again serves as a good example. There, the Bush campaign sought preventive injunctions to restrain various counties from performing recounts after the Florida results had been certified. The Bush campaign did not attempt to overturn results already arrived at, but rather attempted to stop new results from coming in. In turn, the Gore campaign attempted to obtain a preventive injunction to prevent Florida's secretary of state from certifying the election results.

**Mandatory Injunctions** Although the court is vested with wide discretion to fashion injunctive relief, it is also restricted to restraint of a contemplated or threatened action. It also might compel SPECIFIC PERFORMANCE of an act. In such a case, it issues a mandatory injunction, commanding the performance of a positive act. Because mandatory injunctions are harsh, courts do not favor them, and they rarely grant them. Such injunctions have been issued to compel the removal of buildings or other structures wrongfully placed upon the land of another.

**Permanent Injunctions** A *permanent* or *perpetual* injunction is one that is granted by the judgment that ultimately disposes of the injunction suit, ordered at the time of final judgment. This type of injunction must be final relief. Permanent injunctions are perpetual, provided that the conditions that produced them remain permanent. They have been granted to prevent blasting upon neighboring premises, to enjoin the dumping of earth or other material upon land, and to prevent POLLUTION of a water supply.

An individual who has been licensed by the state to practice a profession may properly demand that others in the same profession subscribe to the ethical standards and laws that govern it. An injunction is a proper remedy to prevent the illegal practice of a profession, and the relief may be sought by either licensed practitioners or a professional association. The illegal PRACTICE OF LAW, medicine, dentistry, and architecture has been stopped by the issuance of injunctions.

Acts that are injurious to the public health or safety may be enjoined as well. For example, injunctions have been issued to enforce laws providing for the eradication of diseases in animals raised for food.

The government has the authority to protect citizens from damage by violence and from fear through threats and intimidation. In some states, an injunction is the proper remedy to bar the use of violence against those asserting their rights under the law.

Acts committed without JUST CAUSE that interfere with the carrying on of a business may be enjoined if no other adequate remedy exists.

A TRADE SECRET, for example, may be protected by injunction. An individual's right of personal privacy may be protected by an injunction if there is no other adequate remedy, or where a specific statutory provision for injunctive relief exists. An individual whose name or picture is used for advertising purposes without the individual's consent may enjoin its use. The theory is that injunctive relief is proper because of a celebrity's unique property interest in the commercial use of his or her name and likeness (i.e., their right of publicity).

**Restraining Orders** A RESTRAINING ORDER is granted to preserve the status quo of the subject of the controversy until the hearing on an application for a temporary injunction. A TEMPORARY RESTRAINING ORDER is an extraordinary remedy of short duration that is issued to prevent unnecessary and irreparable injury. Essentially, such an order suspends proceedings until an opportunity arises to inquire whether an injunction should be granted. Unless extended by the court, a temporary restraining order ceases to operate upon the expiration of the time set by its terms.

### Contempt

An individual who violates an injunction may be punished for CONTEMPT of court. A person is not guilty of contempt, however, unless he or she can be charged with knowledge of the injunction. Generally, an individual who is charged with contempt is entitled to a trial or a hearing. The penalty imposed is within the discretion of the court. Ordinarily, punishment is by fine, imprisonment, or both.

FURTHER READINGS

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CROSS-REFERENCES

Equity.

## INJURE

*To interfere with the legally protected interest of another or to inflict harm on someone, for which an action may be brought. To damage or impair.*

The term *injure* is comprehensive and can apply to an injury to a person or property.

CROSS-REFERENCES

Tort Law.

## INJURIOUS FALSEHOOD

*A fallacious statement that causes intentional damage to an individual's commercial or economic relations.*

*Any type of defamatory remark, either written or spoken, that causes pecuniary loss to an individual through disparagement of a particular business dealing.*

For example, the early cases on injurious falsehood involved oral aspersions cast upon an individual's ownership of land, which prevented the individual from leasing or selling it. This TORT has also been called *disparagement of property, slander of goods,* and *trade libel.*

Injurious falsehood is distinguishable from the more general harm to reputation in LIBEL AND SLANDER.

## INJURY

*A comprehensive term for any wrong or harm done by one individual to another individual's body, rights, reputation, or property. Any interference with an individual's legally protected interest.*

A civil injury is any damage done to person or property that is precipitated by a breach of contract, NEGLIGENCE, or breach of duty. The law of TORTS provides remedies for injury caused by negligent or intentional acts.

An *accidental injury* is an injury to the body caused unintentionally. Within the meaning of WORKERS' COMPENSATION acts, it is an injury occurring in the course of employment.

One who is injured might be able to recover damages against the individual who caused him or her harm, since the law seeks to provide a remedy for every injury.

## INLAND WATERS

*Canals, lakes, rivers, water courses, inlets, and bays that are nearest to the shores of a nation and subject to its complete sovereignty.*

Inland waters, also known as internal waters, are subject to the total sovereignty of the country as much as if they were an actual part of its land territory. A coastal nation has the right to exclude foreign vessels, subject to the right of entry in times of distress.

Whether or not particular waters are to be regarded as inland waters has traditionally been dependent upon historical and geographical factors. Certain types of shoreline configurations have been regarded as confining bodies of water,

such as bays. In addition, there has been a recognition that other areas of water that are closely connected to the shore may be regarded as inland waters based upon the manner in which they have been treated by the coastal nation, although they do not meet any exact geographical test. Historic title to inland waters can be claimed only in situations when the coastal nation has asserted and maintained dominion and control over those waters.

CROSS-REFERENCES

Navigable Rivers; Water Rights.

## INNKEEPER

*An individual who, as a regular business, provides accommodations for guests in exchange for reasonable compensation.*

An inn is defined as a place where lodgings are made available to the public for a charge, such as a hotel, motel, hostel, or guest house. A *guest* is a transient who receives accommodations at an inn, transiency being the major characteristic distinguishing him or her from a boarder. In order for the relationship of innkeeper and guest to be established, the parties must intend to have such a relationship. The individual accommodated must be received as a guest and must obtain accommodations in such capacity. The individual need not, however, register.

An innkeeper must accept all unobjectionable individuals offering themselves as guests, provided the innkeeper has available accommodations and the guests are willing to pay the reasonable charges. Proper grounds for a refusal to receive a proposed guest are ordinarily restricted to either lack of accommodations or the unsuitability of the guest.

It is improper and a violation of an individual's CIVIL RIGHTS for an innkeeper to refuse accommodations on the basis of race, creed, or color. Upon assignment to a room, a guest is entitled to its exclusive occupancy for all lawful purposes, subject to the right of the innkeeper to enter the room for proper purposes, such as to assist the police in their investigation of a crime.

### Compensation

An innkeeper is permitted to charge a reasonable compensation only, and must ordinarily fulfill his or her entire obligation prior to being entitled to the compensation. In the event that a guest does not pay, the innkeeper has a lien on the guest's property. Such a lien ordinarily extends to all property brought by the guest to the inn and generally continues until the debt is satisfied unless the innkeeper voluntarily surrenders the goods. The innkeeper may remove a guest upon refusal to pay his or her bill but cannot, however, use excessive force.

### Liability

An innkeeper has an obligation to reasonably protect guests from injury while at the inn. This duty of reasonable care mandates vigilance in protection of the guests from foreseeable risks. The innkeeper must protect guests from injury at the hands of other guests and from assaults and negligent acts of his or her own employees. The obligation to protect guests is not met merely by warning them, but must be coupled with a policing of the premises.

An innkeeper must take reasonable care regarding the safety of the guests' property and must warn guests of any hidden dangers that can be reasonably foreseen. This duty includes making inspections to ascertain that the premises are safe. The innkeeper is liable for any injuries arising from his or her failure to comply with fire regulations. Reasonably safe means of ingress and egress must be provided.

An innkeeper is required to use reasonable care to keep the hallways, passageways, and stairways well lighted and free from obstructions or hazards. An innkeeper who furnishes appliances or furniture for the convenience of guests must maintain them in a reasonably safe condition. Similar duties are required in connection with plumbing apparatus and swimming pools.

Reasonable care must be exercised by an innkeeper in the operation and maintenance of an elevator, which means that the elevator must be inspected and repaired to keep it in safe condition. The obligation to maintain the premises in a reasonably safe condition applies to windows and screens that are defective or insecurely fastened. Failure to have protective window grills or to guard air shafts located on a roof does not, however, necessarily constitute NEGLIGENCE.

The prevalent COMMON LAW view makes an innkeeper liable as an insurer for all PERSONAL PROPERTY brought by the guest to the inn that is lost through the innkeeper's fault. There is no liability, however, if the guest assumes the entire and exclusive care, control, and possession of his or her property. State laws have been enacted with respect to the liability of innkeepers for the

property of their guests. Generally the statutes modify the common law by limiting the innkeeper's liability to a specified amount and by requiring deposit of valuables. Guests must have notice of any limitations of the innkeeper's liability.

## INNOCENT

*Absent guilt; acting in* GOOD FAITH *with no knowledge of defects, objections, or inculpative circumstances.*

A person accused of and prosecuted for the commission of a crime is presumed innocent until proved guilty BEYOND A REASONABLE DOUBT.

## INNOCENT PURCHASER

*An individual who, in* GOOD FAITH *and by an honest agreement, buys property in the absence of sufficient knowledge to charge him or her with notice of any defect in the transaction.*

An individual is an innocent or good-faith purchaser when he or she buys something, paying valuable consideration, without actual or constructive notice of any legal infirmity in the sale. The purchaser of a gold bracelet for $500 from a jewelry store cannot be charged with notice that the bracelet was stolen.

## INNS OF CHANCERY

*Ancient preparatory colleges where qualified clerks studied the drafting of writs, which was a function of the officers of the Court of Chancery.*

Students attended Inns of Chancery to learn the basics of law and to qualify for admission after two years of instruction to the Inns of Court to which the Inn of Chancery was attached. The role of the Inns of Chancery in the English LEGAL EDUCATION process significantly declined in the eighteenth and nineteenth centuries.

## INNS OF COURT

*Organizations that provide preparatory education for* ENGLISH LAW *students in order to teach them to practice in court.*

Inns of Court were founded in the beginning of the fourteenth century. Membership in an inn is tantamount to membership in an integrated bar association in the United States. Inns of Court have a common council of LEGAL EDUCATION, which gives lectures and holds examinations. Currently, inns have the exclusive authority to confer the degree of *barrister-at-law,* a prerequisite to practice as an advocate or counsel in the superior courts in England.

## INOPERATIVE

*Void; not active; ineffectual.*

The term *inoperative* is commonly used to indicate that some force, such as a statute or contract, is no longer in effect and legally binding upon the persons who were to be, or had been, affected by it.

## INQUEST

*An inquiry by a* CORONER *or medical examiner, sometimes with the aid of a jury, into the cause of a violent death or a death occurring under suspicious circumstances. Generally an inquest may result in a finding of natural death, accidental death, suicide, or murder. Criminal prosecution may follow when culpable conduct has contributed to the death.*

*The body of jurors called to inquire into the circumstances of a death that occurred suddenly, by violence, or while imprisoned. Any body of jurors called to inquire into certain matters. (A* GRAND JURY *is sometimes called a grand inquest, for example.)*

*The determination or findings of a body of persons called to make a legal inquiry or the report issued after their investigation.*

The foundation of the modern jury system can be traced back to the Carolingian empire of medieval Europe during the eighth to the tenth centuries. The monarchs used a procedure called inquest, or inquisition, to help them consolidate their authority in the realm. They called together the people of the countryside and required them to recite what they considered to be the immemorial rights of the king. Once these rights were ascertained, they were adopted by the government and considered established. There was no accusation, verdict, or judgment in these proceedings, but the inquest fixed the right of the government to obtain information from its citizens.

The Norman invaders were not long on English soil when they used the inquest to compile the Domesday Book, a census compiled between 1085 and 1086 to record the ownership of land throughout the kingdom.

For this inquiry, citizens were called and required to give testimony under oath about their land and PERSONAL PROPERTY.

The inquest was also used in local courts in England during the Middle Ages. Since a person could not be tried for a crime until accused, a panel of four men from each vill and twelve from each hundred appeared before the court and charged certain individuals with crimes. The panel members appeared voluntarily, however, and were not summoned by a public officer as is done for an inquest today. Then in 1166 a law called the Assize of Clarendon made the inquest procedure mandatory. The panel of men was required to appear before local sheriffs and make regular accusations on their oaths. These cases then were tried in the royal courts because of the king's special interest in keeping the peace. This procedure was the origin of the modern grand jury.

A further step in consolidating the king's powers came with creation of the office of the coroner, so named for its service to the crown. In the Middle Ages the coroner was a powerful local official who kept records of appeals from lower courts, accusations, hangings, and public financial matters. He held inquests to investigate royal rights concerning fish, shipwrecks, treasure trove, and unexplained deaths. The purpose of such inquests was always to determine the extent of the king's financial interests. Anytime there was a death, the crown took whatever object had caused the death and all of the personal property of anyone who committed suicide or was convicted of a felony. From this early function of fiscal administration, the coroner today has become primarily responsible for managing dead bodies, but the inquest is still the procedure the coroner uses for investigation.

CROSS-REFERENCES

Clarendon, Constitutions of.

## INQUIRY, COMMISSIONS OF

*Individuals employed, during conciliation, to investigate the facts of a particular dispute and to submit a report stating the facts and proposing terms for the resolution of the differences.*

## INQUISITORIAL SYSTEM

*A method of legal practice in which the judge endeavors to discover facts while simultaneously representing the interests of the state in a trial.*

The inquisitorial system can be defined by comparison with the adversarial, or accusatorial, system used in the United States and Great Britain. In the ADVERSARY SYSTEM, two or more opposing parties gather evidence and present the evidence, and their arguments, to a judge or jury. The judge or jury knows nothing of the litigation until the parties present their cases to the decision maker. The defendant in a criminal trial is not required to testify.

In the inquisitorial system, the presiding judge is not a passive recipient of information. Rather, the presiding judge is primarily responsible for supervising the gathering of the evidence necessary to resolve the case. He or she actively steers the search for evidence and questions the witnesses, including the respondent or defendant. Attorneys play a more passive role, suggesting routes of inquiry for the presiding judge and following the judge's questioning with questioning of their own. Attorney questioning is often brief because the judge tries to ask all relevant questions.

The goal of both the adversarial system and the inquisitorial system is to find the truth. But the adversarial system seeks the truth by pitting the parties against each other in the hope that competition will reveal it, whereas the inquisitorial system seeks the truth by questioning those most familiar with the events in dispute. The adversarial system places a premium on the individual rights of the accused, whereas the inquisitorial system places the rights of the accused secondary to the search for truth.

The inquisitorial system was first developed by the Catholic Church during the medieval period. The ecclesiastical courts in thirteenth-century England adopted the method of adjudication by requiring witnesses and defendants to take an inquisitorial oath administered by the judge, who then questioned the witnesses. In an inquisitorial oath, the witness swore to truthfully answer all questions asked of him or her. The system flourished in England into the sixteenth century, when it became infamous for its use in the Court of the STAR CHAMBER, a court reserved for complex, contested cases. Under the reign of King Henry VIII, the power of the Star Chamber was expanded, and the court used torture to compel the taking of the inquisitorial oath. The Star Chamber was eventually eliminated as repugnant to basic liberty, and England gradually moved toward an adversarial system.

After the French Revolution, a more refined version of the inquisitorial system developed in France and Germany. From there it spread to the rest of continental Europe and to many African,

South American, and Asian countries. The inquisitorial system is now more widely used than the adversarial system. Some countries, such as Italy, use a blend of adversarial and inquisitorial elements in their court system.

The court procedures in an inquisitorial system vary from country to country. Most inquisitorial systems provide a full review of a case by an appeals court. In civil trials under either system of justice, the defendant, or respondent, may be required to testify. The most striking differences between the two systems can be found in criminal trials.

In most inquisitorial systems, a criminal defendant does not have to answer questions about the crime itself but may be required to answer all other questions at trial. Many of these other questions concern the defendant's history and would be considered irrelevant and inadmissible in an adversarial system.

A criminal defendant in an inquisitorial system is the first to testify. The defendant is allowed to see the government's case before testifying, and is usually eager to give her or his side of the story. In an adversarial system, the defendant is not required to testify and is not entitled to a complete examination of the government's case.

A criminal defendant is not presumed guilty in an inquisitorial system. Nevertheless, since a case would not be brought against a defendant unless there is evidence indicating guilt, the system does not require the PRESUMPTION OF INNOCENCE that is fundamental to the adversarial system.

A trial in an inquisitorial system may last for months as the presiding judge gathers evidence in a series of hearings.

The decision in an inquisitorial criminal trial is made by the collective vote of a certain number of professional judges and a small group of lay assessors (persons selected at random from the population). Neither the prosecution nor the defendant has an opportunity to question the lay assessors for bias. Generally, the judges vote after the lay assessors vote, so that they do not influence the conclusions of the lay assessors. A two-thirds majority is usually required to convict a criminal defendant, whereas a unanimous verdict is the norm in an adversarial system.

The inquisitorial system does not protect criminal defendants as much as the adversarial system. On the other hand, prosecutors in the inquisitorial system do not have a personal incentive to win convictions for political gain, which can motivate prosecutors in an adversarial system. Most scholars agree that the two systems generally reach the same results by different means.

**FURTHER READINGS**

Moskovitz, Myron. 1995. "The O.J. Inquisition: A United States Encounter with Continental Criminal Justice." *Vanderbilt Journal of Transnational Law* 28.

Sward, Ellen E. 1989. "Values, Ideology, and the Evolution of the Adversary System." *Indiana Law Journal* 64.

**CROSS-REFERENCES**

Criminal Procedure; Due Process of Law.

## INSANITY DEFENSE

*A defense asserted by an accused in a criminal prosecution to avoid liability for the commission of a crime because, at the time of the crime, the person did not appreciate the nature or quality or wrongfulness of the acts.*

The insanity defense is used by criminal defendants. The most common variation is cognitive insanity. Under the test for cognitive insanity, a defendant must have been so impaired by a mental disease or defect at the time of the act that he or she did not know the nature or quality of the act, or, if the defendant did know the nature or quality of the act, he or she did not know that the act was wrong. The vast majority of states allow criminal defendants to invoke the cognitive insanity defense.

Another form of the insanity defense is volitional insanity, or IRRESISTIBLE IMPULSE. A defense of irresistible impulse asserts that the defendant, although able to distinguish right from wrong at the time of the act, suffered from a mental disease or defect that made him or her incapable of controlling her or his actions. This defense is common in crimes of vengeance. For example, suppose that a child has been brutally assaulted. If an otherwise conscientious and law-abiding mother shoots the perpetrator, the mother may argue that she was so enraged that she became mentally ill and incapable of exerting self-control. Very few states allow the volitional insanity defense.

The insanity defense should not be confused with INCOMPETENCY. Persons who are incompetent to stand trial are held in a mental institution until they are considered capable of participating in the proceedings.

The insanity defense also should be kept separate from issues concerning mental retardation. The U.S. Supreme Court ruled in 2002 in ATKINS V. VIRGINIA, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) that the execution of mentally retarded criminals constituted "cruel and unusual punishment" and that it was prohibited by EIGHTH AMENDMENT. But if a person is acquitted by reason of insanity, execution is not an option.

The insanity defense reflects the generally accepted notion that persons who cannot appreciate the consequences of their actions should not be punished for criminal acts. Most states regulate the defense with statutes, but a few states allow the courts to craft the rules for its proper use. Generally, the defense is available to a criminal defendant if the judge instructs the jury that it may consider whether the defendant was insane when the crime was committed. The judge may issue this instruction if the defendant has produced sufficient evidence at trial to justify the theory. Sufficient evidence invariably includes EXPERT TESTIMONY by psychologists and psychiatrists.

When invoking insanity as a defense, a defendant is required to notify the prosecution. In some states, sanity is determined by the judge or jury in a separate proceeding following the determination of guilt or innocence at trial. In other states, the defense is either accepted or rejected in the verdict of the judge or jury. Even if evidence of insanity does not win a verdict of not guilty, the sentencing court may consider it as a mitigating factor.

### History

"Complete madness" was first established as a defense to criminal charges by the common-law courts in late-thirteenth-century England. By the eighteenth century, the complete madness definition had evolved into the "wild beast" test. Under that test, the insanity defense was available to a person who was "totally deprived of his understanding and memory so as not to know what he [was] doing, no more than an infant, a brute, or a wild beast" (Feigl 1995, 161).

By 1840, most jurisdictions had refined the wildbeast test to cognitive insanity and supplemented that with irresistible impulse insanity. However, in 1843, a well-publicized assassination attempt in England caused Parliament to eliminate the irresistible impulse defense. Daniel M'Naghten, operating under the delusion that

## Colin Ferguson

Colin Ferguson was convicted in March 1995 for crimes associated with a massacre in Long Island, New York, on December 7, 1993. Ferguson killed six persons and injured nineteen after opening fire with an automatic pistol on a crowded commuter train.

Ferguson's trial was marked with controversy. He discharged his court-appointed attorneys, who believed him mentally incompetent to stand trial, and was allowed by the judge to act as his own attorney. He dropped the insanity defense prepared by his attorneys and argued that a mysterious gunman had committed the shootings.

His bizarre courtroom behavior appeared to contradict the judge's conclusion that Ferguson was competent to stand trial. Though many witnesses identified Ferguson as the gunman, he insisted a white man had taken the gun from his bag while he slept, shot the passengers, and then escaped, leaving Ferguson, who is black, to take the blame. During the trial he asserted that he had been charged with ninety-three counts only because the crime occurred in 1993.

Attorneys Ronald L. Kuby and **WILLIAM M. KUNSTLER**, whom Ferguson had discharged, had asked the judge before trial to find that Ferguson's paranoia and delusional state made him mentally incompetent to stand trial. Yet Ferguson refused to be examined by either prosecution or defense psychiatrists, believing he was not insane. The judge allowed Ferguson to stand trial, believing he could understand the nature of the charges against him and could assist in his own defense.

# Is There a Need for the Insanity Defense?

Though the insanity defense is rarely invoked in criminal trials, it remains a controversial issue. Legislators and the public generally question the need for the defense after a defendant in a highly publicized murder case is found not guilty by reason of insanity. For example, when John Hinckley successfully used the defense after shooting President **RONALD REAGAN** to impress the actress Jodie Foster, there was a public outcry. Legal and medical commentators have divided opinions about the need for the insanity defense.

Those who wish to retain it note that forty-eight of the fifty states have some type of insanity defense. This, they claim, is evidence of the need for such a defense. The public is given a distorted view of who uses the defense and how it is employed. In fact about one percent of criminal defendants invoke the defense. More important, criminals rarely "beat the rap" by **PLEADING** insanity. When an insanity defense is employed, it means the defendant admits committing the criminal behavior and is now seeking a not guilty verdict on the basis of his state of mind. If the jury does not agree, the defendant will be convicted, and generally will serve a longer sentence than will someone convicted of the same crime who has not pleaded insanity.

Juries find for only about 20 percent of the defendants who plead insanity. Even this figure does not reflect the reality that many insanity pleas are the result of plea bargains, which indicates that prosecutors agree that such pleas are sometimes appropriate.

Finally, the fact that most highly publicized cases involve murder disguises the true demographics: 60 to 70 percent of insanity pleas are for crimes other than murder. They range from assault to shoplifting.

All these myths have led to the belief that criminals can avoid punishment by claiming insanity. The truth is that the insanity defense is a risky one at best.

Apart from combating these myths, advocates of the insanity defense contend that a fundamental principle of **CRIMINAL LAW** is at stake. The insanity defense is rooted in the belief that conviction and punishment are justified only if the defendant deserves them. The basic precondition for punishment is that the per-

Prime Minister Robert Peel wanted to kill him, tried to shoot Peel but shot and killed Peel's secretary instead. Medical testimony indicated that M'Naghten was psychotic, and the court acquitted him by reason of insanity (*M'Naghten's Case,* 8 Eng. Rep. 718 [1843]). In response to a public furor that followed the decision, the House of Lords ordered the Lords of Justice of the Queen's Bench to craft a new rule for insanity in the **CRIMINAL LAW.**

What emerged became known as the **M'NAGHTEN RULE.** This rule migrated to the United States within a decade of its conception, and it stood for the better part of the next century. The intent of the *M'Naghten* rule was to abolish the irresistible-impulse defense and to limit the insanity defense to cognitive insanity. Under the *M'Naghten* rule, insanity was a defense if

> at the time of the committing of the act, the party accused was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

Through the first half of the twentieth century, the insanity defense was expanded again. Courts began to accept the theories of psychoanalysts, many of whom encouraged recognition of the irresistible-impulse defense. Many states enacted a combination of the *M'Naghten* rule supplemented with an irresistible-impulse defense, thereby covering both cognitive and volitional insanity.

The insanity defense reached its most permissive standard in *Durham v. United States,* 214 F.2d 862 (D.C. Cir. 1954). The *Durham* rule excused a defendant "if his unlawful act was the product of mental disease or mental defect." The *Durham* rule was lauded by the mental health community as progressive because it allowed psychologists and psychiatrists to contribute to the judicial understanding of insanity. But it was also criticized for placing too much trust in the opinions of mental health professionals. Within seven years of its creation, the rule had been explicitly rejected in 22 states. It is used only in New Hampshire.

In 1964, the American Law Institute (ALI) began to reassess the insanity defense in the

son who committed the criminal behavior must have responsibility as a moral agent. When a person is so mentally disturbed that her irrationality or compulsion is impossible to control, that person lacks responsibility as a moral agent. It would be unfair to punish a person in such an extreme condition.

Based on this argument, proponents of the insanity defense do not support its application to a person who willingly consumes a powerful hallucinogen and then commits a criminal act. Nor would they allow its application to a person who is able to control a mental disorder through medication but fails to do so. But they do support the defense for a person who unwittingly consumes hallucinogens and then commits a crime.

Some opponents attack the insanity defense for confusing psychiatric and legal concepts, in the process undermining the moral integrity of the law. Both sides agree that the word *insane* is a legal, not medical, term. It is too simplistic to describe a severely mentally ill person merely as insane, and the vast majority of people with a mental illness would be judged sane if current legal tests for insanity were applied. The legal tests for insanity, moreover, require that a defendant's mental condition become so impaired that the fact finder may conclude the person has lost his or her free will. Because free will is not a concept that can be explained in medical terms, it may be impossible for a psychiatrist to determine if the mental impairment affected the defendant's capacity for voluntary choice. Without a way to measure insanity, it makes no sense to let prosecution and defense psychiatrists spar over the issue. A jury's decision based on psychiatrists' opinions may be grounded on unreliable evidence.

Another major argument against the insanity defense challenges its supposed moral basis. Critics contend that modern criminal law is concerned more with the consequences of crime and less with moral imperatives. If a person commits a criminal act, that person should be convicted. Mental illness can be taken into consideration at the time of sentencing. This line of reasoning supports laws that several states have adopted, which abolish the insanity defense and replace it with a new verdict of guilty but insane. This verdict carries a criminal penalty. It allows the judge to determine the length of imprisonment, which occurs in a hospital prison, and shifts the burden to the defendant to prove he is no longer dangerous or mentally ill in order to be released.

Finally, critics argue that the insanity plea is a rich person's defense. Only wealthy defendants can retain high-priced psychiatric experts. Persons represented by public defenders are usually afforded a psychiatric examination for the defense, but they may not get the same quality of exam, nor are they typically able to hire more than one examiner. Because a two-tiered criminal justice system is morally repugnant, critics contend that the insanity defense must be abolished.

course of promoting a new **MODEL PENAL CODE**. What emerged from the Model Penal Code Commission was a compromise between the narrow *M'Naghten* test and the generous *Durham* rule. The ALI test provided that a person was not responsible for criminal conduct if, at the time of the act, the person lacked "substantial capacity" to appreciate the conduct or to conform the conduct to the **RULE OF LAW**. The ALI test provided for both cognitive and volitional insanity. It also required only a lack of substantial capacity, less than complete impairment. The ALI version of the insanity defense was adopted by more than half the states and all but one federal circuit.

Several years later, another dramatic event led to another round of restrictions on the insanity defense. In 1981, John W. Hinckley, Jr., attempted to assassinate President **RONALD REAGAN**. Hinckley was prosecuted and acquitted of all charges by reason of insanity, and a resulting public outcry prompted Congress to enact legislation on the issue. In 1984, Congress passed the Insanity Defense Reform Act (Insanity Act) (18 U.S.C.A. § 17 [1988]) to abolish the irresistible-impulse test from federal courts. Initially, Reagan had called for a total abolition of mental illness as a defense to criminal charges, but his administration backed down from this position after intense **LOBBYING** by various professional organizations and trade associations.

The Insanity Act also placed the burden on the defendant to prove insanity. Before the Insanity Act, federal prosecutors bore the burden of proving the defendant's sanity **BEYOND A REASONABLE DOUBT**.

Most states joined Congress in reevaluating the insanity defense after Hinckley's acquittal. The legislatures of these states modified and limited the insanity defense in many and varied ways. Some states shifted the **BURDEN OF PROOF**, and some limited the applicability of the defense in the same manner as Congress did. A few states abolished the defense entirely. Chief Justice **WILLIAM H. REHNQUIST**, of the U.S. Supreme Court, opined in a dissent that it is "highly doubtful that **DUE PROCESS** requires a State to make available an insanity defense to a criminal

*John Hinckley Jr. was prosecuted for the attempted assassination of President Ronald Reagan in 1981. His acquittal by reason of insanity sparked public outcry, ultimately leading Congress to pass the Insanity Defense Reform Act.*

AP/WIDE WORLD PHOTOS

defendant" (*Ake v. Oklahoma,* 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 [1985]).

### Consequences

When a party successfully defends criminal charges on a ground of insanity, the consequences vary from jurisdiction to jurisdiction. Usually, the defendant is committed to a mental institution. On the average, a defendant found not guilty by reason of insanity and committed to a mental institution is confined for twice as long as is a defendant who is found guilty and sent to prison. Very few acquitted insanity defendants are given supervised release, and even fewer are released directly following their verdict.

The detention of an insanity acquittee is limited by law. The acquittee must be allowed periodic review in the mental institution, to determine whether continued treatment is necessary. In addition, a hospital facility may not hold an insanity acquittee indefinitely merely because the acquittee has an antisocial personality (*Foucha v. Louisiana,* 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 [1992]).

The procedural framework in Massachusetts illustrates the consequences that come with the insanity defense. Under chapter 123, section 16, of the Massachusetts General Laws Annotated, the court may order a person found not guilty by reason of insanity (an insanity acquittee) to be hospitalized for 40 days for observation and examination. During this period, the district attorney or the superintendent of the mental hospital may petition the court to have the insanity acquittee committed to the hospital. If the judge orders the commitment, the acquittee is placed in the hospital for six months.

After the first six months have expired, the commitment is reviewed again, and then once a year thereafter. If the superintendent of the mental health facility moves to discharge the acquittee, the district attorney must respond with any objections within 30 days of notice from the superintendent. The mental health facility is authorized to restrict the movement of criminal defendants and insanity acquittees, so a commitment is tantamount to incarceration.

### Defendants' Rights

When PLEADING insanity, a defendant might not want to present the best possible image at trial. In *Riggins v. Nevada,* 504 U.S. 127, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992), defendant David Riggins was charged with robbing and murdering Las Vegas resident Paul Wade. After being taken into custody, Riggins complained that he was hearing voices in his head and that he was having trouble sleeping. A psychiatrist at the jail prescribed 100 milligrams per day of Mellaril, an antipsychotic drug. By the time of trial, the psychiatrist was prescribing 800 milligrams per day of Mellaril.

Just before trial, Riggins's attorney moved the court to suspend administration of the Mellaril. Riggins was pleading not guilty by reason of insanity, and his attorney wanted the jury to see Riggins in his natural state. According to one psychiatrist, Dr. Jack Jurasky, Riggins "would most likely regress to a manifest psychosis and become extremely difficult to manage" if he were taken off Mellaril.

The court denied the motion, and Riggins was convicted and sentenced to death. The Nevada Supreme Court affirmed Riggins's convictions and death sentence. On appeal to the

U.S. Supreme Court, the convictions were reversed. According to the high court, Nevada had violated Riggins's due process rights under the Sixth and Fourteenth Amendments. In the absence of evidence that the treatment was medically appropriate and essential for Riggins's own safety or the safety of others, and without an exploration of less intrusive alternatives, the trial court had erred by denying Riggins's liberty interest in freedom from antipsychotic drugs.

According to the Court, the administration of the Mellaril jeopardized a number of Riggins's trial rights. Not only was it possible that the Mellaril had affected Riggins's outward appearance, and thus his defense, but the high daily dosage of Mellaril also might have affected Riggins's testimony, his ability to communicate with his attorney, and his ability to follow the proceedings. Although the defense had been allowed to present expert testimony on the nature of Riggins's mental condition, the Court concluded that the compromise of Riggins's trial rights was reversible error.

### Uses and Abuses

Victims of abuse often allege temporary insanity in defending their own violent behavior. For example, in 1994, Virginia resident Lorena Bobbitt, charged with severing her husband's penis with a knife, was acquitted of assault charges on the ground of temporary insanity. At trial, Bobbitt testified that her husband had abused her physically and emotionally.

Critics complain that the insanity defense is abused by defense attorneys, who use it to free the perpetrators of deliberate criminal acts. However, 95 percent of all persons found not guilty by reason of insanity are detained in hospitals, and in practice, the insanity defense is rarely invoked and rarely successful. The insanity defense is used by defendants in only one percent of all felony cases, and it results in acquittal in only one-quarter of those cases.

### Psychopaths and Sociopaths

When most people hear about the insanity defense, they automatically assume that it can be used applied to people commonly referred to as psychopaths and sociopaths. While traditionally there has been a small degree of difference between these two classifications, the American Psychiatric Associations most recent Diagnostic and Statistical Manual—Fourth Edition ("DSM-IV") groups sociopathy and psychopathy under the heading "antisocial personality disorder." The DSM-IV lays out a limited and concise set of diagnostic criteria on which to base the diagnosis of antisocial personality disorder.

According to the DSM-IV, antisocial personality disorder is characterized by pervasive pattern of disregard for, and violation of, the rights of others occurring since age 18, as indicated by three (or more) of the following: (1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest; (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure; (3) impulsivity or failure to plan ahead; (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults; (5) reckless disregard for safety of self or others; (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or to honor financial obligations; (7) lack of remorse, as indicated by being indifferent to, or rationalizing, having hurt, mistreated, or stolen from another.

However it is defined, many in the legal community doubt whether the insanity defense covers this kind of behavior at all. The ALI's Model Penal Code test of insanity states that "the terms mental disease or defect do not include an abnormality that is manifested only by repeated criminal or otherwise antisocial conduct." In other words, the criteria laid down by the DSM-IV for antisocial personality disorder would not allow for a claim of insanity under the Model Penal Code, the most widely used insanity test, or in other insanity tests used by states. Thus, sociopaths and psychopaths, while perceived as insane by most people, could likely not use the insanity defense as a defense in a court of law.

For this reason, most celebrated serial killers such as John Wayne Gacy and Ted Bundy, as well as persons whose mental stability seems to be of a questionable nature, such as Ted Kaczynski, have seen their insanity pleas fail or have never used the defense. In fact, in recent years, only Hinckley and Bobbitt are among celebrated cases who have used the defense successfully. For criminals with antisocial personality disorder, the insanity plea simply does not apply.

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**CROSS-REFERENCES**

M'naghten Rule.

## INSECURITY CLAUSE

*Provision in a contract that allows a creditor to make an entire debt come due if there is good reason to believe that the debtor cannot or will not pay.*

## INSIDER

*In the context of federal regulation of the purchase and sale of* SECURITIES*, anyone who has knowledge of facts not available to the general public.*

*Insider information* refers to knowledge about the financial status of a company that is obtained before the public obtains it, and which is usually known only by corporate officials or other insiders. The use of insider information in the purchase and sale of stock violates federal SECURITIES LAW.

*Insider trading* entails the purchase and sale of corporate shares by officers, directors, and stockholders who own more than 10 percent of the stock of a corporation listed on a national exchange (any association that provides facilities for the purchase and sale of securities, such as the New York Stock Exchange). *Insider reports* detailing such transactions must be submitted monthly to the SECURITIES AND EXCHANGE COMMISSION.

## INSOLVENCY

*An incapacity to pay debts upon the date when they become due in the ordinary course of business; the condition of an individual whose property and assets are inadequate to discharge the person's debts.*

## INSPECTION

*An examination or investigation; the right to see and duplicate documents, enter land, or make other such examinations for the purpose of gathering evidence.*

The inspection of documents relevant to issues in a lawsuit is an important element of discovery.

## INSTALLMENT

*Regular, partial portion of the same debt, paid at successive periods as agreed by a debtor and creditor.*

An *installment loan* is designed to be repaid in certain specified, ordinarily equal amounts over a designated period, such as a year or a number of months.

## INSTANT

*Current or present.*

When composing a legal brief, an attorney might use the phrase *the instant case* in reference to the case currently before the court to distinguish it from other cases discussed.

## INSTIGATE

*To incite, stimulate, or induce into action; goad into an unlawful or bad action, such as a crime.*

The term *instigate* is used synonymously with abet, which is the intentional encouragement or aid of another individual in committing a crime.

## INSTITUTE

*To inaugurate, originate, or establish. In* CIVIL LAW*, to direct an individual who was named as*

*A sample installment loan agreement*

**Installment Loan Agreement**

**PROMISSORY NOTE - INSTALLMENT**

_____(city,state,date) FOR VALUE RECEIVED, we the undersigned,

jointly and severally, promise to pay to the order of (name of lender), (city, state) , the sum of _____ ($ ) Dollars with interest on any unpaid balance from (date) at the rate of percent per annum, and payable in equal successive monthly installments of Dollars in lawful money of the United States of America, commencing on the day of each and every month thereafter until paid except the final installment which shall be the balance due on this note.

If any installment be not paid when due, the undersigned promise to pay collection charges of per dollar of each overdue installment, or the actual cost of collection, whichever is greater and the entire amount owing and unpaid hereunder shall at the election of the holder hereof forthwith become due and payable, and notice of such election is hereby waived.

The undersigned promises to pay all reasonable attorney's fees incurred by the holder hereof in enforcing any right or remedy hereunder.

All sums remaining unpaid on the agreed or accelerated date of the maturity of the last installment shall thereafter bear interest at the rate of percent per month. The undersigned authorizes the holder to date and complete this note in accordance with the terms of the loan evidenced hereby, to accept additional co-makers, to release co-makers, to change or extend dates of payment and to grant indulgences all without notice or affecting the obligations of the undersigned, and hereby waives;

a. Presentment, demand, protest, notice of dishonor and the notice of nonpayment;
b. The right, if any, to the benefit, or to direct the application of, any security hypothecated to the holder, until all indebtedness of the maker to the holder, howsoever arising shall have been paid;
c. The right to require the holder to proceed against the maker, or to pursue any other remedy in the holder's power;

And agrees that the holder may proceed against any of the undersigned, directly and independently of the maker and that the cessation of the liability of the maker for any reason other than full payment, or any extension, forbearance, change of rate of interest, acceptance, release, substitution of security, or any impairment or suspension of the holder's remedies or rights against the maker, shall not in anywise affect the liability of any of the undersigned hereunder.

All obligations of the makers if more than one, shall be joint and several.

_____

_____

*heir in a will to pass over the estate to another designated person, known as the substitute.*

For example, to institute an action is to commence it by the filing of a complaint.

## INSTITUTION

*The commencement or initiation of anything, such as an action. An establishment, particularly one that is eleemosynary or public by nature.*

An institution can be any type of organized corporation or society. It may be private and designed for the profit of the individuals composing it, or public and nonprofit.

## INSTRUCTIONS

*Directives given by a judge to a jury during a trial prescribing the manner in which the jurors should proceed in deciding the case at bar. Jury instructions ordinarily include a statement of the* QUESTIONS OF FACT *for determination by the jury, as well as a statement of the laws applicable to the facts of the case.*

## INSTRUMENT

*A formal or legal written document; a document in writing, such as a deed, lease, bond, contract, or will. A writing that serves as evidence of an individual's right to collect money, such as a check.*

## INSTRUMENTALITY RULE

*A principle of corporate law that permits a court to disregard the corporate existence of a subsidiary corporation when it is operated solely for the benefit of the parent corporation, which controls and directs the activities of the subsidiary while asserting the shield of limited liability.*

The instrumentality rule, also called the alter ego doctrine, destroys the corporate IMMUNITY from liability when the corporate nature of an organization is a sham that brings about injus-

tice. When the rule is applied, the court is considered to pierce the corporate veil.

## INSURABLE INTEREST

*A right, benefit, or advantage arising out of property that is of such nature that it may properly be indemnified.*

In the law of insurance, the insured must have an interest in the subject matter of his or her policy, or such policy will be void and unenforceable since it will be regarded as a form of gambling. An individual ordinarily has an insurable interest when he or she will obtain some type of financial benefit from the preservation of the subject matter, or will sustain pecuniary loss from its destruction or impairment when the risk insured against occurs.

In certain jurisdictions, the innocent purchaser of a stolen car, who has a right of possession superior to all with the exception of the true owner, has an insurable interest in the automobile. This is not the case, however, where an individual knowingly purchases a stolen automobile.

Insurable interest is not dependent upon who pays the premiums of the policy. In addition, different people can have separate insurable interests in the same subject matter or property.

## INSURANCE

*A contract whereby, for specified consideration, one party undertakes to compensate the other for a loss relating to a particular subject as a result of the occurrence of designated hazards.*

The normal activities of daily life carry the risk of enormous financial loss. Many persons are willing to pay a small amount for protection against certain risks because that protection provides valuable peace of mind. The term *insurance* describes any measure taken for protection against risks. When insurance takes the form of a contract in an insurance policy, it is subject to requirements in statutes, ADMINISTRATIVE AGENCY regulations, and court decisions.

In an insurance contract, one party, theinsured, pays a specified amount of money, called a premium, to another party, the insurer. The insurer, in turn, agrees to compensate the insured for specific future losses. The losses covered are listed in the contract, and the contract is called a policy.

When an insured suffers a loss or damage that is covered in the policy, the insured can collect on the proceeds of the policy by filing a claim, or request for coverage, with the insurance company. The company then decides whether or not to pay the claim. The recipient of any proceeds from the policy is called the beneficiary. The beneficiary can be the insured person or other persons designated by the insured.

A contract is considered to be insurance if it distributes risk among a large number of persons through an enterprise that is engaged primarily in the business of insurance. Warranties or service contracts for merchandise, for example, do not constitute insurance. They are not issued by insurance companies, and the risk distribution in the transaction is incidental to the purchase of the merchandise. Warranties and service contracts are thus exempt from strict insurance laws and regulations.

The business of insurance is sustained by a complex system of risk analysis. Generally, this analysis involves anticipating the likelihood of a particular loss and charging enough in premiums to guarantee that insured losses can be paid. Insurance companies collect the premiums for a certain type of insurance policy and use them to pay the few individuals who suffer losses that are insured by that type of policy.

Most insurance is provided by private corporations, but some is provided by the government. For example, the FEDERAL DEPOSIT INSURANCE CORPORATION (FDIC) was established by Congress to insure bank deposits. The federal government provides life insurance to military service personnel. Congress and the states jointly fund MEDICAID and MEDICARE, which are HEALTH INSURANCE programs for persons who are disabled or elderly. Most states offer health insurance to qualified persons who are indigent.

Government-issued insurance is regulated like private insurance, but the two are very different. Most recipients of government insurance do not have to pay premiums, but they also do not receive the same level of coverage available under private insurance policies. Government-issued insurance is granted by the legislature, not bargained for with a private insurance company, and it can be taken away by an act of the legislature. However, if a legislature issues insurance, it cannot refuse it to a person who qualifies for it.

## Gene Testing

When a person applies for medical, life, or disability insurance, the insurance company typically requires the disclosure of preexisting medical conditions and a family medical history. In some cases the applicant must undergo a physical examination. Based on this information, the insurance company decides whether to offer coverage and, if so, at what price.

Breakthroughs in genetics now allow persons to be tested for rare medical conditions such as cystic fibrosis and Huntington's disease. In addition, genetic testing can reveal an increased risk of more common conditions, including breast, colon, and prostate cancer; lymphoma; and leukemia. Concerns have been raised that once these tests become affordable, insurance companies will use the results to deny coverage.

Research studies published in the 1990s indicate that persons already have been denied insurance coverage because of the risk of genetic disease. The prospect of widespread genetic discrimination troubles many professionals in the medical and legal communities. It is unfair, they charge, to deny a person coverage or to charge higher premiums, based on a potential risk of genetic disease that the person is powerless to modify.

The insurance industry, which currently collects medical information on genetic disease through the inspection of medical records and family histories, responds that a fundamental principle in writing insurance is charging people rates that reflect their risks. This means that each applicant pays the fairest possible price, based on her individual characteristics. The industry also notes that the concerns about genetic testing do not come into play with large-group health plans, where rates are based on methods other than individual assessments.

**CROSS-REFERENCES**

Genetic Screening.

### History

The first examples of insurance related to marine activities. In many ancient societies, merchants and traders pledged their ships or cargo as security for loans. In Babylon creditors charged higher interest rates to merchants and traders in exchange for a promise to forgive the loan if the ship was robbed by pirates or was captured and held for ransom.

In postmedieval England, local groups of working people banded together to create "friendly societies," forerunners of the modern insurance companies. Members of the friendly societies made regular contributions to a common fund, which was used to pay for losses suffered by members. The contributions were determined without reference to a member's age, and without precise identification of what claims would be covered. Without a system to anticipate risks and potential liability, many of the first friendly societies were unable to pay claims, and many eventually disbanded. Insurance gradually came to be seen as a matter best handled by a company in the business of providing insurance.

Insurance companies began to operate for profit in England during the seventeenth century. They devised tables to mathematically predict losses based on various data, including the characteristics of the insured and the probability of loss related to particular risks. These calculations made it possible for insurance companies to anticipate the likelihood of claims, and this made the business of insurance reliable and profitable.

The British Parliament granted a MONOPOLY over the business of insurance in colonial America to two English corporations, London Assurance and Royal Exchange. During the 1760s, colonial legislatures gave a few American insurance companies permission to operate. Since the Revolutionary War, U.S. insurance companies have grown in number and size, with most offering to insure against a wide range of risks.

### Regulation and Control

Until the middle of the twentieth century, insurance companies in the United States were relatively free from federal regulation. According to the U.S. Supreme Court in *Paul v. Virginia,* 75 U.S. (8 Wall.) 168, 19 L. Ed. 357 (1868), the issuing of an insurance policy did not constitute a commercial transaction. This meant that states had the power to regulate the business of insurance. In 1944 the high court held in *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440, that insurance did, in some cases, constitute a commercial transaction. This meant that Congress had the power to regulate it. The *South-Eastern* holding made the business of insurance subject to federal laws on rate fixing and monopolies.

Insurance is now governed by a blend of statutes, administrative agency regulations, and court decisions. State statutes often control premium rates, prevent unfair practices by insurers, and guard against the financial insolvency of insurers to protect insureds. At the federal level, the MCCARRAN-FERGUSON ACT (Pub. L. No. 79-15, 59 Stat. 33 [1945] [codified at 15 U.S.C.A. §§ 1011–1015 (1988)]) permits states to retain regulatory control over insurance, as long as their laws and regulations do not conflict with federal ANTITRUST LAWS on rate fixing, rate discrimination, and monopolies.

In most states, an administrative agency created by the state legislature devises rules to cover procedural details that are missing from the statutory framework. To do business in a state, an insurer must obtain a license through a registration process. This process is usually managed by the state administrative agency. The same state agency may also be charged with the enforcement of insurance regulations and statutes.

Administrative agency regulations are many and varied. Insurance companies must submit to the governing agency yearly financial reports regarding their economic stability. This requirement allows the agency to anticipate potential insolvency and to protect the interests of insureds. Agency regulations may specify the types of insurance policies that are acceptable in the state, although many states make these declarations in statutes. The administrative agency is also responsible for reviewing the competence and ethics of insurance company employees.

The judicial branches of governments also shape insurance law. Courts are often asked to resolve disputes between the parties to an insurance contract, and disputes with third parties. Court decisions interpret the statutes and regulations based on the facts of the case, creating many rules that must be followed by insurers and insureds.

Insurance companies may be penalized for violating statutes or regulations. Penalties for misconduct include fines and the loss or suspension of the company's business license. In some states, if a court finds that an insurer's denial of coverage or refusal to defend an insured in a lawsuit was unreasonable, the insurance company may be required to pay court costs, attorneys' fees, and a percentage beyond the insured's recovery.

### Types of Insurance

Insurance companies create insurance policies by grouping risks according to their focus. This provides a measure of uniformity in the risks that are covered by a type of policy, which in turn allows insurers to anticipate their potential losses and to set premiums accordingly. The most common forms of insurance policies include life, health, automobile, homeowners' and renters', PERSONAL PROPERTY, fire and casualty, marine, and inland marine policies.

Life insurance provides financial benefits to a designated person upon the death of the insured. Many different forms of life insurance are issued. Some provide for payment only upon the death of the insured; others allow an insured to collect proceeds before death.

A person may purchase life insurance on his or her own life for the benefit of a third person or persons. Individuals may even purchase life insurance on the life of another person. For example, a wife may purchase life insurance that will provide benefits to her upon the death of her husband. This kind of policy is commonly obtained by spouses and by parents insuring themselves against the death of a child. However, individuals may only purchase life insurance on the life of another person and name themselves beneficiary when there are reasonable grounds to believe that they can expect some benefit from the continued life of the insured. This means that some familial or financial relationship must unite the beneficiary and the insured. For example, a person may not purchase life insurance on the life of a stranger in the hope that the stranger will suffer a fatal accident.

*A sample insurance policy*

## Insurance Policy (Motorcycle)

**COLONIAL MOTOR CYCLE COVER**

The Colonial Insurance Company Ltd. (hereinafter referred to as "Colonial") agrees to provide insurance in the Terms and Conditions set out in this Policy during the period of insurance stated in the Schedule or any subsequent period for which the Company may accept a premium.

- The proposal form and declaration signed by you the Insured are the basis of and form part of this contract.
- The policy will operate only in Bermuda.
- This Policy is a Contract of Indemnity between Colonial and you the Insured.
- We welcome you as a policyholder of Colonial.

Stamp Duty chargeable on this Policy under the Stamp Duties Act, 1976 will be paid.

**NO CLAIMS DISCOUNT**

Provided no claim has arisen under this policy during the previous period of insurance your renewal premium will be discounted as follows:
After

| | |
|---|---|
| 1 Claim Free Year | 10% |
| 2 Claim Free Years | 20% |

If only one claim arises in any period of insurance, your No Claim Discount will be reduced to nil.

Your entitlement to No Claims Discount cannot be transferred to anyone else.

**The Policy**

Definition 'Your Motor Cycle' – The Motor Vehicle described in the Schedule of this Policy.

**SECTION 1 – LOSS OR DAMAGE TO YOUR MOTOR CYCLE**

Colonial will pay for loss or damage to your motor cycle and its attached accessories and spare parts by:

(a) fire, explosion, malicious damage.
(b) theft,
(c) accidental collision,
(d) any other cause

**But** Colonial will not pay for:

(a) wear and tear or depreciation,
(b) mechanical or electrical fault or breakdown,
(c) loss of use, cost of alternative transportation
(d) damage to tyres by punctures, cuts, bursts or braking,
(e) loss or damage where the driver has been convicted (or a prosecution is pending against the driver) of an offence contrary to section 35, 35A or 35B of the Road Traffic Act, 1947.

Also see "Compulsory Claims Excess" below.

**Towing Costs**
Colonial will pay for the reasonable cost of removing your Motor cycle to the nearest repairer.

**Claim Settlement**
Colonial has the option to either:

(a) repair your motor cycle,
(b) replace your motor cycle,
(c) pay in cash the amount of the loss or damage.

**N.B.** Any claim payment will not be for more than the market value of your motor cycle immediately prior to the loss or damage or the Insured's estimated value whichever is the less. The market value is the cost of replacing your motor cycle with another of similar type, age and condition.

The Insured's estimated value at the inception of the Policy is stated in the Schedule. At each renewal of this Policy the Insured's estimated value is as stated on the Certificate of Insurance Form A issued as evidence of the existence of this Policy as required by law.

**Compulsory Claims Excess**
If loss or damage (excluding fire, explosion, malicious damage or theft) covered by this policy occurs you will be responsible, in respect of each claim, for the amounts specified below:

| | |
|---|---|
| (a) where the driver is age 26 or over | $50.00 |
| (b) where the driver is under age 26 | $100.00 |

If loss or damage caused by theft occurs you will be responsible in respect of each claim for the amount of $200.00.

**Except** where the Insured's estimated value exceeds $1500 in which case you will be responsible for the amount of $300.00.

[continued]

*A sample insurance policy (continued)*

## Insurance Policy (Motorcycle)

**SECTION 2 – LIABILITY TO THIRD PARTIES**

**Your Liability**
Colonial will indemnify you against your legal liability arising out of an accident in connection with your motor cycle for

an amount of up to BD$5,000,000 (Five Million Dollars) in respect of the total claims arising out of any one accident and/or series of accidents arising out of one event (inclusive of Legal Fees; Costs and Expenses as covered by this Policy)

but subject to

a limit of BD$250,000 (Two Hundred and Fifty Thousand Dollars) in respect of liability for damage to property.

**However,** in the event of Colonial being required to indemnify you for such liability solely because of the requirements of the Motor Car Insurance (Third Party Risks) Act 1943, then the minimum limits as required of an insurance policy by that Act shall apply.

**Other Persons Liability**
In the same way, we will indemnify any person permitted by you to drive or use your motor cycle as if they were you provided that the person is not driving or using your vehicle in contravention of any law.

**Legal Fees; Costs and Expenses**
Colonial will pay all reasonable costs for legal services or any other costs or expenses incurred with our written consent in connection with any incident which might involve legal liability under this policy.

**Indemnity to Legal Personal Representatives**
In the event of death of any person entitled to indemnity under this section, Colonial will indemnify his/her legal personal representatives.

**Liability Not Covered**
Colonial will **NOT** indemnify you for:

(a) liability for damage to your motor cycle or any other property owned by or in the possession of any person claiming indemnity under this section,
(b) liability covered by any other policy,
(c) liability for the death of or injury to any person traveling upon or getting on to or off of your motor cycle,
(d) ( i) compensation for damages in respect of judgements delivered or obtained in the first instance otherwise than by a Court of competent jurisdiction within Bermuda,
(ii) cost and expenses of litigation recovered by any claimant from the insured which are not incurred in and recoverable in Bermuda.

**Right of Recovery**
You will repay to Colonial all sums it must pay because of any law if Colonial would not have been liable for those payments under the Terms of the Policy

**SECTION 3 – GENERAL EXCEPTIONS**

Colonial will NOT be liable

(1) whilst your motor cycle is being driven by
(a) you unless you hold a licence to drive your motor cycle
(b) any other person driving with your permission who does not hold a licence to drive your motor cycle unless the driver has held and is not disqualified from holding or obtaining a licence.
(2) whilst your motor cycle is being used otherwise than in accordance with the Limitations as to Use.

**Limitations As To Use**
Your Motor cycle may be used for social, domestic, and pleasure purposes, and for the Insured's business or profession. The Policy does not cover use for hire or reward, racing, pacemaking, reliability trial and speed testing, or use for any purpose in connection with the Motor Trade.

(3) for liability which attaches by virtue of an agreement but would not have attached in the absence of such an agreement.
(4) in respect of loss or destruction of or damage to your motor cycle or any consequential loss or any legal liability directly or indirectly caused or contributed to by or arising from
(a) ionising radiations or contaminations by radioactivity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel.
(b) the radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof
(c) war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, civil commotion, rebellion, revolution, insurrection or military or usurped power except where it is necessary to meet the requirements of The Motor Car Insurance (Third Party Risks) Act 1943.
(d) earthquake, flood,
(e) riot or civil commotion.

**SECTION 4 – GENERAL CONDITIONS**

(1) Colonial will only provide the insurance described in this Policy if:
(a) any person claiming indemnity has complied with all its terms, conditions and endorsements.
(b) the declaration and information given in the proposal form, which forms the basis of the contract, is complete and correct.

[continued]

*A sample insurance policy (continued)*

**Insurance Policy (Motorcycle)**

(2) You and any other person claiming indemnity must take all reasonable steps to:
  (a) prevent loss or damage
  (b) maintain your motor cycle in an efficient and roadworthy condition.
(3) Colonial must be given free access to examine your motor cycle on requrest.
(4) Colonial may cancel the policy by sending seven days notice by registered letter to your last known address, in which case you will be entitled to a pro rata refund of premium. You may cancel the policy by notifying Colonial and returning the Certificate of Motor Insurance. Provided no claim has arisen during the period of insurance, you shall be entitled to a return of premium less premium charged at the Company's Short Period rates for the time the policy has been in force.
(5) When an accident, injury, loss, or damage occurs, you must advise Colonial in writing as soon as possible.
  In addition Colonial must be advised immediately of:
  (a) any letter, claim, writ or summons whether civil or criminal received by you or any other person covered by this policy.
  (b) any impending prosecution, coroners inquest, or fatal accident inquiry involving any person covered by this policy.
(6) Any person claiming indemnity must:
  (a) not admit liability or fault nor promise or offer any compensation without our written consent
  (b) give all necessary assistance and information that Colonial may require.
(7) Colonial will be entitled to:
  (a) take over and with full discretion conduct the defence settlement or prosecution of any claim in the name of any person claiming indemnity.
  (b) instruct legal representatives of its own choice in any civil or criminal proceedings arising from any event the subject of a claim under this policy.
(8) If any difference shall arise as to the amount to be paid to you under this policy (liability being otherwise accepted) such difference shall be referred to an arbitrator to be appointed by the parties in accordance with current statutory provisions. Where any difference is by this Condition to be referred to arbitration, the making of an Award shall be a condition precedent to any right of action against Colonial.

**SECTION 5 – ENDORSEMENTS**

These endorsements apply only if referred to by number in the Schedule.
(1) **Third Party Only**
  Section 1 is cancelled
(2) **Third Party Fire and Theft**
  No claim will be paid under Section 1 except for loss or damage caused by:
  (a) fire, lightening or explosion
  (b) or theft, attempted theft, or as the result of your motor cycle being taken without the consent of the Insured.
(3) **Excluding Named Persons from Driving**
  The policy will not operate whilst your motor cycle is being driven by or is in the charge of any person named in the schedule against this endorsement number.
(4) **Reduction to Third Party Only for Named Drivers**
  Section 1 of the policy will not operate whilst your motor cycle is being driven by or is in the charge of any person named in the schedule against this endorsement number.
(5) **Named Drivers Only**
  The policy will not operate whilst your motor cycle is being driven by or is in the charge of any person other than a person named in the schedule against this endorsement number.

**Schedule Attached.**

Health insurance policies cover only specified risks. Generally, they pay for the expenses incurred from bodily injury, disability, sickness, and accidental death. Health insurance may be purchased for one's self and for others.

All automobile insurance policies contain liability insurance, which is insurance against injury to another person or against damage to another person's vehicle caused by the insured's vehicle. Auto insurance may also pay for the loss of, or damage to, the insured's motor vehicle. Most states require that all drivers carry, at a minimum, liability insurance under a no-fault scheme. In states that recognize no-fault insurance, damages resulting from an accident are paid for by the insurers, and the drivers do not have to go to court to settle the issue of damages. Drivers in these states may bring suit over an accident only in cases of egregious conduct, or where medical or repair costs exceed an amount defined by statute.

Homeowners' insurance protects homeowners from losses relating to their dwelling, including damage to the dwelling; personal liability for injury to visitors; and loss of, or damage to, property in and around the dwelling. Renters' insurance covers many of the same risks for persons who live in rented dwellings.

As its name would suggest, personal property insurance protects against the loss of, or damage to, certain items of personal property. It is useful when the liability limit on a home-

owner's policy does not cover the value of a particular item or items. For example, the owner of an original painting by Pablo Picasso might wish to obtain, in addition to a homeowner's policy, a separate personal property policy to insure against loss of, or damage to, the painting.

Businesses can insure against damage and liability to others with fire and casualty insurance policies. Fire insurance policies cover damage caused by fire, explosions, earthquakes, lightning, water, wind, rain, collisions, and riots. Casualty insurance protects the insured against a variety of losses, including those related to legal liability, BURGLARY and theft, accidents, property damage, injury to workers, and insurance on credit extended to others. Fidelity and surety bonds are temporary, specialized forms of casualty insurance. A fidelity bond insures against losses relating to the dishonesty of employees, and a surety bond provides protection to a business if it fails to fulfill its contractual obligations.

Marine insurance policies insure transporters and owners of cargo shipped on an ocean, a sea, or a navigable waterway. Marine risks include damage to cargo, damage to the vessel, and injuries to passengers.

Inland marine insurance is used for the transportation of goods on land and on landlocked lakes.

Many other types of insurance are also issued. Group health insurance plans are usually offered by employers to their employees. A person may purchase additional insurance to cover losses in excess of a stated amount or in excess of coverage provided by a particular insurance policy. Air-travel insurance provides life insurance benefits to a named beneficiary if the insured dies as a result of the specified airplane flight. Flood insurance is not included in most homeowners' policies, but it can be purchased separately. Mortgage insurance requires the insurer to make mortgage payments when the insured is unable to do so because of death or disability.

### Contract and Policy

An insurance contract cannot cover all conceivable risks. An insurance contract that violates a statute, is contrary to public policy, or plays a part in some prohibited activity will be held unenforceable in court. A contract that protects against the loss of burglary tools, for example, is contrary to public policy and thus unenforceable.

### Insurable Interest

To qualify for an insurance policy, the insured must have an insurable interest, meaning that the insured must derive some benefit from the continued preservation of the article insured, or stand to suffer some loss as a result of that article's loss or destruction. Life insurance requires some familial and pecuniary relationship between the insured and the beneficiary. Property insurance requires that the insured must simply have a lawful interest in the safety or preservation of the property.

### Premiums

Different types of policies require different premiums based on the degree of risk that the situation presents. For example, a policy insuring a homeowner for all risks associated with a home valued at $200,000 requires a higher premium than one insuring a boat valued at $20,000. Although liability for injuries to others might be similar under both policies, the cost of replacing or repairing the boat would be less than the cost of repairing or replacing the home, and this difference is reflected in the premium paid by the insured.

Premium rates also depend on characteristics of the insured. For example, a person with a poor driving record generally has to pay more for auto insurance than does a person with a good driving record. Furthermore, insurers are free to deny policies to persons who present an unacceptable risk. For example, most insurance companies do not offer life or health insurance to persons who have been diagnosed with a terminal illness.

### Claims

The most common issue in insurance disputes is whether the insurer is obligated to pay a claim. The determination of the insurer's obligation depends on many factors, such as the circumstances surrounding the loss and the precise coverage of the insurance policy. If a dispute arises over the language of the policy, the general rule is that a court should choose the interpretation that is most favorable to the insured. Many insurance contracts contain an INCONTESTABILITY CLAUSE to protect the insured. This clause provides that the insurer loses the right to contest the validity of the contract after a specified period of time.

An insurance company may deny or cancel coverage if the insured party concealed or mis-

represented a material fact in the policy application. If an applicant presents an unacceptably high risk of loss for an insurance company, the company may deny the application or charge prohibitively high premiums. A company may cancel a policy if the insured fails to make payments. It also may refuse to pay a claim if the insured intentionally caused the loss or damage. However, if the insurer knows that it has the right to rescind a policy or to deny a claim, but conveys to the insured that it has voluntarily surrendered such right, the insured may claim that the insurer waived its right to contest a claim.

An insurer may have a duty to defend an insured in a lawsuit filed against the insured by a third party. This duty usually arises if the claims in the suit against the insured fall within the coverage of a liability policy.

If a third party caused a loss covered by a policy, the insurance company may have the right to sue the third party in place of the insured. This right is called SUBROGATION, and it is designed to make the party that is responsible for a loss bear the burden of the loss. It also prevents an insured from recovering twice: once from the insurance company, and once from the responsible party.

An insurance company can subrogate claims only on certain types of policies. Property and liability insurance policies allow subrogation because the basis for the payment of claims is indemnification, or reimbursement, of the insured for losses. Conversely, life insurance policies do not allow subrogation. Life insurance does not indemnify an insured for a loss that can be measured in dollars. Rather, it is a form of investment for the insured and the insured's beneficiaries. A life insurance policy pays only a fixed sum of money to the beneficiary and does not cover any liability to a third party. Under such a policy, the insured stands no chance of double recovery, and the insurance company has no need to sue a third party if it must pay a claim.

### Terrorism Insurance

Following the attacks on the World Trade Center and the Pentagon, insurance premiums skyrocketed, especially for tenants of highly visible landmarks like sports arenas and skyscrapers. The Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107–297, 116 Stat. 2322, established a temporary federal program providing for a shared public and private compensation for insured losses resulting from acts of terrorism. The act, which is valid only for three years, provides that insurers must make terrorism coverage available and must provide policyholders with a clear and conspicuous disclosure of the premium charged for losses covered by the program. TRIA caps the exposure of insurance carriers to future acts of foreign terrorism, leaving the federal government to reimburse the insurance company for excess losses up to a maximum of $100 billion per year. Under TRIA, the TREASURY DEPARTMENT covers 90 percent of terrorism claims when an insurer's exposure exceeds 7 percent of its commercial premiums in 2003, 10 percent of premiums in 2004, and 15 percent in 2005.

TRIA defines an act of terrorism as any act that is certified by the U.S. secretary of the treasury, in concurrence with the U.S. SECRETARY OF STATE and U.S. attorney general. The act of terror must result in damage within the United States, or outside the United States in the case of an airplane or a U.S. mission. A terrorist act must be committed by an individual or individuals acting on behalf of any foreign person or foreign interest. An event must be a violent act or an act that is dangerous to human life, property, or infrastructure. Nuclear, biological, and chemical attacks are not covered, and an event cannot be certified as an act of terrorism unless the total damages exceed $5 million.

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## INSURED

*The person who obtains or is otherwise covered by insurance on his or her health, life, or property. The* insured *in a policy is not limited to the insured named in the policy but applies to anyone who is insured under the policy.*

## INSURER

*An individual or company who, through a contractual agreement, undertakes to compensate specified losses, liability, or damages incurred by another individual.*

An insurer is frequently an insurance company and is also known as an underwriter.

## INSURRECTION

*A rising or rebellion of citizens against their government, usually manifested by acts of violence.*

Under federal law, it is a crime to incite, assist, or engage in such conduct against the United States.

## INTANGIBLES

*Property that is a "right" such as a patent,* COPYRIGHT, *or* TRADEMARK, *or one that is lacking physical existence, such as good will. A nonphysical, noncurrent asset that exists only in connection with something else, such as the good will of a business.*

## INTEGRATED

*Completed; made whole or entire. Desegregated; converted into a nonracial, nondiscriminatory system.*

A contract that has been adopted as a final and complete expression of an agreement between two parties is an integrated agreement.

A school that has been integrated has been made into one in which students, faculty, staff, facilities, programs, and activities combine individuals of different races.

CROSS-REFERENCES

School Desegregation.

## INTEGRATED AGREEMENT

*A contract that contains within its four corners the entire understanding of the parties and is subject to the* PAROL EVIDENCE *rule, which seeks to preserve the integrity of written agreements by refusing to allow the parties to modify their contract through the introduction of prior or contemporaneous oral declarations.*

An agreement is integrated when the parties adopt the writing or writings as the final and complete expression of the agreement.

## INTEGRATED BAR

*The process of organizing the attorneys of a state into an association, membership in which is a condition precedent to the right to practice law.*

Integration is usually attained by enactment of a statute that grants authority to the highest court of the state to integrate the bar, or by rule of court in the exercise of its inherent power. When the bar is integrated, all attorneys within an area, which can include a state, a county, or a city, are members.

## INTEGRATION

*The bringing together of separate elements to create a whole unit. The bringing together of people from the different demographic and racial groups that make up U.S. society.*

In most cases, the term *integration* is used to describe the process of bringing together people of different races, especially blacks and whites, in schools and other settings. But it is also used to describe the process of bringing together people of different backgrounds. A primary purpose of the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C.A. § 12101 et seq.), for example, was to more fully integrate disabled individuals into U.S. society. The House Judiciary Committee's report on the ADA described it as "a comprehensive piece of CIVIL RIGHTS legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation" (H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 26 [1990], *reprinted in* 1990 U.S.C.C.A.N. 445, 449.7).

The term *integration* is most commonly used in association with the efforts of African-Americans in the United States to eliminate racial SEGREGATION and achieve equal opportunity and inclusion in U.S. society. Often, it has been used synonymously with *desegregation* to mean the elimination of discriminatory practices based on race. However, although similar, the terms have been used in significantly different ways by the courts, by legal theorists, and in the context of the CIVIL RIGHTS MOVEMENT. In general, *desegregation* refers to the elimination of policies and practices that segregate people of different races into separate institutions and facilities. *Integration* refers not only to the elimination of such policies but also to the active incorporation of different races into institutions for the purpose of achieving racial balance, which many believe will lead to equal rights, protections, and opportunities.

Throughout the civil rights movement in the United States, black leaders have held different opinions about the meaning and value of integration, with some advocating integration as the ultimate goal for black citizens, and others resisting integration out of concern that it would lead to the assimilation of black citizens into white culture and society. In 1934, a dis-

agreement over the value of integration versus segregation led W. E. B. Du Bois—a cofounder of the National Association for the Advancement of Colored People (NAACP) and a leading scholar, writer, and civil rights activist—to resign from the NAACP. Du Bois rejected the NAACP's heavy emphasis on integration, calling instead for black citizens to maintain their own churches, schools, and social organizations, and especially to develop their own economic base separate from the mainstream white economy.

After Du Bois's resignation, the NAACP adopted a full-fledged campaign to eliminate segregation and to promote integration. In 1940, NAACP leaders sent to President FRANKLIN D. ROOSEVELT, the secretary of the Navy, and the assistant secretary of war a memorandum outlining provisions for the "integration of the Negro into military aspects of the national defense program." This was the first instance in which the NAACP had specifically used the term *integration* in a civil rights policy pronouncement. After WORLD WAR II, the term *racial integration* became commonly used to describe civil rights issues pertaining to race.

On the legal front, the NAACP focused its efforts on eliminating segregation in the public schools. This campaign was led by THURGOOD MARSHALL, the first director-counsel of the NAACP LEGAL DEFENSE AND EDUCATIONAL FUND and later a U.S. Supreme Court justice. In 1954, Marshall successfully argued the landmark case BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, before the U.S. Supreme Court. The ruling in that case declared that racially segregated schools are inherently unequal and thus unconstitutional. Like other NAACP leaders, Marshall was strongly committed to the principle of racial integration. His arguments in *Brown* were heavily based on the work of Kenneth B. Clark, a black social psychologist whose research suggested that black children were stigmatized by being educated in racially segregated schools, causing them to suffer psychological and intellectual harm. Marshall used this theory of "stigmatic injury" to

*Months after the* Brown v. Bd. of Ed. *decision, two schools at military bases in Virginia were first opened to black children. Although not yet required of public schools, the Defense Department ordered the racial integration of all schools on military posts.*

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persuade the Court that racially segregated schools were inherently unequal. Although the *Brown* decision called for an end to formal segregation, it did not explicitly call for positive steps to ensure the integration of public schools.

The desegregation momentum begun by *Brown* was enacted into law by the 1964 CIVIL RIGHTS ACT (Pub. L. No. 88-352, 78 Stat. 246), which denied federal funds to any program that discriminated illegally on the basis of race, sex, color, religion, or national origin, outlawing such discrimination not only in public schools but also in areas of public accommodation and employment. To ensure the support necessary for passage of the act, its writers worded the act specifically to emphasize that its purpose was to desegregate, not to integrate. "Desegregation," the act said, was "the assignment of students to public schools . . . without regard to their race," but "not . . . the assignment of students to public schools in order to overcome racial imbalance."

Nevertheless, after the Civil Rights Act was passed, judges and other federal officials enforcing it required schools to go beyond racially neutral desegregation policies to try to remedy past segregation by enforcing a greater degree of racial integration. This policy was established by the U.S. Supreme Court in 1968 in *Green v. County School Board,* 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716, in which the Court ruled that a school district's desegregation plan was unacceptable under the *Brown* ruling. The *Green* case involved a school district that had two high schools that had previously been segregated by race. When the district changed its rules to allow students to attend the school of their choice, few black students chose to attend the traditionally white school, and no whites chose the black school, thus leaving the schools segregated. In its ruling in *Green,* the Court called the "freedom-of-choice" plan a "deliberate perpetuation of the unconstitutional dual system" and said that school boards had an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which RACIAL DISCRIMINATION would be eliminated root and branch." Although a freedom-of-choice plan could theoretically be a viable method for converting to a "unitary, nonracial school system," the Court said, it would have to "prove itself in operation," adding that such methods as rezoning might prove speedier, and thus more acceptable. Although the Court did not explicitly require active integration, it suggested that the validity of desegregation plans would be measured by the amount of integration that they actually produced.

This emphasis on achieving specific levels of integration as proof of desegregation was reinforced by the 1971 U.S. Supreme Court ruling in SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554. In *Swann,* the Court ruled that schools could use methods such as involuntary busing and the altering of attendance zones to achieve specific ratios of racial mixing, as long as those ratios were established as a "starting point[s] in the process of shaping a remedy" for past discrimination.

In a 1974 case, *Milliken v. Bradley,* 418 U.S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069, the Supreme Court made it more difficult for city school districts to achieve racial integration. In *Milliken,* the Court ruled that a federally ordered desegregation remedy could not include suburban schools when a city's school district was officially segregated for reasons other than past illegal discrimination, such as the simple demographics of its residents. In other words, if the surrounding suburban districts had not contributed to past illegal segregation, they could not be held responsible for remedying it. A cross-district remedy, the Court ruled, would be permissible only to correct a cross-district wrong. The effect of *Milliken* has been to allow an increasing amount of resegregation in public schools as housing patterns divide black and white residents between cities and their surrounding suburbs. More recent cases, such as *Missouri v. Jenkins,* 515 U.S. 70, 115 S. Ct. 2038, 132 L. Ed. 2d 63 (1995), have continued to impose strict judicial limits on the power of the courts to impose and enforce desegregation plans in the public schools.

Despite significant legal victories mandating greater integration, therefore, the actual amount of racial integration in the United States—in the schools and elsewhere—remains limited. In fact, in 2003, the Harvard University Civil Rights Project warned that early school integration gains were actually being reversed. In an 82-page report titled "A Multiracial Society with Segregated Schools: Are We Losing the Dream?" the multidisciplinary research-and-policy think tank examined trends in federal public school enrollment data from the start of integration efforts through the year 2000. According to its analysis of these figures, the desegregation of black stu-

dents progressed continuously until the late 1980s. Quantifiable gains from this policy included sharp increases in minority high-school graduations and the narrowing of differences in test scores between white and minority students. Then a process of "resegregation" began.

As argued in the report, resegregation has been marked by several disturbing statistical trends. Whites have clustered in schools with an average of 80 percent white populations, blacks have found themselves more segregated than at any time since the 1970s, and a substantial number of schools have emerged with virtually all non-white student populations. These the authors scathingly designated "apartheid schools" for their institutional resemblance—in terms of economic impoverishment, lack of resources, and social and health problems—to those found under the system of racial segregation enforced in twentieth-century South Africa. The findings also highlighted the isolation of Latino students, who have become the most highly segregated racial group in the public school system.

Most damningly, the Civil Rights Project report diagnosed an intellectual and moral failure in U.S. society to uphold the principles of integration. Not for want of public support was integration being abandoned, the authors argued. Instead, governments had essentially given up: Policy makers had erroneously concluded that enough progress had been made and that more was unattainable. Noting the absence of Congressional action since the early 1970s and the dearth of EXECUTIVE BRANCH enforcement since the Johnson era (with the sole exception of the Carter administration), the authors blamed lawmakers, the Executive Branch, and the courts for allowing integration efforts to wither while resegregation took root. The report called for a renewed focus on desegregation from both state and federal authorities to offer minority students attendance choices among better, more integrated schools.

Such failures have led many black leaders to question whether integration is indeed possible in the United States and whether it would actually benefit African Americans. Those in favor of integration follow in the tradition of Marshall and MARTIN LUTHER KING, JR., who insisted that integration would lead to increased freedom, power, and opportunities for African Americans. "In our society," King insisted, "liberation cannot come without integration and integration cannot come without liberation." More recently, Andrew Young, civil rights activist, former U.N. ambassador, and former mayor of Atlanta, has emphasized that integration does not lead to assimilation. "Those who reject integration," he said, "do so because they see the black community as one-way assimilation." In contrast, he said, "integration is a two-way street, each side contributing their own values, virtues, and traditions."

Other black scholars and political leaders have followed the lead of Du Bois, questioning the value of integration for African Americans and recommending instead separate black schools, churches, and economic networks. In the 1960s, members of the black power and black nationalist movements, including MALCOLM X, argued that integration was an inappropriate strategy for blacks, who they believed could free themselves from racism and repression only by separating themselves from the mainstream white culture. Integration, they asserted, would result in African Americans being assimilated into the white community. In 1967, for example, STOKELY CARMICHAEL, a leader of the black-power movement, said, "The fact is that integration, as traditionally articulated, would abolish the black community." More recently, some legal theorists of race relations have criticized the theory of stigmatic injury that Marshall presented in *Brown,* contending that it rests on a notion of African-American inferiority by asserting that black children can receive an adequate education

**The Most Segregated States for Black and Hispanic Students: 2000–2001**

| Most Segregated States for Black Students | | | Most Segregated States for Hispanic Students | |
|---|---|---|---|---|
| | State | Mostly minority[a] | State | Mostly minority[a] |
| 1 | Michigan | 62.5% | New York | 58.7% |
| 2 | New York | 60.8% | Texas | 46.9% |
| 3 | Illinois | 60.1% | California | 44.0% |
| 4 | New Jersey | 50.0% | New Jersey | 40.7% |
| 5 | Maryland | 50.0% | Illinois | 40.0% |
| 6 | Pennsylvania | 48.3% | Florida | 30.0% |
| 7 | Alabama | 43.1% | Pennsylvania | 27.6% |
| 8 | Wisconsin | 42.9% | Connecticut | 27.1% |
| 9 | Louisiana | 42.2% | Arizona | 25.6% |
| 10 | Mississippi | 41.3% | Rhode Island | 25.4% |

[a]"Mostly minority" is defined as a school whose enrollment of black and/or Hispanic students is at least 90 percent of the total enrollment.

SOURCE: Harvard University, The Civil Rights Project, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, 2003.

only in the presence of white children. **DERRICK A. BELL, JR.**, a leading legal theorist on race relations, has been a particularly vocal critic of integrated schools, insisting that they do not meet the needs of African-American children, whom, he says, would be better served by increased funding for schools in black neighborhoods, more black teachers and administrators, increased parental involvement, and higher expectations for academic achievement. Many educational experts concur, suggesting that many young black males would receive a higher-quality education by attending black male academies where the approach and curriculum were specifically designed to counter the social and cultural challenges faced by those young men in today's world.

Many of the black leaders who today advocate integration have refined the notion, insisting that it means more than simply mixing black and white students in the same school. Legal scholar john a. powell (who spells his name with only lowercase letters) said that true integration "transforms racial hierarchy" by "[creating] a more inclusive society where individuals and groups have opportunities to participate equally in their communities." Similarly, Ellis Cashmore, a leading scholar of race relations, said integration "describes a condition in which different ethnic groups are able to maintain group boundaries and uniqueness, while participating equally in the essential processes of production, distribution and government." Cashmore conceded, however, that in the United States, this type of integration "remains more of an ideal than a reality."

Cashmore and other current race-relations scholars suggest that integration no longer means simply desegregation but rather that it now includes pluralism. Pluralism, in this context, refers to a condition in which no ethnic hierarchies exist, so there are no ethnic minorities per se; instead, the various groups in society participate equally in the social system, therefore experiencing balance and cohesion rather than contention and resentment. In this sense, said scholar Harold Cruse, "the **SEPARATE-BUT-EQUAL** doctrine that *Brown* ruled unconstitutional *should* have been supplanted by the truly democratic doctrine of *plural but equal.*

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**CROSS-REFERENCES**

Disability Discrimination; School Desegregation; Separate But Equal.

## INTELLECTUAL PROPERTY

*Intangible rights protecting the products of human intelligence and creation, such as copyrightable works, patented inventions,* **TRADEMARKS**, *and trade secrets. Although largely governed by federal law, state law also governs some aspects of intellectual property.*

Intellectual property describes a wide variety of property created by musicians, authors, artists, and inventors. The law of intellectual property typically encompasses the areas of **COPYRIGHT**, **PATENTS**, and trademark law. It is intended largely to encourage the development of art, science, and information by granting certain property rights to all artists, which include inventors in the arts and the sciences. These rights allow artists to protect themselves from infringement, or the unauthorized use and misuse of their creations. Trademarks and service marks protect distinguishing features (such as

names or package designs) that are associated with particular products or services and that indicate commercial source.

Copyright laws have roots in eighteenth-century ENGLISH LAW. Comprehensive patent laws can be traced to seventeenth-century England, and they have been a part of U.S. law since the colonial period. The copyright and patent concepts were both included in the U.S. Constitution. Under Article I, Section 8, Clause 8, of the Constitution, "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The first TRADEMARK LAWS were passed by Congress in the late nineteenth century, and they derive their constitutional authority from the COMMERCE CLAUSE.

The bulk of intellectual PROPERTY LAW is contained in federal statutes. Copyrights are protected by the Copyright Act (17 U.S.C.A. §§ 101 et seq. [1994]); patents are covered in the Patent Act (35 U.S.C.A. §§ 101 et seq. [1994]), and trademark protection is provided by the LANHAM ACT (also known as the Trademark Act) (15 U.S.C.A. §§ 1501 et seq. [1994]).

Intellectual property laws give owners the exclusive right to profit from a work for a particular limited period. For copyrighted material, the exclusive right lasts for 70 years beyond the death of the author. The length of the right can vary for patents, but in most cases it lasts for 20 years. Trademark rights are exclusive for ten

## Napster and Intellectual Property

In early 1999, Shawn Fanning, who was only 18 at the time, began to develop an idea as he talked with friends about the difficulties of finding the kind of MP3 files they were interested in. He thought that there should be a way to create a program that combined three key functions into one. These functions included a search engine, file sharing (the ability to trade MP3 files directly, without having to use a centralized server for storage), and an Internet Relay Chat (IRC), which was a means of finding and chatting with other MP3 users while online. Fanning spent several months writing the code that would become the utility later known world-wide as Napster. Napster became a nonprofit on-line music-trading program which became especially popular among college students who typically have access to high-speed Internet connections.

In April 2000 the heavy metal rock group Metallica sued the on-line music-trading Website Napster for **COPYRIGHT** infringement. Several universities were also named in this suit. Metallica claimed that these universities violated Metallica's music copyrights by permitting their students to access Napster and illegally trade songs using university servers. A number of universities had banned Napster prior to April 2000 because of concerns about potential copyright infringement and/or because traffic on the Internet was slowing down university servers. Yale University, which was named in the suit, immediately blocked student access to Napster.

Metallica argued that Napster facilitated illegal use of digital audio devices, which the group alleged was a violation of the Racketeering Influenced and Corrupt Organizations (RICO) act, 18 U.S.C. § 1961. Napster responded that the Fair Use Act allows owners of compact discs to use them as they wish. Therefore if an owner of the disc decides to copy it into a computer file, he or she should be allowed to do so. If this file happens to be accessible on the Internet, then others can also access or download it without being guilty of a crime. Napster further claimed that since it made no profit off the trades, it owed no money in **ROYALTIES**. The Ninth Circuit held that Napster's operation constituted copyright infringement.

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**CROSS-REFERENCES**

Art Law.

years and can be continually renewed for subsequent ten-year periods.

Intellectual property laws do not fall in the category of CRIMINAL LAW, *per se*. Some copyright laws authorize criminal penalties, but by and large, the body of intellectual property law is concerned with prevention and compensation, both of which are civil matters. This means that the owner, not the government, is responsible for enforcement.

Intellectual property laws provide owners with the power to enforce their property rights in civil court. They provide for damages when unauthorized use or misuse has occurred. They also provide for injunctions, or court orders, to prevent unauthorized use or misuse.

The property protected by copyright laws must be fixed in a tangible form. For example, a musician may not claim copyright protection for a melody unless it has been written down or somehow actualized and affixed with a recognizable notation or recorded. A formula or device may not receive patent protection unless it has been presented in whole to the U.S. PATENT AND TRADEMARK OFFICE; even then, it must satisfy several tests in order to qualify. A symbol may not receive trademark protection unless it has been placed on goods or used in connection with services.

### Copyrights

Copyright laws grant to authors, artists, composers, and publishers the exclusive right to produce and distribute expressive and original work. Only expressive pieces, or writings, may receive copyright protection. A writing need not be words on paper: In copyright law, it could be a painting, sculpture, or other work of art. The writing element merely requires that a work of art, before receiving copyright protection, must be reduced to some tangible form. This may be on paper, on film, on audiotape, or on any other tangible medium that can be reproduced (i.e., copied).

The writing requirement ensures that copyrighted material is capable of being reproduced. Without this requirement, artists could not be expected to know whether they were infringing on the original work of another. The writing requirement also enforces the copyright rule that ideas cannot be copyrighted: Only the individualized expression of ideas can be protected.

Copyrighted material must be original. This means that there must be something sufficiently new about the work that sets it apart from previous similar works. If the variation is more than trivial, the work will merit copyright protection.

Functionality can be a factor in copyright law. The copyrights to architectural design, for example, are generally reserved for architectural works that are not functional. If the only purpose or function of a particular design is utilitarian, the work cannot be copyrighted. For instance, a person may not copyright a simple design for a water spigot. However, if a person creates a fancy water spigot, the design is more likely to be copyrightable.

Copyrighted material can receive varying degrees of protection. The scope of protection is generally limited to the original work that is in the writing. For example, assume that an artist has created a sculpture of the moon. The sculptor may not prevent others from making sculptures of the moon. However, the sculptor may prevent others from making sculptures of the moon that are exact replicas of his own sculpture.

Copyright protection gives the copyright holder the exclusive right to (1) reproduce the copyrighted work; (2) create derivative works from the work; (3) distribute copies of the work; (4) perform the work publicly; and (5) display the work. The first two rights are infringed whether they are violated in public or in private. The last three rights are infringed only if they are violated in public. *Public* showing is defined under the Copyright Act of 1976 as a performance or display to a "substantial number of persons" outside of friends and family (17 U.S.C.A. § 101).

Infringement of copyright occurs whenever someone exercises the exclusive rights of the copyright owner without the owner's permission. The infringement need not be intentional. Copyright owners usually prove infringement in court by showing that copying occurred and that the copying amounted to impermissible appropriation. These showings require an analysis and comparison of the copyrighted work and the disputed work. Many general rules also relate to infringement of certain works. For example, a character created in a particular copyrighted work may not receive copyright protection unless he or she is developed in great detail and a character in the disputed work closely resembles that character.

The most important exception to the exclusive rights of the copyright holder is the "fair use" doctrine. This doctrine allows the general public

to use copyrighted material without permission in certain situations. To varying extents, these situations include some educational activities, some literary and social criticism, some PARODY, and news reporting. Whether a particular use is fair depends on a number of factors, including whether the use is for profit; what proportion of the copyrighted material is used; whether the work is fictional in nature; and what economic effect the use has on the copyright owner.

The rise in electronic publication in the late twentieth century, particularly the widespread use of the INTERNET since the mid 1990s, caused new concerns in the area of copyright. A web site called Napster, which provided a file-sharing system whereby users could trade electronic music files, became one of the most popular sites on the Internet. The company had an estimated 16.9 million worldwide users, and the system accommodated about 65 million downloads. The Recording Industry Association of America sued Napster, eventually causing Napster to close down.

During the late 1990s, Congress enacted a series of laws that had significant impacts on the law of copyright. In 1998, Congress enacted the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (17 U.S.C.A. §§ 101 et seq.), which extended the terms of existing and new copyrights by 20 years, against the protests of several LOBBYING groups. Also in 1998, Congress approved the Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (17 U.S.C.A. §§ 101 et seq.), a broad-based piece of legislation that was designed to bring copyright law into the digital age.

*Napster, an online company that provided users the ability to share music files freely, was sued by the Recording Industry of America and was eventually forced to change its business model. Shawn Fanning, founder of Napster, speaks at a February 2001 news conference following a court ruling against the company.*

AP/WIDE WORLD PHOTOS

### Patents

Patent laws encourage private investment in new technologies by granting to artists the right to forbid all others to produce and distribute technological information that is new, useful, and non-obvious. The statutory requirements for patent protection are more stringent than those for copyright protection. Furthermore, because patent protection for commercial products or processes can give a tremendous market advantage to businesses, those seeking patents often find opposition to their applications. Patent protection can be obtained only through the U.S. Patent and Trademark Office.

The novelty requirement focuses on events that occur prior to the invention. Under Section 102 of the Patent Act, an invention is not novel if it is publicly used, sold, or patented by another inventor within 12 months of the patent application. This definition implements the public policy that favors quick disclosure of technological progress.

Often, two inventors apply for a patent for the same product or process within the same 12-month period. Three factors determine who wins the patent: the date and time that the product or process was conceived; the date and time that the product or process was reduced to practice; and the diligence that was used to pursue patent protection and to perfect the discovery. Generally, the first inventor to conceive the product or process has priority in the application process. However, if the second inventor is the first to reduce the product or process to practice, and the first inventor does not use diligence to obtain patent protection, the second inventor is given priority in the application process.

The utility requirement ensures that the product or process receiving patent protection will have some beneficial use. The inventor must specify in the application a specific utility for the invention. If the application is for a patent on a process, the process must be useful with respect to a product. A process that is new and non-obvious, yet useless, does not increase knowledge or confer any benefit on society.

Non-obviousness is not the same as novelty. Not everything that is novel is non-obvious. Anything that is non-obvious is novel, however, unless it already has been patented. The non-obviousness requirement focuses on existing technology, or "prior art." In determining whether an invention is non-obvious, the U.S. Patent and Trademark Office analyzes the prior art, examines the differences between the invention and the prior art, and determines the level of ordinary skill in the art. Generally, if an invention is obvious to a person of ordinary skill in the relevant art, it is not patentable.

When an inventor claims that his or her patent has been infringed, the court generally engages in a two-step process. First, it analyzes all of the relevant patent documents. It then reads the patent documents and compares them with the device or process that is accused of infringement. If each element of the accused device or process substantially duplicates an element in the patented device or process, the court may declare that the patent has been infringed. Infringement can occur only if another person uses, makes, or sells the patented device or process without the permission of the person who has received the patent.

When a patented device or process is infringed, the patent holder, or patentee, may recover in damages an amount equal to a reasonable royalty. If the infringement was willful, the infringing party may be forced to pay three times the reasonable royalty. If successful in court, the patent holder also may recover court costs and attorneys' fees. If the patent holder anticipates infringement, he or she may apply for an INJUNCTION, which would prohibit a certain party from infringing the patent. An injunction may also issue after a finding of infringement, to prevent repeat infringement.

### Trademarks

Trademark laws allow businesses to protect the symbolic information that relates to their goods and services, by preventing the use of such features by competitors. To receive trademark protection, a mark usually must be distinctive. *Distinctiveness* generally applies to any coined or fanciful word or term that does not closely resemble an existing mark. A mark generally will not receive trademark protection if it is a common or descriptive term used in the marketplace.

To receive trademark protection, a mark must be used in commerce. If two or more marketers claim ownership of a certain mark, the first user of the mark will usually receive the protection. When the mark is known to consumers only in a limited geographic area, though, it may not receive protection in areas where it is unknown.

Infringement occurs if a mark is likely to cause confusion among consumers. In determining whether confusion is likely, the court examines a number of factors, including the similarity between the two marks in appearance, sound, connotation, and impression; the similarity of the goods or services that the respective marks represent; the similarity of the markets; whether the sale of the goods or services is inspired by impulse or only after careful consideration by the buyer; the level of public awareness of the mark; whether shoppers are actually confused; the number and nature of similar marks on similar goods or services; the length of time of concurrent use without actual confusion on the part of shoppers; and the variety of goods or services that the mark represents (*In re E. I. duPont de Nemours & Co.,* 476 F.2d 1357, 177 U.S.P.Q. 563 [1973]).

Defenses to infringement include fair use and collateral use. Fair use occurs when the second user, or repossessor, uses a protected mark in a non-conspicuous way to identify a component of a good or service. For example, a restaurant may use a protected mark to advertise that it serves a particular brand of soft drink, without infringing the mark. However, the restaurant may not identify itself by the mark without infringing the mark.

Collateral use is use of the same mark in a different market. For example, assume that a tree surgeon has received trademark protection for the mark Tree Huggers. This protection might or might not prevent a business that sells logging boots from using the same mark. However, if the mark for the boots is written or otherwise appears with the same defining characteristics as the mark for the tree surgeon,

it risks being denied trademark protection, depending on whether it can be confused by consumers.

Remedies for infringement of a protected trademark consist of damages for the profits lost owing to the infringement; recovery of the profits realized by the infringer owing to the infringement; and attorneys' fees. A trademark holder also may obtain injunctive relief to prevent infringement.

### Other Forms of Intellectual Property

The body of intellectual property law also includes laws relating to trade secrets, UNFAIR COMPETITION, and the right of publicity. TRADE SECRET laws protect any formula, pattern, device, or compilation of information that provides a business advantage over competitors who do not use or know of it. A strategy to increase worker productivity, for example, is a trade secret. Trade secrets do not receive patent protection because they are not inventive. Trade secret laws are included in intellectual property laws because, like other intellectual property laws, they prevent the unauthorized use of certain intangible subject matter.

The right of publicity is the right of a person to control the commercial value and exploitation of his or her name, voice, or likeness. Because right-of-publicity laws promote artistic and commercial pursuits, they are included among intellectual property law. These laws are usually reserved for celebrities and other public figures whose name and image are important to their career. By allowing celebrities the right to control the commercial use of their name, voice, and image, right-of-publicity laws protect the commercial potential of entertainers.

### Developments

Artists face problems protecting their property in other countries because not all countries subscribe to international agreements regarding intellectual property. This has led to widespread unauthorized copying. In the 1990s, China and Mexico were identified as especially serious offenders. In both countries, music and films are copied and sold openly without compensation to the creators. The United States threatened to impose trade sanctions against China if it did not observe international copyright treaties. Such threats illustrate that the United States places a high priority on protecting the right of artists to profit from their work.

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CROSS-REFERENCES

Art Law; Copyright, International; Entertainment Law; Literary Property; Music Publishing; Trade Dress; Trade Name.

## INTEMPERANCE

*A lack of moderation. Habitual intemperance is that degree of intemperance in the use of intoxicating liquor which disqualifies the person a great portion of the time from properly attending to business. Habitual or excessive use of liquor.*

CROSS-REFERENCES

Alcohol.

## INTENT

*A determination to perform a particular act or to act in a particular manner for a specific reason; an aim or design; a resolution to use a certain means to reach an end.*

Intent is a mental attitude with which an individual acts, and therefore it cannot ordinarily be directly proved but must be inferred from surrounding facts and circumstances. Intent refers only to the state of mind with which the act is done or omitted. It differs from motive, which is what prompts a person to act or to fail to act. For example, suppose Billy calls Amy names and Amy throws a snowball at him. Amy's intent is to hit Billy with a snowball. Her motive may be to stop Billy's taunts.

The legal importance of what an individual intended depends on the particular area of law.

In contract law, for example, the intention of the parties to a written contract is fixed by the language of the contract document.

In TORT LAW, intent plays a key role in determining the civil liability of persons who commit harm. An intentional TORT is any deliberate invasion of, or interference with, the property, property rights, personal rights, or personal liberties of another that causes injuries without JUST CAUSE or excuse. In tort an individual is considered to intend the consequences of an act—whether or not she or he actually intends those consequences—if the individual is substantially certain that those consequences will result.

Basic intentional torts include ASSAULT AND BATTERY, conversion of property, false arrest, FALSE IMPRISONMENT, FRAUD, intentional infliction of emotional distress, invasion of privacy, and TRESPASS. It is ordinarily not necessary that any wrongful or illegal means be used to accomplish the negative result, provided the wrongful conduct was intentional and was not accompanied by excuse or justification.

In CRIMINAL LAW the concept of criminal intent has been called mens rea, which refers to a criminal or wrongful purpose. If a person innocently causes harm, then she or he lacks mens rea and, under this concept, should not be criminally prosecuted.

Although the concept of mens rea is generally accepted, problems arise in applying it to particular cases. Some crimes require a very high degree of intent, whereas others require substantially less. LARCENY, for example, requires that the defendant intentionally take property to which the person knows he or she is not entitled, intending to deprive the rightful owner of possession permanently. On the other hand, negligent homicide requires only that the defendant negligently cause another's death.

Criminal law has attempted to clarify the intent requirement by creating the concepts of "specific intent" and "general intent." SPECIFIC INTENT refers to a particular state of mind that seeks to accomplish the precise act that the law prohibits—for example, a specific intent to commit rape. Sometimes it means an intent to do something beyond that which is done, such as assault with intent to commit rape. The prosecution must show that the defendant purposely or knowingly committed the crime at issue.

General intent refers to the intent to do that which the law prohibits. It is not necessary for the prosecution to prove that the defendant intended the precise harm or the precise result that occurred. Thus, in most states, a defendant who kills a person with a gun while intoxicated, to the extent that the defendant is not aware of having a gun, will be guilty of second-degree murder. The law will infer that the defendant had a general intent to kill.

Criminal law dispenses with the intent requirement in many property-related crimes. Under COMMON LAW the prosecution had to establish that the defendant intended to steal or destroy property. By 1900 many statutes eliminated the "intent-to-defraud" requirement for property crimes. Passing a bad check, obtaining property under FALSE PRETENSES, selling mortgaged property, and embezzling while holding public office no longer required criminal intent.

Criminal law and tort law share the concept of transferred intent. For example, if A shoots a gun at B, intending to strike B, but the bullet hits C, the intent to strike is transferred to the act of shooting C and supplies the necessary intent for either a criminal conviction or a civil tort action. Under the criminal doctrine of transferred intent, the intent is considered to follow the criminal act regardless of who turns out to be the victim. Under the tort doctrine of transferred intent, the defendant is liable for monetary damages to the unintended victim.

## INTER ALIA

*[*Latin, Among other things.*] A phrase used in* PLEADING *to designate that a particular statute set out therein is only a part of the statute that is relevant to the facts of the lawsuit and not the entire statute.*

*Inter alia* is also used when reporting court decisions to indicate that there were other rulings made by the court but only a particular holding of the case is cited.

## INTER VIVOS

*[*Latin, Between the living.*] A phrase used to describe a gift that is made during the donor's lifetime.*

In order for an *inter vivos* gift to be complete, there must be a clear manifestation of the giver's intent to release to the donee the object of the gift, and actual delivery and acceptance by the donee.

An *inter vivos* gift is distinguishable from a gift causa mortis, which is made in expectation of impending death.

## INTEREST

*A comprehensive term to describe any right, claim, or privilege that an individual has toward real or* PERSONAL PROPERTY. *Compensation for the use of borrowed money.*

There are two basic types of interest: legal and conventional. *Legal interest* is prescribed by the applicable state statute as the highest that may be legally contracted for, or charged. *Conventional interest* is interest at a rate that has been set and agreed upon by the parties themselves without outside intervention. It must be within the legally prescribed interest rate to avoid the criminal prosecution of the lender for violation of USURY laws.

## INTEREST ON LAWYERS TRUST ACCOUNT

*A system in which lawyers place certain client deposits in interest-bearing accounts, with the interest then used to fund programs, such as legal service organizations who provide services to clients in need.*

Originating in Canada and Australia in the 1960s, interest on lawyers trust account (IOLTA) programs made their first appearance in the United States in Florida in 1981. Since then, all 50 states and the District of Columbia have established IOLTA programs. The concept is straightforward. Lawyers routinely place large client deposits—such as escrow accounts—in interest-bearing accounts, with the interest to be paid to the client. Deposits that would individually be too small or too short-term to generate interest are pooled into IOLTA accounts. The interest generated by these funds is then used to fund a variety of public legal services, usually geared toward those who cannot afford lawyers. Nationwide, IOLTA programs earned more than $200 million in interest in 2002.

Over the years IOLTA programs faced challenges from individuals and lawyers who felt that the interest, however small the amount, belonged to the clients. They cited the Fifth Amendment's prohibition against the taking of private property without just compensation. IOLTA proponents countered that, since the deposits individually would yield no interest, the clients were not actually losing money. The U.S. Supreme Court weighed in on March 26, 2003, when it narrowly decided in favor of IOLTAs (*Brown v. Legal Foundation of Washington,* U.S. Supreme Court, 01-1325, 2003). The Court found that the Fifth Amendment's Just Compensation Clause did not apply because without the existence of the IOLTA accounts no other depository accounts would exist, and consequently the clients whose money was being held would not have received any interest.

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### CROSS-REFERENCES

Fifth Amendment; Group Legal Services.

## INTERFERENCE

*In the law of* PATENTS, *the presence of two pending applications, or an existing patent and a pending application that encompass an identical invention or discovery.*

When interference exists, the PATENT AND TRADEMARK OFFICE conducts an investigation to ascertain the priority of invention between the conflicting applications, or the application and the patent. A patent is customarily granted to the earlier invention.

## INTERGOVERNMENTAL IMMUNITY DOCTRINE

*A principle established under* CONSTITUTIONAL LAW *that prevents the federal government and individual state governments from intruding on one another's sovereignty. Intergovernmental immunity is intended to keep government agencies from restricting the rights of other government agencies.*

The principle of intergovernmental immunity was established by the U.S. Supreme Court in MCCULLOCH V. MARYLAND, 17 U.S. at 426 (1819), in which Chief Justice JOHN MARSHALL and his fellow justices ruled unanimously that states may not regulate property or operations of the federal government. (Under Maryland state law, banks not chartered by the state were subject to restrictions and taxes; the state government had attempted to impose these restrictions on the Second Bank of the United States.)

The doctrine of intergovernmental immunity is frequently invoked in taxation cases. In *Davis v. Michigan Department of Treasury,* 489 U.S. 803 (1989), the U.S. Supreme Court ruled that the state of Michigan was in violation of federal law when it exempted state and local government pensions from taxation but levied taxes on federal government pensions. At the time, more than two dozen other states handled federal pensions in a similar manner.

The doctrine also keeps certain federal entities immune from state laws. The Smithsonian Institution is an example. While not a government agency in the strict sense of what that implies, it is considered an "instrumentality of the United States," and thus under federal jurisdiction. Therefore, the Smithsonian can establish charitable gift annuities and similar funding tools without being required to register under the charitable solicitation laws of individual states.

Intergovernmental immunity also governs the taxation of Native Americans living on federal lands, as well as tribal WATER RIGHTS.

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CROSS-REFERENCES

States' Rights.

## INTERIM

*[*Latin, In the meantime: temporary; between.*]*

An *interim dean* of a law school, for example, is an individual who is appointed to fill the office of dean during a temporary vacancy or a period during which the regular dean is absent due to an illness or disability.

## INTERIOR DEPARTMENT

The Interior Department is a federal agency responsible for U.S. natural resources and for land owned by the federal government. The department fulfills this responsibility by promulgating and enforcing numerous regulations concerning natural resources and public lands. The head of the department is the secretary of the interior, who sits on the president's cabinet and reports directly to the president.

The Department of the Interior was created by Congress in 1849 (9 Stat. 395 [43 U.S.C.A. § 1451]). Its original duties included supervision of all mining in the United States, the General Land Office, the Office of Indian Affairs, the Pension Office, the Patent Office, the District of Columbia penitentiary, the U.S. census, and accounts for federal court officers. These agencies and duties had little in common except that their focus was within U.S. borders, and they were out of place in other departments.

As a result of the continuing search for streamlined organization in government, the Department of the Interior eventually dropped a number of its original duties and developed an emphasis on natural resources. The department has retained responsibility for mining, federal lands, and American Indian issues. Over the years, it has added several offices and bureaus to help fulfill its responsibilities.

The chief functions of the Department of the Interior include efforts to conserve and develop mineral and water resources; to conserve, develop, and utilize fish and wildlife resources; to coordinate federal and state recreation programs; to preserve and administer scenic and historic areas; to operate the Job Corps Conservation Centers and Youth and Young Adult Conservation Corps Camps, and other youth training programs; to irrigate arid lands; to manage hydroelectric systems; to provide social and economic services to U.S. territories; and to provide programs and services to Native Americans.

The Department of the Interior contains several different offices, departments, and bureaus. The Office of the Secretary includes the Offices of the Deputy Secretary, Assistant Secretaries, and Inspector General. The inspector general is charged with coordinating and supervising interior audits and with performing inspections to detect FRAUD and abuse. In addition, the inspector general is responsible for supervising the financial activities of U.S. territories such as Guam, American Samoa, and the Virgin Islands. The Office of Hearings and Appeals is also contained within the Office of the Secretary. Persons involved in disputes with the Department of the Interior may have their cases heard at this office.

The hands-on work of the department is performed by several bureaus and services. The Bureau of Reclamation is devoted to the management of water resources. The Bureau of Land

**Department of the Interior**

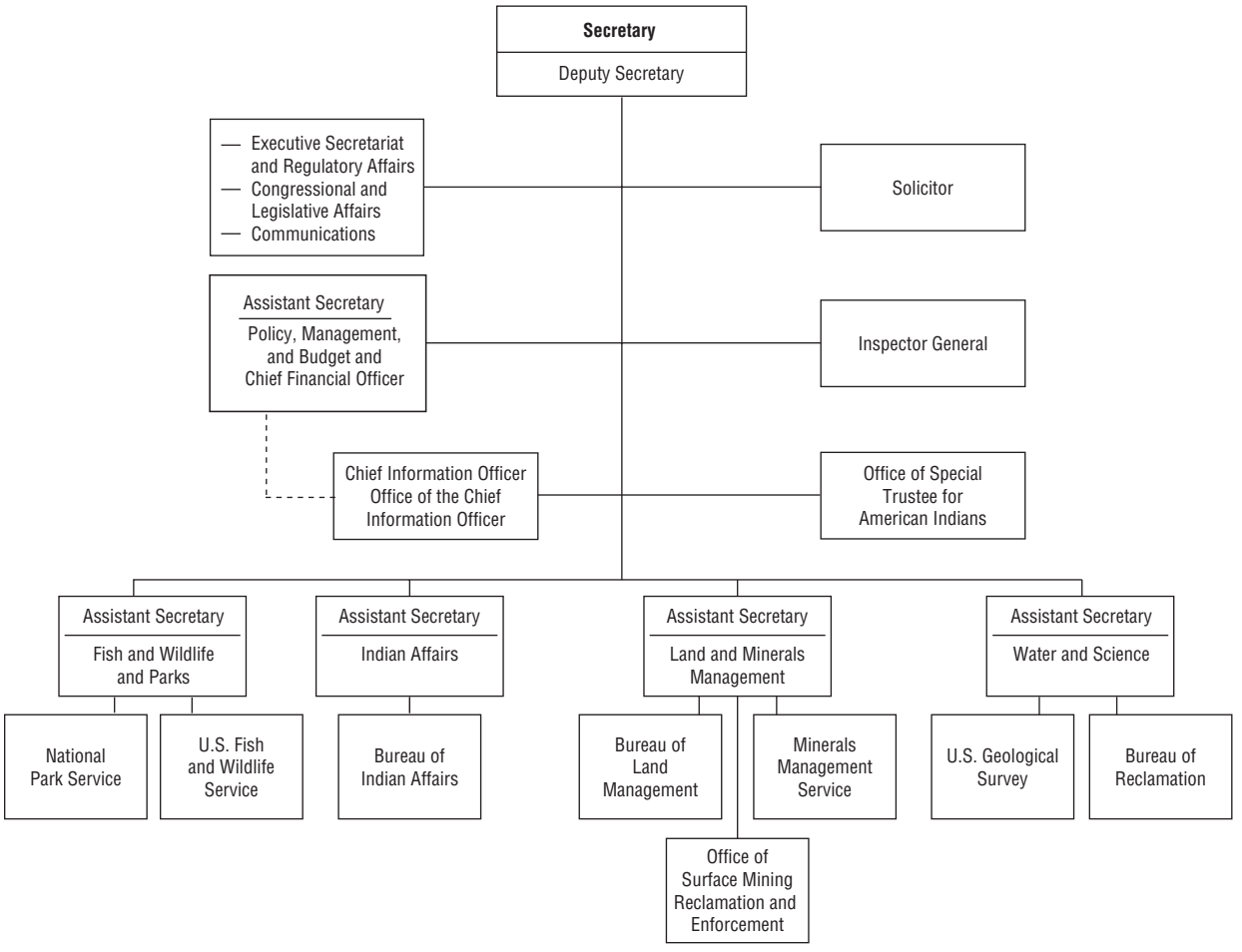


Management is in charge of public lands and resources. The U.S. Geological Survey exists to draw a wide variety of maps and to examine and classify public land structures and mineral resources. The Minerals Management Service assesses the value of minerals and supervises mineral recovery. The Office of Surface Mining Reclamation and Enforcement is charged mainly with the operation of a nationwide program on coal mining. The U.S. Bureau of Mines researches mining issues in order to find the best technology for extracting, processing, using, and recycling non-fuel mineral resources. The National Biological Survey conducts research to promote the sound management of plant and animal life. The National Park Service is dedicated to the preservation of national parks, monuments, scenic parkways, preserves, trails, riverways, seashores, lakeshores, and recreation areas. The U.S. Fish and Wildlife Service is devoted primarily to the conservation and enhancement of the nation's fish and wildlife resources.

One controversial function of the department is the oversight of Indian affairs. The Bureau of Indian Affairs (BIA) performs a number of functions that have to do with Native American issues. The Department of the Interior played a dominant role in the drafting of tribal constitutions during the nineteenth century. During the twentieth century, the Bureau of Indian Affairs continued its control over Indian tribes by insisting on review and approval powers over amendments to tribal constitutions.

The BIA's management of an Indian land trust led to a high-profile lawsuit in 1996 over

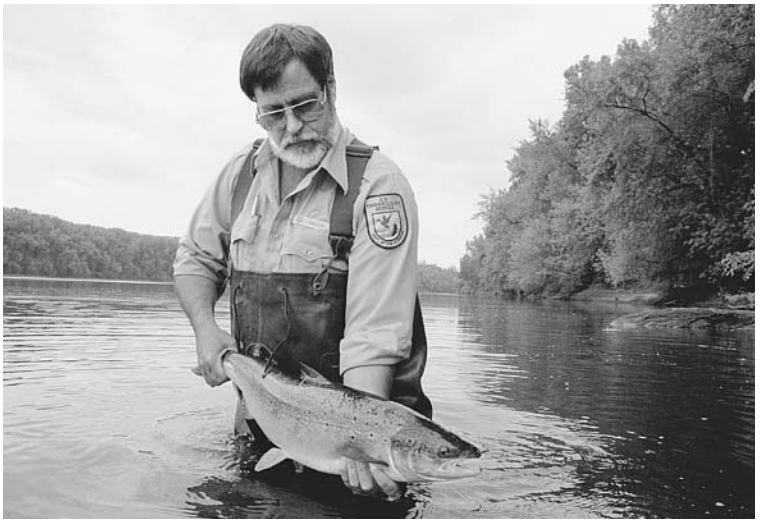

*A member of the U.S. Fish and Wildlife Service, a division of the Interior Department, prepares to release a salmon into the Connecticut River. The service is concerned with the conservation of species threatened by loss of habitat.*

AP/WIDE WORLD PHOTOS

the failure of the BIA to provide Indians with accurate financial accountings of lands held in trust for them by the Department of the Interior. U.S. District Court Judge Royce Lamberth has overseen the CLASS ACTION, and by the September 2002 he had lost patience with the department and Secretary Gale Norton over the lack of effort and honesty in dealing with the issues before the court. In a scathing 267-page ruling, Lamberth concluded that the department and Norton were "either unwilling or unable to administer competently the [Indian} trust." The plaintiffs allege that the BIA cannot account for $137 billion of income due the 500 members of the class, and the district court held the secretary of the interior in CONTEMPT, *Cobell v. Norton*, 226 F.Supp.2d 163 (D.D.C.2002). The DC Circuit Court of Appeals later held that: (1) the secretary was not in criminal contempt of order requiring her to initiate the historical accounting project; (2) the secretary did not commit fraud on court, so as to be in criminal contempt, with respect to quarterly status reports; and (3) the secretary did not commit fraud on court, so as to be in criminal contempt, with respect to her representations regarding computer security of trust data (334 F.3d 1128 [D.C.Cir., Jul 18, 2003]).

Like most other federal administrative agencies, the Department of the Interior is controlled by both Congress and the president. Congress created the Department of the Interior, and it could decide to reduce or eliminate it. However, also like most other administrative agencies, the Department of the Interior is a political necessity. Lawmakers are generally well versed in a broad range of topics, but few have the knowledge required to craft the best rules and regulations on, for example, mining or land management. The Department of the Interior possesses such expertise.

At the executive level, the Department of the Interior reports directly to the president, who also exerts control over it. The president has the power to remove and replace department personnel, to propose increases or reductions in responsibilities, and to redirect the department's goals. All of these changes must be approved by Congress.

This dual control over the Department of the Interior makes it subject to political influence. For example, when a new president takes office, he or she will likely make personnel changes in the Department of the Interior to initiate new programs and directions promised in the campaign. Any high-level appointments to administrative agencies will be reviewed by Congress. If a nominee holds views that are contrary to those of the majority in Congress, Congress may reject the nominee, and the president may have to choose one more acceptable to Congress. On the other hand, senators and representatives may be reluctant to resist the actions of a newly elected president for fear of alienating the voting public.

Historically, the Department of the Interior has been less concerned with conservation than with development. Interior Secretary Roy O. West commented in 1928 that the Department of the Interior should have been named the Department of Western Development. In the early twentieth century, U.S. citizens became aware that the resources that were needed for modern life were not inexhaustible, and the Department of the Interior gradually recognized the need for conservation. However, the Department of the Interior's original mission of managing development was at odds with conservation, and the department was incapable of concentrating exclusively on conservation. To fill the void created by this situation, Congress created the ENVIRONMENTAL PROTECTION AGENCY (EPA) in 1970.

Although the EPA has taken over the goals of conservation and POLLUTION control, the Department of the Interior is still concerned with environmental matters. In 1987, the department reorganized the Bureau of Reclamation to reflect the bureau's new emphasis on management and conservation instead of con-

struction. In the 1990s, Bruce Babbitt, the secretary of the interior under President BILL CLINTON, made several changes in the Department of the Interior to strengthen its environmental-protection efforts.

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CROSS-REFERENCES

Environmental Law; Fish and Fishing; Game; Mine and Mineral Law; Native American Rights.

## INTERLINEATION

*The process of writing between the lines of an instrument; that which is written between the lines of a document.*

An interlineation frequently appears in a contract that has been typed and signed. If the parties agree that a sentence is to be inserted between the lines to clarify a particular provision, the new sentence is known as an interlineation. The new line should be initialed and dated to indicate that both parties are aware of and agree to its insertion. An interlineation results in the alteration of an instrument.

CROSS-REFERENCES

Alteration of Instruments.

## INTERLOCKING DIRECTORATE

*The relationship that exists between the board of directors of one corporation with that of another due to the fact that a number of members sit on both boards and, therefore, there is a substantial likelihood that neither corporation acts independently of the other.*

Because the same persons occupy seats on the boards of companies that are supposed to compete in the marketplace, there is a potential for violations of federal antitrust acts, particularly the CLAYTON ACT (15 U.S.C.A. §§ 12-27 [1914]) which prohibits the existence of interlocking directorates that substantially reduce commercial competition.

## INTERLOCUTORY

*Provisional; interim; temporary; not final; that which intervenes between the beginning and the end of a lawsuit or proceeding to either decide a particular point or matter that is not the final issue of the entire controversy or prevent irreparable harm during the pendency of the lawsuit.*

Interlocutory actions are taken by courts when a QUESTION OF LAW must be answered by an appellate court before a trial may proceed or to prevent irreparable harm from occurring to a person or property during the pendency of a lawsuit or proceeding. Generally, courts are reluctant to make interlocutory orders unless the circumstances surrounding the case are serious and require timely action.

Interlocutory appeals are restricted by state and federal appellate courts because courts do not want piecemeal litigation. Appeals courts generally review only cases that have reached final judgment in the trial courts. When a court administrator enters final judgment, this certifies that the trial court has ended its review of the case and jurisdiction shifts to the appellate court.

Interlocutory appeals are typically permitted when the trial judge certifies to the appellate court in an interlocutory order that an important question of law is in doubt and that it will substantially affect the final result of the case. Judicial economy then dictates that the court resolve the issue rather than subject the parties to a trial that may be reversed on an appeal from a final judgment.

Appellate courts have the discretion to review interlocutory orders. The federal courts of appeal are governed by the Interlocutory Appeals Act (28 U.S.C.A. § 1292). This act grants discretion to the courts of appeal to review interlocutory orders in civil cases where the district judge states in the order that a controlling question of law is in doubt and that the immediate resolution of the issue will materially advance the ultimate termination of litigation. State appellate courts are governed by statutes and court rules of appellate procedure regarding the review of interlocutory orders.

When an appellate court reviews an interlocutory order, its decision on the matters contained in the order is final. The court enters an interlocutory judgment, which makes that part of the case final. Therefore, if a case proceeds to trial after an interlocutory judgment is entered, and an appeal from the trial court judgment follows, the matters decided by the interlocutory judgment cannot be reviewed by the court again.

Interlocutory orders may be issued in a DIVORCE proceeding to prevent injury or irreparable harm during the pendency of the lawsuit. For example, an interlocutory order may require one spouse to pay the other spouse a designated weekly sum for support, pending a decision on ALIMONY and CHILD SUPPORT. This prevents the spouse and children from being without income during the action.

Courts may also issue interlocutory orders where property is about to be sold or forfeited and a lawsuit has been filed seeking to stop the action. In this type of case, a court will enter an interlocutory INJUNCTION, preventing the transfer of property until it has made a final decision. To do otherwise would cause irreparable harm and would complicate legal title to the property if the person contesting the transfer ultimately prevailed.

Thus, though the courts value finality in most proceedings, interlocutory orders and appeals are available to protect important rights and to enhance judicial economy.

*U.S. President Ronald Reagan and Soviet President Mikhail Gorbachev sign the INF Treaty on December 8, 1987. The treaty called for an elimination of an entire class of short- and intermediate-range nuclear missiles.*

AP/WIDE WORLD PHOTOS

## INTERMEDIATE-RANGE NUCLEAR FORCES TREATY

The Intermediate-Range Nuclear Forces Treaty of 1987 (INF) was the first NUCLEAR WEAPONS agreement requiring the United States and the Union of Soviet Socialist Republics (U.S.S.R.) to reduce, rather than merely limit, their arsenals of nuclear weapons. Signed by President RONALD REAGAN, of the United States, and General Secretary Mikhail Gorbachev, of the U.S.S.R., on December 8, 1987, the INF Treaty eliminated all land-based nuclear missiles with ranges of between 300 and 3,400 miles. The U.S. Senate quickly ratified the treaty in 1988 by a vote of 93–5.

The INF Treaty marked an historic shift in superpower relations and was the first superpower ARMS CONTROL treaty since 1979. It required the removal of 1,752 Soviet and 859 U.S. short- and intermediate-range missiles, most of which were located in Europe. It was the second superpower agreement to ban an entire class of weapons, the first being the 1972 Biological Weapons Convention. The INF Treaty also contained unprecedented verification procedures, including mandatory exchanges of relevant missile data, on-site inspections, and satellite surveillance.

Soviet concessions in the INF negotiations grew out of Gorbachev's efforts to limit military competition between the United States and the U.S.S.R. The new Soviet willingness to make arms-control concessions was first evident in the 1986 Stockholm Accord, which established various confidence- and security-building measures between the superpowers and their allied countries, including on-site inspections and advance warning of military movements. In 1988, a year after signing the INF, Gorbachev continued his ambitious program of military cuts by announcing a unilateral reduction of 500,000 troops, including the removal of 50,000 troops and 5,000 tanks from eastern Europe. These developments met with a positive response from the United States and its NORTH ATLANTIC TREATY ORGANIZATION allies, and created an atmosphere that would be conducive to future arms accords, including the CONVENTIONAL FORCES IN EUROPE TREATY of 1990 and the STRATEGIC ARMS REDUCTION TREATIES of 1991 and 1993.

Several successor states to the Soviet Union, including Belarus, Kazakhstan, and Ukraine, continue to implement the treaty. Other Euro-

pean nations, including Germany, Hungary, Poland, Czech Republic, and Slovakia, voluntarily destroyed their medium-range missiles in the 1990s. The United States also persuaded Bulgaria to destroy its missiles in 2002. The right of parties to the treaty to conduct on-site inspections expired on May 31, 2001. However, parties still may conduct satellite surveillance to ensure that member states comply with the treaty. The treaty established the Special Verification Commission to implement the treaty, and the commission continues to meet regularly.

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CROSS-REFERENCES

Arms Control and Disarmament; Cold War; Conventional Forces in Europe Treaty.

## INTERNAL AUDIT

*An inspection and verification of the financial records of a company or firm by a member of its own staff to determine the accuracy and acceptability of its accounting practices.*

## INTERNAL REVENUE CODE

The Internal Revenue Code is the body of law that codifies all federal tax laws, including income, estate, gift, excise, alcohol, tobacco, and employment taxes. These laws constitute title 26 of the U.S. Code (26 U.S.C.A. § 1 et seq. [1986]) and are implemented by the INTERNAL REVENUE SERVICE through its Treasury Regulations and Revenue Rulings.

Congress made major statutory changes to title 26 in 1939, 1954, and 1986. Because of the extensive revisions made in the TAX REFORM ACT OF 1986, title 26 is now known as the Internal Revenue Code of 1986 (Pub. L. No. 99-514, § 2, 100 Stat. 2095 [Oct. 22, 1986]).

Subtitle A of the Code contains five chapters on income taxes. The chapters cover normal income taxes and surtaxes, taxes on self-employment income, withholding of taxes on nonresident ALIENS and foreign corporations, taxes on transfers to avoid INCOME TAX, and consolidated returns.

Subtitle B deals with ESTATE AND GIFT TAXES. The rules and regulations concerning the taxation of probate estates and gifts are very complicated. This subtitle contains chapters on taxing generation-skipping transfers and rules on special valuation of property.

Subtitle C contains the law of employment taxes. It consists of chapters on general provisions relating to employment taxes and other sections dealing with federal insurance contributions, railroad retirement taxes, and federal unemployment taxes.

Subtitle D covers miscellaneous excise taxes. Its fifteen chapters cover a variety of issues, including retail excise taxes, manufacturers' excise taxes, taxes on wagering, environmental taxes, public charities, private foundations, PENSION plans, and certain group health plans.

Subtitle E covers alcohol, tobacco, and other excise taxes. Chapter 53 deals with machine guns, destructive devices, and certain other firearms.

Subtitle F contains provisions on procedure and administration. Under this subtitle are twenty chapters that deal with every step of the taxation process, from the setting of filing dates and the collection of penalties for late filing, to criminal offenses and judicial proceedings. The rules for administrative proceedings under the Code are addressed in the appendix to title 26.

Subtitle G addresses the organization of the Congressional Joint Committee on Taxation. Subtitle H contains the rules for the financing of presidential election campaigns. Subtitle I contains the Trust Fund Code.

The Internal Revenue Code has grown steadily since the 1930s. The complexity of its provisions, most of which are written in technical language, has required law and accounting firms to develop specialists in the various areas of taxation.

CROSS-REFERENCES

Election Campaign Financing.

## INTERNAL REVENUE SERVICE

The Internal Revenue Service (IRS) is the federal agency responsible for administering and enforcing all internal revenue laws in the United States, except those relating to alcohol, tobacco, firearms, and explosives, which are the responsibility of the ALCOHOL, TOBACCO,

FIREARMS, AND EXPLOSIVES BUREAU's Tax and Trade division.

The IRS is the largest agency in the TREASURY DEPARTMENT. By the mid-1990s it had approximately 110,000 employees, 650 office locations in the United States, and 12 offices abroad. The agency processes approximately 205 million tax returns and collects more than $1.2 trillion each year.

The U.S. tax system, which the IRS oversees and administers, is based on the principle of voluntary compliance. According to the IRS, this means "that taxpayers are expected to comply with the law without being compelled to do so by action of a federal agent; it does not mean that the taxpayer is free to decide whether or not to comply with the law."

## Duties and Powers

The IRS is responsible for enforcing the INTERNAL REVENUE CODE (U.S.C.A. tit. 26), which codifies all U.S. tax laws. Basic IRS activities include serving and educating taxpayers; determining, assessing, and collecting taxes; investigating individuals and organizations that violate tax laws; determining PENSION plan qualifications and exempt organization status; and issuing rulings and regulations to supplement the Internal Revenue Code.

Historically, Congress has given the IRS unique and wide-ranging powers for administering the U.S. tax system and enforcing its laws. For example, while in a criminal proceeding the government has the burden to prove that the defendant is guilty BEYOND A REASONABLE DOUBT, in a tax proceeding the burden is on the taxpayer to prove that he or she does not owe the amount claimed by the IRS. The IRS also has the power to impose civil penalties for any of a number of violations of tax law. These penalties are seldom employed, however, and with respect to penalties, the IRS bears the burden of proving that the penalty is justified.

The IRS has the power to collect large amounts of information on U.S. citizens, companies, and other institutions. The most obvious example of this power is that each year all taxpayers must file tax returns containing detailed financial and personal information. Many organizations are also required to notify the IRS of any payments they make to individuals; the IRS receives approximately one billion of these third-party reports annually. The IRS also has the legal authority to order banks, employers, and other institutions to provide information about a taxpayer without having to obtain a warrant from a judge; other law enforcement agencies, such as the FEDERAL BUREAU OF INVESTIGATION and local police forces, must obtain a warrant in such situations.

Another crucial power of the IRS is the ability to withhold taxes automatically from employee paychecks. The IRS was given this authority in 1943, when Congress passed legislation requiring employers to withhold from employees' paychecks the income taxes owed to the government. This withholding requirement was one of several actions taken by the government to increase revenue so that it could meet the huge financial requirements for fighting WORLD WAR II. Today, automatic withholding accounts for the majority of tax dollars paid to the government, with only a small portion sent in with tax returns by April 15, the IRS annual tax deadline. Automatic withholding is important to the government because it enables it to receive a steady stream of tax revenue. It is also useful for enforcing voluntary compliance from taxpayers because the individual's tax burden seems less onerous when taxes owed are subtracted from a paycheck before the check is received.

## Organization

The IRS is led by a commissioner, who works in the IRS National Office located in Washington, D.C. The commissioner and his or her chief counsel are appointed by the president and must be approved by the Senate. The chief counsel serves as the chief legal adviser to the IRS. At the next level are regional commissioners, who oversee IRS operations in the four regions into which the country is divided: the Northeast, Southeast, Midstates, and Western Regions. Within the four regions are 33 district offices, which are responsible for collecting revenue, examining returns, and pursuing criminal investigations within their geographic area. Also located across the country are ten service centers, five submission processing centers, two computing centers, and 23 customer service centers.

In addition to its geographic divisions, the IRS is organized into programs focusing on specific administrative tasks. Several of these, including the Taxpayer Services and Problem Resolution programs, focus on taxpayer assistance and education. Others, including the Examination, Collection, and Criminal Investigation divisions, focus on ensuring taxpayer

compliance. Additional IRS programs include Appeals, which attempts to resolve tax controversies without litigation; Statistics of Income, which compiles and publishes data relating to the operation of the Internal Revenue Code; and Tax Practitioner Conduct, which enforces tax laws applying to attorneys, accountants, and taxpayer agents.

## History

The IRS was created in 1952, though it was preceded by various other U.S. tax-collecting offices. The earliest incarnation of the IRS was the Office of the Commissioner of Revenue, which was established by Congress in 1792 in response to the request by Secretary of the Treasury ALEXANDER HAMILTON that various tariffs and taxes be created to raise money to pay off the U.S. Revolutionary War debt. Trench Coxe of Pennsylvania was the first person to hold the office. By creating the Office of the Commissioner of Revenue, Congress delegated its constitutional power to "lay and collect taxes, duties, imposts, and excises" to the Treasury Department, which has retained the power ever since (art. 1, § 8, U.S. Constitution).

By the time THOMAS JEFFERSON became president in 1801, the internal revenue program had grown to employ 400 revenue officials, who enforced a wide variety of tax regulations, including taxes on distilled spirits, land, houses, and slaves. Jefferson, a Democrat who fiercely opposed Hamilton and his FEDERALIST PARTY programs, abolished the entire system and relied instead on taxes assessed on imported items for government revenue. When the WAR OF 1812 increased the government's needs for funds, taxes were reimposed on items such as sugar, carriages, liquor, furniture, and other luxury items. At the war's end, all internal taxes and collection offices were abolished, and CUSTOMS DUTIES again became the primary source for government revenue.

When the Civil War broke out in 1861, President ABRAHAM LINCOLN faced a financial crisis because the government needed much more money to finance the war effort than could be raised through customs duties. To address this problem, Congress passed sweeping new tax measures, including the Civil War Revenue Act of August 5, 1861, which authorized the country's first INCOME TAX and imposed a direct tax of $20 million apportioned among the states. The Revenue Act of July 1, 1862, created a wide variety of new taxes. To oversee their collection, Congress created the Bureau of Internal Revenue under the secretary of the treasury. This office, which represents the first form of the modern internal revenue collection system, administered the tax system by dividing the country into 185 collection districts. The commissioner was given the power to enforce tax laws through both seizure and prosecution. George S. Boutwell of Massachusetts was the first commissioner of internal revenue. Boutwell was initially assisted by three clerks. By January 1863 the office had grown to employ nearly 4,000 people, most of whom worked in the field as revenue collectors or property assessors.

When the Civil War ended in 1865, the government's need for revenue was greatly reduced. Taxes were scaled back, the income tax was eliminated, and customs duties again became a sufficient source for federal funds. With the subsequent rise of industrialism and growth of populist political ideas, however, many citizens wanted the government to take a more active role and therefore lobbied for a reestablishment of the income tax to provide greater revenue. Most of the support for an income tax came from southern and western states. Most of the opposition came from the wealthier states whose citizens would be most affected by an income tax—Massachusetts, New Jersey, New York, and Pennsylvania.

After many attempts Congress finally passed a modest income tax in 1894. The Supreme Court quickly ruled it unconstitutional on the ground that it violated the constitutional provision requiring that federal taxes be apportioned equally among the various states. Supporters of the income tax overcame this hurdle in 1913, when Wyoming became the thirty-sixth state to ratify the SIXTEENTH AMENDMENT to the Constitution, giving Congress the power to collect taxes without regard to state APPORTIONMENT. That same year Congress enacted the first income tax act under the amendment, and the income tax became a permanent feature of the U.S. tax system.

The passage of the Sixteenth Amendment marked the beginning of an era of significant expansion for the Bureau of Internal Revenue. The establishment of the Personal Income Tax Division greatly increased bureau staff, and many new taxes were imposed to finance WORLD WAR I, thus requiring new bureau divisions and programs. As the bureau's responsibilities con-

tinued to multiply, operations became more inefficient and disorganized. In the 1920s, for example, the national office of the bureau was housed in a dozen different buildings located all around the metropolitan Washington, D.C., area. Tax returns became backlogged, tax FRAUD and evasion were rampant, and an extensive patronage system enabled politically appointed collectors to operate unchecked, outraging their civil service staffs. Beginning in 1945 Congress and the Treasury Department began efforts to overhaul the whole tax collection system. In 1952 the Bureau of Internal Revenue was reorganized and given a new name: the Internal Revenue Service. This new moniker was intended to emphasize the agency's focus on providing service to taxpayers. Patronage was eliminated, and power was decentralized, with the states being divided into seven regional districts through which all return processing, auditing, billing, and refunding would be administered.

Since 1952 the IRS has continued to undergo major changes and reorganizations. Advancements in technology have had a tremendous effect on IRS operations, beginning with the opening of the automatic data processing system in Martinsburg, West Virginia, in 1962. This system revolutionized the collection and audit process by enabling the IRS to maintain a master file of every taxpayer's account. More recent technological applications have changed the way taxpayers interact with the IRS. In 1995, for example, more than 14 million individuals and businesses used the IRS electronic filing program to submit their tax returns. Another approximately 685,000 taxpayers in ten states filed their tax return using their touch-tone telephone. Taxes were also paid electronically, with more than 41,000 businesses making more than $232 billion in federal tax deposits by electronic funds transfer.

**Internal Revenue Gross Collection, by Source, 2002**

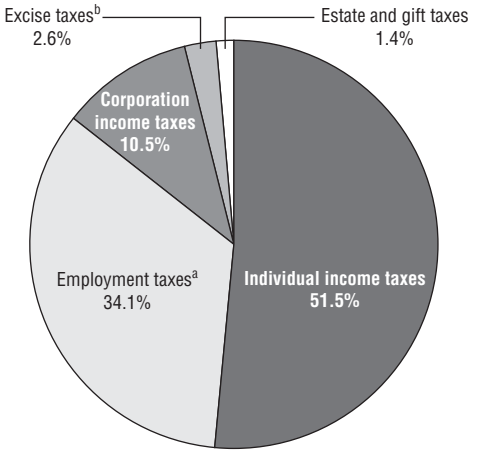


[a]Includes OASDHI, railroad retirement, and unemployment insurance.
[b]Excludes taxes on alcohol, tobacco, and firearms, now collected by the Bureau of Alcohol, Tobacco and Firearms and by the Customs Service.

SOURCE: Internal Revenue Service, *Internal Revenue Gross Collections, By Type, By Tax, Fiscal Years 1973–2002*.

Over the years the IRS has faced continuing pressure from Congress and the public to adopt more reasonable enforcement policies, to provide better service to taxpayers, and to protect private information more carefully. In an attempt to protect taxpayers' rights, Congress in 1988 passed the TAXPAYER BILL OF RIGHTS (Pub. L. No. 100-647, tit. VI, §§ 6226–6247, 102 Stat. 3730–3752 [Nov. 10, 1988]), which outlines the rights and protections a taxpayer has when dealing with the IRS. Included are the right to have penalties waived if the taxpayer follows incorrect advice given by the IRS, the right to request relief when tax laws result in significant hardship, and the right to attorneys' fees in cases where IRS employees violate the Internal Revenue Code to the detriment of the taxpayer.

In 1995 the IRS administrative structure underwent a major reorganization. The seven regions that had been established in 1952 were reduced to four, and management was consolidated, decreasing the number of districts within those regions from 63 to 33.

The IRS came under close examination from Congress in the late 1990s following a series of allegations from taxpayers of improper behavior by IRS agents. In September 1997, over three days of televised hearings, the U.S. Senate Finance Committee heard a litany of horror stories: taxpayers gave accounts of ruined lives, and IRS agents described a culture of lawlessness that included forgeries, spying, shakedowns, and cover-ups. The dramatic testimony capped a six-month committee probe into IRS misconduct.

The first to testify in the open hearings were taxpayers, from business owners to an elderly priest, who told the panel how unfair IRS audits had led to DIVORCE, BANKRUPTCY, and, in some cases, years of fighting inflexible rules to correct

the agency's mistakes. Others said they paid the IRS large sums rather than fight and risk jeopardizing their businesses. Tom Savage, a 69-year-old Delaware construction company owner, told lawmakers that he paid $50,000 in fines despite the fact that the JUSTICE DEPARTMENT told the IRS that levying him was wrong. Another taxpayer, Nancy Jacobs of California, said that the IRS mistakenly assigned her husband a taxpayer identification number belonging to someone else but that she and her husband paid the agency $11,000 to stop enforcement actions in order to save her husband's optometrist practice.

IRS whistle-blowers also testified. Sitting behind screens with their voices garbled electronically to conceal their identities, they accused IRS management of several questionable practices: illegally snooping on private tax data, preying on vulnerable taxpayers, and unduly focusing collection efforts on lower- and middle-class taxpayers. Their chief allegation was that management evaluated employees based on their collection performance. Agents were pressured, they said, to seize as much taxpayer property and assets as possible, in violation of IRS policy and federal law. Jennifer Long, the only agent not to testify behind a curtain with a voice distortion mask, said that agents ignored cheating by friends and by those with resources to fight an audit. Statistics showed that the audit rate for people with annual incomes of more than $100,000 declined from 11.41 percent to 2.79 percent between 1988 and 1995. During that same period, the audit rate for people with annual incomes of less than $25,000 nearly doubled, from 1.03 percent to 1.96 percent.

In 1998, Congress passed the Internal Revenue Service Restructuring and Reform Act of 1998 (IRSRRA), Pub. L. No. 105-206, 112 Stat. 685 (codified in scattered sections of 26 U.S.C.A.), to overhaul operations within the IRS. Title I reorganized the structure and management of the IRS with three sections designed to improve taxpayer treatment. The act directed the commissioner to discard the IRS organizational structure, which had previously run operations through local, regional, and national offices. In its place the commissioner was required to substitute organizational units serving taxpayers with similar tax obligations, such as individuals, small businesses, large businesses, and nonprofit organizations.

The IRSRRA created the Internal Revenue Service Oversight Board, which operates within the Department of the Treasury. The Oversight Board contains nine members, including the secretary of the treasury, the commissioners of the IRS, six civilians, and one federal government employee appointed by the president with the advice and consent of the Senate. The board's general responsibility is to oversee the IRS "in its administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws." Although the board may not view the tax returns of individual taxpayers and, therefore, cannot rectify individual taxpayer abuse, IRSRRA commands the board to ensure that the IRS treats taxpayers properly.

Under the IRSRRA, the commissioner of the IRS must terminate agency employees who engage in a list of forbidden conduct that includes the following: failing to obtain required signatures before seizing homes, personal belongings, and business assets to satisfy tax deficiencies; making a false statement under oath concerning a taxpayer's case; violating a taxpayer's constitutional or CIVIL RIGHTS; falsifying or destroying documents to conceal IRS mistakes; committing assault or BATTERY on a taxpayer; violating the tax laws or regulations for the purpose of retaliating against or harassing a taxpayer; and threatening to audit a taxpayer to extract a personal benefit. Although a loophole allows the commissioner to take personnel action other than termination at his sole discretion, he may not delegate that authority to any other officer.

Title III of IRSRRA contains a Taxpayer Bill of Rights, also designed to reduce taxpayer abuse. Most notably, it shifts the burden of proof in most tax cases to the IRS. Previously, taxpayers sued by the IRS had the burden of proving that their tax calculation was correct. Under IRSRRA, if a taxpayer keeps the appropriate records, cooperates during IRS investigations, and presents "credible evidence" to support his or her tax calculation, the IRS has the burden of proving the calculation is wrong. The requirement that the taxpayer show credible evidence has proven difficult in some cases. For example, in *Higbee v. Commissioner*, 116 T.C. No. 28 (2001), the U.S. TAX COURT held that the testimony of the taxpayer and a document from a small-claims courts showing damages to a piece of property, which he alleged entitled him to a deduction, did not constitute credible evidence to shift the burden of proof to the IRS.

The Taxpayer Bill of Rights also regulates IRS collection efforts and helps specific groups of taxpayers who might lack power to protect themselves. Some evidence suggests that IRSRRA reduced taxpayer abuse shortly after its enactment. By March 1999, property seizures were down 98 percent from levels two years prior; GARNISHMENT of paychecks and bank accounts were down 75 percent; and liens, which ensure that a tax is paid when property is sold, were down 66 percent. Critics, however, contend that these figures reflect reduced, not better, enforcement efforts caused by IRS employees' fear of losing their jobs for violating the IRSRRA. Moreover, other evidence, addressed in a 2002 article in the *New York Times*, suggests that IRS agents are more likely to subject wage earners to heavy scrutiny over tax returns than they are businesses, trusts, and partnerships.

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Civil Service; Customs Duties; Estate and Gift Taxes; Internal Revenue Code; *Pollock v. Farmers' Loan & Trust Co.*; Taxation; Tax Court; Tax Evasion; Sixteenth Amendment.

## INTERNAL WATERS

See INLAND WATERS.

## INTERNATIONAL COURT OF JUSTICE

The International Court of Justice (ICJ) is the main judicial tribunal of the UNITED NATIONS, to which all member states are parties. It is often informally referred to as the World Court. The ICJ was established in 1946 by the United Nations (Statute of the International Court of Justice [ICJ Statute], June 26, 1945, 59 Stat. 1055, 3 Bevans 1179). It replaced the former Permanent Court of International Justice, which had operated within The Hague, Netherlands, since 1922. Like its predecessor, the headquarters of the ICJ is also located in the Peace Palace at The Hague.

The function of the ICJ is to resolve disputes between sovereign states. Disputes may be placed before the court by parties upon conditions prescribed by the U.N. Security Council. No state, however, may be subject to the jurisdiction of the court without the state's consent. Consent may be given by express agreement at the time the dispute is presented to the court, by prior agreement to accept the jurisdiction of the court in particular categories of cases, or by treaty provisions with respect to disputes arising from matters covered by the treaty.

Article 36(2) of the court's statute, known as the Optional Clause, allows states to make a unilateral declaration recognizing "as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes."

Many states have accepted the court's jurisdiction under the Optional Clause. A few states have done so with certain restrictions. The United States, for instance, has invoked the so-called self-judging reservation, or Connally Reservation. This reservation allows states to avoid the court's jurisdiction previously accepted under the Optional Clause if they decide not to respond to a particular suit. It is commonly exercised when a state determines that a particular dispute is of domestic rather than international character, and thus domestic jurisdiction applies. If a state invokes the self-judging reservation, another state may also invoke this reservation against that state, and thus a suit against the second state would be dismissed. This is called the rule of reciprocity, and stands for the principle that a state has to respond to a suit brought against it before the ICJ only if the state bringing the suit has also accepted the court's jurisdiction.

Under the ICJ Statute, the ICJ must decide cases in accordance with INTERNATIONAL LAW. This means that the ICJ must apply (1) any international conventions and treaties; (2) international custom; (3) general principles recognized as law by civilized nations; and (4) judicial decisions and the teachings of highly qualified publicists of the various nations.

One common type of conflict presented to the ICJ is treaty interpretation. In these cases the

ICJ is asked to resolve disagreements over the meaning and application of terms in treaties formed between two or more countries. Other cases range from nuclear testing and water boundary disputes to conflicts over the military presence of a foreign country.

The ICJ is made up of 15 jurists from different countries. No two judges at any given time may be from the same country. The court's composition is static but generally includes jurists from a variety of cultures.

Despite this diversity in structure, the ICJ has been criticized for favoring established powers. Under articles 3 and 9 of the ICJ Statute, the judges on the ICJ should represent "the main forms of civilization and . . . principal legal systems of the world." This definition suggests that the ICJ does not represent the interests of developing countries. Indeed, few Latin American countries have acquiesced to the jurisdiction of the ICJ. Conversely, most developed countries accept the compulsory jurisdiction of the ICJ.

The judgment of the ICJ is binding and (technically) cannot be appealed (arts. 59, 60) once the parties have consented to its jurisdiction and the court has rendered a decision. However, a state's failure to comply with the judgment violates the U.N. Charter, article 94(2). Noncompliance can be appealed to the U.N. Security Council, which may either make recommendations or authorize other measures by which the judgment shall be enforced. A decision by the Security Council to enforce compliance with a judgment rendered by the court is subject to the VETO power of permanent members, and thus depends on the members' willingness not only to resort to enforcement measures but also to support the original judgment.

The ICJ also may render ADVISORY OPINIONS on legal questions when requested to do so by the General Assembly, the Security Council, or other U.N. organs or agencies. For example, the World Health Organization and the General Assembly requested advisory opinions on the legality of NUCLEAR WEAPONS under international law. The World Court held hearings, in which 45 nations testified. It issued an advisory opinion in July 1996, which held that it was illegal for a nation to threaten nuclear war. The court is used infrequently, which suggests that most states prefer to handle their disputes by political means or by recourse to tribunals where the outcome may be more predictable or better controlled by the parties.

*In April 1996, Bosnia went before the International Court of Justice seeking a verdict against Serbia, which it charged had violated the international convention against acts of genocide.*

AP/WIDE WORLD PHOTOS

Since 2000, some of the contentious cases before the ICJ included a property dispute between Liechtenstein and Germany; a territorial and maritime dispute between Nicaragua and Colombia; a land, island, and frontier dispute between El Salvador and the Honduras (Nicaragua intervening); and a 2003 case by Mexico against the United States over alleged violations of consular communications with—and access to—several Mexican nationals sentenced to death in various U.S. states for crimes committed within. A 1993 case filed by Bosnia against the former Yugoslavia for violating the Genocide Convention was still pending in 2003, as was a matter between the Republic of Congo and France over alleged crimes against humanity. Trials against individuals for alleged WAR CRIMES against humanity or genocides involving Bosnia, Croatia, Kosovo, Serbia, and the former Yugoslavia were being handled by the International Criminal Tribunal for the former Yugoslavia, a separate U.N. tribunal.

The ICJ has been maligned for the inconsistency of its decisions and its lack of real enforcement power. But its ambitious mission to resolve disputes between sovereign nations makes it a valuable source of support for many countries in their political interaction with other countries.

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## INTERNATIONAL LAW

*The body of law that governs the legal relations between or among states or nations.*

To qualify as a subject under the traditional definition of international law, a state had to be sovereign: It needed a territory, a population, a government, and the ability to engage in diplomatic or foreign relations. States within the United States, provinces, and cantons were not considered subjects of international law, because they lacked the legal authority to engage in foreign relations. In addition, individuals did not fall within the definition of subjects that enjoyed rights and obligations under international law.

A more contemporary definition expands the traditional notions of international law to confer rights and obligations on intergovernmental international organizations and even on individuals. The UNITED NATIONS, for example, is an international organization that has the capacity to engage in treaty relations governed by and binding under international law with states and other international organizations. Individual responsibility under international law is particularly significant in the context of prosecuting war criminals and the development of international HUMAN RIGHTS.

### Sources of International Law

The INTERNATIONAL COURT OF JUSTICE (ICJ) was established in 1945 as the successor to the Permanent International Court of Justice (PICJ), which was created in 1920 under the supervision of the LEAGUE OF NATIONS (the precursor to the United Nations). The PICJ ceased to function during WORLD WAR II and was officially dissolved in 1946. The ICJ is a permanent international court located in the Hague, Netherlands, and it is the principal judicial organ of the United Nations (UN). It consists of 15 judges, each from a different state. The judges are elected by the UN General Assembly and the UN Security Council and must receive an absolute majority from both in order to take office.

The ICJ has jurisdiction only over states that have consented to it. It follows that the court cannot hear a dispute between two or more state parties when one of the parties has not accepted its jurisdiction. This can happen even where the non-consenting party adheres to the court's statute, for mere adherence to the statute does not imply consent to its tribunals. In addition, the court does not have jurisdiction over disputes between individuals or entities that are not states (I.C.J. Stat. art. 34(1)). It also lacks jurisdiction over matters that are governed by domestic law instead of international law (art. 38(1)).

Article 38(1) of the ICJ Statute enumerates the sources of international law and provides that international law has its basis in international custom, international conventions or treaties, and general principles of law. A rule must derive from one of these three sources in order to be considered international law.

**Custom** Customary international law is defined as a general PRACTICE OF LAW under article 38(1)(b). States follow such a practice out of a sense of legal obligation. Rules or principles must be accepted by the states as legally binding in order to be considered rules of international law. Thus, the mere fact that a custom is widely followed does not make it a rule of international law. States also must view it as obligatory to follow the custom, and they must not believe that they are free to depart from it whenever they choose, or to observe it only as a matter of courtesy or moral obligation. This requirement is referred to as *opinio juris.*

Some criticism against customary international law is directed at its subjective character and its inconsistency. States vary greatly in their opinions and interpretations of issues regarding international law. Thus, it is almost impossible to find enough consistency among states to draw a customary international rule from general practice. In addition, even if one state or judge finds that a practice is a rule of customary international law, another decision maker might reach a different conclusion. Altogether, the process of establishing rules of customary international law is lengthy and impeded by today's fast-changing world.

**Conventions and Treaties** Conventional international law includes international agreements and legislative treaties that establish rules expressly recognized by consenting states. Only states that are parties to a treaty are bound by it. However, a very large number of states voluntarily adhere to treaties and accept their provisions as law, even without becoming parties to them. The most important treaties in this regard are the Genocide Convention, the Vienna conventions, and the provisions of the UN Charter.

### UN Charter and United Nations

The UN Charter and the United Nations as an organization were established on October 26, 1945. The UN Charter is a multilateral treaty that serves as the organization's constitution. The UN Charter contains a supremacy clause that makes it the highest authority of international law. The clause states that the UN Charter shall prevail in the event of a conflict between the obligations of the members of the United Nations under the present charter and their obligations under any other international agreement (art. 103).

At its formation, the United Nations had 51 member states. Its membership had increased to 180 states in 1996, including almost all of the world's independent nations. The United Nations is designed to serve a multitude of purposes and is charged with a variety of responsibilities. Among these are peacekeeping; developing friendly relations among nations; achieving international cooperation in solving international problems of an economic, social, cultural, and humanitarian character; and promoting human rights and fundamental freedoms for all human beings without discrimination (UN Charter art. 1).

The United Nations comprises the Trusteeship Council, the General Assembly, the Security Council, the Economic and Social Council, and the ICJ. The Trusteeship Council's role is to supervise the administration of non-self-governing territories. Because all of these territories have now gained independence, the last one being Palau in 1993, the Trusteeship Council is no longer functional within the United Nations.

The General Assembly and the Security Council are the components of the organization that are most involved in lawmaking and legislative activities. Their respective authority varies greatly. Although the General Assembly lacks formal legislative authority to adopt resolutions that are binding on its members, it is highly active in the making and development of international law. This organ of the United Nations is required to initiate studies and to make recommendations that encourage the progressive development of international law and its CODIFICATION (UN Charter art. 13(1)(a)). Within this context, the General Assembly has originated much of the existing international legislation, and some of its resolutions are now accepted as customary international law, such as the UNIVERSAL DECLARATION OF HUMAN RIGHTS. Thus, resolutions adopted by the General Assembly, albeit formally considered non-binding, have legal character and contribute significantly to the development of international law.

The Security Council, on the other hand, has the authority to adopt binding decisions, and non-compliance with these decisions constitutes a violation of the UN Charter. However, this does not give the Security Council a general lawmaking authority, as its SUBJECT MATTER JURISDICTION is limited to concerns of international peace and security. According to the UN Charter, article 2(3), all nations are required to settle their disputes by peaceful means in such a manner that international peace, security, and justice are not endangered. Nations are advised to resort to peaceful dispute-settlement mechanisms (art. 33(1)) such as negotiation, mediation, and conciliation. Where these measures fail, the parties must refer to the UN Security Council if their proposed measure would be a threat to peace and security. The Security Council then makes recommendations on further peaceful measures, and it resorts to the powers conferred on it under the UN Charter for its peacekeeping operations. The General Assembly's role in peacekeeping focuses mainly on providing a forum for public discussion of the issues. However, the assembly does have the power to bring issues that potentially endanger the peace before the Security Council.

In some cases, the Security Council fails to exercise its responsibility for maintaining international peace and security, and there is a threat to peace or an act of aggression. The General Assembly or Security Council may make appropriate recommendations and may authorize the threat of economic sanctions or the use of armed forces to maintain or restore international peace and security.

The UN Peacekeeping Forces are employed by the World Organization and may function either as unarmed observer forces, or armed

military forces. Their presence in areas of conflict is intended as an incentive to either prevent or reduce the level of conflict. Both parties to a conflict must accept their presence. As of 2001, the number of UN peacekeeping forces per year was the highest in 1993 and 1994 (more than 70,000 each year, during the crisis in Somalia), then subsided until 2001, when it again approached 48,000 following the crisis in Kosovo.

However, the United Nations generally has not been very effective in *preventing* hostilities that involve the world's principal powers, either directly or indirectly. For example, in 1993, the second UN peace operation, UNOSOM II, was intended to assist in rebuilding Somalia and in disarming warring factions there. It met with stiff resistance, culminating in the public deaths of 18 U.S. troops serving with the operation. When the United States announced its withdrawal, the entire operation began to wind down, while the war continued unabated. Serious debate broke out within the UN over the scope and mission of peacekeeping functions, resulting in a general disengagement in such efforts. Sadly, even efforts to respond to the genocide in Rwanda subsequently failed.

Another area of intense UN deliberations has been the Middle East. In 1990, the UN Security Council imposed comprehensive economic sanctions against Iraq following its invasion of Kuwait. The efforts failed to deter Iraq's then-leader, Saddam Hussein. The following year, the United States led allied forces to expel Iraqi forces from Kuwait during the 1991 Persian Gulf War. Following that conflict, UN Security Council Resolution 687 required Iraq to destroy its arsenal of nuclear, chemical, and biological weapons, and to submit to UN inspection for compliance.

Over the next several years, despite Iraqi efforts to conceal them, such weapons were indeed found and destroyed by UN inspectors. However, the inspectors left in 1998, following U.S. and U.K. air strikes bent on speeding up the process and destroying concealed weapons. When economic sanctions against Iraq failed to punish anyone but the Iraqi people, the UN began a humanitarian "Oil for Food" program, again with little impact. After 12 years of failed economic sanctions against Iraq, the United States petitioned the UN for international support and a coalition of military forces to oust the Hussein regime. The measure was vetoed by several superpowers, which favored the CONTINUANCE of UN inspections. In early 2003, the United States and the United Kingdom, supported by several other smaller powers, conducted military strikes on Iraq and eliminated Saddam Hussein's regime. After the fact, the UN agreed to assist in peacekeeping while a new Iraqi government was organized and instituted.

The UN Charter includes a general provision that concerns the human rights of the individual. On December 10, 1948, the United Nations adopted the Universal Declaration of Human Rights, which defines and enumerates specifically the human rights that the United Nations seeks to protect. Among those are freedom from systematic governmental acts and policies involving torture, SLAVERY, murder, prolonged ARBITRARY detention, disappearance, and RACIAL DISCRIMINATION. The declaration guarantees the right to life; to EQUAL PROTECTION of the law; to free speech, assembly, and movement; to privacy; to work; to education; to HEALTH CARE; and to participation in the cultural life of the community. Although the Universal Declaration is not a binding instrument of international law, some of its provisions nonetheless have reached the status of customary international law. Under Articles 55 and 56 of the UN Charter, member states have an obligation to promote these rights. At the same time, the declaration acknowledges that states may limit these rights as they deem necessary, to ensure respect for the rights and freedoms of others.

In 1966, the UN General Assembly adopted three covenants that involve human rights: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; and the Optional Protocol to the Civil and Political Covenant. Unlike the Universal Declaration, these covenants are treaties that require ratification by member states. The United States is not a party to the covenants.

The human rights provisions of the UN Charter, the Universal Declaration of Human Rights, and the covenants constitute the International Bill of Human Rights. Other UN human rights instruments supplement this bill. The most important ones are the Genocide Convention (1948); the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the Convention on the Political Rights of Women (1953); and the

International Convention on the Suppression and Punishment of the Crime of Apartheid (1973). These conventions are legally binding on the parties that have ratified them. Most of the UN member states have ratified at least two: the Genocide Convention and the Racial Convention. The United States has ratified only the Women's Rights Convention and the Genocide Convention.

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## INTERNATIONAL MONETARY FUND

The International Monetary Fund (IMF) is a specialized agency of the UNITED NATIONS that seeks to promote international monetary cooperation and to stimulate international trade. The IMF, which in 2003 had 184 nation-members, has worked to stabilize world currencies and to develop programs of economic adjustment for nations that require economic reform.

The IMF was created in 1944 at the United Nations Monetary and Financial Conference, held at Bretton Woods, New Hampshire. It first began operation in 1947, from its headquarters in Washington, D.C., with a fund of $9 billion in currency, of which the United States contributed almost a third. The creation of the IMF was seen as a way to prevent retaliatory currency devaluations and trade restrictions, which were seen as a major cause of the worldwide depression prior to WORLD WAR II.

Membership is open to countries willing to abide by terms established by the board of governors, which is composed of a representative from each member nation. General terms include obligations to avoid manipulating exchange rates, abstain from discriminatory currency practices, and refrain from imposing restrictions on the making of payments and currency transfers necessary to foreign trade.

The voting power of the governors is allocated according to the size of the quota of each member. The term *quota* refers to the IMF unit of account, which is based on each member's relative position in the world economy. This position is measured by the size of the country's economy, foreign trade, and relative importance in the international monetary system. Once a quota is set by the IMF, the country must deposit with the organization, as a subscription, an amount equal to the size of the quota. Up to three-fourths of a subscription may consist of the currency of the subscribing nation. Each subscription forms part of the reserve available to countries suffering from balance-of-payment problems.

When a member has a balance-of-payment problem, it may apply to the IMF for needed foreign currency from the reserve derived from its quota. The member may use this foreign exchange for up to five years to help solve its problems, and then return the currency to the IMF pool of resources. The IMF offers below-market rates of interest for using these funds. The member country whose currency is used receives most of the interest. A small amount goes to the IMF for operating expenses.

In its early years the IMF directed its major programs toward maintaining fixed exchange

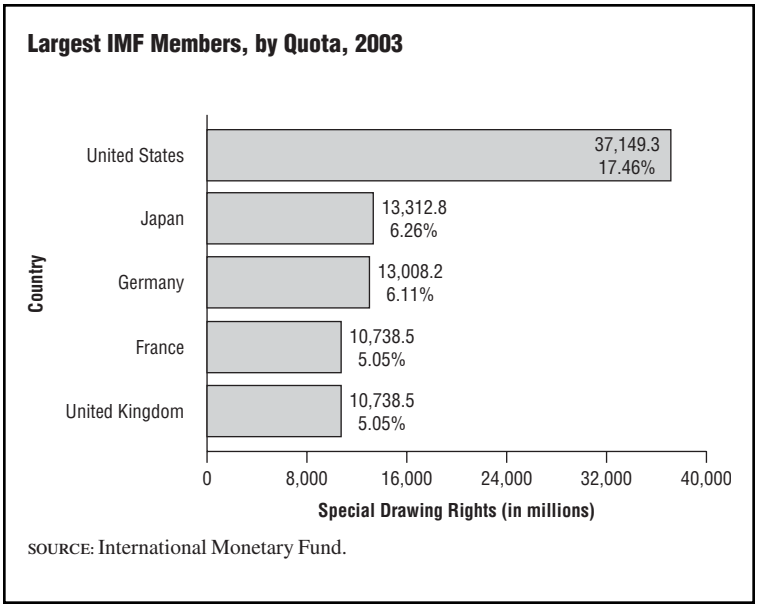


SOURCE: International Monetary Fund.

rates linked to the U.S. dollar, which in turn could be converted at a standard rate into gold. Present IMF policy emphasizes an orderly adjustment of currency exchange rates to reflect underlying economic forces. Special attention has been given to the needs of developing countries, in the form of programs to provide long-term assistance to cover foreign exchange demands necessitated by high import prices, declining export earnings, or development programs. In appropriate circumstances the IMF may impose conditions on the use of IMF resources to encourage recipient countries to make needed economic reforms.

Since 1982 the IMF has concentrated on the problems of developing nations. It has gone beyond its own resources, encouraging additional lending from commercial banks. The IMF has also established new programs, using funds from its richer members, to provide money in larger amounts and for longer periods than those granted under the quota-driven lending procedures. It works closely with the WORLD BANK on these and other international monetary issues.

Starting in the 1990s, the IMF faced enormous economic challenges propelled by the increasing globalization of the world economy. Among the problems were the need to help a number of countries make the transition from a centrally-planned economic system to a market-oriented one, reducing turbulence in emerging financial markets such as Asia and Latin America, and promoting economic growth in the poorest nations. The IMF responded with a number of initiatives including creation of a loan fund to ensure sufficient funds to deal with major financial crises, a new approach to reducing poverty in low-income countries, and the Supplemental Reserve Facility created in 1997 specifically to help countries deal with large short-term financing needs resulting from a sudden reduction in capital outflows due to loss of market confidence.

Despite these moves, the IMF in the late 1990s and early 2000s faced an increasing volume of world-wide criticism and protest against its fiscal policies. A number of economists and other critics charged that IMF loan programs imposed on governments of developing countries resulted in severe economic pain for the populations of those countries, that IMF policies were poorly designed and often aggravated economic conditions in countries experiencing debt or currency crises, and that the IMF has forced countries to borrow foreign capital in a manner that adversely affects them.

In 2000, the managing director and members of the IMF agreed on several governing principles including the promotion of sustained non-inflationary economic growth, encouraging the stability of the international finance system, focusing on core macroeconomic and financial areas and being an open institution that learns from experience and continually adapts to changing circumstances.

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## INTERNATIONAL TRADE ORGANIZATION

Prior to WORLD WAR II, many countries employed "beggar thy neighbor" trade policies, raising tariffs and instituting non-tariff barriers that impeded imports in an attempt to reduce unemployment and increase domestic output. However, other countries retaliated by raising their own barriers against imports. This resulted in reducing export markets, which then only worsened the already poor economic conditions. The problems created by such policies led United States to propose that a new international trade organization be established to regulate trade policies and settle disputes between trading partners. Under the U.S. proposal, the International Trade Organization (ITO) was to be a specialized agency of the UNITED NATIONS and was to have several broad functions: promoting the growth of trade by eliminating or reducing tariffs or other barriers to trade; regulating restrictive business practices hampering trade; regulating international commodity agreements; assisting economic development and reconstruction; and settling disputes among member nations regarding harmful trade policies. Negotiations to establish the ITO began in Geneva, Switzerland, in 1947, with a more complete charter being drafted later in Havana, Cuba. Opposition to the charter of the ITO soon emerged, especially in the U.S. Congress. Subsequently, President HARRY TRUMAN's administration withdrew its support for

the ITO, and interest in the ITO faded. The void left by the collapse of the ITO has been filled by other institutions, like the GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT), the WORLD BANK, and the United Nations Conference on Trade and Development (UNCTAD).

## INTERNATIONAL WATERWAYS

*Narrow channels of marginal sea or inland waters through which international shipping has a right of passage.*

In INTERNATIONAL LAW, international waterways are straits, canals, and rivers that connect two areas of the high seas or enable ocean shipping to reach interior ports on international seas, gulfs, or lakes that otherwise would be landlocked. International waterways also may be rivers that serve as international boundaries or traverse successively two or more states. Ships have a right of passage through international waterways. This right is based on customary international law and treaty arrangements.

### Straits

Some straits are more important than others because they are the sole connecting links between oceans and interior waters. For example, the Strait of Gibraltar gives access from the Atlantic Ocean to the Mediterranean and Aegean Seas. Other straits are not as important. The availability of alternate routes does not in itself deprive a strait of its character as an international waterway. In the *Corfu Channel* case, 1949 I.C.J. 4, 1949 WL 1 (I.C.J.), the INTERNATIONAL COURT OF JUSTICE rejected the test of essentiality as the only route, ruling that "the decisive criterion is rather [the strait's] geographic situation as connecting two parts of the high seas and the fact of its being used for international navigation."

The 1958 GENEVA CONVENTION on the Territorial Sea and Contiguous Zone (516 U.N.T.S. 205, 15 U.S.T. 1606, T.I.A.S. No. 5639) does not deal comprehensively with international waterways, but does provide that "[t]here shall be no suspension of innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state" (art. 16, § 4). A territorial sea is the water that comes under the sovereign control of a state.

A coastal state has somewhat greater control of innocent passage through its territorial seas than of innocent passage through a strait joining two areas of high seas. Passage may be suspended through TERRITORIAL WATERS when essential for security. This means that warships are free to pass through straits but may be denied access to territorial seas.

Since the 1960s a great majority of coastal states have extended their claims on territorial seas from three miles to 12 miles from the low-water mark, some even farther. This change has been a matter of concern to the U.S. government, as a 12-mile limit converts 121 straits to territorial seas, some of which have strategic military importance.

### Canals

With respect to international marine traffic, canals joining areas of the high seas or waters leading to them are geographically in the same position as straits. However, the significant canals have been constructed in accordance with international treaties or later placed under conventional legal regimes. The Suez Canal, located in Egypt, and the Panama Canal are the two most important canals in international commerce.

The United States played the major role in the construction of the Panama Canal, which joins the Atlantic and Pacific Oceans across the Isthmus of Panama. The canal is over 40 miles long and has a minimum width of three hundred feet.

In 1903, after several European-financed efforts to build a canal across the isthmus had failed, the U.S. government negotiated the Hay-Bunau-Varilla Treaty (T.S. No. 431, 33 Stat. 2234, 10 Bevans 663). Under this treaty the United States guaranteed the independence of Panama (which had just broken away from Colombia) and secured a perpetual lease on a ten-mile strip for the canal. Panama was to receive an initial payment of $10 million and an ANNUITY of $250,000, beginning in 1913.

In 1906, President THEODORE ROOSEVELT directed construction of the canal to begin under the supervision of the U.S. Army Corps of Engineers. The Panama Canal was completed in 1914 and officially opened by President WOODROW WILSON on July 12, 1920.

The Hay-Bunau-Varilla Treaty stated that the canal was to be neutralized and free and open to vessels of commerce and war on terms of equality, and without discrimination as to tolls or conditions of passage. However, it did not mandate open access in times of war. The

United States decided, in 1917, to close the canal and the territorial waters of the canal zone (the ten-mile-wide strip of land that contained the canal) to vessels of enemy states and their allies whenever the United States is a belligerent. This was done in World Wars I and II.

From the 1920s to the 1970s, the United States and Panama had many disputes concerning control of the Panama Canal Zone. Panamanians came to regard the zone as part of their country and believed that the 1903 treaty was unfairly favorable to the United States. In 1971, the two countries began negotiations for a new treaty to replace the 1903 agreement.

In 1977, Panama and the United States concluded the Treaty Governing the Permanent Neutrality and Operation of the Panama Canal, and the Panama Canal Treaty (both Washington, D.C., 1977, in force 1979; *Digest of United States Practice in International Law,* 1978, at 1028–560). The treaties provided that the United States would relinquish control and administration of the canal to Panama by December 31, 1999, and stipulated an interim period for the training of, and progressive transfer of functions to, Panamanian personnel under the supervision of a mixed Panama Canal Commission.

The first treaty declared that the canal would be permanently neutralized (as would any other international waterway later constructed wholly or partly in Panamanian territory), with the object of securing it for peaceful transit in time of peace or of war for vessels of all nations on equal terms (arts. 1, 2). The right of passage extends not only to merchant ships but to vessels of war and auxiliary vessels in noncommercial service of all nations "at all times," irrespective of their internal operations, means of propulsion, origin, destination, or armament (art. 3, § 1[e]).

In early December 1999, a United States delegation, headed by former U.S. president **JIMMY CARTER** (who signed the original treaty in 1977), attended the official transfer of the canal into Panamanian hands. Other attendees included Spain's King Juan Carlos, and the presidents of Bolivia, Columbia, Ecuador, and Mexico. As of 2000, it was estimated that approximately 1,400 ships pass through the canal annually.

*Spanish King Juan Carlos and former President Jimmy Carter shake hands at a December 1999 ceremony transferring control of the Panama Canal to Panama. President Mireya Moscoso of Panama (sitting) looks on.*

AP/WIDE WORLD PHOTOS

### Rivers

Customary international law has never granted equal access and rights to countries that share navigable rivers either as boundaries between them or as waterways that traverse them successively. Freer use of international rivers has occurred in the nineteenth and twentieth centuries through the negotiation of treaties.

The St. Lawrence Seaway, opened for navigation by large ships in 1959, is an example of a legal and an administrative regime wholly devised and controlled by the two states (the United States and Canada) that share it. Based on a river in part, the seaway was developed with the construction of bypass canals, locks, and channel improvements, sometimes wholly within the territory of one state. In 1909, **CANADA AND THE UNITED STATES** consolidated and extended a number of earlier piecemeal arrangements in the Boundary Waters Treaty (36 Stat. 2448, 12 Bevans 359), to give both nations equal liberty of navigation in the St. Lawrence River, the Great Lakes, and the canals and waterways connecting the lakes. An international boundary line was drawn generally along the median line of the lakes (with some variation in Lake Michigan), but both nations were to exercise concurrent **ADMIRALTY** and criminal jurisdiction over the whole of the lakes and their connecting waterways. The admiralty jurisdiction reflected a disposition to treat the lakes as the high seas. This view was supported by the U.S. Supreme Court in *United States v. Rodgers,* 150 U.S. 249, 14 S. Ct. 109, 37 L. Ed. 1071 (1893), when it referred to the "high seas of the lakes."

The building of the St. Lawrence Seaway was complicated by the failure of Canada and the United States to negotiate an agreement for the

creation of a joint international authority to supervise the project. Instead, each country established its own national agency to construct the canals, locks, and other works required for the 27-foot channel, making each agency responsible for work on its own side of the river. The agencies coordinated their work in a series of international agreements and informal arrangements. Where works extended over the international boundary, the two commissions allocated responsibility through the coordination of work at the technical level. They agreed on uniform rules of navigation, coordination of pilotage services, uniform tolls, and arrangements for collection.

Seagoing merchant vessels from other countries use the seaway regularly. Their right to do so rests not on any general principle of free navigation, but on national agreements and Article V of the GENERAL AGREEMENT ON TARIFFS AND TRADE, which mandates freedom of transit for merchant ships through the territories of signatories for traffic to or from the territory of other signatories. As the Great Lakes are inland waters and have been demilitarized since the Rush-Bagot Agreement of 1817 (T.S. No. 110½, 2 Miller 645, 12 Bevans 54), it is unlikely that foreign warships will request or receive permission to visit their ports.

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## INTERNET

*A worldwide* TELECOMMUNICATIONS *network of business, government, and personal computers.*

The INTERNET is a network of computers linking the United States with the rest of the world. Originally developed as a way for U.S. research scientists to communicate with each other, by the mid 1990s the Internet had become a popular form of telecommunication for personal computer users. The dramatic growth in the number of persons using the network heralded the most important change in telecommunications since the introduction of television in the late 1940s. However, the sudden popularity of a new, unregulated communications technology raised many issues for U.S. law.

The Internet, popularly called the Net, was created in 1969 for the U.S. DEFENSE DEPARTMENT. Funding from the Advanced Research Projects Agency (ARPA) allowed researchers to experiment with methods for computers to communicate with each other. Their creation, the Advanced Research Projects Agency Network (ARPANET), originally linked only four separate computer sites at U.S. universities and research institutes, where it was used primarily by scientists.

In the early 1970s, other countries began to join ARPANET, and within a decade it was widely accessible to researchers, administrators, and students throughout the world. The National Science Foundation (NSF) assumed responsibility for linking these users of ARPANET, which was dismantled in 1990. The NSF Network (NSFNET) now serves as the technical backbone for all Internet communications in the United States.

The Internet grew at a fast pace in the 1990s as the general population discovered the power of the new medium. A significant portion of the Net's content is written text, in the form of both electronic mail (E-MAIL) and articles posted in an electronic discussion forum known as the Usenet news groups. In the mid-1990s the appearance of the World Wide Web made the Internet even more popular. The World Wide Web is a multimedia interface that allows for the transmission of text, pictures, audio, and video together, known as web pages, which commonly resemble pages in a magazine. Together, these various elements have made the Internet a medium for communication and for the retrieval of information on virtually any topic.

The sudden growth of the Internet caught the legal system unprepared. Before 1996, Congress had passed little legislation on this form of telecommunication. In 1986, Congress passed the Electronic Communications Privacy Act (ECPA) (18 U.S.C.A. § 2701 et seq. [1996]), which made it illegal to read private e-mail. The ECPA extended most of the protection already granted to conventional mail to electronic mail. Just as the post office may not read private letters, neither may the providers of private bulletin boards, on-line services, or Internet access. However, law enforcement agencies can subpoena e-mail in a criminal investigation. The ECPA also permits employers to read their workers' e-mail. This provision was intended to

# Should the Internet Be Policed?

Few observers could have predicted the fuss that the Internet began to generate in political and legal circles in the mid-1990s. After all, the global computer network linking 160 countries was hyped relentlessly in the media in the early 1990s. It spawned a multimillion-dollar industry in Internet services and a publishing empire devoted to the online experience—not to mention Hollywood movies, newspaper columns, and new jargon. But the honeymoon did not last. Like other communications media before it, the Internet provoked controversy about what was actually sent across it. Federal and state lawmakers proposed crackdowns on its content. Prosecutors took aim at its users. Civil liberties groups fought back. As the various factions engaged in a tug-of-war over the future of this sprawling medium, the debate became a question of freedom or control: should the Internet be left alone as a marketplace of ideas, or should it be regulated, policed, and ultimately "cleaned up"? Although this question became heated during the early- to mid-1990s, it has remained a debated issue into the early 2000s.

More than three decades after **DEFENSE DEPARTMENT** contractors put it up, the network remains free from official control. This system has no central governing authority for a very good reason: the general public was never intended to use it. Its designers in the late 1960s were scientists. Several years later, academics and students around the world got access to it. In the 1990s, millions of people in U.S. businesses and homes signed on. Before the public signed on its predecessors had long since developed a kind of Internet culture—essentially, a freewheeling, anything-goes setting. The opening of the Internet to everyone from citizens to corporations necessarily ruptured this formerly closed society, and conflicts appeared.

Speech rights quickly became a hot topic of debate. The Internet is a communications medium, and people have raised objections to speech online just as they have to speech in the real world. The Internet allows for a variety of media—text, pictures, movies, and sound—and **PORNOGRAPHY** is abundantly accessible online in all these forms. It is commonly "posted" as coded information to a part of the Internet called Usenet, a public issues forum that is used primarily for discussions. With over 10,000 topic areas, called news groups, Usenet literally caters to the world's panoply of interests and tastes. Certain news groups are devoted entirely to pornography. As the speed of the Internet increased dramatically with the development of broadband access in the late 1990s and early 2000s, not only has more of this type of information become more available, but also users have been able to access this information in greater quantity.

Several signs in 1994 predicted a legal crackdown on the Internet. Early on, U.S. attorney general **JANET RENO** said criminal investigators were exploring the originators of online **CHILD PORNOGRAPHY**. In July 1994, federal prosecutors won an **OBSCENITY** conviction in Tennessee against the operators of a computer bulletin board system (BBS) called the Amateur Action BBS, a private porn subscription service. Quickly becoming a cause célèbre in the online world, the case raised the question of how far off a general Internet crackdown could be.

In December 1994, a college student's fiction raised a furor. Jake Baker, a sophomore in linguistics at the University of Michigan, published a story about sexual torture in the alt.sex.stories news group on Usenet. Its lurid detail was not unique in the news group, but something else was: Baker used the name of a female classmate for one of his fictional victims. Once the name was recognized, campus critics of pornography lashed out at Baker.

Baker's case demonstrated how seriously objections to Internet material would be taken. In January 1995, the University of Michigan opened an investigation, and soon, **FEDERAL BUREAU OF INVESTIGATION** agents began reviewing Baker's **E-MAIL**. Baker insisted he meant no harm, suggesting that he wanted to be a creative writer. He even submitted to a psychological profile, which determined that he posed no danger to the student named in his story or to anyone else. But on February 9, 1995, federal authorities arrested him. He was charged with five counts of using inter-

protect companies against industrial spying, but it has generated lawsuits from employees who objected to the invasion of their privacy. Federal courts, however, have allowed employers to secretly monitor an employee's e-mail on a company-owned computer system, concluding that employees have no reasonable expectation of privacy when they use company e-mail.

Criminal activity on the Internet generally falls into the category of **COMPUTER CRIME**. It includes so-called hacking, or breaking into computer systems, stealing account passwords and credit-card numbers, and illegally copying **INTELLECTUAL PROPERTY**. Because personal computers can easily copy information—including everything from software to photographs and books—and the information can be sent anywhere in the world quickly, it has become much more difficult for **COPYRIGHT** owners to protect their property.

state communications to make threats to injure—and kidnap—another person. Lacking any specific target for Baker's alleged threats, yet armed with allegedly incriminating e-mail, prosecutors charged that he was dangerous to other university students. The **AMERICAN CIVIL LIBERTIES UNION** (ACLU) came to his aid, arguing in an amicus brief that the accusations were baseless and moreover violated Baker's **FIRST AMENDMENT** rights. A U.S. district court judge threw out the case.

The U.S. Senate had its own ideas about online speech. In February 1995, Senator J. James Exon (D-NE) introduced the Communications Decency Act (S. 314, 104th Cong., 1st Sess. [1995]). Targeting "obscene, lewd, lascivious, filthy, or indecent" electronic communications, the bill called for two-year prison sentences and fines of up to $100,000 for anyone who makes such material available to anyone under the age of 18. In its original form, the bill would have established broad criminal liability: users, online services, and the hundreds of small businesses providing Internet accounts would all be required to keep their messages, stories, postings, and e-mail decent. After vigorous protest from access providers, the bill was watered down to protect them: they would not be held liable unless they knowingly provided indecent material.

Several groups lined up to stop the Decency Act. Opposition came from civil liberties groups including the ACLU, the **ELECTRONIC FRONTIER FOUNDATION** (EFF), and Computer Professionals for Social Responsibility, as well as from online services and Internet access providers. They argued that the bill sought to criminalize speech that is constitutionally protected under the First Amendment.

Although Congress eventually outlawed obscene and other forms of indecent sexual material on the Internet in the Communications Decency Act of 1996, 47 U.S.C.A. § 223, the statute was challenged immediately. In *Reno v. American Civil Liberties Union,* 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997), the Supreme Court found that most of the statute's provisions violated the First Amendment. Congress subsequently sought to focus its attention on legislation that proscribes the transmission of child pornography, though the Supreme Court in a series of cases found that these statutes were likewise unconstitutional.

The central concern in *Reno* and the subsequent cases was that Congress has prohibited constitutionally protected speech in addition to speech that is not afforded First Amendment protection. Some members of Congress and supporters of such legislation suggested that restrictions on obscene and indecent information are necessary in order to protect children who use the Internet. But opponents of these restrictions noted that the Internet cannot be reduced to include only that information that is appropriate for children, and the Supreme Court reached this precise conclusion.

Although the debate about whether the government should regulate pornography and other obscene material continued, much of the focus about Internet policing shifted to other issues that involve the Internet. One important issue has been how the government can protect **COPYRIGHT** and other **INTELLECTUAL PROPERTY** owners from **PIRACY** that is somewhat common on the medium. Another major issue is how the government can prevent the dissemination of unwanted advertising, usually sent through e-mail and commonly referred to as spam. Likewise, computer viruses have caused millions of dollars of damages to computer owners in the United States and worldwide in the 1990s and 2000s, and most of these viruses have been distributed through the Internet.

Many Internet users, some of whom may otherwise object to government regulation of the medium, view governmental regulation that protects users from such problems as piracy, viruses, and spam more favorably than other forms of regulation. Nevertheless, even regulation of **COMPUTER CRIME** raises issues, such as whether such regulation may violate users' First Amendment rights or how government regulation protecting against these harms can be effective. As the Internet continues to develop, and even as the medium gradually becomes more standardized, these questions largely remain unanswered.

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E-mail.

Public and legislative attention, especially in the mid to late 1990s, focused on Internet content, specifically sexually explicit material. The distribution of **PORNOGRAPHY** became a major concern in the 1990s, as private individuals and businesses found an unregulated means of giving away or selling pornographic images. As hard-core and **CHILD PORNOGRAPHY** proliferated, Congress sought to impose restrictions on obscene and indecent content on the Internet.

In 1996, Congress responded to concerns that indecent and obscene materials were freely distributed on the Internet by passing the Communications Decency Act (CDA) as part of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. This law forbade the knowing dissemination of obscene and indecent material to persons under the age of 18 through computer networks or other telecommunications media. The act included penalties for vio-

lations of up to five years imprisonment and fines of up to $250,000.

The AMERICAN CIVIL LIBERTIES UNION (ACLU) and online Internet services immediately challenged the CDA as an unconstitutional restriction on FREEDOM OF SPEECH. A special three-judge federal panel in Pennsylvania agreed with these groups, concluding that the law was overbroad because it could limit the speech of adults in its attempt to protect children. *American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).

The government appealed to the U.S. Supreme Court, but the Court affirmed the three-judge panel on a 7-2 vote, finding that the act violated the FIRST AMENDMENT. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329, 136 L. Ed. 2d 236 (1997). Though the Court recognized the "legitimacy and importance of the congressional goal of protecting children from the harmful materials" on the Internet, it ruled that the CDA abridged freedom of speech and that it therefore was unconstitutional.

Justice JOHN PAUL STEVENS, writing for the majority, acknowledged that the sexually explicit materials on the Internet range from the "modestly titillating to the hardest core." He concluded, however, that although this material is widely available, "users seldom encounter such content accidentally." In his view, a child would have to have "some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended." He also pointed out that systems for personal computers have been developed to help parents limit access to objectionable material on the Internet and that many commercial web sites have age-verification systems in place.

Turning to the CDA, Stevens found that previous decisions of the Court that limited free speech out of concern for the protection of children were inapplicable. The CDA differed from the laws and orders upheld in the previous cases in significant ways. The CDA did not allow parents to consent to their children's use of restricted materials, and it was not limited to commercial transactions. In addition, the CDA failed to provide a definition of "indecent," and its broad prohibitions were not limited to particular times of the day. Finally, the act's restrictions could not be analyzed as forms of time, place, and manner regulations because the act was a content-based blanket restriction on speech. Accordingly, it could not survive the First Amendment challenge.

In 1998, Congress responded to the decision by enacting the Child Online Protection Act (COPA), Pub. L. No. 105-277, 112 Stat. 2681. This act was narrower in its application than the CDA, applying only to commercial transactions and limited to content deemed to be "harmful to minors." The new statute was subject to immediate litigation. A federal district court placed a preliminary injunction on the application of the statute, and this decision was affirmed by the U.S. Court of Appeals for the Third Circuit. *American Civil Liberties Union v. Reno*, 217 F.3d 162 (3d Cir. 2000). Although the U.S. Supreme Court vacated the decision, it was due to procedural grounds rather than the merits of the challenge. *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002). On remand, the Third Circuit again affirmed the INJUNCTION, holding that that statute likely violated the First Amendment. *American Civil Liberties Union v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003).

The questions raised in *Reno* and subsequent decisions have also been raised in the debate over the use of Internet filters. Many schools and libraries, both public and private, have installed filters that prevent users from viewing vulgar, obscene, pornographic, or other types of materials deemed unsuitable by the institution installing the software.

The ACLU, library associations, and other organizations that promote greater access to information have objected to the use of these filters, especially in public libraries. The first reported case involving libraries and Internet filters occurred in *Mainstream Loudon v. Board of Trustees of the London County Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998). A Virginia federal court judge in that case ruled that the use of screening software by a library was unconstitutional, as it restricted adults to materials that the software found suitable for children. Courts have generally been split about his issue, and several have found that the use of these filters in public schools is allowed under the First Amendment.

Pornography is not the only concern of lawmakers and courts regarding potential crime on the Internet. The Internet has produced forms of TERRORISM that threaten the security of business, government, and private computers. Computer "hackers" have defeated computer network "firewalls" and have vandalized or stolen elec-

tronic data. Another form of terrorism is the propagation and distribution over the Internet of computer viruses that can corrupt computer software, hardware, and data files. Many companies now produce virus-checking software that seeks to screen and disable viruses when they arrive in the form of an e-mail or e-mail file attachment. However, computer hackers are constantly inventing new viruses, thus giving the viruses a window of time to wreak havoc before the virus checkers are updated. Moreover, the fear of viruses has led to hoaxes and panics.

One of the most infamous viruses, dubbed the Melissa virus, was created in 1999 by David Smith of New Jersey. It was sent through a Usenet newsgroup as an attachment to a message the purported to provide passwords for sex-related web sites. When the attachment was opened, it infected the user's computer. The program found the user's address book and sent a mass message with attachments containing the virus. Within a few days, it had infected computers across the globe and forced the shutdown of more than 300 computer networks from the heavy loads of e-mail that Melissa generated.

The Melissa virus represented one of the first instances where law enforcement personnel were able to take advantage of new technologies to track the creator of the virus. On April 1, 1999, about a week after the virus first appeared on the Usenet newsgroups, police arrested Smith. He pled guilty to one count of computer FRAUD and abuse. He was sentenced to 20 months in prison and was fined $5,000.

Another area of legal concern is the issue of libel. In TORT LAW, LIBEL AND SLANDER occur when the communication of false information about a person injures the person's good name or reputation. Where the traditional media are concerned, it is well settled that libel suits provide both a means of redress for injury and a punitive corrective against sloppiness and malice. Regarding communication on the Internet, however, there is little case law, especially on the key issue of liability.

In suits against newspapers, courts traditionally held publishers liable, along with their reporters, because publishers were presumed to have reviewed the libelous material prior to publication. Because of this legal standard, publishers and editors are generally careful to review anything that they publish. However, the Internet is not a body of material that is carefully reviewed by a publisher, but an unrestricted flood of information. If a libelous or defamatory statement is posted on the Internet, which is owned by no one, the law is uncertain as to whether anyone other than the author can be held liable.

Some courts have held that online service providers, companies that connect their subscribers to the Internet, should be held liable if they allow their users to post libelous statements on their sites. An online provider is thus viewed like a traditional publisher.

Other courts have rejected the publisher analogy and instead have compared Internet service providers to bookstores. Like bookstores, providers are distributors of information and cannot reasonably be expected to review everything that they sell. U.S. libel law gives greater protection to bookstores because of this theory (*Smith v. California,* 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 [1959]), and some courts have applied it to online service providers.

TRADEMARK infringement on the Internet has also led to controversy and legal disputes. One of the biggest concerns for registered trademark and SERVICE MARK holders is protection of the mark on the Internet. As Internet participants establish sites on the Web, they must create domain names, which are names that designate the location of the web site. Besides providing a name to associate with the person or business that created the site, a domain name makes it easy for Internet users to find a particular home page or web site.

As individuals and businesses devised domain names in this medium, especially during the mid to late 1990s, they found that the names they created were similar to, or replicas of, registered trademarks and service marks. Several courts have considered complaints that use of a domain name violated the rights of a trademark or service mark holder, and early decisions did not favor these parties' rights.

In 1999, Congress enacted the Anti-cybersquatting Consumer Protection Act, Pub. L. No. 106-113, 113 Stat. 1501. The act strengthened the rights of trademark holders by giving these owners a CAUSE OF ACTION against so-called "cybersquatters" or "cyberpirates," individuals who register a third-party's trademark as a domain name for the purpose of selling it back to the owner for a profit.

Prior to the enactment of this law, an individual could register a domain name using the trademark or service mark of a company, and

the company would have to use a different domain name or pay the creator a sum of money for the right to use the name. Thus, for example, an individual could register the name www.ibm.com, which most web users would have associated with International Business Machines (IBM), the universally recognized business. Because another individual used this domain name, IBM could not create a Web site using www.ibm.com without paying the cybersquatter a fee for its use. The 1999 legislation eradicated this problem.

During the 1990s, a number of companies were formed that operated completely on the Internet. Due to the overwhelming success of these companies, the media dubbed this phenomenon the "dot-com bubble." The success of these companies was relatively short-lived, as the "bubble" burst in early 2000. Many of these Internet companies went out of business, while those that remained had to reconsider new business strategies.

Notwithstanding these setbacks, the Internet itself has continued to develop and evolve. During the 1990s, the vast majority of Internet users relied upon telephone systems to log on to the Internet. This trend has changed drastically in recent years, as many users have subscribed to services that provide broadband access through such means as cable lines, satellite feeds, and other types of high-speed networks. These new methods for connecting to the Internet allow users to retrieve information at a much faster rate of speed. They will likely continue to change the types of content that are available through this means of telecommunications.

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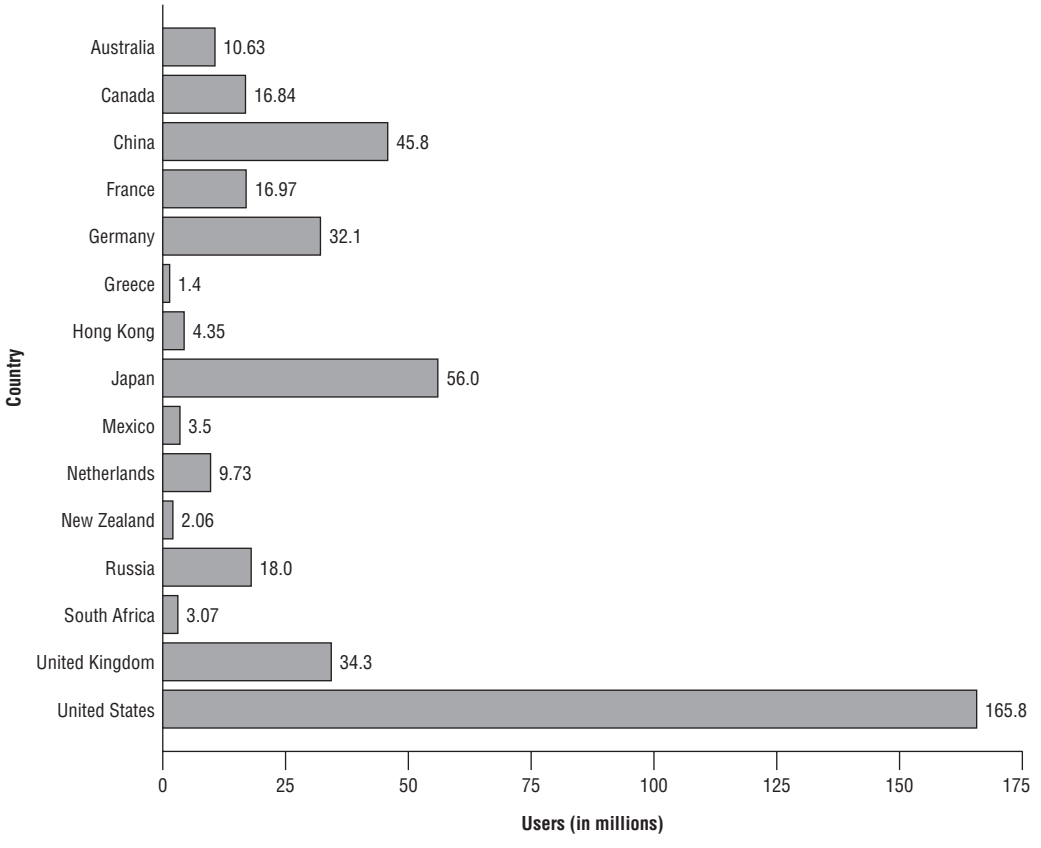


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First Amendment; Freedom of Speech; Internet Fraud; Telecommunications; Trademarks.

## INTERNET FRAUD

*A crime in which the perpetrator develops a scheme using one or more elements of the* INTERNET *to deprive a person of property or any interest, estate, or right by a false representation of a matter of fact, whether by providing misleading information or by concealment of information.*

As increasing numbers of businesses and consumers rely on the Internet and other forms of electronic communication to conduct transactions; illegal activity using the very same media is similarly on the rise. Fraudulent schemes conducted via the Internet are generally difficult to trace and prosecute, and they cost individuals and businesses millions of dollars each year.

From computer viruses to Web site hacking and financial FRAUD, Internet crime became a larger concern than ever in the 1990s and early 2000s. In one sense, this situation was less a measure of growing pains than of the increasing importance of the Internet in daily life. More users surfing the Web, greater business reliance upon E-MAIL, and the tremendous upsurge in electronic commerce have raised financial stakes. A single virus outbreak in 1999 was blamed for more than $80 million in damage, while Web site hacking in early 2000 purportedly cost hundreds of millions more. Adding new wrinkles were complaints about rampant fraud on popular online auction sites. Together, the problems drew tough rhetoric from U.S. officials, who announced new initiatives, deployed cyber-crime units, made numerous arrests, and even pursued international manhunts.

According to a U.S. JUSTICE DEPARTMENT Web site devoted to the topic, Internet fraud refers to any type of scheme in which one or more Internet elements are employed in order to put forth "fraudulent solicitations to prospective victims, to conduct fraudulent transactions, or to transmit the proceeds of fraud to financial institutions or to others connected with the scheme." As pointed out in a report prepared by the National White Collar Crime Center and the FEDERAL BUREAU OF INVESTIGATION (FBI) in 2001, major categories of Internet fraud include, but are not limited to, auction or retail fraud, SECURITIES fraud, and IDENTITY THEFT.

Securities fraud, also called investment fraud, involves the offer of bogus stocks or high-return investment opportunities, market manipulation schemes, pyramid and Ponzi schemes, or other "get rich quick" offerings. Identity theft, or identity fraud, is the wrongful obtaining and use of another person' personal data for one's own benefit; it usually involves economic or financial gain for the perpetrator.

In its May 2002 issue, *Internet Scambusters* cited a study by GartnerG2 that demonstrated online merchants lost $700 million to Internet fraud in 2001. By comparison, the report showed that "online fraud losses were 19 times as high as offline fraud." In fact, the study

pointed out that in the same year more than five percent of those making purchases via the Internet became victims of credit card fraud.

The IFCC, in its 2001 Internet fraud report, released statistics of complaints that had been received and then referred to law enforcement or regulatory agencies for action. For the 12-month period covered by the report, the IFCC received more than 17 million inquiries to its Web site, with nearly 50,000 formal complaints lodged. It must be noted, however, that the number of complaints included reports of computer intrusions and unsolicited CHILD PORNOGRAPHY.

Significant findings in the report revealed that Internet auction fraud was the most reported offense, comprising 42.8 percent of referred complaints. Besides those mentioned above, top fraud complaints also involved nondelivery of merchandise or payment, credit/debit card fraud, and confidence fraud. While it may seem easy to dismiss these concerns as obvious, the schemes used to defraud customers of money or valuable information have become increasingly sophisticated and less discernible to the unsuspecting consumer.

The "IFCC 2001 Internet Report" revealed that 81 percent of those committing acts of fraud were believed to be male, and nearly 76 percent of those allegedly involved in acts of fraud were individuals. According to the report, California, Texas, Florida, New York, and Illinois were the states in which half of the perpetrators resided. The report also provided a shocking example of just how difficult a task tracking down those involved in Internet fraud can be. According to the report, out of the more than 1,800 investigations initiated from complaints during 2001, only three arrests were made.

One example of the growing sophistication of Internet fraud cases can be seen in a 1997 case brought by the FEDERAL TRADE COMMISSION (FTC). *FTC v. Audiotex Connection, Inc.*, CV-970726 (E.D.N.Y.), dealt specifically with a scam in which Internet consumers were invited to view or to access free computer images. As reported in a February 10, 1998, FTC statement made before a Senate Subcommittee on Investigations of the Governmental Affairs Committee, when viewers attempted to access the images, their computer modems were surreptitiously disconnected from their local Internet Service Providers (ISPs) and were reconnected to the Internet through the defendants' expensive international modem connections. Exorbitantly priced long-distance telephone charges continued to ACCRUE until the consumer turned off the computer, even if he or she had exited the defendant's Web site and moved elsewhere on the Internet. Approximately 38,000 consumers fell for this scam, losing $2.74 million.

The U.S. Department of Justice Web site that addresses the major types of Internet fraud reports the following recent examples of various types of illegal activity carried out using the medium.

Two separate Los Angeles cases demonstrate the intricacies of securities fraud and market manipulation. In the first case, defendants bought 130,000 shares of bogus stock in NEI Webworld, Inc., a bankrupt company whose assets had previously been liquidated. Defendants in the case then posted e-mail messages on various Internet bulletin boards, claiming that NEI was being acquired by a wireless TELECOMMUNICATIONS company. Within 45 minutes of the posting, shares increased from $8 to $15 each, during which time defendants "cashed out." The remaining stock was worth 25 cents a share within a 30 minute period. The second example involves a case in which an employee of PairGain Technologies set up a fraudulent Bloomberg news Web site and reported false information regarding the company's purchase by a foreign company. The employee then posted bogus e-mail messages on financial news bulletin boards that caused a 30 percent manipulation of PairGain stock prices within hours.

In another example of investment fraud, perpetrators used the Internet, along with telemarketing techniques, to mislead more than 3,000 victims into investing almost $50 million in fraudulent "general partnerships involving purported high-tech investments, such as an Internet shopping mall and Internet access providers."

More than 100 U.S. military officers were involved in a case of identity theft. Defendants in the case illegally acquired the names and SOCIAL SECURITY numbers of the military personnel from a Web site, and then used the Internet to apply for credit cards issued by a Delaware bank. In another case of identity theft and fraud, a defendant stole personal information from the Web site of a federal agency and then used the information to make applications for an online auto loan through Florida bank.

The Department of Justice Web site also gives an example of a widely reported version of

credit card fraud. In the elaborate scheme, a perpetrator offers Internet consumers expensive electronics items, such as video cameras, at extremely low prices. As an incentive, they tell consumers that the item will ship before payment is finalized. When terms are agreed to, the perpetrator uses the consumer's name and address, but another party's illegally obtained credit card number, to purchase the item through a legitimate online vendor. Once the consumer has received the item, he or she authorizes credit card payment to the perpetrator. In the meantime, when the credit card holder, whose card number was used to purchase the item, stops payment on the unauthorized order, the vendor attempts to re-collect the merchandise from the consumer. The defrauded consumer, the victim of the credit card theft, and the merchant usually have no simple means of redress, since by the time they "catch on," the perpetrator has usually transferred funds into untraceable accounts.

In March 1999 the FBI became involved in a highly publicized hunt for a computer virus author. Electronic viruses are malicious software programs written to cause harm to unsuspecting computer users. They are designed to spread from computer to computer. Their propagation traditionally relied upon computer users sharing disks or software. On March 26, 2000, the appearance of the Melissa virus announced a new, dangerous breed of viruses delivered by e-mail, and it prompted heightened interest from federal law enforcement.

The virus was less deadly than those that erase data on a computer's hard drive. At heart, Melissa was an e-mail that contained a list of PORNOGRAPHY Web sites, along with programming code that sent up to 50 copies of itself to names found in a victim's e-mail address book. This self-replicating behavior had the potential to strain and disable computer networks, as the FBI warned on March 28 in an alert issued through its National Infrastructure Protection Center (NIPC). Within days, these fears were realized as dozens of corporate e-mail servers slowed under a flood of Melissa e-mail. In all, the infection reached nearly 19 percent of U.S. corporations and an estimated 1.5 million computers.

Less than a week later, the FBI nabbed the virus author. David L. Smith, a 30-year-old, Aberdeen, New Jersey, computer programmer, had unintentionally left his name in similar virus code. Charged with conspiracy, theft of computer services, and interruption of public communications, he pleaded innocent. After striking a plea bargain with state and federal prosecutors on December 11, however, he pleaded guilty to a single state count of computer theft along with a single federal count of sending a damaging computer program. Smith acknowledged that the virus had caused upwards of $80 million in clean-up costs.

The FBI issued a second virus advisory in June 1999, and then in May 2000, U.S. and Philippine officials cooperated in a manhunt for a third virus author. Like Melissa, the so-called Love Bug worm transmitted and replicated itself via e-mail, but it differed by damaging files on victims' computers. As authorities deemed it the fastest-spreading virus in history, the NIPC traced its origins to Manila. Prompted by U.S. officials, the Philippine National Bureau of Investigation arrested 27-year-old Reomel Ramones. The case hit snags, however, as authorities were at a loss to find physical evidence and even to know what to charge Ramones with, since virus writing is not a criminal offense under Philippine law.

**Top Products/Services for Internet Fraud Complaints, in 2002[a]**

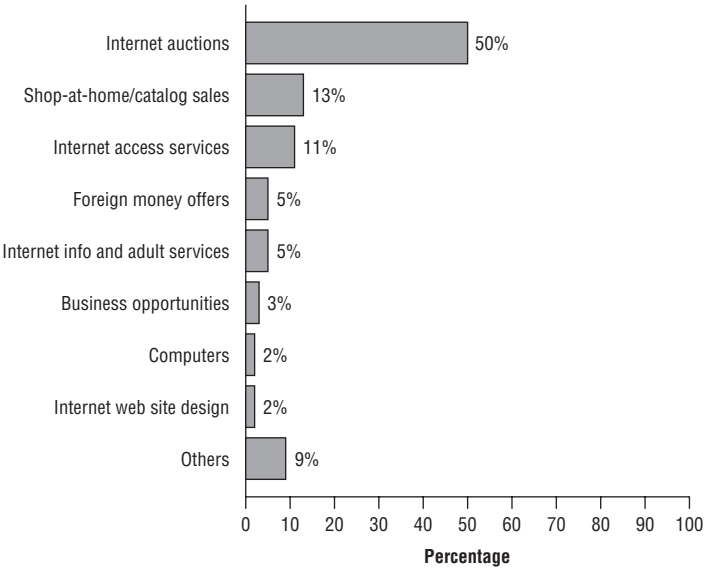


[a]Percentages are based on the total number of Internet-related complaints (102,517) received between January 1 and December 31, 2002.

SOURCE: Federal Trade Commission, *Consumer Sentinel Fraud Complaints*.

Hackers also launched assaults on U.S. government systems. For several years, hackers penetrated federal computers belonging to the Pentagon and other agencies, often eluding authorities. They occasionally publicized government data in works such as *2600: The Hacker Quarterly* and created a daring image celebrated in popular culture. In 1999 the White House declared war. President BILL CLINTON targeted hackers in get-tough speeches in January and May. An FBI dragnet culminated in the arrest of 20 suspected hackers in six states. Apparently as retaliation, hackers defaced Web sites belonging to the FBI, the INTERIOR DEPARTMENT, the U.S. Senate, and even the White House, forcing some to shut down for hours. A few days later, on June 2, White House press secretary Joe Lockhart announced a government-wide review of computer security and vowed to punish the responsible parties. Yet the government's effectiveness came into question in early 2000 as high-profile attacks crippled major Web sites.

As the government grappled with hackers, a famous hacker was released from prison. Kevin Mitnick, held in federal custody without bail or a trial since 1995, entered a plea bargain with the Los Angeles district attorney's office on charges pending from his arrest for intrusion into several corporate computer systems. A cause celebre in the computer underground since fleeing a manhunt in the early 1990s, Mitnick's case had prompted public protests and even hacks of Web sites proclaiming the message, "Free Kevin." On August 9, U.S. District Judge Mariana Pfaelzer sentenced the 35-year-old hacker to 46 months in federal prison and ordered him to pay $4,125 in restitution. He was released on January 21, 2000. Mitnick's PAROLE terms forbid him from using computers in any way for another three years. When authorities subsequently barred him from accepting lucrative speaking engagements, Mitnick retained famed FIRST AMENDMENT attorney Floyd Abrahms, filed suit, and successfully proved that the terms of his parole violated his right to FREEDOM OF SPEECH.

As Internet auction sites gained popularity, fraud also attracted federal attention. In February 2000, the FTC announced a multi-agency effort to combat what it said was a hundredfold increase in complaints about Web-based fraud. The FTC reported that complaints had soared from 107 in 1997 to 10,700 in 1999. In response, it announced plans to work with the Department of Justice, the U.S. Postal Inspection Service, and other federal and state authorities to increase the number of cases it files in court, which to date amounted to only 35. The leading Internet auction site eBay separately announced that it would cooperate with authorities to sniff out con artists. According to statistics from the National Fraud Information Center, fraud in online AUCTIONS accounted for 90 percent of the total incidents of Internet fraud in 2002.

FURTHER READINGS

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CROSS-REFERENCES

Antitrust Law; Computer Crime; Federal Trade Commission; Fraud; Intellectual Property; Privacy; Taxation; Trademarks.

## INTERPLEADER

*An equitable proceeding brought by a third person to have a court determine the ownership rights of rival claimants to the same money or property that is held by that third person.*

Interpleader is a form of equitable relief. Equitable remedies are ways for courts to enforce rights other than by issuing a judgment for money damages. Interpleader is employed when two or more parties seek ownership of money or property that is held by a third party. The property in question is called the stake, and the third party who has custody of it is called the stakeholder. The stakeholder is faced with a legal dilemma: giving the property to either one of the parties will likely lead to a lawsuit by the other party against the stakeholder and the new property owner.

Interpleader enables the stakeholder to turn the controversy over to a court and to be dismissed from the legal action. It is designed to eliminate multiple lawsuits over the same stake and to protect the stakeholder from actual or potential multiple liability. Typically, interpleader will involve corporate SECURITIES or proceeds from insurance policies.

The stakeholder initiates an interpleader by filing an action that states that he or she has no

claim to the money or property in controversy, and does not know to which claimant it should be lawfully delivered. The stakeholder must also establish the possibility of multiple lawsuits. The stakeholder then may be required to deposit the stake with the court, and notifies possible claimants that they can present their claims of ownership in court for determination.

The court must decide whether the interpleader is proper. It has discretion to allow the interpleader, and may deny the relief if the stakeholder is guilty of LACHES (unreasonable delay) or was responsible for the creation of the adverse claim. If the court grants the interpleader, the stakeholder is dismissed from the action. The rival claimants are given the right to litigate their claims, and they will be bound by the decision of the court.

Interpleader is primarily a device of federal CIVIL PROCEDURE. Two types of interpleader are available in federal courts: one under the Federal Rules of Civil Procedure and one under federal statute. When interpleader is sought through rule 22 of the Federal Rules of Civil Procedure, more than $10,000 must be at issue in the action, and the claimants must reside in the same state and must be citizens of a state other than the one in which the stakeholder is a citizen. The action can be tried where the stakeholder resides, where the CAUSE OF ACTION arose, or where the claimants reside. The stakeholder is not obligated to deposit the stake with the court, an important advantage when the property is used for purposes of investment and to generate income.

Interpleader authorized under 28 U.S.C.A. § 1335 differs in several respects from rule 22 interpleader. The dispute may involve as little as $500, at least two of the claimants must be from different states, and the citizenship of the stakeholder is immaterial. The venue, or place of trial, is anywhere that a claimant resides. At the time the suit is filed, the stakeholder must deposit the stake or post a bond in an amount equivalent to its value.

Claimants in an interpleader proceeding may be permitted to assert additional claims against each other or the stakeholder if they satisfy jurisdictional requirements and do not unreasonably complicate or delay the action. Courts must decide, on the particular facts of each case, whether such claims will be considered.

CROSS-REFERENCES

Equity.

## INTERPOL

Interpol is the acronym for the International Criminal Police Organization. It is an international organization of police forces from 176 countries designed to coordinate INTERNATIONAL LAW enforcement. Interpol furthers mutual aid and cooperation among the police forces of its national members in order to prevent and inhibit crime.

Interpol was established in 1923, with the General Secretariat—the international headquarters—located in Lyons, France. Delegates from member countries meet once a year to discuss police problems and admit new members. Each member nation maintains and staffs its own national central bureau. In the United States, the bureau is located in Washington, D.C. The U.S. bureau is under the direction and control of the Departments of Justice and of the Treasury, and is staffed by personnel from those departments.

The General Secretariat is supported by membership dues. Its budget is based on the Swiss franc, since that is a stable currency. Approximately five percent of the total budget is paid by the United States.

Interpol is forbidden by its constitution to undertake any intervention or activities of a political, military, religious, or racial character. Each national central bureau coordinates and responds to inquiries received from local and foreign law enforcement agencies. Each bureau also arranges for resolutions adopted by Interpol to be applied at the national level, and works to ensure that the basic principles laid down by Interpol's constitution are followed. National central bureaus are linked electronically to the Interpol General Secretariat's main database in Lyons.

The organization uses a system of international notices (circulars) to inform peace officers in the national bureaus of cases where known criminals abandon their usual residence and travel abroad surreptitiously. The color coded circulars are distributed by Interpol Headquarters to member countries within twenty days of their issue, or, in urgent cases, the same day. In the case of a fugitive whose arrest is requested and whose EXTRADITION is likely, a wanted notice containing details of the arrest warrant and the offense committed is circulated.

In addition, Interpol conducts investigations of criminal activities, including drug trafficking, TERRORISM, counterfeiting, SMUGGLING,

ORGANIZED CRIME, and new forms of economic crime. It conducts criminal history checks for visa and import permits and traces vehicle registration and ownership. Interpol also performs humanitarian services such as locating missing persons and providing notification of serious illness or death.

## INTERPOLATION

*The process of inserting additional words in a complete document or instrument in such manner as to alter its intended meaning; the addition of words to a complete document or instrument.*

Interpolation is synonymous with interlineation.

## INTERPRETATION

*The art or process of determining the intended meaning of a written document, such as a constitution, statute, contract, deed, or will.*

The interpretation of written documents is fundamental to the process and PRACTICE OF LAW. Interpretation takes place whenever the meaning of a legal document must be determined. Lawyers and judges search for meaning using various interpretive approaches and rules of construction. In constitutional and statutory law, legal interpretation can be a contentious issue.

Legal interpretation may be based on a literal reading of a document. For example, when JOHN DOE signs a will that names his wife, Jane Doe, as his PERSONAL REPRESENTATIVE, his intent to name her the administrator of his estate can be determined solely from the specific language used in the will. There is no need to consider the surrounding facts and circumstances that went into his choice.

When the intended meaning of the words in a document is obscure and conjecture is needed to determine the sense in which they have been used, mixed interpretation occurs. In such a case, the words express an individual's intent only when they are correctly comprehended. If John Doe refers only to "my wife" in his will, a probate court will have to determine who his wife was at the time of his death. How a lawyer or judge ascertains intent when words are unclear is typically governed by rules of construction. For example, the general definition of a word will govern interpretation, unless through custom, usage, or legal precedent a special meaning has been attached to the term.

When a court interprets a statute, it is guided by rules of statutory construction. Judges are to first attempt to find the "plain meaning" of a law, based solely on the words of the statute. If the statute itself is not clear, a court then may look to extrinsic evidence, in this case LEGISLATIVE HISTORY, to help interpret what the legislature meant when it enacted the statute. It is now common practice for statutes to contain "interpretation clauses," which include definitions of key words that occur frequently in the laws. These clauses are intended to promote the PLAIN MEANING of the law and to restrict courts from finding their own meaning.

Concern over whether courts apply strict or liberal methods of interpretation has generated the most controversy at the constitutional level. How the U.S. Supreme Court interprets the Constitution has been widely debated since the 1960s. Critics of the WARREN COURT, of the 1950s and 1960s, charged that the Court had usurped the lawmaking function by liberally interpreting constitutional provisions.

This criticism led to JURISPRUDENCE of "original intent," a philosophy that calls on the Supreme Court and other judges to seek the plain meaning of the Constitution. If plain textual meaning is lacking, the justices should attempt to determine the original intentions of the Framers. Those who advocate an ORIGINAL INTENT method of interpretation also emphasize the need for the justices to respect history, tradition, and legal precedent.

Opponents of original intent jurisprudence argue that discerning the intent of the Framers is impossible on many issues. Even if the original intent is knowable, some opponents believe that this intent should not govern contemporary decision making on constitutional issues. In their view the Constitution is a living document that should be interpreted according to the times. This interpretive philosophy would permit justices to read the Constitution as a dynamic document, with contemporary values assisting in the search for meaning.

CROSS-REFERENCES

Judicial Review; Plain-Meaning Rule.

## INTERROGATION, POLICE

See CUSTODIAL INTERROGATION; MIRANDA V. ARIZONA.

## INTERROGATORIES

*Written questions submitted to a party from his or her adversary to ascertain answers that are prepared in writing and signed under oath and that have relevance to the issues in a lawsuit.*

Interrogatories are a discovery device used by a party, usually a defendant, to enable the individual to learn the facts that are the basis for, or support, a PLEADING with which he or she has been served by the opposing party. They are used primarily to determine what issues are present in a case and how to frame a responsive pleading or a deposition. Only parties to an action must respond to interrogatories, unlike depositions that question both parties and witnesses.

Interrogatories are used to obtain relevant information that a party has regarding a case, but they cannot be used to elicit PRIVILEGED COMMUNICATIONS. The question must be stated precisely to evoke an answer relevant to the litigated issues. A party can seek information that is within the personal knowledge of the other or that might necessitate a review of his or her records in order to answer. The federal rules of CIVIL PROCEDURE and the rules governing state court proceedings provide that when interrogatories seek disclosure of information contained in corporate records, the party upon whom the request is served can designate the records that contain the answers, thereby making the requesting party find the answer for himself or herself. No party can be compelled to answer interrogatories that involve matters beyond the party's control. Objections to questions submitted can be raised and a party need not answer them until a court determines their validity.

Interrogatories are one of the most commonly used methods of discovery. They can be employed at any time and there is no limit on the number that can be served. Although they are not generally used for purposes of evidence in a trial, they might be admissible if they satisfy the RULES OF EVIDENCE, such as the best evidence rule or are an exception to the HEARSAY rule.

## INTERSTATE COMMERCE ACT

The Interstate Commerce Act of 1887 (24 Stat. 379 [49 U.S.C.A. § 1 et seq.]) stands as a watershed in the history of the federal regulation of business. Originally designed to prevent unfair business practices in the railroad industry, the statute shifted responsibility for the regulation of economic affairs from the states to the federal government. It has been amended over the years to embrace new and different forms of interstate transportation, including pipelines, water transportation, and motor vehicle transportation. Among its many provisions, it established the INTERSTATE COMMERCE COMMISSION (ICC).

As part of its mission, the ICC heard complaints against the railroads and issued cease-and-desist orders to combat unfair practices. It later regulated many other forms of surface transportation, including motor vehicle and water transportation. The ICC was abolished in 1995, and many of its remaining functions were transferred to the TRANSPORTATION DEPARTMENT.

The Interstate Commerce Act was passed as a result of public concern with the growing power and wealth of corporations, particularly railroads, during the late nineteenth century. Railroads had become the principal form of transportation for people and goods, and the prices they charged and the practices they adopted greatly influenced individuals and businesses. In some cases, the railroads abused their power as a result of too little competition, as when they charged scandalously high fares in places where they exerted MONOPOLY control. Railroads also grouped together to form trusts that fixed rates at artificially high levels.

Too much competition also caused problems, as when railroads granted rebates to large businesses in order to secure exclusive access to their patronage. The rebates prevented other railroads from serving those businesses. Larger railroads sometimes lowered prices so much that they drove other carriers out of business, after which they raised prices dramatically. Railroads often charged more for short hauls than for long hauls, a scheme that effectively discriminated against smaller businesses. These schemes resulted in BANKRUPTCY for many rail carriers and their customers.

Responding to a widespread public outcry, states passed laws that were designed to curb railroad abuses. However, in an 1886 decision, *Wabash, St. Louis, & Pacific Railway Co. v. Illinois,* 118 U.S. 557, 7 S. Ct. 4, 30 L. Ed. 244, the U.S. Supreme Court ruled that state laws regulating interstate railroads were unconstitutional because they violated the COMMERCE CLAUSE, which gives Congress the exclusive power "to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes" (art. I, § 8). *Wabash* left a regulatory void that was soon filled by Congress. The following

*Sample interrogatories by a plaintiff, directed to a corporation*

## Interrogatories

Small Claims Court _____ County, Colorado
Court Address:
**PLAINTIFF(S):** _____
Address: _____
City/State/Zip: _____
Phone: Home _____ Work _____
v.
**DEFENDANT(S):** _____
Address: _____
City/State/Zip: _____
Phone: Home _____ Work _____

▲ **COURT USE ONLY** ▲
Case Number:
Division Courtroom

**MOTION AND ORDER FOR INTERROGATORIES – SHORT FORM**

**MOTION**

Judgment was entered on: (date) _____, against the:
☐ Plaintiff ☐ Defendant By: ☐ Default ☐ After trial
The judgment remains unsatisfied. Pursuant to Rule 518(a), C.R.C.P., the ☐ judgment creditor requests or the
☐ Court finds that the judgment debtor should be required to answer the following interrogatories.

**ORDER**

☐ Pursuant to Rule 518(a), at the request of the judgment creditor. **OR**
On the Court's review of the above Motion **IT IS ORDERED:**
☐ That the judgment debtor shall answer the following questions and file the answers with the Court
☐ immediately ☐ within ten days after service of these interrogatories upon the judgment debtor, or in lieu thereof, pay the judgment in full. **OR**
☐ That the judgment debtor answer the questions and appear in Court at (date)_____at (time)_____.

**FAILURE TO TRUTHFULLY AND COMPLETELY ANSWER ALL OF THESE QUESTIONS AND RETURN THEM WITHIN TEN DAYS TO THE CLERK OF THE COURT, SMALL CLAIMS COURT, SHALL CAUSE A CITATION TO BE ISSUED FOR CONTEMPT OF COURT. A FINDING OF CONTEMPT BY THE COURT MAY RESULT IN A FINE OR JAIL SENTENCE.**

Dated: _____ _____
☐ Judge ☐ Magistrate

**INTERROGATORIES**

1. What is your full legal name: _____
   List any other names you have been known by: _____
   Home address: _____
   Home phone number: _____ Work phone number: _____
   Date of birth:_____ Social Security Number: _____
   Drivers license number: _____ State: _____
2. As to your employment, complete the following:
   The employer's/company's name: _____
   Address of employer: _____
   Phone number: _____ Supervisor's name: _____
   You are paid: ☐ hourly $ _____ ☐ monthly $ _____ ☐ or your annual rate of pay you earn $ _____ ☐ you are paid commissions, the manner in which commissions are calculated are: _____
   The days or days of the month on which you are paid: _____

[continued]

*Sample interrogatories by a plaintiff, directed to a corporation (continued)*

**Interrogatories**

3. As to your bank accounts, complete the following: List the name and address and account number of every bank, saving and loan, credit union or other financial institution holding any funds that you have deposited or that you are allowed to withdraw without obtaining another person's signature.

| Name of Bank Saving & Loan/Credit Union | Address/Location City/State | Account Number |
|---|---|---|
| Name of Bank Saving & Loan/Credit Union | Address/Location City/State | Account Number |
| Name of Bank Saving & Loan/Credit Union | Address/Location City/State | Account Number |
| Name of Bank Saving & Loan/Credit Union | Address/Location City/State | Account Number |
| Name of Bank Saving & Loan/Credit Union | Address/Location City/State | Account Number |

4. State the full and correct address of all real estate you own or have an interest in:

| Address | City/County State |
|---|---|
| Address | City/County State |
| Address | City/County State |
| Address | City/County State |

5. As to debts owed to you, complete the following. List the name and address of every person who owes you money and the amount owedto you:

| Name | Address City/State | $ Amount owed |
|---|---|---|
| Name | Address City/State | $ Amount owed |
| Name | Address City/State | $ Amount owed |
| Name | Address City/State | $ Amount owed |

6. As to insurance coverage, complete the following: List the name and address of any insurance company providing liability coverage, including policy numbers with agent's name.

| Name of Insurance Company – Name of Agent | Address/Location City/State | Policy Number |
|---|---|---|
| Name of Insurance Company – Name of Agent | Address/Location City/State | Policy Number |
| Name of Insurance Company – Name of Agent | Address/Location City/State | Policy Number |

**UNDER PENALTIES OF PERJURY, I DECLARE THAT THESE STATEMENTS ARE TRUE AND CORRECT.**

Dated: _____ _____
Judgment debtor's signature

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20 _____.

My commission expires: _____ _____
Notary Public/Clerk of the Court/Deputy Clerk

[continued]

*Sample interrogatories by a plaintiff, directed to a corporation (continued)*

## Interrogatories

Case Name _____ v. _____ Case Number: _____

**AFFIDAVIT OF SERVICE**
**(Must be returned to Court)**

I served a copy of the foregoing Interrogatories, on the following:

**Name** **Date** **Place**

If the person on whom service was made is not the named party to be served, I served the Interrogatories:

☐ At the regular place of abode of the person to be served, by leaving the Notice with a person over the age of 18 years who regularly resides at the place of abode. (Identify relationship to defendant _____.)

☐ At the regular place of business of the person to be served, by leaving the Notice with that person's secretary, bookkeeper, chief clerk, office receptionist/assistant or partner. (Circle title of person who was served.)

☐ By leaving the Notice with a partner, limited partner, associate, manager, elected official, receptionist/assistant, bookkeeper or general agent of the partnership, limited liability company, or other non-corporate entity, which was to be served. (Circle title of person who was served.)

☐ By leaving the Notice with an officer, manager, receptionist/assistant, legal assistant, paid legal advisor or general agent, registered agent for service of process, stockholder or principal employee of the corporation that was to be served. (Circle title of person who was served.)

I am over the age of 18 years, and I am not an interested party in this matter.

I have charged the following fees for my services in this matter:

☐ Private process server

☐ Sheriff, _____County

Fee $ _____ Mileage $ _____

_____
Signature of Process Server

_____
Name (Print or type)

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____,

this _____ day of _____, 20 _____.

My commission expires: _____

_____
Notary Public

**CERTIFICATE OF SERVICE BY MAILING**
(To be performed by Clerk within three days of filing)

I hereby certify that on (date)_____, I mailed a true and correct copy of the MOTION AND ORDER FOR INTERROGATORIES – SHORT FORM, by placing it in the United States Mail, postage pre-paid to the Defendant(s) at the address(es) listed above.

_____
Clerk of Court/Deputy Clerk

☐ (If applicable) Plaintiff notified of non-service on (date)_____. Clerk's Initials _____

JDF 252A 9/01 MOTION AND ORDER FOR INTERROGATORIES – SHORT FORM

year, it passed the Interstate Commerce Act, which President GROVER CLEVELAND signed into law on February 4, 1887.

The law required that railroad rates be "reasonable and just," but it did not empower the federal government to fix specific rates. It prohibited trusts, rebates, and discriminatory fares. It also required carriers to publish their fares, and allowed them to change fares only after giving the public ten days' notice.

Now referred to as the Revised Interstate Commerce Act of 1978 (P.L. 95–473), the act was again revised in 1983 (P.L. 97–449) and 1994 (P.L.103–272). The latter revisions and recodifications simplified the language of the act and reorganized certain sections; no major substantive changes were made. The statute remains the bastion of regulatory guidance for the transportation and freight industries and for any other entity acting as a BROKER, shipper or shipper's exclusive agent, or carrier.

FURTHER READINGS

Interstate Commerce Commission. 1979. *Interstate Commerce Commission . . . in the Public Interest.*

Transportation Consumer Protection Council, Inc. 1996. "Freight Claims in Plain English." 3d ed. Available online at www.transportlaw.com (cited May 18, 2003)

CROSS-REFERENCES

Railroad; Shipping Law.

## INTERSTATE COMMERCE COMMISSION

The first independent regulatory agency created by the federal government, the Interstate Commerce Commission (ICC) regulated interstate surface transportation between 1887 and 1995. Over its 108-year history, the agency regulated and certified trains, trucks, buses, water carriers, freight forwarders, pipelines, and many other elements of interstate transportation.

The ICC was created by the INTERSTATE COMMERCE ACT of 1887 (24 Stat. 379 [49 U.S.C.A. § 1 et seq.]). The act created a five-person commission—later expanded to seven and then to 11—to be appointed by the president and confirmed by the Senate. Among the commission's first actions was the election of its first president, THOMAS MCINTYRE COOLEY, a noted legal scholar who had been nominated by President GROVER CLEVELAND.

Congress established the ICC to control the powerful railroad industry, then plagued by monopolistic and unfair pricing practices that often discriminated against smaller railroads and businesses as well as individual consumers. In its early years, the agency's regulatory effectiveness was severely limited by the courts, which in many cases retained the ability to review ICC rate rulings. The agency lost 15 of its first 16 lawsuits against the railroads, and the Supreme Court issued several decisions that hampered its regulatory powers.

Later laws gave the agency's rulings more teeth. The Elkins Act of 1903 (32 Stat. 847) allowed the ICC to punish shippers who practiced unfair competitive methods. The Hepburn Act of 1906 (34 Stat. 584) gave the agency wider powers to regulate railroad rates, making its rulings binding without a court order. The act also assigned to the ICC the oversight of all pipelines other than gas and water.

Over the years, Congress changed the focus and tasks of the ICC, gradually expanding its regulatory powers. In 1893, it entrusted the agency with the regulation of railroad safety. Later, the Motor Carrier Act of 1935 (49 Stat. 543) gave the ICC authority to regulate interstate trucking and other highway transportation. The agency even regulated telephone and telegraph communication from 1888 until 1934, when this task was transferred to the FEDERAL COMMUNICATIONS COMMISSION.

Other tasks performed by the ICC included conducting hearings to examine alleged abuses; authorizing mergers in the transportation industry; overseeing the movement of railroad traffic in certain areas; granting the right to operate railroads, trucking companies, bus lines, and water carriers; and maintaining CONSUMER PROTECTION programs that ensured fair, nondiscriminatory rates and services. At times, the agency participated in important social and political changes, as when it desegregated interstate buses and trains in the 1960s.

By the 1960s, the ICC had reached a peak size of 2,400 employees, with field offices in 48 states. Its growth made it a target for those who sought to reduce the power and size of federal regulatory agencies. Critics claimed that ICC regulation created artificially high rates for many forms of transportation. Some charged the agency with corruption.

In 1976, the Railroad Revitalization and Regulatory Reform Act (90 Stat. 31 [45 U.S.C.A. § 801]) reduced the commission's powers to

regulate carrier rates and practices except in a few areas where a single railroad or trucking firm monopolized a transportation route. This trend toward the deregulation of interstate commerce caused the ICC to gradually get smaller until December 29, 1995, when President BILL CLINTON signed The ICC Termination Act, Pub. L.No. 104-88, 109 Stat. 803 (1995), dissolving the ICC.

In its final year, the ICC employed 300 people and had a budget of $40 million. The legislation ending its existence moved 200 former ICC employees to the TRANSPORTATION DEPARTMENT, which assumed authority over former ICC functions deemed essential by Congress. These essential functions included approving railroad and bus mergers and handling railroad disputes. The new three-person Intermodal Surface Transportation Board within the Department of Transportation oversees many of the functions formerly conducted by the ICC.

FURTHER READINGS

American Association of State Highway and Transportation Officials. Available online at <www.transportation1.org/aashtonew/> (accessed July 28, 2003).

"Commerce: ICC Elimination." 1996. *Congressional Quarterly's News* (January 8).

Interstate Commerce Commission. 1979. *Interstate Commerce Commission . . . in the Public Interest.*

*U.S. Government Manual* Web site. Available online at <www.gpoaccess.gov/gmanual> (accessed November 10, 2003).

CROSS-REFERENCES

Carriers; Highway; Railroad; Shipping Law.

## INTERSTATE COMPACT

*A voluntary arrangement between two or more states that is designed to solve their common problems and that becomes part of the laws of each state.*

Interstate compacts in the United States were first used by the American colonies to settle boundary disputes. After the American Revolution, states continued to use interstate compacts to meet their various needs. Although these compacts were necessary for peaceful interaction between the states, they posed a threat to the future of the United States: if states were allowed to form powerful coalitions, they might be tempted to break away from the rest of the country and fracture the Union.

Under Article I, Section 10, Clause 3, of the U.S. Constitution, "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State." This clause, the Interstate Compact Clause, was adopted with no debate. Moreover, it received only cursory discussion in subsequent papers written by the Constitution's Framers, so its purpose and scope were not developed.

Most courts followed the lead of Justice JOSEPH STORY (1779–1845), of the Supreme Court, an influential legal commentator of the nineteenth century. According to Story, the clause was meant to protect the supremacy of the federal government. With this general principle as guidance, courts interpreted the clause to give Congress the power to nullify an interstate compact if it frustrated federal aims.

Over the years, four steps have evolved to guide courts in their review of interstate compact cases. First, there must be an agreement between two or more states. If no concerted effort is actually undertaken by two or more states, Congress has no power to review the state actions under the Interstate Compact Clause. In determining whether there is an agreement, the court may ask whether the states have officially formed a joint organization, whether a state's action is conditioned on action by another state, and whether any state is free to modify its position without consulting other states.

If the court finds that there is an agreement, the court will examine the agreement to determine whether it infringes on federal sovereignty. Not all interstate compacts infringe on federal supremacy. The question the court asks is whether the agreement between the states interferes with federal statutes or initiatives. For example, consider the federal legislation that outlaws certain automatic and semiautomatic assault weapons: title XI of the Public Safety and Recreational Firearms Use Protection Act (Pub. L. No. 103-322, 108 Stat. 1807 [codified as amended in scattered sections of 42 U.S.C.A.]). The purpose of the legislation is to limit firearm ownership. An interstate compact that legalized the banned assault weapons, and thus expanded firearm ownership, would infringe on the federal statute, whereas an interstate compact that outlawed additional assault weapons, and thus further limited firearm ownership, would not infringe on the federal statute.

If an interstate compact is found to infringe on federal initiatives, the court will then determine whether Congress has given its approval

for the compact. Congress may grant approval before or after a compact is formed. Congress may also give indirect approval to a compact. For example, Congress may give its tacit approval to a compact on state boundaries if it subsequently approves the federal elections, appointments, and tax schemes of the states.

Finally, Congress may seek to amend or change an interstate compact after it has been approved. Congress may amend a compact or completely revoke its approval of a compact. Congress may also grant its approval with conditions attached.

The most common interstate compacts concern agreements to share natural resources, such as water; build regional electric power sources; share parks and parkways; conserve fish and wildlife; protect air quality; manage radioactive and other hazardous wastes; control natural disasters, such as floods; share educational resources and facilities; share police and fire departments; and grant reciprocity for driver's licenses. Congress has passed statutes that require prior congressional approval for many such compacts.

If Congress has not asserted its authority over an interstate compact prior to its formation, the compact probably does not violate the Interstate Compact Clause. In *Northeast Bancorp v. Board of Governors,* 472 U.S. 159, 105 S. Ct. 2545, 86 L. Ed. 2d 112 (1985), Massachusetts and Connecticut passed statutes that allowed out-of-state holding companies in the New England region to acquire in-state banks. These statutes applied only if the state in which the out-of-state company was based also allowed out-of-state holding companies to acquire in-state banks. When the **FEDERAL RESERVE BOARD** (FRB) approved the interstate acquisition of banks in Massachusetts and Connecticut, three banking companies brought suit against the board.

The plaintiffs argued, in part, that the statutes constituted an interstate compact, and that the compact required congressional approval that had not been received. The U.S. Supreme Court disagreed. Assuming the statutes did create an interstate compact, they did not require congressional approval because they did not encroach on any asserted power of the federal government. In fact, Congress had authorized interstate bank acquisitions in an amendment to the Bank Holding Company Act of 1956 (70 Stat. 133 [as amended, 12 U.S.C.A. § 1841, 1842(d)). The amendment prevented the FRB from approving interstate bank acquisitions unless the states had reciprocating statutes. Massachusetts and Connecticut had merely accomplished what was implicitly authorized by the amendment, and the High Court cleared the way for final approval of the acquisitions.

In practice, few interstate compacts are held to violate federal imperatives. Despite the freedom of states to form interstate compacts, the trend is toward increased federal participation and control. Congress has inserted itself into the negotiations over, administration of, and participation in interstate compacts. This level of control may decrease as the United States seeks to trim its budget. However, Congress will remain constitutionally required to prevent states from forming coalitions that wield powers challenging those of the federal government.

**FURTHER READINGS**

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**CROSS-REFERENCES**

Federalism; Supremacy Clause.

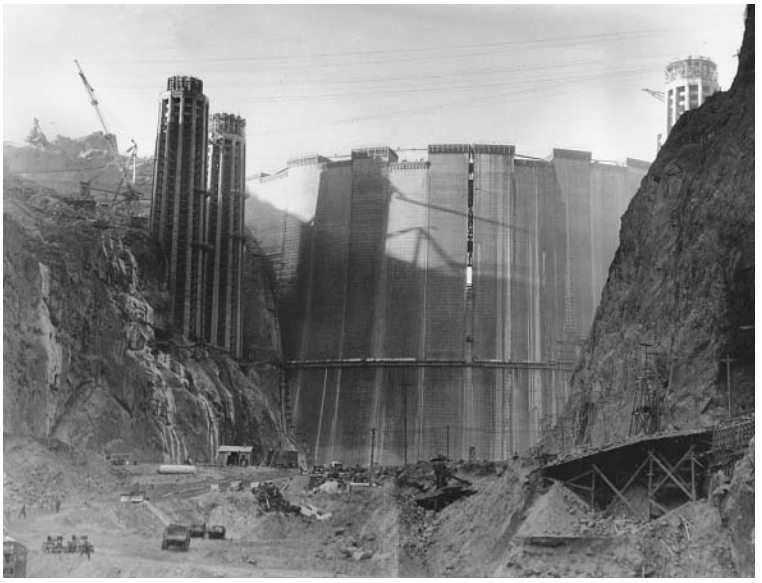

*An interstate compact between western states ultimately led to the construction of the Hoover Dam.*

AP/WIDE WORLD PHOTOS

## INTERVENING CAUSE

*A separate act or omission that breaks the direct connection between the defendant's actions and an injury or loss to another person, and may relieve the defendant of liability for the injury or loss.*

Civil and criminal defendants alike may invoke the intervening cause doctrine to escape liability for their actions.

A defendant is held liable for an injury or loss to another person if the defendant's negligent or reckless conduct was the proximate cause of the resulting injury or loss. This means that the defendant's conduct must have played a substantial part in bringing about or directly causing the injury or loss. However, the defendant may escape liability by showing that a subsequent act or event, or intervening cause, was the real cause of the injury.

Not all intervening causes relieve a defendant of liability. An intervening cause relieves a defendant of liability only if it would not have been foreseeable to a reasonable person, and only if damage resulting from the defendant's own actions would not have been foreseeable to a reasonable person.

For example, assume that a farmer agrees to store a large, heavy sculpture for an artist. The sculpture is designed for outdoor display, so the farmer leaves it in her backyard. A tornado throws the sculpture several thousand feet, ruining it.

If the artist sues the farmer for damage to the sculpture, the farmer may argue that the tornado intervened between her negligent storage and the damage, relieving her from any liability. The farmer may claim that she could not have anticipated any detrimental effects of outdoor storage on the sculpture, because the sculpture was made for outdoor display.

At trial the issue of the farmer's liability is a QUESTION OF FACT to be determined by the judge or jury. The judge or jury asks whether a reasonable person would have anticipated a tornado. Generally, extraordinary weather conditions are deemed an unforeseeable intervening cause. However, if the farmer lives in Kansas, where tornadoes may be expected, and stored the sculpture outside without tethers during tornado season, the judge or jury may find that she should have anticipated the tornado and its damaging effects, and thus is liable for the damage.

Next, the fact-finder considers whether the farmer could have foreseen damage resulting from outdoor storage. Since the artist made the sculpture for outdoor display, damage to the sculpture from outdoor storage may be considered unforeseeable. Under these facts the tornado may be deemed an unforeseeable intervening cause of the damage to the sculpture, and the farmer may avoid liability.

Two types of intervening causes are considered: dependent and independent. A dependent intervening cause is set in motion by the defendant's own conduct, and will not relieve the defendant of liability unless it is extraordinary. For example, suppose the defendant poked an associate in the chest during a friendly discussion around a watercooler, and the associate subsequently jumped out a window. This unusual reaction may be deemed an extraordinary intervening cause that relieves the defendant of liability.

An independent intervening cause arises through no fault of the defendant. It relieves a defendant of liability unless it was foreseeable by the defendant.

The most common intervening causes cited by defendants are natural forces and negligent human conduct. Natural forces include extraordinary weather, earthquakes, volcanic eruptions, and the conduct of animals. Negligent human conduct is conduct that exposes a person to abnormal risks. Criminal human conduct by a third party will not be considered an intervening cause relieving the defendant of liability if the defendant's NEGLIGENCE has contributed to the victim's loss. For example, assume that Martin borrows Tasha's vehicle, drives it to a neighborhood notorious for its high crime rate, and leaves it unlocked with the keys in the ignition. If the vehicle is stolen, Martin may be held liable to Tasha for her loss because a reasonable person would have anticipated the theft.

*Cohen v. Petty,* 62 App. D.C. 187, 65 F.2d 820 (D.C. Cir. 1933), illustrates how the doctrine of intervening cause works. In *Cohen,* Jeanette Cohen sued Joseph Petty for permanent injuries she suffered as a passenger in a vehicle when Petty drove it into an embankment.

At trial Petty argued that he had become sick without warning and had fainted while driving. The sudden sickness and fainting spell were, Petty claimed, an intervening cause that relieved him of liability. Petty testified that he had never fainted before and that he was feeling fine up to the point of the sudden illness. Petty's wife, Theresa Petty,

who was sitting in the front passenger's seat, testified that just before the accident, Petty said, "Oh, Tree, I feel sick." Cohen herself testified that shortly before the accident, she heard Petty exclaim to his wife that he felt sick.

The trial court agreed with Petty and entered judgment in his favor. On appeal the Court of Appeals of the District of Columbia affirmed. According to the appeals court, the sudden illness was an intervening cause. Petty had had no reason to anticipate the illness, and because he had not been negligent in any way prior to the accident, the illness relieved him of all liability for Cohen's injuries.

Some jurisdictions use two terms to define the intervening cause doctrine: *intervening cause* and *superseding cause.* In these jurisdictions *intervening cause* describes any cause that comes between a defendant's conduct and the resulting injury, and an intervening cause that relieves a defendant of liability is called a superseding cause. Other jurisdictions do not use the term *superseding cause.* These jurisdictions simply ask whether the intervening cause is sufficient to relieve a defendant of liability. All jurisdictions differentiate between an intervening cause that relieves a defendant of liability and one that does not: the only difference is in the terminology.

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## INTERVENOR

*An individual who is not already a party to an existing lawsuit but who makes himself or herself a party either by joining with the plaintiff or uniting with the defendant in resistance of the plaintiff's claims.*

## INTERVENTION

*A procedure used in a lawsuit by which the court allows a third person who was not originally a party to the suit to become a party, by joining with either the plaintiff or the defendant.*

The federal rules of CIVIL PROCEDURE recognizes two types of intervention: *intervention of right* and *permissive intervention.*

*Intervention of right* arises when the intervenor, the person who seeks to become a party to an existing lawsuit, can satisfactorily show that his or her interest is not adequately represented by the present parties, that the interest relates to the subject of the action, and that the disposition of the action might in some way impair his or her ability to protect such interest.

*Permissive intervention* is up to the discretion of the court. It arises when the intervenor's claim or defense and the instant suit have a QUESTION OF LAW or fact in common.

In deciding whether or not to permit intervention, the court ordinarily balances the needs and interest of the intervenor against the potential hardship on the existing parties if such intervention is allowed. The court will determine whether the intervenor and the parties to the suit share common issues. If the intervenor attempts to inject new causes of actions into the pending suit, his or her request will be denied, since to permit intervention would increase the potential for prejudice and delay in the original action. An intervenor need not argue that he or she will be prejudiced by the judgment if not joined, provided the intervenor is able to show that his or her interest will be impaired by the action if he or she is not involved.

## INTESTACY

*The state or condition of dying without having made a valid will or without having disposed by will of a segment of the property of the decedent.*

## INTESTATE

*The description of a person who dies without making a valid will or the reference made to this condition.*

## INTESTATE SUCCESSION

*The inheritance of an ancestor's property according to the laws of* DESCENT AND DISTRIBUTION *that are applied when the deceased has not executed a valid will.*

## INTOXICATION

*A state in which a person's normal capacity to act or reason is inhibited by alcohol or drugs.*

Generally, an intoxicated person is incapable of acting as an ordinary prudent and cautious person would act under similar conditions. In

recognition of this factor, the law may allow intoxication to be used as a defense to certain crimes. In many jurisdictions, intoxication is a defense to specific-intent crimes. The underlying rationale is that the intoxicated individual cannot possess the requisite mental state necessary to establish the offense.

Other jurisdictions recognize it as a defense to general-intent crimes as well. For example, although rape is commonly considered a general-intent crime, there are states in which extreme intoxication may be alleged as a defense. It is unlikely, however, that the defense will be successful in such cases absent proof that the defendant was so intoxicated that he or she could not form the intent to have intercourse.

In HOMICIDE cases, intoxication is relevant to negate premeditation and deliberation necessary for first-degree murder. When the defense is successfully interposed, it will reduce a charge of first-degree murder to second-degree murder.

When a person is forced to consume an intoxicant against his or her will, the person is involuntarily intoxicated. In most jurisdictions, the defense of involuntary intoxication is treated similarly to the INSANITY DEFENSE. For example, an intoxicated person who cannot distinguish right from wrong at the time of committing the wrongful act would have a valid defense.

## INTRINSIC EVIDENCE

*Information necessary for the determination of an issue in a lawsuit that is gleaned from the provisions of a document itself, as opposed to testimony from a witness or the terms of other writings that have not been admitted by the court for consideration by the trier of fact.*

## INURE

*To result; to take effect; to be of use, benefit, or advantage to an individual.*

For example, when a will makes the provision that all PERSONAL PROPERTY is to inure to the benefit of a certain individual, such an individual is given the right to receive all the personal property owned by the testator upon his or her death.

## INVALID

*Null; void; without force or effect; lacking in authority.*

For example, a will that has not been properly witnessed is invalid and unenforceable.

## INVENTORY

*An itemized list of property that contains a description of each specific article.*

Inventory of a company, for example, is the annual account of stock taken in the business, or the quantity of goods or materials in stock. The term is also used to describe a list made by the executor or administrator of the estate of a deceased individual.

## INVESTITURE

*In ecclesiastical law, one of the formalities by which an archbishop confirms the election of a bishop. During the feudal ages, the rite by which an overlord granted a portion of his lands to his vassal.*

The investiture ceremony, which took place in the presence of other vassals, consisted of the vassal taking an oath of fealty to the overlord who, in turn, gave him a clod of dirt or a twig, symbolic of the open and notorious transfer of possession of the land. The ritual, used at a time when writing and record keeping were not widely practiced, fixed the date of the vassal's acquisition of the land and, in cases of disputes over the land, provided a source of evidence in the form of testimony of the vassals who witnessed the proceedings.

CROSS-REFERENCES

Feudalism.

## INVESTMENT

*The placement of a particular sum of money in business ventures, real estate, or* SECURITIES *of a permanent nature so that it will produce an income.*

## INVITATION

*The act by which an owner or occupier of particular land or premises encourages or attracts others to enter, remain in, or otherwise make use of his or her property.*

Common examples of those who extend invitations are the proprietors of stores, theaters, or banks, since they invite the general public to enter and utilize their facilities.

An individual who enters property as a result of an invitation is owed a higher duty of care than one who is a trespasser or licensee, one who enters another's property for his or her own purposes. The owner of property must exercise

reasonable care toward an invitee to ascertain that the property is safe for his or her use.

## INVITEE

*An individual who enters another's premises as a result of an express or implied invitation of the owner or occupant for their mutual gain or benefit.*

For example, a customer in a restaurant or a depositor entering a bank to cash a check are both invitees. The owner or occupier of the premises onto which an invitee goes has a duty to exercise reasonable care for such invitee's protection.

An invitee is distinguishable from a licensee, who enters another's premises with the occupier's consent, but for his or her own purpose or benefit alone. A further distinction exists between an invitee and a trespasser, or one who intentionally enters another's property without consent or permission.

## INVOICE

*An itemized statement or written account of goods sent to a purchaser or consignee by a vendor that indicates the quantity and price of each piece of merchandise shipped.*

A *consular invoice* is one used in foreign trade. It is signed by the consul of the nation to which the merchandise is shipped. Such an invoice facilitates the entry through the destination country, since the quality and value of the shipment are verified prior to its arrival.

## INVOLUNTARY CONFESSION

*An admission, especially by an individual who has been accused of a crime, that is not freely offered but rather is precipitated by a threat, fear, torture, or a promise.*

The criminal justice system relies on confessions by defendants to help prove guilt at trial or to induce a guilty plea. POLICE INTERROGATION of suspects has long been a controversial area of U.S. CRIMINAL PROCEDURE, as critics charge that coercion and trickery have unfairly and unconstitutionally led to involuntary confessions. The FIFTH AMENDMENT grants a suspect the PRIVILEGE AGAINST SELF-INCRIMINATION, yet many suspects confess anyway. Because questioning of suspects takes place behind station house doors, little empirical evidence is available to document what usually occurs in a police interrogation.

The 1931 federal WICKERSHAM COMMISSION looked at police practices throughout the United States. This commission raised the issue of coercive interrogations, coining the term *the third degree* to describe physical and mental abuse inflicted on suspects during questioning. From 1936 to the early 1960s, the U.S. Supreme Court dealt with confessions admitted in state criminal proceedings in terms of the fundamental fairness required by the Fourteenth Amendment's DUE PROCESS CLAUSE. The Court used a "voluntariness" test, which depended on the "totality of the circumstances," to determine whether a confession must be excluded from evidence. This approach became difficult to administer, as it called on courts to find and appraise all relevant facts for each case.

Legal debate over the validity of confessions gained momentum in the 1960s, as the U.S. Supreme Court took a hard look at the constitutionality of criminal procedure. In ESCOBEDO V. ILLINOIS, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), Justice ARTHUR J. GOLDBERG stated that "a system of CRIMINAL LAW enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." In *Escobedo* the defendant's confession was suppressed because it was obtained in violation of his RIGHT TO COUNSEL at the time of interrogation.

In 1966 the Supreme Court set out the *Miranda* warnings (MIRANDA V. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 1694), which the police must communicate to a person who is placed in their custody. The warnings cover the right to remain silent, the fact that anything said can and will be used against the individual in court, the right to have a lawyer during interrogation, the right to have an attorney appointed if the individual cannot afford one, and the right to exercise the privilege against SELF-INCRIMINATION at any time during interrogation. These warnings provide basic avenues of inquiry for a court evaluating the "voluntariness" of a confession.

*Miranda* has been criticized by those who see it as an unfair restriction on law enforcement. Nevertheless, empirical studies conducted in the 1970s and 1980s have concluded that the *Miranda* warnings have not appreciably reduced the amount of talking by suspects, and police

officers obtain about as many confessions now as they did before *Miranda.*

Yet the protection afforded to suspects by *Miranda* can be illusory. Police officers may sometimes give the required warnings but then engage in tactics that could make the confession involuntary. It is clear, however, that if police officers use interrogation practices that in the view of a court violate basic notions of human dignity, a confession produced from these practices will be judged involuntary. Physical violence, threats of violence, prolonged isolation, deceit, and trickery are some tactics that may render a confession involuntary, even when no danger exists that the confession is untrue. A defendant's age, state of health, mental condition, and intelligence are also relevant factors. The more vulnerable a defendant is, the more likely a court is to find certain interrogation practices abusive, leading to the conclusion that the confession was involuntary.

Each possibly relevant factor must be evaluated in the context of each specific case. For example, no absolute rule exists that police trickery of a defendant will render a confession involuntary. However, if a defendant is particularly youthful and ignorant, such trickery may be an important factor inducing a court to find a confession involuntary.

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CROSS-REFERENCES

Custodial Interrogation; Due Process of Law.

## INVOLUNTARY MANSLAUGHTER

*The act of unlawfully killing another human being unintentionally.*

Most unintentional killings are not murder but involuntary manslaughter. The absence of the element of intent is the key distinguishing factor between voluntary and involuntary manslaughter. In most states involuntary manslaughter results from an improper use of reasonable care or skill while performing a legal act, or while committing an act that is unlawful but not felonious.

Many states do not define involuntary manslaughter, or define it vaguely in common-law terms. Some jurisdictions describe the amount of NEGLIGENCE necessary to constitute manslaughter with terms such as *criminal negligence, gross negligence,* and *culpable negligence.* The only certainty that can be attached to these terms is that they require more than the ordinary negligence standard in a civil case. With this approach the state does not have to prove that the defendant was aware of the risk.

Other jurisdictions apply more subjective tests, such as "reckless" or "wanton," to describe the amount of negligence needed to constitute involuntary manslaughter. In this approach the defendant must have personally appreciated a risk and then chosen to take it anyway.

There are two types of involuntary manslaughter statutes: criminally negligent manslaughter and unlawful act manslaughter. Criminally negligent manslaughter occurs when death results from a high degree of negligence or recklessness. Modern criminal codes generally require a consciousness of risk and under some codes the absence of this element makes the offense a less serious HOMICIDE.

An omission to act or a failure to perform a duty constitutes criminally negligent manslaughter. The existence of the duty is essential. Since the law does not recognize that an ordinary person has a duty to aid or rescue another in distress, a death resulting from an ordinary person's failure to act is not manslaughter. On the other hand, an omission by someone who has a duty, such as a failure to attempt to save a drowning person by a lifeguard, might constitute involuntary manslaughter.

In many jurisdictions death that results from the operation of a vehicle in a criminally negligent manner is punishable as a separate offense. Usually it is considered a less severe offense than involuntary manslaughter. These jurisdictions usually call the offense reckless homicide, negligent homicide, or vehicular homicide. One reason for this lesser offense is the reluctance of juries to convict automobile drivers of manslaughter.

Unlawful act manslaughter occurs when someone causes a death while committing or attempting to commit an unlawful act, usually a misdemeanor. Some states distinguish between conduct that is *malum in se* (bad in itself) and conduct that is *malum prohibitum* (bad because

it is prohibited by law). Conduct that is *malum in se* is based on common-law definitions of crime; for example, an ASSAULT AND BATTERY could be classified as *malum in se.* Acts that are made illegal by legislation—for example, reckless driving—are *malum prohibitum.* In states that use this distinction, an act must be *malum in se* to constitute manslaughter. If an act is *malum prohibitum,* it is not manslaughter unless the person who committed it could have foreseen that death would be a direct result of the act.

In other states this distinction is not made. If death results from an unlawful act, the person who committed the act may be prosecuted for involuntary manslaughter even if the act was *malum prohibitum.* Courts will uphold unlawful act manslaughter where the statute was intended to prevent injury to another person.

**CROSS-REFERENCES**

Criminal Negligence; Gross Negligence.

## INVOLUNTARY SERVITUDE

SLAVERY*; the condition of an individual who works for another individual against his or her will as a result of force, coercion, or imprisonment, regardless of whether the individual is paid for the labor.*

The term *involuntary servitude* is used in reference to any type of slavery, peonage, or compulsory labor for the satisfaction of debts. Two essential elements of involuntary servitude are involuntariness, which is compulsion to act against one's will, and servitude, which is some form of labor for another. Imprisonment without forced labor is not involuntary servitude, nor is unpleasant labor when the only direct penalty for not performing it is the withholding of money or the loss of a job.

The importation of African slaves to the American colonies began in the seventeenth century. By the time of the American Revolution, the slave population had grown to more than five hundred thousand people, most concentrated in the southern colonies. The Framers of the U.S. Constitution did not specifically refer to slavery in the document they drafted in 1787, but they did afford protection to southern slaveholding states. They included provisions prohibiting Congress from outlawing the slave trade until 1808 and requiring the return of fugitive slaves.

Between 1820 and 1860, political and legal tensions over slavery steadily escalated. The U.S. Supreme Court attempted to resolve the legal status of African Americans in DRED SCOTT V. SANDFORD, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857). The Court concluded that Congress was powerless to extend the rights of U.S. citizenship to African Americans.

With the secession of southern states and the beginning of the Civil War in 1860 and 1861, the Union government was under almost complete control of free states. In 1865 Congress enacted the THIRTEENTH AMENDMENT, which the Union states ratified. Section 1 of the amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Section 2 gives Congress the authority to enforce the provisions of section 1.

The Thirteenth Amendment makes involuntary servitude unlawful whether the compulsion is by a government or by a private person. The penalty for violation of the amendment must be prescribed by law. Although the principal purpose of the amendment was to abolish African slavery, it also abolished other forms of compulsory labor similar to slavery, no matter what they are called. For example, it abolished bond service and peonage, forms of compulsory service based on a servant's indebtedness to a master.

An individual has a right to refuse or discontinue employment. No state can make the quitting of work a crime, or establish criminal sanctions that hold unwilling persons to a particular labor. A state may, however, withhold unemployment or other benefits from those who, without JUST CAUSE, refuse to perform available gainful work.

A court has the authority to require a person to perform affirmative acts that the person has a legal duty to perform. It has generally been held, however, that this power does not extend to compelling the performance of labor or personal services, even in cases where the obligated party has been paid in advance. The remedy for failure to perform obligated labor is generally limited to monetary damages. A court may, without violating the Thirteenth Amendment, use its EQUITY authority to enjoin, or prevent, a person from working at a particular task. Equity authority is the power of a court to issue injunctions that direct parties to do or refrain from doing something. A court also may prevent an artist or performer who has contracted to perform unique

services for one person on a given date from performing such services for a competitor.

The Thirteenth Amendment does not interfere with the enforcement of duties a citizen owes to the state under the COMMON LAW. Government may require a person to serve on a petit or GRAND JURY, to work on public roads or instead pay taxes on those roads, or to serve in the militia. Compulsory military service (the draft) is not a violation of the Thirteenth Amendment, nor is compulsory labor on work of national importance in lieu of military service, assigned to conscientious objectors.

Forced labor, with or without imprisonment, as a punishment upon conviction of a crime is a form of involuntary servitude allowed by the Thirteenth Amendment under its "punishment-for-crime" exception.

CROSS-REFERENCES

Celia, a Slave; *Dred Scott v. Sandford*; Emancipation Proclamation; Fugitive Slave Act of 1850; Selective Service System.

## IPSE DIXIT

*[*Latin, He himself said it.*]* *An unsupported statement that rests solely on the authority of the individual who makes it.*

A court decision, for example, that is in conflict with a particular statute might be said to have no legal support with the exception of the *ipse dixit* of the court.

## IPSO FACTO

*[*Latin, By the fact itself; by the mere fact.*]*

## IRAN-CONTRA AFFAIR

The Iran-Contra Affair involved a secret foreign policy operation directed by White House officials in the NATIONAL SECURITY COUNCIL (NSC) under President RONALD REAGAN. The operation had two goals: first, to sell arms to Iran in the hope of winning the release of U.S. hostages in Lebanon, and second, to illegally divert profits from these sales to the Contra rebels fighting to overthrow the Sandinista government of Nicaragua. Discovery of the secret operation, in 1986, triggered a legal and political uproar that rocked the Reagan administration. The numerous related investigations and indictments did not end until 1993 and even then questions remained about the roles of senior White House officials in this arms-for-hostages deal.

The affair came to public attention on November 3, 1986, when a Lebanese publication, *Al-Shiraa,* first reported that the United States had sold arms to Iran. The news was shocking because the Reagan administration had previously denounced Iran as a supporter of international TERRORISM. Shortly after the *Al-Shiraa* report Nicaraguan forces downed a U.S. plane and captured its pilot. The pilot's confession led to a second startling revelation: a private U.S. enterprise was supplying arms to Contra rebels.

The enterprise seemed designed to circumvent the will of Congress. In the early 1980s, after bitter debate, Congress had passed legislation barring the use of federal monies to overthrow the Nicaraguan government. Through a series of amendments to appropriations bills enacted between 1982 and 1986, known as the Boland amendments, this legislation blocked the Reagan administration's wish to go on supporting the Contras. Now it was revealed that private citizens and private monies were being used to this end. Moreover, the operation was being directed from within the White House by the NSC—the president's advisory cabinet on security affairs and covert operations. Directing the Iran-Contra enterprise were Vice Admiral John Poindexter, national security assistant, and his subordinate, Lieutenant Colonel Oliver North, deputy director for political-military affairs.

Each branch of government quickly began a separate investigation into the affair. In December 1986, President Reagan issued an EXECUTIVE ORDER creating the Tower Commission, named after its chair, John Tower. The purpose of this three-member review board was to recommend changes in executive policy regarding the future roles and procedures of the NSC staff. Reagan's creation of the commission was a tacit disavowal of presidential knowledge or responsibility for the actions of Iran-Contra participants. Although admitting that his administration had negotiated secretly with Iran in order to free the hostages in Lebanon, he publicly denied knowing about the arms-supplying enterprise directed by his own NSC staff.

Simultaneously, the Senate and the House of Representatives each created a select Iran-Contra committee. These committees were charged with holding hearings to uncover facts and to recommend legislative action to prevent future illegal foreign policy operations. In their zeal to fully expose the affair, the committees

granted limited forms of IMMUNITY to several key witnesses. This decision proved to be a mixed blessing. On the one hand, it provided Congress and the U.S. public with a wider understanding of the affair through televised hearings (which also made a public figure out of Lieutenant Colonel North). But it ultimately proved harmful to efforts to prosecute North and Vice Admiral Poindexter.

The attorney general requested that an INDEPENDENT COUNSEL be appointed to investigate wrongdoing. An independent counsel is a special appointee who is given the authority to bring indictments and pursue convictions. For this important role, the U.S. Court of Appeals for the District of Columbia Circuit, Independent Counsel Division, selected Lawrence E. Walsh, a former AMERICAN BAR ASSOCIATION president and former federal judge. Legal authority for Walsh's appointment existed in provisions of the Ethics in Government Act (Pub. L. No. 95-521 [Oct. 26, 1978], 92 Stat. 1824 [28 U.S.C.A. § 592(c) (1) (1982)]).

The various Iran-Contra investigations soon uncovered a plethora of legal violations. The covert arms sales to Iran violated numerous statutes that restricted the transfer of arms to nations that support international terrorism, principally the Arms Export Control Act of 1976 (Pub. L. No. 90-629, 89 Stat. 1320 [22 U.S.C.A. §§ 2751–2796c (1989 Supp.)]). By failing to report the Iranian sales to Congress, the Reagan administration had ignored reporting provisions in the 1980 Intelligence Oversight Act (Pub. L. No. 96-450, tit. IV, 407(b) (1), 94 Stat. 1981 [50 U.S.C.A. § 413 (1982)]). That law required the president to notify Congress in a timely fashion of any "significant anticipated intelligence activity, and to make a formal written "finding" (declaration) that each covert operation was important to national security. Three findings were at issue in the Iran-Contra affair: (1) Not only had President Reagan failed to report the first arms sales, but he had also authorized them through Israeli intermediaries by "oral" findings that were not authorized by intelligence oversight statutes. (2) The CENTRAL INTELLIGENCE AGENCY (CIA) justified a second shipment of arms to the Iranians through a "retroactive" finding issued by the CIA's general counsel; Poindexter admitted destroying this finding. (3) President Reagan admitted signing a third written finding, in January 1986, but later claimed he had never read it.

The investigations took two turns. Congress and the Tower Commission completed their hearings and issued reports and independent counsel Walsh pursued wide-ranging indictments against several individuals, including Reagan administration officials. In 1987, Congress issued the 690-page *Report of the Congressional Committees Investigating the Iran-Contra Affair* (S. Rep. No. 216, H.R. Rep. No. 433, 100th Cong., 1st Sess. 423). The report charged the president with failing to execute his constitutional duty to uphold the law. However, its conclusion did not support changes in legislation to prevent a future breakdown of legality in foreign policy affairs. Iran-Contra, the report said, reflected a failure of people rather than of laws. This assertion pointed to a central political disagreement about the affair: although Democrats were harsh in their condemnation, Republican members of Congress tended to view the investigation itself as an effort by Democrats to interfere with a Republican president's foreign policy. In like fashion, the 1987 Tower Commission

*In December 1986 Lawrence E. Walsh was appointed independent counsel to investigate the Iran-Contra Affair. The investigation of the scandal ended in August 1993.*

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report downplayed any need for legislation to revise national security decision making. Instead, it criticized Reagan's lax management style.

After the reports, attention shifted to the independent counsel's investigation. In March 1988, GRAND JURY indictments were brought against North, Poindexter, Richard V. Secord, and Albert Hakim. The indictments included four distinct charges: conspiring to obstruct the U.S. government; diverting public funds from arms sales to Iran to aid the Contras in Nicaragua; stealing public funds for private ends; and lying to Congress and other government officials. With the exception of the routine criminal charge of theft, the most serious points in the indictments essentially accused the defendants of conducting a private foreign policy in violation of constitutional norms.

Before independent counsel Walsh could begin his prosecutions, several pretrial delays took place. First, the law providing for an independent counsel was challenged. The Reagan administration, joining a number of its former officials who were subject to other independent counsel investigations, argued that the law unconstitutionally denied the president important executive power. In June 1988, the U.S. Supreme Court rejected this argument and upheld the law's constitutionality in *Morrison v. Olson,* 487 U.S. 654, 108 S. Ct. 2597, 101 L. Ed. 2d 569. Next, the first four Iran-Contra defendants—Poindexter, North, Secord, and Hakim—moved for dismissal of the charges brought by Walsh. They argued that their compelled testimony before the joint congressional committees had violated their FIFTH AMENDMENT rights against SELF-INCRIMINATION. In *United States v. Poindexter,* 698 F. Supp. 300 (D.D.C. 1988), U.S. district judge Gerhard Gesell denied the motion, clearing the way for the trials to begin.

Soon, a more serious obstacle hampered Walsh's prosecution: the JUSTICE DEPARTMENT and the White House refused to release classified information crucial to the case on the grounds that it was vital to national security. Without this information, much of Walsh's case collapsed. He was forced to dismiss the broader charges of conspiracy and diversion—the crux of the Iran-Contra Affair's illegality—and to pursue instead the less serious charges remaining in the indictments.

Walsh won a conviction against Lieutenant Colonel North on May 4, 1989, for obstructing Congress, destroying documents, and accepting an illegal gratuity (*United States v. North,* 713 F. Supp. 1448 [D.D.C.]). The trial disclosed evidence that suggested that both Presidents Ronald Reagan and GEORGE H. W. BUSH had greater roles in the Iran-Contra Affair than either the Tower Commission or the congressional committees had concluded. During the trial, North's attorneys failed in an attempt to subpoena Reagan, whom North would later squarely blame for complete knowledge of the affair, in his memoir *Under Fire: An American Story.* Subsequent to the conviction, Judge Gesell denied two motions for an acquittal and a mistrial. Gesell sentenced North to two years' PROBATION, 1,200 hours of community service, and a $150,000 fine.

North appealed. On July 20, 1990, the U.S. Court of Appeals for the District of Columbia, in *U.S. v. North*, 910 F.2d. 843 ((D.C. Cir. 1990), suspended all three of North's felony convictions and completely overturned his conviction for destroying classified documents. At issue was North's earlier testimony before Congress. The appellate ruling was based on the same reasoning as the contention made by North, Poindexter, Secord, and Hakim before their trials: Congress's decision to grant immunity to North had clashed with the Fifth Amendment protection of witnesses against self-incrimination. The appeals court directed the trial court to reexamine North's earlier testimony. Some critics argued that the appellate ruling, written by Judge Laurence Silberman, smacked of partisanship; Silberman had been, in 1980, cochair of the Reagan-Bush foreign policy advisory group. Walsh pressed on, but on September 16, 1991, Judge Gesell dropped all charges against North (*North,* 920 F. 2d 940 [D.C. Cir. 1990], *cert. denied,* 500 U.S. 941, 111 S. Ct. 2235, 114 L. Ed. 2d 477 [1991]).

Vice Admiral Poindexter's trial was similar to North's. After failing to win release of classified subpoenaed materials, Walsh narrowed his case to charges that Poindexter had provided false information and made false statements to Congress. Unlike North's attorneys, however, Poindexter's successfully subpoenaed former president Reagan, who became the first former president ordered to testify in a criminal trial regarding the conduct of affairs during his administration. Reagan provided an eight-hour videotaped deposition. However, Poindexter failed to win access to the former president's

diaries, which his attorneys argued were crucial to Poindexter's defense.

Walsh's prosecution of Poindexter succeeded through a PREPONDERANCE OF EVIDENCE. In testimony for the prosecution, Lieutenant Colonel North said that he had seen Poindexter destroy a high-level secret document, signed by the president, which described the Iran arms sales as an exchange-for-hostages deal. North also claimed that he lied to members of Congress at Poindexter's direction. Other testimony revealed that Poindexter had erased some five thousand computer files after the Iran-Contra story broke in the media in November 1986.

On April 7, 1990, jurors convicted Poindexter on all five of the counts in the indictment. Sentenced on June 11, 1990, to six months in prison, he became the first Iran-Contra defendant to receive a prison term, but remained free pending his appeal. Here, as in *North,* the conviction was overturned. The Court of Appeals for the District of Columbia ruled that Poindexter's testimony before Congress had been unfairly used against him in his trial (*Poindexter,* 951 F. 2d 369 [D.C. Cir. 1991]).

If the reversal of convictions against Poindexter and North represented a defeat to Walsh, so did several plea bargains that his office secured in the late 1980s. Critics had expected more serious convictions to result from his intense investigation. In March 1988, former national security adviser Robert McFarlane pleaded guilty to four misdemeanor counts of withholding information from Congress and was fined a modest amount. Two private fundraisers, Carl Channell and Richard Miller, pleaded guilty to using a tax-exempt organization to raise money to purchase arms for the Contras. Channell was sentenced to probation only; Miller was ordered to do minimal public service. In November 1989, Secord, Hakim, and a corporation owned by Hakim all pleaded guilty to relatively minor counts. As Walsh's office persevered, it could show little in terms of prosecutions, and Republicans in Congress derided the multimillion-dollar investigation as a vindictive exercise in partisan politics.

Then, in 1992, Walsh brought an indictment against the highest-ranking Reagan administration official to be charged in the Iran-Contra Affair: Caspar W. Weinberger, former defense secretary. Weinberger was indicted on June 16, 1992, on five felony counts: one count of obstructing the congressional committees' investigations; two counts of making false statements to investigators working for Walsh and Congress; and two counts of perjury related to his congressional testimony. Penalties for each count were a maximum of five years in prison and up to $250,000 in fines.

*Lieutenant Colonel Oliver North was convicted of obstructing Congress, destroying documents, and accepting an illegal gratuity, but the decision was later reversed by a higher court.*

AP/WIDE WORLD PHOTOS

Walsh based the case on evidence gathered from notes that Weinberger had written while serving for six years in the Reagan administration. These nearly illegible notes, scrawled on 1,700 small scraps of paper, formed a personal diary. Weinberger had given them to the LIBRARY OF CONGRESS, with the requirement that no one could read them without his personal consent. Throughout Iran-Contra investigations, Weinberger had repeatedly testified to Congress and the Tower Commission that he had argued against the arms-for-hostages scheme when it was discussed by White House officials. Walsh did not make Weinberger's involvement an issue in the 1992 indictment. Instead, he zeroed in on Weinberger's testimony under oath that he had not kept notes or a personal diary during the arms sale period. The discovery of the notes in the Library of Congress suggested that Weinberger had presented false testimony.

On June 19, 1992, Weinberger pleaded not guilty to all five felony charges. Judge Thomas F. Hogan set a tentative trial date of November 2, 1992, one day before the presidential election. This timing raised the question of whether Weinberger's trial would cause political embarrassment for President George H. W. Bush, who was campaigning against BILL CLINTON. Four days before the election, Walsh announced a new indictment against Weinberger. It centered

on a note that had been written by Weinberger about a 1986 White House meeting and that seemed to contradict Bush's claim that as vice president he had not been involved in the arms-for-hostages decision making. Senate Republicans, angered by the indictment, asked the Justice Department to name an independent counsel to investigate whether the Clinton campaign had been behind the indictment. Attorney General WILLIAM P. BARR denied the request.

The case progressed no further. In a surprise reprieve on Christmas Eve, 1992, President Bush pardoned Weinberger and five others implicated in the Iran-Contra Affair. The pardon cited Weinberger's record of public and military service, his recent ill health, and a desire to put Iran-Contra to rest. Bush also pardoned former assistant SECRETARY OF STATE Elliot Abrams; former CIA officials Clair George, Duane Clarridge, and Alan Fiers; and former national security adviser McFarlane. Bush deemed all six men patriots and said their prosecution represented not law enforcement but the "criminalization of policy differences," essentially repeating his long-standing argument that Iran-Contra was really a case where Democrats had pursued a political witch-hunt to punish Republican officials over disagreements on foreign policy (Grant of Exec. Clemency, Proclamation No. 6518, 57 Fed. Reg. 62,145).

Reaction to the pardons divided along party lines, with Republicans hailing Bush and Democrats criticizing him. Walsh accused Bush of furthering a cover-up and thwarting judicial process. He had long maintained that top Reagan administration officials had engaged in a cover-up to protect their president. Now, he promised, Bush would become the subject of his remaining investigation.

Bush's only testimony had taken place in a January 1988 videotaped deposition. An unsettled question was why Bush's personal diaries were withheld from prosecutors for six years; their existence was only disclosed to the independent counsel's office following the 1992 presidential election. Throughout 1993, Walsh sought to interview the former president but was blocked by Bush's attorneys. Bush consistently insisted on placing limits on any interview. Walsh refused those limits, complained that Bush was stalling the investigation, and ultimately abandoned the attempt to question Bush.

Walsh also chose, in 1993, not to indict another high-ranking Reagan administration official, former attorney general EDWIN MEESE III. In 1986, Meese said that Reagan did not know about the arms sales to Iran. Walsh contended that the statement was false, but admitted that building a criminal case against Meese would have been difficult: too much time had passed and could therefore have bolstered memory loss as a defense.

On August 6, 1992, after six-and-a-half years and $35.7 million, Walsh concluded the Iran-Contra investigation and submitted his final report to the special court that had appointed him. By 1993, the Iran-Contra Affair seemed over, in one sense. The STATUTE OF LIMITATIONS on crimes that may have been committed during it had expired, and no further prosecution would be forthcoming. However, additional revelations followed as historians sifted through emerging evidence, notably in the memoirs of key participants. The lessons of the affair continued to be debated. Some said that Iran-Contra exposed a pattern of zealous disregard, by the EXECUTIVE BRANCH, of legislative constraint on foreign policy, that dated back to the VIETNAM WAR. Others took the view held by the Reagan and Bush administrations: namely, that nothing terrible had happened.

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## ♦ IREDELL, JAMES

James Iredell was one of the original U.S. Supreme Court justices appointed by GEORGE WASHINGTON.

Iredell was born October 5, 1751, in Lewes, England. At age seventeen he began working in his family's mercantile business in North Carolina and also undertook the study of law. He was licensed to practice law in 1771. In the next few years, he became active in the Revolutionary cause, arguing that the colonies not separate from England and advocating in his writings that the conflict be resolved through reconciliation rather than war. In 1776 he was appointed to a commission to draft and revise the laws for the governance of North Carolina. A year later he served as a judge on the state superior court, and from 1779 to 1781 he was state attorney general. In 1787 he codified and revised the

*James Iredell.* U.S. SUPREME COURT

statutes of North Carolina, a process that resulted in the publication of *Iredell's Revisal* four years later.

A staunch supporter of the Constitutional Convention, Iredell led North Carolina in the movement for ratification through a series of acclaimed and well-publicized floor debates and speeches. In 1790 he drew the attention of President Washington, who appointed him to the newly formed U.S. Supreme Court. At age thirty-eight, Iredell was the youngest of the original justices.

In addition to hearing cases before the entire Supreme Court, the justices at that time presided over circuit court sessions throughout the United States, which required them to travel extensively to hear arguments. Iredell was assigned to the Southern Circuit and quickly developed a reputation as an exceptional jurist with respect to CONSTITUTIONAL LAW matters. He wrote a number of notable opinions, including a dissent in CHISHOLM V. GEORGIA, 2 U.S. (Dall.) 419, 1 L. Ed. 440 (1793), in which he argued that only a constitutional provision could supersede the common-law principle that a state cannot be sued by a citizen from another state. Iredell maintained that the states were sovereign and did not owe their origins to the federal government. Iredell's view of STATES' RIGHTS would prevail in Congress's subsequent adoption of the ELEVENTH AMENDMENT.

Iredell also authored *Calder v. Bull,* 3 U.S. (Dall.) 386, 1 L. Ed. 648 (1798), in which he argued that a legislative act unauthorized by or in violation of the Constitution was void and that the courts were responsible for determining an act's status in that regard. This principle of JUDICIAL REVIEW would be amplified five years later in the landmark decision MARBURY V. MADISON, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), which held that the courts were indeed ultimately responsible for deciding the validity of laws passed by the legislative branch of government.

The strain of the travel required to cover his circuit, in addition to the heavy caseload of the Supreme Court, eventually took its toll on Iredell's health. He died at his home in North Carolina in 1799, less than ten years after ascending to the High Court.

"A WRITTEN OPINION MUST FOR EVER AFTERWARDS SPEAK FOR ITSELF, AND COMMIT THE CHARACTER OF THE WRITER, IN LASTING COLORS, EITHER OF FAME OR INFAMY, OR NEUTRAL INSIGNIFICANCE, TO FUTURE AGES, AS WELL AS TO THE PRESENT."
—JAMES IREDELL

## ♦ IRELAND, PATRICIA

Patricia Ireland is an attorney and social activist who became the ninth president of the NATIONAL ORGANIZATION FOR WOMEN (NOW) on December 15, 1991; she served as president for ten years, stepping down in 2001. Ireland took over the presidency just as NOW was

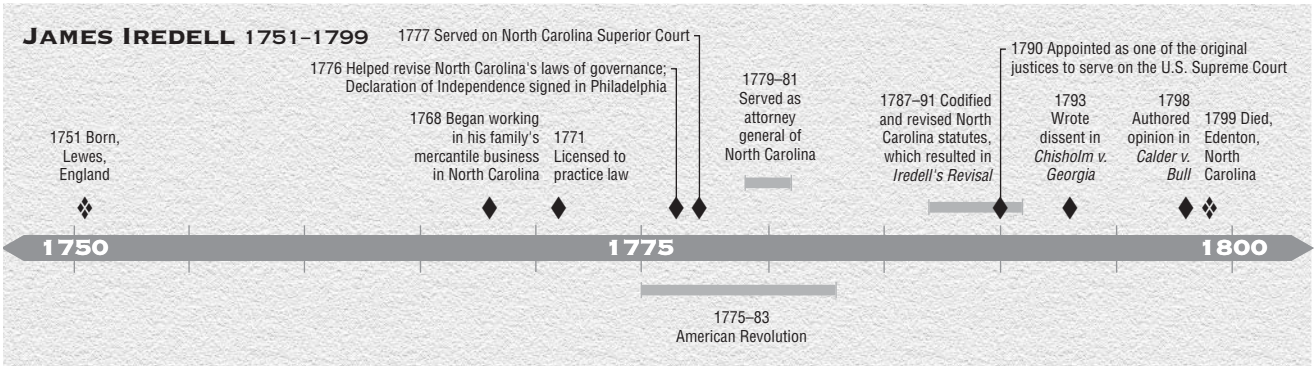

*Patricia Ireland.* AP/WIDE WORLD PHOTOS

"FOR MOST WOMEN, EQUALITY IS A BREAD-AND-BUTTER ISSUE. WOMEN ARE STILL PAID LESS ON THE JOB AND CHARGED MORE FOR EVERYTHING FROM DRY CLEANING TO INSURANCE."
—PATRICIA IRELAND

beginning to feel a shift in its ranks and the United States was experiencing a renewed interest in the feminist movement.

Ireland was born October 19, 1945, in Oak Park, Illinois. She grew up on a farm in Valparaiso, Indiana, where her family raised honeybees. She is the younger of two daughters of James Ireland and Joan Filipek (older sister Kathy was killed in a horseback riding accident when Ireland was five years old). Ireland's father, a metallurgical engineer, taught her to be passionate about her profession. Her mother was a volunteer counselor with Planned Parenthood who became the first director of the local chapter. She was Ireland's social activist role model.

Ireland entered DePauw University when she was 16, but became pregnant and was forced to travel to Japan to obtain a legal **ABORTION**. She then married and transferred to the University of Tennessee, where she obtained a degree in German in 1966. Her first marriage lasted only a short time. She later began work as a graduate student and German teacher, but she quickly became bored with teaching. She and her second husband, artist James Humble, moved to Miami, where she became a flight attendant for Pan American World Airways.

Working as a flight attendant was a pivotal experience for Ireland. She discovered that her employee **HEALTH INSURANCE** plan would not cover her husband's dental expenses, even though it did pay such expenses for the wives of male employees. Ireland consulted Dade County NOW for advice. It referred her to the **LABOR DEPARTMENT**, the **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION** (EEOC), and the flight attendants' union. As a result of Ireland's challenge, the insurance policy was amended. Her characteristic good humor is evident in her comments on the experience: "The vice-president of the labor task force at Dade County NOW is now the dean of women lawmakers in the Florida legislature. I am the president of NOW. And Pan Am is bankrupt."

Taking on Pan Am's discriminatory insurance plan whet Ireland's appetite for more knowledge of the law. She enrolled in the law school at Florida State University while continuing to work as a flight attendant. Ireland began to notice that if she introduced herself as a flight attendant, people had little to say to her, but if she introduced herself as a law student, they were eager to discuss complex legal issues and current events. The denigration of work traditionally done by women offended her growing feminist sensibilities. "My brain was the same,

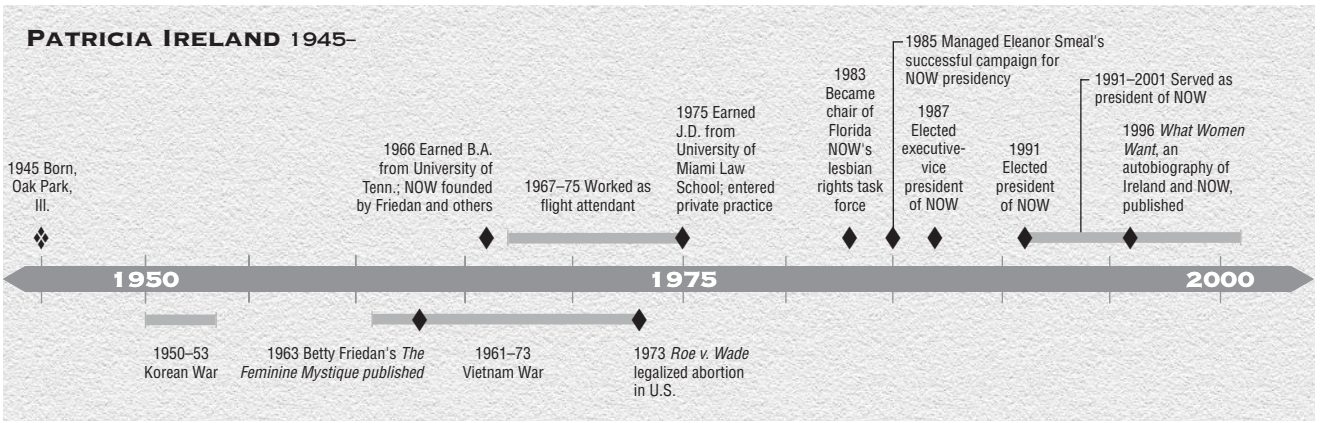

my ideas were just as worthy or unworthy, but there was a tremendous difference in the way that people perceived and treated me," she said. "I think traditional women's work is undervalued —teaching, HEALTH CARE, social work. That was part of the experience that made me want to be an activist."

Ireland earned her law degree from the University of Miami, where she had transferred from Florida State, in 1975. She both served on the school's law review and the *Lawyer of the Americas* (now the *University of Miami Inter-American Law Review*) and did PRO BONO work for Dade County NOW. After graduation, she practiced corporate law for 12 years, continued working for Dade County NOW, and helped corporate clients formulate AFFIRMATIVE ACTION programs.

Ireland's work in the WOMEN'S RIGHTS movement expanded during her years as an attorney. In 1983, she became the chair of Florida NOW's lesbian rights task force. In 1985, she managed Eleanor C. Smeal's successful campaign for the presidency of NOW, and in 1987, she was elected NOW's executive vice president, a post she held until May 1991, when she became acting president following the illness of Molly Yard. On December 15, 1991, Ireland was officially named NOW's ninth president.

As NOW's top officer, Ireland was charged with pursuing the group's four priority issues: protecting abortion rights; electing women to political leadership positions; forming coalitions with other CIVIL RIGHTS organizations; and advocating for international women's rights. She vowed to stir things up, and she did. During her years as president, Ireland developed and implemented a number of programs, including Project Stand Up for Women, an international program designed to protect women who seek abortion services and to combat anti-abortion clinic blockades; Elect Women for a Change, which provides experienced campaign support for feminist candidates; and the Global Feminist Program, which provides a forum for women around the world to discuss relevant women's issues. Ireland also served as legal counsel on several NOW landmark cases, and was a major organizer of such events as the 1993 March on Washington for Gay, Lesbian, and Bi Civil Rights.

Ireland's tenure, however, was not without detractors. Specifically, questions arose as to whether NOW, with Ireland at the helm, represented the majority of U.S. women, or whether its focus had become too narrow. Such questions were prompted when NOW announced that lesbian rights would be one of its top priorities. At about the same time, the *Advocate,* a gay and lesbian newspaper, revealed that Ireland, while maintaining her long-standing marriage to Humble, who lives in Florida, also had a female companion with whom she lived in Washington, D.C.

Even NOW's allies became concerned that the organization would be perceived as a fringe group that did not address the concerns of the majority, and that support for NOW causes would be eroded. BETTY N. FRIEDAN, the group's founding president, accused NOW of failing to address women's current concerns, such as juggling families and jobs. Ireland, however, maintained that NOW was on the right track for carrying on the fight for women's rights. "Someone has to raise the issues that make people uncomfortable, the issues that other people don't want to talk about. . . . [I]t's healthy to be angry at the situation women face. So, yes, we may be militant and angry but we're also thoughtful and intelligent."

In 2001, after ten years, Ireland stepped down as president of NOW. In 2003, she became the CEO of the YWCA of the USA. Some conservative critics raised eyebrows over the appointment. However, according to Audrey Peeples, chair of the YWCA's National Coordinating Board, "There is no better person than Patricia Ireland to help re-ignite our advocacy positions."

In addition to her professional duties, Ireland is a frequent contributor to periodicals, newspapers, and journals and, in 1996, she released her autobiography, *What Women Want.* Ireland is also a frequent guest speaker at universities and with HUMAN RIGHTS groups.

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### CROSS-REFERENCES

Gay and Lesbian Rights; Sex Discrimination; Steinem, Gloria.

## IRRECONCILABLE DIFFERENCES

*The existence of significant differences between a married couple that are so great and beyond resolution as to make the marriage unworkable, and for which the law permits a* DIVORCE.

A divorce premised on the ground of irreconcilable differences is considered a no-fault divorce since there is no need to establish that one party is more responsible or at fault for the end of the marriage than the other.

## IRREGULARITY

*A defect, failure, or mistake in a legal proceeding or lawsuit; a departure from a prescribed rule or regulation.*

An irregularity is not an unlawful act, however, in certain instances, it is sufficiently serious to render a lawsuit invalid. For example, a number of states have statutes that require the appointment of a guardian to represent the interests of a child who is being sued. The failure to do so is an irregularity that can be used as a ground for invalidating and setting aside a judgment entered against the child.

In other cases, however, the flaw might be a simple HARMLESS ERROR that can be easily rectified, and, therefore, does not render the proceeding invalid.

## IRRELEVANT

*Unrelated or inapplicable to the matter in issue.*

Irrelevant evidence has no tendency to prove or disprove any contested fact in a lawsuit.

## IRREPARABLE INJURY

*Any harm or loss that is not easily repaired, restored, or compensated by monetary damages. A serious wrong, generally of a repeated and continuing nature, that has an equitable remedy of injunctive relief.*

## IRRESISTIBLE IMPULSE

*A test applied in a criminal prosecution to determine whether a person accused of a crime was compelled by a mental disease to commit it and therefore cannot be held criminally responsible for her or his actions; in a* WRONGFUL DEATH *case, a compulsion to commit suicide created by the defendant.*

In most jurisdictions, a person may defend criminal charges on a ground of insanity. The INSANITY DEFENSE comes in two main forms. First, a defendant may argue that because of mental disease or defect, he or she lacked the capacity to distinguish right from wrong. This is cognitive insanity.

Second, a defendant may argue that because of mental disease or defect, she or he was unable to act in conformance with the law. This is volitional insanity, and it is known as the irresistible impulse defense. Under this defense, a defendant may be found not guilty by reason of insanity even though she or he was capable of distinguishing right from wrong at the time of the offense.

The success of an irresistible impulse defense depends on the facts of the case. For example, assume that a child has been molested. If the child's mother shoots and kills the suspected molester, the mother could argue that she was so enraged by the violation of her child that she was unable to control her actions. The mother need not have been diagnosed as mentally ill. Rather, she would need to show that she was mentally ill at the time of the shooting, and that the illness impaired her self-control.

Irresistible impulse emerged as a defense in the nineteenth century, when psychoanalysts formulated the concept of moral insanity to describe the temporary inability of otherwise sane persons to resist criminal behavior. Courts began to recognize the condition as one that rendered conduct involuntary and therefore not suitable for punishment. For the better part of a century, many states allowed both cognitive insanity and irresistible impulse insanity as defenses.

Congress and most states abolished the irresistible impulse defense after John Hinckley was acquitted on grounds of insanity for the attempted assassination of President RONALD REAGAN in 1981. Only a handful of states currently allow irresistible impulse as a defense to criminal charges. These states permit it as a supplement to the cognitive insanity defense, which is the only insanity defense recognized in most jurisdictions. On the federal level, Congress abolished the irresistible impulse defense in the Insanity Defense Reform Act of 1984 (18 U.S.C.A. §§ 1 note, 17).

In some states, the irresistible impulse defense has never been adopted. In others, it has been adopted and subsequently withdrawn. Where it has been rejected, the reasons are generally the

same: to prevent sane persons from escaping liability simply because they were unable to control their actions. In the words of one court, "There are many appetites and passions which by long indulgence acquire a mastery over men . . . but the law is far from excusing criminal acts committed under the impulse of such passions" (*State v. Brandon,* 53 N.C. 463 [1862]).

Under the MODEL PENAL CODE definition of irresistible impulse, a person may be found not guilty by reason of insanity if, at the time of the offense, he or she lacked "substantial capacity either to appreciate the criminality of [the] conduct or to conform [the] conduct to the requirements of law" (§ 4.01(1) [1962]). The "lacked substantial capacity" language creates a low threshold for the defendant: in some states, the defendant must allege complete impairment in order to invoke the defense.

Irresistible impulse is also a factor in civil actions. When a person commits suicide, survivors may sue for damages with a wrongful death claim or similar action if they can show that the suicide was caused by the actions of another person. In such a case, the plaintiffs must prove that the defendant caused a mental condition that caused the decedent to experience an irresistible impulse to commit suicide.

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## IRRETRIEVABLE BREAKDOWN OF MARRIAGE

*The situation that exists when either or both spouses no longer are able or willing to live with each other, thereby destroying their* HUSBAND AND WIFE *relationship with no hope of resumption of spousal duties.*

The irretrievable breakdown of a marriage provides the ground for a no-fault divorce in many jurisdictions.

## IRREVOCABLE

*Unable to cancel or recall; that which is unalterable or irreversible.*

## IRS

*An abbreviation for the* INTERNAL REVENUE SERVICE*, a federal agency charged with the responsibility of administering and enforcing internal revenue laws.*

## ISLAND

*A land area surrounded by water and remaining above sea level during high tide.*

Land areas exposed only during low tide are called low-tide elevations or drying rocks, reefs, or shoals. The existence of islands has generated numerous disputes, centering primarily on the size of the territorial sea surrounding an island and the determination of what state has sovereignty over a particular island. The size of the territorial sea has become an important question affecting fishing rights and the right of unrestricted passage for foreign vessels. Although the territorial sea of an island is usually determined by reference to its coastal baseline, some adjustments have been recognized in the cases of archipelagoes and islands located close to the mainland.

Determination of what state has title to an island has traditionally depended upon an open and continuous assertion of sovereignty over the island, which is usually, but not always, accompanied by physical presence of some representative of the state.

CROSS-REFERENCES

Territorial Waters.

## ISSUE

*To promulgate or send out. In a lawsuit, a disputed point of law or* QUESTION OF FACT*, set forth in the pleadings, that is alleged by one party and denied by the other.*

*In the law governing the transfer or distribution of property, a child, children, and all individuals who descend from a common ancestor or descendents of any degree.*

As applied to notes or bonds of a series, date of issue means the day fixed as the start of the period for which they run, with no reference to a specific date when the bonds or notes are to be sold and delivered. With regard to bonds only, bonds are issued to the purchaser when they are delivered.

When an issue of fact arises, the court or jury must consider and evaluate the weight of the evidence in order to reach a decision. An

issue of law exists thereby providing a ground for a SUMMARY JUDGMENT sought by a party to the action when only one conclusion can be drawn by the court from the undisputed evidence, obviating the need for deliberation by a jury.

The term *issue* is frequently found in provisions of a deed. In testamentary matters, the meaning of issue is derived from the intent of the testator, a maker of a will. The intent is determined from the provisions of the will.

## ISSUE PRECLUSION

*A concept that refers to the fact that a particular* QUESTION OF FACT *or law, one that has already been fully litigated by the parties in an action for which there has been a judgment on the merits, cannot be relitigated in any future action involving the same parties or their privies (persons who would be bound by the judgment rendered for the party).*

The term *issue preclusion* is synonymous with COLLATERAL ESTOPPEL, a doctrine which bars the relitigation of the same issue that was the basis of a finding or verdict in an action by the same parties or their privies in subsequent lawsuits involving the same or different causes of action. It is not, however, the same as the doctrine of RES JUDICATA which bars the relitigation of an entire CAUSE OF ACTION, claim or demand, as opposed to an issue that makes up a cause of action, claim, or demand.

## ITEMIZE

*To individually state each item or article.*

Frequently used in tax accounting, an itemized account or claim separately lists amounts that add up to the final sum of the total account on claim.

## ITEMIZED DEDUCTION

See INCOME TAX.

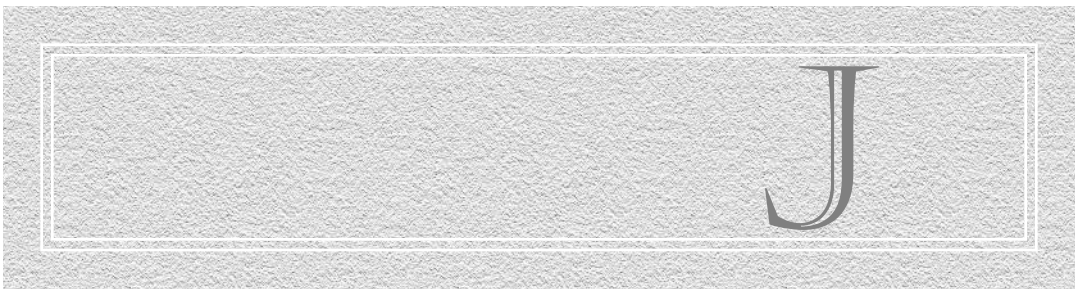

## ♦ JACKSON, ANDREW

Andrew Jackson achieved prominence as a frontiersman, jurist, and military hero, and as seventh president of the United States. His two administrations, famous for ideologies labeled Jacksonian Democracy, encouraged participation in government by the people, particularly the middle class.

Jackson was born March 15, 1767, in Waxhaw, South Carolina. In 1781, Jackson entered the military, fought in the Revolutionary War, and was subsequently taken prisoner and incarcerated at Camden, South Carolina. After his release, he pursued legal studies in North Carolina and was admitted to the bar of that state in 1787.

Jackson relocated to Nashville in 1788 and established a successful law practice. Three years later, he married Rachel Donelson. When it was subsequently discovered that Mrs. Jackson was not legally divorced from her previous husband, Jackson remarried her in 1794 after her **DIVORCE** became final. His enemies, however, used the scandal to their advantage.

Jackson began his public service career in 1791 and performed the duties of prosecuting attorney for the Southwest Territory. He attended the Tennessee constitutional convention in 1796 and entered the federal government system in that same year.

As a member of the U.S. House of Representatives, Jackson represented Tennessee for a year before filling the vacant position of senator from Tennessee in the U.S. Senate during 1797 and 1798.

Jackson embarked on the judicial phase of his career in 1798, presiding as judge of the Tennessee Superior Court until 1804.

During the **WAR OF 1812**, Jackson returned to the military and was victorious at the Horseshoe Bend battle in 1814. He conquered the British at New Orleans at the close of the war, which resulted in national recognition as a war hero.

In 1818, Jackson was involved in a military incident that almost catapulted the United States into another war with Great Britain and Spain. Dispatched to the Florida border to quell Seminole Indian uprisings, Jackson misunderstood his orders, took control of the Spanish possession of Pensacola, and killed two British subjects responsible for inciting the Indians. Spain and Great Britain were in an uproar over the incident, but Secretary of State **JOHN QUINCY ADAMS** supported Jackson. The incident added to Jackson's popularity as a rugged hero.

Jackson sought the office of president of the United States in 1824 against **HENRY CLAY**, John Quincy Adams, and William Crawford. No single candidate received a majority of electoral votes, and the House of Representatives decided the election in favor of Adams. Four years later, Jackson defeated the incumbent Adams and began the first of two terms as chief executive.

During his first administration, Jackson relied on a group of informal advisers known as

"EVERY MAN WHO HAS BEEN IN OFFICE A FEW YEARS BELIEVES HE HAS A LIFE ESTATE IN IT, A VESTED RIGHT. THIS IS NOT THE PRINCIPLE OF OUR GOVERNMENT. IT IS ROTATION OF OFFICE THAT WILL PERPETUATE OUR LIBERTY."
—ANDREW JACKSON

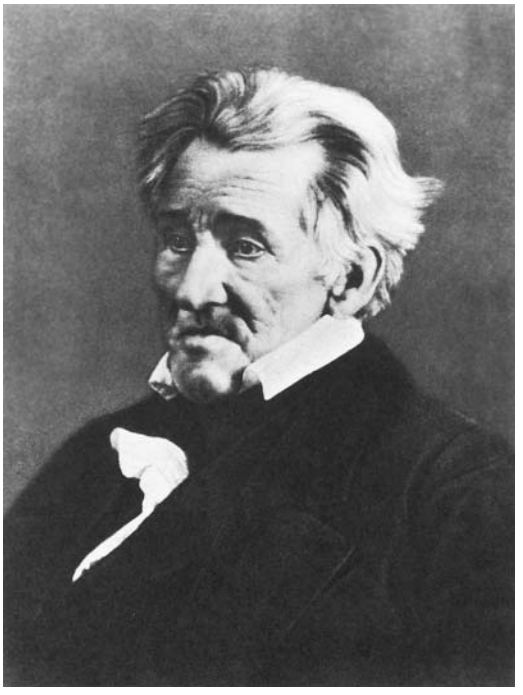

*Andrew Jackson.*
LIBRARY OF CONGRESS

the Kitchen Cabinet. The unofficial members included journalists and politicians, as opposed to the formal cabinet members traditionally involved in policymaking. He also initiated the spoils system, rewarding dutiful and faithful party members with government appointments, regardless of their qualifications for the positions. Many of Jackson's intimate associations did not include members from the traditional families associated with politics, and public dissatisfaction came to a head with the marriage of his Secretary of War John Eaton to the provincial Margaret O'Neill. The social politics employed by cabinet members and their wives, particularly Vice President and Mrs. JOHN C. CALHOUN, caused much upheaval in the Jackson cabinet, and the eventual resignation of Eaton.

Calhoun and Jackson disagreed again in 1832 over a protective tariff, which Calhoun believed was not beneficial to the South. Calhoun initiated the policy of nullification, by which a state could judge a federal regulation null and void and, therefore, refuse to comply with it if the state believed the regulation to be adverse to the tenets of the Constitution. Calhoun resigned from the office of vice president after South Carolina adopted the nullification policy against the tariff act, and Jackson requested the enactment of the Force Bill from Congress to authorize his use of militia, if necessary, to enforce federal law. The Force Bill proved to be solely a strong threat, because Jackson sympathized with the South and advocated the drafting of a tariff compromise. Henry Clay was instrumental in the creation of this agreement, which appeased South Carolina.

The most significant issue during Jackson's term was the controversy over the BANK OF THE UNITED STATES. The bank became a topic in the 1832 presidential campaign and continued into the second administration of the victorious Jackson.

The charter of the bank expired in 1836, but Henry Clay encouraged the passage of a bill to secure its recharter in 1832. Jackson was against the powerful bank and overruled the recharter. He proceeded to transfer federal funds from the bank to selected state banks, called "pet banks," which significantly diminished the power of the bank. Secretary of Treasury Louis McLane refused to remove the funds and was dismissed; similarly, the new treasury secretary, W. J. Duane, also refused. Jackson replaced him with

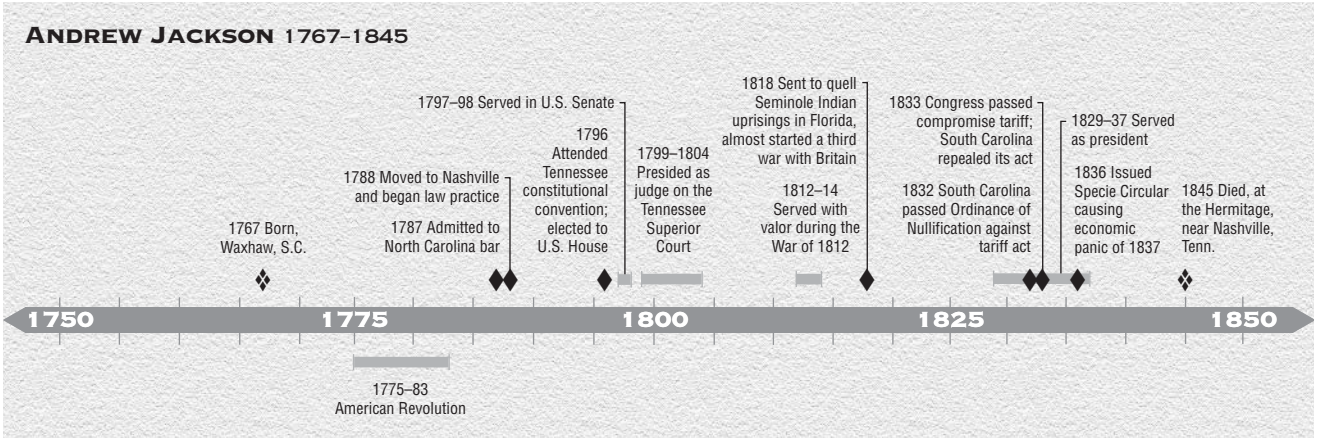

ROGER B. TANEY, who supported Jackson's views and complied with his wishes. In response to this loyalty, Jackson subsequently nominated Taney as a U.S. Supreme Court justice in 1836.

In 1836, Jackson faced another financial crisis. He issued the Specie Circular of 1836, which declared that all payments for public property must be made in gold or silver, as opposed to the previous use of paper currency. This proclamation precipitated the economic panic of 1837, which ended Jackson's second term and extended into the new presidential administration of MARTIN VAN BUREN.

Jackson spent his remaining years in retirement at his estate in Tennessee, "The Hermitage," where he died on June 8, 1845.

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## ♦ JACKSON, HOWELL EDMUNDS

Howell Edmunds Jackson was a U.S. senator, federal judge on the U.S. Sixth Circuit Court of Appeals, and U.S. Supreme Court justice. Jackson toiled diligently without fanfare for many years before garnering widespread attention for the last case he heard while sitting on the Supreme Court, POLLOCK V. FARMERS' LOAN & TRUST CO., 158 U.S. 601, 15 S. Ct. 912, 39 L. Ed. 1108 (1895).

Jackson was born April 8, 1832, in Paris, Tennessee. He graduated from West Tennessee College in 1849, then studied for a time at the University of Virginia. He read the law with a Tennessee Supreme Court judge for a year, and obtained his law degree from Cumberland University in Lebanon, Tennessee, in 1856. Thereafter, he practiced law in Jackson and Memphis. Although Jackson opposed Tennessee's secession in the Civil War, he served the Confederacy as a receiver of confiscated property. Following the Civil War, he served for a short time on the Court of Arbitration for West Tennessee, a provisional court helping the regular Tennessee Supreme Court dispose of a backlog of cases caused by the war. He also made an unsuccessful bid for a seat on the state supreme court.

A Whig before the war, Jackson was elected to the Tennessee state legislature as a Democrat in 1880. The following year the legislature assembled to choose a U.S. senator on a joint ballot. No candidate, including the incumbent, could muster enough votes in the divided assembly. After a number of deadlocked days, a

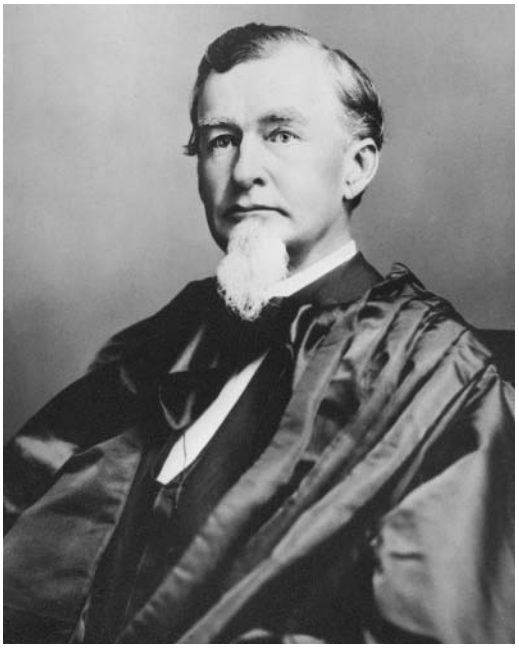

*Howell E. Jackson.*
U.S. SUPREME COURT

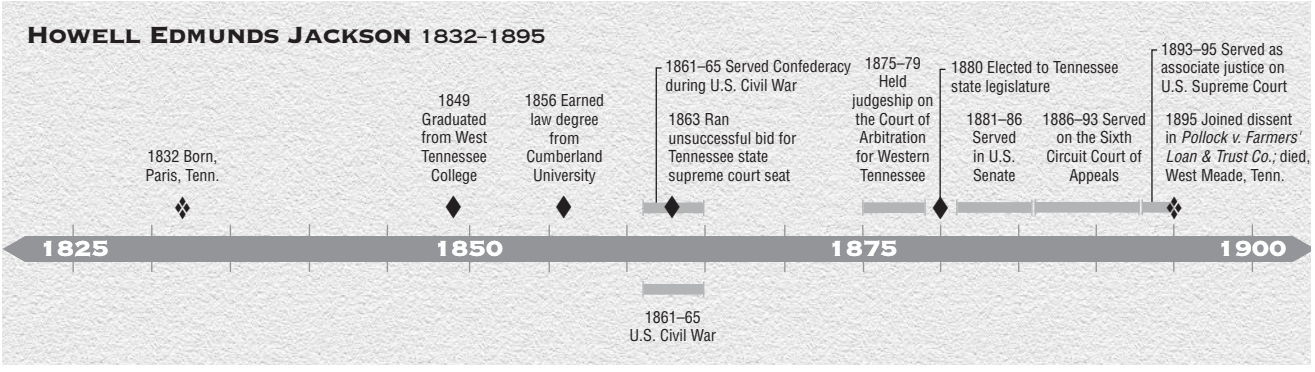

Republican legislator cast his vote for Jackson, who had not been a candidate, and Jackson was quickly elected. In the Senate he gained a reputation as a tireless worker. He was nonpartisan in his friendships, becoming close with Democrat president GROVER CLEVELAND and Republican Senate colleague BENJAMIN HARRISON.

Jackson resigned from the Senate in 1886 when President Cleveland appointed him to the Sixth Circuit Court of Appeals, and eventually became that court's presiding judge. In 1893 lame-duck president Harrison appointed Jackson to fill a vacancy on the U.S. Supreme Court. Harrison appointed Jackson in part because Cleveland was about to become president, and Harrison doubted that any Republican could garner confirmation by the Democratic Senate. Harrison, a former Union general, saw in Jackson, a former member of the Confederate government, not another secessionist southern Democrat but a man committed to serving his entire nation.

"[THE POLLOCK] DECISION DISREGARDS THE WELL-ESTABLISHED CANON . . . THAT AN ACT PASSED BY A CO-ORDINATE BRANCH OF THE GOVERNMENT HAS EVERY PRESUMPTION IN ITS FAVOR, AND SHOULD NEVER BE DECLARED INVALID BY THE COURTS UNLESS ITS REPUGNANCY TO THE CONSTITUTION IS CLEAR BEYOND ALL REASONABLE DOUBT."
—HOWELL JACKSON

In August 1894, Congress imposed a nationwide two percent INCOME TAX on all annual incomes in excess of $4,000. The new law, popular in the South and West but despised in the North and East, was quickly challenged as being unconstitutional. Soon, the Supreme Court agreed to hear the case.

Tuberculosis struck Jackson, and shortly after the October 1894 session began, his deteriorating health kept him off the bench. He was absent in April 1895 when the Court held in *Pollock* that part of the new tax law was unconstitutional. The Court was evenly divided on whether the entire law must be declared unconstitutional, and therefore did not express an opinion on the matter. The absence of a firm decision by the justices meant that the courts could expect a flood of litigation from unwilling taxpayers. The Supreme Court quickly granted a rehearing to reexamine the issue.

To break the deadlock, it appeared essential that Justice Jackson either resign so that a new justice could be appointed, or agree to hear the case. Jackson decided to hear the case. At Chief Justice Melville W. Fuller's insistence, he obtained his doctor's permission to travel from Tennessee, where he had been recuperating, to Washington, D.C., to return to the bench.

The case was argued for three days in early May, 1895. Strong passions about the income tax law, widespread speculation about how Jackson would vote, and the drama of the obviously ailing justice made the case one of keen public interest. Reporters speculated that the effort of participating in the hearing might well shorten Jackson's life.

The decision was rendered less than two weeks after oral arguments. Ironically, Jackson's vote was not crucial, because one of his colleagues changed his opinion. Jackson and three other justices voted to uphold the constitutionality of the tax; five justices, including the colleague who had changed his opinion, voted to declare the entire law void. Jackson, too weak to prepare a formal, written opinion, spoke from notes as he announced his dissent in the Supreme Court chamber. Jackson declared that the decision was "the most disastrous blow ever struck at the constitutional power of Congress." An income tax was not resurrected until passage of the SIXTEENTH AMENDMENT in 1913.

After the rehearing in *Pollock,* Jackson returned to his home in West Meade, Tennessee. He died less than three months later, on August 8, 1895.

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## ♦ JACKSON, JESSE LOUIS, SR.

Reverend Jesse Louis Jackson Sr. is a CIVIL RIGHTS activist, clergyman, and prominent African American leader in the United States.

Jackson was born October 8, 1941, in Greenville, South Carolina. His mother, Helen Burns, was only 16 when Jackson was born. His father, Noah Louis Robinson, acknowledged Jackson as his son, but because he was married to another woman and had several other children, he was not involved in Jackson's life. When he was three, his mother married Charles Jackson. The family eventually moved out of the poor section of town to a new housing project, where, for the first time, they enjoyed hot and cold running water and an indoor bathroom. Jackson was legally adopted by his stepfather when he was 12. He has one brother, Charles Jackson Jr.

Jackson attended the all-black Sterling High School, in Greenville, where he was a star football player. After graduation in 1959, he went north to

the University of Illinois on a football scholarship. The following year he transferred to North Carolina Agricultural and Technical College (North Carolina A&T), a mostly black school in Greensboro. There he met his wife, Jacqueline Lavinia Brown, a fellow student who had also grown up in poverty. The couple married December 31, 1962, and have five children: Santita, Jesse Louis Jr. (Democratic representative, second congressional district of Illinois), Jonathan Luther, Yusef DuBois, and Jacqueline Lavinia.

While at North Carolina A&T, Jackson began the work that would make him a widely recognized civil rights leader. He led a series of protest demonstrations and sit-ins throughout the South and joined one of the first organized groups in the **CIVIL RIGHTS MOVEMENT**, the **CONGRESS OF RACIAL EQUALITY** (CORE).

After graduating from college in the fall of 1964, Jackson left the fledgling civil rights movement and moved north again, to attend Chicago Theological Seminary. He immersed himself in his studies, determined to learn how he could bring about change through the ministry. Then, in 1965, the civil rights movement began to gain momentum, and Jackson wanted to be a part of it. He joined the **SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE** (SCLC) of Martin Luther King Jr, and expanded its Operation Breadbasket, an economic campaign that used boycotts and negotiations to secure jobs for minorities. Six months before he was to graduate from the seminary, he left to work full-time for the SCLC. Nevertheless, he was ordained a Baptist minister in 1968.

Jackson saw King as his mentor and role model, and he became King's protégé. He worked closely with King and the other SCLC leaders and was with King when King was assassinated on April 4, 1968.

*Jesse Jackson.*
LIBRARY OF CONGRESS

In 1969 Jackson organized the first Black Expo, a promotional festival for the companies involved in Operation Breadbasket. The expo was intended to be an annual fund-raiser for the SCLC, but Jackson had quietly incorporated the event independently. SCLC officials were enraged, and Jackson finally left the organization.

In the early 1970s, Jackson formed Operation People United to Serve Humanity (Operation PUSH), with the goal of economic empowerment for the "disadvantaged and people of color." He negotiated with such large corporations as the

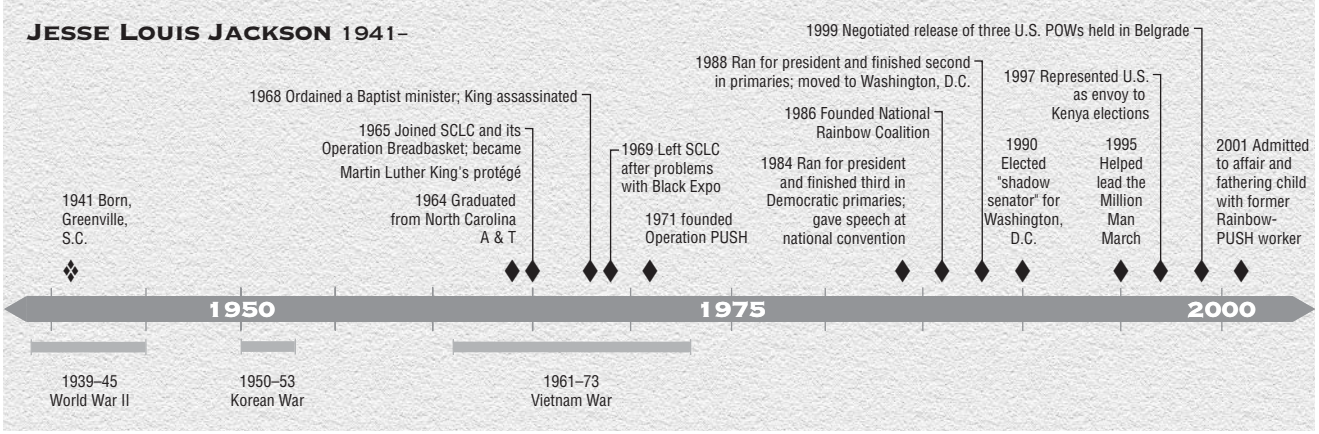

Coca-Cola Company, Heublein, and Ford Motor Company to increase minority employment and minority-owned dealerships and franchises. He also began holding rallies at high schools to raise the self-image of African–American students. He stressed the importance of education, personal responsibility, and hard work to achieve one's goals. Jackson's work with teenagers attracted the attention of President JIMMY CARTER, whose administration rewarded Jackson with grants and contracts to continue his outreach. He named his school ministry PUSH for Excellence, or PUSH-Excel.

During the late 1970s and early 1980s, Jackson emerged as a preeminent African American leader in the United States. He decided to make a bid for the presidency. He mounted an ambitious voter registration drive throughout the South, and barnstormed through Western Europe enlisting support among U.S. service personnel. In an effort to enhance his image and prove that his expertise extended beyond domestic matters, Jackson traveled to trouble spots such as the Middle East, Latin America, and Cuba to meet with leaders there. In 1983, he negotiated the release of Lieutenant Robert O. Goodman Jr., a U.S. citizen whose jet had been shot down over Syrian-held territory in Lebanon.

"AMERICA IS . . . LIKE A QUILT—MANY PATCHES, MANY PIECES, MANY COLORS, MANY SIZES, ALL WOVEN AND HELD TOGETHER BY A COMMON THREAD."
—JESSE JACKSON

Critics dismissed these activities as opportunistic grandstanding. Particularly troubling to some was Jackson's perceived anti-Semitic bias. During a private conversation in 1984, Jackson referred to Jews as Hymies and to New York as Hymietown. He later apologized. A short time later, Louis Farrakhan, head of the controversial NATION OF ISLAM and a Jackson supporter, threatened the reporter who had written about Jackson's remarks. Jackson later distanced himself from Farrakhan and his organization because of their perceived militant anti-white and anti-Semitic stance.

Jackson placed third in the 1984 presidential primaries, behind former vice president Walter F. Mondale and Colorado senator Gary W. Hart. His delegate votes did not give him the clout he needed to compel the Democrats to accept his controversial platform proposals. Jackson gracefully conceded the nomination to Mondale and gave a rousing speech at the Democratic National Convention in San Francisco, which was in part a response to his critics:

> If in my low moments, in word, deed, or attitude, through some error of temper, taste, or tone, I have caused anyone discomfort, created pain, or revived someone's fears, that was not my truest self. . . . I am not a perfect servant. I am a public servant doing my best against the odds. As I develop and serve, be patient. God is not finished with me yet.

After the convention, Jackson resumed his duties as head of Operation PUSH. He also continued to be active in progressive causes, leading what he called a counterinaugural march and prayer vigil in January 1985, and participating in a reenactment of the civil rights march from Selma, Alabama, to Montgomery, Alabama, in March 1985. That same year, Jackson formed the National Rainbow Coalition, his vision of a modern populist movement comprising African Americans, working families, liberal urbanites, Hispanics, WOMEN'S RIGHTS groups, college faculty and students, environmentalists, farmers, and labor unions—a cultural as well as racial alliance searching for alternatives within the DEMOCRATIC PARTY.

Jackson made another run for president in 1988 and finished second behind Michael Dukakis in the primaries. However, much to his disappointment, he was not chosen as the vice presidential nominee.

After the 1988 election, Jackson moved from Chicago to Washington, D.C., and was elected one of the city's "shadow senators." In this unpaid, nonvoting position, which was created by the Washington City Council, Jackson represents the district's interests on Capitol Hill. His main responsibility was to lobby Congress for statehood for the nation's capital.

In the 1990s and into the 2000s Jackson continued to be the leading spokesman for civil rights issues on both the domestic and international fronts. He called on the African American community to take action against the violence that was claiming so many of its young people. He advocated for such issues as universal HEALTH CARE and equal administration of justice in all U.S. cities. And, in 1996, in an effort to maximize efforts, the Rainbow Coalition and Operation PUSH merged to form Rainbow/PUSH Coalition, which remains devoted to education, public policy changes, and social and economic empowerment.

In 1997, President BILL CLINTON and Secretary of State MADELEINE ALBRIGHT named Jackson as Special Envoy for the President and Secretary of State for the Promotion of Democracy in Africa. He has met with many of the leaders of African nations in support of this

directive. He also has served as an international diplomat on a number of other occasions, and in 1999, negotiated the release of U.S. soldiers held in Kosovo. In 2000, President Clinton awarded Jackson the highest civilian honor, the Presidential Medal of Freedom, for his national and international civil rights efforts.

A tireless activist, Jackson maintains a whirlwind schedule, traveling to schools and universities for speaking engagements, appearing on news programs, and writing a weekly syndicated column that provides political analysis. He has received numerous awards and commendations throughout his career, including the NAACP's Spingarn Award. He also has been the recipient of more than 40 honorary degrees.

*Robert H. Jackson.*
PHOTOGRAPH BY HARRIS & EWING. COLLECTION OF U.S. SUPREME COURT

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## ♦ JACKSON, ROBERT HOUGHWOUT

Robert Houghwout Jackson served as general counsel for the Federal Bureau of Internal Revenue, attorney general of the United States, and justice of the U.S. Supreme Court. During his service on the Court from 1941 to 1954 Jackson delivered unconventional opinions that did not always coincide with those of the president who had appointed him, FRANKLIN D. ROOSEVELT. Jackson was nonetheless chosen to be chief counsel at the NUREMBERG TRIALS following WORLD WAR II.

Jackson's straightforward style as a lawyer and a justice stemmed from his rural upbringing. The first Jacksons immigrated to the United States from England in 1819. They settled in Spring Creek, Pennsylvania, where Jackson was born on February 13, 1892. His father, William Eldred Jackson, provided for the family through farming and lumbering.

In September 1911 Jackson entered Albany Law School, passing the bar in 1913. He then began a lengthy career with the establishment of a law practice at Jamestown, New York, and formed a friendship with fellow New Yorker Roosevelt.

In 1934 Jackson was selected by the recently elected president Roosevelt to serve as general

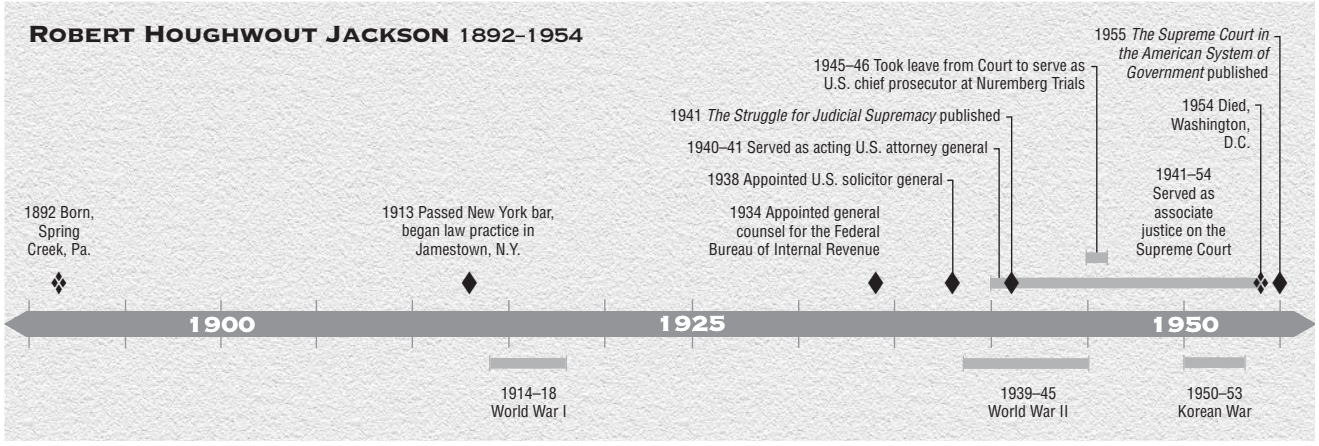

counsel for the Federal Bureau of Internal Revenue. In 1936 he became assistant attorney general of the United States, a position he held until 1938. Between 1938 and 1939, he performed the duties of U.S. SOLICITOR GENERAL. He acted as the U.S. attorney general from 1940 until his appointment in July 1941 as justice of the U.S. Supreme Court.

Jackson earned the trust and admiration of his associates through his wit and wisdom. Many of his philosophies on essential constitutional issues came to be known as Jacksonisms. Throughout his career he withheld blind praise of the U.S. system of government. He stated, "A free man must be a reasoning man, and he must dare to doubt what a legislative or electoral majority may most passionately assert" (*American Communications Ass'n v. Douds,* 339 U.S. 382 70 S. Ct. 674, 94 L. Ed. 925 [1950]).

"IT IS NOT THE FUNCTION OF OUR GOVERNMENT TO KEEP THE CITIZEN FROM FALLING INTO ERROR; IT IS THE FUNCTION OF THE CITIZEN TO KEEP THE GOVERNMENT FROM FALLING INTO ERROR."
—ROBERT JACKSON

Jackson voted against government actions that imposed upon free speech and religion, and voiced mistrust of LABOR UNIONS. Many of his opinions were dissents from a majority that tended to uphold union interests and to support NEW DEAL legislation.

Following the end of the second world war, Jackson was chosen as chief counsel for the United States at the Nuremberg trials, where Nazi leaders were tried for WAR CRIMES. Included among the defendants was Hermann Goering, second in command of the Nazi regime, and Adolf Hitler's designated successor.

In his opening remarks before Goering's trial began, Jackson noted the place of the proceddings in history when he said:

> We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.

On September 30 and October 1, 1946, the Nuremberg tribunal found nineteen of the twenty-two defendants guilty on one or more counts. Twelve defendants, including Goering, were sentenced to death by hanging.

For his success at Nuremberg, Jackson received a number of honors in the United States, including honorary doctoral degrees from Dartmouth College and Syracuse University. Recognition also came from other nations, including honorary degrees in law from the University of Brussels and the University of Warsaw.

After the trials, Jackson continued his service on the Court. He died on October 9, 1954.

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## JACTITATION

*Deceitful boasting, a deceptive claim, or a continuing assertion prejudicial to the right of another.*

One form of jactitation at COMMON LAW is slander of title—defaming another person's title to real property. Some jurisdictions provide a remedy when the injured party brings an action for jactitation.

## JAIL

*A building designated or regularly used for the confinement of individuals who are sentenced for minor crimes or who are unable to gain release on bail and are in custody awaiting trial.*

Jail is usually the first place a person is taken after being arrested by police officers. Most cities have at least one jail, and persons are taken

directly there after they are arrested; in less populated areas, arrestees may be taken first to a police station and later to the nearest jail. Many jails are also used for the short-term incarceration of persons convicted of minor crimes.

A person in jail usually has little choice in being there. Those awaiting trial (pretrial detainees) have been forcibly confined by law enforcement officers, and those serving a sentence (convicts) have been ordered there by the court. A sentence of confinement to jail is backed by the power of law enforcement personnel. Flight from prosecution or confinement is a felony that usually results in a prison sentence.

Jails exist on the federal, state, and local levels. The authority of states to build, operate, and fill jails can be found in the TENTH AMENDMENT, which has been construed to grant to states the power to pass their own laws to preserve the safety, health, and welfare of their communities. On the federal level, the authority to build and fill jails is inherent in the GENERAL WELFARE Clause, the NECESSARY AND PROPER CLAUSE, and various clauses authorizing federal punishment in Article I, Section 8, of the U.S. Constitution.

The money to build, maintain, and operate jails is usually provided by taxpayers. In the 1990s, private business leaders began to push for the opportunity to construct and operate jails and prisons. These entrepreneurs claimed that their companies could do the job more efficiently than the government, and make a profit at the same time. Critics argued that the private operation of jails and prisons violates the Thirteenth Amendment's prohibition of SLAVERY and is an abrogation of governmental responsibility, but many state and local lawmakers have approved these endeavors.

Though they are similar, jails are not the same as prisons. Prisons are large facilities that hold large numbers of people for long terms; jails are usually smaller and hold smaller numbers of people for short terms. Prisons confine only convicted criminals; jails can hold convicted criminals, but usually only for short periods. Many jails are used for the sole purpose of detaining defendants awaiting trial. In jurisdictions with these jails, a subsequent sentence of short-term incarceration is served at a different facility, such as a work farm or workhouse.

Persons sentenced to a workhouse may be forced to work, but pretrial detainees are not. Convicts in prison are usually required to work if they are able. Some convicts sentenced to jail are able to come and go, serving their term on weekends or other designated days. Pretrial detainees in jail may leave if they can make bail. Inmates in prison are rarely allowed to leave until their prison sentence has been completed or they are granted early release on PAROLE.

Jails and prisons are both dangerous. Both house persons accused or convicted of crimes, making anger, humiliation, and violence regular features of life on the inside. Violent GANGS are not as prevalent in jail as in prison, because the incarceration periods are shorter and inmates are less able to organize. However, jail inmates do not have the incentive from "good-time" credits that prison inmates have. A good-time credit reduces the sentence of a prison inmate for good behavior. Transgressions in prison can result in the loss of these credits.

Not all the risks facing incarcerated persons are physical. Fellow inmates may give prosecutors information on crimes in exchange for leniency in sentencing or an early release, and prosecutors often place undercover agents in jail or prison to obtain information from inmates. Unwitting inmates often regret cultivating new friendships with these persons.

In *Illinois v. Perkins,* 496 U.S. 292, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990), Lloyd Perkins, while detained on murder charges, told a fellow inmate of his involvement in a different murder.

**Conviction Status for Inmates in Jail, in 1999**

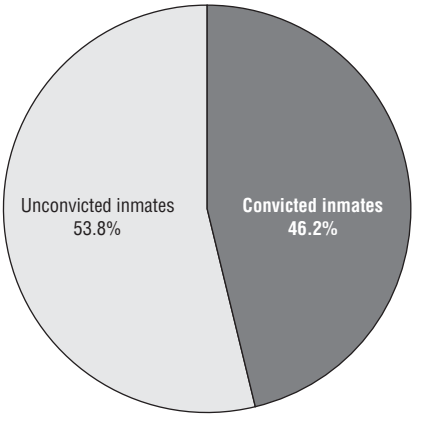


SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, *Census of Jails*, 1999.

The fellow inmate was undercover agent John Parisi. Perkins was prosecuted and found guilty of the other murder. He appealed, arguing that he was entitled to *Miranda* warnings before being questioned by law enforcement personnel, and that his statements to Parisi should have been excluded from trial. The U.S. Supreme Court rejected the argument, ruling in part that employing an undercover agent in an incarceration setting does not make a confession involuntary.

Though jail terms are usually shorter than prison terms, they are not always. Many states limit jail terms to one year, but some allow jail sentences to reach more than two years. In Massachusetts, for example, a person can be sentenced to confinement in a jail or house of correction for as long as two-and-a-half years (Mass. Gen. Laws Ann. ch. 279, § 23). In large, complex cases and in cases of retrial, pretrial detention can last months, sometimes years.

Though they are presumed innocent in a court of law, pretrial detainees can claim few rights beyond those of convicted defendants. The U.S. Supreme Court does not find a reason for distinguishing between pretrial detainees and convicted defendants in jail. In fact, the High Court has stated that security measures in the federal system should be no different than those for convicted criminals because only the most dangerous defendants are held before trial.

Nevertheless, pretrial detainees do possess the same rights as convicted criminals. These include the rights to FREEDOM OF SPEECH and religion, to freedom from discrimination based on race, and to DUE PROCESS OF LAW before additional deprivation of life, liberty, or property. Detainees and inmates also have the rights to sanitary conditions; to freedom from constant, loud noise; to nutritious food; to reading materials; and to freedom from constant physical restraint. All these rights may, however, be infringed by jail and prison officials to the extent that they threaten security in the facility.

The landmark case of *Bell v. Wolfish,* 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), describes the conditions and treatment that pretrial detainees can expect in jail. In *Bell,* pretrial detainees at the federal Metropolitan Correctional Center (MCC), in New York City, challenged an array of prison practices, including double-bunking (housing two inmates in the space intended for one inmate); the prohibition of hardcover books not mailed directly from publishers, book clubs, or bookstores; the prohibition of food and personal items from outside the jail; body cavity searches of pretrial detainees following visits with persons from outside the jail; and the requirement that pretrial detainees remain outside their cell while MCC officials conduct routine searches.

The primary issue in *Bell* was whether any of the practices amounted to punishment of the detainee. The standard for determining this was whether the measures were reasonably related to a legitimate, nonpunitive government objective, such as security. The Supreme Court determined that because the practices were related to security, none constituted a violation of the constitutional rights of the pretrial detainees. According to the Court, "There must be a 'mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.'" (quoting *Wolff v. McDonnell,* 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 [1974]).

In 1984, the High Court revisited *Bell* in *Block v. Rutherford,* 468 U.S. 576, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984). The Court held that random searches of cells in the absence of the detainee, random double-bunking, and the prohibition of physical contact between detainees and outside visitors were all constitutionally permissible.

In 1984, Congress took action to curb the release of pretrial detainees in the federal system, with the Bail Reform Act of 1984 (18 U.S.C.A. § 3141 et seq.). This act requires a judge to find that a defendant is not a danger to the community before determining a bail amount or granting bail at all. The act identifies a wide range of criminal activities by defendants as dangerous to the community, and creates a presumption in favor of PREVENTIVE DETENTION for certain alleged acts. In general, the act makes it more difficult for many accused criminals to remain free pending trial.

Generally, the matter of assigning bail and determining the conditions of pretrial release is left to the discretion of the judge presiding over the case. However, many states followed the lead of Congress by passing laws that restrict the conditions under which a judge may grant pretrial release from jail. These laws, combined with an increase in arrest and incarceration rates, have created cramped conditions in jails.

To alleviate overcrowding, many states turned to alternative forms of sentencing. Alternative forms of sentencing, however, lead to

legal problems. For example, when a defendant is sentenced to a form of imprisonment outside the traditional jail and prison settings, does his sentence constitute incarceration or official detention? This question is significant because if a defendant violates the terms of the incarceration or subsequent **PROBATION** and is resentenced to prison or jail, the defendant may want credit for the time served in the alternative setting.

In *Michigan v. Hite,* 200 Mich. App. 1, 503 N.W.2d 692 (1993), Marvin Hite was convicted of receiving and concealing stolen property and was sentenced to a boot camp program at Camp Sauble, in Freesoil, Michigan. The boot camp imposed intensive regimentation, strict discipline, strenuous physical labor, and grueling physical activities. The four separate buildings of the camp were enclosed by an 18-foot-high fence topped with barbed wire. Hite was also sentenced to a term of probation.

Hite successfully completed the boot camp, but violated the terms of his probation. For that violation, the court resentenced him to serve two to five years' imprisonment. The court also denied credit for the time Hite served in the boot camp. Hite appealed the denial of credit, arguing that it violated the **DOUBLE JEOPARDY** Clause of the **FIFTH AMENDMENT** to the U.S. Constitution.

The Court of Appeals of Michigan agreed with Hite and reversed the decision. According to the court, although the boot camp did not have cells with bars, "the discipline, regimentation, and deprivation of liberties" at the camp were greater than those at any minimum-security prison in Michigan. The court ruled that the boot camp constituted incarceration, and Hite's sentence was decreased by the amount of time he had already served at the camp.

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## JAILHOUSE LAWYER

*Prison inmates with some knowledge of law who give legal advice and assistance to their fellow inmates.*

The important role that jailhouse lawyers play in the criminal justice system has been recognized by the U.S. Supreme Court, which has held that jailhouse lawyers must be permitted to assist illiterate inmates in filing petitions for post-conviction relief unless the state provides some reasonable alternative (*Johnson v. Avery,* 393 U.S. 483, 89 S. Ct. 747, 21 L. Ed. 2d 718 [1969]).

However, the U.S. Supreme Court also has recognized that prison authorities may restrict the activities of prisoners who provide more formalized legal advice. For example, in *Shaw v. Murphy*, 532 U.S. 223, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001), the Court held that prisoners do not possess a **FIRST AMENDMENT** right to provide legal advice to other prisoners. In so ruling, the Court permitted prison officials to discipline inmates who do not have authority to assist other inmates with their legal problems. Kevin Murphy was one of a number of inmates who were designated "inmate law clerks" by Montana prison authorities. Administrators directed certain inmates to Murphy, who would consult with them on their legal problems and assist them with filling out paper work. Montana authorities maintained control over the clerks by preventing them from consulting with inmates without prior approval. Murphy was disciplined for involving himself in an inmate's case without permission, and he took the issue to court. The U.S. Supreme Court unanimously held that prison authorities had reasonable

administrative grounds for restricting legal communications and for disciplining Murphy.

One notable example of a jailhouse lawyer is Jerry Rosenberg. He has been serving a life sentence since 1963 at the Auburn Correctional Facility in upstate New York for the murder of two New York City police officers during a holdup in 1962. Rosenberg never went beyond the eighth grade.

While in prison, Rosenberg has received two separate law degrees from Illinois correspondence schools. As a convicted felon, Rosenberg is unable to obtain a law license, but he still can make use of his LEGAL EDUCATION. In 1978, the U.S. Supreme Court ordered the release of Rosenberg's fellow inmate, Carmine Galante, upon reviewing a brief filed by Rosenberg on Galante's behalf.

In June 1988, Rosenberg made news as he attempted to secure his own release with an imaginative legal argument. In 1986, Rosenberg had suffered a heart attack during open-heart surgery, and his heart had stopped beating for a short time. A patient's heart frequently stops beating during such surgery, but Rosenberg seized on the occurrence to argue that since his heart had stopped, he had "died" while on the operating table. Therefore, he argued, he had met the requirements of his New York *life* sentence, and should, perhaps as a new man, be freed immediately.

Acting New York State Supreme Court Justice Peter Corning denied Rosenberg's petition. Corning agreed with New York Assistant Attorney General Kenneth Goldman's argument for the state that death is an irrevocable condition, and that Rosenberg therefore had not yet died.

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## JAMES, WILLIAM

William James was a popular and influential philosopher whose writings and theories influenced various areas of U.S. life, including the movement known as LEGAL REALISM.

James was born in New York City on January 11, 1842, to Henry James Sr. and Mary Walsh James. Comfortably supported by an inheritance, his parents stressed their children's abilities to make independent choices. James's formal schooling was irregular, and he studied frequently in England, France, Switzerland, and Germany. James pursued an enduring interest in the natural sciences, earning a medical degree from Harvard University in 1869, though he never intended to practice medicine. He joined Harvard's faculty in 1872, teaching anatomy and physiology. He was also interested in psychology and philosophy, seeing these as related fields through his grounding in scientific studies. He began teaching those disciplines at Harvard in 1875 and 1879, respectively. He retired from the Harvard faculty in 1907.

In his first major work, *Principles in Psychology* (1890), James began to articulate a philosophy based on free will and personal experience. In a theory popularized as stream of consciousness, James argued that each person's thought is independent and personal, with the mind free to choose between any number of options. The subjective choices each individual makes are determined by the interconnected string of prior experiences in that person's life. In James's thought, choice and belief are always contingent, with no possibility for some permanent, definitive structure based outside of personal experience.

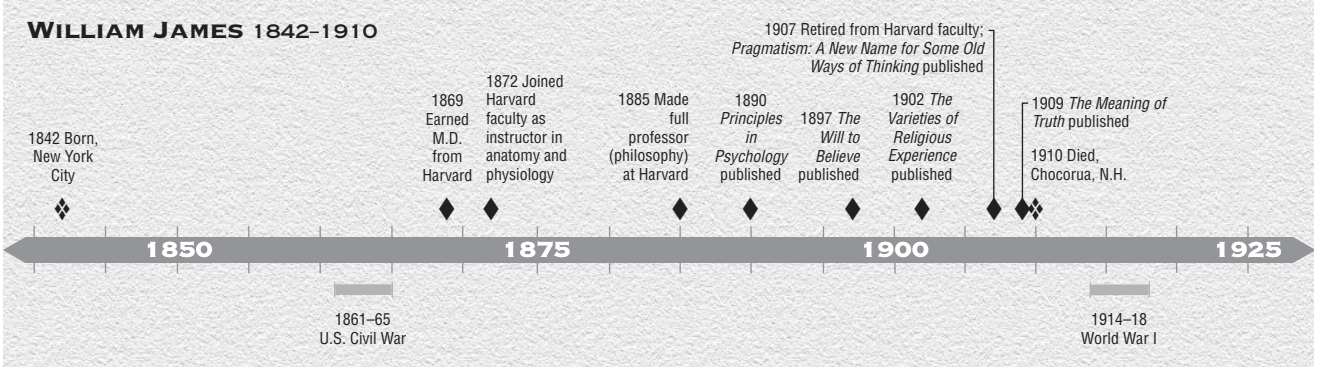

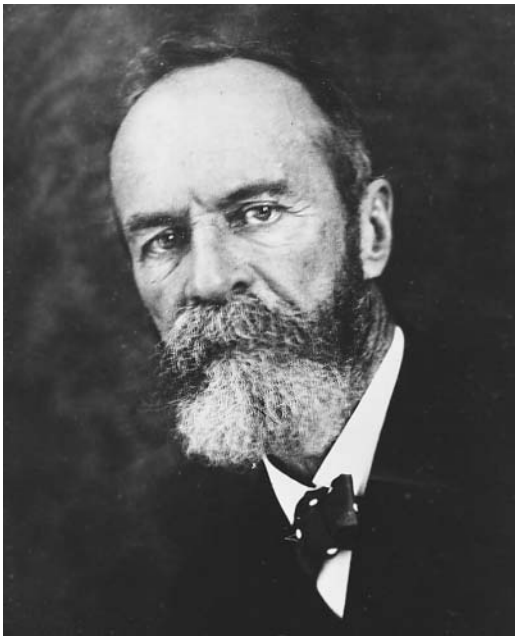

*William James.* LIBRARY OF CONGRESS

James's *Pragmatism: A New Name for Some Old Ways of Thinking* (1907) developed further his idea that knowledge, meaning, and truth are essentially the result of each person's understanding of the experiences in her or his life. Mere formalism has no absolute authority; personal experience forms the framework of belief and action for each individual.

These important elements provided the basis for the movement known as legal realism. James's rejection of immutable truths in favor of experience as the mode to interpret reality was picked up by **ROSCOE POUND, OLIVER WENDELL HOLMES JR.**, and others in the 1920s and 1930s as a challenge to the prevailing belief that legal principles are based on an absolute structure of truth. Legal realists connected law with social and economic realities, both as legislated and as ruled on by courts. They argued that law is a tool for achieving social and policy goals, rather than the implementation of absolute truth, whether or not it is consciously treated that way. James's empiricism, based on experience as the root of human action, had a corollary within legal realism's use of social science as an analytical tool within law.

Though legal realism as a movement was considered to be played out by the 1940s, the belief that varied forces influence the actors and changes within the legal system has become more standard than the view that legal principles are immutable truths. James provided the philosophical underpinning for this shift in thinking.

James died on August 26, 1910, in Chocorua, New Hampshire.

"ALL THE HIGHER, MORE PENETRATING IDEALS ARE REVOLUTIONARY. THEY PRESENT THEMSELVES FAR LESS IN THE GUISE OF EFFECTS OF PAST EXPERIENCE THAN IN THAT OF PROBABLE CAUSES OF FUTURE EXPERIENCE."
—WILLIAM JAMES

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**CROSS-REFERENCES**

Jurisprudence.

# Abbreviations

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|---|---|
| A. | Atlantic Reporter |
| A. 2d | Atlantic Reporter, Second Series |
| AA | Alcoholics Anonymous |
| AAA | American Arbitration Association; Agricultural Adjustment Act of 1933 |
| AALS | Association of American Law Schools |
| AAPRP | All African People's Revolutionary Party |
| AARP | American Association of Retired Persons |
| AAS | American Anti-Slavery Society |
| ABA | American Bar Association; Architectural Barriers Act of 1968; American Bankers Association |
| ABC | American Broadcasting Companies, Inc. (formerly American Broadcasting Corporation) |
| ABM | Antiballistic missile |
| ABM Treaty | Anti-Ballistic Missile Treaty of 1972 |
| ABVP | Anti-Biased Violence Project |
| A/C | Account |
| A.C. | Appeal cases |
| ACAA | Air Carrier Access Act |
| ACCA | Armed Career Criminal Act of 1984 |
| ACF | Administration for Children and Families |
| ACLU | American Civil Liberties Union |
| ACRS | Accelerated Cost Recovery System |
| ACS | Agricultural Cooperative Service |
| ACT | American College Test |
| Act'g Legal Adv. | Acting Legal Advisor |
| ACUS | Administrative Conference of the United States |
| ACYF | Administration on Children, Youth, and Families |
| A.D. 2d | Appellate Division, Second Series, N.Y. |
| ADA | Americans with Disabilities Act of 1990 |
| ADAMHA | Alcohol, Drug Abuse, and Mental Health Administration |
| ADC | Aid to Dependent Children |
| ADD | Administration on Developmental Disabilities |
| ADEA | Age Discrimination in Employment Act of 1967 |
| ADL | Anti-Defamation League |
| ADR | Alternative dispute resolution |
| AEC | Atomic Energy Commission |
| AECB | Arms Export Control Board |
| AEDPA | Antiterrorism and Effective Death Penalty Act |
| A.E.R. | All England Law Reports |
| AFA | American Family Association; Alabama Freethought Association |
| AFB | American Farm Bureau |
| AFBF | American Farm Bureau Federation |
| AFDC | Aid to Families with Dependent Children |
| aff'd per cur. | Affirmed by the court |
| AFIS | Automated fingerprint identification system |
| AFL | American Federation of Labor |

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| AFL-CIO | American Federation of Labor and Congress of Industrial Organizations |
| AFRes | Air Force Reserve |
| AFSC | American Friends Service Committee |
| AFSCME | American Federation of State, County, and Municipal Employees |
| AGRICOLA | Agricultural Online Access |
| AIA | Association of Insurance Attorneys |
| AIB | American Institute for Banking |
| AID | Artificial insemination using a third-party donor's sperm; Agency for International Development |
| AIDS | Acquired immune deficiency syndrome |
| AIH | Artificial insemination using the husband's sperm |
| AIM | American Indian Movement |
| AIPAC | American Israel Public Affairs Committee |
| AIUSA | Amnesty International, U.S.A. Affiliate |
| AJS | American Judicature Society |
| ALA | American Library Association |
| Alcoa | Aluminum Company of America |
| ALEC | American Legislative Exchange Council |
| ALF | Animal Liberation Front |
| ALI | American Law Institute |
| ALJ | Administrative law judge |
| All E.R. | All England Law Reports |
| ALO | Agency Liaison |
| A.L.R. | American Law Reports |
| ALY | *American Law Yearbook* |
| AMA | American Medical Association |
| AMAA | Agricultural Marketing Agreement Act |
| Am. Dec. | American Decisions |
| amdt. | Amendment |
| Amer. St. Papers, For. Rels. | American State Papers, Legislative and Executive Documents of the Congress of the U.S., Class I, Foreign Relations, 1832–1859 |
| AMS | Agricultural Marketing Service |
| AMVETS | American Veterans (of World War II) |
| ANA | Administration for Native Americans |
| Ann. Dig. | Annual Digest of Public International Law Cases |
| ANPA | American Newspaper Publishers Association |
| ANSCA | Alaska Native Claims Act |
| ANZUS | Australia-New Zealand-United States Security Treaty Organization |
| AOA | Administration on Aging |
| AOE | Arizonans for Official English |
| AOL | America Online |
| AP | Associated Press |
| APA | Administrative Procedure Act of 1946 |
| APHIS | Animal and Plant Health Inspection Service |
| App. Div. | Appellate Division Reports, N.Y. Supreme Court |
| Arb. Trib., U.S.-British | Arbitration Tribunal, Claim Convention of 1853, United States and Great Britain Convention of 1853 |
| Ardcor | American Roller Die Corporation |
| ARPA | Advanced Research Projects Agency |
| ARPANET | Advanced Research Projects Agency Network |
| ARS | Advanced Record System |
| Art. | Article |
| ARU | American Railway Union |
| ASCME | American Federation of State, County, and Municipal Employees |
| ASCS | Agriculture Stabilization and Conservation Service |
| ASM | Available Seatmile |
| ASPCA | American Society for the Prevention of Cruelty to Animals |
| Asst. Att. Gen. | Assistant Attorney General |
| AT&T | American Telephone and Telegraph |
| ATFD | Alcohol, Tobacco and Firearms Division |
| ATLA | Association of Trial Lawyers of America |
| ATO | Alpha Tau Omega |
| ATTD | Alcohol and Tobacco Tax Division |
| ATU | Alcohol Tax Unit |
| AUAM | American Union against Militarism |
| AUM | Animal Unit Month |
| AZT | Azidothymidine |

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| BAC | Blood alcohol concentration |
| BALSA | Black-American Law Student Association |
| BATF | Bureau of Alcohol, Tobacco and Firearms |
| BBS | Bulletin Board System |
| BCCI | Bank of Credit and Commerce International |
| BEA | Bureau of Economic Analysis |
| Bell's Cr. C. | Bell's English Crown Cases |
| Bevans | United States Treaties, etc. *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled under the direction of Charles I. Bevans, 1968–76) |
| BFOQ | Bona fide occupational qualification |
| BI | Bureau of Investigation |
| BIA | Bureau of Indian Affairs; Board of Immigration Appeals |
| BID | Business improvement district |
| BJS | Bureau of Justice Statistics |
| Black. | Black's United States Supreme Court Reports |
| Blatchf. | Blatchford's United States Circuit Court Reports |
| BLM | Bureau of Land Management |
| BLS | Bureau of Labor Statistics |
| BMD | Ballistic missile defense |
| BNA | Bureau of National Affairs |
| BOCA | Building Officials and Code Administrators International |
| BOP | Bureau of Prisons |
| BPP | Black Panther Party for Self-defense |
| Brit. and For. | British and Foreign State Papers |
| BSA | Boy Scouts of America |
| BTP | Beta Theta Pi |
| Burr. | James Burrows, *Report of Cases Argued and Determined in the Court of King's Bench during the Time of Lord Mansfield* (1766–1780) |
| BVA | Board of Veterans Appeals |
| c. | Chapter |
| $C^3I$ | Command, Control, Communications, and Intelligence |
| C.A. | Court of Appeals |
| CAA | Clean Air Act |
| CAB | Civil Aeronautics Board; Corporation for American Banking |
| CAFE | Corporate average fuel economy |
| Cal. 2d | California Reports, Second Series |
| Cal. 3d | California Reports, Third Series |
| CALR | Computer-assisted legal research |
| Cal. Rptr. | California Reporter |
| CAP | Common Agricultural Policy |
| CARA | Classification and Ratings Administration |
| CATV | Community antenna television |
| CBO | Congressional Budget Office |
| CBS | Columbia Broadcasting System |
| CBOEC | Chicago Board of Election Commissioners |
| CCC | Commodity Credit Corporation |
| CCDBG | Child Care and Development Block Grant of 1990 |
| C.C.D. Pa. | Circuit Court Decisions, Pennsylvania |
| C.C.D. Va. | Circuit Court Decisions, Virginia |
| CCEA | Cabinet Council on Economic Affairs |
| CCP | Chinese Communist Party |
| CCR | Center for Constitutional Rights |
| C.C.R.I. | Circuit Court, Rhode Island |
| CD | Certificate of deposit; compact disc |
| CDA | Communications Decency Act |
| CDBG | Community Development Block Grant Program |
| CDC | Centers for Disease Control and Prevention; Community Development Corporation |
| CDF | Children's Defense Fund |
| CDL | Citizens for Decency through Law |
| CD-ROM | Compact disc read-only memory |
| CDS | Community Dispute Services |
| CDW | Collision damage waiver |
| CENTO | Central Treaty Organization |
| CEO | Chief executive officer |
| CEQ | Council on Environmental Quality |

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| CERCLA | Comprehensive Environmental Response, Compensation, and Liability Act of 1980 |
| cert. | *Certiorari* |
| CETA | Comprehensive Employment and Training Act |
| C & F | Cost and freight |
| CFC | Chlorofluorocarbon |
| CFE Treaty | Conventional Forces in Europe Treaty of 1990 |
| C.F. & I. | Cost, freight, and insurance |
| C.F.R | Code of Federal Regulations |
| CFNP | Community Food and Nutrition Program |
| CFTA | Canadian Free Trade Agreement |
| CFTC | Commodity Futures Trading Commission |
| Ch. | Chancery Division, English Law Reports |
| CHAMPVA | Civilian Health and Medical Program at the Veterans Administration |
| CHEP | Cuban/Haitian Entrant Program |
| CHINS | Children in need of supervision |
| CHIPS | Child in need of protective services |
| Ch.N.Y. | Chancery Reports, New York |
| Chr. Rob. | Christopher Robinson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (1801–1808) |
| CIA | Central Intelligence Agency |
| CID | Commercial Item Descriptions |
| C.I.F. | Cost, insurance, and freight |
| CINCNORAD | Commander in Chief, North American Air Defense Command |
| C.I.O. | Congress of Industrial Organizations |
| CIPE | Center for International Private Enterprise |
| C.J. | Chief justice |
| CJIS | Criminal Justice Information Services |
| C.J.S. | Corpus Juris Secundum |
| Claims Arb. under Spec. Conv., Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| CLASP | Center for Law and Social Policy |
| CLE | Center for Law and Education; Continuing Legal Education |
| CLEO | Council on Legal Education Opportunity; Chief Law Enforcement Officer |
| CLP | Communist Labor Party of America |
| CLS | Christian Legal Society; critical legal studies (movement); Critical Legal Studies (membership organization) |
| C.M.A. | Court of Military Appeals |
| CMEA | Council for Mutual Economic Assistance |
| CMHS | Center for Mental Health Services |
| C.M.R. | Court of Military Review |
| CNN | Cable News Network |
| CNO | Chief of Naval Operations |
| CNOL | Consolidated net operating loss |
| CNR | Chicago and Northwestern Railway |
| CO | Conscientious Objector |
| C.O.D. | Cash on delivery |
| COGP | Commission on Government Procurement |
| COINTELPRO | Counterintelligence Program |
| Coke Rep. | Coke's English King's Bench Reports |
| COLA | Cost-of-living adjustment |
| COMCEN | Federal Communications Center |
| Comp. | Compilation |
| Conn. | Connecticut Reports |
| CONTU | National Commission on New Technological Uses of Copyrighted Works |
| Conv. | Convention |
| COPA | Child Online Protection Act (1998) |
| COPS | Community Oriented Policing Services |
| Corbin | Arthur L. Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (1950) |
| CORE | Congress on Racial Equality |
| Cox's Crim. Cases | Cox's Criminal Cases (England) |
| COYOTE | Call Off Your Old Tired Ethics |

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|---|---|
| CPA | Certified public accountant |
| CPB | Corporation for Public Broadcasting, the |
| CPI | Consumer Price Index |
| CPPA | Child Pornography Prevention Act |
| CPSC | Consumer Product Safety Commission |
| Cranch | Cranch's United States Supreme Court Reports |
| CRF | Constitutional Rights Foundation |
| CRR | Center for Constitutional Rights |
| CRS | Congressional Research Service; Community Relations Service |
| CRT | Critical race theory |
| CSA | Community Services Administration |
| CSAP | Center for Substance Abuse Prevention |
| CSAT | Center for Substance Abuse Treatment |
| CSC | Civil Service Commission |
| CSCE | Conference on Security and Cooperation in Europe |
| CSG | Council of State Governments |
| CSO | Community Service Organization |
| CSP | Center for the Study of the Presidency |
| C-SPAN | Cable-Satellite Public Affairs Network |
| CSRS | Cooperative State Research Service |
| CSWPL | Center on Social Welfare Policy and Law |
| CTA | *Cum testamento annexo* (with the will attached) |
| Ct. Ap. D.C. | Court of Appeals, District of Columbia |
| Ct. App. No. Ireland | Court of Appeals, Northern Ireland |
| Ct. Cl. | Court of Claims, United States |
| Ct. Crim. Apps. | Court of Criminal Appeals (England) |
| CTI | Consolidated taxable income |
| Ct. of Sess., Scot. | Court of Sessions, Scotland |
| CU | Credit union |
| CUNY | City University of New York |
| Cush. | Cushing's Massachusetts Reports |
| CWA | Civil Works Administration; Clean Water Act |
| DACORB | Department of the Army Conscientious Objector Review Board |
| Dall. | Dallas's Pennsylvania and United States Reports |
| DAR | Daughters of the American Revolution |
| DARPA | Defense Advanced Research Projects Agency |
| DAVA | Defense Audiovisual Agency |
| D.C. | United States District Court; District of Columbia |
| D.C. Del. | United States District Court, Delaware |
| D.C. Mass. | United States District Court, Massachusetts |
| D.C. Md. | United States District Court, Maryland |
| D.C.N.D.Cal. | United States District Court, Northern District, California |
| D.C.N.Y. | United States District Court, New York |
| D.C.Pa. | United States District Court, Pennsylvania |
| DCS | Deputy Chiefs of Staff |
| DCZ | District of the Canal Zone |
| DDT | Dichlorodiphenyltricloro-ethane |
| DEA | Drug Enforcement Administration |
| Decl. Lond. | Declaration of London, February 26, 1909 |
| Dev. & B. | Devereux & Battle's North Carolina Reports |
| DFL | Minnesota Democratic-Farmer-Labor |
| DFTA | Department for the Aging |
| Dig. U.S. Practice in Intl. Law | Digest of U.S. Practice in International Law |
| Dist. Ct. | D.C. United States District Court, District of Columbia |
| D.L.R. | Dominion Law Reports (Canada) |
| DMCA | Digital Millennium Copyright Act |
| DNA | Deoxyribonucleic acid |
| Dnase | Deoxyribonuclease |
| DNC | Democratic National Committee |
| DOC | Department of Commerce |
| DOD | Department of Defense |
| DODEA | Department of Defense Education Activity |
| Dodson | Dodson's Reports, English Admiralty Courts |
| DOE | Department of Energy |

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| DOER | Department of Employee Relations |
| DOJ | Department of Justice |
| DOL | Department of Labor |
| DOMA | Defense of Marriage Act of 1996 |
| DOS | Disk operating system |
| DOT | Department of Transportation |
| DPT | Diphtheria, pertussis, and tetanus |
| DRI | Defense Research Institute |
| DSAA | Defense Security Assistance Agency |
| DUI | Driving under the influence; driving under intoxication |
| DVD | Digital versatile disc |
| DWI | Driving while intoxicated |
| EAHCA | Education for All Handicapped Children Act of 1975 |
| EBT | Examination before trial |
| E.coli | Escherichia coli |
| ECPA | Electronic Communications Privacy Act of 1986 |
| ECSC | Treaty of the European Coal and Steel Community |
| EDA | Economic Development Administration |
| EDF | Environmental Defense Fund |
| E.D.N.Y. | Eastern District, New York |
| EDP | Electronic data processing |
| E.D. Pa. | Eastern-District, Pennsylvania |
| EDSC | Eastern District, South Carolina |
| EDT | Eastern daylight time |
| E.D. Va. | Eastern District, Virginia |
| EEC | European Economic Community; European Economic Community Treaty |
| EEOC | Equal Employment Opportunity Commission |
| EFF | Electronic Frontier Foundation |
| EFT | Electronic funds transfer |
| Eliz. | Queen Elizabeth (Great Britain) |
| Em. App. | Temporary Emergency Court of Appeals |
| ENE | Early neutral evaluation |
| Eng. Rep. | English Reports |
| EOP | Executive Office of the President |
| EPA | Environmental Protection Agency; Equal Pay Act of 1963 |
| ERA | Equal Rights Amendment |
| ERDC | Energy Research and Development Commission |
| ERISA | Employee Retirement Income Security Act of 1974 |
| ERS | Economic Research Service |
| ERTA | Economic Recovery Tax Act of 1981 |
| ESA | Endangered Species Act of 1973 |
| ESF | Emergency support function; Economic Support Fund |
| ESRD | End-Stage Renal Disease Program |
| ETA | Employment and Training Administration |
| ETS | Environmental tobacco smoke |
| et seq. | *Et sequentes* or *et sequentia* (“and the following”) |
| EU | European Union |
| Euratom | European Atomic Energy Community |
| Eur. Ct. H.R. | European Court of Human Rights |
| Ex. | English Exchequer Reports, Welsby, Hurlstone & Gordon |
| Exch. | Exchequer Reports (Welsby, Hurlstone & Gordon) |
| Ex Com | Executive Committee of the National Security Council |
| Eximbank | Export-Import Bank of the United States |
| F. | Federal Reporter |
| F. 2d | Federal Reporter, Second Series |
| FAA | Federal Aviation Administration; Federal Arbitration Act |
| FAAA | Federal Alcohol Administration Act |
| FACE | Freedom of Access to Clinic Entrances Act of 1994 |
| FACT | Feminist Anti-Censorship Task Force |
| FAIRA | Federal Agriculture Improvement and Reform Act of 1996 |
| FAMLA | Family and Medical Leave Act of 1993 |
| Fannie Mae | Federal National Mortgage Association |
| FAO | Food and Agriculture Organization of the United Nations |
| FAR | Federal Acquisition Regulations |

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| FAS | Foreign Agricultural Service |
| FBA | Federal Bar Association |
| FBI | Federal Bureau of Investigation |
| FCA | Farm Credit Administration |
| F. Cas. | Federal Cases |
| FCC | Federal Communications Commission |
| FCIA | Foreign Credit Insurance Association |
| FCIC | Federal Crop Insurance Corporation |
| FCLAA | Federal Cigarette Labeling and Advertising Act |
| FCRA | Fair Credit Reporting Act |
| FCU | Federal credit unions |
| FCUA | Federal Credit Union Act |
| FCZ | Fishery Conservation Zone |
| FDA | Food and Drug Administration |
| FDIC | Federal Deposit Insurance Corporation |
| FDPC | Federal Data Processing Center |
| FEC | Federal Election Commission |
| FECA | Federal Election Campaign Act of 1971 |
| Fed. Cas. | Federal Cases |
| FEHA | Fair Employment and Housing Act |
| FEHBA | Federal Employees Health Benefit Act |
| FEMA | Federal Emergency Management Agency |
| FERC | Federal Energy Regulatory Commission |
| FFB | Federal Financing Bank |
| FFDC | Federal Food, Drug, and Cosmetics Act |
| FGIS | Federal Grain Inspection Service |
| FHA | Federal Housing Administration |
| FHAA | Fair Housing Amendments Act of 1998 |
| FHWA | Federal Highway Administration |
| FIA | Federal Insurance Administration |
| FIC | Federal Information Centers; Federation of Insurance Counsel |
| FICA | Federal Insurance Contributions Act |
| FIFRA | Federal Insecticide, Fungicide, and Rodenticide Act |
| FIP | Forestry Incentives Program |
| FIRREA | Financial Institutions Reform, Recovery, and Enforcement Act of 1989 |
| FISA | Foreign Intelligence Surveillance Act of 1978 |
| FISC | Foreign Intelligence Surveillance Court of Review |
| FJC | Federal Judicial Center |
| FLSA | Fair Labor Standards Act |
| FMC | Federal Maritime Commission |
| FMCS | Federal Mediation and Conciliation Service |
| FmHA | Farmers Home Administration |
| FMLA | Family and Medical Leave Act of 1993 |
| FNMA | Federal National Mortgage Association, ''Fannie Mae'' |
| F.O.B. | Free on board |
| FOIA | Freedom of Information Act |
| FOMC | Federal Open Market Committee |
| FPA | Federal Power Act of 1935 |
| FPC | Federal Power Commission |
| FPMR | Federal Property Management Regulations |
| FPRS | Federal Property Resources Service |
| FR | Federal Register |
| FRA | Federal Railroad Administration |
| FRB | Federal Reserve Board |
| FRC | Federal Radio Commission |
| F.R.D. | Federal Rules Decisions |
| FSA | Family Support Act |
| FSB | Federal'naya Sluzhba Bezopasnosti (the Federal Security Service of Russia) |
| FSLIC | Federal Savings and Loan Insurance Corporation |
| FSQS | Food Safety and Quality Service |
| FSS | Federal Supply Service |
| F. Supp. | Federal Supplement |
| FTA | U.S.-Canada Free Trade Agreement of 1988 |
| FTC | Federal Trade Commission |
| FTCA | Federal Tort Claims Act |
| FTS | Federal Telecommunications System |
| FTS2000 | Federal Telecommunications System 2000 |
| FUCA | Federal Unemployment Compensation Act of 1988 |

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| FUTA | Federal Unemployment Tax Act |
| FWPCA | Federal Water Pollution Control Act of 1948 |
| FWS | Fish and Wildlife Service |
| GAL | Guardian ad litem |
| GAO | General Accounting Office; Governmental Affairs Office |
| GAOR | General Assembly Official Records, United Nations |
| GAAP | Generally accepted accounting principles |
| GA Res. | General Assembly Resolution (United Nations) |
| GATT | General Agreement on Tariffs and Trade |
| GCA | Gun Control Act |
| Gen. Cls. Comm. | General Claims Commission, United States and Panama; General Claims United States and Mexico |
| Geo. II | King George II (Great Britain) |
| Geo. III | King George III (Great Britain) |
| GHB | Gamma-hydroxybutrate |
| GI | Government Issue |
| GID | General Intelligence Division |
| GM | General Motors |
| GNMA | Government National Mortgage Association, "Ginnie Mae" |
| GNP | Gross national product |
| GOP | Grand Old Party (Republican Party) |
| GOPAC | Grand Old Party Action Committee |
| GPA | Office of Governmental and Public Affairs |
| GPO | Government Printing Office |
| GRAS | Generally recognized as safe |
| Gr. Br., Crim. Ct. App. | Great Britain, Court of Criminal Appeals |
| GRNL | Gay Rights-National Lobby |
| GSA | General Services Administration |
| Hackworth | Green Haywood Hackworth, *Digest of International Law* (1940–1944) |
| Hay and Marriott | Great Britain. High Court of Admiralty, *Decisions in the High Court of Admiralty during the Time of Sir George Hay and of Sir James Marriott, Late Judges of That Court* (1801) |
| HBO | Home Box Office |
| HCFA | Health Care Financing Administration |
| H.Ct. | High Court |
| HDS | Office of Human Development Services |
| Hen. & M. | Hening & Munford's Virginia Reports |
| HEW | Department of Health, Education, and Welfare |
| HFCA | Health Care Financing Administration |
| HGI | Handgun Control, Incorporated |
| HHS | Department of Health and Human Services |
| Hill | Hill's New York Reports |
| HIRE | Help through Industry Retraining and Employment |
| HIV | Human immunodeficiency virus |
| H.L. | House of Lords Cases (England) |
| H. Lords | House of Lords (England) |
| HMO | Health Maintenance Organization |
| HNIS | Human Nutrition Information Service |
| Hong Kong L.R. | Hong Kong Law Reports |
| How. | Howard's United States Supreme Court Reports |
| How. St. Trials | Howell's English State Trials |
| HUAC | House Un-American Activities Committee |
| HUD | Department of Housing and Urban Development |
| Hudson, Internatl. Legis. | Manley Ottmer Hudson, ed., *International Legislation: A Collection of the Texts of Multipartite International Instruments of General Interest Beginning with the Covenant of the League of Nations* (1931) |
| Hudson, World Court Reps. | Manley Ottmer Hudson, ea., *World Court Reports* (1934– ) |
| Hun | Hun's New York Supreme Court Reports |
| Hunt's Rept. | Bert L. Hunt, *Report of the American and Panamanian General Claims Arbitration* (1934) |
| IAEA | International Atomic Energy Agency |
| IALL | International Association of Law Libraries |

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| IBA | International Bar Association |
| IBM | International Business Machines |
| ICA | Interstate Commerce Act |
| ICBM | Intercontinental ballistic missile |
| ICC | Interstate Commerce Commission; International Criminal Court |
| ICJ | International Court of Justice |
| ICM | Institute for Court Management |
| IDEA | Individuals with Disabilities Education Act of 1975 |
| IDOP | International Dolphin Conservation Program |
| IEP | Individualized educational program |
| IFC | International Finance Corporation |
| IGRA | Indian Gaming Regulatory Act of 1988 |
| IJA | Institute of Judicial Administration |
| IJC | International Joint Commission |
| ILC | International Law Commission |
| ILD | International Labor Defense |
| Ill. Dec. | Illinois Decisions |
| ILO | International Labor Organization |
| IMF | International Monetary Fund |
| INA | Immigration and Nationality Act |
| IND | Investigational new drug |
| INF Treaty | Intermediate-Range Nuclear Forces Treaty of 1987 |
| INS | Immigration and Naturalization Service |
| INTELSAT | International Telecommunications Satellite Organization |
| Interpol | International Criminal Police Organization |
| Int'l. Law Reps. | International Law Reports |
| Intl. Legal Mats. | International Legal Materials |
| IOC | International Olympic Committee |
| IPDC | International Program for the Development of Communication |
| IPO | Intellectual Property Owners |
| IPP | Independent power producer |
| IQ | Intelligence quotient |
| I.R. | Irish Reports |
| IRA | Individual retirement account; Irish Republican Army |
| IRC | Internal Revenue Code |
| IRCA | Immigration Reform and Control Act of 1986 |
| IRS | Internal Revenue Service |
| ISO | Independent service organization |
| ISP | Internet service provider |
| ISSN | International Standard Serial Numbers |
| ITA | International Trade Administration |
| ITI | Information Technology Integration |
| ITO | International Trade Organization |
| ITS | Information Technology Service |
| ITT | International Telephone and Telegraph Corporation |
| ITU | International Telecommunication Union |
| IUD | Intrauterine device |
| IWC | International Whaling Commission |
| IWW | Industrial Workers of the World |
| JAGC | Judge Advocate General's Corps |
| JCS | Joint Chiefs of Staff |
| JDL | Jewish Defense League |
| JNOV | Judgment *non obstante veredicto* ("judgment nothing to recommend it" or "judgment notwithstanding the verdict") |
| JOBS | Jobs Opportunity and Basic Skills |
| John. Ch. | Johnson's New York Chancery Reports |
| Johns. | Johnson's Reports (New York) |
| JP | Justice of the peace |
| K.B. | King's Bench Reports (England) |
| KFC | Kentucky Fried Chicken |
| KGB | Komitet Gosudarstvennoi Bezopasnosti (the State Security Committee for countries in the former Soviet Union) |
| KKK | Ku Klux Klan |
| KMT | Kuomintang (Chinese, "national people's party") |
| LAD | Law Against Discrimination |

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| LAPD | Los Angeles Police Department |
| LC | Library of Congress |
| LCHA | Longshoremen's and Harbor Workers Compensation Act of 1927 |
| LD50 | Lethal dose 50 |
| LDEF | Legal Defense and Education Fund (NOW) |
| LDF | Legal Defense Fund, Legal Defense and Educational Fund of the NAACP |
| LEAA | Law Enforcement Assistance Administration |
| L.Ed. | Lawyers' Edition Supreme Court Reports |
| LI | Letter of interpretation |
| LLC | Limited Liability Company |
| LLP | Limited Liability Partnership |
| LMSA | Labor-Management Services Administration |
| LNTS | League of Nations Treaty Series |
| Lofft's Rep. | Lofft's English King's Bench Reports |
| L.R. | Law Reports (English) |
| LSAC | Law School Admission Council |
| LSAS | Law School Admission Service |
| LSAT | Law School Aptitude Test |
| LSC | Legal Services Corporation; Legal Services for Children |
| LSD | Lysergic acid diethylamide |
| LSDAS | Law School Data Assembly Service |
| LTBT | Limited Test Ban Treaty |
| LTC | Long Term Care |
| MAD | Mutual assured destruction |
| MADD | Mothers against Drunk Driving |
| MALDEF | Mexican American Legal Defense and Educational Fund |
| Malloy | William M. Malloy, ed., *Treaties, Conventions International Acts, Protocols, and Agreements between the United States of America and Other Powers* (1910–1938) |
| Martens | Georg Friedrich von Martens, ea., *Noveau recueil général de traités et autres actes relatifs aux rapports de droit international* (Series I, 20 vols. [1843–1875]; Series II, 35 vols. [1876–1908]; Series III [1909– ]) |
| Mass. | Massachusetts Reports |
| MCC | Metropolitan Correctional Center |
| MCCA | Medicare Catastrophic Coverage Act of 1988 |
| MCH | Maternal and Child Health Bureau |
| MCRA | Medical Care Recovery Act of 1962 |
| MDA | Medical Devices Amendments of 1976 |
| Md. App. | Maryland, Appeal Cases |
| M.D. Ga. | Middle District, Georgia |
| Mercy | Movement Ensuring the Right to Choose for Yourself |
| Metc. | Metcalf's Massachusetts Reports |
| MFDP | Mississippi Freedom Democratic party |
| MGT | Management |
| MHSS | Military Health Services System |
| Miller | David Hunter Miller, ea., *Treaties and Other International Acts of the United States of America* (1931–1948) |
| Minn. | Minnesota Reports |
| MINS | Minors in need of supervision |
| MIRV | Multiple independently targetable reentry vehicle |
| MIRVed ICBM | Multiple independently targetable reentry vehicled intercontinental ballistic missile |
| Misc. | Miscellaneous Reports, New York |
| Mixed Claims Comm., Report of Decs | Mixed Claims Commission, United States and Germany, Report of Decisions |
| M.J. | Military Justice Reporter |
| MLAP | Migrant Legal Action Program |
| MLB | Major League Baseball |
| MLDP | Mississippi Loyalist Democratic Party |
| MMI | Moslem Mosque, Incorporated |
| MMPA | Marine Mammal Protection Act of 1972 |
| Mo. | Missouri Reports |
| MOD | Masters of Deception |
| Mod. | Modern Reports, English King's Bench, etc. |

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| Moore, Dig. Intl. Law | John Bassett Moore, *A Digest of International Law,* 8 vols. (1906) |
| Moore, Intl. Arbs. | John Bassett Moore, *History and Digest of the International Arbitrations to Which United States Has Been a Party,* 6 vols. (1898) |
| Morison | William Maxwell Morison, *The Scots Revised Report: Morison's Dictionary of Decisions* (1908–09) |
| M.P. | Member of Parliament |
| MP3 | MPEG Audio Layer 3 |
| MPAA | Motion Picture Association of America |
| MPAS | Michigan Protection and Advocacy Service |
| MPEG | Motion Picture Experts Group |
| mpg | Miles per gallon |
| MPPDA | Motion Picture Producers and Distributors of America |
| MPRSA | Marine Protection, Research, and Sanctuaries Act of 1972 |
| M.R. | Master of the Rolls |
| MS-DOS | Microsoft Disk Operating System |
| MSHA | Mine Safety and Health Administration |
| MSPB | Merit Systems Protection Board |
| MSSA | Military Selective Service Act |
| N/A | Not Available |
| NAACP | National Association for the Advancement of Colored People |
| NAAQS | National Ambient Air Quality Standards |
| NAB | National Association of Broadcasters |
| NABSW | National Association of Black Social Workers |
| NACDL | National Association of Criminal Defense Lawyers |
| NAFTA | North American Free Trade Agreement of 1993 |
| NAGHSR | National Association of Governors' Highway Safety Representatives |
| NALA | National Association of Legal Assistants |
| NAM | National Association of Manufacturers |
| NAR | National Association of Realtors |
| NARAL | National Abortion and Reproductive Rights Action League |
| NARF | Native American Rights Fund |
| NARS | National Archives and Record Service |
| NASA | National Aeronautics and Space Administration |
| NASD | National Association of Securities Dealers |
| NATO | North Atlantic Treaty Organization |
| NAVINFO | Navy Information Offices |
| NAWSA | National American Woman's Suffrage Association |
| NBA | National Bar Association; National Basketball Association |
| NBC | National Broadcasting Company |
| NBLSA | National Black Law Student Association |
| NBS | National Bureau of Standards |
| NCA | Noise Control Act; National Command Authorities |
| NCAA | National Collegiate Athletic Association |
| NCAC | National Coalition against Censorship |
| NCCB | National Consumer Cooperative Bank |
| NCE | Northwest Community Exchange |
| NCF | National Chamber Foundation |
| NCIP | National Crime Insurance Program |
| NCJA | National Criminal Justice Association |
| NCLB | National Civil Liberties Bureau |
| NCP | National contingency plan |
| NCSC | National Center for State Courts |
| NCUA | National Credit Union Administration |
| NDA | New drug application |
| N.D. Ill. | Northern District, Illinois |
| NDU | National Defense University |
| N.D. Wash. | Northern District, Washington |
| N.E. | North Eastern Reporter |
| N.E. 2d | North Eastern Reporter, Second Series |
| NEA | National Endowment for the Arts; National Education Association |

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| NEH | National Endowment for the Humanities |
| NEPA | National Environmental Protection Act; National Endowment Policy Act |
| NET Act | No Electronic Theft Act |
| NFIB | National Federation of Independent Businesses |
| NFIP | National Flood Insurance Program |
| NFL | National Football League |
| NFPA | National Federation of Paralegal Associations |
| NGLTF | National Gay and Lesbian Task Force |
| NHL | National Hockey League |
| NHRA | Nursing Home Reform Act of 1987 |
| NHTSA | National Highway Traffic Safety Administration |
| Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| NIEO | New International Economic Order |
| NIGC | National Indian Gaming Commission |
| NIH | National Institutes of Health |
| NIJ | National Institute of Justice |
| NIRA | National Industrial Recovery Act of 1933; National Industrial Recovery Administration |
| NIST | National Institute of Standards and Technology |
| N.J. | New Jersey Reports |
| N.J. Super. | New Jersey Superior Court Reports |
| NLEA | Nutrition Labeling and Education Act of 1990 |
| NLRA | National Labor Relations Act |
| NLRB | National Labor Relations Board |
| NMFS | National Marine Fisheries Service |
| No. | Number |
| NOAA | National Oceanic and Atmospheric Administration |
| NOC | National Olympic Committee |
| NOI | Nation of Islam |
| NOL | Net operating loss |
| NORML | National Organization for the Reform of Marijuana Laws |
| NOW | National Organization for Women |
| NOW LDEF | National Organization for Women Legal Defense and Education Fund |
| NOW/PAC | National Organization for Women Political Action Committee |
| NPDES | National Pollutant Discharge Elimination System |
| NPL | National priorities list |
| NPR | National Public Radio |
| NPT | Nuclear Non-Proliferation Treaty of 1970 |
| NRA | National Rifle Association; National Recovery Act |
| NRC | Nuclear Regulatory Commission |
| NRLC | National Right to Life Committee |
| NRTA | National Retired Teachers Association |
| NSA | National Security Agency |
| NSC | National Security Council |
| NSCLC | National Senior Citizens Law Center |
| NSF | National Science Foundation |
| NSFNET | National Science Foundation Network |
| NSI | Network Solutions, Inc. |
| NTIA | National Telecommunications and Information Administration |
| NTID | National Technical Institute for the Deaf |
| NTIS | National Technical Information Service |
| NTS | Naval Telecommunications System |
| NTSB | National Transportation Safety Board |
| NVRA | National Voter Registration Act |
| N.W. | North Western Reporter |
| N.W. 2d | North Western Reporter, Second Series |
| NWSA | National Woman Suffrage Association |
| N.Y. | New York Court of Appeals Reports |
| N.Y. 2d | New York Court of Appeals Reports, Second Series |
| N.Y.S. | New York Supplement Reporter |

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| N.Y.S. 2d | New York Supplement Reporter, Second Series |
| NYSE | New York Stock Exchange |
| NYSLA | New York State Liquor Authority |
| N.Y. Sup. | New York Supreme Court Reports |
| NYU | New York University |
| OAAU | Organization of Afro American Unity |
| OAP | Office of Administrative Procedure |
| OAS | Organization of American States |
| OASDI | Old-age, Survivors, and Disability Insurance Benefits |
| OASHDS | Office of the Assistant Secretary for Human Development Services |
| OCC | Office of Comptroller of the Currency |
| OCED | Office of Comprehensive Employment Development |
| OCHAMPUS | Office of Civilian Health and Medical Program of the Uniformed Services |
| OCSE | Office of Child Support Enforcement |
| OEA | Organización de los Estados Americanos |
| OEM | Original Equipment Manufacturer |
| OFCCP | Office of Federal Contract Compliance Programs |
| OFPP | Office of Federal Procurement Policy |
| OIC | Office of the Independent Counsel |
| OICD | Office of International Cooperation and Development |
| OIG | Office of the Inspector General |
| OJARS | Office of Justice Assistance, Research, and Statistics |
| OMB | Office of Management and Budget |
| OMPC | Office of Management, Planning, and Communications |
| ONP | Office of National Programs |
| OPD | Office of Policy Development |
| OPEC | Organization of Petroleum Exporting Countries |
| OPIC | Overseas Private Investment Corporation |
| Ops. Atts. Gen. | Opinions of the Attorneys-General of the United States |
| Ops. Comms. | Opinions of the Commissioners |
| OPSP | Office of Product Standards Policy |
| O.R. | Ontario Reports |
| OR | Official Records |
| OSHA | Occupational Safety and Health Act |
| OSHRC | Occupational Safety and Health Review Commission |
| OSM | Office of Surface Mining |
| OSS | Office of Strategic Services |
| OST | Office of the Secretary |
| OT | Office of Transportation |
| OTA | Office of Technology Assessment |
| OTC | Over-the-counter |
| OTS | Office of Thrift Supervisors |
| OUI | Operating under the influence |
| OVCI | Offshore Voluntary Compliance Initiative |
| OWBPA | Older Workers Benefit Protection Act |
| OWRT | Office of Water Research and Technology |
| P. | Pacific Reporter |
| P. 2d | Pacific Reporter, Second Series |
| PAC | Political action committee |
| Pa. Oyer and Terminer | Pennsylvania Oyer and Terminer Reports |
| PATCO | Professional Air Traffic Controllers Organization |
| PBGC | Pension Benefit Guaranty Corporation |
| PBS | Public Broadcasting Service; Public Buildings Service |
| P.C. | Privy Council (English Law Reports) |
| PC | Personal computer; politically correct |
| PCBs | Polychlorinated biphenyls |
| PCIJ | Permanent Court of International Justice |
| | Series A-Judgments and Orders (1922–30) |
| | Series B-Advisory Opinions (1922–30) |
| | Series A/B-Judgments, Orders, and Advisory Opinions (1931–40) |

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| PCIJ (cont'd.) | Series C-Pleadings, Oral Statements, and Documents relating to Judgments and Advisory Opinions (1923–42) |
| | Series D-Acts and Documents concerning the Organization of the World Court (1922 –47) |
| | Series E-Annual Reports (1925–45) |
| PCP | Phencyclidine |
| P.D. | Probate Division, English Law Reports (1876–1890) |
| PDA | Pregnancy Discrimination Act of 1978 |
| PD & R | Policy Development and Research |
| Pepco | Potomac Electric Power Company |
| Perm. Ct. of Arb. | Permanent Court of Arbitration |
| PES | Post-Enumeration Survey |
| Pet. | Peters' United States Supreme Court Reports |
| PETA | People for the Ethical Treatment of Animals |
| PGA | Professional Golfers Association |
| PGM | Program |
| PHA | Public Housing Agency |
| Phila. Ct. of Oyer and Terminer | Philadelphia Court of Oyer and Terminer |
| PhRMA | Pharmaceutical Research and Manufacturers of America |
| PHS | Public Health Service |
| PIC | Private Industry Council |
| PICJ | Permanent International Court of Justice |
| Pick. | Pickering's Massachusetts Reports |
| PIK | Payment in Kind |
| PINS | Persons in need of supervision |
| PIRG | Public Interest Research Group |
| P.L. | Public Laws |
| PLAN | Pro-Life Action Network |
| PLC | Plaintiffs' Legal Committee |
| PLE | Product liability expenses |
| PLI | Practicing Law Institute |
| PLL | Product liability loss |
| PLLP | Professional Limited Liability Partnership |
| PLO | Palestine Liberation Organization |
| PLRA | Prison Litigation Reform Act of 1995 |
| PNET | Peaceful Nuclear Explosions Treaty |
| PONY | Prostitutes of New York |
| POW-MIA | Prisoner of war-missing in action |
| Pratt | Frederic Thomas Pratt, *Law of Contraband of War, with a Selection of Cases from Papers of the Right Honourable Sir George Lee* (1856) |
| PRIDE | Prostitution to Independence, Dignity, and Equality |
| Proc. | Proceedings |
| PRP | Potentially responsible party |
| PSRO | Professional Standards Review Organization |
| PTO | Patents and Trademark Office |
| PURPA | Public Utilities Regulatory Policies Act |
| PUSH | People United to Serve Humanity |
| PUSH-Excel | PUSH for Excellence |
| PWA | Public Works Administration |
| PWSA | Ports and Waterways Safety Act of 1972 |
| Q.B. | Queen's Bench (England) |
| QTIP | Qualified Terminable Interest Property |
| Ralston's Rept. | Jackson Harvey Ralston, ed., *Venezuelan Arbitrations of 1903* (1904) |
| RC | Regional Commissioner |
| RCRA | Resource Conservation and Recovery Act |
| RCWP | Rural Clean Water Program |
| RDA | Rural Development Administration |
| REA | Rural Electrification Administration |
| Rec. des Decs. des Trib. Arb. Mixtes | G. Gidel, ed., *Recueil des décisions des tribunaux arbitraux mixtes, institués par les traités de paix* (1922–30) |
| Redmond | Vol. 3 of Charles I. Bevans, *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled by C. F. Redmond) (1969) |
| RESPA | Real Estate Settlement Procedure Act of 1974 |
| RFC | Reconstruction Finance Corporation |

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| RFRA | Religious Freedom Restoration Act of 1993 |
| RIAA | Recording Industry Association of America |
| RICO | Racketeer Influenced and Corrupt Organizations |
| RLUIPA | Religious Land Use and Institutionalized Persons Act |
| RNC | Republican National Committee |
| Roscoe | Edward Stanley Roscoe, ed., *Reports of Prize Cases Determined in the High Court Admiralty before the Lords Commissioners of Appeals in Prize Causes and before the judicial Committee of the Privy Council from 1745 to 1859* (1905) |
| ROTC | Reserve Officers' Training Corps |
| RPP | Representative Payee Program |
| R.S. | Revised Statutes |
| RTC | Resolution Trust Corp. |
| RUDs | Reservations, understandings, and declarations |
| Ryan White CARE Act | Ryan White Comprehensive AIDS Research Emergency Act of 1990 |
| SAC | Strategic Air Command |
| SACB | Subversive Activities Control Board |
| SADD | Students against Drunk Driving |
| SAF | Student Activities Fund |
| SAIF | Savings Association Insurance Fund |
| SALT | Strategic Arms Limitation Talks |
| SALT I | Strategic Arms Limitation Talks of 1969–72 |
| SAMHSA | Substance Abuse and Mental Health Services Administration |
| Sandf. | Sandford's New York Superior Court Reports |
| S and L | Savings and loan |
| SARA | Superfund Amendment and Reauthorization Act |
| SAT | Scholastic Aptitude Test |
| Sawy. | Sawyer's United States Circuit Court Reports |
| SBA | Small Business Administration |
| SBI | Small Business Institute |
| SCCC | South Central Correctional Center |
| SCLC | Southern Christian Leadership Conference |
| Scott's Repts. | James Brown Scott, ed., *The Hague Court Reports,* 2 vols. (1916–32) |
| SCS | Soil Conservation Service; Social Conservative Service |
| SCSEP | Senior Community Service Employment Program |
| S.Ct. | Supreme Court Reporter |
| S.D. Cal. | Southern District, California |
| S.D. Fla. | Southern District, Florida |
| S.D. Ga. | Southern District, Georgia |
| SDI | Strategic Defense Initiative |
| S.D. Me. | Southern District, Maine |
| S.D.N.Y. | Southern District, New York |
| SDS | Students for a Democratic Society |
| S.E. | South Eastern Reporter |
| S.E. 2d | South Eastern Reporter, Second Series |
| SEA | Science and Education Administration |
| SEATO | Southeast Asia Treaty Organization |
| SEC | Securities and Exchange Commission |
| Sec. | Section |
| SEEK | Search for Elevation, Education and Knowledge |
| SEOO | State Economic Opportunity Office |
| SEP | Simplified employee pension plan |
| Ser. | Series |
| Sess. | Session |
| SGLI | Servicemen's Group Life Insurance |
| SIP | State implementation plan |
| SLA | Symbionese Liberation Army |
| SLAPPs | Strategic Lawsuits Against Public Participation |
| SLBM | Submarine-launched ballistic missile |
| SNCC | Student Nonviolent Coordinating Committee |
| So. | Southern Reporter |
| So. 2d | Southern Reporter, Second Series |
| SPA | Software Publisher's Association |
| Spec. Sess. | Special Session |
| SPLC | Southern Poverty Law Center |
| SRA | Sentencing Reform Act of 1984 |

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|---|---|
| SS | *Schutzstaffel* (German, "Protection Echelon") |
| SSA | Social Security Administration |
| SSI | Supplemental Security Income |
| START I | Strategic Arms Reduction Treaty of 1991 |
| START II | Strategic Arms Reduction Treaty of 1993 |
| Stat. | United States Statutes at Large |
| STS | Space Transportation Systems |
| St. Tr. | State Trials, English |
| STURAA | Surface Transportation and Uniform Relocation Assistance Act of 1987 |
| Sup. Ct. of Justice, Mexico | Supreme Court of Justice, Mexico |
| Supp. | Supplement |
| S.W. | South Western Reporter |
| S.W. 2d | South Western Reporter, Second Series |
| SWAPO | South-West Africa People's Organization |
| SWAT | Special Weapons and Tactics |
| SWP | Socialist Workers Party |
| TDP | Trade and Development Program |
| Tex. Sup. | Texas Supreme Court Reports |
| THAAD | Theater High-Altitude Area Defense System |
| THC | Tetrahydrocannabinol |
| TI | Tobacco Institute |
| TIA | Trust Indenture Act of 1939 |
| TIAS | Treaties and Other International Acts Series (United States) |
| TNT | Trinitrotoluene |
| TOP | Targeted Outreach Program |
| TPUS | Transportation and Public Utilities Service |
| TQM | Total Quality Management |
| Tripartite Claims Comm., Decs. and Ops. | Tripartite Claims Commission (United States, Austria, and Hungary), Decisions and Opinions |
| TRI-TAC | Joint Tactical Communications |
| TRO | Temporary restraining order |
| TS | Treaty Series, United States |
| TSCA | Toxic Substance Control Act |
| TSDs | Transporters, storers, and disposers |
| TSU | Texas Southern University |
| TTBT | Threshold Test Ban Treaty |
| TV | Television |
| TVA | Tennessee Valley Authority |
| TWA | Trans World Airlines |
| UAW | United Auto Workers; United Automobile, Aerospace, and Agricultural Implements Workers of America |
| U.C.C. | Uniform Commercial Code; Universal Copyright Convention |
| U.C.C.C. | Uniform Consumer Credit Code |
| UCCJA | Uniform Child Custody Jurisdiction Act |
| UCMJ | Uniform Code of Military Justice |
| UCPP | Urban Crime Prevention Program |
| UCS | United Counseling Service |
| UDC | United Daughters of the Confederacy |
| UFW | United Farm Workers |
| UHF | Ultrahigh frequency |
| UIFSA | Uniform Interstate Family Support Act |
| UIS | Unemployment Insurance Service |
| UMDA | Uniform Marriage and Divorce Act |
| UMTA | Urban Mass Transportation Administration |
| U.N. | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCTAD | United Nations Conference on Trade and Development |
| UN Doc. | United Nations Documents |
| UNDP | United Nations Development Program |
| UNEF | United Nations Emergency Force |
| UNESCO | United Nations Educational, Scientific, and Cultural Organization |
| UNICEF | United Nations Children's Fund (formerly United Nations International Children's Emergency Fund) |
| UNIDO | United Nations Industrial and Development Organization |
| Unif. L. Ann. | Uniform Laws Annotated |
| UN Repts. Intl. Arb. Awards | United Nations Reports of International Arbitral Awards |

| | |
|---|---|
| UNTS | United Nations Treaty Series |
| UPI | United Press International |
| URESA | Uniform Reciprocal Enforcement of Support Act |
| U.S. | United States Reports |
| U.S.A. | United States of America |
| USAF | United States Air Force |
| USA PATRIOT Act | Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act |
| U.S. App. D.C. | United States Court of Appeals for the District of Columbia |
| U.S.C. | United States Code; University of Southern California |
| U.S.C.A. | United States Code Annotated |
| U.S.C.C.A.N. | United States Code Congressional and Administrative News |
| USCMA | United States Court of Military Appeals |
| USDA | U.S. Department of Agriculture |
| USES | United States Employment Service |
| USF | U.S. Forestry Service |
| USFA | United States Fire Administration |
| USGA | United States Golf Association |
| USICA | International Communication Agency, United States |
| USMS | U.S. Marshals Service |
| USOC | U.S. Olympic Committee |
| USSC | U.S. Sentencing Commission |
| USSG | United States Sentencing Guidelines |
| U.S.S.R. | Union of Soviet Socialist Republics |
| UST | United States Treaties |
| USTS | United States Travel Service |
| v. | *Versus* |
| VA | Veterans Administration |
| VAR | Veterans Affairs and Rehabilitation Commission |
| VAWA | Violence against Women Act |
| VFW | Veterans of Foreign Wars |
| VGLI | Veterans Group Life Insurance |
| Vict. | Queen Victoria (Great Britain) |
| VIN | Vehicle identification number |
| VISTA | Volunteers in Service to America |
| VJRA | Veterans Judicial Review Act of 1988 |
| V.L.A. | Volunteer Lawyers for the Arts |
| VMI | Virginia Military Institute |
| VMLI | Veterans Mortgage Life Insurance |
| VOCAL | Victims of Child Abuse Laws |
| VRA | Voting Rights Act |
| WAC | Women's Army Corps |
| Wall. | Wallace's United States Supreme Court Reports |
| Wash. 2d | Washington Reports, Second Series |
| WAVES | Women Accepted for Volunteer Service |
| WCTU | Women's Christian Temperance Union |
| W.D. Wash. | Western District, Washington |
| W.D. Wis. | Western District, Wisconsin |
| WEAL | *West's Encyclopedia of American Law*, Women's Equity Action League |
| Wend. | Wendell's New York Reports |
| WFSE | Washington Federation of State Employees |
| Wheat. | Wheaton's United States Supreme Court Reports |
| Wheel. Cr. Cases | Wheeler's New York Criminal Cases |
| WHISPER | Women Hurt in Systems of Prostitution Engaged in Revolt |
| Whiteman | Marjorie Millace Whiteman, *Digest of International Law*, 15 vols. (1963–73) |
| WHO | World Health Organization |
| WIC | Women, Infants, and Children program |
| Will. and Mar. | King William and Queen Mary (Great Britain) |
| WIN | WESTLAW Is Natural; Whip Inflation Now; Work Incentive Program |
| WIPO | World Intellectual Property Organization |
| WIU | Workers' Industrial Union |
| W.L.R. | Weekly Law Reports, England |
| WPA | Works Progress Administration |
| WPPDA | Welfare and Pension Plans Disclosure Act |

| | |
|---|---|
| WTO | World Trade Organization |
| WWI | World War I |
| WWII | World War II |
| Yates Sel. Cas. | Yates's New York Select Cases |
| YMCA | Young Men's Christian Association |
| YWCA | Young Women's Christian Association |

# WEST'S ENCYCLOPEDIA *of* AMERICAN LAW

2ND EDITION

# How to Use This Book

❚1❚ Article Title

❚2❚ Definition in italics with Latin translation provided

❚3❚ First-level subhead

❚4❚ Timeline for subject of biography, including general historical events and life events

❚5❚ Sidebar expands upon an issue addressed briefly in the article

❚6❚ Quotation from subject of biography

❚7❚ Biography of contributor to American law

❚8❚ Internal cross-reference to entry within WEAL

❚9❚ In Focus article examines a controversial or complex aspect of the article topic

❚10❚ Cross-references at end of article

❚11❚ Full cite for case

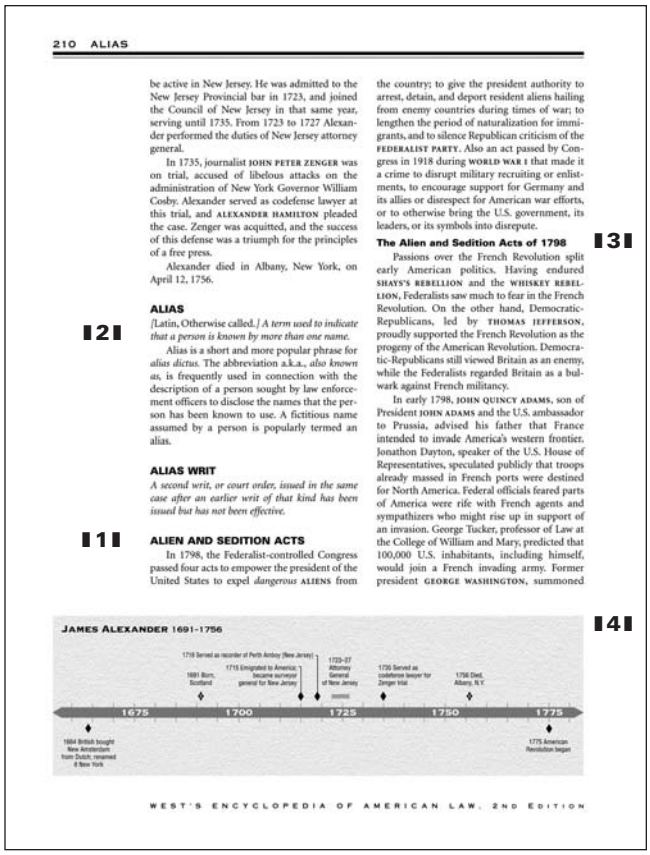



be active in New Jersey. He was admitted to the New Jersey Provincial bar in 1723, and joined the Council of New Jersey in that same year, serving until 1735. From 1723 to 1727 Alexander performed the duties of New Jersey attorney general.

In 1735, journalist JOHN PETER ZENGER was on trial, accused of libelous attacks on the administration of New York Governor William Cosby. Alexander served as codefense lawyer at this trial, and ALEXANDER HAMILTON pleaded the case. Zenger was acquitted, and the success of this defense was a triumph for the principles of a free press.

Alexander died in Albany, New York, on April 12, 1756.

**ALIAS**

❚2❚ *[Latin, Otherwise called.] A term used to indicate that a person is known by more than one name.*

Alias is a short and more popular phrase for *alias dictus.* The abbreviation a.k.a., *also known as,* is frequently used in connection with the description of a person sought by law enforcement officers to disclose the names that the person has been known to use. A fictitious name assumed by a person is popularly termed an alias.

**ALIAS WRIT**

*A second writ, or court order, issued in the same case after an earlier writ of that kind has been issued but has not been effective.*

❚1❚ **ALIEN AND SEDITION ACTS**

In 1798, the Federalist-controlled Congress passed four acts to empower the president of the United States to expel *dangerous* ALIENS from the country; to give the president authority to arrest, detain, and deport resident aliens hailing from enemy countries during times of war; to lengthen the period of naturalization for immigrants, and to silence Republican criticism of the FEDERALIST PARTY. Also an act passed by Congress in 1918 during WORLD WAR I that made it a crime to disrupt military recruiting or enlistments, to encourage support for Germany and its allies or disrespect for American war efforts, or to otherwise bring the U.S. government, its leaders, or its symbols into disrepute.

❚3❚ **The Alien and Sedition Acts of 1798**

Passions over the French Revolution split early American politics. Having endured SHAYS'S REBELLION and the WHISKEY REBELLION, Federalists saw much to fear in the French Revolution. On the other hand, Democratic-Republicans, led by THOMAS JEFFERSON, proudly supported the French Revolution as the progeny of the American Revolution. Democratic-Republicans still viewed Britain as an enemy, while the Federalists regarded Britain as a bulwark against French militancy.

In early 1798, JOHN QUINCY ADAMS, son of President JOHN ADAMS and the U.S. ambassador to Prussia, advised his father that France intended to invade America's western frontier. Jonathon Dayton, speaker of the U.S. House of Representatives, speculated publicly that troops already massed in French ports were destined for North America. Federal officials feared parts of America were rife with French agents and sympathizers who might rise up in support of an invasion. George Tucker, professor of Law at the College of William and Mary, predicted that 100,000 U.S. inhabitants, including himself, would join a French invading army. Former president GEORGE WASHINGTON, summoned

❚4❚

❚5❚

## The First Payments of Social Security

After the enactment of the Social Security Act of 1935 (42 U.S.C.A. § 301 et seq.) and the creation of the Social Security Administration (SSA), the federal government had a short time to establish the program before beginning to pay benefits. Monthly benefits were to begin in 1940. The period from 1937 to 1940 was to be used both to build up the trust funds and to provide a minimum period for participation for persons to qualify for monthly benefits.

From 1937 until 1940, however, Social Security paid benefits in the form of a single, lump-sum payment. The purpose of these one-time payments was to provide some compensation to people who contributed to the program but would not participate long enough to be vested for monthly benefits.

The first applicant for a lump-sum benefit was Ernest Ackerman, a Cleveland motorman who retired one day after the Social Security Program began. During his one day of participation in the program, five cents was withheld from Ackerman's pay for Social Security, and upon retiring, he received a lump-sum payment of seventeen cents.

Payments of monthly benefits began in January 1940. On January 31, 1940, the first monthly retirement check was issued to Ida May Fuller of Ludlow, Vermont, in the amount of $22.54. Fuller died in January 1975 at the age of one hundred. During her thirty-five years as a beneficiary, she received more than $20,000 in benefits.

tions to Social Security. There is no financial need requirement to be satisfied. Once a worker qualifies for protection, his family is also entitled to protection. The entire program is geared toward helping families as a matter of social policy.

Two large funds of money are held in trust to pay benefits earned by people under OASDI: the Old Age and Survivors Trust Fund and the Disability Insurance Trust Fund. As workers and employers make payroll contributions to these funds, money is paid out in benefits to people currently qualified to receive monthly checks.

The OASDI program is funded by payroll taxes levied on employees and their employers and on the self-employed. The tax is imposed upon the employee's taxable income, up to a maximum taxable amount, with the employer contributing an equal amount. The self-employed person contributes twice the amount levied on an employee. In 2003 the rate was 6.2 percent, levied on earned income up to a maximum of $87,000.

**Old Age Benefits** A person becomes eligible for Social Security old age benefits by working a minimum number of calendar quarters. The number of quarters required for full insurance increases with the worker's age. Forty quarters is the maximum requirement. The individual is credited for income up to the maximum amount of money covered by Social Security for those years. This amount is adjusted to reflect the impact of inflation on normal earnings and ensure that a worker who pays increasing Social Security contributions during his or her work life will receive retirement benefits that keep pace with inflation.

Persons born before 1950 can retire at age 65 with full benefits based on their average income during their working years. For those born between 1950 and 1960, the retirement age for full benefits has increased to age 66. Persons born in 1960 or later will not receive full retirement benefits until age 67. Any person, however, may retire at age 62 and receive less than full benefits. At age 65, a worker's spouse who has not contributed to Social Security receives 50 percent of the amount paid to the worker.

Since 1975 Social Security benefits have increased annually to offset the corrosive effects of inflation on fixed incomes. These increases, known as cost of living allowances (COLAs), are based on the annual increase in consumer prices. Allowing benefits to increase automatically ended the need for special acts of Congress, but it has also steadily increased the cost of the Social Security Program.

have the same inheritance rights as other children. The ruling was believed to be the first on the controversial issue by any state supreme court.

Also in January 2002, Marshall addressed the Massachusetts Bar Association Conference, where she called for "a revolution in the administration of justice" stating that the court system needed to improve its management system as well as its staffing and budget controls. In March 2002, her discussion of the court system's problems were amplified in a 52-page report that was published by a blue-ribbon panel appointed by Marshall.

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**16**

*THE GOVERNMENT [THAT THE FRAMERS OF THE CONSTITUTION] DEVISED REQUIRED SEVERAL AMENDMENTS, A CIVIL WAR, AND MOMENTOUS SOCIAL TRANSFORMATION TO ATTAIN THE SYSTEM OF CONSTITUTIONAL GOVERNMENT, AND ITS RESPECT FOR THE INDIVIDUAL FREEDOMS AND HUMAN RIGHTS, THAT WE HOLD AS FUNDAMENTAL TODAY.*
*THURGOOD MARSHALL*

## MARSHALL PLAN

After **WORLD WAR II**, Europe was devastated and urgently needed an organized plan for reconstruction and economic and technical aid. The Marshall Plan was initiated in 1947 to meet this need.

The originator of the plan, U.S. Secretary of State George C. Marshall, introduced it in a speech at Harvard University on June 5, 1947. He pointed out two basic reasons for providing aid to Europe: the United States sought the reestablishment of the European countries as independent nations capable of conducting valuable trade with the United States; and the threat of a Communist takeover was more prevalent in countries that were suffering economic depression.

In 1947 a preliminary conference to discuss the terms of the program convened in Paris. The Soviet Union was invited to attend but subsequently withdrew from the program, as did other Soviet countries.

Sixteen European countries eventually participated, and, in July 1947, the Committee for European Economic Cooperation was established to allow representatives from member countries to draft a report that listed their requirements for food, supplies, and technical assistance for a four-year period.

The Committee for European Economic Cooperation subsequently became the Organization of European Economic Cooperation, an expanded and permanent organization that was responsible for submitting petitions for aid. In 1948, Congress passed the Economic Cooperation Act (62 Stat. 137), establishing funds for the Marshall Plan to be administered under the Economic Cooperation Administration, which was directed by Paul G. Hoffman.

Between 1948 and 1952, the sixteen-member countries received more than $13 billion dollars in aid under the Marshall Plan. The plan was generally regarded as a success that led to industrial and agricultural production, while stifling the Communist movement. The plan was not without its critics, however, and many Europeans believed the **COLD WAR** hostilities between the Soviet nations and the free world were aggravated by it.

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## ◊ MARSHALL, THURGOOD

Thurgood Marshall, the first African American to serve on the U.S. Supreme Court, saw law as a catalyst for social change. For nearly 60 years, as both a lawyer and a jurist, Marshall worked to dismantle the system of **SEGREGATION** and improve the legal and social position of minorities.

Marshall was born July 2, 1908, in Baltimore, the son of a Pullman porter and a schoolteacher. He was a graduate of Lincoln University, a small, all-black college in Pennsylvania, and Howard University Law School in Washington, D.C. At Howard, Marshall excelled under the guidance of Vice Dean **CHARLES HAMILTON HOUSTON**, the first African American to win a case before the U.S. Supreme Court. Houston encouraged his students to become not just lawyers but "social engineers" who could use the legal system to improve society. Marshall graduated first in his law class in 1933.

Marshall's attendance at predominantly black Howard University illustrates the barriers faced by African Americans during the early twentieth century. Although Marshall wished to attend law school at the University of Maryland (a public institution in his home town of Baltimore), he was prohibited by law from doing so because of his race. This injustice helped set Marshall on a course of opposing all forms of official segregation that denied equal opportunities to African Americans.

After law school, Marshall set up a practice in Baltimore, representing indigent clients in civil rights cases. In 1936, his mentor Houston offered him a position with the National Association for the Advancement of Colored People (**NAACP**),





and in 1940, Marshall became director of the **NAACP LEGAL DEFENSE AND EDUCATIONAL FUND**, a position he held until 1961. Determined to eliminate segregation, Marshall coordinated a nationwide campaign to integrate higher education. He filed several successful lawsuits against public graduate and professional schools that refused to accept African-American students. These suits paved the way for similar cases at the high school and elementary school levels. Marshall also journeyed throughout the deep South, traveling fifty thousand miles a year to fight **JIM CROW LAWS** (a series of laws that provided for racial segregation in the South) and to represent criminal defendants.

Marshall argued 32 cases before the U.S. Supreme Court and won 29 of them. No doubt his most famous and far-reaching triumph before the High Court was **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). In that case, the father of African-American student Linda Brown sued the school board of Topeka, Kansas, over its segregation policy. Brown was required by law to attend an all African-American school several blocks from her home even though an all white public school was located in her own neighborhood. Under Kansas law, cities of more than 15,000 people, such as Topeka, could choose to operate segregated schools. Marshall argued that these segregated schools, defended by officials as "separate but equal," were unconstitutional.

**18**

The **SEPARATE-BUT-EQUAL** doctrine originated in **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), a case allowing segregated public accommodations for whites

*Thurgood Marshall.*
LIBRARY OF CONGRESS

and blacks. In a plainspoken argument, Marshall dismissed as fallacy the notion that segregated schools offered the same educational experiences to black and white students. Sociological and psychological studies demonstrated that black children were in fact harmed by the policy of school segregation. The students' self-esteem was damaged and their future diminished when they were forced to accept inadequate facilities, equipment, and educational opportunities. Marshall argued that the only purpose segregation served was to perpetuate the myth of African-Americans' inferiority. A unanimous Court agreed and struck down the separate-but-equal doctrine, a

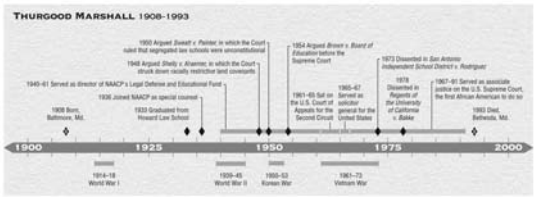






# THE FUTURE OF SOCIAL SECURITY

**19**

The payment of **OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE** (OASDI) benefits has been a cornerstone of U.S. social welfare policy since the establishment of the **SOCIAL SECURITY ADMINISTRATION** in 1935. At the same time, the long-term financial stability of OASDI has been a constant worry. In the early years of the twenty-first century, concerns about Social Security mounted as policy makers assessed the impact of the retirement of the "Baby Boom" generation. Many younger people raised the issue of "generation equity." They express doubt that Social Security benefits will be available when they retire, and anger that they will be forced to pay, through payroll taxes, for the baby boomers' retirement benefits.

Reform of the Social Security system has always been a political hot potato. Retirees and those approaching retirement form a strong **LOBBYING** force, and they zealously protect their benefits. Employers and employees are equally vocal in their opposition to higher payroll taxes to fund OASDI. Thus, changes in Social Security required bipartisan support, which materialized in the face of an impending Social Security crisis. The 1982–83 National Commission on Social Security Reform successfully secured from Congress the short-term financing of OASDI. As a result, Congress passed a series of laws meant to accumulate surpluses as a hedge against future burdens. The Social Security surplus is the amount by which revenue from the federal payroll tax exceeds the amount of Social Security benefits paid out.

IN FOCUS

Shortly after these new laws went into effect, Social Security began running a surplus. Surplus Social Security revenue can be used to fund other government programs and to help retire the national debt. During the favorable economic climate of the late 1990s, Congress began to use the surplus to pay down the federal debt, hoping to better position the government to meet its obligations to future retirees. And, in 2000, the federal government generated enough revenue so that the entire Social Security surplus was available for paying off debt.

The state of Social Security became a major campaign issue in the 2000 elections, with both Republicans and Democrats attempting to appear as though they were guardians of Social Security assets. Candidates from both parties promised to create a "lockbox," meaning that the Social Security surplus would be spent entirely on debt retirement. With the advent of fiscally lean years in the early 2000s, the lockbox approach was largely disregarded by politicians who advanced other ideas about what to do with Social Security surpluses. These ideas included using the surplus to help offset decreases in revenues brought about by tax cuts and using the surplus to fund new or expanded spending initiatives.

Analysts argue that the real issue often is clouded. It is not how to spend the surplus now, but how to maintain the long-term solvency of the Social Security trust fund. Planners estimate that the income from the trust fund will exceed expenses each year until 2020. The trust fund balances will then start to decline as investments are redeemed to meet the increased expenses from a swelling retired workforce. Although it is estimated that 75 percent of the costs would continue to be met from current payroll and income taxes, in the absence of any changes, full benefits could not be paid beginning in 2030.

In its 1996 report, the Social Security Administration's Advisory Council looked at various long-term financing options for OASDI. The council could not reach consensus on a specific long-term plan, but it did suggest several types of financing that represent a marked departure from previous efforts to fund Social Security. The council noted that past efforts have generally featured cutting benefits and raising tax rates on a "pay-as-you-go" basis. The council agreed that this approach must be changed and offered three ways of restoring financial solvency.

One approach, called Maintenance of Benefits (MB), calls for an increase in income taxes on OASDI benefits, a redirection of some revenue from other trust funds, and, most importantly, the adoption of a plan allowing the federal government to invest a portion of the trust fund assets directly in common stocks. Rates of returns on stocks have historically exceeded those on federal government bonds, where all Social Security

A person who continues to work past the retirement age may lose some benefits because Social Security is designed to replace lost earnings. If earnings from employment do not exceed the amount specified by law, the person receives the full benefits. If earnings are greater than that amount, one dollar of benefit is withheld for every two dollars in wages earned above the exempt amount. Once a person reaches age 70, however, he does not have to report earnings to the SSA, and the benefit is not reduced.

**Survivors' Benefits** Survivors' benefits are paid to family members when a worker dies. Survivors can receive benefits if the deceased worker was employed and contributed to Social





momentous victory for Marshall, affecting public schools in twenty-one states.

Marshall was appointed to the U.S. Court of Appeals for the Second Circuit in 1961, and served there until 1965 when he was named **SOLICITOR GENERAL** for the United States. He was appointed to the U.S. Supreme Court in 1967 by President **LYNDON B. JOHNSON** and served as an associate justice for 24 years.

While on the Court, Marshall was known more for his impassioned dissents than for his majority opinions. In particular, as a staunch opponent of **CAPITAL PUNISHMENT**, he regularly voiced his disagreement with the majority in death penalty cases. He was also a firm backer of **AFFIRMATIVE ACTION** and contributed one of his most famous dissents in **REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE**, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In that case, Marshall criticized the high court's ruling that a public medical school's policy of reserving 16 of 100 spots for minority students was unconstitutional. Marshall also dissented in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), disagreeing with the majority view that a Texas property tax system used to fund public education was acceptable, even though it allowed wealthier districts to provide a better school system for students in those districts than less wealthy districts could provide. Marshall objected strongly to the property tax arrangement, claiming that it deprived poor children of an equal education.

Marshall wrote the majority opinion in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968), in which the Court declared that a shopping center was a public forum from which picketers could not be barred by private owners.

Marshall retired from the Court in 1991, but continued his criticism of government policies that were detrimental to African Americans or other disenfranchised groups.

Marshall died on January 24, 1993, in Bethesda, Maryland. Upon Marshall's death, nearly 20,000 mourners filed by his casket during the 12 hours it lay in state in the Great Hall of the U.S. Supreme Court.

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CROSS-REFERENCES

**10**

*Civil Rights Movement; Integration; School Desegregation.*

## MARTIAL LAW

*The exercise of government and control by military authorities over the civilian population of a designated territory.*

**11**

Martial law is an extreme and rare measure used to control society during war or periods of civil unrest or chaos. According to the Supreme Court, the term *martial law* carries no precise meaning (*Duncan v. Kahanamoku*, 327 U.S. 304, 66 S. Ct. 606, 90 L. Ed. 688 [1946]). However, most declarations of martial law have some common features. Generally, the institution of martial law contemplates some use of military force. To a varying extent, depending on the martial law order, government military personnel have the authority to make and enforce civil and criminal laws. Certain civil liberties may be suspended, such as the right to be free from unreasonable **SEARCHES AND SEIZURES**, **FREEDOM OF ASSOCIATION**, and freedom of movement. And the writ of **HABEAS CORPUS** may be suspended (this writ allows persons who are unlawfully imprisoned to gain freedom through a court proceeding).

In the United States, martial law has been instituted on the national level only once, during the Civil War, and on a regional level only once, during **WORLD WAR II**. Otherwise, it has been limited to the states. Uprisings, political protests, labor strikes, and riots have, at various times, caused several state governors to declare some measure of martial law.

Martial law on the national level may be declared by Congress or the president. Under

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*West's Encyclopedia of American Law (WEAL)* is dedicated to librarians and library patrons throughout the United States and beyond. Your interest in the American legal system helps to expand and fuel the framework of our Republic.

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# PREFACE

The U.S. legal system is admired around the world for the freedoms it allows the individual and the fairness with which it attempts to treat all persons. On the surface, it may seem simple, yet those who have delved into it know that this system of federal and state constitutions, statutes, regulations, and common-law decisions is elaborate and complex. It derives from the English common law, but includes principles older than England, along with some principles from other lands. The U.S. legal system, like many others, has a language all its own, but too often it is an unfamiliar language: many concepts are still phrased in Latin. The second edition of *West's Encyclopedia of American Law (WEAL)* explains legal terms and concepts in everyday language, however. It covers a wide variety of persons, entities, and events that have shaped the U.S. legal system and influenced public perceptions of it.

## MAIN FEATURES OF THIS SET

### Entries

This encyclopedia contains nearly 5,000 entries devoted to terms, concepts, events, movements, cases, and persons significant to U.S. law. Entries on legal terms contain a definition of the term, followed by explanatory text if necessary. Entries are arranged alphabetically in standard encyclopedia format for ease of use. A wide variety of additional features, listed later in this preface, provide interesting background and supplemental information.

**Definitions** Every entry on a legal term is followed by a definition, which appears at the beginning of the entry and is italicized. The Dictionary and Indexes volume includes a glossary containing all the definitions from *WEAL*.

**Further Readings** To facilitate further research, a list of Further Readings is included at the end of a majority of the main entries.

**Cross-References** *WEAL* provides two types of cross-references, within and following entries. Within the entries, terms are set in small capital letters—for example, LIEN—to indicate that they have their own entry in the encyclopedia. At the end of the entries, related entries the reader may wish to explore are listed alphabetically by title.

Blind cross-reference entries are also included to direct the user to other entries throughout the set.

### In Focus Essays

In Focus essays accompany related entries and provide additional facts, details, and arguments on particularly interesting, important, or controversial issues raised by those entries. The subjects covered include hotly contested issues, such as abortion, capital punishment, and gay rights; detailed processes, such as the Food and Drug Administration's approval process for new drugs; and important historical or social issues, such as debates over the formation of the U.S. Constitution.

### Sidebars

Sidebars provide brief highlights of some interesting facet of accompanying entries. They

complement regular entries and In Focus essays by adding informative details. Sidebar topics include the Million Man March and the branches of the U.S. armed services. Sidebars appear at the top of a text page and are set in a box.

### Biographies

*WEAL* profiles a wide variety of interesting and influential people—including lawyers, judges, government and civic leaders, and historical and modern figures—who have played a part in creating or shaping U.S. law. Each biography includes a timeline, which shows important moments in the subject's life as well as important historical events of the period. Biographies appear alphabetically by the subject's last name.

## ADDITIONAL FEATURES OF THIS SET

**Enhancements** Throughout *WEAL*, readers will find a broad array of photographs, charts, graphs, manuscripts, legal forms, and other visual aids enhancing the ideas presented in the text.

**Indexes** *WEAL* features a cases index and a cumulative index in a separate volume.

### Appendixes

Three appendix volumes are included with *WEAL*, containing hundreds of pages of documents, laws, manuscripts, and forms fundamental to and characteristic of U.S. law.

### Milestone Cases in the Law

A special Appendix volume entitled Milestones in the Law, allows readers to take a close look at landmark cases in U.S. law. Readers can explore the reasoning of the judges and the arguments of the attorneys that produced major decisions on important legal and social issues. Included in each Milestone are the opinions of the lower courts; the briefs presented by the parties to the U.S. Supreme Court; and the decision of the Supreme Court, including the majority opinion and all concurring and dissenting opinions for each case.

### Primary Documents

There is also an Appendix volume containing more than 60 primary documents, such as the English Bill of Rights, Martin Luther King Jr.'s Letter from Brimingham Jail, and several presidential speeches.

### Citations

Wherever possible, *WEAL* entries include citations for cases and statutes mentioned in the text. These allow readers wishing to do additional research to find the opinions and statutes cited. Two sample citations, with explanations of common citation terms, can be seen below and opposite.

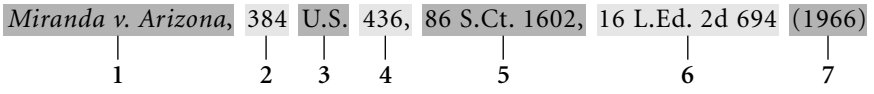


1. *Case title.* The title of the case is set in i and indicates the names of the parties. The suit in this sample citation was between Ernesto A. Miranda and the state of Arizona.
2. *Reporter volume number.* The number preceding the reporter name indicates the reporter volume containing the case. (The volume number appears on the spine of the reporter, along with the reporter name).
3. *Reporter name.* The reporter name is abbreviated. The suit in the sample citation is from the reporter, or series of books, called *U.S. Reports,* which contains cases from the U.S. Supreme Court. (Numerous reporters publish cases from the federal and state courts.)
4. *Reporter page.* The number following the reporter name indicates the reporter page on which the case begins.
5. *Additional reporter page.* Many cases may be found in more than one reporter. The suit in the sample citation also appears in volume 86 of the *Supreme Court Reporter*, beginning on page 1602.
6. *Additional reporter citation.* The suit in the sample citation is also reported in volume 16 of the *Lawyer's Edition*, second series, beginning on page 694.
7. *Year of decision.* The year the court issued its decision in the case appears in parentheses at the end of the cite.

*Brady Handgun Violence Prevention Act*, Pub. L. No. 103–159, 107 Stat. 1536 (18 U.S.C.A. §§ 921–925A)

1 2 3 4 5 6 7 8

1. *Statute title.*
2. *Public law number.* In the sample citation, the number 103 indicates this law was passed by the 103d Congress, and the number 159 indicates it was the 159th law passed by that Congress.
3. *Reporter volume number.* The number preceding the reporter abbreviation indicates the reporter volume containing the statute.
4. *Reporter name.* The reporter name is abbreviated. The statute in the sample citation is from *Statutes at Large.*
5. *Reporter page.* The number following the reporter abbreviation indicates the reporter page on which the statute begins.
6. *Title number.* Federal laws are divided into major sections with specific titles. The number preceding a reference to the U.S. Code stands for the section called Crimes and Criminal Procedure.
7. *Additional reporter.* The statute in the sample citation may also be found in the *U.S. Code Annotated.*
8. *Section numbers.* The section numbers following a reference to the *U.S. Code Annotated* indicate where the statute appears in that reporter.

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## JAPANESE AMERICAN EVACUATION CASES

In the midst of WORLD WAR II (WWII), from 1942 to 1944, the U.S. Army evacuated Japanese Americans living on the West Coast from their homes and transferred them to makeshift detention camps. The army insisted that it was a "military necessity" to evacuate both citizens and noncitizens of Japanese ancestry, and its actions were supported by President FRANKLIN D. ROOSEVELT and the U.S. Congress. Those who were evacuated suffered tremendous losses, being forced to sell their homes and belongings on very short notice and to live in crowded and unsanitary conditions. A few Japanese Americans challenged the constitutionality of the evacuation orders, but the Supreme Court at first ruled against them. In the years since the end of WWII, the U.S. government has acknowledged the injustice suffered by the Japanese American evacuees, and it has made several efforts to redress their losses.

### History

After Japan bombed Pearl Harbor on December 7, 1941, persons of Japanese descent living in the western United States became a target for widespread suspicion, fear, and hostility. Several forces contributed to this sense of anger and paranoia. First, the devastating success of the Pearl Harbor attack led many to question how the U.S. military could have been caught so unprepared. A report commissioned by President Roosevelt directly blamed the U.S. Army and Navy commanders in Hawaii for their lack of preparedness, but it also claimed that a Japanese ESPIONAGE network in Hawaii had sent "information to the Japanese Empire respecting the military and naval establishments" on the island. This espionage ring, the report asserted, included both Japanese consular officials and "persons having no open relations with the Japanese foreign service" (88 *Cong. Rec.* pt. 8, at A261). This accusation against Japanese Hawaiians, though never proved, inflamed the mainland press and contributed to what quickly became an intense campaign to evacuate Japanese Americans from the West Coast.

A second cause for the hostility directed at Japanese Americans was the widespread belief after Pearl Harbor that Japan would soon try to invade the West Coast of the United States. Much of the Pacific fleet had been destroyed by the Pearl Harbor attack, and the Japanese had gone on to achieve a series of military victories in the Pacific. A West Coast invasion seemed imminent to many, and statements by government officials and newspaper editors stoked fears about the loyalty of Japanese Americans and their possible involvement in espionage activities. On January 28, 1942, for example, an editorial in the *Los Angeles Times* argued that "the rigors of war demand proper detention of Japanese and their immediate removal from the most acute danger spots" on the West Coast. Syndicated columnist Henry McLemore was less

restrained in his assessment, which appeared in the *San Francisco Examiner* on January 29: "I am for immediate removal of every Japanese . . . to a point deep in the interior. I don't mean a nice part of the interior either . . . Let 'em be pinched, hurt, hungry and dead up against it. . . . Personally I hate the Japanese."

On February 14, 1942, Lieutenant General John L. De Witt, commanding general of the Western Defense Command, issued a final recommendation to the secretary of war arguing that it was a military necessity to evacuate "Japanese and other subversive persons from the Pacific Coast." The recommendation contained a brief analysis of the situation, which read, in part:

> In the war which we are now engaged, racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become "Americanized," the racial strains are undiluted. . . . It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies of Japanese extraction are at large today. There are indications that the very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken (War Department 1942, 34).

Many other leading politicians and government officials shared De Witt's views. The California congressional delegation, for example, wrote to President Roosevelt urging the removal of the entire Japanese population from the coastal states. California state attorney general EARL WARREN, who would later become governor of California and chief justice of the Supreme Court, strongly advocated the evacuation of the Japanese, arguing before a congressional committee that to believe that the lack of sabotage activity among Japanese Americans proved their loyalty was foolish.

De Witt's report, combined with pressure from other military leaders and political groups, led President Roosevelt on February 19, 1942, to sign EXECUTIVE ORDER No. 9066, which gave the War Department the authority to designate military zones "from which any or all persons may be excluded." Despite warnings from the U.S. attorney general, FRANCIS BIDDLE, that the forced removal of U.S. citizens was unconstitutional, Roosevelt signed 9066 with the clear intent of removing both citizens and noncitizens of Japanese descent. The order theoretically also affected German and Italian nationals, who greatly outnumbered Japanese people living in the designated areas. However, Germans and Italians who were considered suspect were given individual hearings and were interned. The Japanese, on the other hand, were treated not as individuals but as the "enemy race" that De Witt had labeled them in his evacuation recommendation. Congress hurriedly sanctioned the president's order when, with little debate and a unanimous voice vote, it passed Public Law No. 503, which incorporated the procedures of 9066, criminalizing the violations of military orders, such as the curfews and evacuation directives outlined in the order.

The signing of 9066 and its passage into law immediately set in motion the steps leading to the removal of Japanese Americans on the West Coast from their homes and communities. On February 25 General De Witt ordered the eviction of the two thousand Japanese living on Terminal Island, in Los Angeles, giving them 24 hours to sell their homes and businesses. On March 2 De Witt issued Military Proclamation No. 1, which declared the western half of California, Oregon, and Washington to be military zones with specific zones of exclusion. This order allowed Japanese living there to "voluntarily evacuate" the area. Because the Japanese knew they were not welcome in other parts of the country and because those who had tried to resettle had frequently been the targets of violence, the majority remained where they were.

On March 24 De Witt issued Military Order No. 3, which established a nighttime curfew and a five-mile travel restriction to be imposed only on persons of Japanese ancestry. On the same day, the first civilian exclusion order was issued on Bainbridge Island, in Washington, ordering the Japanese Americans there to leave the island within 24 hours. The Japanese began to sense that they would all soon be evicted from the entire West Coast, but because they were subject to the five-mile travel restriction, they were unable to leave the military zones and attempt to resettle elsewhere.

By early April 1942, orders began to be posted in Japanese communities directing all persons of Japanese ancestry, both citizens and resident ALIENS, to report to assembly points. With only a matter of days to prepare for removal, the Japanese were forced to sell their homes, cars, and other possessions, at tremen-

dous losses, to neighbors and others who were eager to take advantage of the situation.

By the beginning of June 1942, all Japanese Americans living in California, Oregon, and Washington had been evacuated and transported by train or bus to detention camps, which were officially labeled assembly centers. Over 112,000 Japanese Americans were evacuated and detained, approximately 70,000 of them U.S. citizens. Because the detention camps had been hastily arranged, they were largely made up of crude shacks and converted livestock stables located in hot and dry desert areas. Privacy was nonexistent; families were separated by only thin partitions, and toilets had no partitions at all. These bleak, crowded, and unsanitary conditions, combined with inadequate food, led to widespread sickness and a disintegration of family order and unity.

Internees were forced to remain in the detention camps until December 1944, when the War Department finally announced the revocation of the exclusion policy and declared that the camps would be closed. This was two-and-a-half years after the June 2, 1942, Battle of Midway, which had left the Japanese naval fleet virtually destroyed, leading U.S. Naval Intelligence to send reports to Washington dismissing any further threat of a West Coast invasion.

### Supreme Court Challenges

Though the majority of the Japanese Americans on the West Coast obeyed the harsh curfews, evacuations, and detentions imposed on them in a surprisingly quiet and orderly fashion, over one hundred individuals attempted to challenge the government's orders. Most of these people were convicted in court and lacked the financial resources to appeal. But a few cases reached the Supreme Court, including *Yasui v. United States,* 320 U.S. 115, 63 S. Ct. 1392, 87 L. Ed. 1793 (1943), *Hirabayashi v. United States,* 320 U.S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943), and KOREMATSU V. UNITED STATES, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944).

Minoru Yasui, an attorney from Portland, Oregon, raised the first legal test of De Witt's curfew orders. A well-educated and very patriotic U.S. citizen of Japanese ancestry, Yasui did not object to the general principle of the curfew order or to a curfew applied only to aliens. His objection was that De Witt's orders applied to all persons of Japanese ancestry, both citizens and noncitizens alike. "That order," Yasui declared, "infringed on my rights as a citizen" (Irons 1983, 84). Determined to become a TEST CASE for the constitutionality of De Witt's curfews, Yasui walked into a Portland police station on the evening of March 28, 1942, hours after the curfew was first imposed and demanded to be arrested for curfew violation.

Yasui was arrested. His case went to trial in June 1942, where he argued that Executive Order No. 9066 was unconstitutional. The judge in the case, James Alger Fee, did not return a verdict until November, when he found Yasui guilty. Fee asserted that Yasui's previous employment as a Japanese consular agent had constituted a FORFEITURE of his U.S. citizenship, and thus he was subject to the curfew order as an enemy alien (*Yasui,* 48 F. Supp. 40 [D. Or. 1942]). Fee sentenced Yasui to the maximum penalty, one year in prison and a fine of $5,000. The Supreme Court unanimously upheld his conviction for curfew violation, though it found that Fee had been incorrect in holding that Yasui had forfeited his U.S. citizenship.

The second test case involved Gordon Kiyoshi Hirabayashi, a 24-year-old student at the University of Washington. A committed Christian and a pacifist, Hirabayashi also decided to make himself a test case for the constitutionality of De Witt's orders, particularly the evacuation order scheduled to take effect on May 16, 1942. He therefore chose to break the curfew three times between May 4 and May 10, and recorded these instances in his diary. On May 16 Hirabayashi went to the FEDERAL BUREAU OF INVESTIGATION office in Seattle, accompanied by his lawyer, and told a special agent there that he had no choice but to reject the evacuation order.

Hirabayashi was convicted of intentionally violating De Witt's evacuation and curfew

*This 1943 photograph by Ansel Adams shows the Manzanar Relocation Center located near Independence, California. The camp was one of ten centers to which Japanese American citizens and Japanese resident aliens were held during World War II.*

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orders. The Supreme Court ruled on Hirabayashi's case on June 21, 1943, upholding his conviction for violating curfew. The Court avoided ruling on the issue of whether evacuation was constitutional by arguing that since Hirabayashi's sentences on the two counts were to run concurrently, his conviction on the curfew violation was sufficient to sustain the sentence.

The Court did, however, rule on one important constitutional issue in *Hirabayashi:* the question of whether De Witt's curfew orders could be applied selectively on the basis of race. Writing for the majority, Chief Justice HARLAN F. STONE emphasized that it was necessary for the Court to defer to the military in security matters, and thus the Court was bound to accept the assertion that "military necessity" required Japanese Americans to be selectively subject to the curfew order. Stone argued that the government needed only a minimum rational basis for applying laws on a racial basis, declaring that "the nature and extent of the racial attachments of our Japanese inhabitants to the Japanese enemy were . . . matters of grave concern." Citing undocumented allegations about the involvement of Japanese Americans in espionage activities, Stone concluded that the "facts and circumstances" showed "that one racial group more than another" constituted "a greater source of danger" to the army's wartime efforts and thus the military was justified in applying its orders solely on the basis of race.

The third test case involved Fred Toyosaburo Korematsu, a 23-year-old welder living in San Leandro, California. Korematsu had no intention of becoming a test case for the constitutionality of De Witt's orders. He simply neglected to report for evacuation because he wanted to remain with his Caucasian fiancée and because he believed that he would not be recognized as a Japanese American. He was soon arrested by the local police and was convicted of remaining in a military area contrary to De Witt's exclusion orders.

When Korematsu's case reached the Supreme Court in 1944, the Court upheld Korematsu's conviction, arguing that the "Hirabayashi conviction and this one thus rest on the . . . same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage." Noting that being excluded from one's home was a "far greater deprivation" than being subjected to a curfew, Justice HUGO L. BLACK wrote in the majority opinion that "we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast area at the time they did." Black based his argument on the minimum rationality test established in *Hirabayashi* and on the military's assertion that Japanese Americans had to be evacuated en masse because it "was impossible to bring about an immediate SEGREGATION of the disloyal from the loyal."

But later in December 1944, the Supreme Court was faced with a more precise and pressing issue. Now came before it a matter wherein a United States loyal citizen of Japanese ancestry had been removed from employment and interned. The case of *Ex Parte Endo,* 323 U.S. 283 (1944), came before the Court as an appeal on a writ of HABEAS CORPUS. Mitsuye Endo was a female federal civil service employee at the California State Highway Commission. In 1942, she was dismissed from her stenography job and ordered by the military to a detention center. Endo was an U.S. citizen; her brother was serving in the U.S. Army. While at the relocation camp, her attorney filed a writ of habeas corpus in federal district court, asking for her discharge from camp and that her liberty be restored. The petition was denied and the Ninth Circuit Court of Appeals certified the matter to the U.S. Supreme Court.

Again, the high court rendered its decision without coming to the underlying constitutional issue which was argued below. The Court, however, concluded that Endo was entitled to an unconditional release by the War Relocation Authority. It approached the construction of E.O. 9066 as it would judicially approach a piece of legislation. In so doing, it concluded that E.O. 9066, along with the underlying act of March 21, 1942, which ratified and confirmed it, was a war measure. Therefore, the Court reasoned, power to detain a concededly loyal citizen could not be implied from a power to protect the war effort from espionage and sabotage; it afforded no basis for keeping loyal U.S. citizens of Japanese ancestry in custody on grounds of community hostility.

Interestingly, the U.S. government, apprehending an unfavorable decision in *Endo,* announced the end of the exclusion order just the day before the Supreme Court issued its opinion. The last of ten major detention camps, Tule Lake, closed in March 1946.

### The Movement to Redress Victims

Though the move to evacuate and detain Japanese Americans on the West Coast enjoyed substantial support from most U.S. citizens, it incited significant protests as well. Some critics, such as Eugene V. Rostow, professor and later dean of the Yale Law School, contended that the evacuation program was a drastic blow to civil liberties and that it was in direct contradiction to the constitutional principle that punishment should be inflicted only for individual behavior, not for membership in a particular demographic group. Others, such as Lieutenant Commander Kenneth D. Ringle, of the Office of Naval Intelligence, questioned the validity of De Witt's assertions concerning the disloyalty of Japanese Americans.

In a memorandum written in February 1942 that became known as the Ringle Report, Ringle estimated that the highest number of Japanese Americans "who would act as saboteurs or agents" of Japan was less than 3 percent of the total, or about 3500 in the United States; the most dangerous of these, he said, were already in custodial detention or were well known to the Naval Intelligence service or the FBI. In his summary Ringle concluded that the "Japanese Problem" had been distorted largely because of the physical characteristics of the people and should be handled based on the individual, regardless of citizenship, and not on race.

The Ringle Report was known to De Witt, who thus knew that Naval Intelligence estimated that at least 90 percent of the army's evacuation of Japanese Americans was unnecessary. In addition, the Department of Justice knew of the Ringle Report's conclusions when it filed its briefs in the *Hirabayashi* and *Korematsu* cases. A senior JUSTICE DEPARTMENT official, Edward Ennis, had sent a memo to SOLICITOR GENERAL Charles Fahy warning, "I think we should consider very carefully whether we do not have a [legal] duty to advise the Court of the existence of the Ringle memorandum . . . It occurs to me that any other course of conduct might approximate the suppression of evidence." But Fahy chose not to mention the Ringle Report in the government's brief, instead asserting that Japanese Americans as an entire class had to be evacuated because "the identities of the potentially disloyal were not readily discoverable," and it would be "virtually impossible" to determine loyalty on the basis of individualized hearings (205).

After the end of the war, some Japanese Americans began to seek financial redress for the losses they had suffered as a result of the government's evacuation program. In 1948 Congress passed the American Japanese Evacuation Claims Act (Pub. L. No. 80-886, ch. 814, 62 Stat. 1231 [codified as amended at 50 U.S.C.A. app. § 1981 (1982)]) to compensate evacuees for property damage. The Justice Department received more than 26,500 claims, and the federal government ultimately paid out approximately $37 million. Because the act required elaborate proof of property losses, the amount paid out was much less than full compensation for losses sustained.

By the 1970s and 1980s, the movement to achieve redress had won additional victories. In 1976 President GERALD R. FORD formally revoked Executive Order No. 9066 and proclaimed, "We know now what we should have known then—not only was [the] evacuation wrong, but Japanese Americans were and are loyal Americans" (Proclamation No. 4417, 3 C.F.R. 8, 9 [1977]). In 1980 Congress established the Commission on Wartime Relocation and Internment of Civilians, whose report, released in 1983, concluded that 9066 was not justified by military necessity and that the policies of detention and exclusion were the result of racial prejudice, war hysteria, and a failure of political leadership. The commission recommended several types of redress. In 1988 Congress passed the Civil Liberties Act of 1988 (50 U.S.C.A. app. § 1989 [1988]), which provided for a national apology and $20,000 to each victim to compensate for losses suffered as a result of the evacuation program.

A final major development in the redress movement has been the use of CORAM NOBIS, the common-law writ of error, to reopen the *Korematsu, Yasui,* and *Hirabayashi* convictions. A writ of *coram nobis* allows one who has served time for a criminal conviction to petition the court for a vacation of that conviction. Vacations are granted if there is evidence of prosecutorial impropriety or if there are special circumstances or errors that resulted in a miscarriage of justice. In 1983 U.S. district court judge Marilyn Hall Patel granted a vacation in the *Korematsu* case. Patel based her decision on the newly discovered evidence that "the Government knowingly withheld information from the Courts when they were considering the critical question of military necessity in this case" (*Korematsu,* 584 F. Supp.

1406 [N.D. Cal. 1984]). Yasui's and Hirabayashi's convictions were also vacated on this basis (*Yasui,* No. 83-151 [D. Or. Jan. 26, 1984]; *Hirabayashi,* 828 F.2d 591 [9th Cir. 1987]).

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Coram Nobis; Discrimination; Prejudice; Vacate.

## ♦ JAWORSKI, LEON

Leon Jaworski, like RICHARD M. NIXON, came from a poor, deeply religious background. In the WATERGATE scandal, Jaworski's rise to national prominence almost seemed to parallel Nixon's descent. Watergate is the name given to the scandal that began with the bungled BURGLARY in June 1972 of the Democratic National Committee's headquarters in the Watergate apartment complex in Washington, D.C., by seven employees of the Committee to Re-Elect the President (CREEP). A lifelong Democrat who twice voted for the Republican Nixon, Jaworski was responsible for bringing to light many damaging facts of the Watergate break-in and subsequent cover-up, ultimately leading to the only resignation ever by a U.S. president. When Nixon appointed him to the post of special prosecutor on the case November 1, 1973, Jaworski expected to find wrongdoing and possible criminal activity by Nixon's aides, but the possibility that the president was involved never occurred to him.

Jaworski was born in Waco, Texas, on September 19, 1905, to an Austrian mother and a Polish father. He was christened Leonidas, after a king of ancient Sparta who courageously gave his life for his beliefs. Jaworski's father, an evangelical minister, instilled in him from an early age a deep and abiding Christian faith and sense of duty. By the time he was fourteen, he was the champion debater at Waco High School. He graduated at age sixteen and enrolled in Baylor University. After one year of undergraduate work, he was admitted to the law school. He graduated at the top of his class in 1925, and became the youngest person ever admitted to the Texas bar.

In 1926 Jaworski obtained a master of laws degree from George Washington University, in Washington, D.C., and then returned to Waco to practice. PROHIBITION was at its height, and Jaworski began his career defending moonshiners and bootleggers. His flair in the courtroom developed early. In one capital murder case, he concealed a stiletto in his pocket. During the trial he whipped it out and tried to hand it to a

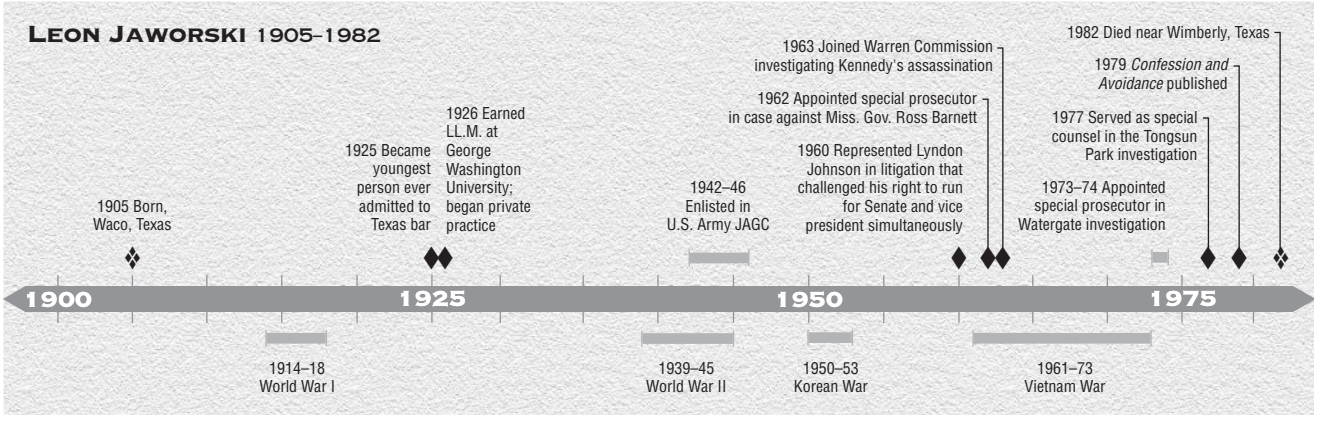

juror, exhorting the jury to kill the defendant immediately instead of sending him to the electric chair later. In 1931 he joined the Houston firm of Fulbright, Crooker, Freeman, and Bates. The firm, eventually known as Fulbright and Jaworski, grew to be one of the largest in the United States. It was the first in Houston to hire black and Jewish staff.

Jaworski enlisted in the Army in 1942, and was commissioned as a captain in the Judge Advocate General's Corps, the legal branch of the Army. One of the first prosecutors of WAR CRIMES in Europe, Jaworski successfully brought action against a German civilian mob that stoned to death six U.S. airmen, and employees of a German sanatorium who participated in the "mercy killing" of over four hundred Poles and Russians. He was also in charge of the war crimes investigation of the Dachau concentration camp, which led to proceedings in which all forty defendants were convicted and thirty-six were sentenced to death.

The Colonel, as he became known after his Army stint, returned to Houston and quickly became enmeshed in representing bankers and big business. LYNDON B. JOHNSON became a client and friend. In 1960 Jaworski handled litigation that challenged Johnson's right to run simultaneously for the Senate and the vice presidency. The case was resolved in Johnson's favor a few days before his inauguration as vice president. In 1962 U.S. attorney general ROBERT F. KENNEDY appointed Jaworski special prosecutor in a CONTEMPT case against Mississippi governor Ross Barnett. The segregationist Barnett had defied a federal order to admit the first black student, JAMES MEREDITH, to the University of Mississippi. It was a volatile time of highly unpopular, court-ordered desegregation in the South, and Jaworski endured some vicious criticism by colleagues, clients, and southerners for prosecuting the case. Following President John F. Kennedy's assassination in Dallas in 1963, Jaworski worked with the WARREN COMMISSION, as the Commission investigated Kennedy's assassination, acting as liaison between Texas agencies and the federal government.

In October 1973 Watergate special prosecutor ARCHIBALD COX was fired in the so-called Saturday Night Massacre when he tried to force Nixon into supplying tapes pursuant to a subpoena. In response to pressure from Cox, Nixon ordered Attorney General ELLIOT RICHARDSON to fire Cox; Richardson refused because Cox and Congress had received assurances that the special prosecutor would not be fired except for gross improprieties. Richardson resigned rather than fire Cox. Deputy Attorney General William Ruckelshaus also resigned after refusing to fire Cox. Nixon's order was finally carried out by Solicitor General ROBERT BORK. Jaworski accepted Cox's vacated position, on the condition that he would not be dismissed except for extraordinary impropriety and that he would have the right to take the president to court if necessary. His new office was in charge of collecting evidence, presenting it to the Watergate grand juries, and directing the prosecution in any trials resulting from GRAND JURY indictments. His job was separate from, although in many respects parallel to, that of the House Judiciary Committee, which was conducting its own investigation.

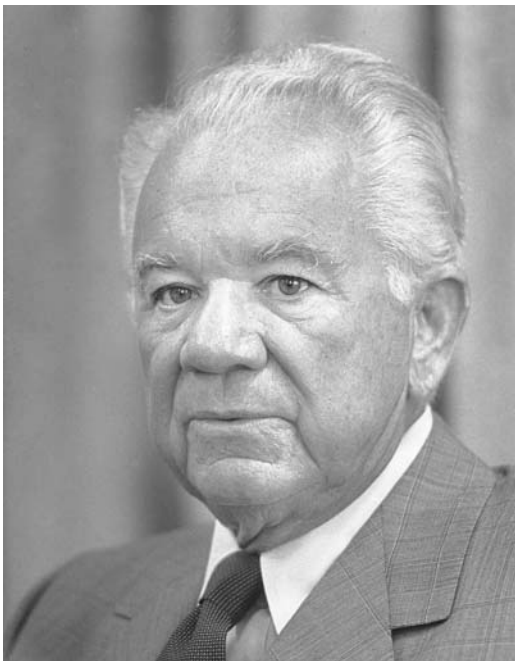

*Leon Jaworski.*
LIBRARY OF CONGRESS

Jaworski's integrity was never questioned, but his appointment was greeted with suspicion. Some felt he was too much in awe of the presidency to execute the job whatever the consequences. Almost immediately, however, he began showing his mettle. He soon learned of an eighteen-minute gap on a crucial tape that had been subpoenaed but had not yet been turned over to the special prosecutor's office. The White House wangled for a delay in informing federal judge John J. Sirica of the apparent erasure. Jaworski pushed forward, and Sirica ordered that all subpoenaed tapes be turned over within

days. Shortly thereafter the tapes were submitted, and Jaworski and his staff listened in disbelief to one from March 21, 1973, in which the president and White House counsel John W. Dean III discussed blackmail, payment of hush money, and perjury in connection with the cover-up of Watergate.

As Jaworski and his staff sifted through evidence and presented it to the grand jury, Jaworski was forced to decide whether a sitting president could be indicted for offenses for which the grand jury had heard evidence. He concluded that the Supreme Court might well find such an action to be unconstitutional, that the nation would suffer great trauma in the interim, and that the IMPEACHMENT inquiry by the House of Representatives was the appropriate forum for determining whether Nixon should be removed from office. Carefully wielding a prosecutor's influence with the grand jury, he convinced the jurors to name Nixon as an unindicted coconspirator. This information was not to be made public until the trial of the grand jury's other indictees. At Jaworski's prompting, and with Judge Sirica's approval, evidence heard by the grand jury regarding Nixon's involvement was forwarded to the House Judiciary Committee and was kept from the public until later.

"ONE OF THE THINGS THAT THE NEXT GENERATION WILL LEARN FROM WATERGATE IS THAT THE PRESIDENT IS SUBJECT TO THE LAWS HE IS SWORN TO ADMINISTER. HIS POWERS ARE NOT ABSOLUTE."
—LEON JAWORSKI

In the spring of 1974, Jaworski subpoenaed sixty-four more tapes. The White House sought to quash the subpoena, and made a desperate attempt to curry public support by releasing edited transcripts of some tapes. The White House claimed that as unsettling as the transcripts were, they contained no evidence of crime, and that they represented all the relevant tapes possessed by the White House. The prosecutors found many important omissions from the transcripts. Moreover, the White House claimed that a key tape from June 23, 1972 (six days after the Watergate break-in) was unaccountably missing. When Judge Sirica ordered the White House to turn over the subpoenaed tapes, it immediately appealed to the District of Columbia Court of Appeals. Jaworski then had to decide whether to attempt to bypass the court of appeals and ask the Supreme Court to review Sirica's order. A special rule permitted such a bypass in cases that required immediate settlement in matters of "imperative public importance." Jaworski's decision would be crucial because it was unclear whether the Supreme Court would bypass the court of appeals, something it had done only twice since the end of WORLD WAR II. If the Supreme Court refused to accept the case, trials against defendants already indicted would be delayed and momentum in the investigation would be lost. Jaworski decided to seek review in the Supreme Court.

Jaworski's gambit paid off. The Supreme Court agreed to hear the case. On July 24, 1974, it ruled 8–0, with Justice WILLIAM H. REHNQUIST abstaining, that the special prosecutor had the right and the power to sue the president, and that the president must comply with the subpoena. Within days of the ruling, the tapes started trickling in to the special prosecutor's office, including one of a conversation between President Nixon and H. R. Haldeman on June 23, 1972. This tape became known as the smoking gun, because it proved decisively that the president not only knew of the Watergate cover-up but also participated in it, only six days after the break-in. This was contrary to earlier assertions that President Nixon first learned of the cover-up in March 1973.

On July 27, 1974, the House Judiciary Committee passed a first article of impeachment, charging that President Nixon had obstructed justice in attempting to cover up Watergate. Within days the Judiciary Committee passed two more ARTICLES OF IMPEACHMENT, charging abuse of PRESIDENTIAL POWERS and defiance of subpoenas. The committee's action, in conjunction with Jaworski's win in the Supreme Court and a concomitant public release of the tapes, finally left Nixon facing almost certain impeachment. On August 9, 1974, he resigned from the presidency.

Nixon's resignation did not end the matter for the special prosecutor. Most of Jaworski's staff pushed hard for an indictment of the former president. Public sentiment seemed to favor indictment. Jaworski studied the issue, but he considered the problem of getting the president a fair trial to be paramount and almost insurmountable.

On September 9, 1974, President GERALD R. FORD pardoned Nixon of all possible federal crimes he may have committed while serving as president. The special prosecutor's office then examined whether the pardon could be attacked in court, on the ground that it preceded any indictment or conviction. Jaworski concluded that Ford was acting within his constitutional powers in granting the pardon. He declined to precipitate a court challenge by indicting Nixon after the pardon, as some called for him to do.

Jaworski resigned as special prosecutor on October 25, 1974. Watergate prosecutions continued for some time thereafter under a new special prosecutor.

In 1977 Jaworski reluctantly agreed to serve as special counsel to the House Ethics Committee's investigation to determine whether members of the House had indirectly or directly accepted anything of value from the government of the Republic of Korea. The investigation, known as Koreagate or the Tongsun Park investigation, potentially involved hundreds of members of Congress and their families and associates, and charges of **BRIBERY** and influence peddling sought by way of envelopes stuffed with $100 bills. Tongsun Park was a central figure in the Korean **LOBBYING** scandal, but exactly who he was remains unclear. U.S.-educated, at times he may have posed as a South Korean ambassador and may have been employed by the Korean CIA or been an agent of the Korean government. He was found trying to enter the United States with a list containing the names of dozens of members of Congress including information regarding contributions. Jaworski's work was thwarted by difficulties getting key Korean figures to testify under oath, as well as the difficulties inherent when a body investigates itself. Jaworski was disappointed with the fruits of his labor. Only two former members of Congress faced criminal charges, two private citizens were indicted and convicted, and three members of Congress were reprimanded.

Jaworski died of a heart attack at his beloved Circle J Ranch, near Wimberly, Texas, on December 9, 1982, while chopping wood, a favorite pastime. Married for fifty-one years, he had three children and five grandsons.

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## ◆ JAY, JOHN

John Jay was a politician, statesman, and the first chief justice of the Supreme Court. He was one of the authors of *The Federalist*, a collection of influential papers written with **JAMES MADISON** and **ALEXANDER HAMILTON** prior to the ratification of the Constitution.

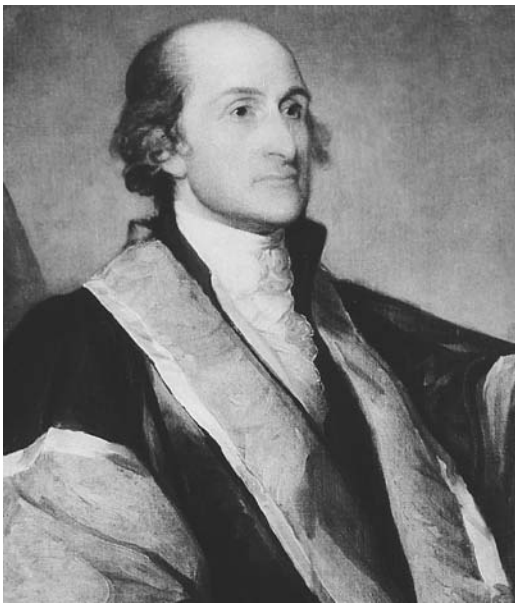

*John Jay.*
PAINTING BY STUART GILBERT. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

"A DISTINCTIVE CHARACTER OF THE NATIONAL GOVERNMENT, THE MARK OF ITS LEGITIMACY, IS THAT IT OWES ITS EXISTENCE TO THE ACT OF THE WHOLE PEOPLE WHO CREATED IT."
—JOHN JAY

Jay was born in New York City on December 12, 1745. Unlike most of the colonists in the New World, who were English, Jay traced his ancestry to the French Huguenots, His grandfather, August Jay, immigrated to New York in the late seventeenth century to escape the persecution of non-Catholics under Louis XIV. Jay graduated from King's College, now known as Columbia University, in 1764. He was admitted to the bar in New York City in 1768.

One of Jay's earliest achievements was his participation in the settlement of the boundary line between New York and New Jersey in 1773. During the time preceding the Revolutionary War, Jay actively protested against British treatment of the colonies but did not fully advocate independence until 1776, when the Declaration of Independence was created. Jay then supported independence wholeheartedly. He was a member of the **CONTINENTAL CONGRESS** from 1774 to 1779, acting as its president from 1778 to 1779.

In 1776, Jay was a member of the Provincial Congress of New York and was instrumental in the formation of the constitution of that state. From 1776 to 1778, he performed the duties of New York chief justice.

Jay next embarked on a foreign service career. His first appointment was to the post of

minister plenipotentiary to Spain in 1779, where he succeeded in gaining financial assistance for the colonies.

In 1782, Jay joined BENJAMIN FRANKLIN in Paris for a series of peace negotiations with Great Britain. In 1784, Jay became secretary of foreign affairs and performed these duties until 1789. During his term, Jay participated in the ARBITRATION of various international disputes.

Jay recognized the limitations of his powers in foreign service under the existing government of the ARTICLES OF CONFEDERATION, and this made him a strong supporter of the Constitution. He publicly displayed his views in the five papers he composed for *The Federalist* in 1787 and 1788. Jay argued for ratification of the Constitution and the creation of a strong federal government.

In 1789, Jay earned the distinction of becoming the first chief justice of the United States. During his term, which lasted until 1795, Jay rendered a decision in CHISHOLM V. GEORGIA, 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793), which subsequently led to the enactment of the ELEVENTH AMENDMENT to the Constitution. This 1793 case involved the ability of inhabitants of one state to sue another state. The Supreme Court recognized this right but, in response, Congress passed the Eleventh Amendment denying the right of a state to be prosecuted or sued by a resident of another state in federal court.

During Jay's tenure on the Supreme Court, he was again called upon to act in foreign service. In 1794 he negotiated a treaty with Great Britain known as Jay's Treaty. This agreement regulated commerce and navigation and settled many outstanding disputes between the United States and Great Britain. The treaty, under which disputes were resolved before an international commission, was the origin of modern international arbitration.

In 1795 Jay was elected governor of New York. He served two terms, until 1801, at which time he retired.

He died May 17, 1829.

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Constitution of the United States; *Federalist Papers*; New York Constitution of 1777.

## J.D.

*An abbreviation for Juris Doctor, the degree awarded to an individual upon the successful completion of law school.*

## ♦ JEFFERSON, THOMAS

Thomas Jefferson served as an American Revolutionary and political theorist and as the third president of the United States. Jefferson, who was a talented architect, writer, and diplomat,

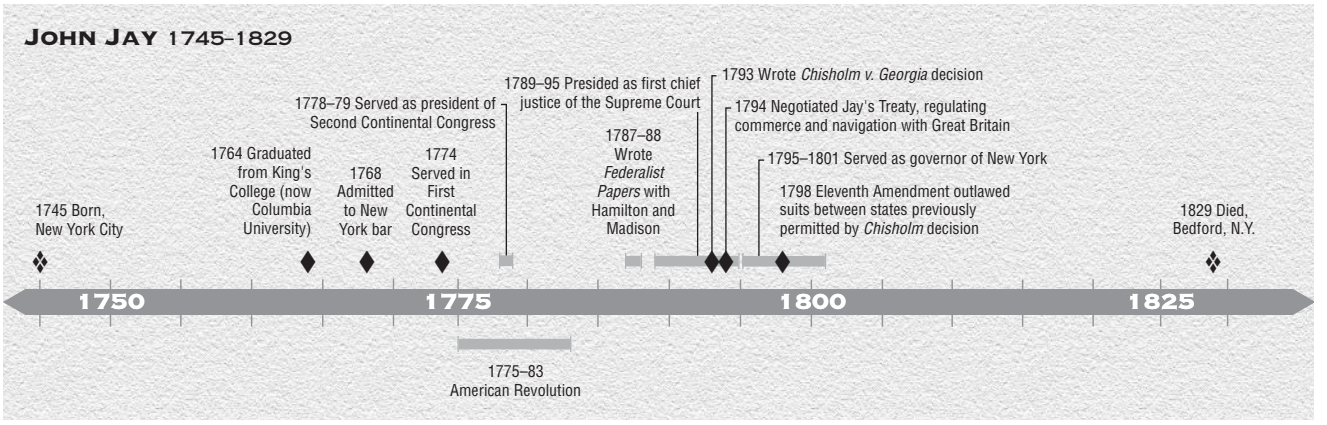

played a profound role in shaping U.S. government and politics.

Jefferson was born April 13, 1743, at Shadwell, in Albemarle County, Virginia. His father was a plantation owner and his mother belonged to the Randolph family, whose members were leaders of colonial Virginia society. Jefferson graduated from the College of William and Mary in 1762, and worked as a surveyor before studying law with GEORGE WYTHE. He was admitted to the Virginia bar in 1767.

His interest in colonial politics led to his election to the Virginia House of Burgesses in 1769. In the legislature he became closely aligned with PATRICK HENRY, Richard Henry Lee, and Francis Lightfoot Lee, all of whom espoused the belief that the British Parliament had no control over the American colonies. He helped form the Virginia Committee of Correspondence, which protested legislation imposed on the colonies by Great Britain.

In 1774 Jefferson wrote *A Summary View of the Rights of British America,* a pamphlet that denied the power of Parliament in the colonies and stated that any loyalty to England and the king was to be given by choice. He attended the Second CONTINENTAL CONGRESS in 1775 and drafted the *Reply to Lord North,* in which Congress rejected the British prime minister's proposal that Parliament would not tax the colonists if they agreed to tax themselves.

After the Revolutionary War began, Jefferson and four others were asked to draft a declaration of independence. Jefferson actually wrote the Declaration of Independence in 1776, which stated the arguments justifying the position of the American Revolutionaries. It also affirmed the natural rights of all people and affirmed the right of the colonists to "dissolve the political bands" with the British government.

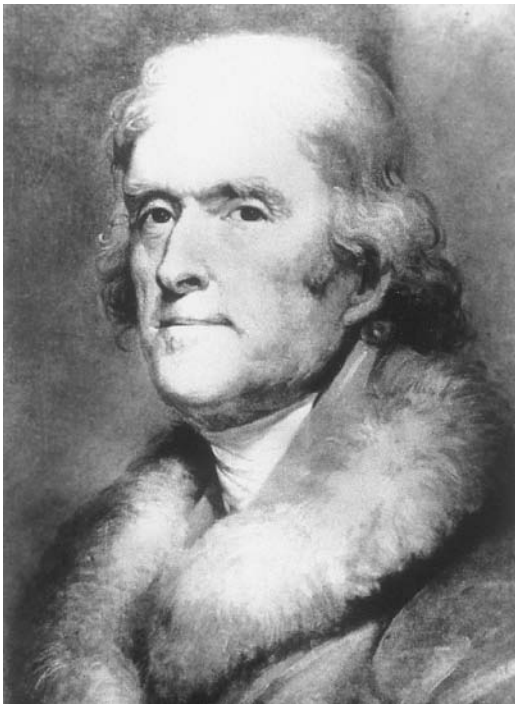

*Thomas Jefferson.*
LIBRARY OF CONGRESS

Jefferson served in the Virginia House of Delegates from 1776 to 1779 and became governor of Virginia in 1779. He was responsible for many changes in Virginia law, including the abolition of religious persecution and the end to entail (inheritance of land through a particular line of descent) and primogeniture (inheritance only by the eldest son). Jefferson also disestablished the Anglican Church as the state-endorsed religion. Jefferson's term as governor expired in 1781, the same year the British invaded Virginia. He was at first blamed for the

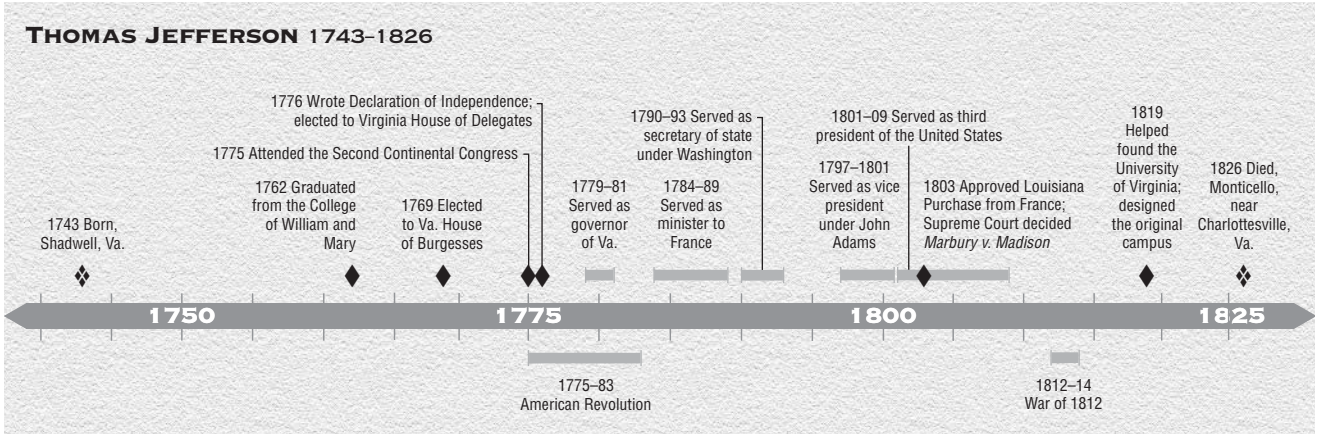

state's lack of resistance but later cleared after an official investigation.

From 1783 to 1784, he was a member of the Continental Congress, where he contributed a monetary program, and secured approval of the TREATY OF PARIS, which ended the Revolutionary War. As a member of that congress he also drafted a decree for a system of government for the Northwest Territory, which lay west of the Appalachian Mountains. This decree was later incorporated into the NORTHWEST ORDINANCE of 1787.

Jefferson served as minister to France from 1784 to 1789. In 1790 he reentered politics as SECRETARY OF STATE in the cabinet of President GEORGE WASHINGTON. Jefferson soon became embroiled in conflict with ALEXANDER HAMILTON, the secretary of the treasury. Jefferson did not share Hamilton's Federalist views, which he believed favored the interests of business and the upper class. Jefferson, a proponent of agricultural interests, disliked the Federalist's desire to expand the power of the federal government.

"THAT GOVERNMENT IS THE STRONGEST OF WHICH EVERY MAN HIMSELF FEELS A PART."
—THOMAS JEFFERSON

The chief dispute between them was over the BANK OF THE UNITED STATES, which Hamilton approved of and Jefferson attacked as unconstitutional. Hamilton won the issue, and Jefferson and his supporters began to form a group known as Republicans, which evolved into the current DEMOCRATIC PARTY. In 1791 editor Philip M. Freneau published Republican views in the *National Gazette,* which increased the agitation between Jefferson and Hamilton. Jefferson resigned his position in 1793.

After JOHN ADAMS was elected president in 1796, Jefferson served as his vice president and presiding officer in the Senate. In 1798 he opposed Congress's adoption of the ALIEN AND SEDITION ACTS (1 Stat. 570, 596), which provided for the deportation or imprisonment of any citizen or alien judged dangerous to the U.S. government. As a result Jefferson and JAMES MADISON drafted the KENTUCKY RESOLUTIONS, which denounced the constitutionality of these acts. These resolutions, which were adopted by the Kentucky and Virginia legislatures, declared that the federal government could not extend its powers over the states unless the Constitution expressly granted authority. The resolutions were the first affirmation of STATES' RIGHTS and were central to Jefferson's belief that state and local governments were the most democratic political institutions.

The presidential election in 1800 ended in a tie between Jefferson and AARON BURR. The House of Representatives decided the election. Hamilton, who despised Burr even more than Jefferson, lobbied the Federalists in the House to elect Jefferson. Jefferson won the election and became the first president to be sworn into office in Washington, D.C.

As president, Jefferson reduced spending and appointed Republicans to assume former Federalist positions. He made a lasting contribution to legislative procedure when he composed in 1801 *A Manual of Parliamentary Practice,* which is still used today. He approved the LOUISIANA PURCHASE from France in 1803, and supported the Lewis and Clark Expedition to explore the West from 1803 to 1806. He supported the repeal of the Judiciary Act of 1801, which would have created federal courts of appeals and would have encouraged appeals from state courts.

Jefferson also expressed concern about the decision in MARBURY V. MADISON, 5 U.S. 137, 2 L. Ed. 60 (1803), which declared that the Supreme Court could review the constitutionality of acts of Congress. The concept of JUDICIAL REVIEW, which is not described in the Constitution, expanded the power of the judiciary. Jefferson and the Republicans worried that Federalist-appointed judges would use judicial review to strike down Republican legislation.

After he was reelected in 1805, Jefferson encountered the problem of attacks on independent U.S. ships by England and France, which were engaged in war. To discourage these attacks, Congress passed the Nonimportation Act of 1806 (2 Stat. 315), forbidding the importation of British goods, and the EMBARGO ACT of 1807 (2 Stat. 451), prohibiting the exportation of U.S. goods to England and France. These measures proved to be detrimental to U.S. commerce.

After the end of his second presidential term, Jefferson retired to his estate, Monticello. He served as president of the American Philosophical Society from 1797 to 1815 and helped found the University of Virginia in 1819.

Jefferson's *Notes on the State of Virginia,* published in 1784 and 1785, remain an important historical resource. Written to a French correspondent, the book contains social, political, and economic reflections that show Jefferson to be a person committed to rational thought. The book also reveals that Jefferson, a slaveholder, believed that African Americans were inferior to whites. Throughout his life Jefferson defended

the institution of SLAVERY, casting a cloud over his professed belief in human dignity.

Jefferson died July 4, 1826, at Monticello, near Charlottesville, Virginia.

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## JEFFERSONIAN REPUBLICAN PARTY

See DEMOCRATIC-REPUBLICAN PARTY.

## JEOPARDY

*Danger; hazard; peril. In a criminal action, the danger of conviction and punishment confronting the defendant.*

A person is in jeopardy when he or she is placed on trial before a court of competent jurisdiction upon an indictment or information sufficient in form and substance to uphold a conviction, and a jury is charged or sworn. Jeopardy attaches after a valid indictment is found and a petit jury is sworn to try the case.

CROSS-REFERENCES

Double Jeopardy.

## JETSAM

*The casting overboard of goods from a vessel, by its owner, under exigent circumstances in order to provide for the safety of the ship by lightening its cargo load.*

## JIM CROW LAWS

The Jim Crow Laws emerged in southern states after the U.S. CIVIL WAR. First enacted in the 1880s by lawmakers who were bitter about their loss to the North and the end of SLAVERY, the statutes separated the races in all walks of life. The resulting legislative barrier to equal rights created a system that favored whites and repressed blacks, an institutionalized form of inequality that grew in subsequent decades with help from the U.S. Supreme Court. Although the laws came under attack over the next half century, real progress against them did not begin until the Court began to dismantle SEGREGATION in the 1950s. The remnants of the Jim Crow system were finally abolished in the 1960s through the efforts of the CIVIL RIGHTS MOVEMENT.

The term "Jim Crow" laws evidently originated from a minstrel show character developed during the mid-nineteenth century. A number of groups of white entertainers applied black cork to their faces and imitated Negro dancing and singing routines. Such acts became popular in several northern cities. One of the performers reportedly sang a song with the lyrics, "Weel about and turn about and do jis so, Eb'ry time I weel about I jump Jim Crow." The moniker Jim Crow later became synonymous with the segregation laws.

The origins of Jim Crow lie in the battered South of the mid-nineteenth century. The Civil War had ended, but its antagonisms had not; the war of values and political identity continued. Many whites refused to welcome blacks into civic life, believing them to be inferior and resenting northern demands in the era of Reconstruction, especially the requirement that southern states ratify the THIRTEENTH AMENDMENT, which would abolish slavery. Southern states initially resisted by passing so-called BLACK CODES, which prohibited former slaves from carrying firearms or joining militias. More hostility followed when Congress enacted the CIVIL RIGHTS ACT of 1875 (18 Stat. 335), which guaranteed blacks access to public facilities. As the federal government pressed the South to enfranchise blacks, a backlash developed in the form of state regulations that separated whites from blacks in public facilities.

In the late nineteenth century, southern states took comfort from two U.S. Supreme Court decisions. First, in 1883, the Court struck down the Civil Rights Act of 1875 as unconstitutional, in the so-called CIVIL RIGHTS CASES, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835. It ruled that Congress had exceeded its powers under the Reconstruction amendments. This decision

*In the southern states, Jim Crow laws permeated nearly every part of public life. Dr. Charles N. Atkins and family stand outside the Santa Fe Depot waiting rooms in Oklahoma City in 1955.*

AP/WIDE WORLD PHOTOS

encouraged southern states to extend Jim Crow restrictions, as in an 1890 Louisiana statute that required white and "colored" persons to be furnished "separate but equal" accommodations on railway passenger cars. In fact, that law came under attack in the Court's next significant decision, the 1896 case of **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256. In *Plessy,* the Court upheld the Louisiana law, ruling that establishing **SEPARATE-BUT-EQUAL** public accommodations and facilities was a reasonable exercise of the **POLICE POWER** of a state to promote the public good. *Plessy* kept the principle of separate but equal alive for the next 60 years.

By the start of **WORLD WAR I**, every southern state had passed Jim Crow laws. Becoming entrenched over the next few decades, the laws permeated nearly every part of public life, including railroads, hotels, hospitals, restaurants, neighborhoods, and even **CEMETERIES**. Whites had their facilities; blacks had theirs. The white facilities were better built and equipped. In particular, white schools were almost uniformly better in every respect, from buildings to educational materials. States saw to it that their black citizens were essentially powerless to overturn these laws, using **POLL TAXES** and literacy tests to deny them the right to vote. Jim Crow even extended to the federal government: Early in the twentieth century, discriminatory policies were rife throughout federal departments, and not until the **KOREAN WAR** (1950–53) did the armed forces stop segregating personnel into black and white units.

Opposition to the policy of Jim Crow came chiefly from African Americans. Early leadership was provided by the Afro-American National League in the 1890s and, after the turn of the century, the influential author and activist **W. E. B. DU BOIS**. The National Association for the Advancement of Colored People (**NAACP**), established in 1909, became the most powerful force for the repeal of Jim Crow laws during the next half century. The NAACP fought numerous battles in two important arenas: the court of public opinion and the courts of law.

At first, legal progress came slowly. In a series of decisions in the 1940s, the U.S. Supreme Court began to dismantle individual Jim Crow laws and practices. The Court ruled that political parties could not exclude voters from primary elections on the basis of race (*Smith v. Allwright,* 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 [1944]). It ruled that black passengers on interstate buses need not follow the segregation laws of the states through which those buses passed (*Morgan v. Virginia,* 328 U.S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317 [1946]). It also held that the judiciary could no longer enforce private agreements—called restrictive covenants—that excluded ownership or occupancy of property based on race (*Shelley v. Kraemer,* 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 [1948]).

By 1950, legal changes were coming in droves. The Court decided in favor of black student Herman Marion Sweatt concerning his appeal for entrance to the University of Texas Law School. In *Sweatt v. Painter,* 339 U.S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 (1950), the Court ruled that the educational opportunities offered to white and black law students by the state of Texas were not substantially equal, and that the **EQUAL PROTECTION CLAUSE** of the **FOURTEENTH AMENDMENT** required that Sweatt be admitted to classes with white students at the University of Texas law school. Four years later came the Court's most significant decision affecting Jim Crow: **BROWN V. BOARD OF EDUCATION**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). Overturning the precedent that had existed since *Plessy* in 1896, the Court in *Brown* decreed unconstitutional the policy of separate-but-equal educational facilities for blacks and whites.

*Brown* marked a turning point in the battle against the institution of segregation that Jim Crow laws had created. It was not the death knell, however. Much remained to be done, not only to topple legal restrictions but also to remove the barriers of prejudice and violence that stood in the way of full INTEGRATION. The final blows were administered by the civil rights movement, whose boycotts, sit-ins, and lawsuits continued over the next two decades. By the mid-1960s, the last vestiges of legal segregation were ended by a series of federal laws, including the Civil Rights Act of 1964 (42 U.S.C.A. § 2000a et seq.), the VOTING RIGHTS ACT OF 1965 (42 U.S.C.A. § 1971 et seq.), and the FAIR HOUSING ACT OF 1968 (42 U.S.C.A. § 3601 et seq.).

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CROSS-REFERENCES

Civil Rights; Equal Protection; Ku Klux Klan; Ku Klux Klan Act; School Desegregation.

## J.N.O.V.

See JUDGMENT NOTWITHSTANDING THE VERDICT.

## JOBBER

*A merchant, middle person, or wholesaler who purchases goods from a manufacturer in lots or bulk and resells the goods to a consumer, or to a retailer, who then sells them to a consumer. One who buys and sells on the stock exchange or who deals in stocks, shares, and* SECURITIES.

In the law of TRADEMARKS and trade names, the term *jobber* refers to an intermediary who receives goods from manufacturers and sells them to retailers or consumers. In this context a jobber may acquire a trademark and affix it to the goods, even though the jobber did not manufacture the products.

In the law governing monopolies, jobbers are referred to as wholesalers. This body of law involves price-fixing scenarios, in which, for example, a manufacturer enters into contracts with numerous wholesalers, wherein the latter agree to resell the manufacturer's product at prices set by the manufacturer. ANTITRUST LAWS also concern scenarios where, for example, a patent owner who deals through wholesalers restricts the resale of the patented article to a specified territory, thereby limiting rightful competition between wholesalers.

## JOHN DOE OR JANE DOE

*A fictitious name used for centuries in the law when a specific person is not known by name.*

The name *John Doe* can be used in a hypothetical situation for the purpose of argument or illustration. For example, the action of EJECTMENT may be used in some states by a person who has possession of a parcel of land but wishes to clear up some doubt concerning his or her right to hold it. Rather than wait until someone else sues to challenge his or her right to the land, that person may bring an action of ejectment against a fictitious defendant, sometimes called a casual ejector. John Doe has traditionally been used for the name of this nonexistent party, but he has also been named *Goodtitle.*

John Doe may be used for a specific person who is known but cannot be identified by name. The form *Jane Doe* is often used for anonymous females, and Richard Roe is often used when more than one unknown or fictitious person is named in a lawsuit.

The tradition of fictitious names comes from the Romans, who also had names that they commonly used for fictitious parties in lawsuits. The two names most commonly used were Titius and Seius.

## ❖ JOHNSON, ANDREW

Andrew Johnson ascended to the U.S. presidency after the assassination of ABRAHAM LINCOLN. He was the seventeenth president and the first to undergo an IMPEACHMENT trial.

Johnson was born December 29, 1808, in Raleigh, North Carolina. Little is known of his early life. His ancestry is usually traced only to the family of his father, Jacob Johnson, who raised his family in Raleigh and served as the city's constable and sexton, was a porter to the state bank, and was a respected captain in the militia of North Carolina. He was viewed as a hero after saving two men from drowning in a pond outside Raleigh. He died of health

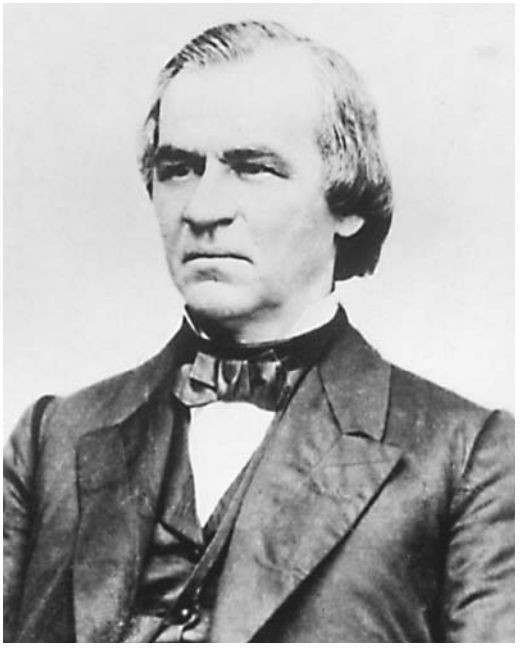

*Andrew Johnson.*
LIBRARY OF CONGRESS

complications only a year later, leaving the Johnson family in poverty.

From the age of ten to the age of 17, Johnson worked as an apprentice to a Raleigh tailor, J. J. Selby. Shortly after, he settled in Greeneville, Tennessee, where he opened his own tailor shop. Before he reached the age of 19, he had met Eliza McCardle, a respected teacher in Greeneville, whom he married on May 17, 1827.

Johnson's wife encouraged his aspirations to become politically active, and Johnson turned his tailor shop into a center for men throughout Greeneville to debate and practice their oratory. In 1828 Johnson was overwhelmingly elected city alderman. Two years later his supporters elected him mayor. From 1835 to 1843, he served in the Tennessee legislature. For the next ten years, he served in the U.S. House of Representatives. He returned to Tennessee in 1853 and was elected governor of the state. When his term expired in 1857, he became a member of the U.S. Senate, where he served until 1862. He was the only southern senator who refused to resign during the Civil War.

Johnson attracted the attention of President Lincoln. In 1862 Lincoln appointed the Tennessee congressman to serve as military governor of the state. After Johnson effectively managed the state throughout the Civil War, Lincoln selected him to run for vice president in the 1864 election. The pro-Union ticket of Lincoln and Johnson was victorious.

Lincoln was assassinated on April 14, 1865, and Johnson assumed the duties of president on April 15. He had been left with the daunting task of assimilating the former confederacy of southern states into the United States. Johnson sought to overlook the secession of the South. He granted many pardons and allowed southern politicians to restore oppressive practices toward former slaves, such as forcing them to give land back to their old masters and depriving them of the right to vote. A group of congressional Republicans, led by Thaddeus Stevens, a representative from Pennsylvania, opposed Johnson's practices. Against Johnson's wishes, the South was put under military rule. The **CIVIL RIGHTS ACT** of 1866, passed in spite of Johnson's **VETO**, granted blacks the right to vote.

In 1867 Congress passed the **TENURE OF OFFICE ACT** (14 Stat. 430), also over Johnson's veto. This act declared that the president could not, without the Senate's permission, remove from federal office any official whose appointment had been approved by the Senate. In August 1867, Johnson refused to follow the Tenure Act when he requested the removal of Secretary of War **EDWIN M. STANTON**. He did so

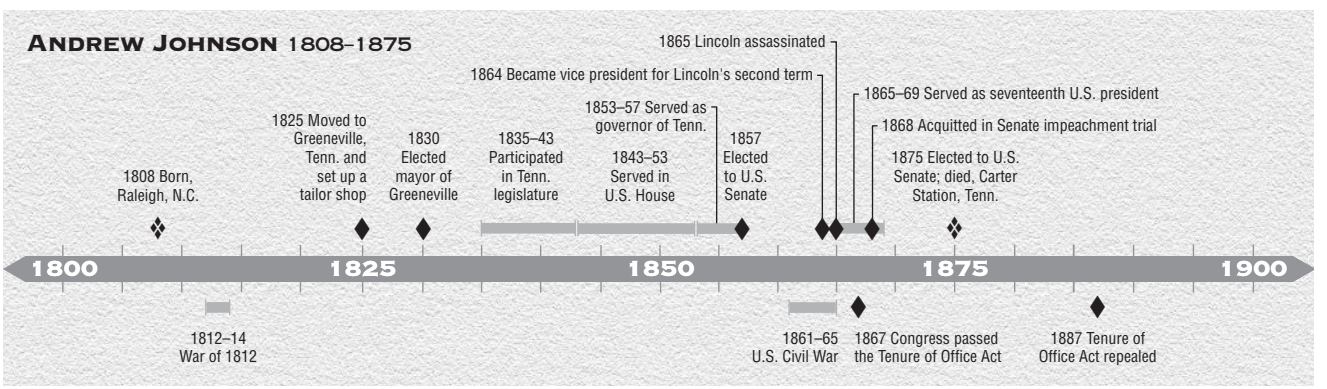

on the ground that Stanton had conspired with radical Republicans against the president.

In removing Stanton from his position, Johnson aroused the wrath of even moderate Republicans in Congress. On February 24, 1868, the House passed resolutions to impeach Johnson for **HIGH CRIMES AND MISDEMEANORS**. By early March, the House had drawn up 12 **ARTICLES OF IMPEACHMENT** against Johnson. Eight of these concerned his alleged violations of the Tenure of Office Act. The ninth alleged a lesser charge, that he had overstepped his boundaries in suborning a U.S. general. The tenth and eleventh articles accused Johnson of defaming Congress in public speeches. A twelfth and final article, dubbed the omnibus article, was intended to induce senators who might have qualms about specific charges against Johnson to find him guilty on general grounds.

Under the Constitution at least two-thirds of the Senate must vote to impeach the president. In Johnson's case this meant that 36 senators would have to vote for impeachment. The defense knew that vote would have to come from the Senate's 42 Republican members—the Senate's 10 Democrats and 2 Johnsonites were bound to support his acquittal. Johnson's lawyers were confident that if they could appeal to the senses of moderate Republicans—whom the defense presumed were loyal to the restoration of the Union—the impeachment effort would fail.

On May 16 and May 26, 1868, the Senate voted 35–19 against Johnson on three of the articles of impeachment. By only one vote less than the two-thirds majority necessary to remove him, Johnson was acquitted of the most serious charges. The Senate subsequently adjourned its court, and Johnson was allowed to finish his term. His presidency ended in 1869, and he returned to Tennessee.

The people of Tennessee welcomed Johnson home and elected him to the U.S. Senate in 1875. However, he died soon after the election, on July 31, 1875, near Carter Station, Tennessee. In 1887 the Tenure of Office Act was repealed. In 1926 the Supreme Court rendered an **EX POST FACTO** (retroactive) judgment declaring the act unconstitutional (272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160 1926).

Most scholars and historians have concluded that the impeachment charges against Andrew Johnson were motivated by partisan politics and that removing Johnson on any one of the charges would have set a dangerous precedent. In effect Congressional Republicans were trying to use impeachment as a political tool to overcome Johnson's repeated attempts to impede their legislative efforts. However, the Founding Fathers, by devising a constitutional system of checks and balances in which the three co-equal branches of government are each delegated certain specific, enumerated authority, tried to prevent any one branch from acquiring too much power and wielding it in a despotic fashion. Had Congress been successful in removing Johnson, impeachment might have become a favored political weapon against future U.S. presidents, thereby severely weakening the presidency and removing any incentive for the House and Senate to cooperate and compromise with the **EXECUTIVE BRANCH**.

Many scholars and historians have also concluded that the Johnson impeachment proceedings helped narrow the class of impeachable offenses. The U.S. Constitution provides that the "President . . . of the United States, shall be removed from Office on Impeachment for . . . high Crimes and Misdemeanors," but fails to define what those terms mean. U.S. Const. art. II § 4. The Johnson impeachment proceedings, in the minds of many observers, have come to stand for the proposition that before an offense may be deemed an impeachable offense it must not only constitute a crime but the crime itself must be of a serious or grave nature. However, this precedent only advanced the discussion so far, as it failed to determine how serious or grave the criminal activity must be for it to be considered an impeachable offense, a question that recurred throughout the impeachment proceedings against **WILLIAM JEFFERSON CLINTON**, who was acquitted by the Senate on charges that he committed the crimes of perjury and **OBSTRUCTION OF JUSTICE** to conceal his relationship with former White-House intern Monica Lewinsky.

"AMENDMENTS TO THE CONSTITUTION OUGHT NOT BE TOO FREQUENTLY MADE; . . . [IF] CONTINUALLY TINKERED WITH IT WOULD LOSE ALL ITS PRESTIGE AND DIGNITY, AND THE OLD INSTRUMENT WOULD BE LOST SIGHT OF ALTOGETHER IN A SHORT TIME."
—ANDREW JOHNSON

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CROSS-REFERENCES

Assassination; Civil Rights Acts; Ex Post Facto Laws; Lincoln, Abraham; Stanton, Edwin McMasters; Tenure of Office Act; Veto.

## ♦ JOHNSON, FRANK MINIS, JR.

As a federal judge in Alabama during the tumultuous CIVIL RIGHTS era, Frank Minis Johnson Jr. earned an outstanding reputation. Serving on the U.S. District Court for the Middle District of Alabama (1955–79) and the U.S. Courts of Appeals for the Fifth and Eleventh Circuits (1979–91), Johnson was a strong, if sometimes cautious, defender of constitutional liberties for all U.S. citizens, regardless of race or social status.

Johnson was one of only a few judges to apply vigorously the U.S. Supreme Court's SCHOOL DESEGREGATION decision in BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). He made history in 1956 when he and another judge overturned a Montgomery, Alabama, ordinance requiring SEGREGATION on city buses (*Browder v. Gayle,* 142 F. Supp. 707 [M.D. Ala.]). That decision gave the nascent CIVIL RIGHTS MOVEMENT an encouraging victory and helped catapult MARTIN LUTHER KING JR., who had led a boycott of Montgomery buses, to the forefront as a civil rights leader. During the 1970s, Johnson issued court orders requiring sweeping changes in Alabama's mental health institutions and prisons. Although his judicial decisions brought death threats to himself and his family from whites who opposed INTEGRATION, Johnson remained faithful to his convictions regarding individual rights.

Johnson was born October 30, 1918, in Delmar, a town in northern Alabama's Winston County. The county, in which Johnson spent his youth, was a Republican stronghold in an overwhelmingly Democratic state; in fact, it had attempted to remain neutral during the Civil War. Johnson's father, Frank Minis Johnson Sr. served as one of the few Republicans in the Alabama state legislature. Johnson studied law at the University of Alabama and graduated in the top of his class in 1943 with a bachelor of laws degree. He gained admission to the Alabama bar the following year.

Johnson distinguished himself during WORLD WAR II while serving as an officer in the U.S. Army. Wounded in the Normandy Invasion, he received numerous decorations, including the Purple Heart with Oak Leaf Cluster and the Bronze Star. He left the military in 1946 and returned to Alabama. Settling in Jasper, he cofounded a law firm and quickly earned a reputation as an outstanding defense lawyer.

In 1952, Johnson worked as a state manager for the presidential campaign of Republican DWIGHT D. EISENHOWER. After Eisenhower became president the following year, he rewarded Johnson with the post of U.S. attorney for Alabama's Northern District. In 1955, Eisenhower named Johnson to the U.S. District Court for Alabama's Middle District. At age 37, John-

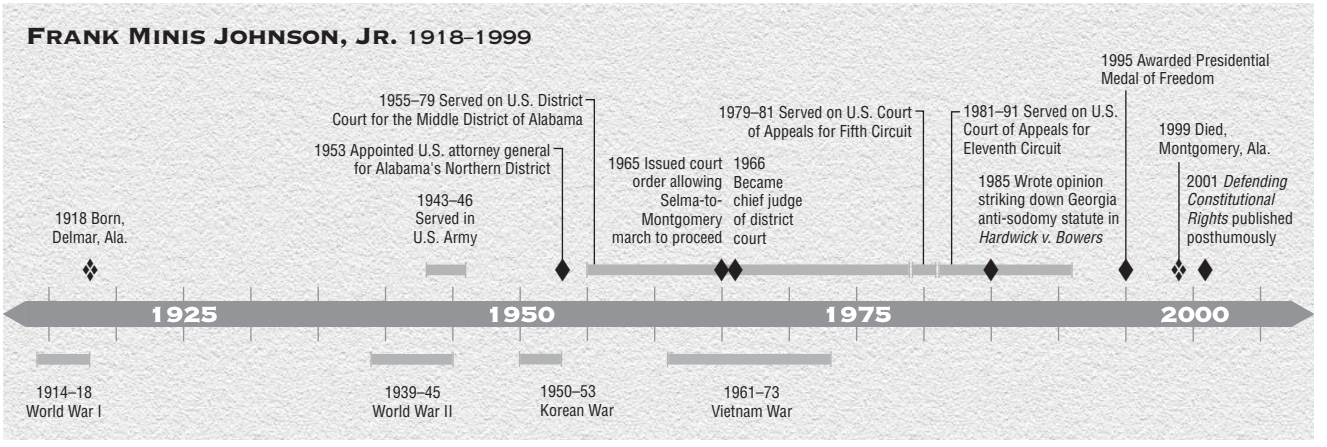

son was the country's youngest federal judge. He became the court's chief judge in 1966.

In 1956, shortly after taking his seat on the bench, Johnson became involved in a formative event of the civil rights movement. A year earlier an African–American woman named ROSA PARKS had been arrested for violating a Montgomery ordinance requiring racial segregation on the city's buses. In response the African–American community organized a boycott of the Montgomery bus system and nominated King as its leader. In addition, the National Association for the Advancement of Colored People (NAACP) challenged the city ordinance in court and eventually appealed the case to the federal district court (*Browder*). Citing the U.S. Supreme Court's reasoning in *Brown,* Johnson and Judge Richard T. Rives, members of a three-judge panel, ruled that the Montgomery ordinance violated the DUE PROCESS and EQUAL PROTECTION Clauses of the FOURTEENTH AMENDMENT.

The ruling was the first of many by Johnson, either alone or as part of a three-judge panel, that eliminated racial segregation in public accommodations such as parks, libraries, bus stations, and airports during the 1950s and 1960s. In many instances, Johnson's decisions were the first of their kind, earning him a national reputation as a staunch defender of civil rights.

Johnson's rulings in support of integration often put him at odds with GEORGE WALLACE, a former law school classmate who served four terms as Alabama's governor (1963–67, 1971–75, 1975–79, and 1983–87). Wallace and the state of Alabama actively opposed the desegregation decrees issued by the federal courts. In response Johnson pioneered the use of injunctions (court orders) to force the desegregation of public schools and to monitor compliance with court orders. Wallace and Johnson also clashed in 1965 over King's Selma-to-Montgomery march for civil rights. After Wallace stopped the march, Johnson issued a court order allowing it to proceed. The march was later credited with sparking passage of the VOTING RIGHTS ACT OF 1965 (42 U.S.C.A. § 1971). Because of the sweeping effect of his judicial decisions on Alabama society, Johnson was sometimes called the "real" governor of Alabama.

Soon after the Selma march, Johnson tried a celebrated case involving the murder of VIOLA LIUZZO, a white civil rights worker who had been shot to death while riding in her car with an African American. After an all-white jury acquitted three KU KLUX KLAN members of the murder in state court, a federal case against the men was brought in Johnson's court. Johnson skillfully maneuvered to avoid a deadlocked jury, and the trial resulted in the conviction of the Klan members for violation of the woman's civil rights.

*Frank M. Johnson.*
AP/WIDE WORLD PHOTOS

Johnson's rulings on voting rights cleared the way for African Americans to vote on an equal basis with whites. In several decisions during the 1960s, Johnson developed the "freeze" doctrine, by which African Americans were allowed to vote as long as their qualifications matched those of the least qualified white. The doctrine was later incorporated into the Voting Rights Act. In addition, Johnson outlawed the poll tax and issued the first court order requiring equitable APPORTIONMENT of legislative seats. Johnson also struck down a state law barring blacks and women from juries, required that court-appointed lawyers be paid, ordered significant changes in Alabama's property tax system, and desegregated the state trooper force.

Johnson's pro–civil rights decisions made him many enemies. Opponents burned crosses on the lawn of his Montgomery home, firebombed his mother's house, and sent hate mail by the bagful. Many leading Montgomery residents ostracized Johnson and his family.

"THE SELMA-TO-MONTGOMERY MARCH . . . DEMONSTRATED SOMETHING ABOUT DEMOCRACY: THAT IT CAN NEVER BE TAKEN FOR GRANTED; [IT] ALSO SHOWED THAT THERE IS A WAY IN THIS SYSTEM TO GAIN HUMAN RIGHTS."
—FRANK M. JOHNSON

After the civil rights era came to an end in the late 1960s, Johnson continued to issue decisions that had a broad and reforming effect on Alabama society. Just as he had done with school desegregation, Johnson used the judicial INJUNCTION as an instrument of social reform. He issued injunctions to remedy inhumane conditions in mental hospitals (*Wyatt v. Stickney,* 334 F. Supp. 1341 [M.D. Ala. 1971]) and prisons (*Newman v. Alabama,* 349 F. Supp. 278 [M.D. Ala. 1972]; *Pugh v. Locke,* 406 F. Supp. 318 [M.D. Ala. 1976]). In both of these instances, Johnson established a HUMAN RIGHTS committee to implement and monitor his orders.

In 1977, President JIMMY CARTER named Johnson director of the FEDERAL BUREAU OF INVESTIGATION, but a heart condition prevented Johnson from taking the job. Surgery improved Johnson's health, and he remained on the federal bench. In 1979, Carter appointed Johnson to the U.S. Court of Appeals for the Fifth Judicial Circuit; in 1981, redistricting made him part of the Eleventh Circuit. In one notable case from his tenure on the Eleventh Circuit court, *Hardwick v. Bowers,* 760 F.2d 1202 (11th Cir. 1985), Johnson wrote an opinion declaring that a Georgia SODOMY statute (Georgia Code. Ann. § 16-6-2 [1984]) violated constitutional rights. The U.S. Supreme Court reversed the decision (*Bowers v. Hardwick,* 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 [1986]).

Johnson retired to senior status on the Eleventh Circuit in 1991. He received many honors and awards, including honorary doctorates of law from Notre Dame, Princeton, Alabama, Boston, Yale, Mercer, and the Tuskegee Institute. He also received the Thurgood Marshall Award. In 1992, the government renamed the federal courthouse in Montgomery the Frank M. Johnson Jr. Federal Building and U.S. Courthouse. And, in 1995, President BILL CLINTON awarded Johnson the Presidential Medal of Freedom, the nation's highest civilian honor. In presenting the award, Clinton noted Johnson's "landmark decisions in the areas of desegregation, voting rights, and civil liberties."

In 1984, Johnson was awarded the Devitt Distinguished Service to Justice Award, which is administered by the American Judicature Society. This award is named for Edward J. Devitt, a former chief U.S. district judge for Minnesota. It acknowledges the dedication and contributions to justice made by all federal judges, by recognizing the specific achievements of one judge who has contributed significantly to the profession. Johnson died on July 23, 1999, in Montgomery.

CROSS-REFERENCES

Gay and Lesbian Rights; Separate But Equal.

## ♦ JOHNSON, JAMES WELDON

James Weldon Johnson was a key figure in the National Association for the Advancement of Colored People (NAACP) between 1916 and 1930, and helped transform that organization into the leading African–American CIVIL RIGHTS advocacy group in the United States. Johnson's efforts as NAACP field secretary greatly increased the number of NAACP branches and members, and his work as executive secretary during the 1920s expanded the association's LOBBYING, litigation, fund-raising, and publicity campaigns. Johnson was also a highly accomplished writer and played a vital role in the African–American literary movement known as the Harlem Renaissance.

Johnson was born June 17, 1871, in Jacksonville, Florida. His parents, James Johnson and Helen Louise Dillette Johnson, encouraged his pursuit of education, and he graduated from Atlanta University in 1894. He then took a job as principal at the Stanton School in Jacksonville, where he established a high school program.

He studied law with a white lawyer in his spare time, and in 1898 was admitted to the Florida bar. He also wrote lyrics for songs composed by his brother, J. Rosamond Johnson. In 1900 the two wrote the song "Lift Every Voice and Sing," which later became known as the "Negro National Anthem." The two brothers moved to New York in 1902 and went on to become a highly successful songwriting team.

Johnson became involved in New York politics. In 1904 he became treasurer of the city's Colored Republican Club, helping with the campaign to reelect THEODORE ROOSEVELT to the presidency. On the recommendation of W. E. B. DU BOIS, an African–American scholar and civil rights leader, Johnson was named U.S. consul to Puerto Cabello, Venezuela, in 1906. Two years later he was appointed consul to Corinto, Nicaragua. He remained in that position until 1913, when he resigned. Johnson believed that the election of WOODROW WILSON, a Democrat, to the presidency, as well as significant racial prejudice, would interfere with his advancement

in the consular service. In 1910 he married Grace Nail. The couple had no children.

Johnson returned to New York and in 1914 became an editorialist and columnist at the *New York Age* newspaper. Two years later he was offered a position as field secretary for the NAACP, which was founded in 1909 to improve the situation of African Americans. In that office Johnson traveled widely and did much to help the NAACP grow from nine thousand members in 1916 to ninety thousand in 1920. Under Johnson's direction the number of branches multiplied rapidly as well. In the South, where NAACP activity had been weak, the number of branches increased from 3 to 131. Johnson also spoke widely on the subject of RACIAL DISCRIMINATION, and he organized NAACP protests. In 1917 he coordinated a silent march in New York to protest LYNCHING of African Americans and other forms of racial oppression. Throughout his tenure at the NAACP, he remained committed to keeping it an interracial organization, seeking the membership and aid of whites as well as blacks.

By 1920 Johnson had risen to executive secretary of the NAACP, the organization's highest leadership position. Under his guidance the NAACP publicized the continued lynching of African Americans, which the organization estimated had caused the death of three thousand people between 1889 and 1919. Johnson directed the NAACP's support of the 1921 Dyer antilynching bill (which did not become law), LABOR UNION movements, and policies to improve living and working conditions for African Americans. In addition, Johnson issued an influential report on the U.S. occupation of Haiti occurring at that time. Furthermore, Johnson was a highly successful fund-raiser.

*James Weldon Johnson.*
LIBRARY OF CONGRESS

Johnson's leadership greatly increased the NAACP's influence on U.S. law. He helped expand the organization's campaigns to end laws and practices that segregated African Americans and denied them basic freedoms such as the right to vote. Under Johnson's leadership the NAACP successfully argued *Nixon v. Herndon,* 273 U.S. 536, 47 S. Ct. 446, 71 L. Ed. 759 (1927), before the Supreme Court. The decision held that a whites-only DEMOCRATIC PARTY primary in Texas was unconstitutional, and marked a significant step toward establishing equal VOTING RIGHTS for African Americans.

In 1930 Johnson resigned from the NAACP to become a professor of creative literature and

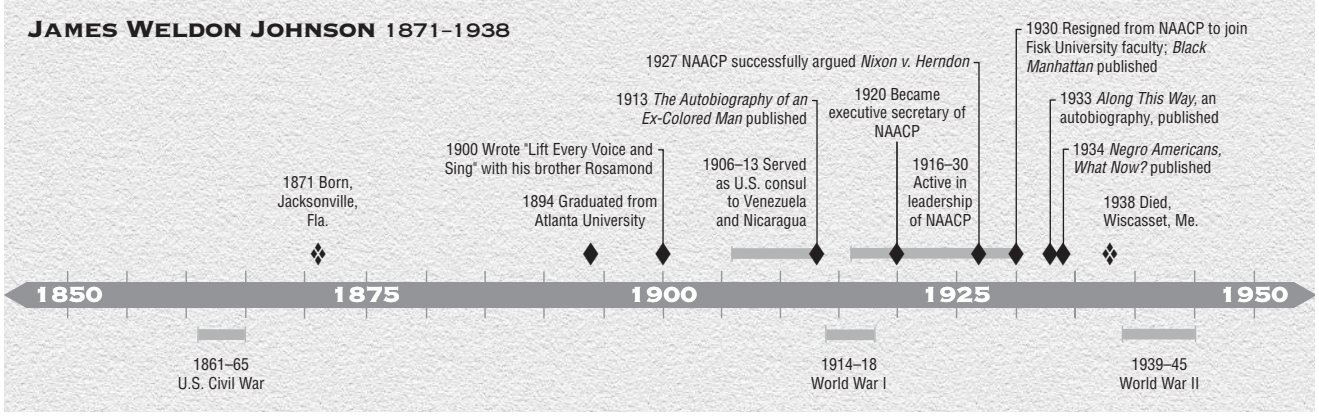

"THE DWARFING, WARPING, DISTORTING INFLUENCE WHICH OPERATES UPON EACH AND EVERY COLOURED MAN IN THE UNITED STATES . . . FORCES [HIM] TO TAKE HIS OUTLOOK ON ALL THINGS, NOT FROM THE VIEW-POINT OF A CITIZEN, OR MAN, OR EVEN A HUMAN BEING, BUT FROM THE VIEW-POINT OF A COLOURED MAN."
—JAMES WELDON JOHNSON

writing at Fisk University, in Nashville. Johnson's writings include *The Autobiography of an Ex-Colored Man* (1913), a novel; three volumes of poetry; *Black Manhattan* (1930), a history of African Americans in New York; *Along This Way* (1933), an autobiography; and *Negro Americans, What Now?* (1934), a treatise on the situation of African Americans. He edited three influential anthologies: *The Book of American Negro Poetry* (1922), *The Book of American Negro Spirituals* (1925), and *The Second Book of American Negro Spirituals* (1926), the last two with his brother.

Johnson received much recognition during his lifetime, including honorary degrees from Atlanta University and Howard University and the NAACP's Spingarn Medal (1925). He was killed in a car accident in Wiscasset, Maine, on June 26, 1938.

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## ◆ JOHNSON, LYNDON BAINES

Lyndon Baines Johnson was the thirty-sixth president of the United States, serving from 1963 to 1969. Like three other vice presidents in U.S. history, he assumed the office following the assassination of the president. He took office November 22, 1963, after JOHN F. KENNEDY was killed in Dallas. Johnson's administration was marked by landmark changes in CIVIL RIGHTS laws and social welfare programs, yet political support for him collapsed because of his escalation of the VIETNAM WAR.

Johnson was born August 27, 1908, near Stonewall, Texas. He was raised in Johnson City, Texas, which was named for his grandfather, who had served in the Texas Legislature. Johnson's father, Sam Ealy Johnson, also served in the Texas Legislature. Johnson graduated from Southwest Texas State Teachers College in 1930 with a teaching degree. He taught high school in Houston, until 1931, when he became involved with Democrat Richard M. Kleberg's campaign for the U.S. House of Representatives. Johnson gave speeches and spoke to voters on Kleberg's behalf. When Kleberg was elected, he asked Johnson to accompany him to Washington, D.C., as his secretary. Johnson agreed, and his political career in Washington, D.C., was launched.

Johnson was not satisfied to be a secretary to a congressman. He began making friends with powerful Democrats, most notably Representative Sam Rayburn, of Texas. Rayburn, who would soon become Speaker of the House, had enormous influence. In 1935, after President FRANKLIN D. ROOSEVELT named him director of the Texas division of the National Youth Administration, Johnson used his connections to put twelve thousand young people to work in public service jobs and to help another eighteen thousand go to college.

He quit this position in 1937 to run in a special election for the U.S. House of Representatives in Texas's Tenth Congressional District. In his campaign he supported Roosevelt's policies,

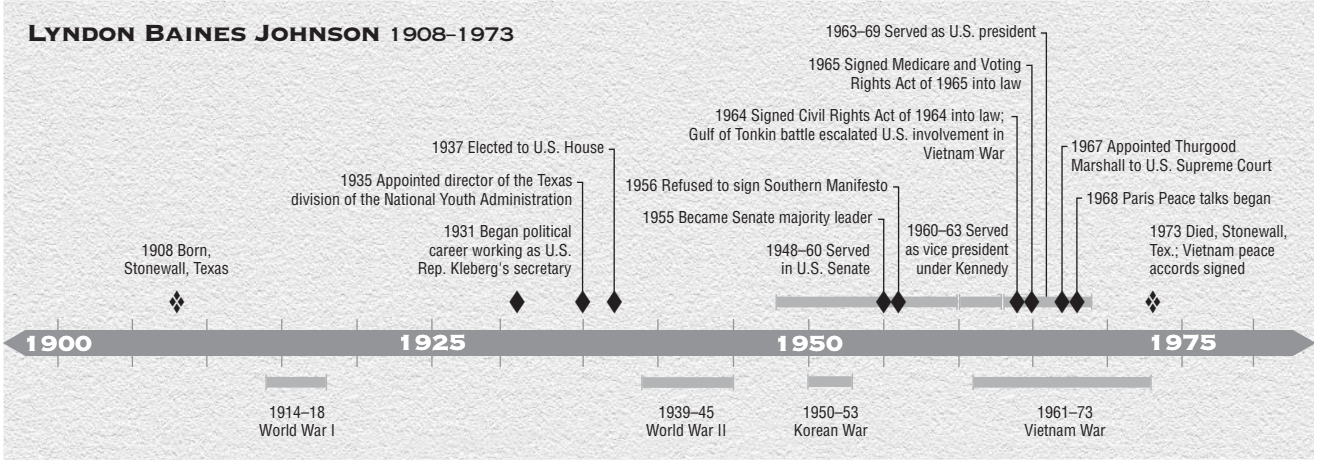

which came under heavy attack by Johnson's opponents. After Johnson was elected, Roosevelt made a point of getting to know him. Soon the two developed a long and lasting friendship.

Johnson remained in the House of Representatives until 1948, though he did spend a brief period in the Navy during WORLD WAR II. He ran for the U.S. Senate in 1941, and lost to Governor W. Lee O'Daniel by fewer than fourteen hundred votes. He ran again in 1948, this time against Coke R. Stevenson, a former Texas governor. Johnson won the 1948 Democratic primary election by eighty-seven votes, but Stevenson claimed that election FRAUD had allowed Johnson supporters to stuff the ballot box with votes from dead or fictitious persons. A federal district court judge ordered Johnson's name removed from the final election ballot pending an investigation of the fraud charges. Johnson enlisted a group of prominent Washington, D.C., attorneys, led by ABE FORTAS, to overturn the order. The attorneys convinced Justice HUGO L. BLACK, of the U.S. Supreme Court, to reverse the order. With his name back on the ballot, Johnson went on to an easy victory.

Johnson moved quickly to gain power and influence in the Senate. Senator Richard B. Russell, of Georgia, became his mentor in the same way Sam Rayburn had been in the 1930s. In 1951 Johnson became the Democratic whip, which required that he maintain party discipline and encourage the attendance of Democratic senators. Two years later he was elected minority leader, at age forty-four the youngest member ever elected to that position. In 1955, after the Democrats took control of the Senate, he assumed the position of majority leader, the most powerful position in that body.

As majority leader Johnson worked at developing consensus with members from both parties. During this period he became famous for the "LBJ treatment," where he would use clever stratagems and steady persuasion to win reluctant colleagues over to his side. He developed a bipartisan approach with the administration of Republican president DWIGHT D. EISENHOWER and sought common ground. He sustained a setback in 1955 when he suffered a heart attack, but returned to government service later that year.

Johnson wanted to be president, and he knew that opposing civil rights would destroy his chances on a national level. He was one of three Southern senators who refused to sign the Southern Manifesto, a 1956 document that urged the South to resist with all legal methods the Supreme Court's decision outlawing racially segregated schools in BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). In 1957 he put through the Senate the first civil rights bill in more than eighty years.

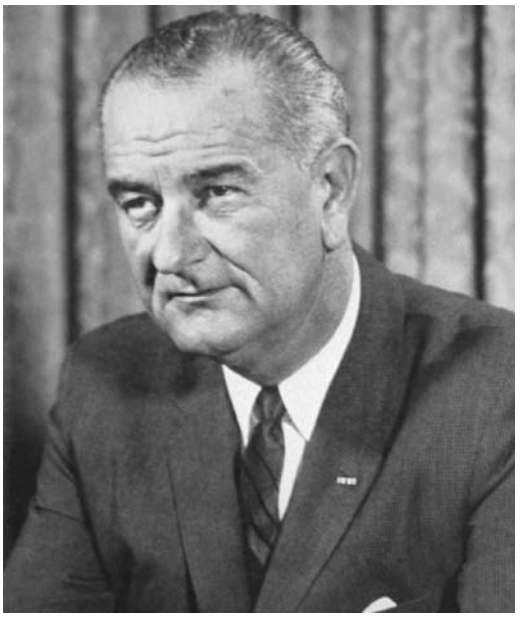

*Lyndon Johnson.*
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"POVERTY HAS MANY ROOTS, BUT THE TAP ROOT IS IGNORANCE."
—LYNDON B. JOHNSON

Senator John F. Kennedy, of Massachusetts, won the Democratic presidential nomination in 1960 and named Johnson his vice presidential running mate. Johnson helped Kennedy in the southern states, and Kennedy won a narrow victory over Vice President RICHARD M. NIXON.

As vice president under Kennedy, Johnson performed numerous diplomatic missions and presided over the National Aeronautics and Space Council and the President's Committee on Equal Employment Opportunities. When Kennedy was assassinated in 1963, Johnson took the oath of office in Dallas. In the months that followed, he concentrated on passing the slain president's legislative agenda. He proposed a war-on-poverty program, helped pass a tax cut, and oversaw the enactment of the landmark Civil Rights Act of 1964 (42 U.S.C.A. § 2000a et seq.). This act outlawed racial and other types of discrimination in employment, education, and public accommodations. Civil rights for all persons was one part of Johnson's vision of what he called the GREAT SOCIETY.

Johnson easily defeated conservative Republican senator BARRY M. GOLDWATER in the 1964 presidential election. Under his administration Congress in 1965 enacted the MEDICARE bill (42

U.S.C.A. § 1395 et seq.), which provided free supplementary HEALTH CARE for older persons as part of their SOCIAL SECURITY benefits. Johnson also obtained large increases in federal aid to education; established the Departments of Transportation and of HOUSING AND URBAN DEVELOPMENT; and proposed the VOTING RIGHTS ACT OF 1965 (42 U.S.C.A. § 1971 et seq.), which ensured protection against racially discriminatory voting practices that had disenfranchised nonwhites. This act changed the South, as it allowed African Americans to register to vote for the first time since Reconstruction. Finally, Johnson appointed to the U.S. Supreme Court THURGOOD MARSHALL, the first African American to sit on the High Court.

International affairs did not go as smoothly for Johnson, especially regarding Vietnam. Kennedy had sent U.S. advisers to help South Vietnam repel what the government characterized as a Communist insurgency that was supported by North Vietnam. Johnson did not wish to abandon the South Vietnamese government, and soon his administration began escalating U.S. involvement. In August 1964 Johnson announced that North Vietnamese ships had attacked U.S. naval vessels in the Gulf of Tonkin. Johnson asked Congress for the authority to employ any necessary course of action to safeguard U.S. troops. Based on what turned out to be inaccurate information supplied by the Johnson administration, Congress gave the president this authority in its GULF OF TONKIN RESOLUTION (78 Stat. 384).

Following his reelection in 1964, Johnson used this resolution to justify military escalation. In February 1965 he authorized the bombing of North Vietnam. To continue the protection of the South Vietnamese government, Johnson increased the number of U.S. soldiers fighting in South Vietnam from twenty thousand to five hundred thousand during the next three years.

As the war escalated, so did antiwar sentiments, especially among college students, many of whom were subject to military CONSCRIPTION. As casualties mounted, antiwar demonstrations increased and support in Congress decreased. The strategy of escalation did not produce the victory military leaders predicted.

The cost of funding a war ended Johnson's Great Society initiatives. More important, the Vietnam War became the focal point for the nation. Johnson's popularity plummeted, and the nation was torn by conflict over the unpopular war. On March 31, 1968, Johnson announced he would not seek reelection. He spent the remainder of his term attempting to convince the South and North Vietnamese to begin a peace process. By the end of his administration, the Paris peace talks were started, which began a long negotiating process between North and South Vietnam.

Johnson left office in January 1969 and returned to his ranch near Johnson City. There he wrote an account of his years in office, *The Vantage Point: Perspectives of the Presidency* (1971). His health deteriorated. Johnson died of a heart attack at his ranch, on January 22, 1973, less than one week before the signing of the accords that ended the Vietnam War.

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## ♦ JOHNSON, REVERDY

Reverdy Johnson served as U.S. attorney general from 1849 to 1850. Johnson also served in the U.S. Senate and was an influential constitutional lawyer. He represented the defense in DRED SCOTT V. SANDFORD, 60 (19 How.) U.S. 393, 15 L. Ed. 691 (1857).

Johnson was born May 21, 1796, in Annapolis, Maryland. He graduated from St. John's College, in Annapolis, in 1811 and was admitted to the Maryland bar in 1815. After establishing a law practice in Upper Marlboro, Maryland, Johnson relocated to Baltimore in 1817 and opened a new firm that specialized in CONSTITUTIONAL LAW.

After his relocation Johnson became interested in politics and government service. He was deputy attorney general of Maryland before being elected to the Maryland Senate in 1821. In 1845 he was elected to the U.S. Senate, then resigned in 1849 to serve as U.S. attorney general in the administration of President ZACHARY TAYLOR.

Johnson's talents in constitutional law were demonstrated in the *Dred Scott* case. Dred Scott

was an African–American slave from Missouri who had been transported to Minnesota, then a "free" (non-slaveholding) territory. Scott sued for his freedom, arguing that he was no longer a slave because he had resided in a free territory. Missouri law had established the principle "once free, always free." John F. A. Sandford, who controlled Scott, objected to the trial court's declaration that Scott was free. The Missouri Supreme Court agreed with Sandford and overturned the once-free, always-free doctrine. Scott appealed to the U.S. Supreme Court.

When the case reached the U.S. Supreme Court, Scott's lawyer framed it as a suit for Scott's freedom. Johnson, one of several lawyers representing Sandford, injected into the proceeding several new issues that transformed the case into a debate over the constitutionality of SLAVERY. Johnson argued that Scott had no right to sue in federal court, raising the issue of a black person's claim to be a U.S. citizen. Johnson also attacked the constitutionality of the 1820 Missouri Compromise, which gave Congress the power to forbid slavery in the territories. Johnson claimed that slaves were private property protected by the Constitution, and therefore Congress could not abolish slavery in the territories. These arguments transformed the issue from whether Scott could be returned to slavery to whether Scott had ever been free at all.

The Supreme Court adopted most of Johnson's arguments. Chief Justice Roger B. Taney's majority opinion concluded that at the time of the ratification of the Constitution, there were no African–American citizens in the United States. Therefore, the Framers never contemplated that African Americans could be federal citizens. In practical terms Scott's lack of citizenship meant he could not sue in federal court. In addition, the Court ruled that the Missouri Compromise was unconstitutional.

The *Dred Scott* case helped precipitate the secession of southern states and the Civil War, yet Johnson supported the Union during the war. He waged a successful campaign to prevent Maryland from seceding, before returning to the U.S. Senate in 1861.

After the Civil War, Johnson was the lone Democratic member of the U.S. Senate to support the ideas of the Radical Republicans' Reconstruction policy. He was a member of the Reconstruction committee and of a joint congressional committee that looked into these issues.

In 1868, as a member of the Senate Rules Committee, Johnson participated in IMPEACHMENT proceedings against President ANDREW JOHNSON. He was strongly in favor of a verdict of acquittal, which occurred by the slimmest of margins.

Johnson entered the foreign service in 1868 as a minister to Great Britain. In 1869 he returned to his law practice. He spent much of his later years defending southerners charged with disloyalty to the federal government. He successfully argued that the FOURTEENTH AMENDMENT applied only to illegal acts committed by the government, not to acts committed by private citizens, including vigilantes.

Johnson died February 10, 1876, in Annapolis, Maryland.

"THE CONSTITUTION . . . ANNOUNCES A GREAT PRINCIPLE OF AMERICAN LIBERTY, . . . THAT AS BETWEEN A MAN AND HIS CONSCIENCE, AS RELATES TO HIS OBLIGATIONS TO GOD, IT IS NOT ONLY TYRANNICAL BUT UNCHRISTIAN TO INTERFERE."
—REVERDY JOHNSON

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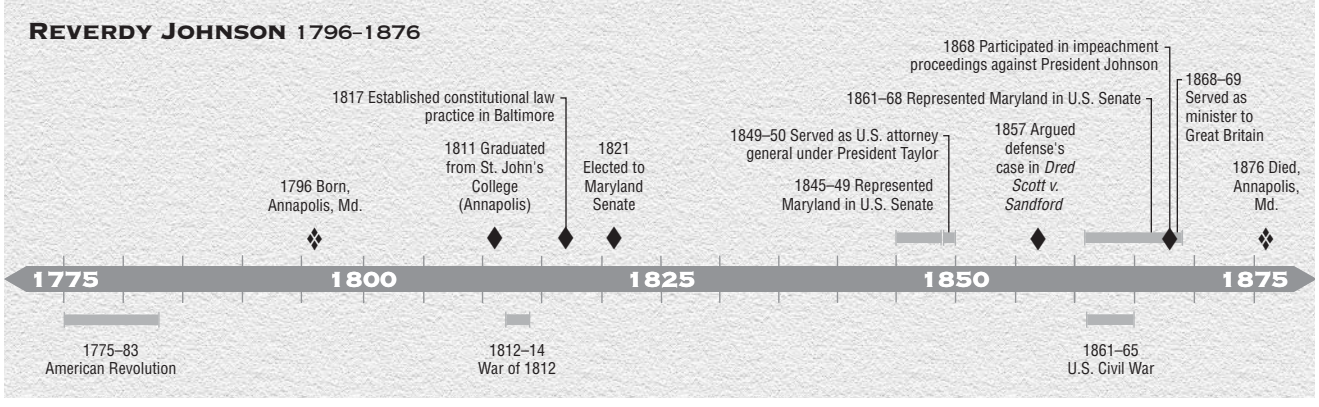

"AMERICA[NS] WISH . . . TO PRESERVE THE CONSTITUTIONAL LIBERTY . . . HANDED DOWN TO US BY OUR ANCESTORS. IF OUR PETITION IS REJECTED BY . . . OUR FRIENDS IN ENGLAND, WILL NOT OUR VERY MODERATE MEN ON THIS SIDE OF THE WATER BE COMPELLED TO OWN THE NECESSITY OF OPPOSING FORCE BY FORCE?"
—THOMAS JOHNSON

## JOHNSON, THOMAS

Thomas Johnson was the first governor of Maryland. He served in the Maryland House of Delegates in the early 1780s and was chief judge of the Maryland General Court from 1790 to 1791. Johnson was appointed to the U.S. Supreme Court in 1791, where he served a brief and uneventful term before resigning because of poor health.

Johnson was born November 4, 1732, to Thomas Johnson and Dorcas Sedgwick Johnson, in Calvert County, Maryland. Johnson was one of twelve children, and he received no formal education as a child. His parents sent him to Annapolis, Maryland, to work as a registry clerk at the land office under Thomas Jennings. Following his apprenticeship, Johnson began to study law in the office of Stephen Bordley, an Annapolis attorney. He was admitted to the bar in 1760, and practiced law before entering politics.

In 1766 Johnson married Ann Jennings, the daughter of his former instructor at the Annapolis land office. They were married for twenty-eight years, until Ann died. They had eight children.

From 1762 to 1773, Johnson was a member of the Maryland colonial assembly. In 1765 he became famous for his strong opposition to the STAMP ACT, which was the first tax imposed on the colonists by Great Britain. Johnson was named a delegate to the Maryland convention in 1774, and a Maryland representative to the First CONTINENTAL CONGRESS, in Philadelphia. He also served on a committee that drafted a petition of grievances to King George III. Johnson formally nominated GEORGE WASHINGTON before the Continental Congress in 1775 for the position of commander in chief of the Continental Army.

*Thomas Johnson.* ETCHING BY ALBERT ROSENTHAL. THE GRANGER COLLECTION, NEW YORK

Johnson supported the Declaration of Independence, although he was not present in Philadelphia on the day it was signed. He voted for Maryland's independence on July 6, 1776, and contributed to the new state constitution that year. During the American Revolution, he served in the Maryland militia as first brigadier general. In 1777 Johnson led nearly two thousand men from Frederick, Maryland, to General Washington's headquarters in New Jersey. Also in 1777 Johnson was elected the first governor of

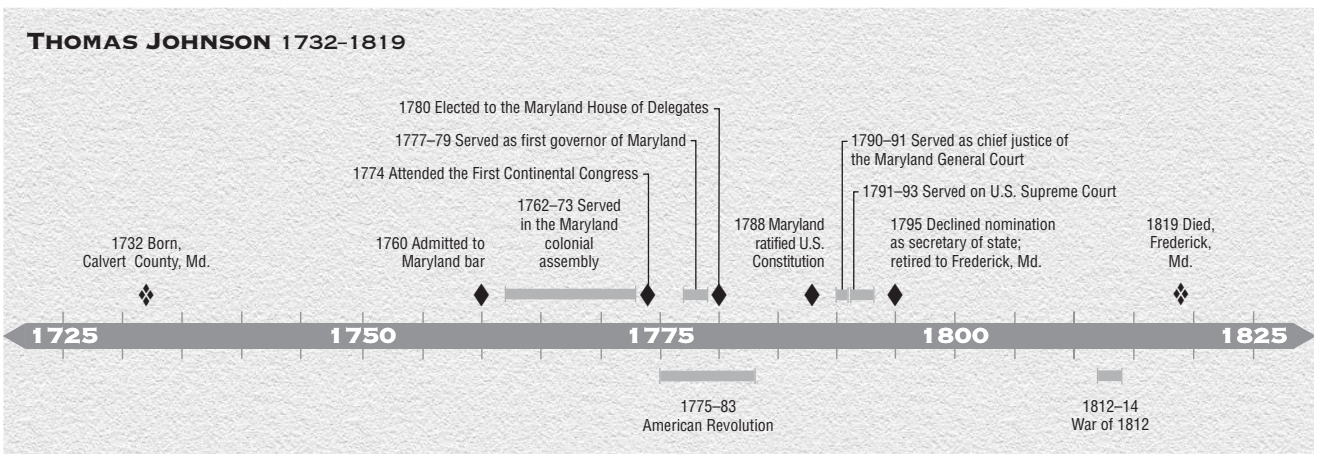

Maryland, from which position he was able to provide crucial assistance in keeping Washington's army peopled and equipped. Johnson continued to serve as Maryland's governor until 1779, when he declined a fourth term. He entered the Maryland House of Delegates in 1780.

Johnson also pursued interests outside of politics. In 1785 he helped organize the state-chartered Potomac Company. This company grew from Johnson's idea to improve navigation along the Potomac River and open a passageway to the West Coast. Johnson began the company with the help of his good friend Washington, who served as president of the company. In the end the enterprise proved unprofitable.

In 1788 Johnson supported ratification of the U.S. Constitution at the Maryland Constitutional Convention. From 1790 to 1791, he served as chief judge of the Maryland General Court. In 1791 President Washington nominated him to the U.S. Supreme Court.

Johnson was hesitant to serve on the Supreme Court because at that time each justice was responsible for riding circuit court duties. Chief Justice JOHN JAY assured Johnson that every effort would be made to relieve the rigors of the circuit court duty, but Johnson was assigned to the Southern Circuit, which included all the territory south of the Potomac. Johnson sought a reassignment. When Jay refused to accommodate that request, Johnson resigned, citing poor health. He had served as an associate justice for just over one year. During his brief and uneventful Supreme Court tenure, he had authored only one opinion.

Johnson continued his public service, becoming a member of the board of commissioners of the federal city, appointed by President Washington to plan a new national capital on the Potomac. That commission voted to name the new city Washington and selected a design submitted by Pierre L'Enfant. Johnson was present in September 1793 when the cornerstone for the new Capitol was laid.

President Washington nominated Johnson to serve as SECRETARY OF STATE in 1795, but Johnson declined. Instead, Johnson retired to Frederick, Maryland, where he died October 26, 1819.

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## ♦ JOHNSON, WILLIAM

William Johnson served in the South Carolina House of Representatives from 1794 to 1798 and as speaker of the house in 1798. He was then elected judge of the South Carolina Court of Common Pleas. In 1804 he was appointed to the U.S. Supreme Court. He served on the U.S. Supreme Court until his death in 1834, earning a reputation as a critic of Chief Justice JOHN MARSHALL, a writer of dissenting opinions, and a nationalist with regard to federal-state relations.

Johnson was born December 27, 1771, in Charleston, South Carolina. He was the son of Sarah Nightingale Johnson and of William Johnson, a blacksmith, legislator, and well-known Revolutionary patriot. During the Revolutionary War, when the British captured Charleston, Johnson's father was sent to detention in Florida, and the family was exiled from its home. The Johnsons returned to South Carolina after being reunited months later.

"IN A COUNTRY WHERE LAWS GOVERN, COURTS OF JUSTICE NECESSARILY ARE THE MEDIUM OF ACTION AND REACTION BETWEEN THE GOVERNMENT AND THE GOVERNED."
—WILLIAM JOHNSON

Johnson graduated first in his class from Princeton in 1790. He then returned to Charleston to study law under Charles C. Pinckney, a prominent adviser to President GEORGE WASHINGTON. Johnson was admitted to the bar in 1793.

In 1794 Johnson married Sarah Bennett, sister of Thomas Bennett, a future governor of South Carolina. The couple had eight children, six of whom died in childhood. They also later adopted two refugee children from Santo Domingo.

From 1794 to 1798, Johnson served in South Carolina's house of representatives as a member of Thomas Jefferson's new REPUBLICAN PARTY. Johnson was speaker of the house in 1798. He was then elected judge of the court of common pleas, the state's highest court.

In 1804 President Jefferson appointed Johnson to the U.S. Supreme Court. During his thirty years of service on the Court, Johnson became known as a critic of Chief Justice John Marshall. Johnson has been called the first great Court dissenter because he established a tradition of dissenting opinions. Among his most noteworthy opinions was his dissent in *Craig v. Missouri,* 29 U.S. (4 Pet.) 410, 7 L. Ed. 903 (1830). In *Craig v. Missouri,* Johnson argued in his dissent that states should be able to issue temporary bills of credit or loans.

In general, Johnson leaned toward the nationalist position in judicial issues involving federal-state relations, as illustrated by his concurring

*William Johnson.*
HULTON/ARCHIVE

opinion in GIBBONS V. OGDEN, 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824). *Gibbons* was a landmark decision that held that the COMMERCE CLAUSE gave to Congress, to the exclusion of the states, the power to regulate interstate commerce, which included navigation between the states. In his circuit court duties as well, Johnson steadfastly held that the federal government had the right to control interstate commerce, including the commerce of slaves. This position proved so unpopular in his native state that he was forced to move to Pennsylvania in 1833.

In the first part of his career as a Supreme Court justice, Johnson sought a different appointment. He wrote to President Jefferson that he found the Court to be no "bed of roses." Nevertheless, he remained on the Court until his death.

Johnson's other accomplishments included the publication of *Sketches of the Life and Correspondence of Nathaniel Greene,* in 1822, and *Eulogy of Thomas Jefferson,* in 1826. Johnson also was a founder of the University of South Carolina. He died following surgery in 1834.

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## JOINDER

*The union in one lawsuit of multiple parties who have the same rights or against whom rights are claimed as coplaintiffs or codefendants. The combination in one lawsuit of two or more causes of action, or grounds for relief. At* COMMON LAW *the acceptance by opposing parties that a particular issue is in dispute.*

### Joinder of Parties

For two or more persons to join together as coplaintiffs or codefendants in a lawsuit, they generally must share similar rights or liabilities. At common law a person could not be added as a plaintiff unless that person, jointly with the other plaintiffs, was entitled to the whole recovery. A person could not be added as a defendant unless that person, jointly with the other defendants, was liable for the entire demand. To be more efficient, reduce costs, and reduce litigation, the modern PRACTICE OF LAW does not proceed on the same principles.

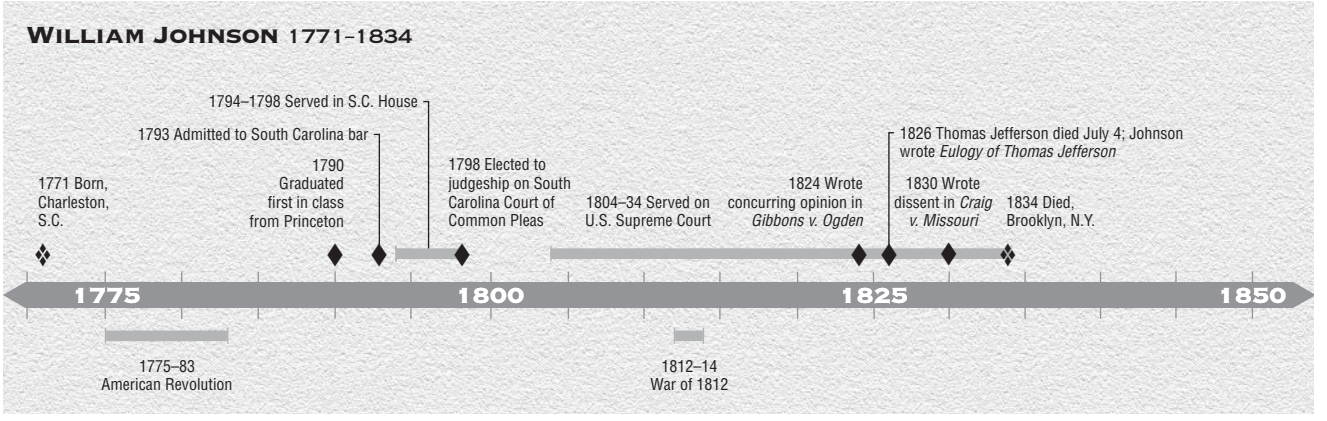

**Permissive Joinder** According to modern law, a person who has no material interest in the subject of the litigation or in the relief demanded is not a proper party and may not be part of the legal action. A proper party is one who may be joined in the action but whose failure to do so does not prevent the court from hearing the case and settling the controversy. A proper party may be added to a lawsuit through a process called permissive joinder.

The statutes that govern permissive joinder generally provide that plaintiffs may unite in one action if they claim a right to relief for injuries arising from the same occurrence or transaction. Likewise, persons may join as defendants in an action if assertions made against them claim a right to relief for damages emerging from the same transaction or occurrence.

**Compulsory Joinder** If a court is being asked to decide the rights of a person who is not named as a party to the lawsuit, that party must be joined in the lawsuit or else the court may not hear the case. Such persons are deemed indispensable or necessary parties, and they may be added as parties to the lawsuit through a process termed compulsory joinder. For reasons of EQUITY and convenience, it is often best for the court not to proceed if an indispensable party is absent and cannot be joined. In some circumstances, however, a court may still hear a matter if an indispensable party is absent, but its judgment can affect only the interests of the parties before it.

To determine whether a person is an indispensable party, the court must carefully examine the facts of the case, the relief sought, and the nature and extent of the absent person's interest in the controversy raised in the lawsuit. The Federal Rules of Civil Procedure and many state rules give courts flexible guidelines for this determination. These rules provide that the court should look to various pragmatic factors and determine whether it is better to dismiss the action owing to the absence of a party, or to proceed without that party. Specifically, the court should consider whether complete relief could still be accorded the parties who are present, whether the absence of the particular party impairs that party's ability to protect an interest, or whether the absence will leave a party that is present subject to a substantial risk of incurring multiple obligations. If the court decides, based on principles of equity and good conscience, that it is best to dismiss the action rather than hear it without the absent party joining the lawsuit, then the absent party is an indispensable party and the case is said to be dismissed for nonjoinder. For example, if one party to a contract asks the court to determine his rights under the contract, and the other party to the contract is absent and cannot be joined, then the court will refuse to hear the case because the other party is indispensable to determining rights under the contract.

### Joinder of Action

Under certain circumstances a plaintiff may join several causes of action, or claims for relief, in one complaint, declaration, or petition, even though each could have been the basis for a separate lawsuit. This procedure is not the same as the common one in which a plaintiff relies on more than one theory of recovery or mode of redress to correct a single wrong.

To determine if the plaintiff is joining separate causes of action, as opposed to merely pursuing more than one means of redress, some courts look to whether the plaintiff is seeking to enforce more than one distinct primary right or whether the complaint addresses more than one subject of controversy. Other courts look to whether the claims emanate from a single occurrence or transaction. If the court's inquiry shows that a plaintiff is attempting to join several causes of action into one lawsuit, the court must look to the applicable court rules and statutes to determine if such a joining is permissible.

Modern statutes and rules of practice governing joinder of causes of action vary by jurisdiction. In general, however, they are liberal and encourage joinder when it promotes efficiency in the justice system. For example, the Federal Rules of Civil Procedure provide that a plaintiff may join in one suit as many claims as she or he has against an opposing party. Some state rules are similarly broad. Many states provide that the court, on its own motion or on the motion of a party, may consolidate similarly related cases.

Joinder is not always favored by modern rules of court and statutes. Some statutes will not permit the joinder of causes of action that require different places of trial. Also, the various joinder statutes generally provide that inconsistent causes of action—that is, ones that disprove or defeat each other—cannot be joined in the same lawsuit. For example, a plaintiff may not in

a single suit rely on a contract as valid and also treat the same contract as rescinded. However, contract and TORT actions may be combined in one suit when they arise out of the same occurrence or transaction and are not inconsistent.

**Misjoinder** Misjoinder is an objection that may be made when a plaintiff joins separate causes of action that cannot be joined according to the applicable law. Some states require the plaintiff to decide which of the misjoined claims he or she wants to pursue. Other states allow the court to sever the misjoined claims into separate actions.

### Joinder of Issue

At common law joinder of issue occurs when one party pleads that an allegation is true and the opposing party denies it, such that both parties are accepting that the particular issue is in dispute.

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Civil Procedure.

## JOINT

*United; coupled together in interest; shared between two or more persons; not solitary in interest or action but acting together or in unison. A combined, undivided effort or undertaking involving two or more individuals. Produced by or involving the concurring action of two or more; united in or possessing a common relation, action, or interest. To share common rights, duties, and liabilities.*

## JOINT AND SEVERAL LIABILITY

*A designation of liability by which members of a group are either individually or mutually responsible to a party in whose favor a judgment has been awarded.*

Joint and several liability is a form of liability that is used in civil cases where two or more people are found liable for damages. The winning plaintiff in such a case may collect the entire judgment from any one of the parties, or from any and all of the parties in various amounts until the judgment is paid in full. In other words, if any of the defendants do not have enough money or assets to pay an equal share of the award, the other defendants must make up the difference.

Defendants in a civil suit can be held jointly and severally liable only if their concurrent acts brought about the harm to the plaintiff. The acts of the defendants do not have to be simultaneous: they must simply contribute to the same event. For example, assume that an electrician negligently installs an electrical line. Years later, another electrician inspects the line and approves it. When the plaintiff is subsequently injured by a short circuit in the line, the plaintiff may sue both electricians and hold them jointly and severally liable.

Joint and several liability can also arise where a HUSBAND AND WIFE or members of an organization owe the government income taxes. In such cases, the revenue agency may collect on the debt from any and all of the debtors. In a contractual situation, where two or more persons are responsible for the same performance and default on their obligations, a nondefaulting party may hold any and all parties liable for damages resulting from the breach of performance.

A small number of states do not strictly follow the doctrine of joint and several liability. In such jurisdictions, called comparative NEGLIGENCE jurisdictions, liability is prorated according to the percentage of the total damages attributable to each defendant's conduct.

## JOINT ESTATE

*Property owned by two or more people at the same time, under the same title, with the same interest, and with the same right of possession.*

Although *joint estate* is sometimes used interchangeably with *joint tenancy,* the two terms are not synonymous. *Joint estate* denotes a broad category of ownership that includes JOINT TENANCY, TENANCY IN COMMON, and TENANCY BY THE ENTIRETY. A more apt synonym for *joint estate* is *concurrent estate,* which depicts the simultaneous ownership of property by more than one person.

### Joint Tenancy

Joint tenants acquire the same interest in the same property through the same conveyance, commencing at the same time, and each holds the property under the same individual possession. Each owner possesses the entire property

by the appropriate designated fraction as well as by the whole, and has the right to enjoy both the fraction and the whole, but shares that right with all other joint tenants. A joint tenancy is created through a simple and straightforward process—for example, through a deed or will.

The principal difference between joint tenancy and other forms of co-ownership is that upon the death of a joint tenant, the surviving tenants have the right to the sole ownership of the property. This right, known as the **RIGHT OF SURVIVORSHIP**, exists without regard to the relationship between the tenants. In other words, two people who are not related in any way can be joint tenants, and either will, upon the death of the other, possess all of the deceased's rights of ownership in that parcel of property. The property does not become part of the decedent's estate, and the disposition of the property cannot be changed by will. When one joint tenant dies, the remaining tenants take an increased share of the property, and this process continues until the last survivor owns the entire parcel. That survivor then ceases to be a joint tenant and may do with the property what she wishes, as its sole owner.

Joint tenancy has enjoyed great popularity because it provides a simple mechanism for holding title to property without that title having to pass through probate. The cumbersome nature of certain probate proceedings and the cost and time that they entail provide ample motivation for many people to seek a joint tenancy arrangement. Joint tenancy is often used by a **HUSBAND AND WIFE** who wish, for example, to have their homestead remain under the sole ownership of the surviving spouse when one dies. The property becomes part of a probated estate only when the second spouse dies.

Four unities are necessary for the establishment of a joint tenancy: time, title, interest, and possession. This means that the interests of the joint owners must come into existence at the same time and by the same conveying document, the interests of all tenants must be identical, and each tenant must have an equal right to enjoy the property. Formerly, if any of these unities did not exist or ceased to exist, a joint tenancy was disallowed or extinguished, and a tenancy in common was created. Today, courts tend not to examine the technical existence of the four unities in considering a joint tenancy case. Where it was the clear intention of the parties to create a joint tenancy and where the requirements have generally been met, most courts will find that a joint tenancy exists.

It is still a well-accepted principle of the unities that if a joint tenant conveys his interest in a property to a third party, the third party becomes a tenant in common, while the remaining tenant continues as a joint tenant but no longer enjoys the right of survivorship. The right of survivorship is lost whether or not the conveyor seeks its loss. Thus, since any joint tenant has the inalienable right to sever the joint tenancy by conveying her property to another party, the existence of a joint tenancy is not a complete protection of the right of survivorship. Other problems may arise owing to the joint tenants' inability to control the distribution of the property through a will. In addition, a federal gift tax may be imposed if the joint tenancy was created primarily from the funds of only one joint tenant.

Many states have tended to favor tenancies in common over joint tenancies because a joint tenant may not clearly understand that the property goes to the surviving tenants. Courts differ on the language required to create a joint tenancy. Where a desire to create a joint tenancy is not clearly expressed, courts will often find in favor of a tenancy in common rather than a joint tenancy.

### Tenancy in Common

Tenancy in common provides ownership of an undivided interest of the whole but not of the whole itself. It bestows no right of survivorship, and the interest of the tenant in common is freely alienable and will pass to the heirs of the tenant upon the tenant's death. When a sole owner dies without having specified the disposition of the property, the heirs will inherit as tenants in common.

### Tenancy by the Entirety

Tenancy by the entirety is similar to joint tenancy in providing the right of survivorship and requiring the four unities. But it is a more restricted type of joint estate that may exist only between a husband and a wife. Each spouse owns the undivided whole of the property so that upon the death of one spouse, the surviving spouse is entitled to the decedent's full share. Neither spouse can voluntarily dispose of his interest in the property, and the tenancy can be created only by will or by deed.

If a conveyance specified a tenancy by the entirety but the grantees were other than hus-

band and wife, some courts have declared that a joint tenancy resulted, whereas others have found a tenancy in common.

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## JOINT OPERATING AGREEMENT

*Any contract, agreement,* JOINT VENTURE, *or other arrangement entered into by two or more businesses in which the operations and the physical facilities of a failing business are merged, although each business retains its status as a separate entity in terms of profits and individual mission.*

The purpose of a joint operating agreement (JOA) is to protect a business from failure, yet prevent monopolization within an industry by allowing each party to retain some form of separate operation. JOAs are used in the newspaper, HEALTH CARE, gas and oil, and other industries.

JOAs have been questioned as providing a means of avoiding antitrust problems. With *International Shoe Co. v. FTC,* 280 U.S. 291, 50 S. Ct. 89, 74 L. Ed. 431 (1930), the Supreme Court created the "failing-company" defense, by which mergers that would ordinarily violate ANTITRUST LAWS are permitted where one of the businesses faces certain failure if no other action is taken. It was argued that a merger between two competitors, one of which is failing, cannot adversely affect competition because, either way, the failing company will disappear as a competitive entity.

In the newspaper business, JOAs are used so that a failing newspaper can be paired with a parent newspaper and still retain separate editorial and reporting functions. In 1965 the JUSTICE DEPARTMENT questioned the legality of JOAs by issuing charges of antitrust violations to two publishers of daily newspapers operated under a JOA in Tucson, Arizona. In *Citizens Publishing Co. v. United States,* 394 U.S. 131, 89 S. Ct. 927, 22 L. Ed. 2d 148 (1969), even though the newspapers used the failing-company defense, the Supreme Court upheld findings of antitrust violations. Its decision narrowed the scope of the failing-company defense. The Court set three strict conditions for claiming failing-company IMMUNITY: (1) the failing company must be about to liquidate, and the JOA must be its last chance to survive; (2) the acquiring company must be the only available purchaser; and (3) reorganization prospects in BANKRUPTCY must be dim or nonexistent.

Congress responded to *Citizens Publishing* by passing the Newspaper Preservation Act (NPA) (15 U.S.C.A. § 1802 et seq.) in 1970. The NPA lets newspapers form a JOA if they pass a less strict test. Under the NPA the attorney general may grant limited exemption from antitrust laws by approving a JOA.

In the health care industry, hospitals may form a JOA to provide a stronger financial structure. The JOA, also known in this industry as a virtual merger, allows the hospitals to retain separate boards of directors but turns over management to a separate company. The hospitals coordinate services, construction needs, and the purchase of major equipment, yet maintain some of their own policies. Religious hospitals gain the benefits of a hospital network and still retain their religious affiliation. For example, a Catholic hospital entering into a JOA can maintain its stand against ABORTION and continue its individual programs for treating people who are poor.

Two or more gas and oil operators can enter into a JOA to share the risk and expense of gas and oil exploration. One party is given responsibility for day-to-day operations, often charging back expenses to the other participants in the JOA. The operator is able to keep costs down, and the other participants still retain rights to their share of the gas and oil, which they can use at their own discretion. The parties are seldom considered to be in a partnership unless the agreement specifically states that they are.

In all JOAs the parties retain some aspect of their original organization, whether it is editorial voice, religious affiliation, mission statement, or the ability to use the resources of the business as they choose. All the parties share in the financial risks of the joint operation and gain the potential for an increased market presence and thus increased profits.

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CROSS-REFERENCES

Mergers and Acquisitions; Monopoly.

## JOINT RESOLUTION

*A type of measure that Congress may consider and act upon, the other types being bills, concurrent resolutions, and simple resolutions, in addition to treaties in the Senate.*

Like a bill, a joint resolution must be approved, in identical form, by both the House and the Senate, and signed by the president. Like a bill, it has the force of law if approved.

A joint resolution is distinguished from a bill by the circumstances in which it is generally used. Although no rules stipulate whether a proposed law must be drafted as a bill or a joint resolution, certain traditions are generally followed. A joint resolution is often used when Congress needs to pass legislation to solve a limited or temporary problem. For example, it is used as a temporary measure to provide continuing appropriations for government programs when annual appropriations bills have not yet been enacted. This type of joint resolution is called a continuing resolution.

Joint resolutions are also often used to address a single important issue. For example, between 1955 and January 1991, on six occasions Congress passed joint resolutions authorizing or approving presidential requests to use armed forces to defend specific foreign countries, such as Taiwan, or to protect U.S. interests in specific regions, such as the Middle East. Two of these resolutions—the TONKIN GULF RESOLUTION of 1964 (78 Stat. 384) and the Persian Gulf Resolution of 1991 (105 Stat. 3)—were used, in part, to justify U.S. participation in a full-scale war.

Another use of joint resolutions is to propose amendments to the U.S. Constitution. Resolutions proposing constitutional amendments must be approved by two-thirds of both houses. They do not require the president's signature, but instead become law when they are ratified by three-fourths of the states.

Finally, joint resolutions are commonly used to establish commemorative days. Of the ninety-nine joint resolutions that became law in the 103d Congress, for example, eighty-three were items of commemorative legislation.

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Congress of the United States.

## JOINT STOCK COMPANY

*An association engaged in a business for profit with ownership interests represented by shares of stock.*

A joint stock company is financed with capital invested by the members or stockholders who receive transferable shares, or stock. It is under the control of certain selected managers called directors.

A joint stock company is a form of partnership, possessing the element of personal liability where each member remains financially responsible for the acts of the company. It is not a legal entity separate from its stockholders.

A joint stock company differs from a partnership in that the latter is composed of a few persons brought together by shared confidence. Partners are not free to retire from the firm or to substitute other persons in their place without prior assent of all the partners. A partner's death causes the dissolution of the firm.

In contrast, a joint stock company consists of a large number of stockholders who are unacquainted with each other. A change in membership or a transfer of stock has no effect on the continued existence of the company and the death of a stockholder does not result in its dissolution. Unlike partners in a partnership, a stockholder in a joint stock company has no agency relationship to the company or any of its members.

A joint stock company is similar to a corporation in that both are characterized by perpetual succession where a member is allowed to freely transfer stock and introduce a stranger in

*Anxious investors wait for news about the South Sea Company, a joint stock company formed in London in 1711. Joint stock companies are a form of partnership in which each member, or stockholder, is financially responsible for the acts of the company.*

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the membership. The transfer has no effect on the continuation of the organization since both a joint stock company and a corporation act through a central management, board of directors, trustees, or governors. Individual stockholders have no authority to act on behalf of the company or its members.

A joint stock company differs from a corporation in certain respects. A corporation exists under a state charter, while a joint stock company is formed by an agreement among the members. The existence of a joint stock company is based upon the right of individuals to contract with each other and, unlike a corporation, does not require a grant of authority from the state before it can organize.

While members of a corporation are generally not held liable for debts of a corporation, the members of a joint stock company are held liable as partners.

In a legal action, a corporation sues and is sued in its corporate name, but a joint stock company sues and defends in the name of a designated officer.

## JOINT TENANCY

*A type of ownership of real or* PERSONAL PROPERTY *by two or more persons in which each owns an undivided interest in the whole.*

In estate law, joint tenancy is a special form of ownership by two or more persons of the same property. The individuals, who are called joint tenants, share equal ownership of the property and have the equal, undivided right to keep or dispose of the property. Joint tenancy creates a RIGHT OF SURVIVORSHIP. This right provides that if any one of the joint tenants dies, the remainder of the property is transferred to the survivors. Descended from common-law tradition, joint tenancy is closely related to two other forms of concurrent property ownership: TENANCY IN COMMON, a less restrictive form of ownership that sometimes results when joint tenancies cease to exist, and TENANCY BY THE ENTIRETY, a special form of joint tenancy for married couples.

Joint tenants usually share ownership of land, but the property may instead be money or other items. Four main features mark this type

of ownership: (1) The joint tenants own an undivided interest in the property as a whole; each share is equal, and no one joint tenant can ever have a larger share. (2) The estates of the joint tenants are vested (meaning fixed and unalterable by any condition) for exactly the same period of time—in this case, the tenants' lifetime. (3) The joint tenants hold their property under the same title. (4) The joint tenants all enjoy the same rights until one of them dies. Under the right of survivorship, the death of one joint tenant automatically transfers the remainder of the property in equal parts to the survivors. When only one joint tenant is left alive, he or she receives the entire estate.

If the joint tenants mutually agree to sell the property, they must equally divide the proceeds of the sale. Because disagreement over the disposition of property is common, courts sometimes intervene to divide the property equally among the owners. If one joint tenant decides to convey her or his interest in the property to a new owner, the joint tenancy is broken and the new owner has a tenancy in common.

Tenancy in common is a form of concurrent ownership that can be created by deed, will, or operation of law. Several features distinguish it from joint tenancy: A tenant in common may have a larger share of property than the other tenants. The tenant is also free to dispose of his or her share without the restrictive conditions placed on a joint tenancy. Unlike joint tenancy, tenancy in common has no right of survivorship. Thus, no other tenant in common is entitled to receive a share of the property upon a tenant in common's death; instead, the property goes to the deceased's heirs.

Tenancy by the entirety is a form of joint tenancy that is available only to a HUSBAND AND WIFE. It can be created only by will or by deed. As a form of joint tenancy that also creates a right of survivorship, it allows the property to pass automatically to the surviving spouse when a spouse dies. In addition, tenancy by the entirety protects a spouse's interest in the property from the other spouse's creditors. It differs from joint tenancy in one major respect: neither party can voluntarily dispose of her or his interest in the property. In the event of DIVORCE, the tenancy by the entirety becomes a tenancy in common, and the right of survivorship is lost.

CROSS-REFERENCES

Real Property.

## JOINT TORTFEASOR

*Two or more individuals with joint and several liability in a tort action for the same injury to the same person or property.*

To be considered joint tortfeasors, the parties must act together in committing the wrong, or their acts, if independent of each other, must unite in causing a single injury. All who actively participate in the commission of a civil wrong are joint tortfeasors. Persons responsible for separate acts of NEGLIGENCE that combine in causing an injury are joint tortfeasors. The plaintiff has the option of suing one or more of the tortfeasors, either individually or as a group.

If the plaintiff is awarded damages, each joint tortfeasor is responsible for paying a portion of the damages, based on the percentage of the injury caused by his or her negligent act. The defendant who pays more than his or her share of the damages, or who pays more than he or she is at fault for, may bring an action to recover from the other culpable defendants under the principle of contribution.

## JOINT VENTURE

*An association of two or more individuals or companies engaged in a solitary business enterprise for profit without actual partnership or incorporation; also called a joint adventure.*

A joint venture is a contractual business undertaking between two or more parties. It is similar to a business partnership, with one key difference: a partnership generally involves an ongoing, long-term business relationship, whereas a joint venture is based on a single business transaction. Individuals or companies choose to enter joint ventures in order to share strengths, minimize risks, and increase competitive advantages in the marketplace. Joint ventures can be distinct business units (a new business entity may be created for the joint venture) or collaborations between businesses. In a collaboration, for example, a high-technology firm may contract with a manufacturer to bring its idea for a product to market; the former provides the know-how, the latter the means.

All joint ventures are initiated by the parties' entering a contract or an agreement that specifies their mutual responsibilities and goals. The contract is crucial for avoiding trouble later; the parties must be specific about the intent of their joint venture as well as aware of its limitations. All joint ventures also involve certain rights and

duties. The parties have a mutual right to control the enterprise, a right to share in the profits, and a duty to share in any losses incurred. Each joint venturer has a fiduciary responsibility, owes a standard of care to the other members, and has the duty to act in GOOD FAITH in matters that concern the common interest or the enterprise. A *fiduciary responsibility* is a duty to act for someone else's benefit while subordinating one's personal interests to those of the other person. A joint venture can terminate at a time specified in the contract, upon the accomplishment of its purpose, upon the death of an active member, or if a court decides that serious disagreements between the members make its continuation impractical.

Joint ventures have existed for centuries. In the United States, their use began with the railroads in the late 1800s. Throughout the middle part of the twentieth century they were common in the manufacturing sector. By the late 1980s, joint ventures increasingly appeared in the service industries as businesses looked for new, competitive strategies. This expansion of joint ventures was particularly interesting to regulators and lawmakers.

The chief concern with joint ventures is that they can restrict competition, especially when they are formed by businesses that are otherwise competitors or potential competitors. Another concern is that joint ventures can reduce the entry of others into a given market. Regulators in the JUSTICE DEPARTMENT and the FEDERAL TRADE COMMISSION routinely evaluate joint ventures for violations of ANTITRUST LAW; in addition, injured private parties may bring antitrust suits.

In 1982 Congress amended the SHERMAN ANTI-TRUST ACT OF 1890 (15 U.S.C.A. § 6a)—the statutory basis of antitrust law—to ease restrictions on joint ventures that involve exports. At the same time, it passed the Export Trading Company Act (U.S.C.A. § 4013) to grant exporters limited IMMUNITY to antitrust prosecution. Two years later the National Cooperative Research Act of 1984 (Pub. L. No. 98-462) permitted venturers involved in joint research and development to notify the government of their joint venture and thus limit their liability in the event of prosecution for antitrust violations. This protection against liability was expanded in 1993 to include some joint ventures involving production (Pub. L. No. 103-42).

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## JONES ACT

Enacted in 1920 (46 U.S.C.A. § 688) the Jones Act provides a remedy to sailors for injuries or death resulting from the NEGLIGENCE of an owner, a master, or a fellow sailor of a vessel. The federal Jones Act defines the legal rights of seamen who are injured or killed in the course of maritime service. It entitles them, or their survivors, to sue their employer in the event that their fellow workers or shipmasters are negligent (unreasonably careless), and to receive a trial by jury. Prior to the law's passage in 1920, sailors did not enjoy these rights, largely because of antiquated legal concepts and court opinions that tended to protect employers. A milestone in liability law, the Jones Act was intended to demolish such barriers in recognition of the special risks taken by sailors. Interpreting the law has been a long and difficult challenge for the federal courts, which have exclusive jurisdiction over Jones Act claims. The crux of the problem is the Jones Act's failure to define the term *seaman,* which courts have generally, but not always, construed to mean "a shipmaster or crew member."

Until the early twentieth century, the rights of sailors were limited. If a sailor was injured through the negligence of another sailor or the master of the ship, the injured party could not hope to win a suit against the employer. Nor could survivors of a sailor who died in the line of service win such a suit. Under general maritime law, sailors were entitled to "maintenance and cure"—a form of contractual compensation that provided a living allowance for food, lodging, and medical expenses. Only when a ship was proved to be unseaworthy could sailors recover damages from their employer.

The U.S. Supreme Court emphasized these limitations in 1903 in *The Osceola,* 189 U.S. 158,

23 S. Ct. 483, 47 L. Ed. 760. In that case the Court ruled that the owner of a ship was not responsible for a sailor's injuries simply because those injuries were caused by the negligent order of the ship's master. The decision had its roots in a common-law doctrine known as the FELLOW-SERVANT RULE. This now outdated concept shifted blame partly, and sometimes entirely, from employers to fellow workers. If sued because a worker was injured on the job, employers could avert liability by blaming the accident on the negligence of fellow employees. In *Osceola* the Court based its reasoning on a so-called fellow-seaman doctrine, thus curtailing the legal remedies available to an injured sailor.

Several historical developments motivated Congress to give sailors greater legal rights. The sinking of the *Titanic* in 1912 heightened public awareness of the perils of service at sea, and it was soon followed by concerns about merchant marines at the onset of WORLD WAR I. In 1915 Congress enacted safety requirements for vessels through the Act to Promote the Welfare of American Seamen in the Merchant Marine of the United States (Act of March 4, 1915, ch. 153, 38 Stat. 1164). This act overruled the Supreme Court's decision in *Osceola,* explicitly stating that the fellow-seaman doctrine could not be used as a defense. But the law had little force. In 1918 the Court ruled that Congress had failed to provide a remedy for negligent acts, and therefore allowed a lower court's dismissal of a sailor's negligence suit to stand (*Chelentis v. Luckenbach Steamship Co.,* 247 U.S. 372, 38 S. Ct. 501, 62 L. Ed. 1171). Federal lawmakers viewed the decision as undermining their will.

Two years later Congress responded by passing the Merchant Marine Act of 1920 (46 App. U.S.C.A. § 861 et seq.), section 33 of which has come to be known as the Jones Act. Lawmakers defined the rights of sailors to sue in explicit language:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury. . . . and in case of the death of any seaman as a result of any such personal injury the PERSONAL REPRESENTATIVE of such seaman may maintain an action for damages at law with the right of trial by jury.

Though Congress had eliminated the barriers that the Supreme Court had erected, a key question remained: who qualified as a seaman? In 1927 Congress provided a partial answer through the passage of the Longshoremen's and Harbor Workers Compensation Act (LHCA) (33 U.S.C.A. § 901 et seq.). The LHCA provided WORKERS' COMPENSATION benefits to dockhands, who by that time had replaced sailors in the tasks of loading and unloading ships. But the LHCA specifically excluded any crew member of a vessel from its coverage; thus, by extension, sailors were not eligible for the benefits afforded dockworkers.

Because Congress did not see a need in 1920 to define *seaman,* it remained ambiguous who qualified to bring a suit under the Jones Act. Nevertheless, the courts had little trouble deciding until 1940, when the Supreme Court ruled that a crew member was not a seaman if his duties did not pertain to navigation (*South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 60 S. Ct. 544, 84 L. Ed. 732). Yet, over the next several decades, some courts liberally construed both who constituted a sailor and what constituted a vessel. More confusion followed as a result of the Supreme Court's 1955 decision in *Gianfala v. Texas Co.,* 350 U.S. 879, 76 S. Ct. 141, 100 L. Ed. 775, which reinstated the district court's ruling that the determination of a sailor's status belonged to the jury. The definition of *seaman* came to include workers on dredges and floating oil drilling platforms. Still, no precise test existed, and the result was an explosion of Jones Act litigation. Between 1975 and 1985, nearly one hundred thousand Jones Act suits were filed in southern states.

During the 1980s critics of the Jones Act called for reform. They asked Congress to limit the act's scope, and the Supreme Court to define whom the act covered. Although Congress did not act, the Court returned a partial answer in 1995 in *Chandris, Inc. v. Latsis,* 515 U.S. 347, 115 S. Ct. 2172, 132 L. Ed. 2d 314. The decision established two elements that must be met by a plaintiff in order for the plaintiff to qualify as a sailor: the worker's duties "must contribute to the function of the vessel or to the accomplishment of its mission," and the worker "must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in both its duration and its nature." One key result of the decision was that sailors could now sue under the Jones Act even if their work required going ashore. But scholars did not believe *Chandris* was a conclusive ruling on all matters of interpretation in the law.

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## ♦ JONES, ELAINE RUTH

A leading African–American attorney, Elaine Ruth Jones has devoted her career to the cause of CIVIL RIGHTS. Since 1993, she has served as director-counsel of the NAACP LEGAL DEFENSE AND EDUCATIONAL FUND (LDF). Known for her eloquence and tenacity as well as for her creative approach to the cause of civil rights, Jones heads the LDF's 80-member staff while frequently speaking out on legal, social, and political issues.

When Jones was born on March 2, 1944, in Norfolk, Virginia, opportunities for blacks in her birthplace were limited. Her father was a Pullman porter who had been taught to read by her college-educated mother. Jones, her brother, and her parents felt the sting of being turned away from whites-only facilities. Yet the family believed in success through hard work and especially in education. Jones graduated third in her class from BOOKER T. WASHINGTON High School, in Norfolk, in 1961, and then attended Howard University, from which she graduated cum laude with a political science degree in 1965.

Jones served in the Peace Corps in Turkey between 1965 and 1967. She returned to the United States determined to pursue social change through the law. Particularly inspiring to her was the career of THURGOOD MARSHALL, founder of the LDF and later a U.S. Supreme Court justice. In 1970, she became the first black woman to graduate from the University of Virginia Law School. Jones's distinction in law school earned her a lucrative offer from the New York–based law firm of Nixon, Mudge, Rose, Guthrie, and Alexander, at that time the firm that represented President RICHARD M. NIXON. At the last minute, she chose not to accept the offer; she wanted to pursue Marshall's work.

Jones joined the LDF as an attorney. As the NAACP's litigation and public education arm, the LDF provides legal assistance to African Americans, and has brought more cases before the U.S. Supreme Court than any other legal body except the solicitor general's office. Assigned to death-penalty cases, Jones represented numerous black defendants in state and federal court. Only two years into her career, she worked on the landmark U.S. Supreme Court case FURMAN V. GEORGIA, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), in which the Court struck down death penalty statutes in 39 states after finding that the death penalty violated the CRUEL AND UNUSUAL PUNISHMENTS Clause of the EIGHTH AMENDMENT. The ruling held up hundreds of executions until states could rewrite their laws.

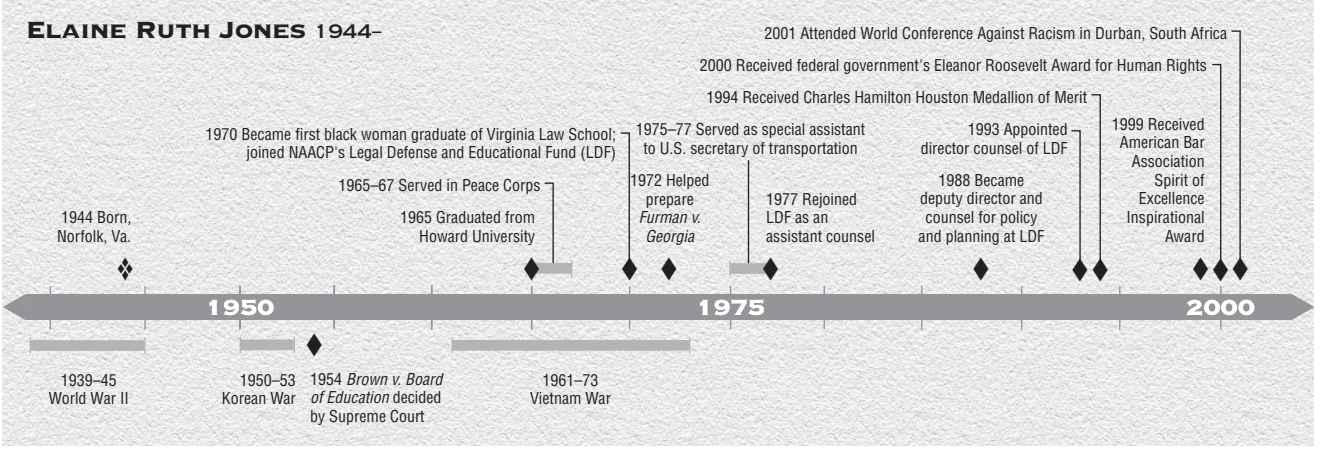

Starting in 1975, Jones spent two years working for the federal government. As a special assistant to the U.S. secretary of transportation, she helped to formulate official policies on a broad range of transportation issues. Among other accomplishments, she helped to open the doors of the U.S. Coast Guard to women. But she longed to return to her former job at the LDF. "Once you get started doing civil rights work, it is hard to put it aside and move on to something else," she said. "I believe that is because there is still so much injustice. You see it everywhere and you want to do everything possible to stop it."

Jones returned to the LDF in 1977, to work in its Washington, D.C., office as an assistant counsel. She again litigated civil rights cases, but the new position also required her to review government actions and policies. She monitored civil rights enforcement activities of EXECUTIVE BRANCH agencies and legislative initiatives of Congress. In 1988, she became deputy director and counsel for policy and planning, devoting herself to determining new areas in which the LDF could pursue its civil rights agenda. In 1989, Jones became the first African American to be elected to the American Bar Association's Board of Governors.

These positions gave Jones a political education that broadened her public visibility and her view of the LDF's mission. When an opening for the organization's highest position, director-counsel, appeared in 1993, she was the board of directors' obvious choice. "[She] was precisely the kind of person whom Justice Marshall no doubt envisioned to take up the leadership position," commented LDF president Robert H. Preiskel. "Elaine shared a good many of the characteristics that made him such a powerful leader."

Jones soon began pursuing a broader agenda for the LDF. She identified new civil rights issues, including environmental disparities as evidenced by the dumping of toxic waste in minority communities and the presence of dangerous lead-based paint in buildings in which black families lived and the need for HEALTH CARE reform. She also used the LDF's public-education function to address traditional issues, advocating continued support for AFFIRMATIVE ACTION programs and opposing racial inequity in death-penalty cases. Jones supported the Racial Justice Act (H.R. 3315, 103d Cong., 2d Sess. [1994] §§ 601–611), legislation—ultimately stripped from President BILL CLINTON's 1994 crime bill—that would have prohibited executions that fit a racially discriminatory pattern. In 1994, she received the Washington Bar Association's prestigious CHARLES HAMILTON HOUSTON Medallion of Merit, an award given to leaders who use the law for social change. In 2000, President Clinton presented her with the Eleanor Roosevelt Human Rights Award.

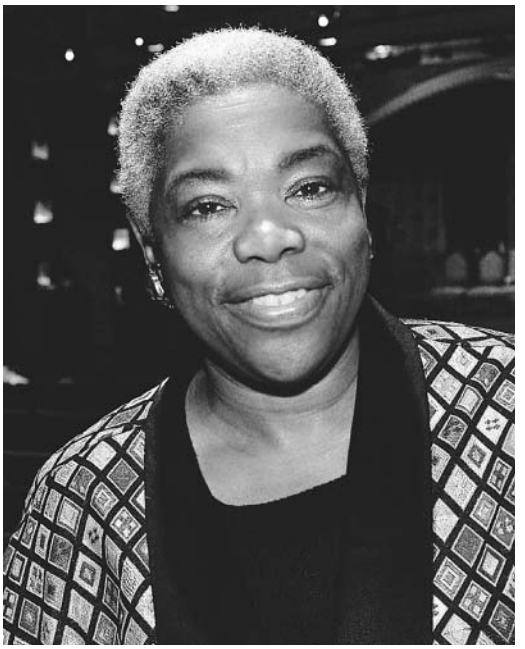

*Elaine R. Jones.*
AP/WIDE WORLD PHOTOS

In recent years, Jones has continued her work as president and director-counsel of the LDF. She has received numerous awards and honorary degrees and is an active teacher and lecturer both in the United States and around the world. She is frequently called upon to comment regarding civil rights issues of national significance.

"WE FIND IT EMOTIONAL, WE FIND IT UNCOMFORTABLE, WE FIND IT HARD AS A NATION TO HAVE A CALM, RATIONAL DISCUSSION ABOUT THE IMPACT OF RACE ON INSTITUTIONS IN OUR SOCIETY."
—ELAINE JONES

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**CROSS-REFERENCES**

Capital Punishment.

*Barbara C. Jordan.*
LIBRARY OF CONGRESS

## JORDAN, BARBARA CHARLINE

Barbara Charline Jordan, attorney, legislator, and educator, was the first African-American woman from a Southern state to win election to the U.S. Congress.

"WHAT PEOPLE WANT IS VERY SIMPLE. THEY WANT AN AMERICA AS GOOD AS ITS PROMISE."
—BARBARA JORDAN

Jordan was born on February 21, 1936, in Houston, Texas, the third and youngest daughter of the Reverend Benjamin Jordan and Arlyne Jordan. In 1952, she graduated at the top of her class from Phyllis Wheatley High School and enrolled in Texas Southern University (TSU), an all-black college, where she joined the debate team and traveled to competitions throughout the United States. The team was restricted to blacks-only motels and restaurants in many of the states bordering Texas.

In 1956, Jordan graduated magna cum laude from TSU with a bachelor's degree in history and political science. She enrolled in Boston University, in Massachusetts—one of six women, including two black women, in the law school's first-year class. During her first year of law school, Jordan realized how inadequate her prior education in Houston had been. But she was successful at Boston, and, she returned to Houston and opened a law practice after her graduation in 1959.

Jordan was also drawn to politics. She became involved in the 1960 presidential campaign and went to work for JOHN F. KENNEDY and for fellow Texan LYNDON B. JOHNSON, both DEMOCRATIC PARTY nominees. In 1962 she made her first unsuccessful bid for a seat in the Texas House of Representatives, running from Harris County. She ran again in 1964, and again was defeated. Jordan decided to make a third attempt at winning public office and in 1966 she was elected to the Texas Senate. She was the first black state senator elected in Texas since 1883.

Shortly after her election, Jordan was invited to the White House by President Johnson to discuss his upcoming CIVIL RIGHTS legislation. In 1972 she was elected to the U.S. House of Representatives, becoming the first black woman from a Southern state to serve in Congress. She immediately enlisted former president Johnson's assistance in winning an appointment to the House Judiciary Committee, where she gained national recognition for her remarks at the IMPEACHMENT proceedings against President RICHARD NIXON.

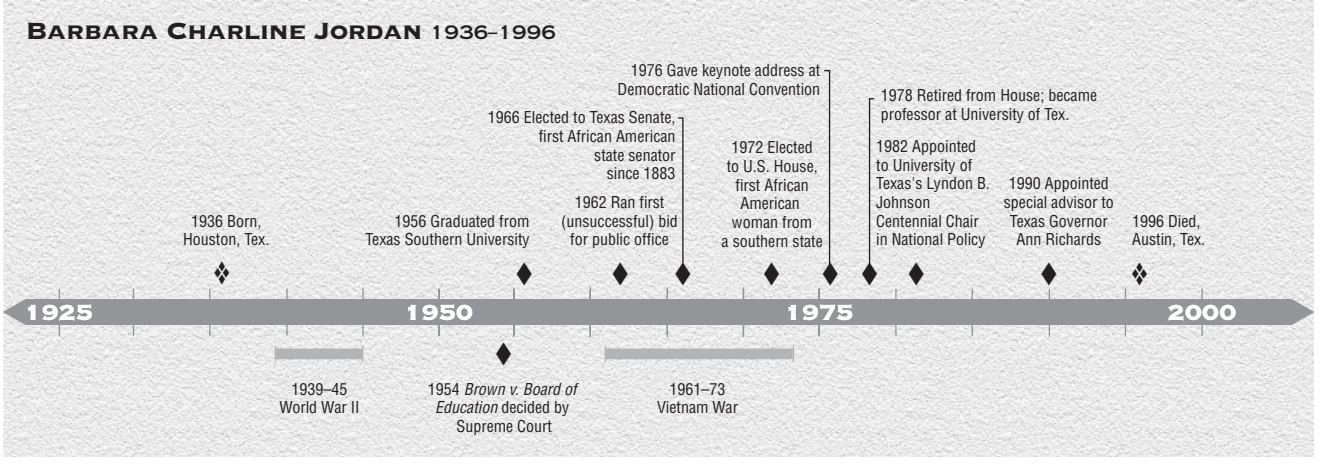

Jordan gained additional prominence in July 1976 when she gave a keynote address at the Democratic National Convention. Her speech about the Democratic Party and the meaning of democracy in the United States brought her a standing ovation. A movement to put Jordan on the ticket as vice president gained tremendous support, but Jordan held a press conference to announce that she did not wish to be nominated.

Jordan served three terms in the House of Representatives and sponsored landmark legislation to expand the VOTING RIGHTS ACT, 42 U.S.C.A. § 1973 et seq., to require printing of bilingual ballots, and to toughen enforcement of civil rights laws. She resigned from Congress in 1972 and became a professor at the Lyndon Baines Johnson School of Public Affairs at the University of Texas at Austin. In 1982, she was appointed to the university's Lyndon B. Johnson Centennial Chair in National Policy, where she taught courses on ethics and national policy issues.

In December 1990, Texas Governor Ann W. Richards appointed Jordan as a special adviser to her administration on ethics in government. Richards had made ethics a primary focus of her campaign, and she asked Jordan to author ethics legislation and work with gubernatorial appointees on guidelines for ethical behavior in their public service.

Jordan died in Austin, Texas on January 17, 1996.

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CROSS-REFERENCES

Apportionment; *Brown v. Board of Education of Topeka, Kansas*; School Desegregation.

## JOURNAL

*A book or log in which entries are made to record events on a daily basis. A book where transactions or events are recorded as they occur.*

A legislative journal is kept by the clerk and is a daily record of the legislative proceedings. Typical entries include actions taken by various committees and a chronological accounting of bills introduced on the floor.

## J.P.

*An abbreviation for* JUSTICE OF THE PEACE, *a minor ranking judicial officer with limited statutory jurisdiction over preservation of the peace, civil cases, and lesser criminal offenses.*

## J.S.D.

*An abbreviation for Doctor of Juridical Science, a degree awarded to highly qualified individuals who have successfully completed a prescribed course of advanced study in law after having earned J.D. and LL.M. degrees.*

The standards for admission to J.S.D. programs are stringent. Although specific academic requirements for acceptance into a J.S.D. program vary from one law school to another, ordinarily applicants must hold J.D. and LL.M. degrees. They must have completed their courses of study with a certain minimum grade average in order to qualify for this advanced program.

Once accepted, each student generally has a full-time faculty member who acts as research advisor concerning the preparation of the student's thesis, which is a requirement for obtaining the J.S.D. degree. It is often mandatory that all work required for a J.S.D. degree must be completed within five years of the commencement of the student's program of study.

J.S.D. is also commonly abbreviated as S.J.D.

## JUDGE

*To make a decision or reach a conclusion after examining all the factual evidence presented. To form an opinion after evaluating the facts and applying the law.*

*A public officer chosen or elected to preside over and to administer the law in a court of justice; one who controls the proceedings in a courtroom and decides* QUESTIONS OF LAW *or discretion.*

As a verb the term *judge* generally describes a process of evaluation and decision. In a legal case this process may be conducted by either a judge or a jury. Decisions in any case must be based on applicable law. Where the case calls for a jury verdict, the judge tells the jury what law applies to the case.

As a noun *judge* refers to a person authorized to make decisions. A judge is a court officer authorized to decide legal cases. A judge presiding over a case may initiate investigations on related matters, but generally judges do not have

the power to conduct investigations for other branches or agencies of government.

Judges must decide cases based on the applicable law. In some cases a judge may be asked to declare that a certain law is unconstitutional. Judges have the power to rule that a law is unconstitutional and therefore void, but they must give proper deference to the legislative body that enacted the law.

There are two types of judges: trial court and appellate. Trial court judges preside over trials, usually from beginning to end. They decide pretrial motions, define the scope of discovery, set the trial schedule, rule on oral motions during trial, control the behavior of participants and the pace of the trial, advise the jury of the law in a jury trial, and sentence a guilty defendant in a criminal case.

Appellate judges hear appeals from decisions of the trial courts. They review trial court records, read briefs submitted by the parties, and listen to oral arguments by attorneys, and then decide whether error or injustice occurred in the trial.

Judges can also be distinguished according to their jurisdiction. For example, federal court judges differ from state court judges. They operate in different courtrooms, and they hear different types of cases. A federal court judge hears cases that fall within federal jurisdiction. Generally, this means cases that involve a question of federal law or the U.S. Constitution, involve parties from different states, or name the United States as a party. State court judges hear cases involving state law, and they also have jurisdiction over many federal cases.

Some judges can hear only certain cases in SPECIAL COURTS with limited subject matter jurisdiction. For example, a federal BANKRUPTCY court judge may preside over only bankruptcy cases. Other special courts with limited SUBJECT MATTER JURISDICTION include tax, probate, juvenile, and traffic courts.

Justices make up the upper echelon of appellate judges. The term *justice* generally describes judges serving on the highest court in a jurisdiction. In some jurisdictions a justice may be any appellate judge.

Judges are either appointed or elected. On the federal level, district court judges, appellate court judges, and justices of the Supreme Court are appointed by the president subject to the approval of Congress. On the state level, judges may be appointed by the governor, selected by a joint ballot of the two houses of the state legislature, or elected by the voters of the state.

On the federal level, judges have lifetime tenure. Most state court judges hold their office for a specified number of years. If a state court judge is appointed by the governor, the judge's term may be established by the governor. In some states a judge's term is fixed by statute. All state jurisdictions have a mandatory retirement age. In New Hampshire, for example, a judge must retire by age 70 (N.H. Const. pt. 2, art. 78). There is no mandatory retirement age for justices and judges on the federal level.

Judges' retirement benefits are provided for by statute. On the federal level, a retiring judge may receive for the remainder of the judge's life the salary that she or he was receiving at the time of retirement. To qualify for retirement benefits, a judge must meet minimum service requirements. For example, a judge who retires at age 65 must have served 15 years as a judge in the federal court system; at age 66, 14 years; and so on until age 70 (§ 371). If a judge is forced to retire because of disability and has not qualified for benefits under § 371, the judge may still receive a full salary for life if she or he served 10 years. If the judge served less than 10 years, she or he may receive half of her or his salary for life (28 U.S.C.A. § 372).

Judges must follow ethical rules. In all jurisdictions statutes specify that a judge may hold office only during a time of good behavior. If a judge violates the law or an ethical rule, the judge may be removed from office. In jurisdictions in which judges are elected, they may be removed from office by popular vote or impeached by act of the legislature. In states where judges are appointed, the legislature or the governor is authorized to remove them from office, but only for ethical or legal violations. This is because the power of the judiciary is separate from and equal to the power of the legislative and executive branches, and unfettered control of the judiciary by the other two branches would upset the balance of power.

Judges are distinct from magistrates. Magistrates are court officers who are empowered by statute to decide pretrial issues and preside over minor cases. Their judicial powers are limited. In the federal court system, for example, magistrates may not preside over felony criminal trials. They may preside over civil trials and misdemeanor criminal trials, but only with the consent of all the parties (28 U.S.C.A. §§ 631–639).

CROSS-REFERENCES

Canons of Judicial Ethics; Code of Judicial Conduct; Court Opinion; Discretion in Decision Making; Judicial Action; Judicial Conduct; Judicial Review.

## JUDGE ADVOCATE

*A legal adviser on the staff of a military command. A designated officer of the Judge Advocate General's Corps (JAGC) of the U.S. Army, Navy, Air Force, or Marine Corps.*

The JAGC was created by GEORGE WASHINGTON on July 29, 1775, only 44 days after he took command of the Continental army. Since that time the U.S. Army's JAGC has grown into the largest government "law firm," numbering 1,500 judge advocates on active duty.

Judge advocates are attorneys who perform legal duties while serving in the U.S. Armed Forces. They provide legal services to their branch of the armed forces and LEGAL REPRESENTATION to members of the ARMED SERVICES. In addition, judge advocates practice international, labor, contract, environmental, TORT, and ADMINISTRATIVE LAW. They practice in military, state, and federal courts. A judge advocate attorney does not need to be licensed to practice law in the state in which he or she practices because they are part of a separate, military system of justice.

Under the UNIFORM CODE OF MILITARY JUSTICE, judge advocates are the central participants in a military COURT-MARTIAL (military criminal trial). A judge advocate administers the oath to other members of the court, advises the court, and acts either as a prosecutor or as a defense counsel for the accused. A judge advocate acting as defense counsel advises the military prisoner on legal matters, protects the accused from making incriminating statements, and objects to irrelevant or improper questions asked at the military proceeding. All sentences with a penalty of dismissal, punitive discharge, confinement for a year or more, or death are subject to review by a court of military review in the office of the judge advocate general of the U.S. Army, Navy, or Air Force, depending on the branch of service to which the defendant belongs. A sentence imposed on a member of the Marine Corps would be reviewed by the office of the judge advocate general of the U.S. Navy.

A judge advocate is admitted to the armed services as an officer. Because the Uniform Code of Military Justice is different from civilian law in many respects, a judge advocate undergoes an orientation and then education in MILITARY LAW. The U.S. Army's JAGC school, for example, at Charlottesville, Virginia, provides a ten-week academic course for new JAGC officers to learn about the mission of the corps and to receive an overview of military law.

Each branch of the armed forces has a judge advocate general, an officer who is in charge of all judge advocates and who is responsible for all legal matters affecting that branch of the service. In the U.S. Army and U.S. Air Force, the judge advocate general holds the rank of major general. In the U.S. Navy this officer is a rear admiral. The judge advocate general serves as a legal adviser to the chief of staff of their service and, in some cases, to the secretary of the department.

The public has been given a look at judge advocates through film and television. For example, the movie *A Few Good Men* (1992) and the television drama *JAG* both portray judge advocates as prosecutors for military crimes. However, the duties of a judge advocate extend far beyond the military courtroom. Over the past three decades, judge advocates have played a key role in the planning of military strategy for top-secret missions and other wartime issues. Further, judge advocates, along with commanding officers of the armed services, take part in the development and application of rules of engagement, which guide U.S. troops in their use of force.

One of the most important rules that involve judge advocates is target planning. When deciding whether something is a proper target, a judge advocate must first determine that it is a military necessity for the enemy. If it passes the first test, they must investigate whether civilians will be affected. Finally, they must perform a BALANCING test. The possible loss of civilians and their property—often referred to as "collateral damage"—cannot be excessive, as compared to the military gain achieved by the attacks. Judge advocates also identify targets that are off-limits. In these wartime contexts, target selection clearly becomes a life-or-death decision.

During the VIETNAM WAR, only one judge advocate was called upon by the U.S. Air Force to give operations law advice. Major Walter Reed, who would later become judge advocate general of the U.S. Air Force, advised which targets were restricted by the military's rules of engagement and the Law of War, the codified laws created by the Hague Convention in 1907, to which most nations adhere. However, in 1972, Air Force General John D. Lavelle attacked

targets in North Vietnam and thus violated the rules of engagement.

Lavelle claimed that his superiors had supported the attacks and that the targets had been included in the rules of engagement when, in fact, they had not been. It then became clear that the drafting, training, and execution of the rules of engagement needed more careful review. The Joint Chiefs of Staff Peacetime Rules of Engagement (later renamed the Standing Rules of Engagement) were established, and judge advocates were called upon to interpret the rules and to advise combat commanders in the planning and execution of military operations. Now, judge advocates are the primary developers of the rules of engagement and their application for military missions. All use of force must be authorized by these rules. In addition, the rules must be clear, yet flexible, so that a soldier is able to make an on-the-spot decision in critical situations.

During Operation Desert Shield and Operation Desert Storm, over 250 judge advocates were stationed in Saudi Arabia. The judge advocates provided significant support, which included the review of all target lists, the training of troops on the rules of engagement, parachuting in with army troops, and deciding the issue of whether the enemy could be buried alive—to which the answer was yes. The judge advocates printed pocket-size cards, which provided peacetime and wartime rules, for troops to carry. The important role played by judge advocates continued as the United States attacked Afghanistan, in 2001, and Iraq, in 2003, as part of the WAR ON TERRORISM.

FURTHER READINGS

The Judge Advocate General's Legal Center and School Website. Available online at <www.jagcnet.army.mil/tjagsa> (accessed August 17, 2003).

## JUDGMENT

*A decision by a court or other tribunal that resolves a controversy and determines the rights and obligations of the parties.*

A judgment is the final part of a court case. A valid judgment resolves all the contested issues and terminates the lawsuit, since it is regarded as the court's official pronouncement of the law on the action that was pending before it. It states who wins the case and what remedies the winner is awarded. Remedies may include money damages, injunctive relief, or both. A judgment also signifies the end of the court's jurisdiction in the case. The Federal Rules of Civil Procedure and most state rules of civil procedure allow appeals only from final judgments.

A judgment must be in writing and must clearly show that all the issues have been adjudicated. It must specifically indicate the parties for and against whom it is given. Monetary judgments must be definite, specified with certainty, and expressed in words rather than figures. Judgments affecting real property must contain an explicit description of the realty so that the land can easily be identified.

Once a court makes a judgment, it must be dated and docketed with the court administrator's office. Prior to modern computer databases, judgments were entered in a docket book, in alphabetic order, so that interested outsiders could have official notice of them. An index of judgments was prepared by the court administrator for record keeping and notification purposes. Most courts now record their judgments electronically and maintain computer docketing and index information. Though the means of storing the information are different, the basic process remains the same.

A court may amend its judgment to correct inaccuracies or ambiguities that might cause its actual intent to be misconstrued. Omissions, erroneous inclusions, and descriptions are correctable. However, persons who were not parties to the action cannot be brought into the lawsuit by an amended judgment. The Federal Rules of Civil Procedure allow a judgment to be amended by a motion served within ten days after the judgment is entered. State rules of civil procedure also permit amendment of a judgment.

Different types of judgments are made, based on the process the court uses to make the final decision. A judgment on the merits is a decision arrived at after the facts have been presented and the court has reached a final determination of which party is correct. For example, in a NEGLIGENCE lawsuit that is tried to a jury, the final decision will result in a judgment on the merits.

A judgment based solely on a procedural error is a dismissal WITHOUT PREJUDICE and generally will not be considered a judgment on the merits. A party whose case is dismissed without prejudice can bring the suit again as long as the procedural errors are corrected. A party that receives a judgment on the merits is barred from

## Enforcement of Foreign Judgments

The principle of territoriality generally limits the power of a state of judicial enforcement of actions to be taken within its territory. Consequently, when a judgment is to be enforced out of property in another state, or requires some act to be done in that other state, the judgment must be brought to the judicial tribunals of the second state for implementation. This allows the judicial tribunal of the enforcing state to examine the judgment to determine whether it should be recognized and enforced.

Conditions for recognizing and enforcing a judgment of a court of another country may be established by treaty or follow general principles of **INTERNATIONAL LAW**. Under those principles, a court of one state will enforce a foreign judgment if (1) the judgment is final between the parties; (2) the court that granted the judgment was competent to do so and had jurisdiction over the parties; (3) regular proceedings were followed that allowed the losing party a chance to be heard; (4) no **FRAUD** was worked upon the first court; and (5) enforcement will not violate the public policy of the enforcing state.

relitigating the same issue by the doctrine of RES JUDICATA. This doctrine establishes the principle that an issue that is judicially decided is decided once and for all.

A SUMMARY JUDGMENT may occur very early in the process of a lawsuit. Under Rule 56 of the Federal Rules of Civil Procedure and analogous state rules, any party may make a motion for a summary judgment on a claim, counterclaim, or cross-claim when he or she believes that there is no genuine issue of material fact and that he or she is entitled to prevail as a MATTER OF LAW. A motion for summary judgment can be directed toward the entire claim or defense or toward any portion of the claim or defense. A court determines whether to grant summary judgment.

A JUDGMENT NOTWITHSTANDING THE VERDICT is a judgment in favor of one party despite a verdict in favor of the opposing litigant. A court may enter a judgment notwithstanding the verdict, thereby overruling the jury verdict, if the court believes there was insufficient evidence to justify the jury's decision.

A consent judgment, or agreed judgment, is a final decision that is entered on agreement of the litigants. It is examined and evaluated by the court, and, if sanctioned by the court, is ordered to be recorded as a binding judgment. Consent judgments are generally rendered in domestic relations cases after the HUSBAND AND WIFE agree to a property and support settlement in a DIVORCE.

A default judgment results from the named defendant's failure to appear in court or from one party's failure to take appropriate procedural steps. It is entered upon the failure of the party to appear or to plead at an appropriate time. Before a default judgment is entered, the defendant must be properly served notice of the pending action. The failure to appear or answer is considered an admission of the truth of the opposing party's PLEADING, which forms the basis for a default judgment.

A deficiency judgment involves a creditor and a debtor. Upon a debtor's failure to pay his or her obligations, a deficiency judgment is rendered in favor of the creditor for the difference between the amount of the indebtedness and the sum derived from a JUDICIAL SALE of the debtor's property held in order to repay the debt.

Once a judgment is entered, the prevailing party may use it to collect damages. This may include placing a judgment lien on the losing party's real property, garnishing (collecting from an employer) the losing party's salary, or attaching the losing party's PERSONAL PROPERTY. A judgment lien is a claim against the real estate of a party; the real estate cannot be sold until the judgment holder is paid. Attachment is the physical seizure of property owned by the losing party by a law officer, usually a sheriff, who gives

the property to the person holding the judgment.

Under the FULL FAITH AND CREDIT CLAUSE of the Constitution, a judgment by a state court must be fully recognized and respected by every other state. For example, suppose the prevailing party in a California case knows that the defendant has assets in Arizona that could be used to pay the judgment. The prevailing party may docket the California judgment in the Arizona county court where the defendant's property is located. With the judgment now in effect in Arizona, the prevailing party may obtain a writ of execution that will authorize the sheriff in that Arizona county to seize the property to satisfy the judgment.

Once a judgment has been paid by the losing party in a lawsuit, that party is entitled to a formal discharge of the obligation, known as a satisfaction of judgment. This satisfaction is acknowledged or certified on the judgment docket.

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## JUDGMENT CREDITOR

*A party to which a debt is owed that has proved the debt in a legal proceeding and that is entitled to use judicial process to collect the debt; the owner of an unsatisfied court decision.*

A party that wins a monetary award in a lawsuit is known as a judgment creditor until the award is paid, or satisfied. The losing party, which must pay the award, is known as a JUDGMENT DEBTOR. A judgment creditor is legally entitled to enforce the debt with the assistance of the court.

State laws provide remedies to a judgment creditor in collecting the amount of the judgment. These measures bring the debtor's property into the custody of the court in order to satisfy the debtor's obligation: they involve the seizure of property and money. The process of enforcing the judgment debt in this way is called execution. The process commences with a hearing called a supplementary proceeding. The judgment debtor is summoned to appear before the court for a hearing to determine the nature and value of the debtor's property. If the property is subject to execution, the court orders the debtor to relinquish it.

Because debtors sometimes fail to surrender property to the court, other means of satisfying the debt may be necessary. In these cases the law refers to an unsatisfied execution—an outstanding and unfulfilled order by the court for property to be given up. Usually this will lead the judgment creditor to seek a writ of attachment, the legal means by which property is seized. To secure a writ of attachment, the judgment creditor must first place a judgment lien on the property. Also called an encumbrance, a lien is a legal claim on the debtor's property that gives the creditor a qualified right to it. Creditors holding liens are called secured creditors. The writ of attachment sets in motion the process of a levy, by which a sheriff or other state official actually seizes the property and takes it into the physical possession of the court. The property can then be sold to satisfy the debt.

Occasionally the judgment creditor is frustrated in the course of enforcing a judgment debt. Debtors may transfer property to another owner, which makes collection through attachment more difficult. Liens on property usually prevent the transfer of ownership. Where a transfer of ownership has occurred, state laws usually allow the judgment creditor to sue the third party who now possesses the property. Some states provide additional statutory relief to creditors in cases where debtors fraudulently transfer assets in order to escape a judgment debt. Florida's Uniform Fraudulent Transfer Act (Fla. Stat. § 726.101 et seq.), for instance, allows creditors more time to pursue enforcement of the debt.

Another process for recovery is GARNISHMENT, which targets the judgment debtor's salary or income. Through garnishment a portion of the judgment debtor's income is regularly deducted and paid to the judgment creditor. The creditor is known as a garnishor, and the debtor as a garnishee.

FURTHER READINGS

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## JUDGMENT DEBTOR

*A party against which an unsatisfied court decision is awarded; a person who is obligated to satisfy a court decision.*

The term *judgment debtor* describes a party against which a court has made a monetary award. If a court renders a judgment involving money damages, the losing party must satisfy the amount of the award, which is called the judgment debt. Such a decision gives the winner of the suit, or JUDGMENT CREDITOR, the right to recover the debt, or award, through extraordinary means, and the court may help the creditor do so. State law governs how the debt may be recovered. Although the recovery process can be harsh, the law provides the debtor with certain rights and protection.

Following the verdict, other legal steps are usually taken against the judgment debtor. The court can order the debtor to appear for an oral hearing to assess the debtor's assets. If it is determined that the debtor has assets sufficient to satisfy the judgment debt, the court may order the debtor to surrender certain property to it. Commonly the judgment creditor must take additional legal action. This involves seeking the court's assistance in seizing the debtor's property, by the process known as attachment, or a portion of the debtor's salary, by the process called GARNISHMENT.

For centuries, attachment of property was allowed ex parte—without first allowing the defendant debtor to argue against it. However, contemporary law affords the debtor some protection. The debtor has the right to minimal DUE PROCESS. States generally require that the judgment creditor first secure a writ of attachment, that the debtor be given notice before seizure occurs, and that the debtor have the right to a prompt hearing afterward to challenge the seizure.

Other protections apply to both property and wages. First, not every kind of property is subject to attachment. States provide exemptions for certain household items, clothing, tools, and other essentials. Additional provisions may protect individuals in cases of extreme hardship. Where the creditor seeks garnishment in order to seize the judgment debtor's wages, laws generally exempt a certain amount of the salary that is necessary for personal or family support.

Courts can exercise their discretion to go beyond the statutory protections for judgment debtors. They can exempt more property from attachment than that specified in a statute. In some cases they can also deny the attachment or garnishment altogether. This can occur when the creditor seeks more in property than the value of the judgment debt, or where the property sought is an ongoing business that would be destroyed by an attachment.

## JUDGMENT DOCKET

*A list under which judicial orders of a particular court are recorded by a clerk or other designated officer to be available for inspection by the public.*

A judgment docket serves an important function by providing parties interested in learning of the existence of a judgment or a lien on property to enforce a judgment with access to such information. The recording of a judgment in a judgment docket is considered official notice to all parties of its existence. The rules of procedure of the particular court govern the maintenance of the judgment docket.

## JUDGMENT NOTE

*A promissory note authorizing an attorney, holder, or clerk of court to appear for the maker of the note and confess, or assent to, a judgment to be entered against the maker due to default in the payment of the amount owed.*

A judgment note is also called a cognovit note and is invalid in many states.

## JUDGMENT NOTWITHSTANDING THE VERDICT

*A judgment entered by the court in favor of one party even though the jury returned a verdict for the opposing party.*

The phrase "judgment notwithstanding the verdict" is abbreviated JNOV, which stands for its Latin equivalent, judgment *"non obstante veredicto."* The remedy of JNOV applies only in cases decided by a jury. Originally this remedy could be entered only in favor of the plaintiff, and the similar remedy of arrest of judgment could be entered only in favor of the defendant. Under modern law a JNOV is generally available to both plaintiffs and defendants, and an arrest of judgment is primarily used with judgments in criminal cases. A JNOV is proper when the court finds that the party bearing the BURDEN OF PROOF fails to make out a PRIMA FACIE case (a case that on first appearance will prevail unless contradicted by evidence).

To be granted relief by a JNOV, a party must make a motion seeking that relief. The motion generally must be made in writing and must set forth the specific reasons entitling the party to

relief. Many statutes and rules require that the moving party must have previously sought a directed verdict, and that the grounds for the JNOV motion be the same or nearly the same as those for the directed verdict. A directed verdict is a request by a party that the judge enter a verdict in that party's behalf before the case is submitted to the jury.

Although a jury generally must return a verdict before a motion for JNOV can be made, if the jury does not agree on a verdict, as in a jury deadlocked, some courts will hear a motion for JNOV. However, some statutes do not permit a court to hear a motion for JNOV under such circumstances.

In deciding a motion for JNOV, the court is facing questions only of law, not fact. The court must consider only the evidence and any inferences therefrom, and must do so in the light most advantageous to the nonmoving party. The court must resolve any conflicts in favor of the party resisting the motion. If there is enough evidence to make out a prima facie case against the moving party, or evidence tending to support the verdict, then the court must deny the motion for JNOV. Some courts maintain that if there is a conflict of evidence, such that the jury could decide either way based on factors such as the credibility of witnesses, the court should deny the motion. Courts approach motions for JNOV with extreme caution and generally will grant them only in clear cases in which the evidence overwhelmingly supports the moving party.

In entering a JNOV, the court is simply reversing the jury's verdict; the motion cannot be the basis for increasing or decreasing the verdict. When granting a JNOV, the court needs to independently assess the damages or order a new trial on the issue of damages.

Under the Federal Rules of Civil Procedure, both a JNOV and a motion for directed verdict are now encompassed within a motion for judgment as a MATTER OF LAW. The change is one of terminology only and not of substance. Many state statutes or rules of court provide for the remedy of a JNOV, although they may call it something different. The applicable state statutes or rules are substantially similar to the federal rules.

A motion for JNOV is made at the close of all the evidence, after the jury returns a verdict, within a period of time specified by statute. An order granting a motion for a JNOV is often considered a delayed-action directed verdict because it presents the same issues. In fact, in some jurisdictions the denial of a motion for a directed verdict is a prerequisite to the entry of a JNOV. If the particular case involves several plaintiffs or defendants, each of them must separately make a proper motion for a directed verdict in order to move properly for a JNOV later. Current procedure holds a motion for JNOV proper when a prior motion for a directed verdict has been denied. If the court denies a motion for a directed verdict after all the evidence has been presented, then the court is deemed to have submitted the case to the jury subject to a later determination of the legal issues raised by the motion, and the court may grant a motion for JNOV after the jury returns a verdict.

To promote judicial economy, some statutes, including the federal rules, permit a party to make alternative motions for a JNOV and for a new trial. Those motions can also be made separately. The statutes that permit the alternative motions generally provide that the motions should be decided together, such that the trial court's rulings can be reviewed together on appeal. If the court denies the motion for a new trial, then the alternative motion for JNOV is also assumed to be denied. If the court grants the motion for a new trial, then the motion for JNOV is deemed to be effectively disposed of or denied. The court does not have to rule on the motion for JNOV if the motion presents the same issues on which the court ruled in considering motions for a directed verdict and for a new trial. Some court rules and statutes, including the federal rules, provide that a court may grant both of the alternative motions, even though they are inconsistent. Courts may avoid the inconsistency by providing that the ruling granting a new trial is effective only if the ruling granting a JNOV is overturned on appeal. In fact, federal courts have held that it is the duty of the trial court to so condition an order granting these alternative motions.

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## JUDGMENT PROOF

*A term used to describe an individual who is financially unable to pay an adverse court decision awarding a sum of money to the opposing party.*

A judgment-proof individual has no money or property within the jurisdiction of the court to satisfy the judgment or is protected by wage laws that exempt salaries and property from formal judicial process.

## JUDICARE

*To decide or determine in a judicial manner.*

In civil and old ENGLISH LAW, judicare means to judge, to pass judgment or sentence, or to decide an issue in an impartial fashion. It refers to the interpretation and application of the laws to the facts and the administration of justice.

## JUDICATURE

*A term used to describe the judicial branch of government; the judiciary; or those connected with the court system.*

Judicature refers to those officers who administer justice and keep the peace. It signifies a tribunal or court of justice.

The Judicature Acts of England are the laws that established the present court system in England.

## JUDICATURE ACTS

*English statutes that govern and revise the organization of the judiciary.*

Parliament enacted a series of statutes in 1873 during the reign of Queen Victoria that changed and restructured the court system of England. Consolidated and called the Judicature Act of 1873, these enactments became effective on November 1, 1875, but were later amended in 1877. As a result, superior courts were consolidated to form one supreme court of judicature with two divisions, the High Court of Justice, primarily endowed with original jurisdiction, and the Court of Appeal, which possessed appellate jurisdiction.

The present court system of England is organized according to the Judicature Acts, which were redrafted in 1925 as the Supreme Court of Judicature (Consolidation) Act and which made the Court of Appeals, consisting of a civil division and criminal division, the center of the English judiciary.

## JUDICIAL

*Relating to the courts or belonging to the office of a judge; a term pertaining to the administration of justice, the courts, or a judge, as in judicial power.*

A judicial act involves an exercise of discretion or an unbiased decision by a court or judge, as opposed to a ministerial, clerical, or routine procedure. A judicial act affects the rights of the parties or property brought before the court. It is the interpretation and application of the law to a particular set of facts contested by litigants in a court of law, resulting from discretion and based upon an evaluation of the evidence presented at a hearing.

Judicial connotes the power to punish, sentence, and resolve conflicts.

## JUDICIAL ACTION

*The adjudication by the court of a controversy by hearing the cause and determining the respective rights of the parties.*

A judgment, decree, or decision rendered by a court, which concerns a contested issue brought before the tribunal by parties who voluntarily appear or who have been notified to appear by SERVICE OF PROCESS. It is the interpretation, application, and enforcement of existing law relating to a particular set of facts in a particular case. Judicial action is the determination of the rights and interests of adverse parties.

Judicial action is taken only when a JUSTICIABLE controversy arises or where a claim of right is asserted against a party who has an interest in contesting that claim. A court does not make a decision when a hypothetical difference exists but only when there is an actual controversy affecting the rights and interests of the parties.

## JUDICIAL ADMINISTRATION

*The practices, procedures, and offices that deal with the management of the administrative systems of the courts.*

Judicial administration, also referred to as court administration, is concerned with the day-to-day and long-range activities of the court system. Every court in the United States has some form of administrative structure that seeks to enhance the work of judges and to provide services to attorneys and citizens who use the judicial system. Since the 1970s the administration of the courts has played a central role in the

judiciary's response to increased court filings and shrinking budgets.

The administration of the courts has traditionally been concerned with overseeing budgets, selecting juror pools, assigning judges to cases, creating court calendars of activities, and supervising nonjudicial personnel. Often administrative decisions are made by judges, either individually or as a group. Clerks of court, now more commonly known as court administrators, and their staff are called on to accept the filing of court documents, to maintain a file system of cases and a record of all final judgments, and to process paperwork generated by judges.

Early in the twentieth century, ROSCOE POUND, a noted jurist and scholar, called for the reform of court administration to ensure efficiency, accuracy, and consistency in the judicial system. Nevertheless, few systematic attempts to modernize and rationalize courts were made until the early 1970s. In 1971 the creation of the National Center for State Courts (NCSC)—an independent, nonprofit organization dedicated to the improvement of justice—provided local and state courts with technical assistance on how to modernize. The NCSC, located in Williamsburg, Virginia, was started at the urging of Chief Justice WARREN E. BURGER, who saw a need for leadership in this field.

The staffing of administrative personnel in the courts has changed since the 1970s. The Institute for Court Management (ICM), a division of the NCSC, develops court leaders through education, training, and a court executive development program. The ICM has provided valuable assistance to thousands of court administrators in the United States, disseminating information on new methods and techniques of court administration. More court administrators now have college and advanced degrees, and many have attended law school.

Judicial administration has largely been taken over by court managers. State courts are organized at the state level, under the direction of a state court administrator. State court administration oversees legislative budgets, personnel administration, and court research and planning. Planning for the future is an integral part of the administrative agenda. The federal courts are organized somewhat differently. There is at least one U.S. district court in each state, but states with larger populations have two or more. There is a clerk of court in each federal district who has duties similar to that of a state court administrator.

Court administrators explore alternative ways of managing court cases, often by statistical research. Various systems of case management are employed in the United States, but the trend has been to seek methods that reduce the amount of time a case remains active in the courts. Consequently, judges often have less control over their time as court managers set out the work that must be accomplished.

Computers have also reshaped the administration of the courts. Before the 1980s courts recorded everything on paper. With the integration of computers and database software, case information is now recorded and retrieved electronically. The use of new technology has improved the efficiency of court administration. Appellate courts distribute court opinions and court rules through computer bulletin boards and the INTERNET. Some courts allow access to their database information through computer modems.

Another function of judicial administration is to eliminate bias. Many state court systems have appointed committees and task forces to investigate racial and gender bias in the courts. Court administrators have been charged with developing ways of eliminating bias, ensuring diversity in the court system, and providing easier access to the courts for pro se litigants, also called pro per litigants in some jurisdictions, (persons representing themselves without an attorney). The certification of court interpreters for testimony given in languages other than English has emerged as a leading issue in court administration.

New divisions of administrative oversight have developed since the 1970s. Offices of PROFESSIONAL RESPONSIBILITY, which administer and investigate ethical complaints against lawyers, are commonplace. Many states require that lawyers take CONTINUING LEGAL EDUCATION (CLE) courses so as to maintain professional competence. Offices have been created in state court administration to accredit CLE programs and to monitor compliance by lawyers.

## JUDICIAL ASSISTANCE

*Aid offered by the judicial tribunals of one state to the judicial tribunals of a second state.*

Judicial assistance may consist of the enforcement of a judgment rendered by a court

of another state or other actions to assist current judicial proceedings taking place in the state requesting the cooperation of the foreign court. A *letter rogatory,* the formal term for such a request, asks a foreign court to take some judicial action, such as issue a summons, compel production of documents, or take evidence. Treaties may be concluded between countries to establish regular methods of transmitting these requests and to assure reciprocal treatment in furnishing assistance.

CROSS-REFERENCES

Letters Rogatory.

## JUDICIAL CONDUCT

See CODE OF JUDICIAL CONDUCT.

## JUDICIAL CONFERENCE OF THE UNITED STATES

The Judicial Conference of the United States formulates the administrative policies for the federal courts. The Judicial Conference also makes recommendations on a wide range of topics that relate to the federal courts. The conference is chaired by the chief justice of the U.S. Supreme Court. Other members include the chief judge of each federal judicial circuit, one district judge from each federal judicial circuit, and the chief judge of the U.S. Court of International Trade.

The Judicial Conference was created in response to a need for uniformity in rules and procedures in the federal court system. In the early 1920s, Chief Justice WILLIAM H. TAFT, of the Supreme Court, led a reform effort that urged centralized review of federal district courts. Until that time the procedures and practices in federal trial courts varied widely from circuit to circuit, causing confusion among attorneys and judges. The result of the reform effort was the passage in 1922 of a federal statute that created the Conference of Senior Circuit Judges (Pub. L. No. 67-297, 423 Stat. 837, 838). The Conference of Senior Circuit Judges was renamed the Judicial Conference of the United States in 1948 (Act of June 25, 1948, ch. 646, 62 Stat. 902, § 331 [codified as amended at 28 U.S.C.A. § 331 (1988)]).

The Judicial Conference is a creation of Congress, and it has only the powers that Congress gives it. Its membership and duties have been expanded by Congress, but its primary missions have remained the same.

The Judicial Conference performs two major functions. The first is to study and offer improvements on federal court rules and procedures. These rules and procedures cover matters ranging from the sentencing of a criminal defendant to the service of a complaint and court summons on a civil defendant. The second major function of the Judicial Conference is to supervise the administration of the federal courts.

In its administrative capacity, the Judicial Conference oversees the ADMINISTRATIVE OFFICE OF THE U.S. COURTS. This is the administrative nerve center of the federal courts. The Judicial Conference formulates the fiscal and personnel policies for the federal courts, and the Administrative Office implements those policies.

The Judicial Conference also reviews orders that judicial councils for the federal circuits issue on complaints of judicial misconduct or judicial disability, and it may reassign federal judges to different federal courts. The final decision on administrative matters that are not covered by existing statutes, rules, and regulations is made by the judicial council of the appropriate federal circuit.

The Judicial Conference recommends ways to improve rules and procedures in the federal courts. Its recommendations do not carry the force of law, but the conference is widely recognized as the authority on federal court rules and procedures.

The Judicial Conference makes yearly suggestions on legislation to Congress and recommendations on federal court rules to the U.S. Supreme Court. The Supreme Court fashions the rules for federal courts and submits them to Congress for final approval. The attorney general of the United States, by request of the chief justice of the Supreme Court, is required to report to the Judicial Conference on the business of the federal courts. Under the Judicial Conference statute, 28 U.S.C.A. 331, the attorney general's reports must discuss with particularity the progress of cases in which the U.S. government is a party.

The Judicial Conference may offer its opinion on legislation passed by Congress that affects the rules and procedures of the federal courts. For example, in 1990 the Federal Courts Study Commission of the Judicial Conference released a study that was critical of federal legislation on mandatory minimum sentences for criminal defendants. Also in the 1990s, the Judicial

Conference publicly opposed federal legislation that limited the right of a criminal defendant to file HABEAS CORPUS petitions in federal court. For persons in prison, habeas corpus petitions are generally the last chance for court review of their criminal conviction.

The Judicial Conference has established committees that specialize in certain topics, including court schedules (known as dockets), court budgets, judicial conduct, and the disclosure of finances by judges and the federal courts. Other committees supervise the support of specialized federal court features, such as the offices of public defenders, PROBATION officers, and magistrates (judicial officers who make decisions on pretrial matters).

Although the power of the Judicial Conference is limited to administrative matters, these matters can be controversial and far reaching. For example, the Judicial Conference has authority over the presence of cameras in federal courtrooms. In 1994 it voted to discontinue a three-year experiment allowing cameras to film civil trials in some federal courts. A majority of the Judicial Conference members expressed a fear that cameras could affect the outcome of a trial. The decision drew criticism from many legal circles, and in March 1995 the Judicial Conference said that it would reconsider its position on the issue. In March 1996 the Conference decided to ban cameras in all federal courts except for federal appeals courts. The Conference allowed each circuit to decide whether it would allow cameras in its appeals courts.

There have been legislative attempts to compel the federal courts to permit cameras in courtrooms. Legislation was reintroduced in April 2003 that would effectively open federal courtrooms to television and radio coverage. Senators Charles Grassley (R-IA) and Charles Schumer (D-NY) sponsored the legislation in the Senate. Schumer and Grassley's legislation, the Sunshine in the Courtroom Act, would also direct the Judicial Conference to draw up nonbinding guidelines that judges can refer to when deciding whether to permit the coverage of a particular case. This legislation is similar to that introduced in 1999 and reintroduced in 2001.

Most states permit some form of electronic coverage of state court proceedings. But under current law, federal courts continue to ban television and radio coverage of federal criminal and civil proceedings at both the trial and appellate levels.

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**CROSS-REFERENCES**

Cameras in Court; Complaint; District Court; Federal Courts; Judicial Administration.

## JUDICIAL IMMUNITY

*A judge's complete protection from personal liability for exercising judicial functions.*

Judicial immunity protects judges from liability for monetary damages in civil court, for acts they perform pursuant to their judicial function. A judge generally has IMMUNITY from civil damages if he or she had jurisdiction over the subject matter in issue. This means that a judge has immunity for acts relating to cases before the court, but not for acts relating to cases beyond the court's reach. For example, a criminal court judge would not have immunity if he or she tried to influence proceedings in a juvenile court.

Some states codify the judicial immunity doctrine in statutes. Most legislatures, including Congress, let court decisions govern the issue.

Judicial immunity is a common-law concept, derived from judicial decisions. It originated in the courts of medieval Europe to discourage persons from attacking a court decision by suing the judge. Losing parties were

## Stump v. Sparkman

The U.S. Supreme Court has consistently upheld absolute **IMMUNITY** for judges performing judicial acts, even when those acts violate clearly established judicial procedures. In *Stump v. Sparkman,* 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978), the Court held that an Indiana state judge, who ordered the sterilization of a female minor without observing **DUE PROCESS**, could not be sued for damages under the federal **CIVIL RIGHTS** statute (42 U.S.C.A. **SECTION 1983**).

In 1971 Judge Harold D. Sparkman, of the Circuit Court of DeKalb County, Indiana, acted on a petition filed by Ora McFarlin, the mother of fifteen-year-old Linda Spitler. McFarlin sought to have her daughter sterilized on the ground she was a "somewhat retarded" minor who had been staying out overnight with older men.

Judge Sparkman approved and signed the petition, but the petition had not been filed with the court clerk and the judge had not opened a formal case file. The judge failed to appoint a **GUARDIAN AD LITEM** for Spitler, and he did not hold a hearing on the matter before authorizing a tubal ligation. Spitler, who did not know what the operation was for, discovered she had been sterilized only after she was married. Spitler, whose married name was Stump, then sued Sparkman.

The Supreme Court ruled that Sparkman was absolutely immune because what he did was "a function normally performed by a judge," and he performed the act in his "judicial capacity." Although he may have violated state laws and procedures, he performed judicial functions that have historically been absolutely immune to civil lawsuits.

In a dissenting opinion, Justice **POTTER STEWART** argued that Sparkman's actions were not absolutely immune simply because he sat in a courtroom, wore a robe, and signed an unlawful order. In Stewart's view the conduct of a judge "surely does not become a judicial act merely on his say so. A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity."

required instead to take their complaints to an appellate court. The idea of protecting judges from civil damages was derived from this basic tenet and served to solidify the independence of the judiciary. It became widely accepted in the English courts and in the courts of the United States.

Judicial immunity was first recognized by the U.S. Supreme Court in *Randall v. Brigham,* 74 U.S. (7 Wall.) 523, 19 L. Ed. 285 (1868). In *Randall* the Court held that an attorney who had been banned from the PRACTICE OF LAW by a judge could not sue the judge over the disbarment. In its opinion, the Court stated that a judge was not liable for judicial acts unless they were done "maliciously or corruptly."

In *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 20 L. Ed. 646 (1871), the U.S. Supreme Court clarified judicial immunity. Joseph H. Bradley had brought suit seeking civil damages against George P. Fisher, a former justice of the Supreme Court of the District of Columbia. Bradley had been the attorney for John H. Suratt, who was tried in connection with the assassination of President ABRAHAM LINCOLN. In Suratt's trial, after Fisher had called a recess, Bradley accosted Fisher "in a rude and insulting manner" and accused Fisher of making insulting comments from the bench. Suratt's trial continued, and the jury was unable to reach a verdict.

Immediately after discharging the jury, Fisher ordered from the bench that Bradley's name be stricken from the rolls of attorneys authorized to practice before the Supreme Court of the District of Columbia. Bradley sued Fisher for damages relating to lost work as a result of the order. At trial, Bradley attempted to introduce evidence in his favor, but Fisher's attorney objected to each item, and the judge excluded each item. After three failed attempts to present evidence, the trial court directed the jury to deliver a verdict in favor of Fisher.

On appeal by Bradley, the U.S. Supreme Court affirmed the trial court's decision. Judges

# Should Judges Have Absolute or Qualified Immunity?

The U.S. Supreme Court has made clear that when judges perform judicial acts within their jurisdiction, they are absolutely immune from money damages lawsuits. When judges act outside their judicial function, such as in supervising their employees, they do not have absolute **IMMUNITY**. The Court's upholding of absolute immunity has troubled some legal commentators, who believe that in appropriate circumstances judges should be held personally accountable for judicial actions that are unlawful.

Defenders of absolute immunity claim that it is required for the benefit of the public, not for the protection of malicious or corrupt judges. The legitimacy of U.S. courts rests on the public's belief that judges have the freedom to act independently, without fear of the consequences. Absolute immunity provides the buffer needed for a judge to act.

In the adversarial process, one party wins, and the other party loses. Losing parties are inevitably disappointed, and some seek ways of venting their frustration at the legal system. Some file complaints with lawyer discipline boards, alleging ethical misconduct by the opposing party's attorney or their own attorney. Some file complaints with a judicial conduct board, claiming that the trial judge violated a canon of judicial conduct. Though these types of complaints do not result in the relitigation of a lawsuit, they do illustrate the **VEXATIOUS LITIGATION** that faces attorneys and judges. Allowing parties to sue a judge for a judicial act would invite a torrent of meritless suits that would impede the judicial system.

Defenders of absolute immunity note that a flood of litigation would not be the only consequence of relaxing the immunity standard. They say that once judges became liable for damages suits, self-interest would lead them to avoid making decisions likely to provoke such suits. The resulting overcautiousness and timidity might be hard to detect, but it would impair independent and impartial adjudication.

Judges do make honest mistakes during the course of trial. The law is complex, and judges cannot call a recess of court to research every motion before making a decision. If a judge could be sued for damages, another judge might have to rule that the defendant judge was liable for injuries due to an erroneous decision or procedural flaw. Having judges judge one another could erode the integrity of the courts and undermine public confidence.

could be reached for their malicious acts, but only through **IMPEACHMENT**, or removal from office. Thus, the facts of the case were irrelevant. Even if Fisher had exceeded his jurisdiction in single-handedly banning Bradley from the court, Fisher was justified in his actions. According to the Court, "A judge who should pass over in silence an offence of such gravity would soon find himself a subject of pity rather than respect."

Since *Bradley,* the U.S. Supreme Court has identified some exceptions to judicial immunity. Judges do not receive immunity for their administrative decisions, such as in hiring and firing court employees (*Forrester v. White,* 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 [1988]). Judges also are not immune from declaratory and injunctive relief. These forms of relief differ from monetary relief. Generally they require parties to do or refrain from doing a certain thing. If a judge loses a suit for **DECLARATORY JUDGMENT** or injunctive relief, he or she may not be forced to pay money damages, but may be forced to pay the court costs and attorneys' fees of the winning party. For example, assume that a judge requires the posting of bail by persons charged in criminal court with offenses for which they cannot be jailed. If a person subjected to this unconstitutional practice files suit against the judge, the judge will not be given judicial immunity and, upon losing the case, will be forced to pay the plaintiff's attorney's fees and court costs. (*Pulliam v. Allen,* 466 U.S. 522, 104 S. Ct. 1970, 80 L. Ed. 2d 565 [1984]).

The Court held in *Pulliam* that a judge could be forced to pay the plaintiff's attorney's fees and court costs under the 1976 Civil Rights Attorney's Fees Awards Act, 42 U.S.C.A. § 1988. Gladys Pulliam, a Virginia state court magistrate, had jailed two men for failure to post bail following their arrest for abusive language and public drunkenness. Under Virginia law, the defendants could not receive a jail sentence if convicted of these offenses. The plaintiffs sued under the federal **CIVIL RIGHTS ACT** 42 U.S.C.A. **SECTION 1983** and obtained an **INJUNC-**

Defenders of absolute immunity also point out that appellate review is a viable remedy for correcting judicial conduct. In addition, if a judge has violated the canons of judicial conduct, judicial conduct boards may issue sanctions, including a recommendation of removal from the bench. A judge can be prosecuted for criminal acts. In some states judges may be impeached, and most state court judges must stand for election periodically. All these options serve as checks on judicial behavior and provide protection to the public.

Those who criticize absolute immunity recognize that judicial independence must be preserved. Nevertheless, they claim that in certain situations the only way to protect the public is to allow personal lawsuits against judges. By totally insulating judges from personal responsibility for their actions, the judicial system allows a small number of judges to escape the consequences of unlawful and outrageous behavior. The public loses respect when it sees a judge "beat the system," while the victim loses the chance to be made whole for the injuries flowing from the judicial act.

These critics believe that a qualified immunity standard would protect judges from meritless lawsuits and guarantee victims of unlawful judicial conduct their opportunity to seek damages. Qualified immunity is a lesser form of immunity that may be granted by a court if the judge demonstrates that the law was not clear on the subject in which the judge's actions occurred. They point out that the **EXECUTIVE BRANCH** is governed by qualified immunity. There is no indication that the administration of government has ground to a halt, or that the executive branch cannot attract high-quality individuals to government service. A well-articulated qualified immunity standard would allow a lawsuit against a judge to be dismissed if it could be established that the judge was operating within accepted judicial authority.

The critics note that the alternative remedies offered by the defenders of absolute immunity do not address the type of conduct that would be the focus of a personal injury lawsuit against a judge. For example, in **STUMP V. SPARKMAN**, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978), the judge issued an order to sterilize a teenage girl without the order's ever having been filed with the clerk of court. Because there was no record of a case filing or decision, the order could not be reviewed by an appellate court. The judge could be sanctioned by the judicial conduct board, but that would not compensate the victim of the illegal sterilization. Absolute immunity allowed the court to dismiss the girl's claim because the "judicial act" was one normally performed by a judge and was within the judge's judicial capacity.

Supporters of qualified immunity discount the assumption that it would precipitate a flood of litigation. They maintain that decisions that judges typically make will seldom be litigated, as appellate review will satisfy most litigants. However, in the rare circumstances where a judge abuses her authority and someone is injured, these supporters contend, it is only fair to qualify a judge's personal immunity. They argue that the removal of absolute immunity would, over time, deter judicial abuse: judges would not be intimidated, but they would be more careful to safeguard the rights of all parties.

TION forbidding the judge to require bail for these offenses. The judge was also ordered to pay the defendants $8,000 as reimbursement for their attorneys' fees.

Judges throughout the United States viewed the *Pulliam* decision as a serious assault on judicial immunity. The Conference of State Chief Justices, the **JUDICIAL CONFERENCE OF THE UNITED STATES**, the **AMERICAN BAR ASSOCIATION**, and the American Judges Association lobbied Congress to amend the law and overturn *Pulliam.* Finally, in the Federal Courts Improvement Act of 1996 (Pub. L. No. 104-317, 110 Stat. 3847), Congress inserted language that voided the decision. The amendment prohibits injunctive relief in a § 1983 action against a "judicial officer for an act or omission taken in such officer's judicial capacity" unless "a declaratory decree was violated or declaratory relief was unavailable." In addition, language was added to § 1988 that precludes the award of costs and attorney's fees against judges acting in their official capacity.

Filing a civil complaint against a judge can be risky for attorneys because the doctrine of judicial immunity is well established. In *Marley v. Wright,* 137 F.R.D. 359 (W.D. Okla. 1991), attorney Frank E. Marley sued two Oklahoma state court judges, Thornton Wright, Jr., and David M. Harbour, their court reporter, and others. Marley alleged in his complaint that Wright and Harbour had violated his constitutional rights in connection with a custody case concerning Marley's children. The court not only dismissed the case, but also ordered Marley to pay the attorney's fees that Wright and Harbour had incurred in defending the suit. According to the court, Marley's complaint "was not warranted by existing law," and Marley had used the suit "not to define the outer boundaries of judicial immunity but to harass judges and judicial personnel who rendered a decision he did not like."

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## JUDICIAL NOTICE

*A doctrine of evidence applied by a court that allows the court to recognize and accept the existence of a particular fact commonly known by persons of average intelligence without establishing its existence by admitting evidence in a civil or criminal action.*

When a court takes judicial notice of a certain fact, it obviates the need for parties to prove the fact in court. Ordinarily, facts that relate to a case must be presented to the judge or jury through testimony or tangible evidence. However, if each fact in a case had to be proved through such presentation, the simplest case would take weeks to complete. To avoid burdening the judicial system, all legislatures have approved court rules that allow a court to recognize facts that constitute common knowledge without requiring proof from the parties.

On the federal trial court level, judicial notice is recognized in rule 201 of the FEDERAL RULES OF EVIDENCE for U.S. District Courts and Magistrates. Rule 201 provides, in part, that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Under rule 201 a trial court must take judicial notice of a well-known fact at the request of one of the parties, if the court is provided with information supporting the fact. A court also has the option to take judicial notice at its discretion, without a request from a party.

Rule 201 further provides that a court may take judicial notice at any time during a proceeding. If a party objects to the taking of judicial notice, the court must give that party an opportunity to be heard on the issue. In a civil jury trial, the court must inform the jury that it must accept the judicially noticed facts in the case as conclusively proved. In a criminal trial by jury, the court must instruct the jury "that it may, but is not required to, accept as conclusive any fact judicially noticed." All states have statutes that are virtually identical to rule 201.

The most common judicially noticed facts include the location of streets, buildings, and geographic areas; periods of time; business customs; historical events; and federal, state, and INTERNATIONAL LAW. Legislatures also maintain statutes that give courts the power to recognize certain facts in specific situations. For example, in Idaho any document affixed with the official seal of the state PUBLIC UTILITIES commission must be judicially noticed by all courts (Idaho Code § 61-209 [1996]). In Hawaii, when a commercial vehicle is cited for violating vehicle equipment regulations, a trial court must take judicial notice of the driver's subordinate position if the driver works for a company that owns the vehicle (Haw. Rev. Stat. § 291-37 [1995]).

The danger of judicial notice is that, if abused, it can deprive the fact finder of the opportunity to decide a contestable fact in a case. In *Walker v. Halliburton Services,* 654 So. 2d 365 (La. App. 1995), Johnny Walker fell from a tank truck approximately ten feet to a concrete floor. Walker sought WORKERS' COMPENSATION benefits for his injuries, and his claim was denied by the Office of Workers' Compensation.

At the application hearing, the hearing officer stated that it was her experience that a soft-tissue injury heals in six weeks. She then took judicial notice of the fact that a soft-tissue injury heals in six weeks—preventing Walker from contesting that proposition—and disallowed Walker's claim. On appeal the Louisiana Court of Appeal, Third Circuit, reversed the decision and ordered the payment of workers' compensation benefits. According to the court, it was a clear error of law for the hearing officer to take judicial notice of such intricate medical knowledge.

## JUDICIAL REVIEW

*A court's authority to examine an executive or legislative act and to invalidate that act if it is contrary to constitutional principles.*

The power of courts of law to review the actions of the executive and legislative branches is called judicial review. Though judicial review is usually associated with the U.S. Supreme Court, which has ultimate judicial authority, it is a power possessed by most federal and state courts of law in the United States. The concept is an American invention. Prior to the early 1800s,

no country in the world gave its judicial branch such authority.

In the United States, the supremacy of national law is established by Article VI, Clause 2, of the U.S. Constitution. Called the **SUPREMACY CLAUSE**, it states that "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land." It goes on to say that, "judges in every state shall be bound thereby." This means that state laws may not violate the U.S. constitution and that all state courts must uphold the national law. State courts uphold the national law through judicial review.

Through judicial review, state courts determine whether or not state executive acts or state statutes are valid. They base such rulings on the principle that a state law that violates the U.S. constitution is invalid. They also decide the constitutionality of state laws under state constitutions. If, however, state constitutions contradict the U.S. Constitution, or any other national statute, the state constitution must yield. The highest state court to decide such issues is the state supreme court.

While judicial review of state laws is clearly outlined in the supremacy clause, the Framers of the U.S. Constitution did not resolve the question of whether the federal courts should have this power over congressional and executive acts. During the early years of the Republic, the Supreme Court upheld congressional acts, which implied the power of judicial review. But the key question was whether the Court had the power to strike down an act of Congress.

In 1803, the issue was settled in **MARBURY V. MADISON**, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60, when the Supreme Court, for the first time, ruled an act of Congress unconstitutional. In *Marbury,* Chief Justice **JOHN MARSHALL** reasoned that since it is the duty of a court in a lawsuit to declare the law, and since the Constitution is the supreme law of the land, where a rule of statutory law conflicts with a rule of the Constitution, then the law of the Constitution must prevail. Marshall asserted that it is "emphatically the province and duty of the judicial department, to say what the law is."

Having established the power of judicial review, the Supreme Court applied it only once prior to the Civil War, in 1857, ruling the **MISSOURI COMPROMISE OF 1820** unconstitutional in **DRED SCOTT V. SANDFORD**, 60 U.S. (19 How.) 393, 15 L. Ed. 691. During the same period, the Court invalidated several state laws that came in conflict with the Constitution. In **M'CULLOCH V. MARYLAND**, 17 U.S. 316, 4 L. Ed. 579 (1819), the Court invalidated a state's attempt to tax a branch of the **BANK OF THE UNITED STATES**. In **GIBBONS V. OGDEN**, 22 U.S. 1, 6 L. Ed. 23 (1824), the Court struck down a New York law granting a **MONOPOLY** to a steamboat company, saying that the state law conflicted with a federal law granting a license to another company.

In addition to invalidating state laws, the Marshall Court established the authority to overrule decisions of the highest state courts. In **MARTIN V. HUNTER'S LESSEE**, 14 U.S. 304, 4 L. Ed. 97 (1816), the Court referred to the supremacy clause to assert that its appellate power extended to state courts.

Following the Civil War, the Supreme Court grew concerned that the recently-passed **FOURTEENTH AMENDMENT** would give the federal government too much power over state governments and individual rights. Therefore, it used the power of judicial review to strike down federal **CIVIL RIGHTS** laws that sought to address **RACIAL DISCRIMINATION** in the former Confederate states. Beginning in 1890, the Court became embroiled in political controversy when it exercised its power of judicial review to limit government regulation of business. In *Chicago, Milwaukee, & St. Paul Railroad Co. v. Minnesota,* 134 U.S. 418, 10 S. Ct. 462, 33 L. Ed. 970 (1890), the Court struck down a state law establishing a commission to set railroad rates. This case was the first of many where the Court applied the doctrine of **SUBSTANTIVE DUE PROCESS** to invalidate state and federal legislation that regulated business. Substantive due process was a vague concept that required legislation to be fair, reasonable, and just in its content.

Through the early 1900s, the Court came under attack from Populists and Progressives for its desire to insulate capitalism from government intervention. Unmoved by its critics, the Court proceeded to invalidate a federal **INCOME TAX** (**POLLOCK V. FARMERS' LOAN & TRUST CO.**, 157 U.S. 429, 15 S. Ct. 673, 39 L. Ed. 759 [1895]), limit the scope of the **SHERMAN ANTI-TRUST ACT** (*United States v. E. C. Knight Co.,* 156 U.S. 1, 15 S. Ct. 249, 39 L. Ed. 325 [1895]), and forbid states to regulate working hours (**LOCHNER V. NEW YORK**, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 [1905]).

The Supreme Court's use of substantive due process brought charges of "judicial activism,"

which means that in determining whether laws would meet constitutional muster, the Court was accused of acting more as a legislative body than as a judicial body. Justice **OLIVER WENDELL HOLMES JR.**, in his famous dissenting opinion in *Lochner,* argued for "judicial restraint," cautioning the Court that it was usurping the function of the legislature.

Despite Holmes's warning the Court continued to strike down laws dealing with economic regulation into the 1930s. In 1932, the United States, in the midst of the Great Depression, elected **FRANKLIN D. ROOSEVELT** president. Roosevelt immediately began to implement his **NEW DEAL** program, which was based on the federal government's aggressive regulation of the national economy. The Supreme Court used its power of judicial review to invalidate eight major pieces of New Deal legislation.

Roosevelt, angry at the conservative justices for blocking his reforms, proposed legislation that would add new appointees to the Court—appointees that would create a liberal majority. This "court-packing" plan aroused bipartisan opposition and ultimately failed. But the Court may have gotten Roosevelt's message, for in 1937, it made an abrupt turnabout: a majority of the Court abandoned the substantive due process doctrine and voted to uphold the **WAGNER ACT**, which guaranteed to industrial workers the right to unionize and bargain collectively (**NATIONAL LABOR RELATIONS BOARD V. JONES & LAUGHLIN STEEL CORP.**, 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 [1937]).

With this decision the Court ceased to interpret the Constitution as a barrier to social and economic legislation. The Court subsequently upheld congressional legislation that affected labor relations, agricultural production, and social **WELFARE**. It also exercised judicial restraint with respect to state laws regulating economic activity.

Beginning in the 1950s, the Supreme Court exercised its judicial review power in cases involving civil rights and civil liberties. During the tenure of Chief Justice **EARL WARREN**, from 1953 to 1969, the Court declared federal statutes unconstitutional in whole or in part in 25 cases, most of the decisions involving civil liberties. The Warren Court's decision in **BROWN V. BOARD OF EDUCATION**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), however, invalidated state laws that mandated racially segregated public schools.

The Supreme Court became increasingly conservative in the 1970s. Yet, in 1973, under Chief Justice **WARREN E. BURGER**, it invalidated state laws prohibiting **ABORTION** in **ROE V. WADE**, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147. Since the elevation of **WILLIAM H. REHNQUIST** to chief justice in 1986, the Court has continued its movement to the right, although it has not retreated from most of the protections it recognized under Warren in the realm of civil rights and civil liberties.

The exercise of judicial review is subject to important rules of judicial self-restraint, which restrict the Supreme Court, and state courts as well, from extending its power. The Supreme Court will hear only cases or controversies, actual live disputes between adversary parties who are asserting valuable legal rights. This means the Court cannot issue **ADVISORY OPINIONS** on legislation. In addition, a party bringing suit must have standing (a direct stake in the outcome) in order to challenge a statute.

The most important rule of judicial restraint is that statutes are presumptively valid, which means that judges assume legislators did not intend to violate the Constitution. It follows that the **BURDEN OF PROOF** is on the party that raises the issue of unconstitutionality. In addition, if a court can construe a disputed statute in a manner that allows it to remain intact without tampering with the meaning of the words or if a court can decide a case on nonconstitutional grounds, these courses are to be preferred. Finally, a court will not sit in judgment of the motives or wisdom of legislators, nor will it hold a statute invalid merely because it is deemed to be unwise or undemocratic.

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Due Process of Law; Separation of Powers; Supreme Court of the United States.

## JUDICIAL SALE

*The transfer of title to and possession of a debtor's property to another in exchange for a price determined in proceedings that are conducted under a judgment or an order of court by an officer duly appointed and commissioned to do so.*

A judicial sale is a method plaintiffs use to enforce a judgment. When a plaintiff wins a judgment against a defendant in civil court, and the defendant does not pay the judgment, the plaintiff can force the sale of the defendant's property until the judgment is satisfied. The plaintiff forces the sale by filing in court for an execution on property, which is a seizure of property by the court for the purpose of selling the property.

Judicial sales are regulated by state and federal statute. In Alabama, for example, the judicial sale process begins when a judgment remains unpaid ninety days after it is placed on the record by the court (Ala. Code § 6-9-21 [1995]). The plaintiff must bring an order mandating payment of the judgment and court costs to the county where the defendant's property is located. This order is called a writ of execution, and it is issued by the trial court. A writ of execution identifies the amount of the judgment, interest, and court costs that the defendant owes the plaintiff.

Generally, a writ of execution may be levied against any real property or PERSONAL PROPERTY of the defendant. The plaintiff must file the writ of execution with the probate judge in the county where the defendant's property is located. The plaintiff must also give notice of the execution on the defendant's property to the defendant. Once the writ is filed, the plaintiff has a lien on the defendant's property. A lien gives the plaintiff a legally recognized ownership interest in the defendant's property, equal to the amount of the judgment.

Once the plaintiff has obtained a lien on the defendant's property, the judicial sale can begin. The process typically must be carried out within a fixed time period, such as within ninety days after the writ of execution is issued. The sheriff's office in the county where the property is located is responsible for levying, or seizing, the property and for conducting the sale of the property.

The sale of real property may take place at the courthouse. If the property that the plaintiff seeks is perishable and in danger of waste or decay, the sale may occur at some other time and place.

A defendant can avoid a judicial sale after a writ of execution is issued, by paying the judgment, interest, and court costs in full. If the defendant appeals the judgment to a higher court, the defendant may postpone the judicial sale by posting a bond to secure the debt during the appeals process. If the defendant does not plan to appeal, and the levying officer is about to seize personal property, the defendant may be able to keep the property until the day of sale if the defendant gives the levying officer a bond made payable to the plaintiff for a certain amount, such as twice the amount in the writ of execution.

Generally, judicial sales are the last resort for a plaintiff trying to collect on a judgment. A defendant who owns or possesses valuable property is usually able to satisfy a judgment in civil court by leveraging the property, or using it to borrow money to pay the judgment.

## JUDICIAL WRITS

*Orders issued by a judge in the English courts after a lawsuit had begun.*

An original writ, issued out of the Chancery, was the proper document for starting a lawsuit in England for hundreds of years, but courts could issue judicial writs during the course of a proceeding or to give effect to their orders after the lawsuit had commenced. Unlike original writs, judicial writs were issued under the private seal of the courts rather than the king's great seal, and they were sent out in the name of the chief judge of the court hearing the case rather than in the king's name. The capias was one form of a judicial writ.

## JUDICIARY

*The branch of government that is endowed with the authority to interpret and apply the law, adjudicate legal disputes, and otherwise administer justice.*

The U.S. judiciary comprises a system of state and federal courts, tribunals, and administrative bodies, as well as the judges and other judicial officials who preside over them.

Every society in human history has confronted the question of how to resolve disputes

# The Politicizing of American Jurisprudence

An old saying goes, "A judge is a lawyer who knew a governor (or senator or president)." The inference is unavoidable: judges are political creatures. From many of the nation's law professors to leading members of its foremost bar association, some legal experts think this assertion is regrettably all too true.

Only federal judges and a handful of state judges are appointed for life, barring **IMPEACHMENT**. In all other states and in local governments, most judges are elected by popular vote for a specific term. Voters tend to elect persons who share their views. The same is true for most gubernatorial appointments, although in many states this tendency is tempered by senatorial confirmation. Inescapably, the development of platforms that represent the most popular, prevailing, or promising views is a political process.

In the words of John Adams's Massachusetts constitution, it has always been the desire to make judges "as free, impartial and independent as the lot of humanity will admit." In a political system where party politics are defined by social issues and where **JURISPRUDENCE** affects those issues, however, party alignment of judges seems inevitable, either by default or by declaration. The extent is arguable, but few would deny that judges assume the bench based on how others perceive they will run the court: conservatively or liberally.

Ostensible checks and balances exist, of course. All judges are expected to follow ethical standards requiring disinterested and unbiased opinions, which most do. Most states have a **CODE OF JUDICIAL CONDUCT** and/or ethics for this purpose, generally fashioned from that of the **AMERICAN BAR ASSOCIATION** (ABA). These codes proscribe many instances of campaign conduct for prospective and current judges. Judges cannot personally solicit or accept campaign funds and often are prohibited from identifying themselves with any political party. Typically, they must run on a non-partisan ticket.

But nothing prevents **POLITICAL ACTION COMMITTEES** (PACs) from making campaign contributions to judges. Some scoff at the imposition of limits. "If PACs are limited, people go out and create more PACs," explained Dick Wilcox, president of the Business and Industry Political Education Committee in Mississippi. "If wealthy individuals are restricted, they give money to their secretaries, wives, or children to contribute." Contributions add up: Michigan spent $16 million on judicial elections in 2000 alone. In Georgia in 2002, races for two Supreme Court seats garnered more than $700,000.

Electing judges, however, is unnecessary. As an alternative, some point to the pioneering Missouri system. Under this system a governor appoints all state trial and appellate judges with the advice and consent of the legislature. Still another variation seeks to further depoliticize such choices by requiring a governor to select among nominees submitted by a selection panel or special nominating committee.

Support for reform is growing. In Michigan, Senator Ken Sikkema introduced a bill in 2001 for a Constitutional amendment allowing the governor to appoint justices to a single 14-year term, an idea favored by state supreme court justice Elizabeth Weaver. More dramatically, the ABA has called for a sweeping overhaul of the current state system. In 2003, the ABA Commission on the 21st Century Judiciary warned that partisanship over the courts was escalating to crisis levels. Among 23 recommendations, the commission called for limiting judges to service of either one long term or until a specific age, without eligibility for retention or reelection. Such limits are needed to "inoculate America's courts against the toxic effects of money, partisanship and narrow interests," the commission declared. (Justice at Stake Campaign. "ABA Commission Warns: State Court Systems at Risk." March 2003.)

Advocates of reform say it may cure other ills and weaknesses, too. Reform might eliminate so-called "negative campaigning." Michigan Supreme Court Chief Justice Maura Corrigan believes negative campaigns create perceptions among voters that justices are "bought" by special interests. Moreover, judges may lose independence out of fear that certain opinions will be used against them in negative campaign ads.

Another blemish that might be cured is that of real or perceived lawyer **LOBBYING**. For years, attor-

neys—particularly plaintiffs' lawyers—have outspent the largest oil and automotive companies in judicial campaign contributions. The ABA has spoken out sharply against attorneys contributing to campaigns of judges before whom they do frequent business or from whom they wish to gain court-appointed business. Yet just like other campaign contributors, attorneys are exercising their speech rights under the **FIRST AMENDMENT**.

Concerns about politicization of the judiciary soared during the unusual 2000 presidential election. When Florida circuit judge Nikki Ann Clark, an African American and a Democrat, was assigned one of the election cases seeking to invalidate as many as 15,000 absentee ballots from Florida's Seminole County, candidate **GEORGE W. BUSH**'s attorneys requested that she **RECUSE** herself from the case. Just weeks before, Bush's brother, Republican Florida governor Jeb Bush, had bypassed her for a state appellate court vacancy. She refused to recuse herself, issuing a decision unfavorable to Bush and favorable to Florida's African–American voters. After her decision was upheld by both the appellate court and the Florida Supreme Court, critics complained that their justices had been appointed by Democratic governors.

Both sides, in fact, found much to complain about. After a sharply divided U.S. Supreme Court reversed the Florida Supreme Court and halted the manual recount of votes (**BUSH V. GORE**, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 [U.S. 2000]), critics of the decision scathingly denounced it as politically motivated. In fact, 524 U.S. law professors at 120 American law schools took out an ad in *The New York Times* criticizing the majority for "acting as political proponents for candidate Bush, not as judges." (People for the American Way Foundation. "524 Law Professors Say" 2001.) Other critics seized upon an alleged remark by Supreme Court Justice Sandra Day O'Connor, reported in the January 1, 2001, issue of *Newsweek*. "This is terrible," Justice O'Connor is supposed to have said upon learning that Gore was ahead. Only a Bush victory would have allowed her to retire knowing that a conservative replacement would be found for her on the Court.

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American Bar Association; Code of Judicial Conduct; Elections; Term Limits.

among its members. Many early societies chose a private system of revenge for dispute resolution. As civilization gradually evolved, and the system of revenge was perceived as counterproductive to society, communities began designating individuals to resolve disputes in accordance with established norms and customs. These individuals were usually leaders who were expected to exercise their judgment in an impartial manner.

The origins of judicial action, judicial power, and judicial process may be traced to the first communities that relied on neutral third parties to resolve legal disputes. Judicial action is any action taken by a court or other judicial body to interpret, apply, or declare what the law is on a particular issue during a legal proceeding. It is also the action taken by a judicial body to settle a legal dispute by issuing an opinion, order, decree, or judgment. Judicial power is the authority of a court to hear a particular lawsuit or legal dispute, and take judicial action with regard to it. Judicial process is the procedures by which a court takes judicial action or exercises its judicial power.

Ancient Greece, one of the earliest known societies in Western civilization, employed a combination of judicial procedures. Greek rulers, known as *arkhons,* were empowered to hear a variety of disputes, as was the *agora,* a group of respected elders in the community. A court known as the *Areopagus* heard murder

cases, and direct retaliation by private citizens was still permitted in many civil disputes. The judicial powers of these institutions were gradually replaced by the *Ekklesia,* an assembly of six thousand jurors that was divided into smaller panels to hear particular cases.

Juries played an integral role in the development of the English judicial system. As more legal disputes were submitted to juries for resolution, this system became more self-conscious. Concerns were expressed that both judges and juries were rendering biased decisions based on irrelevant and untrustworthy evidence. Litigants complained that trial procedures were haphazard, ARBITRARY, and unfair. Losing parties sought effective remedies to redress erroneous decisions made at the trial court level. Each of these concerns has manifested itself in the modern judicial system of the United States.

The blueprints for the U.S. judiciary were laid out in 1789. During that year the U.S. Constitution was formally adopted by the states. Article III of the Constitution delineates the general structure of the federal judicial system, including the powers and obligations of federal courts. The JUDICIARY ACT OF 1789 (1 Stat. 73 [codified as amended in 28 U.S.C.A.]) fleshes out many details of federal judicial power that were not addressed by the Constitution. The blueprints for the state judicial systems were created similarly by state constitutional and statutory provisions.

The U.S. judicial system has three principal characteristics: it is part of a federalist system of government, it has a specific role under the federal SEPARATION-OF-POWERS doctrine, and it is organized in a hierarchical fashion.

### Federalism

The judiciary is part of a federalist system in which the state and federal governments share authority over legal matters arising within their geographic boundaries. In some instances both state and federal courts have the power to hear a legal dispute that arises from a single set of circumstances. For example, four Los Angeles police officers who were accused of participating in the 1991 beating of speeding motorist Rodney G. King faced prosecution for excessive use of force in both state and federal court. In other instances a state or federal court has exclusive jurisdiction over a particular legal matter. For example, state courts typically have exclusive jurisdiction over matrimonial law, and federal courts have exclusive jurisdiction over BANKRUPTCY law.

### Separation of Powers

Under the separation-of-powers doctrine, the judiciary shares power with the executive and legislative branches of government at both the state and federal levels. The judiciary is delegated the duty of interpreting and applying the laws that are passed by the legislature and enforced by the EXECUTIVE BRANCH.

Article I of the U.S. Constitution grants Congress its lawmaking power, and Article II authorizes the president to sign and VETO legislation and to execute laws that are enacted. Article III grants the federal judiciary the power to adjudicate, among other things, lawsuits that arise under the Constitution, congressional law, and treaties with foreign countries.

Federal judges, including Supreme Court justices, are not elected to office. Instead, they are appointed to office by the president of the United States with the advice and consent of the Senate. Once appointed, federal judges hold office for life, unless they resign or are impeached for "Treason, BRIBERY, or other High Crimes and Misdemeanors" (U.S. Const. art. II, § 4).

The lifetime appointment of federal judges is controversial. On one hand, the federal judiciary runs the risk of growing out of touch with popular sentiment because it is being immunized from the electorate. On the other hand, it is considered necessary for the judiciary to remain independent of popular will so that judges will decide cases according to legal principles, not political considerations.

In many states judges are elected to office. Nonetheless, each state constitution similarly delegates powers among the three branches of government. Accordingly, judges are still expected to decide cases based on the law, not the political considerations that the executive and legislative branches may take into account in executing their duties.

### Hierarchy

The U.S. judiciary is a hierarchical system of trial and appellate courts at both the state and federal levels. In general, a lawsuit is originally filed with a trial court that hears the suit and determines its merits. Parties aggrieved by a final judgment have the right to appeal the decision. They do so by asking an appellate court to review the decision of a trial court.

**Hierarchy of U.S. Appellate Judiciary**

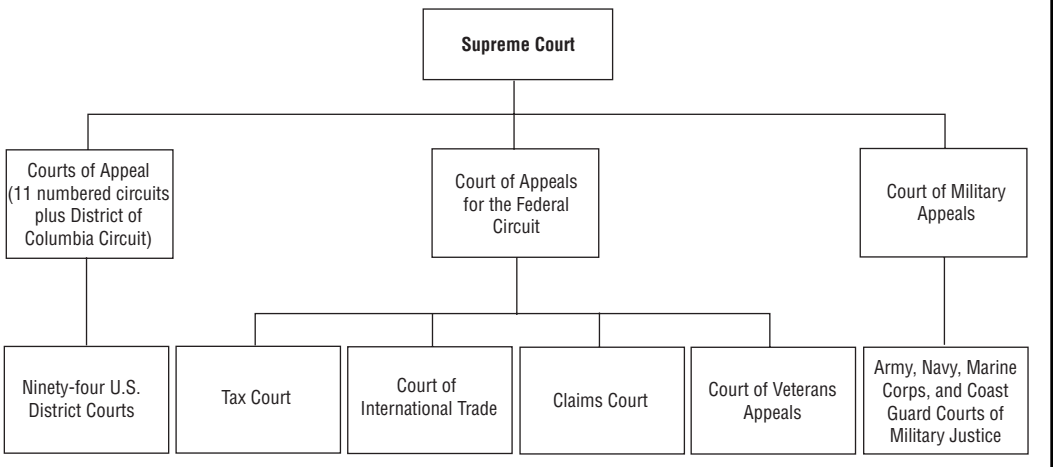


The structure of state court systems varies by state, but four levels generally can be identified: minor courts, major trial courts, intermediate appellate courts, and state supreme courts. Minor courts handle the least serious cases. For example, municipal courts handle city ordinance violations, such as speeding tickets and parking violations. Cases that involve state constitutional issues, state statutes, and COMMON LAW are dealt with by major trial courts. For example, felony cases, such as murder or rape, would be handled in a major trial court. Trial courts are called by different names in different states. For example, in Pennsylvania they are called courts of COMMON PLEAS.

Intermediate appellate courts, called courts of appeals, review cases that have been decided by trial courts. They do not hear new evidence; they decide whether the lower court (the trial court) correctly applied the law in the case. State supreme courts review cases that deal with state law. The decision of the court is final since the state supreme court is the ultimate arbiter of state laws and the state constitution. Supreme courts are called by various names depending on the state. For example, West Virginia calls its state supreme court the Supreme Court of Appeals.

Federal cases, including civil and criminal, are handled by federal district courts. There are 94 district courts, with at least one in each state, as well as a district court for the District of Columbia, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands. The number of judgeships appointed to each district is laid out in Title 28, Section 133 of the U.S. Code, which is a compilation of the permanent laws of the United States.

The 94 districts are divided into 12 regional circuits. Each of these circuits has a U.S. court of appeals, also called a circuit court. U.S. courts of appeals were created by the Evarts Act of 1891 (28 U.S.C.A. § 43); the central location of each court is determined by statute (28 U.S.C.A. § 41 [1995]). Each federal appellate court has jurisdiction over a certain geographic area, and may hear appeals only from federal district courts within that jurisdiction. The Court of Appeals for the Federal Circuit, however, has nationwide jurisdiction to handle certain kinds of cases, including patent cases and those that involve trade with other countries.

The Supreme Court is the nation's highest appellate court. It is sometimes called the "court of last resort" because once the Court reviews a case, and renders a final judgment, further appeals cannot be made. The nine justices who sit on the Supreme Court review cases that begin at either the federal or state level. These cases usually focus on important issues involving the U.S. Constitution and federal law. The Supreme Court receives its authority from Article III, Section 1, of the U.S. Constitution, which states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

**Special Courts** Not all lawsuits begin in an ordinary court. Both the state and federal governments have established SPECIAL COURTS that are expressly designated to hear specific types of cases. For example, at the federal level, the U.S. Court of International Trade handles cases involving foreign business dealings, and the U.S. TAX COURT handles disputes between taxpayers and the INTERNAL REVENUE SERVICE (IRS). Examples at the state level include special courts that hear cases involving juveniles (i.e., juvenile court) or cases involving domestic issues (i.e., family courts). Specialized courts have also been created to hear appeals. For example, the Court of Military Appeals was established in 1950 to review COURT-MARTIAL decisions.

**Alternative Dispute Resolution and Administrative Agencies** In certain areas of law, litigants are prohibited from beginning a lawsuit in an ordinary trial court unless they first exhaust other methods of dispute resolution through an administrative body. Since the mid-1930s, state and federal governments have created elaborate administrative systems to dispose of certain legal claims before a lawsuit may ever be filed. For example, at the federal level, administrative agencies have been created to oversee a number of disputes involving LABOR LAW, ENVIRONMENTAL LAW, ANTITRUST LAW, employment discrimination, SECURITIES transactions, and national transportation.

Administrative agencies are created by statute, and legislatures may prescribe the qualifications for administrative officials, including ADMINISTRATIVE LAW judges, who are appointed by the executive branch; courts of law; and heads of government departments. These agencies are charged with the responsibility of establishing, developing, evaluating, and applying policy over a given area of law. The body of rules, principles, and regulations promulgated by such agencies and their officials is known as administrative law.

Laws created by state and federal administrative bodies, including adjudicative bodies, are considered no less authoritative than laws enacted by legislatures, decreed by the executive branch, or issued by the judiciary. However, litigants who first exhaust their administrative remedies through the appropriate agency and are dissatisfied with a decision rendered by an administrative law judge, may appeal the decision to an ordinary court of law.

State and federal governments have passed formal rules that set forth the procedures that administrative bodies must follow. The rules governing federal administrative adjudication are provided in the Administrative Procedure Act (5 U.S.C.A. § 551 et seq. [1988]).

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Administrative Law and Procedure; Alternative Dispute Resolution; Appellate Advocacy; Code of Judicial Conduct; Court of Appeal; Court of Claims; Court Opinion; Discretion in Decision Making; Federal Courts; Federalism; Judicial Review; Jury; Original Jurisdiction; Separation of Powers; State Courts.

## JUDICIARY ACT OF 1789

The Judiciary Act of 1789 established the lower federal courts. Under Article III, Section 1, of the U.S. Constitution, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." In the Judiciary Act, the first Congress created federal trial courts and federal appeals courts to comply with this provision.

The first Congress engaged in considerable debate over the Judiciary Act. This was not surprising: the Constitutional Convention, which had ended a year and a half earlier, had revealed a deep division between Federalists and Anti-Federalists. Federalists promoted federal powers to protect against local bias and ensure federal supremacy. Anti-Federalists opposed a strong federal government and preferred to leave as much power as possible to the states. Although the debate over the Judiciary Act was not conducted entirely by Federalists and Anti-Federalists, these groups represented the opposing viewpoints.

Many concessions were made to Anti-Federalists in the Constitution. However, the ratification of the Constitution was a victory for Federalists because it created the potential for considerable federal powers. The bill for the Judiciary Act—the first bill to be considered in the first Congress—provided another opportunity for Anti-Federalists to present their arguments against strong federal powers.

On April 7, 1789, the Senate ordered itself to create a committee to draft a bill organizing a federal judiciary. By the end of May, a committee led by OLIVER ELLSWORTH, of Connecticut, WILLIAM PATERSON, of New Jersey, and Caleb Strong, of Massachusetts, had devised a detailed, complex proposal. The committee envisioned a small, unintrusive federal judiciary with exacting jurisdictional requirements. This meant that a case would have to have certain characteristics before it could be heard by a federal court. Remembering criticisms made by the Anti-Federalists at the Constitutional Convention, the committee was careful to avoid giving the federal courts too much authority.

Despite the restrictions on jurisdiction, Anti-Federalists opposed the bill on the grounds that a federal judiciary in any form would deprive states of the right to exercise their own judicial powers. They argued that state courts were more than capable of deciding federal issues. Furthermore, the provision in Article III, Section 1, of the Constitution did not require Congress to create lower federal courts: it merely suggested that Congress do so.

The Anti-Federalists, led by Richard Henry Lee and William Grayson, both of Virginia, submitted amendments to limit the scope of the act. Samuel Livermore, a congressman from New Hampshire and an Anti-Federalist, moved the House to limit the jurisdiction of inferior federal courts to questions of ADMIRALTY. Lee did the same in the Senate. Another proposal consisted of creating no lower federal courts and expanding the jurisdiction of the Supreme Court. All the amendments were voted down. Senator William Maclay, of Pennsylvania, wrote in his diary, "I opposed this bill from the beginning. . . . The constitution is meant to swallow all the state constitutions, by degrees; and this to swallow, by degrees, all the State judiciaries" (Clinton 1986, 1531).

The Federalists, led by JAMES MADISON, of Virginia, insisted that a reasonable reading of Article III, Section 1, required Congress to establish lower federal courts. According to the Federalists, federal courts were necessary to ensure the supremacy of federal law. The supremacy of federal law over state law had, after all, been established in Article VI of the Constitution, which stated, in part, that "[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land."

The Federalists argued further that federal courts provided a venue that would be less susceptible to bias than that of state courts. The Federalists declared that several types of cases were appropriate only in federal court, including cases involving disputes between states; ALIENS, or noncitizens; and crimes against the United States.

Under the proposed act, federal juries would comprise persons from all over the region, decreasing the potential for the jury bias that can exist in closely knit state courts. Also, federal judges would have no allegiance to any particular state because they would have judicial responsibility for several states at once, and thus would be less prone to bias than were state judges.

Eventually, the Federalists won enough support to pass the act. The House approved the bill submitted by the Senate without a recorded vote, and President GEORGE WASHINGTON signed the act into law on September 24, 1789.

The act established two sets of federal courts to operate below the U.S. Supreme Court. On one level, the act created thirteen federal districts. Each of these districts contained a federal trial court that had jurisdiction over minor criminal cases, admiralty and maritime cases, and civil actions on federal matters.

On another level, the act created three federal circuit courts. The circuit courts were given trial court jurisdiction over serious criminal cases and three categories of civil cases: cases where the United States was a plaintiff; cases where at least one of the parties was alien to the United States; and cases between parties of different states, or "diversity" cases, if the amount at issue exceeded $500. Circuit court jurisdiction over diversity cases was made concurrent with state court jurisdiction. This meant that a federal trial was not mandatory, and a plaintiff could sue in either a state or federal court. Also, if a defendant from another state was being sued in state court for more than $500, she or he could have the case moved to the federal circuit court.

Each of the circuit courts comprised a federal district court judge and two Supreme Court justices. This composition was a concession to Anti-Federalists. The general idea was that requiring Supreme Court Justices to sit on circuit courts, or "ride circuit," would force them to keep in touch with local concerns. Theoretically, this would prevent the development of the elite judicial aristocracy feared by the Anti-Federalists.

The Judiciary Act also identified the precise jurisdiction of the Supreme Court: The Supreme Court could hear appeals from the federal district and circuit courts. The Supreme Court could also hear appeals from state courts in cases involving federal treaties or statutes, state statutes that were repugnant to the federal Constitution or to federal laws or treaties, and the interpretation of any clause of the Constitution or of federal laws or treaties. In any case, the decision of a state court would be reviewed by the Supreme Court only if it was against federal interests.

The act gave the Supreme Court trial court jurisdiction over controversies between two or more states and between a state and citizens of another state. The Supreme Court was also given trial court jurisdiction to hear cases against ambassadors, public ministers, and consuls or their domestics, with the adjunct that district courts could also hear cases against consuls or vice consuls. (Consuls and vice consuls were government officers living in another country and responsible for the promotion of U.S. business in that country).

The Judiciary Act fixed the number of justices on the U.S. Supreme Court at six. As the nation grew in size, new circuits were added to the original three, and justices were added to the court along with the circuits. By 1863, the number of justices on the Supreme Court had grown to ten. In 1866, Congress reduced the number of justices to seven. In 1869, the figure was set at nine, where it has remained.

In many sections of the act, federal trial court jurisdiction was made concurrent with state court jurisdiction. This meant that federal courts did not have exclusive jurisdiction over many matters involving federal law. One notable exception was that the federal courts were given exclusive jurisdiction to hear cases involving prosecution for the violation of federal criminal laws.

The Judiciary Act did not provide for federal question jurisdiction. That is, it did not grant federal courts broad authority to hear all cases that arose under the Constitution or federal law. This may have been because no federal laws were on the books at the time the act was established. Whether intentionally or owing to a lack of foresight, Congress chose to identify in the first Judiciary Act the specific cases that could be heard in federal court. Congress did pass a statute authorizing federal question jurisdiction in 1875. However, to this day, Congress usually grants federal court jurisdiction over new laws in a separate statute or clause.

The creators of the Judiciary Act understood it to be a work-in-progress. On the night before its final passage, Madison, an ardent proponent of the act, wrote that it was "defective both in its general structure, and many of its particular regulations" (Clinton 1986, 1539).

The structure of the federal judiciary has changed dramatically since the passage of the first Judiciary Act. The federal judiciary is now more streamlined. The federal district courts handle all federal trials. The circuit courts are now called U.S. courts of appeals, and they are exclusively appeals courts: they no longer have trial court jurisdiction over any cases. Supreme Court justices no longer have to ride circuit. Despite these changes, the Judiciary Act's idea of creating two levels of federal courts beneath the Supreme Court has remained intact.

The act's concern with establishing limits to federal court jurisdiction now seems quaint. In the more than two centuries since the passage of the act, statutes passed by Congress and decisions issued by the Supreme Court concerning the jurisdiction of federal courts have effectively expanded the reach of federal courts. Federal courts have also increased in number: there are now eleven federal circuits, each containing an appeals court and several federal district courts.

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Diversity of Citizenship; Supreme Court of the United States.

## JUDICIARY ACT OF 1801

See MIDNIGHT JUDGES.

## JUNIOR

*Younger; subsequently born or created; later in rank, tenure, preference, or position.*

A junior lien is one that is subordinate in rank to another prior lien. This means that the junior lien will be paid off only after the prior lien has been satisfied.

When used in a proper name, junior or its abbreviation, Jr., is merely descriptive and not part of the individual's legal name. The absence of the term at the end of a name has no legal consequence. A signature that omits the description is still valid.

## JUNK BOND

*A security issued by a corporation that is considered to offer a high risk to bondholders.*

*Junk bond* is the popular name for high-risk bonds offered by corporations. A bond is a certificate or some other evidence of a debt. In the world of corporate finance, a corporation may sell a bond in exchange for cash. The bond contains a promise to repay its purchaser at a certain rate of return, called a yield. A bond is not an EQUITY investment in the corporation; it is debt of the corporation.

A corporate bond is essentially a loan to a corporation. The loan may be secured by a lien or mortgage on the corporation's property as security for repayment.

To determine the level of the default risk for potential bondholders, financial experts analyze corporations and rate them on a number of factors, including the nature of their business, their financial holdings, their employees, and the length of their existence. The higher the risk for bondholders, the lower the risk rating given the corporation.

Because their ventures are considered risky, low-rated corporations must offer bond yields that are higher than those of high-rated corporations. High-rated corporations have less need for income from bonds, so they do not need to offer high yields. Bonds from these companies are called investment-grade bonds. Low-rated corporations have the need for bond income, so they offer high-yield bonds. These high-yield bonds are junk bonds.

When a corporation fails, bondholders may lose all or part of their investment if the corporation has declared BANKRUPTCY or has no assets. This possibility is more real for junk bonds because they are, by definition, issued by unproven or unhealthy corporations.

For some persons, the high yield of a junk bond can be worth the increased risk of default. Junk bonds can increase in value if the corporation's rating is upgraded by private bond-rating firms. Junk bonds are also favored by some persons precisely because they contribute capital to young or struggling corporations. Whether to buy a junk bond depends on the investor: conservative investors do not favor them, but speculators and others seeking a quick profit find them attractive.

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## JURAL

*The principles of natural and positive rights recognized by law.*

Jural pertains to the rights and obligations sanctioned and governed by positive law or that law which is enacted by proper authority. Jural doctrines are founded upon fundamental rules and protect essential rights and duties.

Jural principles are not the same as moral principles. Moral doctrines encompass the entire range of ethics or the science of behavior. Jural doctrines include only those areas of moral conduct that are recognized by law.

Jural denotes the state or an organized political society.

## JURAT

*The certificate of an officer that a written instrument was sworn to by the individual who signed it.*

Jurat is derived from *jurare,* Latin for "to swear." It is proof that an oath was taken before an administering officer, such as a notary. In an AFFIDAVIT, a jurat is the clause at the end of the document stating the date, place, and name of the person before whom it was sworn.

## JURIDICAL

*Pertaining to the administration of justice or to the office of a judge.*

A *juridical act* is one that conforms to the laws and the rules of court. A *juridical day* is one on which the courts are in session.

## JURIMETRICS

*The study of law and science.*

Used primarily in academia to mean a strictly empirical approach to the law, the term *jurimetrics* originated in the 1960s as the use of computers in law practice began to revolutionize the areas of legal research, evidence analysis, and data management. A neologism whose roots suggest JURISPRUDENCE and measurement, it was popularized by the AMERICAN BAR ASSOCIATION (ABA), whose quarterly *Jurimetrics Journal of Law, Science, and Technology* is a widely respected publication with an international focus.

Although the effect of science on law has a long history, modern developments date only to the second half of the twentieth century. Precipitating the rise of the contemporary legal practice—which relies heavily on computers to research relevant law and, in some cases, to analyze evidence—was an emphasis on logical reasoning. Leading the way in this area was the ABA, which in 1959 began publishing in its journal *Modern Uses of Logic in Law* papers arguing in favor of applying a strict, systematic approach to the law. The advent of more powerful and affordable computers allowed symbolic logic (the use of formulas to express logical problems) to be applied on a more practical scale. As the possibilities inherent in rapid data retrieval caused a burst of research during the mid-1960s, the ABA renamed the journal *Jurimetrics.*

Published by the ABA's Section of Law and Technology, *Jurimetrics* examines a wide range of interrelated scientific and legal topics. The journal's articles cover the influence on law of the so-called hard sciences as well as the social sciences, disciplines such as engineering and communications, methodologies such as symbolic logic and statistics, and the use of technology in law practice, legislation, and adjudication. Thus, article topics range from the state of the art in DNA EVIDENCE to experimental research on jury decision making. Also concerned with the regulation of science and technology, *Jurimetrics* examines cutting edge issues such as electronic security and COPYRIGHT law in the age of the INTERNET.

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CROSS-REFERENCES

Computer-Assisted Legal Research.

## JURIS

*[*Latin, Of right; of law.*] A phrase that serves as the root for diverse terms and phrases dealing with the law; for example, jurisdiction,* JURISPRUDENCE*, or jurist.*

## JURIS DOCTOR

*The degree awarded to an individual upon the successful completion of law school.*

Juris doctor, or doctor of JURISPRUDENCE, commonly abbreviated J.D., is the degree commonly conferred by law schools. It is required in all states except California (which includes an option called law office study) to gain ADMISSION TO THE BAR. Gaining admission to the bar means obtaining a license to practice law in a particular state or in federal court.

Until the 1930s and 1940s, many states did not require a person to have a law school degree in order to obtain a license to practice law. Most lawyers qualified for a license by working as an apprentice for an established attorney for a specified period. By the 1950s most states required a law school degree. State legislatures established this requirement to raise the standards of practicing attorneys and to restrict the number of attorneys. The degree offered by most COLLEGES AND UNIVERSITIES was called a master of laws (L.L.M.) degree. In the 1960s, as colleges and universities increased the requirements for a law degree, the J.D. replaced the L.L.M. as the primary degree awarded by law schools.

The specific requirements for a J.D. vary from school to school. Generally, the requirements include completing a minimum number of class hours each academic period, and taking certain mandatory courses such as contracts, TORTS, CIVIL PROCEDURE, and CRIMINAL LAW

in the first year of law school. All states require that students pass a course on **PROFESSIONAL RESPONSIBILITY** before receiving a J.D. degree.

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**CROSS-REFERENCES**

Legal Education.

## JURISDICTION

*The geographic area over which authority extends; legal authority; the authority to hear and determine causes of action.*

Jurisdiction generally describes any authority over a certain area or certain persons. In the law, jurisdiction sometimes refers to a particular geographic area containing a defined legal authority. For example, the federal government is a jurisdiction unto itself. Its power spans the entire United States. Each state is also a jurisdiction unto itself, with the power to pass its own laws. Smaller geographic areas, such as counties and cities, are separate jurisdictions to the extent that they have powers that are independent of the federal and state governments.

Jurisdiction also may refer to the origin of a court's authority. A court may be designated either as a court of general jurisdiction or as a court of special jurisdiction. A court of general jurisdiction is a trial court that is empowered to hear all cases that are not specifically reserved for courts of special jurisdiction. A court of special jurisdiction is empowered to hear only certain kinds of cases.

Courts of general jurisdiction are often called district courts or superior courts. In New York State, however, the court of general jurisdiction is called the Supreme Court of New York. In most jurisdictions, other trial courts of special jurisdiction exist apart from the courts of general jurisdiction; some examples are probate, tax, traffic, juvenile, and, in some cities, **DRUG COURTS**. At the federal level, the district courts are courts of general jurisdiction. Federal courts of special jurisdiction include the **U.S. TAX COURT** and the **BANKRUPTCY** courts.

Jurisdiction can also be used to define the proper court in which to bring a particular case. In this context, a court has either original or appellate jurisdiction over a case. When the court has original jurisdiction, it is empowered to conduct a trial in the case. When the court has appellate jurisdiction, it may only review the trial court proceedings for error.

Generally, courts of general and special jurisdiction have original jurisdiction over most cases, and appeals courts and the jurisdiction's highest court have appellate jurisdiction, but this is not always the case. For example, under Article III, Section 2, Clause 2, of the U.S. Constitution, the U.S. Supreme Court is a court of appellate jurisdiction. However, under the same clause, that court has original jurisdiction in cases between states. Such cases usually concern disputes over boundaries and waterways.

Finally, jurisdiction refers to the inherent authority of a court to hear a case and to declare a judgment. When a plaintiff seeks to initiate a suit, he or she must determine where to file the complaint. The plaintiff must file suit in a court that has jurisdiction over the case. If the court does not have jurisdiction, the defendant may challenge the suit on that ground, and the suit may be dismissed, or its result may be overturned in a subsequent action by one of the parties in the case.

A plaintiff may file suit in federal court; however, state courts generally have concurrent jurisdiction. Concurrent jurisdiction means that both the state and federal court have jurisdiction over the matter.

If a claim can be filed in either state or federal court, and the plaintiff files the claim in state court, the defendant may remove the case to federal court (28 U.S.C.A. §§ 1441 et seq.). This is a tactical decision. Federal court proceedings are widely considered to be less susceptible to bias because the jury pool is drawn from the entire state, not just from the local community.

State courts have concurrent jurisdiction in most cases. Federal courts have exclusive jurisdiction in a limited number of cases, such as federal criminal, antitrust, bankruptcy, patent, **COPYRIGHT**, and some **ADMIRALTY** cases, as well as suits against the U.S. government.

Under federal and state laws and court rules, a court may exercise its inherent authority only if it has two types of jurisdiction: personal and subject matter. **PERSONAL JURISDICTION** is the authority that a court has over the parties in the case. **SUBJECT MATTER JURISDICTION** is a court's authority over the particular claim or controversy.

### State Civil Court Jurisdiction

**Personal Jurisdiction** Personal jurisdiction is based on territorial concepts. That is, a court can gain personal jurisdiction over a party only if the party has a connection to the geographic area in which the court sits. Traditionally, this connection was satisfied only by the presence of the defendant in the state where the court sat. Since the late nineteenth century, notions of personal jurisdiction have expanded beyond territorial concepts, and courts may gain personal jurisdiction over defendants on a number of grounds. However, the territorial basis remains a reliable route to establishing personal jurisdiction.

A person who has a civil claim may file suit in a court that is located in his or her home state. If the defendant lives in the same state, the court will have no trouble gaining personal jurisdiction. The plaintiff must simply serve the defendant with a summons and a copy of the complaint that was filed with the court. Once this is accomplished, the court has personal jurisdiction over both the plaintiff and the defendant. If the defendant lives outside the state, the plaintiff may serve the defendant with the process papers when the defendant appears in the state.

If the defendant lives outside the state and does not plan to re-enter the state, the court may gain personal jurisdiction in other ways. Most states have a LONG-ARM STATUTE. This type of statute allows a state court to gain personal jurisdiction over an out-of-state defendant who (1) transacts business within the state, (2) commits a TORT within the state, (3) commits a tort outside the state that causes an injury within the state, or (4) owns, uses, or possesses real property within the state.

The emergence of the INTERNET as a way to communicate ideas and sell products has led to disputes over whether state long-arm statutes can be used to acquire personal jurisdiction over an out-of-state defendant. In *Zippo Manufacturing v. Zippo Dot Com*, 952 F. Supp.1119 (W.D.Pa.1997), a U.S. District Court proposed that a long-arm statute could be used only when the defendant has either actively marketed a product or the web site has a degree of interactivity that suggests the website seeks to do business. Conversely, a passive web site, where information is merely posted, would not subject a person to the reach of a long-arm statute.

In *Pavlovich v. Superior Court*, 59 Cal.4th 262, 58 P.3d 2, 127 Cal.Rptr.2d 329 (Cal. 2002), the California Supreme Court ruled that an out-of-state web site operator who had posted software that allowed users to decrypt and copy digital versatile discs (DVDs) containing motion pictures could not be sued in California state court. The operator, who lived in Texas, did not solicit business or have any commercial contact with anyone in California. The court relied on the *Zippo* sliding scale and concluded that Pavlovich fell into the passive category. The web site "merely posts information and has no interactive features. There is no evidence in the record suggesting that the site targeted California. Indeed, there is no evidence that any California resident ever visited, much less downloaded" the software. Even if he had known that the software would encourage PIRACY, this substantive issue did not effect the threshold question of jurisdiction. Therefore, the lawsuit had to be dismissed for lack of personal jurisdiction.

The Minnesota Supreme Court took up the question of Internet jurisdiction in the context of a DEFAMATION lawsuit in *Griffis v. Luban*, 646 N.W.2d 527 (Minn. 2002). Katherine Griffis, a resident of Alabama, filed a defamation lawsuit against Marianne Luban, a Minnesota resident, in Alabama state court. Griffis won a default judgment of $25,000 for statements that Luban had made on the Internet. Luban elected not to appear in the Alabama proceeding, and Griffis then filed her judgment in the Minnesota county where Luban resided. Luban then filed a lawsuit challenging the judgment for want of personal jurisdiction. The Minnesota Supreme Court concluded that the key jurisdiction question was whether Luban had targeted the state of Alabama when she made her defamatory statements. The Court found that while Luban knew that Griffis lived in Alabama, she had not "expressly aimed" her statements at the state of Alabama. Instead, she had published these statements to a specialized Internet newsgroup, one that only had Griffis as a member from Alabama. The court stated: "The fact that messages posted to the newsgroup *could* have been read in Alabama, just as they *could* have been read anywhere in the world, cannot suffice to establish Alabama as the focal point of the defendant's conduct." Therefore, Griffis had not established personal jurisdiction over Luban in Alabama, and the Minnesota state courts were not obliged to enforce the Alabama judgment.

If an out-of-state defendant caused an injury while driving inside the state, the court may gain

personal jurisdiction over the defendant on the theory that the defendant consented to such jurisdiction by driving on the state's roads. Many states have statutes that create such IMPLIED CONSENT to personal jurisdiction.

When the defendant is a corporation, it is always subject to personal jurisdiction in the courts of the state in which it is incorporated. If the corporation has sufficient contacts in other states, courts in those states may hold that the out-of-state corporation has consented to personal jurisdiction through its contacts with the state. For example, a corporation that solicits business in other states or maintains offices in other states may be subject to suit in those states, even if the corporation is not headquartered or incorporated in those states. A corporation's transaction of business in a foreign state is a sufficient contact to establish personal jurisdiction.

In actions concerning real property located within the state, state courts may use additional means to gain personal jurisdiction over out-of-state defendants. A state court may gain personal jurisdiction over all parties, regardless of their physical location, in a dispute over the title to real property. This type of personal jurisdiction is called in rem, or "against the thing." Personal jurisdiction over all parties interested in the real property is gained not through the parties but through the presence of the land in the court's jurisdiction.

If a court cannot gain personal jurisdiction over an out-of-state defendant, the plaintiff may be forced to sue the defendant in the state in which the defendant resides or in the state where the injury occurred. For example, a plaintiff who was injured outside his or her home state may have to file suit in the defendant's home state or in the state where the injury occurred if the defendant has no plans to enter the plaintiff's home state.

**Subject Matter Jurisdiction** Courts of general jurisdiction have subject matter jurisdiction over the majority of civil claims, including actions involving torts, contracts, unpaid debt, and CIVIL RIGHTS violations. Courts of general jurisdiction do not have subject matter jurisdiction over claims or controversies that are reserved for courts of special jurisdiction. For example, in a state that has a probate court, all claims involving wills and estates must be brought in the probate court, not in a court of general jurisdiction.

In some cases, a claim must first be heard by a special administrative board before it can be heard by a court. For example, a WORKERS' COMPENSATION claim in most states must be heard by a workers' compensation board before it can be heard in a court of general jurisdiction.

Another consideration in establishing subject matter jurisdiction is the amount in controversy. This is the total of all claims, counterclaims, and cross-claims in the suit. (A counterclaim is a claim by a defendant against a plaintiff; a cross-claim is a claim by a plaintiff against another plaintiff, or by a defendant against another defendant.) In most jurisdictions, if the amount in controversy does not exceed a certain limit, the case must be heard by a court other than a court of general jurisdiction. This court is usually called a SMALL CLAIMS COURT. The rules in such a court limit the procedures that are available to the parties so that the court can obtain a simple and speedy resolution to the dispute.

### Federal Civil Court Jurisdiction

**Personal Jurisdiction** To obtain personal jurisdiction over the parties, a federal court follows the procedural rules of the state in which it sits. For example, a federal court in Michigan follows the Michigan state court rules governing personal jurisdiction. The court examines the usual factors in establishing personal jurisdiction, such as the physical location of the parties, the reach of the state's long-arm statute, any consent to personal jurisdiction by the defendant, or the location of real property in a dispute over real property.

**Subject Matter Jurisdiction** In some cases a plaintiff may file suit in federal court. These cases are limited to (1) claims arising from the U.S. Constitution or federal statutes (federal question jurisdiction), (2) claims brought by or against the federal government, and (3) claims in which all opposing parties live in different states and the amount in controversy exceeds $75,000 (diversity jurisdiction). A federal court obtains subject matter jurisdiction over a case if the case meets one or more of these three requirements.

***Claims arising from the U.S. Constitution or federal statutes*** Federal question jurisdiction is covered in 28 U.S.C.A. § 1331. This statute provides that federal district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Some claims are expressly identified as

federal in the Constitution. These claims include those involving AMBASSADORS AND CONSULS or public ministers, admiralty and maritime claims, and claims made by or against the federal government. Claims that are based on federal law also may be filed in federal court. An action against the federal government based on the NEGLIGENCE of a federal employee, for example, is authorized by the FEDERAL TORT CLAIMS ACT of 1946 (60 Stat. 842 [28 U.S.C.A. § 1346(b), 2674]).

The U.S. Supreme Court, in *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 122 S. Ct. 1889, 153 L. Ed. 2d 13 (2002), issued a landmark decision on "arising under" jurisdiction of the federal courts. The case involved patent law litigation between two competitors, with the plaintiff filing a DECLARATORY JUDGMENT action in federal district court asking the court to declare that the plaintiff had not infringed the defendant's TRADE DRESS. This action was not based on a federal law but the defendant's counterclaim, in which it invoked federal patent law to allege patent infringement by the plaintiff, seemed to give the court "arising under" jurisdiction. The Court thought otherwise, ruling that the counterclaim did not confer federal jurisdiction and that the case must be dismissed. This decision limits the "arising under" jurisdiction of the federal courts and gives state courts the opportunity to hear copyright and patent actions (through a defendant's counterclaim) that have always been heard in the federal courts.

Some cases may combine federal and state issues. In such cases, no clear test exists to determine whether a party may file suit in or remove a suit to federal court. Generally, federal courts will decline jurisdiction if a claim is based predominantly on state law. For example, assume that a plaintiff is embroiled in a property dispute with a neighbor. The plaintiff files suit against the neighbor, alleging state-law claims of NUISANCE, TRESPASS, breach of contract, and assault. A state official advises the plaintiff that the property belongs to the neighbor (the defendant). If the plaintiff sues the state official in the same suit, alleging a constitutional violation such as the uncompensated taking of property, a federal court may refuse jurisdiction because the case involves predominantly state law.

Federal courts may decline jurisdiction on other grounds if a state court has concurrent jurisdiction. When they do so, they are said to abstain, because they are refraining from exercising their jurisdiction. Federal courts tend to abstain from cases that require the interpretation of state law, if state courts can decide those cases. Federal courts abstain in order to avoid answering unnecessary constitutional questions, to avoid conflict with state courts, and to avoid making errors in determining the meaning of state laws.

***Claims brought by or against the federal government*** Generally, the United States may sue in federal court if its claim is based on federal law. For example, if the federal government seeks to seize the property of a defendant in a drug case, it must base the action on the federal FORFEITURE statute, not on the forfeiture statute of the state in which the property lies.

Generally, state and federal governments have SOVEREIGN IMMUNITY, which means that they may not be sued. However, state and federal governments may consent to suit. At the federal level, Congress has removed the government's IMMUNITY for injuries resulting from the negligent and, in some cases, intentional conduct of federal agencies, federal officers, and other federal employees (60 Stat. 842 [28 U.S.C.A. § 1346(b), 2674, 2680]). Generally, the federal government is liable only for injuries resulting from the performance of official government duties.

If Congress has not waived federal immunity to certain suits, a person nevertheless may file suit against the agents, officers, or employees personally. For example, the U.S. Supreme Court has held that federal agents, officers, and employees who violate constitutional rights may be sued for damages in federal court (*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 [1971]).

***Claims in which all opposing parties live in different states and the amount in controversy exceeds $75,000*** Diversity cases provide federal courts with subject matter jurisdiction under 28 U.S.C.A. § 1332. A civil case qualifies as a federal diversity case if all opposing parties live in separate states and the amount in controversy exceeds $75,000. If the opposing parties live in the same state, the case may still qualify for federal subject matter jurisdiction if there is some remaining citizenship diversity between parties. For example, assume that a person is acting as a stakeholder by holding property for a third party. If ownership of the property is in dispute, the stakeholder may join the defendants in the

suit to avoid liability to any of the parties. Such a case may be filed in federal court if a defendant lives in a different state, even if one of the defendants lives in the same state as the stakeholder or in the same state as the other defendants.

### State and Federal Criminal Court Jurisdiction

**Personal Jurisdiction** Personal jurisdiction in a criminal case is established when the defendant is accused of committing a crime in the geographic area in which the court sits. If a crime results in federal charges, the federal court that sits in the state where the offense was committed has personal jurisdiction over the defendant. In a conspiracy case, the defendants may face prosecution in any jurisdiction in which a conspiratorial act took place. This can include a number of states if at least one conspirator crossed state lines or if the conspiracy involved criminal acts in more than one state. KIDNAPPING is another crime that can establish personal jurisdiction in courts in more than one state, if it involves crossing state lines.

**Subject Matter Jurisdiction** In criminal cases, the question of jurisdiction is relatively simple. Subject matter jurisdiction is easily decided because criminal courts or the courts of general jurisdiction have automatic subject matter jurisdiction over criminal cases. In most states, minor crimes may be tried in one court, and more serious crimes in another. In Idaho, for example, criminal cases are tried in the district courts. However, misdemeanor cases may be assigned by the district court to a magistrate (Idaho Code § 1-2208 [1996]). (A magistrate is a judge who is authorized to hear minor civil cases and to decide criminal matters without a jury.)

The major question in criminal subject matter jurisdiction is whether the charges are pursuant to federal or state law. If the charges allege a violation of federal CRIMINAL LAW, the defendant will be tried in a federal court that is located in the state in which the offense was committed. If the charges allege a violation of state law, the defendant will face prosecution in a trial court that has jurisdiction over the area in which the offense was committed. If a crime violates both federal and state law, the defendant may be tried twice: once in state court, and once in federal court.

### Venue

Venue is similar to, but separate from, jurisdiction. The venue of a case is the physical location of the courthouse in which the case is tried. If more than one court has both subject matter and personal jurisdiction over a case, the court that first receives the case can send the case, upon request of one of the parties, to a court in another jurisdiction. Unlike jurisdiction, venue does not involve a determination of a court's inherent authority to hear a case.

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## JURISDICTIONAL DISPUTE

*Conflicting claims made by two different* LABOR UNIONS *to an employer regarding assignment of the work or union representation.*

Two basic types of controversies ordinarily arise in such disputes. There can be a disagreement concerning whether certain work should be done by workers in one union or another. For example, there might be a dispute between employees in a carpenters' union and a glaziers' union concerning who should install frames for windows in an apartment building. When this type of dispute arises, there must exist evidence of a threat of coercive action in order for the NATIONAL LABOR RELATIONS BOARD (NLRB) to intervene by conducting a hearing and making an assignment of the work.

A jurisdictional dispute might also arise concerning which union should represent employees who are performing a particular type of work.

## JURISPRUDENCE

*From the Latin term* juris prudentia, *which means "the study, knowledge, or science of law"; in the United States, more broadly associated with the philosophy of law.*

Legal philosophy has many branches, with four types being the most common. The most prevalent form of jurisprudence seeks to analyze, explain, classify, and criticize entire bodies of law, ranging from contract to TORT to CONSTITUTIONAL LAW. Legal encyclopedias, law reviews, and law school textbooks frequently contain this type of jurisprudential scholarship.

The second type of jurisprudence compares and contrasts law with other fields of knowledge such as literature, economics, religion, and the social sciences. The purpose of this type of study is to enlighten each field of knowledge by sharing insights that have proven to be important in advancing essential features of the compared discipline.

The third type of jurisprudence raises fundamental questions about the law itself. These questions seek to reveal the historical, moral, and cultural underpinnings of a particular legal concept. *The Common Law* (1881), written by OLIVER WENDELL HOLMES JR., is a well-known example of this type of jurisprudence. It traces the evolution of civil and criminal responsibility from undeveloped societies where liability for injuries was based on subjective notions of revenge, to modern societies where liability is based on objective notions of reasonableness.

The fourth and fastest-growing body of jurisprudence focuses on even more abstract questions, including, What is law? How does a trial or appellate court judge decide a case? Is a judge similar to a mathematician or a scientist applying autonomous and determinate rules and principles? Or is a judge more like a legislator who simply decides a case in favor of the most politically preferable outcome? Must a judge base a decision only on the written rules and regulations that have been enacted by the government? Or may a judge also be influenced by unwritten principles derived from theology, moral philosophy, and historical practice?

Four schools of jurisprudence have attempted to answer these questions: formalism proposes that law is a science; realism holds that *law* is just another name for politics; POSITIVISM suggests that law must be confined to the written rules and regulations enacted or recognized by the government; and naturalism maintains that the law must reflect eternal principles of justice and morality that exist independent of governmental recognition.

Modern U.S. legal thought began in 1870. In that year, Holmes, the father of the U.S. legal realist movement, wrote his first major essay for the *American Law Review,* and CHRISTOPHER COLUMBUS LANGDELL, the father of U.S. legal formalism, joined the faculty at Harvard Law School.

### Formalism

Legal formalism, also known as conceptualism, treats law like a math or science. Formalists believe that in the same way a mathematician or scientist identifies the relevant axioms, applies them to given data, and systematically reaches a demonstrable theorem, a judge identifies the relevant legal principles, applies them to the facts of a case, and logically deduces a rule that will govern the outcome of a dispute. Judges derive relevant legal principles from various sources of legal authority, including state and federal constitutions, statutes, regulations, and case law.

For example, most states have enacted legislation that prohibits courts from probating a will that was not signed by two witnesses. If a court is presented with a number of wills to probate for the same estate, and only one of those wills has been witnessed by at least two persons, the court can quickly deduce the correct legal conclusion in a formalistic fashion: each will that has been signed by fewer than two witnesses will have no legal effect, and only the will executed in compliance with the statutory requirements may be probated.

Formalists also rely on inductive reasoning to settle legal disputes. Whereas deductive reasoning involves the application of general principles that will yield a specific rule when applied to the facts of a case, inductive reasoning starts with a number of specific rules and infers from them a broader legal principle that may be applied to comparable legal disputes in the future. GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), provides an example. In *Griswold,* the Supreme Court ruled that although no express provision of the federal Constitution guarantees the right to privacy, and although no precedent had established such a right, an individual's right to privacy can be inferred from the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments and the cases interpreting them.

English jurist SIR EDWARD COKE was among the first to popularize the formalistic approach to law in Anglo-American history. Coke believed that the COMMON LAW was "the peculiar science of judges." The common law, Coke said, represented the "artificial perfection of reason" obtained through "long study, observation, and experience." Coke also believed that only lawyers, judges, and others trained in the law could fully comprehend and apply this highest method of reasoning. The rest of society, including the king or queen of England, was not sufficiently learned to do so.

Langdell invigorated Coke's jurisprudence of artificial reason in the United States during the second half of the nineteenth century. Langdell compared the study of law to the study of science, and suggested that law school classrooms were the laboratories of jurisprudence. Judicial reasoning, Langdell believed, parallels the reasoning used in geometric proofs. He urged professors of law to classify and arrange legal principles much as a taxonomist organizes plant and animal life. Langdell articulated what has remained the orthodox school of thought in U.S. jurisprudence throughout the twentieth century.

Since the early 1970s, Professor RONALD M. DWORKIN has been the foremost advocate of the formalist approach with some subtle variations. Although Dworkin stops short of explicitly comparing law to science and math, he maintains that law is best explained as a rational and cohesive system of principles that judges must apply with integrity. The principle of integrity requires that judges provide equal treatment to all litigants presenting legal claims that cannot honestly be distinguished. Application of this principle, Dworkin contends, will produce a "right answer" in all cases, even cases presenting knotty and polemical POLITICAL QUESTIONS.

## Realism

The realist movement, which began in the late eighteenth century and gained force during the administration of President FRANKLIN D. ROOSEVELT, was the first to attack formalism. Realists held a skeptical attitude toward Langdellian legal science. "The life of the law has not been logic, it has been experience," Holmes wrote in 1881.

Realists held two things to be true. First, they believed that law is not a scientific enterprise in which deductive reasoning can be applied to reach a determinate outcome in every case. Instead, most litigation presents hard questions that judges must resolve by BALANCING the interests of the parties and ultimately drawing an ARBITRARY line on one side of the dispute. This line is typically drawn in accordance with the political, economic, and psychological proclivities of the judge.

For example, when a court is asked to decide whether a harmful business activity is a common-law NUISANCE, the judge must ascertain whether the particular activity is reasonable. The judge does not base this determination on a precise algebraic equation. Instead, the judge balances the competing economic and social interests of the parties, and rules in favor of the litigant with the most persuasive case. Realists would thus contend that judges who are ideologically inclined to foster business growth will authorize the continuation of a harmful activity, whereas judges who are ideologically inclined to protect the environment will not.

Second, realists believed that because judges decide cases based on their political affiliation, the law tends always to lag behind social change. For example, the realists of the late nineteenth century saw a dramatic rise in the disparity between the wealth and working conditions of rich and poor U.S. citizens following the industrial revolution. To protect society's poorest and weakest members, many states began drafting legislation that established a MINIMUM WAGE and maximum working hours for various classes of exploited workers. This legislation was part of the U.S. Progressive movement, which reflected many of the realists' concerns.

The Supreme Court began striking down such laws as an unconstitutional interference with the freedom of contract guaranteed by the FOURTEENTH AMENDMENT of the U.S. Constitution. U.S. realists claimed that the Supreme Court justices were simply using the freedom-of-contract doctrine to hide the real basis of their decision, which was their personal adherence to free-market principles and laissez-faire economics. The realists argued that the free-market system was not really free at all. They believed that the economic structure of the United States was based on coercive laws such as the employment-at-will doctrine, which permits an employer to discharge an employee for almost any reason. These laws, the realists asserted, promote the interests of the most powerful U.S. citizens, leaving the rest of society to fend for itself.

Some realists only sought to demonstrate that law is neither autonomous, apolitical, nor determinate. For example, JEROME FRANK, who coined the term *legal realism* and later became a judge on the U.S. Court of Appeals for the Second Circuit, emphasized the psychological foundation of judicial decision making, arguing that a judge's decision may be influenced by mundane things like what he or she ate for breakfast. Frank believed that it is deceptive for the legal profession to perpetuate the myth that the law is clearly knowable or precisely predictable, when

it is so plastic and mutable. KARL LLEWELLYN, another founder of the U.S. LEGAL REALISM movement, similarly believed that the law is little more than putty in the hands of a judge who is able to shape the outcome of a case based on personal biases.

Since the mid-1960s, this theme has been echoed by the CRITICAL LEGAL STUDIES movement, which has applied the skeptical insights of the realists to attack courts for rendering decisions based on racial, sexist, and homophobic prejudices. For example, feminist legal scholars have pilloried the Supreme Court's decision in *Craig v. Boren,* 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), for offering women less protection against governmental discrimination than is afforded members of other minority groups. Gay legal scholars similarly assailed the Supreme Court's decision in *Bowers v. Hardwick,* 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), for failing to recognize a fundamental constitutional right to engage in homosexual SODOMY. The Supreme Court's 2003 decision in LAWRENCE V. TEXAS 539 U.S. ___, 123 S. Ct. 2472, 156 L. Ed. 2d 508, that overturned the *Bowers* holding was a vindication for gay rights jurisprudence.

Other realists, such as ROSCOE POUND, were more interested in using the insights of their movement to reform the law. Pound was one of the original advocates of sociological jurisprudence in the United States. According to Pound, the aim of every law—whether constitutional, statutory, or case—should be to enhance the welfare of society. JEREMY BENTHAM, a legal philosopher in England, planted the seeds of sociological jurisprudence in the eighteenth century when he argued that the law must seek to achieve the greatest good for the greatest number of people in society. Bentham's theory, known as UTILITARIANISM, continues to influence legal thinkers in the United States.

Law and economics is one school of thought that traces its lineage to Benthamite jurisprudence. This school, also known as economic analysis of the law, argues that judges must decide cases in order to maximize the wealth of society. According to law and economics exponents, such as RICHARD POSNER, each person in society is a rational maximizer of his or her own self-interest. Persons who rationally maximize their self-interest are willing to exchange something they value less for something they value more. For example, every day in the United States, people voluntarily give up their time, money, and liberty to acquire food, property, or peace of mind. This school of thought contends that the law must facilitate these voluntary exchanges to maximize the aggregate wealth of society.

Another school of thought Bentham influenced is known as legal pragmatism. Unlike law and economics exponents, legal pragmatists provide no formula for determining the best means to improve the welfare of society. Instead, pragmatists contend that judges must merely set a goal that they hope to achieve in resolving a particular legal dispute, such as the preservation of societal stability, the protection of individual rights, or the delineation of governmental powers and responsibilities. Judges must then draft the best court order to accomplish this goal. Pragmatists maintain that judges must choose the appropriate societal goal by weighing the value of competing interests presented by a lawsuit, and then using a "grab bag" of "anecdote, introspection, imagination, common sense, empathy, metaphor, analogy, precedent, custom, memory, experience, intuition, and induction" to reach the appropriate balance (Posner 1990, 73).

Pragmatism, sometimes called instrumentalism, is best exemplified by Justice Holmes's statement that courts "decide cases first, and determine the principle afterwards." This school of thought is associated with result-oriented jurisprudence, which focuses more on the consequences of a judicial decision than on how the relevant legal principles should be applied.

### The Realist-Formalist Debate

The realist-formalist dichotomy represents only half of the jurisprudential picture in the United States. The other half comprises a dialogue between the positivist and natural-law schools of thought. This dialogue revolves around the classic debate over the appropriate sources of law.

Positivists maintain that the only appropriate sources of law are rules and principles that have been expressly enacted or recognized by a governmental entity, like a state or federal legislature, administrative body, or court of law. These rules and principles may be properly considered law, positivists contend, because individuals may be held liable for disobeying them. Positivists believe that other sources for determining right and wrong, such as religion and contemporary morality, are only aspirational,

and may not be legitimately consulted by judges when rendering a decision.

Natural-law proponents, or naturalists, agree that governmental rules and regulations are a legitimate source of law, but assert that they are not the only source. Naturalists believe that the law must be informed by eternal principles that existed before the formation of government and are independent of governmental recognition. Depending on the particular strain of NATURAL LAW, these principles may be derived from theology, moral philosophy, human reason, historical practice, and individual conscience.

The dialogue between positivists and naturalists has a long history. For many centuries, historians, theologians, and philosophers distinguished positivism from naturalism by separating written law from unwritten law. For example, the Ten Commandments were inscribed on stone tablets, as were many of the laws of the ancient Greeks. Roman Emperor JUSTINIAN I (A.D. 482–565) reduced most of his country's laws to a voluminous written code. At the same time, Christian, Greek, and Roman thinkers all appealed to a higher law that transcended the written law promulgated by human beings.

Prior to the American Revolution, English philosophers continued this debate along the same lines. English political thinkers JOHN AUSTIN and THOMAS HOBBES were strict positivists who believed that the only authority courts should recognize are the commands of the sovereign because only the sovereign is entrusted with the power to back up a command with military and police force. First intimated by Italian philosopher Niccolò Machiavelli, the "sovereign command" theory of law has been equated in the United States with the idea that might makes right.

Contrasted with the writings of Hobbes and Austin were the writings of JOHN LOCKE in England and THOMAS JEFFERSON in America. In his *Second Treatise on Government* (1690), Locke established the idea that all people are born with the inalienable right to life, liberty, and property. Locke's ruminations about individual rights that humans possess in the state of nature prior to the creation of government foreshadowed Jefferson's Declaration of Independence. In 1776, the Declaration of Independence announced the self-evident truth that "all men are created equal" and are "endowed by their Creator with certain inalienable Rights," including the right to "Life, Liberty and the pursuit of Happiness."

Both positivism and naturalism have had an enormous influence on how U.S. citizens think about law. The institution of African–American SLAVERY, which was recognized by the U.S. Constitution and legalized by legislation passed in the South prior to the Civil War (1861–65), was attacked by abolitionists who relied on higher-law principles of religion and conscience to challenge the moral foundations of human bondage. Following WORLD WAR II, the Allied powers successfully prosecuted German government officials, industrialists, and military leaders in Nuremberg for committing GENOCIDE against European Jewry, even though the Nazi regime had passed laws authorizing such extermination. The Allies relied in part on the natural-law principle that human dignity is an inviolable right that no government may vitiate by written law.

### Historical Jurisprudence

Positivists and naturalists tend to converge in the area of historical jurisprudence. Historical jurisprudence is marked by judges who consider history, tradition, and custom when deciding a legal dispute. Strictly speaking, history does not completely fall within the definition of either positivism or natural law. Historical events, like the Civil War, are not legislative enactments, although they may be the product of governmental policy. Nor do historical events embody eternal principles of morality, although they may be the product of clashing moral views. Yet, historical events shape both morality and law. Thus, many positivists and naturalists find a place for historical jurisprudence in their legal philosophy.

For example, Justice Holmes was considered a positivist to the extent that he believed that courts should defer to legislative judgment unless a particular statute clearly violates an express provision of the Constitution. But he qualified this stance when a given statute "infringe[s] on fundamental principles as they have been understood by the traditions of our people and our law" (LOCHNER V. NEW YORK, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 [1905]). In such instances, Holmes felt, courts were justified in striking down a particular written law.

BENJAMIN N. CARDOZO, considered an adherent of sociological jurisprudence by some and a realist by others, was another Supreme Court justice who incorporated history into his

legal philosophy. When evaluating the merits of a claim brought under the DUE PROCESS Clauses of the Fifth and Fourteenth Amendments, Cardozo denied relief to claims that were not "implicit in the concept of ordered liberty" and the "principle[s] of justice [that are] so rooted in the traditions and conscience of our people as to be ranked as fundamental" (*Palko v. Connecticut,* 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 [1937]).

### Contemporary Thought

Each school of jurisprudence is not a self-contained body of thought. The lines separating positivism from realism and natural law from formalism often become blurry. The legal philosophy of Justice Holmes, for example, borrowed from the realist, positivist, pragmatic, and historical strains of thought.

In this regard, some scholars have observed that it is more appropriate to think of jurisprudence as a spectrum of legal thought, where the nuances of one thinker delicately blend with those of the next. For example, Harold Berman, a leading authority on comparative LEGAL HISTORY, has advocated the development of an integrative jurisprudence, which would assimilate into one philosophy the insights from each school of legal theory. The staying power of any body of legal thought, Berman has suggested, lies not in its name but in its ability to explain the enterprise of law.

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CROSS-REFERENCES

Anarchism; Chicago School; Feminist Jurisprudence; Gay and Lesbian Rights; Judicial Review; Law; Legal Education; Legal History; Nuremberg Trials; Roman Law; Socialism.

## JURIST

*A judge or legal scholar; an individual who is versed or skilled in law.*

The term *jurist* is ordinarily applied to individuals who have gained respect and recognition by their writings on legal topics.

## JURISTIC ACT

*An action intended and capable of having a legal effect; any conduct by a private individual designed to originate, terminate, or alter a right.*

A court performs a juristic act when it makes a decision and hands down a judgment. An individual who enters into a contractual agreement is also performing a juristic act because of the legal ramifications of his or her agreement.

## JURY

*In trials, a group of people who are selected and sworn to inquire into matters of fact and to reach a verdict on the basis of the evidence presented to them.*

In U.S. law, decisions in many civil and criminal trials are made by a jury. Considerable power is vested in this traditional body of ordinary men and women, who are charged with deciding matters of fact and delivering a verdict of guilt or innocence based on the evidence in a case. Derived from its historical counterpart in English COMMON LAW, trial by jury has had a central role in U.S. courtrooms since the colonial era, and it is firmly established as a basic guarantee in the U.S. Constitution. Modern juries are the result of a long series of U.S. Supreme Court decisions that have interpreted this constitutional liberty and, in significant ways, extended it.

### History

The historical roots of the jury date to the eighth century A.D. Long before becoming an

## Minnesota's Approach to a More Diverse Jury Pool

Many urban areas have encountered difficulties in providing racially and economically diverse jury pools. Critics of the criminal justice system point out that people of color are overrepresented in the number of individuals arrested, prosecuted, and imprisoned, and underrepresented on criminal juries.

In 1993 the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System issued a report that called for changes in jury management, so as to encourage diversity in juries. The judicial system took several steps to respond to the report.

The Minnesota Supreme Court amended jury management rules to authorize Hennepin and Ramsey Counties, the most populous and racially diverse counties in the state, to adopt new jury selection procedures that guarantee that, by percentage, minority group representation on the **GRAND JURY** is equal to that in the two counties. Hennepin County implemented a plan that allows grand jurors to be selected randomly unless there are no people of color among the first twenty-one jurors selected, in which case the selection process continues until at least two of the twenty-three grand jurors are people of color.

At the state level, the judicial system secured funds from the legislature to raise the rate of daily juror pay and to pay for drop-in day care for jurors who normally do not use day care. The system also began to reimburse jurors for their mileage to and from the courthouse. These steps were taken to decrease the economic hardship on potential jurors who might otherwise ignore a jury summons or ask to be excused.

impartial body, during the reign of Charlemagne, juries interrogated prisoners. In the twelfth century, the Normans brought the jury to England, where its accusatory function remained: Citizens acting as jurors were required to come forward as witnesses and to give evidence before the monarch's judges. Not until the fourteenth century did jurors cease to be witnesses and begin to assume their modern role as triers of fact. This role was well established in British common law when settlers brought the tradition to America, and after the United States declared its independence, all state constitutions guaranteed the right of jury trial in criminal cases.

Viewing the jury as central to the rights of the new nation, the Founders firmly established its role in the U.S. Constitution. They saw the jury as not only a benefit to the accused, but also as a check on the judiciary, much as Congress exists as a check on the EXECUTIVE BRANCH. The Constitution establishes and safeguards the right to a trial by jury in four ways: Article III establishes this right in federal criminal cases; the FIFTH AMENDMENT provides for grand juries, or panels that review complaints in criminal cases, hear the evidence of the prosecutor, and decide whether to issue an indictment that will bring the accused person to trial; the SIXTH AMENDMENT guarantees in serious federal criminal cases the right to trial by a petit jury, the most common form of jury; and the SEVENTH AMENDMENT provides for a jury trial in civil cases where the amount in controversy exceeds $20.

The modern jury is largely a result of decisions of the U.S. Supreme Court, which has shaped and sometimes extended these constitutional rights. One important decision was the Court's 1968 ruling in *Duncan v. Louisiana,* 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491, which requires states to provide for jury trials in serious criminal cases. Prior to *Duncan,* states had their own rules; Louisiana, for instance, required juries only in cases where the possible punishment was death or hard labor. The Court declared that the right to a jury trial is fundamental. In cases in which the punishment exceeds six months' imprisonment, it ruled, the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT requires that the protections of the Sixth Amendment apply equally to federal and state criminal prosecutions.

# Should the Peremptory Challenge Be Abolished?

A **PEREMPTORY CHALLENGE** permits a party to remove a prospective juror without giving a reason for the removal. This type of challenge has had a long history in U.S. law and has been viewed as a way to ensure an impartial jury. However, use of the peremptory challenge changed as a result of the U.S. Supreme Court decision in *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and its progeny, and the changes have led some lawyers and legal commentators to call for its **ABOLITION**. They argue that these Court decisions have deprived lawyers of their absolute discretion in using the challenges and have turned peremptory challenges into challenges for cause. Defenders of the peremptory challenge believe that the new race, gender, and religious affiliation requirements initiated by *Batson* simply ensure that jurors will not be excluded on the basis of stereotypes.

Those who favor retention of the peremptory challenge point to its four purposes: The peremptory challenge allows litigants to secure a fair and impartial jury. It gives the parties some control over the jury selection process. It allows an attorney to search for biases during the selection process without fear of alienating a potential juror. If, for example, a juror appears offended by the nature of the questioning, that juror can be excluded even if the answers she gives do not demonstrate bias. Finally, the peremptory challenge serves as an insurance policy when a challenge for cause is denied by the judge and the challenging party still believes that the juror is biased.

Defenders of the peremptory challenge contend that the limitations imposed by the Supreme Court have not substantially impaired the use of the challenge. As a result of *Batson,* a peremptory challenge can be questioned by the opposite side if that side believes that it was based solely on race or gender. The reasoning behind this change is that striking jurors on the basis of race or gender perpetuates stereotypes that were prejudicial and that were based on historical discrimination. The only way to correct this record is to allow a party to establish a **PRIMA FACIE** case of racial or gender discrimination. Defenders believe that to say *Batson* introduced race into the jury selection process is to ignore the part race has already played in the use of peremptory challenges. The other side has the opportunity to offer a nondiscriminatory reason for the challenge. The reason does not have to rise to the level of a "for-cause" challenge. It merely has to be a reasonable concern that can be articulated. Defenders of the challenge argue that this is an acceptable modification of the challenge.

They also point out that other characteristics of jurors are not bound by the *Batson* line of cases. A peremptory challenge based on a juror's religion, age,

Defendants may, under some circumstances, refuse a jury trial in favor of a trial before a judge. In 1965, the U.S. Supreme Court ruled that the constitutional right to a jury trial does not imply a related right to refuse one (*Singer v. United States,* 380 U.S. 24, 85 S. Ct. 783, 13 L. Ed. 2d 630). It observed that juries are important not only to the defendant but also to the government and the public. The government, it wrote, has an interest in trying cases "before the tribunal which the Constitution regards as most likely to produce a fair result." Thus, in federal cases, rules governing **CRIMINAL PROCEDURE** allow a defendant to waive a jury trial only if the government consents and the court gives its approval. States vary in their approach, with some, such as Nebraska and Minnesota, requiring only the court's approval and others, such as Illinois and Louisiana, granting the defendant's wish as long as the decision is informed.

In 2002, a Jury Innovations Committee established in Florida offered no fewer than 48 jury-reform suggestions designed to make the system more efficient and user-friendly. The suggestions included requiring jury instructions to be made clearer and to allow jurors to discuss evidence as it is presented, instead of after deliberations begin.

### Jury Selection

Jury selection is the process of choosing jurors. Not all people are required to serve on the jury: Some individuals and members of some occupational groups may be excused if serving would cause them or their family hardship. The U.S. Supreme Court has held that the Sixth Amendment merely requires that jurors be selected from a list that does not exclude any identifiable segment of the community (*Taylor v. Louisiana,* 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 [1975]).

income, occupation, or political affiliation cannot be questioned as long as it is not a pretext for concealing race or gender bias. Therefore, argue supporters, the peremptory challenge is still a valuable tool in trial proceedings.

Those who argue for the abolition of the peremptory challenge come from two camps. One camp believes that the *Batson* line of cases was a mistake. This group would prefer to return to unrestricted use of the challenge but, knowing that overturning precedent is unlikely, recommends eliminating the challenge. The other camp believes that the racial, gender, and religious affiliation tests crafted by the courts are idealistic creations that are easily subverted in daily courtroom practice. The reality is that allegations of bias using *Batson* rarely are successful.

The group that believes that the changes following *Batson* were a mistake argues that the whole point of the peremptory challenge is that it is made totally within the discretion of the lawyer. A trial lawyer may have a gut feeling about a juror, a feeling that is difficult to articulate to a judge and does not rise to a for-cause strike. Prior to *Batson* a court would allow this type of peremptory challenge. Since *Batson* the lawyer is required to articulate a reason. The temptation for the lawyer is to invent a "reasonable" explanation rather than risk having the peremptory challenge denied.

These critics argue that the only way for a lawyer to protect a client under this new system is to interrogate prospective jurors concerning intimate, personal matters in order to create defensible grounds for striking them. Lawyers must take more notes during questioning and spend more time evaluating the answers of jurors. The selection of a jury is lengthened if this tactic is chosen, placing more pressure on an overtaxed court system. Therefore, contend these critics, it would be better to abolish peremptory challenges and try other methods of jury selection. One alternative is expanding challenges for cause, allowing lawyers to exclude prospective jurors for legitimate, articulated reasons that do not satisfy the tougher current standards of challenges for cause.

The other group that questions *Batson* points to the difficulty of achieving the racially neutral selection of a jury. Surveys have shown that motions to deny peremptory challenges because of race or gender bias are rarely made, and that when they are judges accept all types of questionable race-neutral explanations to refute them. Thinking in the legal community over this issue has led state judiciaries to reflect on the best course to take. For example, the Florida Supreme Court-appointed Jury Innovations Committee issued a report in 2002 that recommended the elimination of peremptory challenges.

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Federal courts select grand and petit juries according to the guidelines in the Jury Selection and Service Act of 1968 (28 U.S.C.A. §§ 1861–78 [2000]). Generally, most communities use voter-registration lists to choose prospective jurors, who are then summoned to appear for jury duty. This group of prospective jurors is called a venire.

Once the venire is assembled, attorneys for both the prosecution and the defense begin a process called VOIR DIRE. Literally meaning "to speak the truth," voir dire is a preliminary examination of the prospective jurors, in order to inquire into their competence and suitability to sit on the jury. Although the judge may ask questions, it is primarily the attorneys who do so. Their goal is to eliminate jurors who may be biased against their side, while choosing the jurors who are most likely to be sympathetic. Attorneys for each side are allowed to reject potential jurors in two ways. They may dismiss anyone for cause, meaning a reason that is relevant to that person's ability and fitness to perform jury duty. And they may issue a limited number of peremptory challenges, which are dismissals that do not require a reason.

The process of voir dire—especially in the exercise of peremptory challenges to custom design a jury—has provoked controversy. Defendants may challenge a venire, alleging discrimination, but such complaints are difficult to prove. Thus, critics of the selection process have argued that it skews the composition of juries according to race, class, and gender. In 1990, the U.S. Supreme Court held that juries need not represent a cross section of a community, but merely must be drawn from a pool that is representative of the community (*Holland v. Illinois,* 493 U.S. 474, 110 S. Ct. 803, 107 L. Ed. 2d 905). In 1991, it forbade prosecutors to use their

peremptory challenges to exclude potential jurors on the basis of race (*Powers v. Ohio,* 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411). In 1999, the Supreme Court of Connecticut ruled that prospective jurors could not be dismissed solely on account of their religious beliefs, except when those beliefs would keep them from performing their duties on the jury (*State v. Hodge,* 726 A.2d 531 [Conn. 1999]). Along with other complaints—on issues ranging from efficiency to fairness—the decisions provided advocates of jury reform with further ammunition for their efforts to change fundamentally, and even to eliminate, juries.

### Jury Size

Juries range in size according to their nature. Grand juries are so named because they are usually larger than petit juries, having from 12 to 23 members. Traditionally, petit juries have had 23 members, but the number is not fixed. In 1970, the U.S. Supreme Court held that the number 12 was not an essential element of trial by jury (*Williams v. Florida,* 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446), and it has sanctioned juries of no fewer than six members in criminal cases (*Ballew v. Georgia,* 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 [1978]). Parties in federal district courts, as well as in many state courts, can stipulate that the jury size be any number between six and 12. Commonly, federal district court juries consist of six persons for civil cases.

### Jury Instructions

Throughout a trial, the jury receives instructions from the judge. The judge explains the relevant points of law, which the jury is bound to accept and to apply. The judge directs the jury to disregard inadmissible testimony and provides guidelines on the way to behave outside of court. During the 1995 trial of O. J. SIMPSON for the murder of his estranged second wife and a friend of hers, for example, Judge Lance Ito issued daily orders to jurors not to discuss the case with anyone. Some instructions vary across jurisdictions and according to judges, such as whether jurors will be allowed to take notes during the trial; generally, they may not. In certain highly publicized trials, the judge may sequester the jury—that is, isolate its members in private living quarters such as hotel rooms in order to shield them from trial publicity. Violating the judge's orders can result in a juror being dismissed from the trial in favor of an alternate juror.

*Jury foreman Joe Collins discusses the jury's verdict in the 1999 trial of John William King in Jasper, Texas. King was found guilty and sentenced to death for the murder of James Byrd Jr.*

AP/WIDE WORLD PHOTOS

### Jury Verdict

Following the closing arguments in a trial, jurors deliberate in private to arrive at a verdict, which is then reported to the court by the jury foreman or forewoman. Defendants in federal jury trials have the right to a unanimous verdict. This is not true in state jury trials, where the size of the jury determines whether unanimity is required: A 12-member jury may convict without unanimity, whereas a six-member jury may not.

In some cases, consensus among jurors is very difficult to reach. When jurors fail to reach an agreement, the judge may issue an instruction known as an Allen charge, in which the judge tells the jurors to continue deliberating and to listen carefully to each other and to be deferential toward each other's views. Continued failure to arrive at a verdict results in a hung jury, which necessitates a new trial with a different jury.

In criminal trials in most jurisdictions, the jury's job ends with the delivery of a verdict of guilt or innocence on every count pertaining to the case, and the judge determines sentencing. In civil cases, juries generally determine the amount of a damages award.

Jurors sometimes exercise their right to protest against a law that they consider unfair or unjust by voting "not guilty" even though the defendant is guilty of violating that law. This practice is called *jury nullification* and it goes back to colonial times. An example of JURY NULLIFICATION would be when a juror who believes that marijuana should be legalized votes "not guilty" in a case in which the defendant is accused of growing marijuana. The Fully

Informed Jury Association (FIJA), founded in 1989, provides information about jury nullification to prospective jurors who might not know that it exists as an option.

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Due Process of Law; Grand Jury.

## JURY COMMISSION

*A group of officials charged with the responsibility of choosing the names of prospective jury members or of selecting the list of jurors for a particular term in court.*

The provisions governing these officers vary greatly from one state to another. In certain states, they are elected, and in others, they are appointed by the governor or by judges. Commissioners may be regarded as officers of the state or county or of the court which they serve. In choosing the names to compose the jury list, the commissioners have the power to decide those who are fit to serve as jurors or whether particular individuals possess the qualifications set forth by the statutes. The list, however, must be selected without discrimination from all those qualified to serve as jurors.

## JURY NULLIFICATION

*A sanctioned doctrine of trial proceedings wherein members of a jury disregard either the evidence presented or the instructions of the judge in order to reach a verdict based upon their own consciences. It espouses the concept that jurors should be the judges of both law and fact.*

The traditional approach in U.S. court systems is for jurors to be the "triers of fact," while the judge is considered the interpreter of law and the one who will instruct the jury on the applicable law. Jury nullification occurs when a jury substitutes its own interpretation of the law and/or disregards the law entirely in reaching a verdict. The most widely accepted understanding of jury nullification by the courts is one that acknowledges the *power* but not the *right* of a juror or jury to nullify the law. Jury nullification is most often, although rarely, exercised in criminal trials but technically is applicable to civil trials as well, where it is subject to civil procedural remedies such as the JUDGMENT NOTWITHSTANDING THE VERDICT.

In criminal cases, however, the FIFTH AMENDMENT to the U.S. Constitution makes final a jury trial that results in an acquittal, and it guarantees freedom from DOUBLE JEOPARDY. This gives juries an inherent power to follow their own consciences in reaching a verdict, notwithstanding jury instructions or charges to the contrary.

### History and Development

Jury nullification is not new; in fact, proponents wanting to justify its contemporary application do so by referring to early U.S. history when American colonists struggled to fashion a legal system that would be applicable to them. Prior to U.S. independence, the ENGLISH LAW of seditious libel carried grave consequences for colonists who spoke out against British rule of the colonies. In 1735, defense counsel for JOHN PETER ZENGER, at Zenger's trial for seditious LIBEL, contended that:

> [Juries] have the right beyond all dispute to determine both the law and the facts, and where they do not doubt of the law, they ought to do so. This of leaving it to the judgment of the Court whether the words are libelous or not in effect renders juries useless (to say no worse) in many cases.

The jury acquitted Zenger, and every subsequent colonial jurisdiction that confronted the issue of the jury's right to decide both the law and the facts also came to the conclusion that jurors could decide matters of law. However, this conclusion must be put into historical perspective. First, in pre-revolutionary days, colonists lived under what they deemed an undemocratic, tyrannical govern-

ment. The jury became a shield, where colonists could be judged by members of their own communities, and it was considered their only means for democratic expression. Second, the entire premise of democracy, in both pre- and post-independence days, demanded popular control of all facets of government. There was also a practical side to granting juries such unyielding control of trials: early colonial judges were essentially laymen selected from among their peers, and they often knew no more law than did the jurors.

However, once the United States established itself and a new republican form of government was developed, the will of the people became expressed through popular election of representatives and the enactment of their own laws. As nullification of the law would constitute a frustration of the popular will, the issue became essentially moot. Jury nullification was no longer considered necessary or desirable in a democratic society. Concomitantly, the role of judges as those who decided issues of law became enmeshed with traditional trial procedure. Not until more than 100 years later did the U.S. Supreme Court have to address the issue. In the case of *Sparf and Hansen v. United States,* 156 U.S. 51, 15 S. Ct. 273, 39 L. Ed. 343 (1895), it unequivocally determined that, in the federal system at least, there was no right to jury nullification. The opinion noted,

> [Juries] have the physical power to disregard the law, as laid down to them by the court. But I deny that . . . they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime that the jury should respond as to the facts, and the court as to the law . . . This is the right of every citizen, and it is his only protection.

In subsequent years, jurors tended to invoke nullification to address either unpopular laws or overzealous application of them. Historic examples include the Alien and Seditions Acts, the Fugitive Slave Acts, and PROHIBITION. During the era of the VIETNAM WAR, the issue resurfaced in *United States v. Dougherty,* 473 F.2d 113 (D.C. Cir. 1972). In that case, defendant members of the Catholic clergy had ransacked the offices of the Dow Chemical Company to protest the manufacturing of napalm. At trial, defense counsel requested that members of the jury be instructed on their power to nullify the law. The trial court refused, and the court of appeals upheld the decision. Sporadic subsequent cases, presenting variations on the theme, have similarly underscored the high court's historic ruling.

Notwithstanding a judiciary that denied jurors the *right* to nullify, over the years, jurors have continued to use their *power* to do so. The power is most often wielded when jurors believe that an acquittal is justified for reasons that the law does not officially recognize. Examples include controversial social issues such as motorcycle helmet laws, ABORTION and right-to-life issues, medicinal use of marijuana, and EUTHANASIA.

In 1997, the U.S. Court of Appeals for the Second Circuit held that a juror's intent to nullify the law was JUST CAUSE for dismissal from the jury.

The case of *United States v. Thomas,* 116 F.3d 606 (2d Cir. 1997) involved an African-American juror's dismissal from the criminal jury trial of five African–Americans on drug charges. However, the narrow opinion also reversed the convictions of the five defendants and remanded the matter for a new trial. Although the court ruled that a juror's refusal to apply the relevant law was just cause for dismissal, only unambiguous evidence of the juror's deliberate disregard of the law (not apparent in this case) would justify such a dismissal. In so holding, the appellate court acknowledged the necessity for secrecy in jury deliberations.

Similarly, in 1999, the Colorado Court of Appeals reversed a lower court's CONTEMPT conviction of juror Laura Kriho. *People v. Kriho,* 996 P.2d. 158 (Colo. App. [1999]). Several of Kriho's fellow jurors testified that during deliberations, she suggested to them that drug cases should be handled in the community rather than by a criminal justice system, and then advised them of their right to nullify. Although the trial court cited Kriho's alleged misleading of the court about her attitudes toward drug use during *voir dire* examination, the appellate court found that the Kriho case was, in fact, about jury nullification. It reversed her conviction on grounds that the court should not have considered evidence from jury-room deliberations. The end result of these cases reaffirms that juries have the power to render unreviewable general verdicts of acquittal, making it nearly impossible to definitely prove that nullification occurred.

### Legislative Efforts

Starting in the early 1990s, a new wave of grass-roots promoters again brought the issue to

the forefront, attempting this time to focus on legislation rather than on case law. Several states—including Arizona, Louisiana, Massachusetts, Tennessee, and Washington—were unsuccessful in efforts either to introduce or to pass legislation or constitutional amendments that would require judges to instruct jurors of their right to nullify the law. And in 2002, South Dakota voters overwhelmingly rejected a proposed constitutional amendment to institutionalize jury nullification.

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Jury.

## JUS

*[*Latin, right; justice; law; the whole body of law; also a right.*] The term is used in two meanings:*

Jus *means* law, *considered in the abstract; that is, as distinguished from any specific enactment, which we call, in a general sense,* the law. *Or it means the law taken as a system, an aggregate, a whole. Or it may designate some one particular system or body of particular laws; as in the phrases* jus civile, jus gentium, jus proetorium.

*In a second sense,* jus *signifies a* right; *that is, a power, privilege, faculty, or demand inherent in one person and incident upon another; or a capacity residing in one person of controlling, with the assent and assistance of the state, the actions of another. This is its meaning in the expressions* jus in rem, jus accrescendi, jus possessionis.

## JUS COGENS

*That body of peremptory principles or norms from which no derogation is permitted; those norms recognized by the international community as a whole as being fundamental to the maintenance of an international legal order.*

*Elementary rules that concern the safeguarding of peace and notably those that prohibit recourse to force or the threat of force. Norms of a humanitarian nature are included, such as prohibitions against* GENOCIDE, SLAVERY, *and* RACIAL DISCRIMINATION.

*Jus cogens* may, therefore, operate to invalidate a treaty or agreement between states to the extent of the inconsistency with any such principles or norms.

## JUS TERTII

*The right of a third party. A tenant or bailee or another in possession of property, who pleads that the title is in some person other than that person's landlord or bailor, is said to set up a* jus tertii.

## JUST

*Legally right; conformity with that which is lawful or fair.*

*Just cause* for an action, for example, is a reason for a course of action that is based upon GOOD FAITH.

## JUST CAUSE

*A reasonable and lawful ground for action.*

Appearing in statutes, contracts, and court decisions, the term *just cause* refers to a standard of reasonableness used to evaluate a person's actions in a given set of circumstances. If a person acts with just cause, her or his actions are based on reasonable grounds and committed in GOOD FAITH. Whether just cause exists must be determined by the courts through an evaluation of the facts in each case. For example, in *Dubois v. Gentry,* 182 Tenn. 103, 184 S.W. 2d 369 (1945), the Supreme Court of Tennessee faced the question of whether a plaintiff who leased a filling station had acted with just cause in terminating a lease contract. The defendant station owner argued that the plaintiff had no right under the terms of the lease to terminate it. The court found that the plaintiff had just cause to terminate the lease because the effort supporting WORLD WAR II had created an employee shortage and wartime rationing had placed restrictions on gasoline and automobile parts, making it unprofitable to operate the station.

The term *just cause* frequently appears in EMPLOYMENT LAW. Employment disputes often involve the issue of whether an employee's actions constituted just cause for discipline or

termination. If the employer was required to have just cause for its action and punished the worker without just cause, a court may order the employer to compensate the worker. LABOR UNIONS typically negotiate for a contract provision stating that an employee cannot be fired absent just cause.

Since the 1980s a just cause standard has developed for employees not protected by an employment or a union contract. This standard is an alternative to the traditional employment-at-will doctrine. Under the latter, which has been in place since the late 1800s, employees who do not have an employment contract may be terminated at the will of the employer for any reason, or for no reason. Under the new just cause standard, many jurisdictions now hold an employer to its word where the employer has stated it will not fire employees without just cause.

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## JUST COMPENSATION

*Equitable remuneration to the owner of private property that is expropriated for public use through condemnation, the implementation of the governmental power of* EMINENT DOMAIN.

The FIFTH AMENDMENT to the U.S. Constitution proscribes the taking of private property by the government for public use without just compensation. No precise formula exists by which the elements of just compensation can be calculated. Ordinarily, the amount should be based upon the loss to the owner, as opposed to the gain by the taker. The owner should be fairly and fully indemnified for the damage that he or she has sustained. The owner has a right to recover the monetary equivalent of the property taken and is entitled to be put in as good a financial position as he or she would have been in if the property had not been taken. Generally, the measure of damages for property condemned through eminent domain is its fair market value, since the sentimental value to the owner is not an element for consideration. Market value, however, is not an absolute method of valuation but rather a practical standard to aid the courts in their determination of just compensation based upon constitutional requirements.

When just compensation is assessed, all elements that can appropriately enter into the question of value are regarded. For example, the original cost of the property taken, added to the cost of reproduction or replacement, minus depreciation, can be considered when the market value of property is determined.

## JUST DESSERTS

*A retributive theory of criminal punishment that proposes reduced judicial discretion in sentencing and specific sentences for criminal acts without regard to the individual defendant.*

## JUST WAR

*As widely used, a term referring to any war between states that meets generally accepted international criteria of justification. The concept of just war invokes both political and theological ideology, as it promotes a peaceful resolution and coexistence between states, and the use of force or the invocation of armed conflict only under certain circumstances. It is not the same as, but is often confused with, the term* jihad *or "holy war," a Muslim religious justification for war.*

The principle of a just war emerged early in the development of scholarly writings on INTERNATIONAL LAW. Under this view, a just war was a means of national SELF-HELP whereby a state attempted to enforce rights actually or allegedly based on international law. State practice from the eighteenth to the early part of the twentieth century generally rejected this distinction, however, as war became a legally permissible national policy to alter the existing rights of states, irrespective of the actual merits of the controversy.

Following WORLD WAR I, diplomatic negotiations resulted in the General Treaty for the Renunciation of War, more commonly known as the KELLOGG-BRIAND PACT, signed in 1928. The signatory nations renounced war as a means to resolve international disputes promising instead to use peaceful methods.

The aims of the Kellogg-Briand Pact were adopted in the Charter of the UNITED NATIONS in 1945. Under the charter, the use or threat of force as an instrument of national policy was condemned, but nations were permitted to use force in individual or collective SELF-DEFENSE

against an aggressor. The General Assembly of the United Nations has further defined aggression as armed force by a state against the sovereignty, territorial integrity, or political independence of another state, regardless of the reasons for the use of force. The Security Council is empowered to review the use of force, and therefore, to determine whether the relevant circumstances justify branding one nation as the aggressor and in violation of charter obligations. Under the modern view, a just war is one waged consistent with the Kellogg-Briand Pact and the Charter of the United Nations.

What has complicated the concept of just war in contemporary international relations is the emergence of "asymmetrical warfare." The term refers to conflict with parties or entities (such as international terrorist groups) who are neither officially connected with, nor owe allegiance to, any particular public authority or state. While these individuals or groups may be dependent upon clandestine assistance from states willing to help them secretly, they are not publicly responsible to them. Since contemplation of just war requires public authorities to act in their official capacities for the common good, that objective is frustrated by the lack of a discernible, clearly identifiable enemy state against which to act. As a result, the international community has attempted to unite in a common effort to declare war against TERRORISM in general as "just."

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## JUSTICE

*The proper administration of the law; the fair and equitable treatment of all individuals under the law. A title given to certain judges, such as federal and state supreme court judges.*

## JUSTICE DEPARTMENT

The Department of Justice (DOJ) is the EXECUTIVE BRANCH department responsible for handling the legal work of the federal government. Headquartered in Washington, D.C., the DOJ is the largest legal organization in the United States, with more than 100,000 employees nationwide and a budget of approximately $30 billion.

The DOJ comprises many administrative units whose responsibilities involve either representing the United States' interests in court or enforcing federal laws. Many of the department's activities involve traditional legal and investigative functions, such as filing suits on behalf of the United States or apprehending criminals. Other department functions are administrative. For example, the Office of Policy Development is devoted to long-term policy planning.

### Department Leadership

At the top of the department is the attorney general, who is appointed by the president and must be confirmed by the Senate. A key member of the president's cabinet, the attorney general supervises the many divisions, bureaus, and offices of the DOJ. Unlike other cabinet members, however, the attorney general also functions as a practicing attorney, serving as the president's legal adviser.

Below the attorney general are the deputy attorney general, the associate attorney general, and the SOLICITOR GENERAL. Although the deputy attorney general is officially the second-highest position at the DOJ, the office of associate attorney general, created in 1977, is often considered to be equally powerful. The deputy attorney general and the associate attorney general divide the department's administrative responsibilities between them, providing direction to the organizational units in the department. They also advise the attorney general on policy matters. The solicitor general is primarily responsible for supervising and conducting government litigation before the federal appellate courts, including the U.S. Supreme Court.

### Department Structure

The DOJ is composed of several different units, including divisions, bureaus, and offices. The government's legal business is handled by the department's six litigating divisions: Antitrust, Civil, CIVIL RIGHTS, Criminal, Environment and Natural Resources, and Tax. Each of these divisions is headed by an assistant attorney general. These divisions handle cases involving the United States that have a broad legal impact.

Nationwide, the government is represented by ninety-five U.S. attorneys, who conduct all federal court cases and some federal investigations in their districts. Each state has at least one

**Department of Justice**

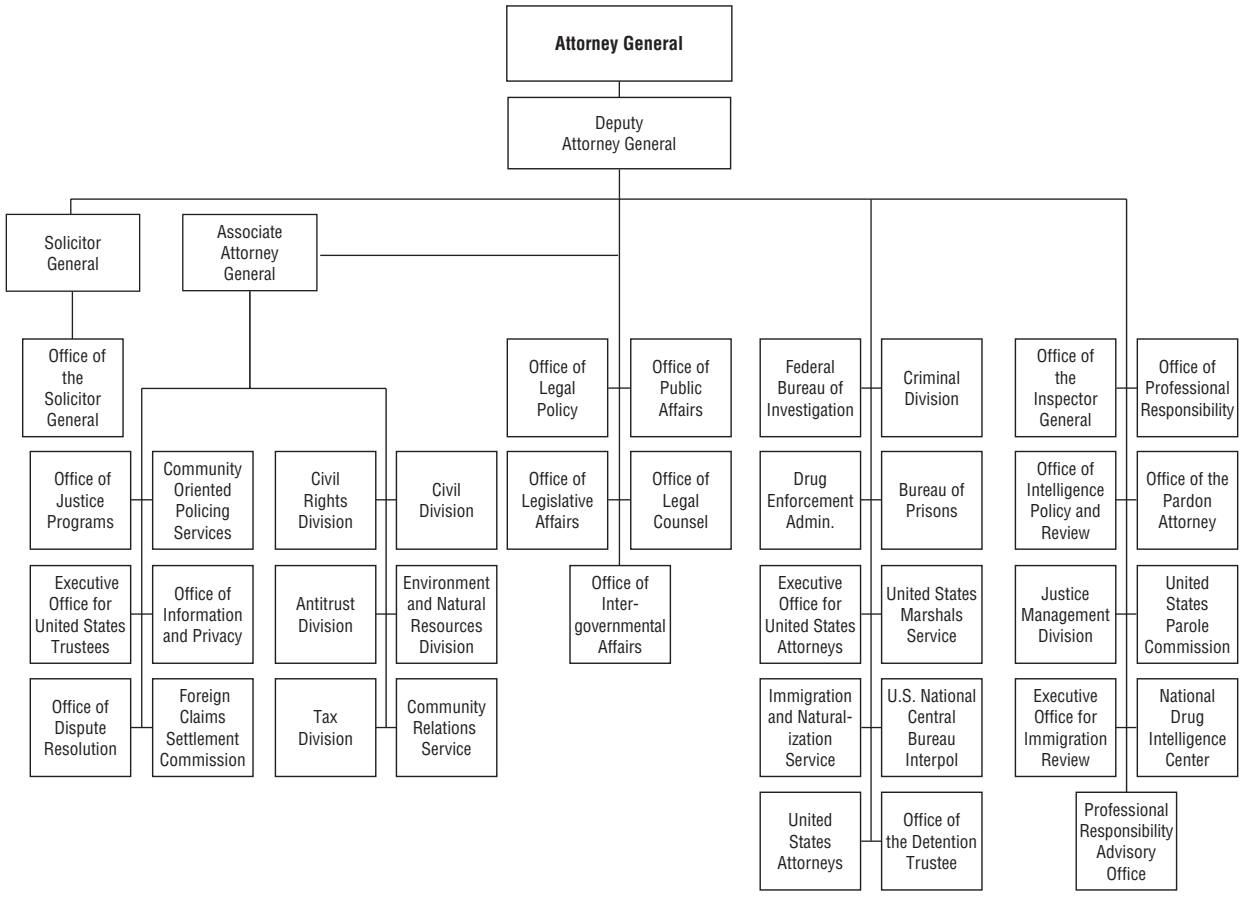


U.S. attorney, and some of the larger states are divided into districts that each have a U.S. attorney. The U.S. attorneys handle the majority of cases in which the federal government is a party. Although the U.S. attorneys report to the DOJ, they traditionally operate with a fair amount of independence and autonomy. Each U.S. attorney is appointed by the president and confirmed by the Senate to a four-year term.

Several bureaus within the DOJ are concerned with various aspects of law enforcement. The **U.S. MARSHALS SERVICE** (USMS) is the country's oldest law enforcement agency, having begun as a group of 13 marshals appointed by **GEORGE WASHINGTON**; today the USMS has 95 marshals and is primarily responsible for providing court security, transporting prisoners, apprehending fugitives, protecting witnesses, and executing federal court orders. The **FEDERAL BUREAU OF INVESTIGATION** (FBI) is the government's major investigatory agency and the largest unit within the DOJ; the FBI pursues information concerning federal violations, collects evidence in cases involving the United States, and performs other duties assigned by law or by the president. The **DRUG ENFORCEMENT ADMINISTRATION** (DEA) combats drug trafficking, investigating major drug dealers, helping to prepare cases against them, and helping foreign governments pursue drug dealers. Also under the DOJ's umbrella are the Bureau of Prisons (BOP), which oversees the federal prison system, and the Office of Justice Programs (OJP), which administers crime prevention and deterrence programs.

The DOJ also houses several offices that provide administrative support functions. These include the Office of Legislative Affairs, which

coordinates the DOJ's relationship with Congress; the Office of Legal Counsel, which helps the attorney general to furnish legal advice to the president; the U.S. Parole Commission, which administers the parole system for federal prisoners; the Executive Office for U.S. Trustees, which administers the handling of BANKRUPTCY cases; and the Foreign Claims Settlement Commission, which handles cases against foreign governments for losses sustained by U.S. citizens.

The Bureau of Justice Statistics is another important DOJ office. The bureau, which was established in 1979, is responsible for the collection and analysis of criminal justice statistics at the state and federal level. It issues ANNUAL REPORTS on criminal victimization, populations under correctional supervision, and federal criminal offenders and case processing. It also issues periodic reports on the administration of law enforcement agencies and correctional facilities, prosecutorial practices and polices, state court case processing, felony convictions, characteristics of correctional populations, criminal justice expenditure and employment, and civil case processing in state courts.

### History of the Department

The position of attorney general has its roots in medieval ENGLISH LAW. The title *attorney general* can be traced to 1398, when the Duke of Norfolk employed attorneys general to witness his BANISHMENT. In the years following, the king or queen and other nobles employed attorneys to appear in court on their behalf. In time, the office of the king's or queen's attorney became a privileged and powerful position. The attorney general, as the position was called after 1461, became an important political and legal adviser, first to the monarch and later to the House of Commons and the government in general.

When English settlers established colonies in America, they included the office of attorney general in the colonial governments they created. Virginia was the first colony to appoint an attorney general, in 1643, followed by Rhode Island in 1650, and Maryland in 1660. By the end of the seventeenth century, most of the colonies had their own attorneys general. By 1776, a fairly consistent system of courts and law officers had been established in the colonies. With the American Revolution, British officeholders were simply replaced with Americans.

When the Constitution was written in 1789, the Framers did not specifically designate an office of attorney general, instead leaving such administrative details to be determined by statute. The attorney general was created by the JUDICIARY ACT OF 1789, which specified that the office should be filled by "a meet person, learned in the law," who would "prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and . . . give his advice and opinion upon QUESTIONS OF LAW when required by the President of the United States, or when requested by the heads of any of the departments." The act gave the attorney general limited powers and resources, including no provisions for staffing or office expenses. The person filling the office was expected to pay for such items. Because the position of attorney general was originally meant to be a part-time position, the salary was set at just $1,500 per year, and the officeholder was expected to maintain a private legal practice.

The first person to fill the position of attorney general was EDMUND RANDOLPH, of Virginia, who was George Washington's personal attorney. Although the attorney general initially was not a member of the president's cabinet, Washington valued Randolph's advice so much that he asked Randolph to sit in on his cabinet meetings. Ever since then, the position of the attorney general has been recognized as a cabinet post.

In addition to the office of attorney general, the Judiciary Act of 1789 established the U.S. district attorneys (now called U.S. attorneys) and the U.S. marshals, who represented the federal government in court and enforced federal laws, respectively, at the state and local levels. Although these officials were statutorily under the supervision of the president, they actually operated with very few checks. To make the government's legal work more controllable and consistent, Attorney General Randolph attempted to bring the U.S. attorneys and marshals under his supervision, arguing that such centralization would help him to secure the government's legal interests. However, the legislation that Randolph recommended failed in Congress.

This division of the government's legal work—among the attorney general, the district attorneys and marshals, and also solicitors hired by individual executive departments—resulted in uncoordinated, inconsistent, and inefficient legal service to the federal government. Presidents and attorneys general made several

attempts to centralize the government's legal services, but Congress was leery of giving the executive branch more power and therefore did not pass the necessary legislation.

In the early nineteenth century, the office of the attorney general expanded slowly. The workload was light, and until 1814 the attorney general was not required to reside in Washington, D.C., except when the U.S. Supreme Court was in session. Significant changes were made, however, when WILLIAM WIRT, attorney general under President JAMES MONROE, took over the office in 1817. Finding that previous attorneys general had kept no records of their work, Wirt established a formal system for recording his official actions and decisions so that future attorneys general would have a record of precedents to follow. Wirt also expanded the duties of the office and created formal operating procedures, greatly increasing his workload. Congress compensated Wirt for his efforts, increasing his salary to $3,500 and providing a clerk and office expenses. These funds, however, were one-time appropriations only; not until 1831 did Congress begin making regular appropriations for office expenses and book purchases.

The next attorney general to make significant changes in the office was CALEB CUSHING, who was appointed attorney general by President FRANKLIN PIERCE in 1853. Unlike his predecessors, Cushing left his own private legal practice and transformed the office of attorney general into a full-time position. Cushing expanded the work performed by the department and was also given additional responsibilities by Congress, including advising treaty commissioners, examining government land titles, administering government PATENTS, and compiling and publishing federal laws. To enable Cushing to complete this work, Congress in 1859 authorized the appointment of an assistant attorney general, who was given control of the U.S. district attorneys. Congress also raised the attorney general's salary to $6,000, finally making it equal to the salaries of other cabinet members.

With the onset of the Civil War, the government's need for legal services and representation increased drastically. All across the country, claimants were filing suits in cases involving issues such as property titles and personal rights. The attorney general's office did not have the resources to handle these cases, nor did it have adequate authority over the district attorneys in the states. The various executive departments were forced to hire outside counsel to represent the government, resulting in enormous costs—nearly $500,000 over four years. These totals came to the attention of Congress, which was trying to curb expenses in the aftermath of the war. To try to economize on the government's legal bills, Congress passed the Judicial Act of 1870, which created the DOJ. The staff was increased by two assistants and a solicitor general, who was to share the attorney general's task of representing the federal government before the U.S. Supreme Court. The act also gave the attorney general positive authority over the U.S. district attorneys and marshals. Although the creation of the DOJ did not materially change the duties of the attorney general, it significantly changed the nature of the job by making it an administrative position that is responsible for an official bureaucracy.

Even with the creation of the DOJ, the federal government's legal work suffered from a lack of coordination because individual executive departments continued to retain their own solicitors. These solicitors provided legal advice to their departments and claimed the right to represent the departments in court. The conflicts and confusion that were created between the departments and the DOJ came to a head during the first world war, when many new federal government agencies and departments were created, each claiming the right to conduct its own legal work. In response, President WOODROW WILSON issued an EXECUTIVE ORDER (Exec. Order No. 2877 [1918]) requiring all government law officers to operate under the supervision of the DOJ. By the 1920s, administrative chaos returned as individual departments again tried to conduct their own legal work. In 1933, President FRANKLIN D. ROOSEVELT issued another executive order (Exec. Order No. 6166 [1933]) consolidating all the government's legal work under the DOJ and the attorney general.

The September 11, 2001 terrorist attacks on the United States led to substantive and organizational changes for the DOJ. The USA PATRIOT ACT ("Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism"), passed by Congress in October 2001, granted the attorney general more surveillance powers with less judicial supervision. However, these powers will sunset in four years. The act also gave the attor-

ney general more power to detain and deport non-citizens, with little or no JUDICIAL REVIEW.

At an organizational level the DOJ surrendered its control of immigration and naturalization when Congress established in late 2002 the HOMELAND SECURITY DEPARTMENT. The Immigration and Naturalization Service (INS) had been subjected to withering criticism for its failure to monitor the September 11 hijackers and for its inability to modernize its management system. As a result, the functions of the INS were transferred to the Border and Transportation Security division of the new cabinet-level department.

Many units of the federal government continue to employ their own legal counsel, but such attorneys generally are restricted to rendering legal advice to that department alone and are not permitted to represent the government in court. Tensions sometimes arise when an executive department and the DOJ take contrary positions on an issue in litigation. When that happens, the attorney general and the solicitor general must decide which department's stand will be taken.

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## JUSTICE OF THE PEACE

*A judicial officer with limited power whose duties may include hearing cases that involve civil controversies, conserving the peace, performing judicial acts, hearing minor criminal complaints, and committing offenders.*

Justices of the peace are regarded as civil public officers, distinct from peace or police officers. Depending on the region in which they serve, justices of the peace are also known as magistrates, squires, and police or district judges. In some districts, such as the District of Columbia, justices of the peace are considered officers of the United States. In other regions, their jurisdiction is limited to a state, city, precinct, county, or township.

The position of justice of the peace originated in England in 1361 with the passing of the Justice of the Peace Act. In colonial America the position, with its judicial, executive, and legislative powers, was the community's main political force and therefore the most powerful public office open to colonists. Legal training was not a prerequisite.

Maintaining community order was a priority in the colonial era. The justice of the peace in this period was responsible for arresting and arraigning citizens who violated moral or legal standards. By the early 1800s, the crimes handled by the justice of the peace included drunkenness, ADULTERY, price evasion (selling below a minimum price fixed by law), and public disorder. Justices of the peace also served as county court staff members and heard GRAND JURY and civil cases. The increasing number of criminal, slave, and tax statutes that were passed during the 1800s also broadened the enforcement powers of the justice of the peace.

Today justices of the peace deal with minor criminal matters and preside only in the lowest state courts. Their legal duties encompass standard judicial tasks such as issuing arrest or search warrants, performing marriage ceremonies, handling routine traffic offenses, determining PROBABLE CAUSE, imposing fines, and conducting inquests.

The duties of a justice of the peace vary by statute, and it is the justice's responsibility to know which actions are within the scope of his or her jurisdiction. For example, a few statutes do not allow justices of the peace to be involved in the operation of another business or profession; however, they can invest in or receive a salary from another business, as long as they are not involved with its operation.

Justices are often considered conservators of the peace. They can arrest criminals or insane people, order the removal of people who behave in a disorderly fashion in a public place, and carry out other duties designed to maintain or restore a peaceful community.

Justices of the peace have limited power in criminal and civil cases. They have jurisdiction over minor criminal matters, including misdemeanors, infractions, and petty offenses. Their

powers of civil jurisdiction are determined by the respective statutes that govern their position. At the highest level, a justice may handle cases that involve contracts, TORTS, injuries to PERSONAL PROPERTY, and personal injuries such as LIBEL, slander, FALSE IMPRISONMENT, and MALICIOUS PROSECUTION. Justices of the peace do not have jurisdiction over cases that involve real property titles, EASEMENTS, or rights of way.

Depending on the tradition in the area where they serve, justices of the peace are either elected or appointed; the method by which they reach their office has no bearing on how much power they have. Appointments are typically handled by the state's legislative body or governor; however, this task may be delegated to local authorities, such as county supervisors or commissioners.

Once elected or appointed, and before taking office, a justice of the peace is required to take an oath and post an official bond. Some statutes also require new justices to sign a sworn statement that they have never been convicted of a misdemeanor or felony.

The length of the term of a justice of the peace varies with the constitution or statute that created the position. If a vacancy is created before a term expires, a public official, such as the governor, fills the vacancy; some statutes require that a special election be held. The replacement justice of the peace usually completes only the remainder of the term or serves until the next scheduled election.

Justices of the peace can be removed from their position for a variety of reasons, including official misconduct or conviction for a misdemeanor or felony. They must have knowingly committed the inappropriate act or acts with improper motives. Usually, the statute that defines the position will outline the procedure for removing a justice of the peace from office. Ordinarily, the justice is served with a notice of the charge or charges and is given an opportunity to be heard before she or he is removed.

If a justice of the peace wishes to resign, he or she must present a letter of resignation to the appropriate official; once the resignation is accepted, it cannot be withdrawn.

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## JUSTICIABLE

*Capable of being decided by a court.*

Not all cases brought before courts are accepted for their review. The U.S. Constitution limits the federal courts to hearing nine classes of cases or controversies, and, in the twentieth century, the Supreme Court has added further restrictions. State courts also have rules requiring matters brought before them to be justiciable.

Before agreeing to hear a case, a court first examines its justiciability. This preliminary review does not address the actual merits of the case, but instead applies a number of tests based on judicial doctrines. At their simplest, the tests concern (1) the plaintiff, (2) the adversity between the parties, (3) the substance of the issues in the case, and (4) the timing of the case. For a case to be heard, it must survive this review. In practice, courts have broad power to apply their tests: they commonly emphasize whichever factors they deem important. This irregularity has made the analysis of justiciability a difficult task for lawyers, scholars, and the courts themselves.

Behind the tests for justiciability are a number of legal doctrines. The Supreme Court has declared that the doctrines have both constitutional and prudential components: some parts are required by the Constitution, according to the Court's interpretation of Article III, and some are based on what the Court considers prudent JUDICIAL ADMINISTRATION. This distinction has important consequences for the limits of judicial power. Congress has the authority to pass laws that override only the prudential limits of JUDICIAL REVIEW; it cannot pass laws that override constitutional limits. Thus, the Supreme Court has insulated the federal courts from congressional influence in some but not all areas of justiciability.

Among the most complex justiciability doctrines is standing, which covers the plaintiff. Standing focuses on the party, not on the issues he wishes to have adjudicated (*Flast v. Cohen,* 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947). A claimant said to have standing has been found by the court to have the right to a trial. To reach such a determination, the court uses several general rules. These rules require that the claimant has suffered an actual or threatened injury; that the case alleges a sufficient connection (or nexus) between the injury and the defendant's action; that the injury can be redressed by a favorable decision; and that the plaintiff neither

brings a generalized grievance nor represents a third party. In addition, separate rules govern taxpayers, organizations, legislators, and government entities.

The question of justiciability also involves the legal relationship of the parties in the case, as well as the substance of their dispute. To be found justiciable, the case must involve parties who have an adversary controversy between them. Moreover, the issues in the controversy must be "real and substantial," and therefore more than mere generalized interests common to the public at large. A related rule forbids the federal courts to issue ADVISORY OPINIONS. Dating from the late eighteenth century, it holds that they must decline to rule on merely hypothetical or abstract questions. In addition, they are restricted from taking cases that address purely POLITICAL QUESTIONS, which are beyond management by the judiciary. Certain state courts do issue advisory opinions on legal questions.

The fourth concern of tests for justiciability, the timing of the case, is evaluated under the concepts of RIPENESS and mootness. The ripeness doctrine holds that a case is justiciable if "the harm asserted has matured sufficiently to warrant judicial intervention" (*Warth v. Seldin,* 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 [1975]). The mootness doctrine prevents a court from addressing issues that are hypothetical or dead. A case may become moot because of a change in law or in the status of the litigants. Most commonly, it is held to be moot because the court is presented with a fact or event that renders the alleged wrong no longer existent. For example, in 1952 the Supreme Court refused to review a state court decision in a case challenging Bible reading in the public schools. The child behind the suit had already graduated, and the parents and taxpayers who brought the suit could show no financial injury (*Doremus v. Board of Education,* 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475). However, the Court did agree to hear the landmark ABORTION case ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), even though the plaintiff was no longer pregnant. The Court gave as its reason the length of a woman's gestation period (nine months), which is too short to permit appellate review.

One reason justiciability is complex is that it is replete with numerous arcane rules and exceptions. Another is that courts apply it on an ad hoc basis, inconsistently choosing to emphasize one element of its tests over another. This fact has led legal scholars to despair of ever reaching a unified analysis of justiciability. Some have taken the cynical view that courts will find a case justiciable when they want to hear it, and refuse to find it justiciable when they do not wish to hear it.

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## JUSTIFICATION

*A sufficient or acceptable excuse or explanation made in court for an act that is otherwise unlawful; the showing of an adequate reason, in court, why a defendant committed the offense for which he or she is accused that would serve to relieve the defendant of liability.*

*A legal excuse for the performance or nonperformance of a particular act that is the basis for exemption from guilt. A classic example is the excuse of* SELF-DEFENSE *offered as justification for the commission of a murder.*

"JUSTICE IS THE CONSTANT AND PERPETUAL WISH TO RENDER TO EVERY ONE HIS DUE."
—JUSTINIAN I

## ◆ JUSTINIAN I

The emperor Justinian I ruled the Eastern Roman, or Byzantine, Empire from 527 until 565. He is significant for his efforts to regain the lost provinces of the Western Roman Empire, his CODIFICATION of ROMAN LAW, and his architectural achievements.

Justinian was born circa 482 in Pauresium, Illyricum (probably south of modern Nišs, Serbia). Justinian came to the throne with the intention of reestablishing the Roman Empire as it had been before the provinces of the Western Roman Empire fell under the control of various Germanic tribes during the fifth century. To this end, he sent his armies against the Vandals in North Africa (roughly, modern Algeria and Tunisia), the Visigoths in Spain, and the Ostrogoths in Italy. The Vandals surrendered in 534, but the Visigoths and Ostrogoths proved more difficult. Justinian's forces never succeeded in capturing more than a small part of Spain and subdued Italy only after a devastating war that ended in 563 with Italy in ruins. Nonetheless,

*Justinian I.*
CORBIS-BETTMANN

when Justinian died, he could claim with some justice that the Mediterranean Sea was once again a Roman lake.

Justinian's conquests proved ephemeral, however. Within four years of his death, northern Italy had fallen to the Lombards, another Germanic tribe, and by the early eighth century, Muslim armies had conquered North Africa and Spain.

Justinian's achievements in law were more long-lasting. Although several collections of imperial Roman legislation had been compiled in the past, by Justinian's reign even the most recent, the Theodosian Code (*Codex Theodosianus*), which had been issued in 438, was out-of-date. Accordingly in 528 Justinian established a commission of ten experts, including Tribonian, to prepare a new edition, which was completed in 534. The Code (*Codex*), as it was called, contains 4,562 laws from the reign of Hadrian (117–138) to 534.

Roman law, however, encompasses both legislation and JURISPRUDENCE; that is, literature interpreting the law. Despite the importance of jurisprudence, no single collection had ever been made, and some important works were not readily available. Therefore in 530 Justinian ordered his commission to collect the most important writings on jurisprudence and to edit and clarify the texts whenever necessary. To complete their task, the commission had to read two thousand books containing over three million lines, but nonetheless they finished the compilation known as the Digest (*Digestum*), or Pandects (*Pandectae*), by December 533.

In the same year, the commissioners issued the Institutes (*Institutiones*), a handbook for law students. Although Justinian had only planned a tripartite compilation of Roman law, imperial legislation did not cease with the completion of the Code in 534. Therefore the edicts issued by Justinian after 534 were collected and came to be known as the Novels (*Novellae*), or New Laws. The Code, Digest, and Institutes had been written in Latin, the traditional language of Rome, but Justinian issued the Novels in Greek in recognition of the fact that Greek was the ordinary language of the Eastern Roman Empire. Together the Code, Digest, Institutes, and Novels came to be known as the Corpus juris civilis ("the corpus of civil law"). The *Corpus juris* not only preserved Roman law for later generations but, after the twelfth century when it came to be known and studied in western Europe, provided inspiration for most European legal systems.

Justinian is also known for the extensive building program that he undertook both in the East and in Italy. The church of Hagia Sophia in Constantinople, which was completed in 562, is considered one of the finest examples of Byzan-

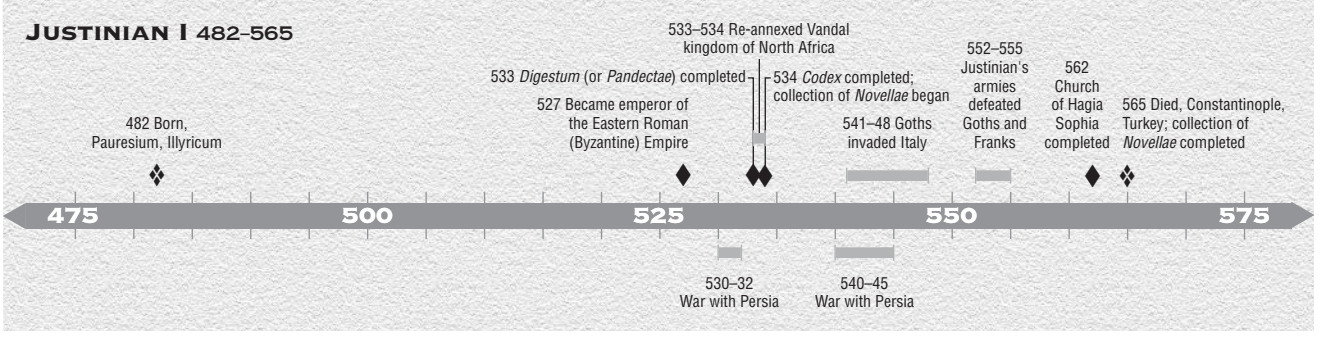

tine architecture. Justinian died November 14, 565, in Constantinople, now Istanbul, Turkey.

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## JUVENILE LAW

*An area of the law that deals with the actions and well-being of persons who are not yet adults.*

In the law a juvenile is defined as a person who is not old enough to be held responsible for criminal acts. In most states and on the federal level, this age threshold is set at 18 years. In Wyoming a juvenile is a person under the age of 19. In some states a juvenile is a person under the age of 17, and in Connecticut, New York, and North Carolina, a juvenile is a person under the age of 16. These age definitions are significant because they determine whether a young person accused of criminal conduct will be charged with a crime in adult court or will be required to appear in juvenile court.

Juvenile courts generally have authority over three categories of children: juveniles accused of criminal conduct; juveniles neglected or abused by their parents or in need of assistance from the state; and juveniles accused of a status offense. This last category refers to conduct that is prohibited only to children, such as absence from school (truancy), flight from home, disobedience of reasonable parental controls, and purchase of alcohol, tobacco, or PORNOGRAPHY.

Originally the term *juvenile delinquent* referred to any child found to be within the jurisdiction of a juvenile court. It included children accused of status offenses and children in need of state assistance. The term *delinquent* was not intended to be derogatory: its literal meaning suggested a failure of parents and society to raise the child, not a failure of the child.

The modern trend is to separate and label juveniles based on the reason for their juvenile court appearance and the facts of their case. Many states have created three categories for juveniles: delinquents, abused or neglected children, and children in need of services. Delinquents are juveniles who have committed acts that would result in criminal prosecution if committed by an adult. Abused or neglected children are those who are suffering from physical or emotional abuse or who have committed status offenses or petty criminal offenses. Children in need of services are ones who are not abused or neglected but are needy in some other way. These children are usually from impoverished homes and require improved nutrition and basic health care.

Generally, the procedures for dealing with abused, neglected, and needy children are less formal than the procedures for dealing with alleged delinquents. The subsequent treatment of nondelinquent juveniles by the courts is also markedly different from the treatment of delinquents. Separation of noncriminal cases from criminal cases removes some of the stigma attached to appearance in juvenile court.

The mission of juvenile courts differs from that of adult courts. Juvenile courts do not have the authority to order punishment. Instead, they respond to juvenile misconduct and misfortune by ordering rehabilitative measures or assistance from government agencies. The juvenile court response to misconduct generally is more lenient than the adult court response.

Juvenile court proceedings are conducted in private, whereas adult proceedings are public. Also, whereas adult criminal courts focus on the offense committed and appropriate punishment, juvenile courts focus on the child and seek to meet the child's needs through rehabilitation, supervision, and treatment. Adult courts may deprive adults of their liberty only for the violation of criminal laws. Juvenile courts, by contrast, are empowered to control and confine juveniles based on a broad range of behavior and circumstances.

### History

Before the nineteenth century, children were generally considered to be young adults, and they were expected to behave accordingly. Children over the age of seven years who were accused of crimes were prosecuted in adult court. If convicted they could be confined in an adult prison. By the nineteenth century, most states had created separate work farms and reform schools for convicted children, but some states still sent children to adult prisons. Juveniles were not always rehabilitated in prison. After interacting with adult criminals, they often emerged from prison with increased criminal knowledge and an increased resolve to commit crimes.

In the late nineteenth century, progressive social discourse caused a shift in the general

# Trying Juveniles as Adults

In 1899 the U.S. made legal history when the world's first juvenile court opened in Chicago. The court was founded on two basic principles. First, juveniles lacked the maturity to take responsibility for their actions the way adults could. Second, because their character was not yet fully developed, they could be rehabilitated more successfully than adult criminals. More than a century later, these principles remain the benchmarks of juvenile justice in the United States.

In recent years, however, a growing number of juvenile criminals are being tried as adults—much the way they might have been before the advent of juvenile courts. In part this stems from public outrage against children who, in increasing numbers, are committing violent crimes. Interestingly, the overall rate of juvenile crime has been decreasing since 1995. When people see gruesome images on television, such as the Columbine High School shootings in Littleton, Colorado, or the Springfield, Oregon, rampage of 15-year-old Kip Kinkel (who shot both his parents and two classmates), their impression is that juvenile crime is out of control.

Since the early 1990s many states have adopted a "get tough" approach to juvenile justice as a response to the increasingly violent crimes committed by children. As of 2003 many states had adopted legislation that permits more children to be tried as adults. All states have a provision allowing prosecutors to try juveniles as young as 14 as adults under certain circumstances. In some states, such as Indiana, South Dakota, and Vermont, children as young as 10 can be tried as adults.

An example of a "get tough" law is Michigan's Juvenile Waiver Law of 1997. This measure lowered the age that juveniles can automatically be tried as adults. In adopting this law, the state has taken away some of the judge's discretion in deciding whether a minor should be tried as a child or as an adult. Factors such as criminal history, psychiatric evaluation, and the nature of the offender's actions carry less weight when the judge is forced to enter an automatic adult plea.

Another example is California's Proposition 21, which was passed in 2000. This law permits prosecutors to send many juveniles accused of felonies directly to adult court. In effect, the prosecutors are the ones who decide whether a minor should be tried and sentenced within the adult system; this takes away the judge's discretion. Proposition 21 also prohibits the use of what was known as "informal probation" in felonies. This type of **PROBATION** was offered to first-time juvenile offenders who admitted their guilt and attempted to make restitution. Finally, the proposition requires known gang members to register with police agencies and increases the penalties for crimes such as **VANDALISM**.

The U.S. **JUSTICE DEPARTMENT** shows that prosecutors are actively putting these new tougher laws to use against juvenile offenders. A Justice Department study released in 2000 states that violent juvenile offenders are more likely to serve out their sentences in an adult prison than they would have been in 1985. With two million adults currently incarcerated in prison, the number of juveniles in adult facilities is a minuscule percentage; 7,400 juvenile offenders were serving time in an adult facility as of 1997, according to the Justice Department. That number, however, is more than double the number of juveniles in adult prisons in 1985.

The question of whether trying juveniles as adults is effective has generated considerable interest. Some studies have suggested that instead of solving a problem, trying juveniles in adult settings may be making things worse. Juveniles who serve time with adults have a higher **RECIDIVISM** rate than those who serve with other juveniles. Moreover, juvenile recidivists from adult facilities were more likely to commit more violent crimes than their counterparts in juvenile centers. Groups such as **HUMAN RIGHTS WATCH** have complained that prison conditions for juveniles in adult prisons are poor and that juveniles in adult facilities are more likely to be assaulted or abused by other prisoners.

Putting aside the debate over whether minors belong in adult prisons, there is no question that the practice had gained support and was in the early 2000s accepted by people who might have balked 20 years earlier. Whether the new "get tough" policy so many states embrace would work remained to be seen, but it was certainly expected to stay.

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Courts; Penitentiary.

attitude toward children. Social, psychological, and behavioral experts proposed a new understanding of children based on their youth. The progressive theory declared that children should be considered innocent and vulnerable and as lacking the mental state required for them to be held responsible for a criminal offense because they have not acquired the wisdom that comes with age. It followed that juveniles should not be punished for their criminal behavior. Instead, they should be reformed, rehabilitated, and educated.

Juvenile crime was an important element, but not the driving force, behind the creation of the juvenile courts. Juvenile crime rates were quite low in the nineteenth century. Progressives claimed that the biggest problems facing children were neglect and poverty. The industrial revolution caused an increase in the number of urban poor. As poverty increased, so did the incidence of child ABANDONMENT, neglect, and abuse. This situation led to a political push for states to protect those who were in distress.

The perception of the government as a surrogate parent, known as PARENS PATRIAE, also led to the formulation of status offenses. These offenses derived from the idea that the government should help shape the habits and morals of juveniles. Status offenses reflected the notion that state control of juveniles should not be limited to enforcement of the criminal laws. Instead, the state would have additional authority to prohibit a wide variety of acts that were considered precursors to criminal behavior.

The progressive theory won widespread support, and legislatures set to the task of conforming the legal system to the new understanding of children. The Illinois legislature was the first to create a separate court for children. The Juvenile Court Act of 1899 (1899 Ill. Laws 131, 131-37) created the first juvenile court and established a judicial framework that would serve as a model for other states.

The Illinois act raised the age of criminal responsibility to 16 years. This action meant that no person under the age of 16 could be prosecuted in adult court for a crime. Children accused of a crime would instead be brought to juvenile court.

The Illinois act gave the juvenile court additional authority to control the fate of a variety of troubled youths. These young people included:

> any child who for any reason is destitute or homeless or abandoned; or dependent on the public for support; or has not proper parental care or guardianship; or who habitually begs or receives alms; or who is found living in any house of ill fame or with any vicious or disreputable person . . . and any child under the age of 8 years who is found peddling or selling any article or singing or playing any musical instrument upon the street or giving any public entertainment.

The Illinois act also created a new system for the disposition of juveniles. The act specified that all children found to be within the jurisdiction of the court should be given a level of care and discipline similar to "that which should be given by its parents" (§ 3 [1899 Ill. Laws 131, 132]). In all cases the court would attempt to place the child with a foster family or a court-approved family responsible for the custody of the child. If foster placement was not accomplished, the child would be placed in a reform school, where he or she would work and study. Juveniles found to be within the jurisdiction of the court remained under the court's control until the age of 21.

The terminology created for juvenile court was based on the terminology used in civil rather than criminal court. This language helped establish a nonthreatening environment. Juveniles were not charged by an indictment, as they would have been charged in adult court; rather, they

# Should the Juvenile Justice System Be Abolished?

The juvenile justice system seeks to rehabilitate children, rather than punish them for their juvenile criminal behavior. Since the late 1970s, critics of the juvenile courts have sought to abolish this system, arguing that it has failed in its rehabilitation efforts and in not punishing serious criminal behavior by young people. At the same time, defenders of the juvenile justice system contend that for the vast majority of children, the system is a worthwhile means of addressing problems. They maintain that a handful of violent juveniles who have committed serious crimes should not lead the public to believe that the system does not provide ways of changing behavior.

Critics note that the social and cultural landscape has changed considerably since the early 1900s when the juvenile justice system was established. Drugs, GANGS, and the availability of guns have led to juveniles committing many serious crimes, including murder. Critics insist that juvenile courts are no longer adequate to address problems caused by violent, amoral young people.

Some argue that the perceived leniency of the juvenile justice system compounds its failure to rehabilitate by communicating to young people that they can avoid serious consequences for their criminal actions. The system engenders a revolving-door process that sends the message that young offenders are not accountable for their behavior. It is not until these repeat offenders land in adult criminal courts that they face real punishment for the first time. Thus, it may be better to punish a juvenile in the first instance, in order to deter future criminal activity.

Critics also claim it is wrong for juvenile offenders who have committed violent crimes to be released from the jurisdiction of the juvenile court at age eighteen or twenty-one. Serving a few years in a juvenile correction facility for a crime that if committed by an adult would result in a ten-year sentence is unjust. The punishment for a crime, argue critics, should be the same, regardless of the age of the perpetrator.

Because of these deficiencies, critics contend, the system should be dismantled.

were brought before the juvenile court by way of a petition. Juveniles were not arraigned by the court at their first appearance; instead, they were held to appear for an intake hearing. The process was not called a trial but an adjudication or a hearing. A juvenile found by the court to have committed a crime was not found guilty but was adjudged delinquent. Finally, instead of fashioning a sentence proportionate to the offense, the juvenile court disposed of the case by focusing on the best interests of the child. This terminology was used in every case, whether the petition concerned a juvenile charged with a crime or a juvenile in need of services or protection.

The Illinois act spawned similar acts in other states, and soon the progressive theory was put into practice across the United States. Juveniles were rehabilitated instead of punished; placed under the control of a juvenile court for a wide range of circumstances, some beyond their own control; and diverted from adult courts and prisons into an informal, relaxed system.

### Modern Juvenile Law

The basic framework created by the first juvenile court act is largely intact. Rehabilitation, not punishment, remains the aim of the juvenile justice system, and juvenile courts still retain jurisdiction over a wide range of juveniles. The most notable difference between the original model and current juvenile law is that juveniles now have more procedural rights in court. These rights include the right to an attorney and the right to be free from SELF-INCRIMINATION.

All states now maintain a juvenile code, or set of laws relating specifically to juveniles. The state codes regulate a variety of concerns, including the acts and circumstances that bring juveniles within the jurisdiction of the juvenile court, the procedures for juvenile courts, the rights of juveniles, and the range of judicial responses to misconduct or to the need for services.

Juvenile law is largely a matter of state law. On the federal level, Congress maintains in the U.S. Code a chapter on juvenile delinquency (18 U.S.C.A. §§ 5031 et seq.). The federal juvenile laws are similar to the state juvenile laws, but they deal solely with persons under the age of 18 who are accused of committing a federal crime, a relatively minor part of the juvenile justice system.

tled. Juveniles should be given full **DUE PROCESS** rights, including the right to trial by jury, just like adults. Freed from the juvenile justice system's rehabilitative ideology and restrictions on criminal due process rights, juveniles should stand accountable for their criminal actions. Once a juvenile is convicted, a trial court can determine the appropriate sentence.

Defenders of juvenile justice respond that a small minority of violent youths have created the misperception that the system is a failure. Though not every child can be rehabilitated, it is unwise to abandon the effort. In every other sphere of society, children are treated differently from adults. For the few juveniles who commit serious crimes and have poor prospects for rehabilitation, current laws provide that they be transferred to adult criminal courts. Allowing this alternative is a wiser course, defenders insist, than dismantling the system.

Defenders also contend that many of the alleged defects of the juvenile courts can be traced to inadequate funding and to the environment in which many juveniles are forced to live. They point out that violent subcultures and early childhood traumas caused by abuse, neglect, and exposure to violence make it more difficult to address individual problems. If the system were adequately funded, **PROBATION** officers and court support personnel could more closely supervise children and rehabilitation efforts. If more energy were put into changing the socioeconomic situation of communities, rehabilitation efforts would improve and crime would decrease.

According to system supporters, placing juveniles in prison will not end the cycle of criminal behavior. The opposite result is more likely, for a teenager may feel stigmatized by a criminal conviction and may believe he is a lost cause, resulting in a return to crime. In addition, the huge amounts expended on incarceration could be better spent on counseling, education, and job training.

Defenders of the juvenile justice system argue that a criminal conviction can engender difficulties in obtaining employment and in negotiating other aspects of life. It is wrong, they contend, to label a person so early in life, for an action that may have been impulsive or motivated by peer pressure. Preserving the juvenile justice system allows many teenagers to learn from their mistakes without prejudicing their adulthood.

Finally, defenders note that many states have changed their laws to deal more severely with violent juvenile offenders. As long as there are ways of diverting these offenders into the adult system, defenders insist, the current juvenile justice system should be maintained.

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Juvenile courts exist in all states. They may be held in a building or room separate from adult courtrooms. The proceedings are private, and the identity of the juveniles and the records of the proceedings are also private.

Many juveniles come to juvenile court after being arrested by the police for a criminal act. Juveniles accused of crimes may be confined in a secure facility prior to the disposition of their case. Although they should be separated from adults prior to trial, many juveniles accused of crimes find themselves in adult jail populations.

Juveniles charged with a crime do not have the right to a jury trial in juvenile court. All juvenile cases are heard by a juvenile court judge. At trial a prosecutor representing the state presents evidence against the juvenile, and the juvenile has an opportunity to respond to the evidence. The juvenile has the right to receive notice of the charges against him or her, to confront and question witnesses, to be free from self-incrimination, and to be represented by an attorney. If the juvenile cannot afford an attorney, the juvenile court will appoint one, at no cost. The juvenile may not be adjudged delinquent unless the prosecution has proved its case **BEYOND A REASONABLE DOUBT**. This is the same high standard of proof required in adult criminal trials.

The harshest disposition of a juvenile case is commitment to a secure reformatory for rehabilitation. A secure reformatory is usually called a youth development center or something similar suggesting rehabilitation. Secure reformatories resemble adult prisons in that the inmates are locked inside. The professed goal of reformatories is rehabilitation, but the unspoken goal is often confinement of the juvenile for the protection of the community.

Not all findings of delinquency result in commitment to a secure facility. Juvenile courts usually have the discretion to order any combination of **PROBATION**, community service, medical treatment, fines, and restitution. Probation releases the juvenile into the community under the supervision of a youth services officer. As a part of probation, juveniles often must fulfill certain conditions identified by the juvenile court and the youth services officer. These conditions can range from attending school and

**Juvenile Arrests, 1994 to 2000**

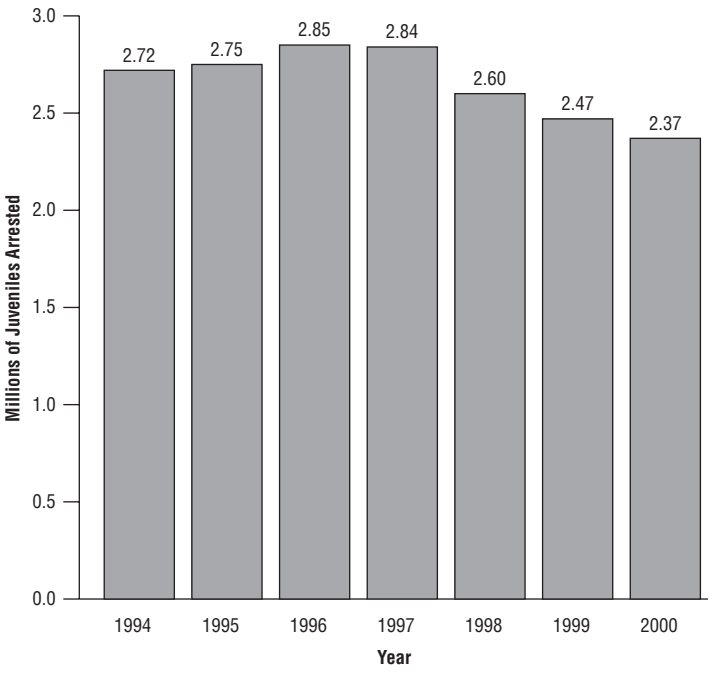


Juveniles are classified as persons between the ages of 10 and 17.

SOURCE: U.S. Department of Justice, Office of Juvenile Justice & Deliquency Prevention.

meeting certain performance requirements, to abstaining from drugs or alcohol. If the juvenile does not fulfill the conditions or commits another offense, she or he may be committed to a secure facility.

For repeated status offenses, a juvenile may be removed from home and placed in a state-approved foster home or some other state facility. Such facilities are usually not secure. However, juveniles ordered to such facilities are required to remain there for the period specified by the juvenile court judge. If they do not, they may be committed to a secure facility.

Juveniles do not have the right to a court-appointed attorney unless they face commitment to a secure facility that is operated by the state or federal government.

Status offenses do not always result in an appearance before juvenile court. Police officers often take intermediate measures before detaining a juvenile and beginning the petition process. These measures range from a simple reprimand to notification of the juvenile's parents. If a juvenile continues to commit status offenses after being excused by the police, he may be detained and eventually declared delinquent.

Abused and neglected juveniles usually come to the attention of juvenile courts through the petitions of state agencies or concerned private parties. In some cases the juvenile may be suffering physical or emotional abuse. In other cases the juvenile may be petitioned because he has committed a number of status offenses or petty offenses. A petition by the state usually seeks to remove the juvenile from the home for placement in foster care or a state facility.

When the state seeks to remove a juvenile from the home, the parents must receive an opportunity to be heard by the juvenile court. The juvenile is also allowed to testify, as are other witnesses. In addition to removing the juvenile from the home, the juvenile court may order that certain parties refrain from contacting the juvenile.

Children in need of services may also be petitioned by third parties. In some cases the juvenile court may simply order counseling for the child or the child's parents. If the parents are financially incapable of supporting the child, the court will usually remove the child from the home until such time as they are financially able to raise the child.

Juveniles have the right to appeal juvenile court decisions to adult courts. The number of available appeals varies from jurisdiction to jurisdiction and can change within a jurisdiction. For example, before 1996 in New Hampshire, juveniles could appeal to the New Hampshire Superior Court and then to the New Hampshire Supreme Court. In 1996 the state legislature changed the law to allow only one appeal by a juvenile, to the state supreme court (N.H. Rev. Stat. Ann. § 169-B:29).

The period of time spent in a secure reformatory can vary. In most cases a juvenile committed to a reformatory must remain there until reaching the age of 18. However, most states allow juvenile courts to retain jurisdiction over certain juveniles past the age of 18 at the request of a prosecutor or state agency representative. These holdovers are usually juveniles who have been adjudicated delinquent for a violent crime or have been adjudicated delinquent several times in separate proceedings.

Some states also allow a juvenile court to order incarceration in adult prison for juveniles who are found to be delinquent past a certain age. In New Hampshire, for example, a juvenile found to be delinquent based on a petition filed after the juvenile's sixteenth birthday may be sent to prison. If prison time is ordered, it cannot extend beyond the maximum term allowed for adults or beyond the juvenile's eighteenth birthday (N.H. Rev. Stat. Ann. § 169-B:19).

Some juveniles may be waived, or transferred, into adult court. In this procedure the juvenile court relinquishes its jurisdiction over the juvenile. Waiver is usually reserved for juveniles over a certain age (varying from 13 to 15) who are accused of violent or other serious crimes. On the federal level, for example, a juvenile accused of committing a violent crime that is a felony may be tried in adult federal court. Waiver in federal court is also authorized for a juvenile accused of violating federal firearms laws or laws prohibiting the sale of controlled substances (18 U.S.C.A. § 5032 [2000]).

The decision of whether to relinquish jurisdiction is usually made by the juvenile court. However, most jurisdictions have statutes that automatically exclude from juvenile court juveniles charged with violent or other serious crimes. In such cases an adult court prosecutor is required to certify to the adult court that the juvenile should, by law, appear in adult court. This certification takes places in a hearing before the adult trial court. Juveniles have the right to an attorney at this hearing and the right to present any evidence that militates against transfer.

Waiver into adult court has serious consequences for juveniles. In adult court juveniles face nearly all the punishments that may be inflicted on adults, including long-term imprisonment, life in prison, and in some cases death. However, in 1988 the U.S. Supreme Court ruled that no state may execute a juvenile who was under the age of 16 at the time of the crime (*Thompson v. Oklahoma,* 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 [1988]).

The treatment of juveniles who have committed **SEX OFFENSES** has stirred a national debate. Each state has passed a law referred to generally as Megan's Law, which requires convicted sex offenders to register with local police and allows communities to be notified that the offender resides in the area. A growing number of states now require juvenile sex offenders to register with law enforcement officers.

Statistics suggest that the number of sex offenses committed by juvenile offenders is on the rise. However, the question of whether these offenders should register with local law enforcement upon their release from juvenile detention facilities remains a highly controversial issue. Those individuals who oppose required registration for juvenile sex offenders argue that such registration undermines the very principals behind juvenile justice in the United States. These individuals assert that requiring juvenile sex offenders to register necessarily circumvents any attempts they make to live a normal life. As such, they contend that the registration requirement thereby negates the possibility that the juvenile sex offender could ever become rehabilitated.

In contrast, other individuals argue that the trend of increasingly violent crimes being committed by juveniles warrants children accused of a crime being treated the same as adults. That is, proponents of extending the registration requirement to juvenile sex offenders argue that the importance of public safety, proper punishment, and individual accountability mandate that these individuals continue to be held responsible for their actions. In addition, some argue that sex offenders, juvenile or otherwise, are untreatable because various well known studies demonstrate a very high **RECIDIVISM** rate, indicating that individuals who have a propensity to commit such crimes are often not amenable to any type of rehabilitation. States such as Oklahoma and Texas have enacted bills extending their versions of Megan's laws to juvenile sex offenders.

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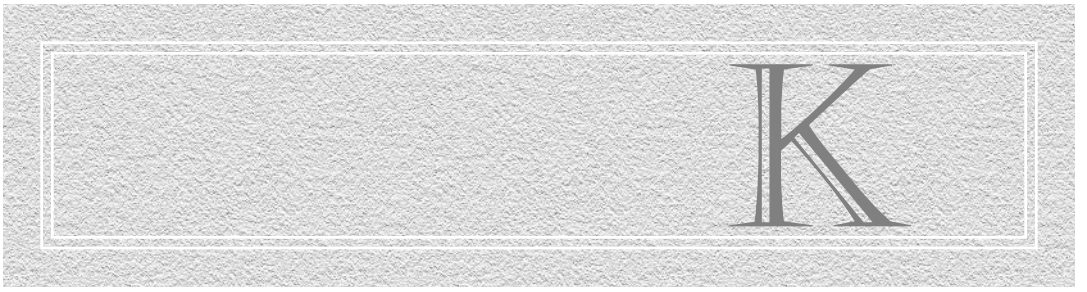

## KANGAROO COURT

*[*Slang of U.S. origin.*] An unfair, biased, or hasty judicial proceeding that ends in a harsh punishment; an unauthorized trial conducted by individuals who have taken the law into their own hands, such as those put on by vigilantes or prison inmates; a proceeding and its leaders who are considered sham, corrupt, and without regard for the law.*

The concept of kangaroo court dates to the early nineteenth century. Scholars trace its origin to the historical practice of itinerant judges on the U.S. frontier. These roving judges were paid on the basis of how many trials they conducted, and in some instances their salary depended on the fines from the defendants they convicted. The term *kangaroo court* comes from the image of these judges hopping from place to place, guided less by concern for justice than by the desire to wrap up as many trials as the day allowed.

The term is still in common usage by defendants, writers, and scholars critical of a court or a trial. The U.S. Supreme Court has also used it. In IN RE GAULT, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), a case that established that children in juvenile court have the right to DUE PROCESS, the Court reasoned, "Under our Constitution, the condition of being a boy does not justify a kangaroo court." Associate Justice WILLIAM O. DOUGLAS once wrote, "[W]here police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court" (*Williams v. United States,* 341 U.S. 97, 71 S. Ct. 576, 95 L. Ed. 774 [1951]).

## KANSAS-NEBRASKA ACT

The Kansas-Nebraska Act of 1854 (10 Stat. 277) was a significant piece of legislation because it dealt with several controversial issues, including SLAVERY, western expansion, and the construction of a transcontinental railroad.

Slavery was a widely debated divisive issue for many years preceding the Civil War and there were several attempts at conciliation. The first of these was the MISSOURI COMPROMISE OF 1820 (3 Stat. 545), which decided the slavery question in regard to the creation of two new states, Missouri and Maine. The compromise declared that Maine was to be admitted as a free state, while Missouri was allowed to enter the Union with no restrictions regarding slavery. Subsequently, however, Missouri entered as a slave state. The compromise also prohibited the extension of slavery north of the 36°30′ latitude which established the southern border of Missouri.

The COMPROMISE OF 1850 (9 Stat. 452) settled another controversy concerning slavery and instituted the doctrine of popular sovereignty, which permitted the residents of the area to decide the question. When Texas and other new territories were acquired as a result of the

Mexican War in 1848, and California sought admission to the Union in 1849, the question again arose concerning the slave status of the new areas. The Compromise of 1850 provided that California be admitted as a free state and that the citizens of the new territories of New Mexico and Utah decide whether their states favored or opposed slavery, pursuant to the doctrine of popular sovereignty.

In 1854, the Kansas and Nebraska territories were the next areas subjected to a dispute over slavery. Senator **STEPHEN A. DOUGLAS** of Illinois drafted a bill calling for the creation of two states, Kansas and Nebraska, areas he felt were vital to the construction of a railroad to the Pacific coast. The question of slavery in these states would be decided by popular sovereignty. The reasons for Douglas's excessive concern are speculative but include his support of western expansion and his belief that the popular sovereignty doctrine would cause the least dispute; his hope that his business interests would profit by the construction of a transcontinental railroad with a Chicago terminus and a route through the new territories; and his desire to gain favor in the South to garner support for his future presidential aspirations.

In order for the Kansas-Nebraska Act to be effective, it was necessary to repeal the Missouri Compromise and its boundary restrictions on the territorial extension of slavery. The new act was opposed by antislavery forces and subject to bitter dispute in Congress. President **FRANKLIN PIERCE** and a faction of Southern congressmen supported the bill and influenced its passage.

The provisions of the Kansas-Nebraska Act did not lead to the peaceful settlement of the issue as intended. In Kansas, the antislavery and proslavery proponents disagreed violently, undermining the effectiveness of the popular sovereignty doctrine. Two opposing governments were established, and acts of destruction and violence ensued, including an assault on the antislavery town of Lawrence. In retaliation, abolitionist **JOHN BROWN** and his followers killed five settlers who advocated slavery. The phrase *Bleeding Kansas* was derived from this violence.

The Lecompton Constitution of 1857 was drafted based upon the results of a Kansas elec-

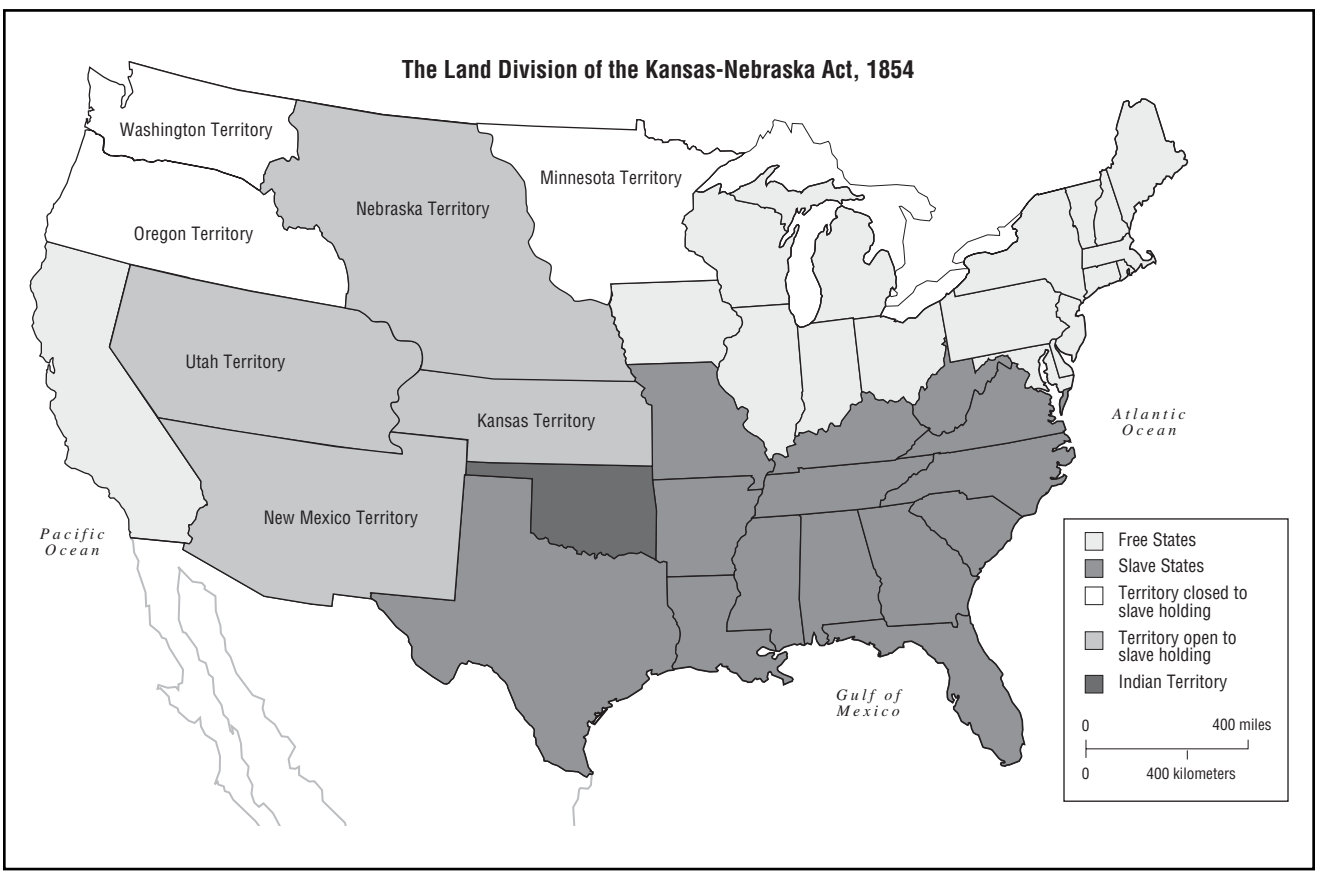


*Map of the continental United States labelled The Land Division of the Kansas-Nebraska Act, 1854.*

ILLUSTRATION BY CHRISTINE O'BRYAN. GALE GROUP

tion that offered the voters the choice of limited or unlimited slavery. This angered the abolitionists, who refused to vote. President JAMES BUCHANAN approved the Lecompton Constitution and encouraged its acceptance by Congress, but Douglas and his supporters vehemently opposed the admission of Kansas as a slave state. Another election was held in 1858, and the people of Kansas voted against the Lecompton document; three years later, Kansas entered the Union as a free state.

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## ♦ KANT, IMMANUEL

Immanuel Kant shook the foundations of Western philosophy in the late eighteenth and early nineteenth centuries. This author and professor did his most important writing between 1781 and 1790 while working at the University of Königsberg, where he spent most of his life. Kant's philosophical model not only swept aside the ideas of the so-called empiricists and rationalists who came before him, it also had a lasting effect outside of philosophy, especially in the areas of ethics and the law. Today, legal scholars still debate his ideas—and their sometimes startling implications—in relation to contemporary issues.

Kant was born into a lower-middle-class family in East Prussia in 1724. A gifted student, he studied in a Latin school from age eight until age sixteen, when he entered the University of Königsberg to take up theology, natural science, and philosophy. The death of his father forced him to abandon his studies in order to work as a private tutor, and he had to wait several years before returning to complete his education. By that time he was already writing serious books. From what is called Kant's precritical period, these early works are primarily scientific. In recognition of his talents, the university made him a lecturer and eventually a professor. He taught logic and metaphysics.

Twenty years later Kant attacked the reigning schools of thought. In this so-called critical period, he wrote his most famous book, *The Critique of Pure Reason* (1781). Kant's work examined the relation of experience and perception: he was concerned with how people know what they know, and just as important, the proper uses of the powers of reasoning. He argued that reality can be perceived only to the extent that it complies with the aptitude of the mind that is doing the perceiving. This places one kind of

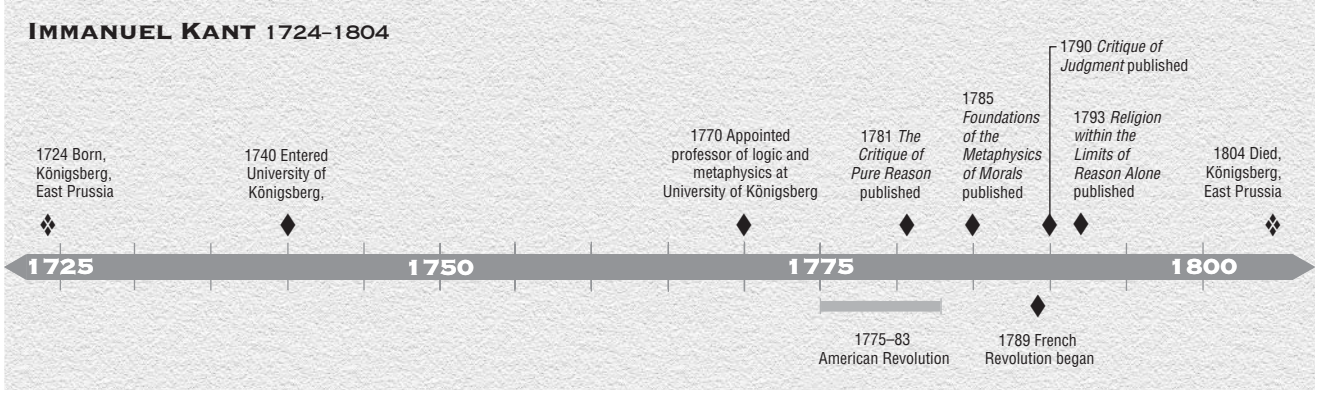

limitation on what can be known. Kant saw another limitation, too: only phenomena—things that can be experienced—are capable of being understood; everything else is unknown. The human senses, therefore, take supreme precedence in determining what is real.

These theories have implications for conventional morality. Kant viewed God, freedom, and immortality as incomprehensible: they can only be contemplated; their existence can never be proved. Nonetheless, he argued, all three of them are important as the basis for morality. Kant believed that reason is insufficient to justify moral behavior. The justification for behaving morally has to come from people's sense of duty, which he called the categorical imperative.

Kant continued to develop his philosophy in subsequent books including *Critique of Judgment* (1790) and *Religion within the Limits of Reasons Alone* (1793). The latter enraged the government, resulting in its CENSORSHIP and an official order to Kant to write no more books about religion.

"THE GREATEST PROBLEM FOR THE HUMAN SPECIES, THE SOLUTION OF WHICH NATURE COMPELS HIM TO SEEK, IS THAT OF ATTAINING A CIVIL SOCIETY WHICH CAN ADMINISTER JUSTICE UNIVERSALLY."
—IMMANUEL KANT

Philosophers have studied Kant's work for over two centuries, but legal thinkers outside of Europe have only widely treated it in recent years. In the late twentieth century, when many U.S. scholars of law turned to interdisciplinary studies that involved the fields of economics and textual analysis, Kant provided another model for argument. Kant's ideas cover the foundation of law while specifically addressing property, contracts, and criminal punishment. Kant proposed that punishment should be meted out strictly without exception—because of society's duty to seek retribution. "[I]f justice goes," Kant wrote in 1797, "there is no longer any value in men's living on the earth."

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## ♦ KATZENBACH, NICHOLAS DEBELLEVILLE

Nicholas deBelleville Katzenbach served as U.S. attorney general from 1965 to 1966, during the administration of President LYNDON B. JOHNSON. A distinguished lawyer and law professor before joining the JUSTICE DEPARTMENT in 1961, Katzenbach played a key role in federal efforts to end racial SEGREGATION in the South.

Katzenbach was born January 17, 1922, in Philadelphia and was raised in New Jersey. His father, Edward L. Katzenbach, was a lawyer who served as attorney general of New Jersey and ran unsuccessfully for governor of New Jersey. Katzenbach graduated from a private high school and in 1941 enlisted in the Army Air Force. During WORLD WAR II, his bomber was shot down over north Africa, and he became a prisoner of war. He read so many books while a prisoner that following his repatriation in 1944, Princeton University allowed him to graduate two years early. After graduating in 1945, he earned a law degree at Yale Law School. In 1947, Katzenbach was a Rhodes scholar at Oxford University in England.

Katzenbach returned to the United States in 1949 and was admitted to the New Jersey bar in 1950. He was briefly an associate in his father's law firm before becoming in 1950 an attorney-adviser in the Office of General Counsel to the Secretary of the Air Force. During this period, Katzenbach first became acquainted with Johnson, then a senator from Texas. In 1952, Katzenbach left Washington, D.C., to teach law at Yale. In 1956, he moved to the University of Chicago Law School as a professor of law.

Attorney General ROBERT F. KENNEDY appointed Katzenbach as assistant attorney general of the Office of Legal Counsel in 1961 and promoted him to deputy attorney general in 1962. Katzenbach soon became a national figure, playing a prominent role in federal desegregation efforts in the South. In October 1962, JAMES H. MEREDITH, an African–American,

attempted to register for classes at the all-white University of Mississippi, in Oxford. Governor Ross Barnett pledged defiance of a federal court order mandating that Meredith be allowed to register. Katzenbach went to Oxford and directed U.S. MARSHALS to protect Meredith as he registered. Riots erupted, and before federal troops arrived to restore order, Katzenbach ordered the marshals to fire tear gas into the unruly crowds.

In 1963, Alabama Governor GEORGE WALLACE pledged to resist the INTEGRATION of the University of Alabama. Wallace confronted Katzenbach at the university and refused to allow him to register James Hood and Vivian Malone. The nationally televised scene was a symbolic last stand for Wallace and other advocates of racial segregation. Once President JOHN F. KENNEDY ordered that state troops were to come under federal control to enforce the court order, Wallace ended his defiance.

Following the assassination of John F. Kennedy, President Johnson announced his determination to pass a strong CIVIL RIGHTS ACT that would end RACIAL DISCRIMINATION in employment, education, and other spheres of life. Katzenbach was Johnson's congressional liaison, working with Senator HUBERT H. HUMPHREY (D-Minn.) and Senate minority leader Everett M. Dirksen (R-Ill.) to achieve a compromise that would ensure the act's final passage. The result was the landmark Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000a et seq.). The following year, Katzenbach drafted the VOTING RIGHTS ACT OF 1965 (42 U.S.C.A. §§ 1973 et seq.), which prohibits states from imposing voting qualifications based on race, color, or membership in a language minority group. This legislation changed the South, as thousands of African–Americans were allowed to register to vote for the first time.

President Johnson appointed Katzenbach as attorney general in February 1965. Katzenbach continued his work on CIVIL RIGHTS legislation and enforcement. In October 1966, Johnson, who was increasingly preoccupied with the growing U.S. involvement in Vietnam, named Katzenbach as undersecretary of state. In that position, Katzenbach became an administration spokesperson for Johnson's Vietnam policies, defending them before Congress on a regular basis.

Katzenbach left government at the end of the Johnson administration, in January 1969, and joined International Business Machines (IBM), a large manufacturer that dominated the U.S. computer market. The Department of Justice had filed an antitrust lawsuit against IBM, and Katzenbach was brought into the corporation to lead the fight against it. For the next 13 years, Katzenbach and a host of attorneys fought the lawsuit, which ultimately was dismissed.

In 1986, Katzenbach left IBM and returned to the PRACTICE OF LAW in Morristown, New Jersey. Katzenbach has remained active in matters relating to law and politics. In the 1990s, Katzenbach and former attorney general RICHARD THORNBURGH advocated for the release of Chinese dissidents Wei Jingsheng and Wang Dan. He was a witness in the IMPEACHMENT trial of President BILL CLINTON in 1998. In 2000, Katzenbach filed an amicus brief supporting Microsoft in its defense of an antitrust lawsuit brought by the Department of Justice. In

"I OBJECT TO SAYING WE ARE AT WAR HERE [IN VIETNAM], ALTHOUGH I REALIZE IN THE POPULAR SENSE THAT MAKES ME PERHAPS LOOK FOOLISH."
—NICHOLAS KATZENBACH

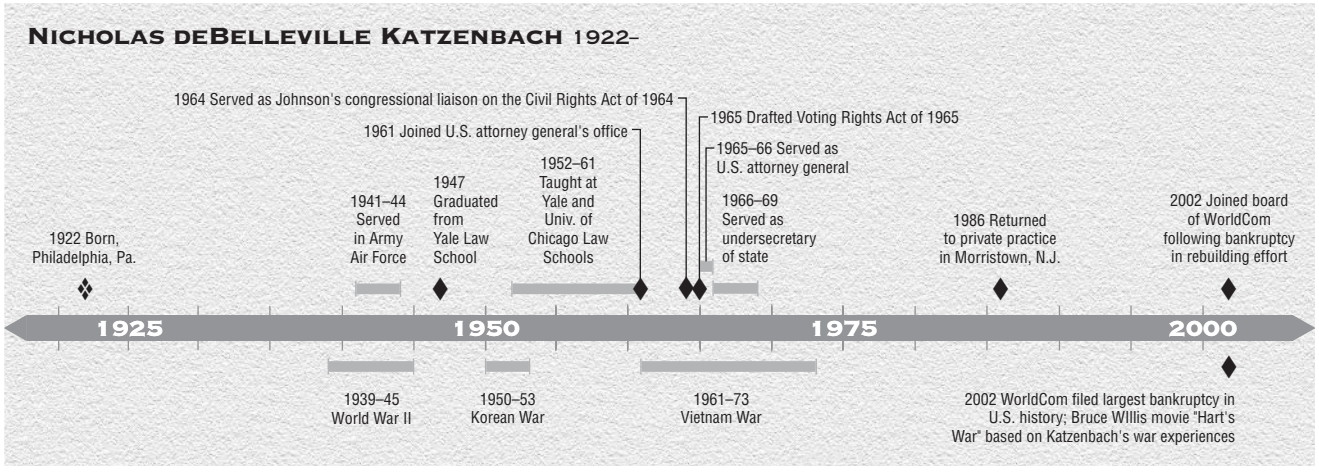

2002, Katzenbach was named to the board of directors and to a special investigative committee of TELECOMMUNICATIONS giant WorldCom, which was reorganizing after filing for Chapter 11 BANKRUPTCY.

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## ♦ KEARSE, AMALYA LYLE

Amalya Lyle Kearse is a judge with the U.S. Court of Appeals for the Second Circuit.

"THE VERY FACT THAT A PERSON IS IN HIS OWN HOME RAISES A REASONABLE INFERENCE THAT HE INTENDS TO HAVE PRIVACY, AND IF THAT INFERENCE IS BORNE OUT BY HIS ACTIONS, SOCIETY IS PREPARED TO RESPECT HIS PRIVACY."
—AMALYA LYLE KEARSE

Kearse was born June 11, 1937, in Vauxhall, New Jersey. Her parents encouraged Kearse to develop her considerable intellectual skills. Her father, the postmaster in her hometown, wanted to become a lawyer, but the Depression prevented him from pursuing his dream. Her mother was a medical doctor who later became an administrator in an antipoverty program. Kearse attended Wellesley College, where she earned her bachelor's degree in philosophy in 1959. "I can trace [the decision to become a litigator] back to a course in INTERNATIONAL LAW at Wellesley," she said. "There was a MOOT COURT, and I found that very enjoyable." Kearse then enrolled at the University of Michigan Law School, and she graduated cum laude in 1962.

Kearse began her legal career with the Wall Street firm of Hughes, Hubbard, and Reed. After seven years of distinguished and diligent work, she was named a partner, becoming the first black female partner in a major Wall Street firm. Her colleagues have praised her for her incisive analytical skills. When asked about Kearse's qualifications, a senior partner at the Hughes, Hubbard firm said, "She became a partner here not because she is a woman, not because she is a black, but because she is just so damned good—no question about it."

Kearse's outstanding talents eventually came to the attention of President JIMMY CARTER, who named her to the U.S. Court of Appeals for the Second Circuit in 1979. She is the first black woman to serve on that court. During her tenure, she has decided many influential cases. In 1980, she wrote the majority opinion in *United States v. Taborda,* 635 F.2d 131 (2d Cir. 1980), a case that concluded that the use of a high-powered telescope to observe drug activity inside an apartment without a warrant constituted an unreasonable search and violated the FOURTH AMENDMENT. In other cases, she joined the majority in upholding a New York state ban on SCHOOL PRAYERS (*Brandon v. Board of Education of Guilderland Central School District,* 635 F.2d 971 [2d Cir. 1980]) and helped overturn a lower court's ruling that Vietnam veterans could sue the manufacturers of Agent Orange for alleged damage (*In re "Agent Orange" Product Liability Litigation,* 635 F.2d 987 [2d Cir. 1980]).

Kearse's name has been on the list of potential nominees to fill vacancies on the U.S. Supreme Court. In 1991, she was considered for the vacancy created by the retirement of Justice THURGOOD MARSHALL. After President GEORGE H. W. BUSH's controversial nomination of CLARENCE THOMAS, who was eventually confirmed notwithstanding allegations that he had sexually harassed a former coworker, an opinion article in the *New York Times* urged Bush to

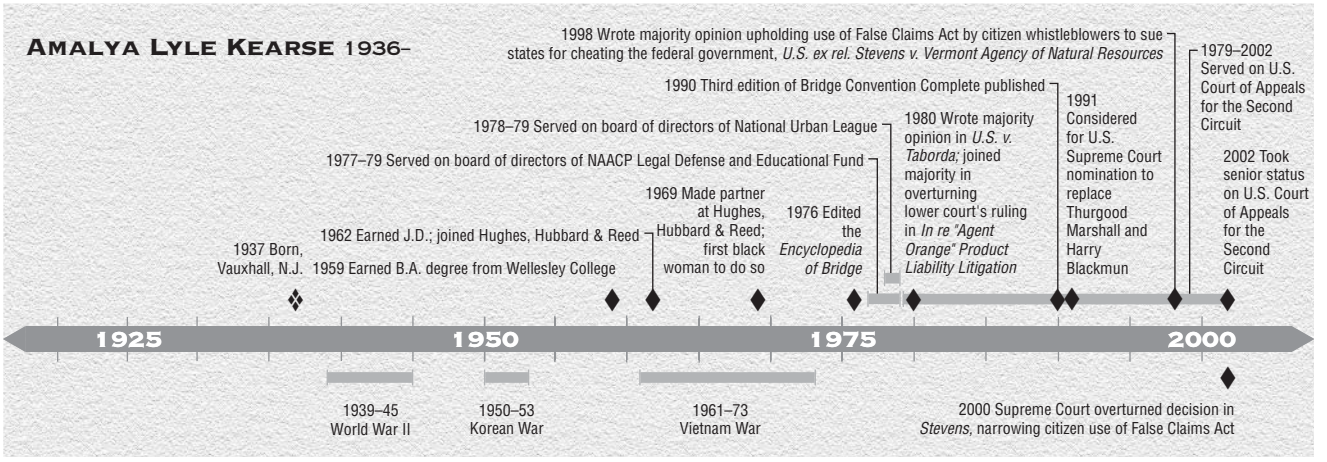

nominate Kearse in Thomas's place. The article noted that, because of her years of distinguished service on the court of appeals, Kearse is "among the four or five persons most qualified for the High Court." The article concluded that "what is needed is an appointment that can unify the country in the assurance that the next Supreme Court nominee is a person of unquestioned excellence. Judge Kearse is that person" (*New York Times,* October 10, 1991). Kearse was considered for the Supreme Court again in 1994 when President BILL CLINTON was evaluating possible replacements for retiring justice HARRY A. BLACKMUN. Earlier, in 1992, Clinton had considered her for the post of attorney general.

Kearse is a top-rated bridge player who has written several books about the game. She is a member of the American Law Institute and a fellow in the American College of Trial Lawyers. She has been an adjunct lecturer at New York University Law School, a member of the Executive Committee of the Lawyers' Committee for Civil Rights under Law, and a member of the President's Commission for Selection of Judges. She has also served on the boards of the NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE'S LEGAL DEFENSE AND EDUCATION FUND and the NATIONAL URBAN LEAGUE. Kearse has received many awards and honors, including the ORDER OF THE COIF and the Jason L. Honigman Award for outstanding contribution to a law review editorial board.

In 1999, Kearse wrote the majority opinion in a false claims case where a former Vermont Agency of Natural Resources attorney alleged that the agency had submitted false claims in regard to several grant programs. The court found that the ELEVENTH AMENDMENT did not bar the suit. The United States Supreme Court issued a 7–2 decision in the case, *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765 (2000), holding that private individuals have standing to bring so-called "whistle-blower" suits in federal court, but that states cannot be included in the definition of "persons" who can be sued under the law. The Court did not explicitly decide whether the 11th Amendment protects states from being sued under the law.

In 2001, one of Kearse's former law clerks, Miguel Estrada, became the center of a political battle in the United States Senate when he was nominated by President GEORGE W. BUSH for a seat on the U.S. Circuit Court of Appeals for the District of Columbia.

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## KEFAUVER INVESTIGATION AND KNAPP COMMISSION

The pervasive reach of ORGANIZED CRIME in the United States has made it a target of investigations and legal action since the nineteenth century. Two of the most noteworthy attacks were the Kefauver investigation in the 1950s and the Knapp Commission hearings in the 1970s. Both investigations brought a new focus to this fight; the Kefauver hearings gave it national prominence, and the Knapp hearings underscored what can happen when corrupt law enforcement officials ignore the criminal element.

Estes Kefauver, a U.S. senator from Tennessee, introduced Senate Resolution 202 in January 1950, which called for a national investigation of organized crime. The rapid growth of crime syndicates in major cities across the United States meant an increase in illegal gambling, drug trafficking, EXTORTION, and prostitution. Many of the syndicate leaders had set up legitimate business fronts to hide their illegal operations. Kefauver believed that the syndicates had grown so strong that local law enforcement was unable to exert any control.

In May 1950 Kefauver and four other senators were named to a Special Committee to Investigate Organized Crime in Interstate Commerce. Because the committee's focus was interstate commerce, the hearings were held across the United States—14 cities in 15 months. Suspected and known organized crime leaders in these cities were interrogated by the five senators, which generated local interest. In Detroit, a local television station broadcast part of the hearings in that city. The Kefauver committee voiced disapproval of legalized gambling operations in Nevada and that disapproval was credited in part for helping defeat legalized gambling proposals on the ballot in Arizona, California, Massachusetts, and Montana.

When the Kefauver committee began hearings in New York City on March 12, 1951, a local station provided live broadcast feed to the major networks. The hearings were televised in 20

*New York City firemen watch William O'Dwyer, the city's former mayor, testify before the Kefauver Senate Crime Investigating Committee. These first major televised Senate hearings had an audience of 30 million.*

BETTMANN/CORBIS

cities, ultimately generating an audience of 30 million. The Kefauver investigation marked the first time a major Senate hearing had been covered on national television, and it made a strong impression on the public. One of the most dramatic broadcasts was the testimony of syndicate leader Frank Costello. Costello, arguably the most important organized crime figure in the United States, did not want his face shown on television. The broadcasters complied and showed his hands instead. Costello's nervous hand movements were ultimately much more telling to viewers than his facial expressions would have been. While the hearings did not eliminate organized crime, they did weaken its hold; a number of syndicate figures were ultimately prosecuted by state and local authorities, many of whom were convicted and sentenced to prison.

Because many of the organized crime syndicates had ties to local Democratic politicians, many Democrats wanted Kefauver (himself a Democrat) to conduct a less ambitious investigation. Kefauver refused, and many well-known Democrats (including Senate majority leader Scott Lucas) were defeated in their bids for reelection during and even after the hearings had ended. Television made Kefauver a popular and easily recognizable figure, and he ran (albeit unsuccessfully) for president in 1952 and 1956.

Meanwhile, organized crime continued to flourish through the 1950s and into the 1960s. Part of the organized crime establishment in New York was thought to be bribing members of the city's police force, and in April 1970 the *New York Times* ran an article that alleged **POLICE CORRUPTION** was widespread among the officers. According to the article, members of the force were accepting bribes from gamblers and illegal drug dealers and extorting money from local businesses. Almost immediately, New York mayor John V. Lindsay organized a five-member Commission to Investigate Alleged Police Corruption. Whitman Knapp, a federal judge, came on board to replace a departing member, and he became the group's chairman. It soon became known as the Knapp Commission.

The Knapp Commission took testimony from numerous police officers and civilians and discovered that there was systematic corruption throughout the force. The bribes, kickbacks, and extortion reported in the *New York Times* was

indeed widespread and went through the ranks. Although clearly not all police officers were corrupt, some of those who were not nonetheless knew corruption was going on but chose not to do anything about it. The testimony of Detective Frank Serpico in particular drew considerable attention both inside and outside the police department. Serpico, who had been a member of the police force since 1960, had reported incidences of corruption to his commanding officers on numerous occasions, but no one had acted on them. He told the Knapp Commission that he had even met with key city officials, who also ignored his reports of corruption. It was Serpico and a fellow officer, David Durk, who had provided the *Times* with the information that led to its April 1970 story.

Serpico, who would later become the subject of a book and a motion picture, was ostracized by the police department because he was considered a "rat." Others believed that his charges were more a means of seeking publicity than exposing police corruption. Nevertheless, it was clear by the time the Knapp Commission made its final report that there were serious problems in the New York Police Department. Knapp blamed not only the police hierarchy but also the administration of Mayor Lindsay. Although Lindsay himself was never blamed for corruption, key officials in his administration who had the power to step in had done nothing.

Police Commissioner Frank Leary stepped down and was replaced by Patrick Murphy, who brought major reforms into the department. He made supervisors and inspectors more accountable for their officers, and he implemented preventive measures to ensure that corruption could be thwarted before it was allowed to take hold. Murphy, who stepped down in 1973, was credited with turning the police department around, improving morale among the officers, and regaining the public's trust in the police.

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Congress of the United States; Organized Crime; Police Corruption and Misconduct.

## KELLOGG-BRIAND PACT

The Kellogg-Briand Pact, also known as the Pact of Paris, was a treaty that attempted to outlaw war (46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57). The treaty was drafted by France and the United States, and on August 27, 1928, was signed by fifteen nations. By 1933 sixty-five nations had pledged to observe its provisions.

Kellogg-Briand contained no sanctions against countries that might breach its provisions. Instead, the treaty was based on the hope that diplomacy and the weight of world opinion would be powerful enough to prevent nations from resorting to the use of force. This soon proved to be a false hope; though Germany, Italy, and Japan were all signatories, the treaty did not prevent them from committing aggressions that led to WORLD WAR II.

The origin of the Kellogg-Briand Pact was a message that the French foreign minister, Aristide Briand, addressed to the citizens of the United States on April 6, 1927, the tenth anniversary of the United States' entrance into WORLD WAR I. In this message Briand announced France's willingness to join the United States in an agreement mutually outlawing war. Such an agreement, Briand stated, would "greatly contribute in the eyes of the world to enlarge and fortify the foundation on which the international policy of peace is being erected." Briand's overture to the United States was part of a larger campaign that France was waging to form strategic alliances that would improve its national security. In addition, Briand was influenced by recent conversations with Nicholas Murray Butler and James Thomson Shotwell, U.S. academics who were leaders in the burgeoning U.S. political movement to outlaw war, also known as the outlawry movement.

Initially, Briand's offer generated little reaction in the United States. The U.S. STATE DEPARTMENT made no response, apparently considering Briand's statement to be simply an expression of friendship. Not until certain leaders in the peace movement, notably Butler, began to generate widespread public support for Briand's proposal did the government become involved. But by the middle of June 1927, France and the United States had begun diplomatic

conversations aimed at reaching the sort of agreement Briand had proposed in his address.

On June 20 the State Department received the Draft Pact of Perpetual Friendship between France and the United States, written by Briand and transmitted through the U.S. ambassador in Paris. The draft contained just two articles: the first declared that France and the United States renounced war "as an instrument of their national policy towards each other," and the second declared that all conflicts between the two nations would be settled only by "pacific means." Secretary of State FRANK B. KELLOGG and other officials in the U.S. State Department were uncomfortable about entering into such an agreement with France alone, fearing that it would amount to an indirect alliance that would deprive the United States of the freedom to act if France were to go to war with another country. Instead, U.S. officials preferred to expand the agreement into a multilateral treaty involving all the world powers except Russia. On December 28, therefore, Kellogg told Briand that the United States was prepared to enter into negotiations with France to construct a treaty that would condemn war and renounce it as an instrument of national policy; when concluded, the treaty would be open to signature by all nations.

France accepted the United States' offer, and treaty negotiations began in January 1928. By early April the four other Great Powers—Germany, Great Britain, Italy, and Japan—were invited to enter the discussions. Soon after, the invitation was extended to Belgium; Czechoslovakia; Poland; India; and the five British dominions, Australia, Canada, Irish Free State, New Zealand, and South Africa. Several of the parties wanted specific conditions and reservations included in the treaty. These issues were resolved, and on August 27, 1928, diplomats from the fifteen countries met in Paris to sign the treaty. By 1933 fifty additional countries had agreed to observe the treaty's provisions.

The final text of the Kellogg-Briand Pact, like the original draft, was extremely simple and contained just two principal articles. The first stated that the contracting parties "condemn[ed] recourse to war for the solution of international controversies, and renounce[d] it as an instrument of national policy in their relations with one another." In the second the parties agreed that "the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise between them, shall never be sought except by pacific means." The treaty therefore outlawed war entirely, providing no exceptions to this general prohibition. The parties, however, generally recognized that war would be permissible in the case of SELF-DEFENSE; several signatories, including the United States, had submitted diplomatic notes prior to the treaty's ratification indicating their understanding that wars entered into in self-defense would be lawful.

When it was signed, the Kellogg-Briand Pact was considered a tremendous milestone in the effort to advance the cause of international peace. In 1929 Kellogg received the Nobel Peace Prize for his work on the treaty. Events soon showed, however, that the pact did not prevent or limit war between the nations. The primary problem was that the treaty provided for no means of enforcement or sanctions against parties who violated its provisions. In addition, it did not address the issues of what constituted self-defense and when self-defense could lawfully be claimed. Because of these large loopholes, the Kellogg-Briand Pact was ultimately an ineffective method for achieving the ambitious and idealistic goal of outlawing war.

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## ♦ KELLOGG, FRANK BILLINGS

Frank Billings Kellogg was born December 22, 1856, in Potsdam, New York. He moved to Minnesota at age nine, received an education in law, and was admitted to the bar in 1877. Kellogg subsequently received numerous doctor of laws degrees from various institutions, including McGill University, Montreal, 1913; New York University, 1927; Harvard, 1929; Brown University, 1930; and Occidental University, 1931. He also received two doctor of CIVIL LAW degrees in 1929, from Trinity College in Connecticut and Oxford University.

After his ADMISSION TO THE BAR, Kellogg performed the duties of city and county attor-

*Frank B. Kellogg.* LIBRARY OF CONGRESS

ney for St. Paul, Minnesota, and established a legal practice, specializing in corporation law. His expertise earned him the position of special counsel for the United States, and he participated in the case against the General Paper and Standard Oil trusts (*United States v. Standard Oil Co.*, 212 U.S. 579, 29 S.Ct. 689, 53 L.Ed. 259 [1909]). He served as special counsel of the INTERSTATE COMMERCE COMMISSION to probe into the speculative dealings concerning the Harriman railroads.

Kellogg began a phase of government and diplomatic service in 1917, when he became U.S. Senator from Minnesota for a six-year term. He followed this with a one-year appointment as minister to Great Britain. From 1925 to 1929, he performed the duties of SECRETARY OF STATE and negotiated treaties.

In 1928, Kellogg achieved international acclaim for his collaboration with Aristide Briand in the formulation of the KELLOGG-BRIAND PACT, which denounced war as a solution to international disagreements. The pact was subsequently ratified by sixty-three nations. In 1929, the Nobel Peace Prize was bestowed upon Kellogg for his contribution to world peace.

During the latter part of his life, Kellogg acted as judge of the Permanent Court of International Justice. He died December 21, 1937, in St. Paul, Minnesota.

"THERE ARE ONLY TWO MEANS OF ENFORCING A TREATY. ONE IS BY WAR, THE OTHER IS BY THE OVERPOWERING STRENGTH OF PUBLIC OPINION."
—FRANK KELLOGG

CROSS-REFERENCES

Kellogg-Briand Pact.

## ◆ KELLY, SHARON PRATT DIXON

From 1991 to 1994, the difficult job of running Washington, D.C., belonged to Mayor Sharon Pratt Dixon Kelly, a successful utilities attorney who had had no previous experience in city government. Kelly was voted mayor in the wake of Marion Barry's fall from political grace. During her uphill campaign, Kelly portrayed herself as a squeaky-clean political outsider, even though she had strong connections to the national DEMOCRATIC PARTY. Kelly, a middle-class African American who was born and raised in the District of Columbia, promised to reduce crime, cut the city's bloated budget, and clean up corrupt government. Although she was turned out of office after just one term, Kelly earned herself a permanent place in history by becoming the first female mayor of the nation's capital.

Kelly was born January 30, 1944, in Washington, D.C. She was the first child of Mildred

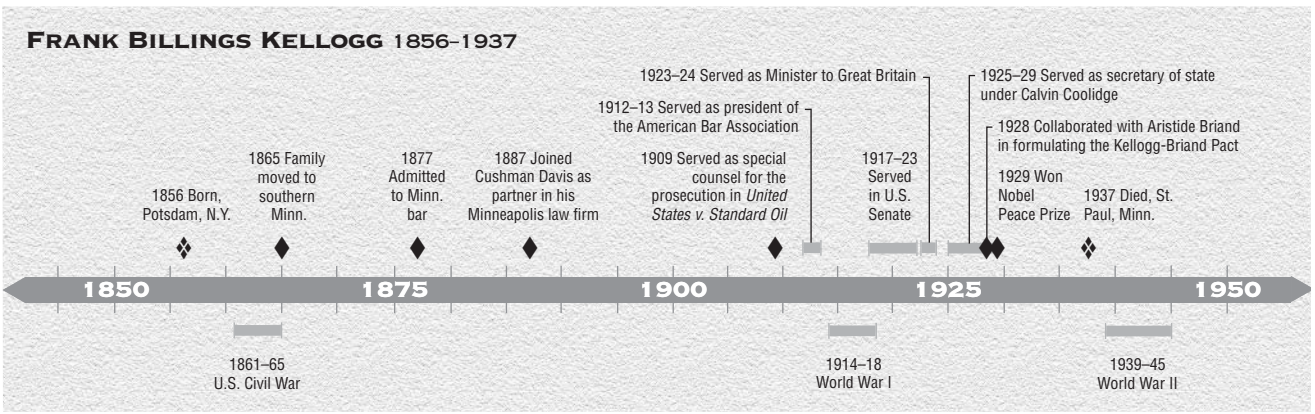

*Sharon Pratt Dixon Kelly.*
MARVIN JONES

"DIVISIVENESS HAS NO PLACE IN OUR POLITICS . . . SPITEFULNESS AND HATRED ONLY ERODE THAT WHICH IS TRULY MAGNIFICENT ABOUT OUR COUNTRY."
—SHARON PRATT DIXON KELLY

Petticord Pratt, who died of cancer when Kelly was just four years old, and Carlisle E. Pratt, who was a lawyer and superior court judge. Family expectations were high for Kelly, whose father gave her a copy of *Black's Law Dictionary* as a birthday gift when she was very young. Kelly did not disappoint her father, graduating from Howard University with a bachelor's degree in political science in 1965 and a law degree in 1968. While in college, Kelly met her first husband, Arrington Dixon, who later became a member of the Washington, D.C., City Council. The couple married in 1967, had two daughters, and divorced in 1982. In 1991, Kelly married entrepreneur James Kelly III. Although she had won the mayoral race as Sharon Pratt Dixon, she changed her last name to Kelly shortly after her 1991 wedding.

Kelly began her legal career as an attorney in her father's law firm. She also taught courses at Antioch School of Law, before joining the Potomac Electric Power Company (PEPCO) as associate counsel in 1976. Kelly eventually became the first African–American woman to be named vice president at PEPCO. As a decisive, hardworking executive, Kelly was involved in LOBBYING, policy making, and regulatory matters for the utility company. At the same time, she developed a strong interest in local Democratic politics. Kelly became the Democratic national committeewoman from the District of Columbia in 1977 and eventually was the first African–American woman to serve as national party treasurer.

Kelly entered politics to try to halt the social and economic deterioration of Washington, D.C. In 1989, she announced her longshot candidacy for mayor. Soon afterward, Barry's career self-destructed with his arrest and subsequent conviction for crack cocaine possession and use. After Barry had withdrawn from the race, Kelly faced three city council members, each of whom had greater name recognition. Kelly was a political unknown whose middle-class background made her suspect to residents in the poorest sections of Washington, D.C. Until then, she had been on the political sidelines, never in the spotlight. To set herself apart from her opponents, Kelly made a rather rash promise to cut Washington's murder rate, which was the highest in the nation. She also pledged to shrink the city's budget by eliminating 2,000 government jobs.

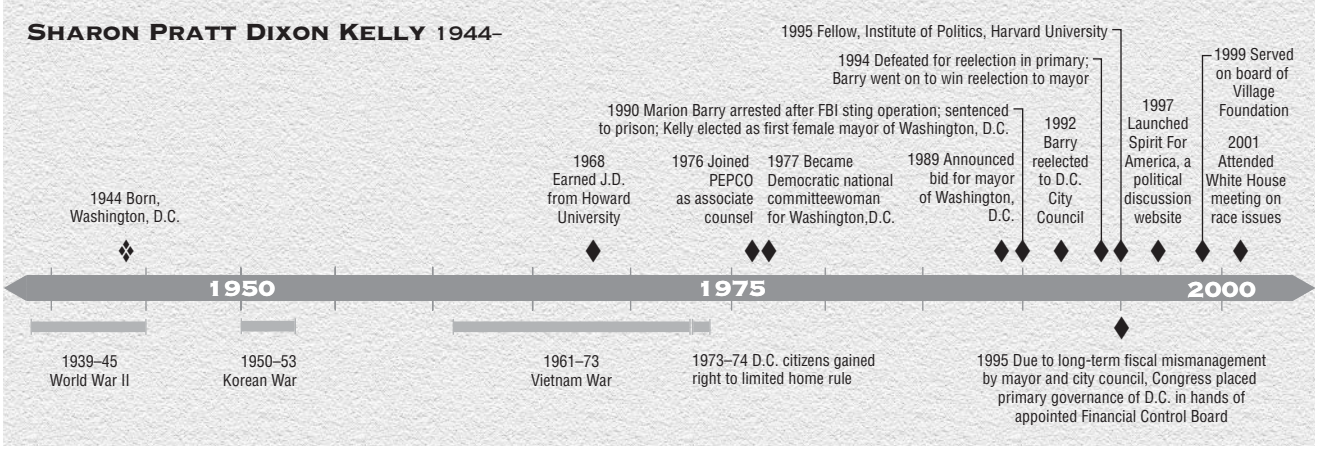

On her lapel, Kelly wore a pin shaped like a shovel, to symbolize her campaign promise to "clean house with a shovel, not a broom."

On September 11, 1990, Kelly achieved her first victory at the polls, winning the mayoral primary election by an impressive margin. In that year's general election, she handily defeated her Republican opponent, Maurice T. Turner, a former D.C. police chief. Kelly won the mayor's race with 86 percent of the vote, a new district record. Her administration's slogan became Yes We Will, a vow to overhaul city government.

During the early days of her administration, Kelly enjoyed successes. She coaxed $100 million in emergency aid from the U.S. Congress, helped to convince the owners of the Washington Redskins football team to remain in town, and handled riots in the Mount Pleasant neighborhood with considerable aplomb. But problems arose, including political squabbling with city council members and serious budget cuts from Congress. Despite her campaign pledges, Kelly still faced an appalling HOMICIDE rate and an overextended city budget. Although her call for deficit reduction was popular, government workers who were affected by proposed layoffs were openly hostile to her plans.

As Kelly's ratings in public-opinion polls plummeted, the political fortunes of former mayor Barry rose. In 1992, Barry staged a remarkable political comeback when he was elected to the D.C. City Council, shortly after his release from federal prison. Despite his well-publicized drug problem, Barry remained popular with many voters, particularly those in poor and working-class neighborhoods. Barry was credited with developing the downtown area, attracting new businesses, and focusing national attention on the capital's plight during his 12 years as mayor. He criticized Kelly, focusing on her inability to improve schools, crime rates, and public housing.

In the primary election on September 13, 1994, Kelly was handed a stunning defeat. Barry and D.C. City Council member John Ray finished in a virtual dead heat for first place in the Democratic mayoral primary. A massive voter registration drive brought new supporters into Barry's camp. As a result, many voters turned to candidate Ray as the only realistic alternative to Barry. Kelly received the unmistakable message that her brand of government did not work in the nation's capital. Voters returned Barry to the mayor's office in the November general election. Among those who were appointed to Barry's mayoral transition team was Kelly's ex-husband, businessman Arrington Dixon.

In 1998, Barry was replaced by Anthony "Tony" Williams, who, like Kelly, pledged to reform District of Columbia politics. In 2002, Williams ran for re-election and was supported by both Sharon Pratt Kelly and Marion Barry. That same year, Williams was implicated in a scandal involving the diversion of funds from the Washington Teachers Union.

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## ◆ KELSEN, HANS

Hans Kelsen was a European legal philosopher and teacher who emigrated to the United States in 1940 after leaving Nazi Germany. Kelsen is most famous for his studies on law and especially for his idea known as the pure theory of the law.

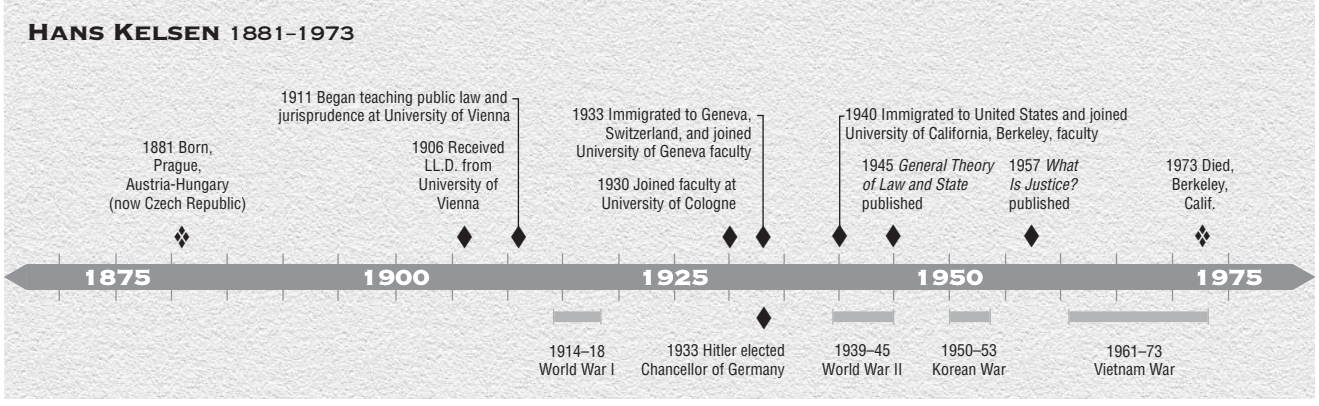

Kelsen was born in Prague, Czechoslovakia, on October 11, 1881. He studied at several universities, including Berlin, Heidelberg, and Vienna. He received a doctor of laws degree from Vienna in 1906 and began teaching at the school in 1911. He taught public law and JURISPRUDENCE at Vienna until 1930, when he moved to Germany to teach at the University of Cologne. There he taught INTERNATIONAL LAW and jurisprudence and served as dean for two years.

With the rise of the Nazi government, he left Germany and emigrated to Switzerland in 1933. He taught at the Graduate Institute of International Studies of the University of Geneva until 1940. He accepted a position as lecturer at the Harvard University Law School the same year, and relocated to the United States. Later in 1940 he accepted a teaching position at the University of California at Berkeley. He remained at Berkeley until his retirement in 1952.

Kelsen's pure theory of the law is fairly abstract. Its objective is knowledge of that which is essential to law; therefore, the theory does not deal with that which is changing and accidental, such as ideals of justice. Kelsen believed that law is a science that deals not with the actual events of the world (what is) but with norms (what ought to be). The legal relation contains the threat of a sanction from an authority in response to a certain act. The legal norm is a relation of condition and consequence: if a certain act is done, a certain consequence ought to follow.

In this theory a legal system is made of a hierarchy of norms. Each norm is derived from its superior norm. The ultimate norm from which every legal norm deduces its validity is the *Grundnorm,* the highest basic norm. The *Grundnorm* is not deduced from anything else but is assumed as an initial hypothesis. A norm is a valid legal norm only because it has been created according to a definite rule.

The theory is independent of morality. It does not matter which particular *Grundnorm* is adopted by a legal order. All that matters is that this basic norm has a minimum effectiveness: it must command a certain amount of obedience, since the effectiveness of the total legal order is necessary for the validity of its norms.

Kelsen received acclaim for authoring many publications, including *General Theory of Law and State* (1945), *The Law of the United Nations* (1950–51), *Principles of International Law* (1952), and *What Is Justice?* (1957).

He died April 20, 1973, in Berkeley, California.

## KENNEDY, ANTHONY MCLEOD

Anthony McLeod Kennedy was appointed as an associate justice of the U.S. Supreme Court in 1988. Kennedy was the third person nominated by President RONALD REAGAN to fill the vacancy created by the retirement of Justice LEWIS F. POWELL JR. As a judicial conservative, Kennedy has generally voted with the conservative justices on the Court, yet he has split from them in significant rulings on ABORTION rights and gay rights.

Kennedy was born in Sacramento, California, on July 28, 1936. He graduated from Stanford University in 1958 and from Harvard Law School in 1961. He practiced law in San Francisco and Sacramento and taught CONSTITUTIONAL LAW at the McGeorge School of Law of the University of the Pacific from 1965 to 1988.

His conservative philosophy and his REPUBLICAN PARTY affiliation led to Kennedy's first judicial appointment. In 1975, President GERALD R. FORD appointed him to the Ninth Circuit Court of Appeals. Kennedy served on the federal appeals court for thirteen years and wrote over four hundred opinions.

A well-respected jurist, Kennedy entered the national limelight after the Senate rejected President Reagan's first nominee for Powell's seat on the Court, Judge ROBERT H. BORK, and Reagan's second nominee, Judge DOUGLAS H. GINSBURG, withdrew following his admission that he had smoked marijuana. Kennedy's confirmation hearings were filled with questions that sought to compare his philosophy to Bork's. Bork had embraced the doctrine of original intent—the idea that a judge should apply the Constitution only in the exact manner intended by the Constitution's Framers—as the only legitimate means of interpretation. Kennedy testified that ORIGINAL INTENT was only a starting point in interpreting the Constitution. In his Senate testimony, Kennedy stated his commitment to the principle of STARE DECISIS. This principle refers to the respect for legal precedent created by prior cases and the need to maintain precedent even if the current judges do not agree with the original ruling.

Kennedy was confirmed in February 1988, with many liberal members of Congress feeling that he was too conservative, and some conser-

vatives believing he was moderate, a compromise candidate who could survive the confirmation process.

Since taking office as associate justice, Kennedy has proved to be both conservative and moderate, depending on the case. He has usually sided with the conservative members of the Court, but he has gained attention by departing from them in two important cases. In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), watchers had expected the Court to overrule explicitly **ROE V. WADE**, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, the 1973 decision that defined the right to choose abortion as a fundamental constitutional right. Kennedy joined with Justices **SANDRA DAY O'CONNOR** and **DAVID H. SOUTER** in an opinion that defended the reasoning of *Roe* and the line of cases that followed it.

In 1996 Kennedy wrote a landmark and controversial decision concerning gay rights. In **ROMER V. EVANS**, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855, Kennedy declared unconstitutional an amendment to the Colorado state constitution (West's C.R.S.A. Const. Art. 2, § 30b) that prohibited state and local governments from enacting any law, regulation, or policy that would, in effect, protect the **CIVIL RIGHTS** of gay men, lesbians, and bisexuals. Kennedy ruled that the amendment violated the **EQUAL PROTECTION CLAUSE** of the **FOURTEENTH AMENDMENT**, noting that the amendment classified gay men and lesbians "not to further a proper legislative end but to make them unequal to everyone else," and adding, "This Colorado cannot do."

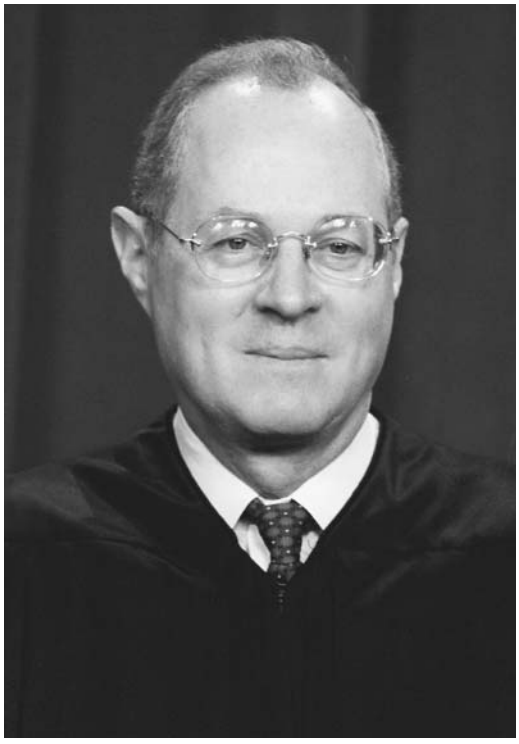

*Anthony M. Kennedy.*
AP/WIDE WORLD PHOTOS

Although considered a swing vote on closely divided court, Kennedy has authored opinions that enhance states' **POLICE POWERS**. In *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L.Ed.2d 501 (1997), Kennedy upheld a state law

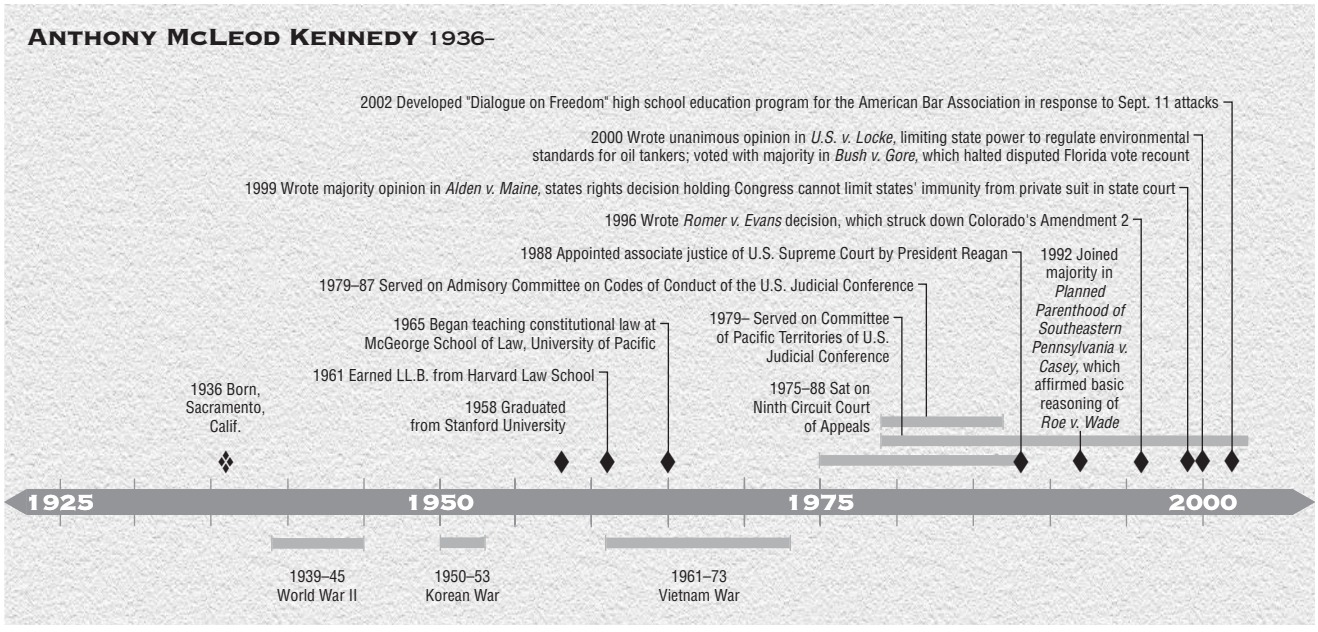

"The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit."
—Anthony M. Kennedy

that permitted the indefinite civil commitment of "sexual psychopath" prisoners who had completed their prison terms. In *McKune v. Lile*, 536 U.S. 24, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002), Kennedy concluded that that states can limit the privileges of prisoners who refuse to divulge their past crimes as part of a therapy program. In addition, he has supported the constitutionality of sex-offender registry lists, compulsory drug testing of public-school students who wish to participate in extracurricular activities, and "three strikes" mandatory-sentencing schemes. In **BUSH V. GORE**, 531 U.S. 98, 121 S. Ct. 525, 148 L.Ed.2d 388 (2000), Kennedy voted with the majority to bar Florida from conducting a recount of presidential ballots, thereby ensuring the election of **GEORGE W. BUSH**.

Some U.S. Supreme Court analysts have suggested that Kennedy might be appointed chief justice if William Rehnquist—who was 78 in 2003—chose to retire. While some argue that Kennedy is not liberal enough for liberals, or conservative enough for conservatives, others point out that the centrist views that often make him the swing vote in cases dividing the Court might make him attractive enough to survive the Senate nomination procedure without a major confirmation fight.

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"America was an idea shaped in the turbulence of revolution, then given formal structure in a constitution."
—Ted Kennedy

## ❖ KENNEDY, EDWARD MOORE

Ted Kennedy has served as a U.S. senator from Massachusetts since 1962. The brother of President **JOHN F. KENNEDY** and Senator **ROBERT F. KENNEDY**, who were both assassinated, he has championed many liberal social programs, including **NATIONAL HEALTH CARE**, and has been a major figure in the **DEMOCRATIC PARTY**. His presidential aspirations were damaged because of personal scandal.

Edward Moore "Ted" Kennedy, the youngest of nine children of Joseph P. Kennedy and Rose Fitzgerald Kennedy, was born February 22, 1932, in Brookline, Massachusetts. He started at Harvard University in 1950, then left in 1951 to serve in the U.S. Army. He returned to college in 1953 and graduated in 1956. He next attended the University of Virginia Law School, where he graduated in 1959. He married Virginia Joan Bennett in 1958. The couple had three children, Kara A., Edward M., Jr., and Patrick J. They were divorced in 1983.

In 1960, Kennedy became an assistant district attorney in Suffolk County, Massachusetts. He soon turned his eye toward politics. After his brother John was elected president in 1960 and had to resign from the U.S. Senate, Kennedy filed in the 1962 election to fill out John's term. His announcement led opponents to criticize him for trading on the Kennedy name. He was only 30 years old, the minimum age for a U.S. senator set by the U.S. Constitution, and had little experience in politics or the workplace. Nevertheless, Kennedy easily won the election. He won a full six-year term in 1964 and has been reelected five times since then.

Despite his youth, Kennedy soon emerged as a forceful advocate of social-welfare legislation and a respected member of the Senate. He was elected Senate majority whip in 1969, which was highly unusual for a person with little seniority. Kennedy appeared ready to make a presidential bid in 1972. But any hopes in that direction were dashed in the summer of 1969, when his personal conduct became a national scandal.

On July 18, 1969, Kennedy attended a party with friends and staff members on Chappaquiddick Island, Massachusetts. That evening, Kennedy drove his car off a narrow bridge on the island. Mary Jo Kopechne, a passenger in the car and former member of his brother Robert's staff, drowned. Kennedy's actions following the accident were disturbing. He did not immediately report what had happened, and he remained in seclusion for days. He pleaded guilty to the misdemeanor charge of leaving the scene of an accident. This plea, coupled with the revelation that he, a married man, had been in the company of a young, unmarried woman, devastated Kennedy's image and political standing. He lost his majority whip position in 1971 and refused to become involved in the 1972 presidential race.

During the 1970s, Kennedy concentrated his energies on his senatorial duties. He became the leading advocate of a national HEALTH CARE system that would provide coverage to every citizen without regard to income. He also argued for tax reform, ARMS CONTROL, and stronger ANTITRUST LAWS. From 1979 to 1981, he chaired the SENATE JUDICIARY COMMITTEE. He initially supported the administration of Democratic president JIMMY CARTER, but soon criticized Carter's economic policies and leadership style.

His dissatisfaction led him to seek the presidential nomination in 1980. Running against an incumbent of his own party, Kennedy drew the support of liberals and won primaries in ten states. Carter nevertheless won the nomination. However, already weakened by Kennedy's criticisms, Carter lost the general election to RONALD REAGAN.

During the administrations of Reagan and his successor, GEORGE H.W. BUSH, Kennedy became the leading liberal critic of Republican policies and politics.

Kennedy's personal life continued to attract attention in the 1990s. In March 1991, Kennedy's nephew, William Kennedy Smith, was charged with rape in Palm Beach, Florida. The alleged assault took place at the Kennedy family compound. Palm Beach police asserted that Kennedy had obstructed justice by misleading police early in their investigation. When police arrived to investigate, they were told that Kennedy and Smith had already left the area. Later investigation of travel records indicated that Kennedy probably was still in the mansion at the time. Although Smith was acquitted of the charge in December 1991, the nationally televised trial again tarnished Kennedy's reputation. In July 1992, Kennedy married Victoria Reggie, a Washington, D.C., lawyer.

*Ted Kennedy.*
LIBRARY OF CONGRESS

Kennedy has not abandoned his liberal beliefs and has remained a powerful member of the U.S. Senate. In 1996, he sponsored legislation with Republican Senator Nancy Kassebaum of Kansas that makes HEALTH INSURANCE portable, so that families do not lose their health insurance coverage if they lose or change jobs.

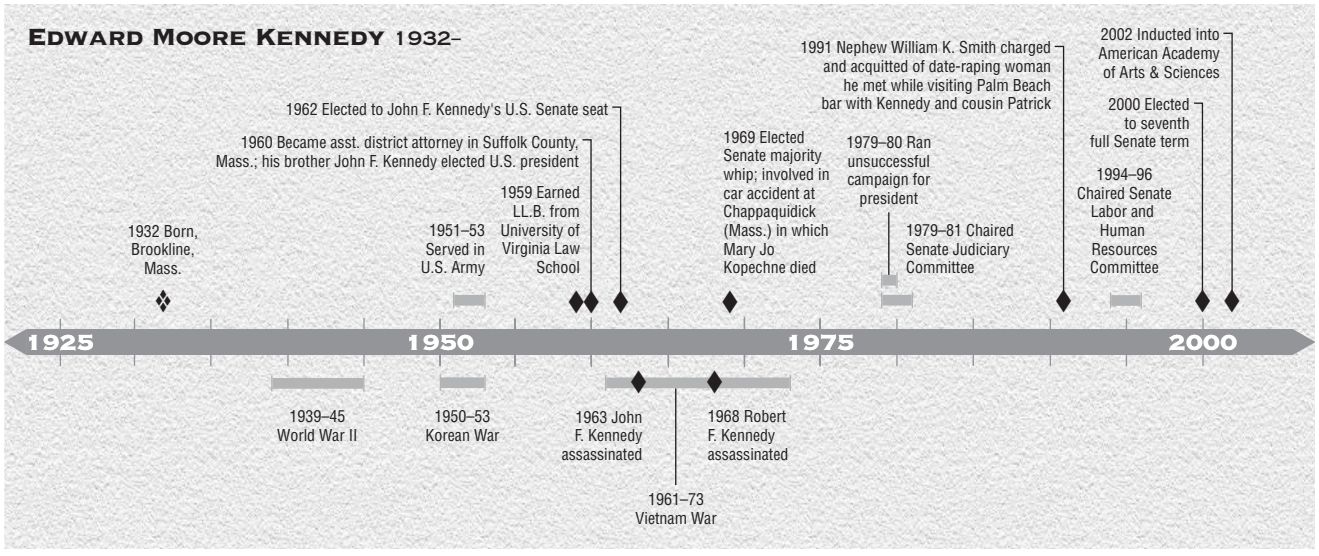

In 1999, Kennedy and his family suffered a further tragic loss when a small airplane piloted by his nephew John Kennedy, Jr. went down in the Atlantic Ocean near Martha's Vineyard, Massachusetts, killing John Kennedy, his wife, and his sister-in-law. Once again, Ted Kennedy found himself playing the role of family patriarch as he oversaw funeral arrangements and consoled family members. In the new millennium, Kennedy has continued his role as senior senator, serving as ranking member on the Health, Education, Labor and Pensions Committee. He is the senior Democrat on the Immigration Subcommittee of the Judiciary Committee and is a member of the Senate Arms Control Observer Group that is part of the Armed Services Committee.

Kennedy's persistence, collegiality, and long service have won him friends on both sides of the aisle. He continues to advocate for numerous causes including raising the MINIMUM WAGE, strengthening CIVIL RIGHTS laws and laws aimed at protecting SENIOR CITIZENS and persons with disabilities, and tightening environmental and worker-safety laws.

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## ♦ KENNEDY, JOHN FITZGERALD

John Fitzgerald Kennedy was the thirty-fifth president of the United States, serving from 1961 until his assassination in 1963. Although his administration had few legislative accomplishments, Kennedy energized the United States by projecting idealism, youth, and vigor.

Kennedy was born May 29, 1917, in Brookline, Massachusetts. His father, Joseph P. Kennedy, was a self-made millionaire and the son of a Boston politician. His mother, Rose Fitzgerald Kennedy, was the daughter of John F. ("Honey Fitz") Fitzgerald, who served as a Representative and a mayor of Boston.

Kennedy, one of nine children, graduated from Harvard University in 1940. His senior thesis, "Why England Slept," which addressed the reasons why Great Britain had been unprepared for WORLD WAR II, was published in 1940 to great acclaim. His father thought that Kennedy would become a writer or teacher, and that Kennedy's older brother, Joseph P. Kennedy, Jr., would go into politics. World War II changed those plans.

Kennedy joined the Navy in 1941 and commanded a PT boat in the Pacific Ocean. In 1943, the boat was attacked and destroyed, and Kennedy emerged a as hero, owing to his valiant efforts to save his crew. His older brother Joseph was killed in action in 1944. Kennedy's father then transferred his political goals to Kennedy.

In 1946, Kennedy was elected to the U.S. House of Representatives from the solidly Democratic Eleventh District of Massachusetts. He was re-elected in 1948 and 1950.

In 1952, he was elected to the Senate, defeating the incumbent, Republican Henry Cabot Lodge Jr. Kennedy kept a low profile at first, working on legislation that benefited Massachusetts. Back problems and other physical maladies bedeviled Kennedy during this period. He underwent two operations on his back, to alleviate chronic pain. During his convalescence, he wrote *Profiles in Courage* (1956), a series of essays on courageous stands taken by U.S. senators throughout U.S. history. It won the 1957 Pulitzer Prize for biography.

In 1956, Kennedy sought the Democratic vice presidential nomination. He made the presidential nominating speech for ADLAI STEVENSON, of Illinois, who was nominated for a second time to run against DWIGHT D. EISENHOWER. Despite a vigorous effort, Kennedy lost the vice presidential nomination to Senator Estes Kefauver, of Tennessee.

In 1957, Kennedy was appointed to the Senate Foreign Relations Committee, where he became a critic of the Eisenhower administration's foreign policy and a champion for increased aid to underdeveloped countries. He also served on the committee that investigated corruption and RACKETEERING in LABOR UNIONS and the head of the Teamsters Union, JAMES R. HOFFA.

In 1960, Kennedy won the Democratic presidential nomination. He selected Senator LYNDON B. JOHNSON, of Texas, to be his running mate. After a vigorous campaign that included television debates with Republican RICHARD M. NIXON, Kennedy won the election by fewer than 120,000 popular votes. He was the youngest American ever to be elected president, as well as the first Roman Catholic to hold the office. His

impressive inaugural speech contained the popular phrase "Ask not what your country can do for you—ask what you can do for your country."

Once in office, Kennedy drafted a series of ambitious measures that were collectively entitled the New Frontier. These policies included expanding the space program, instituting CIVIL RIGHTS legislation, aiding education, improving the tax system, and providing medical care for older citizens through the SOCIAL SECURITY program. Most of the New Frontier programs failed to progress through a Congress that was dominated by southern Democratic leadership, but many were enacted by President Johnson following Kennedy's assassination.

The Kennedy administration was enmeshed in a series of foreign crises almost immediately. In April 1961, Kennedy was severely criticized for approving an ill-fated invasion of the Bay of Pigs, in Cuba. This clandestine operation, conceived during the Eisenhower administration, was conducted by anti-Communist Cuban exiles who had been trained in the United States, and it was directed by the CENTRAL INTELLIGENCE AGENCY. The invasion achieved public notoriety when it failed and created international tension.

In June 1961, Kennedy and Premier Nikita Khrushchev, of the Soviet Union, met in Vienna to discuss ways of improving Soviet-U.S. relations. Instead of proceeding with those discussions, Khrushchev announced an increased alliance with East Germany. Later, the Berlin Wall was constructed to prohibit Western influence and to prevent persons from fleeing East Germany. In response, the United States added to its military forces in Germany.

*John F. Kennedy.*
LIBRARY OF CONGRESS

The most serious crisis occurred in October 1962, when the U.S. learned that Soviet missiles were about to be placed in Cuba. Kennedy issued a forceful statement demanding the dismantling of the missile sites and ordered a blockade to prevent the delivery of the missiles to Cuba. The world was poised for nuclear war until Khrushchev backed down and agreed to Kennedy's demands. Kennedy's handling of the crisis led to national acclaim.

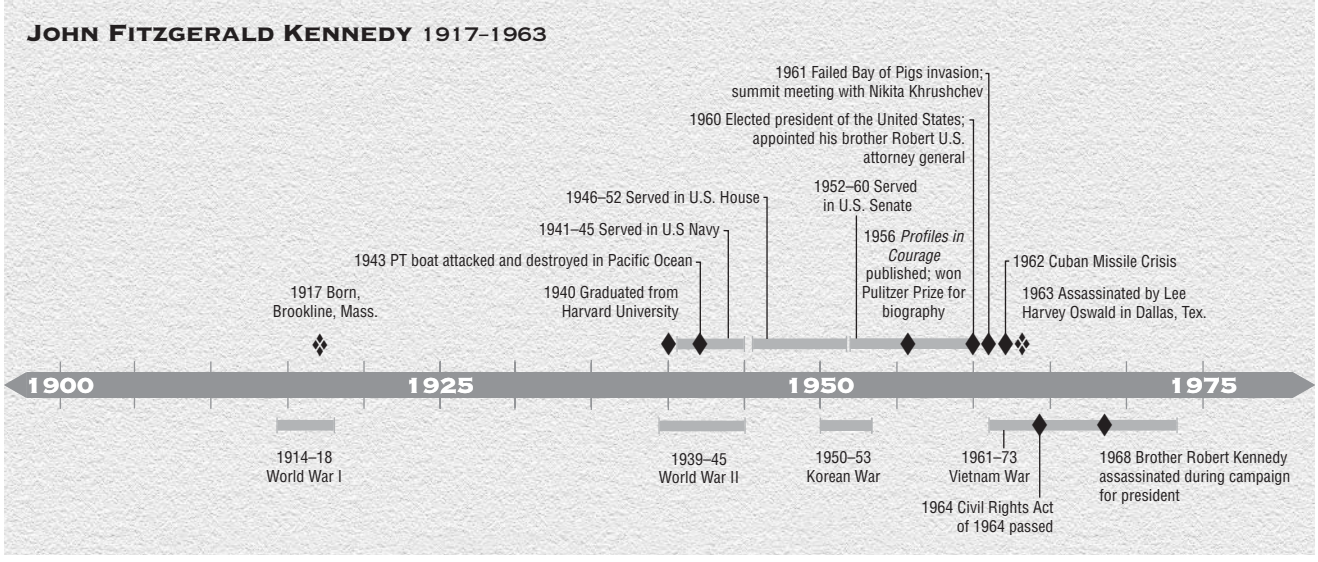

U.S. involvement in Southeast Asia began to increase during the Kennedy administration. Kennedy agreed to send U.S. advisers to help the South Vietnamese government fight Communist rebels. In 1963, the United States became involved in overthrowing the corrupt and unscrupulous South Vietnamese government of President Ngo Dinh Diem.

On the domestic front, Kennedy interacted with a newly invigorated CIVIL RIGHTS MOVEMENT that was seeking to integrate the South. In 1961, federal marshals were sent to Montgomery, Alabama, to help restore order after race riots had erupted. In 1962, Kennedy sent 3,000 federal troops into Oxford, Mississippi, to restore order after whites rioted against the University of Mississippi's admission of JAMES MEREDITH, its first African-American student. In 1963, Kennedy was forced to federalize the Alabama National Guard in order to integrate the University of Alabama. Later that year, he federalized the Guard again, in order to integrate the public schools in three Alabama cities.

"THE RIGHTS OF EVERY MAN ARE DIMINISHED WHEN THE RIGHTS OF ONE MAN ARE THREATENED."
—JOHN F. KENNEDY

Faced with these problems, Kennedy proposed legislation requiring that hotels, motels, and restaurants admit customers regardless of race. He also asked that the U.S. attorney general be given authority to file lawsuits demanding the desegregation of public schools. Most of these proposals were passed in the Civil Rights Act of 1964 (42 U.S.C.A. § 2000a et seq.).

Kennedy's achievements during his brief term as chief executive included an agreement with the Soviet Union to restrict nuclear testing to underground facilities; the creation of the Alliance for Progress, to establish economic programs to aid Latin America; and the creation of the Peace Corps program, which provides U.S. volunteers to work in underdeveloped countries.

On November 22, 1963, Kennedy's term was ended by an assassin's bullets in Dallas, and Johnson was sworn in as president. Lee Harvey Oswald was charged with the murder. Oswald was killed two days later by Dallas nightclub owner JACK RUBY, while being moved from the city jail to the county jail. Johnson appointed a commission headed by Chief Justice EARL WARREN to investigate the Kennedy assassination. In its report, issued in September 1964, the commission concluded that Oswald had acted alone in murdering Kennedy.

Kennedy's assassination has remained one of the nation's most heated controversies. Many people were initially doubtful of the report's conclusions, and the skepticism has grown over time. Thousands of articles and books have been written that challenge the commisssion's findings and allege that agencies of the federal government withheld information from the commission and that the commission itself concealed evidence that contradicted its conclusions. In 1978 and 1979, the House Select Committee on Assassinations re-examined the evidence and concluded that Kennedy "was probably assassinated as a result of a conspiracy." Nevertheless, critics charged that vital information remained withheld from the public. In an effort to restore government credibility, Congress enacted the President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C.A. § 2107, which established the Assassination Records Review Board, an independent federal agency whose mission was to identify and release as many records relating to the assassination as possible. The board completed its work in 1998, releasing thousands of documents relating to the events on, and leading to, November 22, 1963. However, no conclusive evidence has surfaced to indicate the true assassin or any other individuals who participated in the assassination.

Kennedy married Jacqueline Bouvier in 1953. They had two surviving children, Caroline and John F. Kennedy Jr. Following Kennedy's death, the activities of Jacqueline and the two children remained part of the American consciousness. In 1968, Jacqueline married wealthy Greek businessman Aristotle Onassis, who died in 1975. She worked as an editor with Doubleday until her death in 1994. John F. Kennedy Jr. emerged as a popular media figure, and in 1995 he founded the now-defunct political magazine *George.* However, like his father, the junior Kennedy died an early, tragic death when he was killed in a plane crash along with his wife and sister-in-law in 1999.

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## ♦ KENNEDY, ROBERT FRANCIS

For more than twenty-five years in public service, Robert Francis Kennedy was at the center of the most important political and legal developments of his time. The younger brother, by five years, of President JOHN F. KENNEDY, in whose cabinet he served, Bobby Kennedy held a number of roles in government: assistant counsel (1953–55) and chief counsel (1955–57) to the Senate Permanent Subcommittee on Investigations, chief counsel of the Senate Rackets Committee (1957–59), U.S. attorney general (1960–63), and finally U.S. senator from New York (1965–68). His major endeavors included probing union corruption in the 1950s and implementing White House policy on the CIVIL RIGHTS MOVEMENT in the early 1960s. He was assassinated in 1968, like his brother before him, while campaigning for the presidency.

*Robert F. Kennedy.*
LIBRARY OF CONGRESS

Born into one of the United States' most powerful political dynasties, on November 20, 1925, in Brookline, Massachusetts, Kennedy was the third son of Joseph P. Kennedy and Rose Fitzgerald Kennedy. Great things were expected of the Kennedy sons, and the means were provided: $1-million trust funds, entrance to the Ivy League, and later, leverage to see that they held government positions. Kennedy's father, a business magnate and former U.S. ambassador to Great Britain, doted on the shy, bookish, and devoutly Catholic young man. His father thought Kennedy was most like himself: tough.

Kennedy was educated at Harvard College, interrupting his studies to serve in WORLD WAR II as a Navy lieutenant, following the death of his eldest brother, Joseph Patrick Kennedy, Jr., in the war. He served aboard the destroyer *Joseph P. Kennedy* until being discharged in 1946, then returned to Harvard, where he played football and earned his bachelor of arts degree in 1948. He next traveled briefly to Palestine as a war correspondent. Marriage to Ethel Skakel followed in 1950, and a law degree from the University of Virginia in 1951. Kennedy and his wife had eleven children over the next eighteen years.

Kennedy's rapid ascent in national politics began immediately upon his admission to the Massachusetts bar in 1951. He first joined the Criminal Division of the U.S. JUSTICE DEPARTMENT as a prosecutor. The next year, he man-

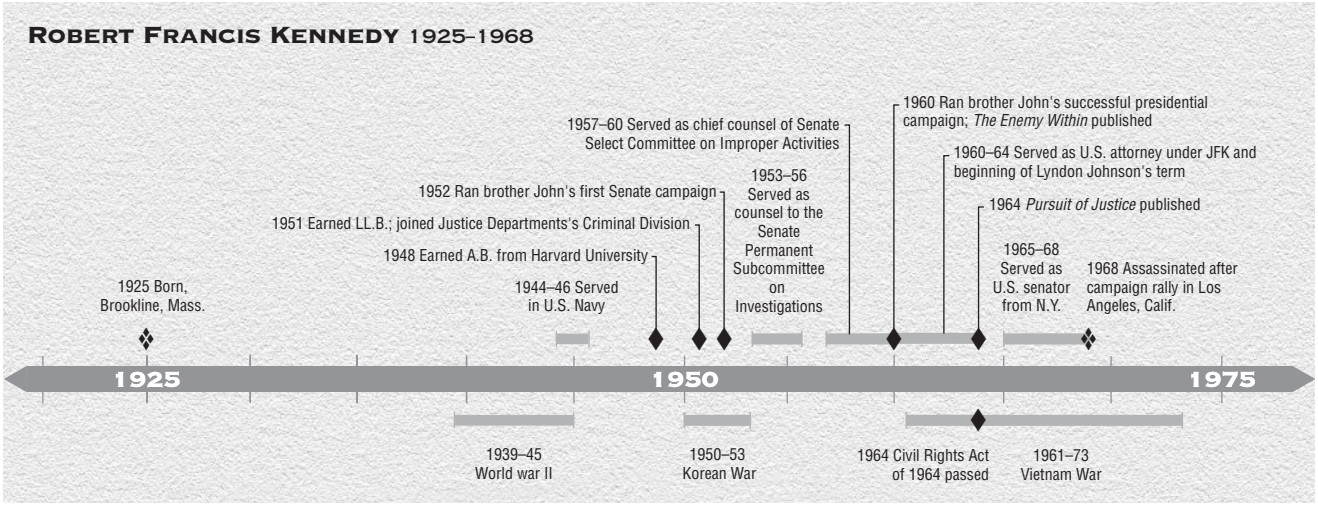

aged his brother John's senatorial campaign, and in early 1953, he was appointed an assistant counsel to the Senate Permanent Subcommittee on Investigations, which became the bully pulpit for the anti-Communist witch-hunts of its chairman, Senator JOSEPH R. MCCARTHY. Kennedy worked under McCarthy's foremost ally, Chief Counsel ROY COHN, and investigated international shipping to Communist China, before resigning over disgust with McCarthy in mid-1953. Historians view his role in the RED SCARE created by the proceedings to have been very limited, although some have argued that Kennedy was initially blind to Senator McCarthy's agenda. Kennedy rejoined the subcommittee in 1954, and became its chief counsel and staff director in 1955.

Under the new leadership of Senator JOHN MCCLELLAN, the subcommittee turned its attention to labor RACKETEERING. Kennedy focused on corruption in the International Brotherhood of Teamsters. Heading a staff of sixty-five investigators, he squared off against the union's presidents, David Beck and JAMES R. HOFFA, in dramatic public hearings at which he often was accompanied by his brother John. Kennedy and the subcommittee believed the union had connections to ORGANIZED CRIME; the union viewed Kennedy as a show-off who was persecuting it for his own political benefit. The union leaders frequently took the FIFTH AMENDMENT, refusing to answer questions under Kennedy's relentless grilling. Beck resigned and was later convicted; Kennedy became a national figure. The hearings began a long-running feud between Kennedy and Hoffa that would continue into the 1960s. Kennedy later devoted considerable resources of the Justice Department to prosecuting Hoffa, ultimately convicted in 1964 for jury tampering, FRAUD, and conspiracy in the handling of a Teamster benefit fund.

"SOME MEN SEE THINGS THAT ARE, AND ASK 'WHY?' I SEE THINGS THAT NEVER WERE, AND ASK 'WHY NOT?'"
—ROBERT F. KENNEDY

In 1960, Kennedy managed his brother John's presidential campaign. His reward was the position of attorney general, an appointment that brought widespread criticism of the president-elect for nepotism. But Kennedy's brother stood behind his decision, and thus began a relationship unique in presidential history: throughout foreign policy crises in Cuba and Vietnam, domestic unrest over CIVIL RIGHTS, and especially the day-to-day functioning of the White House, Kennedy served as his brother's closest adviser. The two also shared a common problem in the person of Director J. EDGAR HOOVER, of the FEDERAL BUREAU OF INVESTIGATION (FBI), who secretly kept tabs on them while intensifying the FBI's domestic spying during the Kennedy administration.

The greatest crisis facing Attorney General Kennedy was the civil rights movement. The slow pace of change had frustrated civil rights leaders and mounting violence—from beatings to murder—brought pleas to the White House for intercession to protect demonstrators. During the Freedom Rides of 1961, for example, when busloads of black activists sought to integrate bus stations in the South, the movement's leaders appealed for help. Kennedy dispatched Justice Department representatives to Alabama; asked for assurances of protection from Governor John Patterson, of that state; and brought suit to win a court order on behalf of the riders. The administration was reluctant to do more because of concerns about limitations on federal power. Then, in May 1961, after more terrible assaults on the activists in Montgomery, Alabama, the attorney general dispatched five hundred federal marshals to Alabama. Yet the protection rendered did not stop local authorities from arresting, jailing, and beating activists.

The reluctance of the White House to intercede more forcefully had a political rationale as well: the new Kennedy administration had won election by a small margin that included southern support. As critics have noted, concerns about federal authority did not stop the attorney general from later authorizing Director Hoover to place wiretaps on the Reverend MARTIN LUTHER KING, JR., whom the pro-civil rights White House treated as an ally. Hoover's concerns about King's alleged Communist ties affected the Kennedys. As Kennedy later told an interviewer, "We never wanted to get very close to him just because of these contacts and connections that he had, which we felt were damaging to the civil rights movement." Nor did Kennedy balk at approving the appointment of William Harold Cox, an outspoken racist, as a district judge in Mississippi, for reasons of political expediency, although he later regretted having done so. In time, Kennedy and the president took bolder steps—in 1962, sending five thousand federal marshals to quell rioting in Mississippi, after JAMES H. MEREDITH became the first black man to enter the state's university, and later, securing King's release from jail in Birmingham, Alabama.

The assassination of his brother John in 1963 changed the course of Kennedy's life.

Besides grieving the loss of his brother, he found he worked uncomfortably under President LYNDON B. JOHNSON, and he soon left the Justice Department. In 1964, he won election in New York to the U.S. Senate, where he served as a liberal voice until announcing his own bid for the presidency in 1968.

Emphasizing a commitment to the concerns of young people, black citizens, and the nation's poor, the Kennedy campaign inspired radicals, the working class, and the dispossessed. Kennedy's opposition to the war in Vietnam was passionate. On a television broadcast, he said:

> Do we have a right here in the United States to say that we're going to kill tens of thousands, make millions of people, as we have . . . refugees, kill women and children? . . . I very seriously question that right. . . . We love our country for what it can be and for the justice it stands for.

Kennedy's candidacy sharply divided the DEMOCRATIC PARTY between him and his opponent for the nomination, EUGENE MCCARTHY. Kennedy had won primaries in Indiana, Nebraska, and finally California, when he was shot at a campaign function on June 4, 1968, by Sirhan Sirhan, a Palestinian immigrant who said his motive was the candidate's support for Israel. The second murder of a Kennedy, following hard on the April 1968 assassination of King, was an immeasurable shock to the nation. It seemed to many to sound the death knell of an era.

Kennedy's contribution to U.S. law is complex. In the 1950s, he helped expose corruption in the nation's unions, but critics have subsequently treated his very personal pursuit of Hoffa as an exercise not only in justice but in vendetta. When he headed the Justice Department in the early 1960s, his advocacy of civil rights had practical limitations imposed by political necessities and legitimate concerns about the balance of state and federal authority; groundbreaking civil rights legislation would, of course, follow in the years after his tenure. It was as a candidate for president that he may have been his most memorable, an ardent and inspirational voice. Through his opposition to the VIETNAM WAR and his support for the disadvantaged, he offered the promise of a new idealism in politics.

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## ♦ KENT, JAMES

James Kent was a U.S. attorney, judge, and scholar who played a central role in adapting the COMMON LAW of England into the common law of the United States. As a justice and later chief justice of the New York Supreme Court and a chancellor of the New York Court of Chancery (then the highest judicial officer in New York), Kent wrote many decisions that became foundations of nineteenth-century law. Kent's great legal treatise *Commentaries on American Law* (1826–30) offered the first comprehensive analysis of U.S. law.

"THE DIGNITY OR INDEPENDENCE OF OUR COURTS IS NO MORE AFFECTED BY ADOPTING [ENGLISH JUDICIAL PRECEDENTS], THAN IN ADOPTING THE ENGLISH LANGUAGE."
—JAMES KENT

Kent was born July 31, 1763, in Putnam County, New York. In 1777 he entered Yale University. The Revolutionary War periodically disrupted his studies. During one of his forced suspensions, Kent read Sir William Blackstone's *Commentaries on the Laws of England* (1765–69), which led him to decide on a legal career. Following college he secured a clerkship with the attorney general of New York, and he was admitted to the New York bar in 1785.

Kent began his law practice in Poughkeepsie, New York. In 1790 he was elected to the New York state legislature, where he served three terms. A steadfast Federalist and supporter of the U.S. Constitution, Kent was committed to a strong national government. After losing a congressional race in 1793, he moved to New York City, where he practiced law and served as a professor of law at Columbia University.

Kent became a member of the New York Supreme Court in 1798, and served as chief justice from 1806 to 1814. He is credited with transforming the court into a professional, respected bench. He introduced the practice of issuing written as well as oral opinions, and was instrumental in appointing an official reporter to collect the written opinions into official law reports. Kent believed that such reports were necessary so that past precedents could be read and cited more easily.

During his time on the court, Kent addressed the then burning issue of whether English

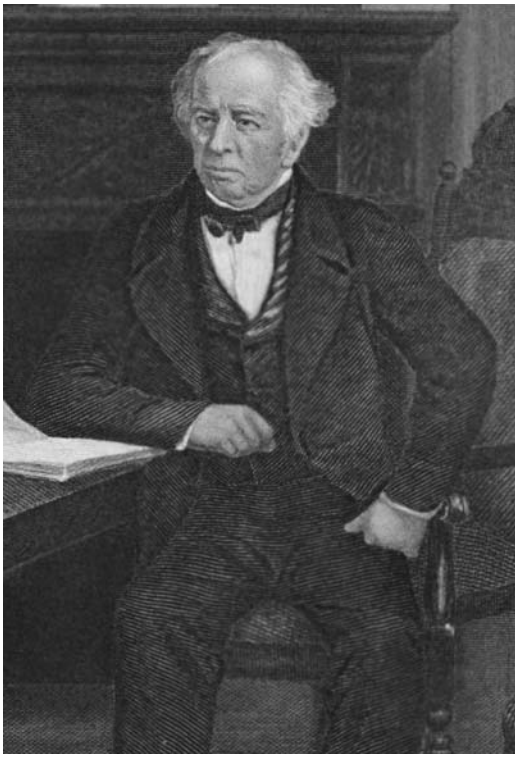

*James Kent.*
LIBRARY OF CONGRESS

precedents could claim the authority of law in the United States. Some members of the New York bar felt that the American Revolution would be unfinished until the United States had a body of law of its own, untainted by the laws of its former imperial master.

Kent disagreed. He argued that the predictability of justice was an indispensable requirement for achieving the commercial progress and stable social order sought by the Federalists. He further suggested that citation and the following of precedent were the best means to judicial predictability. Like many Federalists he admired the stability of the English common law and he maintained that it was the best system ever devised to ensure justice and order. Although he did not follow precedent blindly, Kent believed that previous decisions should not be expressly overturned except when absolutely necessary.

Kent was appointed chancellor of the New York Court of Chancery in 1814. This court was a court of EQUITY, which applied rules of fairness, rather than a court of law, which applied common and statutory law to the resolution of disputes. Most of the matters before it involved commercial disputes. As chancellor Kent was empowered to do justice based on the particular facts of each case and the equitable principles that had developed in England. He used his equity powers to effect his sense that commercial bargains ought to be subject to some equitable scrutiny to ensure that UNCONSCIONABLE advantage was not taken.

By law Kent was forced to retire from the bench at age sixty, in 1823. He returned to the private PRACTICE OF LAW and was reappointed to a professorship at Columbia. He was consulted by lawyers and judges about legal issues, and gave a series of lectures at Columbia that became, in revised form, the core of his *Commentaries.* This treatise, which was published in four volumes, was similar to Blackstone's *Commentaries* in scope but did not follow Blackstone's precisely in form. Kent's *Commentaries* covered INTERNATIONAL LAW, the Constitution and government of the United States, the municipal laws of the states, personal rights, and real and PERSONAL PROPERTY. It quickly became an authoritative and classic example of the U.S. treatise tradition. Five editions were published in

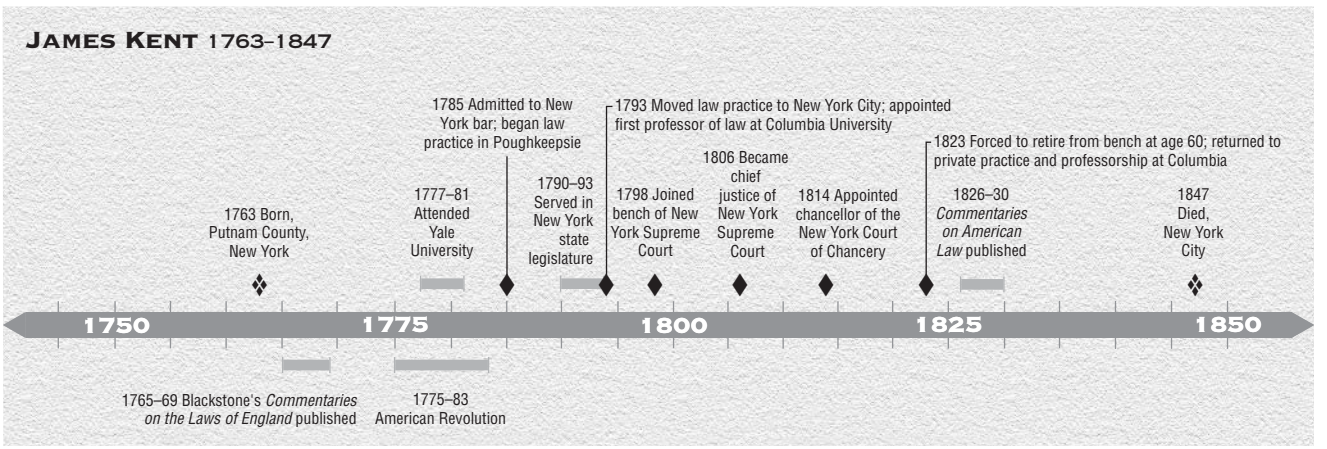

Kent's lifetime, and many more followed in the nineteenth century. The twelfth edition (1873) was edited by **OLIVER WENDELL HOLMES, JR.**

Kent died December 12, 1847, in New York City.

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## KENT STATE STUDENT KILLINGS

In 1970, the United States was in the middle of the **VIETNAM WAR**, and anti-war demonstrations among students around the country were frequent. However, one at Kent State University in Kent, Ohio (near Akron) turned deadly. In 13 seconds of rifle fire, four students were killed and nine others injured by a **NATIONAL GUARD** contingent called in to quell the crowd. The tragic event cast the university into the international spotlight, and changed the face of student demonstrations forever.

The rioting had begun on Friday, May 1, 1970, when several students organized an on-campus demonstration to protest U.S. troops entering Cambodia. That evening, a crowd of drinking and agitated students moved off campus and began breaking windows in the center of town. Police were called in to disperse the crowd. The Kent city mayor, having heard rumors of a radical plot in the making, declared a state of emergency and Ohio officials called in the National Guard. Local bars were closed by authorities, and rioters were herded back toward the campus with tear gas.

By Saturday, the agitated demonstrators had threatened local merchants and surrounded the on-campus barracks of the Army Reserve Officer Training Corps (ROTC), setting the building on fire. When firemen attempted to extinguish the blaze, the rioters punctured or cut open their water hoses. National Guard troops again cleared the campus. The hostility intensified on Sunday, when the crowd failed to disperse on orders to do so. The Ohio Riot Act was read to them and tear gas was fired. The hostile rioters regrouped and moved into town, where the Riot Act was again read to them and tear gas was again used. Several persons, including guardsmen, were injured.

By noon on Monday, May 4, approximately 2,000 demonstrators gathered and were ordered to disperse. They responded with curses and rocks. Eventually, tear gas was again employed but was ineffectual in the afternoon breeze. As the crowd grew more agitated, it was herded by guardsmen toward an athletic practice field surrounded by fence. After being pelted with rocks, the guardsmen receded but were followed by

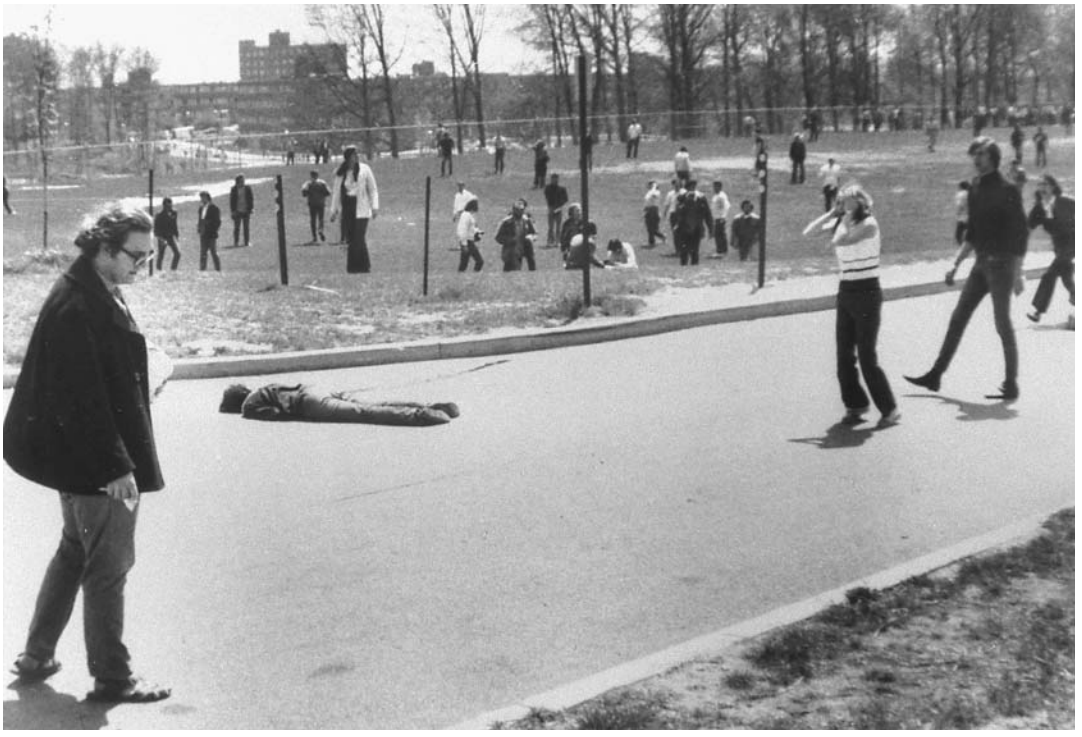

*Students approach one of the four classmates slain when National Guard troops opened fire on protesters during the May 1970 riots at Kent State University.*

UPI/CORBIS-BETTMANN

angry demonstrators, some as close as 20 yards. Guardsmen turned and fired several shots toward the demonstrators, felling several of them. Within seconds, four persons lay dying and nine more were wounded; all 13 were students. A University ambulance moved through the crowd, announcing over a public address system that demonstrators were to pack their things and leave the campus immediately.

Shock and disbelief of the tragic events spread worldwide within hours. By the following morning, James A. Rhodes, governor of Ohio, had called in the FEDERAL BUREAU OF INVESTIGATION (FBI). RICHARD M. NIXON, president of the United States, invited six Kent student representatives to meet with him after their meeting with a state congressman.

On May 21, 1970, Attorney General JOHN MITCHELL announced that the JUSTICE DEPARTMENT would investigate the shootings to determine whether there had been criminal violations of federal laws. Two weeks later, the Ohio legislature passed a new campus riot bill providing for swift action and stiff penalties for those charged in connection with disturbances at state-assisted COLLEGES AND UNIVERSITIES.

By June 10, the first private lawsuit for WRONGFUL DEATH was filed in federal court by the father of a killed student. Governor Rhodes and two Ohio National Guard commanders were named as defendants. The parent also filed a second suit against the state of Ohio in local Portage County Court of Common Pleas. A few days later, the White House announced the naming of a special commission to investigate campus unrest at Kent, as well as the deaths of two black students at Jackson State University in Mississippi.

In September 1970, the President's Commission on Campus Unrest released its general report, which found the National Guard shootings "unwarranted." The report also found that the "violent and criminal" actions by students contributed to the tragedy and caused them to bear responsibility for deaths and injuries of fellow students. According to Kent State University Library archives, the report concluded that "The Kent State tragedy must surely mark the last time that loaded rifles are issued as a matter of course to guardsmen confronting student demonstrators."

A special state GRAND JURY issued indictments against 25 persons in October 1970, but found, in its 18-page report, that the guardsmen were not subject to criminal prosecution because they "fired their weapons in the honest and sincere belief . . . that they would suffer serious bodily injury had they not done so." A federal district judge upheld the indictments against the individuals in January 1971. However, several private lawsuits against the state of Ohio were dismissed on grounds of SOVEREIGN IMMUNITY. Ohio's Eighth District Court of Appeals then ordered a lower court to consider on the merits any suits in which liability was based on the actions of individual Ohio state agents.

The Sixth Circuit Court of Appeals, meanwhile, upheld the Portage County Court's GAG ORDER prohibiting discussion of the shootings by 300 witnesses and others connected with the grand jury indictments. It also upheld the federal grand jury's 25 indictments and the district court's order to destroy the grand jury's report as prejudicial.

Going all the way to the U.S. Supreme Court was a challenge to Ohio's new anti-riot laws, but the Court, in a 6–1 decision, took no action and refused to delay scheduled trials. In November 1972, the first student was tried and convicted of the misdemeanor of interfering with a fireman. The jury could not reach a verdict on felony charges of ARSON, rioting, and throwing rocks at firemen. A few more students pleaded guilty to first-degree riot charges. Prosecutors then dropped all charges against 20 remaining defendants on grounds of lack of evidence, having put their strongest cases first and not being successful in any felony convictions.

In May 1972, the AMERICAN CIVIL LIBERTIES UNION (ACLU) filed several suits totaling $12 million in damages in federal district court against the Ohio National Guard and the State of Ohio. More than a year later, in August 1973, the Justice Department announced that it would reopen its investigation. Also in 1973, a federal grand jury reviewed Justice Department evidence and issued indictments against eight former guardsmen, officially charging them with violating the CIVIL RIGHTS of students. In 1974, a federal district judge acquitted the guardsmen of all charges, ruling that U.S. prosecutors failed to prove willful or intentional deprivation of civil rights.

Once again, the U.S. Supreme Court issued a decision related to the tragedy. In the 1974 case of *Scheur v. Rhodes,* the Court reversed a lower court that found state officials immune from

private suits by the parents of slain students. In 1975, all individual civil suits were consolidated into one case, *Krause v. Rhodes.* Following a 15-week trial, a federal jury, by a 9–3 vote, acquitted all 29 defendants, including Ohio Governor James Rhodes. The decision was appealed and in 1977, the U.S. Circuit Court of Appeals for the Sixth Circuit ordered a retrial, based on evidence that at least one member of the jury had been threatened and assaulted. In January 1979, an out-of-court settlement was reached in all of the consolidated civil cases and approved by the Ohio State Controlling Board.

The $675,000 settlement was dispersed among 13 plaintiffs, the largest amount going to an injured student who was paralyzed in the incident. According to Kent University Library archived documents, the compensation was accompanied by a statement from the defendants that the May 4, 1970, tragedy "should not have occurred." The statement also noted that the Sixth Circuit had upheld as "lawful" the university's ban on rallies and its May 4 order for the students to disperse. The statement concluded, "We hope that the agreement to end this litigation will help assuage the tragic moments regarding that sad day."

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CROSS-REFERENCES

Protest; Riot; Vietnam War.

## KENTUCKY RESOLUTIONS

*A set of proposals formulated by* THOMAS JEFFERSON *and approved by the state legislature of Kentucky during 1798 and 1799 in opposition to the enactment of the* ALIEN AND SEDITION ACTS *(1 Stat. 566, 570, 577, 596) by Congress.*

The Kentucky Resolutions attacked the validity of the Alien and Sedition Acts, the enactment of which were a reaction to the turbulent political climate of France during the late 1700s following the French Revolution. The acts imposed strict residency requirements in order to attain U.S. citizenship, empowered the president to deport or incarcerate ALIENS who were considered "dangerous," and permitted the criminal prosecution of persons who made critical or seditious speeches or writings against the government. The resolutions advocated a strict constructionist view of the federal government which treated the Constitution as an agreement reached among the states as to the particular powers to be exercised by the central government. The federal government could not act in any way unless specifically authorized to do so in the Constitution. The enactment of the Alien and Sedition Acts was considered to be beyond the powers of Congress and, therefore, the acts were void. The resolutions represented the exercise of the right of the state of Kentucky to declare the acts void through nullification (the declaration that such laws were not legally enforceable).

A comparable series of proposals, the Virginia Resolutions, drawn by JAMES MADISON, and approved by the Virginia legislature in 1798, treated the Alien and Sedition Acts in a similar fashion.

Both the Kentucky and Virginia Resolutions did not meet with any real success when presented to other states for adoption. They were, however, significant in American LEGAL HISTORY because they embodied the clash between two competing principles of government—states' rights versus FEDERALISM.

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## KEOGH PLAN

*A retirement account that allows workers who are self-employed to set aside a percentage of their net earnings for retirement income.*

Also known as H.R. 10 plans, Keogh plans provide workers who are self-employed with savings opportunities that are similar to those under company PENSION plans or individual retirement accounts (IRAs). However, Keogh plans allow for a much higher level of contribution, depending on the type of plan selected.

Keogh plans were established in 1962 by the Self-Employed Individuals Tax Retirement Act

(26 U.S.C.A. § 1 et seq.) and modified by provisions in the EMPLOYEE RETIREMENT INCOME SECURITY ACT of 1974 (29 U.S.C.A. § 1 et seq.), the Economic Recovery Tax Act of 1981 (26 U.S.C.A. § 1 et seq.), and the Tax Equity and Fiscal Responsibility Act of 1982 (26 U.S.C.A. § 1 et seq.). Keogh plans are considered tax shelters because Keogh contributions, which are deductible from a taxpayer's gross income, and the earnings they generate are considered tax free until they are withdrawn when the contributor retires or dies. At the time of withdrawal, the money is taxable as ordinary income.

Self-employed individuals are defined as people who pay their own SOCIAL SECURITY taxes on their net income. This net income cannot include any investment earnings, wages, or salary. The self-employment does not have to be full-time; in fact, workers who are self-employed on the side can have a separate IRA or other retirement account in the pension plan of the company that pays their wages or salary.

Self-employed taxpayers who own a business and set up a Keogh plan for themselves are also required to set up a Keogh plan for each employee who has worked for their company for at least one thousand hours over a period of three or more years. The level of contributions allowed depends on the type of Keogh plan chosen.

Four different types of Keogh plans are available: profit sharing, money-purchase pension, paired, and defined benefit. Profit sharing plans are most often set up by small businesses because they require a minimal contribution by employees. The maximum amount that may be contributed to this type of plan is 13.04 percent of an employee's net income, up to a total of $22,500 a year.

Money-purchase pension plans are often used by high-income earners because the percentage contribution is fixed on an annual basis; the amount can be changed only once a year or through termination of the plan. This plan's contribution limit is 20 percent of net income, up to a total of $30,000 a year.

Paired plans merge the benefit of the high contributions allowed by money-purchase pension plans with the flexibility of profit sharing plans. For example, an employee may make a money-purchase plan contribution of 7 percent and then contribute between 0 and 13 percent of her or his remaining net income to a profit sharing plan. With this plan, an employee can make the maximum 20 percent contribution the money purchase plan allows but still be able to change the contribution amount throughout the year.

Defined-benefit plans require a minimum contribution of $30,000 a year, so are not available to everyone who is self-employed. Generally, contributors to these plans will employ an actuary to determine the amount of money to be contributed.

Contributors to all Keogh plans are eligible to begin receiving benefits when they are age 59½. At this point the payments are taxed as income. If any portion of the money in a Keogh plan is withdrawn early (before age 59½), a 10 percent penalty tax is imposed, in addition to the normal INCOME TAX. A 15 percent penalty tax is imposed if the contributor does not start receiving benefits before age 70½.

Money can be collected from a Keogh plan in several different ways. The two most common ways are lump sums and installments. Lump-sum payments are subject to regular income taxes. However, with a tax break called forward averaging, just one tax is paid. This tax is determined by calculating the total amount that would have been paid if the money had been collected in installments. This advantage reduces the amount of total income tax paid on the plan.

Installment distributions can be set up in several different ways and for various lengths. For example, they can be paid annually for ten years or annually for the number of years the recipient is expected to live. Each distribution is taxed as ordinary income.

In the event that the contributor dies before reaching age 59½, the contributor's heirs will receive the money that is in the Keogh plan, minus income taxes. In this case no penalty taxes are imposed for early withdrawal.

As a general rule of thumb, Keogh plan accounts are judgment proof. Their funds can be seized or garnished only in certain situations. For instance, the government can take Keogh funds to pay personal back taxes owed, and a spouse, ex-spouse, or children may be declared entitled to receive a portion of Keogh money by a court order if the contributor owes ALIMONY or CHILD SUPPORT.

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## ♦ KEVORKIAN, JACK

Jack Kevorkian has become the most well-known advocate in the United States for the cause of physician-assisted suicide. Having helped an estimated 130 terminally or chronically ill individuals kill themselves between 1990 and 1999, Kevorkian sparked a national debate on the ethical issues involved in EUTHANASIA, or mercy killing. Although Kevorkian has argued that his actions have prevented needless suffering for patients in pain and that it has allowed them to die with dignity, others see his work as a violation of the medical profession's most cherished ethical principles affirming life over death. Working in an area of vexing ethical issues, Kevorkian was championed as a breaker of unnecessary taboos surrounding death. His crusade ended in 1999 when a Michigan state court convicted him of second-degree murder.

Kevorkian became a focus of national attention in 1990, after he assisted the suicide of Janet Adkins, a 45-year-old woman who was suffering from Alzheimer's disease, a degenerative disease of the brain that causes memory loss and intellectual impairment. Adkins had heard through the media about Kevorkian's invention of a "suicide machine" that allowed individuals who were ill to administer a lethal dose of poison to themselves. The machine, which Kevorkian assembled out of $45 worth of materials, consisted of three dripping bottles that delivered successive doses of three fluids: a harmless saline solution; a painkiller; and, finally, a poison, potassium chloride. When Adkins contacted Kevorkian about using the machine on her, Kevorkian agreed to assist her. Kevorkian diagnosed Adkins as suffering from Alzheimer's and arranged to perform the assisted suicide in a public park, in his rusting, 1968 Volkswagen van. After Kevorkian had inserted an intravenous needle into her arm, Adkins pressed a red button that caused the machine to administer the painkiller and then the poison. Within five minutes, Adkins died of heart failure. Within days, Kevorkian had become a national media celebrity, appearing on such television shows as *Nightline, Geraldo,* and *Good Morning, America.*

This first of Kevorkian's assisted suicides illustrated the objections that many observers raise toward Kevorkian's methods. Although she had begun to show early signs of Alzheimer's, Adkins was otherwise in good health and was not terminally ill; she committed suicide more out of fear of future suffering than out of current suffering. She had joined the Hemlock Society—an organization that advocates voluntary euthanasia for terminally ill patients—even before she became ill. In addition, Adkins's Alzheimer's might have impaired her ability to make decisions. Some observers wondered

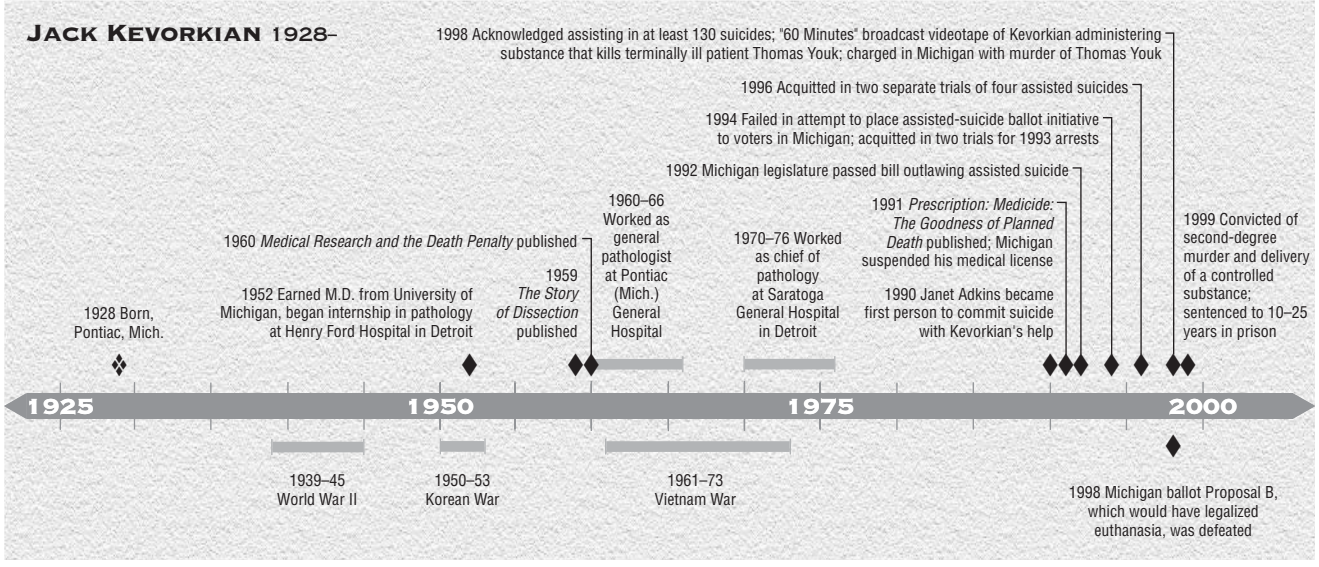

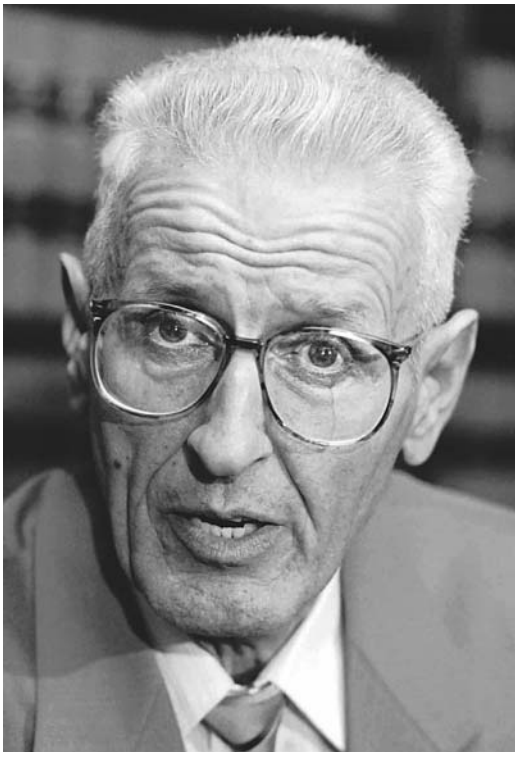

*Jack Kevorkian.*
AP/WIDE WORLD PHOTOS

whether she was also suffering from depression, a treatable mental illness. Moreover, in cases in which a terminally ill patient has expressed a desire to die, established rules of medical ethics require that two independent doctors must confirm that the patient's condition is unbearable and irreversible; Kevorkian had ignored this requirement.

Kevorkian was charged with first-degree murder in the Adkins case, but a judge ruled that prosecutors failed to show that Kevorkian had planned and carried out Adkins's death. Attempts to prosecute Kevorkian were hampered by Michigan's lack of any law against physician-assisted suicide. Most other states have laws that make this act a felony.

In early 1991, a Michigan judge issued an **INJUNCTION** barring Kevorkian's use of the suicide machine, and in the same year, the state of Michigan suspended his medical license. Kevorkian defied such legal actions and continued to help ailing people to end their lives. Now that he no longer could prescribe drugs, Kevorkian assisted with suicides by providing a contraption that administered carbon monoxide through a gas mask. As he practiced assisted suicide and published on the subject—describing it in his own terms as "medicide" or "planned death"—he continued to be surrounded by controversy. For example, an autopsy that was performed on the body of the second person whom he had helped to commit suicide, a patient who had complained of a painful pelvic disease, found no evidence of any disease.

In 1992, the Michigan Legislature passed a bill outlawing assisted suicide, designed specifically to stop Kevorkian's activities (Mich. Comp. Laws § 752.1021). This law was used to charge Kevorkian with assisting in the death of Thomas W. Hyde, Jr., in August 1993. Kevorkian was jailed twice that year, in November and December. During his second jail stay, he embarked on an 18-day fast in which he protested his arrest by drinking only juice. His bail was reduced and was paid by Geoffrey Fieger, a flamboyant lawyer who has done a great deal for Kevorkian's cause as his friend and legal counsel. Kevorkian was found not guilty.

Kevorkian then attempted to place before Michigan voters a ballot initiative, Movement Ensuring the Right to Choose for Yourself (MERCY), which sought to amend the Michigan Constitution in order to guarantee competent adults the right to request and to receive medical assistance in taking their own lives. However, he failed to garner enough signatures to put the initiative on the 1994 ballot. In December 1994, the Michigan Supreme Court upheld the law that had made assisted suicide a crime, and in 1995 the U.S. Supreme Court refused to hear Kevorkian's appeal.

Kevorkian continued to assist in suicides even as prosecutors in his home county unsuccessfully attempted to convict him on charges of murder or assisted suicide. On May 14, 1996, an Oakland County Circuit Court jury again acquitted Kevorkian of assisted suicide. In that case, the prosecution had argued that assisted suicide was a crime under Michigan **COMMON LAW**. After the acquittal, county prosecutors suggested then that it was unlikely that they would take Kevorkian to trial again.

In his actions and his statements, Kevorkian flouted the ethical standards of the medical profession on the issue of assisted suicide. The **AMERICAN MEDICAL ASSOCIATION**, a national professional association of physicians, specifically forbids the practice of physician-assisted suicide. Many doctors deplore Kevorkian's techniques and see them as endangering the trust that must exist between physician and patient.

Even the Hemlock Society opposes Kevorkian's actions, citing his lack of typical procedural precautions.

In 1998, Kevorkian allowed the CBS television program *60 Minutes* to tape the lethal injection of Thomas Youk, a patient who was suffering from Lou Gehrig's disease. After the broadcast, county prosecutors again brought a second-degree murder charge against Kevorkian, who served as his own counsel in his trial. On March 26, 1999, a jury in Oakland County convicted him of second-degree murder and illegal delivery of a controlled substance. He was sentenced in April 1999 to 10 to 25 years in prison. During the next three years, he sought to appeal the conviction to appeals court in Michigan. However, the Michigan Court of Appeals affirmed the conviction, and the Michigan Supreme Court declined to review the appellate court's decision. Lawyers representing Kevorkian sought to appeal the case to the U.S. Supreme Court, but it declined to review the case.

Kevorkian's efforts in the cause of assisted suicide were only the latest in a series of his unconventional, even morbid, attempts to make a name for himself in the area of medical research. Kevorkian had earned the nickname Dr. Death in 1956, only three years after obtaining his medical degree, when he began making what he called death rounds at the Detroit-area hospital where he was employed. During those rounds, he examined dead bodies in order to collect evidence supporting his contention that the time of a person's death could be determined from the condition of the person's eyes. Kevorkian caused more controversy—and lost his job at the University of Michigan—in 1960, when he published the book *Medical Research and the Death Penalty,* in which he argued for the vivisection (i.e., the conduct of medical experiments on live subjects) of prisoners who had been sentenced to death. Claiming it would be "a unique privilege . . . to be able to experiment on a doomed human being," he outlined a plan in which the prisoner-subject would be anesthetized at the time of execution, then used for scientific experiments lasting hours or months, and finally executed using a lethal overdose. According to Kevorkian, this practice would create both a more painless execution and greater advances in medical research. The use of condemned prisoners for medical experimentation and organ donation has remained a consistent theme for Kevorkian. His 1991 book *Prescription: Medicide: The Goodness of Planned Death* rehashes these same arguments while also making a case for assisted suicide. In another unsuccessful venture, Kevorkian re-created experiments in which Soviet scientists had taken blood from recently deceased individuals and transfused it to live patients.

In a later article that set forth his plans for assisted suicide, Kevorkian suggested setting up suicide clinics: "The acceptance of planned death implies the establishment of well-staffed and well-organized medical clinics ('obitoria') where terminally ill patients can opt for death under controlled circumstances of compassion and decorum." As his use of the terms *obitoria* and *medicide* indicate, Kevorkian has a penchant for coining words. He dubbed his first suicide machine alternately a *mercitron* or a *thanatron*—the latter from the Greek word for death, *thanatos*—and has used the word *obitiatry* to indicate the medical specialization in death.

"THE VOLUNTARY SELF-ELIMINATION OF INDIVIDUAL AND MORTALLY DISEASED OR CRIPPLED LIVES TAKEN COLLECTIVELY CAN ONLY ENHANCE THE PRESERVATION OF PUBLIC HEALTH AND WELFARE."
—JACK KEVORKIAN

Kevorkian was born May 26, 1928, in Pontiac, Michigan. Named Murad Kevorkian at birth by his Armenian immigrant parents, he was the first of his family to attend college. He attended the University of Michigan Medical School and did his internship at Detroit-area hospitals. Acquaintances of Kevorkian testify to his prodigious intellect. The retired physician has demonstrated talent as a writer, painter, and composer. A series of 18 paintings that he made on such grisly topics as GENOCIDE, hanging, and cannibalism created a stir in Michigan during the 1960s. Kevorkian also has commented that his unconventional ideas have been influenced by the history of his Armenian ancestors, particularly the genocide in which 1.5 million Armenians were killed during WORLD WAR I by the Turks. Kevorkian has never married.

Although many deplore his actions, Kevorkian has increased public awareness of some of the most difficult ethical issues surrounding DEATH AND DYING. With medical technology's increasing ability to prolong life have come more situations that bring great pain and suffering. Kevorkian's efforts to assist people in their deaths, although often falling short of accepted professional standards of diagnosis and care, have sparked a needed discussion on these issues. Nevertheless, even supporters of euthanasia sought to distance themselves from Kevorkian's practices after his convictions,

drawing distinctions between his practices and their own beliefs in physician-assisted suicide

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## KEY NUMBERS®

*A system devised by West Group involving the classification of legal subjects that are organized within their publications according to specific topics and subtopics. Each topic and subtopic is given a key number which consists of one or more digits preceded by the symbol of a key assigned to each individual classification.*

A particular point of law can be traced through different law books by following the cases listed under a Key Number in each series. West Group, formerly the West Publishing Company, developed the Key Number System of Classification during the decade spanning 1897–1906. The system is a valuable research tool because once the topic and Key Number have been located, a researcher has ready access to all American cases that have litigated that issue provided those cases have been reported. More than 425 Key Numbers in the system are arranged by subject matter under seven main headings—persons, property, contracts, TORTS, crimes, remedies, and government—and 32 subdivisions of the system.

Key Numbers are also a vital component of Westlaw™, an online resource for conducting COMPUTER-ASSISTED LEGAL RESEARCH. The Key Numbers employed on WESTLAW are identical to those used in the print counterparts to the on-line system.

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## KEYCITE™

*An interactive, computer-assisted citatory service that allows legal researchers to verify the validity of a case and to find all references that have cited that case as authority.*

Every day, lawyers are asked by their clients to persuade judges to rule in their favor. One way in which they try to accomplish this task is by citing prior legal decisions, called precedent, that support their clients' positions. Depending on its factual similarity to a pending legal dispute, a relevant precedent can control or influence the outcome of a case. Consequently, lawyers look for ways to make precedents appear more persuasive, while courts look for ways to determine which precedents are relevant, important, or controlling in their jurisdictions.

KeyCite is designed to expedite the process of assessing a case's presidential value. Released by West Group in July 1997, KeyCite was initially available only through Westmate, an online software package that allows subscribers to Westlaw™, West's computer-assisted research service, to connect through their personal computer modems over a telephone line into a central mainframe computer located in Eagan, Minnesota. By the end of 1997, however, KeyCite was also made available to customers over the INTERNET and through West Group's CD-ROM software package called Premise™. The majority of users now use the service through WESTLAW on the Internet.

KeyCite uses graphical markers to signify the status or history of a case. A red flag warns that a case is no longer good law for at least one of the points it contains, meaning that a case has been reversed, vacated, superseded, overruled, or abrogated in some respect. A yellow flag warns that a case has some negative history, meaning that a point of law contained in a case has been amended, modified, limited, or called into doubt, but not completely eviscerated. A blue letter H indicates that a case has some history, but no known negative history, which generally means that a case contains a point of law that has been appealed, affirmed, discussed, relied on as precedent, or otherwise cited as relevant authority.

KeyCite also employs graphical markers to signify the extent to which courts have subsequently relied on a case. Stars are used to reveal the extent to which one case discusses another: four stars indicate that a case has been "examined," meaning that the cited case has received more than a printed page of treatment in another decision; three stars indicate that a case has been "discussed," meaning that the cited case has received more than a paragraph of treatment in another decision, but less than a full printed page; two stars indicate that a case has been "cited," meaning that the cited case has received

less than a paragraph of treatment in another decision; and one star indicates that a case has been "mentioned," meaning that the cited case has been briefly referenced in another decision.

Quotation marks are used in KeyCite displays to signify that a cited case has been quoted by another court. Based on the idea that cases cited more frequently tend to be more significant, KeyCite tallies citation counts for every case within its coverage. Although KeyCite coverage is not comprehensive, it is available for a growing number of types of authorities. Beginning coverage for state case citations varies according to jurisdiction. Citator coverage now also covers state and federal statutes.

KeyCite integrates many of the features already found on Westlaw. KeyCite results can be limited to a particular date range, so that only the most recent cases citing a particular precedent are displayed. They also can be restricted by jurisdiction, so lawyers in one state can focus on legal authority in their home jurisdictions, without being sidetracked by cases from foreign jurisdictions. Finally, KeyCite allows headnotes (i.e., summaries of legal rules and principles established by courts that are added by West Group editors to cases published in the National Reporter System) from particular cases to be traced through subsequent opinions.

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Citator; Westlaw®.

## KEYES, WADE, JR.

See CONFEDERATE ATTORNEYS GENERAL.

## KICKBACK

*The seller's return of part of the purchase price of an item to a buyer or buyer's representative for the purpose of inducing a purchase or improperly influencing future purchases.*

Under federal law kickbacks involving government officials or funds provided by the government are illegal. Kickbacks between a contractor and a government official or government employee are prosecuted under the federal BRIBERY statute, 18 U.S.C.A. § 201. Kickbacks between private contractors working under a federal contract are prosecuted under 41 U.S.C.A. §§ 51–58, otherwise known as the Anti-Kickback Enforcement Act of 1986. Kickbacks to employees or officials of foreign governments are prohibited under the Foreign Corrupt Practices Act of 1977 (15 U.S.C.A. § 78dd-1 et seq.). Most states have commercial bribery statutes prohibiting various forms of kickbacks.

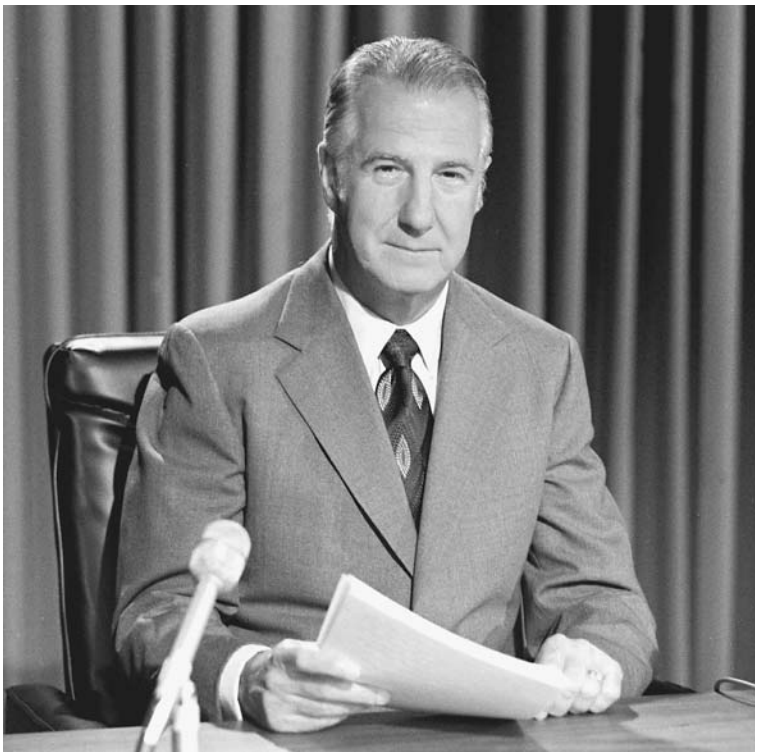

*Spiro Agnew, vice president under Richard Nixon, was accused of taking kickbacks while he was governor of Maryland and later vice president. On October 10, 1973, he resigned from office rather than face a conviction for tax evasion.*

AP/WIDE WORLD PHOTOS

One notable public figure accused of profiting from a kickback scheme was Spiro T. Agnew, vice president of the United States under RICHARD M. NIXON. While governor of Maryland, Agnew oversaw a system in which engineering firms working under state construction contracts paid kickbacks that went 25 percent to the state official who arranged the deal, 25 percent to the official who brought the deal to Agnew, and 50 percent directly to Agnew himself. In another arrangement Agnew demanded a kickback of five cents for every pack of cigarettes sold in vending machines located in Maryland state buildings. These kickbacks were secret, illegal, and not reported on Agnew's income tax returns. Agnew continued to collect them after he became vice president. He resigned the vice presidency in 1973 as part of a

plea bargain that allowed him to avoid going to jail for income TAX EVASION in connection with those kickbacks.

Though many types of kickbacks are prohibited under federal and state law, kickbacks are not illegal per se. If a kickback does not specifically violate federal or state laws and such kickbacks are made to clients throughout the industry, the kickback may be normal, legal, and even tax deductible. According to section 162(a) of the INTERNAL REVENUE CODE (26 U.S.C.A. § 162), "all the ordinary and necessary expenses" that an individual or business incurs during the taxable year are deductible, including kickbacks as long as the kickbacks are not illegal and are not made to an official or employee of the federal government or to an official or employee of a foreign government.

On several occasions the courts have ruled on the deductibility of specific legal kickbacks. In most cases the courts have found these kickbacks to be not deductible because they are not ordinary in the sense of usual and customary. In *Bertoloni Trucking Co. v. Commissioner of Internal Revenue,* 736 F.2d 1120, 84-2 U.S.T.C. P 9591 (1984), however, the Court of Appeals for the Sixth Circuit interpreted the term *ordinary* quite differently. Reviewing Supreme Court cases dealing with the interpretation of *ordinary* in section 162(a), the court identified two lines of interpretation: one held that the term meant "usual and customary," the other held that the term was intended to distinguish payments of a capital nature from payments of a recurring nature, which were thus deductible currently. In *Bertolini* the court held that this second line of interpretation was more consistent with legislative intent, and thus ruled that kickbacks made by the Bertolini Trucking Company were tax deductible.

In a very similar case, the same court came to a different conclusion. In *Car-Ron Asphalt Paving Co. v. Commissioner of Internal Revenue,* 758 F.2d 1132 (6th Cir. 1985), Car-Ron Asphalt Paving Company had paid legal kickbacks to Nicholas Festa, the same contractor to whom Bertolini Trucking had paid kickbacks. As in *Bertolini* the TAX COURT had ruled that such payments were not tax deductible because they were not necessary and ordinary. As not in *Bertolini,* the appeals court ruled that the payments Car-Ron had made to Festa were not necessary business expenses, since, throughout its thirteen-year history, the company had obtained nearly all of its contracts without making such payments.

Beginning in the 1970s, the HEALTH CARE industry became the particular focus for government efforts to prevent kickbacks. As health care costs escalated in the late 1980s and 1990s, efforts to prevent FRAUD intensified, resulting in 1995 in the passage of the Medicare Fraud Statute (42 U.S.C.A. §§ 1320a–1327b). This statute prohibits kickback schemes such as those in which hospitals pay physicians in private practice for patient referrals, and drug companies and medical device manufacturers pay physicians to prescribe their products to patients. The Medicare Fraud Statute makes it illegal for anyone to pay or receive "any remuneration (including any kickback, bribe or rebate)" to induce the recipient to purchase, order, or recommend purchasing or ordering any service reimbursable under MEDICARE or MEDICAID. Some experts in the area of health care fraud suggest that the Medicare Fraud Statute should be used as a model for constructing a general antikickback statute that would prevent kickback arrangements in all areas of the health care industry, not just Medicare and Medicaid.

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## KIDNAPPING

*The crime of unlawfully seizing and carrying away a person by force or* FRAUD, *or seizing and detaining a person against his or her will with an intent to carry that person away at a later time.*

The law of kidnapping is difficult to define with precision because it varies from jurisdiction to jurisdiction. Most state and federal kidnapping statutes define the term *kidnapping* vaguely, and courts fill in the details.

Generally, kidnapping occurs when a person, without lawful authority, physically asports (i.e., moves) another person without that other person's consent, with the intent to use the abduction in connection with some other nefarious objective. Under the MODEL PENAL CODE (a set of exemplary criminal rules fashioned by the Amer-

ican Law Institute), kidnapping occurs when any person is unlawfully and non-consensually asported and held for certain purposes. These purposes include gaining a ransom or reward; facilitating the commission of a felony or a flight after the commission of a felony; terrorizing or inflicting bodily injury on the victim or a third person; and interfering with a governmental or political function (Model Penal Code § 212.1).

Kidnapping laws in the United States derive from the COMMON LAW of kidnapping that was developed by courts in England. Originally, the crime of kidnapping was defined as the unlawful and non-consensual transportation of a person from one country to another. In the late nineteenth and early twentieth centuries, states began to redefine kidnapping, most notably eliminating the requirement of interstate transport.

At the federal level, Congress passed the LINDBERGH ACT in 1932 to prohibit interstate kidnapping (48 Stat. 781 [codified at 18 U.S.C.A. §§ 1201 et seq.]). The Lindbergh Act was named for Charles A. Lindbergh, a celebrated aviator and Air Force colonel whose baby was kidnapped and killed in 1932. The act provides that if a victim is not released within 24 hours after being abducted, a court may presume that the victim was transported across state lines. This presumption may be rebutted with evidence to the contrary. Other federal kidnapping statutes prohibit kidnapping in U.S. territories, kidnapping on the high seas and in the air, and kidnapping of government officials (18 U.S.C.A. §§ 1201 et seq., 1751 et seq.).

A person who is convicted of kidnapping is usually sentenced to prison for a certain number of years. In some states, and at the federal level, the term of imprisonment may be the remainder of the offender's natural life. In jurisdictions that authorize the death penalty, a kidnapper is charged with a capital offense if the kidnapping results in death. Kidnapping is so severely punished because it is a dreaded offense. It usually occurs in connection with another criminal offense, or underlying crime. It involves violent deprivation of liberty, and it requires a special criminal boldness. Furthermore, the act of moving a crime victim exposes the victim to risks above and beyond those that are inherent in the underlying crime.

Most kidnapping statutes recognize different types and levels of kidnapping and assign punishment accordingly. New York State, for example, bases its definition of first-degree kidnapping on the purpose and length of the abduction. First-degree kidnapping occurs when a person abducts another person to obtain ransom (N.Y. Penal Code § 135.25 [McKinney 1996]). First-degree kidnapping also occurs when the abduction lasts for more than 12 hours and the abductor intends to injure the victim; to accomplish or advance the commission of a felony; to terrorize the victim or a third person; or to interfere with a governmental or political function. An abduction that results in death is also first-degree kidnapping. A first-degree kidnapping in New York State is a class A-1 felony, which carries a sentence of at least 20 years in prison (§ 70.00).

New York State also has a second-degree kidnapping statute. A person is guilty of second-degree kidnapping if he or she abducts another person (§ 135.20). This crime lacks the aggravating circumstances in first-degree kidnapping, and it is ranked as a class B felony. A person who is convicted of a class B felony in New York State can be sentenced to one to eight years in prison (§ 70.00).

Two key elements are common to all charges of kidnapping. First, the asportation ordetention must be unlawful. Under various state and federal statutes, not all seizures and asportations constitute kidnapping: Police officers may arrest and jail a person they suspect of a crime, and parents are allowed to reasonably restrict and control the movement of their children.

Second, some aggravating circumstance must accompany the restraint or asportation. This can be a demand for money; a demand for anything of value; an attempt to affect a function of government; an attempt to inflict injury on the abductee; an attempt to terrorize a third party; or an attempt to commit a felony.

In most states, kidnapping statutes specify that any unlawful detention or physical movement of a child, other than that performed by a parent or guardian, constitutes kidnapping. An abduction of a child thus need not be accompanied by some other circumstance, such as EXTORTION or physical injury, to qualify for the highest level of kidnapping charge. In the absence of an aggravating circumstance, an unlawful, non-consensual restraint or movement is usually charged as something less than the highest degree or level of kidnapping.

Many states have enacted special laws for CARJACKING, a specialized form of kidnapping. Generally, carjacking occurs when one person

forces a driver out of the driver's seat and steals the vehicle. Carjacking is a felony whether the aggressor keeps the victim in the car or forces the victim from the car. In California, a carjacking statute is contained within the penal code's chapter on kidnapping, and it carries a sentence of life imprisonment without the possibility of parole. (Cal. Penal Code § 209.5 [West]).

Kidnapping laws are similar to laws on unlawful or felonious restraint, parental kidnapping, and FALSE IMPRISONMENT. These crimes cover the range of unlawful-movement and unlawful-restraint cases. Felonious or unlawful restraint, also known as simple kidnapping, is the unlawful restraint of a person that exposes the victim to physical harm or places the victim in SLAVERY. It is a lesser form of kidnapping because it does not require restraint for a specified period or specific purpose (such as to secure money or commit a felony). False imprisonment is a relatively inoffensive, harmless restraint of another person. It is usually a misdemeanor, punishable by no more than a year in jail. Parental kidnapping is the abduction of a child by a parent. The law on parental kidnapping varies from jurisdiction to jurisdiction: Some jurisdictions define it as a felony, others as a misdemeanor. Many states consider parental kidnapping to be less offensive than classic kidnapping because of the strong bond between parents and children.

The chief judicial concern with the charge of kidnapping is DOUBLE JEOPARDY, which is multiple punishment for the same offense. It is prohibited by the FIFTH AMENDMENT to the U.S. Constitution. Kidnapping often is an act that facilitates another offense, such as rape, ROBBERY, or assault. Rape, robbery, and assault often involve the act of moving a person against his or her will, which is the gravamen (i.e., the significant element) of a kidnapping charge. Thus, a persistent problem with kidnapping prosecutions is in determining whether a kidnapping conviction would constitute a second punishment for the same act.

Legislatures have passed statutes, and courts have fashioned rules, to prevent and detect double jeopardy in kidnapping cases. Generally, these laws and rules hold that for kidnapping to be charged as a separate crime, some factor must set the asportation apart from a companion crime. Most courts will sustain multiple convictions if the asportation exposes the victim to increased risk of harm or results in harm to the victim separate from that caused by the companion offense. In other jurisdictions, the test is whether the asportation involves a change of environment or is designed to conceal a companion offense.

In most states, an asportation of a few feet may constitute the separate offense of kidnapping; in other states, distance is not a factor. In New York State, for example, the focus of the kidnapping statute is not distance, but purpose. Thus, an asportation of 27 city blocks might not constitute kidnapping if it is merely incidental to a companion crime (*People v. Levy,* 15 N.Y.2d 159, 256 N.Y.S.2d 793, 204 N.E.2d 842 [N.Y. 1965]). Likewise, an asportation from the borough of Manhattan to the borough of Queens might not constitute kidnapping if it plays no significant role in the commission of another crime (*People v. Lombardi,* 20 N.Y.2d 266, 282 N.Y.S.2d 519, 229 N.E.2d 206 [Ct. App. 1967]).

Some states have eliminated the asportation element from their kidnapping statutes. In Ohio, for example, kidnapping is defined in part as restraining the liberty of another person (Ohio Rev. Code Ann. § 2905.01 [Baldwin 1996]). This creates an increased risk of double jeopardy in kidnapping convictions because, by definition, every robbery, rape, or assault would constitute kidnapping. However, the Ohio state legislature has enacted a statute that prohibits multiple convictions for the same conduct unless the defendant exhibits a separate animus (i.e., a separate intent) to commit a separate crime (§ 2941.25). Whether the prosecution proves a separate animus to kidnap is a QUESTION OF FACT based on the circumstances surrounding the crime.

In *State v. Logan,* 60 Ohio St. 2d 126, 397 N.E.2d 1345, 14 Ohio Op. 3d 373 (1979), the Supreme Court of Ohio held that the defendant could not be convicted of both rape and kidnapping when he had moved the victim a mere few feet and had released the victim immediately after the rape. Under the facts of the case, the asportation had no significance apart from the rape offense. According to the court, the defendant had displayed no animus beyond that necessary to commit rape, so punishment for both rape and kidnapping was not warranted.

In contrast, in *State v. Wagner,* 191 Wis. 2d 322, 528 N.W.2d 85 (Ct. App. 1995), the appeals court upheld a separate conviction for kidnapping. In *Wagner*, the defendant approached two women on two separate occasions in a laundro-

mat. Both times, the defendant tried to force the women into a bathroom to rape them. He was convicted of two counts of attempted first-degree sexual assault, one count of kidnapping while armed, and one count of attempted kidnapping while armed. On appeal, he argued that he should not have been convicted of kidnapping because, under section 940.31(1)(a) of the Wisconsin Statutes, kidnapping is defined in part as the carrying of a person "from one place to another," and he had not taken his victims to another place. The court disagreed, holding that forced movement from one room to another falls within the meaning of the kidnapping statute. Ultimately, the appeals court affirmed the defendant's sentence of 72 years in prison.

The kidnapping of children has presented a particularly emotional issue for lawmakers. In 1984, in response to the kidnapping and murder of his child Adam, John Walsh founded the National Center for Missing and Exploited Children (NCMEC). NCMEC serves as a resource in providing assistance to parents, children, law enforcement, schools, and the community in recovering missing children and raising public awareness about ways to help prevent child abduction.

In 1996, the kidnapping and murder of Amber Hagerman in Texas inspired the Dallas/Fort Worth Association of Radio Managers and local law enforcement agencies in north Texas to create the nation's first "AMBER Alert" plan. AMBER, in addition to being Amber Hagerman's first name, also serves as an acronym for America's Missing: Broadcast Emergency Response. "Amber Alert" plans allow the development of an early warning system to help find abducted children by broadcasting information over radio and television to the public as quickly as possible. This information includes descriptions and pictures of the missing child, the suspected abductor, a suspected vehicle, and any other information available and valuable to identifying the child and suspect.

From its beginnings in Texas, the AMBER Alert system spread until, by 2002, 55 versions had been adopted at local, regional, and statewide levels. Eighteen states had adopted the plan by 2002, urged on by the NCMEC, which adopted the AMBER Alert as one of its top priorities. As a result, many people were convinced that the late 1990s and new millennium saw a sharp decline in child kidnappings, which were well publicized, thanks to AMBER Alerts. In fact, the FBI reported that child abductions had actually declined from the 1980s, from an average between 200 and 300 per year to only 93 in 2000.

The AMBER Alerts were considered so successful—credited with recovering 30 children—that Congress passed a national AMBER Alert bill as part of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650. Under this bill, the attorney general, in cooperation with the secretary of transportation and the chairman of the FEDERAL COMMUNICATIONS COMMISSION (FCC), appoints a National AMBER Alert Coordinator to oversee the communication network. The AMBER Alert Coordinator at the JUSTICE DEPARTMENT works with states, broadcasters, and law enforcement agencies to set up AMBER plans, to serve as a point of contact to supplement existing AMBER plans, and to facilitate appropriate regional coordination of AMBER Alerts. Grants were provided to help set up effective AMBER Alert programs at the state and local levels.

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## KILBERG DOCTRINE

*A principle applied in lawsuits involving conflicts of law that provides that a court in the place where a* WRONGFUL DEATH *action is brought is not bound by the law of the place where the conduct causing death occurred concerning limitations on damages.*

The rationale behind the Kilberg doctrine is that laws that set limitations on damages are procedural and, therefore, the law of the forum should be applied.

## KIN

*Relation by blood or consanguinity; relatives by birth.*

The term *kin* is ordinarily applied to relationships through ties of blood; however, it is sometimes used generally to include family relationships by affinity.

*Kindred* is a synonym for kin.

## KING, EDWARD

Edward King was a lawyer whose 1844 nomination to the U.S. Supreme Court failed because of political animosity between Congress and the president who proposed him.

King was born January 31, 1794, in Philadelphia. He was well educated and studied law under the prominent Pennsylvania lawyer Charles Chauncey. He was admitted to the Pennsylvania bar in 1816 and soon after entered politics, first as a Federalist and then as a Democrat. Before he was thirty years old, he had established himself as a leader of the DEMOCRATIC PARTY in Pennsylvania.

King became clerk of the Philadelphia orphans' court in 1824. The following year, he was named president judge of the Philadelphia Court of Common Pleas. He was a highly respected jurist who did more to establish Pennsylvania's EQUITY courts than did all the other judges of the state. Equity courts provided a necessary alternative for petitioners whose claims did not fit into the strictly prescribed rules of the common-law or common-pleas courts. Litigants seeking nonmonetary damages, such as an INJUNCTION or SPECIFIC PERFORMANCE of a contract, were without remedy before the establishment of equity jurisdiction.

About the time King was rising to national prominence on the strength of his judicial reputation, the federal government was in flux. Many southern Democrats had become disenchanted with President ANDREW JACKSON and his policies, which they claimed eroded STATES' RIGHTS and led to the economic depression that followed his administration. In 1840, the newly formed WHIG PARTY, born of the South's alienation from Jackson, named WILLIAM H. HARRISON and JOHN TYLER as its candidates for president and vice president, respectively. Harrison won the election; one month after his inauguration, he died, and Tyler ascended to the presidency.

Tyler, who had originally been a Democrat, lacked strong congressional support from either the Democrats or the Whigs. When he nominated King to the Supreme Court on June 5, 1844, the Senate voted to postpone consideration of the proposal. Tyler reappointed King on December 4; in January 1845, the Senate again tabled the nomination. Finally, Tyler withdrew King's nomination on February 7.

King continued as president judge in the common-pleas court until his retirement from the judiciary in 1852. Shortly afterward, he was appointed by Pennsylvania's governor to a commission to revise the state's criminal code. The revision, written mainly by King and then reported to the legislature, was adopted almost literally as prepared.

King spent the remaining years of his life traveling and studying. He was a member of the American Philosophical Society and for many years was president of the Board of Directors of Jefferson Medical College. He died in his hometown of Philadelphia on May 8, 1873.

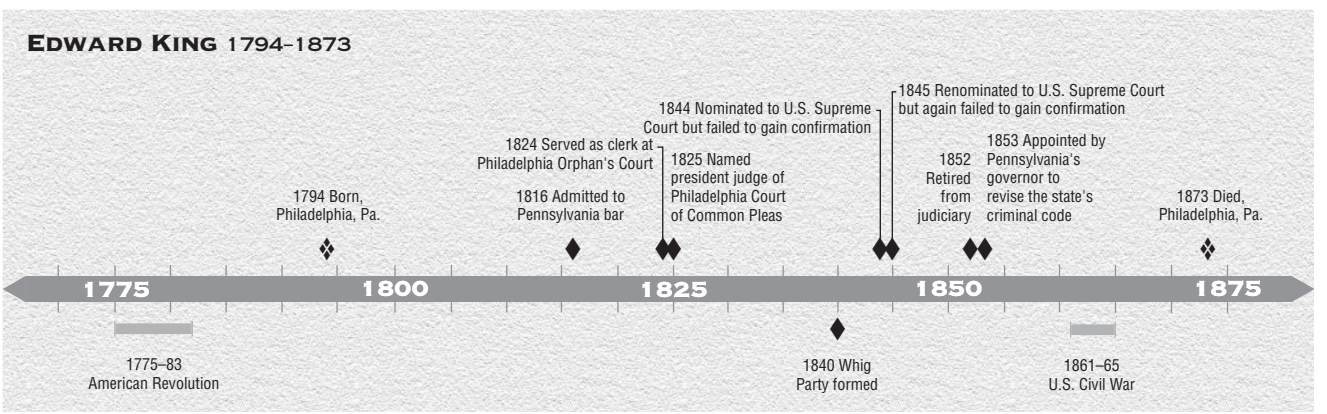

## ♦ KING, MARTIN LUTHER, JR.

For thirteen turbulent years, Martin Luther King Jr. was the inspirational leader and moral arbiter of the U.S. CIVIL RIGHTS MOVEMENT. An advocate of nonviolence, King helped organize well-publicized boycotts, marches, and demonstrations to protest SEGREGATION and racial injustice. From 1955 to 1968, he was the impassioned voice of African Americans who sought the abolishment of JIM CROW LAWS (a series of regulations enacted to keep the races separate) and the guarantee of equal housing, education, voting rights, and employment. Although countless U.S. citizens contributed to the success of the civil rights movement, King is its most enduring symbol. Before his mission was cut short by an assassin's bullet in 1968, he succeeded in permanently raising the social, economic, and political status of all people of color.

King was born January 15, 1929, in Atlanta, Georgia. At an early age, he demonstrated the intellect and drive that would propel him to national prominence. After skipping his senior year of high school, he enrolled in Atlanta's Morehouse College, at the age of fifteen. He earned a degree in sociology from Morehouse in 1948. Since both his father and grandfather were Baptist preachers, it was not surprising when King entered Crozer Theological Seminary, in suburban Philadelphia, at age nineteen. After graduating from Crozer as class valedictorian, King enrolled in Boston University's renowned School of Theology, where he earned a doctor's degree in 1955. While in Boston, he met and married Coretta Scott, a student at the Boston Conservatory.

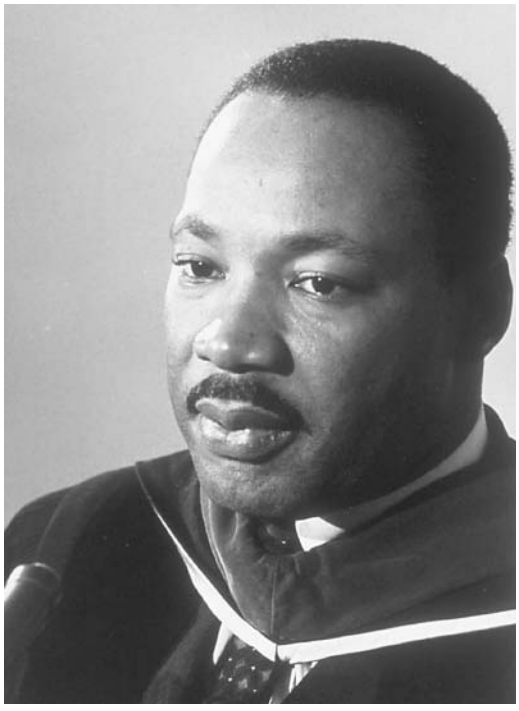

*Martin Luther King Jr.*
LIBRARY OF CONGRESS

The young couple moved to Montgomery, Alabama, in 1954, after King accepted a position as minister of the Dexter Avenue Baptist Church. He was only twenty-six years old and had lived in Montgomery for just eighteen months when an African–American bus rider changed the course of his life forever.

On December 1, 1955, seamstress ROSA PARKS took a personal stand against the South's Jim Crow laws when she refused to give up her seat to a white person and move to the back of a city bus. In Montgomery, segregated seating on buses was mandated by ordinance. Parks's

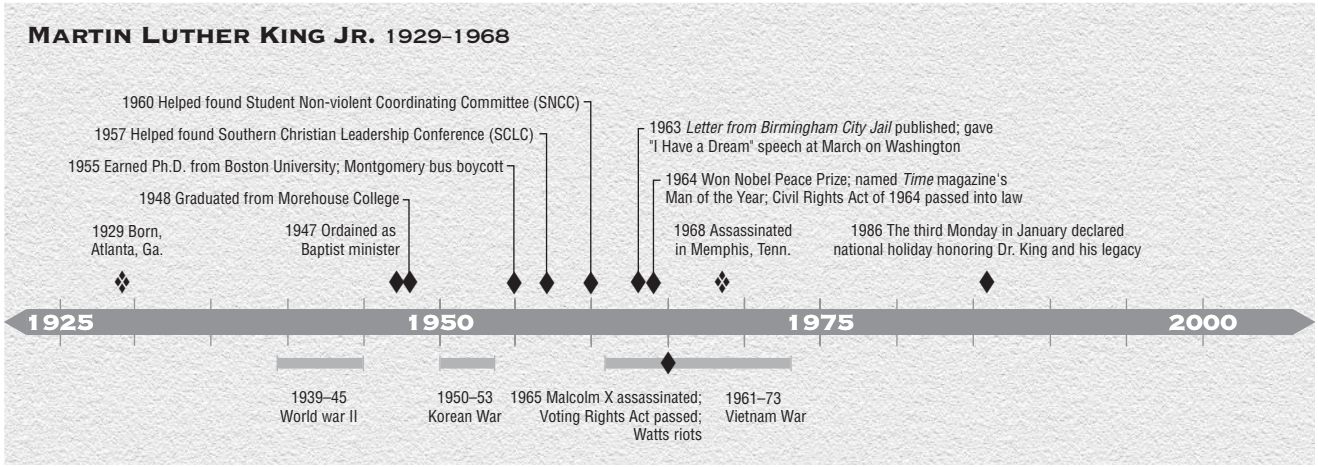

defiant act galvanized the city's African–American community. A bus boycott was organized to support Parks after her arrest and to put an end to segregated public transportation. When the Montgomery Improvement Association was created to direct the protest, a somewhat surprised King was named president. Years later, those involved in the boycott explained that King was selected because of his powerful speaking style, his credibility as a clergyman, and his relatively low profile in Montgomery. Because King was a newcomer, he had not made any enemies within the African American community and had not been corrupted by dishonest white politicians.

With leadership thrust upon him, King took over the boycott. He rose to the challenge, creating peaceful strategies that placed the bus company in an economic squeeze and African Americans on the moral high ground. He was greatly influenced by Mohandas K. ("Mahatma") Gandhi's nonviolence movement in India. King denounced violence throughout the citywide boycott, only to encounter death threats, hate mail, physical attacks, mass arrests, and the bombing of his church and home. The possibility of death was constant, but King used his deep religious faith and inner strength to stare down fear. He told his followers, "Love your enemies; bless them that curse you. . . . Remember, if I am stopped, this Movement will not stop, because God is with this Movement."

"NONVIOLENCE IS THE ANSWER TO THE CRUCIAL POLITICAL AND MORAL QUESTIONS OF OUR TIME; THE NEED FOR MEN TO OVERCOME OPPRESSION AND VIOLENCE WITHOUT RESORTING TO OPPRESSION AND VIOLENCE."
—MARTIN LUTHER KING JR.

By November 1956, the boycott had taken the intended financial toll on the transit company. Seventy percent of Montgomery's bus riders were African Americans, and they supported the boycott in droves. The campaign was declared a success when the buses were at last desegregated in December 1956 and Montgomery's ordinance was declared unconstitutional by the U.S. Supreme Court (*Owen v. Browder,* 352 U.S. 903, 77 S. Ct. 145, 1 L. Ed. 2d 114 [1956]). More important, King and his fellow African Americans discovered the power of social protest and the virtue of nonviolence.

After Montgomery, King knew that his true calling was social activism. In 1957, he helped found the **SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE**, an organization that would guide the growing civil rights movement. During the late 1950s and early 1960s, King took part in dozens of demonstrations throughout the South and was arrested and jailed for his civil disobedience. The national media and the administrations of Presidents **DWIGHT D. EISENHOWER** and **JOHN F. KENNEDY** took notice. King became the torchbearer for the nation's civil rights struggle.

In 1963, King and his fellow activists set out to integrate Birmingham, Alabama, which King called "the most thoroughly segregated city in the country." Unlike Montgomery, where the issue was limited to bus ridership, Birmingham offered a forum for far-reaching objectives. King's goal was to desegregate the entire community—its restaurants, hotels, department stores, rest rooms, and public facilities. As the sit-ins and marches began, the response by some white southerners was ugly. Extremists bombed an African–American church, killing four young girls who were attending Sunday School inside. Police commissioner Eugene ("Bull") Connor ordered his officers to use high-pressure water hoses, police dogs, and clubs against the nonviolent demonstrators. Grade school and high school protesters were jailed alongside adults, and at one point, three thousand African Americans were incarcerated in Birmingham. King himself was jailed and as a result wrote his historic 1963 essay *Letter from Birmingham City Jail,* an eloquent justification of nonviolent resistance to unjust laws. Throughout the saga, television cameras sent searing images of white brutality across the nation. As King hoped, federal intervention was required to handle the situation, and segregation laws were forced off the books.

Perhaps the crowning moment of King's career was the 1963 March on Washington, when 250,000 people from diverse racial and ethnic backgrounds converged in front of the Lincoln Memorial in Washington, D.C. Here, King delivered his famous "I Have a Dream" speech, which described a world of racial equality and harmony. The speech ended with these stirring words:

> When we let freedom ring, when we let it ring from every village and every hamlet, from every state and every city, we will be able to speed up that day when all of God's children, black men and white men, Jews and Gentiles, Protestants and Catholics, will be able at last to join hands and sing in the words of the old Negro spiritual, "Free at last! Free at last! Thank God Almighty, we are free at last!"

King was successful in pressuring the U.S. Congress and President **LYNDON B. JOHNSON** to support the **CIVIL RIGHTS ACT OF 1964** (42 U.S.C.A. § 2000a et seq.). The law guaranteed equal access for all U.S. citizens to public accommodations and facilities, employment, and edu-

cation. In 1965, King's campaign in Selma, Alabama, helped ensure the passage of the VOTING RIGHTS ACT OF 1965 (42 U.S.C.A. § 1973 et seq.), which extended the vote to previously disenfranchised African Americans in the Deep South. The act outlawed the tests, standards, and procedures that were routinely used to disqualify voters on the basis of race.

King received several honors for his work, including the Nobel Peace Prize in 1964. The same year, he was the first African American to be named *Time* magazine's Man of the Year. Since 1986, the third Monday in January has been observed as a federal holiday in honor of King's birthday.

The last years of King's life were difficult, as he struggled with bouts of depression over personal and professional failures. His hold on the civil rights movement was clearly weakening. Young African–American activists were demanding a more militant approach to achieving social and economic justice. The angrier BLACK POWER MOVEMENT appealed to increasing numbers of African Americans who were impatient with the slow pace of King's nonviolent tactics. King's campaigns in northern cities such as Chicago were largely unsuccessful.

On August 11, 1965, just days after the passage of the Voting Rights Act, the African American Watts area of Los Angeles erupted into a riot that lasted six days. Thirty-four people were killed, and $30 million worth of property was damaged. After the upheaval in Watts, King's message and influence were diminished.

In 1967, King publicly criticized the United States' involvement in Vietnam and earned the enmity of his former liberal ally President Johnson. Critics believed that King's entry into the peace movement diluted his efforts to achieve further gains for African Americans.

In the spring of 1968, King planned to participate in the Poor People's Campaign, in Washington, D.C. Before going to the nation's capital, he traveled to Memphis to support striking garbage workers there. On April 4, while standing on the balcony of his room at the Lorraine Motel, in Memphis, he was assassinated by James Earl Ray, a white man.

According to those who knew him, King did not set out to become a martyr for civil rights. As ELLA J. BAKER, a longtime activist, said, "The movement made Martin rather than Martin making the movement." King represents the dignity of the struggle and the sacrifice it required. Despite a tendency to deify King, he should be regarded not as a saint but as an extraordinary individual who used his prodigious talents to change society. When asked to describe his possible legacy, King himself said, "I just want to leave a committed life behind."

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## ♦ KING, RODNEY G.

The 1991 beating of Rodney G. King by Los Angeles, California, police led to state and federal criminal prosecution of the law enforcement officers involved in the assault, a civil jury award of $3.8 million to King for his injuries, and major reforms in the Los Angeles police department. In addition, the April 1992 acquittal of the white police officers for the beating of King, an African American, touched off riots in Los Angeles that rank as the worst in U.S. history. The controversy surrounding each of these actions raised the issues of race, racism, and police brutality in communities throughout the United States.

On the evening of March 3, 1991, Rodney King was driving his automobile when a highway police officer signaled him to pull over to the side of the road. King, who had been drinking, fled, later testifying that he was afraid he would be returned to prison for violating his

PAROLE. A high-speed chase ensued with a number of Los Angeles police officers and vehicles involved. The police eventually pulled King over. After King got out of his car, four officers—Stacey C. Koon, Laurence M. Powell, Timothy E. Wind, and Theodore J. Briseno—kicked King and hit him with their batons more than fifty times while he struggled on the ground.

Unbeknownst to the officers, an amateur photographer, George Holliday, videotaped eighty-one seconds of the beating. The videotape was shown repeatedly on national television and became a symbol of complaints about police brutality.

The four officers were charged with numerous criminal counts, including assault with a deadly weapon, the use of excessive force, and filing a false police report. Because of the extensive publicity surrounding the case, the trial of the four police officers was conducted in Simi Valley, a predominantly white community located in Ventura County, not far from Los Angeles. During the trial the prosecution used the videotape as its principal source of evidence and did not have King testify. The defense also used the videotape, examining it frame by frame to bolster its contention that King was resisting arrest and that the violence was necessary to subdue him. The defense also contended that the videotape distorted the events of that night, because it did not capture what happened before and after the eighty-one seconds of tape recording.

On April 29, 1992, the jury, which included ten whites, one Filipino American, and one Hispanic, but no African Americans, found the four police officers not guilty on ten of the eleven counts and could not come to an agreement on the other count. The acquittals stunned many persons who had seen the videotape. Within two hours riots erupted in the predominantly black South Central section of Los Angeles. The riots lasted seventy hours, leaving 60 people dead, more than 2,100 people injured, and between $800 million and $1 billion in damage in Los Angeles. Order was restored through the combined efforts of the police, more than ten thousand NATIONAL GUARD troops, and thirty-five hundred Army and Marine Corps troops.

*A still from amateur photographer George Holliday's videotape of the March 3, 1991, beating of Rodney King by members of the Los Angeles Police Department.*

AP/WIDE WORLD PHOTOS

In the riot's aftermath, criticism of the Los Angeles police, which had escalated after the King beating, grew stronger. Many believed that the longtime police chief, Daryl F. Gates, had not sufficiently prepared for the possibility of civil unrest and had made poor decisions in the first hours of the riots. These criticisms, coupled with the determination by an independent commission headed by Warren G. Christopher (a distinguished attorney who served in the STATE DEPARTMENT during the administration of President JIMMY CARTER) that Gates should be replaced because of the brutality charges, placed increasing pressure on the police chief. Gates finally resigned in late June 1992.

In August 1992 a federal GRAND JURY indicted the four officers for violating King's CIVIL RIGHTS. Koon was charged with depriving King of DUE PROCESS OF LAW by failing to restrain the other officers. The other three officers were charged with violating King's right against unreasonable SEARCH AND SEIZURE because they had used unreasonable force during the arrest.

At the federal trial, which was held in Los Angeles, the jury was more racially diverse than the one at Simi Valley: two jury members were black, one was Hispanic, and the rest were white. This time King testified about the beating and charged that the officers had used racial epithets. Observers agreed that he was an effective witness. The videotape again was the central piece of evidence for both sides. On April 17, 1993, the jury convicted officers Koon and Powell of violating King's civil rights but acquitted Wind and Briseno. Koon and Powell were sentenced to two and a half years in prison.

King filed a civil lawsuit against the police officers and the city of Los Angeles. After settlement talks broke down, the case went to trial in early 1994. On April 19, 1994, the jury awarded King $3.8 million in COMPENSATORY DAMAGES. However, the jury refused to award King PUNITIVE DAMAGES. In July 1994 the city of Los Angeles struck a deal whereby King agreed to drop any plans to appeal the jury's verdict on punitive damages. In return, the city of Los

Angeles agreed to expedite payment of King's compensatory damages.

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## KING'S BENCH OR QUEEN'S BENCH

*The highest common-law court in England until its end as a separate tribunal in 1875.*

The Court of the King's Bench or Court of the Queen's Bench derived from the royal court first established by William the Conqueror in the eleventh century. The royal court, called the curia regis, was not a judicial body in the modern sense. Rather, it was an assembly of English lords and noblemen that resolved matters of special importance to the king. As the king traveled about England, the royal court followed, advising him and deciding cases.

The royal court was reorganized by the Crown in the twelfth and thirteenth centuries, and renamed the Court of the King's Bench or Court of the Queen's Bench. This court existed as an alternative to the Court of Common Pleas, which was comprised of professional judges. At first the two courts heard different types of cases. However, over the course of several centuries, the Court of the King's Bench or Court of the Queen's Bench expanded its jurisdiction to hear virtually any case. This encroached on the power of the Court of Common Pleas, and the two courts competed for cases.

In 1873 Parliament abolished the Court of the King's Bench or Court of the Queen's Bench—then under Queen Victoria—and merged it into the High Court of Justice as the King's Bench Division. The King's Bench Division of the High Court of Justice is empowered to hear appeals of certain cases. The High Court of Justice is akin to a U.S. trial court. It has two other divisions: the Family Division and the Chancery Division.

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As a scholar, adviser, and U.S. SECRETARY OF STATE, Henry Alfred Kissinger was an important figure in international affairs in the late twentieth century. The German-born Kissinger became a U.S. citizen in the 1930s; emerged as a leading theorist at Harvard in the 1950s; advised presidents during the 1960s; and defined the course of U.S. foreign policy for much of the 1970s. He won great acclaim for his pragmatic vision of foreign policy as well as for his skills as a peace negotiator. In 1973, he shared the Nobel Peace Prize for his efforts in securing a cease-fire in the VIETNAM WAR. However, criticism followed public revelations about his involvement in secret U.S. military and ESPIONAGE operations, and he left public office in 1976 with a controversial record.

Born May 27, 1923, in Fürth, Germany, and given the first name Heinz, Kissinger was the son of middle-class Jewish parents who fled Nazi persecution while he was a teenager. The family emigrated to the United States in 1938, and Kissinger became a U.S. citizen in 1943. Service in the U.S. Army took Kissinger back to Europe during WORLD WAR II. Following combat and intelligence duty, he served in the post-war U.S. MILITARY GOVERNMENT in Germany from 1945 to 1946. Decorated with honors and discharged from the service, he earned a bachelor of arts degree summa cum laude in government studies at Harvard College in 1950, then added a master's degree and, in 1956, a doctorate.

"A CONVENTIONAL ARMY LOSES IF IT DOES NOT WIN. THE GUERILLA ARMY WINS IF IT DOES NOT LOSE."
—HENRY KISSINGER

While teaching at Harvard in the 1950s, Kissinger came to national attention with his book *Nuclear Weapons and Foreign Policy* (1957). The book was a bold argument against narrow COLD WAR views of military strategy. It took aim at the reigning defense doctrine of the day, which was an all-or-nothing approach holding that the United States should retaliate massively with NUCLEAR WEAPONS against any aggressor. Kissinger proposed a different solution based on the approach of *Realpolitik,* the German concept of an intensely pragmatic, rather than idealistic, vision of international relations. The United States should deploy nuclear weapons strategically around the world as a deterrent, he argued, while relying on conventional, non-nuclear forces in the event of aggression against it. The idea gradually took hold over the next decade.

Rising to the top of his field, Kissinger became a driving force behind Harvard's efforts

*Henry Kissinger.* AP/WIDE WORLD PHOTOS

in the area of foreign policy. He took increasingly higher positions in the school's Center for International Affairs and directed its Defense Studies Program. Kissinger became much sought after by politicians, diplomats, and government defense specialists in the 1960s. He counseled Presidents JOHN F. KENNEDY and LYNDON B. JOHNSON on foreign policy. In 1968, he advised Governor Nelson A. Rockefeller, of New York, in Rockefeller's unsuccessful campaign for the REPUBLICAN PARTY nomination for president. After the election, the new president, RICHARD M. NIXON, was quick to hire away his opponent's adviser.

The two terms of Nixon's presidency elevated Kissinger's power. Named first to the position of assistant for national security affairs, a high-level post, he soon eclipsed the president's secretary of state, William P. Rogers, in visibility and influence. Indeed, by the end of Nixon's first term, Kissinger was the acknowledged architect of U.S. foreign policy. His rise to preeminence was complete in 1973, when Nixon made him secretary of state.

Under Nixon, Kissinger had a string of historic successes. He arranged Nixon's breakthrough visit to China in 1972, which ended years of hostile relations between the two nations. Also in 1972, at the STRATEGIC ARMS LIMITATIONS TALKS (SALT 1), he helped to broker the ANTI-BALLISTIC-MISSILE TREATY, the landmark agreement to limit nuclear proliferation, signed by the United States and the Soviet Union. Traveling widely in what came to be known as "shuttle diplomacy," Kissinger conducted peace negotiations between the United States and Vietnam en route to the signing of a cease-fire in 1973. In recognition of his efforts, he was awarded the Nobel Peace Prize, with the chief North Vietnamese negotiator, Le Duc Tho. Kissinger also engineered cease-fires between Arab states and Israel after their 1973 war, and he persuaded Nixon to ready U.S. forces around the world in order to deter Soviet intervention.

In 1973, Kissinger also came under harsh attack. Throughout the Vietnam conflict, antiwar critics had targeted him. New public revelations about the White House's secret conduct of the war in Southeast Asia led to criticism. It was revealed that in 1969, Kissinger had won Nixon's approval to expand the war into Cambodia, a

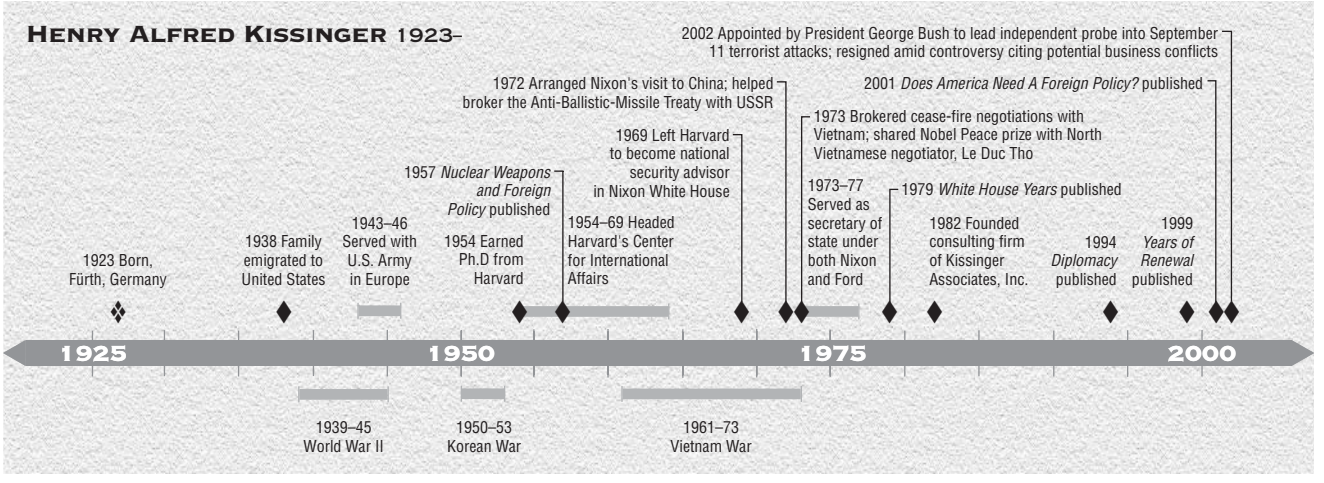

neutral country, with bombings and subsequent ground incursions by U.S. troops. Critics eventually blamed Kissinger and Nixon for the destruction of Cambodia after the country fell to Khmer Rouge leader Pol Pot, whose forces systematically murdered millions of Cambodians. On the political left, some commentators branded the president and his secretary of state war criminals.

When Nixon's 1974 resignation resulted in the succession of GERALD R. FORD as president, Ford kept Kissinger as both secretary of state and national security adviser. But Kissinger faced mounting criticism in the media and Congress. More revelations came to light: Kissinger had secretly authorized CENTRAL INTELLIGENCE AGENCY operations to overthrow the government of Chile and to support rebels in Angola. He was also attacked for having used wiretaps of federal employees in order to stop security leaks. Whereas Congress had listened attentively to Kissinger during the Nixon administration, the allure of his *Realpolitik* was fading in the more cautious, less interventionist post-Vietnam era. He left office in 1976 with his influence at an all-time low.

Kissinger was awarded the presidential Medal of Freedom in 1976 and the Medal of Liberty in 1986. In private life, Kissinger continued to be active in international affairs. He taught, served as a consultant, and often commented in the media on foreign policy, while also writing two popular memoirs: *White House Years* (1980) and *Years of Upheaval* (1982). President RONALD REAGAN briefly lured Kissinger back into public life in 1983, appointing him to head a commission to make policy recommendations on Latin America. In 1994, Kissinger published *Diplomacy* which analyzed modern foreign relations, including the strategies employed during the Vietnam War, and in 2003 he published *Ending the Vietnam War: A Personal History of America's Involvement in and Extrication from the Vietnam War.*

Kissinger's record of public service continues to be the subject of scrutiny. In 2002, a film called *The Trials of Henry Kissinger,* based on a similarly-titled book by journalist Christopher Hitchens, used previously unpublished documents to make the argument that Kissinger should be tried as a war criminal for his involvement in the secret bombing of Cambodia by the United States, the overthrow of democratically elected President Salvador Allende in 1973, and the use of U.S.-supplied weapons in the Indonesian massacre of thousands of civilians in East Timor in 1975. In November 2002, Kissinger was appointed by President GEORGE W. BUSH to chair the commission that had been convened to investigate the SEPTEMBER 11TH ATTACKS. Two weeks later, Kissinger announced his resignation from the commission in order to avoid possible conflicts of interest with persons and organizations that employed his consulting firm, Kissinger Associates.

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## KITING

*The unlawful practice of drawing checks against a bank account containing insufficient funds to cover them, with the expectation that the necessary funds will be deposited before such checks are presented for payment.*

## ♦ KLEINDIENST, RICHARD GORDON

Richard Gordon Kleindienst, a prominent Arizona lawyer and REPUBLICAN PARTY leader, served as U.S. attorney general from 1972 to 1973. He was charged in the WATERGATE scandals and ultimately pleaded guilty to a perjury charge in 1974.

Kleindienst was born August 5, 1923, in Winslow, Arizona. He served in the U.S. Army from 1943 to 1946 and then attended college. He graduated from Harvard University in 1947 and received his law degree from Harvard Law School in 1950. He was admitted to the Arizona bar in 1950 and entered practice with a law firm in Phoenix.

Politics soon became a dominant part of Kleindienst's life. He was elected as a Republican to the Arizona House of Representatives in 1953, where he served one term. During the 1950s, the western conservative wing of the Republican Party started to grow. Senator Barry M. Goldwater, of Arizona, became the standard-bearer of conservatism, and Kleindienst devoted himself to this cause. He led the Young Republicans and served on the state and national Republican committees. He also took on the role of political mentor to WILLIAM H. REHNQUIST, a young Arizona attorney who later would become chief

justice of the U.S. Supreme Court. Kleindienst's political activities climaxed in 1964, when he served as director of field operations for Goldwater's unsuccessful presidential campaign against incumbent LYNDON B. JOHNSON.

Kleindienst became an ally of RICHARD M. NIXON. He worked on Nixon's successful 1968 presidential campaign and served as general counsel of the Republican National Committee. As a reward for Kleindienst's campaign work, Nixon appointed him deputy attorney general in January 1969. Kleindienst brought to Washington, D.C., his protégé Rehnquist to serve as counsel to Attorney General JOHN N. MITCHELL.

In 1972, Mitchell agreed to resign as attorney general and to become the head of President Nixon's re-election committee. Kleindienst was appointed attorney general on June 12. At his confirmation hearings, Democratic senators raised questions about an antitrust settlement that Kleindienst had negotiated between the federal government and International Telephone and Telegraph Corporation (ITT). Rumors suggested that the White House had pressured Kleindienst to drop the antitrust suit. The senators also alleged that ITT had received a favorable disposition of the lawsuit in return for a large contribution to Nixon's re-election campaign. At his hearings, Kleindienst denied that anyone had pressured him.

"IT IS OF UTMOST IMPORTANCE TO THIS ADMINISTRATION IN POWER, AND YOU MEN MUST DO EVERYTHING YOU CAN TO INSURE THAT RESULT."
—RICHARD KLEINDIENST

On June 17, five days after Kleindienst was sworn in as attorney general, persons working for the Nixon re-election committee broke into Democratic National Committee headquarters at the Watergate office building complex in Washington, D.C. The burglars planted electronic eavesdropping devices in hopes of gaining intelligence on the Democrats' strategy to defeat Nixon. The burglars were arrested.

On January 20, 1973, Kleindienst met with Mitchell and White House advisers to discuss handling the public-relations problems that were mounting in the wake of the break-in. As events unfolded, prosecutors began to tie the burglars to the White House and the re-election committee leadership. On April 30, Kleindienst and top White House aides H.R. Haldeman, John D. Ehrlichman, and John W. Dean III resigned, amid charges of White House efforts to obstruct justice in the Watergate case.

In 1974, Kleindienst pleaded guilty to a misdemeanor perjury charge for failing to testify fully at his Senate confirmation hearings concerning the ITT lawsuit. The charge against him revealed that Nixon had called him in 1971 and told him to drop the case. Kleindienst later claimed that he was innocent of the charge and that he had not been swayed by Nixon's directive. He was fined $1,000 and sentenced to 30 days in jail, but the judge suspended the sentence. Prosecutors also discovered that ITT had contributed $400,000 to the Nixon campaign following the resolution of the lawsuit, but Kleindienst was never implicated in that matter.

Kleindienst returned to Arizona, where he resumed his law practice. In 1985, he published *Justice,* his account of his time in Washington, D.C. He died at his home in Prescott, Arizona, on February 3, 2000.

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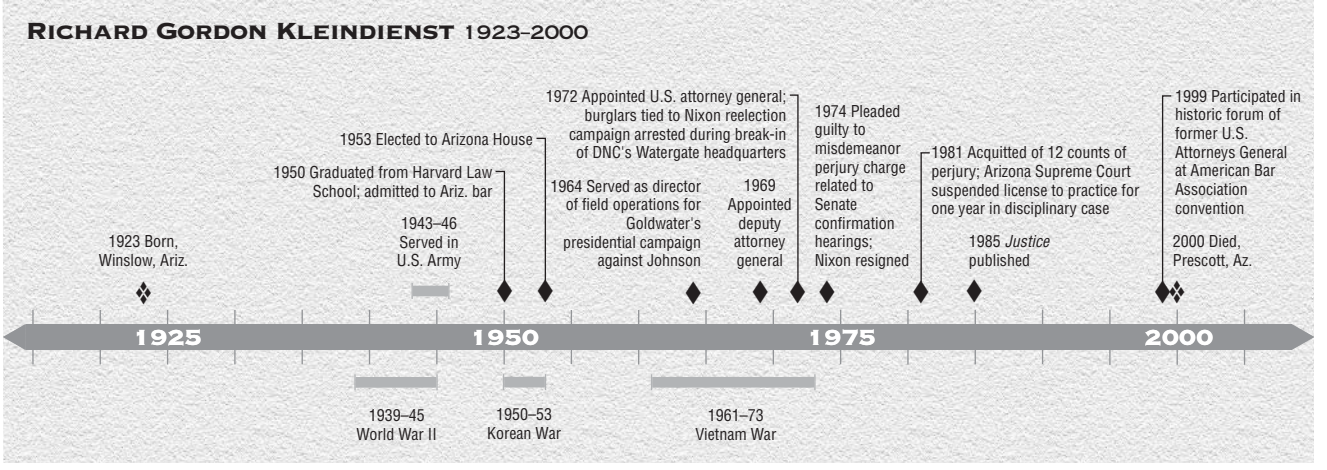

## ♦ KNAEBEL, ERNEST

Ernest Knaebel was an attorney who became an assistant U.S. attorney for Colorado and later a U.S. Supreme Court reporter of decisions.

Born June 14, 1872, in Manhasset, New York, and raised in New York, Knaebel received his college and LEGAL EDUCATION at Yale. He received his bachelor of arts degree in 1894, his bachelor of laws degree summa cum laude in 1896, and his master of laws degree magna cum laude in 1897. After graduating from law school, he was admitted to the New York, New Mexico, and Colorado bars. He practiced law in New York City from 1897 to 1898.

In 1898, Knaebel moved to Colorado and entered private practice with his father in Denver. From 1902 to 1907, he served as assistant U.S. attorney for Colorado. He returned to the East in 1907 to become a special assistant to the attorney general in Washington, D.C., and was named assistant attorney general in 1911. During his tenure with the JUSTICE DEPARTMENT, Knaebel was heavily involved in land-fraud prosecutions, arguing many of the early cases concerning public and Indian land disputes that came before the U.S. Supreme Court. He also organized the Public Lands Division of the Justice Department and directed that division from 1909 to 1916.

In 1916, Knaebel was appointed the reporter of decisions for the U.S. Supreme Court. In this capacity, he and his staff were responsible for the slow, painstaking task of editing the Court's decisions and preparing them for publication. The reporter checks all citations in the opinions, corrects typographical and other errors, adds the headnotes summarizing the major points of law, and lists the voting lineup of the justices and the names of counsel. Under Knaebel's tenure, the office of reporter was reorganized by statute and the printing and sale of *U.S. Reports,* the official publication of Supreme Court orders and decisions, was turned over to the U.S. GOVERNMENT PRINTING OFFICE and the superintendent of documents. Knaebel edited volumes 242 to 321 of *U.S. Reports.*

Knaebel was a member of the AMERICAN BAR ASSOCIATION, Phi Beta Kappa, and Phi Alpha Delta. He served on the Board of Governors of the Lawyers' Club and was a member of the Cosmos Club and the Yale Club.

Knaebel served as reporter of decisions from 1916 until January 31, 1944, when he retired because of ill health. He died on February 19, 1947, in West Boxford, Massachusetts.

## KNOW-NOTHING PARTY

The Know-Nothing movement was actually a group of secret anti-Catholic, anti-Jewish and anti-immigrant political organizations that called itself the American party. The movement, comprised principally of native-born, white, Anglo-Saxon males, came into being in the 1850s, grew rapidly, and waned almost as quickly.

In the early 1800s, as immigrants continued to flow into the United States, a number of American citizens grew increasingly alarmed. Waves of Germans, who mostly spoke in their native tongue, and Irish, whose thick brogues were difficult to understand, were two groups who inspired the great opposition. The clannish Irish, who were Catholics, were particularly feared and despised. Many Protestants felt that

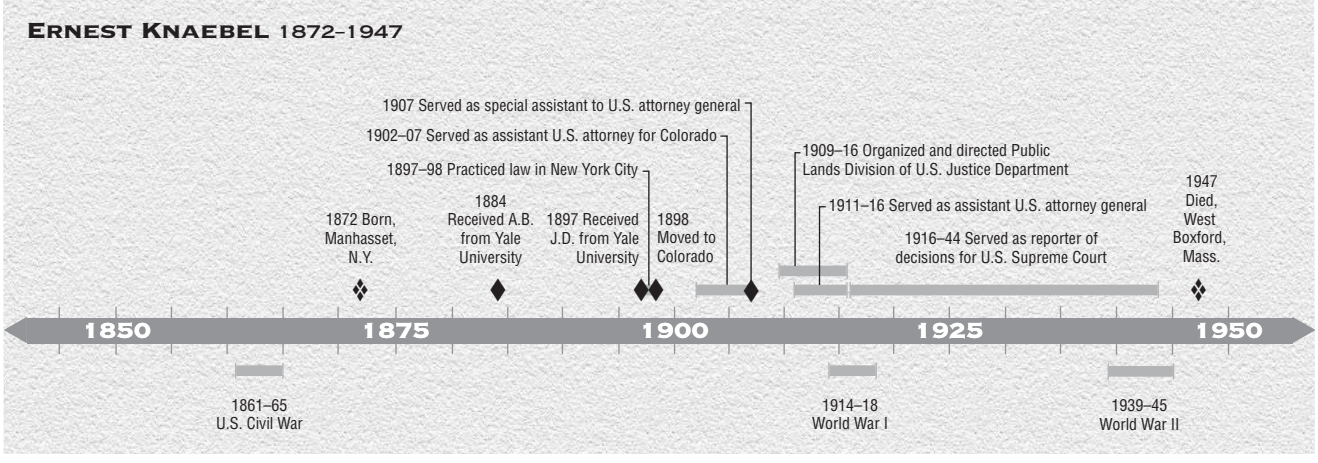

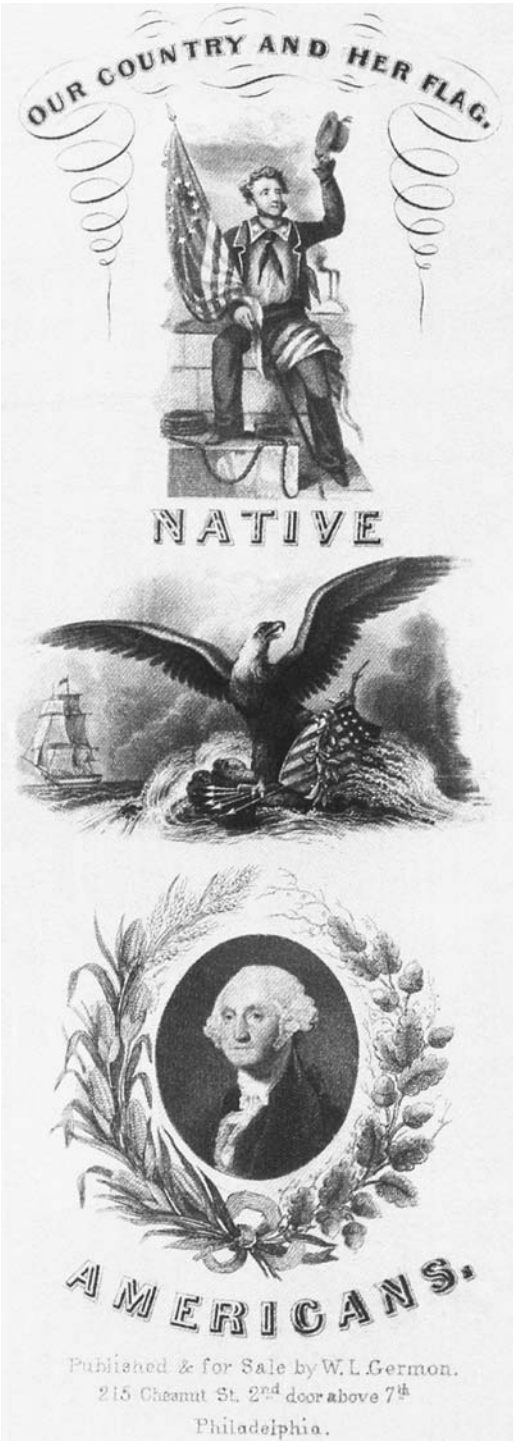


*An 1844 "Nativist" campaign banner. By 1856 the anti-immigrant, anti-Catholic political group—then known as the American Party (or Know-Nothings)—held their only national convention in Philadelphia, nominating Millard Fillmore for president.*

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all Catholics were controlled by and took orders from the pope in Rome.

Certain groups of already established Americans who called themselves "Nativists," formed secret societies dedicated to stopping the flow of immigrants. The depth of nativist animosity was demonstrated in 1834 when a group of anti-Catholic laborers and townspeople chased a group of students and Ursuline nuns from their school and convent near Boston and then burned the buildings.

In 1835 a group of New Yorkers organized a state political party, the Native American Democratic Association. Association candidates, running on a platform that opposed Catholics and immigrants, with support from the Whigs (members of a political party formed in 1834 to oppose ANDREW JACKSON and the Democrats) gained 40 percent of the vote in the fall elections. In the 1840s more groups appeared in Baltimore, Philadelphia, and other metropolitan regions of the country. Various local groups appeared and disappeared over time. Eventually the themes of hostility to Catholics and immigrants and the corresponding opposition to the costs of trying to support and educate indigent foreigners found favor with groups attempting to organize on a national basis.

In 1849 a secret fraternal organization bearing the name of the Order of the Star Spangled Banner was launched in New York and similar lodges began to form in other major American cities. When asked about their nativist origins, members would respond that they "knew nothing" and soon found themselves so-labeled. Secretive at first, the organization soon found support for proposals that included stringent restrictions on immigration, exclusion of foreign-born persons from voting or holding political office and a residency requirement of more than 20 years for U.S. citizenship. Because many Know-Nothing supporters felt that liquor had a pernicious effect on immigrants, they sought to limit alcohol sales. They also supported daily Bible readings in schools and tried to ensure that only Protestants could teach in the public schools.

As it shed its clandestine beginnings, the Know-Nothing movement spread rapidly. By 1852 supporters of the Know-Nothing movement had achieved significant results with many of their candidates winning seats in local and state elections. With the passage of the KANSAS-NEBRASKA ACT of 1854, the movement gained more supporters. Although originally allied with the Whigs, the phenomenal success of the Know-Nothings as well as growing debate over SLAVERY helped cause the decline and demise of the WHIG PARTY. The Know-Nothings elected the governor and all but two members of the Massachusetts state legislature as well as 40 members of the New York state legislature. By

1855 Know-Nothing adherents had elected thousands of local government officials as well as eight governors. Forty-three Know-Nothing candidates were elected to the U.S. House of Representatives and there were five Know-Nothing senators.

Yet even as the number of Know-Nothing adherents reached its peak, the movement was beginning to decline. Despite their numbers in elective office, the Know-Nothings were largely unsuccessful in passing significant legislation. They introduced a bill in Congress that called for the prohibition of immigration of foreign-born paupers and convicts. They also introduced legislation in several states that required registration and literacy tests for voters.

In 1856 the Know-Nothings held their first and only national convention in Philadelphia where, as the American party, they supported former President MILLARD FILLMORE as their presidential candidate. The meeting illustrated the growing divide between antislavery and proslavery factions within the party when a group of antislavery delegates abruptly left the convention. Fillmore received 21 percent of the popular vote and eight electoral votes, finishing a poor third behind Democrat JAMES BUCHANAN (who had been nominated instead of unpopular incumbent FRANKLIN PIERCE and who won the election) and Republican John Fremont.

The dismal showing of Fillmore and the increasing controversy over slavery continued the rapid disintegration of the Know-Nothing movement. Many antislavery adherents joined remnants of the Whigs in the newly emerging REPUBLICAN PARTY, while proslavery supporters joined the DEMOCRATIC PARTY. By 1859 the Know-Nothing movement had lost support in all but a few Northern and border states and was no longer of any significance on the national stage.

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## KNOWINGLY

*Consciously; willfully; subject to complete understanding of the facts or circumstances.*

According to provisions contained in the MODEL PENAL CODE, an individual is deemed to have acted knowingly in regard to a material element of an offense when: in the event that such element involves the nature of his or her conduct or the circumstances attendant thereto, he or she is aware that the conduct is of such nature or that those circumstances exist; if the element relates to a result of the person's conduct, he or she is conscious of the fact that it is substantially certain that the conduct will precipitate such a result.

When the term *knowingly* is used in an indictment, it signifies that the defendant knew what he or she was going to do and, subject to such knowledge, engaged in the act for which he or she was charged.

## KNOX, PHILANDER CHASE

Philander Chase Knox was a corporate attorney, industrialist, and two-time U.S. senator from Pennsylvania. He served as U.S. attorney general under President WILLIAM MCKINLEY from 1901 to 1904, and as U.S. SECRETARY OF STATE under President WILLIAM HOWARD TAFT from 1909 to 1913.

"THE CONSCIOUSNESS OF POSSESSING A GIANT'S STRENGTH IS A SUFFICIENT PREVENTIVE AGAINST THE TYRANNY OF USING IT AS A GIANT."
—PHILANDER KNOX

Knox was born to privilege on May 6, 1853, in Brownsville, Fayette County, Pennsylvania. His banker father, David S. Knox, financed commercial activities in the region around Pittsburgh. His mother, Rebekah Page Knox, was involved in numerous philanthropic and social organizations, and she encouraged her children in community service pursuits.

Knox's early education was in local private schools with the children of other prominent Pennsylvania families. He received a bachelor of arts degree from Mount Union College, in Alliance, Ohio, in 1872. While in college Knox began a lifelong friendship with future president McKinley, who was then district attorney of Stark County, Ohio. McKinley encouraged the young man's interest in the law, and arranged for him to read law in the office of Attorney H. B. Swope, of Pittsburgh.

After spending three years with Swope, Knox was admitted to Pennsylvania's Allegheny County bar in 1875. Shortly thereafter he was appointed assistant U.S. district attorney for the Western District of Pennsylvania. Two years later he formed a law partnership with James H. Reed, of Pittsburgh, that would last more than twenty years. In 1880 he formed an equally lasting marital partnership with Lillie Smith, daughter of Pittsburgh businessman Andrew D. Smith.

Knox's professional skills and personal style were well suited to the business climate of his

*Philander Chase Knox.*
LIBRARY OF CONGRESS

day. He was intimately involved in the industrial development of the Pittsburgh region as well as the organization and direction of the companies forging that development. His efforts made him one of the wealthiest men in Pennsylvania.

Knox, along with many of his business and social peers, was a charter member of the South Fork Fishing and Hunting Club, on Lake Conemaugh, near Johnstown, Pennsylvania. The club erected a dam to create its private lake retreat. When the dam failed on May 31, 1889, an ensuing flood killed more than two thousand people and destroyed countless homes and businesses in its path. Author David McCullough noted in his history *The Johnstown Flood* that no money was ever collected from the club or its members through damage suits. But Knox's family contributed to the relief efforts, and Knox and other businessmen used their resources to help rebuild many of the companies and restore many of the jobs lost in the cataclysm.

By 1897 Knox had sufficiently redeemed himself to be elected president of the Pennsylvania Bar Association. In 1899 his longtime friend President McKinley offered him the position of attorney general of the United States. Knox declined McKinley's initial offer because he was heavily involved in the formation and organization of the Carnegie Steel Company, so the position went to JOHN W. GRIGGS.

When Griggs resigned in 1901, McKinley again offered the position to Knox. This time Knox accepted. He began his term on April 9, 1901. Within the year he brought an antitrust action against the Northern Securities Company, through which James J. Hill, John Pierpont Morgan, and others had attempted to merge the Great Northern, the Northern Pacific, and the Chicago, Burlington, and Quincy railroads. Knox guided the litigation through several appeals and made the winning argument before the U.S. Supreme Court (*Northern Securities Co. v. United States,* 193 U.S. 197, 24 S. Ct. 436, 48 L. Ed. 679 [1904]).

Later in 1901 he ruled against executive authority—and his own preferences—when he advised that game refuges in the national forests could be established only through legislation. He told President McKinley that he regretted having to make that decision: "I would be glad to find authority for the intervention by the Secretary [of Interior] for the preservation of what is left of the game . . . but it would seem that whatever is done in that direction must be done by Congress, which alone has the power" (Baker 1992, 405).

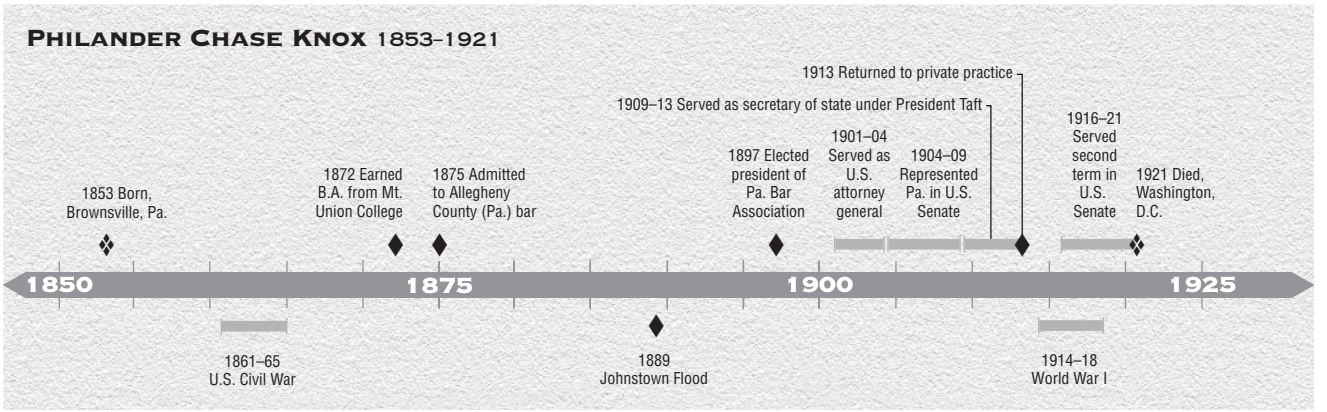

Knox stayed on as attorney general under President THEODORE ROOSEVELT. In 1902 he traveled to Paris to examine the title to a canal concession across the Isthmus of Panama. Knox validated a French company's questionable title (in a three hundred-page opinion) and opened the way for the United States to purchase the company's interests. The incident is often cited as an example of the law being manipulated by presidential prerogative. Knox reportedly said afterward that Roosevelt's plan to acquire the canal concession was not marred by the slightest taint of legality.

His service as attorney general ended June 10, 1904, when Governor Samuel W. Pennypacker, of Pennsylvania, appointed him to fill the vacancy caused by the death of Senator Matthew S. Quay. Knox took Quay's seat in the U.S. Senate July 1, 1904, and was subsequently elected to a full six-year term. During his term he was active and influential, especially in railroad rate legislation. He served on the Judiciary Committee, took a prominent part in a debate over tolls for the Panama Canal, and for a time was chairman of the Senate committee on rules.

He resigned his Senate seat March 4, 1909, to accept President Taft's appointment as secretary of state. Under Taft the focus of foreign policy was the encouragement and protection of U.S. investments abroad. Taft's approach, often called dollar diplomacy, was first applied in 1909, in a failed attempt to help China assume ownership of the Manchurian railways. Tangible proof of Knox's efforts in this attempt can be seen today in Washington, D.C.: the Chinese government gave him two thousand cherry trees that still blossom each spring. More successful attempts at dollar diplomacy were eventually made in Nicaragua and the Caribbean.

In March 1913 Knox returned to the PRACTICE OF LAW. He did not last long. Just three years later, he announced his intention to seek a second term in the U.S. Senate. He was elected November 6, 1916. He was an outspoken opponent of the LEAGUE OF NATIONS, and he took a leading role in the successful fight against the ratification of the TREATY OF VERSAILLES at the close of WORLD WAR I because, he said, it imposed "obligations upon the United States which under our Constitution cannot be imposed by the treaty-making power."

On October 12, 1921, Knox collapsed and died outside his Senate chamber in Washington, D.C. He was sixty-eight years old. He was buried near his home at Valley Forge, Pennsylvania.

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## ♦ KOOP, CHARLES EVERETT

Dr. Charles Everett Koop, SURGEON GENERAL under President RONALD REAGAN, boldly led the United States on controversial health issues such as smoking, ABORTION, infanticide, and ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS). Koop was a driven, dedicated public servant, committed to doing what he felt was best for the health of the American people. He aggressively confronted pressing health issues while dodging Washington, D.C.'s, political machinery. During his eight-year tenure, Koop increased the influence and authority of his post with the PUBLIC HEALTH SERVICE. With a passion for medicine and a sincere interest in promoting the public's health, Koop was affectionately regarded as "America's family doctor."

"I THINK IT IRONIC THAT AT A TIME WHEN SOCIALIST REGIMES ARE COLLAPSING ALL AROUND THE WORLD AND AMERICAN DISENCHANTMENT WITH POLITICS AND GOVERNMENT SEEMS AT AN ALL-TIME HIGH, SO MANY AMERICANS CLAMOR FOR THE GOVERNMENT TO TAKE OVER THE HEALTH-CARE MESS."
—C. EVERETT KOOP

Koop was born October 14, 1916, in Brooklyn, the only surviving child of John Everett Koop and Helen Apel Koop. As a young pupil, he excelled academically and socially, participating in football, BASEBALL, basketball, and wrestling. One month before his 17th birthday, Koop entered Dartmouth College. The Dartmouth coaches quickly recognized Koop's talent at football and awarded him the coveted position of quarterback. However, after a severe concussion damaged his vision and threatened the surgical career that he had envisioned as a young man, Koop quit the team. He immersed himself in pre-med studies, majoring in zoology. Having lost his football scholarship, Koop took a series of odd jobs to finance his way through college.

Koop entered medical school at Cornell University in the fall of 1937. In 1938, he married Elizabeth ("Betty") Flanagan, with whom he eventually raised four children. When the United States entered WORLD WAR II, and many physicians were called to duty, Koop performed many surgeries that, under normal circumstances,

would have been assigned to more senior physicians.

For his next phase of training, Koop and his family moved to Philadelphia. There, he took an internship at Pennsylvania Hospital, followed by a residency at University of Pennsylvania Hospital. After residency, in 1946, Koop became surgeon-in-chief of Children's Hospital of Philadelphia. He was 29 years old.

During his 32 years at Children's Hospital, Koop helped establish pediatric surgery as a medical specialty. At the time he took the job, many surgeons were reluctant to operate on INFANTS and small children because of the risks associated with sedating them. Koop devised anesthetic techniques for his young patients and worked tirelessly to perfect surgical procedures and post-operative care for children. Along with being a skilled surgeon, he was a compassionate doctor. He was sensitive to the parents of sick and dying children, and helped to create support groups to meet their needs.

Koop's work with pre-term and malformed babies at Children's Hospital influenced his strong positions against abortion, infanticide, and EUTHANASIA. While at Children's Hospital, Koop wrote *The Right to Live, the Right to Die* (1980), a best-seller that outlined the relationship among those three practices. He quickly became a spokesman on these issues and committed a great deal of his time to trying to rouse the American conscience. Later, after he was nominated to be surgeon general, Koop was surprised to learn that his Republican supporters valued him more for his stance against abortion than for his impressive medical career.

In 1980, with retirement just one year away, Koop was asked whether he would consider the surgeon general's post in Reagan's new administration. The surgeon general is an officer in the United States Public Health Service Commissioned Corps, a uniformed, mobile health unit. Under the leadership of the secretary of HEALTH AND HUMAN SERVICES, the surgeon general administers health policies and supervises personnel in the field. During his time in office, Koop broadened the surgeon general's role from low-profile administrator to high-profile leader.

Koop's surgeon general's reports and frequent testimony influenced the passage of numerous health-related mandates. He became a household name as he gently, yet firmly, informed the American public about the most preventable threats to their health. Regardless of the political consequences, Koop believed that he was obligated to provide accurate information to the public.

Koop launched an antismoking campaign with the 1982 *Surgeon General's Report on Smoking and Health.* In that document, he clearly stated the relationship between cancer deaths and smoking. In the years that followed, Koop produced reports that linked smoking to cardiovascular disease and to chronic obstructive lung disease.

In an antitobacco campaign, Koop targeted smokeless tobacco products, such as chewing tobacco and snuff, citing their connections to various cancers. His actions spurred the passage of the Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C.A. §§ 4401 et seq., a mandate to educate the public

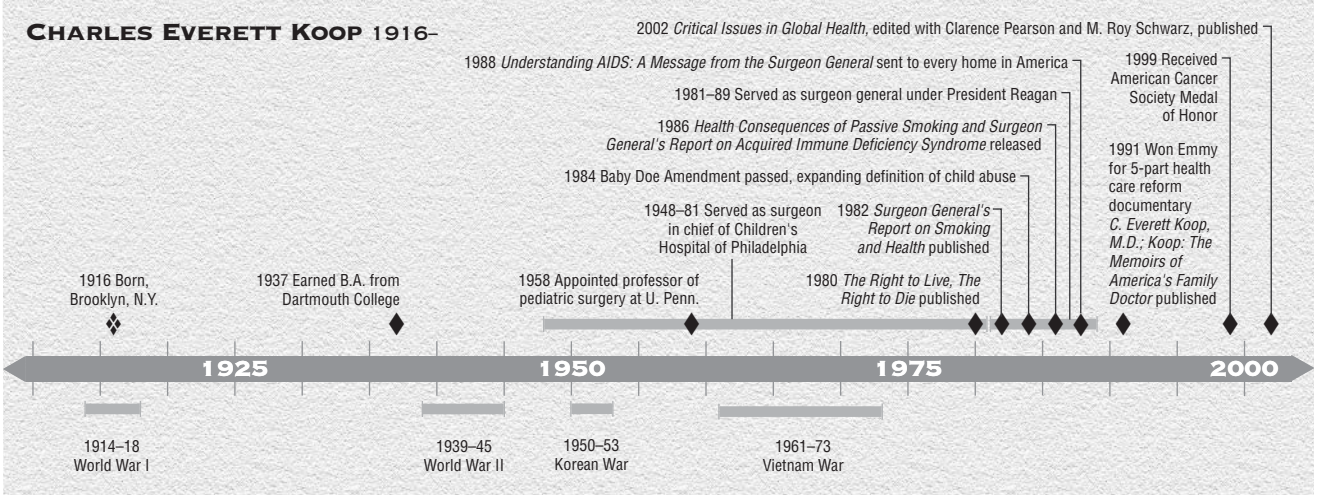

about this health threat. At Koop's urging, Congress legislated warning labels for smokeless tobacco products.

Koop examined the effects of smoking on nonsmokers in his 1986 report *Health Consequences of Passive Smoking*. Legislators across the nation responded to his report by creating laws to restrict smoking and to reduce the risk of passive smoking to nonsmokers. By 1987, smoking was banned in all federal buildings, and regulated in restaurants, hospitals, and other public places in over 40 states. In 1988, Koop commissioned studies on smoke in airplanes. Congress reacted to the results of these studies by banning smoking on all flights lasting less than six hours.

Koop publicized the addictive nature of tobacco in his 1988 surgeon general's report. This report forced tobacco officials to agree to more specific surgeon general's labels on cigarettes. However, Koop lost the fight for labels that would have identified nicotine as an addictive substance.

Although Koop was known for his antiabortion stance, he did little on this issue during his time as surgeon general. He viewed abortion as a moral issue, not a political one, and he strongly disagreed with those who wanted to ban contraceptives and abortion. In response to Koop's position on contraception and sex education, many conservatives who at first had supported him turned against him.

Koop faced a dilemma when President Reagan asked him to study the psychological effects of abortion on women. In Koop's opinion, it was a poor strategy to quibble about the effects of abortion on the mother when the effects on the fetus were conclusive. In addition, because both sides of the abortion controversy produced biased studies, the available research was useless. In the end, Koop could not gather evidence to assert conclusively or to refute damaging psychological effects of abortion on the mother. He never completed the report.

In 1982, the *Baby Doe* case alarmed the nation. Baby Doe was born with Down's syndrome, which results in mental retardation and other physical problems, as well esophageal atresia, an obstruction in the food passageway. The Down's syndrome was not correctable but was compatible with life; the esophageal atresia was incompatible with life but was correctable. On the advice of their obstetrician, the parents chose to forgo treatment, and the baby died.

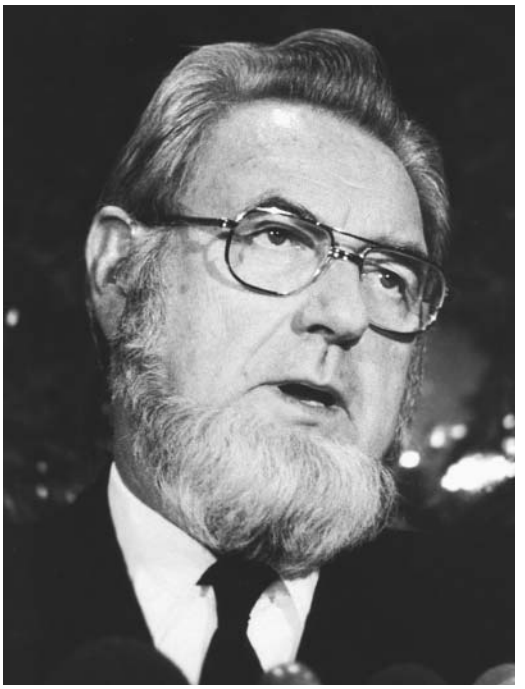

*C. Everett Koop.*
AP/WIDE WORLD PHOTOS

Koop believed that the child was denied treatment because he was retarded, not because the surgery was risky. Koop himself had performed this kind of surgery successfully many times. Judging this to be a case of CHILD ABUSE and infanticide, Koop commented publicly that it is imperative to choose life, even when the quality of that life is not perfect.

In 1983, the nation grappled with similar difficult circumstances surrounding the *Baby Jane Doe* case. Baby Jane Doe was born with spina bifida (a defect in the lower back), an abnormally small head, and hydroencephaly (a condition that causes fluid to collect in the brain). At issue was the baby's right to medical treatment to increase her quality of life, despite her physical handicaps. Koop believed that without medical treatment, Baby Jane Doe's spine would become infected, that the infection would spread to her brain, and that she would become severely retarded. He therefore advocated medical treatment for that condition.

Koop's efforts to educate Congress and the public about the medical injustices affecting handicapped children led to the Baby Doe Amendment (42 U.S.C.A. §§ 5101, 5102, 5103). On October 9, 1984, the amendment extended the laws defining child abuse to include the withholding of fluids, food, and medically indicated treatment from disabled children.

While in office, Koop became embroiled in the politics of educating the public about a growing health threat, AIDS. The Reagan administration prohibited Koop from speaking on the topic for nearly five years. This constraint distressed Koop, who believed that it was the surgeon general's duty to inform the public about all health issues. Despite the Reagan administration's silence on the issue, on October 22, 1986, Koop released *The Surgeon General's Report on Acquired Immune Deficiency Syndrome.* In it, he clearly stated the facts about the transmission of the disease and identified preventive measures and high-risk behaviors.

Koop was adamant that all U.S. citizens obtain the information that they needed in order to stop the spread of AIDS. In May 1988, he sent the mailer *Understanding AIDS: A Message from the Surgeon General* to every household in the United States.

When AIDS first attracted attention, it was labeled a homosexual disease because it was transmitted predominantly through sexual contact among gay males. Koop lost the support of staunch conservatives because he refused to use his position to publicly condemn homosexual behavior. Koop's focus was to educate and to save lives. Although he advocated abstinence as the best method for preventing the transmission of AIDS, he also urged the use of condoms by those who continued to engage in risky sexual behavior. Koop spoke against proposals such as mandatory testing and the detention of HIV-positive homosexuals. He challenged those who opposed the use of tax dollars to fund AIDS research. His reasoned approach to the AIDS epidemic helped to calm the hysteria of the public.

Shortly after GEORGE H.W. BUSH became president, Koop expressed interest in the position of secretary of Health and Human Services. Bush chose Dr. Louis W. Sullivan for that job.

Koop resigned from his position as surgeon general at the end of his second term. He wanted new challenges and looked forward to educating the public without the interference of Washington politics. Ironically, Koop's popularity had undergone a complete reversal during his term in office office: Koop had entered his post on the shoulders of conservative Christians, and he was leaving it as a hero of the liberal press and public.

Even in retirement, Koop continues to fulfill his role as public-health educator. He established the Koop Foundation, and the C. Everett Koop Institute at Dartmouth. The Koop Foundation is a private, nonprofit organization dedicated to fitness, education, and research initiatives to promote the health of U.S. citizens. The Koop Institute actively works for reform in medical education and the delivery of medical care. To that end, the institute provides a health-information network to help doctors address challenging medical cases. Still writing, speaking, and consulting on health issues, the diligent Koop continues to champion the cause of better and more accessible HEALTH CARE.

Koop has received numerous awards for his many lifetime achievements. In 1995, President BILL CLINTON awarded Koop the Presidential Medal of Freedom, the nation's highest civilian award.

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CROSS-REFERENCES

Acquired Immune Deficiency Syndrome; Health Care Law; Surgeon General; Tobacco.

## KOREAN WAR

The KOREAN WAR was a conflict fought on the Korean Peninsula from June 1950 to July 1953. Initially the war was between South Korea (Republic of Korea) and North Korea (Democratic People's Republic of Korea), but it soon developed into an international war involving the United States and 19 other nations. The United States sent troops to South Korea as part of a UNITED NATIONS "police action," which sought to repel the Communist aggression of North Korea. Before the war ended in a stalemate, the People's Republic of China had intervened militarily on the side of North Korea, and the Soviet Union had supplied military equipment to the North.

At the end of WORLD WAR II, in 1945, the Soviet Union occupied the Korean Peninsula north of the thirty-eighth degree of latitude, while the U.S. occupied the territory south of it. In 1947, after the United States and the Soviet Union failed to negotiate a reunification of the two separate Korean states, the United States asked the U.N. to solve the problem. The Soviet Union, however, refused a U.N. proposal for a

general election in the two Koreas to resolve the issue and encouraged the establishment of a Communist regime under the leadership of Kim Il-sung. South Korea then established a democratic government under the leadership of Syngman Rhee. By 1949, most Soviet and U.S. troops had been withdrawn from the Korean Peninsula.

On June 25, 1950, North Korea, with the tacit approval of the Soviet Union, launched an attack across the thirty-eighth parallel. The U.N. Security Council passed a resolution calling for the assistance of all U.N. members to stop the invasion. Normally, the Soviet Union would have vetoed this resolution, but it was boycotting the Security Council in protest of the U.N.'s decision not to admit the People's Republic of China.

Sixteen nations joined the U.N. forces, including the United States. President HARRY S. TRUMAN immediately responded by ordering U.S. forces to assist South Korea. Truman did so without a declaration of war, which until that time had been a prerequisite for U.S. military involvement overseas. Though some Americans criticized Truman for this decision, generally the country supported his action as part of his strategy of "containment," which sought to prevent the spread of COMMUNISM beyond its current borders. Korea became the TEST CASE for containment.

The North Korean forces crushed the South Korean army, with the South Koreans holding just the southeastern part of the peninsula. U.N. forces, under the command of General Douglas MacArthur, stabilized the front. On September 15, 1950, MacArthur made a bold amphibious landing at Inchon, about one hundred miles below the thirty-eighth parallel, cutting off the North Korean forces. The North Korean army was quickly crushed, and more than 125,000 soldiers were captured.

MacArthur then sent U.N. forces into North Korea, proclaiming, on November 24, that the troops would be home by Christmas. As U.N. forces neared the Yalu River, which is the border between North Korea and Manchuria, the northeast part of China, the Chinese army attacked them with 180,000 troops. The entrance of China changed the balance of forces. U.S. troops took heavy casualties during the winter of 1950–51 as the Chinese army pushed the U.N. forces back across the thirty-eighth parallel and proceeded south. U.N. forces finally halted the offensive south of Seoul, the capital of South Korea. A U.N. counteroffensive in February 1951 forced the Chinese to withdraw from South Korea. By the end of April, U.N. forces occupied positions slightly north of the thirty-eighth parallel.

It was during this period that President Truman became concerned about the actions of MacArthur. The general publicly expressed his desire to attack Manchuria, blockade the Chinese coast, and reinforce U.N. forces with troops from Nationalist China, with the goal of achieving victory. Truman, however, favored a limited war, fearing that MacArthur's course would bring the Soviet Union into the war against the United States. When MacArthur continued to make his views known, Truman, as commander in chief, relieved the general of his command on April 11, 1951. The "firing" of MacArthur touched off a firestorm of criticism by Congress and the public against Truman and his apparent unwillingness to win the war. Nevertheless, Truman maintained the limited war strategy, which resulted in a deadlock along the thirty-eighth parallel.

In June 1951, the Soviet Union proposed that cease-fire discussions begin, and in July the representatives of the U.N. and Communist commands began truce negotiations at Kaesong, North Korea. These negotiations were later moved to P'anmunjom.

The Korean War affected U.S. domestic policy. In April 1952, President Truman sparked a constitutional crisis when he seized the U.S. steel industry. With a labor strike by the steelworkers' union imminent, Truman was concerned that

*A convoy of U.S. Army trucks cross the 38th parallel during the Korean War. The parallel marks the dividing line between North and South Korea.*

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

the loss of steel production would hurt the Korean War effort. He ordered Secretary of Commerce Charles Sawyer to seize the steel mills and maintain full production. The steel industry challenged the order, bringing it before the Supreme Court. In **YOUNGSTOWN SHEET AND TUBE CO. V. SAWYER**, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952), the Court refused to allow the government to seize and operate the steel mills. The majority rejected Truman's claim of inherent executive power in the Constitution to protect the public interest in times of crisis.

Truman's popularity declined because of the war, which contributed to his decision not to run for reelection in 1952. In the presidential race, Republican **DWIGHT D. EISENHOWER** easily defeated Democrat **ADLAI STEVENSON**. Eisenhower, a former U.S. Army general and World War II hero, pledged to end the war. The truce negotiations, which broke off in October 1952, were resumed in April 1953. After Eisenhower hinted that he was prepared to use **NUCLEAR WEAPONS** if a settlement was not reached, an **ARMISTICE** was signed on July 27, 1953.

More than 33,000 U.S. soldiers died in the conflict, and 415,000 South Korean soldiers were killed. It is estimated that 2,000,000 North Koreans and Chinese died. The United States has maintained a military presence in South Korea since the end of the war, because North Korea and South Korea have remained hostile neighbors.

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## KOREMATSU V. UNITED STATES

*Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944), was a controversial 6–3 decision of the Supreme Court that affirmed the conviction of a Japanese American citizen who violated an exclusion order that barred all persons of Japanese ancestry from designated military areas during **WORLD WAR II**.

Fred Toyosaburo Korematsu, an American citizen of Japanese descent, was convicted in federal court for remaining in a designated military area in California contrary to a Civilian Exclusion Order issued by an army general that required persons of Japanese ancestry to report to assembly centers as a prelude to mass removal from the West Coast. He unsuccessfully appealed his conviction to the circuit court of appeals and was granted *certiorari* by the Supreme Court.

The order that Korematsu was convicted of violating was based upon an **EXECUTIVE ORDER**, which authorized the military commander to establish military zones and impose restrictions on activities or order exclusion from those areas in order to protect against **ESPIONAGE** and sabotage. Federal law made violation of these orders a crime. The entire West Coast and southern Arizona were designated as military zones. The restriction and exclusion orders applied to all enemy **ALIENS** and additionally to American citizens of Japanese ancestry. Pursuant to the executive order, another order imposed an 8 P.M. to 6 A.M. curfew on all persons of Japanese ancestry in designated West Coast military areas. This order and a conviction based on it was challenged in Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943), but the Supreme Court upheld the order as " 'protection against espionage and against sabotage' " and sustained the conviction. The Court relied upon that case as support for its refusal to rule that Congress and the president exceeded their war powers in excluding persons of Japanese descent from the West Coast in Korematsu. Although it acknowledged that being prohibited from the area where one's home is located is a more severe hardship than a ten-hour curfew, the Court accepted the claims of the government that such drastic measures were necessary to adequately protect the country.

At the start of the majority opinion, the Court stated that any legal restriction that infringes upon the **CIVIL RIGHTS** of a particular race is "immediately suspect." However, it continued, not all restrictions are unconstitutional. Such limitations are valid when dictated by public necessity, but they must withstand rigid judicial scrutiny in order to be upheld. The

restrictions imposed upon Japanese Americans were deemed by the Court to be necessary for public security during time of war.

Korematsu argued that the rationale of the Court in *Hirabayashi* was erroneous and that when the order in question was promulgated there was no longer any danger of a Japanese invasion of the West Coast. The Court rejected these arguments. Both the curfew and exclusion orders were necessary, since disloyal Americans of Japanese origin could not be easily segregated until subsequent investigations took place. Although the hardship of exclusion fell upon many loyal people, the Court viewed it as one of the harsh results of modern warfare.

The Court affirmed Korematsu's conviction, which has been cited by constitutional scholars as the foundation of the STRICT SCRUTINY test that is applied to suspect classifications made by the government.

In 1983, upon a challenge by Korematsu who was represented by the AMERICAN CIVIL LIBERTIES UNION and the Japanese American Citizens League, U.S. district court judge Marilyn Hall Patel vacated the forty-year-old conviction. Based upon newly discovered evidence—previously withheld government documents—the judge found that the new evidence demonstrated "that the Government knowingly withheld information from the Courts when they were considering the critical question of military necessity in this case." The judge added that "justices of [the Supreme] Court and legal scholars have commented that the [Korematsu] decision is an anachronism in upholding overt RACIAL DISCRIMINATION as 'compellingly justified,' and that the Korematsu case lies overruled in the court of history."

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*Fred Korematsu receives the Presidential Medal of Freedom by President Clinton on January 15, 1998.*

AP/WIDE WORLD PHOTOS

## KU KLUX KLAN

The Ku Klux Klan (KKK) is a white supremacist organization that was founded in 1866. Throughout its notorious history, factions of the secret fraternal organization have used acts of terrorism—including murder, LYNCHING, ARSON, rape, and bombing—to oppose the granting of CIVIL RIGHTS to African Americans. Deriving its membership from native-born, white Protestant U.S. citizens, the KKK has also been anti-Semitic and anti-Catholic, and has opposed the immigration of all those it does not view as "racially pure." Other names for the group have been White Brotherhood, Heroes of America, Constitutional Union Guards, and Invisible Empire.

### Origins and Initial Growth

Ex-Confederate soldiers established the Ku Klux Klan in Pulaski, Tennessee, in 1866. They developed the first two words of the group's name from the Greek word *kuklos,* meaning "group or band," and took the third as a variant of the word *clan.* Starting as a largely recreational group, the Klan soon turned to intimidating newly freed African Americans. Riding at night, the Klan terrorized and sometimes murdered those it opposed. Members adopted a hooded white costume—a guise intended to represent the ghosts of the Confederate dead—to avoid identification and to frighten victims during nighttime raids.

The Klan fed off the post-Civil War resentments of white southerners—resentment that centered on the Reconstruction programs imposed on the South by a Republican Congress. Under Reconstruction, the North sought to restructure southern society on the basis of racial equality. Under this new regime, leading

## Hugo L. Black and the KKK

Hugo L. Black is remembered as a distinguished U.S. Supreme Court justice, a progressive U.S. Senator, and an able trial attorney. Black also was a member of the Ku Klux Klan (KKK) in the 1920s. Public disclosure of this fact came shortly after his appointment to the Supreme Court was confirmed by the Senate in 1937. The resulting public uproar would probably have doomed his Court appointment if the disclosure had come just a few weeks earlier.

In 1923 Black was a trial attorney in Birmingham, Alabama, which at the time was controlled by members of the Klan. After rebuffing membership several times, he joined the KKK on September 23, 1923. Black later claimed to have left the group after several years, but no clear evidence documented his departure. In 1937 there were allegations he had signed an undated letter resigning from the Klan, which was to have been used to establish a false resignation date if public scandal occurred.

In 1937 Black made a radio address to the nation, in which he admitted his Klan membership but claimed he had resigned and had not had any connection with the group for many years. He also stated he harbored no prejudice against anyone because of their race, religion, or ethnicity.

During his Court career, Black was reluctant to discuss his KKK membership and offered various reasons for why he had joined. To some people he admitted it was a mistake, whereas to others he said the KKK was just another fraternal organization, like the Masons or Elks. It is clear, however, that as an ambitious politician, Black had sought Klan support for his political campaigns. In the 1920s KKK support had been critical to a Democratic politician in Alabama.

Despite his later denial of holding any prejudices, Black was an active member of the KKK for several years. He participated in Klan events throughout Alabama, wearing the organization's characteristic white robes and hood, and initiated new Klan members into the Invisible Empire, reading the Klan oath, which pledged the members to "most zealously and valiantly shield and preserve by any and all justifiable means . . . white supremacy."

**CROSS-REFERENCES**

Black, Hugo Lafayette.

southern whites were disfranchised, while inexperienced African Americans, carpetbaggers (northerners who had migrated to the South following the war), and scalawags (southerners who cooperated with the North) occupied major political offices.

Shortly after the KKK's formation, Nathan Bedford Forrest, a former slave trader and Confederate general, assumed control of the organization and turned it into a militaristic, hierarchical entity. In 1868, Forrest formally disbanded the group after he became appalled by its growing violence. However, the KKK continued to grow, and its atrocities worsened. Drawing the core of its membership from ex-Confederate soldiers, the KKK may have numbered several hundred thousand at its height during Reconstruction.

In 1871, the federal government took a series of steps to counter the KKK and its violence. Congress organized a joint select committee made up of seven senators and 14 representatives to look into the Klan and its activities. It then passed the CIVIL RIGHTS ACT of 1871, frequently referred to as the KU KLUX KLAN ACT, which made night-riding a crime and empowered the president to order the use of federal troops to put down conspirators by force. The law also provided criminal and civil penalties for people convicted of private conspiracies—such as those perpetrated by the KKK—intended to deny others their civil rights.

Also in 1871, President ULYSSES S. GRANT relocated troops from the Indian wars on the western plains to South Carolina, in order to quell Klan violence. In October and November of that year, the federal Circuit Court for the District of South Carolina held a series of trials of KKK members suspected of having engaged in criminal conspiracies, but the trials resulted in few convictions.

The Klan declined in influence as the 1870s wore on. Arrests, combined with the return of southern whites to political dominance in the South, diminished its activity and influence.

### Resurgence

The KKK experienced a resurgence after WORLD WAR I, reaching a peak of 3 or 4 million members in the 1920s. David W. Griffith's 1915 movie *The Birth of a Nation,* based on Thomas Dixon's 1905 novel *The Clansman,* served as the spark for this revival. The movie depicted the Klan as a heroic force defending the "Aryan birthright" of white southerners against African Americans and Radical Republicans seeking to build a Black Empire in the South. In particular, the movie showed a gallant Klan defending the honor of white women threatened by lecherous African American men.

William J. Simmons renewed the KKK at a Stone Mountain, Georgia, ceremony in 1915. Later, Christian fundamentalist ministers aided recruitment as the Klan portrayed itself as the protector of traditional values during the Jazz Age.

As its membership grew into the millions in the 1920s, the Klan exerted considerable political influence, helping to elect sympathetic candidates to state and national offices. The group was strong not only in southern states such as Georgia, Alabama, Louisiana, and Texas, but also in Oklahoma, California, Oregon, Colorado, Kansas, Missouri, Illinois, Indiana, Ohio, Pennsylvania, New Jersey, and New York. Strongly opposed to non–Anglo-Saxon immigration, the Klan helped secure the passage of strict quotas on immigration. In addition to being racist, the group also espoused hatred of Jews, Catholics, socialists, and unions.

By the end of the 1920s, a backlash against the KKK had developed. Reports of its violence turned public sentiment against the group, and its membership declined to about 40,000. At the same time, Louisiana, Michigan, and Oklahoma passed anti-mask laws intended to frustrate Klan activity. Most of these laws made it a misdemeanor to wear a mask that concealed the identity of the wearer, excluding masks worn for holiday costumes or other legitimate uses. South Carolina, Virginia, and Georgia later passed similar laws.

### Anti-Civil Rights Involvement

The KKK experienced another, less successful resurgence during the 1960s as African Americans won civil rights gains in the South. Opposed to the CIVIL RIGHTS MOVEMENT and its attempt to end racial SEGREGATION and discrimination, the Klan capitalized on the fears of whites, to grow to a membership of about 20,000. It portrayed the civil rights movement as a Communist, Jewish conspiracy, and it engaged in terrorist acts designed to frustrate and intimidate the movement's members. KKK adherents were responsible for acts such as the 1963 bombing of the Sixteenth Street Baptist Church in Birmingham, Alabama, in which four young African–American girls were killed and many others injured, and the 1964 murder of civil rights workers Michael Schwerner, Andrew Goodman, and James Chaney, in Mississippi. The Klan was also responsible for many other beatings, murders, and bombings, including attacks on the Freedom Riders, who sought to integrate interstate buses.

*Ku Klux Klan members parade in Washington, D.C., during the 1920s, a decade in which Klan membership grew into the millions and the group exerted significant political influence.*

LIBRARY OF CONGRESS

In many instances, the FEDERAL BUREAU OF INVESTIGATION (FBI), then under the control of J. EDGAR HOOVER, had intelligence that would have led to the prevention of Klan violence or conviction of its perpetrators. However, the FBI did little to oppose the Klan during the height of the civil rights movement.

By the 1990s, the Klan had shrunk to under ten thousand members and had splintered into several organizations, including the Imperial Klans of America, the Knights of the White Kamelia, and the American Knights of the Ku Klux Klan. These factions also sought alliances

with a proliferating number of other white supremacist groups, including the Order and Aryan Nations. Like these groups, the KKK put new emphasis on whites as an "oppressed majority," victimized by AFFIRMATIVE ACTION and other civil rights measures.

The Klan's campaign of hatred has spurred opposition from many fronts, including Klanwatch, an organization started by lawyer and civil rights activist Morris Dees in 1980. The group is affiliated with Dees's SOUTHERN POVERTY LAW CENTER, in Montgomery, Alabama. In 1987, Dees won a $7 million civil suit against the Alabama-based United Klans of America for the 1981 murder of a 19-year-old man. The suit drove that Klan organization into BANKRUPTCY. In 1998, Dees and the Southern Poverty Law Center won a civil suit against the Christian Knights of the Ku Klux Klan, who were accused of burning down the Macedonia Baptist Church in Bloomville, South Carolina. The center won an unprecedented $37.8 million in damages.

The KKK suffered other setbacks. For example, in 1990 the Georgia Supreme Court upheld the constitutionality of that state's Anti-Mask Act (Ga. Code Ann. § 16-11-38) by a vote of 6–1 (*State v. Miller,* 260 Ga. 669, 398 S.E.2d 547). The case involved a Klan member who had been arrested for wearing full Klan regalia, including mask, in public and had claimed a FIRST AMENDMENT right to wear such clothing. The court ruled that the law, first passed in 1951, protected a STATE INTEREST in safeguarding the right of people to exercise their civil rights and to be free from violence and intimidation. It held that the law did not interfere with the defendant's FREEDOM OF SPEECH.

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## KU KLUX KLAN ACT

The Ku Klux Klan Act of 1871 (ch. 22, 17 Stat. 13 [codified as amended at 18 U.S.C.A. § 241, 42 U.S.C.A. §§ 1983, 1985(3), and 1988]), also called the Civil Rights Act of 1871 or the Force Act of 1871, was one of several important CIVIL RIGHTS ACTS passed by Congress during Reconstruction, the period following the Civil War when the victorious northern states attempted to create a new political order in the South. The act was intended to protect African Americans from violence perpetrated by the KU KLUX KLAN (KKK), a white supremacist group.

In March 1871, President ULYSSES S. GRANT requested from Congress legislation that would address the problem of KKK violence, which had grown steadily since the group's formation in 1866. Congress responded on April 20, 1871, with the passage of the Ku Klux Klan Act, originally introduced as a bill "to enforce the provisions of the FOURTEENTH AMENDMENT and for other purposes." Section 1 of the act covered enforcement of the Fourteenth Amendment and was later codified, in part, at 42 U.S.C.A. § 1983. Section 2 of the act, codified at 42 U.S.C.A. § 1985(3), provided civil and criminal penalties intended to deal with conspiratorial violence of the kind practiced by the Klan. Both sections of the act were intended to give federal protection to Fourteenth Amendment rights that were regularly being violated by private individuals as opposed to the state.

In addition, the Ku Klux Klan Act gave the president power to suspend the writ of HABEAS CORPUS in order to fight the KKK. President Grant used this power only once, in October 1871, in ten South Carolina counties experiencing high levels of Klan TERRORISM. The act also banned KKK and other conspiracy members from serving on juries.

The Republicans who framed the Ku Klux Klan Act intended it to provide a federal remedy for private conspiracies of the sort practiced by the KKK against African Americans and others. As had become all too apparent by 1871, local and state courts were ineffective in prosecuting Klan violence. Local and state law enforcement officials, including judges, were often sympathetic to the KKK or were subject to intimidation by the group, as were trial witnesses. The Ku Klux Klan Act would allow victims of Klan violence to take their case to a federal court, where, it was supposed, they would receive a fairer trial.

The act, like other CIVIL RIGHTS laws from the Reconstruction era, sparked considerable legal debate. Its detractors claimed that the law improperly expanded federal jurisdiction to areas of CRIMINAL LAW better left to the states. The Supreme Court took this view in 1883 when it struck down the criminal provisions of the act's second section on the ground that protecting individuals from private conspiracies was a state and not federal function (*United States v. Harris,* 106 U.S. 629, 1 S. Ct. 601, 27 L. Ed. 290). This and other rulings stripped the Ku Klux Klan Act of much of its power. Like many other civil rights laws from its era, it went largely unenforced in succeeding decades.

The remaining civil provisions of the act were later codified under 42 U.S.C.A. § 1985(3), where they have been referred to as the conspiracy statute. These provisions hold, in part, that when two or more persons "conspire or go in disguise on the highway or the premises of another, for the purpose of depriving . . . any person or class of persons of the EQUAL PROTECTION of the law," they may be sued by the injured parties. The civil provisions, or § 1985(3), remained generally unused until the 1971 U.S. Supreme Court decision *Griffin v. Breckenridge,* 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed. 2d 338. In *Griffin,* the Court reaffirmed the original intention of § 1985(3) and ruled that the statute may allow a civil remedy for certain private conspiracies. The *Griffin* case concerned a 1966 incident in Mississippi in which a group of white men stopped a car out of suspicion that one of its three African–American occupants was a civil rights worker. The whites proceeded to beat and threaten the African Americans. The Court upheld one victim's claim that, under § 1985(3), the whites had engaged in a conspiracy to deny him the equal protection of the laws of the United States and Mississippi.

In making its decision, the Court was careful to restrict § 1985 claims to those involving actions motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." This standard meant that the conspirators in question had to be motivated against a class of persons, not a particular political or social issue. By creating this standard, the Court sought to prevent § 1985(3) from becoming a "general federal TORT law" that would cover every type of private conspiracy.

Since *Griffin,* the Court has expressed misgivings about expanding the types of classes protected by the statute. Using the *Griffin* standard, the Court later ruled in *United Brotherhood of Carpenters & Joiners v. Scott,* 463 U.S. 825, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (1983), that economic or commercial groups could not be considered a class protected by the law. In that case, the Court rejected a claim by nonunion workers who had been attacked by union workers at job sites.

During the 1980s and 1990s, lower federal courts upheld the use of § 1985(3) against antiabortion protesters who blockaded family planning clinics with large demonstrations and disruptions. In one ruling, a federal district court held that an antiabortion group had conspired to violate the right to interstate travel of women seeking to visit family planning clinics (*NOW v. Operation Rescue,* 726 F. Supp. 1483 [E.D. Va. 1989]).

However, in a 1993 case, *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 113 S. Ct. 753, 122 L. Ed. 2d 34, the Supreme Court ruled that § 1985(3) could not be used against antiabortion protesters. The Court held that women seeking ABORTION cannot be considered a class under the terms of the law.

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## ♦ KUNSTLER, WILLIAM MOSES

William Moses Kunstler rose to prominence during the CIVIL RIGHTS MOVEMENT in the 1960s. He represented Freedom Riders, MARTIN LUTHER KING JR., and the CHICAGO EIGHT. Politics and the law are inseparable in his philosophy. He was the author of twelve books, a sometime Hollywood actor, and a cofounder of the CENTER FOR CONSTITUTIONAL RIGHTS (CCR) in Tennessee.

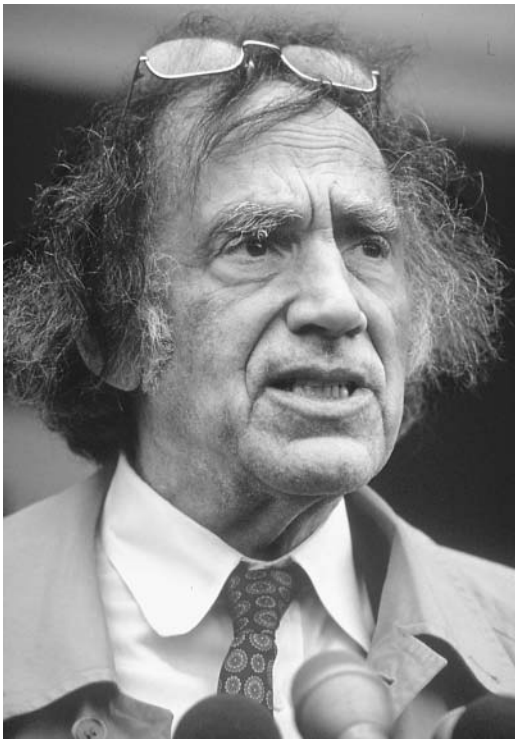

*William M. Kunstler.* ARCHIVE PHOTO/CONSOLIDATED NEWS

"GOVERNMENT-CREATED CRIME HAS BECOME AN ALL TOO FAMILIAR PHENOMENON OF THE PAST DECADE OR SO."
—WILLIAM KUNSTLER

Even as a child, Kunstler liked trouble. He was born July 7, 1919, in New York City, the eldest of three children of Frances Mandelbaum and Monroe B. Kunstler, a physician. Ignoring schoolwork to run with a street gang called the Red Devils, he worried his conservative Jewish family. He read voraciously on his own, and by high school became a straight A student. At Yale, he majored in French and wrote his senior thesis on the satirist Molière. Then he joined the Army and served in WORLD WAR II as a cryptographer, taking part in General Douglas MacArthur's invasion of the Philippines, earning the Iron Cross, and rising to the rank of major. Afterward, he entered Columbia Law School, mainly to compete with his younger brother, Michael Kunstler.

Kunstler and his brother opened a law practice in 1949. The mundane work bored Kunstler, who wanted more challenge than handling ANNULMENTS and divorces. He kept busy writing a book on corporate tax law, contributing to the *New York Times Book Review,* teaching at New York Law School, and hosting radio shows whose eclectic guest lists covered personalities ranging from ELEANOR ROOSEVELT to MALCOLM X.

In the mid-1950s, Kunstler successfully represented a local leader of the National Association for the Advancement of Colored People (NAACP) who had been denied housing because he was black. In 1956 a black journalist had his passport confiscated for violating a national ban on travel to China; he was later arrested on return from Cuba for entering the United States without a passport—in violation of an old federal statute. Kunstler persuaded an appellate court to find the statute unconstitutional. The case had been referred to him by the AMERICAN CIVIL LIBERTIES UNION (ACLU), and a bigger assignment would soon be on the way. Meanwhile, he wrote *Beyond a Reasonable Doubt?* (1961) about the 1960 conviction and execution of CARYL CHESSMAN, a case that had provoked international outrage.

In 1961 the ACLU sent Kunstler to Jackson, Mississippi, where CIVIL RIGHTS workers were being abused by southern police officers and the courts. Known as the Freedom Riders, these

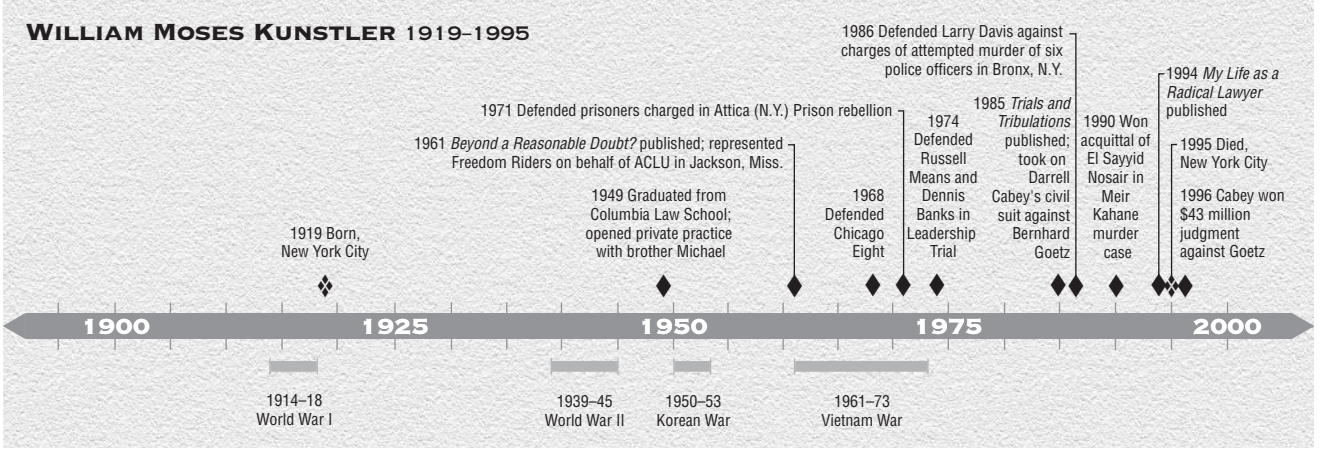

young white and black people tried to force INTEGRATION by riding interstate buses, flouting SEGREGATION laws. Beatings awaited them, followed by arrests and quick convictions for disturbing the peace. Kunstler found only hostility in courtrooms throughout the state. He lost case after case. He asked Mississippi governor Ross Barnett for help, but Barnett only lectured him on the need for segregation. Then Kunstler and a fellow attorney, William Higgs, devised an ingenious strategy: discovering an 1866 law designed to protect ex-slaves, they used it to have the cases of civil rights workers removed from state courts and heard by federal judges. The law also mandated that federal courts grant the defendants bail, something Mississippi refused to do.

The civil rights movement lived, prospered, and changed Kunstler's life. He helped found the Center for Constitutional Rights in Nashville, and with its resources, he was so ubiquitous in representing the new leadership that his motto became Have Brief, Will Travel. He defended STOKELY CARMICHAEL, president of the STUDENT NON-VIOLENT COORDINATING COMMITTEE, against SEDITION charges. He represented leaders of the Black Panthers. But it was his involvement with another prominent black radical, Hubert Geroid Brown—better known as H. Rap Brown—that led him to a new crossroads. Brown's heated speeches around the country struck fear into Congress, which passed in 1968 the so-called Rap Brown statute (18 U.S.C.A. § 2101). The law made it illegal to cross state lines with the intention of inciting a riot. Kunstler saw it as an attempt to crush free speech.

The Rap Brown law created Kunstler's breakthrough case, making him a hero to young people and a virtual outlaw to the legal establishment. In this case, he defended the Chicago Eight, a group of antiwar leaders charged with conspiracy after the Chicago police cracked down on protesters outside the 1968 Democratic National Convention. Among the Eight were Abbie Hoffman and Jerry Rubin, Students for a Democratic Society leader Tom Hayden, and BLACK PANTHER PARTY cofounder Bobbie Seale. The trial drew national attention, divided public opinion, and often thrilled with its circus atmosphere. Kunstler argued ferociously in court with Judge Julius J. Hoffman, especially after the judge ordered Seale to be gagged and bound to a chair.

After the jury's near-total acquittal of the defendants, Judge Hoffman slapped each defendant with a contempt-of-court sentence. He reserved the most serious punishment for Kunstler, giving the attorney four years and thirteen days in prison for twenty-four counts of CONTEMPT. However, this sentence and the sentences of the defendants were all overturned by an appellate court. Kunstler also managed to escape the wrath of the New York bar association, which ultimately dropped its bid to discipline him.

The era of protest that helped create Kunstler's politics came to a close in the early 1970s, but not without a last great upheaval. In 1972 and 1973, leaders of the AMERICAN INDIAN MOVEMENT (AIM) occupied the historic town of Wounded Knee, South Dakota, in protest of the U.S. government's long practice of ignoring treaties and its hostility toward Native Americans. Kunstler was at the barricades during the seventy-one-day siege, and later he was in court to defend AIM leader Russell Means. He also represented Native American activist Leonard Peltier through fifteen years of litigation.

In the 1980s and 1990s, he represented reputed Mafia bosses, an accused murderer of police officers, one of the so-called Central Park rapists, a youth shot by vigilante Bernhard Goetz, a convicted Atlanta child murderer, and more. He became involved in the cases of defendants accused of plotting to blow up the World Trade Center in New York, as well as the case of COLIN FERGUSON, a Jamaican immigrant accused of killing six white commuters and wounding nineteen on the Long Island Railroad in 1993. Kunstler's proposed "black rage" defense of Ferguson—in short, that racism could drive a person to murder—provoked a fierce backlash from many critics, including Kunstler's frequent nemesis the attorney ALAN M. DERSHOWITZ.

At the age of seventy-six, Kunstler still reportedly worked fourteen-hour days in his home. Assisted by his partner, attorney Ron Kuby, he took most of his cases for free. He also did a bit of acting, appearing as a fire-breathing judge in director Spike Lee's 1992 film *Malcolm X*. In 1994 he published his twelfth book, *My Life as a Radical Lawyer,* in which he held to his belief that a revolution is still inevitable.

Kunstler died on September 4, 1995, at the age of seventy-six, of heart failure. Ron Kuby,

his longtime law partner, vowed to continue doing free legal work in their firm, Kunstler & Kuby, and he established The William Moses Kunstler Fund for Radical Justice as a memorial.

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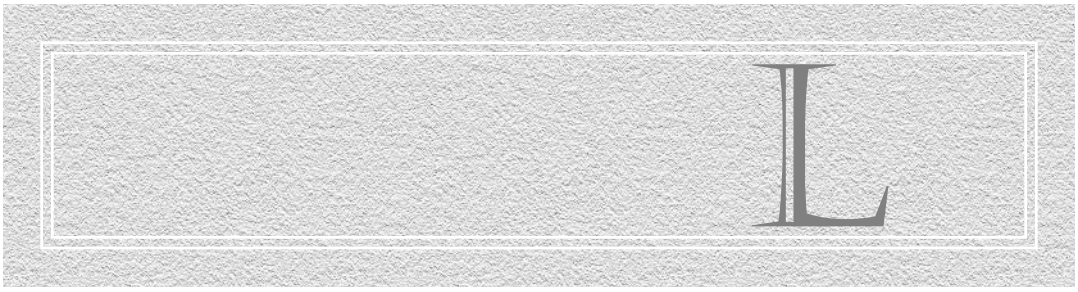

## LA FOLLETTE, ROBERT MARION

Robert Marion La Follette was an important U.S. political leader during the first part of the twentieth century. He served as governor of and senator from Wisconsin, and was at the forefront of the political reform movement that has been labeled Progressivism.

La Follette was born in Primrose, Wisconsin, on June 14, 1855. He graduated from the University of Wisconsin at Madison in 1879 and then studied law without going to law school. He was admitted to the Wisconsin bar in 1880 and began a legal practice in Madison. He was district attorney for Dane County, Wisconsin, from 1880 to 1884. In 1885 he was elected as a Republican representative to the U.S. Congress. He served three terms and then was defeated in 1890.

Following his loss La Follette resumed his law practice in Madison. During the 1890s he became a vocal opponent of state leadership of the REPUBLICAN PARTY. He rejected its conservatism and its reluctance to allow government a role in correcting social, political, and economic problems that had grown larger during the last two decades of the nineteenth century.

La Follette's reform desires were part of the national Progressive movement. Though not a unified political philosophy, Progressivism was built on the assumption that all levels of government must play an active role in reform. Progressives like La Follette argued that corporate capitalism had given too much power to large economic elites and had created inequities in the social and economic order. In addition, Progressives argued, the political parties, especially at the state and local level, had too much control and were stifling democratic change.

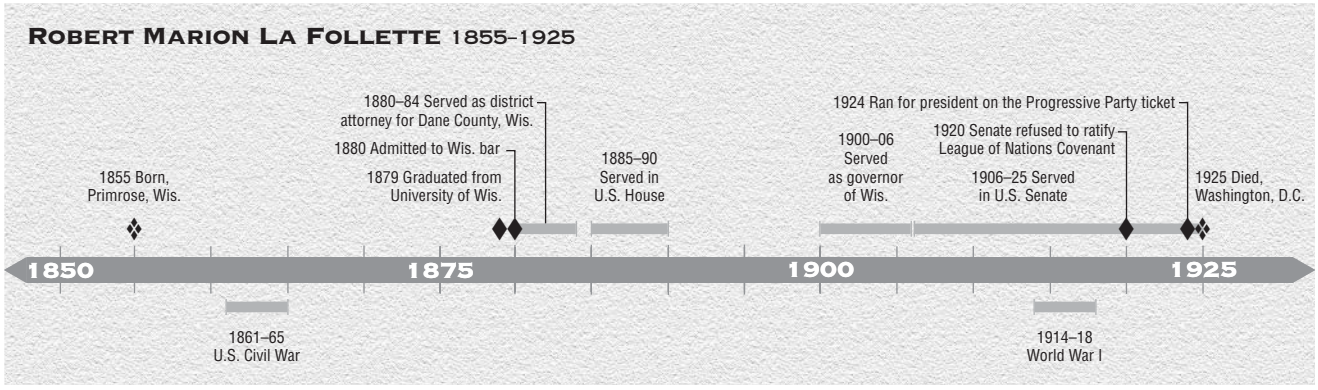

*Robert M. La Follette.*
LIBRARY OF CONGRESS

"NEITHER THE CLAMOR OF THE MOB NOR THE VOICE OF POWER WILL EVER TURN ME BY THE BREADTH OF A HAIR FROM THE COURSE I MAKE OUT FOR MYSELF."
—ROBERT MARION LA FOLLETTE

La Follette's ideas proved popular in Wisconsin. He was elected governor in 1900 and immediately began implementing his Progressive agenda. The Wisconsin Legislature passed many of his measures, including those mandating the nomination of candidates by direct vote in primary elections, the equalization of taxes, and the regulation of railroad rates.

He returned to the national political arena, serving as U.S. senator from 1906 to 1925. He became a leader of the Progressive wing of the Republican party and frequently voiced opposition to the conservative party leadership. As a senator he advocated tougher regulation of railroads, going so far as to call for public ownership of the rail industry. He believed in progressive income taxes, government control of banking, and conservation of natural resources.

La Follette was an isolationist, holding that the United States should not become entangled in foreign alliances and foreign wars. He voted against the U.S. entry into **WORLD WAR I** and later opposed President Woodrow Wilson's plan to have the United States join the **LEAGUE OF NATIONS** and the World Court.

The conservative Republican administrations of **WARREN G. HARDING** and **CALVIN COOLIDGE** proved too much for La Follette. In 1924, after the Republican National Convention rejected his platform proposals, La Follette left the party. He formed the League for Progressive Political Action, commonly known as the **PROGRESSIVE PARTY**, and accepted its presidential nomination. Drawing support from farm groups, **LABOR UNIONS**, and the Socialist party, La Follette waged a spirited third-party campaign. He earned almost 5 million popular votes. But La Follette was not a serious threat to the election of Coolidge; he received only thirteen electoral votes, carrying only his home state of Wisconsin.

Following his defeat La Follette continued as U.S. senator. He died in Washington, D.C., on June 18, 1925. His son, Robert M. La Follette, Jr., succeeded him as senator. The younger La Follette kept the Progressive party alive for another twenty years.

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## LABOR DEPARTMENT

The Department of Labor (DOL) administers federal **LABOR LAWS** for the **EXECUTIVE BRANCH** of the federal government. Its mission is "to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment" (29 U.S.C.A. § 551 [1985]). The DOL was created in 1913 out of four bureaus from the Department of Commerce and Labor: the Bureau of Labor Statistics, Bureau of Immigration, Bureau of Naturalization, and Children's Bureau.

The DOL is headed by the secretary of labor, who serves in the president's cabinet. The department's numerous responsibilities include administering and enforcing federal labor laws guaranteeing workers' rights to safe and healthful working conditions, a minimum hourly wage and overtime pay, freedom from employment discrimination, unemployment insurance, and workers' compensation. The department protects workers' **PENSION** rights, provides for job training programs, helps workers find jobs, and works to strengthen the **COLLECTIVE BARGAINING** process. It keeps track of changes in employment, prices, and other economic measurements. The DOL also makes special efforts to address the unique job market problems of minorities, women, children, the elderly, **DISABLED PERSONS**, among other classes of workers.

The major bureaus and agencies within the DOL are the Employment and Training Administration, Employee Benefits Security Administration, Employment Standards Administration, Occupational Safety and Health Administration, Mine Safety and Health Administration, Bureau of Labor Statistics, and Veterans' Employment and Training Service. Other organizations, including the Women's Bureau, Office of the American Workplace, Bureau of International Labor Affairs, Office of the Assistant Secretary for Policy, and the Office of Disability Employment Policy, also function within the department.

### Employment and Training Administration

The Employment and Training Administration (ETA) administers major programs relating to employment services, job training, and unemployment insurance. The ETA also administers a federal-state employment security system, funds and oversees programs to provide work experience and training for groups having difficulty entering or returning to the workforce, and formulates and promotes apprenticeship standards and programs.

The Employee Benefits Security Administration (EBSA) helps protect the economic future and retirement security of workers, as required under the EMPLOYEE RETIREMENT INCOME SECURITY ACT of 1974 (ERISA) (29 U.S.C.A. § 1001). EBSA assists over 200 million participants and beneficiaries in pension, health, and other employee benefit plans. It also assists more than three million plan sponsors and members of the employee benefit community. EBSA promotes voluntary compliance and facilitates self-regulation to provide assistance to pension and benefit plan participants and beneficiaries. ERISA requires administrators of private pension and welfare plans to provide plan participants with easily understandable summaries of their plans. These summaries are filed with the EBSA, along with ANNUAL REPORTS on the financial operations of the plans and on the bonding of persons charged with handling plan funds and assets. Plan administrators must also meet strict fiduciary responsibility standards, which are enforced by the EBSA.

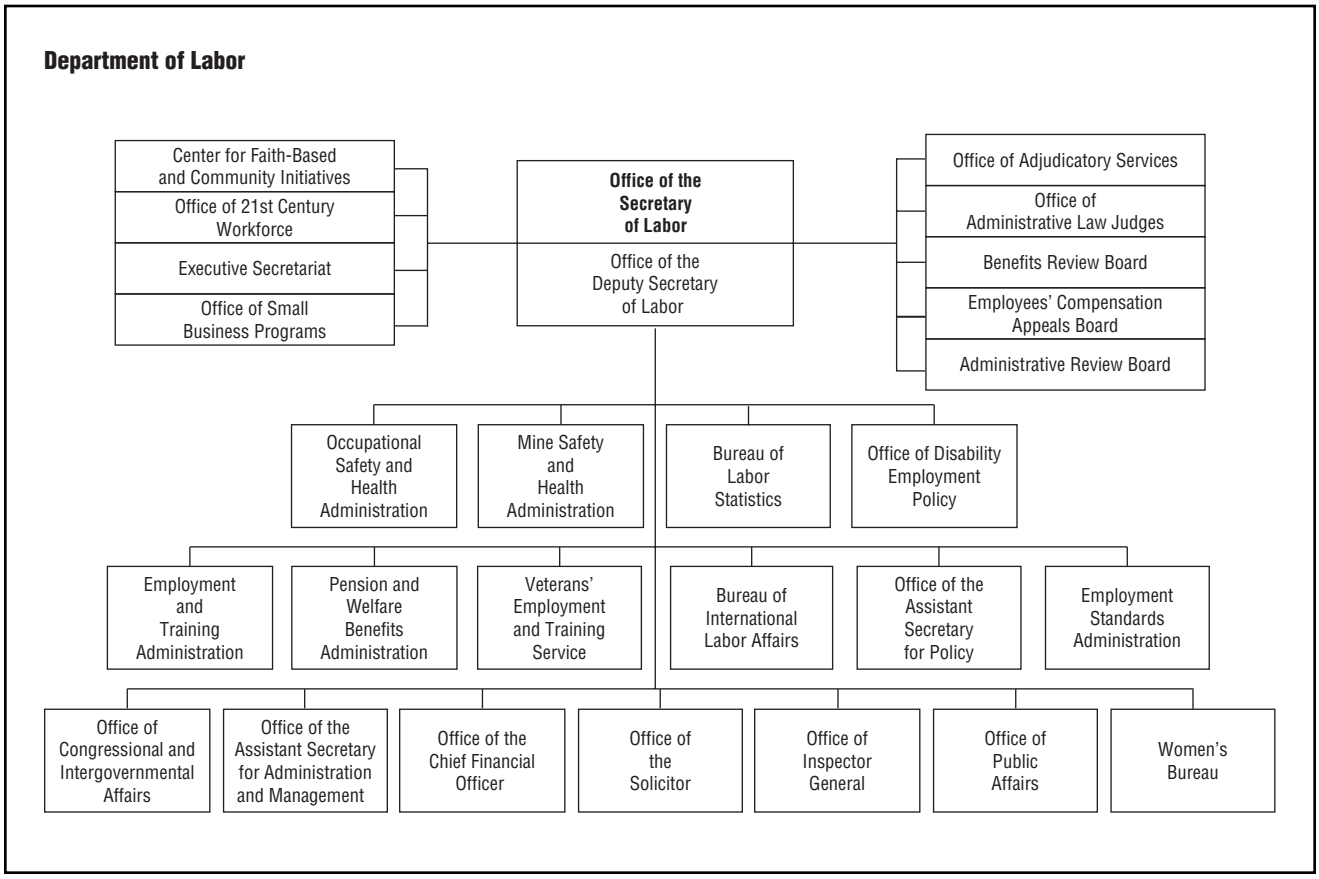

### Employment Standards Administration

The Employment Standards Administration administers MINIMUM WAGE and overtime standards through its Wage and Hour Division. This division seeks to protect low-wage incomes as provided by the minimum wage provisions of the FAIR LABOR STANDARDS ACT (29 U.S.C.A. § 201), and to discourage excessively long hours of work through the enforcement of the overtime provisions of the act. The division also determines the prevailing wage rates for federal construction contracts and federally assisted programs for construction, alteration, and repair of public works subject to the DAVIS-BACON ACT (40 U.S.C.A. § 276a) and related acts.

### Occupational Safety and Health Administration

The Occupational Safety and Health Administration (OSHA) has responsibility for occupational safety and health activities. OSHA was established by the OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 (29 U.S.C.A. § 651 et seq.). It develops and issues occupational safety and health standards for various industries and occupations. OSHA also formulates and publishes regulations that employers are to follow in maintaining health and safety. It conducts investigations and inspections to determine compliance with these standards and regulations, and if it finds noncompliance, it may issue citations and propose penalties.

### Mine Safety and Health Administration

The Mine Safety and Health Administration (MSHA) is responsible for safety and health in coal and other mines in the United States. The Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C.A. § 801 et seq.) gave the MSHA strong enforcement provisions to protect coal miners, and in 1977 the act was amended to protect persons working in the non-coal areas of the mining industry, such as silver mining.

The MSHA develops and promulgates mandatory safety and health standards for the mining industry, inspects mines to ensure compliance, investigates mining accidents, and assesses fines for violations of its regulations. It helps the states develop effective state mine safety and health programs. The MSHA also conducts research on mine safety, in the hope of preventing and reducing mine accidents and occupational diseases.

### Bureau of Labor Statistics

The Bureau of Labor Statistics is the principal data gathering agency of the federal government in the broad field of labor economics. It has no enforcement or regulatory functions. The bureau collects, processes, analyzes, and disseminates data relating to employment, unemployment, and other characteristics of the labor force. It also analyzes prices and consumer expenditures, economic growth and employment projections, and occupational health and safety. Most of the data are collected by the bureau, the Bureau of the Census, or state agencies.

The basic data are issued in monthly, quarterly, and annual news releases, bulletins, reports, and special publications. Data are also provided electronically, including on the INTERNET.

### Veterans' Employment and Training Service

The Veterans' Employment and Training Service directs the DOL veterans' employment and training programs through a nationwide network of support staff. The service's field staff work closely with state employment security agencies to ensure that veterans are provided the priority service required by law. The service provides public information and designs outreach activities that seek to encourage employers to hire veterans. It also administers programs designed to meet the employment and training needs of veterans with service-connected disabilities, Vietnam-era veterans, and veterans recently separated from military service.

### Other Agencies

The Women's Bureau formulates standards and policies that promote the welfare of wage earning women, improve their working conditions, increase their efficiency, and advance their opportunities for profitable employment.

The Office of the American Workplace was created in 1993 to enhance employer-employee relations and collective bargaining, as well as to ensure that LABOR UNIONS are run democratically. It works to establish labor-management networks that disseminate information concerning cooperative labor-management relations and high-performance workplace practices. It conducts investigative audits to uncover and remedy criminal and civil violations of federal law. Its Office of Labor-Management Standards conducts criminal and civil investigations to safeguard the financial

integrity of unions and to ensure union democracy.

The Bureau of International Labor Affairs carries out DOL international responsibilities. It works with other government agencies to formulate international economic, trade, and immigration policies affecting U.S. workers. The bureau represents the United States on delegations to multilateral and bilateral trade negotiations and in international bodies such as the GENERAL AGREEMENT ON TARIFFS AND TRADE, International Labor Organization, Organization for Economic Cooperation and Development, and other U.N. organizations. It also helps administer the U.S. labor attaché program at embassies abroad and carries out technical assistance projects in other countries.

The Office of the Assistant Secretary for Policy (OASP) advises and assists the secretary of labor in, and coordinates and provides leadership to, the department's activities in addressing economic policy issues, conducting economic research, and formulating regulations and procedures bearing on the welfare of American workers. OASP also provides leadership and oversight for coordinating and managing the department's public Web site, ensuring its information and services are cohesive, accessible, timely, accurate, and authoritative.

In 2001 Congress approved an Office of Disability Employment Policy (ODEP). Part of the Department of Labor, ODEP is headed by an assistant secretary. ODEP provides leadership to increase employment opportunities for adults and youth with disabilities. ODEP serves individuals with disabilities and their families; private employers and their employees; federal, state, and local government agencies; educational and training institutions; disability advocates; and providers of services and government employers.

The secretary and all of the separate offices, bureaus, and agencies in the Department of Labor receive support from seven administrative bodies: the Office of Congressional and Intergovernmental Affairs, Office of Administration and Management and Chief Information Office, Office of the Chief Financial Officer, Office of the Solicitor, Office of the Inspector General, Office of Public Affairs, and Office of Small Business Programs. These seven administrative bodies assist the secretary and the Department of Labor to function smoothly, to maintain its vast records, to publicize its initiatives, and to represent the department in Congress regarding issues, legislation, and programs and initiatives that fall within the broad scope of the Labor Department's responsibility.

On March 6, 2001, the labor secretary announced the creation of a new Office of the 21st Century Workforce. The 21st Century Workforce mission is to help ensure that all American workers have the opportunity to equip themselves with the necessary tools to succeed in their careers in the environment of rapid change and technological innovation that marks this period in the history of the American workforce. The changes in national and global economies include a fundamental transformation for all industries and increasingly require higher skill sets and higher education.

FURTHER READINGS

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CROSS-REFERENCES

Collective Bargaining; Employment Law; Labor Law; Labor Union; Mine and Mineral Law; Workers' Compensation.

## LABOR LAW

*An area of the law that deals with the rights of employers, employees, and labor organizations.*

U.S. labor law covers all facets of the legal relationship between employers, employees, and employee LABOR UNIONS. Employers' opposition to recognizing employees' rights to organize and bargain collectively with management has resulted in a system of primarily federal laws and regulations that is adversarial in nature. Modern labor law dates from the passage of the WAGNER ACT of 1935, also known as the National Labor Relations Act (NLRA) (29 U.S.C.A. §§ 151 et seq.). Congress has passed two major revisions of this act: the TAFT-HARTLEY ACT of 1947, also known as the LABOR MANAGEMENT RELATIONS ACT (29 U.S.C.A. §§ 141 et seq.), and the LANDRUM-GRIFFIN ACT of 1959, also known as the Labor Management Reporting and Disclosure Act (29 U.S.C.A. §§ 401 et seq.).

The railroad and airline industries are governed by the Federal Railway Labor Act (45 U.S.C.A. § 151 et seq.), originally passed in 1926 and substantially amended in 1934. Federal employees are covered by the separate Federal

Service Labor Management and Employee Relation Act (5 U.S.C.A. §§ 7101 et seq.). Labor law is also made by the NATIONAL LABOR RELATIONS BOARD (NLRB), an ADMINISTRATIVE AGENCY that enforces federal labor statutes, and by federal courts when they interpret labor legislation and NLRB decisions. In addition, state and municipal employees are covered by state law.

A basic principle of U.S. labor law is that the SUPREMACY CLAUSE of the Constitution authorizes Congress to prohibit states from using their powers to regulate labor relations. The ability of Congress to preempt state labor laws has been defined largely by the U.S. Supreme Court because the NLRA is imprecise about what states can and cannot do. The Court has set out two basic principles concerning PREEMPTION: not all state labor laws are preempted by federal statute, and conduct actually protected by the federal statutes is immune from state regulation. For example, VANDALISM committed by a union organizing campaign may be subject to state criminal and civil sanctions. A strike in an industry subject to the NLRA that is aimed at improving wages cannot be prohibited by the state.

## Historical Background

Labor law traces its roots to the early 1800s, when employees who banded together to strike for improved working conditions were branded as criminals. By the mid-nineteenth century, the law changed to recognize the right of workers to organize and conduct COLLECTIVE BARGAINING with their employers. Employers, however, were not receptive to unions. Between 1842 and 1932, they routinely used injunctions to stop strikes and to frustrate union organizing. The NORRIS-LAGUARDIA ACT (29 U.S.C.A. §§ 101 et seq.) was passed by Congress in 1932 to curb the use of labor injunctions, preventing employers from going through the federal courts to quash unions. The passage of the Wagner Act three years later signaled the beginning of a new era in labor relations and labor law. The legacy of employer-union conflict shaped the new system of government regulation of labor-management relations.

## Modern Labor Law

The NLRA is the most important and widely applicable U.S. labor law. Its section 7 (29 U.S.C.A. § 157) guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively, through representatives of their own choosing, and to engage in other concerted activities for . . . mutual aid or protection." Employees are also entitled to "refrain from any or all such activities." The act prohibits employers and unions from committing "unfair labor practices" that would violate these rights or certain other specified interests of employers and the general public in various circumstances.

Labor law generally addresses one of three different situations: (1) a union attempts to organize the employees of an employer and to get the employer to recognize it as the employees' bargaining representative; (2) a union seeks to negotiate a collective bargaining agreement with an employer; or (3) a union and employer disagree on the interpretation and application of an existing contract between the two. Within these three situations, specific rules have been created to deal with rights of employees and employers.

**Organization and Representation of Employees** Under the NLRA neither employers nor unions may physically coerce employees or discriminate against them on the job because they do or do not wish to join a union, engage in a peaceful strike or work stoppage, or exercise other organizational rights. Although an employer is forbidden to discharge peaceful strikers, the employer may hire replacement workers to carry on business.

When the employees of a particular company decide to be represented by a union, they usually contact the union's parent association or local division for aid and guidance. The union may solicit membership by holding meetings to discuss how working conditions can be improved, and by distributing leaflets.

The employees, union, or employer, may file with the NLRB a petition to conduct an election to decide whether the union should be the collective bargaining representative. This petition must meet with the support of at least 30 percent of the employees in the bargaining unit named in the petition. Once the petition has been filed, the NLRB must determine whether any obstacles exist to holding the election. If not, the NLRB will attempt to get the union and employer to agree to an election.

If the union and employer agree to an election, the NLRB conducts a secret ballot election to determine whether the majority of the employees in the bargaining unit desire to be

represented by the union. During the election campaign, both employer and union may freely express their views about unionization of employees, but neither may resort to threats or bribes. If the union wins the election, the NLRB will certify it as the exclusive bargaining representative of the employees. The union may then be designated an appropriate bargaining unit of a particular category of workers.

A union is generally entitled to picket or patrol with signs reading "Unfair," for up to 30 days at the place of business of an employer it is trying to organize. To picket longer for organizing purposes, the union must file for an NLRB election. If the union then loses the election, it is forbidden to resume such picketing for a year. The U.S. Supreme Court upheld the right to peaceful union picketing in *Thornhill v. Alabama,* 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).

**Negotiation of a Collective Bargaining Agreement** Collective bargaining is the process in which an employer and an accredited employee representative negotiate an agreement concerning wages, hours, and other terms and conditions of employment. An employer and a union representing its employees have a mutual obligation under the NLRA to bargain with each other in GOOD FAITH. The primary goal of collective bargaining is to promote industrial peace between employers and employees. The parties have a duty to try reasonably to accommodate differences and reach common ground, but ultimately they have no obligation to enter into a contract.

The FEDERAL MEDIATION AND CONCILIATION SERVICE or state labor agencies may provide parties with mediators to help them negotiate. Mediators act as neutral facilitators. It is a fundamental part of federal labor policy that unions and management should resolve their disputes through voluntary collective bargaining and not through the imposition of a solution by the government. If a labor dispute becomes serious enough to significantly affect national health or safety, the president has the statutory authority to obtain an 80-day INJUNCTION from the federal courts against any strike or lockout. This procedure has been used over three dozen times since 1947, but rarely since the 1970s.

**Pressure to Resolve a Contract Dispute** When an employer and a union are unable to resolve their differences and negotiate an employment contract, the parties may use different types of pressure to produce an agreement. These types of pressure include boycotts, strikes, the carrying of signs and banners, picketing, and lockouts.

A labor boycott is any type of union action that seeks to reduce or stop public patronage of a business. It is a refusal to purchase from or to handle the products of a particular employer. Employees may legally exert economic pressure on their employer through a boycott, so long as they act peacefully. But a union is forbidden to engage in a SECONDARY BOYCOTT. For example, if a union's primary dispute is with a hardware manufacturer, it may not picket or use other methods to get the employees of a hardware store, who are neutral or secondary parties, to stage a strike at the store in order to force it to cease handling the manufacturer's products.

A strike is a concerted refusal of employees to perform work that they have been assigned, in order to force the employer to grant concessions that the employees have demanded. The right of employees to strike is protected by the courts. A lawful strike must be conducted in an orderly manner and may not be used as a shield for violence or crime. Intimidation and coercion in the course of a strike are unlawful. The peaceful carrying of signs and banners advertising a labor dispute is ordinarily a lawful means to publicize employees' grievances against an employer.

Picketing consists of posting one or more union members at the site of a strike or boycott, in order to interfere with a particular employer's business or to influence the public against patronizing that employer. It can be reasonably regulated. Lawful picketing is peaceful and honest. The use of force, intimidation, or coercion on a picket line is not constitutionally protected activity. In addition, employees are not acting within their rights when they seize any part of the employer's property.

A lockout is an employer's refusal to admit employees to the workplace, in order to gain a concession from them. In *American Ship Building Co. v. NLRB,* 380 U.S. 300, 85 S. Ct. 955, 13 L. Ed. 2d 855 (1965), the U.S. Supreme Court upheld the right of an employer to lock out employees if the intent is to promote the company's bargaining position and not to destroy the collective bargaining process or the union.

With some frequency, lower federal courts and the National Labor Relations Board have upheld lockouts by employers. In *Local 702,*

# Reinventing the Workplace: Improving Quality, or Creating Company (Sham) Unions?

Foreign competition, technological change, and concerns about declining productivity have led to significant modifications in the way many U.S. businesses manage their affairs. These changes, which have been championed by a long list of management consultants, have appeared under numerous labels, including *quality circles* and *total quality management (TQM)*. All of these approaches emphasize that the goal of a business is to achieve a high standard of quality in goods manufactured or services provided. To meet this quality goal, businesses have moved away from top-down management, substituting a team approach. Traditional management personnel and line-level workers meet in committees to discuss and resolve issues within the company concerning product, service, and the way work is organized.

The advocates of teamwork and quality circles have hit a legal brick wall in the National Labor Relations Act of 1935 (NLRA) (29 U.S.C.A. § 151 et seq.). Under the NLRA, sections 2(5) and 8(A)(2), employers are forbidden to create employer-dominated company unions. In *Electromation,* 309 N.L.R.B. 990 (1992), the National Labor Relations Board (NLRB) ruled that Electromation, a nonunion company, could not sponsor an "action committee" because that committee was, under the NLRA provisions, a labor organization. Additional cases have confirmed the NLRB's position on this issue.

Proponents of quality circles and teamwork argue that the NLRA is an antiquated set of laws, based on a period of U.S. history when businesses used every tool at their disposal to subvert unions and union organization. The adversarial posture of labor and management may have made sense in the past, this argument goes, but it is counterproductive in an economy that must adapt quickly to world market forces. The most radical proposal by critics of the NLRB's position on this issue is to abolish the NLRA altogether.

More moderate proponents argue instead for changes in the NLRA to permit committees, teams, and more of what they call workplace democracy. They point out that with the steady decline of union membership and blue-collar jobs, traditional labor-management relations have become irrelevant. They note that white-collar workers, who now dominate the U.S. economy, are less likely to join a **LABOR UNION**. Therefore, worker morale and job satisfaction are better when employees are included in the decision-making process of a business.

Proponents of quality circles also believe that a better educated workforce is capable of making informed decisions about its relations with employers. They assert that the days of the employer's being an absolute sovereign are over. It is more productive to allow nonunion employees to organize within the company based on committees and circles. These workers are entitled to the same type of participatory democracy found in labor unions.

*International Brotherhood of Electrical Workers v. NLRB,* 215 F.3d 11 (D.C. Cir. 2000), the U.S. Court of Appeals upheld a ruling by the NLRB finding that an employer's lockout did not violate the NLRA. Employees of the union in the case resorted to "inside game" tactics, where the employees refused to work voluntary overtime and adhered strictly to company rules to such an extent that it slowed the company's productivity. The union began using this strategy during labor negotiations with the company. The company imposed a lockout of the employees in order to facilitate the negotiations and to counter the effects of the union's strategy. The appellate court, in upholding a decision by the NLRB, found that the employer had legitimate and substantial business justifications for the lockout and that the union had not proven that the employer had acted with an improper motive in initiating the lockout.

### Unfair Labor Practices

An **UNFAIR LABOR PRACTICE** is any action or statement by an employer that interferes with, restrains, or coerces employees in their exercise of the right to organize and conduct collective bargaining. Such interference, restraint, or coercion can arise through threats, promises, or offers to employees.

An unfair labor practice can occur during collective bargaining. In *Auciello Iron Works v. NLRB,* 517 U.S. 781, 116 S. Ct. 1754, 135 L. Ed. 2d 64 (1996), the U.S. Supreme Court upheld an NLRB ruling that the employer had committed an unfair labor practice. After the union accepted one of the employer's collective bar-

Most proponents would give employees the chance to make up their own mind about their work environment. If a union successfully wins over enough employees to be certified as the legal bargaining agent, that would indicate dissatisfaction with the employer and would be an acceptable outcome. These proponents would object to unions filing complaints with the NLRB over company committees where the employees have rejected union representation in the past. As long as employees want to participate in a company committee or circle, they should be permitted to do so.

Proponents argue that the bar on these types of workplace organizational innovations hurts workers. These innovations give employees more autonomy to plan work schedules, meet deadlines, operate equipment, make repairs, and handle health and safety issues. In the past an employee could suggest a change to management but then had to stand back and observe whether the change took place. In today's workplace an employee wants to implement as well as suggest improvements.

Finally, proponents note that in union-organized companies unions are free to negotiate the participation of employees in teams and quality circles. They suggest that it is unfair to restrict nonunion employees from electing to participate in similar business management ventures.

The U.S. labor movement has resisted vigorously the introduction of employee involvement programs by management in both union and nonunion environments. Labor union leadership views the introduction of employer-sponsored committees as a return to the past and as a way of undercutting the ability of unions to organize white-collar workers.

Opponents point out the sordid history of U.S. labor relations prior to the passage of the NLRA in 1935. Company-sponsored unions were put forward as a way to resolve disputes over wages, hours, and other conditions of employment. Employees believed that these unions acted in **GOOD FAITH** to negotiate a contract with management. In reality, these organizations were sham unions, dominated by the employer. The employers would put company spies in them to monitor what was discussed. Employees were either bought off or fired if they proved too effective in their union duties.

Opponents argue that the NRLA is preserving the independence of labor unions. Without its decisions employers of nonunion employees would use *TQM, quality circles,* and other buzzwords to promote a nonunion status that would place employees at a disadvantage. Employees will quite likely be intimidated in employer-organized groups, and unable to raise or meaningfully discuss certain issues that management does not want to hear. Without a collective bargaining agreement negotiated by a union, opponents maintain, employees will not have job security or promotion protection.

Opponents also question who makes the decisions in these groups. Though the rhetoric suggests empowerment of employees, employee committees are purely advisory, and the employer retains the authority to decide all issues. In addition, because management creates these committees, management can dissolve them at any time. The inequality of power within a nonunion business dictates that the employer can do whatever management wants, regardless of a recommendation by an employee committee.

The NLRA has placed a barrier to new models of business organization. The distrust of labor unions and their difficulty in making inroads with white-collar workers reconfirms to the unions the need for an adversarial posture with management. Those who seek fundamental change in the way U.S. business operates believe that the NLRA must be amended to accommodate a major shift in economic organization.

gaining proposals, the employer disavowed the agreement because of good faith doubts about whether the union still commanded a majority of the employees. The Court reasoned that the employer's doubts arose from facts that the employer had known about before its contract offer had been accepted by the union.

Labor laws are not intended to interfere with an employer's normal exercise of discretion in hiring and firing employees. In general, an employer may hire employees based on their individual merit, with no regard to union affiliation. Refusal to hire an applicant owing to affiliation with a labor union is an unfair labor practice.

The motive of an employer in discharging an employee may be a controlling factor in determining whether the discharge is an unfair labor practice. An employer's history of antiunion bias is an extremely important factor in ascertaining the motive for discharge of an employee. An employer may discharge an employee on various grounds without being guilty of an unfair labor practice. Such grounds include misconduct, unlawful activity, disloyalty, and termination of the business operation. In addition, inefficiency, disobedience, or insubordination is proper grounds for dismissal, provided the discharge is not motivated by the employer's reaction to union activity. Firing an employee based on union activity or membership is an unfair labor practice. Furthermore, the filing of unfair labor practice charges or the giving of testimony in a case based on such charges does not warrant dismissal.

In general, an unfair labor practice exists when an employer contributes financial or any

other support to a labor organization. An employer must, therefore, remain neutral between competing unions. It is also an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization.

A union commits an unfair labor practice when it causes, or attempts to cause, an employer to hire, discharge, or discriminate against an employee for the purpose of encouraging or discouraging union activity. The same is true when a union restrains or coerces employees in the exercise of their rights to self-organize; to form, join, or assist labor unions; to bargain collectively; or to refrain from any of these activities. The refusal of a labor organization to bargain collectively or to execute a formal document embodying agreement with an employer is another unfair labor practice.

### Contract Enforcement and Contract Disputes

Almost every collective bargaining agreement in the United States contains a grievance procedure. In the grievance procedure, the union and the employer try to settle any disputes over the meaning or application of the contract by themselves. If the parties fail, they may invoke ARBITRATION, a procedure that typically calls for referring the issue to an impartial third party for a final and binding determination.

Grievance provisions of a collective bargaining agreement govern the procedure to be followed to settle on-the-job disputes. Typical grievance procedures generally consist of at least three steps: (1) an employee and his or her union steward present their complaint orally to the supervisor, who has the power to settle it; (2) in the event that the matter is not settled at that stage, it is reduced to writing, and the union steward and union officers confer with management; (3) if no agreement is reached, the aggrieved employee may submit the matter to arbitration, which will be binding on all parties.

The arbitration of disputes under a collective bargaining agreement is a matter of contract, and the parties to it may delineate the scope of their arbitration clause. Common grievances settled under arbitration clauses include disputes over seniority rights, employee discipline, PENSION or WELFARE benefits, rates of pay, and hours of work. Ordinarily, the issue of whether a strike or lockout is a breach of an agreement is a proper subject for arbitration.

The vast majority of union-employer contract disputes are resolved in a grievance procedure, and most of the rest are disposed of routinely through arbitration. Occasionally, a party will resist arbitration or will refuse to comply with an arbitrator's award. In such a case section 301 of the Taft-Hartley Act authorizes a suit in federal court to enforce the agreement to arbitrate or the arbitrator's award.

The federal courts have enforced a pro-arbitration policy in labor contracts. If a union strikes over a grievance it could have arbitrated, the employer may secure an injunction against the strike under section 301 of the Taft-Hartley Act, even though ordinarily the Norris-LaGuardia Act prevents the federal courts from enjoining strikes by labor unions.

### Regulation of Unions

The Landrum-Griffin Act contains provisions that regulate how labor unions conduct their internal affairs. These provisions seek to prevent union corruption and to guarantee to union members that unions will be run democratically. The act provides a bill of rights for union members, requires certain financial disclosures by unions, prescribes procedures for the election of union officers, and provides civil and criminal remedies for financial abuses by union officers.

### Changing Labor-Management Relations

For most of the history of U.S. labor-management relations, employers and labor unions have seen each other as adversaries. Federal labor law has been shaped by this adversarial relationship, yet shifts in the structure of the U.S. economy have led to more cooperation. In the 1980s unions agreed to givebacks, in which employees agree to reduced wages and benefits in return for job security, particularly in the manufacturing industries. In response, employers have given unions a larger voice in the allocation of jobs and in the work environment itself.

When economic hardships fall on employers, these employers must often negotiate concessions with employees and the unions representing employees in order to save their businesses. After the SEPTEMBER 11TH ATTACKS in 2001, for instance, many airlines in the United States suffered devastating economic downturns. Many of these airlines were forced to negotiate concessions from unions representing airline employees in order to avoid BANK-

RUPTCY. For instance, in April 2003, a union representing flight attendants for American Airlines agreed to concessions with the airline that saved the company $340 million. The concessions allowed American to avoid bankruptcy, which some commentators had previously suggested was inevitable.

Since the 1980s, innovations in corporate management that advocate teamwork, quality circles, and total quality management (TQM) have led to legal disputes and questions about the continued vitality of the adversarial model of labor-management relations. Under the NLRA, sections 2(5) and 8(A)(2), employers are prohibited from creating employer-dominated company unions. This prohibition was included in the original NLRA because employers had created sham unions that promised representation for workers but in fact toed the company line.

With the beginning of TQM and quality circles in the late 1980s, some employers have attempted to reinvent the workplace by empowering all levels of workers to help make decisions, instead of delegating this task to a set of managers. The creation of quality circles and employee committees has run afoul of the NLRA provision against employer-created unions. In *Electromation,* 309 N.L.R.B. 990 (1992), the board held that the company's "action committee" was a labor organization involved with and dominated by the company, in violation of sections 2(5) and 8(A)(2). Electromation was a nonunion company. In *E. I. du Pont de Nemours & Co.,* 311 N.L.R.B. 893 (1993), the board considered identical issues in a union-organized company. The board ruled that a series of safety and fitness committees created by du Pont were illegal under the NLRA. These cases illustrate the skepticism of some unions about the true intentions of management and the difficulty in adjusting to change in some areas of labor law.

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CROSS-REFERENCES

Administrative Agency; Bargaining Agent; Boycott; Employment Law; Federal Mediation and Conciliation Service; Landrum-Griffin Act; Norris-Laguardia Act; Taft-Hartley Act; Unfair Labor Practice.

## LABOR-MANAGEMENT RELATIONS ACT

Federal legislation (29 U.S.C.A. § 141 et seq. [1947]), popularly known as the TAFT-HARTLEY ACT, which governs the conduct of designated union activities, such as by proscribing strikes and boycotts, and establishes the framework for the resolution of labor disputes in times of national emergencies.

CROSS-REFERENCES

Labor Law; Labor Union.

## LABOR UNION

*An association, combination, or organization of employees who band together to secure favorable wages, improved working conditions, and better work hours, and to resolve grievances against employers.*

The history of labor unions in the United States has much to do with changes in technology and the development of capitalism. Although labor unions can be compared to European merchant and craft guilds of the Middle Ages, they arose with the factory system and the Industrial Revolution of the nineteenth century.

The first efforts to organize employees were met with fierce resistance by employers. The U.S. legal system played a part in this resistance. In *Commonwealth v. Pullis* (Phila. Mayor's Ct. 1806), generally known as the *Philadelphia Cordwainers*' case, bootmakers and shoemakers of Philadelphia were indicted as a combination for conspiring to raise their wages. The prosecution argued that the common-law doctrine of criminal conspiracy applied. The jury agreed that the union was illegal, and the defendants were fined. From that case came the labor conspiracy doctrine, which held that collective (as distinguished from individual) bargaining would interfere with the natural operation of the marketplace, raise wages to artificially high levels, and destroy competition. This early resistance to unions led to an adversarial relationship between unions and employers.

Between 1806 and 1842, the labor conspiracy doctrine was applied in a handful of cases.

Then, during the 1840s, U.S. courts began to question the doctrine. The most important case in this regard was *Commonwealth v. Hunt,* 45 Mass. (4 Met.) 11, 38 A.M. Dec. 346 (Mass. 1842), in which Chief Justice LEMUEL SHAW set aside an indictment of members of the bootmakers' union for conspiracy. Shaw agreed with employers that competition was vital to the economy but concluded that unions were one way of stimulating competition. As long as the methods they used were legal, unions were free to seek concessions from employers. By the end of the nineteenth century, courts generally held that strikes for higher wages or shorter workdays were legal.

Despite the decline of the labor conspiracy theory, unions faced other legal challenges to their existence. The labor INJUNCTION and prosecution under antitrust laws became powerful weapons for employers who were involved in labor disputes. In an 1896 case, *Vegelahn v. Guntner,* 167 Mass. 92, 44 N.E. 1077, the highest court in Massachusetts upheld an injunction that forbade peaceful picketing outside the employer's premises.

The first national labor federation to remain active for more than a few years was the Noble Order of the Knights of Labor. It was established in 1869 and had set as goals the eight-hour workday, equal pay for equal work, and the abolition of child labor. The Knights of Labor grew to 700,000 members by 1886 but went into decline that year with a series of failed strikes. By 1900, it had disappeared.

Labor unions nevertheless gained strength in 1886 with the formation of the AMERICAN FEDERATION OF LABOR (AFL). Composed of 25 national trade unions and numbering over 316,000 members, the AFL was a loose confederation of autonomous unions, each with exclusive rights to deal with the workers and employers in its own field. The AFL concentrated on pursuing achievable goals such as higher wages and shorter hours, and it renounced identification with any political party or movement. Members were encouraged to support politicians who were friendly to labor, whatever their party affiliation.

Following the passage of the SHERMAN ANTITRUST ACT in 1890 (15 U.S.C.A. §§ 1 et seq.), which prohibited combinations in restraint of trade, courts punished and enjoined labor practices that were considered wrongful. In the *Danbury Hatters* case (*Loewe v. Lawlor,* 208 U.S. 274, 28 S. Ct. 301, 52 L. Ed. 488 [1908]), the U.S. Supreme Court upheld the application of the act to an appeal that involved a labor publication for a general boycott of named nonunion employers. In 1911, in *Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418, 31 S. Ct. 492, 55 L. Ed. 797, the Court upheld an injunction against a union that had placed the name of the employer on the AFL "We Don't Patronize" list, which was a call for a boycott of the employer.

Opposition to labor unions was particularly intense during the late nineteenth century. Several unsuccessful strikes in the 1890s demonstrated the power of companies to crush unions. In 1892, steelworkers struck against the Carnegie Steel Company's Homestead, Pennsylvania, plant. The company hired private guards to protect the plant, but violence broke out. The strike failed, and most of the workers quit the union and returned to work. In 1894, members of the American Railway Union struck the Pullman Palace Car Company, which made railroad cars. The federal government sent in troops to end the strike.

Despite these setbacks, labor unions gradually increased their political power at the federal level. In 1914, Congress enacted the CLAYTON ACT, sections 6 (15 U.S.C.A. § 7) and 20 (29 U.S.C.A. § 52), declaring that human labor was not to be considered an article of commerce and that the existence of unions was not to be considered a violation of ANTITRUST LAWS. In addition, the act prohibited federal courts from issuing injunctions in labor disputes except to prevent irreparable injury to property. This prohibition was absolute when peaceful picketing and boycotts were involved.

Employers had better success fighting unions by using the so-called YELLOW-DOG CONTRACT. This agreement required a prospective employee to state that he or she was not a member of a union and would not become one. Although some states enacted laws that prohibited employers from requiring employees to sign this type of contract, the U.S. Supreme Court declared such statutes unconstitutional as an infringement of freedom of contract (*Coppage v. Kansas,* 236 U.S. 1, 35 S. Ct. 240, 59 L. Ed. 441 [1915]).

By 1920, trade unions had over five million members. During the 1920s, however, the TRADE UNION movement suffered a decline, precipitated in part by a severe economic depression in 1921-22. Unemployment rose, and competition for jobs became intense. By 1929, union membership had dropped to 3.5 million.

The Great Depression of the 1930s caused more unemployment and a further decline in union membership. Unions responded with numerous strikes, but few were successful. Despite these reverses, the legal position of unions was enhanced during the 1930s. In 1932, Congress passed the **NORRIS-LAGUARDIA ACT** (29 U.S.C.A. §§ 101 et seq.), which declared yellow-dog contracts to be contrary to public policy and stringently limited the power of federal courts to issue injunctions in labor disputes. In cases in which an injunction still might be issued, the act imposed strict procedural limitations and safeguards in order to prevent more instances of abuses by the courts. The Norris-LaGuardia Act effectively ended "government by injunction" and has remained a fundamental law in labor disputes.

During the 1930s, the AFL itself was in turmoil over the aspirations of the labor movement. The trade unions that dominated the AFL were composed of skilled workers who opposed organizing the unskilled or semiskilled workers on the manufacturing production line. Several unions rebelled at this refusal to organize and formed the Committee for Industrial Organization (CIO). The CIO aggressively organized millions of workers who labored in automobile, steel, and rubber plants. In 1938, unhappy with this effort, the AFL expelled the unions that formed the CIO. The CIO then formed its own organization, changed its name to Congress of Industrial Organizations, and elected John L. Lewis, of the United Mine Workers, as its first president.

U.S. labor relations were dramatically altered in 1935 with the passage of the National Labor Relations Act, also known as the **WAGNER ACT** (29 U.S.C.A. §§ 151 et seq.). For the first time, labor unions were given legal rights and powers under federal law. The act guaranteed the right of **COLLECTIVE BARGAINING**, free from employer domination or influence. It made it an **UNFAIR LABOR PRACTICE** for an employer to interfere with employees in the exercise of their right to bargain collectively; to interfere with or to influence unions; to discriminate in hiring or firing because of an employee's union membership; to discriminate against an employee who avails himself or herself of legal rights; or to refuse to bargain collectively.

The Wagner Act also established the **NATIONAL LABOR RELATIONS BOARD**, which has the power to investigate employees' complaints and to issue cease and desist orders. If an employer were to defy such an order, the board may ask a federal court of appeals for an enforcement order, or it could ask the court to review the cease-and-desist order. The board could conduct elections to determine which union should represent the employees in a bargaining unit and certify the union as their agent, and it could designate the bargaining unit.

The heart of the Wagner Act was section 7 (29 U.S.C.A. § 157), which stated the public policy that workers have the right to engage in self-organization, in collective bargaining, and in concerted activities in support of self-organization and collective bargaining. Armed with these rights, unions grew in membership and strength during the late 1930s and through **WORLD WAR II**.

A number of states reacted negatively to these legal changes by enacting laws that sought to restrict and lessen the power of unions. An antiunion backlash developed after World War II, when strikes against the automobile industry and other large corporations reached record numbers. This reaction culminated in the passage of the **LABOR-MANAGEMENT RELATIONS ACT** of 1947, also known as the **TAFT-HARTLEY ACT** (29 U.S.C.A. §§ 141 et seq.). The Taft-Hartley Act amended section 7 of the Wagner Act, affirming the rights that had been formulated in 1935 but providing that workers shall have the right to *refrain from* any of the listed activities. Whereas the Wagner Act listed only employers' unfair labor practices, Taft-Hartley added unions' unfair labor practices. The act created the **FEDERAL MEDIATION AND CONCILIATION SERVICE**, which provides a method for addressing strikes that create a national emergency. It also banned the **CLOSED SHOP**, which requires an employer to hire only union members and to discharge any employee who drops union membership. Taft-Hartley effectively replaced the Wagner Act as the basic federal statute regulating labor relations.

In 1955, the AFL and CIO merged into a single organization, the AFL-CIO. The staunchly anti-communist AFL agreed to the merger only after the CIO had purged its organization of communists and supporters of communist ideals. George Meany was appointed the first president of the new organization.

In 1959, Congress enacted the Labor Management Reporting and Disclosure Act, also

**Median Usual Weekly Earnings, by Union Affiliation, in 2001**

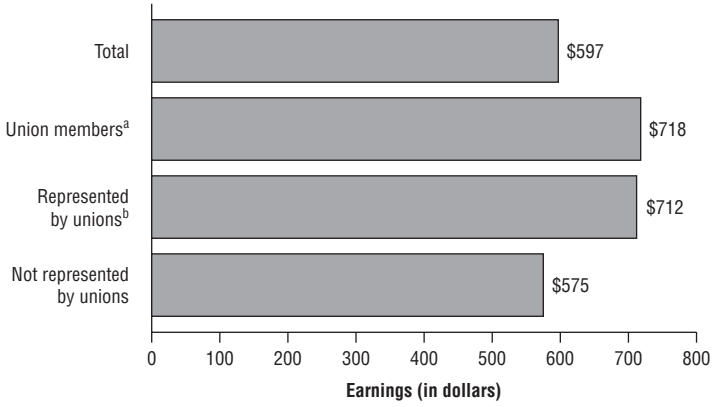


[a]Members of a labor union or an employee association similar to a labor union.
[b]Members of a labor union or an employee association similar to a union as well as workers who report no union affiliation but whose jobs are covered by a union or an employee association contract.

SOURCE: U.S. Department of Labor, Bureau of Labor Statistics.

known as the LANDRUM-GRIFFIN ACT (29 U.S.C.A. §§ 401 et seq.). Title VII of the act contains many amendments to the Taft-Hartley Act, of which two are especially important. First, Landrum-Griffin made peaceful picketing of organizational or recognitional objectives illegal under certain circumstances. Second, it closed loopholes in the provisions of Taft-Hartley that forbadesecondary boycotts.

Other sections of Landrum-Griffin provided for a bill of rights for union members, financial disclosure requirements for unions and their officers, and safeguards in union elections. All of these matters concerned internal union practices, strongly suggesting that union corruption had become a problem. In fact, a 1957 congressional investigation of the Teamsters union had uncovered widespread corruption and had much to do with the introduction of these new statutory provisions.

Labor unions continued to thrive in the 1960s, as a robust economy relied on a large manufacturing industry to maintain growth. Although no comprehensive union legislation was enacted during that decade, the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (42 U.S.C.A. §§ 2000a et seq.), made an important contribution to national labor policy. The act declared it an unfair labor practice for an employer or union to discriminate against a person by reason of race, religion, color, sex, or national origin. Administration of this provision is vested in the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC). Under the CIVIL RIGHTS ACT, if the EEOC is unable to achieve voluntary compliance, the person allegingdiscrimination is authorized to bring a civil action in federal district court. The 1972 amendment gave the EEOC the right to bring such an action. The effect of the law has been to desegregate many trade unions that maintained an all-white membership policy.

The union movement considerably improved working conditions for migrant workers in the late 1960s and the 1970s. The UNITED FARM WORKERS, under the leadership of CESAR CHAVEZ, led successful boycotts and strikes against California growers, most notably against the wine-grape growers.

Many unions suffered, however, with an economic downturn in the 1970s and 1980s, and with the decline of well-paying manufacturing jobs. Automation of industrial processes reduced the number of workers who were required on assembly lines. In addition, many U.S. companies moved either to states that did not have a strong union background or to developing countries where labor costs were significantly lower. Union members became more concerned about job security than about higher wages, particularly in the manufacturing industry, and they agreed to concede salary and benefit givebacks. In return, unions sought greater labor-management cooperation and a larger voice in the allocation of jobs and in the work environment.

Union membership has also declined in response to a shift from blue-collar manufacturing jobs to white-collar service and technology jobs. By the end of 2002, just 13.2 percent of the U.S. workforce claimed union membership, compared with a high of 34.7 percent in 1954.

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## LACHES

*A defense to an equitable action, that bars recovery by the plaintiff because of the plaintiff's undue delay in seeking relief.*

Laches is a defense to a proceeding in which a plaintiff seeks equitable relief. Cases in EQUITY are distinguished from cases at law by the type of remedy, or judicial relief, sought by the plaintiff. Generally, law cases involve a problem that can be solved by the payment of monetary damages. Equity cases involve remedies directed by the court against a party.

Types of equitable relief include INJUNCTION, where the court orders a party to do or not to do something; declaratory relief, where the court declares the rights of the two parties to a controversy; and accounting, where the court orders a detailed written statement of money owed, paid, and held. Courts have complete discretion in equity, and weigh equitable principles against the facts of the case to determine whether relief is warranted.

The rules of equity are built on a series of legal maxims, which serve as broad statements of principle, the truth and reasonableness of which are self-evident. The basis of equity is contained in the MAXIM "Equity will not suffer an injustice." Other maxims present reasons for not granting equitable relief. Laches is one such defense.

Laches is based on the legal maxim "Equity aids the vigilant, not those who slumber on their rights." Laches recognizes that a party to an action can lose evidence, witnesses, and a fair chance to defend himself or herself after the passage of time from the date the wrong was committed. If the defendant can show disadvantages because for a long time he or she relied on the fact that no lawsuit would be started, then the case should be dismissed in the interests of justice.

The law encourages a speedy resolution for every dispute. Cases in law are governed by STATUTES OF LIMITATIONS, which are laws that determine how long a person has to file a lawsuit before the right to sue expires. Different types of injuries (e.g., TORT and contract) have different time periods in which to file a lawsuit. Laches is the equitable equivalent of statutes of limitations. However, unlike statutes of limitations, laches leaves it up to the court to determine, based on the unique facts of the case, whether a plaintiff has waited too long to seek relief.

Real estate boundary disputes are resolved in equity and may involve laches. For instance, if a person starts to build a garage that extends beyond the boundary line and into a neighbor's property, and the neighbor immediately files a suit in equity and asks the court to issue an injunction to stop the construction, the neighbor will likely prevail. On the other hand, if the neighbor observes the construction of the garage on her property and does not file suit until the garage is completed, the defendant may plead laches, arguing that the neighbor had ample time to protect her property rights before the construction was completed, and the court may find it unfair to order that the garage be torn down.

The laches defense, like most of equity law, is a general concept containing many variations on the maxim. Phrases used to describe laches include "delay that works to the disadvantage of another," "inexcusable delay coupled with prejudice to the party raising the defense," "failure to assert rights," "lack of diligence," and "neglect or omission to assert a right."

## ♦ LAMAR, JOSEPH RUCKER

Joseph Rucker Lamar served as an associate justice of the U.S. Supreme Court from 1911 to 1916. Unlike many appointees to the Court, Lamar was not selected on the basis of a long political career. As an attorney and Georgia Supreme Court judge, Lamar was recognized for his legal abilities.

Lamar was born in Ruckersville, Georgia, on October 14, 1857. His wealthy family provided generations of leadership in the community, and included LUCIUS Q. C. LAMAR, who served as an associate justice of the U.S. Supreme Court from 1888 to 1893.

Lamar attended the University of Georgia and graduated from Bethany College in West Virginia in 1877. He then attended Washington and Lee Law School and was admitted to the Georgia bar in 1878. From 1880 to 1903, Lamar practiced law in Augusta, Georgia. He often represented corporations, including railroads, and argued several cases before the U.S. Supreme Court.

He served in the Georgia House of Representatives from 1886 to 1889. His legal abilities were used more directly when he was appointed to serve on a commission revising the Georgia code of state laws. CODIFICATION is a process of

*Joseph R. Lamar.*
PHOTOGRAPH BY JULIAN LAMAR. SUPREME COURT OF THE UNITED STATES

revising and reorganizing legislative laws into a coherent whole. Lamar mastered the highly technical process and revised the civil-law volume himself. The code was approved by the legislature in 1895.

In 1903 he was appointed to the Georgia Supreme Court. He resigned in 1905 to return to his law practice.

Lamar was surprised when President WILLIAM HOWARD TAFT, a Republican, appointed him to the U.S. Supreme Court in 1910. Lamar had met Taft the year before when the president was visiting Augusta, but was not well acquainted with him or his circle. In fact, Democrat WOODROW WILSON, who became president in 1912, was a childhood friend of Lamar's.

During Lamar's brief term on the Court, interstate commerce and the growth of federal regulatory and administrative power were prime topics of legal dispute. Lamar adhered to the majority view in most cases. He wrote the majority opinion in *United States v. Grimaud,* 220 U.S. 506, 31 S. Ct. 480, 55 L. Ed. 563 (1911), which expanded the authority of the EXECUTIVE BRANCH to add details deliberately left open by congressional legislation. Lamar held that it was not an unconstitutional delegation of legislative power to allow administrators to exercise their discretion in filling in the details of laws.

Lamar died January 2, 1916, in Washington, D.C.

## ♦ LAMAR, LUCIUS QUINTUS CINCINNATUS

Lucius Quintus Cincinnatus Lamar served as an associate justice of the U.S. Supreme Court from 1888 to 1893. Lamar's public service, spanning almost fifty years, included both houses of Congress, the EXECUTIVE BRANCH, and the Confederacy.

Lamar was born September 17, 1825, in Eatonton, Georgia, the son of a wealthy plantation owner. He graduated from Emory College in 1845 and then apprenticed in the law. He was admitted to the Georgia bar in 1847. In 1849 he moved to Oxford, Mississippi, where he taught mathematics at the University of Mississippi.

He briefly returned to Georgia, where he served in the Georgia House of Representatives in 1853. He relocated to Mississippi in 1855 and began building his political career. He was elected to the U.S. House of Representatives and served from 1857 to 1860, relinquishing his seat with the secession of the southern states in 1861.

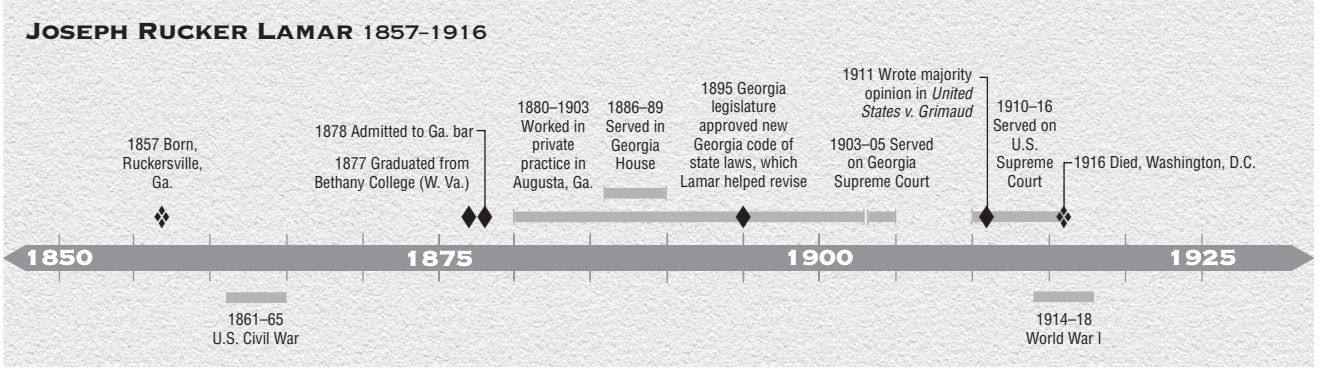

Lamar played an important role in the 1861 Mississippi Secession Convention. Although he had doubts about the theory of secession from the Union, he was influenced by his father-in-law, Augustus Longstreet, an avowed separatist. At the convention Lamar drafted the ordinance of secession, which declared Mississippi no longer a part of the Union. He joined the Confederate militia and served as a colonel in the Mississippi regiment. He also acted in various diplomatic capacities for the Confederacy, and from 1864 to 1865, he served as JUDGE ADVOCATE of the Army of Virginia.

Following the war Lamar resumed his law practice and teaching career in Oxford. His teaching duties expanded to the University of Mississippi law school. In 1873 Lamar was again elected to the U.S. House of Representatives. In 1877 he was elected to the U.S. Senate. In 1885 President GROVER CLEVELAND appointed Lamar secretary of the interior.

In 1887 President Cleveland nominated Lamar to the U.S. Supreme Court. Republican opponents fought the nomination, arguing that Lamar lacked legal experience and that he was too old. The Senate narrowly approved his nomination, by a vote of 42–38, making Lamar the first southerner to join the Court since JOHN A. CAMPBELL in 1853, and the first Democrat since STEPHEN J. FIELD in 1862. He served on the U.S. Supreme Court from 1888 to 1893.

Lamar's tenure on the Court was spent under the leadership of Chief Justice MELVILLE W. FULLER. The Fuller Court reviewed the efforts of the federal government to regulate interstate commerce and curtail the power of monopolies and trusts. In most cases it agreed with business that the federal government had limited constitutional authority to regulate industry. Lamar concurred, adhering to a belief in the doctrine of FEDERALISM. This doctrine has many facets, including a fundamental assumption that the national government must not intrude on the power of the states to handle their affairs.

*Lucius Q. C. Lamar.*
ARCHIVE PHOTOS, INC

Lamar did not author any landmark majority opinions, as he generally received inconsequential cases. He joined in the dissent of Justice JOSEPH P. BRADLEY in *Chicago, Milwaukee & St. Paul Railroad Co. v. Minnesota,* 134 U.S. 418, 10 S. Ct. 462, 33 L. Ed. 970 (1890), which stated that legislatures, not courts, should determine the reasonableness of railroad rates and other public policy matters.

Lamar died January 23, 1893, in Macon, Georgia.

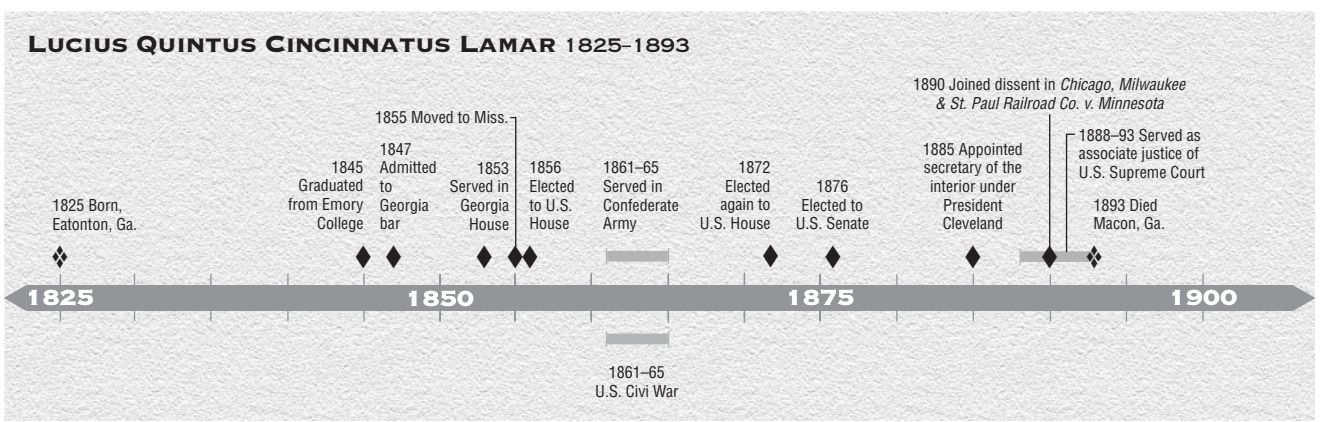

## LAME DUCK

*An elected official, who is to be followed by another, during the period of time between the election and the date that the successor will fill the post.*

The term *lame duck* generally describes one who holds power when that power is certain to end in the near future. In the United States, when an elected official loses an election, that official is called a lame duck for the remainder of his or her stay in office. The term *lame duck* can apply to any person with decision-making powers, but it is usually refers to presidents, governors, and state and federal legislators.

When a legislature assembles between election day and the day that new legislators assume office, the meeting is called a lame-duck session. On the federal level, under the TWENTIETH AMENDMENT to the U.S. Constitution, the Senate and the House of Representatives must convene on January 3 each year. Incoming legislators assume office that day, and outgoing legislators leave office that day. Thus, from the day after election day in November until late December, retiring and defeated legislators have time to pass more legislation.

Legislatures do not have to conduct lame-duck sessions. In fact, if many of their members will be new in the next legislative session, the idea of their defeated lawmakers voting on legislation may be criticized by the public—especially by those who voted for the incoming legislators. The issue of whether to conduct a session between mid-November and early January is usually decided by a vote of the legislators in office during the last session before the election. The legislature may elect to reconvene on a certain date, to adjourn at the call of the chair of either house or both houses, or to adjourn sine die (without planning a day to reconvene). Also, a lame-duck president or governor has the power to call a lame-duck session.

Lame-duck sessions may be called to pass emergency legislation for the immediate benefit or protection of the public during November or December. They also may be conducted for political purposes. For example, if a certain party stands to lose the presidency or governorship and seats in the new legislature, that party may seek to push through a few last pieces of legislation. Thus, lame-duck sessions can spawn hastily written legislation, and the finished product may be of dubious quality.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), also known as Superfund (42 U.S.C.A. § 9601 et seq.), is a piece of lame-duck legislation. This federal statute, which regulates the cleanup of toxic waste sites, was hurriedly passed by a lame-duck Congress and signed by lame-duck president JIMMY CARTER in December 1980. Congress crafted the statute with virtually no debate and under rules that allowed for no amendments. CERCLA is regarded as problem ridden by persons on all sides of the environmental debate.

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## LAME-DUCK AMENDMENT

*The popular name given to the* TWENTIETH AMENDMENT *to the U.S. Constitution.*

Senator GEORGE W. NORRIS proposed the amendment on March 2, 1932, as a way to shorten the period of time in election, or even-numbered, years during which members of Congress who had failed to be reelected (the lame ducks) would serve in office until their terms expired.

The handicap of a session of Congress with numerous lame ducks was particularly evident in December 1932. During the thirteen weeks of that session of the Seventy-second Congress, 158 defeated members (out of a total of 431) served until the new Congress convened in March 1933. In the meantime the newly elected members, spurred by their recent electoral victories and the problems of a nationwide economic depression, had to wait inactive and unorganized until the term of the old Congress expired.

The Norris proposal was ratified by the requisite number of state legislatures on January 23, 1933, and took effect on October 15 of that year. The new amendment stipulated that the terms of all members of Congress begin on January 3. It also required Congress to convene on January 3 each year and for the president and vice president to be inaugurated on January 20 rather

than in March. Two sections of the amendment also clarified the problem of presidential succession under certain conditions.

## LAND GRANT

*A conveyance of public property to a subordinate government or corporation; a* MUNIMENT OF TITLE *issued by a state or government for the donation of some part of the public domain.*

A land grant, also known as *land patent,* was made by the U.S. government in 1862, upon its grant to the several states of 30,000 acres of land for each of its senators and representatives serving in Congress. The lands were subsequently sold by the states and, through the proceeds, colleges were established and maintained. Such colleges, which are devoted mainly to teaching agricultural subjects and engineering, are known as *land grant colleges.*

## LAND-USE CONTROL

*Activities such as* ZONING*, the regulation of the development of real estate, and city planning.*

Land-use controls have been a part of Western civilization since the Roman Empire in 450 B.C. promulgated regulations concerning setback lines of buildings from boundaries and for distances between trees and boundaries. Regulations on the use of land existed in colonial America, but the demand for public regulation of real estate development did not become significant until the twentieth century. As the United States shifted from a rural to an urban society, city governments sought to gain control over the location of industry, commerce, and housing. New York City adopted the first comprehensive zoning ordinance in 1916. By the 1930s zoning laws had been adopted in most urban areas.

The development of master plans and zoning regulations became an accepted part of urban life. Following WORLD WAR II, housing patterns shifted from the inner city to suburbia. The suburbanization of the United States led to the creation of discrete housing developments. Growing suburban communities began imposing regulations on the amount and type of housing that would be allowed within their municipal boundaries. Beginning in the 1970s, as urban sprawl created problems that crossed municipal borders, attention turned to regional planning. Concerns about the environment and historic preservation led to further regulation of land use.

Federal, state, and local governments, to varying degrees, regulate growth and development through statutory law. Nevertheless, a majority of controls on land stem from actions of private developers and government units. The use of land can be affected by judicial determinations that frequently arise in one of three situations: (1) suits brought by one neighbor against another, (2) suits brought by a public official against a neighboring landowner on behalf of the public at large, and (3) suits involving individuals who share ownership of a particular parcel of land.

### Private Land-Use Restrictions

A number of restrictions on land are a result of actions by government units. Many restrictions, however, are created by land developers. Such devices take several forms and can be either positive or negative in nature. They include defeasible fees, EASEMENTS, equitable servitudes, and restrictive covenants.

**Defeasible Fees** In defeasible fee estates, the grantor gives land to the grantee, subject to certain conditions. For example, A might convey a parcel of land to B, provided that it be used for school purposes. The effect of the defeasible fee is that it restricts the use of the property by the possessor. Failure to observe the conditions causes the property to revert to the grantor. Estates of this type are no longer favored in most jurisdictions, because they make the transfer of land cumbersome and do not take into account unforeseen situations. The limited scope of defeasible fees makes them of limited value.

**Easements** Easements are rights to use the property of another for particular purposes. A common type of easement in current use is the affirmative grant to a telephone company to run its line across the property of a private landowner. Easements also are now used for public objectives, such as the preservation of open space and conservation. For example, an easement might preclude someone from building on a parcel of land, which leaves the property open and thereby preserves a park for the public as a whole.

**Equitable Servitudes** Equitable servitudes are land-use restrictions enforceable in a court of EQUITY. They are created by the language of the promise in the form of a COVENANT (agreement) between two individuals. For example, suppose A owns a parcel of land on the edge of a city that A subdivides the parcel into ten lots,

## Planned Communities: Read the Fine Print

One in eight people in the United States live in planned communities, which include townhouses, condominiums, co-ops, and entire real estate developments containing single-family homes. A common feature of all planned communities is a homeowner association, which oversees the maintenance and administration of the real estate, especially the common areas shared by all owners. A board of directors of the association, elected by the property owners, enforces the community's rules.

Planned communities often impose a number of restrictions on their members. These are typically contained in the real estate deed, which becomes a contract between the property buyer and the community. Purchasers are bound by these restrictions whether or not they read or understood them. The restrictions may cover a wide range of architectural and aesthetic limitations, and are believed to increase the value of property in the community. Unwary residents may find the limitations extreme.

Residents of planned communities have faced limitations on things such as paint colors, pets, sports and sporting equipment, and outdoor decorations. Under such restrictions homeowners have been threatened with fines for stringing Christmas lights, taken to court because their dog was too heavy, and prohibited from throwing a Frisbee. Association dues can be used to pay for a lawsuit enforcing a restriction, and some bylaws require the defendant homeowner to reimburse the association's legal fees.

numbered 1 to 10. A then records a declaration of restrictions, limiting each of the ten lots to use solely for family dwelling, providing that only a single-family house may be built on each lot. A sells the lots to ten people, and each deed contains a reference to the declaration of restrictions by record book and page number, coupled with a provision that the person purchasing the lot and all successive purchasers of the lot are bound by the restrictions.

**Restrictive Covenants** Restrictive covenants are provisions in a deed limiting the use of the property and prohibiting certain uses. They are similar in effect to equitable servitudes, but restrictive covenants run with the land because the restrictions are contained in the deed. Restrictive covenants are typically used by land developers to establish minimum house sizes, setback lines, and aesthetic requirements thought to enhance the neighborhood. The legal differences between equitable servitudes and restrictive covenants are less important today, as courts have merged the terms into one general concept.

### The Master Plan and Official Map

Municipal land-use regulation begins with a planning process that ultimately results in a comprehensive or master plan followed by ordinances. These ordinances involve the exercise of the municipality's POLICE POWER through zoning, regulation of subdivision developments, street plans, plans for public facilities, and building regulations. Many states provide for the creation of an official map for a municipality. The map shows the location of major streets, existing and projected public facilities, and other such landmarks. Developers must plan their subdivisions in accordance with the official map.

The master plan takes into account the location and type of activities occurring on the land and the design and type of physical structures and facilities serving these activities. Long-range projections of population and employment trends are considered. The planning process is designed to enable a locality to plan for the construction of schools, streets, water and sewage facilities, fire and police protection, and other public amenities, and the private use of land is controlled by zoning and subdivision ordinances enacted in compliance with the plan.

Since the 1970s more emphasis has been placed on regional and statewide planning. These planning initiatives have often been based on environmental concerns. Regional planning

has become attractive to urban areas that cross state lines. Instead of dealing with two or three competing and conflicting local plans, neighboring municipalities can refer to a regional plan that offers one comprehensive vision and one set of regulations.

### Zoning

Zoning is the regulation and restriction of real property by a local government. It is the most common form of land-use regulation, as municipalities rely on it to control and direct the development of property within their borders, according to present and potential uses of the property. Zoning involves the division of territory based on the character of land and structures and their fitness for particular uses. Consideration is given to conserving the value of property and encouraging the most appropriate use of land throughout a particular locality.

A municipality's power to enact zoning regulations is derived from the state in an exercise of its police power. Police power is the inherent power of the government to act for the welfare of those within its jurisdiction. The power to impose zoning restrictions is conferred on a municipality by a state enabling statute.

Zoning laws are intended to promote the health, safety, welfare, convenience, morals, and prosperity of the community at large, and are meant to enhance the GENERAL WELFARE rather than to improve the economic interests of any particular property owner. They are designed to stabilize neighborhoods and preserve the character of the community by guiding its future growth.

The essential purpose of zoning is to segregate residential, commercial, and industrial districts from one another. Within these three main types of districts there may be additional restrictions as to population density and building height. The use of property within a particular district is for the most part uniform. For example, if a district is zoned for industrial use, residential buildings are not normally permitted there. However, if a residential building predates the zoning plan, it is permitted to remain. This exception is called a nonconforming use.

Municipalities exercise wide discretion in fixing the boundaries of commercial and industrial districts. A number of ordinances have been enacted to protect residential zones from encroachment by gasoline stations, public parking facilities, businesses selling intoxicating liquors, and factories that produce smoke or odors.

When enacting zoning ordinances, a municipality takes many factors into consideration. The most significant are the density of the population; the site and physical attributes of the land involved; traffic and transportation; the fitness of the land for the permitted use; the character of neighborhoods in the community; the existing uses and zoning of neighboring property; the effect of the permitted use on land in the surrounding area; any potential decrease in property values; the gain to the public at large weighed against economic hardships imposed on individual property owners; and the amount of time that the property has remained unimproved, reviewed in the context of land development in the area as a whole.

Exclusionary zoning is the practice of using the zoning power to develop the parochial interests of a particular municipality at the expense of surrounding regions. Its purpose is to advance economic and social SEGREGATION. Exclusionary zoning involves using zoning to take advantage of the benefits of regional development without being forced to bear the burdens of such development, as well as using zoning to maintain particular municipalities as enclaves of affluence or social homogeneity. Both practices have been strongly condemned in the courts, since they violate the principle that municipal zoning ordinances should advance the general welfare.

Exclusionary zoning takes various forms, such as requirements setting a minimum lot size or house size, the prohibition of multifamily housing, and the prohibition of mobile homes.

A municipality has a legitimate interest in ensuring that residential development proceeds in an orderly and planned manner and that the burdens on municipal services do not increase faster than the ability of services to expand. It must also preserve exceptional environmental and historical features. Increasingly, however, exclusionary techniques have come under fire as unfair ways of preventing the creation of economically, racially, and socially diverse communities.

### Nuisance

NUISANCE is an unreasonable, unwarranted, or illegal use by an individual of his or her own property, that in some way injures the rights of others. A nuisance action ordinarily arises

## Dust, Noise, Smells, But Not a Nuisance

Homeowners have a legitimate right to the **QUIET ENJOYMENT** of their property. Nevertheless, when that quiet enjoyment is disturbed by the activities of another property owner, it may be difficult to have those activities declared a private or public **NUISANCE**.

In *Karpiak v. Russo,* 450 Pa. Super. 471, 676 A.2d 270 (1996), the Pennsylvania Superior Court ruled that a landscaping supply business that produced dust, loud noises, and unpleasant smells in an area that contained homes as well as businesses was not a private nuisance. The decision illustrates the need for those complaining of a nuisance to prove significant harm.

The landscaping supply company was established in 1984, when the **ZONING** law classified the location as business property. The area was rezoned in 1993, making the area residential. The company sold topsoil, shredded bark, compost, sand, and river rock from spring to late fall. Nearby homeowners complained of dust blowing into their yard and home; noise from trucks, backhoes, and payloaders; and smells from the compost.

The court rejected these claims of nuisance. It first noted that the company had lawfully complied with the zoning ordinance at the time it started the business. There were other businesses on the same street. Just because the neighborhood had been rezoned did not prohibit the continued existence of the landscape business.

More significantly, the court found that none of the complaining parties had suffered any significant harm. Most of the parties worked weekdays and were absent from the neighborhood when the landscape business was in operation. Aside from one person who had to clean his car and outside furniture, no one claimed any damages from the operation of the business. The court concluded that occasional personal discomfort or annoyance did not establish a serious level of harm that could be defined as a private nuisance. People who reside in neighborhoods with businesses close by will sometimes find their comfort subordinated to the commercial needs of business.

between two neighboring landowners or is brought by a government attorney. The person initiating the nuisance action seeks to control or limit the use of the land that is creating the nuisance. Nuisance is based on the principle that no one has the right to use property in a manner such as to injure a neighbor.

A private nuisance arises when there is an interference with the use or QUIET ENJOYMENT of land without an actual TRESPASS or physical invasion. For example, A might sue B, alleging that constant loud noises by B amount to a nuisance to A and A's property, which may or may not adversely affect other property in the area.

A public nuisance extends further than a private nuisance, since it adversely affects the health, morals, safety, welfare, comfort, or convenience of the general public. Statutes in many states precisely define what constitutes a public nuisance. Common examples are water and AIR POLLUTION, the storage of explosives under dangerous conditions, houses of prostitution, the emission of bad odors or loud noises, and the obstruction of public ways.

A nuisance can be both private and public, since certain activities may be sufficient to constitute a public nuisance while still substantially interfering with the use of the adjoining land to such a degree that a landowner may sue on the ground that a private nuisance is present. Private nuisance refers to the property interest affected, as opposed to the type of conduct.

Nuisances may occur in rural as well as urban areas, but they become more obvious when the area is well established as residential in nature. The fact that an activity of a certain type is permitted in an area under the zoning ordinance does not mean that it may not be stopped if it develops into a nuisance. If an otherwise legitimate activity threatens the health or safety

of the community in general, it can be classified as a public nuisance. Usually, however, very little relief is available for someone who intentionally locates in an industrial area.

### Waste

Waste laws prohibit the unreasonable or improper use of land by someone who is in rightful possession of the land. The most common relationship between waste-law litigants is that of LANDLORD AND TENANT, but waste laws also apply to grantors and grantees, and owners of land for life and their successors.

Waste comes in four forms: voluntary, permissive, ameliorating, and equitable. An intentional act that diminishes the value of land constitutes voluntary waste. Permissive waste is the omission of expected maintenance to land or its property. Ameliorating waste is a land use that is not authorized by the owner but nevertheless improves the value of the property. Finally, if a use is inconsistent with the land's highest use, a person holding a future interest in the land may bring an equitable waste action against the possessor.

A successful action for waste usually results in the awarding of money damages, but courts sometimes issue an INJUNCTION. This means that the landowner can obtain a court order preventing the possessor from engaging in wasteful acts. If a landowner can show a substantial likelihood of harm if such an order is not issued, and that no other satisfactory legal remedies exist, an injunction may be issued.

### Eminent Domain

EMINENT DOMAIN is the right or power of a unit of government or a designated private individual to take private property for public use, following the payment of a fair amount of money to the owner of the property. The FIFTH AMENDMENT to the U.S. Constitution provides, "[N]or shall private property be taken for public use, without just compensation." This statement is commonly referred to as the Takings Clause. The theory behind eminent domain is that the local government can exercise such power to promote the general welfare in areas of public concern, such as health, safety, or morals.

Eminent domain may be exercised by numerous local government bodies, including drainage, levee, or flood control agencies; highway or road authorities; and housing authorities. For example, if a city wishes to build a new bridge, and the land it needs is occupied by 60 houses, it may use its eminent domain power to take the 60 houses, remove the buildings, and build the bridge. The government must make just compensation to the affected property owners, who are entitled to the fair market value of the property.

The power of eminent domain is exercised through condemnation proceedings. These proceedings establish the right to take the property by the government or designated private individual (usually PUBLIC UTILITIES) and the amount of compensation to be paid for the property.

The U.S. Supreme Court has examined the relation between land-use regulations and the Takings Clause. In *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), the Court held that a total deprivation of economic use amounts to a taking for which damages may be awarded. *Lucas* involved a developer who had purchased coastal lots to construct two single-family residences. A South Carolina law, which sought to protect the eroding shoreline, prohibited him from building anything except wooden walkways and a wooden deck. The Supreme Court agreed that he was entitled to compensation because this was a regulatory taking.

In *Dolan v. City of Tigard,* 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994), the Court limited government power to take private property for the public good. The Court ruled that a city cannot force a store owner to make part of the owner's land a public bike path in exchange for a permit to build a larger store. The decision makes it more difficult for municipalities to require that land developers give up for public purposes part of their property, including sidewalks, access roads, and parks. If the government needs the land, it must compensate the owner.

### Historic Districts

Since the 1950s more attention has been paid to the preservation of historic districts. Purchase or condemnation by the government for historic preservation purposes is valid. More important, acts establishing historic districts have been upheld as promoting the public welfare. State and local preservation laws have been bolstered by the federal National Historic Preservation Act of 1966 (16 U.S.C.A. § 47 et seq.), which provides a procedure for registering buildings as historic landmarks. Apart from

# The West Wrestles with Washington

Beginning in the 1990s, a number of controversial clashes over federal authority have concerned the use of federally owned land. One such struggle, between the Clinton administration and western states, for example, covered a variety of issues: fees for ranchers; water, timber, and mining rights; and environmental restrictions on land use. Each issue was part of a more fundamental question: Who has authority to regulate use of the land—federal or local officials? Challenging the administration in Congress and fighting the federal government in court, a broad coalition of western governors, lawmakers, and business interests sought autonomy and relief from outside regulation. More than 60 western counties asserted legal authority over federal lands within their borders. As political tensions heightened, acts of violence aimed at federal officials raised the stakes in what the media called the county supremacy movement, and the U.S. **JUSTICE DEPARTMENT** brought suit to stop it.

The western conflict had been simmering for two decades. A rise of environmental concerns in the 1970s had created a strong lobby that pressed for stricter controls on land use, a demand especially relevant to the millions of acres of federal land in the U.S. West. This development affected western ranchers, who lease federally owned land for their livestock. Early on, environmentalists spurred the passage of the 1971 Wild Horse and Burro Act, 16 U.S.C.A. § 1332 et seq. This law protected wild horses, but at the same time caused deterioration to land on which livestock graze. Private landowners also chafed under the **ENDANGERED SPECIES ACT** (ESA) (16 U.S.C.A. § 1538(a)(1)(B)). Passed in 1973 to preserve specific vanishing species, the ESA restricted their right to develop their land.

Western quarrels with federal management of the land grew into the so-called Sagebrush Rebellion of the late 1970s and early 1980s. This was an attempt by several states to wrest control over land management from the federal government and turn it over to state authorities. The rebels argued that local control would mean less bureaucracy and more responsiveness than could be offered by the federal Bureau of Land Management (BLM), which manages 177 million acres in the western states. Some went further. For instance, in 1979, Nevada declared legislation that the state owned and had control and jurisdiction over all "public lands" within it (Nev. Rev. Stat. §§ 321.596–.599). This claim was largely symbolic in that it excluded federal land such as parks, forests, and wildlife refuges.

Although the rebellion gained slight support from the Reagan administration—whose anti-regulatory stance allowed grazing on nearly all public lands—it failed to lead to the transfer of power that its proponents wanted. Discontent among western political and business leaders remained.

The conflict came to a new crisis in the early 1990s. The election of President **BILL CLINTON** in 1992, and his choice of the environmentally minded Bruce Babbitt as interior secretary, quickly heightened among environmentalists expectations for tougher restrictions. The administration promised broad rangeland reforms. It favored raising the grazing fees charged to cattle ranchers from $1.86 to $4.28 per animal unit month (AUM) (the amount of forage needed to feed one animal for a month) in order to bring the fees closer to the average $8.00 to $15.00 per AUM charged on private land. The proposed reforms also asserted that the federal government would hold title to any water sources developed on federal lands. They imposed more stringent ecological standards and called for ranchers who abused land to be punished by measures that ranged from reductions in the length of grazing permit terms to outright disqualification from the permit program.

The proposals drew praise from environmentalists. They hailed the administration for trying to bring needed protection to western ecological systems and for trying to cut what they argue is a federal subsidy to ranchers. The National Wildlife Federation called the reforms long overdue. To more radical groups like Rest the West, whose slogan was Cattle-Free by '93, the Clinton administration's efforts were a step toward eliminating ranching on public lands altogether.

But among western business and political interests, the proposals caused an uproar. Opponents called the increase in grazing fees unfair, arguing that it failed to take into account that the more expensive private lands offer ranchers superior grazing as well as improvements such as fences and water sources. Industry representatives claimed the fee hike would crush already struggling ranchers. The American Sheep Industry Association, for example, estimated that a quarter of its members would be driven out of

establishing a national register of historic sites, the act provided for the protection and restoration of historic sites and districts.

### Environmental Controls

**ENVIRONMENTAL LAW** and regulation have significantly affected land development. With the passage of the **NATIONAL ENVIRONMENTAL POLICY ACT OF 1969** (NEPA) (42 U.S.C.A. § 4321 et seq.), the public and private sectors were obligated to conform to certain environmental standards. The interrelationship of the objectives of NEPA and more traditional forms of land-use control under police power are illustrated by

business, at a loss of $1.68 billion in revenues. In public statements and at meetings throughout the West, ranchers and politicians decried the effort as a giveaway to environmentalists by out-of-touch federal bureaucrats.

The administration tried several times to make the reforms stick. President Clinton originally wanted to make higher grazing fees part of his first budget, but western lawmakers protested. The administration compromised on water issues and the size of the grazing fee, but to no avail. In October 1993, an attempt to pass the reform package was blocked by several filibusters in the U.S. Senate. Although opponents declared victory, Babbitt plowed ahead with a plan to bring the reforms into effect through changes in BLM regulations. Known as Rangeland Reform '94, the revised regulations were put into place in February 1995 after the interior secretary conducted numerous public meetings with ranchers and environmentalists (BLM Grazing Administration Rules and Regulations [60 Fed. Reg. 9894]). The sharp fee hike was shelved in favor of a customary twelve-cent annual increase. Another significant compromise was the establishment of grassroots resource advisory councils, made up of ranchers, environmentalists, and other citizens who would advise the BLM on policy decisions.

The issuance of new regulations, even sweetened by compromise, hardly quelled western opposition. While fighting the rangeland reform battle, western lawmakers had also grappled with the administration over the issue of mining rights. The dispute centered on an 1872 law that allowed mining companies to snap up federal land at $2.50 to $5.00 an acre (the Mining Act of 1872 [30 U.S.C.A. § 22]). The administration said foreign companies were exploiting the law, originally intended to help small prospectors. Nevertheless, western states refused to budge on demands that a higher royalty fee be imposed to compensate the federal government for the incredibly low price for land. Any increase, they said, would cost their states revenue from the mining industry.

Meanwhile, a more radical element in the western conflict had appeared. Between 1991 and 1995, nearly 60 western counties asserted in ordinances that they—not the federal government—had control over federal lands. As this trend grew and became known as the county supremacy movement, the *National Law Journal* noted that it took two legal forms. One was typified by Boundary County, Idaho, whose 1991 ordinance cited local custom and culture as reasons for requiring all federal and state agencies to comply with its land-use policy plan. The second originated in Nye County, Nevada, where two resolutions in 1993 declared that the county owned all public lands and public roads.

Nye County became a focal point of the new movement. Many of its constituents openly resented federal control of nearly 87 percent of the county's land. In 1994, it became the scene of concern after Dick Carver, a Nevada rancher and Nye County commissioner, used a bulldozer to plow open a forest road over the objections of an armed U.S. Forest Service agent. The incident made Carver a sort of folk hero, and he began delivering lectures in more than 20 states. Hostilities erupted in Nye County, and bombs in New Mexico and Nevada and gunshots in California were aimed at federal employees.

Determined to stop the rebellion and reassert federal authority over federal lands, the U.S. Department of Justice joined one lawsuit and filed another. In March 1996, it won both. In the first, *Boundary Backpackers v. Boundary County,* 913 P.2d 1141, the Idaho Supreme Court invalidated Boundary County's ordinance as unconstitutional. In the second, the U.S. district court in Nevada struck down Nye County's ordinance (*United States v. Nye County,* 920 F.Supp. 1108).

In the new century, one of the biggest land-use battles in the West has been over the proposed use of Yucca Mountain in Nevada as the storage site for the nation's nuclear waste. The plan is to build a nuclear waste repository facility 1,000 feet below the mountain. While the Congress and the president signed off on the decision to use the mountain in 2002, the state of Nevada has filed a lawsuit to stop it. Landowners and Native American tribes have joined this legal fight, and it was expected to be years before the courts made a final determination on this issue. Despite the federal government's victories on some fronts, the West's desire for greater independence and its distrust of federal authority indicate the likelihood of further struggles.

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Environmental Law; Environmental Protection Agency.

NEPA's stated objectives, which relate not only to the environment but also to ensuring aesthetically pleasing surroundings, protecting health and safety, preserving historic and cultural heritage, and preserving natural resources.

NEPA requires that every federal agency submit an environmental impact statement (EIS) with every legislative recommendation or program proposing major federal projects that will most likely affect the quality of the surrounding environment. An EIS may be required for projects such as the rerouting of an interstate highway, construction of a new dam, or expansion of a ski resort on federally owned land.

The EIS is a tool to assist in decision making, providing information on the positive and negative environmental effects of the proposed undertaking and alternatives. The EIS must also examine the effect of not implementing the proposed action. This "no-action" alternative may result in the agency's continuing to use existing approaches. Although NEPA requires agencies to consider the environmental consequences of their actions, it does not force them to take the most environmentally sound alternative, nor does it dictate that they pursue the least expensive option.

The effect of environmental policies on land use has been substantial. State governments followed the lead of the federal government and passed statutes that create water and air pollution control agencies. Some states require EISs, and a number have comprehensive legislation.

### Land-Use Conflicts

Government and judicial bodies usually attempt to make land-use policies responsive to emerging concerns and developing needs. Conflicts result from situations in which localities attempt to block or ignore those needs or from situations in which the response is challenged as an overextension of the police power. The complexity of urban problems and the growth of urban areas place constant tension on the land-use process.

Nor is it just the urban land-use that causes tension between the government and landowners. Decisions to set aside undeveloped or rural land for governmental use causes controversy as well. An example of this practice is the decision by the federal government in 2002 to set aside Yucca Mountain in Nevada for storing the nation's nuclear waste. Various landowners and Native American tribes, as well as the state of Nevada, have filed lawsuits attempting to stop this use of Yucca Mountain. With the population of states such as Nevada growing rapidly, resulting in a decrease of available land, these wrangles over land-use are anticipated to become more frequent.

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CROSS-REFERENCES

Adjoining Landowners; Endangered Species Act; Environmental Protection Agency; Fish and Fishing; Hunting; Pollution; Solid Wastes, Hazardous Substances, and Toxic Pollutants; Water Rights.

## ♦ LANDIS, KENESAW MOUNTAIN

Kenesaw Mountain Landis is remembered by some as the trust-busting federal judge who in 1907 imposed a whopping fine against millionaire John D. Rockefeller's Standard Oil. More often, sports fans remember Landis as the first and, arguably, most powerful commissioner of U.S. BASEBALL.

Landis earned a reputation as a stern, highly principled baseball commissioner who ran a tight ship and disapproved of gambling. He antagonized many team owners with his dictatorial style, yet was reelected several times during his twenty-four-year reign.

Although Landis is criticized for maintaining racially segregated major league teams, he is credited with restoring the integrity of the sport after the Black Sox cheating scandal—in which eight members of the Chicago White Sox were accused of throwing the 1919 World Series—nearly ruined baseball. Surprisingly popular with the public, the former judge was elected to the Baseball Hall of Fame in 1944.

Landis was born November 20, 1866, in the small Ohio town of Millville. He was named after the mountaintop near Atlanta where his father, a Union Army surgeon, was wounded in battle during the U.S. CIVIL WAR. Although Landis did not finish high school, he attended the University of Cincinnati and the Union College of Law in Chicago. He practiced law in Chicago until 1905 when he was appointed by President THEODORE ROOSEVELT to serve as U.S. district judge for northern Illinois.

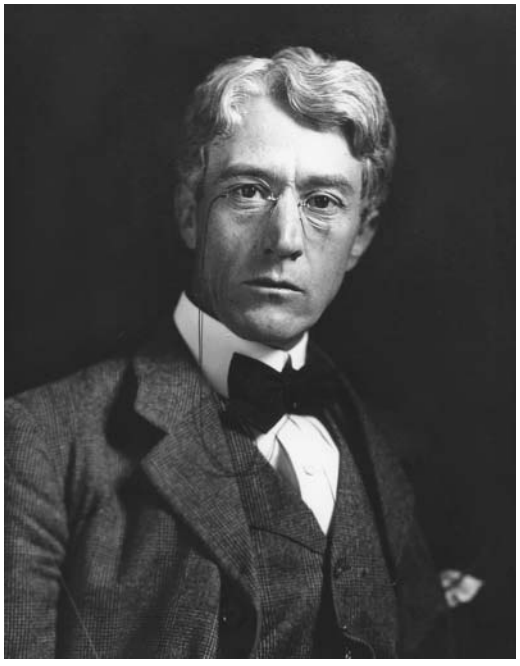

*Kenesaw Mountain Landis.* LIBRARY OF CONGRESS

Landis made headlines in 1907 when he fined Standard Oil of Indiana a record $29.24 million for illegal freight rebates. The decision was applauded by the public but thrown out on appeal. Landis remained on the federal bench from 1905 to 1922, also gaining national attention for his SEDITION trials of labor leaders and socialists during WORLD WAR I. After becoming the first baseball commissioner in 1921, Landis retained his judgeship for one year, until members of Congress complained about conflict of interest in matters pertaining to the sport.

In 1921, Landis replaced the three-person national commission set up in 1903 to oversee the sport of baseball. Although his official title was commissioner for the American and National Leagues of Professional Baseball Clubs and for the National Association of Professional Baseball, Landis was often called simply the czar of baseball.

Landis was asked to do nothing less than save professional baseball. The game suffered a public relations disaster after the White Sox conspiracy and BRIBERY scandal. To cleanse the sport of corruption or the mere appearance of cheating, Landis imposed lifetime bans on the eight White Sox players who had collaborated with gamblers during the 1919 World Series. He also did not hesitate to ban other ballplayers for gambling offenses.

Landis died in Chicago, at age seventy-eight, on November 25, 1944.

"REGARDLESS OF THE VERDICT OF JURIES, NO PLAYER THAT THROWS A BALL GAME, . . . SITS IN CONFERENCE WITH A BUNCH OF CROOKED PLAYERS AND GAMBLERS WHERE THE WAYS AND MEANS OF THROWING A GAME ARE DISCUSSED, AND DOES NOT PROMPTLY TELL HIS CLUB . . . WILL EVER AGAIN PLAY PROFESSIONAL BASEBALL."
—KENESAW MOUNTAIN LANDIS

## LANDLORD

*A lessor of real property; the owner or possessor of an estate in land or a rental property, who, in an exchange for rent, leases it to another individual known as the tenant.*

CROSS-REFERENCES

Landlord and Tenant.

## LANDLORD AND TENANT

*An association between two individuals arising from an agreement by which one individual occupies the other's real property with permission, subject to a rental fee.*

The term *landlord* refers to a person who owns property and allows another person to use

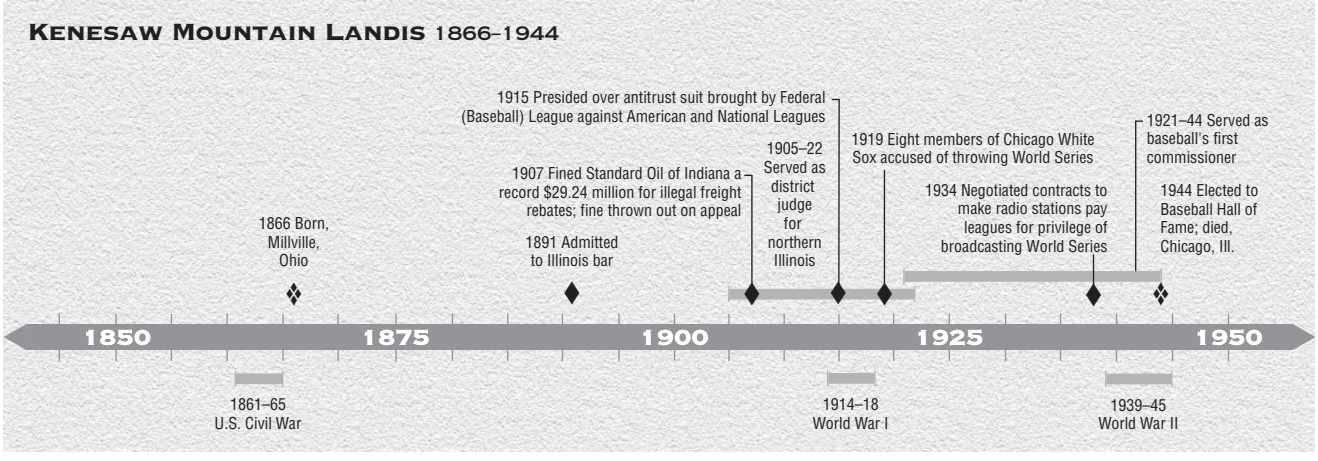

it for a fee. The person using the property is called a tenant. The agreement between a landlord and a tenant is called a lease or rental agreement.

The landlord and tenant relationship has its roots in FEUDALISM, a system of land use and ownership that flourished in Europe between the tenth and thirteenth centuries. Under feudalism land was owned and controlled by a military or political sovereign ruler. This ruler gave portions of land he or she owned to another person, called a lord. The lord, in turn, could allow another person, called a vassal, to use smaller portions of the lord's land. The vassal pledged allegiance and military or other service to the lord in exchange for the right to live and work on the land.

In 1066, the Normans of France conquered England, and William the Conqueror installed himself as king. King William used the feudal framework of land control to retain political power in faraway lands. Feudalism as a means of political control became obsolete by the fourteenth century, but the hierarchical system of land use and ownership remained.

The contemporary landlord and tenant relationship derives from the relationship between the lord and the vassal. However, today the landlord is the owner of the property—not, like the feudal lord, merely the manager. The tenant is similar to the vassal because the tenant does not own the property but is allowed to use it for a fee.

The landlord and tenant relationship usually refers to a living arrangement. In this respect landlord and tenant law differs from the law regarding leases. In a landlord and tenant relationship, the parties are often referred to as lessor (landlord) and lessee (tenant). Indeed, a lease is a contract that creates the same relationship as exists between a landlord and tenant: the lessor owns property and allows the lessee to use it for a fee. However, the law of leases does not necessarily concern itself with living arrangements. A lease agreement may, for example, relate to the use of a good or service. Because living arrangements are vital to human existence, landlord and tenant relationships are treated differently from lease contracts.

Generally, a landlord and tenant relationship exists if (1) the property owner consents to occupancy of the premises; (2) the tenant acknowledges that the owner has title to the property and a future interest in the property; (3) the owner actually has title to the property; (4) the tenant receives a limited right to use the premises; (5) the owner transfers possession and control of the premises to the tenant; and (6) a contract to rent exists between the parties.

A rental contract may be implied under the law. That is, landlord and tenant law may apply even in the absence of a written and signed rental agreement between the owner of the property and the person living on the property. Whether a court will imply a relationship depends on the facts of the case. The court will look at a number of factors, including the owner's consent to occupancy of the property, the length of the occupancy, and the exchange of monies, goods, or services. A court's finding that a landlord and tenant relationship exists between two or more persons is significant because the law places duties on both parties in such a relationship.

Traditionally, landlord and tenant law was favorable to landlords. Courts resolved disputes between landlords and tenants according to strict contract and property principles, and tenants often were forced to pick up and move without notice or an opportunity to present an argument to a court. Also, landlords had no obligation to maintain the premises, and many tenants were forced to live in uninhabitable conditions.

In the twentieth century, as urban populations increased and workers became more specialized, landlord and tenant law was forced to change. Typical tenants were no longer as handy at making repairs as were tenants in previous years. They worked long hours, they did not have the time to maintain premises, and building designs and utilities were more complex than before. These developments made maintenance a specialized task that could be carried out only by the landlord.

Before the 1960s, landlords were not required to rent out properties that were fit for habitation. Landlords could rent filthy, rat-infested apartments lacking hot water and heat. Although no one was physically forced to live in such an apartment, for many persons it was the only kind they could afford.

In the 1960s and 1970s, states began to enact landlord and tenant laws requiring that domestic rental properties be made fit for their particular purpose. The IMPLIED WARRANTY of habitability established by statute meant that rental property must have proper plumbing, water, heat, struc-

tural integrity, and other basic features necessary for human habitability. These laws required landlords to make domestic rental property habitable even if they did not promise tenants habitable conditions in the rental agreement.

New landlord and tenant statutes further require cities to create housing agencies to enforce the laws governing habitability. These agencies are charged with inspecting domestic rental properties to make sure they meet maintenance standards set forth in statutes and agency regulations. The agencies report to a state agency such as the department of health.

State legislation also governs the financial aspects of the landlord-tenant relationship. Such statutes regulate security deposits, require plain language in rental contracts, require inventory checklists, set rules on damage to rental units, and establish rights and duties upon termination of the rental agreement. In some states some of these laws are set out in court opinions, or case law. However, most landlord and tenant laws are set out in statutes in an attempt to make information about rights and duties accessible and understandable to both parties.

Contemporary landlord and tenant laws vary from state to state. Local lawmaking bodies may enact additional landlord and tenant laws, provided they do not conflict with state laws.

Generally, landlords must deliver the rented premises to the tenant at the beginning of the tenancy, and must disclose to the tenant any potential dangers and defects in the premises. The length of the tenancy should be set out in the rental agreement. If no term is written into the agreement, courts will usually deem the tenancy to be month to month. This means that either party must give the other one month's written notice before terminating the tenancy.

The cost of rent is usually governed by market forces, which means that it is usually dictated by what landlords in a similar area charge. Local laws in some urban areas, such as New York City, provide for rent control. Rent control laws limit the amount of rent that a landlord may charge a tenant. Most rent control laws, however, put limits on the amount that a landlord may increase the rent. A landlord may raise rent during a rental period only with sufficient notice to a tenant. The terms of this notice are usually set forth in statutes or ordinances.

One important issue in landlord and tenant law is the implied WARRANTY of habitability. If a landlord breaches the warranty of habitability, the landlord may lose the right to collect rent from the tenant, and the tenant may lose a place to live. *Mannie Joseph, Inc. v. Stewart,* 71 Misc. 2d 160, 335 N.Y.S.2d 709 (1972), illustrates this process. In *Mannie Joseph,* a landlord brought suit against a tenant, seeking back rent. The tenant testified in court that the apartment had no heat, no gas for the stove, no hot water, no running water in the kitchen, low water pressure in the bathroom, "ever-present rats and cockroaches," soggy ceilings and walls, broken windowpanes, no superintendent, and a toilet that did not flush. This testimony was supported in court by the housing director of the West Harlem Community Organization and verified in a personal visit by Judge Richard S. Lane, who noted that the oral testimony had not been sufficient to prepare him for what he saw.

Judge Lane found that the landlord had breached the implied warranty of habitability, and refused to order the tenant to make back rent payments. In his opinion Lane wondered why the tenant should have to pay for what she was receiving. He abated, or forgave, the rent and ordered the landlord to pay the tenant's court costs.

Lane could have ordered the landlord to make repairs, but there were not enough people still living in the building to warrant such an order. In fact, the department of health had recently ordered the building vacated, and Lane lamented that the tenant would "soon follow her many former co-tenants out into the streets."

Landlords have additional duties and restrictions under landlord and tenant statutes. Under the implied warranty of QUIET ENJOYMENT, a landlord must give notice to the tenant and receive permission from the tenant before entering rented premises. This rule does not apply if there is a bona fide emergency, such as a fire or some other danger to the premises.

A concept related to quiet enjoyment is the tenant's right to reasonable use of the premises. Landlords may not substantially interfere with this right. Whether actions by the landlord substantially interfere with a tenant's reasonable use of the premises is determined by the facts of the case. To illustrate, assume that a tenant rents an apartment and works there repairing electronic equipment. The landlord's refusal to allow the tenant to conduct such activity may constitute substantial interference of a reasonable use. If, however, the tenant uses the prem-

ises to mix explosive materials, the landlord may have the right to interfere because such a use is unreasonable.

If a landlord is found to have interfered with a tenant's quiet enjoyment or reasonable use of the premises, the tenant may recover damages. The measure of damages varies by jurisdiction. Usually, the tenant will not have to pay rent for the period of interference, and the tenant may seek damages for any losses caused by the interference.

There are several reciprocal duties between landlords and tenants. A landlord must keep the premises in good repair, but the tenant must not damage the premises. The tenant must leave the premises in their original condition, accounting for reasonable wear and tear, or risk losing the security deposit. A security deposit is money deposited by the tenant with the landlord to guarantee the tenant's performance under the lease. If the tenant damages the premises, the landlord may keep the security deposit and sue the tenant for damages not covered by the deposit.

A landlord must give a tenant notice to vacate the premises if the landlord wishes to rent the premises to another tenant. The landlord may not do this during a rental period. For example, if a tenant has signed a lease for one year, the landlord may not force the tenant to move until the end of the year. If the lease period expires and the landlord has not found a new tenant and has not issued a new lease to the present tenant, the present tenant may be allowed to stay on the premises on a month-to-month basis.

If the tenant plans to move during a rental period, the tenant must give at least a one-month written notice to the landlord. If the tenant fails to give notice to the landlord and leaves the premises, the tenant may be responsible for future rental payments. However, in this situation, the landlord is under a duty to take reasonable steps to find another tenant. This is called the duty to mitigate damages. Once the landlord finds another tenant, or the original lease expires, the tenant's duty to pay expires.

If the lease period expires and the landlord has found a new tenant, but the present tenant refuses to leave the premises, the landlord may sue the present tenant for damages if the landlord could be charging the new tenant more rent. The landlord may also have the tenant evicted by filing suit in court. Such a suit is called a wrongful or **UNLAWFUL DETAINER**. Unlawful detainers are governed by statute and may be based on damage to the property, nonpayment of rent, or unforeseen changes in the economic conditions of the landlord.

All states provide for unlawful detainer hearings. These proceedings help landlords avoid financial loss. Depending on the statute, a court will schedule an unlawful detainer hearing from one to three weeks after the landlord files suit. In most states the hearing is limited to issues concerning the tenant's and landlord's rights and duties. The majority of states prohibit landlords from removing a tenant's **PERSONAL PROPERTY** from the premises until after the court orders an eviction.

A tenant may avoid eviction for nonpayment of rent by paying the past due rent along with any filing costs incurred by the landlord. If the tenant is unable to pay rent before the court date, the tenant can still present defenses to the eviction in court. For example, the tenant may argue that the rent is not due because the landlord failed to make necessary repairs. If the tenant is unable to defend successfully the failure to pay rent, the court will order the tenant to vacate the premises by a certain date in the near future. In order to collect the unpaid rent, the landlord usually must file a separate action against the tenant.

Sometimes the action or inaction of a landlord may constitute a constructive eviction. A constructive eviction occurs when the landlord has made living on the premises unbearable or impossible. For example, assume that a landlord has refused to provide heat to rented premises. This constitutes a constructive eviction, and the tenant is not liable for rent.

The law of eviction differs for tenants in public housing. Public housing is low-cost housing provided by the federal government to impoverished persons. Under the National Public Housing Asset Forfeiture Project (28 U.S.C.A. § 881(a)(7)), the **HOUSING AND URBAN DEVELOPMENT DEPARTMENT** and the **JUSTICE DEPARTMENT** may evict persons from public housing without notice and without a hearing, under exigent circumstances—that is, when the eviction is directly necessary to secure an important government or public interest, and there is a special need for prompt action. An eviction from public housing can be initiated only by the proper government authorities.

Whether exigent circumstances exist to justify eviction without notice and a hearing depends on the facts of the case. The mere use or possession of illegal narcotics, for example, does not warrant summary eviction. However, if an apartment in a public housing project is being used for constant, high-level drug dealing, such activity may constitute exigent circumstances (*Richmond Tenants Organization v. Kemp*, 956 F.2d 1300 [4th Cir. 1992]). Although public housing tenants have increased eviction risks, the additional eviction procedures that must be followed by governments make eviction of public housing tenants a longer, more complicated process than eviction of private tenants.

The Supreme Court in *Department of Housing and Urban Development (HUD) v. Rucker* 535 U. S. 125, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002), upheld the Anti-Drug Abuse Act of 1988 to address the problem of drug-related criminal activity in federally subsidized public housing. The act mandated that every local public housing agency insert a clause in its standard lease document that gives the agency the right to evict tenants if they use or tolerate the use of illegal drugs on or near their premises.

A tenant may give his or her rights as a tenant to another person. This is called an assignment, and it is permissible unless the landlord objects or unless it is prohibited in the rental agreement. If a tenant assigns his or her rights, the tenant is still responsible for the payment of rent. In essence the recipient of the rental rights, or assignee, is a tenant of the original tenant, and there is no legal relationship between the assignee and the landlord.

Courts often examine lease agreements for unconscionability. UNCONSCIONABLE agreements are ones that unduly favor one party over the other. For example, assume that a rental agreement calls for the payment of damages to the landlord if the tenant leaves the apartment without sufficient notice. If the court considers the amount of damages to be too high, it may reduce the damages owed to the landlord.

Some lease agreements allow either party to break the agreement, and specify an amount of damages that the breaching party must pay to the other in the event of breach. Landlord-tenant relationships governed by such agreements are called tenancies at sufferance. Courts usually examine these agreements to ensure that they are not unconscionable.

In many cities tenant organizations operate to protect the interests of tenants. These organizations offer information and services to tenants. Most tenant groups offer information and services to nonmembers for a fee based on the tenant's ability to pay and the amount of work necessary to resolve the tenant's rental issues. Most states have statutes that prohibit landlords from evicting a tenant based on the tenant's membership or participation in a tenant organization.

Landlords are under no obligation to rent to tenants. However, under the FAIR HOUSING ACT OF 1968 (42 U.S.C.A. §§ 3601–3619 [1988 & Supp. III 1991]), they may not refuse to rent based on race, color, religion, sex, handicap, familial status, or national origin.

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### CROSS-REFERENCES

Mitigation of Damages; Rent Strike; Subletting.

## LANDMARK

*A structure that has significant historical, architectural, or cultural meaning and that has been given legal protection from alteration and destruction.*

Although landmark preservation laws vary by city and state, they have the same basic purpose: to keep landmarks as close to their original condition as possible. As a legal specialty, landmark and preservation law has developed as the number of designated landmarks has grown in the United States.

*New York City's Chrysler Building (foreground) and Empire State Building (left) are examples of individual landmarks.*

AP/WIDE WORLD PHOTOS

Landmarks are often buildings such as hotels, homes, skyscrapers, theaters, museums, stores, libraries, churches, and synagogues. Other structures, such as bridges, and even natural points of interest, such as trees, can also be designated as landmarks if they have special historical, architectural, or cultural significance.

New York City divides its landmarks into four categories: individual, interior, scenic, and historic district. Individual landmarks are designated for their exterior. Interior landmarks are noted for the portions of their interior that are open to the public. Scenic landmarks encompass structures that are not buildings, such as bridges, piers, parks, CEMETERIES, sidewalks, clocks, and trees. Historic district landmarks include entire areas that have architectural unity and quality or that represent a specific architectural period or style. All buildings within a designated historical district are protected from alteration or destruction.

The Chrysler Building in New York City is an example of an individual landmark. At the time of its completion, in 1930, it was the tallest building in New York City, at 77 stories and 1,046 feet. Built by Walter P. Chrysler, the founder of the Chrysler Corporation, the building remains a part of the New York City skyline. The building's art deco style is unique. Outside the thirty-first floor, a line of cars made of gray and white bricks encircles the building. The cars have chrome hubcaps, which are embedded in the wall. On each of the four corners of this floor is a buttress, and atop each buttress is a giant steel eagle similar in style to the ornament that used to adorn the Chrysler radiator cap. The floors from the thirty-first to the fifty-ninth make up a tower, and the fifty-ninth floor is marked with eight gargoyles. A spire begins on the fifty-ninth floor, constructed of arches with triangular windows. At night the spire is lit from the inside, highlighting its place in the Manhattan skyline.

Once a landmark has been designated, it is legally protected from alteration or destruction. If the owner of a landmark wishes to change it, the alterations must be approved by the commission or council that governs the landmarks in the city or state in which the landmark is located.

The Landmarks Preservation Commission of New York City is one such body. Since its creation in 1965, the commission has designated more than a thousand landmarks in New York City. The commission creates guidelines for landmark designation, designates landmarks, and reviews applications for the alteration of previously designated landmarks. The group is made up of 11 commissioners, including at least one from each of the five boroughs of New York City.

Many U.S. cities have ordinances regulating historical preservation of landmarks. Under these ordinances a landmark owner basically has two obligations: first, the owner is responsible for the upkeep of the building or structure, which is a basic requirement for any property owner; and second, the owner is required to get advance approval for any exterior improvements or alterations to the landmark. Requests for alterations are made to the appropriate city or state preservation commission.

New York City's Landmarks Preservation Law was passed in 1965, two years after the historic Pennsylvania Station in New York City was demolished to make way for Madison Square Garden. The demise of this historical structure was one among many that sparked the movement to enact preservation laws to protect landmarks.

Despite their prevalence landmark laws are often challenged by property owners who feel that the laws create undue interference with their use of their property. Typically, a landmark owner argues that a taking has occurred because a city or state preservation council has rejected the owner's application to alter the landmark. A taking is defined as interference with or damage to a private property owner's land-use rights. In ZONING law cases, a taking can occur if a property owner is denied economically viable use of the land or the buildings on the land. In landmark cases the line between taking and a legitimate government-imposed limitation is often blurred.

The 1978 case of *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631, illustrates the strength of New York City's landmark preservation laws over the desires of a landmark owner. Penn Central, the owner of the Grand Central Terminal, leased the building to a company that planned to construct a 50-story office tower on top of it. However, the New York City Landmarks Preservation Commission had designated the terminal as a historic landmark, and the commission refused to allow the building's exterior to be altered by the planned tower. Penn Central sued the city, and the case went to the U.S. Supreme Court.

Penn Central argued that the construction denial was a taking. New York City argued that "regulating private property for historical, cultural or aesthetic values, if it is done in accord with a comprehensive plan that provides benefit to all, is in the public interest." The city also argued that the meaningful preservation of landmarks meant that any additions should "protect, enhance and perpetuate the original design, rather than overwhelm it."

The Supreme Court ruled that it was constitutional, "as part of a comprehensive program to preserve historic landmarks and historic districts, [to] place restrictions on the development of individual historic landmarks . . . without effecting a 'taking.'"

*Penn Central* established three factors for determining whether a taking has occurred in landmark land-use cases: the economic effect of the regulation on the claimant; how much the regulation affected investment-backed expectations; and the character of the government action—whether there was a legitimate STATE INTEREST, such as an interest in preserving existing landmarks. New York City's refusal to permit construction did not reduce Penn Central's income or interfere with its ORIGINAL INTENT of operating the terminal, and because New York City had a legitimate state interest (preserving the landmark in its original state), the Supreme Court ruled that a taking had not occurred and that the landmark law was constitutional.

In the 1980 case of *Agins v. City of Tiburon,* 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106, the Supreme Court ruled that "regulation is a taking if it doesn't substantially advance legitimate state interests or denies an owner economically viable use of his land." *Agins* established a two-part test to determine whether a taking has occurred. Under *Agins* a regulation is a taking if it does not substantially advance a legitimate state interest and if it denies the landmark owner all economically viable use of the land. The *Agins* ruling clarified the amount of economic effect necessary for a regulation to be considered a taking. If a regulation prevented all economically viable use of the land, it was a taking. However, if a regulation left some economically viable use, it was not considered a taking.

Twelve years later, in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), the Court clarified its definition of economically viable use, stating that it was any use that was greater than zero.

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### CROSS-REFERENCES

Eminent Domain; Land-Use Control.

## LANDRUM-GRIFFIN ACT

The Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C.A. § 401 et seq.), commonly known as the Landrum-Griffin Act, is an important component of federal LABOR LAW. The act was named after its sponsors, Representative Phillip M. Landrum of Georgia and Senator Robert P. Griffin of Michigan. The provisions of Landrum-Griffin seek to prevent union corruption and to guarantee union members that unions will be run democratically.

The act resulted from a highly publicized investigation of union corruption and RACKETEERING chaired by Senator JOHN L. MCCLELLAN of Arkansas. The Senate Select Committee on Labor and Management Practices, popularly known as the McClellan Committee, was created in 1957 in large part because of the perception that the Teamsters Union was corrupt and under the influence of ORGANIZED CRIME. The McClellan Committee's investigation revealed that officials of the Teamsters Union and other groups had taken union funds for private use and that the union was clearly linked to organized crime. One result of the probe was the expulsion of the Teamsters and two other unions from the AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO). The AFL-CIO is the largest U.S. labor organization, a federation of autonomous LABOR UNIONS that is dedicated to enhancing and promoting unionism.

The other result was the passage of the Landrum-Griffin Act. To prevent abuses and acts of oppression, the act attempts to regulate some internal union affairs and provides for reporting to the government on various union transactions and affairs. Senator JOHN F. KENNEDY of Massachusetts was instrumental in inserting title I of the act (29 U.S.C.A. § 411 et seq.), which has been dubbed the union bill of rights. Title I mandates FREEDOM OF SPEECH and assembly in the conduct of union meetings, equality of rights regarding voting in elections, the nomination of candidates, and attendance at meetings. A secret ballot is required for voting on increases in dues or assessments. In regard to disciplinary actions, a member must be given written charges, time to prepare a defense, and a fair hearing. The act also guarantees that a member will not be subject to union discipline for attempting to exercise statutory rights. A member must have access to union financial records and has the right to recover misappropriated union assets on behalf of the union when the union fails to do so.

Title II (29 U.S.C.A. § 431 et seq.) deals with the management and reporting of union finances, a particular area of concern for Congress in the wake of the Teamsters Union's misappropriation of funds. The act requires unions to have constitutions and bylaws and to file copies of both with the U.S. secretary of labor. They must file reports that show dues, fees, and assessments; qualifications for membership; financial auditing; and authorization for the disbursement of funds and other types of spending. Unions must also file financial reports that show assets and liabilities at the beginning and end of the fiscal year, receipts, salaries, expense reimbursements, and loans to any officer, employee, member, or business enterprise. Officers and employees of unions may be required to disclose in written reports any personal financial interests that may conflict with duties owed to union members and any transactions or business interests that would present a conflict of interest with union duties.

The act also has provisions that apply when a labor organization suspends the autonomy of a union local and places the local or another unit under a trusteeship. This provision addresses a concern that corrupt national union leaders may take over control of union locals to maintain power. The law provides the conditions under which a trusteeship may be imposed and certain restrictions under which it may operate.

Landrum-Griffin also addresses the personal responsibility and integrity of union officers and representatives. Under the act, officers and representatives are held to common-law principles of trust relationships through express provisions that they occupy positions of trust in relation to the organization and its members as a group. This means that persons in union leadership positions must act in the best interests of the union. If a union official acts for personal gain, the official can be held accountable for breach of duty. EMBEZZLEMENT of union funds is a federal offense under the act. And persons who have been convicted of certain specified crimes are barred from serving as union officers, agents, or employees for five years after being released from prison.

The Landrum-Griffin Act provides the tools for union democracy, but it also provides greater government control over union affairs previously believed to be the province of the unions themselves.

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## LANFRANC

Lanfranc served as archbishop of Canterbury under William the Conquerer. He reformed the English church, established strong church-state relations, and introduced components of Roman and CANON LAW to England. Under William's reign, he laid the foundation for what succeeding theorists would build into England's secular common-law court system. Early U.S. law derived some elements from this system.

Lanfranc was born in about 1005 in Pavia, Italy. He studied law in Pavia and became a respected scholar, principally because of his studies in ROMAN LAW, which was a subject of growing interest in Italy at the time.

Lanfranc established a school at Avranches, Normandy, and taught for three years, until about 1042. After being attacked and almost killed by a highway robber, he went into seclusion at Saint Stephens Abbey at Bec, a newly established monastery. After three years of total seclusion, he returned to teaching, this time at the monastery. He taught there for eighteen years, earning high respect throughout Europe as an instructor of theology. The school became one of the most famous in Europe under his leadership. The future pope Alexander II was among his students.

When William the Conquerer decided to marry Matilda of Flanders, Lanfranc declared that the union would be a violation of canon law. Because of Lanfranc's strong opposition, William threatened to exile him. Lanfranc eventually gave up his stand against the marriage. In about 1051 William married Matilda, despite a papal ban on the union. Lanfranc sought support from the pope and engineered an eventual reconciliation of the papacy with the king. Six years after the wedding, William received the pope's approval to marry Matilda. In 1063 the grateful king appointed Lanfranc the first abbot of Saint Stephens.

Lanfranc also successfully lobbied for papal support for William's subsequent invasion of England. Because of these efforts, Lanfranc became William's closest and most trusted adviser by the time of the invasion in 1066, which resulted in the Norman Conquest.

In 1070 William appointed Lanfranc archbishop of Canterbury and chief justiciar. In the latter capacity, Lanfranc worked as a viceroy, or representative of the king, alongside William and when William was away from court. To reinforce William's dominance as ruler of England, Lanfranc replaced many English bishops with Normans. He also defeated an effort by the archbishop-elect of York to declare independence from Canterbury. He supported absolute VETO power for the king and helped lay the precedent for trying bishops before secular courts.

Lanfranc supported papal sovereignty and protected the church from secular influences. He also helped William establish independence for the English church. In 1076 he wrote an important ordinance that separated secular courts from ecclesiastical courts. In addition, he reformed guidelines for the marriage of priests, established ecclesiastical courts, and strengthened monasteries. He died May 24, 1089.

"YOU CAN OFFER GOD NO GREATER OR MORE PLEASING GIFT THAN YOUR DESIRE TO GOVERN DIVINE AND HUMAN AFFAIRS BY THE APPROPRIATE LAWS."
—LANFRANC

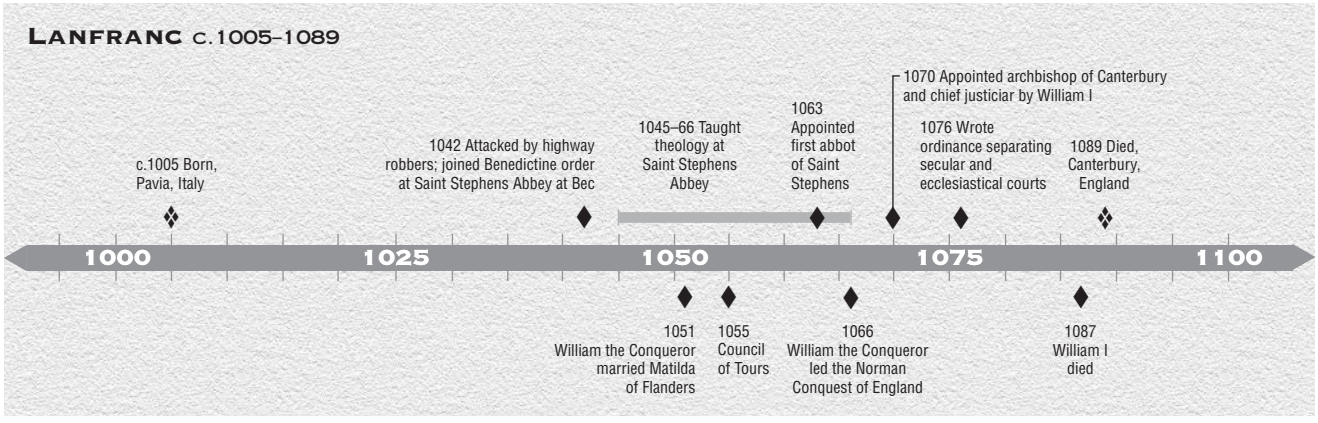

Lanfranc brought to England an understanding of canon and Roman law, which had been more widely embraced in continental Europe. Although he did not replace England's court system with Roman law, he introduced components of that system to England's court system.

Lanfranc's efforts laid the foundation for important writings on ENGLISH LAW in the twelfth and thirteenth centuries. In the twelfth century, the first major text on the COMMON LAW was written, reputedly by RANULF GLANVILL (his authorship is now disputed). In the thirteenth century, writings by HENRY DE BRACTON built further on the common law with principles from both Roman (or civil) law and canon law. These works were important elements in the establishment of England's eventual common-law system. The scholar FREDERIC W. MAITLAND said that Lanfranc's influence was responsible for "the early precipitation of English law in so coherent a form." The United States borrowed concepts from the English court system that began to develop during the years following the Norman Conquest.

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## ♦ LANGDELL, CHRISTOPHER COLUMBUS

"Mr. Fox, will you state the facts in the case of *Payne v. Cave?*" That simple question marked the beginning of a revolution in LEGAL EDUCATION. In 1870, Professor Christopher Columbus Langdell, in the first contracts class he taught at Harvard Law School, put the question to a student and forever changed the way lawyers learned their craft. No longer would law students sit passively and take notes while their professor lectured or read out of a legal treatise. Langdell's students read the reports of actual court cases and were required to discuss them in class. Langdell is credited with introducing the case-study method of instruction into U.S. law schools. Although there is evidence that Langdell was not the first to use the CASE METHOD, as dean, he had the opportunity to shape the program of the influential Harvard Law School and in turn the law training programs of schools throughout the United States.

Langdell was born in the small farming town of New Boston, New Hampshire, on May 22, 1826. With the financial assistance of his two sisters, and a later scholarship, Langdell was educated at Exeter Academy. He entered Harvard College in 1848 but left after only one year to begin his legal education by clerking in a law office, a common method of training for lawyers in those days. Within eighteen months, Langdell was back at Harvard, this time in the college's law school, where he remained for three years. Langdell was admitted to the bar in 1854 and practiced law in New York City for sixteen years.

In 1869, Harvard's new president, Charles W. Eliot, an accomplished chemist committed to educational reform, recruited Langdell to be Dane Professor of Law at the law school. It was hoped that Langdell could help revitalize the school, which had been criticized by the legal community as stagnant. In September 1870, Langdell was voted dean of the three-member faculty, a position that allowed him to change the method of legal instruction at Harvard.

Prior to Langdell, the primary teaching method in the nation's law schools was the lecture. Many professors published textbooks that were really expanded versions of their lectures. In class, students took notes while professors read lectures, or they were quizzed on specific portions of an assigned textbook reading. Discussion was rare, as it was assumed that the author of the textbook had found and set forth the true RULES OF LAW.

Langdell proposed that law students must be given some means of experimentation and research by which they might cut through the excessive verbiage of black-letter rules and discover the fundamental scientific axioms that ought to be used in studying, teaching, and judging the law. Casebooks were to be the students' laboratories. Langdell's case-study method was almost impossible to teach when he first introduced it in 1870 because of a lack of printed case reports. When Langdell introduced the case method at Harvard Law School, he had to write the books he used in his classes. His *Selection of Cases on the Law of Contracts* (1871) was the first modern casebook and became the model for many later such books.

Langdell's new method combined the careful study of the decisions in previous cases, with

the Socratic method of teaching. The Socratic method was modeled after that used by the Greek philosopher Socrates. Using this method, Langdell would ask his students a series of questions whose answers were designed to lead to a logical conclusion foreseen by Langdell.

When Langdell first used this method, many of his students were not pleased. In fact, on that first day, many students were unprepared to answer Langdell's questions about the case of *Payne v. Cave*. The majority of students openly condemned this new method, complaining that there was no instruction or imparting of rules and that really nothing had been learned. The newer students who had not studied law before resisted answering questions because they thought it presumptuous of them to offer an opinion on a matter in which they had no formal training. The older students, upset that Langdell imparted no legal rules, thought the answers of their fellow students nothing more than the idle talk of young boys. Students even expressed concern that they could never learn the law in time to graduate if it continued to be taught by such a method. When asked a question by a student, Langdell usually hesitated and then answered by posing a question to the student. This led some to question whether Langdell even knew the law he professed to teach.

Langdell's new method was controversial and not an immediate success. During the first semester he taught with it, his students missed classes regularly, and total enrollment in the course fell to only seven. Dissatisfaction with this educational experiment apparently spawned a new law school, Boston University Law School, and the effects were felt throughout the Harvard Law School, as enrollment fell from 136 in 1870–71 to 113 in 1872–73.

Despite student criticism, Harvard president Eliot remained committed to Langdell and his controversial method. As students began to understand Langdell's method, and in particular his Socratic process involving dialogue between teachers and students, they grew to prefer their active involvement over the relative passivity of the old lecture methods. By 1873–74, Harvard Law School enrollment began to rise again, and by 1890, Langdell's case-study method was firmly established at the flourishing law school.

Langdell's contributions to legal education go beyond the introduction of the case-study method. As dean of Harvard Law School, he added a third year to what had been a two-year curriculum and required students to pass final exams before they could advance to the next year or graduate. He was also instrumental in hiring professors who were not practicing lawyers or judges, an approach unheard of at the time.

In 1895, Langdell stepped down as dean of Harvard Law School. He continued to teach for five years before retiring in 1900. He died on July 6, 1906, at the age of eighty.

"LAW, CONSIDERED AS A SCIENCE, CONSISTS OF CERTAIN PRINCIPLES OR DOCTRINES. TO HAVE A MASTERY OF THESE AS TO BE ABLE TO APPLY THEM WITH CONSTANT FACILITY AND CERTAINTY TO THE EVER-TANGLED SKEIN OF HUMAN AFFAIRS, IS WHAT CONSTITUTES A TRUE LAWYER."
—CHRISTOPHER LANGDELL

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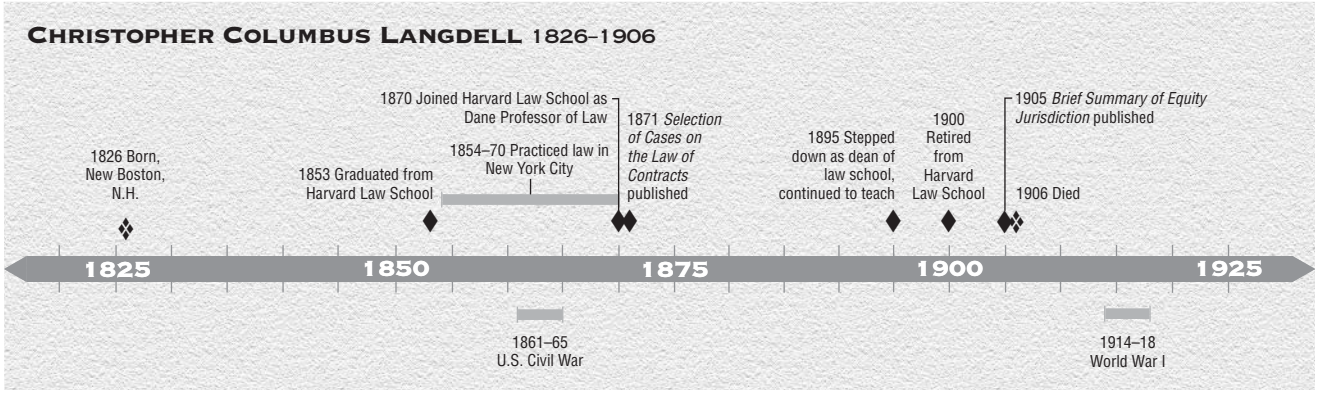

## LANHAM ACT

The Lanham Act of 1946, also known as the Trademark Act (15 U.S.C.A. § 1051 et seq., ch. 540, 60 Stat. 427 [1988 & Supp. V 1993]), is a federal statute that regulates the use of TRADEMARKS in commercial activity. Trademarks are distinctive pictures, words, and other symbols or devices used by businesses to identify their goods and services. The Lanham Act gives trademark users exclusive rights to their marks, thereby protecting the time and money invested in those marks. The act also serves to reduce consumer confusion in the identification of goods and services.

The Lanham Act was not the first federal legislation on trademarks, but it was the first comprehensive federal legislation. Before the Lanham Act, most of trademark law was regulated by a variety of state laws.

The first federal trademark legislation was passed by Congress in 1870 and amended in 1876. In 1879 the U.S. Supreme Court found that legislation unconstitutional. Two subsequent attempts at federal trademark legislation provided little protection for the rights of trademark users. The movement for stronger trademark legislation began in the 1920s, and was championed in the 1930s by Representative Fritz Lanham, of Texas. In 1946 Congress passed the act and named it the Lanham Act after its chief proponent. Lanham stated in 1946 that the act was designed "to protect legitimate business and the consumers of the country."

The Lanham Act protected trademarks used in commerce and registered with the PATENT AND TRADEMARK OFFICE in Washington, D.C. It expanded the types of trademarks that deserved legal protection, created legal procedures to help trademark holders enforce their rights, and established an assortment of rights that attached to qualified trademarks.

Congress has amended the act several times since 1946. The most sweeping changes came in 1988. Those changes included an amendment that authorized the protection of trademarks that had not been used in commerce but were created with the intent that they be used in commerce.

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## LAPSE

*The termination or failure of a right or privilege because of a neglect to exercise that right or to perform some duty within a time limit, or because a specified contingency did not occur. The expiration of coverage under an insurance policy because of the insured's failure to pay the premium.*

*The common-law principle that a gift in a will does not take effect but passes into the estate remaining after the payment of debts and particular gifts, if the beneficiary is alive when the will is executed but subsequently predeceases the testator.*

In its broadest sense, the term *lapse* describes the loss of any right or privilege because of the passage of time or the occurrence or nonoccurrence of a certain event. It is often used by legislatures in reference to governmental concerns. Legislatures may include anti-lapse provisions in statutes to ensure that certain spending programs remain funded from year to year. Lapse also has distinct significance in the law of insurance contracts and wills.

An insurance policy can lapse, or become void, if the insured fails to make payments on it. All states give insureds a grace period, which allows extra time to make a payment owed under a policy. The grace period varies from policy to policy. For example, in Maine the grace period is seven days for HEALTH INSURANCE policies with weekly premiums, ten days for such policies with monthly premiums, and thirty-one days for all other such policies (Me. Rev. Stat. Ann. tit. 24-A, § 2707). The grace period in Maine is thirty days for life insurance policies (§ 2505).

Some statutes on insurance policy lapses provide a small measure of protection against lapse. For example, Maine Revised Statutes Annotated, title 24-A, section 2739 (West 1995), states that no insurance company may cancel a health insurance policy within three months of nonpayment unless the insurer provides the insured with a notice of potential lapse within ten to forty-five days after the premium was due.

Section 4751 provides that in the event of a strike by insurance agents, no life or noncancellable health, hospital expense, or hospital and surgical expense insurance policy may lapse owing to nonpayment within thirty days of the strike's inception. This law applies only if the agent is responsible for the collection of premiums and is represented in COLLECTIVE BARGAINING by a labor organization that has been recognized by the state.

A will is a document left by a deceased person, who is called a testator or devisor. A will allocates the property of a testator to living persons. If the intended recipient of a gift in a will (called a beneficiary or devisee) dies before the testator, the gift may lapse. This means that the gift is void and is placed back into the estate of the testator. The property becomes part of the residuum of the estate and may not be disposed of in the manner sought by the testator.

Almost all states have statutes that provide that in the event of a lapse, the gift should go to the issue, or lineal descendants, of the deceased devisee. If the beneficiary has no issue, then the gift is left in the estate of the testator.

In some states the anti-lapse statute applies only to grandparents of the testator and lineal descendants of the testator's grandparents. For example, under the Maine Revised Statutes Annotated, title 18-A, section 2-605 (West 1995), the issue of the deceased devisee may receive a gift intended for the deceased devisee, but only if they survived the testator by 120 hours.

## LARCENY

*The unauthorized taking and removal of the* PERSONAL PROPERTY *of another by an individual who intends to permanently deprive the owner of it; a crime against the right of possession.*

*Larceny* generally refers to nonviolent theft. It is a common-law term developed by the royal courts of England in the seventeenth century. In the United States, most jurisdictions have eliminated the crime of LARCENY from statutory codes, in favor of a general theft statute.

The crime of larceny was developed to punish the taking of property in nonviolent face-to-face encounters, and to set it apart from ROBBERY. Robbery involved some measure of violence in connection with theft, and the courts did not feel that a nonviolent theft should warrant the same punishment. Larceny was nevertheless punished severely. A person convicted of larceny could receive the death penalty or be sentenced to many years in prison.

The English courts were careful not to encroach on the lawmaking rights of the British Parliament, so they kept the crime of larceny limited and well-defined. A defendant could be convicted of larceny only if he or she had some physical interaction with the victim; the victim relinquished property that was in the victim's possession at the time of the taking; the defendant was not in lawful possession of the stolen goods at the time of the taking; and the defendant actually carried the property away at the time of the interaction.

Over time the English courts recognized the need to expand the concept of larceny. In the absence of legislative action, they created new offenses based on the manner in which the theft was accomplished. EMBEZZLEMENT was created in the eighteenth century to punish the misappropriation of property after lawful possession. This charge would apply, for example, if a store clerk accepted a customer's money in a legal sale, and then took that money for his or her own use. Embezzlement was punished more severely than larceny because it involved a breach of trust.

Larceny by trick was created to punish the taking of property with the owner's consent when that consent was obtained by FRAUD or deceit. Before the courts created the offense of larceny by trick, defendants who had swindled their victims were able to argue that they had not committed larceny because the victims had willfully given them property.

Shortly after the courts created larceny by trick, they created the crime of obtaining property by FALSE PRETENSES. Before, a defendant who induced a person to part with the title to property could escape prosecution because the victim transferred not actual possession of the property but only title to the property. This commercial form of taking was made illegal under the law of false pretenses.

The English courts also began to make distinctions based on the value of the stolen property. Grand larceny was any larceny of property worth more than a certain amount of money. Any larceny of property worth less than that amount was called petit larceny and was punished less severely.

In time the issue of nonviolent theft became too complex for solution through case law, and

the British Parliament began to enact statutes that more clearly defined it.

The law of larceny and related offenses was adopted in the United States and remained in effect throughout the country's early history. Then, in the twentieth century, many legislatures abolished it in favor of a broad theft statute. In North Dakota, for example, the crime of theft now includes "larceny, stealing, purloining, embezzlement, obtaining money or property by false pretenses, EXTORTION, blackmail, fraudulent conversion, RECEIVING STOLEN PROPERTY, misappropriation of public funds, swindling, and the like" (N.D. Cent. Code § 12.1-23-01 [1995]).

The sweeping theft statutes are favored by prosecutors because they make it less likely that a defendant can escape punishment by arguing that one of the discrete elements in a larceny, embezzlement, or related theft was not proved. Under larceny statutes persons who commit theft can escape punishment if the prosecutor does not choose the correct charge. Under broad theft statutes, prosecutors need only be concerned with the intent to steal and the value of the property involved.

In states that have incorporated larceny into a broad theft statute, the punishment for a theft is based largely on the value of the stolen property. In Iowa, for example, theft of property exceeding $10,000 in value, theft directly from another's person, and theft of property in and around certain abandoned buildings is theft in the first degree, a class C felony. A class C felony is punishable by a prison term of up to ten years and a fine of at least $500 but no more than $10,000. Theft of property not exceeding $100 in value is theft in the fifth degree, a simple misdemeanor, which may be punished with a fine of up to $100 and an order to perform some community service specified by the judge (Iowa Code Ann. §§ 714.2, 902.9, 903.1).

The broad theft statutes do not cover all possible theft offenses. States that have a theft statute also maintain statutes prohibiting such acts as the unauthorized use of an automobile, forgery, fraud, deceptive business practices, receiving stolen property, extortion, theft of services, and theft of property that was lost, mislaid, or delivered by mistake.

Massachusetts is one state that has retained its larceny statutes. The general larceny statute in Massachusetts combines the crime of embezzlement with larceny. Under this statute anyone who

> steals, or with intent to defraud obtains by a false pretence, or whoever unlawfully, and with intent to steal or embezzle, converts, or secretes with intent to convert, the property of another . . . whether such property is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny. . . . (Mass. Gen. Laws Ann. ch. 266, § 30(1)).

Massachusetts also has several other larceny statutes, some of which identify a certain act as larceny. For example, the crime of false pretenses relating to contracts, banking transactions, or credit is specifically defined as larceny (§ 33). This statute is necessary because the general larceny statute does not cover such theft.

Larceny and theft are distinct from BURGLARY, which is committed when a person trespasses into a dwelling or other building with the intent to commit a crime. Burglary does not necessarily consist of the taking of property, although the intent to steal can upgrade a criminal charge from trespassing to burglary.

Larceny is also different from shoplifting, which involves the theft of property from a place of business. Most states have eliminated the crime of shoplifting along with larceny, embezzlement, false pretenses, and similar offenses, in creating one broad theft statute.

**Larceny, by Type, in 2001[a]**

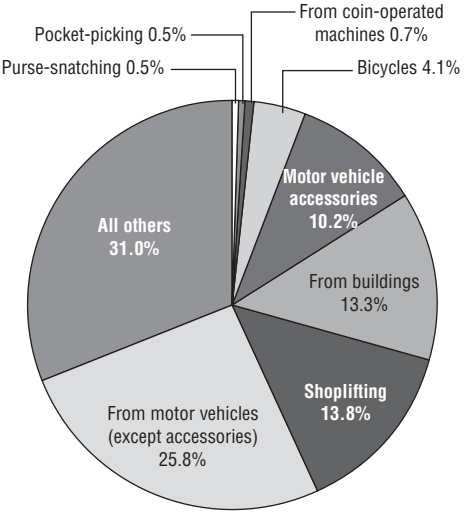


[a]Percentages may not add up to 100 due to rounding.

SOURCE: FBI, *Crime in the United States*, 2001.

In all states larceny and theft are distinct from robbery. Robbery involves the threat of force or the actual use of force in connection with a theft. The line between robbery, and larceny or theft is unsteady. If a perpetrator plies the victim with alcohol or drugs, most courts consider this a form of force that boosts the crime from larceny or theft to robbery. If a perpetrator simply moves a person who is unconscious through no fault of the perpetrator, the movement may not constitute the kind of force that gives rise to robbery. Most courts refuse to convict a defendant of robbery if the victim was unaware of any use of force, but the defendant may be charged with larceny or theft.

Larceny and theft generally are a matter of state law. Congress maintains a few federal laws regarding thefts that have federal implications. These statutes include theft at lending, credit, and insurance institutions; theft of interstate shipments of goods; theft on waterways and oceans; and theft by court officers.

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## LASCIVIOUSNESS

*Lewdness; indecency;* **OBSCENITY***; behavior that tends to deprave the morals in regard to sexual relations.*

The statutory offense of lascivious **COHABITATION** is committed by two individuals who live together as **HUSBAND AND WIFE** and engage in sexual relations without the sanction of marriage.

## LAST CLEAR CHANCE

*In the law of* **TORTS***, the doctrine that excuses or negates the effect of the plaintiff's contributory* **NEGLIGENCE** *and permits him or her to recover, in particular instances, damages regardless of his or her own lack of ordinary care.*

The rule of last clear chance operates when the plaintiff negligently enters into an area of danger from which the person cannot extricate himself or herself. The defendant has the final opportunity to prevent the harm that the plaintiff otherwise will suffer. The doctrine was formulated to relieve the severity of the application of the contributory negligence rule against the plaintiff, which completely bars any recovery if the person was at all negligent.

There are as many variations and adaptations of this doctrine as there are jurisdictions that apply it. Four different categories have emerged, which are classified as *helpless plaintiffs, inattentive plaintiffs, observant defendants,* and *inattentive defendants.*

### Helpless Plaintiffs

Where the plaintiff's previous negligence has placed him or her in a position from which the person is powerless to extricate himself or herself by the exercise of any ordinary care, and the defendant detects the danger while time remains to avoid it but fails to act, the courts have held that the plaintiff can recover.

There must be proof that the defendant discovered the situation, had the time to take action that would have saved the plaintiff, but failed to do what a reasonable person would have done. In the absence of any one of these elements, the courts deny recovery.

If the defendant who has a duty to discover the plaintiff's peril does not do so in time to avoid injury to the plaintiff, some courts have permitted recovery under the rationale that the defendant's subsequent negligence is the proximate cause, or direct cause, of the injury, rather than the contributory negligence of the plaintiff. The defendant must have been able to have discovered the peril through appropriate vigilance so as to avoid its harmful consequences to the plaintiff.

### Inattentive Plaintiffs

In another group of cases, the plaintiff is not helpless but is in a position to escape injury. The person's negligence consists of failure to pay attention to his or her surroundings and detect his or her own peril. If the defendant discovers the plaintiff's danger and inattentiveness, and is then negligent, a majority of courts allows the plaintiff to recover. Some courts hold that the defendant must actually recognize the plaintiff's danger and inattention. Most courts apply a more objective standard; they require only that the defendant discover the situation and that the plaintiff's peril and inattentiveness be evident to a reasonable person. The discovery can be

proved by CIRCUMSTANTIAL EVIDENCE. There is an additional essential qualification that the defendant can frequently, reasonably assume until the last moment that the plaintiff will protect himself or herself, and the defendant has no reason to act until he or she has some notice to the contrary.

If the defendant does not discover the plaintiff's situation—but could do so with appropriate vigilance—neither party can be viewed as possessing the last clear chance. The plaintiff is still in a position to escape, and his or her inattentiveness persists until the juncture of the accident, without the interval of superior opportunity of the defendant. The plaintiff cannot reasonably demand of the defendant greater care for his or her own protection than that which he or she as plaintiff would exercise for himself or herself. Nearly all of the courts have ruled that, in this situation, there can be no recovery.

### Observant Defendant

The observant defendant is one who actually sees the plaintiff in time to act so as to avoid the harm and assumes that a duty exists to act under the circumstances. The person perceives the plaintiff's helpless or inattentive condition, but thereafter is negligent in failing to act so as to prevent the plaintiff's harm. In most instances, the defendant's conduct is itself the cause of the plaintiff's danger, but this is not a requirement so long as a duty to act exists.

The plaintiff must prove that the defendant actually saw him or her and that a reasonable person would have known that he or she was inattentive or helpless. This is determined by an objective test entailing circumstantial evidence of the defendant's state of mind. The defendant cannot assert unawareness of the plaintiff's powerlessness or inattentiveness when that fact would have been evident to any observer.

### Inattentive Defendant

The inattentive defendant is one who fails to fulfill the duty to maintain a surveillance in order to see the plaintiff in time to avoid the harm, perceive the person's helpless or inattentive condition, and thereby exercise reasonable care to act in time to avoid the harm. Due to the defendant's negligence, however, he or she fails to see the plaintiff in time, and injury occurs.

### Application of Doctrine

There are four possible cases in which the rule of last clear chance can be applied.

The typical last clear chance situation involves the *helpless plaintiff* against the *observant defendant,* and all courts that accept the doctrine will apply it. The few courts that do not recognize the rule attain the same result under the doctrine of willful and wanton misconduct.

In the *helpless plaintiff-inattentive defendant* and the *inattentive plaintiff-observant defendant* cases, most jurisdictions that acknowledge the rule apply it.

Where the case entails the *inattentive plaintiff* against the *inattentive defendant,* the justifications for the rule are eliminated, and nearly all jurisdictions refuse to apply it.

The defendant's negligence must occur subsequent to that point in time when the person discovered or should have discovered the plaintiff's peril.

## LAST RESORT

*A court, such as the U.S. Supreme Court, from which there is no further appeal of a judgment rendered by it in review of a decision in a civil or criminal action by a lower court.*

In most jurisdictions, the state's court of last resort is called the supreme court. This name differs in some jurisdictions, however. For example, the court of last resort in New York is the New York Court of Appeals, while the trial-level court is called the Supreme Court. In Texas, the court of last resort for civil trials is the Texas Supreme Court, but the highest court for criminal appeals is the Texas Court of Criminal Appeals. The state of Texas is rather unusual because it employs two courts of last resort to hear appeals.

## LATENT

*Hidden; concealed; that which does not appear upon the face of an item.*

For example, a latent defect in the title to a parcel of real property is one that is not discoverable by an inspection of the title made with ordinary care. Similarly, a latent defect in an item of merchandise is one that could not have been discovered by any known or customary inspection or test.

## LATERAL SUPPORT

*The right of a landowner to have his or her property naturally upheld by the adjoining land or the soil beneath.*

The adjoining owner has the duty not to alter the land, such as by lowering it, so as to cause the support to be weakened or removed.

CROSS-REFERENCES

Adjoining Landowners.

## LAW

*A body of rules of conduct of binding legal force and effect, prescribed, recognized, and enforced by controlling authority.*

In U.S. law, the word *law* refers to any rule that if broken subjects a party to criminal punishment or civil liability. Laws in the United States are made by federal, state, and local legislatures, judges, the president, state governors, and administrative agencies.

Law in the United States is a mosaic of statutes, treaties, case law, ADMINISTRATIVE AGENCY regulations, executive orders, and local laws. U.S. law can be bewildering because the laws of the various jurisdictions—federal, state, and local—are sometimes in conflict. Moreover, U.S. law is not static. New laws are regularly introduced, old laws are repealed, and existing laws are modified, so the precise definition of a particular law may be different in the future from what it is today.

### The U.S. Constitution

The highest law in the United States is the U.S. Constitution. No state or federal law may contradict any provision in the Constitution. In a sense the federal Constitution is a collection of inviolable statutes. It can be altered only by amendment. Amendments pass after they are approved by two-thirds of both houses of Congress or after petition by two-thirds of the state legislatures. Amendments are then ratified by three-fourths of the state legislatures or by conventions in three-fourths of the states. Upon ratification, the amendment becomes part of the Constitution.

Beneath the federal Constitution lies a vast body of other laws, including federal statutes, treaties, court decisions, agency regulations, and executive orders, and state constitutions, statutes, court decisions, agency regulations, and executive orders.

### Statutes and Treaties

After the federal Constitution, the highest laws are written laws, or statutes, passed by elected federal lawmakers. States have their own constitution and statutes.

Federal laws generally involve matters that concern the entire country. State laws generally do not reach beyond the borders of the state. Under Article VI, Section 2, of the U.S. Constitution, federal laws have supremacy over state and local laws. This means that when a state or local law conflicts with a federal law, the federal law prevails.

Federal statutes are passed by Congress and signed into law by the president. State statutes are passed by state legislatures and approved by the governor. If a president or governor vetoes, or rejects, a proposed law, the legislature may override the VETO if at least two-thirds of the members of each house of the legislature vote for the law.

Statutes are contained in statutory codes at the federal and state levels. These statutory codes are available in many public libraries, in law libraries, and in some government buildings, such as city halls and courthouses. They are also available on the World Wide Web. For example, the statutory codes that are in effect in the state of Michigan can be accessed at <http://www.michigan.gov/orr>. A researcher may access the United States Code, which is the compilation of all federal laws, at <http://uscode.house.gov>. The site is maintained by the Office of the Law Revision Counsel of the U.S. House of Representatives.

On the federal level, the president has the power to enter into treaties, with the advice and consent of Congress. Treaties are agreements with sovereign nations concerning a wide range of topics such as environmental protection and the manufacture of nuclear missiles. A treaty does not become law until it is approved by two-thirds of the U.S. Senate. Most treaties are concerned with the actions of government employees, but treaties also apply to private citizens.

### Case Law

Statutes are the primary source of law, and the power to enact statutes is reserved to elected lawmakers. However, judicial decisions also have the force of law. Statutes do not cover every conceivable case, and even when a statute does control a case, the courts may need to interpret it. Judicial decisions are known collectively as case law. A judicial decision legally binds the parties in the case, and also may serve as a law in the same prospective sense as does a statute. In other words, a judicial decision determines the outcome of the particular case, and also may regulate

# Common-Law Courts

Courts of law are a fundamental part of the U.S. judicial system. The U.S. Constitution and all state constitutions recognize a judicial branch of government that is charged with adjudicating disputes. Beginning in the 1990s, vigilante organizations challenged the judicial system by establishing their own so-called common-law courts. By 1996 these common-law courts existed in more than 30 states. Though they have no legitimate power, being created without either constitutional or statutory authority, and in fact sometimes contravene established law.

Traditionally, common-law courts administered the **COMMON LAW**, that is, law based on prior decisions rather than statutes. These new common-law courts, however, are premised on a mixture of U.S. **CONSTITUTIONAL LAW**, English common law, and the Bible, all filtered through an often racist and anti-Semitic world view that holds the U.S. legal system to be illegitimate. These common-law courts imitate the formalities of the U.S. justice system, issuing subpoenas, making criminal indictments, and hearing cases. Most of their cases involve **DIVORCE** decrees and foreclosure actions. Many of the persons on the courts or seeking their assistance are in dire financial circumstances. They wish to prevent the loss of their property by having a common-law court declare them free of the loans they have secured from banks.

Though common-law courts appeared to be merely a symbolic attempt by extremists to assert their political legitimacy, the actions of some of them led to prosecution for criminal conspiracy. Common-law courts have issued arrest warrants for judges and prosecutors in Montana and Idaho and have threatened sheriffs who refused to follow their instructions. In 1994 the Garfield County, Montana, prosecutor charged members of a common-law court with criminal syndicalism, for advocating violence against public officials. One court member was sentenced to ten years in prison, and others received shorter sentences.

future conduct of all persons within the jurisdiction of the court.

The opinions of courts, taken together, comprise the COMMON LAW. When there is no statute specifically addressing a legal dispute, courts look to prior cases for guidance. The issues, reasoning, and holdings of prior cases guide courts in settling similar disputes. A prior opinion or collection of opinions on a particular legal issue is known as precedent, and courts generally follow precedent, if any, when deciding cases. Breaking with precedent may be justified when circumstances or attitudes have changed, but following precedent is the norm. This gives the common law a certain predictability and consistency. The common law often controls civil matters, such as contract disputes and personal injury cases (TORTS). Almost all criminal laws are statutory, so common law principles are rarely applied in criminal cases.

Sometimes courts hear challenges to statutes or regulations based on constitutional grounds. Courts can make law by striking down part or all of a particular piece of legislation. The Supreme Court has the power to make law binding throughout the country on federal constitutional issues. The highest court in each state has the same power to interpret the state constitution and to issue holdings that have the force of law.

Occasionally courts create new law by departing from existing precedent or by issuing a decision in a case involving novel issues, called a CASE OF FIRST IMPRESSION. If legislators disagree with the decision, they may nullify the holding by passing a new statute. However, if the court believes that the new statute violates a constitutional provision, it may strike down all or part of the new law. If courts and lawmakers are at odds, the precise law on a certain topic can change over and over.

When researching a legal issue, it is helpful to consult relevant case law. The researcher first finds the relevant annotated statutes, and then reads the cases that are listed under the statutes. Reading case law helps the researcher understand how the courts interpret statutes, and also how the courts analyze related issues that are not covered in the statutes. Volumes of case law can be

found in some public libraries, in law libraries, in courthouses, and in state government buildings such as statehouses and state libraries. Case law research can also be conducted using the INTERNET. For example, Cornell University's online Legal Information Institute (<http://www.law.cornell.edu>) offers recent and historic U.S. Supreme Court decisions, as well as recent New York appeals decisions.

### Agency Regulations and Executive Orders

Administrative agencies may also create laws. The federal and state constitutions implicitly give the legislatures the power to create administrative agencies. Administrative agencies are necessary because lawmakers often lack detailed knowledge about important issues, and they need experts to manage the regulation of complex subjects. On the federal level, for example, the Department of the Interior was created by Congress to manage the nation's natural resources. In creating the agency, Congress gave it power to promulgate regulations concerning the use and protection of natural resources.

Administrative agency regulations have the force of law if they have a binding effect on the rights and duties of persons. For example, INTERIOR DEPARTMENT regulations that prohibit mining or logging in certain areas of the country are considered law, even though they are not formulated by an elected official or judge. Federal administrative agency rules are approved by Congress, so ultimately they are a product of the will of elected officials. Similarly, on the state and local levels, an administrative agency may promulgate rules that have the force of law, but only at the pleasure of the elected lawmakers that created the agency. If an agency seeks to change a regulation, it must, in most cases, inform the public of its intentions and provide the public with an opportunity to voice concerns at a public meeting.

Not all agency regulations have the force of law. Agency rules that merely interpret other rules, state policy, or govern organization, procedure, and practice need not be obeyed by parties outside the agency.

Some administrative agencies have QUASI-JUDICIAL powers. That is, they have limited authority to hear disputes and make binding decisions on matters relevant to the agency. For example, the HEALTH AND HUMAN SERVICES DEPARTMENT (HHS) has a court with authority to hear cases concerning actions by the HHS, such as the denial of SOCIAL SECURITY benefits. An ADMINISTRATIVE LAW judge (ALJ) presides over the court, and appeals from ALJ decisions can be taken to an HHS appeals council. If an administrative agency has quasi-judicial powers, decisions made by the ALJ and boards of appeals have the force of law.

The quickest way to uncover information about state agency regulations is to search the World Wide Web. Most state agencies maintain a comprehensive website. Each state's SECRETARY OF STATE can also be accessed on the Web. Most agencies are named according to their area of concern. For example, a department of GAMING is concerned with gambling, and a department of fish, game, and wildlife is concerned with issues related to hunting and wildlife conservation.

Executive orders are issued to interpret, implement, or administer laws. On the federal level, executive orders are issued by the president or by another EXECUTIVE BRANCH official under the president's direction. Executive orders range from commands for detailed changes in federal administrative agency procedures to commands for military action. To have the force of law, a federal EXECUTIVE ORDER must be published in the *Federal Register,* the official government publication of executive orders and federal administrative agency regulations. On the state level, governors have similar authority to make laws concerning state administrative agencies and state military personnel.

### Local Laws

Counties, cities, and towns also have the authority to make laws. Local laws are issued by elected lawmakers and local administrative agencies. Local laws cannot conflict with state or federal laws. Decisions by local courts generally operate as law insofar as they apply to the participants in the case. To a lesser extent, local court decisions may have a prospective effect. That is, a local court decision can operate as precedent, but only in cases brought within the same jurisdiction. For example, a decision by a court in Green County may affect future court cases in Green County, but it has no bearing on the law in any other county. Local laws can be found in local courthouses, in local libraries, and in state government libraries. Local laws may also be accessed via the World Wide Web.

CROSS-REFERENCES

Administrative Law and Procedure; Civil Law; Congress of the United States; Constitutional Amendment; Constitution

of the United States; Court Opinion; Criminal Law; Equity; Federalism; *Federal Register*; Judicial Review; Private Law; Public Law; Stare Decisis.

## LAW AND LITERATURE

*An interdisciplinary study that examines the relationship between the fields of law and literature, with each field borrowing insights and methods of analysis from the other.*

Taught as a comparative studies course in many academic settings, the law and literature curriculum was developed by members of academia and the legal profession who hoped to make law a more humanistic enterprise.

Law and literature is now a burgeoning field of comparative learning. During the 1990s entire scholarly journals were dedicated to the subject. From the mid-1980s to the mid-1990s, state and national bar associations sponsored many theatrical re-creations of legal questions presented in classic works of literature, including those written by William Shakespeare and Charles Dickens.

The Greek philosopher Plato recognized a relationship between law and literature more than two thousand years ago, writing, "A society's law book should, in right and reason, prove, when we open it, far the best and finest work of its whole literature." In the United States, Plato's works were read along with other classic works of literature as part of the general education of most professionals during the eighteenth and nineteenth centuries. Following the U.S. CIVIL WAR (1861–65), however, law was seen less as a humanity and more as a science, and the classic works of Western literature played a lesser role in the education of members of the legal profession.

In 1908 the connection between law and literature was reexamined by the preeminent legal scholar JOHN H. WIGMORE, who noted the prevalence of trials and legal themes in many of the world's famous novels (see Wigmore 1908, 574). In 1925 Justice BENJAMIN N. CARDOZO, of the U.S. Supreme Court, published in the *Yale Law Review* a groundbreaking article titled "Law and Literature," which examined the literary styles of judicial opinions.

In the 1960s and 1970s, the ideas of Wigmore and Cardozo formed the foundation of the modern law and literature movement. During this period law was widely perceived as a myopic, rule-oriented vocation that lacked basic human qualities such as sympathy and empathy. A growing number of law students, lawyers, and judges became disenchanted with the limited perspective of their profession, and began exploring other fields of learning for enlightenment. At the same time, high school teachers, college professors, and graduate students began to migrate from the humanities to the legal profession in search of more practical employment opportunities.

Law and literature studies are separated into three areas. The first area involves law *in* literature. This area focuses on the legal themes depicted in novels and other literary works. These fictionalized accounts are used as a prism through which actual proceedings in U.S. courtrooms are scrutinized.

The second area involves law *as* literature. This area studies the educational aspects of actual trials that involve recurring legal disputes over issues such as race relations and the proper role of law enforcement in a free society. This second area of study also analyzes the prose and rhetoric that judges use to explain the legal arguments and conclusions in their judicial opinions.

The third area focuses on law *and* literature. It compares and contrasts the analytical tools each discipline employs when interpreting a particular text, whether it be a constitution, a statute, a judicial precedent, or a work of literature.

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### CROSS-REFERENCES

Jurisprudence; Legal Education.

## LAW DAY

*The date prescribed in a bond, mortgage, or deed for payment of the debt; the maturity date. May 1st, observed in schools, public assemblies, and courts, in honor of our legal system.*

In regard to real property, the law day is the final date fixed by the court on which the debtor can pay off the mortgage debt, redeem the real estate, and prevent it from being sold after foreclosure proceedings are commenced.

The definition of law day, also known as law date, varies from jurisdiction to jurisdiction. Some states define law day as the actual due date of the mortgage or any day thereafter until foreclosure, while others view the date of foreclosure and law day as synonymous. In some jurisdictions, the day fixed in the contract for the closing of title is the law day.

## LAW FRENCH

*A corrupt French dialect used by English lawyers from after the Norman Conquest in 1066 until slightly after the end of the Restoration period in 1688.*

By the mid–thirteenth century, many of the English gentry and some commoners spoke French, and the language was used in the king's courts and in printed legal materials. After England's wars with France during the reign of Edward III (1327–77), schools no longer taught French. Oral French in the courts was thereafter mostly confined to recitation of formal pleadings, and thus lost grammatical sophistication and suffered a drastic decline in vocabulary.

Law French was primarily a written language and was pronounced as if it were English. It persisted because of tradition and because most of the books in lawyers' libraries were printed in French or in Latin. It also functioned as a form of shorthand for lawyers to use in recording legal propositions. In other words, spoken English was transcribed in French. This use resulted in an artificial technical vocabulary, uncorrupted by the vicissitudes of vernacular English usage. The names of everyday things became increasingly Anglicized, but law French terminology formed the cornerstone of the common-law vocabulary. Some of the words still used today are *appeal, arrest, assault, attainder, counsel, covenant, debtor, demand, disclaimer, escrow, heir, indictment, joinder, lessee, larceny, merger, negligence, nuisance, ouster, proof, remainder, tender, suit, tort, trespass,* and *verdict.*

By the mid-Tudor period, in the mid-sixteenth century, the active law French vocabulary consisted of fewer than a thousand words; English was freely substituted for French when the writer's knowledge of French proved inadequate. In 1650 Parliament enacted a statute prohibiting the use of law French in printed books. At the beginning of the Restoration, in 1660, the law was treated as void and there was a widespread, albeit short-lived, reversion to law French. Law French gradually died in the ensuing years. It appears that the last ENGLISH LAW book written in law French was published in 1731. Sir John Comyn, Chief Baron of the Court of Exchequer, wrote his *Digest* in law French but the work was translated into English for its posthumous publication in 1762.

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## LAW JOURNAL

*A magazine or newspaper that contains articles, news items, comments on new laws and case decisions, court calendars, and suggestions for practicing law, for use by attorneys.*

## LAW MERCHANT

*The system of rules and customs and usages generally recognized and adopted by traders as the law for the regulation of their commercial transactions and the resolution of their controversies.*

The law merchant is codified in the UNIFORM COMMERCIAL CODE (UCC), a body of law, which has been adopted by the states, that governs mercantile transactions.

## LAW OF NATIONS

*The body of customary rules that determine the rights and that regulate the intercourse of independent countries in peace and war.*

CROSS-REFERENCES

International Law.

## LAW OF THE CASE

*The principle that if the highest appellate court has determined a legal question and returned the case to the court below for additional proceedings, the question will not be determined differently on*

*a subsequent appeal in the same case where the facts remain the same.*

The law of the case expresses the rule that the final judgment of the highest court is the final determination of the rights of the parties. The doctrine of "law of the case" is one of policy only, however, and will be disregarded when compelling circumstances require a redetermination of the point of law decided on the prior appeal. Such circumstances exist when an intervening or contemporaneous change in the law has transpired by the establishment of new precedent by a controlling authority or the overruling of former decisions.

Courts have ruled that instructions—directions given by the judge to the jury concerning the law applicable to the case—are the "law of the case" where the appealing defendant, the petitioner, accepted the instructions as correct at the time they were given.

## LAW OF THE LAND

*The designation of general public laws that are equally binding on all members of the community.*

The law of the land, embodied in the U.S. Constitution as DUE PROCESS OF LAW, includes all legal and equitable rules defining HUMAN RIGHTS and duties and providing for their protection and enforcement, both between the state and its citizens and between citizens.

## LAW OF THE SEA

*The part of public* INTERNATIONAL LAW *that deals with maritime issues.*

The term *law of the sea* appears similar to the term *maritime law,* but it has a significantly different meaning. Maritime law deals with JURISPRUDENCE that governs ships and shipping, and is concerned with contracts, TORTS, and other issues involving private shipping, whereas the law of the sea refers to matters of public international law.

Many topics are contained within the law-of-the-sea concept. These include the definition of a state's TERRITORIAL WATERS, the right of states to fish the oceans and to mine underneath the oceans, and the rights of states to control navigation.

The area outside a state's territorial waters, commonly known as the high seas, was traditionally governed by the principle of freedom of the seas. On the one hand, this meant freedom for fishing, commercial navigation, travel, and migration by both ships and aircraft; freedom for improvement in communication and supply by the laying of submarine cables and pipelines; and freedom for oceanographic research. On the other hand, it meant freedom for naval and aerial warfare, including interference with neutral commerce; freedom for military installations; and freedom to use the oceans as a place to dump wastes. Until WORLD WAR II, these freedoms continued to be applied to the oceans and airspace outside the states' three-mile territorial limit, with little regulation of abuses other than what could be found in the customary regulations of warfare and neutrality.

Since the 1950s the UNITED NATIONS has attempted to convince the nations of the world to agree to a set of rules that will govern the law of the sea. The First U.N. Conference on the Law of the Sea, which was held in Geneva in 1958, led to the CODIFICATION of four treaties that dealt with some areas of the law of the sea. In the 1970s the Third U.N. Conference on the Law of the Sea began its work. The conference labored for more than ten years on a comprehensive treaty that would codify international law concerning territorial waters, sea lanes, and ocean resources.

On December 10, 1982, 117 nations signed the U.N. Convention on the Law of the Sea, in Montego Bay, Jamaica. The convention originally was not signed by the United States, the United Kingdom, and 28 other nations, because of objections to provisions for seabed mining, which they believe would inhibit commercial development.

The convention, which went into effect November 16, 1994, claims the minerals on the ocean floor beneath the high seas as "the common heritage of mankind." The exploitation of minerals is to be governed by global rather than national authority. Production ceilings have been set to prevent economic harm to land-based producers of the same minerals. There have been continuing negotiations with the United States and other nations to resolve this issue, which is the only serious obstacle to universal acceptance of the treaty. A 1994 agreement amended the mining provisions, which led the United States to submit the treaty to the U.S. Senate for ratification. Despite this amendment and pressure to sign the treaty, the U.S. Senate has not ratified the amendment or the Constitution. As of August 2003, a total of 143 nations

had signed the treaty, including the United Kingdom in 1997.

A major change under the convention is its extension of a state's territorial waters from 3 to 12 nautical miles. Foreign commercial vessels are granted the right of innocent passage through the 12-mile zone. Beyond the zone all vessels and aircraft may proceed freely. Coastal nations are granted exclusive rights to the fish and marine life in waters extending 200 nautical miles from shore. Every nation that has a continental shelf is granted exclusive rights to the oil, gas, and other resources in the shelf up to 200 miles from shore.

Any legal disputes concerning the treaty and its provisions may be adjudicated by the new Tribunal for the Law of the Sea, by ARBITRATION, or by the INTERNATIONAL COURT OF JUSTICE.

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CROSS-REFERENCES

Admiralty and Maritime Law; Environmental Law; Fish and Fishing; Mine and Mineral Law; Navigable Waters; Pollution.

## LAW REPORTS

*Published volumes of the decisions of courts.*

Usually, opinions in cases are promptly published in unbound ADVANCE SHEETS just after they are handed down. They are subsequently collected into bound reporters when there are enough to fill a volume. Volumes are numbered in chronological order, and cases are found by referring to volume and page numbers in the citation for each case. Many law reports are also offered in CD-ROM format, or provided as part of such online services as WESTLAW and LEXIS.

## LAW REVIEW

*A law school publication containing both case summaries written by student members and scholarly articles written by law professors, judges, and attorneys. These articles focus on current developments in the law, case decisions, and legislation. Law reviews are edited by students, and students contribute notes to featured articles.*

The first law review was established in 1875 as a means for law students to enhance legal scholarship. By 2003, law schools published more than eight hundred different law review titles, and the number continues to grow. The majority of law schools in the United States now produce at least one student-edited law review. With 13, Harvard University produces the most student-edited law reviews and journals, including the *Harvard Law Review.* Most schools publish general periodicals, covering any topic of current interest. Many produce publications that focus on a particular area of the law. Harvard, for example, publishes 11 special-focus law reviews. Among the most popular topics of special-focus law reviews are INTERNATIONAL LAW, comparative law, and ENVIRONMENTAL LAW.

The law review is an offshoot of the treatise, which was the principal form of legal writing in the 1800s and was frequently used to teach the law. Legal scholars wrote treatises to discuss legal principles and the cases that illustrated those principles. By the mid-1800s several significant U.S. treatises covered individual topic areas, including evidence, CRIMINAL LAW, damages, and contracts. These treatises became the basis of LEGAL EDUCATION.

In the mid-1800s it also became important for lawyers to know more specifically how judges were ruling in their own jurisdiction. This need led to the growth of regionally specific periodicals produced by attorneys to discuss the legal issues pertinent to their local area. The *American Law Register,* started in Philadelphia in 1852, was the first legal periodical that took a scholarly look at the law, rather than the journalistic slant of earlier periodicals. This publication and the *American Law Review,* from Boston, were the primary inspirations for the student-edited law review.

The first student-edited law review was the *Albany Law School Journal,* which lasted only one year, through 1875. This law review contained articles, MOOT COURT arguments, and a calendar of law school events. The first issue included a student commentary that questioned whether after a lecture it was better for a student to read the cases discussed in the lecture or to read treatises on the topic discussed.

The next law review, Columbia Law School's *Columbia Jurist,* did not appear until 1885. This

publication lasted only three years but inspired the *Harvard Law Review.*

Established in 1887, the *Harvard Law Review* is still published today and is among the most prestigious, most emulated student-edited law reviews. Before starting their law review, Harvard students approached the faculty to get support for their new venture. Professor **JAMES BARR AMES** became their adviser and mentor, and other faculty members provided articles for publication. For financial assistance the students approached alumnus **LOUIS D. BRANDEIS**, who provided money as well as the names of others who would contribute. The students also sold over three hundred subscriptions in the New York City area by the time the first issue was published. The first issue included articles, student news, moot court arguments, case digests, book reviews, and summaries of class lectures. The editors also used the law review to promote the new method of instruction that had recently been introduced at Harvard. This method of instruction combined the use of casebooks and Socratic dialogue—quite a change from the traditional method of textbooks and lectures. The Harvard method of instruction is standard in today's law schools.

By 1906 law schools at Yale, Pennsylvania, Columbia, Michigan, and Northwestern all published student-edited law reviews. With Harvard these schools were considered the top law schools in the United States. Because they were **PUBLISHING LAW** reviews, doing so became a status symbol, and many law schools followed suit. The significance of the law review soon extended beyond the halls of academia as judges began citing articles in their decisions.

Today, the vast number of general and specialty law reviews published around the country cover topics in virtually all areas of practice, from broad areas of law, such as criminal law and **INTELLECTUAL PROPERTY**, to more specialized topics, such as women's issues, air and space law, and computer law. Published pieces range from examinations of legal trends in a particular legal area, to analyses of a single case and its implications, to speeches by and about important legal figures.

As law reviews have grown in number and variety, they have become important sources for legal research. The full text of many recent law reviews is available through such electronic resources as **WESTLAW** and LEXIS®. Moreover, many law schools provide either the full text or abstracts of law review articles produced at these schools through the schools' websites. Some publications, such as the *Richmond Journal of Law and Technology,* are available exclusively in an on-line format.

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Case Method.

## LAW SCHOOL ADMISSION TEST

The Law School Admission Test (LSAT) was first given in 1948 and started to gain prominence in the late 1960s. By the 1980s, when the number of applications to law schools began to rise, it became a standard part of the law school admission process. The test is administered by the Law School Admission Council (LSAC), which is a nonprofit, nonstock corporation with 193 member law schools in the United States and Canada. All members require the LSAT as part of the admission process.

The LSAT is a half-day, six-part test that contains one thirty-minute writing sample and five thirty-five-minute multiple-choice sections. The writing sample is not scored, but is sent to each school to which the student applies. One of the multiple-choice sections (the taker does not know which one) is not scored, but is used to test possible future questions.

The multiple-choice sections are organized into different types of questions: reading comprehension, critical reasoning, and analysis of others' reasoning. These sections are designed to test skills that are important in law school, such as the ability to read complex text with accuracy and draw inferences.

Law schools use applicants' LSAT scores, along with other criteria, to decide who to admit. Some schools require a minimum LSAT score for acceptance. Others use a formula in which the LSAT score is multiplied and then added to the undergraduate grade point average for a total score that helps them decide which

students to admit. Still others use the LSAT score to help them make their decision, but have no hard-and-fast rules regarding a minimum score.

Like all standardized tests, the LSAT is intended to be a fair, objective test of the abilities of prospective law students. Most data indicate that the score on the LSAT is a reliable predictor for success during the first year of law school, although it may not be in an individual case.

Since the 1970s the main criticism of the LSAT has come from those who think the test is biased against women and minorities. These critics assert that the information in the test questions, as well as the perspective of the test as a whole, caters to a white male background and viewpoint. A 1995 study by the LSAC showed that women tend to score lower than men on the LSAT and perform slightly below men in their first year of law school. Despite the criticism the LSAT continues to be a primary gatekeeper to law school and the legal profession.

CROSS-REFERENCES

Legal Education.

## LAWFUL

*Licit; legally warranted or authorized.*

The terms *lawful* and *legal* differ in that the former contemplates the substance of law, whereas the latter alludes to the form of law. A lawful act is authorized, sanctioned, or not forbidden by law. A legal act is performed in accordance with the forms and usages of law, or in a technical manner. In this sense, *illegal* approaches the meaning of *invalid.* For example, a contract or will, executed without the required formalities, might be regarded as invalid or illegal, but could not be described as unlawful.

The term *lawful* more clearly suggests an ethical content than does the word *legal.* The latter merely denotes compliance with technical or formal rules, whereas the former usually signifies a moral substance or ethical permissibility. An additional distinction is that the word *legal* is used as the synonym of constructive, while *lawful* is not. *Legal fraud* is FRAUD implied by law, or made out by construction, but *lawful fraud* would be a contradiction in terms. *Legal* is also used as the antithesis of equitable, just. As a result, *legal estate* is the correct usage, instead of *lawful estate.* Under certain circumstances, however, the two words are used as exact equivalents. A *lawful* writ, warrant, or process is the same as a *legal* writ, warrant, or process.

## LAWRENCE V. TEXAS

The Supreme Court issued a landmark decision in *Lawrence v. Texas,* 539 U.S., 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), striking down state SODOMY laws as applied to gays and lesbians. In the 6–3 decision, five justices overturned a 1986 ruling that had given states the right to criminalize sodomy and announced that homosexuals as well as heterosexuals enjoy a fundamental right to conduct their intimate relations without interference by the state. The decision elated gay rights advocates and outraged conservative groups that warned the decision set the stage for legalizing gay marriage. In a stinging dissent, Justice ANTONIN SCALIA accused the majority of adopting the "homosexual agenda."

John Geddes Lawrence and Tyron Garner were charged with violating a Texas CRIMINAL LAW that made it a crime for same-sex couples to engage in oral and anal intercourse. A police officer had entered their apartment after a neighbor made a false report of a disturbance; the officer observed the couple having sex and charged them with the crime. They pleaded no contest to the charges and were fined $200 and assessed court costs. They appealed to the Texas Court of Appeals and Criminal Court of Appeals, arguing that the law violated the DUE PROCESS and EQUAL PROTECTION CLAUSES of the FOURTEENTH AMENDMENT. They pointed out that the law only applied to acts committed by homosexuals. The Texas courts rejected these arguments, relying on the Supreme Court's 1986 ruling in *Bowers v. Hardwick,* 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986). In *Bowers,* the Court voted 5–4 to uphold a Georgia criminal sodomy statute. It reasoned that there had been a long legal and moral tradition against acts of sodomy and homosexuality. Therefore, homosexuals did not have a constitutional right to commit sodomy. The decision had been severely criticized by legal commentators and state supreme courts, which had overturned sodomy statutes based on state constitution due process clauses. When the Supreme Court agreed to hear the Texas case, it became clear that members of the Court had second thoughts as well.

Justice ANTHONY KENNEDY, writing for the five-member majority, overturned the *Bowers* precedent, but more importantly made a strong statement on behalf of the CIVIL RIGHTS of gays and lesbians. Justice Kennedy stated that Texas had intruded on the "liberty of the person both

in its spatial and more transcendent dimensions" when it prosecuted the two men for committing sodomy. He noted that they were adult men who,

> with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.

Kennedy based his legal analysis on a set of SUBSTANTIVE DUE PROCESS rulings dealing with BIRTH CONTROL and ABORTION, including the controversial decision in ROE V. WADE, 410 U.S. 113 (1973). Under the Fourteenth Amendment's Due Process Clause, the Court has found certain unwritten but fundamental liberty interests that the state cannot restrict. These cases made clear that the Due Process Clause "has a substantive dimension of fundamental significance in defining the rights of the person." Therefore, women have a right to make decisions affecting their destiny and married and unmarried couples may make decisions about birth control. This line of cases mandated that private sex acts between mutually consenting adults deserved similar protection. However, to do that the Court had to discredit and reverse the *Bowers* precedent.

Justice Kennedy dissected the reasoning in *Bowers* and found it weak and unsubstantiated. In that case, the majority had concluded that the issue at stake was solely the right of homosexuals to commit acts of sodomy. Kennedy disagreed, finding that the true issue had been the state's attempt to control personal relationships through the criminal law. He declared that as a general rule the state should not attempt to "define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects." If homosexuals wish to their express their sexuality in certain conduct the Constitution allows them "the right to make the choice." Kennedy concluded that the *Bowers* majority had misread history. Sodomy laws directed at homosexuals had only been enacted since the 1970s and that only nine states had done so. Moreover, sodomy laws in general had not been enforced against heterosexuals or homosexuals when the acts took place in private. Though traditional religious and cultural beliefs argued against the morality of homosexual conduct, these considerations had no bearing on the legal issue before the Court.

*John Geddes Lawrence and Tyron Garner, petitioners in the 2003 U.S. Supreme Court case* Lawrence v. Texas.
AP/WIDE WORLD PHOTOS

Kennedy pointed out that laws against sodomy had fallen out of favor. In 1961 all 50 states had such laws, but by 2003 only 13 survived. Of these laws, four enforced laws only against homosexual conduct. In addition, laws against homosexual sodomy had been struck down in Great Britain and by the European Court of Human Rights. Therefore, the historical and cultural underpinnings of *Bowers* had been wrong. The majority therefore overturned that precedent and declared a due process right to consensual, intimate conduct. In so ruling the majority rejected an alternate argument based on the Equal Protection Clause. That argument would have struck down the Texas law solely because it applied to acts committed by homosexual but not heterosexuals. Justice Kennedy declined to employ this analysis because it might lead to the redrafting of the law to ban sodomy by "same-sex and different-sex participants." This statement implied that all sodomy laws are unconstitutional.

Justice SANDRA DAY O'CONNOR, who had voted with the majority in *Bowers*, voted to strike down the Texas law on the equal protection grounds rejected by the majority.

Justice Antonin Scalia's dissent, which was joined by Chief Justice WILLIAM REHNQUIST and Justice CLARENCE THOMAS, was based on the conclusion that states should be allowed to legislate their criminal codes. The Supreme Court had no business announcing substantive due process rights that essentially endorsed the personal values of a group of justices. In addi-

tion, Scalia argued that the majority had "effectively decree[d] the end of all morals legislation" and would create the opportunity for "judicial imposition of homosexual marriage, as has recently occurred in Canada."

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CROSS-REFERENCES

Gay and Lesbian Rights.

## LAWSUIT

*A popular designation of a legal proceeding between two parties in the courts, instituted by one party to compel another to do himself or herself justice, regardless of whether the action is based upon law or* EQUITY.

## LAWYER

*A person, who through a regular program of study, is learned in legal matters and has been licensed to practice his or her profession. Any qualified person who prosecutes or defends causes in courts of record or other judicial tribunals of the United States, or of any of the states, or who renders legal advice or assistance in relation to any cause or matter. Unless a contrary meaning is plainly indicated this term is synonymous with attorney, attorney at law, or counselor at law.*

Each of the 50 states employs admissions committees or boards to review the backgrounds of prospective attorneys before they are admitted to practice. Each state also has adopted codes of conduct or disciplinary rules and has appointed adjudicative boards to address ATTORNEY MISCONDUCT. But these measures only weed out or discipline those who have violated laws or those who are otherwise unfit to practice law. They have done little to address the day-to-day civility and conduct of attorneys in their practice. In that regard, the behavior and conduct of peers and colleagues within the profession often impose more palpable influences on newly practicing attorneys than any standards or codes of ethics that they may have learned in law school.

A focus of a new movement in several states is not only to crack down on professional misconduct *per se*, but also to stem borderline conduct before it becomes an ethical violation. U.S. Supreme Court Chief Justice WILLIAM REHNQUIST, addressing new graduates from the University of Virginia School of Law in June 2001, remarked that incivility remained one of the greatest threats to the ideals of American justice and to the public's trust in the law. The conduct of former president BILL CLINTON was considered to have seriously contributed to the harming of public confidence and trust in the legal profession because of his subjective approach to answering questions under oath and other improprieties associated with the legal aspects of his administration.

The AMERICAN BAR ASSOCIATION (ABA) and lawyers' groups in more than a dozen states have joined in the movement to improve not only civility and courtesy among lawyers, but also the public's perception of the profession. Ultimately, the goal of these efforts is to ensure that attorneys have an unequivocal, current, and realistic standard of conduct and ethics to rely upon as a valid guide for their profession.

## LAWYER-WITNESS RULE

*The principle that prohibits an attorney from serving as an advocate and a witness in the same case. Also known as the* advocate-witness rule, *it keeps attorneys from being placed in a situation that could at best create a conflict of interest for both themselves and their clients. It also keeps adversary attorneys from having to cross-examine opposing counsel in front of a jury at trial. Attorneys are allowed to serve as witnesses if their testimony is about factual matters that have no bearing on the case; likewise, they are allowed to remain as counsel if their removal from the case would create a substantial hardship for the client. The rule does not prohibit attorneys from being witnesses in general, nor does it prohibit an attorney-witness from assisting in a client's case, for example by acting as a consultant or attending depositions.*

## LAY

*Nonprofessional, such as a lay witness who is not a recognized expert in the area that is the subject of the person's testimony. That which relates to persons or entities not clerical or ecclesiastical; a person not in ecclesiastical orders. To present the*

*formal declarations by the parties of their respective claims and defenses in pleadings. A share of the profits of a fishing or* WHALING *voyage, allotted to the officers and seamen, in the nature of wages.*

## LAYAWAY

*An agreement between a retail seller and a consumer that provides that the seller will retain designated consumer goods for sale to the consumer at a specified price on a future date, if the consumer deposits with the seller an agreed upon sum of money.*

## LEADING CASE

*An important judicial decision that is frequently regarded as having settled or determined the law upon all points involved in such controversies and thereby serves as a guide for subsequent decisions.*

BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS, 347 U.S. 483, 74 S.Ct. 686, 98 L. Ed. 873 (1954), which declared racial SEGREGATION in public schools to be in violation of the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT to the U.S. Constitution, is an example of a leading case.

## LEADING QUESTION

*A query that suggests to the witness how it is to be answered or puts words into the mouth of the witness to be merely repeated in his or her response.*

Leading questions should not be used on the direct examination of a witness unless necessary to develop the person's testimony. They are permissible, however, on cross-examination. When a party calls a hostile witness—the adverse party or a witness identified with the opposing party—leading questions can be employed during the direct examination of such a witness.

## LEAGUE OF NATIONS

The League of Nations is an international confederation of countries, with headquarters in Geneva, Switzerland, that existed from 1920 to 1946, its creation following WORLD WAR I and its dissolution following WORLD WAR II. Though the League of Nations was a flawed and generally ineffective organization, many of its functions and offices were transferred to the UNITED NATIONS, which has benefited from the hard lessons the league learned.

President WOODROW WILSON, of the United States, was the architect of the League of Nations. When the United States entered World War I on April 6, 1917, Wilson sought to end a war that had raged for three years and to begin constructing a new framework for international cooperation. On January 8, 1918, he delivered an address to Congress that named fourteen points to be used as the guide for a peace settlement. The fourteenth point called for a general association of nations that would guarantee political independence and territorial integrity for all countries.

Following the November 9, 1918, ARMISTICE that ended the war, President Wilson led the U.S. delegation to the Paris Peace Conference. Wilson was the only representative of the Great Powers—which included Great Britain, France, and Italy—who truly wanted an international organization. His power and influence were instrumental in establishing the League of Nations.

Although Wilson was the architect of the league, he was unable to secure U.S. Senate ratification of the peace treaty that included it. He was opposed by isolationists of both major political parties who argued that the United States should not interfere with European affairs, and by Republicans who did not want to commit the United States to supporting the league financially. The treaty was modified several times, but was nevertheless voted down for the last time in March 1920.

Despite the absence of the United States, the League of Nations held its first meeting on November 15, 1920, with forty-two nations represented. The constitution of the league was called a COVENANT. It contained twenty-six articles that served as operating rules for the league.

The league was organized into three main branches. The council was the main peacekeeping agency, with a membership that varied from eight to fourteen members during its existence. France, Germany, Great Britain, Italy, Japan, and the Soviet Union held permanent seats during the years they were members of the league. The remainder of the seats were held by smaller countries on a rotating basis. Peacekeeping recommendations had to be made by a unanimous vote.

The assembly was composed of all members of the league, and each member country had one vote. The assembly controlled the league's budget, elected the temporary council members, and made amendments to the covenant. A two-thirds majority vote was required on most mat-

*The League of Nations Disarmament Conference met in September 1924 to discuss the reduction of military armaments following WWI. The United States was never a member.*

BETTMANN/CORBIS

ters. When a threat to peace was the issue, a majority vote plus the unanimous consent of the council was needed to recommend action.

The secretariat was the administrative branch of the league. It was headed by a secretary general, who was nominated by the council and approved by the assembly. The secretariat consisted of over six hundred officials, who aided peacekeeping work and served as staff to special study commissions and to numerous international organizations established by the league to improve trade, finance, transportation, communication, health, and science.

President Wilson and others who had sought the establishment of the league had hoped to end the system of interlocking foreign alliances that had drawn the European powers into World War I. The league was to promote collective security, in which the security of each league member was guaranteed by the entire league membership. This goal was undermined by the covenant because the council and the assembly lacked the power to order members to help an attacked nation. It was left up to each country to decide whether a threat to peace warranted its intervention. Because of this voluntary process, the league lacked the authority to quickly and decisively resolve armed conflict.

This defect was revealed in the 1930s. When Japan invaded Manchuria in 1933, the League of Nations could only issue condemnations. Then, in 1935, Italy, under BENITO MUSSOLINI, invaded Ethiopia. Ethiopia appeared before the assembly and asked for assistance. Britain and France, unwilling to risk war, refused to employ an oil embargo that would have hurt the Italian war effort. In May 1936 Italy conquered the African country.

The league also lost key member states in the 1930s. Japan left in 1933, following the Manchurian invasion. Germany, under the leadership of ADOLF HITLER, also left in 1933,

following the league's refusal to end arms limitations imposed on Germany after World War I. Italy withdrew in 1937, and the Soviet Union was expelled in 1939 for invading Finland.

The beginning of World War II, on September 1, 1939, marked the beginning of the end for the League of Nations. Collective security had failed. During the war the secretariat was reduced to a skeleton staff in Geneva, and some functions were transferred to the United States and Canada. With the creation of the United Nations on October 24, 1945, the League of Nations became superfluous. In 1946 the league voted to dissolve and transferred much of its property and organization to the United Nations.

The United Nations followed the general structure of the league, establishing a security council, a general assembly, and a secretariat. It had the benefit of U.S. membership and U.S. financial support, two vital elements denied the League of Nations.

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## LEAGUE OF UNITED LATIN AMERICAN CITIZENS

The League of United Latin American Citizens (LULAC)is the oldest organization of Hispanic Americans in the United States. With a membership of approximately 115,000, the organization uses education and advocacy to improve living conditions and seek advances for all Hispanic nationality groups. Headquartered in Washington, D.C., LULAC has thousands of members organized in more than 700 LULAC Councils in 48 states and in Puerto Rico.

The original mission and purpose of LULAC was similar to that of the National Association for the Advancement of Colored People (NAACP), which was founded in 1909 to aid African Americans in their struggle against RACIAL DISCRIMINATION. Hispanic Americans, at the time mostly immigrants from Mexico, faced similar prejudice and discrimination based on the color of their skin and the fact that they spoke Spanish.

The period following the Civil War brought about a backlash that affected both freed slaves and persons who had immigrated from Mexico to the United States seeking work and a better life. According to one source, between 1865 and 1920 more Mexicans were lynched in the Southwestern part of the United States than African Americans in the Southern states. Juries refused to convict Caucasians (known to Hispanic Americans as "Anglos") who committed crimes against Mexicans including murder.

Signs reading "No Mexicans Allowed" were common in many states. Economic and social discrimination were pervasive. Mexican Americans were not permitted to use public accommodations used by Anglos such as drinking fountains, or to be served in Anglo restaurants, hotels, or theaters. The schools that were open to Mexicans were inferior. Many Mexican children who worked alongside their parents picking crops received little or no education. Housing was severely substandard and public services such as streetlights, and water and sewer systems were of poor quality or nonexistent.

In the late 1920s several organizations dedicated to fighting discrimination against Mexicans and other Hispanic people began the work of creating a united organization. In February 1929 the League of United Latin American Citizens was created. Over the next 20 years LULAC organizers faced harassment and intimidation. They were labeled Communists, some were beaten, and others were arrested and jailed.

Despite these tactics, the organization continued to gain strength by disseminating information about citizenship and VOTING RIGHTS, launching CLASS ACTION lawsuits to fight for INTEGRATION in housing, for education, and for access to improved work conditions. In 1954 LULAC won a landmark case, *Hernandez v. State of Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954), when the Supreme Court ruled that the prohibition of Mexican Americans from juries was unconstitutional.

In the early 2000s LULAC continued to grow. The organization represented Latino men and women who were legal residents of the United States or its territories. (The term Latino is used to encompass Chicanos, Mexicans, Latin Americans, and others of Hispanic origin.)

Through its National Educational Service Centers started in 1973, LULAC created a network of 16 counseling centers that have provided millions of dollars in scholarships as well as information, tutoring and mentoring program for thousands of Latino students around the country. In the twenty-first century, LULAC continued its fight to eliminate discrimination and to research and inform the public regarding such issues as immigration, language (particularly its opposition to English-only initiatives), and literacy, and disparities in HEALTH CARE, political representation, and education. LULAC also continues to stress the need for Hispanic Americans to become citizens and to register to vote.

The organization has fostered several major national Hispanic organizations. The American GI Forum (AGIF) was formed to secure the rights of Hispanic military veterans. The Mexican American Legal Defense and Education Fund (MALDEF), which was established by LULAC in 1968, functions as the nation's most significant nonprofit legal advocate for Latinos. SER-Jobs for Progress has worked to improve economic conditions for Latinos through programs that provide job training and also retraining for displaced workers as well as affordable housing.

The growing Latino population in the United States has meant increased significance for LULAC and related organizations. In 2003 there were 6.6 million registered Latino voters in the United States with significant concentrations of Latino voters in California, Texas, Florida, Illinois, and New York. By 2002 the Latino vote was avidly courted by local, state, and national politicians. While the Latino population is by no means monolithic, there are certain themes that resonate with all Latino groups. LULAC is well positioned to continue the fight to decrease discrimination and racism and to give Latinos increased access to better homes and to education, jobs, and health services.

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**CROSS-REFERENCES**

Civil Rights Acts; Discrimination; Equal Protection.

## LEASE

*A contractual agreement by which one party conveys an estate in property to another party, for a limited period, subject to various conditions, in exchange for something of value, but still retains ownership.*

A lease contract can involve any property that is not illegal to own. Common lease contracts include agreements for leasing real estate and apartments, manufacturing and farming equipment, and consumer goods such as automobiles, televisions, stereos, and appliances.

Leases are governed by statutes and by COMMON LAW, or precedential cases. Most leases are subject to state laws, but leases involving the U.S. government are subject to federal laws. Generally, federal laws on leases are similar to state laws.

A lease is created when a property owner (the offeror) makes an offer to another party (the offeree), and the offeree accepts the offer. The offer must authorize the offeree to possess and use property owned by the offeror for a certain period of time without gaining ownership. A lease must also contain consideration, which means that the offeree must give something of value to the offeror. Consideration usually consists of money, but other things of value may be given to the offeror. Finally, the offeror must deliver the property to the offeree or make the property available to the offeree. When a lease is formed, the property owner is called the lessor, and the user of the property is called the lessee.

Generally, a lease may be written or oral, but a lease for certain types of property must be in writing and signed by both parties. For example, if a lessee seeks to lease real property (land or buildings) for more than one year, the lease must be in writing. Some leases must be written, signed, and recorded in a registry of deeds. Such leases usually concern real property that will be leased for a period of more than three years.

A lease term begins when the lessee receives a copy of the lease. However, the lease need not be given directly to the lessee; it is enough that the lessee knows that the lease is in the hands of a third person acting on behalf of the lessee. A lease may also take effect when the lessee assumes control over the property.

In all states, leases dealing with commercial goods and services are strictly regulated by statute. Commercial lease laws govern the rights and duties of lessors and lessees in leases that involve commercial goods. Most states have

*A sample lease agreement*

## Lease Agreement

LEASE AGREEMENT made this _____ (Month & Day), _____ (Year), between _____ _____, with an address at _____ (hereinafter referred to as "Landlord") and _____, with an address at _____ (hereinafter referred to as "Tenant").

IT IS THEREFORE AGREED:

1. PREMISES: The Landlord shall lease to the Tenant the premises located at: _____ _____

2. LEASE TERM: The term of this lease shall be for a period of (_____) year(s), commencing _____ (Month & Day), _____ (Year), and terminating _____ (Month & Day), _____ (Year). The lease term can be extended only by mutual agreement of the parties hereto.

3. RENTAL AMOUNT: The Tenant shall pay to the Landlord an annual sum of _____ ($_____) to lease the property. Rental payments shall be paid in monthly payments, each of which shall be in the amount of _____ ($_____), and each of which shall be paid on the _____ day of the month.

4. OPTION TO RENEW: The Tenant shall have an option to renew this lease on the premises for a (_____) year period upon the following terms and conditions: _____. The Tenant's option to renew must be exercised in writing and must be received by the Landlord no less than (_____) days before the expiration of this lease or any extensions thereof.

5. ARBITRATION: Any controversy or claim arising out of or relating to this lease agreement or the breach thereof shall be settled by arbitration in accordance with the rules then obtaining of the American Arbitration Association, and judgment upon the award rendered may be entered and enforced in any court having jurisdiction thereof.

6. NO VIOLATION OR BREACH: The Landlord and the Tenant warrant and represent each to the other that the performance of this agreement does not violate any laws, statutes, local ordinances, state or federal regulations, regarding controlled substances, or otherwise, or any court order or administrative order or ruling, nor is such performance in violation of any loan document's conditions or restrictions in effect for financing, whether secured or unsecured.

7. BENEFIT: This agreement shall be binding upon and inure to the benefit of the parties hereto and their legal representatives, successors and assigns.

8. NOTICES: Any notice required or desired to be given under this agreement shall be deemed given if in writing sent by certified mail to the addresses of the parties to this lease agreement as follows:

Landlord: _____ (Name & Address)

Tenant: _____ (Name & Address)

9. CAPTIONS: Captions are used in this agreement for convenience only and are not intended to be used in the construction or in the interpretation of this agreement.

10. INVALID PROVISION: In the event any provision of this agreement is held to be void, invalid or unenforceable in any respect, then the same shall not affect the remaining provisions hereof, which shall continue in full force and effect.

11. ENTIRE AGREEMENT: This agreement contains the entire understanding of the parties. It may not be changed orally. This agreement may be amended or modified only in writing that has been executed by both parties hereto.

12. INTERPRETATION: This lease agreement shall be interpreted under the laws of the State of _____.

_____ _____
Landlord Date

_____ _____
Tenant Date

enacted section 2A of the UNIFORM COMMERCIAL CODE, which is a set of exemplary laws formulated by the National Conference of Commissioners on Uniform State Laws and by the American Law Institute. The laws governing commercial leases do not apply to leases of real estate, which are covered by LANDLORD AND TENANT laws.

In all states a court may void an UNCONSCIONABLE lease. A lease is unconscionable if it unduly favors one party over the other. For example, assume that a small-business owner leases property for 30 years in order to operate a gas station. The lease contains a clause stating that the lessor may revoke the agreement without cause and without notice. If the lessee performs his obligations under the lease, but the lessor revokes the lease without notice, the clause allowing termination without notice may be found to be unconscionable. A determination of unconscionability must be made by a judge or jury based on the facts of the case. The fact finder may consider factors such as the relative bargaining power of the parties, other terms in the lease, the purpose of the lease, and the potential loss to either party as a result of the terms of the lease.

Commercial leases must contain certain warranties. If they do not, the warranties may be read into them by a court. One such WARRANTY is the warranty of merchantability. Generally, this warranty requires that all leased property be fit for its general purpose. For example, if a passenger vehicle leased for transportation fails to operate, this failure might be a breach of the IMPLIED WARRANTY of merchantability, and the lessee could sue the lessor for damages suffered as a result.

Another warranty implied in commercial leases is the warranty of fitness for a particular purpose. This warranty applies only if the lessor knows how the lessee plans to use the property and that the lessee is relying on the lessor's expertise in choosing the best goods or services.

A lessee may assign a lease to a third party, or assignee. An assignment conveys all rights under the lease to the assignee for the remainder of the lease term, and the assignee assumes a contractual relationship with the original lessor. However, unless the lessor agrees otherwise, the first lessee still retains the original duties under the lease agreement until the lease expires. Generally, an assignment is valid unless it is prohibited by the lessor.

An assignment differs from a sublease. In a sublease the original lessee gives temporary rights under the lease to a third party, but the third party does not assume a contractual relationship with the lessor. The original lessee retains the same rights and obligations under the lease, and forms a second contractual relationship with the sublessee. Like assignments, subleases generally are valid unless they are prohibited by the lessor.

If a lessor defaults on his obligations under the lease, the lessee may sue the lessor for damages. The measure of damages can vary. If a lessor breaches the lease by sending nonconforming goods, or goods that were not ordered by the lessee, the lessee may reject the goods, cancel the lease, and sue the lessor to recover any monies already paid and for damages caused by the shipment of the nonconforming goods. If the lessee defaults on obligations under the lease, the lessor may cancel the lease, withhold or cancel delivery of the goods, or lease the goods to another party and recover from the original lessee any difference between the amount the lessor would have earned under the original lease and the amount the lessor earns on the new lease.

One controversial lease is the rent-to-own lease. Under such a lease, the lessee pays a certain amount of money for a certain period of time, and at the end of the period, the lessee gains full ownership of the leased item. Rent-to-own leases are often associated with consumer goods such as televisions, stereos, appliances, and vehicles. Many rent-to-own leases provide that the lessor may regain possession and ownership of the property if the lessee defaults. Such clauses have been found to be unconscionable if they are exercised after the lessee has paid more than the market value of the leased item.

For example, assume that a party leases a television worth $300. The lease obliges the lessee to make payments of $50 a month for one year. At the end of the lease period, the lessee will have paid $600 for the television. The amount of the total payment may not be unconscionable, because the lessee gains a television without making one large payment. However, if the lessee defaults after making $550 in payments, and the lessor repossesses the television, a court may find that the lessor's actions are unconscionable and order that the television be returned to the lessee.

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CROSS-REFERENCES

Rent Strike; Subletting.

## LEASEBACK

*A transaction whereby land is sold and subsequently rented by the seller from the purchaser who is the new owner.*

## LEASEHOLD

*An estate, interest, in real property held under a rental agreement by which the owner gives another the right to occupy or use land for a period of time.*

## LEAST RESTRICTIVE MEANS TEST

The "least restrictive means," or "less drastic means," test is a standard imposed by the courts when considering the validity of legislation that touches upon constitutional interests. If the government enacts a law that restricts a fundamental personal liberty, it must employ the least restrictive measures possible to achieve its goal. This test applies even when the government has a legitimate purpose in adopting the particular law. The LEAST RESTRICTIVE MEANS TEST has been applied primarily to the regulation of speech. It can also be applied to other types of regulations, such as legislation affecting interstate commerce.

In *Shelton v. Tucker,* 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960), the U.S. Supreme Court applied the least restrictive means test to an Arkansas statute that required teachers to file annually an AFFIDAVIT listing all the organizations to which they belonged and the amount of money they had contributed to each organization in the previous five years. B. T. Shelton was one of a group of teachers who refused to file the affidavit and who as a result did not have their teaching contract renewed. Upon reviewing the statute, the Court found that the state had a legitimate interest in investigating the fitness and competence of its teachers, and that the information requested in the affidavit could help the state in that investigation. However, according to the Court, the statute went far beyond its legitimate purpose because it required information that bore no relationship to a teacher's occupational fitness. The Court also found that the information revealed by the affidavits was not kept confidential. The Court struck down the law because its "unlimited and indiscriminate sweep" went well beyond the state's legitimate interest in the qualifications of its teachers.

Two constitutional doctrines that are closely related to the least restrictive means test are the overbreadth and vagueness doctrines. These doctrines are applied to statutes and regulations that restrict constitutional rights. The OVERBREADTH DOCTRINE requires that statutes regulating activities that are not constitutionally protected must not be written so broadly as to restrict activities that are constitutionally protected.

The vagueness doctrine requires that statutes adequately describe the behavior being regulated. A vague statute may have a chilling effect on constitutionally protected behavior because of fear of violating the statute. Also, law enforcement personnel need clear guidelines as to what constitutes a violation of the law.

The least restrictive means test, the overbreadth doctrine, and the vagueness doctrine all help to preserve constitutionally protected speech and behavior by requiring statutes to be clear and narrowly drawn, and to use the least restrictive means to reach the desired end.

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CROSS-REFERENCES

Chilling Effect Doctrine; First Amendment; Freedom of Speech; Void for Vagueness Doctrine.

## LEAVE

*To give or dispose of by will. Willful departure with intent to remain away.Permission or authorization to do something.*

*Leave of court* is permission from the judge to take some action in a lawsuit that requires an absence or delay. An attorney might request a leave of court in order to file an amended PLEADING, a formal declaration of a claim, or a defense.

CROSS-REFERENCES

Desertion.

## LEDGER

*The principal book of accounts of a business enterprise in which all the daily transactions are*

*entered under appropriate headings to reflect the debits and credits of each account.*

Information that is contained in a ledger can be admitted into evidence in a lawsuit pursuant to the business record exception of the HEARSAY rule.

## LEE V. WEISMAN

*Lee v. Weisman*, 505 U.S. 577 (1992), represented a major political blow for proponents of prayer in the public schools. The decision came as something of a surprise to many legal and political analysts, but was in keeping with precedents established by the Court in similar cases. In ENGEL V. VITALE (1962), the Court barred prayer in the public schools as an unhealthy union of church and state. This position was affirmed and expanded in ABINGTON SCHOOL DISTRICT V. SCHEMPP (1963), in which the Court ruled that school-sponsored devotional activities and Bible readings were unconstitutional under the Establishment Clause. The Court has continued to adhere to a rigorous interpretation of the Establishment Clause in cases including *Board of Education of Kiryas Joel v. Grumet* (1994), where the Court found that the creation of a special school district to accommodate the needs of a community comprising entirely of Hasidic Jews was unconstitutional under the Establishment Clause. Significantly, the Court also refused a direct request from the administration of President GEORGE H. W. BUSH to review the test for violation of the Establishment Clause developed in *Lemon v. Kurtzman* (1971).

Amid what many people saw as increasing social disorder and lawlessness in the 1980s, a strong political movement emerged favoring a more prominent role for religion within the public schools of the United States. This movement particularly emphasized the supposed benefits of prayer in the public schools, believing that a renewed emphasis on religious teachings in a school setting would lessen the perceived waywardness of youth. By the same token, many people feared that the introduction of religion into the public schools would constitute a dangerous abridgement of the Establishment Clause of the U.S. Constitution, which many interpret as calling for the complete separation of church and state. Throughout the decade of the 1980s, conservative presidents RONALD REAGAN and George H. W. Bush appointed new members to the Supreme Court, including SANDRA DAY O'CONNNOR, ANTONIN SCALIA, DAVID H. SOUTER, and CLARENCE THOMAS, who many hoped would vote to reverse earlier Court rulings barring the introduction of religious teachings or practices into the public schools. A challenge to legal precedent was eagerly awaited by proponents of school prayer.

For many years it was customary for the principals of middle and high schools in Providence, Rhode Island, to invite religious leaders to give nonsectarian prayers as invocations and benedictions at school-sponsored graduation ceremonies. The school system had, in fact, prepared guidelines for clergy delivering such prayers, to insure that the prayers would not include any direct references to specific deities or saints. Despite this effort of the schools to make the prayers innocuous and all-inclusive, a middle school student, Deborah Weisman, and her father, Daniel, objected to the use of any prayer at her June 29, 1989, graduation ceremony. Four days prior to the ceremony, the Weismans sought a temporary restraining order from the U.S. District Court for the District of Rhode Island to prohibit the use of prayer at Deborah's graduation. This motion was denied due to a lack of time to fully consider the case, and the graduation ceremony was conducted as planned. Daniel Weisman then filed for a permanent injunction against the use of prayers at future graduation ceremonies from the district court.

The district court held that the use of prayer at public school graduation ceremonies did constitute a violation of the Establishment Clause. To reach its verdict, the district court applied the three-pronged test for establishing infringement of the Establishment Clause devised in *Lemon v. Kurtzman.* The so-called Lemon Test directed that any state-sponsored program, in order to adhere to the Establishment Clause, must: reflect a clearly secular purpose; have a primary effect that neither advances nor inhibits religion; and avoid excessive government entanglement with religion. The district court did not comment on the first or third stipulations of the Lemon Test, but noted that the use of prayer at official public school functions violated the second clause, in that by having prayer of any kind at a state function, the idea of religion in general was advanced. Robert E. Lee, principal of the Nathan Bishop Middle School of Providence, Rhode Island, and representing the petitioners,

appealed the case to the U.S. Court of Appeals for the First Circuit. The court of appeals upheld the ruling of the district court, and expanded its scope by stating that the practice of using prayer at official school functions in fact violated all three prongs of the Lemon Test. The petitioners then appealed the case to the Supreme Court, which heard arguments on November 6, 1991.

In its argument before the Supreme Court, the petitioners maintained that prayer represents an appropriate and effective means to enable students and parents to seek spiritual guidance at important events such as school graduations. The Court was unmoved by either this logic or the prevailing conservative political climate, however, and upheld the ruling of the appeals court by a 5–4 vote. Justice ANTHONY M. KENNEDY, writing for the majority, made a distinction between this case and *Marsh v. Chambers,* when the Court had ruled that the use of a prayer to open a state legislature's session did not constitute a violation of the Establishment Clause. Kennedy maintained that the opening of a legislature, comprising entirely adults who are there of their own free will cannot be realistically compared to a school graduation, where numerous peer, parental, and social pressures for attendants exist. The Court also noted that school children are particularly susceptible to COERCION through the schools, and as such the behavior of schools with regard to the Establishment Clause must be able to withstand especially careful scrutiny. Justices Blackmun, O'Connor, and John Paul Stevens concurred, adding that the Lemon Test was applicable and represented a straightforward means of assessing compliance with the Establishment Clause. Justices O'Connor, Souter, and JOHN PAUL STEVENS. also wrote separately to maintain that the Establishment Clause should not only be construed as prohibiting the government from favoring one religion over another, but also as barring government support for religion as opposed to nonreligion. Justices WILLIAM H. REHNQUIST, Clarence Thomas, and BYRON R. WHITE, in dissenting from the majority, noted the pervasive tradition of using prayers as invocations and benedictions at a number of nonreligious events, viewing such prayers as being essentially nonreligious in intent when used in this manner.

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CROSS-REFERENCES

Religion.

## ♦ LEE, CHARLES

Charles Lee served as attorney general of the United States from 1795 to 1801 under presidents GEORGE WASHINGTON and JOHN ADAMS.

Lee, born in 1758 in Leesylvania, Virginia, descended from a prominent English family. His earliest known ancestor, Lionel Lee, received a title and estate from William the Conqueror. The Lee line in the United States traced back to 1649, when Richard Lee, a member of Charles I's PRIVY COUNCIL, emigrated to help settle the Virginia colonies. Prior to the American Revolution, six of Richard Lee's descendants served simultaneously in the governing body known as the Virginia House of Burgesses; one of those descendants was Charles Lee's father, Henry Lee II.

Lee's father was a well-educated farmer with extensive landholdings in Virginia. His mother, Lucy Grymes Lee, had been admired and courted by George Washington prior to her marriage. In fact, Lee's mother continued to cultivate Washington's interest long after her marriage—and it was largely owing to her influence that Lee's brother, Henry Lee III (a future general and statesman, and father of General Robert E. Lee) and Lee himself were able to advance far and fast in their chosen careers.

Lee probably followed his brother to the College of New Jersey (later named Princeton). From the beginning, he was interested in the law. He completed his legal studies in Philadelphia under Attorney Jared Ingersoll, and he was admitted to the bar in about 1780. As a young lawyer, he served as a delegate to the CONTINENTAL CONGRESS, and he was a member of the Virginia Assembly. But Lee also maintained his family's tradition of military service. He served as chief naval officer of the District of the Potomac for more than a decade. He resigned in December 1795, when he was appointed attor-

ney general of the United States by President Washington.

When Lee's predecessor, Attorney General WILLIAM BRADFORD, died suddenly in August 1795, Washington was faced with the difficult task of appointing the nation's third attorney general in just six years. The position had little to recommend it. It was a part-time job with no staff, little power, and many demands. Because Lee felt duty bound to repay Washington for years of family support and patronage, he honored Washington's request to take the job. He served as attorney general for the balance of Washington's term and for the entire Adams administration—from December 10, 1795, to February 18, 1801.

The role of the attorney general in Lee's time was to conduct all the suits in the Supreme Court in which the United States was a party, and to give advice and opinions to the president and Congress when requested. Because few suits had made their way to the High Court through the nation's fledgling court system, Lee did not spend much time trying cases. Some of his time was occupied with administrative responsibilities: once in office, his first order of business was to finish a task started by Bradford, the establishment of a fee schedule for compensating federal judicial officers. The vast majority of Lee's time was spent writing opinions that would help to shape the direction of the evolving government.

The nation's first investigation of a federal judge took place in 1796 when the House of Representatives considered a petition to impeach Ohio territorial judge George Turner for criminal misconduct. Given the difficulty of conducting a long-distance IMPEACHMENT proceeding, Lee was asked if there was another way to address the complaint against Turner. Lee's opinion that "a judge may be prosecuted . . . for official misdemeanors or crimes . . . before an ordinary court" cleared the way for the high court in Ohio to settle the matter.

In the 1790s, it was commonly believed that insulting or defaming a representative of a foreign government was punishable by INTERNATIONAL LAW. But when Adams asked Lee if the United States could bring a LIBEL action against the editor of *Porcupine's Gazette* for an allegedly defamatory article about a Spanish ambassador, Lee's opinion anticipated the free speech concerns of such a prosecution. Lee conceded that foreign representatives were due the respect of the U.S. citizenry, but he also noted that "the line between freedom and licentiousness of the press [had] not yet been distinctly drawn by judicial decision."

In another international matter, Lee was asked to render an opinion in a volatile EXTRADITION dispute. Jonathan Robbins was charged with murder on board a British ship. British authorities wanted him bound over to face the charges, but he fought extradition, claiming that he was a U.S. citizen who had been imprisoned on the ship. Lee and SECRETARY OF STATE Timothy Pickering argued that the treaty governing extradition did not apply to crimes committed on the high seas; thus, President Adams was under no obligation to surrender Robbins. The president disagreed with his advisers and delivered Robbins to the British authorities. Adams's decision was extremely unpopular with the public, and his actions may have contributed to the defeat of his party in the subsequent presidential election.

In 1803 Lee represented William Marbury against President Thomas Jefferson's secretary of state, JAMES MADISON (MARBURY V. MADISON,

"NO ACT OF CONGRESS CAN EXTEND THE ORIGINAL JURISDICTION OF THE SUPREME COURT BEYOND THE BOUNDS LIMITED BY THE CONSTITUTION."
—CHARLES LEE

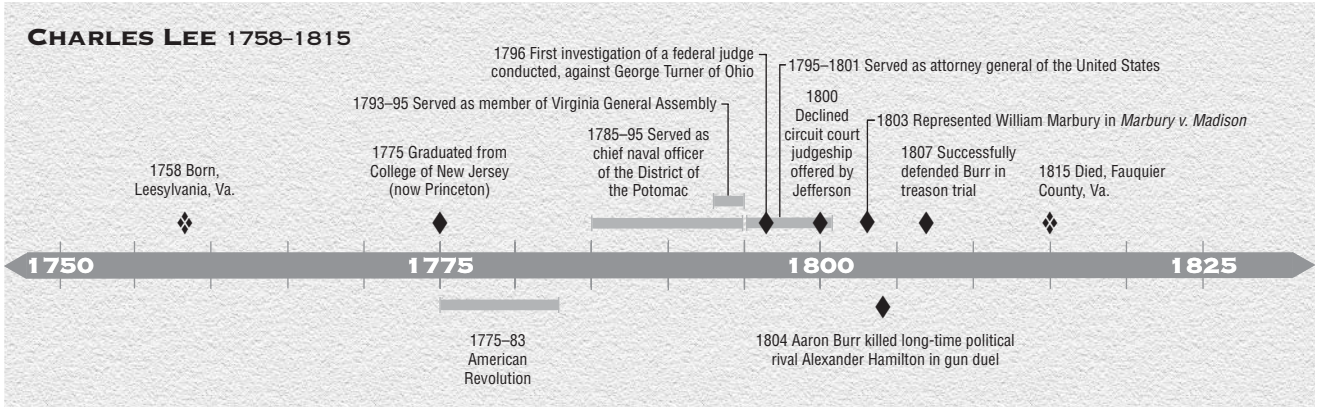

5 U.S. (1 Cranch) 137, 2 L. Ed. 60 [1803]). Marbury was appointed by Adams, Jefferson's predecessor, as a JUSTICE OF THE PEACE, but owing to the rush and confusion surrounding the eleventh-hour appointment, Marbury's commission had not been delivered. When Jefferson ordered Madison to withhold delivery of the commission, Marbury filed suit. Lee lost the case when the Supreme Court ruled that the act of Congress under which Marbury had been issued his commission was unconstitutional. Significantly, *Marbury* established the federal judiciary as the supreme authority in determining the constitutionality of law.

Four years later, Lee was more successful in his defense of statesman and former vice president AARON BURR, who was tried and acquitted on charges of TREASON (a violation of the allegiance one owes to one's sovereign or to the state) (*United States v. Burr,* 25 F. Cas. 2 [1807]). In 1806 Burr had traveled west to promote settlement of land in the Louisiana Territory. His intentions were suspect, and he soon found himself accused of treason for planning to initiate a separation of the western territories from the United States. Lee had been a longtime Burr supporter, and he took the case, winning an acquittal.

Lee died June 24, 1815, in Fauquier County near Warrenton, Virginia.

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CROSS-REFERENCES

Electoral College; Judicial Review.

## LEGACY

*A disposition of* PERSONAL PROPERTY *by will.*

In a narrow technical sense, a legacy is distinguishable from a devise, a gift by will of real property. This distinction, however, will not be permitted to defeat the intent of a testator—one who makes a will—and these terms can be applied interchangeably to either personal property or real property if the context of the will demonstrates that this was the intention of the testator.

A general legacy, a demonstrative legacy, and a specific legacy represent the three primary types of legacies.

## LEGAL

*Conforming to the law; required or permitted by law; not forbidden by law.*

The term *legal* is often used by the courts in reference to an inference of the law formulated as a matter of construction, rather than established by actual proof, such as legal malice.

## LEGAL ADVERTISING

*Any advertising an attorney purchases or places in publications, outdoor installations, radio, television, or any other written or recorded media.*

The pros and cons of legal advertising continue to be widely discussed as the amount and variety of advertising continues to increase each year. On the positive side, legal advertising makes the public aware of current legal issues and lets people know that there are lawyers willing to assist them. Legal advertising also serves the practical purpose of informing people about the times when it may be necessary to consult a lawyer. On the negative side, legal advertising can be manipulated into something that is more slick than informative. Guidelines and legislation have targeted that type of advertising.

The roots of legal advertising can be traced to England's legal system. However, today's standards are based on Canon 27 of the American Bar Association's (ABA's) Canons of Professional Ethics. Originally written in 1908, these guidelines were established to act as model rules for both state and local bar associations. Canon 27, which addressed legal advertising, said, "[S]olicitation of business by circulars or advertisements, or by personal communications, or interviews, not warranted by personal relations are unprofessional." In 1937, this rule was modified to allow attorneys to publish listings in legal directories and other publications that were solely for those in the legal community. The next year the ABA ruled that distinctive listings could also be placed in the white pages of public telephone directories. However, this ruling was overturned in 1951.

In 1969, the ABA reclassified the canons and created the Model Code of Professional Responsibility. In 1983, in an effort to further codify standards of legal conduct, the ABA replaced the code with the Model Rules of Professional Con-

## "Spamming" the Net

Legal advertising has found its way into the phone books and onto radio and television. With the growth of the **INTERNET** as an information and communication resource, lawyers and law firms have established home pages on the World Wide Web to provide legal information and advertise their services. This has created new opportunities and new problems.

In April 1993 Laurence Canter and Martha A. Siegel, of the Phoenix, Arizona, law firm of Canter and Siegel, sent an **E-MAIL** message to thousands of Internet news groups, advertising their immigration law practice, in the hope of gaining new clients. News groups are electronic bulletin boards where people post messages concerning a very specific topic. They have millions of subscribers.

Canter and Siegel's direct mailing to the news groups cost them virtually nothing compared with the cost of a conventional hard copy mailing. In sending their advertisement, they used a process called spamming, which allows a message to be sent to every news group in existence, regardless of whether a particular group might be interested in the content of the message.

The spamming set off a tidal wave of protests from readers of news groups who were angry that the law firm had violated Internet etiquette. Canter and Siegel's Internet provider received thirty thousand messages, some of which were death threats. The law firm claimed to have received over twenty thousand positive responses and to have gained some new clients.

Though the Internet community and members of the legal community voiced their displeasure at the spamming, Canter and Siegel's advertisement was legal. Their action was analogous to placing an advertisement in a newspaper and hoping a person would read it.

**CROSS-REFERENCES**

E-mail; Internet.

duct; Section 7 of the Model Rules deals specifically with lawyer advertising and solicitation. According to Section 7, advertisements must be truthful and not deceptive or misleading. The ABA has defined misleading advertisements as those that create unrealistic expectations of the lawyer's ability; compare the lawyer's service to the services of other lawyers, unless the facts can be substantiated; or contain any known MISREPRESENTATION. Acceptable content includes the lawyer contact information, including address and phone number, type of services offered, bases of fees, available credit arrangements, foreign language ability, references, and client names (with their prior consent). Acceptable media include newspapers, television, radio, phone and legal directories, outdoor installations, and other written or recorded media. Lawyers are required to keep records listing the use and content of each advertisement, as a tool of enforcement.

The ABA periodically amends the model rules to make adjustments for evolving norms and changes in technology. For example, in 1998, the ABA addressed the widespread use of the INTERNET by lawyers to advertise their businesses. According to the ABA Commission on Advertising, "The use of the Internet by legal service providers creates a wide range of ethical issues."

A set of specific guidelines set forth by the ABA limits the ability of lawyers to state or imply that they have special knowledge in a particular field of law, such as patent law or ADMIRALTY LAW. Because potential clients do not typically have a way to verify that a lawyer is a qualified specialist, this guideline protects them from deception. However, in *In re R. M. J.*, 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982), the Supreme Court ruled that lawyers have the right to advertise their area of practice if they use "unsanctioned, non-misleading language." Simply stating that they practice a specific type of law—for example, DIVORCE law—is acceptable; stating that they are specialists in that type of law is not.

Although these guidelines have been helpful in establishing higher standards in legal advertising, several problems have arisen. The major

# Should Legal Advertising Be Restricted?

Despite a series of rulings by the U.S. Supreme Court that lawyers may advertise their services, the issue of legal advertising remains controversial. Proponents of advertising contend that it provides to consumers information about their legal rights and allows those in need of legal services a way to find an attorney. Opponents charge that advertising demeans the legal profession because promoting legal services through print or electronic media tells the public that lawyers are only out to make money. With the rise of the **INTERNET**, legal advertising has moved into a new medium, generating even more questions about the need for restrictions on advertisements.

Opponents of legal advertising are primarily concerned with maintaining the law as a profession. As members of a profession, lawyers have pledged to serve the public interest. For much of U.S. history, lawyers have served as protectors of **CIVIL RIGHTS** and democratic institutions. Those who oppose legal advertising argue that this historic role must be preserved in the face of advertising that is sometimes undignified and demeaning to the profession.

State bar associations and state supreme courts have set standards for the ethical conduct of attorneys. Opponents of advertising believe that the regulation of advertising properly falls within the jurisdiction of these institutions. Though many attorneys may object that regulation restricts their **FIRST AMENDMENT** right to freedom of expression, the U.S. Supreme Court has never ruled that states are without power to police the legal profession.

Opponents argue that even with the restrictions currently imposed, too many lawyers hurt the profession by producing radio and television advertisements that create the perception that lawyers are ambulance chasers. If restrictions were loosened, this group contends, some lawyers would become even more aggressive in soliciting business. Public dissatisfaction with lawyers and the legal system, which has grown considerably since the 1970s, would continue to increase.

Opponents of advertising believe that purposeful competition between lawyers for clients is a great evil of the profession. The legal profession must concentrate on public service rather than profits. When lawyers advertise they provide the public with a misleading picture of legal services, suggesting that legal issues can be solved as easily as a sink can be fixed. Because the law is complex, the consumer cannot evaluate the quality of the offered services.

problem is that the guidelines are the ABA's creation, and therefore the legal profession is responsible for enforcing them. As with any type of self-regulation, this has led some critics to claim that enforcement standards are sometimes lax, and that inadequate punishment only encourages other lawyers to engage in inappropriate or unethical behavior.

The second main problem is that because state associations can create their own legislation based on the ABA's guidelines, what is acceptable legal advertising in one state may be unacceptable in a neighboring state. This can lead to confusion and violation of ethics codes, as well as image problems for the legal profession.

Several landmark cases have set the standards for today's legal advertisements. In *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977), the Supreme Court ruled that legal advertising in newspapers is protected by the **FIRST AMENDMENT**, and that state professional or disciplinary codes cannot prohibit it. However, reasonable restrictions can be placed on deceptive, false, or misleading advertisements.

The Supreme Court addressed the issue of in-person legal solicitation in *Ohralik v. Ohio Bar Ass'n,* 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978). An Ohio Bar Association regulation stated, "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer" (Ohio Code of Professional Responsibility, DR 2-103(A) [1979]). The Supreme Court ruled that in-person solicitation has very limited First Amendment protection, and therefore left its regulation up to the individual states.

The issue of direct-mail solicitation was the focus of *Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988). The Kentucky Bar Association had a statute that prohibited attorneys from using direct-mail solicitation to attract clients. The Supreme

Opponents also note that the high cost of advertising must be passed on to the consumer. Also, the financial burden of advertising may encourage a lawyer to pursue nonmeritorious litigation. In addition, if a lawyer works with a high volume of clients generated by advertising, the lawyer may have little opportunity to communicate with a client or fully analyze a legal issue brought to the lawyer.

Those who support fewer restrictions on legal advertising contend that bar associations and bar leaders are out of step with the realities of U.S. society. First, they argue that bar associations were organized in the late nineteenth century to ensure that lawyers were self-regulated. This meant that a bar association could control the behavior of its members and find ways to preserve the **MONOPOLY** over legal services. These supporters suggest that the public has not been well served by this system.

Though law is a profession, the need to make money has always been acknowledged. Supporters of advertising argue that it is therefore disingenuous for well-heeled lawyers to lament the introduction of competition. They point out that bar leaders have generally come from large corporate law firms, which have no need to advertise for clients but compete for profitable corporate retainers. These firms, they contend, have not provided public service but have concentrated on making profits. If corporate firms had helped with the unmet legal needs of society, perhaps advertising would not be necessary.

Proponents of advertising do not believe that professionalism, public service, and commercialism are mutually exclusive. They contend that lawyers can provide the public with a service by advertising. Much of legal advertising is educational, instructing consumers on what their legal rights are and where they may consult an attorney for free or for a minimal charge. Advertising reaches people who would not otherwise know what to do or where to go with a legal problem.

Proponents of advertising argue that placing the legal profession in the marketplace is not demeaning but democratic. Legal advertising breaks down the elitist notion that lawyers are somehow superior to others in the workforce. Lawyers provide services, many of which are simple. Competition helps to drive down the costs of legal services rather than increase them. Advertising does cost money, but innovative law firms have learned how to use forms, computers, and the services of legal assistants to reduce operating costs. In most cases the quality of legal services has not suffered. As with any business, if consumers are unhappy with the service they receive, they will not return. Proponents contend that the brisk business done by law firms that advertise is evidence of the quality of work they produce.

Those who favor legal advertising generally are convinced that advertisements provide consumers with information about legal services. As long as promotional material is not misleading or false, legal advertising should be subject to minimal restrictions. Proponents note, however, that most lawyers either refrain from advertising or do it in the most conservative way, so as to avoid censure by their bar associations.

Court held that the law violated the First Amendment. The ensuing direct-mail standard was that truthful and nondeceptive ads could be targeted at people with known legal problems.

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CROSS-REFERENCES

Ethics, Legal; Legal Specialization; Professional Responsibility.

## LEGAL AGE

*The time of life at which a person acquires full capacity to make his or her own contracts and deeds and to transact business or to enter into some particular contract or relation, such as marriage.*

In most states a minor attains legal age at eighteen, although for certain acts, such as consuming alcoholic beverages, the age might be higher; for others, such as driving, the age might be lower. Legal age is synonymous with age of consent or age of majority.

## LEGAL AID

*A system of nonprofit organizations that provide legal services to people who cannot afford an attorney.*

In the United States, more than sixteen hundred legal aid agencies provide LEGAL REPRESENTATION without cost or for a nominal fee to people who are unable to pay the usual amount for a lawyer's services. These agencies are sponsored by charitable organizations, lawyers' associations, and law schools, and by federal, state, and local governments. In some states legal aid services are partially funded from the interest earned in law firm trust accounts.

The first U.S. legal aid agency was founded in 1876 in New York City by the German Society. The agency assisted German immigrants with legal problems. Beginning in the late nineteenth century, lawyers' associations took the lead in providing low-cost legal services. In 1911 the National Alliance of Legal Aid Societies was established to promote the concept of legal aid to people who were poor. The alliance, now known as the National Legal Aid and Defender Association, publishes information and holds conferences dealing with legal aid issues.

Legal aid agencies handle civil cases, including those concerning ADOPTION, BANKRUPTCY, DIVORCE, employment issues, and LANDLORD AND TENANT disputes. These agencies may not use federal funds to handle criminal cases. The criminal counterpart to the U.S. legal aid system is called the public defender system. Public defenders are funded through state and local agencies and federal grants.

Legal aid agencies are run by attorneys and administrative support staff. They are often supplemented by law students, who participate in legal aid clinics that give students opportunities to work with indigent clients. In addition, many private attorneys volunteer their time to assist these agencies. In some jurisdictions the court may appoint private attorneys to handle legal aid clients. Despite these PRO BONO (donated) services, legal aid agencies typically have more clients than they can serve. When they do, they may exclude complicated matters, such as divorce, from the legal services they provide.

The scope of legal aid widened dramatically in 1964, when President LYNDON B. JOHNSON established the Office of Legal Services. This agency organized new legal aid programs in many states, then suffered budget cuts in the early 1970s. In 1974 Congress disbanded the office and transferred its functions to the newly created LEGAL SERVICES CORPORATION (Legal Services Corporation Act of 1974, 88 Stat. 378 [42 U.S.C.A. § 2996]). The corporation is a private, nonprofit organization that provides financial support to legal aid agencies through the distribution of grants. It also supports legal aid attorneys and staff through training, research, and technical assistance.

CROSS-REFERENCES

Pro Bono; Right to Counsel.

## LEGAL ASSISTANT

*A person, working under the supervision of a lawyer, qualified through education, training, or work experience to perform substantive legal work that requires knowledge of legal concepts and is customarily, but not exclusively, performed by a lawyer; also known as a paralegal.*

Legal assistants, or paralegals, help attorneys deliver legal services. Although they assist attorneys in very technical areas of the law, they are prohibited from practicing law without a license. Legal assistants cannot represent a client or give legal advice. All work performed by legal assistants must be done under the supervision of an attorney, who is subject to disciplinary procedures for ethical violations committed by the legal assistant.

The legal assistant profession emerged in the 1960s, as law firms hired persons, usually women, to help lawyers prepare complex or highly detailed cases. These persons typically worked in specialties such as BANKRUPTCY, probate and estate planning, real estate, and civil litigation, where they organized documents, completed forms, and prepared cases for trial.

In 1968 the AMERICAN BAR ASSOCIATION (ABA) created the Special Committee on Lay Assistants for Lawyers. The committee worked to develop the training of nonlawyer assistants, and the utilization of their services to enable lawyers to perform their professional duties more effectively and efficiently. In 1973 the ABA approved the Guidelines for the Approval of Legal Assistant Education Programs, and in 1975 it approved the first eight legal assistant training programs under those guidelines. In 1996 there were 206 ABA-approved education programs in the United States.

A drive for professional standing led to the establishment of two legal assistant organizations. The National Federation of Paralegal Associations (NFPA) was founded in 1974. The NFPA is a federation of sixty member associations that works to improve the educational and professional standing of legal assistants. In 1975 the National Association of Legal Assistants (NALA) was formed.

Both the NFPA and the NALA have worked to increase the educational requirements for becoming a legal assistant. In the 1960s legal assistants learned on the job. In the 1970s a variety of educational options became available: certificate programs, two-year associate of arts degrees in paralegal studies, and four-year bachelor of arts degrees in paralegal studies. In the 1990s postbaccalaureate programs started to appear.

The demand for legal assistants has continued to grow since the 1960s. It is estimated that by the year 2000 there will be one hundred thousand paralegals in the United States, most of them women. A 1995 survey by the NFPA revealed that 94 percent of all legal assistants were women. Besides working for law firms, legal assistants are now employed by corporations, banks, government agencies, and insurance companies. The demand for legal assistants is highest in large cities.

The profession has continued to explore ways to improve its status. For example, the NALA offers a certified legal assistant credential. This credential is based on a two-day examination that includes legal research, legal terminology, ethics, communications, and four areas of SUBSTANTIVE LAW chosen by the candidate. It must be renewed every five years by attending continuing education programs. The NALA also offers specialty examinations to those with advanced knowledge in substantive areas of the law.

The regulation of legal assistants has been addressed by numerous state legislatures, state bar association committees, and state supreme court task forces. None of these entities have implemented regulation, whether it be registration, licensure, or certification.

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## LEGAL CAP

*Long stationery with a wide left-hand margin and a narrow right-hand margin, used by attorneys.*

The trend of the courts is to move away from permitting a document of this size to be filed. Courts presently recommend or require the use of standard size paper.

## LEGAL CAUSE

*In the law of* TORTS*, conduct that is a substantial factor in bringing about harm, which is synonymous with proximate cause.*

## LEGAL CERTAINTY

*A test in* CIVIL PROCEDURE *designed to establish that a complaint has met the minimum amount in controversy required for a court to have jurisdiction to hear the case. Under this test, if it is apparent from the face of the pleadings, to a "legal certainty" that the plaintiff cannot recover or was never entitled to the amount in the complaint, then the case will be dismissed.*

For example, the existence of federal diversity jurisdiction on the part of a federal district court—one aspect of which is the presence of an amount in controversy in excess of $75,000—is a threshold QUESTION OF LAW, or one which must be determined by the judge at the start of the action by applying the legal-certainty test.

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CROSS-REFERENCES

Amount in Controversy; Dismissal; Jurisdiction.

## LEGAL DECISION

See COURT OPINION.

## LEGAL DETRIMENT

*A change in position by one to whom a promise has been made, or an assumption of duties or liabilities not previously imposed on the person, due to the person's reliance on the actions of the one who makes the promise.*

CROSS-REFERENCES

Consideration; Contracts.

## LEGAL EDUCATION

There were no law schools in colonial America. Those who sought a legal career had several options. They could embark on a self-directed course of study; they could serve as an assistant in a clerk of court's office; or they could travel to England to study at the Inns of Court. The most common method of obtaining a legal education, however, was through the apprenticeship system.

The apprenticeship system allowed men (it was generally unavailable to women) to acquire education and experience by working under an experienced practitioner. Ideally, an apprentice would spend several years learning both the law and the practical aspects of a law practice. The quality of apprenticeships varied greatly, however, depending on the administering attorney's skill and attention. Some apprenticeships were merely a source of cheap labor. THOMAS JEFFERSON once commented that the services he was expected to render as an apprentice were worth more than the instruction he received.

In 1779, Jefferson helped found the first chair of law, at William and Mary College, and appointed his mentor, GEORGE WYTHE, to fill it. Yale, Columbia, the University of Maryland, and Harvard followed suit. The positions they established were part of the general university curriculum and were typically filled by practitioners rather than academicians. This early movement to emphasize the scholarship of law gained little momentum because most lawyers believed that apprenticeships provided sufficient legal training. In 1784, however, proprietary (for-profit) law schools began to spring up, which spurred the transformation of legal education.

Proprietary law schools were essentially specialized and elaborate law offices. The first and most famous was Connecticut's LITCHFIELD LAW SCHOOL. Its 14-month course provided instruction in subjects such as property, contracts, procedure, master-and-servant, and commercial law—similar to the subjects of some of today's first-year law school classes. Litchfield graduated about one thousand students in its 49-year history, including 2 future vice presidents, 101 congressmen, 28 senators, 14 governors, and scores of distinguished state jurists.

The advent of law professorships, proprietary schools, and bar associations brought some standard of form to legal education. These standards deteriorated, however, thanks in part to ANDREW JACKSON, who was elected the seventh president of the United States in 1828. Jackson, a lawyer, considered himself to be a champion of the common person. State legislatures quickly followed his lead, eschewing anything elitist and reasserting authority formerly delegated to bar associations. Bar admission standards declined. Nearly anyone who could show "good moral character" was permitted to practice law, regardless of any knowledge of the field. BAR EXAMINATIONS, if required at all, were usually perfunctory.

Standards dropped even at Harvard Law School, which was founded in 1817 as the first academic law school. By the end of the 1820s, students who were denied admission to Harvard College could go directly into the law school; the school also quit giving exams. In 1829, however, Justice JOSEPH STORY of the U.S. Supreme Court became a Harvard Law professor and augured Harvard's emergence as the first modern law school. In 1870, CHRISTOPHER COLUMBUS LANGDELL became dean of Harvard Law School, essentially launching the modern era of legal education.

Langdell believed that law could be taught as a science. Rather than listening passively to lectures and reading treatises, Langdell's students dissected reported case decisions. Using a technique known as Socratic dialogue, professors bombarded their students with questions, forcing them to analyze the facts, reasoning, and law in each case. In addition, Langdell grouped related cases together, devoting separate books to different topics. Langdell's method of instruction through dialogue and case-study is standard in today's law schools.

Langdell also instituted tighter admission standards, expanded the program from two to three years, and raised graduation requirements. Other university law schools soon began to adopt some of Harvard's lofty standards.

The AMERICAN BAR ASSOCIATION (ABA), founded in 1878, along with the Association of American Law Schools (AALS), formed in 1900, worked to consign apprenticeships to the pages of history. In 1917, 36 out of 49 jurisdictions still required a period of apprenticeship, but future lawyers could substitute law school. In the last half of the nineteenth century, a high school graduate could enter most law schools, but the ABA and the AALS worked to steadily increase admission standards. By 1931, 17 states required two years of college before admission, and 33 had a three-year law curriculum. Just eight years

later, 41 states required at least two years of college. Today, law schools require prospective students to have a four-year degree from an accredited college or university.

Professional legal development continues throughout a lawyer's career. In 1975, Minnesota was the first state to mandate CONTINUING LEGAL EDUCATION for practitioners, requiring 45 hours of approved legal study every three years. Since then, the majority of states have established rules that require some form of mandatory continuing education, although requirements vary by state. Continuing education is also required for attorneys who wish to be board certified as specialists in a certain area of law. Certified legal specialist programs are offered in many states, and are accredited by the American Bar Association (ABA).

The law profession, like many others, was slow to open up to women. The first woman lawyer in the United States was Arabella Mansfield, who became a member of the Illinois bar in 1869. Mansfield studied in her brother's law office, and was admitted to the bar despite the fact that Illinois legislation required any person applying for bar admission to be white, male, and over 21 years of age. Ada Kepley was the first woman in the United States to earn a law degree. She graduated from Union College of Law (now Northwestern University Law School) in 1870. By 1930, most U.S. law schools were admitting women, but not Harvard Law School. The school remained closed to women until 1950. Although women were finally accepted into law schools, the number of women who attended was scant. Until the mid-1960s, less than 3 percent of law students were women. Those numbers surged during the 1970s. Today, women make up almost 50 percent of U.S. law school admissions.

Desegregation of law schools came no more quickly than it did to other educational institutions, despite the pivotal role lawyers played in the desegregation process. Since the 1960s, minority enrollment in law schools has increased, but the numbers still remain low. In 1960, about one percent of law school students were African American. By the late 1990s, that number had grown to only 8 percent. As a result, a number of schools have active recruitment programs to help ensure greater diversity in their student body.

When schools use race as a factor in the admissions process, however, critics charge that they are violating constitutional rights. Such charges have led to a number of controversial cases, including *Grutter v. Bollinger* (288 F. 3d 732 [2003]), in which a prospective white student contended that she was denied admission to the University of Michigan Law School because the school uses race as a deciding factor in admissions. In a 5–4 opinion, the Supreme Court ruled that the school's admission policy did not violate the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT because there was a "compelling interest in obtaining the educational benefits that flow from a diverse student body."

**Law Degrees Conferred, 1960 to 2000**

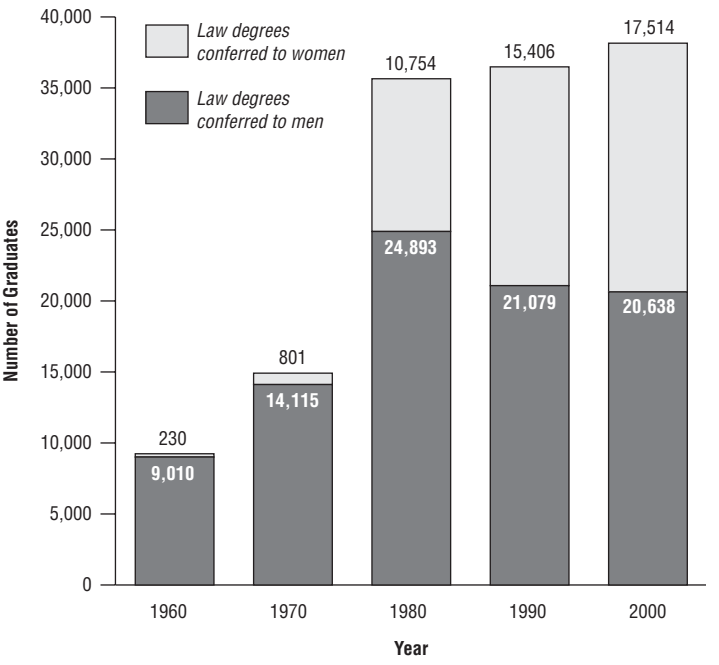


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CROSS-REFERENCES

Affirmative Action; Case Method; Law School Admission Test; Legal Specialization.

## LEGAL FICTION

*An assumption that something occurred or someone or something exists which, in fact, is not the case, but that is made in the law to enable a court to equitably resolve a matter before it.*

In order to do justice, the law will permit or create a legal fiction. For example, if a person undertakes a renunciation of a legacy which is a gift by will the person will be deemed to have predeceased the testator—one who makes a will—for the purpose of distributing the estate.

## LEGAL HISTORY

*The record of past events that deal with the law.*

Legal history is a discipline that examines events of the past that pertain to all facets of the law. It includes analysis of particular laws, legal institutions, individuals who operate in the legal system, and the effect of law on society. U.S. legal history is a relatively new subtopic that began to grow dramatically in the 1960s.

Before the 1960s legal history was confined mostly to biographies of famous lawyers and judges and to technical analysis of particular areas of SUBSTANTIVE LAW. In general it was an afterthought. Political historians made reference to important U.S. Supreme Court cases, but there was little in-depth analysis of topics such as CRIMINAL LAW, the law of SLAVERY, or the development of the state and federal court systems.

The study of U.S. legal history began with the work of James Willard Hurst. In 1950 Hurst published *The Growth of American Law: The Law Makers,* which examined many types of historical sources in order to fashion a history of U.S. law. Hurst went beyond the work of judges and courts to find material about the law in constitutional conventions, legislatures, administrative agencies, and the bar. Among his many other works, Hurst explored the relationship of law and the economy in *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836–1915* (1964).

In his scholarship Hurst tried to integrate public law (law created by government bodies) with private law (law implemented through public courts to resolve individual disputes). Legal historians who began researching and writing in the 1960s typically emphasized one of these types of law. Lawrence M. Friedman emphasized the work of private law in *A History of American Law,* first published in 1973. In this book Friedman examined, among many topics, the law of contract, real property, and TORT.

Paul L. Murphy focused on public law, writing a series of articles and books relating the U.S. Constitution to the social and cultural pressures of different historical periods. In *World War I and the Origin of Civil Liberties in the United States* (1979), Murphy analyzed the relationship between the United States' experience in war and developing interest in FIRST AMENDMENT civil liberties.

The field of legal history also benefited from the growth of social history in the 1960s. The issues of gender, race, and class became crucial to historians during the VIETNAM WAR period. Legal historians such as Kermit L. Hall have built on these issues, interweaving legal history with social and cultural history to explain how law is both a reactive mechanism, responding to public problems, and an active mechanism, shaping behavior through its rules and structure. Hall's *The Magic Mirror: Law in American History* (1989) was the first major work to synthesize twenty years of social and legal history research into an overview of U.S. law, public and private.

Legal historians have looked at the role of law in U.S. history in several disparate ways. Hurst and many other historians have seen the law as a means of enhancing political and economic consensus. Their view is that law acts as a neutral party through which conflicting interests work to achieve their own ends.

Other, more radical historians see law as a formal device for perpetuating the domination of the ruling economic class. Their viewpoint emphasizes that law is not the expression of neu-

tral rules but a creature of power and politics. Therefore, those who lack power—including women, members of racial minorities, and people who are poor—have been hurt by the law.

The consensus and conflict models of legal historical analysis turn on their positions concerning the principle called the RULE OF LAW. This rule, on which all other legal rules are based, has been a basic principle of Western culture since the seventeenth century. It posits that all persons are equal before a neutral and impartial authority, regardless of economic standing, gender, race, family connections, or political connections. Legal historians produce scholarship that goes to the question of whether all persons receive justice.

The field of legal history continues to grow, with historians now exploring every facet of the law. History is no longer defined as just Supreme Court decisions or congressional legislation. Historians examine the inner workings of state courts, frontier law of the nineteenth century, the role of law in slavery, criminal law, legal bias against homosexuality, and more.

CROSS-REFERENCES

Critical Legal Studies; Feminist Jurisprudence; Jurisprudence.

## LEGAL LIST STATUTES

*State laws that enumerate the investments into which certain institutions and fiduciaries—those who manage money and property for another and who must exercise a standard of care in such activity in accordance with law or contract—can venture.*

Legal lists are frequently limited to high caliber SECURITIES that generate a satisfactory yield with a minimum amount of risk to the principal.

## LEGAL MALPRACTICE

A lawyer is obligated to comply with a code of ethics that is adopted by the state in which the lawyer practices. These rules, typically known as the Model Rules of Ethics, or Ethical Rules, address a lawyer's conduct in various situations. A lawyer has a duty, in all dealings and relations with a client, to act with honesty, GOOD FAITH, fairness, integrity, and fidelity. He or she must possess the legal skill and knowledge that is ordinarily possessed by members of the profession. A lawyer should not take any action that is improper under these rules or that which even suggests the appearance of impropriety.

Even after the lawyer and the client terminate their relationship, a lawyer is not permitted to acquire an interest that is adverse to a client, in the event that this might constitute a breach of the ATTORNEY-CLIENT PRIVILEGE. A lawyer may not use information that he or she obtained from a client as a result of their relationship. For example, it would constitute unethical behavior for an attorney to first advise a client to sell a piece of property so that it would not be included in the client's PROPERTY SETTLEMENT upon DIVORCE, and then to purchase the property from the client for half of its market value.

Any dealings that a lawyer has with a client will be carefully examined. Such dealings require fairness and honesty, and the lawyer must show that no UNDUE INFLUENCE was exercised and that the client received the same benefits and advantages as if he or she had been dealing with a stranger. If the client had independent legal advice about any transaction, that is usually sufficient to meet the lawyer's burden to prove fairness.

A lawyer also has the duty to provide a client with a full, detailed, and accurate account of all money and property handled for him or her. The client is entitled to receive anything that the lawyer has acquired in violation of his duties to the client.

If a lawyer fails to promptly pay all funds to his client, the lawyer may be required to pay interest. A lawyer is liable for fraud—except when the client caused the attorney to commit fraud—and is generally liable for any damages resulting to the client by his NEGLIGENCE. In addition, a lawyer is responsible for the acts of associates, clerks, legal assistants, and partners and may be liable for their acts if they result in losses to the client.

Negligent errors are most commonly associated with legal malpractice. This category is based on the premise that an attorney has committed an error that would have been avoided by a competent attorney who exercises a reasonable standard of care. Lawyers who give improper advice, improperly prepare documents, fail to file documents, or make a faulty analysis in examining the title to real estate may be charged with MALPRACTICE by their clients. A legal malpractice action, however, is not likely to succeed if the lawyer committed an error because an issue of law was unsettled or debatable.

Many legal malpractice claims are filed because of lack of communication and negligence in the professional relationship. The improper and unprofessional handling of the attorney-client relationship leads to negligence claims that are not based on the actual services provided. Lawyers who fail to communicate with their clients about the difficulties and realities of the particular claim risk malpractice suits from dissatisfied clients who believe that their lawyer was responsible for losing the case.

Another area of legal malpractice involves fee disputes. When attorneys sue clients for their fees, many clients assert malpractice as a defense. As a defense, it can reduce or totally eliminate the lawyer's recovery of fees. The frequency of these claims is declining, in part perhaps because attorneys are reluctant to sue to recover their fees.

A final area of legal malpractice litigation concerns claims that do not involve a deficiency in the quality of the lawyer's legal services provided to the client, but an injury caused to a third party because of the lawyer's representation. This category includes TORT claims filed against an attorney alleging MALICIOUS PROSECUTION, ABUSE OF PROCESS, DEFAMATION, infliction of emotional distress, and other theories based on the manner in which the attorney represented the client. These suits rarely are successful except for malicious prosecution. Third-party claims also arise from various statutes, such as SECURITIES regulations, and motions for sanctions, such as under Rule 11 of the Federal Rules of Civil Procedure.

Short of filing an actual lawsuit, someone who is unsatisfied with an attorney's services may file a bar complaint with the state bar in the state where the attorney practices. The bar is then obligated to investigate the matter, and the attorney is obligated to cooperate in the investigation, or he or she will face further sanctions. A bar complaint is considered an extremely serious matter and must be answered even if the attorney believes the compliant is frivolous. The bar has the authority to discipline its attorneys with formal and informal procedures up to and including the authority for disbarment. The procedures for these actions are governed by state law.

CROSS-REFERENCES

Attorney Misconduct; Ethics, Legal; Privileged Communication.

## LEGAL POSITIVISM

*A school of* JURISPRUDENCE *whose advocates believe that the only legitimate sources of law are those written rules, regulations, and principles that have been expressly enacted, adopted, or recognized by a governmental entity or political institution, including administrative, executive, legislative, and judicial bodies.*

The key to legal positivism is in understanding the way positivists answer the fundamental question of jurisprudence: "What is law?" The word "positivism" itself derives from the Latin root *positus*, which means to posit, postulate, or firmly affix the existence of something. Legal positivism attempts to define law by firmly affixing its meaning to written decisions made by governmental bodies that are endowed with the legal power to regulate particular areas of society and human conduct. If a principle, rule, regulation, decision, judgment, or other law is recognized by a duly authorized governmental body or official, then it will qualify as law, according to legal positivists. Conversely, if a behavioral norm is enunciated by anyone or anything other than a duly authorized governmental body or official, the norm will not qualify as law in the minds of legal positivists, no matter how many people are in the habit of following the norm or how many people take action to legitimize it.

Legal positivism is often contrasted with NATURAL LAW. According to the natural law school of jurisprudence, all written laws must be informed by, or made to comport with, universal principles of morality, religion, and justice, such that a law that is not fair and just may not rightly be called "law." For example, persons engaging in peaceful protest through civil disobedience often appeal to a higher natural law in denouncing societal practices that they find objectionable. Legal positivists generally acknowledge the existence and influence of non-legal norms as sources to consult in evaluating human behavior, but they contend that these norms are only aspirational, for persons who contravene them suffer no immediate adverse consequences for doing so. By contrast, positivists emphasize that legal norms are binding and enforceable by the POLICE POWER of the government, such that individuals who violate the law may be made to face serious consequences including fine, imprisonment, loss of property, or even death.

Legal positivism serves two values. First, by requiring that all law be written, positivism

ensures that members of society will be explicitly apprised of their rights and obligations by the government. In a legal system that is run in strict accordance with positivist tenants, litigants would never be unfairly surprised or burdened by the governmental imposition of an unwritten legal obligation that was previously unknown or non-existent. Second, legal positivism serves to curb judicial discretion. In some cases, judges are not satisfied with the outcome of a case that would be dictated by a narrow reading of existing laws, and they may be tempted to reach a result that is more fair and just. However, legal positivism requires judges to decide cases in accordance with the law, and not their personal predilections. In this way, positivists believe that the integrity of the law is maintained through a neutral and objective judiciary that is not guided by subjective notions of right and wrong.

Not surprisingly, the autonomous and detached nature of legal positivism has been criticized for its harshness. The mere enactment of a law by a political institution, some critics of positivism have argued, does not mean that society should accept all such laws as legitimate and binding. For example, the slave codes enforced by the Confederacy during the Civil War generally contained clearly written rules that systematically deprived African-Americans of their civil liberties, not to mention their human dignity. In Nazi Germany, Adolph Hitler's regime brutally stripped Jews of any governmental protection through a labyrinth of legal codes.

Despite the written nature of these laws, critics of legal positivism argue, such legal systems must not be treated with the same respect that is afforded to regimes that genuinely confer fundamental liberty equally upon all persons. Legal positivism, these critics point out, sometimes emasculates the social function of law by preventing it from serving human needs. Thus, these critics conclude that written law ceases to be legitimate when it is divorced from principles of fairness, justice, and morality. The American colonists based their revolt against the tyranny of British law precisely upon this point. In fact, the Declaration of Independence, by declaring that "all men are created equal. . . [and] endowed by their Creator with certain inalienable rights," embodies clear natural law principles.

Legal positivism has ancient roots. Christians believe that the Ten Commandments have sacred and pre-eminent value in part because they were inscribed in stone by God, and delivered to Moses on Mount Sinai. When the ancient Greeks intended for a new law to have permanent validity, they inscribed it on stone or wood and displayed it in a public place for all to see. In classical Rome, Emperor Justinian (483-565 A.D.) developed an elaborate system of law that was contained in a detailed and voluminous written code.

Prior to the American Revolution, English political thinkers JOHN AUSTIN and THOMAS HOBBES articulated the command theory of law, which stood for the proposition that the only legal authorities that courts should recognize are the commands of the sovereign, because only the sovereign is entrusted with the power to enforce its commands with military and police force.

The most famous advocate of legal positivism in American history is probably Justice OLIVER WENDELL HOLMES, JR. He wrote that the "prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" (O.W. Holmes Jr., "The Path of the Law," 10 Harvard Law Review 457 [1897]). In making this statement, Holmes was suggesting that the meaning of any written law is determined by the individual judges interpreting them, and until a judge has weighed in on a legal issue, the law is ultimately little more than an exercise in trying to guess the way a judge will rule in a case.

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## LEGAL PROCEEDINGS

*All actions that are authorized or sanctioned by law and instituted in a court or a tribunal for the acquisition of rights or the enforcement of remedies.*

## LEGAL PUBLISHING

*The production of texts that report laws or discuss the* PRACTICE OF LAW.

Originally limited to printed materials, legal publishing now encompasses electronic media

as well, with most legal publications becoming available online or in CD-ROM format.

The first collections of American laws were published during the seventeenth and eighteenth centuries. Printing presses allowed laws to be printed on a regular basis. Colonists relied on ENGLISH LAW as COMMON LAW, so local laws were not reported until after the American Revolution. Once the colonies gained independence and formed the United States, the number of lawyers grew, along with the need for a printed record of U.S. laws.

The original case reporters were published by individuals without the support of the government. In 1841, Georgia was the first state government to require its judges to write out their decisions. The clerk of the court would send the decisions to the governor, who had the decisions printed and distributed to all of the judges in the state.

During the late nineteenth century, John B. West started the National Reporter System. West's *Syllabi* contained the full text of decisions of the Supreme Court of Minnesota. The publication was enlarged to include decisions of Wisconsin and eventually became the *Northwestern Reporter.* West's company soon expanded to cover decisions across the country. The company took responsibility for making sure that the reports were accurate. It included headnotes for each case, summarizing the issues of law that were discussed in the decision. The decisions were published in parts that were later reprinted in hardbound volumes. Using these "advance sheets" allowed decisions to be reported more quickly.

Other publishers that began reporting decisions in the 1800s included Matthew Bender and Company, Bancroft-Whitney Company, and the Lawyers Cooperative Publishing Company. Lawyers Cooperative Publishing printed selected decisions. Each year, it also printed a volume that reported where original decisions were cited in current decisions.

Federal decisions began to be reported in a regular and complete form in the late 1800s. The first volume of *American Law Reports* was printed in 1919 by the Edward Thompson and Lawyers Cooperative Publishing Companies.

With so many decisions being reported, it became difficult to determine the status of a case. Lawyers needed to know whether a case had been overruled or modified. Typically, they would mark any modifications to a decision in the margins of their reporters. In 1875, Frank S. Shepard published the *Illinois Annotations.* This was a series of sheets that could be cut out and pasted in the margins of the book that reported a case. The sticker format was dropped in 1900, and the citator took on its current tabular format. Originally covering only cases, Shepard's citator was expanded to include citations to the Constitution, statutes, and court rules.

The publication of statutes followed a history similar to that of cases. Individual states printed their own statutes beginning at the end of the eighteenth century. The first commercial effort to publish federal laws occurred in 1902. In 1924, Congress authorized the publication of the *U.S. Code.* West Publishing Company and the Edward Thompson Company were hired to assist with the publication. Federal law was divided into individual titles. Today, statutes are first published as unedited, uncollated statutes called "slip laws." At the end of each session, the statutes are gathered into the *U.S. Code.*

Little, Brown and Company was the first to publish books specifically for students. In 1871, Little, Brown started publishing casebooks for students. Casebooks present leading cases in a particular area of law, with accompanying discussion of the law. In 1880, 11 titles were available.

Other common legal publications include practice aids for lawyers, such as form books and practice books. Form books present standard formats for common legal documents. Practice books describe the laws of a particular jurisdiction or practice area and give guidelines on various aspects of the law.

Legal periodicals make up another segment of the legal publishing market. These include newspapers and newsletters that report on current law. Within law schools, student-edited law reviews present articles by students, professors, and law school faculty.

During the 1990s, three companies acquired the vast majority of majority of the major legal publishing companies in the United States. In 1997 alone, the costs of these MERGERS AND ACQUISITIONS amounted to about $1 trillion. Many of the companies that were acquired during this time period were those with long histories in the world of legal publishing. The American Association of Law Libraries' Committee on Relations with Information Vendors (CRIV) maintains lists of the publishing compa-

nies that belong to each parent company (see <www.aallnet.org/committee/criv/>).

Thomson Corporation acquired the largest legal publisher, West Publishing Company, in 1996. It merged Thomson Publishing Company and West Publishing Company to form West Group. West Group continues to publish the National Reporter System, the *United States Code Annotated*, many annotated state statutes, and many other publications formerly published by West Publishing Company. Other companies acquired by, or merged with, Thomson include Lawyers Cooperative Publishing, Research Institute of America, Bancroft-Whitney, Clark Boardman Callaghan, Foundation Press, Rutter Group, Findlaw, Lawoffice.com, and Gale Group.

Reed Elsevier, P.L.C. owns LEXIS Law Publishing, which now publishes the *United States Code Service* and several other legal titles. Reed Elsevier also acquired such companies as Matthew Bender & Co., Mealey Publications, Michie Company, Shepard's, and Martindale-Hubbell. The companies publish a variety of annotated state statutes, other legal practice materials, and SHEPARD'S CITATIONS.

A third company, Wolters Kluwer, owns Aspen Publishers, Inc., CCH Incorporated, Little, Brown, & Company, and Loislaw. The companies produce a number of sources for law students, including casebooks. CCH Incorporated publishes a number of specialized publications focusing, for example, on tax, SECURITIES, and COPYRIGHT.

Today's legal publishing market includes electronic publishing. COMPUTER-ASSISTED LEGAL RESEARCH makes it possible to search legal materials online. Thomson's WESTLAW and Reed Elsevier's LEXIS/NEXIS systems give attorneys access to cases, statutes, rules, law reviews, public records, and a variety of practice guides. Many jurisdictions now make materials available through the INTERNET. Case law, statutes, and practice guides are available in CD-ROM format for most jurisdictions.

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## LEGAL REALISM

*The school of legal philosophy that challenges the orthodox view of U.S.* JURISPRUDENCE *under which law is characterized as an autonomous system of rules and principles that courts can logically apply in an objective fashion to reach a determinate and apolitical judicial decision.*

Legal realists maintain that common-law adjudication is an inherently subjective system that produces inconsistent and sometimes incoherent results that are largely based on the political, social, and moral predilections of state and federal judges.

The U.S. legal realism movement began in 1881 when OLIVER WENDELL HOLMES JR. published *The Common Law,* an attack on the orthodox view of law. "The life of the law has not been logic," Holmes wrote, "it has been experience." Legal realism flourished during the 1920s and 1930s when ROSCOE POUND, a professor from Harvard Law School, and KARL LLEWELLYN, a professor from Yale Law School, published a series of articles debating the nuances of the movement. Although the movement declined after WORLD WAR II, it continues to influence how judges, lawyers, and laypersons think about the law.

Legal realism is not a unified collection of thought. Many realists, like Pound and Llewellyn, were sharply critical of each other and presented irreconcilable theories. Yet, five strands of thought predominate in the movement. The strands focus on power and economics in society, the persuasion and characteristics of individual judges, society's welfare, a practical approach to a durable result, and a synthesis of legal philosophies.

### Power and Economics in Society

The first strand is marked by the nihilistic view that law represents the will of society's

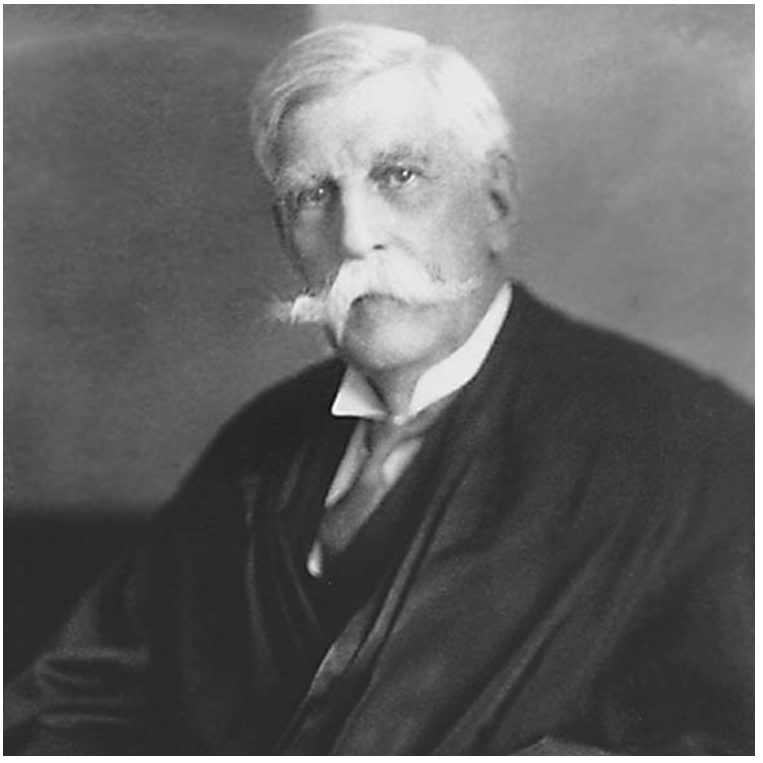

*Oliver Wendell Holmes Jr. started the legal realism movement when he published his book* The Common Law *in 1881.*

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most powerful members. This view is articulated by Thrasymachus in Plato's *Republic*, when he tells Socrates that in every government "laws are made by the ruling party in its own interest," and "the ruling element is always the strongest." When courts speak in terms of what is right and just, Thrasymachus said, they are speaking "in the interest of those established in power." Justice Holmes echoed these sentiments when he wrote that the law must not be perverted to prevent the natural outcome of dominant public opinion (**LOCHNER V. NEW YORK**, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 [1905]).

Realists argued that law frequently equates the dominant power in society with pervasive economic interests. During the incipience of the U.S. legal realism movement in the nineteenth century, the United States was transformed from a static agrarian economy into a dynamic industrial market. Realists asserted that U.S. **COMMON LAW** facilitated this transformation in a number of ways. Horwitz reported in *The Transformation of American Law* that when interpreting an insurance contract, one judge remarked in 1802 that courts must not adopt an interpretation that will "embarrass commerce." Instead, the judge said, courts are at liberty to "adopt such a construction as shall most subserve the solid interests of this growing country."

To help subsidize the growth of a competitive economy in the nineteenth century, realists have argued, U.S. judges commonly frowned on claims brought by litigants seeking monopolistic power. For example, in Palmer v. Mulligan, 3 Cai. R. 307, 2 A.D. 270 (1805), a downstream landowner asked the New York Supreme Court to grant him the exclusive right to use river water for commercial activity despite any injuries that might result to upstream owners. The court refused to grant such a right because if it did "the public would be deprived of the benefit which always attends competition and rivalry." In a subsequent case, the New York Supreme Court held that a landowner's right to enjoy his property could be "modified by the exigencies of the social state" (Losee v. Buchanan, 51 N.Y. 476 [1873]). The court added, "We must have factories, machinery, dams, canals and railroads."

At the same time the common law was facilitating economic expansion, realists claimed that it was also helping to increase the number of exploited U.S. citizens. Realists were skeptical of the traditional description of the U.S. economy as a free market. They felt that the economy was regulated by common-law principles that safeguarded the interests of society's wealthiest members. In support of this contention, realists pointed to landlord-tenant laws that entitled lessors to evict lessees for technical breaches of their lease, **LABOR LAWS** that allowed management to replace striking workers, and contract laws that permitted employers to terminate their workers without justification.

The realists' economic analysis of law spawned two related movements in U.S. jurisprudence that occupy polar extremes on the political spectrum. One is the conservative law and economics movement, whose adherents, most prominent of whom is **RICHARD POSNER**, believe that common-law principles must be interpreted to maximize the aggregate wealth of society without regard to whether such wealth is distributed equally. The other is the liberal **CRITICAL LEGAL STUDIES** movement, whose adherents, called crits, believe that the law must be utilized to redistribute wealth, power, and liberty so that every citizen is guaranteed a minimum level of dignity and equality.

Since the mid-1900s, the crits have focused less on what they perceive as economic exploitation in the law, and more on what they see as political exploitation. In this regard they have assailed various U.S. courts for advancing the

interests of adult, white, heterosexual males at the expense of women, blacks, and homosexuals. The crits have commonly referenced three cases to corroborate this point: *McCleskey v. Kemp,* 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), in which the Supreme Court rejected a constitutional challenge to CAPITAL PUNISHMENT despite evidence that African American defendants are almost three times more likely than whites to receive the death penalty for murdering a white person; *Craig v. Boren,* 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), in which the Supreme Court ruled that the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT provides less protection against discrimination for women than for members of other minority groups; and *Bowers v. Hardwick,* 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), in which the Supreme Court refused to recognize a constitutional right to engage in SODOMY. However in 2003, the Supreme Court overturned the *Bowers* holding in LAWRENCE V. TEXAS 539 U.S. ___, 123 S. Ct. 2472, 156 L. Ed. 2d 508.

### The Persuasion and Characteristics of Individual Judges

The second strand of realist thought subscribes to the relativistic view that law is nothing more than what a particular court says it is on a given day, and that the outcome to a legal dispute will vary according to the political, cultural, and religious persuasion of the presiding judge. Some realists, such as JEROME N. FRANK, another prominent thinker in U.S. jurisprudence during the 1920s and 1930s, insisted that a judge's psychological and personality characteristics also sway the judicial decision-making process. Justice BENJAMIN N. CARDOZO of the Supreme Court went so far as to characterize judges as legislators in robes.

The notion that judges legislate from the bench was a revolutionary idea that flew in the face of orthodox legal thought in the eighteenth and nineteenth centuries. In *The Federalist,* no. 78, ALEXANDER HAMILTON enunciated the orthodox position when he said the judiciary is the "least dangerous branch" because it has "neither force nor will, but merely judgment." The legislature, Hamilton said, has the power to prescribe the rights and duties by which the country is to be regulated, and the executive has the obligation to enforce these laws through the power of the sword. The role of the judiciary, Hamilton wrote, is simply to interpret and apply the laws passed by the other two branches.

Hamilton's view resonated in the opinions of Chief Justice JOHN MARSHALL, who wrote that "courts are the mere instruments of the law, and can will nothing" (*Osborn v. Bank of United States,* 22 U.S. [9 Wheat.] 738, 6 L. Ed. 204 [1824]). Judicial power, Marshall said, should never be exercised for the purpose of implementing the will of the judge. Instead, courts must exercise their power solely to implement the will of legislators, who, as the elected representatives of the American people, embody the "will of the law."

Hamilton and Marshall both believed that law is an autonomous body of knowledge independent and distinguishable from the personal preferences of the judge applying it, and that it is possible to interpret this body of knowledge in an objective fashion. Adherents to this theory of law are known as formalists. In the nineteenth century, formalists asserted that state and federal law constitute a rational system of rules and principles that judges can apply in a mechanical fashion to reach a clear, certain, and uncontroversial resolution to a legal dispute.

Realists, such as Justice Cardozo, questioned the formalists' assumption that law could be autonomous and objective, or produce demonstrably certain outcomes. In *The Nature of the Judicial Process,* a groundbreaking book first published in 1921, Cardozo argued that law is a malleable instrument that allows judges to mold amorphous words like *reasonable care, unreasonable restraint of trade,* and *due process* to justify any outcome they desire.

For example, courts are commonly asked to invalidate contracts on the ground that one party exercised duress and UNDUE INFLUENCE in coercing another party to enter an agreement. Cardozo noted that terms such as *duress* and *undue influence* are subject to interpretation. He argued that judges who are inclined to shape the law in favor of society's weaker members will construe them broadly, invalidating many contracts that stem from predatory behavior. On the other hand, judges who are inclined to shape the law in favor of society's stronger members will construe such words narrowly, allowing particular individuals to benefit from their guile and acumen.

Even when language is clear, Cardozo explained, the law often presents courts with

competing and contradictory principles to apply and interpret. For example, in *Riggs v. Palmer,* 115 N.Y. 506, 22 N.E. 188 (1889), the New York Court of Appeals was presented with the question of whether a man could inherit under a will that named him as a beneficiary, even though he had murdered the testator, his grandfather. The lodestar of testamentary interpretation, Cardozo observed, is that courts must interpret a will according to the explicit intentions of the testator. In this case, juxtaposed with this seemingly unequivocal rule was the ancient MAXIM of EQUITY, "No man shall profit from his own wrong." Depending on the outcome the court of appeals desired to reach in *Riggs,* Cardozo concluded, the panel of three judges could have relied on either legal axiom in support of its decision. In fact, the court was divided on the issue, with two judges voting to disinherit the murderous grandson, and the other voting to enforce the will.

### Society's Welfare

Convinced that common-law principles can be manipulated by the judiciary, Cardozo was concerned that instability and chaos would result if every judge followed his or her own political convictions when deciding a case. To forestall the onset of such legal disarray, Cardozo and other realists argued that all judges must interpret the law to advance the welfare of society. In Posner's biography of Cardozo, he quotes him as saying, "Law ought to be guided by consideration of the effects [it will have] on social welfare." This theory of law is known as sociological jurisprudence, and represents the third major strand of thought in the U.S. legal realism movement. Proponents of sociological jurisprudence encouraged judges to consult communal mores, ethics, and religion, and their own sense of justice when attempting to resolve a lawsuit in accordance with the collective good.

Sociological jurisprudence was foreshadowed by English philosopher JEREMY BENTHAM, who argued that the law must serve the interests of the greatest number of people in society. Bentham, whose legal philosophy is known as utilitarian jurisprudence, defined the collective good in terms of pain and pleasure. Judges should decide cases, Bentham thought, to achieve results that will maximize the pleasure of the majority of the residents in a given community, without much concern for the pain that might be inflicted on the balance of society.

Some realists turned Bentham's philosophy on its head, arguing that the law should serve the interests of the most fragile members in society because they are the least represented in state and federal legislative assemblies. This group of realists was affiliated with the U.S. Progressive movement, which became popular during the first quarter of the twentieth century as it sought to reform society by enacting legislation to protect certain vulnerable classes of employees, particularly women and children, from harsh working conditions. These realists were among the most vocal detractors from the Supreme Court's decision in *Lochner,* which struck down a state law prescribing the maximum number of hours employees could work during a given week in the baking industry.

### A Practical Approach to a Durable Result

Whereas sociological jurisprudence sought to utilize the common law as an engine of social reform, legal pragmatism, the fourth strand of realist thought, sought to employ common-law principles to resolve legal disputes in the most practical way. Pragmatists argued that a judge should undertake a four-step process when rendering an opinion.

First, the judge must identify the competing interests, values, and policies at stake in the lawsuit. Second, the judge must survey the range of alternative approaches to resolving the legal issues presented by the lawsuit. Third, the judge must weigh the likely consequences of each approach, considering the effect a particular decision may have on not only the parties to the lawsuit but also other individuals faced with similar legal problems. Fourth, the judge must choose a response that will yield the most durable result in the course of the law. This pragmatic legal philosophy is often characterized as result-oriented jurisprudence.

### A Synthesis of Legal Philosophies

The fifth strand of realist thought, legal empiricism, attempted to synthesize the other four strands into a single jurisprudence. Made famous by Holmes, legal empiricism claimed that law is best explained as a prediction of what judges will do in a particular case. Empiricists, who were influenced by behaviorists Ivan Pavlov and B. F. Skinner, argued that lawyers can predict the outcome of legal disputes by examining the judicial behavior of a given court.

The empiricists' efforts to integrate the other four schools of legal realism into one coherent philosophy was reflected by their belief that judicial behavior can be influenced by political, economic, sociological, practical, and historical considerations, as well as personal and psychological prejudices and idiosyncrasies. Lawyers and laypersons who spend more time studying these elements and less time studying the labyrinth of legal rules and principles that make up the law, the empiricists concluded, will have a better idea of how a judge will rule in a particular case.

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## LEGAL REPRESENTATION

*The legal work that a licensed attorney performs on behalf of a client.*

Licensed attorneys have the authority to represent persons in court proceedings and in other legal matters. When hiring an attorney, a careful consumer considers a number of variables, including the nature and importance of the case, the attorney's fee and payment arrangement, personal chemistry with the attorney, and the attorney's reputation.

### Self-Representation

If a case is simple, a person may wish to represent himself, or proceed pro se. The courts usually discourage self-representation because legal practice requires special skills, and an unschooled pro se party is usually at a disadvantage in court. Even attorneys are well advised to hire another attorney for personal legal problems.

### Advertising

Many attorneys advertise their services. Attorneys must obey all applicable advertising laws and must follow rules of professional conduct related to advertising. Under these rules they may not make false or misleading claims, create unjustified expectations, or compare the services of another attorney unless the comparison can be factually substantiated. An attorney may not make in-person or live telephone solicitations unless the attorney is related to the person or has a professional relationship with the person. An attorney may not contact an individual after he or she indicates a desire that the solicitations cease, and an attorney may not coerce or harass prospective clients. Aside from these and similar restrictions, attorneys generally are free to use the various media to promote their services.

### Duties and Obligations

Legal representation places duties on both the client and the attorney. The client should provide the attorney with all information relevant to the case and keep the attorney apprised of new information. The client should be completely honest about the case with the attorney. The client also should follow the attorney's directives.

The client has an obligation to pay the attorney for the representation. If the client does not make timely payment, the attorney may decline to perform further work for the client. An attorney also may discontinue representation if the client wants the attorney to perform an unethical or illegal act, the client lies and refuses to correct the lie, the client makes representation unreasonably difficult, or the attorney discovers a conflict of interest.

Generally, a conflict of interest is any circumstance that adversely affects a client, or limits the loyalty of the attorney to a client. For example, assume that an attorney regularly represents a corporation. A new client seeks the attorney's representation in a suit against the same corporation. Representing the new client would be a conflict of interest. Generally, the attorney would not be able to take the case or continue representation after the conflict was

# Hiring an Attorney

The first task in hiring an attorney is to find one who can manage the particular legal problem at issue. All attorneys are not equally skilled in every area of the law. Like many other professionals, attorneys tend to specialize in certain areas of practice such as contracts, **PATENTS**, family matters, taxes, personal injuries, criminal matters, and business matters. A person facing criminal charges, for example, will want to contact an attorney who specializes in criminal defense work, not a patent attorney.

Some attorneys are known for their skill in certain types of cases within a specialty. For example, a criminal defense attorney may be competent to handle any criminal case, but may be especially proficient in drunk driving cases or **HOMICIDE** cases. Attorneys who specialize in certain types of cases often have developed a network of helpful contacts and have a great deal of experience with the kinds of issues involved in these cases.

Some attorneys are general practitioners, proficient in a broad range of legal topics. These attorneys are generally less expensive than specialists. However, if a general practitioner is not competent in a particular area, she may need to put more time and effort into the case than would a specialist, and the client will have to pay for this extra work.

Many businesses specialize in making attorney referrals at no charge to the consumer. They offer lists of attorneys categorized by area of expertise or type of client. For example, some referral services list attorneys who specialize in representing persons of color, women, or gay men and lesbians.

After obtaining a list of qualified attorneys, the consumer should have an initial consultation with several attorneys if possible. Some attorneys offer such a consultation at no cost, whereas others

discovered. However, the attorney may continue representation if he does not believe that the conflict would adversely affect the relationship with the corporation, and if both the corporation and the client agree to the attorney's representation. In practice, continued representation where there is a conflict of interest is rare.

If an attorney must withdraw from representation, he must act to protect the interests of the client. This may involve helping the client find another attorney, postponing court dates, and surrendering papers and documents relevant to the case. The attorney must return to the client any money owed to the client under the fee agreement.

An attorney has many obligations to his or her client. He must zealously defend the interests of the client and respond to the client's concerns. He must communicate with the client, keeping the client informed about the status of the case and explaining developments so that the client can make informed tactical decisions. He must abide by the client's decisions regarding the objectives of the representation. With few exceptions an attorney may not divulge client communications to outside parties without the client's consent.

Attorneys are officers of the court, and as such they must follow the law and obey ethical constraints. They may not harass persons in the course of representation. They may not assist a client who they know will not tell the truth about the case. An attorney should not begin a romantic affair with the client during the course of legal representation. In most states such behavior is an ethical violation. No attorney in any state may perform legal services in exchange for sexual relations.

### Fees

Attorneys' fees vary by attorney and by case. An attorney may charge a client in several different ways. The most common forms of billing include flat fees, hourly rates, contingent fees, and retainers.

A flat fee is a dollar amount agreed to by the attorney and the client before the attorney begins work on the case. The flat fee is favored by many attorneys because it is a simple transaction and because the attorney is paid at the beginning of the representation. The attorney identifies the amount of work that the case will require and calculates a reasonable fee based on the time and effort involved. If the attorney spends less time on the matter than anticipated, the attorney may keep the excess payment, unless the attorney and client agree otherwise. Conversely, the attorney who charges a flat fee may not later demand more money if the case requires more time and effort than originally anticipated.

may charge a nominal fee. In either case the initial consultation does not obligate the consumer to hire that attorney or firm.

At the initial consultation, the potential client should provide the attorney with as much information as possible about the case. Relevant information may include pictures, witness statements, and other documents. This information helps the attorney make an informed judgment about the case.

The attorney generally does not give legal advice at the initial consultation. Instead, the attorney will ask questions to determine whether he is able to represent the consumer. The attorney will not begin to work on the case until a fee arrangement has been reached with the consumer.

In deciding whether to retain a particular attorney, the consumer should look at a number of issues. If money is a consideration, the consumer should weigh the attorney's fee against the importance of the case. For example, the consumer may be willing to spend more money on an attorney if facing criminal charges than if involved in a minor civil matter.

If the consumer and the attorney will need to meet frequently during the representation, the consumer should consider the location of the attorney's office and required travel time.

Another consideration is personal chemistry. Attorneys and clients do not have to be friends, but they should have some rapport so that they can work together. If the consumer does not feel comfortable with an attorney, she should find another attorney.

If time is a consideration, the consumer should ask how long the attorney expects the case to last. Some attorneys work more quickly than others.

A consumer should also consider the reputation of the attorney. Attorneys usually are willing to provide a list of previous clients as references. All states have a **PROFESSIONAL RESPONSIBILITY** board that oversees the conduct of attorneys in the state. These boards may be able to give consumers information regarding ethical violations by attorneys. The consumer also may want to ask if an attorney has **MALPRACTICE** insurance, which compensates clients who are victims of incompetent legal work.

An hourly rate is a predetermined amount charged for each hour of the attorney's work. The attorney and client may agree that hourly fees are to be paid periodically, or in one lump sum at the end of the case. The time that an attorney charges for legal work is called billable time, or billable hours. Hourly rates vary according to the attorney's expertise and experience. Some critics have argued that hourly rates discourage quick work and expedited resolutions. Before agreeing to an hourly rate, prospective clients should ask for a written estimate of the number of billable hours that the attorney anticipates will be necessary to complete the matter.

A **CONTINGENT FEE** is a percentage of the amount recovered by the client. A contingent fee is not paid by the client until the client wins money damages from a defendant. Attorneys offer such a fee if the client stands a good chance of winning a sizable cash settlement or judgment. Contingent fees cannot be used in **DIVORCE** cases, **CHILD CUSTODY** cases, and criminal cases.

Contingent fees are a gamble for the attorney. If the client does not win the case or wins less money than anticipated, the attorney may work for no or little pay. Common contingent fees range from 20 to 40 percent of the client's recovery. For personal injury and **MEDICAL MALPRACTICE** cases, laws in all states limit the percentage that an attorney may receive from a client's recovery. For other cases the percentage is negotiable between the client and attorney.

A client may retain an attorney for a specific period of time rather than for a specific project. In return for regular payment, the attorney agrees to be on call to handle the day-to-day legal affairs of the client. Most individuals do not have enough legal matters to keep an attorney on retainer.

The term *retainer* also refers to an initial fee paid by the client. Retainers often are used by attorneys who charge an hourly rate, and some attorneys add an initial retainer to a contingent fee.

### Pro Bono Services

The term *pro bono* means "for the good." In practice **PRO BONO** describes legal work performed free of charge. Pro bono work is not required of attorneys in most jurisdictions, but courts occasionally appoint attorneys to represent an indigent client free of charge. Under Rule 6.2 of the American Bar Association's Model Rules of Professional Conduct, a lawyer may refuse an appointment, but only if: (1) the appointment would somehow violate another rule of conduct (such as conflicts of interest) or law; (2) the appointment would unreasonably

burden the lawyer; or (3) the lawyer finds the appointment so repugnant that he would not be able to effectively represent the client. Attorneys often perform pro bono work in order to contribute to their community and create goodwill for the firm.

### Public Legal Services

Legal services organizations exist in all states to provide free or low-cost legal services to qualified persons. Legal services offices are funded by a variety of sources, including private businesses, private individuals, the interests from lawyer trust accounts, and federal, state, and local governments. Civil matters such as bankruptcies, divorces, and landlord-tenant disputes are handled by legal aid agencies. Criminal matters are handled by state public defenders.

### Private Legal Services

Some organizations sell "legal insurance" for a fee. Legal insurance is a form of prepaid legal service in which the consumer pays a premium to cover future legal needs. Such a service may be offered through LABOR UNIONS, employers, or other private businesses. Most legal insurance policies do not cover all types of legal matters, and the policyholder may not be entitled to choose his lawyer. The consumer should determine the scope and nature of the legal representation offered in legal insurance packages.

### Other Considerations

If a client does not believe he or she has received competent legal representation, the client has several options. In a criminal case, if a convicted defendant believes he received incompetent representation, the defendant can address the issue on appeal, and the appellate court may reverse the verdict. If a client believes that an attorney has committed misconduct, the client may contact the board of PROFESSIONAL RESPONSIBILITY in the state in which the attorney practices. If an attorney is found to have violated the law or the applicable professional conduct code, the attorney is subject to discipline by the board. Discipline can range from a reprimand to revocation of the attorney's license.

In some states if an attorney and client have a dispute over fees, the attorney may place a lien on the client's money or PERSONAL PROPERTY. There are two types of attorney liens: a retaining lien and a charging lien. A retaining lien gives the attorney the right to retain money or property belonging to the client until the client pays the bill. The attorney does not have to go to court to do this, but the judge may order a hearing at the request of the client to determine whether the attorney has good reason to keep the money or property.

A charging lien gives an attorney the right to be paid from the proceeds of a lawsuit. For example, if an attorney charges a client a contingency fee and the attorney wins a large monetary award for the client, the attorney is entitled to a predetermined share of the award. Generally, the attorney may keep a certain amount for services rendered even if he was fired by the client. However, if a court finds that the client properly fired the attorney for misconduct, the attorney may not be entitled to any portion of the client's award.

#### FURTHER READINGS

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#### CROSS-REFERENCES

Attorney-Client Privilege; Attorney Misconduct; Attorney's Lien; Client Security Funds; Ethics, Legal; Legal Advertising; Legal Malpractice; Practice of Law; Professional Responsibility; Right to Counsel.

## LEGAL REPRESENTATIVE

*In its broadest sense, one who stands in place of, and represents the interests of, another. A person who oversees the legal affairs of another. Examples include the executor or administrator of an estate and a court appointed guardian of a minor or incompetent person.*

*This term is almost always held to be synonymous with the term* personal representative. *In accident cases, the member of the family entitled to benefits under a* WRONGFUL DEATH *statute.*

## LEGAL RESERVE

*Liquid assets that life insurance companies are required by statute to set aside and maintain to assure payment of claims and benefits. In banking, that percentage of bank deposits that must by law be maintained in cash or equally liquid assets to meet the demands of depositors.*

## LEGAL RESIDENCE

*The place of domicile—the permanent dwelling—to which a person intends to return despite temporary abodes elsewhere or momentary absences.*

A person can have several transitory residences, but is deemed to have only one legal residence.

## LEGAL RIGHT

*An interest that the law protects; an enforceable claim; a privilege that is created or recognized by law, such as the constitutional right to* FREEDOM OF SPEECH.

## LEGAL SERVICES CORPORATION

The Legal Services Corporation (LSC) is a private, nonprofit organization established by Congress in 1974 to provide financial support for legal assistance in civil matters to people who are poor (Legal Services Corporation Act of 1974, 42 U.S.C.A. § 2996 et seq.). The LSC receives funds from Congress and makes grants to local nonprofit programs run by boards of directors made up of local lawyers, community leaders, and client representatives. LSC support is the backbone of legal aid funding in the United States. The organization has attracted opposition from fiscal conservatives who wish to abolish it.

The federal government began to make direct grants to legal aid organizations in 1965, during President Lyndon B. Johnson's war on poverty. Studies revealed that states were doing an inadequate job of providing legal assistance to people who were poor, especially in the South, the Southwest, and much of the Midwest. The LSC was established in 1974, during the Nixon administration, to establish a structure for distributing funds to qualified local providers of legal aid that was permanent and immune to political pressure.

The LSC is governed by an 11-member board of directors, appointed by the president of the United States with the advice and consent of the Senate. No more than six members may be of one political party, and at least two members must be eligible clients. Through its Office of Field Services and its regional offices, the LSC distributes grants to legal services programs operating in neighborhood offices in all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Micronesia. Only 3 percent of its budget is spent on the administration costs for the home office; the rest goes to community programs.

The LSC supports local legal aid programs through training, research, sharing of information, and technical assistance. It also funds 16 national support centers that provide specialized assistance to attorneys in representing their clients. Most of these support centers specialize in substantive areas of the law, such as housing, administrative benefits, and health. Others specialize in the unique legal problems of particular groups, such as Native Americans, migrant farm workers, immigrants, and older people. Staff

**Legal Services Coporation**

**GRANTEE CASES, BY TYPE, IN 1999**

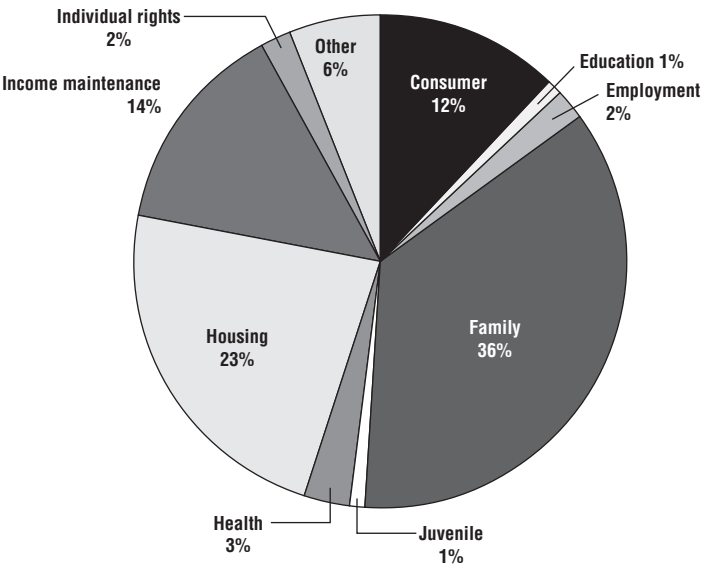


SOURCE: Legal Services Coporation, *Special Report to Congress*, April 30, 2000.

members of the support centers may become directly involved in litigation on behalf of their clients.

General research is conducted by the LSC Institute on Legal Assistance. The institute is devoted to substantive study of the broad range of legal problems encountered by poor people that relate to the services provided by legal aid programs. The research projects of the institute fall into five broad categories: problems posing the most serious consequences to people who are poor, such as income security and health benefit programs; gaps in substantive poverty law, such as rural issues; studies of agencies that provide benefits to people who are poor, such as **WELFARE** agencies and public hospitals; projects to prevent legal controversies and to create new procedures for settling disputes; and ways to evaluate how special legal institutions such as housing and small-claims court affect people who are poor. The institute also conducts seminars and holds meetings on these topics and others that deal with the effect of the law on poor people.

The LSC 2003 budget of $338.8 million funds 161 local legal services and is designed to benefit some 5 million, mostly children living in poverty.

The LSC has been under attack for many years by conservative politicians and other groups that allege that the legal aid programs it funds have engaged in political and **LOBBYING** activities, often at the expense of providing legal services needed by people who are poor. Critics argue that the LSC has been the legal pillar of the welfare state, opposing efforts by conservatives to rein in government programs. Congressional Republicans have sought either to drastically reduce funding of the LSC or to abolish the LSC altogether. Congress allocated $415 million for the program in 1995, compared with $338.8 million in 2003.

In 2000, the LSC approved a document entitled *Strategic Directions 2000–2005.* The goals of the strategy include dramatic increases in the provision of legal services to eligible persons and assurance that eligible clients receive appropriate and high quality legal assistance. Strategies for achieving these goals include use of state planning, technology, and improved program oversight.

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Equal Protection; Legal Aid.

## LEGAL SPECIALIZATION

State-regulated legal certification programs allow attorneys to be recognized as "board certified" experts in their practice areas. The certification process is overseen either by state bar associations or state supreme courts and is designed to prevent the public from being misled by unscrupulous attorneys who claim they are specialists without having bona fide credentials to back up the claim. As of the early 2000s, 18 states had adopted legal certification programs.

Legal specialization certification had been debated for decades, but the argument heated up in the 1970s and early 1980s, when federal and state courts struck down rules that prohibited attorneys from advertising in the media and in telephone books. As phone companies began to sell advertising in different fields of law, national bodies such as the National Board of Trial Advocacy (NBTA) began certifying specialists in civil and criminal litigation, and lawyers continued to become more specialized in their practices. By the mid-1980s certified legal specialist programs gained momentum. The **AMERICAN BAR ASSOCIATION** (ABA) set up a Standing Committee on Specialization and, in 1993, adopted a set of voluntary standards. In addition, the ABA agreed to accredit private national certification programs that met the ABA standards. By 2000, more than 25,000 U.S. lawyers had been accredited as legal specialists.

Certification rules vary from state to state, but each lawyer must fulfill four major requirements to be deemed a certified specialist. He or she must provide evidence of substantial involvement in the specialty area and references from lawyers and judges. He must have completed 36 credit hours of specialty **CONTINUING LEGAL EDUCATION** (CLE) in the three years preceding the application. He must have been admitted to practice and be a member in good

standing in one or more states. And, finally, he must be recertified at least every five years and be subject to revocation of the certification for failure to meet the program's requirements.

State legal certification boards accredit independent agencies to perform the actual testing and certification. This process minimizes the costs incurred by the certification boards and places the cost of the programs on the lawyers who wish to be certified and who must pay application fees to the independent agencies. National organizations authorized to certify specialists include the NBTA, the American Board of Certification, and the National Elder Law Foundation. In addition, many state bar associations are authorized to certify specialists. Eleven certification programs that have been accredited. The specialties include civil trial practice; CRIMINAL LAW; FAMILY LAW trial advocacy; business and consumer BANKRUPTCY; creditor's rights; legal, medical, and accounting professional liability; elder law; and estate planning law.

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## LEGAL TENDER

*All U.S. coins and currencies—regardless of when coined or issued—including (in terms of the* FEDERAL RESERVE *System) Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations that are used for all debts, public and private, public charges, taxes, duties, and dues.*

## LEGAL TITLE

*Ownership of property that is cognizable or enforceable in a court of law, or one that is complete and perfect in terms of the apparent right of ownership and possession, but that, unlike equitable title, carries no beneficial interest in the property.*

## LEGALESE

*Slang; technical jargon used by attorneys that is often beyond the comprehension of the nonlawyer.*

States enact "plain English" laws that require the translation of legalese into everyday language to permit consumers to understand thei insurance policies, deeds, mortgages, leases, credit card financing agreements, and other legal documents.

## LEGARE, HUGH SWINTON

Hugh Swinton Legare was a lawyer, a legal scholar, and an attorney general of the United States under President JOHN TYLER.

Born January 2, 1797, in Charleston, South Carolina, to a wealthy French Huguenot father, both Legare and his sister, Mary, enjoyed a privileged upbringing and social advantages. But the family's money and influence could not cure the boy's severe physical deformity. Prevented from strenuous physical activity, Legare turned his attention to scholarly pursuits, at which he excelled.

"OUR COUNTRY EXHIBITS THE LAST SPECIMEN OF THAT FORM OF GOVERNMENT, WHICH HAS DONE SO MUCH FOR THE DIGNITY AND HAPPINESS OF MAN."
—HUGH SWINTON LEGARE

Legare studied at Moses Waddel's Academy and the College of South Carolina and graduated in 1814. He worked toward degrees in law and languages in the United States (1814–17) and in Scotland (1818–19). Legare's interest in Roman and CIVIL LAW was developed at Edinburgh University under the tutelage of Professor Dugald Stewart. Stewart, a disciple of legal philosopher Friedrich von Savigny, praised the systematic character of ROMAN LAW, and argued that Anglo-American COMMON LAW could be made more precise and scientific by the application of the principles of deductive reasoning. Legare embraced the notion that law—like geometry—could be treated as a deductive science, and it became a lifelong interest.

Legare wrote extensively on law, legal philosophy, and classical literature throughout his life. As a young man, he partnered with botanist Steven Elliot, Sr., and other prominent Charleston intellectuals to establish a quarterly magazine that was devoted to all disciplines of scholarly writing. According to its masthead, the *Southern Review* proposed "to offer to our fellow citizens one Journal in which they may read without finding themselves the objects of perpetual sarcasm." Legare was a principal contributor until the death of his partner and the demands of his political career caused the magazine to fold.

Legare entered politics shortly after his return to the United States in 1819. He settled on St. John's Island, off the South Carolina coast,

*Hugh S. Legare.*
LIBRARY OF CONGRESS

with the intention of developing a cotton plantation, but his physical limitations soon forced a change of plans. Within a year, he was elected to represent St. John's Island in the South Carolina state legislature.

In 1822, Legare gave up his plantation and moved back to his family home in Charleston. He practiced law and campaigned for reelection to the state legislature—this time as a representative from Charleston. He was elected in 1824 and served until 1830, when he was named state attorney general.

During Legare's tenure as state attorney general, the nullification crisis in South Carolina came to a head. (Nullification is a doctrine that asserts the right of a state to prevent within its borders the enforcement of an act of the federal government that is not authorized by the U.S. Constitution as interpreted by the highest legislative authority of the state.) Convinced that the 1828 and 1832 federal tariff laws favored Northern industry and threatened Southern SLAVERY, the South Carolina legislature declared them to be unconstitutional and threatened to secede from the Union if the federal government moved to enforce them. Legare opposed the nullification group, spoke on behalf of the Union, and cautioned the federal government against any exercise of authority that might "tip the political balance . . . toward the nullifiers" and stir the citizens to secession. For his efforts, he was rewarded with a diplomatic post in Brussels. Legare was named U.S. chargé d'affaires in 1832.

After fulfilling his obligations in Brussels and enjoying an extended tour of Europe, Legare returned to the United States in the fall of 1836. On his return, he was elected as a Union Democrat to represent South Carolina in the U.S. Congress. He was defeated in the 1838 election because his view of fiscal policy did not coincide with that of his constituents.

Following his defeat, Legare returned to Charleston and, for the first time in his career, concentrated on the PRACTICE OF LAW. He tried a number of important cases and made his mark in the South Carolina and federal courts. U.S. Supreme Court justice JOSEPH STORY said, "His argumentation was marked by the closest logic; at the same time he had a presence in speaking I have never seen excelled."

Legare also returned to writing, authoring articles on Demosthenes, Athenian democracy, and Roman law. During the presidential campaign of 1840, Legare affiliated with the WHIG PARTY, and he began a series of articles in support of WILLIAM HARRISON, and later Tyler, which appeared in the *New York Review.*

In appreciation for his support, President Tyler named Legare to be attorney general of the

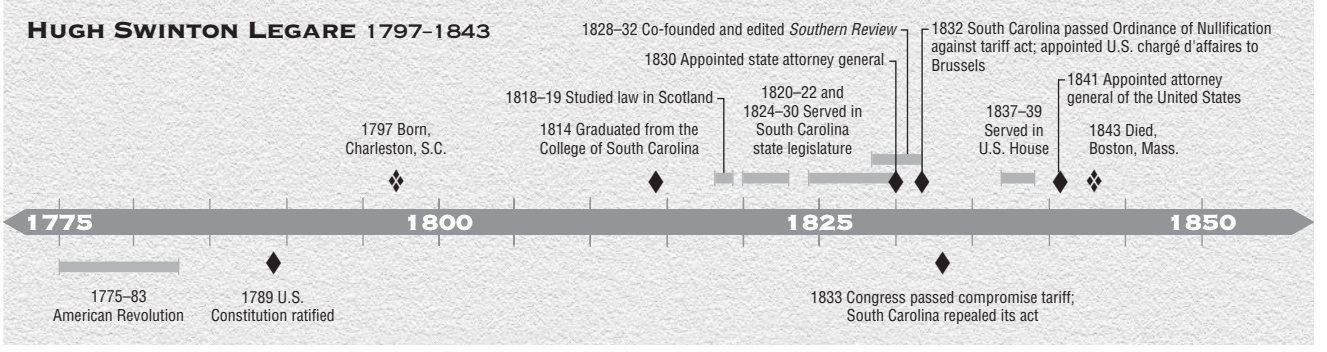

United States in 1841. Because of his foreign-service experience in Belgium and his thorough knowledge of both civil and INTERNATIONAL LAW, Legare was a highly regarded member of the cabinet. As attorney general, Legare replaced DANIEL WEBSTER on the Ashburton Treaty Commission. He is credited with contributing important portions of the treaty that pertained to the right of search.

When Webster resigned as SECRETARY OF STATE in May 1843, Legare assumed a number of his duties and was named secretary ad interim. A month later, on June 20, 1843, Legare died suddenly while accompanying President Tyler to the dedication of the monument at Bunker Hill, in Boston.

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## LEGATEE

*A person who receives* PERSONAL PROPERTY *through a will.*

The term *legatee* is often used to denote those who inherit under a will without any distinction between real property and personal property, but technically, a *devisee* inherits real property under a will.

## LEGATION

*The persons commissioned by one government to exercise diplomatic functions at the court of another, including the minister, secretaries, attachés, and interpreters, are collectively called the* legation *of their government. The word also denotes the official residence of a foreign minister.*

## LEGES HENRICI

*[*Latin, Laws of Henry.*] A book written between 1114 and 1118 containing Anglo-Saxon and Norman law. It is an invaluable source of knowledge of the period preceding the full development of the Norman law.*

## LEGISLATE

*To enact laws or pass resolutions by the lawmaking process, in contrast to law that is derived from principles espoused by courts in decisions.*

## LEGISLATION

*Lawmaking; the preparation and enactment of laws by a legislative body.*

Legislative bodies exist to enact legislation. The legislative process is a series of steps that a legislative body takes to evaluate, amend, and vote on proposed legislation. The U.S. Congress, state legislatures, county boards, and city councils engage in the legislative process. Most legislation is enacted by Congress and state legislatures. Implementation of legislation is left to other entities, both public and private, such as law enforcement agencies, the courts, community leaders, and government agencies.

### Legislative Bills

Legislation begins with the submission of a bill to the legislature for consideration. A bill is a draft, or tentative version, of what might become part of the written law. A bill that is enacted is called an act or statute. The selection of appropriate and clear language for the proposed piece of legislation is critical. Legislators need to understand what is intended by the bill and who will be affected by it.

A bill is amended to accommodate interested and affected groups and to eliminate technical defects. More legislative attention is generally devoted to decisions on amendments than to disputes over whether a bill will be passed. An able legislator or supporter of a piece of legislation constantly seeks ways to silence opposition or convert opponents into supporters. Many important provisions that finally become law are adjusted by amendments in order to accommodate conflicting viewpoints.

### Sources of Legislation

Ideas for legislation come from many sources. Legislators who have experience and knowledge in a particular field introduce bills that they think will improve or correct that field. They often copy existing legislation because an idea that works well in one jurisdiction can be useful in another. For example, in

the 1970s, legislation that created "no-fault" divorces was copied from state to state.

Legislators receive proposals from the National Conference of Commissioners on Uniform State Laws, a coalition of over three hundred lawyers, judges, and law professors, who are appointed by the states. Conference members draft proposals of uniform and MODEL ACTS. Such acts attempt to establish uniformity in a single legislative area. For example, the UNIFORM PROBATE CODE is an attempt to standardize U.S. probate law, and has been widely enacted.

The Council of State Governments, the American Law Institute, the AMERICAN BAR ASSOCIATION, and numerous other organizations all produce model acts for legislatures. Even if a uniform or model act or a law used in a neighboring state is not totally applicable, it is easier to edit and revise it than to draft a new one.

Legislation is not motivated solely by existing ideas. Modern legislation is often concerned with changing or protecting social and economic interests. Interest groups usually become involved in the legislative process through lobbyists, who are persons they hire to act for them. Often lobbyists work to protect the status quo by defensive LOBBYING, that is arguing against a piece of legislation. Other times lobbyists propose a bill. Whether opposing or proposing change, lobbyists typically inform legislators about the expected effect that legislation will have on their particular interest group. Lobbyists also influence legislation through financial contributions to the political campaign committees of legislators.

Modern legislatures have a large staff that helps prepare legislation. On occasion, studies are authorized when a problem is recognized and no solution is readily available. Major legislation often starts with a blue-ribbon legislative commission, which might include citizen members and an independent staff from the academic community. A handful of states have created permanent law revision commissions, which operate independently of the legislature.

In addition, most states have independent offices that act as editors, putting legislative ideas into formal, statutory language that conforms to current usage in the jurisdiction. Modern legislation has become increasingly lengthy and complex, making it difficult for a single legislator to craft a bill alone.

### Legislative Procedure

The procedure by which legislation is enacted varies within the following general structure.

A constitution is the basic charter for governments in the U.S. legal system. Constitutions typically specify that some kinds of legislation, like a capital expenditure, require an extraordinary vote, such as passage by two-thirds rather than by a simple majority. Three separate readings, or announcements, of a bill to the full house, are commonly required before a vote can be taken. Some constitutions require a detailed reading each time, but legislatures have found ways to circumvent this mandate.

Constitutions often require an affirmative vote by a majority of all the members of a house, not merely those present, in order to pass a bill. They can also require that the names of members voting aye and nay be recorded in the journal of the legislative body. Constitutions can authorize the executive to VETO legislation, and establish a procedure for the legislature to override a veto. Sometimes a specific period of time is prescribed for the legislative session or term, and all work must be completed before expiration of the session.

It is common for a constitution to require that a bill pertain to only one subject, which must be expressed in the title of the bill. For example, An Act to Increase the State Sales Tax from Six to Seven Percent is a proper title for a bill that does exactly that and nothing else. This requirement efficiently packages legislative work, significantly affecting procedure, order, and efficiency. It does not apply to the U.S. Congress, but often applies to state and local legislatures.

Each legislature adopts its own rules to detail the organization and procedure of its body. A standard version of legislative rules is often adopted to cover any situation not governed by a specific rule. Legislatures frequently need to depart from regular procedure in order to accomplish tasks. Therefore, special rules usually provide for the suspension of normal procedure, when necessary. A rules suspension can be allowed only by a two-thirds vote.

Some of the work of the legislature can be accomplished by resolution rather than by bill. A resolution is used to settle internal matters or to make a public pronouncement without enacting a law. Resolutions are used to adopt the rules of the house, to establish committees, to initiate investigations, and to authorize and hire legisla-

tive employees. Even more mundane daily work can be accomplished by a motion on the floor. A motion lacks the formality of a resolution in that it cannot be formally announced and printed in the record.

A resolution takes one of several forms. A senate resolution or assembly resolution is adopted by only one house. A joint resolution originates in one house and then is passed in the other house, having the full force of official legislative action. This is the customary form for proposing state constitutional amendments and ratifying amendments to the U.S. Constitution. A concurrent resolution, like a joint resolution, originates in one house and is assented to by the other. It lacks the legal effect of a normally adopted joint resolution, and is often used to express an opinion. Petitions from state legislatures to the president or to the U.S. Congress are drawn as concurrent resolutions. Commendations to persons who have performed socially significant deeds and to victorious athletic teams are typical concurrent resolutions.

### The Enactment of a Bill

A bill must follow certain customary steps through a legislature. It is introduced by an elected member who acts as a sponsor. The chief sponsor, who might or might not be the author of the bill, is the legislator who manages the bill as it progresses through the body and who explains it to other legislators. The bill may also have cosponsors, who attach their names to the bill to add support.

When the bill is introduced, it is referred to a standing committee. Whenever possible the bill's sponsors and the legislative leadership attempt to steer the bill to a particular committee. In most legislatures there is room for discretion in the reference of bills. Major legislation might have to be referred to several committees, so the issue might be who receives it first.

Once the bill is referred, the committee must be convinced to place it on the agenda so that it can be considered and passed. The committee chair is in charge of the committee, and requests for a slot on the agenda of the committee must be directed to the chair and the chair's staff. An autocratic chair can decide which bills to consider without consulting committee members, but much of the work of a committee is done by consensus.

Competition for committee time is generally intense. Usually bills that are heard are essential, popular, or generally beneficial. Occasionally they are noncontroversial or not especially appealing to the chair. A bill can even be scheduled merely to impede another, unfavorable proposal. If a spot cannot be attained on the agenda, a sponsor can seek consideration by a subcommittee so that a rough proposal can be polished into a draft that will be more appealing to the full committee.

Legislative procedure is designed so that a bill is heard when a need for it is demonstrated. Unnecessary or poorly drafted bills are bottled up in committees where no one takes time to consider them. As a bill approaches passage, it becomes more difficult to amend it or kill it. Efforts made early in the history of the bill are generally more effective. For example, fewer members have to be persuaded when a bill is still being considered by a committee, and fewer compromises have to be made.

If a committee decides not to act on a bill and tables it, that bill is effectively stopped for that session of the legislature. If the committee recommends that the bill be indefinitely postponed, the bill is formally killed and that recommendation is reported to the floor as a committee report to be confirmed by house vote. Adoption of the committee report officially kills the bill. If the committee recommends that the bill be passed, the bill is submitted to the floor with a favorable report, which is essential to its passage. If the bill must go through more than one committee, the first committee must then refer it to the second, and the first favorable decision gives it some momentum toward success.

After a legislative body approves a favorable committee report, the bill is placed on the agenda for floor action, or action by the full body. The agenda can be lengthy. During its wait for floor action, the bill is subject to a motion to refer it again to the same committee or any other committee for reconsideration. Making a successful motion to refer it again is a classic method of defeating a bill without taking the difficult step of going on record against it on a final vote.

In most state legislatures, a bill is first considered on the floor in a committee of the whole, in which every member of the house sits as a committee to debate the bill. A committee of the whole is derived historically from the desire of early English parliaments to act in semisecrecy, without recorded votes that the queen or king could monitor. The idea has survived, and legislators continue to act without suffering the

political consequences of an unpopular vote on the record.

Procedurally, the consideration of a bill by a committee of the whole allows debate without limits on the duration of time or number of times a member can speak. It also provides an interval between the first formal floor consideration and final passage of the bill, which permits more time for careful deliberation.

The use of the committee of the whole has, however, declined. More bills are submitted for deliberation by the legislative body and final vote while the subject is still fresh in the members' minds. A legislature can, therefore, eliminate use of the committee of the whole for some types of bills, for special circumstances, or altogether.

Almost every legislature has a consent calendar for bills identified by committee reports as noncontroversial. Each such bill is read at the appointed time and briefly explained, and a vote is taken. Even if only a few votes dissent, the bill is returned to the regular calendar for examination. The consent calendar permits a legislature to dispose of a host of minor bills expeditiously.

As a general practice, the legislative leadership uses a special order to schedule debate, amendment, and passage of a bill at a single session. A bill can be designated for special order by a vote of two-thirds, or more commonly by selection by a priority-setting or policy committee. Bills from appropriations and tax committees might receive automatic special order privileges because of the necessity for their enactment.

Some constitutions, including that of the United States, permit a vote on the final passage of a bill to be oral and unrecorded unless a member calls for the ayes and nays. Ordinarily, a member is entitled to do this on any motion, including final passage.

Immediately following a vote on final passage, a motion to reconsider can be made. In effect this motion requests another vote on the bill. Although the number of successful reconsiderations is small, the device can facilitate additional compromise to accommodate competing interests on the issue. Generally, only one reconsideration of any vote is allowed, so both sides endeavor to gather switch votes after a close vote. The victorious side attempts to conduct the vote on the reconsideration immediately, so that the losers do not have time to marshal strength. In the U.S. Congress, a motion to reconsider is made routinely after every vote, to give the vote a finality by precluding such a motion at a later time.

In a bicameral legislature, once a bill is passed in one house, the chances for success in the second house are good because the bill has become a product of compromise. There is no concern about wasting time on a bill that can never succeed, because the bill has already cleared the other house. Busy legislators prefer not to repeat debates that have already been extensive in the first house, and they respect the value of cooperation between the two houses.

A single bill must be passed by both houses of a bicameral legislature and be signed by the executive. If the houses pass identical but separate bills, one of the houses must approve the official bill from the other house. The presiding officer and the chief clerical official must verify passage of a bill by signing the official or enrolled copy before the bill is ready for the executive's signature. After the final affirmative vote for passage in the first house, the bill is put into an official engrossment, or formal final copy, and transmitted to the other house for consideration.

Since each house must pass the exact same bill, the form that is passed in the first house can be substituted for a parallel or companion bill in the second house. If the second house accepts the version that is adopted in the first house, it returns the bill with a message to that effect. The first house then enrolls, transcribes, and registers the bill on a roll of bills and submits it to the executive for signature.

If the second house amends the bill, it returns the bill to the first house with a message requesting agreement on the changes. If the amendments are acceptable, a motion is made to concur and to place the bill on repassage. If the motion passes, all the formalities of a final vote are repeated for the bill in its amended form. If repassed the bill is enrolled in its amended form, signed by the legislative officers, and submitted to the executive for signature.

When the two houses cannot agree on a final form for a bill, a complex procedure of compromise is attempted in a conference committee comprising usually three to five members from each house. If the conferees can reach agreement, a conference committee report is filed in both houses that reflects the final changes. Both

houses must approve the report, without amendment, for the bill to be passed.

Once the bill is approved by both houses, it is put into final form and transmitted to the executive. If the executive signs the enrolled bill, it is filed with the SECRETARY OF STATE. The enrolled bill is then an act, a written law. Depending on the bill, the act may become effective upon signature of the executive or at some date specified in the bill.

### Executive Veto Power

An executive can refuse to sign a bill and can return it to the legislature with a veto message explaining why. The legislature can attempt, first in the house where the bill originated, to override the veto by an extraordinary vote, usually a two-thirds majority.

Governors in a majority of states also have the authority to select particular items from an appropriations bill and individually veto them. This authority, called the line-item veto, became popular because it allowed the executive to cancel specific appropriations items from bills that were hundreds of pages long. Congress enacted the federal line-item veto authority in 1996 (2 U.S.C.A. §§ 691, 692) to give the president the ability to impose cuts on the FEDERAL BUDGET. In *Clinton v. City of New York*, 524 U.S.417, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998), however, the Supreme Court ruled that the Line-Item Veto Act violated the Presentment Clause under Article I of the Constitution. Under the Presentment Clause, after a bill has passed both Houses, but "before it becomes a Law," it must either be approved (signed) or returned (vetoed) by the president. By canceling only parts of the legislation, the president, in effect, amends the law. The Court concluded that there was no constitutional authorization for the president to amend legislation at his discretion.

The line-item veto, like a regular veto, can be overridden at the state and federal levels by a two-thirds majority vote.

If the executive does not sign a bill or return it to the legislature with a message of disapproval, the bill becomes law within a prescribed number of days. At the state level, the governor turns the bill over to the office of the secretary of state, and the fact that it became law without the governor's signature is noted. If the legislature adjourns before the governor's time for signing expires, the bill does not become law without the signature. The governor's time for consideration has been curtailed, and the adjournment prevents the governor from returning the bill with a veto message. In this case the governor can defeat the bill by refusing to act, which produces a pocket veto.

The veto power gives the executive a pivotal role in the legislative process, if the executive cares to assert his or her authority. Use of the veto power varies considerably, depending on the personality of the executive, the political allegiances of house members and independence of legislative leaders, local customs, and the quality of the work produced by the legislature.

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Commissioners on Uniform Laws; Congress of the United States; Engrossed Bill; Enrolled Bill; House of Representatives; Legislative History; Senate.

## LEGISLATIVE

*Pertaining to the governmental function of lawmaking or to the process of enacting laws.*

## LEGISLATIVE ACTS

*Statutes passed by lawmakers, as opposed to court-made laws.*

## LEGISLATIVE COUNCIL

*Research and support arm of state legislatures and assemblies. Council members research legislative issues, draft legislative proposals, prepare legal opinions, and provide general support services. Also called* legislative counsel.

State legislatures depend on research staff to investigate and craft legislative proposals. These staff members are generally grouped into one body called a legislative council, but the terminology varies from state to state. They usually are nonpartisan bodies composed of lawyers and other professionals who work year-round with legislators. Staff members are expected to be politically neutral and impartial on all issues. Individuals may be assigned to general topical research areas or to specific legislative committees.

Legislative council staff members serve on standing committees, create research documents, prepare implementing legislation, draft

amendments, prepare reports on proposed administrative rules, and respond to research requests from legislators and legislative staff as well as other governmental agencies and the public. When the legislature is not in session the legislative council focuses on research projects that are of interest to legislators. Councils often publish reports on major issues that are of topical concern. Because federal laws mandate state compliance on a host of topics, legislative councils also must continually review federal regulations to determine their effect on current state laws and pending legislation.

In addition, legislative councils serve as the institutional memories of state legislatures. Long-time staff members with particular expertise in a field are valuable as turnover occurs in legislative bodies. The often arcane procedures involved in drafting bills are usually left to legislative council members, who take legislative ideas and directions and craft them into statutory language. In many states the legislative council is responsible for the publication of the legislative session laws as well as the codified statutes and administrative regulations.

During legislative sessions, council members sit with legislators in committee meetings and give both private and public advice. As legislation is proposed, these staff members provide analysis as to the policy and budgetary effects these proposals would have on state government. The production of fiscal notes is a major task for council staff, as legislators need to know what impact a new program would have on the state budget in terms of both spending and revenue.

In some states the legislative council is a two-tiered organization. The first tier is composed of a group of legislative leaders (e.g., senators); the second tier consists of the staff. The legislative members of the council set policy and research directions for the staff to follow. The form and function of a legislative council is mandated by individual state statutes.

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## LEGISLATIVE COURT

The term *legislative court* was coined in 1828 by Chief Justice JOHN MARSHALL, who wrote the opinion in *American Insurance Co. v. Canter,* 26 U.S. (1 Pet.) 516, 7 L. Ed. 242 (1828). In *Canter,* the High Court ruled that the U.S. Congress had the power to establish a federal court in the U.S. territory of Florida. Marshall held that Congress had this power under Article I, Section 8, Clause 9, of the U.S. Constitution. Marshall called courts created under this provision "legislative courts, created in virtue of the general right of sovereignty, which exists in the government."

On the federal level, the congressional authority to create courts is found in two parts of the U.S. Constitution. Under Article III, Section 1, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Article III, Section 1, also provides that the judges in the Supreme Court and in the inferior courts will not have their pay diminished and will hold their office during good behavior. This section establishes an independent judiciary that cannot be influenced by threats of pay cuts or of removal without cause. Article III courts are called constitutional courts.

Article I, Section 8, Clause 9, confers on Congress the power to "constitute Tribunals inferior to the supreme Court." This authority is not encumbered by a clause requiring lifetime tenure and pay protection, so judges sitting on Article I courts do not have lifetime tenure, and Congress may reduce their salaries. Article I courts are called legislative courts.

According to the U.S. Supreme Court, under Article I, the Framers of the Constitution intended to give Congress the authority to create a special forum to hear matters concerning congressional powers, and to further the congressional powers over U.S. territories under Article IV, Section 3. This authority allowed the government to create SPECIAL COURTS that can quickly resolve cases that concern the government. This is considered a benefit to society at large because it facilitates the efficient functioning of government.

The distinction between legislative courts and constitutional courts lies in the degree to which those courts are controlled by the legislature. Control of the judiciary by the legislature is forbidden under the SEPARATION-OF-POWERS doctrine. This doctrine states that the three branches of government—executive, legislative,

and judicial—have SEPARATE-BUT-EQUAL powers. Legislative courts challenge this doctrine because the pay rates and job security of their judges are controlled by a legislature.

The U.S. Supreme Court has identified three situations in which Congress may create legislative courts. First, Congress may create legislative courts in U.S. territories. This is because Congress has an interest in exercising the general powers of government in U.S. territories that do not have their own government. Such legislative courts exist in Guam, the U.S. Virgin Islands, and the Northern Mariana Islands. The local courts of the District of Columbia are also considered legislative courts.

Second, Congress may create legislative courts to hear military cases. This is because Congress has traditionally maintained extraordinary control over military matters. The U.S. Court of Military Appeals is such a legislative court.

Third, Congress may create legislative courts to hear cases involving public rights. Generally, these are rights that have historically been determined exclusively by the legislative or EXECUTIVE BRANCH. The government is always a party in such cases, and such cases generally involve matters of government administration. On the federal level, the only Article I court established under the public rights doctrine is the U.S. TAX COURT. This court hears cases involving federal taxes, brought by or against the INTERNAL REVENUE SERVICE or another federal agency.

Some scholars maintain that the public rights category of legislative courts could pose a threat to the independence of the federal judiciary. Because Congress is involved in many facets of life, these analysts fear that Congress could create an unacceptable number of courts that are not sufficiently independent. For the most part, that fear has not been realized. Congress has not created an inordinate number of Article I courts, and the U.S. Supreme Court has at times been vigilant in protecting the independence of Article III courts.

In 1982 the U.S. Supreme Court struck down a federal statute on the ground that it gave too much power to a legislative court (*Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598). At issue in *Northern Pipeline* was the Bankruptcy Reform Act of 1978 (11 U.S.C.A. § 101 et seq.). This act created federal bankruptcy courts to hear bankruptcy cases. Before the act bankruptcy cases were heard by U.S. district courts, which were independent Article III courts. The new bankruptcy judges were given a tenure of fourteen years, and their salaries were subject to adjustment. The new bankruptcy courts had the authority to decide contract and TORT cases related to bankruptcy.

According to the Supreme Court, the bankruptcy courts had been given the authority to decide issues of private rights, which generally concern the rights of one private party in relation to another private party. Under the Supreme Court's interpretation of Article I, Section 8, Clause 9, legislative courts cannot decide issues of private rights, so the bankruptcy courts were declared unconstitutional.

Two years after the Supreme Court's decision in *Northern Pipeline,* Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984 (28 U.S.C.A. § 1408 et seq.). This act created a distinction between core and noncore bankruptcy proceedings. Core proceedings were matters directly related to bankruptcy; noncore proceedings involved ancillary issues such as personal injury and WRONGFUL DEATH claims. Bankruptcy courts maintained jurisdiction in core proceedings. In noncore proceedings bankruptcy courts were limited to proposing findings of fact that could be thoroughly reviewed by a federal district court.

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## LEGISLATIVE FACTS

*Matters of such general knowledge that they need not be proven to an* ADMINISTRATIVE AGENCY *that is deciding a question of policy.*

General information and ideas affecting a blanket increase in property valuations are an illustration of legislative facts, as distinguished from individual grounds for the assessment of each parcel of property, which are adjudicative facts—information pertaining to the businesses and activities of parties to administrative proceedings.

## LEGISLATIVE HISTORY

*The discussions and documents, including committee reports, hearings, and floor debates, surrounding and preceding the enactment of a law.*

Legislative history includes earlier, similar bills introduced but not passed by the legislature; legislative and executive reports and studies regarding the legislation; transcripts from legislative committee hearings and reports from the committees; and floor debates on the bill.

The legislative history of a statute is a unique form of secondary legal authority. It is not binding on courts in the way that primary authority is. Federal and state constitutions, statutes, case law (judicial decisions), and agency regulations form the body of primary authority that courts use to resolve disputes. As secondary authority, legislative history is used only to decipher the precise meaning behind an ambiguous statute or statutory provision.

For example, suppose Congress passes a CRIMINAL LAW requiring that all persons under age 18 who appear in public after sundown must carry a federal identification card, which must be produced for law enforcement officers on demand. If the statute contains no definition of the phrase "in public," a court faced with a case brought under it may have to consult the legislative history to determine precisely where minors may venture without the identification card.

The value of legislative history in the law is similar to that of academic treatises: both are extrinsic aids. Lawyers may use favorable language from legislative history and academic treatises when they are presenting arguments to a court, and courts may use it when they are attempting to interpret a statute.

In some countries, such as England, courts may not consider secondary sources in making any decision. In these countries the potential for judicial abuse of a secondary source such as legislative history is considered an unacceptable risk to the legislative and judicial processes. The fear is that a judge could use one particularly unrepresentative statement from a lengthy legislative debate to incorrectly interpret a statute.

*North Haven Board of Education v. Bell,* 456 U.S. 512, 102 S. Ct. 1912, 72 L. Ed. 2d 299 (1982), illustrates why legislative history is of secondary importance. The question in *Bell* was whether a federal statute (Title IX of the Education Amendments of 1972, 86 Stat. 373, 20 U.S.C.A. § 1681 et seq.) barred gender-based discrimination in employment by educational institutions. In answering the question in the affirmative, the majority opinion relied heavily on the remarks of Senator Birch Bayh, the sponsor of the legislation. The dissenting opinion relied heavily on remarks by the same senator in reaching a different conclusion.

Not all legislative history in the United States has the same value. Generally, committee reports have the most weight with the judiciary. Remarks of legislators during floor debates have the least value. Committee hearings and reports from the president or governor are given varying weight, according to the court's need for the information.

Legislative history is never the only consideration in a case. In all cases courts examine the PLAIN MEANING of the words in the statute before looking at any legislative history.

The legislative history of federal statutes can be found in the various publications of special legislative commissions and legislative committee hearings, and in the *Congressional Record.* The *Congressional Record* is published by Congress each day that it is in session. It summarizes the proceedings of the previous day in both the Senate and the House of Representatives. Members of Congress also may publish unspoken remarks and all or part of their floor speeches. Collections of federal legislative history are maintained in law libraries and state government libraries. West Group issues a compilation of the statutes passed in each session of Congress and their legislative history. This compilation, called the *United States Code Congressional and Administrative News,* is available in state government libraries, in law libraries, and on West's online computer service, WESTLAW.

The INTERNET has become a reliable and useful source for locating legislative history for recent bills and laws. The U.S. Government Printing Office's website, known as GPO Access, provides the full text of congressional bills, House and Senate committee reports, committee prints, hearing transcripts, the *Congressional Record*, and several other documents. Availability of these documents depends on the individual document, but most are available from the mid-1990s onward. Another useful source is Thomas: Legislative Information on the Internet, produced by the LIBRARY OF CONGRESS. It provides access to recent bills, reports, debates, and other information.

Legislative materials on the state level are more difficult to acquire. In most states committee reports and transcripts of floor debates are stored at the state government library at the state capitol for a certain period of time, such as two years. After that period of time, they may be shipped to a state archives office. Some well-stocked law libraries may have history on state legislation. Most states now provide the text of recent legislation through their websites, but most do not provide access to legislative history.

The availability of the history of local laws varies from jurisdiction to jurisdiction. Some large cities preserve committee reports and legislative comments on local laws; most small towns leave no trace of the intent behind their laws.

Methods for storing state and local legislative history vary widely. To find the legislative history of a particular state or local statute, consult the reference librarian at the appropriate state government library or at a law library.

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CROSS-REFERENCES

Canons of Construction; Plain-Meaning Rule.

## LEGISLATURE

*A representative assembly of persons that makes statutory laws for a municipality, state, or nation.*

A legislature is the embodiment of the doctrine of popular sovereignty, which recognizes that the people are the source of all political power. Citizens choose by popular vote the legislators, or representatives, whom they want to serve them. The representatives are expected to be sensitive to the needs of their constituents and to represent their constituents' interests in the legislature.

### Structure

The federal legislature, the U.S. Congress, is bicameral in structure, meaning that it consists of two chambers, in this case the House of Representatives and the Senate. Each state has a legislature, and all state legislatures have two houses, except the Nebraska Legislature, which has only one. State legislative bodies have various official designations, including *state legislature, general assembly, general court,* and *legislative assembly.* Local legislatures are generally structured differently from the state and national model. They may be called city councils or boards of aldermen and alderwomen.

The traditional bicameral structure of state and national legislatures developed out of early U.S. societal distinctions between the public in general and the propertied, wealthy class. This structure provided for a lower house and an upper house. The lower-house legislators were elected by the general voting public, and it was believed that their votes were likely to be radical. The upper-house legislators were elected by voters who owned more property, and it was believed that they would be more mindful of concerns to property owners.

Traditional bicameralism is still supported for various reasons. It is believed that because both houses must separately pass a bill in order for the bill to become law, bicameral legislatures are less likely to pass hasty, ill-considered laws or to be subject to public passions. Proponents of unicameralism (a one-chamber system) cite lower costs, simpler procedures, better executive-legislative relationships, and legislative developments that are easier for the public to follow.

Federal and state legislatures range in size from the U.S. Congress, consisting of 535 members, to the Delaware Legislature, with fewer than 100 members. Legislatures organize themselves into a number of committees and subcommittees, which undertake in-depth study of issues within their area of expertise and focus. Each committee addresses the issues presented to it, recommends action, and changes bills before they are passed on for consideration by the full house. After members of one house pass a bill, it must go to the other house for approval. After both houses have approved a bill, it is presented to the president or governor to be signed into law or vetoed.

U.S. state legislatures and the U.S. Congress organize their members according to political party affiliations. The political party that represents the majority of a particular house of the legislature is able to organize and control the actions of that house. The lower house of the legislature chooses a member of the dominant political party to serve as Speaker. The upper house chooses a member of the dominant political party to serve as president. Generally, the members of the different political parties meet separately to determine what actions their party

*The Wisconsin Legislature meets in joint session in February 2003. The relationship of state legislatures to state judicial and executive branches is very similar to the relationships among the three federal branches of government.*

AP/WIDE WORLD PHOTOS

will take in the upcoming session of the legislature. Though there are exceptions, legislators tend to vote along party lines. Political parties are less able to command party loyalty from individual legislators in state legislatures than in the U.S. Congress.

The Speaker of the lower house is the presiding officer of that house and is generally the most powerful member of the house. The full membership of the house chooses the Speaker. The duties of the Speaker include appointing members of the standing committees in the lower house. The speaker typically considers party membership, seniority, and the opinions of other party members in making these appointments. Unless there are house rules to the contrary, the Speaker may also refer bills to committee. It is the role of the Speaker to interpret and apply the rules of procedure that govern the actions of the house.

In accordance with the U.S. Constitution, the vice president of the United States officially presides over the U.S. Senate. Most state constitutions have similar rules, charging the lieutenant governor with the duty of presiding over the state's upper legislative house. In states that do not have a lieutenant governor or do not give that individual power to preside over the upper house of the state legislature, a member of the upper house is selected by other members to serve as president of the house. The duties of the president of the upper house are similar to those of the Speaker of the lower house, although they generally do not include appointing members to committees. Some states that do permit the president of the upper house to appoint committee members diminish that power by making the appointments subject to approval by the whole membership of the house. In a state in which the lieutenant governor serves as president of the upper house, if there is a tie on a vote in the upper house, the president of the house must cast the deciding vote. In the U.S. Senate and in states in which the lieutenant governor presides over the upper house, the house selects one member to serve as president pro tem (for the time being) when the president of the house is absent.

Legislative sessions are the periods of time in which a legislature conducts its business. Each

legislative session of the U.S. Congress is called a "Congress," lasts for two years, and is numbered consecutively. For example, the 107th Congress began in January of 2001 and ended in December of 2002. The 108th Congress began in January of 2003. Each Congress begins in the year following a biennial election of members and is divided into two one-year "sessions." Most states have annual sessions, each lasting perhaps only a few months. The governor of a state may call a special session of the state legislature, outside its normal meeting times, to address issues that require immediate attention.

### Qualifications, Terms, and Compensation of Legislators

Members of the U.S. Congress are chosen to represent a particular state. Each state may elect two U.S. senators. The number of U.S. representatives a state may elect is determined by the population of the state, with a minimum of one.

Every state uses a district system to choose its state legislators. Under this system the state is divided into districts, often along county lines, with one or more legislators representing each district.

The applicable national or state constitution sets the qualifications for individuals who are eligible to serve as legislators. These rules are generally not restrictive, including only age, citizenship, and residency requirements. U.S. citizenship is a universal requirement, as is a certain period of state residency. A legislator must live in the state or district from which he or she is elected. Every state requires that members of the lower house of the state legislature be at least 21 years old. The U.S. Constitution requires members of the House of Representatives to be at least 25 years old, and members of the Senate to be at least 30 years old.

Congressional terms are six years for senators and two years for representatives. Terms for state legislators vary, but generally are either two or four years. Over the years there has been a push toward setting term limits in the U.S. Congress—that is, restricting the number of terms a U.S. legislator may serve. State legislatures have a higher rate of turnover and therefore do not generally face this issue.

Legislators are compensated for their services at various rates, and many state legislators are considered underpaid. Legislators also receive reimbursement for their expenses, including mileage to and from their home district and the location of the legislature. Legislators usually have the authority, by virtue of powers given to the legislature, to raise their own salaries. But they are often reluctant to do so for fear of a negative public reaction.

### Relationship with Executive and Judicial Branches

The purpose of a legislature is to make, alter, amend, and repeal laws. Legislatures are empowered to enact laws by virtue of legislative jurisdiction, which is the authority vested in them by the national or state constitution. The enumerated powers of Congress are provided for in Article I of the U.S. Constitution. In addition to their lawmaking duties, members of Congress also have the power to appropriate funds for government functions, institute taxes, regulate commerce, declare war, raise and support a military, approve presidential appointments, and impeach executive officers. Following the national model, each state legislature derives its powers from the state constitution.

In addition to the legislative branch, national and state governments include executive and judicial branches. The head of the EXECUTIVE BRANCH at the national level is the president of the United States and at the state level is the governor. The executive branch enforces the laws enacted by the legislature. It can do so in a number of ways, including policing the streets and prosecuting those who violate laws.

The judicial branch interprets the laws passed by the legislature. The courts first look to the exact language of a particular law. Sometimes the meaning of the statutory language is not clear to the court, or the application of the language to the particular case before the court is doubtful. In such a circumstance, the court tries to determine what the legislature intended when it enacted the statute. Legislative intent can often be determined by looking at the history of the particular law and reading committee notes or congressional debates regarding the law. The judicial branch has developed many maxims of statutory interpretation over many years to help the courts carry out legislative intent when interpreting laws.

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CROSS-REFERENCES

Congress of the United States; Judicial Review; Legislative History.

## LEGITIMATE

*To make lawful, such as when a child is born prior to the parents' marriage and they subsequently wed and thereby confer upon the child the same legal status as those born in lawful wedlock.*

*That which is lawful, legal, recognized by law, or in accordance with law, such as legitimate children or legitimate authority; real, valid, or genuine.*

CROSS-REFERENCES

Illegitimacy.

## LEMON LAWS

*Laws governing the rights of purchasers of new and used motor vehicles that do not function properly and which have to be returned repeatedly to the dealer for repairs.*

Laws in all 50 states and the District of Columbia provide remedies to purchasers of defective new vehicles, often called lemons. These so-called lemon laws protect consumers from substantial defects occurring within a specified period after purchase and provide that a manufacturer must either replace the lemon with a new, comparable car or refund the full purchase price. According to the consumer advocate group Consumers for Auto Reliability and Safety, automakers repurchase 50,000 vehicles a year, about .33 percent of the 15 million vehicles sold annually.

California and Connecticut passed the first lemon laws in 1982, in response to dissatisfaction with remedies in state sales laws and the 1975 federal MAGNUSON-MOSS WARRANTY ACT (15 U.S.C.A. § 2301 et seq.). Magnuson-Moss and other laws previously in effect provided remedies for the breach of full warranties, but the automobile industry typically provided only limited warranties. Other states quickly followed California and Connecticut in an effort to provide relief to new-car buyers under limited warranties.

Lemon laws typically provide CONSUMER PROTECTION for owners of new cars, trucks, and vans. A significant minority of states also provide coverage for leased vehicles. Many states specify coverage for one year from delivery or for the written WARRANTY period, whichever is shorter; a handful of states mandate coverage for the shorter of two years or 24,000 miles.

Lemon laws cover only substantial defects, meaning defects that substantially impair the use, value, or safety of the vehicle. If a defect is safety related, the manufacturer is usually allowed just one chance to fix it before the owner may invoke the lemon law; if a defect impairs the use or value of a vehicle, the manufacturer is usually permitted three or four attempts to repair it. A consumer may also invoke the law if a vehicle is out of service for a certain number of days because of any combination of substantial defects. The time out of service is cumulative, not consecutive, and ranges from 15 to 40 days. Paint defects, rattles, cosmetic flaws, jumpy suspensions, premature wear of the tires, and the like are not normally considered substantial defects.

The purchaser of a new car typically returns to the dealership to have repair work done. Therefore, the dealer knows that a defect exists. However, lemon laws generally require that the purchaser give the manufacturer written notification of a problem within a specific time frame. The manufacturer then has a final opportunity to repair the vehicle before a lawsuit may be commenced. It has been argued that this notice requirement is unduly burdensome for consumers, who are often unaware of it. Consumer advocates have also argued that such notice is redundant. A substantial defect means that the defect would be covered by the automobile's warranty. If a car requires repair for an item covered by warranty, it is done at no cost to the consumer. The manufacturer reimburses the dealer for the warranty repair; the manufacturer would have notice of the defect when the dealer requests reimbursement from the manufacturer for the repair.

After a consumer invokes the lemon law, the parties arbitrate the matter in an attempt to resolve it. Some statutes provide for a state-run ARBITRATION process. Others provide for arbi-

tration provided by private groups such as the Better Business Bureau or even a manufacturer-sponsored panel. Arbitration is an informal trial with a panel or individual deciding the matter. Each side tells its story. Mechanics might testify on behalf of either side. Lawyers are not required but may increase a consumer's likelihood of prevailing or settling prior to the arbitration hearing.

According to one report, fewer than 10 percent of the cases handled by a manufacturer-sponsored panel are decided in the consumer's favor. Consumers tend to fare slightly better in cases handled by the Better Business Bureau and fare best of all under state-run arbitration procedures. An early 1990s survey of three states with state-run arbitration found that consumers were awarded a full refund or replacement car in at least half of the cases. Many states make the arbitrator's decision binding on the manufacturer but not on the consumer.

During arbitration automakers frequently argue that the consumer abused the car or failed to service the vehicle properly or that the defect does not substantially affect the car's safety or value. For this reason consumers should save all documentation about a vehicle and should keep meticulous records of all service problems. One owner of a top-of-the-line luxury car succeeded in arbitration for a whining noise in the air conditioner because an advertising brochure promised that the car would be a soothing and calming haven.

States vary on whether the manufacturer or the consumer chooses the remedy. A lemon owner is entitled to a refund of the vehicle's purchase price, including sales tax, license, and fees, or a new, comparable car—minus a deduction for the value of the owner's use of the lemon. Some states also provide that the manufacturer reimburse the owner's attorney's fees and costs for bringing the lawsuit.

Used-car purchasers must also be wary of lemons. Once a lemon has been repurchased by the manufacturer, either voluntarily or pursuant to an arbitrator's or judge's decision, scant protections prevent its resale elsewhere. States vary greatly on how much information must be disclosed to subsequent purchasers. Some states require the title of a lemon to carry a notation reflecting the lemon status. The notation varies from "nonconforming vehicle" to "defect substantially impairs use, value, or safety." A handful of states require that buyback stickers be placed on the vehicle. However, enforcement of such requirements is often a low priority for state governments, and enforcement of lemon laws effectively ends at a state's border. In response to complaints about resold lemons, in 1996 the FEDERAL TRADE COMMISSION (FTC) began investigating the possibility of imposing a national standard for the resale of lemons. However, the FTC did not take action after completing its inquiry.

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Automobiles.

## LEND-LEASE ACT

Enacted by Congress in 1941 the Lend-Lease Act empowered the president to sell, transfer, lend, or lease war supplies—such as equipment, food, and weapons—to American allies during WORLD WAR II. In exchange for the valuable assistance provided under the Lend-Lease Act (55 Stat. 31 [1941]), the Allies were to comply with the terms set by the president for repayment. The Office of Lend-Lease Administration was created pursuant to the act to oversee the implementation of the program, but this function was later transferred to the STATE DEPARTMENT.

Although the Lend-Lease Act was enacted to provide aid to China and the British Empire, eligibility under its provisions was expanded to include all Allies who were essential to the maintenance of the security of the United States. Subsequent reciprocal agreements with countries

*Under the Lend-Lease Act, U.S. equipment, food, and weapons were sent to allies during World War II, including these crates of TNT being stacked by British soldiers.*

CORBIS

where American troops were stationed provided that the troops would receive comparable aid while stationed there.

President HARRY TRUMAN ended the lend-lease program in 1945.

## ❖ LENIN, VLADIMIR ILYICH

Vladimir Ilyich Lenin founded the Russian Communist party and led the 1917 Russian Revolution, which placed the Bolshevik party in charge of the government. The establishment of the Soviet Union can be traced to Lenin's study of revolution and the ruthless imposition of a one-party state based on Lenin's interpretation of Marxism. The Russian Revolution also profoundly affected U.S. society and politics.

Lenin was born Vladimir Ilyich Ulyanov on April 22, 1870, in Simbirsk, a town on the Volga River. The son of a government official, Lenin was a bright student. He entered Kazan University at Kazan in 1887. That same year his brother Alexander Ulyanov was hanged for taking part in an unsuccessful plot to kill Czar Alexander III, of Russia. Lenin was deeply influenced by his brother's actions. Within three months, he was expelled from school for protesting the lack of freedom in the university. He moved to St. Petersburg and entered St. Petersburg University, from which he graduated with a law degree in 1891.

During his academic period, Lenin studied the works of KARL MARX and his political philosophy, Marxism. In 1893 Lenin joined the Social Democratic group, which believed in Marxist principles. A gifted writer and speaker, Lenin soon traveled to Western Europe to meet with other Marxists. He was arrested by the czar's police in 1896 for revolutionary activities and sent into Siberian exile in 1897. During his exile Lenin wrote one of his most important works, *The Development of Capitalism in Russia* (1899).

Lenin was allowed to leave Russia in 1900. He traveled to Germany, where he began writing for a revolutionary newspaper called *Zarya* (Dawn), which was smuggled into Russia. He took the pen name Lenin at this time, hoping to confuse the police. In 1902 he wrote what is considered a masterpiece of revolutionary organization, *What Is to Be Done?* In this work Lenin advocated the use of a highly disciplined party of professional revolutionaries to lead the masses in an uprising against czarist Russia. This revolutionary party would serve as the "vanguard of the proletariat." It would also assume supreme control during this revolutionary period.

Disputes within Russian revolutionary circles over Lenin's ideas led to a split in 1903 between Lenin's Bolshevik party and the Menshevik party, which favored moderation. Bolsheviks followed Lenin's instructions to commit acts of TERRORISM within Russia. They also worked hard to organize TRADE UNION members and Russian sailors and soldiers.

During most of WORLD WAR I, Lenin stayed in Switzerland. When revolution broke out in Russia in March 1917, Lenin returned with the aid of Germany, which hoped he would gain power and agree to a peace treaty. Accused of being a German agent by the provisional government, Lenin fled to Finland. He returned to Russia secretly in October 1917 and led the October Revolution, which toppled the provi-

sional government and placed the Bolsheviks in charge.

Once in power Lenin moved quickly to eliminate all political opposition. He organized the Red Army (named after the color of the flag of the world Communist movement). The Red Army fought a civil war with the Whites, who opposed one-party and one-man rule by Lenin. The civil war ended in 1922, with the defeat of the White Army. During this period the U.S. government supported the Whites, fearing that the Russian Revolution was a prelude to further Communist revolutions in Europe. This fear seemed confirmed in 1919 when Lenin formed the Communist International to export revolution to the rest of the world.

In 1919 and 1920, U.S. anxiety about the Russian Revolution and the dictatorship of Lenin produced a national hysteria that has come to be known as the first **RED SCARE**. President Woodrow Wilson's attorney general A. **MITCHELL PALMER** created an antiradicalism unit and appointed **J. EDGAR HOOVER** to run it. In late 1919 and early 1920, Palmer raided suspected revolutionaries and subversives. Most of these suspects were not U.S. citizens. The largest "Palmer raid" occurred on January 2, 1920, when six thousand people were arrested. Palmer's agents abused the constitutional rights of these people, searching homes without warrants, holding individuals without giving specific charges, and refusing access to legal counsel. Many **ALIENS** were deported because of their radical political views.

Lenin's revolutionary zeal was tempered by the need to defeat the Whites and to establish a national government in the wake of the loss of lives and resources in World War I. Faced with economic ruin, Lenin instituted in March 1921 his New Economic Policy. This policy abandoned many socialist measures and permitted the growth of small businesses. Lenin also tried to get the United States and Europe to invest in the Soviet Union, but was refused because the Soviets had repudiated all foreign debts. The United States did, however, through its Commission for Relief, provide large amounts of food that may have helped save hundreds of thousands of lives.

Lenin's last years were marked by failing health and a concern about the direction of the Communist party and the Soviet Union. He worried about the increasing strength of the political bureaucracy and about Joseph Stalin's plottings to succeed him. In May 1922 he suffered a stroke, then returned to work against his doctor's advice. He suffered additional strokes in November 1922 and March 1923, the last one destroying his ability to speak clearly. Lenin died January 24, 1924, physically unable to appoint his successor. His body was preserved using special chemicals and placed in a tomb on Red Square in Moscow.

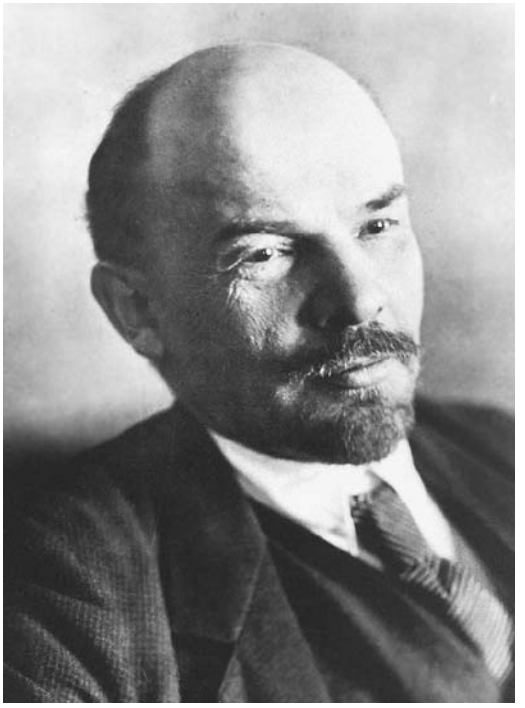

*Vladimir Lenin.*

FURTHER READINGS

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CROSS-REFERENCES

Communism.

## LEOPOLD AND LOEB TRIAL

In 1924, the city of Chicago, Illinois, was shocked by the brutal and senseless murder of adolescent Bobby Franks. The crime resulted in a sensational murder trial wherein eminent attorney **CLARENCE DARROW** achieved a brilliant victory despite an overwhelming amount of incriminating evidence.

Nathan Leopold (*b.* November 19, 1904, in Chicago, Illinois; *d.* August 29, 1971, in San Juan, Puerto Rico), age 19, and Richard Loeb (*b.* June 11, 1905, in Chicago, Illinois; *d.* January 28,

1936, in Joliet, Illinois), age 18, college students from wealthy families, were regarded as unusually intelligent. Their extraordinary reasoning powers compelled them to construct and execute the perfect crime. They decided that KIDNAPPING and murder would challenge their mental capacities to the fullest.

The two young men plotted their crime in 1923. They chose the names Louis Mason and Morton Ballard as aliases and successfully stole a typewriter from the University of Michigan to type a ransom note that would be difficult, if not impossible, to trace. By 1924 they had perfected their plan and accumulated their other necessities, including a chisel and acid.

Leopold and Loeb chose their victim by chance. The ransom note, already typed, had not been addressed to anyone in particular, since the abduction of their victim would be a spontaneous happening. On May 21, 1924, Leopold and Loeb drove around in a rented car near the Harvard School, a private preparatory school in the Kenwood area of Chicago's south side. The first possible victim was a youth named Levinson, who was an acquaintance of the two kidnappers. They drove around the block but lost sight of him. The next student they saw was fourteen-year-old Bobby Franks. Bobby Franks knew Leopold and Loeb from the neighborhood, and when the two college students offered Bobby a ride home, the boy accepted. Once he was in the car he was bludgeoned to death with a chisel. On the way to dispose of the body, the two killers stopped for something to eat. They then proceeded to a deserted area of Chicago, where they dumped Bobby's body. They buried his clothes and poured acid on his face to hinder positive identification.

*Richard Loeb (left) and Nathan Leopold committed a murder that shocked Chicago in the 1920s. They later confessed, but prominent lawyer Clarence Darrow won life sentences rather than the death penalty for both of them.*

AP/WIDE WORLD PHOTOS

The Franks family was frantic with worry over their missing son. Leopold and Loeb began a ritual of telephone calls promising Bobby's safe return upon receipt of $10,000. A ransom note delivered the next day confirmed this demand.

As Mr. Franks was leaving to deliver the ransom money as directed by the kidnappers, he was notified that his son's body had been found. An extensive police investigation ensued, but Leopold and Loeb had cleverly disposed of all evidence. The two men followed the events of the frustrating investigation and joined in local discussions concerning the case.

There was one flaw in the perfect crime, and that was human frailty. A pair of glasses had been discovered near the site of the murdered boy's body, and the prescription was traced to Nathan Leopold. Unperturbed, Leopold stated that he had been with his friend Richard Loeb on the day of the murder, and they had spent the day driving around Chicago in the car owned by the Leopold family. The glasses were lost during a day of birdwatching, which Leopold often pursued in conjunction with an ornithology class he was teaching. Since they were seldom used, he had not noticed that the glasses were missing. Leopold's story was feasible, and his upstanding family and educational background added to his credibility; he was released.

More evidence began to emerge against Leopold and Loeb as the investigation continued. A paper typed by Leopold for a class was discovered, and when it was compared to the typewritten ransom note, the type was suspiciously similar. Further investigation revealed that the Leopold family car, which Leopold and Loeb supposedly used the day of the murder, had not left the garage; this information was corroborated by the family chauffeur.

Loeb panicked and confessed, forcing Leopold to do the same. They admitted that they had killed the boy for the excitement of committing a crime.

The case against Leopold and Loeb was airtight. The confessions were authentic, and further evidence was elicited from the two men. The families of the killers appealed to prominent lawyer Clarence Darrow to defend the accused murderers.

Darrow opposed the idea at first, but felt that Leopold and Loeb would be convicted more on an emotional level than on legal expertise. Darrow knew they were guilty but agreed to attempt to secure a sentence other than the applicable death penalty.

The case came to court on July 21, 1924. Darrow requested that the case be decided solely by a judge, without a jury. Judge John R. Caverly consented.

Leopold and Loeb pleaded guilty. They had been examined by psychiatrists and declared legally sane. Darrow decided that since he could not argue that they were insane, he would try to prove that the two men were mentally diseased, which would not excuse their guilt but could be a mitigating factor in their sentencing. Darrow appealed to the mercy of the court in deciding the punishment for Leopold and Loeb.

The judge deliberated for ten days before rendering his decision. Leopold and Loeb were spared the death sentence and received sentences of life imprisonment.

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## LESBIAN RIGHTS

See GAY AND LESBIAN RIGHTS.

## LESS DRASTIC MEANS TEST

See LEAST RESTRICTIVE MEANS TEST.

## LESSEE

*One who rents real property or* PERSONAL PROPERTY *from another.*

A lessee of land is a tenant.

CROSS-REFERENCES

Landlord and Tenant.

## LESSER INCLUDED OFFENSE

*A lesser crime whose elements are encompassed by a greater crime.*

A lesser included offense shares some, but not all, of the elements of a greater criminal offense. Therefore, the greater offense cannot be committed without also committing the lesser offense. For example, MANSLAUGHTER is a lesser included offense of murder, assault is a lesser included offense of rape, and unlawful entry is a lesser included offense of BURGLARY.

The rules of CRIMINAL PROCEDURE permit two or more offenses to be charged together, regardless of whether they are misdemeanors or felonies, provided that the crimes are of a similar character and based on the same act or common plan. This permits prosecutors to charge the greater offense and the lesser included offense together. Although the offenses can be charged together, the accused cannot be found guilty of both offenses because they are both parts of the same crime (the lesser offense is part of the greater offense).

When a defendant is charged with a greater offense and one or more lesser included offenses, the trial court is generally required to give the jury instructions as to each of the lesser included offenses as well as the greater offense. However, a defendant may waive his or her right to have the jury so instructed. If the jury finds guilt BEYOND A REASONABLE DOUBT as to a lesser included offense, but finds reasonable doubt as to the defendant's guilt with regard to the greater offense, the court should instruct the jury that it may convict on the lesser charge.

It is not uncommon for a prosecutor and defendant to negotiate an agreement by which the defendant pleads guilty to the lesser included offense either before the trial begins or before the jury returns a verdict. Such a plea negotiation is generally acceptable to the prosecuting attorney because the evidence establishing guilt for the lesser included offense is usually strong.

The defendant is generally willing to make such an agreement because the lesser included offense carries a less severe sentence.

The notion of lesser included offenses developed from the common-law doctrine of merger. In the past, felony and misdemeanor trials involved different procedural rights. The merger doctrine determined an individual's procedural rights at trial if the individual was charged with both a felony and a lesser included misdemeanor. In that circumstance the misdemeanor was considered to have merged with the felony, and felony procedural rights applied. The merger doctrine has been repudiated in modern U.S. law because an accused's procedural rights are essentially the same whether the accused is charged with a misdemeanor or a felony.

FURTHER READINGS

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CROSS-REFERENCES

Criminal Law; Plea Bargaining.

## LESSOR

*One who rents real property or* PERSONAL PROPERTY *to another.*

A lessor of land is a landlord.

CROSS-REFERENCES

Landlord and Tenant.

## LET

*To award a contract, such as for the erection of public works, to one of several bidders.*

*To lease certain property.*

CROSS-REFERENCES

Public Contract.

## LETTER OF CREDIT

*A written instrument from a bank or merchant in one location that requests that anyone or a specifically named party advance money or items on credit to the party holding or named in the document.*

When a letter of credit is used, repayment of the debt is guaranteed by the bank or merchant issuing it. For example, if a bank is aware that a prominent citizen is trustworthy and can safely be relied upon to settle the debts which he or she incurs, then a letter of credit will be offered to that person on the basis of his or her good reputation so the person can travel without carrying large sums of money.

Letters of credit were used frequently before credit cards and travelers' checks were in common usage.

## LETTER OF THE LAW

*The strict and exact force of the language used in a statute, as distinguished from the spirit, general purpose, and policy of the statute.*

## LETTER RULING

*In tax law a written interpretation of certain provisions of federal statutes by the Office of the Assistant Commissioner of the Internal Revenue Service.*

Tax laws are often the subject of dispute between U.S. taxpayers and the Internal Revenue Service (IRS). Authority for interpreting the laws, which are found in the INTERNAL REVENUE CODE, rests with regional IRS agents, who have the power to review tax returns through an audit. If a taxpayer disagrees with an interpretation of the law, she or he may ask the national IRS office to issue a ruling on the point of contention. This statement is called a private letter ruling.

Because of the time and expense involved in preparing a request for a letter ruling, such a request is seldom made. The taxpayer must submit a complete record of the transaction in dispute, including a justification for the transaction, all pertinent documents, the section of the tax code in question, and any relevant IRS regulations, rulings, and court precedents.

Letter rulings are issued by the Office of the Assistant Commissioner of the IRS. They are numbered—for example, Private Letter Ruling 8616003. Each discusses the applicable facts before the IRS as well as the IRS ruling, but does not name the individual or organization that requested the ruling. After the ruling is issued to the regional office and the taxpayer, it is pub-

*A sample irrevocable letter of credit*

**Irrevocable Letter of Credit**

Date: _____

**(Current Commissioner)**
Tax Commissioner
Capitol Building, W-300
Charleston, West Virginia 25305

**RE: IRREVOCABLE LETTER OF CREDIT NO._____**

Dear Commissioner _____:

We, _____**(Financial institution))**_____, hereby establish in favor of the State of West Virginia for the use of the Tax Commissioner of the State of West Virginia our Irrevocable Letter of Credit available by draft of the State Tax Commissioner drawn at this Bank at our banking house in _____**(City)**_____, for sums not exceeding _____**(Amount)**_____, for the account of _____**(Taxpayer)**_____,to provide indemnification to the Tax Commissioner adequate to secure compliance with the provisions of Chapter 11 of the West Virginia Code.

1. Hereunder _____**(Funds)**_____ are available to you, or your successor as Tax Commissioner, by drafts of the Tax Commissioner drawn on us if presented on or before _____**(Date)**_____. Drafts must be marked "Drawn Under Letter of Credit No. _____, dated _____".

2. Any draft hereunder shall be accompanied by a written certification by the Tax Commissioner that_____ _____**(Taxpayer)**_____ has failed to comply with the provisions of Chapter 11 of the West Virginia Code, that the Tax Commissioner has given _____**(Taxpayer)**_____ , 15 days written notice by certified mail, return receipt requested, of the default by _____**(Taxpayer)**_____ in payment of any assessment which has become final and not subject to further appeal, and that _____**(Taxpayer)**_____ , has not cured such default within such fifteen day period.

3. All drafts drawn under and in compliance with the terms of this Letter of Credit will be duly honored upon delivery of documents as specified if presented on or before the current or a future date of expiration.

4. This Letter of Credit shall be automatically extended for additional periods of one year from the present or each future expiration date unless we notify you by certified mail, return receipt requested, at the above address at least thirty (30) days prior to the expiration date of this Letter of Credit that we intend not to extend it for another year (less one day) or to replace it with another similar Letter of Credit, and that following such notice you may immediately draw against this Letter of Credit, notwithstanding the provisions of Paragraph 2.

Very truly yours,

_____
**(Financial Institution)**

By: _____

WV/BRT-LOC
Rev. 2/97

lished by the IRS. Several thousand letter rulings are issued annually.

The legal value of a letter ruling is extremely limited. The ruling applies only to the taxpayer who requested it and only for the year in which it is issued; federal tax law states that a letter ruling may not be used or cited by another taxpayer (I.R.C. § 6110(j)(3)). If the ruling favors the taxpayer, the regional IRS agent is bound by it. If the ruling is adverse, the taxpayer can submit the issue to a TAX COURT.

Since the 1930s courts have refused to give precedential weight to letter rulings. In the 1989 case of *Phi Delta Theta Fraternity v. Commissioner of Internal Revenue,* 887 F.2d 1302 (6th Cir.), a national fraternity appealing an order of the U.S. Tax Court based part of its argument on several letter rulings. In affirming the Tax Court's decision, the appellate court described the weight courts are to give letter rulings: "Although private letter rulings are helpful in determining the contours of tax statutes and may be considered when evaluating the consistency of application of statutes, such letter rulings have no precedential effect."

Despite the limited application of letter rulings, they are widely read by tax attorneys. Specialists use them to keep abreast of IRS interpretation, and the documents are available from electronic databases.

FURTHER READINGS

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CROSS-REFERENCES

Income Tax; Taxation.

## LETTERS OF ADMINISTRATION

*A formal document issued by a court of probate appointing a manager of the assets and liabilities of the estate of the deceased in certain situations.*

Courts are often asked to rule on the management of a deceased person's estate. Generally, this is a routine matter for probate courts, which are created specifically for this purpose. Individuals generally determine the distribution of their estate in a will, which usually specifies an executor to carry out its directions. But where the decedent has left no will or the executor named in a will is unable or unwilling to serve, the courts must appoint an administrator. This appointment is made by issuing a short document called letters of administration, which is a decree that serves as evidence of the administrator's authority.

When an individual dies intestate (without a valid will or with no will at all), issues must be resolved involving the disposal of the decedent's property, the settlement of debts and claims against the estate, the payment of estate taxes, and in particular the distribution of the estate to heirs who are legally entitled to receive it. These matters are resolved by following the laws of DESCENT AND DISTRIBUTION, which are found in the statutes of all states. Essentially, these laws divide the decedent's property according to well-established rules of inheritance based on blood relations, ADOPTION, or marriage. In the case of a person who has died intestate, the probate court appoints an administrator to distribute the property according to the relevant descent and distribution statutes.

Even though a decedent may leave a valid will that names an executor, there is no guarantee that the executor will carry out the duties involved. An executor may be unable or unwilling to serve, for example, because of illness or other commitments. For this reason wills often name an alternate executor as a safeguard. When the named executor cannot or will not serve and there is no alternate executor, the court will intervene to appoint an administrator. Generally, one or more relatives of a decedent will submit their name in a petition for letters of administration, and the court will rule on each submitter's fitness for the duty and on the merits of competing claims, if any.

Until the court can appoint someone with full responsibility for the estate, it may choose to appoint a temporary special administrator. This individual is granted limited authority over specified property of the decedent, as opposed to having the authority to direct the disposition of the entire estate. When a valid will exists, any administrator appointed by the court is bound to direct the estate according to the terms of the will.

CROSS-REFERENCES

Executors and Administrators.

*A sample decree granting letters of administration*

**Granting Letters of Administration**

SURROGATE'S COURT - COUNTY

CITATION

THE PEOPLE OF THE STATE OF NEW YORK,
by the Grace of God Free and Independent,

TO

A petition having been duly filed by _____ , who is domiciled at _____ .

YOU ARE HEREBY CITED TO SHOW CAUSE before the Surrogate's Court, _____ County, at _____, New York, on _____ , 20_____ at_____o'clock in the _____noon of that day, why a decree should not be made in the estate of _____ lately domiciled at _____ in the County of _____ , New York, granting Letters of Administration upon the estate of the decedent to _____or to such other person as may be entitled thereto.

(State any further relief requested)

Dated, Attested and Sealed,

_____ , 20_____

(Seal)

HON.
Surrogate

_____

Chief Clerk

Name of
Attorney for Petitioner _____

Tel. No. _____

Address of Attorney _____

Note: This citation is served upon you as required by law. You are not required to appear. If you fail to appear it will be assumed you do not object to the relief requested. You have a right to have an attorney-at-law appear for you.

[continued]

*A sample decree granting letters of administration (continued)*

**Granting Letters of Administration**

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF

_____ X
ADMINISTRATION PROCEEDING
Estate of

NOTICE OF APPLICATION FOR
LETTERS OF ADMINISTRATION
(SCPA 1005)

a/k/a

_____ X
**Deceased**

File No. _____

Notice is Hereby Given That:

(1) an application for Letters of Administration upon the estate of the above-named decedent, has been made by _____
_____ , petitioner,
whose post office address is: _____

(2) each and every name of the intestate decedent known to the undersigned is as indicated in the above caption.

(3) petitioner prays that a decree be made directing the issuance of Letters of Administration to _____
_____

(4) the name and post office address of each and every distributee of the above-named decedent, as set forth in the petition and known to the undersigned, are as follows:

(a) Distributees who have been duly cited, have waived citation or have appeared in this proceeding:

| Name of Distributee | Domicile and Post Office Address |
|---|---|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

(b) Other Distributees;

| Name of Distributee | Domicile and Post Office Address |
|---|---|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

(CONTINUE ON REVERSE SIDE IF MORE SPACE NEEDED)

(5) That the undersigned does not know of any other distributees of the said decedent.

(6) That Letters of Administration will issue on or after _____ , 20_____

Dated: _____ , 20_____

_____
**Signature of Petitioner or Attorney**

_____
**Attorney for Petitioner**

_____
**Print Name**

_____
**Address (Office)**

_____
**Address**

Tel No. _____

[continued]

*A sample decree granting letters of administration (continued)*

**Granting Letters of Administration**

COUNTY OF

_____ X

ADMINISTRATION PROCEEDING
Estate of

AFFIDAVIT OF MAILING
NOTICE OF APPLICATION FOR
LETTERS OF ADMINISTRATION
(SCPA 1005)

a/k/a

File No. _____

_____ X

**Deceased**

STATE OF NEW YORK
COUNTY OF ss.:

_____ , residing at _____ , New York,

being duly sworn, deposes and says that deponent is over the age of eighteen years; that on _____ , 20____, deponent mailed a copy of the foregoing Notice of application for Letters of administration, contained in a securely closed postpaid wrapper, directed to each of the persons named in paragraph 4(b), respectively, as follows:

whose post office address is _____

whose post office address is _____

whose post office address is _____

whose post office address is _____

whose post office address is _____

whose post office address is _____

whose post office address is _____

whose post office address is _____

whose post office address is _____

whose post office address is _____

by depositing the document in a letter box or other official depository under the exclusive care and custody of the United States Post Office, located at:

_____

Sworn to before me this _____

_____
Signature

day of _____ , 20_____

_____
Notary Public
Commission Expires:
**(Affix Stamp or Seal)**

[continued]

*A sample decree granting letters of administration (continued)*

**Granting Letters of Administration**

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF

_____ X
ADMINISTRATION PROCEEDING
Estate of NOTICE TO CONSUL GENERAL

a/k/a

_____ X File No. _____
**Deceased**

TO THE CONSUL GENERAL OF
AT THE CITY OF NEW YORK

PLEASE TAKE NOTICE that a petition (will be) (has been) presented to the Surrogate's Court, County of _____ , on _____, 20_____, with respect to the Estate of the above-named decedent and it appears from the petition that:

a. the deceased was a subject of _____ or
b. the following distributees are nonresidents of the United States:

Names Addresses Citizenship

_____
Attorney for Petitioner

_____
Address

_____
Telephone No.

STATE OF NEW YORK
COUNTY OF ss.:

_____ being duly sworn, says:

That he/she resides at _____, New York; that on the _____, 20_____, he/she served a copy of the above NOTICE on the Consul General of _____ at _____, New York City, by mailing same to the office of the aforesaid Consul.

_____
Signature

Sworn to before me this _____

day of _____, 20____

_____
Notary Public
Commission Expires:
**(Affix Stamp and Seal)**

[continued]

*A sample decree granting letters of administration (continued)*

**Granting Letters of Administration**

At a Surrogate's Court of the
State of New York Held in and
for the County of _____ ,
at _____ New York
on _____, 20____

PRESENT:
HON.
Surrogate.

_____ X

ADMINISTRATION PROCEEDING
Estate of

a/k/a

DECREE APPOINTING
ADMINISTRATOR

File No. _____ ,

_____ X
**Deceased**

A petition having been filed by _____praying that administration of the goods, chattels and credits of the above-named decedent be granted to _____; and all persons named in such petition, required to be cited, having been duly cited to show cause why such relief should not be granted or having duly waived the issuance of such citation and consented thereto; and it appearing that _____ is in all respects competent to act as administrator_____ of the estate of said deceased, and a

[ ] bond having been filed and approved in the amount of $_____

[ ] bond having been dispensed with

and such representative(s) otherwise having qualified therefore; now, after due deliberation, with no one appearing in opposition thereto, it is

ORDERED AND DECREED that Letters of Administration issue to

ORDERED AND DECREED, that the authority of such representative(s) be restricted in accordance with, and that letters herein issued contain, the limitation, if any, which appears immediately below.

_____
Surrogate

[continued]

*A sample decree granting letters of administration (continued)*

**Granting Letters of Administration**

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF

_____ X
ADMINISTRATION PROCEEDING
Estate of

AFFIDAVIT OF
REGULARITY

a/k/a

File No. _____

_____ X
**Deceased**

STATE OF NEW YORK
COUNTY OF ss.:

_____ , being duly sworn, deposes and says:

1. That he/she is the attorney for _____ , the _____herein.

2. That all the parties to this proceeding have been duly cited or have waived the issuance and service of a citation herein and consented to the entry of a decree or order in the following manner and form:

a. By service of a copy of the citation issued herein upon the following persons in the manner prescribed by SCPA 307(1), as more fully appears by the proof of service thereof, made in the manner and form by law and filed on _____ , 20 _____ .

Name Address Date of Service

b. By service pursuant to an order made herein on _____ , 20____ , under SCPA 307(2), as more fully appears by the proof of service thereof, made in the manner prescribed by law and filed herein on _____ , 20_____ .

Name Address Date of Service
(Parties who waive or consent)

c. By duly executed waivers of the issuance and service of the citation herein and a consent to the entry of a decree or order and filed herein on _____ , 20_____ , by:

Name Address Date of Service

3. That no notice of appearance has been filed herein, except by _____
4. That all of the persons named above are of full age and are of sound mind, excepting those hereinbefore stated to be otherwise, and comprise all the parties, as deponent verily believes, who have any interest in this proceeding.

_____
Signature

Sworn to before me this _____
day of _____ , 20 _____

_____
Notary Public
Commission Expires:
**(Affix Stamp and Seal)**

N.B. Where a person cited is an infant, incarcerated, a mentally ill person, a mentally retarded person, a developmentally disabled person, an alcohol abuser or for any cause is mentally incapable of adequately protecting his/her rights, it must so appear in the foregoing affidavit. The age of the infant also must be stated.

[continued]

*A sample decree granting letters of administration (continued)*

**Granting Letters of Administration**

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF

_____ X
ADMINISTRATION PROCEEDING
Estate of

a/k/a

_____ X
**Deceased**

WAIVER OF CITATION, RENUNCIATION AND CONSENT TO APPOINTMENT OF ADMINISTRATOR (INDIVIDUAL)

File No. _____

The undersigned, a distributee or creditor of the above named decedent and being of full age and sound mind hereby voluntarily appears in the Surrogate's Court of _____ County, New York and waives the issuance and service of citation in this matter, renounces all right to Letters of Administration of the above captioned estate and consents that

[ ] Letters of Administration
[ ] Letters of Administration with Limitations
[ ] Limited Letters of Administration

be issued to _____
or any other person or persons entitled thereto without any notice whatsoever to the undersigned, and consents

[ ] that a bond be dispensed with
[ ] that a bond in the amount of $_____ be posted and hereby specifically release any claim I might have under any bond that may be filed.

| _____ | _____ | _____ | _____ |
|---|---|---|---|
| **Date** | **Signature** | **Street Address** | **Relationship** |
| | _____ | _____ | |
| | **Print Name** | **Town/State/Zip** | |

STATE OF NEW YORK
COUNTY OF ss.:

On _____ , 20____ , before me personally appeared _____

_____
to me known and known to me to be the person described in and who executed the foregoing waiver and consent and each duly acknowledged the execution thereof.

_____
Notary Public
Commission Expires:
**(Affix Stamp and Seal)**

_____
**Name of Attorney**

_____
**Address**

_____

_____
**Telephone No.**

[continued]

*A sample decree granting letters of administration (continued)*

**Granting Letters of Administration**

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF

_____ X

ADMINISTRATION PROCEEDING
Estate of

WAIVER OF CITATION, RENUNCIATION AND CONSENT TO APPOINTMENT OF ADMINISTRATOR (CORPORATION)

a/k/a

_____ X

**Deceased**

File No. _____

The undersigned corporation, a creditor of the above-named decedent, hereby voluntarily appears in the Surrogate's Court of_____ _____ County, New York, and waives the issuance and service of a citation in this matter and consents that Letters of Administration be issued to_____

_____

or any other person or persons entitled thereto without any notice whatsoever to the undersigned, without furnishing a bond or other security for the faithful performance of the duties of that office and specifically releasing any claim it might have under any bond that may be furnished.

Dated: _____ , 20_____

_____
**(Name of Corporation)**

By: _____
**(Signature of Officer)**

_____
**(Type Name and Title)**

STATE OF NEW YORK
COUNTY OF ss.:

On _____ , 20_____ , before me personally came _____

_____

to me known, who being duly sworn did say that: he resides at _____

_____ ; he is a _____

_____ of _____

_____ , the corporation described in and which executed the foregoing waiver and consent; and that he signed the same thereto by order of the board of directors of the corporation.

_____
Notary Public
Commission Expires:
**(Affix Stamp and Seal)**

_____
**Name of Attorney**

_____
**Address**

_____
**Telephone Number**

[continued]

*A sample decree granting letters of administration (continued)*

**Granting Letters of Administration**

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF

Note: File proof of Service at least 3 days before return date. State clearly date, time and place of service and name of person served (Uniform Rule 207.7(c)).

_____ X

ADMINISTRATION PROCEEDING
Estate of

AFIDAVIT OF SERVICE
OF CITATION (Adult)

a/k/a

File No. _____

_____ X

**Deceased**

STATE OF NEW YORK: COUNTY OF ss.:

_____ of _____

_____ , being duly sworn, says that I am over the age of eighteen years; that I made

personal service of the citation herein dated _____ , 20_____ on each person named below, each of whom deponent knew to be the person mentioned and described in said citation, by delivering to and leaving with each of them personally a true copy of said citation, as follows:

On _____ , description, viz: sex _____ , color of skin _____ ,

color of hair _____ , approximate age _____, weight _____ , height _____ , at

_____o'clock _____ m. on the _____day of _____ , 20_____ , at _____

_____

On _____ , description, viz: sex _____ , color of skin _____ ,

color of hair _____ , approximate age _____, weight _____ , height _____ , at

_____o'clock _____ m. on the _____day of _____ , 20_____ , at _____

_____

On _____ , description, viz: sex _____ , color of skin _____ ,

color of hair _____ , approximate age _____, weight _____ , height _____ , at

_____o'clock _____ m. on the _____day of _____ , 20_____ , at _____

_____

That none of the aforesaid persons is in the Military Service as defined by the Act of Congress known as the "Soldiers' and Sailors' Civil Relief Act of 1940" and in the New York "Soldiers's and Sailors Civil Relief Act."

Sworn to before me this _____

day of _____ , 20 _____

_____

Notary Public
Commission Expires:
**(Affix Stamp and Seal)**

_____

## LETTERS PATENT

*An instrument issued by a government that conveys a right or title to a private individual or organization, including conveyances of land and inventions.*

Although Article I, Section 8, Clause 8, of the U.S. Constitution confers upon Congress the power to secure to authors and inventors the exclusive right to their respective writings and discoveries, this constitutional clause is not self-executing. Rather, formal application for letters patent must first be made in the manner prescribed by statute (35 U.S.C.) and regulations (37 C.F.R.) promulgated pursuant thereto.

## LETTERS ROGATORY

*A formal written request made by one judicial body to another court in a different, independent jurisdiction that a witness who resides in that jurisdiction be examined through the use of interrogatories accompanying the request.*

*A device used in* INTERNATIONAL LAW *by which the courts of one country ask the courts of another to utilize their procedure to assist the country making the request in the administration of justice within its borders.*

The use of letters rogatory can be traced to early American LEGAL HISTORY when they facilitated cooperation between the courts of the several states of the Union. Their continued use is based primarily upon the comity (courtesy and respect) of courts toward each other. Rule 28 of the Federal Rules of CIVIL PROCEDURE provides for letters rogatory to be used in federal courts to obtain the testimony of a witness who resides in a foreign country through a number of different discovery devices. The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (28 U.S.C.A. § 1781 [1948]) sets out the procedures to be followed in the use of letters rogatory by the countries who are parties to the treaty.

Letters rogatory can be sent to a court in a sister state or to a court or judge in a foreign country. Granting the request, again, is a matter of comity between courts.

CROSS-REFERENCES

Civil Procedure.

## LETTERS TESTAMENTARY

*The formal instrument of authority and appointment granted by the proper court to an executor (one designated in a will to manage the estate of the deceased) empowering that person to execute the functions of the office.*

## LEVEES AND FLOOD CONTROL

*The system constructed and maintained by government to prevent the overflow of water.*

A levee is an embankment constructed by the states along a body of water to prevent the flooding of lands adjacent to the water. The federal government also has power, by virtue of the COMMERCE CLAUSE, to prevent and control flooding, since flood control protects NAVIGABLE WATERS.

As a general rule, the power to construct or establish levees is vested in public authorities and not in individuals. Levee districts are the public agencies most frequently involved in the creation of flood control projects for the purpose of constructing and maintaining flood control improvements for the protection of the general public. The state legislature has power to create levee districts. Subject to constitutional limitations, a tax can be imposed for levees and for general flood control improvements. A state legislature can levy, assess, and tax directly, or it can delegate the power to local levee districts. Generally, only property which is benefited by the flood control project can be subject to a tax assessment.

CROSS-REFERENCES

Rivers.

## LEVERAGE

*A method of financing an investment by which an investor pays only a small percentage of the purchase price in cash, with the balance supplemented by borrowed funds, in order to generate a greater rate of return than would be produced by paying primarily cash for the investment; the economic benefit gained by such financing.*

Real estate syndicates and promoters commonly use leverage financing. A leveraged investor builds up EQUITY or ownership in the investment by making payments on the amount of principal borrowed from a third person. The money allotted to the repayment of interest charged on the borrowed principal is treated typically as a deduction that reduces taxable income. The greater the amount of principal borrowed, the larger the interest payments and

*A sample letters testamentary*

**Letters Testamentary**

Filing Fee Paid $ _____

_____ Certs $ _____

$_____Bond, Fee: _____

Receipt No: _____ No: _____

**DO NOT LEAVE ANY ITEMS BLANK**

SURROGATE'S COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____ X

ADMINISTRATION PROCEEDING,
Estate of

a/k/a

_____ X

**DECEASED**

PETITION FOR LETTERS OF:

[ ] Administration

[ ] Limited Administration

[ ] Administration with Limitations

[ ] Temporary Administration

File No. _____

TO THE SURROGATE'S COURT, COUNTY OF

It is respectfully alleged:

1. The name, domicile and interest in this proceeding of the petitioner, who is of full age, is as follows:

Name:_____

Domicile: _____

**(Street Address)** **(City/Town/Village)**

_____

**(State)** **(Zip)** **(Telephone Number)**

Mailing address is: _____

**(if different from domicile)**

Citizenship (check one): [ ] U.S.A. [ ] Other (specify) _____

Interest of Petitioner (check one):

[ ] Distributee of decedent (state relationship)

[ ] Other (specify) _____

Is proposed Administrator an attorney: [ ] Yes [ ] No [If yes, submit statement pursuant to 22 NYCRR 207.16(e); see also 207.52 (Accounting of attorney-fiduciary).]

2. The name, domicile, date and place of death, and national citizenship of the above-named decedent are as follows: [**The Death Certificate must be filed with this proceeding.** If the decedent's domicile is different from that shown on the death certificate, check box [ ] and attach an affidavit explaining the reason for this inconsistency.]

Name: _____

Domicile: _____

**(Street Number)** **(City/Town/Village)**

_____

**(State)** **(Zip Code)**

Township of: _____ County of: _____

Date of Death: _____ Place of Death: _____

Citizenship: (check one): [ ] U.S.A. [ ] Other (specify)

**[Note: For Items 3a through c: Do not include any assets that are jointly held, held in trust for another, or have a named beneficiary.]**

3. (a) The estimated gross value of the decedent's personal property passing by intestacy is less than

$ _____

(b) The estimated gross value of the decedent's real property, in this state, which is [ ] improved, [ ] unimproved, passing by intestacy is less than S _____

A brief description of each parcel is as follows:

[continued]

*A sample letters testamentary (continued)*

**Letters Testamentary**

(c) The estimated gross rent for a period of eighteen (18) months is the sum of $_____

(d) In addition to the value of the personal property stated in paragraph (3) the following right of action existed on behalf of the decedent and survived his/her death, or is granted to the administrator of the decedent by special provision of law, and it is impractical to give a bond sufficient to cover the probable amount to be recovered therein: **[Write "NONE or state briefly the cause of action and the person against whom it exists, including names and carrier].**

(e) If decedent is survived by a spouse and a parent, or parents but no issue, and there is a claim for wrongful death, check here [ ] and furnish name(s) and address(es) of parent(s) in Paragraph 7. See EPTL 5-4.4.

4. A diligent search and inquiry, including a search of any safe deposit box, has been made for a will of the decedent and none has been found. Petitioner(s) (has) (have) been unable to obtain any information concerning any will of the decedent and therefore allege(s), upon information and belief, that the decedent died without leaving any last will.

5. A search of the records of this Court shows that no application has ever been made for letters of administration upon the estate of the decedent or for the probate of a will of the decedent, and your petitioner is informed and verily believes that no such application ever has been made to the Surrogate's Court of any other county of this state.

6. The decedent left surviving the following who would inherit his/her estate pursuant to EPTL 4-1.1 and 4-1.2:

a. [ ] Spouse (husband/wife).

b. [ ] Child or children or descedents of predeceased child or children. **[Must include marital, nonmarital and adopted].**

c. [ ] Any issue of the decedent adopted by persons related to the decedent (DRL Section 117).

d. [ ] Mother/Father.

e. [ ] Sisters or brothers, either of whole or half blood, and issue of predeceased sisters or brothers.

f. [ ] Grandmother/Grandfather.

g. [ ] Aunts or uncles, and children of predeceased aunts and uncles (first cousins).

h. [ ] First cousins one removed (children of first cousins).

[Information is required only as to those classes of surviving relatives who would take the property of descedent pursuant to EPTL 4-1.1. State **"number"** of survivors in each class. Insert **"No"** in all prior classes. Insert **"X"** in all subsequent classes].

7. The decedent left surviving the following distributees, or other necessary parties, whose names, degrees of relationship, domiciles post office address and citizenship are as follows:

**[Note: Show clearly how each person is related to decedent. If relationship is through an ancestor who is deceased, give name, date of death, and relationship of the ancestor to the decedent. Use rider sheet if space in paragraph (7) is not sufficient. See Uniform Rules 207.16(b).**

**If any person listed in paragraph (7) is a nonmarital person, or descended from a nonmarital person, attach a copy of the order of filiation or Schedule A. If any person listed in paragraph (7) was adopted by any persons related by blood or marriage to decedent or descended from such persons, attach Schedule B].**

7a. The following are of full age and under no disability: [If nonmarital or adopted-out person, so indicate by attaching Schedule A and/or B]

| Name | Relationship | Domicile and Mailing Address | Citizenship |
|---|---|---|---|

7b. The following are infants and/or persons under disability: [Attach applicable Schedule A, B, C, and/or D]

| Name | Relationship | Domicile and Mailing Address | Citizenship |
|---|---|---|---|

8. There are no outstanding debts or funeral expenses, except: [Write "NONE" or state same]

[continued]

*A sample letters testamentary (continued)*

**Letters Testamentary**

9. There are no other persons interested in this proceeding other than those hereinbefore mentioned.

WHEREFORE, your petitioner respectfully prays that: [Check and complete all relief requested]

( ) a. process issue to all necessary parties to show cause why letters should not be issued as requested;

( ) b. an order be granted dispensing with service of process upon those persons named in paragraph (7) who have a right to letters prior or equal to that of the person nominated, and who are non-domiciliaries or whose names or whereabouts are unknown and cannot be ascertained;

( ) c. a decree award Letters of:

[ ] Administration to_____

[ ] Limited Administration to_____

[ ] Administration with Limitation to _____

[ ] Temporary Administration to _____

or to such other person or persons having a prior right as may be entitled thereto, and;

( ) d. That the authority of the representative under the forgoing Letters be limited with respect to the prosecution or enforcement of a cause of action on behalf of the estate, as follows: the administrator(s) may not enforce a judgement or receive any funds without further order of the Surrogate.

( ) e. That the authority of the representative under the foregoing Letters be limited as follows:

( ) f. [State any other relief requested.]

Dated: _____

1. _____
**(Signature of Petitioner)**

_____
**(Print Name)**

2. _____
**(Signature of Petitioner)**

_____
**(Print Name)**

**A-1 (12/98)**

*A sample letters testamentary (continued)*

## Letters Testamentary

STATE OF NEW YORK )
) SS:
COUNTY OF )

**COMBINED VERIFICATION, OATH AND DESIGNATION**

**[For use when petitioner is to be appointed administrator]**

I, the undersigned the petitioner named in the foregoing petition, being duly sworn, say:

1. VERIFICATION: I have read the foregoing petition subscribed by me and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

2. OATH OF ADMINISTRATOR as indicated above: I am over eighteen (18) years of age and a citizen of the United States; and I will well, faithfully and honestly discharge the duties of Administrator of the goods, chattels and credits of said decedent according to law. I am not ineligible to receive letters and will duly account for all moneys and other property that will come into my hands.

3. DESIGNATION OF CLERK FOR SERVICE OF PROCESS: I do hereby designate the Clerk of the Surrogate's Court of _____ County, and his/her successor in office, as a person on whom service of any process, issuing from such Surrogate's Court may be made in like manner and with like effect as if it were served personally upon me, whenever I cannot be found and served within the State of New York after due diligence used.

My domicile is:_____
(Street/Number) (City, Village/Town) (State) (Zip)

_____
Signature of Petitioner

On the _____ day of _____ , 20_____ , before me personally came

_____

to me known to be the person described in and who executed the foregoing instrument. Such person duly swore to such instrument before me and duly acknowledged that he/she executed the same.

_____
Notary Public
Commission Expires:
**(Affix Notary Stamp or Seal)**

Signature of Attorney: _____

Print Name: _____

Firm Name: _____ Tel. No. _____

Address of Attorney: _____

*A sample letters testamentary (continued)*

**Letters Testamentary**

File # _____

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF

_____ X

PROCEEDING FOR
Estate of

a/k/a

_____ X
DECEASED

SCHEDULE A
NONMARITAL PERSONS
(PERSONS BORN OUT OF WEDLOCK)

[NOTE: Nonmarital children (or their issue) who would be distributees if they (or their ancestors) were born in wedlock will not be regarded as distributees unless satisfactory proof is submitted establishing paternity]. See EPTL 4-1.2 which sets forth methods of establishing paternity.

Name of alleged distributee: _____

Date of birth: _____ Relationship to decedent: _____

Name of father: _____

Name of mother: _____

Does the birth certificate contain the father's name? Yes [ ] No [ ]
If yes, attach copy of birth certificate.

Has an order of filiation establishing paternity been entered?
[ ] Yes No [ ] If yes, attach copy of order.

Did the nonmarital person live with his or her father? yes [ ] No [ ]

If yes, give dates and places of residence: _____

_____

_____

*A sample letters testamentary (continued)*

**Letters Testamentary**

File # _____

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF

_____ X

PROCEEDING FOR
Estate of

a/k/a

_____ X
DECEASED

SCHEDULE B
ISSUE OF THE DECEDENT
WHO WERE THE SUBJECT
OF AN ADOPTION

Name of child: _____

Relationship to decedent prior to adoption: _____

Date of adoption: _____

Was this a step-parent adoption? (i.e., was the child adopted by the spouse of the decedent's former spouse?)

Yes [ ] No [ ]

If yes, name of adoptive father or mother: _____

If not a step-parent adoption, indicate below the biological relationship of the adoptive parent to the child:

[ ] grandparent(s)

[ ] brother or sister

[ ] aunt or uncle

[ ] first cousin

[ ] nephew or niece

Name of the adoptive parent: _____

*A sample letters testamentary (continued)*

**Letters Testamentary**

File # _____

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF

_____ X

PROCEEDING FOR
Estate of

SCHEDULE C
INFANTS

a/k/a

_____ X
DECEASED

[NOTE: Please furnish all of the information requested, otherwise the petition may be rejected.]

Name:_____ Date of birth: _____

Relationship to the decedent: _____

With whom does the infant reside? _____

Name of mother: _____ Is she alive? _____

Name of father: _____ Is he alive? _____

Does infant have a court-appointed guardian? Yes [ ] No [ ]

If yes, name and address of guardian: _____

_____

Name: _____ Date of birth: _____

Relationship to the decedent: _____

With whom does the infant reside? _____

Name of mother: _____ Is she alive? _____

Name of father: _____ Is he alive? _____

Does infant have a court-appointed guardian? Yes [ ] No [ ]

If yes, name and address of guardian: _____

_____

*A sample letters testamentary (continued)*

**Letters Testamentary**

File # _____

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF

_____ X

PROCEEDING FOR
Estate of

a/k/a

_____ X
DECEASED

SCHEDULE D
PERSONS UNDER DISABILITY
OTHER THAN INFANTS

[use additional sheets if more than one]

1. Name: _____ Relationship: _____

   Residence: _____

   With whom does this person reside? _____

   If this person is in prison, name of prison: _____

   Does this person have a court-appointed fiduciary? Yes [ ] No [ ]

   If yes, give name, title and address: _____

   _____

   If no, describe nature of disability: _____

   _____

   If no, give name and address of relative or friend interested in his or her welfare: _____

   _____

2. Whereabouts unknown/Unknowns [persons whose addresses or names are unknown to petitioner; if known, give name and relationship to decedent]

the resulting deductions. Obviously, a taxpayer who pays cash is not entitled to deductions for interest payments. In many cases, deductions for the depreciation of thecapital asset constituting the investment are also permitted.

Any investor receives an anticipated rate of return from the investment although the rate may fluctuate depending upon the economic climate and the management of the investment. Because of the favorable tax treatment enjoyed as a result of this method of financing, the leveraged investor keeps more of the income generated by the investment than an investor who financed the investment mainly through cash. There is, however, risk involved in leverage financing. If the income generated by the investment decreases, there might not be adequate funds available to meet payment of the outstanding principal and interest, leading to substantial losses for the investor.

## ♦ LEVI, EDWARD HIRSCH

Edward Hirsch Levi served as U.S. attorney general from 1975 to 1976. A prominent and respected lawyer, scholar, and teacher, Levi became attorney general following the WATERGATE scandals and the resignation of President RICHARD M. NIXON. Levi helped to restore respect and public confidence in the JUSTICE DEPARTMENT, which had become deeply politicized during the Nixon administration.

Levi was born June 26, 1911, in Chicago. He graduated from the University of Chicago in 1932 and earned a law degree there in 1935. He was a Sterling Fellow at Yale University in 1935 and 1936, and received a degree of Doctor of Juristic Science (J.S.D.) from Yale in 1938.

*Edward H. Levi.*
AP/WIDE WORLD PHOTOS

Levi was named an assistant professor of law at the University of Chicago in 1936, the year he was admitted to the Illinois bar. From 1940 to 1945, he took a leave of absence from the university to serve as a special assistant to the U.S. attorney general. During that period, he served in the Antitrust and War Divisions and was chairman of the Interdepartmental Committee on Monopolies and Cartels. His time in government service helped to make him an expert on ANTITRUST LAW.

Levi returned to the University of Chicago Law School in 1945 as a professor. In 1949, he

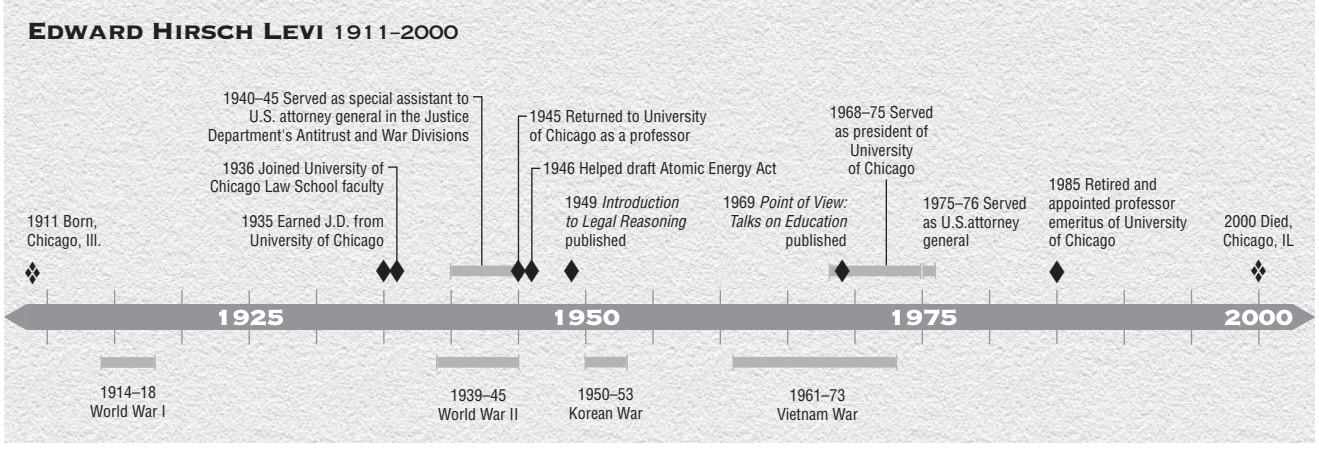

published *Introduction to Legal Reasoning,* a classic work of LEGAL EDUCATION that has been used by thousands of students. He was named dean of the law school in 1950 and provost of the university in 1962, and was appointed president of the university in 1968.

During those years, Levi remained an active participant in government. He was an adviser and counsel to the Federation of Atomic Scientists and in 1946 helped draft the Atomic Energy Act (60 Stat. 755 [42 U.S.C.A. §§ 2011 et seq.]), which led to the establishment of the Atomic Energy Commission. In 1950, he was appointed chief counsel to the Subcommittee on Monopoly Power of the House Judiciary Committee. In that position, he conducted hearings on monopolistic practices in the steel and newsprint industries. During the administration of President LYNDON B. JOHNSON, Levi was a member of the White House Central Group on Domestic Affairs and of the White House Task Force on Education.

"THE BASIC PATTERN OF LEGAL REASONING IS REASONING BY EXAMPLE . . . IN WHICH A PROPOSITION DESCRIPTIVE IN THE FIRST CASE IS MADE INTO A RULE OF LAW AND THEN APPLIED TO A NEXT SIMILAR SITUATION. A METHOD . . . NECESSARY FOR THE LAW, BUT [WITH] CHARACTERISTICS WHICH UNDER OTHER CIRCUMSTANCES MIGHT BE CONSIDERED IMPERFECTIONS."
—EDWARD H. LEVI

In February 1975, President GERALD R. FORD appointed Levi as attorney general of the United States. Ford had assumed the presidency after Nixon's resignation on August 9, 1974, in the wake of the Watergate scandal. The scandal initially revolved around Nixon's role in covering up a break-in and electronic bugging of Democratic National Committee headquarters in the Watergate office building complex in Washington, D.C. But investigations soon revealed that Nixon had used the FEDERAL BUREAU OF INVESTIGATION (FBI), INTERNAL REVENUE SERVICE, and CENTRAL INTELLIGENCE AGENCY to pursue his political enemies. During that period, the Department of Justice came under heavy attack. It appeared that the department either was aiding in the cover-up or that it was incompetent in pursuing the truth.

The appointment of Levi restored confidence in the department. Because of his impeccable credentials and lack of partisanship, Levi was able to restore morale to the shaken organization and to institute internal reforms that might prevent future scandals. He did this, in part, by issuing policies that restricted the FBI's ability to be exploited for political investigations.

Following Jimmy Carter's defeat of Ford in the 1976 presidential election, Levi returned to the University of Chicago as a professor of law. He retired from full-time teaching in 1985 and was appointed professor emeritus.

Levi died on March 7, 2000 in Chicago.

FURTHER READINGS

"The Legacy of Edward Levi; Legendary Former AG Helped Restore Justice Department's Credibility After Watergate." 2000. *Legal Times* 23 (March 13).

Sonnenschein, Hugo F. et al. 2000. "In Memoriam: Edward H. Levi (1912–2000)." *University of Chicago Law Review* 67 (fall): 971–993.

## LEVY

*To assess; raise; execute; exact; tax; collect; gather; take up; seize. Thus, to levy a tax; to levy a* NUISANCE*; to levy a fine; to levy war; to levy an execution,* i.e., *to levy or collect a sum of money on an execution.*

*A seizure. The obtaining of money by legal process through seizure and sale of property; the raising of the money for which an execution has been issued.*

A sheriff or other officer of the law can be ordered by a court to make a levy against any property not entitled to an exemption. The court can do this with an order of attachment, by which the court takes custody of the property during pending litigation, or by execution, the process used to enforce a judgment. The order directs the sheriff to take and safely keep all nonexempt property of the defendant found within the county or as much property as is necessary to satisfy the plaintiff's demand plus costs and expenses. The order also directs the sheriff to make a written statement of efforts and to return it to the clerk of the court where the action is pending. This report, called a return, lists all the property seized and the date of seizure.

The sheriff's act in taking custody of the defendant's property is the levy. A levy on real property is generally accomplished by giving the defendant and the general public notice that the defendant's property has been encumbered by the court order. This can be done by filing a notice with the clerk who keeps real estate mortgages and deeds recorded with the county. A levy of tangible PERSONAL PROPERTY usually requires actual seizure. If the goods are capable of being moved around, most states insist that the sheriff actually take them into custody or remove them to another place for safekeeping with an independent person. If the property is bulky or cumbersome and removal would be impracticable and expensive, actual seizure is not necessary. The levy can be accomplished by removing an essential piece, such as the pinsetter in a bowling alley, or by services of the court demanding preservation of the property. The

order can be served on the defendant or anyone else in possession of the property, and disobedience of it then can be punished as a CONTEMPT of court.

Often the order will permit levy against any property belonging to the defendant, but it will specify seizure of a unique item and allow something else of comparable value to be substituted only if the unusual item cannot be found.

An attempt to attach a debtor's property is effective only after a levy, and from that time on there is a lien on the attached property. This gives the plaintiff some security that he or she will be able to collect what is owed and, if first in time, establishes the plaintiff's priority at the head of the line of the defendant's creditors who might subsequently seek a levy upon a debtor's property. It can strengthen the plaintiff's bargaining position if the plaintiff is trying to settle the dispute with the defendant, and it may even create jurisdiction for the court over the defendant, but only to the extent of the value of the property subject to levy.

## LEWDNESS

*Behavior that is deemed morally impure or unacceptable in a sexual sense; open and public indecency tending to corrupt the morals of the community; gross or wanton indecency in sexual relations.*

An important element of lewdness is openness. Lewdness is sometimes used interchangeably with licentiousness or lasciviousness, which both relate to debauchery and moral turpitude. It is a specific offense in certain state statutes and is included in general provisions in others.

## ❖ LEWIS, JOHN ROBERT

John Robert Lewis first achieved national attention while he was chairman of the STUDENT NONVIOLENT COORDINATING COMMITTEE (SNCC) during the 1960s and was elected to the U.S. House of Representatives in 1986. Lewis was born on February 21, 1940, to Willie Mae and Eddie Lewis in Troy, Alabama.

While he was a teenager, Lewis felt the call to the Christian ministry and began to preach periodically in local churches. He listened regularly to a radio Gospel program presented by a young, Boston-trained theologian, MARTIN LUTHER KING JR. and was inspired because King, a Southern, African-American man, was intelligent, articulate, and interesting. King also had thoughtful ideas about addressing the problems of racial injustice through passive resistance. When Lewis was age 15, he learned of the Montgomery, Alabama, bus boycott led by King, RALPH DAVID ABERNATHY, and other members of the Montgomery Improvement Association (MIA). The MIA led the vast majority of the African-Americans in the city in their decision to refuse to ride the segregated city buses unless they were treated more fairly by white drivers and passengers. It filled Lewis with pride to see the African-American community of Montgomery acting in concert and with determination. After a year-long struggle, the bus company agreed to their demands.

*John R. Lewis.*

"IF WE ARE EVER TO MOVE TOWARD A COLORBLIND SOCIETY, ONE AMERICA, ONE SOCIETY, ONE FAMILY, ONE PEOPLE—WE MUST HAVE POLICIES THAT PROMOTE AND ENCOURAGE DIVERSITY."
—JOHN LEWIS

Lewis was kept from actively participating in CIVIL RIGHTS agitation for a while by his parents, who were frightened for his life. But in 1960, after four students from North Carolina A&T College in Greensboro sat down in the "whites only" section of the local Woolworth's lunch counter and refused to move, hundreds of African-American and white students all over the South followed their example. Although Lewis's parents urged him to remain uninvolved, he joined the lunch counter sit-in demonstrations that were taking place in Nashville. Before the federal CIVIL RIGHTS ACT OF 1964 was passed, Lewis had been jailed and beaten many times and had suffered a fractured skull at the

hands of an angry, white mob in Selma, Alabama, during the 1965 Selma-to-Montgomery protest march.

Because of the spontaneity of the sit-ins, the students had no organizational body or any general affiliation with existing civil rights groups. ELLA BAKER, the executive secretary of the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (SCLC, King's regional organization), called a meeting at Shaw University in Raleigh, North Carolina, in April 1960. The students refused to affiliate with any of the existing major civil rights groups such as the SCLC, the National Association for the Advancement of Colored People (NAACP), or the CONGRESS ON RACIAL EQUALITY (CORE), and formed their own organization. There, with Lewis as a cofounder, along with about 200 other students, SNCC was formed.

After a 1961 U.S. Supreme Court decision declaring illegal all SEGREGATION in interstate bus depots and on buses, CORE leaders decided to stage a "freedom ride" from Washington, D.C., to New Orleans. Led by CORE director James Farmer, seven African-American and six white freedom riders left Washington, D.C., on May 4, 1961. Lewis was among them. The riders, who had pledged themselves to nonviolence, were brutally beaten during the ride. Lewis was the first to be attacked. Finally, when the Greyhound bus that some of the demonstrators were riding in was burned outside of Anniston, Alabama, the CORE volunteers were ready to discontinue their protest. SNCC members—including Lewis—refused to be dissuaded. Lewis also led marches against segregated movie theaters in Nashville, again prompting numerous arrests as well as physical and verbal abuse by local whites. Through it all, Lewis maintained a path of nonviolence toward achieving civil rights.

Lewis was unanimously elected chairman of SNCC in 1963 and served until 1966, when STOKELY CARMICHAEL, the proponent of the more aggressive "Black Power!" strategy, won his seat. During the time that he was chairman, Lewis was one of the speakers during the August 28, 1963, March on Washington, when nearly 250,000 people converged on the U.S. capital to stage a peaceful protest for freedom and fairness in hiring practices. After he was ousted as SNCC chairman, Lewis went on to work for the Field Foundation. One of his most significant roles there was as director of its Voter Education Project. From 1970 through 1977, Lewis led grass-roots efforts to organize Southern African-American voters and to educate the youth politically. In 1977, President JIMMY CARTER appointed Lewis to be director of U.S. operations for ACTION, a federal agency overseeing economic recovery programs at the community level.

In 1982, Lewis was elected to Atlanta City Council, where he was known for his close attention to the needs of the poor and the elderly. Twenty years after he stepped down as the leader of SNCC, Lewis was elected to the U.S. House of Representatives after a hard-fought battle with his former SNCC co-worker, Georgia state senator JULIAN BOND. Although, as a congressman, critics accused him of not adapting his positions to the changing needs of African-Americans, he nonetheless remained a voice calling for a "sense of shared purpose, of basic morality that speaks to blacks and whites alike." In 1991, Lewis became one of the three chief deputy whips for the DEMOCRATIC PARTY, one

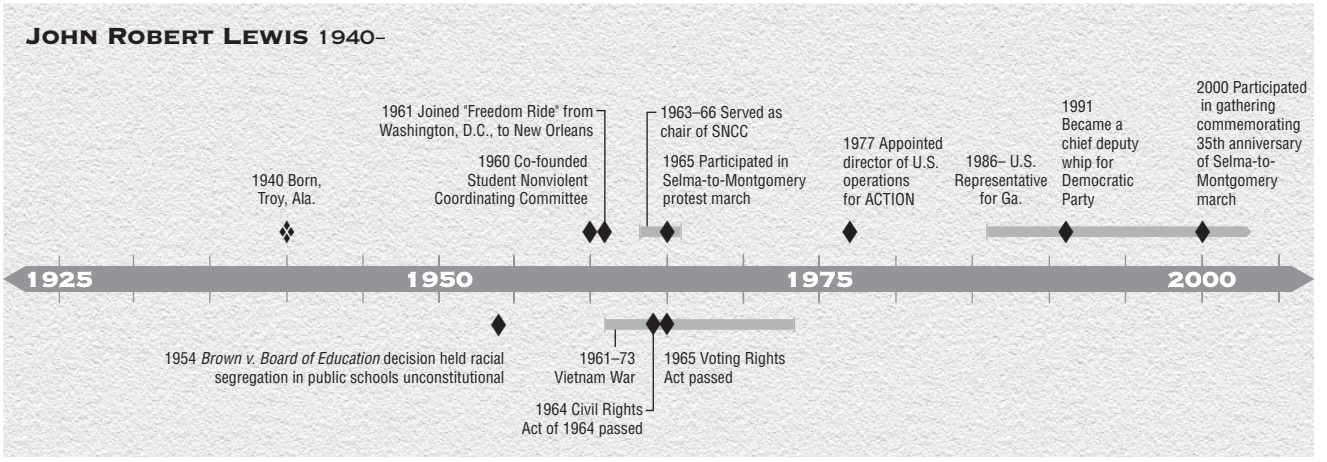

of the most influential positions in the House. His criticism of House speaker NEWT GINGRICH brought him to the forefront of controversy in 1996, although many African-Americans considered him to be a moderate. In 1994, during a speech to African Leaders in Ghana, Lewis summed up his experience and his commitment to civil rights for all peoples: "Do not give up, do not give out, and do not give in. We must hold on, and we must not get lost in a sea of despair."

In 1998, Lewis published his autobiography: *Walking with the Wind: A Memoir of the Movement.* In 2000, he participated in a gathering in Selma, Alabama, commemorating the 35th anniversary of the Selma-to-Montgomery protest march.

In 2003, Lewis was a member of the House Budget Committee, and served on the Subcommittee on Health that is part of the House Ways and Means Committee. He was also Senior Chief Deputy Democratic Whip in the 108th Congress, as well as a member of the Democratic Steering Committee, the Congressional Black Caucus, and the Congressional Committee to Support Writers and Journalists. Lewis additionally served as co-chair of the Faith and Politics Institute.

Lewis has been the recipient of numerous and awards and honors, including the National Constitution Center's "We the People" Award, the NAACP's Spingarn Medal, and the National Education Association's Martin Luther King Jr. Memorial Award. In March 2003, Lewis led a group of fellow representatives and other politicians on a "Civil Rights Pilgrimage," a tour of significant sites in Birmingham, Montgomery, and Selma, Alabama. The purpose of the tour was to acquaint political leaders with the history of the CIVIL RIGHTS MOVEMENT and to encourage dialogue on the topics of race and civil rights in the United States.

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## LEX

*[*Latin, Law.*] In medieval* JURISPRUDENCE*, a body or collection of various laws peculiar to a given nation or people; not a code in the modern sense, but an aggregation or collection of laws not codified or systematized. Also, a similar collection of laws relating to a general subject, and not peculiar to any one people.*

In modern U.S. and English jurisprudence this term signifies a system or body of laws, written or unwritten, applicable to a particular case or question regarded as local or unique to a particular state, country, or jurisdiction.

## LEX FORI

*[*Latin, The law of the forum, or court.*] The positive law of the state, nation, or jurisdiction within which a lawsuit is instituted or remedy sought.*

The *lex fori,* or law of the jurisdiction in which relief is pursued, governs all procedural matters as distinguished from substantive rights.

## LEX LOCI

*[*Latin, The law of the place.*] The law of the state or the nation where the matter in litigation transpired.*

The term *lex loci* can be employed in several descriptions, but, in general, it is used only for *lex loci contractus* (the law of the place where the contract was made), which is usually the law that governs the contract.

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## LIABILITY

*A comprehensive legal term that describes the condition of being actually or potentially subject to a legal obligation.*

Joint *liability* is an obligation for which more than one person is responsible.

Joint and several liability refers to the status of those who are responsible together as one unit as well as individually for their conduct. The person who has been harmed can institute a lawsuit and recover from any or all of the wrongdoers—but cannot receive double compensation, for instance, the full amount of recovery from each of two wrongdoers.

*Primary liability* is an obligation for which a person is directly responsible; it is distinguished from *secondary liability* which is the responsibility of another if the party directly responsible fails or refuses to satisfy his or her obligation.

## LIBEL AND SLANDER

*Two* TORTS *that involve the communication of false information about a person, a group, or an entity such as a corporation. Libel is any* DEFAMATION *that can be seen, such as a writing, printing, effigy, movie, or statue. Slander is any defamation that is spoken and heard.*

Collectively known as defamation, libel and slander are civil wrongs that harm a reputation; decrease respect, regard, or confidence; or induce disparaging, hostile, or disagreeable opinions or feelings against an individual or entity. The injury to one's good name or reputation is affected through written or spoken words or visual images. The laws governing these torts are identical.

To recover in a libel or slander suit, the plaintiff must show evidence of four elements: that the defendant conveyed a defamatory message; that the material was published, meaning that it was conveyed to someone other than the plaintiff; that the plaintiff could be identified as the person referred to in the defamatory material; and that the plaintiff suffered some injury to his or her reputation as a result of the communication.

To prove that the material was defamatory, the plaintiff must show that at least one other person who saw or heard it understood it as having defamatory meaning. It is necessary to show not that all who heard or read the statement understood it to be defamatory, but only that one person other than the plaintiff did so. Therefore, even if the defendant contends that the communication was a joke, if one person other than the plaintiff took it seriously, the communication is considered defamatory.

Defamatory matter is published when it is communicated to someone other than the plaintiff. This can be done in several different ways. The defendant might loudly accuse the plaintiff of something in a public place where others are present, or make defamatory statements about the plaintiff in a newsletter or an on-line bulletin board. The defamation need not be printed or distributed. However, if the defendant does not intend it to be conveyed to anyone other than the plaintiff, and conveys it in a manner that ordinarily would prevent others from seeing or hearing it, the requirement of publication has not been satisfied even if a third party inadvertently overhears or witnesses the communication.

Liability for republication of a defamatory statement is the same as for original publication, provided that the defendant had knowledge of the contents of the statement. Thus, newspapers, magazines, and broadcasters are liable for republication of libel or slander because they have editorial control over their communications. On the other hand, bookstores, libraries, and other distributors of material are liable for republication only if they know, or had reason to know, that the statement is defamatory. Common carriers such as telephone companies are not liable for defamatory material that they convey, even if they know that it is defamatory, unless they know, or have reason to know, that the sender does not have a privilege to communicate the material. Suppliers of communications equipment are never liable for defamatory material that is transmitted through the equipment they provide.

In general, there are four defenses to libel or slander: truth, consent, accident, and privilege. The fact that the allegedly defamatory communication is essentially true is usually an absolute defense; the defendant need not verify every detail of the communication, as long as its substance can be established. If the plaintiff consented to publication of the defamatory material, recovery is barred. Accidental publication of a defamatory statement does not constitute publication. Privilege confers IMMUNITY on a small number of defendants who are directly involved in the furtherance of the public's business—for example, attorneys, judges, jurors, and witnesses whose statements are protected on public policy grounds.

Before 1964, defamation law was determined on a state-by-state basis, with courts applying the local COMMON LAW. Questions of FREEDOM OF SPEECH were generally found to be irrelevant to libel or slander cases, and defendants were held to be strictly liable even if they had no idea that the communication was false or defamatory, or if they had exercised reasonable caution in ascertaining its truthfulness. This deference to state protection of personal reputation was confirmed in *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942), in which the U.S. Supreme Court stated, "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise constitutional problems." The Court in *Chaplinsky* held that defamatory speech is not essential to the exposition of ideas and that it can be regulated without raising constitutional concerns. This reasoning was confirmed in *Beauharnais v. Illinois,* 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919 (1952), where the Court again held that libelous speech is not protected by the Constitution.

In 1964, the Court changed the direction of libel law dramatically with its decision in NEW YORK TIMES V. SULLIVAN, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). For the first time, the Court placed some libelous speech under the protection of the FIRST AMENDMENT. The plaintiff, a police official, had claimed that false allegations about him were published in the *New York Times,* and he sued the newspaper for libel. The Court balanced the plaintiff's interest in preserving his reputation against the public's interest in freedom of expression in the area of political debate. The Court wrote that "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." Therefore, in order to protect the free flow of ideas in the political arena, the law requires that a public official who alleges libel must prove actual malice in order to recover damages. The First Amendment protects open and robust debate on public issues even when such debate includes "vehement, caustic, unpleasantly sharp attacks on government and public officials."

Since *Sullivan,* a public official or other person who has voluntarily assumed a position in the public eye must prove that a libelous statement "was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard to whether it was false or not" (*Sullivan*). The actual-malice standard does not require any ill will on the part of the defendant. Rather, it merely requires the defendant to be aware that the statement is false or very likely false. Reckless disregard is present if the plaintiff can show that the defendant had "serious doubts as to the truth of [the] publication" (see *St. Amant v. Thompson,* 390 U.S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262 [1968]).

Also since *Sullivan,* the question of who is a public official has been raised often. In *Rosenblatt v. Baer,* 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966), the Court found that a nonelected official "among the hierarchy of government employees who have, or appear to have, substantial responsibility for, or control over, the conduct of public affairs" was a public official within the meaning of *Sullivan.* Similarly, in

# The Public Figure Doctrine: An Unworkable Concept?

The "public figure" doctrine announced by the Supreme Court in *Curtis Publishing v. Butts,* 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), held that prominent public persons had to prove actual malice (knowledge of falsity or reckless disregard of whether a statement is true or false) on the part of the news media in order to prevail in a **LIBEL** lawsuit. Prior to *Butts* only public officials had to prove actual malice. In the years since this decision, the public figure doctrine has proved a troublesome area of the law, primarily because it is difficult to apply with any consistency. Some, generally from the news media, have called for making it easier to classify a person as a public figure. Others believe that a strict line must be maintained between public and private figures, so as to prevent the damaging of personal reputations by the media. Both sides agree that greater clarity is needed in defining what constitutes a public figure.

Those who favor a less restrictive definition of public figure argue that **FREEDOM OF THE PRESS** requires such a definition. It is in the public interest to encourage the reporting of news without fear that the subject of a story will sue the news organization for libel. Without adequate safeguards news editors may resort to self-censorship to avoid the possibility of a lawsuit. In a democratic society, self-censorship would prove to be a damaging restriction on the public's right to information.

For these advocates the Supreme Court's decision in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), signified a step away from the protections of the **FIRST AMENDMENT**. The Court held that a person who "voluntarily injects himself or is drawn into a particular public controversy" becomes a public figure "for a limited range of issues." The Court also held that there are persons who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." This category would include, for example, a national labor or **CIVIL RIGHTS** leader.

Critics of *Gertz* argue that these two categories make little sense and are of no help to a court in determining whether a person is a public figure. For example, should a Hollywood entertainer or a professional athlete be cast as a public person in a libel suit? Do these persons have "persuasive power and influence"? As for persons who become involved in public events, courts have been unable to articulate a consistent standard for measuring whether a person "thrust" himself or herself into the status of a public figure. Studies have revealed contradictory ways of applying the *Gertz* standard.

Some commentators have advocated abandoning *Gertz* and replacing it with a "subject matter" test. Under this test if an article or story involves public policy or the functioning of government, it should

*Monitor Patriot Co. v. Roy,* 401 U.S. 265, 91 S. Ct. 621, 28 L. Ed. 2d 35 (1971), the Court found that a candidate for public office fell within the category of public officials who must prove actual malice in order to recover.

Eventually, *Sullivan*'s actual-malice requirement was extended to include defendants who are accused of defaming public figures who are not government officials. In the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker,* 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), the Court held that a football coach at the University of Georgia and a retired Army general were similar to public officials in that they enjoyed a high degree of prominence and access to the mass media that allowed them to influence policy and to counter criticisms leveled against them.

These rules make it difficult for a plaintiff to prevail in a libel action. For example, in *Levan v. Capitol Cities/ABC,* 190 F.3d 1230 (11th Cir. 1999), a federal appeals court dismissed a libel action against a television network because the plaintiff could not prove actual malice. BFC Financial Corporation ("BFC") and its president, chief executive officer, and controlling shareholder, Alan Levan, brought an action for defamation against Capital Cities/ABC, Inc. ("ABC") and one of its producers, Bill Willson. Levan and BFC based their case on a segment that had been aired on ABC's television program "20/20." The segment portrayed BFC and Levan as unfairly taking advantage of investors in real estate-related limited partnerships, by inducing them to participate in transactions known as "rollups." BFC and Levan claimed that ABC had made numerous false or misleading statements with actual malice and that it had misused videotaped statements and congressional testimony.

The U.S. Court of Appeals for the Eleventh Circuit ruled that Levan and BFC failed to prove

be protected by the public figure doctrine. Therefore, if a story discusses a relatively unknown person's **DIVORCE** proceeding or supposed Communist political leanings, this would be a matter of public policy (divorce law or political parties) that invokes the actual-malice standard in a libel suit.

The use of subject matter analysis would give public figures more protection than they currently have under *Gertz.* A story about the private life of an entertainer or professional athlete would generally not involve a public issue under even the broadest definition. Under the subject matter test, the celebrity would not be forced to prove actual malice.

Defenders of the *Gertz* decision admit that the public figure concept has been difficult to apply, but argue that the subject matter test is not a good alternative. They note that although freedom of the press is an important value, the need to protect the reputation of private citizens is also an important societal value. Citizens are encouraged to participate in public affairs, yet a liberal reading of the public figure doctrine could discourage participation if there is no redress for injury to reputation. In addition, private citizens who are deemed public figures could never match the news media's power and pervasiveness in telling one side of the story.

Even with the difficulties inherent in *Gertz,* defenders note that it narrowed the public figure category in ways that protect the public. Simply appearing in the newspapers in connection with some newsworthy story or stories does not make one a public figure. Forced involvement in a public trial does not by itself make one a public figure. Most important, those charged with libel cannot create their own defense by converting a private citizen into a public figure solely by virtue of their news coverage.

Defenders of *Gertz* are leery of the subject matter test. They contend this test is too one-sided in favor of the news media. Almost any topic in human affairs can be generalized into a public policy issue or one that involves the government. It would be unfair to allow a publication to falsely brand a relatively unknown person a Communist and then assert the person is a public figure because radical political parties are a matter of public concern. The victim of this charge would have a difficult time proving actual malice to win a libel suit.

Those who favor a restrictive definition of the public figure doctrine also note that a libel action serves as a private means of controlling irresponsible journalism. *Gertz,* even with its difficulties in application, has allowed private persons a better chance of success in libel suits, which in turn sends a strong message to the media to be more careful in their reporting. As to the concerns about self-censorship, defenders of *Gertz* point out that journalists make choices every day about what is published. Falsely tarnishing the reputation of a person should be the object of self-censorship in professional news-gathering organizations.

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that ABC had "entertained serious doubts" that the underlying theme of the broadcast was untrue. The court pointed to the numerous objective experts whom ABC had interviewed, who all agreed that the rollup transactions were bad for the investors and very good for Levan and BFC. The court also noted that Levan had had a conflict of interest, as he had advised the investors to agree to the rollups, and he then had reaped the benefits. As to ABC's alleged misuse of Levan's videotaped statement and congressional testimony, the court found that that this evidence "pales in contrast" to the sources who told ABC that Levan had traded worthless junk bonds in return for valuable real estate. In sum, most of the evidence that related to actual malice all pointed to the lack of it by ABC.

The Court refined its definition of public figure in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), where it held that public figures are those who thrust themselves into the public eye and invite close scrutiny. The Court also recognized two types of public figures: those who are "public figures for all purposes" and those who are public figures for limited purposes. For an individual to be considered a public figure in all situations, the person's name must be so familiar as to be a household word—for example, Johnny Carson. A limited-purpose public figure is one who voluntarily injects himself or herself into a public controversy and becomes a public figure for a limited range of issues. Limited-purpose public figures have at least temporary access to the means to counteract false statements about them. By voluntarily placing themselves in the public eye, they relinquish some of their privacy rights. For these reasons, false statements about limited-purpose public figures that relate to the public controversies in which they are involved are not considered defamatory unless they meet the actual-malice test that is set forth in *Sullivan.*

# Richard Jewell and the Olympic Park Bombing

The strange ordeal of Richard Jewell grew out of the 1996 Summer Olympics bombing. One of thousands of security guards hired for the Atlanta games, Jewell discovered a suspicious knapsack containing a bomb on July 27, 1996. Before it exploded, he helped lead an evacuation that limited casualties to two dead and more than one hundred wounded. His heroism was widely praised. But within three days, celebrity turned into notoriety as the FBI had made him a primary suspect.

Suspicious of the 11 interviews Jewell granted following the bombing, the FBI theorized that he might have planted the bomb in order to be seen as a hero. This theory was promptly leaked to the press, which made it a cause célébre. The *Atlanta Journal-Constitution* published an extra edition on July 30, with a headline that read "FBI Suspects 'Hero' May Have Planted Bomb." The allegations mounted: Jewell had reportedly sought publicity for his heroism, while persons at Piedmont College, his former employer, were said to have made allegations to the FBI about his character and conduct. On NBC's nightly news program, Tom Brokaw stated that the FBI "probably" had enough evidence to arrest and try Jewell.

The investigation lasted three months. During this time Jewell became the target of two lawsuits by bombing survivors, which were later dismissed. He maintained his innocence and tried to clear his name by pointing out that he had not approached the news media seeking attention, a fact which was quickly confirmed. Only on October 26, 1996, did the FBI finally clear him as a suspect. He appeared at a press conference where he declared that he had spent 88 days living in fear. Nearly a year later, after initially refusing, Attorney General **JANET RENO** formally apologized to Jewell.

After being cleared in the fall of 1996, Jewell sued or threatened suit against several media companies for **DEFAMATION**. They included ABC, NBC, CNN, the *New York Post,* NBC anchor Tom Brokaw, and a local Georgia radio station. Initially, he was successful. In December 1996, NBC negotiated a settlement with Jewell for a reported $500,000. CNN and ABC settled, too, as did Piedmont College, which Jewell had sued for allegedly supplying false information.

The most controversial lawsuit was filed in January 1997 against the *Atlanta Journal-Constitution* and its parent company, Cox Enterprises Inc. Although truth is the key defense in a defamation case and Jewell *was* a suspect in the bombing, the **LIBEL** action was based on more than just a statement of his status as a suspect. Listing 19 allegedly libelous headlines and excerpts from articles, the suit claimed that the newspaper libeled him "in a series of false and defamatory articles that portrayed him as an individual with a bizarre employment history and an aberrant personality who was likely guilty" (*Jewell v. Cox Enterprises Inc.*).

But early on, an unusual ruling went against the plaintiff. Fulton County state court judge John R. Mather ruled on October 5, 1999, that Jewell was a "public figure" for purposes of his legal burden in the defamation case. Mather determined that Jewell made himself a public figure through his extensive media interviews following the bombing.

Unexpected and far-reaching, the ruling put a huge obstacle before the plaintiff. As the U.S. Supreme Court made clear in its oft-cited 1964 ruling in **NEW YORK TIMES V. SULLIVAN**, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d. 686 (1964), there is a distinction in defamation cases between private individuals and public figures. Private individuals have the easier task. As a private individual, Jewell would simply need to prove that the newspaper acted with **NEGLIGENCE** or carelessness in reporting information that was false and defamatory in content. But in order for a *public* figure to prevail, the plaintiff must prove "actual malice" on the part of the media defendants. Meeting the test for actual malice requires showing that the defendants knew that the reported information was false or had a reckless disregard for the truth.

Faced with meeting this significantly higher **BURDEN OF PROOF**, Jewell appealed the ruling unsuccessfully. In October 2001, the state Court of Appeals upheld the lower court, *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175 (Ga. Ct. App. 2001), and a year later appeals were turned down by both the

Supreme Court of Georgia and the U.S. Supreme Court. As the lawsuit moved toward trial in 2003, Lin Wood, his attorney, warned that the decision to hold Jewell a public figure "threatens the reputations of any private citizen who is discussed by a member of the media." (The Associated Press. October 7, 2002. "Supreme Court Sends Several First Amendment Cases Packing.") The newspaper's attorney Peter Canfield observed that Jewell had already admitted to being the focus of the FBI investigation about which the paper had reported.

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**CROSS-REFERENCES**

Public Figure; Terrorism.

Defining who is a limited-purpose public figure has been compared with trying to nail a jellyfish to a wall. Nonetheless, the Court has attempted this feat on several occasions. In *Time, Inc., v. Firestone,* 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976), it held that a wealthy socialite who was involved in a widely publicized DIVORCE was not a public figure because she had not thrust herself into the public eye in order to influence the resolution of any public issue. Her divorce was not a public controversy, although it had undeniable public interest. Likewise, in *Hutchinson v. Proxmire,* 443 U.S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979), a scientist whose research was subjected to ridicule when he received a Golden Fleece Award from Senator William Proxmire was not a public figure because he had neither thrust himself into the public spotlight nor sought to influence public opinion. Proxmire gave these awards to people whom he felt were fleecing the public by using tax dollars on frivolous or useless causes. The Court found that the scientist's notoriety arose strictly from Proxmire's libelous statements about him and his research. Proxmire's claim that Hutchinson was a public figure was rejected because Proxmire's libelous actions were responsible for thrusting Hutchinson into the public eye.

The California Supreme Court rejected the claim of the news media that it is not liable for reporting someone else's libelous statements about a private figure. In *Khawar v. Globe International, Inc.*, 19 Cal. 4th 254, 965 P.2d 696, 79 Cal. Rptr. 2d 178 (1998), the court rejected the media's argument that a "neutral reportage" defense that applies to public figures in some jurisdictions should also apply to private figures. The tabloid newspaper the *Globe* presented an uncritical report about a little-known book in which the author claimed that Sirhan Sirhan had not been the assassin of ROBERT F. KENNEDY in 1968. Robert Morrow, the author of *The Senator Must Die* asserted that the real murderer was Khalid Khawar, a Pakistani reporter who was covering Kennedy's victory rally that night in a Los Angeles hotel for a newspaper in Pakistan. Khawar had not been named in the article, but the *Globe* had published a photograph with a circle and arrow pointing him out. By then a California farmer, Khawar sued the tabloid for libel and was awarded $1.175 million in damages.

The California Supreme Court upheld the verdict. In so ruling, it declined to adopt the neutral reportage libel defense. In jurisdictions that recognize this defense, the news media entity must be neutral, merely reporting charges made by other persons without taking a position itself. In addition, the charges must be reported in a substantially accurate way. The news media argue that such a defense is necessary for them to report the news without the fear of unwarranted libel suits. The court concluded that Khawar was neither an all-purpose or limited-purpose public figure, but rather a private individual. Unlike

public figures, who give up part of their interest in protecting their good name, private individuals do not. Therefore, private individuals are more vulnerable to injury than are public officials and public figures. Reports such as the one that the *Globe* printed rarely benefit the public when the allegations are against a private individual. In addition, private persons rarely have sufficient media access to counter false accusations against them. The Court stated that "republications of accusations made against private figures are never protected by the neutral reportage privilege." However, the court stopped short of recognizing such a privilege when public officials and figures are involved.

A 1991 case made it somewhat easier for public figures to sue authors and publishers for libel. *Masson v. New Yorker Magazine,* 501 U.S. 496, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991), held that a plaintiff alleging libel satisfies the actual-malice standard if it can be proved that the author deliberately altered the plaintiff's words and that the alteration resulted in a material change in the meaning conveyed by the plaintiff in the original statement. Jeffrey M. Masson, a prominent psychoanalyst, had sued Janet Malcolm, the author of an article and book about him, as well as *The New Yorker* magazine and Alfred A. Knopf, Inc., which had published the article and book, respectively. Masson claimed that quotations that were attributed to him in those publications were false and libelous. Malcolm conceded that she had altered quotations in order to make the finished product more readable, but she maintained that the essence of Masson's words had not been changed. The Court held that quotation marks around a passage "indicate to the reader that the passage reproduces the speaker's words verbatim." It was careful to protect journalistic freedom and went on to write that deliberate alteration of quotations does not automatically prove actual malice:

> We conclude that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times Co. v. Sullivan* . . . and *Gertz v. Robert Welch, Inc.* . . . unless the alteration results in a material change in the meaning conveyed by the statement. The use of quotations to attribute words not in fact spoken bears in a most important way on that inquiry, but it is not dispositive in every case.

The tremendous growth of electronic communications networks since the 1990s has raised numerous questions about liability for defamation. Suddenly, it is possible to commit libel and to communicate a libelous statement to thousands of people, instantly. When libel is perpetrated in cyberspace, who is responsible? Are online information providers considered publishers, distributors, or common carriers? What level of First Amendment protection should be afforded to defamatory statements transmitted electronically?

In *Cubby, Inc. v. CompuServe,* 776 F. Supp. 135 (S.D.N.Y. 1991), the plaintiff sued CompuServe, an online service company, for libel because of statements that had appeared in a newsletter written and uploaded by an independent company and transmitted through CompuServe's network. The federal district court found that CompuServe had no editorial control over the contents of the newsletter and that it was therefore only a distributor of the newsletter. CompuServe could not be held liable for the newsletter's contents unless it had known, or had had reason to know, that the newsletter contained defamatory statements. Conversely, in *Stratton Oakmont v. Prodigy Services Co.,* 63 U.S.L.W. 2765, 23 Media L. Rep. 1794, 1995 WL 323710 (N.Y. Sup. Ct. 1995); *reh'g denied,* 24 Media L. Rep. 1126 (N.Y. Sup. Ct. 1995), the court found that Prodigy, an online provider similar to CompuServe, was a publisher rather than a distributor, and that it was liable for the defamatory material in question because it exercised considerable editorial control over what appeared on its system.

Some states have laws that seek to protect vital industries and businesses from unfounded rumors and scare tactics. Such was the case in Texas, which enacted food- and business-disparagement laws that allow victims of false statements about their perishable food or business to sue for damages. Television host Oprah Winfrey was ensnared in litigation involving these laws after she broadcast an episode of her show in 1996 about the problems surrounding the outbreak of mad cow disease in Great Britain. The episode, which was labeled "dangerous food," included a guest who suggested that unless the U.S. banned certain practices, a mad cow disease epidemic in the U.S. would "make AIDS look like the common cold." Beginning the day of the broadcast, the price of beef dropped drastically and remained low for two weeks. The Texas Beef Group filed a civil lawsuit against Winfrey, her company, and the

guest, alleging that comments made on the program had violated Texas's disparagement laws. The judge dismissed the food-disparagement charge, and a jury found the defendants not guilty of business disparagement. The Fifth Circuit Court of Appeals upheld these rulings in *Texas Beef Group v. Winfrey*, 201 F.3d 680 (5th Cir: 2000). The appeals court concluded that the key issue was the statute's definition of a "perishable food product." At trial, the defendants argued that live cattle are not perishable food, but the appeals court declined to rule on that issue. Instead, it focused on whether the defendants had knowingly disseminated false information about beef. The court grounded its analysis on the legal precedent that the First Amendment protects the expression of opinion as well as fact "so long as a factual basis underlies the opinion." It found that, at the time of the broadcast, the factual basis for the guest's opinions was truthful. As for the AIDS comparison, the court characterized it as hyperbole; in its view, exaggeration did not equal defamation. Because the challenged comments had a factual basis, Winfrey and her guest had a First Amendment right to say them.


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CROSS-REFERENCES

Freedom of the Press.


## LIBELANT

*Formerly the party who filed an initiatory* **PLEADING** *(a formal declaration of a claim) in an ecclesiastical or religious matter or in an* **ADMIRALTY** *case, corresponding to the plaintiff in actions at law.*

Since 1966, the Federal Rules of Civil Procedure and Supplementary Admiralty Rules have governed admiralty actions, which are presently commenced by complaint.


CROSS-REFERENCES

Admiralty and Maritime Law; Civil Procedure.


## LIBELOUS

*In the nature of a written* **DEFAMATION**, *a communication that tends to injure reputation.*

## LIBERTARIAN PARTY

The Libertarian party was founded in Colorado in 1971 and held its first convention in Denver in 1972. In 1972 it fielded John Hospers for president and Theodora Nathan for vice president in the U.S. general election. It appeared on two state ballots, receiving a total of 2,648 votes in Colorado and Washington. In the 1976 elections, the party's 176 candidates garnered 1.2 million votes across the United States.

The Libertarian party believes that people have certain natural, individual rights and that deprivation of those rights is unjust. Two basic rights—the right to personal autonomy and the right to utilize previously unused resources—form the foundation of the party's ideals.

*Economist and author Harry Browne (pictured with his wife, Pamela) ran for president in 1996 and 2000 as the Libertarian Party candidate.*

AP/WIDE WORLD PHOTOS

**Libertarian Party Votes, General Election, 2002**

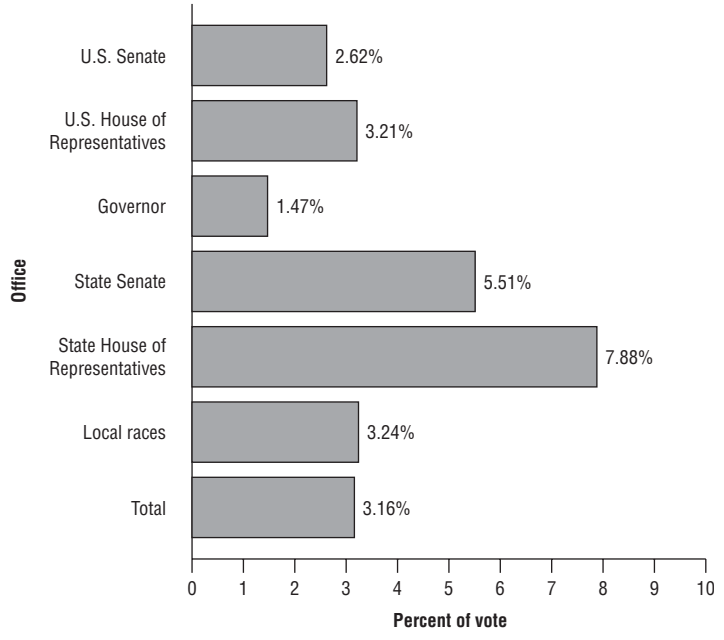


SOURCE: Libertarian Party web page.

The Libertarian party views government as both the cause and the effect of societal ills. Government causes crime and prejudice because excessive laws divide society, rob people of their independence, and frustrate initiative and creativity. It then attempts to eradicate crime and prejudice by exercising more control over individual rights.

The Libertarian party promotes the ABOLITION of compulsory military service, government control of television and other media, laws regarding sexual activity between consenting adults, laws against the use of mood-altering substances, and government control of migration and immigration. Under its leadership farming quotas and subsidies would be eliminated, there would be no mandatory schooling and no MINIMUM WAGE, and defense spending would be drastically reduced. According to the party, the form of government it promotes would be less expensive than the current system of federal, state, and local governance.

The Libertarian party has achieved a small measure of electoral success. In 1980 Ed Clark received over 1 million votes in his bid for the presidency. Having failed to win the popular vote in any state, however, Clark received no electoral votes. Andre Marrou garnered slightly less support as the party's presidential candidate in 1984, 1988, and 1992. In 1992 Marrou and his running mate Nancy Lord received approximately 291,000 votes. Although the party has yet to be a factor in national politics, it has had some success locally. In 1994 it had state representatives in New Hampshire and Alaska, mayors in California, and over 30 city council members in cities across the country.

In 1996 the party held its national convention in Washington, D.C., over the Fourth of July holiday. At the convention it nominated economist and author Harry Browne as its presidential candidate. In his acceptance speech, Browne presented a number of controversial ideas, including making a sizable reduction in the federal government, abolishing the federal INCOME TAX, abolishing federal drug and seizure laws, and increasing recognition of individual rights. Browne and running mate Jo Jorgensen appeared on the election ballot in all 50 states, along with approximately 1,000 Libertarian party candidates for various public offices. Browne and Jorgensen won 485,759 votes, 0.5 percent of the national vote.

Browne ran again for president in 2000, this time with Art Oliver as a running mate. Although the Libertarian party was on the ballot in all 50 states, the Browne ticket received only 382,982 votes, over 100,000 fewer than in the 1996 election. During the 2000 elections the party also entered candidates for more than half of the seats in Congress up for election. In the elections for the U.S. House of Representatives, Libertarian party candidates received a total of 1.7 million votes, the first time in history a third party received more than a million votes for the House.

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## CROSS-REFERENCES

Independent Parties.

## LIBERTARIANISM

*A political philosophy that advocates free will, individual rights, and voluntary cooperation.*

The core doctrine of libertarianism begins with the recognition that people have certain natural rights and that deprivation of these rights is immoral. Among these natural rights are the right to personal autonomy and property rights, and the right to the utilization of previously unused resources. These two basic assumptions form the foundation of all libertarian ideals.

Libertarianism can be traced back to ancient China, where philosopher Lao-tzu advocated the recognition of individual liberties. The modern libertarian theory emerged in the sixteenth century through the writings of Etienne de La Boetie (1530–1563), an eminent French theorist. In the seventeenth century, JOHN LOCKE and a group of British reformers known as the Levellers fashioned the classical basis for libertarianism with well-received philosophies on human nature and economics. Since the days of Locke, libertarianism has attracted pacifists, utopianists, utilitarianists, anarchists, and fascists. This wide array of support demonstrates the accessibility and elasticity of the libertarian promotion of natural rights.

Essential to the notion of natural rights is respect for the natural rights of others. Without a dignified population, voluntary cooperation is impossible. According to the libertarian, the means to achieving a dignified population and voluntary cooperation is inextricably tied to the promotion of natural rights.

Libertarianism holds that people lose their dignity as government gains control of their body and their life. The ABDICATION of natural rights to government prevents people from living in their own way and working and producing at their own pace. The result is a decrease in self-reliance and independence, which results in a decrease in personal dignity, which in turn depresses society and necessitates more government interference.

Thus, the libertarian views government as both the cause and the effect of societal ills. Government is the cause of crime and prejudice because it robs people of their independence and frustrates initiative and creativity. Then, having created the sources of crime and prejudice by depriving individuals of their natural rights, government attempts to exorcise the evils with more controls over natural rights.

Libertarians believe that government should be limited to the defense of its citizens. Actions such as murder, rape, ROBBERY, theft, EMBEZZLEMENT, FRAUD, ARSON, KIDNAPPING, BATTERY, TRESPASS, and POLLUTION violate the rights of others, so government control of these actions is legitimate. Libertarians acknowledge human imperfection and the resulting need for some government deterrence and punishment of violence, NUISANCE, and harassment. However, government control of human activity should be limited to these functions.

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### CROSS-REFERENCES

Anarchism; Independent Parties; Natural Law; Utilitarianism.

## LIBERTY

*The state of being free; enjoying various social, political, or economic rights and privileges The concept of liberty forms the core of all democratic principles. Yet, as a legal concept, it defies clear definition.*

The modern conception of liberty as implying certain fundamental or basic rights dates back to the writings of seventeenth- and eighteenth-century theorists such as Francis Hutcheson and JOHN LOCKE. Hutcheson believed that all people are equal and that they possess certain basic rights that are conferred by NATURAL LAW. Locke postulated that humans are born with an innate tendency to be reasonable and tolerant. He also believed that all individuals are entitled to liberty under the natural law that governed them before they formed societies. Locke's concept of natural law required that no one should interfere with another's life, health, liberty, or possessions. According to Locke, governments are necessary only to protect those who live within the laws of nature from those who do not. For this reason, he believed that the power of government and the rule of the majority must be kept in check, and that they are best controlled by protecting and preserving individual liberties. Locke's philosophies gave rise to the SEPARATION OF POWERS and the system of checks and balances that are the basis of U.S. government.

Limitless freedom is untenable in a peaceful and orderly society. Yet, the founders of the United States were concerned that individual liberty interests be adequately protected. Echoing Locke's natural-law theory, the Declaration of Independence states that all people have inalienable rights, including the right to life, liberty, and the pursuit of happiness. Similarly, the Preamble to the Constitution outlines the Framers' intent to establish a government structure that ensures freedom from oppression. It reads, in part, "We the People . . . in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity. . . ." The **BILL OF RIGHTS** sets forth a number of specific protections of individual liberties.

Through these documents, U.S. citizens are guaranteed **FREEDOM OF SPEECH**, press, assembly, and religion; freedom from unreasonable **SEARCHES AND SEIZURES**; and freedom from **SLAVERY** or involuntary servitude. Criminal law and procedure require that a person may not be detained unlawfully and that a person who is accused of a crime is entitled to reasonable bail and a **SPEEDY TRIAL**. The right to be free from unlawful detention has been interpreted to mean not only that the government may not deprive a person of liberty without **DUE PROCESS OF LAW**, but also that a citizen has a right "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his living by any lawful calling; and to pursue any livelihood or vocation" (*Allgeyer v. Louisiana,* 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed. 832 [1897]). State governments may not regulate individual freedom except for a legitimate public purpose and only by means that are rationally designed to achieve that purpose (see *Nebbia v. New York,* 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 [1934]).

The liberties guaranteed to individuals are not granted without restriction. Throughout U.S. history, the U.S. Supreme Court has held that individual freedom may be restricted when necessary to advance a compelling government interest, such as public safety, national security, or the protection of the rights of others. Countless cases have litigated the parameters of justifiable government restriction. In one such case, *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983), the Court found that the content of a message delivered in a public forum may be restricted if the restriction serves a compelling state interest and is narrowly drawn to achieve that interest. Restrictions on speech in a public forum also may be upheld if the expressive activity being regulated is a of type that is not entitled to full **FIRST AMENDMENT** protection, such as **OBSCENITY**. If a restriction on speech deals only with the time, place, and manner of the activity, it need only serve a significant government interest and allow ample alternative channels of communication (see *Perry*). In such an instance, the law does not need to be the least restrictive alternative; it is necessary only that the government's interest would be achieved less effectively without it and that the means chosen are not substantially broader than necessary to achieve the interest (*Ward v. Rock against Racism,* 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 [1989]).

The Court has held that the government may infringe on a person's **FREEDOM OF ASSOCIATION** by punishing membership in an organization that advocates illegal conduct if the defendant had knowledge of the group's illegal objectives and had the **SPECIFIC INTENT** to further them (see *Scales v. United States,* 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 782 [1961]; *Noto v. United States,* 367 U.S. 290, 81 S. Ct. 1517, 6 L. Ed. 2d 836 [1961]).

The Court has also determined that when competing liberty interests clash, the majority may not necessarily impose its belief on the minority. In **ABINGTON SCHOOL DISTRICT V. SCHEMPP**, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963), the Court held that the freedom to exercise one's religion does not extend to prayer sessions in public schools, even if the proposed prayer is nondenominational and favored by the majority. Justice **TOM C. CLARK**, writing for the majority, emphasized that the freedom to exercise one's religion ends when it infringes on another's right to be free from state-imposed religious practices. He wrote, "While the Free Exercise Clause clearly prohibits the use of **STATE ACTION** to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs." The Court reaffirmed its holding that the Free Exercise Clause does not allow the majority to impose its beliefs on the minority in **WALLACE V. JAFFREE**, 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985).

The Court has engendered bitter and sustained controversy with its defense of privacy rights in cases such as **ROE V. WADE**, 410 U.S. 113,

93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), which found the constitutional right to privacy to include the right to obtain an ABORTION. Critics of such decisions contend that such liberties are not enumerated in the Constitution and that the Court should uphold only rights found in the Constitution. But the Court has consistently held that the liberties enumerated in the Constitution are a continuum that, in the words of Justice JOHN MARSHALL HARLAN, "includes a freedom from all substantial ARBITRARY impositions and purposeless restraints . . . and which also recognizes . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement" (*Poe v. Ullman,* 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 [1961]).

The Court justified its findings of liberty rights that are not enumerated in the Constitution by stating that some rights are basic and fundamental, and that the government has a duty to protect those rights. It has held that the Constitution outlines a "realm of personal liberty which the government may not enter." As an example, it noted that marriage is not mentioned in the Bill of Rights and that interracial marriage was illegal in many places during the nineteenth century, but that the Court has rightly found these activities to be within the liberty interests guaranteed by the Constitution.

The Court has repeatedly held that individual liberties must be protected no matter how repugnant some find the activity or individual involved. For example, in *Planned Parenthood v. Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 28 674 (1992), the Court stated, "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code." In *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), the Court invalidated a law mandating that all students salute theflag, and in TEXAS V. JOHNSON, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989), it invalidated a law prohibiting burning of the flag. In all of these cases, the Court emphasized that individuals may disagree about whether the activity is morally acceptable, but the liberty inherent in the activity may not be proscribed even if a majority of the populace thinks that it should be.

Justice LOUIS D. BRANDEIS summarized the Court's general wariness of government intrusion into liberty interests, in *Whitney v. California,* 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927): "Those who won our independence believed that the final end of the state was to make men free." The Court will continue to grapple with the extent to which organized society may restrict individual liberty without violating that mandate.

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CROSS-REFERENCES

Constitution of the United States; Criminal Procedure; Freedom of Speech; Freedom of the Press; School Prayer.

## LIBRARY OF CONGRESS

The Library of Congress, located in Washington, D.C., is the world's largest library, with nearly 110 million items in almost every language and format stored on 532 miles of bookshelves. Its collections constitute the world's most comprehensive record of human creativity and knowledge. Founded in 1800 to serve the reference needs of Congress, the library has grown from an original collection of 6,487 books to a current accumulation of more than 16 million books and more than 120 million other items and collections, from ancient Chinese wood-block prints to compact discs.

The Library of Congress was created by Act of April 24, 1800 (2 Stat. 56), which provided for the removal of the seat of government to the new capital city of Washington, D.C. (Philadelphia, Pennsylvania had formerly served as the nation's capital), and for $5,000 "for the purchase of such books as may be necessary for the use of Congress . . . and for putting up a suitable apartment for containing them therein." The library was housed in the new capitol until August 1814, when British troops invaded Washington, D.C., and burned the capitol building, destroying nearly three thousand volumes of the small congressional library. The first major book collection acquired by Congress was the personal library of former president THOMAS JEFFERSON, purchased in 1815 at a cost of $23,950. In 1851 a second fire destroyed two-thirds of the library's accumulated holdings of 35,000 volumes, including a substantial portion of the Jefferson library. Congress voted a massive appropriation to replace the lost books, and by the end of the Civil War, the collections of the library had grown to 82,000 volumes.

The librarian of Congress is appointed by the president with the advice and consent of the Senate. In 1864 President ABRAHAM LINCOLN appointed as librarian Ainsworth Rand Spofford, who opened the library to the public and greatly expanded its collections. Spofford successfully advocated a change in the COPYRIGHT law so that the library would receive two free copies of every book, map, chart, musical composition, engraving, print, and photograph submitted for copyright. Under subsequent legislation (2 U.S.C.A. §§ 131–168d) the library's acquisitions included free copies of the *Congressional Record* and of all U.S. statutes, which Spofford parlayed into document exchanges with all foreign nations that had diplomatic relations with the United States.

Soon the Capitol's library rooms, attics, and hallways were filled with the library's growing collections, necessitating construction of the library's first permanent building, the Thomas Jefferson Building, which opened in 1897. The JOHN ADAMS Building was added by Congress in 1939, and the JAMES MADISON Memorial Building in 1980. These three buildings provide nearly 65 acres of floor space.

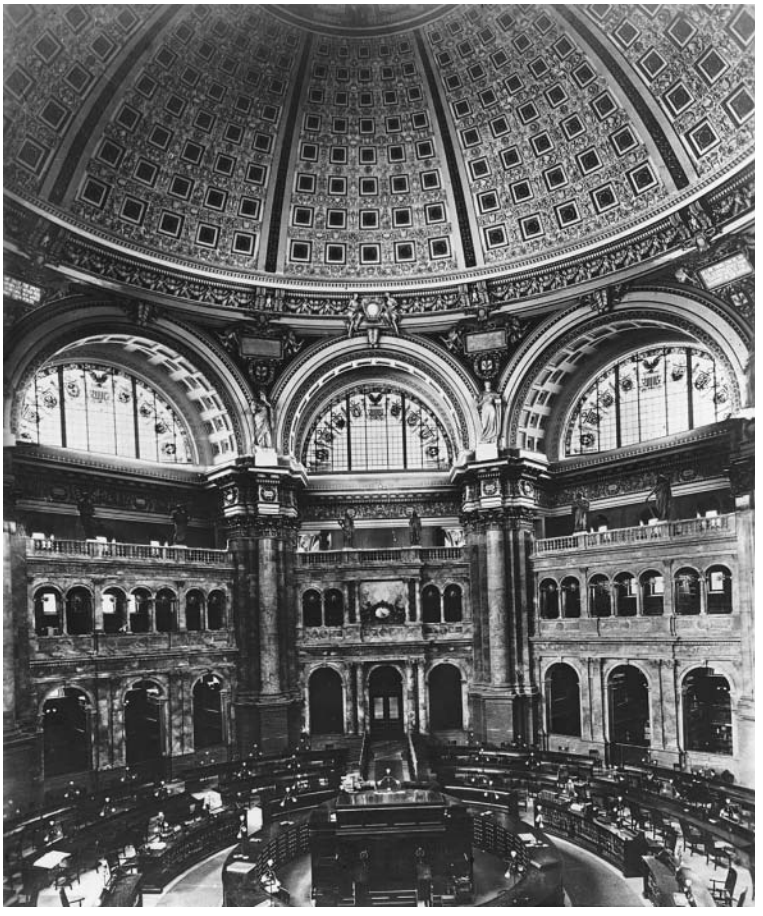

*The Reading Room in the rotunda of the Library of Congress building, 1901.*
LIBRARY OF CONGRESS

Supported mainly by appropriations from Congress, the library also uses income derived from funds received from foundations and other private sources and administered by the Library of Congress Trust Fund Board, as well as monetary gifts presented for direct application (2 U.S.C.A. §§ 154–163). Many of the greatest items in the library have come directly from individual U.S. citizens or were purchased with money donated by them. Gifts that have enriched the cultural heritage of the nation include the private papers of President Lincoln from his son ROBERT TODD LINCOLN; rare Stradivarius violins used for public performances; the Lessing J. Rosenwald collection of illustrated books and incunabula (early works of art or industry); Joseph Pennell's contribution of Whistler drawings and letters; and hundreds of thousands of letters and documents from musicians, artists, scientists, writers, and public figures.

### Congressional Research Service

The library's first responsibility is service to Congress. One department, the CONGRESSIONAL RESEARCH SERVICE (CRS), operates exclusively for the legislative branch of the government. The CRS provides objective, nonpartisan research, analysis, and information to assist Congress in its legislative, oversight, and representative functions.

The CRS evolved from the Legislative Reference Service, a unit developed by a former librarian, Herbert Putnam, whose tenure with the library spanned 40 years. The Legislative Reference Service was developed to prepare indexes, digests, and compilations of law that Congress might need, but it quickly became a specialized reference unit for information transfer and research.

The CRS mandate has grown over the years in response to the increasing scope of public policy issues on the congressional agenda. The service answers more than 500,000 requests for research annually. Its staff anticipates congressional inquiries and provides timely and objective information and analyses in response to those inquiries at every stage of the legislative process and in an interdisciplinary manner. The CRS also creates and maintains a number of specialized reading lists for members of Congress and their staffs and disseminates other materials of interest. Finally, it maintains the

parts of the Library of Congress's automated information system that cover legislative matters, including digests of all public bills and briefing papers on major legislative issues. The CRS director, assisted by a management team, oversees and coordinates the work of seven research divisions, which span a range of public policy subjects and disciplines.

### Collections

The library's extensive collections include books, serials, and pamphlets on every subject, in a multitude of languages, and in various formats including map, photograph, manuscript, motion picture, and sound recording. Among them are the most comprehensive collections of Chinese, Japanese, and Russian language books outside Asia and the former Soviet Union; volumes relating to science and to U.S. and foreign law; the world's largest collection of published aeronautical literature; and the most extensive collection of incunabula in the Western Hemisphere.

The manuscript collections, containing about 46 million items, relate to manifold aspects of U.S. history and civilization and include the personal papers of most presidents, from GEORGE WASHINGTON to CALVIN COOLIDGE, as well as papers of people from many diverse arenas, such as Margaret Mead, Sigmund Freud, HENRY KISSINGER, THURGOOD MARSHALL, and thousands of others.

The library houses a perfect copy of the Gutenberg Bible, one of three such copies in the world. It also contains the oldest written material, a Sumerian cuneiform tablet dating from 2040 B.C.; the earliest known copyrighted motion picture, Fred Ott's Sneeze, copyrighted by Thomas Edison in 1893; and a book so small that it requires a needle to turn the pages. The musical collections contain volumes and pieces, in manuscript and published form, from classic works to the newest popular compositions. Other materials available for research include maps and views; photographic records from the daguerreotype to the latest news photo; musical recordings; speeches and poetry readings; prints, drawings, and posters; government documents, newspapers, and periodicals from all over the world; and motion pictures, microfilms, and audiotapes and videotapes.

### Copyrights

Since 1870 the Library of Congress has been responsible for copyrights registered by the U.S. Copyright Office, located in the Madison Building (Acts of July 8, 1870 [16 Stat. 212–217]; February 19, 1897 [29 Stat. 545, codified as amended at 2 U.S.C.A. 131 (1997)]; October 19, 1976 [90 Stat. 2541, codified as amended at 2 U.S.C.A. 170 (1997)]). The Copyright Office has handled more than 20 million copyright registrations and transfers and processes 600,000 new registrations annually. All copyrightable works, whether published or unpublished, are subject to a system of statutory protection that gives the copyright owner certain exclusive rights, including the right to reproduce the work and distribute it to the public by sale, rental, lease, or lending. Works of authorship include books; periodicals; computer programs; musical compositions; song lyrics; dramas and dramatico-musical compositions; pictorial, graphic, and sculptural works; architectural works; pantomimes and choreographic works; sound recordings; motion pictures; and other audiovisual works.

### American Folklife Center

The American Folklife Center was established in the Library of Congress by Act of January 2, 1976 (20 U.S.C.A. § 2102 et seq.). Its function is to coordinate and carry out federal and nonfederal programs to support, preserve, and present American folklife through activities such as receiving and maintaining folklife collections, scholarly research, field projects, performances and exhibitions, festivals, workshops, publications, and audiovisual presentations. The center is the national repository for folk-related recordings, manuscripts, and other unpublished materials. Its reading room contains over 3,500 books and periodicals; a sizable collection of magazines, newsletters, unpublished theses, and dissertations; field notes; and many textual and musical transcriptions and recordings. The center also administers the Federal Cylinder Project, which is charged with preserving and disseminating music and oral traditions recorded on wax cylinders dating from the late 1800s to the early 1940s. A cultural conservation study was developed at the center in cooperation with the INTERIOR DEPARTMENT pursuant to congressional mandate. Various conferences, workshops, and symposia are given throughout the year, and a series of outdoor concerts of traditional music are scheduled monthly at the library, from April to September.

### Center for the Book

The Center for the Book was established in the Library of Congress by Act of October 17,

1977 (2 U.S.C.A. § 171 et seq.), to stimulate public interest in books, reading, and libraries and to encourage the study of books and print culture. The center is a catalyst for promoting and exploring the vital role of books, reading, and libraries throughout the world. Since 1984, at least 29 states have established statewide book centers that are affiliated with this national center.

### National Preservation Program

To preserve its collections, the library uses the full range of traditional methods of conservation and binding as well as newer technologies such as the deacidification of paper and the digitization of original materials. These measures include maintaining materials in the proper environment, ensuring the proper care and handling of the collections, and stabilizing fragile and rare materials by placing them in acid-free containers to protect them from further deterioration. Research on long-standing preservation problems is conducted by the library's Preservation Research and Testing Office.

The National Film Preservation Board, established by the National Film Preservation Act of 1992 (2 U.S.C.A. § 179b), serves as a public advisory group to the librarian of Congress. The board consists of 36 members and alternates representing many parts of the diverse U.S. film industry, archives, scholars, and others. As its primary mission, the board works to ensure the survival, conservation, and increased public availability of the U. S. film heritage. This mission includes advising the librarian on the annual selection of films to the National Film Registry and counseling the librarian on the development and implementation of the national film preservation plan.

### Extension of Service

The Library of Congress extends its service through an interlibrary loan system; photoduplication of books, manuscripts, maps, newspapers, and prints in its collections; a centralized cataloging program whereby the library acquires material published all over the world as well as material from other libraries and from U.S. publishers; and the development of general schemes of classification (the Library of Congress classification for law and the Dewey decimal system), subject headings, and cataloging, embracing the entire field of printed matter.

The library also provides for the preparation of bibliographic lists responsive to the needs of government and research; the maintenance and publication of the *National Union* catalogs and other cooperative publications; the publication of catalogs, bibliographic guides, and texts of original manuscripts and rare books; the circulation in traveling exhibitions of items from the library's collections; and the provision of books in Braille, talking book records, and books on tape. In addition, the library employs an optical disk system that supplies articles on public policy to Congress and provides research and analytical services on a fee-for-service basis to the executive and judicial branches.

Users outside the library can gain free access to its online catalog of files through the INTERNET. Major exhibitions of the library are available online, as are selected prints and photographs, historic films, and political speeches. Internet sites include the Library of Congress World Wide Web (<www.loc.gov>); THOMAS, an important legislative service containing a searchable full text of the *Congressional Record,* texts of recent bills, and congressional committee information (<thomas.loc.gov>); American Memory Historical Collections, which includes documents, images, and other information about U.S. history (<memory.loc.gov>); Global Gateway, which provides presentations regarding world culture and resources (<international.loc.gov/>); pointers to external Internet resources including extensive international, national, state, and local government information; and an international electronic library of resources arranged by Library of Congress subject headings. The Library of Congress also contributes to the National Digital Library more than 40 million bibliographic records, summaries of congressional bills, copyright registrations, bibliographies and research guides, summaries of foreign laws, an index of Southeast Asian POW-MIA documents, selections from the library's unique historical collections, and more.

### Reference Resources

Admission to the various research facilities of the library is free, and no introduction or credentials are required for persons over high school age. A photo identification and current address are required for the library's reading rooms and collections, and additional requirements apply for entry into certain collections like those of the Manuscript Division, Rare Book, and Special Collections Division, and Motion Picture, Broadcasting, and Recorded

Sound Division. Priority is given to inquiries pertaining to the library's holdings of special materials or to subjects in which its resources are unique. Demands for service to Congress and federal agencies have increased, and thus reference service to others through correspondence is limited.

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CROSS-REFERENCES

Copyright; Copyright, International.

## LICENSE

*The permission granted by competent authority to exercise a certain privilege that, without such authorization, would constitute an illegal act, a* TRESPASS *or a* TORT. *The certificate or the document itself that confers permission to engage in otherwise proscribed conduct.*

A license is different from a permit. The terms *license* and *permit* are often used interchangeably, but generally, a permit describes a more temporary form of permission. For example, if a homeowner seeks to make structural additions to her property, she may have to apply for permits from local land-use and ZONING boards. These permits expire on a certain date or when the work is finished. By contrast, the contractor who completes the work will likely hold a local license that allows her to operate her business for a certain number of years.

Licenses are an important and ubiquitous feature of contemporary society. Federal, state, and local governments rely on licensing to control a broad range of human activity, from commercial and professional to dangerous and environmental. Licenses may also be issued by private parties and by patent or COPYRIGHT holders.

### Government Licenses

The great many activities that require a license issued by a government authority include fishing; hunting; marrying; driving a motor vehicle; providing HEALTH CARE services; practicing law; manufacturing; engaging in retail and wholesale commerce; operating a private business, trade, or technical school; providing commercial services such as those offered by whitewater rafting outfitters and travel agencies; providing public services such as food and environmental inspection; and operating public pinball machines.

Not all persons engaged in a licensed activity need to obtain a license. For example, the owner of a liquor store must obtain a license to operate it, but the cashiers and stock persons need not obtain a license to work there. By contrast, not only does a dentist have to obtain a license to conduct business in a dental office, but dental hygienists and other dental assistants must each have a license to work in the office.

A license gives a person or organization permission to engage in a particular activity. If the government requires a license for an activity, it may issue criminal charges if a person engages in the activity without obtaining a license. Most licenses expire after a certain period of time, and most may be renewed. Failure to abide by certain laws and regulations can result in suspension or revocation of a license. Acquiring a license through FRAUD or MISREPRESENTATION will result in revocation of the license.

Licenses are issued by the administrative agencies of local, state, and federal lawmaking bodies. Administrative agencies are established by legislative bodies to regulate specific government activities and concerns. For example, the U.S. Congress and state legislatures have each created an agency that exercises authority over environmental issues. This agency usually is called a department of environmental protection or of conservation. It is responsible for issuing licenses for activities such as hunting, fishing, and camping. If the same agency has authority over environmental cleanups, it also may be responsible for issuing licenses for inspectors and businesses that specialize in waste management and removal. Specific boards or divisions within an agency may be responsible for issuing licenses.

*Bev Neth, director of Nebraska's Department of Motor Vehicles, points out features of the state's driver's licenses. Federal, state, and local governments rely on licensing to control a broad range of human activity, including driving.*

AP/WIDE WORLD PHOTOS

The licensing process helps to control activity in a variety of ways. License application procedures allow government authorities to screen applicants to verify that they are fit to engage in the particular activity. Before any license is issued by an agency, the applicant must meet certain standards. For example, a person who seeks a driver's license must be at least age 16, must have passed a driver's test and a vision test, and must pay a fee. If an applicant is under age 18, the state department of motor vehicles may require that the applicant obtain the signature of a parent or guardian. If the applicant seeks to drive other than a passenger vehicle, such as a motorcycle or semi-truck, the applicant has to pass tests that relate to the driving of that vehicle and obtain a separate license for driving that vehicle.

The requirements for certain business licenses can be stringent. For example, an insurance adjuster in Maine must be at least 18 years old; be competent, trustworthy, financially responsible, and of good personal and business reputation; pass a written examination on insurance adjusting; and have been employed or have undergone special training for not less than one year in insurance adjustment (Me. Rev. Stat. Ann. tit. 24-A, § 1853 [West 1995]). The insurance board can investigate any applicant for an insurance adjuster's license and deny an applicant a license if he does not meet the qualifications.

Such rigorous licensing procedures are usually used if the activity places the license holder, or licensee, in a fiduciary relationship, that is, in a position of confidence and trust with other persons. Such activity usually involves the handling of money or health matters, and includes endeavors like medical care, LEGAL REPRESENTATION, accounting, insurance, and financial investment.

Requiring a license for a certain activity allows the government to closely supervise and control the activity. The agency responsible for issuing the license can control the number of licensees. This function is important for activities such as hunting, where the licensing of too many hunters may deplete wildlife populations and put hunters in danger of stray bullets.

A license is not a property right, which means that no one has the absolute right to a license. The government may decline to issue a license when it sees fit to do so, provided that the denial does not violate federal or state law. No agency may decline to issue a license on the basis of race, religion, sex, national origin, or ethnic background.

The denial of a license, the requirement of a license, or the procedures required to obtain a license may be challenged in court. The most frequent court challenges involve licenses pertaining to the operation of a business. Such was the case in *FW/PBS v. City of Dallas,* 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990). In *FW/PBS* three groups of individuals and businesses in the adult entertainment industry filed suit in federal district court challenging a new ordinance passed by the Dallas City Council. The ordinance placed a number of new restrictions on sexually oriented businesses. Among other things it required that owners of sexually oriented businesses obtain a license, renew it each year, and submit to annual inspections.

On appeal, the Supreme Court upheld a requirement that hotels renting rooms for less than ten hours obtain a special license. The Court held that the city of Dallas's evidence that such motels fostered prostitution and led to a deterioration of the neighborhoods in which they existed was adequate justification for the requirement. However, the Court struck down the application of the licensing requirement to businesses engaged in sexually oriented expression, such as adult bookstores, theaters, and cabarets. The activities of these businesses are protected by the FIRST AMENDMENT, and licenses regarding activity protected by the First Amendment must be issued promptly. The Dal-

las ordinance failed to meet the promptness requirement because it did not limit the time for review of license applications or provide for quick JUDICIAL REVIEW of license denials. Thus, the Court declared it unconstitutional as applied to businesses engaged in expressive activity.

### Private Party Licenses

When a landowner allows a person to do work or perform an act on the landowner's property, the visitor has a license to enter the property. This kind of license need not be signed and formalized: it may be oral or it may be implied by the relationship or actions of the parties. For example, a public utility inspector has a license to enter private property for the purposes of maintaining the utility and gauging consumption. In such a case, the grantor of the license, or licensor, owes a duty to the licensee to make sure the premises are safe for the licensee.

### Patent and Copyright Holder Licenses

A license granted by the holder of a patent or a copyright on literary or artistic work gives the license holder a limited right to reproduce, sell, or distribute the work. Likewise, the owner of a TRADEMARK may give another person a license to use the mark in a region where the owner's goods have not become known and associated with the owner's use of the mark. These INTELLECTUAL PROPERTY licenses usually require that the licensee pay a fee to the licensor in exchange for use of the property. For example, computer software companies sell licenses to their products. In the licensing agreement users are informed that although they possess a disk containing the software, they have actually only purchased a license to operate it. The license typically forbids giving the software to someone else, making copies of it, or running it on more than one computer at a time.

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CROSS-REFERENCES

Hunting; Patent; Tort Law; Trespass.

## LICENTIOUSNESS

*Acting without regard to law, ethics, or the rights of others.*

The term *licentiousness* is often used interchangeably with lewdness or lasciviousness, which relate to moral impurity in a sexual context.

## LIE DETECTOR TEST

See POLYGRAPH.

## LIEN

*A right given to another by the owner of property to secure a debt, or one created by law in favor of certain creditors.*

A lien is an encumbrance on one person's property to secure a debt the property owner owes to another person. The statement that someone's property is "tied up" describes the effect of liens on both real and PERSONAL PROPERTY. *Lien* is a French word meaning "knot or binding" that was brought to Britain with the French language during the Norman Conquest in 1066.

### Real Estate Liens

In many states a mortgage is regarded as a lien, not a complete transfer of title, and if not repaid the debt is recovered by foreclosure and sale of the real estate. Real estate is also affected by liens that favor local, state, and federal governments for real estate taxes and special assessments; state and federal governments for income and sales or use taxes; condominium and homeowners' associations; and general contractors, subcontractors, material suppliers, and laborers for the value of work or materials installed on real estate. The filing requirements and STATUTES OF LIMITATIONS for these liens vary according to the law of each state.

Perhaps the riskiest move a purchaser of real estate can make is to buy without making certain that there are no liens on the property or without obtaining title insurance against liens on the property. In many states liens are secret: that is, they are hidden from the public records until required to be filed.

The priority of liens on a construction project relates back to the first visible commencement of the work. This line of law makes the last work, perhaps landscaping, equal in priority to the first, excavating. This means that during the entire work of construction, the owner must obtain waivers of lien from each subcontractor and material supplier. Without these waivers the real estate is subject to liens of all such claimants, if the general contractor, though paid in full, fails

to pay them. A waiver is a voluntary relinquishment of a known right. Waivers of lien must be in writing, give a sufficient description of the real estate, and be signed by the one claiming a lien. No payment need be made if the claimant agrees to release the land from the lien and rely only on the credit of the owner or general contractor for payment of the debt.

Lien claimants are protected in this way because all their materials and labor are "buried" in the real estate, having become part of it. They cannot be reclaimed without irreparable damage to the property. Unlike mortgage liens, the liens of these claimants, called mechanic's liens, offer no redemption in a foreclosure judgment.

### Other Liens

The published statutes of a state usually have a section on the topic of liens under which is listed most or all of the liens allowed by state law. A great number of persons in trade or business obtain liens for their services to personal property: garage keepers and warehouse owners for unpaid rent for storage; automobile mechanics for repairs; jewelers; dry cleaners and furriers; artisans for restoration of art objects; bankers; factors dealing in commodities; and many others. Not to be outdone, attorneys have a lien for their fees and may retain clients' files—perhaps containing vital information or documents needed by the client for work or family affairs—until the fees are paid.

A judgment lien can, when entered by a court after a suit, affect all the real and personal property of one who fails to pay a debt, such as a promissory note to a bank, credit card balance, or judgment for injury the person may have caused. In some states the lien of a properly docketed judgment affects all the debtor's property in every county where notice of the judgment is filed. State law governs the length of time such liens survive—which in some states is as long as ten years. Judgments can be enforced by executions and sale of property until the amount due is satisfied.

Courts of EQUITY have the power to create so-called equitable liens on property to correct some injustice. For example, one whose money was embezzled may obtain a lien on the wrongdoer's property by suing for a CONSTRUCTIVE TRUST.

### Discharging a Lien

Liens are discharged after a certain length of time. The requirements for commencing their foreclosure vary among the states. If a person pays and satisfies a lien, she should be careful to obtain a written, legally sufficient release or satisfaction, and file or record it in the appropriate government office, so that her title and credit reports no longer show the encumbrance.

CROSS-REFERENCES

Title Search.

## LIFE ESTATE

*An estate whose duration is limited to the life of the party holding it, or some other person.*

## LIFE IN BEING

*A phrase used in the common-law and statutory rules against perpetuities, meaning the remaining duration of the life of a person who is in existence at the time when the deed orwill takes effect.*

The courts developed the rule during the seventeenth century in order to limit a person's power to control the ownership and possession of property after death, and to ensure the transferability of property.

CROSS-REFERENCES

Rule Against Perpetuities.

## LIFE OR LIMB

*The phrase within the* FIFTH AMENDMENT *to the U.S. Constitution, commonly known as the* DOUBLE JEOPARDY *Clause, that provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb," pursuant to which there can be no second prosecution after a first trial for the same offense.*

The words *life or limb* are not interpreted strictly; they apply to any criminal penalty.

CROSS-REFERENCES

Double Jeopardy.

## LIFO

*An abbreviation for* last in, first out, *a method used in inventory accounting to value the merchandise of a particular business.*

LIFO assumes that the last goods purchased are the first sold and, as a result, those items that remain unsold in the inventory at the end of the year are assumed to be those which were purchased first.

CROSS-REFERENCES

FIFO.

## LIFT

*To raise; to take up.*

To lift a promissory note (a written commitment to pay a sum of money on a certain date) is to terminate the obligation by paying its amount.

To lift the bar of the STATUTE OF LIMITATIONS is to remove, by some sufficient act or ACKNOWLEDGMENT, the obstruction that it interposes. For example, some states will not permit an action to be instituted on a debt owed after ten years from the date of the debt. This is a ten-year statute of limitations. If the debtor acknowledges in writing that he or she owes the debt and will pay it on a certain date, this conduct lifts the bar of the statute of limitations so that the debtor can be sued on the debt for another ten years.

## LIGAN

*Goods cast into the sea tied to a buoy, so that they may be found again by the owners. When goods are cast into the sea in storms or shipwrecks and remain there, without coming to land, they are distinguished by the names of jetsam, flotsam, and* ligan.

## LIMITATION

*A qualification, restriction, or circumspection.*

In the law of property, a limitation on an estate arises when its duration or quality is in some way restricted. For example, in the conveyance, "Owner conveys Blackacre to A until B leaves the country," A's estate is limited, since A is given Blackacre for only a specified length of time.

## LIMITATIONS OF ACTIONS

*Statutes restricting the right to bring suit on certain civil causes of action or criminal prosecutions, which provide that a suit may not be commenced unless it is brought within a designated period after the time that the right to sue accrued.*

CROSS-REFERENCES

Statute of Limitations.

## LIMITED

*Restricted in duration, extent, or scope; confined.*

*Limited liability* is the rule that the owners or shareholders of a corporation cannot usually be sued as individuals for corporate actions unless they are involved in FRAUD or criminal conduct.

*Limited* is also a designation following the name of a corporation that indicates its corporate and limited liability status; it is abbreviated *Ltd.* It is found most commonly after British and Canadian corporate names, although it is sometimes used in the United States.

## LIMITED LIABILITY COMPANY

*A noncorporate business whose owners actively participate in the organization's management and are protected against personal liability for the organization's debts and obligations.*

The limited liability company (LLC) is a hybrid legal entity that has both the characteristics of a corporation and of a partnership. An LLC provides its owners with corporate-like protection against personal liability. It is, however, usually treated as a noncorporate business organization for tax purposes.

### History

The LLC is a relatively new business form in the United States, although it has existed in other countries for some time. In 1977, Wyoming became the first state to enact LLC legislation: it wanted to attract capital and created the statute specifically for a Texas oil company (W.S. 1977 § 17-15-101 et seq., Laws 1977, ch. 158 § 1). Florida followed with its own LLC statute in 1982 (West's F.S.A. § 608.401, Laws 1982, c. 82-177 § 2). At this point states had little incentive to form an LLC because it remained unclear whether the INTERNAL REVENUE SERVICE (IRS) would treat an LLC as a partnership or as a corporation for tax purposes.

In 1988, the IRS issued a ruling that an LLC in Wyoming would be treated as a partnership for tax purposes. This allowed the taxable profits and losses of an LLC to flow through to the LLC's individual owners; unlike a typical corporation, an LLC would not be taxed as a separate business organization. After the 1988 IRS ruling, nearly every state in the United States enacted an LLC statute, and the LLC now is a widely recognized business form. Many legal issues concerning the LLC are still developing, however.

In 1995, the COMMISSIONERS ON UNIFORM LAWS approved the Uniform Limited Liability Company Act. It was amended in 1996. Unlike other UNIFORM ACTS related to business entities, such as the Uniform Partnership Act, the uniform law governing LLCs has not been influential. As of 2003, only eight states and the U.S.

Virgin Islands had adopted the uniform law; the remaining states have drafted their own laws.

### Formation

State law governs the creation of an LLC. Persons form an LLC by filing required documents with the appropriate state authority, usually the secretary of state. Most states require the filing of ARTICLES OF ORGANIZATION. These are considered public documents and are similar to articles of incorporation, which establish a corporation as a legal entity. The LLC usually comes into existence on the same day the articles of organization are filed and a filing fee is paid to the secretary of state.

The minimum information required for the articles of organization varies from state to state. Generally, it includes the name of the LLC, the name of the person organizing the LLC, the duration of the LLC, and the name of the LLC's registered agent. Some states require additional information, such as the LLC's business purpose and details about the LLC's membership and management structure. In all states an LLC's name must include words or phrases that identify it as a limited liability company. These may be the specific words *Limited Liability Company* or one of various abbreviations of those words, such as *LLC* or *Ltd. Liability Co.*

### Structure

The owners of an LLC are called members and are similar in some respects to shareholders of a corporation. A member can be a natural person, a corporation, a partnership, or another legal association or entity. Unlike corporations, which may be formed by only one shareholder, LLCs in most states must be formed and managed by two or more members. LLCs are therefore unavailable to sole proprietors. In addition, unlike some closely held, or S, corporations, which are allowed a limited number of shareholders, LLCs may have any number of members beyond one.

Generally, state law outlines the required governing structure of an LLC. In most states members may manage an LLC directly or delegate management responsibility to one or more managers. Managers of an LLC are usually elected or appointed by the members. Some LLCs may have one, two, or more managers. Like a general partner in a limited partnership or an officer in a corporation, an LLC's manager is responsible for the day-to-day management of the business.

A manager owes a duty of loyalty and care to the LLC. Unless the members consent, a manager may not use LLC property for personal benefit and may not compete with the LLC's business. In addition, a manager may not engage in self-dealing or usurp an LLC's business opportunities, unless the members consent to a transaction involving such activity after being fully informed of the manager's interest.

### Operating Agreement

Nearly every LLC maintains a separate written or oral operating agreement, which is generally defined as the agreement between the members that governs the affairs of the LLC. Some states call an operating agreement regulations or a member control agreement. Although some states do not require an operating agreement, nearly all LLCs create and maintain a written document that details their management structure.

The operating agreement typically provides the procedures for admitting new members, outlines the status of the LLC upon a member's withdrawal, and outlines the procedures for dissolution of the LLC. Unless state law restricts the contents of an operating agreement, members of an LLC are free to structure the agreement as they see fit. An LLC can usually amend or repeal provisions of its operating agreement by a vote of its members.

### Membership Interests

A member of an LLC possesses a membership interest, which usually includes only an economic interest. A membership interest is considered PERSONAL PROPERTY and may be freely transferred to nonmembers or to other members. The membership interest usually does not include any right to participate in the management of the LLC. Accordingly, if a member assigns or sells a membership interest to another person, that other person typically receives only the right to the assigning member's share of profits in the LLC. Persons who receive a membership interest are not able to participate as voting members or managers unless they are admitted as new members.

State law and an LLC's operating agreement or articles of organization provide the circumstances under which a person may be admitted as a new member. These circumstances vary. Usually the admission of a new member requires the consent of existing members, and in most

cases the consent must be unanimous. In some cases the articles of organization do not allow for admission of new members. In others the recipient of a membership interest may be automatically admitted as a new member.

### Member Contributions

Members of an LLC contribute capital to the LLC in exchange for a membership interest. There is no minimum amount of capital contribution, and members usually can contribute cash, property, or services. By default, the total amount of a member's capital contribution to an LLC determines the member's voting and financial rights in the LLC. In other words, unless an LLC's operating agreement provides for a different arrangement, the profits and losses of the LLC are shared proportionally in relation to the members' contributions to the LLC. For example, if a member's capital contributions constitute 40 percent of an LLC's capital, that member typically has a 40 percent stake in the LLC and has more voting power than a member with a 20 percent interest.

A member may promise a future contribution to an LLC in exchange for a membership interest. If the member later fails to make the contribution, the LLC generally may enforce the promise as a contract or sell the member's existing interest to remedy the failure.

Distributions of profits or assets to members are usually governed by an LLC's operating agreement. Most state LLC laws do not require distributions to members other than when a member withdraws or terminates membership. Members vote to determine all aspects of distributions to members, including amount and timing. Because a member's share of any distribution or loss depends on the member's share of all capital contributions to an LLC, the LLC maintains records of each member's capital contribution.

### Liability

State LLC statutes specifically provide that members of an LLC are not personally liable for the LLC's debts and obligations. This limited liability is similar to the liability protection for corporate shareholders, partners in a limited partnership, and partners in a limited liability partnership. Under certain circumstances, however, a member may become personally liable for an LLC's debts.

An individual member is generally personally liable for his or her own TORTS and for any contractual obligations entered into on behalf of the member and not on behalf of an LLC. In addition, a member is personally liable to a third person if the member personally guarantees a debt or obligation to the third person. A person who incurs debts and obligations on behalf of the LLC prior to the LLC's formation is jointly and severally liable with the LLC for those debts and obligations.

Members may also become personally liable for an LLC's debts or obligations under the "piercing-the-corporate-veil" theory. This doctrine imposes personal liability upon corporate shareholders and applies primarily if a corporation is undercapitalized, fails to follow corporate formalities, or engages in FRAUD. Although the law of LLCs is still developing, piercing the corporate veil is likely applicable to an LLC that fails to follow the legal formalities required to manage the LLC. LLC statutes in Colorado, Illinois, and Minnesota specifically apply the corporate veil-piercing theory to LLCs.

A member is generally considered an agent of an LLC and thus may bind the LLC for the debts and obligations of the business. When a member has apparent or actual authority and acts on behalf of an LLC while carrying on the usual business of the LLC, the member binds the LLC. If a third person knows that the member is not authorized to act on behalf of the LLC, the LLC is generally not liable for the member's unauthorized acts. Some states also limit a member's authority to act as an agent of an LLC.

### Records and Books

Many LLC statutes require an LLC to maintain sufficient books and records of its business and management affairs. This requirement varies from state to state. The books and records generally detail the members' contributions to the LLC, the LLC's financial and tax data, and other financial and management information. Like a partnership's books, an LLC's books generally must be kept at the LLC's principal place of business, and each member must have access to and must be allowed to inspect and copy the books upon reasonable demand.

### Taxation

Prior to 1997, the IRS generally treated an LLC as a partnership for federal INCOME TAX purposes. If an LLC is taxed as a partnership, its members are taxed only on their share of the

LLC profits. Any gains, losses, credits, and deductions flow through the LLC to the members, who report them as income and losses on their personal tax return.

The IRS developed a system for determining whether an LLC was formed more like a corporation or more like a partnership. Under prior regulations, if the IRS determined that the LLC's operation was more similar to a corporation, the LLC is taxed as a corporation, meaning that both the LLC and its members were taxed. Specifically, the IRS observed whether the LLC had such characteristics as limited liability, centralized management, free transferability of interests, and continuity of life.

However, the IRS passed regulations in 1996, effective in 1997, that allowed LLC members to elect whether the company is a corporation or a partnership for taxation purposes, 26 C.F.R. § 301.7701-3 (2002). The regulations, known as "check-the-box" regulations, generally freed LLC owners from worrying about whether their method of operation would require them to pay corporate taxes instead of partnership taxes. Accordingly, many LLCs may operate similar to a corporation (centralized management with member owners), yet the members may enjoy taxes that flow through the entity.

### Member Withdrawal

Members may withdraw from an LLC unless the operating agreement or articles of organization limit their ability to do so. A member must usually provide to the LLC written notice that he or she intends to withdraw. If a withdrawal violates the operating agreement, the withdrawing member may be liable to the other members or the LLC for damages associated with it. State law frequently sets forth the circumstances under which a member may withdraw from an LLC. In many states a member may withdraw only if he or she provides six months' written notice of the intent to withdraw. In a few states, an LLC cannot prevent a member's withdrawal.

A member who withdraws is usually entitled to a return of his capital contribution to an LLC, unless the withdrawal is unauthorized. Some LLCs instead pay a withdrawing member the fair market value of his or her membership interest. The operating agreement typically provides for the method and manner of payment of a withdrawing member's interest. State law also governs those issues.

### Dissolution

Dissolution means the legal end of an LLC's existence. In most states an LLC legally dissolves upon the death, disability, withdrawal, BANKRUPTCY, or expulsion of a member. These occurrences are generally called disassociations. Other circumstances that bring about dissolution include bankruptcy of the LLC, a court order, or the fulfillment of the LLC's stated period of duration.

Most states provide for the continuation of an LLC after the disassociation or withdrawal of a member. Continuation after a member's disassociation usually requires the remaining members' unanimous consent. Some states require that the articles of organization or operating agreement allow for the continuation of the business after a member's disassociation. Some states allow an LLC's articles of organization or operating agreement to require the continuation of the business after a member's dissociation even if the remaining members do not provide unanimous consent.

If an LLC dissolves, state law and the LLC's operating agreement usually outline the process for winding up the LLC's business. In this process the LLC pays off its remaining creditors and distributes any remaining assets to its members. The LLC's creditors receive priority. Although members may be creditors, they are not creditors in determining the members' distributive shares of any remaining assets. After the LLC pays off its creditors, and only then, it distributes the remaining assets to its members, either in proportion to the members' shares of profits or under some other arrangement outlined in the operating agreement. After an LLC winds up its business, most states require it to file articles of dissolution.

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## LIMITED LIABILITY PARTNERSHIP

*A form of general partnership that provides an individual partner protection against personal liability for certain partnership obligations.*

The Limited Liability Partnership (LLP) is essentially a general partnership in form, with one important difference. Unlike a general partnership, in which individual partners are liable for the partnership's debts and obligations, an LLP provides each of its individual partners protection against personal liability for certain partnership liabilities.

In 1991 Texas enacted the first LLP statute, largely in response to the liability that had been imposed on partners in partnerships sued by government agencies in relation to massive savings and loan failures in the 1980s. The Texas statute protected partners from personal liability for claims related to a copartner's NEGLIGENCE, error, omission, INCOMPETENCY, or malfeasance. It also permanently limited the personal liability of a partner for the errors, omissions, incompetence, or negligence of the partnership's employees or other agents. By the mid-1990s, at least twenty-one states and the District of Columbia had adopted LLP statutes.

The limit of an individual partner's liability depends on the scope of the state's LLP legislation. Many states provide protection only against TORT claims and do not extend protection to a partner's own negligence or incompetence or to the partner's involvement in supervising wrongful conduct. Other states provide broad protection, including protection against contractual claims brought by the partnership's creditors. For example, Minnesota enacted an expansive LLP statute in 1994. This piece of legislation provided that a partner in an LLP was not liable to a creditor or for any obligation of the partnership. It further provided, however, that a partner was personally liable to the partnership and copartners for any breach of duty, and also allowed a creditor or other claimant to pierce the limited liability shield of a partner in the same way a claimant may pierce the corporate veil of a corporation and personally sue an individual member of the corporation.

In states that recognize LLPs, a partnership qualifies as an LLP by registering with the appropriate state authority and fulfilling various requirements. Some states require proof that the partnership has obtained adequate liability insurance or has adequate assets to satisfy potential claims. All states require a filing fee for registration and also require that an LLP include the words *Registered Limited Liability Partnership* or the abbreviation *LLP* in its name.

A partnership that renders specific professional services may form an LLP and register as a professional limited liability partnership (PLLP). A PLLP is generally the same as an LLP except that it is an association solely of professionals. Each state specifies the qualifying professions for a PLLP. This business form is typically available to attorneys, physicians, architects, dentists, engineers, and accountants. New York's LLP statute restricts eligibility solely to partnerships that render professional services.

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## LIMITED TEST BAN TREATY

The Limited Test Ban Treaty (LTBT), sometimes called the Partial Test Ban Treaty, was first signed in 1963 by the United States, the Union of Soviet Socialist Republics (U.S.S.R.), and the United Kingdom. It prohibits the testing of NUCLEAR WEAPONS in the atmosphere, underwater, or in space. As the first significant ARMS CONTROL agreement of the COLD WAR, the LTBT set an important precedent for future arms negotiations.

The LTBT followed quickly on the heels of the 1962 CUBAN MISSILE CRISIS, in which the United States and the U.S.S.R. came to the brink of war over the Soviet Union's placement of missiles in Cuba. Alarmed at the prospect of nuclear war, President JOHN F. KENNEDY, of the United States, and Premier Nikita Khrushchev, of the Soviet Union, agreed to begin serious arms control negotiations. The LTBT was one of the first fruits of these negotiations. Proponents of the treaty claimed that it would prevent contamination of the environment by radioactive fallout from nuclear testing, slow down the arms race, and inhibit the spread of nuclear weapons to other countries.

*President Kennedy ratifies the Limited Test Ban Treaty on October 7, 1963. Looking on are Sen. John Pastore, W. Averell Harriman, Sen. James Fulbright, Dean Rusk, Sen. George Aiken, Sen. Hubert Humphrey, Sen. Everett Dirksen, William Foster, Sen. Howard Cannon, and Sen. Leverett Saltonstall.*

BETTMANN/CORBIS

Although Kennedy hailed the LTBT as a significant achievement of his presidency, he was disappointed that he could not secure a comprehensive test ban treaty, which would have banned all forms of nuclear testing. Lacking such a ban, the superpowers and other countries with nuclear capability continued to test nuclear weapons underground. However, article 1, section b, of the LTBT pledges that each of its signatory countries will seek "a treaty resulting in the permanent banning of all nuclear test explosions, including all such explosions underground." By 1973, a total of 106 countries had signed the LTBT, and by 1992, that number had grown to 119.

Later test ban treaties have included the Threshold Test Ban Treaty of 1974, which prohibited nuclear tests of more than 150 kilotons (the explosive force of 150,000 tons of TNT), and the Peaceful Nuclear Explosions Treaty of 1976. Although a comprehensive test ban agreement has not yet been reached, the nuclear powers and many nations without nuclear capabilities continue to negotiate the provisions of such a treaty.

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## ❖ LINCOLN, ABRAHAM

Abraham Lincoln was the 16th president of the United States, serving from 1861 until his assassination in April 1865. Lincoln and his supporters preserved the Union by defeating the South in the Civil War.

Lincoln was born February 12, 1809, in Hodgenville, Kentucky. In 1816 his family moved to a farm in Indiana, where he spent the rest of his childhood. He attended school for less than a year and gained most of his education by reading books. In 1828 and 1831, he made flatboat trips down the Mississippi River to take produce to New Orleans. On these trips he was first exposed to the institution of SLAVERY.

In 1830 his family moved to Decatur, Illinois. He left his family in 1831 and moved to New Salem, Illinois, where he worked at various jobs and continued his self-education. He began to study law, then was sidetracked by political ambitions.

In 1832 he ran for the state legislature as a member of the WHIG PARTY. He aligned himself with the views of Whig party leader HENRY CLAY, who served as a U.S. senator from Kentucky. Like Clay, Lincoln promised to use the power of the government to improve the life of the people he represented. During the 1832 campaign, the Black Hawk War erupted in southern Illinois. Lincoln enlisted in the local militia and was elected captain. Though he served for eighty days, he never saw battle. His service in the military distracted him from his campaign for the legislature, and he lost his first election.

In 1834 he was elected to the state legislature. He was reelected in 1836, 1838, and 1840. John T. Stuart, a fellow legislator and also a lawyer, was impressed with Lincoln's intellectual and oratorical abilities and encouraged him to practice law. In the fall of 1836, Lincoln was admitted to the Illinois bar, and in 1837 he became Stuart's law partner in Springfield, Illinois. In 1841 the pair dissolved their partnership and Lincoln began a new partnership with

Stephen T. Logan. By 1844 that arrangement had dissolved and Lincoln took William H. Herndon as a partner. Lincoln was a hardworking attorney who over the years represented railroad companies and other business entities. By the 1850s he had argued many times before the Illinois Supreme Court and various federal courts.

However, his interest in politics continued. In 1847 he was elected to the U.S. House of Representatives as a member of the Whig party. His one brief term in this office was detrimental to his career, for his opposition to the Mexican War and his stand on several other issues were received unfavorably by his constituents.

He did not seek reelection in 1848, choosing instead to work on the presidential campaign of ZACHARY TAYLOR. After Taylor's victory Lincoln was severely disappointed when he failed to receive a prominent presidential appointment. He abandoned politics and devoted his energies to his law practice in Springfield.

Events involving slavery soon drew Lincoln back into the political arena. The passage in 1854 of the KANSAS-NEBRASKA ACT infuriated Lincoln. Senator STEPHEN A. DOUGLAS, of Illinois, a Democrat and rival of Lincoln's, had drafted this legislation, which revoked the MISSOURI COMPROMISE OF 1820. The repeal meant that the settlers of Kansas and Nebraska could allow slavery to exist if they so wished. This was intolerable to Lincoln and many antislavery Whigs and Democrats. Lincoln took to the political stump again, railing against slavery and the congressional actions that had placed the issue at the forefront of national policy.

The Whig party fell apart over the slavery question. In 1856 Lincoln joined others opposed to slavery from both the Whig and Democrat parties, in the newly formed REPUBLICAN PARTY. He quickly rose to prominence. The Republicans chose him as their candidate in the 1858 senatorial race against Douglas. The campaign was marked by a series of seven brilliant debates between the two contenders. Lincoln advocated loyalty to the Union, regarded slavery as unjust, and was opposed to any further expansion of slavery. He opened his campaign by declaring, "'A house divided against itself cannot stand.' I believe this government cannot endure permanently *half* slave and *half* free." Lincoln lost the election owing to an unfavorable APPORTIONMENT of legislative seats in Illinois. (At that time U.S. senators were elected by a vote of the state legislature.) Though Republicans garnered larger numbers of votes, Douglas was reelected.

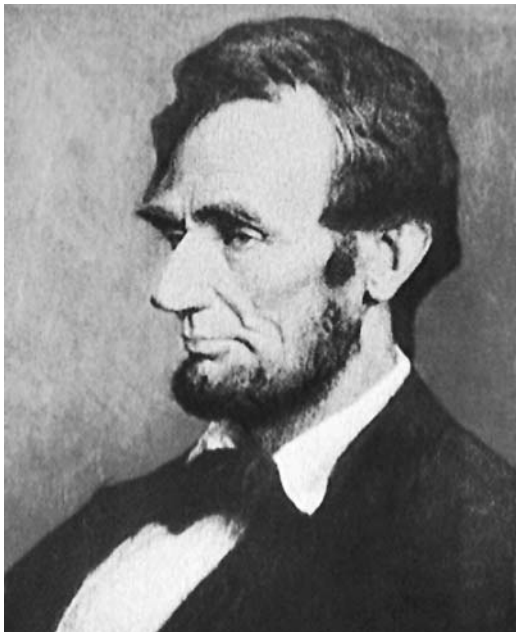

*Abraham Lincoln.*
PAINTING BY DOUGLAS VOLK. LIBRARY OF CONGRESS

"WHENEVER I HEAR ANYONE ARGUING FOR SLAVERY, I FEEL A STRONG IMPULSE TO SEE IT TRIED ON HIM PERSONALLY."
—ABRAHAM LINCOLN

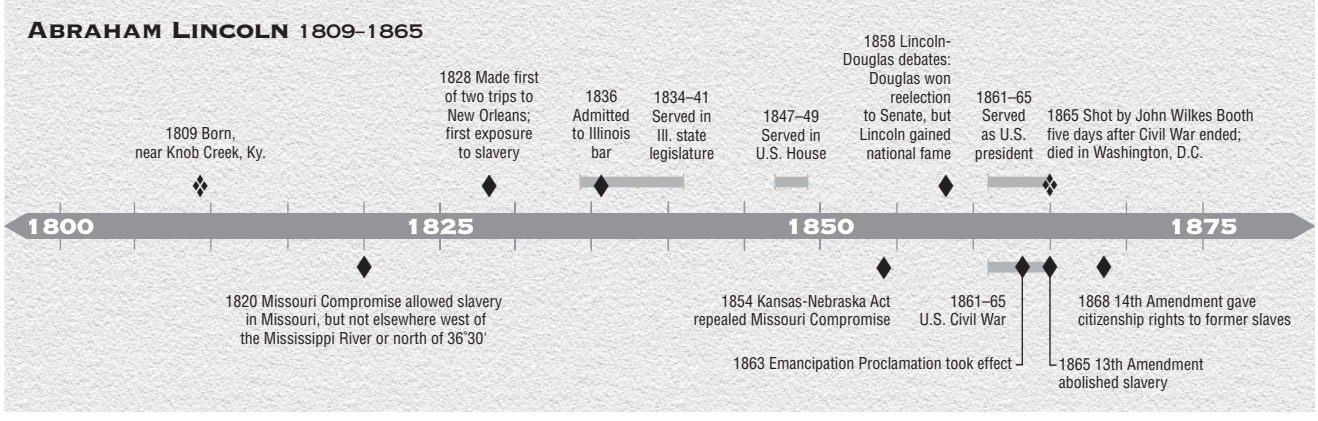

# The Lincoln Assassination: Conspiracy or a Lone Man's Act?

On April 14, 1865, President Abraham Lincoln was assassinated at Ford's Theater in Washington, D.C. Five days earlier, Confederate General Robert E. Lee had surrendered to Union troops. John Wilkes Booth, a well-known actor, Confederate sympathizer, and spy, has gone down in history as the lone assailant of Lincoln. However, Booth was killed by federal soldiers before he could be brought to trial. Eyewitnesses at Ford's Theater identified Booth as the man who shot the president at point-blank range with a single bullet to the back of the head. But Booth's exact motive in the killing was never established. In the wake of the first assassination of a U.S. president, eight of Booth's associates were charged as conspirators. All eight were convicted. However, since then, some modern theories have downplayed the roles of Southern radicals in the conspiracy. Some historians have even pointed fingers at the Republicans, Lincoln's own party.

IN FOCUS

Shortly before his death, Lincoln announced his Reconstruction policy for restoring the United States. He advocated "malice toward none, charity for all." However, more than a handful of Confederates distrusted Yankee politics. Confederate plots to kill the president or KIDNAP him had certainly existed long before April 1865. Lincoln appeared unconcerned about the threats, however, and refused to heed the advice of his advisers to take fewer risks in his public appearances. "What does anybody want to assassinate me for?" Lincoln once asked. "If anyone wants to do so, he can do it any day or night, if he is ready to give his life for mine. It is nonsense."

Booth fled Ford's Theater immediately after killing Lincoln and headed for refuge in the South. The Union cavalry, after a massive manhunt (announced throughout the nation), cornered Booth at the Garrett farm, his hiding spot in Virginia. Soldiers shot him through the neck leaving him partially paralyzed. Booth somehow managed to exit the barn when it was set on fire. He died at the feet of federal officers on the morning of April 26.

In somewhat mysterious fashion, Booth's "diary" (actually an 1864 datebook), was recovered from the site of his death. Booth wrote a running commentary, in scattered detail, on his plans before he shot Lincoln, and the developments of his final days. He wrote: "For six months we had worked to capture. But our cause, being almost lost, something decisive & great must be done. But it's failure was owing to others, who did not strike for their country with a heat. I struck boldly and not as the papers say."

Booth even described himself as a savior, claiming, "Our country owed all her trouble to him, and God simply made me the instrument of his punishment." Booth's diary would not be used directly as evidence in the trial of others with whom he had allegedly conspired.

Despite the Senate loss, Lincoln's national reputation was enhanced by his firm antislavery position. He was urged to run for president in 1860. At the Republican National Convention in Chicago in May 1860, Lincoln defeated William H. Seward for the nomination. A split in the DEMOCRATIC PARTY led to the fielding of two Democratic candidates, John C. Breckenridge and Douglas. This split enabled Lincoln easily to defeat his rivals, including JOHN BELL, head of the Constitutional Union party. He would be easily reelected in 1864.

By the time Lincoln took his oath of office in March 1861, seven Southern states had seceded from the Union and had established the Confederate States of America. Jefferson Davis was elected president of the new government. Lincoln wished to find a solution short of war that would preserve the Union, but there were few options. When Lincoln allowed supplies to be sent to Fort Sumter, a Union base on an island outside Charleston, South Carolina, the new Confederate government seized the opportunity to interpret this as an act of war. On April 12, 1861, Fort Sumter was attacked by Confederate forces, and the Civil War began.

Lincoln's initial actions against this act of aggression included drafting men for military service, approving a blockade of the Southern states, and suspending the writ of HABEAS CORPUS. His troop request led to the secession of Virginia, North Carolina, Tennessee, and Arkansas. Suspending habeas corpus effectively curtailed civil liberties, as persons who were suspected of being Southern sympathizers could be held in custody indefinitely. All these actions were taken by EXECUTIVE ORDER, in Lincoln's capacity as commander in chief, because Congress was not in session at the time.

During the early stages of the war, the North suffered great losses, particularly at Bull Run. A succession of Union generals failed to achieve

Instead, it is a primary piece of evidence to support the argument that Booth acted alone.

Booth's quick death with no trial left many in the nation questioning the circumstances surrounding the murder of the North's beloved leader. Federal investigators subsequently singled out eight Southern civilians who had, by varying accounts, associated with Booth at a boarding house in Maryland. The eight were held as prisoners, accused of assisting in the crime of the century. David Herold, Lewis Payne, George Atzerodt, Michael O'Laughlin, Samuel Arnold, Dr. Samuel Mudd, Edward Spangler, and Mary E. Surratt were charged as traitors and conspirators in a plot to kill Lincoln, Vice President **ANDREW JOHNSON**, **SECRETARY OF STATE** William H. Seward and General **ULYSSES S. GRANT**.

Lincoln's secretary of war, **EDWIN M. STANTON**, had conducted most of the criminal investigation. Based on the charges he developed, former Confederate President Jefferson Davis was directly implicated, but not tried, in the assassination plot. Stanton and Attorney General **JAMES SPEED** subsequently put together a nine man military commission of seven generals and two colonels from the Union Army to sit in judgment. All nine of the appointed officers were staunch Republicans.

In the trial of the suspects, the prosecution relied heavily on the testimony of one individual in particular, Louis Weichmann. Weichmann had been closely acquainted with most of the conspirators and had first learned of their plot, according to his testimony, at a Maryland boarding house run by Mary Surratt. The accounts Weichmann gave primarily implicated Surratt and a country doctor, Samuel Mudd. The defense noted that Weichmann had not reported any of the alleged activity at the boarding house until after the assassination. However, the evidence to which Weichmann led investigators, particularly a boot of Booth's with the inscription "J. Wilkes," found at the home of Dr. Mudd, appeared to seal the fate of the eight defendants.

On June 29 the commission met behind closed doors to consider the evidence. They deliberated for two days and then sentenced four prisoners to death and four to imprisonment and hard labor. On July 7 Surratt was the first to be led to the gallows. Atzerodt, Herold, and Payne also received the death penalty.

Though four people were sent to their deaths, and four to prison, for the crime, historians continue to debate the conspiracy to kill Lincoln. One book that stirred much discussion on the subject was Otto Eisenschiml's *Why Was Lincoln Murdered?,* published in 1937. Eisenschiml postulated that Stanton and a group of Northern industrialists plotted the death of Lincoln to secure the interests of radical Republicans who were bent on the takeover of the newly restored Union. That theory, however, has been largely rebutted by other historians.

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military success. Not until General **ULYSSES S. GRANT** emerged in 1863 as a strong and successful military leader did the Union army begin to achieve substantial victories. In 1864 Lincoln named Grant the commander of the Union army. In April 1865 General Robert E. Lee surrendered his Confederate army to Grant at Appomattox, Virginia, signaling the end of the war.

Lincoln fought the Civil War to preserve the Union, not to end slavery. Though he was personally opposed to slavery, he had been elected on a platform that pledged to allow slavery to remain where it already existed. However, wartime pressures drove Lincoln toward emancipation of the slaves. Military leaders argued that an enslaved labor force in the South allowed the Confederate states to place more soldiers on the front lines. By the summer of 1862, Lincoln had prepared an **EMANCIPATION PROCLAMATION**, but he did not want to issue it until the Union army had better fortune on the battlefield. Otherwise the proclamation might be seen as a sign of weakness.

The Union army's victory at Antietam encouraged the president to issue on September 22, 1862, a preliminary proclamation that slavery was to be abolished in areas occupied by the Confederacy effective January 1, 1863. The wording of the Emancipation Proclamation on that date made clear that slavery was still to be tolerated in the border states and areas occupied by Union troops, so as not to jeopardize the war effort. Lincoln was uncertain that the U.S. Supreme Court would uphold the constitutionality of his action, so he lobbied Congress to adopt the **THIRTEENTH AMENDMENT**, which totally abolished slavery.

Lincoln's writing and speaking skills played a vital part in maintaining the resolve of the Northern states during the war and in preparing the nation for the aftermath of the war. In 1863, at Gettysburg, Pennsylvania, Lincoln delivered

his poignant Gettysburg Address at the dedication of a national cemetery for soldiers who had died at the bloody battleground. The speech summarized the tragic and human aspects of Gettysburg and distilled Lincoln's resolve to protect the Union. At his second inauguration, in March 1865, Lincoln reached out to the South as the end of the war approached. He proclaimed, "With malice toward none; with charity for all."

Even before the war ended, Lincoln began to formulate a plan for Reconstruction, which included the restoration of Southern state governments and the AMNESTY of Confederate officials who vowed loyalty to the Union. These proposals met fierce opposition in Congress, as the Radical Republicans sought harsher treatment for the South and its supporters.

The war ended on April 9, 1865, but Lincoln did not have a chance to fight for his Reconstruction proposals. He was shot in the head on April 14 by John Wilkes Booth during the performance of a play at Ford's Theatre, in Washington, D.C. He died the next day. After lying in state in the Capitol, his body was returned to Springfield for burial.

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## ♦ LINCOLN, LEVI

Levi Lincoln was a U.S. attorney general under President THOMAS JEFFERSON. He held various political posts, including that of sixth governor of Massachusetts. He was among the creators of the first state constitution. As a trial lawyer, Lincoln was involved in a set of landmark cases in the struggle against SLAVERY. He was also the father of Massachusetts statesman and state supreme court justice Levi Lincoln, Jr. (1782–1868).

Lincoln was born May 15, 1749, in Hingham, Massachusetts. His father was a farmer, and as a youth Lincoln was apprenticed to a blacksmith. However, because Lincoln was an avid student, his father allowed him to continue studying in preparation for college. His initial studies were in theology, but after hearing JOHN ADAMS argue a case in Boston, his interests turned to law.

Lincoln graduated from Harvard in 1772 and then worked in the office of Joseph Hawley, in Northampton, Massachusetts. Until the outbreak of the Revolutionary War, he was active in politics and a prominent figure in the Massachusetts movement to abolish slavery. After the Battle of Lexington, in 1775, he traveled with the militia for a brief period before moving to Worcester, Massachusetts. He was admitted to the bar in 1775 and set up his law practice in Worcester, where he remained a resident for the rest of his life.

Lincoln quickly became prominent as a successful trial lawyer and served in various civil offices during the years of the Revolutionary War. In 1775 he was a state court judge, and from 1777 to 1781 he was a probate court judge. In 1779 Lincoln was a delegate to the Massachusetts state constitutional convention, which drew up the first state constitution. In 1781 he married Martha Waldo, with whom he had nine children.

Also in 1781 Lincoln served as a defense counsel in three cases concerning the question of the right to hold slaves. The cases—*Walker v. Jenison, Jenison v. Caldwell,* and *Common-*

*wealth v. Jenison*—addressed the issue of slavery in light of the bill of rights in the 1780 Massachusetts Constitution. Lincoln and co-defense counsel Caleb Strong argued against the legality of slavery in Massachusetts. Their position prevailed, and slavery was made illegal in the state.

Lincoln, a leading Republican, became a key adviser to President Jefferson on matters of Federalist-Republican logistics and diplomacy, specifically regarding introducing laws or policies likely to be unpopular in New England.

Lincoln served in the Massachusetts state House of Representatives in 1796 and was a state senator the following year. From 1800 to 1801, he was a member of the U.S. Congress.

Lincoln served as U.S. attorney general under President Jefferson from 1801 to 1804. Early in his term, he also fulfilled the duties of SECRETARY OF STATE, because personal illness and a death in the family delayed the arrival in Washington, D.C., of secretary of state appointee JAMES MADISON.

As attorney general Lincoln was one of two men to whom Jefferson frequently turned for advice regarding his New England constituency; the other was Postmaster General Gideon Granger. For example, Jefferson, a rigid secularist, drafted a letter of support in response to an appeal from a minority group in Connecticut known as the Danbury Baptists, who were seeking stronger church-state separation in their state. Jefferson's draft declared that because of the Constitution's FIRST AMENDMENT prohibitions, a "wall of separation" had been built between church and state. The draft also noted that because of this strong separation, Jefferson refrained from prescribing "even occasional performances of devotion," such as days of fasting or thanksgiving, as his predecessors had done. Before releasing the paper, Jefferson asked the advice of both Granger and Lincoln. Granger proposed leaving the draft as it was written. Lincoln argued that the phrase regarding days of thanksgiving might anger the eastern states because their governors frequently proclaimed such days. Based on Lincoln's advice, Jefferson removed the phrase.

Because of his Republican partisanship, Lincoln was the subject of frequent criticism by Federalist newspapers and clergy representatives. His book *Letters to the People, by a Farmer,* published in 1802, in which he attacked the political role of the clergy, was written in response to this criticism.

Lincoln resigned his post as attorney general in 1805 and resumed his political career in Massachusetts. In 1807 he served as lieutenant governor of Massachusetts. The following year he was elected governor. He was on the governor's council in 1806 and from 1810 to 1812. In 1812 he was offered a position in the U.S. Supreme Court, which he refused because of failing eyesight. In recommending Lincoln for the position to President Madison, Jefferson called Lincoln a highly desirable appointee because of his legal abilities, his integrity, and his unimpeachable character.

Lincoln spent the rest of his life on his farm in Worcester. He died there April 14, 1820.

"[THE PRESIDENT] IS ACCOUNTABLE ONLY TO HIS COUNTRY . . . AND TO HIS CONSCIENCE. TO AID HIM IN THE PERFORMANCE OF THESE DUTIES, HE IS AUTHORIZED TO APPOINT CERTAIN OFFICERS, WHO ACT BY HIS AUTHORITY AND IN CONFORMITY WITH HIS ORDER. IN SUCH CASES THEIR ACTS ARE HIS ACTS."
—LEVI LINCOLN

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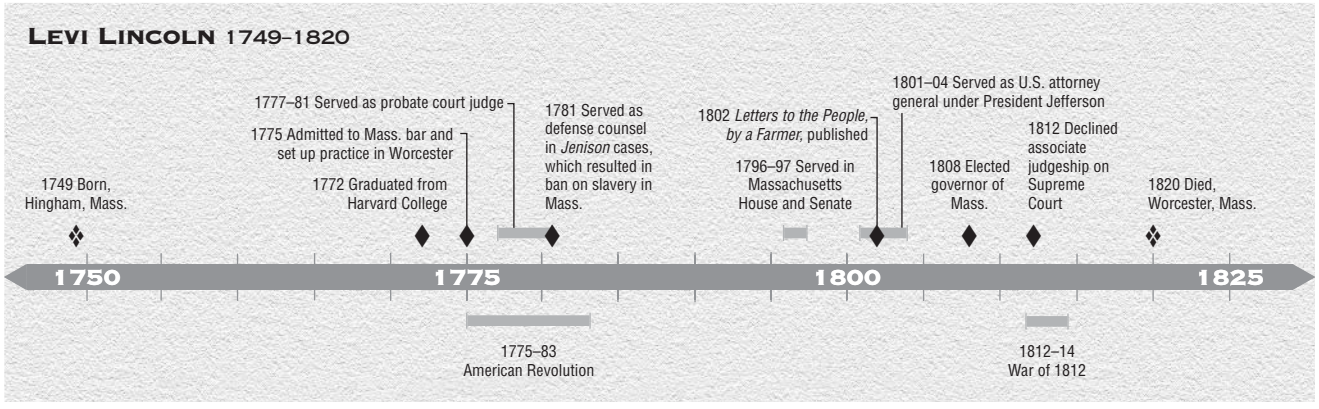

*Robert Todd Lincoln.*
LIBRARY OF CONGRESS

"UNDERSTAND THAT I STILL DO NOT LIKE THE 'HONEST ABE' BUSINESS AT ALL, BUT I AM ACTING ON THE UNDERSTANDING THAT THERE IS NO ESCAPE FROM THAT PART OF IT."
—ROBERT TODD LINCOLN

## LINCOLN, ROBERT TODD

Robert Todd Lincoln was a lawyer, a presidential elector for the Illinois branch of the **REPUBLICAN PARTY** in 1880, secretary of war in the cabinets of Presidents **JAMES GARFIELD** and **CHESTER A. ARTHUR**, U.S. minister to Great Britain from 1889 to 1893, president and chairman of the board for the Illinois-based Pullman Palace Car Company, and the son of President **ABRAHAM LINCOLN**.

Lincoln was born August 1, 1843, in Springfield, Illinois. At the age of 13, he began attending classes at Illinois State University. Lincoln subsequently enrolled in the Phillips Exeter Academy, a prominent preparatory school, and then attended Harvard. His years there were concurrent with his father's presidency, between 1861 and 1865.

Lincoln graduated from Harvard on July 20, 1864, and in September of that year he enrolled in Harvard Law School. He then opted to enlist in the army. On February 11, 1865, Lincoln was appointed captain and assistant adjutant general of Union Army Volunteers. In his service, he witnessed the surrender of General Robert E. Lee at Appomattox, Virginia, on April 9, 1865.

In the 1880 presidential election, Lincoln was active on behalf of the Republican Party. He supported Ulysses S. Grant's attempt to win the presidency for a third time and was chosen to be a presidential elector. James Garfield won the presidency that year. Garfield respected Lincoln's political abilities and on March 5, 1881 appointed him secretary of war.

In 1881, a disappointed office seeker shot President Garfield. Garfield died from his wound in September of that year, and Chester A. Arthur became president. Lincoln continued in his cabinet duties until March 1885. By then, he had re-emerged as a possible Republican candidate for president. However, this was not a position in which Lincoln had a great interest, and ultimately he did not run for the office.

Lincoln nevertheless continued to serve in important federal positions. In 1889, he served as minister to Great Britain. In 1892, his name was discussed for a final time as a potential nominee for president. Lincoln appeared more interested in resuming his work as a lawyer, however.

Lincoln returned to private life, serving as president of the Pullman Palace Car Company until 1911, and then as the chairman of its

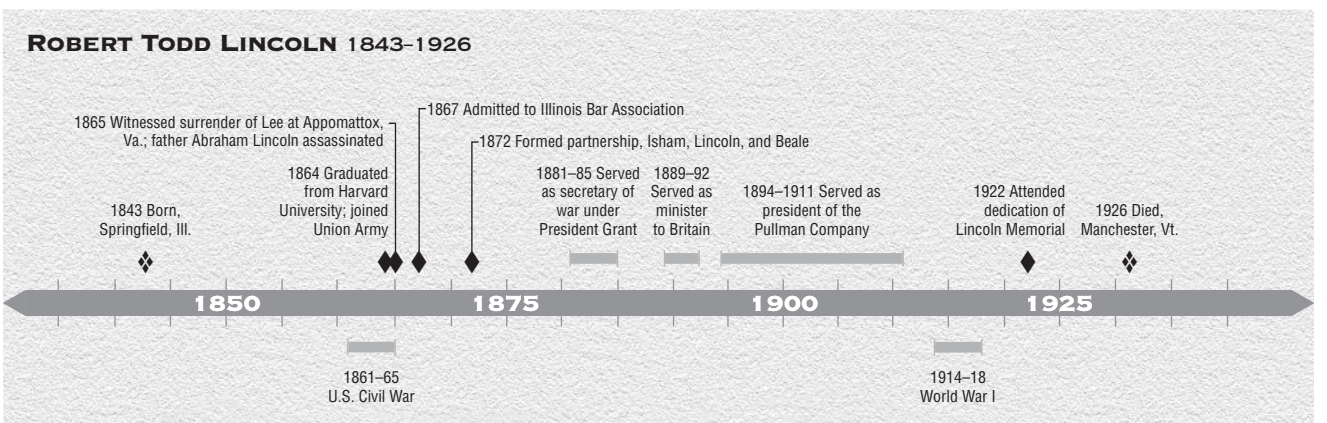

board. In the ensuing years, his health began to fail, and he made few public appearances. He saw the dedication of the Lincoln Memorial on May 30, 1922, but he declined to speak.

Lincoln died in his sleep at the family estate in Hildene, Vermont, where he was found by his butler on July 26, 1926. His remains were moved from Manchester, Vermont, to Arlington National Cemetery, outside of Washington, D.C., in 1928.

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## LINDBERGH ACT

The Lindbergh Act is a federal law (48 Stat. 781) that makes it a crime to kidnap—for ransom, reward, or otherwise— and transport a victim from one state to another or to a foreign country, except in the case of a minor abducted by his or her parent.

The Lindbergh law provides that if the victim is not released within twenty-four hours after being KIDNAPPED, there is a rebuttable presumption that he or she has been transported in interstate or foreign commerce.

The punishment for violation of the Lindbergh Act is imprisonment for a term of years or for life.

CROSS-REFERENCES

Kidnapping; Lindbergh Kidnapping.

## LINDBERGH KIDNAPPING

The KIDNAPPING of Charles A. and Anne M. Lindbergh's twenty-month-old son horrified the United States, and even the world. In 1927, at age twenty-five, Lindbergh achieved international fame with the first solo crossing of the Atlantic Ocean by air, and in the bleak years of the late 1920s, the young aviator became a symbol of courage and success. The disappearance of Charles Augustus Lindbergh, Jr., on March 1, 1932, and the discovery of his corpse ten weeks later, led to a riotous trial, significant changes in federal law, and a tightening of courtroom rules regarding cameras.

Lindbergh's historic flight from New York to Paris in *The Spirit of St. Louis* brought him both adulation and wealth. By the end of 1930, he was estimated to be worth over $1.5 million. His was an enviable life, with more than enough justifications for the nickname Lucky Lindy: world fame; the Congressional Medal of Honor; foreign nations sponsoring his long-distance flights; positions with several airlines; a publishing career; and, in 1929, marriage to the daughter of the U.S. ambassador to Mexico, the writer Anne Spencer Morrow. The couple made their home in New Jersey, where their first child, Charles, Jr., was born in 1930.

In the context of 1930s crime, the kidnapping of Charles, Jr., was not unique. But because he was the Lindberghs' son, his disappearance provoked weeks of well-publicized agonizing. Lindbergh led the search effort and even negotiated with ORGANIZED CRIME figures. All hopes ended when the child's body was found near the family estate.

Nearly two years passed before Bruno Richard Hauptmann, a carpenter, was arrested as the prime suspect in the murder. Hauptmann's trial, held between 1934 and 1935, was a sensation. Nearly seven hundred reporters and photographers flocked to the New Jersey town that was the site of the trial. Inside the courtroom, where flashbulbs popped and a concealed newsreel camera whirred, order was seldom possible. Equally beset were the Lindberghs themselves, and Charles Lindbergh, despite his fame, developed a hatred for the media. After Hauptmann was convicted and, in 1936, executed, the couple left the United States to live in England.

The AMERICAN BAR ASSOCIATION (ABA) viewed the trial as a media circus and called for reform. In 1937 the ABA included a prohibition on courtroom photography in its Canons of Professional and Judicial Ethics. All but two states adopted the ban, and the U.S. Congress amended the Federal Rules of Criminal Procedure to ban cameras and broadcasting from federal courts. The ban on photography in courtrooms prompted by the trial would last nearly four decades.

Another important result of the kidnapping was the passage of the 1932 Federal Kidnapping Act (U.S.C.A. §§ 1201–1202 [1988 & Supp. 1992]), popularly called the Lindbergh Law. This statute made it a federal offense to kidnap

someone with the intent to seek a ransom or reward. The law has since been modified several times not only to increase penalties but to make the investigative work of federal agents easier.

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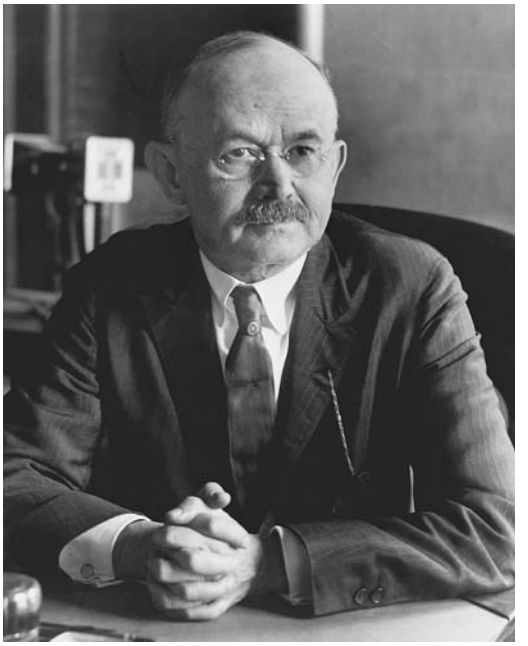

*Benjamin B. Lindsey.* LIBRARY OF CONGRESS

## ♦ LINDSEY, BENJAMIN BARR

Benjamin Barr Lindsey achieved prominence for his work in the juvenile court. Lindsey was born November 25, 1869, in Jackson, Tennessee. He received honorary degrees from the University of Denver and Notre Dame University and was admitted to the bar in 1894. In 1928 he was also admitted to the California bar.

In 1900 Lindsey became judge of the juvenile court of Denver, remaining on the bench until 1927. He is credited with the founding of the juvenile court system in the United States. Many of his ideas were adopted internationally.

As a recognized expert in the field of juvenile delinquency, Lindsey initiated many successful programs concerned with rehabilitation of minors. For example, he introduced the honor system, first used at the Industrial School in Golden, Colorado, which allowed boys the freedom to be unattended. Out of several hundred boys there, only five did not adhere to the code of honor. He was also instrumental in the enactment of legislation in Colorado that recognized the NEGLIGENCE of parents as a contributory factor to the delinquency of juveniles.

In 1928 Lindsey moved to California where, in 1934, he sat on the bench of the superior court. In 1939 he became the first judge of the California Children's Court of Conciliation, a court he helped to create.

Lindsey was the author of many publications, including: *Problems of the Children* (1903);

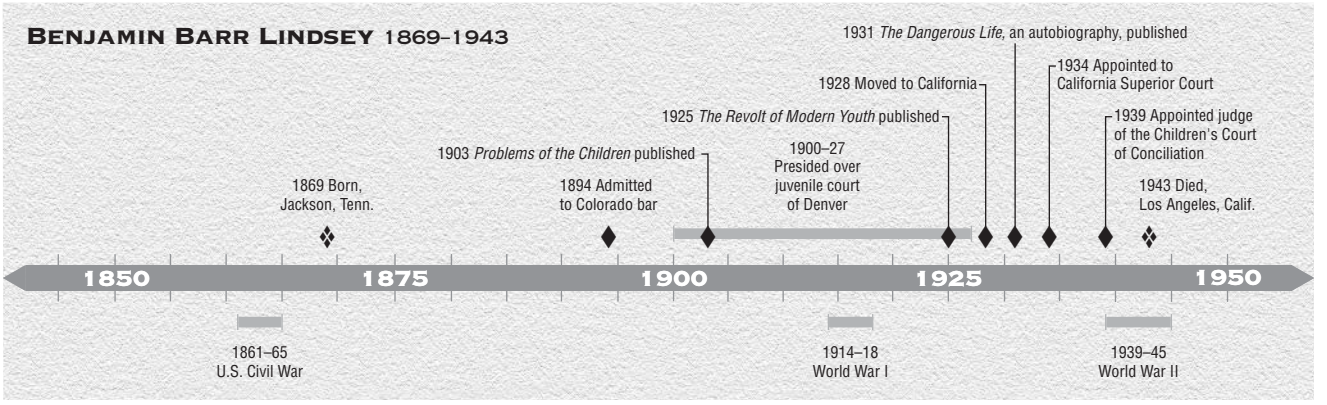

*The Beast and the Jungle* (1910); *The Revolt of Modern Youth* (1925); *The Companionate Marriage* (1927); and *The Dangerous Life* (a 1931 autobiography).

He died March 26, 1943, in Los Angeles, California.

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CROSS-REFERENCES

Juvenile Law.

## LINE OF CREDIT

*The maximum borrowing power granted to a person from a financial institution.*

Line of credit denotes a limit of credit extended by a bank to a customer, who can avail himself or herself of its full extent in dealing with the bank but cannot exceed this limit. It most frequently covers a series of transactions, in which case, when the customer's line of credit is nearly exhausted or not replenished, the customer is expected to reduce the indebtedness by submitting payments to the bank before making additional use of the line of credit.

## LINEAL

*That which comes in a line, particularly a direct line, as from parent to child or grandparent to grandchild.*

## LINEUP

*A criminal investigation technique in which the police arrange a number of individuals in a row before a witness to a crime and ask the witness to identify which, if any, of the individuals committed the crime.*

In a police lineup, a witness to a crime, who may be the victim, observes a group of individuals that may or may not include a suspect in the crime. The witness is not visible to those in the lineup. The witness is asked to identify which, if any, of the individuals committed the crime. A lineup places greater demands on the memory of the witness than does a viewing of a single suspect, and is believed to reduce the chances of a false identification. For example, assume a witness saw a man with a beard and a cap run across an alley near a crime scene. If the police show this witness one man who has a beard and a cap, the witness might make a positive identification. If they instead show the witness several men with a beard and a cap, the witness must make a more detailed identification and may not identify the same man.

In *Schmerber v. California,* 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), the U.S. Supreme Court held that the FIFTH AMENDMENT constitutional privilege against self-incrimination—the right not to be made a witness against oneself in a criminal case—does not apply to appearance in lineups. That privilege, held the Court, protects accused people only from being compelled to testify against themselves or to otherwise provide the state with evidence of a testimonial or communicative nature.

The Constitution does afford an accused individual the RIGHT TO COUNSEL at a post-indictment lineup, and the right not to have testimony from a suggestive lineup admitted at trial. The constitutional right to the presence of counsel at a lineup or for counsel to receive notice of a lineup attaches, or becomes available, when a formal charge, indictment, PRELIMINARY HEARING, or ARRAIGNMENT is issued or conducted. Post-indictment lineups are considered a critical part of proceedings because the filing of a charge initiates adversary proceedings, triggering the right to counsel (*United States v. Wade,* 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 [1967]). Counsel observes the lineup to decide whether to offer information about it during trial in order to cast doubt on an in-court identification. (In an in-court identification, the prosecution asks the witness whether he or she identified anyone in a lineup prior to trial and if so, whether that person is present in the courtroom.) According to *Wade,* an "intelligent waiver" of counsel and of notice to counsel may be made by the accused.

Police lineups that are conducted prior to the filing of a formal charge or the issuance of an indictment are not regarded as occurring at a critical stage of a criminal proceeding and do not require the presence of counsel.

The Due Process Clause of the Constitution requires that a lineup not be unduly suggestive or conducive to irreparable mistaken identification. An unduly suggestive lineup might be one

in which the defendant was the only female. Some characteristics that courts have considered in determining suggestiveness is whether the others in the lineup were of similar age, skin coloration, and physical characteristics such as height and weight.

Courts examine on a case-by-case basis the question of whether a lineup was unduly suggestive or created a likelihood of misidentification. In making this determination, they look at the "totality of circumstances." The totality-of-circumstances test was announced by the Supreme Court in *Manson v. Brathwaite,* 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). This test considers whether the witness or victim had an opportunity to observe the criminal at the time of the crime; the accuracy of the prior description of the accused as well as the degree of attention given to that description; the level of certainty demonstrated by the victim or witness at the confrontation; and the length of time between the crime and the confrontation. Generally, if the court finds that a lineup violated DUE PROCESS, testimony as to the fact of identification is inadmissible. If the lineup complied with constitutional standards, a person who has identified the defendant in the lineup can testify to that fact at trial.

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CROSS-REFERENCES

Criminal Law; Criminal Procedure; Due Process of Law.

## LIQUID ASSETS

*Cash, or property immediately convertible to cash, such as* SECURITIES*, notes, life insurance policies with cash surrender values, U.S. savings bonds, or an account receivable.*

Although the ownership of real property is considered an asset, it is not a liquid asset because it cannot be readily converted into cash upon sale.

## LIQUIDATE

*To pay and settle the amount of a debt; to convert assets to cash; to aggregate the assets of an insolvent enterprise and calculate its liabilities in order to settle with the debtors and the creditors and apportion the remaining assets, if any, among the stockholders or owners of the corporation.*

## LIQUIDATED DAMAGES

*Monetary compensation for a loss, detriment, or injury to a person or a person's rights or property, awarded by a court judgment or by a contract stipulation regarding breach of contract.*

Generally, contracts that involve the exchange of money or the promise of performance have a liquidated damages stipulation. The purpose of this stipulation is to establish a predetermined sum that must be paid if a party fails to perform as promised.

Damages can be liquidated in a contract only if (1) the injury is either "uncertain" or "difficult to quantify"; (2) the amount is reasonable and considers the actual or anticipated harm caused by the contract breach, the difficulty of proving the loss, and the difficulty of finding another, adequate remedy; and (3) the damages are structured to function as damages, not as a penalty. If these criteria are not met, a liquidated damages clause will be void.

The *American Law Reports* annotation on liquidated damages states, "Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in light of the anticipated or actual harm caused by the breach. . . . A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty" (12 A.L.R. 4th 891, 899).

A penalty is a sum that is disproportionate to the actual harm. It serves as a punishment or as a deterrent against the breach of a contract. Penalties are granted when it is found that the stipulations of a contract have not been met. For example, a builder who does not meet his or her schedule may have to pay a penalty. Liquidated damages, on the other hand, are an amount estimated to equal the extent of injury that may occur if the contract is breached. These damages are determined when a contract is drawn up, and serve as protection for both parties that have entered the contract, whether they are a buyer and a seller, an employer and an employee or other similar parties.

The principle of requiring payments to represent damages rather than penalties goes back to the EQUITY courts, where its purpose was to protect parties from making UNCONSCIONABLE bargains or overreaching their boundaries. Today section 2-718(1) of the UNIFORM COMMERCIAL CODE deals with the difference between a valid liquidated damages clause and an invalid penalty clause.

Liquidated damages clauses possess several contractual advantages. First, they establish some predictability involving costs, so that parties can balance the cost of anticipated performance against the cost of a breach. In this way liquidated damages serve as a source of limited insurance for both parties. Another contractual advantage of liquidated damages clauses is that the parties each have the opportunity to settle on a sum that is mutually agreeable, rather than leaving that decision up to the courts and adding the costs of time and legal fees.

Liquidated damages clauses are commonly used in real estate contracts. For buyers, liquidated damage clauses limit their loss if they default. For sellers, they provide a preset amount, usually the buyer's deposit money, in a timely manner if the buyer defaults.

The use and enforcement of liquidated damages clauses have changed over the years. For example, cases such as *Colonial at Lynnfield v. Sloan,* 870 F.2d 761 (1st Cir. 1989), and *Shapiro v. Grinspoon,* 27 Mass. App. Ct. 596, 541 N. E. 2d 359, 1989), have granted courts permission to compare the amount set forth in the liquidated damages provision against the actual damages caused by a breach of contract. These "second-look" rulings have led several courts to honor the liquidated damages clauses only if they are equal to, or almost equal to, the actual damages.

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## LIQUIDATION

*The collection of assets belonging to a debtor to be applied to the discharge of his or her outstanding debts.*

*A type of proceeding pursuant to federal* BANKRUPTCY *law by which certain property of a debtor is taken into custody by a trustee to be sold, the proceeds to be distributed to the debtor's creditors in satisfaction of their claims.*

*The settlement of the financial affairs of a business or individual through the sale of all assets and the distribution of the proceeds to creditors, heirs, or other parties with a legal claim.*

The liquidation of a corporation is not the same as its dissolution (the termination of its existence as a legal entity). Depending upon statute, liquidation can precede or follow dissolution.

When a corporation undergoes liquidation, the money received by stockholders in lieu of their stock is usually treated as a sale or exchange of the stock resulting in its treatment as a capital gain or loss for INCOME TAX purposes.

## LIQUORMART V. RHODE ISLAND

The U.S. Supreme Court has stringently limited government regulation of noncommercial expression, citing the First Amendment's guarantee of freedom of expression. Before the mid-1970s, however, the Court regarded the regulation of commercial speech as simply an aspect of economic regulation, entitled to no special FIRST AMENDMENT protection. After that time the Court made it more difficult for government to restrict advertising. In *44 Liquormart v. Rhode Island,* 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996), the Court ruled that the state of Rhode Island could not prohibit the public advertising of liquor prices, as doing so would abridge the liquor retailer's right to FREEDOM OF SPEECH. After *Liquormart* the ability of the government to restrict truthful, nondeceptive advertising was extremely limited.

Commercial speech is a broad category including but not limited to the advertising of services and products. The constitutional protection of commercial expression emerged in the 1970s, when the Supreme Court struck down state laws that banned the advertising of ABORTION services, prescription drug prices, and attorneys' fees. Constitutional expression was not considered absolute, and the Court allowed reasonable regulation to prevent FRAUD and deception.

A standard was first set in *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341

(1980). In *Central Hudson* the Court noted that commercial speech serves the economic interests of the speaker but also helps consumers and society overall. It outlined a four-part test for judicial evaluation of the regulation of commercial speech. First, if the commercial speech is to receive First Amendment protection, the Court must determine that it concerns a lawful activity and is not misleading. Second, the Court must determine whether the asserted government interest is substantial. Third, if the answer to the second part of the test is yes, the Court must determine if the regulation directly advances the asserted government interest. Fourth, the Court must decide if the regulation is more extensive than is necessary to serve that purpose.

*Central Hudson* represented a compromise between one approach that emphasized CONSUMER PROTECTION and another that stressed a free marketplace of ideas. Only five justices fully joined in the majority opinion, and the viability of the test has been called into question. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 106 S. Ct. 2698, 92 L. Ed. 2d 266 (1986), the Court upheld a law prohibiting advertisements inviting residents of Puerto Rico to gamble legally in local casinos. Justice WILLIAM H. REHNQUIST emphasized Puerto Rico's substantial interest in reducing the demand for casino gambling among its citizens and noted that the regulation at issue directly advanced this objective. In addition, he maintained that because the legislature could have banned all gambling by local residents, this legislative power included the lesser power to ban advertising of casino gambling. Justice JOHN PAUL STEVENS dissented, arguing that Puerto Rico had blatantly discriminated in punishing speech "depending on the publication, audience, and words employed."

The *Liquormart* case raised issues regarding the viability of both the *Central Hudson* test and the *Posadas* reasoning. In 1956 the Rhode Island legislature enacted laws that prohibited the public advertising of alcoholic beverages. Prices could be advertised only inside a licensed liquor retail establishment (R.I. Gen. Laws §§ 3–8–7, 3–8–8.1). 44 Liquormart, a Rhode Island retailer of alcoholic beverages, and the Rhode Island Liquor Stores Association challenged the law in 1993, alleging that the ban violated the First Amendment.

The state of Rhode Island argued that competitive pricing would lower prices and that lower prices would produce more sales, thus encouraging alcohol consumption. It claimed that under *Central Hudson* it had a substantial government interest in controlling the consumption of alcohol and in the laws that directly advance that interest. Apart from *Central Hudson,* the state asserted that under the TWENTY-FIRST AMENDMENT, which repealed the Eighteenth Amendment's PROHIBITION on the sale of alcoholic beverages, the states were given the power to regulate the sale of alcohol, including the power to prohibit sales altogether. Citing *Posadas*, Rhode Island said it was in the same position as the Puerto Rican legislature. Because the state could prohibit the sale of alcohol, it could restrict liquor advertising.

Though the Supreme Court unanimously agreed that Rhode Island's laws on liquor advertising were an unconstitutional restraint on protected First Amendment expression, the Court split in its reasoning for the decision. Justice Stevens, with a shifting coalition of three to four justices in various sections of the opinion, moved away from the *Central Hudson* test, indicating concern about any test that might permit a total ban on truthful, noncoercive advertising. Stevens reasoned that such a ban "usually rest[s] solely on the offensive assumption that the public will respond 'irrationally' to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."

Though skeptical about *Central Hudson,* Stevens applied its four-part test and found the state's position deficient. Stevens concluded that Rhode Island had failed to provide any evidence that its advertising restrictions significantly reduced the consumption of alcohol. The state could not prove that the ban "advanced the substantial state interest," and the ban was "more extensive than necessary" to address the issue of alcohol consumption. Stevens pointed out that the state's goal of promoting temperance could be achieved through "higher prices maintained either by direct regulation or by increased taxation." Educational campaigns against excessive use might produce better results. Any of these approaches would not infringe on First Amendment expression.

Stevens also dismissed Rhode Island's use of the *Posadas* case—a move that was not surprising in light of his vigorous dissent in that case. He stated that "*Posadas* clearly erred in conclud-

ing that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy." Therefore, the Court declined to give force to its "highly deferential approach."

In addition, a unanimous Court rejected the state's argument that the Twenty-first Amendment tilted the First Amendment analysis in its favor. It ruled that the Twenty-first Amendment "does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment."

Justice CLARENCE THOMAS, in a concurring opinion, went further than the rest of the Court, advocating that *Central Hudson* be discarded. In Thomas's view, the four-part BALANCING test had no role to play when "the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace." According to Thomas such an interest is "*per se* illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech."

On the other hand, Justice SANDRA DAY O'CONNOR, in a concurring opinion joined by three other justices, argued that the case could be resolved more narrowly by applying only the *Central Hudson* test. Applying the test O'Connor concluded that the law failed because it was more extensive than necessary to serve Rhode Island's interest.

The *Liquormart* decision revealed that the Court was divided over the question of whether *Central Hudson* is the right test to apply to commercial expression cases. It also demonstrated that the Court was fully committed to First Amendment protection of commercial expression. The practical result was that Rhode Island and other states with similar laws could not prohibit liquor advertising. The decision put in doubt whether existing and proposed prohibitions on tobacco advertising were constitutional.

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CROSS-REFERENCES

Least Restrictive Means Test; Legal Advertising.

## LIS PENDENS

*[*Latin, Pending lawsuit.*] A reference to the jurisdiction (or control) that courts obtain over property in a suit awaiting action.*

*A notice filed in the office of public records that the ownership of real property is the subject of a legal controversy and that anyone who purchases it takes it subject to any claims asserted in the action and thereby its value might be diminished.*

## LISTING

*An agreement that represents the right of a real estate agent or* BROKER *to handle the sale of real property and to receive a fee or commission for services.*

There are various types of real estate listings. A *general* or *open* listing is a right to sell that may be given to more than one agent or broker simultaneously. An *exclusive agency* listing is the right of one real estate agency to be the sole party, with the exception of the owner, who is permitted to sell the property during a particular period. Through an *exclusive authorization to sell* listing, one agency is given the sole authority to sell the property during a certain time period. The agency will receive a commission even if the owner finds the buyer during the time period.

A *multiple listing* takes place when an agent with an exclusive listing provides a number of members of a real estate association with information about the property and shares the commission with the agent who is able to find a buyer.

A *net listing* is an arrangement whereby the seller establishes a minimum price that will be taken for the property, and the agent's commission is the amount for which it sells above such minimum.

## LITCHFIELD LAW SCHOOL

*The first law school in America, founded by Tapping Reeve (*b. *October 1744, in Southhold, Long Island, New York;* d. *December 13, 1823, in Litchfield, Connecticut) in 1784 in Litchfield, Connecticut. It continued operation until 1833.*

In 1778, Tapping Reeve, a young attorney recently admitted to the bar, settled in Litchfield

to practice law. Born in Southhold, Long Island, New York, in 1744, the son of Reverend Abner Reeve, a Presbyterian minister, he graduated from Princeton College in 1763 and immediately taught at a grammar school affiliated with the college. He spent seven years in that position and as a tutor in the college itself. He then moved to Connecticut to study law, entering the office of Judge Elihu Root, who was at that time a practicing attorney in Hartford, and, subsequently, a judge of the Supreme Court. From Hartford, he arrived in Litchfield, after marrying Sally Burr, daughter of President Aaron Burr of Princeton and sister of AARON BURR, the later vice president.

Until the Revolutionary War ended, there was very little civil business transacted in Litchfield County, and Reeve provided legal instruction in anticipation of the conclusion of the war and the resumption of ordinary business matters. This employment augmented his legal knowledge and proficiency and enabled him to commence in 1784 a systematic course of instruction in the law, including regular classes.

The Litchfield Law School officially opened its doors to students in 1784 and continued in successful operation with annual graduating classes until 1833. Its catalog contained the names of 1,500 young men who prepared for the bar after 1798. Most graduates were admitted to the PRACTICE OF LAW in the court at Litchfield. The roster of students prior to that date is inaccurate, but it is certain that there were at least 210. More than two-thirds of the students were from states other than Connecticut, with the original thirteen colonies amply represented. A lesser number of students came from states recently admitted to the Union. The greatest number who entered in any one year was 54 in 1813, when the law school apparently reached its zenith.

Prominent statesmen and politicians, such as Aaron Burr and JOHN C. CALHOUN, studied law at Litchfield. Two of its graduates, HENRY BALDWIN and LEVI WOODBURY, became Supreme Court justices. In addition, fifteen U.S. senators, fifty members of Congress, five cabinet members, ten governors, forty-four judges of state and lower federal courts, and seven foreign ministers graduated from the school. Georgia had the greatest number of distinguished graduates.

The term of instruction at Litchfield was completed in fourteen months, including two vacations (spring and fall) of four weeks each. No students could be admitted for a period shorter than three months. In 1828, tuition was $100 for the first year and $60 for the second year.

The curriculum covered the entire body of the law. Tapping Reeve's lectures referred to the law in general, with respect to the sources from which it is derived, such as customs or statutes, and analyzed the rules for the application and interpretation of each. Courses in real estate, rights of persons, rights of things, contracts, TORTS, evidence, PLEADING, crimes, and EQUITY then followed. Each of these general subjects was treated under various subsidiary topics, in order to enhance the student's comprehension of the subject matter and its relation to the actual practice of law. Reeve administered the school alone until 1798, when, after his election to the Supreme Court, he invited James Gould to become his associate. They jointly operated the school until 1820, when Judge Reeve withdrew. Gould continued the classes until 1833, with the assistance of Jabez W. Huntington during the final year.

The Litchfield Law School afforded an intensive LEGAL EDUCATION because there were not as many different highly developed areas of law as there are today. In 1784, there were no printed reports of decisions of any court in the United States. The English reports contained nearly the entire body of the law. During the tenure of the law school, thecommon-law system of pleading became so encumbered by nuances and fictions that it fell into disfavor. The renowned Rules of Hilary Term were adopted in 1834 to rectify this situation. This development proved to be the forerunner of modern legal theories, such as the merger of law and equity and the desirability of short and plain statements of claims and defenses.

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## LITERAL CONSTRUCTION

*The determination by a court of the meaning of the language of a document by an examination of only the actual words used in it, without any consideration of the intent of the parties who signed the writing except for the fact that they chose the language now in dispute.*

CROSS-REFERENCES

Canons of Construction.

## J.D. Salinger Biography

Biographers of living persons often encounter reluctant or hostile subjects. Such was the case for biographer Ian Hamilton, whose completed manuscript about novelist J. D. Salinger had to be rewritten because Hamilton had violated **COPYRIGHT** law by quoting from Salinger's unpublished letters.

Salinger, the author of *The Catcher in the Rye* (1951) and several other acclaimed works, has lived reclusively since the early 1960s and did not publish any new works between 1965 and 1996. He has zealously protected his privacy, creating an aura of mystery and helping to establish his status as a cult figure.

Hamilton, a noted literary biographer, tracked down and quoted from unpublished letters that Salinger had written between 1939 and 1961. As Hamilton's book containing those quotations neared publication, Salinger sued, noting that as the author of the letters he retained the right of publication. Hamilton then eliminated direct quotations but substituted extensive paraphrases that tracked the original language very closely.

The federal courts agreed with Salinger, holding that Hamilton could write about the factual content of the letters but that Salinger retained the letters' "expressive content." According to the courts, Hamilton's paraphrasing invaded Salinger's expressive content and formed a substantial part of Hamilton's manuscript (*Salinger v. Random House,* 811 F.2d 90 [2d Cir. 1987]). Hamilton was forced to rewrite his manuscript. In the end, the book, *In Search of J. D. Salinger* (1988), was as much about the legal case and the pursuit of Salinger as it was about the novelist's life.

### LITERARY PROPERTY

*The interest of an author in an original and expressive composition, that entitles the author to the exclusive use and profit thereof, with no interest vested in any other individual. The corporal property in which an intellectual production is embodied.*

The concept of literature as property grew from the notion that literary works have value, and that writers deserve legal protection from unauthorized use of their work by others. Before the fifteenth century, writing generally was an activity performed for royalty and organized religion, and literature was not considered a commodity. With the invention of the printing press in the fifteenth century, along with a societal trend away from royal and religious control, literature came to be seen as an item of value that could be bought and sold.

As literature became a commodity, the law slowly moved to protect the economic interests of writers. In England the Statute of Anne was passed by Parliament in 1710 to limit the MONOPOLY of rights that publishers held over writers. Similar COPYRIGHT laws migrated to the American colonies, and comprehensive federal copyright statutes now regulate the right to own and sell literary property in the United States. In the absence of an agreement to the contrary, copyrights to literary property now vest automatically in the author as soon as the work is affixed to a tangible medium.

A precise definition of literary property is elusive. According to Eaton S. Drone, an influential nineteenth-century treatise writer, there is no literary property

> in thoughts, conceptions, ideas, sentiments, etc., apart from their association. . . . their arrangement and combination in a definite form constitute an intellectual production, a literary composition, which has a distinct being capable of identification and separate ownership, and possessing the essential attributes of property. The property is not in the simple thoughts, ideas, etc., but in what is produced by their association. (*A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* [1879])

Ultimately, lawmakers have left the job of determining what constitutes literary property to the courts, which have fashioned some general guidelines.

Not all literature qualifies as literary property. Furthermore, not all the content in a piece

# Should Biographers Be Allowed to Quote Unpublished Literary Property?

The protection of literary property by the federal **COPYRIGHT** statute is intended to create economic incentives that induce authors to create and disseminate new works. A copyright is a reward to an author for making a contribution to society. Nevertheless, the author's copyright **MONOPOLY** is not unlimited. The doctrine of fair use permits other authors to copy or adapt limited amounts of the copyrighted material without infringing the copyright. Fair use allows someone other than the original author to make secondary use of a copyrighted work to create a new work. The creation of the new work is also viewed as a contribution to society.

The competing interests of copyright and fair use have generated conflict over the quotation of unpublished works, primarily letters, by literary biographers. The U.S. Court of Appeals for the Second Circuit's decision in *Salinger v. Random House,* 811 F.2d 90 (1987), concluded that biographers cannot invoke fair use when dealing with unpublished letters. Defenders of the decision assert that it allows authors to control material they do not want published. Critics argue that this restrictive view of fair use ignores the legitimate need of biographers, historians, and other scholars to mine rich sources of unpublished material and present their findings to the public.

Defenders of *Salinger* and its restrictions on the quotation of unpublished works note that the purpose and character of the use of unpublished material are one factor in determining fair use. For example, though a literary biography is a work of criticism and scholarship, biographical works are generally published by commercial, for-profit businesses. If previously unpublished material were used in such a book, the publisher would promote the book by emphasizing that it contained that material.

Because biographies are written for profit, supporters of restrictions argue, biographers should not be entitled to any special consideration in determining fair use. A biographer is free to read unpublished letters and extract their factual content, but copying their author's expression of particular facts is not, and should not be, permitted. The reader of the biography will still benefit from the new factual content. Therefore, it cannot be argued that banning the quotation of unpublished work defeats the advancement of knowledge and scholarship.

Supporters of restrictions further contend that unpublished works deserve heightened protection because their of literary property can receive protection from copying or use by other authors. Only the original expressive content of a piece of literature qualifies as literary property.

Mere ideas generally do not constitute literary property. For example, the idea of writing a novel set in Okefenokee Swamp, in Georgia, is not literary property. But if a person writes such a novel, the expressive content of the novel is literary property, and the author owns the rights to that property. After the novel is published and sold, another person may write a book set in Okefenokee Swamp. However, the writer of the second book may not use the original expressions, characters, and sequence of events created by the author of the first book.

No bright line distinguishes protected and unprotected characters and story lines. Rather, courts place these elements on a continuum from simple to complex. On this continuum general qualities and emotional features do not receive copyright protection. However, the more a character or story is developed, the more it comes to constitute literary property, and the more copyright protection it receives.

A determination of copyright infringement also can depend on the degree of similarity between the literary property and subsequent literary works. For example, assume that a novelist has developed a character named Hijinks, a lovable pool cleaner who moonlights as a private detective and drinks only papaya juice. This is a well-defined character, so it is the property of the novelist and no one may copy it without permission. If a second author writes and sells a book that features a private detective who cleans pools part-time, this would probably not be sufficient borrowing of an original expression to constitute copyright infringement. The second author may even give the pool-cleaning private eye a penchant for fruit juice and be safe from suit. However, if the second author's main character is a papaya-juice drinking, pool-cleaning private detective named Hijinks, a judge or jury could find infringement and award damages to the first author.

authors have not yet commercially exploited them. If a biographer could quote generous selections from a series of letters, the potential market for and value of these unpublished letters would likely decrease. Even if the author asserts that he has no intention of publishing the letters, the law should preserve the author's opportunity to sell the letters if a change of mind occurs. The author's copyright must be protected to allow the author the first chance to reap an economic benefit.

Critics of *Salinger* and its reasoning point out that unpublished letters are usually "public," having been donated by the recipient to an academic or research library for scholarly use. It is unfair, charge the critics, to permit persons who can travel to an academic library holding the unpublished letters of a literary figure to read those letters, while denying the rest of the public the opportunity to learn more about the letter writer.

Authors who write letters know that they surrender ownership of them when they send them. Furthermore, authors do not write letters for financial gain; they write them as a simple form of communication with another individual. Critics of *Salinger* suggest that it should thus be fair use to quote from unpublished letters—while noting that it would not be fair use to quote from an unpublished novel or a short story without the author's permission, since such a work is generally written for economic exploitation.

Critics of the *Salinger* decision also argue that limiting biographers to reciting bland and brief digests of unpublished letters does not advance the public interest. They contend that the use of quotations is essential in literary biographies, where the biographer seeks to compare the public author and the private person. The comparison of expression between published works and letters can reveal consistency and contradiction. Further, the use of the subject's own thoughts and words demonstrates to the reader the complex relationship between art and life.

These critics also dismiss the conclusion that quotations from letters will diminish the market value of the letters for future publication. They point out that the publication of a literary biography generally sparks new interest in the subject and in the subject's works, including a collection of letters. Because of this response in academe and the marketplace, critics contend that the biographer actually enhances the status of the subject.

Critics also hold that the *Salinger* decision is motivated by privacy concerns. They note that if the author of unpublished letters does not wish to permit a biographer to investigate her life, a denial of permission to quote from the letters is an effective way of maintaining privacy. Critics are more troubled by grants of permission to quote that are accompanied by the requirement that the manuscript cannot be published without approval of the subject. Critics maintain that a subject's power to control the content of a book is antithetical to the promotion of scholarship and to the public purposes of copyright.

**CROSS-REFERENCES**

Privacy.

Before 1976 the term *literary property* was used to describe the author's state of ownership prior to publication. When an author fixed a piece of literature in a tangible medium, such as on paper or on an audiotape, the author owned the work forever and could exclude others from using it forever. Once the author published the work, the work became governed by copyright laws, which granted exclusive rights to the author for a fixed term of years.

The effect of publication was eliminated by the Copyright Act of 1976, 17 U.S.C.A. § 101 et seq. Under this act all literary property is subject to statutory provisions from the moment it is affixed in a tangible medium.

The term *literary property* also can describe the tangible instrument that contains the words of a literary work. Novels, short stories, poems, plays, essays, letters, lectures, sermons, and songs are some basic forms of literary property. They can be contained on any tangible medium, including audiotape, videotape, and paper.

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**CROSS-REFERENCES**

Intellectual Property.

## LITIGATION

*An action brought in court to enforce a particular right. The act or process of bringing a lawsuit in and of itself; a judicial contest; any dispute.*

When a person begins a civil lawsuit, the person enters into a process called litigation. Under the various rules of CIVIL PROCEDURE

that govern actions in state and federal courts, litigation involves a series of steps that may lead to a court trial and ultimately a resolution of the matter.

Before a lawsuit is filed, the person contemplating the lawsuit (called the plaintiff) typically demands that the person who caused the alleged injury (called the defendant) perform certain actions that will resolve the conflict. If the demand is refused or ignored, the plaintiff may start the lawsuit by serving copies of a summons and complaint on the defendant and filing the complaint with a civil trial court. The complaint must state the alleged injuries and attribute them to the defendant, and request money damages or equitable relief.

If the service of the complaint on the defendant does not result in a settlement of the issues, the plaintiff must begin the discovery process. This involves sending to the defendant written questions (called interrogatories) that seek information involving the dispute at issue. The plaintiff may depose the defendant and others concerning the issues, with the deposition recorded by a court reporter. The plaintiff may also request copies of documents for review. Once litigation commences the defendant is also permitted to use discovery to learn more about the plaintiff's case. The discovery process may be conducted in a matter of weeks, or it may take years, depending on the complexity of the case and the level of cooperation between the parties.

After discovery is completed, most courts require the parties to attend a settlement conference to determine if the case may be resolved before trial. If the parties are unable to reach a settlement, the litigation continues to trial. Near or on the day of trial, one or both parties often make settlement offers, in the hope of avoiding court proceedings (which are often costly and protracted). Litigation ends if a settlement is reached.

If the parties are still unable to resolve their differences, a trial is held. At trial both sides are permitted to introduce relevant evidence that will help to prove to the jury or the court the truth of their positions. If the plaintiff makes a convincing case, the defendant may seek to settle the case immediately. On the other hand, if the plaintiff presents a weak case, the defendant may ask the court to dismiss the case. If the trial proceeds to a conclusion, either the jury or the judge (if a jury trial was waived) must decide which party prevails.

If the defendant loses the lawsuit, the defendant may ask the court to throw out the jury verdict if the evidence did not warrant the decision, or the defendant may ask that the damages awarded to the plaintiff be reduced. The court has discretion to grant or refuse these kinds of requests.

Once a final decision has been made at the trial court, the losing party may appeal the decision within a specified period of time. The federal courts and the states have intermediate courts of appeal that hear most civil appeals. The appellate court reviews the arguments of the parties on appeal and determines whether the trial court conducted the proceedings correctly. Once the appellate court issues a decision, usually in opinion form, the losing party may appeal to the state supreme court if the litigation occurred in a state court, or to the U.S. Supreme Court if the litigation occurred in a federal court. After the supreme court rules on the case, the decision is final.

Once a decision is final, litigation ends. The prevailing party is then given the authority to collect damages or receive other remedies from the losing party. After the losing party provides the relief, that party is entitled to receive from the prevailing party a satisfaction of judgment, which is filed with the trial court. This document attests to the satisfaction of all court-imposed relief and signifies the end of the case.

## ❖ LITTLE-COLLINS, ELLA LEE

Ella Lee Little-Collins (Muslim name Alziz A. Hamid) was the half sister of MALCOLM X, who credited her with playing a major role in his life. She supported the black revolutionary leader both emotionally and financially throughout his short but highly influential life. Malcolm lived with Little-Collins, who served essentially as a surrogate mother for him, off and on from 1940 until 1946, a period that left an indelible imprint on him. Little-Collins also sponsored Malcolm in his pilgrimage to Mecca in the early 1960s—another important, formative period of his life.

Though Malcolm credited Little-Collins for being only a positive influence in his life, at least one of his biographers suggests that she was a negative influence as well, asserting that she taught Malcolm his lifestyle of petty thievery. And Malcolm's widow, Betty Shabazz, has stated that she had no respect for Little-Collins because of her poor influence on Malcolm. Little-Collins did not

dispute that she had many run-ins with the law, resulting in ten convictions for offenses including petty LARCENY and ASSAULT AND BATTERY. But Little-Collins's family asserts the run-ins occurred when she was defending others who were being harassed or taken advantage of by people in positions of authority. Little-Collins emerges as a major figure in Malcolm's life, one of few people who knew him and remained by his side throughout all of his many philosophical incarnations.

Little-Collins was born December 4, 1912, in Butler, Georgia, the eldest of three children of the Reverend Earl Lee Little and his first wife, Daisy Mason. Her parents had two more children, Mary and Earl, Jr., and divorced in 1917 or 1918. Little-Collins's mother moved to Boston around 1920, taking Earl Jr. with her. Ella and Mary were left in Butler, Georgia, with Earl Sr.'s parents, John and Ella Little, who raised them to adulthood.

Little-Collins left Georgia in 1929 with very little to her name, and went to New York to earn a living. She worked at first as a church secretary at Abyssinian Baptist Church in Harlem, the parish at which the Reverend Adam Clayton Powell, Sr. was minister. This position led to a long-standing professional relationship with the minister's son, ADAM CLAYTON POWELL JR., a CIVIL RIGHTS activist and Harlem's first African American congressional representative. After a short period in New York, Little-Collins moved to Boston to work at a grocery that her mother was running at the time. She was a hard worker, and she soon began sending money to the relatives remaining in Georgia so that they could also come north. Her father was very proud of her for bringing many family members from Georgia to Boston. Collins's devotion to her family extended beyond bringing them out of southern poverty: she was known to support others in achieving their educational or career goals as well. Malcolm later wrote, "[I]f Ella had ever thought that she could help any member of the Little family put up any kind of professional shingle—as a teacher, a foot-doctor, anything . . . you would have had to tie her down to keep her from taking in washing."

In 1933, Little-Collins married Dr. Thomas Lloyd Oxley, a Jamaican-born follower of MARCUS GARVEY. (Garvey urged black Americans to return to their African roots; many members of the Little family were proponents of his philosophy.) Oxley and Little-Collins divorced in 1934. By early 1939, when Little-Collins visited her father's family in Michigan and met Malcolm for the first time, she had been married to her second husband, FRANK JOHNSON, for nearly four years. During this visit, the seeds were planted that led to Malcolm's living with her in Roxbury, Massachusetts, later that summer. Malcolm described his first meeting with his half sister, which occurred when he was a young adolescent and she was twenty-six: "[S]he was the first really proud black woman I had ever seen in my life. She was plainly proud of her very dark skin. This was unheard of among Negroes. . . . I had never been so impressed with anybody."

Little-Collins' second husband was in the military when Malcolm arrived in the summer of 1939, after he had finished seventh grade. In his autobiography, Malcolm described Little-Collins as a community leader in Roxbury, an enclave of blacks outside of Boston, which was to Boston as Harlem was to New York. Little-Collins's standing and the Boston atmosphere impressed the young man, and after he returned home, during the next school year, when he became disenchanted with his opportunities in Michigan, he wrote to Little-Collins that he wanted to live with her permanently in Boston. Little-Collins arranged to transfer official custody of Malcolm to Massachusetts, and he moved there upon finishing eighth grade.

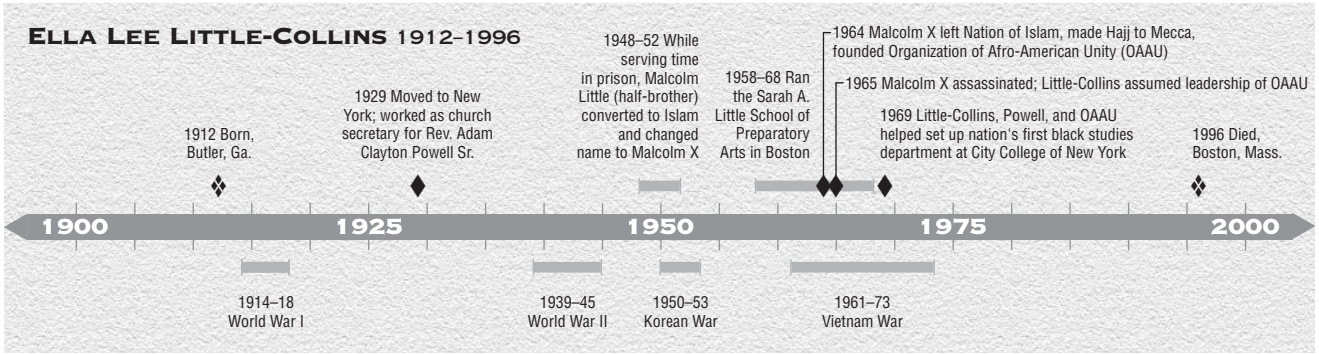

Little-Collins had separated from Frank shortly before Malcolm came to live in Roxbury in 1940. They divorced in June 1942. Malcolm later wrote, "[A]ny average man would find it almost impossible to live for very long with a woman whose every instinct was to run everything and everybody she had anything to do with—including me."

Little-Collins did not approve of the lifestyle that Malcolm began to lead in Roxbury and later continued in Harlem. She was very strict, locking him out of the house if he failed to return home in time, forcing him to spend the night with other relatives who lived downstairs in the same house. She had married Kenneth Collins in June 1942. They had a child, Rodnell, in 1945. Even though Little-Collins had a family of her own, and Malcolm was in and out of trouble, she never really abandoned him. From time to time, when Malcolm returned to her household, she welcomed him with open arms.

After Malcolm was convicted of BURGLARY and firearms charges and sent to prison in 1946, Little-Collins sent him money. In 1948, through her efforts, Malcolm was transferred from Concord Prison to the Norfolk, Massachusetts, Prison Colony, an experimental rehabilitative institution patterned after a college campus. This transfer proved to be monumental for Malcolm. The Norfolk Colony had an outstanding library, whose books Malcolm read prodigiously, and inmates were allowed to participate in cultural events such as debates, group discussions, and educational lectures. Malcolm read about history and religion, increased his vocabulary, and developed his debating skills, all of which later served him as a leader in the NATION OF ISLAM.

Little-Collins continued to have contact with Malcolm after his release from prison, as his stature as a black leader increased. She also continued working within the black community. By 1957, her third marriage had ended; by Malcolm's description, Little-Collins was "more driving and dynamic" than the sum of her three husbands. Because of her half brother's influence, Little-Collins joined the Nation of Islam, becoming a member of Boston's Mosque Eleven. However, she was thrown out, according to Malcolm, because of her tendency to take charge of any situation. She was taken back, but later left on her own, breaking with Elijah Muhammad's Black Muslims in 1959.

During this time, Little-Collins also started the Sarah A. Little School of Preparatory Arts, in Boston, where children were taught Arabic, as well as Swahili, French, and Spanish. Little-Collins herself hired the teachers, who donated their time; although she did not speak any language but English, she echoed her half brother's belief in the importance of being able to communicate with others in their native tongues. The school's curriculum also included arts and etiquette instruction. It was in existence from 1958 to 1968.

Malcolm continued to rely on Little-Collins for her support of both himself and his ministry. After he was silenced as a spokesman for the Nation of Islam, he decided that he wanted to make a pilgrimage to Mecca, but he did not have enough of his own money to pay for the trip. He flew to Boston to ask Little-Collins for help. In his autobiography, he described their meeting as follows: "I was turning again to my sister Ella. Though at times I'd made Ella angry at me . . . Ella had never once really wavered from my corner." When Malcolm announced that he wanted to make the pilgrimage, Little-Collins said only, "How much do you need?" Through the income from her real estate holdings, Little-Collins had been saving for her own trip to Mecca, but insisted that Malcolm take the money because it was more important that he go. Malcolm later credited the trip, taken in April and May 1964, with broadening his horizons and changing his entire outlook on the U.S. blacks' struggle for civil rights.

After Malcolm was assassinated in February 1965, Little-Collins accompanied his widow to the medical examiner's office in New York to identify the body. Little-Collins later returned to Boston, where she announced at a press conference that she would choose the leaders of the Organization of Afro-American Unity (OAAU), the group Malcolm had set up after his break with Elijah Muhammad, to succeed Malcolm. Little-Collins herself served as interim president and president of the OAAU for a time as well as supporting the group financially. For ten years, the OAAU sponsored workshops during the week of May 19, the anniversary of Malcolm's birth. Little-Collins, Adam Clayton Powell Jr., and the OAAU were instrumental in setting up what is said to be the nation's first degree-granting college black studies department, at the City College of New York, in 1969. However, perhaps owing to her domineering personality and the rift between her and Shabazz, the group's influence diminished after Malcolm's death.

Little-Collins continued supporting black causes by donating her time and money. She

brought young people into her home, raised them, passed along the teachings of Malcolm, and sent several on pilgrimages to Mecca. She characterized herself as a human-rights activist rather than a civil-rights activist, because she felt that universal HUMAN RIGHTS were of primary importance. Little-Collins eventually moved to a Boston-area nursing home, where she died August 3, 1996 at the age of 84. She left one son, Rodnell Collins, who is the OAAU's current president.

CROSS-REFERENCES

Civil Rights Movement.

## ♦ LITTLETON, SIR THOMAS

Sir Thomas Littleton was an English judge and writer who is known for his treatise on land law, entitled *On Tenures* (1481). Littleton's work served as an inspiration and model for later English jurists, including SIR EDWARD COKE.

Littleton was born in 1422 in Frankley Manor House, Worcestershire. He became a counsel at law in 1445 and served as a recorder of Coventry in 1450. In 1455 he became a judge of assize on the Northern Circuit, and he was appointed a justice of COMMON PLEAS in 1466. In 1475 King Edward IV made him a knight of the Bath. He died in 1481 and was buried in Worcestershire Cathedral.

Littleton's *On Tenures* is regarded as a model of legal scholarship, a clear and concise classification of English land law. Its significance rests in Littleton's attempt to impose a rational and orderly arrangement on legal rights in land. At the time the work was written, English land law had become extremely complicated.

The treatise consists of three books. The first deals with various estates in land; the second with the incidents of tenure (the holding of lands in subordination to some superior); and the third with co-ownership and other specialized doctrines relating to property. Unlike previous authors, Littleton did not rely on ROMAN LAW but dealt exclusively with English land law.

Littleton followed a consistent method of analysis. He first defined a particular class of rights and then analyzed the many variations and implications of that class. Having identified certain key principles underlying a particular area of land law, Littleton then demonstrated how novel problems might be solved by reference to them. Modern commentators have lauded Littleton for the scientific organization of his material.

*On Tenures* was the first major legal treatise written in French instead of Latin and the first work on ENGLISH LAW to be printed in London. For more than three centuries, it formed the standard introduction to students of English real property law. Coke, who considered it a model of clear and lucid exposition of English law, made it the subject of his First Institute, *Coke upon Littleton* (1628). It stands as an early classic of English law.

## LITTORAL RIGHTS

*Rights relating to the ownership of property that abuts an ocean, sea, or lake.*

*Littoral proprietors* are occupants of land that borders the above-named bodies of water, whereas *riparian proprietors* are those who occupy land bordering streams or rivers. Littoral rights are generally concerned with the use and enjoyment of the shore.

CROSS-REFERENCES

Riparian Rights.

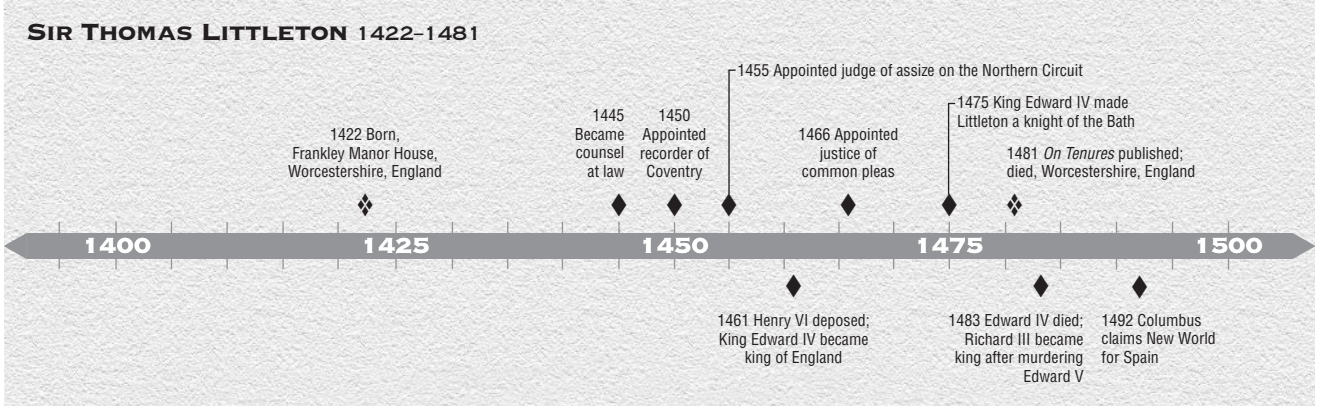

## LITVINOV ASSIGNMENT OF 1933

*An executive agreement made by President* FRANKLIN DELANO ROOSEVELT *as part of the arrangements by which the United States recognized the Soviet Union.*

The Litvinov Assignment purported to transfer to the United States certain American assets located in Russia that had been previously nationalized by the Soviet Union. Accordingly, the United States went to court to establish its title to the assets. In the famous case of *United States v. Pink,* 315 U.S. 203, 62 S.Ct. 552, 86 L. Ed. 796 (1942), the Supreme Court upheld this title on the basis of the executive agreement. The Court saw the agreement as an integral part of the new recognition policy of the government and as a proper method of mitigating losses resulting from the nationalization of U.S. owned property in the Soviet Union. The Court held that the powers of the executive branch in the conduct of foreign policy were not herein restricted by the need for Senate consent.

## ♦ LIUZZO, VIOLA FAUVER GREGG

CIVIL RIGHTS activist and martyr Viola Fauver Gregg Liuzzo was murdered after the 1965 voting rights march from Selma, Alabama, to Montgomery, Alabama. A thirty-nine-year-old wife, mother, and student, Liuzzo had spontaneously driven from her home in Detroit to help with the historic march. While transporting other participants back to Selma afterward, she was killed by members of the KU KLUX KLAN (KKK). The tragedy both shocked and inspired U.S. citizens. President LYNDON B. JOHNSON decried her slaying on national television, and her death gave impetus for passing the landmark VOTING RIGHTS ACT OF 1965 (42 U.S.C.A. § 1973 et seq.). Two Alabama juries failed to convict her assassins, who were ultimately found guilty of conspiracy. Nearly two decades later, her family brought an unsuccessful $2 million lawsuit against the Federal Bureau of Investigation (FBI), following congressional revelations that the bureau may have known about but done nothing to stop Klan plans to kill the marchers. Liuzzo's memory is honored by memorials in Alabama and commemorations in Detroit.

Liuzzo was born in the coal-mining town of California, Pennsylvania, on April 11, 1925. She dropped out of school in the tenth grade and worked as a waitress. In 1950, she married Anthony James Liuzzo, a business agent of the International Brotherhood of Teamsters, with whom she had three children.

Liuzzo returned to school and, in 1962, she graduated with top honors from the Carnegie Institute of Detroit. She found employment as a medical laboratory assistant. Though a high school dropout, she loved reading, and introduced her children to the works of the philosopher HENRY DAVID THOREAU. She explained to them his theory of civil disobedience, a concept that would find widespread support during the CIVIL RIGHTS MOVEMENT.

Despite her lack of formal education, Liuzzo won acceptance to Wayne State University. By 1965, she was studying Shakespeare and philosophy. Like other students across the United States, she became increasingly concerned about violence against civil rights workers. The civil rights movement was at a crossroads: it had achieved important gains against desegregation, but now it faced resistance and violence as it sought to win voting rights for African Americans living in the South.

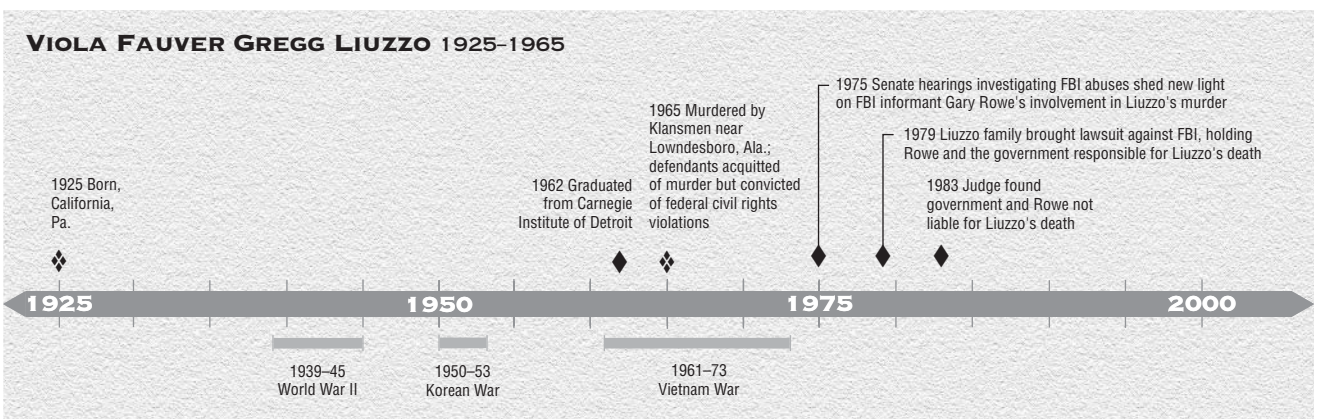

In early March 1965, a pivotal event in civil rights history pushed the movement forward and changed Liuzzo's life. The murder of Jimmie Lee Jackson at the hands of Alabama troopers had motivated civil rights leaders to stage a protest march from Selma, Alabama, to the capitol in Montgomery, fifty miles away. The march would be led by **MARTIN LUTHER KING, JR.**, president of the **SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE** (SCLC); Ralph J. Bunche, an African American Nobel laureate and diplomat to the **UNITED NATIONS**; and other dignitaries. Once at the capitol, they planned to confront Governor **GEORGE WALLACE**, an unbending foe of **INTEGRATION**. But, as in previous civil rights protests, Wallace's state troopers struck first. On March 7, hundreds of African Americans set out from Selma, only to be stopped minutes later by club-wielding police officers and troopers. As law enforcement officers beat men, women, and children, millions of horrified U.S. citizens watched on television. Liuzzo and her family were among the viewers.

Within days, protests erupted nationwide. In Washington, D.C., some six hundred people picketed outside the White House. In Detroit, Liuzzo joined 250 students in a march on local FBI offices. Wherever protests occurred, people demanded federal protection for civil rights workers and the passage of new voting rights legislation. King announced a new march from Selma to Montgomery. Before it could begin on March 9, federal judge **FRANK M. JOHNSON**, fearing new violence, postponed it. Two days later, another civil rights worker—the Reverend James J. Reeb, a Unitarian minister from Boston—died at the hands of violent whites in Selma.

On March 15, President Lyndon B. Johnson appeared on television to address both houses of Congress. He called for passage of the voting rights bill and also gave his full support to the marchers in Selma. That night, Liuzzo attended a meeting at which several Wayne State students said they would join the march. She too decided to go. She packed a few clothes in a shopping bag, and by the next afternoon was driving south.

Liuzzo was one of thousands arriving at the church that served as the launching point for the march, Brown Chapel. Appointed to the reception desk to help with last-minute chores, she greeted new arrivals. As was her way, she wanted to do more, and soon she had volunteered the use of her car for transporting others.

*Viola Liuzzo.*
AP/WIDE WORLD PHOTOS

On March 21, the journey to Montgomery began as marchers passed a vast contingent of federal security. Governor Wallace had ruled out protecting the marchers as being too expensive, but President Johnson had made available military police, FBI agents, **U.S. MARSHALS**, and nineteen hundred members of the Alabama National Guard who were placed under federal control. There was to be no repeat of the violence committed two weeks earlier by Alabama troopers.

The five-day march ended in a gathering of twenty-five thousand people at the capitol in Montgomery, where King once again preached his doctrine of nonviolence. Yet he warned of further struggles ahead.

Now that the march was over, Liuzzo prepared to make good on her promise of driving people back to Selma. Staff members of the SCLC advised her that further help was unnecessary, given the buses already waiting. Liuzzo nevertheless drove three women and a man to their destination and by nightfall, was returning to Selma again, this time with nineteen-year-old Leroy Moton, an African American barber and civil rights worker. In the swamplands of Lowndes County, a car chased them down and its occupants shot and killed Liuzzo. Moton, covered with Liuzzo's blood, feigned death and then ran three miles before finding safety with other civil rights workers.

"IT'S EVERYBODY'S FIGHT. THERE ARE TOO MANY PEOPLE WHO JUST STAND AROUND TALKING."
—VIOLA LIUZZO

It took the FBI eight hours to arrest three suspects, all Klan members. Gary Thomas Rowe, Jr., a thirty-four-year-old Klan member who had been passing information to the FBI for five years, was riding with three others in the car from which the fatal shots were fired. Immediately, the state of Alabama indicted the other three men on first-degree murder charges. Rowe was given IMMUNITY and put in PROTECTIVE CUSTODY in return for testifying against Eugene Thomas, age forty-three; William Orville Eaton, age forty-one; and Collie Leroy Wilkins, Jr., age twenty-one. According to Rowe's subsequent testimony, the men had received instructions from Klan leaders to punish one of the marchers.

A trial on state charges in May 1965 ended in a mistrial. However, a subsequent federal trial, based on a conspiracy to violate Luizzo's civil rights, brought guilty verdicts. Each of the defendants was sentenced to ten years. A subsequent appeal failed.

In 1979 the Liuzzo family filed a $2 million lawsuit against the FBI. The suit accused the bureau of NEGLIGENCE in its hiring, training, and supervision of Rowe. The informant, it alleged, was a loose gun who had actively participated in the murder. U.S. district judge Charles Joiner heard the trial without a jury and on May 30, 1983, found that Rowe did not shoot Liuzzo. He further ruled that the government was not responsible for her death.

In 1982 the Detroit City Council honored Liuzzo for her contributions to the struggle for civil and HUMAN RIGHTS. In June 1982, a mayoral proclamation made June 1–8 Viola Liuzzo Commemoration Week. Other memorials followed. In 1985, nearly one hundred marchers led by the Reverend Joseph Lowery, president of the SCLC, retraced the historic Selma-to-Montgomery march and laid a wreath at the site where she was murdered. There along U.S. Route 80, beside a swampy stretch, stands a simple stone marker, dedicated in 1991 by women members of the SCLC. It reads, "In Memory of Our Sister Viola Liuzzo Who Gave Her Life in the Struggle for the Right to Vote."

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## LIVERY OF SEISIN

*A ceremony performed in medieval England that effected the transfer of land from one party to another.*

Livery of seisin was the dominant method of transferring land in England until 1536, and it continued to be legal until 1925. The term *livery of seisin* means simply "transfer of possession": *livery* means "delivery" and is from the Old French *livrer,* and *seisin* means "possession" and is from the Old French *saisir* or *seisir.* The concept behind livery of seisin, therefore, was the symbolic transfer of the possession of land. The entire ceremony of transfer was called feoffment with livery of seisin, with *feoffment* meaning "a gift," specifically a gift of a freehold interest in a parcel of land. The transferor was the feoffor, the transferee was the feoffee, and the land interest was the fief.

In the Middle Ages, a livery of seisin was essential to convey land from one party to another; without it no real right to land could be transferred. When performing the ceremony, the feoffor, the feoffee, and their witnesses generally stood on the land itself, though it was permissible to stand within view of the land if the feoffee made an actual entry to the land while the feoffor was still alive. During the ceremony the feoffor spoke appropriate words declaring the gift, and then handed the feoffee an object representing that gift, such as dirt, turf, or a twig, or even a ring, a cross, or a knife. If a house was being transferred, the ring of the door might be exchanged.

In addition to delivering possession of the land, the feoffor needed to vacate the land. The feoffor's tenants and others living on the land were expelled, along with their possessions. In some cases, the feoffor performed a ceremony or gesture showing ABANDONMENT of the land, such as by making a sign with the hands, jumping over a hedge, or throwing a rod to the feoffee.

A livery of seisin was sometimes accompanied by a deed, or charter of feoffment, written in Latin, which was used to call attention to the conveyance of land. This was often the case when the transfer in question had special political significance or when it involved complex boundaries. If a charter of feoffment existed, it was read during the livery of seisin. However, such a charter did not in itself serve as a means of transferring land; rather, it was used simply as evidence that a transfer had taken place. Its language was not "I hereby give" but "Know ye that

I have given." A charter of feoffment by itself was not considered an agreement to transfer land, but had to be accompanied by a livery of seisin.

During the Anglo-Saxon period in England, before the Norman Conquest of 1066, the use of writing was rare, so few charters existed. After the Norman invasion, writing was used more often, but charters were still generally short and crude. Eventually, over a period of hundreds of years, the delivery of a charter or deed came to replace the delivery of dirt, twigs, or knives that had been used to convey land in the livery-of-seisin ceremonies.

The Real Property Act of 1845 (8 & 9 Vict. ch. 106 [Eng.]) did not abolish livery of seisin, but it did allow deeds to be used freely as granting devices, which had the same effect. The Law of Property Act, passed in 1925 (15 & 16 Geo. 5, ch. 20 [Eng.]), finally abolished the livery-of-seisin ceremony.

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## LIVERY STABLE KEEPERS

*Individuals who, as a regular course of business, provide quarters for the boarding of horses and rent them for hire.*

Livery stables are ordinarily subject to regulation. A MUNICIPAL CORPORATION acting subject to the authority delegated by the state legislature can prohibit the maintenance of such stables in particular areas of a town or city. Such regulation must be reasonable and uniform in its effect upon individual keepers as well as the general public at large. A state or a municipal corporation can require that a livery stable keeper obtain a license, or it can impose a tax upon their activities. Generally a livery stable keeper who hires out a horse makes an implied promise or WARRANTY that it is fit for ordinary use. The livery stable keeper will be held liable in the event that the horse is vicious and, as a result, a person suffers injury as a result of the horse's behavior.

## LIVING TRUST

*A property right, held by one party for the benefit of another, that becomes effective during the lifetime*

**Living Trust**

**DECLARATION OF LIVING TRUST**

This declaration of trust is made on _____ (Date), by _____ ("Trustee")

in favor of _____ ("Beneficiary").

The Trustee solemnly declares that he or she holds: _____

_____

("Property") in trust solely for the benefit of said Beneficiary.

The Trustee further promises the Beneficiary:

(a) Trustee will not deal with the Property in any way without the authorization of the Beneficiary, except to transfer it to the Beneficiary; and,

(b) Trustee will account to the Beneficiary for any money received by the Trustee in connection with holding said Property.

_____
Trustee

_____
Witness

**Warning:**

**These forms are provided AS IS. They may not be any good. Even if they are good in one jurisdiction, they may not work in another. And the facts of your situation may make these forms inappropriate for you. They are for informational purposes only, and you should consult an attorney before using them.**

*A sample living trust*

*of the creator and is, therefore, in existence upon his or her death.*

A living trust, also known as an *inter vivos trust,* is different from a *testamentary trust,* which is created by will and does not take effect until the death of the settlor.

## LIVING WILL

*A written document that allows a patient to give explicit instructions about medical treatment to be administered when the patient is terminally ill or permanently unconscious; also called an advance directive.*

With improvements in modern medicine, the life of persons who are terminally ill or permanently unconscious can be prolonged. For increasing numbers of persons, the decision of whether to prolong life is being made in the form of a written document called a living will. The living will is one type of advance directive that may be used by a person before incapacitation to outline a full range of treatment preferences or, most often, to reject treatment.

A living will extends the principle of consent, whereby patients must agree to any medical intervention before doctors can proceed. It allows the patient to guide HEALTH CARE for the future when she may be too ill to make decisions concerning care. It can be revoked by the patient at any time. For many the living will preserves personal control and eases the decision-making burden of a family.

Forty-two states and the District of Columbia have living-will statutes that make a properly executed living will legally binding. In states that do not have a statute, living wills stand as a clear expression of the patient's wishes. Living-will statutes require that the person be legally competent to execute the will and that the will be witnessed by at least one disinterested person. Once a person who has a valid living will is terminally ill, the attending physician and a second physician must certify in writing that there is no reasonable expectation for improvement in the patient's condition and that death will occur as a result of the incurable disease, illness, or injury.

Upon this certification the doctor is obligated to follow the instructions contained in the living will. This typically means the patient does not want any medical procedures that serve only to prolong but not prevent the dying process. Therefore, if the patient is unable to breathe, the doctor is not required to connect the patient to a respirator. A patient may state in a living will that he does not want a feeding tube if unable to swallow food. Another common directive is to forbid resuscitation if the patient's heart stops beating.

Living wills have been criticized because they are usually limited to the withholding or withdrawing of "life-sustaining" procedures from a patient with a "terminal condition" or "terminal illness," and thus do not accurately reflect the broad legal right to refuse treatment. In addition, by their very nature, living wills reduce the patient's wishes to writing, and thus may be too rigid (or too vague) to adapt to changing interests or anticipate future circumstances.

To overcome these problems, many states have enacted statutes that permit a competent adult to designate a surrogate decision maker (also termed a health care proxy or agent) to make health care decisions for her in the event of incapacitation. The proxy's authority is usually not limited to decisions about life-sustaining treatment. A proxy can supplement a living will.

All fifty states have durable-power-of-attorney statutes that permit an individual (the principal) to designate another person (the attorney in fact) to perform specific tasks during any period of incapacity. Though most of these statutes do not expressly refer to medical care decisions, no court has ruled that they preclude the delegation of medical decision-making authority to the attorney in fact.

CROSS-REFERENCES

Death and Dying; Health Care Law; Organ Donation Law; Patients' Rights; Physicians and Surgeons; *Quinlan, In re.*

## ♦ LIVINGSTON, EDWARD

Edward Livingston was an important lawyer, politician, and diplomat who served under Presidents THOMAS JEFFERSON and ANDREW JACKSON. Apart from the many government offices he held, Livingston is remembered for proposing a comprehensive criminal code in which all offenses were clearly and simply defined.

Livingston was born on May 28, 1764, in Clermont, New York. His father, ROBERT R. LIVINGSTON, was a prominent New York political leader and judge in the years leading up to the American Revolution. His older brother, also named Robert R. Livingston, was a lawyer and a member of the CONTINENTAL CONGRESS com-

mittee that drafted the Declaration of Independence. He was a close advisor to President Jefferson and negotiated the LOUISIANA PURCHASE from France. Edward Livingston followed in his brother's footsteps. After graduating from the College of New Jersey (now Princeton University) in 1781, he studied law in Albany, New York. He was admitted to the New York bar in 1785 and entered private law practice. In 1795, Livingston was elected to Congress. He served three terms and chaired the House Commerce Committee during his second term. Livingston earned Jefferson's loyalty when he opposed the ALIEN AND SEDITION ACTS and Jay's Treaty.

In 1801, Livingston left Congress to become U.S. attorney for New York City. That same year, he was elected Mayor of New York. What seemed a promising start to a successful political career came crashing down on Livingston in 1803. One of his aides either lost or took public funds, and Livingston was obligated to sell his property to pay off the debt. He severed ties with New York in 1804 and moved to Louisiana. He pursued his legal career, but the WAR OF 1812 brought him back into public life. He organized the New Orleans public defense committee and then served as General Andrew Jackson's top aide during the Battle of New Orleans. After the war, he returned to law practice, but by 1820 he was back in politics as part of the Louisiana state legislature.

In 1821, Livingston produced a criminal code that he urged Louisiana to adopt. He sought to bring order and clarity to CRIMINAL LAW and procedure, which was a mixture of statutes and many COMMON LAW decisions. It was his belief that people were entitled to know, rather than to guess, what actions constituted crimes. His code was not enacted by Louisiana but he tried again at the federal level when he entered the U.S. House of Representatives in 1823. In 1829, he was elected to the U.S. Senate as his model code, *A system of Penal Law for the United States of America,* drew favorable reviews in Europe. Although his code was never enacted, it remains an important document for the CODIFICATION movement that reached its zenith during the twentieth century.

Livingston resigned from the Senate in 1831 to serve as SECRETARY OF STATE for President Andrew Jackson. Two years later, he left that post to serve as U.S. minister to France. He returned to the United States in 1835 and died on May 23, 1836, in Barrytown, New York.

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## ♦ LIVINGSTON, HENRY BROCKHOLST

Henry Brockholst Livingston came from a powerful New York family. He was educated at Princeton alongside JAMES MADISON, had political ties to THOMAS JEFFERSON, and enjoyed rapid advancement through the military, private practice, and the bench. From 1802 to 1807, Livingston served on the New York Supreme Court. An outspoken anti-Federalist in his youth, Livingston grew more conservative in later life. He served as an associate justice on the U.S. Supreme Court from 1807 until his death in 1823.

Livingston was born November 25, 1757, in New York City. Established in New York in the late seventeenth century, his family also included other notable public figures: Philip

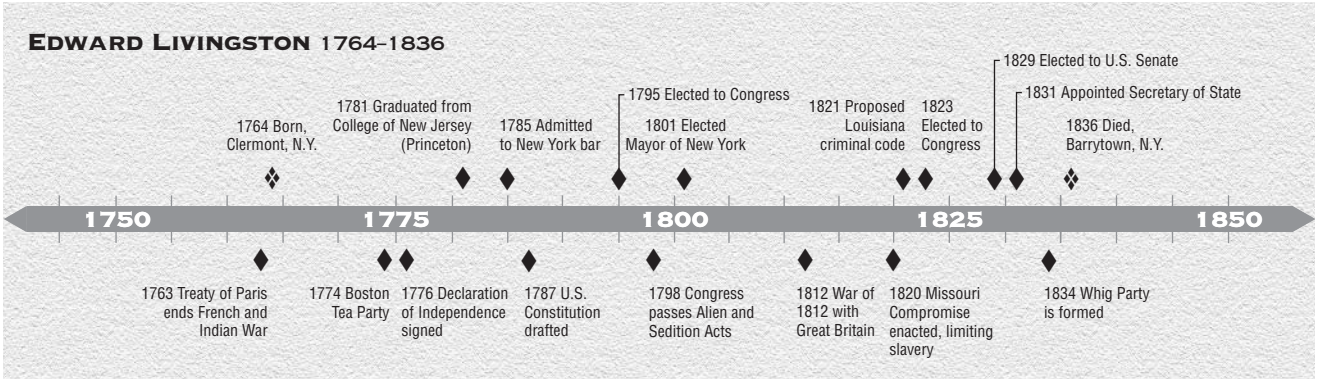

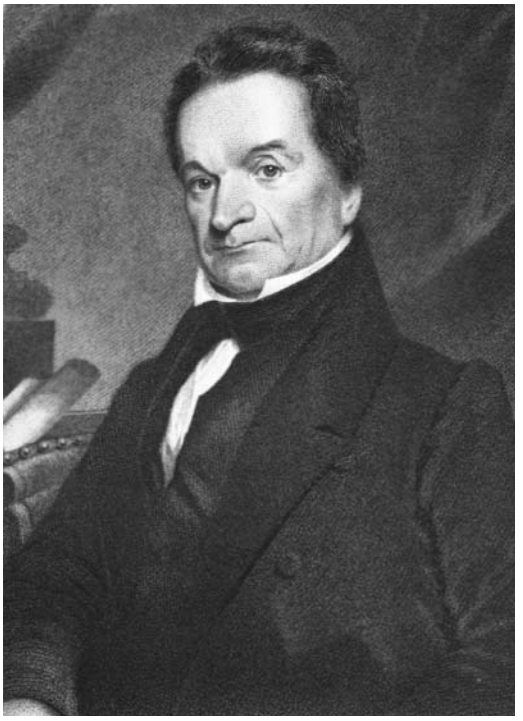

*Henry B. Livingston.*
LIBRARY OF CONGRESS/CORBIS

Livingston (1716–78) signed the Declaration of Independence, William Livingston (1723–90) was New Jersey's first governor, ROBERT R. LIVINGSTON (1746–1813) negotiated the LOUISIANA PURCHASE, and EDWARD LIVINGSTON (1764–1836) served in Congress and as SECRETARY OF STATE. At an early age, Livingston had several outstanding accomplishments in military service. He was commissioned a major at age nineteen. At twenty-two he was a secretary in Spain to his brother-in-law, U.S. minister JOHN JAY. At twenty-five he helped negotiate the end of the Revolutionary War.

Livingston's legal career advanced in similar fashion. After being admitted to the New York bar in 1783, he was soon in private practice working alongside ALEXANDER HAMILTON and AARON BURR. He entered politics in 1786 when he was elected to the New York Assembly. In 1789 he delivered the first Independence Day speech in Saint Paul's Church, before Congress, President GEORGE WASHINGTON, and other distinguished leaders. During this period he became a fierce anti-Federalist and sided with Jefferson.

Livingston's outspokenness in public and in print led to conflict. He survived an assassination attempt in 1785, and in 1798, after being punched in the nose by an angry Federalist, he killed the man in a duel. But his politics also brought rewards. In return for helping Jefferson win the state of New York in the 1800 presidential election, Livingston was appointed to the New York Supreme Court.

In four years on the New York bench, Livingston gained high distinction. He wrote 149 opinions—a prodigious number—many concerning his specialty, COMMERCIAL LAW. He tended to favor business interests at a time when capitalism was bustling. In civil liberties he took the traditional view that truth and GOOD FAITH were not defenses against a charge of seditious libel. He was also a practitioner of the art of judicial humor. His most-quoted opinion is his dissent in the so-called *Foxhunt* case, *Pierson v. Post,* 3 Cai. R. 175 (1805), which dealt with the question of who should be entitled to claim a fox—the hunter who has pursued it up to the end, or another hunter who snatches it at the last moment. "This is a knotty point," wrote Livingston, "and should have been submitted to the ARBITRATION of sportsmen."

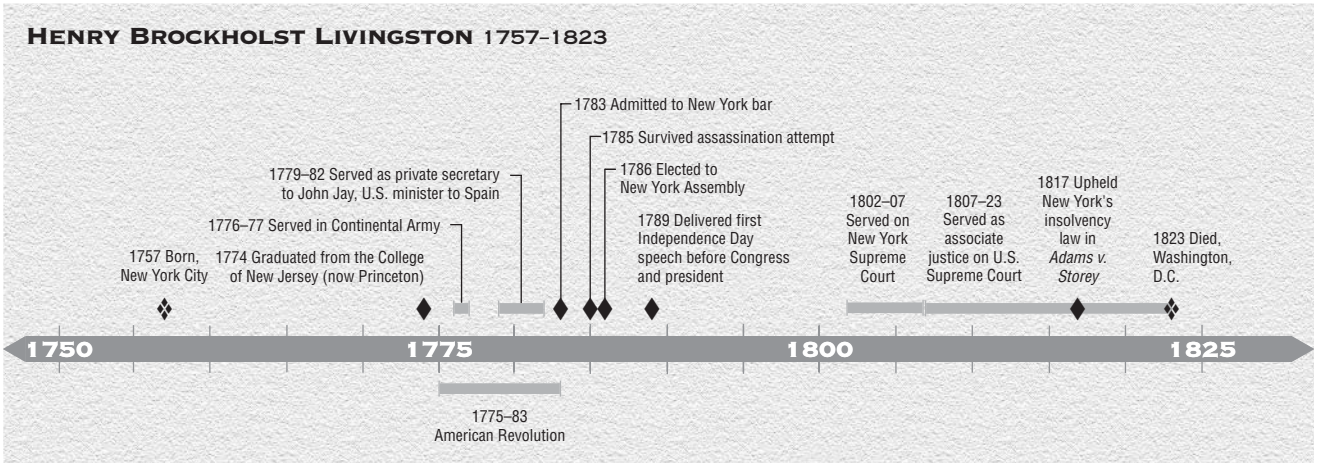

In 1807 President Jefferson made Livingston his second appointee to the U.S. Supreme Court. Under Chief Justice JOHN MARSHALL, Livingston's anti-Federalism was tempered, and he generally followed the chief justice's lead. Compared with the stream of opinions he issued in New York, his output of thirty-eight majority opinions, eight dissents, and six concurrences was minimal. He continued to write chiefly on commercial and maritime law; in the latter area, he was a specialist in PRIZE LAW, a now antiquated area of JURISPRUDENCE that dealt with the capture of goods at sea during wartime. Early Supreme Court justices, in addition to their duties on the Court, routinely travelled the circuit to which they were assigned and presided over its cases. Most scholars have found Livingston's circuit court decisions more notable than his opinions in Supreme Court cases, especially *Adams v. Storey,* 1 Fed. Cas. 141 (C.C.D.N.Y. 1817) (No. 66), in which he upheld New York's insolvency law against a challenge that it violated the Constitution's Contracts Clause and federal BANKRUPTCY jurisdiction.

Livingston suffered two ethical lapses while on the Supreme Court. He told JOHN QUINCY ADAMS the Court's decision in FLETCHER V. PECK, 10 U.S. (6 Cranch) 87, 4 L. Ed. 629 (1810) before it was announced, when Adams was a counsel on the case. And while the Court was deciding DARTMOUTH COLLEGE V. WOODWARD, 17 U.S. (4 Wheat.) 518, 4 L. Ed. 629 (1819), he reportedly received extrajudicial information about the case from a former colleague.

Neither incident seems to have damaged his career. He continued to serve on the Court until his death on March 18, 1823, in Washington, D.C.

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## ♦ LIVINGSTON, ROBERT R.

Robert R. Livingston served the United States in many ways, from participating in the CONTINENTAL CONGRESS, to administering the oath of office to GEORGE WASHINGTON and negotiating the LOUISIANA PURCHASE.

Livingston was born November 27, 1746, in New York City. His great-grandfather came to America in the 1670s with little, but through hard work and a fortuitous marriage soon began building a vast empire. Livingston's father, Judge Robert R. Livingston, was called the richest landowner in New York, and real estate holdings of the influential and politically active Livingston clan eventually totaled nearly 1 million acres.

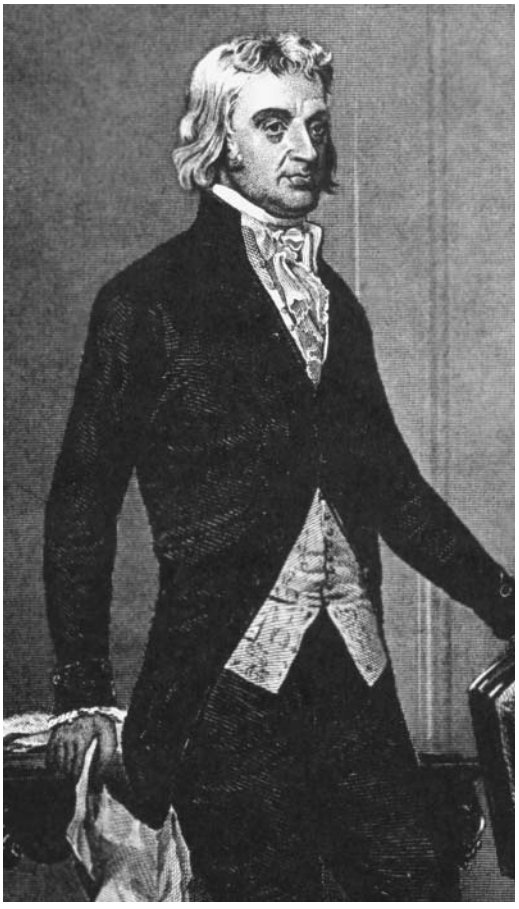

*Robert R. Livingston.*
LIBRARY OF CONGRESS

After graduating from King's College (now Columbia University), Livingston studied law, and was admitted to the bar in 1770. He practiced law for a time with his college classmate and friend JOHN JAY. In 1773 he received a political appointment as recorder for New York City, wherein he presided over certain criminal trials. He held the position until 1775, when his Revolutionary sympathies made him unacceptable to the Crown.

Livingston was elected to the Continental Congress in 1775. He was soon appointed to the committee charged with drafting a declaration of independence, with ROGER SHERMAN, BENJAMIN FRANKLIN, JOHN ADAMS, and THOMAS JEFFERSON. However, Livingston was apparently not involved in the actual drafting of the document; his appointment was seemingly a political maneuver designed to encourage the equivocating province of New York into a firm commitment to independence. Livingston himself was

"ON THE WHOLE I THINK IT WOULD BE MORE DIGNIFIED AND MORE SAFE TO ACT UPON OUR GROUND AND IF WE MUST ENTER INTO THE WAR [AGAINST NAPOLEON], SECURE TO OURSELVES ALL THE ADVANTAGES THAT MAY RESULT FROM [DOING SO]."
—ROBERT LIVINGSTON

ambivalent. He believed that autonomy from Britain was necessary and inevitable, but inexpedient at that time; in debate he advocated postponement of the issue. When the Continental Congress voted on the declaration on July 2, 1776, New York abstained, preventing a unanimous ballot. The New York delegation was forced to abstain because the New York convention had not authorized it to vote affirmatively. Within weeks a newly elected New York convention ratified the declaration, and the ratification was retroactively ruled unanimous. When the signing of the Declaration of Independence commenced in Philadelphia on August 2, Livingston was elsewhere organizing a committee to coordinate New York's defense and conferring with General Washington on military matters.

Livingston, Jay, and Gouverneur Morris were the principal writers of New York's constitution, which was submitted for approval in 1777. Livingston's main contribution to the document was a council of revision, which could VETO legislation. The council of revision was composed of the governor, chancellor, and state supreme court justices.

In 1777 Livingston was appointed chancellor of New York, the state's highest legal officer, second in precedence only to the governor. In this position, which he held until 1801, he presided over the court of EQUITY. His legal abilities were highly regarded by his colleagues.

Livingston was again a delegate to the Continental Congress in 1779–80. A tireless worker, he was active on committees on financial affairs, military issues, legal organization, and foreign affairs, among others. He helped formulate a court of appeals. In 1780 he was nominated for an appellate judgeship, but declined the position.

In 1781 Livingston was appointed secretary of foreign affairs, a position he held for three years. He organized the newly established department. His most important contribution during this period was his diplomatic correspondence regarding peace with Great Britain. The Revolutionary War was over, but negotiating the peace was a lengthy endeavor. Finally, on April 19, 1783, the TREATY OF PARIS made it official, and Livingston had the honor of conveying the news to General Washington.

Livingston served in the Continental Congress again in 1784–85. In 1788 he was a leader in Poughkeepsie, New York, at the convention to ratify the U.S. Constitution. A staunch Federalist, he was one of the most frequent pro-Constitution speakers at the ratifying convention. Livingston, along with ALEXANDER HAMILTON, played a major role in the success of FEDERALISM in New York at that time.

By virtue of his position as chancellor, Livingston administered the oath of office to President Washington in the national capital, then New York City, on April 30, 1789. His friend Jay was appointed chief justice of the U.S. Supreme Court, and Hamilton was named secretary of the treasury. Despite Livingston's activism the new government did not reward him with an office. Possibly for this reason, and because he disagreed with Hamilton's policy of federal assumption of state debts, Livingston turned anti-Federalist and entered into a political alliance with members of the Jeffersonian opposition—then called Republicans—in about 1791.

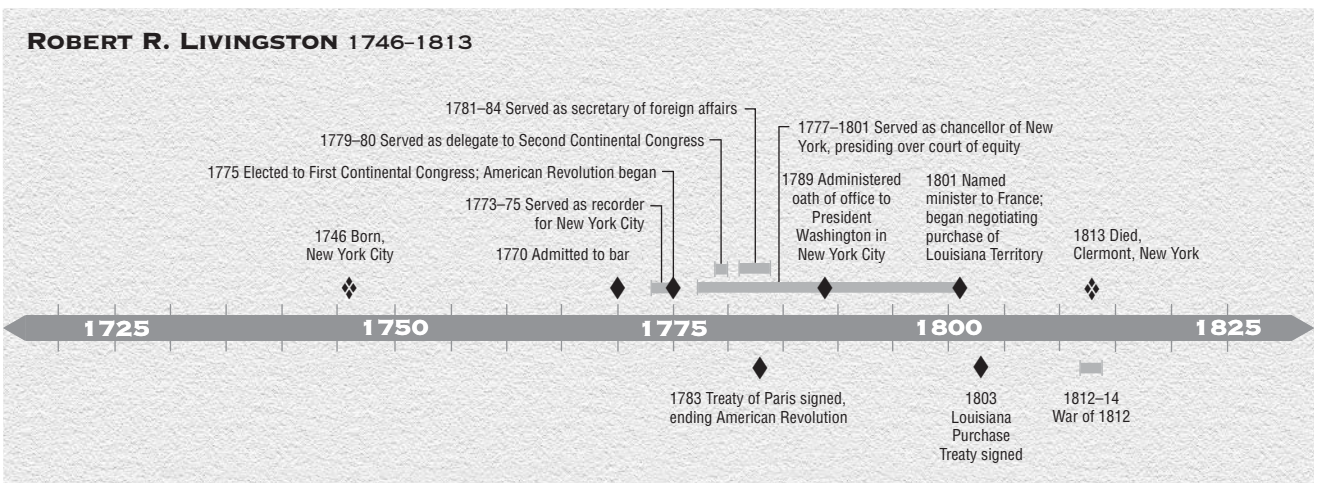

Jefferson offered Livingston the secretaryship of the Navy in 1800, but he declined. In 1801 Jefferson named him minister to France. Once in Paris Livingston set about investigating rumors that Spain was about to cede its province Louisiana back to France, which had owned it until 1762. Livingston was charged with preventing this. If unable to do so, he was to procure parts of the province, including West Florida and New Orleans, for the United States.

Livingston soon discovered that the retrocession had already occurred. However, because of impending war with Great Britain, a French failure in Santo Domingo, and financial concerns, Napoléon suddenly offered to sell the entire Louisiana Territory to the United States. No one really knew how vast the region was, but it was generally agreed that the Mississippi River formed the eastern boundary and the Rocky Mountains the western edge. Livingston and JAMES MONROE, who had recently joined him in Paris, negotiated the final deal for $15 million—purchasing approximately 828,000 square miles for only pennies an acre. Overnight, the size of the United States doubled. The Louisiana Purchase Treaty, closing the purchase from France, signed May 2, 1803, but antedated April 30, 1803, was the triumph of Livingston's career.

Livingston resigned his diplomatic post in 1804. After touring Europe he returned to his home in Clermont, New York, and retired from politics.

Livingston had long been interested in steam navigation. While in Paris he had met Robert Fulton, and the two men had entered into a partnership to develop a commercially successful steamboat. An early venture sank on the Seine, but in 1807 a new boat sailed on the Hudson River from New York City to Albany. The running speed of the *Clermont* approached five miles an hour, and cut sailing time to a small fraction of that required by the tall-masted Hudson River sloops then in use. Livingston had used his political clout to obtain a steam navigation MONOPOLY in New York in 1798, and he and Fulton set about attempting to exploit and extend the monopoly. Protracted litigation concerning the monopoly kept Livingston occupied in his final years.

Livingston was very active in his home state as well as nationally. In addition to working on New York's constitution, he was a leader in Revolutionary organizations replacing the Crown government, and was a member of the commission that governed the state after the Revolutionary War. In 1811 he was on the first canal commission, which eventually resulted in the Erie Canal.

Livingston also had a keen interest in farming, and maintained an active correspondence with Jefferson, Washington, and others regarding the latest scientific agricultural methods. He was a leader in importing merino sheep from Spain and using gypsum as fertilizer.

Livingston died February 26, 1813, in Clermont.

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## LL.B.

*An abbreviation denoting the degree of bachelor of laws, which was the basic degree awarded to an individual upon completion of law school until the late 1960s.*

The degree has been largely replaced by the J.D., Juris Doctor (or doctor of JURISPRUDENCE) degree.

## ♦ LLEWELLYN, KARL NICKERSON

Karl N. Llewellyn was a distinguished legal scholar and professor, and a leading proponent of LEGAL REALISM, a philosophy that is critical of the theory that the law operates only as a system of objective rules.

Llewellyn was born May 22, 1893, in West Seattle, Washington. His father was of Welsh ancestry and his mother's ancestors had come to the New World on the *Mayflower.* Llewellyn spent much of his youth in Brooklyn, where his family had moved during the first year of his life. Unhappy and unchallenged academically by high school in the United States, he entered the *Realgymnasium* in Mecklenburg, Germany, where he boarded with relatives of a family friend. During his three years in Germany, Llewellyn became fluent in German and demonstrated talent in mathematics and science. He left Mecklenburg in the spring of 1911, and briefly attended the University of Lausanne, in Switzerland, before returning to the United States.

"A COURT IS DOING ITS DUTY WHEN . . . WITH CLEAR CONSCIOUSNESS THAT IT UNDERSTANDS WHAT IT IS DOING AND WHY, AND WITH CLEAR STATEMENT OF BOTH, IT GOES TO BAT ON THE WHOLE OF A BROAD SITUATION."
—KARL LLEWELLYN

In September 1911, Llewellyn entered Yale, where he compiled an outstanding academic record and excelled at athletics, especially boxing. In the spring of 1914, he entered the Sorbonne, in Paris, to study Latin, law, and French. He was still a student there when WORLD WAR I broke out. Although he never officially enlisted, he fought with the Seventy-eighth Prussian Infantry on the western front, earning the Iron Cross for his service. He was wounded in battle in November 1914 and spent nearly three months in a military hospital.

Llewellyn returned to the United States and to school in 1915. During his second stint at Yale, he took his coursework even more seriously and began considering a career in teaching. He studied under William Graham Sumner, the author of *Folkways* (1906), an acclaimed work concerning social practices and beliefs and the influence of both on society and individual behavior. The ideas and theories found in Sumner's work would significantly affect the development of Llewellyn's view of the law as a social institution that is greatly influenced by the surrounding culture.

Later in 1915, Llewellyn entered Yale Law School. He served as editor in chief of the *Yale Law Journal* for three years and wrote many of its articles himself. In 1918, he graduated at the top of his class. He remained for two years as a part-time instructor in the law school, filling in for an ailing professor. Llewellyn mostly taught courses in COMMERCIAL LAW, which later would become his specialty. In September 1920, thinking that practical experience was important before settling into an academic career, he took a position in the legal department of the National City Bank in New York City. Soon after he was hired, the bank dissolved its legal department and transferred its legal business to the Wall Street law firm of Shearman and Sterling. Llewellyn was also transferred, and subsequently worked almost exclusively on the bank's legal affairs. Although he enjoyed the work and gained valuable experience in legal drafting and international banking matters, two years later he decided to return to teaching, accepting a full-time position at Yale as an assistant professor.

In 1923, Llewellyn was promoted to associate professor. He stayed at Yale for only a year, before accepting a post at Columbia Law School so that his first wife could continue with her graduate studies at Columbia University. He remained at Columbia until 1951. While there, he authored a number of important books, including *The Bramble Bush: On Our Law and Its Study* (1931), adapted from a series of introductory lectures he had given to first-year law students during the 1929–30 academic year, when he was appointed the first Betts Professor of Jurisprudence at Columbia. He also wrote what eventually would become a leading casebook on commercial law, *Cases and Materials on the Law of Sales,* published the same year.

Llewellyn's developing theories on legal realism, introduced in *The Bramble Bush,* brought him much attention. Llewellyn declared that legal opinions must be examined to see how judges are influenced by factors that might have nothing to do with the law. He wrote that "[f]or the long haul, for the large-scale reshaping and growth of doctrine and our legal institutions, . . . the almost unnoticed changes . . . [are] more significant than the historic key cases." Thus, he

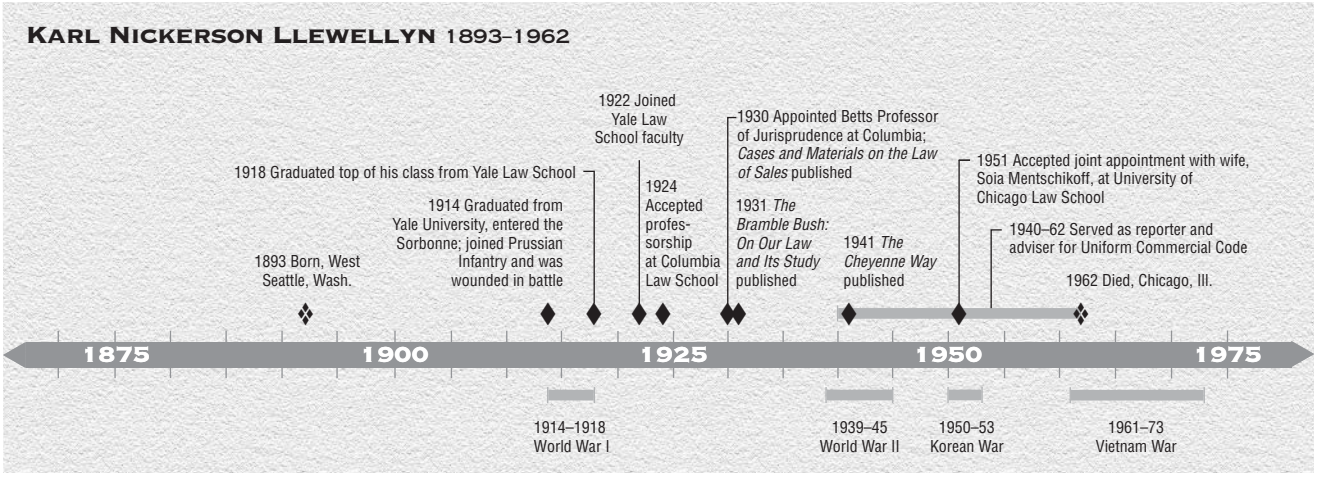

believed, lawyers should be trained to make persuasive arguments that emphasize the particular facts of a case, as those facts sometimes have a more significant effect on the outcome than does the applicable law.

Although Llewellyn's views were considered important and innovative, they also drew criticism. Opponents of his theories argued that, for practical reasons, legal realism was difficult to apply. Under Llewellyn's system of jurisprudence, they argued, a lawyer would be required to go to potentially ridiculous lengths to argue a case adequately, in an effort to learn every possible factor that could affect its outcome. As a result, Llewellyn's legal-realist theories never replaced the prevailing (and well-settled) view of the law as a set of well-defined rules to be applied to each individual situation.

Although his theories did not have quite the effect he had hoped for, Llewellyn is still widely viewed as an important legal scholar and author. His writings extend to nonlegal areas, including a book on anthropology, *The Cheyenne Way* (1941), which was a study of dispute resolution among the Cheyenne Indians, which he coauthored with anthropologist E. Adamson Hoebel. Llewellyn was also active in the Legal Aid Society, the AMERICAN CIVIL LIBERTIES UNION, and the National Association for the Advancement of Colored People (NAACP).

In 1951, Llewellyn left Columbia for the University of Chicago Law School, where he and his third wife, SOIA MENTSCHIKOFF, a commercial law scholar, accepted a joint appointment. Llewellyn taught there for nearly ten years and also served as chief reporter on the UNIFORM COMMERCIAL CODE, drafted during the early 1950s. He died in Chicago on February 13, 1962.

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## LL.M.

*An abbreviation for Master of Laws, which is an advanced degree that is awarded to an individual who already holds a J.D. upon the successful completion of a prescribed course of graduate study in law.*

A candidate for an LL.M. degree must complete the program set forth by the graduate admissions department in the particular law school he or she attends. The program ordinarily entails a minimum number of credit hours, including some credits in seminar courses and courses in which the student must take an examination for grading purposes. Candidates generally must also comply with such requirements as the maintenance of a minimum grade average as well as attendance requirements.

Students enrolled in LL.M. programs may either opt for a general degree or a degree in a specialized area of law. An LL.M. is generally available in such specialized areas as INTERNATIONAL LAW, labor relations, and taxation.

## LOAD LINES

*A marking indicating the extent to which the weight of a load may safely submerge a ship; also called* Plimsoll line.

The load line, or Plimsoll mark, is positioned amidships on both sides of a vessel. Its purpose is to indicate the legal limit to which a ship may be loaded for specific ocean areas and seasons of the year. The basic Load Line Certificate is issued after a complex calculation is made to determine exactly where the Plimsoll mark should be positioned. These certificates take several forms, such as international voyage, coastwise traffic, and Great Lakes operations.

By calculating the load line, the agency issuing a certificate has determined, among other aspects of seaworthiness, that a vessel has enough volume of ship (reserve buoyancy) above the waterline so that it will not be in danger of foundering or plunging when under way in heavy seas. In the United States the U.S. Coast

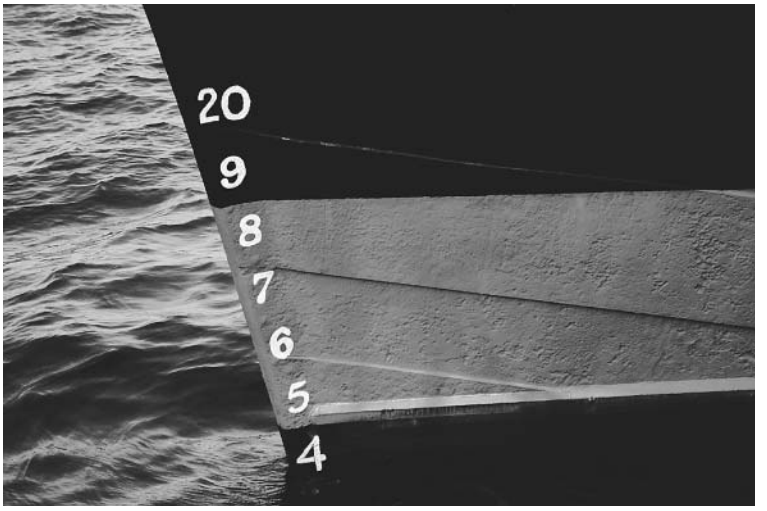


*Load lines indicate the legal limit to which a ship may be loaded for specific ocean areas and seasons of the year. In the United States, the U.S. Coast Guard issues these regulations.*

ROYALTY-FREE/CORBIS

Guard issues load line regulations; routine assignment of load lines is handled by the American Bureau of Shipping.

A series of multilateral treaties has been executed to impose on signatories the responsibility of seeing that ships flying under their flag have safe load lines designated and that they are observed. The principal treaty is the International Convention on Load Lines 1966. The use of load lines on vessels sailing under the flag of the United States is mandated by federal law (46 U.S.C.A. 86 [1973]). The treaties typically do not apply to ships of war, small ships, pleasure boats, and fishing vessels.

## LOAN COMMITMENT

*Commitment to a borrower by a lending institution that it will loan a specific amount at a certain rate on a particular piece of real estate. Such commitment is usually limited to a specified time period (e.g., four months), which is commonly based on the estimated time that it will take the borrower to construct or purchase the home contemplated by the loan.*

## LOAN SHARK

*A person who lends money in exchange for its repayment at an interest rate that exceeds the percentage approved by law and who uses intimidating methods or threats of force in order to obtain repayment.*

In most jurisdictions USURY laws regulate the charging of interest rates. Loan sharking violates these laws, and in many states it is punishable as a criminal offense. The usual penalty imposed is a fine, imprisonment or both.

## LOBBYING

*The process of influencing public and government policy at all levels: federal, state, and local.*

Lobbying involves the advocacy of an interest that is affected, actually or potentially, by the decisions of government leaders. Individuals and interest groups alike can lobby governments, and governments can even lobby each other. The practice of lobbying is considered so essential to the proper functioning of the U.S. government that it is specifically protected by the FIRST AMENDMENT to the U.S. Constitution: "Congress shall make no law . . . abridging . . . the right of the people peaceably . . . to petition the Government for a redress of grievances."

The practice of lobbying provides a forum for the resolution of conflicts among often diverse and competing points of view; provides information, analysis, and opinion to legislators and government leaders to allow for informed and balanced decision making; and creates a system of checks and balances that allows for competition among interest groups, keeping any one group from attaining a permanent position of power. Lobbyists can help the legislative process work more effectively by providing lawmakers with reliable data and accurate assessments of a bill's effect.

The role lobbyists play in the legislative arena can be compared to that of lawyers in the judicial arena. Just as lawyers provide the trier of fact (judge or jury) with points of view on the legal issues pertaining to a case, so do lobbyists provide local, state, and federal policymakers with points of view on public policy issues.

Although lobbying as a whole serves as a checks-and-balances safeguard on the legislative process, individual lobbyists are not necessarily equal. Unlike voters, who each get one vote, lobbyists vary in their degree of influence. The level of influence a lobbyist has over the legislative process is often proportional to the resources—time and money—the lobbyist can spend to achieve its legislative goal. Some people think lobbyists in general have too much power. During his 1912 campaign for president, WOODROW WILSON remarked, "The government of the United States is a foster child of the special interests. It is not allowed to have a will of its own."

The term *lobbyist* has been traced to the mid-seventeenth century, when citizens would gather in a large lobby near the English House of Commons to express their views to members of Parliament. By the early nineteenth century, the term *lobby-agent* had come to the United States, where it was applied to citizens seeking legislative favors in the New York Capitol lobby, in Albany. By 1832 it had been shortened to *lobbyist* and was widely used at the U.S. Capitol.

In the early 2000s lobbyists practice their trade not only in the halls of the U.S. Capitol and the corridors of state legislatures, but also on playgrounds, in boardrooms, in manufacturing plants, at cocktail parties, and in retirement homes. Contemporary lobbying methods include POLITICAL ACTION COMMITTEES, high-tech communication techniques, coalitions

among groups and industries sharing the same political goals, and campaigns to mobilize constituents at the grassroots level. Lobbyists include schoolchildren who want to prevent their favorite neighborhood park from becoming a shopping mall, corporations who contribute to a particular legislator's campaign, lawyers who speak with legislators on behalf of their clients' business interests, cities who lobby the state legislature for changes in transportation laws, presidential aides who suggest new amendment language to congressional committee members, retired persons who want to save their government benefits, and many others. Each type of lobbyist attempts to win support for a particular point of view.

Samuel Ward, a well-respected lobbyist, was so successful at influencing legislators that in the mid-1800s Congress decided to investigate him. When questioned about the elegant dinners he orchestrated for politicians, the self-described King of the Lobby said, "At good dinners people do not talk shop, but they give people a right, perhaps, to ask a gentleman a civil question and get a civil answer."

Despite the noncorrupt success of lobbyists such as Ward, lobbyists during the mid-nineteenth century were often regarded as ethically questionable individuals. This reputation was enhanced whenever lobbyists abused their position with improper practices such as bribing members of Congress.

Although lobbying is specifically protected by the Constitution, numerous attempts have been made to regulate it—attempts that, not surprisingly, lobbyists have historically resisted. Congress began efforts to reform lobbying in 1907, when it banned campaign contributions from banks and corporations. In 1911 proposed restrictions on domestic lobbying were first considered, but these were not approved until 1946, when Congress passed the Federal Regulation of Lobbying Act (2 U.S.C.A. §§ 261, 261 note, 262–270 [1946]).

In 1954 lobbyists challenged the Regulation of Lobbying Act for being unconstitutionally vague and unclear. In *United States v. Harriss,* 347 U.S. 612, 74 S. Ct. 808, 98 L. Ed. 989, the Supreme Court responded by upholding the act's constitutionality but also by narrowing the scope and application of the act. The Court ruled that the act applies only to paid lobbyists who directly communicate with members of Congress on pending or proposed federal legislation. This means that lobbyists who visit with congressional staff members rather than members of Congress themselves are not considered lobbyists. In addition, the act covers only attempts to influence the passage or defeat of legislation in Congress and excludes other congressional activities. Further, the act applies to and restricts only individuals who spend at least half of their time lobbying.

According to the 1946 act, lobbyists to whom the law applies are required to disclose their name and address; the names and addresses of clients for whom they work; how much they are paid and by whom; the names of all contributors to the lobbying effort and the amount of their contributions; accounts that tally all money received and expended, specifying to whom it was paid and for what purposes; the names of all publications in which the lobbyists have caused articles or editorials to be published; and the particular legislation they have been hired to support or oppose. In addition, the act requires lobbyists to file registration forms with the clerk of the House of Representatives and the secretary of the Senate prior to engaging in lobbying. These forms must be updated in the first ten days of each calendar quarter for as long as the lobbying activity continues. Violation of the act is a misdemeanor punishable by a fine of up to $5,000 or a jail sentence of up to 12 months, and a three-year prohibition on lobbying.

Although a number of lobbying statutes have been enacted that regulate special situations—such as lobbying by the agents of foreign governments, employees of holding companies, and firms affected by various federal shipping laws—the Federal Regulation of Lobbying Act remains the only comprehensive law governing the practice of lobbying.

Critics of the 1946 act suggest that its effectiveness is limited, since it does not apply to a large part of the population that actually lobbies the government. In fact, in 1991 the GENERAL ACCOUNTING OFFICE found that nearly 10,000 of the 13,500 individuals and organizations listed in a popular lobbyist directory were not registered under the 1946 act.

In 1995 Congress passed a law designed to close loopholes in the 1946 law by increasing lobbyists' accountability: the Lobbying Disclosure Act of 1995 (Pub. L. No. 104-65, 109 Stat. 691). Under the new law, individuals who receive at least $5,000 in a six-month period

# Should Lobbyists Be Strictly Regulated?

Since the 1940s there has been continuing debate in the United States over the proper role of lobbyists in a democratic society. Lobbyists contend they offer a valuable service to legislators and government officials, providing information and raising questions about pending legislation or executive action. Critics argue that many lobbyists are nothing more than influence peddlers who seek political and legislative favors for their clients.

The perception that lobbyists and the interest groups they represent have corrupted the political process has led to state and federal legislation that regulates lobbyists. Nevertheless, a fundamental conflict remains over the extent to which government may regulate lobbyists and lobbying activities. Those opposed to restrictions on lobbying argue that the **FIRST AMENDMENT** guarantees the right of citizens to petition the government for redress of grievances. Placing restrictions on lobbyists impairs this right. On the other side, critics of lobbyists assert that regulations are needed to preserve the democratic process and to ensure the legitimacy of government. Many people have become cynical about politicians and government, perceiving that only lobbyists have access to the halls of power.

Lobbyists believe that their activities are protected by the First Amendment. Though the U.S. Supreme Court has never stated that there is a constitutional right to petition the government, supporters of lobbying note that several state supreme courts have acknowledged a fundamental right to do so. Therefore, any regulations on lobbying must be the least restrictive means to further a compelling state interest.

Lobbyists assert that regulations requiring them to name specific contacts made with legislative or congressional staff have a chilling effect and weaken relationships that have been built up over many years. Staff members are often under time pressure to find information on legislative issues, and depend on lobbyists to help them meet these demands. Disclosure of contacts with lobbyists forces staff members to refrain from making legitimate requests, out of fear that disclosure will produce political embarrassment.

Lobbyists argue they have been given an unflattering and absurd stereotype as influence peddlers. With over fourteen thousand lobbyists in Washington, D.C., representing every conceivable interest group, including environmental and consumer organizations, it is clear that there is a demand for lobbying. The size and complexity of the federal government have, in large part, driven the need for lobbyists to help define positions on issues of public policy. Moreover, on all issues of widespread concern, lobbyists are found on both sides, producing one more set of checks and balances that undercuts the simplistic picture of corruption and favoritism.

from a single client are required to register with the clerk of the House and the secretary of the Senate, listing the congressional chambers and federal agencies they contacted, the issues they lobbied for, and how much money was spent on the effort. The reporting requirements also apply to organizations whose own employees lobby on their behalf and spend at least $20,000 in a six-month period on that effort.

Besides these federal regulations, states may separately enact their own regulations governing state lobbying. Most lobby restrictions involve reporting and registration provisions similar to those in place at the federal level.

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Lobbyists and their supporters maintain that intrusive regulations on lobbying can impair the democratic process. Laws that seek to identify contributors to lobbying groups may have a chilling effect on the exercise of citizens' rights. If made public, a contribution to an unpopular lobby can discourage similar contributions by others. Because many unpopular lobbies are small and poorly funded, discouraging even a few donors may significantly affect the support for a wide variety of viewpoints.

Supporters of strict regulation of lobbyists dispute these arguments. They contend that regulation is needed to prevent special interests from controlling the political process, to ensure ethical behavior on the part of lawmakers and government officials, and to enhance the public's confidence in the government. Numerous scandals have been linked to lobbying at the federal and state levels, providing ample justification for such regulation. Lobbyists have a place in the legislative process, concede many critics, but they must be prevented from using money and favors improperly to influence legislators and their staffs.

Critics of lobbying note that the courts have generally supported reasonable regulation of lobbying activity. This type of regulation does not prevent lobbyists from openly and appropriately communicating with government in regard to legislation. The regulation does restrict traditional practices such as giving legislators and staffs tickets to sporting events, paying for meals and entertainment, and underwriting golf and skiing junkets. These practices have contributed to the public perception that gifts and favors buy access to legislators and sometimes even votes.

Critics of lobbying also support regulation that forces the public disclosure of whom lobbyists represent. Registration of lobbyists is a minimally restrictive means of serving the public interest, yet it gives the public information on which interest groups are involved in pending legislative matters. Critics argue that lobbyists should not be permitted to work their influence in anonymity. The public has a right to know what interest groups have shaped legislation.

Despite the reforms legislated in the federal Lobbying Disclosure Act of 1995, 109 Stat. 691, 2 U.S.C.A. § 1601 et seq., critics of lobbying argue that additional reform is needed. The act addresses disclosure, registration, and a ban on gifts and meals, but it leaves large loopholes, the largest being the ability of lobbyists to make large contributions to the campaign committees of members of Congress. The critics point out the irony of banning small gifts yet permitting senators and representatives to accept $5,000 donations for their campaign committees from **POLITICAL ACTION COMMITTEES** controlled by lobbyists. Even more distressing, note critics, is the change this situation has produced in the dynamics between lobbyist and legislator: it is now the legislator who calls the lobbyist, asking for a political contribution.

Critics charge that the unceasing quest for campaign cash has distorted the political system. The only way to prevent lobbyists and the special interests they represent from dominating the legislative process is to establish the public financing of congressional campaigns. Once campaign contributions are no longer an issue, critics conclude, lobbyists will lose their last effective means of improperly influencing legislation.

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## LOCAL ACTION

*A lawsuit concerning a transaction that could not occur except in some particular place. Any type of lawsuit that can be brought only in one place. A classic example is a situation where recovery of possession of a particular parcel of land is sought.*

## LOCHNER V. NEW YORK

In *Lochner v. New York,* 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), the U.S. Supreme Court struck down a state law restricting the hours employees could work in the baking industry, as a violation of the freedom of contract guaranteed by the **DUE PROCESS CLAUSE** of the **FOURTEENTH AMENDMENT**. This seemingly minor decision spawned a new era in constitutional interpretation.

**CONSTITUTIONAL LAW** is often divided into three eras, the center of which is *Lochner.* In the pre-*Lochner* era (1789–1870), courts interpreted the Due Process Clause of the **FIFTH AMENDMENT** to have primarily a procedural content that protected persons against **ARBITRARY** governmental deprivations of life, liberty, and property. This procedural right meant that individuals were entitled to sufficient notice and a fair hearing before the government could take

harmful action against them. Courts reviewed only the manner in which a particular law infringed on a substantive right, without evaluating the importance of the right or the severity of the infringement.

During the *Lochner* era (1870–1937), courts interpreted the Due Process Clauses of the Fifth and Fourteenth Amendments to have a substantive content that protected from governmental intrusion certain economic and property interests, such as the right of employers and employees to determine the terms and conditions of their employment relationship. (Though *Lochner* was decided in 1905, prior cases going back to 1870 contributed to *Lochner* and are included in the *Lochner* era.)

The post-*Lochner* era (1937–present) is marked by decreased constitutional protection for economic and property rights and increased recognition of "fundamental" constitutional rights that protect minorities from discrimination, safeguard the interests of criminal defendants, and delineate a sphere of private conduct upon which the state may not encroach.

The *Lochner* era was an outgrowth of the U.S. industrial revolution. During the second half of the nineteenth century, the output of manufactured goods tripled, and the value of those goods soared from $3 billion to over $13 billion. The national labor force kept pace during this period, growing from 13 million to 19 million workers. Along with the growth of industry came a large disparity in the wealth and working conditions of U.S. citizens. Although some business proprietors were working fewer hours and making more money, many of their employees were working more hours in unhealthy conditions for scant wages. The bakers of New York were one group of such workers.

New York bakers at this time reportedly worked 12 hours a day, seven days a week, in a confined and uncomfortable environment. This lifestyle left little time for rest, causing some bakers to live in their kitchen and sleep at their workbench. A number of bakers died at an early age, and others contracted debilitating diseases. In 1895 the New York state legislature unanimously passed the Bakeshop Act, which attempted to address these problems by limiting the working hours of bakers to ten a day and 60 a week.

In 1902 Joseph Lochner, who owned a small bakery in Utica, was fined $50 for permitting an employee to work more than 60 hours in a week. During the trial Lochner offered no defense and was convicted. On appeal he challenged the constitutionality of the Bakeshop Act, claiming that it interfered with his right to pursue a lawful trade. The state defended the statute by arguing that it represented a legitimate exercise of its POLICE POWERS, pursuant to which the legislature may enact laws to preserve and promote the health, safety, and morality of society.

Lochner's claim did not lack precedent. In 1897 the Supreme Court nullified a Louisiana statute that attempted to regulate contracts between state residents and out-of-state insurance companies (*Allgeyer v. Louisiana,* 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed. 832 [1897]). Holding that that statute impaired the liberty of contract guaranteed by the Due Process Clause of the Fourteenth Amendment, the Court said that the Louisiana resident had a right "to live and work where he will," "to earn a livelihood by any lawful calling," and to "enter into all contracts which may be proper, necessary, and essential to . . . carrying out . . . the purposes above mentioned."

In addition to this precedent, the general mood of the country also favored Lochner's claim. Despite the universal support for the Bakeshop Act in the New York Legislature, a large number of U.S. citizens were still committed to the idea that in a capitalistic market, a government that governs least governs best (an idea that reflects laissez-faire economics).

In a 5–4 decision, the Supreme Court upheld Lochner's due process claim, striking down the Bakeshop Act as an interference with the right of employers and employees "to make contracts regarding labor upon such terms as they may think best, or upon which they may agree." Writing for the majority, Justice RUFUS W. PECKHAM said that despite statistics indicating that the baking industry was not as healthy as some other trades, the common understanding of the Court suggested otherwise. "The trade of a baker," Peckham wrote, "is not . . . unhealthy . . . to such a degree which would authorize the legislature . . . to cripple the ability of the laborer to support himself and his family."

The Court acknowledged that state governments possess police powers to protect the health and safety of their residents. However, the Court said, a statute must have a direct relation to a material danger that would compromise the public health or the health of employees before it may restrict the hours of labor in any trade or profession. In this case, the Court concluded, the con-

nection between the Bakeshop Act and the health and welfare of New York bakers was too remote.

Two dissenting opinions were written in *Lochner,* one by Justice OLIVER WENDELL HOLMES JR., and the other by Justice JOHN M. HARLAN. Both dissents attacked the majority opinion as judicial activism and extolled the virtues of judicial self-restraint.

Harlan conceded that the Due Process Clause contains a substantive content that protects the liberty of contract. But this liberty, Harlan emphasized, may be circumscribed by state regulations that are calculated to promote the GENERAL WELFARE. Such regulations, Harlan argued, must be sustained by state and federal courts unless they clearly exceed legislative power, bear no substantial relation to societal welfare, or invade rights secured by fundamental law. Harlan concluded that doubts as to the validity of a statute must be resolved in favor of upholding its validity. Applying this standard, Harlan found the Bakeshop Act valid.

Holmes's dissent is considered a classic exposition of judicial self-restraint. As part of the U.S. system of democracy, Holmes stated, a majority of adults residing in any state have the "right to embody their opinions in law," even if those opinions are tyrannical or injudicious. It is the judiciary's role in this system to interpret and apply the laws passed by the coordinate branches of government.

Notwithstanding the Court's decision in *Lochner*, state legislatures were apparently free to maintain a paternalistic role when enacting similar laws that applied only to women. Three years after *Lochner*, the Court upheld the constitutionality of an Oregon statute that restricted women from working more than ten hours per day in a mechanical establishment, factory, or laundry. *Muller v. Oregon*, 208 U.S. 412, 28 S. Ct. 324, 52 L. Ed. 551 (1908). Although the statute was very similar to the New York statute, except that it applied to women, the Court clearly based its decision upon its perception that women were inferior to men. According to the majority opinion written by Justice DAVID BREWER, "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious . . . history discloses the fact that woman has always been dependent upon man." Because the Court found that the statute was designed for what it considered the necessary protection of women in the workplace, the Court upheld the statute as constitutional under the Fourteenth Amendment. In doing so, the Court specifically left the ruling in *Lochner* intact.

*Lochner* remained the controlling precedent for nearly 30 years; it was overruled finally in WEST COAST HOTEL CO. V. PARRISH, 300 U.S. 378, 57 S. Ct. 578, 81 L. Ed. 703 (1937). *Parrish* examined the validity of a Washington state statute that established a MINIMUM WAGE for women. A hotel owner challenged the constitutionality of the statute on the grounds that it violated his liberty of contract guaranteed by the Fourteenth Amendment.

The hotel owner relied on *Lochner* and a series of subsequent cases that nullified various state regulations as inconsistent with the substantive rights protected by the Due Process Clause. One of these cases, *Adkins v. Children's Hospital,* 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923), invalidated a similar minimum wage law in the District of Columbia. But the Supreme Court was no longer persuaded by the rationale underlying *Lochner* and ruled that the Washington statute was a reasonable exercise of the state's police powers.

In the 32 years between *Lochner* and *Parrish,* the United States was confronted by a STOCK MARKET crash in 1929, which precipitated the Great Depression of the 1930s. President FRANKLIN D. ROOSEVELT attempted to combat some of the more serious problems of the depression by initiating a host of federal laws known collectively as the NEW DEAL. These events made many U.S. citizens more sympathetic to governmental largesse.

The Supreme Court was also affected by these events. Where *Lochner* had underscored free-market laissez-faire principles, *Parrish* highlighted the unequal bargaining power of employers and employees, as well as the oppression and exploitation of female workers. Freedom of contract, the Supreme Court said in *Parrish,* is not an absolute and uncontrollable liberty.

Any lingering doubts as to the validity of *Lochner* were eliminated by the Supreme Court in *United States v. Carolene Products Co.,* 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938), which held that courts must sustain state and federal laws that regulate economic interests, unless there is no rational basis to support them. By contrast the Court said that legislation that "appears on its face to be within a specific prohibition of the Constitution . . . restricts . . . political processes . . . [or is] prejudic[ial] against

discrete and insular minorities" will be subject to stricter scrutiny.

The *Carolene Products* case ushered in the post-*Lochner* era. During this era the Supreme Court has offered little constitutional protection for contract and other property rights. At the same time, the Court has offered increasing protection against legislation that touches upon a fundamental constitutional right or denies a governmental benefit to a suspect class of persons, what the Court in *Carolene Products* called "discrete and insular minorities."

Fundamental rights include most of the rights enumerated in the first ten amendments to the Constitution, as well as the right to privacy, the right to travel, the right to vote, and the right to education. Suspect classes include groups of persons who are discriminated against on the basis of race, gender, national origin, or other "immutable" genetic characteristics (**FRONTIERO V. RICHARDSON**, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 [1973]).

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**CROSS-REFERENCES**

Due Process of Law; Jurisprudence; Labor Law; Rational Basis Test; Substantive Law.

## ♦ LOCKE, JOHN

John Locke was a seventeenth-century English philosopher whose writings on political theory and government profoundly affected U.S. law and society. It is chiefly from Locke's *Two Treatises of Government* (1690) that U.S. politics takes its core premises of the ultimate sovereignty of the people, the necessity of restraints on the exercise of **ARBITRARY** power by the executive or the legislature, and the ability of the people to revoke their social contract with the government when power has been arbitrarily used against them. The Declaration of Independence and the U.S. Constitution are testaments to many of Locke's central ideas.

Locke was born in Wrington, Somerset, England, on August 29, 1632. His father, also John Locke, was an attorney, and a Calvinist with Puritan sympathies who supported the parliamentary side in England's struggle against King Charles I and fought on that side in the English Civil War of 1642. Despite this background Locke developed monarchist leanings while attending boarding school, which remained with him throughout his life.

In 1652 Locke entered Oxford University, where he became interested in medicine and the newly developed discipline of experimental science. He collaborated with Robert Boyle, a founder of modern chemistry. Locke studied natural science and philosophy, concentrating on the principles of moral, social, and political laws. Following graduation in 1656, he earned a master of arts degree and was appointed a tutor at Oxford. He left teaching in 1662 and in 1666 decided to pursue medicine. In 1668 Locke was elected to the Royal Society.

In 1675, plagued with the symptoms of consumption, Locke moved to France in the hope of improving his health. He studied philosophy while abroad, then returned to England in 1679. His friendship with the duke of Shaftsbury made his stay in England a short one. Shaftsbury had been discovered as having been involved in a conspiracy to overthrow the king. Though Shaftsbury was acquitted of the charges, he fled to Holland in 1683. The king became suspicious of Locke and other friends of Shaftsbury, and had Locke closely watched. Knowing that his personal safety was at risk, Locke also chose exile in Holland in 1683. In 1684 his name appeared with eighty-three others on a list sent to The Hague by the English government, with the accusation that those named had committed **TREASON** and a demand for their **EXTRADITION** by the Dutch government. Locke went into hiding for a while, but soon returned to public life when the Dutch refused the extradition request.

While in Holland, Locke wrote *Essay Concerning Human Understanding* (1690) and *Two Treatises. Essay* set forth Locke's theory that all human knowledge comes from experience. It stated that people are born without ideas—that is, with a blank mind—directly challenging the belief that people are born with certain knowl-

edge already implanted. It further stated that as a result people must formulate their ideas based on experience. This theory became the basis for the school of English philosophy called empiricism.

*Two Treatises* was written when England was divided over the rule of King James II. The Protestants wished to remove the king, who was a Roman Catholic. In the Glorious Revolution of 1688, James abdicated the throne and Parliament offered the crown to the Dutch prince William of Orange and his wife, Mary. The revolution reformed government along the lines outlined by Locke in *Two Treatises,* which was published in 1690. England became a constitutional monarchy, controlled by Parliament, and greater measures of religious toleration and freedom of expression and thought were permitted.

*Two Treatises* was a blow to political absolutism. The first treatise was a refutation of the theory of the divine right of kings, which posits that monarchs derive their authority from God. The second treatise had the most lasting effect, for it set out a theory of politics that found its way into U.S. law.

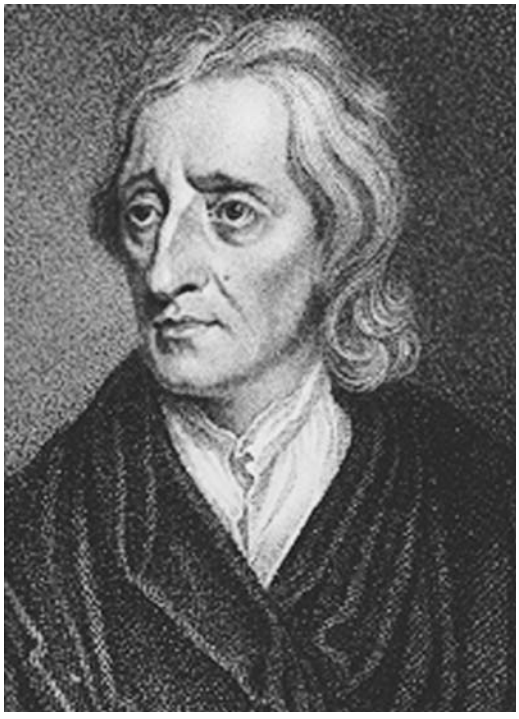

*John Locke.*
LIBRARY OF CONGRESS

In this second treatise, Locke maintained that people are naturally tolerant and reasonable, but that without a governing force, a certain amount of chaos and other inconvenience will occur. In his view people are basically pacific, communitarian, and good-natured. This belief contrasts with that of philosopher THOMAS HOBBES, which is that if left to their own devices, people will live in violent, selfish ANARCHY.

For Locke all people are inherently equal and free to pursue "life, liberty, health, and property." To do this they engage in a social contract in which they consent to give up a certain amount of power to a government dedicated to maintaining the well-being of the whole. They also give up one right, the right to judge and punish other persons, which is permitted in the state of nature. Apart from that concession to government, Locke argued, a person's individual right to freedom of thought, speech, and worship must be preserved. In addition, a person's private property must be preserved by the government. This compact between the people and their rulers legitimizes the government and explains the source of the rulers' power.

Locke believed that the people's consent to give up some power is the essential element of the social contract. Government is the trustee of

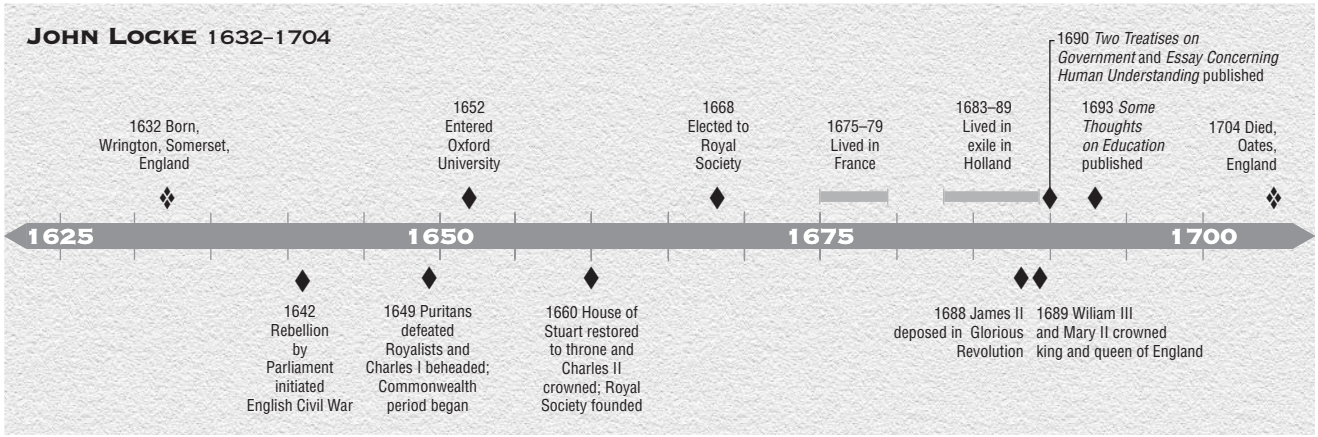

the people's power, and any exercise of power by government is specifically for the purpose of serving the people. By extending the trust analogy, Locke legitimized the concept of revolution. If their trust is abused by their governors, the people—the grantors of the trust—have a right to revoke the trust. Once the trust has been revoked, the people can assume the reins of government themselves or place them in new hands.

Locke attempted to soften this justification for revolution by claiming that revolution is appropriate only as a last resort and only in extreme circumstances. But he gave no real guidance as to how the people can be trusted to distinguish between inevitable temporary aberrations, which are to be endured, and a long series of abuses that justifies rebellion.

*Two Treatises* was well received in England, making Locke a respected figure once more and the intellectual leader of the WHIG PARTY. He returned to England in 1689, following the Glorious Revolution. He lived in semiretirement in Essex, in the company of friends such as the scientist Sir Isaac Newton. He died October 28, 1704, in Oates, Essex.

"IT IS ONE THING TO SHOW A MAN THAT HE IS IN ERROR, AND ANOTHER TO PUT HIM IN POSSESSION OF TRUTH."
—JOHN LOCKE

*Two Treatises* commanded great interest in the eighteenth century, providing justification for the American Revolution in 1776 and the French Revolution in 1789. The U.S. Declaration of Independence uses Locke's ideas of the law of nature, popular sovereignty, and the sanctity of the right of private property to set forth the premises of U.S. political thought. The U.S. Constitution, with its separation of church and state and its guarantee of personal freedoms, draws on Locke's work.

In the United States, Lockean thought continues to justify resistance to executive tyranny, such as the despotism that was exhibited by President RICHARD M. NIXON in the WATERGATE affair in the early 1970s and led to his resignation in 1974. Locke's second treatise provides support for U.S. constitutional ideals of inalienable rights and personal liberty. The FIRST AMENDMENT would be unthinkable without Locke's philosophical foundation.

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Constitution of the United States; Natural Law; "Second Treatise on Government" (Appendix, Primary Document).

## LOCKOUT

*Employer's withholding of work from employees in order to gain concession from them; it is the employers' counterpart of the employee's strike. Refusal by the employer to furnish available work to its regular employees, whether refusal is motivated by the employer's desire to protect itself against economic injury, by its desire to protect itself at the bargaining table, or by both.*

CROSS-REFERENCES

Labor Law; Labor Union.

## LOCKUP

*A place of detention in a police station, court or other facility used for persons awaiting trial. In corporate law, a slang term that refers to the setting aside of* SECURITIES *for purchase by friendly interests in order to defeat or make more difficult a takeover attempt. A lockup option is a takeover defensive measure permitting a friendly suitor to purchase divisions of a corporation for a set price when any person or group acquires a certain percentage of the corporation's shares. To be legal, such agreement must advance or stimulate the bidding process, to best serve the interests of the shareholders through encouraged competition.*

## ♦ LOCKWOOD, BELVA ANN

Belva Ann Lockwood achieved prominence as the first woman to be admitted to argue cases before the U.S. Supreme Court. In addition to her legal career, she was active in many phases of the campaign for WOMEN'S RIGHTS.

Lockwood was born October 24, 1830, in Royalton, New York. A graduate of Genessee College in Lima, New York, in 1857, Lockwood received an honorary master of arts degree from Syracuse University in 1871 and a doctor of laws degree in 1908. Before her admission to the Washington, D.C., bar in 1873, Lockwood taught school from 1857 to 1868. She began her fight for women's rights with her work advocating the passage of a bill granting female government employees equal pay for equal work.

*Belva A. Lockwood.* LIBRARY OF CONGRESS

In 1879 Lockwood further advanced the cause of women to the judiciary with her participation in the enactment of a bill permitting women to practice law before the U.S. Supreme Court. As a result she became the first woman to be admitted to this court and was subsequently admitted to practice before the former U.S. Court of Claims.

Lockwood continued her legal career while participating in reform movements, notably those for temperance and women's suffrage. At the height of her popularity in the 1880s, Lockwood was nominated by the Equal Rights party as a candidate for president of the United States in 1884 and 1888, the first woman to receive this honor.

In 1896 Lockwood was chosen to represent the United States at the Congress of Charities and Corrections held in Switzerland. After her return she continued her work in the women's rights movement and was instrumental in the formulation of the law granting women residents of the District of Columbia equal property rights and equal claims to the custody of children. She also drafted an amendment to the statehood bills of Oklahoma, Arizona, and New Mexico, allowing women in these states the right to vote.

A staunch advocate of peace, Lockwood served as a representative to the Universal Peace Congress held in Paris in 1889 and participated at the International Peace Bureau at Bern, Switzerland, in 1892.

Lockwood died May 19, 1917, in Washington, D.C.

"I KNOW WE CAN'T ABOLISH PREJUDICE THROUGH LAWS, BUT WE CAN SET UP GUIDELINES FOR OUR ACTIONS BY LEGISLATION."
—BELVA LOCKWOOD

## LOCO PARENTIS

*[*Latin, The place of a parent.*] A description of the relationship that an adult or an institution assumes toward an infant or minor of whom the adult is not a parent but to whom the adult or institution owes the obligation of care and supervision.*

The term is usually designated in loco parentis.

## LOCUS

*[*Latin, Place; place where a thing is performed or done.*]*

For example, the *locus delicti* is the place where an accident or crime occurred.

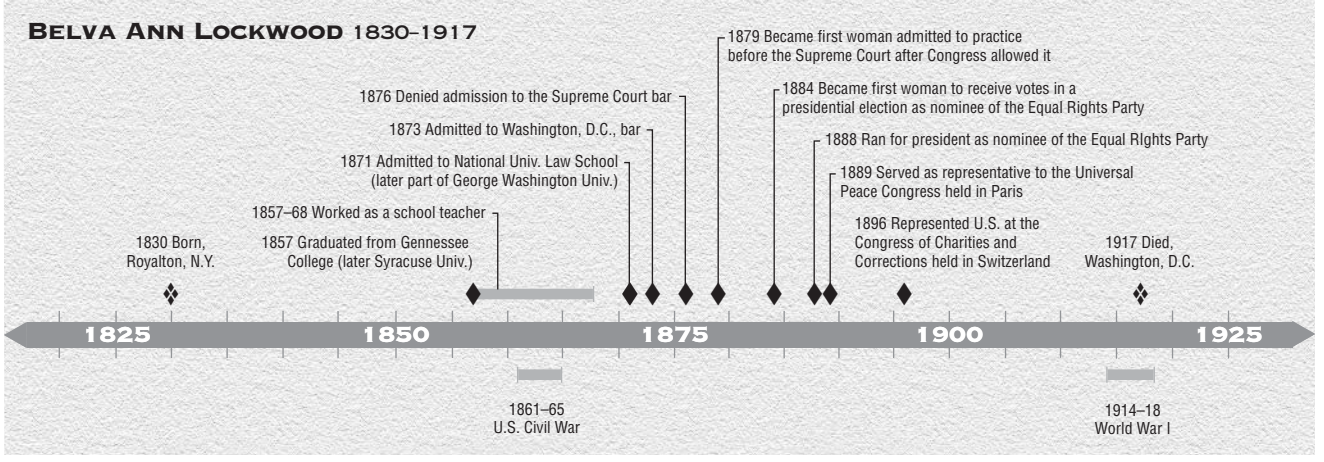

*Henry Cabot Lodge.*
LIBRARY OF CONGRESS

## LODGE, HENRY CABOT

Henry Cabot Lodge helped write the Sherman Anti-Trust Act of 1890 (15 U.S.C.A. § 1 et seq.). He was an enthusiastic supporter of the SPANISH-AMERICAN WAR of 1898 and advocated military power as the United States' best tactic for peace. He believed firmly in the principles of the MONROE DOCTRINE, by which the United States sought to protect nations in the Western Hemisphere from European intrusion. Although he opposed strong control by the federal government, he believed that in some circumstances moderate government regulation was essential to prevent SOCIALISM. Lodge was a conservative Republican U.S. senator from 1893 to 1924. He successfully fought to defeat U.S. entry into President WOODROW WILSON's newly proposed LEAGUE OF NATIONS at the end of WORLD WAR I. He chaired the Senate Foreign Relations Committee from 1918 to 1924 and influenced U.S. foreign policy in the first quarter of the twentieth century. He also was a prolific writer, most notably of a series of biographies, and the grandfather of Henry Cabot Lodge, Jr., a Republican senator in 1937–44 and 1947–53.

Lodge was born May 12, 1850, in Boston. The families of his father, John Ellerton Lodge, and mother, Anna Cabot Lodge, were wealthy and of high social standing. Lodge graduated from Harvard in 1871, and married Anna Cabot Mills ("Nannie") Davis the day after his graduation ceremony. He attended Harvard Law School from 1872 to 1874, and in 1874 made his first entry into politics as a delegate to the Republican state convention.

Lodge taught American colonial history at Harvard for a year and then turned to writing, producing a biography of his great-grandfather, a colonial history, and various magazine articles, among other works. He was an editor on the *International Review* magazine for four years, and wrote a set of books called the American Statesman Series, on GEORGE WASHINGTON, Washington Irving, and DANIEL WEBSTER, among others.

In the late 1870s, he wrote articles on election reform, gave an Independence Day address, and served two one-year terms in the Massachusetts General Court. In 1883 he chaired the Republican State Central Committee and met THEODORE ROOSEVELT, with whom he would remain close friends throughout his life.

Lodge was elected to the House in 1886, where he served for six years. He chaired the House Committee on Elections, sponsored the Federal Elections Bill, and introduced a bill prohibiting entry into the United States by illiterate

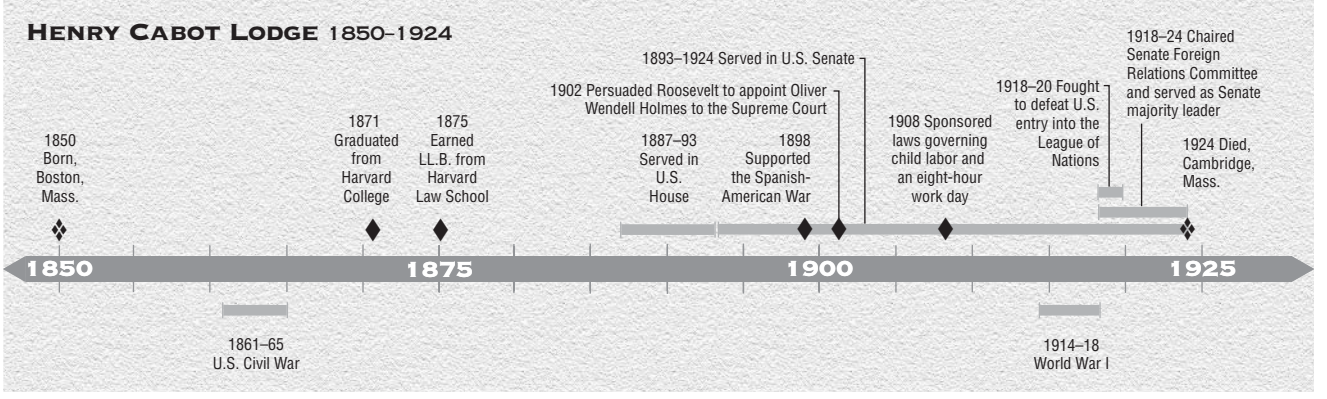

immigrants (later vetoed by President GROVER CLEVELAND). In 1890 Lodge helped write the SHERMAN ANTI-TRUST ACT, the first federal law to control growing centralization of economic power by monopolistic corporations.

In 1893 Lodge entered the Senate, where he served until his death in 1924. As a senator he was a strong supporter of the Spanish-American War, in which two of his three sons served. He supported U.S. imperialism during the presidency of Theodore Roosevelt. In 1902 he helped persuade Roosevelt to appoint OLIVER WENDELL HOLMES, JR., to the U.S. Supreme Court; Holmes's fundamentally new approach to the judicial process—which rejected the notion of legal principles as absolutes—changed U.S. law. Also in the early 1900s, he sponsored a child labor law (May 28, 1908, ch. 209, 35 Stat. 420) in Washington, D.C., and an AMERICAN FEDERATION OF LABOR law mandating an eight-hour workday. In 1906 Lodge worked on Roosevelt's Food and Drug Act (ch. 3915, 34 Stat. 768).

From 1918 to 1924, Lodge chaired the Senate Foreign Relations Committee and was the Senate majority leader. He also worked adamantly to foil President Wilson's efforts to establish the League of Nations. Lodge disliked both the policies and the personality of Wilson.

Wilson attempted to link the passage of his League of Nations with the signing of the peace treaty that would officially end World War I. Lodge attacked this approach, accusing Wilson of jeopardizing the peace process for the sake of his project. Lodge also was chief among Wilson's critics for two other actions. In an era in which presidents rarely left the country, Wilson traveled to Europe to make a highly publicized case for his League of Nations. Although he was well received by the Europeans with whom he met, the trip was not favorably viewed by many in the United States. Second, he took with him a small group of men that included only Democrats.

In 1919 Lodge addressed the Senate about the "crudeness and looseness of expression" of the proposed League of Nations. He cited a direct conflict between Wilson's league and the Monroe Doctrine, which he said dictated that "American questions be settled by America alone." He also questioned whether the United States could follow up on some of the promises outlined in Wilson's proposal, and cited a potential loss of U.S. control over immigration.

Lodge and two other men crafted a declaration listing their objections to the proposed League of Nations, the primary ones involving congressional rights. Lodge then circulated the declaration through the Republican senators seeking signatures of support, a process called a round-robin, and received thirty-seven signatures, more than enough to indicate strong support for the declaration. Lodge led a lengthy debate on the Senate floor, followed by hearings in which a variety of representatives from around the world were allowed to testify on a broad range of topics. Witnesses spoke, for example, on Irish independence, which had little relevance to the League of Nations but which took time on the floor. Lodge also read the entire text of Wilson's proposal, which took two weeks to complete, in order to wear down Wilson and his supporters and to encourage a deadlock.

Ultimately, Congress did deadlock on the issue, and the U.S. public decided the fate of the league with the November 1920 presidential election, when James Cox, the Democratic candidate, lost to WARREN G. HARDING, who opposed the league.

In his last years, Lodge returned to writing and spent time with his family. He died November 9, 1924, at age seventy-four.

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"LET EVERY MAN HONOR AND LOVE THE LAND OF HIS BIRTH . . . [BUT] IF A MAN IS GOING TO BE AN AMERICAN AT ALL LET HIM BE SO WITHOUT QUALIFYING ADJECTIVES; AND IF HE IS GOING TO BE SOMETHING ELSE, LET HIM DROP THE WORD AMERICAN FROM HIS PERSONAL DESCRIPTION."
—HENRY CABOT LODGE

## LODGER

*An occupant of a portion of a dwelling, such as a hotel or boardinghouse, who has mere use of the premises without actual or exclusive possession thereof. Anyone who lives or stays in part of a building that is operated by another and who does not have control over the rooms therein.*

## LOG ROLLING

*A legislative practice of embracing in one bill several distinct matters, none of which, perhaps, could singly obtain the assent of the legislature, and then procuring its passage by a combination of the minorities in favor of each of the measures into a majority that will adopt them all.*

*Practice of including in one statute or constitutional amendment more than one proposition, inducing voters to vote for all, notwithstanding they might not have voted for all if amendments or statutes had been submitted separately.*

## LOGAN ACT

The Logan Act (18 U.S.C.A. § 953 [1948]) is a single federal statute making it a crime for a citizen to confer with foreign governments against the interests of the United States. Specifically, it prohibits citizens from negotiating with other nations on behalf of the United States without authorization.

Congress established the Logan Act in 1799, less than one year after passage of the ALIEN AND SEDITION ACTS, which authorized the arrest and deportation of ALIENS and prohibited written communication defamatory to the U.S. government. The 1799 act was named after Dr. George Logan. A prominent Republican and Quaker from Pennsylvania, Logan did not draft or introduce the legislation that bears his name, but was involved in the political climate that precipitated it.

In the late 1790s, a French trade embargo and jailing of U.S. seamen created animosity and unstable conditions between the United States and France. Logan sailed to France in the hope of presenting options to its government to improve relations with the United States and quell the growing anti-French sentiment in the United States. France responded by lifting the embargo and releasing the captives. Logan's return to the United States was marked by Republican praise and Federalist scorn. To prevent U.S. citizens from interfering with negotiations between the United States and foreign governments in the future, the Adams administration quickly introduced the bill that would become the Logan Act.

*In 1984 Democratic presidential candidate Jesse Jackson met with Cuban president Fidel Castro and later described a ten-point agreement the two had reached. His negotiations with Castro may have violated the Logan Act, but Jackson was not prosecuted.*

AP/WIDE WORLD PHOTOS

The Logan Act has remained almost unchanged and unused since its passage. The act is short and reads as follows:

> Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined under this title or imprisoned not more than three years, or both.
>
> This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.

The language of the act appears to encompass almost every communication between a U.S. citizen and a foreign government considered an attempt to influence negotiations between their two countries. Because the language is so broad in scope, legal scholars and judges have suggested that the Logan Act is unconstitutional. Historically, the act has been used more as a threat to those engaged in various political activities than as a weapon for prosecution. In fact, Logan Act violations have been discussed in almost every administration without any serious attempt at enforcement, and to date there have been no convictions and only one recorded indictment.

One example of the act's use as a threat of prosecution involved the Reverend JESSE JACKSON. In 1984 Jackson took well-publicized trips to Cuba and Nicaragua and returned with several Cuban political prisoners seeking ASYLUM in the United States. President RONALD REAGAN stated that Jackson's activities may have violated the law, but Jackson was not pursued beyond a threat.

The only Logan Act indictment occurred in 1803. It involved a Kentucky newspaper article that argued for the formation in the western United States of a separate nation allied to France. No prosecution followed.

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## LOGGING

*The cutting of, or commercial dealing in, tree trunks that have been cut down and stripped of all branches.*

The statutes in certain jurisdictions provide for the marking of logs for the purpose of identification. Once a log is marked, its mark must be recorded, as must any change in ownership of the marked logs.

Trees which are standing upon land can become objects of PERSONAL PROPERTY prior to their severance from the soil and, therefore, a change in the ownership of the land would have no effect upon ownership of the trees. Standing timber can be conveyed separately from the property upon which it was grown. If this occurs, two separate and distinct property interests are created: one in the land and one in the timber.

A purchaser of standing timber may enter onto the land for the purpose of cutting and removing the timber. Contracts for the sale of standing timber may limit the time during which the right of entry can continue.

The public may generally float logs on any stream which is capable of being so used in its natural state. When necessary, the right to use a stream includes the incidental right to use the banks, at least below the high-water mark.

## LOGGING IN

*A colloquial term for the process of making the initial record of the names of individuals who have been brought to the police station upon their arrest.*

The process of logging in is also called booking.

## LONG-ARM STATUTE

*A state law that allows the state to exercise jurisdiction over an out-of-state defendant, provided that the prospective defendant has sufficient minimum contacts with the forum state.*

Jurisdiction over an out-of-state defendant is referred to as extraterritorial in personam jurisdiction. In personam jurisdiction, also known as PERSONAL JURISDICTION, allows a court to exercise jurisdiction over an individual, and is the fundamental requirement necessary for a court to hear the merits of a claim. Historically, a state could exercise jurisdiction only within its territorial boundaries; therefore, a nonresident defendant could be brought into court only when SERVICE OF PROCESS was effected while that defendant was within the boundaries of the state. The U.S. Supreme Court upheld this principle, and raised it to a constitutional level, when it stated that judgments entered by a court without such jurisdiction were violations of the Due Process Clause of the U.S. Constitution (*Pennoyer v. Neff,* 95 U.S. 714, 24 L. Ed. 565 [1877]).

The requirement of physical presence within the state's boundaries was expanded in *International Shoe Co. v . Washington,* 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). In *International Shoe,* the Supreme Court held that DUE PROCESS required that the defendant have "certain minimum contacts" with the forum in order for a state to assert jurisdiction, and that such jurisdiction may not offend "traditional notions of fair play and substantial justice."

Since *International Shoe,* the Supreme Court has set forth several criteria to be used in analyzing whether jurisdiction over a nonresident is proper. These criteria require (1) that the defendant has purposefully availed himself or herself of the benefits of the state so as to reasonably foresee being haled into court in that state; (2) that the forum state has sufficient interest in the dispute; and (3) that haling the defendant into court does not offend "notions of fair play and substantial justice."

Following the Court's lead in *International Shoe,* individual states began enacting long-arm statutes setting forth their requirements for personal jurisdiction over nonresidents. Illinois was the first state to do so. Its statute (Ill. Rev. Stat. chap. 110, para. 17 [1955]) allowed service of process outside the state on nonresident individuals and corporations in actions arising out of (1) the transaction of any business in the state; (2) the commission of a tortious act within the state; (3) the ownership, use, or possession of real estate in the state; or (4) a contract to insure any person, property, or risk located in the state. The Illinois statute became a template for many state long-arm statutes.

In 1963, the Uniform Interstate and International Procedure Act was promulgated by the COMMISSIONERS ON UNIFORM LAWS. The Uniform Act was similar to the Illinois statute, but

also included a provision authorizing jurisdiction in the event that an act or omission outside the state caused injury in the state. This Uniform Act also became a model for other states in developing their long-arm statutes.

Since 1963, all states and the District of Columbia have enacted long-arm statutes. Long-arm statutes tend to fall into one of two categories. The first enumerates factual situations likely to satisfy the minimum-contacts test of *International Shoe.* The second type is much broader: it provides jurisdiction over an individual or corporation as long as that jurisdiction is not inconsistent with constitutional restrictions. If such a statute enumerates requirements for jurisdiction, the facts of the situation must fall within one of those requirements. The court must then determine whether the procedural due process requirements of both the state and federal constitutions have been met.

The long-arm statute has seriously been challenged with the emergence of the INTERNET. Since the late 1990s, lawsuits that center on Internet commercial and DEFAMATION disputes have been commonplace. A key issue has been whether plaintiffs may sue and enforce judgment in their state of residence or whether they must file suit in the state where the defendant resides or has its place of business. In *Zippo Manufacturing v. Zippo Dot Com*, 952 F. Supp.1119 (W.D. Pa. 1997), the court announced a standard that showed promise for analyzing this question.

Zippo Manufacturing, the maker of the well-known Zippo lighter, discovered that another company, Zippo Dot Com, had acquired the domain names "zippo.com," "zipponews.com," and "zippo.net." From these sites, Zippo Dot Com, based in California, ran a news distribution service with nearly 150,000 paying customers, including some 3,000 in Pennsylvania, Zippo Manufacturing's state of incorporation. Zippo Dot Com's contacts with Pennsylvania were almost entirely electronic, consisting of the contract filled out online by new customers and access agreements with seven Internet service providers in that state. Zippo Manufacturing sued Zippo Dot Com in the Western District of Pennsylvania for a variety of TRADEMARK offenses relating to the domain names owned by the latter. The news service filed a motion to dismiss for lack of personal jurisdiction.

The court denied Zippo Dot Com's motion and concluded that the news service does do business in Pennsylvania; therefore, jurisdiction was established. In its ruling, the court divided websites into three categories based on the presumption that the exercise of personal jurisdiction is "directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." If a defendant enters into contracts that involve the "knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper." At the opposite end are situations where a defendant runs a "passive website" that merely contains posted information accessible to anyone. The third category involves interactive websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the site.

Owing to the different types of long-arm statutes, as well as various court interpretations of these statutes, the relevant state laws must be examined when determining whether a prospective nonresident defendant falls under the jurisdiction of a state and may be brought into that state's court.

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## LOOPHOLE

*An omission or* AMBIGUITY *in a legal document that allows the intent of the document to be evaded.*

Loopholes come into being through the passage of statutes, the enactment of regulations, the drafting of contracts or the decisions of courts. A loophole allows an individual or group to use some gap in the restrictions or

requirements of the law or contract for personal advantage without technically breaking the law or contract. In response, lawmakers and regulators work to pass reforms that will close the loophole. For example, in the federal tax code, a long-standing loophole was the so-called tax shelter, which allowed taxpayers to reduce their tax debt by making investments. Although not closed entirely, this loophole was substantially reduced by the TAX REFORM ACT OF 1986 (Pub. L. No. 99-514, 100 Stat. 2085 [codified as amended in numerous sections of 26 U.S.C.A.]).

Loopholes exist because it is impossible to foresee every circumstance or course of conduct that will arise under, or in response to, the law. Loopholes often endure for a time because they can be difficult to close. Those who benefit from a loophole will lobby legislators or regulators to leave the loophole open. In the case of ELECTION CAMPAIGN FINANCING, it is the legislators themselves who benefit. The Federal Election Campaign Act Amendments of 1974 (Pub. L. No. 93-443, 88 Stat. 1263 [1974] [codified as amended in scattered sections of 2 U.S.C.A. §§ 431–455 (1988)]) were passed to limit private financing of federal election campaigns. But loopholes in the law allow these limits to be circumvented. Through one loophole, intermediaries can pool or "bundle" contributions so that the limit is not legally exceeded. Through another, money raised specifically for building political parties (soft money) is funneled into campaigns.

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CROSS-REFERENCES

Lobbying.

## LOSS

*Diminution, reduction, depreciation, decrease in value; that which cannot be recovered.*

The term *loss* is a comprehensive one, and relative, since it does not have a limited or absolute meaning. It has been used interchangeably with *damage, deprivation,* and *injury.*

In the law of insurance, a loss is the ascertained liability of the insurer, a decrease in value of resources, or an increase in liabilities. It refers to the monetary injury that results from the occurrence of the contingency for which the insurance was taken out.

*Loss of earning capacity* is an injury to an individual's ability to earn wages at a future time and may be recovered as an element of damages in a TORT case.

## LOSS OF CONSORTIUM

See CONSORTIUM.

## LOSS OF SERVICES

*A deprivation of a family member, such as a parent or spouse, of the right to benefit from the performance of various duties, coupled with the privation of love and companionship, provided by the victim of a personal injury or* WRONGFUL DEATH.

Pecuniary awards for loss of services are a type of COMPENSATORY DAMAGES, intended to serve as restitution for injuries sustained by family members. Family relationships can be interfered with in various ways. Along with economic losses from medical expenses, there might exist pain and suffering as well as loss of consortium and society.

Damages for loss of services are recoverable by a parent whose child has been killed or injured; by a husband or wife whose spouse has been killed or injured; and, in some instances, by a father whose daughter has been a victim of seduction.

The PARENT AND CHILD relationship involves many mutual duties, privileges, and obligations. A parent has the right to the services of his or her unemancipated infant. When a child is injured by TORT in a manner which disables the child from performing services, a parent has a CAUSE OF ACTION to recover for the value of these services. This cause of action exists even where a child was not actually performing any services before being harmed. This right of action stems from the parental interest in the custody, society, companionship, and affection of his or her offspring.

A husband may sue for the loss of personal services of his wife, including the performance of various household duties as well as sexual relationships, companionship, and affection.

## LOST INSTRUMENTS

*Documents that cannot be located after a thorough, careful, and diligent search has been made for them.*

In some jurisdictions, documents that have been stolen are held to be lost. An instrument that the owner has voluntarily and intentionally destroyed in order to cancel its legal effects is not a lost instrument, nor is an instrument that has been mutilated. Generally the loss of a written instrument does not affect the validity of the transaction that it represents, since a copy can usually be established in court. An action to restore a lost instrument is not one for relief against a wrong but rather one to enforce the plaintiff's interests. It can be initiated immediately subsequent to the loss, and all interested persons should be made parties to, and should be given notice of, such proceedings.

An action to establish a lost instrument indicating ownership of land, such as a deed, can be commenced by anyone who has an interest in the subject matter, such as an heir of a deceased property owner. This type of case is analogous to a QUIET TITLE ACTION.

## LOT

*In sales, a parcel or single article that is the subject matter of a separate sale or delivery, irrespective of whether or not it is adequate to perform the contract. In the* SECURITIES *and commodities market, a specific number of shares or a particular quantity of a commodity specified for trading. In the law of real estate, one of several parcels into which real property is divided.*

A lot is ordinarily one of several contiguous pieces of land of which a block is composed. Real property is commonly described in terms of lot and block numbers on recorded maps and plats.

## ♦ LOTT, CHESTER TRENT

Trent Lott has served the U.S. government for over three decades. He was elected to both houses of the U.S. Congress and served subsequent terms as a member from the state of Mississippi. Comments suggesting his endorsement of segregationist views resulted in an uproar that led to his resignation as the Senate Majority Leader in December 2002.

As a U.S. Senator from Mississippi, Trent Lott has been a major political figure in the nation's capitol. He first came to Washington as a Democratic congressional aide in the early 1960s. Lott is best-known for his conservative views, having served as a Republican in both the House of Representatives and the U.S. Senate. He was recognized for his leadership skills in Congress and was able to organize support for important issues among Republicans and Democrats. Paul Weyrich, a radio news commentator, once described Lott "as a wily Southerner. He likes to make deals, but sometimes, when he feels a great principle is at stake, he can be tough as nails." Lott was elected by fellow senators as Senate majority leader on December 3, 1996.

Born on October 9, 1941, in Grenada County, Mississippi, Chester Trent Lott moved with his family to the costal town of Pascagoula. His father, also named Chester, was a shipyard worker who later tried his hand in the furniture business. In a *U.S. News & World Report* interview, Lott described his father as "handsome and outgoing, and I always thought he might actually run for office someday."

Lott entered the University of Mississippi (Ole Miss) in the fall of 1959. While at Ole Miss, Lott had his first real experience in politics. During his freshman year, he pledged the Sigma Nu fraternity. While he participated in Sigma Nu activities, Lott also made many friends among members of other fraternities and independent student groups. Eventually, he was elected as president of both Sigma Nu and the university's interfraternity council. Cheerleaders at Ole Miss were also elected positions, and running for cheerleader provided Lott with another opportunity to gain political skills in forming political blocks, cutting deals and doing door-to-door precinct work.

No African-American students attended the University of Mississippi when Lott first entered the school. During Lott's senior year, on September 30, 1962, Air Force veteran JAMES MEREDITH enrolled at Ole Miss, protected by armed U.S. MARSHALS. The small group was confronted by rock-throwing students and non-student protestors in violent demonstrations. By the time the violence ended, two people were dead and many others were injured and arrested. Lott worked to keep Sigma Nu fraternity members from taking part.

However, four decades after Lott graduated from Ole Miss, evidence surfaced that Lott had helped to lead a successful battle to prevent blacks from joining his fraternity. Former CNN

President Tom Johnson, a Sigma Nu member at the University of Georgia, told *Time* magazine, "Trent was one of the strongest leaders in resisting the INTEGRATION of the national fraternity in any of the chapters." Due to the strong resistance among southern chapters, Sigma Nu remained segregated during that period.

Graduating with a bachelor's degree in public administration in the spring of 1963, Lott enrolled in the Ole Miss law school. While Lott attended law school, the VIETNAM WAR was expanding in scope and troop commitments. Like other college students Lott received a student deferment from the draft. By the time he had graduated from law school in 1967, Lott had married Patricia (Tricia) Thompson of Pascagoula and, under SELECTIVE SERVICE rules, obtained a hardship exemption due to the birth of their first child, also named Chester.

Lott and his family returned to Pascagoula. For a brief period, Lott worked in a private law firm, leaving after less than a year, when he was offered a top staff job by Congressman William M. Colmer, a Mississippi Democrat. The Lott family moved to Washington, D.C., in 1968. Political skills learned at Ole Miss in organizing and influencing people earned Lott a reputation as an effective and able congressional aide. When Congressman Colmer announced his retirement from the House of Representatives in 1972, Lott announced his candidacy as a Republican to seek the vacant office. Lott was able to win Comer's endorsement and support. He had a well-organized and tireless campaign. With the aid of the landslide re-election of President RICHARD NIXON, he was able to win the House seat with a vote margin of 55 percent.

*Trent Lott.*
AP/WIDE WORLD PHOTOS

Arriving in Washington as a freshman Representative, Lott was appointed to membership on the House Judiciary Committee. As the youngest member of the committee, Lott became involved in the 1974 hearings to impeach President Nixon. The president had been implicated in the break-in of the Democratic National Committee headquarters at an office complex called WATERGATE. After the president released tape recordings and transcripts indicating his involvement and a cover-up of the crime, Lott reversed his position as a staunch supporter and joined others in the call for the president's resignation, which occurred less than a week later.

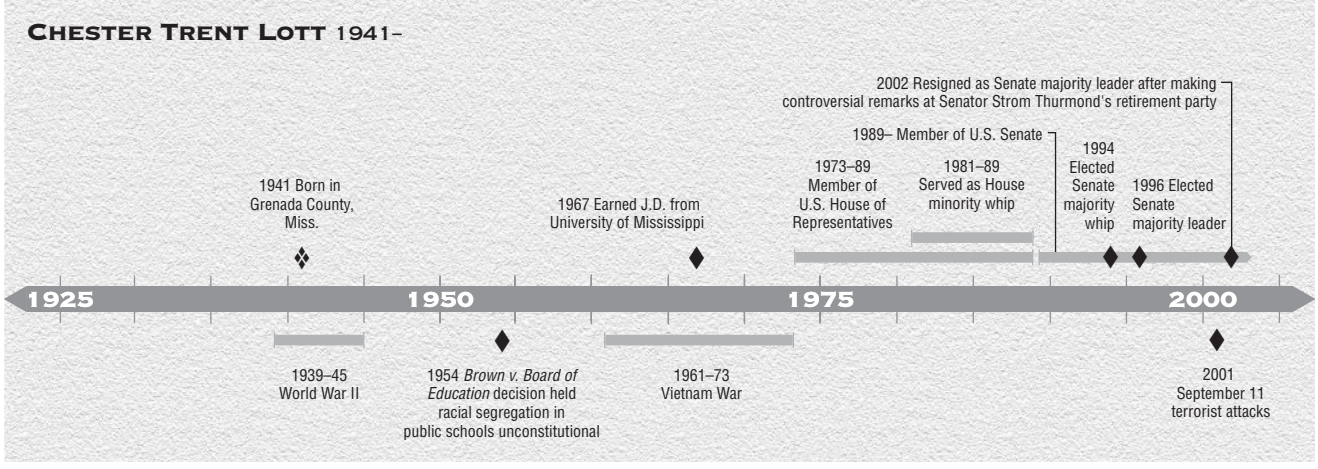

Although Lott had vowed to fight against increased government controls from his seat in the House, he actually supported more federal spending for entitlement programs, farm subsidies, public works projects, and the military. During his 16-year tenure in the U.S. House of Representatives, Lott was never credited with authoring any major legislation. However, he won praise for his work on tax and budget reform. He was an active member of the House, and served on the powerful House Rules Committee from 1975-89. With the support of his fellow Representatives, Lott was elected and served as minority whip from 1981-89. As minority whip, he was the second ranking Republican in the House of Representatives. He was also named chair of the Republican National Convention's platform committees in 1980 and 1989. Lott, however, did not always support the legislative agenda of his political party. When President **RONALD REAGAN** proposed a tax-reform bill in 1985, Lott used his political power as minority whip to oppose the measure. Two years later, Lott joined with Democrats to override a presidential **VETO** of a highway spending bill that included several highway projects in his home district.

"A LOT OF . . . WHAT IS WRONG HERE IS NOT ENOUGH COMMUNICATION, NOT ENOUGH UNDERSTANDING OF HOW PEOPLE FEEL AND HOW . . . THERE HAS BEEN IMMORAL LEADERSHIP IN MY PART OF THE COUNTRY FOR A LONG TIME."
—CHESTER "TRENT" LOTT

When the Mississippi Democratic Senator John Stennis retired in 1988, Lott announced that he would seek the vacant Senate seat. He won with a 54-percent majority. As a Senator, Lott continued to focus his political talents on building coalitions and was appointed as a member of the Ethics Committee. He was later appointed as a member of the powerful Senate Budget Committee. Continuing his climb through the ranks of the Senate, Lott was elected as the secretary of the Senate Republican Conference in 1992. In 1994, he won the election for Senate majority whip by a one-vote margin, making him the first person to be elected whip in both houses of Congress.

Lott's experiences as House minority whip helped him to establish a highly-organized whip system in the Senate. Individual members of Congress were drafted to organize and track colleagues on a regional basis. These regional whips provided daily briefings to Lott on crucial votes. One of the regional whips was also assigned to be on the Senate floor at all times. Lott's ability to work with both parties helped to end what was described in the popular press as budget gridlock. When the Senate majority leader, **BOB DOLE**, announced his plans to retire from the Senate in order to run for president, Lott used his well-controlled whip organization to campaign for the vacant leadership position. His organizational and political skills were rewarded, and he was elected senate majority leader on June 13, 1996.

The Senator's stances on other major issues facing the nation were widely known. He articulated his views on numerous radio and television interview shows. He also took advantage of the electronic media and maintained a website that stated his position on key political and national issues. On the issue of a balanced national budget, Lott declared, "I understand the concerns regarding the Balanced Budget Amendment and want to assure you that I do not take amending our Constitution lightly. However, having watched many futile attempts to reduce the deficit through legislation, I am convinced that an amendment to our Constitution is necessary." Lott also described his position concerning prayer in public schools on this site: "I have consistently advocated strong legislative action in support of the rights of students who wish to participate in voluntary prayer in their schools."

Lott was re-elected as Senate majority leader in 2002. However, at a retirement party for Senator **STROM THURMOND**, Lott praised Thurmond's 1948 segregationist's campaign for president, suggesting that the nation would have been better off if Thurmond had been elected. The comments, which Lott claimed were lighthearted and intended as a complement to Thurmond, soon became the center of a media frenzy and serious debate among members of Congress. President **GEORGE W. BUSH** called the comments "offensive" and "wrong." Lott apologized on a number of occasions, but to no avail. Both Democrat and Republican members of Congress criticized the remarks, including his friends in the Senate.

A number of media sources reviewed prior public comments by Lott and discovered that he had made similar remarks in the past. In fact, in 1980, he made a very similar claim endorsing Thurmond after Thurmond had made a speech in support of Ronald Reagan, who was then a candidate for president. In December 2002, Bill Frist (R.-Tenn.) claimed that he had enough votes to replace Lott as Senate majority leader. However, Lott resigned from the position before any vote took place.

Lott retained his seat in the Senate, but the events in 2002 and early 2003 have clouded the

public's view of him. In Congress, his ability to mobilize his fellow representatives and senators in support of key legislation was recognized with prominent positions in both houses. He also has the distinction of being the first Southerner to be House minority whip, and the first person to be elected whip in both houses of Congress. Nevertheless, his reputation and legacy have been tarnished, and his comments will likely follow him for some time to come.

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## LOTTERY

See STATE LOTTERY.

## LOUISIANA CIVIL CODE

See CIVIL LAW.

## LOUISIANA PURCHASE

The Louisiana Purchase of 1803 doubled the size of the United States, gave the country complete control of the port of New Orleans, and provided territory for westward expansion. The 828,000 square miles purchased from France formed completely or in part thirteen states: Arkansas, Colorado, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, and Wyoming. President THOMAS JEFFERSON was unsure if the Constitution authorized the acquisition of land, but he found a way to justify the purchase.

France originally claimed the Louisiana Territory in the seventeenth century. In 1763 it ceded to Spain the province of Louisiana, which was about where the state of Louisiana is today. By the 1790s U.S. farmers who lived west of the Appalachian Mountains were shipping their surplus produce by boat down rivers that flowed into the Gulf of Mexico. In 1795 the United States negotiated a treaty with Spain that permitted U.S. merchants the right of deposit at New Orleans. This right allowed the merchants to store their goods in New Orleans without paying duty before they were exported.

In 1800 France, under the leadership of Napoléon, negotiated a secret treaty with Spain that ceded the province of Louisiana back to France. President Jefferson became concerned that France had control of the strategic port of New Orleans, and sought to purchase the port and West Florida. When France revoked the right of deposit for U.S. merchants in 1802, Jefferson sent JAMES MONROE to Paris to help ROBERT R. LIVINGSTON convince the French government to complete the sale. These statesmen warned that the United States would ally itself with England against France if a plan were not devised that settled this issue.

Monroe and Livingston were authorized by Congress to offer up to $2 million to purchase the east bank of the Mississippi; Jefferson secretly advised them to offer over $9 million for Florida and New Orleans.

Napoléon initially resisted U.S. offers, but changed his mind in 1803. He knew that war with England was imminent, and realized that if France were tied down with a European war, the United States might annex the Louisiana Territory. He also took seriously the threat of a U.S.-English alliance. Therefore, in April 1803 he instructed his foreign minister, Charles-Maurice de Talleyrand-Périgord, to negotiate with Monroe and Livingston for the United States' purchase of the entire Louisiana Territory. Acting on their own, the U.S. negotiators agreed to the price of $15 million, with $12 million paid to France and $3 million paid to U.S. citizens who had outstanding claims against France. The purchase agreement, dated April 30, was signed May 2 and reached Washington, D.C., in July.

President Jefferson endorsed the purchase but believed that the Constitution did not provide the national government with the authority to make land acquisitions. He pondered whether a constitutional amendment might be needed to legalize the purchase. After consultations Jefferson concluded that the president's authority to make treaties could be used to justify the agreement. Therefore, the Louisiana Purchase was designated a treaty and submitted to the Senate for ratification. The Senate ratified the treaty October 20, 1803, and the United States took possession of the territory December 20, 1803.

The U.S. government borrowed money from English and Dutch banks to pay for the acquisition. Interest payments for the fifteen-year loans brought the total price to over $27 million. The vast expanse of land, running from the Mississippi River to the Rocky Mountains and from

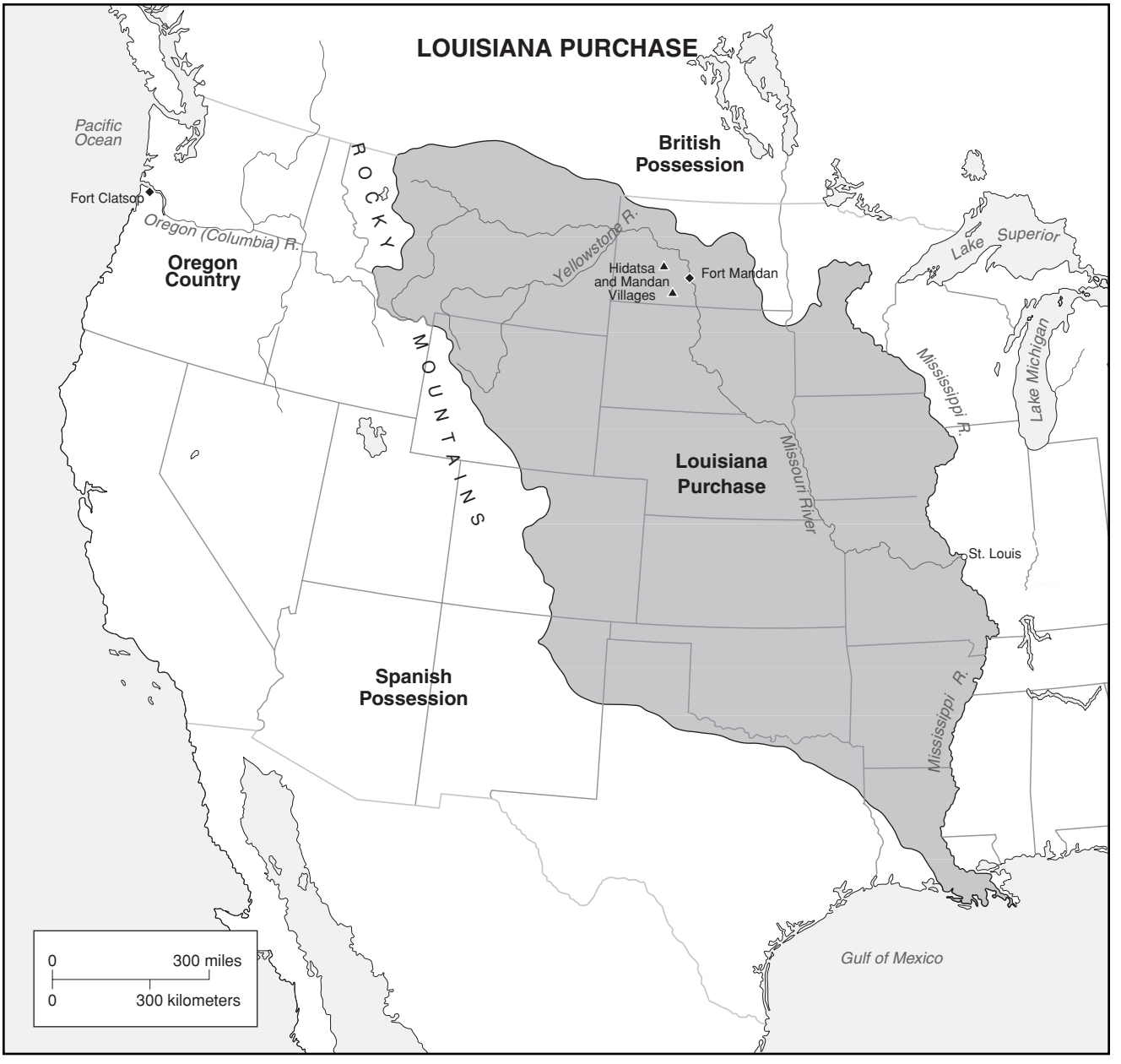


*Map showing area of Louisiana Purchase and surrounding areas.*

ILLUSTRATION BY CHRISTINE O'BRYAN. GALE GROUP

the Gulf of Mexico to the Canadian border, is the largest ever added to the United States at one time. The settling of the territory played a large part in the debate over SLAVERY preceding the Civil War, as Congress grappled with the question of whether to allow slavery in new states, such as Missouri and Kansas.

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CROSS-REFERENCES

Kansas-Nebraska Act; Missouri Compromise of 1820.

## LOW-TIDE ELEVATION

*Offshore land features such as shoals, rocks, or reefs that are exposed at low tide but submerged at high tide are referred to as low-tide elevations.*

If a low-tide elevation lies at least partially within the normal breadth of the TERRITORIAL WATERS of a nation, the low-water line of that elevation may be used as a baseline for measuring the ultimate reach of the territorial sea of

that nation. Those low-tide elevations lying totally outside the usual breadth of the territorial sea do not expand the reach of the territorial sea of a nation.

## LOYALTY OATH

*An oath that declares an individual's allegiance to the government and its institutions and disclaims support of ideologies or associations that oppose or threaten the government.*

Loyalty oaths are required of government officials, such as the president, members of Congress and state legislatures, and members of the judiciary. Naturalized citizens are required to pledge their allegiance to the United States, as are members of the ARMED SERVICES. Employees in sensitive government positions may also be required to take a loyalty oath. (See U.S.C.A. § 1448; U.S. Const. art. II, § 1, cl. 7; U.S. Const. art. VI, cl. 3.)

Requiring an employee to promise to support the government as a condition of employment is constitutional as long as the requirement is reasonably related to the employee's fitness for the particular position. Loyalty oaths that infringe on a person's ability to exercise a constitutional right must be narrowly focused to achieve a legitimate government objective. If an oath is overly broad or vague, it may be found unconstitutional.

Loyalty oaths have played a role in American history since the settlement of the colonies. The Puritans in New England required citizens to pledge their support of the commonwealth and to report any individuals who advocated dissent against the government. To ensure unity the CONTINENTAL CONGRESS and the legislatures of the first states all enacted laws requiring citizens to pledge their allegiance to the U.S. government.

Loyalty oaths are often invoked during times of stress, such as wars, or when the government perceives an outside threat to security. For example, after the Civil War, some states enacted statutes that excluded from certain professions those who had been disloyal to the United States and had sympathized with the Confederacy. One statute that required an oath of prior loyalty for ADMISSION TO THE BAR was found unconstitutional because it imposed a legislative punishment for past acts. (See *Ex parte Garland,* 4 Wall. 333, 71 U.S. 333, 18 L. Ed. 366 [1866]; *Cummings v. Missouri,* 4 Wall. 277, 71 U.S. 277, 18 L. Ed. 356 [1866].)

The period after WORLD WAR II was the high-water mark in the history of loyalty oaths. Fear of Communist subversion affected many aspects of life in the United States. There was particular concern that Communist sympathizers were obtaining employment in the government and in public schools. Thus the majority of states enacted statutes that required public employees, public school teachers, and university professors to sign a loyalty oath as a condition of employment. Under some of the statutes, schools were permitted to discharge teachers who were thought to be disloyal to the government. Most of the statutes required employees to pledge their support of the state and federal constitutions. Some also required teachers to promise to promote patriotism, pledge not to teach or advocate the forcible overthrow of the government, and swear that they did not belong to the Communist party or any other organization that advocated the overthrow of the government.

Most loyalty oaths required of public employees have been struck down by the Supreme Court, usually on the ground that they violate DUE PROCESS because they are vague and susceptible to wide interpretation. In *Baggett v. Bullitt,* 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964), the Court invalidated Washington's statute requiring teachers and state employees to take a loyalty oath. This oath stated that the employee promised to support the federal and state constitutions and promote respect for the flag and reverence for law and order. The Court held that the oath was unduly vague, uncertain, and broad. The Court found further that it violated due process and infringed on the teachers' FREEDOM OF SPEECH. (See also *Cramp v. Orange*

*Enlistees in the U.S. Navy take a loyalty oath during a re-enlistment ceremony aboard the USS* John C. Stennis *in 2002. Armed services members are required to pledge their allegiance to the United States.*

AP/WIDE WORLD PHOTOS

*County, Florida,* 368 U.S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 285 [1961].)

The Court expressed a particular interest in protecting ACADEMIC FREEDOM from infringements imposed by loyalty oaths, in *Keyishian v. Board of Regents,* 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967). In declaring a New York loyalty statute unconstitutionally vague, the Court in *Keyishian* called academic freedom a "special concern of the First Amendment." It also expressed its belief that loyalty statutes that attempt to prescribe what a teacher can say threaten to "cast a pall of orthodoxy over the classroom."

Some loyalty oath statutes have been invalidated on the ground that they unconstitutionally infringe on FREEDOM OF ASSOCIATION. In *Wieman v. Updegraff,* 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216 (1952), the Court held that Oklahoma's loyalty oath offended due process because it indiscriminately penalized innocent association or membership in Communist or other subversive groups. That oath required public employees to deny any past affiliation with such organizations. Similarly, in *Elfbrandt v. Russell,* 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966), the Court invalidated Arizona's public employee loyalty oath on the ground that it infringed on the employees' freedom of association. To satisfy the Constitution, such statutes may penalize only those who join a subversive organization with knowledge of the group's illegal objectives and SPECIFIC INTENT to further them. The Arizona statute denied public employment to anyone associated with a subversive organization, whether or not the person knew of the group's objectives or subscribed to them.

In some cases the Court has upheld loyalty oaths for government employees if the oaths meet certain requirements. The oaths may not infringe on freedom of speech or association and may not be unduly vague. According to the Court, requiring a public employee to promise to uphold and defend the Constitution and oppose the illegal overthrow of the government does not unduly burden freedom of speech or association. (See *Cole v. Richardson,* 405 U.S. 676, 92 S. Ct. 1332, 31 L. Ed. 2d 593 [1972].)

In 1994 a loyalty oath as a prerequisite for public employment was challenged on the ground that it violated religious freedom. In *Bessard v. California Community College,* 867 F. Supp. 1454 (E.D. Cal. 1994), the plaintiffs, who were Jehovah's Witnesses, stated that proclaiming loyalty to the government is prohibited by their religion. They argued that under the Religious Freedom Restoration Act of 1993 (RFRA) (42 U.S.C.A. § 2000bb et seq.), the state could not require them to take the loyalty oath as a condition of employment unless it could prove that it had a compelling interest that could not be served except by requiring the oath. The court held that the RFRA applied to the case, that the loyalty oath unconstitutionally infringed on the plaintiffs' religious freedom, and that the defendant must make reasonable accommodations for the plaintiffs. The court further noted that the defendant could ensure the plaintiffs' loyalty by having them sign a statement that they would not act contrary to the defendant's interests. In *City of Boerne v. Flores,* 117 S. Ct. 2157 (1997), the Supreme Court struck down RFRA as exceeding Congress's authority to safeguard rights under the FOURTEENTH AMENDMENT. The Court held that RFRA was an unconstitutional encroachment on state power.

Government attempts to condition the receipt of certain benefits on a declaration of loyalty have generally been found unconstitutional. In *Speiser v. Randall,* 357 U.S. 513, 78 S. Ct. 1352, 2 L. Ed. 2d 1460 (1958), the Court held that requiring veterans to take a loyalty oath as a precondition to receiving a veterans' property tax exemption impinged on their free speech rights. Justice WILLIAM J. BRENNAN JR., writing for the majority, reasoned, "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." Brennan's opinion went on to state that the requirement would have a chilling effect on the claimant's exercise of free speech.

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CROSS-REFERENCES

Chilling Effect Doctrine; Cold War; Communism; Compelling State Interest; Due Process of Law; Void for Vagueness Doctrine.

## L.S.

*An abbreviation for* locus sigilli, *Latin for "the place of the seal," signifying the place within a written contract where a seal is affixed in order to bind the agreement.*

Since the use of seals is decreasing, the use of this abbreviation has declined.

## LUMP-SUM SETTLEMENT

*The payment of an entire debt all at once rather than in installments; the payment of a set amount of money to satisfy a pecuniary obligation that might otherwise continue indefinitely.*

*Lump-sum alimony,* for example, is the payment of a large sum of money upon the dissolution of a marriage in order to circumvent the obligation to pay a certain amount, fixed or fluctuating, on a regular basis, for an indefinite period of time. This type of PROPERTY SETTLEMENT is also known as *alimony in gross.*

## ❖ LURTON, HORACE HARMON

Horace Harmon Lurton epitomized late-nineteenth-century judicial conservatism. Whether he was on the state or federal bench, restraint characterized Lurton's opinions. After a successful period in private practice in the 1860s and 1870s, Lurton won election to the Tennessee Supreme Court in 1886. He was its chief justice in 1893; a federal judge on the U.S. Court of Appeals for the Sixth Circuit, in Cincinnati, from 1893 to 1909; and a professor and eventually law school dean at Vanderbilt University starting in 1898. In 1910, at age sixty-six, he became the oldest justice ever appointed to the U.S. Supreme Court.

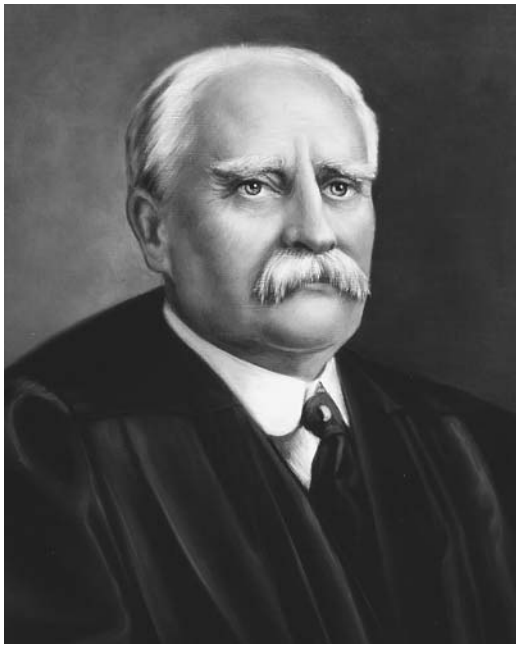

*Horace H. Lurton.*
U.S. SUPREME COURT

Lurton was born in Newport, Kentucky, on February 26, 1844. The son of an itinerant physician-turned-preacher, he spent a humble childhood in Tennessee. The defining moment in his life came while he was a sixteen-year-old undergraduate studying at Douglas University, in Chicago. When the Civil War broke out, Lurton immediately left school to join the Confederate army. After refusing discharge for a lung condition, he was captured; escaped; and then, while helping conduct guerrilla raids on Union forces, imprisoned again. He was thought to be near death in the last months of the war when his mother successfully appealed to President

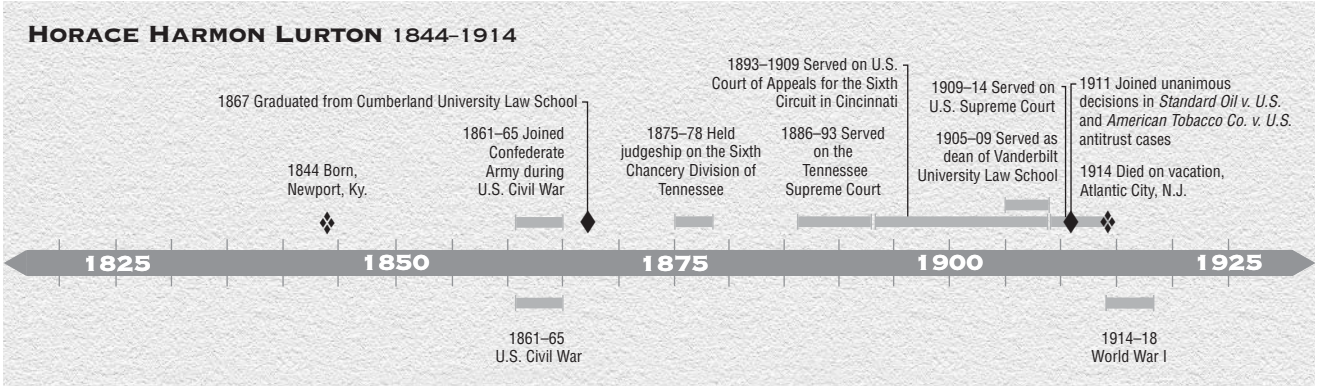

ABRAHAM LINCOLN to release him for health reasons.

The experience of war gave Lurton new priorities. Rather than returning to finish his degree in Chicago, he chose to pursue law at Cumberland University Law School, in Lebanon, Tennessee. After graduating in 1867, he distinguished himself in private practice as a diligent, detail-oriented attorney. In 1875 he was appointed to fill a vacated judgeship in the Sixth Chancery Division of Tennessee, where he served for three years before financial pressures made him return to practicing law. The judgeship cemented his reputation, and his practice flourished over the next decade. In 1886 he ran for a seat on the Tennessee Supreme Court. Lurton won. For the next seven years, he was regarded as an eminently fair, patient, and courteous judge. Not the least of his admirers were his colleagues on the Tennessee high court: by a unanimous vote, they made him the court's chief justice in 1893. While on the court he also taught law at Vanderbilt University.

"THE DUTY OF THE COURT IS LIMITED TO THE DECISION OF ACTUAL PENDING CONTROVERSIES."
—HORACE LURTON

No sooner had Lurton been made chief justice of the Tennessee Supreme Court than President GROVER CLEVELAND tapped him for the federal bench. Lurton resigned from the Tennessee Supreme Court and took his seat on the U.S. Court of Appeals for the Sixth Circuit, in Cincinnati. On the appellate court, Lurton continued to pursue the conservative legal philosophy that had guided his earlier career. He placed extreme importance on the SEPARATION OF POWERS, preferring to have legislatures make laws and abhorring modification of the law by the courts.

In 1905 Lurton served as dean of the Vanderbilt University law school. He was nearly appointed to the U.S. Supreme Court in 1906 by the reform-minded President THEODORE ROOSEVELT. The Republican president's selection was a measure of the respect that the Democratic judge had garnered. Roosevelt only backed off from appointing Lurton when he was persuaded to choose a Republican instead.

In December 13, 1909, President WILLIAM HOWARD TAFT had no qualms about appointing a Democrat, or about appointing the oldest candidate in Supreme Court history. Some opposition was raised over Lurton's age; more complaints were directed at the narrowness of his outlook. Nevertheless, the Senate approved the nomination and Lurton received his commission only one week later. There proved to be no reason for worry: as an associate justice, Lurton largely followed the lead of the majority. Commentators are generally at a loss to find much of note in Lurton's tenure on the Court, which lasted four years until his death. It was the Progressive Era, and the Court was often concerned with the issue of government regulatory power, particularly in antitrust, the area of law devoted to enforcing fair competition in business. Although he had always resisted so-called judge-made law, Lurton joined in the Court's unanimous decisions in groundbreaking antitrust cases such as *Standard Oil v. United States,* 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911), and *American Tobacco Co. v. United States,* 221 U.S. 106, 31 S. Ct. 632, 55 L. Ed. 663 (1911).

Lurton died July 12, 1914, in Atlantic City, New Jersey.

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## LYNCHING

*Violent punishment or execution, without due process, for real or alleged crimes.*

The concept of taking the law into one's own hands to punish a criminal almost certainly predates recorded history. Lynching (or "lynch law") is usually associated in the United States with punishment directed toward blacks, who made up a highly disproportionate number of its victims. (While the origins of the term "lynch" are somewhat unclear, many sources cite William Lynch, an eighteenth-century plantation owner in Virginia who helped to mete out vigilante justice.)

Lynching acquired its association with violence against blacks early in the nineteenth century. It was used as a punishment against slaves who tried to escape from their owners. Sometimes, whites who openly opposed SLAVERY were the victims of lynch mobs as well. Perhaps not surprisingly, lynching did not become a pervasive practice in the South until after the Civil War. The passage of the FOURTEENTH AMENDMENT to the Constitution granted blacks full rights of citizenship, including the right to DUE PROCESS OF LAW. Southern whites had been humiliated by their loss to the North, and many resented the thought that their former slaves were now on an equal footing with them (rela-

tively speaking). Groups such as the KU KLUX KLAN and the Knights of the White Camelia attracted white Southerners who had been left destitute by the war. These groups promoted violence (sometimes indirectly) as a means of regaining white supremacy.

Part of the appeal of groups such as the Ku Klux Klan was their white supremacy focus. But these groups also played on the fears of Southern whites—that blacks would be able to compete with them for jobs, that blacks could run for political office, and even that blacks could rebel against whites. Lynchings were carried out because of these fears. Whites believed that lynchings would terrorize blacks into remaining subservient while allowing whites to regain their sense of status.

Lynchings became even more widespread beginning in the 1880s and would remain common in the South until the 1930s. Between 1880 and 1930, an estimated 2,400 black men, women, and children were killed by lynch mobs. (During the same time period, roughly 300 whites were lynched.) Most lynchings occurred in the Deep South (i.e., Mississippi, Georgia, Louisiana, Alabama, and South Carolina). Border Southern states—Florida, Tennessee, Arkansas, Kentucky, and North Carolina also had a noteworthy number of lynchings.

A partial list of "crimes" that prompted lynch mobs during these years underscores a chilling disregard for life: gambling, quarreling, arguing with a white man, attempting to vote, unruly remarks, demanding respect, and "acting suspiciously." Lynchings were often carried out against those suspected of more serious crimes, but they were carried out without allowing a fair trial. It is no exaggeration to state that any black man, woman, or child in the South during these years was in danger of being lynched for any real or imagined improper behavior.

Often, the victim of a lynching would be dragged from his or her home; not infrequently, a lynch mob would drag a victim from a jail cell where supposedly he or she was to be awaiting a fair trial. The typical lynch mob would be made up of local citizens; a core group would actually carry out the crime, while many of the town's residents would look on. The spectators often included "respectable" men and women, and children were often brought to lynchings. A lynching victim might be shot, stabbed, beaten, or hanged; if he was not hanged to death, his body would often be hung up for display. Local police, and even members of the armed forces, either could not or would not intervene to stop a lynch mob from taking the law into its own hands. Not infrequently, a lynching would conclude with a loud, rowdy demonstration among the assembled crowd. The clear message in each lynching was that the mob was in control.

*An African American victim of a 1928 lynching. Between 1880 and 1930, an estimated 2,400 black men, women, and children were killed by lynch mobs.*

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One of the most common crimes answered by lynch mobs was rape—particularly the rape of a white woman by a black man. Often, all that a black man had to do to be accused of rape was to speak to a white woman or ask her out. Lynchers justified their actions by saying that they needed to protect women from dangerous men. In response, a group of prominent women from seven Southern states met in 1930 to form the Association of Southern Women for the Prevention of Lynching. This group deplored not only the act of lynching itself, but also the fact that lynchings were frequently witnessed by women and children. They were angered by claims that lynching was a means of protecting white women. During the 1930s, they worked to eliminate lynchings throughout the South.

Efforts by politicians to end lynchings were weak at best. Efforts to move anti-lynching legislation through Congress in the early 1900s and again in the 1930s proved futile, in part because Southern representatives and senators

**Lynchings by Race, 1882 to 1964**

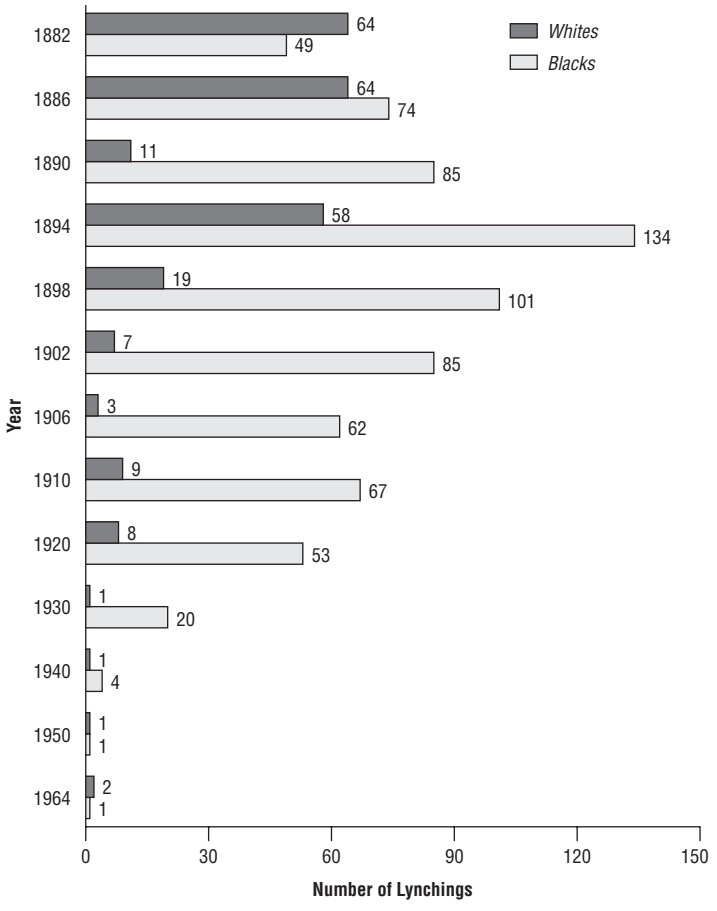


SOURCE: University of Missouri-Kansas City School of Law, Professor Douglas Linder's Famous Trials Homepage, Sheriff Shipp Trial, Lynching Statistics.

carried significant political weight. The first politician to take a visible stand against lynching was President HARRY S. TRUMAN, in 1946. Shocked by a lynching in Monroe, Georgia, in which four people—one a WORLD WAR II veteran—were pulled off of a bus and shot dozens of times by a mob, Truman launched a campaign to guarantee CIVIL RIGHTS for blacks, including a push for federal anti-lynching laws.

Truman was able to realize part of what he wanted, but the powerful Southern lobby managed to maintain much of the status quo. Although large-scale lynchings were no longer staged, blacks in the South still faced vigilante retribution. The murder of Emmett Till, in 1955, put enormous pressure on the South to condemn such barbarism. Till, a 14-year-old from Chicago, was visiting relatives in rural Mississippi, where he made suggestive remarks to a white woman. The woman's husband and brother-in-law tracked Till down, shot him, and threw his body in a river. Although (perhaps because) they were acquitted of the murder, the case added momentum to the growing CIVIL RIGHTS MOVEMENT. People across the nation were genuinely shocked at the trial's outcome, and new civil rights legislation was introduced in Congress. By the time the CIVIL RIGHTS ACT of 1965 was signed into law, there were still racial tensions—and elements of racial discord continue into the twenty-first century—but the era of the free-for-all lynch party in which entire communities participated had effectively come to a close.

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## CROSS-REFERENCES

Civil Rights Movement; Slavery; Vigilantism.

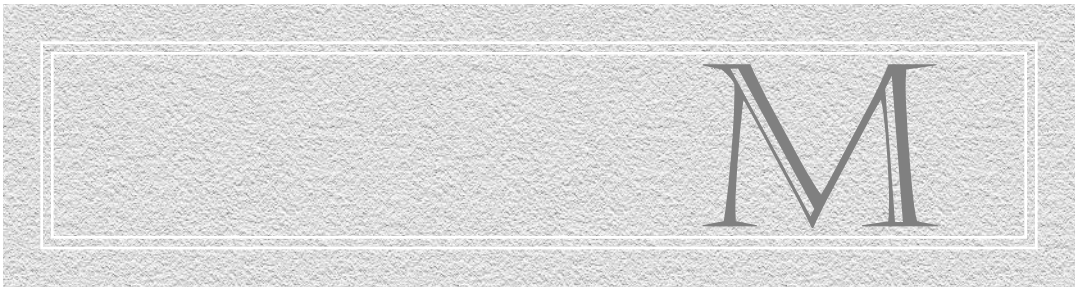

## ♦ MACKINNON, CATHARINE ALICE

Catharine A. MacKinnon is a law professor, author, and one of the leading scholars in feminist legal theory. MacKinnon's ideas about SEXUAL HARASSMENT and PORNOGRAPHY have forced courts and legal commentators to reexamine their assumptions. Her controversial proposal for suppressing pornography was enacted by the city council of Indianapolis, but the ordinance was ultimately overturned by a federal appeals court.

MacKinnon was born in 1946 in Minnesota. Her father, George E. MacKinnon, was a prominent REPUBLICAN PARTY leader who served one term in Congress and later became a federal appeals court judge. MacKinnon graduated from Smith College in 1969 and then attended Yale University Law School. She received her law degree in 1977 and a Ph.D. in political science from Yale in 1987.

MacKinnon was admitted to the Connecticut bar in 1978, and the following year she published her first book, *Sexual Harassment of Working Women: A Case of Sex Discrimination.* She served as co-counsel for Mechelle Vinson in the groundbreaking U.S. Supreme Court case concerning sexual harassment in the workplace: *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). The Court agreed with MacKinnon that the concept of a "hostile work environment" was actionable under the 1964 CIVIL RIGHTS ACT (42 U.S.C.A. § 2000e et seq.) as SEX DISCRIMINATION. The Court rejected a narrow reading of the law that would have restricted sexual-harassment claims to discrimination of an economic character. Under this restrictive reading, an employer could not be held liable for harassment unless the employee's salary and promotions were affected by the actions.

Between 1979 and 1989, MacKinnon was a visiting professor at a number of prominent law schools, including her alma mater, Yale. Although she was a prolific writer and a popular teacher, her views and her actions concerning pornography made her a controversial public figure. Her radical feminist theories challenged the legitimacy of the legal system and mainstream liberal thought. She argued that men, as a class, have dominated women, creating gender inequality. According to MacKinnon, this inequality is the consequence of a systematic subordination rather than a product of irrational discrimination. Thus, heterosexuality is a social arrangement in which men are dominant and women are submissive. Gender, for radical feminists, is a question of power.

In MacKinnon's view, pornography is a powerful tool of the dominant male class, subordinating women and exposing them to rape and other abusive behavior. In 1982, she and feminist author ANDREA DWORKIN convinced the Indianapolis city council to enact a pornography ordinance that expressed their theory of sexual subordination. The ordinance described

"PORNOGRAPHY SETS THE PUBLIC STANDARD FOR THE TREATMENT OF WOMEN IN PRIVATE AND THE LIMITS OF TOLERANCE FOR WHAT CAN BE PERMITTED IN PUBLIC."
—CATHARINE MACKINNON

*Catharine A. MacKinnon.* AP/WIDE WORLD PHOTOS

pornography as "a discriminatory practice based on sex which denies women equal opportunity in society," and defined it as "the graphic sexually explicit subordination of women, whether in pictures or words," especially in a violent or degrading context. The ordinance made unlawful the production, sale, exhibition, and distribution of pornography and gave anyone who was injured by a person who has seen or read pornography the right to bring a civil suit against the maker or seller.

Supporters of the ordinance argued that the legislation was a **CIVIL RIGHTS** measure that was meant to fight sex discrimination. In their view, the ordinance regulated conduct, rather than free speech, and thus did not violate the **FIRST AMENDMENT.**

The U.S. Court of Appeals for the Seventh Circuit, in *American Booksellers Ass'n, Inc. v. Hudnut,* 771 F.2d 323 (1985), overturned the ordinance. The court agreed that pornography affected the way in which people view the world and their social relations, but it observed that the same could be said of other protected speech, including expressions of racial bigotry. To permit the MacKinnon-Dworkin approach would give the government control of "all institutions of culture" and allow it to be the "great censor and director of which thoughts are good for us." Despite the demise of the ordinance, MacKinnon has remained steadfast in her view, sometimes debating persons who defend the publication of pornography on First Amendment grounds.

In 1989, MacKinnon became a tenured law professor at the University of Michigan Law School. She was named as the Elizabeth A. Long Chair in Law in 1998. Since 1997, she has served as visiting professor of law at the University of Chicago and has also served as a visiting professor at Columbia University and the University of Basel in Switzerland. She has continued to write and to lecture about **FEMINIST JURISPRUDENCE.**

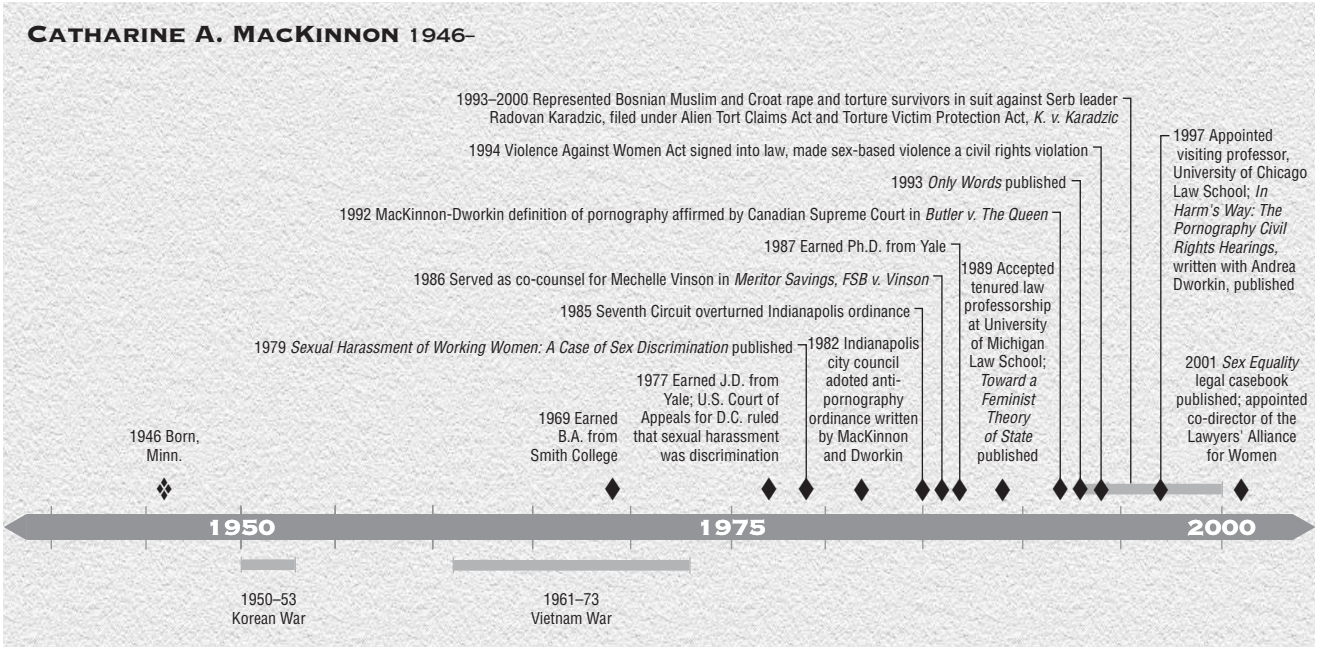

MacKinnon's 1993 book, *Only Words,* restated her attack on pornography, rape, and the sexual subordination of women. In 1998, she published another book entitled *In Harm's Way: The Pornography Civil Rights Hearings*, and in 2001, she published a casebook entitled *Sex Equality*. She has a number of works in progress.

MacKinnon remained active in litigation. In August 2000, along with co-counsel, she successfully secured a $745 million verdict in a New York court for Croatians and Muslim Bosnian women and children who were sexual victims in Serbia. *Kadic v. Karadzic,* 866 F.Supp. 734 (S.D.N.Y. 1994), 70 F. 3d 232 (2d Cir. 1996), cert. denied 518 U.S. 1005 (1996). The case, originally filed under the Alien Tort Claims Act and Torture Victim Protection Act, established rape as a legal claim for GENOCIDE under INTERNATIONAL LAW and has been influential in domestic and international courts. MacKinnon also served as co-director of the Lawyer's Alliance for Women.

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## MACPHERSON V. BUICK MOTOR CO.

A famous 1916 New York Court of Appeals decision, *MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050, expanded the classification of "inherently dangerous" products and thereby effectively eliminated the requirement of privity—a contractual relationship between the parties in cases that involve defective products that cause personal injury.

The Buick Motor Company manufactured automobiles that it sold to retailers who, in turn, sold them to consumers. The plaintiff, Donald MacPherson, bought a car from a dealer and was subsequently injured when the car collapsed during a drive. The accident was due to a defective wheel, which the defendant, Buick, did not make but purchased from another manufacturer. Evidence indicated that the defect could have been discovered by reasonable inspection, but none took place. The plaintiff sued the defendant for his personal injuries, but the defendant claimed that it was not liable for the wheel manufacturer's NEGLIGENCE. The state trial and intermediate appellate courts found for the plaintiff, and the defendant appealed to the Court of Appeals, the highest court of New York. The court narrowed the issue to whether the defendant owed a duty to anyone but the retailer to whom it sold the car.

In a majority opinion written by BENJAMIN CARDOZO, the court affirmed the judgment for the plaintiff. Since the defendant was a manufacturer of automobiles that, if defective, are inherently dangerous by virtue of their existence, it had a responsibility for the finished product, which included testing its various parts before placing it on the market for sale. The manufacturer could not avoid liability based upon the fact that it purchased the wheels from a reputable manufacturer, because it had a duty to inspect the car, which it failed to do. The defendant argued that since poisons, explosives, or comparable items that are normally used as "implements of destruction" were not involved, there was no "imminent danger" to the plaintiff's life. There was therefore, no basis for the imposition of liability upon a manufacturer to a third person, who was not a party to the contract between the manufacturer and seller of the dangerous product. The court rejected this argument, reasoning that if a product when negligently made poses a danger of personal injury, then the product is "a thing of danger," since injury is a foreseeable consequence of its use. Since the car had room for three persons and the retailer who bought the car from the manufacturer planned to resell it, ultimately to the plaintiff, it could be expected that injury could occur to persons who did not purchase the car directly from the manufacturer. The failure of the defendant—the manufacturer of the finished product for sale to the public—to inspect the car, and in light of the other factors mentioned, rendered the company liable to the plaintiff who was not in privity with it.

The rule of *MacPherson v. Buick Motor Co.* that eliminated the need for privity between a manufacturer and an individual suffering personal injury from a defectively made product became the majority rule in the United States and one of the fundamental principles of the law of PRODUCT LIABILITY.

## ♦ MACVEAGH, ISAAC WAYNE

Isaac Wayne MacVeagh served as U.S. attorney general from March to October 1881. His appointment was short because of the assassination of President JAMES GARFIELD early in the president's term of office. MacVeagh resigned soon after Garfield's death so that President CHESTER A. ARTHUR could select his own attorney general.

MacVeagh was born on April 19, 1833, in Phoenixville, Pennsylvania. He attended school in Pottstown, Pennsylvania, before entering Yale College, where he graduated in 1853. He studied law in West Chester, Pennsylvania, and was admitted to the bar in 1856. In 1859 he became district attorney of Chester County, Pennsylvania.

During the Civil War, MacVeagh served as an infantry captain and as a major in the cavalry. He was forced to resign from the military because of ill health. He resumed his position as district attorney, but he also became active in REPUBLICAN PARTY politics. He was appointed U.S. minister to Turkey in 1870. The following year he returned to Pennsylvania and waged a failed campaign to win a U.S. Senate seat.

In 1877 President RUTHERFORD B. HAYES selected MacVeagh to direct an organization, subsequently known as the MacVeagh Commission, to arbitrate political differences in Louisiana. The actions of the commission hastened the removal of federal troops from the area and ended the last vestiges of Reconstruction in the South.

President James Garfield appointed him attorney general on March 5, 1881, but MacVeagh had little time to perform his duties. Garfield was shot on July 2, 1881, after only four months in office, at the railroad station in Washington, D.C., by Charles J. Guiteau, a disappointed office seeker. For eighty days the president lay ill and performed only one official act—the signing of an EXTRADITION paper. On September 19, 1881, Garfield died. MacVeagh submitted his resignation on October 24, 1881.

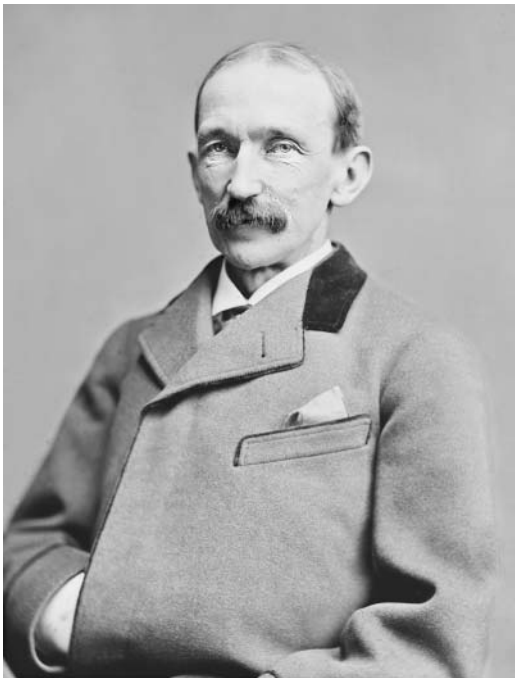

*Isaac W. MacVeagh.* LIBRARY OF CONGRESS

In 1882 MacVeagh decided to join the DEMOCRATIC PARTY. In 1893 President GROVER CLEVELAND, a Democrat, appointed MacVeagh minister to Italy, a post he held until 1897. Toward the end of his career, MacVeagh served as chief counsel for the United States at the HAGUE TRIBUNAL during a dispute involving

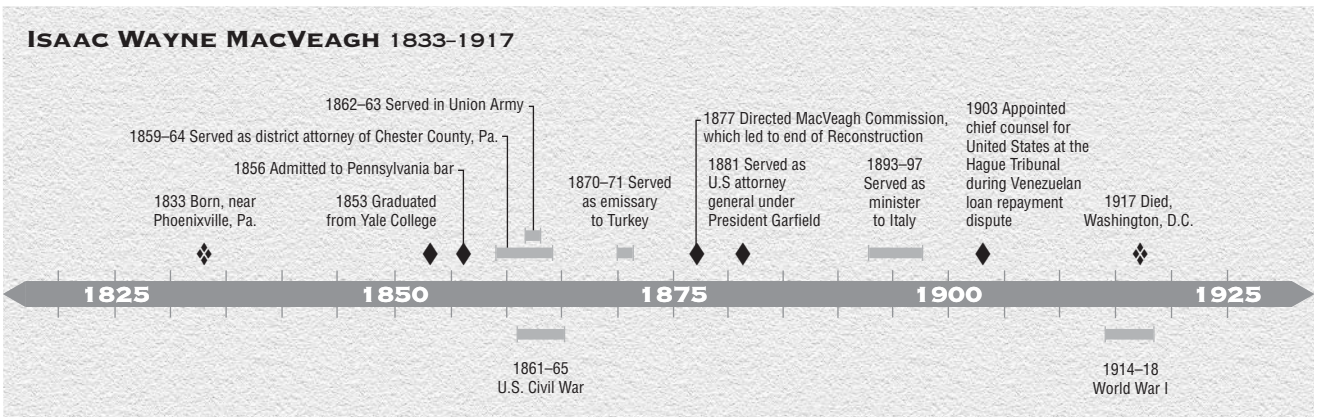

Venezuela's repayment of loans to several countries.

MacVeigh died on January 11, 1917, in Washington, D.C.

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## ♦ MADISON, JAMES

James Madison was the fourth president of the United States, serving from 1809 to 1817. Before achieving the nation's highest office, he participated in the Virginia Constitutional Convention; was a delegate to the CONTINENTAL CONGRESS; drafted a proposal for the U.S. Constitution; supported ratification of the Constitution, through *The Federalist Papers,* written with ALEXANDER HAMILTON and JOHN JAY; served in the House of Representatives; helped write the BILL OF RIGHTS; and was Thomas Jefferson's SECRETARY OF STATE.

Born March 16, 1751, in Port Conway, Virginia, Madison was the first of 11 children in his family. His father, James Madison Sr., was the wealthiest landowner in Orange County, Virginia, and provided Madison with a stable and comfortable upbringing. Eleanor Conway Madison, his mother, was an affectionate woman who gave the family emotional support throughout her ninety-eight years of life.

Madison grew up on an isolated plantation in Montpelier, Virginia. As a teenager he attended school in King and Queen County, studying logic, philosophy, mathematics, astronomy, and French, among other subjects. Although Madison suffered from ill health during much of his youth, he developed a reputation as an intense and ambitious student at the College of New Jersey (now Princeton University), which he attended from 1769 to 1772.

By 1774 it was becoming clear to many observers that the differences between the colonists and the British government could not be resolved peacefully. During that year Parliament passed the Coercive Acts, which closed the Boston Port, restricted town assemblies, and authorized British authorities to house their troops in private colonial residences. In September 1774 the First Continental Congress convened to discuss the emerging crisis with Great Britain. Unlike many colonists, who were reluctant to take any radical measures before Parliament could respond to the petition of grievances drafted by Congress, Madison favored immediate military preparations.

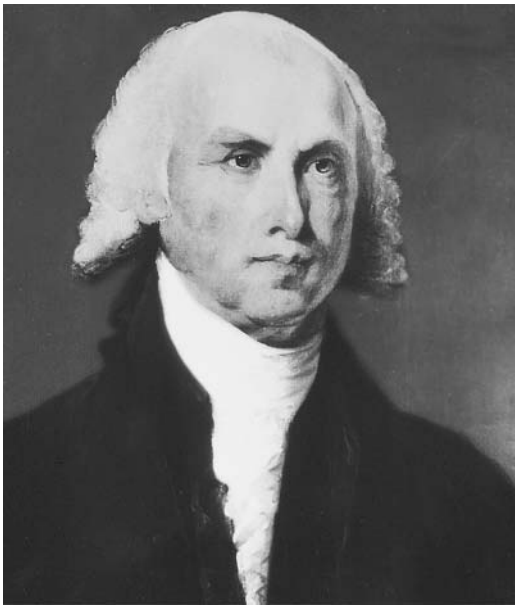

*James Madison.* NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

As Madison became more politically vocal, he became more politically active. In December 1774 he was elected to the Orange County Committee of Safety, one of many colonial bodies formed to carry out congressional mandates such as the American boycott of English goods. In October 1775, six months after the Revolution began in Lexington and Concord, Madison was commissioned a colonel in the county militia. In 1776, at age 25, he was elected as a delegate to the Virginia Provincial Convention, where he helped draft Virginia's constitution.

In May 1776 the Virginia Provincial Convention, later known as the New House of Delegates, instructed its representatives at the Second Continental Congress to draft a declaration of independence, negotiate foreign alliances, and complete the U.S. ARTICLES OF CONFEDERATION. The Articles of Confederation empowered Congress to govern certain areas of national concern, including foreign policy. The several states retained power to govern most other issues within their own borders.

In the New House of Delegates, Madison forged a friendship with Jefferson that would leave an indelible imprint on U.S. law and U.S. history. Jefferson and Madison shared a love for books, ideas, and solitude. Jefferson had authored the Declaration of Independence, and Madison would be considered the architect of

"BUT WHAT IS GOVERNMENT ITSELF, BUT THE GREATEST OF ALL REFLECTIONS ON HUMAN NATURE? IF MEN WERE ANGELS, NO GOVERNMENT WOULD BE NECESSARY. IF ANGELS WERE TO GOVERN MEN, NEITHER EXTERNAL OR INTERNAL CONTROLS ON GOVERNMENT WOULD BE NECESSARY."
—JAMES MADISON

the U.S. Constitution. But whereas Jefferson was idealistic and impetuous, Madison was more realistic and rational. Although Madison was eight years younger than Jefferson, his thoughtful temperament often helped palliate the mercurial Jefferson. From 1777 to 1779, Madison served as a cabinet member for Jefferson, who was the governor of Virginia.

In December 1779 Virginia chose Madison as one of its five delegates to the Continental Congress. Earning respect for his sober and methodical approach to lawmaking as well as his intellectual prowess, Madison helped Congress pass a revenue measure that rescued the fledgling nation from BANKRUPTCY. Over the next three years, Madison learned how to shape an agenda and to achieve results through compromise.

On April 15, 1783, Congress ratified a peace treaty with Great Britain that concluded the Revolutionary War, and won U.S. independence. This year also marked the end of Madison's tenure with the Continental Congress. After returning home to Virginia, Madison was elected by the voters of Orange County to the state legislature in 1784.

During the 1784 fall session, the Virginia assembly approved an act to incorporate the Episcopal Church, and postponed action on another bill that sought to subsidize Christianity by levying a tax on behalf of teachers who taught this religion. In response to this proposed bill, Madison anonymously published a short leaflet entitled *Memorial and Remonstrance against Religious Assessments.* This leaflet called for a separation of church and state, denounced government aid to religion, declared the equality of all religions, and articulated a general liberty to worship according to the dictates of one's conscience without fear of persecution. Many copies of the leaflet were distributed to the state assembly in October 1785, along with supporting signatures, which helped influence enough legislators to defeat the Christian subsidy.

The following year Madison joined Hamilton in urging Congress to summon a national convention at Philadelphia to draft a federal constitution that would replace the Articles of Confederation. Under the Articles of Confederation, Congress had no power to regulate commerce. As a result the thirteen states engaged in a series of trade wars with each other. Many states imposed discriminatory taxes and regulations on goods imported from other states, and some states refused to import any goods from neighboring states.

Also under the Articles of Confederation, Congress had no power to tax. When Congress requested money to pay for the public debt and the Continental Army, the states often failed to respond. Consequently, the national debt grew and the Continental Army suffered a rash of desertions. Congressional ability to obtain credit dwindled. Madison observed that the 13 states would be in a precarious and vulnerable position if the country were required to defend its borders against foreign invasion.

Congress was the country's only federal government body; the Articles of Confederation did not provide for an EXECUTIVE BRANCH to enforce congressional will, or a judicial branch to resolve disputes. This single body was virtually powerless to do anything about outbreaks of

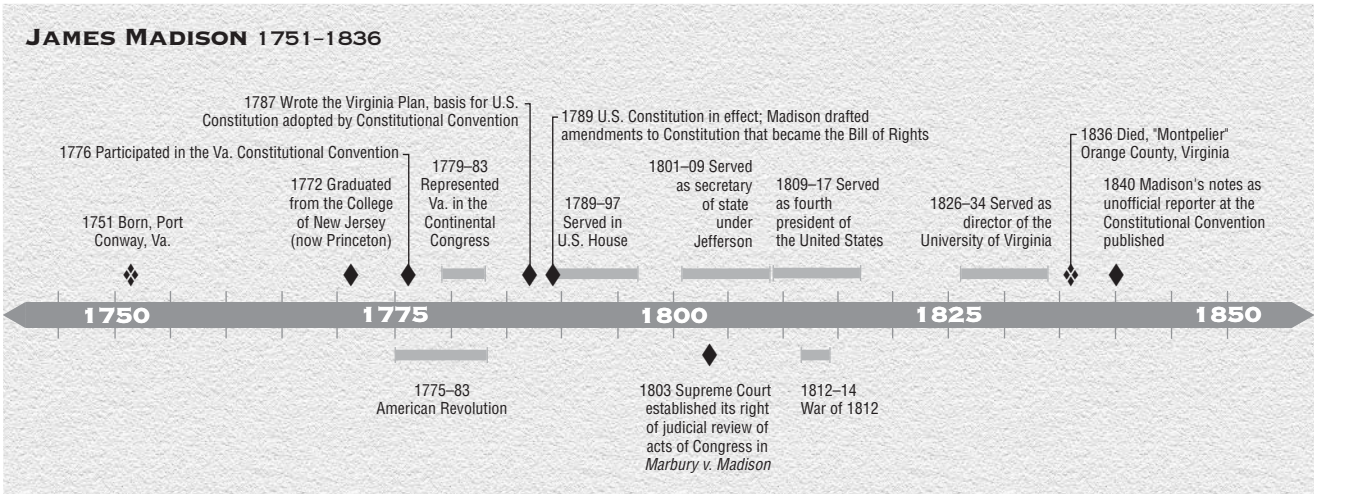

rebellion that were becoming more frequent in the states. For example, it offered no reasonable resolution for SHAYS'S REBELLION of 1786, an insurrection of nearly two thousand farmers who were protesting Massachusetts's land foreclosure laws.

Fifty-five delegates representing 12 states attended the Constitutional Convention during the summer of 1787. Reaching Philadelphia on May 14, Madison was the first delegate to arrive from any state other than Pennsylvania. Business would not begin until May 25, when a quorum of seven states would first be present. Madison seized the intervening 11 days to draft a 15-point proposal that formed the underpinnings of the U.S. Constitution.

Known as the Virginia Plan, this proposal presented a radical departure from the Articles of Confederation. In it, with help from the other Virginia delegates, Madison suggested a constitutional system comprising a strong centralized federal government with three branches: executive, legislative, and judicial. The sovereignty granted to each branch would be limited by the sovereignty granted to the other two branches and by the concurrent sovereignty retained by the states. This system of checks and balances had no predecessor in history.

The Virginia Plan provided the blueprint for a bicameral (two-chamber) legislature, with an upper chamber known as the Senate and a lower chamber known as the House of Representatives. As originally conceived, the plan gave Congress the indefinite power to legislate in all "cases to which the states are not competent." State governments would retain authority to legislate local concerns, and to create constitutional systems of their own. However, Madison made clear that the federal government would be supreme, and that any state law in contravention of the U.S. Constitution, a congressional enactment, or a federal treaty would be void.

At the same time, Madison's proposal for a broad grant of undefined congressional power was jettisoned. Madison argued that Congress should be given more legislative authority than state legislatures because state laws had been largely responsible for the recent trade wars and farmer rebellions. However, Madison was unable to explain why the federal government, made up of representatives from the several states, should be trusted to exercise its lawmaking powers any more prudently than had the state governments. Thus, the delegates persuaded Madison that the powers of the executive and legislative branches must be limited to those expressly enumerated in the Constitution. However, one of those enumerated powers, Congress's power to make all laws "necessary and proper" in the performance of its legislative function, has provided a broad constitutional basis for federal lawmaking similar to that originally envisioned by Madison.

The NECESSARY AND PROPER CLAUSE was only one of the constitutional provisions vigorously defended in *The Federalist Papers,* a series of essays written by Madison, Hamilton, and Jay that explained and promoted the system of government created by the Philadelphia convention. Called *The Federalist Papers* because proponents of the federal Constitution were known as Federalists, this collection of essays was circulated among the delegates to the state ratifying conventions, in an effort to win their support. Opponents of the federal Constitution, known as Anti-Federalists, published and circulated essays and leaflets of their own.

Some Anti-Federalists eventually lent their support to the ratification movement when Madison and other Federalists promised to draft a bill of rights that would protect individual liberty and state sovereignty from encroachment by the federal government. In 1788 the Constitution was adopted by the states. The next year Madison was elected to the House of Representatives, where he subsequently represented Virginia for eight years. During the First Congress, in 1789, Madison drafted 12 amendments to the U.S. Constitution, ten of which were ultimately adopted by the states, with some subtle changes in language, and now stand as the Bill of Rights.

Neither the Constitution nor the Bill of Rights expressly mentions the power of JUDICIAL REVIEW, which is the prerogative of state and federal courts to invalidate laws that violate a constitutional provision or principle. Article VI declares that the federal Constitution "shall be the supreme Law of the Land." Yet it does not state whether the executive, legislative, and judicial branches possess the power to nullify laws that are unconstitutional. Although the Framers of the Constitution recognized that courts had traditionally exercised the authority to interpret and apply the law, the power of judicial review had never been a clearly established practice in Anglo-American LEGAL HISTORY.

In the landmark case MARBURY V. MADISON, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), the

U.S. Supreme Court established the power of judicial review in the United States. While serving as secretary of state to President Jefferson (1801–1809), Madison was sued by William Marbury, a judge who had been appointed to the federal bench during the waning hours of President John Adams's administration. Marbury argued that Madison had violated his duties as secretary of state by failing to deliver to Marbury a commission that he needed to complete his appointment to the federal judiciary.

Although the Supreme Court agreed that Madison had wrongfully withheld the commission, it denied Marbury's claim because it had been brought pursuant to an unconstitutional provision of a federal statute. By invalidating that provision, the Supreme Court established the power of judicial review. When Madison learned of the Supreme Court's decision, he criticized the judicial branch for attempting to usurp congressional lawmaking power.

Madison said that to allow unelected federal judges to overturn legislation enacted by the popularly elected branches of government makes "the judicial department paramount in fact to the legislature, which was never intended, and can never be proper." Madison changed his mind on this issue near the end of his life. As an elder statesman attending the Virginia Constitutional Convention in 1829, and as a director for the University of Virginia from 1826 to 1834, he assailed the nullification theories of southern legislators who proclaimed the prerogative to ignore federal laws in certain circumstances. Only the judiciary, Madison concluded, had the power to declare federal laws unconstitutional.

Serving as the fourth president of the United States (1809–17), Madison revealed the same propensity to reevaluate strongly held beliefs in light of experience. Earlier in his career, he had opposed the creation of a congressionally chartered national bank. He had initially believed that under no faithful interpretation of the Constitution was Congress authorized to establish a national bank. Yet, in 1816 Madison signed a bill that established the Second Bank of the United States, agreeing that it represented a constitutional exercise of congressional power. Popular acceptance of the First Bank of the United States had altered Madison's perception.

The **WAR OF 1812** provided some of the best and worst moments of Madison's presidency. During the low point of the war with Great Britain, English troops occupied Washington, D.C., and burned down the White House. Despite other such humiliating moments for the U.S. military, Madison's troops rebounded in 1815 and soundly defeated the British in the final battle of the war at New Orleans. Although Americans gained nothing tangible from the war, they had successfully defended their soil.

The perseverance and resolve demonstrated by Madison and his troops during the war proved to be an important step in the maturation process of the young republic. By winning the War of 1812 and defeating British troops for a second time in less than half a century, **JOHN ADAMS** remarked, Madison brought more glory to the United States than any of his three predecessors in office. Madison also unified the country like never before in its short history, allowing his successors to build upon the emerging national identity.

After the close of his second term, Madison retired from public office and returned home to Montpelier, Virginia, where he devoted long hours to farming and became president of the local agricultural society. Madison welcomed retirement, seeing it as an opportunity to renew his passion for reading and resume his correspondence with **THOMAS JEFFERSON**.

He died on June 28, 1836.

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Bank of the United States; Constitution of the United States; Federalism; *Federalist Papers*; Virginia Conventions.

## MAGISTRATE

*Any individual who has the power of a public civil officer or inferior judicial officer, such as a* JUSTICE OF THE PEACE.

The various state judicial systems provide for judicial officers who are often called magistrates, justices of the peace, or police justices. The authority of these officials is restricted by statute, and jurisdiction is commonly limited to the county in which the official presides. The position may be elected or appointed, depending on the governing state statute. The exact role of the official varies by state; it may include handling hearings regarding violations of motor vehicle codes or breaches of the peace, presiding over criminal preliminary hearings, officiating marriages, and dispensing civil actions involving small sums of money.

U.S. magistrates are judicial officers appointed by the judges of federal district courts pursuant to the United States Magistrates Act (28 U.S.C.A. §§ 631 et seq.), enacted in 1968. This act was designed to reduce the workload of federal courts by replacing the old system of U.S. commissioners with a new system of U.S. magistrates. U.S. magistrates can perform more judicial functions than could U.S. commissioners. Federal magistrates may be assigned some, but not all, of the duties of a federal judge. They may serve as special masters (persons appointed by the court to carry out a particular judicial function on behalf of the court), supervise pretrial or discovery proceedings, and provide preliminary consideration of petitions for postconviction relief. U.S. magistrates generally may not decide motions to dismiss or motions for SUMMARY JUDGMENT, because these motions involve ultimate decision making, a responsibility and duty of the federal courts. However, if all the parties to a case agree, a federal magistrate may decide such motions and may even conduct a civil or misdemeanor criminal trial. Federal magistrates are not permitted to preside over felony trials or over jury selection in felony cases.

## MAGNA CHARTA

On June 15, 1215, King John (1199–1216) was surrounded on the battlefield at Runnymede by a cordon of England's most powerful barons, who demanded royal recognition for certain liberties and legal procedures they enumerated in a written document known today as the Magna Charta. Contained in the Magna Charta's 63 chapters are the seeds of trial by jury, due process, HABEAS CORPUS, and equality under the law. The Magna Charta was reissued three times during the reign of Henry III (1216–72) with some minor alteration, and confirmed by the Crown more than 30 times thereafter.

Sometimes called the Great Charter, the Magna Charta is widely considered to be the foundation of the English and U.S. constitutional systems, representing the first time the often tyrannical power of the monarchy was restrained by law and popular resistance. The Magna Charta was cited by SIR EDWARD COKE, esteemed English jurist and member of the House of Commons, in opposition to the monarchy's assertion of absolute power in the seventeenth century. During the American Revolution, colonists relied on the Magna Charta when they convened the First CONTINENTAL CONGRESS to restore the rights lost under the coercive legislation of Parliament.

Almost from its inception, the Great Charter has been imbued with two separate meanings, one literal and the other symbolic. The literal meaning is reflected by the original understanding of the Magna Charta in the thirteenth century; the symbolic meaning was developed by subsequent generations, which interpreted its provisions in light of a changing political landscape. The literal meaning was associated with the concrete rights enforced by the barons against the monarchy; the symbolic meaning became associated with the RULE OF LAW, an impartial system of justice, and government by the consent of the people and their representatives. To understand the symbolic importance attached to the Magna Charta, one must view the literal meaning in its original context.

The Magna Charta is the product of three competing legal jurisdictions: royal, ecclesiastical, and baronial. The royal system of justice maintained jurisdiction over all matters that

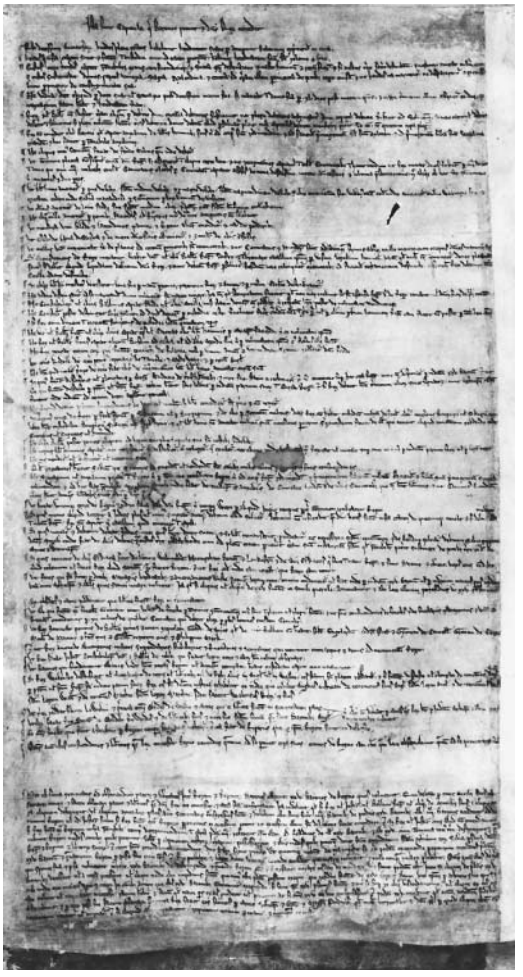

*Part of the Magna Charta, signed by England's King John in 1215. The document became a model for written contracts between governed and governed, such as the U.S. Constitution.* BRITISH MUSEUM COLLECTION.

affected the monarch's peace, directly or indirectly. Royal courts heard disputes at a central location in Westminster, and royal itinerant judges traveled locally to dispense the monarch's justice to communities across England.

The Catholic church, with the pope presiding as the spiritual head in Rome, ran the ecclesiastical courts. These courts maintained jurisdiction over the discipline of the church's clergy, religious offenses such as heresy, and most moral, marital, and testamentary matters

Baronial courts were governed by barons, powerful men who were given titles of dignity by the Crown and who held large parcels of land, known as manors, from the monarch. Each baron, as lord of his manor, was invested with the authority to hear disputes involving his tenants, men and women who agreed to work the land in exchange for shelter and security.

John alienated both the ecclesiastical and baronial jurisdictions during his reign as king, converting them into adversaries. The first ten years of John's reign were consumed by controversy with the church. John considered the pope to be subordinate to the Crown and treated the archbishop as a mere civil servant. The church, on the other hand, considered itself to be a separate and independent sovereign that had shared power with the Crown since the time of Henry I (1100–1135). Henry I and the church had agreed that the nomination of bishops in England would tacitly remain with the king. But the pope retained power to confirm bishops by conferring upon them the honorary symbols of their title, the spiritual staff and ring.

The agreement between Henry I and the church provided no resolution for the controversy between King John and Pope Innocent III at the outset of the thirteenth century. The controversy began when Innocent III rejected John's candidate for archbishop of Canterbury and substituted his own choice, Stephen Langton, a man of superior "moral and intellectual greatness" (Trevelyan 1982, 146). John responded by confiscating the church's property in England. The papacy, whose power had grown as a result of its compromise with Henry I, subsequently undertook a series of steps to damage the Crown's prestige and credibility.

The pope excommunicated King John, suspended religious sacraments in England, and declared the English empire a forfeit from God. Facing growing pressure from the church and increasing unpopularity among Catholics within his own country, John surrendered England to the papacy, receiving it back as a fief, which meant the Crown was now subordinate to Rome and was required to pay homage to the pope. These royal concessions satisfied the pope and made him a cautious ally of the Crown. Archbishop Langton was determined to achieve similar concessions for the barons.

The grievances voiced by the barons were quite different from those voiced by the church. The barons' dissatisfaction stemmed from the manner in which the royal system of justice had been abused by King John. Prior to the reign of HENRY II (1154–89), ENGLISH LAW had comprised a loose collection of customs and traditions followed by a variety of ethnic groups scattered across the realm. Henry II created a centralized system of justice that emanated from London, which the monarch's officials administered in a uniform manner to all English people in common. Although this "common law" established a body of rights and procedures by which

all litigants appearing before the ruler's courts would theoretically be treated the same, it also vested an enormous amount of power in the Crown. The tension separating ARBITRARY royal power from the principle of equality under the law erupted during the struggle between King John and his baronial magnates.

King John regularly sold legal rights and privileges to the highest bidder, rewarded favorites, punished enemies, and otherwise administered justice in an erratic and unfair fashion. For a dispute to be heard by the royal courts, parties were required to pay the monarch fees, which varied from case to case depending on the circumstances. If the Crown was in need of emergency revenue—and it seemingly always was during the reign of King John—these litigation fees were increased commensurate with the urgency of a particular financial crisis. Litigants in good graces with the monarch typically paid lower court fees than litigants in disfavor. A defendant who requested the postponement or suspension of a legal matter was required to pay a greater fee than the plaintiff was charged.

Such litigation fees, which were paid in all legal matters—civil, criminal, matrimonial, and probate—simply enabled parties to assert their claims and defenses before the royal court. They did not guarantee a particular outcome, although the amount paid may have influenced the outcome, and they bore no relationship to the penalty or fine imposed on the losing party. Consequently, defendants who paid an exorbitant fee just to present an unsuccessful defense often faced fines of an equally outrageous amount. Defendants who suffered incarceration for a wrongdoing were usually forced to purchase their freedom from the monarch.

The manner in which the ruler enforced and collected royal debts was no less capricious. Litigants who could not afford to pay the legal fees set by the Crown frequently borrowed money from the ruler in order to pursue a particular right or remedy. The terms of such loan agreements were typically draconian. As collateral for these loans, John required the debtors to pledge their estates, PERSONAL PROPERTY, and sometimes family members. In one case, a debtor was forced to pledge his castle and four sons as collateral. On other occasions, friends and family members of the debtor were held hostage by the king until the loan was repaid in full.

In some instances, the king simply forgave a loan because the debtor was a personal friend, had promised political favors, or had provided an invaluable service. In most instances, the invaluable service was military duty. During the thirteenth century, each baron was required to serve as a soldier in the monarch's army, and provide the Crown with a certain number of knights for military service. A fine could be paid in lieu of the baron's military service, and a tax, known as scutage, was then paid in lieu of the knights' service. When King John launched a military campaign, he dramatically increased the fines and taxes for nonservice, and used these monies to pay mercenaries to fight his battles.

Although King John dreamed of building an English empire through military conquest on the European continent, he was an utter failure on the battlefield. With each military loss, the miscellaneous economic demands made by the Crown seemed less justified and more absurd. It is not surprising, then, that the barons renounced loyalty to the king, plotted his assassination, and ultimately compelled his capitulation to the Magna Charta.

The grievances King John promised to redress in the Magna Charta represent both the substance of the Great Charter's original meaning and its later symbolic import. The document's immediate purpose was to appease the baronial leadership. In this vein, it provided that justice would not be sold, denied, or delayed (ch. 40), and ensured that certain rights and procedures would be "granted freely" without risk of "life or limb" (ch. 36). It guaranteed the safe return of hostages, lands, castles, and family members that had been held as security by the Crown for military service and loan agreements. The Magna Charta mandated the investigation and ABOLITION of any "ill customs" established by King John (ch. 48), and required that no "justices, constables, sheriffs, or bailiffs" be appointed unless they "know the law of the land, and are willing to keep it" (ch. 45).

The phrase "law of the land" is interspersed throughout the Magna Charta, and is emblematic of other abstract legal concepts contained in the Great Charter that outlasted the exigencies of 1215. Nowhere in the Great Charter is "law of the land" defined, but a number of sections offer an early glimpse of certain constitutional liberties in embryonic form.

For example, the American colonies equated "law of the land" with "due process of law," a legal principle that has been the cornerstone of procedural fairness in U.S. civil and criminal tri-

als since the late 1700s. The DUE PROCESS CLAUSE of the Fifth and Fourteenth Amendments has been relied on by the U.S. Supreme Court as a source for substantive rights as well, including the right to privacy.

Chapter 39 of the Magna Charta linked the law-of-the-land principle with another important protection. It provided, "No free man shall be seized, or imprisoned, or disseised, or outlawed, or exiled or injured in any way, nor will we enter on him or send against him except by the lawful judgment of his peers, or by the law of the land." In 1215, a person obtained "lawful judgment of his peers" through a communal inquest in which 12 knights or landowners familiar with the subject matter of the dispute took an oath, and swore to testify truthfully based on their own knowledge or on knowledge gained from an EYEWITNESS or other credible source.

This primitive form of fact-finding replaced even cruder methods—such as trial by battle, where the disputants fought savagely until one party begged for mercy or died, and the victorious party was presumed to have God and Right on his side. The process of one's peers in the community rendering judgment also presaged the modern trial by jury recognized by the SEVENTH AMENDMENT to the U.S. Constitution, which similarly entitles a defendant to be tried by a body of jurors that is a "truly representative" cross section of the community (*Glasser v. United States,* 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 [1942]).

The U.S. Supreme Court has also traced the origins of modern habeas corpus law to chapter 39 of the Magna Charta (*Murray v. Carrier,* 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 [1986]). Habeas corpus is a procedure that authorizes a court to determine the legality under which a person is jailed, imprisoned, or otherwise detained by the government. If the court finds that the person was deprived of liberty through "due process of law," continued detention is permissible until trial, where guilt and innocence are placed in issue. Similarly, the Magna Charta validated the continued imprisonment of persons who had been originally incarcerated by the "law of the land."

In *Harmelin v. Michigan,* 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), the Supreme Court also pointed to the Magna Charta as an early source of its EIGHTH AMENDMENT proportionality analysis. Chapter 20 of the Great Charter prohibited the monarch from imposing a fine "unless according to the measure of the offense." It further provided that "for a great offense [a free man] shall be [punished] according to the greatness of the offense." Under the Eighth Amendment to the Constitution, the Supreme Court has echoed this principle by prohibiting state and federal governments from imposing fines and other forms of punishment that are disproportionate to the seriousness of the offense for which the defendant was convicted.

The contemporary significance of the Magna Charta is not confined to the areas of civil and CRIMINAL PROCEDURE. The Great Charter prohibited the government from assessing any military tax such as scutage "except by the common counsel of [the] realm" (ch. 12). The common counsel comprised persons from various classes of English society, including bishops, abbots, earls, and barons. The common counsel was a forerunner to Parliament and Congress as a representative body limiting the power of the government to pass legislation, particularly tax legislation, without popular consent.

The common counsel also proclaimed what would become a battle cry of the American colonists: No Taxation without Representation. Indeed, some colonists decried the STAMP ACT, a statute passed by Parliament that taxed everything from newspapers to playing cards, as an illegal attempt to raise revenue in violation of the Magna Charta. Other colonists cited "the assembly of barons at Runnymede, when Magna Carta was signed" as precedent for the Continental Congress (Bailyn 1992, 173 n. 13).

The achievement of the Magna Charta, then, is found not only in the original meaning understood by Englanders of the thirteenth century, but also in the subsequent application of the document's principles. The Magna Charta began as a peace treaty between the baronial class and the king, but later symbolized a written contract between the governed and the government, a contract that included the right of rebellion when the government grew despotic or ruled without popular consent.

The Magna Charta also came to represent the notion of government bound by the law, sometimes referred to as the rule of law. The distinction between government according to law and government according to the will of the sovereign has been drawn by legal and political philosophers for thousands of years. This dis-

tinction was also made during the reign of King John. For example, Peter Fitz Herbert, an important landowner, complained that his father had been "disseised" of land "by the will of the king" despite evidence that the land belonged to his family as a matter of "right."

In another case, jurors returned a verdict against the Crown because the king had acted "by his will and without judgment" (Holt 1965, 91). For subsequent generations, in both England and the United States, the Magna Charta signified the contrast between tyrannical government unfettered by anything but the personal whims of its political leadership, and representative government limited by the letter and spirit of the law. The Magna Charta implied that no government official, not even an autocratic monarch asserting absolute power, is above the law.

Finally, the Magna Charta has come to symbolize equality under the law. Although the baronial leadership of 1215 represented a privileged class of male landowners, many provisions of the Magna Charta safeguarded the interests of women as well. For example, the Magna Charta granted women the right to refuse marriage and the option to remarry. It also protected a widow's DOWER interest in one-third of her husband's property.

Some provisions of the Magna Charta applied more broadly to all "free" individuals (ch. 39), whereas other provisions seemingly applied to every person in the realm, free or not. Chapter 16, for example, stated that "no one" shall be compelled to perform service for a knight's fee, and chapter 42 guaranteed a safe return to "anyone" who left the realm.

The most telling provision in this regard was chapter 40, which provided that "justice" will be sold to "no one." This provision embodies more than the idea that justice is cheapened when bought and sold. It also underscores the principle that all persons, rich and poor, must be treated the same under the law. An extension of this principle was captured by the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT to the U.S. Constitution, which, as interpreted by the Supreme Court, invalidates laws that discriminate on the basis of, among other things, race, gender, national origin, and ILLEGITIMACY.

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## MAGNUSON-MOSS WARRANTY ACT

The Magnuson-Moss Warranty–Federal Trade Commission Improvement Act was the first federal statute to address the law of WARRANTY. The act (15 U.S.C.A. § 2301 et seq.) mandates that a written warranty on any consumer product that costs more than $5 must completely and conspicuously disclose, in easily understood words, the terms and conditions of the warranty. A warranty may guarantee several things, such as that the item will perform in a certain way or that the manufacturer will repair or replace the item if it is defective.

The act was sponsored by Senators Warren G. Magnuson and Frank E. Moss. Congress passed the act in 1975. Its purpose was to improve the information available to consumers, prevent deception, and improve competition in the marketing of consumer products, which are defined as property distributed in commerce and actually used for personal, family, or household purposes. The act provides a federal CAUSE OF ACTION for consumers who experience problems with warranted durable goods. If a plaintiff prevails against a seller in a lawsuit brought under the act, the plaintiff is entitled to recover all litigation expenses, includ-

ing attorney's fees based on actual time expended, as determined by the court.

The Act does not require that manufacturers or sellers of consumer products provide written warranties. Instead, the act requires that manufacturers and sellers who do warrant their products to clearly disclose the terms of the warranty so that the consumer understands his or her rights under the warranty.

In addition, according to the act, a written warranty on a consumer product that costs more than $10 must be clearly labeled as "full" or "limited." A full warranty means that whoever promises to fix the item must do so in cases of defect or where the item does not conform to the warranty. This action must be done within a reasonable time and without charge. A limited warranty can contain reasonable restrictions regarding the responsibilities of the manufacturer or seller for the repair or replacement of the item.

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## MAIL COVER

*The process governed by the U.S. Postal Regulations (39 C.F.R. § 233.3) that allows the recording of all the information that appears on the outside cover of mail in any class, and also allows the recording of the contents of second-, third-, and fourth-class mail, international parcel post mail, and mail on which the appropriate postage has not been paid.*

Mail covers may be granted by the chief postal inspector, or a delegate of the inspector's, and are allowed upon the request of a law enforcement agency. The law enforcement agency's purpose must be to protect national security, locate a fugitive, obtain evidence of the commission or attempted commission of a crime, or help identify property, proceeds or assets forfeitable under law.

To obtain a mail cover, the law enforcement agency must make a request in writing to the chief postal inspector, and must specify reasonable grounds demonstrating the necessity of the mail cover. The regulations do not define reasonable grounds, but in *Vreeken v. Davis,* 718 F.2d 343 (1983), the Tenth Circuit Court of Appeals held that a statement as to why the mail cover was necessary to an investigation, and that the subjects of the mail cover were under GRAND JURY investigation, was sufficient. In *Vreeken* the court held that a letter stating that the plaintiffs were subjects of a grand jury investigation for tax FRAUD, and that the mail cover was necessary to identify promoters, finders, and investors involved in the alleged scheme, was enough to meet the requirements of the mail cover regulations. The court stated that the regulations do not include a requirement that the request contain "the factual predicate upon which it concludes that the subject of the mail cover is involved in the commission of a crime."

The constitutionality of mail cover has been challenged primarily as a violation of the FOURTH AMENDMENT right against unreasonable SEARCHES AND SEIZURES. Although the U.S. Supreme Court has not addressed this issue directly, lower courts have held that such a violation does not exist. Mail cover has been compared to the use of a PEN REGISTER, which is a mechanical device that records the numbers dialed on a telephone without monitoring the conversation. The Supreme Court, in *Smith v. Maryland,* 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979), held that pen registers do not violate an individual's Fourth Amendment right to privacy. The Court concluded that there is no reasonable expectation of privacy regarding the numbers dialed on a telephone because the user knows that the phone company receives those numbers. The court in *Vreeken* compared mail covers to pen registers in that the contents of mail are not examined, and that a person sending or receiving mail should know that the information first goes to the post office and that the outside of the mail must be examined by employees of the post office before it can be delivered.

Mail covers also have been held not to violate the FIRST AMENDMENT, the NINTH AMENDMENT, or postal regulations.

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## MAIL FRAUD

*A crime in which the perpetrator develops a scheme using the mails to defraud another of money or property. This crime specifically requires*

*the intent to defraud, and is a federal offense governed by section 1341 of title 18 of the U.S. Code. The mail fraud statute was first enacted in 1872 to prohibit illicit mailings with the Postal Service (formerly the Post Office) for the purpose of executing a fraudulent scheme.*

Initially, courts strictly followed the mail FRAUD statute's language and interpreted it narrowly. The early decisions required a connection between the fraudulent scheme and the misuse of the mails for a violation of the mail fraud statute. Since its enactment, application of the statute has evolved to include dishonest and fraudulent activities with only a tangential relationship to the mails.

Punishment for a conviction under the mail fraud statute is a fine or imprisonment for not more than five years, or both. If, however, the violation affects a financial institution, the punishment is more severe: the statute provides that "the person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

Both the Supreme Court and Congress have consistently broadened the mail fraud statute since its enactment. Prior to a 1909 amendment, a violation of the mail fraud statute required proof, among other requirements, of either opening or intending to open correspondence or communication with another person. In 1909 Congress eliminated this requirement and replaced it with the language that the mails be used "for the purpose of executing such scheme or artifice or attempting so to do." This amendment followed the Supreme Court's decision in *Durland v. United States,* 161 U.S. 306, 16 S. Ct. 508, 40 L. Ed. 709 (1896), which held that the mailing only needed to "assist" in the completion of the fraud. Although this amendment was the last significant change until 1988, the Supreme Court has struggled with the relationship between the mailing element and the execution of the fraud.

The Court's struggle with this relationship is illustrated by two of its decisions: *United States v. Maze,* 414 U.S. 395, 94 S. Ct. 645, 38 L. Ed. 2d 603 (1974), and *Schmuck v. United States,* 489 U.S. 705, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989). In *Maze,* the defendant stole his roommate's credit card and car and signed his roommate's name to the charge VOUCHERS to obtain food and lodging. The merchants mailed the invoices to a bank in Louisville, Kentucky. The Supreme Court held that this did not fall within the scope of the mail fraud statute because the mailings did not perpetuate the fraud. The Court held that the scheme did not depend on the mailings and that the fraud was completed once the defendant signed the vouchers. The Court refused to interpret the statute as merely a jurisdictional requirement and stated that "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme."

However, in *Schmuck,* the Court did expand the mail fraud statute. In *Schmuck,* the defendant sold used cars to auto dealers in which he had rolled back the odometers to inflate the vehicles' value. The dealers sent title application forms to the state department of transportation to register the cars after the dealers sold them to individual purchasers. The Court held that the sale of the vehicles depended on the transfer of title and that, although the mailing of the registration may not have contributed directly to the scheme, it was necessary for the passage of title and perpetuation of the scheme.

In recent years Congress has amended the mail fraud statute twice. In 1988 Congress added section 1346, which states that the term "scheme to defraud" includes a scheme to deprive another of the intangible right of honest services. In 1994 Congress expanded the use of the mails to include any parcel that is "sent or delivered by a private or commercial interstate carrier." As a result of these amendments, the mail fraud statute has become a broad act for prosecution of dishonest and fraudulent activities, as long as those crimes involve the mails or an interstate carrier.

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## ♦ MAINE, HENRY JAMES SUMNER

Sir Henry James Sumner Maine was a leading nineteenth-century English jurist. Maine's writings on the social and historical bases of all legal

*Henry Maine.*
LIBRARY OF CONGRESS

"EXCEPT THE BLIND FORCES OF NATURE, NOTHING MOVES ON THIS WORLD WHICH IS NOT GREEK IN ITS ORIGIN."
—HENRY MAINE

systems have been recognized for their clarity of thought and style, although modern commentators have criticized Maine for overgeneralization.

Maine was born August 15, 1822, in Kelso, Scotland. In 1844, he graduated from Cambridge University, where he tutored until he was appointed to be a professor of CIVIL LAW in 1847. He criticized LEGAL EDUCATION for teaching practical skills rather than the analysis of law as a science. His legal practice was limited, as he concentrated on publishing legal and political writings.

Maine first achieved prominence with the publication of *Ancient Law* in 1860. *Ancient Law* traced the historical development of law in the ancient world. Maine argued in it that there are two types of societies: static and progressive. Static societies include most of the non-Western world. He believed that countries such as India and China were locked in an unchanging world, bound by a fixed legal condition dominated by family dependency. In those societies, laws had very limited application and were binding not on individuals but on families. The rule of conduct for the individual was the law of the home, as distinguished from civil law.

In contrast, Maine proposed, European societies were progressive, characterized by a desire to improve and to develop. In progressive societies, civil law grew as a greater number of personal and property rights were removed from the domestic forum to the public tribunal. Maine saw the distinguishing feature in this movement as the gradual dissolution of family dependency and its replacement by individual obligation—as a movement from personal conditions to agreement, from status to contract.

Maine believed that the modern legal order would make talent and ability more important than race, sex, or family in shaping personal status. His beliefs in the evolution of Western law, and progress in general, struck a chord in the Anglo-American legal community. His theories were attractive to those in the United States who saw a powerful national economy reshaping society and creating opportunity for those who were willing to take risks and to work hard.

Maine took a hiatus from his professorship in 1863, to serve as a legal member of the Viceroy's Council in India for six years. Upon his return to England in 1869, he resumed his legal scholarship, publishing *Village Communities* in 1871, *The Early History of Institutions* in 1875, and *Early Law and Custom* in 1883.

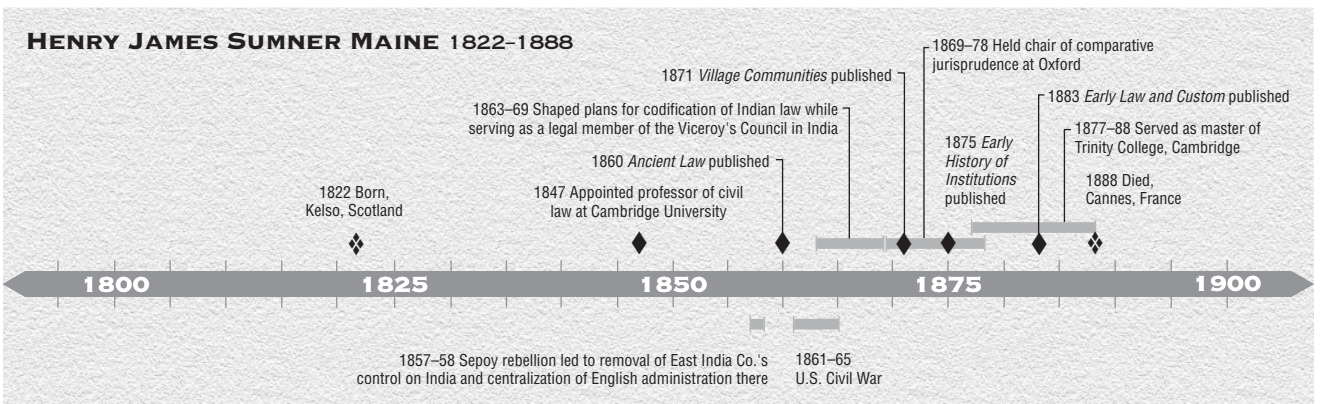

Maine's conclusions have been challenged over the past century. Historians and social scientists have pointed out that many of his interpretations are false and based on limited information. Despite these perceived shortcomings, Maine is still regarded as a seminal figure in JURISPRUDENCE. His use of historical and anthropological methods was groundbreaking, and his strong conceptual framework helped to reshape the way in which legal developments are analyzed.

Maine died February 3, 1888, in Cannes, France.

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## MAINTENANCE

*Unauthorized intervention by a nonparty in a lawsuit, in the form of financial or other support and assistance to prosecute or defend the litigation. The preservation of an asset or of a condition of property by upkeep and necessary repairs.*

*A periodic monetary sum paid by one spouse for the benefit of the other upon separation or the dissolution of marriage; also called* ALIMONY *or spousal support.*

At COMMON LAW the offense of CHAMPERTY AND MAINTENANCE arose when a stranger bargained with a party to a legal action, undertaking to pay for the litigation in exchange for a promise of a portion of the recovery. The common-law doctrines of champerty and maintenance were designed to stop vexatious and speculative litigation supported by officious intermeddlers (nonparties with improper motives). These common-law principles have been adopted in varying degrees in the United States, depending on the particular state.

The term *maintenance* is also used to describe the expenses of preserving property, which may be deductible according to the applicable state or federal tax laws. Maintenance expenses are typically recurring, with the goal of preserving the particular asset in its original condition, to prolong its useful life. Maintenance differs from a repair because a repair is an expenditure designed to return an asset to its normal operating condition.

In FAMILY LAW *maintenance* is often used as a synonym for *spousal support* or *alimony,* and the term is in fact replacing alimony. Traditionally, alimony was solely the right of the wife to be supported by the husband. In *Orr v. Orr,* 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979), the U.S. Supreme Court held that an Alabama statute (Ala. Code § 30-2-51 to 30-2-53 [1975]) that provided that only husbands could be required to pay alimony violated the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT. Under current law alimony may be payment by either the wife or the husband in support of the other.

The award of spousal maintenance is generally determined based on all or some of the following guidelines: the recipient's financial needs; the payer's ability to pay; the age and health of the parties; the standard of living the recipient became accustomed to during the marriage; the length of the marriage; each party's ability to earn and be self-supporting; and the recipient's nonmonetary contributions to the marriage.

The amount and length of spousal maintenance payments may be agreed to by the parties and approved of by the court, or may be set by the court when the issue is contested. Some states have adopted financial schedules to help judges determine the appropriate level of support. Although maintenance generally takes the form of periodic payments of money directly to the recipient, it can also constitute a payment to a third party to satisfy an obligation of the receiving spouse. Maintenance may be set in a predetermined amount, such as $1,000 a month, or it may be a fluctuating percentage, such as 25 percent of the payer's gross income.

Spousal maintenance may be temporary or permanent. The parties generally may adjust its amount at a future date by returning to court and reassessing the relevant criteria at that time. In some states the parties may forever waive their right to spousal maintenance by written agreement.

Spousal maintenance payments always cease upon the death or remarriage of the recipient. Some states have adopted laws that provide for the termination of maintenance when the payer can show that the recipient is living with another person as if married, but has not remarried because he or she wants to continue to receive maintenance payments. Maintenance also generally terminates upon the death of the payer, although a minority of states will grant the receiving spouse a claim on the estate of the paying spouse. Alternatively, many states require the paying spouse to carry insurance on his or her

life, payable to the recipient spouse, in lieu of granting the recipient the right to make a claim on the payer's estate.

Spousal maintenance that is periodic and made in discharge of a legal obligation is included in the gross income of the recipient and is deductible by the payer. Other voluntary payments, made by one spouse to the other, are not treated the same way by the tax code.

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CROSS-REFERENCES

Divorce.

## ❖ MAITLAND, FREDERIC WILLIAM

Frederic William Maitland pioneered the study of early English LEGAL HISTORY. A talented and prolific scholar, Maitland imaginatively reconstructed the world of Anglo-Saxon law.

Maitland was born May 28, 1850, in London, England. He graduated from Cambridge University and then studied law at Lincoln's Inn. He joined the bar in 1876 and soon proved himself a skilled attorney. Maitland's interests subsequently shifted to the history of ENGLISH LAW. He set as his goal the writing of a scientific and philosophical history of English law that took into account its interaction with the social, economic, and cultural life of the English people. His first book, *Pleas of the Crown for the County of Gloucester,* was published to acclaim in 1884. In that year he left his law practice and became a reader in English law at Cambridge. In 1888 he was named a professor of law at Cambridge.

"THE HISTORY OF LAW MUST BE A HISTORY OF IDEAS."
—FREDERIC MAITLAND

Between 1885 and 1906, Maitland published many volumes of English history, including *Justice and Police* (1885), *The History of English Law before the Time of Edward I* (with SIR FREDERICK POLLOCK, 1895), and *Domesday Book and Beyond* (1897). He also helped form the SELDEN SOCIETY, an association devoted to the preservation and analysis of Old English legal history. Maitland contributed many introductions to society publications, which mainly consisted of reprints of primary legal documents. Finally, Maitland was a popular lecturer. His published lectures include *Constitutional History of England* (1908), *Equity* (1909), and *The Forms of Action* (1909).

As a historian, Maitland has been praised for his ability to grasp and articulate the great central themes underlying the development of the COMMON LAW, and his ability to penetrate and render the inner meaning of words. He enjoyed being a historical detective, sifting through masses of often contradictory and confusing sources to find historical truth. Despite his respect for the English common-law tradition, Maitland was not an antiquarian. He actively supported the major law reform efforts of his day.

Maitland's historiography was not based on ideology or theory. History, to Maitland, was not the product of impersonal social or economic forces, but something more complex. Therefore, in the world described in his writings, individual personalities, particular events, cultural traditions, and the peculiarity of language play significant roles. Running through his work is a deep respect for the toughness, resiliency, and vitality of English common law. Common-law lawyers and judges are intellectual and moral heroes in his evocation of medieval England.

Though many of Maitland's claims have been qualified or refuted by later research and

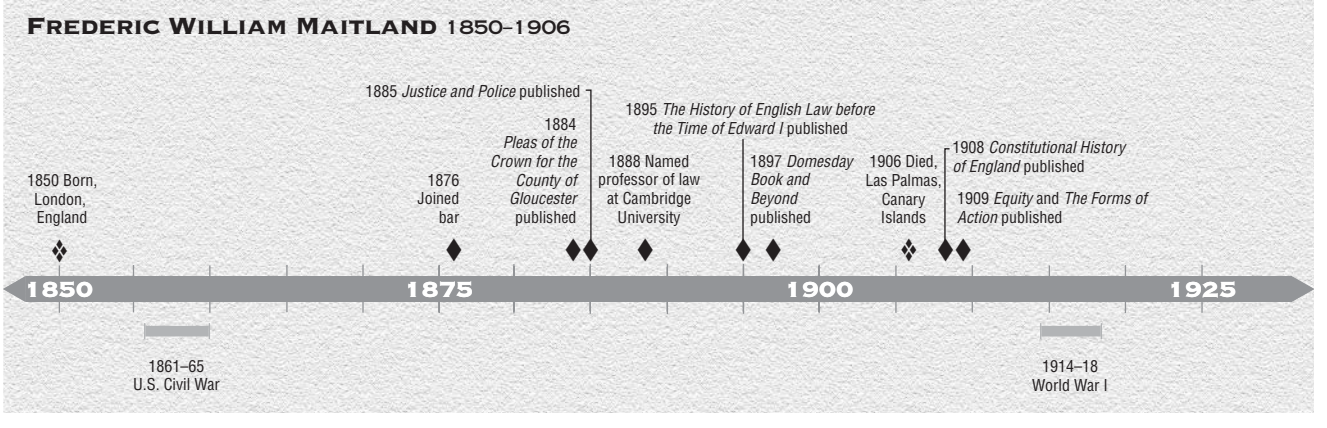

scholarship, he is recognized as a seminal figure in the study of English legal history.

Maitland died December 19, 1906, at Las Palmas, Canary Islands.

## MAJORITY

*Full age; legal age; age at which a person is no longer a minor. The age at which, by law, a person is capable of being legally responsible for all of his or her acts (e.g. contractual obligations), and is entitled to the management of his or her own affairs and to the enjoyment of civic rights (e.g. right to vote). The opposite of minority. Also the* status *of a person who is a major in age.*

*The greater number. The number greater than half of any total.*

The common-law age of majority is twenty-one although state legislatures may change this age by statute. INFANTS reach the age of majority on the first moment of the day preceding their twenty-first birthday. Minority is the period of time when a child is an infant.

## MAKER

*One who makes, frames, executes, or ordains; as a* lawmaker, *or the* maker *of a promissory note. One who signs a note to borrow and, as such, assumes the obligation to pay the note when due. The person who creates or executes a note, that is, issues it, and in signing the instrument makes the promise of payment contained therein. One who signs a check; in this context, synonymous with drawer. One who issues a promissory note or certificate of deposit.*

## MALA FIDES

*[*Latin, Bad faith.*]*

A *mala fide purchaser* is one who buys property from another with the knowledge that it has been stolen. In contrast, a bona fide purchaser is one who does so with no knowledge that the seller lacks good title to the property.

## MALA IN SE

*Wrongs in themselves; acts morally wrong; offenses against conscience.*

In CRIMINAL LAW, crimes are categorized as either *mala in se* or mala prohibita, a term that describes conduct that is specifically forbidden by laws. Although the distinction between the two classifications is not always clear, crimes *mala in se* are usually common-law crimes or those dangerous to life or limb.

BATTERY and grand larceny or petit larceny are examples of offenses that courts have held to be *mala in se.*

## MALA PROHIBITA

*[*Latin, Wrongs prohibited.*] A term used to describe conduct that is prohibited by laws, although not inherently evil.*

Courts commonly classify statutory crimes as *mala prohibita.* This, however, is not a fixed rule since not all statutory crimes are classified as such.

Examples of *mala prohibita* include public intoxication and carrying a concealed weapon.

## ♦ MALCOLM X

Malcolm X was a NATION OF ISLAM minister and a black nationalist leader in the United States during the 1950s and 1960s. Since his assassination in 1965, his status as a political figure has grown considerably, and he has now become an internationally recognized political and cultural icon. The changes in Malcolm X's personal beliefs can be followed somewhat by the changes in his name, from Malcolm Little when he was a young man to Malcolm X when he was a member of the Nation of Islam to El-Hajj Malik El-Shabazz-Al-Sabann after he returned to the United States from a spiritual pilgrimage to Mecca in 1964. He was a ward of the state, a shoe shine boy in Boston, a street hustler and pimp in New York, and a convicted felon at the age of 20. After embracing Islam in prison and directing his grassroots leadership and speaking skills to recruit members to the Nation of Islam, he ultimately became an influential black nationalist during the CIVIL RIGHTS MOVEMENT of the 1960s.

The fifth child in a family of eight children, Malcolm was born May 19, 1925, in Omaha, Nebraska. His father, Earl Little, was a Baptist minister and a local organizer for the Universal Negro Improvement Association, a black nationalist organization founded by Marcus M. Garvey in the early twentieth century. His mother, Louise Little, was of West Indian heritage. Malcom's father was killed under suspicious circumstances in 1931 and his mother had a breakdown in 1937.

After his father's death and his mother's commitment to a mental hospital, Malcolm was

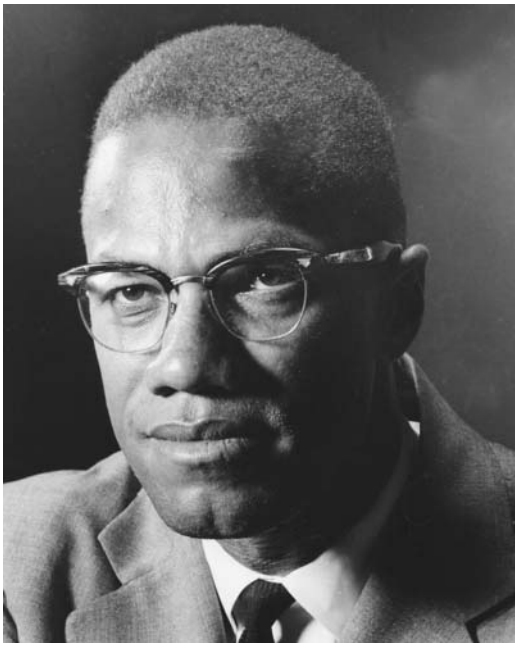

*Malcolm X.* AP/WIDE WORLD PHOTOS

first placed with family friends, but the state WELFARE agency ultimately situated him in a juvenile home in Mason, Michigan, where he did well. Malcolm was an excellent student in junior high school, earning high grades as well as praise from his teachers. Despite his obvious talent, his status as an African American in the 1930s prompted his English teacher to discourage Malcolm from pursuing a professional career. The teacher instead encouraged him to work with his hands, perhaps as a carpenter.

In 1941, shortly after finishing eighth grade, Malcolm moved to Roxbury, a predominantly African American neighborhood in Boston. From 1941 to 1943, he lived in Roxbury with his half-sister ELLA LEE LITTLE-COLLINS. He worked at several jobs, including one as the shoe shine boy at the Roseland State Ballroom. He became what he later described as a Roxbury hipster, wearing outrageous zoot suits and dancing at local ballrooms.

Malcolm moved to Harlem in 1943, at the age of 18. Here, he earned the nickname Detroit Red, because of his Michigan background and the reddish hue to his skin and hair. In his early Harlem experience, Malcolm was a hustler, dope dealer, gambler, pimp, and numbers runner for mobsters.

In 1945, when his life was threatened by a Harlem mob figure named West Indian Archie, Malcolm returned to Boston, where he became involved in a BURGLARY ring with an old Roxbury acquaintance. In 1946 he was caught attempting to reclaim a stolen watch he had left for repairs, and the police raided his apartment and arrested him and his accomplices, including two white women. He was charged with LARCENY and breaking and entering, to which he pleaded guilty at trial. On February 27, 1946, he entered Charlestown State Prison to begin an eight- to ten-year sentence; he was 20 years old.

Malcolm was transferred in 1948 to an experimental and progressive prison program in Norfolk, Massachusetts. The Norfolk Prison Colony gave greater freedom to its inmates. It also had an excellent library, and Malcolm began to read voraciously. Prompted by his brother, Reginald Little, Malcolm converted to Islam while in prison and became a follower of Elijah Muhammad, the leader of the Nation of Islam. The Nation of Islam, founded by Wallace D. Fard in the 1930s, advocated racial separatism and enforced a strict moral code for its followers, all of whom were African American.

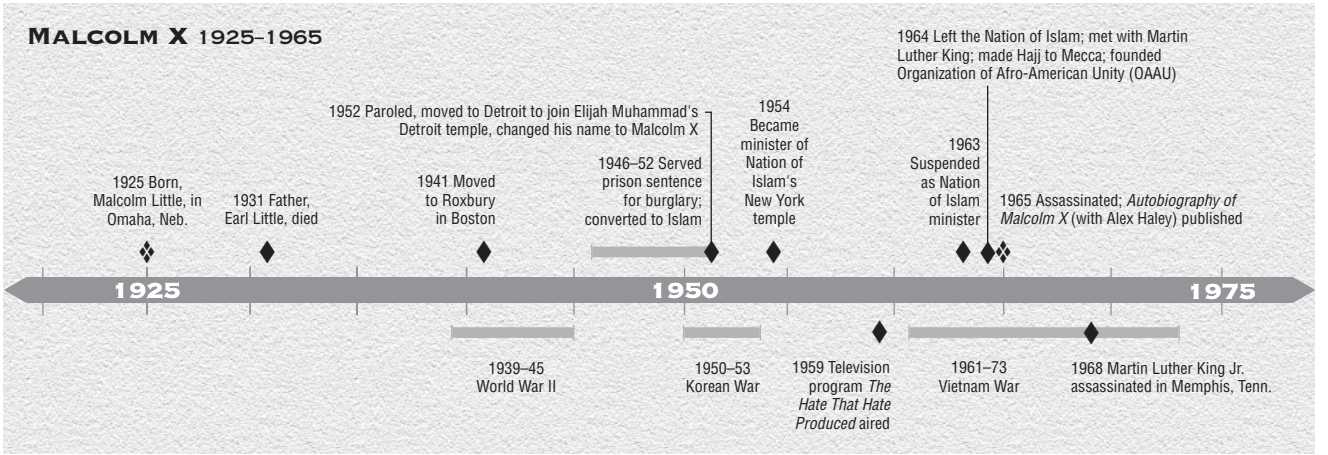

Malcolm was paroled from prison in 1952. He immediately moved to Detroit, where he worked in a furniture store and attended the Nation of Islam Detroit temple. Malcolm soon abandoned the surname Little in favor of X, which represented the African surname he had never known. With his oratory skill, Malcolm X quickly became a national minister for the Nation of Islam. As a devout follower of Elijah Muhammad, he helped to establish numerous temples across the United States. He became the minister for temples in Boston and Philadelphia, and in 1954, he became minister of the New York temple. In 1958 he married Sister Betty X, who had earlier joined the Nation of Islam as Betty Sanders. Together, they had six children, including twins who were born after Malcolm's assassination.

During his early years with the Nation of Islam, Malcolm's primary role was as spokesman for Elijah Muhammad. He was a highly effective grassroots activist and successfully recruited thousands of urban blacks to join the organization. In 1959 a television program entitled *The Hate That Hate Produced* resulted in a focused public scrutiny of the Nation of Islam and its followers, who became known to many U.S. citizens as Black Muslims. Increasingly, Malcolm was seen as the national spokesman for the Black Muslims, and he was often sought out for his opinion on public issues. In vitriolic public speeches on behalf of the Nation of Islam, he described whites in the United States as devils and called for African Americans to reject any attempt to integrate them into a white racist society. As a Nation of Islam minister, he denounced Jews and criticized the more cautious mainstream CIVIL RIGHTS leaders as traitors who had been brainwashed by a white society. He further challenged the so-called integrationist principles of recognized civil rights leaders such as MARTIN LUTHER KING JR.

Elijah Muhammad took a somewhat less rash approach and favored a general nonengagement policy in place of more confrontational tactics. Malcolm's increasing popularity—as well as his caustic public remarks—began to create tension between him and Elijah Muhammad. Malcolm became frustrated at having to restrain his comments.

When President JOHN F. KENNEDY was assassinated on November 22, 1963, Malcolm exclaimed that Kennedy "never foresaw that the chickens would come home to roost so soon." Malcolm later regretted his comment and explained that he meant that the government's involvement in and tolerance of violence against African Americans and others had created an atmosphere that contributed to the death of the president. Nevertheless, his comments and his increasing public notoriety prompted Elijah Muhammad to "silence" Malcolm and suspend him as a minister on December 1, 1963. Members of the Nation of Islam were instructed not to speak to him.

However, by 1963, Malcolm had become disillusioned by the Nation of Islam, particularly with rumors that Elijah Muhammad had been unfaithful to his wife and had fathered several illegitimate children. On March 8, 1964—while still under suspension from the Nation of Islam—Malcolm formally announced his separation from the organization. He soon announced the creation of his own organization, Moslem Mosque, Incorporated (MMI), which would be based in New York. MMI, Malcolm stated, would be a broad-based black nationalist organization intended to advance the spiritual, economic, and political interests of African Americans. On March 26, Malcolm met for the first and only time with Martin Luther King, in Washington, D.C. King at the time was scheduled to testify on the pending CIVIL RIGHTS ACT OF 1964.

In April 1964, Malcolm made a spiritual pilgrimage to Mecca, the holy site of Islam and the birthplace of the prophet Muhammad. He was profoundly moved by the pilgrimage, and said later that it was the start of a radical alteration in his outlook about race relations.

Upon his return to the United States, Malcolm began to use the name El-Hajj Malik El-Shabazz Al-Sabann. He also exhibited a profound shift in political and social thinking. Whereas in the past he had advocated against cooperation with other civil rights leaders and organizations, his new philosophy was to work with existing organizations and individuals, including whites, so long as they were sincere in their efforts to secure basic civil rights and freedoms for African Americans. In June 1964, he founded the secular Organization of Afro-American Unity (OAAU), which espoused a pan-Africanist approach to basic HUMAN RIGHTS, particularly the rights of African Americans. He traveled and spoke extensively in Africa to gain support for his pan-Africanist views. He pledged to bring the condition of

"WE ARE NOT FIGHTING FOR INTEGRATION, NOR ARE WE FIGHTING FOR SEPARATION. WE ARE FIGHTING FOR RECOGNITION AS HUMAN BEINGS. WE ARE FIGHTING FOR . . . HUMAN RIGHTS."
—MALCOLM X

African Americans before the General Assembly of the UNITED NATIONS and thereby "internationalize" the civil rights movement in the United States. He further pledged to do whatever was necessary to bring the black struggle from the level of civil rights to the level of human rights. When he advocated for the right of African Americans to use arms to defend themselves against violence, he not only laid the groundwork for a subsequent growth of the BLACK POWER MOVEMENT, but also led many U.S. citizens to believe that he advocated violence. However, in his autobiography, Malcolm said that he was not advocating wanton violence but calling for the right of individuals to use arms in SELF-DEFENSE when the law failed to protect them from violent assaults.

In 1965 Malcolm's increasing public criticism of Elijah Muhammad and the Nation of Islam prompted anonymous threats against his life. In his attempts to forge relationships with established civil rights organizations such as the STUDENT NON-VIOLENT COORDINATING COMMITTEE, Malcolm was criticized severely in the Nation of Islam's official publications. In a December 1964 article in *Muhammad Speaks*—the official newspaper of the Nation of Islam—Louis X (now known as Louis Farrakhan) said, "[S]uch a man as Malcolm is worthy of death, and would have met with death if it had not been for Muhammad's confidence in Allah for victory over the enemies."

On February 14, 1965, Malcolm's home in Queens, New York—which was still owned by the Nation of Islam—was firebombed while he and his family were asleep. Malcolm attributed the bombing to Nation of Islam supporters but no one was ever charged with the crime. One week later, when Malcolm stepped to the podium at the Audubon Ballroom in New York to present a speech on behalf of the OAAU, he was assassinated. The gunmen, later identified as former or current members of the Nation of Islam, were convicted and sentenced to life imprisonment in April 1966.

Malcolm left a complex political and social legacy. Although he was primarily a black nationalist in perspective, his changing philosophy and politics toward the end of his life demonstrate the unfinished development of an influential figure. Although some people point to his identification with the Nation of Islam and dismiss him as a racial extremist and anti-Semite, his later thinking reveals profound changes in his perspective and a more universal understanding of the problems of African Americans. In his eulogy of Malcolm, the U.S. actor Ossie Davis said,

> However we may have differed with him—or with each other about him and his value as a man—let his going from us serve only to bring us together, now. Consigning these mortal remains to earth, the common mother of all, secure in the knowledge that what we place in the ground is no more now a man—but a seed—which, after the winter of our discontent, will come forth again to meet us.

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## MALFEASANCE

*The commission of an act that is unequivocally illegal or completely wrongful.*

*Malfeasance* is a comprehensive term used in both civil and CRIMINAL LAW to describe any act that is wrongful. It is not a distinct crime or TORT, but may be used generally to describe any act that is criminal or that is wrongful and gives rise to, or somehow contributes to, the injury of another person.

Malfeasance is an affirmative act that is illegal or wrongful. In tort law it is distinct from misfeasance, which is an act that is not illegal but is improperly performed. It is also distinct from NONFEASANCE, which is a failure to act that results in injury.

The distinctions between malfeasance, misfeasance, and nonfeasance have little effect on tort law. Whether a claim of injury is for one or the other, the plaintiff must prove that the defendant owed a duty of care, that the duty was breached in some way, and that the breach caused injury to the plaintiff.

One exception is that under the law of STRICT LIABILITY, the plaintiff need not show

the absence of due care. The law of strict liability usually is applied to PRODUCT LIABILITY cases, where a manufacturer can be held liable for harm done by a product that was harmful when it was placed on the market. In such cases the plaintiff need not show any actual malfeasance on the part of the manufacturer. A mistake is enough to create liability because the law implies that for the sake of public safety, a manufacturer warrants a product's safety when it offers the product for sale.

## MALICE

*The intentional commission of a wrongful act, absent justification, with the intent to cause harm to others; conscious violation of the law that injures another individual; a mental state indicating a disposition in disregard of social duty and a tendency toward malfeasance.*

In its legal application, the term *malice* is comprehensive and applies to any legal act that is committed intentionally without JUST CAUSE or excuse. It does not necessarily imply personal hatred or ill feelings, but rather, it focuses on the mental state that is in reckless disregard of the law in general and of the legal rights of others. An example of a malicious act would be committing the TORT of slander by labeling a nondrinker an alcoholic in front of his or her employees.

When applied to the crime of murder, malice is the mental condition that motivates one individual to take the life of another individual without just cause or provocation.

In the context of the FIRST AMENDMENT, public officials and public figures must satisfy a standard that proves *actual malice* in order to recover for LIBEL or slander. The standard is based upon the seminal case of NEW YORK TIMES V. SULLIVAN, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), where the Supreme Court held that public officials and public figures cannot be awarded damages unless they prove that the person accused of making the false statement did so with knowledge that the statement was false or with reckless disregard as to the truth or falsity of the statement. Demonstrating malice in this context does not require the plaintiff to show that the person uttering the statement showed ill will or hatred toward the public official or public figure.

## MALICE AFORETHOUGHT

*A predetermination to commit an act without legal justification or excuse. A malicious design to injure. An intent, at the time of a killing, willfully to take the life of a human being, or an intent willfully to act in callous and wanton disregard of the consequences to human life; but* malice aforethought *does not necessarily imply any ill will, spite or hatred towards the individual killed.*

*The actions of Los Angeles residents who rioted and looted in the wake of the 1992 Rodney King trial verdict represented malfeasance, a breach of the duty of care.* AP/WIDE WORLD PHOTOS

## MALICIOUS

*Involving malice; characterized by wicked or mischievous motives or intentions.*

An act done maliciously is one that is wrongful and performed willfully or intentionally, and without legal justification.

## MALICIOUS MISCHIEF

*Willful destruction of* PERSONAL PROPERTY *of another, from actual ill will or resentment towards its owner or possessor. Though only a* TRESPASS *at the* COMMON LAW*, it is now a misdemeanor in most states.*

## MALICIOUS PROSECUTION

*An action for damages brought by one against whom a civil suit or criminal proceeding has been unsuccessfully commenced without* PROBABLE CAUSE *and for a purpose other than that of bringing the alleged offender to justice.*

An action for malicious prosecution is the remedy for baseless and malicious litigation. It is not limited to criminal prosecutions but may be brought in response to any baseless and malicious litigation or prosecution, whether criminal or civil. The criminal defendant or civil respondent in a baseless and malicious case may

later file this claim in civil court against the parties who took an active role in initiating or encouraging the original case. The defendant in the initial case becomes the plaintiff in the malicious prosecution suit, and the plaintiff or prosecutor in the original case becomes the defendant. In most states the claim must be filed within a year after the end of the original case.

A claim of malicious prosecution is a tort action. A TORT action is filed in civil court to recover money damages for certain harm suffered. The plaintiff in a malicious prosecution suit seeks to win money from the respondent as recompense for the various costs associated with having to defend against the baseless and vexatious case.

The public policy that supports the action for malicious prosecution is the discouragement of VEXATIOUS LITIGATION. This policy must compete against one that favors the freedom of law enforcement officers, judicial officers, and private citizens to participate and assist in the administration of justice.

In most jurisdictions an action for malicious prosecution is governed by the COMMON LAW. This means that the authority to bring the action lies in case law from the courts, not statutes from the legislature. Most legislatures maintain some statutes that give certain persons IMMUNITY from malicious prosecution for certain acts. In Colorado, for example, a merchant, a merchant's employee, or a police officer, who reasonably suspects that a theft has occurred, may detain and question the suspect without fear of liability for slander, false arrest, FALSE IMPRISONMENT, unlawful detention, or malicious prosecution (Colo. Rev. Stat. Ann. § 18-4-407 [West 1996]).

An action for malicious prosecution is distinct from an action for false arrest or false imprisonment. If a person is arrested by a police officer who lacks legal authority for the arrest, the proper remedy is an action for false arrest. If a person is confined against her or his will, the proper remedy is an action for false imprisonment. An action for malicious prosecution is appropriate only when the judicial system has been misused.

## Elements of Proof

To win a suit for malicious prosecution, the plaintiff must prove four elements: (1) that the original case was terminated in favor of the plaintiff, (2) that the defendant played an active role in the original case, (3) that the defendant did not have probable cause or reasonable grounds to support the original case, and (4) that the defendant initiated or continued the initial case with an improper purpose. Each of these elements presents a challenge to the plaintiff.

**The Original Case Was Terminated in Favor of the Plaintiff** The original case must end before the defendant or respondent in that case may file a malicious prosecution suit. This requirement is relatively easy to prove. The original case qualifies as a prosecution if the defendant or respondent had to appear in court. The original case need not have gone to trial: it is enough that the defendant or respondent was forced to answer to a complaint in court. If the original case is being appealed, it is not considered terminated, and the defendant or respondent must wait to file a malicious prosecution suit.

To proceed with a malicious prosecution claim, the plaintiff must show that the original case was concluded in her or his favor. Generally, if the original case was a criminal prosecution, it must have been dismissed by the court, rejected by the GRAND JURY, abandoned by the prosecutor, or decided in favor of the accused at trial or on appeal. If the original case was a civil suit, the respondent must have won at trial or the trial court must have disposed of the case in favor of the respondent (now the plaintiff).

If recovery by the plaintiff in a civil action was later reversed on appeal, this does not mean that the action was terminated in favor of the respondent. However, if the plaintiff in the original case won by submitting fabricated evidence or by other fraudulent activity, a reversal on such grounds may be deemed a termination in favor of the respondent. A settlement between the plaintiff and the respondent in a civil suit is not a termination in favor of the respondent. Likewise, courts do not consider a plea bargain in a criminal case to be a termination in favor of the defendant.

**The Defendant Played an Active Role in the Original Case** In a malicious prosecution suit, the plaintiff must prove that the defendant played an active role in procuring or continuing the original case. The plaintiff must prove that the defendant did more than simply participate in the original case. False testimony alone, for example, does not constitute malicious prosecution. Moreover, witnesses are immune from suit for DEFAMATION, even if they lie on the witness

stand. Such is the case because the concept of a fair and free trial requires that witnesses testify without fear of having to defend a defamation suit owing to their testimony.

An action for malicious prosecution focuses on the abuse of legal process, not on defamatory, untruthful statements. If a person helps another person launch a baseless case or takes action to direct or aid such a case, the first person may be held liable for malicious prosecution. The defendant must have been responsible in some way for the institution or continuation of the baseless case. This position of responsibility does not always include criminal prosecutors and civil plaintiffs. For example, if a prosecutor bringing criminal charges is tricked into prosecuting the case by an untruthful third party, the deceiving party is the one who may be found liable for malicious prosecution, not the prosecutor.

**The Defendant Did Not Have Probable Cause to Support the Original Case** The plaintiff must prove that the person who began or continued the original case did not have probable cause to do so. Generally, this means proving that the person did not have a reasonable belief in the plaintiff's guilt or liability. In examining this element, a court will look at several factors, including the reliability of all sources, the availability of information, the effort required to obtain information, opportunities given to the accused to offer an explanation, the reputation of the accused, and the necessity in the original case for speedy judicial action.

A failure to fully investigate the facts surrounding a case may be sufficient to prove a lack of probable cause. The termination of the original case in favor of the original defendant (now the plaintiff) may help to prove a lack of probable cause, but it may not be decisive on the issue. The plaintiff should present enough facts to allow a reasonable person to infer that the defendant acted without a reasonable belief in the plaintiff's guilt or liability in beginning or continuing the original case.

In a criminal case, an acquittal does not constitute a lack of probable cause. A criminal defendant stands a better chance of proving lack of probable cause if the original case was dismissed by prosecutors, a grand jury, or the court before the case went to trial. The criminal process provides several safeguards against prosecutions that lack probable cause, so a full criminal trial tends to show the presence of probable cause. Civil cases do not have the same safeguards, so a full civil trial does not tend to prove probable cause.

**The Defendant Initiated or Continued the Original Case with an Improper Purpose** In a malicious prosecution, the plaintiff must prove with specific facts that the defendant instituted or continued the original proceeding with an improper purpose. Sheer ill will constitutes an improper purpose, and it may be proved with facts that show that the defendant resented the plaintiff or wanted somehow to harm the plaintiff. However, the plaintiff does not have to prove that the defendant felt personal malice or hostility toward the plaintiff. Rather, the plaintiff need only show that the defendant was motivated by something other than the purpose of bringing the plaintiff to justice.

Few defendants admit to improper purposes, so improper purpose usually must be inferred from facts and circumstances. If the plaintiff cannot discover any apparent purpose, improper purpose can be inferred from the lack of probable cause.

***Hodges v. Gibson Products Co.*** *Hodges v. Gibson Products Co.,* 811 P.2d 151 (Utah 1991), contained all the elements of a malicious prosecution. According to Chad Crosgrove, the manager of Gibson Discount Center in West Valley, Utah, store money was noticed missing during the afternoon of September 4, 1981. Both Crosgrove and part-time bookkeeper Shauna Hodges had access to the money, and both denied taking it. On September 9 Crosgrove and Gibson officials went to the local police station, where they lodged an accusation of theft against Hodges. Crosgrove was not accused. Hodges was arrested, handcuffed, and taken to jail. After a PRELIMINARY HEARING, she was released on bail and ordered to return for trial on May 12, 1982.

After Hodges was formally charged, an internal audit at Gibson revealed that Crosgrove had embezzled approximately $9,000 in cash and goods from the store. The thefts had occurred over a time period that included September 4, 1981. Gibson still did not charge Crosgrove with theft. Instead, it allowed him to resign with a promise to repay the money.

The night before Hodges's trial was to begin, and almost two months after Crosgrove's EMBEZZLEMENT was discovered, management at Gibson notified Hodges's prosecutor of Crosgrove's activities. The prosecutor immediately

dropped the charges against Hodges. Hodges then filed a suit for malicious prosecution against Gibson and against Crosgrove.

At trial Hodges was able to prove all the elements of malicious prosecution to the jury's satisfaction: (1) She had been subjected to prosecution for theft, and the matter had been terminated in her favor. (2) She had sued the correct parties, because Gibson and Crosgrove were responsible for instituting the original proceedings against her. (3) She had ample evidence that the original prosecution was instituted without probable cause because Gibson failed to investigate Crosgrove until after she had been arrested and because the prosecutor dismissed the charges against her. (4) Finally, there were enough facts for the jury to infer that both Gibson and Crosgrove had acted with improper motive: Gibson had acted with an apparent bias against Hodges, and Crosgrove apparently had accused Hodges for self-preservation. The jury awarded Hodges a total of $88,000 in damages: $77,000 from Gibson, and $11,000 from Crosgrove. The verdict was upheld on appeal.

### Damages

The plaintiff in an action for malicious prosecution can recover money from the defendant for certain harms suffered. Typical injuries include loss of reputation and credit, humiliation, and mental suffering. If the original action was a criminal case, additional harms often include discomfort, injury to health, loss of time, and deprivation of society with family.

If the plaintiff suffered an economic loss directly related to the original action, the plaintiff can also recover the amount lost. This amount includes attorneys' fees and court costs incurred by the plaintiff in defending the original case.

Finally, the plaintiff may recover PUNITIVE DAMAGES. Punitive damages are imposed by judges and juries to punish misconduct by a party. Because an action for malicious prosecution requires proof of improper intent on the part of the defendant, punitive damages commonly are awarded to malicious prosecution plaintiffs who win damages awards.

### Other Considerations

Actions for malicious prosecution must compete against the public interest in allowing parties to pursue cases unfettered by the specter of a retaliatory case. Very few civil or criminal cases result in an action for malicious prosecution. This is because it is difficult to prove that the defendant procured or continued the original case without probable cause and with an improper purpose.

Another difficulty for the plaintiff in an action for malicious prosecution is immunity. Generally, the law protects witnesses, police officers, judges, prosecutors, and lawyers from suit for malicious prosecution. Witnesses are given immunity because justice requires that they testify without fear of reprisals. Law enforcement and judicial officers are given immunity because they must be free to perform their duties without continually defending against malicious prosecution cases.

There are exceptions, however. If a law enforcement or judicial official ventures outside the bounds of official duties to instigate or continue a malicious prosecution, the official may be vulnerable to a malicious prosecution suit. For example, a prosecutor who solicits fabricated testimony to present to a grand jury may be sued for malicious prosecution. The prosecutor would receive only limited immunity in this instance because the solicitation of evidence is an administrative function, not a prosecutorial function (*Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 [1993]).

Private parties may also at times enjoy immunity from actions for malicious prosecution. For example, a person who complains to a disciplinary committee about an attorney may be immune. This general rule is followed by courts to avoid discouraging the reporting of complaints against attorneys.

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**CROSS-REFERENCES**

False Arrest; Malice; Probable Cause; Tort Law.

## MALPRACTICE

*The breach by a member of a profession of either a standard of care or a standard of conduct.*

Malpractice refers to NEGLIGENCE or misconduct by a professional person, such as a lawyer, a doctor, a dentist, or an accountant. The failure to meet a standard of care or standard of conduct that is recognized by a profession reaches the level of malpractice when a client or patient is injured or damaged because of error.

After the 1970s the number of malpractice suits filed against professionals greatly increased. Most malpractice suits involved doctors, especially surgeons and other specialists who performed medical procedures with a high degree of risk to their patients. Large damage awards against doctors resulted in higher malpractice insurance costs. Similarly, the increase of malpractice awards against lawyers led to higher insurance premiums and caused some insurance companies to stop writing malpractice policies altogether.

The typical malpractice suit will allege the TORT of negligence by the professional. Negligence is conduct that falls below the legally established standard for the protection of others against unreasonable risk of harm. Under negligence law a person must violate a reasonable standard of care. Typically this has meant the customary or usual practice of members of the profession. For example, if a surgeon leaves a sponge or surgical tool inside a patient, the surgeon's carelessness violates a basic standard of care. Likewise, if an attorney fails to file a lawsuit for a client within the time limits required by law, the attorney may be charged with negligence.

### Medical Malpractice

Among physicians, malpractice is any bad, unskilled, or negligent treatment that injures the patient. The standard of care formerly was considered to be the customary practice of a particular area or locality. Most states have modified the "locality rule" into an evaluation of the standard of practice in the same or similar locality, combined with an examination of the state of development of medical science at the time of the incident. This modification has taken place as medicine has become increasingly uniform and national in scope. A majority of states define the standard of conduct as that degree of skill and learning ordinarily possessed and used by other members of the profession. A doctor who has met the standard, as established by EXPERT TESTIMONY at trial, cannot generally be found negligent. Some states have passed statutes that establish the standard of the profession as the test of whether particular treatment was negligent.

Specialists within the medical field are generally held to standards of care that are higher than those for general practitioners. In addition, a specialist or anyone undertaking to perform procedures ordinarily done by a specialist will be held to the level of performance applied to that specialty, although the person may not actually be a certified specialist in that field.

A small number of states apply the "respectable minority rule" in evaluating doctors' conduct. This rule exempts a physician from liability where he chooses to follow a technique used only by a small number of respected practitioners. Courts, however, frequently have difficulty in determining what is a respectable minority of physicians or acceptable support for a particular technique.

Some states use the "error in judgment rule." This principle holds that a medical professional who otherwise subscribes to applicable professional standards should not be found to have committed malpractice merely because she committed an error in judgment in choosing among different therapeutic approaches or in diagnosing a condition.

### Legal Malpractice

The four general areas of LEGAL MALPRACTICE are negligent errors, negligence in the professional relationship, fee disputes, and claims filed by an adversary or nonclient against a lawyer. As in the medical field, lawyers must

conform to standards of conduct recognized by the profession.

A lawyer has the duty, in all dealings and relations with a client, to act with honesty, GOOD FAITH, fairness, integrity, and fidelity. A lawyer must possess the legal skill and knowledge that is ordinarily possessed by members of the profession.

Once the lawyer and the client terminate their relationship, a lawyer is not allowed to acquire an interest that is adverse to a client, in the event that this might constitute a breach of the ATTORNEY-CLIENT PRIVILEGE. In addition, a lawyer cannot use information that he obtained from a client as a result of their relationship. For example, it would constitute unethical behavior for an attorney to first advise a client to sell a piece of property so it would not be included in the client's PROPERTY SETTLEMENT upon DIVORCE and then to purchase the property from the client for half its market value.

Any dealings that a lawyer has with a client will be carefully examined. Such dealings require fairness and honesty, and the lawyer must show that no UNDUE INFLUENCE was exercised and that the client received the same benefits and advantages as if she had been dealing with a stranger. If the client had independent legal advice about any transaction, that is usually sufficient to meet the lawyer's burden to prove fairness.

A lawyer also has the duty to provide a client with a full, detailed, and accurate account of all money and property handled for him or her. The client is entitled to receive anything that the lawyer has acquired in violation of his duties to the client.

If a lawyer fails to promptly pay all funds to his client, the lawyer may be required to pay interest. A lawyer is liable for fraud—except when the client caused the attorney to commit fraud—and is generally liable for any damages resulting to the client by his negligence. In addition, a lawyer is responsible for the acts of his associates, clerks, legal assistants, and partners and may be liable for their acts if they result in losses to the client.

Negligent errors are most commonly associated with legal malpractice. This category is based on the premise that an attorney has committed an error that would have been avoided by a competent attorney who exercises a reasonable standard of care. Lawyers who give improper advice, improperly prepare documents, fail to file documents, or make a faulty analysis in examining the title to real estate may be charged with malpractice by their clients. A legal malpractice action, however, is not likely to succeed if the lawyer committed an error because an issue of law was unsettled or debatable.

Many legal malpractice claims are filed because of negligence in the professional relationship. The improper and unprofessional handling of the attorney-client relationship leads to negligence claims that are not based on the actual services provided. Lawyers who fail to communicate with their clients about the difficulties and realities of the particular claim risk malpractice suits from dissatisfied clients who believe that their lawyer was responsible for losing the case.

Another area of legal malpractice involves fee disputes. When attorneys sue clients for attorneys' fees, many clients assert malpractice as a defense. As a defense, it can reduce or totally eliminate the lawyer's recovery of fees. The frequency of these claims is declining, in part perhaps because attorneys are reluctant to sue to recover their fees.

A final area of legal malpractice litigation concerns claims that do not involve a deficiency in the quality of the lawyer's legal services provided to the client, but an injury caused to a third party because of the lawyer's representation. This category includes tort claims filed against an attorney alleging MALICIOUS PROSECUTION, ABUSE OF PROCESS, DEFAMATION, infliction of emotional distress, and other theories based on the manner in which the attorney represented the client. These suits rarely are successful except for malicious prosecution. Third-party claims also arise from various statutes, such as SECURITIES regulations, and motions for sanctions, such as under Federal Rule of Civil Procedure 11.

### Clergy Malpractice

A growing number of lawsuits against churches and clergy began to be filed in the 1980s, where plaintiffs sued churches as they might sue a corporation or a government agency. Those lawsuits alleged CLERGY MALPRACTICE. In them, the plaintiffs claimed that clergy members should be legally held to a higher standard of conduct than ordinary citizens should, in the same way as other professionals in positions of trust, such as doctors or lawyers. The majority of courts have ruled that

standards of clergy conduct would violate the First Amendment's separation of church and state. However, some courts have accepted narrower claims accusing individual clergy members of inflicting emotional distress or breaching their fiduciary duty.

In *Nally v. Grace Community Church of the Valley*, 763 P.2d 948 (Cal. 1988), the California Supreme Court in 1988 rejected a lawsuit accusing the pastors of a Protestant church in Los Angeles of negligence for failing to prevent the 1979 suicide of a 24-year-old man who was a church member. The lawsuit, brought by his parents, argued that the pastors should have referred him to a professional counselor when they learned he had suicidal tendencies.

In 2001, the Utah Supreme Court unanimously upheld the dismissal of *Franco v. The Church of Jesus Christ of Latter-day Saitns,* 21 P.3d 19 (Utah 2001). In that case, Lynette Franco sued the MORMON CHURCH for negligence for telling her to forgive and forget a 1986 incident in which she claimed to have been the victim of child rape at the hands of another church member. Lawyers for Franco had initially included an allegation of clergy misconduct in the lawsuit, but later dropped it, focusing instead on FRAUD, negligence and infliction of distress. But the court rejected it nevertheless, ruling that setting a standard for clergy conduct would embroil the courts in establishing the training, skill and standards applicable for members of the clergy in this state in a diversity of religions professing widely varying beliefs. The justices, all Mormons, were unanimous in their ruling.

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CROSS-REFERENCES

Attorney Misconduct; Ethics, Legal; Health Care Law; Medical Malpractice; Physicians and Surgeons; Privileged Communication.

## MAN-IN-THE-HOUSE RULE

*A regulation that was formerly applied in certain jurisdictions that denied poor families* WELFARE *payments in the event that a man resided under the same roof with them.*

Under the man-in-the-house rule, a child who otherwise qualified for welfare benefits was denied those benefits if the child's mother was living with, or having relations with, any single or married able-bodied male. The man was considered a substitute father, even if the man was not supporting the child.

Before 1968 administrative agencies in many states created and enforced the man-in-the-house rule. In 1968 the U.S. Supreme Court struck down the regulation as being contrary to the legislative goals of the Aid to Families of Dependent Children (AFDC) program. The AFDC program, established by the Social Security Act of 1935 (49 Stat. 620, *as amended* [42 U.S.C.A. § 301 et seq.]), provides benefits to the children of impoverished parents.

In *King v. Smith,* 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968), the U.S. Supreme Court entertained a challenge to the man-in-the-house rule brought by the four children of Mrs. Sylvester Smith, a widow. These children were denied benefits by Dallas County, Alabama, welfare authorities, based on their knowledge that a man named Williams was visiting Smith on weekends and had sexual relations with her.

The children of Smith filed a CLASS ACTION suit in federal court on behalf of other children in Alabama who were denied benefits under Alabama's "substitute father" regulation. This regulation considered a man a substitute father if (1) he lived in the home with the mother; (2) he visited the home frequently for the purpose of living with the mother; or (3) he cohabited with the mother elsewhere (*King,* citing Alabama Manual for Administration of Public Assistance, pt. I, ch. II, § VI). Testimony in the case revealed that there was some confusion among the authorities over how to interpret the regulation. One official testified that the regulation applied only if the parties had sex at least once a week, another official testified that sex every three months was sufficient, and still another placed the frequency at once every six months.

According to the High Court, Congress did not intend that the AFDC program require children "to look for their food to a man who is not in the least obliged to support them." The Court maintained that when Congress used the term *parent* in the SOCIAL SECURITY ACT, it was referring to "an individual who owed to the child a state-imposed legal duty of support." Ultimately, the Court struck down the man-in-the-house rule by holding that under the AFDC provisions

in the Social Security Act, "destitute children who are legally fatherless cannot be flatly denied federally funded assistance on the transparent fiction that they have a substitute father."

## MANAGED CARE

*A general term that refers to health plans that attempt to control the cost and quality of care by coordinating medical and other health-related services.*

The U.S. HEALTH CARE system has undergone major structural changes since the 1970s. The traditional way of obtaining medical care has been for a patient to choose a doctor and then pay that doctor for the services provided. This "fee-for-service" model, which has been financially rewarding for doctors, gives the patient the right to choose a physician. But the fee-for-service model underwent a rapid decline in the 1980s and 1990s as the concept of managed care took hold in the health care industry.

Managed care is a new term for an old medical financing plan known as the HMO, or health maintenance organization. HMOs are not insured plans. They are prepaid health care systems, offering services to which the member is entitled, as opposed to a dollar amount guaranteed by an insurance policy. Doctors are paid a set amount of money monthly for each patient regardless of the level or frequency of care provided.

HMOs emphasize preventive care. They became popular with employers who purchase health care coverage for their employees because they charged lower fees than insurance plans that reimburse patients for fee-for-service payments. Holding down the cost of medical care was one of the chief aims of HMOs.

The first HMOs were started around 1930. The Kaiser Foundation Health Plan of California was one of the first and largest HMOs. Another large HMO is the Health Insurance Plan of Greater New York. Both Kaiser and Health Plan also have their own hospitals. The federal government has promoted HMOs since the 1970s, enacting the Health Maintenance Organization Act of 1973, 87 Stat. 931, and other legislation that allow HMOs to meet federal standards for MEDICARE and MEDICAID eligibility.

A person who participates in an HMO deals with a primary care physician, who directs the person's medical care and determines whether he or she should be referred for specialty care. This "gatekeeper" function has drawn both criticism and praise. Critics argue that a person can be tied down to a physician not of his or her choosing, who has complete control over whether the person will be seen by a specialist or be given special drugs or treatments. Critics also argue that HMO physicians are not allowed to perform thorough testing procedures because of the demands of HMO management to limit costs, and that this ultimately leads to rationing of medical treatment.

Advocates of HMOs and managed care argue that it is an advantage to the patient to have one physician with full responsibility for his or her care. With few exceptions, these primary care physicians are trained as general practitioners, family practice physicians, pediatricians, internists, or obstetrician-gynecologists.

The debate over NATIONAL HEALTH CARE reform escalated during the first term of the Clinton administration. President BILL CLINTON sought to overhaul the U.S. health care system by guaranteeing universal coverage while simultaneously controlling costs. His plan, which emphasized the managed care model, died in Congress, yet managed care continues to grow. Medicaid, the state-operated, but federally and state-funded, health care plans for the poor, started in 1966 as a fee-for-service program. By the 1990s, the conversion of Medicaid to a managed care model of service delivery had grown rapidly, serving as many as 10 million people.

The early promise of HMOs has given way to deep concerns about the steady escalation of health care costs. By 2003, annual premium increases of almost 20 percent were hurting employers, employees, and small business owners who purchase their own health insurance. An average HMO family premium has risen from the $100–$150 range in 1993 to the $400–$600 range in 2003. HMOs defend the rise in costs by pointing to advances in medical technology that require the purchase of high-priced equipment, rising prescription drug prices, and a U.S. population that demands increasingly more services, in particular the aging "baby boomer" population. To manage costs and discourage frivolous visits, most HMOs now require members to make a co-payment for most types of medical visits. HMOs also point to state laws that undercut their management of costs by giving members the right to go outside of the HMO network

of health providers for services. In addition, members can now take advantage of state laws that provide appeal rights when denied medical services.

HMOs and health insurance companies have challenged these state laws, arguing that the 1974 federal EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) preempted these state laws. ERISA seeks to protect employee benefit programs, which include PENSION plans and health care plans, through a lengthy set of standards, rules, and regulations. Health care providers have pointed to the comprehensive nature of ERISA as demonstrating the intent of Congress to maintain a uniform national system. However, the U.S. Supreme Court has been unsympathetic to these arguments.

In *Moran v. Rush Prudential HMO, Inc.*, 536 U.S. 355, 122 S. Ct. 2151, 153 L. Ed.2d 375 (2002), the U.S. Supreme Court, in a 5–4 decision, upheld an Illinois law that required HMOs to provide independent review of disputes between the primary care physician and the HMO. Debra Moran had complained of continued numbness, pain, and loss of function and mobility in her right shoulder. A nerve conduction test revealed that she had braxial plexopathy, which involves compression of the nerves. Moran researched this condition and found a doctor in Virginia who performed microsurgery to correct this type of problem. Because the doctor was "out-of-network," Rush Prudential refused to pay for Moran's consultation with him. The doctor diagnosed Moran as suffering from a syndrome that could be corrected with surgery. Moran gave her Illinois primary physician the diagnosis, which was confirmed by two Rush-affiliated thoracic surgeons. Moran was not satisfied with the surgical methods offered by these two doctors. Even though Rush denied her coverage, Moran elected to have the operation performed by the Virginia surgeon. The surgery was a success, but Moran faced medical bills of almost $95,000. She took advantage of the Illinois independent-review law. A year later, the judge determined, based on an independent medical examination, that the surgery performed by the Virginia doctor had been "medically necessary." This conclusion led Moran to ask the state court to order Rush to reimburse her for the medical costs of the surgery. The U.S. Supreme Court upheld the Illinois review law, finding that the law was an insurance regulation rather than a benefit regulation. Therefore, ERISA did not preempt the state regulation.

**Enrollment in Health Maintenance Organizations (HMOs), 1976 to 2001**

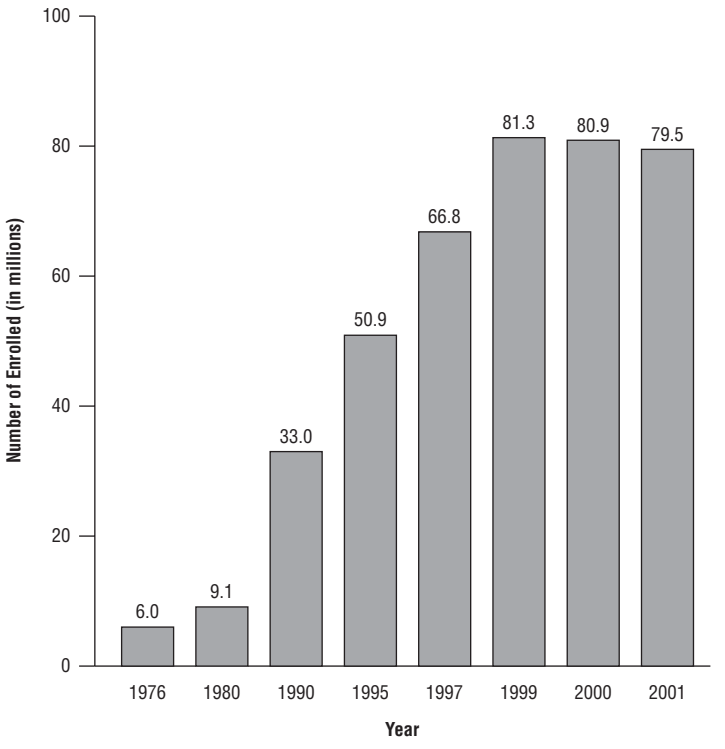


SOURCE: U.S. Department of Health and Human Services, National Center for Health Statistics, *Health, United States*, 2002.

HMOs suffered an even greater defeat in their quest to manage services and costs when the U.S. Supreme Court upheld "any willing provider" laws passed by Kentucky. The laws permitted HMO members to obtain medical services from outside the designated list of HMO providers. HMOS again objected, contending that ERISA preempted the laws because they clearly dealt with health care benefits. The Court, in *Kentucky Association of Health Plans, Inc. v. Miller*, 538 U.S. 329, 123 S. Ct. 1471, 155 L. Ed.2d 468 (2003), unanimously rejected this argument. It again characterized the laws as insurance regulations, which are exempt from ERISA PREEMPTION.

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CROSS-REFERENCES

Health Care Law; Health Insurance; Physicians and Surgeons.

## MANAGER

*One who has charge of a corporation and control of its business, or of its branch establishments, divisions, or departments, and who is vested with a certain amount of discretion and independent judgment. A person chosen or appointed to manage, direct, or administer the affairs of another person or of a business, sports team, or the like. The designation of* manager *implies general power and permits reasonable inferences that the employee so designated is invested with the general conduct and control of the employer's business.*

## MANDAMUS

*[*Latin, We comand.*] A writ or order that is issued from a court of superior jurisdiction that commands an inferior tribunal, corporation,* MUNICIPAL CORPORATION*, or individual to perform, or refrain from performing, a particular act, the performance or omission of which is required by law as an obligation.*

A writ or order of mandamus is an extraordinary court order because it is made without the benefit of full judicial process, or before a case has concluded. It may be issued by a court at any time that it is appropriate, but it is usually issued in a case that has already begun.

Generally, the decisions of a lower-court made in the course of a continuing case will not be reviewed by higher courts until there is a final judgment in the case. On the federal level, for example, 28 U.S.C.A. § 1291 provides that appellate review of lower-court decisions should be postponed until after a final judgment has been made in the lower court. A writ of mandamus offers one exception to this rule. If a party to a case is dissatisfied with some decision of the trial court, the party may appeal the decision to a higher court with a petition for a writ of mandamus before the trial proceeds. The order will be issued only in exceptional circumstances.

The writ of mandamus was first used by English courts in the early seventeenth century. It migrated to the courts in the American colonies, and the law on it has remained largely the same ever since. The remedy of mandamus is made available through court opinions, statutes, and court rules on both the federal and state levels. On the federal level, for example, 28 U.S.C.A. § 1651(a) provides that courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The Supreme Court set forth some guidelines on writs of mandamus in *Kerr v. United States District Court,* 426 U.S. 394, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976). In *Kerr,* the Court upheld the denial of a writ of mandamus sought by prison officials to prevent the district court from compelling them to turn over personnel and inmate files to seven prisoners who had sued the prison over alleged constitutional violations. The officials argued that turning over the records would compromise prison communications and confidentiality.

The Supreme Court observed in *Kerr* that the writ of mandamus was traditionally used by federal courts only to confine an inferior court to a lawful exercise of its jurisdiction, or to compel an inferior court to exercise its authority when it had a duty to do so. The Court also noted that mandamus is available only in exceptional cases because it is so disruptive of the judicial process, creating disorder and delay in the trial. The writ would have been appropriate, opined the Court, if the trial court had wrongly decided an issue, if failure to reverse that decision would irreparably injure a party, and if there was no other method for relief. Because the prison officials could claim a privilege to withhold certain documents, and had the right to have the documents reviewed by a judge prior to release to the opposing party, other remedies existed and the writ was inappropriate.

Although traditionally writs of mandamus are rare, they have been issued in a growing number of situations. They have been issued by federal courts when a trial judge refused to dismiss a case even though it lacked jurisdiction; refused to reassign a case despite a conflict of interest; stopped a trial for ARBITRATION or an administrative remedy; denied a party the opportunity to intervene, to file a cross-claim, or to amend a PLEADING; denied a CLASS ACTION; denied or allowed the consolidation or severance of two trials; refused to permit depositions; or entered an order limiting or denying discovery of evidence.

*A sample petition for a writ of mandamus*

## Petition for a Writ of Mandamus

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

TIMOTHY JAMES McVEIGH,
Petitioner-Defendant,
v.
HONORABLE RICHARD P. MATSCH,
Respondent.

Case No. 96 (Case No. 96-CR-68-M below)

PETITION FOR WRIT OF MANDAMUS OF PETITIONER-DEFENDANT, TIMOTHY JAMES McVEIGH AND BRIEF IN SUPPORT

COMES NOW the Petitioner, Timothy James McVeigh, by and through the undersigned counsel, and moves this Court to:

1. Assume jurisdiction in this matter and issue a Writ of Mandamus to the respondent trial judge directing the respondent to enter the appropriate orders specifically requested herein; and

2. Issue a stay of the proceedings below pending resolution of this petition in this Court or, in the alternative, allow jury selection to proceed on schedule, March 31, 1997, but stay the taking of evidence in the court below pending this Court's resolution of the Petition.

OVERVIEW

The McVeigh defense, based upon the material provided to it, suggests the following hypothesis: A foreign power, probably Iraq, but not excluding the possibility of another foreign state, planned a terrorist attack(s) in the United States and that one of those targets was the Alfred P. Murrah Building in Oklahoma City. The Murrah Building was chosen either because of lack of security (i.e. it was a "soft target"), or because of available resources such as Iraqi POW's who had been admitted into the United States were located in Oklahoma City, or possibly because the location of the building was important to American neo-Nazis such as those individuals who supported Richard Snell who was executed in Arkansas on April 19, 1995.

The plan was arranged for a Middle Eastern bombing engineer to engineer the bomb in such a way that it could be carefully transported and successfully detonated. There is no reported incident of neo-Nazis or extreme right-wing militants in this country exploding any bomb of any significant size let alone one to bring down a nine (9) story federal building and kill 168 persons. In fact, not even members of the left-wing militant groups such as the Weatherman were ever able to accomplish anything of this magnitude.

This terrorist attack was "contracted out" to persons whose organization and ideology was friendly to policies of the foreign power and included dislike and hatred of the United States government itself, and possibly included was a desire for revenge against the United States, with possible anti-black and anti-semitic overtones. Because Iraq had tried a similar approach in 1990, but had been thwarted by Syrian intelligence information given to the United States, this time the information was passed through an Iraqui intelligence base in the Philippines.

Operating out of the Philippines as a base, the state-sponsored [sic] terrorists, with the Murrah Building already chosen as the target, enlisted the support and assistance of members of the Radical American Right. The defense believes the evidence suggests that American neo-Nazis were chosen to carry out the bombing of the Murrah Building because of a shared ideological bent of hatred against the American government. It is possible that those who carried out the bombing were unaware of the true sponsor.

The evidence collected by the defense suggests that the desired ideology was found by the state-sponsored terrorists in Elohim City, Oklahoma, a small compound near Muldrow, Oklahoma, consisting of between 25 and 30 families and described as a terrorist organization which preaches white supremacy, polygamy and overthrow of the government. Elohim City was a haven for former members of The Covenant, The Sword and the Arm of the Lord ("CSA"), another extremist organization that had been raided by the federal government on April 19, 1985, exactly ten years to the day prior to the Oklahoma City bombing. One member of CSA turned on the organization and testified in court at the trial of Richard Snell and others who were charged in Arkansas with sedition in that they conspired to destroy the Alfred P. Murrah Building in Oklahoma City with a rocket launcher in the early 1980's. Snell was convicted on unrelated capital charges and sentenced to death in Arkansas. He was executed the day of the Oklahoma City bombing—April 19, 1995—and is buried at Elohim City. It is from this group of people that the defense believes that the evidence suggests foreign, state-sponsored terrorists groomed the most radical persons associated with Elohim City and extracted monumental revenge against the federal government by destroying the Murrah Building on the day of Richard Snell's execution and the anniversary date of federal raid.

But the defense hypothesis also entails evidence, very strong evidence, that the federal government, through the Bureau of Alcohol, Tobacco & Firearms, had an informant in Elohim City, an informant who warned federal law enforcement prior to April 19, 1995, that former residents, including the former chief of security, of Elohim City were planning to "target for destruction" federal buildings in Oklahoma, including the Alfred P. Murrah Building. The defense believes this scenario is true, that it is [sic] eerily similar to the World Trade Center bombing where the FBI had an informant infiltrate the terrorist group but failed to stop that criminal act, and that, absent judicial intervention, information concerning these government will be forever buried.

The defense for Mr. McVeigh is not engaged in a fishing expedition. As the information set forth in this Petition demonstrates, the McVeigh defense, using resources provided to it by the district court, has conducted a wide-ranging and increasingly narrow focused investigation. But without subpoena power, without the right to take depositions, and without access to national intelligence information, the McVeigh defense can go no further.

The writ of mandamus can also be issued in a mandamus proceeding, independent of any judicial proceeding. Generally, such a petition for a mandamus order is made to compel a judicial or government officer to perform a duty owed to the petitioner. For example, in Massachusetts, each year the commonwealth's attorney general and each district attorney must make available to the public a report on wiretaps and other interceptions of oral communications conducted by law enforcement officers. If the report is not made available, any person may compel its production by filing an action for mandamus (Mass. Gen. Laws Ann. ch. 272, § 99 [West 1996]). If successful, a court would issue an order directing the attorney general and district attorneys to produce the information. The attorney general and district attorneys have a chance to defend their actions at a hearing on the action. If the parties fail to comply with a mandamus order, they may be held in CONTEMPT of court and fined or jailed.

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Wyler, Robert A. 1990. *Legalines: Civil Procedures.* 3d ed. Chicago: Harcourt Brace Jovanovich Legal & Professional.

## MANDATE

*A judicial command, order, or precept, written or oral, from a court; a direction that a court has the authority to give and an individual is bound to obey.*

A mandate might be issued upon the decision of an appeal, which directs that a particular action be taken, or upon a disposition made of a case by an inferior tribunal.

The term *mandate* is also used in reference to an act by which one individual empowers another individual to conduct transactions for an individual in that person's name. In this sense, it is used synonymously with POWER OF ATTORNEY.

## MANDATORY

*Peremptory; obligatory; required; that which must be subscribed to or obeyed.*

*Mandatory statutes* are those that require, as opposed to permit, a particular course of action. Their language is characterized by such directive terms as "shall" as opposed to "may." A *mandatory provision* is one that must be observed, whereas a directory provision is optional.

An example of a mandatory provision is a law that provides that an election judge must endorse his or her initials on a ballot.

## MANDATORY AUTHORITY

*Precedents, in the form of prior decisions by a higher court of the same state on point, statutes, or other sources of law that must be considered by a judge in the determination of a legal controversy.*

Mandatory authority is synonymous with binding authority.

## MANN ACT

The Mann Act (18 U.S.C.A. § 2421 et seq.), also known as the White Slave Traffic Act, is a federal criminal statute that deals with prostitution and CHILD PORNOGRAPHY. Enacted in 1910 and named for its sponsor, Representative JAMES R. MANN, of Illinois, it also was used to prosecute men who took women across state lines for consensual sex.

Representative Mann introduced the act in December 1909 at the request of Chicago prosecutors who claimed that girls and women were being forced into prostitution by unscrupulous pimps and procurers. The term *white slavery* became popular to describe the predicament these females faced. It was alleged that men were tricking, coercing, and drugging females to get them involved in prostitution and then forcing them to stay in brothels.

The legislation was intended to stop the interstate trafficking of women. Though federal criminal statutes were rare in 1910, and seen as an attack on state POLICE POWERS, the legislation encountered little opposition. The act made it a felony to transport knowingly any woman or girl in interstate commerce or foreign commerce for prostitution, debauchery, or any other immoral purpose. It also made it a felony to coerce a woman or a girl into such immoral acts. President WILLIAM H. TAFT signed the bill in June 1910.

The U.S. Supreme Court upheld the constitutionality of the Mann Act in *Hoke v. United States,* 227 U.S. 308, 33 S. Ct. 281, 57 L. Ed. 523 (1913). The Court broadened the scope of the act in *Caminetti v. United States,* 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442 (1917), when it ruled that the act applied to noncommercial acts of immorality. In *Caminetti* the Court seized on

the phrase "any other immoral purpose," concluding that Congress intended to prevent the use of interstate commerce to promote sexual immorality. This interpretation radically changed the scope of the act.

The Mann Act was used by the FEDERAL BUREAU OF INVESTIGATION to curtail commercialized vice. It was also often used to prosecute prominent persons who did not conform to conventional morality. Jack Johnson, a heavyweight boxing champion, was charged with and convicted of a Mann Act violation in 1912, for taking his mistress across state lines. Over the years, similar charges were leveled against the architect Frank Lloyd Wright, the actor Charlie Chaplin, and the rock and roll singer Chuck Berry. Of these three, only Berry was convicted of a Mann Act violation.

Congress amended the act in 1978 to attack the problem of child PORNOGRAPHY. The amendments made the act's provisions regarding this issue gender neutral, so that both boys and girls who were sexually exploited were now protected (Pub. L. No. 95-225, 92 Stat. 8–9). In 1986 the law was further amended. The new amendments made the entire act gender neutral as to victims of sexual exploitation. More important, all references to debauchery and any other immoral purpose were replaced by the phrase "any sexual activity for which any person can be charged with a criminal offense" (Pub. L. No. 99-628, 100 Stat. 3511–3512.) This change took the federal government out of the business of defining *immoral.* Because most states have repealed criminal laws against fornication and ADULTERY, noncommercial, consensual sexual activity no longer is subject to prosecution.

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Langum, David J. 1994. *Crossing over the Line: Legislating Morality and the Mann Act.* Chicago: Univ. of Chicago Press.

## ♦ MANN, HORACE

Attorney, politician, and reformer of U.S. public education Horace Mann transformed the nation's schools. Mann was a gust of wind blowing through the doldrums of nineteenth-century teaching. In 1837, he left a promising career in law and politics to become Massachusetts's first secretary of education. In this capacity, he rebuilt shoddy schools, instituted teacher training, and ensured widespread access to education for children and adults. These reforms not only revived the state system but also inspired great national progress. The spirit of opportunity and the duty of citizenship guided Mann: "In a republic," he said, "ignorance is a crime." Later, he served in the U.S. Congress before becoming a professor at and the president of Antioch College. Besides these contributions, his legacy to U.S. education is still felt in the contemporary debate over school prayer. He helped wean education from its religious origins in order to create a truly public system.

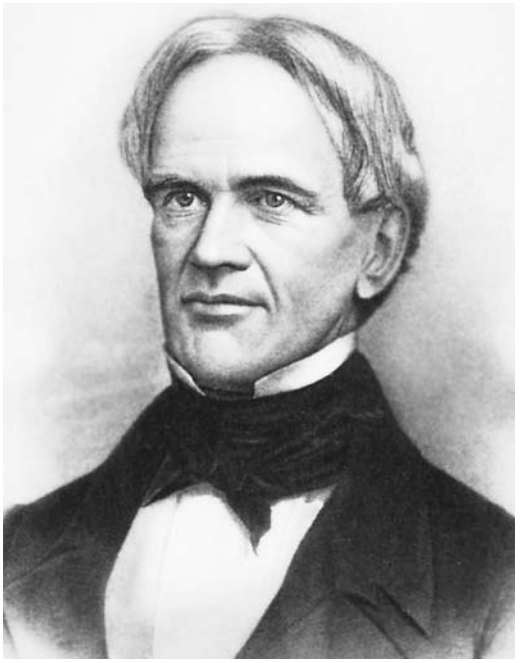

*Horace Mann.*
ARCHIVE PHOTOS, INC.

Mann was born in poverty on May 4, 1796, in Franklin, Massachusetts. His father, Thomas Mann, was a farmer in Franklin. Neither his father nor his mother, Rebecca Mann, received much formal education, which was not widely available in the years following the American Revolution. Little opportunity existed for Mann, a sensitive boy driven to tears by hellfire-and-brimstone sermons on Sundays. Although an avid reader, Mann never attended school for more than ten weeks of the year. His extraordinary mind might have gone no further than the family's ancestral farm were it not for a traveling Latin teacher who tutored him when Mann was twenty. Provided with decent instruction, Mann's gifts were revealed: he qualified for entrance as a sophomore to Brown University. He graduated with high honors in 1819;

remained briefly as a tutor in Latin and Greek; enrolled in LITCHFIELD LAW SCHOOL, in Connecticut, two years later; and was admitted to the bar of Norfolk County in 1823.

Mann practiced law for fourteen years while making his name in politics. He first won election to the Massachusetts House of Representatives in 1827; election to the state senate, where he served as president, followed in 1833. He left his mark on the legislature in two ways: by seeking state help for mentally ill persons and by passing the landmark education bill of 1837. The law created a board of education at a time when Massachusetts's public schools were barely limping along. Buildings were crumbling, teachers underpaid, and teaching methods erratic. Much the same could be said of the nation's public schools. In Massachusetts, moreover, one-third of the children did not attend school at all, and one-sixth of all students attended private schools. To clean up this mess, the 1837 law called for the appointment of a state secretary of education. Mann, despite the promise of further success as a lawyer and politician, took the job.

"EDUCATION THEN, BEYOND ALL OTHER DEVICES OF HUMAN ORIGIN, IS A GREAT EQUALIZER OF THE CONDITIONS OF MEN,—THE BALANCE WHEEL OF THE SOCIAL MACHINERY."
—HORACE MANN

Over the next twelve years, Mann's success was stunning. His efforts rebuilt Massachusetts's education system from the ground up: he centralized control of its schools, invested in better facilities, established institutes for teacher training, revamped the curriculum, discouraged physical punishment, and held annual education conventions for teachers and the public. Educators nationwide sought out his ideas, published in a bimonthly magazine that he founded, called the *Common School Journal,* as well as in ANNUAL REPORTS. In 1843, pursuing new ideas for improving the quality of Massachusetts's system, he toured schools in eight European countries. His praise for the rigors of the German model brought him into open conflict with schoolteachers back home, who thought him critical of their work. Mann stood his ground; he had not spent five months abroad only to be bullied by the status quo.

Even more controversial was Mann's position on Bible reading in public schools. In the mid-nineteenth century, the practice remained a leftover from the colonial period, when schools were each run by a church of an individual sect, or group. Mann thought Bible reading useful for teaching moral instruction, and he promoted it, but only so long as it was done without comment. As a Unitarian, he did not want teachers imposing views on students of different faiths; this had often led to bitter disagreements. (In the early 1840s, disputes over classroom Bible reading would cause Catholic-Protestant riots in New York and Philadelphia.) Under Mann's influence, Massachusetts adhered to the law it had passed in 1827 banning sectarian instruction (instruction specific to or characteristic of a particular religious group) from public schools. Orthodox church leaders sharply attacked Mann, one calling his policy "a grand instrument in the hands of free thinkers, atheists and infidels." History was on Mann's side, however. The sectarian influence would continue to die out over the next half century, a historical trend culminating in the U.S. Supreme Court's landmark rulings banning school prayer in 1962 (ENGEL V. VITALE, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 [1962]) and Bible reading in 1963 (ABINGTON SCHOOL DISTRICT V. SCHEMPP, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 [1963]).

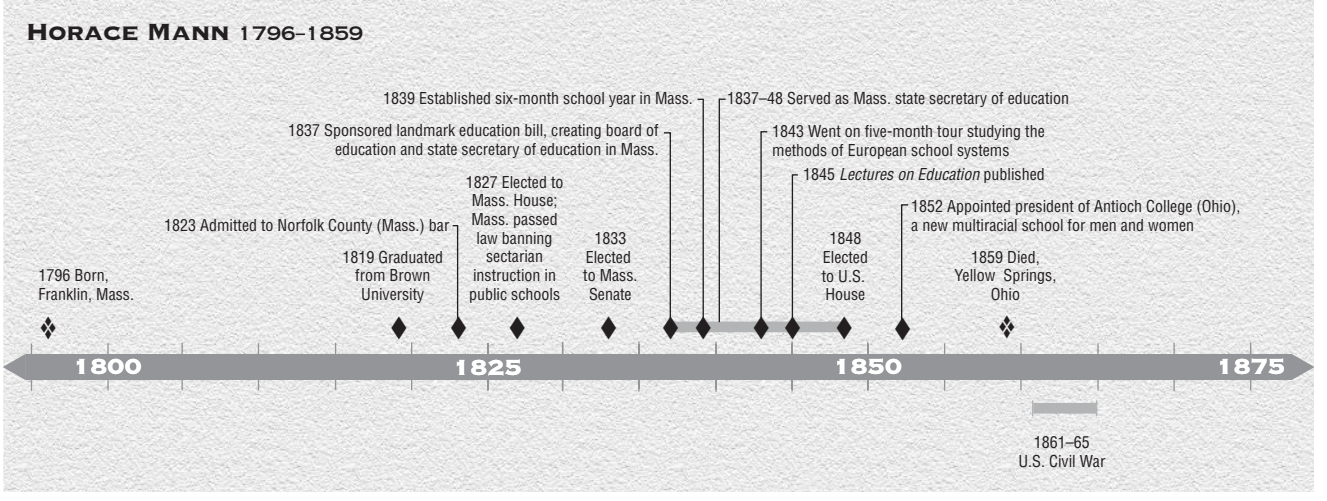

Ironically, the prayer ban arose from an attempt by administrators of education in New York to compose a bland, inoffensive prayer in the spirit of Mann's anti-sectarianism.

Mann spent the last decade of his life in public service and education. Resigning the education secretary's post in 1848, he won election to the U.S. Congress and served there four years. A run for governor of Massachusetts failed in 1852, and he accepted the offer of the presidency of newly founded Antioch College, a multiracial school for men and women, where he also taught courses in philosophy and theology. The college suffered financially. Mann's health failed, and he died August 2, 1859, at the age of sixty-three. Shortly before his death, at a commencement ceremony, he left the graduating class to ponder this sterling ideal: "Be ashamed to die until you have won some victory for humanity."

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CROSS-REFERENCES

Education Law; Schools and School Districts.

## ♦ MANN, JAMES ROBERT

James Robert Mann served in the U.S. House of Representatives from 1897 to 1922. Mann, an Illinois Republican, sponsored three pieces of legislation that enlarged the power of the federal government to regulate the economy and the nation's morals. He is best remembered as the author of the MANN ACT (18 U.S.C.A. § 2421 et seq.), also known as the White Slave Traffic Act.

Mann was born October 20, 1856, in McLean County, Illinois. He graduated from the University of Illinois in 1876 and then attended the Union College of Law (now known as the Northwestern University Law School). Following his admission to the Illinois bar in 1881, Mann joined a prominent Chicago law firm and achieved success as a business attorney.

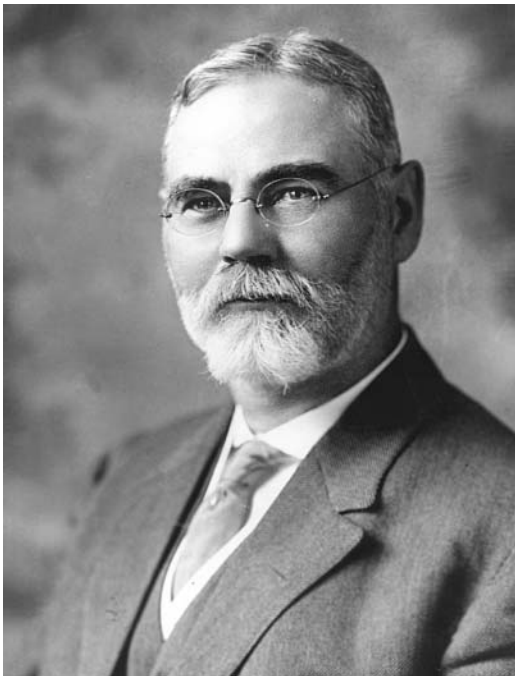

*James R. Mann.*
LIBRARY OF CONGRESS

Mann became active in Chicago politics during the 1880s and was elected to the U.S. House of Representatives in 1897. As a moderate Republican, Mann believed that the federal government had a role to play in managing the national economy. His interest in reform was heightened by the work of muckraking journalists who produced sensational investigative articles exposing impure food processing and impure and often fraudulent drugs.

In response to public concerns about the quality of food and medicine, Mann sponsored a major piece of federal legislation, the PURE FOOD AND DRUG ACT OF 1906 (34 Stat. 768).

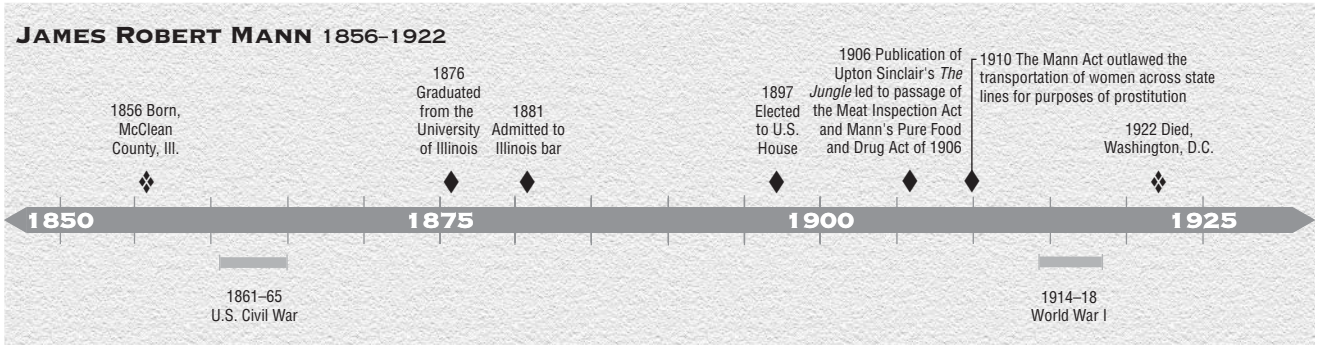

This act invoked the Constitution's COMMERCE CLAUSE for authority to regulate the interstate shipment of food and medicine. The law signaled a change in the state-federal power relationship, which had previously emphasized the right of states to regulate business.

The inspection of food products and medicines by the federal government both reassured the public about the quality of what it consumed and served notice that a national economy required national regulation. Mann demonstrated his continuing interest in regulation with his sponsorship of the Mann-Elkins Act of 1910 (36 Stat. 539). Mann-Elkins gave the INTERSTATE COMMERCE COMMISSION authority to regulate and set the rates for telegraph, telephone, and railroad companies. The law recognized that these modes of communication and transportation were a vital part of the interstate economy and that their rates needed to be regulated by the federal government rather than by the states.

"ALL OF THE HORRORS WHICH HAVE EVER BEEN URGED, EITHER TRUTHFULLY OR FANCIFULLY, AGAINST THE BLACK-SLAVE TRADE PALE INTO INSIGNIFICANCE AS COMPARED TO THE HORRORS OF THE SO-CALLED 'WHITE-SLAVE TRAFFIC'."
—JAMES MANN

Mann was instrumental in the passage of the Mann Act in 1910. This act grew out of concerns of Chicago authorities that women and girls were being forced into prostitution through a variety of tricks and coercive tactics. The term *white slavery* came to symbolize the predicament of women who were kept in houses of prostitution against their will. It was alleged that "white slaves" (pimps and procurers) lured females from rural states into large cities such as Chicago and then forced them into prostitution.

Responding to pleas from Chicago prosecutors that a federal CRIMINAL LAW was needed, Mann introduced the Mann Act. The act prohibited the transportation of women across state lines for prostitution or "any other immoral purpose." Mann skillfully guided the legislation through the House of Representatives, overcoming congressional Democrats who argued that the act expanded federal POLICE POWER. Once passed, the Mann Act became a central part of the work of the newly created FEDERAL BUREAU OF INVESTIGATION.

Mann died in Washington, D.C., on November 30, 1922.

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## MANOR

*A house, a dwelling, or a residence.*

Historically under ENGLISH LAW, a manor was a parcel of land granted by the king to a lord or other high ranking person. Incident to every manor was the right of the lord to hold a court called the court baron, which was organized to maintain and enforce the services and duties that were owed to the lord of the manor. The lands that constituted the manor holdings included *terrae tenementales,* Latin for "tenemental lands," and *terrae dominicales,* Latin for "demesne lands." The lord gave the tenemental lands to his followers or retainers in freehold. He retained part of the demesne lands for his own use but gave part to tenants in copyhold—those who took possession of the land by virtue of the evidence or copy in the records of the lord's court. A portion of the demesne lands, called the *lord's waste,* served as public roads and common pasture land for the lord and his tenants.

The word *manor* also meant the privilege of having a manor with the jurisdiction of a court baron and the right to receive rents and services from the copyholders.

CROSS-REFERENCES

Feudalism.

## ❖ MANSFIELD, WILLIAM MURRAY, FIRST EARL OF

William Murray, first earl of Mansfield, was an eighteenth-century English lawyer and judge who, along with SIR WILLIAM BLACKSTONE and SIR EDWARD COKE, played an important part in molding U.S. law. His revision of PROPERTY LAW and his formulation of basic principles of contract law provided the basis for modern COMMERCIAL LAW. Lord Mansfield also is remembered for his decision in *Somerset's Case,* 1 Lofft's Rep. 1, 20 Howell's State Trials 1, 98 Eng. Rep. 499 (1772), in which he held that there was no legal basis for SLAVERY in England. This case came to have great significance in the United States, as it presented a legal theory for those opposed to slavery.

Mansfield was born March 2, 1705, in Scone, Scotland. He was educated at Christ Church, Oxford, and was called to the bar at Lincoln's Inn in 1730. From 1742 to 1754, Mansfield acted as SOLICITOR GENERAL of England, and from 1754 to 1756, he served as attorney general. In 1756 he became chief justice of the King's Bench, and he served on the court until 1788. In

recognition of these achievements, he was created first earl of Mansfield.

Mansfield departed from the traditional role of an English judge. He did not seek to formulate law solely on the basis of STARE DECISIS, which relies on the exact holdings of previous decisions. Instead, Mansfield sought to determine general principles inherent in the decisions reached by common-law courts and then to apply those principles to the case at hand. This gave Mansfield great flexibility in responding to new varieties of litigation that came with the development of English commerce. Also, Mansfield educated himself about commercial practices. Because of his growing sensitivity to their interests, members of the English commercial classes were encouraged to bring more of their disputes to his court and to let their affairs be governed by his common-law principles.

In deciding commercial-law cases, Mansfield adopted the guiding principle of GOOD FAITH, which demanded an adherence to moral obligations. In contract law he believed that the parties' intentions—rather than out-of-date, rigid common-law rules—ought to be used to set the scope of agreements and to settle disputes. In the area of real property, Mansfield tried, against much resistance, to update and modify a species of law that was both archaic and arcane. Throughout his tenure on the bench, Mansfield demonstrated a consistent desire to modernize the law of commerce.

Mansfield's decision in *Somerset's Case* dealt a fatal blow to English slaveholding interests. In this 1772 case, a slave brought to England by his master had escaped and had been recaptured. Antislavery activists demanded his release and sought a writ of HABEAS CORPUS (an order of protection against illegal imprisonment), arguing that England did not have a law permitting slavery. Mansfield ordered that the slave be released, holding that slavery was "so odious, that nothing can be suffered to support it but positive law." Mansfield did not rule that slavery was always illegal, only that it would take a positive law (an act of Parliament) to legitimate it. Absent a positive law that would recognize the powers of a slave owner over a slave, English courts would not uphold a slaveholder's claim to a slave. This decision was embraced by opponents of U.S. slavery in nonslaveholding states. *Somerset's Case* ultimately shaped the federal system in the United States, making slavery there a product of state, not federal, statutory law. It also permitted runaway slaves in the United States to claim legal protection if they escaped to a nonslaveholding state.

Mansfield died March 20, 1793, in London.

"I DESIRE NOTHING SO MUCH AS THAT ALL QUESTIONS OF MERCANTILE LAW BE FULLY SETTLED AND ASCERTAINED; AND IT IS OF MUCH MORE CONSEQUENCE THAT THEY SHOULD BE SO, THAN WHICH WAY THE DECISION IS."
—WILLIAM, FIRST EARL OF MANSFIELD

## MANSLAUGHTER

*The unjustifiable, inexcusable, and intentional killing of a human being without deliberation, premeditation, and malice. The unlawful killing of a human being without any deliberation, which may be involuntary, in the commission of a lawful act without due caution and circumspection.*

Manslaughter is a distinct crime and is not considered a lesser degree of murder. The essential distinction between the two offenses is that malice aforethought must be present for murder, whereas it must be absent for manslaughter. Manslaughter is not as serious a crime as murder.

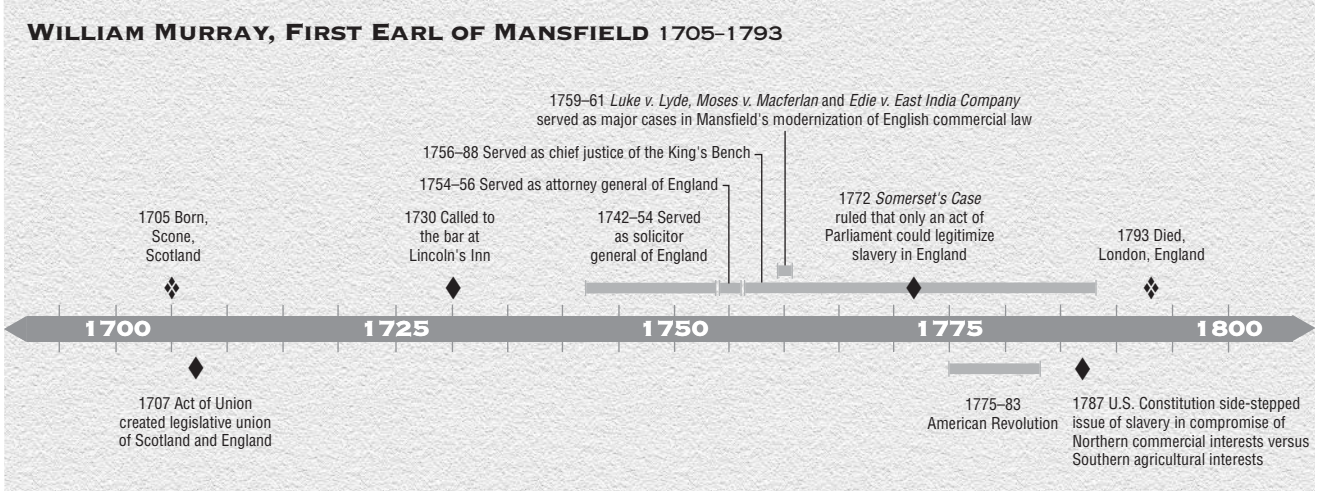

On the other hand, it is not a justifiable or excusable killing for which little or no punishment is imposed.

At COMMON LAW, as well as under current statutes, the offense can be either voluntary or INVOLUNTARY MANSLAUGHTER. The main difference between the two is that voluntary manslaughter requires an intent to kill or cause serious bodily harm while involuntary manslaughter does not. Premeditation or deliberation, however, are elements of murder and not of manslaughter. Some states have abandoned the use of adjectives to describe different forms of the offense and, instead, simply divide the offense into varying degrees.

### Voluntary Manslaughter

In most jurisdictions, voluntary manslaughter consists of an intentional killing that is accompanied by additional circumstances that mitigate, but do not excuse, the killing. The most common type of voluntary manslaughter occurs when a defendant is provoked to commit the HOMICIDE. It is sometimes described as a heat of passion killing. In most cases, the provocation must induce rage or anger in the defendant, although some cases have held that fright, terror, or desperation will suffice.

If adequate provocation is established, a murder charge may be reduced to manslaughter. Generally there are four conditions that must be fulfilled to warrant the reduction: (1) the provocation must cause rage or fear in a reasonable person; (2) the defendant must have actually been provoked; (3) there should not be a time period between the provocation and the killing within which a reasonable person would cool off; and (4) the defendant should not have cooled off during that period.

Provocation is justifiable if a reasonable person under similar circumstances would be induced to act in the same manner as the defendant. It must be found that the degree of provocation was such that a reasonable person would lose self-control. In actual practice, there is no precise formula for determining reasonableness. It is a matter that is determined by the trier of fact, either the jury or the judge in a nonjury trial, after a full consideration of the evidence.

Certain forms of provocation that frequently arise have traditionally been considered reasonable or unreasonable by the courts. A killing that results from anger that is induced by a violent blow with a fist or weapon might constitute sufficient provocation, provided the accused did not incite the victim. It is not reasonable, however, to respond similarly to a light blow. A killing that results from mutual combat is often considered manslaughter, provided it was caused by the heat of passion aroused by the combat. An illegal arrest of one who knows of or believes in his or her innocence may provoke a reasonable person, although cases are in dispute on the issue of whether such an arrest would justify a killing. An attempt to make a legal arrest in an unlawful manner by the use of unnecessary violence might also constitute a heat of passion killing that will mitigate an intentional killing. Some cases have held that a reasonable belief that one's spouse is committing ADULTERY will suffice. An injury to persons in a close relationship to the accused, such as a spouse, child, or parent, is often held to constitute reasonable provocation, particularly when the injury occurs in the accused person's presence.

Mere words or gestures, although extremely offensive and insulting, have traditionally been viewed as insufficient provocation to reduce murder to manslaughter. There is, however, a modern trend in some courts to hold that words alone will suffice under certain circumstances, such as instances in which a present intent and ability to cause harm is demonstrated.

The reasonable person standard is generally applied in a purely objective manner. Unusual mental or physical characteristics are not taken into consideration. The fact that a defendant was more susceptible to provocation than an average person because he or she had a previous head injury is not relevant to a determination of whether the person's conduct was reasonable. There has, however, been a trend in some cases that indicates a willingness to consider some subjective factors.

If a reasonable period of time passed between the provocation and the killing so that the defendant had sufficient time to cool off, a homicide will not be reduced to manslaughter. Most courts will reduce the charge if a reasonable person would not have cooled off. Some, however, look solely at the defendant's temperament and make a subjective decision as to whether the person had sufficient time to regain self-control.

In some states, there is a case-law trend in which a killing that is committed under a mistaken belief that one is justified constitutes voluntary manslaughter. It is reasoned that

although the crime is not justifiable, it is not serious enough to be murder.

It is a general rule that a defendant who acts in SELF-DEFENSE may only use force that is reasonably calculated to prevent harm to himself or herself. If the person honestly, but unreasonably, believes DEADLY FORCE is necessary and, therefore, causes another's death, some courts will consider the crime voluntary manslaughter. Similarly when a defendant acts under an honest but unreasonable belief that he or she has a right to kill another to prevent a felony, some courts will find the person guilty of voluntary manslaughter. Although it is generally considered a crime to kill another in order to save oneself, the justification of coercion or necessity may, likewise, reduce murder to manslaughter in some jurisdictions.

### Involuntary Manslaughter

Involuntary manslaughter is the unlawful killing of another human being without intent. The absence of the intent element is the essential difference between voluntary and involuntary manslaughter. Also in most states, involuntary manslaughter does not result from a heat of passion but from an improper use of reasonable care or skill while in the commission of a lawful act or while in the commission of an unlawful act not amounting to a felony.

Generally there are two types of involuntary manslaughter: (1) criminal-negligence manslaughter; and (2) unlawful-act manslaughter. The first occurs when death results from a high degree of NEGLIGENCE or recklessness, and the second occurs when death is caused by one who commits or attempts to commit an unlawful act, usually a misdemeanor.

Although all jurisdictions punish involuntary manslaughter, the statutes vary somewhat. In some states, the criminal negligence type of manslaughter is described as gross negligence or culpable negligence. Others divide the entire offense of manslaughter into degrees, with voluntary manslaughter constituting a more serious offense and carrying a heavier penalty than involuntary manslaughter.

Many statutes do not define the offense or define it vaguely in common-law terms. There are, however, a small number of modern statutes that are more specific. Under one such statute, the offense is defined as the commission of a lawful act without proper caution or requisite skill, in which one unguardedly or undesignedly kills another or the commission of an unlawful act that is not felonious or tends to inflict great bodily harm.

**Criminally Negligent Manslaughter** A homicide resulting from the taking of an unreasonable and high degree of risk is usually considered criminally negligent manslaughter. Jurisdictions are divided on the question of whether the defendant must be aware of the risk. Modern criminal codes generally require a consciousness of risk, although, under some codes, the absence of this element makes the offense a less serious homicide.

There are numerous cases in which an omission to act or a failure to perform a duty constitutes criminally negligent manslaughter. The existence of a duty is essential. Since the law does not recognize that an ordinary person has a duty to aid or rescue another in distress, an ensuing death from failure to act would not be manslaughter. On the other hand, an omission in which one has a duty, such as the failure of a lifeguard to attempt to save a drowning person, might constitute the offense.

When the failure to act is reckless or negligent, and not intentional, it is usually manslaughter. If the omission is intentional and death is likely or substantially likely to result, the offense might be murder. When an intent to kill, recklessness, and negligence are present, no offense is committed.

In many jurisdictions, death that results from the operation of a vehicle in a criminally negligent manner is punishable as a separate offense. Usually it is considered a less severe crime than involuntary manslaughter. Although criminal negligence is an element, it is generally not the same degree of negligence as that which is required for involuntary manslaughter. For example, some vehicular homicide statutes have been construed to require only ordinary negligence while, in a majority of jurisdictions, a greater degree of negligence is required for involuntary manslaughter.

**Unlawful-Act Manslaughter** In many states, unlawful-act manslaughter is committed when death results from an act that is likely to cause death or serious physical harm to another person. In a majority of jurisdictions, however, the offense is committed when death occurs during the commission or attempted commission of a misdemeanor.

In some states, a distinction is made between conduct that is *malum in se,* bad in itself and

conduct that is *malum prohibitum,* bad because prohibited by law. In these states, the act that causes the death must be *malum in se* and a felony in order for the offense to constitute manslaughter. If the act is *malum prohibitum,* there is no manslaughter unless it was foreseeable that death would be a direct result of the act. In other states that similarly divide the offense, the crime is committed even though the act was *malum prohibitum* and a misdemeanor, especially if the unlawful act was in violation of a statute that was intended to prevent injury to other persons.

### Punishment

The penalty for manslaughter is imprisonment. The precise term of years depends upon the applicable statute. Usually the sentence that is imposed for voluntary manslaughter is greater than that given for involuntary manslaughter. In most states, a more serious penalty is imposed for criminally negligent manslaughter than for unlawful-act manslaughter.

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CROSS-REFERENCES

Deadly Force.

## MANUFACTURES

*Items of trade that have been transformed from raw materials, either by labor, art, skill, or machine into finished articles that have new forms, qualities, or properties.*

For example, a blouse that is made of raw silk would be considered a manufacture, whereas fresh vegetables sold on a farm would not.

Whether particular products are within the definition of manufactures becomes significant with respect to taxes and other regulations imposed upon manufacturers.

## MAPP V. OHIO

A landmark Supreme Court decision, *Mapp v. Ohio,* 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), established the rule that evidence that has been obtained by an illegal SEARCH AND SEIZURE cannot be used to prove the guilt of a defendant at a state criminal trial.

Police officers went to the home of Dollree Mapp in an attempt to find someone who was wanted for questioning about a recent bombing. When they demanded entrance to the house, Mapp called her attorney and refused to allow the police to enter without a SEARCH WARRANT. Subsequently the police officers became rough with Mapp and handcuffed her. Upon a search of the house, they found obscene books, pictures, and photographs for the possession of which the defendant was subsequently prosecuted and convicted.

The defendant brought an unsuccessful action challenging the constitutionality of the search. An appeal was made to the Ohio Supreme Court, which affirmed the judgment. The defendant appealed to the U.S. Supreme Court, which reversed the decision on the ground that evidence obtained by an unconstitutional seizure was inadmissible.

The Court was extremely critical of the actions of the police and held that the defendant's privacy had been unconstitutionally invaded. The police tactics were deemed comparable to a confession forced out of a fearful prisoner. The Court ruled that to compel respect for the constitutional right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, it was necessary to exclude illegally obtained evidence from the consideration of the trial court.

The Supreme Court had ruled, as early as 1886, that any illegally obtained evidence could not be introduced in federal courts. This principle, known as the EXCLUSIONARY RULE, was initially applied to state criminal prosecutions in *Mapp.* The Court made note of the fact that, in other instances, various states had attempted to prevent illegal police searches by other means, but the exclusionary rule is, in the opinion of the Supreme Court, the only effective means of protecting citizens from illegal searches conducted by government agents.

CROSS-REFERENCES

Criminal Procedure.

## MARBURY V. MADISON

*Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), established the power of JUDICIAL REVIEW in the U.S. Supreme Court. This power,

which was later extended to all federal courts, authorizes the federal judiciary to review laws enacted by Congress and the president and to invalidate those that violate the Constitution.

The power of judicial review also permits federal courts to compel government officials to take action in accordance with constitutional principles, as the Supreme Court did when it ordered President RICHARD M. NIXON to release tapes he had made of conversations at the White House regarding a series of scandals that began with the BURGLARY of the Democratic party's national headquarters in the WATERGATE office complex in June 1972. Finally, judicial review empowers federal courts to decide legal issues raised by state constitutions, statutes, and common-law decisions that touch upon a federal constitutional provision.

Judicial review is also routinely exercised by state courts over state and federal constitutional questions. Unlike the federal power of judicial review, which derives from *Marbury,* the state power of judicial review usually derives from an express provision in a state constitution.

*Marbury* was an outgrowth of political struggles between the Federalist and Republican parties during the late eighteenth and early nineteenth centuries in the United States. These struggles began as a dispute between the Federalists and Anti-Federalists over the ratification of the Constitution.

The Federalists, including ALEXANDER HAMILTON and JOHN JAY, supported ratification of the Constitution as a means of creating a stronger national government that would replace the feeble central government formed under the ARTICLES OF CONFEDERATION. The Federalists believed that a strong national government was necessary to promote economic growth and geographic expansion and to protect U.S. citizens from internal and external aggression. The Anti-Federalists, including GEORGE MASON and PATRICK HENRY, opposed ratification because they feared it would create a despotic national government that would vitiate state sovereignty and be unresponsive to local interests.

After the Constitution was ratified by the states, many disgruntled Anti-Federalists joined the REPUBLICAN PARTY. Like their Anti-Federalist predecessors, the Republicans worked to curtail further growth of the national government, drawing their constituency from farmers and mechanics. The Federalists, meanwhile, sought an increased role for the national government, including the establishment of a federal bank, and drew their constituency from wealthy property owners and mercantilists.

During the administration of JOHN ADAMS (1797–1801), Federalists controlled the executive and legislative branches of the federal government and permeated the federal judiciary as well. However, the political tides turned against the Federalists during the elections of 1800, when the Republicans wrested control of both houses of Congress and THOMAS JEFFERSON, their party leader, was elected president. Determined not to lose all its influence over the national government, the lame-duck Federalist Congress passed legislation that created a host of new federal judgeships and called for the appointment of 42 justices of the peace in the District of Columbia.

In the haste of filling these vacancies during the waning hours of his last night in office, President Adams neglected to deliver the commissions (warrants issued by the government authorizing a person to perform certain acts) of several appointees. One of the so-called midnight appointees who did not receive his commission was William Marbury. After Jefferson ordered Secretary of State JAMES MADISON to withhold Marbury's commission, Marbury petitioned the Supreme Court for a writ of MANDAMUS (a court order requiring an official to perform his duties) to compel Madison to deliver the commission.

The case was heard before Chief Justice JOHN MARSHALL and four associate justices. Marshall was one of the "midnight judges" President Adams had appointed to the federal bench during his last few months in office. Prior to his appointment to the Supreme Court, Marshall had served as secretary of state for the Adams administration. Ironically, it was Marshall who, serving in a dual capacity as the secretary of state and chief justice, had failed to deliver the commission to Marbury. None of these facts presented a sufficient conflict of interest for Marshall to disqualify himself from hearing the dispute.

Marshall's opinion, written for a unanimous Court, was divided into five parts, the first three being the least controversial. First, the Court held that Marbury had a legal right to serve as JUSTICE OF THE PEACE and was entitled to receive the commission memorializing that right. Marbury had been nominated for the office by the president and confirmed by the

Senate, in accordance with the procedures set forth in the Constitution. When President Adams signed the commission and affixed the seal of the United States to it, the appointment was "complet[e]." Delivery of the commission was a mere "convenience" that did not interfere with Marbury's legal right.

Second, the Court ruled it was a "plain violation" of this right for Madison to withhold the commission. When a commission has been signed and sealed by the **EXECUTIVE BRANCH** following a nominee's appointment and confirmation, the secretary of state, Marshall said, has a "duty" to "conform to the law" and deliver it as part of his "ministerial" responsibilities.

Third, the Marshall opinion said a writ of mandamus was the proper remedy because mandamus is a "command" directing "any person, corporation or inferior court of judicature . . . to do some particular thing . . . which appertains to their office and duty."

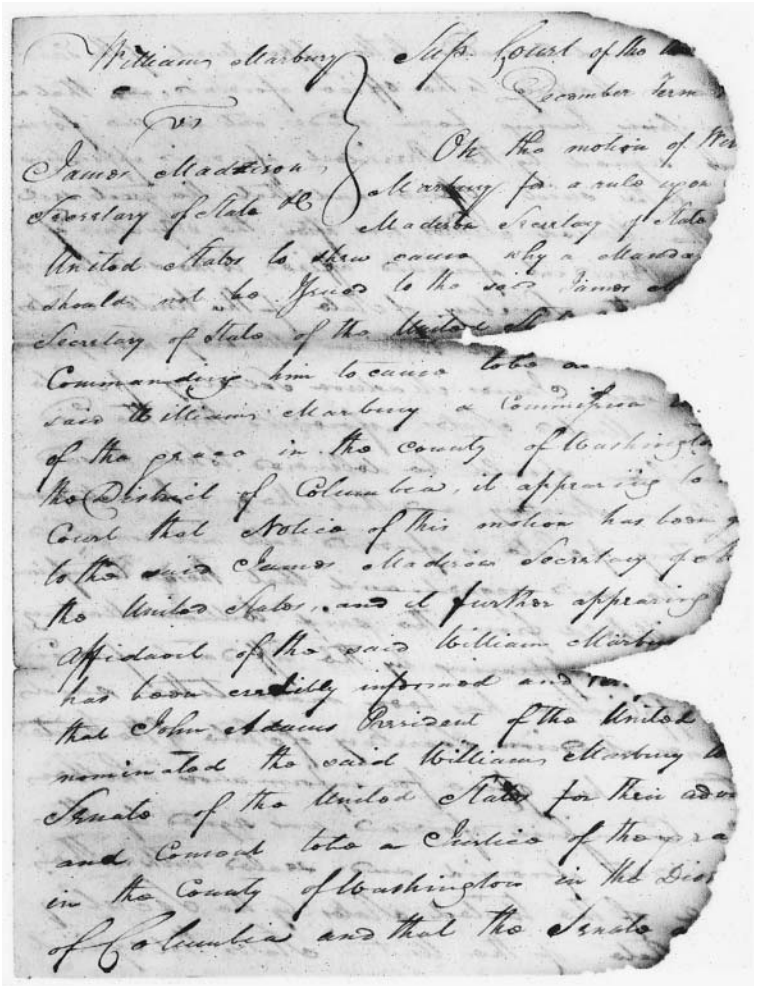

*The show-cause order served on James Madison was damaged in the Capital fire of 1898.*
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Marshall's opinion next addressed the question of whether the Supreme Court had the power to issue Marbury the writ. This question turned on the Court's jurisdiction. Article III of the U.S. Constitution confers upon the Supreme Court two types of jurisdiction: original and appellate. Original jurisdiction gives courts the power to hear lawsuits from their inception, when a complaint or petition is "originally" filed with the tribunal. Appellate jurisdiction gives courts the power to review decisions that were made by lower courts and have been "appealed" in order to reverse a purported error. Under Article III, the Supreme Court has original jurisdiction over politically sensitive disputes such as those "affecting ambassadors" or those in which one of the 50 states is named as a party. In all other cases, the Supreme Court retains appellate jurisdiction.

In petitioning the Supreme Court directly for a writ of mandamus, Marbury was asking the Court to invoke its original jurisdiction pursuant to section 13 of the **JUDICIARY ACT OF 1789**, which authorized all federal courts to issue such writs "in cases warranted by the principles and usages of law." Yet Marbury was not an ambassador or state government entitled to have the Supreme Court hear the case under its original jurisdiction. As a consequence, Marshall opined that section 13 impermissibly attempted to enlarge the Supreme Court's original jurisdiction to include disputes such as those presented by *Marbury v. Madison*, in contravention of the constitutional limitations placed on that jurisdiction by Article III.

However, Marshall suggested that merely because a piece of legislation violates a constitutional principle does not necessarily mean that the legislation is unenforceable. "[W]hether an act repugnant to the constitution can become law of the land," Marshall noted, "is a question deeply interesting to the United States." Observing that the Constitution expressly delegates and limits the powers of Congress, Marshall asked, "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"

Marshall argued that the "distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation." Marshall continued:

> It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. . . . Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. . . . If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

For Marshall, the idea that an unconstitutional act of legislature could "bind the courts and oblige them to give it effect" was "an absurdity too gross to be insisted on." Thus, Marshall concluded that congressional legislation contrary to the federal Constitution is null and void and cannot be enforced by a court of law.

Having ruled that the Judiciary Act of 1789 was invalid and unenforceable, Marshall next asked whether the judiciary was the appropriate branch to be vested with authority to overturn unconstitutional legislation. Although it is commonly accepted today that the power to nullify state and federal statutes falls within the purview of the judicial branch of government, the Constitution does not specifically delegate this power to any one branch. Under the explicit provisions of the Constitution, then, the executive and legislative branches might have argued in 1803 that they were no less entitled than the judicial branch to be entrusted with the power of judicial review.

The Court rejected this idea:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Marshall was arguing that it was the historical role of courts to settle legal disputes by interpreting and applying the law. In some instances, the applicable statutory or COMMON LAW has conflicted with other laws, Marshall said, and it has been the obligation of courts to resolve "the operation of each."

Earlier in his opinion, the chief justice had described the federal Constitution as a special kind of law that was "paramount" to all other laws in the United States. It then followed, the chief justice reasoned, that courts carried the responsibility to interpret and apply the Constitution's provisions. This responsibility inevitably entailed review of cases where laws passed by the legislative and executive branches conflicted with the strictures of the Constitution. By resolving such conflicts, Marshall maintained, courts were doing nothing more than fulfilling their traditional role of settling legal disputes.

Marshall also questioned whether members of the legislative and executive branches could objectively evaluate the constitutionality of legislation they passed. It is sometimes said that a diner, not the cook, is the best judge of a meal. Following the same reasoning, Marshall hinted that the legislative and executive branches could not impartially review legislation that they had helped prepare or enact. It is far from clear, for example, whether the Federalists in Congress who supported the Judiciary Act of 1789 could have put aside their partisan views long enough to exercise the power of judicial review over the *Marbury* dispute in a fair and neutral manner.

Chief Justice Marshall's opinion in *Marbury* has been the object of much criticism. Constitutional historians claim that *Marbury* represents a paradigm of judicial activism, which is marked by judges who decide cases based on issues not argued before them. This criticism seems to be particularly apt when applied to *Marbury* because, as constitutional scholar Leonard W. Levy has pointed out, "[In] no other case in our constitutional history has the Court held unconstitutional an act of Congress whose constitutionality was not at issue." Neither Marbury nor Madison had attacked the constitutionality of the Judiciary Act.

Against this criticism, historians have weighed the dilemma confronting Chief Justice Marshall. As a Federalist appointed to the Supreme Court, Marshall attempted to facilitate the growth of the national government through his judicial opinions. To achieve this end, Marshall aspired to establish the Constitution as the supreme law of the land, under which the executive, legislative, and judicial branches of both

state and federal governments would be subordinate. He also hoped to establish the Supreme Court as the ultimate arbiter of the Constitution, providing the final word on the meaning and application of any constitutional principles.

Marshall realized that none of these aspirations would be realized unless the Supreme Court gained respect and acceptance from Congress and the president. After all, the Supreme Court depended on the executive branch to enforce its decisions. President ANDREW JACKSON once underscored this point when he exclaimed, "John Marshall has made his decision [in *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832)], now let him enforce it!" (as quoted in *Coleman v. United States Bureau of Indian Affairs,* 715 F.2d 1156 [7th Cir. 1983]).

Marshall also needed to curry the favor of Congress, which possessed the power to limit the appellate jurisdiction of the Supreme Court under Article III, Section 2, of the Constitution. In addition, Congress possessed the power to impeach the Supreme Court justices, a power that it unsuccessfully exercised in 1805 when the Senate acquitted Federalist justice SAMUEL CHASE of wrongdoing.

*Marbury* was the powder keg threatening to upset the delicate relationships between the coordinate branches of the federal government. Marshall understood that if the Court ordered Madison to deliver the commission to Marbury, the Jefferson administration might ignore the order and tarnish the Court's reputation by exposing it as an impotent institution. On the other hand, if the Court ruled in favor of Madison, Marbury and the Federalists who had appointed and confirmed him would suffer a humiliating defeat. In either instance, the executive branch would be perceived as preeminent.

The chief justice's solution to this dilemma was what one constitutional scholar has called a "masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another" (McCloskey 1960, 40). Marshall's opinion in *Marbury* denied a Lilliputian power to the Supreme Court with one hand, while grabbing a titanic power for the judicial branch with the other.

By rejecting Marbury's claim on the ground that the Supreme Court did not have original jurisdiction to issue the writ of mandamus under the Constitution, Marshall established the power of judicial review in the nation's highest court. While appeasing the Jeffersonian Republicans with a victory over President Adams in the battle over the president's midnight appointments, Marshall introduced the idea that the federal Constitution is the fundamental law underlying both the state and federal governments. In striking down a section of the Federalist-supported Judiciary Act, Marshall identified the Supreme Court as the authoritative interpreter of the Constitution.

Each of these accomplishments set the stage for a gradual accretion of power, respect, and prestige in the federal judiciary. As the power of the federal judiciary increased, so did the power of the entire federal government, something that proved important in President Abraham Lincoln's efforts to preserve the Union during the Civil War.

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CROSS-REFERENCES

Congress of the United States; Constitution of the United States; Judicial Review; "*Marbury v. Madison*" (Appendix, Primary Document); Separation of Powers; Supreme Court of the United States.

## MARGIN

*The edge or border; the edge of a body of water where it meets the land. As applied to a boundary line of land, the* margin *of a river, creek, or other watercourse means the center of the stream. But in the case of a lake, bay, or natural pond, the* margin *means the line where land and water meet.*

*In finance, the difference between market value of loan collateral and face value of loan.*

*A sum of money, or its equivalent, placed in the hands of a* BROKER *by the principal or person on whose account a purchase or sale of* SECURITIES *is to be made, as a security to the former against losses to which he or she may be exposed by subsequent fluctuations in the market value of the stock. The amount paid by the customer when he uses a broker's credit to buy a security.*

*In commercial transactions the difference between the purchase price paid by an intermediary or retailer and the selling price, or difference between price received by manufacturer for its goods and costs to produce. Also called gross profit margin.*

## MARGIN CALL

*A demand by a* BROKER *that an investor who has purchased* SECURITIES *using credit extended by the broker (on margin) pay additional cash into his or her brokerage account to reduce the amount of debt owed.*

A broker makes a margin call when the stocks in the account of the client have fallen below a particular percentage of their market price at the time of purchase, thereby increasing the outstanding debt and the broker's liability should the client become unable to pay. This process is also known as remargining.

A broker might also make a margin call when a client desires to make additional purchases of stock and securities.

## ♦ MARIS, ALBERT BRANSON

Albert Branson Maris, a federal judge for fifty years, brought his quiet, scholarly leadership to the 1947 and 1948 recodifications of the U.S. Criminal and Judicial Codes. Because of his ongoing commitment to the revision and modernization of civil, criminal, BANKRUPTCY, and judicial codes, Maris is often called the father of modernized judicial procedure in the United States. He not only helped to shape federal JURISPRUDENCE in this country but also was instrumental in the development of the laws and judicial systems of Guam and the U.S. Virgin Islands.

Maris was born in Philadelphia on December 19, 1893. Descendants of Quaker colonists, Maris and his family were also members of the Society of Friends. Maris studied at the Friends Select School, and later the Westtown School, attended by his father and grandfather.

Mindful of his responsibility to his widowed mother and younger siblings, Maris made no plans to attend college after graduating from Westtown. He enrolled in a business course offered by a Scranton, Pennsylvania, correspondence school and entered the workforce as a clerk for an insurance company. He then took night courses at Temple University, passed the college entrance exam, and went on to study law.

Maris received his law degree from Temple University Law School—and married Edith Robinson on the same day—in 1917. The escalation of WORLD WAR I delayed the PRACTICE OF LAW for Maris. He served in an Army artillery unit as an enlisted man and later became an officer.

After the war, Maris entered private practice near Philadelphia. He also returned to school and earned a diploma from Drexel University Engineering School in 1926. He served as auditor of

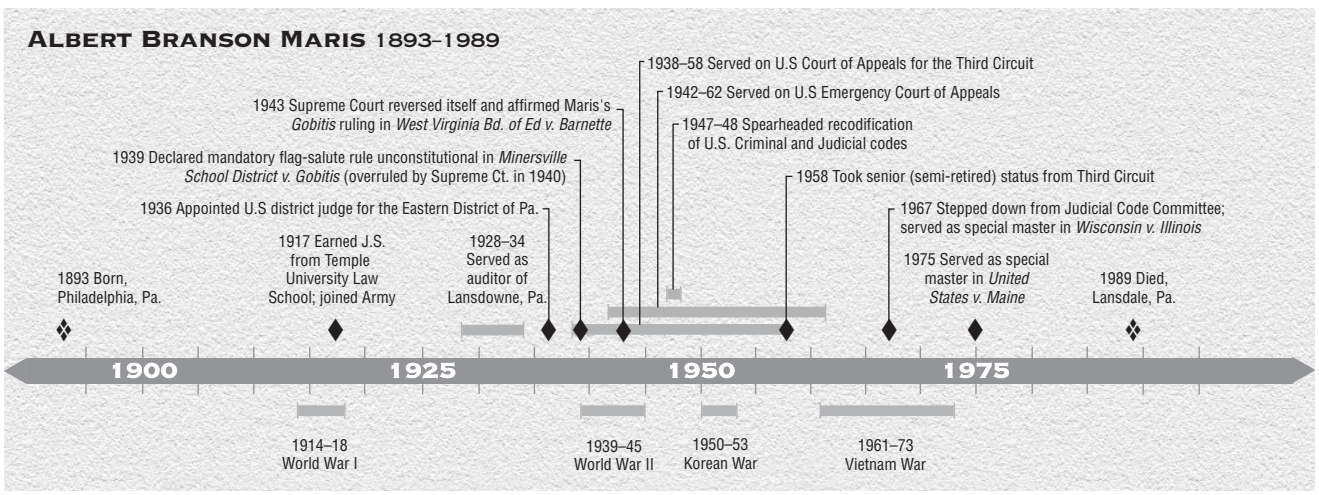

the borough of Lansdowne, Pennsylvania, from 1928 to 1934 and as councilman of the borough of Yeadon, Pennsylvania, from 1935 to 1936. After eighteen years of private practice and community service, Maris was appointed U.S. district judge for the Eastern District of Pennsylvania by President FRANKLIN D. ROOSEVELT on June 22, 1936. Two years later, he was elevated to the U.S. Court of Appeals for the Third Circuit, which handles appeals of federal cases from Pennsylvania, New Jersey, Delaware, and the Virgin Islands.

Maris's decisions were rarely appealed and almost never overturned. *Minersville School District v. Gobitis,* 108 F.2d 683 (3d Cir. 1939), was among the few cases in which his ruling was challenged. In 1938, the children of William Gobitis and Lily Gobitis were expelled from school for refusing, on religious grounds, to recite the Pledge of Allegiance. The Gobitises filed a lawsuit in federal court, claiming that local regulations enforcing recitation of the pledge violated their FIRST AMENDMENT rights. Maris declared the school district's regulations unconstitutional. But when the case was appealed to the Supreme Court, the justices overruled Maris by an 8–1 vote. An opportunity to challenge the *Gobitis* ruling eventually made its way through the courts when two sisters faced a similar issue in West Virginia (*West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 [1943]). When that case reached the Supreme Court, two justices who had participated in the *Gobitis* decision were now retired. With two new justices, the High Court reversed itself, ruling as Maris had in the *Gobitis* case.

"TO PERMIT PUBLIC OFFICERS TO DETERMINE WHETHER THE VIEWS OF INDIVIDUALS SINCERELY HELD AND THEIR ACTS SINCERELY UNDERTAKEN ON RELIGIOUS GROUNDS ARE IN FACT BASED ON CONVICTION RELIGIOUS IN CHARACTER WOULD BE TO SOUND THE DEATH KNELL OF RELIGIOUS LIBERTY."
—ALBERT MARIS

In addition to his Third Circuit duties, Maris served on the TEMPORARY EMERGENCY COURT OF APPEALS during WORLD WAR II and the postwar years. (This court decided cases throughout the United States that arose from temporary legislation enacted by Congress to facilitate the war effort.) Maris served the temporary court as needed for the next twenty years and eventually became its chief judge. His work on this court broadened his interest in the crafting of legislation and the CODIFICATION of laws. This interest led to an appointment as chairman of the U.S. Judicial Conference Committee on Revision of the Laws in 1944.

His committee spearheaded the much-needed recodifications of the U.S. Criminal and Judicial Codes in 1947 and 1948. As committee chairman, he oversaw the ongoing revision and modernization of civil, criminal, bankruptcy, and appellate rules of procedure until 1967, when he stepped down. Even the modest Maris admitted that the adoption of his committee's work in 1947 and 1948 was a milestone in the improvement of JUDICIAL ADMINISTRATION.

In the early 1950s, Maris began to cultivate an interest in INTERNATIONAL LAW. Shortly after World War II, the U.S. INTERIOR DEPARTMENT asked Maris to study the legal and judicial systems of the islands and trust territories of the South Pacific. He did, and he made recommendations that were well received at home and abroad. Throughout the 1950s, he worked tirelessly with the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa to draft and enact legislation creating and revising their court systems and procedures. In conjunction with his international work, he served as a member of the U.S. Advisory Committee on International Rules of Judicial Procedure from 1959 to 1963, and as a member of the Advisory Committee to the SECRETARY OF STATE on Private International Law from 1964 to 1967.

Maris took senior (or semiretired) status on December 31, 1958. As a senior judge, he served as SPECIAL MASTER under appointment of the U.S. Supreme Court in a number of significant and complex cases—including land and water claims cases between states and between states and the federal government (see, e.g., *Wisconsin v. Illinois,* 388 U.S. 426, 87 S. Ct. 1774, 18 L. Ed. 2d 1290 [1967]; *United States v. Maine,* 420 U.S. 515, 95 S. Ct. 1155, 43 L. Ed. 2d 363 [1975]). He continued to hear and rule on almost one hundred cases a year for the next twenty-five years.

Maris died on February 7, 1989, in Lansdale, Pennsylvania.

## MARITAL

*Pertaining to the relationship of* HUSBAND AND WIFE*; having to do with marriage.*

*Marital agreements* are contracts that are entered into by individuals who are about to be married, are already married, or are in the process of ending a marriage. They ordinarily govern the division and ownership of marital property.

## MARITAL COMMUNICATIONS PRIVILEGE

*The right given to a* HUSBAND AND WIFE *to refuse to testify in a trial as to confidential statements made to each other within and during the framework of their spousal relationship.*

The marital communications privilege is a right that only legally married persons have in court. Also called the husband-wife privilege, it protects the privacy of communications between spouses. The privilege allows them to refuse to testify about a conversation or a letter that they have privately exchanged as marital partners.

The marital privilege is an exception to the general rule that all relevant evidence is admissible at trial. Similar privileges exist for communications between priest and penitent (one who has confided in the priest), attorney and client, and doctor and patient. Privileges exclude evidence from trial in order to advance some social goal. With the marital privilege, the goal of free and open communication between spouses, which is believed to strengthen and further the marital relationship, is given greater weight than the need for evidence (the information exchanged by the spouses) to resolve a legal dispute.

The marital communications privilege originated at COMMON LAW. It was made formal in the English Evidence Amendment Act of 1853, which said that neither husbands nor wives could be forced to disclose any communication made to the other during the marriage. In the United States, the privilege came to be recognized in state and FEDERAL RULES OF EVIDENCE. By the twentieth century, the U.S. Supreme Court said that it was "regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice" (*Wolfle v. United States,* 291 U.S. 7, 54 S. Ct. 279, 78 L. Ed. 617 [1934]).

The marital communications privilege is available in most jurisdictions. Most jurisdictions offering it allow a witness spouse to choose whether to testify; some automatically disqualify evidence from a spouse.

The privilege is not absolute. Because its effect is to deny evidence at trial, courts generally interpret it narrowly.

The most important condition for its use is a legal marriage. Courts will not permit its use by partners who merely live together or by those who have a COMMON-LAW MARRIAGE or a sham, or false, marriage. Moreover, the communication must have taken place while the marriage existed, not after a DIVORCE. Generally, the determination of whether a marriage is legal depends on state law.

The privilege also cannot be claimed in certain situations, such as where one spouse is subject to prosecution for crimes committed against the other or against the children of the couple. In addition, the presence of third persons at the time of the communication usually eliminates confidentiality and thus destroys the privilege, although courts have granted exceptions for the presence of children.

Many jurisdictions make the distinction of which spouse "holds," and may therefore assert, the privilege—the defendant spouse or the witness spouse. In these jurisdictions, the spouse who holds the privilege may waive it and testify against the other spouse.

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CROSS-REFERENCES

Attorney-Client Privilege; Privileged Communication; Testimony.

## MARITIME LIEN

*The right of a particular individual to compel the sale of a ship because he or she has not been paid a debt owed to him or her on account of such vessel.*

A maritime lien is designed to furnish security to a creditor and to enable a person to obtain repairs and supplies even in the event that the ship is a distance away from its owners and no significant amount of money is on board to pay for the goods and services that are provided.

Maritime liens are distinguishable from a majority of other types of liens since the creditor need not retain possession of the boat before asserting a claim. They can exist only on movable objects that bear some relationship to navigation or commerce on NAVIGABLE WATERS: for example, every part of a vessel, such as the hull, engine and tackle; as well as flatboats, lighters, scows, and dredges used to deepen harbors and channels. Controversy exists concerning whether a maritime lien can attach to a raft; however, courts have not recognized maritime liens for repairs done on a seaplane while it is in a hangar on dry land or for bridges, dry docks, wharves, or floating structures permanently moored to shore, such as barges that are used for restaurants.

The amount of a maritime lien equals the reasonable value of services that are performed

in maintaining the ship, coupled with supplies that are furnished plus interest, less any set-off for claims the ship has against the lienholders. The amount ordinarily arises out of a contract; however, a maritime lien can also be created for damages that are attributable to injuries that are caused by the ship.

An individual who is entitled to a maritime lien may forfeit his or her right if he or she delays in enforcing it or does something inconsistent with the lien. Allowing the ship to depart does not affect the lien; however, the complete destruction of a vessel extinguishes it.

A lienholder must sue in federal court in order to enforce a maritime lien, and anyone holding a lien against the ship can intervene in the action.The court may order a sale of the ship and its cargo and distribute the proceeds to those who establish a valid claim against the ship. Where there are insufficient funds to satisfy every claim, the court determines which liens have priority, and the percentage of recovery that each claimant is entitled to collect.

CROSS-REFERENCES

Intervention; Admiralty and Maritime Law.

## MARKET VALUE

*The highest price a willing buyer would pay and a willing seller would accept, both being fully informed, and the property being exposed for sale for a reasonable period of time. The market value may be different from the price a property can actually be sold for at a given time (market price). The market value of an article or piece of property is the price that it might be expected to bring if offered for sale in a fair market; not the price that might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular article or piece of property.*

## MARKETABLE TITLE

*Ownership and possession of real property that is readily transferable since it is free from valid claims by outside parties.*

The concept of marketability of title refers to ownership of real estate. Under law, titles are evidence of ownership. Selling real estate (land and the property attached to it) involves transferring its title. A marketable title is one that can be transferred to a new owner without the likelihood that claims will be made on it by another party. The concept is crucial in all real estate transactions because buyers generally expect to receive property to which no one else can lay claim; they do not expect that their ownership will later be challenged. Marketability of title is addressed in the contract for sale. Unless a contract for sale specifies that a third party has claims on the real estate, there is an implied provision that the seller has a good or marketable title, which the buyer will receive.

However, some real estate that is for sale will have outside claims against it. These claims are known as clouds and encumbrances. For instance, the owner of the title may have outstanding debts or owe interest that has resulted in a lien being placed on the property. The lien gives the owner's creditor a qualified legal right to the property in question, which remains in effect until the debt is settled. Because liens are long-lived (they can remain in force across generations), many states have tried to simplify land transactions by adopting marketable title acts. Generally, these laws limit the duration of a lien to a period of years during which the lien holder must take some action to satisfy the lien, or it is extinguished. Typically these laws apply to liens in existence at the time of the law's creation, as well as to future liens.

Ordinarily, contracts for the sale of real estate provide a remedy for a buyer who later discovers that the title is not marketable. If the seller has failed to provide marketable title, the buyer is permitted to rescind the sale—that is, to back out of the contract and receive a refund of the money paid for the property. Suppose, for example, that Mary buys land from Bob. The contract of sale declares that Bob holds marketable title to the land. After paying Bob, Mary receives a letter from an attorney saying that a business called Lou's Used Cars holds a lien on the property because Bob is using it as collateral for a car loan. In this case Bob has failed to provide Mary with marketable title. He will soon be hearing from her attorney, who will say that Mary is rescinding and wants her money back.

CROSS-REFERENCES

Cloud on Title; Real Property; Title Insurance; Title Search.

## MARQUE AND REPRISAL

*A commission by which the head of a government authorizes a private ship to capture enemy vessels.*

The authority to do such capturing is granted to private vessels in letters of marque and reprisal. In the technical sense, a *letter of marque* is permission to cross over the frontier into another country's territory in order to take a ship; a *letter of reprisal* authorizes taking the captured vessel to the home port of the capturer.

Since letters of marque and REPRISAL allowed privately owned and operated vessels to carry out acts of war, the practice came to be known as *privateering.* Privateering was frequently encouraged from the period between 1692 to 1814, at which time weaker countries used privateers to hurt a stronger country in the way guerrilla warfare is currently used. Privateers operated concomitant to regular navies. Their main purpose was to annoy the enemy; however, an enemy's merchant vessels were often seized in retaliation for acts of hostility.

The system of privateering was subject to extensive abuses. In the absence of proper letters, a privateer was tantamount to a pirate. PIRACY is subject to severe punishment throughout the world. Although privateers allegedly existed in order to support the defense of their sovereigns, they frequently acquired much personal wealth through their activities. In addition, since privateers were not subject to the same discipline as a regular navy, they yielded to the temptation to seize ships beyond the scope of their authority.

Such abuses, and new theories of naval warfare led civilized nations, in 1856, to sign an agreement outlawing privateering. The agreement does not prohibit a state from organizing a voluntary navy of private vessels, which are under the dominion and control of the state.

The U.S. Constitution provides that no state can grant letters of marque and reprisal. The federal government is not limited in this right by the Constitution; however, modern custom and treaties prevent it from granting the letters.

CROSS-REFERENCES

Admiralty and Maritime Law.

## MARRIAGE

*The legal status, condition, or relationship that results from a contract by which one man and one woman, who have the capacity to enter into such an agreement, mutually promise to live together in the relationship of* HUSBAND AND WIFE *in law for life, or until the legal termination of the relationship.*

Marriage is a legally sanctioned contract between a man and a woman. Entering into a marriage contract changes the legal status of both parties, giving husband and wife new rights and obligations. Public policy is strongly in favor of marriage based on the belief that it preserves the family unit. Traditionally, marriage has been viewed as vital to the preservation of morals and civilization.

The traditional principle upon which the institution of marriage is founded is that a husband has the obligation to support a wife, and that a wife has the duty to serve. In the past, this has meant that the husband has the duty to provide a safe house, to pay for necessities such as food and clothing, and to live in the house. A wife's obligation has traditionally entailed maintaining a home, living in the home, having sexual relations with her husband, and rearing the couple's children. Changes in society have modified these marital roles to a considerable degree as married women have joined the workforce in large numbers, and more married men have become more involved in child rearing.

Individuals who seek to alter marital rights and duties are permitted to do so only within legally prescribed limits. Antenuptial agreements are entered into before marriage, in contemplation of the marriage relationship. Typically these agreements involve property rights and the terms that will be in force if a couple's marriage ends in DIVORCE. Separation agreements are entered into during the marriage prior to the commencement of an action for a separation or divorce. These agreements are concerned with CHILD SUPPORT, visitation, and temporary maintenance of a spouse. The laws governing these agreements are generally concerned with protecting every marriage for social reasons, whether the parties desire it or not. Experts suggest that couples should try to resolve their own difficulties because that is more efficient and effective than placing their issues before the courts.

In the United States, marriage is regulated by the states. At one time, most states recognized COMMON-LAW MARRIAGE, which is entered into by agreement of the parties to be husband and wife. In such an arrangement, no marriage license is required nor is a wedding ceremony necessary. The parties are legally married when

*A sample marriage license*

## Marriage License

**State of Tennessee Any County**

**Marriage License**

***To any person duly authorized under the provisions of T.C.A. Section 36-3-301 to solemnize the rite of matrimony:***

**Greeting: You are hereby authorized to solemnize the**

**Rite of Matrimony**

**Between** _____

**and** _____

**according to the laws of the State of Tennessee. This license must be issued under the hand of a County Clerk in the State of Tennessee.**

**Issued at the office of the County Clerk of** _____ **County, Tennessee, this** _____ **day of** _____ **, 20** _____ **.**

_____

**County Clerk or Deputy County Clerk**

**[SEAL]**

***This license is not valid after thirty (30) days from date of issuance.***

*[SAMPLE REVERSE SIDE - MARRIAGE LICENSE]*

MARRIAGE LICENSE

CERTIFICATION OF OFFICIANT

I hereby certify that on the_____ day of_____, 20_____

I solemnized the RITE OF MATRIMONY between

_____

and

_____

Signed: _____ . Officiant

Official Position: _____

Address: _____

RETURNED

This_____ day of_____, 20_____

_____

County Clerk

Recorded in Marriage Record Book_____ Page_____

**MINISTERS AND OTHERS OFFICIATING ARE REQUIRED TO ENDORSE ON THE LICENSE THE DATE OF SOLEMNIZATION OF THE MARRIAGE AND RETURN THE LICENSE TO THE COUNTY CLERK WITHIN THREE (3) DAYS OF THE DATE OF MARRIAGE. FAILURE TO MAKE THIS RETURN IS A MISDEMEANOR.**

they agree to marry and subsequently live together, publicly holding themselves out as husband and wife. The public policy behind the recognition of common-law marriage is to protect the parties' expectations, if they are living as husband and wife in every way except that they never participated in a formal ceremony. By upholding a common-law marriage as valid, children are legitimized, surviving spouses are entitled to receive SOCIAL SECURITY benefits, and families are entitled to inherit property in the absence of a will. These public policy reasons have declined in significance. Most states have abolished common-law marriage, in large part because of the legal complications that arose concerning property and inheritance.

The U.S. Supreme Court has held that states are permitted to reasonably regulate marriage by prescribing who can marry and the manner in which marriage can be dissolved. States may grant an ANNULMENT or divorce on terms that they conclude are proper, because no one has the constitutional right to remain married. There is a right to marry, however, that cannot be casually denied. States are proscribed from absolutely prohibiting marriage in the absence of a valid reason. The U.S. Supreme Court, for example, struck down laws in southern states that prohibited racially mixed marriages. These antimiscegenation statutes were held to be unconstitutional in the 1967 case of *Loving v. Virginia,* 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010, because they violated EQUAL PROTECTION of the laws.

On the other hand, the Court ruled in 1878 that polygamous marriages (i.e., having more than one spouse simultaneously) are illegal. The requirement that marriage involve one man and one woman was held to be essential to Western civilization and the United States in *Reynolds v. United States,* 98 U.S. 145, 25 L. Ed. 244. Chief Justice MORRISON R. WAITE, writing for a unanimous court, concluded that a state (in that case, Utah) may outlaw POLYGAMY for everyone, regardless of whether it is a religious duty, as the Mormons claimed it was.

All states limit people to one living husband or wife at a time and will not issue marriage licenses to anyone who has a living spouse. Once someone is married, the person must be legally released from his or her spouse by death, divorce, or annulment before he or she may legally remarry. Persons who enter into a second marriage without legally dissolving a first marriage may be charged with the crime of bigamy.

The idea that marriage is the union of one male and one female has been thought to be so basic that it is not ordinarily specifically expressed by statute. This traditional principle has been challenged by gays and lesbians who, until recently, have unsuccessfully sought to legalize their relationships. In *Baker v. Nelson,*, 191 N.W.2d 185 (Minn. 1971), the Minnesota Supreme Court sustained the clerk's denial of a marriage license to a homosexual couple.

The 1993 decision of the Hawaii Supreme Court in *Baehr v. Lewin,* 852 P.2d 44, 74 Haw. 530, revived the possibility of homosexual marriage. In *Baehr,* the court held that the state law restricting legal marriage to parties of the opposite sex establishes a sex-based classification, which is subject to strict constitutional scrutiny when challenged on equal protection grounds. Although the court did not recognize a constitutional right to same-sex marriage, it indicated that the state would have a difficult time proving that the gay and lesbian couples were not being denied equal protection of the laws. On remand, the Circuit Court of Hawaii found that the state had not met its burden, and it enjoined the state from denying marriage applications solely because the applicants were of the same sex (*Baehr v. Miike,* 1996 WL 694235 [Hawaii Cir. Ct., Dec. 3, 1996]). However, this decision was stayed pending another appeal to the Hawaii Supreme Court. In the wake of *Baehr,* a number of states prepared legislation to ban same-sex marriage and to prohibit recognition of such marriages performed in Hawaii. In 1996, Congress enacted the Defense of Marriage Act, Pub. L. No. 104–199, 110 Sat. 219, which defines marriage as a legal union between one man and one woman and permits states to refuse to recognize same-sex marriages performed in other states.

Each state has its own individual requirements concerning the people who may marry. Before a state will issue a marriage license, a man and a woman must meet certain criteria. Some states prohibit marriage for those judged to be mentally ill or mentally retarded. In other states, however, a judge may grant permission to mentally retarded persons to marry.

Every state proscribes marriage between close relatives. The prohibited degree of relationship is fixed by state law. Every state forbids marriage to a child or grandchild, parent or grandparent, uncle or aunt, and niece or nephew, including illegitimate relatives and relatives of half blood, such as a half brother who

has the same father but a different mother. A number of states also prohibit marriage to a first cousin, and some forbid marriage to a more distant relative, in-law, stepparent, or stepchild.

Age is an additional requirement. Every jurisdiction mandates that a man and a woman must be old enough to wed. In the 1800s, the legal age was as low as 12 years old for females. Modern statutes ordinarily provide that females may marry at age 16 and males at age 18. Sometimes a lower age is permitted with the written consent of the parents. A number of states allow for marriage below the minimum age if the female is pregnant and a judge grants permission.

Every couple who wishes to marry must comply with a state's formal requirements. Many states require a blood test or a blood test and physical examination before marriage, to show whether one party is infected with a venereal disease. In some states, for example, the clerk is forbidden to issue a marriage license until the parties present the results of the blood test.

Most states impose a waiting period between the filing of an application for a license and its issuance. The period is usually three days, but in some states the period may reach five days. Other states mandate a waiting period between the time when the license is issued and the date when the marriage ceremony may take place. Many states provide that the marriage license is valid only for a certain period of time. If the ceremony does not take place during this period, a new license must be obtained.

It has been customary to give notice of an impending marriage to the general public. The old form of notice was called "publication of the banns," and the upcoming marriage was announced in each party's church three Sundays in a row before the marriage. This informed the community of the intended marriage and gave everyone the opportunity to object if any knew of a reason why the two persons could not be married. Today, the names of applicants for marriage licenses are published in local newspapers.

Once a license is issued, the states require that the marriage commence with a wedding ceremony. The ceremony may either be civil or religious because states may not require religious observances. Ceremonial requirements are very simple and basic, in order to accommodate everyone. In some states, nothing more is required than a declaration by each party in the presence of an authorized person and one additional witness that he or she takes the other in marriage.

A minority of states have sought to curb growing divorce rates by enacting legislation designed to encourage couples to remain married. Statutes in states such as Arkansas, Arizona, and Louisiana provide for COVENANT marriages, where couples agree to impose upon themselves limitations on their ability to divorce one another. Twenty other states have considered, but ultimately rejected, the adoption of similar bills. In covenant marriages, parties mutually agree to reject "no-fault divorce," agree to enroll in premarital or post-wedding counseling, and also agree to divorce only under certain, more limiting conditions, such as DOMESTIC VIOLENCE, ABANDONMENT, ADULTERY, imprisonment of a spouse, or lengthy separation. States that pass bills recognizing covenant marriages do not actually require such marriages, but rather formally acknowledge them as legally viable, thus creating legal recourse under the law for breaches of such covenants.

Louisiana passed its covenant-marriage law in 1997. At the time, it was touted as the first substantive effort in two centuries to make divorce more difficult, and lawmakers had hoped that other states would follow suit. Since then, however, fewer than five percent of Louisiana couples have opted to enter into such marriages. Arizona's version of the law is less restrictive in that it permits an additional reason for divorce based on the mutual consent of the parties.

The most common objection to covenant marriages comes from those who view such measures as undue government intrusion into family matters. The counter argument is that states increasingly have viewed divorce as a legitimate matter of public concern because of its extensive costs and the havoc it causes to primary and extended social and economic relationships. In this regard, covenant marriages are no more intrusive than are state laws that permit or deny divorce based on certain articulated grounds.

Another objection is that covenant marriages seemingly infringe upon the separation of church and state because the mandatory premarital counseling contained in the two existing laws is often provided by clergy. Other opponents to the attempted legislative measures in other states have either expressed reservation for laws that seem to limit adult autonomy and choice or have themselves been active in the

"divorce industry." This resistance was apparently the case in Texas and Oklahoma, where covenant-marriage bills failed because of opposition by key committee chairmen who were divorce attorneys.

In addition to the failed legislative attempts to pass covenant-marriage bills in other states, different tactics to curb divorce have been tried. For example, Florida enacted the Marriage Preparation and Preservation Act in 1998, but no state has followed Florida in requiring its marriage-education curriculum for public high schools. The Minnesota legislature attempted to pass a law that would have lowered marriage-license fees for couples who sought pre-marital counseling, but Governor Jesse Ventura vetoed it. In Wisconsin, a federal judge struck down a new state law that earmarked WELFARE money for clergy who encouraged long-married couples to mentor younger couples. According to the judge, the measure unfairly and unconstitutionally favored ministers over lay persons such as judges or justices of the peace. Texas passed law allocating $3 from every marriage-license fee to be used for marriage-education research and reform. Nationwide, a group of activists called Americans for Divorce Reform seeks to educate lawmakers, the media, and the general public on the true negative aspects of divorce, but the group does not advocate any specific reform such as covenant marriages.

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CROSS-REFERENCES

Celebration of Marriage; Domestic Violence; Family Law; Gay and Lesbian Rights; Miscegenation; Necessaries; Privileged Communication.

## MARSHAL

*A federal court officer whose job entails maintaining the peace, delivering legal papers, and performing duties similar to those of a state sheriff.*

The term *marshal* originated in Old ENGLISH LAW, where it was used to describe a variety of law enforcement officers with responsibilities to the courts and the king or queen. In contemporary U.S. law, it refers primarily to the chief law officers for the federal courts (28 U.S.C.A. §§ 561 et seq.). U.S. marshals execute federal laws within the states under the instructions of the courts. Their chief duty is to enforce legal orders; they have no independent authority to question whether a judge is right or wrong. Their responsibilities include delivering writs and processes and carrying out other orders, which range from making arrests to holding property in the custody of the court. Marshals may exercise the same powers as a state sheriff.

*Among their other duties, U.S. marshals are charged with executing federal laws within the states under the instructions of the courts. In September 1962, 500 federal marshals were sent to the University of Mississippi campus to protect James Meredith when he became the first African American to enroll at the institution.*

FLIP SCHULKE/CORBIS

The chain of command for U.S. marshals begins in the White House. The president appoints to a four-year term one marshal for each judicial district. Each appointment is subject to confirmation by the U.S. Senate. Once an appointment is confirmed, the president retains the power to remove the marshal at any time. In the JUSTICE DEPARTMENT, the U.S. attorney general designates where each marshal's office is located. Each marshal appoints her or his own deputies and staff, with salaries based on schedules in federal law.

At the state and local levels, the term *marshal* is also used to describe police officers whose job is similar to that of a constable or sheriff. It can also denote the head of a city police or fire department.

## MARSHALING ASSETS AND SECURITIES

*The process of organizing, ranking, and distributing funds in a manner set forth by law as being the most effective way to discharge debts that are owed to various creditors.*

When assets and SECURITIES are marshalled, the *two-fund doctrine* is frequently applied. It provides that when one claimant has two possible funds in the hands of a debtor to whom the claimant is able to resort to satisfy his or her demand, and a second claimant has an interest in only one of the funds, the second claimant can force the first to satisfy the claims out of the fund in which he or she, the second claimant, has no lien.

## ♦ MARSHALL, JOHN

John Marshall presided over the U.S. Supreme Court from 1801 to 1835. Appointed by President JOHN ADAMS, Marshall assumed leadership during a pivotal era. The early nineteenth century saw tremendous political battles over the future of the United States and its Constitution, often with the Court at the center of controversy. By the force of personality, argument, and shrewdness, Marshall steered it through this rocky yet formative period. He weathered harsh criticism as the Court set important precedents that increased its power and defined its role in government. Historians credit him with establishing what has been called the American judicial tradition, in which the Supreme Court acts as an independent branch of government endowed with final authority over constitutional interpretation.

"IT IS, EMPHATICALLY, THE PROVINCE AND DUTY OF THE JUDICIAL DEPARTMENT TO SAY WHAT THE LAW IS."
—JOHN MARSHALL

Marshall was born September 24, 1755, near Germantown (now Midland), Virginia. He was the son of Thomas Marshall, a wealthy landowner, JUSTICE OF THE PEACE, and sheriff. Like his father he fought in the Revolutionary War and married into a prominent family. His father's tutoring significantly enhanced his mere two years of formal education, which were augmented in 1780 by a brief attendance at lectures in law at the College of William and Mary.

Marshall was also influenced by GEORGE WASHINGTON. Because of his service to General Washington in the war, Marshall became a strong Federalist. He later wrote about his mentor in his book *Life of George Washington* (1805–7).

Marriage ties made Marshall a relative of a leading Virginia political family. This helped secure his place in society, paving the way for an early legal and political career in the 1780s. He specialized in appellate cases and quickly distinguished himself in the Virginia state bar. He also served in Virginia's council of state from 1782 to 1784, and in its house of delegates four times between 1782 and 1795. But it was as a partisan of the Federalists—the opponents of the states' rights–minded Republicans—that he came to wide acclaim. The struggle between the Federalists and the Jeffersonian Republicans was the most important political contest of the day. Marshall served as a devoted publicist and organizer for the Federalist cause in Virginia, and this work earned him various offers to serve as U.S. attorney general and as an associate justice of the Supreme Court. It also earned him the animosity of his distant cousin, Republican THOMAS JEFFERSON, who soon became U.S. president and was his lifelong political adversary.

In 1798 Marshall agreed to serve Federalist president John Adams as one of three U.S. ministers to France during one of the Napoleonic Wars between France and Great Britain. In a scandal known as the XYZ AFFAIR, the French foreign ministry attempted to solicit a bribe from the U.S. emissaries, and Marshall became a national hero for refusing. He quickly emerged

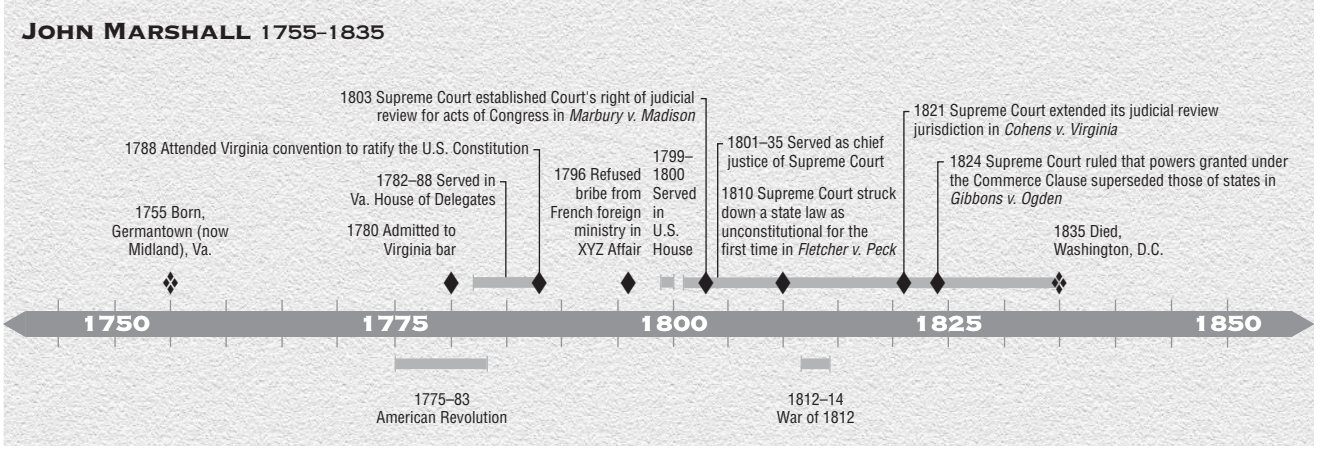

as the leading spokesman for FEDERALISM in Washington, D.C., as a member of Congress from 1799 to 1800 and briefly as SECRETARY OF STATE under Adams in 1800. Then Adams lost the 1800 presidential election to Jefferson, and the Republicans won control of Congress. In a desperate attempt to preserve the Federalists' power, Adams spent the remaining days of his administration making judicial appointments. Sixteen new positions for judges on federal circuit courts and dozens for justices of the peace in the District of Columbia were handed out during the final days of Adams's administration. These last-minute appointees came to be known as MIDNIGHT JUDGES. One of these seats went to Marshall, who was appointed chief justice of the Supreme Court.

On March 4, 1801, Marshall assumed his duties as the head of the Court. Jefferson and the Republicans were furious over Adams's court stacking, and they swiftly quashed the appointments—except that, inexplicably, they did not challenge Marshall's. Marshall kept the Court out of the fray. He feared that in a conflict between the judiciary and the EXECUTIVE BRANCH, the Court would lose.

Marshall again faced political conflict when in 1803 the Court ruled on a case brought by William Marbury, whose appointment as a D.C. justice of the peace had been one of those barred by the Republicans. Marshall's opinion for the unanimous Court in MARBURY V. MADISON, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60, dismissed Marbury's suit on the ground that the Supreme Court lacked jurisdiction to rule on it. But at the same time, the Court restated the position that it had the power to rule on questions of constitutionality. By striking down a section of the JUDICIARY ACT OF 1789 (1 Stat. 73), Marshall's opinion marked the first time that the Court overturned an act of Congress. Not for more than fifty years would it exercise this power again. Marshall asserted the right of the Supreme Court to engage in JUDICIAL REVIEW of the law, writing, "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* was the crucial first step in the evolution of the Supreme Court's authority as it exists today.

Marshall emphasized the need to limit state power by asserting the primacy of the federal government over the states. In 1819, as Marshall reached the height of his influence, he cited the Contracts Clause of the U.S. Constitution (art. 1, § 10) as a basis for protecting corporate charters from state interference (TRUSTEES OF DARTMOUTH COLLEGE V. WOODWARD, 17 U.S. [4 Wheat.] 518, 4 L. Ed. 629). That year he also struck a blow to STATES' RIGHTS in MCCULLOCH V. MARYLAND, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579, where he noted that the Constitution is not a "splendid bauble" that states can abridge as they see fit. In 1821 he advanced the theory of judicial review, rejecting a challenge by the state of Virginia to the appellate authority of the Supreme Court (*Cohens v. Virginia,* 19 U.S. [6 Wheat.] 264, 5 L. Ed. 257).

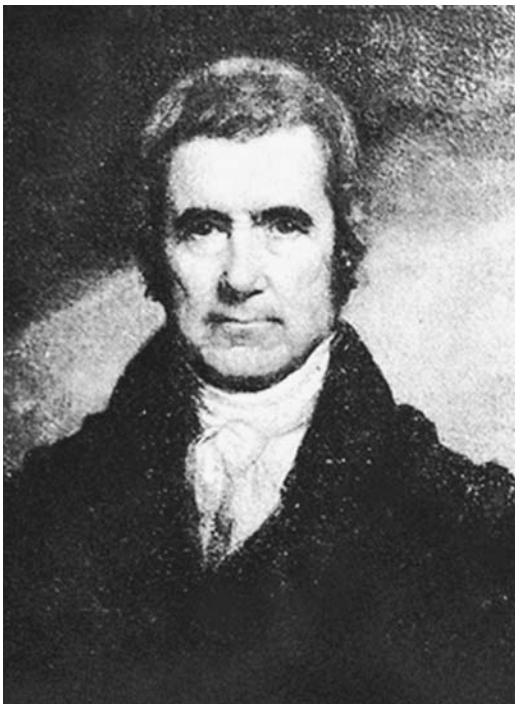

*John Marshall.*

In his written opinions, Marshall typically relied on the power of logic and his own forceful eloquence, rather than citing law. This approach was noted by Associate Justice JOSEPH STORY: "When I examine a question, I go from headland to headland, from case to case. Marshall has a compass, puts out to sea, and goes directly to the result."

Marshall was not without opponents. Foremost among them was Jefferson. In 1810 Jefferson wrote to President JAMES MADISON that "[t]he Chief Justice's leadership was marked by "cunning and sophistry" and displayed "rancourous hatred" of the democratic principles of the Republicans. Jefferson led the Republican attack on Marshall with the accusation that he twisted the law to suit his own biases.

Although Marshall weathered the attacks, his authority, and the Court's, was ultimately affected. Not all his decisions were enforced; some were openly resisted by the president. New appointments to the Court brought states' rights advocates onto the bench, and Marshall began to compromise as a leader and to make concessions to ideological opponents.

Marshall died in office on July 6, 1835.

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## ♦ MARSHALL, MARGARET HILARY

On October 13, 1999, Margaret Hilary Marshall became the first woman chief justice of the Supreme Judicial Court of Massachusetts. Marshall was born in 1944 in Newcastle, Natal, South Africa. Her mother, Hilary A.D. Marshall, was born in Richmond, England. Her late father, Bernard Charles Marshall, was a native of Johannesburg, South Africa, and was a chemist and production manager at the African Metals Corporation. She is married to *New York Times* columnist Anthony Lewis and has three stepchildren.

In 1966, Marshall received a bachelor of arts degree from Witwatersrand University in Johannesburg. At Witwatersrand, Marshall majored in English and art history. From 1966 to 1968, she was president of the National Union of South African Students, leading her fellow classmates in protests against apartheid. The National Union of South African Students was the only multiracial national group in the country at the time.

Marshall immigrated to the United States in 1968 in order to pursue an education at the graduate level. She studied at Harvard University, where she was awarded a graduate scholarship by the Ernest Oppenheimer Trust. The following year, she received her master's degree in education from Harvard. After doing so, Marshall decided on a law career. She studied at Yale Law School from 1973 until 1975. Although she completed her last year of law school at Harvard, Yale awarded her a Juris Doctor degree in 1976.

Marshall began her career as a lawyer in private practice, working as both an associate and a member in the Boston law firm of Csaplar & Bok from 1976 through 1989. In 1978, she became naturalized as a U.S. citizen. She then continued the private PRACTICE OF LAW in Boston as a partner at the prominent law firm of Choate, Hall & Stewart from 1989 through 1992. During these years, Marshall's practice consisted primarily of civil litigation. She earned a reputation as an expert in the area of INTELLECTUAL PROPERTY, which includes patent, COPYRIGHT,

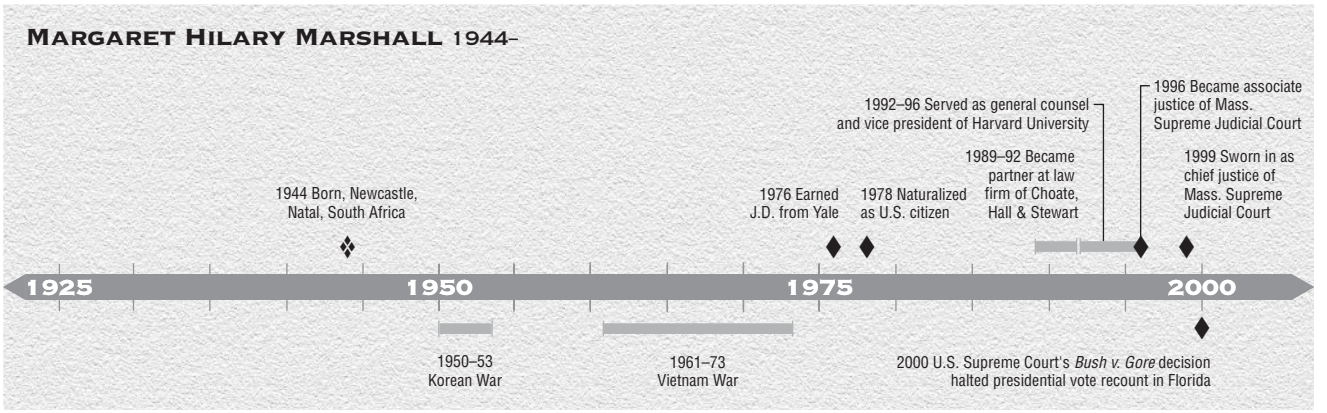

and TRADEMARK LAWS that protect inventions, designs, artistic and literary products, and commercial symbols.

While pursuing her career in private practice, Marshall continued in the fight against apartheid in her native county. She urged the United States to impose sanctions against South Africa due to its racial SEGREGATION. At that time, advocating sanctions against South Africa was a treasonable offense in her native country. Consequently, she was not able to return to South Africa because of her activities in the United States.

Marshall returned to Harvard University in 1992, where she served as general counsel and vice president until 1996. In that position, Marshall was responsible for Harvard's legal and regulatory affairs. Furthermore, she served as an active member of the President's Academic Council.

In November 1996, Marshall became an associate justice of the Supreme Judicial Court of Massachusetts. She was only the second woman ever to serve as a justice on the highest Court in Massachusetts. The Massachusetts Supreme Judicial Court is the oldest court in continuous service in the United States.

As a Supreme Judicial Court justice, Marshall is known for authoring opinions that strongly support CIVIL RIGHTS and liberties. For example, in one opinion, she supported the constitutional rights of SEX OFFENDERS by holding that they are entitled to a hearing before their names are entered on the sex-offender registry in Massachusetts. Marshall is also known for opposing CAPITAL PUNISHMENT.

On March 9, 1998, Marshall authored an opinion in the widely publicized case of *Commonwealth of Massachusetts v. Louise Woodward*, 694 N.E.2d 659 (Mass. 1998). In that case, at the trial-court level, a jury found Woodward, an au pair from England, guilty of the murder of Matthew Eappen, an eight-month-old child under her care. However, the trial judge reduced the jury's verdict from murder to INVOLUNTARY MANSLAUGHTER and sentenced Woodward to time served. Both sides appealed, and the case ultimately went before the Supreme Judicial Court for disposition. In the 46-page decision, Marshall stated that the reduced conviction of MANSLAUGHTER, as well as the sentence imposed by the trial judge, were lawful. In making her ruling, Marshall explained that the trial judge merely invoked the commonly used right to reduce a jury verdict and to sentence a defendant to time served.

*Margaret H. Marshall.*
AP/WIDE WORLD PHOTOS

After Marshall served as an associate justice on the Supreme Judicial Court for three years, the Governor of Massachusetts, Paul Cellucci, nominated her to be the court's first female chief justice and the first female to head one of the three branches of government in Massachusetts. On October 13, 1999, the Governor's Council approved Marshall's nomination. In December of the same year, Marshall was sworn in as chief justice of the Supreme Judicial Court. As such, she is the first naturalized U.S. citizen to become a chief justice.

As Chief Justice, Marshall designates which judges write opinions on particular cases, acts as the liaison to the Massachusetts governor and legislature, and has wide ranging authority over the administration of the state's courts. In a keynote address delivered to the Massachusetts Bar Association on January 2, 2000, Marshall stated, "Because of my experiences in South Africa, I value profoundly the central place of law in American society . . . law in the true sense. An impartial judiciary. Equal justice under the law."

In January 2002, Marshall wrote the majority opinion in a unanimous decision that held that children who are conceived by ARTIFICIAL INSEMINATION after the death of their father

have the same inheritance rights as other children. The ruling was believed to be the first on the controversial issue by any state supreme court.

Also in January 2002, Marshall addressed the Massachusetts Bar Association Conference, where she called for "a revolution in the administration of justice" stating that the court system needed to improve its management system as well as its staffing and budget controls. In March 2002, her discussion of the court system's problems were amplified in a 52-page report that was published by a blue-ribbon panel appointed by Marshall.

"THE GOVERNMENT [THAT THE FRAMERS OF THE CONSTITUTION] DEVISED REQUIRED SEVERAL AMENDMENTS, A CIVIL WAR, AND MOMENTOUS SOCIAL TRANSFORMATION TO ATTAIN THE SYSTEM OF CONSTITUTIONAL GOVERNMENT, AND ITS RESPECT FOR THE INDIVIDUAL FREEDOMS AND HUMAN RIGHTS, THAT WE HOLD AS FUNDAMENTAL TODAY."
—THURGOOD MARSHALL

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## MARSHALL PLAN

After WORLD WAR II, Europe was devastated and urgently needed an organized plan for reconstruction and economic and technical aid. The Marshall Plan was initiated in 1947 to meet this need.

The originator of the plan, U.S. Secretary of State George C. Marshall, introduced it in a speech at Harvard University on June 5, 1947. He pointed out two basic reasons for providing aid to Europe: the United States sought the reestablishment of the European countries as independent nations capable of conducting valuable trade with the United States; and the threat of a Communist takeover was more prevalent in countries that were suffering economic depression.

In 1947 a preliminary conference to discuss the terms of the program convened in Paris. The Soviet Union was invited to attend but subsequently withdrew from the program, as did other Soviet countries.

Sixteen European countries eventually participated, and, in July 1947, the Committee for European Economic Cooperation was established to allow representatives from member countries to draft a report that listed their requirements for food, supplies, and technical assistance for a four-year period.

The Committee for European Economic Cooperation subsequently became the Organization of European Economic Cooperation, an expanded and permanent organization that was responsible for submitting petitions for aid. In 1948, Congress passed the Economic Cooperation Act (62 Stat. 137), establishing funds for the Marshall Plan to be administered under the Economic Cooperation Administration, which was directed by Paul G. Hoffman.

Between 1948 and 1952, the sixteen-member countries received more than $13 billion dollars in aid under the Marshall Plan. The plan was generally regarded as a success that led to industrial and agricultural production, while stifling the Communist movement. The plan was not without its critics, however, and many Europeans believed the COLD WAR hostilities between the Soviet nations and the free world were aggravated by it.

## ♦ MARSHALL, THURGOOD

Thurgood Marshall, the first African American to serve on the U.S. Supreme Court, saw law as a catalyst for social change. For nearly 60 years, as both a lawyer and a jurist, Marshall worked to dismantle the system of SEGREGATION and improve the legal and social position of minorities.

Marshall was born July 2, 1908, in Baltimore, the son of a Pullman porter and a schoolteacher. He was a graduate of Lincoln University, a small, all-black college in Pennsylvania, and Howard University Law School in Washington, D.C. At Howard, Marshall excelled under the guidance of Vice Dean CHARLES HAMILTON HOUSTON, the first African American to win a case before the U.S. Supreme Court. Houston encouraged his students to become not just lawyers but "social engineers" who could use the legal system to improve society. Marshall graduated first in his law class in 1933.

Marshall's attendance at predominantly black Howard University illustrates the barriers faced by African Americans during the early twentieth century. Although Marshall wished to attend law school at the University of Maryland (a public institution in his home town of Baltimore), he was prohibited by law from doing so because of his race. This injustice helped set Marshall on a course of opposing all forms of official segregation that denied equal opportunities to African Americans.

After law school, Marshall set up a practice in Baltimore, representing indigent clients in civil rights cases. In 1936, his mentor Houston offered him a position with the National Association for the Advancement of Colored People (NAACP),

and in 1940, Marshall became director of the **NAACP LEGAL DEFENSE AND EDUCATIONAL FUND**, a position he held until 1961. Determined to eliminate segregation, Marshall coordinated a nationwide campaign to integrate higher education. He filed several successful lawsuits against public graduate and professional schools that refused to accept African-American students. These suits paved the way for similar cases at the high school and elementary school levels. Marshall also journeyed throughout the deep South, traveling fifty thousand miles a year to fight **JIM CROW LAWS** (a series of laws that provided for racial segregation in the South) and to represent criminal defendants.

Marshall argued 32 cases before the U.S. Supreme Court and won 29 of them. No doubt his most famous and far-reaching triumph before the High Court was **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). In that case, the father of African-American student Linda Brown sued the school board of Topeka, Kansas, over its segregation policy. Brown was required by law to attend an all African-American school several blocks from her home even though an all white public school was located in her own neighborhood. Under Kansas law, cities of more than 15,000 people, such as Topeka, could choose to operate segregated schools. Marshall argued that these segregated schools, defended by officials as "separate but equal," were unconstitutional.

The **SEPARATE-BUT-EQUAL** doctrine originated in **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), a case allowing segregated public accommodations for whites and blacks. In a plainspoken argument, Marshall dismissed as fallacy the notion that segregated schools offered the same educational experiences to black and white students. Sociological and psychological studies demonstrated that black children were in fact harmed by the policy of school segregation. The students' self-esteem was damaged and their future diminished when they were forced to accept inadequate facilities, equipment, and educational opportunities. Marshall argued that the only purpose segregation served was to perpetuate the myth of African-Americans' inferiority. A unanimous Court agreed and struck down the separate-but-equal doctrine, a

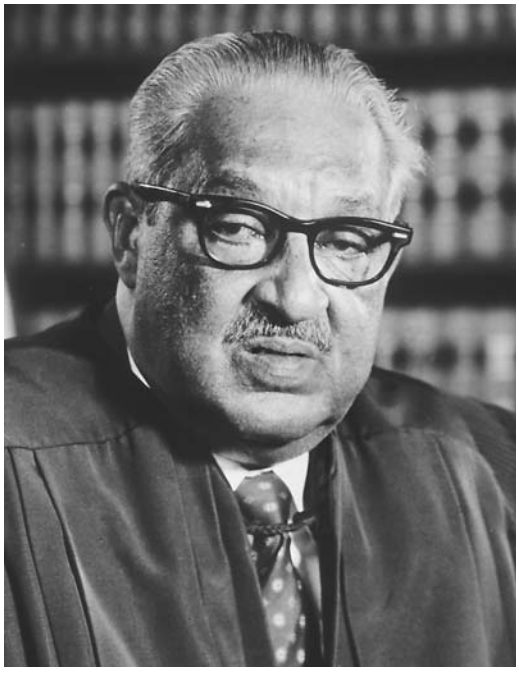

*Thurgood Marshall.*
LIBRARY OF CONGRESS

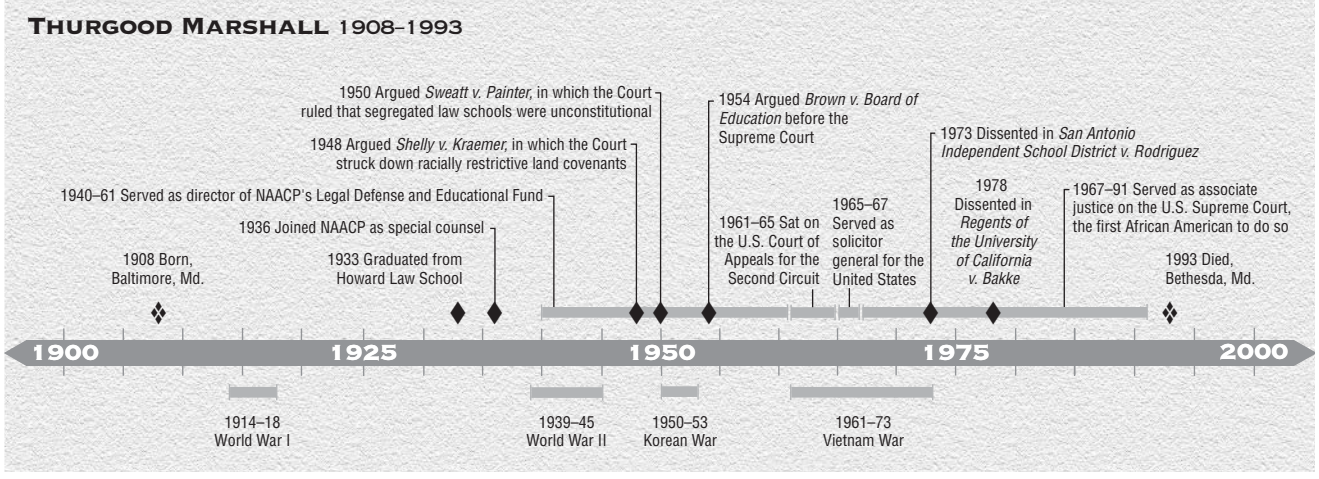

momentous victory for Marshall, affecting public schools in twenty-one states.

Marshall was appointed to the U.S. Court of Appeals for the Second Circuit in 1961, and served there until 1965 when he was named SOLICITOR GENERAL for the United States. He was appointed to the U.S. Supreme Court in 1967 by President LYNDON B. JOHNSON and served as an associate justice for 24 years.

While on the Court, Marshall was known more for his impassioned dissents than for his majority opinions. In particular, as a staunch opponent of CAPITAL PUNISHMENT, he regularly voiced his disagreement with the majority in death penalty cases. He was also a firm backer of AFFIRMATIVE ACTION and contributed one of his most famous dissents in REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In that case, Marshall criticized the high court's ruling that a public medical school's policy of reserving 16 of 100 spots for minority students was unconstitutional. Marshall also dissented in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), disagreeing with the majority view that a Texas property tax system used to fund public education was acceptable, even though it allowed wealthier districts to provide a better school system for students in those districts than less wealthy districts could provide. Marshall objected strongly to the property tax arrangement, claiming that it deprived poor children of an equal education.

Marshall wrote the majority opinion in *Amalgamated Food Employees Union v. Logan Valley Plaza,* 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968), in which the Court declared that a shopping center was a public forum from which picketers could not be barred by private owners.

Marshall retired from the Court in 1991, but continued his criticism of government policies that were detrimental to African Americans or other disenfranchised groups.

Marshall died on January 24, 1993, in Bethesda, Maryland. Upon Marshall's death, nearly 20,000 mourners filed by his casket during the 12 hours it lay in state in the Great Hall of the U.S. Supreme Court.

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CROSS-REFERENCES

Civil Rights Movement; Integration; School Desegregation.

## MARTIAL LAW

*The exercise of government and control by military authorities over the civilian population of a designated territory.*

Martial law is an extreme and rare measure used to control society during war or periods of civil unrest or chaos. According to the Supreme Court, the term *martial law* carries no precise meaning (*Duncan v. Kahanamoku,* 327 U.S. 304, 66 S. Ct. 606, 90 L. Ed. 688 [1946]). However, most declarations of martial law have some common features. Generally, the institution of martial law contemplates some use of military force. To a varying extent, depending on the martial law order, government military personnel have the authority to make and enforce civil and criminal laws. Certain civil liberties may be suspended, such as the right to be free from unreasonable SEARCHES AND SEIZURES, FREEDOM OF ASSOCIATION, and freedom of movement. And the writ of HABEAS CORPUS may be suspended (this writ allows persons who are unlawfully imprisoned to gain freedom through a court proceeding).

In the United States, martial law has been instituted on the national level only once, during the Civil War, and on a regional level only once, during WORLD WAR II. Otherwise, it has been limited to the states. Uprisings, political protests, labor strikes, and riots have, at various times, caused several state governors to declare some measure of martial law.

Martial law on the national level may be declared by Congress or the president. Under

Article I, Section 8, Clause 15, of the Constitution, Congress has the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress insurrections and repel Invasions." Article II, Section 2, Clause 1, of the Constitution declares that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Neither constitutional provision includes a direct reference to martial law. However, the Supreme Court has interpreted both to allow the declaration of martial law by the president or Congress. On the state level, a governor may declare martial law within her or his own state. The power to do so usually is granted in the state constitution.

Congress has never declared martial law. However, at the outset of the Civil War, in July 1861, Congress ratified most of the martial law measures declared by President ABRAHAM LINCOLN. Its martial law declaration gave the Union military forces the authority to arrest persons and conduct trials. However, Congress initially refused to ratify Lincoln's suspension of the writ of habeas corpus. This refusal created friction between Congress and the president and raised the question of whether unilateral suspension of the writ under martial law was within the president's power. The Supreme Court reviewed the issue and ruled in *Ex parte Merryman,* 17 F. Cas. 144 (1861) (No. 487), that only Congress had the power to suspend the writ of habeas corpus. After Congress approved Lincoln's suspension of the writ in 1863, Union forces were authorized to arrest and detain Confederate soldiers and sympathizers, but only until they could be tried by a court of law.

The martial law declared by Lincoln during the Civil War spawned another legal challenge, this one to the military courts: EX PARTE MILLIGAN, 71 U.S. (4 Wall.) 2, 18 L. Ed. 281 (1866). Lamdin Milligan, a civilian resident of Indiana, was arrested on October 5, 1864, by the Union military forces. Milligan was charged with five offenses: conspiring against the United States, affording AID AND COMFORT to rebels, inciting insurrection, engaging in disloyal practices, and violating the laws of war. Milligan was tried, found guilty, and sentenced to prison by a military court.

Although the habeas corpus petition had been suspended, the Supreme Court accepted Milligan's petition for a writ of habeas corpus. The Supreme Court held that neither the president nor Congress could give federal military forces the power to try a civilian who lived in a state that had federal courts. *Milligan* firmly established the right of the U.S. Supreme Court to review the propriety of martial law declarations.

The next large-scale martial law declaration took place 80 years later. On December 7, 1941, the day that Japanese warplanes bombed Pearl Harbor in what was then the territory of Hawaii, Governor Joseph B. Poindexter, of Hawaii, declared martial law on the Hawaiian Islands. The governor also suspended the writ of habeas corpus. The commanding general of the Hawaiian military assumed the position of military governor. All courts were closed by order of the military governor, and the military was authorized to arrest, try, and convict persons. Under Poindexter's martial law order, approved by the president, the military courts were given the power to decide cases without following the RULES OF EVIDENCE of the courts of law, and were not limited by sentencing laws in determining penalties.

In February 1942 the Department of War appointed General John L. DeWitt to carry out martial law in California, Oregon, Washington, and the southern part of Arizona. In March 1942 DeWitt announced that the entire Pacific Coast of the United States would be subject to additional martial law measures. Later that month he declared that all alien Japanese, Germans, and Italians, and all persons of Japanese descent, on the Pacific Coast were to remain inside their home between 8:00 P.M. and 6:00 A.M.

These martial law measures were challenged by criminal defendants shortly after they were put in force. In *Duncan v. Kahanamoku,* 327 U.S. 304, 66 S. Ct. 606, 90 L. Ed. 688 (1946), the Supreme Court held that the military tribunals established under martial law in Hawaii did not have jurisdiction over common criminal cases because the Hawaiian Organic Act (31 Stat. 141 [48 U.S.C.A. § 532]) did not authorize the governor to close the courts of law when they were capable of functioning. In *Duncan* the Court ordered the release of two prisoners who had been tried and convicted of EMBEZZLEMENT and assault by military courts.

In other cases the High Court was more tolerant of CIVIL RIGHTS deprivations under martial law. In *Hirabayashi v. United States,* 320 U.S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943), the Court upheld a curfew placed on Japanese

Americans during the war, on the ground of military necessity, and in **KOREMATSU V. UNITED STATES**, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944), the Court justified the random internment (imprisonment) of more than 110,000 Japanese Americans during the war.

At least one governor has used martial law to enforce state agency regulations. In 1931 Governor Ross S. Sterling, of Texas, sent Texas **NATIONAL GUARD** troops into east Texas oil fields to force compliance with limits on the production of oil and an increase in the minimum number of acres required between oil wells. The regulations had been drawn up by the Texas Railroad Commission with the approval of the Texas Legislature, but similar regulations had been enjoined (stopped) by a federal court just four months earlier. In 1932 the Supreme Court invalidated Sterling's use of martial law, holding that it violated the constitutional **DUE PROCESS** rights of the property owners (*Sterling v. Constantin,* 287 U.S. 378, 53 S. Ct. 190, 77 L. Ed. 375 [1932]).

"... IN A FEDERAL GOVERNMENT, THE PARTIES TO THE COMPACT ARE NOT THE PEOPLE, AS INDIVIDUALS, BUT THE STATES, AS STATES; AND ... [IT IS] BY THE STATES AS STATES, ... THAT THE SYSTEM OF GOVERNMENT OUGHT TO BE RATIFIED, AND NOT BY THE PEOPLE, AS INDIVIDUALS."
—LUTHER MARTIN

Another governor declared martial law in response to an assassination and rumors of political corruption. In June 1954 Albert Patterson, a nominee for state attorney general in Alabama, was shot to death on a street in Phenix City. Alabama governor Gordon Persons declared martial law in Phenix City and dispatched General Walter J. ("Crack") Hanna and the Alabama National Guard to take over the city. Hanna appointed a military mayor, and the troops took control of the county courthouse and city hall. The troops physically removed certain officials from the courthouse and city hall, seized gambling equipment, and revoked liquor licenses.

Martial law usually is used to try to restore and maintain peace during civil unrest. It does not always yield the desired results. In May 1970, for example, Ohio governor James Rhodes declared limited martial law by sending in National Guard troops to contain a Kent State University protest against the **VIETNAM WAR**. Four protestors were shot and killed by the troops. In a case brought by their survivors, the Supreme Court held that the governor and other state officials could be sued if they acted beyond the scope of state laws and the federal Constitution (*Scheuer v. Rhodes,* 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 [1974]).

Martial law is generally an act of last resort. Courts will uphold a decision to use troops only if it is necessary and proper.

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Habeas Corpus; Japanese American Evacuation Cases; Kent State Student Killings; Military Law; Military Occupation; Militia; National Guard.

## ♦ MARTIN, LUTHER

Luther Martin was a distinguished lawyer and statesman who played an influential role in U.S. law and politics during the early years of the republic. During most of his legal career, he served as Maryland's attorney general.

Most sources cite Martin's birth as being on February 9, 1748, near New Brunswick, New Jersey. He graduated from the College of New Jersey (now known as Princeton University) in 1766 and then taught school in Maryland for three years. In 1770, he began studying law and was admitted to the Virginia bar in 1771. He established a successful law practice in Maryland and Virginia and became known for his superior legal talents.

In 1774, Martin entered politics as a member of the Annapolis Convention, which was convened to formulate a list of grievances against

the British government. In 1778, he was appointed to be Maryland's first attorney general, a position he would retain for most of the next 40 years. He attended the CONTINENTAL CONGRESS in 1785 and the Constitutional Convention in 1787. Martin opposed the idea of a strong federal government, preferring that power reside in the states. Unhappy with the final version of the Constitution, he opposed its ratification.

As an attorney, Martin achieved a prestigious reputation and argued several landmark cases before the U.S. Supreme Court. In FLETCHER V. PECK, 10 U.S. (6 Cranch) 87, 3 L. Ed. 162 (1810), the Court for the first time invalidated a state law as contrary to the U.S. Constitution. The Georgia legislature had revoked a land grant that originally had been permitted by a contract. The Court ruled that public grants were contractual obligations and that they could not be abrogated without fair compensation. Chief Justice JOHN MARSHALL based the decision on the Contract Clause of the Constitution (Art. I, Sec. 10, Cl. 1), which provides that no state shall impair the obligations of contract.

Martin also appeared before the U.S. Supreme Court in MCCULLOCH V. MARYLAND, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819), where he argued that Maryland had the right to impose a tax on a federally chartered bank. Chief Justice Marshall ruled against Maryland, finding that the state had no authority under the Constitution to tax any agency that has been authorized by the federal government. In Marshall's words, "the power to tax is the power to destroy." Such a power did not comport with the allocation of powers under the Constitution.

Martin also served as counsel in two politically charged cases. In 1804, he successfully helped to defend U.S. Supreme Court Justice SAMUEL CHASE against IMPEACHMENT. Chase, a Federalist judge who had outraged Democrats with several decisions that appeared to be based as much on politics as on law, was acquitted at his Senate trial after Martin convinced senators that the impeachment itself was politically motivated.

In 1807, Martin represented AARON BURR, who was accused of TREASON. Martin argued that the charge was baseless and that it was motivated by President Thomas Jefferson's personal and political dislike of Burr. His indictment of the Jefferson administration helped to convince the jury to acquit Burr.

*Luther Martin.*
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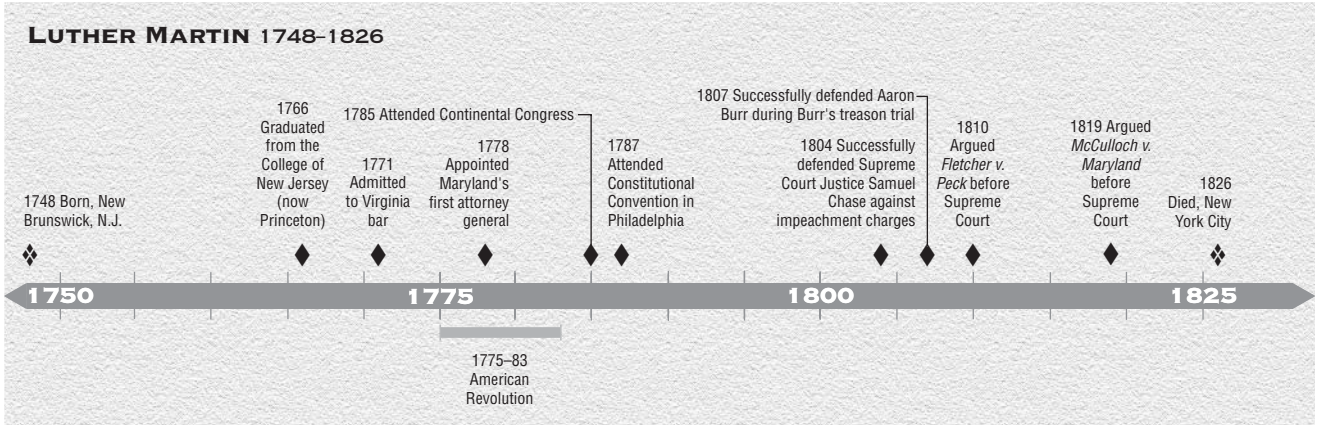

Martin suffered a stroke in 1820, shortly after arguing *McCulloch v. Maryland*. Despite his stature and his successful law practice, Martin was insolvent. The Maryland legislature levied a $5 license fee on every attorney to help support Martin. In 1823, Aaron Burr took Martin into his home, where Martin lived for three years. Martin died on July 10, 1826, in New York City.

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CROSS-REFERENCES

Bank of the United States; Constitution of the United States.

## MARTIN V. HUNTER'S LESSEE

The framing of the U.S. Constitution came after the ARTICLES OF CONFEDERATION failed to create a viable national government. The 13 former colonies had retained most of their political power, and the resulting national government was impotent. In contrast, the U.S. Constitution allocated powers between the national government and state governments. Moreover, the three branches of the national government were given specific grants of power. Despite these provisions and the history of the confederation era, some states were outraged that the U.S. Supreme Court could review and reverse state court decisions. The high court issued such rulings and asserted its jurisdiction without incident until 1813, when the Virginia Court of Appeals refused to enforce the high court's judgment. The case returned to the U.S. Supreme Court in 1816 and led to a landmark decision, *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816). In a lengthy and magisterial opinion, Justice JOSEPH STORY reaffirmed the Court's jurisdiction and set to rest the idea that state courts could decide whether or not to honor federal court decisions. In addition, the Court raised for the first time that the federal government wielded implied powers as well as enumerated powers.

The legal dispute in question reached back to the Revolutionary War. Following the Declaration of Independence, Virginia passed a law that authorized the confiscation of property held by Loyalists to the British regime. Thomas Lord Fairfax, a Loyalist, held substantial property in Northern Neck, Virginia. After his death, his heir, Denny Martin, sought to claim this property but discovered that it had been confiscated and sold to a private party by the state of Virginia. Martin filed suit in Virginia court, asking the court to eject the current owner and to restore title to him. He based his claim on the TREATY OF PARIS (1783) and Jay's Treaty (1794), which the U.S. had signed with Great Britain. The Treaty of Paris ended the War for Independence, and Jay's Treaty resolved lingering disputes over parts of the peace treaty. Both treaties contained provisions that forbade the confiscation of Loyalist property. Martin pointed to Article III of the Constitution, which grants the judicial power of the U.S. to the U.S. Supreme Court and gives it jurisdiction to hear disputes involving treaties. He contended that federal treaty provisions trumped state laws. The U.S. Supreme Court agreed in 1813 and ordered Virginia to enforce the Court's judgment restoring title to Martin.

Martin was to be disappointed, as the Virginia Court of Appeals, the commonwealth's highest court, refused to enforce the judgment. It claimed that the U.S. Supreme Court had no power to review state court decisions. Several other states were sympathetic to this viewpoint, signaling a looming crisis over the judicial powers of the national government. It was in this light that the U.S. Supreme Court issued its decision in March 1816. Chief Justice JOHN MARSHALL, a Virginian with financial and other conflicts of interests, did not participate in the decision, leaving it in the hands of Justice Story and the five other justices.

The Court, in a unanimous decision, rejected Virginia's argument and held that the U.S. Supreme Court had the constitutional and statutory authority to review state court decisions. Justice Story, writing for the Court, conducted a lengthy review of the language of the constitutional and statutory provisions, but he also looked at the historical factors that had led to the framing of Article III. Story, one of the great legal thinkers of the nineteenth century, bluntly dismissed Virginia's claim that the states, in agreeing to the Constitution, had retained their absolute sovereignty. This compact theory of government was, in Story's view, the basis for the Articles of Confederation but not the Constitution. He noted that the Constitution's preamble states that the document was ordained and established "by the people of the United States" and not by the states in their sovereign capacities. The Constitution was not "carved out of existing state sovereignties, nor a surrender of

powers already existing in state institutions." In essence, the people had drawn up their government on a clean slate and had allocated powers to the states, the federal government, and to the three branches of the federal government.

This clean slate was evidenced in the allocation of judicial power. Article III laid heavy emphasis on the superiority of the national judicial power in its statement that "the judicial power of the United States shall be vested in such inferior courts as the Congres may from time to time ordain and establish." Story reviewed the text of this provision, using the "natural and obvious sense" of each word. It was illogical to grant the judicial power to a supreme court and then to argue that inferior state courts could take away such power. Therefore, Story concluded that Congress had the duty to vest the "whole judicial power" to the U.S. Supreme Court. The word "shall" loomed large in this discussion, as it signified that Congress did not have discretion to vest less than absolute judicial power. Story also suggested that the federal government held implied powers to execute the commands of the Constitution as well as the enumerated powers contained in the document. Without such implied powers, the government could be hamstrung by pinched readings of its authority to carry out policies for the good of the people.

Having established the constitutional grounds for the right to review state-court decisions, Story turned to Virginia's statutory challenge. Section 25 of the JUDICIARY ACT OF 1789, one of the first acts passed by the first Congress, gave the U.S. Supreme Court the authority to issue judgments involving treaty-based lawsuits. Virginia claimed that this violated Article III and the TENTH AMENDMENT, which in essence states that all powers not delegated to the three branches of the federal government are reserved to the states. Justice Story rejected this claim. The U.S. Supreme Court needed to retain jurisdiction over treaties as well as other types of lawsuits named in the Judiciary Act. Story was frank in his criticism. The Constitution had been drafted, in part, to prevent "state attachments, state prejudices, state jealousies, and state interests." Without a manifestly supreme court, states could "obstruct, or control . . . the regular administration of justice." Moreover, the uniformity of decisions was an important goal. Great mischief would take place if each state could interpret laws, treaties, and the U.S. Constitution. Finally, Story noted that if Virginia's interpretation were to be adopted, the U.S. Supreme Court would have no power to review any state criminal case. Such an interpretation made no sense when the intent of the Framers was reviewed. Therefore, the U.S. Supreme Court had the power to review state-court decisions, and federal judicial supremacy was affirmed.

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## MARTINDALE-HUBBELL LAW DIRECTORY

*A database containing information about attorneys and law firms around the world.*

Primarily lawyers use the *Martindale-Hubbell Law Directory* to assist them in the practice of their profession. An attorney may use the directory, for example, to find out more information about a lawyer or law firm that has filed a lawsuit against her client or to find an attorney in another jurisdiction to assist in a case.

James B. Martindale published his first legal directory in 1868. In 1874 he published *Martindale's United States Law Directory,* a selective listing of attorneys that made no attempt to include complete information on all attorneys. The 1885–1886 biannual edition was renamed *Martindale's American Law Directory.* The first attempt to publish a complete roster of all attorneys in the United States and Canada, this edition listed each attorney and law firm in alphabetical order by state and city and the laws of each state and all Canadian provinces. In 1896 annual publication of the directory began, and a section listing foreign attorneys and law firms was added. The 1896 edition also introduced the basic information format for attorneys that continues to the present: date of birth, date of ADMISSION TO THE BAR, and a rating, if any, of legal ability.

In 1930 the Martindale Company purchased the publishing rights of *Hubbell's Legal Directory* issued by J. H. Hubbell & Company from 1870 to 1930. The company was purchased from Edwin Powell Hubble (a variant spelling of the family name), the astronomer for whom the Hubble Space Telescope is named. The merged publications, renamed the *Martindale-Hubbell Law Directory,* appeared as a two-volume set in 1931.

The size of the directory has grown steadily as more attorneys have joined the profession. In 1948 the directory went to three volumes. By 1968 it had increased to five volumes. The first eight-volume set was published in 1987, and the 1991 edition was made up of sixteen smaller volumes. In 1996 the directory consisted of twenty-five volumes and contained listings for more than 900,000 attorneys and law firms in the United States, Canada, and throughout the world.

The directory is now available on CD-ROM, through LEXIS-NEXIS, and through the Martindale-Hubbell site on the World Wide Web. It has become a standard reference publication for law libraries. The Martindale Company was purchased by Reed Elsevier in 1990 and is part of Reed Reference Publishing.

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## MARX, KARL HEINRICH

Karl Heinrich Marx was a nineteenth-century German intellectual whose works have had great influence on the world. Largely ignored during his lifetime, Marx's writings on economics, politics, social science, and revolution eventually led to the founding of two political movements, SOCIALISM and COMMUNISM. In addition, his views have influenced many legal philosophers.

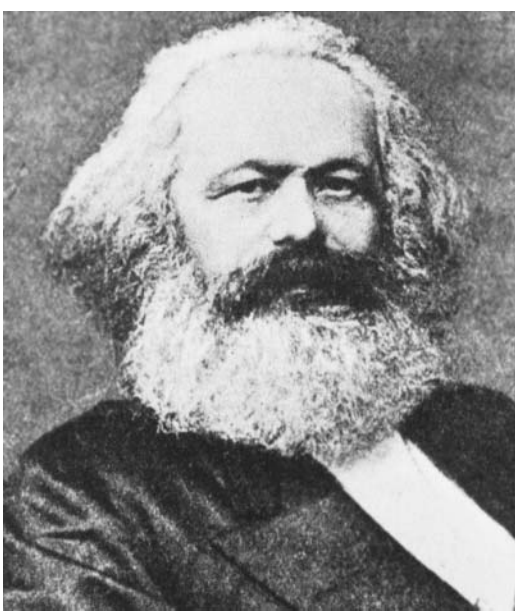

*Karl Marx.*

Marx was born May 5, 1818, in Trier, in what was then the state of Prussia. His father was a successful lawyer. A bright student, Marx studied law at the University of Bonn in 1835. The following year he transferred to the University of Berlin, where he studied philosophy. While at Berlin, Marx joined a group of students and teachers who were opposed to the Prussian government. At that time citizens of Prussia enjoyed few civil liberties and were prevented from participating fully in public affairs.

Marx's political activity proved harmful for his academic career. After obtaining his doctorate in philosophy in 1841, he tried to get a teaching job. The Prussian government barred him from teaching. He then became a freelance journalist.

Following his marriage to Jenny von Westphalen in 1843, Marx moved to Paris. In 1845 he moved to Brussels, where he remained until 1848. In 1848 he returned to Germany to become the editor of a radical paper in Cologne. He used the newspaper to rail against the Prussian government, and he encouraged the German Revolution of 1848, which failed to topple the regime.

During the days leading up to the revolution, Marx first articulated his political and historical theories. In the *Communist Manifesto* (1848), a pamphlet written with his friend Friedrich Engels, Marx argued that history is a series of conflicts between economic classes. He predicted that the ruling middle class would be overthrown by the working class, and a classless society would be created. This classless society would be characterized by the public ownership of all means of economic production. Marx and Engels had previously written *The German Ideology* (1845–46), a seven-hundred-page book that dealt in more philosophic terms with economics and politics.

Marx's participation in the failed revolution forced him to flee Germany. In 1849 he settled in London, where he remained for the rest of his life. He and his family lived in abject poverty. He refused to work, except for a stint as a political reporter for the *New York Tribune.* Instead, he spent his time researching at the British Museum library. Friends contributed to his support, especially Engels, who owned a textile manufacturing plant in England. In 1864 Marx founded the International Workingmen's Asso-

ciation, a group dedicated to preparing the way for a socialist revolution. He died in London on March 14, 1883.

Marx spent most of his life in England working on *Das Kapital* (Capital). The first volume was published in 1867, the second and third volumes after his death. He considered *Das Kapital* to be his major work, because it described the functioning of industrial capitalism. Marx saw capitalism as an efficient way of producing wealth, but also saw a fatal flaw in how this wealth was distributed: those who owned the means of production retained most of the wealth, whereas the working class had to get by on fluctuating wages. Marx argued that this inequality would eventually lead the working class to revolt.

Marx's writings had a great effect on the socialist and Communist revolutionary movements of the nineteenth and twentieth centuries. He cast his theories as historically inevitable, providing revolutionaries with a way of explaining the world that appeared to be scientific.

Marxist ideas became the core intellectual tradition for Communist countries in the twentieth century. Social science, history, and philosophy were shaped by his views. U.S. intellectuals generally ignored Marxism until the 1960s, in part because many people believed that it was a subversive political doctrine.

In law, the field of Marxist JURISPRUDENCE has grown significantly. A Marxist analysis of law places more importance on the power of economic forces in society rather than on the concept of an impartial, neutral RULE OF LAW. Marxists believe that the material forces of a society and those that control these forces shape the society's legal system.

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Cold War; Hegel, Georg Wilhelm Friedrich; Lenin, Vladimir Ilyich; Stalin, Joseph.

## ♦ MASON, GEORGE

George Mason was an eighteenth-century statesperson who in 1776 wrote the Declaration of Rights for the State of Virginia and who later helped write the U.S. Constitution. Mason was a champion of liberty whose opposition to SLAVERY and a strong federal government led him to refuse to sign the Constitution.

Mason was born on October 7, 1725, in Fairfax County, Virginia, the son of a wealthy commercial and agricultural family. Mason studied law but was primarily a plantation owner and real estate speculator. He was a neighbor of GEORGE WASHINGTON. Mason was deeply interested in western expansion, and in 1749 he became a member of the Ohio Company, which developed land and trade on the upper Ohio River.

At about this time, Mason helped found the city of Alexandria, Virginia. Because he suffered from chronic poor health, Mason avoided public office, serving only a short time in the Virginia

"OUR ALL IS AT STAKE, AND THE LITTLE CONVENIENCES AND COMFORTS OF LIFE, WHEN SET IN COMPETITION WITH OUR LIBERTY, OUGHT TO BE REJECTED NOT WITH RELUCTANCE BUT WITH PLEASURE."
—GEORGE MASON

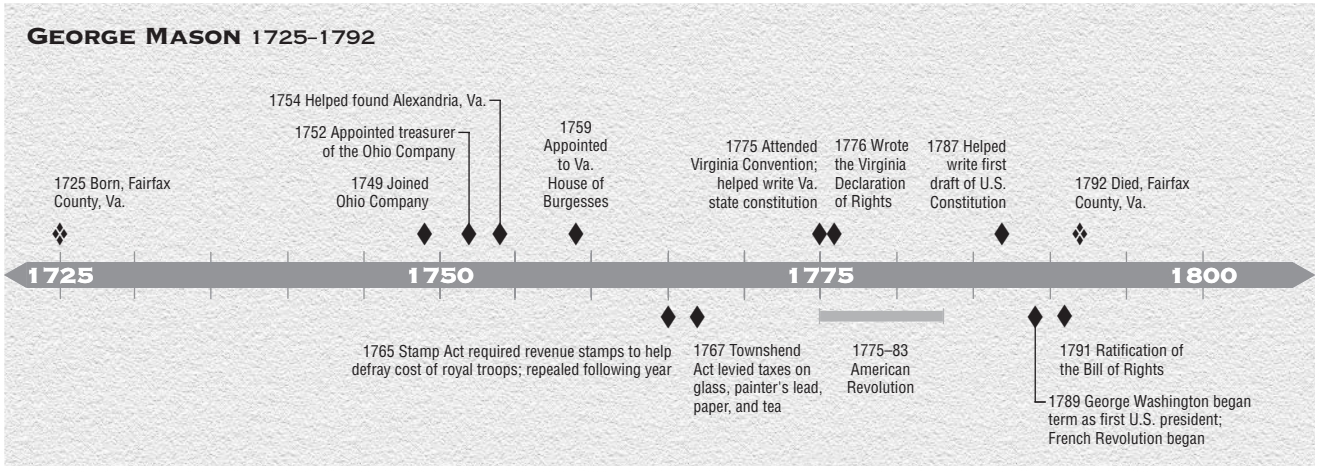

*George Mason.*
ARCHIVE PHOTOS, INC.

House of Burgesses. Yet he did not shun the political debate over British interference with the colonies. British attempts at taxing and controlling the colonies through the STAMP ACT of 1765 and the TOWNSHEND ACTS led many colonial leaders to consider political independence.

In 1775 Mason attended the Virginia convention, where he helped write most of the Virginia constitution. In June 1776 he wrote the VIRGINIA DECLARATION OF RIGHTS. THOMAS JEFFERSON was probably familiar with Mason's concepts and language when he wrote the Declaration of Independence later that year, and other states soon copied Mason's work. French revolutionaries also showed they had been influenced by Mason's declaration in their Declaration of the Rights of Man, which was composed in 1789.

The Virginia Declaration of Rights stated that government derived from the people, that individuals were created equally free and independent, and that they had inalienable rights that the government could not legitimately deny them.

As a delegate to the Constitutional Convention of 1787, Mason was called on to write part of the first draft. By the end of the convention, however, he had become deeply alienated by the result. Although he came from a slaveholding state, Mason opposed slavery on both moral and economic grounds. He sought an end to the slave trade and the manumission of all slaves. Instead, the Constitution allowed the slave trade to continue for twenty years, and it said nothing about the institution of slavery.

Mason also objected to the lack of provision for individual rights, believing that the Constitution gave too much power to the federal government. His criticism contributed to the enactment and ratification of the BILL OF RIGHTS in 1791, portions of which were modeled on Mason's Declaration of Rights.

Mason died on October 7, 1792, at his estate in Fairfax County, Virginia.

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## ♦ MASON, JOHN YOUNG

John Young Mason served as a U.S. attorney general under President JAMES POLK. He was secretary of the Navy during the Mexican War, chair of the House committee on foreign affairs, and an ambassador to France. While serving as ambassador, Mason was one of three U.S. ministers to sign the Ostend Manifesto, a written proposal to buy or seize Cuba from Spain that was later dismissed as an effort to extend SLAVERY in the United States.

Mason was born in Greensville County, Virginia, on April 18, 1799. His father was Edmunds Mason, and his mother was Frances Ann Young Mason. His grandfather was Captain James Mason of the Fifteenth Virginia Line. Mason graduated from the University of North Carolina in 1816 and attended the law school at Litchfield, Connecticut, for three years. In 1819 he was admitted to the Virginia bar and began practice at Hicksford in Greensville County.

In 1822 Mason moved to Southampton County, Virginia, and began a law practice that quickly became lucrative. In 1823 he was elected as a Democrat to the Virginia General Assembly, where he served until 1827. He served in the Virginia Senate from 1827 to 1831. Mason was also a member of the 1829 state constitutional convention.

In 1831 Mason was elected to the U.S. House of Representatives. While serving as a representative, Mason supported most of President Andrew Jackson's measures. He refused to vote to recharter the National Bank, even when the Virginia General Assembly pressed him to do so.

As chair of the House committee on foreign affairs, Mason introduced a bill recognizing independence for Texas. He also supported naval preparedness during a time of adversarial relations between the United States and France. Mason served in the House until 1837, when he accepted a position as judge of the U.S. district for Virginia.

President JOHN TYLER appointed Mason secretary of the Navy in March 1844, and President Polk appointed Mason attorney general in 1845. Mason was the only member of Tyler's cabinet to be retained by the new president. He served as attorney general until 1846 when Polk reappointed him as secretary of the Navy. He served in that position until 1849.

Mason was secretary of the Navy during the years of the Mexican War. Although he was an expansionist, he opposed incorporating Mexico into the United States and supported U.S. acceptance of the treaty signed with Mexico.

At the end of the Polk administration, Mason returned to his law practice in Richmond. He was elected president of the James River and Kanawha Company in 1849 and became an active advocate of efforts to rapidly extend the canal system in Virginia. In the 1852 presidential campaign, Mason publicly supported FRANKLIN PIERCE.

In 1853 President Pierce appointed Mason U.S. minister to France. In 1854, at the request of Secretary of State William L. Marcy, Mason met with JAMES BUCHANAN, U.S. minister to Great Britain, and Pierre Soulé, U.S. minister to Spain, in Ostend, Belgium, to discuss the issue of Cuban uprisings. During this period U.S. leaders were bitterly debating the circumstances under which slavery should or should not be extended into new states. On October 18, 1854, Mason, Buchanan, and Soulé—who were pro-slavery—signed the Ostend Manifesto, a secret document proclaiming that Spain should sell Cuba to the United States and that, if it refused to do so, the United States had the right to take the island by force. The press published the document and ridiculed it as a clumsy plot to add new slave territory to the United States. Marcy subsequently dismissed the document on behalf of the Pierce administration.

Mason was reappointed U.S. minister to France when Buchanan became president, and he remained in that position, living abroad, until his death in Paris on October 18, 1859.

*John Mason.*
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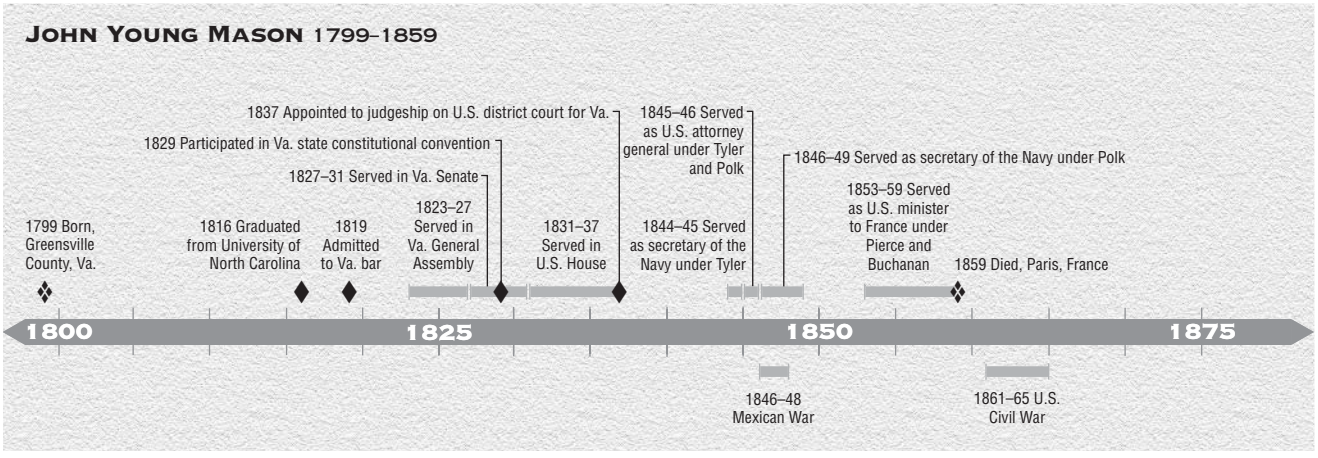

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## MASS COMMUNICATIONS LAW

*A body of primarily federal statutes, regulations, and judicial decisions that govern radio; broadcast, cable, and satellite television; and other means of electronic communication.*

Since the introduction of the radio in the early twentieth century, sophisticated technological devices have been developed to facilitate the transmission of ideas, information, and entertainment throughout the United States and the world. The federal government has taken an active role in regulating the means of communication that involve the interstate transmittal of information. Government regulation was needed in order to create a coherent plan for radio and television broadcasting and to ensure that these facilities are used responsibly. The passage of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, however, signals a decline in government regulation. This massive deregulation allows companies involved with mass communications to compete and to combine more freely.

### Early History

Government regulation of radio began in 1910, at a time when radio was regarded primarily as a device to bring about safe maritime operations and as a potential advancement in military technology. Persons seeking to use radio frequencies would register with the COMMERCE DEPARTMENT to have a frequency assigned to them. During WORLD WAR I, entrepreneurs began to recognize the commercial possibilities of radio.

By the mid 1920s, commercial radio stations were operating, and the secretary of commerce set aside frequencies for commercial application. The regulatory powers of the secretary were uncertain because the secretary was authorized under law only to record applications and to grant frequencies. The Federal Radio Commission was created in 1927 to assign applicants designated frequencies under specific engineering rules and to create and enforce standards for the broadcasters' privilege of using the public's airwaves.

The commission later became the FEDERAL COMMUNICATIONS COMMISSION (FCC), which was established by the Communications Act of 1934 (47 U.S.C.A. §§ 151 et seq.). The 1934 act set out a regulatory structure that would govern mass communications law for more than 60 years, with the FCC as the governing regulatory body. The law also made clear that the federal government has sole jurisdiction over modern mass communication.

### The FCC

The FCC establishes the requirements for the licensing of stations and sets up a framework that tries to ensure some competition for licenses. It allows the free market to determine such matters as advertising costs, expenses, cost of equipment, and choice of programming by broadcasters.

In addition to regulating commercial and educational broadcasting, the FCC has pervasive power to govern nonbroadcast use of communications facilities, such as interstate commerce carrier systems, radio systems for truck-to-truck communication, taxicab networks, marine and ship radio, aviation frequencies, citizens band (i.e., CB) radio, international "ham" communication, police and fire communications networks, and cable and satellite television. All radio stations owned and operated by the United States, however, are exempt from regulation by the FCC.

The FCC may not decide whether a particular advertising message is false or misleading. This subject matter is delegated by law to the FEDERAL TRADE COMMISSION (FTC). The FCC can act when a licensee continues to broadcast an advertisement that the FTC has determined to be false and misleading. The FCC does not set advertising rates or oversee ordinary and usual business practices, such as production charges, commission arrangements, and salaries of artists.

Although government regulation of broadcasting appears to conflict with the First Amendment's guarantee of FREEDOM OF SPEECH and FREEDOM OF THE PRESS, such regulation is often justified in terms of the limited number of available broadcast frequencies. Unlike the print media, which can physically

## Cable TV and the "Must Carry" Law

Since the 1970s the **FEDERAL COMMUNICATIONS COMMISSION** (FCC) has required **CABLE TELEVISION** systems to dedicate some of their channels to local broadcasting stations. For many years cable operators did not challenge the constitutionality of these "must carry" provisions, believing that compliance was necessary to obtain operating licenses. With the dramatic growth in the cable industry, however, cable operators argued that they should be able to use these channels for more profitable programming. In the late 1980s, as a result of challenges by cable operators, the courts struck down must carry rules as a violation of the **FIRST AMENDMENT**.

Congress replied in the Cable Television Consumer Protection and Competition Act of 1992 (47 U.S.C.A. § 151 et seq.), providing that cable systems with twelve or fewer channels must carry at least three local broadcast signals and that larger systems must carry all local signals up to a maximum of one-third of the system's total number of channels.

Turner Broadcasting System, a leading cable operator, filed suit, claiming that the must carry law violated the First Amendment by suppressing and burdening free speech. The Supreme Court, on a 5–4 vote, in *Turner Broadcasting System v. FCC,* 117 S. Ct. 1174 (1997), rejected these arguments, finding that Congress had substantial evidence to justify the must carry provisions and that the provisions advanced important governmental interests unrelated to the suppression or burdening of free speech.

The Court noted that the must carry provisions preserve the benefits of free, over-the-air local broadcast television, promote the widespread dissemination of information from many sources, and advance fair competition in the television programming market. The Court was reluctant to abandon the law when 40 percent of U.S. households still rely on over-the-air signals for television programming. The Court found that when local broadcasters are denied cable access, audience size and advertising revenues decline, station operations are restricted, and **BANKRUPTCY** may result.

Conversely, the Court determined that the must carry provisions had not burdened cable operators, with the vast majority unaffected in a significant manner. Most systems had enough channels to accommodate local stations and their own programming. Therefore, Congress had not overstepped the First Amendment in mandating the must carry requirement.

coexist in the same community at the same time, broadcasting requires the government to make a choice between two or more potential broadcasters that wish to use the same broadcast space. In broadcasting, two or more radio or television stations cannot physically operate on the same frequency, because neither would be heard. Because it is important to the general public that someone be heard, the FCC must choose who that will be.

The FCC is not always faced with the necessity of choice. Only one broadcaster might apply for a particular open frequency. The FCC must determine, no matter how many applicants, whether a potential broadcaster has the proper qualifications and whether it will operate "in the public interest" before the applicant will be permitted to broadcast.

### Licensing

Congress has devised a procedure by which broadcasters are granted an exclusive right or license to broadcast over a particular frequency for a statutory maximum number of years. Under the Telecommunications Act of 1996, new licenses and renewals are granted for eight years. The FCC classifies different types of stations and the particular services they provide, and it assigns the band of frequencies for each individual station. The three sets of broadcast frequencies are the AM band, the FM band, and a third set used for television. Licenses are issued only on a showing that public convenience, interest, and necessity will be served and that an applicant satisfies certain requirements, such as citizenship, character, financial capability, and technical expertise.

**Citizenship** A noncitizen, foreign government, or corporation of which any officer or director is an alien, or where more than one-fifth of the stock is owned by ALIENS or representatives of foreign governments, may not receive a broadcasting license. These restrictions are mandatory and the FCC may not waive them. Only Congress may pass legislation making an exception to the citizenship rule. There are no similar restrictions on foreign ownership of CABLE TELEVISION systems.

**Character** Applicants must possess the essential character qualifications of honesty and candor. However, the FCC evaluates the applicant based on information that the applicant provides. The FCC relies on the honesty of applicants because it has neither the staff nor the budget to verify the representations made by license applicants or its licensees. Any intentional MISREPRESENTATION by an applicant will seriously jeopardize the license application, regardless of the significance of the matter.

A license may be denied for violations of CRIMINAL LAW, but disqualification does not automatically occur for minor offenses. An applicant that has been convicted of violating federal regulatory laws in a business not involving communications might have a license application denied because the conviction indicates an intentional disregard for government regulations.

When faced with a choice between an applicant against whom no character question is raised and one who has violated a law, but not one that results in an automatic denial, the FCC is most likely, all other considerations being equal, to grant the license to the non-lawbreaker.

**Financial Qualifications** An applicant must demonstrate the financial capability to construct and operate the proposed facility for one year. If the person intends to rely on anticipated revenue, he or she must file evidence that these revenues will, in fact, be earned. Such evidence may include affidavits from prospective advertisers indicating their plan to contract with the station for advertising time.

An applicant who wants to buy an existing profit-making station need only show the financial ability to maintain operations without revenues for the first three months. A station that has earned profits in the past is considered to be likely to continue to earn profits in the future. Where a station that is already in financial difficulty is being sold, the applicant-purchaser must demonstrate a capability to produce a profit in the first year of operation.

**Technical Expertise** A broadcaster must comply with all of the technical requirements imposed by the FCC, such as the use of transmitting equipment that is the type approved by the FCC and the operation of broadcast facilities during the hours appropriate for the frequency sought.

**Ownership of More Than One Station** Before 1996, the FCC enforced its "multiple-ownership rule," which restricted persons or entities from acquiring excessive power through ownership of a number of radio and television facilities. The rule was based on the assumption that if one person or company owned most or all of the media outlets in an area, the diversity of information and programming on these stations would be restricted. The rule meant that a single entity could not own more than one station in the same market, such as two AM stations in the same community, or in adjacent communities when the stations' signals would overlap to a certain designated extent. In addition, the FCC restricted the total number of licenses that one entity could own to 12 AM, 12 FM, and seven television stations anywhere in the United States.

The Telecommunications Act of 1996 eliminated the restrictions limiting the number of AM and FM stations that may be owned by one entity nationally. The FCC was directed to reduce the restrictions on locally owned AM and FM stations as well. The act eliminated the restriction on the number of television stations that an entity may own directly or indirectly and increased the ceiling on permissible national audience reach from 25 percent to 35 percent. The FCC was directed to permit entities to have cross-ownership in network and cable systems. The act also removed the prohibition on cable operators from owning or controlling local television broadcast systems.

### Procedure for Obtaining a License

A license can be granted without a hearing. Where there are substantial and material questions of fact, or the FCC does not find that the issuance of a license would be in the public interest, a hearing must be held to review the application. Other broadcast stations might intervene in the application process, particularly where a grant of a license to another applicant

could affect their licenses or seriously impair their economic well-being. In cases of such intervention, a hearing is usually required.

Representatives of the public can participate in the licensing process where a grant of a license would have a particular, definable effect upon them. A citizen may not participate by merely asserting a general listenership interest without alleging a specific injury to himself or herself. A representative group that suffers a particular injury may file a petition with the FCC to deny the application. If there is a substantial or material QUESTION OF FACT, a hearing is justified.

In the context of radio licenses, a radio spectrum refers to the range of frequencies that are used by radio waves for communication. The FCC apportions these frequencies and allows parties exclusively to use frequencies with a specific geographic location. Since 1994, the FCC has held spectrum AUCTIONS, which allows competitors to bid on the assignment of licenses for an electromagnetic spectrum. The auction is open to any eligible company or individual who submits and application and upfront payment and is found to be a qualified bidder by the commission. The auction is conducted electronically over the INTERNET.

### License Renewal and Revocation

A broadcasting entity must renew its license during the time set by statute to continue operating on that frequency, and no guarantee exists that such renewal is automatic.

A license is revocable during its term, but the FCC must notify the licensee and give it a full opportunity to be heard prior to revocation. There must be reasonable grounds to warrant revocation of the license. The FCC decision must be embodied in written findings that contain a full explanation of its reasoning and actions. Such decisions are reviewable by the U.S. Court of Appeals for the District of Columbia.

### Regulation of Licensees

Although the primary responsibility of the FCC is the licensing of broadcasting stations, it also regulates, to a certain extent, the manner in which stations operate.

**Political Broadcasts** Congress has long recognized the potential of using various broadcast media to influence the outcome of an election. A candidate with access to broadcasting facilities has a greater chance of reaching more voters than does a candidate who lacks such access. Congress has mandated that any licensee that permits a legally qualified candidate for public office to use its facilities to campaign must give all other candidates for that position equal opportunities to use the broadcast station. This requirement, sometimes called the "equal-time doctrine," does not apply to news broadcasts or advertisements on behalf of the candidate in which the candidate does not appear.

Equal rates must be charged to each candidate. During election campaigns, candidates must be given the "lowest unit charge" that is offered by the station to commercial advertisers for comparable time. The FCC is the regulatory agency that ensures licensee compliance with this law. Stations may not censor political advertisements, even if the candidate makes libelous or scandalous charges. Stations may not be sued, however, for libel or slander based on a candidate's remarks.

When a licensee either endorses or opposes a legally qualified candidate in an editorial, the other candidate must be notified within 24 hours of the date and time of the editorial, must be given a script or videotape or audio tape of the editorial, and must be furnished with a reasonable opportunity to respond. If the editorial is broadcast within 72 hours of the election, the licensee must provide the material within sufficient time prior to the broadcast to enable candidates to have a reasonable opportunity to present a reply. These requirements exist only when a station endorses a particular candidate. They do not apply to editorials on public issues, such as funding for public education.

The FCC has developed a "quasi equal opportunity doctrine" that governs appearances by representatives for candidates who are not covered by the equal-time doctrine. When supporters of a candidate purchase time from a broadcaster during an election campaign, the licensee must make comparable time available to the supporters of the opponent.

**Fairness Doctrine** From 1959 to 1987, the FCC enforced the "fairness doctrine," which required that broadcasters provide reasonable opportunity for the discussion of opposing views on controversial issues that affect the public. The doctrine proved controversial, and in 1987 the FCC rescinded it, concluding that it was a restriction on the FIRST AMENDMENT and that the growth of electronic media provided adequate means for presenting diverse opinions on issues of public policy.

**Personal Attack Rule** Although the FCC repealed the FAIRNESS DOCTRINE, it left intact the "personal-attack rule," which is an aspect of the fairness doctrine that concerns the right of a person who has been criticized in a broadcast to gain access to the broadcast facility to defend herself or himself. When, during the presentation of views on a controversial issue of public importance, the honesty, character, or integrity of an identified person or group is impugned, the licensee must, within one week after the attack, notify the subject of the attack of the date, time, and identification of the broadcast and must provide a script or videotape or audio tape of the attack and a reasonable opportunity to reply using the licensee's facilities. This rule does not apply to attacks on foreign groups or foreign public figures, or to personal attacks made by legally qualified candidates, their authorized representatives, or persons associated with them. Attacks occurring during bona fide newscasts, news interviews, or on-the-air coverage of bona fide news events are not covered by the personal-attack rule.

This rule does not cover every personal attack carried on a station—only personal attacks broadcast during the presentation of views on a controversial issue of public importance. A person who is attacked at some other time will have no redress from the FCC but might have grounds to seek relief under the law governing LIBEL AND SLANDER. If the personal-attack rule is applicable, the person who has been attacked has an absolute right to appear in his or her own defense, and the station may not require that a different person make the defense.

**Broadcasting Content** Unlike print media, radio and television broadcasts may be regulated for content. Typically this practice has involved broadcasts of allegedly obscene or indecent material. The U.S. Supreme Court has upheld regulations banning obscene material because OBSCENITY is not protected by the First Amendment. It also has permitted the FCC to prohibit material that is "patently offensive," and either "sexual" or "excretory," from being broadcast during times when children are presumed to be in the audience (*FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 [1978]). The courts rejected FCC attempts to interpret the indecency standard more broadly. Congressional legislation that expanded the standard also was ruled unconstitutional. The Telecommunications Act of 1996 contained the Communications Decency Act (CDA), codified at 47 U.S.C.A. § 223 (a) to (h), which makes it a federal crime to use telecommunications to transmit "any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication." A three-judge panel, in *American Civil Liberties Union v. Reno,* 929 F. Supp. 824 (E.D. Pa. 1996) held that the CDA was unconstitutional because it violated the First Amendment. The U.S. Supreme Court later upheld the decision in *Reno v. American Civil Liberties Union,* 519 U.S. 1025, 117 S. Ct. 554, 136 L. Ed. 2d 436 (1996).

The Telecommunications Act of 1996 also mandates the establishment of an advisory committee to rate video programming that contains indecent material, in order to warn parents of its content. The act also requires that by 1998, all manufactured televisions with screens 13 inches or larger must be equipped with a "V-chip" to allow parents to block programs with a predesignated rating for sex and violence.

### Public Broadcasting

Public broadcasting systems are noncommercial television and radio stations that are financed by viewer and private contributions, in addition to funding by federal, state, and local governments, as an alternative to the programming aired by commercial channels. The Corporation for Public Broadcasting, a private, independent, nonprofit corporation established in 1967 by the Public Broadcasting Act (47 U.S.C.A. §§ 390 et seq.), is also involved in the creation and development of public stations.

### Cable Television

Cable television has grown tremendously since the 1980s. By 1996, it was available to more than 96 percent of U.S. homes, and 60 percent were subscribers to cable. Cable originally served communities in mountainous regions that had difficulty receiving broadcast transmissions. Many communities solved this problem by erecting tall receiving towers at the highest point in the area to capture broadcast signals and retransmit them over wires running from the tower to various homes that subscribed to this service. This service is called community antenna television system, popularly known as CATV, or cable television.

During the 1970s and 1980s, large corporations installed cable systems in every large metropolitan area in the United States, as well as in rural areas. Independent programming was transmitted on cable systems by companies such as Home Box Office (HBO) and Cable News Network (CNN).

The FCC adopted the first general federal regulation of cable systems, although cable television could not be categorized as broadcasting in the traditional sense. Local government also became involved because each municipality had to award a cable system franchise to one vendor. Cable operators negotiated system requirements and pricing with local governments. Concerns about rate regulation led Congress to enact the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460. The act gave the FCC greater control of the cable television industry, mandated improved customer service, and sought to improve the competitive position of broadcast stations. It also set rate structures to control the price of cable subscriptions. However, the Telecommunications Act of 1996 reversed the 1992 act by ending all rate regulation. This meant that cable operators were free to charge what they wished.

Congress deregulated cable television rates in part because of increased interest by telephone companies to enter the cable market by sending programming through existing phone lines. The 1996 act permits phone companies to provide video programming directly to subscribers in their service areas. Congress believed that competition between phone companies and cable operators would improve service and hold down subscription rates.

### New Technology

The development of satellite, direct broadcast television, broadband Internet access, and wireless technologies, along with the continued development of other Internet technologies, has demonstrated the continued vitality of electronic communications technologies. The 1996 act moved toward deregulation and competition as ways of exploring the new and emerging vehicles of mass communications.

The FCC has continued to revise its regulations in order to ensure that they remain applicable to these new technologies. The new millennium saw a rise in the use of digital subscriber lines (DSL) and cable to provide broadband Internet access. However, cable and DSL have been somewhat limited to larger geographic areas. In smaller, rural areas, some providers have sought to provide broadband access through wireless technologies. In 2002, the FCC relaxed its regulations relating to the frequencies used by these wireless technologies. The regulations were designed to add flexibility for these wireless broadband providers to further develop these technologies.

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## MASSACHUSETTS CONSTITUTION OF 1780

In 1630, John Winthrop and his associates in the Massachusetts Bay Company established the Great and General Court of Massachusetts to provide a form of local government for the Puritans who had settled the Boston area. During the American Revolution, the General Court produced an initial draft of a state constitution for Massachusetts. The citizens of Massachusetts refused to accept this constitution as law, however, due to their nonparticipation in the process by which it was formed; instead they elected representatives to meet at a constitutional convention to determine the nature of their government. In 1779, the representatives convened in Cambridge and designated JOHN ADAMS to be the primary drafter of the constitution. This constitution was ratified in 1780.

Among the terms of the Massachusetts Constitution of 1780 is the provision that empowers the governor and his or her council or the legislature to obtain ADVISORY OPINIONS from the Supreme Judicial Court on questions relating to the scope of the power of the governor or legislature of the Commonwealth. Presently Massachusetts is the only one of the thirteen original

states that has retained its first constitution. The constitution has, however, been subject to numerous amendments, the most extensive of which were made by the Massachusetts Constitutional Convention that was convened from 1917 to 1919.

## MASSACHUSETTS TRUST

*A business arrangement that is used in place of a corporation or partnership in which trustees hold title to property for the advantage of beneficiaries for investment purposes.*

A Massachusetts trust is another name for a *common-law trust* or a BUSINESS TRUST, which offers its beneficiaries limited financial liability in transactions in which it engages.

## MASSIAH V. UNITED STATES

In *Massiah v. United States,* 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), the Supreme Court held that in addition to the RIGHT TO COUNSEL at the trial stage, the SIXTH AMENDMENT also affords a defendant the right to legal counsel in pretrial stages. The Court held that this right attaches once the accused has been indicted and that the accused is protected from deliberate elicitation of information, including face-to-face encounters with police officers and approaches by unknown government informants.

Winston Massiah was a merchant sailor who was arrested, arraigned, and indicted for possession of narcotics and for conspiring to possess narcotics aboard a U.S. vessel and to import, conceal, and facilitate the sale of narcotics. Massiah retained a lawyer, pleaded not guilty, and was released on bail. One of the accused coconspirators, Jesse Colson, also retained a lawyer and pleaded not guilty. A few days later, unbeknownst to Massiah, Colson decided to cooperate with the government. Colson and Massiah met in Colson's automobile where Massiah made several incriminating statements during the course of their conversation. A radio transmitter had been secretly installed under the front seat of Colson's car, and a government agent listened to and recorded the conversation. At trial Massiah's incriminating statements were admitted into evidence, and the jury convicted him of several narcotics offenses.

The *Massiah* Court held that Massiah's basic protections of the Sixth Amendment were violated when his statements were surreptitiously and "deliberately elicited from him after he had been indicted and in the absence of his counsel." In essence, the *Massiah* doctrine activates the Sixth Amendment right to counsel once the criminal suspect reaches the status of accused and restricts the use of covert tactics by the government in obtaining incriminating evidence.

Since announcing the *Massiah* doctrine, the Supreme Court has attempted to limit its effect by requiring the accused to show that the government participated in active interrogation. The cases that follow *Massiah* help determine what constitutes active interrogation.

The Supreme Court held that when an inmate working for the government actively prompts an accused to make incriminating statements, this involves active interrogation and is a violation of the accused's Sixth Amendment right to counsel (*United States v. Henry,* 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 [1980]). However, when a government agent passively listens to the accused's incriminating statements, there is no violation of the accused's Sixth Amendment right to counsel (*Kuhlmann v. Wilson,* 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 [1986]). In *Kuhlmann,* the Court held that, to prove a violation of the Sixth Amendment, "the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks."

The *Massiah* doctrine effectively limits the types of tactics law enforcement may use in obtaining evidence. Under this doctrine once formal charges have been initiated, the right to counsel attaches and law enforcement may not elicit information, either face-to-face, covertly, or through an undercover agent, without the presence of an attorney.

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### CROSS-REFERENCES

Criminal Law; Criminal Procedure.

## MASTER

*An individual who hires employees or servants to perform services and who directs the manner in which such services are performed.*

*A court officer appointed by a judge to perform such jobs as examining witnesses, taking testimony, computing damages, or taking oaths, affidavits, or acknowledgments of deeds.*

A master makes a report of his or her findings to the judge so a decree can be formulated. A *master in chancery* was an officer in Chancery Court in England. In the U. S. these duties may be rendered by a court clerk, commissioner, auditor, or referee.

## MASTER AND SERVANT

*An archaic generic legal phrase that is used to describe the relationship arising between an employer and an employee.*

A *servant* is anyone who works for another individual, the *master,* with or without pay. The master and servant relationship only arises when the tasks are performed by the servant under the direction and control of the master and are subject to the master's knowledge and consent.

A servant is unlike an agent, since the servant has no authority to act in his or her employer's place. A servant is also distinguishable from an INDEPENDENT CONTRACTOR, who is an individual entering into an agreement to perform a particular job through the exercise of his or her own methods and is not subject to the control of the individual by whom he or she was hired.

The master and servant relationship arises out of an express contract; the law, however, will sometimes imply a contract when none exists if a person was led to believe there was one by the conduct of both the employer and the employee. No contract exists, however, unless both master and servant consent to it. The contract can contain whatever terms and conditions the parties agree to, provided they are legal. It is essential that the terms be sufficiently definite so as to be enforceable by a court in the event that the contract is breached. An employment contract is legally enforceable by the award of damages against either party who breaks it. No employment contract, however, can be enforced by compelling the employee to work, since that would constitute INVOLUNTARY SERVITUDE, which is proscribed by the U.S. Constitution.

Federal and state laws regulate certain conditions of employment, such as minimum wages, maximum hours, overtime pay, time off for religious observances, and the safety of the work environment. Statutes ordinarily restrict employment of children, and federal CIVIL RIGHTS laws prohibit employment discrimination based upon race, color, religion, sex, or national origin. Employment agencies are generally licensed and regulated, due to the risk that dishonest agencies might come into existence.

### Duties of Master and Servant

The general rule is that a master may hire and fire servants; however, this is limited to a certain extent by the law. An employee cannot be discharged for a reason not permitted by his or her employment contract or the collective bargaining agreement that may govern the employment; nor can the person be fired because of race, color, religion, sex, or national origin. In addition, an employer cannot fire an employee who is exercising certain rights, such as filing a discrimination complaint with a governmental agency or filing for worker's compensation benefits.

An employee can be discharged for misappropriating funds, being unfaithful to his or her employer's interest, refusing to perform services that were agreed upon in a contract, or for being habitually late or absent. An employee cannot be fired for insubordination for refusing to subscribe to unlawful directives from his or her employer, nor can the employee be required to perform such illegal tasks as committing perjury or handling stolen property. A suit for damages may be brought against an employer who wrongfully discharges an employee.

An employee has the obligation to be honest and faithful in the performance of duties. When trade secrets are disclosed to an employee, he or she must not reveal them to others either prior or subsequent to employment. In some cases, an employment contract specifies that the employer owns any new ideas or inventions created by the employee during the period of employment. When this is true, the employee has no rights in the idea or invention nor any right to ask for additional compensation.

### Compensation

An employee can enter into an agreement to work without compensation, but in the absence of such an agreement, an employer must pay an employee at the agreed rate. The employer cannot delay payment of wages or substitute something other than money unless the employee assents. The employee is entitled to his or her wages as long as the work is completed. If an employer wrongfully discharges an employee,

the employee can collect all the money the employer had agreed to pay him or her.

The amount and type of compensation is ordinarily regulated by agreement; however, it is affected by a number of statutes. Employers are required to pay at least a certain prescribed MINIMUM WAGE under most state laws, which must be no less than the amount set by federal law, unless it is a type of employment that is excluded under the law or the employer is small enough in size to be exempt from the minimum wage laws. Other state and federal laws mandate employers to allow for paid sick time and additional wages for overtime or holiday work. It constitutes a violation of federal law, the Equal Pay Act (29 U.S.C.A. § 206 [1963]) to pay men and women different wages for substantially similar work. Special laws protect INFANTS (individuals under the age of majority) by restricting the hours they can work at certain ages and proscribing their employment in certain kinds of jobs.

CROSS-REFERENCES

Child Labor Laws; Employment at Will; Employment Law; Labor Law; Labor Union.

## MATERIAL

*Important; affecting the merits of a case; causing a particular course of action; significant; substantial. A description of the quality of evidence that possesses such substantial* PROBATIVE *value as to establish the truth or falsity of a point in issue in a lawsuit.*

A *material fact* is an occurrence, event, or information that is sufficiently significant to influence an individual into acting in a certain way, such as entering into a contract. In formal court procedures, a material fact is anything needed to prove one party's case, or tending to establish a point that is crucial to a person's position.

A *material issue* is a question that is in dispute between two parties involved in litigation, and that must be answered in order for the conflict to be resolved.

A *material witness* is a person whose testimony is a necessary element of a lawsuit. An individual who is considered a material witness can be compelled to appear in court and provide testimony. In the event that the person's safety is endangered as a result of his or her planned or actual testimony, he or she may be given legal protection or held in PROTECTIVE CUSTODY.

## MATHEWS V. ELDRIDGE TEST

*A three-part test that determines whether an individual has received* DUE PROCESS *under the Constitution. The test balances (1) the importance of the interest at stake; (2) the risk of an erroneous deprivation of the interest because of the procedures used, and the probable value of additional procedural safeguards; and (3) the government's interest.*

Decisions by the Supreme Court in the 1960s enhanced the due process rights of individuals under both the Fifth and Fourteenth Amendments. Aggrieved individuals used these precedents to litigate various issues involving the termination of employment, government benefits, professional licensure, and other interests involving ADMINISTRATIVE LAW matters. As a result, the Supreme Court had to sort out how much process was enough to constitute due process. The Court resolved this issue in *Mathews v. Eldridge,* 425 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), when it announced a three-part BALANCING test that lower courts must apply when analyzing procedural due process cases.

In *Mathews,* the plaintiff accused the federal government of terminating his SOCIAL SECURITY disability benefits without an evidentiary hearing prior to termination. The claim was that the administrative procedures in place by the government violated his constitutional right to due process. The Court acknowledged that the receipt of benefits was an important private interest, which satisfies the first part of the test focusing on whether or not a private interest is at stake. Later court decisions have shown that this part of the test is subjective, calling on courts to make judgment calls on the relative merit of the interest at stake.

The second part of the test assesses the risk of the possibility that a person will be mistakenly deprived of the interest because of the need for additional or different procedural safeguards. If the risk of error is minimal, then the need for additional procedures declines. If the risk is high then additional procedures would be merited. Government agencies also may reduce the risk of erroneous deprivation by ensuring that regulations are not ARBITRARY or discriminatory, and by defining reasonable classifications. In *Mathews,* the Court ruled that administrative procedures that were in place did not violate due process rights; the plaintiff was offered several methods to address the termination of benefits, but did not choose to employ them.

The final part of the test deals with the government's interest. The *Mathews* court, however, made it clear that in addition to interest, administrative burdens also must be factored into the analysis. If the need for enhanced due process is merited by the need to assure individuals that administrative actions are just, then administrative costs should not be considered. However, if the costs of the additional procedures outweigh the benefits, then the government should not be required to use additional resources. The courts give "substantial weight to the good-faith judgments" of officials charged with government administration. In *Mathews*, the Court ruled that an evidentiary hearing was not required prior to the termination of benefits and, therefore, the government's administrative procedures did not violate his due process rights.

Some commentators have criticized the three-part test as too subjective and impressionistic, allowing judges to impose their personal values on the relative worth of private and government interests. For example, in its ruling in *Mathews* the Court commented that "the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Such undefined terminology opens the door for an array of interpretations. Supporters, however, contend that the balancing of the three parts gives courts flexibility in assessing a particular set of facts. Nevertheless, the test continues to be applied by the Supreme Court and the lower courts.

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## MATTER OF FACT

*That which is to be determined by the senses or by the testimony of witnesses who describe what they have perceived through the senses of sight, smell, touch, taste, and hearing.*

Trials are highly complex forums for the consideration of fact, opinion, and law. Each area is distinct in its type and in who has responsibility for evaluating it. Courts use the term *matter of fact* to distinguish a particular kind of information. A fact is a thing done—an actual occurrence or event—and it is presented during a trial in the form of testimony and evidence. The RULES OF EVIDENCE generally allow witnesses to testify as to what they personally know about the facts in dispute, but do not allow witnesses to testify as to their opinions (i.e., thoughts, beliefs, or inferences) in regard to those facts. An exception is made for expert witnesses, whose technical or scientific specialty is considered sufficient to allow them to state their opinion on relevant and material matters.

Facts are often difficult to ascertain because the record is unclear or because competing interpretations of the facts are presented. QUESTIONS OF FACT are for the jury, which must weigh their validity in reaching a verdict. The jury's role is kept distinct from that of the court, which has the authority to rule on all matters of law.

CROSS-REFERENCES

Matter of Law.

## MATTER OF LAW

*That which is determined or ascertained through the use of statutes, rules, court decisions, and interpretations of legal principles.*

In legal actions the term *matter of law* is used to define a particular area that is the responsibility of the court. Matter of law is distinguished from *matter of fact.* All questions concerning the determination of fact are for the jury, though a judge may determine the facts if a jury trial is waived or is not permitted under the law.

The designation of matters of law to the judge and matters of fact to the jury did not develop, however, until the late eighteenth century. Until that time a jury could exercise its judgment over matters of fact and law. Jury instructions, which in modern law are technical and specific about which law to apply, were informal and general. A jury was free to accept the instructions, modify them, or ignore them completely.

By the middle of the nineteenth century, courts had acquired authority over matters of law and confined juries to matters of fact. Commercial lawyers were particularly influential in bringing about this change, as greater judicial control over matters of law helped produce a stable legal system in which business could prosper.

Today courts rule on all matters of law, including pretrial motions, trial objections to the introduction of particular evidence or testi-

mony, proposed jury instructions, and posttrial motions. Their decisions are based on statutes, RULES OF EVIDENCE and procedure, and the body of relevant case law.

When the facts in a civil action are not in dispute, one or both of the parties may request a court to make a SUMMARY JUDGMENT. Summary judgment is purely a matter of law; the court accepts the relevant facts as presented by the party opposing summary judgment and renders a decision based on the applicable legal principles.

A matter of law can be the basis for an appeal, but generally a matter of fact cannot. Though an appeals court can reverse a decision because of a mistaken matter of law, it will not reverse if the mistake did not affect the verdict. This "harmless error" rule developed, in part, from the recognition that during a trial the court often must make hundreds of decisions based on matters of law.

"THE EXERCISE OF FUNDAMENTAL RIGHTS, INCLUDING THE RIGHT TO PURSUE A PROFESSION OR TRADE [MUST] NOT BE MADE SUBJECT TO THE EXERCISE OF ARBITRARY GOVERNMENTAL POWER."
—STANLEY MATTHEWS

## MATTER OF RECORD

*Anything that has been entered in the formal written record of a court, which can be proved by the production of that record.*

A court produces a lengthy written record of a trial. A *matter of record* is anything entered in the official court record, including pleadings, testimony, evidence, motions, objections, rulings, and the verdict. Any matter of record can be proved by producing the relevant document from the trial court record.

Proving matters of record is especially important in petitions for appeal. When appellate courts determine whether to hear an appeal, the existence of a matter of record can be decisive: the record can conclusively refute allegations contained in the petition. Thus, for example, an appeal based on something said in testimony must be supported by the record; if it is not, the court may deny the petition without any further consideration. An appellate court in most instances will not consider evidence, issues, or objections that were not made a part of the record at trial. Getting an issue into the record at trial is said to preserve the issue for appeal.

In general, matters of record are available to the public unless state law or court order prevents them from being released. For example, courts typically refuse to release the names of minors who are victims of sexual assault. Rhode Island's family court rules of practice provide another example; matters of record "involving scandal or immoral practices" are kept private except from the parties in interest or their representatives (R.I. R. Fam. Ct. Prac. Rule 3.3).

## MATTHEWS, STANLEY

Stanley Matthews served as associate justice of the U.S. Supreme Court from 1881 to 1889. A longtime friend and adviser to President RUTHERFORD B. HAYES, Matthews proved an effective and hardworking member of the Court during his brief tenure. His 1859 prosecution of a reporter for aiding the escape of two fugitive slaves proved politically embarrassing in later years. On the other hand, his opinion in YICK WO V. HOPKINS, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886), established an enduring principle of EQUAL PROTECTION analysis under the FOURTEENTH AMENDMENT.

Matthews was born July 21, 1824, in Cincinnati. He preferred his middle name and dropped his first name, Thomas, in his adult life. He graduated from Kenyon College in 1840 and then studied law in Cincinnati. He was admitted to the Tennessee bar in 1842 and began a law practice in Columbia, Tennessee. Matthews also devoted himself to journalism, editing the *Tennessee Democrat* newspaper. He returned to Ohio in 1845 to become editor of the *Cincinnati Morning Herald.*

Soon Matthews was drawn into politics and public service. He became clerk of the Ohio House of Representatives in 1848, then left in 1851 to sit as judge on the court of COMMON PLEAS in Hamilton County, Ohio. He was elected to the Ohio Senate in 1855, where he served until 1857.

Matthews was appointed U.S. attorney for the Southern District of Ohio in 1858. In 1859 he prosecuted W. B. Connelly, a local reporter, under the federal FUGITIVE SLAVE ACT, for assisting two runaway slaves. Though Matthews was an abolitionist, he duly enforced the law. Critics charged him with forsaking his conscience in the hope of furthering his legal and political careers. Matthews never escaped the taint of these accusations.

When the Civil War broke out, Matthews enlisted in the Twenty-third Ohio Infantry as a lieutenant colonel, under the command of Hayes, a college classmate and friend. He left the army in 1863, following his election as a judge of

the Cincinnati Superior Court. He held that post until 1865, when he resumed his private law practice.

Matthews aided his friend Hayes in the 1876 presidential election, against SAMUEL J. TILDEN, the Democratic governor of New York. An electoral commission was formed by Congress in early 1877 to resolve disputes over the electoral votes in several states. Matthews represented Hayes and the REPUBLICAN PARTY, successfully arguing that Hayes should be awarded all the disputed votes and thus become president.

Matthews was elected to the U.S. Senate in 1877. In 1880 Hayes nominated him to the Supreme Court. The Senate rejected his nomination, in part because of his 1859 prosecution of Connelly under the fugitive slave law and also because he had represented railroads and corporations in his law practice. Some senators argued that this would affect Matthews's judgment in cases on these issues.

In 1881 President JAMES GARFIELD nominated Matthews to the Court. This time he was confirmed by one vote.

During his nearly eight years on the Court, Matthews authored 232 opinions and five dissents. In HURTADO V. CALIFORNIA, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884), Matthews rejected the idea that the Fifth and Fourteenth Amendments' DUE PROCESS provisions required states to prosecute citizens solely through the GRAND JURY indictment process. Matthews wrote that as long as the defendant had notice and an opportunity to prepare a defense to the charges, due process was provided.

Matthews is most famous for his opinion in *Yick Wo*. In this opinion Matthews invalidated a San Francisco ordinance requiring owners of laundries housed in wooden buildings to obtain permission from the city government to continue the operation of their business. Although the language of the ordinance was neutral, it was administered in such a way that Chinese laundry owners were denied licenses and nearly all non-Chinese applicants were granted licenses. Matthews looked past the neutral language to strike down the ordinance as a violation of the Fourteenth Amendment's Equal Protection Clause, concluding that unequal application of the ordinance furthered "unjust and illegal discrimination." Matthews's opinion became the

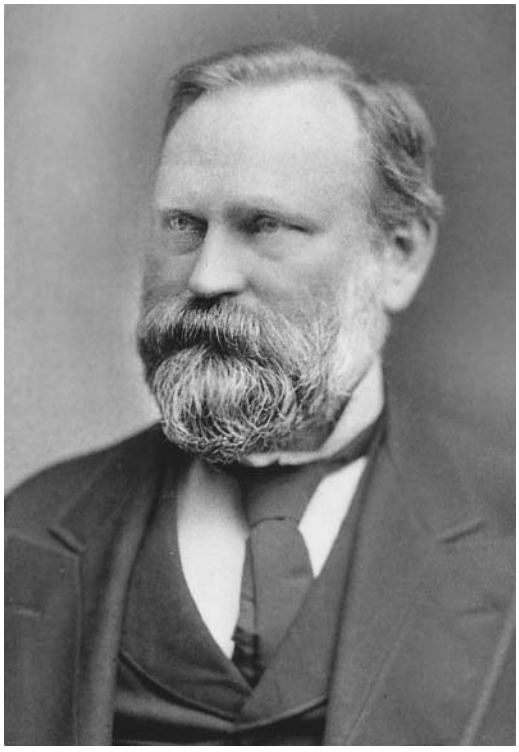

*Stanley Matthews.*
ETCHING BY ALBERT ROSENTHAL. THE GRANGER COLLECTION, NEW YORK

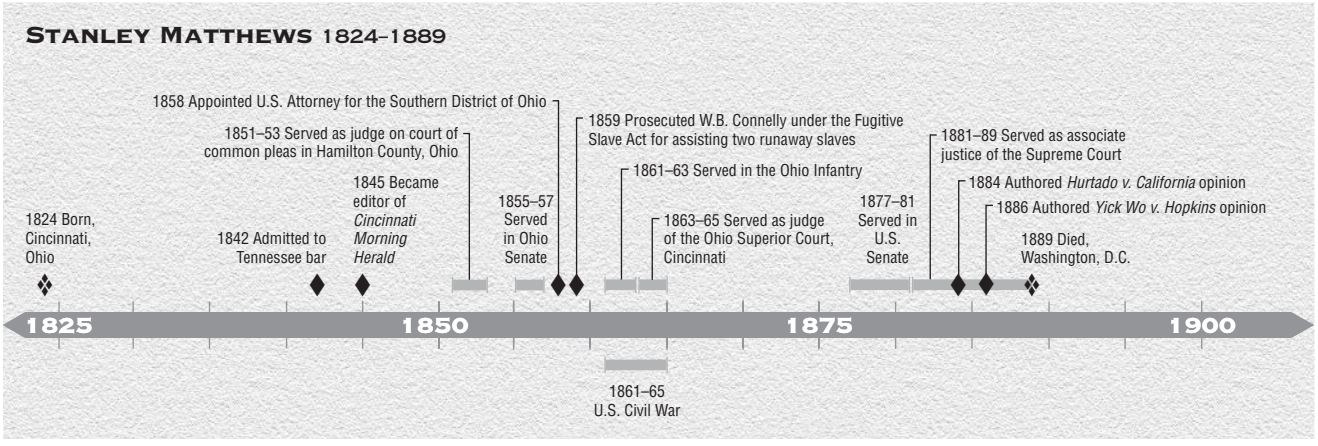

foundation for modern civil rights cases involving DISPARATE IMPACT, in which discrimination is established by statistical inequality rather than through proof of intentional discrimination.

Matthews died March 22, 1889, in Washington, D.C.

## MAXIM

*A broad statement of principle, the truth and reasonableness of which are self-evident. A rule of* EQUITY*, the system of justice that complements the* COMMON LAW.

Maxims were originally quoted in Latin, and many of the Latin phrases continue to be familiar to lawyers in the early 2000s. The maxims were not written down in an organized code or enacted by legislatures, but they have been handed down through generations of judges. As a result, the wording of a maxim may vary from case to case. For example, it is a general rule that *equity does not aid a party at fault.* This maxim has been variously expressed:

> No one is entitled to the aid of a court of equity when that aid has become necessary through his or her own fault.
>
> Equity does not relieve a person of the consequences of his or her own carelessness.
>
> A court of equity will not assist a person in extricating himself or herself from the circumstances that he or she has created.
>
> Equity will not grant relief from a self-created hardship.

The principles of equity and justice are universal in the common-law courts of the world. They are flexible principles aimed at achieving justice for both sides in each case. No maxim is ever absolute, but all of the principles must be weighed and fitted to the facts of an individual controversy. A rule does not apply when it would produce an unfair result. A party cannot insist that a strict technicality be enforced in his or her favor when it would create an injustice because equity will instead balance the interests of the different parties and the convenience of the public.

### The Foundations of Equity

Two maxims form the primary foundations of equity: *Equity will not suffer an injustice* and *equity acts in personam.* The first of these explains the whole purpose of equity, and the second highlights the personal nature of equity. Equity looks at the circumstances of the individuals in each case and fashions a remedy that is directed at the person of the defendant who must act accordingly to provide the plaintiff with the specified relief. Unless a statute expands the powers of an equity court, it can make decrees that concern property only indirectly, phrasing them as decrees against persons. It is said that these are the oldest two maxims of equity. All others are consistent with them.

### "He who seeks equity must do equity."

This maxim is not a moral persuasion but an enforceable RULE OF LAW. It does not require every plaintiff to have an unblemished background in order to prevail, but the court will refuse to assist anyone whose CAUSE OF ACTION is founded on his or her own misconduct toward the other party. If, for example, a wealthy woman tricks her intended spouse into signing a prenuptial agreement giving him a token $500 should they DIVORCE and after marriage she engages in a consistent pattern of conduct leading to a divorce, a court could refuse to enforce the agreement. This maxim reflects one aspect of the principle known as the *clean hands doctrine.*

### "He who comes into equity must come with clean hands."

This maxim bars relief for anyone guilty of improper conduct in the matter at hand. It operates to prevent any affirmative recovery for the person with "unclean hands," no matter how unfairly the person's adversary has treated him or her. The maxim is the basis of the *clean hands doctrine.* Its purpose is to protect the integrity of the court. It does not disapprove only of illegal acts but will deny relief for bad conduct that, as a matter of public policy, ought to be discouraged. A court will ask whether the bad conduct was intentional. This rule is not meant to punish carelessness or a mistake. It is possible that the wrongful conduct is not an act but a failure to act. For example, someone who hires an agent to represent him or her and then sits silently while the agent misleads another party in negotiations is as much responsible for the false statements as if he himself or she herself had made them.

The bad conduct that is condemned by the clean hands doctrine must be a part of the transaction that is the subject of the lawsuit. It is not necessary that it actually have hurt the other party. For example, equity will not relieve a plaintiff who was also trying to evade taxes or defraud creditors with a business deal, even if

that person was cheated by the other party in the transaction.

Equity will always decline relief in cases in which both parties have schemed to circumvent the law. In one very old case, a robber filed a bill in equity to force his partner to account for a sum of money. When the real nature of the claim was discovered, the bill was dismissed with costs, and the lawyers were held in CONTEMPT of court for bringing such an action. This famous case has come to be called *The Highwayman* (*Everet v. Williams,* Ex. 1725, 9 L.Q. Rev. 197), and judges have been saying ever since that they will not sit to take an account between two robbers.

### "Equity aids the vigilant, not those who slumber on their rights."

This principle recognizes that an adversary can lose evidence, witnesses, and a fair chance to defend himself or herself after the passage of time from the date that the wrong was committed. If the defendant can show disadvantages because for a long time he or she relied on the fact that no lawsuit would be started, then the case should be dismissed in the interests of justice. The law encourages a speedy resolution for every dispute. It does not favor the cause of someone who suddenly wakes up to enforce his or her rights long after discovering that they exist. A long unreasonable delay like this is called LACHES, and it is a defense to various forms of equitable relief.

### "Equity follows the law."

Equity does not replace or violate the law, but it backs it up and supplements it. Equity follows appropriate RULES OF LAW, such as the RULES OF EVIDENCE and pretrial discovery.

### "Equity acts specifically."

This maxim means that a party who sues in equity can recover the precise thing that he or she seeks rather than monetary damages as a substitute for it. This maxim is the remedy of SPECIFIC PERFORMANCE.

### "Equity delights to do justice and not by halves."

It is the purpose of equity to find a complete answer to the issues that are raised in a lawsuit. It will bring in all the necessary parties, balance their rights, and give a decree that should protect all of them against further litigation on the subject. Whenever necessary, the court will retain jurisdiction in order to supervise enforcement of relief. For example, a lawsuit remains alive as long as an INJUNCTION is in force. Either party may come back into court and apply for reconsideration of the order if circumstances change. Courts also retain jurisdiction when CHILD SUPPORT payments are ordered. The amount can be changed if the child's needs require an increase or if the supporting parent becomes ill, unemployed, or retired.

### "Equity will not suffer a wrong to be without a remedy."

It is the traditional purpose of equity to find solutions in lawsuits. Where money will not pay for the injury, equity has the authority to find another remedy.

This maxim is a restatement of the broad legal principle: *Ubi jus, ibi remedium,* "Where there is a right, there is a remedy." The maxim is applied in equity in an orderly way. It does not mean that anything goes. It calls forth recognized remedies for well-established wrongs, wrongs that are invasions of property rights or personal or CIVIL RIGHTS and that the law considers actionable. A court will not listen to complaints about every petty annoyance or immoral act.

### "Equity regards substance rather than form."

Equity will not permit justice to be withheld just because of a technicality. Formalities that frustrate justice will be disregarded and a better approach found for each case. Equity enforces the spirit rather than the letter of the law alone.

### "Equity is equality."

This maxim means that equity will not play favorites. For example, a receiver who has been appointed to collect the assets of a business in financial trouble must use the income to pay every creditor an equal share of what is owed to him or her. If a PENSION fund loses a large amount of money through poor investment, then everyone who is entitled to benefits must suffer a fair share of the loss. Three adult children of a woman who is killed in an auto accident should share equally in any money that is recovered in a WRONGFUL DEATH action if the children are the woman's only surviving close relatives.

A judge will depart from this principle only under compelling circumstances, but the rule applies only to parties who are on an equal footing. If, for example, the woman in an auto accident died leaving three young children, then the

money that is recovered might be distributed in proportion to each child's age. A younger child will have lost his or her mother for more years than an older brother or sister. Also, a receiver would have to prefer a secured creditor over those creditors who had no enforceable interest in a particular asset of the company. Unless there is proof that one person in a group is in a special position, the law will assume that each should share equally in proportion to his or her contribution or loss.

### "Between equal equities the law will prevail."

When two parties want the same thing and the court cannot in good conscience say that one has a better right to the item than the other, the court will leave it where it is. For example, a company that had been collecting sales tax and turning it over to the state government found that it had overtaxed and overpaid by 2 percent. It applied for a refund, but the state refused. The court upheld the state on the ground that the money really belonged to the customers of the company. Since the company had no better right to the money than the state, the court left the money with the state.

### "Between equal equities the first in order of time shall prevail."

When two parties each have a right to possess something, then the one who acquired an interest first should prevail in equity. For example, a man advertises a small boat for sale in the classified section of the newspaper. The first person to see the ad offers him $20 less than the asking price, but the man accepts it. That person says he or she will pick up the boat and pay for it on Saturday. Meanwhile another person comes by, offers the man more money, and the man takes it. Who owns the boat? Contract law and equity agree that the first buyer gets the boat, and the second buyer gets his or her money back.

### "Equity abhors a forfeiture."

A FORFEITURE is a total loss of a right or a thing because of the failure to do something as required. A total loss is usually a rather stiff penalty. Unless a penalty is reasonable in relation to the seriousness of the fault, it is too harsh. In fairness and good conscience, a court of equity will refuse to permit an unreasonable forfeiture. This maxim has particularly strong application to the ownership of land, an interest for which the law shows great respect. Title to land should never be lost for a trivial reason—for example, a delay of only a few days in closing a deal to purchase a house.

Generally equity will not interfere with a forfeiture that is required by statute, such as the loss of an airplane illegally used to smuggle drugs into the country. Unless the statute violates the DUE PROCESS requirements of the Constitution, the penalty should be enforced. "Equity abhors a forfeiture" does not overcome the maxim that "equity follows the law."

Neither will equity disregard a contract provision that was fairly bargained. Generally it is assumed that a party who does most of what is required in a business contract and does it in a reasonable way, should not be penalized for the violation of a minor technicality. A contractor who completes work on a bridge one day late, for example, should not be treated as though he or she had breached the entire contract. If the parties, however, include in their agreement an express provision, such as time is of the essence, this means that both parties understand that performance on time is essential. The party who fails to perform on time would forfeit all rights under the contract.

FURTHER READINGS

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Kraut, Jayson, et al. 1983. *American Jurisprudence.* Rochester, N.Y.: Lawyers Cooperative.

CROSS-REFERENCES

Equity; Forfeiture; Laches.

## MAYHEM

*Mayhem at* COMMON LAW *required a type of injury that permanently rendered the victim less able to fight offensively or defensively; it might be accomplished either by the removal of (dismemberment), or by the disablement of, some bodily member useful in fighting. Today, by statute, permanent disfigurement has been added; and as to dismemberment and disablement, there is no longer a requirement that the member have military significance. In many states the crime of mayhem is treated as aggravated assault.*

# Abbreviations

| | |
|---|---|
| A. | Atlantic Reporter |
| A. 2d | Atlantic Reporter, Second Series |
| AA | Alcoholics Anonymous |
| AAA | American Arbitration Association; Agricultural Adjustment Act of 1933 |
| AALS | Association of American Law Schools |
| AAPRP | All African People's Revolutionary Party |
| AARP | American Association of Retired Persons |
| AAS | American Anti-Slavery Society |
| ABA | American Bar Association; Architectural Barriers Act of 1968; American Bankers Association |
| ABC | American Broadcasting Companies, Inc. (formerly American Broadcasting Corporation) |
| ABM | Antiballistic missile |
| ABM Treaty | Anti-Ballistic Missile Treaty of 1972 |
| ABVP | Anti-Biased Violence Project |
| A/C | Account |
| A.C. | Appeal cases |
| ACAA | Air Carrier Access Act |
| ACCA | Armed Career Criminal Act of 1984 |
| ACF | Administration for Children and Families |
| ACLU | American Civil Liberties Union |
| ACRS | Accelerated Cost Recovery System |
| ACS | Agricultural Cooperative Service |
| ACT | American College Test |
| Act'g Legal Adv. | Acting Legal Advisor |
| ACUS | Administrative Conference of the United States |
| ACYF | Administration on Children, Youth, and Families |
| A.D. 2d | Appellate Division, Second Series, N.Y. |
| ADA | Americans with Disabilities Act of 1990 |
| ADAMHA | Alcohol, Drug Abuse, and Mental Health Administration |
| ADC | Aid to Dependent Children |
| ADD | Administration on Developmental Disabilities |
| ADEA | Age Discrimination in Employment Act of 1967 |
| ADL | Anti-Defamation League |
| ADR | Alternative dispute resolution |
| AEC | Atomic Energy Commission |
| AECB | Arms Export Control Board |
| AEDPA | Antiterrorism and Effective Death Penalty Act |
| A.E.R. | All England Law Reports |
| AFA | American Family Association; Alabama Freethought Association |
| AFB | American Farm Bureau |
| AFBF | American Farm Bureau Federation |
| AFDC | Aid to Families with Dependent Children |
| aff'd per cur. | Affirmed by the court |
| AFIS | Automated fingerprint identification system |
| AFL | American Federation of Labor |

| | |
|---|---|
| AFL-CIO | American Federation of Labor and Congress of Industrial Organizations |
| AFRes | Air Force Reserve |
| AFSC | American Friends Service Committee |
| AFSCME | American Federation of State, County, and Municipal Employees |
| AGRICOLA | Agricultural Online Access |
| AIA | Association of Insurance Attorneys |
| AIB | American Institute for Banking |
| AID | Artificial insemination using a third-party donor's sperm; Agency for International Development |
| AIDS | Acquired immune deficiency syndrome |
| AIH | Artificial insemination using the husband's sperm |
| AIM | American Indian Movement |
| AIPAC | American Israel Public Affairs Committee |
| AIUSA | Amnesty International, U.S.A. Affiliate |
| AJS | American Judicature Society |
| ALA | American Library Association |
| Alcoa | Aluminum Company of America |
| ALEC | American Legislative Exchange Council |
| ALF | Animal Liberation Front |
| ALI | American Law Institute |
| ALJ | Administrative law judge |
| All E.R. | All England Law Reports |
| ALO | Agency Liaison |
| A.L.R. | American Law Reports |
| ALY | *American Law Yearbook* |
| AMA | American Medical Association |
| AMAA | Agricultural Marketing Agreement Act |
| Am. Dec. | American Decisions |
| amdt. | Amendment |
| Amer. St. Papers, For. Rels. | American State Papers, Legislative and Executive Documents of the Congress of the U.S., Class I, Foreign Relations, 1832–1859 |
| AMS | Agricultural Marketing Service |
| AMVETS | American Veterans (of World War II) |
| ANA | Administration for Native Americans |
| Ann. Dig. | Annual Digest of Public International Law Cases |
| ANPA | American Newspaper Publishers Association |
| ANSCA | Alaska Native Claims Act |
| ANZUS | Australia-New Zealand-United States Security Treaty Organization |
| AOA | Administration on Aging |
| AOE | Arizonans for Official English |
| AOL | America Online |
| AP | Associated Press |
| APA | Administrative Procedure Act of 1946 |
| APHIS | Animal and Plant Health Inspection Service |
| App. Div. | Appellate Division Reports, N.Y. Supreme Court |
| Arb. Trib., U.S.-British | Arbitration Tribunal, Claim Convention of 1853, United States and Great Britain Convention of 1853 |
| Ardcor | American Roller Die Corporation |
| ARPA | Advanced Research Projects Agency |
| ARPANET | Advanced Research Projects Agency Network |
| ARS | Advanced Record System |
| Art. | Article |
| ARU | American Railway Union |
| ASCME | American Federation of State, County, and Municipal Employees |
| ASCS | Agriculture Stabilization and Conservation Service |
| ASM | Available Seatmile |
| ASPCA | American Society for the Prevention of Cruelty to Animals |
| Asst. Att. Gen. | Assistant Attorney General |
| AT&T | American Telephone and Telegraph |
| ATFD | Alcohol, Tobacco and Firearms Division |
| ATLA | Association of Trial Lawyers of America |
| ATO | Alpha Tau Omega |
| ATTD | Alcohol and Tobacco Tax Division |
| ATU | Alcohol Tax Unit |
| AUAM | American Union against Militarism |
| AUM | Animal Unit Month |
| AZT | Azidothymidine |

| | |
|---|---|
| BAC | Blood alcohol concentration |
| BALSA | Black-American Law Student Association |
| BATF | Bureau of Alcohol, Tobacco and Firearms |
| BBS | Bulletin Board System |
| BCCI | Bank of Credit and Commerce International |
| BEA | Bureau of Economic Analysis |
| Bell's Cr. C. | Bell's English Crown Cases |
| Bevans | United States Treaties, etc. *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled under the direction of Charles I. Bevans, 1968–76) |
| BFOQ | Bona fide occupational qualification |
| BI | Bureau of Investigation |
| BIA | Bureau of Indian Affairs; Board of Immigration Appeals |
| BID | Business improvement district |
| BJS | Bureau of Justice Statistics |
| Black. | Black's United States Supreme Court Reports |
| Blatchf. | Blatchford's United States Circuit Court Reports |
| BLM | Bureau of Land Management |
| BLS | Bureau of Labor Statistics |
| BMD | Ballistic missile defense |
| BNA | Bureau of National Affairs |
| BOCA | Building Officials and Code Administrators International |
| BOP | Bureau of Prisons |
| BPP | Black Panther Party for Self-defense |
| Brit. and For. | British and Foreign State Papers |
| BSA | Boy Scouts of America |
| BTP | Beta Theta Pi |
| Burr. | James Burrows, *Report of Cases Argued and Determined in the Court of King's Bench during the Time of Lord Mansfield* (1766–1780) |
| BVA | Board of Veterans Appeals |
| c. | Chapter |
| $C^3I$ | Command, Control, Communications, and Intelligence |
| C.A. | Court of Appeals |
| CAA | Clean Air Act |
| CAB | Civil Aeronautics Board; Corporation for American Banking |
| CAFE | Corporate average fuel economy |
| Cal. 2d | California Reports, Second Series |
| Cal. 3d | California Reports, Third Series |
| CALR | Computer-assisted legal research |
| Cal. Rptr. | California Reporter |
| CAP | Common Agricultural Policy |
| CARA | Classification and Ratings Administration |
| CATV | Community antenna television |
| CBO | Congressional Budget Office |
| CBS | Columbia Broadcasting System |
| CBOEC | Chicago Board of Election Commissioners |
| CCC | Commodity Credit Corporation |
| CCDBG | Child Care and Development Block Grant of 1990 |
| C.C.D. Pa. | Circuit Court Decisions, Pennsylvania |
| C.C.D. Va. | Circuit Court Decisions, Virginia |
| CCEA | Cabinet Council on Economic Affairs |
| CCP | Chinese Communist Party |
| CCR | Center for Constitutional Rights |
| C.C.R.I. | Circuit Court, Rhode Island |
| CD | Certificate of deposit; compact disc |
| CDA | Communications Decency Act |
| CDBG | Community Development Block Grant Program |
| CDC | Centers for Disease Control and Prevention; Community Development Corporation |
| CDF | Children's Defense Fund |
| CDL | Citizens for Decency through Law |
| CD-ROM | Compact disc read-only memory |
| CDS | Community Dispute Services |
| CDW | Collision damage waiver |
| CENTO | Central Treaty Organization |
| CEO | Chief executive officer |
| CEQ | Council on Environmental Quality |

| | |
|---|---|
| CERCLA | Comprehensive Environmental Response, Compensation, and Liability Act of 1980 |
| cert. | *Certiorari* |
| CETA | Comprehensive Employment and Training Act |
| C & F | Cost and freight |
| CFC | Chlorofluorocarbon |
| CFE Treaty | Conventional Forces in Europe Treaty of 1990 |
| C.F. & I. | Cost, freight, and insurance |
| C.F.R | Code of Federal Regulations |
| CFNP | Community Food and Nutrition Program |
| CFTA | Canadian Free Trade Agreement |
| CFTC | Commodity Futures Trading Commission |
| Ch. | Chancery Division, English Law Reports |
| CHAMPVA | Civilian Health and Medical Program at the Veterans Administration |
| CHEP | Cuban/Haitian Entrant Program |
| CHINS | Children in need of supervision |
| CHIPS | Child in need of protective services |
| Ch.N.Y. | Chancery Reports, New York |
| Chr. Rob. | Christopher Robinson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (1801–1808) |
| CIA | Central Intelligence Agency |
| CID | Commercial Item Descriptions |
| C.I.F. | Cost, insurance, and freight |
| CINCNORAD | Commander in Chief, North American Air Defense Command |
| C.I.O. | Congress of Industrial Organizations |
| CIPE | Center for International Private Enterprise |
| C.J. | Chief justice |
| CJIS | Criminal Justice Information Services |
| C.J.S. | Corpus Juris Secundum |
| Claims Arb. under Spec. Conv., Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| CLASP | Center for Law and Social Policy |
| CLE | Center for Law and Education; Continuing Legal Education |
| CLEO | Council on Legal Education Opportunity; Chief Law Enforcement Officer |
| CLP | Communist Labor Party of America |
| CLS | Christian Legal Society; critical legal studies (movement); Critical Legal Studies (membership organization) |
| C.M.A. | Court of Military Appeals |
| CMEA | Council for Mutual Economic Assistance |
| CMHS | Center for Mental Health Services |
| C.M.R. | Court of Military Review |
| CNN | Cable News Network |
| CNO | Chief of Naval Operations |
| CNOL | Consolidated net operating loss |
| CNR | Chicago and Northwestern Railway |
| CO | Conscientious Objector |
| C.O.D. | Cash on delivery |
| COGP | Commission on Government Procurement |
| COINTELPRO | Counterintelligence Program |
| Coke Rep. | Coke's English King's Bench Reports |
| COLA | Cost-of-living adjustment |
| COMCEN | Federal Communications Center |
| Comp. | Compilation |
| Conn. | Connecticut Reports |
| CONTU | National Commission on New Technological Uses of Copyrighted Works |
| Conv. | Convention |
| COPA | Child Online Protection Act (1998) |
| COPS | Community Oriented Policing Services |
| Corbin | Arthur L. Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (1950) |
| CORE | Congress on Racial Equality |
| Cox's Crim. Cases | Cox's Criminal Cases (England) |
| COYOTE | Call Off Your Old Tired Ethics |

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| CPA | Certified public accountant |
| CPB | Corporation for Public Broadcasting, the |
| CPI | Consumer Price Index |
| CPPA | Child Pornography Prevention Act |
| CPSC | Consumer Product Safety Commission |
| Cranch | Cranch's United States Supreme Court Reports |
| CRF | Constitutional Rights Foundation |
| CRR | Center for Constitutional Rights |
| CRS | Congressional Research Service; Community Relations Service |
| CRT | Critical race theory |
| CSA | Community Services Administration |
| CSAP | Center for Substance Abuse Prevention |
| CSAT | Center for Substance Abuse Treatment |
| CSC | Civil Service Commission |
| CSCE | Conference on Security and Cooperation in Europe |
| CSG | Council of State Governments |
| CSO | Community Service Organization |
| CSP | Center for the Study of the Presidency |
| C-SPAN | Cable-Satellite Public Affairs Network |
| CSRS | Cooperative State Research Service |
| CSWPL | Center on Social Welfare Policy and Law |
| CTA | *Cum testamento annexo* (with the will attached) |
| Ct. Ap. D.C. | Court of Appeals, District of Columbia |
| Ct. App. No. Ireland | Court of Appeals, Northern Ireland |
| Ct. Cl. | Court of Claims, United States |
| Ct. Crim. Apps. | Court of Criminal Appeals (England) |
| CTI | Consolidated taxable income |
| Ct. of Sess., Scot. | Court of Sessions, Scotland |
| CU | Credit union |
| CUNY | City University of New York |
| Cush. | Cushing's Massachusetts Reports |
| CWA | Civil Works Administration; Clean Water Act |
| DACORB | Department of the Army Conscientious Objector Review Board |
| Dall. | Dallas's Pennsylvania and United States Reports |
| DAR | Daughters of the American Revolution |
| DARPA | Defense Advanced Research Projects Agency |
| DAVA | Defense Audiovisual Agency |
| D.C. | United States District Court; District of Columbia |
| D.C. Del. | United States District Court, Delaware |
| D.C. Mass. | United States District Court, Massachusetts |
| D.C. Md. | United States District Court, Maryland |
| D.C.N.D.Cal. | United States District Court, Northern District, California |
| D.C.N.Y. | United States District Court, New York |
| D.C.Pa. | United States District Court, Pennsylvania |
| DCS | Deputy Chiefs of Staff |
| DCZ | District of the Canal Zone |
| DDT | Dichlorodiphenyltricloro-ethane |
| DEA | Drug Enforcement Administration |
| Decl. Lond. | Declaration of London, February 26, 1909 |
| Dev. & B. | Devereux & Battle's North Carolina Reports |
| DFL | Minnesota Democratic-Farmer-Labor |
| DFTA | Department for the Aging |
| Dig. U.S. Practice in Intl. Law | Digest of U.S. Practice in International Law |
| Dist. Ct. | D.C. United States District Court, District of Columbia |
| D.L.R. | Dominion Law Reports (Canada) |
| DMCA | Digital Millennium Copyright Act |
| DNA | Deoxyribonucleic acid |
| Dnase | Deoxyribonuclease |
| DNC | Democratic National Committee |
| DOC | Department of Commerce |
| DOD | Department of Defense |
| DODEA | Department of Defense Education Activity |
| Dodson | Dodson's Reports, English Admiralty Courts |
| DOE | Department of Energy |

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|---|---|
| DOER | Department of Employee Relations |
| DOJ | Department of Justice |
| DOL | Department of Labor |
| DOMA | Defense of Marriage Act of 1996 |
| DOS | Disk operating system |
| DOT | Department of Transportation |
| DPT | Diphtheria, pertussis, and tetanus |
| DRI | Defense Research Institute |
| DSAA | Defense Security Assistance Agency |
| DUI | Driving under the influence; driving under intoxication |
| DVD | Digital versatile disc |
| DWI | Driving while intoxicated |
| EAHCA | Education for All Handicapped Children Act of 1975 |
| EBT | Examination before trial |
| E.coli | Escherichia coli |
| ECPA | Electronic Communications Privacy Act of 1986 |
| ECSC | Treaty of the European Coal and Steel Community |
| EDA | Economic Development Administration |
| EDF | Environmental Defense Fund |
| E.D.N.Y. | Eastern District, New York |
| EDP | Electronic data processing |
| E.D. Pa. | Eastern-District, Pennsylvania |
| EDSC | Eastern District, South Carolina |
| EDT | Eastern daylight time |
| E.D. Va. | Eastern District, Virginia |
| EEC | European Economic Community; European Economic Community Treaty |
| EEOC | Equal Employment Opportunity Commission |
| EFF | Electronic Frontier Foundation |
| EFT | Electronic funds transfer |
| Eliz. | Queen Elizabeth (Great Britain) |
| Em. App. | Temporary Emergency Court of Appeals |
| ENE | Early neutral evaluation |
| Eng. Rep. | English Reports |
| EOP | Executive Office of the President |
| EPA | Environmental Protection Agency; Equal Pay Act of 1963 |
| ERA | Equal Rights Amendment |
| ERDC | Energy Research and Development Commission |
| ERISA | Employee Retirement Income Security Act of 1974 |
| ERS | Economic Research Service |
| ERTA | Economic Recovery Tax Act of 1981 |
| ESA | Endangered Species Act of 1973 |
| ESF | Emergency support function; Economic Support Fund |
| ESRD | End-Stage Renal Disease Program |
| ETA | Employment and Training Administration |
| ETS | Environmental tobacco smoke |
| et seq. | *Et sequentes* or *et sequentia* (“and the following”) |
| EU | European Union |
| Euratom | European Atomic Energy Community |
| Eur. Ct. H.R. | European Court of Human Rights |
| Ex. | English Exchequer Reports, Welsby, Hurlstone & Gordon |
| Exch. | Exchequer Reports (Welsby, Hurlstone & Gordon) |
| Ex Com | Executive Committee of the National Security Council |
| Eximbank | Export-Import Bank of the United States |
| F. | Federal Reporter |
| F. 2d | Federal Reporter, Second Series |
| FAA | Federal Aviation Administration; Federal Arbitration Act |
| FAAA | Federal Alcohol Administration Act |
| FACE | Freedom of Access to Clinic Entrances Act of 1994 |
| FACT | Feminist Anti-Censorship Task Force |
| FAIRA | Federal Agriculture Improvement and Reform Act of 1996 |
| FAMLA | Family and Medical Leave Act of 1993 |
| Fannie Mae | Federal National Mortgage Association |
| FAO | Food and Agriculture Organization of the United Nations |
| FAR | Federal Acquisition Regulations |

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| FAS | Foreign Agricultural Service |
| FBA | Federal Bar Association |
| FBI | Federal Bureau of Investigation |
| FCA | Farm Credit Administration |
| F. Cas. | Federal Cases |
| FCC | Federal Communications Commission |
| FCIA | Foreign Credit Insurance Association |
| FCIC | Federal Crop Insurance Corporation |
| FCLAA | Federal Cigarette Labeling and Advertising Act |
| FCRA | Fair Credit Reporting Act |
| FCU | Federal credit unions |
| FCUA | Federal Credit Union Act |
| FCZ | Fishery Conservation Zone |
| FDA | Food and Drug Administration |
| FDIC | Federal Deposit Insurance Corporation |
| FDPC | Federal Data Processing Center |
| FEC | Federal Election Commission |
| FECA | Federal Election Campaign Act of 1971 |
| Fed. Cas. | Federal Cases |
| FEHA | Fair Employment and Housing Act |
| FEHBA | Federal Employees Health Benefit Act |
| FEMA | Federal Emergency Management Agency |
| FERC | Federal Energy Regulatory Commission |
| FFB | Federal Financing Bank |
| FFDC | Federal Food, Drug, and Cosmetics Act |
| FGIS | Federal Grain Inspection Service |
| FHA | Federal Housing Administration |
| FHAA | Fair Housing Amendments Act of 1998 |
| FHWA | Federal Highway Administration |
| FIA | Federal Insurance Administration |
| FIC | Federal Information Centers; Federation of Insurance Counsel |
| FICA | Federal Insurance Contributions Act |
| FIFRA | Federal Insecticide, Fungicide, and Rodenticide Act |
| FIP | Forestry Incentives Program |
| FIRREA | Financial Institutions Reform, Recovery, and Enforcement Act of 1989 |
| FISA | Foreign Intelligence Surveillance Act of 1978 |
| FISC | Foreign Intelligence Surveillance Court of Review |
| FJC | Federal Judicial Center |
| FLSA | Fair Labor Standards Act |
| FMC | Federal Maritime Commission |
| FMCS | Federal Mediation and Conciliation Service |
| FmHA | Farmers Home Administration |
| FMLA | Family and Medical Leave Act of 1993 |
| FNMA | Federal National Mortgage Association, ''Fannie Mae'' |
| F.O.B. | Free on board |
| FOIA | Freedom of Information Act |
| FOMC | Federal Open Market Committee |
| FPA | Federal Power Act of 1935 |
| FPC | Federal Power Commission |
| FPMR | Federal Property Management Regulations |
| FPRS | Federal Property Resources Service |
| FR | Federal Register |
| FRA | Federal Railroad Administration |
| FRB | Federal Reserve Board |
| FRC | Federal Radio Commission |
| F.R.D. | Federal Rules Decisions |
| FSA | Family Support Act |
| FSB | Federal'naya Sluzhba Bezopasnosti (the Federal Security Service of Russia) |
| FSLIC | Federal Savings and Loan Insurance Corporation |
| FSQS | Food Safety and Quality Service |
| FSS | Federal Supply Service |
| F. Supp. | Federal Supplement |
| FTA | U.S.-Canada Free Trade Agreement of 1988 |
| FTC | Federal Trade Commission |
| FTCA | Federal Tort Claims Act |
| FTS | Federal Telecommunications System |
| FTS2000 | Federal Telecommunications System 2000 |
| FUCA | Federal Unemployment Compensation Act of 1988 |

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| FUTA | Federal Unemployment Tax Act |
| FWPCA | Federal Water Pollution Control Act of 1948 |
| FWS | Fish and Wildlife Service |
| GAL | Guardian ad litem |
| GAO | General Accounting Office; Governmental Affairs Office |
| GAOR | General Assembly Official Records, United Nations |
| GAAP | Generally accepted accounting principles |
| GA Res. | General Assembly Resolution (United Nations) |
| GATT | General Agreement on Tariffs and Trade |
| GCA | Gun Control Act |
| Gen. Cls. Comm. | General Claims Commission, United States and Panama; General Claims United States and Mexico |
| Geo. II | King George II (Great Britain) |
| Geo. III | King George III (Great Britain) |
| GHB | Gamma-hydroxybutrate |
| GI | Government Issue |
| GID | General Intelligence Division |
| GM | General Motors |
| GNMA | Government National Mortgage Association, "Ginnie Mae" |
| GNP | Gross national product |
| GOP | Grand Old Party (Republican Party) |
| GOPAC | Grand Old Party Action Committee |
| GPA | Office of Governmental and Public Affairs |
| GPO | Government Printing Office |
| GRAS | Generally recognized as safe |
| Gr. Br., Crim. Ct. App. | Great Britain, Court of Criminal Appeals |
| GRNL | Gay Rights-National Lobby |
| GSA | General Services Administration |
| Hackworth | Green Haywood Hackworth, *Digest of International Law* (1940–1944) |
| Hay and Marriott | Great Britain. High Court of Admiralty, *Decisions in the High Court of Admiralty during the Time of Sir George Hay and of Sir James Marriott, Late Judges of That Court* (1801) |
| HBO | Home Box Office |
| HCFA | Health Care Financing Administration |
| H.Ct. | High Court |
| HDS | Office of Human Development Services |
| Hen. & M. | Hening & Munford's Virginia Reports |
| HEW | Department of Health, Education, and Welfare |
| HFCA | Health Care Financing Administration |
| HGI | Handgun Control, Incorporated |
| HHS | Department of Health and Human Services |
| Hill | Hill's New York Reports |
| HIRE | Help through Industry Retraining and Employment |
| HIV | Human immunodeficiency virus |
| H.L. | House of Lords Cases (England) |
| H. Lords | House of Lords (England) |
| HMO | Health Maintenance Organization |
| HNIS | Human Nutrition Information Service |
| Hong Kong L.R. | Hong Kong Law Reports |
| How. | Howard's United States Supreme Court Reports |
| How. St. Trials | Howell's English State Trials |
| HUAC | House Un-American Activities Committee |
| HUD | Department of Housing and Urban Development |
| Hudson, Internatl. Legis. | Manley Ottmer Hudson, ed., *International Legislation: A Collection of the Texts of Multipartite International Instruments of General Interest Beginning with the Covenant of the League of Nations* (1931) |
| Hudson, World Court Reps. | Manley Ottmer Hudson, ea., *World Court Reports* (1934– ) |
| Hun | Hun's New York Supreme Court Reports |
| Hunt's Rept. | Bert L. Hunt, *Report of the American and Panamanian General Claims Arbitration* (1934) |
| IAEA | International Atomic Energy Agency |
| IALL | International Association of Law Libraries |

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| IBA | International Bar Association |
| IBM | International Business Machines |
| ICA | Interstate Commerce Act |
| ICBM | Intercontinental ballistic missile |
| ICC | Interstate Commerce Commission; International Criminal Court |
| ICJ | International Court of Justice |
| ICM | Institute for Court Management |
| IDEA | Individuals with Disabilities Education Act of 1975 |
| IDOP | International Dolphin Conservation Program |
| IEP | Individualized educational program |
| IFC | International Finance Corporation |
| IGRA | Indian Gaming Regulatory Act of 1988 |
| IJA | Institute of Judicial Administration |
| IJC | International Joint Commission |
| ILC | International Law Commission |
| ILD | International Labor Defense |
| Ill. Dec. | Illinois Decisions |
| ILO | International Labor Organization |
| IMF | International Monetary Fund |
| INA | Immigration and Nationality Act |
| IND | Investigational new drug |
| INF Treaty | Intermediate-Range Nuclear Forces Treaty of 1987 |
| INS | Immigration and Naturalization Service |
| INTELSAT | International Telecommunications Satellite Organization |
| Interpol | International Criminal Police Organization |
| Int'l. Law Reps. | International Law Reports |
| Intl. Legal Mats. | International Legal Materials |
| IOC | International Olympic Committee |
| IPDC | International Program for the Development of Communication |
| IPO | Intellectual Property Owners |
| IPP | Independent power producer |
| IQ | Intelligence quotient |
| I.R. | Irish Reports |
| IRA | Individual retirement account; Irish Republican Army |
| IRC | Internal Revenue Code |
| IRCA | Immigration Reform and Control Act of 1986 |
| IRS | Internal Revenue Service |
| ISO | Independent service organization |
| ISP | Internet service provider |
| ISSN | International Standard Serial Numbers |
| ITA | International Trade Administration |
| ITI | Information Technology Integration |
| ITO | International Trade Organization |
| ITS | Information Technology Service |
| ITT | International Telephone and Telegraph Corporation |
| ITU | International Telecommunication Union |
| IUD | Intrauterine device |
| IWC | International Whaling Commission |
| IWW | Industrial Workers of the World |
| JAGC | Judge Advocate General's Corps |
| JCS | Joint Chiefs of Staff |
| JDL | Jewish Defense League |
| JNOV | Judgment *non obstante veredicto* ("judgment nothing to recommend it" or "judgment notwithstanding the verdict") |
| JOBS | Jobs Opportunity and Basic Skills |
| John. Ch. | Johnson's New York Chancery Reports |
| Johns. | Johnson's Reports (New York) |
| JP | Justice of the peace |
| K.B. | King's Bench Reports (England) |
| KFC | Kentucky Fried Chicken |
| KGB | Komitet Gosudarstvennoi Bezopasnosti (the State Security Committee for countries in the former Soviet Union) |
| KKK | Ku Klux Klan |
| KMT | Kuomintang (Chinese, "national people's party") |
| LAD | Law Against Discrimination |

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| LAPD | Los Angeles Police Department |
| LC | Library of Congress |
| LCHA | Longshoremen's and Harbor Workers Compensation Act of 1927 |
| LD50 | Lethal dose 50 |
| LDEF | Legal Defense and Education Fund (NOW) |
| LDF | Legal Defense Fund, Legal Defense and Educational Fund of the NAACP |
| LEAA | Law Enforcement Assistance Administration |
| L.Ed. | Lawyers' Edition Supreme Court Reports |
| LI | Letter of interpretation |
| LLC | Limited Liability Company |
| LLP | Limited Liability Partnership |
| LMSA | Labor-Management Services Administration |
| LNTS | League of Nations Treaty Series |
| Lofft's Rep. | Lofft's English King's Bench Reports |
| L.R. | Law Reports (English) |
| LSAC | Law School Admission Council |
| LSAS | Law School Admission Service |
| LSAT | Law School Aptitude Test |
| LSC | Legal Services Corporation; Legal Services for Children |
| LSD | Lysergic acid diethylamide |
| LSDAS | Law School Data Assembly Service |
| LTBT | Limited Test Ban Treaty |
| LTC | Long Term Care |
| MAD | Mutual assured destruction |
| MADD | Mothers against Drunk Driving |
| MALDEF | Mexican American Legal Defense and Educational Fund |
| Malloy | William M. Malloy, ed., *Treaties, Conventions International Acts, Protocols, and Agreements between the United States of America and Other Powers* (1910–1938) |
| Martens | Georg Friedrich von Martens, ea., *Noveau recueil général de traités et autres actes relatifs aux rapports de droit international* (Series I, 20 vols. [1843–1875]; Series II, 35 vols. [1876–1908]; Series III [1909– ]) |
| Mass. | Massachusetts Reports |
| MCC | Metropolitan Correctional Center |
| MCCA | Medicare Catastrophic Coverage Act of 1988 |
| MCH | Maternal and Child Health Bureau |
| MCRA | Medical Care Recovery Act of 1962 |
| MDA | Medical Devices Amendments of 1976 |
| Md. App. | Maryland, Appeal Cases |
| M.D. Ga. | Middle District, Georgia |
| Mercy | Movement Ensuring the Right to Choose for Yourself |
| Metc. | Metcalf's Massachusetts Reports |
| MFDP | Mississippi Freedom Democratic party |
| MGT | Management |
| MHSS | Military Health Services System |
| Miller | David Hunter Miller, ea., *Treaties and Other International Acts of the United States of America* (1931–1948) |
| Minn. | Minnesota Reports |
| MINS | Minors in need of supervision |
| MIRV | Multiple independently targetable reentry vehicle |
| MIRVed ICBM | Multiple independently targetable reentry vehicled intercontinental ballistic missile |
| Misc. | Miscellaneous Reports, New York |
| Mixed Claims Comm., Report of Decs | Mixed Claims Commission, United States and Germany, Report of Decisions |
| M.J. | Military Justice Reporter |
| MLAP | Migrant Legal Action Program |
| MLB | Major League Baseball |
| MLDP | Mississippi Loyalist Democratic Party |
| MMI | Moslem Mosque, Incorporated |
| MMPA | Marine Mammal Protection Act of 1972 |
| Mo. | Missouri Reports |
| MOD | Masters of Deception |
| Mod. | Modern Reports, English King's Bench, etc. |

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| Moore, Dig. Intl. Law | John Bassett Moore, *A Digest of International Law,* 8 vols. (1906) |
| Moore, Intl. Arbs. | John Bassett Moore, *History and Digest of the International Arbitrations to Which United States Has Been a Party,* 6 vols. (1898) |
| Morison | William Maxwell Morison, *The Scots Revised Report: Morison's Dictionary of Decisions* (1908–09) |
| M.P. | Member of Parliament |
| MP3 | MPEG Audio Layer 3 |
| MPAA | Motion Picture Association of America |
| MPAS | Michigan Protection and Advocacy Service |
| MPEG | Motion Picture Experts Group |
| mpg | Miles per gallon |
| MPPDA | Motion Picture Producers and Distributors of America |
| MPRSA | Marine Protection, Research, and Sanctuaries Act of 1972 |
| M.R. | Master of the Rolls |
| MS-DOS | Microsoft Disk Operating System |
| MSHA | Mine Safety and Health Administration |
| MSPB | Merit Systems Protection Board |
| MSSA | Military Selective Service Act |
| N/A | Not Available |
| NAACP | National Association for the Advancement of Colored People |
| NAAQS | National Ambient Air Quality Standards |
| NAB | National Association of Broadcasters |
| NABSW | National Association of Black Social Workers |
| NACDL | National Association of Criminal Defense Lawyers |
| NAFTA | North American Free Trade Agreement of 1993 |
| NAGHSR | National Association of Governors' Highway Safety Representatives |
| NALA | National Association of Legal Assistants |
| NAM | National Association of Manufacturers |
| NAR | National Association of Realtors |
| NARAL | National Abortion and Reproductive Rights Action League |
| NARF | Native American Rights Fund |
| NARS | National Archives and Record Service |
| NASA | National Aeronautics and Space Administration |
| NASD | National Association of Securities Dealers |
| NATO | North Atlantic Treaty Organization |
| NAVINFO | Navy Information Offices |
| NAWSA | National American Woman's Suffrage Association |
| NBA | National Bar Association; National Basketball Association |
| NBC | National Broadcasting Company |
| NBLSA | National Black Law Student Association |
| NBS | National Bureau of Standards |
| NCA | Noise Control Act; National Command Authorities |
| NCAA | National Collegiate Athletic Association |
| NCAC | National Coalition against Censorship |
| NCCB | National Consumer Cooperative Bank |
| NCE | Northwest Community Exchange |
| NCF | National Chamber Foundation |
| NCIP | National Crime Insurance Program |
| NCJA | National Criminal Justice Association |
| NCLB | National Civil Liberties Bureau |
| NCP | National contingency plan |
| NCSC | National Center for State Courts |
| NCUA | National Credit Union Administration |
| NDA | New drug application |
| N.D. Ill. | Northern District, Illinois |
| NDU | National Defense University |
| N.D. Wash. | Northern District, Washington |
| N.E. | North Eastern Reporter |
| N.E. 2d | North Eastern Reporter, Second Series |
| NEA | National Endowment for the Arts; National Education Association |

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| NEH | National Endowment for the Humanities |
| NEPA | National Environmental Protection Act; National Endowment Policy Act |
| NET Act | No Electronic Theft Act |
| NFIB | National Federation of Independent Businesses |
| NFIP | National Flood Insurance Program |
| NFL | National Football League |
| NFPA | National Federation of Paralegal Associations |
| NGLTF | National Gay and Lesbian Task Force |
| NHL | National Hockey League |
| NHRA | Nursing Home Reform Act of 1987 |
| NHTSA | National Highway Traffic Safety Administration |
| Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| NIEO | New International Economic Order |
| NIGC | National Indian Gaming Commission |
| NIH | National Institutes of Health |
| NIJ | National Institute of Justice |
| NIRA | National Industrial Recovery Act of 1933; National Industrial Recovery Administration |
| NIST | National Institute of Standards and Technology |
| N.J. | New Jersey Reports |
| N.J. Super. | New Jersey Superior Court Reports |
| NLEA | Nutrition Labeling and Education Act of 1990 |
| NLRA | National Labor Relations Act |
| NLRB | National Labor Relations Board |
| NMFS | National Marine Fisheries Service |
| No. | Number |
| NOAA | National Oceanic and Atmospheric Administration |
| NOC | National Olympic Committee |
| NOI | Nation of Islam |
| NOL | Net operating loss |
| NORML | National Organization for the Reform of Marijuana Laws |
| NOW | National Organization for Women |
| NOW LDEF | National Organization for Women Legal Defense and Education Fund |
| NOW/PAC | National Organization for Women Political Action Committee |
| NPDES | National Pollutant Discharge Elimination System |
| NPL | National priorities list |
| NPR | National Public Radio |
| NPT | Nuclear Non-Proliferation Treaty of 1970 |
| NRA | National Rifle Association; National Recovery Act |
| NRC | Nuclear Regulatory Commission |
| NRLC | National Right to Life Committee |
| NRTA | National Retired Teachers Association |
| NSA | National Security Agency |
| NSC | National Security Council |
| NSCLC | National Senior Citizens Law Center |
| NSF | National Science Foundation |
| NSFNET | National Science Foundation Network |
| NSI | Network Solutions, Inc. |
| NTIA | National Telecommunications and Information Administration |
| NTID | National Technical Institute for the Deaf |
| NTIS | National Technical Information Service |
| NTS | Naval Telecommunications System |
| NTSB | National Transportation Safety Board |
| NVRA | National Voter Registration Act |
| N.W. | North Western Reporter |
| N.W. 2d | North Western Reporter, Second Series |
| NWSA | National Woman Suffrage Association |
| N.Y. | New York Court of Appeals Reports |
| N.Y. 2d | New York Court of Appeals Reports, Second Series |
| N.Y.S. | New York Supplement Reporter |

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| N.Y.S. 2d | New York Supplement Reporter, Second Series |
| NYSE | New York Stock Exchange |
| NYSLA | New York State Liquor Authority |
| N.Y. Sup. | New York Supreme Court Reports |
| NYU | New York University |
| OAAU | Organization of Afro American Unity |
| OAP | Office of Administrative Procedure |
| OAS | Organization of American States |
| OASDI | Old-age, Survivors, and Disability Insurance Benefits |
| OASHDS | Office of the Assistant Secretary for Human Development Services |
| OCC | Office of Comptroller of the Currency |
| OCED | Office of Comprehensive Employment Development |
| OCHAMPUS | Office of Civilian Health and Medical Program of the Uniformed Services |
| OCSE | Office of Child Support Enforcement |
| OEA | Organización de los Estados Americanos |
| OEM | Original Equipment Manufacturer |
| OFCCP | Office of Federal Contract Compliance Programs |
| OFPP | Office of Federal Procurement Policy |
| OIC | Office of the Independent Counsel |
| OICD | Office of International Cooperation and Development |
| OIG | Office of the Inspector General |
| OJARS | Office of Justice Assistance, Research, and Statistics |
| OMB | Office of Management and Budget |
| OMPC | Office of Management, Planning, and Communications |
| ONP | Office of National Programs |
| OPD | Office of Policy Development |
| OPEC | Organization of Petroleum Exporting Countries |
| OPIC | Overseas Private Investment Corporation |
| Ops. Atts. Gen. | Opinions of the Attorneys-General of the United States |
| Ops. Comms. | Opinions of the Commissioners |
| OPSP | Office of Product Standards Policy |
| O.R. | Ontario Reports |
| OR | Official Records |
| OSHA | Occupational Safety and Health Act |
| OSHRC | Occupational Safety and Health Review Commission |
| OSM | Office of Surface Mining |
| OSS | Office of Strategic Services |
| OST | Office of the Secretary |
| OT | Office of Transportation |
| OTA | Office of Technology Assessment |
| OTC | Over-the-counter |
| OTS | Office of Thrift Supervisors |
| OUI | Operating under the influence |
| OVCI | Offshore Voluntary Compliance Initiative |
| OWBPA | Older Workers Benefit Protection Act |
| OWRT | Office of Water Research and Technology |
| P. | Pacific Reporter |
| P. 2d | Pacific Reporter, Second Series |
| PAC | Political action committee |
| Pa. Oyer and Terminer | Pennsylvania Oyer and Terminer Reports |
| PATCO | Professional Air Traffic Controllers Organization |
| PBGC | Pension Benefit Guaranty Corporation |
| PBS | Public Broadcasting Service; Public Buildings Service |
| P.C. | Privy Council (English Law Reports) |
| PC | Personal computer; politically correct |
| PCBs | Polychlorinated biphenyls |
| PCIJ | Permanent Court of International Justice |
| | Series A-Judgments and Orders (1922–30) |
| | Series B-Advisory Opinions (1922–30) |
| | Series A/B-Judgments, Orders, and Advisory Opinions (1931–40) |

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| PCIJ (cont'd.) | Series C-Pleadings, Oral Statements, and Documents relating to Judgments and Advisory Opinions (1923–42) |
| | Series D-Acts and Documents concerning the Organization of the World Court (1922 –47) |
| | Series E-Annual Reports (1925–45) |
| PCP | Phencyclidine |
| P.D. | Probate Division, English Law Reports (1876–1890) |
| PDA | Pregnancy Discrimination Act of 1978 |
| PD & R | Policy Development and Research |
| Pepco | Potomac Electric Power Company |
| Perm. Ct. of Arb. | Permanent Court of Arbitration |
| PES | Post-Enumeration Survey |
| Pet. | Peters' United States Supreme Court Reports |
| PETA | People for the Ethical Treatment of Animals |
| PGA | Professional Golfers Association |
| PGM | Program |
| PHA | Public Housing Agency |
| Phila. Ct. of Oyer and Terminer | Philadelphia Court of Oyer and Terminer |
| PhRMA | Pharmaceutical Research and Manufacturers of America |
| PHS | Public Health Service |
| PIC | Private Industry Council |
| PICJ | Permanent International Court of Justice |
| Pick. | Pickering's Massachusetts Reports |
| PIK | Payment in Kind |
| PINS | Persons in need of supervision |
| PIRG | Public Interest Research Group |
| P.L. | Public Laws |
| PLAN | Pro-Life Action Network |
| PLC | Plaintiffs' Legal Committee |
| PLE | Product liability expenses |
| PLI | Practicing Law Institute |
| PLL | Product liability loss |
| PLLP | Professional Limited Liability Partnership |
| PLO | Palestine Liberation Organization |
| PLRA | Prison Litigation Reform Act of 1995 |
| PNET | Peaceful Nuclear Explosions Treaty |
| PONY | Prostitutes of New York |
| POW-MIA | Prisoner of war-missing in action |
| Pratt | Frederic Thomas Pratt, *Law of Contraband of War, with a Selection of Cases from Papers of the Right Honourable Sir George Lee* (1856) |
| PRIDE | Prostitution to Independence, Dignity, and Equality |
| Proc. | Proceedings |
| PRP | Potentially responsible party |
| PSRO | Professional Standards Review Organization |
| PTO | Patents and Trademark Office |
| PURPA | Public Utilities Regulatory Policies Act |
| PUSH | People United to Serve Humanity |
| PUSH-Excel | PUSH for Excellence |
| PWA | Public Works Administration |
| PWSA | Ports and Waterways Safety Act of 1972 |
| Q.B. | Queen's Bench (England) |
| QTIP | Qualified Terminable Interest Property |
| Ralston's Rept. | Jackson Harvey Ralston, ed., *Venezuelan Arbitrations of 1903* (1904) |
| RC | Regional Commissioner |
| RCRA | Resource Conservation and Recovery Act |
| RCWP | Rural Clean Water Program |
| RDA | Rural Development Administration |
| REA | Rural Electrification Administration |
| Rec. des Decs. des Trib. Arb. Mixtes | G. Gidel, ed., *Recueil des décisions des tribunaux arbitraux mixtes, institués par les traités de paix* (1922–30) |
| Redmond | Vol. 3 of Charles I. Bevans, *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled by C. F. Redmond) (1969) |
| RESPA | Real Estate Settlement Procedure Act of 1974 |
| RFC | Reconstruction Finance Corporation |

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| RFRA | Religious Freedom Restoration Act of 1993 |
| RIAA | Recording Industry Association of America |
| RICO | Racketeer Influenced and Corrupt Organizations |
| RLUIPA | Religious Land Use and Institutionalized Persons Act |
| RNC | Republican National Committee |
| Roscoe | Edward Stanley Roscoe, ed., *Reports of Prize Cases Determined in the High Court Admiralty before the Lords Commissioners of Appeals in Prize Causes and before the judicial Committee of the Privy Council from 1745 to 1859* (1905) |
| ROTC | Reserve Officers' Training Corps |
| RPP | Representative Payee Program |
| R.S. | Revised Statutes |
| RTC | Resolution Trust Corp. |
| RUDs | Reservations, understandings, and declarations |
| Ryan White CARE Act | Ryan White Comprehensive AIDS Research Emergency Act of 1990 |
| SAC | Strategic Air Command |
| SACB | Subversive Activities Control Board |
| SADD | Students against Drunk Driving |
| SAF | Student Activities Fund |
| SAIF | Savings Association Insurance Fund |
| SALT | Strategic Arms Limitation Talks |
| SALT I | Strategic Arms Limitation Talks of 1969–72 |
| SAMHSA | Substance Abuse and Mental Health Services Administration |
| Sandf. | Sandford's New York Superior Court Reports |
| S and L | Savings and loan |
| SARA | Superfund Amendment and Reauthorization Act |
| SAT | Scholastic Aptitude Test |
| Sawy. | Sawyer's United States Circuit Court Reports |
| SBA | Small Business Administration |
| SBI | Small Business Institute |
| SCCC | South Central Correctional Center |
| SCLC | Southern Christian Leadership Conference |
| Scott's Repts. | James Brown Scott, ed., *The Hague Court Reports,* 2 vols. (1916–32) |
| SCS | Soil Conservation Service; Social Conservative Service |
| SCSEP | Senior Community Service Employment Program |
| S.Ct. | Supreme Court Reporter |
| S.D. Cal. | Southern District, California |
| S.D. Fla. | Southern District, Florida |
| S.D. Ga. | Southern District, Georgia |
| SDI | Strategic Defense Initiative |
| S.D. Me. | Southern District, Maine |
| S.D.N.Y. | Southern District, New York |
| SDS | Students for a Democratic Society |
| S.E. | South Eastern Reporter |
| S.E. 2d | South Eastern Reporter, Second Series |
| SEA | Science and Education Administration |
| SEATO | Southeast Asia Treaty Organization |
| SEC | Securities and Exchange Commission |
| Sec. | Section |
| SEEK | Search for Elevation, Education and Knowledge |
| SEOO | State Economic Opportunity Office |
| SEP | Simplified employee pension plan |
| Ser. | Series |
| Sess. | Session |
| SGLI | Servicemen's Group Life Insurance |
| SIP | State implementation plan |
| SLA | Symbionese Liberation Army |
| SLAPPs | Strategic Lawsuits Against Public Participation |
| SLBM | Submarine-launched ballistic missile |
| SNCC | Student Nonviolent Coordinating Committee |
| So. | Southern Reporter |
| So. 2d | Southern Reporter, Second Series |
| SPA | Software Publisher's Association |
| Spec. Sess. | Special Session |
| SPLC | Southern Poverty Law Center |
| SRA | Sentencing Reform Act of 1984 |

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| SS | *Schutzstaffel* (German, "Protection Echelon") |
| SSA | Social Security Administration |
| SSI | Supplemental Security Income |
| START I | Strategic Arms Reduction Treaty of 1991 |
| START II | Strategic Arms Reduction Treaty of 1993 |
| Stat. | United States Statutes at Large |
| STS | Space Transportation Systems |
| St. Tr. | State Trials, English |
| STURAA | Surface Transportation and Uniform Relocation Assistance Act of 1987 |
| Sup. Ct. of Justice, Mexico | Supreme Court of Justice, Mexico |
| Supp. | Supplement |
| S.W. | South Western Reporter |
| S.W. 2d | South Western Reporter, Second Series |
| SWAPO | South-West Africa People's Organization |
| SWAT | Special Weapons and Tactics |
| SWP | Socialist Workers Party |
| TDP | Trade and Development Program |
| Tex. Sup. | Texas Supreme Court Reports |
| THAAD | Theater High-Altitude Area Defense System |
| THC | Tetrahydrocannabinol |
| TI | Tobacco Institute |
| TIA | Trust Indenture Act of 1939 |
| TIAS | Treaties and Other International Acts Series (United States) |
| TNT | Trinitrotoluene |
| TOP | Targeted Outreach Program |
| TPUS | Transportation and Public Utilities Service |
| TQM | Total Quality Management |
| Tripartite Claims Comm., Decs. and Ops. | Tripartite Claims Commission (United States, Austria, and Hungary), Decisions and Opinions |
| TRI-TAC | Joint Tactical Communications |
| TRO | Temporary restraining order |
| TS | Treaty Series, United States |
| TSCA | Toxic Substance Control Act |
| TSDs | Transporters, storers, and disposers |
| TSU | Texas Southern University |
| TTBT | Threshold Test Ban Treaty |
| TV | Television |
| TVA | Tennessee Valley Authority |
| TWA | Trans World Airlines |
| UAW | United Auto Workers; United Automobile, Aerospace, and Agricultural Implements Workers of America |
| U.C.C. | Uniform Commercial Code; Universal Copyright Convention |
| U.C.C.C. | Uniform Consumer Credit Code |
| UCCJA | Uniform Child Custody Jurisdiction Act |
| UCMJ | Uniform Code of Military Justice |
| UCPP | Urban Crime Prevention Program |
| UCS | United Counseling Service |
| UDC | United Daughters of the Confederacy |
| UFW | United Farm Workers |
| UHF | Ultrahigh frequency |
| UIFSA | Uniform Interstate Family Support Act |
| UIS | Unemployment Insurance Service |
| UMDA | Uniform Marriage and Divorce Act |
| UMTA | Urban Mass Transportation Administration |
| U.N. | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCTAD | United Nations Conference on Trade and Development |
| UN Doc. | United Nations Documents |
| UNDP | United Nations Development Program |
| UNEF | United Nations Emergency Force |
| UNESCO | United Nations Educational, Scientific, and Cultural Organization |
| UNICEF | United Nations Children's Fund (formerly United Nations International Children's Emergency Fund) |
| UNIDO | United Nations Industrial and Development Organization |
| Unif. L. Ann. | Uniform Laws Annotated |
| UN Repts. Intl. Arb. Awards | United Nations Reports of International Arbitral Awards |

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| UNTS | United Nations Treaty Series |
| UPI | United Press International |
| URESA | Uniform Reciprocal Enforcement of Support Act |
| U.S. | United States Reports |
| U.S.A. | United States of America |
| USAF | United States Air Force |
| USA PATRIOT Act | Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act |
| U.S. App. D.C. | United States Court of Appeals for the District of Columbia |
| U.S.C. | United States Code; University of Southern California |
| U.S.C.A. | United States Code Annotated |
| U.S.C.C.A.N. | United States Code Congressional and Administrative News |
| USCMA | United States Court of Military Appeals |
| USDA | U.S. Department of Agriculture |
| USES | United States Employment Service |
| USF | U.S. Forestry Service |
| USFA | United States Fire Administration |
| USGA | United States Golf Association |
| USICA | International Communication Agency, United States |
| USMS | U.S. Marshals Service |
| USOC | U.S. Olympic Committee |
| USSC | U.S. Sentencing Commission |
| USSG | United States Sentencing Guidelines |
| U.S.S.R. | Union of Soviet Socialist Republics |
| UST | United States Treaties |
| USTS | United States Travel Service |
| v. | *Versus* |
| VA | Veterans Administration |
| VAR | Veterans Affairs and Rehabilitation Commission |
| VAWA | Violence against Women Act |
| VFW | Veterans of Foreign Wars |
| VGLI | Veterans Group Life Insurance |
| Vict. | Queen Victoria (Great Britain) |
| VIN | Vehicle identification number |
| VISTA | Volunteers in Service to America |
| VJRA | Veterans Judicial Review Act of 1988 |
| V.L.A. | Volunteer Lawyers for the Arts |
| VMI | Virginia Military Institute |
| VMLI | Veterans Mortgage Life Insurance |
| VOCAL | Victims of Child Abuse Laws |
| VRA | Voting Rights Act |
| WAC | Women's Army Corps |
| Wall. | Wallace's United States Supreme Court Reports |
| Wash. 2d | Washington Reports, Second Series |
| WAVES | Women Accepted for Volunteer Service |
| WCTU | Women's Christian Temperance Union |
| W.D. Wash. | Western District, Washington |
| W.D. Wis. | Western District, Wisconsin |
| WEAL | *West's Encyclopedia of American Law*, Women's Equity Action League |
| Wend. | Wendell's New York Reports |
| WFSE | Washington Federation of State Employees |
| Wheat. | Wheaton's United States Supreme Court Reports |
| Wheel. Cr. Cases | Wheeler's New York Criminal Cases |
| WHISPER | Women Hurt in Systems of Prostitution Engaged in Revolt |
| Whiteman | Marjorie Millace Whiteman, *Digest of International Law*, 15 vols. (1963–73) |
| WHO | World Health Organization |
| WIC | Women, Infants, and Children program |
| Will. and Mar. | King William and Queen Mary (Great Britain) |
| WIN | WESTLAW Is Natural; Whip Inflation Now; Work Incentive Program |
| WIPO | World Intellectual Property Organization |
| WIU | Workers' Industrial Union |
| W.L.R. | Weekly Law Reports, England |
| WPA | Works Progress Administration |
| WPPDA | Welfare and Pension Plans Disclosure Act |

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| WTO | World Trade Organization |
| WWI | World War I |
| WWII | World War II |
| Yates Sel. Cas. | Yates's New York Select Cases |
| YMCA | Young Men's Christian Association |
| YWCA | Young Women's Christian Association |

# WEST'S ENCYCLOPEDIA *of* AMERICAN LAW

2ND EDITION

# How to Use This Book

❚1❚ Article Title

❚2❚ Definition in italics with Latin translation provided

❚3❚ First-level subhead

❚4❚ Timeline for subject of biography, including general historical events and life events

❚5❚ Sidebar expands upon an issue addressed briefly in the article

❚6❚ Quotation from subject of biography

❚7❚ Biography of contributor to American law

❚8❚ Internal cross-reference to entry within WEAL

❚9❚ In Focus article examines a controversial or complex aspect of the article topic

❚10❚ Cross-references at end of article

❚11❚ Full cite for case

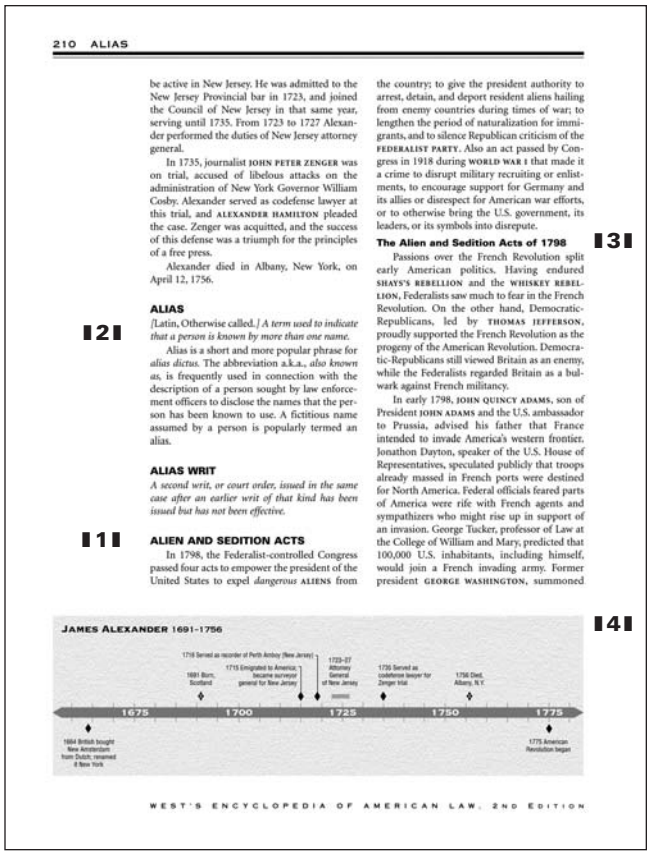



be active in New Jersey. He was admitted to the New Jersey Provincial bar in 1723, and joined the Council of New Jersey in that same year, serving until 1735. From 1723 to 1727 Alexander performed the duties of New Jersey attorney general.

In 1735, journalist JOHN PETER ZENGER was on trial, accused of libelous attacks on the administration of New York Governor William Cosby. Alexander served as codefense lawyer at this trial, and ALEXANDER HAMILTON pleaded the case. Zenger was acquitted, and the success of this defense was a triumph for the principles of a free press.

Alexander died in Albany, New York, on April 12, 1756.

**ALIAS**

❚2❚ *[Latin, Otherwise called.] A term used to indicate that a person is known by more than one name.*

Alias is a short and more popular phrase for *alias dictus.* The abbreviation a.k.a., *also known as,* is frequently used in connection with the description of a person sought by law enforcement officers to disclose the names that the person has been known to use. A fictitious name assumed by a person is popularly termed an alias.

**ALIAS WRIT**

*A second writ, or court order, issued in the same case after an earlier writ of that kind has been issued but has not been effective.*

❚1❚ **ALIEN AND SEDITION ACTS**

In 1798, the Federalist-controlled Congress passed four acts to empower the president of the United States to expel *dangerous* ALIENS from the country; to give the president authority to arrest, detain, and deport resident aliens hailing from enemy countries during times of war; to lengthen the period of naturalization for immigrants, and to silence Republican criticism of the FEDERALIST PARTY. Also an act passed by Congress in 1918 during WORLD WAR I that made it a crime to disrupt military recruiting or enlistments, to encourage support for Germany and its allies or disrespect for American war efforts, or to otherwise bring the U.S. government, its leaders, or its symbols into disrepute.

❚3❚ **The Alien and Sedition Acts of 1798**

Passions over the French Revolution split early American politics. Having endured SHAYS'S REBELLION and the WHISKEY REBELLION, Federalists saw much to fear in the French Revolution. On the other hand, Democratic-Republicans, led by THOMAS JEFFERSON, proudly supported the French Revolution as the progeny of the American Revolution. Democratic-Republicans still viewed Britain as an enemy, while the Federalists regarded Britain as a bulwark against French militancy.

In early 1798, JOHN QUINCY ADAMS, son of President JOHN ADAMS and the U.S. ambassador to Prussia, advised his father that France intended to invade America's western frontier. Jonathon Dayton, speaker of the U.S. House of Representatives, speculated publicly that troops already massed in French ports were destined for North America. Federal officials feared parts of America were rife with French agents and sympathizers who might rise up in support of an invasion. George Tucker, professor of Law at the College of William and Mary, predicted that 100,000 U.S. inhabitants, including himself, would join a French invading army. Former president GEORGE WASHINGTON, summoned

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## The First Payments of Social Security

After the enactment of the Social Security Act of 1935 (42 U.S.C.A. § 301 et seq.) and the creation of the Social Security Administration (SSA), the federal government had a short time to establish the program before beginning to pay benefits. Monthly benefits were to begin in 1940. The period from 1937 to 1940 was to be used both to build up the trust funds and to provide a minimum period for participation for persons to qualify for monthly benefits.

From 1937 until 1940, however, Social Security paid benefits in the form of a single, lump-sum payment. The purpose of these one-time payments was to provide some compensation to people who contributed to the program but would not participate long enough to be vested for monthly benefits.

The first applicant for a lump-sum benefit was Ernest Ackerman, a Cleveland motorman who retired one day after the Social Security Program began. During his one day of participation in the program, five cents was withheld from Ackerman's pay for Social Security, and upon retiring, he received a lump-sum payment of seventeen cents.

Payments of monthly benefits began in January 1940. On January 31, 1940, the first monthly retirement check was issued to Ida May Fuller of Ludlow, Vermont, in the amount of $22.54. Fuller died in January 1975 at the age of one hundred. During her thirty-five years as a beneficiary, she received more than $20,000 in benefits.

tions to Social Security. There is no financial need requirement to be satisfied. Once a worker qualifies for protection, his family is also entitled to protection. The entire program is geared toward helping families as a matter of social policy.

Two large funds of money are held in trust to pay benefits earned by people under OASDI: the Old Age and Survivors Trust Fund and the Disability Insurance Trust Fund. As workers and employers make payroll contributions to these funds, money is paid out in benefits to people currently qualified to receive monthly checks.

The OASDI program is funded by payroll taxes levied on employees and their employers and on the self-employed. The tax is imposed upon the employee's taxable income, up to a maximum taxable amount, with the employer contributing an equal amount. The self-employed person contributes twice the amount levied on an employee. In 2003 the rate was 6.2 percent, levied on earned income up to a maximum of $87,000.

**Old Age Benefits** A person becomes eligible for Social Security old age benefits by working a minimum number of calendar quarters. The number of quarters required for full insurance increases with the worker's age. Forty quarters is the maximum requirement. The individual is credited for income up to the maximum amount of money covered by Social Security for those years. This amount is adjusted to reflect the impact of inflation on normal earnings and ensure that a worker who pays increasing Social Security contributions during his or her work life will receive retirement benefits that keep pace with inflation.

Persons born before 1950 can retire at age 65 with full benefits based on their average income during their working years. For those born between 1950 and 1960, the retirement age for full benefits has increased to age 66. Persons born in 1960 or later will not receive full retirement benefits until age 67. Any person, however, may retire at age 62 and receive less than full benefits. At age 65, a worker's spouse who has not contributed to Social Security receives 50 percent of the amount paid to the worker.

Since 1975 Social Security benefits have increased annually to offset the corrosive effects of inflation on fixed incomes. These increases, known as cost of living allowances (COLAs), are based on the annual increase in consumer prices. Allowing benefits to increase automatically ended the need for special acts of Congress, but it has also steadily increased the cost of the Social Security Program.

have the same inheritance rights as other children. The ruling was believed to be the first on the controversial issue by any state supreme court.

Also in January 2002, Marshall addressed the Massachusetts Bar Association Conference, where she called for "a revolution in the administration of justice" stating that the court system needed to improve its management system as well as its staffing and budget controls. In March 2002, her discussion of the court system's problems were amplified in a 52-page report that was published by a blue-ribbon panel appointed by Marshall.

FURTHER READINGS

Teicher, Stacy A. 2000." A Subtle Revolution as Women Lead the Bench." *Christian Science Monitor* (January 5).

Lavoie, Denise. 2002. "Court Rules on Posthumous Conception." *Associated Press* (January 2)

**[6]**

*THE GOVERNMENT [THAT THE FRAMERS OF THE CONSTITUTION] DEVISED REQUIRED SEVERAL AMENDMENTS, A CIVIL WAR, AND MOMENTOUS SOCIAL TRANSFORMATION TO ATTAIN THE SYSTEM OF CONSTITUTIONAL GOVERNMENT, AND ITS RESPECT FOR THE INDIVIDUAL FREEDOMS AND HUMAN RIGHTS, THAT WE HOLD AS FUNDAMENTAL TODAY.*
*THURGOOD MARSHALL*

## MARSHALL PLAN

After **WORLD WAR II**, Europe was devastated and urgently needed an organized plan for reconstruction and economic and technical aid. The Marshall Plan was initiated in 1947 to meet this need.

The originator of the plan, U.S. Secretary of State George C. Marshall, introduced it in a speech at Harvard University on June 5, 1947. He pointed out two basic reasons for providing aid to Europe: the United States sought the reestablishment of the European countries as independent nations capable of conducting valuable trade with the United States; and the threat of a Communist takeover was more prevalent in countries that were suffering economic depression.

In 1947 a preliminary conference to discuss the terms of the program convened in Paris. The Soviet Union was invited to attend but subsequently withdrew from the program, as did other Soviet countries.

Sixteen European countries eventually participated, and, in July 1947, the Committee for European Economic Cooperation was established to allow representatives from member countries to draft a report that listed their requirements for food, supplies, and technical assistance for a four-year period.

The Committee for European Economic Cooperation subsequently became the Organization of European Economic Cooperation, an expanded and permanent organization that was responsible for submitting petitions for aid. In 1948, Congress passed the Economic Cooperation Act (62 Stat. 137), establishing funds for the Marshall Plan to be administered under the Economic Cooperation Administration, which was directed by Paul G. Hoffman.

Between 1948 and 1952, the sixteen-member countries received more than $13 billion dollars in aid under the Marshall Plan. The plan was generally regarded as a success that led to industrial and agricultural production, while stifling the Communist movement. The plan was not without its critics, however, and many Europeans believed the **COLD WAR** hostilities between the Soviet nations and the free world were aggravated by it.

**[7]**

## ◊ MARSHALL, THURGOOD

Thurgood Marshall, the first African American to serve on the U.S. Supreme Court, saw law as a catalyst for social change. For nearly 60 years, as both a lawyer and a jurist, Marshall worked to dismantle the system of **SEGREGATION** and improve the legal and social position of minorities.

Marshall was born July 2, 1908, in Baltimore, the son of a Pullman porter and a schoolteacher. He was a graduate of Lincoln University, a small, all-black college in Pennsylvania, and Howard University Law School in Washington, D.C. At Howard, Marshall excelled under the guidance of Vice Dean **CHARLES HAMILTON HOUSTON**, the first African American to win a case before the U.S. Supreme Court. Houston encouraged his students to become not just lawyers but "social engineers" who could use the legal system to improve society. Marshall graduated first in his law class in 1933.

Marshall's attendance at predominantly black Howard University illustrates the barriers faced by African Americans during the early twentieth century. Although Marshall wished to attend law school at the University of Maryland (a public institution in his home town of Baltimore), he was prohibited by law from doing so because of his race. This injustice helped set Marshall on a course of opposing all forms of official segregation that denied equal opportunities to African Americans.

After law school, Marshall set up a practice in Baltimore, representing indigent clients in civil rights cases. In 1936, his mentor Houston offered him a position with the National Association for the Advancement of Colored People (**NAACP**),





and in 1940, Marshall became director of the **NAACP LEGAL DEFENSE AND EDUCATIONAL FUND**, a position he held until 1961. Determined to eliminate segregation, Marshall coordinated a nationwide campaign to integrate higher education. He filed several successful lawsuits against public graduate and professional schools that refused to accept African-American students. These suits paved the way for similar cases at the high school and elementary school levels. Marshall also journeyed throughout the deep South, traveling fifty thousand miles a year to fight **JIM CROW LAWS** (a series of laws that provided for racial segregation in the South) and to represent criminal defendants.

Marshall argued 32 cases before the U.S. Supreme Court and won 29 of them. No doubt his most famous and far-reaching triumph before the High Court was **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). In that case, the father of African-American student Linda Brown sued the school board of Topeka, Kansas, over its segregation policy. Brown was required by law to attend an all African-American school several blocks from her home even though an all white public school was located in her own neighborhood. Under Kansas law, cities of more than 15,000 people, such as Topeka, could choose to operate segregated schools. Marshall argued that these segregated schools, defended by officials as "separate but equal," were unconstitutional.

**[8]**

The **SEPARATE-BUT-EQUAL** doctrine originated in **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), a case allowing segregated public accommodations for whites and blacks. In a plainspoken argument, Marshall dismissed as fallacy the notion that segregated schools offered the same educational experiences to black and white students. Sociological and psychological studies demonstrated that black children were in fact harmed by the policy of school segregation. The students' self-esteem was damaged and their future diminished when they were forced to accept inadequate facilities, equipment, and educational opportunities. Marshall argued that the only purpose segregation served was to perpetuate the myth of African-Americans' inferiority. A unanimous Court agreed and struck down the separate-but-equal doctrine, a

*Thurgood Marshall.*
LIBRARY OF CONGRESS

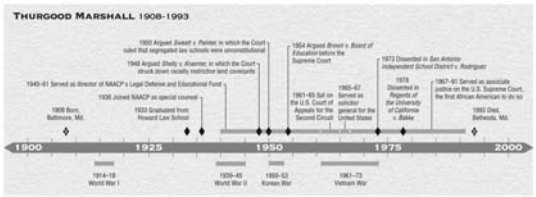






# THE FUTURE OF SOCIAL SECURITY

**[9]**

The payment of **OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE** (OASDI) benefits has been a cornerstone of U.S. social welfare policy since the establishment of the **SOCIAL SECURITY ADMINISTRATION** in 1935. At the same time, the long-term financial stability of OASDI has been a constant worry. In the early years of the twenty-first century, concerns about Social Security mounted as policy makers assessed the impact of the retirement of the "Baby Boom" generation. Many younger people raised the issue of "generation equity." They express doubt that Social Security benefits will be available when they retire, and anger that they will be forced to pay, through payroll taxes, for the baby boomers' retirement benefits.

Reform of the Social Security system has always been a political hot potato. Retirees and those approaching retirement form a strong **LOBBYING** force, and they zealously protect their benefits. Employers and employees are equally vocal in their opposition to higher payroll taxes to fund OASDI. Thus, changes in Social Security required bipartisan support, which materialized in the face of an impending Social Security crisis. The 1982–83 National Commission on Social Security Reform successfully secured from Congress the short-term financing of OASDI. As a result, Congress passed a series of laws meant to accumulate surpluses as a hedge against future burdens. The Social Security surplus is the amount by which revenue from the federal payroll tax exceeds the amount of Social Security benefits paid out.

IN FOCUS

Shortly after these new laws went into effect, Social Security began running a surplus. Surplus Social Security revenue can be used to fund other government programs and to help retire the national debt. During the favorable economic climate of the late 1990s, Congress began to use the surplus to pay down the federal debt, hoping to better position the government to meet its obligations to future retirees. And, in 2000, the federal government generated enough revenue so that the entire Social Security surplus was available for paying off debt.

The state of Social Security became a major campaign issue in the 2000 elections, with both Republicans and Democrats attempting to appear as though they were guardians of Social Security assets. Candidates from both parties promised to create a "lockbox," meaning that the Social Security surplus would be spent entirely on debt retirement. With the advent of fiscally lean years in the early 2000s, the lockbox approach was largely disregarded by politicians who advanced other ideas about what to do with Social Security surpluses. These ideas included using the surplus to help offset decreases in revenues brought about by tax cuts and using the surplus to fund new or expanded spending initiatives.

Analysts argue that the real issue often is clouded. It is not how to spend the surplus now, but how to maintain the long-term solvency of the Social Security trust fund. Planners estimate that the income from the trust fund will exceed expenses each year until 2020. The trust fund balances will then start to decline as investments are redeemed to meet the increased expenses from a swelling retired workforce. Although it is estimated that 75 percent of the costs would continue to be met from current payroll and income taxes, in the absence of any changes, full benefits could not be paid beginning in 2030.

In its 1996 report, the Social Security Administration's Advisory Council looked at various long-term financing options for OASDI. The council could not reach consensus on a specific long-term plan, but it did suggest several types of financing that represent a marked departure from previous efforts to fund Social Security. The council noted that past efforts have generally featured cutting benefits and raising tax rates on a "pay-as-you-go" basis. The council agreed that this approach must be changed and offered three ways of restoring financial solvency.

One approach, called Maintenance of Benefits (MB), calls for an increase in income taxes on OASDI benefits, a redirection of some revenue from other trust funds, and, most importantly, the adoption of a plan allowing the federal government to invest a portion of the trust fund assets directly in common stocks. Rates of returns on stocks have historically exceeded those on federal government bonds, where all Social Security

A person who continues to work past the retirement age may lose some benefits because Social Security is designed to replace lost earnings. If earnings from employment do not exceed the amount specified by law, the person receives the full benefits. If earnings are greater than that amount, one dollar of benefit is withheld for every two dollars in wages earned above the exempt amount. Once a person reaches age 70, however, he does not have to report earnings to the SSA, and the benefit is not reduced.

**Survivors' Benefits** Survivors' benefits are paid to family members when a worker dies. Survivors can receive benefits if the deceased worker was employed and contributed to Social





momentous victory for Marshall, affecting public schools in twenty-one states.

Marshall was appointed to the U.S. Court of Appeals for the Second Circuit in 1961, and served there until 1965 when he was named **SOLICITOR GENERAL** for the United States. He was appointed to the U.S. Supreme Court in 1967 by President **LYNDON B. JOHNSON** and served as an associate justice for 24 years.

While on the Court, Marshall was known more for his impassioned dissents than for his majority opinions. In particular, as a staunch opponent of **CAPITAL PUNISHMENT**, he regularly voiced his disagreement with the majority in death penalty cases. He was also a firm backer of **AFFIRMATIVE ACTION** and contributed one of his most famous dissents in **REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE**, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In that case, Marshall criticized the high court's ruling that a public medical school's policy of reserving 16 of 100 spots for minority students was unconstitutional. Marshall also dissented in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), disagreeing with the majority view that a Texas property tax system used to fund public education was acceptable, even though it allowed wealthier districts to provide a better school system for students in those districts than less wealthy districts could provide. Marshall objected strongly to the property tax arrangement, claiming that it deprived poor children of an equal education.

Marshall wrote the majority opinion in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968), in which the Court declared that a shopping center was a public forum from which picketers could not be barred by private owners.

Marshall retired from the Court in 1991, but continued his criticism of government policies that were detrimental to African Americans or other disenfranchised groups.

Marshall died on January 24, 1993, in Bethesda, Maryland. Upon Marshall's death, nearly 20,000 mourners filed by his casket during the 12 hours it lay in state in the Great Hall of the U.S. Supreme Court.

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CROSS-REFERENCES

**[10]**

*Civil Rights Movement; Integration; School Desegregation.*

## MARTIAL LAW

*The exercise of government and control by military authorities over the civilian population of a designated territory.*

**[11]**

Martial law is an extreme and rare measure used to control society during war or periods of civil unrest or chaos. According to the Supreme Court, the term *martial law* carries no precise meaning (*Duncan v. Kahanamoku*, 327 U.S. 304, 66 S. Ct. 606, 90 L. Ed. 688 [1946]). However, most declarations of martial law have some common features. Generally, the institution of martial law contemplates some use of military force. To a varying extent, depending on the martial law order, government military personnel have the authority to make and enforce civil and criminal laws. Certain civil liberties may be suspended, such as the right to be free from unreasonable **SEARCHES AND SEIZURES**, **FREEDOM OF ASSOCIATION**, and freedom of movement. And the writ of **HABEAS CORPUS** may be suspended (this writ allows persons who are unlawfully imprisoned to gain freedom through a court proceeding).

In the United States, martial law has been instituted on the national level only once, during the Civil War, and on a regional level only once, during **WORLD WAR II**. Otherwise, it has been limited to the states. Uprisings, political protests, labor strikes, and riots have, at various times, caused several state governors to declare some measure of martial law.

Martial law on the national level may be declared by Congress or the president. Under

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# PREFACE

The U.S. legal system is admired around the world for the freedoms it allows the individual and the fairness with which it attempts to treat all persons. On the surface, it may seem simple, yet those who have delved into it know that this system of federal and state constitutions, statutes, regulations, and common-law decisions is elaborate and complex. It derives from the English common law, but includes principles older than England, along with some principles from other lands. The U.S. legal system, like many others, has a language all its own, but too often it is an unfamiliar language: many concepts are still phrased in Latin. The second edition of *West's Encyclopedia of American Law (WEAL)* explains legal terms and concepts in everyday language, however. It covers a wide variety of persons, entities, and events that have shaped the U.S. legal system and influenced public perceptions of it.

## MAIN FEATURES OF THIS SET

### Entries

This encyclopedia contains nearly 5,000 entries devoted to terms, concepts, events, movements, cases, and persons significant to U.S. law. Entries on legal terms contain a definition of the term, followed by explanatory text if necessary. Entries are arranged alphabetically in standard encyclopedia format for ease of use. A wide variety of additional features, listed later in this preface, provide interesting background and supplemental information.

**Definitions** Every entry on a legal term is followed by a definition, which appears at the beginning of the entry and is italicized. The Dictionary and Indexes volume includes a glossary containing all the definitions from *WEAL*.

**Further Readings** To facilitate further research, a list of Further Readings is included at the end of a majority of the main entries.

**Cross-References** *WEAL* provides two types of cross-references, within and following entries. Within the entries, terms are set in small capital letters—for example, LIEN—to indicate that they have their own entry in the encyclopedia. At the end of the entries, related entries the reader may wish to explore are listed alphabetically by title.

Blind cross-reference entries are also included to direct the user to other entries throughout the set.

### In Focus Essays

In Focus essays accompany related entries and provide additional facts, details, and arguments on particularly interesting, important, or controversial issues raised by those entries. The subjects covered include hotly contested issues, such as abortion, capital punishment, and gay rights; detailed processes, such as the Food and Drug Administration's approval process for new drugs; and important historical or social issues, such as debates over the formation of the U.S. Constitution.

### Sidebars

Sidebars provide brief highlights of some interesting facet of accompanying entries. They

complement regular entries and In Focus essays by adding informative details. Sidebar topics include the Million Man March and the branches of the U.S. armed services. Sidebars appear at the top of a text page and are set in a box.

### Biographies

*WEAL* profiles a wide variety of interesting and influential people—including lawyers, judges, government and civic leaders, and historical and modern figures—who have played a part in creating or shaping U.S. law. Each biography includes a timeline, which shows important moments in the subject's life as well as important historical events of the period. Biographies appear alphabetically by the subject's last name.

## ADDITIONAL FEATURES OF THIS SET

**Enhancements** Throughout *WEAL*, readers will find a broad array of photographs, charts, graphs, manuscripts, legal forms, and other visual aids enhancing the ideas presented in the text.

**Indexes** *WEAL* features a cases index and a cumulative index in a separate volume.

### Appendixes

Three appendix volumes are included with *WEAL*, containing hundreds of pages of documents, laws, manuscripts, and forms fundamental to and characteristic of U.S. law.

### Milestone Cases in the Law

A special Appendix volume entitled Milestones in the Law, allows readers to take a close look at landmark cases in U.S. law. Readers can explore the reasoning of the judges and the arguments of the attorneys that produced major decisions on important legal and social issues. Included in each Milestone are the opinions of the lower courts; the briefs presented by the parties to the U.S. Supreme Court; and the decision of the Supreme Court, including the majority opinion and all concurring and dissenting opinions for each case.

### Primary Documents

There is also an Appendix volume containing more than 60 primary documents, such as the English Bill of Rights, Martin Luther King Jr.'s Letter from Brimingham Jail, and several presidential speeches.

### Citations

Wherever possible, *WEAL* entries include citations for cases and statutes mentioned in the text. These allow readers wishing to do additional research to find the opinions and statutes cited. Two sample citations, with explanations of common citation terms, can be seen below and opposite.

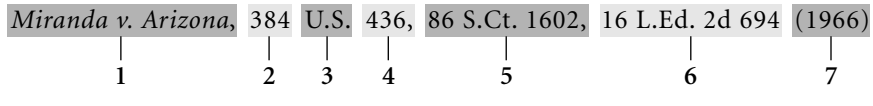


1. *Case title.* The title of the case is set in i and indicates the names of the parties. The suit in this sample citation was between Ernesto A. Miranda and the state of Arizona.
2. *Reporter volume number.* The number preceding the reporter name indicates the reporter volume containing the case. (The volume number appears on the spine of the reporter, along with the reporter name).
3. *Reporter name.* The reporter name is abbreviated. The suit in the sample citation is from the reporter, or series of books, called *U.S. Reports,* which contains cases from the U.S. Supreme Court. (Numerous reporters publish cases from the federal and state courts.)
4. *Reporter page.* The number following the reporter name indicates the reporter page on which the case begins.
5. *Additional reporter page.* Many cases may be found in more than one reporter. The suit in the sample citation also appears in volume 86 of the *Supreme Court Reporter*, beginning on page 1602.
6. *Additional reporter citation.* The suit in the sample citation is also reported in volume 16 of the *Lawyer's Edition*, second series, beginning on page 694.
7. *Year of decision.* The year the court issued its decision in the case appears in parentheses at the end of the cite.

*Brady Handgun Violence Prevention Act*, Pub. L. No. 103–159, 107 Stat. 1536 (18 U.S.C.A. §§ 921–925A)

1 2 3 4 5 6 7 8

1. *Statute title.*
2. *Public law number.* In the sample citation, the number 103 indicates this law was passed by the 103d Congress, and the number 159 indicates it was the 159th law passed by that Congress.
3. *Reporter volume number.* The number preceding the reporter abbreviation indicates the reporter volume containing the statute.
4. *Reporter name.* The reporter name is abbreviated. The statute in the sample citation is from *Statutes at Large.*
5. *Reporter page.* The number following the reporter abbreviation indicates the reporter page on which the statute begins.
6. *Title number.* Federal laws are divided into major sections with specific titles. The number preceding a reference to the U.S. Code stands for the section called Crimes and Criminal Procedure.
7. *Additional reporter.* The statute in the sample citation may also be found in the *U.S. Code Annotated.*
8. *Section numbers.* The section numbers following a reference to the *U.S. Code Annotated* indicate where the statute appears in that reporter.

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# M (cont.)

## ♦ MCCAIN, JOHN SIDNEY

Senator John McCain spent 22 years in the U.S. Navy before becoming a Republican congressman, and then a senator, from Arizona. He did not have a typical military career, however. McCain endured five-and-a-half years as a prisoner of war in Vietnam. He, nevertheless, prefers to be known for what he has accomplished as an elected official. In 1998, he won credit as an antitobacco crusader. McCain's name became synonymous with a drive to sharply decrease smoking in America by raising taxes and halting tobacco companies' ability to shield themselves from lawsuits. That bill eventually lost support, and the senator redirected his energy into other issues, such as campaign-finance reform and TELECOMMUNICATIONS legislation.

John Sidney McCain was born on August 29, 1936, in the Panama Canal Zone, to John Sidney McCain Jr. and Roberta (Wright) McCain. He grew up on naval bases in the United States and overseas. The elder McCain was an admiral who served as commander of American forces in the Pacific during the VIETNAM WAR. In fact, the family has a long lineage in the U.S. military. McCain's paternal grandfather, John S. McCain Sr. was also an admiral, as well as commander of all aircraft carriers in the Pacific during WORLD WAR II. He and McCain's father were the first father-and-son admirals in the history of the U.S. Navy.

McCain graduated from Episcopal High School in Alexandria, Virginia, in 1954 and then attended the U.S. Naval Academy in Annapolis, Maryland, where he took courses in electrical engineering. There, he was known as a rowdy and insubordinate student, whose demerits for his antics detracted from his otherwise respectable grades. He graduated in 1958, toward the bottom of his class (790 out of 795), but nevertheless was accepted to train as a naval aviator.

On October 26, 1967, the lieutenant commander lifted off from the carrier Oriskany in an A-4E Skyhawk on a mission over the Vietnamese capital, Hanoi. Above the city, an antiaircraft missile sliced off the plane's right wing, forcing McCain to eject. With both arms broken, a shattered knee, and a broken shoulder, he landed in a lake where a Vietnamese man extracted him. Subsequently, a crowd beat him, stabbed him with a bayonet, and took him into custody. He did not receive care for his wounds for nine days. When officials learned of his father's high rank, they admitted him to a hospital and later placed him with an American cellmate, who helped to nurse him back to health. Because of his father's status, McCain was offered an early release after just seven months. He denied it, insisting on following the U.S. prisoner-of-war code of conduct, which holds that prisoners should only accept release in the order in which they were captured.

After five-and-a-half years as a prisoner of war in Vietnam, McCain and the rest of the men in Hanoi were released on March 17, 1973. McCain was given a hero's welcome upon his

"GLORY IS NOT A CONCEIT. IT IS NOT A DECORATION FOR VALOR. GLORY BELONGS TO THE ACT OF BEING CONSTANT TO SOMETHING GREATER THAN YOURSELF, TO A CAUSE, TO YOUR PRINCIPLES, TO THE PEOPLE ON WHOM YOU RELY AND WHO RELY ON YOU IN RETURN."
—JOHN MCCAIN

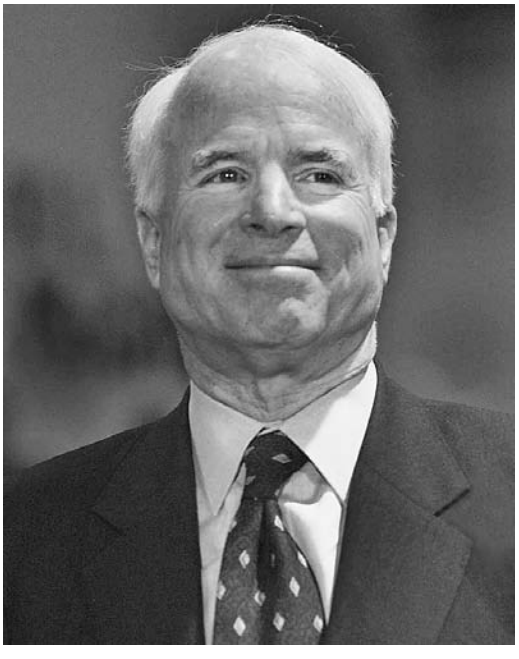

*John McCain.*
AP/WIDE WORLD PHOTOS

return to the United States, meeting President RICHARD NIXON and California Governor RONALD REAGAN and receiving the Silver Star, Bronze Star, Legion of Merit, Purple Heart, and Distinguished Flying Cross. He went to the National War College in Washington, D.C., in 1973 and 1974, but he missed flying. After returning to the skies as a training-squadron commander, he was promoted to the rank of captain in 1977.

In 1977, the Navy named McCain its liaison to the U.S. Senate, marking the beginning of his political aspirations. He retired from the Navy in 1981 and moved to Phoenix to work for his wife's father, a beer distributor. In 1982, despite his newcomer status in the state, he ran for the House of Representatives from Arizona's First Congressional District—a Republican-dominated area taking up much of Phoenix—and won. Unopposed in the 1984 primary, he was re-elected by a large majority over his Democratic opponent. His conservative voting record followed the party line rather faithfully during the Reagan years. He supported prayer in public schools, the Gramm-Rudman deficit-reduction bill, the use of lie-detector tests in certain forms of employment, and the reintroduction of certain handgun sales. He voted against the EQUAL RIGHTS AMENDMENT and against budgeting extra funds for the Clean Air Act. Understandably hawkish in his views on the military, he opposed the 1983 nuclear-freeze resolution and supported more funding for MX missile development and other programs.

McCain showed in many ways that he was not afraid to voice his own opinion. He approved of sanctions in the apartheid-era South Africa, voting to override President Reagan's VETO, and also spoke out against a maneuver to cut millions of dollars from a program that provided food to poor persons in order to give raises to administrators. He also stood against direct U.S. intervention in Central America.

In 1986, McCain ran unopposed in the primary for the U.S. Senate seat that was to be vacated when Arizona's political icon BARRY GOLDWATER retired. He won the general election and was appointed to the Armed Services Committee and its subcommittees on readiness, personnel, and seapower; the Indian Affairs Committee; and the Senate Commerce, Science, and Transportation Committee. He also lobbied for the rights of veterans and pushed to normalize relations with Vietnam, a goal that he realized on July 11, 1995. His early record was punctuated by the passage of the line-item veto, a power that was given to the president in order to erase certain elements of a bill, usually

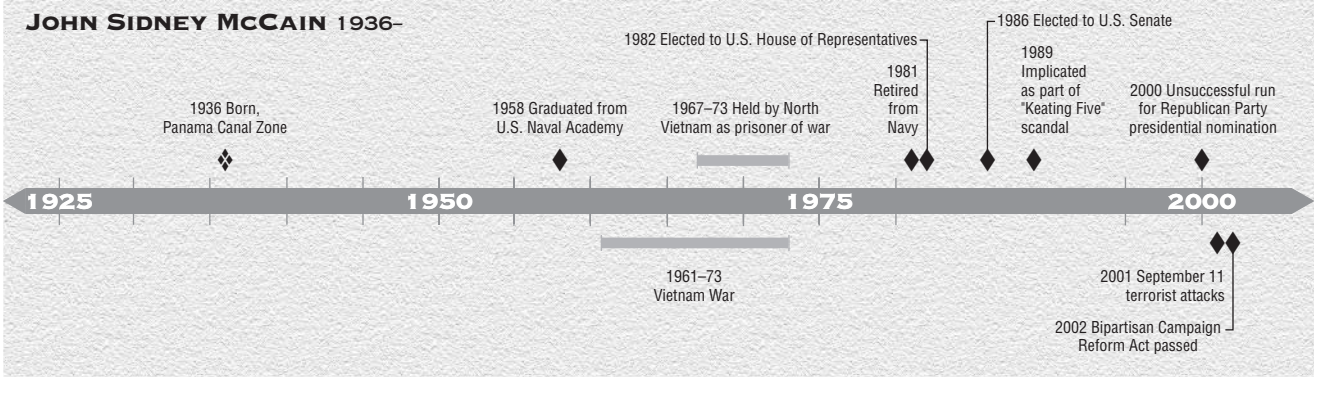

inserted by representatives who were trying to add special-interest or narrow-constituent issues on to a larger, unrelated bill. Although the federal courts eventually struck down the line-item veto in 1997, McCain became known as the champion fighting against "pork-barrel politics," even hiring a staff member to sit in the Senate Gallery and to spot any instances of such dealings at all hours.

McCain also rankled fellow Republicans when he took up the issue of campaign-finance reform. Wanting to make sweeping changes to the way fund raising is handled, he joined forces with Democrat Russell Feingold around 1995. They sought to draft a bill that would limit private donations to campaigns for public office, as well as to even the balance between lavishly funded incumbents and their opponents. The unpopular measure was not taken seriously at first. "We were like the guys who introduced the metric system," McCain told Michael Lewis in the *New York Times Magazine.* Although Democrats have come out heavily in support of the idea, Lewis observed, "Their enthusiasm derives from their certainty that Republicans will find a way to kill it." The bill's most lofty intention was to close the loophole that allows parties to accept general donations and then reroute them to specific candidates; these funds are called "soft money." The House of Representatives passed a version of the bill in August 1998, but the Senate blocked it.

The lowest point in McCain's career was in 1989. He was counted as one of the notorious "Keating Five," along with Senators John Glenn, Donald Riegle, Dennis DeConcini, and Alan Cranston. They were implicated in a scandal to protect Charles Keating, the owner of Lincoln Savings and Loan. Keating gave generously to the senators and, in return, he expected them to shelter him from federal bank regulators after his dealings had ruined his financial institution and cost taxpayers more than $3 billion to bail out. The Senate Ethics Committee investigated the matter and found that although McCain had exercised "poor judgment," he was not guilty of any wrongdoing. The affair hurt his reputation in the short term, but not fatally, and he was reelected in 1992. McCain's later efforts, in addition to campaign-finance reform, included an attention-getting $516 billion proposed bill that made tobacco companies more vulnerable to lawsuits filed by smokers and their families. He further proposed to sharply increase taxes on the substance. The measure made headlines for much of the first half of 1998, until it was voted down, generally due to its emphasis on raising taxes for those who buy tobacco products. In addition, McCain was involved in a telecommunications-reform measure, pushing to install INTERNET connections in schools, to cut satellite- and cable-television costs, and to introduce local telephone competition.

In 1999, McCain published his memoir *Faith of My Fathers*; the book hit the best-seller list and was in its 12th printing one year later. In 2000, McCain ran for president but lost the Republican nomination to GEORGE W. BUSH. That year, McCain underwent surgery to remove a cancerous lesion after a recurrence of the melanoma that he had experienced in 1993. McCain returned to the Senate, where he continued his maverick ways to the point where some analysts began to speculate that he might switch parties. McCain made it clear that he had no intention of leaving the REPUBLICAN PARTY, taking as his model the "trust-busting" president THEODORE ROOSEVELT who campaigned vigorously against corporate financial FRAUD and misfeasance.

In the new millennium, McCain continued to take stands that left him at odds with his own party. He continued to fight for campaign-finance reform. He also voted against President Bush's tax cuts, and sponsored legislation to raise automobile-emissions standards. McCain also joined with Democrats to propose background checks for persons buying firearms at gun shows, a ban on college-sports gambling, and financial-statement disclosure for corporations that deduct executives' stock options.

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## MCCARRAN-FERGUSON ACT OF 1945

The McCarran-Ferguson Act of 1945 (15 U.S.C.A. § 1011 et seq.) gives states the authority to regulate the "business of insurance" without interference from federal regulation, unless federal law specifically provides otherwise.

The act provides that the "business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." Congress passed the McCarran-Ferguson Act primarily in response to the Supreme Court case of *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944). Before the *South-Eastern Underwriters* case, the issuing of an insurance policy was not thought to be a transaction in commerce, which would subject the insurance industry to federal regulation under the COMMERCE CLAUSE. In *South-Eastern Underwriters,* the Court held that an insurance company that conducted substantial business across state lines was engaged in interstate commerce and thus was subject to federal antitrust regulations. Within a year of *South-Eastern Underwriters,* Congress enacted the McCarran-Ferguson Act in response to states' concerns that they no longer had broad authority to regulate the insurance industry in their boundaries.

The McCarran-Ferguson Act provides that state law shall govern the regulation of insurance and that no act of Congress shall invalidate any state law unless the federal law specifically relates to insurance. The act thus mandates that a federal law that does not specifically regulate the business of insurance will not PREEMPT a state law enacted for that purpose. A state law has the purpose of regulating the insurance industry if it has the "end, intention or aim of adjusting, managing, or controlling the business of insurance" (*U.S. Dept. of Treasury v. Fabe,* 508 U.S. 491, 113 S. Ct. 2202, 124 L. Ed. 2d 449 [1993]).

The act does not define the key phrase "business of insurance." Courts, however, analyze three factors when determining whether a particular commercial practice constitutes the business of insurance: whether the practice has the effect of transferring or spreading a policyholder's risk, whether the practice is an integral part of the policy relationship between the insurer and the insured, and whether the practice is limited to entities within the insurance industry (*Union Labor Life Insurance Co. v. Pireno,* 458 U.S. 119, 102 S. Ct. 3002, 73 L. Ed. 2d 647 [1982]).

The McCarran-Ferguson Act does not prevent the federal government from regulating the insurance industry. It provides only that states have broad authority to regulate the insurance industry unless the federal government enacts legislation specifically intended to regulate insurance and to displace state law. The McCarran-Ferguson Act also provides that the SHERMAN ANTI-TRUST ACT OF 1890, 15 U.S.C.A. § 1 et seq., the CLAYTON ACT OF 1914, 15 U.S.C.A. § 12 et seq., and the Federal Trade Commission Act of 1914, 15 U.S.C.A. §§ 41–51, apply to the business of insurance to the extent that such business is not regulated by state law.

Courts have distinguished between the general regulatory exemption of the McCarran-Ferguson Act and the separate exemption provided for the Sherman Act, which is the federal ANTITRUST LAW. Cases involving the applicability of the Sherman Act to state-regulated insurance practices take a narrower approach to the phrase "business of insurance" and apply the three criteria set forth in the *Pireno* case. In other cases that do not involve the federal antitrust exemption of the McCarran-Ferguson Act, the Supreme Court takes a broader approach. It has thus defined laws enacted for the purpose of regulating the business of insurance to include laws "aimed at protecting or regulating the performance of an insurance contract" (*Fabe*). Insurance activities that fall within this broader definition of the business of insurance include those that involve the relationship between insurer and insured, the type of policies issued, and the policies' reliability, interpretation, and enforcement (*Securities & Exchange Commission v. National Securities,* 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2d 668 [1969]).

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## MCCARRAN INTERNAL SECURITY ACT

*Legislation proposed by Senator* PATRICK ANTHONY MCCARRAN *and enacted by Congress in 1950 that subjected alleged members of designated Communist-action organizations to regulation by the federal government.*

The McCarran Internal Security Act, also known as the Subversive Activities Control Act of 1950 (50 U.S.C.A. § 781 et seq.), was part of a legislative package that was designated as the

Internal Security Act of 1950. Congress passed such statutes in response to the post-World War II COLD WAR during which many public officials perceived a threat of violent and forcible overthrow of the U.S. government by U.S. Communist groups that advocated this objective. Among other things, the legislation required members of the Communist party to register with the attorney general, and the named organizations had to provide certain information, such as lists of their members. It established the Subversive Activities Control Board to determine which individuals and organizations had to comply with the law and the procedures to be followed. Failure to satisfy the statutory requirements subjected the individual or organization to criminal prosecution and stiff fines.

Congress repealed the registration requirements of the law in 1968 as a result of a number of decisions by the U.S. Supreme Court that declared certain aspects of the law unconstitutional.

CROSS-REFERENCES

Communism.

## ◆ MCCARRAN, PATRICK ANTHONY

Patrick Anthony McCarran was born August 8, 1876, in Reno, Nevada. He graduated from the University of Nevada in 1901 and took up farming for a few years before his admission to the Nevada bar in 1905.

McCarran's career as a jurist was centered in Nevada. He practiced law from 1905 to 1907 in Tonopah and Goldfield, two areas that experienced prosperity due to mining successes. He served as district attorney of Nye County for the next two years before establishing a law practice in Reno. He entered the judiciary in 1912, presiding as associate justice of the Nevada Supreme Court; he rendered decisions as chief justice during 1917 and 1918. He subsequently practiced law until 1926, when he was defeated in an attempt to win election to the U.S. Senate.

*Patrick A. McCarran.*
AP/WIDE WORLD PHOTOS

In 1932, McCarran again sought a Senate seat and was successful. He represented Nevada until 1954, serving as chairman of the Judiciary Committee, from 1943 to 1946 and from 1949 to 1953, and of the Subcommittee on Foreign Economic Cooperation from 1950 to 1952.

During his lengthy participation in the Senate, McCarran was known for his outspoken

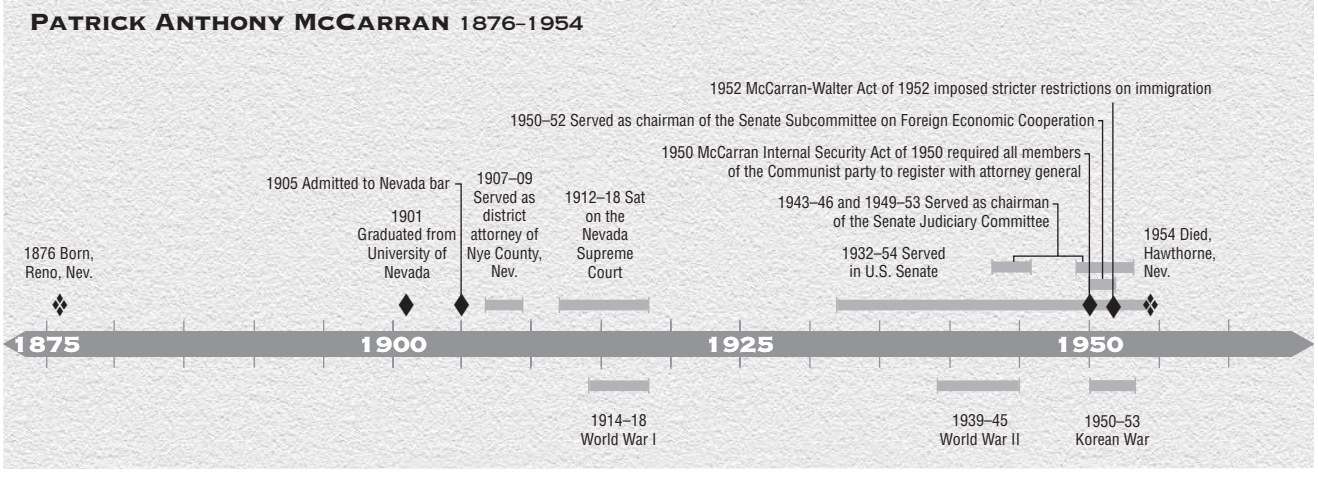

beliefs. Most notable was his support of two pieces of controversial legislation that were passed despite the opposition of President HARRY S. TRUMAN. The MCCARRAN INTERNAL SECURITY ACT of 1950 (50 U.S.C.A. § 781 et seq.) declared that all members of the Communist party must register with the attorney general; it also prohibited anyone with Communist connections to become involved in the government. The McCarran-Walter Act of 1952 (8 U.S.C.A. § 1101 et seq.) imposed stricter restrictions on immigration.

McCarran died September 28, 1954, in Hawthorne, Nevada.

CROSS-REFERENCES

Communism.

## ♦ MCCARTHY, EUGENE JOSEPH

Eugene Joseph McCarthy served as a member of the U.S. House of Representatives from 1949 to 1959 and as a U.S. senator from 1959 to 1971. He was a liberal Democrat who served in the shadow of his fellow Minnesota senator, HUBERT H. HUMPHREY. His opposition to the VIETNAM WAR led to his candidacy for the Democratic presidential nomination in 1968. Although ultimately unsuccessful, his candidacy galvanized the antiwar constituency and helped persuade President LYNDON B. JOHNSON not to seek re-election.

McCarthy was born March 29, 1916, in Watkins, Minnesota, the son of a livestock buyer. He graduated from Saint John's University, in Collegeville, Minnesota, in 1935, and worked on a master's degree at the University of Minnesota during the late 1930s while he was a high-school teacher in Mandan, North Dakota. McCarthy returned to Saint John's in 1940 to teach economics. After deciding not to join the priesthood, he left Saint John's in 1943 and served in the War Department's Intelligence Division until the close of WORLD WAR II in 1945.

After the war, McCarthy joined the faculty at the College of St. Thomas, in St. Paul, where he taught sociology. In 1948, he was elected to the U.S. House of Representatives, beginning a 22-year political career in Washington, D.C. During the 1950s McCarthy worked on labor and agricultural issues and maintained a liberal Democratic voting record. In 1957, he established an informal coalition of members of Congress, later formally organized as the House Democratic Study Group, to counter anti–civil rights actions of southern Democrats.

McCarthy was elected to the U.S. Senate in 1958 and became a respected member of the body. His wit and scholarly, understated manner became recognized nationally, but his demeanor was no match for that of Humphrey, his energetic and voluble colleague. In 1964, President Johnson generated publicity during the Democratic National Convention by floating both senators' names for the vice presidential slot on his re-election ticket. In the end, he chose Humphrey.

In 1965, McCarthy joined the Senate Foreign Relations Committee, which was to become the center of congressional opposition to the Vietnam War. Although in 1964 McCarthy had voted for the TONKIN GULF RESOLUTION (78 Stat. 384), which had given President Johnson the power to wage war in Vietnam, he soon had doubts about the wisdom of U.S. involvement. In January 1966, McCarthy and 14 other senators signed a public letter urging Johnson not to

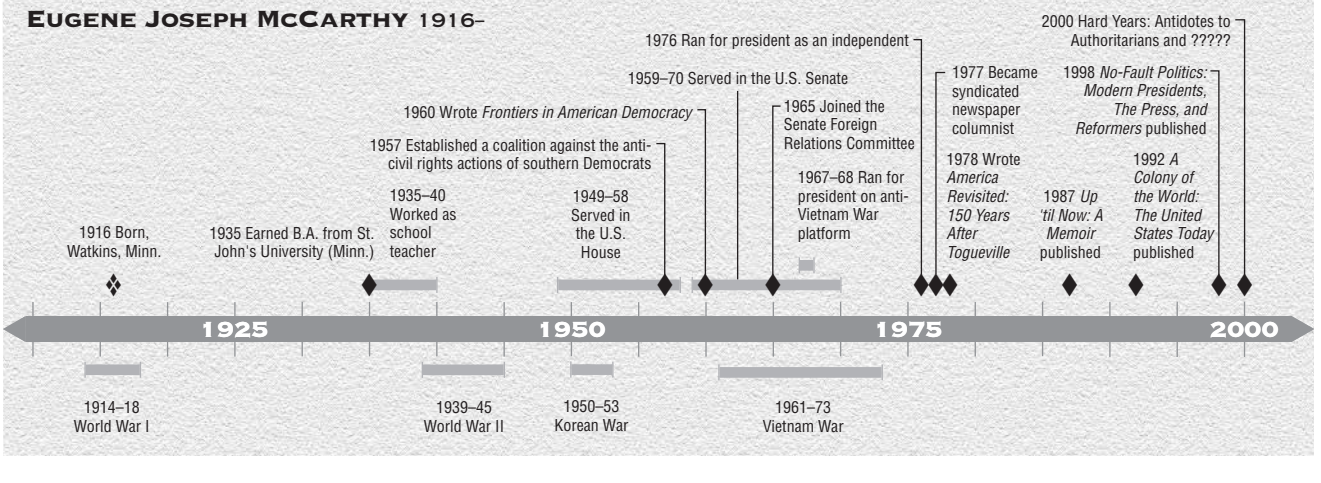

resume bombing of North Vietnam after a brief holiday truce. From that first public criticism of the Vietnam War, McCarthy became a consistent, vocal opponent, making speeches against the war in 1966 and 1967.

In November 1967, McCarthy announced his candidacy for president, based specifically on Johnson's Vietnam policies. Although McCarthy's campaign was not taken seriously at first, an outpouring of support by largely unpaid, politically inexperienced student volunteers on college campuses across the country captured national attention and gave his candidacy political momentum. This momentum was demonstrated when McCarthy won 20 of the 24 New Hampshire delegates in the state's March 1968 primary. President Johnson narrowly won the popular vote in New Hampshire, but the delegates' response was a devastating blow for an incumbent president.

Encouraged by McCarthy's success, Senator **ROBERT F. KENNEDY**, of New York, joined the race. McCarthy was embittered by Kennedy's decision because McCarthy had wanted Kennedy to run all along, but because Kennedy had refused, McCarthy ran instead. Kennedy had refused to contest Johnson's re-election when the odds appeared in the president's favor. Johnson, sensing the difficulty of his re-election, dropped out of the race in March 1968. Vice President Humphrey entered the race after Johnson's withdrawal.

From April to June 1968, McCarthy and Kennedy waged a series of primary battles. McCarthy won the first three, then lost four of the next five to Kennedy. Humphrey refused to run in the primaries, collecting his delegates through state political conventions and the cooperation of local party leaders.

Kennedy was assassinated in June 1968, and the race then centered on McCarthy and Humphrey. Humphrey won the nomination, but unprecedented violence at the Democratic National Convention in Chicago helped to doom his candidacy against **RICHARD M. NIXON**. McCarthy refused to campaign for Humphrey, largely because Humphrey was reluctant to articulate a proposal to end the Vietnam War. Humphrey lost the November election to Nixon by a smaller margin than had been predicted, leading some Democratic leaders to complain that McCarthy's unwillingness to campaign for the ticket had cost Humphrey the election.

McCarthy declined to run for re-election to the Senate in 1970. Humphrey ran successfully in his place. McCarthy ran a lackluster presidential campaign in 1972 and a better-organized independent presidential campaign in 1976. He lost both races and subsequently retired from the political arena.

*Eugene J. McCarthy.*
LIBRARY OF CONGRESS

"THE WAR IN VIETNAM IS OF QUESTIONABLE LOYALTY AND CONSTITUTIONALITY . . . DIPLOMATICALLY INDEFENSIBLE . . . EVEN IN MILITARY TERMS [AND] MORALLY WRONG."
—EUGENE MCCARTHY

McCarthy endorsed **RONALD REAGAN** in 1980 over incumbent president **JIMMY CARTER** and his running mate, Minnesotan Walter Mondale. In 1982, McCarthy ran for senator in Minnesota but was defeated in the Democratic primary by Mark Dayton.

After leaving active politics, McCarthy concentrated on teaching, political commentary, and poetry writing. In 1998, he published *No-Fault Politics: Modern Presidents, the Press, and Reformers.* In 2001, a documentary film titled, *I'm Sorry I Was Right: Eugene McCarthy* was released. In the film, McCarthy discusses his past experiences, extrapolates on lessons learned from the Vietnam War, warns against the growing power of the military-industrial complex, and recites some of his poetry. In 2003, McCarthy continued to write, to travel the country, and to speak out against the war in Iraq.

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## ♦ MCCARTHY, JOSEPH RAYMOND

Joseph Raymond McCarthy was a U.S. senator who during the early 1950s conducted a highly controversial campaign against supposed Communist infiltration of the U.S. government. His accusations and methods of interrogation of witnesses came to be called "McCarthyism," a term that remains a part of the U.S. political vocabulary. Though he was ultimately censured for his activities by the Senate, McCarthy was, between 1950 and 1954, the most powerful voice of anti-COMMUNISM in the United States.

McCarthy was born November 14, 1908, in Grand Chute, Wisconsin. He graduated from Marquette University in 1935 with a bachelor of laws degree. He practiced law in Wisconsin until 1939, when he was elected a circuit court judge. During WORLD WAR II, McCarthy served in the Marine Corps as a tailgunner. He progressed to the rank of captain and was awarded several commendations for his military achievements.

"THE FATE OF THE WORLD RESTS WITH THE CLASH BETWEEN THE ATHEISM OF MOSCOW AND THE CHRISTIAN SPIRIT THROUGHOUT OTHER PARTS OF THE WORLD."
—JOE MCCARTHY

McCarthy used his wartime record as "Tailgunner Joe" to help upset Republican Senator ROBERT M. LAFOLLETTE Jr., in the 1946 Wisconsin primary election. McCarthy was elected to the Senate in 1946 and reelected in 1952.

During his first three years in office, McCarthy was an undistinguished and relatively unknown senator. He catapulted to public attention, however, after giving a speech in Wheeling, West Virginia, in February 1950. In the speech, McCarthy charged that 205 Communists had infiltrated the STATE DEPARTMENT. He claimed that Communist subversion had led to the fall of China to the Communists in October 1949. A Senate investigating committee ordered McCarthy to produce evidence of his accusations, but he was unable to produce the names of any Communists.

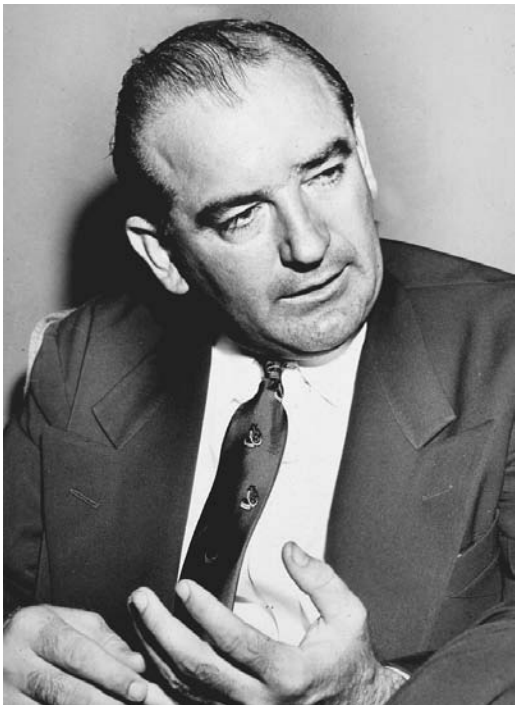

*Joe McCarthy.* ARCHIVE PHOTOS, INC.

Despite this failure to produce evidence, McCarthy escalated his anti-Communist crusade. He accused Democratic President HARRY S. TRUMAN's administration of harboring Communists and of failing to stop Communist aggression. His accusations struck a chord with many U.S. citi-

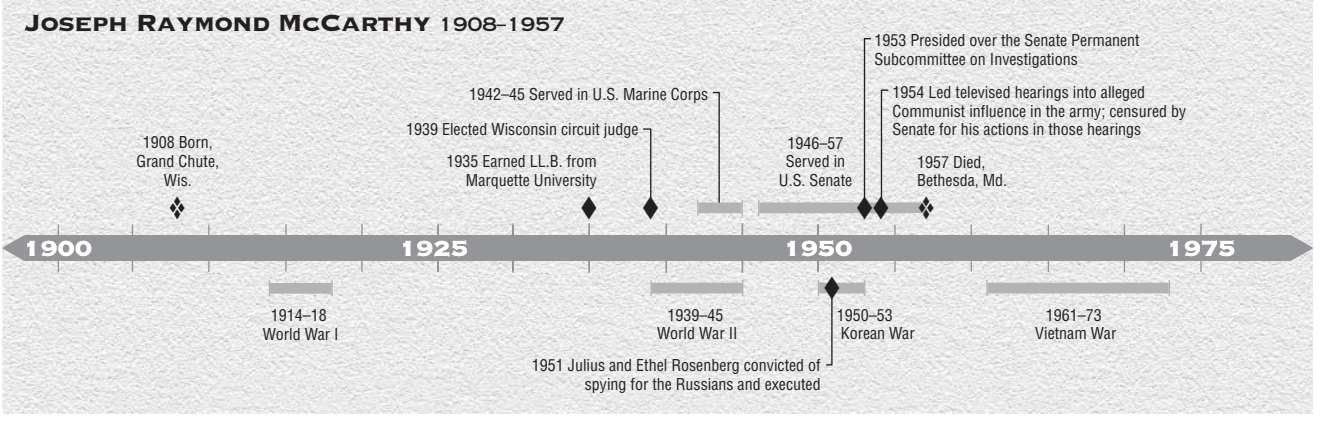

zens, who were fearful of the growth of Communism and the menace of the Soviet Union as well as angry at the U.S. government's apparent inability to prevent the spread of Communism.

In 1953 McCarthy became the chair of the Senate's Government Committee on Operations and head of its permanent subcommittee on investigations. Though DWIGHT D. EISENHOWER, a Republican, became president in 1953, McCarthy used the investigations subcommittee to continue his campaign against Communist subversion in the federal government. McCarthy brought persons before his committee who he claimed were "card-carrying" Communists. He made colorful and clever accusations against these witnesses, who, as a result, often lost their jobs and were labeled as subversive. Evidence that a person had briefly joined a left-wing political group during the 1930s was used by McCarthy to suggest that the person was a Communist or a Communist sympathizer.

McCarthy attacked some of the policies of President Eisenhower, yet the president was reluctant to criticize the popular senator. In April 1954 McCarthy leveled charges against the U.S. Army, claiming the secretary of the army had concealed foreign ESPIONAGE activities. Thirty-six days of televised hearings ensued, known as the "Army-McCarthy hearings." McCarthy was unable to substantiate any of his allegations. During the course of the hearings, McCarthy's aggressive and intimidating tactics backfired, turning public opinion against him.

After the Democrats regained control of the Senate in the November 1954 elections, McCarthy was replaced as chair of the investigating committee by Senator JOHN L. MCCLELLAN of Arkansas. McClellan, who had been critical of McCarthy's approach, helped lead an effort to censure McCarthy for his methods and for his abuse of other senators. In 1955, the Senate, on a vote of 67 to 22, moved to censure McCarthy.

The censure vote marked the decline of McCarthy's political influence. He died on May 2, 1957 in Bethesda, Maryland.

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*John L. McClellan.*
LIBRARY OF CONGRESS

CROSS-REFERENCES

Cohn, Roy Marcus; Cold War; Red Scare; Welch, Joseph Nye.

## ♦ MCCLELLAN, JOHN LITTLE

John Little McClellan served as a U.S. senator from 1942 to 1977. During the 1950s, McClellan rose to national prominence for his opposition to the methods used by Senator JOSEPH R. MCCARTHY in investigating alleged Communist subversion. McClellan succeeded McCarthy as chair of the investigating subcommittee and conducted probes of union corruption, graft, and ORGANIZED CRIME between 1955 and 1973.

"MOUNTING CRIME AND CORRUPTION ARE INSIDIOUSLY GNAWING AT THE VITALITY AND STRENGTH OF OUR REPUBLIC."
—JOHN MCCLELLAN

McClellan was born on February 25, 1896, in Sheridan, Arkansas. He was admitted to the Arkansas bar in 1913 and served a tour of military duty in WORLD WAR I. He maintained a private law practice in Arkansas before becoming a prosecuting attorney in 1927. McClellan left the post in 1930 to resume private practice, but abandoned law for DEMOCRATIC PARTY politics in 1935, when he was elected to the U.S. House of Representatives. In 1942 he began a career in the U.S. Senate that would span thirty-five years.

McClellan was largely unknown outside of Arkansas until the 1950s. In 1953, he was named to the special investigating subcommittee headed by Republican Senator Joseph R. McCarthy of Wisconsin. McCarthy had become a national figure for his controversial charges of Communist subversion in the STATE DEPARTMENT and other

divisions of the federal government. McCarthy was a master of the media, attracting front-page coverage for his allegations. However, his use of the investigating committee angered McClellan, who objected to McCarthy's unsubstantiated accusations and to his brow-beating of witnesses.

In 1954, following a contentious, thirty-six day televised hearing dealing with the Army's alleged concealment of foreign **ESPIONAGE**, McCarthy's popularity declined. McClellan served on a committee that investigated McCarthy's actions during these hearings. The committee concluded McCarthy should be censured by the Senate for his abusive methods and for his "contemptuous" conduct toward a subcommittee that had investigated his finances in 1952. McClellan and an overwhelming majority of his colleagues censured McCarthy on these charges.

After the Democrats regained control of the Senate in the November 1954 elections, McClellan replaced McCarthy as chair of the investigating committee. In 1957 he drew national attention as chair of the Senate Select Committee on Improper Activities in the Labor or Management Field. As presiding officer, he directed investigations of several powerful **LABOR UNIONS**. He forcefully questioned the leadership of the Teamsters Union, including Dave Beck and James (Jimmy) Hoffa. The McClellan Committee's investigation revealed that the Teamsters Union and other groups had taken union funds for private use and that there were clear links between the Teamsters and organized crime. One result of the probe was the expulsion of the Teamsters and two other unions from the **AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS** (AFL-CIO).

The corruption uncovered by McClellan's committee also led to the passage of the Labor-Management Reporting and Disclosure Act of 1959, commonly known as the **LANDRUM-GRIFFIN ACT** (29 U.S.C.A. § 401 et seq.). This act sought to prevent union corruption and to guarantee union members that unions would be run democratically.

In 1961 McClellan investigated the fraudulent agricultural dealings of Texas businessman Billy Sol Estes. In 1963 McClellan was involved with the investigation of organized crime. During the hearings, Joseph Valachi, a member of an organized crime family, gave graphic testimony of its inner workings. McClellan continued to organize investigations as part of the Permanent Investigations Subcommittee until 1973, when he became head of the Senate Appropriations Committee.

McClellan died on November 27, 1977 in Little Rock, Arkansas.

## MCCULLOCH V. MARYLAND

*McCulloch v. Maryland* is a keynote case, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), decided by the U.S. Supreme Court that established the principles that the federal government possesses broad powers to pass a number of types of laws, and that the states cannot interfere with any federal agency by imposing a direct tax upon it.

This case represents another illustrative example of the ongoing debate among the founders of the U.S. constitutional government regarding the balance of powers between the states and the federal government. The Federalists were in favor of a strong central government, whereas the Republicans wanted the states to retain most powers. Those who wrote and ratified the U.S. Constitution ultimately agreed to grant the federal government certain specific powers known as the enumerated powers—listed in the Constitution—and concluded with

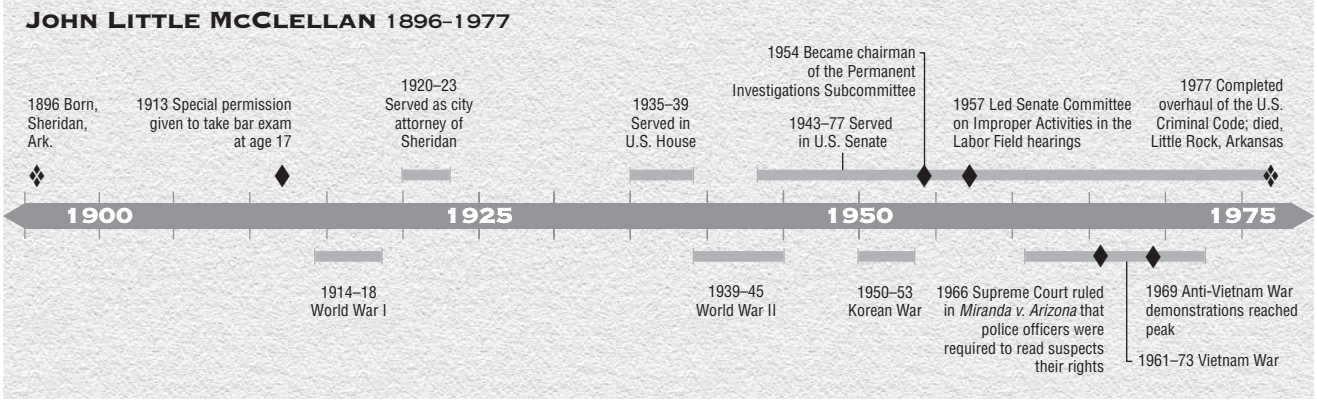

a general provision that permitted Congress to make all laws that are necessary and proper for the carrying out of the foregoing powers, as well as all other powers vested in the U.S. government by the Constitution. Some people were fearful that such a provision, which is called the NECESSARY AND PROPER CLAUSE of the Constitution, was a blanket authorization for the federal government to regulate the states.

Subsequently, a series of articles—which came to be called the *Federalist Papers*—were published in New York newspapers. These articles defended the clause on the basis that any power only constitutes that ability to do something, and that the power to do something is the power to utilize a means of doing it. It is necessary for a legislature to have the power to make laws; therefore, the proper means of exercising that power is by making "necessary and proper" laws. The Constitution was, therefore, ratified in 1789 with the Necessary and Proper Clause.

In exercise of the power conferred by that clause, the first Congress enacted a law in 1791 that incorporated a national bank called the BANK OF THE UNITED STATES, which operated as a private bank, took deposits of private funds, made private loans, and issued bank notes that could be used like money. In addition, wherever branches were established, it operated as a place for the federal government to deposit its funds. The legislation that incorporated the bank stated in its preamble that it would be extremely conducive to the successful operation of the national finances, would aid in the obtaining of loans for the use of the government in sudden emergencies, and would produce considerable advantages to trade and industry in general.

That bank charter was allowed to expire in 1811; however, a second Bank of the United States was incorporated in 1816 with one-fifth of its stock owned by the United States, and it became extremely unpopular. This was particularly true in the South and West, where it first overexpanded credits and then drastically limited them, thereby contributing to the failure of many state-chartered banks. A number of states attempted to keep branches of the national bank out of their states by passing laws proscribing any banks not chartered by the state or by imposing heavy taxes on them. The only bank affected by these laws was the Bank of the United States. The tremendous dispute that subsequently arose between the federal and state governments required resolution by the Supreme Court.

Maryland had one of the least stringent rules against the bank, which required that any bank or branch that was not established subject to the authority of the state must use special stamped paper for its bank notes and, in effect, pay 2 percent of the value of the notes as a tax or pay a general tax of $15,000 a year. Maryland brought suit against McCulloch, cashier of the Bank of the United States, for not paying the tax and won a judgment for the amount of the penalties. An appeal was brought to the Supreme Court by McCulloch.

Chief Justice JOHN MARSHALL wrote the majority opinion of the Court, which reversed the Maryland judgment. The Court held that the federal government has the power to do what is necessary and proper, which included the grant of authority to establish a national bank. Maryland, therefore, had no right to tax the bank, a conclusion which was based upon the theory that "the power to tax is the power to destroy." A state cannot have authority under the Constitution to destroy or tax any agency that has been properly set up by the federal government. On that basis, the law that was passed by the legislature of Maryland that imposed a tax on the Bank of the United States was unconstitutional and void.

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Constitution of the United States; Federalism; *Federalist Papers.*

## MCGRAIN V. DAUGHERTY

A landmark decision of the Supreme Court, *McGrain v. Daugherty,* 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1927), recognized the implicit power of either House of Congress to hold a witness in a congressional investigation in CONTEMPT for a refusal to honor its summons or to respond to its questions.

During the mid-1920s, there were numerous allegations that the U.S. JUSTICE DEPARTMENT was being mismanaged by its administrator, HARRY DAUGHERTY, the attorney general of the United States. In response to the charges, the Senate passed a resolution that empowered an investigatory committee to hear evidence as to whether Daugherty failed to prosecute various violations of the ANTITRUST LAWS. Mally S. Daugherty, who was a bank president as well as the brother of the attorney general, refused to respond to a subpoena that was issued by the committee on two occasions, ordering him to appear and to bring designated bank ledgers. The president pro tempore of the Senate issued a warrant to his sergeant at arms that Mally Daugherty be taken into custody. A deputy of the sergeant at arms took Daugherty into custody in Cincinnati, Ohio. Daugherty brought a HABEAS CORPUS action for his release in federal district court in Ohio. The court declared that the attachment and detention of the witness was void on the ground that the Senate exceeded its powers in directing the investigation and in ordering the seizure of Daugherty. The deputy made a direct appeal to the Supreme Court, which accepted the case for review.

The Court defined two issues: whether the Senate or House of Representatives has authority to use its own process to compel a private person to appear as a witness and to testify before it or one of its committees in order that Congress can perform a legislative function that it has under the Constitution; and whether the process that was used in this case was directed toward that purpose. Before addressing those questions, however, the Court reviewed some of Daugherty's assertions. Daugherty argued that there was no statutory provision for a deputy and that even if there were, the deputy had no power to execute the warrant, since it was addressed to the sergeant at arms. The Court disagreed. It explained that deputies were authorized to act for the sergeant at arms by virtue of a standing order adopted by the Senate and that Congress recognized their status by establishing and making appropriations for their compensation.

Daugherty also used the FOURTH AMENDMENT provision that "no warrants shall issue, but upon PROBABLE CAUSE, supported by oath or affirmation," to assert that the warrant was void because its basis was an unsworn committee report. The Court rejected this argument on the ground that the committee members were acting pursuant to their oath as Senators when they issued the warrant. When committee members act on matters within their knowledge, probable cause exists for the action of the committee. The warrant withstood constitutional muster.

Daugherty also claimed that the warrant was deficient because it stated that he be "brought before the bar of the Senate then and there" to testify. It was not a subpoena to appear before the Senate, nor did he refuse to do so. The Court dismissed this assertion, because it considered the warrant an auxiliary process used by the committee that was acting for the Senate to compel the witness to provide testimony sought by the subpoena.

The Court finally addressed the central issues of the case: the constitutional authority of the Senate to act in such a manner; and whether the warrant in this case was appropriate. It reasoned that while the power to investigate was not explicitly given to Congress by the Constitution, it was traditionally recognized as implicit in the legislative function since it is a means to obtain necessary information. The Court also referred to various federal laws that demonstrated that either house of Congress has the power to commence investigations and gather evidence concerning activities within its jurisdiction; that committees may conduct such investigations; that in order to fully implement the power to investigate, either house may punish uncooperative witnesses; and witnesses may be given IMMUNITY from criminal prosecutions that derive from their testimonies before the committees. Based upon tradition and statutes, the Court concluded that each house of Congress has auxiliary powers that are essential in order to effectuate its express powers, but neither house has unlimited "general" power to investigate private matters and force testimony. The Senate acted within its powers when it authorized a committee to investigate Daugherty. When the committee sought Daugherty's testimony, it was as a means to perform a legislative function since the purpose of the inquiry was to determine whether the attorney general and the Department of Justice—subjects of congressional regulations and appropriations—were properly performing their duties. The Court deemed that Daugherty's seizure and detention were appropriate because of his wrongful refusal to appear and testify before a

lawful congressional committee. It reversed the order of the district court that released Daugherty from custody.

CROSS-REFERENCES

Congress of the United States.

## ♦ MCGRANERY, JAMES PATRICK

James Patrick McGranery was a U.S. representative and a federal judge prior to his appointment as attorney general of the United States. He served as attorney general under President HARRY S. TRUMAN from April 1952 to January 1953.

McGranery was born July 8, 1895, in Philadelphia. His Irish Catholic parents, Patrick McGranery and Bridget Gallagher McGranery, were devout, hardworking, and practical. They sent McGranery to local parochial schools, and they did not discourage their son when he chose to quit school and enter the workforce. McGranery was a high-school student when he landed his first full-time job at a Philadelphia printing plant. He remained a card-carrying member of a Philadelphia printer's union for most of his life.

When the United States entered WORLD WAR I, McGranery left his job to enlist in the Army. He served as a balloon observation pilot and as adjutant with the 111th Infantry. At the end of the war, he returned home with a broader view of the world and a strong determination to resume his education. He entered Philadelphia's Maher Preparatory School in 1919 to complete the entrance requirements for Temple University.

The war experience also sparked McGranery's interest in law and government. While at Temple, and later at Temple Law School, he became active in local ward politics. Soon after graduating and passing the bar examination in 1928, he was tapped by Philadelphia ward bosses to manage the local campaign of Democratic presidential candidate Alfred E. Smith, of New York. Smith ultimately lost his presidential bid, but McGranery was exhilarated by the political process and eager to attempt his own run for office. He hastily made a bid for a vacant clerk-of-court seat, and was defeated.

*James P. McGranery.*
LIBRARY OF CONGRESS

McGranery's introduction to the political process showed him the need for a solid political base, and it convinced him that a base of supporters could be cultivated through the PRACTICE OF LAW. To that end, he established the firm of Masterson and McGranery. He started to represent clients with known political influence, including police officers and firefighters, and leaders of their unions. While building his practice, McGranery made two more failed attempts

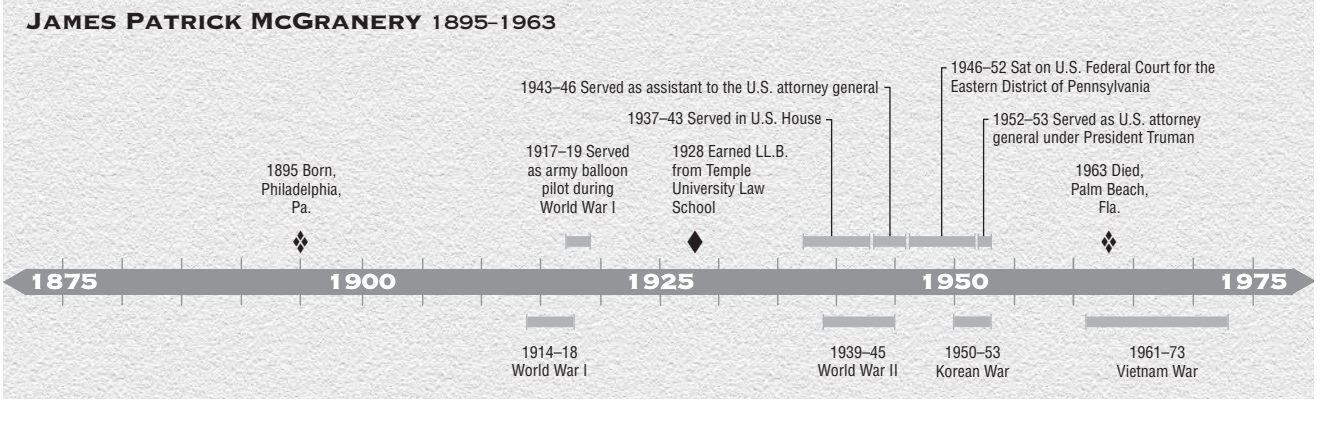

at elected office—as a candidate for district attorney in 1931, and as a candidate for the U.S. Congress in 1934.

Finally, in 1936, McGranery had paid his dues and curried the favor he needed. He was elected as a Democrat to represent Pennsylvania's Second Congressional District, by a margin of almost 25,000 votes over his Republican opponent. He was reelected in 1938, 1940, and 1942. Just before his second term in Congress, McGranery married Attorney Regina T. Clark, of Philadelphia, with whom he had three children: James Patrick, Jr., Clark, and Regina.

During his years in Congress, McGranery served on the House Banking and Currency, Interstate, Foreign Commerce, and Ways and Means Committees. His voting record was consistent with his allegiance to President **FRANKLIN D. ROOSEVELT** and the **DEMOCRATIC PARTY**.

"No specific intent to monopolize is necessary; the only relevant intent is the intent to enter into the business arrangements which give rise to the power."
—James McGranery

McGranery resigned his seat in the fall of 1943 when his congressional district was eliminated by reapportionment. Roosevelt was reluctant to lose McGranery's longtime support, so he offered to create a position for McGranery in the **JUSTICE DEPARTMENT** as assistant to Attorney General **FRANCIS BIDDLE**. McGranery accepted. He served as the department's chief administrative officer and chief liaison with Congress and other federal departments and agencies during the **WORLD WAR II** years. He also reviewed board-of-appeals findings under the Selective Service Act (50 U.S.C.A. App. 451-471a).

After the war, McGranery remained in the Department of Justice to serve as chief assistant to Truman's first attorney general, **TOM C. CLARK**. Though McGranery held a position of prominence, he was not as involved or influential under Clark as he had been under Biddle. History suggests that Clark shut McGranery out of high-profile or sensitive cases, including one involving a vote-fraud allegation in the president's home district; a mail-fraud case against a bond dealer who raised funds for Truman, which was dismissed; and an investigation of *Amerasia,* a left-wing magazine devoted to Asian affairs. McGranery resigned his post in October 1946 to accept an appointment from Truman to the federal bench in the Eastern District of Pennsylvania.

Judge McGranery quickly established a reputation as a tough jurist. Critics described him as high-handed, autocratic, and inclined to favor the government's position on any given issue. Even former attorney general Biddle acknowledged that McGranery was essentially an advocate rather than a judge.

In one celebrated pronouncement, McGranery ruled in 1949 that Representative Earl Chudoff (D-Pa.) could not appear as a defense attorney in McGranery's court because, as a government employee, the congressman had an inherent conflict in representing a client in a federal proceeding (*Chudoff v. McGranery,* 179 F.2d 869).

During his years on the federal bench, McGranery's name was often mentioned in connection with nominations to Democratic Party and government posts including chairman of the Democratic National Committee, postmaster general, and attorney general. It was just as often discounted because of McGranery's personal reputation. McGranery was well-known to be given to emotional outbursts; he had a history of erratic behavior dating back to his early days in the Department of Justice.

Despite warnings from a number of quarters, Truman asked McGranery to fill the attorney general post in the spring of 1952, following the departure of **J. HOWARD MCGRATH**. Truman had reluctantly asked for McGrath's resignation after McGrath had failed to cooperate with, and later fired, a special assistant who had been named to investigate corrupt practices inside the Department of Justice and the Bureau of Internal Revenue. A confirmation committee in Congress briefly raised the issue of McGranery's participation in the *Amerasia* incident and speculated that he might try to block the ongoing Department of Justice investigation just as McGrath had. Nevertheless, after some discussion, McGranery was confirmed as attorney general. To the surprise of many of his longtime critics, he oversaw a thorough inquiry that led to numerous dismissals and prosecutions in both the Department of Justice and the Bureau of Internal Revenue.

McGranery made a number of other contributions as attorney general, including the initiation of antitrust cases in the oil and steel industries, the diamond trade, and magazine wholesaling; the prosecution of American Communist Party leaders; the deportation of organized-crime figures; and the instigation of Department of Justice support for the cause of school **INTEGRATION** in **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS** (347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 [1954]). His office

helped to provide the basis for that decision overruling the "separate-but-equal" doctrine.

At the close of the Truman administration, McGranery practiced law in Washington, D.C., and Philadelphia. He died on December 23, 1962, in Palm Beach, Florida.

## ♦ MCGRATH, JAMES HOWARD

James Howard McGrath, a three-term governor and U.S. senator from Rhode Island, served as SOLICITOR GENERAL and attorney general of the United States under President HARRY S. TRUMAN.

McGrath was born November 28, 1903, in Woonsocket, Rhode Island, and reared in nearby Providence. His father, James J. McGrath, worked as a knitter in a woolen mill before venturing into real estate and insurance. He rose to prominence through his association with the Independent Order of Foresters (a fraternal insurance organization), handling the company's affairs in the New England states. His mother, Ida E. May McGrath, used her training as a bookkeeper to manage the family's financial affairs while her husband was on the road.

As a young boy, McGrath set out to win a subscription contest at a Providence newspaper by targeting his father's business colleagues as potential subscribers. He sold a record number of new subscriptions and, in the process, captured the attention of the newspaper's owner, Rhode Island senator Peter G. Gerry.

When he was not selling newspapers, McGrath attended Providence's La Salle Academy. He completed his undergraduate studies in 1922 and enrolled at Providence College. During his college years, McGrath was a founding member and the first president of the Young Men's Democratic League of Rhode Island.

By graduation day in 1926, McGrath knew he wanted a career in politics. While waiting to attend law school, McGrath approached Senator Gerry and asked for a summer job. Gerry remembered the young man and put him to work in his senate office. McGrath worked for Gerry until his graduation from Boston University Law School in 1929. Following his ADMISSION TO THE BAR, McGrath joined a Providence law firm and decided to marry. He and his wife, Estelle A. Cadorette McGrath, had one son, James David McGrath, in 1930.

Though 1929 and 1930 were years of change and new beginnings for McGrath, his interest in politics remained constant. He had been named vice chairman of the Rhode Island Democratic State Committee in 1928; by 1930, he was chairman of the committee and ready to make his own place in the political arena. McGrath's first political appointment came in late 1930 when he was named city solicitor of Central Falls, Rhode Island. He served in that post for four years before resigning to accept a second appointment as U.S. district attorney for Rhode Island in 1934.

With McGrath's growing prominence in legal and business circles came growing influence in Rhode Island's DEMOCRATIC PARTY. From his position as chairman of the Rhode Island Democratic State Committee, he rose to chairman of the Rhode Island delegation at the Democratic National Convention in 1932. Age twenty-eight at the time, he was the youngest man ever to hold the job.

By 1940, he had laid the foundation for a successful bid for the state's highest office. He

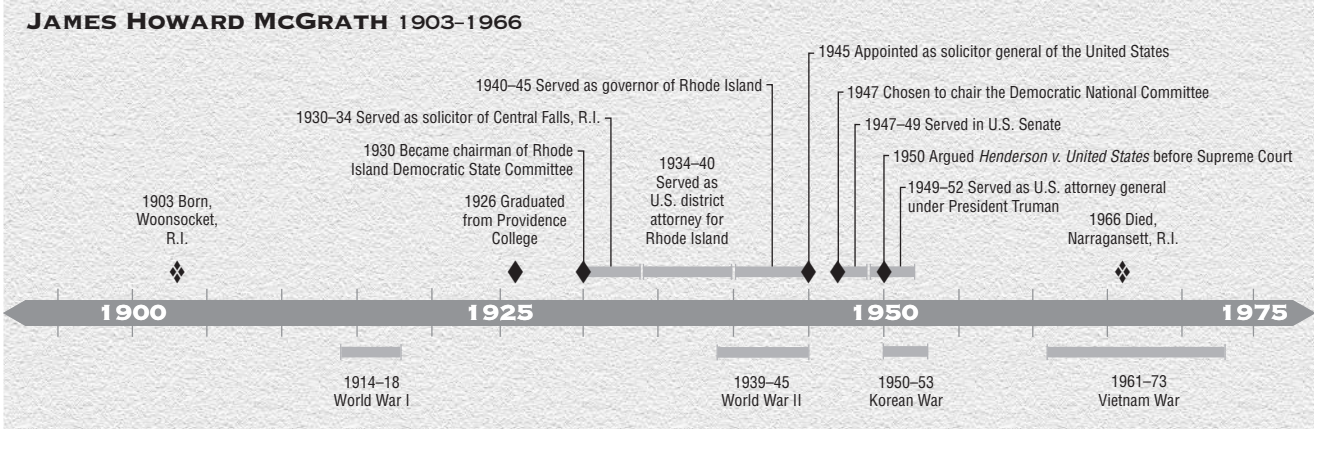

sought and received the gubernatorial nomination from the Democratic party, and he defeated Republican incumbent William H. Vanderbilt by a large margin.

McGrath served as governor of Rhode Island for three consecutive terms. In that office, he revised the state tax structure, reorganized the juvenile court system, established a labor relations board, and started a WORKERS' COMPENSATION fund. During WORLD WAR II, he continued to serve as governor while chairing the Rhode Island State Council of Defense and assisting the U.S. TREASURY DEPARTMENT with war financing activities.

McGrath's work was noticed by national Democratic leaders including President FRANKLIN D. ROOSEVELT. It was not long before he was asked to serve on a committee to organize the 1944 Democratic National Convention and to help secure the presidential nomination for Roosevelt's vice president, Truman. McGrath, who had seconded Truman's vice presidential nomination at the previous convention, was an eager and hardworking member of the committee. He liked Truman—and the feeling was mutual.

"[COMMUNISTS] ARE EVERYWHERE—IN FACTORIES, OFFICES, BUTCHER SHOPS, ON STREET CORNERS, IN PRIVATE BUSINESS—AND EACH CARRIES IN HIMSELF THE GERMS OF DEATH FOR SOCIETY."
—JAMES MCGRATH

After Truman's election, in October 1945, McGrath was rewarded with an appointment to the post of solicitor general of the United States. As solicitor general, he successfully defended the constitutionality of the Public Holding Company Act (15 U.S.C.A. § 79 et seq.) and fully supported an international military tribunal's conviction of Japan's General Tomoyuki Yamashita for WAR CRIMES.

In 1946 McGrath was elected to the U.S. Senate. While in office, McGrath fought the removal of wartime economic controls and the reduction of income taxes instituted during the war years. He thought the additional money should be used to broaden SOCIAL SECURITY initiatives, underwrite national HEALTH INSURANCE, and fund education. He also encouraged his colleagues to speak out on HUMAN RIGHTS issues, charging that in the years before World War II, the United States almost encouraged the Nazis by not speaking out against them.

In September 1947, McGrath became Truman's handpicked candidate to chair the Democratic National Committee and to orchestrate the president's reelection bid. McGrath was formally elected to the post a month later.

Under McGrath's leadership, the party in 1948 waged a tough, and sometimes divisive, national effort that carried many state and local Democratic candidates into office and resulted in Truman's narrow victory over THOMAS E. DEWEY.

After the election, McGrath returned to the Senate. Almost immediately, the Rhode Island Charities Trust came under investigation by a Senate subcommittee. As a trustee, McGrath was called to explain the organization's financial practices. The investigation ran its course without result, but a cloud remained over McGrath's personal finances.

McGrath's declining sphere of influence was most evident when he tried to find support for his legislative initiatives. He continued to sponsor unpopular measures addressing social issues, including a CIVIL RIGHTS bill supported by the administration in late 1949. His efforts to push the bill through the Senate further angered powerful southern Democrats he had offended during the presidential campaign by ending a policy of racially segregating the staff at Democratic national headquarters. (Though this change in policy had caused tremendous turmoil within the party and precipitated a loss of support in many southern states, it had also helped to deliver the crucial black vote needed in 1948 to carry Illinois, New York, and Ohio.)

It was in this climate that McGrath was appointed to replace TOM C. CLARK as U.S. attorney general after Truman named Clark to the U.S. Supreme Court. The press blasted McGrath's appointment, saying it demonstrated a terrible lack of judgment on Truman's part. McGrath resigned his Senate seat in December 1949 to accept the appointment.

With Truman's blessing, McGrath continued to be a strong advocate for civil rights. During his term as attorney general, the JUSTICE DEPARTMENT first challenged the constitutionality of racial SEGREGATION. McGrath argued a number of important cases before the U.S. Supreme Court in the spring of 1950, including a landmark case in which the High Court outlawed discriminatory dining arrangements in railroad cars (*Henderson v. United States,* 339 U.S. 816, 70 S. Ct. 843, 94 L. Ed. 1302).

Though he had a few bright moments, McGrath's subordinates and colleagues did not consider him a particularly effective attorney general. His most egregious error occurred when a House Ways and Means subcommittee uncovered evidence of corruption in the Bureau of

Internal Revenue and in the Tax Division of the Justice Department. Truman's initial response, in January 1952, was to announce that the Justice Department would investigate and clean up any corruption in the government. When critics objected to the Justice Department's investigating itself, the president appointed New York Republican Newbold Morris to conduct an independent investigation of the charges.

Initially, McGrath promised full cooperation, but he had second thoughts when Morris asked him and other top Justice Department officials to complete a detailed financial questionnaire. Calling the questionnaire a violation of individual rights and an invasion of privacy, McGrath refused to complete or submit the document—or to order his subordinates to do so. Three days later, McGrath forced Truman's hand by firing the special investigator and resuming charge of the investigation. In the political uproar that followed, the president had no choice but to ask for McGrath's resignation.

After leaving office, McGrath continued to be active in Democratic politics. In 1956 he managed Senator Estes Kefauver's vice presidential campaign, and in 1960, he made an unsuccessful attempt to regain his old Senate seat. After retiring from politics, he practiced law and managed his many business interests. McGrath died on September 2, 1966, in Narragansett, Rhode Island.

### M.C.J.

*An abbreviation for master of comparative* JURISPRUDENCE*, a degree awarded to foreign lawyers trained in* CIVIL LAW *countries who have successfully completed a year of full-time study of the Anglo-American legal system.*

The M.C.J. degree is ordinarily offered by universities and law schools that have comparative law departments. It is awarded to highly qualified foreign lawyers who intend to return to the legal profession in a foreign country after completion of their studies in the United States.

## ♦ MCKENNA, JOSEPH

Joseph McKenna rose from humble immigrant roots as a baker's son to a position of prominence in California Republican politics. McKenna served as county district attorney (1866–1870), U.S. Congressman, justice of the Ninth U.S. Circuit court (1892–1897), and, briefly, U.S. attorney general (1897). His controversial nomination to the Supreme Court in 1897 led to a twenty-seven-year tenure.

McKenna was born in Philadelphia on August 10, 1843, to Irish immigrant parents. He became head of the family at age fifteen when his father died shortly after moving the eight-member household to California. By age twenty-two, and while working several jobs, McKenna had studied enough law on his own to pass the California bar. One year later, despite little experience, he was elected district attorney for Solano County. He owed his rapid success to help from railroad baron LELAND STANFORD, the state's governor. In time, his loyalty to Stanford earned him three straight Republican nominations for Congress. He finally won in 1885. In Washington, D.C., McKenna opposed business regulations, supported federal land grants to the railroads, and sponsored legislation that would have made Chinese immigrants carry identification cards.

In 1892, on the urging of Stanford, who had become a U.S. senator, President BENJAMIN

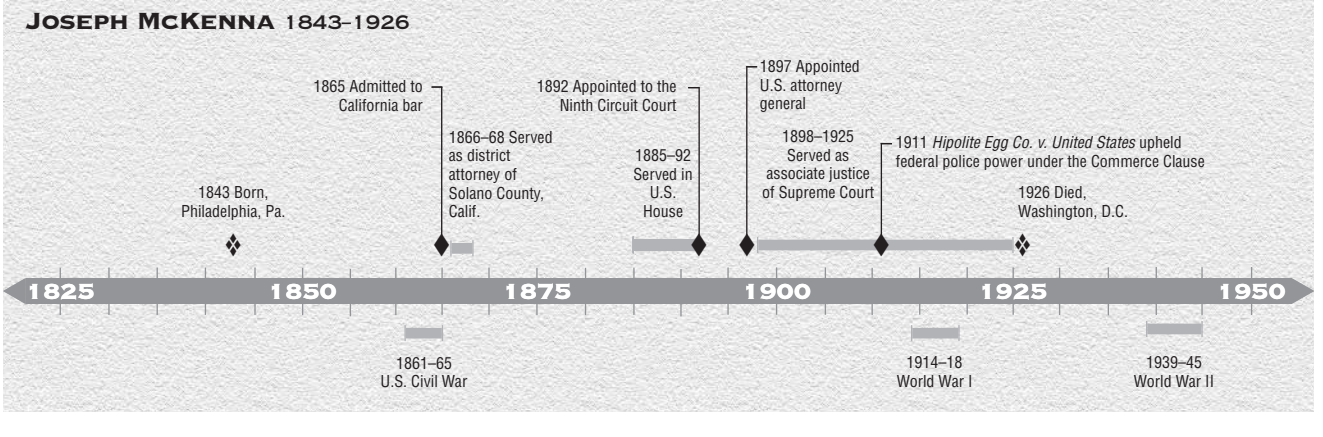

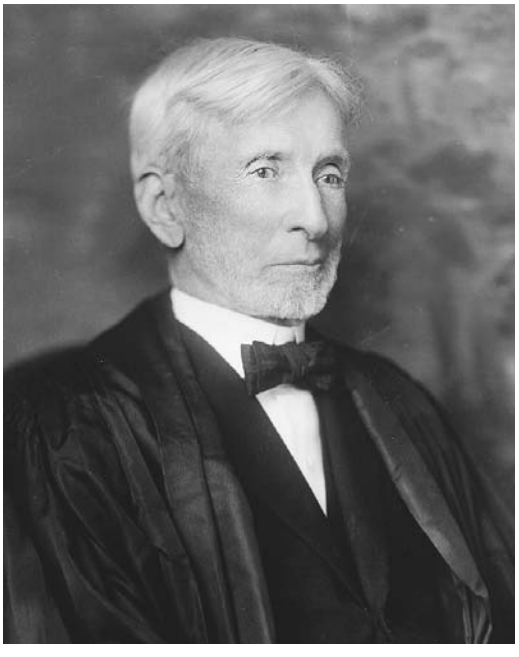

*Joseph McKenna.*
U.S. SUPREME COURT

HARRISON appointed McKenna to the Ninth Circuit Court of Appeals. Opponents protested that McKenna was unqualified and, moreover, beholden to railroad interests, but the nomination succeeded. He held the seat for four years, largely without incident or note; yet occasionally he proved his critics right about his allegiances. In *Southern Pacific Co. v. Board of Railroad Commissioners,* 78 F. 236 (C.C.N.D. Cal. 1896), for example, he blocked the California legislature's attempt to set railroad fares, arguing that the proposed rates were unfair to the railroads.

While serving on the Ways and Means Committee in Congress, McKenna had befriended fellow Republican WILLIAM MCKINLEY. McKinley became president in 1896 and in 1897 made McKenna U.S. attorney general. Only a few months later, McKinley nominated McKenna to fill a vacancy on the U.S. Supreme Court created by the departure of Justice STEPHEN FIELD. Again, there was opposition, with newspapers and lawmakers calling him unfit for the responsibility. However, the nomination succeeded.

Of McKenna's 633 opinions, only a handful were majority opinions. These came in important cases, however, such as *Hipolite Egg Co. v. United States,* 220 U.S. 45, 31 S. Ct. 364, 55 L. Ed. 364 (1911), one of the decisions during the era that upheld federal POLICE POWER under the Constitution's COMMERCE CLAUSE. Generally regarded as a hard-working justice, his body of opinions shows that he developed a pragmatism and clarity of expression in his twenty-seven years on the bench. Slowed by age, he resigned in 1925 under the advice of Chief Justice WILLIAM HOWARD TAFT. He died several months later on November 21, 1926, in Washington, D.C.

FURTHER READINGS

Friedman, Leon, and Fred L. Israel, eds. 1969. *The Justices of the United States Supreme Court, 1789–1969: Their Lives and Major Opinions.* New York: Chelsea House.

## ♦ MCKINLEY, JOHN

John McKinley served on the U.S. Supreme Court as an associate justice from 1837 to 1852. During the 1820s, McKinley built his career in the Alabama legislature. He later served in both the U.S. Senate and the House of Representatives. At a time when westward expansion brought federal and state governments into conflict over the use of land, McKinley was a strong advocate of STATES' RIGHTS and affordable land for settlers. In 1837, President MARTIN VAN BUREN appointed McKinley to the Court, where McKinley sat for 15 years. McKinley complained endlessly about the great deal of travel required by Supreme Court justices at that time. He produced only 20 opinions and two concurrences during his tenure, and he is largely remembered for his dissent on behalf of states' rights in *Bank of Augusta v. Earle,* 38 U.S. (13 Pet.) 519, 10 L. Ed. 274 (1839).

Born in Culpeper County, Virginia, on May 1, 1780, McKinley studied law in Kentucky and passed the bar examination in 1800. While practicing law in Kentucky and later Alabama over the next 20 years, McKinley developed an interest in politics. He won the first of his several elections to the state legislature in 1820. Later, by shrewdly changing political allegiances from presidential candidate HENRY CLAY to the more popular ANDREW JACKSON, he was elected to the U.S. Senate in 1826. His chief concern in office was land legislation. As settlers pushed westward, McKinley favored the interests of small land buyers over those of big speculators. He also argued for the primacy of state control over land within state borders, taking the traditional states'-rights view that denied the validity of federal authority. As his political fortunes rose and fell, McKinley lost a bid for re-election to the Senate in 1830 and then alternated between serving terms in the Alabama legislature and the U.S. House of Representatives.

In 1837, McKinley had returned to the Alabama legislature as a representative when Congress increased the number of seats on the U.S. Supreme Court from seven to nine. President Van Buren first offered one of the seats to another Alabama lawmaker, WILLIAM SMITH, who declined. McKinley accepted, but not without reservation. He was chiefly bothered by the need to travel upwards of 5,000 miles every year.

During McKinley's time, justices had responsibility not only over the Court itself, but also over the federal circuit courts, which required them to travel in a practice known as *circuit riding*. In charge of the largest circuit, the Ninth, McKinley loathed this obligation. Twice, in 1838 and 1842, McKinley asked Congress to absolve him of the responsibility, which he claimed exposed him to undue personal expense and the risk of yellow fever. Embittered by lack of sympathy for his complaints, he sometimes neglected to visit all of the courts in his circuit, a failure that brought him criticism.

In 1839, McKinley wrote his most notable opinion, in the case of *Bank of Augusta v. Earle*. Rooted in a state banking dispute, the case concerned the constitutional limitations of state power to regulate business—specifically, how far a state could go in excluding a corporation from doing business within its borders. On the circuit court, McKinley ruled that states have broad powers, and the opinion provoked outrage from corporations, attorneys, and even McKinley's colleague, U.S. Supreme Court Justice JOSEPH STORY. When the case reached the high court, the 8-to-1 majority took a far more moderate view. In dissent, McKinley adhered to his position: A state could properly limit business activity to corporations that were chartered in it, and it should be free to reject the business of any outside corporation.

*John McKinley.*
ETCHING BY ALBERT ROSENTHAL. ARCHIVE PHOTOS, INC.

As his health deteriorated in his later years, McKinley did less circuit riding, and after 1845 he played a very limited role in the Court's affairs. He remained on the Court until his death in Louisville, Kentucky, on July 19, 1852.

FURTHER READINGS

Friedman, Leon, and Fred L. Israel, eds. 1969. *The Justices of the United States Supreme Court, 1789–1969: Their Lives and Major Opinions.* New York: Chelsea House.

"THE NATURAL SOCIETY OF NATIONS CANNOT SUBSIST, IF THE RIGHTS WHICH EACH HAS RECEIVED FROM NATURE ARE NOT RESPECTED."
—JOHN MCKINLEY

## ❖ MCKINLEY, WILLIAM

William McKinley served as the twenty-fifth president of the United States, from 1897 until his death from an assassin's bullet in 1901. A conservative Republican who advocated high tariffs to protect U.S. industry, McKinley waged the SPANISH-AMERICAN WAR and at the end of it gained overseas territories for the United States.

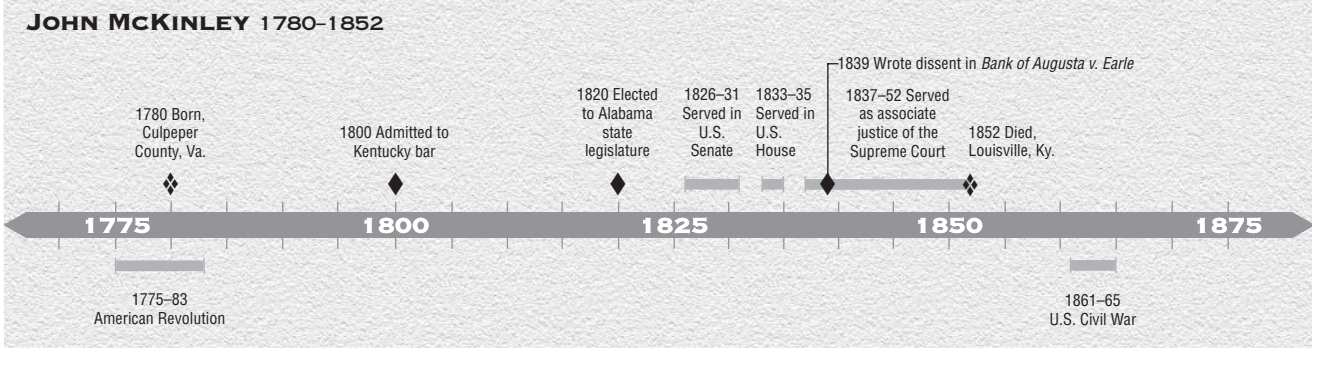

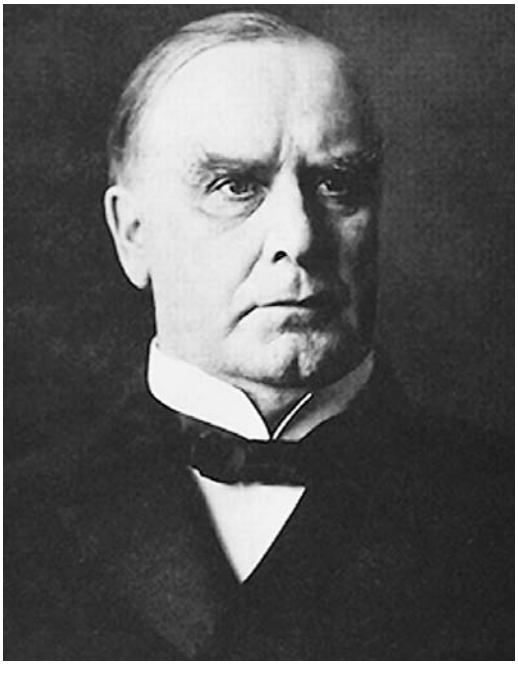

*William McKinley.*
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"LET US REMEMBER THAT OUR INTEREST IS IN CONCORD, NOT IN CONFLICT, AND THAT OUR REAL EMINENCE AS A NATION LIES IN THE VICTORIES OF PEACE, NOT THOSE OF WAR."
—WILLIAM MCKINLEY

McKinley was born January 29, 1843, in Niles, Ohio. As a young man, he briefly attended Allegheny College, in Meadville, Pennsylvania; taught school; and fought in the Union army during the Civil War, attaining the rank of major. McKinley was aide-de-camp to the regimental commander, **RUTHERFORD B. HAYES**, who was later governor of Ohio and the nineteenth U.S. president. After the war McKinley studied law with an attorney and attended Albany Law School, in New York. He was admitted to the Ohio bar in 1867, and established a law practice in Canton, Ohio, which remained his official residence for the rest of his life. From 1869 to 1871, he served as county attorney.

McKinley's political ambitions were nurtured by Hayes. McKinley became active in Ohio Republican politics and was elected to the U.S. House of Representatives in 1876. McKinley was an outspoken advocate of higher tariffs, believing that U.S. industry and U.S. workers were protected by the taxation of imported foreign goods. His stand on tariffs culminated in the McKinley Tariff Act of 1890, which raised duties on many imports to the highest levels up to that time. The act was an unpopular measure, and McKinley was voted out of office in the election of 1890.

McKinley returned to Ohio, where he was elected governor in 1891 and reelected governor in 1893. Mark Hanna, a wealthy Ohio industrialist and a leader in national Republican politics, became McKinley's benefactor and helped him secure the 1896 Republican presidential nomination. The Democratic candidate was **WILLIAM JENNINGS BRYAN**, who supported free coinage of silver, arguing that it would increase the money supply and thus help farmers and small-business owners. McKinley, who advocated retaining the gold standard, defeated Bryan, with Hanna raising large sums of money from big business to support the campaign. The money was used to help fund more than three hundred delegations and more than 750,000 people who traveled to McKinley's front porch in Canton to hear him campaign.

As president, McKinley signed the Currency Act of 1900 (31 Stat. 45), institutionalizing the gold standard until the 1930s. However, his first term was dominated by foreign affairs and overseas territorial expansion. When McKinley took office, a national independence movement had arisen in Cuba, seeking freedom from Spain. The United States tried to remain neutral while negotiating a solution acceptable to both sides. On February 15, 1898, the U.S. warship *Maine* blew up in the Havana harbor. Though later

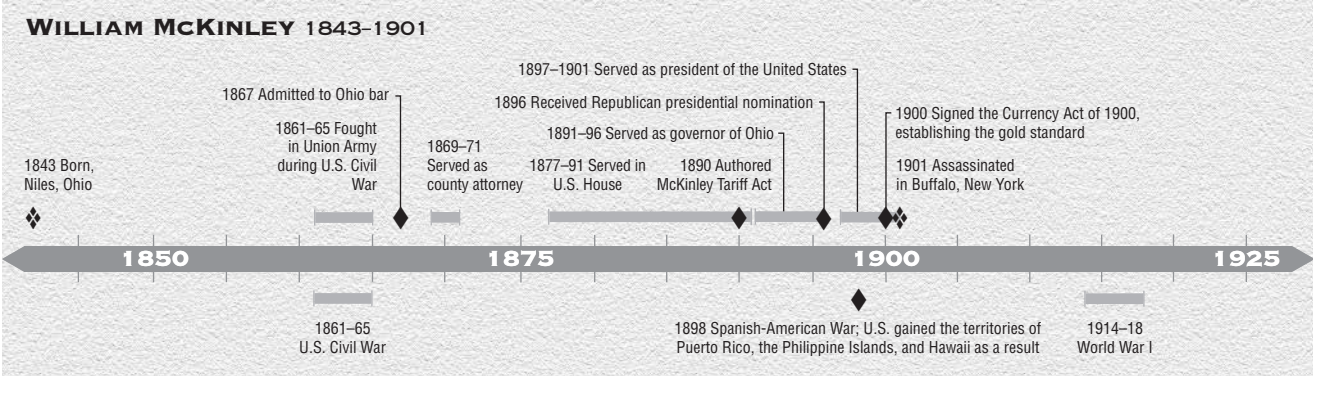

investigation suggested that a boiler explosion sank the *Maine* and killed its crew, immediate public reaction, inflamed by the newspapers owned by William Randolph Hearst, blamed Spain for the attack. At McKinley's request Congress approved a declaration of war.

The Spanish-American War was brief, with Spain agreeing to terms in August 1898. Cuba gained its independence, though the United States reserved the right to intervene to ensure stability. Under the peace treaty, Spain transferred to the United States its claims to Puerto Rico and the Philippine Islands. In addition, the U.S. Congress voted in July 1898 to take possession of the Hawaiian Islands. This territorial expansion increased the United States' international prestige as a imperialist power, but some citizens questioned its constitutionality and whether it fit with the U.S. national character. The U.S. Supreme Court decided the legal question in 1901 in a set of decisions known as the *Insular* cases. The Court held that these new possessions were domestic territory of the United States, under the full control of Congress, and the residents of these new dependencies did not have the rights of citizens (*De Lima v. Bidwell,* 182 U.S. 1, 21 S. Ct. 743, 45 L. Ed. 1041; *Downes v. Bidwell,* 182 U.S. 244, 21 S. Ct. 770, 45 L. Ed. 1088).

In the 1900 presidential election, McKinley easily again defeated Bryan, who continued to campaign for free silver and against U.S. imperialism.

On September 6, 1901, McKinley was shot by Leon F. Czolgosz, an anarchist who had dreamed of killing a prominent person, at the Pan-American Exposition, in Buffalo, New York. An infection set into McKinley's wound, and he died September 14, in Buffalo. Vice President THEODORE ROOSEVELT succeeded McKinley as president.

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## MCKINNEY ACT

The Stewart B. McKinney Homeless Assistance Act, 42 U.S.C.A. 11301 et seq. (1989 Supp.), was named after the Republican congressman from Connecticut. It authorizes the HOUSING AND URBAN DEVELOPMENT DEPARTMENT to coordinate the disbursement of unused federal property to community groups interested in providing shelter to HOMELESS PERSONS, especially elderly persons, handicapped persons, families with children, Native Americans, and veterans. The Interagency Council on the Homeless (Pub. L. No. 100-77, 101 Stat. 484, 42 U.S.C.A. 11301 (b) (1) [1989]) distributes information on how to use benefits under the act.

Initially, priority to receive excess properties was given to homeless providers rather than local communities. However, the Base Closure and Community Redevelopment Act of 1994 (Pub. L. No. 103-421, Oct. 25, 1994, 108 Stat. 4346) amended the McKinney Act by eliminating homeless providers' priority. The result is that homeless providers' needs are considered simultaneously in a community's reuse planning.

Funding and support for the McKinney Act has been reduced, especially with the 1996 WELFARE reform, because the act functions in connection with other related legislation. In one recent funding cycle, nearly three thousand requests for transitional housing were submitted, but only 818 proposals could be funded under the act.

In 1996, to assist homeless individuals, the 104th Congress appropriated $823 million for the emergency shelter grants program (as authorized under subtitle B of title IV of the McKinney Act), the supportive housing program (as authorized under subtitle C of title IV of the McKinney Act), the section 8 moderate rehabilitation single room occupancy program (as authorized under the United States Housing Act of 1937 [Sept. 1, 1937, ch. 896, 50 Stat. 888], as amended, pursuant to section 441 of the McKinney Act), and the shelter plus care program (as authorized under subtitle F of the title IV of the McKinney Act) (110 Stat 2874).

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"IN THE [DRED SCOTT V. SANDFORD] ARGUMENT, IT WAS SAID THAT A COLORED CITIZEN WOULD NOT BE AN AGREEABLE MEMBER OF SOCIETY. THIS IS MORE A MATTER OF TASTE THAN LAW . . . [FOR] UNDER THE LATE TREATY WITH MEXICO WE MADE CITIZENS OF ALL GRADES, COMBINATIONS, AND COLORS."
—JOHN MCLEAN

## ♦ MCLEAN, JOHN

John McLean served as associate justice on the U.S. Supreme Court for thirty-two years, one of the longest tenures in the history of the Court.

McLean was born on March 11, 1785, in New Jersey but was raised primarily near Lebanon, Ohio, where his father staked out land that later became the family farm. McLean attended a county school and later was tutored by two schoolmasters, Presbyterian ministers,

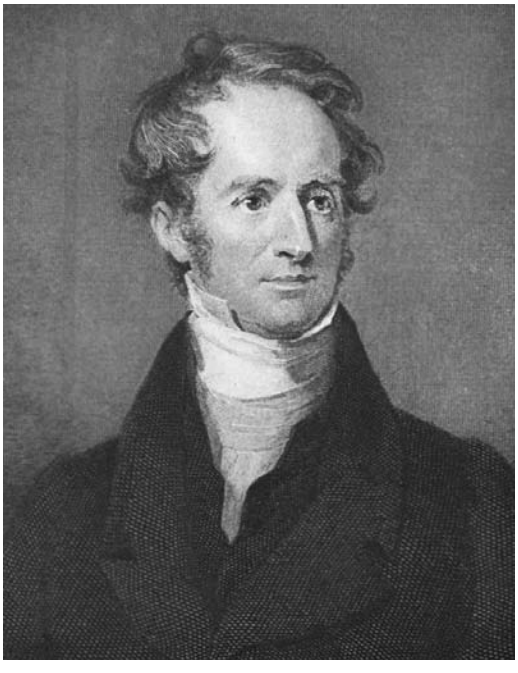

*John McLean.*
LIBRARY OF CONGRESS

and paid them with money he earned working as a farm hand. In 1804, at the age of nineteen, he began working as an apprentice to the clerk of the Hamilton County Court of Common Pleas in Cincinnati and also studied law with Arthur St. Clair and John S. Gano, two distinguished Cincinnati lawyers.

In 1807 McLean was admitted to the bar, married, and returned to Lebanon to open a printing office. He began publishing the Lebanon *Western Star,* a partisan journal supporting the Jeffersonian party. Three years later McLean gave his newspaper and printing business to his brother to concentrate full-time on the PRACTICE OF LAW. At the same time, McLean, who had been raised Presbyterian, converted to Methodism, an experience that would have a strong impact throughout his life. He was active in church affairs and wrote articles about the Bible, and in 1849 he was named honorary president of the American Sunday School Union.

In 1812, after a year serving as examiner in the U.S. Land Office in Cincinnati, McLean was elected to the U.S. House of Representatives at the age of twenty-seven and was reelected two years later. During his two terms in the House, McLean was a staunch supporter of President JAMES MADISON and his efforts to wage the WAR OF 1812. McLean, unhappy with the salary paid to members of Congress and wanting to be closer to his wife and children, chose not to run again in 1816 and returned home. Back in Ohio, McLean easily won election to one of four judgeships on the Ohio Supreme Court, a demanding position that required him to "ride the circuit," or hear cases throughout the state.

In 1822 McLean was again drawn to politics and made an unsuccessful bid for the U.S. Senate. Shortly after McLean lost the election, President JAMES MONROE appointed him commissioner of the General Land Office in Washington, a direct result of McLean's earlier hard work to secure Monroe's nomination for the presidency. The position meant a large increase in salary and led to McLean's appointment the next year to the position of postmaster general. During his six years as postmaster general, McLean expanded the number of routes and deliveries, established thousands of new post offices, and increased the size of the U.S. POSTAL SERVICE to almost 27,000 employees.

Though he served as postmaster under JOHN QUINCY ADAMS, McLean used his considerable political skills to establish ties with ANDREW JACKSON, who defeated Adams for the presi-

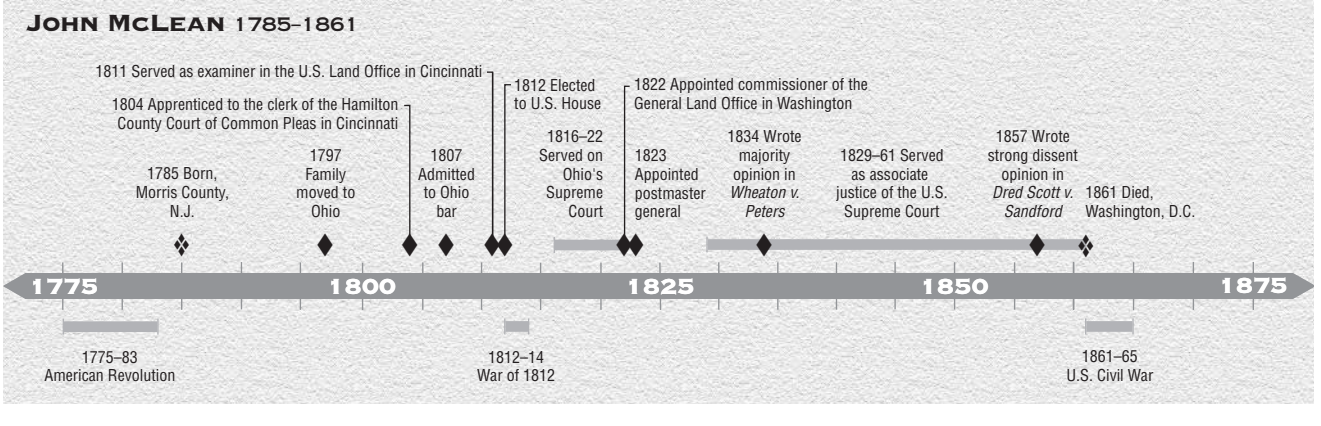

dency in 1828. As a result, McLean was appointed to the U.S. Supreme Court, winning confirmation easily.

McLean remained interested in politics during his tenure on the Supreme Court and was even seriously considered as a nominee for the presidency at several national conventions, though his name was withdrawn from consideration each time. His last bid came in 1860, a year before his death, when he was one of the Republican party's candidates. The nomination instead went to ABRAHAM LINCOLN.

While an associate justice on the High Court, McLean wrote a number of significant opinions, including a strong dissent in the *Dred Scott* case of 1857 (DRED SCOTT V. SANDFORD, 60 U.S. 393 (Mem), 19 How. 393, 15 L. Ed. 691). In *Dred Scott,* a slave sued his master for freedom after he had been taken to live on free soil for several years. The Supreme Court held that African Americans could not be U.S. citizens and that Congress could not pass legislation preventing SLAVERY. McLean, however, who had long opposed slavery, argued that Congress could exclude slavery from the territories and could also liberate slaves living in "free" states. McLean's most significant majority opinion came in 1834 in WHEATON V. PETERS, a dispute between two of the Court's reporters of decisions (33 U.S. 591, 8 Pet. 591, 8 L. Ed. 1055 (Mem.) (U.S. Pa., Jan. Term 1834)). Richard Peters sought to republish decisions that had previously been published by HENRY WHEATON, his predecessor. Wheaton, worried that he would sell fewer opinions and thus lose profits, sued Peters, alleging COPYRIGHT infringement. McLean, writing for the Court, held that the opinions were in the public domain and thus no copyright had been violated.

Though McLean enjoyed a long and distinguished career as a jurist, his personal life was less happy. Three of his four daughters died young, as did a brother, and he also lost his first wife in 1840. He and his second wife had one son who died only a few weeks after birth. Though McLean's own health began to fail as early as 1859, he continued to serve on the Court until his death from pneumonia April 4, 1861.

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## MCNABB-MALLORY RULE

*A federal judicial doctrine that operates to exclude from evidence a confession that is obtained from a person who was not brought before a judicial officer promptly after the person's arrest.*

The McNabb-Mallory rule, which is applicable only in federal prosecutions, derives from the U.S. Supreme Court cases of *McNabb v. United States,* 318 U.S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943), and *Mallory v. United States,* 354 U.S. 449, 77 S. Ct. 1356, 1 L. Ed. 2d 1479 (1957). The McNabb-Mallory rule is not a constitutional rule but is based on federal law and on the federal judiciary's authority to oversee the administration of criminal justice within the federal courts. The purpose of the rule is to provide protection against an arresting officer's "secret interrogation" of a suspect prior to the suspect's appearance before a judicial officer. Before *McNabb,* authorities could effectively and without penalty delay a suspect's presentment before a judicial officer in order to obtain a confession. *McNabb* held that the penalty for obtaining confessions as a result of such a delay is the exclusion of the confession at trial.

In *McNabb,* a federal revenue agent was killed when agents attempted to arrest members of the McNabb family, a clan of Tennessee mountaineers. The agents subsequently arrested three of the McNabbs and placed them in a detention cell for more than fourteen hours. Over the course of the next two days, federal agents interrogated the McNabbs and finally obtained confessions from them. Based primarily on these confessions, which were admitted into evidence at trial, a jury convicted the McNabbs of second-degree murder. On appeal, however, the U.S. Supreme Court held that the McNabbs' confessions should have been excluded from trial because the federal agents had improperly obtained the confessions by delaying their appearance before a judicial officer. A federal law at the time required federal law officers to take a person charged with any crime before the nearest U.S. commissioner or judicial officer. Relying on this law and on the Court's supervisory authority to oversee justice in the federal court system, the Court held that the confessions should have been excluded from evidence at trial. The Court noted in its decision that the arresting officers had "subjected the accused to the pressures of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arrest-

ing officers of the Government and which tends to undermine the integrity of the criminal proceeding."

Federal courts questioned whether the *McNabb* EXCLUSIONARY RULE applied only in determining whether a confession was voluntary or whether it applied only when the presentation of the arrested person before a federal magistrate was unnecessarily delayed. Subsequently, the Supreme Court in *Upshaw v. United States,* 335 U.S. 410, 69 S. Ct. 170, 93 L. Ed. 100 (1948), clarified that a confession was "inadmissible if made during the illegal detention due to failure promptly to carry a prisoner before a committing magistrate."

The *McNabb* case preceded the adoption of the Federal Rules of Criminal Procedure in 1944. Rule 5(a) provided that an arresting officer must bring an arrested person "without unnecessary delay" before the nearest available federal magistrate. In *Mallory,* the Court held that the *McNabb* ruling concerning exclusion of improperly obtained confessions applied equally to rule 5(a). Justice FELIX FRANKFURTER, writing for the Court, stated:

> The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on "probable cause." The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of PROBABLE CAUSE may be promptly determined. The arrested person may, of course, be "booked" by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.

Because the defendant in *Mallory* had been interrogated for more than seven hours, during which time a judicial officer was readily available for ARRAIGNMENT, the Court held that the defendant's confession should have been excluded from evidence at trial.

The McNabb-Mallory rule is not mandated by the Constitution. As a result, Congress frequently attempted to repeal the McNabb-Mallory rule by legislative act. Finally, in 1968, Congress passed the Omnibus Crime Control and Safe Streets Act (42 U.S.C.A. § 3701 et seq.), which allowed the admission of a confession at trial as long as the confession was "voluntary." The act made the delay in an arrested person's appearance before a judicial officer one of several factors for the courts to consider in determining whether the person's confession was voluntary and therefore admissible. Nevertheless, Supreme Court cases since *McNabb* and *Mallory* have mandated the McNabb-Mallory rule in certain cases, such as requiring that a person be brought before a federal magistrate promptly after arrest in a case of an arrest without a warrant. The McNabb-Mallory rule stands for the proposition that the federal judiciary may supervise the administration of justice in the federal courts and, in the exercise of that function, exclude evidence obtained in violation of federal law.

Although the McNabb-Mallory rule is not applicable to prosecutions of individuals in state court proceedings, some states have a similar rule. Other states exclude confessions of a defendant only if the confession was involuntarily made during the period of pre-arraignment detention.

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CROSS-REFERENCES

Criminal Law; Criminal Procedure.

## ♦ MCREYNOLDS, JAMES CLARK

James Clark McReynolds served as an associate justice of the U.S. Supreme Court from 1914 to 1941. McReynolds was a very conservative justice who gained prominence for his opposition to the NEW DEAL legislation of the 1930s and for his unprecedented number of opinions declaring acts of Congress unconstitutional.

McReynolds was born on February 3, 1862, in Elkton, Kentucky, the son of a prominent surgeon. McReynolds graduated from Vanderbilt University in 1882 and then attended the University of Virginia law school, graduating in 1884. He established a law practice in Nashville and became a successful business attorney. In 1900 he was appointed a professor of law at Vanderbilt.

During the period 1886 to 1900, McReynolds established himself as a conservative Democrat, running unsuccessfully in 1886 for Congress despite substantial Republican

support. Although a Democrat, he found favor with Republican president **THEODORE ROOSEVELT**, who appointed McReynolds assistant U.S. attorney general in 1903. He remained in the **JUSTICE DEPARTMENT** until 1907.

In that year he moved to New York and joined a large law firm. In 1913 Democratic president **WOODROW WILSON** appointed McReynolds attorney general. He gained prominence for his prosecution of antitrust cases but left the post in 1914 when Wilson appointed him to the Supreme Court.

McReynolds's conservatism was consistent and unbending. He believed in a restricted role for the federal government, which meant that he opposed federal social and economic regulation. His views matched those of most of his fellow justices during the 1920s and 1930s, but the Great Depression and the New Deal legislation of President **FRANKLIN D. ROOSEVELT** soon put McReynolds in the spotlight. McReynolds, along with Justices **GEORGE SUTHERLAND**, **WILLIS VAN DEVANTER**, and **PIERCE BUTLER**, a group known as the "Four Horsemen," became the core of opposition to federal efforts to revitalize the economy and create a social safety net. McReynolds voted with the majority to strike down as unconstitutional the **NATIONAL INDUSTRIAL RECOVERY ACT**, 48 Stat. 195 (1933), in *Schechter Poultry Corporation v. United States,* 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935), and the Agricultural Adjustment Act, 7 U.S.C.A. § 601 et seq., in *United States v. Butler,* 297 U.S. 1, 56 S. Ct. 312, 80 L. Ed. 477 (1936).

As McReynolds and the Court struck down each new piece of New Deal legislation, Roosevelt became frustrated. He proposed a "court-packing" plan that would have added additional justices to the Court, in hope of gaining a more sympathetic majority. Although Congress rejected Roosevelt's plan, the national debate over the role of the federal government and the recalcitrance of the Supreme Court led more moderate members of the Court to change their positions and vote in favor of New Deal proposals.

*James C. McReynolds.*
LIBRARY OF CONGRESS

McReynolds was outraged at this switch and the resulting expansion of the federal government. Now in the minority, he issued stinging dissents against what he believed were unconstitutional acts by the national government. In *Steward Machine Co. v. Davis,* 301 U.S. 548, 57 S. Ct. 883, 81 L. Ed. 1279 (1937), he dissented from a decision that upheld the **SOCIAL SECURITY ACT OF** 1935, 42 U.S.C.A. § 301 et seq., castigating the idea that the Constitution gave the federal

"LOGIC AND TAXATION ARE NOT ALWAYS THE BEST FRIENDS."
—JAMES MCREYNOLDS

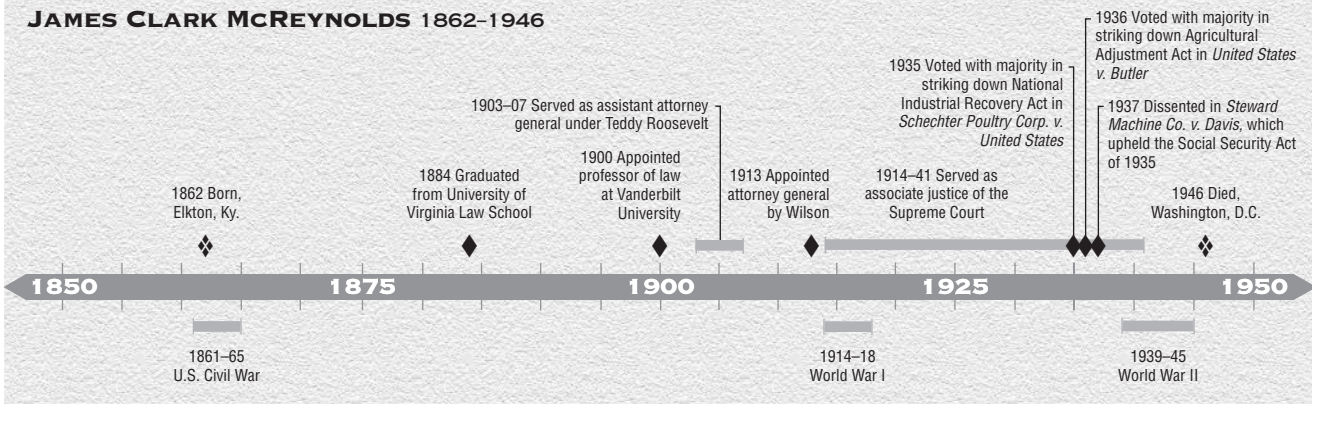

government the right to provide "public charity throughout the United States."

On a personal level, McReynolds ranks as one of the most troubling figures ever to sit on the Court. A virulent anti-Semite, McReynolds treated Justices LOUIS D. BRANDEIS and BENJAMIN N. CARDOZO, both Jews, with undisguised contempt. He refused to sign joint opinions with Brandeis or sit next to Brandeis at official Court ceremonies.

Increasingly isolated, McReynolds retired in 1941. He died on August 24, 1946, in Washington, D.C.

## MECHANIC'S LIEN

*A charge or claim upon the property of another individual as security for a debt that is created in order to obtain priority of payment of the price or value of work that is performed and materials that are provided in the erection or repair of a building or other structure.*

CROSS-REFERENCES

Lien.

## MEDIATION

*A settlement of a dispute or controversy by setting up an independent person between two contending parties in order to aid them in the settlement of their disagreement.*

In INTERNATIONAL LAW, mediation is the friendly interference of one state in the controversies of nations. It is recognized as a proper action to promote peace among nations.

The individual who intervenes in order to help the other parties settle their dispute is called a *mediator.*

CROSS-REFERENCES

Alternative Dispute Resolution.

## MEDIATION, INTERNATIONAL LAW

One of the procedures for the peaceful settlement of international disputes is mediation, which is the direct participation by a third country, individual, or organization in resolving a controversy between states. The mediating state may become involved at the request of the parties to the dispute or on its own initiative. In its role as mediator the intervening state will take part in the discussions between the other states and may propose possible solutions. A related procedure is the offer of good offices, where a state will take various actions to bring the conflicting states into negotiations, without necessarily taking part in the discussions leading to settlement.

## MEDICAID

*A joint federal-state program that provides* HEALTH CARE *insurance to low-income persons.*

Medicaid was enacted in 1965 as an amendment to the Social Security Act of 1935 (title XIX, 42 U.S.C.A. § 1396), entitling low-income persons to medical care. The program is a joint federal-state endeavor, with the federal government providing money to the states, which provide additional financing and administer medical programs for the poor that satisfy federal standards. Medicaid has become a major social WELFARE program. By 1995, 34 million people were covered by Medicaid, including 17 million children.

Before 1965, a patchwork of programs financed by state and local governments, along with charities and community hospitals, provided indigent persons with limited health care. Most of these programs provided emergency health care services. President LYNDON B. JOHNSON supported Medicaid as well as MEDICARE legislation for retired persons in 1965. The enactment of Medicaid meant that persons who met federal financial eligibility requirements were entitled to health care.

Medicaid furnishes at least five general categories of treatment: inpatient hospital services, outpatient hospital services, laboratory and X-ray services, skilled nursing home services, and physicians' services. Generally, each of these services is available to treat conditions that cause acute suffering, endanger life, result in illness or infirmity, interfere with the capacity for normal activity, or present a significant handicap. In addition, all states provide eye and dental care and prescription drugs. Almost all states provide physical therapy, hospice care, and rehabilitative services.

Medicaid is a "vendor" plan because payment is made directly to the vendor (the person or entity that provides the services) rather than to the patient. Only approved nursing homes, physicians, and other providers of medical care are entitled to receive Medicaid payments for their services. Since the early 1970s, rising medical costs have placed financial pressures on the

*A sample mechanic's lien*

**Mechanics Lien**

**NOTICE OF CLAIM OF MECHANICS LIEN**

The undersigned claimant hereby claims a mechanic's lien under section

_____

of the Civil Code of the State of _____ and hereby declares the following:

1. That a statement of claimant's demand, after deducting all just credits and offsets, in the sum of

   $_____.

2. That the name of the owner[s], or reputed owner[s] of the property is [are]:

   _____

   _____

3. A general statement of the kind of work done or materials furnished by claimant, or both is:

   _____

   _____

   _____

   _____

4. That the name[s] of the person[s] by whom claimant was employed or to whom claimant furnished the materials is [are]

   _____

   _____

5. A description of the property sought to be charged with the lien is:

[legal description of property].

DATED: _____

_____
[Signature of Claimant]

Medicaid program. Consequently, health care providers are not fully reimbursed for the services they provide to Medicaid patients. Because of lower reimbursement payments, one-third of physicians limit the number of Medicaid patients they see, and one-quarter of them refuse to accept any Medicaid patients.

The federal government, through statutes and regulations, has enacted an increasing number of criteria for the states to follow in administering the Medicaid program. For example, from 1987 to 1992, the federal government imposed 30 mandates on states that related to eligibility, reimbursement, and services. The intent of these mandates was to reduce variations among the states and to create more consistency in the coverage to low-income persons.

Under federal law, states cannot reduce other welfare benefits that people receive when they become eligible for Medicaid. State plans cannot impose a citizenship or residency requirement other than requiring that an applicant be a resident of the state. No age requirement exists, and everyone receiving welfare may

apply for Medicaid. People who are "medically needy" because they are unable to cover costs for their medical care are also eligible, even if their incomes or resources exceed the level that would qualify them for welfare. Beginning in 1988, Medicaid was extended to the "working poor"—low-income persons who have jobs with no health coverage.

When Medicaid began, persons who were eligible had the right to select their own doctors, hospitals, or other medical facilities. Because of skyrocketing medical expenditures, almost all states have received waivers from the federal government concerning the choice of physician. These states now direct most of their Medicaid clients to private, MANAGED CARE programs. *Managed care* is a general term that refers to health plans that attempt to control the cost and quality of care by coordinating medical and other health-related services.

The federal government has also granted waivers to states that prefer to pay for home and community care for elderly beneficiaries who otherwise would end up in nursing homes. This type of care is less expensive than nursing home care and allows state funds to be stretched further.

The federal government reimburses states based mainly on their per capita income. States with high per capita incomes, such as New York and Illinois, receive 50 cents from the federal government for every dollar they spend on Medicaid. Poorer states receive more, with Mississippi receiving reimbursement of 79 percent. The average reimbursement level is 57 percent.

Medicaid FRAUD has plagued the program. The size and complexity of the system, with each state administering Medicaid differently, create opportunity for health care providers and state employees to engage in abuse. It is estimated that ten percent of Medicaid expenditures are paid on fraudulent claims by vendors. Relatively little fraud is attributable to individuals who provide false information to receive Medicaid benefits.

Another problem for Medicaid has been the growing number of middle-class, elderly persons who divest their assets, usually to their children, to meet the Medicaid financial guidelines and qualify for state-paid nursing home care. This practice results in cases where the truly needy cannot find a bed in a nursing home. In addition, the divestiture of assets imposes additional financial pressures on a program that already has difficulty meeting the demands of the truly needy. If an individual or couple gives away or sells a resource at less than fair market value, the SOCIAL SECURITY ADMINISTRATION must report such a transfer to the state Medicaid agency. A TRANSFER OF ASSETS may result in a period of ineligibility for certain Medicaid-covered nursing home services.

The U.S. Supreme Court, in *Wisconsin Department of Health and Family Service v. Blumer*, 534 U.S. 473, 122 S. Ct. 962, 151 L. Ed. 2d 935 (2002), upheld a Medicaid formula for determining Medicaid eligibility for a person needing nursing home care. More than 30 states developed Medicaid rules that used an "income-first" formula, while the remainder of the states used a "resource-first" formula to help determine eligibility for Medicaid assistance and the proper amount of income for the community spouse. The "income-first" rule generally calls upon the community spouse to count more of his or her assets toward his spouse's nursing home care. The "resource-first" rule allows the spouse to keep more assets, in the belief that income from these assets will help to support the community spouse.

The state of Wisconsin used the income-first formula. A married coupled challenged this formula, and the U.S. Supreme Court determined that either formula could be used by a state without violating the Medicare Catastrophic Coverage Act of 1988 (MCCA). The Court placed great emphasis on the fact that the HEALTH AND HUMAN SERVICES DEPARTMENT (HHS) had issued several statements in support of the income-first rule and noted that in late 2001 HHS had proposed a rule that would formalize this support.

The seriousness of these fraudulent transfers led Congress in 1996 to make a person criminally liable who "knowingly and willfully disposes of assets (including by any transfer in trust) in order for an individual to become eligible for medical assistance" (42 U.S.C.A. § 1320a–7b(a)). A person convicted of this offense may be fined $25,000 and imprisoned for five years.

The Balanced Budget Act of 1997 provided a new opportunity for states to further expand HEALTH INSURANCE coverage for children under Medicaid. The legislation created a new State Children's Health Insurance Program under Title XXI of the SOCIAL SECURITY ACT. Funding is available to states for this voluntary program.

A state's allotment may be used to expand Medicaid, to develop a new program or to expand an existing program to provide health insurance to uninsured children, or to implement a combination of the two approaches. Up to ten percent of a state's allotment may be used for administrative costs, outreach, or other health care services for children. The new funds must be used to serve children below age 19 living in families with incomes at or below 200 percent of the federal poverty level.

The increase in state and federal expenditures on Medicaid ($240 billion in 2003) and in federal mandates to states on administration of the program have led to calls for reform. Reform efforts, which have been based on the payment to the states of block grants for medical assistance, have been unsuccessful. President GEORGE W. BUSH asked Congress to consider a block grant program for Medicaid in his 2003 legislative proposals. His proposal would give more authority to the states to set eligibility requirements. By 2003, 45 million people qualified for Medicaid assistance.

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CROSS-REFERENCES

Health Care Law; Health Insurance.

## MEDICAL EXAMINER

*A public official charged with investigating all sudden, suspicious, unexplained, or unnatural deaths within the area of his or her appointed jurisdiction. A medical examiner differs from a* CORONER *in that a medical examiner is a physician. Medical examiners have replaced coroners in most states and jurisdictions.*

Medical examiners determine such things as the positive identification of a corpse, the time of death, whether death occurred at the location where the corpse was found, and the manner and cause of death. They conduct autopsies and other medical tests to determine any or all of the details of death. They often work in conjunction with a legal team, such as a state prosecutor's office, and will testify at trial as to their findings and determinations. In that regard, a medical examiner's testimony is that of an expert witness, subject to cross-examination by counsel or refutation by the testimony of other expert witnesses.

## MEDICAL MALPRACTICE

*Improper, unskilled, or negligent treatment of a patient by a physician, dentist, nurse, pharmacist, or other* HEALTH CARE *professional.*

NEGLIGENCE is the predominant theory of liability concerning allegations of medical malpractice, making this type of litigation part of TORT LAW. Since the 1970s, medical malpractice has been a controversial social issue. Physicians have complained about the large number of malpractice suits and have urged legal reforms to curb large damage awards, whereas tort attorneys have argued that negligence suits are an effective way of compensating victims of negligence and of policing the medical profession.

A person who alleges negligent medical malpractice must prove four elements: (1) a duty of care was owed by the physician; (2) the physician violated the applicable standard of care; (3) the person suffered a compensable injury; and (4) the injury was caused in fact and proximately caused by the substandard conduct. The burden of proving these elements is on the plaintiff in a malpractice lawsuit.

Physicians, as professionals, owe a duty of care to those who seek their treatment. This element is rarely an issue in malpractice litigation, because once a doctor agrees to treat a patient, he or she has a professional duty to provide competent care. More important is that the plaintiff must show some actual, compensable injury that is the result of the alleged negligent care. Proof of injury can include the physical effects of the treatment performed by the physician, but it can also include emotional effects. The amount of compensation at issue is usually a highly contested part of the litigation.

Causation may also be a vigorously litigated issue because a physician may allege that the injuries were caused by physical factors unrelated to the allegedly negligent medical treatment. For example, assume that a physician is sued for the negligent prescription of a drug to a patient with coronary artery disease and that the patient died of a heart attack. The plaintiff's estate cannot recover damages for the heart attack unless there is sufficient proof to show that the medication was a contributing cause.

The critical element is standard of care, which is concerned with the type of medical care that a physician is expected to provide. Until the 1960s the standard of care was traditionally regarded as the customary or usual practice of members of the profession. This standard was referred to as the "locality rule," because it recognized the custom within a particular geographic area. This rule was criticized for its potential to protect a low standard of care as long as the local medical community embraced it. The locality rule also was seen as a disincentive for the medical community to adopt better practices.

Most states have modified the locality rule to include both an evaluation of the customary practices of local physicians and an examination of national medical standards. Physicians are called to testify as expert witnesses by both sides in medical malpractice trials because the jury is not familiar with the intricacies of medicine. Standards established by medical specialty organizations, such as the American College of Obstetricians and Gynecologists, are often used by these expert witnesses to address the alleged negligent actions of a physician who practices in that specialty. Nonconformance to these standards is evidence of negligence, whereas conformance supports a finding of due care.

Other rules govern the standard of care evaluation. A few states apply the "respectable minority rule" in evaluating a physician's conduct. This rule holds that a physician is not negligent merely by electing to pursue one of several recognized courses of treatment. Some states use the "error in judgment rule." This principle exempts a physician from liability if the malpractice is based on the physician's error in judgment in choosing among different methods of treatment or in diagnosing a condition.

Medical malpractice litigation began to increase in the 1960s. Tort lawyers were able to break the traditional "conspiracy of silence" that discouraged physicians from testifying about the negligence of colleagues or serving as expert witnesses. By the 1970s physicians alleged that malpractice claims were interfering with their medical practices, with insurance companies either refusing to write malpractice policies for them or charging inflated premiums.

Over the years, physicians and health care providers argued that malpractice claims were also driving up the cost of health care. They contended that jury verdicts in the millions of dollars had to be passed on to the consumer in the form of higher insurance premiums and physician fees. In addition, many physicians were forced to practice "defensive medicine" to guard against malpractice claims. Defensive medicine refers to the conducting of additional tests and procedures that are not medically necessary but that would assist in defeating a negligence claim.

In response to rising malpractice suits, many states pushed for "tort reform" measures. Such measures limit the amount of damages a patient can recover for noneconomic losses, such as pain and suffering, and PUNITIVE DAMAGES. For example, in 1975, California enacted the Medical Injury Compensation Reform Act, which limits recovery of noneconomic damages at $250,000 and restricts the amount of fees that may be recovered by lawyers. Several other states adopted similar measures based on the California model.

The medical community, however, continued to fight for widespread tort reform among the states, and at the national level. They cited insurance increases in the late 1990s and early 2000s, which put further pressure on doctors' and hospitals' earnings—earnings that had been shrinking under MANAGED CARE. Some areas of medicine were particularly hard hit. In New York and Florida, for example, obstetricians, gynecologists, and surgeons—the doctors who are sued the most frequently—pay more than $100,000 a year for $1 million in coverage.

In 2003, President GEORGE W. BUSH addressed the medical community's concerns by endorsing legislation that would place a $250,000 cap on noneconomic damages at the national level. According to Bush, who spoke before an AMERICAN MEDICAL ASSOCIATION (AMA) advocacy conference, "There are too many frivolous lawsuits against good doctors, and the patients are paying the price." The president cited the fact that the federal government suffers losses of $28 million per year as a result of liability insurance and defensive medicine practices.

Critics who contest tort-reform laws argue that medical malpractice awards account for only one percent of the total yearly NATIONAL HEALTH CARE expenditures. They also claim that such reforms protect insurance companies and physicians, and not the patients. Trial attorneys point the finger at the insurance companies. They claim that insurers keep prices artificially low while competing for market share and new revenue. When the economy is sluggish and the

market is slow, they increase premiums because they are no longer able to use STOCK MARKET gains to subsidize low rates. Proponents of reform continue to maintain, however, that a federal cap will ultimately result in lower medical costs and greater medical access for the general population.

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CROSS-REFERENCES

Health Care Law; Managed Care; Patients' Rights; Physicians and Surgeons.

## MEDICARE

*A federally funded system of health and hospital insurance for persons aged 65 and older and for* DISABLED PERSONS.

The Medicare program provides basic HEALTH CARE benefits to recipients of SOCIAL SECURITY and is funded through the Social Security Trust Fund. President HARRY S. TRUMAN first proposed a medical care program for the aged during the late 1940s, but Medicare was not enacted until 1965, as one of President Lyndon B. Johnson's GREAT SOCIETY programs (42 U.S.C.A. §§ 1395 et seq.).

Medicare went into effect in 1966 and was first administered by the SOCIAL SECURITY ADMINISTRATION. In 1977, the Medicare program was transferred to the newly created Health Care Financing Administration (HCFA). The HCFA is concerned with the development of policies, programs, procedures, and guidance regarding Medicare recipients, the providers of services—such as hospitals, nursing homes, and physicians—and other organizations that are closely related to the Medicare program.

Unlike other federal programs, Medicare is not supported by a large, federal organizational hierarchy. The federal government enters into contracts with private insurance companies for the processing of Medicare claims. Health care providers must meet state and local licensing laws and standards set by the HCFA in order to qualify for Medicare payments for their services.

Eligibility for Medicare does not depend on income. Almost everyone aged 65 and older is entitled to Medicare coverage. Disabled persons under age 65 may receive Medicare benefits after they have been collecting Social Security or railroad disability payments for at least two years. Workers do not have to retire at age 65 in order to be protected by Medicare. People who have not worked long enough under Social Security to receive retirement benefits may enroll in the plan by paying a monthly premium. For those individuals who are not covered under Social Security and who are too poor to pay the monthly premium, MEDICAID, the state and federal program for low-income persons, is available.

Medicare is divided into a hospital insurance program and a supplementary medical insurance program. The Medicare hospital insurance plan is funded through Social Security payroll taxes. It covers reasonable and medically necessary treatment in a hospital or skilled nursing home, meals, regular nursing-care services, and the cost of necessary special care. Medicare also pays for home health services and hospice care for terminally ill patients.

The hospital insurance program extends coverage based on "benefit periods." An episode of illness is termed a benefit period and starts when the patient enters the hospital or nursing home facility and ends 60 days after the patient has been discharged from the facility. A new benefit period starts with the next hospital stay, and there is no limit to the number of benefit periods that a person can have. In any benefit period, Medicare will pay the cost of hospitalization for up to 90 days. The patient must pay a one-time deductible fee for the first 60 days in a benefit period and an additional daily fee called a co-payment for hospital care for the following 30 days. Apart from these payments, Medicare covers the full cost of hospital care.

Medicare also pays for the first 20 days of care in a skilled nursing home and for expenses exceeding a daily minimum amount for the next 80 days when certain conditions show that such care is necessary. Payment also may be made for up to 100 home-health visits provided by a home-health agency for up to 12 months after the patient's discharge from a hospital or nursing home, provided that certain conditions apply.

Medicare's supplementary medical insurance program is financed by monthly insurance premiums paid by people who sign up for coverage, combined with money contributed by the federal government. The government contributes the major portion of the cost of the program, which

is funded out of general tax revenues. Persons who enroll pay small, annual, deductible fees for any medical costs incurred above that amount during the year, and also a regular monthly premium. Once the deductible has been paid, Medicare pays 80 percent for any bills incurred for physicians' and surgeons' services, diagnostic and laboratory tests, and other services. Doctors are not required to accept Medicare patients, but almost all do. Payments may not be made for routine physical checkups, drugs and medicines, eyeglasses, hearing aids, dentures, or orthopedic shoes.

Medicare bases its 80 percent payment for medical expenses on what is considered to be a reasonable charge for each kind of service. The reasonable charge is an amount that is determined by the insurance organizations that process Medicare claims for the federal government, based on the customary charge for that service in that part of the country.

Medicare payments may be sent directly to the doctor or provider of the service or to the patient. In 1994, 93 percent of all charges to Medicare patients for covered physician services were billed directly to the insurance systems rather than to the patients themselves. Thus, few patients need to be reimbursed for payments that they had made directly to the physician or another provider of services. Under either method, the patient receives a notice after the doctor or provider files a medical insurance claim. The notice details the medical service and explains the expenses that are covered by Medicare and are approved; how much of the charge is credited toward the annual deductible amount; and how much Medicare has paid. A person who disagrees with the decision on the claim may ask the insurance company to review the decision. A formal hearing may be held on claims that, if paid, would total at least $100. Cases that involve $1,000 or more can eventually be appealed to a federal court.

The financial future of Medicare has been a hotly debated issue since the 1980s. In 1995, Medicare covered 37 million people. The number of people eligible for Medicare will continue to rise as the post–World War II baby boom generation begins to retire.

Other factors have had an impact on the financial future of Medicare. The quality of medical care has increased life expectancies.

**Medicare Enrollment, 1966 to 2001**

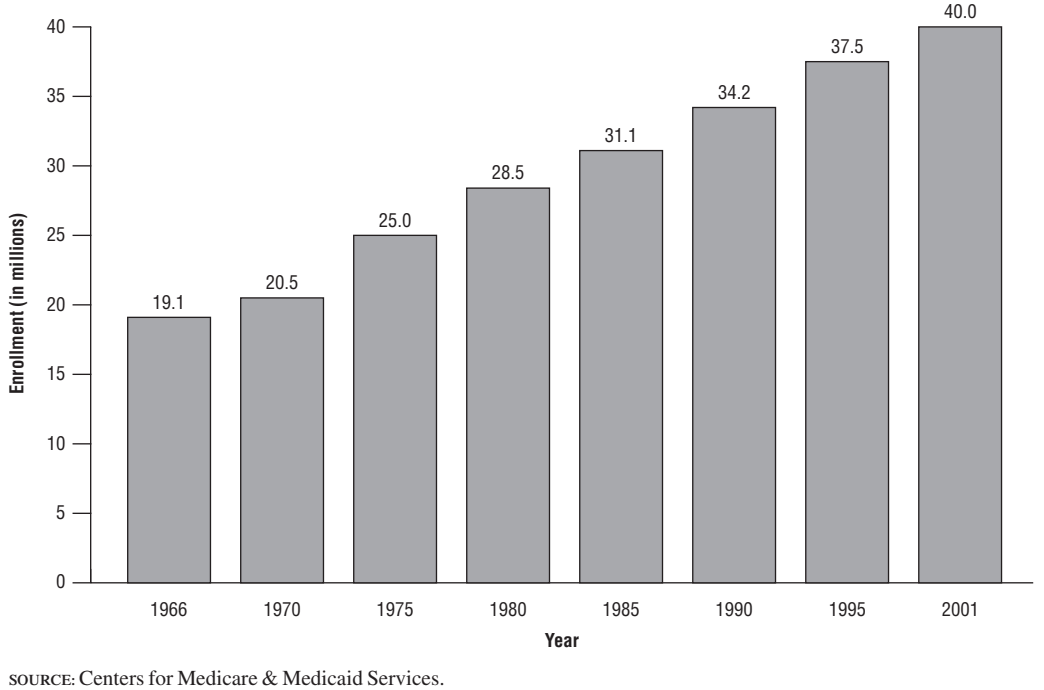


SOURCE: Centers for Medicare & Medicaid Services.

Nearly three years have been added to life expectancies since Medicare was created. Modern medicine is likely to continue this trend, which means that Medicare will be taking care of people for longer. Another factor is the increased cost of medical care itself, which takes more resources out of the system.

Medicare's hospital insurance is financed by a payroll tax of 2.9 percent, divided equally between employers and workers. The money is placed in a trust fund and is invested in U.S. Treasury SECURITIES. A surplus accumulated during the 1980s and early 1990s, but the program's outlays are projected to rise more rapidly than the future payroll-tax revenues.

Changing the financing of Medicare has proved difficult. In 1988, Congress passed legislation to expand Medicare to cover the health care costs associated with catastrophic illnesses. The new coverage was to be financed by a surtax on the incomes of taxpayers over the age of 65. Elderly citizens and organizations such as the AMERICAN ASSOCIATION OF RETIRED PERSONS vigorously protested the tax. In the face of this opposition, Congress repealed the law in 1989.

In *Fischer v. United States,* 529 U.S. 667 S. Ct. 1780, 146 L. Ed. 2d 707 (2000), the U.S. Supreme Court addressed the issue of criminal aspects with respect to payment of Medicare benefits to an institution. Fischer, while president and part owner of Quality Medical Consultants, Inc. (QMC), negotiated a $1.2 million loan to QMC from West Volusia Hospital Authority (WVHA), a municipal agency that is responsible for operating two Florida hospitals, both of which participate in the federal Medicare program. In 1993 WHVA received between $10 and $15 million in Medicare funds. After a 1994 audit of WHVA raised questions about the QMC loan, the petitioner was indicted for violations of the federal BRIBERY statute, including defrauding an organization that receives benefits under a federal assistance program. A jury convicted him on all counts, and the district court sentenced him to prison, imposed a term of supervised release, and ordered the payment of restitution. On appeal, the petitioner argued that the government had failed to prove WHVA, as the organization affected by his wrongdoing. The U.S. Court of Appeals for the Eleventh Circuit rejected his argument and affirmed his conviction.

In 2003, President George W. Bush and Congress worked together to pass a new law to bring people with Medicare more choices in health care coverage and better health care benefits. The new Medicare Prescription Drug Improvement and Modernization Act of 2003 was passed. This new law preserved and strengthened the Medicare program by adding important new prescription drug and preventive benefits and provides extra help to people with low incomes. Seniors are still able to choose doctors, hospitals, and pharmacies.

If seniors are happy with the Medicare coverage they have, they can keep it exactly the same. Or, if they choose, may enroll in new options. One of the major changes is the Drug Discount Cards which began in 2004. Medicare-Approved Drug Discount Cards will help seniors save on prescription drugs. Medicare will contract with private companies to offer new drug discount cards until a Medicare prescription drug benefit starts in 2006. The cards will save seniors 10–25% on prescription drugs. The enrollment period for the cards is May 2004 through December 31, 2005.

Other highlights of the new law include a Medicare Advantage Plan, new and improved preventive benefits for 2005, prescription drug plans for 2006, and Health Savings Accounts for all Americans, which will work just like an Individual Retirement Account (IRA), whereby Americans will be able to set aside money each year, tax free, in Health Savings Accounts.

For the latest information on Medicare visit the Medicare web site at <www.medicare.gov>

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CROSS-REFERENCES

Elder Law; Health Care Law; Health Insurance; Managed Care; Physicians and Surgeons; Senior Citizens.

## ♦ MEESE, EDWIN, III

Edwin Meese III served as U.S. attorney general from 1985 to 1988. A close and trusted advisor to President RONALD REAGAN, Meese sought to advance the president's conservative agenda. His tenure, however, was clouded by allegations of ethical violations that eventually led to his resignation.

Meese was born on December 2, 1931, in Oakland, California. He graduated from Yale

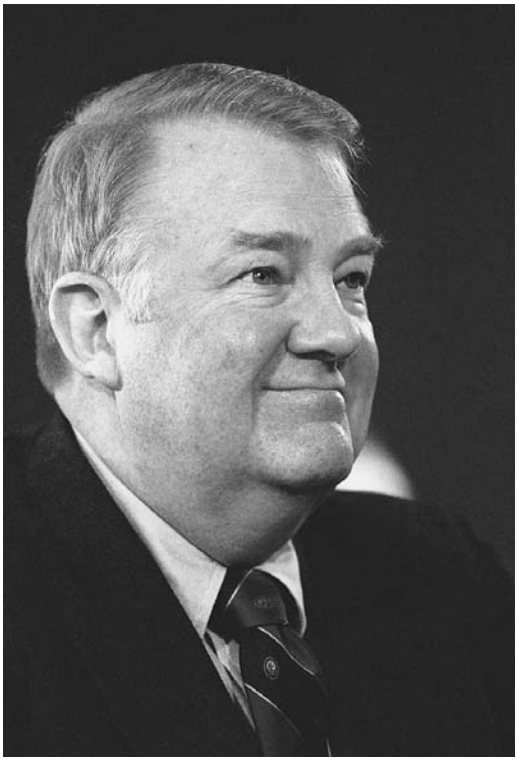

*Ed Meese.*
BETTMANN/CORBIS

University in 1953 and received his law degree from the University of California School of Law at Berkeley in 1958. From 1958 to 1967, Meese worked as a deputy district attorney for Alameda County, California.

From 1967 to 1969, Meese served then-California governor Ronald Reagan as secretary of legal affairs. In 1969, Meese became executive assistant to the governor, and in the following year he was made chief of staff. After Reagan left office, Meese worked in business and law, becoming the director of the Center for Criminal Justice and a professor of law at the University of California at San Diego in 1977.

When President Reagan took office in 1981, he appointed Meese as counselor to the president. In that role, Meese became an important advisor on domestic policy. Meese and Reagan shared a common agenda on legal topics. They sought to make ABORTION illegal and to restrict criminal defendants' rights, and were also in agreement on the issues of AFFIRMATIVE ACTION, and judicial activism. Meese helped to reshape the federal judiciary by advising the president on the appointments for more than half the federal judgeships.

In 1984, Reagan nominated Meese to be U.S. attorney general. Meese encountered fierce opposition from Senate Democrats, who questioned his commitment to CIVIL RIGHTS and his personal ethics. Meese admitted that he had paid no interest over 20 months on a $60,000 unsecured loan from a trust headed by John McKean, a California accountant whom he barely knew. McKean was later appointed, with the help of Meese, to the U.S. POSTAL SERVICE board of governors, a part-time position that paid $10,000 a year. This and other charges concerning Meese's personal finances contributed to a 13-month delay in his confirmation. The Senate eventually confirmed Meese, who became attorney general in March 1985.

As attorney general, Meese served as Chairman of the Domestic Policy Council and the National Drug Policy Board and was a member of the NATIONAL SECURITY COUNCIL. Meese

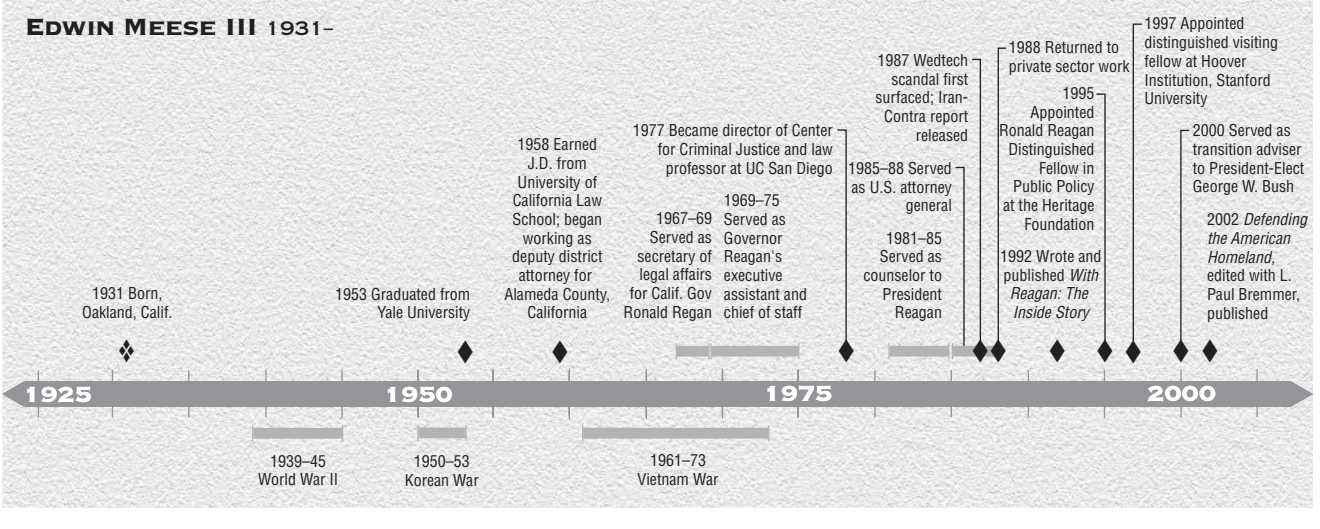

sought to establish tough policies against PORNOGRAPHY. He appointed a Commission on Pornography, which issued a controversial two-volume report in 1986 that stated that there was a causal link between violent pornography and aggressive behavior toward women. The report also claimed that nonviolent, sexually explicit material contributed to sexual violence, a conclusion that many social scientists challenged. The report broke new ground in its exploration of the problem of CHILD PORNOGRAPHY.

In 1987, Meese came under scrutiny for his role in the IRAN-CONTRA scandal, which involved a 1985 arms-for-hostages deal with Iran. The key issue in that scandal, which involved presidential aides Oliver L. North and John M. Poindexter, as well as other administration officials, was whether President Reagan had been aware of these activities in 1985. Meese announced on November 24, 1986, that the president had not known about the deal.

A congressional Iran-Contra committee issued its report in November 1987. It stated that Meese had failed to give the president sound legal advice. The report suggested that Meese had not fully investigated the scandal and that he might have participated in a cover-up. In addition, the committee determined that he had failed to take appropriate steps to prevent North and Poindexter from destroying critical evidence. INDEPENDENT COUNSEL Lawrence Walsh, who investigated Iran-Contra, issued a report in 1993 that stated Meese that had made a false statement in 1986 when he said that Reagan had not known about the 1985 deal. Walsh did not seek a criminal charge against Meese because he did not have a key piece of evidence, the notes of former defense secretary Caspar W. Weinberger, until 1991.

While Iran-Contra plagued Meese, a more serious problem arose, known as the Wedtech scandal. The scandal began in February 1987 and grew to involve other highly placed members of the Reagan administration, as well as government officials in New York, where the Wedtech Corporation was located. The Wedtech Corporation sought DEFENSE DEPARTMENT contracts in the early 1980s. The company hired E. Robert Wallach, Meese's former law school classmate and personal attorney, to lobby the government on its behalf. In 1982, Meese helped Wedtech, at Wallach's urging, to get a special hearing on a $32 million Army engine contract, which the Army considered Wedtech unqualified to perform. Soon after the meeting, the contract was awarded to Wedtech, and one of Meese's top deputies went to work for the corporation. A federal criminal investigation unraveled a string of illegal conduct that led to the conviction of Wallach and other public officials.

Independent Counsel James C. McKay investigated the Wedtech contract and other allegations of misconduct by Meese. In July 1988, he issued his report, which did not call for the filing of any criminal charges against Meese for his actions in Wedtech or his failure to file an income tax return on capital gains. McKay did conclude, however, that Meese may have been "insensitive to the appearance of impropriety."

Following the filing of McKay's 830-page report, Meese announced his resignation, effective at the end of August 1988. Meese claimed that the report vindicated his actions.

In 1992, Meese published his memoirs, *With Reagan: The Inside Story*. In the new millennium, Meese held the Ronald Reagan Chair in Public Policy at the HERITAGE FOUNDATION, a conservative "think tank" based in Washington, D.C. He continued to work as a consultant, writer, and lecturer on a variety of topics including public policy and the American legal system.

"CONSTITUTIONAL INTERPRETATION IS NOT THE BUSINESS OF THE COURT ONLY, BUT ALSO PROPERLY THE BUSINESS OF ALL BRANCHES OF GOVERNMENT."
—ED MEESE

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## MEETING OF CREDITORS

*One of the first steps in federal* BANKRUPTCY *proceedings whereby the creditors of a debtor meet in court to present their claims against him or her and a trustee is named to handle the application of the debtor's assets to pay his or her debts.*

## MEETING OF MINDS

*The mutual agreement and assent of the parties to a contract to its substance and terms.*

The "meeting of the minds" that is required to make a contract is not predicated on the subjective purpose or intention of one of the parties that is not brought to the attention of the other party, but it is based on the purpose and intention that has been made known or that, from all the circumstances, should be known.

## MEGAN'S LAW

Megan's Laws are named for Megan Kanka, a seven-year-old girl from New Jersey who was sexually assaulted and murdered in 1994 by a neighbor who, unknown to the victim's family, had been previously convicted for SEX OFFENSES against children. Megan's Laws are state and federal statutes that require convicted sex offenders to register with local police. Sex offenders are required to register with local police and to notify law enforcement authorities whenever they move to a new location. The statutes establish a notification process to provide information about sex offenders to law enforcement agencies and, when appropriate, to the public. The type of notification is based on an evaluation of the risk to the community from a particular offender.

The brutality of the crimes in the Megan Kanka case provided the impetus for laws that mandate registration of sex offenders and corresponding community notification. In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Title 17, 108 Stat.2038, as amended, 42 U.S.C. § 14071. This precursor to a federal Megan's Law conditioned certain federal law enforcement funds on state adoption of sex-offender registration laws and set minimum standards for state programs. By 1996, every State, the District of Columbia, and the Federal Government had enacted some variation of Megan's Law.

Under the federal Megan's Law statute, states have discretion to establish criteria for disclosure, but they must make private and personal information on registered sex offenders available to the public. The premise of Megan's Law is that communities will be better able to protect their children if they are informed of the descriptions and whereabouts of high-risk sex offenders. Notification of sex-offender information to the community assists law enforcement in investigations, provides legal grounds to detain known sex offenders, may deter sex offenders from committing new offenses, and offers citizens information that they can use to protect their children.

Megan's Laws were not created without controversy. Opponents argue that the statutes encourage acts of VIGILANTISM and do not give offenders who have paid their dues the chance to merge back into society. But actions taken against the convicted sex offender, including VANDALISM of property, verbal or written threats, or actual physical violence against the offender, their family, or employer, could lead to arrest and prosecution for criminal acts. Despite these concerns, however, federal and state legislatures have continued to reinforce and broaden the scope of these statutes.

On May 17, 1996, federal efforts to strengthen the Jacob Wetterling Act got a boost when President BILL CLINTON signed an amendment to the VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994 (42 U.S.C. 14071); the amendment is known as Megan's Law. This legislation directs all state legislatures to adopt laws requiring convicted sex offenders to register with their local law enforcement agency after release. Additionally, the federal Megan's Law mandates states to grant access to sex-offender registries to the public. Although sex-offender registration for law enforcement purposes had been required previously, the idea of community notification was relatively new.

The legislation has undergone many adaptations in the states. While the details of state Megan's Laws differ from jurisdiction to jurisdiction, conviction of any one or more of the following offenses will require convicts to register pursuant to Megan's Laws:

- aggravated sexual assault,
- sexual assault,
- aggravated criminal sexual contact,
- endangering the welfare of a child by engaging in sexual conduct that would impair or debauch the morals of the child,
- luring or enticing,
- kidnapping (if the victim is a minor and the offender not a parent),
- criminal restraint, and
- false imprisonment.

Megan's Laws have guidelines that list factors law that enforcement agencies are to consider when weighing the risk of re-offense. These include some or all of the following:

- post-incarceration supervision,
- the status of therapy or counseling,
- criminal background,
- degree of remorse for criminal acts,
- substance abuse,
- employment or schooling status,
- psychological or psychiatric profile, and
- any history of threats or of STALKING locations where children congregate.

State sex offender registries include sex offenders' names, descriptions and photographs, addresses, places of employment or school (if applicable), descriptions of the offenders' vehicles and license plate numbers, and brief descriptions of the offenses for which the sex offender was convicted. Prosecutors and courts are responsible for determining who should receive direct notice of the presence of a particular individual in a community.

In 2003, 39 states provided access to sex-offender information in searchable databases on the INTERNET. Arkansas, California, Colorado, Hawaii, Idaho, Maine, Maryland, Massachusetts, Nevada, Rhode Island, and Vermont either did not provide Internet access or restricted access. Various law enforcement agencies and some private citizens or civic groups also publish listings that are specific to counties or communities. Most, if not all, of these sites are freely available regardless of the residence of the individual who is searching for information.

As with the state laws themselves, state sex-offender databases have little or no uniformity. Some, like those for Alaska, Connecticut, and Florida, include photographs, physical descriptions, dates of birth, and details concerning the offenses for which offenders were convicted. The Virginia sex-offender list stores home and work addresses, while Indiana's contains only the city where the sex offender resides.

Most of the databases permit searching by zip code or name. Kansas allows searching by partial zip codes, while Alaska and Delaware allow searching by street name or by partial address, and Indiana permits searching by SOCIAL SECURITY number.

While Megan's Laws do provide some measure of increased security for some parents and individuals who are concerned about the likelihood of convicted sex offenders in their midst, they cannot guarantee the public's protection from offenders who are determined to re-offend. The statutes cannot even guarantee absolute accuracy of the information contained on their registries. While offenders must register with the local police upon release from prison, many give incomplete or even false details. Others have given their details, but have traveled to areas where no one has been warned about them for the purposes of committing additional sex offenses. Critics of the measures point out that only 80 percent of pedophiles comply with registration requirements in the US, as compared with 97 percent in the United Kingdom. They also note that most cases of CHILD ABUSE occur within the family, and suggest that victims might stay silent if they know that a family member will be prosecuted. But in spite of these arguments, Megan's Laws receive widespread support in communities and legislatures.

*A California Justice Department exhibit at the 1997 L.A. County Fair provides opportunity to search a database of registered sex offenders. Under the federal Megan's Law statute, states can establish criteria for disclosure but* must *make information on registered sex offenders available to the public.*

AP/WIDE WORLD PHOTOS

In addition to compliance and enforcement problems with Megan's Laws, privacy advocates have challenged existing public-records laws that allow the availability of personal data via websites. In 2003, the U.S. Supreme Court handed down major decisions upholding the constitutionality of Megan's Laws. The Court upheld Connecticut's Megan's Law by a vote of 9 to 0 and upheld Alaska's legislation in a 6-to-3 decision.

In *Connecticut Dept. of Public Safety v. Doe*, 123 S. Ct. 1160, 155 L. Ed. 2d 98, 71 USLW 4125, 71 USLW 4158, 3 Cal. Daily Op. Serv. 1957, 2003 Daily Journal D.A.R. 2471, 16 Fla. L. Weekly Fed. S 140 (2003). Connecticut's Megan's Law was challenged by a convicted sex offender, JOHN DOE. Doe protested that the Internet listing violated his DUE PROCESS rights because he was never given a hearing to disprove the suggestion that he might represent a continuing danger to the community. A federal judge and a three-judge federal appeals court panel agreed with Doe, striking down the law. But the Supreme Court overturned those decisions, stating that the key factor causing sex offenders to be listed in Connecticut's Internet registry is a prior conviction for a sex offense, not whether an individual might present a continued danger to the community.

The court said that statutes such as Connecticut's Megan's Law provide an important service that helps to protect society from those who would prey on its weakest members. Even though Megan's Laws create certain burdens for sex offenders, the court wrote that such laws do not amount to a form of EX POST FACTO punishment, nor do they violate the Constitution's due process requirements.

In the Alaska case, *Smith v. Doe*, 123 S. Ct. 1140, 155 L. Ed. 2d 164, 71 USLW 4125, 71 USLW 4182, 3 Cal. Daily Op. Serv. 1974, 2003 Daily Journal D.A.R. 2474, 16 Fla. L. Weekly Fed. S. 142 (2003) (No. 01-729). Alaska's Megan's Law was challenged by two convicted sex offenders who already had served their prison sentences prior to passage of that state's version of the law. The two men, John Doe I and John Doe II, argued that the law was another form of punishment imposed after they already had completed their punishment. They claimed that the law failed to recognize the possibility that they might be rehabilitated and that they might no longer pose a danger to others. In previous litigation, a federal judge found no ex post facto violation, but an appeals court panel reversed, striking down the law.

The high court wrote that Alaska's Megan's Law is a civil, non-punitive regulatory effort to account for the whereabouts of convicted sex offenders. Writing for the majority, Justice Kennedy stated that there was nothing in the statute to suggest that the legislature intended to create anything other than a civil scheme designed to protect the public from harm. And even though the law applied to sex offenders who already had been released from prison, it was not an extra form of punishment.

In these two cases, the U.S. Supreme Court effectively disposed of the principal legal arguments against Megan's Laws. In short, the Court found that state laws that are designed to use the Internet to notify parents of the presence of convicted rapists and child molesters in their own neighborhoods do not violate the constitutional rights of the listed sex offenders.

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## MEMBERSHIP CORPORATION

*A company or organization that is formed for purposes other than generating a profit.*

Common examples of membership corporations are religious societies and trade unions.

CROSS-REFERENCES

Beneficial Association.

## MEMORANDUM

*An informal record, in the form of a brief written note or outline, of a particular legal transaction or document for the purpose of aiding the parties in remembering particular points or for future reference.*

A memorandum may be used in court to prove that a particular contract was made. For instance, in a real estate transaction, a memorandum can be used to show that the parties to a sale have entered into an agreement to sell a particular parcel at an indicated price, in addition to other details of the agreement. This type of memorandum is also referred to as a binder.

An attorney might use a memorandum to explain and summarize a specific point of law for a judge or for another attorney.

A memorandum decision is a written decision, issued by a court, which reports the ruling, and the decisions and orders of the court. It does not, however, contain an opinion, which is an explanation of the rationale upon which the decision was based.

## MEMORANDUM DECISION

*A court's decision that gives the ruling (what it decides and orders done), but no opinion (reasons for the decision).*

A memorandum decision is not subject to appeal by the dissatisfied party.

## MENS REA

*As an element of criminal responsibility, a guilty mind; a guilty or wrongful purpose; a criminal intent. Guilty knowledge and wilfulness.*

A fundamental principle of CRIMINAL LAW is that a crime consists of both a mental and a physical element. Mens rea, a person's awareness of the fact that his or her conduct is criminal, is

the mental element, and *actus reus*, the act itself, is the physical element.

The concept of mens rea developed in England during the latter part of the common-law era (about the year 1600) when judges began to hold that an act alone could not create criminal liability unless it was accompanied by a guilty state of mind. The degree of mens rea required for a particular common-law crime varied. Murder, for example, required a malicious state of mind, whereas LARCENY required a felonious state of mind.

Today most crimes, including common-law crimes, are defined by statutes that usually contain a word or phrase indicating the mens rea requirement. A typical statute, for example, may require that a person act knowingly, purposely, or recklessly.

Sometimes a statute creates criminal liability for the commission or omission of a particular act without designating a mens rea. These are called STRICT LIABILITY statutes. If such a statute is construed to purposely omit criminal intent, a person who commits the crime may be guilty even though he or she had no knowledge that his or her act was criminal and had no thought of committing a crime. All that is required under such statutes is that the act itself is voluntary, since involuntary acts are not criminal.

Occasionally mens rea is used synonymously with the words *general intent,* although general intent is more commonly used to describe criminal liability when a defendant does not intend to bring about a particular result. SPECIFIC INTENT, another term related to mens rea, describes a particular state of mind above and beyond what is generally required.

## MENSA ET THORO

*[*Latin, From bed and board.*] A type of* DIVORCE *that is a partial termination of the duties of a marital relationship.*

A divorce *mensa et thoro* is one that does not provide a HUSBAND AND WIFE with the right to remarry but that permits them to live separately. Such a divorce does not dissolve the marriage but amounts to a *legal separation.*

## MENTAL ANGUISH

*When connected with a physical injury, includes both the resultant mental sensation of pain and also the accompanying feelings of distress, fright, and anxiety. As an element of damages implies a relatively high degree of mental pain and distress; it is more than mere disappointment, anger, worry, resentment, or embarrassment, although it may include all of these, and it includes mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair, and/or public humiliation. In other connections, and as a ground for* DIVORCE *or for compensable damages or an element of damages, it includes the mental suffering resulting from the excitation of the more poignant and painful emotions, such as grief, severe disappointment, indignation, wounded pride, shame, public humiliation, despair, etc.*

## MENTAL CRUELTY

*A course of conduct on the part of one spouse toward the other spouse that can endanger the mental and physical health and efficiency of the other spouse to such an extent as to render* CONTINUANCE *of the marital relation intolerable. As a ground for* DIVORCE*, it is conduct that causes embarrassment, humiliation, and anguish so as to render life miserable and unendurable or to cause a spouse's life, person, or health to become endangered.*

## ♦ MENTSCHIKOFF, SOIA

Soia Mentschikoff was a distinguished legal scholar and educator whose career encompassed several "firsts" for women in the legal profession.

Mentschikoff was born April 2, 1915, in Russia where her father, a resident of New York City, was working. In 1918 her family returned to New York where Mentschikoff graduated from Hunter College in 1934 and from Columbia Law School in 1937.

At Columbia Mentschikoff met KARL LLEWELLYN, a professor of law and the chief reporter, or drafter, of the UNIFORM COMMERCIAL CODE (UCC) for the American Law Institute (the Uniform Commercial Code is a model for laws dealing with business and commercial transactions that has been adopted, at least in part, by all the states, except Louisiana, and the District of Columbia). Initially, Mentschikoff worked with Llewellyn on the UCC as his research assistant; from 1949 through 1954 she was the associate chief reporter of the code. Subsequently, she became a consultant to the Permanent Editorial Board for the UCC.

After the UCC was completed, Mentschikoff became increasingly interested in the interna-

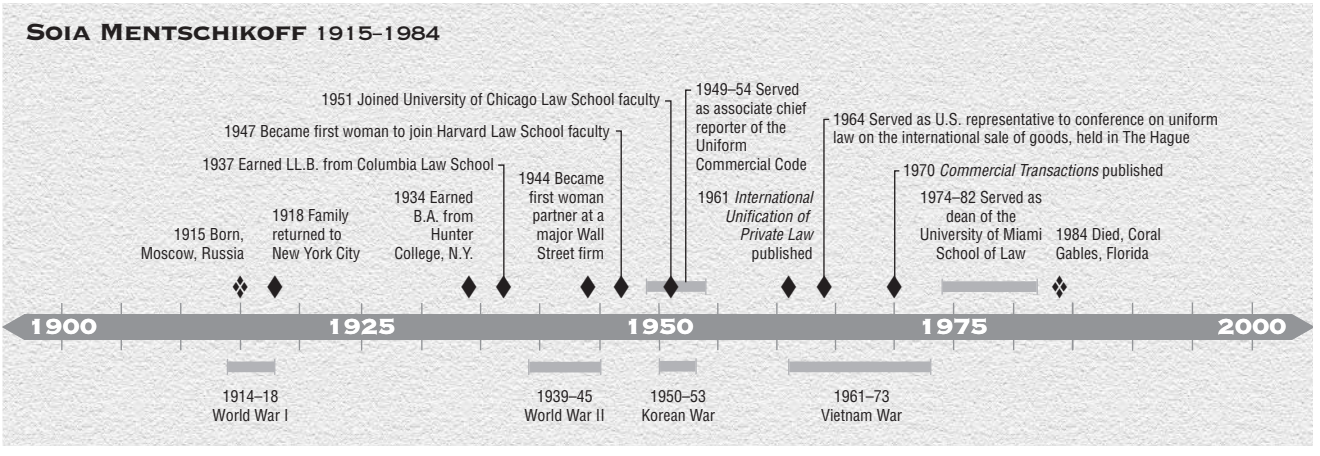


tional aspects of COMMERCIAL LAW. In 1964 she was one of the U.S. representatives at a diplomatic conference held at The Hague to consider a uniform law on the international sale of goods. She later became an adviser to the STATE DEPARTMENT on matters involving international sales and international ARBITRATION.

In 1947 Mentschikoff joined the faculty at the Harvard Law School, the first time a woman had taught at that school. Three years earlier in 1944, she had achieved another first by becoming the first woman partner at a major Wall Street firm. In 1951 Mentschikoff and Llewellyn, whom she had married in 1947, joined the faculty at the University of Chicago Law School. To satisfy the school's anti-nepotism rule, Llewellyn was named a "professor" while Mentschikoff was a "professorial lecturer" until his death in 1962 when she became a professor. In 1974 Mentschikoff became the dean of the University of Miami School of Law, a position that she held until 1982.

Mentschikoff died June 18, 1984, in Coral Gables, Florida.

## MERCANTILE

*Relating to trade or commerce; commercial; having to do with the business of buying and selling; relating to merchants.*

A *mercantile agency* is an individual or company in the business of collecting data about the financial status, ability, and credit of individuals who are engaged in business. Once this information is compiled, it is sold by the agency to its customers, who are known as subscribers. Mercantile agencies are known as credit bureaus in current usage.

## MERCHANTABLE

*Salable; of quality and type ordinarily acceptable among vendors and buyers.*

An item is deemed merchantable if it is reasonably fit for the ordinary purposes for which such products are manufactured and sold. For example, soap is merchantable if it cleans. In general, a seller or manufacturer is required by law to make products of merchantable quality. In the event that the items do not meet with the proper standards, a suit can be brought against the seller or manufacturer by anyone who is injured as a result.

CROSS-REFERENCES

Product Liability; Sales Law.

## MERCIAN LAW

*A major body of Anglo-Saxon customs that, along with the Dane law and the West Saxon law, continued to constitute the law in England in the days immediately following the Norman Conquest.*

## MERCY KILLING

See EUTHANASIA.

## ◆ MEREDITH, JAMES HOWARD

CIVIL RIGHTS pioneer and activist James Howard Meredith put his life at risk by being the first African American to attend the University of Mississippi in 1962. After the state repeatedly blocked his attempts to register at the university, a legal battle waged by Meredith and the National Association for the Advancement of Colored People (NAACP) achieved a landmark victory for INTEGRATION. When violence erupted on the day

that Meredith enrolled, President JOHN F. KENNEDY sent several thousand U.S. Army troops to the campus to quell bloody rioting. Armed federal marshals protected Meredith in every classroom until he graduated in 1963. In 1966, the James Meredith March against Fear united traditional and radical civil rights leaders in a voter-registration march across Mississippi. Meredith was shot, but he recovered and joined MARTIN LUTHER KING, JR., and others in a month-long demonstration that marked a turning point in the civil rights struggle. In later years, Meredith, who had always maintained independence from the inheritors of the CIVIL RIGHTS MOVEMENT, became one of their sharpest critics.

Meredith was born June 25, 1933, in Kosciusko, Mississippi. He was one of ten children of Roxy Patterson Meredith and Moses Cap, a poor farmer in Kosciusko. As a young child, Meredith became aware of racism. He would refuse the nickels and dimes that a local white man regularly gave to black children, calling the gifts degrading. More painful was the realization he made as a young man on a trip to visit relatives in Detroit, where he saw blacks and whites sharing the same public facilities. He rode the train home from this brush with integration, and when he arrived in Memphis, the conductor told him to leave the whites-only car. "I cried all the way home," Meredith later recalled, "and vowed to devote myself to changing the degrading conditions of black people." He also had other ambitions and goals. Ever since a childhood visit to a white doctor's office, he had harbored a dream of attending the University of Mississippi, the physician's alma mater.

After high school, in 1951, Meredith joined the U.S. Air Force. He rose to the rank of staff sergeant, earned credits toward a college degree,

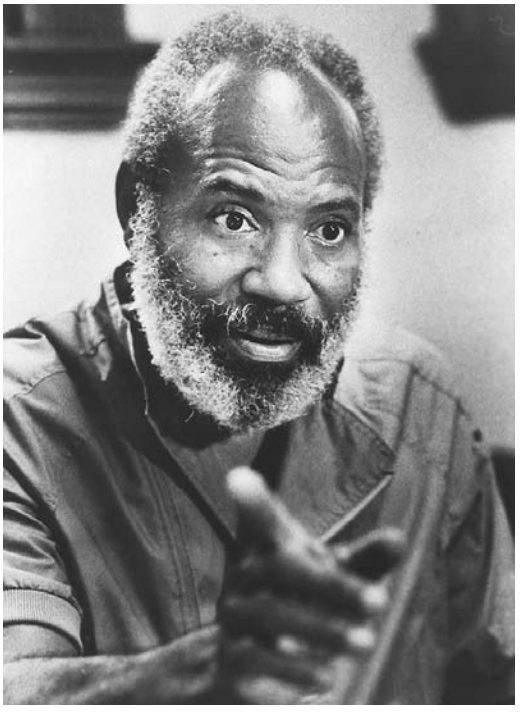

*James Meredith.*
AP/WIDE WORLD PHOTOS

and served in the KOREAN WAR. Following his discharge in 1960, he attended the all-black Jackson State College, but the courses he wanted to take were offered only at the state university. As a 28-year-old, he followed with hopefulness the speeches of President John F. Kennedy, which promised greater enjoyment of opportunity for all U.S. citizens. Change was in the air, and many African Americans were heartened by the portents in Kennedy's 1961 inaugural address. On the same day that Kennedy became president, Meredith applied for admission to the University of Mississippi.

The school turned down his application. Mississippi still practiced SEGREGATION, and

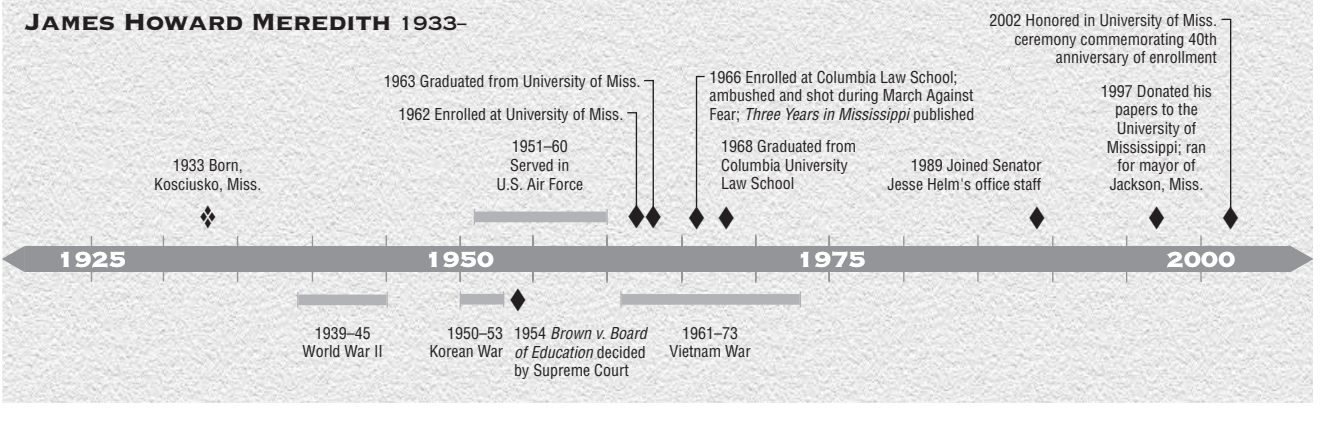

that meant that no African Americans could attend the all-white university. Even seven years after **BROWN V. BOARD OF EDUCATION** 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), southern states resisted complying with the U.S. Supreme Court's decision that compulsory segregation was unconstitutional. Knowing that he had a constitutional right that the state refused to recognize, Meredith turned to the NAACP Legal Defense and Education Fund. This arm of the civil rights organization, accustomed to fighting segregation cases, extended help to him. Meredith and his attorneys fought some 30 court actions against the state.

At last, a federal court ruled that a qualified student could not be denied admission on the ground of race. Meredith had won, but the court order infuriated segregationists. Playing to popular sentiment, Mississippi Governor Ross Barnett promised to stop Meredith. Barnett pressured the state legislature to give him authority over university admissions, a power that usually was exercised by the state college board.

"THERE IS NO WAY FOR ONE NEGRO TO CHANGE HIS BASIC STATUS WITHOUT FIRST CHANGING THAT OF ALL NEGROES."
—JAMES MEREDITH

As Meredith's enrollment date, September 20, 1962, approached, Meredith received death threats; Barnett continued to promise to prevent his enrollment; and segregationists spread the word to be at "Ole Miss" to save it from integration. On the day that Meredith arrived to register, white students massed around a Confederate flag chanting anti-integration slogans. Barnett stood blocking the door to the admissions office. A university official read a proclamation naming Barnett as acting registrar, by order of the university's board of trustees, and a satisfied Barnett told Meredith that his application was denied.

The governor's action was purportedly good politics in his home state. Across the South, leaders such as Alabama Governor **GEORGE WALLACE** were prospering politically by staging similar acts of defiance. However, Barnett's refusal to let Meredith in was a serious problem for Washington, D.C. It represented a challenge to the authority of the federal courts, and in a short time, the **JUSTICE DEPARTMENT** entered the dispute. Attorney General **ROBERT F. KENNEDY** confronted Barnett, demanding assurances that Meredith's next attempt to register would be successful and that the student would be protected. Barnett gave none. He replied that the situation was beyond his control. Where civil rights were concerned, the young attorney general was quickly learning that only federal intervention could bring the southern states under the mandate of the courts. He sent 500 federal marshals to the University of Mississippi campus with strict orders: They were to protect Meredith, but not to shoot anyone. Only tear gas and clubs were to be used for their own defense.

On September 30, Meredith arrived at Ole Miss to try to enroll for a second time. Protected by the marshals, he finally registered, and then took refuge in his dormitory. Students and outsiders gathered in front of the school's administration building, known as the Lyceum. The angry mob began throwing rocks at the outnumbered marshals, who were soon besieged by thousands of new protesters streaming onto the campus. A vicious riot erupted, with the armed agitators firing shots and hurling rocks, bricks, bottles, flaming gas, and acid. By late evening on the day Meredith registered, a French journalist and an onlooker were dead. More than 160 marshals were wounded; the rest were exhausted, and their tear gas supply was running out. Reluctantly, Kennedy dispatched 5,000 Army troops to Ole Miss; their numbers were finally enough to disperse the mob and to regain control of the battered campus.

Meredith attended classes under armed guard, but persevered, graduating in August 1963. By the summer of 1966, Meredith was enrolled at Columbia University School of Law, but he interrupted his studies to launch a bold personal demonstration for civil rights. Meredith announced plans to march across the state of Mississippi, covering the 220 miles from Memphis to Jackson in 16 days. The James Meredith March against Fear would show African Americans that they could safely assert their right to vote, despite years of legal obstruction, harassment, and murder. As he had done at Ole Miss, Meredith ignored several death threats, proclaiming that he would survive his long march along the state's back roads.

On June 5, 1966, Meredith set out from Memphis with an ebony walking stick that an African chieftain had given him. When he crossed into Mississippi the following morning, he was ambushed and shot; remarkably, he survived. His assailant, an unemployed member of the **KU KLUX KLAN**, pleaded guilty and received a five-year prison sentence (of which three years were suspended). While Meredith recovered in his hospital bed, he was visited by the leaders of major civil rights organizations. A group including **STOKELY CARMICHAEL**, of the **STUDENT NON-VIOLENT COORDINATING COMMITTEE**

(SNCC), and Dr. King wanted to stage a protest. Meredith wanted to go on. He continued the march joined by other civil rights workers.

The marchers completed their journey by late June against often-violent opposition. It was a great symbolic victory for civil rights, but the movement itself had begun to factionalize. King and his supporters, who advocated peaceful resistance, were at odds with Carmichael's BLACK POWER MOVEMENT, which advocated violence if necessary to secure equal rights for African Americans.

Meredith returned to Columbia, completing his law degree in 1968. In the years that followed, Meredith embarked on a series of pursuits. He studied economics at a Nigerian university, established the African Development and Reunification Association, and worked as a consultant, financial planner, tree farmer, and educator.

In the 1980s, Meredith returned to the public eye, this time as a critic of integration, WELFARE, and AFFIRMATIVE ACTION, programs that he believed did more to hurt black people than to help them. He joined the staff of conservative senator JESSE HELMS and later supported former Ku Klux Klan member David Duke, whose welfare views he praised, in Duke's campaign for governor of Louisiana. He also took a series of walks that were reminiscent of his 1966 march, to promote his conservative vision. Meredith is the author of *Three Years in Mississippi* (1966).

Meredith published an historical work entitled *Mississippi: A Volume of Eleven Books* in 1995. In March 1997, the University of Mississippi's J.D. Williams Library accepted Meredith's donation of his personal papers, which are now housed in the library's Special Collections branch. In September 2002, Meredith was a participant in a forum sponsored by the Kennedy Library to commemorate the 40th anniversary of his admission to the University of Mississippi.

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## MERGER

*The combination or fusion of one thing or right into another thing or right of greater or larger importance so that the lesser thing or right loses its individuality and becomes identified with the greater whole.*

In contract law, agreements are merged when one contract is absorbed into another. The merger of contracts is generally based on the language of the agreement and the intent of the parties. The merger of contracts is not the same as a merger clause, which is a provision in a contract stating that the written terms cannot be varied by prior or oral agreements.

Estates affecting ownership of land are merged where a greater estate and a lesser estate coincide and are held by the same individual. For example, merger occurs when a person who leases land from another subsequently is given ownership of it upon the death of the lessor who has so provided in his will.

In CRIMINAL LAW, the commission of a major crime that includes a lesser offense results in the latter being merged in the former. For example, the crime of rape includes the lesser offense of SEXUAL ABUSE which is merged into one prosecution for rape.

CROSS-REFERENCES

Lesser Included Offense; Mergers and Acquisitions.

## MERGERS AND ACQUISITIONS

*Methods by which corporations legally unify ownership of assets formerly subject to separate controls.*

A merger or acquisition is a combination of two companies where one corporation is completely absorbed by another corporation. The less important company loses its identity and becomes part of the more important corporation, which retains its identity. A merger extinguishes the merged corporation, and the surviving corporation assumes all the rights, privileges, and liabilities of the merged corporation. A merger is not the same as a consolidation, in which two corporations lose their separate identities and unite to form a completely new corporation.

Federal and state laws regulate mergers and acquisitions. Regulation is based on the concern that mergers inevitably eliminate competition between the merging firms. This concern is most acute where the participants are direct rivals,

because courts often presume that such arrangements are more prone to restrict output and to increase prices. The fear that mergers and acquisitions reduce competition has meant that the government carefully scrutinizes proposed mergers. On the other hand, since the 1980s, the federal government has become less aggressive in seeking the prevention of mergers.

Despite concerns about a lessening of competition, U.S. law has left firms relatively free to buy or sell entire companies or specific parts of a company. Mergers and acquisitions often result in a number of social benefits. Mergers can bring better management or technical skill to bear on underused assets. They also can produce economies of scale and scope that reduce costs, improve quality, and increase output. The possibility of a takeover can discourage company managers from behaving in ways that fail to maximize profits. A merger can enable a business owner to sell the firm to someone who is already familiar with the industry and who would be in a better position to pay the highest price. The prospect of a lucrative sale induces entrepreneurs to form new firms. Finally, many mergers pose few risks to competition.

Antitrust merger law seeks to prohibit transactions whose probable anticompetitive consequences outweigh their likely benefits. The critical time for review usually is when the merger is first proposed. This requires enforcement agencies and courts to forecast market trends and future effects. Merger cases examine past events or periods to understand each merging party's position in its market and to predict the merger's competitive impact.

### Types of Mergers

Mergers appear in three forms, based on the competitive relationships between the merging parties. In a horizontal merger, one firm acquires another firm that produces and sells an identical or similar product in the same geographic area and thereby eliminates competition between the two firms. In a VERTICAL MERGER, one firm acquires either a customer or a supplier. Conglomerate mergers encompass all other acquisitions, including pure conglomerate transactions where the merging parties have no evident relationship (e.g., when a shoe producer buys an appliance manufacturer), geographic extension mergers, where the buyer makes the same product as the target firm but does so in a different geographic market (e.g., when a baker in Chicago buys a bakery in Miami), and product-extension mergers, where a firm that produces one product buys a firm that makes a different product that requires the application of similar manufacturing or marketing techniques (e.g., when a producer of household detergents buys a producer of liquid bleach).

### Corporate Merger Procedures

State statutes establish procedures to accomplish corporate mergers. Generally, the board of directors for each corporation must initially pass a resolution adopting a plan of merger that specifies the names of the corporations that are involved, the name of the proposed merged company, the manner of converting shares of both corporations, and any other legal provision to which the corporations agree. Each corporation notifies all of its shareholders that a meeting will be held to approve the merger. If the proper number of shareholders approves the plan, the directors sign the papers and file them with the state. The SECRETARY OF STATE issues a certificate of merger to authorize the new corporation.

Some statutes permit the directors to abandon the plan at any point up to the filing of the final papers. States with the most liberal corporation laws permit a surviving corporation to absorb another company by merger without submitting the plan to its shareholders for approval unless otherwise required in its certificate of incorporation.

Statutes often provide that corporations that are formed in two different states must follow the rules in their respective states for a merger to be effective. Some corporation statutes require the surviving corporation to purchase the shares of stockholders who voted against the merger.

### Competitive Concerns

Horizontal, vertical, and conglomerate mergers each raise distinctive competitive concerns.

**Horizontal Mergers** Horizontal mergers raise three basic competitive problems. The first is the elimination of competition between the merging firms, which, depending on their size, could be significant. The second is that the unification of the merging firms' operations might create substantial market power and might enable the merged entity to raise prices by reducing output unilaterally. The third problem is that, by increasing concentration in the relevant market, the transaction might strengthen

the ability of the market's remaining participants to coordinate their pricing and output decisions. The fear is not that the entities will engage in secret collaboration but that the reduction in the number of industry members will enhance tacit coordination of behavior.

**Vertical Mergers** Vertical mergers take two basic forms: forward INTEGRATION, by which a firm buys a customer, and backward integration, by which a firm acquires a supplier. Replacing market exchanges with internal transfers can offer at least two major benefits. First, the vertical merger internalizes all transactions between a manufacturer and its supplier or dealer, thus converting a potentially adversarial relationship into something more like a partnership. Second, internalization can give management more effective ways to monitor and improve performance.

Vertical integration by merger does not reduce the total number of economic entities operating at one level of the market, but it might change patterns of industry behavior. Whether a forward or backward integration, the newly acquired firm may decide to deal only with the acquiring firm, thereby altering competition among the acquiring firm's suppliers, customers, or competitors. Suppliers may lose a market for their goods; retail outlets may be deprived of supplies; or competitors may find that both supplies and outlets are blocked. These possibilities raise the concern that vertical integration will foreclose competitors by limiting their access to sources of supply or to customers. Vertical mergers also may be anticompetitive because their entrenched market power may impede new businesses from entering the market.

**Conglomerate Mergers** Conglomerate transactions take many forms, ranging from short-term joint ventures to complete mergers. Whether a conglomerate merger is pure, geographical, or a product-line extension, it involves firms that operate in separate markets. Therefore, a conglomerate transaction ordinarily has no direct effect on competition. There is no reduction or other change in the number of firms in either the acquiring or acquired firm's market.

Conglomerate mergers can supply a market or "demand" for firms, thus giving entrepreneurs liquidity at an open market price and with a key inducement to form new enterprises. The threat of takeover might force existing managers to increase efficiency in competitive markets. Conglomerate mergers also provide opportunities for firms to reduce capital costs and overhead and to achieve other efficiencies.

Conglomerate mergers, however, may lessen future competition by eliminating the possibility that the acquiring firm would have entered the acquired firm's market independently. A conglomerate merger also may convert a large firm into a dominant one with a decisive competitive advantage, or otherwise make it difficult for other companies to enter the market. This type of merger also may reduce the number of smaller firms and may increase the merged firm's political power, thereby impairing the social and political goals of retaining independent decision-making centers, guaranteeing small business opportunities, and preserving democratic processes.

## Federal Antitrust Regulation

Since the late nineteenth century, the federal government has challenged business practices and mergers that create, or may create, a MONOPOLY in a particular market. Federal legislation has varied in effectiveness in preventing anticompetitive mergers.

**Sherman Anti-Trust Act of 1890** The SHERMAN ANTI-TRUST ACT (15 U.S.C.A. §§ 1 et seq.) was the first federal antitrust statute. Its application to mergers and acquisitions has varied, depending on its interpretation by the U.S. Supreme Court. In *Northern Securities Co. v. United States,* 193 U.S. 197, 24 S. Ct. 436, 48 L. Ed. 679 (1904), the Court ruled that all mergers between directly competing firms constituted a combination in restraint of trade and that they therefore violated Section 1 of the Sherman Act. This decision hindered the creation of new monopolies through horizontal mergers.

In *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911), however, the Court adopted a less stringent "rule of reason test" to evaluate mergers. This rule meant that the courts must examine whether the merger would yield monopoly control to the merged entity. In practice, this resulted in the approval of many mergers that approached, but did not achieve, monopoly power.

**Clayton Anti-Trust Act of 1914** Congress passed the CLAYTON ACT (15 U.S.C.A. §§ 12 et seq.) in response to the *Standard Oil Co. of New Jersey* decision, which it feared would undermine the Sherman Act's ban against trade

restraints and monopolization. Among the provisions of the Clayton Act was Section 7, which barred anticompetitive stock acquisitions.

The original Section 7 was a weak antimerger safeguard because it banned only purchases of stock. Businesses soon realized that they could evade this measure simply by buying the target firm's assets. The U.S. Supreme Court, in *Thatcher Manufacturing Co. v. Federal Trade Commission,* 272 U.S. 554, 47 S. Ct. 175, 71 L. Ed. 405 (1926), further undermined Section 7 by allowing a firm to escape liability if it bought a controlling interest in a rival firm's stock and used this control to transfer to itself the target's assets before the government filed a complaint. Thus, a firm could circumvent Section 7 by quickly converting a stock acquisition into a purchase of assets.

By the 1930s, Section 7 was eviscerated. Between the passage of the Clayton Act in 1914 and 1950, only 15 mergers were overturned under the ANTITRUST LAWS, and ten of these dissolutions were based on the Sherman Act. In 1950, Congress responded to post–World War II concerns that a wave of corporate acquisitions was threatening to undermine U.S. society, by passing the Celler-Kefauver Antimerger Act, which amended Section 7 of the Clayton Act to close the assets loophole. Section 7 then prohibited a business from purchasing the stock or assets of another entity if "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Congress intended the amended section to reach vertical and conglomerate mergers, as well as horizontal mergers. The U.S. Supreme Court, in *Brown Shoe Co. v. United States,* 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962), interpreted the amended law as a congressional attempt to retain local control over industry and to protect small business. The Court concluded that it must look at the merger's actual and likely effect on competition. In general, however, it relied almost entirely on market share and concentration figures in evaluating whether a merger was likely to be anticompetitive. Nevertheless, the general presumption was that mergers were suspect.

In *United States v. General Dynamics,* 415 U.S. 486, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1974), the Court changed direction. It rejected any antitrust analysis that focused exclusively on market-share statistics, cautioning that although statistical data can be of great significance, they are "not conclusive indicators of anticompetitive effects." A merger must be viewed in the context of its particular industry. Therefore, the Court held that "only a further examination of the particular market—its structure, history, and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger." This totality-of-the-circumstances approach has remained the standard for conducting an antitrust analysis of a proposed merger.

**Federal Trade Commission Act of 1975** Section 5 of the FEDERAL TRADE COMMISSION Act (15 U.S.C.A. § 45), prohibits "unfair method[s] of competition" and gives the Federal Trade Commission (FTC) independent jurisdiction to enforce the antitrust laws. The law provides no criminal penalties, and it limits the FTC to issuing prospective decrees. The JUSTICE DEPARTMENT and the FTC share enforcement of the Clayton Act. Congress gave this authority to the FTC because it thought that an administrative body would be more responsive to congressional goals than would the courts.

**Hart-Scott-Rodino Antitrust Improvements Act of 1976** The Hart-Scott-Rodino Antitrust Improvements Act (HSR) (15 U.S.C.A. § 18a) established a mandatory premerger notification procedure for firms that are parties to certain mergers. The HSR process requires the merging parties to notify the FTC and the Department of Justice before completing certain transactions. In general, an HSR premerger filing is required when (a) one of the parties to the transaction has annual net sales (or revenues) or total assets exceeding $100 million and the other party has annual net sales (or revenues) or total assets exceeding $10 million; and (b) the acquisition price or value of the acquired assets or entity exceeds $15 million. Failure to comply with these requirements may result in the RESCISSION of completed transactions and may be punished by a civil penalty of up to $10,000 per day.

HSR also established mandatory waiting periods during which the parties may not "close" the proposed transaction and begin joint operations. In transactions other than cash tender offers, the initial waiting period is 30 days after the merging parties have made the requisite premerger notification filings with the federal agencies. For cash tender offers, the waiting period is 15 days after the premerger filings. Before the initial waiting periods expire, the federal agency that is responsible for reviewing the

transaction may request the parties to supply additional information relating to the proposed merger. These "second requests" often include extensive interrogatories (lists of questions to be answered) and broad demands for the production of documents. A request for further information may be made once, and the issuance of a second request extends the waiting period for ten days for cash tender offers and 20 days for all other transactions. These extensions of the waiting period do not begin until the merging parties are in "substantial compliance" with the government agency's request for additional information.

If the federal government decides not to challenge a merger before the HSR waiting period expires, a federal agency is highly unlikely to sue at a late date to dissolve the transaction under Section 7 of the Clayton Act. The federal government is not legally barred from bringing such a lawsuit, but the desire of the federal agencies to increase predictability for business planners has made the HSR process the critical period for federal review. However, the decision of a federal agency not to attack a merger during the HSR waiting period does not preclude a lawsuit by a state government or a private entity. To facilitate analysis by the state attorneys general, the National Association of Attorneys General (NAAG) has issued a Voluntary Pre-Merger Disclosure Compact under which the merging parties can submit copies of their federal HSR filings and the responses to second requests with NAAG for circulation among states that have adopted the compact.

### Merger Guidelines

In the vast majority of antitrust challenges to mergers and acquisitions, the matters have been resolved by consent order or decree. The Department of Justice and the FTC have sought to clarify they way they analyze mergers through merger guidelines issued May 5, 1992 (4 Trade Reg. Rep. [CCH] ¶ 13,104). These guidelines are not "law" but enforcement-policy statements. Nevertheless, the antitrust enforcement agencies will use them to analyze proposed transactions.

The 1992 merger guidelines state that most horizontal mergers and acquisitions aid competition and that they are beneficial to consumers. The intent of issuing the guidelines is to "avoid unnecessary interference with the larger universe of mergers that are either competitively beneficial or neutral."

The guidelines prescribe five questions for identifying hazards in proposed horizontal mergers: Does the merger cause a significant increase in concentration and produce a concentrated market? Does the merger appear likely to cause adverse competitive effects? Would entry sufficient to frustrate anticompetitive conduct be timely and likely to occur? Will the merger generate efficiencies that the parties could not reasonably achieve through other means? Is either party likely to fail, and will its assets leave the market if the merger does not occur?

The guidelines essentially ask which products or firms are now available to buyers, and where could buyers turn for supplies if relative prices increased by five percent (the measure for assessing a merger-generated price increase). The guidelines redraw market boundaries to cover more products and a greater area, which tends to yield lower concentration increases than U.S. Supreme Court merger decisions of the 1960s.

### Mergers in the Telecommunications Industry

Beginning in 1980, with President Ronald Reagan's administration, the federal government has adjusted its policies to allow more horizontal mergers and acquisitions. The states have responded by invoking their antitrust laws to scrutinize these types of transactions. Nevertheless, mergers and acquisitions have increased throughout the U.S. economy, and this has been especially true in the TELECOMMUNICATIONS industry.

Beginning in the mid 1980s and extending to the mid 1990s, each of the three major television networks, ABC, CBS, and NBC, was purchased by another corporation. In 1985, Capital Cities purchased ABC for $3.5 billion. The same year, General Electric (G.E.) purchased RCA, and in 1985, G.E. purchased NBC. Westinghouse purchased CBS in 1994 for $5.4 billion, and the Walt Disney Co. purchased Capital Cities/ABC for $19 billion in 1995. Other mergers also had a major impact on the industry. In 1989, Time, Inc. merged with Warner Corporation to form the largest media conglomerate in the world, and in 1993, Viacom, Inc. purchased Paramount Corporation in an $8.2 billion deal.

These mergers were major news at the time, and they still have an impact on the industry. Congress deregulated much of the industry

with the passage of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.A.). It was the most significant legislative change in the industry since the passage of the Communications Act of 1934, 48 Stat. 1064. The act called for more open competition among companies within the industry, designed for the purpose of improving services to consumers. The result of the legislation was a wide number of mergers among smaller and larger companies within the industry.

Almost immediately after the passage of the Telecommunications Act, four of the seven Bell telephone regional holding companies announced proposed mergers. More mergers occurred among Bell companies and other local carriers. At least 13 significant mergers in the industry occurred in 1996 alone. Time Warner merged with Turner Broadcasting in 1996 in a $6.7 billion deal, creating the largest media corporation in the world. Worldcom, Inc. purchased MFS Communications for $12.4 billion to become the first local and long-distance telephone company since 1984. Westinghouse/CBS purchased Infinity Broadcasting for $4.9 billion, allowing Westinghouse/CBS to become the dominant power in the radio market.

These mergers continued throughout the 1990s and beyond. For instance, Time Warner merged with America Online, Inc. in 2000 in a $166 billion deal to form the largest convergence of INTERNET access and content in the world. Although some companies and consumer groups complained that the formation of these conglomerate companies could stifle competition and control prices, these mergers have become commonplace.

### The Future of Mergers and Acquisitions

Although a number of factors influence mergers and acquisitions, the market is the primary force that drives them. The late 1990s saw an unprecedented influx in mergers. In 1999, companies filed a record 4,700 Hart-Scott-Rodino filings, about three times the number received in 1995. The total dollar value of the mergers announced in 1998—$11 trillion—was ten times the amount since 1992. The rash of mergers in the telecommunications industry accounted for many of these mergers, but companies in other industries were involved as well.

Another factor in the rise in mergers during the late 1990s was a booming economy, which grew at unprecedented levels. As the country faced recession in the following decade, many companies were forced to downsize, and the number of major mergers decreased accordingly. Improvements in the economy, as well as potential legislative changes, could very well spark another wave of mergers.

#### FURTHER READINGS

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Antitrust Law; Bonds "Michael R. Milken: Genius, Villain, or Scapegoat?" (Sidebar); Golden Parachute; Junk Bond; Restraint of Trade; Scorched-Earth Plan; Unfair Competition.

## MERIT SYSTEM

*System used by federal and state governments for hiring and promoting governmental employees to civil service positions on the basis of competence.*

The merit system uses educational and occupational qualifications, testing, and job performance as criteria for selecting, hiring, and promoting civil servants. It began in the federal government circa 1883. The merit system was established to improve parts of the governmental work force previously staffed by the political patronage or spoils system, which allowed the political party in power the opportunity to reward party regulars with government positions. The merit system has been adopted by state and local governments as well.

## MERIT SYSTEMS PROTECTION BOARD

The Merit Systems Protection Board (MSPB) ensures that federal civil servants are hired and retained based on merit. In overseeing the personnel practices of the federal government, the board conducts special studies of the merit systems; hears and decides charges of wrongdoing and employment appeals of adverse agency actions; and orders corrective disciplinary actions against an executive agency or employee when appropriate. The board's independent special counsel investigates, among other things, prohibited personnel practices and allegations of activities proscribed by civil service laws,

rules, and regulations, and prosecutes officials who violate civil service rules and regulations.

The MSPB is a successor agency to the U.S. Civil Service Commission, which had been established by act of Congress on January 16, 1883. The duties and authority of the board are specified in 5 U.S.C.A. §§ 1201–1206 (1978).

The board has responsibility for hearing and adjudicating appeals by federal employees of adverse personnel actions, such as removals, suspensions, and demotions. It also resolves cases involving re-employment rights, the denial of periodic step increases in pay, actions against ADMINISTRATIVE LAW judges, charges of merit-system violations, and prohibited personnel practices, including charges in connection with WHISTLE-BLOWING (i.e., the reporting of illegal acts). When President BILL CLINTON reauthorized the MSPB and the Office of Special Counsel in 1994, he directed that federal employee whistle-blowers and other victims of prohibited personnel practices receive additional protections. Clinton instructed the agencies to follow appropriate procedures to protect the constitutional rights of such federal employees.

The board has the authority to enforce its decisions and to order corrective and disciplinary actions. An employee or applicant for employment who is involved in an appealable action that also involves an allegation of discrimination may ask the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION to review a board decision. Final decisions and orders of the board are appealable to the U.S. Court of Appeals for the Federal Circuit.

The board reviews regulations issued by the Office of Personnel Management (OPM) and has the authority to require agencies to cease compliance with any regulation that could constitute a prohibited personnel practice. It also conducts special studies on the civil service and other EXECUTIVE BRANCH merit systems and reports to the president and the Congress on whether the federal workforce is being adequately protected against political abuses and prohibited personnel practices.

The Office of the Special Counsel is responsible for investigating allegations and other information concerning prohibited personnel practices; prohibited political activities by federal and certain state and local employees; ARBITRARY or capricious withholding of information in violation of the FREEDOM OF INFORMATION ACT (5 U.S.C.A. § 552 et seq.) (1986); prohibited discrimination when found by appropriate authority; and other activities that are prohibited by any civil service law, rule, or regulation. The special counsel initiates disciplinary and corrective actions before the board when warranted.

The special counsel is also responsible for receiving and referring to the appropriate agency information that evidences a violation of any law, rule, or regulation; mismanagement; gross waste of funds; abuse of authority; or substantial and specific danger to public health or safety.

Since the late 1990s, the board has expanded the amount of information on its web site. Federal employees who wish to file an appeal may download forms and rules. In addition, the decisions of the board are now posted on its web site, <www.mspb.gov>.

FURTHER READINGS

Merit Systems Protection Board Web site. Available online at <www.mspb.gov> (accessed November 11, 2003).

*U.S. Government Manual* Web site. Available online at <www.gpoaccess.gov/gmanual> (accessed November 10, 2003).

CROSS-REFERENCES

Administrative Agency; Administrative Law and Procedure; Bureaucracy; Merit System.

## MERITS

*The strict legal rights of the parties to a lawsuit.*

The word *merits* refers to the substance of a legal dispute and not the technicalities that can affect a lawsuit. A judgment on the merits is the final resolution of a particular dispute.

## MESNE

*Intermediate; intervening; the middle between two extremes, especially of rank or time. In feudal law, an intermediate lord; a lord who stood between a tenant and the chief lord; a lord who was also a tenant.*

CROSS-REFERENCES

Feudalism.

## METES AND BOUNDS

*The boundary lines of land, with their terminal points and angles. A way of describing land by listing the compass directions and distances of the boundaries. It is often used in connection with the Government Survey System.*

## MEXICO AND THE UNITED STATES

Relations between the United States and Mexico are among the most important and complex that each nation maintains. They are shaped by a mixture of mutual interests, shared problems, and growing interdependence. The United States is particularly concerned with illegal immigration, narcotics trafficking, environmental POLLUTION, and economic stability.

The scope of U.S.-Mexican relations goes far beyond diplomatic and official contacts, entailing extensive commercial, cultural, and educational ties. More than one million legal crossings are made from Mexico to the United States every day. Along the 2,000-mile shared border, state and local governments interact closely. The two countries seek to resolve many issues, ranging from combating narcotics trafficking to improving and protecting the shared environment.

The U.S. government has long recognized that a stable and economically prosperous Mexico is fundamental to U.S. interests. Since 1981, the United States-Mexico Binational Commission, composed of numerous U.S. cabinet members and their Mexican counterparts, has met annually to discuss an array of topics, including trade and investment opportunities, financial cooperation, anti-narcotics cooperation, and migration.

Mexico is a major trading partner with the United States. Mexican exports in 2001 totaled $159 billion, with 88.4 percent of its exports going to the United States. Of Mexico's 2001 imports totaling $168 billion, 68.4 percent of the imports were from the United States. In January 1994, Mexico joined CANADA AND THE UNITED STATES in the NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA), which will phase out all tariffs among the nations over a 15-year period. U.S. LABOR UNIONS and some businesses were concerned that the lower tariffs would induce more U.S. companies to relocate factories to Mexico because of lower labor costs there.

**Estimated U.S. Population of Unauthorized Mexican Immigrants, 1990 to 2000**

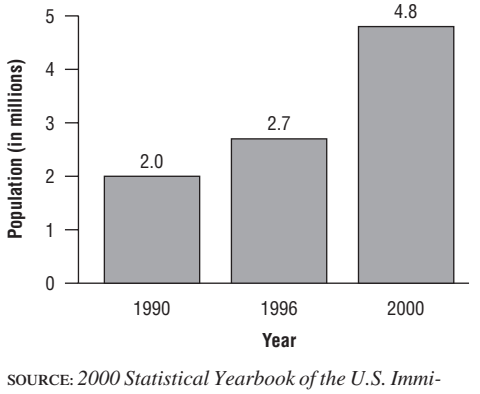


SOURCE: *2000 Statistical Yearbook of the U.S. Immigration and Naturalization Service* and INS, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, January 2003.

The United States played a major role in stabilizing the Mexican economy in 1995. The Mexican government, unable to meet its foreign debt obligations, devalued its peso in December 1994. The resulting financial crisis threatened the stability of other emerging-market economies in Latin America. The United States led a group of international lenders that made available to Mexico more than $40 billion in international financial assistance, including $20 billion from the United States. Although Mexico suffered a severe recession in 1995, the Mexican government's implementation of tough stabilization measures averted an even more serious collapse. The economy began to recover in 1996, and by 1997 Mexico was able to repay the United States the $12.5 billion in loans that it actually had used.

A major concern of the United States has been illegal immigration from Mexico. The desire of Mexicans to leave their country is fueled by a large population (more than 103 million in 2002) and a shortage of well-paying jobs. The U.S. Border Patrol has grown in response to the large number of Mexicans crossing the border illegally. More than 4,000 agents police the border, an increase of 50 percent from 1993, and the number is expected to grow. Parts of the 2,000-mile border have become militarized zones. Steel fences run through deserts and up over hillsides. Border Patrol agents use high-technology surveillance equipment to track the movement of illegal ALIENS. In some sectors, the NATIONAL GUARD and Army personnel assist the Border Patrol.

The Mexican-U.S. border is also the leading entry point into the United States for illegal narcotics. It is estimated that drug traffickers smuggle about $10 billion worth of narcotics into the United States each year, making marijuana, heroin, cocaine, and methamphetamine some of Mexico's most lucrative exports. U.S. and Mexican officials offer differing explanations for the trafficking. U.S. officials blame the alleged cor-

ruption of Mexican law enforcement officials for allowing large-scale traffickers to continue their operations. Mexican officials argue that the problem lies on the other side of the border, where the appetite of U.S. drug users drives the trafficking.

The United States has steadily restricted the Mexican drug trade through aggressive patrol of the borders and searches at border checkpoints. Nevertheless, NAFTA has increased legitimate border traffic, overwhelming U.S. customs officers at the checkpoints. It is estimated that officers can only search about seven percent of all vehicles crossing the border.

In response, the U.S. DRUG ENFORCEMENT ADMINISTRATION has sought to develop closer ties with Mexican drug enforcement officials. However, concern about the corruption of government officials has hurt relations between the countries. Mexico has failed to arrest several drug lords whom the United States has long sought and has failed to implement anti-narcotics legislation passed in 1996. In February 1997, the official in charge of Mexico's antidrug war, General Jesus Gutierrez Rebollo, was arrested for allegedly being on the payroll of the leader of the Juárez, Mexico, drug cartel. Although the United States stood by the Mexican government, it made clear that Mexico must make progress in arresting major drug lords, extraditing drug criminals to the United States, prosecuting MONEY LAUNDERING, and fighting internal corruption. With some experts claiming that Mexico is responsible for 70 percent of the illegal drugs in the United States, the war on drugs remains a source of friction between the two countries.

The United States and Mexico have sought to resolve common environmental issues, particularly in border areas where rapid population growth, urbanization, and industrialization have caused serious problems. In 1992, the United States and Mexico developed the Integrated Border Environment Plan, under which the two countries have worked to construct wastewater treatment plants; strengthen cooperative planning and enforcement efforts; reduce pollution, develop planning, training, and education; and improve understanding of the border environment.

The second phase of the 1992 border plan, called Border XXI, will promote environmental and sustainable development in the U.S.-Mexican border region through increased public participation and improved coordination among local, state, and federal agencies to maximize cooperative and effective use of limited resources. In addition, the plan will encompass environmental health issues and natural-resource protection.

As part of NAFTA's environmental agreement, the United States, Mexico, and Canada have created a North American Commission on Environmental Cooperation. This commission is charged with strengthening environmental laws and addressing common environmental concerns.

In 1993, the United States and Mexico established two institutions to address the environmental infrastructure needs of the border region. The Border Environmental Cooperation Commission (BECC) works with local communities to develop plans for better meeting their need for environmental facilities, including wastewater treatment plants, drinking-water systems, and solid-waste-disposal facilities. In addition, the two countries created the North American Development Bank to obtain private-sector capital to finance the construction of border environmental facilities certified by the BECC.

The International Boundary Commission, which was established as a permanent, joint commission by treaty in 1889, is responsible for solving U.S.-Mexican water and boundary problems. These issues include distribution between the two countries of the waters of the Colorado and Rio Grande Rivers, and joint operation of international dams on the Rio Grande to control floods, conserve water, and generate electricity. Since the early 1980s, the commission has focused on border sanitation problems and has studied groundwater resources along the boundary.

When President GEORGE W. BUSH took office in 2001, he immediately entered into discussions with Mexican President Vicente Fox. One of the items on his agenda was the creation of a guest-worker program, which would allow thousands of Mexican nationals to work in the United States as guests, mostly in agriculture. A number of groups opposed the proposal. A United States-Mexico Migration Panel, a binational group consisting of 30 members from both nations, agreed that the two countries should collaborate to meet several objectives, including making visas more available to Mexican citizens, improving cooperation between Mexican and

U.S. law enforcement to counter human SMUGGLING, and improving Mexico's economy. The negotiations were part of Fox's efforts toward economic development and social reform.

The SEPTEMBER 11TH ATTACKS of 2001 largely put a halt to these negotiations. The United States immediately shifted its attention to protecting its lands against terrorist attacks, including enhancing and improving border patrol. In 2002, Congress abolished the Immigration and Naturalization Service, creating from the agency the Bureau of Citizenship and Immigration Services and the Directorate of Border and Transportation Security. Both agencies are part of the HOMELAND SECURITY DEPARTMENT.

The slowdown in the U.S. economy and the change of focus on the part of the United States from Latin America concerns to those related to TERRORISM caused a minor strain on U.S.-Mexico relations. Fox was criticized when he unsuccessfully sought to win concessions from the United States over immigration issues. Nevertheless, these strains have not eroded the economic relationship between the two countries, as trade between the United States and Mexico is expected to rise during the first decade of the twenty-first century.

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CROSS-REFERENCES

Aliens; Drugs and Narcotics; Environmental Law; Water Rights.

## MICHIGAN V. TUCKER

*Michigan v. Tucker,* 417 U.S. 433, 94 S. Ct. 2357, 41 L. Ed. 2d 182, was a critical 1974 Supreme Court decision that limited the constitutional authority of the *Miranda* rights that the Court had developed in the landmark decision in MIRANDA V. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). In *Michigan v. Tucker,* the Court concluded that the *Miranda* rights were procedural safeguards and not rights protected by the Constitution.

The FIFTH AMENDMENT to the Constitution contains the Self-Incrimination Clause, which guarantees a person the right to refuse to answer questions that might implicate the person in a crime. The Court in *Miranda* announced a set of warnings that law enforcement officers must give a suspect before an interrogation. These well-known warnings direct that a suspect be advised of the right to remain silent, be warned that any statement the suspect makes may be used as evidence against the person, be told of the right to have a lawyer present during interrogation, and if the suspect cannot afford an attorney, the right to have a lawyer appointed to represent the suspect. The Court believed that this set of warnings would create a uniform policy for all law enforcement officers to follow. The penalty for ignoring the *Miranda* warning was the exclusion at trial of any statements or confessions made by the defendant.

In *Michigan v. Tucker,* the Court was confronted with a suspect in a brutal rape whose interrogation had occurred prior to the Court's ruling in *Miranda.* Nevertheless, the police officers who interrogated Thomas W. Tucker advised him of his right to remain silent and his right to an attorney. They did not advise him, however, that he had a right to a free lawyer. Tucker waived his rights and proceeded to name a person who he claimed could provide an alibi. That person, however, provided incriminating evidence against Tucker. Tucker objected to the admission of his statements and sought the protection of the *Miranda* rights that the Court had announced after his arrest but prior to his trial. Tucker also asked that the alibi witness not be allowed to testify because Tucker had provided that information during his interrogation.

The trial judge excluded all of Tucker's statements but allowed the alibi witness to testify. A jury convicted Tucker, and his appeals were denied by the Michigan courts. He then filed a HABEAS CORPUS action in federal court, alleging that the admission of the alibi witness's testimony was tainted by the failure of the police to give him his full *Miranda* rights. Both the federal district court and the court of appeals agreed with Tucker, reversing the conviction.

The U.S. Supreme Court disagreed with the lower courts. Justice WILLIAM H. REHNQUIST, writing for the majority, articulated in general terms the difference between a *Miranda* violation and a constitutional violation of a defendant's Fifth Amendment right against self-incrimination. The Court found that there was a difference between incriminating statements that are actually "coerced" or "compelled" and those obtained

merely in violation of the *Miranda* warning. The former are violations of the Fifth Amendment, whereas the latter are violations of a set of procedural safeguards. Violations of the procedural safeguards, by themselves, will not result in the suppression of the defendant's statements. In this case Tucker's statements had not been coerced; therefore, the testimony of the alibi witness was permissible.

Rehnquist noted that *Miranda*:

> recognized that these procedural safeguards [the warnings] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. . . . The suggested safeguards were not intended to "create a constitutional straitjacket," but rather to provide practical reinforcement for the right against compulsory self-incrimination.

This meant that the failure of police to provide a complete set of warnings, by itself, would not taint the interrogation and force the suppression of the statements. A court had to then look at the conduct of the police to determine if the suspect had been coerced into making incriminating statements.

In this case Rehnquist found that Tucker's interrogation did not bear "any resemblance to the historical practices at which the right against compulsory self-incrimination was aimed. . . . [H]is statements could hardly be termed involuntary as that term has been defined in the decisions of this Court." Rehnquist emphasized that the Court's determination that the case did not involve compulsion sufficient to breach the right of self-incrimination did not mean that police could disregard the *Miranda* warning. The question was "how sweeping [were] the judicially imposed consequences of this disregard." Absent evidence that a defendant's statement was coerced, the Court was not willing to exclude evidence because the police failed to follow the procedures set out in *Miranda.*

The distinction in *Tucker* between what Rehnquist called "prophylactic rules" and constitutional rights reappeared in *New York v. Quarles,* 467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984), and *Oregon v. Elstad,* 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985). In *Quarles* the Court recognized a "public safety" exception to the requirement that the *Miranda* warning be given, reasoning that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."

In *Elstad* the Court held that a second confession, immediately preceded by the *Miranda* warning, was admissible, although an earlier statement from the defendant had been obtained in violation of *Miranda.* The Court noted that suppression of a defendant's statements assumes a "constitutional violation" but that unwarned questioning in itself violated only prophylactic standards laid down to safeguard against such a violation. Using the reasoning in *Tucker* the Court ruled that a noncoercive *Miranda* violation will not result in the suppression of the "accused's own voluntary testimony." The implication of *Tucker* and the two later decisions is that all types of evidence will not be suppressed because of *Miranda* violations.

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CROSS-REFERENCES

Criminal Law; Criminal Procedure; Custodial Interrogation; Due Process of Law; Right to Counsel.

## MIDNIGHT JUDGES

Presidents throughout history have sought to influence law through their judicial appointments. However, the skirmish involving the midnight judges had a much broader significance: it belonged to a fight that had begun shortly after the WAR OF INDEPENDENCE between the leaders of the new nation. The argument pitted the Federalists (led by JOHN ADAMS) against the Republicans (led by THOMAS JEFFERSON) over a fundamental problem: how much power should be given to the federal government and, in particular, the federal judiciary? The answer would influence the course of U.S. law for generations to come.

When Adams lost the 1800 election, the nation was only twenty-four years old. The Constitution, ratified in 1789, was even younger. For more than two decades, the Federalists and the Republicans had argued over their competing visions of strong federal government versus

STATES' RIGHTS. The 1800 election crystallized these opposing philosophies. Adams and the Federalists accused the Republicans of intending to plunder property and undermine civilized society. On the other side, Jefferson and the Republicans attacked the Federalists for trying to subvert the guarantees of the BILL OF RIGHTS. The election tipped the balance of power. With the Republicans capturing the White House and Congress, it appeared that Jefferson's party would at last have the upper hand.

But the Federalists intended to preserve their power. Just before time ran out on the Adams administration, they enacted the Judiciary Act of 1801. This sweeping law struck at a key point of contention: the jurisdiction of the federal courts. The Republicans wanted the federal courts to be constrained, but the new law gave these courts increased jurisdiction over land and BANKRUPTCY cases. The federal courts now had greater authority at the expense of the states. The act added six new federal circuits with sixteen new judges. As a final measure, they also added dozens of new justices of the peace to the District of Columbia. Between December 12 and March 4, President Adams, with the approval of the Senate, busily stacked the courts with his own people. If the Federalists could not control Washington through elected office, they would at least dictate the composition of the judiciary.

The Republicans could not tolerate this bold maneuver. Enraged, Jefferson declared that "the Federalists have retired into the judiciary as a stronghold" where his own party's efforts would be "beaten down and erased." Once in power the Republicans quickly repealed the 1801 act, thus restoring the original jurisdictional authority of the federal courts. But removing the midnight judges presented a difficult constitutional question. The Constitution provided that federal judges were to hold office as long as they demonstrated good behavior—in effect, for life. The Republicans' plan was therefore to abolish the new circuit courts. The Federalists called this an unconstitutional attack on the independence of the judiciary and predicted that the Supreme Court—which was dominated by Federalists—would not allow it. The Republican-controlled Congress stalled a decision on their actions by eliminating the 1802 term of the Court.

The action only delayed an inevitable ruling. Fortunately for the Republicans, Adams had to leave office before he could secure commitments from his appointees, and several declined to serve. Those who accepted did not manage to challenge their removal. But one appointment of a midnight judge had gone largely unnoticed, and it proved to be one of the most important appointments in U.S. history. This was the nomination of JOHN MARSHALL as chief justice of the Supreme Court. Marshall, who was an ardent Federalist, viewed President Jefferson as nothing less than an "absolute terrorist."

In 1803, when the Court reconvened, it ruled on a case that arose from Adams's District of Columbia appointments. Prevented from receiving his commission as a JUSTICE OF THE PEACE, William Marbury asked the Court to order that his commission be honored.

The Court's landmark opinion in MARBURY V. MADISON, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), settled the immediate dispute and partially answered the constitutional question at stake. Writing for the unanimous Court, Chief Justice Marshall dismissed Marbury's suit on the grounds that the Supreme Court lacked jurisdiction. Marshall wanted to avoid an impasse between the judiciary and the White House. However, Marshall's opinion also greatly expanded the power of the Court by holding that the judiciary has the power to say what the law is, and, if necessary, to overturn acts of Congress that it finds unconstitutional. The Court did this in *Marbury* for the first time in history, striking down a section of the JUDICIARY ACT OF 1789.

The problem of the midnight judges was settled, but with unexpected results. The judges appointed by Adams could not take office, and in this way the Federalists were thwarted. Yet in an indirect way, they triumphed. Marshall would serve on the Supreme Court for the next thirty-four years and in the process become perhaps the greatest chief justice in history. Moreover, with his opinion in *Marbury v. Madison,* the Court established its power of JUDICIAL REVIEW, a principal goal of the Federalists.

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CROSS-REFERENCES

Constitution of the United States; Supreme Court of the United States.

## MIGRATORY BIRD TREATY OF 1918

The Migratory Bird Treaty of 1918 between the United States and Great Britain prohibited the killing of many species of birds that traversed certain parts of the United States and Canada. Such species were of great value both as a source of food and because they destroyed insects injurious to vegetation, but they were in danger of extermination through lack of protection.

The state of Missouri sought to have the treaty declared an unconstitutional interference with the rights that are reserved to the states by the TENTH AMENDMENT to the Constitution. In *Missouri v. Holland,* 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920), the Supreme Court held that a valid treaty must prevail over state law, even if a federal statute on the subject would be unconstitutional. Acts of Congress are the supreme law of the land only when made pursuant to the Constitution, and treaties are accorded the same status when made under the authority of the United States.

*Certain species of birds that traverse the U.S. and Canada, including these snow geese, are protected by the Migratory Bird Act of 1918. The Supreme Court held that this treaty, and others like it, must prevail over state law, even if a federal statute concerning the same matter would be held unconstitutional.*

AP/WIDE WORLD PHOTOS

## MILITARY GOVERNMENT

*A government that is established during or after military occupation by the victorious country in an armed conflict. According to* INTERNATIONAL LAW*, the territory that has been placed under the authority of a hostile army continues to belong to the state that has been ousted. However, it may be ruled by the occupiers under a special regime.*

When a country's army achieves decisive victory over an enemy, the victor may supplement military presence in the enemy territory with some type of government. If the victor is a signatory to certain international agreements, it must follow international RULES OF WAR that outline the rights and responsibilities when governing a territory under belligerent occupation. This military government is not the same as MARTIAL LAW, although the occupiers may impose martial law as part of maintaining order.

The rules of military government are established in various international agreements, primarily the Hague Conference of 1907 and the Geneva Conference of 1949. These documents provide guidelines on such topics as rights and duties of the occupying power, protection of civilians, treatment of prisoners of war, coordination of relief efforts, property rights of the ousted state, and other wartime and postwar concerns. A country that establishes a military government and steps beyond its allotted rights runs the risk of international censure or criticism. Countries sometimes try to deny that they have imposed a military government. For example, in the Persian Gulf War, Iraq claimed that Kuwait is an Iraqi province and therefore not eligible for the protections given by the law of belligerent occupation.

The U.S. CIVIL WAR (1861–1865) contributed to the development of rules for military behavior and belligerent occupation. The *Lieber Instructions* is considered a first attempt to codify the laws of war as they existed during the Civil War era. Columbia College Professor Francis Lieber prepared this list of laws in 1863 at the request of President ABRAHAM LINCOLN. They led in part to the Brussels Conference of 1887 and the Hague Conferences of 1899 and 1907 on land warfare. The *Lieber Instructions* included sections on military jurisdiction, protection of persons, and public and private property of the enemy.

The U.S. Civil War pitted the Confederacy—a group of southern states that wanted to secede from the United States—against Union forces, made up of primarily northern and newly formed states. After the victory of Union forces, the U.S. government had to decide how to treat the defeated South. Some vocal members of Congress insisted that because the Confederate states had violated the Constitution by seceding, they had committed "state suicide" and should be treated like conquered provinces.

These politicians finally got their way in 1867, two years after the war ended. State governments were abolished in the rebel states, and the territory was split into five districts, each commanded by a major general of the Union army. Gradually public opinion in the North pushed for home rule for the South, and by 1870 all southern states were restored to the Union. President RUTHERFORD B. HAYES took office in 1877 and removed the army from the last three occupied southern states.

By means of the Hague and Geneva Conferences, and organizations such as the International Committee of the Red Cross, the rules of war have evolved beyond those in the *Lieber Instructions*. When following these general rules, victorious countries continue to have broad discretion in how they govern conquered zones. The United States has used various approaches to establish postwar governments. For example, after WORLD WAR II, the United States established very different types of governments to oversee the reconstruction of Germany and Japan, which were defeated by Allied forces.

After Germany surrendered in World War II, the country and its capital were each divided into four zones. Government of the zones was assigned to four different countries: the United States, Great Britain, France, and the Soviet Union. The occupiers differed in their opinions about what type of permanent government should follow military occupation, and the zones occupied by the Soviet Union became communist East Germany. The other zones became democratic West Germany. The two Germanys were reunited in October 1990.

Unlike the military government in Germany, the U.S. occupation of Japan did not involve a large military presence. After Japan surrendered, its existing civilian governing structure was left mostly intact, directed by General Douglas MacArthur and the Supreme Command of the Allied Powers (SCAP). During occupation, Japan—a nation of seventy million people—was supervised by 600,000 troops, whose number was soon reduced to 200,000.

During more than six years of U.S. occupation, the Japanese Diet (legislature) met and passed laws that were subject to VETO by SCAP. The Japanese army and navy were abolished, weapons were destroyed, 4,200 Japanese were found guilty of WAR CRIMES, Shinto was disestablished as the state religion, and a new constitution—the "MacArthur Constitution"—was adopted. SCAP accomplished land reform, strengthened trade unions, and placed limits on Japan's powerful monopolistic corporations.

After World War II the international community agreed that more safeguards were necessary to protect civilians and their property in occupied territories. As a result the Fourth Geneva Conference was established in 1949 to tackle these issues.

In more recent times, the United States, after invading Grenada and Panama, established a military government in each country during a brief belligerent occupation.

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CROSS-REFERENCES

Military Law.

## MILITARY LAW

*The body of laws, rules, and regulations that have been developed to meet the needs of the military. It encompasses service in the military, the constitutional rights of service members, the military criminal justice system, and the* INTERNATIONAL LAW *of armed conflict.*

The Framers of the Constitution vigorously debated the necessity and advisability of a standing army. Federalists such as ALEXANDER HAMILTON and JAMES MADISON argued that a standing army was needed for the maintenance of a unified defense. Others, like THOMAS JEFFERSON and GEORGE MASON, were fearful of instituting a military establishment that could be an instrument of governmental abuse. They argued that the Constitution should prohibit, or at least limit, the size of the armed forces. The opposing sides compromised by approving a standing army but limiting appropriations for its support to two-year terms, thereby imposing a continual check on the military's activities.

The authority of the government to maintain a military and to develop rules and regulations governing it is found in Article I, Section 8, of the Constitution, which grants Congress the power to provide for the common defense and to raise and support armed forces.

The U.S. Supreme Court confirmed the legality of the standing army in EX PARTE MILLI-

GAN, 71 U.S.(4 Wall.) 2, 18 L. Ed. 281 (1866). It held that the Constitution allows Congress to enact rules and regulations to punish any member of the military when he or she commits a crime, in times of war or peace and in any location. The Court further confirmed the constitutionality of MARTIAL LAW in situations where ordinary law is insufficient to secure public safety and private rights.

### Service in the Military

Congress's duty to provide for the national defense is carried out through four basic routes into military service: enlistment, activation of reservists, CONSCRIPTION, and appointment as an officer.

Typically, military enlistment entails a six-year service obligation, usually divided between active and reserve duty. Enlistees agree to abide by the provisions of the UNIFORM CODE OF MILITARY JUSTICE, (UCMJ) obey lawful orders, serve in combat as required, and accept any changes in status or benefits brought about by war or statutory amendments. In return, the military branch agrees to provide the enlistee with compensation and to honor promises concerning assignment, education, compensation, and support of dependents.

Enlistment is open to persons who are at least 17 years old and who enter into the enlistment agreement voluntarily. It is not available to declared homosexuals (although the military may not inquire as to sexual orientation) or to unmarried parents of children under 18 years of age. Enlistees are required to sign the enlistment agreement and, in most cases, to take the oath of allegiance.

Enlistment in the armed forces creates both a contractual obligation and a change in the recruit's legal status. (See *United States v. Grimley,* 137 U.S. 147, 11 S. Ct. 54, 34 L. Ed. 636 [1890].) Although personal service contracts are generally not enforceable, the courts recognize the special legal status of military enlistees and have required those who breach the enlistment contract to remain in the service or serve a prison term. However, after the institution of the all-volunteer military during the 1970s and 1980s, the courts relied more on traditional contract law when ruling on breach-of-enlistment suits. (See *Woodrick v. Hungerford,* 800 F.2d 1413 [5th Cir. 1986], *cert. denied,* 481 U.S. 1036, 107 S. Ct. 1972, 95 L. Ed. 2d 812 [1987], and *Cinciarelli v. Carter,* 662 F.2d 73, 213 U.S. App. D.C. 228 [D.C. Cir. 1981], where the courts applied contract law principles and found that the enlistments in question were void or voidable.)

Reservists or NATIONAL GUARD members are civilians who are subject to active service to execute laws, suppress insurrections, and repel invasions. Several suits by state governors have challenged congressional power to call up reservists. In *Perpich v. Department of Defense,* 496 U.S. 334, 110 S. Ct. 2418, 110 L. Ed. 2d 312 (1990), a suit by Minnesota's governor challenging Congress's authority to call reservists to active duty, the U.S. Supreme Court confirmed that the reserve system, under which members serve in both the state National Guard and the federal National Guard, is a necessary and proper exercise of Congress's power to raise and support armies.

Conscription, also known as the draft, is another route by which individuals are inducted into military service. The draft was the primary means of filling the ranks of the military from WORLD WAR I through WORLD WAR II, the KOREAN WAR, and the VIETNAM WAR. Although many cases challenged the constitutionality of conscription, the U.S. Supreme Court has consistently held that Congress's power to conscript Americans for military service is "beyond question." (See *United States v. O'Brien,* 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 [1968].) Deferments and exemptions from the draft were granted for certain physical, mental, and religious reasons, or where induction would cause an undue hardship on the draftee or the draftee's family. The draft was abolished in 1972.

The final method of entry into the military is through appointment as an officer. Officer appointments are governed by the Appointments Clause of the Constitution (Art. II, Sec. 2, Cl. 2). Officers are appointed to a rank within a specific branch of the service.

Most military personnel serve their entire tour of duty and are discharged without any complications. An honorable discharge must be issued when a service member's record reflects acceptable military conduct and performance of duty (32 C.F.R. pt. 41, app. A). An honorable discharge cannot be denied without DUE PROCESS OF LAW. (See *United States ex rel. Roberson v. Keating,* 121 F. Supp. 477 [N.D. Ill. 1949].) A general discharge under honorable conditions may be issued when the service member's record does not warrant an honorable discharge because of ineptitude, defective attitude, or apathy (32 C.F.R. pt. 41, app. A).

A discharge under other than honorable conditions may be issued under certain circumstances indicating that a service member's behavior is inconsistent with conduct expected of military personnel (32 C.F.R. pt. 41, app. A, pt. 2). In most cases, the service member must be notified and given an opportunity to request review of the discharge by an administrative review board.

Bad-conduct and dishonorable discharges are punitive discharges that may be issued only after a full COURT-MARTIAL. Each results in loss of veterans' benefits and, in some cases, loss of CIVIL RIGHTS.

In addition to discharges, separations from military service may be accomplished through administrative proceedings (10 U.S.C.A. § 1169). The Department of Defense outlines the reasons, guidelines, and procedures for administrative separation (32 C.F.R. pt. 41, app. A). Administrative separation may be allowed to permit a service member to pursue educational opportunities or to accept public office; to alleviate hardship or dependency; to accommodate the demands of pregnancy or parenthood; to address religious concerns or conscientious objections; or to address physical and mental conditions that interfere with an assignment or the performance of duty.

Administrative separation may be initiated when a service member is found to have engaged in homosexual conduct. The National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, Nov. 30, 1993, 107 Stat. 1547, states, "The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." The courts have consistently upheld the congressional prerogative to discharge homosexuals from the military.

During the 1980s, the military discharged service members for homosexual orientation as well as homosexual conduct. In 1993, President BILL CLINTON attempted to change the military's policy of discharging gays and lesbians because of their sexual orientation. He struck a compromise with those who were opposed to changing the policy in the National Defense Authorization Act of 1994, which requires separation from service of individuals who voluntarily declare their homosexuality, but bars military personnel from inquiring into a service member's sexual orientation. This has become known as the "don't-ask-don't-tell" policy.

Two administrative bodies review military discharges: the Discharge Review Board and the Board for Correction of Military Records. Service members also may seek JUDICIAL REVIEW of a discharge, but the courts generally require exhaustion of administrative remedies before they will accept jurisdiction over a discharge review. (See *Seepe v. Department of Navy,* 518 F.2d 760 [6th Cir. 1975], and *Woodrick v. Hungerford,* 800 F.2d 1413 [5th Cir. 1986], *cert. denied,* 481 U.S. 1036, 107 S. Ct. 1972, 95 L. Ed. 2d 812 [1987].)

### Rights of Service Members

In the past, some legal analysts contended that those in the military receive a level of constitutional protection that is inferior to that afforded to civilians. However, in *United States v. Stuckey,* 10 M.J. 347 (1981), the Court of Military Appeals (now called the U.S. Court of Appeals for the Armed Services) held that "the BILL OF RIGHTS applies with full force to men and women in the military service. . . ."

Congress, under its authority to regulate the armed forces, generally determines the due process and EQUAL PROTECTION rights of service personnel, and most courts defer to congressional authority in this area. However, the U.S. Supreme Court has made it clear that Congress must heed the Constitution when it enacts legislation that concerns the military.

Because both the FIRST AMENDMENT and the authority to regulate the military are found in the Constitution, a balance must be struck between First Amendment freedoms and the needs of the military. For example, Article 88 of the UCMJ makes it a crime for a commissioned officer to use contemptuous words against the president, vice president, Congress, and other government officials. Although this probably would be a violation of First Amendment FREEDOM OF SPEECH outside the military context, constitutional challenges to Article 88 have consistently failed. In *United States v. Howe,* 37 C.M.R. 555 (A.B.R. 1966), *reconsideration denied,* 37 C.M.R. 429 (C.M.A. 1967), a second lieutenant was convicted of violating Article 88 when he participated in an antiwar demonstration in which he carried a sign derogating President LYNDON B. JOHNSON. The court allowed his conviction to stand, even though he was off duty and wearing civilian clothes at the time of the

demonstration. Similar limitations on the speech of enlisted personnel have been upheld, as well.

Military personnel are entitled to certain rights and benefits by virtue of their service. They retain the right to vote and participate in the election of the government. For income and property tax purposes, they retain the domicile in which they reside at the time of enlistment and cannot be taxed by other states where they may be stationed. The Soldiers and Sailors Civil Relief Act Amendments of 1942 (SSCRA) (50 U.S.C.A. app. §§ 514–591) protects military personnel from legal or financial disadvantage that results from their being ordered to active duty. A variety of remedies to alleviate hardship are available under the SSCRA, including stays of civil proceedings; stays of execution of judgments, attachments, or garnishments; protection against foreclosures on real or PERSONAL PROPERTY; a cap on interest rates charged on obligations incurred before active duty; and protection against evictions.

The Uniformed Services Employment and Reemployment Rights Act of 1994 (38 U.S.C.A. §§ 4301 et seq.) requires employers to rehire former employees who serve in the military for five years or less, with certain exceptions. The act also protects insurance, PENSION, and fringe benefits. The Veterans' Preference Act (1944) (5 U.S.C.A. §§ 2108 and 3309–3320) grants an employment preference to certain veterans and their survivors and enhances their job security.

Veterans also receive education benefits under the Post-Vietnam Era Veterans' Educational Assistance Program (1976) (38 U.S.C.A. ch. 32) and the New GI Bill (1987) (38 U.S.C.A. ch. 30). Education benefits are granted to spouses and dependent children of certain veterans in the Survivors' and Dependents' Educational Assistance Act (38 U.S.C.A. § 3501). Finally, most veterans are eligible for assistance in purchasing a home under a federal lender-guarantee program that lowers the mortgage interest rate and down payment that a veteran must pay (38 U.S.C.A. § 3710).

Under some circumstances, military personnel may seek compensation from the federal government for injury or death that occurs during service under the FEDERAL TORT CLAIMS ACT (28 U.S.C.A. §§ 2675). The most notable exceptions under the act are claims that arise out of combat during time of war and claims that arise while the service member is in a country outside the United States. In addition, the Military Claims Act (10 U.S.C.A. § 2733) provides an administrative remedy for those who incur damage to, or loss of, property, personal injury, or death caused by a civilian employee or a member of the ARMED SERVICES. The Military Claims Act addresses injuries that are not covered by the Federal Tort Claims Act.

### Military Criminal Justice System

The military justice system is the primary legal enforcement tool of the armed services. It is similar to, but separate from, the civilian criminal justice system. The Uniform Code of Military Justice, first enacted in 1950, is the principal body of laws that apply to members of the military. Military tribunals interpret and enforce it.

There are several rationales for a separate military justice system. The system's procedures are efficient and ensure swift and certain decisions and punishments, which are essential to troop discipline. By comparison, the civilian criminal justice system can be cumbersome and slow and may yield unanticipated or inconsistent results. Speedy trials and predictable decisions aid the military in its effort to maintain order and uniformity. This, in turn, contributes to national security. In addition, the court-martial system fulfills the civilian public's expectation of a disciplined and efficient military.

In addition to enhancing discipline, order, uniformity, efficiency, and obedience, the UCMJ addresses certain offenses that are unique to the military, such as desertion, insubordination, or absence without leave. Finally, the military requires a uniform system that can be administered at the location of the crime to adjudicate offenses committed by service members outside U.S. jurisdiction.

The jurisdiction of the military courts is established when the court is properly convened, the membership of the court satisfies the requirements of the UCMJ, the court has the power to try the accused, and the offense is addressed in the UCMJ. The UCMJ provides that military courts have jurisdiction over all members of the armed services and certain civilians who meet limited, well-defined criteria.

The three tiers of military courts are courts-martial, Courts of Criminal Appeals, and the United States Court of Appeals for the Armed Services.

**Courts-Martial** The three types of courts-martial—summary, general, and special—comprise the trial level of the military justice system.

Courts-martial were originally authorized by an amendment to the Articles of War (Act of March 3, 1863, ch. 75, sec. 30, 12 Stat. 736). The amendment gave courts-martial jurisdiction over military personnel in times of war, insurrection, or rebellion to prosecute such crimes as murder, ROBBERY, ARSON, BURGLARY, rape, and other common crimes. The UCMJ authorizes military commanders to convene courts-martial on an ad hoc basis to try a single case or several cases of service members who are suspected of having violated the code.

**Summary Courts-Martial** Summary courts-martial adjudicate minor offenses. Their jurisdiction is limited to enlisted personnel. Summary courts-martial may impose a sentence of confinement for not more than one month, hard labor without confinement for not more than 45 days, restriction to specified limits for not more than two months, or FORFEITURE of not more than two-thirds of one month's pay (UCMJ art. 20, 10 U.S.C.A. § 820). Although the summary court-martial is intended to dispose of petty criminal cases promptly, it must fully and fairly investigate both sides of the case. Nevertheless, the protections guaranteed in special or general courts-martial are diminished in a summary hearing. Therefore, a summary court-martial may be conducted only with the consent of the accused.

The defendant in a summary court-martial may consult with military counsel before trial but is not entitled to military defense counsel at the hearing. A summary court-martial is presided over by a single commissioned officer who conducts the trial with minimal input from adversarial counsel and acts as judge, fact finder, and counsel. Thus, a summary court-martial is more similar to the inquisitorial courts of the civil-law system than to the Anglo-American adversarial model. Summary courts-martial are employed less frequently than are other types of courts-martial. With increased recognition of the constitutional rights of the accused during the last part of the twentieth century, their use has greatly diminished.

**Special Courts-Martial** A special court-martial generally consists of a military judge and at least three armed-service members. However, under Article 16(2) of the UCMJ (10 U.S.C.A. § 816(2)), the members may sit without a judge, or the accused may choose to be tried by a judge alone.

The military-judge position was authorized by the Military Justice Act of 1968 (UCMJ art. 26, 10 U.S.C.A. § 826). The military judge's role is similar to that of a civilian trial judge. Military judges do not determine penalties and may only instruct the members of the court, who act as a jury, as to the kind and degree of punishment that the court may legally impose, unless the accused elects to have the judge sit as both judge and jury. This dual role is permissible only in non-capital cases. In any case, the judge rules on all legal questions.

The UCMJ requires that service members who are selected for the special court-martial be the best qualified to serve, as measured by their age, education, training, experience, length of service, and judicial temperament.

Special courts-martial have jurisdiction over most offenses under the UCMJ and may impose a range of sentences, including confinement for no longer than six months; three months of hard labor without confinement; a bad-conduct discharge; forfeiture of pay not to exceed two-thirds of monthly pay; withholding of pay for no more than six months; or a reduction in rank (UCMJ art. 19, 10 U.S.C.A. § 819).

**General Courts-Martial** The general court-martial is the most powerful trial court in the military justice system. A general court-martial is presided over by either a military judge and at least five service members, or a judge alone if the accused so requests and the case involves a non-capital offense (UCMJ art. 16(1), 10 U.S.C.A. § 816(1)). General courts-martial may try all offenses under the UCMJ and may impose any lawful sentence, including the death penalty, dishonorable discharge, total forfeiture of all pay and allowances, and confinement. General courts-martial have jurisdiction over all persons who are subject to the UCMJ.

A general court-martial may be convened only by a high-ranking official, such as the president, the secretary of a military branch, a general, or a commander of a large unit or major installation. The commander of a smaller unit may only convene a special court-martial. Trial attorneys who are appointed to represent the accused in a general court-martial must be certified military lawyers. Verbatim recordings of general courts-martial are required by the Rules for Court-Martial.

The constitutionality of the court-martial system has been upheld in a number of cases

under the theory that the military constitutes a separate society that requires its own criminal justice system. The U.S. Supreme Court has consistently deferred to the authority of the military, as conferred by Congress, to govern its members. In *Solorio v. United States,* 483 U.S. 435, 107 S. Ct. 2924, 97 L. Ed. 2d 364 (1987), the Court held that "Congress has primary responsibility for the delicate task of BALANCING the rights of servicemen against the needs of the military. . . . [W]e have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of servicemen were implicated."

**Courts of Criminal Appeals** The intermediate appellate courts in the military justice system are the four Courts of Criminal Appeals (CCA), one for each branch of the armed services (i.e., the Army, Navy, Air Force, and Marines). Before 1995, these courts were called the Courts of Military Review (CMR).

The Military Justice Act of 1968 (10 U.S.C.A. § 866) established the CMR to review court-martial convictions. They generally have three-judge panels that review all cases in which the sentence exceeds one year of confinement, involves the dismissal of a commissioned officer, or involves the punitive discharge of an enlisted person (UCMJ art. 66, 10 U.S.C.A. § 866). Courts of Criminal Appeals may review findings of fact and findings of law and may reduce the sentence, dismiss the charges, or order a new trial.

Review by the CCA is mandatory and automatic in cases where the sentence is death, dismissal, dishonorable or bad-conduct discharge, or imprisonment for one year or more, and the right to appellate review has not been waived or an appeal has not been withdrawn. CCA judges may be commissioned officers or civilians, but all must be members of a bar of a federal court or of a state's highest court. The judges are selected by the JUDGE ADVOCATE general of the appropriate service branch. CCA judges do not have tenure or fixed terms. They serve at the pleasure of the judge advocate general. Decisions of the CCA are subject to review by the United States Court of Appeals for the Armed Forces.

**U.S. Court of Appeals for the Armed Forces** Congress established the U.S. Court of Appeals for the Armed Forces (USCAAF), formerly known as the Court of Military Appeals (CMA), in 1950 (10 U.S.C.A. § 867). It is the highest civilian court that is responsible for reviewing decisions of military tribunals. It is exclusively an appellate criminal court. The court consists of three civilian judges appointed by the president, with the advice and consent of the Senate, to serve 15-year terms.

The USCAAF has jurisdiction over all cases in which the death penalty is imposed, all cases sent by the judge advocate general for review after CCA review, and certain appeals petitioned by the accused that the court agrees to review. The court may only review QUESTIONS OF LAW. Decisions of the USCAAF may be appealed to the U.S. Supreme Court, which may grant or deny review.

**Jurisdictional Questions Involving Military Courts** On a number of occasions in U.S. history, the jurisdiction of military courts has come into question. Congress resolved many of these disputes through legislation, the most significant of which was the Uniform Code of Military Justice. Although military courts generally have powers that are analogous to those of their counterparts in the civilian system, they are subject to limitations in the federal laws creating them.

The U.S. Supreme Court resolved a major jurisdictional question involving the military courts in *Clinton v. Goldsmith*, 526 U.S. 529, 119 S. Ct. 1538, 143 L. Ed. 2d 720 (1999). The Court ruled that the USCAAF did not have the authority to issue an INJUNCTION preventing the U.S. Air Force from dropping a convicted officer from its rolls. The decision made clear that the president has the power to fire military personnel for the same offenses that resulted in their courts-martial and convictions.

In 1996, Congress passed legislation that expanded the president's authority over the military. The president was empowered to drop from the rolls of the armed forces any officer who had been sentenced by a court-martial to more than six months' confinement and who had served at least six months. The case in *Goldsmith* arose when an Air Force major, who was HIV-positive, continued to have unprotected sex after a superior had ordered him to inform his sexual partners of his disease. When the officer had sex with two partners, including a fellow officer and a civilian, he was convicted by a court-martial of willful disobedience of an order from a superior officer and two other related charges.

The officer appealed his conviction to the Court of Criminal Appeals and, later, the

USCAAF, seeking an injunction to prevent the president and the Air Force from dropping the officer from the Air Force rolls. Although the CCA refused, indicating that it lacked jurisdiction, the USCAAF issued the injunction. A unanimous U.S. Supreme Court, per Justice DAVID H. SOUTER, ruled that the USCAAF lacked this form of injunctive power. According to the Court, the USCAAF's authority is limited to the review of sentences imposed by courts-martial and appellate decisions by the Court of Criminal Appeals.

### Law of Armed Conflict

The international law of armed conflict applies to situations involving an armed, hostile conflict that is not a civil or internal matter.

An armed conflict may begin by declaration of war, by the announcement of one governmental entity that it considers itself at war with another, or through the commission of hostile acts by the military forces of one entity against another. In the past, a formal declaration of hostilities was required before a conflict was legally interpreted as a war. Thus, in *Savage v. Sun Life Assurance Co.*, 57 F. Supp. 620 (W.D. La. 1944), the court found that the insured, who died in the Japanese attack on Pearl Harbor, had not died as a result of war because the United States had not yet formally declared itself at war with Japan. Rather, the court found that the insured's death was accidental and that his beneficiary could collect double indemnity under an accidental death policy. In modern times, the outbreak of hostilities even without a formal declaration or ultimatum is regarded as war in a legal sense, unless both parties deny the existence of a state of war.

Armed conflict may be terminated by a peace treaty, a cessation of hostilities and establishment of peaceful relations, unconditional surrender, or subjugation.

The United States, as a member of the UNITED NATIONS, is bound by the U.N. Charter, which requires that its members refrain from the threat or use of force in any manner that is not consistent with U.N. policies. In addition, the United States is a signatory to most major treaties relating to warfare, including the Hague Conference of 1907, the Geneva conferences of 1929 and 1949, and the Genocide Convention of 1948. All of these treaties set forth basic principles that govern the conduct of war: Force should be directed only at targets that are directly related to the enemy's ability to wage war (military necessity); the degree of force used should be directly related to the importance of the target and should be no more than is necessary to achieve the military objective (proportionality); and the force used should cause no unnecessary suffering, destruction of civilian property, loss of civilian life, or loss of natural resources (humanitarian principle). In addition, the Hague Conference provided that captured prisoners may not be killed; captured towns may not be pillaged; and the property, rights, and lives of civilians in armed conflict areas must be respected.

In addition to written treaties relating to war, international armed conflict is governed by customary international law, or the COMMON LAW of armed conflict. Under this constantly evolving body of law, certain conduct is proscribed because world opinion forbids it. In *Ex parte Quirin,* 317 U.S. 1, 63 S. Ct. 2, 87 L. Ed. 3 (1942), *order modified by* 63 S. Ct. 22, the Court upheld jurisdiction of a military tribunal over German saboteurs who used civilian disguises, even though no written law or treaty justified their trial. The Court based its decision on the ground that infiltration by disguise violated the customary law of armed conflict. (See also *The Paquete Habana,* 175 U.S. 677, 20 S. Ct. 290, 44 L. Ed. 320 [1900].) The customary law of war is based on the same principles embodied in the Hague Conference and subsequent treaties and reflects international agreement that actions that are inconsistent with those principles should not go unpunished even in the absence of express prohibitions. Many nations, including the United States, have codified significant portions of the common law of armed conflict. (See U.S. Department of the Army, *The Law of Land Warfare* [Field Manual 27-10, 1956].)

In response to the SEPTEMBER 11TH ATTACKS in 2001, when terrorists hijacked four U.S. planes and used them to destroy the World Trade Center in New York and seriously damage the Pentagon, President GEORGE W. BUSH led the country into a WAR ON TERRORISM. As part of this war, Bush signed a military order on November 13, 2001 that, among other provisions, allows the United States to try suspected terrorists in a military tribunal, rather than the federal court system.

According to the order, "To protect the United States and its citizens, and for the effective conduct of military operations and prevention of ter-

rorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals." The order authorizes the secretary of defense to issue regulations establishing military commissions to try any and all offenses subject to the order. These regulations must ensure a full and fair trial and must provide rules pertaining to procedures, evidence, issuance of process, qualifications of attorneys, and other similar matters.

The DEFENSE DEPARTMENT issued regulations on March 21, 2002. Many of the provisions in the regulations are similar or analogous to rules that apply in the civilian courts. These regulations provide that an accused must be provided with a defense counsel, or may choose his or her own attorney. The accused is presumed innocent until proven guilty, and the prosecution must prove its case BEYOND A REASONABLE DOUBT. The rules also ensure the rights against SELF-INCRIMINATION and DOUBLE JEOPARDY.

As the United States engaged in military action in Afghanistan, suspected members of the Taliban regime and the al-Qaeda organization were held at U.S. military bases, and could have been subjected to the military tribunals. Supporters of this plan indicate that military tribunals are necessary because the United States is at war with terrorists, and alien enemies are generally not afforded the protection of the U.S. Constitution at times of war. Moreover, supporters note that during critical wars in the nation's history, leaders often have used military tribunals. These leaders include GEORGE WASHINGTON, during the Revolutionary War; ABRAHAM LINCOLN, during the Civil War; and FRANKLIN DELANO ROOSEVELT, during World War II.

Critics note that the use of military tribunals has serious constitutional implications. Certain constitutional rights might not apply in a military tribunal as they do in the regular court system. Whereas a conviction in a regular court requires a unanimous vote, a military tribunal, which makes all determinations of the law and the facts, must agree by a two-thirds majority. Moreover, a trial in a military court need not be held in public, and the right to an appeal is limited. No ruling by a military tribunal is final until approved by the president or the secretary of defense.

Bush's order generally has not been popular overseas, as the use of these tribunals has been seen as a means by which the U.S. can avoid fair trials in its civilian system. Nevertheless, the Bush administration has defended the development of the system. According to Bush, "We are an open society, but we are at war. We must not let foreign terrorists use the forums of liberty to destroy freedom itself."

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CROSS-REFERENCES

Arms Control and Disarmament; Conscientious Objector; Gay and Lesbian Rights; Geneva Conventions, 1949; Genocide; GI Bill; Just War; Military Government; Military Occupation; Militia; Nuremberg Trials; Rules of War; Selective Service System; Solomon Amendment; Veterans Affairs Department; War; War Crimes.

## MILITARY OCCUPATION

Military occupation occurs when a belligerent state invades the territory of another state with the intention of holding the territory at least temporarily. While hostilities continue, the occupying state is prohibited by INTERNATIONAL LAW from annexing the territory or creating another state out of it, but the occupying state may establish some form of military administration over the territory and the population. Under the MARTIAL LAW imposed by this regime, residents are required to obey the occupying authorities and may be punished for not doing so. Civilians may also be compelled to perform a variety of nonmilitary tasks for the occupying authorities, such as the repair of roads and buildings, provided such work does not contribute directly to the enemy war effort.

Although the power of the occupying army is broad, the military authorities are obligated

under international law to maintain public order, respect private property, and honor individual liberties. Civilians may not be deported to the occupant's territory to perform forced labor nor impressed into military service on behalf of the occupying army. Although measures may be imposed to protect and maintain the occupying forces, existing laws and administrative rules are not to be changed. Regulations of the Hague Conventions of 1907 and, more importantly, the 1949 GENEVA CONVENTION for the Protection of Civilian Persons in Time of War have attempted to codify and expand the protection afforded the local population during periods of military occupation.

CROSS-REFERENCES

War.

## MILITIA

*A group of private citizens who train for military duty in order to be ready to defend their state or country in times of emergency. A militia is distinct from regular military forces, which are units of professional soldiers maintained both in war and peace by the federal government.*

In the United States, as of the early 2000s, the NATIONAL GUARD serves as the nation's militia. Made up of volunteers, the National Guard acts under the dual authority of both the federal and state governments. According to the Constitution, Congress can call the National Guard into federal service for three purposes: to enforce federal laws, to suppress insurrections, and to defend against invasions. State governors can call upon the National Guard for emergencies that are prescribed by state law.

The American militia system has its roots in ancient English tradition, dating back to the Anglo-Saxon militia that existed centuries before the Norman Conquest in 1066. This militia, known as the *fyrd,* consisted of every able-bodied male of military age. It was traditionally used for defense only, and the sovereign could call upon the fyrd to fight if the men would be able to return to their homes by nightfall. Fyrd members were required to supply their own weapons, which they could use only in the service of the king.

After 1066 the victorious Normans retained this militia system, and successive English monarchs continued to rely on citizen soldiers for national defense. During the reign of the Tudors (1485–1603), professional forces began to be used in England, but their main task was to train the local militias, which were much less expensive to use than their professional counterparts. The major element of training was the muster, which was a mandatory gathering of all able-bodied free males, age 16 to 60, for the purpose of appraising the participants, their weapons, and their horses. Mustering was an ancient ritual, but during her reign Queen Elizabeth I systematized the practice, requiring musters four times a year and authorizing payment for those attending. Even with this enhanced level of organization, however, musters were as much social occasions as they were military drills. Participants looked forward to musters as an opportunity to eat and drink heavily before engaging in fights and mock battles.

When the English began to establish colonies in North America in the seventeenth century, the colonial governments continued to require all able-bodied free men to possess arms and to participate in the colonial militias. Each colony formed its own militia unit, appointing officers, providing training, and building its own fortifications. The function of each colonial militia was principally to defend the settlers' homes and villages against Indian raids, and at this they were largely successful.

Colonial militias were much less effective when used for offensive purposes on extended campaigns far from the militia members' homes. GEORGE WASHINGTON discovered this when, as a colonel in the Virginia militia, he had great difficulty recruiting enough men to fight the French and Indian War, which lasted from 1754 to 1763. Few men were willing to report for duty. Of those who did, few were well armed, and many quickly deserted the troops and returned home. Some militia officers instituted drafts to recruit more men, but even then, many of the draftees simply paid less-qualified men to report in their places. The British were finally able to win the war when Prime Minister William Pitt made changes in recruiting policies and the military bureaucracy, which made serving in the militia more palatable for the American colonists.

After Great Britain defeated France in the French and Indian War, it was left with a greatly enlarged North American empire to manage and finance. Large numbers of British troops were stationed in America, and the colonists were expected to quarter them and to pay various

taxes and fees, including the well-known Stamp Tax, to finance the troops. These additional taxes were one of the principal grievances that motivated the American colonists to prepare for revolution and to form the select militia units that became known as the "Minutemen"; this name reflected the fact that the men were trained to respond instantly when called. The Minutemen first saw action when the Massachusetts unit was called to defend the colonists' military stores at Lexington and Concord on April 19, 1775.

During the Revolutionary War, American military forces consisted of a combination of state militias, specially trained militia units (such as the Minutemen), and the Continental Army, a small professional force created by Congress. The militia was much more effective than it had been during the French and Indian War because its members were fighting for a cause in which they fervently believed. In addition, the militia system had been reorganized and strengthened: there were more training days, the punishment was more severe for missing musters, and fewer men were exempted from military duty. Even so, militia forces were much less reliable than the professional army, and commanders found it difficult to plan their moves, never knowing exactly how many men would show up and how long they might stay. Ultimately, however, the militias played a critical role in helping the colonists to defeat the British, supplying enough men to keep the Continental Army going and providing, on very short notice, large numbers of armed men for brief periods of emergency service.

When state delegates met in 1787 to create the Constitution for the new United States of America, the principal division was between those delegates who favored a strong central government and those who preferred to leave more power to the states. The former wanted a strong standing military, and the latter argued for greater reliance on the state militias. The issue of a standing military was particularly controversial because many Americans were suspicious of the very concept of a standing army, associating it with the tyranny they had experienced under Great Britain. Nevertheless, because most of the delegates were more concerned about invasion than domestic tyranny, Congress was given the power to create a standing army if it so chose. Advocates of state power did achieve a partial victory, however, in that authority over the state militias was divided between the federal government and the state governments. Congress was given the authority to organize, arm, and discipline the militia, but states were given the power to appoint officers and provide training. Congress, not the president, was given the power to summon state militias into federal service for just three specific tasks: "to execute the laws of the Union, suppress insurrections, and repel invasions" (Art. I, Sec. 8, Cls. 15, 16).

During his first term as president, George Washington worked with Secretary of War Henry Knox to reorganize and strengthen the militia. They sent their plan to Congress, and after heated debate Congress, on May 9, 1792, passed what became known as the Uniform Militia Act (1 Stat. 264). This law, which remained the basic militia law until the twentieth century, stated that all free, able-bodied white men, age 18 to 45, were required to serve in their state militias and that they were obligated to supply themselves with the appropriate firearms and equipment. The law provided certain specifications for how militia units were to be organized, but Congress left many details to the states and declined to include sanctions for states or individuals who failed to comply with the law. As a result, the act had little legal weight and served mostly as a recommendation to the states.

All 15 states passed laws in response to the Uniform Militia Act. These laws had some provisions in common, such as the right of the people to keep and bear arms and the exemption of conscientious objectors from military duty; the laws varied in other areas, such as in the frequency of training and the methods for selecting officers. In general, the Uniform Militia Act and the laws passed in response to it created many strong and effective state militias; in addition to being an indispensable part of ceremonies and parades, state militia units manned coastal forts, guarded criminals, enforced quarantines, and assisted the police. However, the many state laws prevented the integration of the various state militias into a reliable force for federal purposes. The federal government often lacked even basic information about the strength and organization of the state militias, making it difficult to make full use of them for military purposes.

Despite the many weaknesses of the militia system, it continued to receive widespread support in the nineteenth century from politicians and the public, who were eager to avoid the expense of a standing army and who viewed the idea of the citizen-soldier as crucial for the

maintenance of U.S. freedom and independence. In reality, however, the militia system was often ineffective and unreliable, as during the WAR OF 1812 when militia units were chronically undermanned and poorly prepared. Despite calls for reforms, the militia system declined steadily during the nineteenth century. Less training was required, fewer men attended, and fewer still had firearms, instead showing up for training with cornstalks and broomsticks.

By the 1830s and 1840s, several states had weakened or abolished their systems of compulsory service, relying instead on volunteers. As a result, the militia units became more ceremonial and elitist in nature, as members donned expensive uniforms and equipment to march in parades and other festivals. These volunteer units were useful to state and local authorities because they often assisted the local police in maintaining law and order, which were frequently disrupted by riots and protests, particularly in larger cities.

After the Civil War, in which militia units played a crucial role by supplementing the regular armies of both the Union and the Confederacy, the militia system again went into a decline. A shortage of funds required cutbacks in militia programs, and military service became more unattractive as the rapid growth of industrialism led to frequent labor strikes, which the Army was required to police. According to Russell F. Weigley, a prominent military historian, "The main effect of industrialism seems to have been to reduce inclination and time for amateur soldiering, and thus to weaken the militia institutions inherited from the rural past."

*The National Guard, a volunteer militia distinct from professional military forces, can be pressed into service by state governors in response to emergencies prescribed by state law. Here a National Guard member keeps watch during the 1992 Los Angeles riots.*

BETTMANN

One rejuvenating factor for the militia during this time, however, was the formation of the National Guard Association (NGA) in 1879. This organization was formed to represent the militia's interests before federal and state governments and the public. The name "National Guard," borrowed from the French, was chosen because most states at the time were already using that term to designate their organized volunteer companies. The leaders of the National Guard Association insisted that their units were an integral part of the U.S. military establishment but also maintained the importance of the guard's connection to individual states. In 1887 the NGA achieved its first victory by persuading Congress to raise the federal annual appropriation to arm the guard to $400,000.

At the beginning of the twentieth century, Congress and President WILLIAM MCKINLEY began work to reform the nation's military structure and operations. Secretary of War Elihu Root saw that the United States needed a workable reserve system, rather than the militia, which still operated under the Uniform Militia Act of 1792. Root worked with leaders from the NGA to create a REORGANIZATION PLAN, and the result was the passage in 1903 of the Dick Act (32 Stat. 775), so named for Major General Charles Dick, who had played a large role in creating and supporting the bill. This act formally repealed the Uniform Militia Act of 1792 and extended federal involvement with the National Guard in peacetime. More federal funds were made available to state National Guard units, and in return the state units were required to drill their troops 24 times a year, train reservists in summer encampments, and submit to annual inspections by federal officers.

In the years leading up to WORLD WAR I, professional officers in the regular army and leaders of the National Guard consistently opposed each other on the issue of establishing a national reserve free from all ties to the states. The NGA contended that National Guard units were the proper national reserve, but military professionals argued that national security could not depend on reserves that had two commanders-in-chief and two chains of command—federal and state. In congressional hearings held in 1916, then ex-Secretary of War Root argued against the guard as a reliable reserve: "The idea . . . that forty-eight different governors can be the basis for developing an efficient, mobile national army is quite absurd."

Proponents of a national reserve won the debate, and on June 3, 1916, President WOODROW WILSON signed the National Defense Act (39 Stat. 166), which for the first time created reserve components of the regular services under exclusive federal control. The act also conferred federal status on the National Guard, with the federal government providing more funding and exerting more control over it. National Guard units still reported to the state governors and served on a statewide basis, but guardsmen could now be drafted directly into federal service for the duration of an emergency. Guard members now had to take LOYALTY OATHS to the United States as well as to their home states, and the War Department could cut federal aid to the guard unit of any state that failed to comply with the mandates of the act.

This basic system established in 1916 has continued to be maintained with few changes over the course of the twentieth century. The state National Guard units report to both the state and federal governments, but when they are called into federal service, state governors lose their authority over them. This state and federal authority conflicted several times in the 1950s and 1960s, when guard units from southern states were called into federal service to enforce federal desegregation mandates over the objections of the state governors.

Another type of militia, not recognized by the federal or state governments, is the private militia. Private militias are composed of private citizens who train for armed combat. The formation of private militias became more common in the United States in the early 1990s as some political groups armed themselves to demonstrate their opposition to certain policies and practices of the federal government. One of the most publicized private militia groups was the Montana Freemen, who were involved in a lengthy standoff with agents of the FEDERAL BUREAU OF INVESTIGATION in 1996.

One of the most horrifying events of the 1990s, the Oklahoma City bombing in 1995, had a significant impact on private militias in the United States during that decade. Although the bombings, which killed 169 people, were not carried out by an identified private militia, a number of individuals reportedly were drawn to join these private groups after witnessing the attack. The total number of private militia groups climbed to an estimated 370 in 1996, according to the Southern Poverty Center, which is well-known for tracking hate groups in the United States.

Militia groups faded quickly in the latter half of the 1990s, however. Law enforcement officials began cracking down on the groups, and many members reportedly became impatient in training for the causes of the various militia. By 1999, the total number of private militias in the U.S. had shrunk to an estimated total of 68. Law enforcement officials continue to track militia, citing their extremist beliefs and their propensity for conspiring to commit acts of violence.

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CROSS-REFERENCES

Armed Services; Gun Control; Military Law; Second Amendment; Second Amendment "Private Militias" (In Focus).

## MILL

*One-tenth of one cent: $0.001. A mill rate is used by many localities to compute property taxes. For example, some states levy a one-time nonrecurring*

*tax of two mills per dollar (0.2%) on the fair market value of all notes, bonds, and other obligations for payment of money that are secured by mortgage, deed of trust, or other lien on real property in lieu of all other taxes on such property.*

## ♦ MILL, JOHN STUART

John Stuart Mill was the leading English political philosopher of the middle and late nineteenth century. Mill's writings on individual freedom, most notably the essay "On Liberty" (1859), have had a profound influence on U.S. CONSTITUTIONAL LAW. His "libertarian theory" continues to attract those opposed to government interference in the lives of individuals.

Mill was born on May 20, 1806, in London. His father, James Mill, was a leading proponent of UTILITARIANISM, a political theory that claimed that the greatest happiness of the greatest number should be the sole purpose of all public action. James Mill provided his son with an unorthodox but extensive education. John Mill began studying Greek at the age of three, and by the age of 17 he had completed advanced courses in science, philosophy, psychology, and law.

In 1822 Mill began working as a clerk for his father at India House, the large East Indian trading company. He rose to the position of chief of the examiner's office and stayed with the company until his retirement in 1858.

"THE WORTH OF A STATE, IN THE LONG RUN, IS THE WORTH OF THE INDIVIDUALS COMPOSING IT." —JOHN STUART MILL

Mill's real passion, however, was political and social philosophy. In 1826 he had a serious mental crisis that caused him to reevaluate the tenets of utilitarianism and to reconsider his own purpose and aim in life. At the same time, he became acquainted with Harriet Taylor, a gifted thinker who would become Mill's collaborator and later his wife. Largely ignored by historians, Taylor is now credited as a major contributor to Mill's published works.

Mill's essay "On Liberty" remains his major contribution to political thought. He proposed that self-protection is the only reason an individual or the government can interfere with a person's liberty of action. Outside of preventing harm to others, the state has no legitimate reason to compel a person to act in the way the government wishes. This principle has proved complex in application, because it is difficult to determine which aspects of behavior concern only individuals and which concern other members of society.

In chapter two of "On Liberty," Mill considered the benefits that come from FREEDOM OF SPEECH. He concluded that, except for speech that is immediately physically harmful to others (like the classic example of the false cry of "fire" in a crowded theater, cited by OLIVER WENDELL HOLMES JR.), no expression of opinion, written or oral, ought to be prohibited. Truth can only emerge from the clash of contrary opinions; therefore, robust debate must be permitted. This "adversarial" theory of the necessary nature of the search for truth and this insistence on the free marketplace of ideas have become central elements of U.S. free speech theory.

Mill also applied his principle of liberty to action as well as speech. Mill believed that "experiments of living" maximize the development of human individuality. Restraints on action should be discouraged, even if the actions are inherently harmful to the individuals who engage in them. Mill claimed that society should not be allowed to prohibit fornication, the consumption of alcohol, or even POLYGAMY.

Mill asserted the importance of personal development and the negative impact of conditioning and conformity which he believed tended to stunt or stifle individual development. The liberty he proclaimed was one in which all individuals are equally free to develop innate tal-

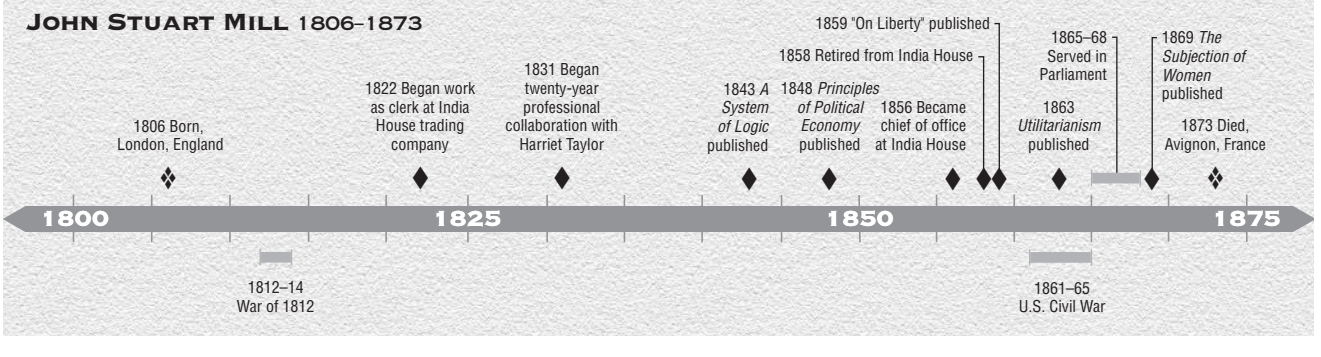

ents and abilities. He assumed that individuals will naturally tend to be drawn toward what they are good at doing and this natural ability, freely allowed to develop, enhances and contributes to all society.

Mill's other works include *A System of Logic* (1843), *Principles of Political Economy* (1848), *The Subjection of Women* (1869), and *Autobiography* (1873).

Mill served in Parliament from 1865 to 1868. He was considered a radical because he supported the public ownership of natural resources, compulsory education, BIRTH CONTROL, and social and legal equality for women. His advocacy of women's suffrage contributed to the creation of the suffrage movement.

Mill died on May 7, 1873, in Avignon, France.

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CROSS-REFERENCES

Bentham, Jeremy; Libertarianism; Utilitarianism.

## ♦ MILLER, LOREN

Loren Miller was a municipal court judge and housing discrimination specialist whose involvement in the early stages of the CIVIL RIGHTS MOVEMENT earned him a reputation as a tenacious fighter for equal housing opportunities for minorities.

Miller was born January 20, 1903, in Pender, Nebraska, the son of a post–Civil War migrant from the South. His family moved to Kansas when he was a boy, and he graduated from high school in Highland, Kansas. Later, he attended the University of Kansas; Howard University; and Washburn University, in Topeka, Kansas, where he earned his bachelor of laws degree in 1928. He was admitted to the Kansas bar the same year, and practiced law there for one year before moving to California to pursue his first interest, journalism. He worked for the *California News,* a Los Angeles newspaper, from 1929 to 1933.

Miller returned to the field of law when he married and was admitted to the California bar in 1933. By the 1940s, he was raising his voice in protest over policies and practices that discriminated against African Americans. In the wake of WORLD WAR II, many blacks had left their rural and southern homes to seek economic opportunity in California, only to face discrimination and bias, particularly in housing. By 1947, Miller had represented more than one hundred plaintiffs seeking to invalidate housing covenants that prevented blacks from purchasing or renting housing in certain areas. As a board member of the AMERICAN CIVIL LIBERTIES UNION (ACLU), he became a well-known spokesman for the rights of minorities to enjoy equal access to housing and education. He was openly critical of

"THE NEGRO HAS BEEN THE WARD OF THE SUPREME COURT OF THE UNITED STATES FOR MORE THAN A HUNDRED YEARS."
—LOREN MILLER

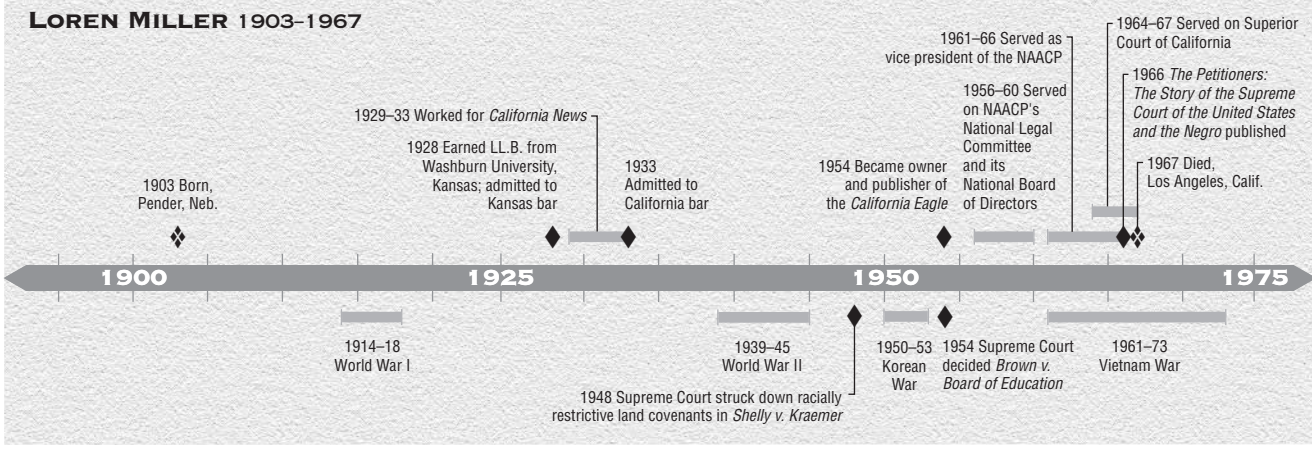

the Federal Housing Authority (FHA), declaring that FHA policies fostered a Jim Crow policy that kept blacks confined to "tight ghettos" and provoked racial tension. Commenting on the effect of racially restrictive covenants, he noted that contrary to the claims of those who supported the covenants, residential SEGREGATION did not preserve public peace and GENERAL WELFARE but rather resulted in "nothing but bitterness and strife."

In 1954 Miller's love of journalism prompted his return to the newspaper business. He became the owner and publisher of the *California Eagle,* a weekly newspaper with wide circulation in the African American community. He also contributed numerous articles to such journals as the *Crisis,* the *Nation,* and *Law in Transition.* Later, Miller was named cochair of the West Coast legal committee of the National Association for the Advancement of Colored People (NAACP). In that capacity, he became the first U.S. lawyer to win an unqualified verdict outlawing residential restrictive covenants in real estate sales that involved FHA or VETERANS ADMINISTRATION (VA) financing. Perhaps the most celebrated case Miller was involved in was *Shelley v. Kraemer,* 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), in which the U.S. Supreme Court declared that racial covenants on property cannot be enforced by the courts.

Miller was one of the first to recognize that bias in housing would be an explosive social issue in the United States. The greatest tension, he predicted, would exist where an all-white area adjoined an all-black area, because "there white Americans stand eternal guard to keep their Negro fellow Americans out." He denounced as "money lenders" and "hucksters of prejudice" the owners of slum properties where many members of minorities are forced to live under substandard conditions because of the "artificial housing shortages . . . in the Negro community."

In 1964, Governor Edmund G. Brown of California appointed Miller to the Superior Court of California, where he served until his death. He was vice president of the NAACP (1961–66); a member of the NAACP's National Legal Committee and of its National Board of Directors (1956–60); a member of the national committee of the ACLU; and vice president of the National Bar Association, an organization of African American attorneys. Miller was also a member of the California Advisory Commission on Civil Rights, vice president of the National Committee against Discrimination in Housing, and a member of the NAACP LEGAL DEFENSE AND EDUCATIONAL FUND.

In 1966, Miller wrote *The Petitioners: The Story of the Supreme Court of the United States and the Negro,* a book that recounts the vital role of the U.S. Supreme Court in shaping the lives of African Americans in the U.S. He and his wife, Juanita Ellsworth Miller, had two sons, Loren Jr., and Edward. Miller died in Los Angeles on July 14, 1967.

## ♦ MILLER, SAMUEL FREEMAN

Samuel Freeman Miller served as an associate justice of the U.S. Supreme Court from 1862 to 1890. During his long tenure on the Court, Miller played a major role in restricting the reach of the FOURTEENTH AMENDMENT into areas of the law reserved to the states. He is most famous for writing the majority opinion in the SLAUGHTER-HOUSE CASES, 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1873).

Miller was born on April 5, 1816, in Richmond, Kentucky, and grew up on a farm. He attended Transylvania University, where he earned a medical degree in 1838. Miller practiced medicine for ten years, and during that time he taught himself law. In 1847, he was admitted to the Kentucky bar, and soon afterward he abandoned his medical practice for a law practice in Knox County, Kentucky.

Miller became more interested in politics after he became an attorney. A member of the WHIG PARTY, Miller was opposed to SLAVERY, a position that caused him difficulty in Kentucky as pro-slavery sentiment began to rise. In 1850, he moved to Iowa, which was more tolerant of his antislavery views. He established a law practice in Keokuk, Iowa, and became a prominent member of the REPUBLICAN PARTY and a supporter of Abraham Lincoln's presidential campaign in 1860.

Lincoln appointed Miller to the U.S. Supreme Court in 1862, during the most difficult period for the Union during the Civil War. Miller voted to sustain Lincoln's suspension of HABEAS CORPUS and to try civilians by military courts-martial. Following the war, Miller voted to uphold the constitutionality of LOYALTY OATHS that were required of former Confederates who wished to hold public office.

Miller is best known for his majority opinion in the *Slaughter-House Cases* in 1873. At

issue was the scope of the authority in the Fourteenth Amendment, which had been passed in 1868 to guarantee that states could not restrict the constitutional rights of citizens and businesses. The case involved a Louisiana state law that allowed one meat company the exclusive right to slaughter livestock in New Orleans. Other packing companies were required to pay a fee for using the slaughterhouses. Those companies filed suit, claiming that the law violated the **PRIVILEGES AND IMMUNITIES CLAUSE** of the Fourteenth Amendment, which stated that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Miller upheld the Louisiana **MONOPOLY** law, ruling that the Privileges and Immunities Clause had a limited effect because it only reached privileges and immunities guaranteed by U.S. citizenship, not state citizenship. The law in question concerned state rights; therefore, the Fourteenth Amendment had no effect. In Miller's view, the Fourteenth Amendment was designed to grant former slaves legal equality, and not to grant expanded rights to the general population. In addition, Miller was concerned that a broad interpretation of the Fourteenth Amendment would give too much power to the federal government and that it could distort the concept of **FEDERALISM**, which grants the states a large measure of power and autonomy.

Having set the standard for interpreting the Fourteenth Amendment, Miller and most members of the Court followed it during the 1870s and 1880s. Miller and the Court struck down state-sponsored **RACIAL DISCRIMINATION** under the amendment but refused to do the same to private discrimination, most notably in the **CIVIL RIGHTS CASES**, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883). In these cases, the Court held that federal laws that banned private discrimination in public transportation and public accommodation were unconstitutional because the Fourteenth Amendment only reaches state-enacted discrimination.

*Samuel F. Miller.*
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In a nonjudicial role, Miller served on the electoral commission that counted the electoral votes in the deadlocked and disputed presidential election of 1876 between **RUTHERFORD B. HAYES** and **SAMUEL J. TILDEN**. During the 1880s, some Republican leaders promoted Miller as a presidential candidate, but nothing came of it.

Miller died on October 13, 1890, in Washington, D.C.

"IT DOES NOT . . . FOLLOW, THAT WHEN A WORD WAS USED IN A STATUTE . . . SEVENTY YEARS SINCE, THAT IT MUST BE HELD TO INCLUDE EVERYTHING TO WHICH THE SAME WORD IS APPLIED AT THE PRESENT DAY."
—SAMUEL MILLER

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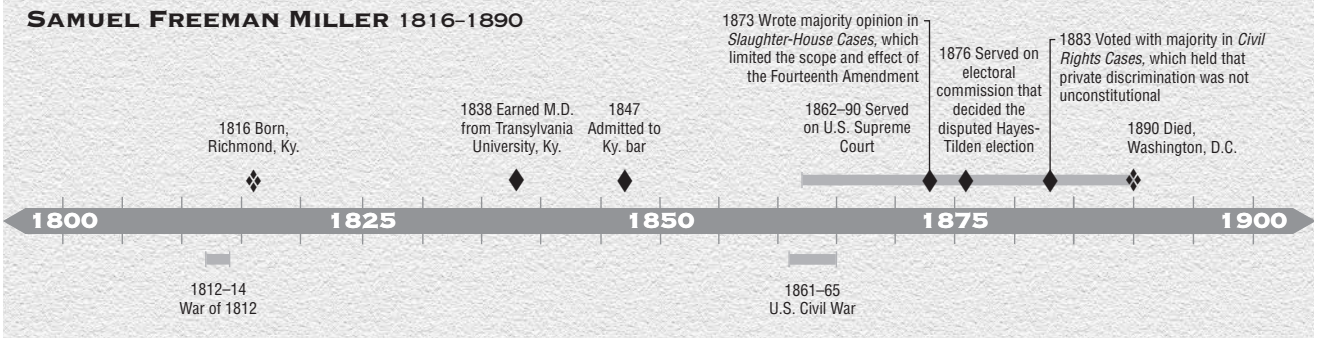

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States' Rights.

## MILLER V. CALIFORNIA

Arguably the most important in a series of late-twentieth-century Supreme Court cases laying down the definition of OBSCENITY and setting down the boundaries as to how and when communities could regulate obscene materials. *Miller v. California,* 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973) remained the Supreme Court's final word on most types of PORNOGRAPHY into the twenty-first century. While the test set down for defining obscenity in *Miller v. California* has been modified and expanded by subsequent court cases since the original decision was handed down in 1973, it has never been overturned and forms the starting point for nearly all U.S. court cases dealing with obscenity prosecutions.

### Pre-Miller Obscenity Cases

*Miller v. California* and its companion case, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446, (1973), marked the culmination of a period when the Supreme Court laid down several tests for obscenity, the most famous and succinct of which was Justice Potter Stewart's comment in his concurrence in *Jacobellis v. State of Ohio* 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964), "I know it when I see it." For years, U.S. courts had generally followed the definition of obscenity contained in the 1868 British case, *Regina v. 3 L.R.-Q.B. 360 (1868).* That case said the definition of obscenity was "whether the tendency of the matter charged is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." Courts differed as to whether just one passage of the material was sufficient to prove this tendency or whether the work had to be examined as a whole.

But in 1957, the Supreme Court explicitly rejected *Regina v. Hicklin* in ROTH V. UNITED STATES 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498,(1957). In that case, a divided Supreme Court first ruled for the first time that obscenity was beyond constitutional protection. The Court went on to rule that the new standard for judging obscenity was whether to an average person, applying contemporary community standards, the dominant theme of material taken as a whole appealed to prurient interest. In imposing an average person standard, the Court departed from *Hicklin*'s more broad definition to allow a finding of obscenity wherever there were "minds open to . . . immoral influences."

Unfortunately, the Supreme Court's obscenity test in *Roth* seemed to create more problems than it solved, for both lower courts and the high court itself, partially because it proved difficult to determine who the average person in a community was and whether local, state, or national standards were to be applied in trying to divine this person. Also, measuring the dominance of obscenity within a piece of material was not an easy task for most courts. In *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General of Massachusetts,* 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1, (1966), the high court further added that the material in question had to be utterly without redeeming social value, a standard that many prosecutors complained was almost impossible to meet.

With all the confusion, the stage was set for the court to make a definitive statement on obscenity. This is what the court tried to do in *Miller v. California.* But for years after the decision was handed down, commentators debated whether the court had succeeded.

### Miller v. California

Under a California obscenity statute, Marvin Miller was convicted for mailing illustrated brochures advertising "adult" books. The California appeals court used the tests previously enunciated by the court to uphold Miller's conviction. The Supreme Court took up the case as an opportunity to reconsider its previous holdings.

The resulting 5–4 decision imposed a new test for determining obscenity. In a decision written by Chief Justice WARREN BURGER, the Court imposed a new three-part test for determining whether a work was obscene. Burger wrote: "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken

as a whole, lacks serious literary, artistic, political, or scientific value."

In handing down this decision, Burger reaffirmed that obscenity and pornography are not protected by the FIRST AMENDMENT. He explicitly rejected the "utterly without redeeming social value" test in favor of the third prong of his formula, which was viewed as an easier standard for prosecutors to meet. He also stated that no one could be subjected to prosecution "for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hardcore' sexual conduct specifically defined by the regulating state law, as written or construed."

Burger went further than past Supreme Court decisions in attempting to define what would constitute hardcore pornography. While emphasizing that "it is not our function to propose regulatory schemes for the States" he said that "It is possible . . . to give a few plain examples of what a state statute could define for regulation: (a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and (b) patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

The companion case of *Paris Adult Theatre I v. Slaton*, handed down on the same day, ruled that as long as state laws met the *Miller* test, they could regulate hardcore pornography even if the showing of such pornography was limited to consenting adults. Chief Justice Burger, who wrote the majority opinion in *Paris Adult Theatre*, stated that "States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, including so-called 'adult' theaters from which minors are excluded." Such regulations can be likened to when "legislatures and administrators act to protect the physical environment from POLLUTION and to preserve our resources of forests, streams, and parks, they must act on such imponderables as the impact of a new highway near or through an existing park or wilderness area," according to Burger.

The *Miller* and *Paris Adult Theatre* rulings did not meet with unanimous acclaim even when they were being handed down. In a dissent in *Miller*, Justice WILLIAM O. DOUGLAS wrote: "I do not think we, the judges, were ever given the constitutional power to make definitions of obscenity. If it is to be defined, let the people debate and decide by a constitutional amendment what they want to ban as obscene and what standards they want the legislatures and the courts to apply." Despite such criticisms, both rulings remained the law of the land in regards to obscenity prosecutions. Subsequent Supreme Court rulings imposed a "reasonable person" standard on the third prong "serious value" test and allowed states to impose a more stringent criterion for CHILD PORNOGRAPHY. But as of 2003, *Miller* was undisturbed as the test for pornography and obscenity in U.S. courts.

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CROSS-REFERENCES

Obscenity; Pornography.

## ♦ MILLER, WILLIAM HENRY HARRISON

William Henry Harrison Miller served as U.S. attorney general from 1889 to 1893, in the administration of President BENJAMIN HARRISON. Miller, Harrison's law partner and political adviser, was recognized for his incorruptibility.

Miller was born on September 6, 1840, in Augusta, New York. His connection with Benjamin Harrison appeared preordained, because Miller was named after the ninth president, William Henry Harrison, the grandfather of Benjamin. Miller attended country schools and Whitestown Seminary before enrolling at Hamilton College, from which he graduated in 1861.

He studied law in the office of future U.S. Supreme Court Chief Justice MORRISON R. WAITE and was admitted to the Indiana bar in 1865. He started a law practice in Peru, Indiana, and also held the office of county school examiner. In 1866 he moved his law practice to Fort Wayne, Indiana. He remained there until 1874, when he moved to Indianapolis and became the law partner of General Benjamin Harrison.

Harrison had achieved fame as a Civil War commander. For his heroism in leading the Seventieth Indiana Regiment, President ABRAHAM

*William Henry Harrison Miller.*
LIBRARY OF CONGRESS

LINCOLN promoted him to brigadier general. Upon his return to Indianapolis, Harrison began to build a political career. Miller entered Harrison's law firm and the political arena. He soon became a trusted adviser to Harrison, who ran unsuccessfully for the Indiana governorship in 1876. Harrison later served in the U.S. Senate from 1881 to 1887, and in 1888 he was the Republican nominee for president. It was during the 1888 campaign that Miller served as a confidential adviser to Harrison, who defeated President GROVER CLEVELAND.

Harrison, who had promised the country a Legal Deal, appointed six lawyers and two businessmen to his cabinet. Miller was named attorney general, a position he held for the four years of the Harrison administration. In 1890 Congress passed the SHERMAN ANTI-TRUST ACT (15 U.S.C.A. § 1 et seq.), which outlawed trusts and monopolies that restrained trade. Miller did not make any effort, however, to use the new legislation.

The Harrison administration was untouched by scandal, but an economic depression in the West severely hurt the REPUBLICAN PARTY. Democrat Grover Cleveland defeated Harrison in the 1892 election. Miller returned to Indianapolis in March 1893 and resumed his law practice.

He died on May 25, 1917, in Indianapolis.

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## ♦ MILLETT, KATHERINE MURRAY

Katherine Murray Millett is a writer and sculptor who is best known for her groundbreaking work of feminist literary criticism, *Sexual Politics* (1969). Although she abandoned criticism after writing that book, turning to works of fiction and autobiography, *Sexual Politics* became a starting point for scholars working in FEMINIST JURISPRUDENCE.

Millett was born on September 14, 1934, in St. Paul, Minnesota. She was educated at the University of Minnesota, Oxford University, and Columbia University. As a graduate student and part-time instructor in English at Columbia during the 1960s, she became active in the CIVIL RIGHTS MOVEMENT. Millett soon focused her attention on sexual discrimination against women. Her dissertation shifted from traditional literary criticism to an analysis of the sexual subordination of women in the works of novelists D.H. Lawrence, Henry Miller, and Norman Mailer. She was granted a Ph.D. degree in

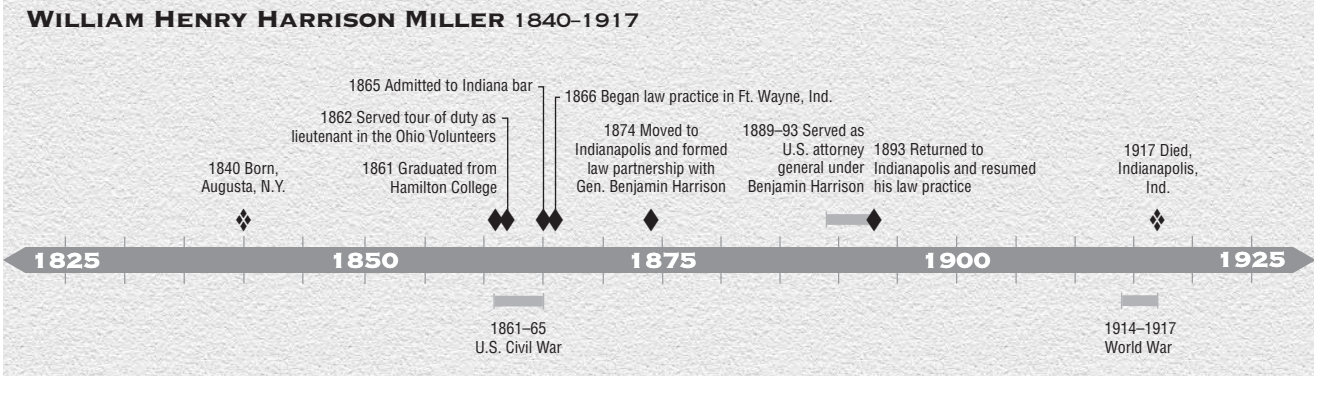

1970, on the heels of the publication of *Sexual Politics,* a revised version of her dissertation.

The book became a national best-seller overnight, attracting both strong support and vitriolic opposition. Millett argued that in the twentieth century, social and technological change had helped women in the United States to begin redefining gender roles. In the face of change, the male-dominated society had sought to preserve a patriarchal social structure and the patriarchal family through an ideology of sexual domination and violence. This ideology was most fully expressed in novels written by men and acclaimed by male intellectuals and critics.

Millett charged D.H. Lawrence with glorifying masculinity, Henry Miller with exalting the sexual degradation of women, and Norman Mailer with promoting a cult of virility. She believed that writers served as a mirror on U.S. culture and helped to explain why women have been sexually subordinated. Sexual subordination, in Millett's view, is tied to the economic and political subordination of women.

*Sexual Politics* was published before the field of feminist JURISPRUDENCE had been started. Millett's analysis of sexual subordination in literature inspired feminist legal scholars to examine U.S. law for patriarchal influences. In their attacks on PORNOGRAPHY, law professor CATHARINE A. MACKINNON and writer ANDREA DWORKIN derived many of their ideas from Millett's work.

After writing *Sexual Politics* Millett wrote *Flying,* an autobiography (1974), and a novel, *Sita* (1976). Her personal life has been marked by periods of mental illness and institutionalization. She wrote about this part of her life in *The Loony Bin Trip* (1990). She published *The Politics of Cruelty* in 1994, which explored the use of torture in the modern world, and another memoir, *A.D.,* in 1995.

In the later 1990s, Millett had difficulty finding work, and most of her books went out of print. In the new millennium, the University of Illinois has republished *Sexual Politics* and several other of her works. In 2000, Millett became an adjunct professor at New York University. In 2001, she published *Mother Millett*, her story of caring for her dying mother.

"IT IS INTERESTING THAT MANY WOMEN DO NOT RECOGNIZE THEMSELVES AS DISCRIMINATED AGAINST; NO BETTER PROOF COULD BE FOUND OF THE TOTALITY OF THEIR CONDITIONING."
—KATHERINE MURRAY MILLETT

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CROSS-REFERENCES

Sex Discrimination; Women's Rights.

## MILLIGAN, EX PARTE

An 1866 Supreme Court decision, *Milligan ex parte,* 71 U.S. (4 Wall.) 2, 18 L.Ed. 281, recognized that a civilian and citizen of a state that is not invaded by hostile forces during wartime is not subject to the jurisdiction of a COURT-MARTIAL.

In 1864, Lambdin P. Milligan, a civilian, was arrested in Indiana for conspiracy, insurrection, and other crimes arising from his alleged involvement in organizing a secret military unit

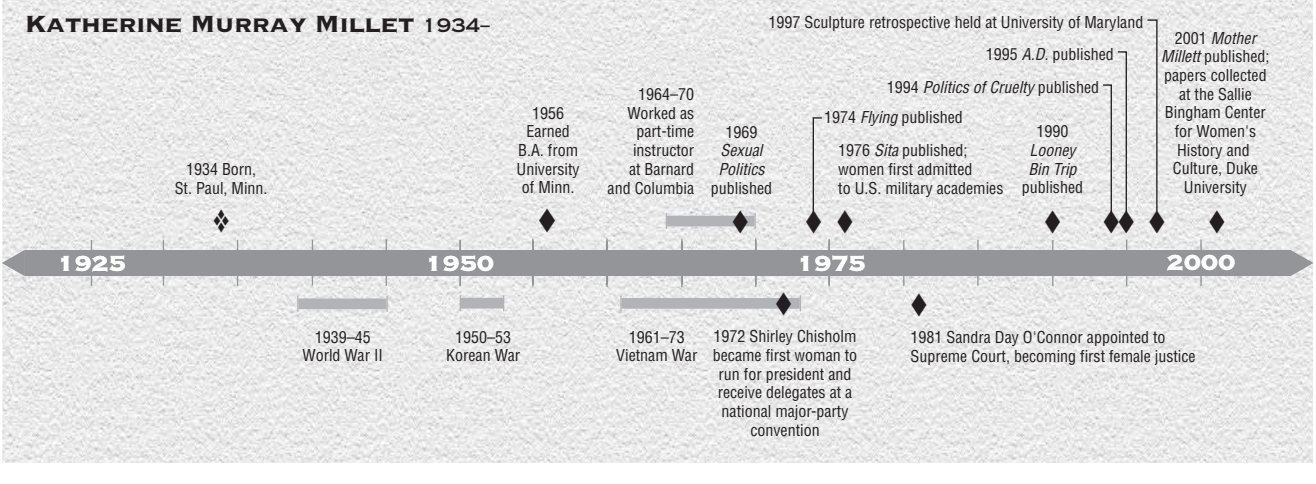

in the state to assist the Confederacy. His arrest and detention were made pursuant to the orders of General Alvin P. Hovey, commander of the military district of Indiana. He was brought to trial before a military commission in Indianapolis, convicted, and sentenced to death. Milligan applied for a writ of HABEAS CORPUS to the Supreme Court, challenging the jurisdiction of the military commission to try and sentence him.

The Court acknowledged that Article III, Section 2, Clause 3 of the Constitution—which provides "that the trial of all crimes, except in cases of IMPEACHMENT, shall be by jury"—and other constitutional provisions safeguarded this right. It recognized, however, that in times of war, various civil liberties and the right to challenge illegal detention by a writ of habeas corpus may be suspended. MARTIAL LAW might be imposed, however, only where an actual invasion of enemy forces effectively stopped the operation of the civil government.

The military argued that the designation of Indiana as a military district with a commander because of the constant threat of invasion by Confederate troops justified the imposition of martial law. The military commission, therefore, had lawful jurisdiction under the "laws and usages of war." The Court rejected this argument. The state of Indiana had not opposed federal authority, its civil and criminal courts continued to operate during the war, and Milligan was a civilian who was not connected to the military. Although civil liberties and habeas corpus could be suspended in wartime, to permit the military commission to determine the fate of Milligan, a civilian, in a state which was loyal to the Union, and where there was only a mere threat of invasion and the courts were open, would usurp the powers of the courts in violation of the Constitution. The Court decided that the military commission had no jurisdiction over Milligan and therefore ordered Milligan's release.

## MINE AND MINERAL LAW

*The law governing the ownership, sale, and operation of mines, quarries, and wells, and the rights to natural resources found in the earth.*

The extraction of natural resources from the earth is governed by specific laws dealing with mines and minerals. Federal and state governments have mine and mineral laws to protect the health and safety of miners, encourage the efficient use of natural resources, protect the environment, and raise tax revenues.

A mine is an excavation in the soil and subsoil from which ores, coal, or other mineral substances are removed. A mineral is valuable, inert matter created by forces of nature and found either on or in the earth. A mineral right is the possessory interest in minerals in the ground. The owner of the mineral rights has the right to enter the land and occupy it for the purpose of removing the minerals. It is possible for someone to own the mineral rights and mine the minerals without owning the land itself.

The federal government has played a large role in the exploitation of mineral resources by granting mineral rights, called PATENTS, to persons and companies that wish to mine on land owned by the federal government. The Mining Act of 1872 has remained unchanged since its enactment during the presidential administration of ULYSSES S. GRANT. The law tried to help small prospectors by making land more affordable. It set the price of mineral rights to federal property at between $2.50 and $5.00 an acre and gave prospectors the right to mine without paying ROYALTIES. A royalty is the payment by the lessor to the owner of the property of a percentage of the value of the minerals that are mined.

The Mining Act of 1872 has drawn increased criticism since the 1980s because of the small amount of money companies pay to obtain mineral rights valued at millions and even billions of dollars and because the companies do not have to pay a royalty to the federal government. Most of the federal land is located in the West. Western legislators have been unwilling to amend the law, out of fear that changes would reduce employment and depress the mining industry. Attempts to amend the act to raise the price of mineral rights and to impose a royalty have met fierce resistance by western lawmakers and the mining industry, which is dominated by companies located outside the United States.

Mining operations are considered one of the main sources of environmental POLLUTION. Under the Mining Act of 1872, mining companies are not required to clean up mining sites that are on federal property. The ENVIRONMENTAL PROTECTION AGENCY estimates that cleaning up fifty-five of the United States' most dangerous mines will cost taxpayers $32 billion. On lands that are not owned by the federal government, state and federal environmental regu-

lations require mining companies to clean up and restore their mining sites.

Mining is a dangerous occupation. Since the late 1960s, state and federal legislation has set numerous operating standards regarding dust and gas concentrations in the mines, as well as general rules regarding roof support. These provisions attempt to prevent explosions, mine collapses, and the breathing of tainted air. The Federal Mine Safety and Health Act of 1977 (30 U.S.C.A. § 801) is a comprehensive safety and health act that applies to all metal and nonmetal mines, including coal mines.

CROSS-REFERENCES

Environmental Law; Land-Use Control "The West Wrestles with D.C." (In Focus); Law of the Sea; Miner's Codes; Solid Wastes, Hazardous Substances, and Toxic Pollutants.

## MINERAL RIGHT

*An interest in minerals in land, with or without ownership of the surface of the land. A right to take minerals or a right to receive a royalty.*

*Mineral right* is a term encompassing all the ways a person can have a possessory interest in minerals in the ground. It includes the right to enter the land and occupy it in order to remove the minerals. Mineral rights can be retained when land is sold or conveyed, thus making it possible for someone to own the right to mine the minerals without owning the land. A right of entry onto the land can be held by the grantor who retains the mineral rights, or other arrangements can be made to gain access to the minerals. Mineral rights can be leased or sold. A landowner who leases mineral rights often receives a royalty, or a percentage of the value of the minerals which are mined by the leaseholder.

CROSS-REFERENCES

Mine and Mineral Law.

## MINER'S CODES

During the era of Western settlement in the middle of the nineteenth century, various forms of primitive legal practices were instituted to bring order to the frontier; many formal legal codes evolved from these early precepts, including the Miner's Codes.

Originally the codes were various traditional laws that were respected throughout mining camps in the West. The codes were recorded, and their purpose was to establish guidelines for filing and determining claims and arbitrating disagreements among miners. The miner's "courts" rendered decisions in disputes, and the tenets of the codes guaranteed their enforcement.

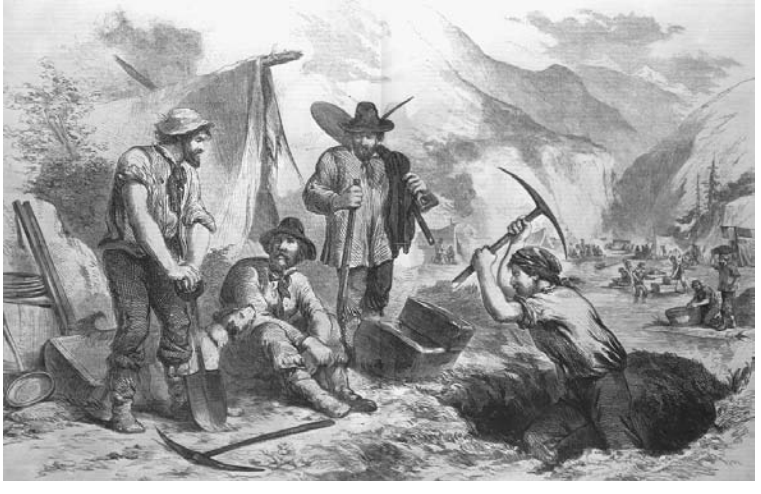

*Traditionally respected regulations that governed mining camps in the frontier West were known as the Miner's Codes. Such seemingly primitive laws can prove effective and evolve into formally adopted legislation.*

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The Gregory Diggings Code of Colorado was the best example of a functioning system based on the laws of the Miner's Code. The Gregory Code successfully produced a harmonious political and judicial system that was imitated by other mining towns. Between 1861 and 1862, the legislature of the Colorado territory formally adopted the canons of the Gregory Code.

CROSS-REFERENCES

Mine and Mineral Law.

## MINIMUM CONTACTS

See PERSONAL JURISDICTION.

## MINIMUM WAGE

*The minimum hourly rate of compensation for labor, as established by federal statute and required of employers engaged in businesses that affect interstate commerce. Most states also have similar statutes governing minimum wages.*

Along with a requirement for overtime pay and restrictions on child labor, the minimum-wage law is one of the most significant, substantive obligations created more than 50 years ago by the FAIR LABOR STANDARDS ACT of 1938 (FLSA) (29 U.S.C.A. §§ 201 et seq.). The FLSA culminated a long struggle for state and federal protective legislation for workers that had begun during the nineteenth century.

The original campaign for minimum-wage legislation in the United States began at the state

level and resulted from growing public concern about the prevalence of sweatshops—workhouses where recent immigrants, women, and young children were paid substandard wages. Proponents of minimum-wage legislation appealed to society's sense of obligation to act through its elected officials to ensure an adequate standard of living for all working citizens.

In 1912, Massachusetts, an industrial state, was the first state to enact minimum-wage legislation. The momentum continued, and by 1920 13 states, Puerto Rico, and the District of Columbia had enacted minimum-wage programs. The Great Depression moved even more states to enact protective minimum-wage legislation, and by 1938 25 states had some form of minimum-wage law. In creating minimum wage legislation, the states generally used three minimum wage models. The Massachusetts model established a wage commission that recommended voluntary minimum-wage rates based on what commission members determined was the best combination of a "living wage" for employees and the "financial condition" of the employer's business. The next model established a similar wage commission but disregarded the financial conditions of the employer, made the minimum wage compulsory, and established sanctions for non-compliance. The third law, the Utah model, established a flat rate of minimum compensation for all covered workers.

Despite the success of state legislatures in creating minimum-wage laws, state supreme courts and, ultimately, the U.S. Supreme Court rejected as unconstitutional any legislation that interfered with an employer's freedom to contract with employees over wages.

Under the leadership of President **FRANKLIN D. ROOSEVELT**, Congress passed the **NATIONAL INDUSTRIAL RECOVERY ACT OF 1933** (NIRA) (June 16, 1933, ch. 90, 48 Stat. 195). NIRA granted the president authority to establish minimum-wage and maximum-hour standards for all private-industry workers. Its legal basis was the federal government's power to regulate interstate commerce. The U.S. Supreme Court, however, rejected the NIRA's legal basis as unconstitutional in *ALA Schechter Poultry v. United States,* 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935). In fact, from 1923 in *Adkins v. Children's Hospital,* 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785, to 1937 in *Morehead v. New York ex rel. Tipaldo,* 298 U.S. 587, 56 S. Ct. 918, 80 L. Ed. 1347, the Court consistently ruled against the constitutionality of all minimum-wage legislation.

During his second administration, President Roosevelt worked with members of Congress to create a modified version of the labor provisions of the NIRA, and in 1937 the FLSA was introduced. Although national business lobbies and agricultural interests vigorously fought the proposed legislation—even organized labor did not support it—Congress passed the FLSA, and it was signed into law on June 25, 1938. Referring to the FLSA the night before signing the bill into law, President Roosevelt declared, "Except perhaps for the **SOCIAL SECURITY ACT**, it is the most far-reaching, the most far-sighted program for the benefit of workers ever adopted." In a landmark decision in 1941 (*United States v. Darby,* 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609), the U.S. Supreme Court found the FLSA constitutional:

> [I]t is no longer open to question that the fixing of a minimum wage is within the legislative power and the bare fact of its exercise is not a denial of **DUE PROCESS** under the Fifth more than under the Fourteenth Amendment.

The minimum-wage law has evolved significantly since the Court declared it constitutionally sound in *United States v. Darby.* The federal minimum wage remains the same until Congress passes a bill to raise it and the president signs the bill into law. The minimum wage started at 25¢ per hour, and Congress has increased it 18 times. Since the law was enacted, increases to the minimum wage have been signed into law by Presidents **HARRY S. TRUMAN**, **DWIGHT D. EISENHOWER**, **JOHN F. KENNEDY**, **LYNDON B. JOHNSON**, **RICHARD M. NIXON**, **JIMMY CARTER**, **GEORGE H. W. BUSH**, and **BILL CLINTON**. The increases in the minimum wage have been sporadic. For example, the wage rose five times in the inflationary 1970s but was unchanged for the last nine years of the 1980s. In 1989, the FLSA was amended to raise the minimum wage in two steps: from $3.35 to $3.80 per hour on April 1, 1990, and from $3.80 to $4.25 per hour on April 1, 1991.

Every time Congress considers legislation to increase the minimum wage, it must ponder what constitutes a living wage—a wage that is sufficient to provide a worker with food, clothing, and shelter. Along those lines, the **CONGRESSIONAL RESEARCH SERVICE** estimated that the minimum wage would have to rise to $6.75 per

hour in 1996 to equal the purchasing power that it represented in 1978.

Congress most recently amended the minimum-wage law with the Minimum Wage Increase Act of 1996 (Pub. L. No. 104-188, sec. 2104(a), 110 Stat. 1228 [amends sec. 206]). Congress increased the minimum wage to $4.75 per hour effective October 1, 1996 and increased it to $5.15 per hour effective September 1, 1997.

The minimum wage is the most direct and definitive measure to guarantee workers a living wage, but the FLSA (and thus its minimum-wage provisions) does not protect all employees. In 1988, of the approximately 110 million wage and salary earners in the United States, the FLSA did not cover about eight million workers because of coverage limits, nor another 28 million workers because of exemptions.

The minimum-wage law can be enforced by employees themselves, by the secretary of labor, or by the attorney general. Under section 216(b) of the FLSA, employees can file suit in federal or state court to enforce their rights to minimum wages and overtime compensation. Employees also can seek redress if employers retaliate against them for trying to enforce their rights under the FLSA. The secretary of labor can enforce the act on behalf of employees under sections 216(c) and 217 by either filing a wage suit on behalf of the employees or by seeking an INJUNCTION.

If a suit by either the employees or the secretary of labor is successful, the FLSA authorizes recovery of any unpaid minimum wages and/or overtime compensation; with some exceptions, the injured party may be able to recover an equal amount in LIQUIDATED DAMAGES, as well. In addition, employees who win FLSA suits may be awarded attorneys' fees. For repeated or willful violations of the minimum-wage provisions, the secretary is authorized to assess civil penalties, subject to administrative review, of up to $1,000 per violation (29 U.S.C.A. § 217(e)).

Finally, the attorney general has the authority to file criminal actions for FLSA violations, although this authority has rarely been used.

Although the FLSA is the most significant federal wage statute, a number of other laws impose minimum-wage obligations on entities that perform work for the federal government. For example, the DAVIS-BACON ACT (40 U.S.C.A. §§ 276a–276a–5) applies to contracts in excess of $2,000 to work on federal buildings or other

**Minimum Hourly Wage, by State, in 2003**

| State | Basic Minimum Rate (per hour) |
|---|---|
| Alabama | No state minimum wage law |
| Alaska | $7.15 |
| Arizona | No state minimum wage law |
| Arkansas | $5.15 |
| California | $6.75 |
| Colorado | $5.15 |
| Connecticut | $6.90[a] |
| Delaware | $6.15 |
| District of Columbia | $6.15 |
| Florida | No state minimum wage law |
| Georgia | $5.15 |
| Hawaii | $6.25 |
| Idaho | $5.15 |
| Illinois | $5.15 |
| Indiana | $5.15 |
| Iowa | $5.15 |
| Kansas | $2.65 |
| Kentucky | $5.15 |
| Louisiana | No state minimum wage law |
| Maine | $6.25 |
| Maryland | $5.15 |
| Massachusetts | $6.75 |
| Michigan | $5.15 |
| Minnesota | $5.15 (large employer)<br>$4.90 (small employer) |
| Mississippi | No state minimum wage law |
| Missouri | $5.15 (large employer)<br>$4.00 (small employer) |
| Montana | $5.15 |
| Nebraska | $5.15 |
| Nevada | $5.15 |
| New Hampshire | $5.15 |
| New Jersey | $5.15 |
| New Mexico | $4.25 |
| New York | $5.15 |
| North Carolina | $5.15 |
| North Dakota | $5.15 |
| Ohio | $4.25 (large employer)<br>$3.25 (medium employer)<br>$2.80 (small employer) |
| Oklahoma | $5.15 (large employer)<br>$2.00 (other employer) |
| Oregon | $6.90 |
| Pennsylvania | $5.15 |
| Rhode Island | $6.15 |
| South Carolina | No state minimum wage law |
| South Dakota | $5.15 |
| Tennessee | No state minimum wage law |
| Texas | $5.15 |
| Utah | $5.15 |
| Vermont | $6.25 |
| Virginia | $5.15 |
| Washington | $7.01 |
| West Virginia | $5.15 |
| Wisconsin | $5.15 |
| Wyoming | $5.15 |

[a]Increased by statue in 2004.

SOURCE: U.S. Department of Labor, Employment Standards Administration Wage and Hour Division.

public works; the Walsh-Healey Act (41 U.S.C.A. §§ 35–45) applies to employers that provide materials, supplies, and equipment to the United States under contracts exceeding $10,000; and the Service Contract Act (41 U.S.C.A. §§ 351–358) applies to contracts in excess of $2,500 to provide services to the federal government. These statutes all require contracting entities to pay workers the prevailing wage in the locality.

As of 2003, the federal minimum wage has remained at $5.15 per hour for non-exempt employees. However, in 11 states, particularly those in northwestern and northeastern parts of the United States, the state minimum wage is higher than that of the federal government. Under the FLSA, if a state's minimum wage is higher, then that rate applies to employees working in that state.

The following 11 states provide a higher minimum wage than the federal standard (with the applicable hourly rate in parentheses), according to information from the U.S. LABOR DEPARTMENT: California ($6.75); Oregon ($6.90); Washington ($7.01); Maine ($6.25); Vermont ($6.25); Massachusetts ($6.75); Delaware ($6.15); Connecticut ($7.10); Rhode Island ($6.15); Alaska ($7.15); and Hawaii ($6.25).

The law in a few states still provides a minimum wage that is lower than the federal rate, although the latter continues to apply. Rates in American Samoa are established by a special industry committee, which determines rates for particular industries, rather than all covered employees. Like the states, an employer in American Samoa may choose to set rates at a higher level than the standard set by the committee.

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CROSS-REFERENCES

Child Labor Laws; Employment Law; Labor Law; National Recovery Administration; New Deal.

## MINISTER

See AMBASSADORS AND CONSULS; DIPLOMATIC AGENTS.

## MINISTERIAL

*Done under the direction of a supervisor; not involving discretion or policymaking.*

Ministerial describes an act or a function that conforms to an instruction or a prescribed procedure. It connotes obedience. A *ministerial act* or *duty* is a function performed without the use of judgment by the person performing the act or duty.

## MINITRIAL

*A private, voluntary, and informal type of* ALTERNATIVE DISPUTE RESOLUTION.

The minitrial is an alternative dispute resolution (ADR) procedure that is used by businesses and the federal government to resolve legal issues without incurring the expense and delay associated with court litigation. The minitrial does not result in a formal adjudication but is a vehicle for the parties to arrive at a solution through a structured settlement process. It is used most effectively when complex issues are at stake and the parties need or wish to maintain an amicable relationship.

Though minitrials can be arranged under rules negotiated by the parties, they usually conform to procedures used by facilitators of ADR. The parties sign an agreement consenting to a minitrial and then each chooses a management representative to sit on the panel. These representatives have the authority to negotiate a settlement. The parties also select a "neutral adviser" to sit on the panel. The adviser must be independent and impartial, as this person will moderate the minitrial. If the parties cannot agree on a neutral adviser, the ADR facilitating agency may make the selection. The parties pay an equal share of the adviser's fees and bear their own minitrial costs.

Prior to the minitrial the parties select and then provide the neutral adviser with background materials. The parties also file legal briefs and exhibits with the adviser that contain informa-

tion they intend to present at what is termed the "information exchange." This exchange is, in effect, the minitrial. The parties must agree on the length of briefs and the due dates for documents.

At the information exchange each party makes presentation, and each party is entitled to make a rebuttal. As with all other procedures, the parties must either agree on the lengths of their presentations and rebuttals or let the neutral adviser set the time limits. During this information exchange the neutral adviser acts as a moderator rather than a judge. Factual witnesses and expert witnesses may also make presentations. The members of the panel may ask questions of the presenters. In addition to the lawyers representing the parties, each management representative may have advisers in attendance.

After the conclusion of the information exchange, the management representatives meet by themselves to see if they can resolve the dispute. The information exchange should have revealed the strengths and weaknesses of each party's case and motivated the representatives to settle the dispute. If they cannot resolve the dispute on their own, they may ask the neutral adviser to meet with them separately, or jointly, and give an oral opinion on the issues and the likely outcome at trial of each issue. The representatives may also ask the neutral adviser to issue a written opinion and to mediate the negotiations and settlement terms.

If an agreement is reached it is set out in writing and signed by the representatives. The agreement is legally binding on the parties. If the parties cannot settle, the proceedings will terminate 30 days after the date of the information exchange.

An important difference between a court trial and a minitrial is that the RULES OF EVIDENCE do not apply at the minitrial except for the rules governing PRIVILEGED COMMUNICATIONS and attorney work product. Another difference is that minitrials are not recorded, so no transcript can be produced. Finally, the proceedings are totally confidential and any offers or statements made in the process are inadmissible at a court trial.

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## MINOR

*An infant or person who is under the age of legal competence. A term derived from the* CIVIL LAW*, which described a person under a certain age as* less than *so many years. In most states, a person is no longer a minor after reaching the age of 18 (though state laws might still prohibit certain acts until reaching a greater age; e.g., purchase of liquor). Also, less; of less consideration; lower; a person of inferior condition.*

## MINORITY

*The state or condition of a minor; infancy. Opposite of majority. The smaller number of votes of a deliberative assembly; opposed to majority. In context of the Constitution's guarantee of* EQUAL PROTECTION*,* minority *does not have merely numerical denotation but refers to identifiable and specially disadvantaged groups such as those based on race, religion, ethnicity, or national origin.*

## ♦ MINTON, SHERMAN

Sherman Minton served as an associate justice of the U.S. Supreme Court from 1949 to 1956. A strong supporter of President FRANKLIN D. ROOSEVELT's NEW DEAL policies when he served as a U.S. senator from Indiana, Minton maintained a consistent judicial philosophy that allowed the legislative and executive branches wide discretion without judicial interference.

"ONE'S ASSOCIATES, PAST AND PRESENT, . . . MAY PROPERLY BE CONSIDERED IN DETERMINING FITNESS AND LOYALTY [FOR A JOB]."
—SHERMAN MINTON

Minton was born on October 20, 1890, in Georgetown, Indiana. He graduated from Indiana University in 1915 and earned a law degree from Yale Law School in 1916. He entered the private PRACTICE OF LAW in Indiana but also devoted himself to DEMOCRATIC PARTY politics. In 1934 he was elected to the U.S. Senate, where he served one term. While in the Senate, Minton was a staunch supporter of Roosevelt's legislative efforts, including the president's plan to "pack" the Court with extra justices to break the conservative majority that had ruled many pieces of New Deal law unconstitutional. Minton lost his seat in the 1940 election.

In 1941 President Roosevelt first appointed Minton to advise him on military agencies and planning and then nominated him to the U.S. Court of Appeals for the Seventh Circuit. President HARRY S. TRUMAN, who got to know Minton when they served in the Senate together, elevated him to the Supreme Court in 1949. During his confirmation process, Minton refused to testify before the SENATE JUDICIARY

*Sherman Minton.*
U.S. SUPREME COURT

COMMITTEE, claiming it would be improper to testify. Surprisingly, the committee did not object.

During his seven years on the Court, Minton maintained his belief that the judiciary should not intrude on the actions of the other branches unless absolutely required. His conservative view led him to support decisions that upheld anticommunist policies such as LOYALTY OATHS and restrictions on the civil liberties of subversives. Minton, writing for the majority in *Adler v. Board of Education,* 342 U.S. 485, 72 S. Ct. 380, 96 L. Ed. 517 (1952), ruled that a New York statute that prohibited members of politically subversive groups from teaching in public schools was permissible.

As a result of his deference to the other branches of government, Minton was the only dissenter in YOUNGSTOWN SHEET AND TUBE CO. V. SAWYER, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952). In this case President Truman had claimed executive authority when he seized U.S. steel mills in 1952 as the steel workers union went on strike. This occurred during the second year of the KOREAN WAR. Truman needed steel for war production and wanted to make sure that a pay hike would not cause higher steel prices, which would increase inflation in the national economy. The majority rejected Truman's claim to inherent executive power in the Constitution to protect the public interest in times of crisis. Minton sided with the president's position.

Minton suffered serious health problems for several years and resigned from the Court for health reasons in 1956. He died on April 9, 1965, in New Albany, Indiana.

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## MINUTE BOOK

*An account where official proceedings are recorded.*

A minute book refers to a book kept by the clerk of a court for recording a summary of all the judicial orders in a proceeding. The records are identified by case numbers.

It also refers to a record of official actions taken at a meeting of a board of directors or of the stockholders of a corporation.

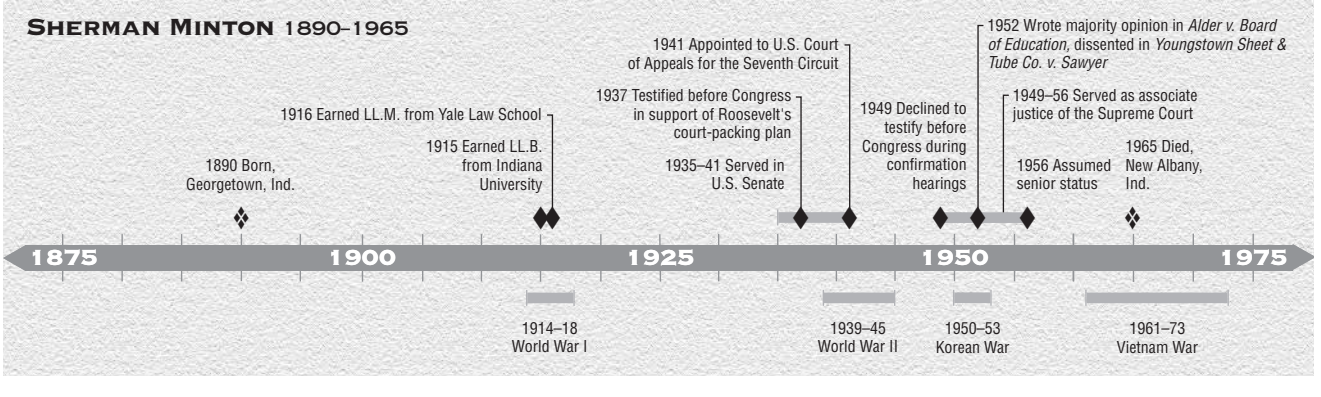

## MINUTES

*The written record of an official proceeding. The notes recounting the transactions occurring at a meeting or official proceeding; a record kept by courts and corporations for future reference.*

## MIRANDA V. ARIZONA

*Miranda v. Arizona* was a landmark decision, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), in the field of CRIMINAL PROCEDURE. In *Miranda,* the U.S. Supreme Court declared a set of specific rights for criminal defendants. The *Miranda* warning, named after Ernesto Miranda, one of the petitioners in the case, is a list of rights that a law enforcement officer must read to anyone arrested for a criminal act.

Before the High Court's decision in *Miranda,* the law governing CUSTODIAL INTERROGATION of criminal suspects varied from state to state. In many states statements made by criminal defendants who were in custody and under interrogation by law enforcement officials were admissible at trial, even though the defendants had not been advised of their legal rights. If the totality of the circumstances surrounding the statements indicated that the suspect made the statements voluntarily, it did not matter that officers had not apprised the suspect of his legal rights.

The totality of the circumstances rule was effective even if a defendant was in custody. Generally a defendant was considered in custody if the person was not free to leave the presence of law enforcement officers. The basic legal rights for criminal defendants subjected to custodial interrogation included the FIFTH AMENDMENT right against SELF-INCRIMINATION and the RIGHT TO COUNSEL, this latter right established by the Court two years earlier in ESCOBEDO V. ILLINOIS, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964).

The *Miranda* case involved four criminal defendants. Each of the defendants was appealing a conviction based in part on the failure of law enforcement officers to advise him, prior to custodial interrogation, of his right to an attorney or his right to remain silent.

Ernesto Miranda, the first defendant listed in the case, was arrested on March 18, 1963, at his home in Arizona and taken to a Phoenix police station. At the station witnesses identified Miranda as a rapist. Police then brought Miranda to an interrogation room where he was questioned by two police officers.

The officers did not tell Miranda that he had a right to an attorney, and Miranda confessed to the crime in two hours. Miranda wrote a confession on a piece of paper and signed the paper. At the top of the paper was a typed statement saying that Miranda had made the confession voluntarily and with full knowledge of his legal rights. Miranda was convicted of rape and KIDNAPPING in an Arizona state court. The circumstances involving the other three defendants were similar, all three confessing after a period of custodial interrogation without the assistance of legal counsel.

The U.S. Supreme Court agreed to hear appeals from all four defendants, joining the appeals into a single review. A divided Court affirmed the California Supreme Court's decision against one of the defendants and reversed the guilty verdicts against Miranda and the other two.

The majority opinion, written by Chief Justice EARL WARREN, began with a review of POLICE INTERROGATION activities and a detailed formulation of new rules for law enforcement personnel.

The opening of the *Miranda* majority opinion set a grave tone:

> The cases before us raise questions which go to the roots of American criminal JURISPRUDENCE: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

*The 1966 decision of the Supreme Court in* Miranda v. Arizona *set forth specific rights for criminal defendants. Ernesto Miranda (right), one of the petitioners, with his attorney, John J. Flynn.*

BETTMANN/CORBIS

The Court described in detail the unfairness and coercion used by some law enforcement officers engaged in interrogation. The majority also took note of deceptive practices in interrogation. For example, officers would put a suspect in a lineup and tell the person that he or she had been identified as a suspect in the instant crime as well as other crimes even though no such identifications had taken place. The suspect would confess to the instant crime to avoid being prosecuted for the fictitious crimes. The majority noted that these examples were exceptions, but it also stated that they were sufficiently widespread to warrant concern.

The Court then outlined the now-familiar procedures that law enforcement officers would have to follow thereafter. They would have to tell persons in custody that they have the right to remain silent, that they have the right to an attorney, that if they cannot afford an attorney the court will appoint an attorney, and that anything they say can be used in a criminal prosecution.

Ultimately, the Court held that statements made by a criminal suspect in custody would not be admissible at trial unless the suspect had made a knowing and intelligent waiver of his legal rights after being apprised of the various legal rights and after being given an opportunity to exercise those rights. The majority assured the law enforcement community that it did not intend to hamper criminal investigations and prosecutions. The Court pointed out that interrogations were still a perfectly legitimate investigative tool, that questioning a suspect without advising the suspect of legal rights before taking the suspect into custody was still legitimate, and that volunteered statements were likewise legitimate.

Justice **TOM CLARK** dissented to the decisions with respect to all defendants except the one whose conviction was upheld. According to Clark, the Court should have continued to accept the totality of the circumstances test for determining whether a defendant's statements or confession were made voluntarily. Clark concluded that only the defendant whose conviction was upheld gave a confession that was not voluntary.

Justices **JOHN M. HARLAN**, **POTTER STEWART**, and **BYRON R. WHITE** dissented in all the cases. In an opinion authored by Harlan, the dissent argued that the majority had exaggerated the evils of normal police questioning. According to Harlan, "Society has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law."

Another dissent by White argued that the majority had gone too far in imposing such procedural requirements on the law enforcement community. White predicted that the new procedures would prevent the early release of the truly innocent because they discourage statements that would quickly explain a situation. According to White, the procedures were "a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty and to increase the number of trials." "I have no desire whatsoever," wrote White, "to share the responsibility for any such impact on the present criminal process."

The *Miranda* case was remarkable in at least two ways. The opinion mandated important procedural changes that had to be followed by every law enforcement official across the country. In addition, the majority opinion's survey of interrogation tactics sent a rare notice to the law enforcement community that the Court was aware of, and would not tolerate, abuse in interrogation.

Two years after the decision in *Miranda*, congressional anger at the decision led to the passage of 18 U.S.C.A. § 3501 (1996), which restored voluntariness as a test for admitting confessions in federal court. The **U.S. JUSTICE DEPARTMENT**, however, under attorneys general of both major political parties, refused to enforce the provision, believing the law to be unconstitutional. The law lay dormant for several decades until the Fourth Circuit Court of Appeals in 1999 ruled that Congress had the constitutional authority to pass the law. *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999).

The Supreme Court disagreed with the Fourth Circuit. In a 7–2 decision, the Court ruled that because *Miranda* had been based on the Fifth and Fourteenth Amendments, Congress did not have the constitutional authority to overrule the decision through legislation. *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). In addition, the Court refused to overrule *Miranda*. Chief Justice **WILLIAM H. REHNQUIST**, who has been a frequent critic of the decision, wrote the majority opinion that upheld the decision. According to Rehnquist, the ruling had become "part of our national culture" with respect to law enforcement.

However, the *Miranda* holding has been pared down by the High Court. In 1985 the

Court held that if a defendant makes an incriminating statement without the *Miranda* warning and then later receives the *Miranda* warning and confesses, the confession should not be excluded from trial (*Oregon v. Elstad,* 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 [1985]).

In *Illinois v. Perkins,* 496 U.S. 292, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990), the Court held that the *Miranda* warning is not required when a suspect who is unaware that he or she is speaking to a law enforcement officer gives a voluntary statement. In *Withrow v. Williams,* 507 U.S. 680, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993), the Court held that a prisoner can not base a HABEAS CORPUS petition on the failure of law enforcement to give *Miranda* rights before interrogation.

In *Moran v. Burbine,* 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986), however, the Court appeared to return to the totality of the circumstances test. In *Moran,* a lawyer representing a criminal suspect, Brian Burbine, called the police station while Burbine was in custody. The lawyer was told that Burbine would not be questioned until the next day. In fact, Burbine was questioned that day, and he confessed, without requesting the lawyer and after being told his *Miranda* rights. According to the Court, the conduct of the police fell "short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States." Although law enforcement had not given Burbine a full opportunity to exercise his right to an attorney, a 6–3 majority of the Court concluded that, on the facts of the case, the incriminating statements were made voluntarily and that excluding them was therefore not required.

In 2002, the Supreme Court granted certiorari to consider a case involving the question of whether police officers are required to give criminal suspects their *Miranda* rights even if the suspects are never brought to trial. In 1997, Oliverio Martinez, a farm worker, was shot and injured by police officers during a struggle. A police sergeant, Ben Chavez, questioned Martinez for 45 minutes while the latter lay in a hospital bed. Chavez never gave Martinez his *Miranda* warnings, and Martinez insisted that he did not want to answer the questions.

The Ninth Circuit Court of Appeals determined that this questioning violated Martinez's constitutional rights, thus allowing him to recover under 42 U.S.C.A. SECTION 1983 (Supp. 2003). *Martinez v. City of Oxford,* 270 F.3d 852 (9th Cir. 2001). However, a sharply divided Supreme Court reversed the Ninth Circuit's decision on appeal. CHAVEZ V. MARTINEZ, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003). Although the Court in *Chavez* did not overrule *Miranda,* the Court further limited the scope of the decision by holding that the failure by the officer to read Martinez's *Miranda* warnings did not violate Martinez's constitutional rights and could not be used as a basis for recovery under 42 U.S.C.A. § 1983. According to the Court, per Justice CLARENCE THOMAS, *Miranda* warnings merely offer protection against violations of constitutional rights, but the failure to provide these warnings is not itself a constitutional violation. Moreover, because Martinez was never required to be a witness against himself in a criminal trial, the fact that the officer asked coercive questions did not violate Martinez's Fifth Amendment right against self-incrimination, according to the Court.

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CROSS-REFERENCES

Coercion; Criminal Procedure; Criminal Law; Due Process of Law; Exclusionary Rule; Fruit of the Poisonous Tree.

## MISCARRIAGE OF JUSTICE

*A legal proceeding resulting in a prejudicial outcome.*

A miscarriage of justice arises when the decision of a court is inconsistent with the substantive rights of a party.

## MISCEGENATION

*Mixture of races. A term formerly applied to marriage between persons of different races. Statutes prohibiting marriage between persons of different races have been held to be invalid as contrary to the* EQUAL PROTECTION CLAUSE *of the Constitution.*

## MISCHIEF

*A specific injury or damage caused by another person's action or inaction. In* CIVIL LAW*, a person who suffered physical injury due to the* NEGLIGENCE *of another person could allege mischief in a lawsuit in* TORT*. For example, if a baseball is hit through a person's window by accident, and the resident within is injured, mischief can be claimed. It is distinct from malicious mischief, which is a criminal act usually involving reckless or intentional behavior such as* VANDALISM*.*

## MISDEMEANOR

*Offenses lower than felonies and generally those punishable by fine, penalty,* FORFEITURE*, or imprisonment other than in a penitentiary. Under federal law, and most state laws, any offense other than a felony is classified as a misdemeanor. Certain states also have various classes of misdemeanors (e.g., Class A, B, etc.).*

## MISFEASANCE

*A term used in* TORT LAW *to describe an act that is legal but performed improperly.*

Generally, a civil defendant will be liable for misfeasance if the defendant owed a duty of care toward the plaintiff, the defendant breached that duty of care by improperly performing a legal act, and the improper performance resulted in harm to the plaintiff.

For example, assume that a janitor is cleaning a restroom in a restaurant. If he leaves the floor wet, he or his employer could be liable for any injuries resulting from the wet floor. This is because the janitor owed a duty of care toward users of the restroom, and he breached that duty by leaving the floor wet.

In theory, misfeasance is distinct from NONFEASANCE. *Nonfeasance* is a term that describes a failure to act that results in harm to another party. Misfeasance, by contrast, describes some affirmative act that, though legal, causes harm. In practice, the distinction is confusing and uninstructive. Courts often have difficulty determining whether harm resulted from a failure to act or from an act that was improperly performed.

To illustrate, consider the example of the wet bathroom floor. One court could call a resulting injury the product of misfeasance by focusing on the wetness of the floor. The washing of the floor was legal, but the act of leaving the floor wet was improper. Another court could call a resulting injury the product of nonfeasance by focusing on the janitor's failure to post a warning sign.

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CROSS-REFERENCES

Malfeasance.

## MISPRISION

*The failure to perform a public duty.*

*Misprision* is a versatile word that can denote a number of offenses. It can refer to the improper performance of an official duty. In Arkansas, for example, rule 60 of the Arkansas Rules of Civil Procedure provides that a judgment, decree, or order may be vacated or modified "for misprisions of the clerk." In this sense *misprision* refers to neglect, mistake, or subterfuge on the part of the court clerk who performed the paperwork for the judgment, decree, or order.

*Misprision* also can refer to seditious or rebellious conduct against the government or the courts. This is an archaic usage of the word. Organized rebellion against the government is now uniformly referred to as SEDITION or insurrection.

The most familiar and popular use of the term *misprision* describes the failure to report a crime. In England, beginning in the thirteenth century, the failure to report a crime became itself a crime. According to tradition, it was a citizen's duty to "raise the hue and cry" by reporting crimes, especially felonies, to law enforcement authorities (*Branzburg v. Hayes,* 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 [1972], quoting WILLIAM BLACKSTONE).

The crime of misprision still exists in England, but it has never been fully embraced in the United States. The first Congress passed a misprision of felony statute in 1789. The statute holds, "Whoever, having knowledge of the actual commission of a felony . . . conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States" is guilty of misprision of felony and can be punished with up to three years in prison.

Under the federal statute, the prosecution must prove the following elements to obtain a misprision of felony conviction: (1) another person actually committed a felony; (2) the

defendant knew that the felony was committed; (3) the defendant did not notify any law enforcement or judicial officer; and (4) the defendant took affirmative steps to conceal the felony. Precisely what constitutes active concealment is a QUESTION OF FACT that depends on the circumstances of the case. Lying to a police officer satisfies the requirement, but beyond that generally accepted rule, little is certain about the definition of active concealment.

Almost every state has rejected the crime of misprision of felony. Thus, persons are under no duty to report a crime. One policy reason for rejecting misprision is that the crime is vague and difficult to apply to real situations. Another reason is that the crime is seen as an unacceptable encroachment on civil freedom. In 1822 the U.S. Supreme Court cautioned against misuse of the misprision of felony statute, stating, "It may be the duty of a citizen to . . . proclaim every offense which comes to his knowledge; but the law which would punish him in every case, for not performing this duty, is too harsh" (*Marbury v. Brooks,* 20 U.S. [7 Wheat.] 556, 5 L. Ed. 522).

The Supreme Court has not completely abandoned the duty to report criminal activity. In *Roberts v. United States,* 445 U.S. 552, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980), the High Court held that a court can increase a criminal defendant's sentence if the defendant refuses to cooperate with government officials investigating a related crime. Also, a journalist who has knowledge of a crime may be compelled to reveal the source of that knowledge (*Branzburg v. Hayes*).

The federal misprision of felony statute remains on the books, but the crime rarely has been prosecuted. On the state level, most states have either abolished or refused to enact misprision of felony laws. South Carolina is the only state that has prosecuted the misprision of a felony.

In *State v. Carson,* 262 S.E.2d 918, 274 S.C. 316 (1980), Isaac E. Carson, the EYEWITNESS to a murder, refused to give law enforcement authorities information regarding the murder because he feared for his life if he cooperated with authorities. Carson was prosecuted and convicted of misprision of felony and sentenced to three years in prison.

The prosecution of Carson was based on the COMMON LAW. South Carolina did not have a misprision of felony statute. Instead the prosecution relied on title 14, chapter 1, section 50, of the Code of Laws of South Carolina. Under this statute the common law of England continues in effect in South Carolina. On appeal by Carson, the Supreme Court of South Carolina affirmed the conviction. According to the court, the prosecution was valid because misprision of felony was a crime at common law in England and because the South Carolina legislature had not taken steps to repeal the common-law crime of misprision of felony.

The crime of misprision of felony is similar to the crime of acting as an ACCESSORY after the fact because both crimes involve some affirmative act to conceal a crime. Two basic differences are that the crime of misprision is committed even if the defendant does not give aid to the criminal and misprision is committed only if the underlying crime is completed.

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## MISREPRESENTATION

*An assertion or manifestation by words or conduct that is not in accord with the facts.*

Misrepresentation is a TORT, or a civil wrong. This means that a misrepresentation can create civil liability if it results in a pecuniary loss. For example, assume that a real estate speculator owns swampland but advertises it as valuable commercially zoned land. This is a misrepresentation. If someone buys the land relying on the speculator's statement that it is commercially valuable, the buyer may sue the speculator for monetary losses resulting from the purchase.

To create liability for the maker of the statement, a misrepresentation must be relied on by the listener or reader. Also, the speaker must know that the listener is relying on the factual correctness of the statement. Finally, the listener's reliance on the statement must have been reasonable and justified, and the misrepresentation must have resulted in a pecuniary loss to the listener.

A misrepresentation need not be intentionally false to create liability. A statement made

with conscious ignorance or a reckless disregard for the truth can create liability. Nondisclosure of material or important facts by a fiduciary or an expert, such as a doctor, lawyer, or accountant, can result in liability. If the speaker is engaged in the business of selling products, any statement, no matter how innocent, may create liability if the statement concerns the character or quality of a product and the statement is not true. In such a case, the statement must be one of fact. This does not include so-called puffing, or the glowing opinions of a seller in the course of a sales pitch (such statements as "you'll love this car," or "it's a great deal").

A misrepresentation in a contract can give a party the right to rescind the contract. A RESCISSION of a contract returns the parties to the positions they held before the contract was made. A party can rescind a contract for misrepresentation only if the statement was material, or critical, to the agreement.

A misrepresentation on the part of the insured in an insurance policy can give the insurer the right to cancel the policy or refuse a claim. An insurer may do this only if the misrepresentation was material to the risk insured against and would have influenced the insurer in determining whether to issue a policy. For example, if a person seeking auto insurance states that she has no major chronic illnesses, the insurer's subsequent discovery that the applicant had an incurable disease at the time she completed the insurance form probably will not give the insurer the right to cancel the auto policy. However, if the person was seeking HEALTH INSURANCE, such a misrepresentation may justify cancellation of the policy or a denial of coverage. Generally, cancellation or denial of insurance coverage for a misrepresentation can occur only if the insurance applicant was aware of the inaccuracy of the statement.

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CROSS-REFERENCES

Consumer Protection; Product Liability; Sales Law; Tort Law.

## MISSOURI COMPROMISE OF 1820

The Missouri Compromise of 1820 was a congressional agreement that regulated the extension of SLAVERY in the United States for the next 30 years. Under the agreement the territory of Missouri was admitted as a slave state, the territory of Maine was admitted as a free state, and the boundaries of slavery were limited to the same latitude as the southern boundary of Missouri: 36° 30' north latitude.

The issue of slavery had been troublesome since the drafting of the Constitution. Slave-holding states, concerned that they would be outvoted in Congress because their white population was much smaller than that of the free states, extracted concessions. Under the Constitution, representation of the U.S. House of Representatives was based on the total white population and three-fifths of the black population. The Constitution apportioned two senators for each state.

By 1820, however, the rapid growth in population in the North left Southern states, for the first time, with less than 45 percent of the seats in the House. The Senate was evenly balanced between eleven slave and eleven free states. Therefore, Missouri's 1818 application for statehood, if approved, would give slave-holding seats a majority in the Senate and reduce the Northern majority in the House.

After a bill was introduced in the House in 1818 to approve Missouri's application for statehood, Representative James Tallmadge of New York introduced an amendment that prohibited the further introduction of slavery in Missouri and required that any slave born there be emancipated at age 25. The bill passed the House but was defeated in the Senate, where Southern strength was greater.

In 1819 the free territory of Maine applied for statehood. Speaker of the House HENRY CLAY of Kentucky saw this event as an opportunity to maintain the balance of free and slave states. He made it clear to Northern congressmen that Maine would not be admitted without an agreement to admit Missouri. Clay was successful, getting the Northern congressmen to drop their amendment restricting slavery while winning Southern congressmen over to the idea of limiting slavery to the 36° 30' north latitude. This provision, in effect, left unsettled portions of the LOUISIANA PURCHASE north and west of Missouri free from slavery. The only area remaining for further expansion of slavery was the future territory of Arkansas and Oklahoma. Clay managed to pass the compromise in the House by a three-vote margin. Missouri and Maine were to be admitted to the Union simultaneously to preserve the sectional equality in the Senate.

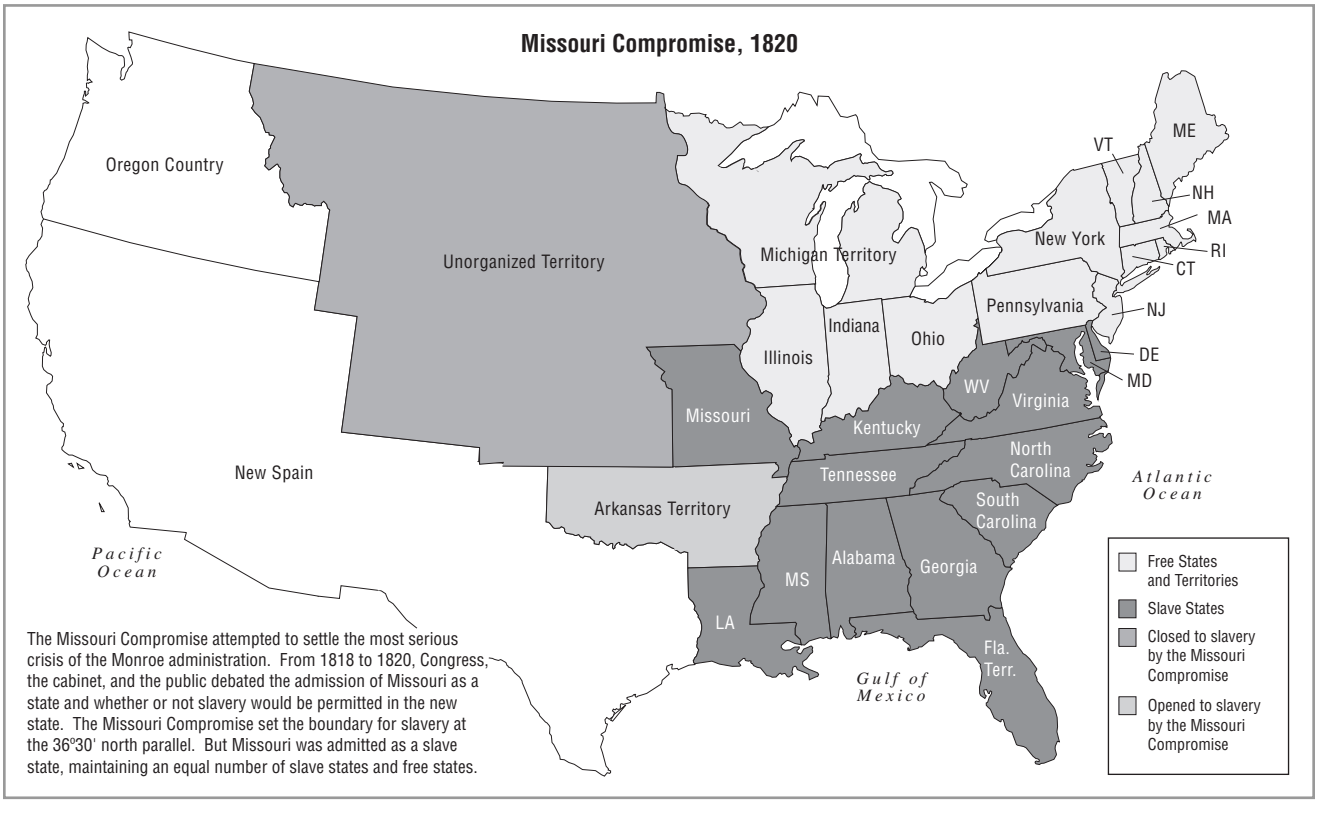


*Missouri Compromise (map showing boundaries of free and slave states).*

ILLUSTRATION BY ERIC WISNIEWSKI. GALE GROUP

In 1821 Missouri complicated matters, however, by inserting a provision into its state constitution that forbade any free blacks or mulattoes (people of mixed Caucasian and African-American heritage) to enter the state. Northern congressmen objected to this language and refused to give final approval for statehood until it was removed. Clay then negotiated a second compromise, removing the contested language and substituting a provision that prohibited Missouri from discriminating against citizens from other states. It left unsettled the question of who was a citizen. With this change Missouri and Maine were admitted to the Union.

The Missouri Compromise of 1820 merely postponed the conflict over slavery. As new territories were annexed to the Union, new compromises with slavery became necessary. The COMPROMISE OF 1850 redrew the territorial map of slavery and altered the 36° 30′ north latitude prescription of the Missouri Compromise. California was admitted as a free state, and the Utah and New Mexico territories were open to slavery. The KANSAS-NEBRASKA ACT of 1854 repealed the Missouri Compromise. This new law provided for the organization of two new territories that allowed slavery, Kansas and Nebraska, both north of the 1820 Missouri Compromise line of 36° 30′ north latitude. The land open to slavery drove deep into the north and west.

The constitutionality of the Missouri Compromise itself was challenged in the landmark U.S. Supreme Court case of DRED SCOTT V. SANDFORD, 60 U.S. (19 How.) 393, 15 L. Ed. 69 (1857). Scott, a slave, had lived with his master in the free state of Illinois and also in part of the Wisconsin territory, where slavery had been federally prohibited under the Missouri Compromise. After his master died, Scott sued in the Missouri courts for his freedom, on the grounds that he had lived in a free territory. The Supreme Court ruled against Scott, with Chief Justice ROGER B. TANEY holding that the FIFTH AMENDMENT denies Congress the right to deprive persons of their property without DUE PROCESS OF LAW. Therefore, the Missouri Compromise prohibiting slavery north of 36° 30′ was unconstitutional. The decision wiped away the Missouri Compromise but also raised the issue of whether slavery could be regulated by any government anywhere in the Union.

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## MISTAKE

*An unintentional act, omission, or error.*

Mistakes are categorized as a MISTAKE OF FACT, MISTAKE OF LAW, or mutual mistake. A mistake of fact occurs when a person believes that a condition or event exists when it does not. A mistake of law is made by a person who has knowledge of the correct facts but is wrong about the legal consequences of an act or event. A mutual mistake arises when two or more parties have a shared intention that has been induced by a common misbelief.

## MISTAKE OF FACT

*An error that is not caused by the neglect of a legal duty on the part of the person committing the error but rather consists of an unconscious ignorance of a past or present material event or circumstance or a belief in the present existence of a material event that does not exist or a belief in the past existence of a material event that did not exist.*

Mistake of fact can be a factor in reducing or eliminating civil liability or criminal culpability. A mistake of fact is of little consequence unless it is born of unconscious ignorance or forgetfulness. A person cannot escape civil or criminal liability for intentional mistakes.

In contract law a mistake of fact may be raised as a defense by a party seeking to avoid liability under the contract. Also, a mistake of fact can be used affirmatively to cancel, rescind, or reform a contract. A mistake of fact can affect a contract only if the mistaken fact was material, or important, to the agreement.

For example, assume that a bookseller has agreed to sell a copy of a Virginia Woolf novel that was signed by the late author. Assume further that the buyer is only interested in buying the book because it contains Woolf's signature. The seller knows this, and with an authentic signature the book fetches a very high price. If it is later discovered that the signature was actually forged decades earlier and neither the seller nor the buyer knew of the forgery, this would be a mistake of fact material to the deal, and the buyer would have the right to return the book and get her money back. This example illustrates a mutual mistake, or a material fact that is mistaken by both parties. In such a case, the party who is adversely affected by the mistake has the right to cancel or rescind the contract.

In the event of a unilateral mistake, only one party to the agreement is mistaken about a material fact. In such a case, the party adversely affected by the mistake will not be able to void the contract unless the other party knew or should have known of the mistake, or unless the other party had a duty to disclose the mistaken fact. For example, assume that a person owns an expensive sports car that is in perfect condition. Assume further that a neighbor asks the owner if he will sell the car, and the owner responds, "I will sell this car for thirty bills." If the neighbor returns with $30, no contract is formed because the neighbor mistakenly thought that the owner meant $30 when actually the owner was using slang for $30,000. Further, the neighbor should have known that an expensive sports car would not be sold for $30.

If a party to a contract assumes the risk that a material fact may be different than expected, that party will not be able to recover any losses when the fact turns out to be different. For example, assume that a farmer sells a horse to a buyer who wants to use the horse for polo games. Neither the farmer nor the buyer knows whether the horse will be suitable for polo, and the farmer makes no guarantees. If the horse proves unsuitable, the buyer will not be able to rescind the deal because the farmer made no warranties as to the horse's suitability for polo. To avoid such a result, parties to a contract may agree, as part of the deal, to cancel or rescind the contract if a certain fact related to the contract later proves unacceptable to one of the parties.

If a contract can be reformed, a court may not allow a party to rescind a contract on account of mistake of fact. The court reforms a contract to reflect the true intent of the parties. For example, assume that a footwear retailer offers to buy 100 mukluks from a mukluk manufacturer for $10 a pair. Assume further that the retailer mistakenly orders 100 mukluks for $100 a pair. If the mukluk manufacturer delivers 100 mukluks and later demands $100 for each pair, the retailer can ask a court to reform the contract to reflect a price of $10 a pair. This action

generally occurs when the mistake makes the agreement UNCONSCIONABLE. If, for example, the retailer had offered to pay $101 a pair and the retailer later discovered that the standard price was $100, the retailer would likely be stuck with the contract.

A mistake involving the use of force in the defense of property can give rise to civil liability. Generally, if a person has a privilege to enter onto property, a landowner or tenant has no right to use force to keep the intruder off the property. If, however, the intruder causes a reasonable, mistaken belief that the property must be defended, a landowner or tenant may have the right to use force to repel the intruder. For example, if an electricity meter reader arrives to read a meter at night wearing dark clothing and a ski mask, a resident on the property may not be liable for a reasonable use of force necessary to expel the intruder. The meter reader can be considered to have caused the mistaken belief on the part of the resident that the property was being invaded by someone with no privilege to enter.

In CRIMINAL LAW an honest and reasonable mistake of fact can eliminate the mens rea element of criminal responsibility. *Mens rea* is Latin for "guilty mind," and, along with an act, a guilty mind, or a criminal intent, is required before a person can be held criminally responsible for most crimes. For example, assume that a person who buys stolen goods honestly and reasonably believed that the goods actually belonged to the seller. This would negate the criminal intent necessary to be convicted of receiving stolen goods, and the buyer would not be held criminally liable.

If a mistake of fact in a criminal case does not negate mens rea, it may reduce it. For example, if a person honestly and reasonably, but mistakenly, believes that DEADLY FORCE is necessary to preserve her own life, she may not be found guilty of murder if a death results from the deadly force. The mistake reduced the mens rea necessary to be convicted of murder. That is, the person did not have the SPECIFIC INTENT to kill without justification or excuse. She may be found guilty of MANSLAUGHTER, a HOMICIDE less serious than murder, if her actions were unreasonable. She may even be found not guilty of any homicide if the judge or jury finds that she was not reckless or negligent in the killing. This is a QUESTION OF FACT to be determined by the judge or jury sitting on the case.

In some criminal and civil cases, no mens rea is required for liability. Such cases involve STRICT LIABILITY crimes. STATUTORY RAPE is an example of a strict liability crime. It does not matter whether the defendant knew that the victim was too young to have sexual relations or whether the defendant intended to have sex with a minor. In such a case, a mistake of fact is no defense. Strict liability crimes are generally those that endanger the public WELFARE, such as toxic waste dumping and the sale of alcohol to minors.

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CROSS-REFERENCES

Mens Rea.

## MISTAKE OF LAW

*A misconception that occurs when a person with complete knowledge of the facts reaches an erroneous conclusion as to their legal effect; an incorrect opinion or inference, arising from a flawed evaluation of the facts.*

Generally, a mistaken belief about a law is no defense to a violation of that law. All persons are presumed to know and understand the law, except minors, persons who lack mental capacity to contract with others, and, in criminal cases, persons who are insane. There are, however, a few other rare exceptions to this general rule.

A mistake of law may be helpful to criminal defendants facing prosecution for a specific-intent crime. A specific-intent crime requires that a defendant act with a criminal intent beyond the general intent required to commit the act. Murder, for example, is a specific-intent crime. The prosecution must show that the defendant specifically intended to kill the victim without justification. MANSLAUGHTER, conversely, requires only a showing that the defendant intended to do those actions that caused

the death. If a defendant is charged with a specific-intent crime, the defendant's reasonable mistaken belief about the law may reduce the defendant's criminal liability.

For example, assume that a defendant is accused of robbing another person. Assume further that the defendant was actually trying to retrieve money that the alleged victim owed to the defendant. A court may hold that the defendant mistakenly believed that the law allows SELF-HELP in such situations and that the mistaken belief about the law negated the SPECIFIC INTENT required for the crime. That is, the defendant did not have the specific intent to gain control over the property of another person. Generally, a mistake of law is helpful to criminal defendants only in specific-intent cases. For general-intent and STRICT LIABILITY crimes, a mistake of law is no defense.

There are other exceptions to the general rule that ignorance of the law is no excuse. If a defendant relied on a statute that permitted a certain act and the act is later made illegal, the defendant cannot be prosecuted. This applies to general-intent and strict liability crimes as well as specific-intent crimes. If a defendant reasonably relies on a judicial decision, an opinion, or a judgment that is later reversed, the reversal does not retroactively make a related act illegal. Similarly, if a defendant acts with reasonable reliance on an official statement of law in an administrative order or from an official interpretation by a public officer or government agency, the defendant may use the mistake-of-law defense. Mistaken advice from an attorney, however, does not create a mistake-of-law defense.

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## MISTRIAL

*A courtroom trial that has been terminated prior to its normal conclusion. A mistrial has no legal effect and is considered an invalid or nugatory trial. It differs from a "new trial," which recognizes that a trial was completed but was set aside so that the issues could be tried again.*

A judge may declare a mistrial for several reasons, including lack of jurisdiction, incorrect jury selection, or a deadlocked, or hung, jury. A deadlocked jury—where the jurors cannot agree over the defendant's guilt or innocence—is a common reason for declaring a mistrial. Extraordinary circumstances, such as death or illness of a necessary juror or an attorney, may also result in a mistrial. A mistrial may also result from a fundamental error so prejudicial to the defendant that it cannot be cured by appropriate instructions to the jury, such as improper remarks made during the prosecution's summation.

In determining whether to declare a mistrial, the court must decide whether the error is so prejudicial and fundamental that expenditure of further time and expense would be wasteful, if not futile. Although the judge has the power to declare a mistrial and discharge a jury, this power should be "exercised with great care and only in cases of absolute necessity" (*Salvatore v. State of Florida,* 366 So. 2d 745 [Fla. 1978], *cert. denied,* 444 U.S. 885, 100 S. Ct. 177, 62 L. Ed. 2d 115 [1979]).

For example, in *Ferguson v. State,* 417 So. 2d 639 (Fla. 1982), the defendant moved for a mistrial because of an allegedly improper comment made by the prosecution during closing argument. The prosecution stated that not only was defense counsel asking the jury to find a scapegoat for the defendant's guilt, he was also putting the blame on someone who had already been found guilty. The appellate court found that the lower court had properly denied the motion for a mistrial because the prosecutor's comment fell within the bounds of "fair reply."

A mistrial in a criminal prosecution may prevent retrial under the DOUBLE JEOPARDY provision of the FIFTH AMENDMENT, which prohibits an individual from being tried twice for the same offense, unless required by the interests of justice and depending on which party moved for the mistrial. Typically, there is no bar to a retrial if the defendant requests or consents to a mistrial. A retrial may be barred if the court grants a mistrial without the defendant's consent, or over his objection. If the mistrial results from judicial or prosecutorial misconduct, a retrial will be barred. In *United States v. Jorn,* 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971), the Supreme Court held that reprosecuting the defendant would constitute double jeopardy because the judge had abused his discretion in declaring a mistrial. On his own motion, the judge had declared a mistrial to enable government witnesses to consult with their own attorneys.

CROSS-REFERENCES

Criminal Procedure; Harmless Error; Hung Jury.

## ♦ MITCHELL, JOHN NEWTON

John Newton Mitchell served as U.S. attorney general from 1969 to 1972. A key political adviser to President RICHARD M. NIXON, Mitchell was later convicted of crimes associated with the WATERGATE scandal, becoming the first attorney general to serve time in a federal prison.

Mitchell was born September 5, 1913, in Detroit. He worked his way through Fordham University and Fordham Law School playing semiprofessional hockey. After graduating from law school in 1938, he was admitted to the New York bar and began work in a New York City law firm. He was made a partner in 1942. During WORLD WAR II, he served as a torpedo boat commander in the U.S. Navy.

Mitchell became rich and prominent as a municipal bond lawyer, devising new ways for states and municipalities to finance construction projects. He met Richard M. Nixon in 1962, when Nixon joined a prominent New York law firm. At that time Nixon appeared to have no political future; he had lost the 1960 presidential election and the 1962 California gubernatorial election. In 1967 Mitchell's firm merged with Nixon's and the pair became confidants.

Mitchell served as Nixon's campaign manager for the presidency in 1968. He forged a conservative coalition of southern and western states that helped carry Nixon to victory over Vice President HUBERT H. HUMPHREY. During the campaign Mitchell claimed he would never accept a cabinet position if Nixon was elected. Despite these statements Mitchell accepted the post of attorney general in 1969.

As attorney general, Mitchell led the JUSTICE DEPARTMENT in a sweeping law-and-order drive that many critics believed went too far. He increased the number of telephone wiretaps on private citizens and generally clamped down on political dissenters, especially those who opposed U.S. involvement in the VIETNAM WAR. A number of these Justice Department initiatives were later ruled illegal by the courts. For example, in *Ellsberg v. Mitchell*, 353 F. Supp. 515 (D.D.C. 1973), the department sought to prosecute Daniel Ellsberg for leaking secret documents to the press regarding military involvement in Vietnam. The release of the Pentagon Papers infuriated the Nixon White House. The case was dismissed after Ellsberg's attorneys informed the court that a secret White House security group (the "plumbers") had illegally

*John N. Mitchell.*
CONSOLIDATED/ ARCHIVE PHOTOS

"YOU WILL BE BETTER ADVISED TO WATCH WHAT WE DO INSTEAD OF WHAT WE SAY."
—JOHN MITCHELL

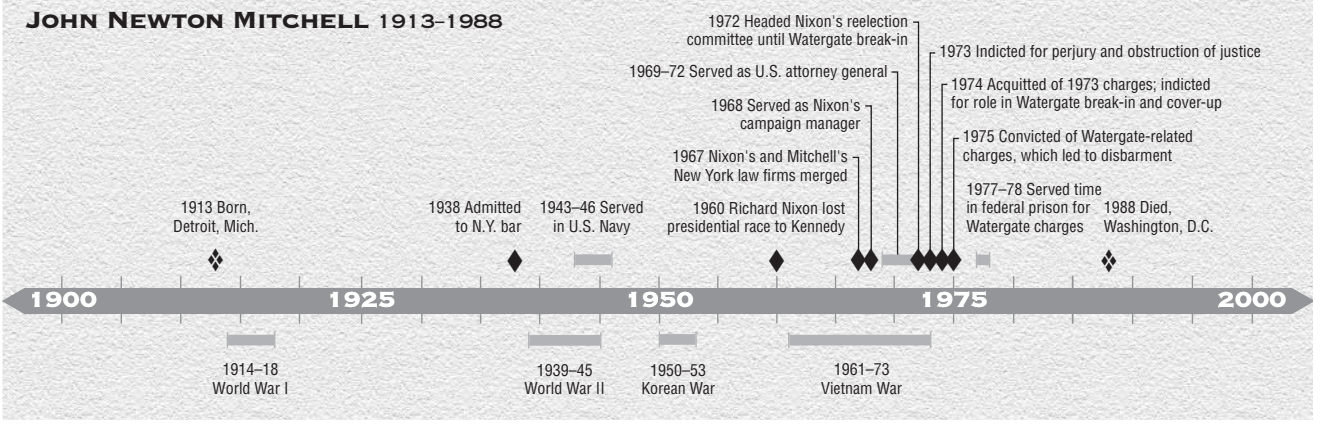

broken into the office of Ellsberg's psychiatrist in search of damaging evidence. The dismissal was also based on the Justice Department's refusal to produce wiretap records pertaining to Ellsberg.

Mitchell resigned as attorney general in February 1972 to head President Nixon's reelection committee. On June 17, 1972, five men were arrested after breaking into Democratic National Committee headquarters at the Watergate building complex in Washington, D.C. They and two other men associated with the White House and the reelection committee were charged with BURGLARY and WIRETAPPING. Mitchell denied playing any part in the Watergate incident but resigned from the reelection committee post in July.

In May 1973 he was indicted in New York City for perjury and OBSTRUCTION OF JUSTICE in an alleged scheme to secretly contribute cash to the Nixon reelection campaign. He was acquitted of the charge in 1974. In that same year, however, he was indicted for conspiracy, obstruction of justice, giving false testimony to a GRAND JURY, and perjury, for his role in the Watergate break-in and cover-up. He was convicted of these charges in 1975 and sentenced to two-and-a-half to eight years in prison. After exhausting his criminal appeals, he entered federal prison in June 1977. His sentence was later reduced to one to four years after he made a statement of contrition. He was paroled in January 1978.

His criminal convictions led to his disbarment in 1975. Following his release he served as an international business consultant. He died on November 9, 1988, in Washington, D.C.

"WE ARE GOING TO HAVE AN OUTBURST AGAINST THIS DISCOVERY BUSINESS UNLESS WE CAN HEDGE IT WITH SOME APPEARANCE OF SAFETY AGAINST FISHING EXPEDITIONS."
—WILLIAM MITCHELL

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## ♦ MITCHELL, WILLIAM DE WITT

William de Witt Mitchell was a distinguished lawyer who became the fifty-fourth attorney general of the United States.

Mitchell was born on September 9, 1874, in Winona, Minnesota. He was the son of William Mitchell, a distinguished justice of the Minnesota Supreme Court for whom the William Mitchell College of Law in St. Paul is named. The younger Mitchell left Minnesota at the age of fourteen to attend preparatory school in New Jersey. He then entered Yale University to study electrical engineering, but during vacations back in Minnesota, he pursued his interest in the law, spending time discussing legal issues with his father and with other judges and attorneys who were family friends. As a result, after two years at Yale, he transferred to the University of Minnesota for pre-law studies. After receiving his bachelor of arts degree in 1895 and his bachelor of laws degree in 1896, he was admitted to the bar and took a position as a law clerk with Stringer and Seymour, a St. Paul law firm.

When the SPANISH-AMERICAN WAR broke out in 1898, Mitchell enlisted in the Fifteenth Minnesota Volunteer Infantry, where he became a second lieutenant and served as a JUDGE ADVOCATE for the Second U.S. Army Corp. When the war ended, he returned to St. Paul and Stringer and Seymour. After his father lost his seat on the state supreme court in an election, Mitchell and the elder Mitchell established a law partnership with two other lawyers. Though his father died in 1900, Mitchell continued to practice law until another war—World War I—intervened. Mitchell again returned to military service as an infantry officer until 1919, when he rejoined his law firm, becoming a senior partner in 1922.

In 1925, through an influential friend in Washington, Mitchell's name was brought to the

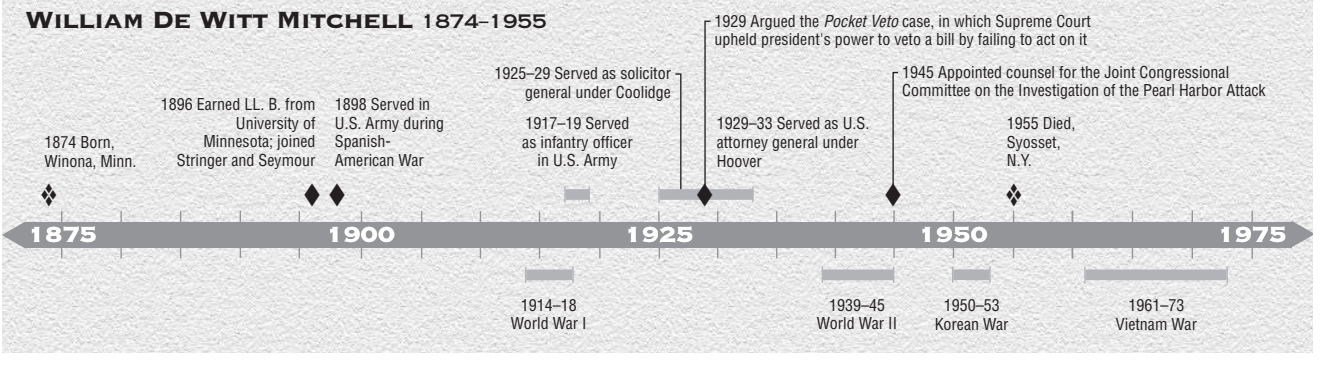

attention of President CALVIN COOLIDGE, who was seeking to fill the position of SOLICITOR GENERAL. Coolidge, a Republican, offered Mitchell, a Democrat, the job, passing over several better-known Republican candidates. As solicitor general, under the direction of the U.S. attorney general, Mitchell was primarily responsible for representing the government of the United States before the U.S. Supreme Court in cases in which the United States had an interest. Mitchell, though he had intended to hold the position for only two years and then return to private practice, was solicitor general until 1929, appearing before the Court in thirty-four cases.

That year, upon the recommendation of several justices on the Supreme Court, newly elected President HERBERT HOOVER appointed Mitchell to be U.S. attorney general. Though his new role involved a wide and daunting range of responsibilities (including acting as a member of the president's cabinet), Mitchell continued to occasionally argue important cases himself before the High Court. One significant case was *Okanogan, Methow, San Poelis, Nespelem, Colville, and Lake Indian Tribes or Bands of State of Washington v. United States,* 279 U.S. 655, 49 S. Ct. 463, 73 L. Ed. 894 (1929), better known as the *Pocket Veto* case. In that decision the Supreme Court upheld the president's power to VETO a bill by failing to return it to Congress when Congress was in recess.

At the end of the Hoover administration, Mitchell returned to private practice, joining a New York law firm. Twelve years later, in 1945, Mitchell was appointed counsel for the Joint Congressional Committee on the Investigation of the Pearl Harbor Attack. Though he was selected unanimously and had virtually unfettered access to all departments, records, and personnel involved in the incident, Mitchell was unhappy with the slow pace of the committee's inquiry and left the position after less than three months to again return to private practice in New York. While practicing he served on several important commissions and was chairman of the Committee on Federal Rules of Civil Procedure, which was charged with redrafting rules governing practice in the federal courts. He died on August 24, 1955, in Syosset, New York, at the age of eighty-one.

## MITIGATING CIRCUMSTANCES

*Circumstances that may be considered by a court in determining culpability of a defendant or the extent of damages to be awarded to a plaintiff. Mitigating circumstances do not justify or excuse an offense but may reduce the severity of a charge. Similarly, a recognition of mitigating circumstances to reduce a damage award does not imply that the damages were not suffered but that they have been partially ameliorated.*

In criminal cases where the death penalty may be imposed, the Supreme Court has held that, under the Eighth and Fourteenth Amendments, juries must be instructed that they may consider mitigating circumstances such as the defendant's youth, mental capacity, or childhood abuse so that they may reach a reasoned and moral sentencing decision. (See *Penry v. Lynaugh,* 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 [1989].) Mitigating circumstances may be used to reduce a charge against a defendant. In *People v. Morrin,* 31 Mich. App. 301, 187 N.W.2d 434 (1971), the Michigan Court of Appeals reversed and remanded Morrin's conviction on first-degree murder charges because he committed the murder in the heat of passion caused by adequate legal provocation. The court found that because of these mitigating circumstances, the evidence was insufficient to support a first-degree murder conviction, which requires malice aforethought.

In civil actions mitigating circumstances may be considered to reduce damage awards or the extent of the defendant's liability. In *Cerretti v. Flint Hills Rural Electric Cooperative Ass'n,* 251 Kan. 347, 837 P.2d 330 (1992), the Supreme Court of Kansas held that a court, in reviewing a damage award, may consider any mitigating circumstances that affected the intent of the defendant, the financial worth of the defendant, or the plaintiff's expenses.

Many states allow defendants in DEFAMATION actions to prove mitigating circumstances by showing that they acted in GOOD FAITH, with honesty of purpose, and without malice in speaking or publishing the defamatory words. If the court is convinced that legitimate mitigating circumstances existed, it may reduce the amount of damages the defendant is required to pay. In *Roemer v. Retail Credit Co.,* 44 Cal. App. 3d 926, 119 Cal. Rptr. 82 (1975), the defendant claimed that the plaintiff defaced the wall of his office, thereby mitigating the defendant's liability for defamatory statements. However, the court did not allow the defendant to introduce this evidence because he could not

prove that the plaintiff was responsible for the defacement.

CROSS-REFERENCES

Capital Punishment; Criminal Law.

## MITIGATION OF DAMAGES

*The use of reasonable care and diligence in an effort to minimize or avoid injury.*

Under the mitigation of damages doctrine, a person who has suffered an injury or loss should take reasonable action, where possible, to avoid additional injury or loss. The failure of a plaintiff to take protective steps after suffering an injury or loss can reduce the amount of the plaintiff's recovery. The mitigation of damages doctrine is sometimes called minimization of damages or the doctrine of AVOIDABLE CONSEQUENCES.

In contract law the non-breaching party should mitigate damages or risk a reduction in recovery for the breach. For example, assume that a property owner and home builder contract for the construction of a home in exchange for payment of $50,000. Assume further that the builder begins constructing the home but that the owner wrongfully cancels the contract before the builder has finished construction. If the builder must sue the owner to recover the unpaid portion of the contract price, a court may reduce the amount of money that the builder recovers if the builder does not try to avoid additional loss. For example, the builder could sell the materials already purchased for the job or use the materials in another job. The savings that the builder realizes will be deducted from the loss incurred on the contract in computing the builder's net recovery in court.

In TORT LAW mitigation of damages refers to conduct by the plaintiff that, although not constituting a civil wrong itself, may reduce the plaintiff's recovery. For example, if the victim of an assault used provocative words prior to the assault, the words may mitigate the plaintiff's damages. Most states limit mitigation of damages for provocative words to a possible reduction in PUNITIVE DAMAGES, as opposed to COMPENSATORY DAMAGES.

A tort victim also should act to mitigate damages subsequent to the wrongful acts of another. For instance, assume that the victim in the assault example suffers a broken leg. If the victim refuses to get medical treatment and the leg eventually must be amputated, the defendant may be liable only for the reasonable medical expenses to repair a broken leg. Because a reasonable person would seek medical attention after suffering a broken leg, a court could find it unreasonable to make the defendant pay for additional damage that the victim could have prevented with minimal effort.

If it is unreasonable to expect the victim to mitigate damages following the injury, the defendant may be held liable for subsequent injury to the victim that stems from the wrongful act. For example, if the assault victim lives alone in a rural area without a source of transportation, and if the leg requires amputation because the victim could not get to a hospital, the defendant may be held liable not only for a broken leg but for the medical expenses, pain and suffering, and lost wages associated with the amputation.

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## MITTIMUS

*A court order directing a sheriff or other police officer to escort a convict to a prison.*

A mittimus is a written document. It can command a jailer to safely keep a felon until he or she can be transferred to a prison. A mittimus also refers to the transcript of the conviction and sentencing stages, which is duly certified by a clerk of court.

## MIXED ACTIONS

*Lawsuits having two purposes: to recover real property and to obtain monetary damages.*

Mixed actions take their character from real actions and personal actions. Originally the common-law courts in England concentrated on rights involving the possession of land. The relief granted was an order to give over possession of the real property in dispute. These were the real actions. Only later were FORMS OF ACTION developed to permit a lawsuit for monetary damages in a personal or mixed action. Then the sheriff might be ordered to collect a fine and later damages, out of the loser's profits, which were the rents and income from land, and

out of any PERSONAL PROPERTY. Special procedures existed for mixed actions that concerned the sort of relief sought in both real and personal actions.

## M'NAGHTEN RULE

*A test applied to determine whether a person accused of a crime was sane at the time of its commission and, therefore, criminally responsible for the wrongdoing.*

The M'Naghten rule is a test for criminal insanity. Under the M'Naghten rule, a criminal defendant is not guilty by reason of insanity if, at the time of the alleged criminal act, the defendant was so deranged that she did not know the nature or quality of her actions or, if she knew the nature and quality of her actions, she was so deranged that she did not know that what she was doing was wrong.

The M'Naghten rule on criminal insanity is named for Daniel M'Naghten, who, in 1843, tried to kill England's prime minister Sir Robert Peel. M'Naghten thought Peel wanted to kill him, so he tried to shoot Peel but instead shot and killed Peel's secretary, Edward Drummond. Medical experts testified that M'Naghten was psychotic, and M'Naghten was found not guilty by reason of insanity.

The public chafed at the verdict, and the House of Lords in Parliament ordered the Lords of Justice of the Queen's Bench to fashion a strict definition of criminal insanity. The Lords of Justice complied and declared that insanity was a defense to criminal charges only if

> at the time of the committing of the act, the party accused was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. (*Queen v. M'Naghten,* 8 Eng. Rep. 718 [1843])

The aim of the M'Naghten rule was to limit the INSANITY DEFENSE to cognitive insanity, a basic inability to distinguish right from wrong. Other tests formulated by legislatures and courts since *M'Naghten* have supplemented the M'Naghten rule with another form of insanity called volitional insanity. Volitional insanity is experienced by mentally healthy persons who, although they know what they are doing is wrong, are so mentally unbalanced at the time of the criminal act that they are unable to conform their actions to the law.

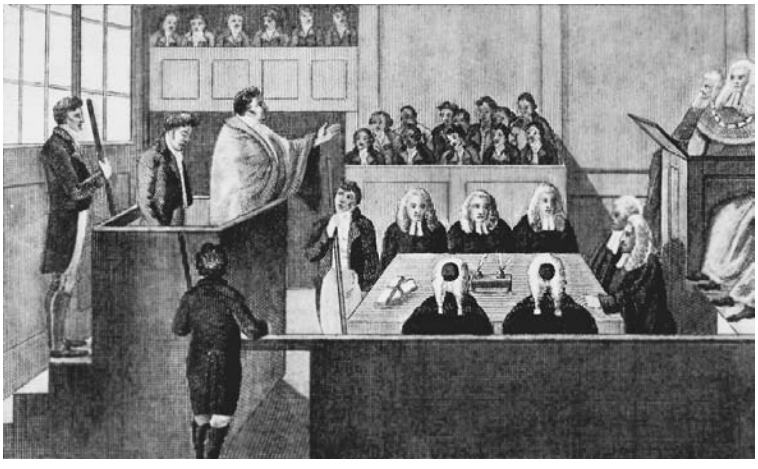

*In 1843 Daniel M'Naghten tried to kill England's prime minister Sir Robert Peel. At trial, M'Naghten was found not guilty by reason of insanity.*
HULTON-DEUTSCH COLLECTION

The M'Naghten rule was adopted in most jurisdictions in the United States, but legislatures and courts eventually modified and expanded the definition. The definition of criminal insanity now varies from jurisdiction to jurisdiction, but most of them have been influenced by the M'Naghten rule.

Many jurisdictions reject volitional insanity but retain cognitive insanity with a minor variation on the M'Naghten definition. Under the M'Naghten rule, a person was legally insane if she was so deranged that she did not know what she was doing. Under many current statutes, a person is legally insane if she is so deranged that she lacks substantial capacity to appreciate the criminality of her conduct.

The difference between the two definitions is largely theoretical. In theory, the latter definition is more lenient because it requires only that a person lack substantial capacity to appreciate her conduct.

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### CROSS-REFERENCES

Durham Rule; Insanity Defense.

## MOCK TRIAL

*A simulated trial-level proceeding conducted by students to understand trial rules and processes. Usually tried before a mock jury, these proceedings are different from* MOOT COURT *proceedings, which simulate appellate arguments.*

Mock trials are sometimes used as an ALTERNATIVE DISPUTE RESOLUTION tool, in which parties that are not inclined to negotiate may see

how the merits of their respective cases stand when argued before neutral evaluators.

## MODEL ACTS

*Statutes and court rules drafted by the American Law Institute (ALI), the* AMERICAN BAR ASSOCIATION *(ABA), the* COMMISSIONERS ON UNIFORM LAWS*, and other organizations. State legislatures may adopt model acts in whole or in part, or they may modify them to fit their needs. Model acts differ from* UNIFORM ACTS*, which are usually adopted by the states in virtually the same form proposed by the American Law Institute and other organizations.*

The ALI was founded in 1923 by a group of American judges, lawyers, and law professors. Its goal was to resolve uncertainty and complexity in American law by promoting clarification and simplicity in the law. Since its founding, the organization has worked with other scholarly organizations to draft model and uniform statutes that may be adopted by the various state legislatures.

One of the most successful of ALI's model acts is the MODEL PENAL CODE. First adopted in 1962, it has had a major influence on the way that states draft penal codes. In fact, the majority of states revised their penal codes based upon the provisions of the Model Penal Code. The code attempts to, among other things, create uniformity in such controversial areas as the authority of the courts in sentencing and how to define specific crimes, including criminal HOMICIDE and KIDNAPPING. In 2002, the ALI announced that it was launching a reexamination and revision of the sentencing provision of the code.

The ABA also approves drafts of model laws and rules. The Model Business Corporation Act (MBCA) is an example of a model act approved by the ABA that was implemented successfully. The MBCA was first adopted in 1950 and revised substantially in 1969, 1971, and 1983. It addresses all aspects of corporate legal structure, from bylaws to shareholder rights to fiduciary responsibilities. At least 18 states have adopted the act in its entirety. Many other states have adopted significant portions of the act.

Other model acts adopted in whole or in part by the states include the Model Rules of Professional Conduct, the Model Probate Code, the Model Class Actions Act, the Model Juvenile Court Act, and the Model Survival and Death Act.

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## MODEL PENAL CODE

The Model Penal Code (MPC) is one of the most important developments in American law, and perhaps the most important influence on American CRIMINAL LAW since it was completed in 1962. Conceived as a way to standardize and organize the often-fragmentary criminal codes enacted by the states, the MPC has influenced a large majority of states to change their laws. Although some provisions of the MPC are now considered outdated, and the code fails to address many important recent criminal law issues, its impact could still be felt as the country entered the twenty-first century.

Members of the American Law Institute (ALI), a group of judges, lawyers, and legal scholars whose purpose is to clarify and improve the law, began working on the Model Penal Code in 1952. The group had abandoned two previous attempts to create a model criminal code. The third attempt took ten years, and the ALI produced numerous drafts, reports, and revisions.

Herbert Wechsler, a Columbia Law School professor, served as the chief reporter, or principal drafter. From 1953 to 1962, ALI council members examined, considered, and debated the work of Wechsler, his staff, and his advisors in a total of 31 drafts. Finally, in 1962, the MPC was completed and published.

The impact of the MPC was immediate. For many states, the notion of codifying their criminal code was a foreign one—their criminal statutes were often poorly organized and did not define their crimes. The MPC arranged matters differently, organizing itself into four parts: (1) general provisions containing definitional functions and presumptive rules; (2) definitions of specific offenses; (3) provisions governing treatment and correction; and (4) provisions governing the organization of corrections departments and divisions such as the divisions responsible for PAROLE or PROBATION.

Several elements of the MPC have changed the way criminal law is administered in the United States. A good example of this is in the issue of *mens rea,* meaning state of mind or guilty mind. Previous state criminal statutes

took a scattershot approach to mens rea, requiring it for some crimes and not for others, and using multiple terms to measure culpability. The MPC stated simply that a person is not guilty of an offense unless he or she acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense. It then proceeded to define what these terms meant in a criminal law context, and what types of conduct would satisfy these terms. The clarity and simplicity of this approach made it desirable for many states to replace their codes with MPC-influenced codes. Following the introduction of the MPC, 36 states adopted new criminal codes, all of them influenced by the MPC and some of them using the exact language of the MPC for their statutes. Even if they did not adopt the language, some states used the MPC's model of organization as a starting point.

In addition, the MPC's influence is felt in the courts, where judges often rely on the code when handling substantive criminal law decisions. It has also become an important teaching tool in law schools, where the commentaries accompanying the code are read, as well as the code itself, in an attempt to gain insight into criminal law. Although the MPC has come under some criticism in recent years, with some critics suggesting that it may be time for revision, it remains firmly ensconced as an influence in the criminal laws of more than two-thirds of the states.

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## MODEL RULES OF PROFESSIONAL CONDUCT

See PROFESSIONAL RESPONSIBILITY.

## MODIFICATION

*A change or alteration in existing materials.*

*Modification* generally has the same meaning in the law as it does in common parlance. The term has special significance in the law of contracts and the law of sales.

The parties to a completed and binding contract are free to change the terms of the contract. Changes to a preexisting contract are called *contract modifications.* If the parties agree to modify the contract, the modification will be enforceable in a court of law.

A contract modification may be either written or oral, with some exceptions. An oral modification is unenforceable if the contract specifies that modifications must be in writing (*United States ex rel. Crane Co. v. Progressive Enterprises, Inc.,* 418 F. Supp. 662 [E.D. Va. 1976]). As a general rule, a modification should be in writing if it increases or decreases the value of the contract by $500 or more.

In contracts between parties who are not merchants, a modification should be supported by some consideration, which is the exchange of value, or something to solidify an agreement. Courts impose this requirement to prevent FRAUD and deception in the modification of contracts. Consideration operates as evidence that the parties have agreed to the modification. Without the requirement of consideration, a party to a contract could declare that the contract should be modified or canceled whenever such a demand was advantageous.

In contracts between merchants, a modification need not be supported by consideration. Derived from article 2, section 209, of the UNIFORM COMMERCIAL CODE, this rule is designed to honor the intent of commercial parties without requiring the time-consuming technicalities of consideration.

Like any non-merchant, a merchant is free to reject a proposed modification, but a merchant may waive the right to reject a modification by failing to object to the modification. For example, if an electrician doing work as a subcontractor notifies the general contractor that the electrical work will be more expensive than anticipated, the general contractor may be obliged to pay for the extra expenses if she fails to object before the electrician begins the work. There must be a legitimate commercial reason for such a contract modification, and the modification must be reasonable in light of the standards within the particular industry. Courts are free to strike down contract modifications that are brought about by duress or bad faith.

CROSS-REFERENCES

Sales Law.

## MODUS OPERANDI

*[*Latin, Method of working.*] A term used by law enforcement authorities to describe the particular manner in which a crime is committed.*

The term *modus operandi* is most commonly used in criminal cases. It is sometimes referred to by its initials, M.O. The prosecution in a criminal case does not have to prove modus operandi in any crime. However, identifying and proving the modus operandi of a crime can help the prosecution prove that it was the defendant who committed the crime charged.

Modus operandi evidence is helpful to the prosecution if the prosecution has evidence of crimes committed by the defendant that are similar to the crime charged. The crimes need not be identical, but the prosecution must make a strong and persuasive showing of similarity between the crime charged and the other crimes. The prosecution may introduce evidence from prior or subsequent crimes to prove modus operandi only if the other crimes share peculiar and distinctive features with the crime charged. The features must be uncommon and rarely seen in other crimes, and they must be so distinct that they can be recognized as the handiwork of the same person.

For example, assume that a defendant is on trial for armed ROBBERY. In the robbery the defendant is alleged to have brandished a pistol and ordered the victim to relinquish cash and valuables. Assume further that the defendant has committed armed robbery in the past by brandishing a pistol and demanding cash and valuables. A prosecutor might be able to introduce the evidence into trial to show the defendant's motive, intent, or state of mind, or to identify the weapon used in the crime. However, the prosecutor could not argue to the judge or jury that the robberies were so similar as to demonstrate that it was the defendant who committed that particular robbery, because it is not unusual for a robber to brandish a pistol and demand cash and valuables in the course of an armed robbery.

Now assume that a defendant is charged with robbing a movie theater that was showing the movie *Showgirls* and that the defendant was wearing a glittering, flamboyant Las Vegas-style cabaret costume during the robbery. Assume

*During the 1982 trial of Angelo Buono, California's notorious "Hillside Strangler," the prosecution relied on modus operandi evidence to show similarities in the deaths of ten victims.*

AP/WIDE WORLD PHOTOS

further that the prosecution has evidence that the defendant, while dressed as a Las Vegas dancer, has robbed other movie theaters showing the movie *Showgirls*. The prosecution could introduce this evidence into trial to prove modus operandi and show that it was the defendant who committed the crime, because the method of armed robbery used in the crimes was both similar and distinctive.

When offering evidence to prove modus operandi, the prosecution does not have to prove BEYOND A REASONABLE DOUBT that the other crimes occurred. Rather, the prosecution simply must present sufficient evidence to show that the act took place and was committed by the defendant.

CROSS-REFERENCES

Criminal Law; Criminal Procedure.

## MOIETY

*One-half.*

Joint tenants own their estate by the moiety.

CROSS-REFERENCES

Joint Tenancy.

## MONEY LAUNDERING

*The process of taking the proceeds of criminal activity and making them appear legal.*

Laundering allows criminals to transform illegally obtained gain into seemingly legitimate funds. It is a worldwide problem, with approximately $300 billion going through the process annually in the United States. The sale of illegal narcotics accounts for much of this money. Those who commit the underlying criminal activity may attempt to launder the money themselves, but increasingly a new class of criminals provides laundering services to ORGANIZED CRIME. This new class consists of lawyers, bankers, and accountants.

Criminals want their illegal funds laundered because they can then move their money through society freely, without fear that the funds will be traced to their criminal deeds. In addition, laundering prevents the funds from being confiscated by the police.

Money laundering usually consists of three steps: placement, layering, and integration. Placement is the depositing of funds in financial institutions or the conversion of cash into negotiable instruments. Placement is the most difficult step. The easiest way to begin laundering large amounts of cash is to deposit them into a financial institution. However, under the federal Bank Secrecy Act of 1970 (BSA), 31 U.S.C.A. §§ 5311 et seq., financial institutions are required to report deposits of more than $10,000 in cash made by an individual in a single day. To disguise criminal activity, launderers route cash through a "front" operation; that is, a business such as a check-cashing service or a jewelry store. Another option is to convert the cash into negotiable instruments, such as cashier's checks, money orders, or traveler's checks.

Layering involves the wire transfer of funds through a series of accounts in an attempt to hide the funds' true origins. This often means transferring funds to countries outside the United States that have strict bank-secrecy laws. Such countries include the Cayman Islands, the Bahamas, and Panama. Once deposited in a foreign bank, the funds can be moved through accounts of "shell" corporations, which exist solely for laundering purposes. The high daily volume of wire transfers makes it difficult for law enforcement agencies to trace these transactions.

Integration involves the movement of layered funds, which are no longer traceable to their criminal origin, into the financial world, where they are mixed with funds of legitimate origin.

Many banks did not comply with the BSA during the 1970s and early 1980s. Following several federal investigations where it was revealed that banks had failed to report billions of dollars of cash transactions, reporting requirements were strengthened. Congress also enacted the Money Laundering Control Act of 1986 (MLCA), 18 U.S.C.A. §§ 1956 et seq. This statute criminalizes money laundering itself. It centers its attention on the criminals and conspirators who seek to launder the proceeds of illegal activity, including merchants, bankers, and members of the professions who assist criminals with money laundering. Another provision of the MLCA authorizes the government to confiscate all property that is traceable to violations of laws against money laundering.

After the SEPTEMBER 11TH ATTACKS on the United States in 2001, the federal government began to investigate more closely the connection between TERRORISM and the sale of illegal drugs. According to President GEORGE W. BUSH, "[T]errorists use drug profits to fund their cells to commit acts of murder. If you quit drugs, you

join the fight against terror in America." Terrorists have laundered money through such foreign countries as Colombia and Afghanistan. In September 2002, the DRUG ENFORCEMENT ADMINISTRATION opened a museum exhibit in New York entitled "Target America: Traffickers, Terrorists and You" in an effort to educate the American public about the connection between drug sales and terrorism.

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CROSS-REFERENCES

Banks and Banking.

## MONEY PAID

*The technical name given a declaration in* ASSUMPSIT *in which the plaintiff declares that the defendant had and received certain money. A* COMMON-LAW PLEADING, *stating that the defendant received money that, in* EQUITY *and good conscience, should be paid to the plaintiff.*

## MONOPOLY

*An economic advantage held by one or more persons or companies deriving from the exclusive power to carry on a particular business or trade or to manufacture and sell a particular item, thereby suppressing competition and allowing such persons or companies to raise the price of a product or service substantially above the price that would be established by a free market.*

In a monopoly, one or more persons or companies totally dominates an economic market. Monopolies may exist in a particular industry if a company controls a major natural resource, produces (even at a reasonable price) all of the output of a product or service because of technological superiority (called a natural monopoly), holds a patent on a product or process of production, or is otherwise granted government permission to be the sole producer of a product or service in a given area.

U.S. law generally views monopolies as harmful because they obstruct the channels of free competition that determine the price and quality of products and services that are offered to the public. The owners of a monopoly have the power, as a group, to set prices, to exclude competitors, and to control the market in the relevant geographic area. U.S. ANTITRUST LAWS prohibit monopolies and any other practices that unduly restrain competitive trade. These laws are based on the belief that equality of opportunity in the marketplace and the free interactions of competitive forces result in the best allocation of the economic resources of the nation. Moreover, it is assumed that competition enhances material progress in production and technology while preserving democratic, political, and social institutions.

### History

Economic monopolies have existed throughout much of human history. In England, a monopoly originally was an exclusive right that was expressly granted by the king or Parliament to one person or class of persons to provide some service or goods. The holders of such rights, usually the English guilds or inventors, dominated the market. By the early seventeenth century, the English courts began to void monopolies as interfering with free of trade. In 1623, Parliament enacted the Statute of Monopolies, which prohibited all but specifically excepted monopolies. With the Industrial Revolution of the early nineteenth century, economic production and markets exploded. The growth of capitalism and its emphasis on the free play of competition reinforced the idea that monopolies were unlawful.

In the United States, during most of the nineteenth century, monopolies were prosecuted under COMMON LAW and by statute as market-interference offenses in attempts to stop dealers from raising prices through techniques such as buying up all available supplies of a material, which is called "cornering the market." Courts also refused to enforce contracts with harsh provisions that were clearly unreasonable restraints of trade. These measures were largely ineffective.

### Government Regulation

Congress intervened after abuses became widespread. In 1887, Congress, pursuant to its constitutional power to regulate interstate com-

merce, passed the INTERSTATE COMMERCE ACT (49 U.S.C.A. § 1 et seq.) in response to the monopolistic practices of railroad companies. Although competition among railroad companies for long-haul routes was great, it was minimal for short-haul runs. Railroad companies discriminated in the prices they charged to passengers and shippers in different localities by providing rebates to large shippers or buyers, in order to retain their long-haul business. These practices were especially harmful to farmers because they lacked the volume of traffic necessary to obtain more favorable rates. Although states attempted to regulate the railroads, they were powerless to act where interstate commerce was involved. The Interstate Commerce Act was intended to regulate shipping rates. It mandated that charges be set fairly, and it outlawed unreasonable discrimination among customers through the use of rebates or other preferential devices.

Congress soon moved ahead on another front, enacting the SHERMAN ANTI-TRUST ACT OF 1890 (15 U.S.C.A. §§ 31 et seq.). A trust was an arrangement by which stockholders in several companies transferred their shares to a set of trustees in exchange for a certificate that entitled them to a specified share of the consolidated earnings of the jointly managed companies. The trusts came to dominate a number of major industries, destroying their competitors. The Sherman Act prohibited such trusts and their anticompetitive practices. From the 1890s through 1920, the federal government used the act to break up these trusts.

The Sherman Act provides for criminal prosecution by the federal government against corporations and individuals who restrain trade, but criminal sanctions are rarely sought. The act also provides for civil remedies for private persons who start an action under it for injuries caused by monopolistic acts. The award of treble damages (the tripling of the amount of damages awarded) is authorized under the act in order to promote the interest of private persons in safeguarding a free and competitive society and to deter violators and others from future illegal acts.

The Clayton Anti-Trust Act of 1914 (15 U.S.C.A. §§ 12 et seq.) was passed as an amendment to the Sherman Act. The CLAYTON ACT specifically defined which monopolistic acts were illegal but not criminal. The act proscribed price discrimination (the sale of the same product at different prices to similarly situated buyers), exclusive-dealing contracts (sales on condition that the buyer stop dealing with the seller's competitors), corporate mergers, and interlocking directorates (the same people serving on the boards of directors of competing companies). Such practices were illegal only if, as a result, they materially reduced competition or tended to create a monopoly in trade.

The Federal Trade Commission Act of 1914 (15 U.S.C.A. §§ 41 et seq.) established the FEDERAL TRADE COMMISSION, the regulatory body that promotes free and fair competitive trade in interstate commerce through the prohibition of price-fixing arrangements, FALSE ADVERTISING, boycotts, illegal combinations of competitors, and other methods of UNFAIR COMPETITION.

Congress passed the ROBINSON-PATMAN ACT of 1936 (15 U.S.C.A. §§ 13 et seq.) to amend the Clayton Act. The act makes it unlawful for any seller engaged in commerce to directly or indirectly discriminate in the sale price charged on commodities of comparable grade and quality where the effect might injure, destroy, or prevent competition unless the seller discriminated in order to dispose of perishable or obsolete goods or to meet the equally low price of a competitor.

### Exemptions

Despite these legal prohibitions, not all industries and activities are subject to them. LABOR UNIONS monopolize the labor force and take concerted action to improve the wages, hours, and working conditions of their members. The Clayton Act and the NORRIS-LAGUARDIA ACT of 1932 (29 U.S.C.A. §§ 101 et seq.) recognized that unions would be powerless without this monopolistic behavior and therefore made unions immune from antitrust laws.

A government-awarded monopoly, such as the right to provide electricity or natural gas to a region of the country, is exempt from antitrust laws. Government agencies regulate these industries and set reasonable rates that the company may charge.

Sometimes an industry is a natural monopoly. This type of monopoly is created as a result of circumstances over which the monopolist has no power. A natural monopoly may exist where a market for a particular product or service is so limited that its profitable production is impossible except when done by a single plant that is large enough to supply the entire demand. Natural monopolies are beyond the reach of antitrust laws.

Special-interest industries, such as agricultural and fishery marketing associations, banking and insurance industries, and export trade associations, are also immune from antitrust laws. Major league BASEBALL has been exempted from antitrust laws as well.

The phenomenal popularity of the personal computer (PC) in the 1980s and 1990s catapulted Microsoft Corporation past manufacturing corporations as a preeminent business organization in the United States and the world. With the explosion of interest in the INTERNET in the mid-1990s, Microsoft moved aggressively to market its Internet Explorer (IE) web browser and to crush its competitor, Netscape. Having already secured a monopoly with its Windows Operating System, Microsoft seemed poised to dominate Internet software. However, in 1998, 19 state attorneys general joined the U.S. JUSTICE DEPARTMENT in filing an antitrust lawsuit against Microsoft. The suit alleged that the software company forced computer manufacturers (known as original equipment manufacturers or OEMs) to license and distribute Microsoft's IE in exchange for the right to pre-install Microsoft's Windows 95 operating system on new PCs. Microsoft contended that IE was an integral part of Windows 95 and that it could not be separated without causing the operating system as a whole to malfunction. The plaintiffs argued that Microsoft was engaged in an illegal TYING ARRANGEMENT, by conditioning the purchase of a popular product (Windows 95) on the purchase of an additional, unrelated product (IE.)

The case came to trial in October 1998 before U.S. District Court Judge Thomas Penfield Jackson, sitting without a jury. Jackson ruled for the plaintiffs in November 1999, finding that the facts fully justified the conclusion that Microsoft had sought monopoly power through illegal means. He appointed Chief Judge RICHARD A. POSNER of the U.S. Court of Appeals for the Seventh Circuit to mediate the case, in hopes of bringing the bitter conflict to a quick conclusion. However, Posner could not broker a settlement, and Jackson issued his final order in April 2000. He ordered that Microsoft be split into two companies and that the companies desist from monopolistic conduct. A federal appeals court overturned this decision in June 2001. Although the panel agreed that Microsoft had engaged in monopolistic practices, it found that Judge Jackson had committed misconduct by making derogatory comments about Microsoft. The case was sent back to another district court judge, who encouraged new settlement talks. In August 2002, the U.S. Department of Justice and the states agreed to a settlement in which Microsoft did not have to split apart. Instead, Microsoft agreed to allow OEMs and consumers to add and remove access to certain Windows features and to set defaults for competing software. Microsoft also made available to software developers a host of software interfaces and tools at no charge, to allow the developers to write Windows applications.

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Antitrust Law; Combination in Restraint of Trade; Interstate Commerce Commission; Mergers and Acquisitions; Public Utilities; Restraint of Trade.

## MONROE DOCTRINE

The Founding Fathers of the United States of America sought to establish a foreign policy that was compatible with the surge of nationalism that engulfed the new country during its first century of independence. The Monroe Doctrine, proposed by President JAMES MONROE in 1823, contributed to the formation of such a policy.

Certain events in 1821 prompted the creation of the doctrine. An insurrection in the colonies under Spanish rule in Latin America resulted in freedom for the colonies, but several European nations threatened to intervene on Spain's behalf and restore the former colonies to Spanish domination. Both the United States and Great Britain saw the advantages of trade with the new Latin American nations and feared further European interference in future disputes. As a result, British Foreign Secretary George Canning approached the U.S. emissary in London, RICHARD RUSH, with a proposal for the formation of a dual alliance to protect the interests of the two countries. According to Canning's plan,

the United States and Great Britain would oppose any intervention in the Spanish colonies by any European country except Spain.

President Monroe was agreeable to the terms of Canning's proposition, as were Secretary of War JOHN C. CALHOUN and former Presidents THOMAS JEFFERSON and JAMES MADISON. Secretary of State JOHN QUINCY ADAMS, however, presented an alternative view. Adams believed that Britain's interests in Latin America were sufficiently strong to encourage Britain's defense of those nations whether or not the United States agreed to Canning's proposal. Adams favored the development of a U.S. policy without alliance with Britain.

On December 2, 1823, Monroe presented the terms of the Monroe Doctrine, which Adams had helped to develop. The doctrine contained four significant elements: the American continents were to be regarded as independent, with no further settlement by European nations; the nations of the Western Hemisphere were deemed republics, as opposed to the European system of monarchies; European intervention in the affairs of nations of the Western Hemisphere was prohibited and would be viewed as a threat to the security of the United States; and, conversely the United States promised to refrain from involvement in European affairs.

CROSS-REFERENCES

"Monroe Doctrine" (Appendix, Primary Document).

## ♦ MONROE, JAMES

James Monroe was the fifth president of the United States and a distinguished diplomat. His administration was marked by several foreign-policy accomplishments, including the MONROE DOCTRINE, and a period of domestic tranquility that has been called the Era of Good Feelings.

Monroe was born in Westmoreland County, Virginia, on April 28, 1758. He attended the College of William and Mary at the age of 16 but left in 1776 to fight in the Revolutionary War. He was wounded at the Battle of Trenton but served until the end of the war.

During this period he became acquainted with THOMAS JEFFERSON, then governor of Virginia. Monroe soon adopted Jefferson as his teacher and mentor, a relationship that would endure throughout Monroe's life. In 1780 Monroe began studying law with Jefferson, and in 1786 he established a law practice in Fredericksburg, Virginia. Politics, however, proved a more powerful attraction than a legal career.

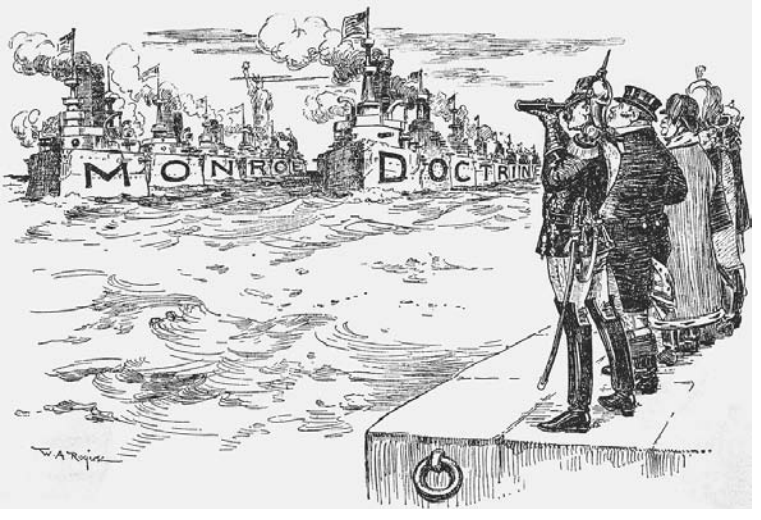


*This undated cartoon from the* New York Herald *depicts European potentates observing U.S. naval might*

CORBIS

Monroe became a member of the Virginia House of Delegates in 1782, and from 1783 to 1786 he participated in the CONTINENTAL CONGRESS. Monroe, like Jefferson, did not favor a highly centralized federal government. He preferred a government system under the ARTICLES OF CONFEDERATION, which allocated greater powers to the states, as opposed to the Constitution, which gave the federal government more authority. He did believe in the development of the West and worked with Jefferson to enact laws to further this purpose.

In 1786 he retired from Congress. In 1788 Monroe participated in the Virginia convention that ratified the new federal Constitution. He was elected to the U.S. Senate in 1790 and served until 1794. After the expiration of his senatorial term, Monroe served as minister to France. President GEORGE WASHINGTON appointed Monroe to this position despite Monroe's opposition to the Washington administration's policies. When Monroe did not follow his diplomatic instructions and made intemperate remarks about policies with which he disagreed, Washington recalled him in 1796.

Monroe quickly reentered Virginia politics. He was elected governor in 1799 and served a three-year term. In 1802 President Jefferson sent Monroe back to France as a special envoy. He and ROBERT R. LIVINGSTON negotiated the LOUISIANA PURCHASE from France in 1803. Following this success, Jefferson named Monroe minister to England, where he served until 1806.

"LET US BY ALL WISE AND CONSTITUTIONAL MEASURES PROMOTE INTELLIGENCE AMONG THE PEOPLE AS THE BEST MEANS OF PRESERVING OUR LIBERTIES."
—JAMES MONROE

*James Monroe.*
LIBRARY OF CONGRESS

Again Virginia politics beckoned. Monroe served briefly as governor but left in 1811 to join the cabinet of President JAMES MADISON. He was SECRETARY OF STATE from 1811 to 1817 and secretary of war, during the WAR OF 1812 and from 1814 to 1815. The successful conclusion of the war and the military triumphs of General ANDREW JACKSON helped boost Monroe's popularity.

In 1816 he was elected president of the United States as a member of the DEMOCRATIC-REPUBLICAN PARTY. The FEDERALIST PARTY disappeared after the election, and most politicians belonged to the Democratic-Republican party. With an end to the political feuding of the early years of the Republic, Monroe was able to promote what has been called the Era of Good Feelings. His popularity was so great that he was unopposed for reelection in 1820.

Monroe's presidency produced important domestic legislation, including the MISSOURI COMPROMISE OF 1820, which limited the extension of SLAVERY into new territories. His main efforts, however, were directed at foreign affairs. The Rush-Bagot Treaty, drafted in 1817, restricted the increase of armaments in the Great Lakes area. In 1818 Great Britain agreed to the forty-ninth parallel as the boundary between the United States and Canada from Lake of the Woods on the Minnesota-Ontario border as far west as the Rocky Mountains. In 1819 U.S. diplomats convinced Spain to cede Florida to the United States in return for the cancellation of $5 million in U.S. claims against Spain.

In 1823 Monroe presented the most significant measure of his administration, the Monroe Doctrine. During the Napoleonic Wars, Spain had lost interest in its American colonies. Most of the colonies declared their independence, but the United States was concerned that Spain might try to reassert control. The Monroe Doctrine declared that the Western Hemisphere was closed to further European colonization and that any European intervention would be regarded as a threat to the security of the United States. Conversely, the United States agreed not to intervene in European matters. The Monroe Doctrine would be invoked several times by future presidential administrations.

After leaving the presidency in 1824, Monroe retired to Oak Hill, his estate in Virginia that was near Jefferson's Monticello. He served as a regent of the University of Virginia and in 1829 presided over the Virginia Constitutional Convention.

Monroe's last years were difficult. He left public service a poor man and was too old to rebuild his law practice. He was forced to sell his home and move to New York City to live with his daughter. He died there on July 4, 1831.

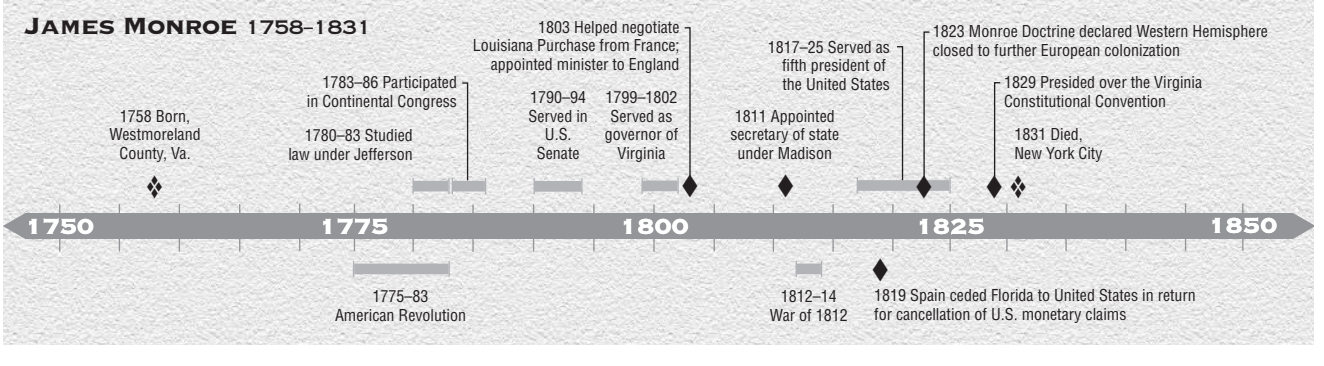

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Missouri Compromise of 1820; Monroe Doctrine; "Monroe Doctrine" (Appendix, Primary Document).

## ♦ MONTESQUIEU, CHARLES-LOUIS DE SECONDAT, BARON DE LA BRÈDE ET DE

Charles-Louis de Secondat, Baron de la Brède et de Montesquieu, was a French social and political philosopher whose ideas about laws and government had great influence on the leaders of the American Revolution and the Framers of the U.S. Constitution.

Montesquieu was born January 18, 1689, in La Brède, France, just outside of Bordeaux, to an aristocratic family with considerable landholdings. As a young man, he studied Latin, French, history, and the law before graduating from the University of Bordeaux in 1708. In 1715 he married Jeanne Lartigue, whose family brought him substantial wealth, and a year later his uncle died and left him his title and his property, making Montesquieu extremely rich. While his wife remained in La Brède managing his estate, Montesquieu traveled and enjoyed the social and intellectual life of Paris, attending fashionable salons and meeting with leading thinkers in the areas of politics and literature. He also served as *president á mortier,* or justice, of the Bordeaux *parlement,* an office he inherited from his uncle.

In 1728 Montesquieu left Paris for a three-year trip through Europe. Montesquieu closely examined the people and cultures of the countries he visited, paying particular attention to England, where he was intrigued by the level of political and religious freedom the people there enjoyed, as well as the country's bustling mercantile economy. He remained in England for eighteen months. During this time he was introduced into the most prestigious intellectual and social circles, was admitted to court, was made a fellow of the Royal Society, and attended several sessions of Parliament. Montesquieu's experience in England was critical in shaping his political philosophies because it proved to him that a society could combine the RULE OF LAW with political freedom.

After returning home in May 1731, Montesquieu spent the next fifteen years working on

*Charles-Louis de Secondat, Baron de la Brède et de Montesquieu.*

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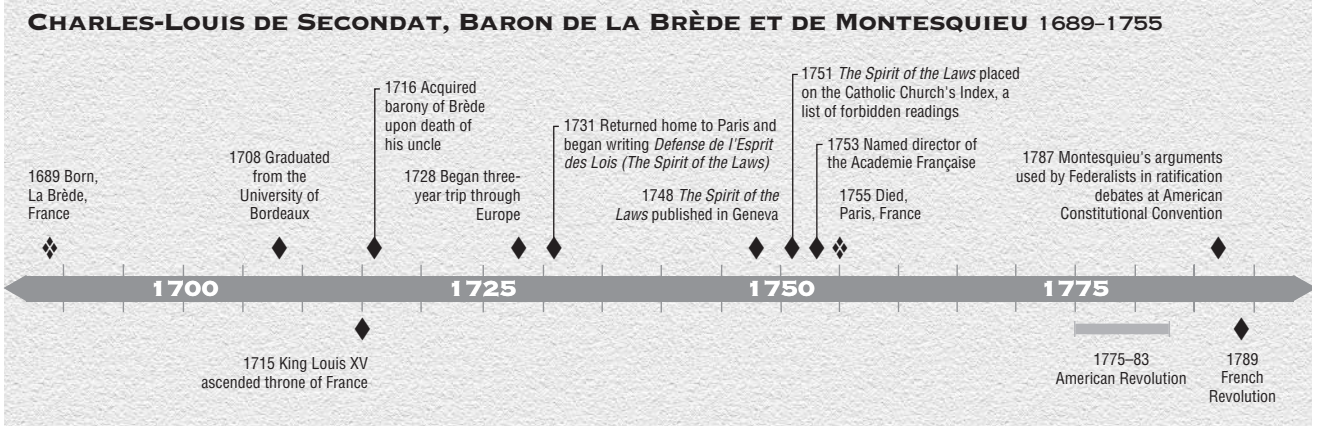

his masterpiece, *De l'Esprit des lois* (literally *On the Spirit of the Laws,* but usually translated as *The Spirit of the Laws*). In this immense and loosely connected work, containing more than six hundred chapters grouped into thirty-one books, Montesquieu combined a lifetime of thoughts and personal observations concerning governments, laws, and human nature. His topics ranged from detailed analyses of ancient history to the effects of climate on national character. By closely examining a wide variety of societies through time and across cultures, Montesquieu sought to identify the basic principles underlying how laws work, how they evolve, and how they differ from country to country and culture to culture.

*The Spirit of the Laws* was published in 1748 in Geneva. It was a huge and immediate success; by the end of 1749, twenty-two other editions, including many translations, had reached all over Europe and across the ocean to the North American colonies. The work also generated considerable controversy, particularly with church authorities. They objected to Montesquieu's intellectual approach, which was grounded in the then radical notion that laws were not divinely inspired or handed down by ancient lawgivers such as Moses but evolved naturally out of everything that influences life in a country, including traditions, habits, history, religion, economics, and climate. Laws, Montesquieu believed, could be rationally studied and then adjusted to increase liberty for all. He responded to criticisms of his work in 1750 with *Defense de l'Esprit des lois,* but the Catholic Church nevertheless put *The Spirit of the Laws* on the church's Index in 1751, which meant that Catholics were forbidden to read it. Despite this official censure, Montesquieu was named director of the Academie Française in 1753.

"USELESS LAWS WEAKEN THE NECESSARY LAWS."
—BARON CHARLES-LOUIS DE MONTESQUIEU

On January 29, 1755, Montesquieu became ill with what appears to have been influenza, and his health quickly deteriorated. His sickness generated much attention; many people viewed it as symbolic of the great conflict between established religion and the forces of reason and enlightenment that marked the eighteenth century. During his illness Montesquieu's house was filled with friends monitoring his condition, including messengers from the king. Montesquieu died on February 10, 1755, and was buried in the parish church of Saint-Sulpice.

As was the case in Europe, Montesquieu was a leading intellectual figure in the American colonies, and *The Spirit of the Laws* was a standard subject of close study for young American scholars. Figures show that Montesquieu's works, particularly *The Spirit of the Laws,* were widely disseminated through American booksellers and libraries, and Montesquieu's ideas were frequently discussed in newspapers and journals. Montesquieu's works were found in the personal libraries of nearly all of the country's founding fathers, including **BENJAMIN FRANKLIN**, **JOHN ADAMS**, **THOMAS JEFFERSON**, and **JAMES MADISON**.

Different elements of the theories Montesquieu outlined in *The Spirit of the Laws* were popular in America at different times, varying with political conditions and developments. In general, however, the most influential portions of the work were chapters 3 and 6 of book XI, in which Montesquieu analyzed the English constitution, a discussion that heavily influenced the **SEPARATION OF POWERS** later enshrined in the U.S. Constitution. In his analysis Montesquieu outlined the basic principle of the English constitution, which was—and still is—not an actual document but an unwritten consensus regarding the proper rules of governing based on such historical documents as the **MAGNA CHARTA**, the body of **COMMON LAW**, court decisions, precedents, and tradition.

According to Montesquieu, although England did not have the perfect system of government, it was the best system to be found in modern Europe because it allowed for the greatest degree of liberty, which Montesquieu defined as the right "to do what one should want to do, and not being forced to do what one should not want to do." For Montesquieu, liberty was, essentially, the right to be left alone.

This type of liberty, Montesquieu argued, was only possible under a government specifically constituted to protect citizens from the oppression of their rulers and the aggressions of each other, while allowing for the representation of a wide range of popular interests. For citizens to maintain their liberty against the encroachment of oppressive rulers, a government had to be composed of separate and balanced powers that would check and moderate each other, thus leaving the people a maximum degree of freedom under the laws.

To Montesquieu, England most closely approximated this model because its government divided the three main functions of government—the legislative, the executive, and the

judicial—into three separate branches: the Parliament, the monarch, and the courts. The powers of these branches were so intertwined that the branches needed each other to operate and also served to moderate each other's actions. For example, the king or queen could VETO parliamentary legislation, but the monarch's actions were limited by Parliament's power of the purse. Because no single branch was able to dominate the other branches or the populace at large, the people were left with a large degree of political freedom. Because the branches had to operate together, their forces counterbalanced each other and resulted in a guarantee of freedom and a bulwark against political tyranny. Although Montesquieu did not present the English system as the perfect model for democratic government, he did praise it for being the only government in modern Europe constituted for the specific purpose of maximizing political liberty.

Montesquieu's description of the basic principles of the English constitution and his emphasis on political liberty held great appeal for the English colonists in North America, particularly beginning in the 1760s when those colonists were chafing under taxes and restrictions imposed by Parliament that they thought undermined their constitutional rights. Montesquieu was frequently quoted in newspapers, pamphlets, and speeches as colonists protested the oppressive powers of Parliament and defended their right to political liberty. His description of the English constitution became a model against which the colonists contrasted what they saw as the injustice and corruption of the actual English government.

After the Revolutionary War ended, Montesquieu again became a principal authority as political leaders set about to create a constitution for the new United States of America. Most of the architects of the Constitution were thoroughly acquainted with Montesquieu's ideas, and at the Constitutional Convention of 1787, *The Spirit of the Laws* was frequently cited as delegates attempted to lay down the principles for a government that would maximize political liberty while also maintaining the rule of law. The Framers followed many of Montesquieu's maxims, including his insistence upon a separation of powers and his belief that a country's laws must not be imposed from above but conform to the genius, or nature, of the citizens of that country.

Montesquieu's arguments were also used in the debates over the ratification of the Constitution that followed the Constitutional Convention. He was cited with particular frequency in *The Federalist Papers,* which were written by James Madison, ALEXANDER HAMILTON, and JOHN JAY to argue in favor of the new Constitution. The writers cited Montesquieu at length in defense of the wisdom of confederating the states into a single republic and of creating a government based upon a separation of powers. Although other scholars had also written on the separation of powers principle, Montesquieu was most closely associated with it, as James Madison noted in *The Federalist,* no. 47: "The oracle who is always consulted and cited on this subject, is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind." Montesquieu's arguments were also frequently used in the debates over the Constitution at the individual state conventions. Both proponents and opponents of the new Constitution respected him as a political authority, and both used his writings to bolster their arguments.

After the ratification of the Constitution in 1789, Montesquieu continued to remain an authority on the creation of laws and the rule of government. *The Spirit of the Laws* continued to be taught at COLLEGES AND UNIVERSITIES, and leaders of both political parties, the Republicans and the Federalists, used his arguments to advance their own. Montesquieu's only significant detractor was Thomas Jefferson, who believed, along with friends involved in the impending revolution in France, that Montesquieu was too enamored with England and its constitution. After the French Revolution and the radical changes it wrought, Montesquieu's writings came to seem dated and less relevant, and they gradually faded from the political debates. Even so, his work continued to exert a lasting influence on the laws of the United States through the Constitution that was so significantly shaped by his ideas.

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## MONTGOMERY BUS BOYCOTT

The Montgomery bus boycott was a mass protest by African American citizens in the city of Montgomery, Alabama, against SEGREGATION policies on the city's public buses. It was nine years before the CIVIL RIGHTS ACT OF 1964 would change the nation forever. But in 1955, when ROSA PARKS refused to give up her seat on a public bus to a white man, she was arrested and jailed for violating state segregation laws. She did not realize at the time that her actions would have an immediate effect on other members of the African American community and a lasting effect on the national history of CIVIL RIGHTS. The resultant massive boycott lasted for 11 months. It ended in late 1956 when the U.S. Supreme Court ruled that public bus segregation (the case involved the City of Montgomery) was unconstitutional. *Browder v. Gayle,* 352 U.S. 903.

Several of Rosa Parks' friends were members of the Women's Political Council (WPC), an organization of black professionals founded in 1946. As early as 1953, WPC members had been actively pursuing changes in bus segregation law through communications with Mayor W.A. Gayle. They requested that black persons be allowed to sit from back toward front and whites from front toward back until a bus was filled. They also demanded more bus stops located in black residential communities. When the talks produced little result, WPC president Jo Ann Robinson sent a final letter to the mayor in May 1954, advising that plans were being made to ride less, if at all, on the buses.

*Rosa Parks's refusal to give up her bus seat to a white man on December 1, 1955, sparked the 11-month long Montgomery Bus Boycott.*

AP/WIDE WORLD PHOTOS

Notwithstanding waning use of the public bus system by Montgomery's black citizens, it was Rosa Parks's actions on December 1, 1955, that ignited a more organized boycott. Following her arrest, WPC members prepared a leaflet and made thousands of copies to distribute through local churches the following Sunday. They asked for a show of support for Rosa Parks in a one-day boycott of the city's buses. On December 5, 1955, 90 percent of Montgomery's black citizens avoided use of the public buses.

Wanting to capitalize on the momentum, church ministers in the area quickly mobilized and organized the Montgomery Improvement Association as the flagship entity to lead a formal boycott. The ministers elected 27-year-old newcomer, MARTIN LUTHER KING JR., as the spokesperson for the new organization. Formal demands were made to the city and the bus company. African Americans wanted more courteous service, black bus drivers hired for the black routes, and a first-come, first-served (but still segregated) rider policy.

To punctuate the seriousness of the protests, Montgomery citizens (black and white) formed what was locally referred to as a "taxicab army." They refused to ride the public buses and instead walked to their destinations or hailed taxicabs driven by African Americans. As part of the boycott, the taxi drivers had agreed to charge a reduced rate of ten cents per person, equal to the public bus fare. When riders began sharing taxicab fares and riding together in the same direction, city officials declared it illegal. In response, people began donating their own vehicles to transport riders. Others began volunteering their services as drivers for those who needed to travel farther than they could walk. By the end of the first week, more than 20,000 black citizens of Montgomery were getting rides to work through the Montgomery Improvement Association.

In February 1956, city officials obtained an INJUNCTION against the boycott and used a

1921 law prohibiting the hindrance of a bus as grounds to arrest 156 protesters. Martin Luther King Jr. was also arrested, convicted, and ordered to pay fines. Ultimately, Fred Gray, a young black Montgomery attorney, filed an action on behalf of a group of black citizens. He sought a DECLARATORY JUDGMENT finding Alabama's state statutes and Montgomery city ordinances unenforceable and unconstitutional under the FOURTEENTH AMENDMENT to the U.S. Constitution. The laws and ordinances required separate accommodations on any commercial vehicle operated by any motor transportation company within the state of Alabama and the city of Montgomery. The bus company, in response, had alleged that segregation on privately owned buses was valid under the laws.

A three-member federal panel struck down the laws, finding the 1954 Supreme Court ruling in BROWN V. BOARD OF EDUCATION (repudiating a "separate but equal" principle) applicable to city buses. The U.S. Supreme Court upheld the decision, and the successful boycott ended in major victory.

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Civil Rights Acts; Discrimination.

## MONUMENT

*Anything by which the memory of a person, thing, idea, art, science or event is preserved or perpetuated. A tomb where a dead body has been deposited.*

*In* REAL-PROPERTY *law and surveying, visible marks or indications left on natural or other objects indicating the lines and boundaries of a survey. Any physical object on the ground that helps to establish the location of a boundary line called for; it may be either natural (e.g., trees, rivers, and other land features) or artificial (e.g., fences, stones, stakes, or the like placed by human hands).*

## ❖ MOODY, WILLIAM HENRY

William Henry Moody, Supreme Court appointee of THEODORE ROOSEVELT, served the Court from 1906 to 1910. The Massachusetts Republican, representative, and two-time cabinet member supported the progressive policies of his era. He was especially respected by his colleagues for his skill in the area of ANTITRUST LAW. Moody's service on the Court was ended prematurely due to health problems.

Moody was born on December 23, 1853, in Newbury, Massachusetts from a long line of New England, Puritan ancestry. He was educated at Phillips Academy and found his first real success in life as an athlete on the Harvard baseball team. He graduated from Harvard in 1876 with honors in history, ranking third in his class. After Harvard, he worked in the law office of RICHARD DANA. He was admitted to the bar in 1878.

Moody established a private practice in Haverhill, Massachusetts, and served as the city solicitor for two years (1888–1890). In 1890 he

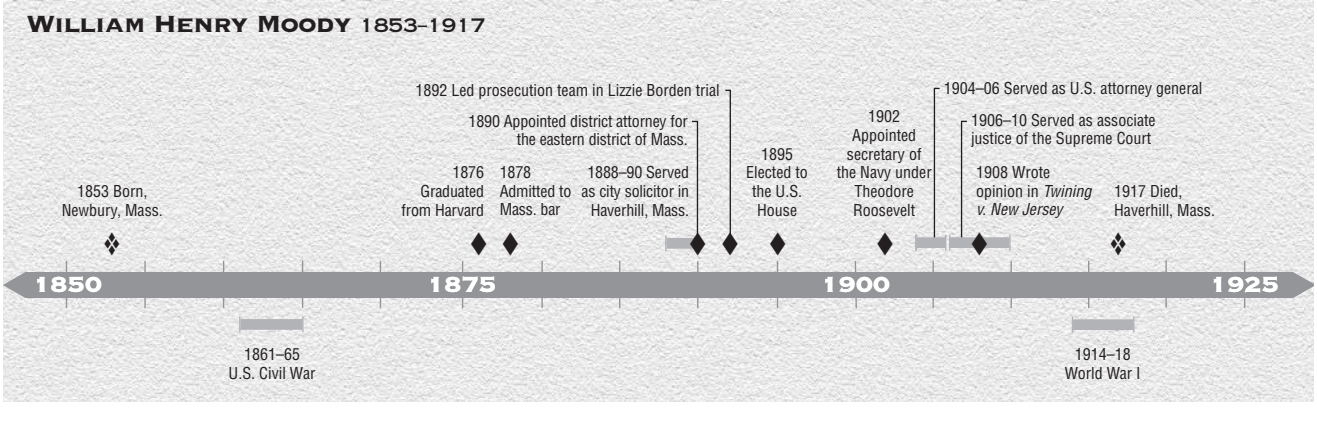

*William H. Moody.*
LIBRARY OF CONGRESS

was appointed district attorney for the eastern district of Massachusetts. He was one of the state's two prosecutors in the trial of LIZZIE BORDEN, who was charged with murdering her father and stepmother with an ax in 1892. Although Borden was acquitted, Moody won respect for his performance in the trial.

Shortly after the Borden case, the Republicans nominated Moody to a seat in Congress. He was elected to the House of Representatives in November 1895 and became one of its most influential members. On April 30, 1902, he resigned from the House to become Theodore Roosevelt's secretary of the Navy.

Two years later he was appointed attorney general. He successfully argued the landmark antitrust case of *Swift and Company v. United States,* 196 U.S. 375, 25 S. Ct. 276, 49 L. Ed. 518 (1905), before the Supreme Court. The government had obtained an INJUNCTION against the trust by arguing that a combination of corporations and individuals, after purchasing livestock and converting it to fresh meat, sold products in interstate commerce in such a manner as to suppress competition both in livestock and fresh meats. The trust appealed the injunction. Moody won a perpetual injunction, but the trust ignored it. Moody was infuriated and instigated a GRAND JURY investigation in Chicago, which led to indictment of all the major packers. Through Moody's success in prosecuting Swift and Company, the Supreme Court first formulated the "stream of commerce" doctrine, which held corporations responsible for all of their interstate commercial activities.

After the resignation of Associate Justice HENRY B. BROWN, Roosevelt appointed Moody to the Supreme Court in 1906. Moody's most important opinion with the Court was probably that in *Twining v. New Jersey,* 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908), which held that the Fourteenth Amendment's DUE PROCESS CLAUSE did not incorporate the FIFTH AMENDMENT right against SELF-INCRIMINATION and apply it to the states. *Twining* was overruled in 1964 by *Malloy v. Hogan,* 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653.

Moody continued to serve the Court until 1910, at which time acute rheumatism forced his retirement. He died July 2, 1917, in Haverhill, Massachusetts.

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## ♦ MOORE, ALFRED

As an associate justice, Alfred Moore served on the U.S. Supreme Court for five years. The ardent federalist, whose life and political career involved danger, controversy, and principled stands, left little mark on the Court's business during his service from 1799 to 1804. Although he fought in the Revolutionary War and later held high office in North Carolina, Moore's fire had mostly left him by the time President JOHN ADAMS appointed him to the Supreme Court. Even at a time when the Court decided major cases, he either acquiesced to the majority or did not participate in certain decisions because of poor health. He wrote just one opinion, *Bas v. Tingy,* 4 U.S. (4 Dall.) 37, 1 L. Ed 731 (1800), important only in its historical relevance to the United States' undeclared naval war with France in the last years of the eighteenth century.

Moore was a youth during the country's difficult transition from British colony to independent nation. Born on May 21, 1755, in New Hanover County, North Carolina, he was the son of Maurice Moore, a colonial judge. Moore studied in Boston before being educated in law by his father, and he was admitted to the North

Carolina bar at the age of twenty in 1775. Soon after, he fought against the British, first as a soldier and then as a saboteur. During the war, Moore's brother, father, and uncle were killed, the family plantation was ransacked, and their home was destroyed.

Moore was a member of the North Carolina legislature in 1782 and 1792. From 1782 to 1791, he served as the state's attorney general, arguing one particularly important case, *Bayard v. Singleton,* 1 N.C. (Mart.) 5 (1787), which marked one of the first complete discussions of the doctrine of JUDICIAL REVIEW (the authority of courts to determine the validity of legislation under the Constitution). A federalist who firmly believed in central government, he spearheaded North Carolina's ratification of the U.S. Constitution in 1788. In 1791 Moore took the strongest personal stand of his career when he resigned from the office of attorney general; he stepped down over the state legislature's creation of the office of SOLICITOR GENERAL with powers equivalent to his, an action he saw as unconstitutional. He won reelection to the legislature but failed in a 1795 bid for the U.S. Senate by one vote.

In 1799 President John Adams nominated Moore to fill a vacancy on the U.S. Supreme Court created by the death of Associate Justice JAMES IREDELL. The next five years were pivotal ones for the Supreme Court, which expanded its powers of judicial review under the highly influential Chief Justice JOHN MARSHALL. However, failing health minimized Moore's role. He did not participate in the most important decision of his day, MARBURY V. MADISON, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).

Moore's only recorded Supreme Court opinion is a five-paragraph statement on the undeclared naval war between France and the United States. This war reached its height in 1798 and 1799 and was fought chiefly over French claims to seize all cargo of British origin from both British and U.S. ships. Although Congress passed many acts in relation to the conflict, problems arose over the ownership of goods that were recaptured, and in one instance the issue was resolved by determining whether France and the United States were enemy nations. When *Bas v. Tingy* reached the Supreme Court in 1800, each of the four justices hearing the case agreed that the two nations were indeed foes. Moore's opinion declared, "It is for the honor and dignity of both nations . . . that they should be called enemies."

In 1804 Moore resigned from the Court. He died on October 15, 1810, in Bladen County, North Carolina, leaving as part of his legacy

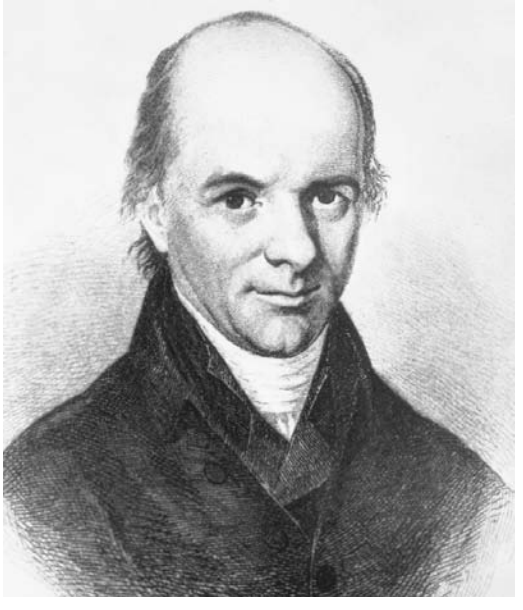

*Alfred Moore.*
ETCHING BY ALBERT ROSENTHAL. SUPREME COURT OF THE UNITED STATES

"IF WORDS ARE BUT THE REPRESENTATIVE OF IDEAS, . . . BY WHAT OTHER WORD [CAN] THE IDEA OF THE RELATIVE SITUATION OF AMERICA AND FRANCE BE COMMUNICATED, THAN BY THAT OF HOSTILITY OR WAR?"
—ALFRED MOORE

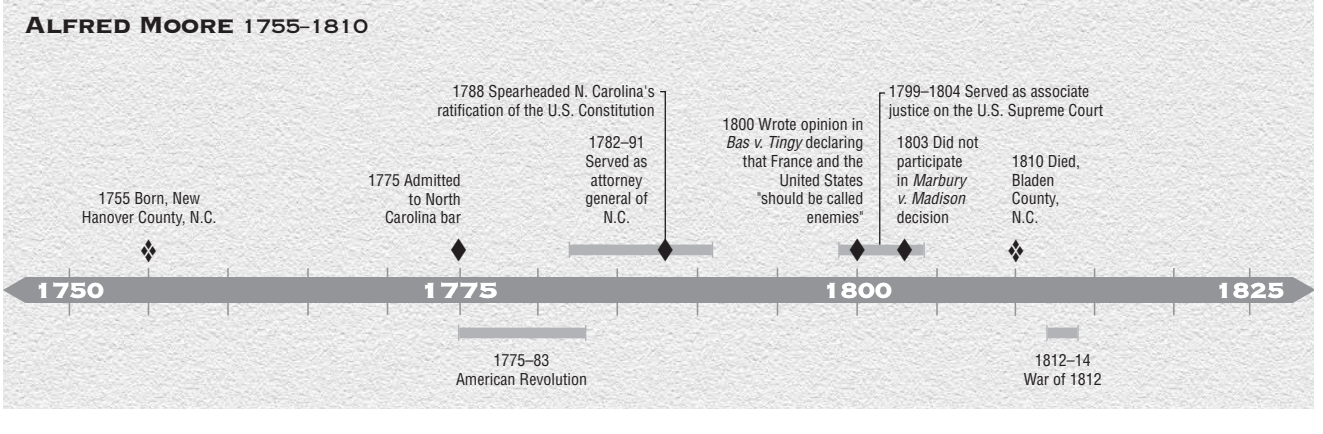

the establishment of the University of North Carolina.

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## MOOT

*An issue presenting no real controversy.*

*Moot* refers to a subject for academic argument. It is an abstract question that does not arise from existing facts or rights.

*Moot court* is a cocurricular or extracurricular activity in law school where students have the opportunity to write briefs and present oral arguments on hypothetical cases.

## MOOT COURT

*A method of teaching law and legal skills that requires students to analyze and argue both sides of a hypothetical legal issue using procedures modeled after those employed in state and federal appellate courts.*

In the mid-1700s moot courts in the United States had a tradition of debate and oratory revered in undergraduate institutions such as Yale College. Moot court exercises have changed in the United States since that time. Law instructors present hypothetical cases and students argue them before professors or other lawyers, who serve as judges. Hypothetical cases often address matters of current political and constitutional import.

Moot court requirements vary from law school to law school, with most schools mandating that students participate at least once in a moot court argument before receiving their law degree. Many law schools offer a series of moot court opportunities for students of differing skill levels and legal interests. The activity is competitive by nature, and students vie for honors within their school and in regional and national moot court competitions featuring teams of students from several law schools.

Moot court helps students learn to analyze legal issues; its larger purpose is to teach students the practical side of practicing law. Typically, law students are given a detailed hypothetical fact scenario that raises one or more legal issues. Often these fact patterns are based on real cases on appeal to a state's highest court or the U.S. Supreme Court. Students choose or are assigned the position on the issue to be argued. They then conduct legal research, finding statutes, regulations, and case law that both support their position and detract from it. An important part of the moot court process is to teach students to overcome legal authority (statutes, regulations, and cases) that cuts against their position.

Students then draft appellate briefs, which are formal legal papers combining a recital of the facts of the case with analysis and argument of the legal issues raised. As with real appellate courts, moot courts generally dictate many specific requirements for a brief, including the size of the paper, the width of the margins, and the maximum number of pages. Citations to legal authority must also be listed in a uniform style.

Once the briefs are written, students prepare for the second phase of moot court advocacy: oral argument. Oral argument demands preparation, organization, and the ability to think quickly and respond convincingly when questioned. The student appears before a panel of judges (typically law professors, actual judges, or other students) and presents her or his position on the legal issue. Each student has a time limit, normally five to ten minutes, to convince the panel. As with real appellate courts, judges on the panel are free to interrupt the student advocate frequently and at any time to ask questions about the facts of the case, legal authority for or against the student's position, or the student's thoughts and opinions about the case's outcome. Students learn to anticipate difficult questions about their legal position and respond intelligently and persuasively. Following oral argument, the moot court panel often will review the student's performance.

Moot court is modeled after the appellate procedure employed in state and federal courts. Moot court is sometimes confused with mock trials, a similar learning method by which students conduct a jury trial based on a hypothetical fact pattern. Where moot court emphasizes legal research, analysis, writing, and oratory, mock trials emphasize jury persuasion techniques and a thorough familiarity with the RULES OF EVIDENCE.

Top moot court advocates from law schools throughout the country compete each year at a variety of national moot court competitions, many having a focus on a specific area of the law.

The National Moot Court Competition is held annually in New York City and focuses on issues of CONSTITUTIONAL LAW. The Philip C. Jessup INTERNATIONAL LAW Moot Court Competition, held each spring in Washington, D.C., is sponsored by the American Society of International Law and the International Law Students Association. The Chief Judge Conrad B. Duberstein National BANKRUPTCY Moot Court is an annual competition focusing on bankruptcy issues.

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Legal Education.

## MORAL LAW

*The rules of behavior an individual or a group may follow out of personal conscience and that are not necessarily part of legislated law in the United States.*

Moral law is a system of guidelines for behavior. These guidelines may or may not be part of a religion, codified in written form, or legally enforceable. For some people moral law is synonymous with the commands of a divine being. For others, moral law is a set of universal rules that should apply to everyone.

Ethical principles held primarily by the followers of Christianity have influenced the development of U.S. secular law. As a result, Christian moral law and secular law overlap in many situations. For example, murder, theft, prostitution, and other behaviors labeled immoral are also illegal. Moral turpitude is a legal term used to describe a crime that demonstrates depravity in one's public and private life, contrary to what is accepted and customary. People convicted of this crime can be disqualified from government office, lose their license to practice law, or be deported (in the case of immigrants).

Passing laws is relatively easy when public policy makers can unanimously identify behavior that is socially unacceptable. Policy makers can then attempt to enforce socially correct behavior through legal channels. However, in many other situations, it is far more difficult to determine what behavior the government should promote, if any. When a government seeks to implement a code of conduct that may conflict with the U.S. Constitution, the courts are generally called upon to determine the law's validity.

ABORTION is an area where legal and moral principles converge and often conflict. In 1973 the U.S. Supreme Court ruled in ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, that a woman's decision to have an abortion is a private choice that is protected by the Constitution, at least until the end of the first trimester of pregnancy. After a fetus is viable (able to survive outside the womb), the state may regulate the woman's pregnancy and prohibit abortion except if the woman's life is in danger.

Some advocates of legalized abortion as well as some critics believe that the current legal situation is inadequate. To protect either the rights of the pregnant woman or the rights of the fetus is a moral question that individuals decide for themselves. Yet the extent to which people should be allowed to act on their beliefs and exercise their rights is debated in the arena of legislative and judiciary decision making.

Medical science is a field where evolving technology can create moral crises that have legal consequences. The AMERICAN MEDICAL ASSOCIATION sponsors a Council on Ethical and Judicial Affairs, which debates such problems as assisted suicide, harvesting organs over the objections of family, and whether to include HIV status on autopsy reports.

Many public policy issues form a crossroad of legal and moral law, including EUTHANASIA, assisted suicide, same-sex marriages, and CAPITAL PUNISHMENT.

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CROSS-REFERENCES

Acquired Immune Deficiency Syndrome; Animal Rights; Death and Dying; Ethics, Legal; Fetal Rights; Fetal Tissue Research; Gay and Lesbian Rights; Genetic Engineering; Genetic Screening; Health Care Law; Health Insurance; Jurisprudence; Natural Law; Organ Donation Law; Organ Transplantation; Patients' Rights; Slavery; Surrogate Motherhood.

## MORAL RELATIVISM

*The philosophized notion that right and wrong are not absolute values, but are personalized according to the individual and his or her circumstances or cultural orientation. It can be used positively to effect change in the law (e.g., promoting tolerance for other customs or lifestyles) or negatively as a means to attempt justification for wrongdoing or lawbreaking. The opposite of moral relativism is moral absolutism, which espouses a fundamental,* NATURAL LAW *of constant values and rules, and which judges all persons equally, irrespective of individual circumstances or cultural differences.*

Within the U.S. justice system, constant values or rules (represented by constitutional, statutory, or case law) are intended to be structurally tempered to accommodate moral relativity. For example, OLIVER WENDELL HOLMES, who served on the U.S. Supreme Court from 1902 to 1932, is credited with being the first Supreme Court justice to state that the U.S. Constitution was an organic document—a living constitution subject to changing interpretation. Many times since, Supreme Court justices, in their opinions, have referred to the notion of "evolving" law when modifying, refining, or, in rare circumstances, overruling earlier precedent. Likewise, statutory laws are enacted or repealed by Congress or state legislators in an effort to best reflect the principles and mores of their constituency.

Notwithstanding this flexible approach to law, moral relativism often plays a significant role in the shaping of law and the punishment of criminals. In 2002, *U.S. News & World Report* cited a Zogby International poll of 401 randomly selected college seniors, which was commissioned by the National Association of Scholars. According to the results, 73 percent of the students interviewed indicated that they were taught by professors that uniform standards of right and wrong do not exist, but were instead dependent upon individual values and cultural diversity. Such attitudes and perceptions affect not only the thinking of subsequent generations of politicians and lawmakers, but also the courtroom adjudication of existing laws.

In many jury trials, defense attorneys attempt to persuade jurors that the law should be applied differently to a particular defendant. Examples of persuasive arguments may include such operative language as requesting that jurors be "more fair" or "more just" to a particular defendant, or that in order for "justice to be served," jurors must excuse the defendant's conduct as justifiable under the circumstances.

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CROSS-REFERENCES

Jury Nullification; Moral Law.

## MORAL TURPITUDE

*A phrase used in* CRIMINAL LAW *to describe conduct that is considered contrary to community standards of justice, honesty, or good morals.*

Crimes involving moral turpitude have an inherent quality of baseness, vileness, or depravity with respect to a person's duty to another or to society in general. Examples include rape, forgery, ROBBERY, and solicitation by prostitutes.

Many jurisdictions impose penalties, such as deportation of ALIENS and disbarment of attorneys, following convictions of crimes involving moral turpitude.

## MORATORIUM

*A suspension of activity or an authorized period of delay or waiting. A moratorium is sometimes agreed upon by the interested parties, or it may be authorized or imposed by operation of law. The term also is used to denote a period of time during which the law authorizes a delay in payment of debts or performance of some other legal obligation. This type of moratorium is most often invoked during times of distress, such as war or natural disaster.*

Government bodies may declare moratoria for a broad range of reasons. For example, a local government may attempt to regulate property development by imposing a moratorium on the issuance of building permits. The legality of such a moratorium is generally determined by measuring its impact on the affected parties. In 1987 the U.S. Supreme Court held that certain moratoria on property development may be unconstitutional takings, thus making it more difficult for local governments to slow development in their communities (*First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250). On the other hand, in 1995 the Court upheld a thirty-day moratorium on lawyer advertising that was challenged as an infringement of FIRST AMENDMENT rights

(*Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541).

Many state legislatures have passed moratorium legislation in response to popular demand for debt relief during emergencies. The constitutionality of these statutes is determined using a two-pronged analysis. First, the courts consider the effect of the moratorium on the rights of the parties to the impaired contract. If the moratorium changes only the remedy for breach and not the terms of the contract, it is generally upheld (see *Sturges v. Crowninshield,* 17 U.S. [4 Wheat.] 122, 4 L. Ed. 529 [1819]). Second, if the moratorium is a response to a bona fide emergency, it is upheld (see *Johnson v. Duncan,* 3 Mart. 530 [La. 1815], upholding a moratorium passed when the British invaded Louisiana in 1814).

As a function of its POLICE POWER, a state may suspend contractual rights when public welfare, health, or safety are threatened. However, this police power is limited by standards of reasonableness. During the WORLD WAR I housing shortage, some New York landlords raised rents to exorbitant levels and evicted tenants who failed to pay. In response to what it perceived as a public health and safety emergency, the state legislature passed a law that limited rentals to reasonable amounts, gave courts authority to determine reasonableness, and prohibited landlords from evicting tenants willing to pay reasonable rents. The law was sustained by the U.S. Supreme Court in *Marcus Brown Holding Co. v. Feldman,* 256 U.S. 170, 41 S. Ct. 465, 65 L. Ed. 877 (1921).

An example of a contemporary debt moratorium is the Minnesota Mortgage Moratorium Act (1933 Minn. Laws 514), passed by the Minnesota legislature in response to a sharp rise in foreclosures on mortgaged farm property. The constitutionality of the act was challenged in *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934), in which the Supreme Court upheld the legislation based on five criteria: a bona fide emergency existed; the statute addressed a legitimate societal interest; debt relief was granted only under limited conditions; contractual rights were reasonably protected; and the legislation was of limited duration. This act was extended until 1942. Fifty years later the Minnesota legislature responded again to public pressure to relieve farm debts by passing another Mortgage Moratorium Act (Minn. Stat. § 583.03 [Supp. 1983]).

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## MORMON CHURCH

The Mormon Church is a religious body founded in 1830 in Fayette, New York, by Joseph Smith. It is also known as the Church of Jesus Christ of Latter-day Saints, or LDS Church. There are 7.7 million Mormons worldwide. Approximately two-thirds reside in the United States, with the highest concentration in the western states, especially Utah. The church, which is headquartered in Salt Lake City, Utah, encountered legal difficulties during its early years because of its practice of POLYGAMY and its opposition to the use of COMMON LAW as legal precedent. The church's differences with the U.S. government led to armed conflict in the late 1800s.

Joseph Smith based his teachings on his translation of hieroglyphic messages revealed to him on several golden plates. Smith's translation of these divine messages is known as the Book of Mormon. The Book of Mormon and the Bible form the basis of Mormon belief.

During the early 1800s, Smith and his followers settled in Kirtland, Ohio, and Jackson County, Missouri, where they were persecuted because of their beliefs. They moved to Illinois and helped establish the town of Nauvoo, where the church prospered. However, local residents became inflamed over rumors that Smith and his followers were practicing polygamy, or plural marriage. Smith and his brother Hyrum were arrested and taken to Carthage, the county seat. On June 27, 1844, they were both shot and killed by a group of townspeople.

Smith was succeeded by Brigham Young, the head of the church's Council of the Twelve Apostles. In 1846 Young organized and directed church members to follow him from Nauvoo to the Great Salt Basin in the Utah Territory. They settled there and established the headquarters of the church in Salt Lake City.

In Utah the Mormon Church prospered and grew. In addition to leading the church, Young became provisional governor of the Utah Territory in 1849. In that capacity he and the other members of the government, most of whom were Mormons, defied the U.S. government by

*Brigham Young was the second president of the Mormon Church and colonizer of Utah. The church's resistance to the application of common law resulted in conflict with the federal government during the 1800s.*

UNDERWOOD & UNDERWOOD/CORBIS

rejecting common law as valid legal precedent in Utah. Common law, as distinct from statutory law, is English precedent adopted by U.S. courts. Over time, common law became part of U.S. JURISPRUDENCE except where it was expressly abrogated. Although Young patterned the structure of Utah's territorial government after the other state governments, with executive, legislative, and judicial branches, he believed that the United States should abandon all vestiges of English tradition. According to Young, the application of common law allowed judges too much latitude to impose standards that did not comport with public will.

Young's opposition to the application of common law reached its nadir over the issue of polygamy. By the mid-1800s, the Mormon Church had acknowledged polygamy as one of its tenets. Mormon teaching of the time held that men were obligated to have multiple wives. Common law provides that marriage to more than one living husband or wife is a felony and that any marriages other than the first are void.

When President MILLARD FILLMORE assigned three federal judges to the Utah Territory in the 1850s, Young became concerned that the new judges would impose common-law precedent. He attempted to blunt their impact by urging the legislature to prohibit judges from using common-law precedent in Utah. On January 14, 1854, the legislature passed a bill that prohibited any law from being read, cited, or adopted in Utah unless it had been enacted by the legislature or the governor. This bill directly contravened the Organic Act of Utah of 1850 (9 Stat. 453) by which the U.S. Congress created the Utah Territory. The act gave the U.S. Supreme Court and the federal district courts of the territory both common-law and EQUITY jurisdiction and established that the laws of the United States applied in the territory. In 1856 the Territorial Supreme Court held that the Organic Act extended common law over the Territory of Utah and that the legislature violated the Organic Act when it forbade the use of common law in Utah (*People v. Moroni Green,* 1 Utah 11 [1856]).

Tensions continued to mount between Mormons and the federal government. In May 1857 President JAMES BUCHANAN dispatched 2,500 U.S. Army troops to Utah to remove Young from office and enforce federal authority. Anticipating the federal troops' arrival, a group of angry Mormons joined forces with a group of Paiute Indians who attacked and killed 120 settlers traveling through the territory in September 1857. Mormon leaders feared that the attack, known as the Mountain Meadows Massacre, would lead to further reprisals by the federal government. They sent sympathetic church members to destroy the Army's supplies, thereby delaying the troops' arrival. The Mormons' resistance came to be known as the Utah War. By the time the troops arrived in the summer of 1858, tensions had eased considerably, and under a negotiated settlement, troops were stationed outside Salt Lake City without incident.

The Mormon Church's resistance to the application of common law continued through the late 1800s. A number of cases reached the Territorial Supreme Court, which repeatedly

affirmed that common law is valid in the territory. (See *Murphy v. Carter,* 1 Utah 17 [1868], and *Godebe v. Salt Lake City,* 1 Utah 68 [1870]). In *First National Bank of Utah v. Kinner,* 1 Utah 100 (1873), the court held that the people of the Utah territory had tacitly agreed to the application of common law. In 1878 the U.S. Supreme Court settled the question of whether the common-law prohibition of polygamy applied in the territory. In *Reynolds v. United States,* 98 U.S. (8 Otto) 145, 25 L. Ed. 244, the plaintiff argued that the common-law prohibition of polygamy was unconstitutional because it violated the FIRST AMENDMENT guarantee of freedom of religion. The Court disagreed and held that religious freedom does not encompass the practice of polygamy and that laws prohibiting the practice are constitutional. The Court stated that to allow Mormons to practice plural marriage "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

By the 1890s the Mormon Church had officially abandoned the practice of plural marriage. In 1896 Utah became a state, and in 1898 the legislature passed a measure that declared that the common law "shall be the rule of decision in all courts of this state" (The Revised Statutes of the State of Utah, § 2488). The common law continues to carry the force of precedent in Utah, except for the common law of crimes, which the legislature abolished in 1973 (Utah Code Ann. § 76-1-105; repealed, Utah Code Ann. § 68-2-3; replaced by Utah Code Ann. § 68-3-1).

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## MORTALITY TABLES

*A means of ascertaining the probable number of years any man or woman of a given age and of ordinary health will live. A mortality table expresses on the basis of the group studied the probability that, of a number of persons of equal expectations of life who are living at the beginning of any year, a certain number of deaths will occur within that year.*

*Such tables are used by insurance companies to determine the premium to be charged for those in the respective age groups.*

## MORTGAGE

*A legal document by which the owner (i.e., the buyer) transfers to the lender an interest in real estate to secure the repayment of a debt, evidenced by a mortgage note. When the debt is repaid, the mortgage is discharged, and a satisfaction of mortgage is recorded with the register or recorder of deeds in the county where the mortgage was recorded. Because most people cannot afford to buy real estate with cash, nearly every real estate transaction involves a mortgage.*

The party who borrows the money and gives the mortgage (the debtor) is the mortgagor; the party who pays the money and receives the mortgage (the lender) is the mortgagee. Under early English and U.S. law, the mortgage was treated as a complete transfer of title from the borrower to the lender. The lender was entitled not only to payments of interest on the debt but also to the rents and profits of the real estate. This meant that as far as the borrower was concerned, the real estate was of no value, that is, "dead," until the debt was paid in full—hence the Norman-English name "mort" (dead), "gage" (pledge).

The mortgage must be executed according to the formalities required by the laws of the state where the property is located. It must describe the real estate and must be signed by all owners, including non-owner spouses if the property is a homestead. Some states require witnesses as well as acknowledgement before a NOTARY PUBLIC.

The mortgage note, in which the borrower promises to repay the debt, sets out the terms of the transaction: the amount of the debt, the mortgage due date, the rate of interest, the amount of monthly payments, whether the lender requires monthly payments to build a tax and insurance reserve, whether the loan may be repaid with

larger or more frequent payments without a prepayment penalty, and whether failing to make a payment or selling the property will entitle the lender to call the entire debt due.

State courts have devised varying theories of the legal effect of mortgages: Some treat the mortgage as a conveyance of the title, which can be defeated on payment of the debt; others regard it as a lien, entitling the borrower to all of the rights of ownership, as long as the terms of the mortgage are observed. In California a deed of trust to a trustee who holds title for the lender is the preferred security instrument.

At COMMON LAW, if the borrower failed to pay the debt in full at the appointed time, the borrower suffered a complete loss of title, however long and faithfully the payments had been made.

Courts of EQUITY, which were originally ecclesiastical courts, had the authority to decide cases on the basis of moral obligation, fairness, or justice, as distinguished from the law courts, which were bound to decide strictly according to the common law. Equity courts softened the harshness of the common law by ruling that the debtor could regain title even after default, but before it was declared forfeited, by paying the debt with interest and costs. This form of relief is known as the equity of redemption.

Nowadays, nearly all states have enacted statutes incorporating the equity of redemption, and many also have enacted periods of redemption, specifying lengths of time within which the borrower may redeem. Although some debtors, or mortgagors, are able to avoid foreclosure through the equity of redemption, many are not, because redeeming means coming up with the balance of the mortgage plus interest and costs, something that a financially troubled debtor might not be able to accomplish. However, because foreclosure upends the agreement between mortgagor and mortgagee and creates burdens for both parties, lenders are often willing to work with debtors to help them through a period of temporary difficulty. Debtors who run into problems meeting their mortgage obligations should speak to their lender about developing a plan to avert foreclosure.

Failure to redeem results in foreclosure of the borrower's rights in the real estate, which is then sold by the county sheriff at a public foreclosure sale. At a foreclosure sale, the lender is the most frequent purchaser of the property.

If the bid at the sale is less than the debt, even if it is for fair market value, the lender may be granted a deficiency judgment for the balance of the debt against the debtor, with the right to resort to other assets or income for its collection.

Often other creditors bid at the sale to protect their interest as judgment creditors, second mortgagees, or mechanic's lien claimants. All such persons must be notified of the foreclosure suit and must be given a right to bid at the sale to protect their claims. Similar protections are afforded transactions involving deeds of trust.

A fixed-rate mortgage carries an interest rate that will be set at the inception of the loan and will remain constant for the length of the mortgage. A 30-year mortgage will have a rate that is fixed for all 30 years. At the end of the 30th year, if payments have been made on time, the loan is fully paid off. To a borrower, the advantage is that the rate will remain constant, and the monthly payment will remain the same throughout the life of the loan. The lender is taking the risk that interest rates will rise and that it will carry a loan at below-market interest rates for some or part of the 30 years. Because of this risk, there is usually a higher interest rate on a fixed-rate loan than the initial rate and payments on adjustable rate or balloon mortgages. If the rates fall, homeowners may pay off the loan by refinancing the house at the then-lower interest rate.

An adjustable-rate mortgage (ARM) provides a fixed initial interest rate and a fixed initial monthly payment for a short period of time. With an ARM, after the initial fixed period, which can be anywhere from six months to six years, both the interest rate and the monthly payments adjust on a regular basis to reflect the then-current market interest. Some ARMs may be subject to adjustment every three months, while others may be adjusted once per year. Moreover, some ARMs limit the amount that the rates may change. While an ARM usually carries a lower initial interest rate and a lower initial monthly payment, the purchaser is taking the risk that rates may rise in the future.

An alternative form of financing, usually a last resort for those who do not qualify for other mortgages, is called owner financing or owner carryback. The owner finances or "carries" all or part of the mortgage. Owner financing often involves balloon mortgage payments, as the monthly payments are frequently interest-only. A balloon mortgage has a fixed interest rate and a fixed monthly payment, but after a fixed

*A sample plain-language mortgage note*

## Plain-Language Mortgage Note

Multistate

**NOTE**

FHA Case No. _____

December 6, 2000
(Date)

101 MAIN STREET, ATLANTA, GEORGIA 30341
(Property Address)

**1. PARTIES**
"Borrower" means each person signing at the end of this Note, and the person's successors and assigns. "Lender" means ABC **MORTGAGE COMPANY** and its successors and assigns.

**2. BORROWER'S PROMISE TO PAY; INTEREST**
In return for a loan received from Lender, Borrower promises to pay the principal sum of **One Hundred Twenty-Five Thousand Six Hundred Fifty and 00/100 dollars (U.S. $125,650.00)**, plus interest, to the order of Lender. Interest will be charged on unpaid principal, from the date of disbursement of the loan proceeds by Lender, at the rate of **Eight and 00/100 percent (8%)** per year until the full amount of principal has been paid

**3. PROMISE TO PAY SECURED**
Borrower's promise to pay is secured by a mortgage, deed of trust or similar security instrument that is dated the same date as this Note and called the "Security Instrument". That Security Instrument protects the Lender from losses which might result if Borrower defaults under this Note.

**4. MANNER OF PAYMENT**
**(A) Time**
Borrower shall make a payment of principal and interest to Lender on the first day of each month beginning on **February 1st, 2001**. Any principal and interest remaining on the first day of **January, 2031**, will be due on that date, which is called the "Maturity Date".

**(B) Place**
Payment shall be made at **1000 South Street, Atlanta, GA 30342** or at such other place as Lender may designate in writing by notice to Borrower.

**(C) Amount**
Each monthly payment of principal and interest will be in the amount of **$921.97.** This amount will be part of a larger monthly payment required by the Security Instrument, that shall be applied to principal, interest and other items in the order described in the Security Instrument.

**(D) Allonge to this note for payment adjustments**
If an allonge providing for payment adjustments is executed by Borrower together with this Note, the covenants of the allonge shall be incorporated into and shall amend and supplement the covenants of this Note as if the allonge were a part of this Note. [Check applicable box]

☐ Graduated Payment Allonge ☐ Growing Equity Allonge ☐ Other [Specify]

**5. BORROWER'S RIGHT TO PREPAY**
Borrower has the right to pay the debt evidenced by this Note, in whole or in part, without charge or penalty, on the first day of any month.

**6. BORROWER'S FAILURE TO PAY**
**(A) Late Charge for Overdue Payments**
If Lender has not received the full monthly payment required by the Security Instrument as described in Paragraph 4(C) of this Note by the end of fifteen calendar days after the payment is due, Lender may collect a late charge in the amount of **Four and 00/100 percent (4%)** of the overdue amount of each payment.

**(B) Default**
If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this option without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted by HUD regulations. As used in this Note, "Secretary" means the Secretary of Housing and Urban Development of his or her designee.

**(C) Payment of Costs and Expenses**
If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note.

[continued]

*A sample plain-language mortgage note (continued)*

**Plain-Language Mortgage Note**

**7. WAIVERS**

Borrower and any other person who has obligations under this Note waive the rights of presentment and notice of dishonor. "Presentment" means the right to require Lender to demand payment of amounts due. "Notice of dishonor" means the right to require Lender to give notice to other persons that amounts due have not been paid.

**8. GIVING OF NOTICES**

Unless applicable law requires a different method, any notice that must be given to Borrower under this Note will be given by delivering it or by mailing it by first class mail to Borrower at the property address above or at a different address if Borrower has given Lender notice of Borrower's different address.

Any notice that must be given to Lender under this Note will be given by first class mail to Lender at the address stated in Paragraph 4(B) or at a different address if Borrower is given a notice of that different address.

**9. OBLIGATIONS OF PERSONS UNDER THIS NOTE**

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. Lender may enforce its rights under this Note against each person individually or against all signatories together. Any one person signing this Note may be required to pay all of the amounts owed under this Note.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Note.

_____ (Seal)
Borrower - **SAM F. MAGUIRE, JR**.

_____ (Seal)
Borrower -

_____ (Seal)
Borrower -

_____ (Seal)
Borrower -

**FHA Multistate Fixed Rate Note - 2/91**

period of time, such as five or ten years, the whole balance of the loan becomes due at once, meaning that the buyer must either pay the balloon loan off in cash or refinance the loan at current market rates.

A home-equity loan is usually used by homeowners to borrow some of the equity in the home. This may raise the monthly housing payment considerably. More and more lenders are offering home-equity lines of credit. The interest might be tax-deductible because the debt is secured by a home. A home-equity line of credit is a form of revolving credit secured by a home. Many lenders set the credit limit on a home-equity line by taking a percentage of the home's appraised value and subtracting from that the balance owed on the existing mortgage. In determining the credit limit, the lender will also consider other factors to determine the homeowner's ability to repay the loan. Many home-equity plans set a fixed period during which money may be borrowed. Some lenders require payment in full of any outstanding balance at the end of the period.

Home-equity lines of credit usually have variable, rather than fixed, interest rates. The variable rate must be based on a publicly available index such as the prime rate published in major daily newspapers or a U.S. Treasury bill rate. The interest rate for borrowing under the home-equity line will change in accordance with the index. Most lenders set the interest rate at the value of the index at a particular time plus a margin, such as 3 percentage points. The cost of borrowing is tied directly to the value of the index. Lenders sometimes offer a temporarily discounted interest rate for a home-equity line. This is a rate that is unusually low and that may last for a short introductory period of merely a few months.

The costs of setting up a home-equity line of credit typically include a fee for a property appraisal, an application fee, fees for attorneys, title search, mortgage preparation and filing

fees, property and title insurance fees, and taxes. There also might be recurring maintenance fees for the account, or a transaction fee every time there is a draw on the credit line. It might cost a significant amount of money to establish the home-equity line of credit, although interest savings often justify the cost of establishing and maintaining the line.

The federal TRUTH IN LENDING ACT, 15 U.S.C.A. §§ 1601 set. seq., requires lenders to disclose the important terms and costs of their home-equity plans, including the APR, miscellaneous charges, the payment terms, and information about any variable-rate feature. If the home involved is a principal dwelling, the Truth in Lending Act allows three days from the day the account was opened to cancel the credit line. This right allows the borrower to cancel for any reason by informing the lender in writing within the three-day period. The lender then must cancel its security interest in the property and return all fees.

A second mortgage provides a fixed amount of money that is repayable over a fixed period. In most cases, the payment schedule calls for equal payments that will pay off the entire loan within the loan period. A second mortgage differs from a home-equity loan in that it is not a line of credit, but rather a more traditional type of loan. The traditional second-mortgage loan takes into account the interest rate charged plus points and other finance charges. The annual percentage rate for a home-equity line of credit is based on the periodic interest rate alone. It does not include points or other charges.

A reverse mortgage works much like a traditional mortgage, only in reverse. It allows homeowners to convert the equity in a home into cash. A reverse mortgage permits retired homeowners who own their home and have paid all of their mortgage to borrow against the value of their home. The lender pays the equity to the homeowner in either payments or a lump sum. Unlike a standard home-equity loan, no repayment is due until the home is no longer used as a principal residence, a sale of the home, or the death of the homeowner.

A deed of trust is similar to a mortgage, with one important exception: If the borrower breaches the agreement to pay off the loan, the foreclosure process is typically much quicker and less complicated than the formal mortgage-foreclosure process. While a mortgage involves a relationship between the borrower/homeowner and the bank/lender, a deed of trust involves the homeowner, the lender, and a title insurance company. The title insurance company holds legal title to the real estate until the loan is paid in full, at which time the company transfers the property title to the homeowner.

Subdivision or condominium-development mortgages that cover a large tract of land are blanket mortgages. A blanket mortgage makes possible the sale of individual lots or units, with the proceeds applied to the mortgage, and partial release of the mortgage recorded to clear the title for that lot or unit.

Construction mortgages need special treatment depending on state construction-lien law. Often the loan proceeds are placed in escrow with title insurance companies to make certain that the mortgage remains a first lien, with priority over contractors' construction liens.

Open-end mortgages make possible additional advances of money from the lender without the necessity of a new mortgage.

The time of repayment may be extended by a recorded extension of mortgage. Other real estate may be added to the mortgage by a spreading agreement. Mortgaged real estate may be sold, with the buyer taking either "subject to" or by "assuming" the mortgage. In the former case, the buyer acknowledges the existence of the mortgage and, upon default, may lose the title. By assuming the mortgage, the buyer promises to repay the debt and may be personally liable for a deficiency judgment if the sale brings less than the debt.

Lenders regularly assign mortgages to other investors. Assignments with recourse are guarantees by the one who assigns the mortgage that that party will collect the debt; those WITHOUT RECOURSE do not contain such guarantees. Assignments with recourse usually involve lower-risk properties or those of relatively stable or rising value. Assignments without recourse tend to involve riskier properties. Mortgages assigned without recourse are often sold at a price discounted well below their market value.

Before the Great Depression of the 1930s, most mortgages were "straight" short-term mortgages, requiring payments of interest and lump-sum principal, with the result that when incomes dropped, many borrowers lost their properties. That risk is minimized today because commercial lenders take fully amortized mortgages, in which part of the periodic payment

**Mortgage Debt Outstanding, by Type of Property and Holder, in 2002[a]**

TYPE OF PROPERTY

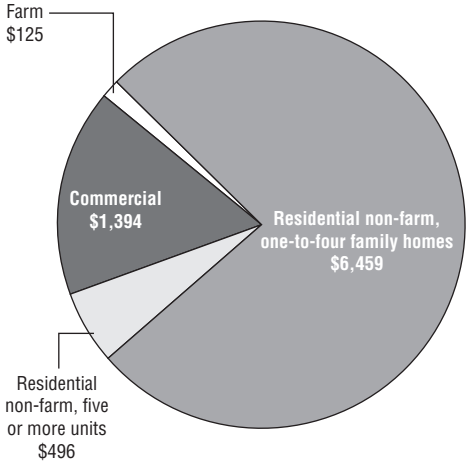


TYPE OF HOLDER

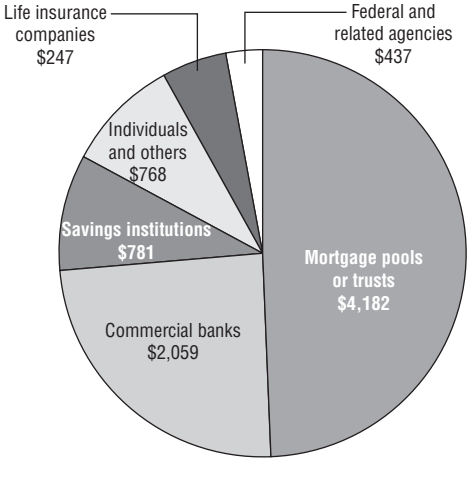


[a]In billions of dollars.

SOURCE: The Bond Market Association web page.

applies first to interest and then to principal, with the balance reduced to zero at the end of the term.

Several agencies of the federal government have assisted the mortgage market by infusion of capital and by guarantees of repayment of mortgages. The Federal Housing Administration made possible purchases of real estate at low interest rates and with low down payments. The VETERANS AFFAIRS DEPARTMENT (VA) also guarantees home loans to certain veterans on favorable terms. Both agencies contributed greatly to the growth of the housing market after WORLD WAR II. During the late 1950s, private corporations began insuring repayment of conventional mortgages.

The GOVERNMENT NATIONAL MORTGAGE ASSOCIATION (Ginnie Mae), created by the U.S. government in 1968, makes possible trading in mortgages by investors by guaranteeing mortgage-backed SECURITIES.

The FEDERAL NATIONAL MORTGAGE ASSOCIATION (Fannie Mae) is a private corporation, chartered by the U.S. government, that bolsters the supply of funds for home mortgages by buying mortgages from banks, insurance companies, and savings and loans.

Inflation in the 1970s made long-term fixed-rate mortgages less attractive to lenders. In response, lenders devised three types of mortgage loans that enable the rate of interest to vary in case of rises in rates: the variable-rate mortgage, graduated-payment mortgage, and the adjustable-rate mortgage. These mortgages are offered at initial interest rates that are somewhat lower than those for 20- to 30-year fixed-rate mortgages.

Home-equity loans are typically second mortgages to the holder of the first mortgage, advancing funds based on a percentage of the owner's equity; that is, the amount by which the value of the real estate exceeds the first mortgage balance.

CROSS-REFERENCES

Amortization.

## MORTMAIN

*[*French, Dead hand.*] A term to denote the conveyance of ownership of land or tenements to any corporation, religious or secular.*

Traditionally, such transfers were made to religious corporations. Like any corporation, the religious society had unlimited, perpetual duration under the law. It could, therefore, hold land permanently unlike a natural person, whose property is redistributed upon his or her death. The holdings of religious corporations grew as contributions were received from their members. Because such holdings were immune from responsibilities for taxes and payment of feudal

dues, greater burdens were placed on noncorporate secular property. Therefore, land in mortmain was said to be held in perpetuity in one dead hand, that of the corporation.

### MORTMAIN ACTS

*Statutes designed to prevent lands from being perpetually possessed or controlled by religious corporations.*

The first mortmain act in England was enacted during the reign of King Edward I. A later statute passed during the reign of King George II was the model for subsequent mortmain acts in that it prevented the transfer of lands to charities unless the gift complied with certain requirements. Mortmain acts have been abolished by statute.

In the law governing wills, statutes based upon the original mortmain acts have been passed in some states to restrict the power of a testator to make gifts to charities. These modern statutes, also called mortmain acts, protect only the immediate family of a decedent from disinheritance by death-bed gifts to charities when the will is executed within the statutory period.

## ♦ MOSELEY-BRAUN, CAROL ELIZABETH

Carol Moseley-Braun was the first woman and first African-American to serve as assistant majority leader of the Illinois House of Representatives; later, she became the first woman and first African-American to hold executive office in Cook County (Chicago), Illinois. In 1992, she became the first African-American woman from the state of Illinois to be elected to the U.S. Senate, where she served until 1998.

*Carol Moseley-Braun.*
AP/WIDE WORLD PHOTOS

Carol Elizabeth Moseley was born on August 16, 1947 in Chicago, the daughter of a police officer and a medical technician. She earned her Bachelor of Arts degree from the University of Illinois at Chicago in 1969. She then went to the University of Chicago Law School, where she was awarded her juris doctor degree in 1972. After earning her law degree, she spent one year as an associate with the firm of Davis, Miner, and Barnhill.

In 1973, Moseley-Braun was appointed assistant U.S. attorney for the Northern District

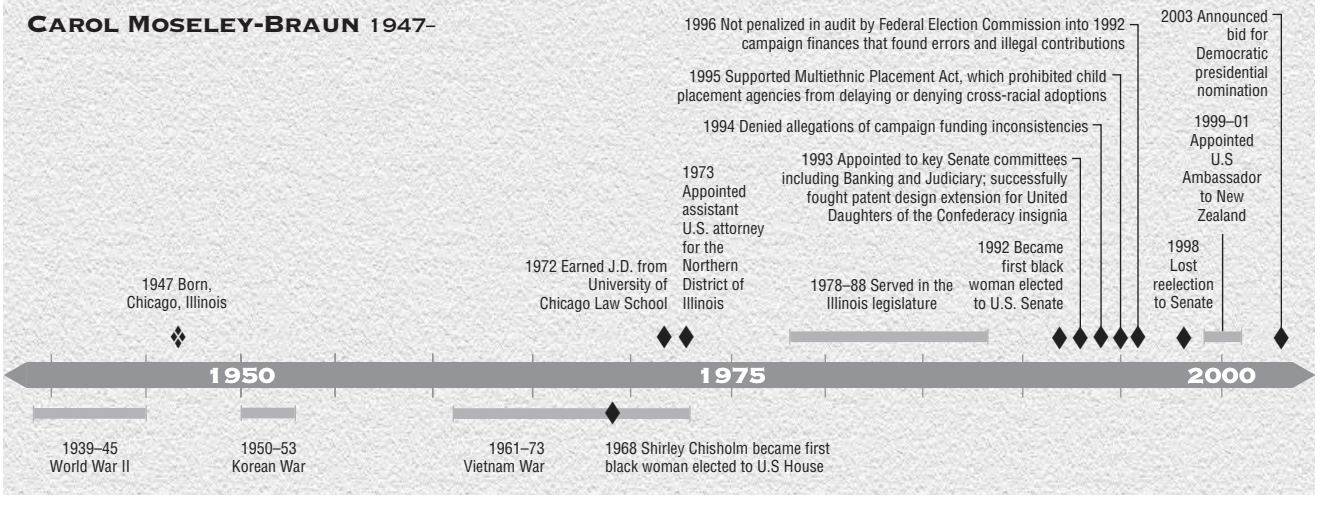

of Illinois, a position she held until 1977. Her election to the Illinois state legislature in 1978 started her on the road that would eventually lead to the U.S. Senate. While a member of the Illinois House, Moseley-Braun rose to the position of assistant majority leader, becoming the first African-American and the first woman to do so.

Moseley-Braun's last position before being elected to the U.S. Senate was Cook County recorder of deeds and registrar of titles. She was also the first woman and first African-American to hold this, or any, executive office in Cook County.

Moseley-Braun entered the Illinois primary and upset two-term Democratic incumbent Alan J. Dixon. She then played upon voters' unhappiness with the sagging U.S. economy to clinch her victory over Republican Richard S. Williamson and to become the first African-American woman elected to the U.S. Senate.

"HOW WE CHARACTERIZE THE DEBATE WILL HAVE A CRITICAL IMPACT ON HOW WE CHARACTERIZE THE OUTCOME."
—CAROL MOSELEY-BRAUN

Moseley-Braun's rise to national office was not without controversy. During her campaign against Williamson, it was reported that she had received over $28,000 in royalty payments from the sale of timber on land owned by her mother, a nursing home resident whose care was being paid for by MEDICAID. Moseley-Braun did not report the income to either the INTERNAL REVENUE SERVICE or Medicaid, as required by law. She later repaid the state $15,239 for her mother's nursing home expenses.

During her term in the Senate, Moseley-Braun was appointed to some of the most powerful and influential Senate committees: Banking, Housing and Urban Affairs; Small Business; and Judiciary. She also became a member of the Congressional Black Caucus.

In May 1993, just a few months after her induction into the Senate, she challenged Senator STROM THURMOND (R-S.C.), the Senate's most senior member at the time. The two debated a bill that would have extended the design patent on the insignia of the United Daughters of the Confederacy (UDC), which featured the Confederate flag. Arguing that the flag was a symbol of a time in U.S. history when African-Americans were held as human chattel under the flag of the Confederacy, Moseley-Braun persuaded her colleagues on the Judiciary Committee not to extend the UDC patent.

The issue was not dead, however. In July 1993, Senator JESSE HELMS (R-N.C.) included the patent extension as an amendment to another bill. The Senate voted 52–48 to approve the amendment. Undaunted, Moseley-Braun vowed to filibuster to reverse the vote. She lobbied her fellow Senators to reconsider the vote on the Helms amendment. She argued that the Confederate flag had no place in our modern times, no place in the Senate, and no place in our society. The Senate reconsidered its vote and finally tabled the Helms amendment, effectively killing it, by a vote of 75–25.

Moseley-Braun was narrowly defeated for re-election in 1998, losing to wealthy Republican Peter Fitzgerald in a heated race in Illinois. Immediately following her defeat, she served from 1998 to 1999 as a consultant on school construction to the EDUCATION DEPARTMENT. In 1999, with the support of President BILL CLINTON, she was nominated to be the U.S. ambassador to New Zealand and Samoa. Her appointment was approved by a 96–2 vote in the Senate. She served for two years in that position.

In 2003, Moseley-Braun served as executive vice president at Good Works International, a global policy and strategy consulting company. Although some expected her to run again for the Senate in 2004, she decided to enter the presidential race instead, announcing the decision in 2003. In the early stages of her campaign, she received support and endorsements from several feminist and minority political-action groups.

FURTHER READINGS

Moseley-Braun, Carol. 1995. "Interracial Adoption." *A.B.A. Journal* 45.

Page, Clarence. 2003. "Dems' Dilemma: Moseley-Braun vs. Sharpton." *Daily Press* K3.

## MOST-FAVORED-NATION STATUS

*A method of establishing equality of trading opportunity among states by guaranteeing that if one country is given better trade terms by another, then all other states must get the same terms.*

In the twentieth century, the history of world trade is dominated by the move from protective tariffs to free trade. International agreements have permitted most of the world's nations to export their products without facing discriminatory duties. A key concept in the liberalization of trade is most-favored-nation (MFN) status.

MFN status is a method of preventing discriminatory treatment among members of an international trading organization. MFN status provides trade equality among partners by

ensuring that an importing country will not discriminate against another country's goods in favor of those from a third. Once the importing country grants any type of concession to the third-party country, this concession must be given to all other countries.

For example, assume that the United States government negotiates a bilateral trade agreement with Indonesia that provides, among other things, that a duty of $1 will be charged for imported Indonesian television sets. All countries that have MFN status will pay no more than a $1 duty to export televisions to the United States. If the United States later negotiates a duty of 75¢ with Japan for imported televisions, Indonesia and all other MFN countries will pay 75¢, despite Indonesia's original agreement to pay more duty.

The number of countries with MFN status increased after **WORLD WAR II** with the **GENERAL AGREEMENT ON TARIFFS AND TRADE** (GATT) treaty, which was signed by many nations in 1948. Article I of the GATT requires that exports of all contracting parties to the treaty should be treated alike by other contracting parties, immediately and without condition. Thus, each member's exports are treated on the best terms (or "most favored" terms) available to any GATT member.

The MFN status proclaimed in the GATT has been granted to about 180 countries. Only a handful of communist countries have been denied MFN status.

The United States is forbidden by law to grant MFN status to communist countries that do not have free-market economies. The practical effect is that imports from these countries are subject to much higher tariffs. An amendment to the Trade Act of 1974, however, created a loophole. The president may waive the MFN restriction on an annual basis if the communist country permits free emigration or if MFN status would lead to increased emigration. By law, the president must tell Congress each year of the administration's intention to renew or deny MFN status benefits to a communist country. Congress has sixty days to overturn the decision and would then need a two-thirds majority to override a presidential **VETO**.

China has been the main beneficiary of this loophole. Since 1979 China has been granted MFN status. After China suppressed its democracy movement and the Tiananmen Square protest in 1989, Congress opposed continuation of the country's MFN status, yet both President **GEORGE H. W. BUSH** and President **BILL CLINTON** renewed China's MFN benefits.

## MOTHERS AGAINST DRUNK DRIVING

Mothers Against Drunk Driving (MADD) is a nonprofit organization with more than 600 chapters nationwide. MADD seeks to find effective solutions to the problems of drunk driving and underage drinking, while also supporting those persons whose relatives and friends have been killed by drunk drivers. MADD has proven to be an effective organization, successfully **LOBBYING** for tougher laws against drunk drivers.

MADD was founded by a small group of California women in 1980 after 13-year-old Cari Lightner was killed by a hit-and-run driver who had previous drunk driving convictions. Although the offender was sentenced to two years in prison, the judge allowed him to serve time instead in a work camp and a halfway house. Candy Lightner, the victim's mother, worked to call attention to the need for more appropriate, vigorous, and equitable actions on the part of law enforcement and the courts in response to alcohol-related traffic deaths and injuries. Lightner and a handful of volunteers campaigned for tougher laws against impaired driving, stiffer penalties for committing crimes, and greater awareness about the seriousness of driving drunk.

As the California group drew public attention, other individuals who had lost relatives or who had been injured by drunk drivers formed local chapters. Beginning in 1995, MADD embarked on a five-year plan to reduce the proportion of alcohol-related traffic fatalities by 20 percent by the year 2000. This "20 by 2000" campaign was a comprehensive approach that embraced both previous positions and goals and new objectives. Five main areas are addressed: youth issues, enforcement of laws, sanctions, self-sufficiency, and responsible marketing and service.

By 1997 MADD membership had grown to three million people, making it the largest victim-advocate and anti-drunk-driving organization in the United States and the world. In addition to local chapters, MADD has state offices in 29 states. Coordination of the organization is handled by a national headquarters staff of approximately 60 individuals located in

Irving, Texas, who direct training, seasonal and ongoing education and awareness programs, national fund-raising, media campaigns, and federal and state legislative activities.

Also in 1997, MADD sponsored the first National Youth Summit to Prevent Underage Drinking. The summit was attended by 435 teens representing each of the U.S. congressional districts. In 1998, with support from MADD members, "Zero Tolerance" legislation was passed in all 50 states.

Youth issues include enforcement of the 21-year age requirement for purchasing and consuming alcohol, ZERO TOLERANCE for underage drivers who drink, and limits on advertising and marketing of alcoholic beverages to young people.

MADD also endorses the use of sobriety checkpoints by law enforcement and lowering the blood alcohol count for drunk driving to .08 percent. As for sanctions, MADD advocates administrative revocation of the licenses of drunk drivers, the confiscation of license plates and vehicles, progressive sanctions for repeat offenders, and mandatory confinement for repeat offenders. The organization wants drunk drivers to pay for the cost of the system that arrests, convicts, and punishes them. Funding for enforcement through fines, fees, and other assessments will make this system self-sufficient. Finally, MADD wants businesses that serve alcohol to be more vigorous in preventing customers from becoming intoxicated. MADD seeks the end of "happy hours" and other promotions that encourage irresponsible drinking.

In 2000, MADD observed its twentieth anniversary with the slogan "Twenty years of making a difference!" The organization noted that annual deaths from drinking and driving have decreased from approximately 28,000 in 1980 to 16,068 in 2000. MADD also pointed out that preliminary statistics showed that the percentage of alcohol-related fatal traffic crashes had declined from 57 percent in 1982 to 38 percent in 2000. In 2002 MADD reported that 34 states and the District of Columbia had passed laws making it illegal to drive with a blood alcohol count of more than 0.08.

FURTHER READINGS

MADD. Available online at <www.madd.org> (accessed July 28, 2003).

CROSS-REFERENCES

Driving Under the Influence (DUI); Drunkard; Drunkenness.

## MOTION

*A written or oral application made to a court or judge to obtain a ruling or order directing that some act be done in favor of the applicant. The applicant is known as the moving party, or the* MOVANT.

In the U.S. judicial system, procedural rules require most motions to be made in writing and can require that written notice be given in advance of a motion being made. Written motions specify what action the movant is requesting and the reasons, or grounds, for the request. A written motion may contain citations to case law or statutes that support the motion. A motion almost always contains a recitation of the facts of the case or the situation prompting the movant to make the request.

For example, suppose that a plaintiff in a lawsuit has refused to submit to a deposition—questioning under oath—by the defendant. The defendant therefore files a motion with the court to compel in an effort to compel the plaintiff to attend the deposition. The written motion briefly explains the nature of the lawsuit, describes the efforts made by the defendant to get the plaintiff to submit to a deposition, addresses any known reasons for the plaintiff's failure to cooperate, and recites the statute that permits the taking of depositions in civil litigation. The motion may also request that the issue be addressed at a hearing before the judge with all parties present.

Once the judge receives the motion, he or she may grant or deny the motion based solely on its contents. In the alternative, the judge may schedule a hearing. At a motion hearing, each party has an opportunity to argue its position orally, and the judge can ask specific questions about the facts or the law. The judge's decision on the motion is called an order.

Under some circumstances motions can be made orally. Oral motions frequently occur during trials, when it is impractical to draft a written motion. A common oral motion occurs during witness testimony. Witnesses sometimes give inadmissible testimony before an attorney can object. When that happens, the attorney must object and move the court to strike the inadmissible testimony from the record. Motions for mistrial—made when courtroom proceedings are fraught with errors, inadmissible evidence, or disruptions so prejudicial to a party's case that justice cannot be served—often are made orally. Sometimes judges themselves take action on

*A sample motion to dismiss form*

**Motion to Dismiss Form**

Motion To Dismiss, Presenting Defenses Of Failure To State A Claim, Of Lack Of Service Of Process, Of Improper Venue, And Of Lack Of Jurisdiction Under Rule 12(B)

The defendant moves the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.
2. To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the Southern District of New York, and (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M. N. and X. Y. hereto annexed as Exhibit A and Exhibit B respectively.
3. To dismiss the action on the ground that it is in the wrong district because (a) the jurisdiction of this court is invoked solely on the ground that the action arises under the Constitution and laws of the United States and (b) the defendant is a corporation incorporated under the laws of the State of Delaware and is not licensed to do or doing business in the Southern District of New York, all of which more clearly appears in the affidavits of K. L. and V. W. hereto annexed as Exhibits C and D, respectively.
4. To dismiss the action on the ground that the court lacks jurisdiction because the amount actually in controversy is less than ten thousand dollars exclusive of interest and costs.

Signed: _____
Attorney for Defendant.

Address: _____

**Notice of Motion**

To: _____
Attorney for Plaintiff.

_____

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at Room XX, United States Court House, Foley Square, City of New York, on the XXX day of XXXX, 20XX, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Signed: _____
Attorney for Defendant.

Address: _____

behalf of a party, such as changing or adding necessary language to a PLEADING without a motion from a party. This is known as making an amendment on the court's own motion.

A motion to dismiss asks the court to dismiss an action because the initial pleading, or complaint, fails to state a CAUSE OF ACTION or claim for which the law provides a remedy. For example, a complaint alleges that an employer unfairly fired an employee but does not allege illegal discrimination or labor practices. Merely firing an employee for unfair reasons is not illegal; thus a court may dismiss this complaint.

A motion to strike asks the court to remove from the record inadmissible evidence or language in pleadings that is redundant, immaterial, impertinent, or scandalous. A party can file a motion for a more definite statement when the language in a pleading is so vague or ambiguous that the party cannot reasonably be expected to draft a responsive pleading.

A motion for SUMMARY JUDGMENT, also known as a motion for judgment on the pleadings, asks the court to make a judgment solely on the facts set forth in the pleadings, without the necessity of trial. A court will grant a summary judgment motion when the material facts of the case are not in dispute and all that remains to be determined are QUESTIONS OF LAW. For example, in *Stieber v. Journal Publishing Co.*, 120 N. M. 270, 901 P.2d 201 (App. 1995), the court found that the issue of whether a newspaper company's treatment of a reporter was extreme and outrageous was a legal question, not a factual question. In that case the reporter, Tamar Stieber, sued her employer for, among other things, intentional infliction of

emotional distress. Stieber charged that the newspaper asked her to write so many daily stories that she could not perform her duties as a special projects reporter. To recover for the TORT of intentional infliction of emotional distress, the court noted, Stieber had to prove that the newspaper's conduct was so extreme and outrageous as to go "beyond all possible boundaries of decency, and to be regarded as atrocious, and utterly intolerable in civilized community." The court ruled that as a MATTER OF LAW, Stieber failed to prove this allegation, and the lower court's summary judgment was affirmed.

A motion in limine, also made before trial, asks the court to prohibit an opposing party from offering evidence or referring to matters that would be highly prejudicial to the movant during a trial. A motion to suppress is similar to a motion in limine but asks the court to keep out of a criminal trial evidence that was obtained illegally, usually in violation of the Fourth, Fifth, or Sixth Amendments to the U.S. Constitution. For example, a defendant in a murder trial may move the court to suppress her confession because she was questioned without being told of her right to have an attorney present.

Following a trial but before a jury verdict, a party may move for a directed verdict, asking the judge to make a judgment without letting the jury reach a verdict. Following a jury verdict, a party may move for JUDGMENT NOTWITHSTANDING THE VERDICT, or JNOV. This motion requests that the court enter a judgment contrary to the jury verdict, and is granted when no reasonable jury could have reached that verdict. A motion for a new trial asks the judge to order a new trial, setting aside the judgment or verdict, because the trial was improper or unfair. This motion is sometimes brought as the result of newly discovered evidence.

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CROSS-REFERENCES

Civil Procedure; Criminal Procedure.

## MOTIVE

*An idea, belief, or emotion that impels a person to act in accordance with that state of mind.*

Motive is usually used in connection with CRIMINAL LAW to explain why a person acted or refused to act in a certain way—for example, to support the prosecution's assertion that the accused committed the crime. If a person accused of murder was the beneficiary of a life insurance policy on the deceased, the prosecution might argue that greed was the motive for the killing.

Proof of motive is not required in a criminal prosecution. In determining the guilt of a criminal defendant, courts are generally not concerned with *why* the defendant committed the alleged crime, but *whether* the defendant committed the crime. However, a defendant's motive is important in other stages of a criminal case, such as police investigation and sentencing. Law enforcement personnel often consider potential motives in detecting perpetrators. Judges may consider the motives of a convicted defendant at sentencing and either increase a sentence based on avaricious motives or decrease the sentence if the defendant's motives were honorable—for example, if the accused acted in defense of a family member.

In criminal law, motive is distinct from intent. Criminal intent refers to the mental state of mind possessed by a defendant in committing a crime. With few exceptions the prosecution in a criminal case must prove that the defendant intended to commit the illegal act. The prosecution need not prove the defendant's motive. Nevertheless, prosecutors and defense attorneys alike may make an issue of motive in connection with the case.

For example, if a defendant denies commission of the crime, he may produce evidence showing that he had no motive to commit the crime and argue that the lack of motive supports the proposition that he did not commit the crime. By the same token, the prosecution may produce evidence that the defendant did have the motive to commit the crime and argue that the motive supports the proposition that the defendant committed the crime. Proof of motive, without more evidence tying a defendant to the alleged crime, is insufficient to support a conviction.

A HATE CRIME is one crime that requires proof of a certain motive. Generally, a hate crime is motivated by the defendant's belief regarding a protected status of the victim, such as the victim's religion, sex, disability, customs, or national origin. In states that prosecute hate crimes, the prosecution must prove that the defendant was motivated by animosity toward a protected status of the victim. Hate-crime laws

are exceptions to the general rule that proof of motive is not required in a criminal prosecution.

In CIVIL LAW a plaintiff generally need not prove the respondent's motive in acting or failing to act. One notable exception to this general rule is the TORT of MALICIOUS PROSECUTION. In a suit for malicious prosecution, the plaintiff must prove, in part, that the respondent was motivated by malice in subjecting the plaintiff to a civil suit. The same applies for a malicious criminal prosecution.

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## ♦ MOTLEY, CONSTANCE BAKER

Constance Baker Motley played an integral role in defending legislation that was created to protect the rights of all Americans. Her work on landmark civil rights cases in the 1940s, 1950s, and 1960s helped to abolish SEGREGATION in schools and changed the way in which the U.S. Constitution is interpreted. Motley was the first African-American woman to be elected to the New York State Senate; the first African-American and the first woman to be elected as Manhattan borough president; and the first female African American federal judge.

Motley was born in New Haven, Connecticut, on September 14, 1921, one of nine children. The America in which Motley grew up was segregated. As a child going to a beach in Milford, Connecticut, Motley was turned away because of the color of her skin. When she returned home, she asked her parents, both West Indian immigrants, why the color of her skin meant that she could not go swimming. Her parents were unfamiliar with U.S. segregation and had no answer.

*Constance Baker Motley.*
THE BETTMANN ARCHIVE

As a teenager, Motley became fascinated with U.S. history, particularly the Civil War, ABRAHAM LINCOLN, and the EMANCIPATION PROCLAMATION. She sought out role models in her community to help her focus her interests and began attending meetings at a local adult

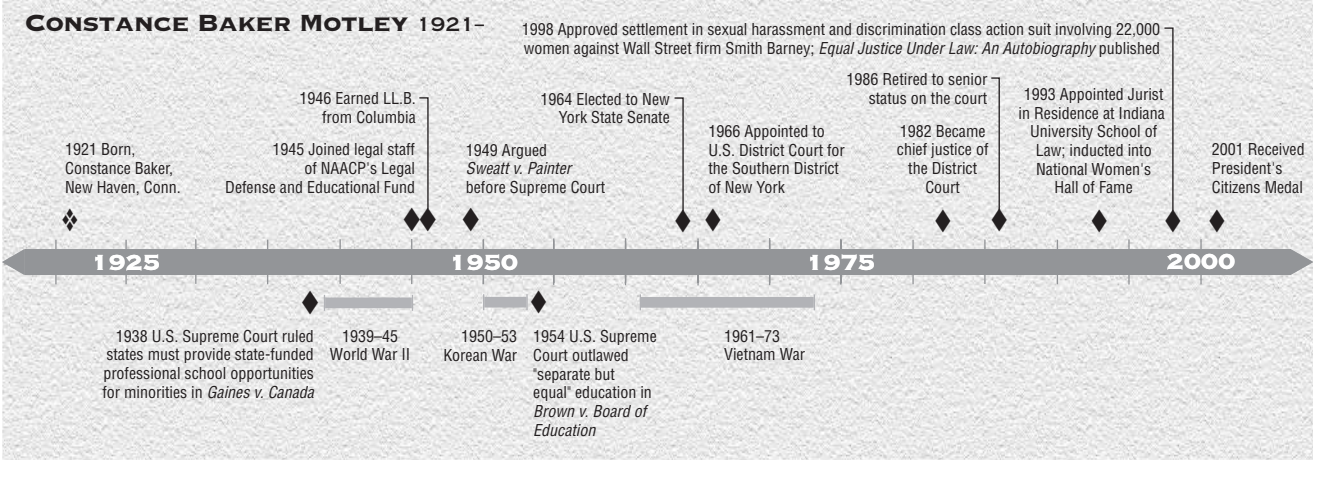

community center. At that center, she came in contact with George W. Crawford, a prominent black lawyer in New Haven, who told her about the case of *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337, 59 S. Ct. 232, 83 L. Ed. 208 (1938).

At the time of *Gaines,* Missouri was like many southern states that maintained all-white professional schools, sending qualified minority law school applicants to schools in other states. The U.S. Supreme Court ruled in *Gaines* that Missouri's admissions practice did not offer an equal educational opportunity to minority students and that it therefore violated the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT. That verdict meant that many states had to re-evaluate their school systems and either create new schools specifically for black students or desegregate existing white graduate schools. Crawford told Motley that he believed that the *Gaines* case would prompt states to create separate schools to avoid desegregation.

"THE STRUGGLE FOR RACIAL EQUALITY IS LIKE A PRAIRIE FIRE. YOU MAY SUCCEED IN STAMPING OUT THE STRUGGLE FOR EQUALITY IN ONE CORNER AND, LO AND BEHOLD, IT APPEARS SOON THEREAFTER SOMEWHERE ELSE."
—CONSTANCE BAKER MOTLEY

The *Gaines* case inspired Motley to attend law school. She wanted to be a lawyer in order to fight for CIVIL RIGHTS, as Abraham Lincoln had done. However, when she approached her father about following her dream, he told her that college was a financial impossibility on his wages as a chef at a Yale fraternity house.

After graduating from high school as an honor student in 1939, Baker spent 18 months working for the National Youth Administration in New Haven. Disturbed by blacks' lack of interest in the community center, she decided to address her peers at a meeting at the center. As president of the New Haven Youth Council, Motley spoke about the apparent apathy of blacks toward the center, which she suggested stemmed from the lack of black involvement in setting policy and designing projects for the center. Clarence Blakeslee, the successful, white businessman who had been the primary donor for the community center, heard Motley speak and was very impressed. He offered to pay for Motley's education.

Accepting the offer, Motley attended New York University, where she received a bachelor of arts degree in economics. She then went to Columbia University School of Law, where she received her law degree in 1946. While still at Columbia, Motley got a job with the National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund, clerking for chief counsel THURGOOD MARSHALL, who would later sit on the U.S. Supreme Court.

Motley joined the NAACP during WORLD WAR II and worked on many cases involving black servicemen. These soldiers told of segregation in the armed forces and protested that punishments given to black soldiers were outrageous compared with those given to white soldiers for similar infractions. Motley worked on hundreds of COURT-MARTIAL cases that earned the NAACP much notoriety. Her work with the NAACP enabled her to try cases in federal courts and even to try ten cases before the U.S. Supreme Court. Motley often was the first African-American attorney, and usually the first female African-American attorney, to be seen in many of those courtrooms.

In the late 1940s, the NAACP decided to focus on eliminating segregation in education. Motley's first case after she had completed law school took the *Gaines* case a step further. It involved Herman Marion Sweatt (*Sweatt v. Painter,* 339 U.S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 [1949]) who was denied admission to the law school at the University of Texas solely because he was black. Under pressure from the NAACP, the school set up a makeshift classroom for Sweatt in the basement of a building, obtained books for him, and assigned him four professors from the faculty. However, the U.S. Supreme Court held that the state had violated the Equal Protection Clause because Sweatt's inability to interact with fellow classmates made his education inferior. Motley tried other cases involving segregation in professional schools and was a driving force in reforming their admission practices, thus paving the way for minority professionals in this country.

In 1954, Motley helped to write legal briefs for the landmark case BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). In *Brown,* the Court ruled that segregated schools were unconstitutional as a violation of the Equal Protection Clause of the U.S. Constitution. The case was a major victory for civil rights advocates and fueled Motley's hope for real change in U.S. attitudes toward minority groups.

In the 1960s, Motley turned her attention toward minority children. She was concerned about the inadequate schooling for black children, the slum conditions in which many were forced to live, and the high rates of unemployment in black communities. She wanted new

legislation to address these problems. In 1964, Motley became the first African-American woman to be elected to the New York State Senate. In 1965, she relinquished her Senate seat when she was elected president of the borough of Manhattan. From that post, she worked to revitalize Harlem and to advance urban renewal.

In 1966, when President LYNDON B. JOHNSON appointed Motley to the U.S. District Court for the Southern District of New York, protest from southerners held up her appointment from January to August. Later, when President Johnson nominated Motley to the U.S. Court of Appeals, male opposition pressured him into withdrawing her name.

Since she became a federal judge, Motley has ruled on more than 2,500 cases. In 1982, Motley became chief judge of the court. She assumed senior status in 1986.

In 1993, Motley was inducted into the National Women's Hall of Fame, and in 1998 she published *Equal Justice Under Law: An Autobiography*. In the new millennium, Motley continued to hear cases as a senior U.S. district court judge. She has been the recipient of numerous honorary degrees and awards, including the NAACP Legal Defense Fund's Equal Justice Award. In 2001, President BILL CLINTON awarded her the Presidential Citizens Medal.

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CROSS-REFERENCES

Civil Rights Movement; Integration; School Desegregation.

## MOVANT

*One who makes a motion before a court. The applicant for a judicial rule or order.*

Generally, it is the job of the movant to convince a judge to rule, or grant an order, in favor of the motion. Rules and legal precedent within particular jurisdictions, as well as the type of motion sought, dictate the burdens of proof and persuasion each party must meet when a court considers a motion.

For example, one common type of motion is a motion for SUMMARY JUDGMENT. This motion is made shortly before a trial commences and is granted if the pleadings, depositions, answers to interrogatories, and affidavits indicate that no genuine dispute as to any material fact exists and that the movant is entitled to a favorable judgment as a MATTER OF LAW. In other words, if the facts of the case are not disputed, it is easier, faster, and less expensive for a judge to simply rule on the legal issues that apply to those facts, avoiding a trial altogether.

A summary judgment movant in most jurisdictions has the burden of showing that no genuine issue of material fact exists and that, by law, the undisputed facts support a judgment in the movant's favor. But once the movant meets this burden, the opposing party is given a chance to refute the movant's argument. The opposing party will try to establish that there is a genuine dispute about a material fact in the case and that the law does not support a judgment in the movant's favor.

For example, assume a case in which a fashion model is suing a newspaper for publishing her picture without her knowledge or permission in an advertisement for a nightclub. Shortly before trial the newspaper makes a motion for summary judgment. The movant newspaper admits that the photograph of the model ran in the newspaper and that the newspaper did not have the model's permission to publish it. The newspaper argues, however, that the model has no right under current law to sue the newspaper, which merely sells space for advertisements, and that her only legal recourse is in suing the advertiser that placed the advertisement in the newspaper. Thus, the newspaper has argued that no material facts are in dispute. The movant has also shown that, given the incontestable material facts, the law would support a judgment in favor of the newspaper.

Now the burden shifts to the model, who must demonstrate the existence of a disputed fact that, if proven, would make the newspaper legally liable. She may do this by producing an affidavit—a sworn written statement—by a former newspaper employee alleging that the newspaper did not merely print the advertisement but actually created the advertisement with the model's picture for the nightclub. Because this material fact, if proven, could make the newspa-

per legally liable, the court would deny the movant's summary judgment motion.

In most jurisdictions the burden of producing evidence supporting the granting or denial of a summary judgment motion shifts between the movant and the opposing party, but the ultimate burden of persuading the court remains with the movant. A movant's burdens of proof and persuasion differ depending on the jurisdiction and the type of motion. In Hawaii, a movant in a criminal case seeking to have the trial continued or postponed because a witness is unavailable must show that the movant has exercised due diligence in finding the witness; the witness would provide substantial favorable evidence; the witness is otherwise available and willing to testify; and the movant would be materially prejudiced by a denial of the CONTINUANCE (*State v. Lee,* 9 Hawai'i App. 600, 856 P.2d 1279 [1993]). In Utah a movant requesting that the court set aside its CHILD SUPPORT award because of a judicial mistake in failing to use a required joint custody worksheet in computing the amount of child support need only demonstrate the existence of a judicial mistake. A denial of the motion by the trial court, without an explanation as to why it deviated from the joint custody worksheet requirement, was an ABUSE OF DISCRETION and was reversed and remanded by an appellate court (*Udy v. Udy,* 893 P.2d 1097 [Utah App. 1995]).

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## MOVE

*To make an application to a court for a rule or order, or to take action in any matter. The term comprehends all things necessary to be done by a litigant to obtain an order of the court directing the relief sought. To propose a resolution, or recommend action in a deliberative body. To pass over; to be transferred, as when the consideration of a contract is said to* move *from one party to the other. To occasion; to contribute to; to tend or lead to.*

## MOVIE RATING

*A classification given to a commercially released motion picture that indicates to consumers whether the film contains sex, profanity, violence, or other subject matter that may be inappropriate for persons in certain age groups.*

The idea for a nationwide movie rating system took root in the late 1960s. In 1966 Jack Valenti, a former aide to President LYNDON B. JOHNSON, became president of the Motion Picture Association of America (MPAA). That same year the film *Who's Afraid of Virginia Woolf* was completed. The film used terms such as *screw* and *hump* to refer to sexual intercourse. Because these terms were considered controversial language, Valenti met with officials at Warner Brothers before the film's release, and the group decided which terms could be deleted and which ones were necessary to the film's content.

The experience led Valenti in 1968 to implement a voluntary film ratings system, which has remained in effect, in varying forms, since that time. The MPAA that year created the Classification and Ratings Administration (CARA) to designate films with one of four ratings: G (general audiences), M (mature audiences), R (children under 16 years of age not admitted without parent or guardian), and X (children under 17 years of age not admitted). Three years later M became PG (parental guidance suggested). In 1984, in response to violence in the movie *Indiana Jones and the Temple of Doom,* the film review board instituted the PG-13 rating, which cautions parents that the film's contents may be inappropriate for children under age 13. In 1990 the board responded to criticism that the X rating unfairly categorized artistic adult films, such as *Midnight Cowboy,* with hard-core PORNOGRAPHY. In that year the board replaced X with NC-17.

In the movie business, a better rating is generally a lower rating. Movies typically make more money when they appeal to the widest possible audience. This rule holds true particularly with motion picture video sales. Many video outlets limit their inventory to movies with ratings no higher than PG-13 or R. Some theaters refuse to show movies with the NC-17 rating, and some newspapers refuse to carry advertisements for movies with the NC-17 rating. A movie studio therefore wants its film to earn the least restrictive rating possible.

One exception to this general rule is the marketing of pornographic films. Because studies have suggested that sexually explicit films become more desirable when they are restricted, the pornographic film industry voluntarily labels its films X or XXX in an effort to increase sales. XXX is a marketing tool, not an actual MPAA rating.

Although the MPAA publicizes the meaning of each rating, most moviegoers do not know how the ratings are assigned. A ratings board, consisting of 11 members, views approximately 600 films a year, discusses each film's content, and chooses a rating for each film. Valenti and the board's chair choose all the board members and keep their identities secret to prevent film producers and studios from attempting to influence them. The members work full-time, serving terms of varying length. Members must be parents and cannot be involved with the motion picture industry, but they must meet no other requirements. Members base their ratings on a set of MPAA guidelines, some of which are precise whereas others call for individual taste and judgment. According to one MPAA guideline, a certain word used merely as an expletive in a film may garner a PG rating whereas the same word used to convey a sexual meaning may result in an R rating.

Directors who are unhappy with the board's rating may cut or edit objectionable film footage and resubmit the movie, or they may appeal the rating. Movie producers have the right to know the reason behind the rating their film receives. However, directors and producers have complained that the board's reasons are often unclear or too general, requiring them to edit a film several times before it receives the target rating. Some directors have added especially gory scenes to the first version of a film with the idea that they will cut the gore during the ratings process, leaving the film in its intended state with the desired rating.

Because the movie ratings system is a voluntary process not under government control, **FIRST AMENDMENT** protections do not apply to ratings. If filmmakers believe that the rating for their film is too restrictive, they may appeal to a special board, which is composed of movie industry professionals rather than laypersons. The board screens the film, consults with the original ratings board, and listens to the complaints of the producer or director before voting. A two-thirds majority will overturn the original rating, and the decision of the appeals board is final.

No law requires filmmakers to undergo the ratings process; it is strictly voluntary. Yet, with very few exceptions, filmmakers comply. The system has the support of major film studios, theater owners, and video rental chains that rely on customer satisfaction for a healthy business. It is the movie industry that pays for the privilege of having a film rated; the producer of a film pays a fee for this service that is based on the cost of film production.

The ratings system has critics. Filmmakers complain that the system is **ARBITRARY** and point to instances in which films with similar content have different ratings. Producers and directors have also alleged racism, arguing that films depicting sexual encounters between African Americans receive more restrictive ratings than films involving sex between white characters. Critics also allege sex bias in that movies with frontal nude shots of women commonly receive R ratings, whereas movies with similar nude shots of men commonly receive X or NC-17 ratings. And major studios, say some critics, receive better treatment from the ratings board than do smaller, independent studios, which also have less money to spend on reediting and resubmitting movies in an effort to achieve a better rating.

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CROSS-REFERENCES

First Amendment; Pornography; X Rating.

## ♦ MUELLER, ROBERT SWANN, III

Robert Swann Mueller III became the sixth director of the **FEDERAL BUREAU OF INVESTIGATION** (FBI) on September 4, 2001. In that position, Mueller has faced conflict and controversy stemming from a host of problems concerning spy scandals, terrorist activities, and accusations that the Bureau had developed a "culture of arrogance" that impeded its ability to function.

Mueller was born in New York City on August 7, 1944. He graduated from Princeton University in 1966. He also received a master's

degree in International Studies from New York University. In 1973, he received his Juris Doctor from the University of Virginia School of Law, where he also served on the Law Review.

Mueller served for three years as an officer in the U.S. Marine Corps. He spent one year in the Third Marine Division in Vietnam. He was awarded the Bronze Star, the Purple Heart, two Navy commendation medals, and the Vietnamese Cross of Gallantry.

After his military service, Mueller embarked on a multifaceted career that saw him moving between private practice and government positions while building a record of support from Republicans as well as Democrats. From 1973 to 1976, Mueller worked as a litigation associate at the law firm of Pillsbury, Madison & Sutro in San Francisco. Between 1976 and 1981, he served in a number of positions in the Civil and Criminal Divisions of the Office of the U.S. Attorney, Northern District of California in San Francisco.

"I KNOW WE WILL BE JUDGED BY HISTORY NOT JUST ON HOW WE DISRUPT AND DETER TERRORISM, BUT ALSO ON HOW WE PROTECT THE CIVIL LIBERTIES AND CONSTITUTIONAL RIGHTS OF ALL AMERICANS, INCLUDING THOSE AMERICANS WHO WISH US ILL."
—ROBERT S. MUELLER

From 1986 to 1987, Mueller served as U.S. Attorney for the District of Massachusetts, where he had been Chief of the Criminal Division from 1982 to 1985. While he served in these offices, Mueller gained experience prosecuting a wide variety of cases, including RACKETEERING cases, complex tax and financial FRAUD cases, drug conspiracies, government corruption, and cases involving terrorists.

Mueller was a partner in the Boston firm of Hill & Barlow from 1988 to 1989. From 1989 to 1990, he worked in the JUSTICE DEPARTMENT as the assistant to Attorney General Richard L. Thornburgh. In June 1990, he was nominated by President GEORGE H.W. BUSH to be Assistant Attorney General in charge of the department's Criminal Division. While in that position, Mueller oversaw a number of high-profile cases including the prosecutions of former Panamanian president Manuel Noriega and New York organized-crime boss John Gotti and the investigation into the 1988 bombing of Pan Am flight 103.

From 1993 to 1995, Mueller practiced law as a partner in Hale & Dorr, a Boston firm where he centered his work on sophisticated transactions, including complex litigation, WHITE-COLLAR CRIME, and internal corporate reviews. From 1995 to 1998, Mueller worked in the HOMICIDE Section of the office of U.S. Attorney for the District of Columbia, becoming Section Chief in 1997. Some former colleagues viewed this as a step down for a man who had supervised an entire division of the Department of Justice, but Mueller explained that he felt obligated to do what he could to stop the horrendously high murder rate of young people in the nation's capital.

In August 1998, Mueller became interim U.S. Attorney for the Northern District of California. He was nominated by President BILL CLINTON on the recommendation of Democratic Senator Barbara Boxer and confirmed by the Senate to the permanent position in October, 1999. Mueller held that position until August 2001. Between January and May of 2001, he also served as Acting Deputy General of the U.S. Department of Justice.

In May 2001, FBI Director Louis Freeh announced his resignation. His eight-year tenure had been marked by criticism of several high-profile cases, including that of Oklahoma City bomber Timothy McVeigh and turncoat FBI agent Robert Hanssen. Two months later,

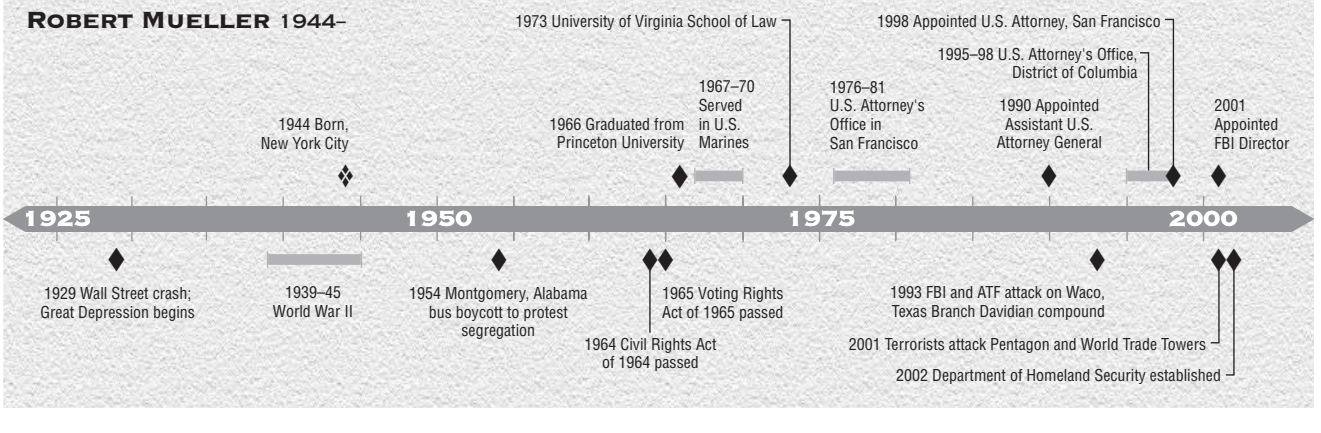

Mueller was nominated by President GEORGE W. BUSH to fill a ten-year term as director of the FBI. Mueller was confirmed to the position in August 1, 2001, by a Senate vote of 98–0.

Despite enjoying broad bipartisan support, Mueller faced a number of difficult challenges involving interdepartmental communications, the continuing investigations into alleged terrorist activities, and the restructuring of the department's bureaucracy. Controversies continued to arise, including criticism regarding the FBI's failure to act on information that preceded the SEPTEMBER 11TH TERRORIST ATTACKS and the FBI's announcement in April 2003 that a former FBI agent might have caused serious losses of classified information during his affair with a prominent Chinese businesswoman who was accused of being a double agent working for China.

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## MULTIDISTRICT LITIGATION

*A procedure provided by federal statute (28 U.S.C.A. § 1407) that permits civil lawsuits with at least one common (and often intricate)* QUESTION OF FACT *that have been pending in different federal district courts to be transferred and consolidated for pretrial proceedings before one judge.*

Congress has given the federal judicial system a mechanism to help manage complex and protracted civil lawsuits that are related to each other. Under 28 U.S.C.A. § 1407, the Judicial Panel on Multidistrict Litigation has the authority to transfer related cases to one federal judge for "coordinated and consolidated pretrial discovery" in advance of trial. The panel is composed of seven federal judges based throughout the United States, who have been appointed by the chief justice of the U.S. Supreme Court. The panel's clerk's office is located in Washington, D.C.

Certain types of litigation are good candidates for transfer and consolidation to a single judge. TORTS involving a disaster (usually airplane crashes), PRODUCT LIABILITY, TRADEMARK and patent infringement, SECURITIES violations, and antitrust issues have typically used multidistrict transfer.

Section 1407 transfers are initiated either by motion of a party or by the panel itself. The panel's decision whether to make a transfer is guided by a number of criteria: the existence of one or more common questions of fact within the group of cases being considered; whether transfer would be "for the convenience of parties and witnesses [and would] promote the just and efficient conduct of such actions" (section 1407(a)); the residence of the principal witnesses; the locations where the actions were initially filed; and the likelihood that transfer will avoid conflicting rulings. In general, economy and convenience become the determining factors.

Once the panel decides that a transfer is appropriate, it must select the appropriate judicial district to handle the litigation. There are no statutory guidelines governing the assignment of the consolidated case, but the panel considers the location of the judicial district in relation to the residences of the parties, the scene of the disaster (if the case involves such a situation), the business headquarters of the parties, the location with the highest concentration of relevant documents, and how easily the location of a judicial district can be reached. Apart from these factors, the panel seeks to place transferred cases in courts that have the time to oversee the complexities of the litigation.

After a district is chosen and a federal district judge is selected to manage the group of cases, the judge exercises full judicial powers over the case. The judge will enter a "practice and procedure order" that governs all matters leading to trial. During the pretrial stage, the parties use the discovery process to find out as much as they can about each other's case.

Under the statute, once all pretrial proceedings have been concluded, the judge remands the case to the panel, along with a recommendation as to how the panel should proceed in setting the cases for trial. Though the statute implies that the cases be remanded to their districts of inception for trial, the panel usually transfers a case back to the judge who handled the pretrial proceedings.

Federal multidistrict litigation is governed by the Rules of Procedure of the Judicial Panel on Multidistrict Litigation and the *Manual for*

*Complex Litigation.* The panel's *In re Concrete Pipe,* 302 F. Supp. 244 (J.P.M.L. 1969), contains many additional factors that it may consider in deciding whether to transfer a case.

At the state level, similar transfer and consolidation methods have been employed to deal with complex litigation. States have appointed judges to oversee product liability cases involving products such as asbestos, breast implants, and tobacco.

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CROSS-REFERENCES

Civil Procedure; Federal Courts.

## MULTILEVEL DISTRIBUTORSHIP

*A type of referral sales scheme by which an individual who purchases a particular item from a company agrees to solicit and provide additional buyers for the product in exchange for a commission or rebate from the company.*

This type of plan is also known as a pyramid sales scheme and is against the law in many jurisdictions.

CROSS-REFERENCES

Consumer Protection.

## MULTIPLICITY OF ACTIONS

*Several unnecessary attempts to litigate the same claim or issue.*

The law strongly disfavors multiplicity of actions because of the public policy to promote judicial efficiency and to furnish speedy relief to an injured party. The rule against splitting a claim provides that if a plaintiff sets forth only certain aspects of the CAUSE OF ACTION in a complaint, he or she will be barred from raising the remaining aspects in a subsequent suit. If the plaintiff sues upon any portion of a particular claim, all other aspects of the claim are merged in this judgment if the plaintiff wins and are barred if the plaintiff does not win. For example, a plaintiff who claims $10,000 due under a single, indivisible contract and files two separate suits, for $5,000 each, will be permitted to litigate only the first suit, since the contract claim is a single cause of action.

## MUNICIPAL

*In its narrower and more common sense, pertaining to a local governmental unit, commonly a city or town. In its broader sense, pertaining to the public or governmental affairs of a state, nation, or of a people. Relating to a state or nation, particularly when considered as an entity independent of other states or nations.*

## MUNICIPAL CORPORATION

*An incorporated political subdivision of a state that is composed of the citizens of a designated geographic area and which performs certain state functions on a local level and possesses such powers as are conferred upon it by the state.*

A municipal corporation is a city, town, village, or borough that has governmental powers. A municipality is a city, town, village, or, in some states, a borough. A corporation is an entity capable of conducting business. Cities, towns, villages, and some boroughs are called municipal corporations because they have the power to conduct business with the private sector.

Generally, the authority to govern the affairs within a state rests with the state legislature, the governor, and the state judicial system. However, states give localities limited powers to govern their own areas. The origin of the municipal corporation varies from state to state. Municipal corporations are given the power to govern through either the state constitution or state statutes, or through the legislative grant of a charter.

States give municipalities the power to create an official governmental body, such as a board or council. Members of this body are elected by voters who live within the voting boundaries of the municipality. The local body has the power to pass ordinances, or local laws. These laws may not conflict with state or federal laws.

Most states grant so-called home rule powers to municipalities in the state constitution and state statutes. Home rule is a flexible grant of power from the state to the voters of a municipality. The first grant of home rule was given to the city of St. Louis in 1875 when the state of Missouri created a new state constitution that gave the city the power to create its own government.

Home rule gives municipalities the power to determine their own goals without interference from the state legislature or state agencies. It gives municipalities room to experiment with new approaches to government without first

seeking approval from the state. It also allows municipalities to act more quickly on issues of local concern because they do not have to seek approval for their actions from the state legislature. Although home rule powers are broad, in no event may a municipality enact a law that is specifically precluded by state law or that is contrary to state law. For example, a municipality may not vote to decriminalize narcotics that are illegal under state law. It may, however, strengthen existing state laws. For instance, a municipality may act to restrict the sale of alcohol to a greater degree than is done in other municipalities.

The alternative to home rule is Dillon's Rule, a set of principles related to municipal power formulated by the influential jurist John Forest Dillon in 1872. Under Dillon's Rule, municipalities exercise only the limited powers specifically granted by the state, the powers necessary to carry out the specifically granted powers, and the powers indispensable to the declared purposes of the municipality. Few states rely on Dillon's Rule, and the trend among states is to give municipalities more power in deciding local issues.

The governmental authority most commonly exercised by municipalities is the **POLICE POWER**. The term *police power* does not refer to the authority to create police departments, although it does include that power. Police power is the power of state and local governments to enact laws governing health, safety, morals, and general public welfare. On the local level, such ordinances range from the provision of local police to **ZONING** laws to laws on domestic partnerships. The authority of states to exercise police power can be found in the **TENTH AMENDMENT** to the U.S. Constitution. States, in turn, grant police power to municipalities, and the municipalities exercise that power within their respective borders. The grant of police power from the state to municipalities can be found in state constitutions or state statutes.

States also commonly give their municipalities the power to enter into contracts. This power can be exercised only by action of the local governing body. The body must give notice of its intent to hire a private party for local government work. For example, if a municipality seeks a contractor to construct a building, the municipality must publish a notice of its intentions in a local newspaper and post other notices in public places. A municipality should not hire a private company if a member of the governing body has a financial interest in the company.

A municipality must exercise ordinary and reasonable care in providing safe public places and safe public services. If a municipality fails to exercise reasonable care, it may be held liable for resulting injuries. For example, if a person falls through a manhole and into the sewer, the city may be liable for any injuries resulting from the fall if the manhole cover was not secure. In this respect, a municipality may be liable for its **NEGLIGENCE** just like an individual. The most common **TORT** cases against municipalities are based on personal injuries caused by defects or obstructions in public streets, sidewalks, drains, and sewers.

Since the 1960s, cities across the United States have begun to decay because of lack of resources. To increase municipal resources, cities have imposed a variety of fees on private developers. Such fees include charges for building permit approvals, plat approvals, and water or sewer connection; impact fees that take into account future costs of a development; and special assessments for benefits given to a developer by the city. For example, a city may impose a transportation exaction fee on the developer of a residential subdivision to pay for the laying and maintenance of new roads that must be built to serve the subdivision. Developers have argued that such fees force private parties to pay for public functions, and they have attacked the fees as being beyond the power of the city government. In some cases their challenges have been upheld.

Municipal corporations are an important feature of the political structure of the United States. Incorporating a municipality gives it the freedom to form a society that is distinct from other localities in the state and around the country. This idea of local control is the same concept that animates the constitutional division of the country into a collection of smaller states. By giving municipalities some autonomy, individuals are more capable of participating in politics and gaining a measure of control over their lives than if political activity occurred only on the federal and state levels.

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Land-Use Control.

## MUNIMENTS OF TITLE

*Documents that serve as evidence of ownership of real or* PERSONAL PROPERTY. *Written instruments, such as stock certificates or deeds to land, by which an owner is enabled to defend his or her ownership rights.*

The *muniment of title* doctrine provides that when ownership of property has been litigated between two parties and title has been adjudicated to be held by one of the two, the loser is not able to relitigate the matter with anyone who relies upon the title of the winner.

## MUNN V. ILLINOIS

See GRANGER MOVEMENT.

## MURDER

*The unlawful killing of another human being without justification or excuse.*

Murder is perhaps the single most serious criminal offense. Depending on the circumstances surrounding the killing, a person who is convicted of murder may be sentenced to many years in prison, a prison sentence with no possibility of PAROLE, or death.

The precise definition of murder varies from jurisdiction to jurisdiction. Under the COMMON LAW, or law made by courts, murder was the unlawful killing of a human being with malice aforethought. The term *malice aforethought* did not necessarily mean that the killer planned or premeditated on the killing, or that he or she felt malice toward the victim. Generally, *malice aforethought* referred to a level of intent or recklessness that separated murder from other killings and warranted stiffer punishment.

The definition of murder has evolved over several centuries. Under most modern statutes in the United States, murder comes in four varieties: (1) intentional murder; (2) a killing that resulted from the intent to do serious bodily injury; (3) a killing that resulted from a depraved heart or extreme recklessness; and (4) murder committed by an ACCOMPLICE during the commission of, attempt of, or flight from certain felonies.

Some jurisdictions still use the term *malice aforethought* to define intentional murder, but many have changed or elaborated on the term in order to describe more clearly a murderous state of mind. California has retained the malice aforethought definition of murder (Cal. Penal Code § 187 [West 1996]). It also maintains a statute that defines the term *malice*. Under section 188 of the California Penal Code, malice is divided into two types: express and implied. Express malice exists "when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." Malice may be implied by a judge or jury "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

In *Commonwealth v. LaCava*, 783 N.E.2d 812 (Mass. 2003), the defendant, Thomas N. LaCava, was convicted of the deliberate, premeditated murder of his wife. LaCava admitted to the shooting and the killing, but he claimed that due to his diminished mental capacity, he could not form the requisite malice when he committed the killing, so as to be convicted of first degree murder. The Supreme Judicial Court of Massachusetts found that Massachusetts law permits psychiatric evidence to attack the premeditation aspect of murder. However, the judge's instructions to the jury regarding the definition of murder was sufficient to render the error harmless, according to the court.

Many states use the California definition of implied malice to describe an unintentional killing that is charged as murder because the defendant intended to do serious bodily injury, or acted with extreme recklessness. For example, if an aggressor punches a victim in the nose, intending only to injure the victim's face, the aggressor may be charged with murder if the victim dies from the blow. The infliction of serious bodily injury becomes the equivalent of an intent to kill when the victim dies. Although the aggressor in such a case did not have the express desire to kill the victim, he or she would not be charged with assault, but with murder. To understand why, it is helpful to consider the alternative: When a person dies at the hands of an aggressor, it does not sit well with the public conscience to preclude a murder charge simply because the aggressor intended only to do serious bodily injury.

Some murders involving extreme recklessness on the part of the defendant cause extreme public outrage. In *People v. Dellinger*, 783 P.2d 200 (Cal. 1989), the defendant, Leland Dellinger, was found guilty of the murder of his two-year-old stepdaughter. The primary cause of the child's death was a fractured skull caused by trauma to the head. However, other evidence showed that the child had large quantities of cocaine in her system when she died. Moreover, her mother discovered that the defendant had fed the child wine through a baby bottle. Due to the defendant's "wanton disregard for life," the verdict of murder was proper, according to the California Supreme Court.

A person who unintentionally causes the death of another person also may be charged with murder under the depraved-heart theory. Depraved-heart murder refers to a killing that results from gross negligence. For example, suppose that a man is practicing shooting his gun in his backyard, located in a suburban area. If the man accidentally shoots and kills someone, he can be charged with murder under the depraved-heart theory, if gross NEGLIGENCE is proven.

In *Turner v. State*, 796 So. 2d 998 (Miss. 2001), the defendant, Jimmy Ray Turner, was convicted of the murder of his wife. The couple had contemplated DIVORCE, but had apparently reconciled. After their reconciliation, they went together to the defendant's parents' house to return a borrowed shotgun. As they walked to the parents' house, the defendant, who testified that he did not think the shotgun was loaded, demonstrated to his wife how he carried the gun with his fingers on the trigger and walked with his arms swinging. His wife stopped suddenly, bumping into the defendant. The shotgun fired, killing the wife. Although the defendant was not charged with premeditated murder, he was indicted and convicted of depraved-heart murder due to his gross negligence in handling the shotgun.

Most states also have a felony murder statute. Under the felony murder doctrine, a person who attempts or commits a specified felony may be held responsible for a death caused by an accomplice in the commission of the felony; an attempt to commit the felony; or flight from the felony or attempted felony. For example, if two persons rob a bank and during the ROBBERY one of them shoots and kills a security guard, the perpetrator who did not pull the trigger nevertheless may be charged with murder.

The felonies that most commonly give rise to a felony murder charge are murder, rape, robbery, BURGLARY, KIDNAPPING, and ARSON. Many states add to this list. Maine, for example, adds gross sexual assault and escape from lawful custody (Me. Rev. Stat. Ann. tit. 17-A, § 202 [West 1996]). Generally, felony murder liability lies only if the death was a reasonably foreseeable consequence of the felony, a felony attempt, or flight from the crime. For example, courts have held that death is a reasonably foreseeable consequence of armed robbery.

Most states divide the crime of murder into first and second degrees. In such states, any intentional, unlawful killing done without justification or excuse is considered second-degree murder. The offense usually is punished with a long prison term or a prison term for life without the possibility of parole. Second-degree murder can be upgraded to first-degree murder, a more serious offense than second-degree murder, if the murder was accomplished with an aggravating or special circumstance. An aggravating or special circumstance is something that makes the crime especially heinous or somehow worthy of extra punishment.

California lists some 20 different special circumstances that can boost a murder from second to first degree, including murder carried out for financial gain; murder committed with an explosive; murder committed to avoid or prevent a lawful arrest; murder to perfect or attempt an escape from lawful custody; murder of a law enforcement officer, prosecutor, judge, or elected, appointed, or former government official; murder committed in an especially heinous, atrocious, or cruel fashion where the killer lay in wait for, or hid from, the victim; murder where the victim was tortured by the killer; murder where the killer used poison; or murder where the killing occurred during the commission of, aid of, or flight from certain felonies. These felonies include rape, robbery, kidnapping, burglary, arson, train wrecking, sodomy, the performance of a lewd or lascivious act upon a child under age 14, and oral copulation with a child under age 14 (Cal. Penal Code § 190.2 [West 1996]).

If a murder does not qualify by statute for first-degree murder, it is charged as second-degree murder. A second-degree murder may be downgraded to MANSLAUGHTER if mitigating factors were involved in the killing, such as

## Women Murdered on the Job

The workplace can be a dangerous environment, exposing workers to hazards that can cause accidents, disease, and sometimes death. But the workplace also is a place where murders are committed. Statistics indicate that there is a large difference between the number of men and the number of women killed on the job. Fifteen percent of men who die at work are murdered, whereas 35 percent of female workplace deaths are the result of homicides.

It is believed that the high number of female workplace murders is based in part on the kinds of jobs women take in the economy. Many work in retail jobs, clerking at late-night convenience stores where robberies often occur and where security is often lacking. Analysts also believe that male perpetrators select retail stores where they believe that they can easily overpower a female employee.

Other workplace murders of women are committed by former boyfriends and husbands who are upset over a separation. Some psychologists believe that these men associate the woman's job with independence and the breakup of their relationship. Murdering a former wife or lover is a way for a man to reassert his dominance.

Finally, some murders of women appear to be committed out of resentment over the loss of a job at the workplace and the perception that women are to blame for the job loss. Roughly five percent of all the murders committed in the workplace, male and female, are committed by former or current employees.

adequate provocation by the victim, or the absence of intent or recklessness on the part of the defendant.

Maine has simplified the law of murder. In Maine, a person is guilty of murder if he or she intentionally or knowingly causes the death of another human being, engages in conduct that manifests a depraved indifference to the value of human life and causes death, or intentionally or knowingly causes another human being to commit suicide by the use of force, duress, or deception (Me. Stat. tit. 17-A § 201 [1996]). Maine also has a felony murder statute. It does not divide murder into degrees.

Sentencing for murder varies from state to state, and according to degrees in the states that have them. Second-degree murder usually is punished with more than 20 years in prison. A person convicted of second-degree murder in Minnesota, for example, may be sentenced to prison for not more than 40 years. Some states, such as California, allow a sentence up to life in prison for second-degree murder.

In some states that have a first-degree murder charge, the crime is punished with a life term in prison without the possibility of parole. In other states, first-degree murder is punishable by death. A defendant's criminal history may affect sentencing for a murder conviction. The greater the criminal history, the more time the defendant is likely to serve. The criminal history of a murder defendant may even cause a murder charge to be upgraded from second degree to first degree. In California, for example, a murder defendant who has a prior conviction for murder faces an automatic first-degree murder charge.

The strongest defenses to a murder charge are provocation and SELF-DEFENSE. If the defendant acted completely in self-defense, this fact may relieve the defendant of all criminal liability. If it does not relieve the defendant of all liability, self-defense at least may reduce the charge from murder to manslaughter. Provocation rarely results in complete absolution, but it may reduce the defendant's criminal liability. For example, suppose that a family is being tormented by a neighbor for no apparent reason. The neighbor has damaged the family's property, assaulted the children, and killed the family dog. If the father kills the neighbor and is charged with murder, the father may argue that the provocation by the victim was so great that if he is to be found criminally liable at all, he should be found liable for manslaughter, not murder.

A defendant's subjective belief that he or she was under attack by a victim at the time of a

killing may be a basis for a claim of self-defense. In *Henderson v. Texas*, 906 S.W.2d 589 (Tex. App. 1995), the defendant, Sherri Henderson, was convicted of the murder of a victim whom she shot outside of a nightclub. The victim had engaged in a fight with the defendant's sister inside the club, and the fight later moved outside. The defendant carried a gun that she had purchased a few days before, apparently for protection from her estranged husband. The facts in the case were in dispute, but the defendant found her sister bleeding from the head when she went to the parking lot. She claimed that she saw someone reach for a weapon, and she fired into a crowd, hitting and fatally wounding the woman who had fought her sister. The jury apparently believed the prosecution's claim that the defendant had intentionally shot at the victim after seeing her sister on the ground, and Henderson was convicted of murder. However, the Texas appellate court reversed the trial court's conviction, holding that evidence of the defendant's subjective beliefs regarding her attacker's identity and evidence of prior attacks on the defendant by her husband were relevant to her claim for self-defense.

Insanity is another defense to a murder charge. If a defendant was suffering from such a defect of the mind that he or she did not know what he or she was doing, or the defendent did not know that what he or she was doing was wrong, the defendant may be found not guilty by reason of insanity. In some states, the defendant may be found guilty but mentally ill. In either case, the result is the same: The defendant is confined to a mental institution instead of a prison.

The INSANITY DEFENSE has many critics, and it especially comes under fire when a defendant commits an atrocious killing. In 2001, the nation was shocked by the story about Andrea Yates, who drowned each of her five young children in a bathtub. The children's ages ranged from six months to seven years old at the time of the killings. Yates was estranged from her husband and contacted him shortly after the killings. She subsequently confessed to the crime but claimed the defense of insanity. Her counsel argued that because she suffered from schizophrenia, which had first surfaced several years earlier, she did not know the difference between right and wrong at the time of the killings. According to testimony, she had considered stabbing her first child shortly after his birth. The insanity defense failed, however, and Yates was convicted and sentenced to life in prison.

The modern law of murder is relatively static, but minor changes are occasionally proposed or implemented. Some legislatures have debated the idea of striking assisted suicide from murder statutes. Some have considered proposals making doctors liable for murder if they perform a third-trimester ABORTION. Many have made changes with respect to juveniles. Juveniles accused of murder used to be tried in juvenile courts, but in the 1980s and 1990s, legislatures passed laws to make juvenile murder defendants over the ages of 14 or 15 stand trial as adults. This change is significant because a juvenile defendant convicted in the juvenile justice system might go free upon reaching a certain age, such as 21. A juvenile defendant who is tried in adult court does not have such an opportunity and may be sentenced to prison for many years, or for life without parole. A juvenile may be put to death upon conviction for murder but only if he or she was age 16 or older at the time of the offense (*Thompson v. Oklahoma,* 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 [1988]).

### Mass Murders and Serial Killings

The public is often fascinated, although also horrified, by stories of mass murders and serial killings. This fascination is evidenced by the popularity of such films as *Natural Born Killers* and *Silence of the Lambs*. When a mass murder or serial killing occurs, it often receives considerable media attention. Stories are revisited for years following the incidents, as experts and novices alike try to determine the causes of why these tragedies occur and how they can be prevented. Although statistics show that mass murders and serial killings are more common now than they have been in the past, this type of killings is still rather rare.

Criminologists and other experts distinguish between a serial killer and a mass murderer, although the profiles of these perpetrators are often similar. A serial killer is most often a younger, white male, who targets specific strangers near his work or home. This type of killer is typically a sociopath who kills to satisfy delusional personal needs and desires through killing by physical force. Serial killers such as Jack the Ripper, David Berkowitz, Ted Bundy, and John Wayne Gacy are household names. A mass murderer is likewise often a young, white male, who acts deliberately and methodically in

carrying out his killings. One of the most celebrated mass murderers was Charles Joseph Whitman, who in 1966 climbed a tower at the University of Texas at Austin and engaged in a 90-minute shooting spree. He shot 44 people, killing 14, before being fatally shot by a police officer. The motivation of either a serial killer or a mass murderer obviously varies by the killer, but experts note that it is often terror, power, revenge, or profit.

The United States and several other countries have been especially horrified by a number of school shootings in the past decade. One of the most horrific of these shootings occurred at Columbine High School in Littleton, Colorado on April 20, 1999. Two teenagers, Dylan Klebold and Eric Harris, went on a shooting rampage throughout the school, killing 12 students and injuring more than 20, before finally killing themselves. Since 1996, more than 25 schools in the United States have suffered from school shootings, as have schools in such countries as Canada, Sweden, Scotland, and Germany. Because the perpetrators of these murders are usually teenagers, experts have investigated these shootings closely, in order to identify potential signs that an unbalanced student might consider resorting to violence.

"OFFICIAL COMPULSION TO AFFIRM WHAT IS CONTRARY TO ONE'S RELIGIOUS BELIEFS IS THE ANTITHESIS OF FREEDOM OF WORSHIP."
—FRANCIS MURPHY

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Capital Punishment; Criminal Law; Death and Dying; Felony-Murder Rule; Homicide; Insanity Defense; Juvenile Law.

## ♦ MURPHY, FRANCIS WILLIAM

As a champion of civil liberties in the WORLD WAR II era, Francis ("Frank") William Murphy had an extraordinary political and legal career. An associate justice of the U.S. Supreme Court from 1940 to 1949, he previously had served in local, state, and federal government. He was appointed U.S. governor general of the Philippine Islands in 1935, elected governor of Michigan in 1936, and appointed U.S. attorney general in 1939. Murphy's support for workers, women, and members of religious and racial minority groups, as well as his broad reading of the First and Fourth Amendments, distinguished him at a time when both the federal government and the Court moved slowly in upholding CIVIL RIGHTS.

Born in Sand Beach (later Harbor Beach), Michigan, April 13, 1890, Murphy was the son of an Irish Catholic country lawyer and a devoutly religious mother. He studied at the University of Michigan before being admitted to the state bar in 1914. He then went off to fight in France and Germany in WORLD WAR I. On returning to Michigan, he acquired legal experience by working in the state attorney general's office and in private practice. He next became judge for the principal criminal court in Detroit, which in turn led to a political career. A pro-labor Democrat, Murphy was mayor of Detroit from 1930 to 1933.

In the midst of the Great Depression, Murphy supported FRANKLIN D. ROOSEVELT for president in 1932. President Roosevelt rewarded him with appointment as the governor general of the Philippine Islands. Murphy enacted MINIMUM WAGE laws and supported women's suffrage while helping to effect the country's transition to independence. Returning to Michigan, he campaigned and won election as governor in 1936. That year the historic sit-down strike by 135,000 automobile workers proved to be the turning point in Murphy's career. He refused to deploy state police against the unpopular strikers and as a consequence lost his reelection bid in 1938.

President Roosevelt named him to his administration. Although Murphy wanted to be secretary of war—and, indeed, would spend several years trying to find ways to join the war effort—Roosevelt had other plans. The president made him U.S. attorney general. Murphy established the first civil liberties unit in the JUSTICE DEPARTMENT and brought suit against trust companies and a powerful DEMOCRATIC PARTY boss, Thomas J. Pendergast of Kansas City. In 1939 the death of Associate Justice PIERCE BUTLER opened the so-called Catholic seat on the Supreme Court, and Roosevelt gave it to a reluctant Murphy, who thought himself less qualified than others.

Murphy served for nine years as an associate justice. He wrote 199 opinions. Inherently suspicious of government power and passionately devoted to the rights of the weak, Murphy supported civil rights in nearly every case. He scorned the federal government's treatment of Japanese Americans during World War II, for

example, and at other times sided with the claims of workers and religious minority groups.

This philosophy found its best expression in 1944. "The law knows no finer hour," Murphy wrote in one of his many dissents, "than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution" (*Falbo v. United States,* 320 U.S. 549, 64 S. Ct. 346, 88 L. Ed. 305). That case was one of several in the 1940s involving church-state issues that concerned the rights of the Jehovah's Witnesses, in this case a CONSCIENTIOUS OBJECTOR. Murphy often voted in favor of upholding FIRST AMENDMENT claims; for example, he joined the majority in ending compulsory flag-saluting for children in public schools (*West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 [1943]). In another important speech case, Murphy wrote the majority opinion protecting LABOR UNION picketing (*Thornhill v. Alabama,* 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 [1940]). Yet more often than not, his broader reading of individual rights led him into dissent against the majority.

On and off the Court, Murphy faced criticism for his idealism. He was seen as too emotional at the expense of strict legal thinking. He was the target of the popular barb, "justice tempered with Murphy." His personal life only fed his somewhat prim reputation, because he was a hypochondriac who never drank, smoked, or married. Chief Justice HARLAN F. STONE disliked him for another reason: he thought Murphy was too reliant on his law clerks.

Although Murphy occasionally seemed out of step with both the Court and his times, his broad vision of civil liberties was later vindicated. In particular, he believed in vigorous application of the Fourth Amendment's prohibition of unreasonable SEARCHES AND SEIZURES by the police. Murphy dissented in *Wolf v. Colorado,* 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949), where the Court refused to apply to the states what already existed for federal courts: the ban on admitting improperly seized evidence in a trial. He wrote that the majority, by leaving state courts out of the equation, was allowing "lawlessness by officers of the law." Twelve years later, in 1961, a different Supreme Court agreed with him and overruled *Wolf* in the landmark case MAPP V. OHIO, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

*Frank Murphy.*
LIBRARY OF CONGRESS

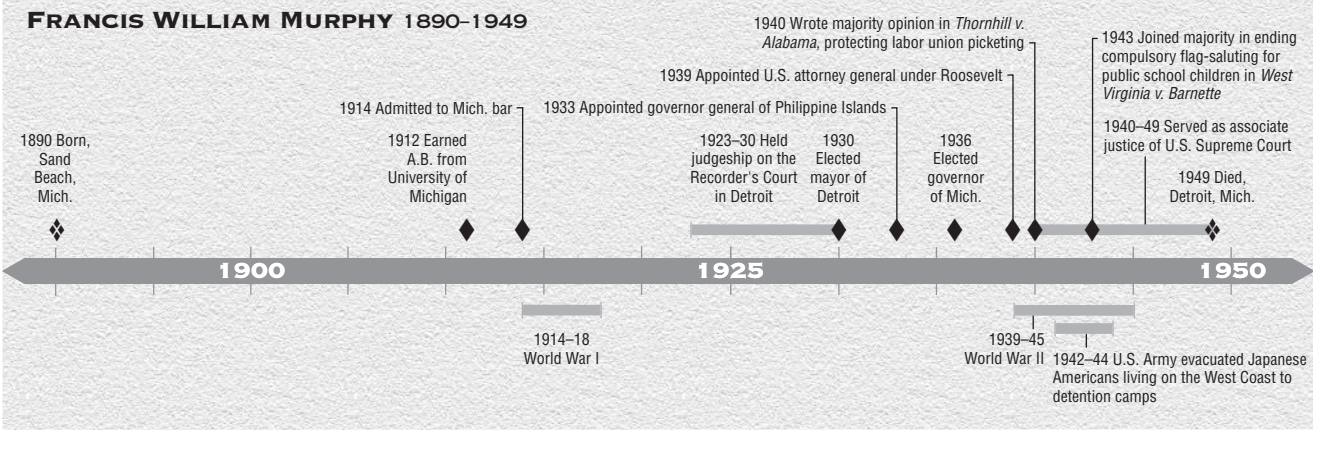

Murphy died on July 19, 1949 in Detroit, Michigan.

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Flag; Japanese American Evacuation Cases.

## MUSIC PUBLISHING

*The contractual relationship between a songwriter or music composer and a music publisher, whereby the writer assigns part or all of his or her music copyrights to the publisher in exchange for the publisher's commercial exploitation of the music.*

Music publishing has been an important part of the U.S. entertainment industry since the early twentieth century. Songwriters contract with music publishing companies to exploit their songs, with both parties sharing the income generated from the songs. Before the introduction of musical recordings, songwriters and publishers earned their income primarily from the sale of sheet music. In the modern era, songs can be commercially exploited in many types of media, including recordings, radio, television, film, and video. Music publishing is governed by U.S. COPYRIGHT law, but much of the law of music publishing is negotiated through private contractual agreements.

Music publishers are powerful intermediaries between songwriters and recording companies. Typically, a music publisher demands copyright ownership from the songwriter, along with half of the ROYALTIES. A publisher may make a large cash advance to a popular or promising songwriter, but often the advance is minimal. In return, the publisher seeks to place the songwriter's compositions with performers who will make a recording. In addition, a publisher will try to place songs in films, television shows, and advertisements. If the songwriter is also a performer, the publisher will assist the artist in obtaining a recording contract. The publisher also assumes the responsibility of collecting royalties and giving the songwriter his share.

Publishing income comes from various sources, but it is separate from income derived from retail sales of recordings. Income from recording sales flows to the owner of the recording (usually the record company), which then pays a contractually negotiated recording royalty to the performer. The owner of the recording separately pays the publisher of the recorded compositions a mechanical royalty for the right to record, copy, and distribute copies of the composition. These royalties are called mechanical royalties because the license is for mechanical recording and reproduction of the composition.

Under U.S. copyright law, a publisher is required to grant a mechanical license to anyone wishing to record a composition that has previously been recorded and released commercially. This is called a compulsory license, and the minimum rate that must be paid to the publisher for such a license is set by Congress at a few cents for each copy made of a recording of the composition. Normally, however, a record label that wishes to record a publisher's composition will negotiate a private license with the publisher rather than follow the strict accounting and reporting rules that accompany recording under a compulsory license. Because of this situation, the statutory compulsory license rate has become the effective ceiling rate for recording a composition, because no one need pay more than the rate set by law.

A lucrative part of music publishing involves performance royalties. Performance royalties are paid when a song is played on the radio or television, used by businesses for background music, or used by clubs for dance music or by bands performing at a club. A popular song can earn thousands and sometimes millions of dollars through the collection of performance royalties. However, it would be too demanding for a publisher to sign performance licenses with every club, radio station, and business office that might use a particular song. Instead publishers and songwriters register with a performing rights organization (PRO) to collect fees on their behalf.

The three PROs in the United States are the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music Inc. (BMI), and the Society of European State Authors and Composers (SESAC). The PROs negotiate blanket licenses with all who use music for profit. Such fees can range from less than one hundred dollars for a small business using music to enhance its business environment, to hundreds of thousands of dollars or millions of dollars for large-scale broadcasting entities. The PROs then monitor radio and television broad-

casts, and then using a complex statistical model, they pay publishers and songwriters based on projected actual uses of a song. When a composition is registered with a PRO, the registrant informs the PRO what percentages of royalties are to be paid to the publisher and songwriter. The PRO issues separate payments to the publisher and to the songwriter (or songwriters). A particular songwriter may only be registered with one PRO at a given time to avoid confusion as to which PRO is responsible for collecting performance royalties on the songwriter's behalf. The use of blanket licenses allows an artist to perform compositions written by another songwriter without first requesting the songwriter's permission.

As opposed to mechanical licenses, there is no statutory rate for the use of a song in films and television advertisements (synchronization licenses), in radio advertisements (transcription licenses), or for sale as sheet music (print licenses). These fees are negotiated separately between the user and the music publisher. The licensee pays the entire fee to the publisher, who then pays the songwriter's share to the songwriter.

Recording artists who feel that the publishers have cheated them out of part of their royalties often take the publishers to court. High-profile artists have sued, claiming that their celebrity and marketability has not given them leverage against the music industry. The pop star Michael Jackson, who was wildly successful in the 1980s, launched a lawsuit against Universal Music Group (UMG) in 2003 claiming that UMG owed him millions of dollars in royalties from music he recorded (alone and with his brothers) that was released after 1980. In September a judge in Los Angeles threw out part of Jackson's lawsuit. Jackson had given up his rights to all songs released before 1979 in a deal with the music publisher Motown (which was later bought by UMG). Jackson attempted to cancel the 1980 agreement with Motown as part of his suit, but the judge ruled that there was no justification to cancel the agreement; consequently, all pre-1980 tunes were removed from the suit.

Musicians also sue each other for copyright infringement. In the case of *Three Boys Music Corporation v. Bolton,* 212 F.3d 477 (9th Cir. 2000), a jury awarded rhythm-and-blues group the Isley Brothers $5.4 million in a lawsuit against the singer-songwriter Michael Bolton and his co-writer. The Isley Brothers maintained that Bolton and Goldmark's 1991 song *Love is a Wonderful Thing* was substantially similar to their song of the same name, released in 1966. While Bolton and Goldmark contended that they had not deliberately copied the song, the jury felt they were similar enough to prove the Isleys' case. The Ninth Circuit Court of Appeals upheld the verdict.

Since the 1960s, many popular musical performers have written their own musical compositions. Some of these artists choose to "self-publish," forgoing relationships with publishers and thus retaining full ownership and control of their copyrights. These artists are more often songwriters whose compositions are so unique that they are not likely to be recorded by other performers. Therefore, this type of artist will receive little benefit from an outside publisher's marketing efforts. However, because the music industry's royalty structure assumes that publishing income will be paid to a publisher, a self-published artist often will set up her own publishing company under an assumed name to receive publishing income. A self-published artist will frequently hire an accounting firm to handle specific administrative functions such as royalty collection, for a much smaller fee than a full-service music publisher would demand.

In the early 2000s, the advent of music-sharing over the INTERNET has begun to change the face of the recording industry. With file-sharing software such as Napster and KaZaA, individuals can trade favorite songs and download them to their computers. The recording industry began retaliating with a series of lawsuits, as did individual artists such as the rapper Dr. Dre and the heavy metal band Metallica. Although the creators of file-sharing software have made efforts to comply with copyright laws and work with music publishers, the computer has made music PIRACY a significant issue. The Recording Industry Association of America (RIAA) went on the offensive in the summer of 2003 with a series of legal actions. It filed 261 lawsuits against individuals who allegedly downloaded and shared music illegally. Since some of those named were children and others were adults who claimed their grandchildren had downloaded the music, it was widely believed that the move was more to make a point than to go after ordinary citizens. The RIAA also went after COLLEGES AND UNIVERSITIES, a huge market for file-sharing, and a number of colleges have begun to crack down on illegal

music sharing. This situation has raised issues of privacy (should a college be required to report a student caught downloading pirated music, or does the student have the right to anonymity, for example), and as technology continues to become more sophisticated the issue will undoubtedly need to be explored carefully and continuously.

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CROSS-REFERENCES

Broadcasting; Entertainment Law; Intellectual Property; License; Royalty.

## ♦ MUSSEY, ELLEN SPENCER

At a time when women in the United States were often excluded from higher education, Ellen Spencer Mussey helped found a coeducational law school to promote the social and economic advancement of women.

In 1896, Mussey and colleague EMMA M. GILLETT sponsored a series of lectures in Washington, D.C., aimed at attracting and training female lawyers. The lectures were primarily for local women whose professional goals were frustrated by the men-only admission policies of most law schools in the District. After two years of well-received lectures, Mussey and Gillett expanded their curriculum and formally established Washington College of Law, a coeducational institution that later became part of American University. Mussey was the law school's first dean; she was succeeded by Gillett in 1913.

Mussey was born May 13, 1850, in Geneva, Ohio, to Platt Rogers Spencer and Persis Duty Spencer. After attending Lake Erie Seminary, in Painesville, Ohio, and Rockford Seminary, in Rockford, Illinois, Mussey moved to Washington, D.C., where she worked as a principal for the Spencerian Business College. She married lawyer Reuben Delavan Mussey in 1871 and had two children, Spencer Mussey and William Hitz Mussey. Under her husband's tutelage, Mussey read law and eventually attended the Law School of Cornell University in the summer of 1896.

When Mussey's husband became seriously ill, she took over the daily operation of his law office. After his death in 1892, Mussey was admitted to the D.C. bar. (At that time, a law degree was not required for bar admission.) She became one of very few women from her generation to be admitted to practice before the U.S. Supreme Court and the U.S. Court of Claims. In private practice, Mussey specialized in international and real estate law. At the request of

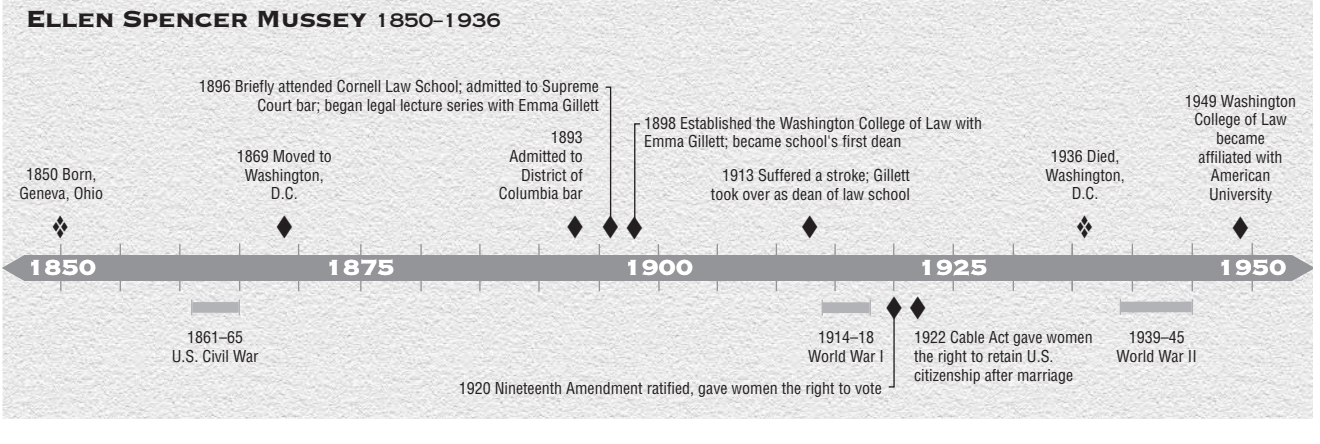

American Red Cross founder Clara Barton, she became the Red Cross's first staff attorney.

A social reformer, Mussey was a major force behind new legislation giving women the same rights as men over children, property, and earnings. She also pushed for laws allowing women to keep their U.S. citizenship after marrying foreign citizens.

Mussey served as editor of *American Monthly* magazine, committee chair for the National Council of Women, and delegate to the 1911 International Council of Women held in Stockholm. She also helped organize the National Association of Women Lawyers and the Women's Bar Association of the District of Columbia.

Mussey died April 21, 1936, in Washington, D.C., at the age of eighty-five. She had overcome long-standing societal barriers to pursue her professional interests and social agenda. Washington College of Law was the crowning achievement of her illustrious career.

## MUSSOLINI, BENITO

Benito Mussolini ruled as dictator of Italy from 1922 to 1943. His political philosophy, which he called fascism, was based on the total domination of the government in all spheres of political, social, economic, and cultural life. Initially seen by the Italian people as a hero, Mussolini was driven from government before the end of WORLD WAR II.

Mussolini was born in Dovia di Predappio, Italy, on July 29, 1883, the son of a socialist blacksmith. He embraced SOCIALISM as a teenager and as a young man became a schoolteacher and socialist journalist in northern Italy. In 1902 he moved to Switzerland and earned a living as a laborer. He returned to Italy in 1904 to perform his required military service and then resumed his teaching.

His wanderlust, however, resumed. He went to Trent, Austria, in 1909 and worked for a socialist newspaper. He was expelled from Austria after he publicly urged the return of Trent to Italy. In 1912 he became editor of *Avanti!,* the most important Italian socialist newspaper, with headquarters in Milan. When WORLD WAR I broke out in August 1914, Mussolini proved unwilling to toe the socialist line. Socialists argued that disputes between nations were not their concern and that Italy should stay out of the conflict. Mussolini disagreed, whereupon the socialists expelled him from the party.

*Benito Mussolini.*
GALE

This expulsion radically changed Mussolini's political outlook. He founded *Il Popol d'Italia* (The People of Italy), a strident newspaper that argued that Italy should enter the war against Germany. When Italy did join the war, Mussolini enlisted in the army and served from 1915 to 1917, when he was wounded.

After the war Mussolini started his own political movement. In 1919 he formed the Fascist party, called the Fasci di Combattimento. The name *fascism* is derived from the Latin *fascis,* meaning *bundle.* The fasces is a bundle of rods strapped together around an axe. A symbol of authority in ancient Rome, it represented absolute, unbreakable power. Mussolini promised to recreate the glories of the Roman Empire in a movement that was nationalistic, antiliberal, and antisocialist.

Mussolini's movement struck a chord with lower-middle-class people. Supporters wore black shirts and formed private militias. In 1922 Mussolini threatened a march on Rome to take over the government. King Victor Emmanuel capitulated to this threat and asked Mussolini to form a government. Once in power Mussolini abolished all other political parties and set out to transform Italy into a fascist state.

Initially Italians and foreign observers saw Mussolini as a strong leader who brought needed discipline to the economy and social structure of Italy. He poured money into building the infrastructure of a modern country. In a

country known for disorganization, it was said that Mussolini made the trains run on time. He also, however, abolished trade unions and closed newspapers that did not follow the party line. He used the police to enforce his rule and imprisoned thousands of people for their political views.

In the 1930s Mussolini sought to make Italy an international power. In 1935 Italy invaded the East African country of Ethiopia. Mussolini ignored the League of Nations' demand that he withdraw and proceeded to conquer the country. In 1936 he sent Italian troops to support General Francisco Franco's Loyalist Army in the Spanish Civil War. By the end of the 1930s, Mussolini also moved closer to ADOLF HITLER and Nazi Germany. In 1939 he invaded nearby Albania.

Mussolini did not enter World War II until June 1940, when he invaded the south of France. At first his alliance with Hitler appeared propitious. However, the Italian army suffered defeat in North Africa, and the Allies invaded Sicily in 1943. Mussolini's regime crumbled. King Victor Emmanuel dismissed Mussolini as the head of state on July 25, 1943. Mussolini was briefly imprisoned, but German troops rescued him. Hitler directed Mussolini to head an Italian puppet state in northern Italy, then under the control of German forces. As the Allies moved north in 1945, Mussolini tried to escape to Switzerland. He was captured by Italian partisans and shot on April 28, 1945. The bodies of Mussolini and his mistress, Clara Petacci, were displayed to jeering crowds on the streets of Milan.

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## "MUST CARRY" LAW

See MASS COMMUNICATIONS LAW (sidebar).

## MUTILATION

*Cutting, tearing, erasing, or otherwise changing a document in a way that changes or destroys its legal effect. It is a federal crime to mutilate public records, coins, or passports.*

*In* CRIMINAL LAW*, the crime of violently, maliciously, and intentionally giving someone a serious permanent wound.*

## MUTINY

*A rising against lawful or constituted authority, particularly in the naval or* ARMED SERVICES.

In the context of CRIMINAL LAW, mutiny refers to an insurrection of soldiers or crew members against the authority of their commanders. The offense is similar to the crime of SEDITION, which is a revolt or an incitement to revolt against established authority, punishable by both state and federal laws.

## MUTUAL COMPANY

*A corporation in which members are the exclusive shareholders and the recipients of profits distributed as dividends in proportion to the business that such members did with the company.*

The most common kind of mutual company is a mutual insurance company. In this type of organization, which is a cooperative association, the members are both the insurers and the insured. Such companies exist for the purpose of satisfying the insurance needs of their members at a minimal cost. The members contribute through a system of premiums or assessments, forming a fund from which all losses and liabilities are paid. Any profits are divided among the members of the company in amounts proportionate to their individual interests.

The members of a mutual company choose the management. Professional associations that offer their members insurance coverage often form mutual insurance companies.

## MUTUAL FUND

*A fund, in the form of an investment company, in which shareholders combine their money to invest in a variety of stocks, bonds, and money-market investments such as U.S. Treasury bills and bank certificates of deposit.*

Mutual funds provide a form of investment that is both relatively safe and relatively lucrative. Mutual funds offer investors the advantages of professional management of invested money and diversification of that investment. Mutual fund managers assume the responsibility of investigating and researching financial markets and selecting the combination of stocks, bonds, and other investment vehicles to be bought and sold. Thus, consumers purchase shares in a mutual fund and rely on the expertise of the mutual fund manager, whose job is to provide them with the highest possible return on their investments.

Investing in a mutual fund is not as safe as investing in a bank or a SAVINGS AND LOAN ASSOCIATION. The federal government normally insures money deposited in banks or savings and loan associations; if one of those institutions fails, each of its deposits of up to $100,000 generally is guaranteed. This is not true of other investment vehicles such as stocks and bonds, which by their nature rise and fall in value and offer no guarantees. But investing in a mutual fund usually is considered to be safer than investing in individual stocks and bonds. Mutual fund managers observe the financial markets and take advantage of trends that affect the fund by buying and selling various components of the fund. And because a mutual fund is diverse—comprised perhaps of a hundred or more different kinds of stocks, bonds, or other investments—even the complete failure of one stock will make a relatively small impact on the fund's overall success.

There are two general types of mutual funds. An investor in an open-end fund may request at any time that the fund buy back, or redeem, that investor's shares. The price of shares in an open-end fund is based on the market value of the fund's portfolio of investments. Investors in open-end funds may be charged additional fees known as loads. Front-end loads are charged when the investor purchases shares in a mutual fund; back-end loads are subtracted from the redemption price. Open-end funds are sold by SECURITIES dealers and brokers and financial planners, or they are sold directly to the investor by the fund's sales staff.

Closed-end funds are traded on stock exchanges or the over-the-counter market. Unlike open-end funds, closed-end funds usually have a fixed number of shares, which are purchased and redeemed at their market price plus a commission.

Mutual funds are broadly classified according to three types of investment objectives: growth of capital, stability of capital, or current income. Most funds are geared toward one or two of these objectives. For example, money-market funds invest in instruments like U.S. Treasury bills, which are relatively safe and generally stable. Therefore many investors view money-market funds as a good alternative to a bank account. Other funds seek stability of capital by investing in blue-chip stocks and high-quality bonds. Some funds are potentially more lucrative, but far riskier. Growth funds are somewhat aggressive, investing in speculative securities that show promise over time for slow but steady long-term return. Income funds also tend to be speculative, often investing in high-risk, high-yield securities with the goal of greater short-term return.

Within the three broad categories of mutual funds are numerous subcategories. Funds that seek both growth and income are known as balanced funds. Sector funds invest in certain types of businesses, such as the computer industry. Some funds strive to fulfill a political agenda, such as investing in environmentally responsible companies or companies that actively promote women and minorities. Precious metals funds, municipal bond funds, and international stock funds are other examples of mutual fund categories. Other funds are far less specialized and allow the fund manager free reign to compile and alter the fund's portfolio.

Mutual fund shareholders receive periodic investment income, or dividends, which comes from dividends and interest earned by the various securities that make up the fund's portfolio. Shareholders often elect to have these dividends reinvested into the mutual fund. Investors in mutual funds may choose to make monthly payments into the fund or have a specified amount automatically withdrawn from a bank account or savings and loan association account each month. Some companies offer a variety of open-end mutual funds with different investment objectives and allow investors a simple way to switch their money from one fund to another as their savings goals change.

Securities laws, both state and federal, govern mutual funds. Some statutes regulate the organization of investment companies and the sale of securities by brokers and dealers. Federal securities laws that regulate mutual funds include the Securities Act of 1933 (15 U.S.C.A. § 77a et seq.), the Securities Exchange Act of 1934 (15 U.S.C.A. § 78a et seq.), and the Investment Company Act of 1940 (15 U.S.C.A. § 80a–1 et seq.).

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## MUTUAL MISTAKE

*An error of both parties to a contract, whereby each operates under the identical misconception concerning a past or existing material fact.*

For example, a customer goes to the sample room of an interior decorator to select a carpet and asks the clerk to show him a navy carpet, which he subsequently purchases and takes with him. The sales slip notes that the carpet purchased is navy. When, upon examining the carpet in daylight, the customer discovers that it is black, not navy as he thought when he bought it, a mutual mistake would have occurred, since both the seller and buyer were in error concerning the correct color of the carpet sold. Since there had never been a true and complete meeting of the minds, no mutual assent was actually arrived at, and the buyer would be entitled to return the carpet and obtain a full refund.

## MUTUALITY OF OBLIGATION

*The legal principle that provides that unless both parties to a contract are bound to perform, neither party is bound.*

## MY LAI MASSACRE

The event known as the "My Lai Massacre" was one of the darkest moments of the VIETNAM WAR, and further fueled the already growing anti-war movement in the United States. On March 16, 1968, U.S. Army troops murdered more than 300 unarmed Vietnamese women, children, and elderly persons. When the facts of the massacre became known, war crime charges were brought against 30 soldiers, and there was a marked increase in both domestic and foreign pressure to end the war.

The Vietnam War began in the 1940s as a war of liberation between Vietnamese nationalists called the Viet Minh and the French who controlled Vietnam. The Viet Minh sought help from Communist China in the mid-1950s, bringing the conflict to the attention of the United States. In 1954 the French were decisively defeated, and the country was temporarily divided into North Vietnam and South Vietnam. Most of the Viet Minh and their supporters relocated to North Vietnam. When the provisional head of South Vietnam refused to hold reunification elections, hostilities resumed.

Fearing a communist takeover if the North Vietnamese won, the United States provided economic and military aid, and by 1967 the United States had almost 400,000 troops in the country. Viet Cong, Vietnamese soldiers who had trained in the North and moved back to the South to conduct guerilla warfare, were especially feared. Dressed to blend in with the peasants who populated South Vietnamese villages, the Viet Cong carried on a stealthy campaign of sabotage and murder. American soldiers, who did not speak Vietnamese and were unable to distinguish between Viet Cong combatants and the general population, were anxious and wary whenever they traveled into the rural countryside. Knowing that many villagers were sympathetic to the Viet Cong added to their stress.

My Lai was part of the Song My village located in South Vietnam's Quang Ngai Province. The area had been heavily mined by the Viet Cong, and in the weeks preceding the massacre, numerous members of "Charlie Company," a unit of the U.S. Army's American Division, had been injured or killed by the mines. Under the direction of Captain Ernest Medina, a group of about 120 anxious and angry soldiers from Charlie Company entered My Lai on a mission to "search [out] and destroy" enemy soldiers.

According to later EYEWITNESS reports, the soldiers, under orders from their platoon leader Lieutenant William L. Calley, used rifles, machine guns, bayonets, and grenades to kill the villagers. Old men, women who begged and prayed for mercy, children, and babies were murdered by the soldiers. Several young girls were raped and killed. Estimates of the number of villagers massacred at My Lai ranged from 300 to 500; the final army estimate was 347. Of the 100 soldiers who entered My Lai about 30 participated in the killing. Most of the other soldiers did not participate, but they did not try to stop the killing. Some testified later that they thought their lives would be in danger if they tried to stop their fellow soldiers.

Informed of the incident by Captain Hugh C. Thompson, an army helicopter pilot who had managed to save a few of the villagers, the U.S. Army did nothing. Ron Ridenhour, an army helicopter gunner, was told about the massacre shortly after it took place. After leaving the service, Ridenhour wrote detailed letters to the Pentagon, Congress, and the White House asking for an investigation. In November 1969 the army

appointed General William R. Peers to look into Ridenhour's charges.

After a four-month army investigation that included listening to 398 witnesses and collecting thousands of pages of testimony, charges were initially brought against 30 of the participants; that number was subsequently reduced to 13. Nine enlisted men and four officers faced charges ranging from murder to dereliction of duty for covering up the incident.

In November 1969 Seymour Hersh's newspaper story about the events of My Lai and subsequent follow-up reports shocked and horrified people around the world. The stories ignited waves of controversy over U.S. presence in Vietnam and increased pressure to bring an end to the war.

In 1971 five members of Charlie Company including Captain Medina and Lt. Calley were subjected to courts-martial. Captain Medina was represented by prominent defense attorney F. LEE BAILEY and was acquitted of all charges. Lt. Calley was the only soldier convicted. He was found guilty of the premeditated murder of more than 20 Vietnamese civilians and sentenced to life imprisonment. His sentence was later reduced to 10 years and he was paroled in September 1975.

In May 1998 three former U.S. soldiers who had placed themselves at risk to save some of the civilians at My Lai were awarded (one posthumously) the army's prestigious Soldier's Medal.

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**CROSS-REFERENCES**

Vietnam War.

## NAACP

Founded in 1909, the organization formerly known as the National Association for the Advancement of Colored People and now called simply NAACP is the oldest and largest CIVIL RIGHTS organization in the United States. Headquartered in Baltimore, Maryland, with a staff of more than 220 persons, the interracial NAACP works for the elimination of RACIAL DISCRIMINATION through LOBBYING, legal action, and education. With its victories in landmark Supreme Court cases such as BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), as well as its sponsorship of grassroots social programs, the NAACP has been a leader in the effort to guarantee that African Americans and members of other racial minorities receive EQUAL PROTECTION under the law.

The NAACP grew out of race riots that occurred in Springfield, Illinois, in August 1908. Shocked at the violence directed against African Americans by white mobs in Abraham Lincoln's hometown, William English Walling, a white socialist, wrote a magazine article that called for the formation of a group to come to the aid of African Americans. The following year, Walling met with two young white social workers, Mary White Ovington and Henry Moskowitz, and began planning a course of action. They enlisted the aid of Oswald Garrison Villard, grandson of the abolitionist WILLIAM LLOYD GARRISON, to publicize the Conference on the Status of the Negro, to be held that May. The conference drew several hundred people, many of whom would unite a year later as the NAACP.

Although originally the NAACP leadership was largely white, since the 1920s, it has been primarily African American. The organization drew many of its original white members from progressive and socialist ranks, and most of its first African American members through the leadership of the historian and sociologist W. E. B. DU BOIS. Du Bois and BOOKER T. WASHINGTON were the two principal African American leaders of the day. Du Bois had led the Niagara Movement, an African American protest organization, since 1905, and he brought the membership of that organization into the NAACP. He was named director of publicity and research for the NAACP in 1910, and he edited the organization's highly respected journal, *The Crisis,* until 1934.

From the beginning, the NAACP made legal action on behalf of African Americans a top priority. It won early Supreme Court victories in *Guinn v. United States,* 238 U.S. 347, 35 S. Ct. 926, 59 L. Ed. 1340 (1915), which overturned the GRANDFATHER CLAUSE as a means of disfranchising black voters, and in *Buchanan v. Warley,* 245 U.S. 60, 38 S. Ct. 16, 62 L. Ed. 149 (1917), which barred municipal ordinances requiring racial SEGREGATION in housing. The *grandfather clause* imposed a literacy test on persons who were not entitled to vote prior to 1866. This meant that all slaves and their descendants had to pass a rigorous literacy test based on knowledge

of the state constitution and other highly technical documents. Few, if any, African Americans passed the test.

The NAACP appointed its first African American executive director, JAMES WELDON JOHNSON, in 1920. Under Johnson and his successor, Walter White, who led the organization from 1931 to 1955, the NAACP worked for the passage of a federal antilynching law. Although unsuccessful in its efforts to pass a federal law, the NAACP brought public attention to the brutality of LYNCHING and helped to significantly reduce its occurrence. As a result, lynching—which is the infliction of punishment, usually hanging, by a mob without trial—is now illegal in every state.

In 1941 the NAACP established its Washington, D.C., bureau as the legislative advocacy and lobbying arm of the organization. The bureau does the strategic planning and coordination of NAACP political action and legislation program. It acts as the liaison between NAACP units and government agencies, and it coordinates the work of other organizations that support NAACP programs and proposals.

The bureau sponsors the annual Legislative Mobilization which informs participants of the NAACP legislative agenda, monitors and advocates for NAACP civil rights and related legislation, and prepares an annual "Report Card" showing how each member of Congress voted on key civil rights issues.

For its early litigation efforts, the NAACP relied on lawyers who volunteered their services. In 1934, the group hired CHARLES HAMILTON HOUSTON, an African American and dean of Howard Law School, as its first full-time attorney. The following year, Houston started a legal campaign to end school segregation. Houston was assisted by THURGOOD MARSHALL, a young lawyer who would go on to argue many cases before the Supreme Court and in 1967 would become the first African American appointed to the Court. In 1940, the NAACP appointed Marshall director-counsel of its new legal branch, the NAACP LEGAL DEFENSE AND EDUCATIONAL FUND (LDF). In 1957, the LDF became a separate entity.

After succeeding in Supreme Court cases concerning unequal salary scales for black teachers and segregation in graduate and professional schools, the NAACP achieved its most celebrated triumph before the Court in *Brown,* a decision that declared racial segregation in public schools to be unconstitutional.

The *Brown* decision sparked another civil rights initiative, the Montgomery, Alabama, bus boycott of 1955. The boycott catapulted MARTIN LUTHER KING JR. to national recognition and spurred the creation of the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (SCLC). By the early 1960s, the SCLC, the STUDENT NONVIOLENT COORDINATING COMMITTEE (SNCC), the CONGRESS OF RACIAL EQUALITY (CORE), and the NATIONAL URBAN LEAGUE all promoted civil rights for African Americans. These groups adopted a direct-action approach to promoting African American interests by conducting highly publicized sit-ins and demonstrations.

The NAACP, meanwhile, drew criticism for its devotion to traditional legal and political means for seeking social change. ROY WILKINS, executive director of the NAACP from 1955 to 1975, voiced his preference for traditional tactics over "the kind that picks a fight with the sheriff and gets somebody's head beaten" (Spear 1984, 7:402). Although many viewed it as overly conservative in its civil rights approach, the NAACP helped pass important civil rights legislation such as the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000a et seq.), the VOTING RIGHTS ACT OF 1965 (42 U.S.C.A. § 1973 et seq.), and the FAIR HOUSING ACT OF 1968 (42 U.S.C.A. § 3601 et seq.). The NAACP remained an interracial group and spurned the call for black nationalism and separatism voiced by SNCC, the BLACK PANTHERS, and other groups that turned to blacks-only membership later in the 1960s.

Unlike many of the more radical civil rights groups, the NAACP outlasted the turbulent 1960s. However, it experienced setbacks during the 1970s in Supreme Court cases such as *Bradley v. Millikin,* 418 U.S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974), which overturned efforts to integrate largely white suburban public school districts and largely black urban districts, and REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978), which placed limits on AFFIRMATIVE ACTION programs.

BENJAMIN L. HOOKS succeeded Wilkins as NAACP director in 1977. He held that office until 1993, when he was replaced by Benjamin F. Chavis Jr. Leadership and funding problems plagued the NAACP during the mid-1990s. After a SEXUAL HARASSMENT suit was filed against Chavis in 1994, the NAACP board of

**National Association for the Advancement of Colored People**

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|---|---|
| 1905 | W. E. B. Du Bois and others founded the Niagara Movement |
| 1908 | Race riots erupted in Springfield, Illinois, Abraham Lincoln's hometown |
| 1909 | On 100th anniversary of Lincoln's birthday, more than sixty citizens issued a "call" for a national conference to renew the struggle for civil and political liberty; the group and conference formed the foundation of the NAACP |
| 1910 | National Association for the Advancement of Colored People (NAACP) chosen as group's name at second annual conference; William Walling chosen as executive director; W. E. B. Du Bois chosen as director of publicity and research and editor of the *Crisis* |
| 1911 | NAACP incorporated |
| 1915 | In *Guinn v. United States*, the Supreme Court struck down grandfather clauses in state constitutions as unconstitutional barriers to voting rights granted under the Fifteenth Amendment |
| 1917 | Supreme Court barred municipal ordinances requiring racial segregation in housing in *Buchanan v. Warley* |
| 1920 | NAACP appointed its first African American executive director, James Weldon Johnson |
| 1923 | Supreme Court ruled in *Moore v. Dempsey* that exclusion of African Americans from a jury was inconsistent with the right to a fair trial |
| 1931 | Walter White appointed to succeed Johnson as director of NAACP |
| 1934 | Charles Hamilton Houston hired as NAACP's first full-time attorney |
| 1936 | Thurgood Marshall joined NAACP as special counsel |
| 1940 | NAACP created separate legal arm, the NAACP Legal Defense and Educational Fund, and appointed Marshall as its director-counsel |
| 1941 | Secretary of Army authorized first segregated airman unit, the 99th Squadron, better known as the Tuskegee Airmen |
| 1948 | Marshall's team argued *Shelley v. Kraemer*, which struck down racially restrictive (land) covenants; President Truman abolished racial segregation in armed services by executive order |
| 1950 | In *Sweatt v. Painter*, Supreme Court ruled racially segregated professional schools inherently unequal and therefore unconstitutional; first integrated combat units saw action in Korea |
| 1954 | Marshall's team argued *Brown v. Board of Education of Topeka, Kansas*, which ruled racial segregation in public schools unconstitutional |
| 1955 | Roy Wilkins appointed to succeed White as NAACP's executive director |
| 1961 | Marshall appointed to U.S. Court of Appeals for the Second Circuit; Jack Greenberg succeeded Marshall as director of LDF |
| 1964 | NAACP lobbying led to passage of the Civil Rights Act of 1964 |
| 1965 | NAACP lobbying led to passage of the Voting Rights Act of 1965 |
| 1967 | Thurgood Marshall became first African American associate justice of the Supreme Court |
| 1968 | NAACP lobbying led to passage of the Fair Housing Act of 1968 |
| 1972 | U.S. Supreme Court declared existing capital punishment laws unconstitutional in *Furman v. Georgia* |
| 1974 | NAACP experienced a setback when Supreme Court overturned efforts to integrate largely white suburban school districts with largely black urban districts in *Milliken v. Bradley* |
| 1976 | Georgia, Florida, and Texas drafted new death penalty laws; Supreme Court upheld these new laws |
| 1977 | Benjamin Hooks succeeded Wilkins as NAACP's executive director |
| 1978 | Supreme Court placed limits on affirmative action programs in *Regents of University of California v. Bakke* |
| 1993 | Benjamin F. Chavis Jr. appointed to succeed Hooks as NAACP's executive director |
| 1994 | NAACP board of directors voted to oust Chavis after sexual harassment suit was filed against him |
| 1995 | Myrlie Evers-Williams replaced William F. Gibson as chairman of the NAACP board of directors |
| 1996 | NAACP board appointed Kweisi Mfume, a U.S. representative from Maryland, as president and chief financial officer; Mfume cut national staff by third as first step in returning NAACP to financial health |
| 1997 | NAACP launched the Economic Reciprocity Program |
| 2000 | TV diversity agreements; retirement of the debt and first six years of a budget surplus; largest black voter turnout in 20 years |
| 2001 | Cincinnati riots; development of five year strategic plan |

SOURCE: NAACP web page; *Simple Justice* by Richard Kluger (1975).

directors voted to oust him as executive director. The following year, it dismissed board chairman William F. Gibson and replaced him with MYRLIE EVERS-WILLIAMS, the widow of civil rights activist MEDGAR EVERS. Seeking to put aside its troubles, on February 20, 1996, the NAACP board appointed Kweisi Mfume, a U.S. representative from Maryland and head of the Congressional Black Caucus, as the organization's new president and chief executive officer. To restore the organization's financial stability, Mfume cut back the national staff by one-third.

Among its many tasks, the NAACP works on the local level to handle cases of racial discrimination; offers referral services, tutorials, and day care; sponsors the NAACP National Housing Corporation to help develop low- and moderate-income housing for families; offers programs to youths and prison inmates; and maintains a law library. It also lobbies Congress regarding the appointment of Supreme Court justices.

The NAACP accepts people of all races and religions as members. In the early 2000s it had a membership of over 500,000, with 2,200 units (including more than 600 youth councils and college chapters) in the United States and around the world. The organization continues to struggle with the need to increase membership and retain relevancy while advocating for various civil rights issues. In 2000 the board instituted mandatory training for NAACP local

leadership. More than 10,000 branch officers and executive committee members attended the training, and the organization removed 800 officers and committee members who did not attend.

The NAACP has also taken steps to build coalitions with black youth. NAACP president Kweisi Mfume sits on the board of Summit Action Network, a coalition of hip hop music stars as well as record company executives and community organizations that seek to educate and mobilize fans of rap music to register and vote in local and national elections. In addition, the NAACP has sought to overcome political differences and gain the support of the country's major Latino civil right organizations including the LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC) and the NATIONAL COUNCIL OF LA RAZA. In January 2003 the NAACP announced that the UNITED NATIONS had designated it as a non-governmental organization (NGO). The NGO designation meant that the NAACP could advise and consult with foreign governments and with the U.N. secretariat on issues relating to HUMAN RIGHTS.

In 2001 the NAACP signed a new three-year contract with Mfume to continue as the organization's president and CEO. Mfume continued to move ahead with his action agenda that emphasizes civil rights, political empowerment, educational excellence, economic development, and health and youth outreach. The NAACP Board of Directors continued to implement its plan to streamline and strengthen the governing procedures of the organization. For the first time since its inception in 1909, the board began revising and updating its constitution and bylaws. Up to this point each NAACP unit including state conferences, youth councils, college chapters, and local chapters had its own constitution and bylaws. The goal of the board is to have a uniform set of governing documents that are understandable and "user-friendly."

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## NAACP LEGAL DEFENSE AND EDUCATIONAL FUND

In 1940 the organization formerly known as the National Association for the Advancement of Colored People and now called the NAACP launched the Legal Defense and Educational Fund (LDF). Since its founding, the organization has been involved in more cases before the U.S. Supreme Court than any other nongovernmental organization.

The NAACP, which had been founded in 1909 to support CIVIL RIGHTS, soon found itself needing direction and aid as it sought to help people find their way through the criminal justice system. Under the leadership of future Supreme Court Justice THURGOOD MARSHALL, the LDF was created to provide information about the criminal justice system and legal assistance to indigent African Americans.

In 1957, three years after the Supreme Court's landmark decision in BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS, 347 U.S. 483, 47 S.Ct. 686, 98 L.Ed. 873, which held that SEGREGATION in public schools was unconstitutional, the LDF was established as an entirely separate organization from the NAACP. The LDF is headquartered in New York City and has regional offices in Washington, D.C., and Los Angeles. The LDF has close to two dozen attorneys on staff whose work is supplemented by assistance from hundreds of attorneys around the United States.

The LDF primarily works with issues involving education, AFFIRMATIVE ACTION, fair employment and economic access, issues related to voting and other forms of civic and political participation, and criminal justice issues including the death penalty and prison reform. With more than 100 active cases, the LDF has one of the largest legal caseloads of any public service organization in the country.

While the primary focus of the LDF is on court cases, the fund also monitors legislation, provides advocacy, education research, and builds coalitions with related organizations. The scope of LDF activity has also widened to include advocacy for other minorities in this country as well as for global HUMAN RIGHTS. To this end, the LDF has aided in the establishment of similar organizations that advocate for other minority groups in the United States. Additionally, the fund has used its experience and legal expertise to help form public interest legal organizations in Brazil, Canada, and South Africa.

In addition to the *Brown* case which resulted in a flood of legal cases around the country relating to SCHOOL DESEGREGATION, the LDF won a number of significant cases in the 1950s that concerned housing discrimination, voting access, jury selection, the use of forced confessions, and access to counsel by indigent persons.

In the 1960s the LDF provided counsel for MARTIN LUTHER KING JR., and other civil rights activists. The LDF also began its drive to abolish CAPITAL PUNISHMENT. LDF provided counsel in numerous death penalty cases and was able to stop executions in the United States between 1966 and 1978. Since 1965 the LDF has published *Death Row USA*, a list of death-row inmates.

In the 1980s and 1990s, the LDF undertook hundreds of CLASS ACTION suits against employers, unions, and governmental units that have helped secure and safeguard the employment rights of thousands of workers.

The LDF also continued to support major VOTING RIGHTS legislation and to be involved in numerous cases aimed at securing voting rights for minorities. In the early 2000s the LDF continued to be involved in cases stemming from the redistricting of congressional districts after the 2000 census. After the 2000 presidential election, the LDF and five other civil rights organizations filed a class action lawsuit against Florida's SECRETARY OF STATE and other elected officials alleging that a significant number of minority citizens were unable to vote or faced severe obstacles in trying to register and vote.

In the early 2000s the Fund continued its fight in support of equal education and affirmative action. In February 2003 the LDF filed briefs in two major suits that challenged the use of race-conscious criteria in the admissions programs of the University of Michigan law school and its undergraduate School of Literature, Science, and the Arts. In June the Supreme Court decided in favor of the University of Michigan race-conscious criteria for admissions (*Grutter v. Bollinger*, 539 U.S., _____, 123 S.Ct. 2235, 156 L.Ed.2d 304 [U.S., Jun. 23, 2003]).

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## ♦ NADER, RALPH

Considered the father of the CONSUMER PROTECTION movement, Ralph Nader has had a great effect on U.S. law and public policy of the late twentieth century. Nader's advocacy on behalf of consumers and workers hastened into reality many features of the contemporary political landscape. The work of this lawyer and irrepressible gadfly of the powers that be, which began in the mid-1960s, has led to the passage of numerous consumer-protection laws in such areas as automobiles, mining, insurance, gas pipelines, and meatpacking, as well as the creation of government agencies such as the National Highway Traffic Safety Administration, the Occupational Safety and Health Administration, the ENVIRONMENTAL PROTECTION AGENCY, and the CONSUMER PRODUCT SAFETY COMMISSION. Nader himself has founded many well-known consumer advocacy groups, including the Public Interest Research Group, the Clean Water Action Project, the Center for Auto Safety, and the Project on Corporate Responsibility. His goal in these efforts, he has said, is "nothing less than the qualitative reform of the industrial revolution."

"THE MOST IMPORTANT OFFICE IN AMERICA FOR ANYONE TO ACHIEVE IS FULL-TIME CITIZEN."
—RALPH NADER

Nader was born February 27, 1934, in Winsted, Connecticut, to Nadra Nader and Rose Bouziane Nader, Lebanese immigrants who owned and operated a restaurant and bakery. He is the youngest of five children. He attended the Gilbert School and Princeton University on scholarships. At Princeton, he entered the WOODROW WILSON School of Public and International Affairs, and he graduated magna cum laude and Phi Beta Kappa in 1955. During an era of conformity, his challenges to school authorities and procedures at Princeton made him stand out. At one point, he protested the use of the poisonous insecticide dichlorodipehnyltrichloroethane (DDT) on campus trees.

After Princeton, Nader attended Harvard Law School, where he edited the *Harvard Law Record,* and graduated with distinction in 1958.

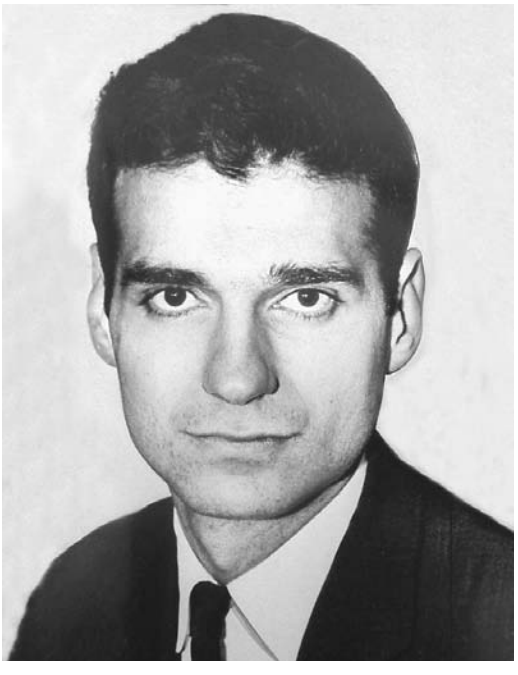

*Ralph Nader.*
LIBRARY OF CONGRESS

It was at Harvard that he first became interested in auto safety. After studying auto-injury cases, in 1958 he published his first article on the subject, "American Cars: Designed for Death," in the *Harvard Law Record.* It contained a thesis that he would bring to national attention in the mid-1960s: Auto fatalities result not just from driver error, as the auto industry had maintained, but also from poor vehicle design. Nader followed his law degree with six months of service in the Army and then a period of personal travel through Latin America, Europe, and Africa. Upon his return, he established a private law practice in Hartford, Connecticut created an informal legal aid society, and lectured from 1961 to 1963 at the University of Hartford.

Having worked at the local level for auto-safety regulations in the years subsequent to his graduation from Harvard, Nader decided to go to Washington, D.C., in 1964, where he hoped to have more influence. Through his friendship with Daniel P. Moynihan, who then was serving as assistant secretary of labor, Nader worked as a consultant at the DEPARTMENT OF LABOR and wrote a study that called for federal responsibility over auto safety.

Nader left the Department of Labor in May 1965 and devoted himself to completing what would become his most celebrated book, *Unsafe at Any Speed: The Designed-in Dangers of the American Automobile.* The book was published later that year and quickly became a best-seller. In it, Nader painted a grim picture of motor vehicle injuries and fatalities, noting that 47,700 people were killed in auto accidents in 1964. He made an eloquent appeal for federal car-safety standards that would both prevent accidents from occurring and better protect passengers in the event of an accident. The book also communicated a philosophy regarding public regulation of technology that would cause him to do battle on many other issues. "A great problem of contemporary life," he wrote, "is how to control the power of economic interests which ignore the harmful effects of their applied science and technology." Nader has devoted his life to solving this problem.

Taking some of his inspiration from the CIVIL RIGHTS MOVEMENT, Nader stood up to the

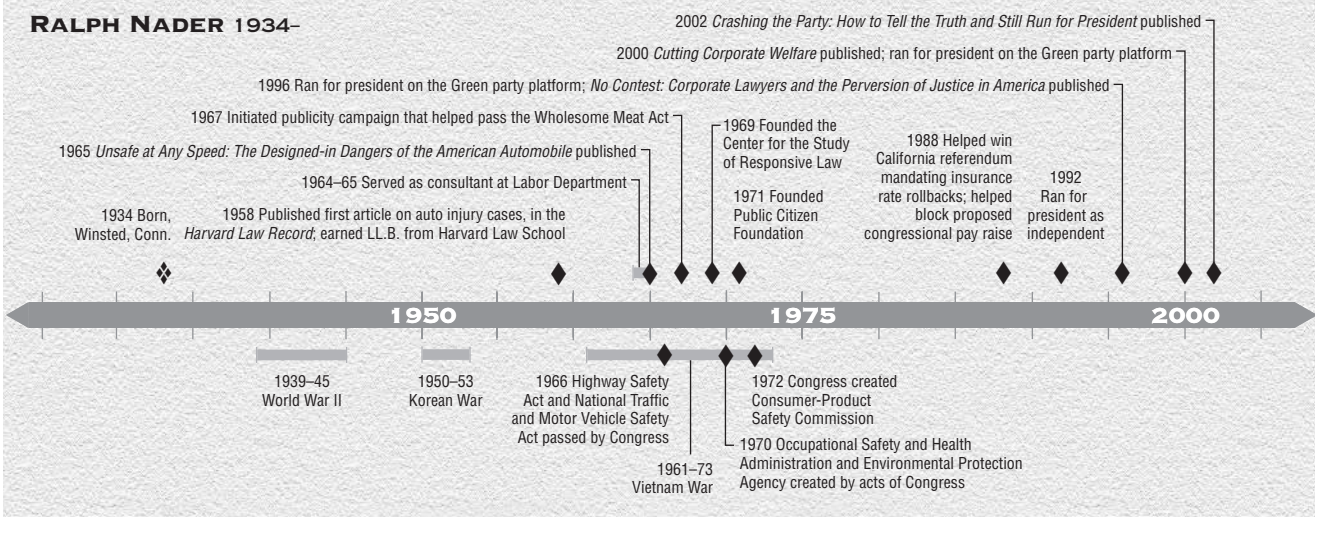

most powerful companies in the world. His book targeted the safety problems of the Chevrolet Corvair, a product of the world's largest company, General Motors (GM). He convincingly marshaled evidence that the driver could lose control of the Corvair even when it was moving slowly, thus making it "unsafe at any speed." The Goliath GM did not take kindly to the stones thrown by this David, and the company began a campaign of harassment and intimidation that was intended to abort Nader's efforts. Subsequent congressional committee hearings in 1966 revealed that GM's campaign against Nader had involved harassing phone calls and attempts to lure Nader into compromising situations with women. The company formally apologized before Congress for these tactics.

Many politicians in Washington, D.C., and many Americans were receptive to Nader's ideas. In 1966, in his State of the Union address, President LYNDON B. JOHNSON called for a national highway safety act. Later that year, Congress passed the Highway Safety Act (80 Stat. 731 [23 U.S.C.A. § 401 note]) and the National Traffic and Motor Vehicle Safety Act (80 Stat. 718 [15 U.S.C.A. § 1381 note]). The latter created a new government body, later named the National Highway Traffic Safety Administration, that oversaw the creation of federal safety standards for automobiles and was also empowered to authorize recalls of unsafe vehicles. In subsequent years, these laws and others for which Nader had advocated helped to bring about a marked decrease in traffic fatalities per vehicle mile. As the *Washington Post* exclaimed, on August 30, 1966, "[A] one-man lobby for the public prevailed over the nation's most powerful industry."

Nader's first work in the area of auto safety remains his most famous consumer advocacy. However, he has remained a tireless proponent of consumers' and workers' rights on many different fronts. Shortly after his triumph with auto regulation, Nader initiated a publicity campaign that helped to pass the Wholesome Meat Act, 81 Stat. 584, 19 U.S.C.A. 1306 (1967), which established stricter federal guidelines for meatpacking plants. By the late 1960s, he began to mobilize college students who joined him in his investigations of public policy and the effectiveness of government regulations. These young forces came to be called "Nader's Raiders," and many of them eventually rose to positions of influence in the government and in public policy organizations. By the mid-1970s, the various groups that Nader had created, including Public Interest Research Groups in many states, were doing research and financing legal action in relation to myriad public policy issues, including tax reform, consumer-product safety, and corporate responsibility.

During Ronald Reagan's presidency in the 1980s, Nader's influence in Washington, D.C., declined, particularly as the Reagan administration dismantled much of the government regulation that Nader had helped to establish. He did not give up his cause, however. In the late 1980s, he was again in the media spotlight, this time through his attempts to lower car-insurance rates in California and to block a proposed congressional pay increase. During the 1980s and 1990s, he also addressed the savings-and-loan bailout problem, well before it became high on the nation's agenda; opposed the use of chlorofluorocarbons (CFCs), which damage the ozone layer; and worked to prevent limitations on damages that consumers may receive from corporations through civil lawsuits.

Nader has run for president three times, including the 1992, 1996, and 2000 elections. In 1992, he entered the race as a write-in candidate. Four years later, he was nominated as a candidate by the GREEN PARTY, which has its strongest support in California. With political activist Winona LaDuke as his running mate, he ran a no-frills campaign, accepting no taxpayer money, eschewing advertising, and often traveling alone. He earned 684,902 votes that year, including two percent of the votes in California.

Nader ran again in the 2000 election. He raised more than $8 million for the campaign, some $30 million less than REFORM PARTY candidate PAT BUCHANAN. Running again with LaDuke, Nader finished third in the election, with 2,882,955 votes, while Buchanan finished with 448,895. Several supporters have urged Nader to run again in the 2004 election.

Nader has written and edited dozens of books during his career, including *Crashing the Party,* which details his run during the 2000 presidential election. Other books include *The Consumer and Corporate Accountability* (1973), *Corporate Power in America* (1973), *Working on the System: A Comprehensive Manual for Citizen Access to Federal Agencies* (1974), *Government Regulation: What Kind of Reform?* (1976), *The Big Boys: Power and Position in American Business* (1986), and *Collision Course: The Truth*

*about Airline Safety* (1994). He also has founded or helped to found a number of consumer and other advocacy organizations.

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Green Party.

## NAKED CONTRACT

*From the Latin term* nudum pactum, *or "bare promise" An agreement between two parties that is without any legal effect because no consideration has been exchanged between the parties. A naked contract is unenforceable.*

In ROMAN LAW, a nudum pactum was an informal agreement that was not legally enforceable, because it did not fall within the specific classes of agreements that could support a legal action. A pactum could, however, create an exception to or modification of an existing obligation.

## NAME

*The designation of an individual person or of a firm or corporation. A word or combination of words used to distinguish a person, thing, or class from others.*

An individual's name is comprised of a name given at birth, known as the *given name* or *first name,* selected by the parents, and the surname or last name, which identifies the family to which he or she belongs. Ordinarily an individual is not properly identified unless he or she is called or described by this given name in addition to the surname. This rule has significance, among other times, when students are designated in school records and when parties are called or referred to in legal proceedings, including CHILD CUSTODY actions. The general rule is that when identity is certain, a small variance in name, such as that caused by typographical errors, is unimportant.

The method by which an individual can change his or her name is usually prescribed by state statutes and involves filing a certificate in, or making an application to, a court. Whether or not a name change will be granted is ordinarily a matter of judicial discretion.

In recent years, some married women have begun to depart from the traditional practice of taking their husband's surname upon marriage. Instead they retain their birth names, the surnames possessed before marriage. While some states subscribe to the rule that a woman's legal name is her husband's surname, others hold that an individual can be known by whatever name he or she desires as long as such designation is used consistently and in the absence of a fraudulent purpose. A number of states have specifically provided that a wife is not required to use her husband's surname, or that she can use it in her personal life while continuing to use her birth name in her profession.

## NAPOLEONIC CODE

*The first modern organized body of law governing France, also known as the Code Napoleon or Code Civil, enacted by Napoléon I in 1804.*

In 1800, Napoléon I appointed a commission of four persons to undertake the task of compiling the Napoleonic Code. Their efforts, along with those of J. J. Cambacérès, were instrumental in the preparation of the final draft. The Napoleonic Code assimilated the private law of France, which was the law governing transactions and relationships between individuals. The Code, which is regarded by some commentators as the first modern counterpart to ROMAN LAW, is currently in effect in France in an amended form.

The Napoleonic Code is a revised version of the Roman law or CIVIL LAW, which predominated in Europe, with numerous French modifications, some of which were based on the Germanic law that had been in effect in northern France. The code draws upon the Institutes of the Roman Corpus Juris Civilis for its categories of the civil law: property rights, such as licenses; the acquisition of property, such as trusts; and personal status, such as legitimacy of birth.

Napoléon applied the code to the territories he governed—namely, some of the German states, the low countries, and northern Italy. It

was extremely influential in Spain and, eventually, in Latin America as well as in all other European nations except England, where the COMMON LAW prevailed. It was the harbinger, in France and abroad, of codifications of other areas of law, such as CRIMINAL LAW, CIVIL PROCEDURE, and COMMERCIAL LAW. The Napoleonic Code served as the prototype for subsequent codes during the nineteenth century in twenty-four countries; the province of Québec and the state of Louisiana have derived a substantial portion of their laws from it. Napoléon also promulgated four other codes: the Code of Civil Procedure (1807), the COMMERCIAL CODE (1808), the Code of Criminal Procedure (1811), and the Penal Code (1811).

## NARAL PRO-CHOICE AMERICA

NARAL Pro-Choice America, founded in 1969 as the National Abortion and Reproductive Rights Action League, is a nonprofit organization that was formed primarily to maintain a woman's legal right to have an abortion. The mission of NARAL, however, has broadened to include supporting policies that enable women and men to make responsible decisions about sexuality, contraception, pregnancy, childbirth, and abortion. NARAL is comprised of a network of 35 state affiliates and has 500,000 members. It has proven to be an effective organization, promoting pro-choice candidates for state and federal offices and LOBBYING for pro-choice legislation.

Since the U.S. Supreme Court legalized abortion in ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), opponents of abortion have sought to overturn or limit this decision. NARAL has vigorously defended *Roe* but has also encouraged better sex education and the use of BIRTH CONTROL to make abortion less often necessary. Through NARAL Pro-Choice America PAC, its POLITICAL ACTION COMMITTEE, NARAL has been a driving force behind the election of many pro-choice candidates. NARAL Pro-Choice America PAC mounts campaigns to elect pro-choice candidates and defeat candidates opposed to legalized abortion, using paid advertising and get-out-the-vote efforts.

The NARAL Pro-Choice America Foundation, a charitable organization founded in 1977, supports research and legal work, publishes substantive policy reports, mounts public education campaigns and other communications projects, and provides leadership training for grassroots activists. The NARAL Foundation and NARAL employ a computerized state-by-state database, NARAL*STAR (State Tracking of Abortion Rights), which provides up-to-the-minute information for NARAL staff, affiliates, policy makers, media, and coalition partners on state laws related to reproductive rights, pending legislation, state constitutions, and state executive branches.

NARAL and the NARAL Foundation regularly publish *Who Decides? A State-by-State Review of Abortion Rights,* a compilation of abortion-related information in each state, including the position on choice of elected officials, summaries of selected statutes and regulations, and recent legislative activity.

NARAL worked with the President BILL CLINTON administration to reverse policies of the RONALD REAGAN and GEORGE H.W. BUSH presidential administrations dealing with abortion. It helped remove bans on the testing of RU-486 (a nonsurgical abortion method), the use of fetal tissue in scientific research, and the provision of abortion services at military hospitals. NARAL also played a major role in the passage of the Freedom of Access to Clinic Entrances Act, which places certain restrictions on protestors' ability to obstruct or hinder persons seeking access to abortion services. Since 1996, when Congress enacted a bill banning the practice of partial-birth ABORTIONS, NARAL has been on the defensive. Though President Bill Clinton vetoed the bill, many states have since passed laws banning the procedure, and Congress continues to debate the issue.

The election of GEORGE W. BUSH as president in 2000 and the gain of Republican seats in both the House and Senate in 2002 strengthened the position of abortion opponents and gave increased urgency to the NARAL pro-choice mission. The organization continues to fight for increased access to federal funding of abortions for poor women, federal employees, and women in the military. It has mounted vigorous campaigns opposing President Bush's judicial nominees who are opposed to abortion. The organization also launched "Generation Pro-Choice," a Web site aimed at educating college students and younger women about their reproductive rights and encouraging them to become pro-choice advocates.

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Abortion; Fetal Rights; Women's Rights.

## NARCOTICS ACTS

### Background

Control over, and prevention of, the distribution and usage of narcotic drugs has been a major priority of the federal government and the various state governments since the early part of the twentieth century. Notwithstanding these efforts, statistics on the use of narcotics in the United States remain startling. According to statistics from the U.S. DRUG ENFORCEMENT ADMINISTRATION, between 10,000 and 24,000 metric tons of marijuana were available on American streets. This is in addition to large quantities of other forms of narcotics, including: 260–270 metric tons of cocaine, 110–140 metric tons of methamphetamine, and 13–18 metric tons of heroin.

According to the National Household Drug Survey on Drug Abuse, conducted by the SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, 55.6 percent of respondents between the ages of 18 and 25 said that they had used illicit drugs. This compares to 53.3 percent of respondents between the ages of 26 and 34, and 28.4 percent of respondents between the ages of 12 and 17. The National Institute on Drug Abuse's 2002 Monitoring the Future Study found that 53 percent of high-school seniors claimed to have used narcotics, including 41 percent who said that they had used drugs in the past year, and 25.4 percent who said that they had used drugs in the past month.

The efforts of law enforcement officers have had some effect on the use and transfer of narcotics in the past, although these efforts have been costly. In 2001, federal agents seized approximately 1,215 metric tons of marijuana, 106 metric tons of cocaine, 3.6 metric tons of methamphetamine, and 2.5 metric tons of heroin. The costs to society in enforcing narcotics laws have continued to increase. In 1992, the total estimated costs to society of narcotics use was $102 billion. By 2000, this number had grown to $160 billion, including almost $15 billion in HEALTH CARE costs.

### Development of Federal Narcotics Laws

During the Civil War, forms of opiates were considered "miracle" drugs that could be used as anesthetics when a doctor performed surgery. Without opiates, surgeries during that period, which often consisted of amputations, involved a group of men holding down a patient while a doctor sawed off the limb of a patient. By the 1870s, opiates, cocaine and other drugs were used in a variety of medical concoctions, leading to increases in addictions.

The use of opium, cocaine, and other drugs continued through most of the nineteenth century. The type of addiction during that time that caused the most concern was alcoholism, and because the causes of addiction and the dangers of narcotics were both unknown, doctors recommended morphine and heroin as remedies for addiction to alcohol. Cocaine was also used in tonics, such as the mixture that became known as Coca-Cola. Moreover, patients, including those of Sigmund Freud, were treated for depression with cocaine.

Congress enacted the PURE FOOD AND DRUG ACT OF 1906, ch. 3915, 34 Stat. 768, which formed the FOOD AND DRUG ADMINISTRATION (FDA) and gave it the power to regulate food and drugs. Drug addiction began to drop as a result of early FDA regulations. Eight years later, Congress enacted the Harrison Tax Act, ch. 1, 38 Stat. 789, which prohibited the dispensation and distribution of narcotic drugs. In 1922, Congress enacted the Narcotics Drug Import and Export Act, ch. 202, 42 Stat. 596, which prohibited importation and use of opium and other narcotics except for medical purposes.

Between 1922 and 1970, Congress enacted several additional laws that were designed to curb narcotics importation, trade, and use. Drugs such as marijuana and heroin were prohibited, as was the cultivation of opium poppies. The Narcotic Control Act of 1956, ch. 629, 70 Stat. 567 criminalized the transport of narcotics, including marijuana. Some legislation began to focus upon rehabilitation of narcotics addicts. For example, the Narcotic Addict Rehabilitation Act of 1966, Pub. L. No. 89-793, 80 Stat. 1438, provided for treatment of addicts as an alternative to incarceration.

### Comprehensive Drug Abuse and Control Act

By the late 1960s, illicit drug use in the United States had become widespread. Moreover, use of narcotics became more open, causing concerns among many communities, law enforcement personnel, and legislators. Existing narcotics laws were failing to curb the usage of

narcotics drugs. For example, about half of the amphetamines and barbiturates produced legally in the United States were being distributed through illegal means.

In response to these problems, Congress in 1970 enacted the Controlled Substances Act (CSA) as Title II of the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1242. The CSA developed a complex regulatory system designed to control the distribution of drugs. It established five schedules of drugs, with each schedule representing the degree with which the drug is likely to be abused and the level of accepted medical use. Most narcotics, such as marijuana, cocaine, and heroin, fall within Schedule I, which includes drugs with high potential for abuse and with no accepted medical use.

The CSA has been amended dozens of times since is original enactment. In 1974, Congress enacted the Narcotic Addict Treatment Act of 1974, Pub. L. No. 93-281, 88 Stat. 124, which allows practitioners to dispense narcotics for detoxification and similar purposes. Other amendments to the CSA have established federally funded prevention and treatment programs, including drug-awareness education programs.

### Anti-Drug Acts and National Drug Control Policy

Despite Congress' efforts to strengthen narcotics laws through the CSA, use and abuse of narcotics remained a major national problem in the 1980s. By 1984, narcotics were a part of an $80 million industry in the United States, and use of illicit drugs had reached epidemic proportions according to findings by Congress. Law enforcement officers were able to interdict only five to 15 percent of the drugs entering into the country. Moreover, statistics showed a high correlation between drug use and criminal activities. For example, about 90 percent of heroin users relied upon crime to fund their habit.

The National Narcotics Act of 1984, Pub. L. No. 98-473, 98 Stat. 2168 established the National Drug Enforcement Policy Board to coordinate efforts among federal agencies to combat narcotics trade and for other programs. Four years later, Congress enacted the National Narcotics Leadership Act of 1988 as Subtitle A of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, which replaced the board with the OFFICE OF NATIONAL DRUG CONTROL POLICY. This office continues to implement the country's policies regarding education about the dangers of drug abuse as well as efforts to stifle the drug trade. The Office of National Drug Control Policy and the U.S. Drug Enforcement Administration are the two main federal agencies that are responsible for addressing narcotics issues in the United States.

### State Narcotics Acts

Many states have enacted statutes to address narcotics trade and usage within their borders. The vast majority of states adopted the Uniform Narcotics Drug Act, which was first approved by the COMMISSIONERS ON UNIFORM LAWS and other organizations in 1930. That act and other state laws limited the production of marijuana and generally prohibited more dangerous drugs, including cocaine and heroin. In 1970, the same year that Congress approved the federal Controlled Substances Act, the Commissioners approved the Uniform Controlled Substances Act. This uniform law was eventually approved by 46 states. Although it was updated in 1990 and 1994, few states adopted the amended version.

#### FURTHER READINGS

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#### CROSS-REFERENCES

Drugs and Narcotics; Office of National Drug Control Policy.

## NATION OF ISLAM

The Nation of Islam (NOI) is a religious and political organization whose origins are somewhat mysterious. Wallace D. Fard, later known as Master Wallace Fard Muhammad, established the NOI in Detroit during the 1930s. Fard Muhammad, a traveling salesman who sold African silks and advocated self-sufficiency and independence for African Americans, taught Elijah Poole the history of what Fard Muhammad called the Lost-Found Nation of Islam—descendants of the tribe of Shabazz from the Lost Nation in Asia. Fard Muhammad taught Poole in part that Mr. Yacub, a black mad scientist, created what was called the devil race—the white race—approximately six thousand years ago, and that the devil race would rule the world for the next six thousand years.

Elijah Poole was born in Sandersville, Georgia in 1897. His father, who was a Baptist preacher, had been a slave. At the age of twenty-six, Poole moved to Detroit with his family. In 1930 in Detroit, he met W. D. Fard, the founder of the Lost-Found Nation of Islam. When Fard disappeared in 1934, Poole—then known as Elijah Muhammad—moved to Chicago, where he organized his own following and established the headquarters of the Nation of Islam. Elijah Muhammad remained the spiritual and organizational leader of the NOI from 1934 until his death in 1975. During that time, the NOI became recognized as a black nationalist religious organization that advocated racial separatism and self-sufficiency for African Americans. Often called Black Muslims, the NOI's members are required to adhere to a strict moral and disciplinary code. Men members typically wear suits and ties, and women members are required to wear modest clothing, typically white gowns or saris. The NOI's teachings forbid the eating of pork and the consumption of alcohol or tobacco.

In the early 1950s and 1960s, the NOI called for racial separatism in the United States, and at times protested against police brutality and filed suit against various police departments in response to alleged police brutality. It also frequently recruited members in large cities and prisons. In 1947, Malcolm Little—who later became Malcolm X—converted to Islam and joined the NOI while incarcerated in a Massachusetts prison. As a national minister and spokesman for the NOI, MALCOLM X was a fiery speaker and proponent of the organization's concerns. However, during the early 1960s, ideological differences developed between Malcolm X and Elijah Muhammad, and in 1964, Malcolm X formally left the NOI.

Shortly after Elijah Muhammad's death in 1975, his son Warith Deen Muhammad renounced black separatism and the origins of Black Muslims and established the World Community of Al-Islam in the West, later called the American Muslim Mission. NOI minister Louis X, who later became Louis Farrakhan, initially supported Warith Muhammad but soon reestablished the NOI. Other organizations and factions also split off from the original NOI, including the more militant Lost-Found Nation of Islam, which publishes the weekly newspaper *Muhammad Speaks.* In the mid-1990s, Farrakhan's organization was generally known as the NOI.

Like Malcolm X, Farrakhan is a fiery orator and skilled leader. Yet, he and the NOI have been criticized for anti-Semitic and antiwhite statements as well as conspiracy theories concerning Jewish American business leaders. Khalid Muhammad, a former NOI spokesman, was especially known for the excoriating statements and speeches he gave at many U.S. colleges in the late 1980s and early 1990s. Although the NOI later expelled Khalid Muhammad, his speeches contributed to a continuing debate as to whether so-called hate speech should be punished or regulated by U.S. universities.

During the early and mid-1990s, Farrakhan and the NOI appeared to be shifting their political focus away from black separatism and toward a more universalist or mainstream approach. The NOI also has begun to develop various major business ventures, including the operation of a restaurant in a poor neighborhood on Chicago's South Side. Its security arm—the Fruit of Islam—has been involved in providing security for housing projects in Baltimore, Chicago, and Washington, D.C., under contracts with public agencies such as the Chicago Housing Authority. In October 1995, the NOI and Farrakhan were instrumental in organizing the Million Man March, bringing together hundreds of thousands of African American men in Washington, D.C.

**FURTHER READINGS**

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**CROSS-REFERENCES**

Hate Crime; Civil Rights Movement.

## NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (NAB) is comprised of representatives of radio and television stations and networks. The NAB, which has a membership of 7,500, seeks to ensure the viability, strength, and success of free over-the-air broadcasters (companies that do not charge

customers for service, as do cable and satellite television operators). It serves as an information resource to the industry, and it also lobbies the FEDERAL COMMUNICATIONS COMMISSION (FCC) for regulations favorable to the radio and television industry. The NAB is headquartered in Washington, D.C., with a staff of approximately 165 employees.

The organization was founded in 1922, when radio broadcasting was in its infancy. Founded as the National Association of Radio Broadcasters, it changed its name to the National Association of Radio and Television Broadcasters in 1951, when it absorbed the Television Broadcasters Association. In 1958 it changed its name to the National Association of Broadcasters. In 1985 it absorbed the Daytime Broadcasters Association, and in 1986 it absorbed the National Radio Broadcasters Association.

The NAB seeks to maintain a favorable legal, governmental, and technological climate for free over-the-air broadcasting. Its legal and regulatory department represents broadcasters before the FCC and other federal agencies, as well as before courts and other regulatory bodies. This department provides legal guidance to NAB members through "counsel memos," legal memoranda that identify and explain current legal issues for broadcasters.

The NAB opposes legislation that would require broadcasters to provide free air time to political candidates. In addition, it is opposed to discounting the commercial rates stations charge to candidates, contending that broadcasters now provide candidates with heavily discounted air time.

Because the NAB represents the interests of free over-the-air broadcasters, it has sought to protect the industry from the inroads made by cable and satellite television. For example, as TV viewers in rural areas began to buy home satellite equipment, Congress passed laws in 1988 and 1994, with the encouragement of the NAB, that restrict access to network programming sent by satellite only to those viewers who live outside the local market of over-the-air network affiliates. By 1997 satellite operators and the NAB were in court, because the NAB sought to end the practice of some operators who flout the law and provide network signals to satellite subscribers who are already served by their local network affiliates.

Aside from LOBBYING and bringing legal actions, the NAB provides members with other benefits. Its research library contains ten thousand volumes, and its staff includes experts in science and technology and research and planning. For its members, the NAB publishes a monthly newsletter, *NAB World*, as well as the weekly publications *RadioWeek* and *TV Today*. The NAB annual spring convention is the world's largest showcase for broadcast, postproduction multimedia and TELECOMMUNICATIONS hardware, software, and services. The convention draws more than 100,000 attendees.

In order to educate citizens in the United States about the principles of free speech and other topics concerning the industry, the NAB started the NAB Education Foundation. The foundation conducts research and education activities on issues such as FIRST AMENDMENT rights relating to program content, editorial opinions, and commercial speech. The foundation also provides economic data regarding advertiser-supported broadcasting, examines the impact of new technologies on the industry and the public, and seeks to train, with an emphasis on diversity, new leaders in the broadcasting field.

FURTHER READINGS

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CROSS-REFERENCES

Broadcasting; Telecommunications; Television.

## NATIONAL ASSOCIATION OF MANUFACTURERS

The National Association of Manufacturers (NAM) is the oldest and largest broad-based industrial trade association in the United States. NAM seeks to enhance the competitiveness of manufacturers by LOBBYING for legislation and regulations conducive to U.S. economic growth and to increase understanding among policy makers, the media, and the general public about the importance of manufacturing to U.S. economic strength. NAM is comprised of more than 14,000 member companies and subsidiaries of which more than 80 percent are small manufactures, plus 350 member associations in all 50 states. NAM member companies and affiliated associations produce about 85 percent of U.S. manufactured goods and employ more than 18 million persons. NAM, which has 175 professional and support staff, is headquartered in Washington, D.C., with ten regional offices located across the United States.

NAM was founded in Cincinnati, Ohio, in 1895, in the midst of a economic recession. Many major manufacturers saw a need to find new markets for their products in other countries. At its organizing convention, NAM adopted a number of objectives, including the retention and supply of home markets with U.S. products, extension of foreign trade, development of reciprocal trade relations between the United States and foreign governments, rehabilitation of the U.S. Merchant Marine, construction of a canal in Central America, and improvement and extension of U.S. waterways.

NAM soon became a dominant influence in U.S. economic and political affairs. It lobbied for higher tariffs on imported goods and for the creation of the U.S. DEPARTMENT OF COMMERCE in 1903, and it called for states to enact workers' compensation laws. During the 1930s, NAM vigorously opposed many of President FRANKLIN D. ROOSEVELT'S NEW DEAL proposals. In the 1940s and 1950s, it lobbied for the passage of federal laws restricting the power and internal governance of LABOR UNIONS.

In the 1990s, NAM undertook new initiatives. The Manufacturing Institute was established to provide information on modern industry. This organization distributes monthly mailings to Congress, conducts research on technology and exports, produces research reports, commissions public opinion polls, and disperses books and educational CD-ROMs to schools.

NAM and the Manufacturing Institute joined forces in the 1990s with key partners in the Partnership for a Smarter Workforce and other efforts to identify the best ways to train employees. In 1997 the institute established the Center for Workforce Success and an awards program for outstanding manufacturing workers. In addition, NAM has lobbied for increased accountability and results in taxpayer-funded training programs.

NAM has increased its lobbying on international economic issues. The association played a key role in a number of trade policy victories during the 1990s, including the NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) and the certification of China as a most favored nation. NAM also lobbied vigorously for a national campaign to facilitate exports.

In response to a decline in jobs and a decrease in the number of small manufacturing companies brought on by a weakening economy in the early 2000s, NAM established its "Strategy for Growth and Manufacturing Renewal" to focus attention on the issues affecting manufacturing. These issues include changes to tax and trade policies, energy-related concerns, asbestos litigation, innovations to technology, and development of worker skills.

FURTHER READINGS

National Association of Manufacturers. Available online at <www.nam.org> (accessed July 28, 2003).

CROSS-REFERENCES

Manufactures.

## NATIONAL ASSOCIATION OF REALTORS

The National Association of Realtors (NAR) is made up of residential and commercial realtors who are brokers, salespeople, property managers, appraisers, and counselors, and others working in the real estate industry. NAR began as the National Association of Real Estate Exchanges in 1908 with a membership of 120. In 2003 its membership numbered over 840,000, making it the world's largest professional association. Members belong to one or more of 1,700 local real estate associations and boards and 54 state and territory associations. NAR headquarters are in Washington, D.C.

NAR provides a national facility for professional development, research, and exchange of information among its members, the public, and government. More importantly, it plays an influential role in shaping public policies at the local, state, and national level that affect real property. Through its legislative and LOBBYING efforts, NAR seeks to protect the real estate industry from what it considers burdensome legislative and regulatory changes and to advocate for legislative and regulatory changes that enhance the conduct of real estate business. At the national level, NAR analyzes federal issues and lobbies Congress and regulatory agencies.

The 1998 NAR legislative agenda included rewriting federal law that governs the disclosure of closing costs at the time a real estate purchase is completed. In addition, NAR supports federal legislation that would give persons more rights to contest a government "taking" their property through the power of EMINENT DOMAIN.

NAR also participates in the political process through its Realtor Political Action Committee (RPAC). This committee, currently one of the largest trade association PACs, contributes cam-

paign funds to federal political candidates and encourages members to volunteer for candidates. The committee also educates voters on issues that affect home ownership and real estate.

Apart from political involvement, NAR seeks to make its viewpoint known through legal advocacy. The NAR Legal Action Committee provides financial support to legal cases that seek establish a favorable precedent for real estate brokerage or that seek to preserve the rights to own, use, and transfer real property. The NAR also participates in lawsuits involving real estate by filing AMICUS CURIAE (friend of the court) briefs in cases that will set legal precedent.

The NAR has established a code of ethics to enhance the professionalism of its members. In addition, it has created NAR sections, professional institutes, societies, and counsels that allow members to communicate with others in their particular real estate specialty. These specialty groups include Counselors of Real Estate, the Commercial Investment Real Estate Institute, the Institute of Real Estate Management, the Real Estate Brokerage Managers Council, the Residential Sales Council, the Real Estate Buyers Agent Council, and the Appraisal Section. Education and certification in these specializations enable members to receive professional designations, identifying them as highly qualified specialists to business associates and the public.

In 1998 NAR launched a national consumer education initiative called the "Public Awareness Campaign" to inform the public about the significant role played by realtors in real estate transactions. Also, in 1998 NAR created the National Realtors Database System (NRDS), an INTERNET database that gave members the opportunity to update their own records online. In 1997 the NAR established REALTOR.com, its official Internet site. In 2003 REALTOR.com featured more than 1.5 million property listings that were viewed by millions of consumers.

FURTHER READINGS

National Association of Realtors. Available online at <www.realtor.org> (accessed July 28, 2003).

CROSS-REFERENCES

Real Estate; Real Property.

## NATIONAL CHARACTER OF AIRCRAFT

The nationality of an aircraft is determined by the state in which the aircraft is registered. This principle was recognized by state practice soon after air flight proved feasible and was incorporated into the Convention on International Civil Aviation of December 7, 1944 (Chicago Convention). Applying the same concept of nationality to aircraft as is applied to maritime vessels provides a basis for a state to maintain jurisdiction over an aircraft while it is flying through international airspace and establishes the power of the state to regulate what happens on board the aircraft regardless of its location. Under the Chicago Convention, contracting states register aircraft according to their domestic laws. When it registers an aircraft, the state must also certify that the craft is airworthy and has appropriate markings identifying the nationality and registration of the aircraft.

CROSS-REFERENCES

Airlines.

## NATIONAL COOPERATIVE BANK

The National Consumer Cooperative Bank (NCCB) was created and chartered by the National Consumer Cooperative Bank Act (92 Stat. 499, 12 U.S.C.A. 3001), enacted on August 20, 1978. The bank is directed by the act to encourage the development of new and existing cooperatives. The bank provides specialized credit and technical assistance to eligible cooperatives that provide goods, services, housing, and other facilities to their members as ultimate consumers. The bank is itself structured as a cooperative financial institution. Under its congressional charter, the bank is directed to make loans and offer its services throughout the United States, its territories and possessions, and the Commonwealth of Puerto Rico.

The act provided that the federal government would contribute the initial capitalization of the bank through the purchase of the bank's Class A stock. All 15 members of the bank's board of directors are appointed by the president of the United States. The act contemplated that the number of president-appointed directors was to decrease gradually as borrowers and cooperatives eligible to borrow purchased Class B and Class C stock in the bank.

In 1981 the act was amended by Title III, subtitle C, of the Omnibus Budget Reconciliation Act of 1981 (95 Stat. 433). The 1981 act converted the federal government's initial capitalization of the bank, formerly represented by Class A stock, into Class A capital notes, held by

the secretary of the treasury. The act further mandated that after the Final Government Equity Redemption Date (FGERD), as defined by the National Consumer Cooperative Bank Act, the bank's Class B and C stockholders would elect 12 of the bank's 15 directors. The remaining three were to be appointed by the president with the advice and the consent of the Senate. The president is directed by the act, as amended, to select one member from among proprietors of small business concerns, one member from among the officers of the agencies and departments of the United States, and one member from among persons having extensive experience in the cooperative field representing low-income eligible cooperatives.

The bank is operated by a board of directors under bylaws and policies it prescribes consistent with the National Consumer Cooperative Bank Act.

The bank's credit and technical assistance to cooperatives is intended to improve the quality and availability of goods and services to consumers. The bank makes loans to eligible cooperatives at prevailing market interest rates.

The bank encourages broad-based ownership, control, and active participation by members in eligible cooperatives. The bank also seeks to maintain broad-based control of the bank by its voting stockholders.

The National Consumer Cooperative Bank Act established the Office of Self-Help Development and Technical Assistance within the bank. Cooperatives that are eligible to receive assistance from the bank may be eligible to qualify for financial and technical assistance from the office. The office may provide financial assistance to newly developed or established cooperatives that cannot qualify for a bank loan, or when the membership of the cooperative consists substantially of low-income persons or it provides services to low-income persons.

The Omnibus Budget Reconciliation Act of 1981 directed that as soon as practical after the FGERD, the board of directors of the bank would establish a nonprofit corporation under the laws of the District of Columbia to succeed the office and to carry out the functions of the office. That nonprofit corporation, the Consumer Cooperative Development Corporation, was incorporated on December 30, 1982.

In 1985, the NCCB became a private financial institution and changed its name to National Cooperative Bank (NCB). At the same time, the Consumer Cooperative Development Corporation became the NCB Development Corporation (NCBDC). In 1986 the NCB registered with the SECURITIES AND EXCHANGE COMMISSION and performed its first private placement. The NCB, in 1995, launched the Community Association Loan Program that provided financing for condominium, townhouse, and other owner associations. By 2000, the NCB had provided more than $6 billion in financing to homes, school facilities, assisted living units, and other community developments.

**FURTHER READINGS**

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*U.S. Government Manual* Website. Available online at <www.gpoaccess.gov/gmanual> (accessed November 10, 2003).

**CROSS-REFERENCES**

Housing and Urban Development Department.

## NATIONAL COUNCIL OF LA RAZA

The National Council of La Raza (NCLR) is the largest Hispanic advocacy organization in the United States. The NCLR was founded in 1968 as a nonpartisan nonprofit organization dedicated to reducing discrimination and poverty and to improving the lives and economic opportunities of Hispanic Americans. The NCLR has over 270 formal affiliates serving 40 states, the District of Columbia, and Puerto Rico. These affiliates, along with a nationwide network of more than 30,000 groups and individuals, provides information and services to more than 3.5 million Hispanics annually.

Headquartered in Washington, D.C., the NCLR has field offices in Chicago, Los Angeles, Phoenix, San Antonio, and San Juan, Puerto Rico. These offices focus on program operations, management, and governance, as well as resource development. The NCLR Washington, D.C.-based Policy Analysis Center is a major Hispanic "think tank" that is known for its political independence, its advocacy expertise, and its extensive analysis of issues affecting Hispanics nationwide. The NCLR has given public testimony and commentary on topics concerning CIVIL RIGHTS, tax policy, free trade, affordable housing, employment and training, and HEALTH CARE. The organization's Census Information Center (CIC) functions as a national clearing-

house for census data and other information regarding Hispanics in the United States.

In addition to implementing "big picture" strategies such as policy research and analysis, the NCLR also concentrates its efforts on detailed "capacity-building" tactics aimed at working with local community-based Hispanic groups in both urban and rural areas throughout the United States and its territories. The NCLR has long espoused a philosophy of self-help and collaboration. Unlike many advocacy organizations that provide help only to their own local chapters, the NCLR gives resources and assistance to other local Hispanic organizations, especially those that aid low-income and disadvantaged Hispanics. The organization also sponsors "issue networks" that provide information and assistance on such issues as HIV/AIDS, health, education and leadership.

In order to more closely relate the national policy aspects of its work with the grassroots views of its constituents, the NCLR has also established "local policy centers" at six of its community-based affiliates. In addition, the NCLR works with other major groups such as the LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), the oldest Hispanic advocacy organization in the United States, and the Mexican American Legal Defense and Education Fund (MALDEF), which was founded in 1968 as the legal arm of LULAC.

The NCLR works closely with the private sector and has established a Corporate Board of Advisors consisting of senior executives and staff from 25 major corporations. The advisory board provides information and assistance to the NCLR on numerous programs and projects, from education and health initiatives to public relations and fund-raising. The NCLR has broad-based financial support. The organization receives more than two-thirds of its funding from corporations and foundations; the rest comes from government sources.

In all of its efforts, the NCLR focuses on cooperation and collaboration. NCLR staff work with various issue-based coalitions and associations on topics ranging from energy conservation to WELFARE reform. The NCLR also undertakes joint projects with other major national organizations such as the NATIONAL URBAN LEAGUE and the NAACP.

The NCLR authors major reports, for example, the 1995 report that analyzed the effect of computer verification procedures, the use of identification cards, and immigration policies on Hispanic Americans; a 1996 report on the impact of federal tax policy on Hispanic working families; and a 1998 statistical report on the educational status of Hispanics. It also authors numerous publications and publishes a quarterly newsletter, *Agenda.*

Because the Hispanic American population consists of a diverse number of groups including Mexican Americans, Chicanos, and Latin Americans, the need for an organization that can recognize the diversity and also still provide unity of purpose is paramount. NCLR President Raul Yzaguirre, who joined the NCLR in 1974, had in 2003 led the organization for more than 25 years. The NCLR has a 33-member board of directors and its bylaws require that board members be geographically diverse and that they represent various nationality groups. According to the information published in the 2000 U.S. Census, Hispanics have surpassed African Americans as the largest ethnic group in the United States. Between immigration and native births, the Hispanic population increased 58 percent in the 1990s to 35.3 million in 2000. In light of these demographic changes, the NCLR constituency plays a larger role in U.S. politics and economics.

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CROSS-REFERENCES

Civil Rights Acts; Discrimination; Equal Protection; Mexico and the United States.

## NATIONAL CREDIT UNION ADMINISTRATION

The National Credit Union Administration (NCUA) is responsible for chartering, insuring, supervising, and examining federal credit unions (FCUs) and for administering the National Credit Union Share Insurance Fund. The NCUA also manages the Central Liquidity Facility, a mixed-ownership government corporation, the purpose of which is to supply emergency loans to member credit unions.

**Summary of Federal Credit Unions, 1992 to 2001**

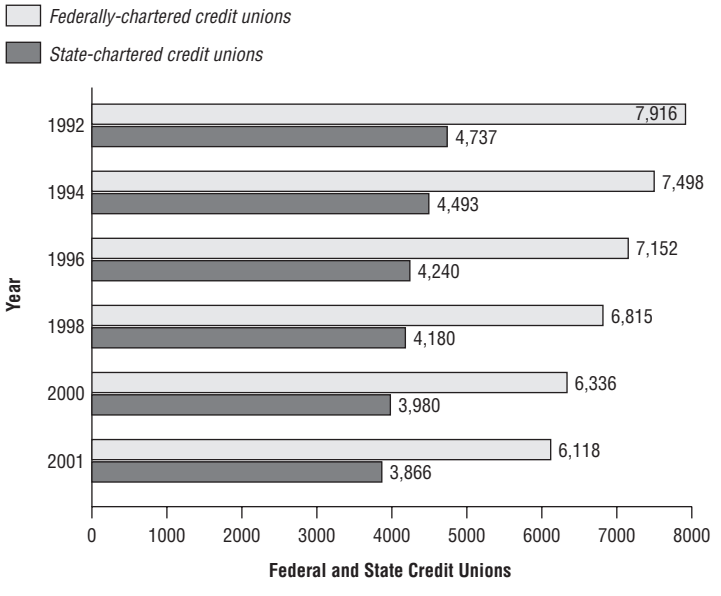


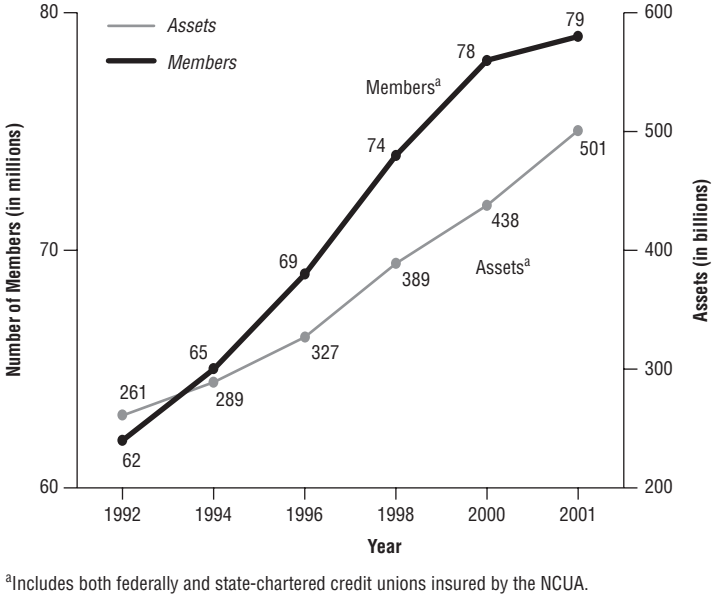


[a]Includes both federally and state-chartered credit unions insured by the NCUA.

SOURCE: National Credit Union Administration, *2001 Annual Report*.

A credit union (CU) is a financial cooperative that aids its members by improving their economic situation through encouraging thrift among its members and providing them with a source of credit for provident purposes at reasonable rates of interest. Federal CUs serve occupational, associational, and residential groups, thus benefiting a broad range of citizens throughout the country.

The NCUA was established by an act of March 10, 1970 (84 Stat. 49, 12 U.S.C.A. 1752) and reorganized by an act of November 10, 1978 (92 Stat. 3641, 12 U.S.C.A. 226 note), as an independent agency in the EXECUTIVE BRANCH of the federal government. The NCUA regulates and insures all FCUs and insures state-chartered CUs that apply for and qualify for share insurance. As of 2003, total assets of federally chartered CUs exceeded $172 billion, and the assets of all federally insured state-chartered CUs exceeded $104 billion.

### Programs and Activities

The NCUA grants FCU charters to groups sharing a common bond of occupation or association or to groups within a well-defined neighborhood, community, or rural district. A preliminary investigation is made to determine if certain minimum standards are met before granting a federal charter.

Supervisory activities are carried out through examiner contacts and through periodic policy and regulatory releases from the administration. The administration also maintains an early warning system designed to identify emerging problems as well as to monitor operations between examinations.

The administration conducts periodic examinations of federal credit unions to determine their solvency and compliance with laws and regulations and to assist credit union management in improving operations.

The act of October 19, 1970 (84 Stat. 994, 12 U.S.C.A. 1781 et seq.) provides for a program of share insurance. The insurance is mandatory for federal credit unions and optional for state-chartered credit unions that meet NCUA standards. Credit union members' accounts are insured up to $100,000. The National Credit Union Share Insurance Fund charges each insured credit union a premium of one-twelfth of 1 percent of the total member accounts (shares) outstanding at the end of the preceding calendar year.

High interest rates and insurance losses in the 1980s brought the insurance fund close to insolvency. In 1985, Congress approved a plan that enabled the credit unions to recapitalize the fund. The 1990s were marked by major changes including deregulation, expanded eligibility for membership, mergers, and an increase in mem-

ber services. In 2001 the NCUA chartered, regulated, and/or insured more than 10,000 credit unions across the United States.

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CROSS-REFERENCES

Credit; Credit Union.

## NATIONAL DRUG CONTROL POLICY, OFFICE OF

See OFFICE OF NATIONAL DRUG CONTROL POLICY.

## NATIONAL EDUCATION ASSOCIATION

The National Education Association (NEA) is a nonprofit and nonpartisan professional organization made up of elementary and secondary school teachers, higher education faculty, education support professionals, school administrators, and others interested in public education. The NEA, which was founded in 1857, is the oldest and largest U.S. organization dealing with public education. The organization has more than 2.7 million members and is headquartered in Washington, D.C. The organization has approximately 565 staff members in its headquarters and regional offices. The association's budget for fiscal year 2002–03 was more than $267 million.

The NEA has 51 state-level affiliates that include 50 state associations and the Federal Education Association. The more than 14,000 local NEA affiliates include approximately 800 higher education affiliates. Anyone who works for a public school district, a college or university, or any other public institution devoted primarily to education is eligible to join the NEA. It also has special membership categories for retired educators and college students studying to become teachers.

The NEA is a volunteer-based organization supported by a network of staff at the local, state, and national levels. At the local level, NEA affiliates are active in various capacities, such as conducting professional workshops on discipline and bargaining contracts for school district employees. At the state level, NEA affiliates regularly lobby legislators for the funds for public education, campaign for higher professional standards for the teaching profession, and file legal actions to protect ACADEMIC FREEDOM. At the national level, the NEA coordinates innovative projects to restructure how learning takes place and lobbies Congress on behalf of public education.

NEA members nationwide set association policy by meeting at their annual representative assembly every July. NEA members at the state and local levels elect the more than 9,000 assembly delegates, who, in turn, elect the top NEA officers, debate issues, and set NEA policy.

The NEA has been a vigorous opponent of efforts to privatize education through the use of tuition VOUCHERS. It rejects the arguments of voucher advocates that vouchers improve student learning, provide meaningful parental choice, and increase educational opportunities for low-income students. Instead, the NEA contends that vouchers are costly and that they are not the panacea for the problems in public education.

The NEA has also expressed concerns about laws that allow the creation of charter schools, which are deregulated, autonomous public schools. Advocates of charter schools believe that freeing some public schools from many state and local mandates will encourage educational innovation, create greater parental involvement, and promote improvement of public education in general. The NEA, while not opposing the concept of charter schools, has lobbied for sufficient oversight of these new schools, believing that public accountability is necessary.

The election of GEORGE W. BUSH as president in 2000 and the gain of Republican seats in both the House and Senate in 2002 strengthened the position of voucher supporters and gave increased urgency to continuing NEA opposition. In 2003, faced with a weakening economy and the consequent tightening of state and local budgets, NEA continued to oppose the privatization of work traditionally performed by school district employees and pressed for reduced class sizes and the need to train more teachers as millions of veteran teachers neared retirement.

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**CROSS-REFERENCES**

Education Law; Public.

## NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C.A. § 4331 et seq.) was a revolutionary piece of legislation. NEPA established for the first time national policies and goals for the protection of the environment. NEPA aims to encourage harmony between people and the environment, promote efforts to prevent or eliminate damage to the environment and the biosphere, and enrich the understanding of ecological systems and natural resources important to the country.

NEPA is divided into two titles. Title I contains a basic national charter for protection of the environment. Section 101 is entitled "Declaration of the National Environmental Policy." Title II establishes the Council on Environmental Quality (CEQ), an **EXECUTIVE BRANCH** watchdog organization that monitors the progress toward the goals set forth in Section 101 of NEPA. The CEQ advises the president on environmental issues and provides guidance to all federal agencies, which are required by NEPA to cooperate with the CEQ. The CEQ prepares an **ANNUAL REPORT** on environmental quality, evaluates federal programs and activities affecting the environment, and gathers and provides statistical information.

NEPA requires that every federal agency submit an environmental impact statement (EIS) with every legislative recommendation or program proposing major federal projects that will most likely affect the quality of the surrounding environment. An EIS may be required for such projects as rerouting an interstate highway, building a new dam, or expanding a ski resort on federally owned land. The first question NEPA asks is whether the proposed action merits a "categorical exclusion." If an action has been studied in the past and does not have significant impact, or if it can be compared with different activities that the law defines as not having significant impact, then no further NEPA studies are necessary. The agency can then implement its proposed action.

If the proposed action is not excluded from further study, the next question asked is whether the action will have a significant impact on the environment. If the answer is yes, NEPA outlines a detailed process for an EIS. If the answer is unknown, a less detailed study or an environmental assessment (EA) is prepared.

An EA is an overview of potential impacts. Enough analysis is done to determine either that the more detailed EIS is necessary or that the action will not have a significant impact on the environment.

Preparing the EIS is a well-defined process. A notice of intent is published in the *Federal Register* informing the public that a study will be done. The general public, federal and state agencies, and Native American tribes are given the opportunity to comment on the proposal. Next, a draft EIS is written, and a forty-five-day period for public comment is set. At the end of the comment period, the federal agency drafts a final EIS that responds to oral and written comments received during the public review of the draft. The agency, after a thirty-day waiting period, issues its record of decision, which discusses the decision, identifies the alternatives, and indicates whether all practicable means to avoid or minimize environmental harm from the selected alternative were adopted. The federal agency may then begin to implement its decision.

The EIS is a tool to assist in decision making, providing information about the positive and negative environmental effects of the proposed undertaking and its alternatives. The EIS must also examine the impact of not implementing the proposed action. In this no-action alternative, the agency may continue to use existing approaches. Although NEPA requires agencies to consider the environmental consequences of their actions, it does not force them to take the most environmentally sound alternative nor does it dictate the least expensive alternative.

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CROSS-REFERENCES

Air Pollution; Environmental Law; Environmental Protection Agency; Land-Use Control; Pollution; Solid Wastes, Hazardous Substances, and Toxic Pollutants; Water Pollution.

## NATIONAL FEDERATION OF INDEPENDENT BUSINESSES

The National Federation of Independent Businesses (NFIB) is the largest U.S. advocacy organization representing small and independent businesses. The NFIB has a membership of 600,000 business owners, including commercial enterprises, manufacturers, family farmers, neighborhood retailers, and service companies. The total membership employs more than 7 million people and reports annual gross sales of approximately $747 billion.

Founded in 1943, the NFIB was created to give small and independent business a voice in government decision making. The NFIB is recognized as one the most influential LOBBYING organizations in the United States, working with state and federal legislators and regulators. Its administrative headquarters are located in Nashville, Tennessee, but its public policy headquarters are in Washington, D.C. The NFIB also has state legislative offices in all 50 state capitals.

The governance of the NFIB differs from that of more traditional lobbying organizations. The NFIB uses the balloting of its membership, rather than a steering committee or a board of directors, to determine NFIB policies. In addition, it seeks to prevent UNDUE INFLUENCE by one member or group of members by setting a maximum contribution of dues. Minimum dues are $100, and the maximum dues contribution is $1,000. The NFIB follows these procedures so that the policies it advances will reflect the consensus of the business community rather than the narrow interests of any particular trade group. Once the ballots are counted—five times a year on federal issues and at least once a year on state issues—NFIB lobbyists carry the message to Congress and the state legislatures.

The NFIB opposes higher taxes on business and government regulation. At the state level, it works to lower the rates businesses are required to pay for workers' compensation insurance. At the federal level, it has campaigned for cutting the federal deficit, stopped an effort to raise employment taxes, and fought to increase the deductibility of HEALTH INSURANCE premiums for the self-employed.

The NFIB has been a critic of the ENVIRONMENTAL PROTECTION AGENCY, the Occupational Safety and Health Administration, and the INTERNAL REVENUE SERVICE, believing that these federal agencies stifle the productivity and profitability of business through over-regulation. It emphasizes the need for a free-market economy, noting that small business produces 38 percent of the gross domestic product.

In the late 1990s, the NFIB broadened its scope and began to support pro-small business candidates for state and national office. In 2000, the organization established the NFIB Legal Foundation, which advocates for small business in the courts and strives to educate its members on legal issues. In addition, the NFIB POLITICAL ACTION COMMITTEE "NFIB SAFE Trust PAC" uses member contributions to support candidates who are pro-small business. Issues concerning NFIB in 2003 included tax relief, including permanent repeal of the inheritance tax, affordable HEALTH CARE, MEDICAL MALPRACTICE law reform, caps on civil suit damages, and affordable high-speed access to the INTERNET.

FURTHER READINGS

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CROSS-REFERENCES

Business Affected with a Public Interest.

## NATIONAL FIREARMS ACT OF 1934

The first attempt at federal gun-control legislation, the National Firearms Act (NFA) only covered two specific types of guns: machine guns and short-barrel firearms, including sawed-off shotguns. It did not attempt to ban either weapon, but merely to impose a tax on any transfers of such weapons. Despite these limitations, it led to a precedent-setting U.S. Supreme Court decision.

In the 1930s, the United States faced a run of much-publicized gangster violence, led by such well-known criminals as John Dillinger, AL CAPONE, Baby Face Nelson, and Bonnie and Clyde. The sensationalistic aspect of their crimes convinced the administration of President FRANKLIN D. ROOSEVELT that something needed to be done to control the spread of weapons into the general population. U.S. Attorney General HOMER CUMMINGS and his staff began the process of drafting recommended legislation that would achieve this goal.

Cummings and his staff quickly determined that, rather than ban weapons and run afoul of the SECOND AMENDMENT, they would try to tax such weapons out of circulation. As originally proposed, the NFA covered a fairly broad range of weapons, but as passed by Congress, it's scope was narrowed to cover only "A shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun."

The statute levied a $200 tax on each firearm defined as above, for any transfer involving the firearm. The tax was to be paid by the transferor, and to be represented by appropriate stamps to be provided by the commissioner. It was declared unlawful for anyone to sell or receive a firearm in violation of this section, and they could be fined $2,000 and imprisoned for up to five years for violating it.

While the $200 tax does not seem like much in current dollars, it represented a very large amount in 1934—in many cases the tax was more than the cost of the firearm itself. The act also required dealers of the listed firearms to register with the federal government, and also required for firearms sold before the effective date of the act, that "every person possessing a firearm shall register, with the collector of the district in which he resides, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof."

The NFA did not inspire as much controversy in 1934 as gun-control acts do today, in part because of the general public perception that crime was out of control and in part because anti-gun-control groups such as the NATIONAL RIFLE ASSOCIATION (NRA) did not have nearly the strength or LOBBYING power they would later have. In fact, the NRA formed its legislative affairs division, a precursor to its powerful lobbying arm, in 1934 in belated response to the NFA. Nevertheless, the NFA did result in several lawsuits claiming the law was unconstitutional, one of which reached the Supreme Court.

In *Miller v. United States*, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (U.S.Ark. 1939), two men were charged with transferring a double barrel 12-gauge shotgun in violation of the NFA. A federal district court quashed the indictment, ruling that the NFA did indeed violate the Second Amendment. But the Supreme Court, in a unanimous decision, disagreed.

Writing for the court, Justice JAMES MCREYNOLDS famously dismissed the defendants case with this statement: "the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." McReynolds added that "certainly it is not within JUDICIAL NOTICE that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." He also noted that many states had adopted gun-control laws over the years.

The NFA is still in force, codified in amended form at 26 USCA § 5801 et. seq. As the first federal gun-control legislation, it set the stage for all other federal GUN CONTROL laws, and its legacy overshadows the scope of the law and the limited number of weapons to which it actually applied.

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CROSS-REFERENCES

Second Amendment; Gun Control.

## NATIONAL GAY AND LESBIAN TASK FORCE

The National Gay and Lesbian Task Force (NGLTF) is a nonprofit organization that supports grassroots organizing and advocacy for lesbian, gay, bisexual, and transgender rights. Founded in 1973, NGLTF works to strengthen the gay and lesbian movement at the state and local levels while connecting these activities to a national agenda. It is recognized as the leading activist organization in the national gay and lesbian movement, and serves as a national

resource center for state and local organizations. Its headquarters are in Washington, D.C.

NGLTF works to combat antigay violence and antigay legislative and ballot measures. It also lobbies state and federal governments to end job discrimination and repeal SODOMY laws. With the arrival of HIV and AIDS in the 1980s, NGLTF sought government funding of medical research, and has campaigned for reform of the HEALTH CARE system.

In 1997 NGLTF played a major role in the creation of a new national political organization, the Federation of Statewide Lesbian, Gay, Bisexual, and Transgender Political Organizations. The purpose of the federation, which draws its membership from 32 state groups, is to strengthen the efforts of these statewide groups through a network that will foster strategizing across state lines, building stronger state organizations, and developing good working relationships between state and national groups. The need for the federation grew out of meetings of statewide activists at the NGLTF annual Creating Change Conference, held each November in a major U.S. city.

The federation consists of 16 executive committee members, selected from each region of the country, who will develop the federation's mission. NGLTF serves as coordinator of the federation, supporting its work through the creation and dissemination of information and materials and the making of regular conference calls.

At the federal level, NGLTF was unsuccessful in its opposition to the 1996 Defense of Marriage Act (DOMA), which permits states to bar legal recognition of same-sex marriages performed in other states. In 1988 NGLTF renewed its efforts to have Congress expand the federal mandate for prosecution of HATE CRIMES including crimes that are committed against people because of their sexual orientation. The Hate Crimes Prevention Act (S. 1529 and H.R. 3081) would add hate crimes based on an individual's real or perceived sexual orientation to the list of bias crimes that the federal government can prosecute.

In 2002, the NGLTF Policy Institute released the first and largest-ever study of gay, lesbian, bisexual and transgender African Americans. This study documented among these groups significant numbers of individuals with children, high levels of political participation, and widespread experiences of racism and homophobia.

NGLTF, through its policy institute, conducts research and publishes studies on many topics, including CIVIL RIGHTS, workplace discrimination, violence, health, campus activities, and families.

FURTHER READINGS

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CROSS-REFERENCES

Civil Rights; Discrimination; Equal Protection; Gay and Lesbian Rights: Same-Sex Marriage.

## NATIONAL GUARD

The National Guard is the term for the state-organized units of the U.S. Army and Air Force, composed of citizens who undergo training and are available for service in national or local emergencies. National Guard units are organized in each of the 50 states, the District of Columbia, and Puerto Rico. The National Guard units are subject to the call of the governor of their state or territory, except when ordered into federal service by the president of the United States. Entry into the National Guard is by voluntary enlistment. The National Guard is trained to work in conjunction with the active forces of the Army and Air Force. Much of its value comes from its service in times of peace, when the Guard provides emergency aid to victims of national disasters and assists law enforcement authorities during civil emergencies.

"Citizen-soldiers" have come a long way since the American Revolution. The Army National Guard has fought in every major war in which the United States has been involved, from the American Revolution to the VIETNAM WAR and the 2003 war in Iraq. Since the end of the Vietnam War, the Guard has been engaged in all U.S. national defense missions. Not only is the National Guard devoted to the defense of the United States and its allies, it is also involved in a number of other activities, such as dealing with emergencies like civil disturbances, riots, and natural disasters, and helping law enforcement agencies to keep illegal drugs off the streets.

After the American Revolution, the First CONGRESS OF THE UNITED STATES did not consider the formation of a militia a top priority, and it disbanded the Continental Army. Congress did not officially debate the notion of a militia until the Constitutional Convention in 1787. The Constitution authorized a standing

army in its Army Clause (art. I, § 8, cl. 12) and provided for a militia under the Militia Clauses (U.S. Const. art. I, § 8, cls. 15–16). Under the Constitution, the militia is to be available for federal service for three distinct purposes: "to execute the Laws of the Union, suppress Insurrections and repel Invasions." Congress is to organize and discipline the militia, and the states are to appoint officers and train the soldiers.

The National Guard, whose main responsibility since its inception had been the protection of colonial settlements, faced its first significant challenge when it tried to defend the settlements from Native American domination. In 1789, the federal government formed a War Department of approximately 700 men for the purpose of defending U.S. soil and its settlements from Native American attack. These small armies failed, and Congress responded to the failure of its small armies to fight off Native Americans in the West by enacting the Militia Act of 1792 (May 8, 1792, ch. 33, I Stat. 271 [repealed 1903]); this act was the militia's only permanent organizing legislation for more than 100 years. While the act governed the militia, the United States endured three wars—the WAR OF 1812, the Civil War, and the Spanish-American War—and the militia was ineffective in all three. Congress replaced the act with the Dick Act of 1903 (32 Stat. 775) to transform "a frontier police force into a respected and modern fighting machine."

The Dick Act provided for an organized militia—to be named the National Guard—that would conform to the organization of the Army, be equipped through federal funds, and be trained by Army instructors. The act consisted of 26 sections and set forth new provisions that had previously only applied to the Army, but now also applied to the newly formed National Guard, including a nine-month limit for reservists' service on active duty, a provision that when on active duty, the reservists would be guided by Army rules and regulations and would receive the same pay as that given to Army soldiers, and a new requirement for the performance of 24 drills per year and a five-day summer camp. The act also gave states' governors certain powers over their Guard units, such as the power to excuse their troops from any of the drills or summer camp.

Congress amended and strengthened the Dick Act when it passed the National Defense Act of 1908, on May 27, 1908, ch. 204, 35 Stat. 399 (amending Dick Act of Jan. 21, 1903, ch. 196, 32 Stat. 775), which provided that the Guard could not only be called into services within or outside of United States territory but could also be called into service for as long as the president deemed necessary, no longer subject to a nine-month limitation. The National Defense Act of 1916 (June 3, 1916, ch. 134, 39 Stat. 166) separated the Army, the reserves, and the militia and "federalized" the National Guard.

Several years later Congress declared the National Guard a part of the Army, and the National Guard became solely authorized by the Army Clause of the Constitution when Congress passed the Act of 1933 (48 Stat. 149, 155). This act provided that reserve soldiers would no longer be drafted into federal service and that they would be ordered to active duty only if "Congress declared a national emergency and authorized the use of troops in excess of those of the Regular Army."

Since 1933 federal law has provided that persons who enlist in a state National Guard unit simultaneously enlist in the National Guard of the United States, a part of the Army. The enlistees retain their status as state National Guard members unless and until ordered to active federal duty and revert to state status upon being relieved from federal service.

The authority to order the Guard to federal duty was limited to periods of national emergency until Congress passed the Armed Forces Reserve Act of 1952 (66 Stat. 481), which authorized orders "to active duty or active duty for training" without any emergency requirement but provided that such orders could not be issued without the consent of the governor of the state concerned. The act also set forth the mission of the reserve components and defined some important terms. For example, the act clarified that the U.S. armed forces are the Army, Navy, Air Force, the Marine Corps, and the Coast Guard, and that the seven reserve components are the National Guard, the Army Reserve, the Navy Reserve, the Marine Corps Reserve, the Air National Guard, the Air Force Reserve, and the Coast Guard Reserve. According to the act, the purpose of the reserve components is to provide "trained units and qualified individuals to be available for active duty in the Armed Forces of the United States in time of war or national emergency, and at such other times as the national security may require."

Further, the act declares that "the National Guard . . . [is] an integral part of the first line

defenses of this Nation [and must be maintained at all times]. . . . [W]henever . . . units and organizations are needed for the national security in excess of those of the Regular components . . ., the National Guard . . . shall be ordered into the active military service of the United States and continued therein so long as such necessity exists."

The legal basis of the National Guard is founded not only in federal constitutional and statutory law but in state constitutions and statutes as well. The original "militia," which eventually became known as the Army National Guard, began as a domestic force made up of untrained men led by political generals. The Army Clause of the Constitution gives Congress the power to provide and maintain a Navy and make rules for the government and regulation of the land and naval forces. The Militia Clauses of the Constitution authorize the states to organize the National Guard but give Congress the power to employ the Guard in the service of the country.

Article II, Section 2, of the Constitution states that the president of the United States is the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."

The Framers of the Constitution authorized Congress to recognize a militia that was largely controlled by the states. The states generally have maintained control over the militia during times of peace but not during war or national emergency. However, after two state governors refused to consent to federal training missions abroad for their Guard units, the gubernatorial consent requirement was partially repealed in 1986 by the Montgomery Amendment, which provides that a governor cannot withhold consent for reservists to be on active duty outside the United States because of any objection to the location, purpose, type, or schedule of such duty. The Supreme Court affirmed the constitutionality of the Montgomery Amendment in *Perpich v. Department of Defense,* 496 U.S. 334, 110 S. Ct. 2418, 110 L. Ed. 2d 312 (1990). According to the Court, the Militia Clause of the Constitution granted independent rights to both the states and the federal government to train the militia. Congress is free to train the militia as it sees fit, provided it does not prevent the states from also conducting training.

Ultimately, the National Guard enjoys a dual status as both a state militia and as an integral part of the federal armed forces. Although the Guard continues to perform important domestic functions, the federal government has ultimate power when it requires the National Guard for national defense.

*National Guard units help with sandbagging efforts during the March 1997 flooding of the Ohio and Cumberland rivers in Smithland, Kentucky. National Guard units are a part of the federal armed forces but are called to service primarily by state authorities.*

AP/WIDE WORLD PHOTOS

In the 1990s and early 2000s, the significance of the National Guard as a major part of the country's national defense system increased. In 1991 more than 75,000 reservists participated in the first Gulf War ("Desert Storm"). Since that time, components of the National Guard have completed missions in Haiti, Bosnia, and Kosovo. After the **SEPTEMBER 11TH TERRORIST ATTACKS**, more than 50,000 National Guard members were called upon to provide security at home and abroad. In 2003, National Guard members and reservists played a crucial role in the war against Iraq.

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CROSS-REFERENCES

Militia.

## NATIONAL HEALTH CARE

The development of a national system of HEALTH CARE in the United States has remained a major topic of debate throughout the United States, especially since the 1980s. Healthcare costs in the United States have risen dramatically during the past 40 years, due in part to longer average life spans, which give rise to greater costs because older citizens require greater care, and the employment of technologies that extend the life of patients, which generally results in greater spending. Insurance costs have likewise increased dramatically, and a relatively large percentage of U.S. citizens and other residents are uninsured or underinsured. According to information from the CENSUS BUREAU in 2001, 41.2 million Americans, constituting 14.2 percent of the population, did not have HEALTH INSURANCE.

The healthcare system is largely controlled by the free market, which is believed to provide limitations on how much physicians and other specialists can charge to their patients. However, many critics of the current system, including organizations composed of physicians, note that the system has become largely bureaucratic and that cost-cutting measures and pressures caused by competition and the need for profit have reduced the effectiveness of medical practice. Despite these problems, many commentators have not been able to agree as to the proper level of control that state or federal governments should have over health care.

Following WORLD WAR II, the number of Americans that had private insurance policies grew dramatically. In 1965, Congress approved the development of MEDICARE and MEDICAID to assist the elderly and the poor in being able to afford medical care. The vast majority of U.S. citizens were covered by either private or public insurance at that time. However, healthcare costs experienced a dramatic growth during the 1970s, and employers were forced to pay for the bulk of this increase as they paid their employees' premiums. Many companies in the early 1980s began to require employees to pay deductibles on their insurance policies, and some small companies began to refuse to provide insurance at all.

Beginning in the 1980s, scholars and other commentators began to propose a variety of major reforms to the healthcare system to create a truly national system. In 1989, an article in the *New England Journal of Medicine* by David Himmelstein and Steffe Woolhander maintained that the system of health care in the United States was failing. A considerable amount of concern by those authors and others was directed towards the overhead costs and other administrative expenses incurred by insurance companies and healthcare providers. According to one study in 1987, the total cost of healthcare administration was an estimated $96.8 billion to $120.4 billion, accounting for 19.3 to 24.1 percent of the total spending on health care in the United States. In 1989, the more than 1,500 private health insurers in the United States consumed an estimated eight percent of their total revenues through overhead costs.

A number of commentators compared the healthcare system in the United States with the national system in Canada. Administrative healthcare costs in the United States were estimated in 1983 to be 60 percent higher than those in Canada, and Canada's system provides healthcare coverage for all of its citizens. Canada employs a so-called *single-payer* form of national health insurance in which the federal government administers and finances the plan. All Canadians are covered under the plan, which provides for a basic benefit package. Citizens are not required to pay a deductible or co-payment, and the government forbids private insurance companies from duplicating the services provided under the government plan. The single-payer approach reduces overhead expenses dramatically because the government pays the medical costs directly to the provider.

Although many in the medical community supported proposals to adopt a form of the single-payer model, critics noted the population of the United States is roughly ten times the population of Canada. These critics also noted that the costs of such a system would be paid for with taxes, so citizens are required to pay for this system indirectly. Moreover, adoption of such a system would involve a high level of governmental involvement, which conservative commentators dislike.

Other proposals for national health care have been introduced and have likewise been advocated unsuccessfully. Some proposals include mandates that all employers provide insurance coverage to all employees. Other proposals focus on market-based solutions, including the devel-

opment of medical savings accounts holding funds, which individuals could use to spend for healthcare costs. The competing sides to the debate are generally unable or unwilling to compromise their positions, and the reform effort remains largely a matter of rhetoric.

The issue of healthcare reform was a major debate during the 1992 presidential campaign. Most of the Democratic candidates, including eventual nominee BILL CLINTON, advocated their own strategies for this reform, as did the incumbent president GEORGE H.W. BUSH. Clinton's proposal, which was a compromise between several reform alternatives, purported to guarantee practically universal coverage by requiring employers to provide health insurance to all full-time employees. The plan would have also established a national health board and an ADMINISTRATIVE AGENCY that would have been responsible for determining the maximum allowable growth rate of insurance premiums of private insurers.

After Clinton was elected, the healthcare reform initiative was a top priority in the first two years of his first term. However, Clinton encountered many roadblocks. He was criticized for having his wife, HILLARY RODHAM CLINTON, take the lead in promoting the proposal. The plan was also very complex, and the administration was criticized for failing to articulate it properly to the public. Several bills that would have given rise to major healthcare reform were introduced before Congress in 1993 and 1994, but Congress refused to take action with respect to most of them. The most significant of these bills was the National Health Security Act, S. 1757, 103d Cong., in 1994, but its consideration was stalled at the committee level.

Republicans won a sweeping victory in the 1994 congressional elections, and the enthusiasm for providing a national healthcare system declined. Evidence also suggested that increases in healthcare costs had begun to stabilize. From 1993 to 1997, U.S. spending on health care remained at 13.5 percent of the country's gross national product (GNP). In 1997, the United States experienced only a 4.8 percent increase in healthcare spending, which was an all-time low. Moreover, by 1997, private companies and individuals paid about 53.6 percent of the overall health expenditures, which was considerably less than the percentage paid 20 years prior.

Although major healthcare reform in the United States appears less likely than it did during the early 1990s, commentators note that the poor still suffer from the market-based system. Many lower-class workers suffer more than nonworkers, primarily due to the current public insurance systems, especially Medicaid. These workers are often paid too much to qualify for Medicaid, yet their employers do not provide insurance and the workers cannot afford to pay insurance premiums from private companies. Even more disconcerting to many observers is the number of children who are uninsured and whose families do not qualify for Medicaid. As many as 8.5 million children under the age of 18 are uninsured, according to the 2001 census.

Beyond the political and economic considerations in the debate regarding national health care are questions of whether citizens in the United States possess the right to such care. Few people question that Congress has the power, both under the COMMERCE CLAUSE and Spending Clause of the Constitution, to enact national healthcare legislation, but some maintain that health is one of the basic HUMAN RIGHTS that the Constitution impliedly protects. Other commentators disagree strongly, noting that no citizen has the inherent right to health care and that health care providers deserve to be paid the market value for their services. Other critics add that the intervention required of the government in a national healthcare system would make citizens too dependent upon the state, which could lead the government to take excessive control over its citizens' lives.

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CROSS-REFERENCES

Medicaid; Medicare.

## NATIONAL INDUSTRIAL RECOVERY ACT OF 1933

The National Industrial Recovery Act of 1933 (NIRA) was one of the most important and daring measures of President FRANKLIN D. ROOSEVELT'S NEW DEAL. It was enacted during the famous First Hundred Days of Roosevelt's first term in office and was the centerpiece of his initial efforts to reverse the economic collapse of the Great Depression. NIRA was signed into law on June 16, 1933, and was to remain in effect for

two years. It attempted to make structural changes in the industrial sector of the economy and to alleviate unemployment with a public works program. It succeeded only partially in accomplishing its goals, and on May 27, 1935, less than three weeks before the act would have expired, the U.S. Supreme Court ruled it unconstitutional.

Economists, scholars, politicians, and the public at large were deeply divided as to the underlying causes of the Great Depression and the best means to bring it to an end. In the months following Roosevelt's inauguration, his advisers, along with members of Congress and representatives from business and labor, drafted the legislation that was introduced in Congress on May 15, 1933, as the National Industrial Recovery Act. The division of opinions about the Depression was reflected in those who drafted NIRA, and the act drew both praise and criticism from across the political spectrum. Nevertheless, the urgency of the economic situation (with unemployment exceeding 30 percent in many parts of the country) pressured Congress to act.

The House of Representatives passed the NIRA by a vote of 325 to 76. When it reached the Senate, however, several powerful senators opposed the bill. Some progressives favored alternative legislation authored by Alabama Senator HUGO L. BLACK, which promoted a 30-hour workweek. Some senators were concerned that the act suspended the enforcement of ANTITRUST LAWS at the same time that it called on businesses to play a major role in drafting "codes of fair competition." The Senate eventually approved the bill by a margin of seven votes.

NIRA was divided into three sections, or titles. Title I promoted centralized economic planning by instituting codes of fair competition for industry. Title II provided $3.3 billion for public works projects. Title III contained minor amendments to the Emergency Relief and Construction Act of 1932 (47 Stat. 709).

Title I of the act declared a "national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public WELFARE, and undermines the standards of living of the American people." To correct this situation, NIRA proposed to "remove obstructions to the free flow of interstate and foreign commerce, . . . to eliminate unfair competitive practices, . . . to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment [and] to improve standards of labor." NIRA was designed to accomplish these goals through the codes of fair competition, which were essentially sets of rules created on an industry-by-industry basis governing wages, prices, and business practices. The codes were intended to arrest the downward spiral of the economy in which high unemployment depressed wages, which decreased public purchasing power, leading to lower prices and profits (as desperate businesses tried to undersell one another), putting further downward pressure on wages. It was hoped that organized cooperation between business and government would correct what was perceived by some to be waste and inefficiency in the free-market economy.

NIRA created the NATIONAL RECOVERY ADMINISTRATION (NRA) to oversee the drafting and implementation of the codes of fair competition. The agency was modeled, in part, after the War Industries Board, which had operated during WORLD WAR I. To lead NRA, Roosevelt chose former General Hugh S. Johnson, who had served as a liaison between the U.S. Army and the War Industries Board during World War I.

NRA began its work with great fanfare and initially received enthusiastic public support. A massive public relations campaign included the largest parade in the history of New York City. Businesses that adopted the codes were encouraged to advertise the fact by displaying the NRA blue eagle logo with its motto, "We do our part."

The NRA worked with businesses to establish the mandated codes for fair competition. Industrial groups then submitted proposed codes to the president for his approval. The president approved the codes only if the submitting organization did not restrict membership and was representative of the industry, and if the codes themselves promoted the policy of the act. Although the codes were exempt from antitrust laws, they were to neither foster monopolies nor discriminate against small businesses. Once approved, the codes became legally enforceable standards for that trade or industry.

Under Section 3(c) of the act, federal district courts had jurisdiction over code violations, and U.S. district attorneys were given authority to seek court orders to compel violators to comply with the codes. Section 3(f) provided that any violation affecting interstate or foreign commerce was to be treated as a misdemeanor for which an offender could be fined not more than $500 for each offense.

Under Section 7(a), industry codes were required to include provisions for the protection of labor. For example, provisions for minimum wages and the right to COLLECTIVE BARGAINING were to increase workers' deflated purchasing power, and limits on the number of work hours were to increase employment by spreading the available hours of work among more employees. Section 7(a) also provided that an employee must not be required to join a company union or be prevented from joining a union as a condition of employment.

Section 7(a) had such far-reaching consequences that some labor historians have called it the MAGNA CHARTA of the labor movement. Nationwide, union membership grew dramatically. The Amalgamated Clothing Workers, for example, doubled its membership from 60,000 to 120,000 between early 1933 and mid-1934. The United Mine Workers of America quadrupled its membership, from 100,000 to 400,000, less than a year after passage of NIRA.

Under the supervision of the NRA, several hundred industry codes were rapidly enacted, but public support soon diminished. The codes tended to increase efficiency and employment, improve wages and hours, prevent price cutting and UNFAIR COMPETITION, and encourage collective bargaining. However, they also tended to raise prices and limit production. Businesses found the codes burdensome. More than 540 codes were promulgated, and it was not unusual for one business to be governed by several, or even several dozen, codes. The codes sometimes conflicted with each other, and businesses occasionally had to pay their workers different rates of pay at different times of the day.

Laborers were also unhappy with NIRA. In spite of some NRA successes, such as the end of child labor in the textile industry, many in the labor community alleged that the NRA's interpretation of the labor provisions favored employers. In addition, labor was dissatisfied with the activities of the NRA regarding unions. It appeared that Congress had intended Section 7(a) of NIRA to assist employees in self-organizing and to discourage company unions. However, the NRA did not actively seek to prohibit the creation of company unions, nor were NRA representatives available to protect individuals from being coerced into joining company unions.

Title II of NIRA created the Public Works Administration (PWA) to award $3.3 billion in contracts for the construction of public works. (The government did not directly employ workers on PWA projects, as it did in a later New Deal program with a similar name, the Works Progress Administration [WPA].) Secretary of the Interior Harold L. Ickes ran the PWA. Ickes was scrupulously honest in choosing projects and awarding contracts, and he insisted that funds not be wasted. He was successful in that respect. However, the result was that the benefits of the public works provisions of NIRA were realized too slowly to have much immediate effect on national recovery.

*The NIRA created the National Recovery Administration (NRA) to oversee the drafting and implementation of the codes of fair competition. Businesses adopting the codes were encouraged to advertise the fact by displaying the NRA blue eagle logo and motto, "We do our part."*

AP/WIDE WORLD PHOTOS

Nevertheless, the PWA did oversee an enormous number and variety of public works projects, including schools, hospitals, post offices, courthouses, roads, bridges, water systems, and waste treatment plants. Its two most prominent projects were the construction of the Triborough Bridge in New York City and the completion of the Boulder (now called the Hoover) Dam on the Colorado River in Arizona. Ultimately the PWA completed more than 34,000 projects around the country.

In spite of the gradual success of the Public Works Administration, the NRA continued to lose the support of the public and its government sponsors. Three weeks before NIRA's two-year expiration date, the Supreme Court unanimously declared it unconstitutional in *Schechter Poultry Corp. v. United States,* 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935). The Court held that the act impermissibly delegated

legislative power to the NRA and that the application of the act to commerce within the state of New York exceeded the powers granted to the federal government under the COMMERCE CLAUSE of the U.S. Constitution. The Commerce Clause gives Congress the power to regulate commerce between states, but not within an individual state.

In response to *Schechter* and to other decisions invalidating New Deal legislation, Roosevelt delivered a famous speech on May 31, 1935, in which he criticized the Supreme Court for employing "the horse and buggy definition of interstate commerce." Subsequent New Deal legislation incorporated some elements of NIRA, most notably the labor provisions of Section 7(a), and ultimately survived the scrutiny of the Supreme Court.

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CROSS-REFERENCES

Labor Law; Labor Union.

## NATIONAL LABOR RELATIONS ACT

See WAGNER ACT.

## NATIONAL MEDIATION BOARD

The National Mediation Board is a three-person board created in 1934 by an act amending the Railway Labor Act (45 U.S.C.A. §§ 151–158, 160–162, 1181–1188) to resolve disputes in the railroad and airline industries that could disrupt travel or imperil the economy. The board also handles railroad and airline employee representation disputes and provides administrative and financial support in adjusting minor grievances in the railroad industry. At the time the board was created, railroads were the dominant carriers of passengers and commercial goods. Railroad strikes were common, which disrupted travel and the national economy. In addition, friction between railroad companies and the railroad LABOR UNIONS made negotiation of employment issues difficult.

The National Mediation Board was created to address these issues, first for railroads and later for commercial airlines. The board's major responsibility is the mediation of disputes over wages, hours, and working conditions that arise between rail and air carriers and organizations representing their employees. The board also investigates representation disputes and certifies employee organizations as representatives of crafts or classes of carrier employees.

The board may become involved in mediation when the parties fail to reach accord in direct bargaining. Either party may request the board's services, or the board may become involved on its own. Once the board has entered the process, negotiations continue until the board determines that its efforts to mediate have been unsuccessful, at which time it seeks to induce the parties to submit the dispute to ARBITRATION. If either party refuses arbitration, the board issues a notice stating that the parties have failed to resolve the dispute through mediation. The notice triggers a thirty-day cooling-off period, after which either side may avail itself of SELF-HELP, which may include an employee strike.

The board must notify the president when the parties have failed to reach agreement through the board's mediation efforts and when the labor dispute, in the judgment of the board, threatens substantially to interrupt interstate commerce to a degree that would deprive any section of the country of essential transportation service. In these cases the president has the discretion to appoint an emergency board to investigate and report on the dispute. In these situations self-help is barred for sixty days after the appointment of the emergency board.

If a carrier's employees cannot agree on who will represent them, the board must investigate the dispute and determine by a secret ballot election or other appropriate means to whom a representation certificate should be issued. In the course of this process, the board must determine the craft or class in which the employees seeking representation properly belong.

Disputes in the railroad industry concerning rates of pay, rules, or working conditions are referred to the National Railroad Adjustment Board. This board has four divisions, each one consisting of an equal number of representatives of the carriers and of national organizations of

employees. In deadlocked cases the National Mediation Board is authorized to appoint a referee to sit with the members of the division for the purpose of making an award.

No national adjustment board has been established in the airline industry. Air carriers and employees have established bargaining relationships that create a grievance procedure with a board to resolve the conflicts. The National Mediation Board is frequently called on to name a neutral referee to serve on these kinds of boards when the parties cannot agree on such an appointment themselves.

The board consists of a chair and two other members. Its headquarters are in Washington, D.C.

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CROSS-REFERENCES

Labor Law.

## NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS

The National Organization for the Reform of Marijuana Laws (NORML) is a nonprofit organization dedicated to the legalization of marijuana. Founded in 1970, NORML remains the leading national advocate for legalization. NORML, which believes adult private use of marijuana should be legal, seeks the repeal of federal anti-marijuana laws. Repeal would allow states to experiment with different models of legalization. During the 1970s, NORML led the successful efforts to decriminalize minor marijuana offenses in 11 states and significantly lower penalties in all others. During the 1980s, however, the decriminalization movement lost political appeal when presidents **RONALD REAGAN** and **GEORGE H.W. BUSH** committed their administrations to the "war on drugs."

NORML has a five-person staff at its national headquarters in Washington, D.C. It is governed by a board of directors that includes prominent attorneys, scientists, and researchers. NORML provides information to the national news media for marijuana-related stories and lobbies state and federal legislators to permit the medical use of marijuana and to reject attempts to treat minor marijuana offenses more harshly. NORML also functions as the umbrella group for a national network of activists committed to ending marijuana prohibition.

NORML also assists those who are arrested on marijuana charges through a legal committee (NLC) comprised of 350 criminal defense attorneys. The NLC also sponsors NORML legal seminars, notifies NORML of important judicial decisions and law enforcement trends, and provides NORML with copies of briefs and other legal documents. These lawyers regularly defend victims of marijuana prohibition and sometimes set important legal precedents.

The NORML **AMICUS CURIAE** committee files amicus curiae (friend of the court) briefs in important or novel marijuana-related legal actions at the appellate court level. This committee, which is comprised of experienced NORML criminal defense attorneys from around the country, gives NORML the opportunity to contribute its point of view in cases that may have national importance.

In 1997, NORML established the NORML Foundation, a nonprofit organization that sponsors public advertising campaigns to educate the public about the costs of marijuana prohibition and the benefits of alternative policies. In 1999, the organization adopted a mission statement that advocated the repeal of the prohibition of responsible marijuana use by adults.

NORML has actively supported efforts to legalize the medical use of marijuana for those patients suffering from serious illnesses and medical conditions, including glaucoma, AIDS, multiple sclerosis, quadriplegia and paraplegia, and the side effects of chemotherapy, despite the fact that federal law still prohibits such use. As of 2003, nine states (Alaska, Arizona, California, Colorado, Hawaii, Maine, Nevada, Oregon, and Washington) still had laws in effect that legalized the medical use of marijuana.

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CROSS-REFERENCES

Drugs and Narcotics; Drug Enforcement Administration.

## NATIONAL ORGANIZATION FOR WOMEN

The National Organization for Women (NOW) is the largest organization of feminist activists in the United States, numbering more than 500,000 members. A nonpartisan organization, it has more than 550 chapters in all 50 states and the District of Columbia. It receives its funding from membership dues and private donations. NOW has used both traditional and nontraditional means to push for social change. Traditional activities have included extensive electoral and LOBBYING work, and the filing of lawsuits. NOW also has organized mass marches, rallies, pickets, counter-demonstrations, and nonviolent civil disobedience. Its headquarters are located in Washington, D.C.

NOW was established in 1966 in Washington, D.C., by people attending the Third National Conference of the Commission on the Status of Women. Among the 28 NOW founders was its first president, BETTY FRIEDAN, author of *The Feminine Mystique* (1963). In its original statement of purpose, NOW declared to "take action to bring women into full participation in the mainstream of American society now, exercising all privileges and responsibilities thereof in truly equal partnership with men."

As part of its efforts to pursue economic equality and other rights for women, NOW launched a nationwide campaign in the 1970s to pass the EQUAL RIGHTS AMENDMENT (ERA) to the U.S. Constitution. Though the ERA ultimately failed to be ratified, NOW efforts helped the organization. NOW became a huge network of more than 200,000 activists and began operating with multimillion-dollar annual budgets. Leaders organized POLITICAL ACTION COMMITTEES, NOW/PAC and NOW Equality PAC, that raised hundreds of thousands of dollars for pro-ERA candidates.

NOW priorities are promoting economic equality, including an amendment to the U.S. Constitution that will guarantee equal rights for women; championing ABORTION rights, reproductive freedom, and other women's health issues; opposing racism and opposing bigotry against lesbians and gays; and ending violence against women. The organization has proved effective in many of these areas. NOW points to sweeping changes that put more women in political posts; increased educational, employment, and business opportunities for women; and the enactment of tougher laws against violence, SEXUAL HARASSMENT, and discrimination.

Its 1992 "Elect Women for a Change" campaign sent an unprecedented number of feminist women and men to the U.S. Congress. NOW has combated harassment and violence by organizing the first "Take Back the Night" marches and establishing hot lines and shelters for battered women. NOW has also successfully prosecuted lawsuits against antiabortion groups that bombed and blocked clinics and laws that deprived lesbian women of custody of their children. NOW has also consistently sought economic equality for women in the workplace, exposing both the "glass ceiling" that professional women face in advancing in the workplace and the difficult circumstances that poor women face in the United States.

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### CROSS-REFERENCES

Equal Rights; "National Organization for Women Statement of Purpose" (Appendix, Primary Document); Women's Rights.

## NATIONAL RECOVERY ADMINISTRATION

In 1933, the United States was in the throes of a severe economic depression. Unemployment was widespread, and the economic system was in chaos. An emergency measure was needed to alleviate the situation, and the members of President FRANKLIN DELANO ROOSEVELT's NEW DEAL administration attempted to ease the problem with the passage of the NATIONAL INDUSTRIAL RECOVERY ACT (NIRA) (48 Stat. 195).

The chief provision of the act was the establishment of business codes to be enforced nationally. The codes included rules regarding fair competition, discontinuance of antitrust regulations for a two-year period, voluntary participation in unions, and establishment of shorter hours and better wages.

In June 1933, the National Recovery Administration (NRA) was created to supervise the execution of the NIRA under the direction of Hugh S. Johnson. During its first year, the NRA worked on the industrial codes; all participating

businesses displayed a blue eagle, a sign of patriotism as well as acceptance of the program.

Many people regarded the NRA as too powerful, and in 1935 the U.S. Supreme Court declared the CODIFICATION system of the NRA unconstitutional in SCHECHTER POULTRY CORP. V. UNITED STATES, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, due to the incorrect granting of legislative authority to the EXECUTIVE BRANCH.

In 1936 the controversial NRA came to an end. During its brief existence, employment was stimulated, child labor was prohibited, and labor organization was encouraged.

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## NATIONAL REPORTER SYSTEM

See CENTURY DIGEST®; DECENNIAL DIGEST®; FEDERAL REPORTER®.

## NATIONAL RIFLE ASSOCIATION

The National Rifle Association (NRA) is an organization that promotes the sport of shooting rifles and pistols in the United States. In 2001, the NRA had replaced the AMERICAN ASSOCIATION OF RETIRED PERSONS as Washington's most powerful LOBBYING group, according to *Fortune* magazine's top 25 list. The organization reports a membership of more than 4 million, which included 1 million new members alone in 2000. The membership includes hunters, target shooters, gun collectors, firearms manufacturers, and police personnel. From its headquarters in Washington, D.C., the NRA has been a dominant voice in the debate over GUN CONTROL.

With a budget of more than $200 million, the NRA maintains its own $35 million state-of-the-art lobbying machine, which includes as its major branch the NRA Institute for Legislative Action. The lobbying component is complete with an in-house telemarketing department, its own newscast, and 1 million political organizers at the precinct level. The NRA considers itself America's foremost defender of the SECOND AMENDMENT of the U.S. Constitution, which preserves the right of the people to bear arms. The NRA platform prefers gun safety programs and the intensified enforcement of existing federal gun laws to an increase in the number of restrictions on gun owners.

Formed by New York charter in 1871, the NRA defined its original goal to "promote and encourage rifle shooting on a scientific basis," according to co-founder Colonel William C. Church. He and fellow co-founder, fellow Union veteran George Wingate, were dismayed by the lack of sportsmanship shown by Union troops and wanted to set up a rifle range for practice. With contributions from New York State, the new organization purchased the Creed Farm on Long Island in 1872 and opened it to members in 1873 under the name of "Creedmoor," the first official NRA shooting range. When political opposition to the promotion of marksmanship arose in New York, Creedmoor was deeded back to the state. A new range was established in Sea Girt, New Jersey.

The NRA targeted America's youth from the onset, and by 1903 was promoting shooting sports and competition matches through the establishment of rifle clubs at all major colleges, universities, and military academies. In addition to training and education in marksmanship, the association published *The American Rifleman*, which helped keep its members abreast of new bills and laws affecting firearms. In 1934, the NRA formed its Legislative Affairs Division, which engaged in direct mail efforts to apprise members of legislative facts regarding and analyses of pending bills. Although it was not involved in direct lobbying efforts at that time, the NRA later formed the Institute for Legislative Action in 1975, organized for the "the political defense of the Second Amendment."

During WORLD WAR II, the association offered its shooting ranges to the U.S. government and helped develop training materials for personnel and industrial security. NRA members also volunteered to reload ammunition for those guarding war plants. Through a series of gun control laws enacted between the WORLD WAR I and II, Britain found itself virtually disarmed and vulnerable when Germany began its European invasions. The NRA's efforts to encourage assistance for Britain in 1940 resulted in the collection of more than 7,000 firearms for Britain's defense against German invasion.

Following the war, the NRA concentrated on the hunting community and in 1949, in conjunction with the state of New York, set up the

first hunter education program. In 1973, it launched its second magazine, *The American Hunter*. Although hunter education courses eventually became the assumed responsibility of state fish and game departments, the NRA continued to manage its Youth Hunter Education Challenge (YHEC), a program that as of 2003 was active in 43 states and three Canadian provinces, with youth enrollment of more than 40,000.

Since 1956, the association has been instrumental in law enforcement training as well. With the introduction of its Police Firearms Instructor Certification Program in 1960, the NRA became the only national trainer of law enforcement officers, and by 2000, more than 10,000 individuals had become NRA-certified graduates. The association's certified instructors train about 750,000 civilian gun owners each year, conducting gun safety programs for children in addition to personal security and protection seminars, as well as marksmanship training, for adults.

The NRA in the 1990s, in addition to fighting gun control, worked to pass state laws that made it easier for gun owners to carry their weapons in public. The "right-to-carry" movement is based on the idea that any trained, law-abiding citizen has a right to get a permit from the government to carry a firearm. As a result of the NRA's lobbying efforts, 14 states have passed right-to-carry laws and 24 other states have liberalized their statutes.

The NRA has also fought efforts by city and county governments to regulate firearms. It has lobbied for state **PREEMPTION** statutes, which declare that only the state government may pass firearms laws. Through its efforts, Wisconsin, Pennsylvania, and several other states passed preemption laws in 1995. Despite its longtime success in fighting gun control, the increasingly belligerent NRA rhetoric became a problem for the organization in the mid-1990s. Former President **GEORGE H.W. BUSH**, a lifetime member, resigned from the NRA to protest a fund-raising letter that contained anti-government statements.

The association announced the publication of its third periodical, *The American Guardian*, which proved to be less esoteric in content and catered more to topics such as recreational use of firearms and **SELF-DEFENSE**. Concomitant with the new publication was an internal effort to purge the organization of radical, right-wing gun enthusiasts and develop a more general appeal. From 1997 to 2003, actor Charleton Heston served as the organization's president. Kayne Robinson, a former police officer and Marine, took over as president after Heston announced that he was suffering from a neurological disorder

Politically and historically, supporters for both the NRA and the gun-control movement have split along party lines. The NRA essentially backed so-called conservative candidates and views, such as those typically held by the **REPUBLICAN PARTY** or the **LIBERTARIAN PARTY**; those who sought stricter limitations on gun ownership tended to support Democratic candidates. At the end of the twentieth century, the delineation became more nebulous, not only among politicians but also between lobbying groups. While the organization generally opposes all forms of gun control as abridgements upon individuals' constitutional rights, many NRA members had aligned with what they refer to as "common-sense" gun control efforts. The militant gun control movement, however, splintered into extremist and middle-ground factions within their own ranks. The NRA generally holds that the criminals create gun violence, not the 48 percent of the electorate who constitute law-abiding gun owners.

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**CROSS-REFERENCES**

Gun Control; Libertarian Party.

## NATIONAL RIGHT TO LIFE COMMITTEE

The National Right to Life Committee (NRLC) is a nonprofit organization that seeks to end legalized **ABORTION** in the United States. Founded in 1973, following the U.S. Supreme Court's decision in **ROE V. WADE**, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), which held that women had a constitutional right to abor-

tion, the NRLC has become the leading antiabortion organization in the United States. It has more than 7 million members, with 3,000 local chapters and 50 state affiliates. It is headquartered in Washington, D.C., and has an annual budget of more than $9 million. The *National Right to Life News*, a biweekly newsletter, has a circulation of 135,000.

From its inception, the NRLC has sought the passage of a constitutional amendment banning abortion. Though this effort has not been successful, the NRLC has played an important role in state and federal legislation regulating and restricting abortion, and has been instrumental in restricting government funding of abortions to poor women. The NRLC has a POLITICAL ACTION COMMITTEE that endorses and campaigns for candidates who support its agenda, which includes opposition to some forms of BIRTH CONTROL as well as physician-assisted suicide. The committee states that it does not take a position on issues such as contraception, sex education, CAPITAL PUNISHMENT, and national defense.

The NRLC has lobbied for federal legislation banning partial-birth abortions. Though Congress passed the Partial-Birth Abortion Ban Act in 1996 and 1997, President BILL CLINTON vetoed the measure both times. The act remained the highest priority of the NRLC, which has helped secure state legislation banning the abortion procedure in 17 states. It also supports legislation that would make it a federal offense to transport an individual age 17 or under across a state line for an abortion if this action circumvents the application of a state law requiring parental involvement in a minor's abortion.

The NRLC operates four outreach programs: National Teens for Life, American Victims of Abortion, National Pro-Life Religious Council, and Black Americans for Life. National Teens for Life organizes various activities for its teenage members, including speaking in schools and to youth groups, volunteering in crisis pregnancy centers, peer counseling, debating, and helping adult groups work to pass legislation. American Victims of Abortion is comprised of women who have had an abortion. This group lobbies legislators and seeks to educate the media about the physical and emotional risks associated with abortion. The National Pro-Life Religious Council seeks "to articulate the historic Judeo-Christian perspective concerning human life issues," and "to support efforts that discourage and prevent acts that dehumanize and harm women, the unborn, DISABLED PERSONS, the elderly, and those who are medically dependent." Black Americans for Life attempts to discourage African American women from having abortions.

The NRLC political action committee spent over $2 million during the 1996 elections. In 1999, NLRC opposition to campaign finance reform caused a divisive split between the NLRC and pro-life Democrats who accused the organization of becoming increasingly identified with the REPUBLICAN PARTY. The election of GEORGE W. BUSH as president in 2000 and the gain of Republican seats in both the House and Senate in 2002 strengthened the position of abortion opponents including the NRLC. As a number of state legislatures with anti-abortion majorities began to pass restrictive legislation, many analysts waited to see if Supreme Court retirements would lead President Bush to appoint a judge or judges who might vote to reverse *Roe v. Wade*, given the opportunity.

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CROSS-REFERENCES

Abortion; Fetal Rights; Women's Rights.

## NATIONAL SECURITY COUNCIL

The National Security Council (NSC) is the U.S. president's principal forum for considering national security and foreign policy matters; the council consists of senior national security advisors and cabinet officials. Since its inception under President HARRY TRUMAN, the function of the NSC has been to advise and assist the president on national security and foreign policies. The council also serves as the president's principal arm for coordinating these policies among various government agencies.

The NSC was established by the National Security Act of 1947, as amended (50 U.S.C.A. § 402), and was placed in the Executive Office of the President by REORGANIZATION PLAN No. 4 of 1949 (5 U.S.C.A. app.). The NSC was designed to provide the president with a foreign-policy instrument independent of the STATE DEPARTMENT.

*President George W. Bush meets with the National Security Council in October 2001.*

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The NSC is chaired by the president. Its statutory members, in addition to the president, include the vice president and the secretaries of state and defense. The chair of the Joint Chiefs of Staff is the statutory military advisor to the council, and the director of the CENTRAL INTELLIGENCE AGENCY is the statutory intelligence advisor. The secretary of the treasury, the U.S. representative to the UNITED NATIONS, the assistant to the president for national security affairs, the assistant to the president for economic policy, and the chief of staff to the president are invited to all meetings. The attorney general and the director of the OFFICE OF NATIONAL DRUG CONTROL POLICY attend meetings pertaining to their jurisdiction. Other officials are invited, as appropriate.

The NSC began as a small office supporting the president, but its staff has grown over the years. It is headed by the assistant to the president for national security affairs, who is also referred to as the national security advisor. The NSC staff performs a variety of activities for the president and the national security advisor. The staff participates in presidential briefings, assists the president in responding to congressional inquiries, and prepares public remarks. The NSC staff serves as an initial point of contact for departments and agencies that want to bring a national security issue to the president's attention. The staff also participates in interagency working groups organized to assess policy issues in coordinated fashion.

The issues concerning national security are wide ranging. Foreign and military relations with other countries have generally taken center stage, but international TERRORISM, narcotics control, and world economic issues have been brought before the NSC. In most administrations, the national security advisor has played a key role in formulating foreign policy. For example, as national security advisor during the Nixon administration, HENRY KISSINGER was the *de facto* SECRETARY OF STATE, developing policy on the VIETNAM WAR, the opening of relations with communist China, and negotiating with Israel and the Arab nations for a peaceful solution to problems in the Middle East.

The image of the NSC was tarnished in the 1980s during the Reagan administration. Two successive national security advisors, Robert C. McFarlane and Rear Admiral John M. Poindexter, and NSC staffer Lieutenant Colonel Oliver L. North participated in the IRAN-CONTRA AFFAIR. They violated a congressional ban on U.S. military aid to the Nicaraguan anticommunist Contra rebels by providing the rebels with funds obtained by the secret sale of military weapons to Iran.

Under the administration of President GEORGE H.W. BUSH in the early 1990s, the NSC was reorganized to include a Principals Committee, Deputies Committee, and eight Policy Coordinating Committees. Under President BILL CLINTON, NSC membership was expanded to include the secretary of the Treasury, the U.S representative to the United Nations, and the assistant to the president for Economic Policy as well as the president's chief of staff and his national security advisor. In 2001 President GEORGE W. BUSH appointed Dr. Condoleezza Rice to be his national security advisor. She was the first woman appointed to that position. The NSC has been involved in American foreign policy decisions that have ranged from sending troops to Panama in 1989 and to Iraq in 1991 and 2003, as well as dealing with such issues as international trafficking in illegal drugs, U.N. peacekeeping missions, strategic ARMS CONTROL policy, and global environmental affairs.

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CROSS-REFERENCES

Executive Branch; Presidential Powers; State Department.

## NATIONAL TRANSPORTATION SAFETY BOARD

The National Transportation Safety Board (NTSB) is a federal investigatory board headquartered in Washington, D.C., whose mandate is to ensure safe public transportation. Established in 1966 as part of the DEPARTMENT OF TRANSPORTATION, the NTSB investigates accidents, conducts studies, and makes recommendations to federal agencies and the transportation industry. It is chiefly known for its highly visible role in civil aviation accidents, which it has sole authority under federal law to investigate. Additionally, the NTSB probes certain marine accidents and accidents that occur in the use of railroads, highways, and pipelines. The five members of the board are appointed by the president.

The NTSB grew out of the long history of federal oversight of aviation. As early as 1926, Congress required the investigation of civil aviation crashes under the Air Commerce Act (Pub. L. No. 69-254, 44 Stat. 568). Over the next three decades, lawmakers created a maze of regulatory agencies, including the Civil Aeronautics Authority and the FEDERAL AVIATION ADMINISTRATION (FAA). The Federal Aviation Act of 1958 (Pub. L. No. 85-726, 72 Stat. 731) gave duties for investigating accidents to the Civil Aeronautics Board (CAB), intending for the board to study aircraft and the actions of their pilots in the hopes of preventing future disasters.

As the airline industry grew, Congress reorganized its regulatory scheme. With passage of the Department of Transportation Act of 1966 (Pub. L. No. 89-670, 80 Stat. 935), lawmakers created the NTSB within the Department of Transportation and gave it the responsibilities formerly held by the CAB. However, the NTSB often ended up conducting investigations of the FAA. In 1974, in an attempt to avoid conflicts between agencies, Congress made the NTSB an independent board by passing the Independent Safety Board Act of 1974 (49 U.S.C.A. app. § 1901 [1982]). The act gave the NTSB sole responsibility for investigating airline crashes.

The investigatory powers of the NTSB are quite broad. Once its teams are dispatched to the site of an accident, they maintain exclusive control over the scene. Their authority includes seizing all evidence for examination, including an airline's flight recorder (the so-called "black box"). They can also bar other parties from their proceedings—an important element of autonomy given the inevitable litigation that follows airline accidents. In subsequent stages of an investigation, the NTSB is empowered to demand records, testimony, and other information from airline officials. The purpose of its work is to prepare public reports of two types: factual reports and interpretive analyses of accidents to determine their PROBABLE CAUSE.

The use of NTSB reports in court is controversial. Under federal law they are intended to be used to prevent future accidents from occurring, and therefore they are released to the public. But to a certain extent, they are forbidden by law from being used in civil lawsuits. Some form of this rule has been in effect since the creation of the CAB in 1958. Section 1441(e) of the Independent Safety Board Act of 1974 stated, "No part of any report or reports of the National Transportation Safety Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports." However, courts have permitted civil litigants to use some NTSB report material, and the regulations have changed in response. Only the so-called probable cause reports are strictly impermissible in civil lawsuits, and NTSB employees are permitted only to testify as to factual matters surrounding their investigations. These limitations have upset some attorneys who argue that civil litigants should have full access to all NTSB data, but defenders have argued that the standard is necessary to protect the board's autonomy.

Since its creation in 1967, the NTSB has investigated over 114,000 aviation accidents and more than 10,000 surface transportation accidents. The organization has issued more than 11,600 recommendations regarding transportation safety to over 2,200 recipients. Many of these recommendations became the basis for safety features incorporated into surface, air, and water vehicles. Since 1990, the NTSB has highlighted various issues such as protecting child passengers, use of SEAT BELTS, and recreational boating safety in its "Most Wanted" list of transportation safety improvements. NTSB investigators are on call 24 hours a day, 365 days a year,

**National Transportation Safety Board**

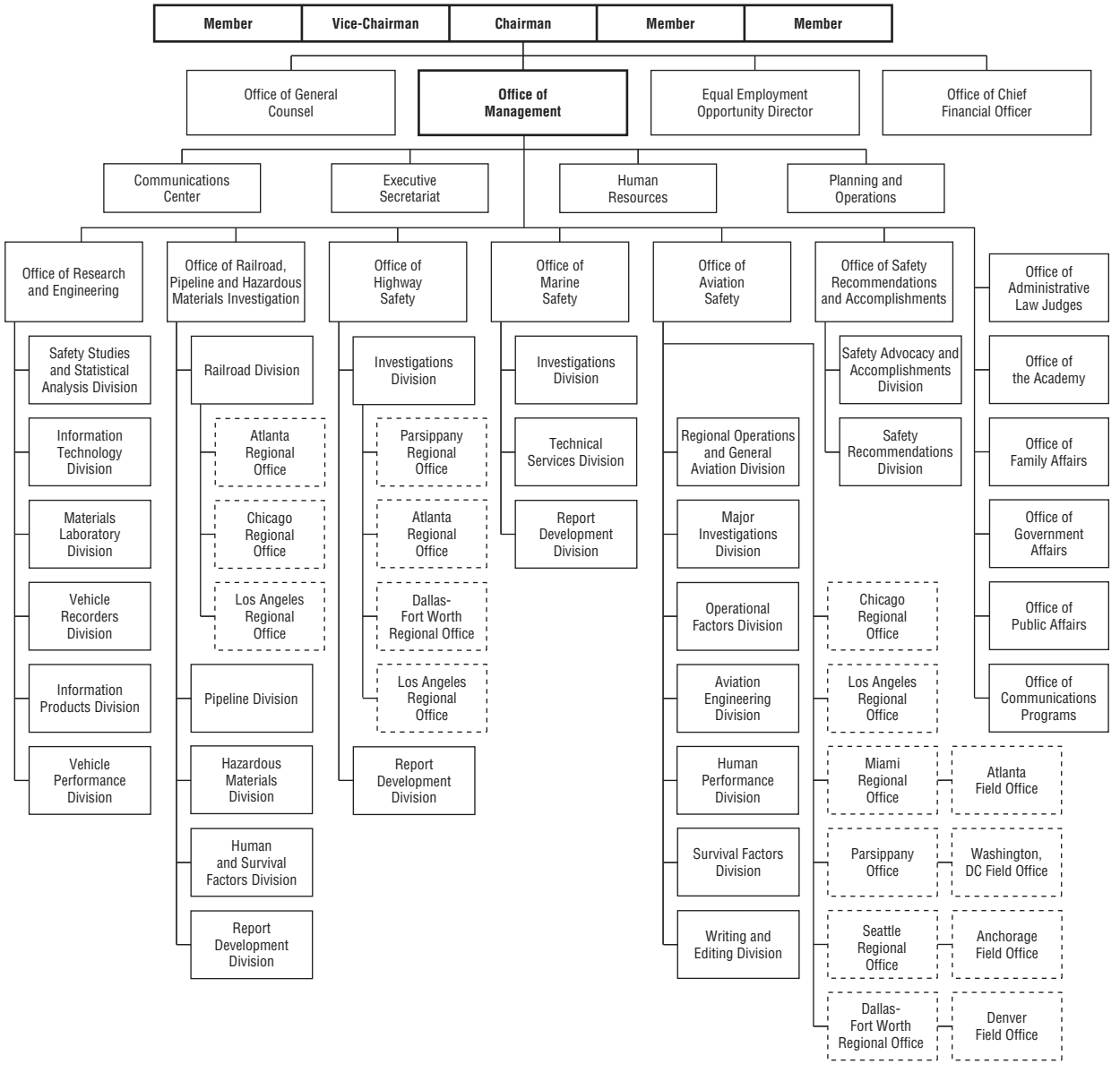


traveling throughout the United States and all over the world to investigate major accidents.

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CROSS-REFERENCES

Airlines; Federal Aviation Administration.

## NATIONAL URBAN LEAGUE

The National Urban League, more commonly known as the Urban League, is a nonprofit, mul-

tiracial organization that is dedicated to the elimination of racial SEGREGATION and discrimination and to the enhancement of economic and educational opportunities for African Americans throughout the United States. The Urban League, which was founded in 1910 and is headquartered in New York City, has more than 100 affiliates in 34 states and the District of Columbia.

In 1896, the U.S. Supreme Court's decision in PLESSY V. FERGUSON 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), which held that "separate but equal" accommodations for blacks and whites was constitutional, led to a severe system of segregation in the South in which so-called JIM CROW LAWS barred blacks from schools, jobs, and many public places including hotels, bars, and restaurants. The early 1900s saw the beginnings of a migration of blacks from the rural South moving North to find better jobs and economic stability for their families.

Upon arriving in the Northern states, however, many blacks found themselves still excluded from decent housing, jobs, and education. Mostly rural in background, many were bewildered by the customs and mores of urban living. Realizing that these newcomers desperately needed help, the Committee on Urban Conditions among Negroes was established in New York City on September 29, 1910.

In 1911, the committee merged with two other organizations to form the National League on Urban Conditions among Negroes. The organization began by counseling black migrants and training black social workers but soon expanded its activities into such areas as housing, employment, education, recreation, and health and sanitation. By the end of WORLD WAR I, the organization had 81 staff members working in New York and in affiliates that had been established in 30 other cities. In 1919 the organization became known as the National Urban League.

Throughout the Great Depression the Urban League crusaded for the INTEGRATION of blacks into segregated LABOR UNIONS and for inclusion in President FRANKLIN D. ROOSEVELT'S NEW DEAL programs that were aimed at fostering economic recovery. During WORLD WAR II, the League continued to fight for integration of the trade unions, particularly those involved in defense work and in the ARMED SERVICES. After the war, the league worked with businesses to train black workers for various trades and to encourage Fortune 500 companies to participate in job fairs held on black college campuses.

In 1942 Mrs. Mollie L. Moon started the first Urban League Guild in New York City. Guild members were volunteers who helped League efforts and its programs. The guild placed particular emphasis on information, fund-raising, and leadership development. The activities of the New York Guild were so productive that many others were started by Urban League affiliates. In 1952 the National Council of Guilds was established. In 2003 the National Council oversaw the work of guilds in more than 85 cities.

In 1961 Whitney M. Young Jr. became the league's executive director. Under his leadership the organization grew from 60 chapters to 98, and numerous large American corporations and foundations made contributions that supported job and housing programs as well as other social WELFARE programs. Young's ten-point program calling for federal funding to help reduce poverty among blacks became the basis for President Lyndon Johnson's "War on Poverty" that was aimed at reducing poverty for all Americans.

In 1972 Vernon E. Jordan Jr. became the league's fifth executive director. Jordan oversaw a number of new initiatives in the areas of business development, housing, and education. He established the league as a major channel for passing federal funds to urban community programs and services. He also emphasized voter registration, and programs dealing with energy conservation, protection of the environment, and new job roles for women.

John Jacob, who expanded the league's mission and established the Permanent Development Fund, succeeded Jordan in 1982. Jacob advocated for programs to fight crime in black neighborhoods, to reduce teenage pregnancies, and to help single parents. In 1994 Jacob was succeeded by Hugh B. Price, an attorney who emphasized AFFIRMATIVE ACTION, economic empowerment, and the importance of diversity in an increasingly multi-ethnic society.

In 2000 the league recast its Washington Operations Office as the Institute for Opportunity and Equality. The Institute conducts research, analyzes policy, and advocates for significant issues including employment, criminal justice, community development, and economic policy.

In April 2003, the Urban League named Milton Little as interim president and CEO to

replace Price who resigned in November 2002. The new president will oversee the operations of the league, which in 2003 had a budget of more than $40 million and was the oldest and largest community-based U.S. organization dedicated to helping blacks achieve racial and economic parity.

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CROSS-REFERENCES

Civil Rights Acts; Civil Rights Movement; Discrimination; Equal Rights; NAACP.

## NATIONALITY

See ALIENS.

## NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT OF 1990

Years of the U.S. government granting a free hand to those who wished to examine Native American remains came to an end with the passage of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) (25 U.S.C. § 3001 et. seq.). This act marks a reversal of previous U.S. government policies, not only providing protection for Native American burial sites but also helping Native Americans take possession of the remains of their ancestors currently in the hands of museums and other scientific institutions. The law supports the idea that Native Americans have the right to determine the proper disposal of the remains of their ancestors, although it has come under some criticism by the scientific community for its potential to stifle research into ancient American tribes.

Among the many contentious issues that have afflicted the relationship between Native Americans and the U.S. government, none has been more difficult than the issue of the remains of Native American tribes. The U.S. Government has traditionally seen these remains as worthy of archeological and scientific study and has awarded wide latitude to those who want to examine them. In contrast, Native Americans tend to see the archeologists and museums who have dug up and taken possession of these remains over the years as little more than "grave robbers"and have demanded that the burial places of their ancestors be respected.

The law's origin lies in the CIVIL RIGHTS MOVEMENT of the 1960s and its affect on Native Americans, who began advocating changes in American laws that they saw as promoting a disrespect for their culture. Among the most egregious examples of this was the Antiquities Preservation Act of 1906, which made almost all Native American burial sites into "objects of antiquity" or "archaeological resources" and in effect gave the federal government the right to determine their fate. This became unacceptable to Native Americans, and in response to their complaints, the federal government passed the 1979 Archaeological Resource Protection Act, (16 U.S.C. § 470aa-470ii), which made it more difficult to excavate on Native American lands, and the 1989 National Museum of the American Indian Act (20 U.S.C.A. § 80q), which required the Smithsonian Institute to repatriate remains to tribes that could show that they were related to the remains.

But Native American groups saw these laws as inadequate, so in 1990, Congress passed the sweeping Native American Graves Protection and Repatriation Act. NAGPRA for the first time establishes that the ownership or control of Native American cultural items, including remains that are excavated or discovered on federal or tribal lands, shall rest with the Native American tribes themselves. Priority is given first to the lineal descendants of the Native American whose remains were discovered, or in any case in which such lineal descendants cannot be ascertained, in the Native American tribe on whose tribal land such objects or remains were discovered; and then to the Native American tribe that has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects.

If the cultural affiliation of the objects cannot be reasonably ascertained, and if the objects were discovered on federal land that is recognized by a final judgment of the Indian Claims Commission or the U.S. Court of Claims as the aboriginal land of some Indian tribe, the ownership title will go to the Native American tribe that is recognized as occupying the area in which the objects were discovered, if the tribe states a claim for such remains or objects. However, if it can be shown by a PREPONDERANCE OF THE EVIDENCE that a different tribe has a stronger

cultural relationship with the remains or objects than the tribe or organization that currently occupies the area, then ownership of the remains will go to the Indian tribe that has the strongest demonstrated relationship.

In addition, NAGPRA requires federal agencies and each museum that has possession or control over holdings or collections of Native American human remains to compile an inventory of such items and, to the extent possible based on information possessed by such museum or federal agency, identify the geographical and cultural affiliation of such item. The agency or museum must supply notice to any tribe that it finds was affiliated with the remains. The agency and museum must repatriate any items where a claim has been established by known lineal descendant of the Native American or of the tribe; or where a cultural affiliation is shown by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion. For unassociated funerary objects, sacred objects, or objects of cultural patrimony, the museum or agency must return such objects where the requesting party is the direct lineal descendant of an individual who owned the sacred object, where the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the tribe or organization, or where the requesting Native American tribe can show that the sacred object was owned or controlled by a member thereof, provided that in the case where a sacred object was owned by a member thereof, there are no identifiable lineal descendants of said member, or the lineal descendants have failed to make a claim for the object.

The only exception is that repatriation is not required of such items that are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed. Museums may also retain material until competing claims are resolved, and they are protected against claims by aggrieved parties if objects are returned in GOOD FAITH. Finally, the law establishes a seven-member commission, three of whom must be from Native-American tribes, three of whom represent the scientific community, and one of whom is appointed by the secretary from a list approved by the other six members, for the purpose of resolving certain disputes under the legislation. Two of the three Native Americans appointed to this commission must be traditional religious leaders.

NAGPRA for the first time gives Native Americans control over their ancestors burial remains, and ensures repatriation for remains and other sacred objects that currently reside in museums and with other federal agencies. It is an important milestone in the relationship between the United States and its Native American inhabitants

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## NATIVE AMERICAN RIGHTS

In the United States, persons of Native American descent occupy a unique legal position. On the one hand, they are U.S. citizens and are entitled to the same legal rights and protections under the Constitution that all other U.S. citizens enjoy. On the other hand, they are members of self-governing tribes whose existence far predates the arrival of Europeans on American shores. They are the descendants of peoples who had their own inherent rights—rights that required no validation or legitimation from the newcomers who found their way onto their soil.

These combined, and in many ways conflicting, legal positions have resulted in a complex relationship between Native American tribes and the federal government. Although the historic events and specific details of each tribe's situation vary considerably, the legal rights and status maintained by Native Americans are the result of their shared history of wrestling with the U.S. government over such issues as tribal sovereignty, shifting government policies, treaties that were made and often broken, and conflicting latter-day interpretations of those treaties. The result today is that although Native Americans enjoy the same legal rights as every other U.S. citizen, they also retain unique rights

in such areas as hunting and fishing, water use, and GAMING operations. In general, these rights are based on the legal foundations of tribal sovereignty, treaty provisions, and the "reserved rights" doctrine, which holds that Native Americans retain all rights not explicitly abrogated in treaties or other legislation.

### Tribal Sovereignty

Tribal sovereignty refers to the fact that each tribe has the inherent right to govern itself. Before Europeans came to North America, Native American tribes conducted their own affairs and needed no outside source to legitimate their powers or actions. When the various European powers did arrive, however, they claimed dominion over the lands that they found, thus violating the sovereignty of the tribes who already were living there.

The issue of the extent and limits of tribal sovereignty came before the U.S. Supreme Court in *Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823). Writing for the majority, Chief Justice JOHN MARSHALL described the effects of European incursion on native tribes, writing that although the Indians were "admitted to be the rightful occupants of the soil . . . their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it." The European nations that had "discovered" North America, Marshall ruled, had "the sole right of acquiring the soil from the natives."

Having acknowledged this limitation to tribal sovereignty in *Johnson,* however, Marshall's opinions in subsequent cases reinforced the principle of tribal sovereignty. In *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831), Marshall elaborated on the legal status of the Cherokees, describing the tribe as a "distinct political society that was separated from others, capable of managing its own affairs, and governing itself." In *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832), Marshall returned to the issue, this time in an opinion denying the state of Georgia's right to impose its laws on a Cherokee reservation within the state's borders. He rejected the state's argument, writing "The Cherokee nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force." Reviewing the history of relations between native tribes and the colonizing European powers, Marshall cited the Indians' "original natural rights," which he said were limited only by "the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed."

The cumulative effect of Marshall's opinions was to position Native American tribes as nations whose independence had been limited in just two specific areas: the right to transfer land and the right to deal with foreign powers. In regard to their own internal functions, the tribes were considered to be sovereign and to be free from state intrusion on that sovereignty. This position formulated by Marshall has been modified over the years, but it continues to serve as the foundation for determining the extents and limits of Native American tribal sovereignty. Although Congress has the ultimate power to limit or abolish tribal governments, until it does so each tribe retains the right to self-government, and no state may impose its laws on the reservation. This position was reiterated in a 1978 U.S. Supreme Court case, *United States v. Wheeler,* 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303, in which Justice POTTER STEWART concluded that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."

The ways that individual tribes exercise their sovereignty vary widely, but, in general, tribal authority is used in the following areas: to form tribal governments; to determine tribal membership; to regulate individual property; to levy and collect taxes; to maintain law and order; to exclude non-members from tribal territory; to regulate domestic relations; and to regulate commerce and trade.

### Treaty Rights

From the time Europeans first arrived in North America, they needed goods and services from Native Americans in order to survive. Often, the terms of such exchanges were codified in treaties, which are contracts between sovereign nations. After the American Revolution, the federal government used treaties as its principal method for acquiring land from the Indians. From the first treaty with the Delawares in 1787 to the end of treaty making in 1871, the federal

government signed more than 650 treaties with various Native American tribes. Although specific treaty elements varied, treaties commonly included such provisions as a guarantee of peace; a cession of certain delineated lands; a promise by the United States to create a reservation for the Indians under federal protection; a guarantee of Indian hunting and fishing rights; and a statement that the tribe recognized the authority or placed itself under the protection of the United States. Treaty making ended in 1871, when Congress passed a rider to an Indian appropriations act providing, "No Indian nation or tribe . . . shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . ." (25 U.S.C.A. § 71). This rider was passed largely in response to the House of Representatives' frustration that it was excluded from Indian affairs because the constitutional power to make treaties rests exclusively with the Senate. Since 1871, the federal government has regulated Native American affairs through legislation, which does not require the consent of the Indians involved, as treaties do.

Indian treaties may seem like historical documents, but the courts have consistently ruled that they retain the same legal force that they had when they were negotiated. Despite frequent challenges and intense opposition, courts have upheld guaranteed specific tribal rights, such as hunting and fishing rights. Often, disputes over treaty rights arise from conflicting interpretations of the specific language of treaty provisions. In general, there are three basic principles for interpreting treaty language. First, uncertainties in Indian treaties should be resolved in favor of the Indians. Second, Indian treaties should be interpreted as the Indians signing the treaty would have understood them. Third, Indian treaties are to be liberally construed in favor of the Indians involved. Courts have consistently upheld these principles of treaty interpretation, which clearly favor the Indians, on the basis that Indian tribes were the much weaker party in treaty negotiations, signing documents written in a foreign language and often with little choice. Liberal interpretation rules are designed to address the great inequality of the parties' original bargaining positions.

### Reserved Rights Doctrine

Another crucial factor in the interpretation of Native American treaties is what is known as the reserved rights doctrine, which holds that any rights that are not specifically addressed in a treaty are reserved to the tribe. In other words, treaties outline the specific rights that the tribes gave up, not those that they retained. The courts have consistently interpreted treaties in this fashion, beginning with *United States v. Winans,* 198 U.S. 371, 25 S. Ct. 662, 49 L. Ed. 1089 (1905), in which the U.S. Supreme Court ruled that a treaty is "not a grant of rights to the Indians, but a grant of rights from them." Any right not explicitly extinguished by a treaty or a federal statute is considered to be "reserved" to the tribe. Even when a tribe is officially "terminated" by Congress, it retains any and all rights that are not specifically mentioned in the termination statute.

### Federal Power over Native American Rights

Although Native Americans have been held to have both inherent rights and rights guaranteed, either explicitly or implicitly, by treaties with the federal government, the government retains the ultimate power and authority to either abrogate or protect Native American rights. This power stems from several legal sources. One is the power that the Constitution gives to Congress to make regulations governing the territory belonging to the United States (Art. IV, Sec. 3, Cl. 2), and another is the president's constitutional power to make treaties (Art. II, Sec. 2, Cl. 2). A more commonly cited source of federal power over Native American affairs is the COMMERCE CLAUSE of the U.S. Constitution, which provides that "Congress shall have the Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (Art. I, Sec. 8, Cl. 3). This clause has resulted in what is known as Congress's "plenary power" over Indian affairs, which means that Congress has the ultimate right to pass legislation governing Native Americans, even when that legislation conflicts with or abrogates Indian treaties. The most well-known case supporting this congressional right is *Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S. Ct. 216, 47 L. Ed. 299 (1903), in which Congress broke a treaty provision that had guaranteed that no more cessions of land would be made without the consent of three-fourths of the adult males from the Kiowa and Comanche tribes. In justifying this abrogation, Justice EDWARD D. WHITE declared that when "treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy."

Another source for the federal government's power over Native American affairs is what is called the "trust relationship" between the government and Native American tribes. This "trust relationship" or "trust responsibility" refers to the federal government's consistent promise, in the treaties that it signed, to protect the safety and well-being of the tribal members in return for their willingness to give up their lands. This notion of a trust relationship between Native Americans and the federal government was developed by U.S. Supreme Court Justice John Marshall in the opinions that he wrote for the three cases on tribal sovereignty described above, which became known as the Marshall Trilogy. In the second of these cases, *Cherokee Nation v. Georgia,* Marshall specifically described the tribes as "domestic dependant nations" whose relation to the United States was like "that of a ward to his guardian." Similarly, in *Worcester v. Georgia,* Marshall declared that the federal government had entered into a special relationship with the Cherokees through the treaties they had signed, a relationship involving certain moral obligations. "The Cherokees," he wrote, "acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected."

The federal government has often used this trust relationship to justify its actions on behalf of Native American tribes, such as its defense of Indian fishing and hunting rights and the establishment of the Bureau of Indian Affairs. Perhaps more often, however, the federal government has used the claim of a trust relationship to stretch its protective duty toward tribes into an almost unbridled power over them. The United States, for example, is the legal title-holder to most Indian lands, giving it the power to dispose of and manage those lands, as well as to derive income from them. The federal government has also used its powers in ways that seem inconsistent with a moral duty to protect Indian interests, such as terminating dozens of Indian tribes and consistently breaking treaty

provisions. Because the trust responsibility is moral rather than legal, Native American tribes have had very little power or ability to enforce the promises and obligations of the federal government.

Several disputes have erupted over the relationship between the federal government and Native Americans. Beginning in 1998, beneficiaries of Individual Indian Money (IIM), which is held in trust by the federal government, brought a CLASS ACTION against the secretary of the interior and others, alleging mismanagement and breach of fiduciary duties against trustee-delegates of the funds. The case has spawned dozens of orders and rulings by the U.S. District Court for the District of Columbia.

In 1999, the district court in *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999), found that the secretary of the interior and others had violated their fiduciary duties and ordered the secretary to file quarterly reports detailing progress in fulfilling these orders. The U.S Court of Appeals for the District of Columbia Circuit affirmed this ruling in *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001). Since the appeals court ruling, the district court has considered numerous motions and has issued several orders, including a holding that the secretary of the interior and the secretary of the Treasury were guilty of civil CONTEMPT for refusing to comply with a court order to produce certain documents.

Other issues involving the federal government's power over Native Americans have likewise resulted in litigation. The struggle to define the jurisdictional boundaries between Native American tribal courts and state courts has occupied the federal courts for many years. Although Indian reservations are deemed sovereign states, both Congress and the U.S. Supreme Court have placed limitations on their sovereignty. Therefore, as specific issues arise about tribal court jurisdiction, the federal courts must intervene to decide these cases.

Such was the case in *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001), in which the U.S. Supreme Court ruled that tribal courts do not have jurisdiction to hear federal CIVIL RIGHTS lawsuits concerning allegedly unconstitutional actions by a state government officer on tribal land. The case arose when the home of a member of the Fallon Paiute-Shoshone Tribes of western Nevada was searched under suspicion that the tribe member had killed a bighorn sheep in violation of Nevada law. The tribe member brought a federal civil rights lawsuit against the game warden who had searched his house. The suit was brought in tribal court, which ruled that it had jurisdiction to hear the claim against the warden.

The district court and the U.S. Court of Appeals for the Ninth Circuit both found that the warden was required to exhaust his remedies in the tribal court before proceeding to federal court. The U.S. Supreme Court, per Justice ANTONIN SCALIA disagreed, finding that Congress had not extended the jurisdiction of tribal court to hear federal civil rights claims. The case severely limits the scope of tribal jurisdiction.

### Hunting and Fishing Rights

Hunting and fishing rights are some of the special rights that Native Americans enjoy as a result of the treaties signed between their tribes and the federal government. Historically, hunting and fishing were critically important to Native American tribes. Fish and wildlife were a primary source of food and trade goods, and tribes based their own seasonal movements on fish migrations. In addition, fish and wildlife played a central role in the spiritual and cultural framework of Native American life. As the Court noted, access to fish and wildlife was "not much less necessary to the existence of the Indians than the atmosphere they breathed" (*United States v. Winans*, 198 U.S. 371, S. Ct. 662, 49 L. Ed. 2d 1089 [1905]).

When Native American tribes signed treaties consenting to give up their lands, the treaties often explicitly guaranteed hunting and fishing rights. When the treaties created reservations, they usually gave tribe members the right to hunt and fish on reservation lands. In many cases, treaties guaranteed Native Americans the continued freedom to hunt and fish in their traditional hunting and fishing locations, even if those areas were outside the reservations. Even when hunting and fishing rights were not specifically mentioned in treaties, the reserved-rights doctrine holds that tribes retain any rights, including the right to hunt and fish, that are not explicitly abrogated by treaty or statute.

Controversy and protest have surrounded Native American hunting and fishing rights, as state governments and non-Indian hunters and fishers have fought to make Native Americans subject to state hunting and fishing regulations. The rights of tribal members to hunt and fish on their own reservations have rarely been

questioned, because states generally lack the power to regulate activities on Indian reservations. Tribes themselves have the right to regulate hunting and fishing on their reservations, whether or not they choose to do so. Protests have arisen, however, over the rights of Native Americans to hunt and fish off of their reservations. Such rights can be acquired in one of two ways. In some instances, Congress has reduced the size of a tribe's reservation, or terminated it completely, without removing the tribe's hunting and fishing rights on that land. In other cases, treaties have specifically guaranteed tribes the right to hunt and fish in locations off the reservations. In the Pacific Northwest, for example, treaty provisions commonly guaranteed the right of tribes to fish "at all usual and accustomed grounds and stations," both on and off their reservations. Tribes in the Great Lakes area also reserved their off-reservation fishing rights in the treaties they signed.

These off-reservation rights have led to intense opposition and protests from non-Indian hunters and fishermen and state wildlife agencies. Non-Indian hunters and fishermen resent the fact that Indians are not subject to the same state regulations and limits imposed on them. State agencies have protested the fact that legitimate conservation goals are compromised when Indians can hunt and fish without having to follow state wildlife regulations. The U.S. Supreme Court, however, has consistently upheld the off-reservation hunting and fishing rights of Native Americans. In the 1905 case *United States v. Winans,* it ruled that treaty language guaranteeing a tribe the right to "tak[e] fish at all usual and accustomed places" indeed guaranteed access to those usual and accustomed places, even if they were on privately owned land.

The most intense opposition to Native American off-reservation hunting and fishing rights has occurred in the Pacific Northwest, where tribal members have fought to defend their right to fish in their traditional locations, unhindered by state regulations. In a series of cases involving the state of Washington and local Native American tribes, the federal courts ruled on aspects of the extent and limits of tribal fishing rights. In a 1942 case, *Tulee v. Washington,* 315 U.S. 681, 62 S. Ct. 862, 86 L. Ed. 1115, the Court ruled that tribal members could not be forced to purchase fishing licenses because the treaties that their ancestors had signed already reserved the right to fish in the "usual and accustomed places."

That case was followed by a series of cases involving the Puyallup Indian tribe that became known as *Puyallup I, Puyallup II,* and *Puyallup III.* In the first of those cases, the Court ruled that the state of Washington has the right, in the interest of conservation, to regulate tribal fishing activities, as long as "the regulation meets appropriate standards and does not discriminate against the Indians" (*Puyallup Tribe v. Department of Game,* 391 U.S. 392, 88 S. Ct. 1725, 20 L. Ed. 2d 689 [1968]). In the second case, the Court ruled that the state's prohibition on net fishing for steelhead trout was discriminatory because its effect was to reserve the entire harvestable run of steelhead to non-Indian sports fishermen (*Department of Game v. Puyallup Tribe,* 414 U.S. 44, 94 S. Ct. 330, 38 L. Ed. 2d 254 [1973]). In its ruling, the Court declared that the steelhead "must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing." Finally, in *Puyallup III,* the Court ruled that the fish caught by tribal members on their reservation could be counted against the Indian share of the fish (*Puyallup Tribe v. Department of Game,* 429 U.S. 976, 97 S. Ct. 483, 50 L. Ed. 2d 583 [1976]).

This notion of a fair APPORTIONMENT of fish was clarified by *United States v. Washington,* 384 F. Supp. 312 (W.D. Wash. 1974), in which the court determined that treaty language guaranteeing tribes the right to take fish "in common with all citizens of the Territory" guaranteed the Indians not just the right to fish but also the right to a certain percentage of the harvestable run, up to 50 percent. This decision set off a firestorm of controversy throughout the Pacific Northwest. Hundreds of legal disputes erupted over the allocation of individual runs of salmon and steelhead, and state and non-Indian fishing interests attacked the decision. The U.S. Supreme Court ultimately upheld the decision in a collateral case, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n* 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979). In that case, the Court upheld the district court's ruling and went on to clarify the details of the way the fish should be apportioned. Writing for the majority, Justice JOHN PAUL STEVENS stated that the treaties guaranteed the tribes "so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say a moderate living." A "fair appor-

tionment," he said, would be 50 percent of the fish, emphasizing that 50 percent was the maximum, but not the minimum, amount of fish to which the Indians were entitled.

The Court resolved a decade-old legal dispute in 1999 involving Indian fishing and hunting rights with the decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999). It ruled in favor of the Chippewa Indians' right to fish and hunt in northern Minnesota without state regulation. By a 5-4 vote, the Court upheld an appeals court decision finding that the tribe's rights under an 1837 treaty were still valid. The ruling marked a final victory for the tribe in its long fight to assert its treaty rights and to defend its cultural traditions.

Brought by the tribe in 1990, the lawsuit proved highly controversial in Minnesota, which regarded it as a threat to the $54 million in tourism revenue generated by the Mille Lacs Lake resort industry. But two lower federal courts and the U.S. Supreme Court rejected the state's arguments that the 162-year old treaty had been invalidated by presidential order, later treaties, and even by Minnesota's gaining of statehood. The U.S. Supreme Court's majority opinion, written by Justice SANDRA DAY O'CONNOR, detailed the history of the treaty and subsequent actions that the state, nine counties, and landowners claimed had rendered the treaty invalid. She found nothing in this historical information that had bearing on the continued validity of the treaty.

### Water Rights

Access to water is another area in which Native Americans enjoy special rights. The issue of WATER RIGHTS has been most pertinent in the western part of the United States, where most Indian reservations are located and where water is the scarcest. In the West, rights to water are determined by the "appropriative" system, which holds that water rights are not connected to the land itself. Rather, the right to water belongs to the first user who appropriates it for a beneficial use. That appropriator is guaranteed the right to continue to take water from that source, unhindered by future appropriators, as long as the water continues to be put to a beneficial use. When the appropriator ceases to use the water, he or she loses the right to it. In contrast to this appropriative system, states in the East, where water is plentiful, follow the "riparian" system, which gives the owner of land bordering a body of water the right to the reasonable use of that water. All riparian owners are guaranteed the right to a continued flow of water, whether or not they use it continuously.

Native American water rights combine the features of the appropriative and riparian systems. The legal foundation for Indian water rights is the 1908 U.S. Supreme Court case *Winters v. United States,* 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340. That case involved a Montana Indian reservation that had a river as one of its borders. After the reservation was established, non-Indian settlers diverted the river's water, claiming that they had appropriated the water after the reservation was created but before the Indians had begun to use the water themselves. The U.S. Supreme Court ruled against the settlers, finding that when the reservation was created, reserved water rights for the Indians were necessarily implied. It was unreasonable, the Court argued, to assume that Indians would accept lands for farming and grazing purposes without also reserving the water that would make those activities possible.

A second important case involving Native American water rights is *Arizona v. California,* 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963). In that case, as in *Winters,* the U.S. Supreme Court held that the establishment of a reservation necessarily implied the rights to the water necessary to make the land habitable and productive. *Arizona* went beyond *Winters,* however, in also ruling on the quantity of water to which the reservation had a right. Although competing water users argued that the amount of water reserved to the reservation should be limited to the amount that was likely to be needed by the relatively small Indian population, the Court ruled that the Indians were entitled to enough water "to irrigate all the practicably irrigable acreage on the reservation," a much more generous allotment.

Based on *Winters* and *Arizona,* Native American water rights today are determined by a set of principles called "*Winters* rights." First, Congress has the right to reserve water for federal lands, including Indian reservations. Second, when Congress establishes a reservation, it is implied that the reservation has the right to water sources within or bordering the reservation. Third, reservation water rights are reserved as of the date of the reservation's creation. Competing users with earlier appropriation dates take precedence, but those with later dates are

**Tribal Casino Jobs, in 1999**

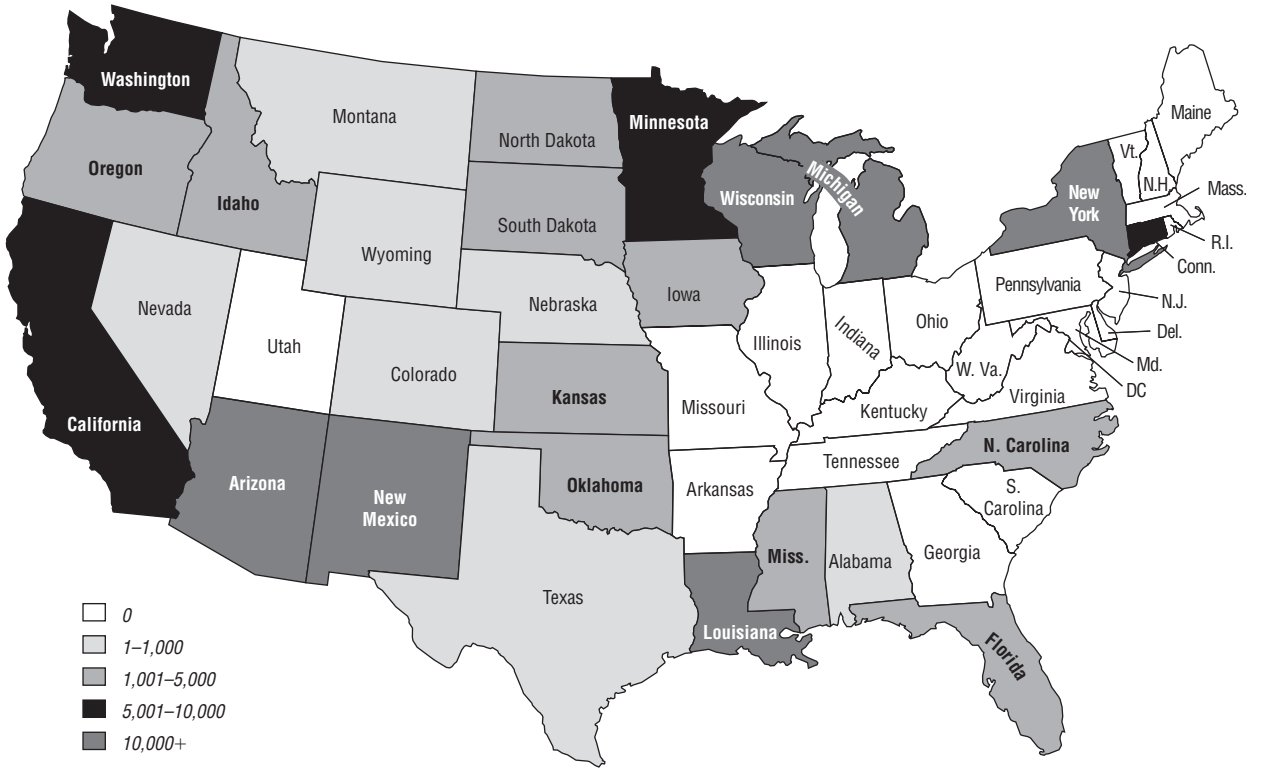


SOURCE: American Gaming Association, *State of the States: The AGA Annual Survey of Casino Entertainment*, 2000.

subordinate. Fourth, the amount of water reserved for Indian use is the amount necessary to irrigate all of the practically irrigable land on the reservation. Finally, *Winters* rights to water are not lost through non-use of the water. All of these rights apply to both surface water and groundwater.

Even with the acknowledgement of Native Americans' *Winters* rights, water use in the West continues to be highly contested, as reservations fight to maintain their rights against the competing demands of state governments and non-Indian users. Several issues are yet to be resolved, such as the precise quantity of water that is needed to irrigate all "practically irrigable acreage" and the question of whether states can regulate non-Indian water users on Indian reservations. Because of the high costs and other difficulties involved in litigation, many tribes and states are choosing to try to negotiate water rights and then ask to Congress or the courts to approve their agreements.

### Gaming Rights

In recent years, gaming has become one of the most important areas of economic development for Native American tribes. Since 1979, when the federal courts ruled that tribal-sponsored gaming activities were exempt from state regulatory law, the Indian gaming industry has grown tremendously, with more than 200 tribes operating gaming establishments. These operations have been extremely lucrative for the tribes running them; in 1993 the gross gambling revenues from class II and class III tribal gaming operations amounted to approximately $2.6 billion. By comparison, Atlantic City had revenues of $3.3 billion the same year. Tribe members benefit from the creation of jobs on the reservation and from the cash generated, which some tribal governments choose to distribute through direct payments to tribe members and others choose to reinvest in improving reservation infrastructure, educational facilities, and other programs and services designed to benefit tribe members.

The impetus for the growth of Native American gaming began in the late 1970s, when the Oneida tribe in Wisconsin and the Seminole tribe in Florida sought to open high-stakes bingo operations on their reservations. The applicable laws in those states imposed limitations on the size of jackpots and the frequency of bingo games. The tribes asserted, however, that as sovereign nations, they were not bound by such limitations; they claimed that they could operate bingo games and regulate them under tribal law, deciding for themselves how large prizes could be and how often games could be played. Both suits ended up in federal court, and both tribes won (*Seminole Tribe of Florida v. Butterworth,* 658 F. 2d 310 [5th Cir. 1981]; *Oneida Tribe of Indians v. Wisconsin,* 518 F. Supp. 712 [W.D. Wis. 1981]). The rulings in both cases hinged on whether the states' laws concerning gaming were criminal laws that prohibited gaming, or civil laws that regulated gaming. If the laws were criminal-prohibitory, they could be applied to activities on Indian reservations, but if they were civil-regulatory, they could not. The courts ruled that because the states allowed bingo games in some form, the laws were civil-regulatory and thus did not apply to gaming operations on Indian reservations.

Other tribes subsequently sued in federal court on the same issue and also won. The issue finally reached the U.S. Supreme Court in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987). In that case, the Court accepted the criminal-prohibitory/civil-regulatory distinction of the lower courts, ruling that the Cabazon Band of Mission Indians in California had the right to operate high-stakes bingo and poker games on its reservation because the state's gaming laws were civil-regulatory and thus could not be applied to on-reservation gaming activities.

Concern over Indian gaming had been building in Congress during the 1980s, and Congress responded to *California v. Cabazon* by passing the Indian Gaming Regulatory Act (IGRA), (25 U.S.C.A. §§ 2701 et seq.) in 1988. The IGRA specifically provides that Indian tribes "have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of CRIMINAL LAW and public policy, prohibit such gaming activity." The sponsors of the IGRA claimed that one of the bill's main goals was to use gaming as a means of "promoting tribal economic development, self-sufficiency, and strong tribal governments." Nevertheless, many tribal leaders were opposed to the provisions of IGRA, regarding them as infringements on tribal sovereignty.

The IGRA provides the general framework for regulating Indian gaming. Its principal provision is the classification of Indian gaming, with each category of games being subject to the different regulatory powers of the tribes, the states, and federal agencies, including the National Indian Gaming Commission (NIGC), which was created by the IGRA. The IGRA classifies games into three types. Class I games are traditional Indian games, such as those played in connection with tribal ceremonies or celebrations; those games are regulated exclusively by the tribes. Class II games include bingo and related games; those games are regulated by the tribes, with oversight from the NIGC. Class III games include all games that do not fall into classes I and II, including casino-style games, parimutuel wagering, slots, and dog and horse racing. Class III games, according to the IGRA, may be conducted if three conditions are met: if the state in which the tribe is located permits any such games for any purposes; if the tribe and the state have negotiated a compact that has been approved by the secretary of the interior; and if the tribe has adopted an ordinance that has been approved by the chair of the NIGC.

Indian gaming and the IGRA continue to face opposition from various quarters. Tribal leaders view state regulation as a violation of their tribal sovereignty. The proprietors of non-Indian gaming establishments have attempted to slow or to stop the growth of Indian gaming, viewing it as a threat to their own enterprises. In some cases, tribal and state governments have had great difficulties negotiating the details of tribal-state compacts. These areas of difficulty and dissatisfaction suggest that Indian gaming may be subject to further legislation in the future.

Gaming has led to unprecedented growth for tribal economies, providing thousands of jobs for Indians and non-Indians and drastically improving the financial well-being of the tribes that have operated successful gaming establishments. Although some legislators have expressed concern over the expansion of gaming activities and the problems associated with increased gambling, Indian gaming generally

enjoys broad public support. Native Americans have described it as "the return of the white buffalo," a traditional Native American symbol of good fortune.

The U.S. Supreme Court has stepped in to resolve several controversies regarding gaming rights. In *Chickasaw Nation v. United States*, 534 U.S. 84, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001), the Court held that revenues from pull-tab games, similar to lottery tickets, at Chickasaw Nation gaming operations could be taxed under Chapter 35 of the INTERNAL REVENUE CODE. The ruling also applied to the Choctaw Nation, which offered a similar type of pull-tab game. The U.S. Court of Appeals for the Tenth Circuit, in reviewing the Chickasaw Nation's gaming activities, ruled that revenue from these games amounted to gambling revenues, rather than lottery revenues. The Federal Circuit, however, reached an opposite conclusion with respect to the Choctaw Nation in *Little Six, Inc. v. United States*, 210 F.3d 1361 (Fed. Cir. 2000).

The U.S. Supreme Court, per Justice STEPHEN BREYER, found that the INTERNAL REVENUE SERVICE had properly levied a tax on these gaming activities. Although states are not required to pay these taxes, the applicable provisions in the tax laws applied specifically to the Indian tribes. Although Court precedent suggested that statutes regarding Indian tribes should be construed liberally in favor of the Indian tribes, Breyer found the statute to be unambiguous by its terms.

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CROSS-REFERENCES

Cherokee Cases; Fish and Fishing; Indian Child Welfare Act; Interior Department. See also primary documents in "Native American Rights" section of Appendix.

## NATURAL AND PROBABLE CONSEQUENCES

*Those ramifications of a particular course of conduct that are reasonably foreseeable by a person of average intelligence and generally occur in the normal course of events.*

The individual who is guilty of misconduct in contract or TORT is responsible for the natural and probable consequences of the act or omission that proximately causes loss or injury to the plaintiff. Based on the usual experience of human beings, if the consequences were to be expected, a plaintiff can recover damages from a defendant who caused the injuries.

### Breach of Contract

Damages for breach of contractual agreement are those that result naturally from the violation of contract provisions and that are reasonably contemplated by the parties when the contract is made. Factors to be considered in determining what damages might have reasonably been considered include the nature and purpose of the contract as well as the accompanying conditions of which the parties were aware when the contract was executed. Damages that do not stem naturally from a breach of contract are not recoverable, nor are damages that are not within the reasonable contemplation of the parties. There is no requirement that the promisor compensate the injured party for harm that the promisor or any reasonable person upon making the contract would not have reason to foresee as the predictable outcome of a breach.

### Torts

An individual who is guilty of committing a tort is liable for loss or injury that is the natural and probable result of his or her act or omission. It is sufficient that consequences are merely possible, since they must be reasonably foreseeable in order to serve as an adequate basis for the recovery of damages.

### Prospective and Anticipated Consequences

In a situation where a CAUSE OF ACTION is complete, prospective damages reasonably certain to ACCRUE may be recovered as part of the natural and probable consequences of the defendant's action.

**Breach of Contract** Prospective damages are recoverable in cases involving an ANTICIPATORY REPUDIATION of contract. If the breach

does not serve to discharge the entire contract but rather gives rise to subsequent actions, future damages must be recovered in successive actions. This type of situation might arise in an action for breach of a lease for the rental of an apartment in which the breach occurs during the fourth month of a twelve-month lease. Successive actions will have to be brought for the breach occurring from the fifth to twelfth months.

**Torts** Damages in tort actions are not limited to the period that ends with the institution of the lawsuit. In an action for personal injury, for example, the jury can properly consider the potential consequences of an injury that might require a major operation at some time in the future in assessing the present value of an injury as opposed to future damages. Damages can be awarded to a plaintiff who has adequately established that there will be future effects from an injury precipitated by the defendant's misconduct. The amount of certainty required in the assessment of future damages varies from one jurisdiction to another; however, no recovery can be permitted for the mere possibility of future consequences of harm inflicted by the defendant.

**Damage to Property** All types of damages, including past, current, and prospective, can be recovered in a singleaction for permanent damage to or TRESPASS on real estate. If the cause of the injury can be abated through an expenditure of labor or money, future damages will not be recovered.

## NATURAL LAW

*The unwritten body of universal moral principles that underlie the ethical and legal norms by which human conduct is sometimes evaluated and governed. Natural law is often contrasted with positive law, which consists of the written rules and regulations enacted by government. The term* natural law *is derived from the Roman term* jus naturale. *Adherents to natural law philosophy are known as naturalists.*

Naturalists believe that natural law principles are an inherent part of nature and exist regardless of whether government recognizes or enforces them. Naturalists further believe that governments must incorporate natural law principles into their legal systems before justice can be achieved. There are three schools of natural law theory: divine natural law, secular natural law, and historical natural law.

Divine natural law represents the system of principles believed to have been revealed or inspired by God or some other supreme and supernatural being. These divine principles are typically reflected by authoritative religious writings such as Scripture. Secular natural law represents the system of principles derived from the physical, biological, and behavioral laws of nature as perceived by the human intellect and elaborated through reason. Historical natural law represents the system of principles that has evolved over time through the slow accretion of custom, tradition, and experience. Each school of natural law influenced the Founding Fathers during the nascent years of U.S. law in the eighteenth century and continue to influence the decision-making process of state and federal courts today.

### Divine Natural Law

Proponents of divine natural law contend that law must be made to conform to the commands they believe were laid down or inspired by God, or some other deity, who governs according to principles of compassion, truth, and justice. These naturalists assert that the legitimacy of any enacted human law must be measured by its consonance with divine principles of right and wrong. Such principles can be found in various Scriptures, church doctrine, papal decrees, and the decisions of ecclesiastical courts and councils. Human laws that are inconsistent with divine principles of morality, naturalists maintain, are invalid and should neither be enforced nor obeyed. St. Thomas Aquinas, a theologian and philosopher from the thirteenth century, was a leading exponent of divine natural law.

According to Judeo-Christian belief and the Old Testament, the Ten Commandments, were delivered to Moses by God on Mount Sinai. These ten laws represent one example of divine natural law. The Bible and Torah are thought by many to be other sources of divine natural law because their authors are said to have been inspired by a divine spirit. Some Christians point to the CANON LAW of the Catholic Church, which was applied by the ecclesiastical courts of Europe during the Middle Ages, as another source of divine natural law.

Before the Protestant Reformation of the sixteenth century, Europe was divided into two competing jurisdictions—secular and religious. The emperors, kings, and queens of Europe governed the secular jurisdiction, and the pope

presided over the religious jurisdiction. The idea that monarchs ruled by "divine right" allowed the secular jurisdiction to acquire some of the authority of religious jurisdiction. Moreover, the notion that a "higher law" transcends the rules enacted by human institutions and that government is bound by this law, also known as the RULE OF LAW, fermented during the struggle between the secular and religious powers in Europe before the American Revolution. For example, HENRY DE BRACTON, an English judge and scholar from the thirteenth century, wrote that a court's allegiance to the law and to God is above its allegiance to any ruler or lawmaker.

The influence of divine natural law pervaded the colonial period of U.S. law. In 1690 English philosopher JOHN LOCKE wrote that all people are born with the inherent rights to life, liberty, and estate. These rights are not unlimited, Locke said, and may only be appropriated according to the fair share earned by the labor of each person. Gluttony and waste of individual liberty are not permitted, Locke argued, because "[n]othing is made by God for man to spoil or destroy."

In the Declaration of Independence, THOMAS JEFFERSON, borrowing from Locke, wrote that "all men are created equal . . . and are endowed by their creator with certain inalienable rights . . . [including] life, liberty and the pursuit of happiness." Jefferson identified the freedom of thought as one of the inalienable rights when he said, "Almighty God has created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint." In *Powell v. Pennsylvania,* 127 U.S. 678, 8 S. Ct. 1257, 32 L. Ed. 253 (1888), the Supreme Court recognized the importance of the divine influence in early U.S. law, stating that the "right to pursue happiness is placed by the Declaration of Independence among the inalienable rights of man, not by the grace of emperors or kings, or by the force of legislative or constitutional enactments, but by the Creator."

The U.S. Constitution altered the relationship between law and religion. Article VI establishes the Constitution as the supreme law of the land. The FIRST AMENDMENT prohibits the government from establishing a religion, which means that a law may not advance one religion at the expense of another or prefer a general belief in religion to irreligion, atheism, or agnosticism. Although the Supremacy and Establishment Clauses seemingly preclude the judiciary from grounding a decision on Scripture or religious doctrine, state and federal courts have occasionally referred to various sources of divine natural law.

For example, in *Edwards v. Aguillard,* 482 U.S. 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987), the Supreme Court said that "the Founding Fathers believed devotedly that there was a God and that the inalienable rights of man were rooted in Him." In *McIlvaine v. Coxe's Lessee,* 6 U.S. 280, 2 Cranch 280, 2 L. Ed. 279 (1805), the Supreme Court relied on the Bible as "ancient and venerable" proof that expatriation had long been "practiced, approved, and never restrained."

Confronted with the question as to whether the conveyance of a particular piece of land was legally enforceable, the Supreme Court stated that it would consider "those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations" (*Johnson v. M'Intosh,* 21 U.S. 543, 8 Wheat. 543, 5 L. Ed. 681 [1823]). In DRED SCOTT V. SANDFORD, 60 U.S. 393, 19 How. 393, 15 L. Ed. 691 (1856), the Supreme Court held that slaves were the property of their owners and were not entitled to any constitutional protection. In a dissenting opinion, however, Justice JOHN MCLEAN wrote that a "slave is not mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man."

In the later twentieth century (in a judgment overturned in LAWRENCE V. TEXAS, 539 U.S. ___, 123 S.Ct. 2472, 156 L.Ed.2d 508 [2003]), the Supreme Court relied on Judeo-Christian standards as evidence that homosexual SODOMY is a practice not worthy of constitutional protection because it has been condemned throughout the history of western civilization (*Bowers v. Hardwick,* 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 [1986] [Burger, J., concurring]). State and federal courts also have considered Judeo-Christian standards when evaluating the constitutionality of statutes prohibiting bigamy and INCEST. For example, *Benton v. State,* 265 Ga. 648, 461 S.E.2d 202 (1995), upheld the constitutionality of a Georgia statute prohibiting incest.

Despite the sprinkling of cases that have referred to Scripture, religious doctrine, and Judeo-Christian heritage, such sources of divine natural law do not ordinarily form the express basis of judicial decisions. At the same time, it cannot be said that state and federal courts have

completely eliminated any reliance on natural-law principles. To the contrary, many controversial legal disputes are still decided in accordance with unwritten legal principles that are derived not from religion, but from secular political philosophy.

### Secular Natural Law

The school of natural law known as secular natural law replaces the divine laws of God with the physical, biological, and behavioral laws of nature as understood by human reason. This school theorizes about the uniform and fixed rules of nature, particularly human nature, to identify moral and ethical norms. Influenced by the rational empiricism of the seventeenth- and eighteenth-century Enlightenment thinkers who stressed the importance of observation and experiment in arriving at reliable and demonstrable truths, secular natural law elevates the capacity of the human intellect over the spiritual authority of religion.

Many secular natural law theorists base their philosophy upon hypotheses about human behavior in the state of nature, a primitive stage in human evolution before the creation of governmental institutions and other complex societal organizations. In the state of nature, John Locke wrote, human beings live according to three principles—liberty, equality, and self-preservation. Because no government exists in the state of nature to offer police protection or regulate the distribution of goods and benefits, each individual has a right to self-preservation that he or she may exercise on equal footing with everyone else.

This right includes the liberties to enjoy a peaceful life, accumulate wealth and property, and otherwise satisfy personal needs and desires consistent with the coterminous liberties of others. Anyone who deprives another person of his or her rights in the state of nature, Locke argued, violates the principle of equality. Ultimately, Locke wrote, the state of nature proves unsatisfying. Human liberty is neither equally fulfilled nor protected. Because individuals possess the liberty to delineate the limits of their own personal needs and desires in the state of nature, greed, narcissism, and self-interest eventually rise to the surface, causing irrational and excessive behavior and placing human safety at risk. Thus, Locke concluded, the law of nature leads people to establish a government that is empowered to protect life, liberty, and property.

Lockean JURISPRUDENCE has manifested itself in the decisions of the Supreme Court. In *Powell v. Pennsylvania,* 127 U.S. 678, 8 S. Ct. 1257, 32 L. Ed. 253 (1888), Justice STEPHEN J. FIELD wrote that he had "always supposed that the gift of life was accompanied by the right to seek and produce food, by which life can be preserved and enjoyed, in all ways not encroaching upon the equal rights of others." In another case the Supreme Court said that the "rights of life and personal liberty are the natural rights of man. To secure these rights . . . governments are instituted among men" (*U.S. v. Cruikshank,* 92 U.S. 542, 2 Otto 542, 23 L. Ed. 588 [1875]).

In the spirit of Lockean natural law, the Fifth and Fourteenth Amendments to the Constitution prohibit the government from taking "life, liberty, or property without due process of law." The concept of "due process" has been a continuing source of natural law in constitutional jurisprudence. If Lockean natural law involves theorizing about the scope of human liberty in the state of nature, constitutional natural law involves theorizing about the scope of liberty protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.

On their face the Due Process Clauses appear to offer only procedural protection, guaranteeing litigants the right to be informed of any legal action being taken against them and the opportunity to be heard during an impartial hearing where relevant claims and defenses may be asserted. In the 200 years following the writing of the Constitution, however, federal courts interpreted the Due Process Clauses to provide substantive protection against ARBITRARY and discriminatory governmental encroachment of fundamental liberties. Similar to the rational empiricism by which Enlightenment thinkers identified HUMAN RIGHTS in the state of nature, federal judges have identified the liberties protected by the Due Process Clauses through a reasoned elaboration of the Fifth and Fourteenth Amendments.

The federal judiciary has described the liberty interest protected by the Due Process Clauses as an interest guaranteeing a number of individual freedoms, including the right to personal autonomy, bodily integrity, self-dignity, and self-determination (*Gray v. Romeo,* 697 F. Supp. 580 [1988]). The word *liberty,* the Supreme Court stated, means something more than freedom from physical restraint. "It means freedom to go where one may choose, and to act

in such manner . . . as his judgment may dictate for the promotion of his happiness . . . [while pursuing] such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment" (MUNN V. ILLINOIS, 94 U.S. 113, 4 Otto 113, 24 L. Ed. 77 [1876] [Field, J., dissenting]).

The full breadth of constitutional liberty, the Supreme Court has said, is best explained as a rational continuum safeguarding every facet of human freedom from arbitrary impositions and purposeless restraints (*Poe v. Ullman,* 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 [1961]). The government may not intrude upon this liberty unless it can demonstrate a persuasive countervailing interest. However, the more that the U.S. legal system cherishes a particular freedom, the less likely a court is to enforce a law that infringes upon it.

In this regard the Supreme Court has identified certain fundamental rights that qualify for heightened judicial protection against laws threatening to restrict them. This list of fundamental rights includes most of the specific freedoms enumerated in the BILL OF RIGHTS, as well as the FREEDOM OF ASSOCIATION; the right to vote and participate in the electoral process; the right to marry, procreate, and rear children; and the right to privacy. The right to privacy, which is not expressly enumerated anywhere in the Constitution, guarantees the freedom of adults to use BIRTH CONTROL (GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 [1965]) and the right of women to terminate their pregnancy before the fetus becomes viable (ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 [1973]).

During the 1990s the right to privacy was enlarged to recognize the right of certain terminally ill or mentally incompetent persons to refuse medical treatment. In *Cruzan v. Missouri Department of Health,* 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990), the Supreme Court ruled that a person who is in a persistent vegetative state, marked by the absence of any significant cognitive abilities, may seek to terminate life-sustaining measures, including artificial nutrition and hydration equipment, through a parent, spouse, or other appropriate guardian who demonstrates that the incompetent person previously expressed a clear desire to discontinue medical treatment under such circumstances.

The Court of Appeals for the Ninth Circuit later cited *Cruzan* in support of its decision establishing the right of competent but terminally ill patients to hasten their death by refusing medical treatment when the final stages of life are wrought with pain and indignity (*Compassion in Dying v. Washington,* 79 F.3d 790 [9th Cir. 1996]). However, the Court of Appeals for the Second Circuit ruled that physicians possess no due process right to assist terminally ill patients in accelerating their death by prescribing a lethal dose of narcotics (*Quill v. Vacco,* 80 F.3d 716 [2d Cir. 1996]). Similarly, in a notorious case involving Dr. JACK KEVORKIAN, the Michigan Supreme Court ruled that patients have no due process right to physician-assisted suicide (*People v. Kevorkian,* 447 Mich. 436, 527 N. W. 2d 714 [1994]).

In the *Cruzan* decision, the manner in which the Supreme Court recognized a qualified right to die reflects the Enlightenment tradition of secular natural law. Where Locke inferred the inalienable rights of life, liberty, and property from observing human behavior, the Supreme Court said in *Cruzan* that "a Constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."

For example, in *Jacobson v. Massachusetts,* 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905), the Supreme Court protected the constitutional right of a person to decline a smallpox vaccination that was required by state law. In *Washington v. Harper,* 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990), the Court ruled that the liberty interest guaranteed by the Due Process Clauses prohibits the government from compelling prisoners to take antipsychotic drugs. These cases, as well as others, the Supreme Court reasoned in *Cruzan,* establish that all U.S. citizens have a general right to refuse unwanted medical treatment, which includes the specific right of certain mentally incompetent and terminally ill persons to hasten their death.

### Historical Natural Law

Another school of natural law is known as historical natural law. According to this school, law must be made to conform with the well-established, but unwritten, customs, traditions, and experiences that have evolved over the course of history. Historical natural law has played an integral role in the development of the Anglo-American system of justice. When King James I attempted to assert the absolute power of the British monarchy during the seventeenth

century, for example, English jurist SIR EDWARD COKE argued that the sovereignty of the crown was limited by the ancient liberties of the English people, immemorial custom, and the rights prescribed by MAGNA CHARTA in 1215.

Magna Charta also laid the cornerstone for many U.S. constitutional liberties. The Supreme Court has traced the origins of grand juries, petit juries, and the writ of HABEAS CORPUS to Magna Charta. The EIGHTH AMENDMENT proportionality analysis, which requires that criminal sanctions bear some reasonable relationship to the seriousness of the offense, was foreshadowed by the Magna Charta prohibition of excessive fines (*Solem v. Helm,* 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 [1983]). The concept of due process was inherited from the requirement in Magna Charta that all legal proceedings comport with the "law of the land" (IN RE WINSHIP, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 [1970]).

DUE PROCESS OF LAW, the Supreme Court has observed, contains both procedural and historical aspects that tend to converge in criminal cases (ROCHIN V. CALIFORNIA, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 [1952]). Procedurally, due process guarantees criminal defendants a fair trial. Historically, due process guarantees that no defendant may be convicted of a crime unless the government can prove his or her guilt BEYOND A REASONABLE DOUBT. Although the REASONABLE DOUBT STANDARD can be found nowhere in the express language of the Constitution, the Supreme Court has said that the demand for a higher degree of persuasion in criminal cases has been repeatedly expressed since "ancient times" through the common-law tradition and is now "embodied in the Constitution" (*In re Winship*).

The legacy of the trial of JOHN PETER ZENGER, 17 Howell's State Trials 675, further illustrates the symbiotic relationship between history and the law. In 1735, Zenger, the publisher of the *New York Weekly Journal,* was charged with libeling the governor of New York. At trial Zenger admitted that he had published the allegedly harmful article but argued that the article was not libelous because it contained no inaccurate statements. However, in the American colonies, truth was not considered a defense to LIBEL actions. Nonetheless, despite Zenger's admission of harmful publication and lack of a cognizable legal defense, the jury acquitted him.

The Zenger acquittal spawned two ideas that have become entrenched in U.S. jurisprudence. First, the acquittal gave birth to the idea that truth is indeed a defense to accusations of libel. This defense received constitutional protection under the First Amendment in NEW YORK TIMES V. SULLIVAN, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Looking back, the Supreme Court came to describe the Zenger trial as "the earliest and most famous American experience with freedom of the press" (*McIntyre v. Ohio Elections Commission,* 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426, [1995]).

The Zenger trial is also the progenitor of JURY NULLIFICATION, which is the power of a jury, as the conscience of the community, to acquit defendants against whom there is overwhelming evidence of guilt in order to challenge a specific law, prevent oppression, or otherwise achieve justice. For example, the Zenger jurors issued an acquittal despite what amounted to a confession by the defendant in open court. Some observers have compared the Zenger trial to the trial of O. J. SIMPSON, in which the former football star was acquitted of a double HOMICIDE notwithstanding DNA EVIDENCE linking him to the crimes. According to these observers, JOHNNIE COCHRAN, defense attorney for Simpson, implored the jurors to ignore the evidence against his client and render a verdict that would send a message denouncing POLICE CORRUPTION, perjury, and racism.

All three schools of natural law have influenced the development of U.S. law from colonial to modern times. In many ways the creation and ratification of the Constitution replaced Scripture and religion as the ultimate source of law in the United States. The federal Constitution makes the people the fundamental foundation of authority in the U.S. system of government. Many of the Framers characterized the Constitution as containing "sacred and inviolate" truths. In the same vein, THOMAS PAINE described the Constitution as a "political Bible."

In 1728 many Americans understood that the COMMON LAW encompassed the Law of Nature, the Law of Reason, and the Revealed Law of God, which are equally binding at all times, in all places, and to all persons. The law of history could have been added to this list. Between 1776 and 1784, 11 of the original 13 states made some allowance for the adoption of the English common law. One federal court said that the Constitution "did not create any new rights to life, liberty or due process. These rights had existed for Englishmen since Magna Charta. The Decla-

ration of Independence . . . merely declared and established these rights for the American colonies" (*Screven County v. Brier Creek Hunting & Fishing Club,* 202 F. 2d 369 [5th Cir. 1953]). Thus, natural law in the United States may be best understood as the integration of history, secular reason, and divine inspiration.

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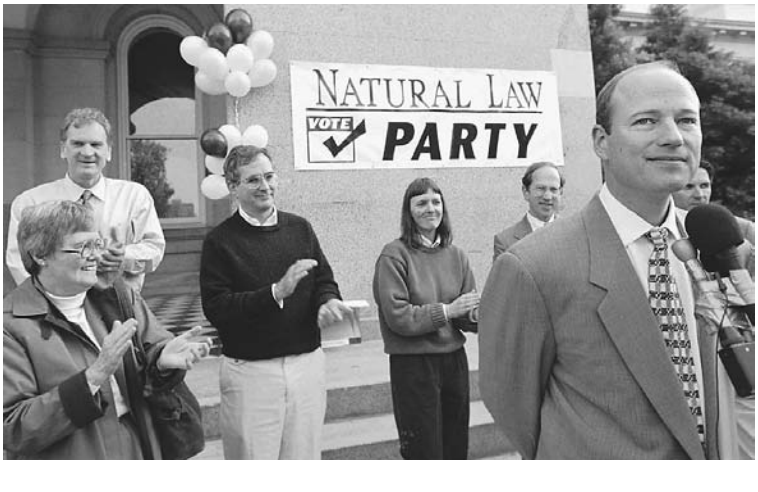


*John S. Hagelin (far right) was the Natural Law Party's presidential candidate in 1992, 1996, and 2000.*
AP/WIDE WORLD PHOTOS

## NATURAL LAW PARTY

Citizens of Fairfield, Iowa, formed the Natural Law Party in April 1992. In a few short months, the party had succeeded in placing its presidential ticket on the ballot in 28 states for the 1992 election. By 1996 the party was offering candidates for elective office in all 50 states.

Fairfield, Iowa, is the site of Maharishi International University, a school that teaches students to use transcendental meditation (TM) to achieve good health and a heightened awareness and understanding of the self and the world. The school, founded by Maharishi Mahesh Yogi, has provided the Natural Law Party with the inspiration and resources to enter the field of electoral politics.

The Natural Law Party has fashioned an unusual and ambitious political platform. The party endorses the practice of TM as a humane and cost-effective way to rehabilitate convicted and accused criminals. The party offers a proactive alternative to the current HEALTH CARE system, a system that party candidates call "disease care." Instead of pouring millions of dollars each year into the creation of drugs to manage disease, the Natural Law Party would promote health education and stress management, along with TM, as ways to avoid disease.

Dr. John S. Hagelin has been the standard-bearer for the Natural Law Party. Hagelin, a renowned physicist, was the party's nominee for president in 1992 and 1996. Although he is a professor at the Maharishi International University and a staunch proponent of the benefits of TM, Hagelin has worked to expand the party's scope beyond the TM message. The party emphasizes the importance of social equality for all persons, and party candidates talk of world peace as a reachable goal. The party platform also stresses environmental protection. For example, the party endorses alternative methods of energy production, such as a redirection of resources away from fossil fuels and toward renewable energy.

Although party membership has grown rapidly, and may be over 100,000 members, the party's goals in the political process have proved elusive. In 1996 Hagelin was one of only five presidential candidates who was on enough ballots to conceivably win the election in the ELECTORAL COLLEGE and from a party that had held primaries. Hagelin, along with REFORM PARTY candidate H. Ross Perot and LIBERTARIAN PARTY candidate Harry Browne, sought to par-

ticipate in the nationally televised presidential debates based on these accomplishments. However, the Commission on Presidential Debates, a private nonprofit organization formed by the Democratic and Republican National Committees, concluded that Hagelin, Perot, and Browne had no realistic chance of winning the election and thus excluded all three from the debates. Hagelin won 113,667 votes in the national election, or about 0.12 percent of the vote.

In 1999 Hagelin announced his candidacy for both the Natural Law Party and the Reform Party presidential nominations. When the Reform Party split over the candidacy of PATRICK BUCHANAN, supporters of Hagelin took the name Independence Party. In the 2000 elections, Natural Law-Independence Party coalition candidates received more than 1.4 million votes. In March 2003 the Natural Law Party condemned the invasion of Iraq by the United States. In April 2003, the Natural Law Party announced that Representative Dennis Kucinich (D-Oh.) had reintroduced his legislation to establish a U.S. Department of Peace, legislation that Hagelin had helped to draft.

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CROSS-REFERENCES

Libertarian Party; Third Party.

## NATURALIZATION

*The process under federal law whereby a foreign-born person may be granted citizenship. In order to qualify for naturalization, an applicant must meet a number of statutory requirements, including those related to residency, literacy, and education, as well as an exhibition of "good moral character" and a demonstration of an attachment to constitutional principles upon which the United States is based.*

CROSS-REFERENCES

Aliens; Citizens.

## NAVIGABLE RIVERS

See INTERNATIONAL WATERWAYS.

## NAVIGABLE WATERS

*Waters that provide a channel for commerce and transportation of people and goods.*

Under U.S. law, bodies of water are distinguished according to their use. The distinction is particularly important in the case of so-called navigable waters, which are used for business or transportation. Jurisdiction over navigable waters belongs to the federal government rather than states or municipalities. The federal government can determine how the waters are used, by whom, and under what conditions. It also has the power to alter the waters, such as by dredging or building dams. Generally a state or private property owner who is inconvenienced by such work has no remedy against the federal government unless state or private property itself is taken; if such property is taken, the laws of EMINENT DOMAIN would apply, which may lead to compensation for the landowner.

The basis for federal jurisdiction over navigable waters lies in the U.S. Constitution. Since the early nineteenth century, the U.S. Supreme Court has held that the COMMERCE CLAUSE (Article 1, Section 8) gives the federal government extensive authority to regulate interstate commerce. This view originated in 1824 in the landmark case of GIBBONS V. OGDEN, 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23. In *Gibbons,* the Court was faced with deciding whether to give precedence to a state or federal law for the licensing of vessels. It ruled that navigation of vessels in and out of the ports of the nation is a form of interstate commerce and thus federal law must take precedence. This decision led to the contemporary exercise of broad federal power over navigable waters, and in countless other areas of interstate commerce.

In practical terms federal regulation of navigable waters takes many forms. One area of this regulation covers matters of transportation and commerce: for example, rules governing the licensing of ships and the dumping of waste. A second area applies to the alteration of the navigable waters, which is strictly controlled by federal law. The Rivers and Harbors Appropriation Act of 1899 forbids building any unauthorized obstruction to the nation's navigable waters and gives enforcement powers to the U.S. Army Corps of Engineers. A third area of regulation involves WORKERS' COMPENSATION claims. The concept of navigable waters is important in claims made under the Longshore and Harbor Workers' Compensation Act of 1988

(33 U.S.C.A. §§ 901–950). The act provides that employers are liable for injuries to sailors that occur upon navigable waters of the United States.

The vast body of federal regulation concerning navigable waters frequently gives rise to litigation, and in many cases the courts have the difficult job of determining whether particular bodies of water are navigable (and thus subject to the law or regulation in question). Lakes and rivers are generally considered navigable waters, but smaller bodies of water may also be navigable. Attempting to address years of problematic litigation, the U.S. Supreme Court in 1979 created four tests for determining what constitutes navigable waters. Established in *Kaiser Aetna v. United States,* 444 U.S. 164, 100 S. Ct. 383, 62 L. Ed. 2d 332, the tests ask whether the body of water (1) is subject to the ebb and flow of the tide, (2) connects with a continuous interstate waterway, (3) has navigable capacity, and (4) is actually navigable. Using these tests, courts have held that bodies of water much smaller than lakes and rivers also constitute navigable waters. Even shallow streams that are traversable only by canoe have met the test.

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CROSS-REFERENCES

Admiralty and Maritime Law; Pilot; Riparian Rights; Water Rights.

## NAVY DEPARTMENT

The navy is one of three primary components of the U.S. military. Incorporating the Marine Corps, it serves along with the army and the air force as part of the nation's defense. The navy's mission is to protect the United States as directed by the president or the secretary of defense by the effective prosecution of war at sea. With its Marine Corps component, the navy's objectives are to seize or defend advanced naval bases; support, as required, the forces of all military departments of the United States; and maintain freedom of the seas. The Department of the Navy includes the U.S. Coast Guard when it is operating as a service in the navy.

The U.S. Navy was founded on October 13, 1775, when Congress enacted the first legislation creating the Continental Navy of the American Revolution. The Department of the Navy and the Office of Secretary of the Navy were established by the act of April 30, 1798 (10 U.S.C.A. §§ 5011, 5031). For nine years before that date, by act of August 7, 1789 (1 Stat. 49), the conduct of naval affairs was under the secretary of war. The National Security Act Amendments of 1949 provided that the Department of the Navy be a military department within the DEPARTMENT OF DEFENSE (63 Stat. 578).

### Office of the Secretary of the Navy

The secretary of the Navy is the head of the Department of the Navy. Appointed by the president of the United States, the secretary serves under the direction, authority, and control of the cabinet-level secretary of defense (10 U.S.C.A. § 5031). The secretary is responsible for the policies and control of the navy, including its organization, administration, functioning, and efficiency. Next in succession for the position is the under secretary of the navy, who functions as deputy and principal assistant to the secretary and has full authority in the general management of the department.

**Civilian Executive Assistants** The civilian executive assistants are the principal advisers and assistants to the secretary of the navy. They include the under secretary of the navy, the assistant secretaries of the navy, and the general counsel of the navy. With department-wide responsibilities for administration, the civilian executive assistants carry out their duties in harmony with the statutory positions of the chief of naval operations, who is the principal military adviser and executive to the secretary regarding naval matters, and the commandant of the Marine Corps, who is the principal military adviser and executive regarding Marine Corps matters. Each is authorized and directed to act for the secretary within his or her assigned area of responsibility.

**Staff Assistants** The staff assistants to the secretary of the navy are the naval inspector general, the comptroller of the navy, the auditor general of the navy, and the chief of information. The secretary or the law has established the following positions and boards for administrative purposes.

*Judge Advocate General* The JUDGE ADVOCATE general is the senior officer and head of the Judge Advocate General's Corps and the Office of the Judge Advocate General. The officer's primary responsibilities are to administer military justice throughout the Department of the Navy, perform functions required or authorized by the UNIFORM CODE OF MILITARY JUSTICE, and provide technical supervision for the Naval Justice School at Newport, Rhode Island. In cooperation with the general counsel to the navy, the judge advocate general also has broad responsibility for providing legal advice and related services to the secretary of the navy on military justice, ethics, ADMINISTRATIVE LAW, ENVIRONMENTAL LAW, operational and INTERNATIONAL LAW and treaty interpretation, and litigation involving these issues. Officers of the Judge Advocate General's Corps and judge advocates of the Marine Corps provide a variety of legal services to both individual service members and naval commands, ranging from personal representation for individual service members for courts-martial to legal services for naval commands on matters such as investigations and claims.

*Naval Criminal Investigative Service* The director of the Naval Criminal Investigative Service commands a worldwide organization with representation in more than 160 geographic locations to provide criminal investigation, counterintelligence, law enforcement, information, and personnel security support to the U.S. Navy and Marine Corps, both ashore and afloat.

*Office of Naval Research* Established by act of Congress on August 1, 1946 (10 U.S.C.A. §§ 5150–5153), the Office of Naval Research is the integrated headquarters of the navy for science and technology investment. It manages funding for basic research, exploratory development, advanced technology development, manufacturing technologies, and small business support.

*Personnel Boards* The Naval Council of Personnel Boards has four components:

1. The Naval Discharge Review Board reviews, pursuant to 10 U.S.C.A. § 1553, the discharge or dismissal of former members of the U.S. Navy and Marine Corps, except in cases of COURT-MARTIAL. It determines whether, under reasonable standards of naval law and discipline, a discharge or dismissal should be changed and, if so, what change should be made.
2. The Naval Complaints Review Board reviews, upon request, decisional documents and index entries created by the Naval Discharge Review Board after April 1, 1977, to determine whether they conform to applicable regulations of the Department of Defense and the Department of the Navy.
3. The Naval Clemency and Parole Board reviews, pursuant to 10 U.S.C.A. §§ 953–954, U.S. Navy and Marine Corps court-martial cases referred to it and grants or denies clemency and, pursuant to 10 U.S.C.A. § 952, reviews and directs that parole be granted or denied.
4. The Physical Evaluation Board organizes and administers disability evaluations within the Department of the Navy, pursuant to 10 U.S.C.A., ch. 61, and other applicable provisions of law and regulation.

*Naval Records* The Board for Correction of Naval Records is the highest echelon of review of administrative errors and injustices suffered by members and former members of the U.S. Navy and Marine Corps. Established under 10 U.S.C.A. § 1552 to give the secretary of the navy direction on taking actions that otherwise would require congressional decision, the board relieves Congress of the need for additional legislation. This statutory civilian board reviews service members' complaints about actions taken by various boards and officials in the department. The secretary of the navy, acting through this board of civilians of the executive part of the department, is authorized to change naval or military records to correct an error or to remove an injustice.

## United States Navy

**Chief of Naval Operations** The chief of naval operations is the highest-ranking officer of the naval service. The chief is the U.S. Navy member of the Joint Chiefs of Staff, the group of senior military officers who advise the president. Under the secretary of the navy, the chief of naval operations exercises command over certain central executive organizations, assigned shore activities, and the Operating Forces of the Navy.

In the broadest terms, the chief of naval operations is responsible for the navy's readiness and for executing military orders. The chief plans for and provides the personnel, material, weapons, facilities, and services to support the needs of the navy, with the exception of the Fleet

**Department of the Navy**

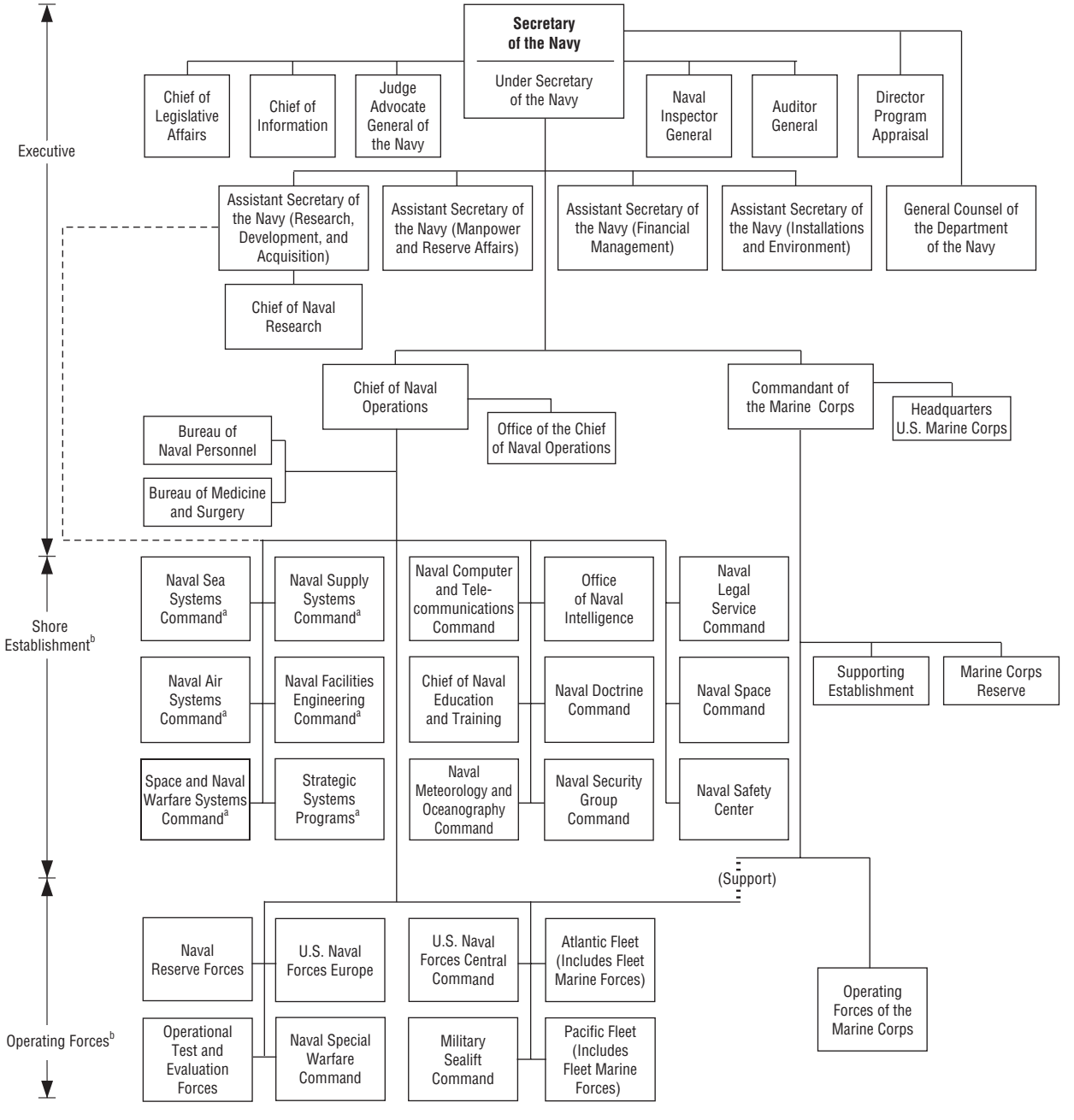


[a]Systems commands and SSP report to ASN (RDA) for acquisition matters only.
[b]Also includes other Echelon 2 commands and subordinate activities under the command or supervision of the designated organizations.

Marine Forces; maintains water transportation services, including sea transportation services for the Department of Defense; directs the Naval Reserve; and exercises authority for matters of naval administration, including matters related to customs and traditions of the naval service, security, intelligence, discipline, communications, and operations.

**Operating Forces of the Navy** The Operating Forces of the Navy are responsible for naval

operations necessary to carry out the Department of the Navy's role in upholding and advancing the national policies and interests of the United States. The Operating Forces of the Navy include the several fleets, seagoing forces, Fleet Marine Forces, and other assigned Marine Corps forces, the Military Sealift Command, and other forces and activities as may be assigned by the president or the secretary of the navy.

The U.S. Navy's two fleets are composed of ships, submarines, and aircraft. The Pacific Fleet operates throughout the Pacific and Indian Oceans, and the Atlantic Fleet operates throughout the Atlantic Ocean and Mediterranean Sea. Additionally, the Naval Forces, Europe, is composed of forces from both fleets.

**Navy Command Structure** The chief of naval operations manages and supports the Operating Forces of the navy through an organizational structure that is composed of sea systems, air systems, space and naval warfare systems, supply systems, naval facilities, strategic systems, naval personnel, naval medicine, oceanography, space command, legal services, computers and TELECOMMUNICATIONS, cryptology, intelligence, education and training, and naval doctrine command.

### United States Marine Corps

The United States Marine Corps was established on November 10, 1775, by resolution of the CONTINENTAL CONGRESS. The Marine Corps's composition and functions are detailed in 10 U.S.C.A. § 5063. Within the Department of the Navy, it is organized to include not less than three combat divisions and three aircraft wings, along with additional land combat, aviation, and other services. Its purpose is to provide forces necessary to seize or defend advanced naval bases and to conduct land operations essential to a naval campaign. In coordination with the U.S. Army and the U.S. Air Force, the Marine Corps develops the tactics, techniques, and equipment used by landing forces in amphibious (involving both sea and land) operations.

The Marine Corps also provides detachments and organizations for service on armed vessels of the navy, provides security detachments for the protection of naval property at naval stations and bases, and performs such other duties as the president may direct.

The Marine Corps is composed of the Marine Corps headquarters, the Operating Forces, and the supporting establishment. The Operating Forces consist of Fleet Marine Force Atlantic, Fleet Marine Force Pacific, Marine Corps Reserve, Marine Security Forces, and Marine Detachments Afloat. The supporting establishment includes recruiting activities, training installations, reserve support activities, ground and aviation installations, and logistics bases.

Basic combat units of the marines are deployed as Marine Air Ground Task Forces (MAGTFs). There are four types of MAGTFs: the Marine Expeditionary Force, the Marine Expeditionary Brigade, the Marine Expeditionary Unit, and the Special Purpose MAGTF. Each group has a command element, a ground combat element, an aviation combat element, and a combat service support element. Marine Expeditionary Forces are routinely deployed on amphibious ships to the Mediterranean Sea, Persian Gulf, and Pacific Ocean. Larger MAGTFs can rapidly deploy by air, sea, or any combination of means from both coasts of the United States and bases in the western Pacific to respond to emergencies worldwide.

### United States Naval Academy

The United States Naval Academy is the undergraduate college of the naval service. Located in Annapolis, Maryland, the academy offers a comprehensive four-year program that stresses excellence in academics, physical education, professional training, conduct, and honor. It prepares young men and women to be professional officers in the U.S. Navy and Marine Corps. All graduates receive a bachelor of science degree in one of 18 majors.

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#### CROSS-REFERENCES

Armed Services; Defense Department; Military Law.

## NEAR V. MINNESOTA

FREEDOM OF THE PRESS is a bedrock constitutional principle. However, the presumption that the press cannot be restrained from publishing stories was not established until 1931, when the U.S. Supreme Court issued its landmark ruling in *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357. This FIRST AMENDMENT decision has become a core constitutional precedent that

protects the press from unwarranted government interference in the newsroom.

The case grew out of the state of Minnesota's disgust at the rise of yellow journalism. Sensationalistic newspapers peddled the alleged financial and sexual misdeeds of prominent politicians and community leaders. These papers angered the subjects of the lurid stories, who demanded that something be done. In response the Minnesota legislature enacted a law in 1925 that provided for the abatement (prevention of publishing), as a public NUISANCE, of a "malicious, scandalous and defamatory newspaper, magazine or other periodical." Under the law, which was dubbed the Minnesota Gag Law, a judge could also stop the publication of a newspaper if the judge concluded it was "obscene, lewd, and lascivious." The judge determined these facts without a jury and was empowered to enter an INJUNCTION ordering no future publication. A person who violated the injunction and continued to publish could be charged with CONTEMPT, fined $1000, and sentenced up to 12 months in jail. A publisher could defend the periodical using truth as a defense, but the publisher had to demonstrate "good motives" and "justifiable ends."

The city of Minneapolis used the law to prosecute J.M. Near, the publisher of the *Saturday Press*. The paper reported stories about POLICE CORRUPTION and RACKETEERING and did so in a lively but reasonably accurate manner. Near's stories angered the mayor and police chief, who were alleged to have connections with ORGANIZED CRIME and may have been guilty of dereliction of their duties. Near's newspaper was tinged with anti-Semitism, anti-labor, and anti-Catholic sentiments, so he drew little sympathy. In November 1927 the court issued an injunction ordering Near to destroy the last three months of the *Press* and forbidding him to publish any future editions of the newspaper or any publication that contained the same type of material. The judge had effectively prevented Near from publishing anything that did not conform to the good taste of Minnesota judges. The Minnesota Supreme Court upheld the law and the order against Near, paving the way for the U.S. Supreme Court to hear the case.

The U.S. Supreme Court, in a 5–4 decision, overturned the injunction and ruled the Minnesota statute unconstitutional as a PRIOR RESTRAINT on the press. Chief Justice CHARLES EVANS HUGHES, in his majority opinion, noted that the law was "unusual, if not unique," yet it raised important issues concerning freedom of the press and FREEDOM OF SPEECH. In prior decisions the Court had begun to read some of the provisions of the BILL OF RIGHTS into the FOURTEENTH AMENDMENT, thereby making these rights applicable to the actions of state governments as well as the federal government. Hughes stated that there was "no doubt" that freedom of the press and freedom of speech were protected by the Fourteenth Amendment's DUE PROCESS CLAUSE against actions by state and local governments. However, these freedoms were not absolute, and the state could punish those who abuse these freedoms.

Chief Justice Hughes dismissed "mere errors" by the trial court and went to the constitutional issues. He pointed out that the gag law did not seek to redress individual wrongs, such as LIBEL against the police chief or mayor. These officials remained free to sue Near for libel and extract damages from him for his defamatory statements. Instead, the gag law was meant to protect the "public morals" and "general welfare" of the community. The law was in part troubling because the prosecutor did not have to prove the falsity of the charges in the newspaper. Moreover, the defense of truth was limited by a showing of good motives and justifiable ends. The Minnesota court made these points clear when it stated that there is "no constitutional right to publish a fact merely because it is true."

The Minnesota statute also troubled the majority because it protected public as well as private citizens. Charges against public officials "by their very nature, create a scandal." Another concern was that the object of the statute was not punishment "in the ordinary sense of the word" but the suppression of the newspaper. Therefore, a publisher who ignored the law and the court order in order to continue to expose official corruption will be shut down by the state. A publisher who seeks to continue publication must bow to official CENSORSHIP and produce a newspaper that is not "malicious, scandalous, or defamatory."

Having laid out the features of the law and the Court's initial concerns, Hughes reviewed the history of freedom of the press in England and quoted approvingly from Blackstone that liberty of the press consists in laying no previous restraints upon publication and not in freedom from censure for criminal matter when published. Hughes concluded that this principle had

been honored since the birth of the Republic and that there had been "almost an entire absence of attempts to impose previous restraints upon publications." Public officials must have their actions subject to public investigation and criticism. If the charges are false they may sue under libel laws. Only in exceptional circumstances should the government be granted a prior restraint.

Justice PIERCE BUTLER, in a dissenting opinion joined by Justices GEORGE SUTHERLAND, William Van Devanter, and JAMES MCREYNOLDS, criticized the Court for broadening the scope of freedom of the press. Moreover, the Court's decision had violated principles of FEDERALISM by using the Fourteenth Amendment to overturn a state law. Butler also contended that the action of the law did not constitute a prior restraint. Once the court concluded that writings were malicious, the state's POLICE POWER could be used to prohibit many types of questionable expression.

*Near* was a landmark case because it applied the First Amendment's freedom of the press and freedom of speech provisions to state government actions through the Fourteenth Amendment. In addition, the case announced a principle that has defined freedom of the press. Absent exceptional circumstances, editors and publishers know they are free to print their stories about public officials without fear of retribution through state censorship.

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CROSS-REFERENCES

Censorship; Freedom of Speech; Freedom of the Press.

## NECESSARIES

*Things indispensable, or things proper and useful, for the sustenance of human life.*

Traditional law required a husband to support his wife during their marriage irrespective of the wife's own means, her own ability to support herself, or even her own earnings, which, according to the Married Women's Property Acts passed in the mid-nineteenth century, she could do with as she pleased. The wife had no corresponding duty to support her husband. A husband owed the same support to the couple's children. He had the legal obligation to provide "necessaries" for his wife and children, which encompass food, clothing, lodging, HEALTH CARE, education, and comfort. Modern FAMILY LAW is now gender neutral: husbands and wives have an equal and mutual obligation to provide necessaries.

Courts rarely let themselves be involved in family disputes concerning necessaries while the marriage is ongoing. Depending on a couple's income, what is deemed "necessary" will vary widely. Although the level at which a spouse is to be maintained during marriage should correspond to the couple's station in life, successful litigation defining support obligations during marriage is rare. When a couple separates or divorces, maintenance and support become issues for the courts.

The law has recognized the wife's traditional authority to purchase necessaries. If a husband fails to fulfill his duty of support, his wife is authorized to purchase what necessaries she or their child needs, on the husband's credit and even against his express wishes. Beyond the basic necessities, courts look to the couple's circumstances. In some cases fur coats, gold watches, jewelry, and expensive furniture have been deemed necessaries. It is up to the merchant to show that the unauthorized purchases were in fact necessaries, and the merchant will not collect from the husband if the husband actually furnished appropriate necessaries to his wife and family.

The future of the necessaries rule is unclear. It may become gender neutral by evolving to protect purchases by the nonearning spouse in role-divided marriages, or it may disappear altogether because of the increasing financial independence of marriage partners and the attendant blurring of role division.

CROSS-REFERENCES

Alimony; Child Support; Divorce; Husband and Wife.

## NECESSARY AND PROPER CLAUSE

The specific powers and duties of the U.S. Congress are enumerated in several places in the Constitution. The most important listing of

these powers is in Article I, Section 8, which identifies in 17 paragraphs the many important powers of Congress. The last paragraph grants to Congress the flexibility to create laws or otherwise to act where the Constitution does not give it the explicit authority to act. This clause is known as the Necessary and Proper Clause, although it is not a federal power, in itself.

The Necessary and Proper Clause allows Congress "To make all Laws which shall be necessary and proper for carrying into Execution the [enumerated] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (Article I, Section 8, Clause 18). It is also sometimes called the "elastic clause." It grants Congress the powers that are *implied* in the Constitution, but that are not explicitly stated. That is why the powers derived from the Necessary and Proper Clause are referred to as implied powers.

The correct way to interpret the Necessary and Proper Clause was the subject of a debate between Secretary of the Treasury **ALEXANDER HAMILTON** and Secretary of State **THOMAS JEFFERSON**. Hamilton argued for an expansive interpretation of the clause. His view would have authorized Congress to exercise a broad range of implied powers. On the other hand, Jefferson was concerned about vesting too much power in any one branch of government. He argued that "necessary" was a restrictive adjective meaning *essential.* Jefferson's interpretation would have strengthened **STATES' RIGHTS**. **GEORGE WASHINGTON** and **JAMES MADISON** favored Hamilton's more flexible interpretation, and subsequent events helped to foster the growth of a strong central government. Their debate over the Necessary and Proper Clause between Hamilton and Jefferson came to a head in a landmark U.S. Supreme Court case, **MCCULLOCH V. MARYLAND**, 17 U.S. 316 (1819).

*McCulloch v. Maryland* was the first case in which the U.S. Supreme Court applied the Necessary and Proper Clause. Some constitutional historians believe that the opinion in *McCulloch v. Maryland* represents an important act in the ultimate creation of the U.S. federal government. The case involved the question of whether Congress had the power to charter a bank. At first, this question might seem inconsequential, but underlying it are larger questions that go to the foundations of constitutional interpretation. To some extent, they are still debated.

The First Bank of the United States was established in 1791, but it had failed in 1811 due to a lack of support from Congress. Inflation in the years following the **WAR OF 1812** compelled President James Madison and Congress to establish a new national bank, which was chartered in 1816. The new bank established branches throughout the states. Many state-chartered banks resented the cautious policies of the **BANK OF THE UNITED STATES**. Their directors sought assistance from their state legislatures to restrict the operations of the Bank of the United States. Accordingly, Maryland imposed a tax on the bank's operations, and when James McCulloch, a cashier of the Baltimore branch of the Bank of the United States, refused to pay the Maryland tax, the issue went to court.

The questions before the U.S. Supreme Court involved whether the state or national government held more power. Central to this issue was the Court's interpretation of the Necessary and Proper Clause. The Court held that the state of Maryland could not undermine an act of Congress. The states were subordinate to the federal government. This ruling established that Congress could use the Necessary and Proper Clause to create a bank even though the Constitution does not explicitly grant that power to Congress. Chief Justice **JOHN MARSHALL**'s opinion not only endorsed the constitutionality of the bank, but went on to uphold a broad interpretation of the federal government's powers under the Constitution. The case quickly became the legal cornerstone of subsequent expansions of federal power.

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## NECESSITY

*A defense asserted by a criminal or civil defendant that he or she had no choice but to break the law.*

The necessity defense has long been recognized as **COMMON LAW** and has also been made part of most states' statutory law. Although no federal statute acknowledges the defense, the Supreme Court has recognized it as part of the

common law. The rationale behind the necessity defense is that sometimes, in a particular situation, a technical breach of the law is more advantageous to society than the consequence of strict adherence to the law. The defense is often used successfully in cases that involve a TRESPASS on property to save a person's life or property. It also has been used, with varying degrees of success, in cases involving more complex questions.

Almost all common-law and statutory definitions of the necessity defense include the following elements: (1) the defendant acted to avoid a significant risk of harm; (2) no adequate lawful means could have been used to escape the harm; and (3) the harm avoided was greater than that caused by breaking the law. Some jurisdictions require in addition that the harm must have been imminent and that the action taken must have been reasonably expected to avoid the imminent danger. All these elements mirror the principles on which the defense of necessity was founded: first, that the highest social value is not always achieved by blind adherence to the law; second, that it is unjust to punish those who technically violate the letter of the law when they are acting to promote or achieve a higher social value than would be served by strict adherence to the law; and third, that it is in society's best interest to promote the greatest good and to encourage people to seek to achieve the greatest good, even if doing so necessitates a technical breach of the law.

The defense of necessity is considered a justification defense, as compared with an excuse defense such as duress. An action that is harmful but praiseworthy is justified, whereas an action that is harmful but ought to be forgiven may be excused. Rather than focusing on the actor's state of mind, as would be done with an excuse defense, the court with a necessity defense focuses on the value of the act. No court has ever accepted a defense of necessity to justify killing a person to protect property.

Most states that have codified the necessity defense make it available only if the defendant's value choice has not been specifically contradicted by the state legislature. For example, in 1993 the Massachusetts Supreme Judicial Court rejected the necessity defense of two people who were prosecuted for operating a needle-exchange program that was intended to reduce the transmission of AIDS through the sharing of contaminated hypodermic needles (*Massachusetts v. Leno,* 415 Mass. 835, 616 N.E.2d 453). Their actions violated a state law prohibiting the distribution of hypodermic needles without a physician's prescription. In rejecting the defense, the court held that the situation posed no clear and imminent danger. The court reasoned that citizens who disagree with the legislature's policy are not without remedy, as they can seek to have the law changed through popular initiative.

The necessity defense has been used with sporadic and very limited success in the area of civil disobedience since the 1970s. The most common circumstances involve public protests against ABORTION, NUCLEAR POWER, and NUCLEAR WEAPONS. Virtually all abortion protesters who have tried to avail themselves of the defense have lost. The courts have reasoned that because the right to an abortion is constitutionally protected, it cannot simultaneously be a legally recognized harm justifying illegal action. In these cases the courts have also denied the defense on the basis that the criminal act of protest would not stop abortions from occurring; that the harm caused by the act was greater than the harm of abortion; and that legal means of protest, such as demonstrating outside of the clinic rather than entering the clinic or trespassing on its property, were available. Consequently, according to the courts, there was no necessity for the protesters to break the law. In the vast majority of cases in which protesters, trespassing on property, blocked the entrance to nuclear plants, the courts have denied the necessity defense on the grounds that there was no imminent danger and that the trespassing protesters could not reasonably have believed that their actions would halt the manufacture of nuclear materials (see, e.g., *State v. Marley,* 54 Haw. 450, 509 P.2d 1095 [Haw. 1973]). The defense has also been denied in civil disobedience cases involving protests against U.S. policy abroad, the homeless problem, lack of funding for AIDS research, harmful logging practices, prison conditions, and human and ANIMAL RIGHTS violations.

Necessity has been used successfully by inmates who escape from prison under certain circumstances. In *Spakes v. State,* 913 S.W.2d 597 (Tex. Crim. App. 1996), the highest criminal court in Texas allowed the jury to be instructed on the necessity defense before deliberating the verdict for an inmate whose three cellmates had planned an escape and threatened to slit his throat if he did not accompany them. The defendant inmate argued that because of the terribly

violent crimes of which his cellmates had been convicted (one had bragged about chopping his girlfriend up with an ax), he accompanied them and escaped. Even though he made no attempt to return himself to custody when he was separated from his cellmates, the court still allowed the defense. In contrast, most jurisdictions have held that an escapee must make an attempt to surrender or report to authorities as a condition for asserting the necessity defense. These courts have reasoned that once the immediate threat is no longer present, the action of escape is no longer necessary, and consequently it should end.

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## NEGATIVE COVENANT

*A provision found in an employment agreement or a contract of sale of a business that prohibits an employee or seller from competing in the same area or market.*

A negative covenant is commonly used by businesses, particularly those that depend upon trade secrets for their success. An employer wants to ensure that a former employee will not parlay information, skills, customer lists, and personal relationships with clients acquired on the job to gain a better position with a competitor or to start his or her own business. An employer also wants to protect his or her business in the competitive marketplace against the use of the unique personal skills of a former employee. An employer can achieve these objectives by including a negative COVENANT in the employment contract. Such a provision specifies that the employee will not work for a competitor or start a competing business for a period of time after leaving the employer. The covenant must be reasonable in its scope and duration. It cannot bar the employee from working at all, anywhere, or for an unreasonable length of time.

A court enforces a negative covenant by granting an INJUNCTION prohibiting the employee from working in a competitive enterprise as described in the covenant. It will do so only when necessary to protect the former employer's legitimate interests.

A contract for the sale of a business often includes a negative covenant at the insistence of the buyer. A buyer wants to protect and capitalize on the good will of the business he or she buys. He or she must have an opportunity to get to know and serve the customers if the business is to continue to be successful. The value of the business is undermined if the seller can open a competing enterprise next door, thereby keeping some of the good will that was sold to the buyer. A negative covenant under which the seller agrees not to open a competing enterprise for a reasonable period of time within a reasonable distance from the original business is a frequent provision in a sales contract.

## NEGLECT

*An omission to do or perform some work, duty, or act.*

As used by U.S. courts, the term *neglect* denotes the failure of responsibility on the part of defendants or attorneys. Neglect is related to the concept of NEGLIGENCE, but its rather limited use in the law sets it apart from that much broader doctrine. Generally speaking, neglect means omitting or failing to do something that is required. Neglect is often related to timeliness: examples include the failure of a taxpayer to file a timely income tax return and the failure of an attorney to meet a deadline for filing an appeal. In determining whether to rule against a party, courts consider the reason for the neglect, which can range from unavoidable accidents and hindrances to the less acceptable extreme of carelessness and indifference to duty.

Special terminology applies to some forms of neglect. Culpable neglect exists where a loss arises from an individual's carelessness, improvidence, or folly. Willful neglect applies to marital cases; it refers to the neglect of one spouse, historically the husband, to provide such essentials as food, shelter, and clothing to the other spouse, either because of refusal or indifference.

Excusable neglect is used to grant exceptions in cases where neglect was the consequence of accident, unavoidable hindrance, reliance on legal counsel, or reliance on promises made by the adverse party. Excusable neglect can serve as the basis for a motion to vacate a judgment, as in the case of explaining why a deadline for filing an appeal could not be met. Under the Federal Rules of Civil Procedure, excusable neglect authorizes a court to permit an act to be done after the official deadline has expired (Fed. R. Civ. P. 6(b)).

CROSS-REFERENCES

Child Abuse; Necessaries.

## NEGLIGENCE

*Conduct that falls below the standards of behavior established by law for the protection of others against unreasonable risk of harm. A person has acted negligently if he or she has departed from the conduct expected of a reasonably prudent person acting under similar circumstances.*

*In order to establish negligence as a* CAUSE OF ACTION *under the law of* TORTS, *a plaintiff must prove that the defendant had a duty to the plaintiff, the defendant breached that duty by failing to conform to the required standard of conduct, the defendant's negligent conduct was the cause of the harm to the plaintiff, and the plaintiff was, in fact, harmed or damaged.*

The concept of negligence developed under ENGLISH LAW. Although English COMMON LAW had long imposed liability for the wrongful acts of others, negligence did not emerge as an independent cause of action until the eighteenth century. Another important concept emerged at that time: legal liability for a failure to act. Originally liability for failing to act was imposed on those who undertook to perform some service and breached a promise to exercise care or skill in performing that service. Gradually the law began to imply a promise to exercise care or skill in the performance of certain services. This promise to exercise care, whether express or implied, formed the origins of the modern concept of "duty." For example, innkeepers were said to have a duty to protect the safety and security of their guests.

The concept of negligence passed from Great Britain to the United States as each state (except Louisiana) adopted the common law of Great Britain (Louisiana adopted the CIVIL LAW of France). Although there have been important developments in negligence law, the basic concepts have remained the same since the eighteenth century. Today negligence is by far the widest-ranging tort, encompassing virtually all unintentional, wrongful conduct that injures others. One of the most important concepts in negligence law is the "reasonable person," which provides the standard by which a person's conduct is judged.

### The Reasonable Person

A person has acted negligently if she has departed from the conduct expected of a reasonably prudent person acting under similar circumstances. The hypothetical reasonable person provides an objective by which the conduct of others is judged. In law, the reasonable person is not an average person or a typical person but a composite of the community's judgment as to how the typical community member should behave in situations that might pose a threat of harm to the public. Even though the majority of people in the community may behave in a certain way, that does not establish the standard of conduct of the reasonable person. For example, a majority of people in a community may jaywalk, but jaywalking might still fall below the community's standards of safe conduct.

The concept of the reasonable person distinguishes negligence from intentional torts such as ASSAULT AND BATTERY. To prove an intentional tort, the plaintiff seeks to establish that the defendant deliberately acted to injure the plaintiff. In a negligence suit, however, the plaintiff seeks to establish that the failure of the defendant to act as a reasonable person caused the plaintiff's injury. An intoxicated driver who accidentally injures a pedestrian may not have intended to cause the pedestrian's injury. But because a reasonable person would not drive while intoxicated because it creates an unreasonable risk of harm to pedestrians and other drivers, an intoxicated driver may be held liable to an injured plaintiff for negligence despite his lack of intent to injure the plaintiff.

The law considers a variety of factors in determining whether a person has acted as the hypothetical reasonable person would have acted in a similar situation. These factors include the knowledge, experience, and perception of the person, the activity the person is engaging in, the physical characteristics of the person, and the circumstances surrounding the person's actions.

**Knowledge, Experience, and Perception** The law takes into account a person's knowledge, experience, and perceptions in determining whether the individual has acted as a reasonable person would have acted in the same circumstances. Conduct must be judged in light of a person's actual knowledge and observations, because the reasonable person always takes this into account. Thus, if a driver sees another car approaching at night without lights, the driver must act reasonably to avoid an accident, even though the driver would not have been negligent in failing to see the other car.

In addition to actual knowledge, the law also considers most people to have the same knowledge, experience, and ability to perceive as the hypothetical reasonable person. In the absence of unusual circumstances, a person must see what is clearly visible and hear what is clearly audible. Therefore, a driver of a car hit by a train at an unobstructed railroad crossing cannot claim that she was not negligent because she did not see or hear the train, because a reasonable person would have seen or heard the train.

Also, a person cannot deny personal knowledge of basic facts commonly known in the community. The reasonable person knows that ice is slippery, that live wires are dangerous, that alcohol impairs driving ability, and that children might run into the street when they are playing. To act as a reasonable person, an individual must even take into account her lack of knowledge of some situations, such as when walking down a dark, unfamiliar corridor.

Finally, a person who undertakes a particular activity is ordinarily considered to have the knowledge common to others who engage in that activity. A motorist must know the rules of the road and a product manufacturer must know the characteristics and dangers of its product, at least to the extent they are generally known in the industry.

**Special Skills** If a person engages in an activity requiring special skills, education, training, or experience, such as piloting an airplane, the standard by which his conduct is measured is the conduct of a reasonably skilled, competent, and experienced person who is a qualified member of the group authorized to engage in that activity. In other words, the hypothetical reasonable person is a skilled, competent, and experienced person who engages in the same activity. Often persons practicing these special skills must be licensed, such as physicians, lawyers, architects, barbers, pilots, and drivers. Anyone who performs these special skills, whether qualified or not, is held to the standards of conduct of those properly qualified to do so, because the public relies on the special expertise of those who engage in such activities. Thus, an unlicensed driver who takes his friends for a joyride is held to the standard of conduct of an experienced, licensed driver.

The law does not make a special allowance for beginners with regard to special skills. The learner, beginner, or trainee in a special skill is held to the standard of conduct of persons who are reasonably skilled and experienced in the activity. Sometimes the beginner is held to a standard he cannot meet. For example, a first-time driver clearly does not possess the experience and skill of an experienced driver. Although it may seem unfair to hold the beginner to the standards of the more experienced person, this standard protects the general public from the risk of a beginner's lack of competence, because the community is usually defenseless to guard against such risks.

**Physical Characteristics** The law takes a person's physical characteristics into account in determining whether that person's conduct is negligent. Whether a person's conduct is reasonable, and therefore not negligent, is measured against a reasonably prudent person with the same physical characteristics. There are two reasons for taking physical characteristics into account. A physically impaired individual cannot be expected to conform to a standard of conduct that would be physically impossible for her to meet. On the other hand, a physically challenged person must act reasonably in light of her handicap, and she may be negligent in taking a risk that is unreasonable in light of her known physical limitations. Thus, it would be negligent for a blind person to drive an automobile.

**Mental Capacity** Although a person's physical characteristics are taken into account in determining negligence, the person's mental capacity is generally ignored and does not excuse the person from acting according to the reasonable person standard. The fact that an individual is lacking in intelligence, judgment, memory, or emotional stability does not excuse the person's failure to act as a reasonably prudent person would have acted under the same circumstances. For example, a person who causes a forest fire by

failing to extinguish his campfire cannot claim that he was not negligent because he lacked the intelligence, judgment, or experience to appreciate the risk of an untended campfire.

Similarly, evidence of voluntary intoxication will not excuse conduct that is otherwise negligent. Although intoxication affects a person's judgment, voluntary intoxication will not excuse negligent conduct, because it is the person's conduct, not his or her mental condition, that determines negligence. In some cases a person's intoxication is relevant to determining whether his conduct is negligent, however, because undertaking certain activities, such as driving, while intoxicated poses a danger to others.

**Children** Children may be negligent, but they are not held to the same standard of conduct as adults. A child's conduct is measured against the conduct expected of a child of similar age, intelligence, and experience. Unlike the standard for adults, the standard of reasonable conduct for children takes into account subjective factors such as intelligence and experience. In this sense the standard is less strict than for adults, because children normally do not engage in the high-risk activities of adults and adults dealing with children are expected to anticipate their "childish" behavior.

In many states children are presumed incapable of negligence below a certain age, usually seven years. In some states children between the ages of seven and fourteen years are presumed to be incapable of negligence, although this presumption can be rebutted. Once a person reaches the age of majority, usually eighteen years, she is held to adult standards of conduct.

One major exception to the rules of negligence exists with regard to children. If a child is engaging in what is considered an "adult activity," such as driving an automobile or flying an airplane, the child will be held to an adult standard of care. The higher standard of care imposed for these types of activities is justified by the special skills required to engage in them and the danger they pose to the public.

**Emergencies** The law recognizes that even a reasonable person can make errors in judgment in emergency situations. Therefore, a person's conduct in an emergency is evaluated in light of whether it was a reasonable response under the circumstances, even though, in hindsight, another course of action might have avoided the injury.

In some circumstances failure to anticipate an emergency may constitute negligence. The reasonable person anticipates, and takes precautions against, foreseeable emergencies. For example, the owner of a theater must consider the possibility of a fire, and the owner of a swimming pool must consider the possibility of a swimmer drowning. Failure to guard against such emergencies can constitute negligence.

Also, a person can be negligent in causing an emergency, even if he acts reasonably during the emergency. A theater owner whose negligence causes a fire, for instance, would be liable for the injuries to the patrons, even if he saved lives during the fire.

**Conduct of Others** Finally, the reasonable person takes into account the conduct of others and regulates his own conduct accordingly. A reasonable person must even foresee the unlawful or negligent conduct of others if the situation warrants. Thus, a person may be found negligent for leaving a car unlocked with the keys in the ignition because of the foreseeable risk of theft, or for failing to slow down in the vicinity of a school yard where children might negligently run into the street.

### Proof of Negligence

In a negligence suit, the plaintiff has the burden of proving that the defendant did not act as a reasonable person would have acted under the circumstances. The court will instruct the jury as to the standard of conduct required of the defendant. For example, a defendant sued for negligent driving is judged according to how a reasonable person would have driven in the same circumstances. A plaintiff has a variety of means of proving that a defendant did not act as the hypothetical reasonable person would have acted. The plaintiff can show that the defendant violated a statute designed to protect against the type of injury that occurred to the plaintiff. Also, a plaintiff might introduce expert witnesses, evidence of a customary practice, or CIRCUMSTANTIAL EVIDENCE.

**Statutes** Federal and state statutes, municipal ordinances, and administrative regulations govern all kinds of conduct and frequently impose standards of conduct to be observed. For example, the law prohibits driving through a red traffic light at an intersection. A plaintiff injured by a defendant who ignored a red light can introduce the defendant's violation of the statute as evidence that the defendant acted negligently.

However, a plaintiff's evidence that the defendant violated a statute does not always establish that the defendant acted unreasonably. The statute that was violated must have been intended to protect against the particular hazard or type of harm that caused injury to the plaintiff.

Sometimes physical circumstances beyond a person's control can excuse the violation of a statute, such as when the headlights of a vehicle suddenly fail, or when a driver swerves into oncoming traffic to avoid a child who darted into the street. To excuse the violation, the defendant must establish that, in failing to comply with the statute, she acted as a reasonable person would have acted.

In many jurisdictions the violation of a statute, regulation, or ordinance enacted to protect against the harm that resulted to the plaintiff is considered negligence *per se*. Unless the defendant presents evidence excusing the violation of the statute, the defendant's negligence is conclusively established. In some jurisdictions a defendant's violation of a statute is merely evidence that the defendant acted negligently.

**Experts** Often a plaintiff will need an expert witness to establish that the defendant did not adhere to the conduct expected of a reasonably prudent person in the defendant's circumstances. A juror may be unable to determine from his own experience, for example, if the medicine prescribed by a physician was reasonably appropriate for a patient's illness. Experts may provide the jury with information beyond the common knowledge of jurors, such as scientific theories, data, tests, and experiments. Also, in cases involving professionals such as physicians, experts establish the standard of care expected of the professional. In the above example, the patient might have a physician offer EXPERT TESTIMONY regarding the medication that a reasonably prudent physician would have prescribed for the patient's illness.

**Custom** Evidence of the usual and customary conduct or practice of others under similar circumstances can be admitted to establish the proper standard of reasonable conduct. Like the evidence provided by expert witnesses, evidence of custom and habit is usually used in cases where the nature of the alleged negligence is beyond the common knowledge of the jurors. Often such evidence is presented in cases alleging negligence in some business activity. For example, a plaintiff suing the manufacturer of a punch press that injured her might present evidence that all other manufacturers of punch presses incorporate a certain safety device that would have prevented the injury.

A plaintiff's evidence of conformity or nonconformity with a customary practice does not establish whether the defendant was negligent; the jury decides whether a reasonably prudent person would have done more or less than is customary.

**Circumstantial Evidence** Sometimes a plaintiff has no direct evidence of how the defendant acted and must attempt to prove his case through circumstantial evidence. Of course, any fact in a lawsuit may be proved by circumstantial evidence. Skid marks can establish the speed a car was traveling prior to a collision, a person's appearance can circumstantially prove his or her age, etc. Sometimes a plaintiff in a negligence lawsuit must prove his entire case by circumstantial evidence. Suppose a plaintiff's shoulder is severely injured during an operation to remove his tonsils. The plaintiff, who was unconscious during the operation, sues the doctor in charge of the operation for negligence, even though he has no idea how the injury actually occurred. The doctor refuses to say how the injury occurred, so the plaintiff will have to prove his case by circumstantial evidence.

In cases such as this, the doctrine of RES IPSA LOQUITUR (the thing speaks for itself) is invoked. *Res ipsa loquitor* allows a plaintiff to prove negligence on the theory that his injury could not have occurred in the absence of the defendant's negligence. The plaintiff must establish that the injury was caused by an instrumentality or condition that was under the defendant's exclusive management or control and that the plaintiff's injury would not have occurred if the defendant had acted with reasonable care. Thus, in the above example, the plaintiff can use *res ipsa loquitor* to prove that the doctor negligently injured his shoulder.

## Duty

A defendant is not liable in negligence, even if she did not act with reasonable care, if she did not owe a duty to the plaintiff. In general, a person is under a duty to all persons at all times to exercise reasonable care for their physical safety and the safety of their property. This general standard of duty may lead to seemingly unjust results. For example, if a property owner leaves a deep hole in her backyard with no warnings or

barriers around the hole, she should be liable if her guest falls into the hole. But what if a trespasser enters the backyard at night and falls into the hole? Although the property owner was negligent in failing to guard against someone falling into the hole, it would be unfair to require the property owner to compensate the trespasser for his injury. Therefore, the law states that a property owner does not have a duty to protect a trespasser from harm.

The law uses the concept of duty to limit the situations where a defendant is liable for a plaintiff's injury. Whether a defendant has a duty to protect the plaintiff from harm is a question decided by the court, not the jury. Over time, courts have developed numerous rules creating and limiting a person's duty to others, and sometimes duties are established or limited by statute. Whether the defendant owes the plaintiff a duty depends upon the relationship between the defendant and the plaintiff.

A preexisting relationship can create an affirmative duty to exercise reasonable care to protect another person from harm. For example, an inn has an affirmative duty to protect its guests, a school has a duty to its pupils, a store has a duty to its customers, and a lifeguard has a duty to swimmers.

One always has a duty to refrain from taking actions that endanger the safety of others, but usually one does not have a duty to render aid or prevent harm to a person from an independent cause. A common example of this limitation on duty is the lack of a duty to go to the aid of a person in peril. An expert swimmer with a boat and a rope has no duty to attempt to rescue a person who is drowning (although a hired lifeguard would). A physician who witnesses an automobile accident has no duty to offer emergency medical assistance to the accident victims.

Sometimes a person can voluntarily assume a duty where it would not otherwise exist. If the doctor who encounters an automobile accident decides to render aid to the victims, she is under a duty to exercise reasonable care in rendering that aid. As a result, doctors who have stopped along the highway to render medical assistance to accident victims have been sued for negligence. Many states have adopted "good samaritan" statutes to relieve individuals who render emergency assistance from negligence liability.

Even if a plaintiff establishes that the defendant had a duty to protect the plaintiff from harm and breached that duty by failing to use reasonable care, the plaintiff must still prove that the defendant's negligence was the proximate cause of her injury.

*The law of negligence imposes higher standards on individuals who engage in activities that require special skills and training. For example, someone who engages in the practice of medicine must act as a reasonably skilled, competent, and experienced physician would.*

NATHAN BENN/CORBIS

### Proximate Cause

Perhaps no issue in negligence law has caused more confusion than the issue of proximate cause. The concept of proximate cause limits a defendant's liability for his negligence to consequences reasonably related to the negligent conduct. Although it might seem obvious whether a defendant's negligence has caused injury to the plaintiff, issues of causation are often very difficult. Suppose, for example, that a defendant negligently causes an automobile accident, injuring another driver. The colliding cars also knock down a utility pole, resulting in a power outage. Clearly the defendant's negligence has in fact caused both the accident and power outage. Most people would agree that the negligent defendant should be liable for the other driver's injuries, but should he also be liable to an employee who, due to the failure of her electric alarm clock, arrives late for work and is fired? This question raises the issue of proximate cause.

Actually, the term *proximate cause* is somewhat misleading because as a legal concept it has little to do with proximity (in time or space) or causation. Rather, proximate cause is related to fairness and justice, in the sense that at some point it becomes unfair to hold a defendant responsible for the results of his negligence. For example, Mrs. O'Leary's negligent placement of her lantern may have started the Great Chicago

Fire, but it would be unjust to hold her responsible for all the damage done by the fire.

In determining whether a defendant's negligence is the proximate cause of a plaintiff's injury, most courts focus on the foreseeability of the harm that resulted from the defendant's negligence. For example, if a driver negligently drives his automobile, it is foreseeable that he might cause an accident with another vehicle, hit a pedestrian, or crash into a storefront. Thus, the driver would be liable for those damages. But suppose the negligent driver collides with a truck carrying dynamite, causing an explosion that injures a person two blocks away. Assuming that the driver had no idea that the truck was carrying dynamite, it is not foreseeable that his negligent driving could injure a person two blocks away. Therefore the driver would not be liable for that person's injury under this approach. When applying this approach, courts frequently instruct juries to consider whether the harm or injury was the "natural or probable" consequence of the defendant's negligence.

A minority of courts hold the view that the defendant's negligence is the proximate cause of the plaintiff's injury if the injury is the "direct result" of the negligence. Usually a plaintiff's injury is considered to be the direct result of the defendant's negligence if it follows an unbroken, natural sequence from the defendant's act and no intervening, external force acts to cause the injury.

### Intervening Cause

Sometimes a plaintiff's injury results from more than one cause. For instance, suppose a defendant negligently injures a pedestrian in an automobile accident. An emergency room doctor negligently treats the plaintiff, aggravating her injury. The doctor's negligence is an "intervening cause" of the plaintiff's injury. A cause of injury is an INTERVENING CAUSE only if it occurs subsequent to the defendant's negligent conduct.

Just because an intervening cause exists, however, does not mean that the defendant's negligent conduct is not the proximate cause of the plaintiff's injury. The defendant remains liable if he should have foreseen the intervening cause and taken it into account in his conduct. If a defendant negligently spills a large quantity of gasoline and doesn't clean it up, he will not be relieved of liability for a resulting fire merely because another person causes the gasoline to ignite, because it is foreseeable that the gasoline might be accidentally ignited. Also, it is foreseeable that a sudden gust of wind might cause the fire to spread quickly.

Even if an intervening cause is foreseeable, however, in some situations the defendant will still be excused from liability. If the intervening cause is the intentional or criminal conduct of a third person, the defendant is not liable for this person's negligent conduct. In the example where the defendant spilled gasoline and did not clean it up, he is not responsible for the resulting fire if someone intentionally ignites the gas. Also, sometimes a third person will discover the danger that the defendant created by his negligence under circumstances where the third person has some duty to act. If the third person fails to act, the defendant is not liable. In the gasoline example, suppose the defendant, a customer at a gas station, negligently spills a large quantity of gas near the pumps. The owner of the gas station sees the spilled gasoline but does nothing. The owner of the gas station, not the defendant, would be liable if another customer accidentally ignites the gasoline.

Sometimes, however, a completely unforeseeable event or result occurs after a defendant's negligence, resulting in harm to the plaintiff. An abnormal, unpredictable, or highly improbable event that occurs after the defendant's negligence is known as a "superseding cause" and relieves the defendant of liability. For example, suppose a defendant negligently blocks a road causing the plaintiff to make a detour in her automobile. While on the detour, an airplane hits the plaintiff's car, killing the plaintiff. The airplane was completely unforeseeable to the defendant, and thus he cannot be held liable for the plaintiff's death. The airplane was a superseding cause of the plaintiff's death.

Even great jurists have had difficulty articulating exactly what constitutes proximate cause. Although the law provides tests such as "foreseeability" and "natural, direct consequences," ultimately the issue of proximate cause is decided by people's sense of right and wrong. In the example where the defendant spills gasoline and does not clean it up, most people would agree that the defendant should be liable if a careless smoker accidentally ignites the gasoline, even if they could not articulate that the smoker was a foreseeable, intervening cause of the fire.

### Defenses to Negligence Liability

Even if a plaintiff has established that the defendant owed a duty to the plaintiff, breached

that duty, and proximately caused the defendant's injury, the defendant can still raise defenses that reduce or eliminate his liability. These defenses include contributory negligence, comparative negligence, and ASSUMPTION OF RISK.

**Contributory Negligence** Frequently, more than one person has acted negligently to create an injury. Under the common-law rule of contributory negligence, a plaintiff whose own negligence was a contributing cause of her injury was barred from recovering from a negligent defendant. For example, a driver negligently enters an intersection in the path of an oncoming car, resulting in a collision. The other driver was driving at an excessive speed and might have avoided the collision if she had been driving more slowly. Thus, both drivers' negligence contributed to the accident. Under the doctrine of contributory negligence, neither driver would be able to recover from the other, due to her own negligence in causing the accident.

The doctrine of contributory negligence seeks to keep a plaintiff from recovering from the defendant where the plaintiff is also at fault. However, this doctrine often leads to unfair results. For example, even if a defendant's negligence is the overwhelming cause of the plaintiff's injury, even slight negligence on the part of the plaintiff completely bars his recovery. Also, the negligence of many defendants such as corporations, manufacturers, and landowners creates no corresponding risk of injury to themselves. In such cases the doctrine of contributory negligence, which can completely eliminate the liability for their negligence, reduces their incentive to act safely. As a result, courts and statutes have considerably weakened the doctrine of contributory negligence.

**Comparative Negligence** Most states, either by court decision or statute, have now adopted some form of comparative negligence in place of pure, contributory negligence. Under comparative negligence, or comparative fault as it is sometimes known, a plaintiff's negligence is not a complete bar to her recovery. Instead the plaintiff's damages are reduced by whatever percentage her own fault contributed to the injury. This requires the jury to determine, by percentage, the fault of the plaintiff and defendant in causing the plaintiff's injury. For example, suppose a plaintiff is injured in an automobile accident and sustains $100,000 in damages. The jury determines that the plaintiff was 25 percent responsible for the accident and that the defendant was 75 percent responsible. The plaintiff will then be allowed to recover 75 percent of her damages, or $75,000.

Most states have adopted the "50 percent rule" of comparative negligence. Under this rule the plaintiff cannot recover any damages if her negligence was as great as, or greater than, the negligence of the defendant. This rule partially retains the doctrine of contributory negligence, reflecting the view that a plaintiff who is largely responsible for her own injury is unworthy of compensation. A minority of states have adopted "pure comparative fault." Under that rule even a plaintiff who is 80 percent at fault in causing her injury may still recover 20 percent of damages, reflecting the defendant's percentage of fault.

**Assumption of Risk** Under the assumption of risk defense, a defendant can avoid liability for his negligence by establishing that the plaintiff voluntarily consented to encounter a known danger created by the defendant's negligence. Assumption of risk may be express or implied. Under express assumption of risk, persons agree in advance that one person consents to assume the risk of the other's negligence. For example, a skier who purchases a lift ticket at a ski resort usually expressly agrees to assume the risk of any injury that might occur while skiing. Thus, even if the ski resort negligently fails to mark a hazard on a trail resulting in an injury to a skier, the ski resort may invoke the assumption of risk defense in the skier's subsequent lawsuit.

Assumption of risk may also be implied from a plaintiff's conduct. For example, the defendant gives the plaintiff, a painter, a scaffold with a badly frayed rope. The plaintiff, fully aware of the rope's condition, proceeds to use the scaffold and is injured. The defendant can raise the implied assumption of risk defense. This defense is similar to the contributory negligence defense; in the above example, the defendant might also argue that the plaintiff was contributorily negligent for using the scaffold when he knew the rope was frayed.

The implied assumption of risk defense has caused a great deal of confusion in the courts because of its similarity to contributory negligence, and with the rise of comparative fault, the defense has diminished in importance and is viable today only in a minority of jurisdictions.

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CROSS-REFERENCES

Alcohol; Automobiles; Good Samaritan Doctrine; Guest Statutes; Last Clear Chance; *MacPherson v. Buick Motor Co.*; Natural and Probable Consequences; *Palsgraf v. Long Island Railroad Company*; Product Liability; Rescue; *Rylands v. Fletcher*; Strict Liability.

## NEGLIGENT ENTRUSTMENT

*The act of leaving an object, such as an automobile or firearm, with another whom the lender knows or should know could use the object to harm others due to such factors as youth or inexperience.*

Negligent entrustment claims arise when an unlicensed, incompetent, or reckless driver causes damages while driving a motor vehicle owned by someone else. A party injured by such a driver must generally prove five components of this TORT: (1) that the owner entrusted the vehicle to the driver; (2) that the driver was unlicensed, incompetent, or reckless; (3) that the owner knew or should have known that the driver was unlicensed, incompetent, or reckless; (4) that the driver was negligent in the operation of the vehicle; and (5) that the driver's NEGLIGENCE resulted in damages (*Amaya v. Potter,* 94 S.W.3d 856 [Tex. App. 2002]).

If a plaintiff proves these elements, an owner may be liable for the full amount of damages caused by the driver. In some instances, the plaintiff may also recover PUNITIVE DAMAGES from the owner, particularly if the owner himself acted recklessly in entrusting the vehicle to the driver (*Allstate Ins. Co. v. Wade,* 579 S.E.2d 180 [Va. 2003]).

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## NEGOTIABLE INSTRUMENT

*A* COMMERCIAL PAPER, *such as a check or promissory note, that contains the signature of the maker or drawer; an unconditional promise or order to pay a certain sum in cash that is payable either upon demand or at a specifically designated time to the order of a designated person or to its bearer.*

## NEGOTIATE

*To conduct business transactions; to deal with another individual in regard to a purchase and sale; to bargain or trade. To conclude by way of agreement, bargain, or compact. To transfer a* negotiable instrument, *such as a promissory note, or other* COMMERCIAL PAPER.

## ♦ NELSON, JOHN

John Nelson was a prominent U.S. lawyer, congressman, and diplomat who served as attorney general of the United States under President JOHN TYLER.

Nelson was born on June 1, 1791 (some sources say 1794), in Frederick County, Maryland. As a young boy, he was educated by private tutors; subsequently, he entered the College of William and Mary at Williamsburg, Virginia. He graduated in 1811 and went on to study law with attorneys in both Virginia and Maryland. He was admitted to the bar in 1813 and established a practice in his hometown.

In 1820 Nelson was elected to the U.S. House of Representatives as a Democrat. He

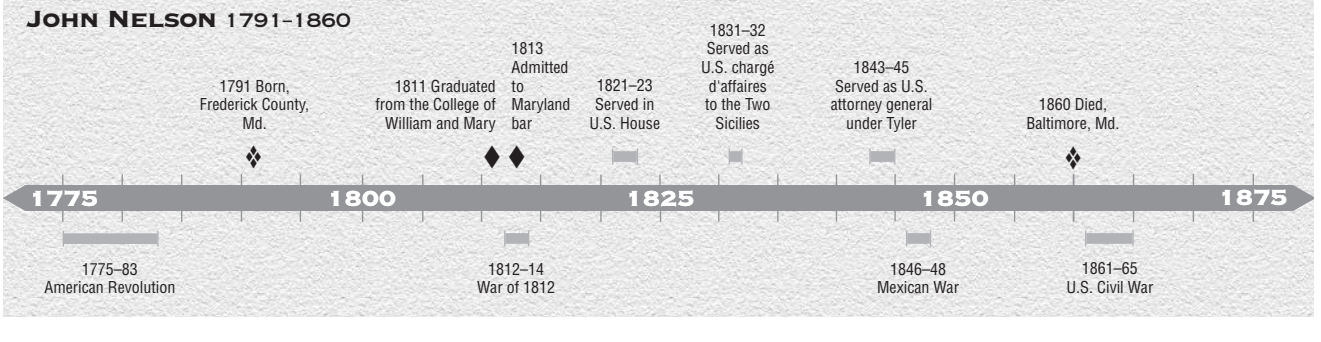

took the oath of office on March 4, 1821, and served until March 3, 1823. He did not run for reelection but did support Andrew Jackson's presidential bid in 1828.

Over the next two decades, Nelson served the U.S. government in a number of unofficial capacities. He received the first of his official appointments from President Jackson in 1831, when he was named to a diplomatic post in Naples. He served as U.S. charge d'affaires (*charge d'affaires* is a title accorded lower-level diplomats) to Two Sicilies from October 24, 1831, to October 15, 1832. (The Two Sicilies was an independent Bourbon/Spanish-ruled kingdom located in southern Italy prior to that country's unification in the mid-1860s. The kingdom's capital was Naples.)

When Tyler assumed the presidency following the death of President WILLIAM H. HARRISON, he named Nelson attorney general of the United States. Nelson held a cabinet post as SECRETARY OF STATE ad interim at the same time. (The position of attorney general was not a cabinet-level post at the time.) Nelson served in both capacities from 1843 to 1845.

In his later years, Nelson resumed the PRACTICE OF LAW in Baltimore, Maryland. He died there on January 8, 1860 and is buried at Baltimore's Greenmount Cemetery.

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## ♦ NELSON, SAMUEL

Samuel Nelson served as an associate justice of the U.S. Supreme Court from 1845 to 1872. He brought with him experience as a politician, lawyer, and judge, which had included service as chief justice of the New York Supreme Court. His nomination to the U.S. Supreme Court by a desperate President JOHN TYLER came only after several prior nominees had declined or had been rejected by the U.S. Senate.

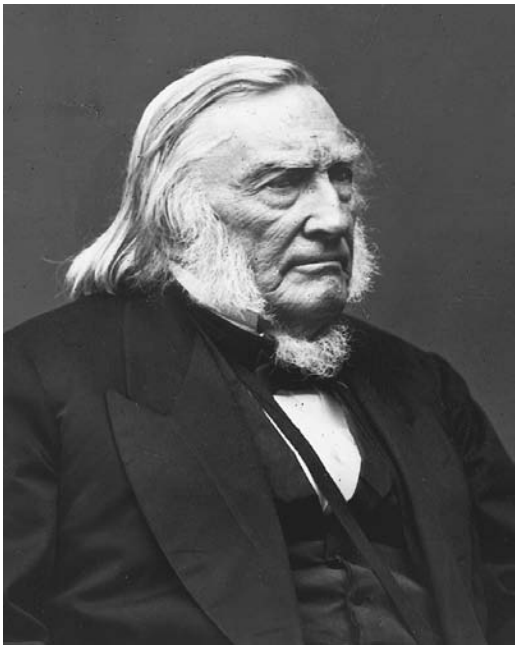

*Samuel Nelson.*
U.S. SUPREME COURT

Nelson was born in Hebron, New York, on November 10, 1792. He entered Middlebury College, in Vermont, at the age of 15 and graduated in 1813. Nelson chose a career in law, and during his twenties he managed a successful private practice in real estate and COMMERCIAL LAW that brought him political recognition. In 1821, he was the youngest delegate to serve in the New York state constitutional convention. His judicial career began in 1823 with his appointment as a judge to the U.S. Court of Appeals for the Sixth Circuit. In 1831, he began a 14-year tenure on the New York Supreme

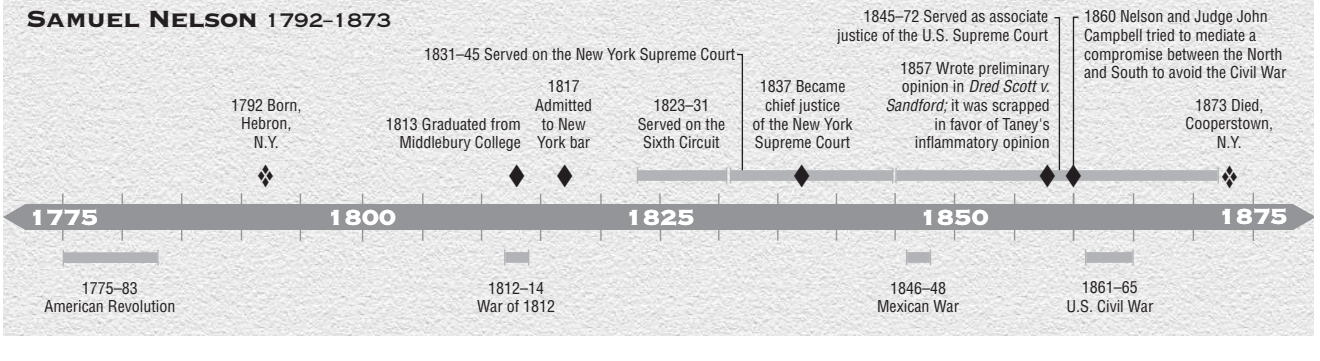

Court, during the last four years of which he served as its chief justice. (Since 1847, New York's highest court has been called the New York Court of Appeals.) There, Nelson developed a reputation for common sense and a belief in the limits of judicial power.

In 1845, President Tyler turned to Nelson in desperation. The president's attempts to fill a vacant seat on the U.S. Supreme Court had produced more than half a dozen nominees, all of whom had refused the nomination or had failed to win Senate approval. Nelson, a last-minute substitution, sailed through the nomination process.

Nelson believed that the Court should move cautiously in matters pertaining to the expressed will of Congress. He wrote the original majority opinion in the *Dred Scott* decision that upheld the institution of SLAVERY (DRED SCOTT V. SANDFORD, 60 U.S. [19 How.] 393, 15 L. Ed. 691 [1857]). Nelson's opinion sought to avoid answering the highly controversial question of slavery. But under political pressure from Southern justices on the Court, his opinion was scrapped, and Chief Justice Roger B. Taney's inflammatory opinion was substituted. Taney's decision led to violent protest and deepened hostilities that ultimately led to the Civil War. Nelson died December 13, 1873.

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## NET

*The sum that remains following all permissible deductions, including charges, expenses, discounts, commissions, or taxes.*

*Net assets,* for example, are what remain after an individual subtracts the amount owed to creditors from his or her assets. *Net pay* is the salary an individual actually receives after deductions such as INCOME TAX and SOCIAL SECURITY payments.

## NET WORTH

*The difference between total assets and liabilities; the sum total of the assets of an individual or business minus the total amount owed to creditors.*

The net worth of a corporation is ordinarily determined by subtracting the liabilities from the assets, or by adding the capital account to the surplus account, as shown in the balance sheet of the company.

## NEUTRALITY

*The state of a nation that takes no part in a war between two or more other powers.*

Since the nineteenth century, INTERNATIONAL LAW has recognized the right of a nation to abstain from participation in a war between other states. In an international war, those taking no part are called neutrals. This means that a neutral state cannot provide assistance to the belligerents, the principal hostile powers, or to their allies, who cooperate and assist them.

The law of neutrality that emerged from the nineteenth century was codified in several of the Hague Conferences of 1907, including No. 3, Convention Relative to the Opening of Hostilities (requiring notice to neutrals of a state of war); No. 5, Convention Respecting Rights and Duties of Neutral Powers and Persons in Case of War on Land; and No. 11, Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War.

Once a state decides on a position of neutrality, it must take steps to prevent its territory from becoming a base for military operations of a belligerent. It must prevent the recruiting of military personnel, the organizing of military expeditions, and the constructing, outfitting, commissioning, and arming of warships for belligerent use. A neutral state is under no obligation to prevent private persons or companies from advancing credits or selling commodities to belligerents. Such sales are not illegal under the international law of neutrality. A neutral state may, if it chooses, go beyond the requirements of international law by placing an embargo upon some or all sales or credits to belligerents by its nationals. If it does so, it has the obligation to see that legislation, commonly referred to as neutrality laws, is applied impartially to all belligerents. Once enacted, neutrality laws are not to be modified in ways that would advantage one party in the war.

For most of its history, the United States tried to remain neutral during the wars among European states. President GEORGE WASHINGTON issued a neutrality proclamation in 1793 after the outbreak of war between France and the European allies. Congress enacted its first neutrality law in 1794 (1 Stat. 381), which prohibited private individuals from accepting a for-

eign military commission, outfitting military vessels for a foreign state, or enlisting or hiring persons for the service of a foreign state.

This legislation proved generally effective in accomplishing its objectives, but it did not deter citizens who wished to support revolutionary belligerent or insurgent movements in South and Central America during the nineteenth century. The Mexican Revolution of 1910 and the counterrevolution that followed led to the trafficking in arms and ammunition across the border. In response, Congress enacted, in 1912, its first arms embargo (37 Stat. 630), a prohibition not required by international law. It authorized the president, upon finding that conditions of violence in an American country were promoted by procurement of arms or munitions of war in the United States, to prohibit further export of them.

With the rise of international conflicts around the world in the 1930s, Congress passed the Neutrality Acts of 1935, 1936, and 1937 (49 Stat. 1081, 49 Stat. 1152, 50 Stat. 121). These laws required registration and licensing by a National Munitions Control Board of all persons trading in munitions and a mandatory embargo on the export of arms, ammunition, and implements of war, and on loans and credits to all belligerents or to neutrals for transshipment to belligerents. An embargo would take effect when the president found a state of war to exist.

The desire of the United States to remain neutral has been called isolationism. During the 1930s the U.S. public did not want the United States entangled with the international strife perpetrated by Italy, Germany, and Japan. In 1935, President **FRANKLIN D. ROOSEVELT** invoked the arms embargo provision after the Italian invasion of Ethiopia and the consequent war. With the outbreak of the European war in 1939, limiting the conflict by an arms embargo was no longer possible. Although isolationist sentiment was strong, there was also a growing feeling that the Allies needed support against Nazi aggression. The Roosevelt administration, with some difficulty, secured the repeal of the arms embargo in the Neutrality Act of 1939 (22 U.S.C.A. § 441). Because this repeal could work to the advantage only of Great Britain and France, it was a deliberately non-neutral act.

The United States remained a neutral state before its entry into **WORLD WAR II** in December 1941, yet it took actions that undermined its status. In 1940, the United States entered into an agreement for the transfer of 50 old destroyers to Great Britain in exchange for leased naval and air bases in British islands off the Atlantic coast of the United States. Congress took a further step in the **LEND-LEASE ACT** of 1941 (55 Stat. 31) by agreeing to provide munitions, food, machinery, and services to Great Britain and the other Allies without immediate cost, thus eliminating their difficulty in finding dollar credits for purchases. Later repayment could be made in kind or property or other acceptable benefits. Under the Lend-Lease Act, the United States made huge shipments before and after entering the war.

Following the passage of the Lend-Lease Act, the United States became increasingly involved in direct military assistance, permitting U.S. merchant ships to transport war materials to the Allies, using U.S. pilots to deliver bombers to Canada and Britain, and using naval vessels for a "neutrality patrol" in the Atlantic that assisted in protecting belligerent convoys against submarines.

Much of the 1939 act remains in force (22 U.S.C.A. §§ 441–457), including the president's authority to find and proclaim a state of war, prohibition of travel by citizens in belligerent ships, and prohibition of financial transactions by persons in the United States with belligerents or solicitation or collection of contributions for a belligerent except for humanitarian purposes. The authority for an arms embargo, which was revoked in 1941, has not been reinstated. Sales by U.S. individuals and companies are governed by the international law of neutrality, unless Congress enacts a specific embargo provision.

In the post–World War II era, the U.S. government has committed several neutrality violations. Its conduct was less than disinterested and neutral in the overthrow of the Guatemalan government in 1954, in its sponsorship of the Bay of Pigs military expedition against Cuba in 1961, in its intervention in the civil war in the Dominican Republic in 1965, and in its aid to those who overthrew the Salvador Allende government in Chile in 1973.

Congress did enact the Arms Export Control Act of 1976 (22 U.S.C.A. §§ 2751–2796c [1989 Supp.]), which was designed to restrict the transfer of arms to nations that support international **TERRORISM**. The **IRAN-CONTRA AFFAIR** that emerged as a political scandal in President Ronald Reagan's administration involved violations of this act. The transfer of arms to Iran, a nation that supported terrorism, and the financial and military support of a right-wing revolutionary group

in Nicaragua violated congressional legislation and, in the case of Nicaragua, thwarted the desire of Congress to remain neutral in the conflict.

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## NEW DEAL

"I pledge you, I pledge myself, to a new deal for the American people." In July 1932, FRANKLIN DELANO ROOSEVELT said these words to the delegates at the Democratic National Convention, who had just elected him the party's candidate for president of the United States.

Roosevelt's New Deal was a response to the tumultuous events of the years leading to his nomination. After WORLD WAR I, the people of the United States experienced unprecedented prosperity. Consumers of all income levels were buying goods "on time" by putting a few dollars down and paying a few dollars a month. Record numbers of people were also using the installment-buying concept to purchase stocks. The number of stockbrokers grew from fewer than 30,000 in 1920 to more than 70,000 in 1929. Stockbrokers allowed their clients to "buy on margin," meaning that a customer only had to pay 10–15 percent down on a stock, with the BROKER lending the client the rest and being repaid when the stock went up in value. By 1929, the skyrocketing prices in the STOCK MARKET indicated continued prosperity to some economists, but to others it signaled impending doom. So much investment had been done on margin that stockbrokers had borrowed money from banks that by then were also heavily in debt. Stock prices began rapidly dropping in September 1929, and on "Black Thursday," October 24, 1929, they plummeted beyond all belief, devastating thousands of brokerage houses. By the following Tuesday, October 29, virtually all stocks were worthless. Millionaires became paupers overnight. People who had invested their savings woke up to find themselves penniless. This was the start of the Great Depression.

HERBERT HOOVER was the president at the time of the great stock market crash. He initially refused to believe that there was a problem, and even in April 1930, when more than three million people had lost their jobs, he continued in vain to reassure people that everything was fine. Because people were afraid of losing their jobs and running out of money, they refused to engage in the free-spending ways of the past and chose to save rather than to spend their money. This behavior, in turn, created a new cycle of problems. Because many banks had failed during the crash, people no longer trusted them, and kept their money at home, which depleted the supply of capital that banks needed. People also refused to buy new products and instead repaired old ones. Because few people were buying new products, companies were forced to close and to lay off employees. Many people were evicted from their homes for failing to make payments, and often several members of extended families lived together. The number of HOMELESS PERSONS soared, as did cases of malnutrition. President Hoover still remained firm in his stance that government aid was not an option. He believed that private charity could take care of those individuals who could not take care of themselves and that the ingenuity of private business would cure the ills of the country, not government intrusion. The American people resented President Hoover's attitude. The camps of makeshift shacks in which many people lived after being evicted were called Hoovervilles, and slogans such as Hard Times Are Hoover-ing over Us were heard everywhere. By December 1931, the unemployment rate was more than 13.6 million, a third of the labor force. When President Hoover sent military troops with bayonets and tear gas to disband the Bonus Army—a group of World War I veterans who had come to Washington, D.C., to seek early payment of a promised bonus for fighting in the war—his approval among U.S. voters plunged irrevocably.

Although the Republicans knew that the Democratic presidential candidate would more than likely win, they nominated Hoover again in 1932. The Democratic nominee, Franklin D. Roosevelt, won all but six states and received 22 million votes, as compared to Hoover's 15 mil-

lion. Roosevelt came from a wealthy family, had served as assistant secretary of the navy and as governor of New York, and had battled polio courageously. His promised "new deal" was anxiously awaited.

The day after he was inaugurated, Roosevelt requested a special session of Congress to convene and declared a week-long bank holiday. He guaranteed that at the end of one week's time, banks that the government found to be sound and secure would reopen. Roosevelt also announced a **MORATORIUM** on the export of gold. Because foreign investors required trading to be done in gold (paper money was believed to be too risky) the combination of the moratorium and the bank holiday effectively put the economy of the United States on hold. After the week had passed, Roosevelt held the first of his famous "fireside chats" via the radio to reassure the American people. As promised, the majority of the banks reopened. Many people followed Roosevelt's advice and again placed their money in the banks. During those same first weeks, Roosevelt and Congress worked together to repeal **PROHIBITION**, allowing the sale and consumption of alcohol to resume.

These moves were only the beginning of what is referred to as the Hundred Days. More legislation was passed during the first hundred days of Roosevelt's presidency than had been passed in any similar period of any previous presidency. Roosevelt worked with young lawyers, professors, and social workers to create legislation that was meant to get people working and spending once again. To relieve the immediate need for food and shelter, Roosevelt ushered through Congress the Federal Emergency Relief Administration, which granted $500 million in aid to the states for distribution to people in need.

Next came congressional approval of Roosevelt's Civilian Conservation Corps Act (ch. 383, 50 Stat. 319). The government paid young men between the ages of 18 and 25 for six months to one year to do construction or conservation work. The men built bridges, dams, and roads and planted more than 17 million acres of new forests. They were paid $30 per month and were required to send most of their money home to their families.

The Agricultural Adjustment Act of 1933 (AAA), 7 U.S.C.A. §§ 601 et seq., also was passed during these first hundred days. Farmers were growing large surpluses of crops such as wheat and corn, and these surpluses drove prices down even though the farmers' expenses were rising. The AAA sought to reduce the surplus of crops by paying farmers not to grow them. Although some Americans questioned this practice because so many people were starving, the theory of the plan bore out, and by 1936 farmers were receiving $1.02 per bushel of wheat, as compared to the 38 cents per bushel that they had received in 1932.

*Unemployed men gather at a Chicago soup kitchen in February 1931. Roosevelt's New Deal was a response to the severe economic decline that engulfed the nation in the first years of the Great Depression. Two years after the September 1929 crash of the stock market 33 percent of the labor force was unemployed.*

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Toward the end of the hundred days, Congress enacted the **NATIONAL INDUSTRIAL RECOVERY ACT OF 1933** (NIRA), (ch. 90, 48 Stat. 195) and created the National Industrial Recovery Administration to implement the act's goals. The legislation's main goal was to stimulate dormant factories and industries and to get people back to work. The National Industrial Recovery Administration believed that the best way to do this was to create a series of codes (746 in all) that companies had to follow in the marketplace. These codes regulated everything from a minimum hourly wage to the maximum number of hours per week that an employee could work. They controlled advertising and business production and output. Fearing a return of the high unemployment rate, one code forbade industry from developing technological advances that would lead to employee layoffs.

NIRA represents the first direct government involvement in business operations. It allowed industries and business to engage in previously prohibited monopolistic price-fixing so that one manufacturer could not underprice its goods to drive a competitor out of business. The legislation allowed workers to unionize and to bargain

*One of the most popular programs of the New Deal was the Works Progress Administration, which created more than 250,000 projects, putting millions of people to work.*

AP/WIDE WORLD PHOTOS

collectively for better pay and working conditions. This was all done with the goal of increasing business profits, which, in turn, would create more jobs and more spending. However, NIRA posed difficulties for many business owners, who were forced to restructure their business operations.

One of the most popular programs of the New Deal was the Works Progress Administration (WPA), which created more than 250,000 projects, putting millions of people to work. Most of the money and effort went to public construction of bridges, roads, and government buildings such as post offices. Writers were employed to interview town residents and to compile local histories. Actors and musicians were hired to bring theater and live music to residents of rural towns, who otherwise had little opportunity to see live performances.

After the first 18 months of the New Deal, five million previously unemployed people had found work. However, Roosevelt and his New Deal were not without their critics. When wealthy people realized that Roosevelt was intending not to return the country to the pre-crash status quo but rather to reform the entire national economic structure, they soon turned on him, calling him a traitor to his class. They disliked Roosevelt for the new taxes imposed on them, and some believed rumors that Roosevelt wanted to make the United States a socialist state under his dictatorship. The leaders of big business, once beholden to Roosevelt for getting their businesses back on track, were now among his most forceful critics.

Wealthy people were not Roosevelt's only critics. People to the political left of Roosevelt thought that he had let the common man down. Socialists such as **UPTON SINCLAIR** and some Democrats such as Huey Long, the senator from Louisiana, complained that Roosevelt and his New Deal did not do enough for the lower and middle classes of society. Despite criticism from many angles, the majority of U.S. citizens loved Roosevelt, re-electing him by a landslide in 1936 over the Republican nominee, Alfred M. Landon.

One significant reason for Roosevelt's considerable popularity was the passage of the **SOCIAL SECURITY ACT OF** 1935 (42 U.S.C.A. § 301 et seq.)—the first piece of legislation in the history of the United States to address social welfare. The legislation provided people over the age of 65 with a monthly **PENSION** from the federal government. It also contained provisions for unemployment insurance and for aid to children. Although this form of government charity also had its critics, Roosevelt was pleased with it because it was proof that he had not forgotten the common man.

The early successes of the New Deal created a boldness that eventually led to its demise. By the mid 1930s, the U.S. Supreme Court began to strike down New Deal legislation as unconstitutional exercises of congressional power. In *Schechter Poultry Corp. v. United States,* 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935), for example, the Court struck down the heart of Roosevelt's New Deal legislation, the NIRA. The Schechter brothers were wholesale kosher poultry distributors who did business within the state of New York. They were convicted of violating the Live Poultry Code, including wage-and-hour violations. The Court unanimously held that the federal government could only control trade between states, not trade within one state. Even liberal justices on the Court who had supported previous New Deal legislation found the challenged provisions unconstitutional. The following year, the Court struck down the Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991, because its enactment was not based upon a

power that Congress possessed under the Constitution. *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936).

Many legal actions against other New Deal legislation were piling up, and in a fast and furious move in 1937, Roosevelt proposed a restructuring of the high court through the addition of a new justice to the Court for each justice over the age of 70. At the time of this proposal, six of the nine justices were over the age of 70, including Chief Justice CHARLES EVANS HUGHES and associate justices WILLIS VAN DEVANTER, JAMES MCREYNOLDS, LOUIS BRANDEIS, GEORGE SUTHERLAND, and PIERCE BUTLER. Roosevelt tried to place a nonpolitical spin on his proposal, citing instances where changes to the composition of the Court had been made before, as well as the heavy workload for nine justices, but he could not disguise his blatant attempt to pack the Court with liberal justices who saw things his way. Roosevelt refused to concede, which resulted in months of Senate debates that cost him many supporters.

Rather than exploding, the controversy retreated as the Court began supporting many pieces of New Deal legislation. In NLRB V. JONES & LAUGHLIN STEEL CORP., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937), the Court upheld the constitutionality of the National Labor Relations Act, which was purportedly based upon the COMMERCE CLAUSE of the Constitution. Prior to *Jones & Laughlin Steel Corp.*, Van Devanter resigned from the Court and was replaced by HUGO BLACK. The Court's structure changed dramatically over the eight years following the decision, as the majority of justices retired or resigned from the court, including the following: Sutherland (1938); BENJAMIN CARDOZO (1938); Brandeis (1939); Butler (1939); Hughes (1941); McReynolds (1941); HARLAN STONE (1941); and Roberts (1945).

Although, in the end, the makeup of the Court was just as Roosevelt wanted, he suffered losses in support and confidence that he never regained. Many people felt that the New Deal legislation had granted labor too much power, and they were resentful of the unionization efforts, which led to strikes that were often violent. Finally, the unemployment rate in late 1937 to mid 1938 soared from five million to eleven million. Roosevelt and his vision for a New Deal lost congressional support. No further reform legislation was passed during Roosevelt's time in the White House. Although the country was much better off than it had been when he took office in 1932, the Great Depression continued. It ended not by legislation, but by the coming of WORLD WAR II.

The political machine of the New Deal and its dominant social policy continued for decades after the last piece of its legislation was passed. Although its demise can not be traced to one single event, by the time RONALD REAGAN was elected president in 1980, the era of the New Deal was effectively over.

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## NEW PARTY

The New Party is a grassroots progressive political organization that focuses on local elections and uses the concept of multiple-party nomination or "fusion" to build coalitions with other like-minded organizations and political parties. Despite a major setback from a 1997 U.S. Supreme Court decision which held that states are not required to permit fusion, the New Party, which uses the slogan "Building a New Majority from the Ground Up," won 300 of the first 400 races it entered between 1992 and 2002.

Fed up with what they saw as only minor distinctions between the Democratic and Republican parties as well as a lack of commitment by the majority parties to the concepts of democracy and corporate accountability, a group of TRADE UNION members, low-income community activists, environmentalists, minority voters, and other supporters started the New Party in New York in 1992. Fueled by a vision based on recognition of the moral equality of each person, the New Party sought to build a multi-ethnic party of activists dedicated to taking back the reins of democracy from an increasingly powerful alliance of corporations and corporate media that has come to dominate the U.S. political system.

The organization has established a series of "New Party Principles" that include full public financing of elections and universal voter registration; establishment of the right to democratic self-organization for workers, consumers and others; a children's BILL OF RIGHTS; community control and equitable funding for schools; a safe and secure community environment; a prohibition of discrimination based on race, gender, age, country of origin, and sexual orientation; and the safeguarding of civil liberties, reproductive rights, and the right to privacy.

Economic principles include a progressive tax system, creation of a sustainable economy that includes protection of the environment, full employment and a guaranteed minimum income for all adults, a reduction in defense spending, and progressive international trade practices.

The organization started in 1992 with a strategy of selecting local contests and building alliances with other small progressive parties. In the view of New Party organizers, the current winner-take-all system for political elections has stifled debate that would otherwise include minor party candidates. This system has also restrained the development of alternative political parties because many voters are afraid to "waste" their vote on a candidate who has little or no chance of winning.

The New Party espouses the concept of fusion in order to grow its political base. In politics fusion means the practice of permitting political parties to allow the name of another party's candidate to be placed on the ballot line. In fusion races the votes a candidate receives on all ballot lines are totaled and the candidate with the most votes would be declared the winner.

Fusion was popular in the 1800s, the best-known example being when presidential candidate WILLIAM JENNINGS BRYAN was nominated by both the Democrats and the Populist "People's Party" in 1896. The increasing popularity of fusion came to be viewed as a threat by the major parties, and many state legislatures began to pass statutes that prohibited it. Between 1896 and 1907 fusion was banned in 18 states. In 2001 fusion was legal in eight states: Connecticut, Delaware, Mississippi, New York, South Carolina, South Dakota, Utah, and Vermont.

In 1994 the Twin Cities chapter of the New Party gave its nomination to Andy Dawkins, a Democratic incumbent legislator who was running for reelection. Dawkins agreed to the fusion nomination and there was no objection from the state DEMOCRATIC PARTY. However, the state of Minnesota objected and the New Party sued. The district court dismissed the case, but it was reversed on appeal by the Eighth Circuit Court of Appeals, which held that the state ban on fusion imposed a severe burden on the New Party's FREEDOM OF ASSOCIATION by not allowing it to nominate the candidate it had selected. The Eighth Circuit's decision was reversed by the U.S. Supreme Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997), which held, in a 6–3 vote, that the FIRST AMENDMENT does not require states to permit fusion voting.

This decision was disappointing to the New Party and other minor parties who had hoped to use fusion throughout the country to leverage the voting power of their supporters. Members of the New Party vowed to move forward with their agenda of running candidates for local level elections including school boards and city councils, mayoral races, and state assemblies. The organization is also pursuing a long-term strategy for changing state election laws to permit fusion voting.

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Third Party.

## NEW YORK CONSTITUTION OF 1777

The first constitution of the state of New York was adopted on Sunday, April 20, 1777, at Kingston, New York, by a convention of delegates empowered by the people of the colony to establish a state government. It marks the birth of the state of New York. The constitution was not submitted to the people for ratification, but it became effective immediately upon its adoption by the convention.

The New York Constitution of 1777 was framed amidst the chaos of the Revolutionary War. Three men were instrumental in drafting the constitution: JOHN JAY, ROBERT R. LIVINGSTON, and Gouverneur Morris. All three were affluent young men (ages 30, 29, 24, respectively, at the time of their appointments) with little experience in public affairs. John Jay is generally credited as being the primary author of the constitution.

The first constitution faithfully adhered in many respects to the English constitutional system of government. Some delegates, however, were incensed upon discerning minor deviations from ENGLISH LAW in the proposed constitution. The patterning of the New York Constitution of 1777 after the English governmental prototype was not actually inconsistent with the objectives of the Revolutionary War. Even though there were structural similarities between the system of government set forth in the New York Constitution of 1777 and the English system, the impact of the laws upon the lives of the people of New York and their British counterparts was different, due to the abandonment by America of the class system of government that prevailed in England. The oppressiveness of English rule was eradicated, but the valid fundamental legal principles were retained. The English constitutional system of government was applied to the extent that its principles conformed to the concept of a republican form of government. The reliance upon the English system was also attributable to the inexperience of the draftsmen, who felt comfortable with the basic precepts and established traditions of English law. Even they realized, however, that some changes were essential. The people of New York were permitted to choose the chief executive instead of having sovereign authority do so on their behalf. It also was deemed necessary to alter the parliamentary system, and as a result, the House of Lords and the Colonial Council were transformed into the state senate.

On April 20, the entire proposed constitution was presented, and, after several inconsequential revisions and some major ones, it was read and adopted by a vote of 32–1. John Jay was not present for the adoption of the constitution, since he had been called away as a result of his mother's death on April 17. He had wanted to include certain amendments to the constitution, and he expressed dismay over what he perceived to be its rather hasty adoption. The fact that less than one-third of the entire convention attended the discussions of the constitution was attributable to compelling personal reasons and the exigencies of the Revolutionary War. The turmoil created by the latter factor explains why the constitution was adopted on a Sunday; the delegates convened whenever possible, irrespective of weekend dates.

The New York Constitution of 1777 was a relatively brief document that covered only a few topics. Some significant provisions, particularly those pertaining to the Council of Revision and the Council of Appointment, were added while the constitution was being evaluated by the convention.

The resolutions adopted by the Third Provincial Congress, providing for the election of the convention, and the Declaration of Independence, which has been set out in its entirety, comprise the preliminary segment. The body of the constitution contains forty-five brief sections, which were labeled "articles" at that time. The powers granted to the new government are expressed in rather austere language. The framers retained the essential nature of the colonial government but removed its royal features. The judicial system of the colony and the local governments generally remained unaltered.

The constitution delineates new executive and legislative branches, administrative authority, and abstract rights, which are few in number and concise, including, but not limited to, VOTING RIGHTS, freedom of religion, and the right of trial by jury. Although the constitution created the legislative, executive, and judicial branches of government, the framers combined their functions due to their ignorance of the concept, significance, and ramifications of the SEPARATION OF POWERS. In addition to lawmaking power, they vested the legislature with executive authority through the Council of Appointment, which consisted of four senators selected annually by the assembly. The higher courts were granted authority over legislation through the Council of Revision, comprised by the judges of the supreme court, the chancellor, and the governor. As a result, the governor's power was severely circumscribed. Since he was under the control of the Council of Appointment, the governor was divested of the responsibility for official appointments. He also was deprived of unabridged VETO power, because the judges of the Council of Revision could overrule him.

The constitution has a few provisions pertaining to the separate powers of the senate and assembly, including the power of the assembly to issue ARTICLES OF IMPEACHMENT and to choose the members of the Council of Appointment. The legislature was authorized to elect the state treasurer, administer contracts with Indians, and to naturalize ALIENS. The U.S. Constitution, however, eventually preempted this right of naturalization. The legislature was proscribed from

enacting bills of attainder, and from creating any courts, except common law courts. The constitution fixed the terms of judicial officers and provided for the election of state and local officials. Article 35 continued the English statutory and COMMON LAW, and colonial legislation, to the extent they were applicable under the new form of government. Miscellaneous provisions established a state militia, ratified English grants, and barred the clergy from holding office.

The state made tremendous progress as a result of this constitution, in spite of its inherent limitations. Its system of JURISPRUDENCE evolved and expanded. The constitution established the university and the common school, and colleges, academies, and libraries were nurtured. It provided for the administration of assistance to the indigent. A system of taxation was formulated, political subdivisions were created, and the statutory law was frequently revised. The constitution also prompted the drafting of a plan for the construction of the canals. The New York Constitution of 1777 was an extremely valuable document, and its fundamental principles became prompted in subsequent constitutions. It remained in effect until it was superseded by the Constitution of 1821.

## NEW YORK TIMES CO. V. SULLIVAN

A landmark U.S. Supreme Court case, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), extended the FIRST AMENDMENT's guarantee of free speech to LIBEL cases brought by public officials. The Supreme Court sought to encourage public debate by changing the rules involving libel that had previously been the province of state law and state courts.

*New York Times v. Sullivan* grew out of events occurring during the 1960s CIVIL RIGHTS MOVEMENT in Alabama. In 1960, MARTIN LUTHER KING JR., and other CIVIL RIGHTS leaders conducted protests against SEGREGATION in Montgomery, Alabama. Their efforts met fierce resistance from Montgomery public officials. Civil rights leaders placed a full-page advertisement in the *New York Times* seeking contributions for civil rights causes in the South. Signed by sixty-four prominent leaders in public affairs, religion, trade unions, and the performing arts, the advertisement, entitled "Heed Their Rising Voices," stated that thousands of southern African American students were engaging in nonviolent demonstrations in positive affirmation of the right to live in human dignity. The ad went on to charge that these demonstrations had been met with a "wave of terror" by state and local governments. Alleged events that backed up this charge were described, but no particular public official was named.

L.B. Sullivan, the Montgomery city commissioner responsible for supervising the city police department, filed a libel suit against four African American clergyman and the *New York Times* in Alabama state court. Sullivan alleged that the advertisement implicitly libeled him. Libel is a civil TORT and consists of injuring someone's reputation by reporting falsehoods about that person.

At trial Sullivan proved that the advertisement contained a number of minor inaccuracies about described incidents. The jury had to determine whether the statements in the advertisement were "of and concerning" Commissioner Sullivan. The judge instructed the jury that under Alabama law, if the statements were found libelous, falsity and malice were presumed, and damages could be awarded without direct proof of financial loss. The jury concluded that the statements did concern Sullivan and awarded him $500,000 for injuries to his reputation and profession.

The U.S. Supreme Court reversed, holding that the RULE OF LAW applied by Alabama violated the First Amendment. Justice WILLIAM J. BRENNAN JR., in his majority opinion, placed the legal issues in the context of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Brennan maintained that erroneous statements are inevitable in free debate and must be protected if freedom of expression is to have the "breathing space" it needs to survive.

The advertisement was squarely a public expression and protest, and fell within constitutional protection. Neither the allegedly defamatory content of the ad, nor the falsity of some of its factual statements, nor the NEGLIGENCE of anyone in preparing or publishing it forfeited this protection. Brennan dismissed the idea that courts were free to conclude that libelous statements were made "of and concerning" a particular person when the statements on their face did not make even an oblique reference to the

individual. Brennan stated that there is "no legal alchemy" by which a court constitutionally can establish that "an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations."

Brennan then set out the rule that reshaped libel law. A public official could recover in a libel action only if and when a court found that the libelous statement about the official was made with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." As long as the press has an "absence of malice," public officials are barred from recovering damages for the publication of false statements about them.

In separate concurring opinions, Justices HUGO L. BLACK and WILLIAM O. DOUGLAS differed with Justice Brennan over whether the press should ever be held liable in DEFAMATION of public officials. They concluded that the First Amendment provided an absolute IMMUNITY for criticism of the way public officials do their public duty. Anything less than absolute immunity encourages "deadly danger" to a free press by state libel laws that harass, punish, and ultimately destroy critics.

In the years since *New York Times,* some critics have argued that Black and Douglas were right. The "reckless disregard" requirement has allowed highly intrusive inquiries into the reportorial and editorial processes of the mass media. In addition, the "chilling effect" of libel suits has not been diminished because of the case. If a jury finds reckless disregard, it can award enormous damage awards against the press.

Other critics of the decision believe it affords too much protection to the press. Public officials unfairly libeled by the press rarely file libel suits because of the difficulty of proving actual malice. This prevents them from establishing in a court of law the falsity of the statements at issue.

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Freedom of Speech; Freedom of the Press; Libel and Slander; *New York Times Co. v. Sullivan* (Appendix, Milestone Case).

## NEW YORK TIMES CO. V. UNITED STATES

*New York Times Co. v. United States,* (per curiam) 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971), often referred to as the *Pentagon Papers* case, concerned the government's attempt to prohibit the *New York Times* and the *Washington Post* from publishing portions of a secret government study on the VIETNAM WAR. The documents in the study became known as the Pentagon Papers. The United States contended that publication of the Pentagon Papers could prolong the Vietnam War and hinder efforts to return U.S. prisoners held in Vietnam. The *Times* and the *Post* claimed that the government was engaging in CENSORSHIP. Thus, the case pitted the rights of the newspapers under the FIRST AMENDMENT against the duty of the EXECUTIVE BRANCH to protect the nation. The case drew significant national attention as it went through the judicial system and the public wondered what the Pentagon Papers contained.

The *Pentagon Papers* case addressed whether a PRIOR RESTRAINT on the press can be justified under the First Amendment. A "prior restraint" is the imposition of a restraint on the publication of information before the information is published. There are two basic types of prior restraints. One consists of a government order or court INJUNCTION that prohibits a person from communicating certain information. The other basic type of prior restraint occurs when a license or permit is required before a particular type of expression may be used. *New York Times v. United States* involved the first type of prior restraint, since the government sought a court injunction prohibiting the newspapers from publishing portions of the Pentagon Papers. Other than the *Pentagon Papers* case, the most important Supreme Court case discussing prior restraints is NEAR V. MINNESOTA, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931), which held that under the First Amendment, prior restraints on free speech are justified only in "exceptional cases," such as when the information to be published would include "the sailing dates of transports or the number and location of troops."

In the *Pentagon Papers* case a divided Supreme Court, in a decision that contains a separate opinion from each of the nine justices, refused to enjoin publication of the Pentagon Papers, emphasizing the First Amendment's strong presumption against any prior restraint on free speech. The justices' reasons for their

decisions varied widely. Two justices believed that *any* prior restraint on the press amounts to censorship in clear violation of the First Amendment, whereas three justices believed that publication of the Pentagon Papers should have been delayed until the courts had more time to evaluate the impact of publication on national security. Because the case sped through the judicial system and the justices' opinions varied widely, it does not provide a clear statement of First Amendment law on prior restraint. For example, the Court failed to specify when, if ever, a prior restraint on the press might be allowed. The case is of great significance, however, as a statement that a prior restraint on the FREEDOM OF SPEECH is almost never justified.

From June 12 to 14, 1971, the *New York Times* published a series of articles about the origins of the Vietnam War. The articles were based on a 47-volume DEFENSE DEPARTMENT study covering the years 1945 to 1968, which had been leaked to the *Times* by Daniel Ellsberg, a former Defense Department analyst. Although the study contained only information regarding events that occurred before 1968, the government contended that the study contained "secret" and "top secret" information. Further, the government alleged that publication of the information could prolong the Vietnam War and threaten the safe return of U.S. prisoners of war. On June 15, 1971, the government sued in New York federal district court, seeking an injunction prohibiting the *Times* from continuing to publish information from the Pentagon Papers. Soon after, the *Washington Post* began publishing material from the study; accordingly, the government sought a similar injunction against the *Post* in the District of Columbia.

The actions against the *Times* and the *Post* were rushed through the courts because of the unique national importance of the issues and the widespread national public attention the cases were receiving. Although the federal district courts both refused to issue a permanent injunction against publication of the Pentagon Papers, publication was temporarily enjoined pending appeals by the United States. Less than two weeks after the *Times* published its first articles, the Supreme Court heard arguments on the cases, and five days later, on June 30, 1971, issued its decision.

The Supreme Court decided on a 6–3 vote that a prior restraint could not be imposed on publication of the Pentagon Papers. In a brief opinion the whole Court noted that the government "carries a heavy burden of showing justification for the imposition of such a restraint" and stated that the government had failed to meet that burden. The brief opinion reflected the widely varying views of the nine justices. The Court could not agree on a precise standard for determining when the government may impose a prior restraint on free speech or even whether the government could *ever* impose a prior restraint.

In concurring opinions Justices HUGO L. BLACK and WILLIAM O. DOUGLAS both stated, in very strong language, that prior restraints on the freedom of expression are never justified, no matter what the circumstances. Black, commenting on the government's argument that prior restraints might be justified in certain circumstances, stated, "I can imagine no greater perversion of history. . . . Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions or prior restraints." Black and Douglas both believed that "every moment's CONTINUANCE of the injunctions . . . amounts to a flagrant, indefensible, and continuing violation of the First Amendment."

The other four justices who concurred in the judgment, Justices WILLIAM J. BRENNAN JR., POTTER STEWART, BYRON R. WHITE, and THURGOOD MARSHALL, each believed that the government could impose a prior restraint in certain extraordinary circumstances, such as where the publication of information could endanger U.S. soldiers, but that those circumstances were not present in the *Pentagon Papers* case. Stewart was the only justice who offered a standard for determining when a prior restraint could be imposed, stating that a prior restraint would be appropriate only where publication "will surely result in direct, immediate, and irreparable damage to our Nation or its people." White, while agreeing that the circumstances did not warrant a prior restraint on the publication of the Pentagon Papers, opined that the newspapers might be criminally liable under ESPIONAGE laws if they published sensitive national secrets. Marshall based his argument on the separate powers of the three branches of the government. He believed that, because Congress had declined to pass a statute authorizing the courts to enjoin publication of sensitive national secrets, the Supreme Court lacked authority to enjoin publication of the Pentagon Papers.

Chief Justice WARREN E. BURGER, Justices JOHN MARSHALL HARLAN, and HARRY A. BLACKMUN dissented, all strongly objecting to the "unseemly haste" with which the courts heard and decided the case. Harlan stated, "With all respect, I consider that the Court has been almost irresponsibly feverish in dealing with these cases." Blackmun commented:

> [T]his, in my opinion, is not the way to try a lawsuit of this magnitude and asserted importance. It is not the way for federal courts to adjudicate, and be required to adjudicate, issues that allegedly concern the Nation's vital welfare. The country would be none the worse off were the cases tried quickly to be sure, but in the customary and properly deliberative manner.

The dissenting justices thus believed that the publication of the Pentagon Papers should have been enjoined until the courts had adequate time to evaluate carefully the legal issues and the impact of publication of the documents on the interests of the United States.

The decision was hailed as a great victory for advocates of FREEDOM OF THE PRESS. For the first time in the nation's history, the government had succeeded, if only during the appeals of the case, in precluding the press from publishing news in its possession. At least in the circumstances presented by the case, however, the Supreme Court held that such a prior restraint on freedom of speech violates the First Amendment. The practical effect of the decision, which carefully avoided any mention of the contents of the Pentagon Papers, was far less dramatic than suggested by the attention it received. The newspapers never did publish the portions of the Pentagon Papers that the government claimed were the most sensitive. In addition, further publication of the Pentagon Papers by newspapers around the country did not attract a great deal of attention or significantly affect the United States' policy on Vietnam. The *Pentagon Papers* case remains, however, an important precedent in support of freedom of the press under the First Amendment.

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CROSS-REFERENCES

Executive Branch; First Amendment; Precedent; Prior Restraint.

## NEWS REPORTER'S PRIVILEGE

See EVIDENCE.

## ♦ NEWTON, HUEY PERCY

Huey Percy Newton was a cofounder and leader of the BLACK PANTHER PARTY FOR SELF-DEFENSE, a group formed in 1966 in Oakland to organize African Americans against police brutality and racism. Convicted or charged with several murders and assaults during his life, Newton was shot and killed in 1989 in the same poor Oakland neighborhood where he had begun mobilizing African Americans to arm themselves in SELF-DEFENSE more than twenty years earlier.

"I SUGGESTED THAT WE USE THE PANTHER AS OUR SYMBOL . . . [BECAUSE] THE PANTHER IS A FIERCE ANIMAL, BUT HE WILL NOT ATTACK UNTIL HE IS BACKED INTO A CORNER; THEN HE WILL STRIKE OUT."
—HUEY NEWTON

Newton was born on February 17, 1942, in New Orleans, the son of a sharecropper who was once nearly lynched for talking back to his white bosses. When Newton was one year old, his family moved to Oakland. By the time he was fourteen, Newton had been arrested for gun possession. He was illiterate when he graduated from high school, but he taught himself to read before attending Merritt College in Oakland and the San Francisco School of Law. In 1966 while at Merritt he met BOBBY SEALE, with whom he formed the Black Panther Party for Self-Defense in response to Malcolm X's call to African Americans to take up arms to defend themselves against the police. The armed and uniformed Panthers patrolled Oakland streets, interrupting arrests and other police activities when they believed that African Americans were being mistreated.

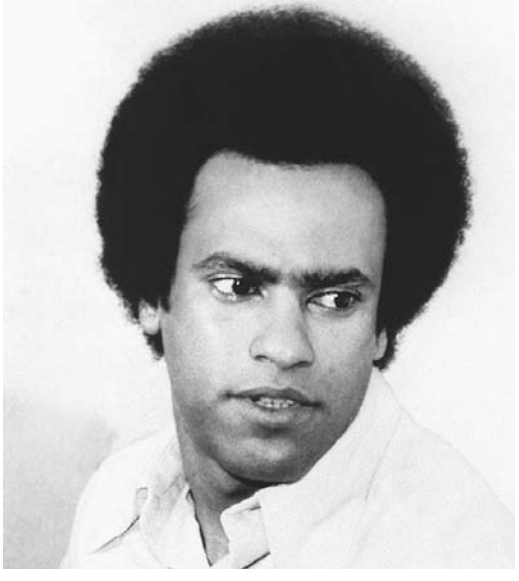

*Huey Newton.*
AP/WIDE WORLD PHOTOS

Newton was designated minister of defense and was a spokesperson for the party. The party drew national attention in May 1967, when six armed Panthers and about twenty supporters burst into the California Assembly at Sacramento to protest its plan to ban possession of loaded firearms within city limits. Though Newton did not participate in that event, the Oakland police increased their surveillance on him and his fellow Panthers.

On October 28, 1967, a scuffle during a routine traffic check escalated into a gun battle that left Newton with a bullet wound in his stomach, one police officer dead, and another wounded. Newton was convicted in 1968 of voluntary MANSLAUGHTER, but the California Court of Appeals overturned the conviction in 1970 because of the omission of key jury instructions. Newton's second and third trials ended in hung juries, and the charges were dismissed in 1972.

Newton's political agenda for the Black Panthers had moved beyond issues of police brutality to a Marxist revolutionary call for change in U.S. society. Newton called for the release of all African Americans from jail and for the payment of compensation to African Americans for centuries of economic exploitation by white America.

When Newton was released from prison in 1972 following his successful appeal of the manslaughter charge, Black Panther Party membership in forty-five cities had fallen to fewer than one thousand people. J. EDGAR HOOVER, head of the FEDERAL BUREAU OF INVESTIGATION (FBI), had targeted the Panthers as a dangerous, politically subversive group. The FBI used informants and fake documents and letters to undermine the party. Panthers in many cities were subjected to local police harassment as well. In addition, Newton became embroiled in a dispute over the direction of the party with ELDRIDGE CLEAVER, the party's minister of information.

By the mid-1970s, the Black Panthers had abandoned their violent image and had begun community service programs, including free health clinics, a children's breakfast program, and drug abuse counseling. By the early 1980s, however, the Black Panthers had effectively disbanded.

Newton's role in the Black Panthers gradually diminished in the 1970s, as he had to contend with new criminal charges. In 1974 he was charged with murdering a seventeen-year-old girl and later with pistol-whipping a tailor. He

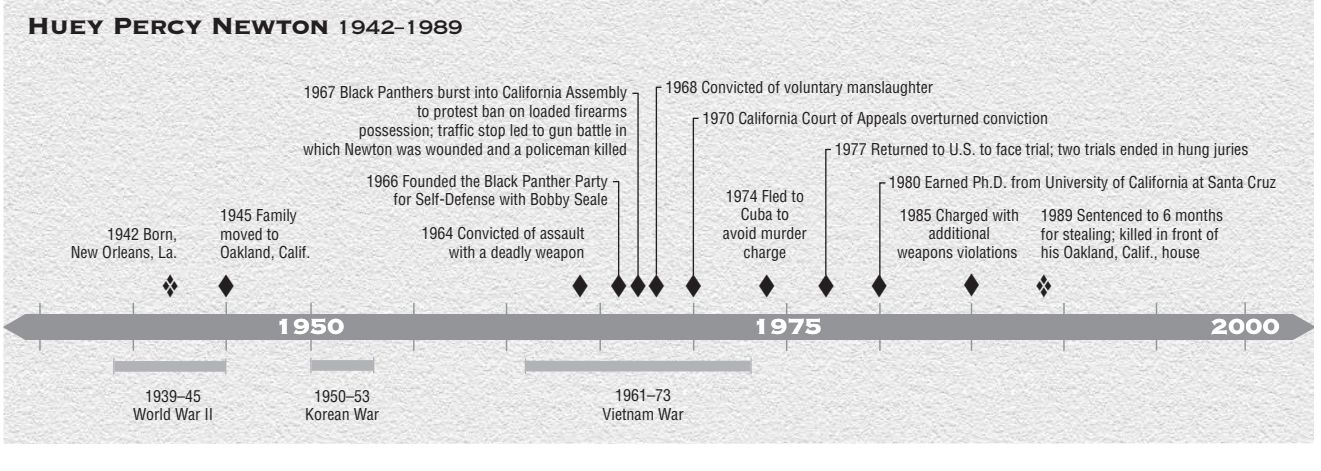

fled to Cuba to avoid prosecution but returned in 1977. His two murder trials ended in hung juries, and the assault case was dropped when the tailor refused to testify.

Newton was found guilty in 1978 of being an ex-felon in possession of a handgun and was found guilty of a second count of the same charge in 1979. During this period he worked on the completion of his doctoral dissertation at the University of California at Santa Cruz. He was awarded a Ph.D. degree in 1980 for his work, "War Against the Panthers: A Study of Repression in America." After lengthy appeals Newton was sentenced in 1981. He was charged with additional weapons violations in 1985 but was acquitted by a jury in 1986. After being paroled on the earlier weapons charges, he was returned to prison twice for violation of PAROLE following arrests for possession of narcotics paraphernalia and failure to submit to required drug testing.

Newton's downward spiral continued. In March 1989 he was sentenced to six months in jail after PLEADING no contest to a charge of cashing for his own use a $15,000 state aid check earmarked for the Oakland Community School, which the Black Panther party operated. The school had been closed in 1982 in the face of allegations that federal and state funds had been misused.

Newton was found shot dead on an Oakland street on August 22, 1989.

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## NEXT FRIEND

*An individual who acts on behalf of another individual who does not have the legal capacity to act on his or her own behalf.*

*The individual in whose name a minor's lawsuit is brought, or who appears in court to represent such minor's interest. The French term prochein ami has been used to designate such an individual, but the term* GUARDIAN AD LITEM *is more commonly used.*

At COMMON LAW, when an individual was unable to look after his or her own interests or manage his or her lawsuit, the court would appoint a person to represent that individual's legal interests. In court terminology this person was called a next friend, which is derived from the French term *prochein ami.* Individuals requiring a next friend included minors, persons who were mentally ill or mentally retarded, infirm or senile persons, and others whose disabilities prevented them from managing their affairs.

State statutes now set the qualifications and duties of a person who acts as a next friend, but these laws more commonly designate this person a *guardian ad litem,* or a court-appointed special advocate. Regardless of the designation, this person's responsibilities are now confined to representing a minor or incompetent person in a lawsuit or court proceeding. At common law, a next friend represented a plaintiff, whereas a *guardian ad litem* represented a defendant. This distinction has been removed in modern law.

A next friend is not a party to a lawsuit but an officer of the court. When the lawsuit is concluded, the next friend's duty ends. The next friend has no right to control the property of the person she or he represents or to assume custody of that person. These rights may be given to a person designated by a court as a minor's or incompetent person's guardian.

*Guardians ad litem* are commonly used in family and juvenile courts, where the best interests of the child require an independent, neutral person to safeguard the child's rights. The increased number of these representatives has led states to develop training and certification programs for individuals wishing to serve as next friends or *guardians ad litem.* Though attorneys also may represent juveniles, next friends provide valuable assistance to the courts.

CROSS-REFERENCES

Infants.

## NEXT OF KIN

*The blood relatives entitled by law to inherit the property of a person who dies without leaving a valid will, although the term is sometimes interpreted to include a relationship existing by reason of marriage.*

CROSS-REFERENCES

Descent and Distribution.

## NIHIL

[Latin, Nothing.] *The abbreviated designation of a statement filed by a sheriff or constable with a court describing his or her unsuccessful attempts to serve a writ, notice, or process upon the designated person.*

The complete phrase *nihil est* refers to a failure to serve any writ while the term *nihil habet* describes the failure to serve a writ SCIRE FACIAS or another writ.

The term *nil* is a contracted form of *nihil.*

## NIMMER, MELVILLE BERNARD

Melville B. Nimmer was a leading authority on COPYRIGHT law.

Nimmer was born June 6, 1923. He graduated from the University of California at Berkeley in 1947 and from Harvard Law School in 1950. After law school he obtained a position in the legal department at Paramount Pictures where he remained until 1957 when he entered private practice. Nimmer continued to be involved with the motion picture industry, however, and served as general counsel to the Writers Guild of America, which represents film and television writers. He was the chief negotiator for the guild during a five-month strike in 1960 where the right to receive residuals for the showing of theatrical films on television was established.

Although Nimmer's work in the film industry involved questions of copyright law, he had to learn the subject largely by reading cases on his own. At that time copyright law was a relatively unimportant discipline. Few lawyers specialized in it, and no law school offered courses in the subject as part of its regular curriculum. In the last decades, however, copyright questions have become a major concern for many industries, including the computer industry.

Nimmer became a leading authority in the growing field. His treatise *Nimmer on Copyright* (first published in 1963 with frequent revisions thereafter) became the standard work on the subject. A companion volume *Nimmer on Freedom of Speech* appeared in 1984. When he died, Nimmer was working on a book entitled *World Copyright,* which was to contain chapters on all significant copyright laws in the world.

In 1962 Nimmer joined the faculty at the University of California at Los Angeles School of Law and continued to teach there until his death. At the university Nimmer came into contact with the student protests and antiwar demonstrations and became increasingly interested in the FREEDOM OF SPEECH issues that the demonstrations raised. In *Cohen v. California,* 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971), Nimmer represented a protestor who was charged with disturbing the peace because he entered a courthouse wearing a jacket inscribed with a vulgar protest against the draft. The U.S. Supreme Court ruled in favor of the protester on the ground that the words presented no danger of violence and that the state therefore had no compelling reason to suppress them.

Nimmer died November 23, 1985, in Los Angeles, California.

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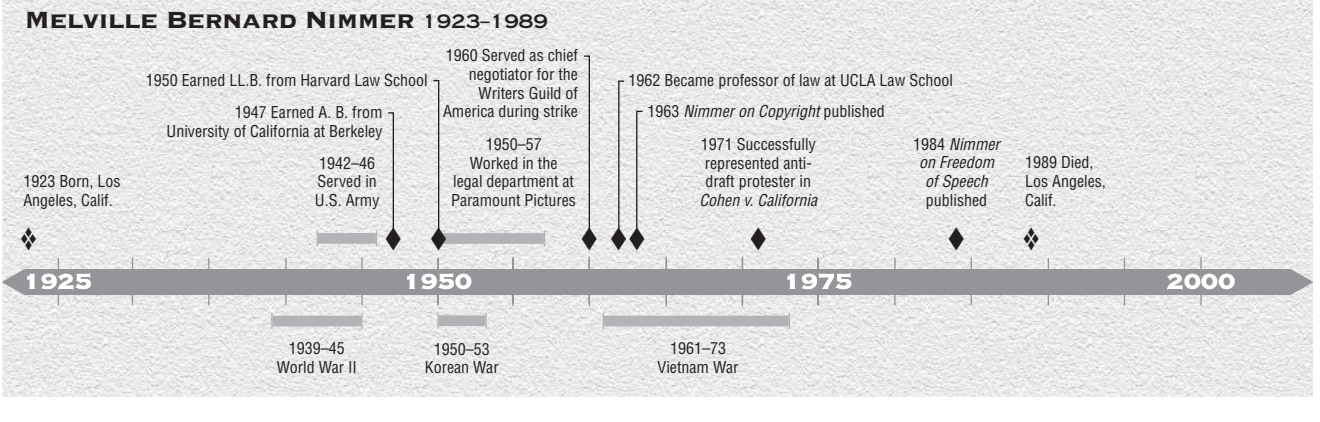

## NINETEENTH AMENDMENT

The Nineteenth Amendment to the U.S. Constitution reads:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation.

The Nineteenth Amendment was enacted in 1920, after a 70-year struggle led by the women's suffrage movement.

The groundwork for the suffrage movement was laid in 1848 in Seneca Falls, New York, now considered the birthplace of the women's movement. Here **ELIZABETH CADY STANTON** drafted the Declaration of Rights and Sentiments, which demanded **VOTING RIGHTS**, property rights, educational opportunities, and economic **EQUITY** for women.

Rather than face the difficult task of obtaining approval of an amendment to the U.S. Constitution from an all-male Congress preoccupied with the question of **SLAVERY**, the suffragists decided to focus their attention on the separate states and seek state constitutional amendments. The state-by-state effort began in 1867 in Kansas with a **REFERENDUM** to enfranchise women. The referendum was defeated, but that same year the western territories of Wyoming and Utah provided the first victories for the suffragists.

The movement then suffered a series of setbacks beginning in January 1878 when the voting rights amendment was first introduced in Congress. The full Senate did not consider the amendment until 1887 and voted to defeat the bill. The suffragists continued their state-by-state strategy and won a referendum ballot in Colorado in 1893 and Idaho in 1896.

The suffragists mounted a final and decisive drive in the second decade of the 1900s with victories in Washington in 1910 and California in 1911. The following year Arizona, Kansas, and Oregon gave women the right to vote, and in 1913 Illinois also passed measures supporting suffrage as did Montana and Nevada in 1914. Women in eleven states voted in the 1916 presidential election. By this time the United States was also involved in **WORLD WAR I**, which brought national attention to the suffrage movement as well as to the important role women played in the war effort. During the war, an unprecedented number of women joined the depleted industrial and public service workforce. Women became an active and visible population of the labor sector that benefited the national economy. By the end of 1918 four more states—Michigan, Oklahoma, New York, and South Dakota—had approved women's suffrage.

*Suffragists march in a 1912 rally in New York City. In 1920, after decades of struggle for the right to vote, the Nineteenth Amendment's ratification granted female suffrage.*

LIBRARY OF CONGRESS

With the requisite two-thirds majority, the U.S. House of Representatives introduced the amendment in January 1918. The vote was initially postponed, and the amendment was later defeated in October 1918 and again in February 1919. On June 4, 1919, almost 17 months after its introduction by the House of Representatives, the amendment was finally passed by the Senate. Having already considered and debated the voting rights issue for several years, the states ratified the amendment quickly. In August 1920 Tennessee became the thirty-sixth and last state necessary to ratify the enactment. With ratification complete, the Nineteenth Amendment was added to the U.S. Constitution on August 18, 1920.

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**Women in U.S. Congress: 1917 to 2003**

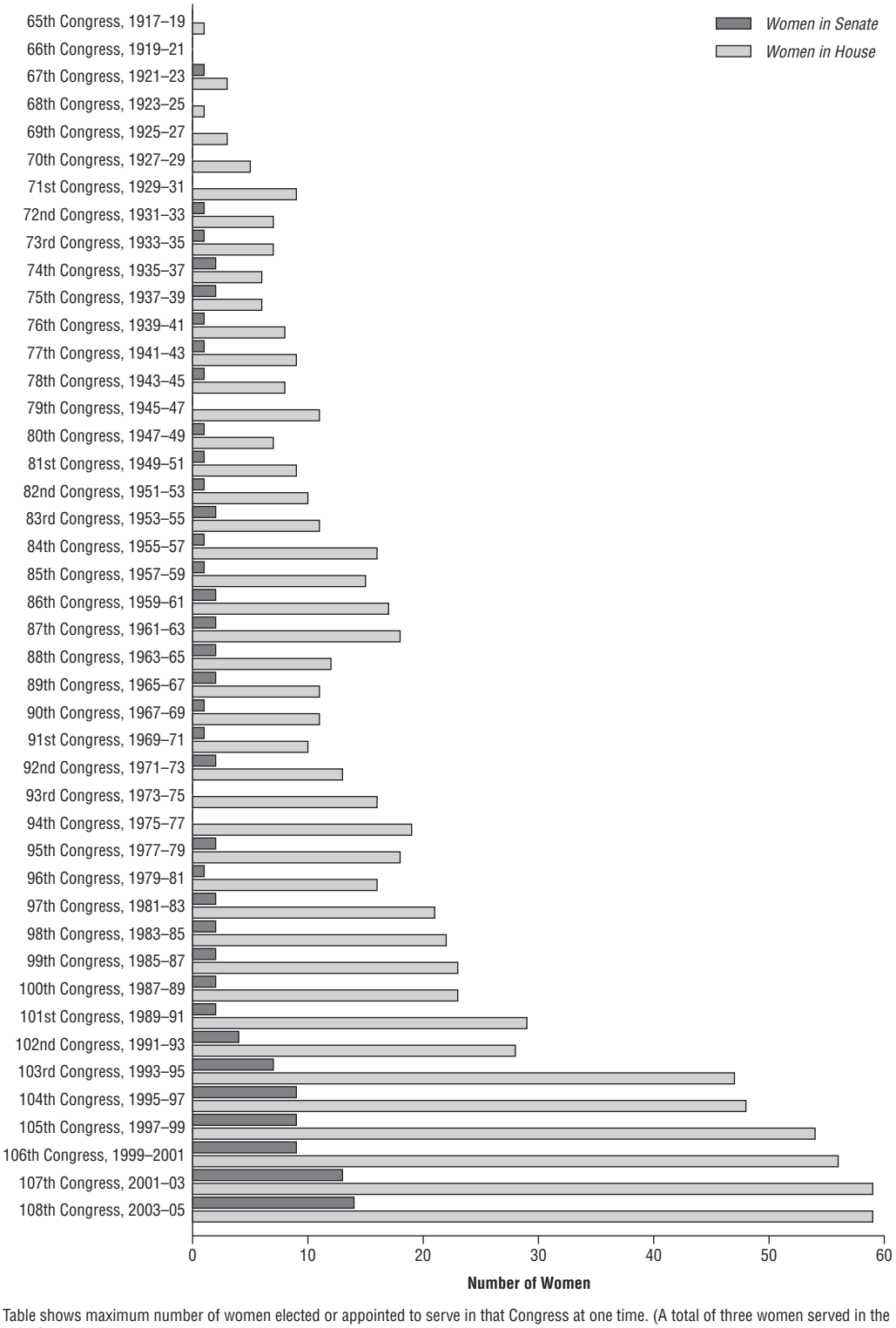


Table shows maximum number of women elected or appointed to serve in that Congress at one time. (A total of three women served in the 75th Congress, but no more than two served together at any one time.) Numbers do not include those who filled expired terms and those never sworn in. Numbers do not include the delegate from pre-statehood Hawaii and current non-voting delegates from the Virgin Islands and Washington, D.C.

SOURCE: Center for the American Woman and Politics, Eagleton Institute of Politics, Rutgers University.

CROSS-REFERENCES

Anthony, Susan Brownell; Equal Rights Amendment; Women's Rights.

## NINETY-DAY LETTER

*The name given to a written notice sent to a taxpayer by the* INTERNAL REVENUE SERVICE *regarding a deficiency in the payment of tax (26 U.S.C.A. § 6212 et seq.).*

The ninety-day letter, also known as the statutory notice of deficiency, suspends the running of the STATUTE OF LIMITATIONS regarding tax assessment for ninety days. During the ninety days following the mailing of a ninety-day letter, the taxpayer may consent to the assessment and pay the tax but later seek a refund in U.S. district court. If the taxpayer disputes the assessment or refuses to pay the additional amount, he or she may challenge the deficiency by filing a petition with the U.S. Tax Court. The ninety-day letter, sent by certified or registered mail, gives the taxpayer an opportunity to challenge an alleged deficiency before paying it. If the taxpayer neither pays the tax nor files a TAX COURT petition within the ninety-day period, the additional tax liability may be assessed promptly.

For taxpayers who reside outside the United States, the time period is extended to 150 days.

CROSS-REFERENCES

Taxation.

## NINTH AMENDMENT

The Ninth Amendment to the U.S. Constitution reads:

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

The Ninth Amendment to the U.S. Constitution is somewhat of an enigma. It provides that the naming of certain rights in the Constitution does not take away from the people rights that are not named. Yet neither the language nor the history of the Ninth Amendment offers any hints as to the nature of the rights it was designed to protect.

Every year federal courts are asked to recognize new UNENUMERATED RIGHTS "retained by the people," and typically they turn to the Ninth Amendment. However, the federal judiciary does not base rulings exclusively on the Ninth Amendment; the courts usually cite the amendment as a secondary source of fundamental liberties. In particular, the Ninth Amendment has played a significant role in establishing a constitutional right to privacy.

Ratified in 1791, the Ninth Amendment is an outgrowth of a disagreement between the Federalists and the Anti-Federalists over the importance of attaching a BILL OF RIGHTS to the Constitution. When the Constitution was initially drafted by the Framers in 1787, it contained no Bill of Rights. The Anti-Federalists, who generally opposed ratification because they believed that the Constitution conferred too much power on the federal government, supported a Bill of Rights to serve as an additional constraint against despotism. The Federalists, on the other hand, supported ratification of the Constitution without a Bill of Rights because they believed that any enumeration of fundamental liberties was unnecessary and dangerous.

The Federalists contended that a Bill of Rights was unnecessary because in their view the federal government possessed only limited powers that were expressly delegated to it by the Constitution. They believed that all powers not constitutionally delegated to the federal government were inherently reserved to the people and the states. Nowhere in the Constitution, the Federalists pointed out, is the federal government given the power to trample on individual liberties. The Federalists feared that if the Constitution were to include a Bill of Rights that protected certain liberties from government encroachment, an inference would be drawn that the federal government could exercise an implied power to regulate such liberties.

ALEXANDER HAMILTON, one of the leading Federalists, articulated this concern in *The Federalist* No. 84. Why should a Bill of Rights, Hamilton asked, "declare that things shall not be done which there is no power to do?" For instance, Hamilton said it was unnecessary for a Bill of Rights to protect the FREEDOM OF THE PRESS when the federal government is not granted the power to regulate the press. A provision "against restraining the liberty of the press," Hamilton said, "afford[s] the clear implication that a power to prescribe proper regulations concerning it was intended to be vested in the national government."

The Federalists were also concerned that any constitutional enumeration of liberties might imply that other rights, not enumerated by the Constitution, would be surrendered to

the government. A Bill of Rights, they feared, would quickly become the exclusive means by which the American people could secure their freedom and stave off tyranny. Federalist JAMES MADISON argued that any attempt to enumerate fundamental liberties would be incomplete and might imperil other freedoms not listed. A "positive declaration of some essential rights could not be obtained in the requisite latitude," Madison said. "If an enumeration be made of all our rights," he queried, "will it not be implied that everything omitted is given to the general government?"

Anti-Federalists and others who supported a Bill of Rights attempted to mollify the Federalists' concerns with three counterarguments. First, the Anti-Federalists underscored the fact that the Constitution guarantees certain liberties even without a Bill of Rights. For example, Article I of the Constitution prohibits Congress from suspending the writ of HABEAS CORPUS and from passing bills of attainder and EX POST FACTO LAWS. If these liberties could be enumerated without endangering other unenumerated liberties, Anti-Federalists reasoned, additional liberties, such as freedom of the press and religion, could be safeguarded in a Bill of Rights.

Second, while acknowledging that it would be impossible to enumerate every human liberty imaginable, supporters of a Bill of Rights maintained that this obstacle should not impede the Framers from establishing constitutional protection for certain essential liberties. THOMAS JEFFERSON, responding to Madison's claim that no Bill of Rights could ever be exhaustive, commented that "[h]alf a loaf is better than no bread. If we cannot secure all of our rights, let us secure what we can."

Third, Anti-Federalists argued that if there was a genuine risk that naming certain liberties would imperil others, then an additional constitutional amendment should be drafted to offer protection for all liberties not mentioned in the Bill of Rights. Such an amendment, the Anti-Federalists argued, would protect those liberties that might fall through the cracks of written constitutional provisions. This idea became the Ninth Amendment.

Unlike every other provision contained in the Bill of Rights, the Ninth Amendment had no predecessor in ENGLISH LAW. It stemmed solely from the genius of those who framed and ratified the Constitution. Ironically, Madison, who opposed a Bill of Rights in 1787, was the chief architect of the Ninth Amendment during the First Congress in 1789.

After reconsidering the arguments against a Bill of Rights, Madison said he was now convinced that such concerns could be overcome. It was still plausible, Madison believed, that the enumeration of particular rights might disparage other rights that were not enumerated. Yet Madison told Congress that he had attempted to guard against this danger by drafting the Ninth Amendment, which he submitted in the following form:

> The exceptions [to power] here or elsewhere in the constitution made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations on such powers, or as inserted merely for greater caution.

The House Select Committee, consisting of one representative from each state in the Union, reviewed and revised Madison's proposal until it gradually evolved into its present form. The debates in both houses of Congress add little to the original understanding of the Ninth Amendment. The Senate conducted its sessions in secret, and the House debates failed to offer a glimmer as to what unenumerated rights are protected by the Ninth Amendment, how such rights might be identified, or by what branch of government they should be enforced.

The Supreme Court did not attempt to answer these questions for more than 170 years. Until 1965 no Supreme Court decision made more than a passing reference to the Ninth Amendment. In 1958, Supreme Court Justice ROBERT H. JACKSON wrote that the rights protected by the Ninth Amendment "are still a mystery." Nevertheless, the dormant Ninth Amendment experienced a renaissance in GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

In *Griswold* the Supreme Court was asked to review the constitutionality of a Connecticut law that banned adult residents from using BIRTH CONTROL and prohibited anyone from assisting others to violate this law. In the majority opinion, Justice WILLIAM O. DOUGLAS, writing for the Court, rejected the notion that the judiciary is obligated to enforce only those rights that are expressly enumerated in the Constitution. On several occasions in the past, Douglas wrote, the Court has recognized rights that can-

not be found in the written language of the Constitution.

Only briefly discussed in Douglas's majority opinion, the Ninth Amendment was the centerpiece of Justice ARTHUR GOLDBERG's concurring opinion. The language and history of the Ninth Amendment, Goldberg wrote, demonstrate that the Framers of the Constitution intended the judiciary to protect certain unwritten liberties with the same zeal that courts must protect those liberties expressly referenced in the Bill of Rights. The Ninth Amendment, Goldberg emphasized, reflects the Framers' original understanding that "other fundamental personal rights should not be denied protection simply because they are not specifically listed" in the Constitution.

Justices HUGO L. BLACK and POTTER STEWART criticized the Court for invoking the Ninth Amendment as a basis for its decision in *Griswold.* The Ninth Amendment, the dissenting justices said, does not explain what unenumerated rights are retained by the people or how these rights should be identified. Nor does the amendment authorize the Supreme Court, in contrast to the president or Congress, to enforce these rights. By reading the Ninth Amendment as creating a general right to privacy, Black and Stewart suggested, the unelected justices of the Supreme Court had substituted their own subjective notions of justice, liberty, and reasonableness for the wisdom and experience of the elected representatives in the Connecticut state legislature who were responsible for passing the birth control regulation.

The *Griswold* decision was the starting point of a continuing debate over the proper role of the Ninth Amendment in constitutional JURISPRUDENCE. One side of the debate reads the Ninth Amendment to mean that the Constitution protects not only those liberties written into the Bill of Rights but some additional liberties found outside the express language of any one provision. The other side sees no way to identify the unenumerated rights protected by the Ninth Amendment and no objective method by which to interpret and apply such rights. Under this view, courts that interpret and apply the Ninth Amendment do so in a manner that reflects the political and personal preferences of the presiding judge. Federal courts have attempted to reach a middle ground.

A number of federal courts have found that the Ninth Amendment is a rule of judicial construction, or a guideline for interpretation, and not an independent source of constitutional rights (*Mann v. Meachem,* 929 F. Supp. 622 [N.D.N.Y. 1996]). These courts view the Ninth Amendment as an invitation to liberally interpret the express provisions of the Constitution. However, federal courts will not recognize constitutional rights claimed to derive solely from the Ninth Amendment (*United States v. Vital Health Products,* 786 F. Supp. 761 [E.D. Wis. 1992]). By itself, one court held, the Ninth Amendment does not enunciate any substantive rights. Instead the amendment serves to protect other fundamental liberties that are implicit, though not mentioned, in the Bill of Rights (*Rothner v. City of Chicago,* 725 F. Supp. 945 [N.D. Ill. 1989]).

After *Griswold,* federal courts were flooded with novel claims based on unenumerated rights. Almost without exception, these novel Ninth Amendment claims were rejected.

For example, the Ninth Circuit Court of Appeals found no Ninth Amendment right to resist the draft (*United States v. Uhl,* 436 F.2d 773 [1970]). The Sixth Circuit Court ruled that there is no Ninth Amendment right to possess an unregistered submachine gun (*United States v. Warin,* 530 F.2d 103 [1976]). The Fourth Circuit Court held that the Ninth Amendment does not guarantee the right to produce, distribute, or experiment with mind-altering drugs such as marijuana (*United States v. Fry,* 787 F.2d 903 [1986]). The Eighth Circuit Court denied a claim asserting that the Ninth Amendment guaranteed Americans the right to a radiation-free environment (*Concerned Citizens of Nebraska v. U.S. Nuclear Regulatory Commission,* 970 F.2d 421 [1992]).

This series of cases has led some scholars to conclude that the Ninth Amendment may be returning to a constitutional hibernation. Yet the Ninth Amendment retains some vitality. In ROE V. WADE, the federal District Court for the Northern District of Texas ruled that a state law prohibiting ABORTION in all instances except to save the life of the mother violated the right to privacy guaranteed by the Ninth Amendment (314 F. Supp. 1217 [1970]).

On appeal the Supreme Court affirmed the district court's ruling, stating that the right to privacy, "whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the

Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" (*Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 [1973]). Federal courts continue to rely on the Ninth Amendment in support of a woman's constitutional right to choose abortion under certain circumstances.

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Constitution of the United States; *Federalist Papers*; Penumbra.

## NISI PRIUS

[Latin, Unless before.]

A court of *nisi prius* is a court that tries QUESTIONS OF FACT before one judge and, in some cases, a jury. In the United States, the term ordinarily applies to the trial level court where the case is heard by a jury, as opposed to a higher court that entertains appeals where no jury is present.

## ♦ NIXON, RICHARD MILHOUS

Richard Milhous Nixon was the 37th president of the United States. Though he made several major breakthroughs in his presidency, his involvement with the WATERGATE affair proved his undoing. In 1974 he became the only president ever to resign from office. Late in life Nixon's advice as a political analyst and foreign affairs expert was sought by both parties.

Nixon was born January 9, 1913, in Yorba Linda, California, the second of five sons of Francis A. Nixon and Hannah Milhous Nixon. His father had grown up on a farm in Ohio and arrived in California in 1907. He worked as a trolley car motorman in Whittier, where he met Hannah Milhous. They were married in 1908. In 1922 they bought the grocery store and gas station where Nixon grew up. Nixon was a disciplined student who worked hard and received superior grades. He enjoyed playing football and participating in music, acting, and debating. A devout Quaker during his youth, he attended church four times a week.

When Nixon was 12, his younger brother Arthur died of tubercular encephalitis. His older brother, Harold, died when Nixon was 20, after a ten-year battle with tuberculosis. Harold's death was particularly traumatic for the family, as it had poured much of its limited resources into his treatment.

After graduating from high school, Nixon wanted to attend an Ivy League college but instead entered Whittier College, a small Quaker school close to home and within his family's financial means. He graduated second in his class and won a scholarship to Duke University Law School. At Duke, he was elected president of the Duke Bar Association and graduated third in his class.

In 1937, Nixon was admitted to the California bar and joined the firm of Wingert and Bewley in Whittier. He participated in civic groups; taught Sunday school; and acted in a community theater troupe, where he met Thelma Catherine Ryan, who was known as Patricia or Pat. They were married June 21, 1940, and had two children, Patricia ("Tricia") Nixon Cox and Julie Nixon Eisenhower. The Nixons would celebrate 53 years of marriage before Pat's death in 1993.

In 1941, Nixon took a job as an attorney with the Office of Price Administration in Washington, D.C. Seven months later, he applied for and received a Navy commission. He served as an operations officer with the South Pacific Combat Air Transport Command during WORLD WAR II.

Shortly after his return from the service, Nixon ran for Congress against incumbent California Democratic representative Jerry Voorhis. Nixon's campaign literature portrayed him as a returning veteran who had defended his country in the mud and jungles of the Solomon Islands while his opponent never left Washington, D.C. It also implied that Voorhis was endorsed by a Communist-supported POLITICAL ACTION COMMITTEE. At a time when fear of Communist subversion was widespread, Nixon's strategy worked. He came from behind in a race no one

expected him to win to defeat Voorhis with 57 percent of the votes.

Nixon quickly made his mark in Washington, D.C. He became a vocal member of the House Committee on Un-American Activities, which investigated U.S. citizens suspected of having ties with or sympathies for the Communist party. One such case brought Nixon into the national spotlight. In 1948, ALGER HISS, a former STATE DEPARTMENT official, was investigated for allegedly passing secret information to the Communist government in the former Soviet Union. Nixon's determined pursuit of the case led to Hiss's indictment and eventual conviction for perjury.

In 1950 Nixon ran for the U.S. Senate against Democratic Representative Helen Gahagan Douglas. In an effort to discredit Douglas, he circulated a campaign flyer indicating that she had voted 354 times with Representative Vito Marcantonio of New York, a member of the Communist Workers party. The flyer, printed on pink paper, was known as the pink sheet, and Nixon often referred to Douglas as the pink lady, a link to the color red associated with COMMUNISM. Nixon defeated Douglas by a secure margin of 680,000 votes, raising speculation that his strident campaign may have been unnecessary.

In 1952 Republicans chose World War II hero General DWIGHT D. EISENHOWER as their nominee for president. Eisenhower chose Nixon as his running mate. The campaign encountered a crisis almost immediately. In September 1952, several newspapers disclosed that Nixon had received financial support from a secret fund raised by wealthy California business owners. This offense was viewed as shocking, and many people called for Nixon to withdraw from the ticket. Instead, he took the offensive and pleaded his case on national television, delivering what came to be known as the "Checkers Speech." Nixon maintained his innocence, disclosed his financial situation to show he was in debt, and pointed out that his wife did not have a mink coat but rather wore "a respectable Republican cloth coat." He went on to say that a supporter in Texas had given the family a gift, a dog named Checkers, and that "the kids love the dog, and . . . we're going to keep it." The public's response was overwhelmingly positive and Nixon remained on the Republican ticket. Nixon had discovered the enormous power of television and had utilized it to his advantage, reaching a large audience without the need to endure press scrutiny.

*Richard M. Nixon.*
LIBRARY OF CONGRESS

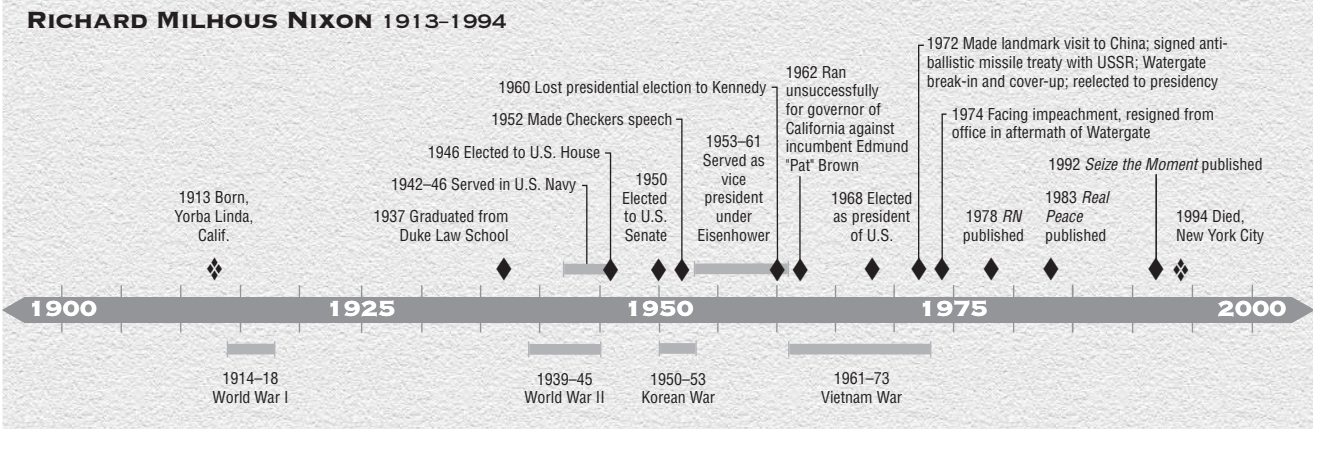

Eisenhower and Nixon received 55.1 percent of the popular vote in the 1952 election. Nixon served two terms as an unusually active vice president, honing his foreign policy skills during trips to 56 countries. Among the most famous of these journeys was a 1959 visit to Moscow, where he engaged in the celebrated Kitchen Debate with Soviet leader Nikita Khrushchev. The two men informally debated the merits of capitalism versus Communism while they toured the kitchen of a model home at a U.S. fair. Nixon's willingness to confront critics and his ability to turn adversity to his advantage earned him praise and acclaim.

In 1960, delegates at the Republican convention in Chicago nominated Nixon for president on the first ballot. He faced another young, energetic, popular contender, Democratic senator JOHN F. KENNEDY of Massachusetts. In the first of four televised debates with Kennedy, Nixon, who had been ill and was exhausted from campaigning, appeared haggard, strained, and tense. His appearance cost him many votes even though he had a keen command of the facts and debated well—indeed, those who listened to the debates on radio rather than watching them on television felt that Nixon had outdone Kennedy. Nixon lost the election, suffering his first political defeat, by a mere 119,000 votes. In spite of allegations of voting irregularities, particularly in Chicago, Nixon decided not to demand a recount and instead gracefully conceded to Kennedy.

"THERE IS ONE THING SOLID AND FUNDAMENTAL IN POLITICS—THE LAW OF CHANGE. WHAT'S UP TODAY IS DOWN TOMORROW."
—RICHARD M. NIXON

After losing the 1960 election, Nixon ran for governor of California against Edmund "Pat" Brown in 1962 but was unable to unseat the incumbent. He moved to New York to practice law and almost immediately began preparing his comeback. In January 1968, he announced his candidacy for the presidency and was nominated on the Republicans' first ballot, defeating Governor Nelson A. Rockefeller of New York, and Governor RONALD REAGAN of California.

The DEMOCRATIC PARTY was in a shambles in 1968. President LYNDON B. JOHNSON withdrew as a candidate because of growing domestic unrest and opposition to the VIETNAM WAR. Senator ROBERT F. KENNEDY was assassinated in June 1968 while campaigning for the Democratic nomination. The Democrats nominated HUBERT H. HUMPHREY, Johnson's vice president. Nixon defeated Humphrey by a narrow margin. During his first term, Nixon appointed a broad-based cabinet that included both conservatives and liberals. In his inaugural speech, he said that he hoped to "bridge the generation gap" and bring the country back together after years of unrest over Vietnam and RACIAL DISCRIMINATION. While he continued to pursue foreign policy goals, he also achieved much on the domestic front. He responded to strong public demand for expanded government services, and proposed a family assistance program that, had it not been voted down by Congress, would have been the most far-reaching WELFARE reform in modern history. He supported health and safety protection on the job and housing allowances for disadvantaged people. Nixon's administration built more subsidized housing units than any administration before or since. He expanded the Food Stamp Program and began the federal revenue-sharing program for local governments. Another lasting legacy was the creation of the ENVIRONMENTAL PROTECTION AGENCY.

Nixon also reshaped the Supreme Court. Under Chief Justice EARL WARREN, who had been appointed by President Eisenhower, the Court had taken what many felt was an ideologically liberal turn. During his presidency, Nixon appointed four members to the court: WARREN E. BURGER, as chief justice; and HARRY A. BLACKMUN, LEWIS F. POWELL JR., and WILLIAM H. REHNQUIST, as associate justices. The Burger Court began a retreat from liberalism and judicial activism that continued through the 1980s and 1990s.

Perhaps Nixon's most noteworthy triumphs were in foreign policy. In 1972 Nixon and his chief foreign affairs adviser, HENRY KISSINGER, traveled to Communist China to begin the process of reestablishing diplomatic relations with the Beijing government. The visit marked a major shift in U.S. policy toward China. The two governments shared a history of animosity, and the United States had long recognized the Nationalist Chinese government of Chiang Kai-shek, based on the island of Taiwan, as the official government of China. After Nixon's visit, the door was opened to diplomatic and trade dealings. Formal diplomatic relations with Communist China were established in 1978.

Nixon also opened negotiations with the Communist government in the former Soviet Union. He initiated the process known as détente by holding three summit meetings with Soviet leader Leonid Brezhnev. His efforts culminated in a breakthrough agreement in 1972 limiting the use of antiballistic missiles.

One major goal that eluded Nixon in foreign policy was a quick end to the Vietnam War. After promising "peace with honor" during his campaign in 1968, he saw the war continue through his first term.

Though the war would end in January 1973, an event in June of 1972 marked the beginning of Nixon's downfall. At that time, during Nixon's campaign for reelection, a group of men working for the Committee to Reelect the President broke into the Democratic party headquarters in the Watergate office complex in Washington, D.C. It was a crime that would be traced back to the president.

In November, Nixon won a sweeping victory over his Democratic challenger, Senator George S. McGovern, of South Dakota, receiving 60.7 percent of the vote and carrying every state except Massachusetts. The following March, testimony before the Senate select committee investigating the incident implicated the White House. In televised hearings John W. Dean III, Nixon's White House counsel, told the Senate committee that Nixon had been involved from the start.

Further testimony revealed that Nixon had secretly recorded all conversations that took place in the Oval Office of the White House. Congress and prosecutors began efforts to obtain the tapes. In October 1973, his reputation in jeopardy, Nixon carried out what came to be called the Saturday Night Massacre. Angered by Watergate special prosecutor **ARCHIBALD COX**, Nixon ordered Attorney General **ELLIOT L. RICHARDSON** to dismiss Cox. Richardson refused and resigned. Deputy Attorney General William D. Ruckelshaus also refused to carry out the task and was dismissed. Finally, Solicitor General **ROBERT H. BORK**, appointed acting attorney general, dismissed Cox.

Calls for Nixon's resignation mounted, and **IMPEACHMENT** resolutions were referred to the House Judiciary Committee. On March 1, 1974, a federal **GRAND JURY** indicted seven former Nixon aides in the continuing cover-up of Watergate. Nixon was named as an unindicted coconspirator.

Nixon responded to pressure from both those who wanted him to prove himself innocent and those who believed him guilty, by announcing in April 1974 that he would release to the House Judiciary Committee edited transcripts of conversations regarding Watergate culled from his library of tape recordings. Though the committee responded that it would need the tapes themselves, Nixon refused to supply them. The edited transcripts alone were tremendously damaging. The transcripts implicated the Nixon White House not only in burglaries and cover-ups, but also illegal wiretaps, corruption of government agencies, domestic **ESPIONAGE**, unfair campaign tactics, and abuse of campaign funds. Eventually, 19 Nixon aides and associates served prison terms for their roles in these illegal activities.

By late July 1974, the House Judiciary Committee, in televised hearings, was deliberating **ARTICLES OF IMPEACHMENT** against Nixon. The articles charged him with **OBSTRUCTION OF JUSTICE**, abuse of power, and defiance of congressional subpoenas. It became clear that the full House would impeach him, and he would probably face conviction by the Senate. In early August, in response to a Supreme Court ruling (**UNITED STATES V. NIXON**, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 [1974]), Nixon released the contested tape recordings that showed conclusively that he had been involved in the effort to halt the Federal Bureau of Investigation's probe of Watergate.

On August 7, 1974, facing certain impeachment, Nixon met with his family and aides and informed Secretary of State Kissinger of his decision to resign. He made this announcement to the nation in a television broadcast the evening of August 8. The following day, with his family around him, he bade an emotional farewell to his staff, boarded *Air Force One* with his wife, and flew home to San Clemente, California. Vice President **GERALD R. FORD** was sworn in to serve the remainder of Nixon's term. On September 8, President Ford granted Nixon an unconditional pardon for all federal crimes he "committed or may have committed or taken part in" while in office, thus ending the crisis that had gripped the nation for more than two years.

After his resignation Nixon published eight books and numerous newspaper and magazine articles. He traveled again to China, where he was warmly received, and in 1994, shortly before his death, he returned to Russia. Nixon came to be considered an elder statesman and political analyst. As an expert in foreign policy his advice and counsel were sought by Senator and presidential candidate **BOB DOLE** and President **BILL CLINTON**.

Nixon died April 22, 1994. All five living presidents at the time—Clinton, GEORGE H.W. BUSH, Reagan, JIMMY CARTER, and Ford—and their wives attended Nixon's funeral. Clinton delivered a eulogy in which he said:

> He suffered defeats that would have ended most political careers, yet he won stunning victories that many of the world's most popular leaders have failed to attain.

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## NIXON, UNITED STATES V.

In *United States v. Nixon,* 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), the U.S. Supreme Court recognized the doctrine of EXECUTIVE PRIVILEGE but held that it could not prevent the disclosure of materials needed for a criminal prosecution. The case arose during the WATERGATE political scandal, which involved President RICHARD M. NIXON and numerous members of his administration. The Court had to consider whether Nixon was required to turn over secret White House tape recordings to government prosecutors. Nixon claimed that the doctrine of executive privilege allowed him to refuse to release the tapes, while prosecutors argued that they had a right to obtain evidence of possible crimes, even if that evidence was held by the president of the United States.

The Watergate scandal began during the presidential campaign of 1972, in which Nixon defeated his Democratic opponent, Senator George McGovern of South Dakota, by a wide margin. Several months before the election, on June 17, a group of burglars broke into the DEMOCRATIC PARTY campaign headquarters in the Watergate building complex in Washington, D.C. Aggressive investigative reporting by the *Washington Post* uncovered connections to officials in the Nixon administration. Though the administration denied any wrongdoing, it soon became clear that members of the administration had tried to cover up the BURGLARY and connections to it that might include the president.

Under congressional and public pressure, Nixon appointed a special prosecutor. When it was revealed that the president had secretly taped conversations in the Oval Office in the White House, the prosecutor, ARCHIBALD COX, filed a subpoena to secure tapes that he believed were relevant to the criminal investigation. When Cox refused to withdraw his request, Nixon had him fired. The resulting public outrage forced Nixon to appoint LEON JAWORSKI as a new special prosecutor.

In March 1974 a federal GRAND JURY indicted seven Nixon associates for conspiracy to obstruct justice and for other offenses related to the Watergate burglary. Nixon himself was named as an unindicted co-conspirator. Upon Jaworski's motion the U.S. district court issued a new subpoena to the president, requiring him to produce certain tapes and documents pertaining to precisely identified meetings between the president and others. Although Nixon released edited transcripts of some of the subpoenaed conversations, his attorney moved to quash, or void, the subpoena on the grounds of executive privilege. When the district court denied the motion, the president appealed, and the case was quickly brought to the U.S. Supreme Court.

Nixon refused to release the tapes, contending that the doctrine of executive privilege gave him the right to withhold documents from Congress and the courts. Executive privilege, though not mentioned in the U.S. Constitution, was first asserted by GEORGE WASHINGTON. Presidents have argued that the privilege is inherent in executive power and is necessary to maintain the secrecy of information related to national security and to protect the confidentiality of their

deliberations. Executive privilege did not become a major point of contention until the Nixon presidency, however. Nixon routinely used it during his first term to thwart congressional inquiries.

The Supreme Court, in a unanimous decision (Justice WILLIAM H. REHNQUIST recused himself because he had served in the Nixon administration), recognized for the first time the general legitimacy of executive privilege. Nevertheless, Chief Justice WARREN E. BURGER, writing for the Court, rejected Nixon's claim of "an absolute, unqualified Presidential privilege of IMMUNITY from judicial process under all circumstances." Burger found that [a]bsent a claim of need to protect military, diplomatic, or sensitive national security secrets," the need for protecting the confidentiality of presidential communications must give way to a legitimate request by the courts for information vital to a criminal prosecution. Burger noted that the judge would review the subpoenaed tapes in private to determine what portions should be released to the prosecutors. This confidential review would prevent sensitive but irrelevant information from being disclosed.

Nixon obeyed the order and turned the tapes over to the district court. When relevant portions were released, they revealed that the president had been intimately involved with the attempt to cover up White House involvement in the Watergate burglary. Less than three weeks after the Court announced its decision, Nixon resigned the presidency, thereby avoiding IMPEACHMENT by Congress.

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Nixon, Richard Milhous; Watergate.

## NLRB V. JONES & LAUGHLIN STEEL CORP.

From the 1870s through the mid-1930s the U.S. Supreme Court was generally hostile to federal legislation that sought to regulate business through the use of the Constitution's COMMERCE CLAUSE. A conservative judiciary believed that the free market should govern economic activities; consequently laws that attempted to regulate labor relations were overturned. The Great Depression of the 1930s led to the presidential election in 1932 of FRANKLIN D. ROOSEVELT, who advocated an aggressive role for the federal government in national economic affairs. Congress consistently turned Roosevelt's legislative agenda into law yet the Supreme Court ruled these new laws unconstitutional. However, in the landmark case of *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937), the Court reversed course, paving the way for NEW DEAL legislation and a new judicial attitude toward the Commerce Clause.

For generations LABOR UNIONS had confronted a business community that was hostile to the concept of COLLECTIVE BARGAINING. Therefore, the passage of the National Labor Relations Act (NLRA or WAGNER ACT) of 1935 (29 U.S.C.A. § 151 et seq.) was a dramatic recognition of workers' rights. The law gave workers the right to organize unions and to require employers to negotiate with a certified union. An elaborate administrative process was also established, headed by the National Labor Relations Board (NLRB). The NLRB was create to review complaints about alleged violations of the law and issue administrative sanctions against employers for retaliatory discharges based on union membership or organization activities. Employers vowed to test the constitutionality of the NLRA and the actions of the NLRB.

In July 1935, 13 employees of the Jones and Laughlin Steel Corporation plant in Aliquippa, Pennsylvania, were discharged for minor infractions of company rules. Most of these workers had been actively involved in a union. The union filed with the NLRB a charge of UNFAIR LABOR PRACTICES against the steel company, claiming that the discharges were because of union membership. At a subsequent NLRB hearing, Jones & Laughlin argued that the NLRA was unconstitutional because it regulated labor relations and not interstate commerce. Therefore, Congress had no authority to regulate labor relations. The NLRB rejected the argument and found that the company was the fourth largest steel producer in the United States and was clearly involved in interstate commerce. It ordered the workers reinstated and directed Jones & Laughlin to cease

and desist from these labor practices. Jones & Laughlin appealed, confident that the Supreme Court would overturn what was viewed as the most radical piece of New Deal law.

In a stunning reversal of precedent the Court upheld the constitutionality of the NLRA on a 5–4 vote. Previous decisions striking down New Deal legislation had also come on 5–4 votes, with Chief Justice CHARLES EVANS HUGHES joining four conservative justices to constitute a majority. In this case Hughes joined the four liberal justices and wrote the majority opinion. The tenor of Hughes' opinion was significant, for he abandoned Court precedent that had considered labor relations outside the stream of interstate commerce. The previous year Hughes had embraced this idea, but in the present case he looked at the world differently. He concluded that DUE PROCESS and liberty of contract concerns were irrelevant.

The Court's decision made clear that the federal government had the constitutional authority to regulate labor relations. Hughes reasoned that labor strife, including strikes, affected interstate commerce. He stressed that the Commerce Clause was broad enough to permit Congress to extend its regulations to both interstate commerce and to any activity that affected commerce, directly or indirectly. What was important was the "effect upon commerce, not the source of the injury."

The Court concluded that the NLRA went no further than to "safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining." This was "a fundamental right." This declaration reversed over 100 years of judicial thinking about labor unions and endorsed the authority of Congress to protect this right.

This decision was a bitter defeat for the four conservatives justices: GEORGE SUTHERLAND, PIERCE BUTLER, WILLIS VAN DEVANTER, and JAMES MCREYNOLDS. In their dissents they argued that the NRLA violated the liberty of contract between an individual employee and an employer. Moreover, they held fast to the "stream of commerce" line of precedent. They could not see how the discharge of a few employees in a city in Pennsylvania had any connection to the sale and distribution of steel through the channels of interstate commerce.

*Jones* changed the face of labor relations by requiring employers to treat unions and union workers fairly. It also signaled an end to the Supreme Court's striking down New Deal laws that sought to reshape the national economy. From *Jones* onward the Court permitted the federal government to take a dominant role in matters of commerce. The balance of power between the federal government and state governments shifted dramatically in the years following this decision.

This decision also empowered Congress to apply the Commerce Clause to federal civil right legislation. The CIVIL RIGHTS ACT OF 1964 contains provisions banning segregated public accommodations that are a part of interstate commerce. Congress used the Commerce Clause as its authority because the Fourteenth Amendment's due process and EQUAL PROTECTION rights only apply to state and local government actions. Therefore, if the state does not mandate segregated facilities, the private discriminatory actions would be exempt from the FOURTEENTH AMENDMENT. Therefore, Congress claimed that segregated public accommodations affected interstate commerce. The Supreme Court, in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964), applied the *Jones* reasoning. It noted that 75 percent of the Heart of Atlanta Motel's clientele came from out of state and that it was strategically located near several interstate highways. Therefore, the business clearly affected interstate commerce. The Court upheld the constitutionality of this landmark legislation.

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## NO BILL

*A term that the foreman of the* GRAND JURY *writes across the face of a bill of indictment (a document drawn up by a prosecutor that states formal criminal charges against a designated individual) to indicate that the criminal charges alleged therein against a suspect have not been sufficiently supported by the evidence presented before it to warrant his or her criminal prosecution.*

When the grand jury agrees that the evidence is sufficient to establish the commission of a crime, it returns an indictment endorsed by the grand jury foreman with the phrase *true bill* to indicate that the information presented before it is sufficient to justify the trial of the suspect.

## NO CONTEST

*The English translation of a* nolo contendere *plea used in criminal cases. Generally the terms* nolo contendere *and* no contest *are used interchangeably in the legal community. The operation of a no contest plea is similar to a plea of guilty. A defendant who enters a no contest plea concedes the charges alleged without disputing or admitting guilt and without offering a defense. No contest has a different meaning in the context of a will.*

The modern no contest plea originated during the reign of Henry IV in England in the early 1400s. It was considered a prisoner's implied confession. In cases where a death sentence was not a possibility, a prisoner was allowed simply to ask the court for mercy rather than contest the issue of guilt or innocence. Today the no contest plea is defined by statute and is available in almost every state. Such a plea is considered a privilege and not an automatic right of a defendant. Consequently, a no contest plea is accepted only with the consent of the court, and a judge is vested with discretion to accept or reject the plea. A plea of no contest usually is not allowed in death penalty cases.

The court must address several procedural concerns before accepting a no contest plea. If it appears from the facts presented that the defendant did not commit the offense charged, the trial court will refuse a no contest plea. Generally, a defendant must also tender a no contest plea knowingly and voluntarily. A plea is not deemed knowing and voluntary unless the defendant has a full understanding of the charges alleged and the legal ramifications of PLEADING no contest. To ensure that the plea is freely tendered, the court will also inquire whether the defendant has received any threats or promises. The adherence to these standards varies among courts and jurisdictions. Some courts operate under the assumption that a no contest plea should be accepted in the absence of some reason to the contrary, whereas others require the defendant to strictly observe every legal requirement before they will accept the plea.

A plea of no contest is advantageous for defendants where the effects of a plea of guilty are too harsh. For example, a defendant might choose to enter a no contest plea to avoid the expense and publicity of a trial. Another procedural advantage of a no contest plea is that it cannot be used against the accused in any civil suit for the same act. For example, if a motorist pleads no contest to a criminal assault charge against a hitchhiker, the hitchhiker cannot introduce evidence of that plea in a related civil proceeding for assault to impeach the motorist's credibility.

One disadvantage of a no contest plea is that it carries the same legal effect as a conviction for sentencing purposes. Though a defendant may hope for leniency during sentencing for saving the court the time and costs of a trial or because of a bargain worked out with the prosecutors, the full range of penalties remain available to the court for the given crime. Thus, a defendant risks receiving the same punishment without the opportunity to offer a defense or a chance for an acquittal from a jury.

A second meaning of no contest relates to wills and the intentions of the testator. A no contest provision in a will provides that the gift or devise is given on the condition that no legal action is taken to challenge the will. If a legal challenge to the will is pursued, the no contest provision provides that the person bringing the action forfeits the gift or devise. The purpose of no contest clauses is to carry out the express wishes of the testator and to discourage litigation. Nonetheless, many courts refuse to enforce no contest clauses if the challenge is brought in GOOD FAITH and on PROBABLE CAUSE.

## NO FAULT

*A kind of automobile insurance that provides that each driver must collect the allowable amount of money from his or her own insurance carrier subsequent to an accident regardless of who was at fault.*

No-fault insurance is required by statute in a number of states.

The term *no fault* is also used colloquially in reference to a type of DIVORCE in which a marriage can be dissolved on the basis of irretrievable breakdown or irreconcilable differences, without a requirement that either party prove that the spouse was guilty of any misconduct causing the end of the marriage.

CROSS-REFERENCES

Automobiles.

## NO FAULT DIVORCE

See DIVORCE.

## NO-LOAD FUND

*A type of* MUTUAL FUND *that does not impose extra charges for administrative and selling expenses incurred in offering its shares for sale to the public.*

## NOLLE PROSEQUI

[Latin, Will not prosecute.]

The term *nolle prosequi* is used in reference to a formal entry upon the record made by a plaintiff in a civil lawsuit or a prosecutor in a criminal action in which that individual declares that he or she wishes to discontinue the action as to certain defendants, certain issues, or altogether. A *nolle prosequi* is commonly known as *nol pros.*

## NOLO CONTENDERE

[Latin, I will not contest it.] *A plea in a criminal case by which the defendant answers the charges made in the indictment by declining to dispute or admit the fact of his or her guilt.*

The defendant who pleads *nolo contendere* submits for ajudgment fixing a fine or sentence the same as if he or she had pleaded guilty. The difference is that a plea of *nolo contendere* cannot later be used to prove wrongdoing in a civil suit for monetary damages, but a plea of guilty can. *Nolo contendere* is especially popular in antitrust actions, such as price-fixing cases, where it is very likely that civil actions for treble damages will be started after the defendant has been successfully prosecuted.

A plea of *nolo contendere* may be entered only with the permission of the court, and the court should accept it only after weighing its effect on the parties, the public, and the administration of justice.

## NOMINAL

*Trifling, token, or slight; not real or substantial; in name only.*

*Nominal capital,* for example, refers to extremely small or negligible funds, the use of which in a particular business is incidental.

## NOMINAL DAMAGES

*Minimal money damages awarded to an individual in an action where the person has not suffered any substantial injury or loss for which he or she must be compensated.*

This kind of damages reflects a legal recognition that a plaintiff's rights have been violated through a defendant's breach of duty or wrongful conduct. The amount awarded is ordinarily a trifling sum, such as a dollar, which varies according to the circumstances of each case. In certain jurisdictions, the amount of the award might include the costs of the lawsuit.

In general, nominal damages may be recovered by a plaintiff who is successful in establishing that he or she has suffered a loss or injury as a result of the defendant's wrongful conduct but is unable to adequately set forth proof of the nature and extent of the injury.

## NON

[Latin, Not.] *A common prefix used to indicate negation.*

For example, the term *non sequitur* means "it does not follow."

## NON OBSTANTE VEREDICTO

See JUDGMENT NOTWITHSTANDING THE VERDICT.

## NON PROSEQUITUR

[Latin, He does not pursue, or follow up.] *The name of a judgment rendered by a court against a plaintiff because he or she fails to take any necessary steps, in legal proceedings, within the period prescribed for such proceedings by the practice of court.*

When a judgment of *non prosequitur* is entered against the plaintiff, he or she has failed to properly pursue the lawsuit and cannot subsequently obtain a judgment against the defendant. A failure of such nature would result in a dismissal of the action or in a default judgment in favor of the defendant.

## NON SUI JURIS

[Latin, Not his own master.] *A term applied to an individual who lacks the legal capacity to act on his or her own behalf, such as an infant or an insane person.*

## NON VULT CONTENDERE

[Latin, He does not wish to contest it.] *A type of plea that can be entered by a defendant who is unwilling to admit guilt but is willing to submit to the court for sentencing.*

The term, sometimes abbreviated *non vult,* is a variation of nolo contendere, which has the same meaning.

## NONAGE

*Infancy or minority; lack of requisite legal age.*

Nonage entails various contractual disabilities and is a ground for ANNULMENT in some jurisdictions.

CROSS-REFERENCES

Infants.

## NONCOMPETE AGREEMENT

*A contract limiting a party from competing with a business after termination of employment or completion of a business sale.*

Found in some business contracts, noncompete agreements are designed to protect a business owner's investment by restricting potential competition. Generally, businesses pursue these agreements in two instances: when hiring new employees, or when purchasing an established business. The noncompete agreement is a form of RESTRICTIVE COVENANT, a clause that adds limitations to the employment or sale contract. These agreements protect the business by restricting the other party from performing similar work for a specific period of time within a certain geographical area. First used in the nineteenth century, and common today in certain professions, noncompete agreements sometimes have an uncertain legal status. Courts do not always uphold them. Generally, courts evaluate such clauses for their reasonableness to determine whether they constitute an unfair restraint on trade.

The rationale behind noncompete agreements is an employer's self-interest. Typically, companies invest heavily in the training of their employees. Similarly, they have an interest in protecting their customer base, trade secrets, and other information vital to their success. The noncompete agreement is a form of protection against losses. The company does not wish to invest in an employee only to see the employee take the skills acquired, or the company's customers, to another employer. Thus, when hiring a new employee, the company may make her sign a noncompete agreement as part of a condition of employment. Likewise, the prospective purchaser of an established business may only buy it if the current owner is willing to sign a noncompete agreement.

In practice, such agreements are very specific in several respects. Usually the agreement will define a length of time, geographic radius in miles, and type of activity in which the employee promises to refrain from working after leaving her or his job. This is often the case in businesses that depend on an established group of customers. A hair salon, for example, may require its stylists to agree not to compete against it in neighboring hair salons. Noncompete agreements are also well established in fields where an individual is associated with a product or service. High-profile positions in the media typically require them. A television anchorwoman, for example, will typically be contractually bound not to work for a competing news channel in the same market for a period of time following the termination of her contract.

In legal challenges courts use a standard of reasonableness in deciding whether to uphold a noncompete agreement. Most states use a three-part test: the agreement must be reasonable in terms of length of time, size of geographical territory included, and the business's necessity for the agreement. Covenants restricting the sellers of businesses typically receive a lower level of scrutiny, whereas restrictions on the behavior of former employees are closely scrutinized.

Courts are primarily concerned with preventing unfair restraints on trade. In a free market, most businesses cannot reasonably assert a need to restrict competition. Many states will evaluate each separate part of an agreement using the so-called blue pencil doctrine of severability, under which certain parts of the agreement can be upheld as enforceable and others can be found unenforceable. A few states, however, throw out an entire agreement if any part of it is found to be an unfair restraint on trade.

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CROSS-REFERENCES

Restraint of Trade.

## NONCONFORMING USE

*Continuing use of real property, permitted by* ZONING *ordinances, in a manner in which other similar plots of land in the same area cannot ordinarily be used.*

Most municipal governments have enacted zoning ordinances that regulate the development of real estate within the municipality. The municipality is divided into zoning districts that permit a particular use of property: residence, business, or industry. Within these three main types of zoning districts, population density and building height may also be restricted. Zoning attempts to conserve the value of property and to encourage the most appropriate use of land throughout a particular locality.

When zoning is established, however, the ordinance cannot eliminate structures already in existence. Thus, if a district is zoned residential, the corner grocery store and neighborhood service station become nonconforming use sites. These businesses may remain even though they do not fit the predominant classification of real property in the zoning district.

As long as the property having nonconforming use status does not change, its status is protected. Problems arise, however, when change occurs. In general, substantial alterations in the nature of the business, new equipment that is not a replacement but a subterfuge to expand the use of the property, or a new structure amount to illegal expansion or extension. These types of actions will result in the loss of the nonconforming use status and the closing of the business. For example, if the corner grocery builds an addition to house a restaurant, that would be a significant change. If, however, the grocery updates its refrigeration equipment, that would not be an illegal change.

If a nonconforming use structure is destroyed or partially destroyed by fire or similar occurrences, zoning ordinances generally provide that if it is destroyed beyond a certain percentage, it cannot be rebuilt. Usually the owner loses the right to rebuild if 50 percent or more of the structure is damaged.

If a business stops operating at the nonconforming use site, zoning ordinances generally classify this as a discontinuance and revoke the nonconforming use status. The owner of the business must intend to abandon the use. Discontinuance due to repairs, acts of war or nature, government controls, foreclosure, condemnation, or injunctions are not regarded as manifesting intent to abandon the nonconforming use status if the situation is beyond the business owner's control.

Another tool to end nonconforming use situations is amortization, where the nonconforming use of a structure must cease within a zoning district at the end of the structure's estimated useful economic life. This device often is used in connection with billboards and junkyards.

Though municipalities may seek to end nonconforming use status through these various approaches, landowners usually retain this status until it becomes economically undesirable.

**CROSS-REFERENCES**

Land-Use Control.

## NONFEASANCE

*The intentional failure to perform a required duty or obligation.*

*Nonfeasance* is a term used in TORT LAW to describe inaction that allows or results in harm to a person or to property. An act of nonfeasance can result in liability if (1) the actor owed a duty of care toward the injured person, (2) the actor failed to act on that duty, and (3) the failure to act resulted in injury.

Originally the failure to take affirmative steps to prevent harm did not create liability, and this rule was absolute. Over the years courts have recognized a number of situations in which a person who does not create a dangerous situation must nevertheless act to prevent harm.

Generally a person will not be held liable for a failure to act unless he or she had a preexisting relationship with the injured person. For example, if a bystander sees a stranger drowning and does not attempt a rescue, he cannot be liable for nonfeasance because he had no preexisting relationship with the drowning person. The bystander would not be liable for the drowning even if a rescue would have posed no risk to him.

However, if the victim is drowning in a public pool and the bystander is a lifeguard employed by the city, and if the lifeguard does not act to help, she may be held liable for the drowning because the lifeguard's employment places her in a relationship with swimmers in the pool. Because of this relationship, the lifeguard owes a duty to take affirmative steps to prevent harm to the swimmers.

Courts have found a preexisting relationship and a duty to act in various relationships, such as the relationship between HUSBAND AND WIFE, innkeeper and guest, employer and employee, jailer and prisoner, carrier and passenger, PARENT AND CHILD, school and pupil, and host and guest. A person who renders aid or

protection to a stranger also may be found liable if the rescuer does not act reasonably and leaves the stranger in a more dangerous position, even if the rescuer had nothing to do with the initial cause of the stranger's dilemma.

Courts have found a duty to act if a person does something innocuous that later poses a threat and then fails to act to prevent harm. For example, assume that Johnny loans a powerful circular saw to Bobby. If Johnny later remembers that the bolt securing the blade is loose and that the blade will dislodge in a dangerous manner when the saw is used, Johnny must try to warn Bobby. If Bobby is injured because Johnny failed to act, Johnny can be held liable for nonfeasance.

In theory nonfeasance is distinct from misfeasance and malfeasance. Malfeasance is any act that is illegal or wrongful. Misfeasance is an act that is legal but improperly performed. Nonfeasance, by contrast, is a failure to act that results in harm.

In practice the distinctions between the three terms are nebulous and difficult to apply. Courts in various jurisdictions have crafted different rules relating to the terms. The most difficult issue that faces courts is whether to imply a duty to act and find liability for the failure to act.

Originally courts used the term nonfeasance to describe a failure to act that did not give rise to liability for injuries. The meaning of the term reversed direction over time, and most courts now use it to describe inaction that creates liability.

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CROSS-REFERENCES

Good Samaritan Doctrine.

## NONPROFIT

*A corporation or an association that conducts business for the benefit of the general public without shareholders and without a profit motive.*

Nonprofits are also called not-for-profit corporations. Nonprofit corporations are created according to state law. Like for-profit corporations, nonprofit corporations must file a statement of corporate purpose with the SECRETARY OF STATE and pay a fee, create articles of incorporation, conduct regular meetings, and fulfill other obligations to achieve and maintain corporate status.

Nonprofit corporations differ from profit-driven corporations in several respects. The most basic difference is that nonprofit corporations cannot operate for profit. That is, they cannot distribute corporate income to shareholders. The funds acquired by nonprofit corporations must stay within the corporate accounts to pay for reasonable salaries, expenses, and the activities of the corporation. If the income of a corporation inures to the personal benefit of any individual, the corporation is considered to be profit driven. Salaries are not considered personal benefits because they are necessary for the operation of the corporation. An excessive salary, however, may cause a corporation to lose its nonprofit status.

Nonprofit corporations are exempt from the income taxes that affect other corporations but only if they conduct business exclusively for the benefit of the general public. State laws on

**National Nonprofit Associations, by Number and Type, in 2003**

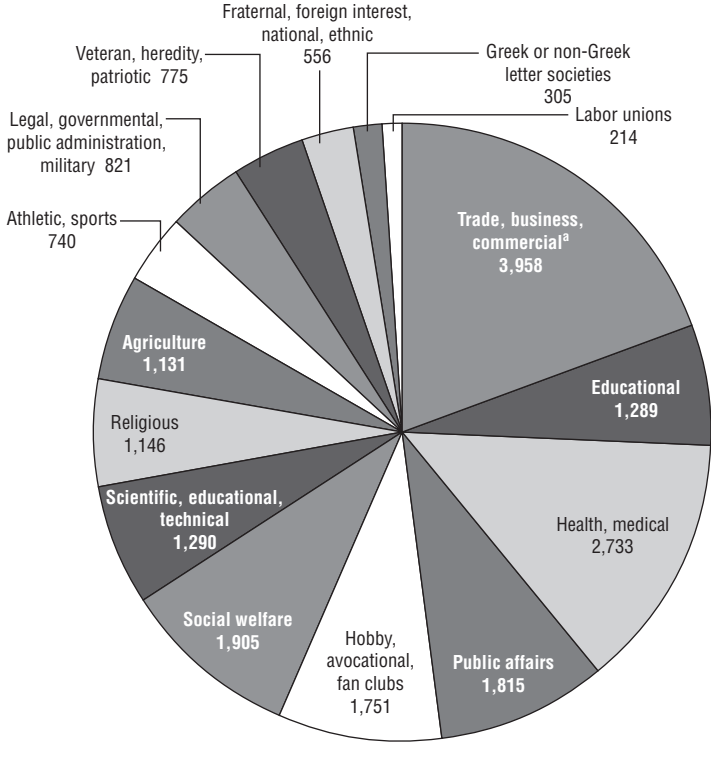


[a]Includes national and binational chambers of commerce.

SOURCE: The Gale Group, *Encyclopedia of Associations*, 2003.

corporations vary from state to state, but generally states give tax breaks and exemptions to nonprofit corporations that are organized and operated exclusively for either a religious, charitable, scientific, public safety, literary, or educational purpose, or for the purpose of fostering international sports or preventing cruelty to children or animals. Nonprofit organizations may charge money for their services, and contributions to tax-exempt nonprofit organizations are tax deductible. The INTERNAL REVENUE SERVICE must approve the tax-exempt status of all nonprofit organizations except churches.

A vast number of organizations qualify for nonprofit status under the various definitions. Nonprofit organizations include churches, soup kitchens, charities, political associations, business leagues, fraternities, sororities, sports leagues, COLLEGES AND UNIVERSITIES, hospitals, museums, television stations, symphonies, and public interest law firms.

A nonprofit corporation with a public purpose is just one organization that qualifies for tax-exempt status. Under Section 501 of the INTERNAL REVENUE CODE (26 U.S.C.A. § 501), more than two dozen different categories of income-producing but not-for-profit organizations are exempt from federal income taxes. These other tax-exempt organizations include credit unions, civic leagues, recreational clubs, fraternal orders and societies, labor, agricultural, and horticultural organizations, small insurance companies, and organizations of past or present members of the armed forces of the United States.

The number of nonprofit corporations in the United States continued to increase into the twenty-first century. Although nonprofit corporations cannot produce dividends for investors, they provide income for the employees, and they foster work that benefits the public.

The activities of nonprofit corporations are regulated more strictly than the activities of other corporations. Nonprofit corporations cannot contribute to political campaigns, and they cannot engage in a substantial amount of legislative LOBBYING.

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## NONSUIT

*A broad term for any of several ways to terminate a legal action without an actual determination of the controversy on the merits.*

For instance, a *judgment of nonsuit* may be granted against a plaintiff who either fails to pursue, or abandons, the action.

## NONSUPPORT

*The failure of one individual to provide financial maintenance for another individual in spite of a legal obligation to do so.*

Nonsupport of a spouse or child is a crime in some states and a ground for DIVORCE in certain jurisdictions.

CROSS-REFERENCES

Child Support.

## ♦ NORRIS, GEORGE WILLIAM

George William Norris was born July 11, 1861, in Sandusky County, Ohio. He graduated from Indiana Normal College in 1881 and pursued a career in law and politics.

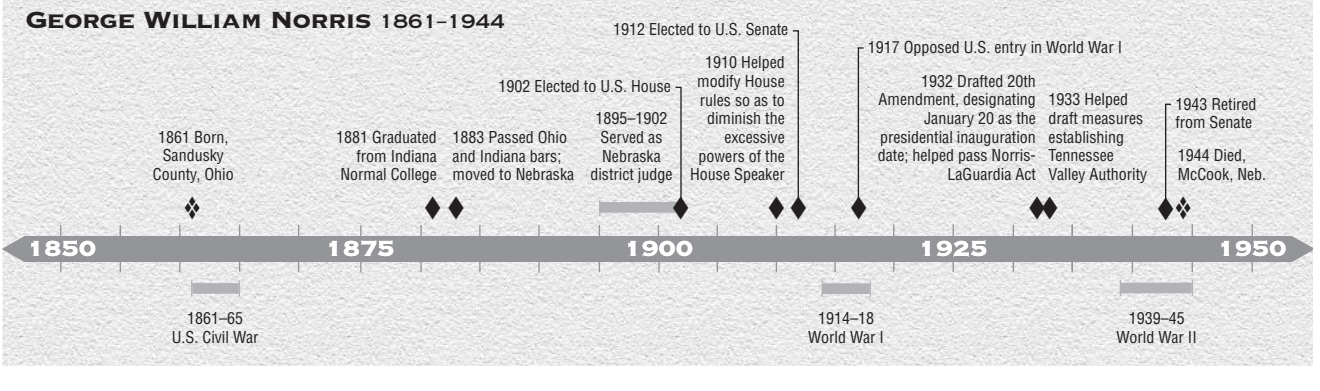

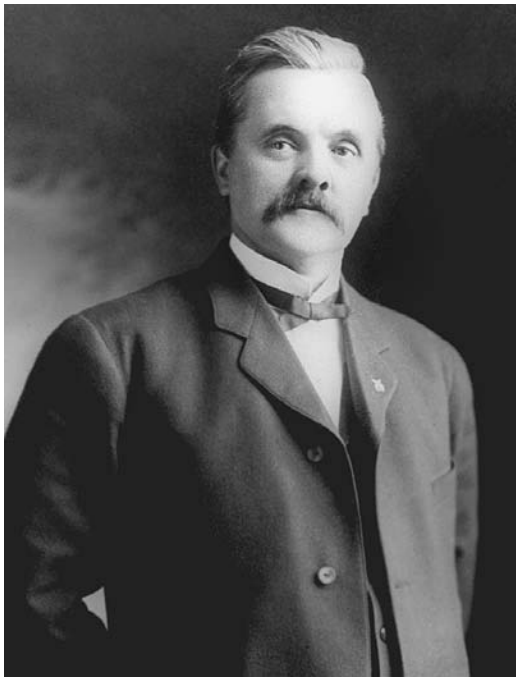

*George W. Norris.* LIBRARY OF CONGRESS

After admission to the Ohio and Indiana bars in 1883, Norris established a law practice in Nebraska, where he also served as prosecuting attorney. He presided as a Nebraska district court judge from 1895 to 1902.

In 1903, Norris was elected to the U.S. House of Representatives. In 1910, he was instrumental in modifying the House rules so as to diminish the excessive powers of House Speaker Joseph Gurney Cannon.

In 1913, Norris was elected to the Senate, where he would serve for the next 30 years. He opposed the entry of the United States into WORLD WAR I but generally supported the policies of President FRANKLIN DELANO ROOSEVELT. During Roosevelt's administrations, Norris was involved in several important activities. In 1932, he drafted the TWENTIETH AMENDMENT to the Constitution, which designated January 20 as the date of a presidential inauguration instead of the traditional March 4, thus eliminating the need for a "lame duck" congressional session. During that same year, he was instrumental in the passage of the NORRIS-LAGUARDIA ACT (29 U.S.C.A. § 101 et seq.), which restricted the use of injunctions in labor disagreements. He also helped to draft measures for the establishment of the TENNESSEE VALLEY AUTHORITY in 1933 and advocated programs for farm relief.

Norris died September 2, 1944, in McCook, Nebraska.

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## NORRIS-LAGUARDIA ACT

The Norris-LaGuardia Act (29 U.S.C.A. § 101 et seq.) is one of the initial federal LABOR LAWS in favor of organized labor. It was enacted in 1932 to provide that contracts that limit an employee's right to join a LABOR UNION are unlawful. Such contracts are commonly known as YELLOW DOG CONTRACTS. Initially the law was known as the anti-injunction act since its numerous restrictions had the effect of stopping any federal court from issuing an INJUNCTION to end a labor dispute. In one part of the act, for example, there is a provision that an injunction prohibiting a strike cannot be issued unless the local police are either unwilling or unable to prevent damage or violence.

CROSS-REFERENCES

Labor Law.

## NORTH AMERICAN FREE TRADE AGREEMENT

*The North American Free Trade Agreement (NAFTA) was made between the United States, Canada, and Mexico, and took effect January 1, 1994. Its purpose is to increase the efficiency and fairness of trade among the three nations.*

At the heart of NAFTA is a simple goal: the elimination of tariffs—the taxes each nation imposes on the others' imports—and other bureaucratic and legal barriers to trade. In addition to its central terms, the massive, highly detailed agreement also includes so-called side agreements intended to ensure that each nation enforces its own labor and environmental laws. The bulk of its regulations are to be phased in over the course of 15 years.

The impetus for NAFTA developed in the 1980s. Its roots lie in the United States-Canada Free Trade Agreement of 1988—implemented by the United States-Canada Free Trade Agreement Implementation Act (19 U.S.C.A. § 2112 note [Supp. 1993])—which, by the mid-1990s, had already eliminated most trade barriers between

the United States and Canada. With the world gradually becoming divided into large regional trading blocs where goods and services move freely, as in the European Union, NAFTA's supporters saw the inclusion of Mexico as necessary for North America to compete internationally.

In the United States, debate over NAFTA threatened to derail it. Proponents saw economic benefits for all three nations in the agreement. But opponents concentrated their attack on the implications for the relationship between the United States and Mexico. They feared several potential outcomes if NAFTA were signed: the loss of U.S. jobs, damage to the environment as a result of economic growth in Mexico, and the likelihood that U.S. safety regulations would be challenged as barriers to free trade.

In 1993, a coalition of consumer and environmental groups brought suit in an attempt to block congressional consideration of the agreement. In *Public Citizen v. United States Trade Representative,* 5 F.3d 549 (D.C. Cir. 1993), the coalition argued that the administration of President **BILL CLINTON** had failed to comply with the **NATIONAL ENVIRONMENTAL POLICY ACT** (42 U.S.C.A. §§ 4321 et seq. [1977]), which requires all federal agencies to submit environmental impact statements for all legislation or actions that affect the environment. The suit failed when a federal appellate court ruled that it had no authority to review the president's actions.

In response to anti-NAFTA criticisms, the White House negotiated three side agreements that were signed on September 14, 1993. The side agreements attempted to ensure that the three countries comply with their own labor and environmental laws; established fines and limited trade sanctions for violations; and called for consultations by the members if increases in imports from one country appeared to be having a devastating effect on an industry in one of the other countries. Two months later NAFTA won congressional approval. The House of Representatives narrowly passed the implementing legislation (North American Free Trade Implementation Act [19 U.S.C.A. §§ 3314 et seq., Pub. L. No. 103-182, 107 Stat. 2057]), and the Senate also passed it.

NAFTA specifies a timetable for its changes. When the agreement went into effect on January 1, 1994, the United States eliminated all tariffs on 60 percent of imports from Mexico that previously were subject to tariffs. On January 1, 2003, more U.S. tariffs on Mexico's imports were removed, and 92 percent of previously taxed Mexican goods were able to enter the United States without tariffs. Finally, on January 1, 2008, all remaining tariffs on the three countries' goods will be eliminated. Other barriers were removed beginning January 1, 2000. For instance, U.S. banks, which had traditionally been shut out of Mexico, became free to take over as much as 15 percent of the Mexican financial market.

*President Bill Clinton signs a NAFTA side agreement on September 14, 1993. NAFTA won congressional approval two months later.*

AP/WIDE WORLD PHOTOS

### Investor Protection Provisions Under NAFTA

One of the more controversial provisions in NAFTA (Chapter 11) involves the "investor-to-state" dispute resolution process. This provision provides a vehicle and a forum for corporations and other companies to sue governments directly for what is called "regulatory expropriation," which is similar to **EMINENT DOMAIN** under domestic law. A company may allege regulatory **EXPROPRIATION** in such instances as the actual taking of property by a country through condemnation, or constructive taking by way of laws or regulations that negatively affect the commercial value of a property. In order for a company to bring suit under this provision, it need only show that it is an "investor party."

In *Metalclad Corp. v. Mexico*, a special NAFTA dispute resolutions panel awarded U.S. corporation Metalclad $16.7 million in damages under this provision. In response, Mexico filed an appeal. The decision was then reviewed by a neutral Canadian court, the Supreme Court of the Province of British Columbia, which upheld the decision, but slightly reduced the damages to

$15 million. Both parties withdrew their appeals in 2001.

Metalclad, a U.S. waste-disposal company, requested the creation of the special NAFTA tribunal in 1997, after a local Mexican government condemned property that Metalclad owned. The property in question was a closed toxic-waste dumping site, which Metalclad had purchased, and which the company intended to clean up and reopen. After it purchased the site, Metalclad successfully secured permits for the $20 million project from Mexican federal authorities, including federal environmental agencies, but it had not coordinated with local authorities. Local and state authorities refused to issue permits to Metalclad, claiming that the site was part of a 600,000-acre protected environmental reserve.

Metalclad complained to NAFTA officials, charging that the Mexican government's actions constituted expropriation. Mexico countered that Metalclad had started construction without waiting for all levels of approval. In particular, what angered Mexican authorities was that Metalclad had bypassed local jurisdictional forums and gone directly to NAFTA, claiming $90 million in damages and lost profits. The Canadian court that reviewed the appeal found that the original NAFTA panel, meeting behind closed doors in Washington, had interpreted the NAFTA Chapter 11 investor protection clause too broadly. It disagreed with the panel's decision that federal, state, and local governments in Mexico had issued a series of contradictory declarations to Metalclad, which violated NAFTA's guarantee of clear and transparent rules to protect investors.

By 2001, at least nine companies had invoked NAFTA's investor protection clause to file multimillion-dollar damage claims against the three member countries of NAFTA. Many of them alleged trade-restrictive practices involving environmental regulations. Canada's Methanex Corporation filed a claim against the state of California, charging that the state's ban on the gasoline additive MTBE resulted in company losses of more than $1 billion. Conversely, the U.S.-based Ethyl Corporation was reimbursed $13 million in damages for Canada's restrictions on the importation of the gasoline additive MMT. Another U.S. company, S. D. Myers, sought $20 million in damages against Canada for its ban on importing PCB chemicals.

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CROSS-REFERENCES

Canada and the United States; Mexico and the United States.

## NORTH ATLANTIC TREATY ORGANIZATION

The North Atlantic Treaty Organization (NATO) is a collective security group that was established by the North Atlantic Treaty (34 U.N.T.S. 243) in 1949 to block the threat of military aggression in Europe by the Soviet Union. NATO united Western Europe and North America in a commitment of mutual security and collective SELF-DEFENSE. Its 19 members (as of early 2004)—Belgium, Canada, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom, and the United States—have used NATO as a framework for cooperation in military, political, economic, and social matters.

NATO's military forces are organized into three main commands: the Atlantic Command, the Channel Command, and the Allied Command Europe. During peacetime, the three commands plan the defense of their areas and oversee and exercise the forces of member nations. The supreme Allied commander in Europe directs these units. Every supreme Allied commander through 1997 has been a U.S. general.

NATO established the North Atlantic Council, a nonmilitary policy group, in the 1950s. It is composed of permanent delegates from all member nations and is headed by a secretary-general. It is responsible for general policy, budget issues, and administrative actions. The Military Committee, consisting of the chiefs of staff of the member nations' armed forces, meets twice a year to define military policies and offer advice to the council.

The North Atlantic Treaty calls for the peaceful resolution of disputes, but article 5 pledges the use of the member nations' forces for collective self-defense. During the 1950s Western Europe was concerned about Soviet aggression. Though U.S. troops had been stationed in Europe since the end of WORLD WAR II,

**North Atlantic Treaty Organization**

SOURCE: NATO web page.

the United States and European nations did not have the resources to match the Soviet Army soldier for soldier. Instead the United States stated that it would use NUCLEAR WEAPONS against Soviet aggression in Europe.

In the 1960s the alliance was tested. President Charles de Gaulle of France complained about U.S. domination and control of NATO. In 1966 France expelled NATO troops from its soil and removed its troops from NATO command, but it remained a member of the organization. This action led to the relocation of NATO headquarters from Paris to Brussels.

With the collapse of COMMUNISM in Eastern Europe and in the Soviet Union and with the reunification of Germany, NATO underwent a reassessment period. As of 2003, 100,000 U.S. troops remain stationed in Europe, with another 10,000 troops stationed in Bosnia and Kosovo. In fact, the U.S. maintains the most powerful military force in Europe. Despite this situation, questions persist about the need for NATO in a post-Cold-War world, with critics calling for Europe to shoulder more of its own defense burden.

Despite the criticism, few U.S. leaders have expressed the desire to dismantle NATO. Instead, leaders appear to be seeking a new mission for the organization. Some have suggested that the United States retain a foothold in Europe to insure political stability. Others urge using NATO as a tool to defend western interests outside Europe. Then, too, since September 11, 2001, NATO has taken on an additional role in the "War on Terrorism." As part of the expanded membership and roles envisioned for NATO, the group has opened its membership to former Communist bloc countries of Eastern Europe. Russian leaders have objected to this idea, seeing it as an attempt to end a Russian sphere of influence that has existed for 50 years. In addition, nearly a year after U.S. coalition troops ousted the Taliban, 5,500 NATO troops were sent to Afghanistan to take over peace-keeping duties.

This was the first time that NATO has mobilized a military force outside Europe.

This proposed expansion was met with hostility by Russia. In 1997, Russia entered into an agreement with NATO in which Russia itself accepted a small role in the alliance. This arrangement was an attempt to further thaw relations between Russia and the West. It also helped facilitate former Soviet bloc nations in joining the Western alliance. NATO formally expanded in 1999, when Poland, Hungary, and the Czech Republic joined. That expansion was approved only after long, contentious debate in the U.S. Senate and elsewhere.

In 2002, NATO entered into another new security agreement with Russia that further eased the entry of additional former Warsaw Pact countries into NATO. Under the new arrangement, Russia was given more authority in the new body than in the 1997 informal arrangement set up to nudge Moscow closer to the West. Even so, Russia's future involvement was expected to remain limited to certain areas, including crisis management, peacekeeping, and such military areas as air defense, search-and-rescue operations, and joint exercises.

On March 26, 2003, at NATO Headquarters, a special meeting of the North Atlantic Council was held for the signing of the Protocols of Accession. This ceremony marked the official invitation for joining NATO that was extended to seven countries: Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, and Slovenia. The seven countries were invited to join the Alliance at the NATO Summit in Prague in November 2002. The Protocols of Accession are amendments to the North Atlantic Treaty. When signed and ratified by the 19 NATO member countries, the new agreement will permit the invited countries to become parties to the treaty and members of NATO. From December 2002 to March 2003, a series of meetings were held between NATO and the individual invitees to discuss and formally confirm their interest, willingness, and ability to meet the political, legal, and military commitments of NATO membership.

**FURTHER READINGS**

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**CROSS-REFERENCES**

Cold War; Communism.

## NORTH PACIFIC FISHERIES CONVENTION, 1952

In the 1952 International Convention for the High Seas Fisheries of the North Pacific Ocean, Canada, Japan, and the United States joined together to establish cooperative measures for the conservation of the fishery stock of the North Pacific. The tripartite negotiations resulted in the creation of the International North Pacific Fisheries Commission, which, in addition to its duty to gather and compile information, is responsible for recommending changes in any conservation measures already in place. In limited situations, conservation measures may entail abstention from harvesting some stocks of fish.

**CROSS-REFERENCES**

Fish and Fishing.

## NORTHWEST ATLANTIC FISHERIES CONVENTION, 1949

The Northwest Atlantic Fisheries Convention was held in Washington, D.C., in 1949. Its purpose was to conserve the fishery resources of the North Atlantic. The convention established the International Commission for Northwest Atlantic Fisheries.

**CROSS-REFERENCES**

Fish and Fishing.

## NORTHWEST ORDINANCE

The Northwest Ordinance, officially known as the Ordinance of 1787, created the Northwest Territory, organized its governing structure, and established the procedures by which territories were admitted as states to the Union. It was derived from a proposal by **THOMAS JEFFERSON** concerning the formation of states from the territory acquired as a result of the Revolutionary War. The territory stretched from the Ohio River to the Mississippi River to the area around the Great Lakes and encompassed what is today Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota. The reaction to Jefferson's proposal was mixed, and it was only when the Ohio Company of Associates expressed

interest in purchasing the land that Congress took action.

The ordinance, passed by Congress in July 1787, was significant in providing a framework for the admission of territories into the Union as states. A government composed of a governor, a secretary, and three judges appointed by Congress was established in the region north of the Ohio River. When the population of the territory reached 5,000, the inhabitants were authorized to elect a legislature and to be represented in the House of Representatives by a nonvoting member. When a designated area of the territory had 60,000 residents, that area could seek to become a state by complying with the requirements of the ordinance. Congress required that the territory be divided into at least three but not more than five states. Five states were eventually carved out of the territory.

Aside from the provisions concerning statehood, the Northwest Ordinance had two distinct prohibitions. There was to be no SLAVERY within the boundaries of the territory, and no law could be enacted that would impair a contract.

The Northwest Ordinance was important because it provided the foundation for the creation of later territories within the Union and established the process by which territories became states.

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CROSS-REFERENCES

Territories of the United States.

## ♦ NORTON, ELEANOR HOLMES

Eleanor Holmes Norton is a politician, lawyer, educator, and CIVIL RIGHTS activist. As the District of Columbia's delegate to the U.S. Congress, she expanded the district's power over its own affairs.

Norton, the eldest of three daughters, was born to Coleman Holmes and Vela Holmes on June 13, 1937, in Washington, D.C. Her father was a government employee in the District of Columbia, and her mother was a schoolteacher. Norton grew up in the segregated Washington, D.C., of the 1940s and 1950s and was a member of the last segregated class at Dunbar High School. Norton attended Antioch College, where she participated in many civil rights protests, and she graduated from Yale Law School.

In 1965, Norton became an attorney with the AMERICAN CIVIL LIBERTIES UNION (ACLU), seeking to defend the freedoms of speech, press, and assembly. The clients she represented were not always those she had imagined. Among them were former Alabama governor GEORGE WALLACE, an avowed segregationist, who had been denied a permit to speak at New York City's Shea Stadium, and a group of white supremacists who had been barred from holding a rally. The white supremacists' suit eventually went to the U.S. Supreme Court, where Norton argued it and won (*Carroll v. President of Princess Anne,* 393 U.S. 175, 89 S. Ct. 347, 21 L. Ed. 2d 325 [1968]).

In 1970, Norton became head of the New York City Commission on Human Rights. In 1977, President JIMMY CARTER appointed her to run the federal EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC), which was facing a backlog of nearly 100,000 unsettled AFFIRMATIVE ACTION and discrimination complaints. At the EEOC, Norton initiated a system known as "rapid charge processing," which provided for informal settlement procedures. By late 1980, the backlog had dropped to 32,000 complaints. The National Association for the Advancement of Colored People (NAACP) criticized the agency's emphasis on settling individual complaints rather than attacking broad patterns of discrimination. But Norton argued that only by wiping out the backlog could the EEOC get to these broader issues. By the time she left the agency, it was taking on more sweeping investigations, antidiscrimination guidelines for employers were in place, and the Carter administration was enforcing workplace laws such as the EQUAL PAY ACT OF 1963 (29 U.S.C.A. 206) and the Age Discrimination in Employment Act of 1967 (29 U.S.C.A. 621).

Following Carter's defeat in 1980, Norton moved on to the Urban Institute. In 1982, she joined the law faculty at Georgetown University Law Center, where she wrote widely on civil rights and education issues. In 1990, Norton was elected the nonvoting D.C. delegate in the U.S. House of Representatives. During her first term, she helped the district government to obtain $300 million in new federal aid and a guarantee of steady increases in future aid. She secured

seats on three House committees that greatly affect the district's economy, and she was the only freshman legislator to be invited on a congressional fact-finding mission to the Middle East following the Persian Gulf War.

Norton also sought to increase the power of the D.C. delegate position. The district's delegate to Congress is prohibited by the U.S. Constitution from becoming a full member of the House of Representatives, and had been allowed to vote only in legislative committees. Norton argued that because she could vote in other committees, she should also be allowed to vote in the committee of the whole, where most of the business of the full House is conducted. In February 1993, the House granted Norton and the representatives of four U.S. territories—Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa—a limited vote in the committee of the whole. The voting limitations included a provision that any time the delegates provided a margin of victory for legislation, a second vote would be held, from which the delegates would be excluded. Despite these restrictions, House Republicans filed suit in federal district court, asking that the delegates' right to vote be taken away. In March 1993, U.S. district judge Harold Greene rejected the challenge (*Michel v. Anderson,* 817 F. Supp. 126 [D.D.C.]). The Republicans then appealed the decision to the U.S. Court of Appeals for the District of Columbia Circuit, which upheld the lower court (14 F. 3d 623 [D.C. Cir. 1994]). Norton and the four territorial representatives retained their voting privileges until January 1995, when a new House took them away.

*Eleanor H. Norton.*
JACQUES M. CHENET/CORBIS

Norton's efforts on behalf of the District of Columbia extended outside the House of Representatives. Traditionally, the senior senator from each state, if a member of the president's party, recommends to the president candidates for federal judgeships and U.S. attorney positions. Because the district has no senators, the president alone has made these appointments for it.

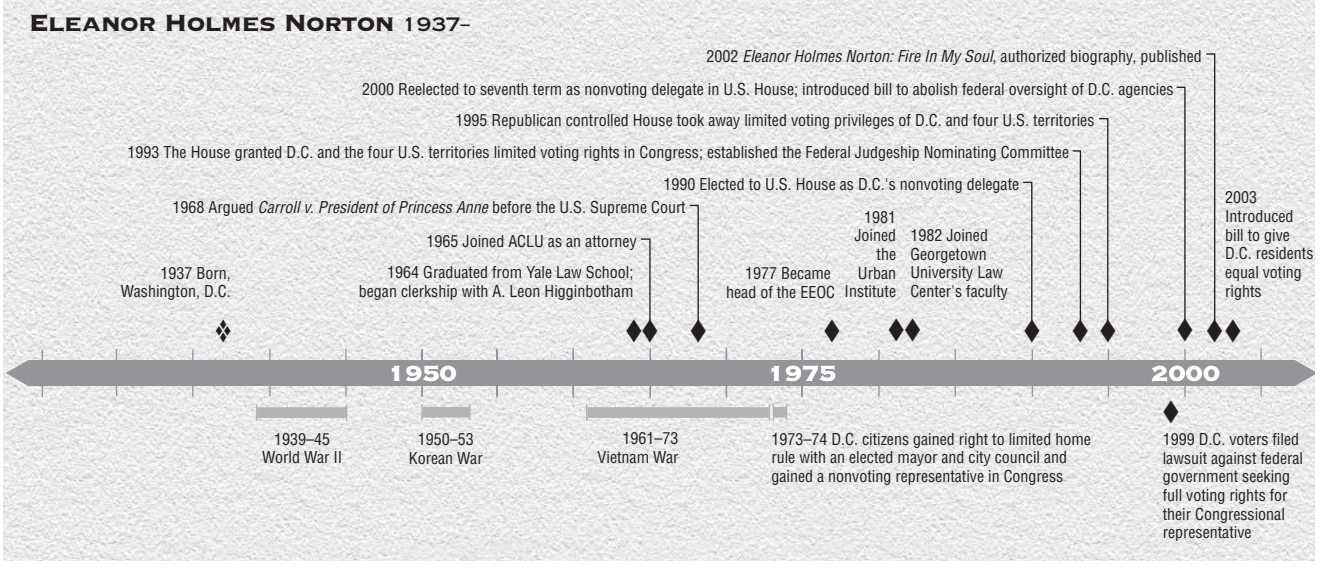

In 1993, Norton convinced President BILL CLINTON to give her the advisory powers reserved for senators and to allow her to nominate candidates for a U.S. attorney position and five federal judgeships, becoming the first district congressional delegate to do so. Norton established the Federal Judicial Nominating Commission, composed of members from the district, to forward recommendations to her. All five of the judges Norton ultimately recommended to the president had been active in D.C. legal circles, and four of them lived in the district.

Norton also continued her predecessors' efforts to obtain statehood for the district. After a three-year effort to bring the issue to the House floor, the measure failed by a vote of 277–153. But Norton said that she would continue her efforts and that she would put new emphasis on gaining support for legislation that would expand the district's limited home rule. Norton also worked for increased federal contributions to the city's PENSION system, for an end to congressional review of the city's budget, and for the right of D.C. residents to choose local judges.

"ON BEHALF OF THE TAXPAYING CITIZENS I REPRESENT, I DEEPLY REGRET THE WITHDRAWAL OF THE VOTE I WON ON THE HOUSE FLOOR JUST TWO YEARS AGO."
—ELEANOR NORTON

In 2003, Norton was serving her seventh term as the Congresswoman for the District of Columbia. She was a member of subcommittees on the House Committee on Government Reform and the House Transportation and Infrastructure Committee, where she has a full vote. She has served as Democratic chair of the Women's Caucus and has served in the Democratic House leadership group. She continues to fight for civil rights and human rights and to advocate strongly for full congressional voting representation for District of Columbia citizens.

Norton has served on numerous boards including the Rockefeller Foundation and the Board of Governors of the D.C. Bar Association. She has received more than 50 honorary degrees.

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CROSS-REFERENCES

District of Columbia.

## NOTARY PUBLIC

*A public official whose main powers include administering oaths and attesting to signatures, both important and effective ways to minimize* FRAUD *in legal documents.*

The origin of notaries public can be traced to ancient Rome, where a notarius was held in high regard as legal counsel. During that era only the few people who knew how to write were qualified to serve as a notarius. A notarius wrote legal documents, including contracts and wills, and retained them for safekeeping. A small fee was charged for those services, a tradition that continued to modern times.

As colonists settled in the New World, most transactions that required an oath or signature attestation were handled in the courts. During that period the few notaries who existed were appointed or elected in a manner similar to the election or appointment of judges. However, as trade with Europe began, the demand for notaries increased because of the large number of bills of exchange that needed to be witnessed. The authority to appoint notaries was transferred to the states, where the SECRETARY OF STATE (or another nonjudicial office) usually acted as the appointer.

In 1983 the Commission on Uniform State Laws passed the Uniform Law on Notarial Acts (14 U.L.A. 125), which covered nearly all aspects of the office of notary public, from the definition of duties to appointment policies. As of the early 2000s, most states use this model law as a basis for their own notary public statutes. These laws vary from state to state, and the amount of power that a state gives to notaries can depend on its history. For example, Louisiana was a French possession and used a civil code rather than a COMMON LAW. It gives its notaries broad powers—almost equal to those of a JUSTICE OF THE PEACE. In Louisiana notaries' powers include making "inventories, appraisements, and partitions; . . . all contracts and instruments of writing; [and holding] family meetings and meetings of creditors . . ." (La. Rev. Stat. Ann. § 35:2 [1996]).

California also gives notaries additional powers, allowing them to "demand acceptance and payment of foreign and inland bills of exchange, or promissory notes, to protest them for nonacceptance and nonpayment" (Cal. Gov't. Code § 8205 [West 1997]).

In some cases the notary responsible for a transaction has an invalid commission because of a technicality. If the notary already witnessed and completed the transaction before becoming aware of the problem, the transaction is still considered valid.

Notaries public have two main duties that remain consistent from state to state. Perhaps the most important duty of a notary public is attesting to signatures on documents. This duty is important because it aids in minimizing fraud; signature attestation must be done with the notary and the signatory in a face-to-face setting.

The process of notarizing a signature is simple. The person who wants his or her signature notarized must present sufficient evidence to prove his or her identity and then sign the necessary document with the notary as a witness to the signing. The notary completes the process by stamping or sealing, dating, and signing the document. This face-to-face procedure helps ensure the authenticity of the signature.

A notary public may also administer oaths in depositions or other situations. Even though this type of oath may not take place in court, the witness can still be held accountable and be punished for perjury.

In Ohio a notary can also hold an affiant in CONTEMPT if he or she is a reluctant witness. In the U.S. Supreme Court case of *Bevan v. Krieger,* 289 U.S. 459, 53 S. Ct. 661, 77 L. Ed. 1316 (1933), a notary public held a witness in contempt because he refused to comply with the requirements of the subpoena he was served. The court ruled that the notary was acting within his powers when he held the witness in contempt.

To become a notary, a candidate must complete several steps. A candidate must fill out an application and submit it to the appropriate government agency, usually the respective state's department of the secretary of state or the U.S. DEPARTMENT OF STATE. As part of the application procedure, the candidate must also take an oath of office and submit a bond. The purpose of the bond is to offer a small amount of monetary insurance in case the notary is sued. On average, notarial bonds are less than $5,000. If a notary is sued for more money than the amount of the bond, the notary is still personally liable for the difference between the bond and the sum awarded to the plaintiff.

Once an application is approved and the notary is commissioned, the notary must register in the county in which he or she resides and pay a registration fee. The commission itself has a time limit, which can range from two to ten years, with an average limit of four years. To renew the commission, the notary must repeat the application process.

Most states require that a notary be at least 18 years old and be able to read and write English. However, the latter requirement may change in the future because of the increasing number of transactions that take place in languages other than English. Some states require potential notaries to pass an exam as part of the application process. Others may require a notary to keep a detailed journal of the transactions he or she officiates.

Until 1984 many states required that a notary be a U.S. citizen or a resident of the state in which he or she would serve as a notary, or both. However, in *Bernal v. Fainter,* 467 U.S. 216, 104 S. Ct. 2312, 81 L. Ed. 2d 175 (1984), the U.S. Supreme Court ruled that requiring a notary to be a U.S. citizen was unconstitutional under the Fourteenth Amendment's EQUAL PROTECTION CLAUSE. Therefore, even though the plaintiff in the case was actually a Mexican native and longtime resident alien, it was unconstitutional to deny him a notarial commission simply because he was not a U.S. citizen. Despite this ruling many states have kept the U.S. citizenship requirement in their statutes.

Another challenge to the procedure for becoming a notary occurred in the case of *Torasco v. Watkins,* 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961). In this case, an atheist objected to Maryland's notary public oath, which required him to acknowledge a belief in God. When his notary commission was denied, he sued. The case went to the U.S. Supreme Court, which ruled that, under both the Maryland Constitution and the U.S. Constitution, it was "repugnant" for an oath to require a belief in God.

Notaries can only be held liable for actions they take while performing the notary function. For example, although notaries are responsible for attesting to the validity of a signature, they are not responsible for the validity of the document. It is not considered MALPRACTICE for a notary to attest to a signature on a document that he or she knows is invalid.

A notary must "act as a reasonably prudent notary would act in the same situation." In an action against a notary, the BURDEN OF PROOF is on the plaintiff to show that the notary acted negligently. If the plaintiff meets this burden, the notary can be held personally liable for damages to all parties involved, including third parties.

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CROSS-REFERENCES

Fraud; Signature.

## NOTE

*To take notice of. A* COMMERCIAL PAPER *that contains an express and absolute promise by the maker to pay to a specific individual, to order, or to bearer a definite sum of money on demand or at a specifically designated time.*

## NOTES OF DECISIONS

*Annotations; concise summaries and references to the printed decisions of cases that are designed to explain particular* RULES OF LAW *or applicable sections of statutes.*

## NOTICE

*Information; knowledge of certain facts or of a particular state of affairs. The formal receipt of papers that provide specific information.*

There are various types of notice, each of which has different results. In general, notice deals with information that a party knows or should have known. In this context notice is an essential element of DUE PROCESS. Notice can also refer to commonly known facts that a court or ADMINISTRATIVE AGENCY may take into evidence.

Actual notice is information given to the party directly. The two kinds of actual notice are express notice and implied notice. An individual is deemed to have been given express notice when he or she actually hears it or reads it. Implied notice is deduced or inferred from the circumstances rather than from direct or explicit words. Courts will treat such information as though actual notice had been given.

Constructive notice is information that a court deems that an individual should have known. According to a RULE OF LAW that applies in such cases, the court will presume that a person knows the information because she could have been informed if proper diligence had been exercised. Constructive notice can be based on a legal relationship as well. For example, in the law governing partnerships, each partner is deemed to have knowledge of all the partnership business. If one partner engages in dishonest transactions, the other partners are presumed to know, regardless of whether they had actual knowledge of the transaction. The term *legal notice* is sometimes used interchangeably with constructive notice.

In certain cases involving the purchase of real property, an individual is charged with inquiry notice. When an individual wishes to purchase land, he ordinarily has the duty under the recording acts to check the title to the property to determine that the land is not subject to any encumbrances, which are claims, liens, mortgages, leases, EASEMENTS or right of ways, or unpaid taxes that have been lodged against the real property. In some situations, however, the individual must make a reasonable investigation outside of the records, such as in cases involving recorded but defective documents. This type of notice is known as inquiry notice.

Some states have notice recording statutes that govern the RECORDING OF LAND TITLES. Whereas inquiry notice deals with looking closely at documents that have been recorded, notice recording statutes state that an unrecorded conveyance of property is invalid against the title bought by a subsequent bona fide purchaser for value and without notice. This means that if John purchases a piece of land on a contract for deed from Tom and does not record the contract for deed, and if Tom resells the land to Jill, who has no notice of the prior sale, then Jill as a bona fide purchaser will prevail, and John's conveyance will be invalid.

The concept of notice is critical to the integrity of legal proceedings. Due process requires that legal action cannot be taken against anyone unless the requirements of notice and an opportunity to be heard are observed.

Legal proceedings are initiated by providing notice to the individual affected. If an individual is accused of a crime, he has a right to be notified of the charges. In addition, formal papers must be prepared to give the accused notice of the charges.

*A sample notice of motion or objection*

## Notice of Motion

**Form 20A. Notice of Motion or Objection**

*[Caption as in Form 16A.]*

**NOTICE OF [MOTION TO ] [OBJECTION TO ]**

_____has filed papers with the court to [relief sought in motion or objection].

**Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)**

If you do not want the court to [relief sought in motion or objection], or if you want the court to consider your views on the [motion] [objection], then on or before _____ , you or your attorney must:
(date)

[File with the court a written request for a hearing {or, if the court requires a written response, an answer, explaining your position} at:

_____
{address of the bankruptcy clerk's office}

If you mail your {request}{response} to the court for filing, you must mail it early enough so the court will receive it on or before the date stated above.

You must also mail a copy to:

_____
{movant's attorney's name and address}

_____
{names and addresses of others to be served}]

[Attend the hearing scheduled to be held on _____ , _____ , at
(date) (year)
_____a.m./p.m. in Courtroom _____ , United States Bankruptcy Court,

_____.]
{address}

[Other steps required to oppose a motion or objection under local rule or court order.]

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

Date: _____

Signature: _____

Name: _____

Address: _____

_____

**Form B20A (Official Form 20A)**
**(9/97)**

An individual who is being sued in a civil action must be provided with notice of the nature of the suit. State statutes prescribe the method of providing this type of notice. Courts are usually strict in requiring compliance with these laws, and ordinarily a plaintiff must put this information into a complaint that must be served upon the defendant in some legally adequate manner. The plaintiff may personally serve the complaint to the defendant. When that is not practical, the papers may be served through the mail. In some cases a court may allow, or require, service by posting or attaching the papers to the defendant's last known address or to a public place where the defendant is likely to see them. Typically, however, notice is given by publication of the papers in a local newspaper. When the defendant is not personally served, or is formally served in another state, the method of service is called substituted service.

Notice is also critical when suing a state or local government. Many states and municipalities have notice of claim provisions in their statutes and ordinances that state that, before a lawsuit is started, a notice of claim must be filed within a reasonable time, usually three to six months after the injury occurs. The notice must contain the date of injury, how it occurred, and other facts that establish that the prospective plaintiff has a viable CAUSE OF ACTION against the government. Failure to file a notice of claim within the prescribed time period prevents a plaintiff from filing a lawsuit unless exceptions to this requirement are provided by statute or ordinance.

Notice is also an important requirement in ending legal relationships. For example, a notice to quit is a written notification given either by the tenant to the landlord, or vice versa, indicating that either the tenant intends to surrender possession of the premises on a certain day or that the landlord intends to regain possession of the premises on a certain day. Many kinds of contracts require that similar notice be given to either renew or end the contractual relationship.

Notice may also refer to commonly known facts that a court or administrative agency may take into evidence during a trial or hearing. JUDICIAL NOTICE is a doctrine of evidence that allows a court to recognize and accept the existence of a commonly known fact without the need to establish its existence by the admission of evidence. Courts take judicial notice of historical events, federal, state, and international laws, business customs, and other facts that are not subject to reasonable dispute.

Administrative proceedings use the term *official notice* to describe a doctrine similar to judicial notice. A presiding administrative officer recognizes as evidence, without proof, certain kinds of facts that are not subject to reasonable dispute. Administrative agencies, unlike courts, have an explicit legislative function as well as an adjudicative function: they make rules. In rule making, agencies have wider discretion in taking official notice of law and policy, labeled *legislative facts.*

CROSS-REFERENCES

Due Process of Law; Legislative Facts; Personal Service; Recording of Land Titles; Registration of Land Titles; Service of Process; Title Search.

## NOVATION

*The substitution of a new contract for an old one. The new agreement extinguishes the rights and obligations that were in effect under the old agreement.*

A novation ordinarily arises when a new individual assumes an obligation to pay that was incurred by the original party to the contract. It is distinguishable from the situation that occurs when another individual makes a guarantee that a debtor will pay what he or she owes to a creditor. In the case of a novation, the original debtor is totally released from the obligation, which is transferred to someone else. The nature of the transaction is dependent upon the agreement between the parties.

A novation also takes place when the original parties continue their obligation to one another, but a new agreement is substituted for the old one.

## NUCLEAR NONPROLIFERATION TREATY

The Nuclear Nonproliferation Treaty (NPT), formally called the Treaty on the Nonproliferation of Nuclear Weapons, is the cornerstone of the international effort to halt the proliferation, or spread, of NUCLEAR WEAPONS (*State Department, United States Treaties and Other International Agreements,* Vol. 21, part 1 [1970], pp. 483–494). The NPT was first signed in 1968 by three nuclear powers —the United States, the Soviet Union, and the United Kingdom—and by nearly 100 states without nuclear weapons. It

*A sample novation*

## Novation

**NOVATION AGREEMENT**

Agreement made _____ (date) between and among the following parties:

1. Seller: _____ (name), of _____ (address), _____ (city), _____ (county), _____ (state), referred to here as seller.

2. Buyer: _____ (name), of _____ (address), _____ (city), _____ (county), _____ (state), referred to here as buyer.

3. Party in Substitution: _____ (name), of _____ (address), _____ (city), _____ (county), _____ (state), referred to here as party in substitution.

SECTION ONE:

CONTRACT SUBJECT TO THIS AGREEMENT

This novation agreement is entered into with reference to a contract of sale entered into between seller and buyer, dated _____ _____, involving the sale of the following goods: _____ _____.

A copy of the contract of sale, marked Exhibit _____, is attached to this agreement.

SECTION TWO:

NOVATION AGREEMENT

It is agreed by all parties in this novation agreement that party in substitution shall be substituted for _____ (buyer or seller) in the above-referenced contract of sale. Party in substitution shall acquire all the rights and become obligated to perform all the duties of _____ (buyer or seller) that are here fully assigned and delegated to party in substitution, who undertakes full performance of the above-referenced contract of sale in the place of _____ (buyer or seller) and makes a separate promise to faithfully and fully so perform.

SECTION THREE:

RELEASE OF BUYER OR SELLER FROM LIABILITIES

In consideration of this novation, _____ (buyer or seller) shall be relieved of any and all further obligations to perform under the above-referenced contract of sale and shall be fully relieved of further liability to any other party to this novation agreement arising out of the above-referenced contract of sale.

In witness whereof, the parties have executed this agreement at _____ (designate place of execution) the day and year first above written.

_____
Signature

_____
Signature

came into force in 1970, and by the mid 1990s it had been signed by 168 countries.

The NPT distinguishes between nuclear-weapon states and non-nuclear-weapon states. It identifies five nuclear-weapon states: China, France, the Soviet Union, the United Kingdom, and the United States.

Article II forbids non-nuclear-weapon states that are parties to the treaty to manufacture or otherwise acquire nuclear weapons or nuclear explosive devices. Article III concerns controls and inspections that are intended to prevent the diversion of nuclear energy from peaceful uses to nuclear weapons or explosive devices. These safeguards are applied only to non-nuclear-weapon states and only to peaceful nuclear activities. The treaty contains no provisions for verification of the efforts by nuclear-weapon states to prevent the proliferation of nuclear weapons.

Under the provisions of Article IV, all parties to the treaty, including non-nuclear-weapon states, may conduct nuclear research and development for peaceful purposes. In return for agreeing not to develop nuclear weapons, non-nuclear-weapon states receive two promises from nuclear-weapon states: the latter will help them to develop nuclear technology for peaceful purposes (Art. IV), and the latter will "pursue negotiations in GOOD FAITH on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament" (Art. VI) (as quoted in U.S. Arms Control and Disarmament Agency 1982, 93).

Since 1975, NPT signatory countries have held a review conference every five years to discuss treaty compliance and enforcement.

North Korea has caused international concerns since 1993, with its attempts to develop a nuclear arsenal. In 1993, North Korea announced that it would withdraw from the NPT, only to rescind its withdrawal shortly thereafter. In 1994, North Korea and the United States entered into an agreement whereby the United States agreed to provide power supplies and other necessities in exchange for North Korea's promise not to pursue the development of nuclear weapons. However, in October 2002, North Korea announced that it would resume its program to develop these weapons. On January 10, 2003, it announced again that it would withdraw from the treaty, effective the following day. Although the NPT requires that nations adhere to a three-month waiting period to withdraw from the treaty, North Korea claimed that it had already done so, for it originally had announced its withdrawal in 1993. North Korea's attempts to develop nuclear weapons have brought crisis to that region, and South Korea and Japan have sought U.S. assistance to resolve the crisis through diplomacy.

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CROSS-REFERENCES

Arms Control and Disarmament.

## NUCLEAR POWER

*A form of energy produced by an atomic reaction, capable of producing an alternative source of electrical power to that supplied by coal, gas, or oil.*

The dropping of the atom bomb on Hiroshima, Japan, by the United States in 1945 initiated the atomic age. Nuclear energy immediately became a military weapon of terrifying magnitude. For the physicists who worked on the atom bomb, the promise of nuclear energy was not solely military. They envisioned nuclear power as a safe, clean, cheap, and abundant source of energy that would end society's dependence on fossil fuels. At the end of WORLD WAR II, leaders called for the peaceful use of nuclear energy.

Congress passed the Atomic Energy Act of 1946 (42 U.S.C.A. §§ 2011 et seq.), which shifted nuclear development from military to civilian government control. Very little development of commercial nuclear power occurred from 1946 to 1954 because the 1946 law maintained a federal government MONOPOLY over the control, use, and ownership of nuclear reactors and fuels.

Congress amended the Atomic Energy Act in 1954 (68 Stat. 919) to encourage the private commercial development of nuclear power. The act ended the federal government's monopoly over nonmilitary uses of nuclear energy and allowed private ownership of reactors under licensing procedures established by the Atomic

Energy Commission (AEC). Private power companies did not rush to build nuclear power plants because they feared the financial consequences of a nuclear accident. Congress responded by passing the Price-Anderson Act of 1957 (42 U.S.C.A. § 2210), which limited the liability of the nuclear power industry and assured compensation for the public. With the passage of the Price-Anderson Act, power companies began to build nuclear plants.

At first, nuclear power was attractive largely because the demand for electricity grew at a steady rate in the 1960s and coal-burning facilities were becoming an environmentally unacceptable alternative. The high price of oil during the mid-1970s continued to make nuclear power economically desirable and helped keep nuclear energy a prominent part of national energy plans. By the 1990s, approximately 110 nuclear plants were operating in the United States, supplying 20 percent of the nation's electricity.

A nuclear reactor produces energy through a chain reaction that splits a uranium nucleus, releasing energy in the form of heat. Fast breeder reactors, which use plutonium as fuel, generate more energy than they expend. Plutonium is not a natural element. It must be recycled from the excess uranium produced from a chain reaction. The radioactivity of plutonium is higher and its life is longer than that of any other element. Because of these characteristics, the public became concerned about the safety of its development and use.

Until 1969, the AEC did not have a formal process for evaluating the environmental impact of building nuclear power plants. In that year Congress passed the NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 (42 U.S.C.A. §§ 4321–4370), which required environmental impact statements for all major federal activities. In the 1970s, the temper of nuclear regulation changed. People were no longer complacent about nuclear power safety or convinced by environmental claims made by industry and government.

This lack of public trust centered on the role of the AEC as both a promoter of nuclear technology and a regulator of the nuclear power industry. In 1974, realizing the cross purposes of promotion and safety, Congress passed the Energy Reorganization Act (42 U.S.C.A. §§ 5801–5879), which created two agencies with different missions. The NUCLEAR REGULATORY COMMISSION (NRC) is an independent agency responsible for safety and licensing. The Energy Research and Development Administration (ERDA), later absorbed into the ENERGY DEPARTMENT, is responsible for promotion and development of nuclear power. This alignment did not completely remove fundamental regulatory conflict for the NRC, because the agency is responsible both for licensing plants and for safety oversight. If the NRC is too vigorous in exercising its safety role, the resulting compliance costs act as a disincentive to invest in nuclear plants.

A nuclear facility cannot be built without a construction permit issued by the NRC. An environmental impact statement that assesses the effect the facility will have on the environment must also be filed with the ENVIRONMENTAL PROTECTION AGENCY (EPA). Once built, a nuclear plant must operate pursuant to a license from the NRC. A license requires that the facility use the lowest levels of radiation necessary to reasonably and efficiently maintain operations. The NRC also issues licenses for the use of nuclear materials, for transportation of nuclear materials, and for the export and import of nuclear materials, facilities, and components.

Nuclear power regulation is highly centralized in the federal government when nuclear

**Nuclear Power Generation in the United States, 1965 to 2000**

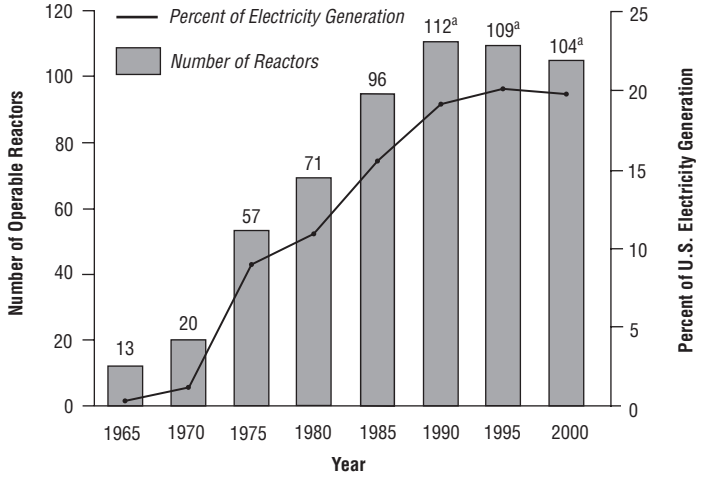


[a]Includes Browns Ferry 1, which was shut down in 1985. The unit is defueled but is still fully licensed. In May 2002, the Tennessee Valley Authority announced its intention to have the unit resume operation in 2007.

SOURCE: U.S. Energy Information Administration, *Annual Energy Review*.

safety and radiological hazards are at issue. States may address the financial capability of power companies to dispose of waste and may define state TORT liability for injuries suffered at nuclear facilities.

Public confidence in the nuclear power industry suffered a major blow in 1979 when an accident occurred at the Three Mile Island Nuclear Station near Harrisburg, Pennsylvania. No one was hurt during the accident although radioactive gases escaped through the plant's ventilating system. The accident did reveal, however, the nuclear power industry's lack of emergency preparedness. Following the incident, the NRC increased safety inspections, stepped up enforcement, required the retrofitting of systems to enhance safety, and developed emergency preparedness rules. These regulations delayed the opening of new nuclear plants during the early 1980s.

In 1986, however, the safety of nuclear power again was challenged when a nuclear reactor exploded at Chernobyl in the Ukraine. Radiation 50 times higher than that at Three Mile Island exposed people nearest the reactor, and a cloud of radioactive fallout spread to Western Europe, causing the deaths of more than 30 people. People the world over questioned the logic of using such a volatile energy source.

Nuclear power also became less attractive to energy companies in the 1980s. The problem of disposing of nuclear waste became the focal point for the industry. Congress passed the Nuclear Waste Policy Act of 1982 (42 U.S.C.A. §§ 10101-10226), which directed the Department of Energy to formally begin planning the disposal of nuclear wastes and imposed most of the costs of disposal on the industry. The escalating costs of waste disposal helped bring construction of new nuclear facilities to a stop.

The problem of what to do with nuclear waste has proved difficult to solve. Nuclear material is contained in fuel rods. When spent fuel rods and other waste products fill the storage capacity at utility plants, the plants must either expand their storage capacity or find permanent off-site storage. Developing permanent nuclear waste sites is imperative because nuclear waste continues to accumulate. In addition, more than one hundred of the nuclear power facilities must be permanently shut down between 2010 and 2025 because their equipment and infrastructure will no longer be safe. This will entail removing most radioactive elements within each plant's nuclear reactor and then razing the entire plant.

The federal government has encountered political controversy and public opposition in its attempt to identify potential permanent nuclear waste sites. Since 1986 it has been unsuccessful in finding an acceptable site. Yucca Mountain, Nevada, has been earmarked as a nuclear waste repository, against the objections of citizens of Nevada and other advocacy groups. In January 2002, Secretary of Energy Spencer Abraham sent a letter to Nevada Governor Kenny C. Guinn notifying Guinn that Abraham had recommended to President GEORGE W. BUSH the development of the Yucca Mountain site. Guinn responded that the decision was premature and that further testing was necessary. When Bush approved the development of the site, Guinn vetoed, thus sending the issue to Congress.

The House and Senate both passed resolutions in 2002 with significant majorities approving the development of the Yucca Mountain site. The Energy Department must apply for a license from the NRC in order to construct the site; the application is not expected to be filed until 2004. The state of Nevada filed lawsuits against Abraham, President Bush, the DOE, the NRC, and the Environmental Protection Agency, seeking to block the future development of this site.

The commercial prospects for nuclear energy have faded. The decommissioning of nuclear plants in the early twenty-first century will be a huge undertaking. The cost, per plant, will be more than one billion dollars. Utility customers will pay for the costs in higher utility rates, but power companies will have to devote significant amounts of time, energy, and money to complete the process.

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#### CROSS-REFERENCES

Energy Department; Environmental Law; Public Utilities; Solid Wastes, Hazardous Substances, and Toxic Pollutants.

## NUCLEAR REGULATORY COMMISSION

The Nuclear Regulatory Commission (NRC) is an independent regulatory agency that oversees the civilian use of NUCLEAR POWER in the

**Nuclear Regulatory Commission**

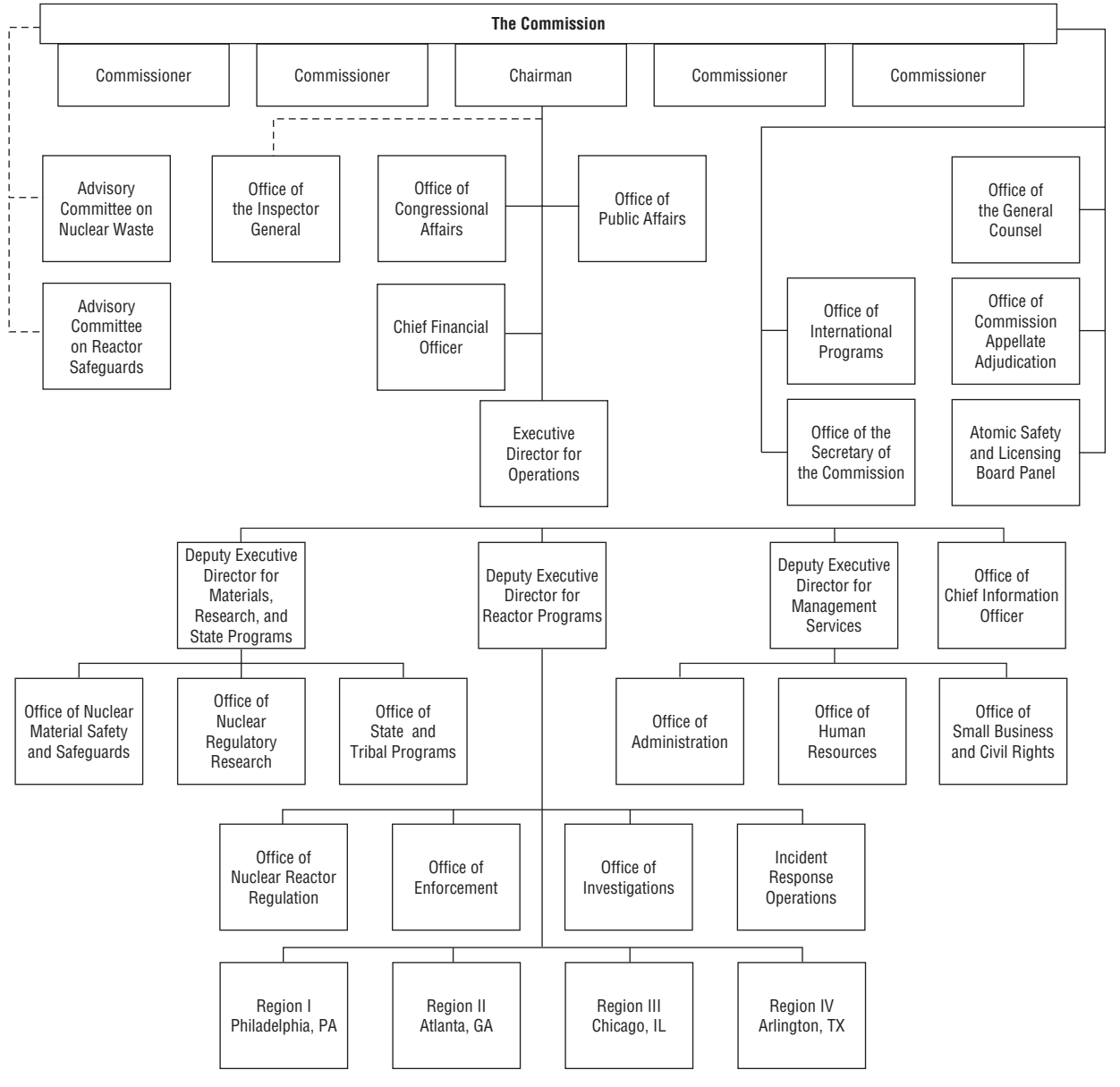


United States. It licenses and regulates the uses of nuclear energy to protect public health and safety, and the environment. The NRC's prime responsibility is to ensure that the more than 100 commercial nuclear power plants in the United States conform to its regulations. It also regulates the use of nuclear materials in the diagnosis and treatment of cancer, in sterilizing instruments, in smoke detectors, and in gauges used to detect explosives in luggage at airports.

The NRC was established under the provisions of the Energy Reorganization Act of 1974 (42 U.S.C.A. §5801) and EXECUTIVE ORDER No. 11,834 of January 15, 1975 (40 Fed. Reg. 2971). These actions dissolved the Atomic Energy Commission (AEC) and transferred the AEC's licensing and regulatory functions to the NRC. The AEC, which had both regulated and promoted nuclear power, fell out of favor because of these conflicting roles. Congress believed that

the NRC, which has only a regulatory function, would better protect public health and safety, because it has no direct interest in the promotion of nuclear energy. The 1974 act also created the Energy Research and Development Administration (ERDA) to handle the promotion of nuclear energy. This agency became part of the ENERGY DEPARTMENT in 1977.

NRC headquarters are located in Rockville, Maryland. There are also four regional offices. The NRC is composed of five members, all of whom are appointed by the president. One member is designated as chairman and spokesperson. Policies and decisions of the commission are carried out by the Executive Director for Operations, who also oversees the various NRC offices, including the Office of Nuclear Reactor Regulation, the Office of Nuclear Material Safety and Safeguards, the Office of Nuclear Regulatory Research, the Office of Investigations, and the Office of Enforcement.

NRC fulfills its responsibilities through a system of licensing and regulation. The Office of Nuclear Reactor Regulation licenses the construction and operation of nuclear reactors and other nuclear facilities. It regulates site selection, design, construction, operation maintenance, and the decommissioning of facilities.

The Office of Nuclear Material Safety and Safeguards licenses and regulates the processing, handling, and transportation of nuclear materials. This office ensures the safe disposal of nuclear waste and is responsible for reviewing and assessing the safeguards against potential threats, thefts, and sabotage for all licensed facilities.

The Office of Nuclear Regulatory Research performs research to confirm reactor safety and to confirm the implementation of established safeguards and environmental protection policies. This office develops regulations, criteria, guides, standards, and codes that govern health, safety, the environment, and safeguards that pertain to all aspects of nuclear facilities.

Policies and procedures for investigating nuclear power licensees and contractors are developed by the NRC's Office of Investigations. The Office of Enforcement ensures that NRC requirements are enforced. The office has the power to give violation notices, enforce fines, and order license modification, suspension, or revocation.

In 1979, the credibility of the NRC, and the nuclear power industry in general, was questioned after an accident took place at the Three Mile Island nuclear power plant near Harrisburg, Pennsylvania. Almost half of the reactor's core melted, and radioactive steam escaped, but no major injuries were reported. NRC responded by reexamining safety requirements and imposing new regulations to correct deficiencies. It also required each nuclear plant to create a plan for evacuating the population within a ten-mile radius of the plant in the event of a reactor accident. Plant owners must work with state and local police, fire, and civil defense authorities to devise an emergency plan that is then tested and evaluated by the NRC and the FEDERAL EMERGENCY MANAGEMENT AGENCY.

Another issue of concern to the public and to the nuclear power industry is the problem of radioactive waste. The NRC has pressed Congress for a solution to this problem. As nuclear power plants age they accumulate spent nuclear fuel rods. On-site temporary storage at these facilities turned into long-term storage, which raised safety concerns with the NRC as early as the 1970s. The Nuclear Waste Policy Act of 1982 (42 U.S.C.A. §§ 10101-10226), authorized a study of possible storage sites. In 1987, Congress amended the act, directing that Yucca Mountain, Nevada, be studied as the only permanent storage site for nuclear waste. Yucca Mountain is located 90 miles northwest of Las Vegas. The law gave the state of Nevada VETO authority over approving the site, subject to a congressional override. The NRC and the Energy Department endorsed the Yucca Mountain site as geologically sound and capable of safely storing the waste for the thousands of years it will remain radioactive. However, political controversy in Congress and Nevada stalled a decision.

The nuclear power industry lobbied the Bush administration for approval of Yucca Mountain and, in 2002, the Energy Department and President GEORGE W. BUSH formally endorsed the storage site plan. The state of Nevada formally vetoed the site; Congress had 90 days to overrule the decision. In July 2002, Congress overturned the decision and authorized the spending of $69 billion to prepare Yucca Mountain to receive thousands of tons of nuclear waste currently at power plant sites around the United States.

The fear of TERRORISM played a part in the Yucca Mountain decision, as Congress expressed alarm that a terrorist might be able to steal or obtain spent radioactive material stored at power plant sites. Following the SEPTEMBER

11TH ATTACKS in 2001, the NRC launched a review of nuclear power plants to determine if there were security risks. The commission concluded that the heavy concrete construction of nuclear facilities made it highly unlikely that a Three Mile Island episode could occur if a terrorist flew a hijacked plane into a facility. However, during heightened terrorist alert periods the NATIONAL GUARD and local law enforcement agents now routinely patrol nuclear plants.

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CROSS-REFERENCES

Environmental Law; Public Utilities; Solid Wastes, Hazardous Substances, and Toxic Pollutants.

## NUCLEAR WEAPONS

*Weapons of mass destruction that are powered by nuclear reaction. Types of nuclear weapons include atom bombs, hydrogen bombs, fission bombs, and fusion bombs.*

The actions of countries in times of war are governed by INTERNATIONAL LAW that constantly changes with advancements in weapons technology. There is not, however, an international law that specifically addresses the use of nuclear weapons. The Geneva Conventions, in 1949, outlined rules to protect populations during armed conflict. They require distinguishing between civilians and soldiers, and prohibit indiscriminate methods of attack that are not directed at a specific military target. The conventions also prohibit weapons that cause unnecessary injury and those that cause long-term and severe environmental damage. Specific types of weapons are not mentioned. Many believe that given the extremely destructive power of nuclear weapons, they should be specifically prohibited. These critics contend that the use of nuclear weapons clearly violates international humanitarian law regarding armed conflict.

To clarify this issue, the United Nations General Assembly asked the INTERNATIONAL COURT OF JUSTICE (ICJ) for an ADVISORY OPINION regarding the legality of the threat or use of nuclear weapons. The opinion of the ICJ, handed down on July 8, 1996, is the most authoritative statement regarding the legality of nuclear weapons under international law. The ICJ concluded unanimously that the threat or use of such weapons should be consistent with existing international laws. The ICJ did not declare such weapons specifically illegal, but did state that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, leaving the issue of SELF-DEFENSE open.

Advocates of nuclear disarmament contend that based on this ruling of the ICJ, the threat or use of nuclear weapons violates U.S. as well as international law. Article VI of the United States Constitution states, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." The reasoning is that since the threat or use of nuclear weapons violates international treaties that the United States has signed and ratified (e.g., the GENEVA CONVENTION), then the threat or use of these weapons should be illegal.

Since the ICJ opinion was delivered in 1996, direct actions by the public in support of nuclear disarmament have increased. Some courts have recognized the legality of such actions. In October 1999, a Scottish judge dismissed a case against three women who had caused damage at a base, which was part of a Trident nuclear submarine defense program. The judge cited the ICJ opinion and claimed that the women were justified in their actions because they were attempting to thwart the use of illegal weapons. In June 1999, a jury in the state of Washington found four activists not guilty of blocking traffic into a Trident nuclear submarine base. The court relied on international law, including the ICJ opinion.

The one international treaty that attempts to safeguard against the threat of nuclear weapons is the NUCLEAR NON-PROLIFERATION TREATY (NPT). Under the treaty, the possession of nuclear weapons is prohibited by all states, except for the Nuclear Weapon States (NWS). The treaty defines an NWS as one that had manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967, which limits membership to the

United States, the former Soviet Union (and its successor state, Russia), the United Kingdom, France, and China. Those few states possessing nuclear weapons are under obligation, as set forth in Article VI of the NPT, to "pursue negotiations in GOOD FAITH on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament."

While the Nuclear Weapon States pledged to negotiate nuclear disarmament, the Non-Nuclear Weapon States (NNWS) pledged not to acquire nuclear weapons. As an incentive, the NNWS were promised assistance with research, production, and use of nuclear energy for peaceful purposes "without discrimination." Each NNWS also agreed to accept safeguards under the auspices of the INTERNATIONAL ATOMIC ENERGY AGENCY. These safeguards do not apply to the NWS.

The NPT was signed in 1968, and entered into force in 1970. Its initial duration was 25 years. In 1995, it was extended indefinitely, with a review conference to be held every five years. Nearly every country in the world, 188 total, is a party to the NPT, with three notable exceptions: India, Israel, and Pakistan. Each of these countries possesses nuclear weapons. Under the ICJ opinion, however, the obligation to negotiate elimination of nuclear arsenals applies to those states as well as the NWS.

Nuclear waste storage has also become an issue. High level radioactive waste is generally material from the core of a nuclear reactor or nuclear weapon. This waste includes uranium, plutonium, and other highly radioactive elements made during fission. Most of these elements have extremely long half-lives (some longer than 100,000 years), which means it will be a long time before the waste will settle to safe levels of radioactivity.

In 1982, Congress enacted legislation in the hopes of solving the problem of nuclear waste disposal in the United States. The Nuclear Waste Policy Act (42 U.S.C.A. §§ 10101-10226) made the U.S. ENERGY DEPARTMENT responsible for finding a site and building and operating an underground disposal facility called a geologic repository. The recommendation to use a geologic repository dates back to 1957 when the National Academy of Sciences recommended that the best means of protecting the environment and public health and safety would be to dispose of the waste in rock deep underground.

Based on Energy Department findings, three sites were designated as possible repositories: Hanford, Washington; Deaf Smith County, Texas; and Yucca Mountain, Nevada. In 1987, Congress amended the Nuclear Waste Policy Act and directed the Energy Department to study only Yucca Mountain. Yucca Mountain is located in a remote desert approximately ninety miles northwest of Las Vegas, Nevada. On July 23, 2002, President GEORGE W. BUSH signed House Joint Resolution 87, allowing the Energy Department to take the next steps in establishing a repository. The state of Nevada and the city of Las Vegas filed a number of suits against the Energy Department and various other federal entities. These suits challenge such things as the lack of compliance with the Nuclear Waste Policy Act and faulty design of the proposed facility.

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CROSS-REFERENCES

Energy Department; Nuclear Power; Nuclear Regulatory Commission.

## NUDUM PACTUM

See NAKED CONTRACT.

## NUGATORY

*Invalid; lacking legal force. A statute is nugatory if it has been declared unconstitutional.*

## NUISANCE

*A legal action to redress harm arising from the use of one's property.*

The two types of nuisance are private nuisance and public nuisance. A private nuisance is a civil wrong; it is the unreasonable, unwarranted, or unlawful use of one's property in a manner that substantially interferes with the

enjoyment or use of another individual's property, without an actual TRESPASS or physical invasion to the land. A public nuisance is a criminal wrong; it is an act or omission that obstructs, damages, or inconveniences the rights of the community.

### Public Nuisance

The term *public nuisance* covers a wide variety of minor crimes that threaten the health, morals, safety, comfort, convenience, or welfare of a community. Violators may be punished by a criminal sentence, a fine, or both. A defendant may also be required to remove a nuisance or to pay the costs of removal. For example, a manufacturer who has polluted a stream might be fined and might also be ordered to pay the cost of cleanup. Public nuisances may interfere with public health, such as in the keeping of diseased animals or a malarial pond. Public safety nuisances include shooting fireworks in the streets, storing explosives, practicing medicine without a license, or harboring a vicious dog. Houses of prostitution, illegal liquor establishments, GAMING houses, and unlicensed prizefights are examples of nuisances that interfere with public morals. Obstructing a highway or creating a condition to make travel unsafe or highly disagreeable are examples of nuisances threatening the public convenience.

A public nuisance interferes with the public as a class, not merely one person or a group of citizens. No civil remedy exists for a private citizen harmed by a public nuisance, even if his or her harm was greater than the harm suffered by others; a criminal prosecution is the exclusive remedy. However, if the individual suffers harm that is different from that suffered by the general public, the individual may maintain a TORT ACTION for damages. For example, if dynamiting has thrown a large boulder onto a public highway, those who use the highway cannot maintain a nuisance action for the inconvenience. However, a motorist who is injured from colliding with the boulder may bring a tort action for personal injuries.

Some nuisances can be both public and private in certain circumstances where the public nuisance substantially interferes with the use of an individual's adjoining land. For example, POLLUTION of a river might constitute both a public and a private nuisance. This is known as a mixed nuisance.

### Private Nuisance

A private nuisance is an interference with a person's enjoyment and use of his land. The law recognizes that landowners, or those in rightful possession of land, have the right to the unimpaired condition of the property and to reasonable comfort and convenience in its occupation.

Examples of private nuisances abound. Nuisances that interfere with the physical condition of the land include vibration or blasting that damages a house; destruction of crops; raising of a water table; or the pollution of soil, a stream, or an underground water supply. Examples of nuisances interfering with the comfort, convenience, or health of an occupant are foul odors, noxious gases, smoke, dust, loud noises, excessive light, or high temperatures. Moreover, a nuisance may also disturb an occupant's mental tranquility, such as a neighbor who keeps a vicious dog, even though an injury is only threatened and has not actually occurred.

An attractive nuisance is a danger likely to lure children onto a person's land. For example, an individual who has a pool on his property has a legal obligation to take reasonable precautions, such as erecting a fence, to prevent foreseeable injury to children.

Trespass is sometimes confused with nuisance, but the two are distinct. A trespass action protects against an invasion of one's right to exclusive possession of land. If a landowner drops a tree across her neighbor's boundary line she has committed a trespass; if her dog barks all night keeping the neighbor awake, she may be liable for nuisance.

### Legal Responsibility

A private nuisance is a tort, that is, a civil wrong. To determine accountability for an alleged nuisance, a court will examine three factors: the defendant's fault, whether there has been a substantial interference with the plaintiff's interest, and the reasonableness of the defendant's conduct.

**Fault** Fault means that the defendant intentionally, negligently, or recklessly interfered with the plaintiff's use and enjoyment of the land or that the defendant continued her conduct after learning of actual harm or substantial risk of future harm to the plaintiff's interest. For example, a defendant who continues to spray chemicals into the air after learning that they are blowing onto the plaintiff's land is deemed to be intending that result. Where it is alleged that a

defendant has violated a statute, proving the elements of the statute will establish fault.

**Substantial Interference** The law is not intended to remedy trifles or redress petty annoyances. To establish liability under a nuisance theory, interference with the plaintiff's interest must be substantial. Determining substantial interference in cases where the physical condition of the property is affected will often be fairly straightforward. More challenging are those cases predicated on personal inconvenience, discomfort, or annoyance. To determine whether an interference is substantial, courts apply the standard of an ordinary member of the community with normal sensitivity and temperament. A plaintiff cannot, by putting his or her land to an unusually sensitive use, make a nuisance out of the defendant's conduct that would otherwise be relatively harmless.

**Reasonableness of Defendant's Conduct** If the interference with the plaintiff's interest is substantial, a determination must then be made that it is unreasonable for the plaintiff to bear it or to bear it without compensation. This is a BALANCING process weighing the respective interests of both parties. The law recognizes that the activities of others must be accommodated to a certain extent, particularly in matters of industry, commerce, or trade. The nature and gravity of the harm is balanced against the burden of preventing the harm and the usefulness of the conduct.

The following are factors to be considered:

- Extent and duration of the disturbance;
- Nature of the harm;
- Social value of the plaintiff's use of his or her property or other interest;
- Burden to the plaintiff in preventing the harm;
- Value of the defendant's conduct, in general and to the particular community;
- Motivation of the defendant;
- Feasibility of the defendant's mitigating or preventing the harm;
- Locality and suitability of the uses of the land by both parties.

ZONING boards use these factors to enact restrictions of property uses in specific locations. In this way, zoning laws work to prohibit public nuisances and to maintain the quality of a neighborhood.

## Defenses

In an attempt to escape liability, a defendant may argue that legislation (such as zoning laws or licenses) authorizes a particular activity. Legislative authority will not excuse a defendant from liability if the conduct is unreasonable.

A defendant may not escape liability by arguing that others are also contributing to the harm; damages will be apportioned according to a defendant's share of the blame. Moreover, a defendant is liable even where his or her actions without the actions of others would not have constituted a nuisance.

Defendants sometimes argue that a plaintiff "came to a nuisance" by moving onto land next to an already operating source of interference. A new owner is entitled to the reasonable use and enjoyment of his or her land the same as anyone else, but the argument may be considered in determining the reasonableness of the defendant's conduct. It may also have an impact in determining damages because the purchase price may have reflected the existence of the nuisance.

## Remedies

Redress for nuisance is commonly monetary damages. An INJUNCTION or abatement may also be proper under certain circumstances. An injunction orders a defendant to stop, remove, restrain, or restrict a nuisance or abandon plans for a threatened nuisance. In public nuisance cases, a fine or sentence may be imposed, in addition to abatement or injunctive relief.

Injunction is a drastic remedy, used only when damage or the threat of damage is irreparable and not satisfactorily compensable only by monetary damages. The court examines the economic hardships to the parties and the interest of the public in allowing the continuation of the enterprise.

A SELF-HELP remedy, abatement by the plaintiff, is available under limited circumstances. This privilege must be exercised within a reasonable time after learning of the nuisance and usually requires notice to the defendant and the defendant's failure to act. Reasonable force may be used to employ the abatement, and a plaintiff may be liable for unreasonable or unnecessary damages. For example, dead tree limbs extending dangerously over a neighbor's house may be removed by the neighbor in danger, after notifying the offending landowner of the nuisance. In cases where an immediate dan-

ger to health, property, or life exists, no notification is necessary.

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CROSS-REFERENCES

Land-Use Control; Tort Law.

## NULL

*Of no legal validity, force, or effect; nothing. As used in the phrase* null and void, *refers to something that binds no one or is incapable of giving rise to any rights or duties under any circumstances.*

## NUNC PRO TUNC

[Latin, Now for then.] *When courts take some action* nunc pro tunc, *that action has retroactive legal effect, as though it had been performed at a particular, earlier date.*

The most common use of *nunc pro tunc* is to correct past clerical errors, or omissions made by the court, that may hinder the efficient operation of the legal system. For example, if the written record of a trial court's judgment failed to correctly recite the judgment as the court rendered it, the court has the inherent power to change the record at a later date to reflect what happened at trial. The decision, as corrected, would be given legal force from the time of the initial decision so that neither party is prejudiced, or harmed, by the error. The purpose of *nunc pro tunc* is to correct errors or omissions to achieve the results intended by the court at the earlier time.

## NUNCUPATIVE WILL

*The oral expression of a person's wishes as to the disposition of his or her property to be performed or to take effect after the person's death, dictated by the person in his or her final illness before a sufficient number of witnesses and afterward reduced to writing. Such wills are invalid in certain states and in others are valid only under certain circumstances.*

## NUREMBERG TRIALS

The Nuremberg trials were a series of trials held between 1945 and 1949 in which the Allies prosecuted German military leaders, political officials, industrialists, and financiers for crimes they had committed during WORLD WAR II.

The first trial took place in Nuremberg, Germany, and involved twenty-four top-ranking survivors of the National Socialist German Workers' Party (Nazi Party). The subsequent trials were held throughout Germany and involved approximately two hundred additional defendants, including Nazi physicians who performed vile experiments on human subjects, concentration camp commandants who ordered the extermination of their prisoners, and judges who upheld Nazi practices.

World War II began in 1939 when Germany invaded Poland. Over the next few years, the European Axis powers (Germany, Italy, Albania, Bulgaria, Hungary, and Romania) successfully invaded and occupied France, Belgium, Luxembourg, Denmark, Norway, Greece, Yugoslavia, Czechoslovakia, Finland, and the Netherlands. But when ADOLF HITLER's troops invaded the Soviet Union, the Nazi war machine stalled. By the end of the war, the Axis powers were battered and beleaguered, and in 1945 they unconditionally surrendered to the United States, the Soviet Union, Great Britain, and France (the four Allied powers).

Although the surrender of the Axis powers brought the war to its formal conclusion, the Third Reich had left an indelible imprint on the world. During Germany's attempted conquest and occupation of Europe and Asia, the Nazis slaughtered, tortured, starved, and tormented over six million Jews and countless others—including Catholics, prisoners of war, dissenters, intelligentsia, nobility, and other innocent civilians. As part of their systematic effort to extinguish persons they deemed subversive, dangerous, or impure, the Nazis constructed

concentration camps around Europe where they murdered their victims in gas chambers and incinerated their bodies in crematories. Persons who escaped this fate were deported to Nazi labor camps where they were compelled upon threat of death to work for the Third Reich.

The Allies had been discussing the idea of punishing war criminals since 1943 when U.S. president FRANKLIN D. ROOSEVELT, British prime minister Winston Churchill, and Soviet premier JOSEPH STALIN signed the Moscow Declaration promising to hold the Axis powers, particularly Germany, Italy, and Japan, responsible for any atrocities they committed during World War II. In 1944 Roosevelt and Churchill briefly entertained the idea of summarily executing the highest-ranking members of the Third Reich without a trial or legal proceeding of any kind.

However, by June of 1945, when delegations from the four Allied powers gathered in London at the International Conference of Military Trials, the U.S. representatives firmly believed that the Nazi leaders could not be executed without first being afforded the opportunity to defend themselves in a judicial proceeding. Principles of justice, fairness, and DUE PROCESS, delegates from the United States argued, required no less. U.S. leaders also feared that the Allies would be perceived as hypocritical for denying the vanquished powers the same basic legal rights that were denied to those persons summarily executed by Germany, Italy, and Japan during the war.

On August 8, 1945, the four Allied powers signed a convention called the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers, which set forth the parameters by which the accused would be tried. Under this convention, which is sometimes referred to as the London Agreement or Nuremberg Charter, the Allies would conduct the trials of leaders of the European Axis powers in Nuremberg, and would subsequently prosecute lower-ranking officials and less important figures in the four occupied zones of Germany. American military tribunals in the South Pacific, under the command of General Douglas MacArthur, tried accused Japanese war criminals.

The London Agreement also established the International Military Tribunal (IMT), which was a panel of eight judges, two named by each of the four Allied powers. One judge from each country actively presided at trial, and the other four sat on the panel as alternates. The four Allied powers also selected the prosecutors, who agreed to pursue a conviction against the defendants on behalf of the newly formed UNITED NATIONS.

Under the Nuremberg Charter, each defendant accused of a war crime was afforded the right to be represented by an attorney of his choice. The accused war criminals were presumed innocent by the tribunal and could not be convicted until their guilt was proven BEYOND A REASONABLE DOUBT. In addition, the defendants were guaranteed the right to challenge incriminating evidence, cross-examine adverse witnesses, and introduce exculpatory evidence of their own.

The court appointed interpreters to translate the proceedings into four languages: French, German, Russian, and English. Written evidence submitted by the prosecution was translated into the native language of each defendant. When considering the admissibility of particular documents or testimony, the IMT was not bound by technical RULES OF EVIDENCE common to Anglo-American systems of justice. The tribunal retained discretion to evaluate HEARSAY and other forms of evidence that are normally considered unreliable in the United States and Great Britain.

The IMT made all of its decisions by a majority vote of the four judges. On issues that divided the judges equally, the president of the court, Lord Justice Geoffrey Lawrence from Great Britain, was endowed with the deciding vote. In all other situations, a vote cast by Lawrence carried no greater weight than a vote cast by Soviet judge Ion Nikitchenko, French judge Henri Donnedieu de Vabres, American judge FRANCIS BIDDLE, or any of the alternates. The IMT's decisions, including any rulings, judgments, or sentences, were final and could not be appealed.

Neither the defense nor the prosecution was permitted to challenge the legal, political, or military authority of the court. The IMT said that its jurisdiction stemmed from the London Agreement that was promulgated by the Allies pursuant to their inherent legislative powers over the conquered nations, which had unconditionally surrendered. According to the tribunal, each Ally possessed the unqualified right to legislate over the territory that it occupied. By establishing the IMT, the court said, the Allies

"had done together what any one of them might have done singly."

The IMT was given authority to hear four counts of criminal complaints: conspiracy, crimes against peace, WAR CRIMES, and crimes against humanity. Count I encompassed conspiracies to commit crimes against peace, whereas count II covered persons who committed such crimes in their individual capacities. Crimes against peace included the planning, preparation, initiation, and waging of aggressive war in violation of international treaties, agreements, or assurances. Crimes against peace differed from other war crimes, the tribunal said, in that they represented the "accumulated evil" of the Axis powers.

Count III consisted of war crimes committed in violation of the laws and customs of war as accepted and practiced around the world. This count aimed to punish those individuals who were responsible for issuing or executing orders that resulted in the plundering of public and private property, the wanton destruction of European cities and villages, the murder of captured Allied soldiers, and the CONSCRIPTION of civilians in occupied territories for deportation to German labor camps.

Count IV consisted of crimes against humanity, including murder, extermination, enslavement, and other inhumane acts committed against civilian populations, as well as every form of political, racial, and religious persecution carried out in furtherance of a crime punishable by the IMT. This count aimed to punish the most notorious crimes committed by the Nazi regime, such as GENOCIDE and torture. Early in the trial, however, the IMT ruled that the court did not have authority to try the defendants for crimes they committed before 1939 when World War II began.

Many of the prospective Nazi defendants were dead or could not be found after the war. Adolf Hitler, the totalitarian dictator of Germany who was the emotional and intellectual catalyst behind most of the war crimes committed by the Nuremberg defendants, Heinrich Himmler, head of the SS (*Schutzstaffel,* or Blackshirts, the Nazi organization in charge of the concentration camps and the Gestapo, the German secret police), and Paul Joseph Goebbels, the Nazi minister of propaganda, had all killed themselves during the final days of the war. BENITO MUSSOLINI, totalitarian dictator of Italy, was shot and hung by his own people in Milan in April 1945. Other German officials such as Karl Adolf Eichmann, a lieutenant colonel in the SS who was the architect of Hitler's "final solution" to exterminate the Jewish population in Europe and Asia, and Dr. Josef Mengele, a physician who performed barbaric experiments on prisoners at the concentration camp in Auschwitz, Poland, eluded the Allies by fleeing Germany after the war.

Not all of the Nazi leadership was able to escape justice. Twenty-four Nazi officials were indicted under the Nuremberg Charter for war crimes. The tribunal convicted eighteen of the defendants and acquitted three defendants (Dr. Hjalmar H. G. Schacht, president of the German Central Bank, Hans Fritzsche, propaganda minister for German radio, and Franz von Papen, vice chancellor of Germany). One defendant (Dr. Robert Ley, leader of the Nazi Labor Front) committed suicide before the proceedings began; one defendant (Gustav Krupp von Bohlen und Halbach, a German military industrialist) was deemed mentally and physically incompetent to stand trial; and one defendant (Martin Bormann, Hitler's secretary and head of the Nazi Party Chancellery) was tried and convicted in absentia because his whereabouts were unknown.

The trial began on November 20, 1945, and concluded on October 1, 1946. Thirty-three witnesses testified for the prosecution. Eighty witnesses testified for the defense, including nineteen of the defendants. An additional 140 witnesses provided evidence for the defense through written interrogatories. The prosecution introduced written evidence of its own, including original military, diplomatic, and government files of the Nazi regime that fell into the hands of the Allies after the collapse of the Third Reich.

ROBERT H. JACKSON, an associate justice of the U.S. Supreme Court, led the prosecution team. President HARRY S. TRUMAN had asked Jackson to assemble a staff of U.S. attorneys to investigate alleged war crimes and present evidence against the defendants. Jackson was joined on the prosecution team by Roman Rudenko, François de Menthon, and Sir Hartley Shawcross, the chief prosecutors for Russia, France, and Great Britain, respectively. Each of the four powers employed a number of assistant prosecutors as well.

Jackson commenced the trial with an OPENING STATEMENT that is considered one of the

most eloquent in the annals of JURISPRUDENCE. "The wrongs which we seek to condemn and punish," Jackson said, "have been so calculated, so malignant, and so devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated. . . . That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to judgment of the law is one of the most significant tributes that power has ever paid to reason."

Hermann Goering was the most powerful surviving member of the German government to be tried at Nuremberg. Goering had been elected president of the Reichstag (the German parliament) in 1932. After Hitler was named chancellor of Germany in 1933, Goering was appointed minister of interior for Prussia where he created the Gestapo and established the first concentration camps. In 1935 Goering became chief of the Luftwaffe (the German air force), and two years later he was made commissioner of the Four Year Plan, an economic program designed to make Germany self-sufficient in preparation for the ensuing Nazi blitzkrieg. After Germany's invasion of Finland in 1939, Goering was elevated to Reich marshall, the highest military rank in Germany, and designated as Hitler's successor in the event of Hitler's death.

The IMT convicted the Reich marshall on all four counts and sentenced him to death. The prosecution demonstrated that Goering had helped plan and direct the invasions of Poland and Austria. Other evidence indicated that Goering had ordered the Luftwaffe to destroy a business district in Rotterdam, Netherlands, even though the city had already surrendered. Goering was also implicated in the extermination of Polish intelligentsia, nobility, and clergy, the execution of British prisoners of war, the deportation of foreign laborers to Germany, the theft of art from French museums, and the suppression of domestic political opposition. Additionally, Goering admitted on cross-examination that he was responsible for promulgating laws that had facilitated the persecution of Jews throughout Europe.

Rudolph Hess was another influential Nazi official prosecuted at Nuremberg. Hess was a longtime friend of Hitler. In 1923 the two joined forces in an unsuccessful attempt to incite a Nazi revolution in a Munich tavern. Although Hitler was arrested and convicted of TREASON for his role in the so-called beer hall putsch, German interest in the Nazi movement grew after the publication of *Mein Kampf,* a manifesto Hitler dictated to Hess while serving his prison term. *Mein Kampf* planted the seeds of Aryan supremacy, German nationalism, anti-Semitism, and totalitarian government, seeds that Hess later cultivated in his capacity as deputy führer to the Third Reich.

During the Nuremberg trial, the prosecution offered evidence that Hess had signed orders authorizing the persecution of European Jews and the ransacking of churches. Documents signed by Hess and meetings he attended reflected his support for Hitler's plan to invade Czechoslovakia, Poland, France, Belgium, Luxembourg, and the Netherlands. Hess originally asserted a defense of amnesia to these charges, claiming that he had forgotten the entire period of his life in which he had acted as deputy führer. However, Hess withdrew this defense upon realizing that he would not stand trial with the other defendants if he were diagnosed as incompetent. Hess was convicted of counts I and II and sentenced to life imprisonment.

Joachim von Ribbentrop, Germany's foreign minister during World War II, was convicted on all four counts and sentenced to death. When he took the witness stand, the prosecution asked him if he considered Germany's invasions of Poland, Denmark, Norway, Greece, France, and the Soviet Union "acts of aggression." In each case Ribbentrop answered in the negative, arguing that such invasions were more properly described as acts of war. Confronted with evidence that he had urged the German regent of Hungary to exterminate the Jews in that country, Ribbentrop responded only by saying that he did not use those words exactly.

Dr. Ernst Kaltenbrunner was the head of the Reich Central Security Office, the Nazi organization in charge of the Gestapo and the SD (*Sicherheitsdienst,* Security Service, the German intelligence agency) and was second in command to Himmler at the SS. Kaltenbrunner faced a mountain of evidence demonstrating that he visited a number of concentration camps and had personally witnessed prisoners being gassed and incinerated. One letter signed by Kaltenbrunner authorized the execution of Allied prisoners of war, and another letter authorized the conscription and deportation of foreign laborers. Laborers who were too weak to contribute, Kaltenbrunner wrote, should be exe-

*Twenty of the 24 defendants at the Nuremberg Trials listen to the hearings. Eighteen of the Nazi officials indicted by the International Military Tribunal were convicted; three were acquitted.*

USHMM PHOTO ARCHIVES

cuted, regardless of their age or gender. Kaltenbrunner received a death sentence after being convicted under counts III and IV.

Alfred Rosenberg was the Nazi minister for the occupied Eastern European territories. Rosenberg told Axis troops that the accepted rules of land warfare could be disregarded in areas under his control. He ordered the SEGREGATION of Jews into ghettos where his subordinates murdered them. His signature was found at the bottom of a directive approving the deportation of forty-five thousand youths to German labor camps. Cross-examined about his role in the unlawful confiscation of Jewish property, Rosenberg claimed that all such property was seized to protect it from Allied bombing raids. Rosenberg was found guilty on all four counts and sentenced to death by hanging.

Hans Frank, the governor-general of Poland during German occupation, was sentenced to hang after being convicted on counts III and IV. Frank described his administration's policy by stating that Poland was "treated like a colony" in which the Polish people became "the slaves of the Greater German World Empire." The tribunal found that this policy entailed the destruction of Poland as a national entity, the evisceration of all political opposition, and the ruthless exploitation of human resources to promote Hitler's reign of terror. While on the witness stand, Frank confessed to participating in the Nazis' systematic attempt to annihilate the Jewish race.

Wilhelm Frick, the German minister of interior, was found guilty on counts I, II, and III and sentenced to be hanged. Frick had signed decrees sanctioning the execution of Jews and other persons held in "protective custody" at the concentration camps and had given Himmler a blank check to take any "security measures" necessary to ensure the German foothold in the occupied territories. The tribunal also determined that Frick exercised supreme authority over Bohemia and Moravia and was responsible

for implementing Hitler's policies of enslavement, deportation, torture, and extermination in these territories.

Wilhelm Keitel, field marshall for the High Command of the armed forces, was sentenced to die after being found guilty on every count. On direct examination Keitel admitted that there were "a large number of orders" bearing his signature that "contained deviations from existing international law." He also conceded that a number of atrocities had been committed under his command during Germany's invasion of the Soviet Union. As a defense to these charges, Keitel asserted that he had been following the orders of his superiors when committing these crimes. Yet some witnesses testifying on behalf of the defense tended to undermine this assertion.

Alfred Jodl, chief of the operations staff for the armed forces, also received the death sentence after being convicted on every count. During the early stages of World War II, Jodl had been asked to review an order drafted by Hitler authorizing German troops to execute all Soviet military commissars captured during the Nazi invasion of Russia. Aware that this order was a violation of the customs, practices, and laws governing the treatment of prisoners during times of war, Jodl made no attempt to dissuade Hitler from issuing it. Jodl was also found responsible for distributing an order that authorized the execution of Allied commandos caught by the Axis powers and for mobilizing the German army against its European foes.

Julius Streicher, an anti-Semitic propagandist, was found guilty of count IV and sentenced to death. Author, editor, and publisher of *Der Stuermer,* a privately owned Jew-baiting newspaper, Streicher held no meaningful government position with the Axis powers during World War II. Yet the tribunal determined that circulation of Streicher's racist newspaper had fueled the Nazis' maniacal hatred of Jews and fomented an atmosphere in which genocide was acceptable and desirable. The prosecution introduced an article Streicher had published during 1942 in which he described Jewish procreation as a curse of God that could only be lifted through a process of political and ethnic emasculation.

Albert Speer, Nazi minister of armaments, received a prison term of twenty years after being convicted on counts III and IV. Speer had fascinated Hitler long before the war with his architectural prowess, designing buildings that were both immense and imposing. After the war began, however, Speer's primary obligation was to supply the German armed forces with military supplies, equipment, and weapons. Thus, Speer became a lynchpin in the Nazi military empire. In an effort to maintain this empire, the prosecution demonstrated, Speer had repeatedly cajoled Hitler to procure foreign labor to work in his weapons factories.

Dr. Arthur Seyss-Inquart, an Austrian who was appointed by Hitler to govern Austria and the Netherlands during German occupation, was found guilty on counts II, III, and IV and sentenced to death for his confessed mistreatment of racial minorities in those territories, including the deportation of more than 250,000 Jews to Germany. Seyss-Inquart also assisted Hitler's takeover of Austria, Poland, and Czechoslovakia.

Baron Konstantin von Neurath, Reich protector of Czechoslovakia, was convicted on all four counts and sentenced to fifteen years in prison for participating in the Nazi militarization campaign. Hoping to immunize the Nazi regime from its obligations under INTERNATIONAL LAW, Neurath had advocated Germany's withdrawal from the LEAGUE OF NATIONS and denounced the Versailles Treaty that had formally concluded WORLD WAR I. Neurath was also implicated in various brutalities committed against the Czechoslovakian civilian population.

Baldur von Schirach, governor of occupied Vienna and leader of the Hitler Youth, was convicted on count IV and sentenced to a twenty-year prison term. The IMT determined that Schirach had provided the visceral foundations for the militarization of Germany's youngest Nazis through psychological and educational indoctrination and had conspired with Hitler to deport Viennese Jews to Poland where most of them met their death. Fritz Sauckel, the plenipotentiary general for the allocation of labor, was convicted on counts III and IV and sentenced to death for his central role in the Nazi forced labor program that enslaved more than eleven million Europeans.

Erich Raeder served as Germany's naval commander and chief until 1943 when he resigned due to a disagreement with Hitler, and he was succeeded by Karl Doenitz. Both Raeder and Doenitz were indicted under counts I, II, and III for war crimes committed on the high seas, and both were convicted based in part on evidence that they had authorized German sub-

marines to fire on Allied commercial ships without warning in contravention of international law. Doenitz was sentenced to a ten-year prison term, and Raeder received a life sentence. Walther Funk, Nazi minister of economics, also received a life sentence for financing Germany's aggressive warfare and for exploiting foreign laborers in German industry.

The IMT declared four Nazi organizations to be criminal: the SS, the SD, the Gestapo, and the Nazi Party. A team of Allied attorneys, including American Telford Taylor, subsequently prosecuted individual members of these organizations. Three Nazi organizations were acquitted: the SA (*Sturmabteilung,* the paramilitary organization also known as the Brownshirts or Stormtroopers), and the general staff and High Command of the German armed forces.

The Nuremberg trials made three important contributions to international law. First, they established a precedent that all persons, regardless of their station or occupation in life, can be held individually accountable for their behavior during times of war. Defendants cannot insulate themselves from personal responsibility by blaming the country, government, or military branch for which they committed the particular war crime.

Second, the Nuremberg trials established that individuals cannot shield themselves from liability for war crimes by asserting that they were simply following orders issued by a superior in the chain of command. Subordinates in the military or government are now bound by their obligations under international law, obligations that transcend their duty to obey an order issued by a superior. Orders to initiate aggressive (as opposed to defensive) warfare, to violate recognized rules and customs of warfare, or to persecute civilians and prisoners are considered illegal under the Nuremberg principles.

Third, the Nuremberg trials clearly established three discrete substantive war crimes that are punishable under international law: crimes against peace, crimes against humanity, and crimes in violation of transnational obligations embodied in treaties and other agreements. Before the Nuremberg trials, these crimes were not well defined, and persons who committed such crimes had never been punished by a multinational tribunal. For these reasons the Nuremberg convictions have sometimes been criticized as EX POST FACTO justice.

The Nuremberg trials have also been criticized as "victor's justice." Historians have observed that the Allied nations that tried and convicted the leading Nazis at Nuremberg did not come to the table with clean hands. The Soviet Union had participated in Germany's invasion and occupation of Poland and had been implicated in the massacre of more than a thousand Poles in the Katyn forest. Bombing raids conducted by the United States and Great Britain during World War II left thousands of civilians dead in cities like Dresden, Germany, and Nagasaki and Hiroshima, Japan. President Roosevelt had implemented a relocation program for more than 100,000 Americans of Japanese descent that confined them to concentration camps around the United States.

The Nuremberg trials were not typical partisan trials, though. The defendants were afforded the RIGHT TO COUNSEL, plus a full panoply of evidentiary and procedural protections. The Nuremberg verdicts demonstrate that these protections were taken seriously by the tribunal. The IMT completely exonerated three defendants of war crimes and acquitted most of the remaining defendants of at least some charges. Thus, the Nuremberg trials, while not perfect, changed the face of international law, both procedurally and substantively.

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## OATH

*Any type of attestation by which an individual signifies that he or she is bound in conscience to perform a particular act truthfully and faithfully; a solemn declaration of truth or obligation.*

*An individual's appeal to God to witness the truth of what he or she is saying or a pledge to do something enforced by the individual's responsibility to answer to God.*

Similarly an affirmation is a solemn and formal declaration that a statement is true; however, an affirmation includes no reference to God so it can be made by someone who does not believe in God or by an individual who has conscientious objections against swearing to God. Provisions in state statutes or constitutions ordinarily allow affirmations to be made as alternatives to oaths.

In order for an oath to be legally effective, it must be administered by a public official. The law creating each public office and describing the duties of the official ordinarily indicates who is authorized to administer the oath of office. A spoken oath is generally sufficient; however, a written and signed oath can be required by law.

The most famous oath prescribed by law in the United States is the oath repeated by the president-elect upon taking the office of the presidency.

*President George W. Bush takes the oath of office from Chief Justice William Rehnquist on January 20, 2001.* AFP/CORBIS

## OBITER DICTUM

[Latin, By the way.] *Words of an opinion entirely unnecessary for the decision of the case. A remark made or opinion expressed by a judge in a decision upon a cause, "by the way," that is, incidentally or collaterally, and not directly upon the question before the court or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. Such are not binding as precedent.*

CROSS-REFERENCES

Court Opinion.

## OBJECT

*As a verb, to take exception to something; to declare or express the belief that something is improper or illegal.*

*As a noun, the thing sought to be accomplished or attained; aim; purpose; intention.*

One might, for example, object to the admission of particular evidence at a trial.

The object of a civil suit, for example, might be to be compensated in the form of damages for an injury incurred.

## OBJECTION

*A formal attestation or declaration of disapproval concerning a specific point of law or procedure during the course of a trial; a statement indicating disagreement with a judge's ruling.*

Some laws provide that an appeal to a higher tribunal can be based only upon errors objected to during the course of a trial conducted in a lower court. An error that initially slips by without any objection by the party's counsel cannot subsequently be set forth as a reason for the appeals court to overturn the original decision in a particular case. The making of objections in open court during the course of a proceeding is important so that on appeal, the appellate court can evaluate the record of the lower court action.

The FEDERAL RULES OF EVIDENCE, the Federal Rules of Civil Procedure, and the Federal Rules of Criminal Procedure govern the making of objections in federal actions. Comparable state provisions apply to state proceedings.

CROSS-REFERENCES

Civil Procedure; Evidence.

## OBJECTIVE THEORY OF CONTRACT

*A principle in U.S. law that the existence of a contract is determined by the legal significance of the external acts of a party to a purported agreement, rather than by the actual intent of the parties.*

Some disagreement exists as to whether the COMMON LAW governing contracts required judges to determine the subjective intent of the parties in order to recognize the existence of a contract, or whether judges were required to view the external acts of the parties and then determine, in an objective manner, whether a contract had been formed. Some scholars maintain that the common law had long employed an objective test for recognizing a contract. Other scholars and writers claim that the widespread use of the objective theory of contracts in the courts was a much more recent phenomenon, perhaps developed during the late nineteenth century.

Whatever the specific origin of objective theory may be, it is clear that by the late nineteenth century American law had generally adopted it. Since then the theory has been heatedly debated among legal experts, and contracts scholars often take firm stances as either "objectivists" or "subjectivists." Within each of these theories are variations regarding the application of either a subjective or an objective view of contracts.

Legal historians note that many of the top judges and legal scholars of the late 1800s and early 1900s adhered to the objective theory of contract. Among these judges and scholars were CHRISTOPHER COLUMBUS LANGDELL, OLIVER WENDELL HOLMES, and SAMUEL WILLISTON. Judge LEARNED HAND of New York summarized the objective theory of contracts in a famous quote from a 1911 case (*Hotchkiss v. National City Bank*, 200 F. 287 [S.D.N.Y. 1911]):

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party when he used the words intended something else than the usual meaning which the law imposes on them, he would still be held, unless there were mutual mistake or something else of the sort.

The sharp dichotomy between the objective and subjective theories of contract should not suggest that an ordinary, everyday agreement would commonly be considered a binding contract under one theory but not under the other. If two parties enter into an agreement, subjectively intend to be bound by the agreement, and make external acts showing their intent to be bound by the agreement, then a court applying either the subjective theory or the objective theory of contract law would reach the same conclusion—that the parties had entered into a binding contract.

The major differences in the two theories arise when one party claims that he or she did not intend to enter into the agreement. For example, party A owns an automobile valued at $20,000. His neighbor, party B, asks party A for the amount of money which party A would be willing to sell the car. Party A, who has no intention of selling the car, and who knows that party B cannot afford to pay $20,000, says "I'd sell it to

you for $1,000." Party B replies, "OK, it's a deal." Party A states that his offer was not serious, and that he never intended to sell the car for that amount of money. Nevertheless, a court could find that parties A and B had entered into a binding agreement—selling the car for $1,000—if a reasonable person in party B's position would have believed that party A intended to enter into such an agreement. However, if party A were to tell party B that he would sell the car for $5, then a court may be more likely to find that a reasonable person would not have believed that party A intended to be bound. Under a subjective theory of contract, party A could dispute the formation of a contract by introducing evidence that he did not actually intend to be bound by his statement (of either the $1,000 or the $5 sales price).

Although the objective theory of contracts applies in virtually all jurisdictions in the United States, some aspects of subjectivity are nevertheless present in American law. For instance, many of the grounds by which a party or parties may avoid a contract, such as mistake or duress, are based upon the subjective beliefs or intentions of the parties. Likewise, if the two parties specifically indicate that they agree *not* to be bound by an agreement, then a court will not recognize the agreement as enforceable. The court would similarly refuse to find the existence of a contract if one party did not intend to be bound and the other party knew or should have known that the first party did not intend to enter into a binding agreement.

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## OBLIGATION

*A generic term for any type of legal duty or liability.*

In its original sense, the term *obligation* was very technical in nature and applied to the responsibility to pay money owed on certain written documents that were executed under seal. Currently obligation is used in reference to anything that an individual is required to do because of a promise, vow, oath, contract, or law. It refers to a legal or moral duty that an individual can be forced to perform or penalized for neglecting to perform.

An *absolute obligation* is one for which no legal alternative exists since it is an unconditional duty.

A *contractual obligation* arises as a result of an enforceable promise, agreement, or contract.

An *express obligation* is spelled out in direct and actual terms, and an *implied obligation* is inferred indirectly from the surrounding circumstances or from the actions of the individuals involved.

A *joint obligation* is one that binds two or more people to fulfill whatever is required, and a *several obligation* requires each of two or more individuals to fulfill the obligation in its entirety by himself or herself.

A *moral obligation* is binding upon the conscience and is fair but is not necessarily enforceable in law.

A *primary obligation* is one that must be performed since it is the main purpose of the contract that contains it, whereas a *secondary obligation* is only incidental to another principal duty or arises only in the event that the main obligation cannot be fulfilled.

A *penal obligation* is a penalty, such as the obligation to pay extra money if the terms or conditions of an agreement cannot be satisfied.

## OBLIGEE

*The individual to whom a particular duty or obligation is owed.*

The obligation might be to pay a debt or involve the performance or nonperformance of a particular act.

The term *obligee* is often used synonymously with creditor.

## OBLIGOR

*The individual who owes another person a certain debt or duty.*

The term *obligor* is often used interchangeably with debtor.

## OBLITERATION

*A destruction; an eradication of written words.*

Obliteration is a method of revoking a WILL or a clause therein. Lines drawn through the signatures of witnesses to a will constitute an obliteration of the will even if the names are still decipherable.

## OBSCENE

*Offensive to recognized standards of decency.*

The term *obscene* is applied to written, verbal, or visual works or conduct that treat sex in an objectionable or lewd or lascivious manner. Although the FIRST AMENDMENT guarantees freedom of expression, such constitutional protection is not extended to obscene works. To determine whether a work is obscene, the trier of fact applies the three-pronged guidelines established by the U.S. Supreme Court in MILLER V. CALIFORNIA, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973):

> (a) whether the "average person, applying contemporary community standards" would find that the work depicting or describing sexual conduct when taken as a whole, appeals to the prurient interest. . ., (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

CROSS-REFERENCES

Freedom of Speech; Pornography.

## OBSCENITY

*The character or quality of being obscene; an act, utterance, or item tending to corrupt the public morals by its indecency or lewdness.*

*Obscenity* is a legal term that applies to anything offensive to morals and is often equated with the term PORNOGRAPHY. Pornography, however, is a more limited term, which refers to the erotic content of books, magazines, films, and recordings. Obscenity includes pornography, but may also include nude dancing, sexually oriented commercial telephone messages, and scatological comedy routines. U.S. courts have had a difficult time determining what is obscene. This problem has serious implications, because if an act or an item is deemed obscene, it is not protected by the FIRST AMENDMENT.

Until the mid-nineteenth century and the Victorian era in Great Britain and the United States, sexually explicit material was not subject to statutory prohibition. The federal COMSTOCK LAW OF 1873 criminalized the transmission and receipt of "obscene," "lewd," or "lascivious" publications through the U.S. mail. U.S. courts looked to the English case of *Regina v. Hicklin,* 3 L.R.-Q.B. 360 (1868), for a legal definition of obscenity. The *Hicklin* test was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

This test permitted judges to look at objectionable words or passages without regard for the work as a whole and without respect to any artistic, literary, or scientific value the work might have. In 1930, Massachusetts courts declared both Theodore Dreiser's novel *An American Tragedy* and D.H. Lawrence's novel *Lady Chatterly's Lover* obscene. An important break from *Hicklin* came in a lawsuit over the U.S. publication of James Joyce's novel *Ulysses.* Both at the trial and appellate levels, the federal courts held that the book was not obscene (*United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 [S.D.N.Y. 1933], aff'd 72 F.2d 705 [2d Cir. 1934]). The courts rejected the *Hicklin* test and suggested a standard based on the effect on the average reader of the dominant theme of the work as a whole.

In 1957, the U.S. Supreme Court retired the *Hicklin* test in ROTH V. UNITED STATES, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498. Justice WILLIAM J. BRENNAN JR. stated that obscenity is "utterly without redeeming social importance" and therefore was not protected by the First Amendment. He announced, as a new test, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient [lewd or lustful] interest." The new test was applicable to every level of government in the United States.

The *Roth* test proved difficult to use because every term in it eluded a conclusive definition. The Supreme Court justices could not fully agree what constituted "prurient interest" or what "redeeming social importance" meant. Justice POTTER STEWART expressed this difficulty at defining obscenity when he remarked, "I know it when I see it" (*Jacobellis v. Ohio,* 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 [1964]).

The Supreme Court added requirements to the definition of obscenity in a 1966 case involving the bawdy English novel *Fanny Hill.* In *Memoir v. Massachusetts,* 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1, the Court concluded that to establish obscenity, the material must, aside from appealing to the prurient interest, be "utterly without redeeming social value," and "patently offensive because it affronts contemporary community standards relating to the

description of sexual matters." The requirement that the material be "utterly" without value made prosecution difficult. Defendants presented expert witnesses, such as well-known authors, critics, or scholars, who attested to the literary and artistic value of sexually charged books and films.

The Supreme Court did make conclusive rulings on two other areas of obscenity in the 1960s. In *Ginzburg v. United States,* 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31 (1966), the Court held that "pandering" of material by mailed advertisements, designed to appeal to a prurient interest, could be prosecuted under the federal obscenity statute. Even if the material in publisher Ralph Ginzburg's *Eros* magazine was not obscene, the Court was willing to allow the government to punish Ginzburg for appealing to his prospective subscribers' prurient interest. In *Stanley v. Georgia,* 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969), the Court held that the First and Fourteenth Amendments prohibited making the private possession of obscene material a crime.

The failure of the WARREN COURT to achieve consensus over the *Roth* test kept the definition of obscenity in limbo. Then, in 1973, aided by conservative justices LEWIS F. POWELL JR. and WILLIAM H. REHNQUIST, Chief Justice WARREN EARL BURGER restated the constitutional definition of obscenity in MILLER V. CALIFORNIA, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419. Burger explicitly rejected the "utterly without redeeming social value" standard:

> The basic guidelines for the trier of fact must be (a) whether the "average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . ., (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Burger noted that the new test was intended to address "'hard core' sexual conduct," which included "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated . . . masturbation, excretory functions, and lewd exhibitions of genitals."

In 1987, the Supreme Court modified the "contemporary community standards" criteria. In *Pope v. Illinois,* 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439, the Court stated that the "proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, and scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole." It is unclear whether the "reasonable person" standard represents a liberalization of the obscenity test.

In 1989, the Supreme Court unanimously held that the First Amendment's guarantee of free speech protected indecent, sexually explicit telephone messages (*Sable Communications of California, Inc. v. Federal Communications Commission,* 492 U.S. 115, 109 S. Ct. 2829, 106 L. Ed. 2d 93). The Court ruled that a federal law that attempted to ban "Dial-a-Porn" commercial phone services over interstate telephone lines (Pub. L. No. 100-297, 102 Stat. 424) to shield minors from obscenity was unconstitutional because it applied to indecent as well as obscene speech. The Court indicated, however, that obscene calls could be prohibited.

Congressional attempts to prevent the INTERNET from being used to distribute obscene materials have been blocked by Supreme Court decisions. The Communications Decency Act of 1996 (CDA), codified at 47 U.S.C.A. § 223(b), as amended, 47 U.S.C.A. § 223(b), was designed to outlaw obscene and indecent sexual material in cyberspace. One section made it a federal crime to use TELECOMMUNICATIONS to transmit "any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication."

The AMERICAN CIVIL LIBERTIES UNION (ACLU) and 20 other plaintiffs immediately filed a lawsuit challenging the constitutionality of the CDA's provisions, especially the part of the CDA that dealt with indecent material. In *Reno v. American Civil Liberties Union,* 521 U.S. 844, 117 S .Ct. 2329, 138 L. Ed. 2d 874 (1997), the Supreme Court recognized the "legitimacy and importance of the congressional goal of protecting children from harmful materials," but ruled that the CDA abridged FREEDOM OF SPEECH and therefore was unconstitutional. The Court was most troubled by the CDA's "many ambiguities." The concern, in particular, was that the act's undefined terms *indecent* and *patently offensive* would provoke uncertainty as to how the two standards relate to each other

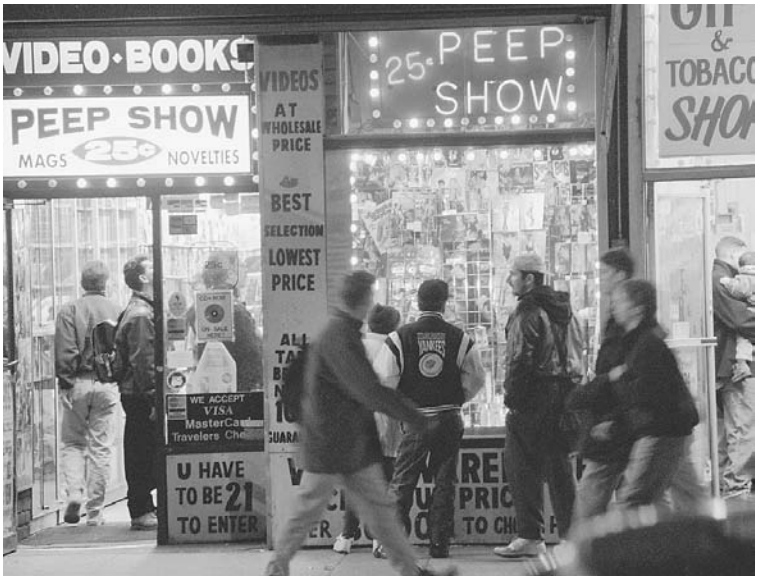


*Ambiguous language and shifting mores make obscenity laws difficult to interpret and to prosecute. Courts must decide if the goods and services offered by an establishment violate "contemporary community standards" or if they have "redeeming social value."* AP/WIDE WORLD PHOTOS

and just what they mean. The vagueness of this content-based regulation, along with its criminal penalties, led the Court to conclude that the CDA would have a "chilling effect" on free speech.

In addition, the CDA did not deal with key parts of the *Miller* test. One element from *Miller,* which was missing from the CDA, requires that the proscribed material must be "specifically defined by the applicable state law." This, in the Court's view, would have reduced the vagueness of the term "patently offensive." Another important element of the *Miller* test is the requirement that the material, "taken as a whole, lacks serious literary, artistic, political, or scientific value." The Court found that this "societal value" requirement allowed appellate courts "to impose some limitations and regularity on the definition by setting, as a **MATTER OF LAW**, a national floor for socially redeeming value." The failure of the CDA to include this element meant that the law posed a serious threat to censor speech that was outside the statute's scope.

Congress sought to address these deficiencies, in 1998, when it passed the Child Online Protection Act (COPA). COPA attempted to limit restrictions on pornographic material to communications made for commercial purposes. Although Congress incorporated the *Miller* test in hopes that the law would pass constitutional muster, the ACLU and a group of on-line website operators challenged the constitutionality of COPA, arguing that it was overbroad. In addition, the plaintiffs contended that the use of the community standards test would give any community in the United States the ability to file civil and criminal lawsuits under COPA. The Supreme Court, in *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002), issued what many legal commentators considered to be a murky decision that suggested the law might be overbroad. It referred the case back to the district court for a full hearing on the merits of the case.

Obscenity challenges are not restricted to pornographic content. In *City of Erie v. Pap's A. M.*, 529 U.S. 277, 120 S. Ct. 1382, 146 L .Ed. 2d 265 (2000), the Supreme Court moved from cyberspace to real estate when it held that a city could prevent the location of a nude dancing club using its **ZONING** law powers. The Court ruled that the zoning ordinance did not violate the First Amendment because the government sought to prevent the means of the expression and not the expression itself.

In 1994, Erie, Pennsylvania, enacted an ordinance that made it a crime to knowingly or intentionally appear in public in a "state of nudity." The Court held that nude dancing is "expressive conduct" that "falls only within the outer ambit" of First Amendment protection. It based its analysis on the framework for content-neutral restrictions on **SYMBOLIC SPEECH** set forth in the draft registration card case, *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct.1673, 20 L. Ed. 2d 672 (1968). The first factor of the *O'Brien* test is whether the government regulation is within the constitutional power of the government to enact. The Court concluded that Erie had the power to protect public health and safety. The second factor is whether the regulation furthers an important or substantial government interest. The city based its ban on public nudity as a way of combating the harmful secondary effects associated with nude dancing. The preamble to the ordinance stated that Erie City Council had, for over 100 years, expressed "its findings that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity." The Supreme Court found this an important government interest. The ordinance also satisfied *O'Brien's* third factor, that the government interest is unrelated to the suppression of free expression.

Assessing whether an activity or object is obscene based on community standards is problematic, especially when community values change over time. For example, in the case of the "cussin' canoeist," a Michigan man was convicted, in 1999, for violating an 1897 state law making it illegal to use obscenities and profanities while in public. He had been cited for loudly swearing while in a canoe on a public stream. However, the Michigan court of appeals reversed his conviction in 2002. The court struck down the nineteenth-century statute, ruling that the law unquestionably "operates to inhibit the exercise of First Amendment Rights" (*Michigan v. Boomer*, 250 Mich. App. 534, 655 N.W.2d 255 [Mich.App.2002]).

Another sticking point in obscenity prosecutions involves the often overbroad interpretation of what is obscene. In recent years, state appellate courts have struck down laws that made it criminally obscene for a parent to photograph his or her own child playing in a bathtub or running nude on a beach.

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## OBSTRUCTION OF JUSTICE

*A criminal offense that involves interference, through words or actions, with the proper operations of a court or officers of the court.*

The integrity of the judicial system depends on the participants' acting honestly and without fear of reprisals. Threatening a judge, trying to bribe a witness, or encouraging the destruction of evidence are examples of obstruction of justice. Federal and state laws make it a crime to obstruct justice.

Obstruction of justice in the federal courts is governed by a series of criminal statutes (18 U.S.C.A. §§ 1501–1517), which aim to protect the integrity of federal judicial proceedings as well as agency and congressional proceedings. Section 1503 is the primary vehicle for punishing those who obstruct or who endeavor to obstruct federal judicial proceedings.

Section 1503 proscribes obstructions of justice aimed at judicial officers, grand and petit jurors, and witnesses. The law makes it a crime to threaten, intimidate, or retaliate against these participants in a criminal or civil proceeding. In addition, section 1503 makes it illegal to attempt the BRIBERY of an official to alter the outcome of a judicial proceeding.

Besides these specific prohibitions, section 1503 contains the Omnibus Clause, which states that a person who "corruptly or by threats of force, or by threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice" is guilty of the crime of obstruction of justice. This clause offers broad protection to the "due administration of justice." Federal courts have read this clause expansively to proscribe any conduct that interferes with the judicial process.

To obtain a conviction under section 1503, the government must prove that there was a pending federal judicial proceeding, the defendant knew of the proceeding, and the defendant had corrupt intent to interfere with or attempted to interfere with the proceeding.

Two types of cases arise under the Omnibus Clause: the concealment, alteration, or destruction of documents; and the encouraging or rendering of false testimony. Actual obstruction is not needed as an element of proof to sustain a conviction. The defendant's endeavor to obstruct justice is sufficient. "Endeavor" has been defined by the courts as an effort to accomplish the purpose the statute was enacted to prevent. The courts have consistently held that "endeavor" constitutes a lesser threshold of purposeful activity than a criminal "attempt."

Federal obstruction of justice statutes have been used to prosecute government officials who have sought to prevent the disclosure of damaging information. The WATERGATE scandal of the 1970s involving President RICHARD M. NIXON is a classic example of this type of obstruction. A number of Nixon's top aides were convicted of obstruction of justice, including former attorney general JOHN N. MITCHELL. A federal GRAND JURY named Nixon himself as an unindicted coconspirator for the efforts to prevent disclosure of White House involvement in

the 1972 BURGLARY of Democratic National Committee headquarters at the Watergate building complex in Washington, D.C.

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## OCCUPANCY

*Gaining or having physical possession of real property subject to, or in the absence of, legal right or title.*

In a fire insurance policy, for example, the term *occupancy* is used in reference to the purpose to which the land or building is devoted or adopted, as indicated in the policy.

## OCCUPATION

See MILITARY OCCUPATION.

## OCCUPATIONAL DISEASE

*A disease resulting from exposure during employment to conditions or substances that are detrimental to health (such as black lung disease contracted by miners).*

An individual suffering from an occupational disease can seek compensation for his or her condition under WORKERS' COMPENSATION statutes or such federal legislation as the Black Lung Benefits Act of 1972, 30 U.S.C.A. § 901 et seq. Worker's compensation statutes typically require that the worker contract the disease during the course of employment; that the disease be peculiar to the worker's job by virtue of how it is caused and manifested or how job conditions result in a particular hazard, unlike employment in general; and that there be a substantially greater risk of contracting the disease or condition on the job in a different, more serious manner, than in general public experiences.

## OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

Under the Occupational Safety and Health Act, 29 U.S.C.A. § 651 et seq., a business that negligently jeopardizes the lives or health of its workers commits a federal misdemeanor.

The Occupational Safety and Health Act of 1970 created the LABOR DEPARTMENT's Occupational Safety and Health Administration (OSHA) to serve as the federal government's workplace-safety watchdog, and the Occupational Safety and Health Review Commission (OSHRC) to rule on cases, forwarded to it by the Labor Department, of disagreements over the results of OSHA safety and health inspections.

The act authorizes civil fines up to $10,000 for instances where employers "willfully" expose workers to "serious" harm or death. Any act of criminal negligence can result in imprisonment of up to six months.

The Labor Department's assistant secretary for occupational safety and health has responsibility for overseeing OSHA. OSHA has its headquarters in Washington, D.C., and maintains ten regional offices. It develops and promulgates occupational safety and health standards and it issues regulations that enforce these standards. The essence of OSHA is its inspection responsibility. OSHA inspectors conduct investigations and inspections to determine the status of compliance with safety and health standards and regulations. If an inspector visits a work site and finds that the employer is not in compliance with OSHA regulations, the inspector issues a citation and proposes penalties.

From its inception, OSHA has been a controversial agency. Businesses have complained that OSHA regulations are often too bureaucratic, rigid, and hard to understand, making compliance difficult. Organized labor, on the other hand, has charged that OSHA is not diligent enough in enforcing the regulations.

During the administration of President RONALD REAGAN, the number of OSHA inspectors was reduced by 25 percent, making it even more difficult to investigate allegations of injuries. In addition, President Reagan, by EXECUTIVE ORDER No. 12,291 in 1981, permitted OSHA to certify that a company was in compliance with safety and health standards by reviewing paperwork submitted by the company.

OSHA standards and regulations touch every facet of workplace health and safety. The regulations establish maximum levels of exposure to lead, asbestos, chemicals, and other toxic substances, and they specify the proper safety gear for workers. For example, construction workers who work on scaffolding or on structural steel must wear a safety harness.

During the late 1990s, questions arose about whether OSHA regulations applied to commuters and work-at-home employees. In a response to an inquiry about these questions in November 1999, OSHA stated that employers

who allow employees to work at home were indeed responsible for any injuries that occurred in the employee's home. This interpretation would mean that employers would have to inspect each employee's home and, if necessary, make necessary corrections to the home design, including cooling, heating, and ventilation systems. Although OSHA claimed that the letter did not represent official policy, several businesses and members of Congress heavily criticized the letter.

OSHA withdrew the responses to the letter in January 2000. According to statements by OSHA spokespersons, the regulations do not apply to most white-collar commuters who work at home. However, regulations do apply to employees who conduct hazardous manufacturing from their homes.

OSHA's letter regarding the regulation of home offices did not end with the agency's withdrawal of its response. In 2001, President GEORGE W. BUSH introduced a series of proposals, named the "New Freedom Initiatives," designed to enhance the opportunities for DISABLED PERSONS under the Americans with Disabilities Act. Among the proposals was a call to prevent OSHA from regulating home offices, including a specific reference to the 1999 OSHA letter.

OSHA works to improve health and safety through education and training programs. It also provides assistance to state occupational and health programs to maintain consistent national standards. Among its numerous initiatives, OSHA has sought to reduce ergonomic hazards in the workplace that cause pain and discomfort for millions of workers in the U.S. For example, in 2003, OSHA announced that it would work with the U.S. POSTAL SERVICE to reduce ergonomic injuries among employees of the service.

Employers have the right to dispute any alleged job-safety or health violation found during an OSHA inspection, the penalties OSHA has proposed, or the time given by OSHA to correct any hazardous situation. Employees and union representatives may file a case challenging the propriety of the time that OSHA has allowed for correction of any violation.

These cases are heard by OSHRC, an independent, QUASI-JUDICIAL agency. A case arises when a citation is issued against the employer as a result of an OSHA inspection and the employer contests the citation within 15 working days.

**Sources, Events of Exposure, and Nature of Resultant Occupational Illnesses or Injuries, in 2001[a]**

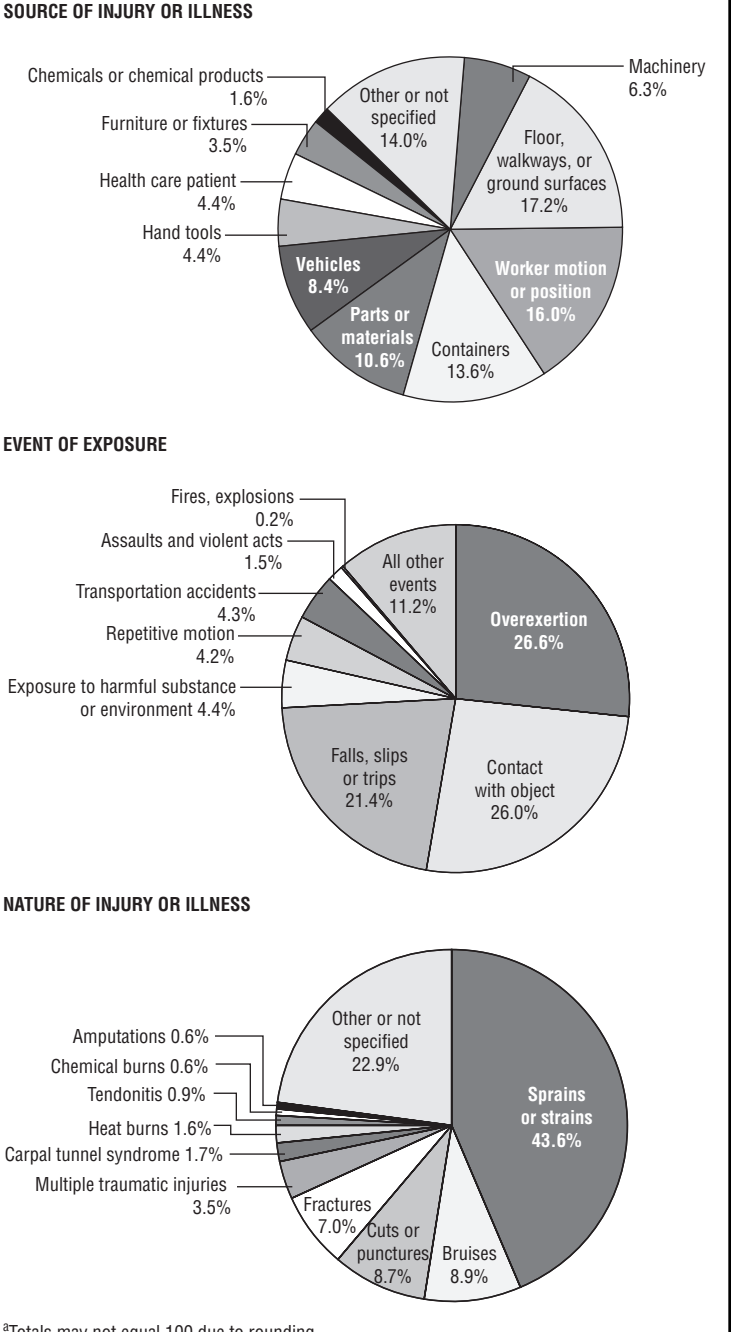


[a]Totals may not equal 100 due to rounding.

SOURCE: U.S. Department of Labor, Bureau of Labor Statistics.

All cases that require a hearing are assigned to an administrative law judge (ALJ), who decides the case. The government has the BURDEN OF PROOF. A substantial number of the

decisions of the ALJs become final orders of the commission. However, each decision is subject to discretionary review by the three members of the commission upon the direction of any one of the three, if done within 30 days of the filing of the decision. A party who is dissatisfied with an ALJ decision does not have a right of appeal to the commission but must convince at least one commissioner to exercise discretion and to agree to have the commission hear the appeal. When discretionary review is taken, the commission issues its own decision. Once a case is decided, any person who has been adversely affected may file an appeal with a U.S. court of appeals.

The principal office of the commission is located in Washington, D.C. There are also three regional offices where commission judges are stationed.

"THE PURPOSE OF STRICT SCRUTINY IS TO 'SMOKE OUT' ILLEGITIMATE USES OF RACE BY ASSURING THAT THE LEGISLATIVE BODY IS PURSUING A GOAL IMPORTANT ENOUGH TO WARRANT USE OF A HIGHLY SUSPECT TOOL."
—SANDRA DAY O'CONNOR

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CROSS-REFERENCES

Administrative Law and Procedure; Employment Law; Labor Law; Workers' Compensation.

## ♦ O'CONNOR, SANDRA DAY

Sandra Day O'Connor was appointed to the U.S. Supreme Court in 1981, becoming the first female justice on the high court. O'Connor has established herself as a moderate conservative who prefers narrow, limited holdings.

Sandra Day was born on March 26, 1930, in El Paso, Texas. She grew up in a remote part of southeastern Arizona, where her parents owned a 160,000-acre ranch. She spent her winters in El Paso, where she lived with her grandmother while attending school. In 1950, she graduated from Stanford University with a bachelor's degree in economics. She then attended Stanford Law School, where she graduated third in her class in 1952. **WILLIAM H. REHNQUIST**, who later would become her colleague on the U.S. Supreme Court, ranked first in the same law school class.

After law school, Day married John O'Connor, an attorney. She had hoped to join a law firm in Los Angeles or San Francisco, but none was willing to hire a woman attorney, although one did offer her a position as legal secretary. Instead, O'Connor spent a year as a deputy county attorney in San Mateo, California. In 1953, she accompanied her husband, a member of the U.S. Army's Judge Advocate General's Corps, to West Germany. During the three years the couple spent in Germany, O'Connor worked as a civilian attorney for the Quartermaster Corps.

On their return from Germany in 1957, O'Connor and her husband settled in Phoenix, Arizona where she entered private practice. She soon became active in state and local government, serving as a member of the Maricopa County Board of Adjustments and Appeals (1960–1963) and the Governor's Committee on Marriage and the Family (1965). From 1965 to 1969, she served as assistant attorney general for Arizona.

In 1969, O'Connor was appointed to fill a vacancy in the Arizona Senate. She won election to a full term in 1970 and was reelected in 1972. After her re-election, her colleagues elected her to be majority leader, making her the first woman in the country to hold such a position.

During her years in the Arizona Senate, O'Connor voted in favor of the **EQUAL RIGHTS AMENDMENT** to the U.S. Constitution and supported the restoration of the death penalty and limitations on government spending. She also played an active role in **REPUBLICAN PARTY** politics, serving as state co-chair of the committee supporting the re-election of President **RICHARD M. NIXON** in 1972.

O'Connor's career shifted in 1974 with her election to the Maricopa County Superior Court. She became a respected trial judge and was appointed by Democratic Governor Bruce Babbitt to the Arizona Court of Appeals in 1979. In 1981, President **RONALD REAGAN** appointed her to the U.S. Supreme Court to replace justice **POTTER STEWART**.

O'Connor's decisions on the Court have revealed her to be a pragmatic conservative. She has written many concurring opinions that attempt to limit the majority's holding, suggesting ways that the Court could have decided an issue on narrower grounds. She has joined her conservative brethren in limiting the rights of defendants in **CRIMINAL PROCEDURE** cases and restricting federal intervention into areas that are reserved to the states. She has been an influential voice in reviewing challenges to **AFFIRMATIVE ACTION** programs. In her majority opinion in *City of Richmond v. J.A. Croson Co.*, 488 U.S.

469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989), O'Connor struck down a set-aside program for minority contractors. She concluded that these types of affirmative action programs can only be justified to remedy prior government discrimination instead of past societal discrimination. In *Adarand Constructors v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995), O'Connor's opinion extended the holding of *Croson* by requiring that racial classifications by federal, state, and local governmental units must be subjected to the STRICT SCRUTINY of the courts. Although the decision clarified the standard by which affirmative action programs should be reviewed, lower federal and state courts have since struggled with this standard in their review of various types of programs.

O'Connor's position on ABORTION has been consistent. O'Connor has refused to join opinions written by some of her conservative colleagues arguing for the overruling of ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, the 1973 decision that defined the right to choose abortion as a fundamental constitutional right. In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), she joined Justices ANTHONY M. KENNEDY and DAVID H. SOUTER in an opinion that defended the reasoning of *Roe* and the line of cases that followed it. She has supported the rights of states to regulate abortion as long as the regulations are not too burdensome.

*Sandra Day O'Connor.* LIBRARY OF CONGRESS

O'Connor has been the subject of several books about her life on and off the bench. In 2002, she published memoirs of her childhood, *Lazy B: Growing Up on a Cattle Ranch in the American Southwest,* which she co-wrote with her brother, H. Alan Day. Around the same time, her health began to suffer, and because she has been the swing vote on so many controversial issues during her tenure on the Court, several observers have speculated about

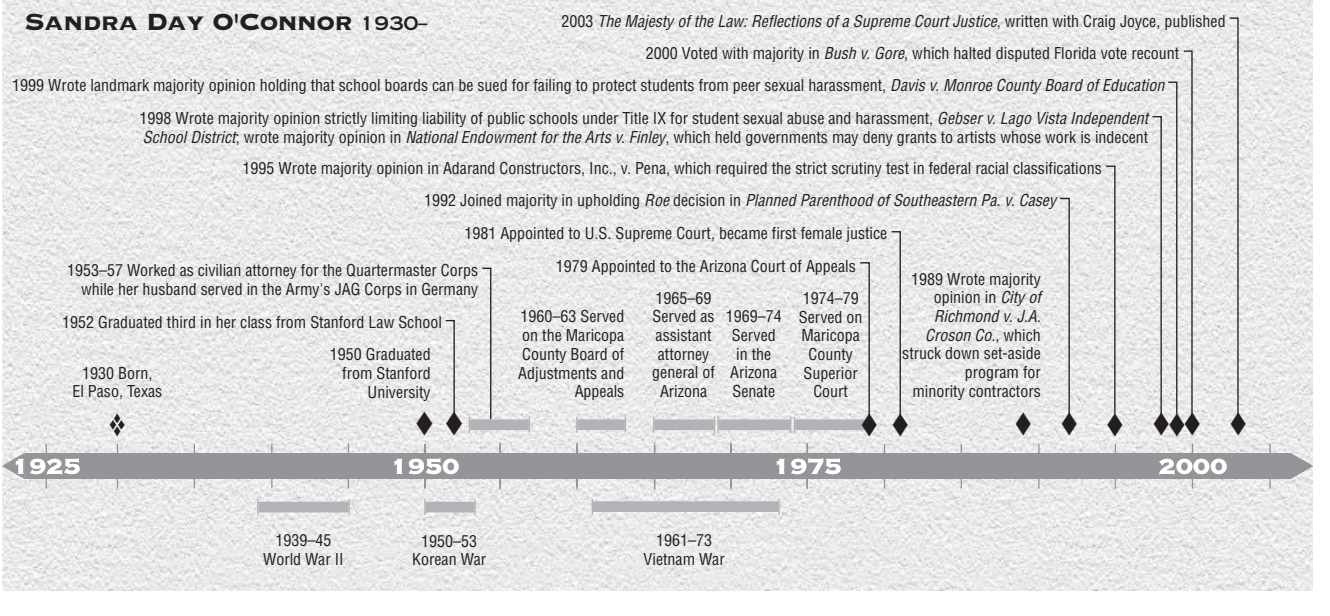

the direction it would take if she were to step down.

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## O'CONOR, CHARLES

Charles O'Conor achieved prominence as a New York attorney and as counsel for the prosecution in the trial of the notorious Tweed Ring.

O'Conor was born January 22, 1804, in New York City. After his ADMISSION TO THE BAR in 1824, O'Conor practiced law in New York for twenty years, specializing in corporation law. He attended the New York Constitutional Convention in 1846 and served as U.S. district attorney from 1853 to 1854.

In 1871 O'Conor began a four-year term as special deputy attorney general for New York State. During his tenure he acted as counsel for the prosecution in the trial of William M. ("Boss") Tweed and his followers, who controlled a corrupt political machine in New York City. The trial resulted in the disbandment of the Tweed Ring.

The year 1872 was a presidential election year and O'Conor was nominated for the presidency by a faction of the DEMOCRATIC PARTY known as the Straight-Out Democrats. After his unsuccessful presidential campaign, O'Conor served, in 1877, as counsel during the investigation of the controversial Rutherford B. Hayes-Samuel Tilden election results.

O'Conor died May 12, 1884, in Nantucket, Massachusetts.

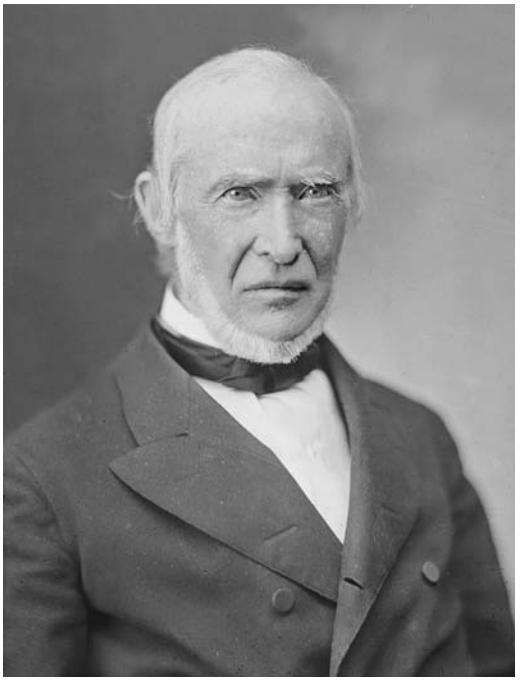

*Charles O'Conor.* LIBRARY OF CONGRESS

## OF COUNSEL

*A term commonly applied in the* PRACTICE OF LAW *to an attorney who has been employed to aid in the preparation and management of a particular case but who is not the principal attorney in the action.*

*Of counsel* is also sometimes used in reference to an attorney who is associated with a law firm, but is neither a partner nor an associate.

## OF COURSE

*Any action or step that an individual might take during judicial proceedings without being required to ask the judge's permission or that will*

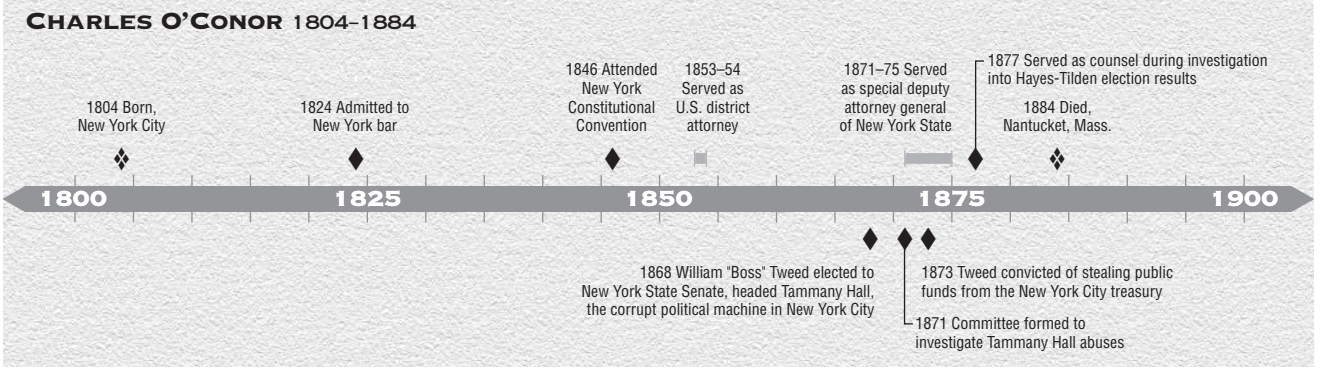

*receive the judge's automatic approval if the individual does ask permission; that which is a matter of right.*

## OF RECORD

*Entered on the appropriate official documents maintained by a governmental body and that are usually available for inspection by the public.*

A mortgage is of record when it is entered in the appropriate records of the clerk in the area where the mortgaged property is located. When it is recorded, notice is thereby provided to anyone interested in purchasing the land that it is subject to certain encumbrances.

An *attorney of record* is the lawyer whose name is contained in the records of the court as the principal lawyer handling an action.

CROSS-REFERENCES

Recording of Land Titles.

## OFFENSE

*A breach of law; a crime.*

An offense may consist of a felony or a misdemeanor. The term is used to indicate a violation of public rights as opposed to private ones. For example, murder is an offense whereas LIBEL is not.

## OFFER

*A promise that, according to its terms, is contingent upon a particular act, forbearance, or promise given in exchange for the original promise or the performance thereof; a demonstration of the willingness of a party to enter into a bargain, made in such a way that another individual is justified in understanding that his or her assent to the bargain is invited and that such assent will conclude the bargain.*

The making of an offer is the first of three steps in the traditional process of forming a valid contract: an offer, an acceptance of the offer, and an exchange of consideration. (Consideration is the act of doing something or promising to do something that a person is not legally required to do, or the forbearance or the promise to forbear from doing something that he or she has the legal right to do.)

An offer is a communication that gives the listener the power to conclude a contract. The question of whether a party in fact made an offer is a common question in a contract case. The general rule is that it must be reasonable under the circumstances for the recipient to believe that the communication is an offer. The more definite the communication, the more likely it is to constitute an offer. If an offer spells out such terms as quantity, quality, price, and time and place of delivery, a court may find that an offer was made. For example, if a merchant says to a customer, "I will sell you a dozen high-grade widgets for $100 each to be delivered to your shop on December 31," a court would likely find such a communication sufficiently definite to constitute an offer. On the other hand, a statement such as "I am thinking of selling some widgets" would probably not be labeled an offer.

The question of whether a communication constitutes an offer can be significant. An offer may bind the offerer to the terms of the offer if the recipient of the offer responds by accepting the offer and giving the offerer a partial payment. If the offerer accepts the payment, a deal has been struck, and the offerer is legally obligated to follow through on the agreement. If the offerer fails to fulfill the terms of the offer, the offeree may seek a remedy in court.

There are many notable caveats to the general rules on offers. Generally, a simple price quote is not an offer. Advertisements are considered invitations for offers, not actual offers. However, an advertisement promising to pay an award may constitute an offer because only one person, or very few persons, will have the opportunity to accept the offer.

An oral offer cannot be enforced against the offerer for agreements concerning real estate, contracts for the sale of goods priced at $500 or more, and transactions that cannot be completed within one year. Such agreements must be in writing to be enforceable. These restrictions on oral offers are derived from the STATUTE OF FRAUDS, 29 Car. II, ch. 3, a law passed by the British Parliament in 1677 and designed in part to prevent false claims that an offer was tendered.

If a person rejects an offer, it is considered terminated. Likewise, if the recipient of an offer changes its terms, the original offer is terminated and a new offer is created. This new offer is called a counteroffer, and the original offerer may accept it.

In offers between merchants, a counteroffer may constitute acceptance of the original offer. Courts often hold that a contract is created when

the facts show that two merchants agreed to make a sale but the recipient of the offer added terms to the agreement. In many such cases, a contract will be created as to the original offer, and the additional terms may be enforced. For example, assume that a wholesaler writes to a retailer, "Will sell 750 Grade A Fancy Pears immediately. Also have Grade A Fancy Cherries." If the retailer writes back, "Will take 750 Grade A Fancy Pears and 10 bushels of Grade A Fancy Cherries," a court may find that a contract had been created for the sale of pears and cherries.

Courts find offer and acceptance more readily in communications between merchants because merchants are more sophisticated than non-merchants in the practice of making agreements. Nevertheless, a counteroffer between merchants that adds new terms will not be enforced if the offer expressly limited acceptance to the terms of the offer, if the additional terms materially alter the intent of the parties, or if notification of rejection of the counteroffer was given to the recipient of the offer by the original offerer.

If an offer indicates that it will terminate within a certain period of time, it cannot be accepted after the time has expired. The passage of a reasonable length of time may automatically terminate an offer. The determination of a reasonable length of time depends on the circumstances surrounding the offer. For example, if a wholesaler contacts a retailer offering to sell perishable produce, the retailer cannot wait six weeks and then accept the offer. Even if an item is nonperishable, an unusually lengthy response time may terminate an offer. For example, if the usual practice in the lumber business is a response time of less than two weeks, the offerer may refuse to honor the offer if the recipient of the offer does not respond within that time period.

Some offers may be made irrevocable. An irrevocable offer is one that cannot be revoked by the offerer and terminates only upon the passage of time or rejection by the recipient. There are three types of irrevocable offers: (1) where the recipient of the offer pays the offerer for the promise to keep the offer open; (2) where the recipient of the offer partly or fully performs his or her obligations under the offer; and (3) firm offers under section 2-205 of the UNIFORM COMMERCIAL CODE. A firm offer is an assurance by a merchant to buy or sell goods. The assurance must be in writing. No consideration is necessary to support the promise that the offer will remain open. A firm offer created under section 2-205 remains open no more than ninety days.

## OFFERING

See PUBLIC OFFERING.

## OFFICE AUDIT

*A thorough examination and verification of the tax returns and financial records of an individual or firm by the* INTERNAL REVENUE SERVICE *in the office of the agent who is conducting the review.*

## OFFICE OF MANAGEMENT AND BUDGET

The Office of Management and Budget (OMB), formerly the Bureau of the Budget, is an agency of the federal government that evaluates, formulates, and coordinates management procedures and program objectives within and among departments and agencies of the EXECUTIVE BRANCH. It also controls the administration of the FEDERAL BUDGET, while routinely providing the president of the United States with recommendations regarding budget proposals and relevant legislative enactments. The Bureau of the Budget was first established in the Executive Office of the President pursuant to REORGANIZATION PLAN No. 1 of 1939 (5 U.S.C.A. app.), effective July 1, 1939. Its functions were reorganized and the office renamed OMB by EXECUTIVE ORDER No. 11,541 of July 1, 1970. Since the reorganization, the OMB has played a central role in analyzing the federal budget and making recommendations for changes in the budget. Its director, who is appointed by the president, is a key advisor on fiscal policy. The director often appears before congressional committees to explain budgetary proposals.

The OMB assists the president in developing and maintaining effective government by reviewing the organizational structure and management procedures of the executive branch to ensure that the intended results are achieved. It works to develop efficient coordinating mechanisms to implement government activities and to expand interagency cooperation.

The OMB assists the president and executive departments and agencies in preparing the budget and in formulating the government's fiscal program. It also publishes the president's proposed *Budget of the U.S. Government* every

year. Once Congress approves a budget, the OMB supervises and controls the administration of it. In addition, it advises the president on proposed legislation and recommends to the president whether to sign or VETO legislative enactments.

The office also assists in developing regulatory reform proposals and programs for paperwork reduction, especially reporting burdens of the public. The OMB helps in considering, clearing, and, where necessary, preparing proposed executive orders and proclamations that will have an impact on the federal budget.

The OMB has assumed an oversight role in determining the effectiveness of federal programs. It plans and develops information systems that provide the president with program performance data, and it plans, conducts, and promotes evaluation efforts that assist the president in assessing program objectives, performance, and efficiency.

The office also keeps the president informed of the progress of government agency activities with respect to work proposed, initiated, and completed. It coordinates work among the agencies of the executive branch to eliminate overlap and duplication of effort and to ensure that the funds appropriated by Congress are expended in the most economical manner.

Finally, OMB works to improve the economy, efficiency, and effectiveness of the procurement processes by directing procurement policies, regulations, procedures, and forms for the executive branch.

OMB is comprised of divisions that are organized by agency or program area and also by function. Resource Management Offices develop and support the president's Budget and Management proposals. The Budget Review Division provides technical support for budget-related negotiations and decisions. The Legislative Reference Division coordinates the position of the administration regarding budget-related legislation. Statutory offices include the Office of Federal Financial Management, the Office of Federal Procurement Policy, and the Office of Information and Regulatory Affairs.

**FURTHER READINGS**

Office of Management and Budget. Available online at <www.whitehouse.gov/omb> (accessed August 1, 2003).

**CROSS-REFERENCES**

Executive Branch.

## OFFICE OF NATIONAL DRUG CONTROL POLICY

The Office of National Drug Control Policy (ONDCP) was established by the National Narcotics Leadership Act of 1988 (21 U.S.C.A. § 1501 et seq.) and began operations in January 1989.

ONDCP develops and coordinates the policies and objectives of the federal government's program for reducing the use of illicit drugs. ONDCP seeks ways to combat the manufacture and distribution of illegal drugs, drug-related crime and violence, and drug-related health consequences. The director of ONDCP is charged with producing the National Drug Control Strategy, which directs the U.S. anti-drug efforts and establishes a program, a budget, and guidelines for cooperation among federal, state, and local entities.

By law, the director also evaluates, coordinates, and oversees both the international and domestic anti-drug efforts of the EXECUTIVE BRANCH agencies and ensures that such efforts sustain and complement state and local anti-drug activities. The director is commonly referred to as the "drug czar" because he or she advises the president regarding changes in the organization, management, budgeting, and personnel of federal agencies that could affect the U.S. anti-drug efforts. The director is a member of the NATIONAL SECURITY COUNCIL and the Cabinet Council on Counternarcotics.

ONDCP drug-control priorities include treatment, prevention, domestic law enforcement, and interdiction and international initiatives. It presumes that chronic, hard-core drug use is a disease and that anyone suffering from the disease needs treatment. ONDCP seeks to create a balance between sanctions for drug-related criminal activity and treatment of an addictive disease.

In the area of prevention, ONDCP seeks to reverse the upward trend in drug use and find ways to empower communities to address their drug problems. It develops and implements initiatives that attempt to prevent illicit drug use by young people and other high-risk populations.

ONDCP also emphasizes the need for strong, effective law enforcement efforts, including strong sanctions against drug offenders. Key priorities for domestic law enforcement are the disruption and dismantling of drug trafficking organizations, including seizure of their assets,

and the investigation, arrest, prosecution, and imprisonment of drug traffickers. It seeks to attack drug trafficking organizations at every level, from the drug kingpin to the street-corner dealer, through a careful coordination of federal, state, and local law enforcement efforts.

In the international sphere, ONDCP views interdiction as an important component of national drug policy. It cooperates with other nations in building their law enforcement institutions, attacking drug production facilities, interdicting drug shipments in both source and transit countries, and dismantling drug trafficking organizations.

The director of ONDCP is supported by a number of organizational units. The Office of Demand Reduction undertakes and oversees activities to reduce the demand for drugs, including drug education, drug prevention, drug treatment, and related efforts for the rehabilitation of persons addicted to drugs. This office also conducts research on drug use and periodically convenes expert panels to assess state-of-the-art approaches to reducing the demand for drugs.

The Office of Supply Reduction seeks to reduce the availability, production, and distribution of illicit drugs in the United States and abroad. The Office of State and Local Affairs coordinates agency relationships and outreach efforts to state and local government agencies. The Counter-Drug Technology Assessment Center is the central counter-drug enforcement research and development organization of the federal government. It works to identify the scientific and technological needs of federal, state, and local law enforcement agencies.

The election of President **GEORGE W. BUSH** in 2000 boosted efforts of conservatives who supported governmental funding for "faith-based" drug treatment programs. In 2003, the director of the ONDCP announced President Bush's plan for a three-year, $600 million voucher plan that would give such programs access to federal funds.

Also, in March 2003, John P. Walters, the director of the ONDCP, and Tom Ridge, Secretary of the **HOMELAND SECURITY DEPARTMENT**, jointly announced the appointment of Roger Mackin as counter-narcotics officer/U.S. interdiction coordinator. One of Mackin's responsibilities was to ensure that all Homeland Security Department counter-drug policies and efforts were aligned with the president's National Drug Control Strategy.

In April 2003, Walters testified before a House Appropriations Committee that ONDCP efforts had been a significant factor in the recent downturn in youth drug use. Among the ONDCP accomplishments were its media campaign that uses a Web site, ads, and other means of disseminating information about drugs and the organization's Technology Transfer Program that has brought updated technology and training to more than 20 percent of the nation's state and local police departments and sheriffs' offices.

At the same time, a 2003 report from the ONDCP stated that in 1992, the overall cost of drug abuse to the U.S. population was approximately $102 billion; the projected cost for the 2000 fiscal year (FY) was estimated to be $160.7 billion. In the same report, ONDCP restructured its budget to reflect new methods for reporting drug abuse. The requested drug control budget for FY 2004 was $11.7 billion.

**FURTHER READINGS**

Office of National Drug Control Policy Website. Available at <www.whitehousedrugpolicy.gov> (accessed August 1, 2003).

*U.S. Government Manual* Website. Available online at <www.gpoaccess.gov/gmanual> (accessed November 10, 2003).

**CROSS-REFERENCES**

Drugs and Narcotics; Executive Branch.

## OFFICE OF THRIFT SUPERVISION

The Office of Thrift Supervision (OTS) was established as a bureau of the **TREASURY DEPARTMENT** in August 1989 as part of a major **REORGANIZATION PLAN** of the thrift regulatory structure mandated by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (12 U.S.C.A. § 1462a). The reorganization resulted from the savings and loan crisis of the 1980s, when a newly deregulated thrift industry invested in high-risk real estate ventures, many of which collapsed. This situation led to enormous financial losses and the call for more federal regulation and oversight.

The OTS is authorized to charter federal thrift institutions and to serve as the primary regulator of the 1,700 federal- and state-chartered thrifts that belong to the Savings Association Insurance Fund. Its purpose is to maintain the

safety, soundness, and viability of the thrift industry by adopting regulations that seek to prevent unreasonable lending risks, examining and supervising thrift institutions, and enforcing compliance with federal laws and regulations. In addition to overseeing thrift institutions, the OTS also oversees companies that own thrifts and controls the acquisition of thrifts by such holding companies.

The OTS is organized into five main divisions. The Washington Operations Office develops national policy guidelines to clarify and implement statutes and regulations and establishes programs to implement new policies and laws. This division monitors the condition of the thrift industry and attempts to identify emerging supervisory problem areas.

The Regional Operations division examines and supervises thrift institutions through five regional offices located in Jersey City, Atlanta, Chicago, Dallas, and San Francisco. These offices also promote housing and other financial services in areas with the greatest need. The regional offices oversee the training and development of federal thrift regulators through accredited programs.

The Chief Counsel division provides a full range of legal services to the OTS, including drafting regulations, representing the agency in court, and taking enforcement actions against savings institutions that violate laws or regulations.

The staff of the Congressional Affairs division interacts with members of Congress, congressional staff, and committee members to accomplish the legislative objectives of the OTS. This division provides information to Congress about the office's supervisory, regulatory, and enforcement activities.

The Public Affairs division disseminates information, including policies, regulations, and key developments within the office. It also maintains an archive of business records and documented actions of the OTS and its predecessor, the Federal Home Loan Bank Board.

The OTS uses no tax money to fund its regulation. Its expenses are met through fees and assessments on the thrift institutions it regulates. The OTS is headed by a director appointed by the president and confirmed by the Senate to serve a five-year term.

Since 1999 the OTS has filed annual performance reports, and in 2000 it prepared a strategic report for 2000-2005. Since the late 1990s it has expanded its Web site, offering consumers information on the stability of the thrift institutions it regulates. In addition since 2001 it has prepared regulations in "plain English" to reduce confusion.

FURTHER READINGS

Office of Thrift Supervision. Available online at <www.ots.treas.gov> (accessed August 1, 2003).

*U.S. Government Manual* Website. Available online at <www.gpoaccess.gov/gmanual> (accessed November 10, 2003).

CROSS-REFERENCES

Savings and Loan Association; Treasury Department.

## OFFICER

*An individual with the responsibility of performing the duties and functions of an office, that is a duty or charge, a position of trust, or a right to exercise a public or private employment.*

A *public officer* is ordinarily defined as an individual who has been elected or appointed to exercise the functions of an office for the benefit of the public. *Executive officers,* such as the president or state governors, are public officers charged with the duty to ascertain that the law is enforced and obeyed. A *legislative officer,* such as a member of Congress, has the duty of making the laws. A public officer whose duties include administering justice, adjudicating controversies, and interpreting the laws is called a *judicial officer.* A *de jure officer* is one who is legally appointed and qualified to exercise the office. A *de facto officer* is an individual who appears to be legally qualified and appointed to an office but is not due to some legal technicality, such as failure to file a financial disclosure statement within the time prescribed by statute.

A public office must be created either by statute or by constitutional provision. Public officers are distinguishable from employees in that they are required to take an oath of office and are appointed or elected to specified terms of office. The eligibility, duties, and compensation of public officers are defined by statute.

Removal from office occurs when an officer is dismissed from his or her position by a superior officer acting according to law. Sufficient cause must exist to justify the removal. When an individual is wrongfully removed from office, he or she may seek reinstatement.

A *military officer* is one who has been commissioned as such in the ARMED SERVICES.

An officer of a corporation is someone, such as the president, vice-president, treasurer, or secretary, whose main duties are to oversee the efficient operation of the business.

CROSS-REFERENCES

Officers of the Court.

## OFFICERS OF THE COURT

*An all-inclusive term for any type of court employee including judges, clerks, sheriffs, marshals, bailiffs, and constables.*

An attorney is also regarded as being an officer of the court and must therefore comply with court rules.

## OFFICIAL GAZETTE

*A compilation published weekly by the* PATENT AND TRADEMARK OFFICE *listing all the* PATENTS *and* TRADEMARKS *issued and registered, thereby providing notice to all interested parties.*

## OFFSET

*A contrary claim or demand that may cancel or reduce a given claim; a counterclaim. A kind of bookkeeping entry that counters the effect of a previous entry.*

## OKLAHOMA CITY BOMBING

See TERRORISM "The Oklahoma City Bombing" (Sidebar); VENUE "Venue and the Oklahoma City Bombing Case" (Sidebar).

## OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE

The federal Old-Age, Survivors, and Disability Insurance (OASDI) system was developed pursuant to the federal Social Security Act of 1935 (42 U.S.C.A. § 301 et seq. [1935]) to provide government benefits to eligible retirees, disabled individuals, and surviving spouses and their dependents.

OASDI benefits are monthly payments made to retired people, families whose wage earner has died, and workers who are unemployed because of sickness or accident. Workers qualify for such protection by having been employed for the mandatory minimum amount of time and by having made contributions to SOCIAL SECURITY. There is no financial need requirement. Once a worker qualifies for protection, his or her family is also entitled to protection. The OASDI program is geared toward helping families as a matter of social policy.

The OASDI program is funded by payroll taxes levied on employees, their employers, and the self-employed. The rate of the contributions is based upon the employee's taxable income, up to a maximum taxable amount, with the employer contributing an equal amount. The self-employed person contributes twice the amount levied on an employee. In 1996 a tax rate of 6.2 percent was levied on earned income up to a maximum of $62,887 to fund OASDI.

### Old-Age Benefits

Old-age benefits were the cornerstone of the original SOCIAL SECURITY ACT, which was passed in 1935. More than 25 million Americans receive old-age benefits each month, and those payments amount to almost $20 billion a year. Because of the increasing median age of the adult population, these figures are constantly increasing.

To be eligible for Social Security old-age benefits, a person must have worked a minimum number of calendar quarters, which increases with the worker's age. Forty quarters is the maximum requirement. Once a person earns credit for the required number of calendar quarters, she or he is insured. Workers born before 1950 can retire at age 65 with full benefits based on their average income during working years. For those workers born between 1950 and 1960, the retirement age has increased to age 66. Workers born in 1960 or later will be awarded full benefits for retirement at age 67. A person may retire at age 62 and receive less than full benefits. A worker's spouse who has not contributed to Social Security receives, at age 65, 50 percent of the amount paid to the worker.

### Survivors' Benefits

Survivors' benefits are payments made to family members when a worker dies. The payments are intended to help ease the financial strain caused by the loss of the worker's income. Survivors can receive benefits if the deceased worker was employed and contributed to Social Security long enough to be considered insured.

When a wage earner dies, his or her spouse and unmarried minor children are entitled to receive benefits. In addition to monthly checks, the worker's surviving spouse, or if there is none, another eligible person, may receive a lump-sum payment of $255.

### Disability Benefits

A person who becomes unable to work and expects to be disabled for at least twelve months or who will probably die from the condition can receive Social Security payments before reaching retirement age. A worker is eligible for disability benefits if she or he has worked enough years under Social Security before the onset of disabilities.

A disability is any physical or mental condition that prevents the worker from doing substantial work. Examples of disabilities that meet the Social Security criteria include brain damage, heart disease, kidney failure, severe arthritis, and serious mental illness.

The SOCIAL SECURITY ADMINISTRATION (SSA) determines whether a person's disability is serious enough to justify the awarding of benefits. The SSA determines whether the impairment is so severe that it significantly affects "basic work activity." If the answer is yes, the worker's medical data are compared with a set of guidelines known as the Listing of Impairments. If the claimant is found to suffer from a condition contained in this list, payment of the benefits will be approved. If the condition is less severe, SSA determines whether the impairment prevents the person from doing his or her former work. If not, the application will be denied. If so, a determination is made as to whether the impairment will prevent the applicant from doing other work present in the economy.

At this point SSA uses a series of guidelines that attempt to combine consideration of the applicant's residual functional capacity with the factors of age, education, and experience. The guidelines classify work into three types: sedentary work, light work, and medium work. If the SSA determines that an applicant can perform one of these types of work, it will deny benefits. A claimant may appeal this decision and ask for a hearing in which to present further evidence, including personal testimony. If the recommendation of the ADMINISTRATIVE LAW judge conducting the hearing is adverse, the claimant may appeal to the Social Security Administration's Appeals Council. If the claimant loses the appeal, she or he may file civil action in federal district court seeking review of the agency's adverse determination.

Three types of benefits are available to persons who meet the OASDI disability eligibility requirements: monthly cash payments, vocational rehabilitation, and medical insurance. Cash payments begin, provided proper application has been made, with the sixth month of disability. The amount of the monthly payment depends on the amount of earnings on which the employee has paid Social Security taxes and the number of eligible dependents. The maximum for a family usually equals roughly the amount to which the disabled employee is entitled as an individual plus allowances for two dependents.

Vocational rehabilitation services are provided through a joint federal-state program. Persons receiving cash payments for disability may continue to receive them for a limited time after they begin to work or near the end of a program of vocational rehabilitation. This period is referred to as the "trial work period" and may last as long as nine months.

Medical services are available through the MEDICARE program in which a recipient of OASDI disability benefits begins to participate twenty-five months after the onset of disability.

**Old-Age, Survivors, and Disability Insurance**

**BENEFICIARIES, BY TYPE OF BENEFIT, IN 2002**

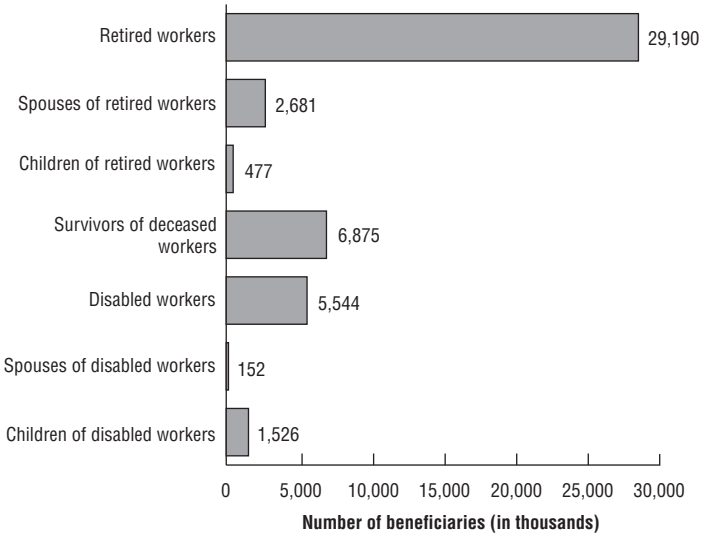


SOURCE: Social Security Administration, *Fact Sheet on the Old-Age, Survivors, and Disability Insurance Program*, December 31, 2002.

FURTHER READINGS

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Nickles, Don. 1999. "Retiring in America: Why the United States Needs a New Kind of Social Security for the New Millennium." *Harvard Journal on Legislation* 36 (winter).

Social Security Advisory Board. 2001. *Social Security Disability: The Basics.* Mechanicsburg: Pennsylvania Bar Institute.

*Social Security and SSI Disability.* 1999. New York: Practising Law Institute.

CROSS-REFERENCES

Disability Discrimination; Elder Law; Health Insurance; Senior Citizens.

## OLMSTEAD V. UNITED STATES

*Olmstead v. United States,* 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928), was the first case dealing with the issue of whether messages passing over telephone wires are within the constitutional protection against unreasonable SEARCHES AND SEIZURES.

In *Olmstead,* several individuals were convicted of a conspiracy to violate the National Prohibition Act (41 Stat. 305) by illegally possessing, transporting, and importing intoxicating liquors, maintaining nuisances, and selling intoxicating liquors. The information leading to the discovery of the conspiracy was, for the most part, obtained through the interception of messages on the telephones of the conspirators by four federal PROHIBITION officers. Wires were placed along the ordinary telephone wires from the homes of four of the defendants and along the wires that led to their main office of operation. The insertion of the wires was made without any TRESPASS having been committed on any of the defendants' property since it was done in the basement of the large office building and in the streets near the residences.

The Supreme Court held that messages passing over telephone wires were not within the protection against unreasonable searches and seizures. The eavesdropper had to have physically trespassed in order for evidence procured by WIRETAPPING to be regarded as having been obtained unconstitutionally. The Court reasoned that, since there was no entry of the homes or offices of the defendants, there was no physical trespass. In addition, in spite of the fact that the evidence leading to the conviction was obtained in violation of a state statute that made it a misdemeanor to intercept telegraphic or telephonic messages, the Court indicated that the statute did not declare that evidence obtained in such manner would be inadmissible, and it was not inadmissible under COMMON LAW.

Subsequently the *Olmstead* case was overruled, the physical trespass doctrine abandoned, and the holding in *Olmstead* is no longer the law. Under current law, in order for ELECTRONIC SURVEILLANCE to be constitutionally permissible, it must be done pursuant to the prior authorization by a court.

## ♦ OLNEY, RICHARD

In the late nineteenth century, the Massachusetts-born attorney Richard Olney exerted a powerful influence over domestic and international affairs. From 1893 to 1895, Olney served as U.S. attorney general under President GROVER CLEVELAND and, from 1895 to 1897, as SECRETARY OF STATE. A nationalist with a forceful personality who took a broad view of federal power, Olney is remembered for two important actions during his public career that had long-lasting implications for U.S. law. First, as attorney general, he used the office in 1894 to break a strike by railway workers that hampered the delivery of mail nationwide. The outcome affected the rights of workers for more than a quarter of a century, thrust Olney into the national spotlight, and earned him the enmity of LABOR UNIONS. Second, after becoming secretary of state, he resolved a conflict between Venezuela and England that shaped U.S. foreign policy well into the twentieth century.

Born in Oxford, Massachusetts, on September 15, 1835, Olney was educated at Brown University and Harvard Law School. Admitted to the Boston bar in 1859, he established a successful law practice and earned recognition for his work with railroads. A brief political career followed with his election to the Massachusetts state legislature, where he served one term between 1873 and 1874. In 1893 he was appointed U.S. attorney general at the start of the second and deeply troubled administration of President Cleveland. The president became mired in public controversies, and his new attorney general would be at the heart of one of the worst.

When Olney assumed his duties in the DEPARTMENT OF JUSTICE, the nation was suffering from an economic depression. The Pullman Company, a Chicago-based railroad, cut its workers' pay to near-starvation wages but went on paying dividends to its shareholders. In 1894 the company's laborers staged a strike that spread nationwide under the auspices of the

nascent American Railway Union: everywhere, railroad workers refused to handle Pullman train cars. Tensions escalated when railroad owners began firing the workers, and violence was threatened. The General Managers Association, a trade organization representing railroads, appealed to the Cleveland administration for federal intervention.

Because the strike had prevented the delivery of U.S. mails, Cleveland and Olney had to intervene. Olney had little sympathy for the workers. His first idea was to use the U.S. Army to crush them. Instead he sent 5000 special deputies to restore order. When riots followed, Olney arrested and prosecuted union leaders on grounds of conspiracy, and he won a sweeping federal court **INJUNCTION** to prevent workers from interfering with the railroads' operation. Appealing to the U.S. Supreme Court in 1895, union president **EUGENE V. DEBS** lost his case, and the strike was broken (*In re Debs,* 158 U.S. 564, 15 S. Ct. 900, 39 L. Ed. 1092). The Court's sanction of the injunction was a great boon to U.S. corporations, which thereafter sought court injunctions to break strikes until the practice was restrained during the 1930s. Nonetheless, Olney and Cleveland paid a high political price in the polls for their widely unpopular actions.

In 1895, toward the end of the Cleveland administration, the president appointed Olney secretary of state. At once Olney faced a foreign policy crisis: the conflict between Venezuela and Great Britain over the Venezuela-British Guiana boundary. As much a believer in U.S. supremacy as he was in federal power at home, Olney ordered Britain to enter **ARBITRATION** with Venezuela. His order relied on a broad reading of the **MONROE DOCTRINE**. As the basis of U.S. foreign policy in the nineteenth century, the Monroe Doctrine essentially preserved U.S. independence in the Western Hemisphere. Although the doctrine prohibited foreign intervention in Latin American nations, Olney believed it permitted U.S. intervention to stop European interference with Latin American affairs. Britain ultimately resolved its conflict with Venezuela through arbitration in 1899. But the broader impact of Olney's views came later. His interpretation came to be known as the Olney Corollary to the Monroe Doctrine and was influential in the foreign policy of President **THEODORE ROOSEVELT**.

Olney left office in 1897 at the end of the unpopular Cleveland administration. Returning to private practice, he was touted as a possible presidential candidate in 1904, but he did not run. He died in Boston on April 8, 1917.

*Richard Olney.*
ARCHIVE PHOTOS, INC.

"TODAY THE UNITED STATES IS PRACTICALLY SOVEREIGN ON THIS CONTINENT AND ITS FIAT IS LAW UPON THE SUBJECTS TO WHICH IT CONFINES ITS INTERPOSITION."
—RICHARD OLNEY

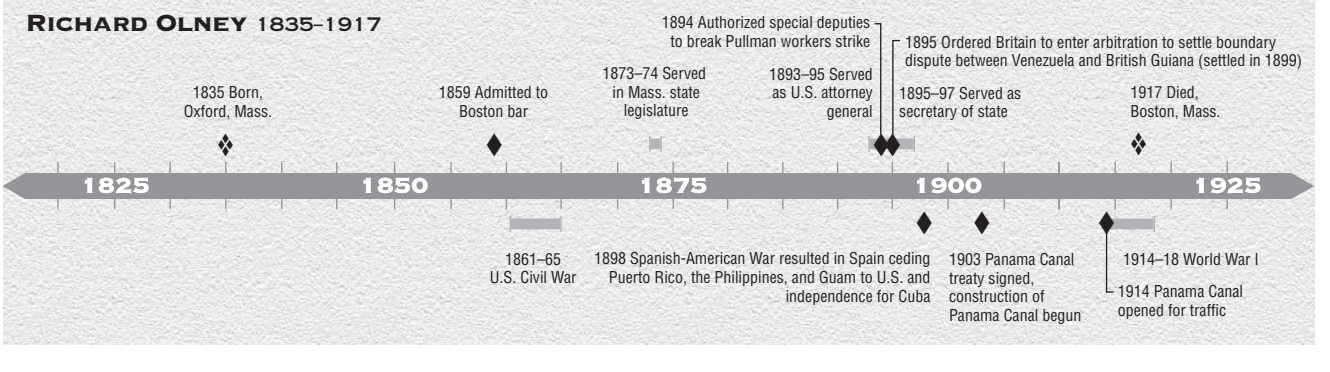

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## OMBUDSPERSON

*A public official who acts as an impartial intermediary between the public and government or bureaucracy, or an employee of an organization who mediates disputes between employees and management.*

The Swedish legislature first created the position of ombudsperson in the early 1800s; the literal translation of *ombudsperson* is "an investigator of citizen complaints." This official was considered to be a person of "known legal ability and outstanding integrity" and was chosen by the Swedish parliament to serve a four-year term.

In modern times, an ombudsperson addresses concerns (such as administrative abuse or maladministration) that citizens or groups have about organizations or bureaucracies. In these situations, the ombudsperson acts as an impartial mediator between the two parties, providing a less threatening type of dispute resolution. For the ombudsperson to help reduce friction between citizens and the government, he or she must be viewed as trustworthy and neutral; the process will not work if one party believes that the ombudsperson is taking the side of the other party. Ombudspersons are bound by the oath of the Ombudsman's Association, which requires neutrality and confidentiality, requirements that are necessary to create trust between the persons involved in a dispute and the ombudsperson.

The power of the ombudsperson lies in his or her ability to investigate complaints of wrongdoing and then notify the public or the relevant government agencies, or both, of the findings. However, an ombudsperson cannot change or make laws, enforce any recommendations, or change administrative actions or decisions.

At the government level, the ombudsperson is appointed by the legislature of the state or county in which he or she serves. The ombudsperson typically has some law training, although a law degree is not required, and the ombusperson must be free of any political loyalties because the job requires neutrality. The goal of the ombudsperson is to assist the communication between the public and the government and help create solutions to problems that arise between the two parties, rather than punishing the wrongdoer. These solutions are aimed at reducing the possibility of similar problems in the future.

Friction between the public and government often can be attributed to the way laws or legislative policies are enforced. In these cases, the ombudsperson can try to reduce the friction by finding a more satisfactory method of carrying out the law. For example, even though police officers may legally enter a workplace to arrest an employee on charges of a crime, this practice can embarrass the employee and threaten her job, even if charges are later dropped. In this situation the ombudsperson would most likely confer with the police department to see if arrests for nonfelonies could be made safely outside the workplace.

The ombudsperson's role in U.S. government is not clearly defined; not all states use an ombudsperson within their governmental agencies. Compared with ombudspersons in other countries, an ombudsperson in the United States has a larger role in the mediation and negotiation of settlements. Government branches such as social and child WELFARE agencies, prisons, law enforcement agencies, and consumer bureaus often have ombudspersons within their ranks.

Although ombudspersons generally work in government agencies, county governments, and city governments, companies also may employ an ombudsperson as a confidential, neutral contact with whom employees can discuss their concerns. In the mid-1990s more than 200 private corporations employed an ombudsperson. A corporate ombudsperson serves as the point of contact for dispute resolution in a corporation. The corporate ombudsperson, who is typically a senior official within the company, helps employees work through a variety of work-related conflicts, such as dissatisfaction with salary, unethical behavior such as theft or FRAUD, terminations, discrimination, and SEXUAL HARASSMENT. In recent years issues such as

government contract compliance and WHISTLEBLOWING have also been handled by corporate ombudspersons.

The corporate ombudsperson's position arose from corporations' desire to increase the job satisfaction of their employees, improve the communication between employees and management, and avoid litigation. As of 1992, there were more than 1000 corporate ombudspersons practicing. On average, a corporate ombudsperson will handle 200 to 300 cases per year and deal with 2 to 8 percent of the corporate workforce.

A corporate ombudsperson works with employees and management by reviewing management decisions and intervening in employee-employee and employee-management disputes. Generally, the methods the corporate ombudsperson may use include responsive listening, investigation, mediation, direct resolution, and upward feedback to management. The ombudsperson allows an employee to voice her concerns and advises or counsels the employee on the best way to deal with the situation. If necessary, as is often the case in allegations of sexual harassment, for example, the ombudsperson can investigate the situation further.

Because of the variety of situations a corporate ombudsperson deals with and because corporate cultures vary from one company to another, there is no standard job description or authority level for corporate ombudspersons.

Other organizations that employ ombudspersons are hospitals, school districts, and universities. In the mid-1990s more than 100 COLLEGES AND UNIVERSITIES employed an ombudsperson, and more than 4000 hospitals offered ombudsperson services for patients. Many small businesses also have an office that handles client or citizen complaints and functions as an ombudsperson's office.

Ombudsperson confidentiality is important to the success of the office. If either party in a dispute believes that her concerns are not heard in confidence, communication with the ombudsperson will decline and the possibility of resolving a problem will also decline. Generally, communication with an ombudsperson is confidential. However, an ombudsperson is not required to maintain confidentiality regarding criminal behavior or conduct that threatens employee safety or company assets.

The question of whether an ombudsperson's communications with a party to a dispute are privileged (whether they may be protected from disclosure in court) is determined by courts on a case-by-case basis. Several cases have recognized an ombudsperson's privilege, including *Shabazz v. Scurr,* 662 F. Supp. 90 (S.D. Iowa 1987), which involved communications to a prison ombudsperson, and *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570 (E.D. Mo. 1991), which involved a corporate ombudsperson.

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CROSS-REFERENCES

Administrative Law and Procedure; Alternative Dispute Resolution.

## OMNIBUS

[Latin, For all; containing two or more independent matters.] *A term frequently used in reference to a legislative bill comprised of two or more general subjects that is designed to compel the executive to approve provisions that he or she would otherwise reject but that he or she signs into law to prevent the defeat of the entire bill.*

Laws governing the FEDERAL BUDGET are typically omnibus bills; for example, the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (110 Stat. 1321).

## ON DEMAND

*Payable immediately on request.*

A note that is payable on demand is one that is to be paid the moment payment is requested

by the individual who has legal possession thereof.

CROSS-REFERENCES

Commercial Paper.

## ON OR ABOUT

*Near; approximately; without significant variance from an agreed date.*

The phrase *on or about* is used to avoid being bound to a more precise statement than is required by law. For example, when an individual seeks to purchase a home, the date when the transaction is closed and the legal title and possession are transferred from seller to buyer is ordinarily scheduled on or about a particular date. The phrase is used to indicate that the parties recognize the fact that, although the exact date might not be convenient for both of them, the transaction should be completed as close to that date as is practicable.

## ON POINT

*Directly applicable or dispositive of the matter under consideration.*

A statute or case is "on point" if it has direct application to the facts of a case currently before a tribunal for determination.

## ONE PERSON, ONE VOTE

*The principle that all citizens, regardless of where they reside in a state, are entitled to equal legislative representation.*

This principle was enunciated by the Supreme Court in REYNOLDS V. SIMS, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). The Court ruled that a state's APPORTIONMENT plan for seats in both houses of a bicameral state legislature must allocate seats on a population basis so that the voting power of each voter be as equal as possible to that of any other voter.

CROSS-REFERENCES

*Baker v. Carr.*

## ♦ O'NEILL, THOMAS PHILLIP, JR.

In many ways, Democrat Tip O'Neill epitomized the cigar-smoking, deal-making American politician of a bygone era. A tough, gregarious leader, O'Neill was the formidable Speaker of the U.S. House of Representatives from 1977 to 1986. He was a die-hard liberal whose commitment to America's poor and working class remained undiminished throughout his 35 years in Washington, D.C. When O'Neill died of cardiac arrest at age 81 on January 5, 1994, President BILL CLINTON eulogized him as one of the nation's most prominent and loyal champions of American workers and as a man who genuinely loved politics and people.

Thomas Phillip "Tip" O'Neill Jr. was born December 9, 1912, in a working-class section of Cambridge, Massachusetts. His Irish Catholic father, Thomas O'Neill Sr., was a bricklayer and member of the Cambridge City Council. His mother, Rose Tolan O'Neill, died when O'Neill was just one year old.

At an early age, O'Neill developed a passion for politics. When he was 15 years old, he spent hours working on Democrat Alfred E. Smith's unsuccessful presidential campaign against HERBERT HOOVER. During his senior year at Boston College, O'Neill ran for public office for the first time. He entered the race for the Cambridge City Council and lost by a mere 150 votes.

This early defeat taught the young candidate a valuable lesson about politics. Taking his local support for granted, O'Neill had failed to campaign in his own North Cambridge neighborhood. The voters from his district resented his neglect and did not back him as strongly as expected. O'Neill never repeated this tactical error. After the city council loss, O'Neill's father reportedly observed, "All politics is local." For years, O'Neill quoted his father's maxim and applied it to his work.

In 1936, the year he graduated from college, O'Neill enjoyed his first victory at the polls. Using the political leverage of jobs and favors, he won a seat in the Massachusetts House of Representatives, from the North Cambridge district. O'Neill served in the state legislature for 16 years. In 1952, he launched into national politics and was elected to the U.S. House of Representatives, beginning a congressional career that included an appointment as majority whip in 1971 and election as majority leader in 1972. He reached the pinnacle of legislative power in 1976 when he rose to the House speakership.

Outgoing and outspoken, O'Neill was known for his partisanship and for his skillful use of power. He embodied the liberal politics of the DEMOCRATIC PARTY during the late twentieth century. His support of federal social programs was unbending. As the political right

grew in power, O'Neill fought conservative proposals such as a balanced budget because they threatened the education, housing, and WELFARE programs he cherished.

As Speaker of the House, O'Neill led Congress during the administrations of Presidents JIMMY CARTER, a Democrat, and RONALD REAGAN, a Republican. O'Neill did not respect Reagan's intellectual capabilities or his conservative policies. After clashing repeatedly with Reagan during his two terms in the White House, O'Neill called his fellow Irishman the least knowledgeable president he had ever worked with in 35 years in the nation's capitol. The two were polar opposites on nearly every political issue, particularly the government's role in American life.

O'Neill's legislative legacy includes a code of ethics for House members and a drive to impeach President RICHARD M. NIXON. O'Neill also was among the first Democrats to speak out against the VIETNAM WAR during the 1960s. He once told an interviewer that the only vote in his congressional career that he regretted was his affirmative vote on the GULF OF TONKIN RESOLUTION in 1964. (The resolution increased American troop involvement in Southeast Asia.) Partisan to a fault, O'Neill had voted for the measure because he felt duty bound to support the Democratic president, LYNDON B. JOHNSON.

While in office, O'Neill shared a bachelor apartment in Washington, D.C. with Representative Edward Boland of Massachusetts. His wife, Mildred ("Millie"), and their five children stayed in the home district. According to Capitol Hill legend, the refrigerator in the men's apartment was stocked mostly with diet soft drinks, beer, and cigars.

*Thomas "Tip" O'Neill.* UPI/CORBIS-BETTMANN

O'Neill did not survive more than a quarter century in Washington, D.C., without some tarnish to his reputation. In 1978, he was criticized for accepting favors from Tongsun Park, an influence-peddling rice merchant from South Korea. An ethics committee investigation concluded that O'Neill had shown bad judgment in allowing Park to throw parties for him. The committee cleared O'Neill of any illegalities.

O'Neill retired from Congress in 1987. He subsequently spent most of his time in Washington, D.C., or at Cape Cod with his wife. O'Neill wrote a best-selling book about his experiences in Washington, entitled *Man of the House,* and

"YOU CAN TEACH AN OLD DOG NEW TRICKS—IF THE OLD DOG WANTS TO LEARN."
—THOMAS "TIP" O'NEILL

**THOMAS PHILLIP O'NEILL JR.** 1912–1994

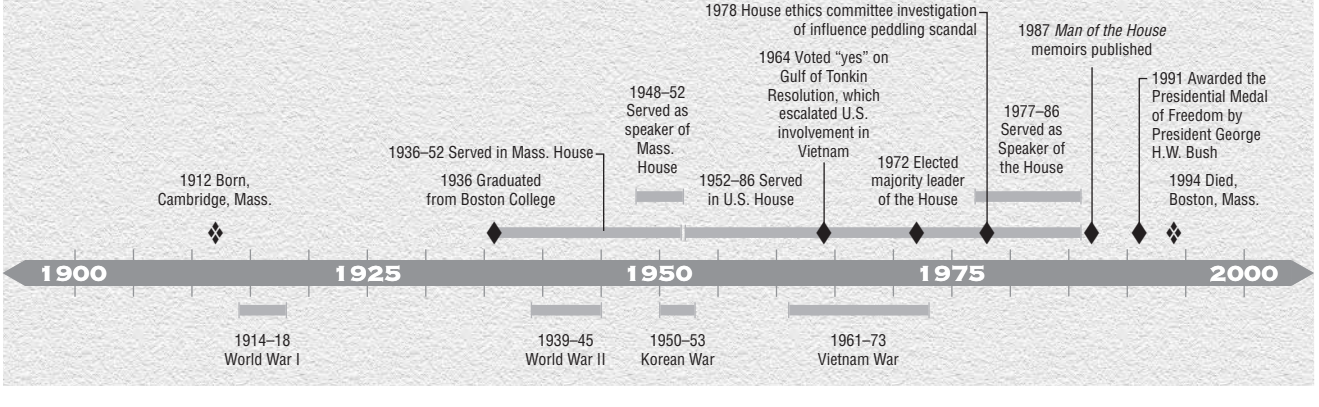

starred in popular commercials for credit cards. He died January 5, 1994, in Boston, Massachusetts.

O'Neill was a throwback to an earlier era of backroom politics on Capitol Hill. The colorful Massachusetts congressman was a master at pressuring representatives to pass or block key legislation. O'Neill enjoyed a national reputation but remained loyal to the constituents back home. He is remembered as an unapologetic liberal, proud of his role in assisting the poor, the unemployed, and the least privileged Americans. He was one of the last and most highly regarded of the old-style American politicians.

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## ONUS PROBANDI

[Latin, The burden of proof.] *In the strict sense, a term used to indicate that if no evidence is set forth by the party who has the* BURDEN OF PROOF *to establish the existence of facts in support of an issue, then the issue must be found against that party.*

## OPEN

*To make accessible, visible, or available; to submit to review, examination, or inquiry through the elimination of restrictions or impediments.*

To *open a judgment* means to render it capable of reexamination by removing or relaxing the bar of its finality. A judgment is ordinarily opened at the insistence of a party who is able to show good cause as to why the execution of the judgment would be inequitable.

To *open a court* is to formally announce, ordinarily through the bailiff, that the session has commenced and that the business before the tribunal will proceed.

The term *open* is also used as an adjective in reference to that which is patent, visible, apparent, or notorious, such as a defect in a product, or conduct such as lewdness.

## OPEN ACCOUNT

*An unpaid or unsettled account; an account with a balance that has not been ascertained, that is kept open in anticipation of future transactions. A type of credit extended by a seller to a buyer that permits the buyer to make purchases without a note or security and is based on an evaluation of the buyer's credit. A contractual obligation that may be modified by subsequent agreement of the parties, either by expressed consent or by consent implied from the conduct of the parties, provided the agreement changing the contractual obligation is based upon independent consideration.*

## OPEN BID

*An offer to perform a contract, generally of a construction nature, in which the bidder reserves the right to reduce his or her bid to compete with a lower bid.*

## OPEN COURT

*Common law requires a trial in open court; "open court" means a court to which the public has a right to be admitted. This term may mean either a court that has been formally convened and declared open for the transaction of its proper judicial business or a court that is freely open to spectators.*

## OPEN-END CONTRACT

*An agreement that allows a buyer to make purchases over a period of time without a change in the price or terms by the seller.*

## OPEN-END CREDIT

*A type of revolving account that permits an individual to pay, on a monthly basis, only a portion of the total amount due.*

This type of CONSUMER CREDIT is frequently used in conjunction with bank and department store credit cards.

## OPEN-END MORTGAGE

*A mortgage that allows the borrowing of additional sums, often on the condition that a stated ratio of collateral value to the debt be maintained. A mortgage that provides for future advances on the mortgage and which so increases the amount of the mortgage.*

## OPEN LISTING

*A type of real estate listing contract whereby any agent who has a right to participate in the open listing is entitled to a commission if he or she produces the sale.*

## OPEN SHOP

*A business in which union and nonunion workers are employed. A business in which union member-*

*ship is not a condition of securing or maintaining employment.*

The term *open shop* is frequently used to imply that the operator of this type of shop is, in effect, exercising discrimination against trade unions and hampering their advancement through the employment of nonunion employees.

**CROSS-REFERENCES**

Labor Union.

## OPENING STATEMENT

*An introductory statement made by the attorneys for each side at the start of a trial. The opening statement, although not mandatory, is seldom waived because it offers a valuable opportunity to provide an overview of the case to the jury and to explain the anticipated proof that will be presented during the course of the trial.*

The primary purpose of an opening statement is to apprise the trier of fact, whether jury or court, of the issues in question and to summarize the evidence that the party intends to offer during the trial. The Supreme Court has characterized an opening statement as "ordinarily intended to do no more than to inform the jury in a general way of the nature of the action and defense so that they may better be prepared to understand the evidence" (*Best v. District of Columbia,* 291 U.S. 411, 54 S. Ct. 487, 78 L. Ed. 882 [1934]).

Most practitioners and legal scholars agree that an effective opening statement is vital to the trial process. The importance of an opening statement has been established by studies that showed that 80 percent of jurors' ultimate conclusions with respect to the verdict corresponded with their tentative opinion after opening statements. This is because an effective opening statement establishes the facts of the case and sets forth a legal theory and explanation for why the attorney's client should prevail.

An opening statement may be either a matter of right or a privilege depending on applicable state and local laws. A party may waive its option of presenting an opening statement because opening statements are not mandatory.

If a party chooses to give an opening statement, the party with the **BURDEN OF PROOF** will usually present its opening statement first. In a civil case, this means that the plaintiff's attorney presents an opening statement first. In a criminal case, the burden of proof rests on the prosecution. Therefore, the prosecution will be first to present an opening statement.

The defense may present its opening statement after the plaintiff or prosecution has given its opening statement. The defense also has the option of reserving the opening statement until after the plaintiff has presented its case. Courts have discretion to direct a different order of presentation of opening statements if it finds good reasons for such change in order.

Opening statements allow attorneys for each side to introduce themselves and to introduce the parties involved in the lawsuit. Additionally, attorneys will usually outline the important facts of the case during the opening statement to assist the jury in understanding the evidence that will be presented during the trial. An opening statement generally contains a brief explanation of the applicable law and a request for verdict. In a request for verdict, the attorney explains the verdict sought and explains the facts that will support the verdict. A well-planned opening statement serves as a road map of the trial.

Opening statements are often informal and narrative in form. The attorney tells the client's story and explains to the jury what the evidence will show. An opening statement, however, does not constitute evidence, and the jury cannot rely on it in reaching a verdict. The opening statement should be brief and general rather than long and detailed.

An attorney is limited in what he or she can say during an opening statement. An attorney may not discuss inadmissible evidence. This is especially true where the evidence was ruled inadmissible in a pretrial motion hearing. The attorney must reasonably believe that the matters stated will be supported by the evidence. In addition, statements that are purely argumentative are not proper during opening statements. An attorney may not assert personal opinions, comment about the evidence, or comment about the credibility of a witness during an opening statement.

Objections by opposing counsel during an opening statement are appropriate where the attorney presenting the opening statement engages in improper conduct. If the attorney fails to object to the inappropriate conduct, the objection is deemed waived, and the attorney cannot complain of such misconduct later in the trial.

A court usually has the discretion to employ one of several remedies for misconduct during an opening statement. The most common remedy for misconduct during an opening statement is jury admonition, where the judge simply instructs the jury to disregard the improper statement. Where misconduct is more serious, however, the following remedies may be available: (1) counsel may be cited for misconduct or CONTEMPT; (2) a mistrial may be declared; (3) a new trial may be ordered; (4) an appeal may be taken based on the misconduct.

An attorney can make damaging statements during the opening statement that legally bind the client. Such statements, known as "admissions," are not limited to the opening statement but can occur throughout the litigation process. Attorneys must use caution during the opening statement to avoid making damaging admissions.

The court may decide the case after the opening statement and before the jury ever has the opportunity to hear the evidence. A court can properly take the case from the jury where it is clear from the opening statement that the plaintiff cannot succeed on the merits or that the defendant has no valid defense. This is usually accomplished by an attorney bringing a motion for a directed verdict. Taking the case from the jury is an extreme measure and exercised with great caution. Courts favor allowing a case to be tried on its merits and rarely grant a directed verdict after the opening statement.

A strong opening statement will have a lasting impact on the trier of fact. It is often the jury's first introduction to the parties, the issues, and the trial procedure. The opening statement begins the process of persuasion, the ultimate goal of which is a favorable verdict.

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## OPERATION OF LAW

*The manner in which an individual acquires certain rights or liabilities through no act or cooperation of his or her own, but merely by the application of the established legal rules to the particular transaction.*

For example, when an individual dies intestate, the laws of DESCENT AND DISTRIBUTION provide for the inheritance of the estate by the heir. The property of the decedent is said to be transferred by operation of law.

## OPINION

See COURT OPINION.

## OPINION EVIDENCE

*Evidence of what the witness thinks, believes, or infers in regard to facts in dispute, as distinguished from personal knowledge of the facts themselves. The* RULES OF EVIDENCE *ordinarily do not permit witnesses to testify as to opinions or conclusions.*

When this type of evidence is expressed by an expert witness, it may be used only if scientific, technical, or specialized knowledge will aid the trier of fact in understanding the evidence or determining a fact in issue. In the event that the witness is not testifying as an expert, the witness's testimony is restricted to opinions or inferences that are rationally based upon his or her perception and are helpful to a clear understanding of the testimony or the determination of a fact in issue.

## OPPRESSION

*The offense, committed by a public official, of wrongfully inflicting injury, such as bodily harm or imprisonment, upon another individual under color of office.*

Oppression, which is a misdemeanor, is committed through any act of cruelty, severity, unlawful exaction, or excessive use of authority.

## OPTION

*A privilege, for which a person has paid money, that grants that person the right to purchase or sell certain commodities or certain specified* SECURITIES *at any time within an agreed period for a fixed price.*

*A right, which operates as a continuing offer, given in exchange for consideration—something of value—to purchase or lease property at an agreed price and terms within a specified time.*

An option is a type of contract that is used in the stock and commodity markets, in the leasing and sale of real estate, and in other areas where

one party wants to acquire the legal right to buy something from or sell something to another party within a fixed period of time.

In the stock and commodity markets, options come in two primary forms, known as "calls" and "puts." A call gives the holder of the option the choice of buying or not buying stock or a commodities futures contract at a fixed price for a fixed period of time. A put gives the holder the option of selling or not selling stock or a commodities futures contract at a fixed price for a fixed period of time. Because an option only has value for a fixed period of time, its value decreases with the passage of time. Because of this feature, it is considered a "wasting" asset.

There are four parts to an option: the underlying security, the type of option (put or call), the strike price, and the expiration date. Take, for example, an "International Widget July 100 call." International Widget stock is the underlying security, July is the expiration month of the option, $100 is the strike price (sometimes referred to as the exercise price), and the option is a call, giving the holder of the call the right, not the obligation, to buy one hundred shares of International Widget at a price of $100. The holder of the call cannot buy the one hundred shares until the exercise date.

In the case of a commodity option, the right to purchase or sell pertains to an underlying physical commodity, such as a specific quantity of silver, or to a commodity futures contract. The period during which an option can be exercised is specified in the contract.

Stock option plans are used in business to reward employees. A stock option is a contract between the company and the employee giving the employee the right to purchase shares of company stock between certain dates at a price that is often fixed by the company or determinable by formula at the time the option is granted. For example, International Widget may issue an option to a key employee, which will allow the employee to purchase one hundred shares of stock at the fair market value at the grant date. The employee has five years in which to exercise that option. If the price increases above the grant-date fair market value, the employee will presumably exercise the option and realize an economic gain based on the spread between the fair market value at the grant date and the fair market value at the exercise date. If the price decreases after the option is granted, the employee will forgo exercising the option and thereby have no loss in economic value.

Options have a role in business outside the stock and commodity markets. In the law of contract, the option is a continuing offer to purchase or lease property. The offer is irrevocable for the stated period of time. Like most other contracts, the option contract is not terminated by the subsequent death or insanity of either party.

Options usually assume one of two forms. The seller can state to the purchaser, "If you pay me $500 today, I promise to sell Whiteacre to you for $50,000 on the condition that you pay the $50,000 within sixty days." If the purchaser pays the $500, a unilateral contract—an agreement in which there is a promise on only one side and a possibility of a performance by the other side—is created, and the offer is irrevocable. The seller of Whiteacre is obligated to perform if the purchaser pays the $50,000 within sixty days.

The second form of option contract is created when the seller states to the purchaser, "I offer to sell you Whiteacre for $50,000. This offer will remain open for sixty days if you pay $500 for this privilege." If the purchaser pays the $500, there is a collateral contract—an agreement made prior to, or simultaneous with, another agreement not to revoke the offer—and the seller is obligated not to revoke.

Acceptance of an option contract is operative when received by the offeror, rather than when sent. An option contract is interpreted strictly in favor of its creator and must be unequivocal and in accordance with the terms of the option. It is frequently said that "time is of the essence" in an option contract, but this means only that the option cannot be exercised after the offer has lapsed.

An offer can be accepted only by the person or persons for whom it is intended. Therefore, no assignment—a transfer to another of any property—of an offer can be made. The prohibition is based on the concept that everyone has the privilege of choosing with whom to contract. Once an offer has ripened into a contract, however, the rights thereby created are usually assignable. For example, if Jane offers an option to Jack to purchase Whiteacre, Jack cannot accept the option and then assign it to Joe. Once Jack and Jane enter into a contract for the sale of Whiteacre, Jack can assign his contract rights to Joe.

## ORAL CONTRACT

*An agreement between parties that is either partly in writing and partly dependent on spoken words or that is entirely dependent on spoken words.*

An oral contract is enforceable unless its subject matter comes within the statute of frauds, an ENGLISH LAW adopted in the United States, that requires certain contracts to be in writing. For example, a contract to sell real property, to be enforceable, must be in writing to comply with the statute. An oral contract to sell PERSONAL PROPERTY for an amount less than that set in the statute does not fall within its limits and, therefore, is enforceable without being reduced to a writing. The UNIFORM COMMERCIAL CODE governs the enforceability of oral contracts in sales transactions involving merchants.

## ORDEAL

*One of the most ancient forms of trial in England that required the accused person to submit to a dangerous or painful test on the theory that God would intervene and disclose his or her guilt or innocence.*

*Trials by ordeal* were a pagan custom that took on added ritual when Christianity was introduced into England. There were various ordeals, and at different times certain ordeals were reserved for people of higher rank, whereas others were used for common people. All were based on the belief that supernatural forces would rescue the innocent from perils to which they were exposed and would allow the guilty to be physically harmed.

The *ordeal of water* was performed by casting the suspect into a pond or river. If the suspect floated to the surface without any action of swimming, she was deemed guilty. If the suspect sank, she was pulled out and pronounced innocent. The *hot water ordeal* required the accused to plunge his bare arm up to the elbow into boiling water without injury. In the *ordeal of the cursed morsel,* the suspect swallowed a piece of dry bread with a feather in it. If the suspect did not choke, he was found innocent. The *ordeal of the red-hot iron* required the accused to carry a heated poker weighing one, two, or three pounds over a certain distance. After that, the suspect's hand was bound, and in three days the bandages were removed. If the wound had not become infected, the suspect was pronounced innocent. A variation of this ordeal required the accused person to walk barefoot and blindfolded over nine red-hot plowshares placed at uneven distances. The ordeals of the red-hot iron and the plowshares were also called the *fire ordeals* and were often reserved for nobility.

Evidence from very early cases indicates that there were more acquittals than convictions by ordeal, but the severity of the methods may have encouraged cheating. It is impossible to tell exactly how compelling the psychological stresses of the ordeal were, but all were administered amidst the ritual of the church at the high moment of the mass. In time church leaders came to disapprove of the participation of clergymen in a somewhat pagan tradition, and in 1215 priests were forbidden to take part in trials by ordeal. In remote places, the practice continued for a time as priests disobeyed the order, but eventually trial by ordeal was eliminated. This made the CRIMINAL LAW of England unenforceable because the chief means of determining guilt or innocence had been abolished.

The people were reluctant to accept a system that permitted a judge to determine the facts in a criminal case. That would be replacing the voice of God with that of a mortal man. For a while, the law enforcers imprisoned persons with a general reputation for wrongdoing, banished those guilty of moderately serious crimes, and required pledges of security to ensure the peacefulness of persons accused of small crimes. When these measures proved unsatisfactory, judges began calling upon groups of people in the community to make decisions. As many as forty-eight neighbors might be asked whether the accused was guilty or innocent. Their opinions were based on what they knew or could find out about the case and not on the presentation of evidence or testimony. This procedure was a forerunner of the modern jury.

## ORDER

*Direction of a court or judge normally made or entered in writing, and not included in a judgment, which determines some point or directs some step in the proceedings.*

The decision of a court or judge is made in the form of an order. A court may issue an order after a motion of a party requesting the order, or the court itself may issue an order on its own discretion. For example, courts routinely issue scheduling orders, which set the timetable and procedure for managing a civil lawsuit. More

substantive orders, however, typically are made following a motion by one of the parties.

A motion is an application for an order. The granting or denying of a motion is a matter of judicial discretion. When a motion is granted, the moving party (the party who requests the motion) is ordinarily limited to the relief requested in the application. Although no particular form is required, a court order granting a motion should be sufficiently explicit to enable the parties to do whatever is directed. Though a court is not obligated to issue an opinion, in most cases a party is entitled to have the reasons for the decision of the court stated in the order. The order must be consistent with the relief requested in the motion, and it should set forth any conditions on which relief is awarded.

In trial courts the attorney for a party who obtains a favorable ruling usually has the responsibility of writing a proposed order. A copy of the proposed order is furnished to the other party so that he or she can propose amendments to it. It is then presented to the court for settlement and approval. Courts are free, however, to modify proposed orders or to write their own order. Appellate courts routinely write their own orders.

To take effect, an order must be entered, filed, or incorporated into the minutes of the court. An entry or filing must be made with the court administrator within the prescribed time limits.

Aside from scheduling orders and other orders that deal with the administration of a case, there are several general categories of orders. An INTERLOCUTORY order is an order that does not decide the case but settles some intervening matters relating to it or affords some temporary relief. For example, in a DIVORCE case, a judge will issue an interlocutory order that sets the terms for temporary CHILD SUPPORT and VISITATION RIGHTS while the case is pending.

A RESTRAINING ORDER may be issued upon the filing of an application for an INJUNCTION forbidding the defendant to do the threatened act until the court has a hearing on the application. These types of orders are also called temporary restraining orders (TROs), because they are meant to be effective until the court decides whether to order an injunction. For example, if a neighborhood association seeks to prevent a land developer from cutting down a stand of trees, the association would seek an injunction to prevent the cutting and a TRO to forbid the developer from removing the trees before the court holds a hearing. If the association did not request a TRO, the developer could legally cut down the trees and effectively render the injunction request moot.

A final order is one that terminates the action itself or finally decides some matter litigated by the parties. In a civil lawsuit, the plaintiff may make many allegations and legal claims, some of which the court may dispose of during the litigation by the issuance of an order. When the court is ready to completely dispose of the case, it enters a final order. As part of the final order, the court directs that judgment be entered, which authorizes the court administrator to close the case in that court.

## ORDER OF THE COIF

*An unincorporated national scholastic honor society in law. Its purpose is to foster excellence in legal scholarship and to recognize those who have attained high grades in law school or who have distinguished themselves in the teaching of law. There are more than sixty chapters located in law schools throughout the country.*

The honor society is named after the English Order of the Coif, the most ancient and one of the most honored institutions of the COMMON LAW. The coif was a close-fitting cap of white linen that covered the ears and was tied with strings under the chin, like a baby's bonnet. It originated in the twelfth century as a head covering for men and became part of the ecclesiastic and legal headgear, lasting until the sixteenth century. For a long period of time, English judges were selected only from the order.

The Order of the Coif honor society was formed in 1912 as a national organization. The national constitution sets requirements for election to membership and criteria for the creation of chapters at law schools. The order is a federated organization with authority in local matters vested in each chapter. Each chapter has its officers, and the national organization has an executive committee composed of three officers and three other members. Officers are elected every three years.

Law students who are graduating seniors are eligible for election to the Order of the Coif if they have completed 75 percent of their law studies in graded courses and their grade record

ranks them in the top 10 percent of all graduating seniors of the chapter's school. A chapter may also elect members of the law school faculty if the chapter believes professors have exhibited qualities of scholarship consistent with the objectives of the order.

A chapter may each year elect to honorary membership one member of the legal profession who is recognized for his or her scholarship. Every three years the national executive committee may elect up to five honorary members who have attained national distinction for their contributions to the legal system.

In addition, every three years the Order of the Coif recognizes legal scholarship by conferring one or more awards on the author or authors of published legal works. The national executive committee also is empowered to establish other awards for the purpose of recognizing preeminent legal scholarship and leadership among law students, law professors, judges, and practitioners.

## ORDINANCE

*A law, statute, or regulation enacted by a* MUNICIPAL CORPORATION.

An ordinance is a law passed by a municipal government. A municipality, such as a city, town, village, or borough, is a political subdivision of a state within which a municipal corporation has been established to provide local government to a population in a defined area.

Ordinances constitute the subject matter of municipal law. The power of municipal governments to enact ordinances is derived from the state constitution or statutes or through the legislative grant of a municipal charter. The charter in large part dictates how much power elected officials have to regulate actions within the municipality. Municipalities that have been granted "home rule" charters by the legislature have the most authority to act. If, however, a municipality enacts an ordinance that exceeds its charter or is in conflict with state or federal law, the ordinance can be challenged in court and ruled void.

Many ordinances deal with maintaining public safety, health, morals, and GENERAL WELFARE. For example, a municipality may enact housing ordinances that set minimum standards of habitability. Other ordinances deal with fire and safety regulations that residential, commercial, and industrial property owners must follow. Many municipalities have enacted noise ordinances, which prohibit prescribed levels of noise after certain hours of the evening.

Ordinances may also deal with public streets and sidewalks. They typically include regulations regarding parking, snow removal, and littering. Restrictions on pets, including "pooper scooper" and leash laws, are also governed by municipal ordinances.

One of the most significant areas of municipal law is ZONING. Zoning ordinances constitute a master plan for land use within the municipality. A municipality is typically divided into residential, commercial, and industrial zoning districts. Zoning attempts to conserve the value of property and to encourage the most appropriate use of land throughout a particular locality.

In the past, many U.S. municipalities enacted a variety of ordinances regulating public morals and behavior. Many, such as ordinances that prohibited spitting on a public sidewalk, have been repealed or are rarely enforced.

## ORGAN DONATION LAW

Dramatic developments in organ and tissue transplantation have allowed persons with life-threatening illnesses a chance to live. The successful transplantation of kidneys, livers, hearts, lungs, eyes, and skin has been enhanced by better surgical techniques and new drugs, such as cyclosporin, that prevent the body from rejecting a transplanted organ. Success, however, has led to an undersupply of organs for the estimated 30,000 patients each year who need a transplant. Laws have been enacted at the state and local level that attempt to provide a better system of organ donation and distribution and to encourage individuals to volunteer to be organ donors.

The Uniform Anatomical Gift Act that was drafted in 1968 was the first effort at providing a national organ and tissue donation policy. The act created a uniform legal procedure for persons who wish to donate organs and for hospitals and medical institutions that want to accept them. Under this model act, which has been adopted in some form by all 50 states, a person of sound mind, who is at least 18 years of age, may donate all or part of his or her own body. There are several ways for a donor to record the wish to make a donation. The donor may

include the donation in a will. If part of a will, the provision becomes effective immediately upon death, unlike other provisions of the will, which need to go through probate before they become effective. In practical terms, however, a will may be ineffective. Time is of the essence in organ donation, and if the will is not read for several days, it may be too late to make an effective donation.

The uniform act provides for a more common form of recording a person's intention to make an organ donation: a donor card that may be carried in a wallet. States also allow this donor information to be imprinted on a driver's license. When a person applies for a driver's license, she or he has the option of including a desire to donate organs. Despite the simplicity of this option, it has not generated the quantity of donors that proponents of the procedure expected.

A written donation must be signed by the donor and witnessed by at least two other people. A donation can be made orally, but it too must be witnessed by at least two other people. A dying patient can communicate his or her wish to donate organs to an attending physician, who can act as one of the witnesses. However, the attending physician cannot be the doctor who removes or transplants the organ.

A person can revoke in writing or orally her or his intent to make an organ or tissue donation. If a dying person is unable to communicate and has not expressed an intent to donate, a family member or guardian can make a gift of all or part of the person's body, within certain limitations. In general, even if a person has expressed the intent to donate, physicians still ask permission of a family member or guardian.

The uniform act forbids the sale of body parts. The recipient cannot pay for the donated organ but must pay for the cost of transportation and transplant. Organs and tissue can only be received by hospitals, surgeons, physicians, educational institutions involved in medical or dental research, a storage facility for these institutions, or any specified individual who needs the organ personally for therapy or transplantation.

A 1986 federal law (42 U.S.C.A. § 1320b–8) requires all hospitals participating in MEDICARE or MEDICAID to implement a "required request" policy. Hospitals are required to discuss with potential donors and their families "the option of organ and tissue donation and their option to decline."

The 1984 National Organ Transplant Act (42 U.S.C.A. §§ 273 et seq.) initiated a national HEALTHCARE policy regarding ORGAN TRANSPLANTATION. The act provided funds to help establish "qualified organ procurement organizations," banned the interstate sale of organs, and created a task force to study organ transplantation policy issues. The 1986 task force report was an exhaustive examination of the medical, legal, social, and economic implications of organ procurement and transplantation. The 1986 required "request law" came from one of the task force's recommendations.

Despite these legal and medical mechanisms that seek to encourage organ donation, demand has continued to exceed supply. In 1996 it was estimated that eight people died every day waiting for a transplant that never came because of the donor shortage. In response, Congress enacted the Organ Donor Insert Card Act in 1996 (Pub. L. No. 104-91, 110 Stat. 1936). The act directed the secretary of the treasury to enclose with each tax refund check in 1997 an organ donor card. It was estimated that these

**Organ Donors, by Organ and Donor Type, in 2001**

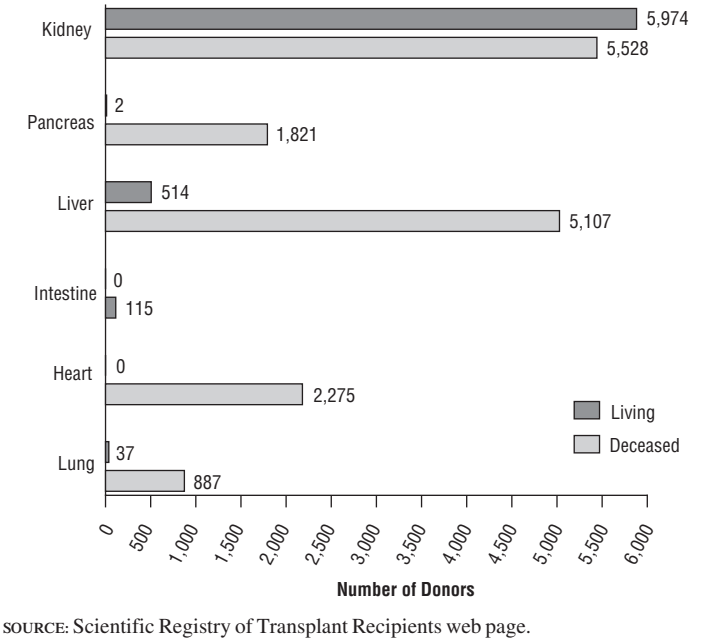


SOURCE: Scientific Registry of Transplant Recipients web page.

# Should Dying Babies Be Organ Donors?

As many as half of the approximately 1,500 children waiting for organ transplants each year die before donors can be found. The shortage of donors has led to calls for permitting the organs of children born with the birth defect anencephaly to be donated before the children die. The issue has proved controversial, as doctors and medical ethicists debate the legality and morality of allowing the harvesting of organs from a person who is not legally dead.

Anencephaly is a birth defect that prevents the skull and brain from fully developing. While the heart and other internal organs of anencephalic **INFANTS** often develop normally, most of the brain is missing. The anencephalic infant possesses a brain stem, which can keep breathing and heartbeat going temporarily. But because the cerebral cortex is missing, the infant has no thought or sensory functions and will never be conscious. Most of these infants die within hours or days of birth. Because of these bleak prospects, most of each year's 2,500 anencephalic pregnancies are aborted.

Some parents have forgone **ABORTION** but have sought to have their child's organs donated. Because the brain stem gradually fails after birth, an infant's heartbeat and breathing gradually slow until the infant dies of heart failure or stops breathing. The vital organs deteriorate, however, leaving them useless as transplants. The only way the organs can be used is if they are removed while the infant is still alive. This requirement cannot be met under current law because organ donation is premised on the dead donor rule: donors must be declared brain dead before their organs can be removed. An anencephalic infant exists in a gray area between life and death, but because the brain stem functions, he cannot be declared brain dead. Therefore, the harvesting of organs of anencephalic infants would require stretching the definition of death.

Some physicians, medical ethicists, and parents of anencephalic infants believe that such a redefinition should occur and that organ retrieval from an anencephalic infant at birth should be permitted. They argue that an anencephalic infant's profound abnormality makes it permissible to make an exception to the dead donor rule. It is a unique abnormality: the infant never experiences consciousness.

Proponents contend that, because these infants are never conscious, they do not meet the most minimal criteria for becoming a person. In 1995 the American Medical Association's (AMA) Council on Ethical and Judicial Affairs supported the idea of organ retrieval from anencephalic infants at birth on the basis that the infants' lack of consciousness meant that they could not suffer harm.

cards would reach 70 million U.S. families and would result in increased donations.

The location of a potential donee of a transplant has had a significant effect on whether the donee receives an organ. In 1998, for instance, a patient awaiting a kidney transplant could expect to be on a waiting list for only 107 days in Oregon, but as long as 1,680 days in New York. A severely ill patient in one state could die while waiting, even though a patient in another state could receive a transplant before he or she was even sick enough to be hospitalized.

Because of this disparity, the **HEALTH AND HUMAN SERVICES DEPARTMENT** (HHS) in 1998 issued the Organ Procurement and Transplantation Network, which changed the distribution and allocation of organs by broadening transplant areas. The old system of distribution and allocation allowed organs to be distributed locally first. This policy was based on the belief that local distribution gave states and local medical institutions an incentive to promote organ donation. If the organs were to be distributed regionally or nationally, states and hospitals might conclude that successful promotion of organ donations turned the state into a supplier for other states that were not as successful in encouraging donations.

The new regulations angered a number of states and hospitals. The state of Wisconsin, the University of Wisconsin Hospitals, and Froedert Memorial Lutheran Hospital filed a lawsuit in federal district court, claiming that the regulations would severely reduce the number of organs available to their patients. The plaintiffs alleged that the HHS lacked legislative authority to broaden the regional organ sharing networks. In addition, the plaintiffs claimed that the regulations would injure the hospitals financially because they would have to pay a larger amount of the transplantation network's operating costs. However, in an unpublished decision, a federal district court in Wisconsin dismissed the case because the plaintiffs lacked standing to file the lawsuit.

Proponents point out that it has been the parents of anencephalic infants who have sought to donate the babies' organs. As long as the harvesting of organs is done at the request of the parents and with their consent, the interests of the parents are not harmed. For these parents the desire to have some good come from the tragedy of giving birth to an anencephalic infant is the driving force in making their decision.

Finally, proponents note the shortage of organs for transplantation in children. Because of this shortage, many children die who might otherwise live a normal life if given a transplant. Some experts believe that using organs from anencephalic infants could mean up to an additional three hundred transplants a year. Faced with this prospect, proponents contend that society's interests are advanced by making a narrow exception to the dead donor rule.

Opponents are horrified at the idea of removing organs from a living infant. They contend that the dead donor rule is an important boundary in medical science. Crossing this line in the case of anencephalic infants, they contend, will cause a "slippery slope" effect. Physicians might ask to harvest organs from coma victims or from children with other severe, but nonfatal brain defects. Opponents argue that blurring the definition of brain death will have detrimental consequences to society greater than the benefit of obtaining organs from several hundred infants each year.

Critics further argue that anencephalic infants are human beings who deserve the protection of the law. They point out that, to be an organ donor, a person's entire brain must be declared dead. This means that the brain stem completely ceases to function and to produce electrical impulses and that the person has no reflexes or responses. Anencephalic infants do not meet all these criteria. They are not brain dead because the brain stem functions, they support their respiration independently, and they have responses and reflexes. These critics note that, only six months after its support of harvesting organs from anencephalic infants at birth, the AMA's Council on Ethical and Judicial Affairs reversed its decision, citing questions as to whether anencephalic infants are truly unconscious and whether they feel pain.

Though most of the critics ground their objections in ethical, moral, and religious concerns about the sanctity of human life, others have more pragmatic arguments. These critics argue that the debate itself over harvesting organs from anencephalic infants at birth harms the effort to recruit the general public as organ donors. The public may become fearful that the medical community is seeking ways to change the definition of death. The few hundred organs a year that could be gained through a change in law, these critics contend, is not worth the loss of thousands of potential donors.

Critics respect the desire of parents who wish to do something good through organ donation. Yet they contend that making parents feel better does not rank higher than society's interest in preserving human life. Unless a state passes a law that makes an exception to the dead donor rule, the use of anencephalic infants as organ sources immediately upon birth will not occur.

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CROSS-REFERENCES

Abortion; Death and Dying; Fetal Rights; Fetal Tissue Research; Health Care Law; Patients' Rights; Physicians and Surgeons.

## ORGAN TRANSPLANTATION

*The transfer of organs such as the kidneys, heart, or liver from one body to another.*

The transplantation of human organs has become a common medical procedure. Typical organs transplanted are the kidneys, heart, liver, pancreas, cornea, skin, bones, and lungs. The organ most frequently transplanted is the cornea, followed by the kidney.

The first human organ transplants were performed in the early 1960s, when it became possible to use special tissue-matching techniques and immunosuppressive drugs that reduced the chance that a transplanted organ would be rejected by the host body. By the early 1980s, the new immunosuppressive drug cyclosporine led to great advances in the success rate of organ transplants.

### Organ Shortages

As organ transplants became increasingly successful, the most significant problem related to them was the shortage of available organs. A large gap separated the high demand for organs and their scarce supply. Experts estimated that

# Organ Procurement: Is It Better to Give or to Sell?

In the early days of organ transplant surgery, during the 1960s and 1970s, the practice was seen as experimental and risky. Patients' bodies often rejected a transplant, and the survival rate in many cases was deemed too low to be acceptable. However, with the development of new surgical procedures and the wide use of new immunosuppressive drugs such as cyclosporine in the 1980s, organ transplantation became a common medical technique available to more and more people. In the 1980s, over 400,000 transplants were performed in the United States. The age range of heart transplant recipients has expanded from forty-five to over sixty at the upper limit, and to infancy at the lower limit.

Results such as these have caused such a demand for organ transplants that there are far more potential organ recipients than available organs. Those who are deemed medically suitable to receive organs are put on long waiting lists, and it is often months or years before they get the organs they need; many others are deemed medically unsuitable and are not even put on waiting lists. Some have criticized the term *medically unsuitable* as an **ARBITRARY** and uncertain medical judgment used simply to prevent raising the hopes of those who are unlikely to get a timely transplant.

What should be done about this dire shortage of organs available for transplantation? Three different organ procurement systems have been proposed as a means of alleviating the situation: an organ market, a presumed consent program, and a required request program. All three proposals have their advocates and detractors.

**Organ Market** Although the sale of human organs was made illegal by the 1985 National Organ Transplantation Act (42 U.S.C.A. § 274(e)), an organ market remains a widely discussed alternative to the generally accepted approach of encouraged voluntarism. Its supporters claim that the system of encouraged voluntarism, which supplies organs free of cost through altruistic donation, has created a rapidly worsening organ shortage.

Typically, advocates of the market system are quick to note that they do not support a market in organs from living donors, nor do they envision donors and recipients haggling in hospital rooms. Instead, they focus on paying potential donors a fixed amount for signing a contract that authorizes the future removal of one or more of their organs at death. This may, for example, occur in the form of a uniform cash payment or tax credit to all individuals who agree to sign a donor form on the back of their driver's license application. This type of arrangement is called a forward market because payment for the organ occurs well before the organ is removed. The amount paid for such donor contracts could be adjusted up or down depending on the demand for organs.

Some of those who call for an organ market take the economist's perspective and claim that it is the best alternative because it would maximize social welfare. The benefits of such a system would include an increase in the supply of organs, and thus the saving of many more lives and the improved health of many more patients. More patients who have to undergo the expensive and time-consuming procedure of kidney dialysis, for example, would be able to instead receive a transplant. Moreover, firms and individuals engaged in the procurement business would have a direct financial incentive to increase public awareness of the facts surrounding organ donation and transplantation.

Advocates claim that a market would also produce a number of indirect benefits. Medical professionals would be able to choose from a greater number of available organs from the dead—termed cadaveric organs—and obtain higher-quality organs that more precisely match the tissue type of the recipient. With more closely matched organs would come less need to rely on living donors, thus avoiding the pain, loss of pay, and risks associated with donor surgery. Moreover, more organs would mean more transplant operations, and with increased frequency, the cost of those operations would fall as hospitals and their staffs become more proficient at conducting and managing them. Organ market supporters also argue that an undersupply of organs leads to a black market, and that this market will only

by the late 1980s, three people were on transplant waiting lists for every available organ. Given the grossly inadequate supply of organs, many vexing ethical, legal, and political issues surrounded the question of what is the best way to harvest or procure organs.

A number of laws sought to address the problem of organ procurement. The Uniform Anatomical Gift Act (8A U.L.A. 15-16 [1983]), drafted in 1968 and adopted in all 50 states, allows any competent adult to state in writing, including by signing a donor card or checking off an item on a driver's license application, whether he wishes to allow or forbid the use of her or his organs after death. The act also permits next of kin to authorize donation. Such a

become greater with time. Finally, an increase in the harvesting of cadaveric organs would eventually lead to greater social acceptance of the practice as part of the death process.

Critics see an organ market as not expanding the number of choices available but diminishing them, thereby undermining the ethical goal of individual autonomy and free choice. Even if sales were restricted to organs from those who are dead, they claim, the potential conflicts of interest on the part of physicians, patients, and families would erode the capability of individuals to make decisions about their own bodies. Critics also point out that if the sale of organs from living subjects were permitted, poor people would have economic incentives to sell their body parts, and as a result their own health could suffer.

Detractors of the market approach also claim that it would not increase the supply of organs and that the price of organs would be so high that few people would consent to give away their valuable organs. Some also claim that an organ market would result in lower-quality organs because poorer people, who are generally less healthy, would be more likely to sell organs for profit. Moreover, if organs had to be purchased, poor people would not be able to afford transplants. Market advocates counter that the total costs of organ transplantation would likely fall under a market system, making it more, not less, accessible to poor people.

**Presumed Consent Program** The presumed consent system of organ procurement is currently used in many European countries. It means that medical professionals are presumed to have a deceased individual's and surviving family members' consent to remove needed organs, unless those individuals have earlier made known their objections to organ removal. Supporters of this system argue that it increases the supply of organs, makes the decision to remove organs much easier, and further removes the physician and hospital from liability.

Critics of the presumed consent system find fault with it for economic, legal, and ethical reasons. Looking at the program in terms of economics, they claim that it does not actually increase the number of organs harvested because it does not impose financial incentives for organ requests. As a result, medical staff still exhibit a reluctance to remove organs and that leads to a continuation of the organ shortage. Critics also claim that a presumed consent system is expensive to create and maintain. It requires the creation of large, centralized registries listing individuals' decisions regarding their own body, and these must be updated continuously. Mistakes inevitably occur, causing unwanted organ removal and expensive lawsuits.

Other critics of the presumed consent system find it legally suspect and charge that if it is implemented in the United States it will violate the **DUE PROCESS CLAUSE** of the Constitution.

Those who find fault with the ethical premise of presumed consent argue that it removes the moral dignity surrounding donation by making it mandatory. It also detracts from the goal of free choice and autonomous behavior by precluding the individual from making no decision or from leaving the decision to others.

**Required Request Program** A required request program is a more moderate approach to the problem of organ donation. It seeks to reform the existing system of encouraged voluntarism by requiring that family members or guardians be given the opportunity to make an organ donation when a death has occurred. Such a program would require hospitals to have a specially trained person to approach families and inquire about organ donation at the time death is pronounced. The request would be noted in writing on the death certificate to ensure that medical providers comply with the policy. The required request system would allow for exceptions in cases where a request would not be in the best interests of family members or guardians, with such exceptions also duly noted on the death certificate. Such a system, its advocates claim, would increase freedom of choice by informing individuals of their options.

Proponents of this system point to statistics that indicate that in the U.S. public, the level of altruism regarding organ donation is quite high. In some hospitals, for example, over 60 percent of the families who were asked to donate the organs of loved ones agreed to do so. The problem with the current system, they maintain, is that donor cards do not adequately tap this altruistic sentiment. They also note that a required request system would ensure that donor cards or written directives are honored. With time, such requests would become a routine part of the death process in medical facilities, making them less surprising and less intrusive to family privacy at the time of death.

Critics of the required request system say that it would not do enough to change an already flawed organ procurement system. Moreover, they argue that approaching families in the hours following the death of a loved one imposes too much psychological distress.

program, termed encouraged voluntarism, relied on the free and autonomous choice of the individual or surviving family as the basis for organ donation.

Organ donation was also aided by brain-death statutes. These made it possible to declare as dead those who have lost whole-brain function but whose bodies are kept alive through artificial means. Such brain-dead persons become potential organ donors. In fact, most organs are obtained from accident victims who are injured in this way.

The combination of encouraged voluntarism and brain-death statutes did not produced adequate numbers of organs. For example, a 1984 study estimated that of the

20,000 people each year who die of accidents or strokes and are medically suitable organ donors, only 3,000 served as donors. Experts estimated that only 3 percent of those who serve as organ donors are actually carrying a donor card at the time they are pronounced dead.

A number of different problems contributed to this shortage of donated organs. Most people were fearful or uncomfortable with thoughts of death—particularly their own—and consequently did not contemplate organ donation. Others pointed out that some states had not yet enacted statutes that recognize brain death as the definition of death. Also, a general distrust of large, impersonal medical institutions kept many people from committing to organ donation. Many people were afraid that if they carried an organ donor card, they would not receive adequate medical treatment in an emergency. Moreover, medical professionals were generally not required to present the option of organ donation to critically ill or injured patients and their families. As a result, even if a person had a donor card, it might go unnoticed.

When the system of encouraged voluntarism established by the Uniform Anatomical Gift Act failed to increase the number of available organs adequately, some individuals advocated establishing a legal market in organs. Some versions of an organ market would allow living individuals to sell one of their kidneys at a market price. More commonly, organ market advocates proposed the sale of organs taken only from those who have died—that is, cadaveric organs—usually through "forward contracts" signed when the patient was living. However, the sale of organs was barred by state and federal legislation, particularly the National Organ Transplant Act (42 U.S.C.A. § 274(e) [1985]), which stated, "It shall be unlawful for any person to knowingly acquire, receive or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce." Rather than creating an organ market, Congress afterward sought to establish laws that established "required request" protocols. These protocols would require major hospitals to ask a patient's relatives if the wished to donate the patient's organs (Omnibus Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874, 2009).

Some states went a step further, passing "presumed consent" laws that allowed for the removal of organs unless the next of kin objected or it was known that the potential donor objected to such a procedure while alive. Some of these laws allowed only the removal of corneas under such conditions; others applied only to unclaimed dead bodies. The huge demand for organs was expected to lead to the wider passage of presumed consent laws and the creation of market incentives for organ donation.

**Organ Transplant Registration Waiting List, in 2001**

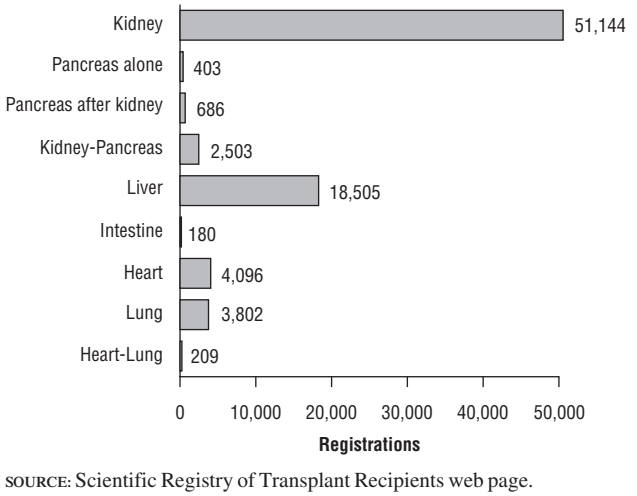


SOURCE: Scientific Registry of Transplant Recipients web page.

## Controversial Issues

Organ transplants generate increasingly vexing legal and ethical questions as medical technology becomes more complex. Three controversial issues surrounding the subject are conception for organ donation, donor consent, and transplants from terminally disabled INFANTS.

In some instances, a child is conceived expressly for the purpose of using her organs for transplantation in another person, usually a blood relative. In 1990, for example, a California couple gave birth to a child they had conceived solely in hopes that the baby's bone marrow cells would save the life of their teenage daughter, who was dying of cancer. Although the legality of such conceptions was not challenged, the practice raised ethical questions relating to who may give informed consent for the donor child and whether such a practice may be considered CHILD ABUSE.

The problem of donor consent arose in lawsuits seeking to compel persons to donate

organs to relatives. For example, in 1990, an Illinois family with a son who had leukemia brought a lawsuit seeking to compel the boy's half sister and half brother to submit to preliminary medical tests that would have established their suitability to serve as bone marrow donors. A judge, noting the objections of the mother of the half siblings, ruled that such tests would be an invasion of the potential donors' right of privacy. The Illinois Supreme Court later upheld this ruling (*Curran v. Bosze,* No. 70501 [Ill. filed Dec. 20, 1990]). In its opinion, the court outlined three critical factors in determining the best interests of the donating child: (1) the consenting parent must know the inherent risks and benefits of the procedure, (2) the primary caretaker of the child must be able to provide emotional support, and (3) there must be an existing, close relationship between the donor and the recipient.

The issue of organ donations made by terminally disabled infants came to national attention in 1992 when a Florida couple sought to have the organs of their anencephalic baby, Theresa Ann Campo Pearson, donated for use by other newborns. Anencephaly is a rare and always fatal gestational disorder in which the brain develops a stem, or lower brain, but not a cortex, or upper brain. Though the rest of the anencephalic infant's body is healthy, the disorder causes the child to die soon after birth. Theresa Ann's mother and father sought to have her declared brain dead, but a judge stated that under Florida statutes, a declaration of brain death may be made only if activity in all parts of the brain has ceased (Fla. Stat. ch. 382.009 [1992]). The judge noted that Theresa Ann had lower-brain activity. She died ten days after birth, without having donated her organs.

Critics of this decision argued that because anencephaly is always fatal, the organs of children with this disorder should be used to save other children. Supporters note that if an exception were made for anencephaly, other severely DISABLED PERSONS might be inappropriately targeted as a source for organs. Others argue that the life of one child, no matter how brief or unsatisfactory, cannot be taken to save another.

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Death and Dying; Fetal Rights.

## ORGANIC LAW

*The fundamental law or constitution of a particular state or nation, either written or unwritten, that defines and establishes the manner in which its government will be organized.*

## ORGANIZATION

*A generic term for any type of group or association of individuals who are joined together either formally or legally.*

The term *organization* includes a corporation, government, partnership, and any type of civil or political association of people.

## ORGANIZED CRIME

*Criminal activity carried out by an organized enterprise.*

Modern organized crime is generally understood to have begun in Italy in the late nineteenth century. The secretive Sicilian group La Cosa Nostra, along with other Sicilian mafia, were more powerful than the Italian government in the early twentieth century. In 1924 Benito Mussolini's fascist government rose to power, and Mussolini orchestrated a crackdown on the Italian mafia. Those mafiosi who were not jailed or killed were forced to flee the country. Many came to the United States, where they flourished in the art of bootlegging and other criminal activity. Since the 1920s organized

crime has crossed ethnic lines and is associated with no particular ethnic group.

Congress and many states maintain laws that severely punish crime committed by criminal enterprises. On the federal level, Congress passed the Organized Crime Control Act in 1970. The declared purpose of the act is to eradicate organized crime by expanding evidence-gathering techniques for law enforcement, specifying more acts as being crimes, authorizing enhanced penalties, and providing for the FORFEITURE of property owned by criminal enterprises.

The Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C.A. § 1961 et seq.) is the centerpiece of the Organized Crime Control Act. RICO is a group of statutes that define and set punishments for organized crime. The act's provisions apply to any enterprise that engages in RACKETEERING activity. Racketeering is the act of engaging in a pattern of criminal offenses. The list of offenses that constitute racketeering when committed more than once by an enterprise is lengthy. It includes EXTORTION, FRAUD, MONEY LAUNDERING, federal drug offenses, murder, KIDNAPPING, gambling, ARSON, ROBBERY, BRIBERY, dealing in obscene matter, counterfeiting, EMBEZZLEMENT, OBSTRUCTION OF JUSTICE, obstruction of law enforcement, tampering with witnesses, filing of a false statement to obtain a passport, passport forgery and false use or misuse of a passport, peonage, SLAVERY, unlawful receipt of WELFARE funds, interstate transport of stolen property, sexual exploitation of children, trafficking in counterfeit labels for audio and visual works, criminal infringement of copyrights, trafficking in contraband cigarettes, white slavery, violation of payment and loan restrictions to LABOR UNIONS, and harboring, aiding, assisting, or transporting illegal ALIENS. RICO also includes forfeiture provisions that allow the government to take the property of parties found guilty of violations of the act.

Modern organized criminal enterprises make money by specializing in a variety of crimes, including extortion, blackmail, gambling, loan-sharking, political corruption, and the manufacture and sale of illicit narcotics. Extortion, a time-tested endeavor of organized crime, is the acquisition of property through the use of threats or force. For instance, a criminal enterprise located in a certain neighborhood of a city may visit shopkeepers and demand a specific amount of so-called protection money. If a shopkeeper does not pay the money, the criminal organization may strike at him, his property, or his family.

Blackmail is similar to extortion. It is committed when a person obtains money or value by accusing the victim of a crime, threatening the victim with harm or destruction of the victim's property, or threatening to reveal disgraceful facts about the victim.

Gambling and loan-sharking are other traditional activities of organized criminal enterprises. Where gambling is illegal, some organized crime groups act as the locus for gambling activity. In states where some gambling is legal and some gambling is illegal, organized crime groups offer illegal GAMING. Loan-sharking is the provision of loans at illegally high interest rates accompanied by the illegal use of force to collect on past due payments. In organized crime circles, such loans usually are made to persons who cannot obtain credit at legitimate financial institutions and who can serve the criminal enterprise in some way in the event they are unable to repay the loan. Loan-sharking provides organized criminal enterprises with money and helps enlarge the enterprise by bringing into the fold persons who owe a debt to the enterprise.

Political corruption has diminished as a focus of organized crime. In the first half of the twentieth century, some organized crime groups blackmailed or paid money to politicians in return for favorable legislation and favorable treatment from city hall. This sort of activity has decreased over the years as public scrutiny of political activity has increased.

The most recent major venture in organized crime is the manufacture and sale of illicit narcotics. This practice was prefigured in the activities of organized crime from 1919 to 1933. During this period alcohol was illegal under the EIGHTEENTH AMENDMENT to the U.S. Constitution, and the manufacture and sale of liquor was a favorite activity of organized crime groups. The manufacture and sale of illegal liquors, or bootlegging, was extremely profitable, and it gave organized crime a foothold in American life. Many organized criminal enterprises subsequently imitated bootlegging by selling other illegal drugs.

Violence often accompanies organized crime. Many crime syndicates use murder, tor-

ture, assault, and TERRORISM to keep themselves powerful and profitable. The constant threat of violence keeps victims and witnesses silent. Without them, prosecutors find it difficult to press charges against organized criminals.

The modern notion of organized crime in the United States has expanded beyond the prototypical paradigm of family operations. Organized crime in the early 2000s refers to any group of persons in a continuing operation of criminal activity, including street GANGS. To combat the violence and other illegal activity of street gangs, federal and state legislatures have passed laws pertaining specifically to street gangs. Many states provide extra punishment for persons in street gangs who are convicted of certain crimes.

On the federal level, a street gang is defined as an ongoing group, club, organization, or association of five or more persons formed for the purpose of committing a violent crime or drug offense, with members who have engaged in a continuing series of violent crimes or drug law violations that affect interstate or foreign commerce (18 U.S.C.A. § 521). Any person in a street gang convicted for committing or conspiring to commit a violent federal crime or certain federal drug offenses receives an extra ten years in prison beyond the prison sentence for the actual crime.

Despite stringent punishments, organized crime is difficult to eradicate. It tends to occur in large cities where anonymity is relatively easy to maintain. The size and hereditary makeup of many enterprises make them capable of surviving the arrest and imprisonment of numerous members. Many organized crime participants are careful, efficient, and professional criminals, making them difficult to apprehend.

Another reason organized crime is so durable is that the participants are extremely dedicated. The group looks after its own and there are serious consequences of betrayal. Members of organized crime groups often take an oath of allegiance. For example, members of La Cosa Nostra stated, "I enter alive into this organization and leave it dead."

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## ORGANIZED CRIME CONTROL ACT OF 1970

See RACKETEERING.

## ORIGINAL INTENT

*The theory of interpretation by which judges attempt to ascertain the meaning of a particular provision of a state or federal constitution by determining how the provision was understood at the time it was drafted and ratified.*

Sometimes called original understanding, originalism, or intentionalism, the theory of original intent is applied by judges when they are asked to exercise the power of JUDICIAL REVIEW during a legal proceeding. (The power of judicial review is the power of state and federal courts to review and invalidate laws that have been passed by the legislative and executive branches of government but violate a constitutional principle.)

Not every judge adheres to the theory of original intent, and many adherents fail to apply it in a uniform and faithful manner. Judges who do attempt to apply this judicial philosophy generally agree that only through its application may courts be bound by the law and not their own views of what is desirable. They also generally agree that courts must apply original intent in order to preserve the representative democracy created by the federal Constitution.

Originalists observe that the democracy created by the U.S. Constitution is marked by three essential features: a SEPARATION OF POWERS, FEDERALISM, and a BILL OF RIGHTS. The Constitution separates the powers of the federal government into three branches, which help foster what is known as a system of checks and balances. Article I of the Constitution delegates lawmaking power to the legislative branch, which comprises the two houses of Congress. This lawmaking power authorizes members of Congress to pass legislation that reflects the values of their voting constituency, usually consist-

ing of a plurality or majority of the adults residing in the representative's home state. If a representative makes policy that is inconsistent with the values of the representative's constituents, the representative will likely be voted out of office at the next election and replaced by someone who is more sensitive to popular will. Under this system, Congress remains perpetually accountable to the U.S. people, who, originalists point out, are the ultimate source of authority from which the Constitution derives its legitimacy.

The EXECUTIVE BRANCH is also held accountable to the U.S. public at the voting booth. Every four years, U.S. citizens are given the opportunity to determine who will be president of their country. They generally vote for someone who is perceived to represent their economic, societal, and personal interests on a variety of issues, including taxes, the WELFARE system, and the right to live and die free from governmental restraint.

Article II empowers the president to sign the congressional acts that he approves and VETO the rest, enabling the executive branch to influence national policy, if not make it. The president may also influence national policy by promulgating executive decrees (which are orders issued by the executive branch without congressional approval) that are intended to implement a constitutional provision, federal law, or treaty. In addition, Article II charges the president with the responsibility of enforcing legislation that has been passed by Congress and signed into law.

Article III of the Constitution delegates federal judicial power to the U.S. Supreme Court and to other "inferior" federal courts that Congress may establish. Unlike the president and members of Congress, federal judges are largely unaccountable to the U.S. electorate. Once appointed to the bench by the president and confirmed by the Senate, a federal judge holds office for life, unless she or he retires or is removed for "treason, BRIBERY, or other high crimes and misdemeanors" (U.S. Const. art. II, § 4).

Although Article III does not confer the power of judicial review, in MARBURY V. MADISON, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), the Supreme Court ruled that it is "emphatically the duty" of the federal "judicial department to say what the law is" by "resolving the operation" of congressional legislation that conflicts with the paramount law of the U.S. Constitution. *Marbury* thus emphasized the traditional role of courts as oracles of the law; however, it provided little guidance on how courts should interpret and apply the particular provisions of the Constitution.

Originalists attempt to provide this guidance. They argue that the interpretation of most written documents, legal or otherwise, involves a form of "communication" in which "the writer seeks to communicate with the reader," Constitutional interpretation is no different, originalists say, because it involves the attempt of judges, as readers, to understand the meaning of a constitutional provision as conveyed by the Framers and ratifiers who authored it. Originalists believe that judges who fail to employ this method of interpretation transform courts into naked power organs.

Originalists contend that judges who deviate from the original understanding of a constitutional provision are forced to replace that understanding with their own subjective sympathies, social preferences, and notions of reasonableness. When judges substitute their own value choices for those actually written in the Constitution, federal courts become super-legislatures that make decisions based on the personal will of judges and not the law of the land (*Day-Brite Lighting v. Missouri,* 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 [1952]).

Originalists assert that judges who legislate from the bench violate the separation of powers by making law rather than interpreting and applying it. These judges also violate the principles of federalism, the second essential feature of U.S. constitutional democracy identified by originalists. Under these principles, courts must strike an appropriate balance between the sovereignties of state and federal governments, not allowing the smaller state governments to be wholly consumed by the ubiquitous federal government. Originalists contend that this balance impermissibly tips in favor of the federal government when federal courts invent new constitutional rights that state governments are then required to enforce.

Such rights have protected areas concerning homosexual behavior, ABORTION, CAPITAL PUNISHMENT and individual privacy. Justice CLARENCE THOMAS, an exponent of originalism, observed that "[t]he federal Constitution" is not meant to "address all ills in our society" (*Hudson v. McMillian,* 503 U.S. 1, 112 S. Ct. 995, 117 L.

Ed. 2d 156 [1992] [Thomas, J., dissenting]). Nor is the Constitution meant, Thomas said, "to prohibit everything that is intensely undesirable" (*Bennis v. Michigan,* 516 U.S.442, 116 S. Ct. 994, 134 L. Ed. 2d 68 [1996] [Thomas, J., concurring]). Originalists claim that the Constitution must protect only the areas of life that are expressly referred to or fairly implied by the explicit language of its text. In other words, where the Constitution stops speaking, the state governments may begin.

Respect for principles of federalism, then, is intimately connected with the third essential feature of U.S. Constitutional democracy identified by originalists, the Bill of Rights. The Bill of Rights protects certain freedoms from the popular will no matter how democratically the majority attempts to trample them. In all other areas, originalists assert, state and federal majorities are entitled to rule for no better reason than that they are majorities. Originalists explain that majority tyranny occurs if legislation invades areas properly left to individual freedom, and minority tyranny occurs if the majority is prevented from ruling where its power is legitimate.

Originalists argue that the judiciary facilitates minority tyranny by improperly interpreting the Bill of Rights to guarantee liberties not contemplated by the language and intent of the Framers. To avoid this pitfall, originalists believe, judges must safeguard only the liberties that can be clearly derived from the Constitution. Originalists cite a series of cases in which the Supreme Court recognized a right to privacy as the antithesis of proper constitutional interpretation.

In GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), the Court struck down a state law forbidding married adults to use contraceptives, because it violated their right to privacy guaranteed by the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. Although a majority of the Court recognized privacy interests that may be inferred from these several constitutional amendments, Justice POTTER STEWART noted in a dissenting opinion that "no such general right of privacy" can be found in the express language of "the Bill of Rights" or "any other part of the Constitution." Originalists argue that courts cannot apply a general right to privacy in a politically neutral manner without protecting all sorts of illegal activities that are conducted in private, such as spousal abuse, price-fixing, and prostitution.

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CROSS-REFERENCES

Bork, Robert Heron; Constitution of the United States; Jurisprudence; Penumbra; Scalia, Antonin.

## ORIGINAL JURISDICTION

*The authority of a tribunal to entertain a lawsuit, try it, and set forth a judgment on the law and facts.*

Original jurisdiction is distinguishable from appellate jurisdiction, which is the power of a court to hear and enter judgment upon a case brought for review. For example, the U.S. Supreme Court's caseload consists almost entirely appellate cases from the circuit courts of appeal. When two or more states are locked in a dispute, however, the Supreme Court has original jurisdiction to gather and hear evidence much like a trial court. The Court appoints a SPECIAL MASTER to hear the evidence and prepare factual findings. It then hears oral arguments and issues a decision as it does in appellate jurisdiction cases. Because it is the

highest court in the United States, the Supreme Court's decision in original jurisdiction cases is final, with no right of appeal. An example of such a case is *New Jersey v. New York*, 523 U.S. 767, 118 S. Ct. 1726, 140 L. Ed. 2d 993 (1998), in which the Supreme Court took evidence and determined which state had claim to Ellis Island.

## ORIGINAL WRIT

*A document formerly used to commence a lawsuit in English courts.*

Historically, the writ needed to start a personal action was a mandatory letter from the king, issued by the Chancery and sealed with the Great Seal. It was directed to the sheriff of the county where the wrong was supposed to have been committed and required the sheriff to command that the defendant either satisfy the plaintiff's claim or answer the charges that had been made. This form of writ has been replaced by the summons, which commences civil actions today, but the summons is still sometimes called an original writ.

## ORIGINATION FEE

*A charge imposed by a lending institution or a bank for the service of processing a loan.*

For example, a bank might charge an individual who has applied for a student loan an origination fee of one percent for processing the application and granting the loan.

## ORPHAN'S COURT

*The designation of tribunals in a number of New England states that have probate or surrogate jurisdiction.*

Such a court ordinarily has the power to handle such matters as the establishment of wills, the administration and distribution of decedents' estates, the supervision of the guardianship of INFANTS, and the control of their property.

## OSTENSIBLE

*Apparent; visible; exhibited.*

*Ostensible authority* is power that a principal, either by design or through the absence of ordinary care, permits others to believe his or her agent possesses.

## ♦ OTIS, JAMES, JR.

James Otis Jr. was a Massachusetts lawyer who became a leading colonial political activist in the 1760s. His constitutional challenge to British governance of the colonies in the WRITS OF ASSISTANCE CASE in 1761 was one of the most important legal events leading to the American Revolution. A brilliant speaker and writer, Otis faded from the revolutionary scene as he struggled with alcoholism and mental illness.

Otis was born on February 5, 1725, in West Barnstable, Massachusetts. His father, James Otis Sr., was a prominent merchant and political figure in the colony. Otis graduated from Harvard College in 1743 and was admitted to the bar in 1748. He moved his law practice from Plymouth, Massachusetts, to Boston in 1750 and was appointed advocate general of the Boston vice-admiralty court in 1756. He served until 1761, when the furor over writs of assistance pushed Otis into becoming an opponent of the colonial government he served.

A writ of assistance was a general SEARCH WARRANT that allowed customs officers to command the assistance of any local public official in making entry and seizing contraband goods. Goods seized by use of the writ were brought before the vice-admiralty court, which determined if the goods had been imported lawfully. SMUGGLING had bedeviled the colonial government for many years, but the need for tax revenue during the course of the French and Indian War led to a crackdown. The use of the writ made revenue collection easier, but it upset the merchant community of Boston.

Otis resigned his position on the vice-admiralty court and agreed to represent the merchants in challenging the legality of the writs of assistance. At trial Otis argued that the writs were a form of tyranny. He coined the phrase "A man's home is his castle" to describe the sanctity and privacy that a citizen deserved from his or her government.

More important, he argued that the writs were unconstitutional under British law. Though England did not have a written constitution, Otis referred to the accumulation of practices and attitudes throughout English history that set limits on the power of government. In his view there were traditional limits beyond which the Parliament or the king could not legitimately go. The writs exceeded these bounds and were therefore null and void. Though he lost

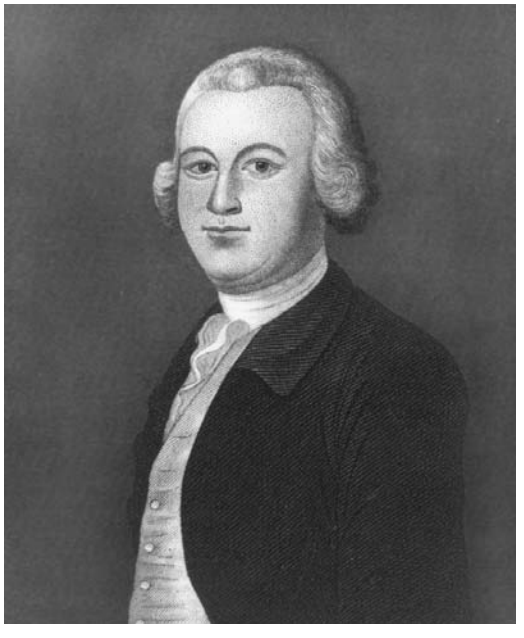

*James Otis Jr.* LIBRARY OF CONGRESS

the *Writs of Assistance* case, his theory caught the public's attention. It provided justification for an increasing number of protests against taxation without representation. The case also elevated Otis as a radical colonial leader.

In May 1761 he was elected to the General Court of Massachusetts. This body, which served as the provincial legislature, gave Otis a platform to expound his radical political views. In 1762 he published *A Vindication of the Conduct of the House of Representatives of the Province of Massachusetts Bay.* In the pamphlet he defended the legislature's refusal to pay for ships that England had sent to protect the colony from pirates. He wrote numerous papers to the other colonies and to the government in England arguing for political freedom. His ideas became a part of the address that the STAMP ACT Congress of 1765 sent to the House of Commons protesting taxation of the colonies.

As the colonies moved closer to breaking away from England, Otis's influence faded, the result of alcoholism and mental illness. In 1769 he was struck in the head by a customs officer who disliked Otis's views. This injury left him mentally incapacitated and unable to continue in public life. For the remainder of his life, Otis had few lucid moments. He died on May 23, 1783, in Andover, Massachusetts, after being struck by lightning.

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Writs of Assistance Case.

## ♦ OTTO, WILLIAM TOD

William Tod Otto served as the reporter of decisions for the U.S. Supreme Court from 1875 to 1883. A distinguished lawyer, judge, and government administrator before his appointment as reporter, Otto is also noted for successfully arguing before the Supreme Court the case of *Murdock v. City of Memphis,* 87 U.S. (20 Wall.) 590, 22 L. Ed. 429 (1875), which resolved issues concerning the jurisdiction of the Court.

Otto was born on January 19, 1816, in Philadelphia, Pennsylvania. He earned a bachelor's degree in 1833 and a master's degree in 1836 from the University of Pennsylvania. Otto

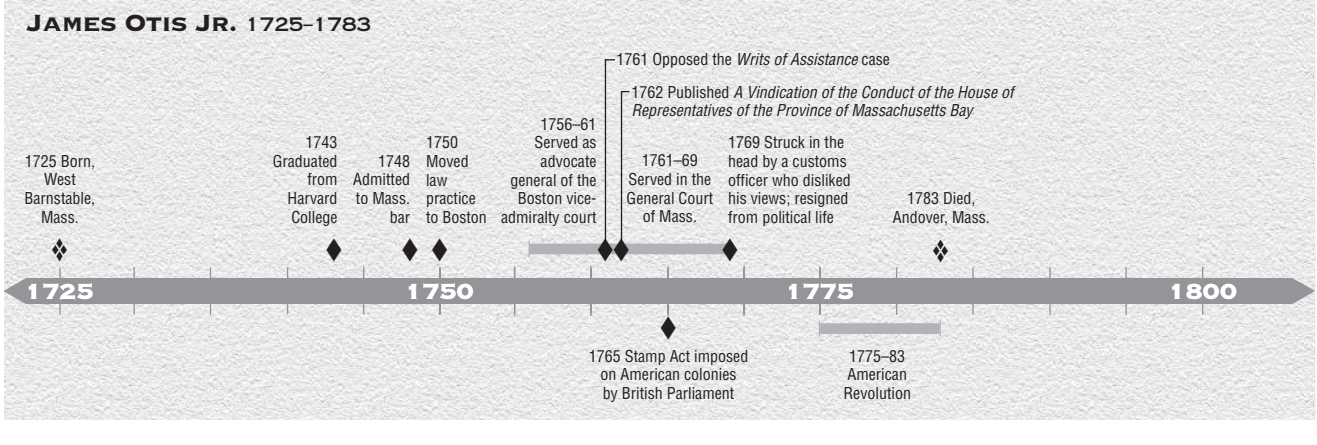

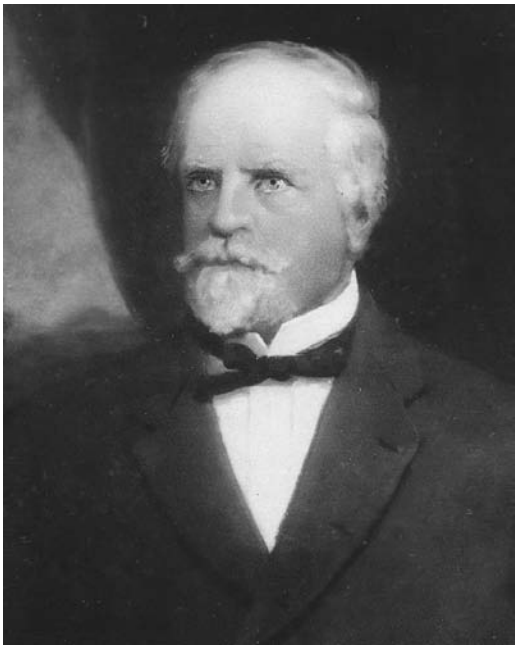

*William Tod Otto.*
U.S. SUPREME COURT

studied law in Philadelphia and then moved to Brownstown, Indiana, to open a private practice. In 1844 he was elected a judge of Indiana's Second Circuit court, a position he held until his defeat in the election of 1852. From 1847 to 1852, Otto also taught law at Indiana University.

Despite his election defeat, Otto remained interested in public office. Although he lost an election in 1858 for Indiana attorney general, he had the good fortune of supporting ABRAHAM LINCOLN for president at the 1860 Republican convention. President Lincoln named Otto assistant secretary of the interior in 1863. In this post Otto administered Indian affairs. He left the department in 1871 to serve as arbitrator for claims against Spain from U.S. citizens living in its colony of Cuba.

In 1875 Otto argued *Murdock v. Memphis*, 20 Wall. 590 (1875), before the Supreme Court. The case concerned congressional changes to section 25 of the JUDICIARY ACT OF 1789, which granted appellate authority to the Supreme Court over federal question cases from the state courts (those cases involving federal constitutional or statutory issues) but excluded questions of state law from review by the Court. This meant that state courts had the final and unreviewable authority over the interpretation of the state constitution and laws. However, in the 1867 reenactment of section 25, Congress omitted the provision containing this exclusion. *Murdock* raised the question of whether the U.S. Supreme Court could now review questions of state law. The Court agreed with Otto, concluding that Congress's failure to clearly state its intent to radically change the scope of federal jurisdiction prevented the Court from inferring intent.

Shortly after the *Murdock* decision, Otto was appointed reporter of decisions, succeeding JOHN WILLIAM WALLACE. He was the first reporter to issue Supreme Court reports without his name appearing on the spine of each volume. Previous reporters had acted as their own publishers and distributors; thus they were entitled to use their names in marketing the volumes of court decisions. In 1874, however, Congress appropriated money for publishing the Court's opinions under government auspices. Otto, though hardly anonymous, assembled the reports for publication by the government.

Between 1875 and 1883, Otto edited 17 volumes (91–107 *United States Reports*). He left the

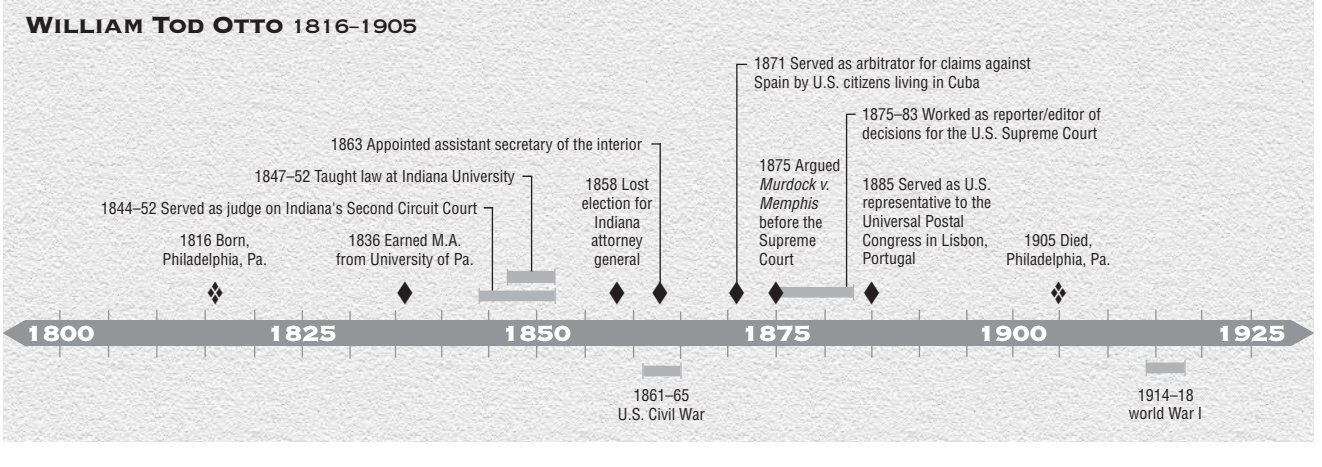

position to resume a private law practice and served as U.S. representative to the Universal Postal Congress in Lisbon, Portugal, in 1885.

Otto died on November 7, 1905, in Philadelphia.

## OUT-OF-COURT SETTLEMENT

*An agreement reached between the parties in a pending lawsuit that resolves the dispute to their mutual satisfaction and occurs without judicial intervention, supervision, or approval.*

An out-of-court settlement provides that the parties relinquish their rights to pursue judicial remedies.

## OUTLAWRY

*A declaration under old* ENGLISH LAW *by which a person found in* CONTEMPT *on a civil or criminal process was considered an outlaw—that is, someone who is beyond the protection or assistance of the law.*

During the Anglo-Saxon period of English history, a person who committed certain crimes lost whatever protection he or she had under the law, forfeited whatever property he or she owned, and could be killed by anyone. If the crime committed was TREASON or a felony, a declaration of outlawry was tantamount to a conviction and attainder. Outlawry for a misdemeanor did not, however, amount to a conviction for the offense. The Norman Conquest led to significant changes in the law governing outlawry, eventually leading to its abolition.

## OUTPUT CONTRACT

*In the law of sales, an agreement in which one party assents to sell his or her total production to another party, who agrees to purchase it.*

This type of contract does not entail an illusory promise, a purported agreement that actually means nothing because it leaves to one party the choice of performance or nonperformance, even if the quantity of goods that are the subject of the contract is indefinite. It is also known as an *entire output contract,* and it is subject to the UNIFORM COMMERCIAL CODE, a body of law adopted by the states that governs commercial transactions.

**CROSS-REFERENCES**

Requirements Contract.

## OUTSTANDING WARRANT

*An order that has not yet been carried out; an order for which the action commanded has not been taken.*

When the action ordered has been done, the warrant is said to have been executed.

## OVERBREADTH DOCTRINE

*A principle of* JUDICIAL REVIEW *that holds that a law is invalid if it punishes constitutionally protected speech or conduct along with speech or conduct that the government may limit to further a compelling government interest.*

Legislatures sometimes pass laws that infringe on the FIRST AMENDMENT freedoms of religion, speech, press, and peaceable assembly. When a legislature passes such a law, a person with a sufficient interest affected by the legislation may challenge its constitutionality by bringing suit against the federal, state, or local sovereignty that passed it. One common argument in First Amendment challenges is that the statute is overbroad.

Under the overbreadth doctrine, a statute that affects First Amendment rights is unconstitutional if it prohibits more protected speech or activity than is necessary to achieve a compelling government interest. The excessive intrusion on First Amendment rights, beyond what the government had a compelling interest to restrict, renders the law unconstitutional.

If a statute is overbroad, the court may be able to save the statute by striking only the section that is overbroad. If the court cannot sever the statute and save the constitutional provisions, it may invalidate the entire statute.

The case of *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985), illustrates how the overbreadth doctrine works. At issue in *Brockett* was an OBSCENITY statute passed by the state of Washington. The statute declared to be a moral NUISANCE any place where lewd films were shown as a regular course of business and any place where lewd publications constituted a principal part of the stock in trade. Lewd matter was defined as being obscene matter, or any matter that appeals to the prurient interest. Under the statute the term *prurient* was defined as tending to incite lasciviousness or lust.

The Supreme Court in *Brockett* ruled that the Washington statute was overbroad because it prohibited lust-inciting materials. According to

the Court, because lust is a normal sexual appetite, materials that include an appeal to lust enjoy First Amendment protection. Therefore, a statute that prohibits any material arousing lust is constitutionally overbroad.

The remedy in the *Brockett* case was not complete invalidation of the moral nuisance law. The Court directed that the reference to lust be excised from the statute and stated that the rest of the statute was valid. The statute, though originally overbroad, was still valid because it contained a severability clause and was still effective after its overbroad portion was struck.

CROSS-REFERENCES

Compelling State Interest; Freedom of Speech; Freedom of the Press.

## OVERDRAFT

*A check that is drawn on an account containing less money than the amount stated on the check.*

The term *overdraft* is also used in reference to the condition that exists when VOUCHERS or purchase orders are drawn in amounts exceeding the amount that has been appropriated or budgeted.

CROSS-REFERENCES

Commercial Paper.

## OVERHEAD

*A sum total of the administrative or executive costs that relate to the management, conduct, or supervision of a business that are not attributable to any one particular product or department.*

Expenses such as rent, taxes, insurance, lighting, heating, and other miscellaneous office expenses all fall under the category of overhead.

## OVERREACHING

*Exploiting a situation through* FRAUD *or* UNCONSCIONABLE *conduct.*

## OVERRIDE

*An arrangement whereby commissions are made by sales managers based upon the sales made by their subordinate sales representatives. A term found in an agreement between a real estate agent and a property owner whereby the agent keeps the right to receive a commission for the sale of the property for a reasonable time after the agreement expires if the sale is made to a purchaser with whom the agent negotiated prior to the expiration of the agreement.*

## OVERRULE

*The refusal by a judge to sustain an objection set forth by an attorney during a trial, such as an objection to a particular question posed to a witness. To make void, annul, supersede, or reject through a subsequent decision or action.*

A judicial decision is overruled when a later decision, made by the same tribunal or a higher court in the same system, hands down a decision concerning the identical QUESTION OF LAW, which is in direct opposition to the earlier decision. The earlier decision is thereby overruled and deprived of its authority as precedent.

## OVERT

*Public; open; manifest.*

The term *overt* is used in CRIMINAL LAW in reference to conduct that moves more directly toward the commission of an offense than do acts of planning and preparation that may ultimately lead to such conduct.

## OVERT ACT

*An open, manifest act from which criminality may be implied. An outward act done in pursuance and manifestation of an intent or design.*

An overt act is essential to establish an attempt to commit a crime. It is also a key element in the crime of TREASON and has become a component of federal and some state criminal conspiracy laws. It also plays a role in the right of SELF-DEFENSE.

An attempt to commit a crime is an offense when an accused makes a substantial but unsuccessful effort to commit a crime. The elements of attempt include an intent to commit a crime, an apparent ability to complete the crime, and an overt act. An overt act is an act that is performed to execute the criminal intention and will naturally achieve that result unless prevented by some external cause. The act must directly move toward commission of the crime and must be more than acts of planning or preparation.

Defining when an act is more than preparatory has proved difficult. Several tests have been used to determine when an overt act has been committed. The "unequivocal" test states that a defendant's act, standing alone, is unequivocally

consistent only with her or his intent to commit the allegedly attempted crime. This test has been criticized as too lenient on criminals because no act is truly unequivocal. A person who shoots someone several times can argue that she was only trying to injure the victim and that it was her skilled shooting and not luck that prevented the victim's death.

Some jurisdictions favor the "substantial act" test. They permit an attempt conviction when a defendant with the requisite criminal intent performs a substantial act towards the commission of the crime. Under this test, for example, a prospective burglar can be convicted of attempted BURGLARY if apprehended in an alley with burglary tools, even though he had not determined which building he was going to burglarize.

The "probable desistence" test asks whether the defendant had gone so far down the road of crime that it is unlikely that she or he would have voluntarily desisted from completing the crime. One way of measuring this probability is to look at the past criminal record of an accused. Thus, an accused with a previous record may be convicted under this test, because her past propensity makes it unlikely that she would have stopped taking the acts leading to the crime.

The need for an overt act also is required in federal and some state criminal conspiracy prosecutions. A conspiracy is a voluntary agreement by two or more persons to commit an unlawful act or to use unlawful means to accomplish an act that is not in itself unlawful. Under federal law the overt act must be an independent act that comes after the agreement or conspiracy and is performed to effect the objective of the conspiracy. The overt act itself need not be a criminal act, because its sole function is to demonstrate that the conspiracy is operative. If, for example, two persons conspire to rob a bank and rent a getaway car, the rental is an overt act that in itself is perfectly legal. Some states, however, still adhere to the common-law rule that an overt act is not required to prove a conspiracy.

An overt act that justifies the exercise of the right of self-defense is one that causes a reasonable person to perceive a present intention to cause his or her death or great bodily harm.

The federal crime of treason contains an overt act requirement. Article III, Section 3, Clause 1, of the U.S. Constitution provides, "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act." In such a case, an overt act means a step taken to execute a treasonable purpose, as distinguished from mere words or a treasonable sentiment, purpose, or design not resulting in action. It is an act in furtherance of the crime.

CROSS-REFERENCES

Criminal Law.

## OWNER

*The person recognized by the law as having the ultimate control over, and right to use, property as long as the law permits and no agreement or* COVENANT *limits his or her rights.*

## OYER AND TERMINER

[French, To hear and decide.] *The designation "court of oyer and terminer" is frequently used as the actual title, or a portion of the title, of a state court that has criminal jurisdiction over felonious offenses.*

## OYEZ

[French, Hear ye.] *A word used in some courts by the public crier to indicate that a proclamation is about to be made and to command attention to it.*

## PACIFIC RAILROAD ACT

The Pacific Railroad Act, passed by Congress in 1862 (12 Stat. 489), authorized the construction of the first transcontinental railway line connecting the east and west coasts. The need for a transcontinental railway to facilitate transportation of persons and products across the United States became increasingly clear in the 1850s due to the acquisition of California and the resolution of the Oregon boundary dispute. In 1862, before the secession of the South from the Union, the REPUBLICAN PARTY in Congress was instrumental in enacting legislation that authorized the Union Pacific Railway and the Central Pacific Railroad to construct such a railway. The Union Pacific Railway was to begin construction at Omaha, Nebraska, with the objective of connecting with the Central Pacific Railroad, which was to begin construction at the same time at Sacramento, California. The law provided that after each railroad laid forty miles of track, it was to receive 6,400 acres of public lands and government loans ranging from $16,000 to $48,000 per mile of track completed.

Congress passed additional legislation in 1864 to provide more land and money to complete the project. The two lines finally met at Promontory Point, Utah, in 1869, thereby providing a fast means of access from the Missouri River and the Pacific Ocean by rail.

The Union Pacific Railway and the Central Pacific Railroad were merged into the Union Pacific Railroad in 1900 by Edward Harriman.

CROSS-REFERENCES

Railroad.

## PACIFISM

*A belief or policy in opposition to war or violence as a means of settling disputes. Pacifists maintain that unswerving nonviolence can bestow upon people a power greater than that achieved through the use of violent aggression.*

Over the years, pacifism has acquired different meanings. As a consequence, it is practiced in a variety of ways. For example, pacifists may make an individual vow of nonviolence. They may also organize and actively pursue nonviolence and peace between nations. They may even assert that some form of support for selective violence is sometimes necessary to achieve worldwide peace.

### History

The earliest form of recorded pacifism appear in the teachings of Siddhartha Gautama, who became known as the Buddha. The Buddha, or the Enlightened One, left his family at a young age and spent his life searching for a release from the human condition. Before dying in northeast India between 500 and 350 B.C., the Buddha taught the paths to elevated existence and inspired a new religion. Buddhism eventually spread from India to central and Southeast Asia, China, Korea, Japan, and the United States.

The teachings of Jesus Christ continued the attachment of nonviolence to organized reli-

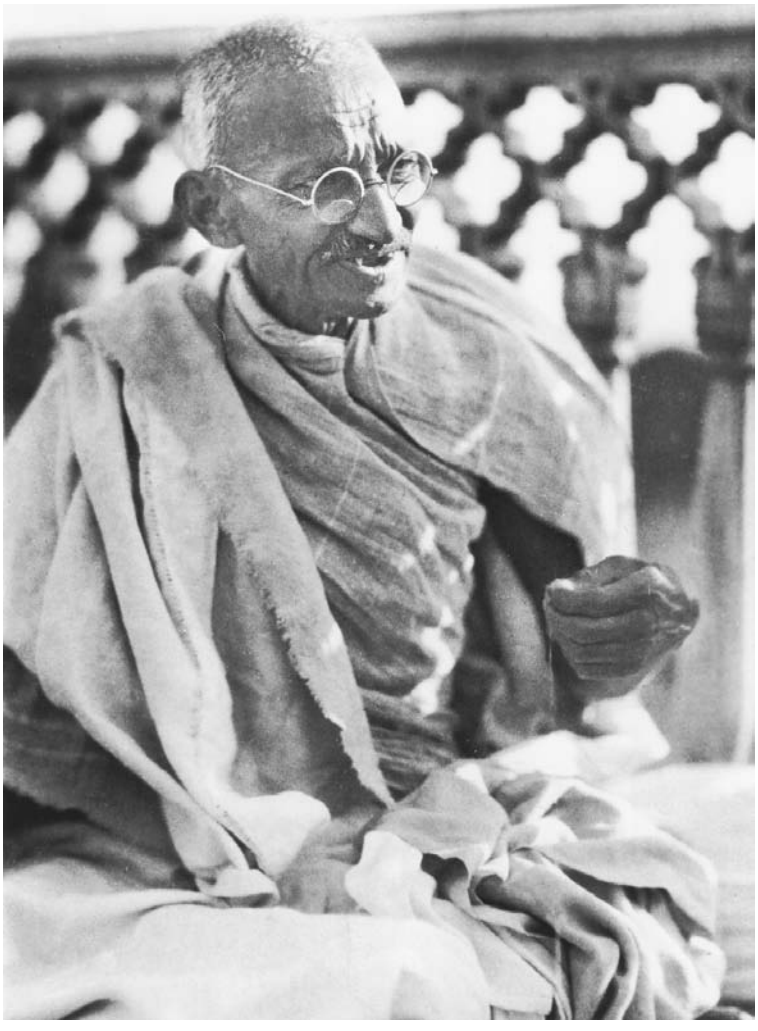

*Though better known for challenging injustices in British-ruled India, Gandhi also spent many years working for the rights of Indian residents of South Africa.* AP/WIDE WORLD PHOTOS

gion. Christ taught, in part, that an appropriate response to violence is to "turn the other cheek" and offer no resistance.

As civilization expanded and distinct states were formed, Christianity was carried to developing areas. It became popularized as the official religion of entire states, the leaders of which sought to retain both Christianity and a stronghold on power. In the third century, the nonresistance aspect of Christianity was reconsidered, and certain passages in the Gospel were interpreted to mean that resistance is an acceptable reaction to evil forces.

Saint Augustine solidified Christianity's break with pure pacifism in the fifth century with a warmly received religious treatise. In *The City of God,* he maintained, in part, that peace could be realized only through the acceptance of Christianity and that the Church was to be defended.

More than a millennium passed before the next great pacifist movement was seen. In the fifteenth century, Martin Luther led the Protestant Reformation, which inspired religious creativity. Europeans who were disenchanted with Catholicism broke away from the Church in Rome, experimented with observations and practices, and founded their own religions. The most pacific of these was Anabaptism. Anabaptists practiced nonviolence and actively supported those suffering from violence.

In the seventeenth century, still more pacific religious groups were established, such as the Mennonites, the Brethren, and the Religious Society of Friends. Of these, the Friends have gathered the largest following in the United States.

### Religious Society of Friends

In 1652, George Fox founded the Religious Society of Friends in England. Initially, Friends were known as Children of the Light, Publishers of Truth, or Friends of Truth. They held fast to the belief that there exists in all persons a light, which can be understood as the presence of God. With this reverence for other people, nonviolence came naturally. And, since God exists in all people, violence can be avoided by finding and revealing the Light in others.

Friends were also called Quakers, perhaps from the trembling some experience as they find the Inner Light during meetings. The nickname was originally coined by antagonists and intended as derisive, but many Friends began to use it in their own speech. *Quaker* soon lost its derogative connotation, and it remains the most recognized name for Friends.

A Friend's commitment to pacifism often came with no small dose of activism. Friends interrupted church services and refused to take oaths in seventeenth-century England, arguing that if one always tells the truth, one need not promise to do so. Friends ignored social niceties, refusing, for example, to remove their hat in the presence of royalty. Friends also used the informal *thee* and *thy* in place of the more respectful *you* and *your.* Within four years of the creation of the Society, Friends in England were being imprisoned by the thousands, and they began to seek refuge in the New World.

Ann Austin and Mary Fisher were the first Friends to reach colonial America from England. After their arrival in 1656, Austin and Fisher were imprisoned and deported. Friends who came after them suffered a similar fate.

Many of those who stayed moved to Rhode Island, which Roger Williams founded on religious freedom principles.

In 1681, Charles II gave to William Penn, a longtime Friend, the charter to colonial land in America as repayment for a debt owed to Penn's father. In 1682, Penn founded Pennsylvania as a "holy experiment," and many English and European Friends found permanent sanctuary there.

Friends continued their activism in colonial America by obstructing the business of SLAVERY. Many Friends published their opposition to slavery and assisted fugitive slaves. Friends also addressed other social issues, such as the treatment of mentally ill persons and the rights of women. With the onset of the Civil War, many Friends reconsidered their absolute refusal to participate in war and helped the Union forces and slaves. In World Wars I and II, many Friends took an active part in medical and relief work.

### Mohandas K. Gandhi

Mohandas K. Gandhi was the first great modern pacifist. Born October 2, 1869, in Porbandar, India, Gandhi led a high-profile life dedicated to political and social reform through nonviolence.

During the 1900s, Gandhi experimented with various means of resolving conflict. Passive resistance, according to Gandhi, had to be supplemented by an active effort to understand and respect adversaries. In an atmosphere of respect, people could find peaceful, creative solutions. This active campaign for equality is called satyagraha, or "grasping for the truth."

Gandhi led a well-orchestrated political campaign for Indians in South Africa through the early 1900s. The movement reached its pinnacle in November 1913, when Gandhi led Indian miners on the Great March into Transvaal. The march was a profound show of determination, and the South African government opened negotiations with Gandhi shortly thereafter.

By promoting a variety of nonviolent activities designed to dramatize and call attention to social injustice, Gandhi won new rights for laborers, members of minorities, and poor people in South Africa and India. In many cases, however, Gandhi was working against centuries of hatred, and success was never absolute.

### Martin Luther King Jr. and the Civil Rights Movement

Gandhi's campaigns became the inspiration and model for the U.S. CIVIL RIGHTS and political movements in the 1950s and 1960s. Among those inspired was MARTIN LUTHER KING JR. King was born in Atlanta on January 15, 1929, the son of a Baptist preacher. His Baptist upbringing was supplemented by the study of theology at Crozer Theological Seminary in Chester, Pennsylvania, where he was introduced to the nonviolent teachings of Gandhi.

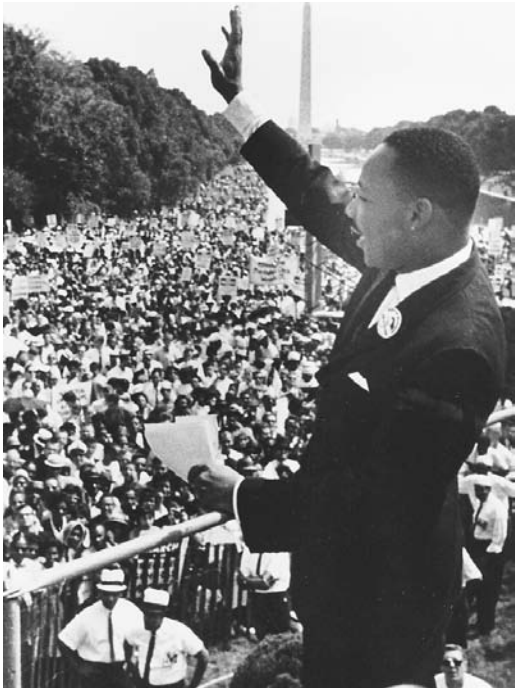

*Martin Luther King Jr. at the August 1963 March on Washington. Gandhi's campaigns became the inspiration and models used by King and other civil rights leaders during the 1950s and 1960s.* AP/WIDE WORLD PHOTOS

In 1955, King became involved with the first great pacifist movement in the United States, the African American CIVIL RIGHTS MOVEMENT. He eventually spearheaded that movement. On December 1, ROSA PARKS, a black Montgomery resident, refused to surrender her seat on a bus to a white man. Her subsequent arrest for violating SEGREGATION laws sparked a boycott of the Montgomery transit system led by King and the black activists of the Montgomery Improvement Association. The boycott lasted over one year, until the Montgomery city government abolished segregation on buses. King's leadership had helped effect political change without the use of violence, and he resolved to build on the success.

In the late 1950s, King organized the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (SCLC). The SCLC operated as a network for civil rights work and a platform from which to address the nation and the world. Armed only with fortitude, the moral rightness of a cause, and an exceptional gift for public speaking, King was able to garner widespread support for a

*During an early 1970s anti-war rally in New York City, members of the Religious Society of Friends (aka Quakers) read the names of people killed in the Vietnam War.* HULTON-DEUTSCH COLLECTION/CORBIS

series of popular campaigns that led to the end of official discrimination and segregation in the southern United States.

The influence of Gandhi on King was apparent. At the core of King's philosophy was nonviolence, but this pacifism was buttressed by action. Like Gandhi, King directed much of his energy toward the organization of nonviolent campaigns designed to call attention to social injustice. The campaigns did not always win the hearts and minds of other U.S. citizens. Occasionally, King and fellow civil rights activists suffered from the violence of their opponents.

### Conscientious Objector Status

When the United States becomes involved in war, military service may become mandatory, and the status of CONSCIENTIOUS OBJECTOR (CO) is sought by pacifists to avoid military service. To qualify as a CO, one need only show "a sincere and meaningful" objection to all war (*Reiser v. Stone,* 791 F. Supp. 1072 [E.D. Pa. 1992] [quoting *Shaffer v. Schlesinger,* 531 F.2d 124 (3d Cir. 1976)]). This objection need not be grounded in religion. It is legitimate if it results from an "intensely personal" conviction that some might find "incomprehensible; or "incorrect" (*Reiser* [quoting *United States v. Seeger,* 380 U.S. 163, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965)]).

In *Reiser,* Dr. Lynda Dianne Reiser sought discharge from military service on the grounds of a conscientious objection to war. Reiser had entered the Army in 1983 in the Reserve Officers' Training Corps (ROTC) program at Washington and Jefferson College. After graduating in 1986, she sought and received a deferment of military service in order to attend Temple University Medical School. Upon graduation from medical school in 1990, Reiser sought and received another deferment in order to perform a one-year medical internship. In August 1990, Reiser informed the Army that she was a conscientious objector and that she would refuse the four years of military service required of her in return for the ROTC scholarship.

Although Reiser had possessed moral convictions approaching pacifism before entering the ROTC program, she had envisioned a career in medicine and expected her participation in military service to be minimal. In 1985, serious misgivings over military service began to take hold in Reiser. By 1989, her opposition to military service was firm. After treating a 16-year-old shooting victim, Reiser experienced nightmares and attempted to avoid all contact with violence. In April 1990, her beliefs crystallized into complete opposition to violence, war, and military service. Four months later, she applied for CO status.

The Department of the Army Conscientious Objector Review Board (DACORB) denied Reiser's application in September 1990. Despite supporting testimony from Army chaplain Colonel Ronald Miller and Army investigator Lieutenant Colonel Charles Nester, DACORB concluded that Reiser's belief in pacifism was not sincerely held.

Reiser appealed the DACORB decision to the U.S. District Court for the Eastern District of Pennsylvania. After reciting the chronology of the case and the legal standards for CO status, the court conducted a complete review of the record. This included an in-depth examination of Reiser's evolution to pacifism.

In addition to possessing a predisposition to nonviolence, Reiser had undergone a pacific metamorphosis that had not been disproved. Reiser had been deeply affected by the Kurt Vonnegut novel *Slaughterhouse Five* (1969) and had had her growing pacifism affirmed by roommates. She had also experienced a strengthening of her nonviolent convictions as a result of her medical training.

DACORB had ruled that Reiser had failed to prove that she would have "no rest or inner peace" if she were not discharged. This standard had been rejected by the court in an earlier case, which held that conscientious objectors need

only show sincerity in their opposition to war (*Masser v. Connolly,* 514 F. Supp. 734, 740 [E.D. Pa. 1981]). According to the *Reiser* court, the "no rest or inner peace" standard was valid, but nothing in the record supported the DACORB conclusion that Reiser would lose no sleep over forced military service.

Because the timing of a CO application alone cannot be used to deny CO status, DACORB took pains to deemphasize the timing of Reiser's application. However, Reiser's application came less than one year before she was scheduled to begin military service, and DACORB was unable to let the issue go untouched. The timing of the application, admitted DACORB, called Reiser's sincerity into question.

DACORB use of application timing did call Reiser's sincerity into question. What DACORB failed to do, according to the court, was answer the question of Reiser's sincerity. Without additional support for its skepticism, DACORB use of application timing as a basis for rejecting CO status for Reiser carried no weight. The court ultimately reversed the DACORB decision and relieved Reiser of her obligation to work four years for the U.S. Army.

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## PACKING

*The process of exercising unlawful, improper, or deceitful means to obtain a jury composed of individuals who are favorably disposed to the verdict sought.*

## PACT

*A bargain, compact, or agreement. An agreement between two or more nations or states that is similar to, but less complex than, a treaty.*

## PACT OF PARIS

See KELLOGG-BRIAND PACT.

## PACTA SUNT SERVANDA

[Latin, Promises must be kept.] *An expression signifying that the agreements and stipulations of the parties to a contract must be observed.*

## PACTUM

[Latin, Pact.] *A compact, bargain, or agreement.*

## ♦ PAGE, ALAN CEDRIC

Alan Cedric Page, former Minnesota Vikings football star, has served as an associate justice of the Minnesota Supreme Court since 1993. Page gained athletic fame as one of the four "Purple People Eaters" for the Vikings' defense who were essential to the team's ten division titles and four Super Bowl appearances during the 1960s and 1970s. While still employed full-time as a professional football player, Page attended the University of Minnesota Law School full-time and graduated in 1978. He is the first and only African-American supreme court justice in the state of Minnesota.

"AT THE VERY BEST, ATHLETIC ACHIEVEMENT MIGHT OPEN A DOOR THAT DISCRIMINATION ONCE HELD SHUT. BUT THE DOORS SLAM QUICKLY ON THE UNPREPARED AND THE UNDEREDUCATED."
—ALAN PAGE

One of four children of Georgianna Umbles and Howard Felix Page, Alan Page was born on August 7, 1945, in Canton, Ohio, the home of the Pro Football Hall of Fame. His mother, a country club attendant, and his father, a bar manager, always emphasized the importance of learning. They instilled strong values in him, and Page looked up to his parents as role models.

Page was an outstanding athlete in high school, but even at a young age, his aspirations went beyond the gridiron and into the courtroom. Page admired U.S. Supreme Court Justice THURGOOD MARSHALL and was a fan of the *Perry Mason* television show. He told *Parade Magazine* in 1990 that he viewed sports not as a goal, but as a means to achieve an education. "Even when I was playing professionally," he said, "I never viewed myself as a football player. There's far more to life than being an athlete."

Page graduated from the University of Notre Dame in 1967 with a B.A. in political science. At

Notre Dame, he was an All-American defensive end and played on the school's 1966 national championship team. Chosen in 1967 by the Vikings as their first-round draft choice, Page went on to earn the Most Valuable Player award in the National Football League in 1971. In the NFL, he played the position of defensive tackle. He logged fifteen seasons with the Vikings and Chicago Bears, starting in each of the 236 games he played during his career before retiring in 1981. He was elected to the Pro Football Hall of Fame in 1988 and to the College Football Hall of Fame in 1993.

After graduating from law school in 1978, he joined the law firm of Lindquist and Vennum in Minneapolis, where he specialized in labor and employment litigation from 1979 to 1984, overlapping with his final years in the NFL. He served as assistant attorney general for the state of Minnesota from 1987 to 1993.

Page established the Page Education Foundation in 1988 to increase the participation of minority youth in post-secondary education and work-readiness activities. Scholarship recipients tutor kindergarten through eighth-grade students for eight to ten hours each month during the school year while attending post-secondary school, thus creating a pyramid influencing younger students of color as mentors and role models.

Page regularly speaks to minority students about the importance of education. He also encourages adults to influence children to look at the values and good examples of hard work that decent Americans provide every day for "creating and sustaining hope for the future." He noted, "These are not the heroes who offer hope with promises of winning the lottery, becoming a rap star, or pulling down backboards and endorsement contracts in the NBA. These are simply men and women who get up every morning and do the things that citizens do."

Page was appointed to the Minnesota Supreme Court in 1993. In his 1998 re-election campaign, an opponent charged that Page's foundation activities violated canons regarding the judicial appearance of impartiality. The ethics complaint showed that donations to the scholarship fund had soared in recent years and that some of the contributors included companies and law firms with cases pending before the Minnesota Supreme Court. Page said that he refused to help raise funds and that he intentionally avoided any knowledge of his contributors. The complaint also charged that awarding scholarships only to minorities violated the judicial canon prohibiting any expressions of bias or prejudice. In February 1999, the Minnesota Board of Judicial Standards cleared Page of any ethics violations in the matter.

Page was in the news in 2000 when he was ticketed for driving with expired automobile license tabs, which is a sticker affixed to the license plate each year as proof that the owner has paid the annual license fee. He demanded a trial on the $57 fine, although the fine would have been reduced to $28 if he had agreed to pay. In court, Page's attorney offered documentation that his client had mailed a check for the tabs weeks before he received the ticket. The Minneapolis City Attorney's office argued that Page had an obligation to stay off the road until he received his tabs. However, the court ruled in Page's favor, finding that Page should not have been penalized for the state's delay.

Page has received a number of honors, both for his playing days and for his activities after retirement from the NFL. He was a recipient of the Dick Enberg Award and became a member of the Academic All-American Hall of Fame. He

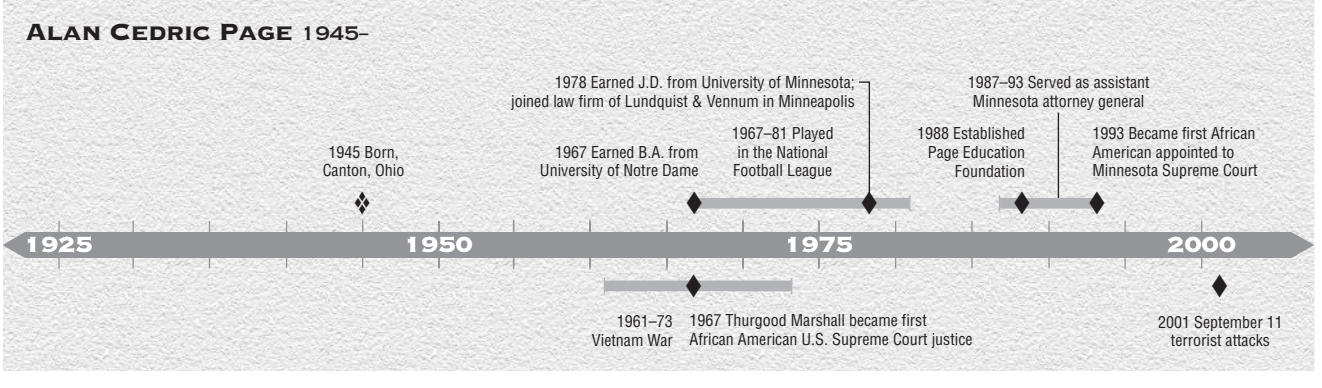

was named by the *Star Tribune* of Minneapolis and St. Paul as one of the 100 most influential Minnesotans in the twentieth century. He also has received honorary doctor of laws degrees from Notre Dame, St. John's University, Westfield State College, and Luther College.

While playing for the Vikings, Page married Diane Sims. They have four children.

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## ♦ PAINE, ROBERT TREAT

Robert Treat Paine was born March 11, 1731, in Boston, Massachusetts. He graduated from Harvard University in 1749 and was admitted to the Massachusetts bar in 1757. After a brief career in the ministry, he became an eminent lawyer, politician, and judge.

Paine first won fame as an associate prosecuting attorney in the BOSTON MASSACRE trial. The Boston Massacre, which occurred in 1770, was a violent response to the passing of the TOWNSHEND ACTS by Great Britain. These acts decreed that CUSTOMS DUTIES would be imposed on the importation of tea, lead, glass, paints, and paper. When British troops were sent to Boston to enforce payment of the duties, the colonists harassed them to such an extent that they fired into a crowd, killing five men.

Subsequently Paine served two terms as a member of the Massachusetts Provincial Assembly, from 1773 to 1775 and from 1777 to 1778, acting as speaker during 1777 and 1778. During the next four years, he was an active member of two congresses: the Provincial Congress, in 1774 and 1775, and the CONTINENTAL CONGRESS, from 1774 to 1778. In 1776 he signed the Declaration of Independence.

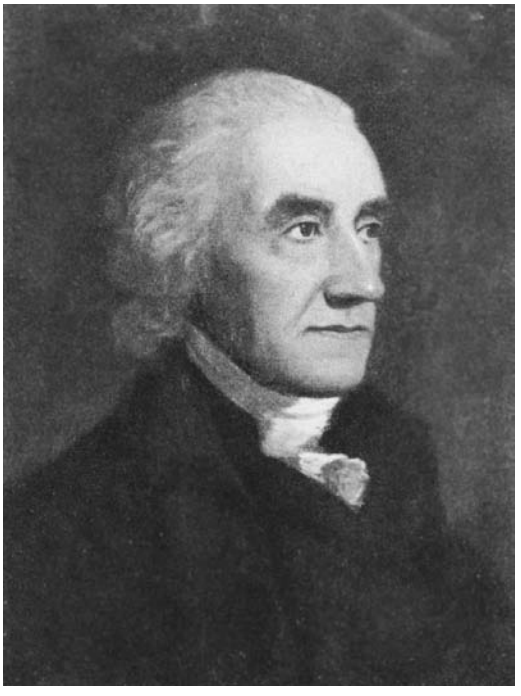

*Robert Treat Paine.*

Paine continued to be active in Massachusetts government after the American Revolution. In 1777 he became the first attorney general of Massachusetts and held that office until 1790. From 1778 to 1780, he was involved in the enactment of the Massachusetts constitution and was instrumental in the establishment of the American Academy of Arts and Sciences in 1780.

In 1790, Paine became a justice of the Massachusetts Supreme Court, where he remained until 1804.

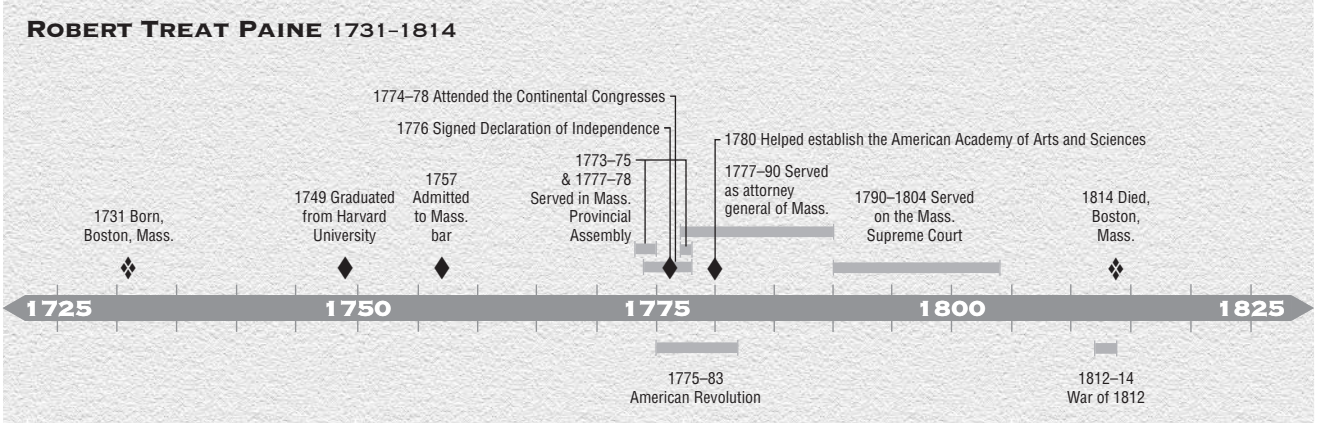

Paine died May 11, 1814, in Boston, Massachusetts.

CROSS-REFERENCES

Boston Massacre Soldiers; Massachusetts Constitution of 1780.

## ♦ PAINE, THOMAS

Social agitator Thomas Paine was an influential political writer whose support of revolution and republican government emboldened the American colonists to declare independence from England. In 1776, the corset-maker-turned-pamphleteer published the first of a sixteen-part series entitled *The American Crisis.* Paine's tract contained the stirring words "These are the times that try men's souls." Paine wrote the famous pamphlet to lift the spirits of the beleaguered Continental Army.

The effect of Paine's political writing was felt not only in America but also in England and France. After the American Revolution, Paine returned to his native Europe, where he supported the French Revolution. His political opinions ignited a storm in England and landed him in jail in France. During his lifetime, Paine's political views made him both tremendously popular and almost universally despised. In particular, his later writings about organized religion and deism offended many Americans. Shunned and penniless at the end of his life, Paine has only recently found his rightful place in history.

"SOCIETY IN EVERY STATE IS A BLESSING, BUT GOVERNMENT, EVEN IN ITS BEST STATE, IS BUT A NECESSARY EVIL; IN ITS WORST STATE AN INTOLERABLE ONE."
—THOMAS PAINE

Paine was born into a poor English family on January 29, 1737, in Thetford, Norfolk, England. To help support his Quaker father and Anglican mother, Paine quit school at age thirteen and began training in corset making, his father's trade. Unhappy in his vocation, Paine left home and enlisted as a seaman in the Seven Years' War. Afterward, he traveled to London, where he became interested in science and mechanics. Paine held a variety of jobs, including customs official, preacher, and schoolteacher. At the urging of BENJAMIN FRANKLIN, while Franklin served as a colonial official in England, Paine immigrated to America. Arriving in Philadelphia in 1774, Paine became the managing editor of *Pennsylvania Magazine.*

In January 1776, Paine published his first important pamphlet, *Common Sense.* A phenomenal success, the publication sold more than five hundred thousand copies. Paine urged the American colonies not only to protest English taxation but to go further and declare independence. He also recommended calling a constitutional convention to establish a new government. Paine's tract was extremely influential in convincing the colonists to cut their ties with England; embrace the Revolution; and embark upon a new, republican form of government.

Paine served in the Continental Army and experienced firsthand the miserable conditions of war. To boost the soldiers' morale after a retreat, he wrote the influential series *The American Crisis.* Under orders from General Washington, Paine's pamphlet was read aloud to encourage the troops. *The American Crisis* has been given credit for inspiring the American victory in the Battle of Trenton.

Paine was elected to the CONTINENTAL CONGRESS in 1777, as secretary of the Committee of Foreign Affairs. He resigned under pressure in 1779 after publishing confidential information about treaty negotiations with France.

After the United States' victory over England, Paine devoted his time to perfecting his

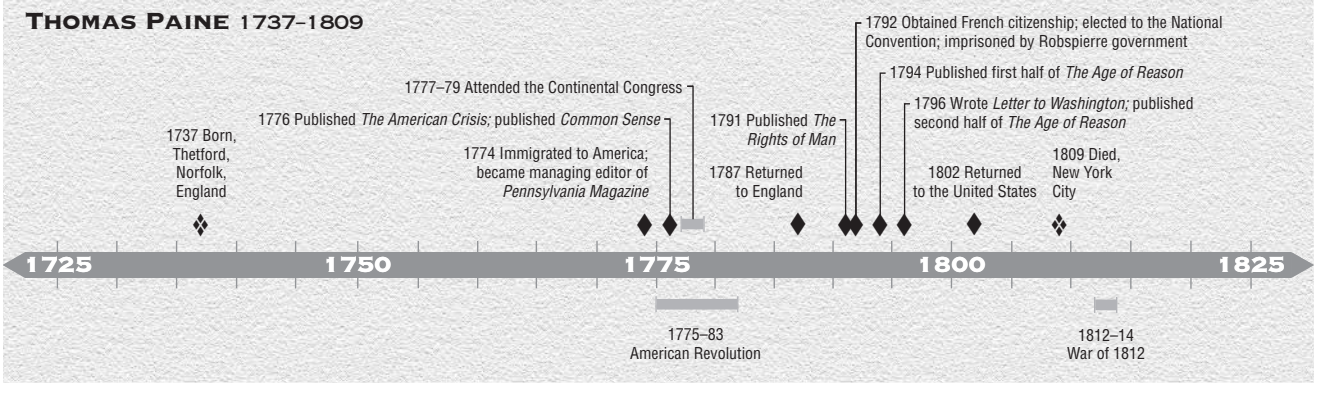

inventions. In 1787, he returned to Europe to gather financial support and interest in his ideas for an iron bridge. While in England, Paine became caught up in the debate over the French Revolution. In 1791, he published the first part of *The Rights of Man.* It was a response to Edmund Burke's *Reflections on the Revolution in France* (1790), a vigorous denunciation of the events in France. Paine's *The Rights of Man* supported the revolution and upheld the dignity and rights of the common person. Controversial for its time, *The Rights of Man* sold two hundred thousand copies in England but Paine was forced out of that country under an indictment for TREASON.

Paine moved to France. After obtaining French citizenship, he was elected to the National Convention in 1792. Because Paine protested the execution of Louis XVI, he was arrested and imprisoned by the radical Robespierre government. Barely avoiding the guillotine, he spent ten months in a Luxembourg prison before his release was won by JAMES MONROE, U.S. ambassador to France. Paine wrote *Letter to Washington* in 1796, a critical look at the U.S. president's inability to quickly obtain Paine's freedom.

While in prison, Paine published in 1794 the first half of his most controversial work, *The Age of Reason.* The second half was printed in 1796, after his release. In *The Age of Reason,* Paine criticized organized religion and explained his own deist beliefs. Deism is a religious and philosophical belief that accepts the concept of God but views reason as the key to moral truths. Deism was confused by many of Paine's readers with atheism, the rejection of a belief in God. Because people mistook *The Age of Reason* for an atheist tract, Paine came under attack for his unorthodox religious views.

When Paine arrived in the United States in 1802, he was rejected by many of his former associates. His reputation was damaged by his misinterpreted deist beliefs and by his public criticism of the American hero GEORGE WASHINGTON.

Paine died June 8, 1809, in New York City, misunderstood and impoverished, with his role in the Revolutionary War downplayed by his detractors. He was buried on his farm in New Rochelle, New York. In 1819, political journalist William Cobbett made arrangements to have Paine reburied in England in a place of honor.

*Thomas Paine.* PHOTOGRAPH OF PAINTING BY ROMNEY. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Somehow, en route to England, Paine's remains were lost. They were never retrieved.

Paine's reputation as a political philosopher has been largely restored. He is remembered favorably for his rousing call to arms during the American Revolution and for his defense of republicanism and the rights of common people.

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## PAIRING-OFF

*In the practice of legislative bodies, a system by which two members, who belong to opposing political parties or are on opposite sides with respect to a certain question, mutually agree that they will both be absent from voting, either for a specified period or when a vote is to be taken on the particular question.*

As a result of pairing-off, a vote is neutralized on each side of the question, and the comparative division of the legislature remains the same as if both members were present. The practice is said to have originated in the English House of Commons during the time of Oliver Cromwell.

## PAIS

[French, The country; the neighborhood.] *A trial* per pais *denotes a trial by the country; that is, trial by jury.*

An ESTOPPEL in pais means that a party is prevented by his or her own conduct from obtaining the enforcement of a right which would operate to the detriment of another who justifiably relied on such conduct. This type of estoppel differs from an estoppel by deed or by record which, as a result of the language set out in a document, bars the enforcement of a claim against a party who acted in reliance upon those written terms.

## PALIMONY

See ALIMONY; COHABITATION.

## PALM OFF

*To misrepresent inferior goods of one producer as superior goods made by a reputable, well-regarded competitor in order to gain commercial advantage and promote sales.*

The doctrine of palming off is applied to the particular facts of a case in which the defendant is accused of engaging in UNFAIR COMPETITION against the plaintiff.

## ❖ PALMER, ALEXANDER MITCHELL

Alexander Mitchell Palmer served as U.S. attorney general from 1919 to 1921. Palmer, who also served as a congressman and federal judge, became a controversial figure for rounding up thousands of ALIENS in 1920 that he considered to be politically subversive. These "Palmer raids" violated basic civil liberties and ultimately discredited Palmer.

"FULLY 90 PERCENT OF THE COMMUNIST AND ANARCHIST AGITATION IS TRACEABLE TO ALIENS."
—A. MITCHELL PALMER

*A. Mitchell Palmer.* LIBRARY OF CONGRESS

Palmer was born May 4, 1872, in Moosehood, Pennsylvania. He graduated from Swarthmore College in 1891 and then studied law at Swarthmore, Lafayette College, and George Washington University. Though he did not earn a law degree, he passed the Pennsylvania bar exam and was admitted to the bar in 1893. He entered a small law firm in Stroudsberg, Pennsylvania, and practiced there until 1901. He then became a solo practitioner.

During the 1890s, Palmer became active in DEMOCRATIC PARTY politics. He was elected to the U.S. House of Representatives in 1908 where he served until 1915. In 1912 he played a key role in securing the Democratic presidential nomi-

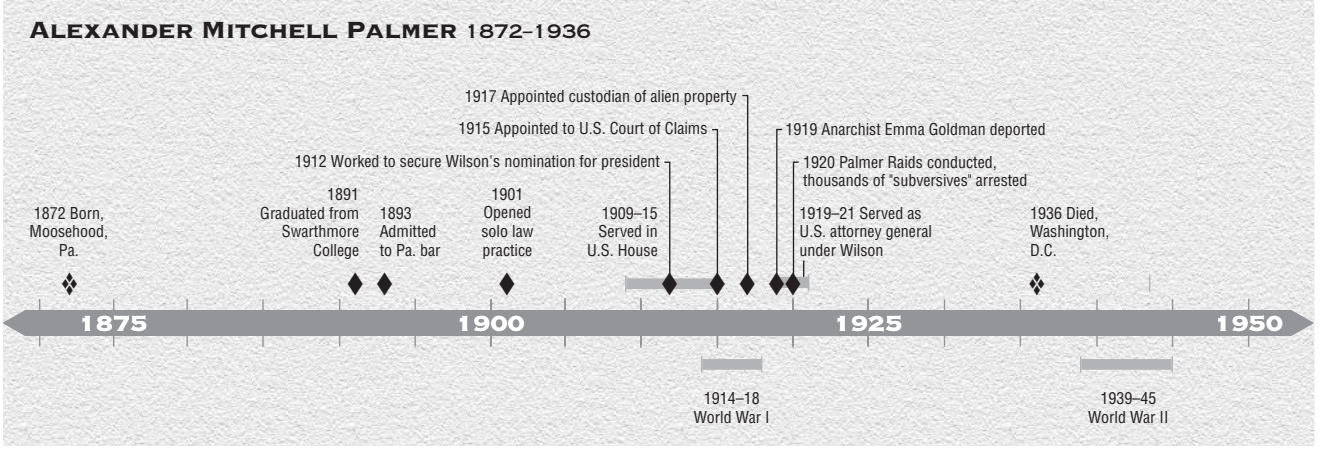

nation for New Jersey governor WOODROW WILSON. Following Wilson's victory that fall, Wilson asked Palmer to join his cabinet as secretary of war. Palmer's pacifist Quaker beliefs, however, precluded him from accepting the office.

In 1914 he ran for the U.S. Senate but lost. In April 1915 Wilson appointed him a judge of the United States Court of Claims. It was a brief appointment. He resigned in September and returned to his law practice. He continued his political career, however, serving as a member of the Democratic National Committee during Wilson's eight-year term.

In 1917, after the United States entered WORLD WAR I, Wilson appointed Palmer custodian of alien property. Palmer's duties included seizing and selling properties belonging to aliens, primarily Germans, and his methods often met with disapproval.

In March 1919 Wilson appointed Palmer U.S. attorney general. Though World War I was over, the Bolshevik Revolution in Russia caused political hysteria in western Europe and the United States. The Communist movement advocated world revolution, and U.S. leaders suspected that left-wing radicals, who were primarily aliens, were plotting to overthrow the government.

Palmer used the ESPIONAGE ACT OF 1917 and the SEDITION Act of 1918 to begin a crusade against this perceived threat. He deported the anarchist EMMA GOLDMAN and many other radicals, but these actions were a prelude to his unprecedented dragnets. On January 2, 1920, at Palmer's direction, federal agents in thirty-three cities rounded up six thousand persons suspected of subversive activities. Agents entered and searched homes without warrants, held persons without specific charges for long periods of time, and denied them legal counsel. Hundreds of aliens were deported. Palmer's actions were part of an anti-Communist "Red Scare" that ignored civil liberties in the pursuit of rooting out allegedly subversive activities. He steadfastly defended the raids in the face of widespread protests.

Palmer sought to succeed Wilson as president but lost the Democratic Party nomination in 1920. After leaving the office of attorney general in March 1921, Palmer resumed his private law practice and remained active in Democratic Party politics, campaigning for presidential candidate Alfred E. Smith in 1928 and FRANKLIN D. ROOSEVELT in 1932.

Palmer died May 11, 1936, in Washington, D.C.

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## PALPABLE

*Easily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest.*

The term *palpable* usually refers to some type of egregious wrong, such as a governmental error or abuse of power.

## PALSGRAF V. LONG ISLAND RAILROAD COMPANY

*Palsgraf v. Long Island Railroad Company,* 248 N.Y. 339, 162 N.E. 99, decided by the New York Court of Appeals in 1928, established the principle in TORT LAW that one who is negligent is liable only for the harm or the injury that is foreseeable and not for every injury that follows from his or her NEGLIGENCE.

The unique facts of the case created a need for a new application of the generally accepted theory that negligence is the absence of care, according to the circumstances. Mrs. Palsgraf was standing on a railroad platform when she was injured by falling scales. The scales toppled as the result of a shock of an explosion caused by an accident that occurred at the other end of the platform, "many feet away" from Palsgraf.

The accident involved a passenger with a package who was running to catch a departing train. As the passenger jumped to board the train, two railroad employees, one on the train and the other on the platform, reached for and pushed (respectively) him so he would not fall off it. The employees' help caused the passenger to drop the package. The package wrapped in newspaper contained fireworks that exploded upon hitting the tracks. The resulting explosion caused the scales to fall, striking Palsgraf. She sued the railroad for the conduct of its employees that led the passenger to drop his package of fireworks.

Both the trial court and the intermediate appellate court awarded judgment to the plaintiff, Palsgraf. The Court of Appeals decision, written by BENJAMIN CARDOZO, reversed the judgment. Cardozo stated that negligence is wrongful "because the eye of vigilance perceives the risk of danger . . . The risk reasonably to be

perceived defines the duty to be obeyed, and risk imports relation; it is to another or others within the range of apprehension." Given this principle, Cardozo reasoned that "Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage throughout the station."

The dissenting opinion offered that "Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others . . . Unreasonable risk being taken, its consequences are not confined to those who might probably be hurt." It viewed the concept of proximate cause as "practical politics," not based on logic. Although it must be ". . . something without which the event would not happen," proximate cause means "that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." The foreseeable or natural results of a negligent act affect a determination of whether the act is a proximate cause of the injuries. The dissenters, therefore, reasoned "given such an explosion as here, it needed no great foresight to predict that the natural result would be to injure one on the platform at no greater distance from its scene than was the plaintiff."

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## PANDER

*To pimp; to cater to the gratification of the lust of another. To entice or procure a person, by promises, threats,* FRAUD, *or deception to enter any place in which prostitution is practiced for the purpose of prostitution.*

Pandering is established when the evidence shows that the accused succeeded in inducing a victim to become an inmate of a house of prostitution. One who solicits for a prostitute is a panderer.

The *pandering of obscenity* refers to the business of purveying, by some form of advertising, pictorial or graphic material that appeals to the prurient interest of customers or potential customers.

CROSS-REFERENCES

Obscene.

## PANEL

*A list of jurors to serve in a particular court or for the trial of a designated action. A group of judges of a lesser number than the entire court convened to decide a case, such as when a nine-member appellate court divides into three, three-member groups, and each group hears and decides cases. A plan in reference to prepaid legal services.*

The term *open-panel legal services* refers to a plan in which legal services are paid for in advance, usually by insurance, but in which members can select their own lawyers. Under a closed panel, all legal services are rendered by a group of attorneys previously chosen by the insurer, the union, or another entity.

## PAPER

*A document that is filed or introduced in evidence in a lawsuit, as in the phrases* papers in the case *and* papers on appeal.

*Any written or printed statement, including letters, memoranda, legal or business documents, and books of account, in the context of the* FOURTH AMENDMENT *to the U.S. Constitution, which protects the people from unreasonable* SEARCHES AND SEIZURES *with respect to their "papers" as well as their persons and houses.*

*In the context of accommodation paper and* COMMERCIAL PAPER, *a written or printed evidence of debt.*

## PAR

*In* COMMERCIAL LAW, *equal; equality.*

The term *par* refers to an equality that exists between the nominal or face value of a document—such as a bill of exchange or a share of stock—and its actual selling value. When the values are equal, the share is said to be *at par;* if it can be sold for more than its face value, it is *above par;* if it is sold for less than its nominal value, it is *below par.*

## PARALEGAL

See LEGAL ASSISTANT.

## PARALLEL CITATION

*A reference to the same case or statute published in two or more sources.*

For example, BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS, a landmark decision by the Supreme Court in 1954, can be located in

347 U.S. 483, 74 S. Ct. 686, and 98 L. Ed. 873. These references are parallel citations to reporters in which Supreme Court decisions are published.

## PARAMOUNT TITLE

*In the law of real property, ownership that is superior to the ownership with which it is compared, in the sense that the former is the source or the origin of the latter.*

The term *paramount title* is, however, frequently used to signify a title that is merely better or stronger than another or will prevail over it. This usage is rarely correct, unless the superiority consists of the seniority of the title referred to as *paramount.*

## PARCENER

*A joint heir. Collectively the joint heirs are called coparceners.*

## PARDON

*The action of an executive official of the government that mitigates or sets aside the punishment for a crime.*

The granting of a pardon to a person who has committed a crime or who has been convicted of a crime is an act of clemency, which forgives the wrongdoer and restores the person's CIVIL RIGHTS. At the federal level, the president has the power to grant a pardon, and at the state level the governor or a pardon board made up of high-ranking state officials may grant it.

The power to grant a pardon derives from the English system in which the king had, as one of his royal prerogatives, the right to forgive virtually all forms of crimes against the crown. The Framers of the U.S. Constitution, in Article II, Section 2, Clause 1, provided that the president "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." Throughout U.S. history the courts have interpreted this clause to give the president virtually unlimited power to issue pardons to individuals or groups and to impose conditions on the forgiveness.

The first major court case involving the pardon power, *Ex parte Garland,* 71 U.S. (4 Wall.) 333, 18 L. Ed. 366 (1866), established both the scope of the pardon power and the legal effect on a person who was pardoned. President ANDREW JOHNSON pardoned Arkansas attorney and Confederate sympathizer Alexander Hamilton Garland, who had not been tried, for any offenses he might have committed during the Civil War. Garland sought to practice in federal court, but federal law required that he swear an oath that he never aided the Confederacy. Garland argued that the pardon absolved him of the need to take the oath. The Supreme Court agreed with Garland. It held that the scope of the pardon power "is unlimited, with the exception stated [impeachment]. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment."

The power to pardon applies only to offenses against the laws of the jurisdiction of which the pardoning official is the chief executive. Thus the president may only pardon for violations of federal law, and governors may only pardon for violations of the laws of their states.

A president or governor may grant a full (unconditional) pardon or a conditional pardon. The granting of an unconditional pardon fully restores an individual's civil rights forfeited upon conviction of a crime and restores the person's innocence as though he or she had never committed a crime. This means that a recipient of a pardon may regain the right to vote and to hold various positions of public trust.

A conditional pardon imposes a condition on the offender before it becomes effective. Typically this means the commutation of a sentence. For example, the president has the power under the Pardon Clause to commute a death sentence on the condition that the accused serve the rest of his or her life in prison without eligibility for PAROLE, even though a life sentence imposed directly by a court would otherwise be subject to parole. In upholding this type of conditional pardon, the Supreme Court in *Schick v. Reed,* 419 U.S. 256, 95 S. Ct. 379, 42 L. Ed. 2d 430 (1974), reasoned that "considerations of public policy and humanitarian impulses support an interpretation of that [pardon] power so as to permit the attachment of any condition which does not otherwise offend the Constitution."

Unless the pardon expressly states that it is issued because of a determination that the recipient was innocent, a pardon does not imply innocence. It is merely a forgiveness of the offense. It is generally assumed that acceptance of a pardon is an implicit ACKNOWLEDGMENT of guilt, for one cannot be pardoned unless one has committed an offense.

The Constitution allows two other pardon powers besides the power of commutation. It expressly speaks about the president's power to grant "reprieves." A reprieve differs from a pardon in that it establishes a temporary delay in the enforcement of the sentence imposed by the court, without changing the sentence or forgiving the crime. A reprieve might be issued for the execution of a prisoner to give the prisoner time to prove his or her innocence. A related power is the power to grant "amnesty," which is also implicit in the pardon power. AMNESTY is applied to whole classes or communities, instead of individuals. The power to issue an amnesty and the effect of an amnesty are the same as those for a pardon.

The most widely publicized pardons have involved political figures. President GERALD R. FORD's September 1974 pardon of former president RICHARD M. NIXON for all offenses that he had committed, or in which he had taken part, relieved Nixon from facing criminal prosecution for his role in the WATERGATE scandal. President Ford justified the pardon as a way to restore domestic tranquility to a nation that had spent two years in political turmoil.

In 1977, President JIMMY CARTER granted an amnesty to all persons who had unlawfully evaded the military draft during the VIETNAM WAR. Carter, too, justified his amnesty as a way to end a divisive period in U.S. history. In December 1992, President GEORGE H.W. BUSH pardoned six officials of the RONALD REAGAN administration who were implicated in the IRAN-CONTRA AFFAIR. Bush granted the pardons shortly before leaving office. He based the pardons on his belief that the officials had been prosecuted over policy differences rather than for criminal acts.

In January 2001, a day before leaving office, President BILL CLINTON issued pardons to several individuals, including financier Marc Rich and his associate Pincus Green. Rich and Green had fled to Switzerland in 1983 to avoid prosecution on FRAUD charges in the United States. Soon after the pardon was announced, it was revealed that Rich's ex-wife, Denise, had made a gift of $450,000 to the Clinton Library Founda-

*On September 8, 1974, President Gerald Ford pardoned Richard Nixon, thereby allowing the former president to avoid possible criminal prosecution for his role in the Watergate scandal.* AP/WIDE WORLD PHOTOS

tion and a $109,000 donation to the Senate campaign of HILLARY RODHAM CLINTON. The donations apparently were made during the period when she and several of Marc Rich's business associates were LOBBYING for the pardons. The news caused an uproar among Republicans and Democrats alike. Many of Clinton's strongest supporters said that even if there was no wrongdoing, the timing was at best a sign of extremely poor judgment. The revelations led to federal investigations. In March 2001, the House and Senate introduced legislation that would require stringent contributor disclosure for anyone seeking either a pardon or a commutation, as well as stricter disclosure rules for anyone donating to a presidential library (previously not subject to campaign disclosure laws).

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CROSS-REFERENCES

Board of Pardons.

## PARENS PATRIAE

[Latin, Parent of the country.] *A doctrine that grants the inherent power and authority of the state to protect persons who are legally unable to act on their own behalf.*

The *parens patriae* doctrine has its roots in English COMMON LAW. In feudal times various obligations and powers, collectively referred to as the "royal prerogative," were reserved to the king. The king exercised these functions in his role of father of the country.

In the United States, the *parens patriae* doctrine has had its greatest application in the treatment of children, mentally ill persons, and other individuals who are legally incompetent to manage their affairs. The state is the supreme guardian of all children within its jurisdiction, and state courts have the inherent power to intervene to protect the best interests of children whose welfare is jeopardized by controversies between parents. This inherent power is generally supplemented by legislative acts that define the scope of child protection in a state.

The state, acting as *parens patriae,* can make decisions regarding mental health treatment on behalf of one who is mentally incompetent to make the decision on his or her own behalf, but the extent of the state's intrusion is limited to reasonable and necessary treatment.

The doctrine of *parens patriae* has been expanded in the United States to permit the attorney general of a state to commence litigation for the benefit of state residents for federal antitrust violations (15 U.S.C.A. § 15c). This authority is intended to further the public trust, safeguard the general and economic welfare of a state's residents, protect residents from illegal practices, and assure that the benefits of federal law are not denied to the general population.

States may also invoke *parens patriae* to protect interests such as the health, comfort, and welfare of the people, interstate WATER RIGHTS, and the general economy of the state. For a state to have standing to sue under the doctrine, it must be more than a nominal party without a real interest of its own and must articulate an interest apart from the interests of particular private parties.

CROSS-REFERENCES

Antitrust Law; Child Abuse; Children's Rights; Infants.

## PARENT AND CHILD

*The legal relationship between a father or mother and his or her offspring.*

The relationship between parent and child is of fundamental importance to U.S. society, because it preserves the safety and provides for the nurture of dependent individuals. For this reason, the parent-child relationship is given special legal consideration. Increasingly, local, state, and federal governments have become more involved in the relationship, especially when a child is abused or neglected. In addition, parental roles have shifted over time, and the law has moved with these changes. Legal rights that were once the sole province of the father are now shared with the mother, and, in general, the law seeks to treat parents equally.

The term *child* is used in the limited sense to indicate an individual below the age of majority. The more precise word for such an individual is *minor, juvenile,* or *infant.* The age of majority, which transforms a child legally into an adult, has traditionally been the age of 21 years. Many states, however, have reduced the age of majority to 18 years.

# CHILDREN'S RIGHTS V. PARENTS' RIGHTS: YOU DON'T OWN ME . . . DO YOU?

In 1874, a badly beaten girl known only as Mary Ellen became the first legally recognized victim of **CHILD ABUSE** in the United States. Before 1874, society offered little protection for minors. Children were considered the property of their parents, and neither the government nor private individuals intervened when they were injured, overworked, or neglected. Mary Ellen was rescued from unfit parents only after the American Society for the Prevention of Cruelty to Animals (ASPCA) stepped in on her behalf. ASPCA advocates pointed out that if Mary Ellen were a horse or a dog, her mistreatment would be prohibited by statute. A judge agreed that the young girl deserved at least the same protection as an animal.

The status of U.S. children has improved dramatically since Mary Ellen's ordeal. At the turn of the twentieth century, a nationwide child protection movement helped eliminate the long hours, poor wages, and punishing conditions faced by child workers. **CHILD LABOR LAWS** paved the way for later reforms regarding compulsory education, foster care, protective services, **HEALTH CARE**, and criminal justice for juveniles.

Just how far these reforms should go is the subject of debate. A mild uproar over children's rights arose during the 1992 U.S. presidential race between incumbent **GEORGE H. W. BUSH** (R) and challenger **BILL CLINTON** (D). Scholarly articles written in the early 1970s by Clinton's wife, **HILLARY RODHAM CLINTON**, were at the heart of the controversy. A former lawyer for the Children's Defense Fund, Clinton questioned the traditional legal presumption of **INCOMPETENCY** for children. She believed that children were capable of making many of their own decisions; thus she proposed the elimination of minority status for children and suggested a new presumption of legal competence. Clinton also favored granting children the same substantive and procedural rights enjoyed by adults. Further, because children's interests are not always the same as their parents', Clinton felt that minors should be allowed to hire their own lawyers.

During the presidential campaign, Clinton's views were attacked by political opponents who claimed she encouraged children to sue their parents. Her critics predicted that Clinton's ideas would lead children to "divorce" their parents over trivial matters such as curfews, homework, allowances, and household chores.

However, Clinton's views were actually much less extreme than those of so-called child liberationists who believe that children should be allowed to vote, choose their residence, refuse to attend school, enter into contracts, and take part in activities currently reserved for adults. More radical child advocates maintain that children are just as rational as adults and that the nation's commitment to justice requires equal treatment of all people, regardless of age.

Critics of children's rights believe conferring too many rights on children would erode parental authority and the traditional family. Many conservatives believe that children lack the wisdom to make important decisions and require the guidance of responsible adults. They approve of a paternalistic approach to children's welfare rather than one that empowers young people. Critics also

### Parent-Child Relationship

In its most restricted use, the term *parent* refers only to a mother or father who is related to the child by blood. This definition holds whether the child is legitimate (the natural parents are married to each other) or illegitimate (the parents are not married to each other). As of 2003, as a result of statutes, adoptive parents have the same rights and responsibilities as natural parents. Other persons standing in the place of natural parents, such as stepparents, are not, however, given such extensive rights and responsibilities. Although in some instances foster parents and foster care agencies have the legal responsibility to nurture a minor, they are not entitled to the full status of parent.

A child is the issue or offspring of his parents. A posthumous child is one conceived prior to, and born after, the death of his father. Such a child has the same inheritance rights as a child born while his father is alive. A child is not entitled to full legal rights unless the child is born alive. The law does not ordinarily consider a fetus to be a child.

Various rights and responsibilities that reflect the social goals of nurturing and protecting dependent individuals are attached to the status of parent and child. The public policy in favor of promoting the protection and care of minors gives rise to the legal presumption that the parent-child relationship exists when it is acknowledged by a parent or when a parent

resent the legal system's intrusion into parents' domain, arguing that parents are entitled to the final word in their children's upbringing. Conservatives fear that if children have ready access to attorneys, a rash of frivolous or retaliatory lawsuits will erupt, destroying many fragile families in need of help. So strong is this fear that the United States is one of only two countries (Somalia is the other) that have not ratified the United Nations Convention on the Rights of the Child. Among other concerns some critics have raised against children's rights are that children could be allowed legally to join **GANGS** or have **ABORTIONS**. Some critics have gone so far as to claim that ratification of the United Nations treaty would take control of children away from parents and hand it to the United Nations (even though the U.S. Constitution does not allow any treaty to override its precepts). Some groups, such as the Children's Rights Council (CRC), believe that children have the "right" to be raised in a two-parent household. One CRC goal is to keep marriages together, but, in the case of **DIVORCE**, it seeks to encourage parents to share custody equitably.

Three well-publicized cases illustrate the philosophical divide over children's and parents' rights.

**Kingsley v. Kingsley** In 1992, an eleven-year-old Florida boy went to court to terminate the rights of his biological parents. Gregory Kingsley retained attorney Jerri Blair to represent him in a proceeding to sever all ties with his natural parents, Rachel and Ralph Kingsley. Kingsley also petitioned for his own **ADOPTION** by his foster parents, Lizabeth and George Russ. Rachel Kingsley opposed her son's actions; her estranged husband did not.

Kingsley persuaded circuit court judge Thomas Kirk that he had been abandoned by his mother. Most of Kingsley's chaotic, impoverished life had been spent in and out of foster care. His unstable early environment was contrasted with the loving and more affluent home now offered by the Russ family. Kirk determined that Kingsley, a minor, had the capacity to bring the action and ordered both the termination of parental rights and the adoption.

Rachel's attorney, Jane Carey, complained that a child's wish had been declared more important than the preservation of the family. Carey worried that the termination of Rachel's rights sent a message to poor parents that they could never measure up to wealthier families. It also drove a symbolic wedge between U.S. children and their parents. To Gregory's supporters, however, the ruling was an important victory on behalf of neglected, mistreated children.

On appeal, Florida's Fifth District Court of Appeals determined that, as a minor, Kingsley could not initiate a proceeding to terminate his parents' rights (*Kingsley v. Kingsley,* 623 So. 2d 780 [1993]). Only a **GUARDIAN AD LITEM**, or friend of the court, could do so. Nonetheless, the appeals court upheld the termination of Rachel's parental rights because clear and convincing evidence demonstrated her **ABANDONMENT** of Kingsley and because Kingsley's foster parents had properly initiated the proceeding by filing separate termination petitions. The court also found that there was no legitimate reason to order Kingsley's adoption at the same time as Rachel's termination of rights. In fact, the simultaneous adoption order was in error because the termination order was subject to appeal.

Although Kingsley's initial triumph was diluted by the appeals court ruling, it challenged traditional notions of parental "ownership" of children.

**Mays-Twigg Case** Kimberly Mays of Florida was nine years old when she received shocking news: she had been switched at birth with another baby and raised by parents to whom she was not related. Mays was born in a rural Florida hospital in 1978. She was taken home by Robert Mays and his wife, Barbara Mays,

*(continued)*

resides with and raises the child. The relationship continues in the absence of unusual circumstances that mandate intervention by the state. Proper legal procedures must be followed when the state intervenes. Parents or children cannot alter or destroy the relationship either by themselves or merely by agreement.

Ordinarily a parent has the right to the custody and supervision of her child. In addition, a parent has the duty to care for and nurture her offspring. The child has the right to receive this care and nurture and the obligation to yield to reasonable parental guidance and supervision. The state has a duty to preserve family stability by ensuring proper care of children. The right of the family to privacy limits state regulation of the parent-child relationship to some extent, but modern laws dealing with **CHILD ABUSE** and neglect give the state greater powers to intervene.

A parent's duties extend beyond providing daily necessities and financial support. A court may reasonably expect that a parent will provide for the child's education, medical care, and social and religious training, as well as exhibit love and affection for the child. A parent must also discipline the child when necessary.

### Constitutional Considerations

Statutes governing the parent-child relationship are primarily state laws. These laws must conform to the requirements of the U.S. Consti-

## Children's Rights v. Parents' Rights: You Don't Own Me . . . Do You? (continued)

who later died of cancer. The only other Caucasian infant in the hospital at the time was a girl who was taken home and raised by Ernest and Regina Twigg. The switch was discovered after a blood test determined that the Twiggs' daughter, whom they had named Arlena, was not genetically related to them. A review of hospital records and further blood tests established that Mays was actually the Twiggs' biological daughter. After Arlena died of a heart defect in 1988, the Twiggs sought custody of Mays, and, failing that, attempted to win **VISITATION RIGHTS**. Mays requested an end to any contact with the Twiggs, saying visits with them were upsetting.

In August 1993, state circuit judge Stephen Dakan ruled that Mays was not required to meet with her biological parents because forced visitation was detrimental to her. Dakan reasoned that if a 15-year-old minor had the right to an abortion, Mays surely had the right to refuse contact with people who essentially were strangers.

Although Mays was allowed to sever ties with the Twiggs, she later chose to renew them. In a strange twist of events, Mays moved in with the Twiggs in March 1994 because of personal conflicts with Robert Mays. She soon moved out of the Twiggs' home; by age 17, she was married and, by 19, she was a mother. Later, during a brief estrangement from her husband, she almost lost custody of her son.

Although the Mays-Twigg case suggests a weakening in the rights of biological parents, the DeBoer case indicates the opposite.

**DeBoer Case** Jessica DeBoer was raised from birth by Jan and Roberta DeBoer, a Michigan couple trying to adopt her. Cara Clausen, DeBoer's unmarried biological mother, terminated her parental rights shortly after DeBoer was born. Dan Schmidt, DeBoer's biological father, did not sign away his parental rights because, initially, Clausen named another man as the child's father. Clausen and Schmidt eventually married and decided to reclaim DeBoer. After much legal maneuvering, the Michigan Supreme Court ordered DeBoer, who was now age two, returned to her biological parents in Iowa, saying they had the greater legal claim to her (*DeBoers v. DeBoers,* 442 Mich. 648, 502 N.W.2d 649 [1993]).

Despite **EXPERT TESTIMONY** that it was not in DeBoer's best interests to be separated from the only home and parents she knew, the court ordered the girl turned over to the Schmidts. The DeBoers reluctantly complied with the order after exhausting every avenue of appeal.

Child rights advocates point to this case as an example of how children are still considered the property of their natural parents. At the same time, support groups for birth parents applaud the decision. They believe that Jessica DeBoer—who was renamed Anna Schmidt—belongs with Cara and Dan Schmidt because Dan never relinquished his parental rights and because blood ties have a special social and legal significance.

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**CROSS-REFERENCES**

Child Abuse; Child Care; Child Custody.

tution and the constitution of the particular state. The U.S. Supreme Court has held that many provisions of the Constitution protect the parent-child relationship, as well as the rights of both parent and child.

The issue of the right to conceive or the right to give birth to a child is governed by Supreme Court decisions involving the right to privacy. With **GRISWOLD V. STATE OF CONNECTICUT**, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), the Court held that married people have the right to be educated about **BIRTH CONTROL** methods and to have access to contraceptive devices. The right was extended to unmarried people in *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972). In **ROE V. WADE**, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), the Court ruled that a woman has a right to have an **ABORTION**. Because an established legal principle states that a fetus is not a child, the state cannot interfere arbitrarily with the woman's decision to have an abortion by favoring the welfare of the fetus over her welfare.

### Authority of Parents

Parents are entitled to the custody of their children. They are free to make all decisions relating to the welfare of their child as they see fit, short of violating laws that protect children from abuse and neglect. Courts will not interfere with reasonable directives set forth by parents to discipline their children.

Modern statutes and courts have reconsidered the father's traditional primary role and

now give equal powers, rights, and duties to both parents. In the case of DIVORCE or separation, all rights of decision and control over the child go to the parent awarded custody, except when joint custody is awarded. In the case of the death of one parent, the other parent assumes custody.

The parent has the obligation to furnish a home for the child. A parent has the right to use CORPORAL PUNISHMENT, but it must not be so excessive as to constitute child abuse.

A parent's power over his child includes the authority and obligation to oversee medical treatment. A parent will most likely be held guilty of criminal neglect if he disregards the health requirements of his child. In cases where essential medical treatment is not procured for a child, juvenile authorities will start proceedings to provide care for the child and disciplinary action for the parent.

A controversial issue arises when a child is ill and the parents refuse health treatment for religious reasons. In an emergency that would jeopardize the child's life, a court may override the parental consent requirement and authorize treatment. A much greater obstacle exists when the parents, on religious grounds, refuse to provide their child with medical care that is important but not life threatening.

Parents are allowed broad discretion in making decisions regarding their child's education. This freedom, however, is not absolute and is tempered by compulsory state school attendance laws and the right of the state to require that the child be educated. However, most states now allow home schooling, with education provided by a parent.

A parent who fails to carry out obligations or abuses parental rights is guilty of a crime. A parent who fails to make certain that her child regularly goes to school can be held criminally liable for violating compulsory attendance laws. A number of states have criminal nonsupport and ABANDONMENT statutes that make it unlawful for a parent to neglect to provide for her child. Where essential support has been provided by an outside source, such as an agency or an individual, this source can initiate a lawsuit to recoup the expenses of services and supplies. A person who has custody or guardianship of a child can initiate a lawsuit to request that the noncustodial parent pay a suitable amount of money on a regular basis to support the child.

### Custody

Parents usually have a legal right to custody of their own offspring. The Supreme Court has established that the right to CHILD CUSTODY by a parent is constitutionally protected. The general presumption of the courts is that a child's welfare is protected best when the natural ties of mother and father are preserved. In the absence of clear evidence that a child is in danger, the state must not interfere with the judgment of the parents.

When the two parents do not live together, the question arises as to where the child will reside. In some cases, one parent will agree to relinquish custody to the other parent without giving up any other parental privileges. Although the custodial parent supervises the child's daily care, the noncustodial parent ordinarily has the right to be told about significant occurrences in the child's life. In addition, the noncustodial parent is usually entitled to visit the child at regular intervals. The noncustodial parent may seek a change in custody arrangements if circumstances so mandate.

If separated or divorced parents cannot agree on custody arrangements, the court will intervene. The court considers the circumstances of each case in light of a parent's ability to support and care for the child. In all custodial decisions, the best interests of the child are of paramount importance.

A battle for custody of a child does not always involve the parents. Custody is frequently sought by other relatives, including grandparents, uncles, aunts, or others, such as stepparents or foster parents.

In the event that a child is illegitimate, the unwed mother has a primary custody right that traditionally could not be defeated by the father. However, the Supreme Court has recognized the unwed father's interest in his child and the potential ability to obtain custody or VISITATION RIGHTS (*Lehr v. Robertson,* 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 614 [1983]).

In many families, grandparents play an important role in the upbringing of children. When the parents of a child separate and divorce, many of these grandparents continue to play an active role in the children's lives. Every state has enacted legislation that allows a court to grant visitation rights to grandparents if the grandparents meet certain criteria. Such criteria often require that the visitation is in the best interests of the

child, that one of the parents is deceased, and that the grandparent has cared for the child for a significant period of time prior to filing the petition.

In *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), the U.S. Supreme Court held that a grandparent visitation statute in the state of Washington, which allowed a court to grant visitation rights to any person at any time if it was in the best interests of the child, was unconstitutional. Noting that this broad statute placed a substantial burden on the traditional parent-child relationship, Justice SANDRA DAY O'CONNOR held that the statute denied parents SUBSTANTIVE DUE PROCESS. However, the Court did not hold that all grandparent visitation statutes are unconstitutional, leaving this determination to the state courts. State legislatures have since struggled to draft grandparent visitation and custody statutes that remain constitutional under this decision.

### Support

Generally a parent is responsible for support of a minor child. This responsibility encompasses the essentials of food, clothing, and shelter, as well as education and medical care. A parent who is unable to provide such support is excused. However, that parent must demonstrate an earnest effort to become employed so that he can fulfill his financial responsibility.

At COMMON LAW, the child's father had the primary duty to support the child. The law now recognizes that both parents have an equal responsibility for the support of a child.

Parents are not entitled to use money that belongs to the child (for example, an inheritance) for the child's support. Although a parent is allowed to petition the court to release a certain amount of money for the child's expenses, courts are generally unwilling to honor such requests unless warranted by the circumstances. It is, for example, proper to release funds to support a child whose only other means of support would be through public welfare.

State and federal governments have become more active in requiring parents to support their children. If parents live apart, whether by reason of divorce or separation, or if they have remained unmarried, various remedies are available to enforce court-issued CHILD SUPPORT orders. State statutes generally provide criminal misdemeanor penalties for a default on support obligations, but courts typically use the CONTEMPT power as an enforcement vehicle. Civil contempt is imposed to encourage payment by jailing for an indeterminate time a parent who is able to pay. The parent is free to leave jail as soon as the parent makes the payment. Criminal contempt is imposed as punishment for default, the sentence being for a specific period.

States have also set up child support collection systems that use stronger enforcement methods to ensure compliance. If a parent fails to pay court-ordered child support, his tax refunds and wages can be garnished, and his driver's license can be revoked.

The federal government has sought to ensure that child support is paid. The Child Support Recovery Act of 1992 (18 U.S.C.A. § 338) makes willful failure to support a child in another state a federal crime. Prosecution is available for unpaid support exceeding $5,000 or for obligations unpaid longer than one year. Penalties range from imprisonment to fines. First offenses are misdemeanors; repeat offenses are felonies. In addition, federal courts may make the payment of child support a condition of PROBATION.

State governments have also sought to ensure that parents who are recipients of child support payments receive these payments. The Texas attorney general, for example, oversees a child support division, which is responsible for ensuring that child support payments are received and distributed properly. The division determines what is required on a case-by-case basis, but generally noncustodial parents must submit child support payments directly to the division, which then distributes this money to the custodial parent. If the noncustodial parent fails to make the child support payments, the division may locate the parent and take a number of remedial actions, including suspension of state licenses. Other states employ similar systems.

The general rule is that no one is obligated to support a child to whom the person is not related. A number of states, however, currently require a stepfather to support his wife's children if he lives with them. A child whose natural father does not contribute to her support might be allowed to receive welfare benefits unless she is adopted by the stepfather.

A parent's support obligation does not end merely because the parent is not living with the child. Upon divorce or legal separation, child support agreements arrange for the child's continued support. An identified father must aid in

the support of his illegitimate child, even if they have never lived together.

The duty of a parent to support a minor child sometimes continues even when the child becomes a parent, such as the case of a 16-year-old girl who has an illegitimate child but continues to live with her parents. The unwed father, however, would have primary responsibility for support of his child provided he acknowledged the child as his or the court orders him to provide support following an action to establish his PATERNITY.

The common-law rule is that a parent has no obligation to support an adult child. Similarly, an adult child has no duty to support parents or grandparents. Some states, however, have altered this rule by enacting statutes that impose financial responsibilities upon people for their poverty-stricken relatives. Certain laws require parents to provide support for a child who is incapable of earning a living because of a mental or physical disability regardless of whether the child has reached the age of majority. Similarly, other statutes require children to support parents who would otherwise be dependent on public welfare.

### Child's Earnings and Services

At common law, a father had the right to the earnings of a child. State statutes have modified this principle to give either a primary right to a child's earnings to the custodial parent or an equal right to both parents. The right to a child's wages stems from the parental duty of support and, therefore, can be destroyed if a parent neglects or deserts the child. States, however, also have enacted laws that place a child's earnings in trust until the child reaches the age of majority. These laws were originally passed in the 1930s to protect child actors and entertainers who earned large sums of money. Before these laws were passed, some of the parents of these children had squandered their children's incomes.

The issue of the services of a child, which range from performing simple household tasks to working in the family business, ordinarily arises when a child has been injured. A parent may sue the individual who caused the child harm and claim damages for both medical costs and loss of the child's services.

### Wrongful Death and Wrongful Life Actions

A child is entitled to start a WRONGFUL DEATH action against anyone who causes the death of his parent. Parents may also sue for the wrongful death of children, although at times their economic value to the family is arguable. Parents may recover, however, for the loss of companionship or for their mental pain and suffering upon the loss of the child.

Some state laws prevent parents from recovering for the death of an adult child who is either financially independent or married. Ordinarily the parent who brings suit for wrongful death must be a legal parent, whether natural or adoptive. A parent who has neglected or failed to support a child generally cannot sue for wrongful death.

WRONGFUL LIFE cases arise when parents object to the birth of an unwanted or unplanned child. Cases have involved faulty sterilization, failure to diagnose a pregnancy, or, in the case of a pharmacist, dispensing the wrong birth control pills. In a majority of states, the courts refuse to entertain such suits, partly on grounds of public policy and partly on the theory that the benefit of having and keeping the child outweighs any damage. Other courts have allowed recovery, some holding that the probable enjoyment the child will bring must be offset by the cost of having and raising the child. Compensation for the cost of pregnancy and the pain and suffering of pregnancy and childbirth has been upheld.

### Emancipation

Emancipation is a legal occurrence by which a child acquires the freedom attached to adulthood earlier than at the statutory age. There are no set procedures by which emancipation may be accomplished. Generally, enlistment in the armed forces, marriage, or becoming self-supporting will effect emancipation. Typically, the inquiry takes place after the fact, and if the child is found to be independent of the parents, emancipation has probably occurred, and the court will be more likely to recognize this emancipation.

An agreement may be made between the parents and the child whereby the child leaves the parents' home and establishes an independent life. Once this happens, the parents relinquish the right to custody and supervision of the child. Another important meaning of emancipation is that it ends the parental obligation of support.

Another important legal consideration relates to the effect of commercial dealings of

persons who, but for emancipation, would have been minors. Once a nearly absolute defense, modern law has significantly restricted the effect of minority as a legal defense to contractual obligations to third parties. Thus, an emancipated 16-year-old girl who signs a contract to buy a car cannot avoid the terms of the contract by later PLEADING that she was underage and could not legally bind herself.

The issue of emancipation has declined in importance because most states have made 18 years the age of majority. The most serious questions concerning emancipation involved the age spread from 18 to 21 years.

### Responsibility of Parents for Injuries

At common law, parents were not responsible for TORTS their children committed against third parties. When they had neglected their duty of supervision, parents could be held liable for their own NEGLIGENCE. This largely remains true, although many state statutes now hold parents vicariously liable for torts committed by their children, for a limited amount.

Another exception to parental IMMUNITY from liability for their child's torts is the "family purpose doctrine," which allows third parties to recover from parents when they were injured by children driving the family car. This doctrine is based on the idea that the child is acting as the parent's agent or authorized representative.

To promote family unity, a number of states have refused to permit lawsuits between parents and children for harm caused by negligence. Some states have rejected this doctrine, however, particularly in the event of automobile accidents. In such cases, it was perceived as unjust to allow strangers to obtain insurance benefits when family members were precluded from doing so. A majority of states, however, still regard a parent as immune from legal actions for exercising parental authority and also for injuries stemming from negligent supervision.

### In Loco Parentis

Persons may act IN LOCO PARENTIS, "in place of the natural parents," in relation to the child in certain situations. Ordinarily, no one is responsible for a child's control or support unless that person is the parent, whether natural or adoptive, or has otherwise agreed to take care of the child. The question of whether a person acting in place of the parent has these responsibilities is contingent upon whether the person intended to undertake them. A college, for example, may act in loco parentis when it houses its students in college-supervised dormitories and imposes rules and regulations on student behavior.

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CROSS-REFERENCES

Adoption; Child Care; Child Labor Laws; Children's Defense Fund; Children's Rights; Descent and Distribution; Family Car Doctrine; Family Law; Fetal Rights; Fetal Tissue Research; Garnishment; *Gault, In re*; Guardian ad Litem; Guardian and Ward; Health Care Law; Illegitimacy; Infancy; Infants; Juvenile Law; Organ Donation Law "Should Dying Babies Be Organ Donors?" (In Focus); Paternity; Schools and School Districts.

## PARENT COMPANY

*An enterprise, which is also known as a parent corporation, that owns more than 50 percent of the voting shares of its subsidiary.*

## PARI CAUSA

[Latin, With equal right.] *Upon an equal footing; having the same rights or claims.*

## PARI DELICTO

[Latin, In equal fault.] *The doctrine, also known as* in pari delicto, *that provides that courts will not enforce an invalid contract and that no party can recover in an action where it is necessary to prove the existence of an illegal contract in order to make his or her case.*

## PARI MATERIA

[Latin, Of the same matter; on the same subject.] *The phrase used in connection with two laws relating to the same subject matter that must be analyzed with each other.*

For example, the federal gift tax provisions supplement the federal estate tax provisions.

The two are *in pari materia* and must be read together because the gift tax provisions were enacted to prevent the avoidance of estate taxes.

CROSS-REFERENCES

Estate and Gift Taxes.

## PARI PASSU

[Latin, By an equal progress; equably; ratably; without preference.] *Used especially to describe creditors who, in marshalling assets, are entitled to receive out of the same fund without any precedence over each other.*

## PARITY

*Equality in amount or value. Equivalence of prices of farm products to the prices existing at some former date (the base period) or to the general cost of living; equivalence of prices of goods or services in two different markets. The relationship between two currencies such that they are exchangeable for each other at the par or official rate of exchange.*

## ❖ PARKS, ROSA LOUISE MCCAULEY

Rosa Louise McCauley Parks sparked a year-long boycott of buses in Montgomery, Alabama, by the city's black community, when she refused to give up her seat to a white passenger on a segregated bus. Her arrest and trial on charges of violating SEGREGATION laws led to the U.S. Supreme Court's decision that segregation on the city's buses was unconstitutional, the rise of the MARTIN LUTHER KING JR. as a civil rights leader, and the emergence of the CIVIL RIGHTS MOVEMENT as a national cause.

Parks was born February 4, 1913, in Tuskegee, Alabama. She attended a one-room school in Pine Level, Alabama. There, one teacher taught 50 to 60 students, who were separated into rows by age. The students were responsible for cutting wood to heat the school, and occasionally a parent would deliver a load of wood to the school by wagon. Whereas the black community had to heat and even build its own schools, a new brick school for white children was constructed near Parks's home, paid for with public funds, including taxes paid by both blacks and whites, and heated at public expense. Black children's families helped them to plow and plant in the spring, and to harvest in the fall, so the children attended school only five months during the year; white children attended school for nine months.

Because Pine Level offered no schooling to black children beyond the sixth grade, Parks's mother sent her to Montgomery to live with relatives and to continue her education. But she was forced to drop out of high school during her junior year to care for her dying grandmother and, later, her ailing mother. She finally earned her high-school diploma in 1933 at the age of 20, a year after she had married Raymond Parks.

Her husband was the first activist whom Parks had met. He was a long-time member of the National Association for the Advancement of Colored People (NAACP). When he met Parks, he was working to raise money for the legal

"PEOPLE ALWAYS SAY THAT I DIDN'T GIVE UP MY SEAT BECAUSE I WAS TIRED, BUT THAT ISN'T TRUE. I WAS NOT TIRED PHYSICALLY. . .THE ONLY TIRED I WAS, WAS TIRED OF GIVING UP."
—ROSA PARKS

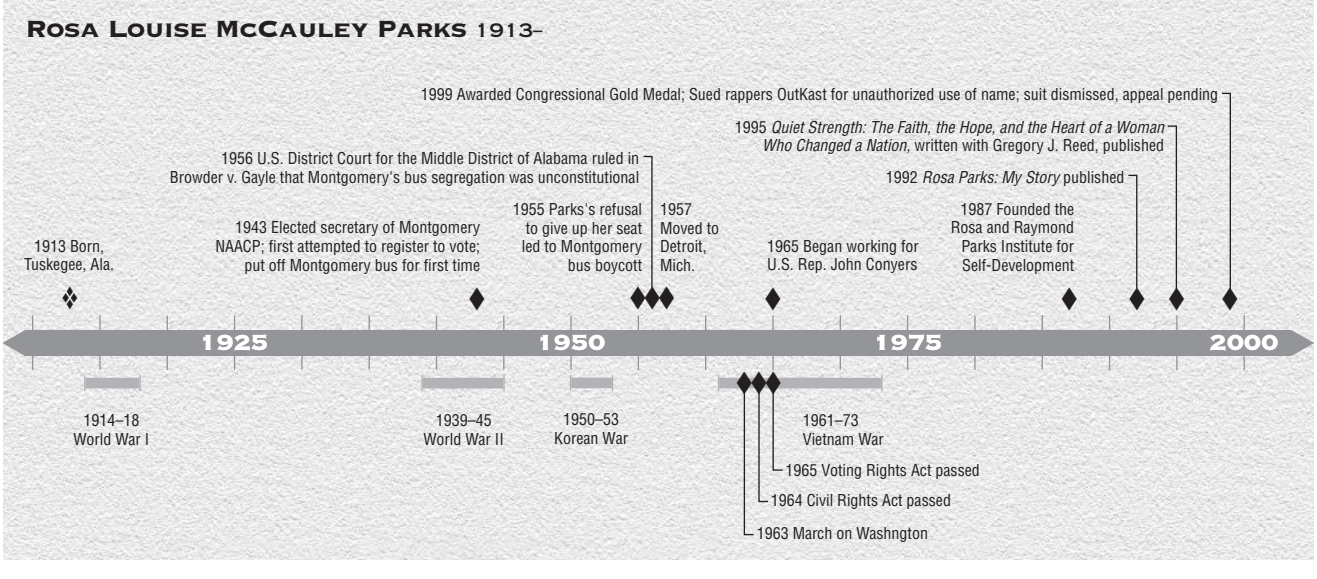

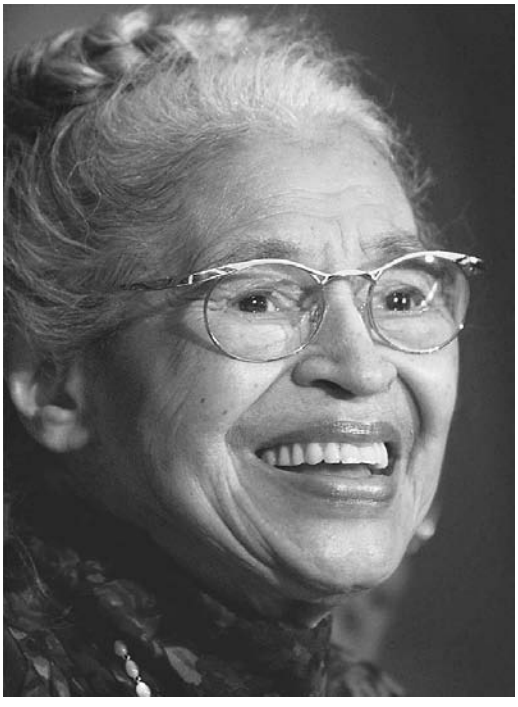

*Rosa Parks.* AP/WIDE WORLD PHOTOS

defense of nine young black men, known as the Scottsboro Boys, who had been arrested for raping a white woman. Although the charges were unsubstantiated, all of the men were found guilty and all but one were scheduled to die in the electric chair in 1931. The NAACP and other national organizations were able to file an appeal on the men's behalf with the U.S. Supreme Court, which ordered a new trial. All of the defendants were eventually exonerated.

After the Scottsboro defendants were saved from execution, Parks and her husband became involved in voter registration. Parks first attempted to register to vote in 1943. Like most other black citizens, she was forced to take a literacy test. Although she believed that she had passed the test, she was denied twice. Then, before she could complete her registration, she had to pay an accumulated poll tax of $1.50 a year. Blacks and whites were subject to the poll tax. However, whites were allowed to register upon turning 21 and could simply pay the tax once per year from then on. On the other hand, blacks might not be able to register until they were much older, and they were then forced to pay the tax retroactively to the age of 21. Parks's tax totaled $16.50, a considerable amount of money at that time.

While Parks was making her second attempt to register to vote in 1943, she was put off of a Montgomery city bus for the first time. Blacks had to follow certain rules when riding the bus, including stepping in the front door to pay their fare, then stepping off and going around to the back door to board the bus. They were required to sit at the back of the bus, even when the front section that was reserved for whites was empty. On this occasion, Parks boarded the bus in the front and made her way through the bus to the back. When the driver insisted that she leave the bus and re-enter through the back door, she refused. The driver then grabbed her coat sleeve and told her to get off his bus.

By that time, Parks was a member of the NAACP, one of only two women who were active in the local organization. At the 1943 meeting of the Montgomery branch, she was elected secretary. The Montgomery NAACP had begun to consider filing a lawsuit against the city over bus segregation, but it wanted a plaintiff who had a strong case.

On the evening of December 1, 1955, Parks left work and boarded the bus home. After she had paid her fare, she realized that the bus driver was the same one who had put her off of his bus 12 years earlier and whom she had since gone out of her way to avoid. Parks took a vacant seat in the front of the black section of the bus, near three other black passengers. As the bus began to fill up, a white man was left standing, and the bus driver demanded that Parks and the other blacks relinquish their seats. The other three people moved back, but Parks refused. The bus driver called the police, who arrested Parks and took her to the city jail. She was soon released on bail, and a trial date was set for the following week. Later that evening, Parks agreed to become the plaintiff whom the NAACP had been seeking to test the constitutionality of segregation on the buses.

That evening, leaders of the Montgomery Women's Political Caucus began calling for a bus boycott by the black community for December 5, to coincide with Parks's hearing. The 18 black-owned cab companies in the city agreed to stop at all of the bus stops on Monday and to charge only ten cents, the same as the bus fare.

When Monday came, the Montgomery city buses were nearly empty of black riders, marking the black community's first united protest against segregation. At her court hearing that day, Parks pleaded not guilty. The court ruled that she had violated the state segregation laws,

and she was fined and given a suspended sentence and fined.

Earlier that day, several ministers in the city, including the Reverend Ralph D. Abernathy, decided to form a new organization, the Montgomery Improvement Association (MIA), to lead the boycott. The ministers felt that the NAACP did not have a large enough membership in Alabama to assume a leadership role, and they wanted to have a local group at the forefront so that no one could claim that outside agitators were running the demonstration. The group elected King as its president. King was then pastor of the Dexter Avenue Baptist Church. The group thought that he was the best candidate because he was so new to the city and to civil rights work that he had not yet made any strong friends or strong enemies.

The bus boycott lasted more than a year. Many black people lost their jobs because of their support of the boycott. Parks's husband resigned from his job as a barber at the Maxwell Field Air Force Base when the white shop owner ordered that there was to be no discussion of Parks or the protest in his shop. The city police tried to disrupt the protest by harassing groups of blacks who were waiting at city bus stops for the black-owned cabs and by threatening to arrest cabdrivers if they did not charge their regular fare.

Once the police actually began arresting the cabdrivers, the community developed a sophisticated, private transportation system consisting of 20 cars and 14 station wagons. Thirty-two pickup and transfer sites were established, and service was scheduled from 5:30 A.M. to 12:30 A.M. Through this system, several people were transported to and from work every day. Although white supporters of the boycott received threatening letters and telephone calls, many white women who were unwilling to go without household help transported their black housekeepers and cooks every day. Blacks were also subjected to violence. King's home and those of other boycott leaders were bombed. Drivers of the black car-pool were arrested for minor traffic violations, and insurance on the cars in the pool was canceled until King located a black insurance agent in Atlanta who arranged for Lloyd's of London to write a policy for some of the cars.

While the boycott continued, the fight over segregation began in the courts. In February 1956, after the appeal of Parks's conviction was dismissed on a technicality, lawyers filed suit in U.S. district court on behalf of five women, including Parks, who had been mistreated on the buses. The suit claimed that bus segregation was unconstitutional.

At the same time, white lawyers discovered an old state law that prohibited boycotts, and a GRAND JURY issued 89 indictments against King, other ministers and leaders of the MIA, and other citizens, including Parks. King was the first to be tried. He was found guilty and was sentenced to pay a $500 fine or to serve a year of hard labor. His conviction was successfully appealed, however, and no one else was brought to trial in connection with those boycotts.

In June 1956, a three-judge panel of a U.S. district court in Alabama ruled that Montgomery's bus segregation was unconstitutional (*Browder v. Gayle,* 142 F. Supp. 707 [M.D. Ala. 1956]). The city appealed the decision to the U.S. Supreme Court. On November 13, the high court upheld the district court (352 U.S. 903, 77 S. Ct. 145, 1 L. Ed. 2d 114). The boycotters decided to continue their demonstration until the order was official. On December 20, the Court's written decision arrived. On the following day, the black community ended the bus boycott.

In the beginning, INTEGRATION of the buses did not go smoothly. Snipers fired at buses, and the city imposed curfews that prevented buses from operating after 5:00 P.M., which kept people who worked until 5:00 from riding the buses home.

Because of the boycott, Parks and her husband received hate mail and threatening telephone calls. In 1957, they decided to move to Detroit, where Parks's younger brother, Sylvester, lived. Parks was spending a great deal of time traveling around the country speaking about the bus boycott and the civil rights movement. She often attended meetings of a new organization formed by King and other ministers, the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE. She also attended the 1963 March on Washington that was organized to push for civil rights legislation. By that time, black people all over the South were protesting segregation and were organizing boycotts.

In 1964, President LYNDON B. JOHNSON signed the CIVIL RIGHTS ACT, 42 U.S.C.A. § 1971, 1975a to 1975d, 2000a to 2000h-6, guaranteeing blacks the right to vote and to use pub-

lic accommodations. But segregation was still pervasive in the South. In March 1965, King called for a mass march in Alabama, from Selma to Montgomery, to protest the treatment of civil rights demonstrators in Selma. Parks was invited to join the march for the final eight miles to the capital in Montgomery.

In 1965, Parks went to work for U.S. Representative John Conyers, whom she had supported in his campaign for the congressional seat from the First District in Michigan. Parks remained as Conyers's receptionist and office assistant until her retirement in 1988.

For a long time, Parks wanted to start an organization to help young people. In 1987, she founded the Rosa and Raymond Parks Institute for Self-Development, to offer classes in communications skills, health, economics, and political awareness.

*Time* magazine named Parks one of the 100 most influential people of the twentieth century, as a heroine and an icon. In 1996, President BILL CLINTON awarded Parks the Presidential Medal of Freedom, the highest civilian honor in the United States. In 1999, Congress awarded to her the Congressional Gold Medal of Honor, the highest award conferred by the U.S. government. "It is not an exaggeration to say that American history has moved through and with Rosa Parks. . . . This modest woman transformed an act designed to perpetuate the harsh rule of Jim Crow into the spark that ignited a determined and righteous crusade," said Spencer Abraham (R-Mich.), one of the sponsors of the award.

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CROSS-REFERENCES

Pacifism; *Powell v. Alabama*; Voting.

## PARLIAMENTARY LAW

*The general body of enacted rules and recognized usages governing the procedure of legislative assemblies and other deliberative sessions such as meetings of stockholders and directors of corporations, town meetings, and board meetings. Roberts Rules of Order are an example of such rules.*

## PARODY

*A form of speech protected by the* FIRST AMENDMENT *as a "distorted imitation" of an original work for the purpose of commenting on it.*

The use of parody as a means to express political and social views has a long history in the United States. Every president of the United States, including GEORGE WASHINGTON, has been the subject of satire and parody, often in the form of political cartoons. The cartoons, caricatures, and other forms of parody and satire typically distort and overly emphasize certain aspects of the subject's physical characteristics, such as ABRAHAM LINCOLN's lanky posture, FRANKLIN D. ROOSEVELT's jutting jaw and cigarette holder, RONALD REAGAN's long face and slick, black hair, and BILL CLINTON's large nose and red cheeks. Although often comical, political cartoons and other forms of satire and parody have often immortalized the individuals portrayed.

Parody and satire can be used for purposes beyond lighthearted comic intent. Many political cartoons, for example, have influenced the course of national debate. For instance, Thomas Nast, the famous nineteenth-century political cartoonist, published a series of post–Civil War cartoons in *Harper's Weekly* characterizing the activities of William M. "Boss" Tweed and other corrupt politicians in New York City's TAMMANY HALL political machine. More recently, countless political cartoonists drew caricatures of Clinton with Monica Lewinsky, the White House intern with whom Clinton had an affair. Clinton's dishonesty regarding the affair eventually led to his IMPEACHMENT by the House of Representatives in 1998.

Some forms of parody and satire are difficult to distinguish from truthful publications. Moreover, many forms of parody and satire can be particularly offensive to the subject of the parody. As a result, publication of various types of parody often involves litigation over libel, slander, and other types of DEFAMATION.

In 1988, the U.S. Supreme Court reviewed the most famous case involving the use of parody in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 108 S. Ct. 816, 99 L. Ed. 2d 41 (1988). In 1983, the adult magazine *Hustler* published a

parody of an advertisement for Campari Liqueur, which featured Jerry Falwell, a nationally recognized evangelist who is well known for his conservative commentary on political and social issues. The original advertisements contained interviews with celebrities discussing the "first time" they had consumed Campari. *Hustler*'s parody used a layout similar to the original advertisement, but included a fictitious interview with Falwell where he stated that his "first time" occurred with his mother in an outhouse.

Falwell brought suit, alleging libel and intentional infliction of emotional distress. The trial court found in favor of *Hustler* and its publisher, Larry Flynt, on the libel claim because the court found that no reasonable person would have believed the advertisement to be true. However, the court found *Hustler* and Flynt liable for intentional infliction for emotional distress. The Fourth Circuit Court of Appeals affirmed the district court's ruling.

The Supreme Court, per Justice WILLIAM REHNQUIST, reversed the Fourth Circuit. The Court has held in a line of cases regarding defamation that the First Amendment requires a plaintiff who is a public official or a public figure to demonstrate "actual malice," meaning it must be proven that the person being accused showed a reckless disregard as to whether a statement was true or false. These cases generally apply to claims of LIBEL AND SLANDER brought by public officials or public figures.

After reviewing a brief history of the use of parody in the United States, the Court found that the actual malice standard applies to cases involving intentional infliction of emotional distress as well. Since Falwell was unquestionably a public figure under the Court's analysis, he had to prove actual malice on the part of *Hustler.* The Court also rejected a claim by Falwell that this particular form of parody was so outrageous that it should not be the subject of First Amendment protection. This case establishes that the First Amendment protects forms of parody and satire involving public figures or public officials against a variety of claims, including libel, slander, and intentional infliction of emotional distress.

Parody also involves the application of other laws. Because many parodies mimic or copy other publications, the parodies may implicate COPYRIGHT and other INTELLECTUAL PROPERTY laws. In *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994), the Court reviewed whether a parody of Roy Orbison's song, "Oh, Pretty Woman," by the rap group 2 Live Crew violated the Copyright Act of 1976. The court of appeals held that the parody did not constitute fair use under copyright law, primarily due to its commercial character. The Supreme Court disagreed, holding that the commercial character of the song did not create a presumption that the parody violated fair use.

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## PAROL EVIDENCE

Parol *refers to verbal expressions or words. Verbal evidence, such as the testimony of a witness at trial.*

In the context of contracts, deeds, wills, or other writings, parol evidence refers to extraneous evidence such as an oral agreement (a parol contract), or even a written agreement, that is not included in the relevant written document. The parol evidence rule is a principle that preserves the integrity of written documents or agreements by prohibiting the parties from attempting to alter the meaning of the written document through the use of prior and contemporaneous oral or written declarations that are not referenced in the document.

Terms of a contract are commonly proposed, discussed, and negotiated before they are included in the final contract. When the parties to the negotiations do put their agreement in writing and acknowledge that the statement is the complete and exclusive declaration of their agreement, they have integrated the contract. The parol evidence rule applies to integrated contracts and provides that when parties put their agreement in writing, all prior and contemporaneous oral or written agreements merge in the writing. Courts do not permit integrated contracts to be modified, altered, amended, or changed in any way by prior or contemporaneous agreements that contradict the terms of the written agreement.

The parol evidence rule applies to written contracts to safeguard the terms of the con-

tract. The courts assume by the parol evidence rule that contracts contain the terms and provisions that the parties specifically intended and lack those provisions that the parties did not want.

The parol evidence rule does not apply to written integrated contracts in some instances. For example, clerical or typographical errors found in the written agreement may be changed because the incorrect term does not represent the true agreement between the parties. Courts will also not apply the parol evidence rule to prohibit contradictory evidence that shows that the contract was entered into under duress, mistake, FRAUD, or UNDUE INFLUENCE. Finally, the parol evidence rule will not prevent evidence that shows the existence of a separate agreement between the parties.

The law of sales also involves numerous written and oral contracts to which the parol evidence rule may be applied. However, in sales the court may look to contemporaneous or prior agreements not to contradict a written agreement but to explain or supplement it. The court may examine such evidence based on the parties' course of dealing, usage of trade, course of conduct, or evidence of consistent additional terms. Parties' course of dealing refers to a situation where two parties have a history of working together and entering into numerous contracts with each other, and the court can look to that history to clarify or interpret their written expressions. Usage of trade refers to circumstances in which the parties are participants in a particular trade or industry that has established ways of doing business. The courts can examine those established and accepted methods within the industry to help explain a written agreement. Parties' course of conduct refers to the actions of the parties in carrying out the particular contract, such as if a party accepts without objection the continued performance of the other party. It is also permissible for a court to consider supplemental consistent evidence that would generally not be included in the written agreement as long as it does not contradict the terms of the original agreement.

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CROSS-REFERENCES

Integrated Agreement; Oral Contract; Sales Law.

## PAROLE

*The conditional release of a person convicted of a crime prior to the expiration of that person's term of imprisonment, subject to both the supervision of the correctional authorities during the remainder of the term and a resumption of the imprisonment upon violation of the conditions imposed.*

Parole is the early supervised release of a prison inmate. It is usually regulated by statutes, and these provisions vary from state to state. Parole boards created by statute possess the authority to release prisoners from incarceration. Parolees have no constitutional right to representation in parole hearings and parole revocation hearings, but many states provide representation to impoverished inmates and parolees in such hearings.

Parole was first used in the United States in New York in 1876. By the turn of the century, parole was prevalent in the states. In 1910 Congress established the U.S. Parole Commission and gave it the responsibility of evaluating and setting the release dates for federal prisoners.

Parole is used for several reasons. It is less expensive to supervise a parolee than to incarcerate a prisoner. A person on parole has an opportunity to contribute to society. At the same time, society still receives some protection because the parolee is supervised and can be revoked for the most minor of transgressions. Parole is also a method of rehabilitation, because it gives convicts supervision and guidance during their reentry into society.

Although parole laws vary from state to state, there are some common practices. In many states, the governor is charged with appointing a parole board. The duties of the board are to study the case histories of persons eligible for parole, deliberate on the record, conduct hearings, grant parole, craft the conditions for parole, issue warrants for persons charged with violation of parole, conduct revocation hearings, and grant final discharge to parolees.

States may charge parolees a small monthly fee to offset the costs of supervision. For example, in Kentucky, a person on parole for a felony must pay $10 per month while under active supervision, but no more than a total of $2,500; for a misdemeanor parole, the fee is not less than $10 per month and no more than $500 in all. Failure to pay these fees, without a good reason for the failure, may result in revocation of the

parole, but revocation may not be based on failure to pay a fee unless the board first has held a hearing on the matter.

For lesser offenses, the determination of eligibility for parole is often left to the parole board. Parole will be ordered only if it serves the best interests of society. Parole is not considered to be a method of reducing sentences or awarding a pardon.

For more serious offenses, most states limit the discretion of the parole board. Parole statutes in these states generally identify a specified period of imprisonment that must be served before a prisoner is eligible for parole. The time periods are often a percentage of the prison sentence, and they can vary according to the crime for which the prospective parolee was convicted. In Arkansas, for example, persons convicted of first-degree murder, KIDNAPPING, aggravated ROBBERY, rape, and causing a catastrophe are not eligible for parole until they have served 70 percent of their prison sentence (Ark. Code Ann. § 16-93-611). For lesser felonies, persons must serve at least one-third of their sentence before becoming eligible for parole (Ark. Code Ann. § 16-93-608).

Parole has come under increasing attack since the 1970s. A powerful "truth in sentencing" movement has been successful in many states. Truth in sentencing is a catchphrase used to describe the notion that convicted criminals should serve the entire prison sentence handed down by the court. Many states have abolished parole entirely. In Virginia, for example, a felon who was committed after January 1, 1995, is ineligible for parole (Va. Code Ann. § 53.1-165.1). A felon may have prison time reduced from his sentence for good behavior, but in any case, the felon must serve at least 85 percent of the prison sentence.

At least 27 states and the District of Columbia now require violent offenders to serve 85 percent of their prison sentence before obtaining early release. Some of these states, like Virginia, have abolished parole entirely; others still allow parole for offenders as long as they have served the required time of their sentence. An additional 13 states, like Arkansas, require violent offenders to serve a substantial portion of their minimum sentence before being eligible for release. Fourteen states have abolished parole board release for all offenders, with at least six other states abolishing parole board release for certain violent or felony offenders.

**Characteristics of Adults on Parole, in 2001**

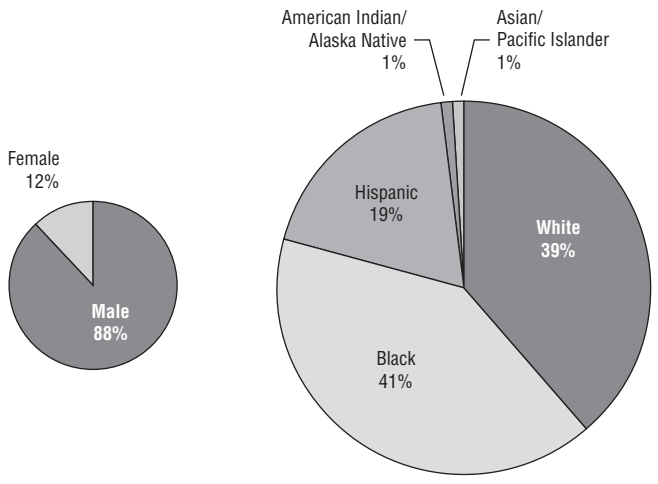


SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, *Probation and Parole in the United States, 2001.*

On the federal level, Congress abolished parole in the Comprehensive Crime Control Act of 1984 (Pub. L. No. 98-473 § 218(a)(5), 98 Stat. 1837, 2027 [repealing 18 U.S.C.A. § 4201 et seq.]). Federal prisoners may, however, earn a maximum of 54 days good time credit per year against their sentence (18 U.S.C.A. § 3624(b)).

The issue of victim's rights has also become important when dealing with parole. Most states now have laws requiring the victim or victim's families to be notified of a parole hearing. According to the National Center for the Victims of Crime (NCVC), as of 2000, 46 states and the District of Columbia required the victim or victim's families to be given a notice of a parole application or hearing at their request. Many states have gone further and required that a victim or their family be notified of their right to attend a parole hearing, the right to submit a victim impact statement, and the earliest estimated parole eligibility date.

Most states also allow victims the opportunity to comment on the offender's request for parole. The NCVC overview says that as of 2000, 46 states allow victims to submit impact testimony in person, 42 states permit written victim impact statements to be submitted, six states authorize the submission of audiotaped statements, seven states permit victims to submit videotaped statements, three states allow victims

to be heard via teleconferencing, and eight states authorize the victim's counsel or representative to present a statement on the victim's behalf. Under certain circumstances, parolees may also be required to pay restitution as a condition of their parole.

Several important Supreme Court decisions were handed down at the end of the 1990s and beginning of the twenty-first century concerning parole. In 1998, in *Spencer v. Kemna*, 523 U.S. 1, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998), the Supreme Court ruled against a man who filed a petition for HABEAS CORPUS after his sentence had expired challenging allegedly unconstitutional parole revocation procedures. The Court agreed with the district court that the completion of his sentence made his habeas corpus petition moot. But the Court held that a presumption that criminal convictions have collateral consequences, which the Court had previously said could be considered in habeas challenge to propriety of conviction even after habeas petitioner was released from prison, could not be extended to revocations of parole, in order to satisfy the injury-in-fact requirement of the habeas corpus petition of the Constitution.

In the 2000 decision, *United States v. Johnson*, 529 U.S. 53, 120 S. Ct. 1114, 146 L. Ed. 2d. 236 (2000), the Court ruled unanimously that a period of supervised release cannot commence until the prisoner is actually released from incarceration. The case involved a defendant whose convictions were vacated and his prison sentence reduced to a term less than that already served. The defendant moved for reduction of his supervised release term by the amount of extra time served on the vacated convictions. But the Court ruled that when a statute provides that a supervised release term does not commence until an individual is released from imprisonment, the word "released" means freed from confinement.

In another 2000 ruling, *Garner v. Jones*, 529 U.S. 244, 120 S. Ct. 1362, 146 L .Ed. 2d 236 (2000), the Court determined that retroactive application of Georgia's amended parole rule, changing the frequency of required parole reconsideration hearings for inmates serving life sentences from every three years to every eight years, did not necessarily violate the EX POST FACTO Clause of the Constitution. In its 6–3 decision, the Court emphasized that the States must have "due flexibility" in designing their parole procedures. There was no showing that the change in the law lengthened the inmate's time of actual imprisonment, the Court noted, and board had discretion to act in accordance with its assessment of each inmate's likelihood of release between reconsideration dates.

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CROSS-REFERENCES

Probation; Sentencing.

## ♦ PARSONS, THEOPHILUS

Theophilus Parsons served as chief justice of the Massachusetts Supreme Judicial Court from 1806 to 1813. A man of wide interests and learning, he is recognized for a series of decisions that defined legal principles that have shaped the American business corporation.

Parsons was born February 24, 1750, in Byfield, Massachusetts. He graduated from Harvard University in 1769 and was admitted to the Massachusetts bar in 1774. He established a successful legal practice in the area of Massachusetts that later became Portland, Maine. He gained prominence for his outspoken opinions at the ESSEX JUNTO, a 1778 gathering of merchants and lawyers from New England, the majority of whom resided in Essex County, Massachusetts. This group endorsed a state constitution that gave the state government broad authority.

Parsons strongly supported ratification of the U.S. Constitution. As a delegate to the 1788 Massachusetts Constitutional Convention that ratified the document, Parsons attempted to calm the fears of those delegates who worried about a strong federal government.

From 1787 to 1791, he served in the Massachusetts legislature. He maintained a lucrative COMMERCIAL LAW practice and became recog-

nized as a distinguished lawyer. John Quincy Adams, future president of the United States and a member of the prominent Boston Adams family, read the law under Parson's tutelage during this period.

In 1805 Parsons again entered the state legislature, but his tenure was brief. In 1806 he was appointed chief justice of the Massachusetts Supreme Judicial Court, the state's highest court. His commercial law background proved valuable on the court because he decided cases involving shipping and insurance. More importantly, Parsons had the experience and confidence to decide cases involving business corporations at a time when very little COMMON LAW was available to guide him.

Much of what became common law in U.S. corporate law was first developed while Parsons served as chief justice. In 1799 Massachusetts became the first state to enact a set of laws governing business corporations. During this period corporations had to obtain their charters from the legislature. The legislature was liberally granting these charters, and soon the courts were filled with legal issues concerning this new type of private business entity.

The Massachusetts Supreme Judicial Court, under the influence of Parsons, assumed an activist role in defining the rights and responsibilities of corporations. In a series of decisions between 1806 and 1810, the court announced several basic principles. It recognized that a corporation was a private arrangement, closer to a contract than to a municipal government corporation. The court held that a corporation has a duty to be fair to its shareholders and that the shareholders have limited liability for the debts and obligations of the corporation. The court also ruled that a corporation could be sued in TORT. All of these decisions became part of U.S. corporate law in the nineteenth century.

*Theophilus Parsons.* SOCIAL LAW LIBRARY, BOSTON, MASSACHUSETTS. SOURCE UNKNOWN

"THE LOVE OF PRECEDENT AND STABILITY . . . GIVES TO JUDICIAL DECISIONS AN AUTHORITY ALMOST LIKE THAT OF LAW ITSELF."
—THEOPHILUS PARSONS

Parsons was a Renaissance man. He studied mathematics and theoretical astronomy and was the author of many scientific studies. He died October 13, 1813, in Boston, Massachusetts.

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CROSS-REFERENCES

Massachusetts Constitution of 1780.

## PARTICULAR AVERAGE LOSS

*In maritime law, damage sustained by a ship, cargo, or freight that is not recompensed by contri-*

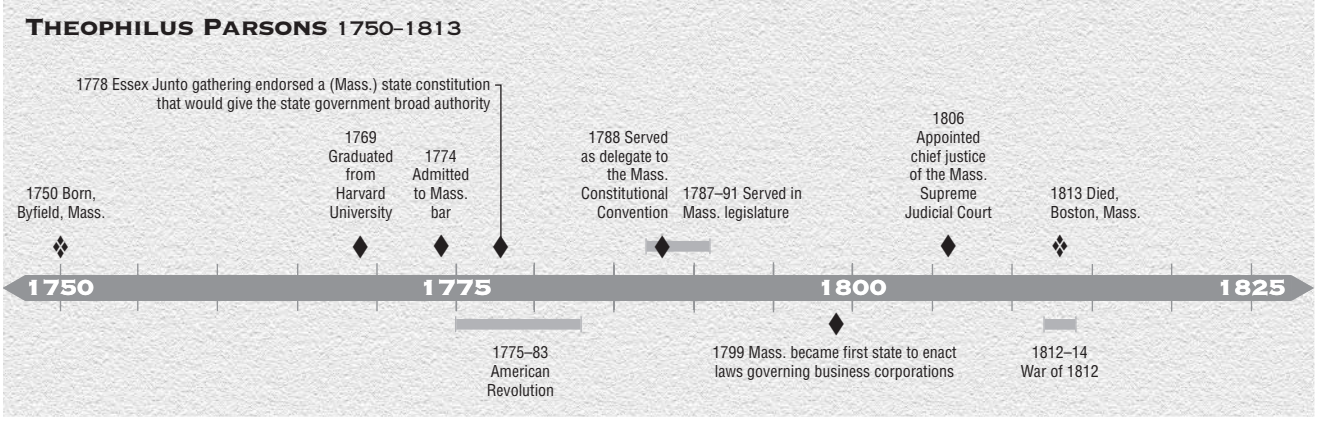

*bution from all interests in the venture but must be borne by the owner of the damaged property.*

Particular average loss is the opposite of general average loss, which denotes contribution by the various interests engaged in a maritime undertaking to recoup the loss of one of them for the voluntary sacrifice of a portion of the ship or cargo in order to save the remaining property and the lives of those on board, or for extraordinary expenses necessarily incurred for the common benefit and safety of all.

CROSS-REFERENCES

Admiralty and Maritime Law.

## PARTICULARS

*The details of a claim, or the separate items of an account.*

When these are detailed in an orderly form for the purpose of informing a defendant, the statement is called a bill of particulars.

## PARTIES

*The persons who are directly involved or interested in any act, affair, contract, transaction, or legal proceeding; opposing litigants.*

Persons who enter into a contract or other transactions are considered parties to the agreement. When a dispute results in litigation, the litigants are called parties to the lawsuit. U.S. law has developed principles that govern the rights and duties of parties. In addition, principles such as the standing doctrine determine whether a person is a rightful party to a lawsuit. Also, additional parties may be added to legal proceedings once litigation has begun.

### Parties in Lawsuits

In court proceedings, the parties have common designations. In a civil lawsuit, the person who files the lawsuit is called the plaintiff, and the person being sued is called the defendant. In criminal proceedings, one party is the government, called the state, commonwealth, or the people of the United States, and the other party is the defendant. If a case is appealed, the person who files the appeal is called the appellant, and the other side is called either the respondent or the appellee. Numerous variations on these basic designations exist, depending on the court and its jurisdiction. Assigning party designations allows the legal system and its observers to quickly determine the basic status of each party to a lawsuit.

### Parties as Adversaries

The U.S. legal system is based on the adversarial process, which requires parties to a legal proceeding to contend against each other. From this contest of competing interests, the issues are presented to the court and fully argued. In the end, one of the parties will obtain a favorable result.

For the adversary process to fulfill its mission of producing justice, it is vital that the issues at stake be argued by persons who have a genuine interest in them. Under the old rules of COMMON-LAW PLEADING, which used to regulate who could bring a lawsuit, only a person who actually held title to disputed property could be a party in a lawsuit concerning the property. This technicality sometimes prevented a person who had the most to gain or lose on the issue from becoming a party and presenting his or her case. This rule has now been replaced by laws requiring every action to be prosecuted by the real party in interest. This is most important when one person is managing an asset for the benefit of another. For example, administrators of a deceased person's estate can sue to protect the estate's interests without having to join the beneficiaries of the estate as parties. This modern rule sharpens the issues so that the decision in a case puts a controversy to rest for all the parties involved.

The U.S. Supreme Court has developed the standing doctrine to determine whether the litigants in a federal civil proceeding are the appropriate parties to raise the legal questions in the case. The Court has developed an elaborate body of principles defining the nature and contours of standing. In general, to have standing a party must have a personal stake in the outcome of the case. A plaintiff must have suffered some direct and substantial injury or be likely to suffer such an injury if a particular wrong is not redressed. A defendant must be the party responsible for perpetrating the alleged legal wrong.

A person has standing to challenge a law or policy on constitutional grounds if he can show that the enforcement of the law or implementation of the policy infringes on an individual constitutional right. On the other hand, in most cases a taxpayer does not have standing to challenge policies or programs he is forced to financially support.

### Legal Entities that Can Be Parties

Only an actual legal entity may initiate a lawsuit. A natural person is a legal entity, for

example, and any number of people can be parties on either side of a lawsuit. A corporation is endowed by its charter with existence as a separate legal entity. A business partnership is usually not considered a legal entity, but generally it can sue or be sued in the partnership name or in the names of the individual partners.

Many states permit lawsuits under a common name. This arrangement allows a business to be sued in the commonly used business name if it is clear who the owner or owners are. A lawsuit against Family Dry Cleaners, for example, may entitle the plaintiff to collect a judgment out of the value of the business property. The plaintiff will not be able to touch property that belongs to the owner or owners personally, however, unless they have also been named defendants in the action.

When a group of persons wishes to start a lawsuit, the group has several options. If, for example, a group of residential property owners wants to contest the construction of a toxic waste disposal site in its community, it can file a lawsuit listing each property owner as a plaintiff. The group could also select an association name that the court accepts (Citizens Against Toxic Waste) to represent those individuals. A more expensive alternative would be to incorporate the group and file the suit under the corporation's name.

The CLASS ACTION provides another option for bringing parties into a large-scale civil lawsuit. In a class action lawsuit, thousands and even millions of persons can be parties. To obtain a class action designation, the plaintiffs must convince the court that many persons possess similar interests in the subject matter of the lawsuit and that the plaintiffs can act on the group's behalf without specifically identifying every individual member of the group as a party to the litigation. The class action lawsuit can be an economical method of resolving civil claims that involve large numbers of persons with common interests, especially when the amount of each individual claim is too small to warrant independent legal actions by the claimants.

### The Capacity to Sue or Be Sued

A person must have the requisite legal capacity to be a party to a lawsuit. Some people are considered non sui juris: they do not possess full civil and social rights under the law. A child is *non sui juris* because the law seeks to protect the child from his or her improvidence until the child reaches the age of majority. A child who has not reached the age of majority has a legal disability. Others who suffer a similar legal disability include mentally ill persons, mentally retarded persons, and persons who are judged mentally incompetent because of illness, age, or infirmity. Legal disability does not mean, however, that persons in these categories are removed from civil actions. The claims or defenses of a person who is *non sui juris* usually can be asserted by a legal representative, such as a parent, guardian, trustee, or executor.

Prisoners also have limited rights as parties to civil actions. They can appeal their convictions and bring HABEAS CORPUS petitions to challenge the validity of their incarceration. They can file prisoners' rights cases for a violation of their federally protected CIVIL RIGHTS. Some states permit prisoners to defend themselves in an action that threatens them with FORFEITURE of their property, but most states will not permit prisoners to start a civil lawsuit against any other party during the period of incarceration. Convicted felons or prisoners given life sentences may suffer what is called civil death, a total loss of rights, including the right to be a party in a lawsuit.

### Joinder of Additional Parties

Usually a plaintiff decides when, where, and whom she or he wants to sue. In some cases a plaintiff may wish to join, or add, other parties after the start of the lawsuit. Proper parties and necessary or indispensable parties may be added while the action is pending.

A proper party is anyone who may be a party in the lawsuit. The JOINDER, or addition, of a proper party in a pending lawsuit is entirely permissible. The court may allow the joinder of an additional party, but the lawsuit does not have to be dismissed if it does not. In some states anyone who has an interest in the subject of the controversy is a proper party in the lawsuit. Some courts encourage joinder of everyone who could be affected by the decision.

Under modern rules of procedure in many states and the federal courts, joinder is not encouraged to the point where a lawsuit becomes unwieldy or cluttered with unrelated parties and claims. Generally, joinder is approved where the claims of the persons sought to be joined arose out of the same transaction or event as the claims of the existing parties, so that all the claims may be settled by answering the same QUESTIONS OF LAW or fact.

The decision to join additional parties is within the discretion of the court. Courts are careful not to exclude parties with an interest in a lawsuit because a failure to join those parties might lead to a series of lawsuits with inconsistent verdicts. That could ultimately leave a deserving plaintiff without a remedy or force a defendant to pay a certain claim more than once.

Whether a person is potentially necessary or indispensable to an action depends on the character and extent of that person's interest in the subject of the lawsuit. It is fair and equitable to require any person who has an interest that can be affected by the lawsuit to be joined as a party. A person whose interest may be affected by the outcome of the case is considered necessary, and such a person should be joined if possible. A person whose interest is sure to be affected by the outcome of the lawsuit is considered an indispensable party, and the case cannot proceed without this person. The case must be dismissed, for example, if a person cannot be joined because he or she is beyond the jurisdiction of the court. In deciding whether a person should be a party to a lawsuit, the courts carefully weigh the consequences of proceeding without the person and seek a remedy that will give relief to those who are actual parties without doing great harm to a necessary or indispensable party who is missing.

Federal courts abandoned this analysis and terminology relating to necessary and indispensable parties in 1966. The Federal Rules of Civil Procedure focus on factors affecting the overall balance of fairness to the parties and potential parties involved rather than on categories of parties. Once a federal court determines that someone absent from the proceedings has an interest that can be affected by the case, the court must order that person to be joined as a party if it is practical to do so. If not, the court must weigh the competing interests of the plaintiff who would like to keep the case in federal court, the defendant who might be exposed to multiple lawsuits on the same issue, and the absent person whose rights may be lost if he or she does not become a party. The court must also consider how best to avoid wasting judicial time and resources and whether the case before it is the most efficient way to resolve the controversy.

### Impleader

A defendant who feels that the plaintiff in a lawsuit should have sued someone else on the claim can bring that other person into the case. The procedure for doing this is called IMPLEADER, and the additional party is called a third-party defendant. The original defendant who impleads a third-party defendant is called a third-party plaintiff, but he or she continues to be a defendant in relation to the plaintiff.

For example, a restaurant patron who becomes ill after eating a ham dinner can sue the restaurant. The patron is the plaintiff, and the restaurant is the defendant. The restaurant may want to implead the meat-packing company that furnished the ham, if it believes that the meat was tainted before it was delivered to the restaurant. The restaurant cannot avoid being a defendant, but it can cover itself by impleading the meat packer and making that company a third-party defendant. If a jury finds that the ham was bad and that the patron is entitled to $10,000 damages, then the restaurant has an opportunity to show that its employees were not careless in preparing or serving the meat and that the restaurant should not be liable for the damages.

The decision to allow impleading of a third party is within the discretion of the court. The court also decides whether the third-party defendant may file claims against any of the other parties or whether the other parties may make additional claims against the third-party defendant. Permitting all parties to put forward all their claims in one action promotes efficient use of the courts, but a court will not permit additional parties or claims to complicate proceedings, delay resolution of the main controversy, or confuse a jury.

### Intervention

A person can volunteer to become a party in a lawsuit by a procedure called intervention. A person might wish to intervene in a lawsuit if he or she has an interest that will be affected by the outcome of the case and the person believes that this interest will not be adequately protected by the other parties.

A court decides whether to permit an intervening party by BALANCING the interests of the person seeking to intervene with the additional burden imposed on the existing parties if the person is allowed to enter the lawsuit. The court considers whether the intervenor is raising the same issues already present in the case or whether the intervenor is seeking to inject new controversies into the case. The intervenor must

demonstrate some practical effect of the outcome of the case on his or her rights or property. If a person is not allowed to intervene, the person is not bound by the judgment given in the case.

An intervenor must make the request to intervene in a motion to the court. Timing is important. If the case has already progressed beyond the preliminary stages, the court is likely to find that the intervenor's intrusion would prejudice the rights of the existing parties, which would be grounds for the court to deny the motion.

FURTHER READINGS

Cohen, Alan G., et al, eds. 1992. *The Living Law: A Guide to Modern Legal Research.* Rochester, N.Y.: Lawyers Cooperative.

Kraut, Jayson, et al. 1983. *American Jurisprudence.* Rochester, N.Y.: Lawyers Cooperative.

CROSS-REFERENCES

Adversary System.

## PARTITION

*Any division of real property or* PERSONAL PROPERTY *between co-owners, resulting in individual ownership of the interests of each.*

The co-ownership of real and personal property can have many benefits to the parties. But when there is discord and the owners cannot agree on the use, improvement, or disposition of the property, all states have laws that permit the remedy of partition.

Most cases of partition involve real property. Persons can own property as tenants in common or joint tenants. As common owners of the property, they have equal rights in the use and enjoyment of the property. Partition statutes allow those who own property in common to sever their interests and take their individual share of the property.

Partition may be either voluntary or compulsory. Voluntary partition is when the cotenants (owners) divide the property themselves, usually by exchanging individual deeds. Each co-owner owns a part of the property and ceases to have an undivided interest in the whole. The parties can also provide for the sale of the property and divide the proceeds among themselves.

When the co-owners cannot agree on the value of the property and their rightful shares, they may select a disinterested third person, such as an arbitrator or an appraiser, to divide the property and to allot the shares. A voluntary partition by all the co-owners is legally effective unless there is a contractual challenge to its recognition. These challenges include allegations of FRAUD or unconscionability, or the allegation that the parties are seeking to defraud a third party by agreeing to the partition.

When the co-owners cannot agree to a voluntary partition, a lawsuit to compel partition can be filed to sever property interests. Unless there are exceptional circumstances, a tenant in common or a joint tenant has the absolute right to seek a compulsory partition. Partition must be made even if every other owner objects to it. The motives of the party seeking partition are irrelevant, and the court that hears the lawsuit has no discretion to deny partition. Its main function is to determine the method of executing the partition. Commonly the court will order the property sold and the proceeds divided, instead of ordering a physical partition of the property. If the title to the property is put into issue, most states permit the court to resolve this issue as well as the partition.

Both real and personal property can be subject to compulsory partition. Real property that can be subject to partition includes a building, a story of a building, the land on which a building rests, or the surface of land where there is an oil or gas lease.

Similarly, personal property can be subjected to compulsory partition. The fact that the property is owned in unequal shares does not affect the partition. The right has been enforced with respect to a cashier's check payable jointly to those who share a TENANCY IN COMMON, promissory notes, shares of stock in a corporation, and stocks of merchandise.

FURTHER READINGS

Thomas, David A., ed. 1998. *Thompson on Real Property.* Charlottesville, Va.: LEXIS.

CROSS-REFERENCES

Joint Tenancy.

## PARTNERSHIP

*An association of two or more persons engaged in a business enterprise in which the profits and losses are shared proportionally. The legal definition of a partnership is generally stated as "an association of two or more persons to carry on as co-owners a business for profit" (Revised Uniform Partnership Act § 101 [1994]).*

Early English mercantile courts recognized a business form known as the *societas.* The *societas* provided for an accounting between its business partners, an agency relationship between partners in which individual partners could legally bind the partnership, and individual partner liability for the partnership's debts and obligations. As the regular English courts gradually recognized the *societas,* the business form eventually developed into the common-law partnership. England enacted its Partnership Act in 1890, and legal experts in the United States drafted a Uniform Partnership Act (UPA) in 1914. Every state has adopted some form of the UPA as its partnership statute; some states, however, have made revisions to the UPA or have adopted the Revised Uniform Partnership Act (RUPA), which legal scholars issued in 1994.

The authors of the initial UPA debated whether in theory a partnership should be treated as an aggregate of individual partners or as a corporate-like entity separate from its partners. The UPA generally opted for the aggregate theory in which individual partners ("an association") comprised the partnership. Under an aggregate theory, partners are co-owners of the business; the partnership is not a distinct legal entity. This led to the creation of a new property interest known as a "tenancy in partnership," a legal construct by which each partner co-owned partnership property. An aggregate approach nevertheless led to confusion as to whether a partnership could be sued or whether it could sue on its own behalf. Some courts took a technical approach to the aggregate theory and did not allow a partnership to sue on its own behalf. In addition, some courts would not allow a suit to go forward against a partnership unless the claimant named each partner in the complaint or added each partner as an "indispensable party."

The RUPA generally adopted the entity approach, which treats the partnership as a separate legal entity that may own property and sue on its own behalf. The RUPA nevertheless treats the partnership in some instances as an aggregate of co-owners; for example, it retains the joint liability of partners for partnership obligations. As a practical matter, therefore, the present-day partnership has both aggregate and entity attributes. The partnership, for instance, is considered an association of co-owners for tax purposes, and each co-owner is taxed on his or her proportional share of the partnership profits.

### Formation

The formation of a partnership requires a voluntary "association" of persons who "co-own" the business and intend to conduct the business for profit. Persons can form a partnership by written or oral agreement, and a partnership agreement often governs the partners' relations to each other and to the partnership. The term *person* generally includes individuals, corporations, and other partnerships and business associations. Accordingly, some partnerships may contain individuals as well as large corporations. Family members may also form and operate a partnership, but courts generally look closely at the structure of a family business before recognizing it as a partnership for the benefit of the firm's creditors.

Certain conduct may lead to the creation of an implied partnership. Generally, if a person receives a portion of the profits from a business enterprise, the receipt of the profits is evidence of a partnership. If, however, a person receives a share of profits as repayment of a debt, wages, rent, or an ANNUITY, such transactions are considered "protected relationships" and do not lead to a legal inference that a partnership exists.

### Relationship of Partners to Each Other

Each partner has a right to share in the profits of the partnership. Unless the partnership agreement states otherwise, partners share profits equally. Moreover, partners must contribute equally to partnership losses unless a partnership agreement provides for another arrangement. In some jurisdictions a partner is entitled to the return of her or his capital contributions. In jurisdictions that have adopted the RUPA, however, the partner is not entitled to such a return.

In addition to sharing in the profits, each partner also has a right to participate equally in the management of the partnership. In many partnerships a majority vote resolves disputes relating to management of the partnership. Nevertheless, some decisions, such as admitting a new partner or expelling a partner, require the partners' unanimous consent.

Each partner owes a fiduciary duty to the partnership and to copartners. This duty requires that a partner deal with copartners in GOOD FAITH, and it also requires a partner to

*A sample partnership agreement*

## Partnership Agreement

This PARTNERSHIP AGREEMENT is made on the _____ day of _____ , 20 _____ between _____ , whose address is _____ and _____ , whose address is _____.

**NAME AND BUSINESS.**

The parties hereby form a partnership under the name of _____ to conduct the business of _____ .

The principal office of the business shall be at _____ _____.

**TERM.**

The partnership shall begin on the _____ day of _____, 20_____ , and shall continue until terminated as herein provided.

**CAPITAL.**

The capital of the partnership shall be contributed in cash by the partners as follows:

A separate capital account shall be maintained for each partner. Neither partner shall withdraw any part of his capital account. Upon the demand of either partner, the capital accounts of the partners shall be maintained at all times in the proportions in which the partners share in the profits and losses of the partnership.

**PROFIT AND LOSS.**

The net profits of the partnership shall be divided equally between the partners and the net losses shall be borne equally by them. A separate income account shall be maintained for each partner. Partnership profits and losses shall be charged or credited to the separate income account of each partner. If a partner has no credit balance in his income account, losses shall be charged to his capital account.

**SALARIES AND DRAWINGS.**

Neither partner shall receive any salary for services rendered to the partnership. Each partner may, from time to time, withdraw the credit balance in his income account.

**INTEREST.**

No interest shall be paid on the initial contributions to the capital of the partnership or on any subsequent contributions of capital.

**MANAGEMENT DUTIES AND RESTRICTIONS.**

The partners shall have equal rights in the management of the partnership business, and each partner shall devote his entire time to the conduct of the business. Without the consent of the other partner neither partner shall on behalf of the partnership borrow or lend money, or make, deliver, or accept any commercial paper, or execute any mortgage, security agreement, bond, or lease, or purchase or contract to purchase, or sell or contract to sell any property for or of the partnership other than the type of property bought and sold in the regular course of its business.

**BANKING.**

All funds of the partnership shall be deposited in its name in such checking account or accounts as shall be designated by the partners. All withdrawals therefrom are to be made upon checks signed by either partner.

**BOOKS.**

The partnership books shall be maintained at the principal office of the partnership, and each partner shall at all times have access thereto.

The books shall be kept on a fiscal year basis, commencing on the _____ day of _____ and ending on the _____ day of _____, and shall be closed and balanced at the end of each fiscal year. An audit shall be made as of the closing date.

**VOLUNTARY TERMINATION.**

The partnership may be dissolved at any time by agreement of the partners, in which event the partners shall proceed with reasonable promptness to liquidate the business of the partnership. The partnership name shall be sold with the other assets of the business. The assets of the partnership business shall be used and distributed in the following order:

(a) to pay or provide for the payment of all partnership liabilities and liquidating expenses and obligations;

(b) to equalize the income accounts of the partners;

[continued]

*A sample partnership agreement (continued)*

**Partnership Agreement**

(c) to discharge the balance of the income accounts of the partners;

(d) to equalize the capital accounts of the partners; and

(e) to discharge the balance of the capital accounts of the partners.

**DEATH.**

Upon the death of either partner, the surviving partner shall have the right either to purchase the interest of the decedent in the partnership or to terminate and liquidate the partnership business. If the surviving partner elects to purchase the decedent's interest, he shall serve notice in writing of such election, within three months after the death of the decedent, upon the executor or administrator of the decedent, or, if at the time of such election no legal representative has been appointed, upon any one of the known legal heirs of the decedent at the last-known address of such heir.

If the surviving partner elects to purchase the interest of the decedent in the partnership, the purchase price shall be equal to the decedent's capital account as at the date of his death plus the decedent's income account as at the end of the prior fiscal year, increased by his share of partnership profits or decreased by his share of partnership losses for the period from the beginning of the fiscal year in which his death occurred until the end of the calendar month in which his death occurred, and decreased by withdrawals charged to his income account during such period. No allowance shall be made for goodwill, trade name, patents, or other intangible assets, except as those assets have been reflected on the partnership books immediately prior to the decedent's death; but the survivor shall nevertheless be entitled to use the trade name of the partnership.

Except as herein otherwise stated, the procedure as to liquidation and distribution of the assets of the partnership business shall be the same as stated in the section regarding VOLUNTARY TERMINATION.

**ARBITRATION.**

Any controversy or claim arising out of or relating to this Agreement, or the breach hereof, shall be settled by arbitration in accordance with the rules, then obtaining, of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof.

In witness whereof the parties have signed this Agreement.

Executed this _____ day of _____ , 20_____.

_____
Signature

_____
Signature

**Warning:**

**These forms are provided AS IS. They may not be any good. Even if they are good in one jurisdiction, they may not work in another. And the facts of your situation may make these forms inappropriate for you. They are for informational purposes only, and you should consult an attorney before using them.**

account to copartners for any benefit that he or she receives while engaged in partnership business. If a partner generates profits for the partnership, for example, that partner must hold the profits as a trustee for the partnership. Each partner also has a duty of loyalty to the partnership. Unless copartners consent, a partner's duty of loyalty restricts the partner from using partnership property for personal benefit and restricts the partner from competing with the partnership, engaging in self-dealing, or usurping partnership opportunities.

## Relationship of Partners to Third Persons

A partner is an agent of the partnership. When a partner has the apparent or actual authority and acts on behalf of the business, the partner binds the partnership and each of the partners for the resulting obligations. Similarly, a partner's admission concerning the partnership's affairs is considered an admission of the partnership. A partner may only bind the partnership, however, if the partner has the authority to do so and undertakes transactions while

conducting the usual partnership business. If a third person, however, knows that the partner is not authorized to act on behalf of the partnership, the partnership is generally not liable for the partner's unauthorized acts. Moreover, a partnership is not responsible for a partner's wrongful acts or omissions committed after the dissolution of the partnership or after the dissociation of the partner. A partner who is new to the partnership is not liable for the obligations of the partnership that occurred prior to the partner's admission.

### Liability

Generally, each partner is jointly liable with the partnership for the obligations of the partnership. In many states each partner is jointly and severally liable for the wrongful acts or omissions of a copartner. Although a partner may be sued individually for all the damages associated with a wrongful act, partnership agreements generally provide for indemnification of the partner for the portion of damages in excess of her or his own proportional share.

Some states that have adopted the RUPA provide that a partner is jointly and severally liable for the debts and obligations of the partnership. Nevertheless, before a partnership's creditor can levy a judgment against an individual partner, certain conditions must be met, including the return of an unsatisfied writ of execution against the partnership. A partner may also agree that the creditor need not exhaust partnership assets before proceeding to collect against that partner. Finally, a court may allow a partnership creditor to proceed against an individual partner in an attempt to satisfy the partnership's obligations.

### Partnership Property

A partner may contribute PERSONAL PROPERTY to the partnership, but the contributed property becomes partnership property unless some other arrangement has been negotiated. Similarly, if the partnership purchases property with partnership assets, such property is presumed to be partnership property and is held in the partnership's name. The partnership may convey or transfer the property but only in the name of the partnership. Without the consent of all the partners, individual partners may not sell or assign partnership property.

In some jurisdictions the partnership property is considered personal property that each partner owns as a "tenant in partnership," but other jurisdictions expressly state that the partnership may own property. The tenant in partnership concept, which is the approach contained in the UPA, is the result of adopting an aggregate approach to partnerships. Because the aggregate theory is that the partnership is not a separate entity, it was thought that the partnership could not own property but that the individual partners must actually own it. This approach has led to considerable confusion, and the RUPA has expressly stated that the partnership may own partnership property.

### Partnership Interests

A partner's interest in a partnership is considered personal property that may be assigned to other persons. If assigned, however, the person receiving the assigned interest does not become a partner. Rather, the assignee only receives the economic rights of the partner, such as the right to receive partnership profits. In addition, an assignment of the partner's interest does not give the assignee any right to participate in the management of the partnership. Such a right is a separate interest and remains with the partner.

### Partnership Books

Generally, a partnership maintains separate books of account, which typically include records of the partnership's financial transactions and each partner's capital contributions. The books must be kept at the partnership's principal place of business, and each partner must have access to the books and be allowed to inspect and copy them upon demand. If a partnership denies a partner access to the books, he or she usually has a right to obtain an INJUNCTION from a court to compel the partnership to allow him or her to inspect and copy the books.

### Partnership Accounting

Under certain circumstances a partner has a right to demand an accounting of the partnership's affairs. The partnership agreement, if any, usually sets forth a partner's right to a predissolution accounting. State law also generally allows for an accounting if copartners exclude a partner from the partnership business or if copartners wrongfully possess partnership property. In a court action for an accounting, the partners must provide a report of the partnership business and detail any transactions dealing with partnership property. In addition,

the partners who bring a court action for an accounting may examine whether any partners have breached their duties to copartners or the partnership.

### Taxation

One of the primary reasons to form a partnership is to obtain its favorable tax treatment. Because partnerships are generally considered an association of co-owners, each of the partners is taxed on her or his proportional share of partnership profits. Such taxation is considered "pass-through" taxation in which only the indimvidual partners are taxed. Although a partnership is required to file annual tax returns, it is not taxed as a separate entity. Rather, the profits of the partnership "pass through" to the individual partners, who must then pay individual taxes on such income.

### Dissolution

A dissolution of a partnership generally occurs when one of the partners ceases to be a partner in the firm. Dissolution is distinct from the termination of a partnership and the "winding up" of partnership business. Although the term *dissolution* implies termination, dissolution is actually the beginning of the process that ultimately terminates a partnership. It is, in essence, a change in the relationship between the partners. Accordingly, if a partner resigns or if a partnership expels a partner, the partnership is considered legally dissolved. Other causes of dissolution are the BANKRUPTCY or death of a partner, an agreement of all partners to dissolve, or an event that makes the partnership business illegal. For instance, if a partnership operates a gambling casino and gambling subsequently becomes illegal, the partnership will be considered legally dissolved. In addition, a partner may withdraw from the partnership and thereby cause a dissolution. If, however, the partner withdraws in violation of a partnership agreement, the partner may be liable for damages as a result of the untimely or unauthorized withdrawal.

After dissolution, the remaining partners may carry on the partnership business, but the partnership is legally a new and different partnership. A partnership agreement may provide for a partner to leave the partnership without dissolving the partnership but only if the departing partner's interests are bought by the continuing partnership. Nevertheless, unless the partnership agreement states otherwise, dissolution begins the process whereby the partnership's business will ultimately be wound up and terminated.

### Dissociation

Under the RUPA, events that would otherwise cause dissolution are instead classified as the dissociation of a partner. The causes of dissociation are generally the same as those of dissolution. Thus, dissociation occurs upon receipt of a notice from a partner to withdraw, by expulsion of a partner, or by bankruptcy-related events such as the bankruptcy of a partner. Dissociation does not immediately lead to the winding down of the partnership business. Instead, if the partnership carries on the business and does not dissolve, it must buy back the former partner's interest. If, however, the partnership is dissolved under the RUPA, then its affairs must be wound up and terminated.

### Winding Up

*Winding up* refers to the procedure followed for distributing or liquidating any remaining partnership assets after dissolution. Winding up also provides a priority-based method for discharging the obligations of the partnership, such as making payments to non-partner creditors or to remaining partners. Only partners who have not wrongfully caused dissolution or have not wrongfully dissociated may participate in winding up the partnership's affairs.

State partnership statutes set the procedure to be used to wind up partnership business. In addition, the partnership agreement may alter the order of payment and the method of liquidating the assets of the partnership. Generally, however, the liquidators of a partnership pay non-partner creditors first, followed by partners who are also creditors of the partnership. If any assets remain after satisfying these obligations, then partners who have contributed capital to the partnership are entitled to their capital contributions. Any remaining assets are then divided among the remaining partners in accordance with their respective share of partnership profits.

Under the RUPA, creditors are paid first, including any partners who are also creditors. Any excess funds are then distributed according to the partnership's distribution of profits and losses. If profits or losses result from a liquidation, such profits and losses are charged to the partners' capital accounts. Accordingly, if a part-

ner has a negative balance upon winding up the partnership, that partner must pay the amount necessary to bring his or her account to zero.

### Limited Partnerships

A limited partnership is similar in many respects to a general partnership, with one essential difference. Unlike a general partnership, a limited partnership has one or more partners who cannot participate in the management and control of the partnership's business. A partner who has such limited participation is considered a "limited partner" and does not generally incur personal liability for the partnership's obligations. Generally, the extent of liability for a limited partner is the limited partner's capital contributions to the partnership. For this reason, limited partnerships are often used to provide capital to a partnership through the capital contributions of its limited partners. Limited partnerships are frequently used in real estate and entertainment-related transactions.

The limited partnership did not exist at COMMON LAW. Like a general partnership, however, a limited partnership may govern its affairs according to a limited partnership agreement. Such an agreement, however, will be subject to applicable state law. States have for the most part relied on the Uniform Limited Partnership Act in adopting their limited partnership legislation. The Uniform Limited Partnership Act was revised in 1976 and 1985. Accordingly, a few states have retained the old uniform act, and other states have relied on either revision to the uniform act or on both revisions to the uniform act.

A limited partnership must have one or more general partners who manage the business and who are personally liable for partnership debts. Although one partner may be both a limited and a general partner, at all times there must be at least two different partners in a limited partnership. A limited partner may lose protection against personal liability if she or he participates in the management and control of the partnership, contributes services to the partnership, acts as a general partner, or knowingly allows her or his name to be used in partnership business. However, "safe harbors" exist in which a limited partner will not be found to have participated in the "control" of the partnership business. Safe harbors include consulting with the general partner with respect to partnership business, being a contractor or employee of a general partner, or winding up the limited partnership. If a limited partner is engaged solely in one of the activities defined as a safe harbor, then he or she is not considered a general partner with the accompanying potential liability.

Except where a conflict exists, the law of general partnerships applies equally to limited partnerships. Unlike general partnerships, however, limited partnerships must file a certificate with the appropriate state authority to form and carry on as a limited partnership. Generally, a certificate of limited partnership includes the limited partnership's name, the character of the limited partnership's business, and the names and addresses of general partners and limited partners. In addition, and because the limited partnership has a set term of duration, the certificate must state the date on which the limited partnership will dissolve. The contents of the certificate, however, will vary from state to state, depending on which uniform limited partnership act the state has adopted.

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#### CROSS-REFERENCES

Joint and Several Liability; Limited Liability Partnership.

## PARTY

*Any person involved in a transaction or proceeding. A group of voters organized for the purpose of influencing governmental policy, particularly through the nomination and election of candidates for public office.*

Plaintiffs and defendants are PARTIES in lawsuits, for example. They have the right to make claims and defenses, offer proof, and examine and cross-examine witnesses at trials. They can pursue appeals after unsatisfactory judgments if they satisfy designated criteria.

In the United States, the Democrats and the Republicans make up the two major national political parties.

CROSS-REFERENCES

Democratic Party; Republican Party.

## PARTY OF THE FIRST PART

*A phrase used in a document to avoid repeating the name of the persons first mentioned in it.*

## PARTY WALL

*A partition erected on a property boundary, partly on the land of one owner and partly on the land of another, to provide common support to the structures on both sides of the boundary.*

Each person owns as much of a party wall as is situated on his or her land. The wall is subject to cross-easements—reciprocal rights of use over the property of another—in favor of each owner for the support of his or her building or for the maintenance of the wall. A party wall can also be owned by adjoining tenants pursuant to a TENANCY IN COMMON, or the wall can belong entirely to one of the adjoining owners, subject to an EASEMENT or a right in the other owner to have it maintained as a dividing wall between the two tenements.

*Row houses in the Georgetown area of Washington, D.C., share a wall in common, or a party wall. Whether the wall is owned jointly or wholly by one tenant, each party is entitled by easement to enjoy full use of the wall—on his own side.* ALAN SCHEIN PHOTOGRAPHY/CORBIS

### Creation

A party wall is ordinarily created by a contract between the adjoining owners, by statute, or by prescription. ADJOINING LANDOWNERS can enter into a contract to build a party wall. The parties can agree that the wall is to be located on land owned entirely by one of them or that it is to stand partly, usually equally, on both parcels. Under a typical arrangement, one party builds the wall and the other contributes to its construction. The parties can also agree that an existing dividing wall is to become a party wall.

Statutes authorizing the construction of a party wall by one of two adjoining owners when the line between the properties is vacant embody the COMMON LAW and have been upheld as a constitutionally valid exercise of the POLICE POWER of a state. These statutes are subject to a STRICT CONSTRUCTION since they permit the taking and permanent occupation of a portion of land.

When a wall between adjoining buildings has been continuously and uninterruptedly used as a party wall by the respective owners for a period of time set forth by statute, a prescriptive right to use the wall arises.

A party wall can also be created when the owner of buildings that stand on adjoining lots and share a common wall, which forms a part of each building, conveys the lots to different persons. Each owner acquires title to one-half the wall and an easement for its support as a party wall in the other half. This rule applies even though the deeds are silent concerning the rights of the parties in the wall. The result is the same when one of the lots is retained by the original common owner.

### Duration

A party wall that is constructed without any reference to a time limitation implies permanency. A wall built as a result of an agreement loses its character as a party wall when the parties rescind, or cancel, the agreement. Although the title to one-half of such a party wall, which is jointly owned by adjoining landowners, cannot be waived or abandoned, a party wall easement can be extinguished when the party entitled to it renounces his interest.

The easement of support of adjoining buildings by the party wall ends when the wall becomes unfit for its purpose or is so decayed as to need rebuilding from its foundation. When the buildings are accidentally destroyed, the easement ends, even though a portion of the wall, or the whole wall, remains standing.

### Manner of Use

A party wall is for the mutual benefit and convenience of both owners. Each adjoining

owner has the right to its full use as a party wall in the improvement and enjoyment of his property. Neither owner can use the wall in a manner that impairs the other's easement or interferes with his or her property rights.

An adjoining owner is not entitled to extend the front wall or rear wall of his building beyond the center of the party wall. In addition, an adjoining owner cannot extend the beams of her building beyond the center of the wall. Neither party can attach window shutters, exhaust pipes, anchor rods, or other projections or fixtures over the adjoining premises, even if the projection does not actually damage, or interfere with, the rights of the adjoining owner. An easement does not give either owner a right to construct and maintain a roof or cornice that extends beyond the party wall and over the property of the adjoining owner.

By common usage, a party wall has come to mean a solid wall. Unless an agreement exists between the adjoining property owners to the contrary, neither has a right to maintain windows or other openings in the wall unless they are necessary for air and light.

A party wall can be used by the adjoining owners for the construction and maintenance of chimney flues and fireplaces. Both parties are entitled to use a flue built into the middle of the wall, although the lower part of it is located wholly in the other owner's half of the wall.

Neither owner of a party wall has a right to maintain a sign on the other side of the wall, but either has a right to do so on his or her own side.

### Destruction and Rebuilding

Ordinarily neither of the adjoining owners has the right to destroy or remove a party wall, but if a fire or other casualty causes the wall to become useless to either owner, it can be removed.

In a number of states, even though a party wall is sufficient to support existing structures, an adjoining owner can replace it with a stronger wall to support a new structure requiring greater reinforcement. The owner must replace the wall within a reasonable time without damaging the property of the adjoining owner.

Either party can replace a party wall that is dangerous to life or property or insufficient for the support of existing buildings. Neither owner has any right to have a dangerous wall bolstered by allowing it to rest upon, or be sustained by, the timbers, walls, or parts of the other's building.

No obligation is imposed upon either owner to erect a new party wall to replace a wall that has been destroyed by some accidental cause, even if the foundation of the wall remains firm and sound. When the adjoining buildings are destroyed and the party wall remains standing, neither adjoining owner is obliged to reconstruct her building as it existed.

### Addition, Alteration, and Repair

Unless restricted by a conveyance, transfer, or a party wall agreement, either owner can add to, alter, or repair the wall. In doing so, the owner must not damage the adjoining property or impair the easement to which the owner is entitled.

Either party, for example, may increase the height of the wall, provided the increase does not diminish its strength. Similarly either party may underpin the wall and sink the foundation deeper or increase the thickness of the wall by adding to it on his own land.

### Contribution

In some jurisdictions, an adjoining landowner who uses a wall built partly on his or her land by the other adjoining landowner has no duty to contribute to the cost of construction of the wall. If there is no evidence of the conditions under which the wall was built, courts presume that each person owns as much of the wall as is situated on his property and has no obligation to contribute to the other's wall.

In some jurisdictions, liability might be imposed by statute. For example, a statute might authorize one of two adjoining landowners to build a wall partly on the adjoining land and require the other landowner to contribute, if and when she used the wall in the construction and support of an adjoining building; until payment would be made, the wall would be owned exclusively by the builder.

The obligation to contribute can, of course, be a provision in the contract between adjoining landowners, but the agreement need not be express. It can be implied from the conduct of the parties, although a contract cannot be implied from the mere assent by one owner to the construction of a wall standing equally on the land of both.

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CROSS-REFERENCES

Boundaries.

## PASS

*As a verb, to utter or pronounce, as when the court* passes *sentence upon a prisoner. Also to proceed; to be rendered or given, as when judgment is said to* pass *for the plaintiff in a suit.*

*In legislative parlance, a bill or resolution is said to* pass *when it is agreed to or enacted by the house, or when the body has sanctioned its adoption by the requisite majority of votes; in the same circumstances, the body is said to* pass *the bill or motion.*

*When an auditor appointed to examine any accounts certifies to their correctness, she is said to* pass *them; i.e., they pass through the examination without being detained or sent back for inaccuracy or imperfection.*

*The term also means to examine anything and then authoritatively determine the disputed questions that it involves. In this sense a jury is said to* pass upon *the rights or issues in litigation before them.*

*In the language of conveyancing, the term means to move from one person to another; i.e. to be transferred or conveyed from one owner to another.*

**U.S. Passports Issued, 1974 to 2002**

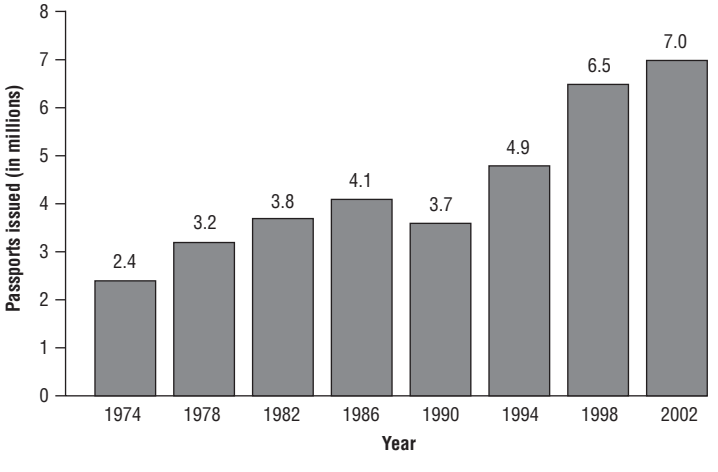


SOURCE: U.S. Department of State web page.

*To publish; utter; transfer; circulate; impose fraudulently. This is the meaning of the word when referring to the offense of* passing *counterfeit money or a forged paper.*

*As a noun, permission to pass; a license to go or come; a certificate, emanating from authority, wherein it is declared that a designated person is permitted to go beyond certain boundaries that, without such authority, he could not lawfully pass. Also a ticket issued by a railroad or other transportation company, authorizing a designated person to travel free on its lines, between certain points or for a limited time.*

## PASSIM

[Latin, Everywhere.] *A term frequently used to indicate a general reference to a book or legal authority.*

## PASSPORT

*A document that indicates permission granted by a sovereign to its citizen to travel to foreign countries and return and requests foreign governments to allow that citizen to pass freely and safely.*

*With respect to* INTERNATIONAL LAW, *a passport is a license of safe conduct, issued during a war, that authorizes an individual to leave a warring nation or to remove his or her effects from that nation to another country; it also authorizes a person to travel from country to country without being subject to arrest or detention because of the war.*

*In maritime law, a passport is a document issued to a neutral vessel by its own government during a war that is carried on the voyage as evidence of the nationality of the vessel and as protection against the vessels of the warring nations. This paper is also labeled a* pass, sea-pass, sea-letter, *or* sea-brief. *It usually contains the captain's or master's name and residence; the name, property, description, tonnage, and destination of the ship; the nature and quantity of the cargo; and the government under which it sails.*

## PAT. PEND.

*An abbreviation displayed prominently on an invention for which an application for a patent has been made but has not yet been issued.*

The term *Pat. Pend.* provides notice to all that the inventor has applied to the U.S. PATENT AND TRADEMARK OFFICE for the exclusive right to make, sell, and use his or her invention.

## PATENT

*Open; manifest; evident.*

In the sale of PERSONAL PROPERTY, a *patent defect* is one that is clearly visible or that can be discovered by an inspection made by a person exercising ordinary care and prudence.

A patent defect in a legal description is one that cannot be corrected so that a new description must be used.

## PATENT AND TRADEMARK OFFICE

The U.S. Patent and Trademark Office (PTO) is a federal agency that grants PATENTS and registers TRADEMARKS to qualified applicants. A division of the COMMERCE DEPARTMENT, the PTO was named the Patent Office when it was established by Congress in 1836. In 1975 it was renamed the Patent and Trademark Office to reflect its dual function. The PTO is now organized pursuant to 35 U.S.C.A. § 1 et seq.

Under the direction of the secretary of commerce, the PTO is run by the commissioner of patents and trademarks, a deputy commissioner, several assistant commissioners, and a support staff of more than 1,000 employees. The primary job of the commissioners is to review the merits of patent and trademark applications. Patents are typically issued upon a showing that a particular applicant has discovered or developed a new and useful process, machine, article of manufacture, chemical composition, or other invention. Trademark protection is typically afforded to applicants who are seeking to identify their commercial goods by means of a distinctive word, name, symbol, or other device.

Trademark applications must be submitted with a drawing of the proposed mark; patent applications must be accompanied by a detailed description of the invention. A filing fee is also required for both patent and trademark applications. Applications are reviewed at the PTO by persons of competent legal knowledge and scientific ability, though such persons need not be scientists or lawyers to qualify for the job. Because the application process often requires a significant amount of technical expertise and legal acumen, many applicants hire INTELLECTUAL PROPERTY attorneys to represent them. The commissioner of patents and trademarks maintains a roster of attorneys and other agents who are eligible to represent applicants in proceedings before the PTO. Each year the PTO receives hundreds of thousands of patent and trademark applications. However, only a fraction of the applications are approved. During the fiscal year of 2000 the PTO issued 176,087 patents and registered approximately 106,383 trademarks.

When the application process is completed, the PTO attaches its seal of authenticity to all patents and trademarks that have been approved. Additionally, the PTO publishes the *Official Gazette,* a weekly notice of all successful patent and trademark applications. Old editions of the *Gazette* dating back to 1872 are kept at a library in the PTO. The library contains more than 30 million documents, including ownership records for both U.S. and foreign patents and trademarks. The library is open to the public, and the PTO will furnish certified copies of patents, trademarks, and other library records to any interested person.

Patent applicants who are dissatisfied with a decision made by the PTO may appeal to the Board of Patent Appeals and Interferences. The board consists of the commissioner of patents and trademarks, the deputy commissioner, an assistant commissioner for patents, an assistant commissioner for trademarks, and individuals known as examiners-in-chief. Trademark applicants can appeal adverse decisions to the Trademark Trial and Appeal Board, which has a similar composition. Applicants who lose before either the Board of Patent Appeals and Interferences or the Trademark Trial and Appeal Board may appeal directly to the U.S. Court of Appeals for the Federal Circuit, which is vested with jurisdiction over most intellectual property matters.

In addition to examining the merits of patent and trademark applications, the PTO performs studies regarding the development of intellectual PROPERTY LAW at the domestic and international levels. These studies have allowed the PTO to establish a number of programs to recognize, identify, assess, and forecast technological trends and their utility to industry. The PTO has relied on these programs in its efforts to strengthen patent and trademark protection around the world.

The PTO, located in Arlington, Virginia, employs over 5,000 staff members to support its major functions of examining and issuing patents and examining and registering trademarks. Since 1991, the PTO has operated similarly to a private business, providing products and services in return for fees that pay for PTO

**Patent Applications and Grants, 1840 to 2000**

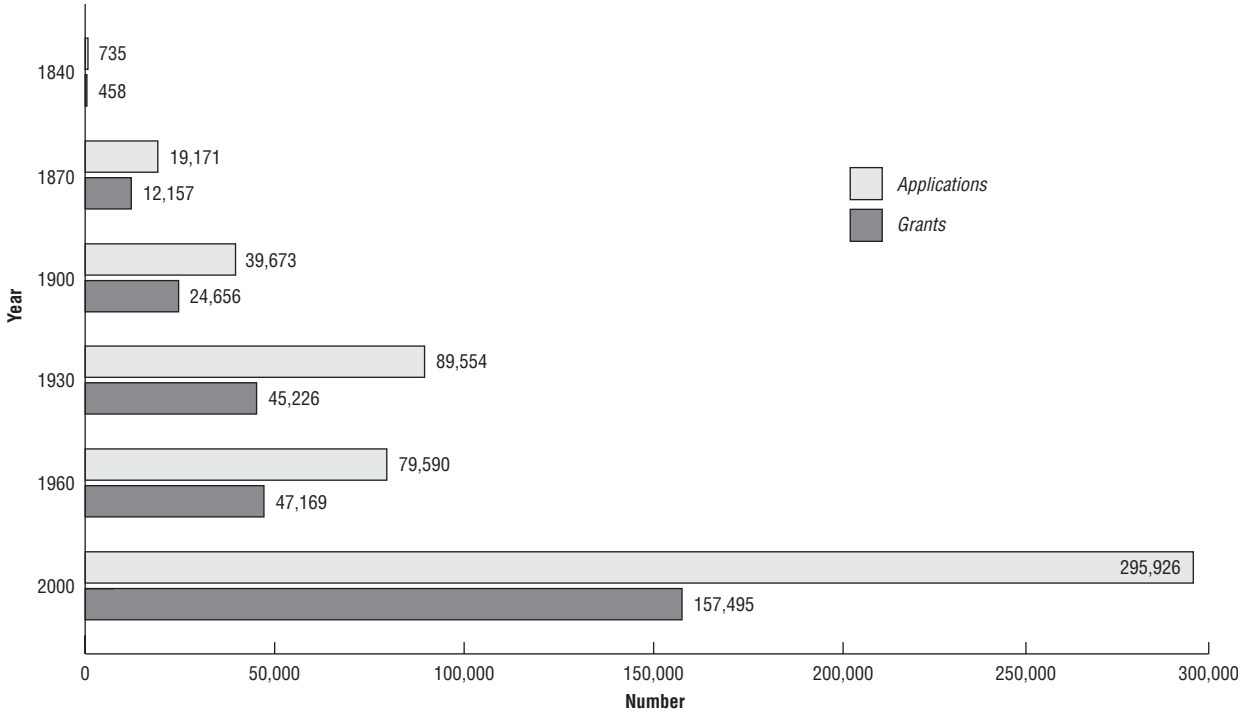


SOURCE: U.S. Patent and Trademark Office web page.

operations, although increased filings for patents and trademarks have caused fiscal strain. The PTO has responded by a variety of methods including electronic filing. The PTO features a user-friendly Web site that permits users to apply for a patent or file a trademark online as well as checking the status of patents and trademarks as they move through the application or filing process.

FURTHER READINGS

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*U.S. Government Manual* Website. Available online at <www.gpoaccess.gov/gmanual> (accessed November 10, 2003).

CROSS-REFERENCES

Commerce Department; Intellectual Property; Jurisdiction.

## PATENT WRIT

*An open court order in earlier times; a writ that was not folded and sealed up as a close writ would be.*

## PATENTS

*Rights, granted to inventors by the federal government, pursuant to its power under Article I, Section 8, Clause 8, of the U.S. Constitution, that permit them to exclude others from making, using, or selling an invention for a definite, or restricted, period of time.*

The U.S. patent system is designed to encourage inventions that are useful to society by granting inventors the absolute right to exclude all others from using or profiting from their invention for a limited time, in exchange for disclosing the details of the invention to the public. Once a patent has expired, the public then has the right to make, use, or sell the invention.

Once a patent is granted, it is regarded as the PERSONAL PROPERTY of the inventor. An inventor's property rights in an invention itself are freely transferable and assignable. Often employees who invent something in the course and scope of their employment transfer and assign their property rights in the invention to

their employer. In addition, a patent holder, or patentee, can grant a license to another to use the invention in exchange for payment or a royalty.

Inventors are not required to participate in the patent system, and they can elect instead to try to keep their invention a trade secret. However, if the inventor begins to sell his or her invention or allows the public to use it, others can study the invention and create impostor products. If this happens, the original inventor has no protection because he or she did not obtain a patent.

There are three types of patents: (1) design patents, (2) plant patents, and (3) utility patents. Design patents are granted to protect a unique appearance or design of an article of manufacture, whether it is surface ornamentation or the overall configuration of an object. Plant patents are granted for the invention and asexual reproduction of a new and distinct variety of plant, including mutants and hybrids. Utility patents are perhaps the most familiar, applying to machines, chemicals, and processes.

### Governing Laws

Patent law in the United States is based upon statutes located in Title 35 of the U.S. Code, including the Patent Act of 1952. The rules of the PATENT AND TRADEMARK OFFICE, found in Title 37 of the CODE OF FEDERAL REGULATIONS, provide additional authority. In addition, the GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT) has led to significant changes in U.S. patent law that are designed to bring some aspects of U.S. law into conformity with those of the country's trading partners. The GATT Implementation Act was signed into law in 1994, and those of its provisions that impact U.S. patent law began to take effect in 1995.

### Patent Duration

One important change in U.S. patent law resulting from GATT is the duration of U.S. patents. Patents were originally given 14-year terms from the date of issue, until that was changed in 1861. From 1861 until the implementation of GATT, the term of a patent was 17 years from the date of issue. Under GATT, all patents issued after June 7, 1995, have a term of 20 years from the effective filing date. GATT contained a retroactive component which provided that all patents that had been issued, but not yet expired, as of June 7, 1995, would have a term that is the longer of 20 years from its effective filing date or 17 years from the date of issue. The effective filing date is the date on which the earliest U.S. application is filed under which priority is claimed. In the United States, patent rights begin when the patent is issued.

Upon expiration of the term, the invention becomes public property and is freely available for use, reproduction, or sale. Patents can be extended for up to five years under limited circumstances, including interference proceedings (proceedings to determine the priority of an invention), secrecy orders, and appellate review.

### Patentable Inventions

The Patent Act provides a broad definition of what can be patented: any new or useful process, machine, manufacture, composition of matter, or any new and useful improvement thereof. Although these categories of patentable subject matter are broad, they are also exclusive, and any item that does not fall into one of them is not patentable.

As defined by the Patent Act, a process is a method of treating certain material to produce a specific physical change in the character or quality of that material. A machine is a device that uses energy to get work done. The term manufacture refers to a process whereby an article is made by the art or industry of people. A composition of matter is a compound produced from the combination of two or more specific ingredients that has properties different from, or in addition to, those separately possessed by each ingredient.

An improvement is any addition to, or alteration in, a known process, machine, manufacture, or composition that produces a useful result. The right to a patent of an improvement is restricted to the improvement itself and does not include the process, machine, or article improved.

Naturally occurring substances, such as a type of bacteria or an element, are not patentable. But a genetically engineered bacterium is patentable. The law of gravity and other laws of nature are not patentable. Other abstract principles, fundamental truths, calculation methods, mathematical algorithms, computer programs, and bookkeeping systems are not patentable. Ideas, mental theories, or plans of action alone, without concrete means to implement them, are not patentable, irrespective of how revolutionary and useful to humanity they might be.

# Is the Human Genome Patentable?

Deoxyribonucleic acid (DNA) is often called the "blueprint of life." Between 1980 and the early 2000s efforts were made to patent the human genome, which contains the entire genetic code for the human species. These efforts have generated controversy, especially between members of the scientific and religious communities. In 1980 the U.S. Supreme Court contributed to the controversy by ruling that live, human-made microorganisms are patentable subject matter under the federal Patent Act. Applying the Supreme Court's ruling to the human species, the U.S. **PATENT AND TRADEMARK OFFICE** (USPTO) extended patent protection to isolated and purified strands of the human genome.

The U.S. Constitution gives Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S.C.A. Const. Art. I Section 8, Clause 8. Pursuant to this authority, Congress enacted the Patent Act of 1952. July 19, 1952, c. 950, 66 Stat. 797. Section 101 of that act allows a patent to be obtained by anyone who "invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." 35 U.S.C.A. 101. Congress also created the USPTO to issue patents.

A patent is like a legally protected **MONOPOLY** over a specific **INTELLECTUAL PROPERTY**. Patents grant inventors the exclusive right to make, use, or sell their inventions for a period of 20 years. 35 U.S.C.A. 154. Patent holders can prevent anyone else from using their invention, even someone who innocently infringes on the patent holder's intellectual property rights by subsequently developing the same invention independently. Alternatively, patent holders can require that subsequent users pay licensing fees, **ROYALTIES**, and other forms of compensation for the right to make commercial use of an invention. In exchange for this broad, exclusive right over an invention, patent holders must disclose their invention to the public in terms that are sufficient to allow others in the same field to make use of it. 35 U.S.C.A. 112.

The patentability of inventions under U.S. law is determined by the Patent and Trademark Office (USPTO) in the **DEPARTMENT OF COMMERCE**. A patent application is judged on four criteria. The invention must be "useful" in a practical sense (the inventor must identify some useful purpose for it), "novel" (i.e., not known or used before the filing), and "nonobvious" (i.e., not an improvement easily made by someone trained in the relevant area). The invention also must be described in sufficient detail as to enable one skilled in the field to use it for the stated purpose (sometimes called the "enablement" criterion). In general, raw products of nature are not patentable. DNA products usually become patentable when they have been isolated, purified, or modified to produce a unique form not found in nature. The USPTO has three years to issue a patent.

As of 2003 over 3 million genome-related patent applications have been filed. U.S. patent applications are confidential until a patent is issued. The human genome represents a biological map of the DNA in a body's cells. The human body is made up of roughly 1 trillion cells. Every cell contains 23 pairs of chromosomes, and each chromosome houses a single DNA molecule. The chief DNA task is to provide cells with instructions for building thousands of proteins that perform most of the body's essential chores. Proteins contain amino acids and enzymes that catalyze hormones, biochemical reactions, and major structural development, a process known as protein synthesis.

The legal controversy surrounding DNA patenting intensified during 1988 when Congress initiated the Human Genome Project (HGP), a 15-year, $3 billion dollar research project designed to map and sequence the entire human genome. The HGP goal is to develop diagnostic tests and treatments for more than 5,000 genetically-based diseases. A rough draft of the entire genome was completed in June 2000.

In 1995 a group of more than 200 Catholic priests, Protestant ministers, Jewish rabbis, and other religious leaders gathered in San Francisco at the annual Biotechnology Industry Organization conference to attack the laws that have allowed scientists to patent the DNA of various organisms. They argued that such laws violate the sanctity of life by unlocking divine secrets and enabling scientists to patent God's creations. Environmentalists, who assert that nature is devalued by laws enabling corporations to reduce a species and its molecules to ownership, have lev-

eled a variation of this criticism. They raise questions about what will happen to society when its most basic notions about the distinctions between animate and inanimate objects are blurred, as human life becomes just another commodity to be bought and sold on the open market.

Some of the strongest criticism has come from the scientific community itself. Certain members of that community have argued that patenting human DNA sequences hampers the free flow of information necessary to most research projects. They contend that having to invest time in tracking down a patent holder, entering into licensing agreements, and paying royalties drives up costs, slows research, and provides disincentives for scientists to undertake research in the first place. They observe that two companies, Incyte Pharmaceuticals Inc. and Human Genome Sciences Inc., own more than half of the U.S. patents on human genetic structures, and thus can exact exorbitant fees from **HEALTHCARE** companies hoping to put their discoveries to use.

Proponents of DNA patenting point to the groundbreaking discoveries that have already been patented, including genetic links to breast cancer, colon cancer, multiple sclerosis, tuberculosis, diabetes, cystic fibrosis, Huntington's disease, and Alzheimer's disease. Proponents maintain that the speed at which these discoveries were made was dramatically increased by laws making them a commercially valuable, patentable invention.

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**CROSS-REFERENCES**

Intellectual Property; Patent and Trademark Office.

However, the 2001 Supreme Court case *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Intern., Inc.*, 534 U.S. 124, 122 S.Ct. 593, 151 L.Ed.2d 508 (2001), affirmed that newly developed plant breeds are patentable subject matter. In an opinion written by Justice CLARENCE THOMAS, the Court said that plants were patentable under the general utility patent statute. To obtain patent protection, a plant breeder must show that the plant it has developed is new, useful, and nonobvious, and must provide written description of plant and deposit of seed that is publicly accessible.

A process that uses a NATURAL LAW, fundamental principle, or mathematical equation can be patented. For example, in the 1981 decision of *Diamond v. Diehr,* 450 U.S. 175, 101 S. Ct. 1048, 67 L. Ed. 2d 155, the U.S. Supreme Court decided that an industrial process could be patented in spite of the fact that it depended upon a mathematical equation and involved the use of a computer program.

The *Diamond* ruling upheld a patent to two inventors for an improved process for molding rubber articles. A patent examiner had previously ruled against the inventors, finding that they sought patent protection for a computer program, which the Supreme Court had expressly said could not be patented. The process in question, which was patented, was developed to calculate with greater accuracy the amount of time required to obtain uniform curves in synthetic rubber molds.

As a further requirement for an invention to be patentable, it must meet three criteria: (1) novelty (it does not conflict with a prior pending patent application or a previously issued patent); (2) utility (virtually any amount of usefulness suffices); and (3) nonobviousness (the invention is not obvious to a person of ordinary skill in the art to which the invention pertains).

It is not always easy to determine what is an "ordinary level of skill" or what is "obvious" in deciding whether an invention meets the criterion of nonobviousness. The U.S. Supreme Court decision in *Graham v. John Deere Co.,* 383 U.S. 1, 86 S. Ct. 684, 15 L. Ed. 2d 545, 148 U.S.P.Q. 459 (1966), provides the analytical framework in which to decide whether an invention is nonobvious. Just because all the parts of

an invention may be found in a prior art does not necessarily make the invention obvious.

Patents may be rejected for nonutility when their only use is a violation of public morals, such as a tool that can only be used to commit a crime.

### Individuals Entitled to Patents

To be entitled to a patent, an inventor must be the first and original inventor. Joint inventors can obtain a patent for a joint invention, but none of them can obtain a valid patent as a sole inventor.

U.S. law requires that patent applications be filed in the name of and signed by the actual inventor or inventors. If one of the actual inventors is deceased, then the patent application may proceed in the names of the other inventors, but the application must still properly identify all inventors. If all of the inventors, or the sole inventor, are deceased, another person may file a patent application in their place, but only if the filing individual has a legal right to file (such as through descent of the inventors' personal property) and the inventors are still properly identified.

In the United States, the initial right to file for a patent rests with the actual inventor, even if that person is an employee who creates the invention in the course and scope of his or her employment using employer resources. However, it is a regular practice for employees engaged in research leading to patentable inventions to sign written contracts that specify that they will assign to their employer the exclusive rights under any patent obtained during the course of the employment. The employee may receive a certain percentage of the profits earned by the invention in exchange for the assignment of the patent.

Government employees, other than those employed in the Patent and Trademark Office, are entitled to obtain patents for their inventions or discoveries. During the period of employment and for one year thereafter, anyone who is employed in the Patent and Trademark Office is ineligible to acquire or take directly or indirectly, except by inheritance or BEQUEST, any rights in a patent that is issued or to be issued by the office.

### Procedure for Obtaining a Patent

To obtain a valid patent, an inventor must make an application to the Patent and Trademark Office. Before making an application, inventors generally make a preliminary patentability search, a relatively low-cost search of all of the patents issued in the United States, to determine if it is feasible to proceed with an application. Often professional searchers perform these searches and give the results to a patent attorney who provides an opinion as to whether the invention is patentable. Although the preliminary search is not required by law, if it is performed, the inventor is required to provide all information obtained through that search to the Patent and Trademark Office if she ultimately files a patent application.

The application must include specifications and drawings of the proposed invention, an oath signed by the inventor, and the requisite fee. The Patent and Trademark Office keeps patent applications confidential until the patent is granted. The term *letters patent* refers to the document that contains the grant of a patent right.

### Specification

A specification is a written description of the invention that includes the manner and process of creating, constructing, compounding, and using it. It should also state the practical limits of the operation of the invention. The description must be in complete, clear, concise, and precise terms to make the limits of the patent known, to protect the inventor, and to encourage the inventiveness of others by informing the public of what is still available for patent. Total disclosure of the invention is mandated to allow the public to freely use the invention once the patent has expired. No patent will be granted if the description purposely omits the complete truth about the invention in order to deceive the public.

The specification concludes with the claims, which explicitly describe both the structure of the invention and what it does. By regulation and time-honored tradition, the patent claims are written in the form of a continuous run-on sentence. The claims give the Patent and Trademark Office and the courts the opportunity to determine whether the subject matter is patentable or whether it has been anticipated by a previous invention. A claim can be either rejected by the Patent and Trademark Office or deemed invalid if it is vague, indefinite, or incomplete. The claim should cover only the actual invention. It can also be rejected if it is so broad as to include what is old and known information in addition to what is new. Each claim

*An example of a patent*

## Patent

**3,032,012**
**RETRACTABLE BALL POINT PEN**
**Charles K. Lovejoy, Atlanta, Ga., assignor to**
**Scripto, Inc., a corporation of Georgia**
**Filed July 19, 1960, Ser. No. 43,921**
**2 Claims. (Cl. 120–42.03)**

This invention relates to writing instruments and more particularly to an improved ball point pen having a retractable writing unit wherein the extremity of the writing tip is inclined towards the central longitudinal axis of said pen barrel so as to afford a readily visible writing tip and achieve a near vertical writing angle formed between the axis of the inclined extremity of the writing tip and the writing surface when held by the writer in normal writing position.

In the past ball point pens have utilized angled writing tips, however, such angled tips were not frontally disposed of the central longitudinal axis of the pen barrel, frontally disposed being defined as that side of the writing instrument which the writer sees during writing when the pen is held in normal writing position. The advantage that is achieved by the present invention is that a readily visible writing tip is afforded which provides a near vertical writing angle formed between the axis of the inclined extremity of the writing tip and the writing surface when held by the writer in normal writing position. In addition, the present invention provides a writing instrument that is balanced, the reason for this being that the weight of the writing instrument is stably supported on the writing tip in an underslung fashion when in contact with the writing surface since the writing tip is above or frontally of the central longitudinal axis of the pen barrel which precludes any tendency to rotate in the writer's hand.

These and other features of the present invention are described in further detail below in connection with the accompanying drawings, in which:

FIG. 1 is a longitudinal cross section of the writing instrument according to the present invention showing the writing unit at projected position;

FIG. 2 is an enlarged longitudinal cross section of the forward portion of the pen shown in FIG. 1;

FIG. 3 is a transverse cross section taken along the line 3—3 in FIG. 2; and

FIG. 4 is a longitudinal cross section of the extremity of the writing tip.

Referring now in detail to the drawings, the writing instrument is generally designated by the reference numeral **10**, and has a retractable ball point writing unit **12** housed within forward barrel portion **14** and rear barrel portion **16** which are normally held together in releasable threaded engagement. The writing unit **12** is longitudinally slidable in inclined relation within the central bore **18** that is formed within forward barrel portion **14** and rear barrel portion **16** and which terminates at its forward end in an aperture **20**. The writing unit **12** is selectively projected or retracted by a projection and retraction mechanism **22** which can be of the type disclosed and claimed in U.S. Patent No. 2.930.354 and which may incorporate the further structural features that are disclosed and claimed in copending application Serial No. 739,545, filed June 3, 1958, now Patent Number 3,007,444. The details of this mechanism are clearly disclosed in the above mentioned issued patent and copending application and hence will not be discussed in detail here, but merely referred to generally by the reference numeral **22** which is recognized to include a latch L and a plunger P. The latch L in response to a depression of plunger P is adapted to engage longitudinally spaced latch shoulders disposed within rear barrel portion **16** for selectively positioning the writing unit at its projected or retracted position. The writing unit is normally urged toward retracted position by spring **24** which is positioned between shoulders **26** and **28** formed in the forward barrel portion **14** and on the writing unit **12**, respectively. Writing unit **12** has a forward metallic tube section **30** of reduced diameter which carries at its forward end writing tip **32**. The writing tip **32** is of general cylindrical shape having a conical extremity **34** formed about an axis **36** that is inclined to the axis **38** of the cylindrical portion of the writing tip **32**. The conical extremity **34** is also formed within the principal diameter that defines the cylindrical configuration of writing tip **32**. A ball **40** is rotatably housed within the angled, conical extremity **34**. The writing unit **12** is prevented from rotating within the central bore **18** by means of key **42**, which is attached to the forward metal tube portion **30**, being slidably disposed in slot **44** which is formed in forward barrel portion **14**. To illustrate the combined advantages of a readily visible writing tip having a near vertical writing angle, shown by reference numeral **46** and it can be readily seen in FIGS. 1 and 2 that the inclined writing extremity **34** is frontally disposed of the longitudinal axis **46** of the writing instrument. By this arrangement the writing extremity is clearly visible to the writer. The writing angle θ is shown as the angle formed between the axis **36** of the angled extremity **34** of writing tip **32** and the writing surface **48**. By referring to FIG. 2 it is readily seen that this angle approaches 90 degree when held in normal writing position.

The present invention has been described in detail above for purposes of illustrating only and is not intended to be limited by this description or otherwise except as defined in the appended claims.

I claim:

1. In a writing instrument having a barrel formed about a central longitudinal axis with a main central bore and an aperture formed in its forward end, a writing unit including a ball point writing tip at its forward end slidably disposed within said central bore for shifting between projected and retracted positions with respect to said forward barrel end, means normally biasing said writing unit toward retracted position and means for selectively positioning said writing unit at projected and retracted positions, the improvement of said ball point writing tip having a conical portion the axis of which is inclined toward the central longitudinal axis of said barrel, said conical portion terminating in a ball retaining lip which lies in a plane facing the longitudinal axis of said barrel and adapted for disposition through said forward barrel aperture so that said conical portion of the writing tip when projected is frontally disposed of and inclined toward said central longitudinal axis of said barrel to afford a visible writing tip having a near vertical writing angle when brought in contact with a writing surface and to provide a balanced writing instrument that precludes any tendency to rotate about said central longitudinal axis of said pen barrel when held by the writer in normal writing position.

2. In a writing instrument the improvement as defined in claim 1 and further characterized in that said writing unit is keyed against rotation within said barrel.

**References Cited** in the file of this patent

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must contain only one single and distinct invention, but more than one claim can be included in a single application. The inventor also must disclose in the specification what she considers to be the optimum way of practicing or using the invention.

### Drawings

Drawings must be included in a patent application only when they are necessary for understanding the subject for which a patent is sought. If drawings are omitted, the commissioner of patents can require that they be submitted within two months from the time that the inventor receives notice. Drawings that are submitted after that time cannot be used with the application, and a patent can be denied due to the inadequacy of the specification.

The commissioner can require that the inventor provide a model of the invention. In addition, when the invention involves a composition of matter, the applicant might have to furnish a specimen of it for inspection or experimentation.

### Oath and Fee

The application for a patent is accompanied by an oath that the inventor believes herself to be the first and original inventor. The patent laws of the United States do not discriminate on the basis of the citizenship of the inventor. An inventor from another country may apply for a patent on the same basis as a U.S. citizen.

An application for an original patent must be accompanied by a filing fee payable to the Patent and Trademark Office. Fees vary depending upon the type of application and the size of the entity applying for the patent. Small entities pay lower fees. When a patent is issued, the patentee must pay an additional fee. These fees also vary based on the size of the entity to whom the patent is issued. Additional fees are charged for maintaining a patent, which likewise vary with the size of the entity involved in the maintenance of the patent.

### Patent and Trademark Office Proceedings

Upon receipt of an application for a patent, the commissioner must examine it to determine whether the applicant is entitled to a patent. The Patent and Trademark Office is not restricted to the use of technical evidence in reviewing applications but can act upon anything that establishes the facts with reasonable certainty.

A patent application can be rejected for substantial and reasonable grounds, such as when the alleged invention lacks usefulness or when the invention has been publicly used or sold previously. If the patent is rejected, the commissioner must notify the applicant of the rejection and the grounds for the rejection. An applicant can request a reexamination of the application and submit evidence to rebut the reasons for rejection. Failure to request a review is considered a waiver of the right to challenge the rejection.

A pending application may be amended until the Patent and Trademark Office ultimately decides the matter, either by issuing the patent or rejecting the patent application. New and enlarged claims can be added by amendment only when they are fairly within the scope of the original claim. An amendment that involves a material departure from the invention described in the original specification or enlarges the scope of the original application is invalid. When made within a reasonable time, amendments relate back to the original date of the application and are treated as if they were included in the original application. This is significant because time determines who will be entitled to the patent when two inventors claim essentially the same invention.

### Loss or Denial of a Patent

An individual who has invented or discovered a process or object is entitled to a patent if the item or process falls within the specific categories of patentable matter and possesses the necessary attributes of invention, novelty, and utility.

**Anticipation** A patent will be denied in the event that anticipation occurs, which means that the complete invention was disclosed before the applicant's invention or discovery. This situation might arise when substantially similar elements that produce, or are capable of producing, the same results are found in previously invented machines that are known and commercially used. However, if the two similar inventions accomplish substantially different results or perform totally different functions, they are not deemed to be anticipated, and the second invention will be patentable even if it is essentially identical structurally to the first invention.

For a prior patent to anticipate a later invention, it must disclose the complete and operative invention in such full, clear, and exact terms as

to enable a skilled individual involved in the art to practice the invention without the exercise of his or her own inventive skill. A process or instrument used for one purpose might anticipate an invention that uses essentially the same method for a new use if the latter is so comparable to the original invention that it would be apparent to a person experienced in the field. An invention is not anticipated if it has been produced previously due to an accident but is incapable of being repeated because the necessary knowledge to do so is lacking. If the results could be reproduced, however, the invention is considered anticipated.

Previous experimental efforts that are abandoned before the invention achieves actual results do not anticipate the invention. The invention is anticipated, however, if the experiment proves successful.

**Statutory Bar** Section 102(b) of 35 U.S.C.A. provides a statutory bar to some otherwise meritorious inventions. Under this rule, an inventor is not issued a patent if her invention was described in a book, catalog, magazine article, thesis, or trade publication in the United States or any other country before she invented it or more than a year before she filed the patent application. This statutory bar applies regardless of who made the invention discussed in the prior publication. Thus, if an inventor publishes a description of an invention or places the invention for sale or for public use, a statutory bar can result. Once an invention is placed for sale in the United States, the inventor has just one year in which to file a patent application or the right to patent that invention is forever lost. The clock begins when the invention is placed for sale, even if it is never actually sold. This rule is intended to guarantee that an inventor cannot expand the period of patent protection for the commercial exploitation of her MONOPOLY.

**Abandonment and Forfeiture** An inventor can lose the right to obtain a patent through ABANDONMENT. An invention is regarded as abandoned when it is subject to free and unrestricted public use.

A recognized exception to this general rule, called the "experimental use exception," occurs when an invention must be placed in the public use to determine its operability. However this exception is very narrow, and the inventor must be careful to document the invention to support a later claim of experimental use.

An inventor forfeits the right to a patent when she delays making a claim or hides the invention for an extensive period of time because such conduct unduly postpones the time that the public would be entitled to the subsequent free use of the invention. Delay in applying for a patent does not constitute abandonment if the inventor can demonstrate that she never intended to abandon the invention.

**Priority** When two or more inventors discover or invent the same thing, patent priority can deny a patent to one of the inventors. Patents are generally issued to the first inventor, as determined by certain guidelines. The Patent and Trademark Office commences an interference proceeding to determine the priority of invention between two or more inventors who are claiming substantially the same patentable invention and who each appear to be entitled to the patent but for the other's application. Such a proceeding examines the dates of conception and reduction to practice and also considers the diligence exercised by the individual who conceived of the invention first but did not reduce it to practice until after the other inventor had done so. The date of conception is the date when the idea, encompassing all the basic and necessary components of the invention, becomes so clearly defined in the mind of the inventor as to be capable of physical expression. Reduction to practice occurs when the way in which the invention works is readily demonstrable.

An inventor who is the first to conceive of an invention and reduce it to practice is entitled to a patent. When an inventor who first conceives of an invention exercises reasonable diligence in reducing it to practice, she will receive a patent, even if the inventor who was second to conceive of the idea was faster in reducing it to practice.

Another general rule is that an individual who actually reduces an invention to practice has priority over one who constructively reduces it to practice. Actual reduction takes place when the invention is put into practical form, whereas constructive reduction occurs when a patent application is filed with the Patent and Trademark Office.

Former U.S. patent law only allowed inventive activity that actually took place within the borders of the country to establish a date of invention. GATT has changed this restriction to allow foreign inventors to prove inventive activity that took place in another country to show a

date of invention. Because the United States has a "first to invent" patent system, whereas most other countries have a "first to file" system, the United States had effectively discriminated against foreign inventors because it gave patents to the first inventor to actually make the invention in the United States. GATT addressed this issue that for many years was a disadvantage for U.S. trading partners.

### Appeals

Applicants for a patent, or for the reissue of a patent, whose claims have twice been rejected can bring an appeal from the final decision of the primary examiner to the Patent Office Board of Appeals and Interferences. An applicant who is dissatisfied with the decision of the board of appeals can appeal to the U.S. Court of Appeals for the Federal Circuit or start a civil action against the commissioner in U.S. District Court for the District of Columbia within a specified period of time after the board issues its decision. The applicant is not permitted, however, to institute both a civil lawsuit and an appeal to the U.S. Court of Appeals for the Federal Circuit.

### Reissue and Disclaimer

A reissued patent is the grant of a new patent that modifies the original invention by the addition of new elements. A reissued patent is essentially an amendment of the original patent effected to rectify some defect or insufficiency in it.

A disclaimer is the voluntary abandonment of some portion of a patent claim that would render it invalid for lack of novelty. It limits the claim to what is new and thereby saves the patentability of the item by circumventing the invalidity that would otherwise defeat the entire claim. An inventor who knows that a patent contains invalid claims should immediately file a disclaimer because the failure to do so could result in the rejection of the patent.

### Assignment and Lease

An assignment is a transfer either of the entire patent, encompassing the exclusive right to make, use, and sell the invention, or a specified part thereof, in the United States. The assignment must be in writing and should be recorded in the Patent and Trademark Office. In the event that a patent is assigned but the assignment is not recorded, a later purchaser of the patent can use the purchased patent as if it had never been assigned.

An assignment is different from a license because a license merely provides the licensee with a temporary right to use the patent as agreed. A license need not be in writing. Whether a transfer is an assignment or a license is determined by reference to the contract between the parties. A patent license is personal to the licensee and cannot be transferred unless specifically indicated in the agreement. The licensor, the individual who issued the license to another, ordinarily requires the payment of a royalty for the use of the patent.

### Marking Patented Items

A patentee or any authorized party who makes or sells any patented item must provide notice to the public that the article is patented by placing the word *patent* and the number given to the patent on the article. If the nature of the article prohibits such a designation, a label that contains the same information should be enclosed in, or marked on, its package. This marking requirement is not applicable to a patent for a process.

Inventors can mark their inventions with the words *patent pending* if they have a patent application on file and pending with the Patent and Trademark Office at the time the products are marked.

Federal law imposes a penalty for various forms of false marking, including marking an unpatented article with the word *patent,* or any term that implies that the article is patented, for the purpose of deceiving the public. If a patent holder fails to mark the patented product as required, he or she may not recover damages for any patent infringement that may take place as a result.

### Infringement

Infringement is the unauthorized making, using, or selling for practical use or for profit an invention covered by a patent. Effective 1996, GATT also made the offer to sell a patented invention without the permission of the patentee a direct infringement violation.

Although no infringement can occur before a patent is issued, infringement can occur even if the infringer does not have any actual knowledge of the existence of a patent. A direct infringer is one who makes, uses, or sells the patented invention without permission from the patentee. An indirect infringer is one who actively encourages another to make, use, or sell

a patented invention without permission. A contributory infringer is one who knowingly sells or supplies a part or component of the patented invention to another, unless the component is a staple article of commerce and is suitable for a substantial noninfringing use.

The definition of an infringement, provided in 35 U.S.C.A. § 271, has been greatly expanded in the late 1980s and 1990s. For example, it is an infringement to apply for federal FOOD AND DRUG ADMINISTRATION approval of a patented drug if the purpose is to obtain approval to manufacture, use, or sell the drug before its patent expires. It is also an infringement to provide a substantial portion of the components of a patented invention to someone outside of the United States so that the components can be assembled outside of the reaches of U.S. patent law. Similarly, it is an infringement to import into the United States a product made by a process covered by a U.S. patent although it was produced outside the United States.

### Remedies

The Patent Act provides for several remedies in the event of an infringement, including injunctive relief, compensable damages, treble damages when appropriate to punish the infringer, payment of attorneys' fees in cases involving knowing infringement, and payment of the costs incurred in bringing the infringement claim in court.

The owner of a patent has a right of action for the unlawful invasion of patent rights by an infringement that has arisen within six years from the date when the lawsuit is initiated.

**Injunction** Courts frequently grant injunctions to protect property rights in patents. An INJUNCTION is a court decree that orders an infringer to stop illegally making, using, or selling the patented article. An injunction is only granted when an award of monetary damages will not adequately remedy the situation—for example, when an infringer plans to continue the unlawful acts. If an individual disobeys an injunction and continues to make use of an invention without permission, he will be guilty of CONTEMPT and subject to a fine or imprisonment or both.

**Damages** In an action for infringement of a patent, compensation for prior infringements can be awarded; however, compensation will be denied for use of the invention before the date the patent was issued. Where there is an infringement, the court will award the patentee actual damages adequate to compensate for the loss in an amount that is equal to a reasonable royalty for the infringing use, together with interest or costs set by the court. If the jury in a trial does not determine the amount of damages, the court will. In either case, the court, under the authority of statute, can increase the damages awarded by the jury up to three times the amount determined, called treble damages. Treble damages are punitive and awarded only in certain instances, such as when the infringer intentionally, in bad faith, infringed the patent.

The question of whether amendments to a patent can bar an infringement claim was ruled on by the Supreme Court in the 2002 case of *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 122 S.Ct. 1831, 152 L.Ed.2d 944 (2002). In that case, the Court unanimously ruled that a patent amendment is not an absolute bar to a claim of infringement under the doctrine of equivalents. Justice ANTHONY KENNEDY, writing for the court, stated the patentee has the burden of proving that the amendment did not surrender the particular equivalent in question.

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CROSS-REFERENCES

Intellectual Property; License; Property Law; Royalty.

## PATERNITY

*The state or condition of a father; the relationship of a father.*

English and U.S. COMMON LAW have recognized the importance of establishing the paternity of children. In the United States, a child born outside a legal marriage relationship will lose CHILD SUPPORT and inheritance rights if the fatherhood of the child is not legally established. The father may voluntarily acknowledge paternity in a legal document filed with a court

## The Impossible Heir

In contemporary law the legal determination of paternity generally rests on the results of blood and genetic testing. However, there are times when it can be proved that it was impossible for a husband to be the father of his wife's child because the husband was absent during the period when conception occurred.

In an unusual reversal of modern law on paternity, the Alabama Supreme Court, in *Tierce v. Ellis,* 624 So. 2d 553 (1993), found that Dennis Tierce was the legitimate son of William Tierce, even though William was serving overseas in the armed forces during **WORLD WAR II** when Dennis was conceived.

William Tierce returned from the war to Alabama in December 1945 to discover that his wife Irene was six months pregnant. He immediately filed for **DIVORCE** on the ground of **ADULTERY**. The divorce was granted in February 1946. On April 4, 1946, Dennis Tierce was born. William Tierce was erroneously listed as the father on the birth certificate, but Tierce never knew of this mistake. He remarried and had five children, including his daughter, Sheila Ellis.

William Tierce died in 1972. When the executors of his estate filed a list of heirs in 1989, they listed Dennis as William's son. Sheila Ellis filed suit, challenging the paternity of Dennis and his status as an heir. The trial court ruled that it was impossible for Dennis to be the biological son of William.

The Alabama Supreme Court reversed, basing its decision on two grounds. First, under the Alabama Uniform Parentage Act (Ala. Code §§ 26-17-1 et seq. [1992 and Supp. 1994]), a husband is presumed to be the father of a child born within three hundred days of a divorce. Dennis was born sixty days after his parents' divorce. Second, the court invoked the **COMMON LAW** rule of repose, which requires a prompt disposition of a legal dispute. The court concluded that because William Tierce did not seek a paternity judgment during his divorce proceedings in 1946, his daughter could not now attempt to rebut the marital paternity presumption. Therefore, Dennis Tierce, the impossible heir, could claim a share of the estate of a person he never knew and to whom he was not related.

or may agree to have his name listed as the father on the child's birth certificate. If the man disputes fatherhood, the mother or the state government may initiate a legal proceeding, known as a paternity action, to adjudicate fatherhood.

The common law also established the "marital paternity presumption," which holds that a child born during a marriage is the offspring of the husband. Therefore, a child born as a result of the wife's adulterous affair is recognized as a legitimate child of the marriage. This rule recognized that ILLEGITIMACY brought social stigma as well as severe economic penalties to a child, including the inability to inherit from the husband of the child's mother. By establishing a presumption of paternity and therefore legitimacy, the rule promoted family stability and integrity.

This rule was developed at a time when no medical tests existed to prove paternity. In addition, a husband could not testify that he had no access to his wife at the time of conception. A husband could rebut the marital presumption only by proving his impotence or his absence from the country.

By the late nineteenth century, U.S. courts began to allow the defense of impossibility to rebut the marital presumption. The question of paternity became a fact that could be rebutted by clear and convincing evidence that procreation by the husband was impossible.

In 1973 the COMMISSIONERS ON UNIFORM LAWS proposed the Uniform Parentage Act (UPA), which sought to establish a consistent rule on adjudicating paternity disputes. The UPA, which has been adopted by 18 states, continued to use the marital paternity presumption. In addition, it presumes a mother's husband to be the natural father of a child if the child is born during the marriage or within 300 days after the marriage is terminated. The UPA does state, however, that a presumption of paternity may be rebutted by clear and convincing evidence.

Modern science has made the adjudication of paternity issues easier. Modern blood and genetic testing can accurately determine paternity. Human leukocyte antigen tissue typing can provide up to a 98 percent probability that a certain man is the father of a particular child. The use of DNA testing provides near-positive paternity identification. Many states that have adopted the UPA have created a presumption of paternity based solely on genetic testing. Some courts have questioned the need for the marital presumption at all because of the certainty produced by testing.

The evolving state of the martial presumption of paternity can be seen in the revised Uniform Parentage Act (UPA), published in 2000. While the new UPA retains all of the original presumptions related to marriage, it eliminates the clear and convincing evidence standard for rebutting an assumption of paternity. Instead it states that the presumption may be rebutted "only by admissible results of genetic testing excluding that man as the father of the child or identifying another man as the father of the child." The most recent UPA states: "The existence of modern genetic testing obviates this old approach to the problem of conflicting presumptions when a court is to determine paternity."

In determining a husband's paternity, the court may deny a request for genetic testing if it finds by clear and convincing evidence that the conduct of the mother or the presumed father means it would be unfair to allow that party to deny parentage and it would be wrong to end the father-child relationship. According to the new UPA, the alleged biological father of a child born to a married mother now has standing to bring an action to determine the existence or non-existence of the parent-child relationship. The new UPA also adopts a time limit to rebut the marital presumption to two years following the birth of the child if the presumed father lived in the same household as the child or treated the child as his own.

In addition to the changing provisions of the new UPA, genetic testing has also allowed most states to expand the categories of persons who can challenge the martial presumption and increase the chances that such challenges will be successful. With that, the marital presumption of paternity has become eroded. Twenty-two states now set a scientific standard for a conclusive presumption of non-paternity, while eight states establish a scientific standard for a conclusive presumption of paternity.

But despite the new emphasis on genetic testing, both the newly revised UPA and most state laws and courts put some emphasis on the best interests of the child. In states such as Arizona, Wisconsin, Kansas, Maryland, Montana and Minnesota, courts have said that the best interest of the child must be taken into account when determining paternity. In some cases, courts have upheld the right to refuse genetic tests if it is determined they are not in the best interest of the child; others have stated the best interests of the child must be taken into account after the genetic testing determines paternity.

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CROSS-REFERENCES

DNA Evidence; Family Law; Paternity Suit.

## PATERNITY SUIT

*A civil action brought against an unwed father by an unmarried mother to obtain support for an illegitimate child and for payment of bills incident to the pregnancy and the birth.*

A paternity suit, also known as an affiliation proceeding, is a criminal proceeding in certain states.

Generally the unwed mother initiates a paternity suit; in some jurisdictions, however, if the mother is a minor, proceedings must be initiated by a parent or guardian acting on her behalf.

CROSS-REFERENCES

Child Support; Illegitimacy; Parent and Child.

## ♦ PATERSON, WILLIAM

William Paterson was a distinguished public servant during the early years of the Republic of the United States, serving as governor of New Jersey, a Framer of the U.S. Constitution, a U.S. senator, and associate justice of the U.S. Supreme Court. In recognition of his service to New Jersey, the city of Paterson was named for him.

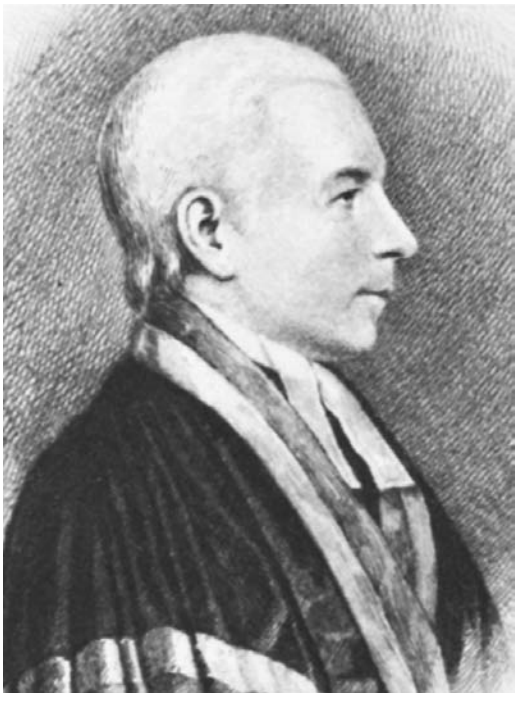

*William Paterson.*
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Paterson was born on December 24, 1745, in County Antrim, Ireland. He emigrated with his family to New Jersey in 1747 and graduated from the College of New Jersey (now Princeton University) in 1763. He was admitted to the New Jersey bar in 1768, establishing a law practice in New Bromley, New Jersey.

He entered government in 1775, serving in the New Jersey Provincial Congress. He became attorney general of New Jersey in 1776, holding the position for seven years. During this period he briefly served in the New Jersey Senate. He also participated in the New Jersey State Constitutional Convention in 1776.

Paterson played a key role in the U.S. Constitutional Convention, which was held in Philadelphia in 1787. As a delegate from New Jersey, Paterson sought to protect his and other small states from demands by larger states that representation be based on population. Paterson offered an alternative to the large-state proposition, or Virginia Plan. His New Jersey Plan went to the other extreme. He proposed that each state have one vote in Congress. Out of this conflict came the compromise that created two houses of Congress, with the House of Representatives based on population and the Senate on equal representation (two votes per state). The compromise also led to the creation of the Supreme Court in Article III of the U.S. Constitution. Paterson, who signed the Constitution, was a strong supporter of the document and campaigned for its adoption in New Jersey.

He was elected to the Senate in 1789 and was one of the authors of the JUDICIARY ACT OF 1789, which created the federal legal structure of Supreme Court, circuit court, and district court. The act created the office of attorney general and gave the Supreme Court the appellate jurisdiction to review state court decisions that involved the Constitution, federal laws, and treaties.

Paterson resigned in 1790 to run for governor of New Jersey. Easily elected, he left the governorship in 1793 when President GEORGE WASHINGTON appointed him an associate justice of the U.S. Supreme Court. His tenure on the Court revealed him to be a strong supporter of the federal government and an independent judiciary. His role as a Framer lent credibility to his conclusions as to what was the "original intent" of the drafters of the Constitution.

As a circuit judge (in that period Supreme Court justices also rode circuit), he conducted the TREASON trials of the participants in the

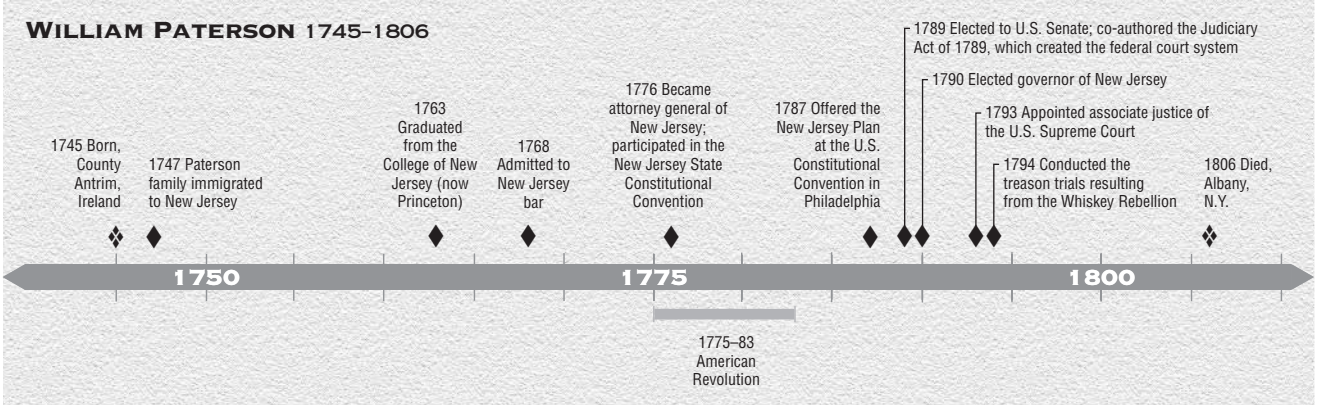

WHISKEY REBELLION, a revolt in 1794 against the excise tax on whiskey imposed by Secretary of the Treasury ALEXANDER HAMILTON. He later presided over the trials of prominent Democratic-Republicans who were charged with SEDITION for criticizing President JOHN ADAMS.

Paterson died on September 9, 1806, in Albany, New York.

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CROSS-REFERENCES

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## PATIENTS' RIGHTS

*The legal interests of persons who submit to medical treatment.*

For many years, common medical practice meant that physicians made decisions for their patients. This paternalistic view has gradually been supplanted by one promoting patient autonomy, whereby patients and doctors share the decision-making responsibility. Consequently doctor-patient relationships are very different now than they were just a few decades ago. However, conflicts still abound as the medical community and those it serves struggle to define their respective roles.

### Consent

Consent, particularly informed consent, is the cornerstone of patients' rights. Consent is based on the inviolability of one's person. It means that doctors do not have the right to touch or treat a patient without that patient's approval because the patient is the one who must live with the consequences and deal with any discomfort caused by treatment. A doctor can be held liable for committing a BATTERY if the doctor touches the patient without first obtaining the patient's consent.

The shift in doctor-patient relationships seems inevitable in hindsight. In one early consent case, a doctor told a woman he would only be repairing some cervical and rectal tears; instead he performed a hysterectomy. In another case, a patient permitted her doctors to examine her under anesthesia but insisted that they not operate; the doctors removed a fibroid tumor during the procedure. In yet another case, a doctor assured a man that a proposed operation was simple and essentially without risk; the patient's left hand was paralyzed as a result of the surgery.

Consent must be voluntary, competent, and informed. Voluntary means that, when the patient gives consent, he or she is free from extreme duress and is not intoxicated or under the influence of medication and that the doctor has not coerced the patient into giving consent.

The law presumes that an adult is competent, but competency may be an issue in numerous instances. Competence is typically only challenged when a patient disagrees with a doctor's recommended treatment or refuses treatment altogether. If an individual understands the information presented regarding treatment, she or he is competent to consent to or refuse treatment.

Consent can be given verbally, in writing, or by one's actions. For example, a person has consented to a vaccination if she stands in line with others who are receiving vaccinations, observes the procedure, and then presents her arm to a HEALTHCARE provider. Consent is inferred in cases of emergency or unanticipated circumstances. For example, if unforeseen serious or life-threatening circumstances develop during surgery for which consent has been given, consent is inferred to allow doctors to take immediate further action to prevent serious injury or death. Consent is also inferred when an adult or child is found unconscious, or when an emergency otherwise necessitates immediate treatment to prevent serious harm or death.

Consent is not valid if the patient does not understand its meaning or if a patient has been misled. Children typically may not give consent; instead a parent or guardian must consent to medical treatment. Competency issues may arise with mentally ill individuals or those who have diminished mental capacity due to retardation or other problems. However, the fact that someone suffers from a mental illness or diminished mental capacity does not mean that the individual is incompetent. Depending on the type and severity of the disability, the patient may still have the ability to understand a proposed course of treatment. For example, in recent years most jurisdictions have recognized the right of hospitalized mental patients to refuse medication under certain circumstances. Numerous courts have ruled that a mental patient may have the right to refuse antipsychotic drugs, which can produce disturbing side effects.

If a patient is incompetent, technically only a legally appointed guardian can make treatment decisions. Commonly, however, physicians defer to family members on an informal basis, thereby avoiding a lengthy and expensive competency hearing. Consent by a family member demonstrates that the doctor consulted someone who knows the patient well and is likely to be concerned about the patient's well-being. This will probably be sufficient to dissuade a patient from suing for failure to obtain consent should the patient recover.

Legal, moral, and ethical questions arise in competency cases involving medical procedures not primarily for the patient's benefit. These cases typically arise in the context of organ donation from one sibling to another. Many of these cases are approved in the lower courts; the decisions frequently turn on an examination of the relationship between the donor and recipient. If the donor and recipient have a relationship that the donor is aware of, actively participates in, and benefits from, courts generally conclude that the benefits of continuing the relationship outweigh the risks and discomforts of the procedure. For example, one court granted permission for a kidney transplant from a developmentally disabled patient into his brother because the developmentally disabled boy was very dependent on the brother. In another case, a court approved a seven-year-old girl's donation of a kidney to her identical twin sister after experts and family testified to the close bond between the two. Conversely, a mother successfully fought to prevent testing of her three-and-a-half-year-old twins for a possible bone marrow transplant for a half brother because the children had only met the boy twice and were unaware that he was their brother.

Married or emancipated minors, including those in the ARMED SERVICES, are capable of giving their own consent. Emancipated means that the minor is self-supporting and lives independently of parents and parental control. In addition, under a theory known as the mature minor doctrine, certain minors may consent to treatment without first obtaining parental consent. If the minor is capable of understanding the nature, extent, and consequences of medical treatment, he or she may consent to medical care. Such situations typically involve older minors and treatments for the benefit of the minor (i.e., not ORGAN TRANSPLANT donors or blood donors) and usually involve relatively low-risk procedures. In recent years, however, some minors have sought the right to make life-or-death decisions. In 1989, a state court first recognized that a minor could make such a grave decision. A 17-year-old leukemia patient refused life-saving blood transfusions based on a deeply held, family-shared religious conviction. A psychologist testified that the girl had the maturity of a 22-year-old. Ironically, the young woman won her right to refuse treatment but was alive and healthy when the case was finally decided. She had been transfused before the slow judicial process needed to decide such a difficult question led to a ruling in her favor.

Some state statutes specifically provide that minors may give consent in certain highly charged situations, such as cases of venereal disease, pregnancy, and drug or alcohol abuse. A minor may also overrule parental consent in certain situations. In one case, a mother gave consent for an ABORTION for her 16-year-old unemancipated daughter, but the girl disagreed. A court upheld the daughter's right to withhold consent.

Courts often reach divergent outcomes when deciding whether to interfere with a parent's refusal to consent to a non-life-threatening procedure. One court refused to override a father's denial of consent for surgery to repair his son's harelip and cleft palate. But a different court permitted an operation on a boy suffering from a severe facial deformity even though his mother objected on religious grounds to the accompanying blood transfusion. In another case, a child was ordered to undergo medical treatments after the parents unsuccessfully treated the child's severe burns with herbal remedies.

Courts rarely hesitate to step in where a child's life is in danger. To deny a child a beneficial, life-sustaining treatment constitutes child neglect, and states have a duty to protect children from neglect. One case involved a mother who testified that she did not believe that her child was HIV positive, despite medical evidence to the contrary. The court ordered treatment, including AZT, for the child. Many other cases involve parents who want to treat a serious illness with nontraditional methods or whose religious beliefs forbid blood transfusions. Cases involving religious beliefs raise difficult questions under the First Amendment's Free Excise of Religion Clause, COMMON LAW, statutory rights of a parent in raising a child, and the

state's traditional interest in protecting those unable to protect themselves.

When a child's life is in danger and parental consent is withheld, a hospital seeks a court-appointed guardian for the child. The guardian, often a hospital administrator, then consents to the treatment on behalf of the child. In an emergency case, a judge may make a decision over the telephone. In some cases, doctors may choose to act without judicial permission if time constraints do not allow enough time to reach a judge by telephone.

In 1982, a six-day-old infant with Down's syndrome died after a court approved a parental decision to withhold life-saving surgery. The child had a condition that made eating impossible. The baby was medicated but given no nourishment. The public furor over the *Baby Doe* case eventually helped spur the DEPARTMENT OF HEALTH AND HUMAN SERVICES to create regulations delineating when treatment may be withheld from a disabled infant. Treatment may be withheld if an infant is chronically and irreversibly comatose, if such treatment would merely prolong dying or would otherwise be futile in terms of survival of the infant, or if such treatment would be virtually futile in terms of survival and the treatment would be inhumane under these circumstances.

Although courts overrule parental refusal to allow treatment in many instances, far less common are cases where a court overrides an otherwise competent adult's denial of consent. The cases where courts have compelled treatment of an adult usually fall into two categories: when the patient was so physically weak that the court ruled that the patient could not reflect and make a choice to consent or refuse; or when the patient had minor children, even though the patient was fully competent to refuse consent. The possible civil or criminal liability of a hospital might also factor into a decision. A court typically will not order a terminally ill patient to undergo treatments to prolong life.

### Informed Consent

Simply consenting to treatment is not enough. A patient must give *informed consent.* In essence, informed consent means that before a doctor can treat or touch a patient, the patient must be given some basic information about what the doctor proposes to do. Informed consent has been called the most important legal doctrine in patients' rights.

State laws and court decisions vary regarding informed consent, but the trend is clearly toward more disclosure rather than less. Informed consent is required not only in life-or-death situations but also in clinic and outpatient settings as well. A healthcare provider must first present information regarding risks, alternatives, and success rates. The information must be presented in language the patient can understand and typically should include the following:

- A description of the recommended treatment or procedure;
- A description of the risks and benefits—particularly exploring the risk of serious bodily disability or death;
- A description of alternative treatments and the risks and benefits of alternatives;
- The probable results if no treatment is undertaken;
- The probability of success and a definition of what the doctor means by success;
- Length and challenges of recuperation; and
- Any other information generally provided to patients in this situation by other qualified physicians.

Only material risks must be disclosed. A material risk is one that might cause a reasonable patient to decide not to undergo a recommended treatment. The magnitude of the risk also factors into the definition of a material risk. For example, one would expect that a one in 10,000 risk of death would always be disclosed, but not a one in 10,000 risk of a two-hour headache.

Plastic surgery and vasectomies illustrate two areas where the probability of success and the meaning of success should be explicitly delineated. For example, a man successfully sued his doctor after the doctor assured him that a vasectomy would be 100 percent effective as BIRTH CONTROL; the man's wife later became pregnant. Because the only purpose for having the procedure was complete sterilization, a careful explanation of probability of success was essential.

Occasionally, informed consent is not required. In an emergency situation where immediate treatment is needed to preserve a patient's health or life, a physician may be justified in failing to provide full and complete information to a patient. Moreover, where the risks are minor and well known to the average person, such as in drawing blood, a physician may dis-

pense with full disclosure. In addition, some patients explicitly ask not to be informed of specific risks. In this situation, a doctor must only ascertain that the patient understands that there are unspecified risks of death and serious bodily disabilities; the doctor might ask the patient to sign a waiver of informed consent.

Finally, informed consent may be bypassed in rare cases in which a physician has objective evidence that informing a patient would render the patient unable to make a rational decision. Under these circumstances, a physician must disclose the information to another person designated by the patient.

Informed consent is rarely legally required to be in writing, but this does provide evidence that consent was in fact obtained. The more specific the consent, the less likely it will be construed against a doctor or a hospital in court. Conversely, blanket consent forms cover almost everything a doctor or hospital might do to a patient without mentioning anything specific and are easily construed against a doctor or hospital. However, blanket forms are frequently used upon admission to a hospital to provide proof of consent to noninvasive routine hospital procedures such as taking blood pressure. A consent form may not contain a clause waiving a patient's right to sue, unless state law provides for binding ARBITRATION upon mutual agreement. Moreover, consent can be predicated upon a certain surgeon doing a surgery. It can also be withdrawn at any time, subject to practical limitations.

### Right to Treatment

In an emergency situation, a patient has a right to treatment, regardless of ability to pay. If a situation is likely to cause death, serious injury, or disability if not attended to promptly, it is an emergency. Cardiac arrest, heavy bleeding, profound shock, severe head injuries, and acute psychotic states are some examples of emergencies. Less obvious situations can also be emergencies: broken bones, fever, and cuts requiring stitches may also require immediate treatment.

Both public and private hospitals have a duty to administer medical care to a person experiencing an emergency. If a hospital has emergency facilities, it is legally required to provide appropriate treatment to a person experiencing an emergency. If the hospital is unable to provide emergency services, it must provide a referral for appropriate treatment. Hospitals cannot refuse to treat prospective patients on the basis of race, religion, or national origin, or refuse to treat someone with HIV or AIDS.

In 1986, Congress passed the Emergency Medical Treatment and Active Labor Act (EMTALA) (42 U.S.C.A. § 1395dd), which established criteria for emergency services and criteria for safe transfer of patients between hospitals. This statute was designed to prevent "patient dumping," that is, transferring undesirable patients to another facility. The law applies to all hospitals receiving federal funds, such as MEDICARE (almost all do). The law requires hospitals to provide a screening exam to determine if an emergency condition exists, provide stabilizing treatment to any emergency patient or to any woman in active labor before transfer, and continue treatment until a patient can be discharged or transferred without harm. It also delineates strict guidelines for the transfer of a patient who cannot be stabilized. A hospital that negligently or knowingly and willfully violates any of these provisions can be terminated or suspended from Medicare. The physician, the hospital, or both can also be penalized up to $50,000 for each knowing violation of the law.

One of the first cases brought under EMTALA involved a doctor who transferred a woman in active labor to a hospital 170 miles away. The woman delivered a healthy baby during the trip, but the doctor was fined $20,000 for the improper transfer of the woman. In addition to federal laws such as EMTALA, states may also impose by regulation or statute a duty on hospitals to administer emergency care.

There is no universal right to be admitted to a hospital in a nonemergency situation. In nonemergency cases, admission rights depend largely on the specific hospital, but basing admission on ability to pay is severely limited by statutes, regulations, and judicial decisions. For example, most hospitals obtained financial assistance from the federal government for construction; these hospitals are required to provide a reasonable volume of services to persons unable to pay. The amount of services to be provided is set by regulation, and the obligation continues for 20 years after construction is completed. Patients must be advised of the hospital's obligation under the law, or the hospital may be foreclosed from suing to collect on the bill. In addition, many states prohibit hospitals from denying admission based solely on inability to pay; some courts have made similar rulings against public hospitals based on hospital char-

*Under EMTALA hospitals are required to provide emergency treatment until a patient can be discharged or transferred without harm. The act was intended to curb the practice of "patient dumping."*

ters and public policy reasons. Hospitals are also prohibited from requiring a deposit from a Medicare or MEDICAID patient.

Once a patient has been duly admitted to a hospital, she or he has a right to leave at any time, or the hospital could be liable for FALSE IMPRISONMENT. This is so even if the patient has not paid the bill or if the patient wants to leave against all medical advice. In rare cases, such as contagious disease cases, public health authorities may have state statutory or regulatory authority to quarantine a patient. In addition, state laws governing involuntary commitment of the mentally ill may be used to prevent a person of unsound mind from leaving the hospital if a qualified psychiatrist determines that the person is a danger to himself or herself or to the lives of others.

A doctor familiar with a patient's condition determines when a patient is ready for discharge and signs a written order to that effect. If the patient disagrees with a decision to discharge, she or he has the right to demand a consultation with a different physician before the order is carried out. The decision to discharge must be based solely on the patient's medical condition and not on nonpayment of medical bills.

In the mid-1990s, concern over maternity patients being discharged just a few hours after giving birth prompted legislation at both the state and federal levels. In September 1996, President BILL CLINTON signed a law ensuring a 48-hour hospital stay for a woman who gives birth vaginally and a 96-hour stay for a woman who has a caesarean section, unless the patient and the doctor agree to an earlier discharge. A number of state legislatures have passed similar laws as well.

With the rise of MANAGED CARE and Health Maintenance Organizations (HMOs), patients faced new issues involving the right to treatment. HMOs may deny authorization for expensive or experimental treatments, or for treatments provided outside the network of approved physicians. HMOs contend that they must control costs and make decisions that benefit the largest number of members. In response, state legislatures have enacted HMO regulations that seek to give patients a process for appealing the denial of benefits. The HMOs have opposed these measures and have vigorously defended their denial of benefits in court.

In *Moran v. Rush Prudential HMO, Inc.*, 536 U.S. 355, 122 S.Ct. 2151, 153 L.Ed.2d 375 (2002), the Supreme Court in a 5–4 decision upheld an Illinois law that required HMOs to provide independent review of disputes between the primary care physician and the HMO. The law mandated that the HMO must pay for services deemed medically necessary by the independent

reviewer. Most importantly, the court ruled that the federal EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) did not PREEMPT the Illinois law. ERISA is an extremely complex and technical set of provisions that seek to protect employee benefit programs. The decision was significant because it empowered other states to enact similar laws that give patients more rights in obtaining treatment

### Medical Experimentation

Medical progress and medical experimentation have always gone hand in hand, but patients' rights have sometimes been ignored in the process. Sometimes patients are completely unaware of the experimentation. Experimentation has also taken place in settings in which individuals may have extreme difficulty asserting their rights, such as in prisons, mental institutions, the military, and residences for the mentally disabled. Legitimate experimentation requires informed consent that may be withdrawn at any time.

Some of the more notorious and shameful instances of human experimentation in the United States in the twentieth century include a 1963 study in which terminally ill hospital patients were injected with live cancer cells to test their immune response; the TUSKEGEE SYPHILIS STUDY, begun before WORLD WAR II and continuing for 40 years, in which effective treatment was withheld from poor black males suffering from syphilis so that medical personnel could study the natural course of the disease; and a study where developmentally disabled children were deliberately infected with hepatitis to test potential vaccines.

Failure to obtain informed consent can arise even when consent has ostensibly been obtained. The California Supreme Court ruled in 1990 that a physician must disclose preexisting research and potential economic interests that may affect the doctor's medical judgment (*Moore v. Regents of the University of California,* 51 Cal. 3d 120, 793 P. 2d 479). The case involved excision of a patient's cells pursuant to surgery and other procedures to which the patient had consented. The surgery itself was not experimental; the experimentation took place after the surgery and other procedures. The cells were used in medical research that proved lucrative to the doctor and medical center.

Patients in teaching hospitals are frequently asked to participate in research. Participants do not surrender legal rights simply by agreeing to cooperate and validly obtained consent cannot protect a researcher from NEGLIGENCE.

In hospitals, human experimentation is typically monitored by an institutional review board (IRB). Federal regulation requires IRBs in all hospitals receiving federal funding. These boards review proposed research before patients are asked to participate and approve written consent forms. IRBs are meant to ensure that risks are minimized, the risks are reasonable in relation to anticipated benefits, the selection of subjects is equitable, and informed consent is obtained and properly documented. Federal regulations denominate specific items that must be covered when obtaining informed consent in experimental cases. IRB approval never obligates a patient to participate in research.

### Advance Medical Directives

Every state has enacted advance medical directive legislation, but the laws vary widely. Advance medical directives are documents that are made at a time when a person has full decision-making capabilities and are used to direct medical care in the future when this capacity is lost. Many statutes are narrowly drawn and specify that they apply only to illnesses when death is imminent rather than illnesses requiring long-term life support, such as in end-stage lung, heart, or kidney failure; multiple sclerosis; paraplegia; and persistent vegetative state.

Patients sometimes use living wills to direct future medical care. Most commonly, living wills specify steps a patient does not want taken in cases of life-threatening or debilitating illness, but they may also be used to specify that a patient wants aggressive resuscitation measures used. Studies have shown that living wills often are not honored, despite the fact that federal law requires all hospitals, nursing homes, and other Medicare and Medicaid providers to ask patients on admission whether they have executed an advance directive. Some of the reasons living wills are not honored are medical personnel's fear of liability, the patient's failure to communicate his or her wishes, or misunderstanding or mismanagement by hospital personnel.

Another way individuals attempt to direct medical care is through a durable POWER OF ATTORNEY. A durable power of attorney, or proxy decision maker, is a written document wherein a person (the principal) designates another person to perform certain acts or make

certain decisions on the principal's behalf. It is called durable because the power continues to be effective even after the principal becomes incompetent or it may only take effect after the principal becomes incompetent. As with a LIVING WILL, such a document has little power to compel a doctor to follow a patient's desires, but in the very least it serves as valuable evidence of a person's wishes if the matter is brought into court. A durable power of attorney may be used by itself or in conjunction with a living will.

When advance medical directives function as intended and are honored by physicians, they free family members from making extremely difficult decisions. They may also protect physicians. Standard medical care typically requires that a doctor provide maximum care. In essence, a living will can change the standard of care upon which a physician will be judged and may protect a physician from legal or professional repercussions for withholding or withdrawing care.

### Right to Die

A number of cases have addressed the right to refuse life-sustaining medical treatment. Broadly speaking, under certain circumstances a person may have a right to refuse life-sustaining medical treatment or to have life-sustaining treatment withdrawn. On the one side in these cases is the patient's interest in autonomy, privacy, and bodily integrity. This side must be balanced against the state's traditional interests in the preservation of life, prevention of suicide, protection of dependents, and the protection of the integrity of the medical profession.

In IN RE QUINLAN, 355 A.2d 647 (1976), the New Jersey Supreme Court permitted withdrawal of life-support measures for a woman in a persistent vegetative state, although her condition was stable and her life expectancy stretched years into the future. Many of the emotional issues the country struggles with in the early 2000s were either a direct result of or were influenced by this case, including living wills and other advance medical directives, the right to refuse unwanted treatment, and physician-assisted suicide.

The first U.S. Supreme Court decision addressing the difficult question regarding the removal of life support was *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990). *Cruzan* involved a young woman rendered permanently comatose after a car accident. Her parents petitioned to have her feeding tube removed. The Supreme Court ruled that the evidence needed to be clear and convincing that the young woman had explicitly authorized the termination of treatment prior to becoming incompetent. The Court ruled that the evidence had not been clear and convincing, but upon remand to the state court the family presented new testimony that was deemed clear and convincing. The young woman died 12 days after her feeding tube was removed.

The Supreme Court decided two right-to-die cases in 1997, *Quill v. Vacco,* 521 U.S. 793, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997), and WASHINGTON V. GLUCKSBERG, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). In *Glucksberg,* the appellate courts in New York and Washington had struck down laws banning physician-assisted suicide as violations of EQUAL PROTECTION and DUE PROCESS, respectively. The Supreme Court reversed both decisions, finding no constitutional right to assisted suicide, thus upholding states' power to ban the practice.

Though both cases were considered together, *Glucksberg* was the key right-to-die decision. Dr. Harold Glucksberg and three other physicians sought a DECLARATORY JUDGMENT that the state of Washington's law prohibiting assisted suicide was unconstitutional as applied to terminally ill, mentally competent adults. The Supreme Court voted unanimously to sustain the Washington law, though five of the nine justices filed concurring opinions in *Quill* and *Glucksberg.* Chief Justice WILLIAM REHNQUIST, writing for the Court, based much of his analysis on historical and legal traditions. The fact that most western democracies make it a crime to assist a suicide was backed up by over 700 years of Anglo-American common-law tradition that has punished or disapproved of suicide or assisting suicide. This "deeply rooted" opposition to assisted suicides had been reaffirmed by the Washington legislature in 1975 when the current prohibition had been enacted and again in 1979 when it passed a Natural Death Act. This law declared that the refusal or withdrawal of treatment did not constitute suicide, but it explicitly stated that the act did not authorize EUTHANASIA.

The doctors had argued that the law violated the SUBSTANTIVE DUE PROCESS component of the FOURTEENTH AMENDMENT. Unlike proce-

dural due process which focuses on whether the right steps have been taken in a legal matter, substantive due process looks to fundamental rights that are implicit in the amendment. For the Court to recognize a fundamental liberty, the liberty must be deeply rooted in U.S. history and it must be carefully described. The Court rejected this argument because U.S. history has not recognized a "right to die" and therefore it is not a fundamental right. Employing the RATIONAL BASIS TEST of constitutional review, the Court concluded that the law was "rationally related to legitimate government interests" and thus passed constitutional muster.

### Privacy and Confidentiality

Confidentiality between a doctor and patient means that a doctor has the express or implied duty not to disclose information received from the patient to anyone not directly involved with the patient's care. Confidentiality is important so that healthcare providers have knowledge of all facts, regardless of how personal or embarrassing, that might have a bearing on a patient's health. Patients must feel that it is safe to communicate such information freely. Although this theory drives doctor-patient confidentiality, the reality is that many people have routine and legitimate access to a patient's records. A hospital patient might have several doctors, nurses, and support personnel on every shift, and a patient might also see a therapist, nutritionist, or pharmacologist, to name a few.

The law requires some confidential information to be reported to authorities. For example, birth and death certificates must be filed; CHILD ABUSE cases must be reported; and infectious, contagious, or communicable diseases must be reported. In addition, confidential information may also be disclosed pursuant to a judicial proceeding or to notify a person to whom a patient may pose a danger.

In spite of the numerous exceptions to the contrary, patients legitimately demand and expect confidentiality in many areas of their treatment. Generally speaking, patients must be asked to consent before being photographed or having others unrelated to the case (including medical students) observe a medical procedure; they have the right to refuse to see anyone not connected to a hospital; they have the right to have a person of the patient's own sex present during a physical examination conducted by a member of the opposite sex; they have the right to refuse to see persons connected with the hospital who are not directly involved in the patient's care and treatment (including social workers and chaplains); and they have the right to be protected from having details of their condition made public.

A patient owns the information contained in medical records, but the owner of the paper on which they are written is usually considered the actual owner of the records. The patient's legal interest in the records generally means that the patient has a right to see the records and is entitled to a complete copy of them. The patient's rights are subject to reasonable limitations such as requiring inspection and copying to be done on the doctor's premises during working hours.

### Federal Patients' Bill of Rights

Dissatisfaction with an expanding corporate healthcare industry dominated by profit margins has spawned numerous reform ideas. One idea that has gained a foothold is a patients' federal BILL OF RIGHTS. In 1997, President Bill Clinton appointed an Advisory Commission on Consumer Protection and Quality in the Health Care Industry. The commission was directed to propose a "consumer bill of rights." The 34-member commission developed a bill of rights that identified eight key areas: information disclosure, choice of providers and plans, access to emergency service, participation in treatment decisions, respect and nondiscrimination, confidentiality of health information, complaints and appeals, and consumer responsibilities.

The proposed rights include: the right to receive accurate, easily understood information in order to make informed health care decisions; the right to a choice of healthcare providers that is sufficient to ensure access to appropriate high-quality health care; the right to access emergency healthcare services; the right and responsibility to fully participate in all decisions related to their health care; the right to considerate, respectful care from all members of the healthcare system at all times and under all circumstances; the right to communicate with healthcare providers in confidence and to have the confidentiality of their individually identifiable healthcare information protected; the right to a fair and efficient process for resolving differences with their health plans, healthcare providers, and the institutions that serve them; and the responsibility of consumers to do their part in protecting their health. This bill of rights

has been debated in Congress and there are bipartisan areas of agreement, but, as of 2003, no final action has taken on enacting a set of rights into federal law.

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CROSS-REFERENCES

Acquired Immune Deficiency Syndrome; Competent; Death and Dying; Duress; Fetal Rights; Genetic Screening; Health Care Law; Health Insurance; Liability; Organ Transplantation; Physicians and Surgeons; Privacy; Privileged Communication.

## PATRONAGE

*The practice or custom observed by a political official of filling government positions with qualified employees of his or her own choosing.*

When the candidate of a political party wins an election, the newly elected official has the right to appoint a certain numbers of persons to jobs in the government. This is the essence of the patronage system, also known as the spoils system ("To the victor go the spoils"): appointing persons to government positions on the basis of political support and work rather than on merit, as measured by objective criteria. Though the patronage system exists at all levels of U.S. government, the number of positions that are available through patronage has decreased dramatically since the 1880s.

The patronage system thrived in the U.S. federal government until 1883. In 1820 Congress limited federal administrators to four-year terms, leading to constant turnover. By the 1860s and the Civil War, patronage had led to widespread inefficiency and political corruption. Where patronage had once been confined to the cabinet, department heads, and foreign ambassadorships, by the 1860s low-level government positions were subject to patronage. The loss of a presidential election by a political party signaled wholesale turnover in the federal government. When President **BENJAMIN HARRISON** took office in 1889, 31,000 federal postmaster positions changed hands.

The assassination of President **JAMES GARFIELD** in 1881 by a disgruntled office seeker who did not receive a political appointment spurred Congress to pass the Civil Service Act, or Pendleton Act of 1883 (5 U.S.C.A. § 1101 et seq.). The act, which at the time only applied to 10 percent of the federal workforce, created a Civil Service Commission and advocated a merit system for the selection of government employees. By 1980, 90 percent of federal positions had become part of the civil service system. In addition, the passage in 1939 of the **HATCH ACT** (53 Stat. 1147) curtailed or restricted most partisan political activities of federal employees.

State and local governments have employed large patronage systems. Big-city political machines in places such as New York, Boston, and Chicago thrived in the late nineteenth century. A patronage system not only rewards political supporters for past support, it also encourages future support, because persons who have a patronage job try to retain it by campaigning for the party at the next election.

Large-scale patronage systems declined steadily during the twentieth century. During the Progressive Era (1900–1920), "good government" reformers overthrew political machines and installed civil service systems. Chicago, under Mayor Richard J. Daley, remained the last bastion of patronage, existing in its purest form until the late 1970s.

Patronage has its defenders. It is a way to maintain a strong political organization by offering campaign workers rewards. More importantly, patronage puts people into government who agree with the political agenda of the victor. Cooperation, loyalty, and trust flow from this arrangement. Finally, patronage guarantees some turnover, bringing new people and new ideas into the system.

Opponents have long agreed that patronage is acceptable at the highest levels of government. Presidents, governors, and mayors are entitled to select their cabinet and department heads. How-

ever, history indicates that patronage systems extending far down the organizational chain are susceptible to inefficiency and corruption.

Congress took another look at patronage issues in the Civil Service Reform Act of 1978 (92 Stat. 1121–1131, 5 U.S.C.A. 1201–1209). Concerned that federal bureaucrats were too independent and unresponsive to elected officials, the act replaced the Civil Service Commission with the Office of Personnel Management, under closer control of the president. The act also created the Senior Executive Service, which gives the president greater discretion in reassigning top officials to departments and agencies.

CROSS-REFERENCES

Bureaucracy; Civil Service; Tammany Hall.

## ♦ PAUL, ALICE STOKES

Alice Stokes Paul was a militant U.S. suffrage leader who is best remembered as the author in 1923 of the EQUAL RIGHTS AMENDMENT. Paul, who for decades played a major role in the National Woman's Party, also successfully lobbied for the inclusion of a ban against SEX DISCRIMINATION in title VII of the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000e et seq.).

"IF THE WOMEN OF THE WORLD HAD NOT BEEN EXCLUDED FROM WORLD AFFAIRS, THINGS TODAY MIGHT HAVE BEEN DIFFERENT."
—ALICE PAUL

Paul was born on January 11, 1885, in Moorestown, New Jersey. She graduated from Swarthmore College in 1905 and then went to England to do graduate work. While in England, Paul became involved with the British suffragettes and received three jail sentences for participating in militant actions. She returned to the United States in 1910 and continued her graduate work at the University of Pennsylvania. She earned a Ph.D. in social work in 1912.

*Alice Paul.* BETTMANN/CORBIS

In 1913 Paul formed the Congressional Union for Woman Suffrage, which later became the National Woman's Party (NWP). She advocated a more militant position to publicize the need for an amendment to the U.S. Constitution. Paul organized marches, rallies, and protests outside the White House. As in England, she was jailed three times for organizing and participating in suffrage protests. While in jail she waged hunger strikes, resulting in her hospitalization where she was force-fed.

With the ratification of the NINETEENTH AMENDMENT to the Constitution in 1920, which

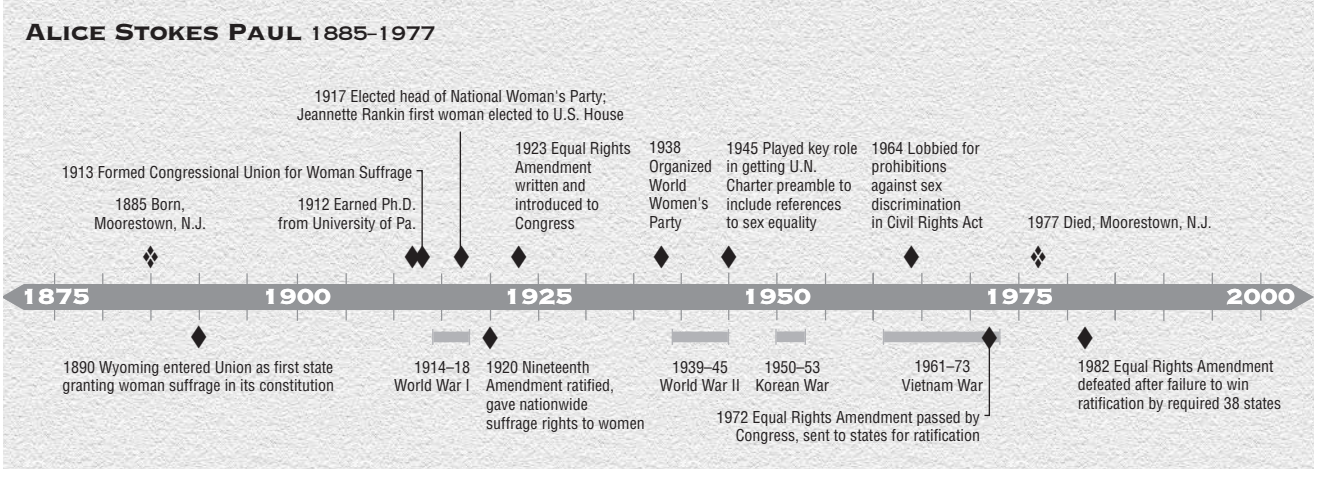

gave women the vote, Paul shifted her focus to the legal inequality of women. In 1923 she wrote the equal rights amendment, which she called the Lucretia Mott amendment, in honor of the nineteenth-century feminist leader. The proposed amendment stated that "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex" and that "the Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Paul's proposed amendment was introduced to Congress in 1923, but it would not be approved until March 1972. However, the amendment failed to be ratified by the thirty-eight states required under the Constitution.

Paul continued to lead the NWP, and in 1938 she organized the World Party for Equal Rights for Women, known as the World Woman's Party. She played a key role in seeing that the preamble to the United Nations Charter included references to sex equality. During the debates over the 1964 Civil Rights Act, Paul and the NWP helped lobby for the inclusion of sex discrimination as illegal conduct.

Paul died on July 9, 1977, in Moorestown, New Jersey.

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## PAUPER

*An impoverished person who is supported at public expense; an indigent litigant who is permitted to sue or defend without paying costs; an impoverished criminal defendant who has a right to receive legal services without charge.*

## PAWN

*To deliver* PERSONAL PROPERTY *to another as a pledge or as security for a debt. A deposit of goods with a creditor as security for a sum of money borrowed.*

In common usage, pawn signifies a pledge of goods, as distinguished from a pledge of intangible personal property, such as a contract right. In a more limited sense, it denotes a deposit of personal property with a pawnbroker as security for a loan. A pawned article is retained until the loan is repaid within a certain time. If it is not repaid on time, the pawnbroker may sell the item.

## PAWNBROKER

*A person who engages in the business of lending money, usually in small sums, in exchange for* PERSONAL PROPERTY *deposited with him or her that can be kept or sold if the borrower fails or refuses to repay the loan.*

## PAXTON'S CASE

See WRITS OF ASSISTANCE CASE.

## PAY EQUITY

See COMPARABLE WORTH.

## PAYABLE

*Justly due; legally enforceable.*

A sum of money is said to be payable when a person is under an obligation to pay it. The term may therefore signify an obligation to pay at a future time, but when used without qualification, it ordinarily means that the debt is due to be paid immediately.

## PAYEE

*The person who is to receive the stated amount of money on a check, bill, or note.*

## PAYMENT

*The fulfillment of a promise; the performance of an agreement. A delivery of money, or its equivalent in either specific property or services, by a debtor to a creditor.*

## P.C.

*An abbreviation for professional corporation, which is a special corporation established by professionals, such as physicians, accountants, or, in some states, attorneys, who practice together.*

In most jurisdictions, a professional corporation may be organized by professionals who render a personal service to the public that requires a license and that, before proper statutory organization, could not be performed by a corporation.

One of the main reasons professionals incorporate is to gain certain tax benefits. Incorporation neither changes PROFESSIONAL

RESPONSIBILITY nor protects those incorporating from liability for MALPRACTICE.

### PEACE BOND

*The posting of money in court, as required by a judge or magistrate, by a person who has threatened to commit a breach of the peace.*

### PEACE OFFICERS

*Sheriffs, constables, marshals, city police officers, and other public officials whose duty it is to enforce and preserve the public order.*

### ♦ PECKHAM, RUFUS WHEELER

"THE GENERAL RIGHT TO MAKE A CONTRACT IN RELATION TO HIS BUSINESS IS PART OF THE LIBERTY OF THE INDIVIDUAL PROTECTED BY THE FOURTEENTH AMENDMENT . . . THE RIGHT TO PURCHASE OR TO SELL LABOR IS PART OF THE LIBERTY PROTECTED BY THIS AMENDMENT."
—RUFUS WHEELER PECKHAM

Rufus Wheeler Peckham served as an associate justice of the U.S. Supreme Court from 1895 to 1909. A prominent New York attorney and judge, Peckham was a conservative judge who believed that state and federal government had limited authority to regulate business activity. He expressed this belief most clearly in LOCHNER V. NEW YORK, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), a case that is best remembered for the dissent of Justice OLIVER WENDELL HOLMES JR.

Peckham was born in Albany, New York, on November 8, 1838, into a family of prominent lawyers and judges. He attended private schools and studied abroad as a young man. He read the law in his father's Albany law office and was admitted to the New York bar in 1859, following the lead of his older brother, Wheeler Hazard Peckham. After almost ten years in private practice, he began his career in New York government in 1868 when he became district attorney of Albany County. He served until 1872.

An active participant in New York State DEMOCRATIC PARTY politics, Peckham and his brother Wheeler were aligned with the upstate wing of the party, which was often in conflict with the New York City faction that was dominated by the corrupt TAMMANY HALL regime. Wheeler Peckham was instrumental in the 1873 prosecution of the Tweed Ring, the Tammany machine run by William M. ("Boss") Tweed. His efforts would later hurt his legal career.

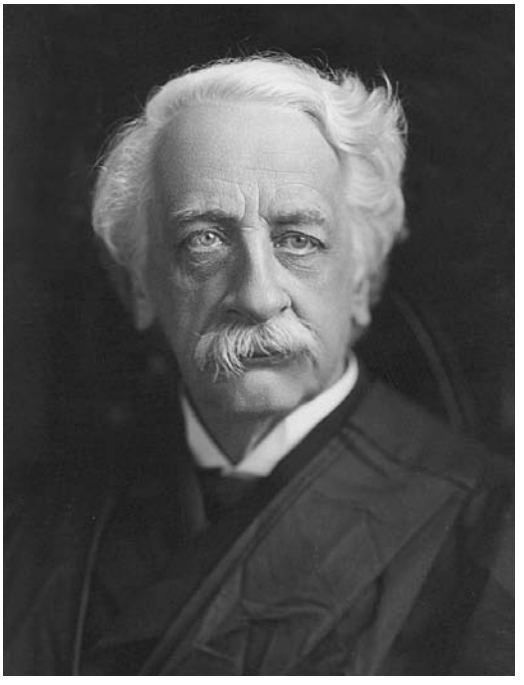

*Rufus Wheeler Peckham.* LIBRARY OF CONGRESS

From 1880 to 1881, Rufus Peckham served as corporation counsel for the city of Albany. In 1883 he was elected to the New York Supreme Court (the state's trial court), and in 1886 he was appointed to the New York Court of Appeals (the state's highest court). In 1895 President

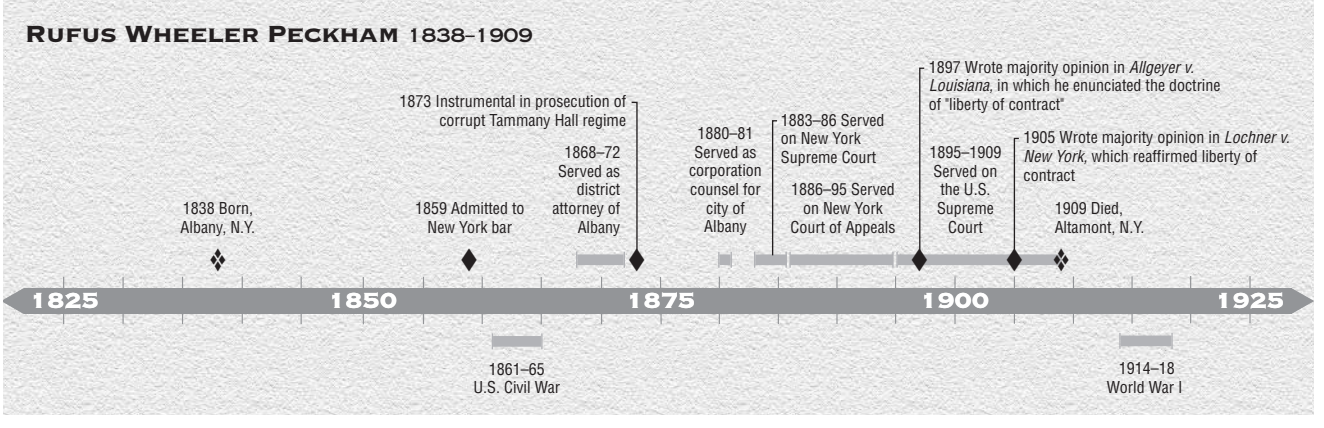

GROVER CLEVELAND nominated Peckham to the U.S. Supreme Court. This followed Cleveland's unsuccessful attempt to appoint Wheeler Peckham to the High Court in 1894. The appointment of Wheeler Peckham failed when New York Senators Edward Murphy Jr. and David Bennett Hill, both aligned with the New York City Democratic machine, blocked the nomination.

Rufus Peckham had little trouble winning confirmation. He joined a Supreme Court that was generally hostile to attempts by state and federal government to regulate business and the economy. Peckham fit right in. In *Allgeyer v. Louisiana,* 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed. 832 (1897), he wrote the majority opinion that struck down a Louisiana insurance law as being a violation of the federal DUE PROCESS CLAUSE. He enunciated the doctrine of "liberty of contract" as a limit on state regulation of business. Government could not limit a person from entering "into all contracts which may be proper, necessary, and essential" to the conduct of a person's life.

Peckham reaffirmed liberty of contract in *Lochner.* In his majority opinion, Peckham held that a New York State law that limited bakers to no more than ten hours of work a day violated the "liberty of contract" guaranteed by the FOURTEENTH AMENDMENT, which provided that no state was to "deprive any person of life, liberty or property without due process of law." The state's power to regulate was restricted to matters of health, safety, and welfare. In Peckham's view the restriction of hours did not fit into any of these three areas and therefore the law unconstitutionally interfered with the right of bakers and bakery companies to negotiate work hours and work conditions. Justice Holmes, in his dissent, castigated Peckham and the majority for reading into the Constitution their particular economic theory and for not practicing judicial restraint.

Despite Peckham's opposition to government regulation, he did support ANTITRUST LAWS. This was consistent, in his view, with maintaining individual economic liberty. He articulated his support and helped restore some of the authority of federal antitrust efforts in *United States v. Trans-Missouri Freight Association,* 166 U.S. 290, 17 S. Ct. 540, 41 L. Ed. 1007 (1897), *United States v. Joint-Traffic Association,* 171 U.S. 505, 19 S. Ct. 25, 43 L. Ed. 259 (1898), and *Addyston Pipe & Steel Company v. United States,* 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 (1899).

Peckham died on October 24, 1909, in Altamont, New York.

CROSS-REFERENCES

Labor Law.

## PECULATION

*The unlawful appropriation, by a depositary of public funds, of the government property entrusted to the care of the depository; the fraudulent diversion to an individual's personal use of money or goods entrusted to that person's care.*

## PECUNIARY

*Monetary; relating to money; financial; consisting of money or that which can be valued in money.*

## PEDERASTY

*The criminal offense of unnatural copulation between men.*

The term *pederasty* is usually defined as anal intercourse of a man with a boy. Pederasty is a form of SODOMY.

## PEDOPHILIA

See CHILD MOLESTATION.

## PEERS

*Equals; those who are an individual's equals in rank and station.*

The traditional phrase *trial by a jury of his peers* means trial by a jury of citizens.

## PEN REGISTER

*A device that decodes or records electronic impulses, allowing outgoing numbers from a telephone to be identified.*

The use of pen registers is governed by a 1986 federal statute, Pen Registers and Trap and Trace Devices (18 U.S.C.A. §§ 3121–3127). The statute also governs the use of trap devices, which are used to identify the originating number from which the wire or electronic communications were transmitted. Neither device enables the listening or recording of the actual communication.

In *Smith v. Maryland,* 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979), the U.S. Supreme Court upheld the constitutionality of the use of

pen registers, declaring that the use of a pen register is not an invasion of privacy. In the *Smith* case, Patricia McDonough, the victim of a ROBBERY, began receiving threatening and obscene telephone calls from a man identifying himself as the robber. In one instance the man asked her to step out on her porch, and when she did, she identified the car that she had previously described to the police as belonging to the robber. The police traced the license plate number and learned that Smith was the registered owner. With this information the police asked the telephone company to install a pen register at its office to record the numbers dialed from Smith's telephone. The register revealed that a call was placed from Smith's residence to McDonough's telephone, and with this information, along with other evidence, the police obtained a warrant to search Smith's residence. During the search the police found Smith's telephone book open to the page where McDonough's name and address appeared. Smith was arrested, and McDonough identified him from a six-man lineup as the man who had robbed her.

Smith asserted that the installation of the pen register violated his constitutional rights and that "all fruits derived from the pen register" should be suppressed. The Court of Appeals of Maryland held that no constitutionally protected right of privacy existed in the numbers dialed into a telephone. Therefore, use of the pen register did not violate the FOURTH AMENDMENT, which guarantees the "right of the people to be secure in their persons, house, papers and effects, against unreasonable searches and seizures."

The Supreme Court held that in determining whether a government-initiated ELECTRONIC SURVEILLANCE constitutes a "search" within the meaning of the Fourth Amendment, it must determine "whether the person invoking the protection can claim a 'justifiable,' 'reasonable,' or a 'legitimate expectation' of privacy" (*Smith*). The Court examined the government activity that was being challenged and stated that Smith "could not claim that his property was invaded or that the police intruded into a constitutionally protected area" because the pen register was installed on the telephone company's property. The determination as to whether a "search" took place depended on whether Smith had a "legitimate expectation of privacy" regarding the numbers dialed into his telephone.

In its analysis the Court stated that it is doubtful that people expect privacy in the telephone numbers they dial. People realize that the numbers go through the telephone company once they are dialed, and they also realize that the telephone company keeps records for billing purposes of long-distance numbers dialed. Furthermore, most telephone books inform subscribers that the company has the capacity to "identify to the authorities the origin of unwelcome and troublesome calls." The Court held that Smith probably did not have an expectation of privacy in the telephone numbers he dialed but that even if he did, the expectation was not "legitimate." Therefore, the use of the pen register was not a "search" within the Fourth Amendment, and thus a SEARCH WARRANT was not required for its installation.

The dissent in *Smith,* as well as legal commentators, have expressed concern regarding the holding that there is no legitimate right of privacy in the numbers dialed into the telephone. They assert that there is a reasonable and legitimate expectation of privacy when the numbers are dialed from a person's residence. Justice POTTER STEWART, in his dissent, stated that using a telephone within a person's home is private conduct and that, without question, this conduct is entitled to Fourth and FOURTEENTH AMENDMENT protection.

Although *Smith* upheld the constitutionality of the installation of a pen register without a warrant, 18 U.S.C.A. § 3123 now requires a court order, based on a law enforcement officer's declaration that the information is relevant to an ongoing investigation, before a pen register may be installed.

Many states have enacted legislation similar to the federal statutes regulating the use of pen registers and trap and trace devices. At the state level, Caller ID and its use of Calling Party Identification has been challenged on several different theories with varying outcomes. Caller ID is a service provided by telephone companies that records each calling party's telephone number, enabling the receiving party to view the number before answering the telephone.

Proponents of Caller ID, primarily telephone companies, believe that it provides additional security to customers because it can detect and prevent obscene and harassing calls and may facilitate emergency response services. The telephone companies also state that cus-

tomers are able to screen their calls with the service, thus enhancing their privacy.

Opponents of Caller ID argue that the service is an invasion of privacy because some callers may wish to remain anonymous, especially callers with unlisted telephone numbers or users of a confidential crisis hot line. Furthermore, opponents argue that Caller ID is a violation of state and federal trap or trace device statutes.

In determining the legality of Caller ID, states tend to follow either *Barasch v. Pennsylvania Public Utility Commission,* 133 Pa. Cmwlth. 285, 576 A.2d 79 (1990), affirmed 529 Pa. 523, 605 A.2d 1198 (1992), or *Southern Bell Telephone & Telegraph Co. v. Hamm,* 306 S.C. 70, 409 S.E.2d 775 (1991). In *Barasch* the court held that the use of Caller ID was a violation of Pennsylvania's constitutional right of privacy. The court reasoned that people do have a reasonable expectation that the numbers dialed into the telephone are as private as the content of the conversation. In addition, the court held that the Caller ID service violated the state's WIRETAPPING and Electronic Surveillance Control Act (18 Pa. Cons. Stat. Ann. §§ 5701–5781) (1978) governing the use of trap and trace devices. The statute provides that pen registers and trap and trace devices may not be installed without a court order unless one of the statutory exceptions exists. One of the exceptions provided in section 5771(b)(2) of the act is that if the user of the service consents to the installation of the pen register or trap and trace device, then a court order is not necessary. The Commonwealth Court's decision in *Barasch* held that because both the calling party and the recipient are users of the service, both must give their consent. The Pennsylvania Supreme Court upheld this part of the Commonwealth Court's holding.

Conversely, in *Hamm* the court held that Caller ID was not an invasion of privacy because an individual does not have a legitimate expectation of privacy in the numbers dialed into the telephone. Furthermore, although South Carolina has a similar exception to the general prohibition of trap and trace devices, the court held that "user of the service" meant only the subscriber and that therefore consent by the calling party is not necessary. The courts that follow the rationale of *Hamm* agree that unless indicated otherwise in the statutes, the purpose of trap or trace device statutes is to protect telephone users from unauthorized third-party or government intrusions and not merely to protect users from one another.

Many states have proposed or have already passed legislation authorizing the use of Caller ID. In addition, telephone companies offering Caller ID also offer per-call and per-line blocking to those individuals who wish to remain anonymous. In per-call blocking, a caller may block the transmission of his or her telephone number by dialing a specified code number before dialing. In per-line blocking, the number is blocked on every call unless the caller dials a specified code number to disable the block for a particular call.

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#### CROSS-REFERENCES

Search and Seizure; Wiretapping.

## PENAL

*Punishable; inflicting a punishment.*

## PENALTY

*A punitive measure that the law imposes for the performance of an act that is proscribed, or for the failure to perform a required act.*

Penalty is a comprehensive term with many different meanings. It entails the concept of punishment—either corporal or pecuniary, civil or criminal—although its meaning is usually

confined to pecuniary punishment. The law can impose a penalty, and a private contract can provide for its assessment. Pecuniary penalties are frequently negotiated in construction contracts, in the event that the project is not completed by the specified date.

## PENDENT JURISDICTION

*The discretionary power of a federal court to permit the assertion of a related state law claim, along with a federal claim between the same parties, properly before the court, provided that the federal claim and the state law claim derive from the same set of facts.*

Generally, in the CIVIL LAW, claims based on federal law are heard in federal court, and claims based on state law are heard in state court. The principle of pendent jurisdiction creates an exception to this general rule by allowing a plaintiff who has filed a claim based on federal law in federal court to add a state law claim to the case. This may be done only if the state law claim arose out of the same transaction or occurrence, or nucleus of facts, that gave rise to the federal claim.

For example, assume that a plaintiff has filed suit in federal court alleging that the respondent has violated her CIVIL RIGHTS under the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000a et seq.). Assume further that the claim arises from an incident in which the plaintiff was denied service at a public restaurant based on her perceived national origin. If the plaintiff was also physically harmed by the respondent in the incident, she may want to file claims for ASSAULT AND BATTERY. Assault and battery of a private party are state law claims; no federal laws exist under which the plaintiff could bring such claims. Pendent jurisdiction would give the federal court the authority to hear the assault and battery claims because they arose out of the same incident that gave rise to the federal civil rights claims.

Pendent jurisdiction is a rule of judicial convenience and efficiency. If federal courts could not hear state law claims, many plaintiffs would be forced to present two cases in two courts involving essentially the same matter. Such a rule would be unduly expensive for plaintiffs, would increase the number of cases in the court system, and could lead to seemingly inconsistent results from different courts concerning related matters.

CROSS-REFERENCES

Jurisdiction.

## PENDENTE LITE

*[*Latin, Pending the litigation.*] During the actual progress of a lawsuit.*

## PENDING

*Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; in the process of adjustment.*

A lawsuit is said to be pending from its inception until the issuance of a final judgment by a court. The phrase *pending appeal* refers to the time before an appeal is taken, as well as to the period during which an appeal is in progress.

## ♦ PENDLETON, GEORGE HUNT

George Hunt Pendleton was a prominent nineteenth-century lawyer, congressman, senator, and ambassador who played the central role in passing the Civil Service Act, also known as the

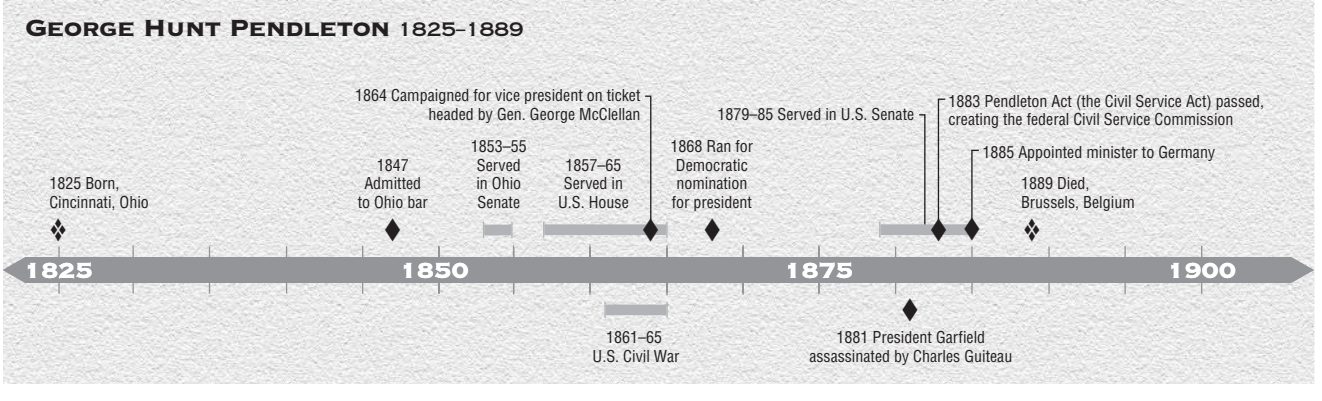

Pendleton Act of 1883 (5 U.S.C.A. § 1101 et seq.). The Pendleton Act established a federal civil service system that was based on merit rather than on political patronage.

Pendleton was born on July 29, 1825, in Cincinnati, Ohio. After his admission to the Ohio bar in 1847, he established a law practice in Cincinnati. He soon turned his attention toward politics. A lifelong member of the DEMOCRATIC PARTY, Pendleton was elected to the Ohio Senate in 1853, where he served for two years. In 1857 he was elected to the U.S. House of Representatives, where he served until 1865. During the Civil War, Pendleton gained national prominence for his opposition to President Abraham Lincoln's suspension of HABEAS CORPUS and other wartime measures that restricted civil liberties. In 1864 he was the Democratic vice-presidential candidate, campaigning for peace between the North and the South on a ticket headed by Union General George B. McClellan. Lincoln and Vice President ANDREW JOHNSON won reelection.

After the war Pendleton became the leader of the greenbacker movement, which sought to redeem Civil War bonds in paper currency (greenbacks) instead of gold. His advocacy of this cause cost him the 1868 Democratic presidential nomination, because East Coast Democrats disagreed with the scheme.

Pendleton did not reenter national politics until 1879, when he was elected to the U.S. Senate. By 1883 the federal government was plagued by inefficiency and corruption, most of which was attributed to the way federal employees were hired. Under the patronage system (also known as the "spoils system"), federal employees were hired and fired for political reasons. It was understood that presidents were entitled to reward political allies with cabinet posts, judgeships, and diplomatic posts, but the spoils system extended to routine and low-level government workers. This created employee turnover when a president left office and the opposition party came into power.

The 1881 assassination of President JAMES GARFIELD by a disappointed office seeker led to the passage of the Pendleton Act in 1883. The act, which created a federal Civil Service Commission that administered a merit-based, open selection process for hiring government employees, began the process of professionalizing the federal government. Politics and factors such as religion and nationality were to have no bearing on the hiring of civil servants. Although the act initially covered only about 10 percent of the jobs, subsequent legislation increased the percentage and it grew steadily.

*George H. Pendleton.*
LIBRARY OF CONGRESS

Pendleton's efforts at patronage reform cost him his Senate seat. Democratic leaders who preferred political patronage prevented his return to the Senate for a second term in 1885. President GROVER CLEVELAND appointed Pendleton minister to Germany in that year. He served in this position until his death on November 24, 1889, in Brussels, Belgium.

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## PENITENTIARY

*A prison or place of confinement where persons convicted of felonies serve their term of imprisonment.*

CROSS-REFERENCES

Jail.

## PENNSYLVANIA CONSTITUTION OF 1776

In 1776 Pennsylvania enacted its first state constitution in direct response to the Declaration of Independence and the instructions of the Second Continental Congress to the colonies to reject British rule. Dedicated to the idea of plac-

ing authority in the hands of the people, and specifying a broad range of rights, the constitution proved to be controversial. Over the next fourteen years, criticism of the document came both from within Pennsylvania and from across the new nation, and the state replaced the constitution in 1790.

With the signing of the Declaration of Independence, the American Revolution had begun. Congress issued two resolutions in May 1776 calling for the colonies to reject British rule and establish governments based on the authority of the people. Pennsylvania had refused to join the rebellion, and Congress hoped to win its support. Instead, revolutionaries in Pennsylvania quickly held public meetings and devoted themselves to electing representatives to a constitutional convention. The noted American statesman and philosopher **BENJAMIN FRANKLIN** was instrumental in organizing and leading the endeavor. The constitution was debated and revised for four months and was approved on September 28, 1776.

Although five other states also adopted constitutions during this time, the Pennsylvania document was unique. In outlook, the constitution bore the mark of the French philosopher **JEAN-JACQUES ROUSSEAU**, a critic of representative government who viewed it as a necessary evil. Thus, under the Pennsylvania Constitution, government would aspire to the democratic ideal of maximum participation by citizens while simultaneously ensuring fair, just, and **LEGAL REPRESENTATION** by politicians.

The constitution pursued this goal in several ways. It created a unicameral legislature— having only one body—a feature unique among American states. Legislators were to be "persons most noted for wisdom and virtue" and were required to swear that they would do nothing "injurious to the people." In an effort to rotate the largest number of people in and out of office, the rules mandated annual elections and limited terms to four out of every seven years. The framers had two goals: to make representatives more responsive to the people, and to allow bad politicians to be removed from office swiftly. To ensure participation by citizens, lawmaking itself was controlled. No bill could be enacted until it had been printed for general reading and, except in rare instances, until a year after its printing.

Strikingly, no provision was made for a state governor. Instead, the executive function fell to an elected twelve-member executive council. These members served staggered three-year terms, making them ineligible for reelection until four years after their terms ended. The framers believed that this approach not only served to train more citizens for political leadership, it also helped to thwart what they most detested: "an inconvenient aristocracy" of politicians. The council and the legislature elected a president and vice president. The president could not exercise any power—whether appointing judges or commanding the state's militia—without the consent of a majority of the council.

Just as the constitution placed restraints on lawmakers, so did it look skeptically at the judiciary. Pennsylvania judges were not given independence. The legislature could revoke judgeships, which lasted seven years, for "misbehavior" at any time. As an additional limitation on the judiciary, the constitution created a special body called the Council of Censors, which met every seven years to review the constitutionality of laws.

The rights granted by the Pennsylvania Constitution were among the most liberal in the United States at that time. The right to vote was based on a minimal property interest; it belonged to free men above the age of twenty-one who had resided in the state for one year and had paid public taxes, as well as to the sons of freeholders. The constitution defended the free exercise of religion, stating that no "man who acknowledges the being of a God, [may] be justly deprived or abridged of any civil right as a citizen" regardless of his "religious sentiments or peculiar mode of religious worship." Other significant liberties included the right to buy one's release from military service, not to be taxed without the consent of lawmakers, and to receive liberal **DUE PROCESS** in court.

Despite its idealism the Pennsylvania Constitution was neither a success at home nor outside the state. Critics complained about its heavy reliance on a revolving, and extremely powerful, legislature. Influential forces in the state, particularly those in business, attacked the uncertain conditions that it created for commerce. The Federalists, who believed in a strong federal government, detested its independence. Lawyers and judges decried the weakened judiciary. By 1790 the experiment had ended: the state replaced the constitution with one modeled on the U.S. Constitution's **SEPARATION OF POWERS** and its adherence to the idea of a republic.

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## PENNY STOCKS

*Inexpensive issues of stock, typically selling at less than $1 a share, in companies that often are newly formed or involved in highly speculative ventures.*

Penny stocks are usually available for sale over-the-counter, that is, among brokers and customers themselves, as opposed to being listed on the American Stock Exchange or the New York Stock Exchange.

## PENOLOGY

*The science of prison administration and rehabilitation of criminals.*

## PENSION

*A benefit, usually money, paid regularly to retired employees or their survivors by private businesses and federal, state, and local governments. Employers are not required to establish pension benefits but do so to attract qualified employees.*

The first pension plan in the United States was created by the American Express Company in 1875. A few LABOR UNIONS and state and local governments began to offer pension plans shortly thereafter, and by 1935 governments in half the states and many businesses were offering pension plans. In 1997 about half of all U.S. workers had pension plans.

Employers establish pension plans by paying a certain amount of money into a pension fund. The money paid into this fund is not taxed to the employer, and it is not taxed to the employee until the employee retires and begins to collect pension benefits. The employer gives control of the pension fund to a trustee, who may invest the money in stocks and bonds and other financial endeavors to increase the fund. Some pension plans require the employee to make a small, periodic contribution to the fund.

The amount of pension that a pensioner receives depends on the type of pension plan. Pension plans generally can be divided into two categories: defined benefit plans and defined contribution plans. A defined benefit plan provides a set amount of benefits to a pensioner. Under a defined contribution plan, the employer places a certain amount of money in the employee's name into the pension fund and makes no promises concerning the level of pension benefits that the employee will receive upon retirement. Employers using defined contribution plans contribute an amount into the pension fund based on the employee's salary. As a result, higher-paid employees receive larger pensions than do lower-paid employees.

The same is true for defined benefit plans: employers tend to offer larger pensions to higher-paid employees. The difference between the two types of plans is that in a defined contribution plan, the employee assumes the risk of investment failure because the funds are not insured by the federal government. Under most defined benefit plans, the employer assumes the risk that pension funds will not be available. Employees assume little risk because most funds are insured by the federal government to a certain limit.

The most important issue to pensioners is the potential loss of their pension benefits. This issue is of less concern when the government is the employer because governments have access to additional funds. Such is not the case with private businesses. Before the 1970s employees did not always receive their promised pension benefits. An employee could lose his or her pension if the employer went out of business and employers could fire long-time employees just before their pensions vested to avoid paying pensions. Citing the profound effect that pension plans have on interstate commerce and the economic security of the country, Congress enacted the EMPLOYEE RETIREMENT INCOME SECURITY ACT of 1974 (ERISA) (29 U.S.C.A. § 1001 et seq.) to regulate pension plans created by private businesses other than religious organizations.

ERISA is a complex collection of federal statutes that take precedence over most state pension laws. The act encourages the creation of pension funds by making employer contributions to pension funds tax free. ERISA also is designed to ensure that pension funds promised to an employee will be available. It establishes rules for the vesting of pensions based on the employee's age and length of employment. Under the law an employer using a pension plan that is not funded by the employees may choose one of several methods for vesting of pensions.

An employer may allow all pension benefits to become nonforfeitable once the employee has completed five years of employment. In the alternative, an employee may be guaranteed a percentage of pension funds according to length of service, with the percentage increasing as the length of service increases. An employee with three years of service is guaranteed 20 percent of the derived benefit from the employer contributions to the pension plan. After four years the employee has a right to 40 percent of the benefits; after five years the percentage is 60; after six years the percentage is 80; and an employee who completes seven years of service becomes fully vested. An employee is always entitled to the amount of money she or he has contributed to a pension fund.

Under ERISA, the fiduciaries who control the pension funds must meet certain reporting requirements. The act restricts the kinds of investments that trustees can make using pension funds. It mandates that employers make annual contributions to pension funds, and it devises formulas for setting minimum contribution levels. These formulas are created in actuarial tables based on such factors as the turnover of the participants in the plan, the life expectancy of the participants, the amount of money in pensions promised to employees, and the success of the pension fund's investments. The act authorizes criminal penalties for violators of pension laws and provides CIVIL LAW remedies to victims of pension misuse or abuse.

An employer who is delinquent in making contributions to the pension fund may have to pay penalties. ERISA requires employers to report to pension holders significant facts regarding the pension fund, such as a summary describing in clear language how the plan works, what benefits it provides, and how such benefits can be received. The employer also must report annually to each employee the amount of benefits that have accrued and have vested, and the earliest date on which the employee's pension will vest as of the date of the report.

ERISA created the Pension Benefit Guaranty Corporation (PBGC) to ensure the payment of certain benefits of pension plans. PBGC is a government corporation within the U.S. DEPARTMENT OF LABOR that is governed by the secretaries of labor, commerce, and treasury, and funded by premiums collected from pension plans. If an employer is unable to meet pension obligations, the PBGC may make the payments for the employer. PBGC covers only defined benefit pension plans, with the exception of church-based pension plans. Religious organizations are excepted because courts and legislatures consider church-based pensions to be an ecclesiastical matter beyond the authority of the law.

An employee cannot lose pension benefits by retiring early. Under defined benefit plans, the employee may begin to receive pension benefits upon reaching the normal retirement age of 65 years. If an employee retires before reaching age 59.5 and begins drawing from his pension, his pension payments are taxed at a 10 percent annual rate in addition to any regular income taxes. This excise tax is levied because pension funds are designed to promote security after retirement.

The excise tax does not apply to a pension given to a surviving spouse when the employee dies before the pension is fully paid, even if the employee dies before reaching age 59.5. Employees who become disabled before age 59.5 do not have to pay the excise tax, nor do persons who specifically choose to receive the pension payments as an ANNUITY or periodically. In addition, the excise tax does not apply to pensions of employees over the age of 55 years who have separated from their employer, certain pensions paid for medical expenses, and pension payments made pursuant to certain divorce-related court orders.

ERISA does not regulate pension plans with 25 or fewer participants or plans that are solely for business partners or a sole proprietor. Employees of businesses not covered by ERISA may look to state statutes governing pensions that contain regulations and requirements similar to those in ERISA.

Congress refined the tax consequences of pensions in January 1996. Under the Pension Source Act (Pub. L. No. 104-95, amending title 4 of U.S.C.A. § 114), a state that imposes income taxes may not tax pension benefits earned in the state if the pensioner is living in a state that does not impose personal INCOME TAX.

Pensions are an attractive component of employee compensation packages. The money that the employer withholds during the working life of the employee is not taxed, and the money in a pension fund can be increased through investments. When the pensioned employee retires, she or he can ask for the entire pension in one lump sum or can take the pension as an

annuity, which is a series of payments that lasts for a specified period of time. If the retiree lives long enough, she or he will receive more money than the employer originally withheld. If the pensioner dies before the pension is fully paid, her or his surviving spouse or another designated survivor may receive the remainder of the pension. A retiree who has worked at several companies may receive several pensions.

Individuals who are self-employed have their own pension options. A self-employed worker may establish a KEOGH PLAN, which is a type of retirement plan for self-employed workers that is comparable to a pension plan. Under a Keogh plan, the worker makes tax-free payments into a fund and receives larger payments upon retirement.

An INDIVIDUAL RETIREMENT ACCOUNT (IRA) is another way to provide for security in retirement. An IRA is a personal retirement account that workers may establish in addition to, or instead of, a pension. Employers may establish similar personal retirement accounts for their employees. These accounts are called 401K plans, after the section of the INTERNAL REVENUE CODE that authorizes them. Under a 401K plan, a worker deposits a portion of his or her gross earnings into the account to avoid income tax on that portion of the earnings. The earnings are subject to taxation when the retiring worker receives them. If the worker is in a lower tax bracket by retirement, he or she will end up paying less tax on the portion of the earnings in the IRA.

Pension benefits are distinct from other retirement benefits such as SOCIAL SECURITY and medical assistance. A pension may reduce slightly the amount of Social Security benefits that a government employee receives.

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CROSS-REFERENCES

Social Security.

## PENT ROAD

*A street that is closed at its terminal points.*

The term *pent,* which means penned or confined, is used to distinguish this type of road from an open highway that leads to other thoroughfares. Pent roads are frequently adjacent to the lands of persons who are constructing connecting arteries across their own property to secure needed outlets.

## PENTAGON PAPERS

See NEW YORK TIMES CO. V. UNITED STATES.

## PENUMBRA

*The rights guaranteed by implication in a constitution or the implied powers of a rule.*

The original and literal meaning of *penumbra* is "a space of partial illumination between the perfect shadow . . . on all sides and the full light" (*Merriam Webster's Collegiate Dictionary,* 10th ed., 1996). The term was created and introduced by astronomer Johannes Kepler in 1604 to describe the shadows that occur during eclipses. However, in legal terms penumbra is most often used as a metaphor describing a doctrine that refers to implied powers of the federal government. The doctrine is best known from the Supreme Court decision of GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), where Justice WILLIAM O. DOUGLAS used it to describe the concept of an individual's constitutional right of privacy.

The history of the legal use of the penumbra metaphor can be traced to a federal decision written by Justice STEPHEN J. FIELD in the 1871 decision of *Montgomery v. Bevans,* 17 F.Cas. 628 (9th C.C.D. Cal.). (At the time, Field was performing circuit duty while a member of the Supreme Court.) Since the *Montgomery* decision, the penumbra metaphor has not been used often. In fact, more than half of its original uses can be attributed to just four judges: OLIVER

WENDELL HOLMES, JR., LEARNED HAND, BENJAMIN N. CARDOZO, and William O. Douglas.

In an 1873 article on the theory of TORTS, Justice Holmes used the term penumbra to describe the "gray area where logic and principle falter." In later decisions, Justice Holmes developed the penumbra doctrine as representing the "outer bounds of authority emanating from a law." Justice Holmes usually used the word in an attempt to describe the need to draw ARBITRARY lines when forming legislation. For instance, in the decision of *Danforth v. Groton Water Co.,* Holmes referred to constitutional rules as lacking mathematical exactness, stating that they, "[l]ike those of the COMMON LAW, end in a penumbra where the Legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power" (178 Mass. 472, 476–77, 59 N.E. 1033, 1034 [1901]).

Judge Hand expanded the meaning of the word in opinions written between 1915 and 1950 by using it to indicate the vague borders of words or concepts. He used it to emphasize the difficulty in defining and interpreting statutes, contracts, TRADEMARKS, or ideas.

Justice Cardozo's use of the penumbra metaphor in opinions written between 1934 and 1941 was similar to Holmes's application, but Justice Douglas took a different approach. Rather than using it to highlight the difficulty of drawing lines or determining the meaning of words or concepts, he used the term when he wanted to refer to a peripheral area or an indistinct boundary of something specific.

Douglas's most famous use of penumbra is in the *Griswold* decision. In the *Griswold* case, appellants Estelle Griswold, executive director of the Planned Parenthood League of Connecticut, and Dr. C. Lee Buxton, a medical professor at Yale Medical School and director of the league's office in New Haven, were convicted for prescribing contraceptive devices and giving contraceptive advice to married persons in violation of a Connecticut statute. They challenged the constitutionality of the statute, which made it unlawful to use any drug or medicinal article for the purpose of preventing conception, on behalf of the married persons with whom they had a professional relationship. The Supreme Court held that the statute was unconstitutional

*The concept of penumbra involves trying to divine the spirit of the law from its letter. In 1965, Estelle Griswold (left) of Planned Parenthood and Mrs. Ernest Jahncke of the Parenthood League react to the Supreme Court's use of this method to interpret a Connecticut statute forbidding the distribution of contraceptives to married couples as a violation of their privacy rights.* BETTMANN/CORBIS

because it was a violation of a person's right to privacy. In his opinion, Douglas stated that the specific guarantees of the BILL OF RIGHTS have penumbras "formed by emanations from those guarantees that help give them life and substance," and that the right to privacy exists within this area.

Since *Griswold,* the penumbra doctrine has primarily been used to represent implied powers that emanate from a specific rule, thus extending the meaning of the rule into its periphery or penumbra.

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CROSS-REFERENCES

Judicial Review; Jurisprudence.

## PEONAGE

*A condition of enforced servitude by which a person is restrained of his or her liberty and compelled to labor in payment of some debt or obligation.*

CROSS-REFERENCES

Involuntary Servitude.

## PEOPLE

*The aggregate of the individuals who comprise a state or a nation.*

In a more restricted sense, as generally used in CONSTITUTIONAL LAW, the entire body of those citizens of a state or a nation who are invested with political power for political purposes (the qualified voters).

## PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS

People for the Ethical Treatment of Animals (PETA) is an international nonprofit organization that supports ANIMAL RIGHTS and has spawned a tremendous amount of conflict and controversy from its inception. The organization, which has been headquartered in Norfolk, Virginia, since 1996, was founded in 1980 by Ingrid Newkirk, who had worked at an animal shelter and then as a deputy sheriff in Montgomery County, Maryland, where she focused on animal-cruelty cases. She was also chief of Animal Disease Control for the Public Health Commission of the District of Columbia.

Newkirk became increasingly horrified at the inhumane treatment of animals that she encountered in her work, particularly in so-called "factory farms," which confine hundreds to thousands of animals (usually chickens, pigs, turkeys, or cows) in one facility, and in research laboratories. While other organizations are dedicated to seeing that animals are treated humanely, none is as radical in both outlook and strategies as PETA. Newkirk has been quoted as saying, "When it comes to feelings like hunger, pain, and thirst, a rat is a pig is a dog is a boy." The organization's philosophy is uncompromising: "animals are not ours to eat, wear, experiment on, or use for entertainment." The organization's goals to inform and educate the public and policy-makers about animal abuse and to stop such abuse wherever possible are carried out in a number of ways.

PETA is a grassroots organization run by hundreds of volunteers under the leadership of Newkirk, Dan Mathews, vice-president of campaigns, and Bruce Friedrich, director of vegan outreach. The vegan philosophy prohibits eating, wearing, or using any kind of animal products including milk, eggs, honey, and wool or leather products.

PETA has been called "the most successful radical organization in America." With over 750,000 members and supporters in the United States and around the world, the organization has an annual budget of approximately $14 million, almost all of which is raised by small contributions from individuals.

In addition to familiar protest tactics such as letter-writing campaigns and corporate boycotts, the organization makes prolific use of multiple Web sites that proselytize against numerous issues, including the fur trade (furismurder.com), fishing (fishinghurts.com), zoos (wildlifepimps.com), tobacco companies that continue to do animal testing (smokinganimals.com), and fast food restaurants. PETA has been particularly successful in appealing to youth

between the ages of 13 and 24 who are interested in the humane treatment of animals as well as vegetarianism and veganism. The organization's youth-oriented Web site peta2.com advertises PETA as the "largest and boldest animal rights organization in the world."

PETA supporters have staged hundreds of flamboyant activities in the United States and Europe in which they have sprayed red paint on fur coats while the coats were being worn, tossed containers of currency covered with fake blood on audiences at the International Fur Fair, dropped a dead raccoon on the plate of a *Vogue* magazine editor as she dined at a fashionable New York restaurant, sat naked in cages and crawled along streets wearing leg-hold traps on their feet.

In November 2002, PETA activists disrupted a Victoria's Secret lingerie show that was being watched on network television by 11 million viewers. Despite extremely high security, several women managed to leap onto the stage in front of Brazilian supermodel Gisele Bundchen with signs that read "Gisele: Fur Scum." Bundchen had been featured in a series of ads promoting a line of Blackglama brand mink furs. Although the PETA supporters were quickly arrested and jailed, the subsequent news stories and video clips of the incident were played throughout the world, eclipsing coverage of the show and gaining maximum publicity for PETA.

Like its other strategies, PETA advertising campaigns are designed to create maximum interest by both attracting and repelling political and public attention. Some of PETA ad campaigns featuring nude female celebrities under the slogan "I'd rather go naked than wear fur" have drawn the ire of both conservative and feminist groups. When PETA ran a series of ads lampooning the dairy industry's "Got Milk?" campaign with a "Got Beer?" ad that ran in numerous college newspapers, the organization was attacked by MOTHERS AGAINST DRUNK DRIVING (MADD) for making light of alcohol abuse by college students.

In February 2003, PETA launched what many considered its most inflammatory campaign to date, a traveling exhibit called "Holocaust on Your Plate," which compared human abuse and mistreatment of animals to the torture, cruelty, and death inflicted by the Nazis on concentration camp victims. Numerous writers and organizations including the ANTI-DEFAMATION LEAGUE denounced the PETA exhibit, but the organization succeeded once again in making the news.

Other organizations have sought IRS revocation of the PETA nonexempt status citing the violence of the rhetoric used by PETA leaders and activists and its support of the Animal Liberation Front, which has been labeled a "domestic terrorist" group and openly claims to use damage and destruction of property to save animals.

Even the organization's critics, however, agree that PETA has been instrumental in a number of victories ranging from closing laboratories where animals were mistreated to getting cosmetic corporations to stop animal testing and persuading car manufacturers not to use animals as auto crash test subjects. PETA also successfully applied pressure to various fast food corporations to add vegetarian options to their menus and to institute regulations for better treatment of poultry and livestock by their producers.

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CROSS-REFERENCES

Animal Rights.

## PER

[Latin, By, through, or by means of.]

## PER CAPITA

*[*Latin, By the heads or polls.*] A term used in the* DESCENT AND DISTRIBUTION *of the estate of one who dies without a will. It means to share and share alike according to the number of individuals.*

In a per capita distribution, an equal share of an estate is given to each heir, all of whom stand in equal degree of relationship from a decedent. For example, a woman died intestate, that is, without a will. Her husband and three children predeceased her, and her only living heirs are her ten grandchildren. These grandchildren will take per capita. In other words, each grandchild will receive one-tenth of the estate.

Per capita differs from per stirpes, where persons do not inherit in their individual capac-

ity but take as part of a group represented by a deceased ancestor closer in line to the decedent.

## PER CURIAM

*[*Latin, By the court.*] A phrase used to distinguish an opinion of the whole court from an opinion written by any one judge.*

Sometimes *per curiam* signifies an opinion written by the chief justice or presiding judge; it can also refer to a brief oral announcement of the disposition of a case by the court that is unaccompanied by a written opinion.

## PER QUOD

*[*Latin, Whereby.*] With respect to a complaint in a civil action, a phrase that prefaces the recital of the consequences of certain acts as a ground of special harm to the plaintiff.*

At COMMON LAW, this term acquired two meanings in the law of DEFAMATION: with respect to slander, it signified that proof of special damages was required; in regard to LIBEL, it meant that proof of extrinsic circumstances was required.

Words that are actionable *per quod* do not furnish a basis for a lawsuit upon their face but are only litigable because of extrinsic facts showing the circumstances under which they were uttered or the damages ensuing to the defamed party therefrom.

CROSS-REFERENCES

Extrinsic Evidence; Libel and Slander.

## PER SE

*[*Latin, In itself.*] Simply as such; in its own nature without reference to its relation.*

In the law of DEFAMATION, slander *per se* refers to certain language that is actionable as slander in and of itself without proof of special damages, such as the situation in which a person is falsely accused of having committed a crime. Defamation per se is in contradistinction to defamation per quod, which requires proof of special damages.

CROSS-REFERENCES

Libel and Slander.

## PER STIRPES

*[*Latin, By roots or stocks; by representation.*] A term used to denote a method used in dividing the estate of a person. A person who takes per stirpes, sometimes called by right of representation, does not inherit in an individual capacity but as a member of a group.*

**Per Stirpes vs. Per Capita**

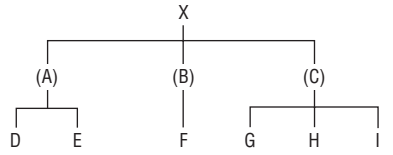


- Per Capita, D gets 1/6th; F gets 1/6; G gets 1/6th
- Per Stirpes, D gets 1/6th; F gets 1/3; G gets 1/9th

SOURCE: Professor Don R. Castleman, "Intestate Succession—Lineal Descendents," class notes for Decedents Estates and Trusts course, Wake Forest University School of Law.

In a per stirpes distribution, a group represents a deceased ancestor. The group takes the proportional share to which the deceased ancestor would have been entitled if still living.

For example, a man died intestate; his wife predeceased him. He had four children, three of whom are still living at the time of his death. The deceased child had three children, all still living. These three grandchildren will share equally in one-fourth of their grandfather's estate, the share the deceased parent would have taken if still alive. The three living children will also each receive one-fourth of the estate.

Per stirpes differs from per capita, in which an equal share is given to each of a number of persons who all stand in equal degree of relationship to the deceased.

CROSS-REFERENCES

Descent and Distribution.

## PERCENTAGE LEASE

*A rental agreement, usually with respect to a retail business property, whereby a portion of the gross sales or net sales of the tenant is used to determine the rent.*

There is generally a provision in a percentage lease that calls for a minimum or base rental. It protects the lessor in the event of poor sales.

## PEREMPTORY CHALLENGE

*The right to challenge a juror without assigning, or being required to assign, a reason for the challenge.*

During the selection of a jury, both parties to the proceeding may challenge prospective jurors for a lack of impartiality, known as a challenge for cause. A party may challenge an unlimited number of prospective jurors for cause. Parties also may exercise a limited number of peremptory challenges. These challenges permit a party to remove a prospective juror without giving a reason for the removal.

Peremptory challenges provide a more impartial and better qualified jury. Peremptory challenges allow an attorney to reject a potential juror for real or imagined partiality that would be difficult to demonstrate under the challenge for cause category. These challenges, however, have become more difficult to exercise because the U.S. Supreme Court has forbidden peremptory strikes based on race or gender.

Parties do not have a federal constitutional right to exercise peremptory challenges. Peremptory challenges are granted by statute or by case law. The number of challenges is usually determined by statute, but some jurisdictions allow the trial court to grant additional peremptory challenges. In federal court each side is entitled to three peremptory challenges. If more than two parties are involved in the proceeding, the court may either grant additional challenges or restrict the parties to the minimum number of challenges.

Peremptory challenges came under legal attack in the 1980s. Critics claimed that white prosecutors used their peremptory challenges to remove African Americans from the jury when the criminal defendant was also African American because the prosecutors thought that the potential jurors would be sympathetic to a member of their own race. This constituted **RACIAL DISCRIMINATION** and a violation of the Fourteenth Amendment's **EQUAL PROTECTION CLAUSE.**

The U.S. Supreme Court, in *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), prohibited prosecutors from excluding prospective jurors on the basis of race. Under the *Batson* test, a defendant may object to a prosecutor's peremptory challenge. The prosecutor then must "come forward with a neutral explanation for challenging black jurors." If the prosecutor cannot offer a neutral explanation, the court will not excuse the juror.

The Court extended this holding in criminal proceedings in two later cases. In *Powers v. Ohio,* 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), the Court broadened the *Batson* rule by stating that a defendant need not be of the same race as the excluded juror in order to successfully challenge the juror's exclusion. In *Georgia v. McCollum,* 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992), the Court held that the defense's exercise of peremptory challenges to strike African American jurors on the basis of their race was equally forbidden. Previously, the court had ruled in *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991), that in civil trials a private party could not exclude prospective jurors on account of their race by using peremptory challenges. This series of decisions makes any racial exclusion in jury selection constitutionally suspect.

The Supreme Court has also forbidden peremptory challenges based on gender. In *J. E. B. v. Alabama,* 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994), the Court ruled that striking jurors on the basis of gender serves to perpetuate stereotypes that are prejudicial and based on historical discrimination. No overriding **STATE INTEREST** justified peremptory challenges on the basis of gender. Permitting gender-based strikes could also have undermined the *Batson* holding, because gender might be used as an excuse for racial discrimination.

In an extension of *Batson*, the Supreme Court of Connecticut ruled that the Equal Protection Clause barred the prosecutor from striking prospective jurors based on their religious affiliation. The court, in *State v. Hodge*, 726 A.2d 531 (Conn.1999), distinguished religious beliefs and religious affiliations. It held that litigants could strike prospective jurors whose religious beliefs would prevent them from performing their duties as jurors.

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**CROSS-REFERENCES**

Case Law; Federal Courts; Jurisdiction; Jury; Trial.

## PEREMPTORY RULING

*An immediate and absolute decision by the court on some point of law that is rendered without consideration of alternatives.*

## PERFECT

*Complete; finished; executed; enforceable; without defect; merchantable; marketable.*

To perfect a title is to record or register it in the proper place so that one's ownership will be established against all others.

## PERFORMANCE

*The fulfillment or accomplishment of a promise, contract, or other obligation according to its terms.*

*Part performance* entails the completion of some portion of what either party to a contract has agreed to do. With respect to the sale of goods, the payment—or receipt and acceptance of goods—makes an oral sales contract, otherwise unenforceable because of the STATUTE OF FRAUDS, enforceable in regard to goods for which payment has been made and accepted or which have been received and accepted.

SPECIFIC PERFORMANCE is an equitable doctrine that compels a party to execute the agreement according to its terms where monetary damages would be inadequate compensation for the breach of an agreement, as in the case of a sale of land. In regard to the sale of goods, a court orders specific performance only where the goods are unique or in other proper circumstances.

## PERIL

*The designated contingency, risk, or hazard against which an insured seeks to protect himself or herself when purchasing a policy of insurance.*

Among the various types of perils for which insurance coverage is available are fire, theft, illness, and death.

## PERJURY

*A crime that occurs when an individual willfully makes a false statement during a judicial proceeding, after he or she has taken an oath to speak the truth.*

The common-law crime of perjury is now governed by both state and federal laws. In addition, the MODEL PENAL CODE, which has been adopted in some form by many states and promulgated by the Commission on Uniform State Laws, also sets forth the following basic elements for the crime of perjury: (1) a false statement is made under oath or equivalent affirmation during a judicial proceeding; (2) the statement must be material or relevant to the proceeding; and (3) the witness must have the SPECIFIC INTENT to deceive.

The punishment for perjury in most states, and under federal law, is the imposition of a fine, imprisonment, or both. Federal law also imposes sentencing enhancements when the court determines that a defendant has falsely testified on her own behalf and is convicted. Under the Federal Sentencing Guidelines, the court is required to automatically increase the defendant's sentence.

Two federal statutes govern the crime of perjury in federal proceedings. Title 18 U.S.C.A. § 1621 codifies the COMMON LAW of perjury and consists of the elements listed above. In 1970, the scope of section 1621 was expanded by the enactment of 18 U.S.C.A. § 1623. Section 1623 changes the definition of intent from willfully offering false testimony to merely having knowledge that the testimony is false. In addition it adds to the definition of perjury to include the witness's use of information, including any book, paper, document, record, recording, or other material she knows contains a false material declaration, and includes proceedings that are ancillary to any court, such as affidavits and depositions, and GRAND JURY proceedings. Section 1623 also contains a retraction defense. If, during the proceeding in which the false statement was made, the person admits to the falsity of the statement before it is evident that the falsity has been or will be exposed, and as long as the falsity does not affect the proceeding substantially, prosecution will be barred under section 1623.

Commentators believe that the existence of these two federal statutes actually frustrates the goals of Congress to encourage truthful statements. The reasoning behind this concern is that when a retraction exists, prosecutors may charge a witness with perjury under section 1621 and when a retraction does not exist, the witness may be charged under section 1623.

Two variations of perjury are SUBORNATION OF PERJURY and false swearing; in many states these two variations are separate offenses. Subornation of perjury is a crime in which the defendant does not actually testify falsely but

instead induces, persuades, instigates, or in some way procures another witness to commit perjury. False swearing is a false statement made under oath but not made during an official proceeding. Some states have created a separate offense for false swearing, while others have enacted perjury statutes to include this type of false statement. These crimes also may be punished by the imposition of a fine, imprisonment, or both.

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## ♦ PERKINS, FRANCES

At a time when few women achieved prominence in national politics, Frances Perkins distinguished herself as a public official, a respected labor and industry expert, and an adviser to the president of the United States. When Perkins was named secretary of labor by President FRANKLIN D. ROOSEVELT in 1933, she became the first woman in U.S. history to hold a cabinet post. Perkins used her position to help launch the sweeping social and economic reforms of the NEW DEAL.

"WE ALL TAKE REFUGE IN THE OPTIMISM WHICH IS TYPICAL OF THIS GREAT CREATIVE NATION. EVERY SITUATION HAS FOUND US UNPREPARED."
—FRANCES PERKINS

Perkins was born April 10, 1880, in Boston, and raised in Worcester, Massachusetts. After graduating from Worcester Classical High School, Perkins attended Mount Holyoke College, where she studied physics and chemistry and was class president. As a senior at Mount Holyoke, Perkins was influenced by Jacob A. Riis's 1890 book *How the Other Half Lives* and by a speech given by Florence Kelley, the general secretary of the National Consumers League. Perkins's growing awareness of the plight of underprivileged U.S. citizens would lead to her life's work as a labor activist. After graduating from Mount Holyoke in 1902, Perkins pursued further studies in economics and sociology at the University of Pennsylvania and Columbia University. She earned a master's degree from Columbia in 1910.

After graduate school, Perkins briefly taught biology and physics in a school in Lake Forest, Illinois. In her off-hours, she volunteered at Jane Addams's Hull House, in nearby Chicago, and at other settlement houses. There, Perkins witnessed the poverty and wretched working conditions endured by thousands of U.S. citizens. Determined to help improve the plight of workers, she returned to New York City to work as a lobbyist with her mentor, Kelley, at the New York Consumers League.

Perkins's task was formidable. Throughout the early twentieth century, U.S. businesses were unregulated: workers in sweatshops worked long hours for low pay in unsafe working conditions. There were no BUILDING CODES to ensure the employees' safety, no regular inspections of equipment and machinery, and no limit to the number of hours employees could work. Children routinely were employed in factories, mills, and mines under the most miserable conditions. Some women worked nineteen hours a day with their children by their side.

An industrial tragedy heightened Perkins's resolve to force changes in the workplace. On March 25, 1911, a fire broke out at the Triangle Shirtwaist Company, in New York City. Perkins happened to be in the neighborhood and watched as employees trapped on the top three floors of the burning ten-story building jumped

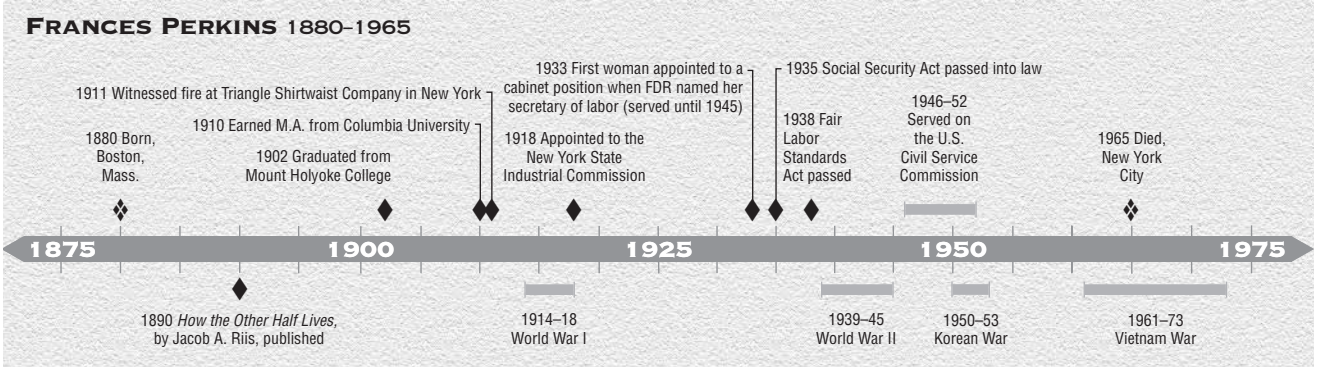

from windows to their death. The door to the only stairway in the building had been locked by employers, to halt break-ins. One hundred workers perished inside the building, and forty-seven jumped or fell to their death. The owners of the company were later absolved of criminal negligence for the disaster and collected $64,925 in property damage insurance.

In the fire's aftermath, the New York State Factory Commission was created, with Perkins named as chief investigator. She also became a member of the Committee on Safety of the City of New York and lobbied hard for legislation to make the workplace safer. She toured the state with Alfred E. Smith and ROBERT F. WAGNER and documented the deplorable conditions faced by workers. An exhaustive investigation led to new laws to protect the labor force.

A major success for Perkins was the passage of a bill by the New York Legislature to limit the workweek to fifty-four hours for women and children. The bill was vigorously opposed by the employers of the four hundred thousand female factory workers throughout the state. While LOBBYING for the bill, Perkins became acquainted with Roosevelt, who was a New York state senator. Although Roosevelt's support of the fifty-four-hour bill was lukewarm, Perkins developed a professional relationship with him that grew stronger as Roosevelt's views on labor and government began to mirror her own.

In 1913 Perkins married Paul Caldwell Wilson and rejected prevailing social convention by retaining her maiden name for professional purposes. In 1918 she was appointed to the New York State Industrial Commission.

Perkins's work with Roosevelt in New York led to a position in the federal government. When Roosevelt was elected president in 1932, he asked Perkins to become secretary of labor. Although she argued that a female trade unionist should be nominated for the post, she eventually accepted the position. Perkins became the only cabinet member to serve during all four of Roosevelt's terms of office.

When Roosevelt took office, the country was in the midst of the Great Depression. About a third of the nation's workforce was unemployed. As labor secretary, Perkins helped shape the SOCIAL SECURITY ACT (42 U.S.C.A. § 301 et seq.), a key component of Roosevelt's New Deal. Passed by the U.S. Congress in 1935, the act allowed qualified workers in commerce and industry to collect OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE benefits. The new program required employers and employees to make contributions to a federal PENSION fund for aged and DISABLED PERSONS. In this way, workers and their families were financially protected in the event of unemployment, old age, or the death of a wage earner. Although critics likened the plan to SOCIALISM, SOCIAL SECURITY became a successful federal entitlement program.

*Frances Perkins.*
LIBRARY OF CONGRESS

Perkins also helped develop the FAIR LABOR STANDARDS ACT of 1938 (29 U.S.C.A. § 201 et seq.), which limited the number of hours employees could work for MINIMUM WAGE. The law also placed restrictions on child labor. It prohibited children under sixteen years of age from working in most jobs, and made hazardous occupations unavailable to workers under eighteen years of age. The Wage and Hour Division of the LABOR DEPARTMENT was also established by the act.

After Roosevelt's death in 1945, Perkins served briefly in the administration of President HARRY S. TRUMAN. She left Truman's cabinet to serve on the U.S. Civil Service Commission from 1946 to 1952. Perkins then taught courses at Cornell University's School of Industrial and Labor Relations. She died in New York City on May 14, 1965, at the age of eighty-five.

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CROSS-REFERENCES

Child Labor Laws; Labor Law.

## PERMISSIVE COUNTERCLAIM

*A claim by a defendant opposing the claim of the plaintiff and seeking some relief from the plaintiff for the defendant.*

Once a plaintiff sues a defendant in a civil action, the defendant has the right to assert a legal claim of her own against the plaintiff. This is known as a counterclaim. A counterclaim makes assertions that the defendant *could have made* in a lawsuit if the plaintiff had not already begun an action. A counterclaim is distinct from a mere defense, which seeks only to defeat the plaintiff's lawsuit, in that it seeks a form of relief. There are two types of counterclaims: compulsory counterclaims and permissive counterclaims. Both are governed in federal court by rule 13 of the Federal Rules of CIVIL PROCEDURE. The rules in state courts are similar.

The compulsory counterclaim arises from the same transaction or occurrence that forms the basis of the plaintiff's suit. For example, a car accident between two drivers leads to a personal injury lawsuit, but the defendant asserts in a compulsory counterclaim that the plaintiff actually owes him damages for injuries. A compulsory counterclaim generally must be part of the initial answer to the plaintiff's action and cannot be made later in the suit or in a separate lawsuit.

By contrast, the permissive counterclaim arises from an event unrelated to the matter on which the plaintiff's suit is based. For example, John Smith breaks his leg while visiting the home of Jane Doe. Smith sues Doe, alleging that she negligently left her child's roller skate on her front porch. In a permissive counterclaim, Doe asserts that Smith owes her money. The court will rule separately on plaintiff Smith's and defendant Doe's respective claims; if both claims are permitted to proceed, *Smith v. Doe* will involve the two parties' respective allegations of NEGLIGENCE and a bad debt.

Counterclaims are usually valid only if it is possible to make the same claim by starting a lawsuit. Thus, in the example of Smith and Doe, Doe can only make her permissive counterclaim if the STATUTE OF LIMITATIONS on collection of the debt has not expired. Permissive counterclaims need not be made in the initial PLEADING; they can be made at a later time or even in another lawsuit. This flexibility may help the defendant's legal strategy: she can wait and sue in a different court, in order to have another judge hear the case or to avoid arguing the merits of separate claims before the same jury.

## PERPETRATOR

*A term commonly used by law enforcement officers to designate a person who actually commits a crime.*

## PERPETUATING TESTIMONY

*The procedure permitted by federal and state discovery rules for preserving the attestation of a witness that might otherwise be lost prior to the trial in which it is intended to be used.*

The usual method of perpetuating testimony is by taking a deposition. It is usually allowed when a witness is aged and infirm or is about to leave the state.

## PERPETUATION OF EVIDENCE

*The procedure employed to assure that proof will be available for possible use at a later trial.*

The police, for example, can deposit a murder weapon with the court, prior to the day set for trial of the accused, for purposes of perpetuation of evidence.

## PERPETUITIES

See RULE AGAINST PERPETUITIES.

## PERQUISITES

*Fringe benefits or other incidental profits or benefits accompanying an office or position.*

The abbreviation *perks* is used in reference to extraordinary benefits afforded to business executives, such as country club memberships or the free use of automobiles.

## PERSON

*In general usage, a human being; by statute, however, the term can include firms, labor organiza-*

*tions, partnerships, associations, corporations, legal representatives, trustees, trustees in* BANKRUPTCY*, or receivers.*

A corporation is a "person" for purposes of the constitutional guarantees of EQUAL PROTECTION OF LAWS and DUE PROCESS OF LAW.

Foreign governments otherwise eligible to sue in United States courts are "persons" entitled to institute a suit for treble damages for alleged antitrust violations under the CLAYTON ACT (15 U.S.C.A. § 12 et seq.).

Illegitimate children are "persons" within the meaning of the Equal Protection Clause of the FOURTEENTH AMENDMENT to the U.S. Constitution.

The phrase *interested person* refers to heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in, or a claim against, a trust estate or the estate of a decedent, ward, or protected person. It also refers to personal representatives and to fiduciaries.

## PERSONAL ACTIONS

*Lawsuits initiated in order, among other things, to recover damages for some injury to a plaintiff's personal right or property, for breach of contract, for money owed on a debt, or for the recovery of a specific item of* PERSONAL PROPERTY.

Under the old COMMON LAW, personal actions were one of the three categories of FORMS OF ACTION, the other two being real actions and mixed actions. The right to bring personal actions was an innovation in a day when the only useful property was land. There were few consumer goods and little money in ancient England. From the ACCESSION of the Norman kings in 1066, the royal right to supervise ownership and possession of land was seldom questioned. Only when the security of land ownership was seen to depend on the peace of individual persons were personal actions like debt, DETINUE, and TRESPASS permitted.

## PERSONAL INJURY

*Any violation of an individual's right, other than his or her rights in property.*

The term *personal injury* is not confined to physical injuries, although NEGLIGENCE cases usually do involve bodily injuries.

CROSS-REFERENCES

Tort Law.

## PERSONAL JURISDICTION

*The power of a court to hear and determine a lawsuit involving a defendant by virtue of the defendant's having some contact with the place where the court is located.*

Personal jurisdiction, also known as in personam (against the person) jurisdiction, gives a court the authority to make decisions binding on the persons involved in a civil case. Every state has personal jurisdiction over persons within its territory. Conversely, no state can exercise personal jurisdiction and authority over persons outside its territory unless the persons have manifested some contact with the state.

The authority of the court to issue orders to persons present within the territory comes from the sovereign power of the government. The court's authority allows it to reach all residents of a state, including those who are outside the state for a short period and out-of-state residents who enter the state even briefly.

Deciding whether an individual is within the personal jurisdiction of a court has not been difficult to determine. Difficulty has arisen when courts have had to decide whether corporations were subject to personal jurisdiction. Corporations have a legal existence and a legal identity but not a tangible existence. They are subject to lawsuits involving TORT and contract. As corporations became national economic entities, the courts of a state had difficulty finding personal jurisdiction if the corporation was not located within that state.

Courts established that a corporation is always subject to the jurisdiction of the courts in the state where it was incorporated. States also require corporations to file written consents to personal jurisdiction before they can conduct business within the state. Other states require that either the corporation designate an agent to accept legal process (the legal documents initiating a lawsuit) in the state or that the state attorney general be authorized to accept process for all out-of-state corporations doing business within the state.

In 1945 the U.S. Supreme Court modernized personal jurisdiction requirements when it announced the "minimum contacts" test in *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95. The Court held that courts could constitutionally exercise jurisdiction over a nonresident defendant if the defendant had sufficient contacts with the state

such that forcing the person to litigate in that forum did not offend "traditional notions of fair play and substantial justice." Because of the ease of modern communication and transportation, it is usually not unfair to require a party to defend itself in a state in which it conducts business activity.

The threshold of minimum contacts varies. Where the action arises out of or is related to the defendant's contacts with the state, the quantity of contacts necessary to establish personal jurisdiction may be truly minimal. In such cases the nature and quality of the contact are the determining factors. In the case of a nonresident motorist who causes an injury in the forum state (the state of the court asserting jurisdiction), the interest of the state in providing a forum for its residents and regulating its highways, coupled with the defendant's having purposefully entered the state, permits the state to fairly assert personal jurisdiction.

A corporation or individual not physically present in a state may invoke personal jurisdiction by making a single contact with the state by telephone, mail, or facsimile transmission. In *Hanson v. Denckla,* 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958), the Court ruled that even a single transaction can trigger personal jurisdiction when the defendant purposely avails itself of the privilege of conducting activities with the forum state and invokes the benefits and protection of state law.

States quickly took advantage of *International Shoe* by enacting "long-arm statutes." These statutes allow the state to reach out and obtain jurisdiction over anyone who is not present in the state but who transacts business within the state, commits a tort within the state, commits a tort outside the state that causes injury within the state, or owns, uses, or possesses real property within the state.

Personal jurisdiction in the federal courts is governed by rule 4 of the Federal Rules of Civil Procedure. Rule 4 directs each federal district court to follow the law on personal jurisdiction that is in force in the state courts where the federal court is located. Federal courts may use state LONG-ARM STATUTES to reach defendants beyond the territory of their normal authority. With cases that can only be brought in federal court, such as lawsuits involving federal SECURITIES and ANTITRUST LAWS, federal courts may exercise personal jurisdiction over a defendant no matter where the defendant is found.

When a person wishes to challenge personal jurisdiction, he or she must take care in appearing before the court in the forum state. If the defendant makes a general appearance, the court will take this to be an unqualified submission to the personal jurisdiction of the court. The defendant waives the right to raise any jurisdictional defects.

To prevent this from happening, a defendant must request a special appearance before the court. A special appearance is made for the limited purpose of challenging the sufficiency of the SERVICE OF PROCESS or the personal jurisdiction of the court. If any other issues are raised, the proceeding becomes a general appearance. The court must then determine whether it has jurisdiction over the defendant. If the defendant is found to be within the personal jurisdiction of the court, the issue may be appealed. Some states permit an immediate appeal, whereas others make the defendant raise the issue after the case has been heard on its merits in the trial court.

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## PERSONAL PROPERTY

*Everything that is the subject of ownership that does not come under the denomination of real property; any right or interest that an individual has in movable things.*

Personal property can be divided into two major categories: (1) corporeal personal property, including such items as animals, merchandise, and jewelry; and (2) incorporeal personal property, comprised of such rights as stocks, bonds, PATENTS, and copyrights.

### Possession

Possession is a property interest under which an individual is able to exercise power over something to the exclusion of all others. It is a basic property right that entitles the possessor to (1) the right to continue peaceful possession against everyone except someone having a superior right; (2) the right to recover a chattel that has been wrongfully taken; and (3) the right to recover damages against wrongdoers.

Possession requires a degree of actual control over the object, coupled with the intent to possess and exclude others. The law recognizes two basic types of possession: actual and constructive.

*Actual possession* exists when an individual knowingly has direct physical control over an object at a given time. For example, an individual wearing a particular piece of valuable jewelry has actual possession of it. *Constructive possession* is the power and intent of an individual to control a particular item, even though it is not physically in that person's control. For example, an individual who has the key to a bank safe deposit box, which contains a valuable piece of jewelry that she owns, is said to be in constructive possession of the jewelry.

### Possession of Animals

Animals ferae naturae, or wild animals, are those that cannot be completely domesticated. A degree of force or skill is necessary to maintain control over them. Gaining possession is a means of obtaining title to, or ownership of, wild animals.

Generally an owner of land has the right to capture or kill a wild animal on her property and upon doing so, the animal is regarded as belonging to that individual because she owns the soil. The traditional legal principle has been that one who tames a wild animal is regarded as its owner provided it appears to exhibit animus revertendi, or the intent to return to the owner's domicile. Conversely when a captured wild animal escapes and returns to its natural habitat without any apparent intent to return to the captor's domicile, the captor forfeits all personal property right and the animal may be captured by anyone.

### Lost, Mislaid, and Abandoned Property

Personal property is considered to be *lost* if the owner has involuntarily parted with it and is ignorant of its location. *Mislaid property* is that which an owner intentionally places somewhere with the idea that he will eventually be able to find it again but subsequently forgets where it has been placed. *Abandoned property* is that to which the owner has intentionally relinquished all rights.

Lost or mislaid property continues to be owned by the person who lost or mislaid it. When one finds lost goods, the finder is entitled to possession against everyone with the exception of the true owner.

The finder of lost articles on land belonging to someone else is entitled to possession against everyone but the true owner, unless the finder is guilty of TRESPASS. The finder of misplaced goods has no right to their possession. The owner of the place where an article is mislaid has a right to the article against everyone but the true owner. Abandoned property can be possessed and owned by the first person who exercises dominion over it with an intent to claim it as his or her own. In any event, between the finder of a lost, mislaid, or abandoned article and the owner of the place where it is found, the law applies to whatever rule will most likely result in the return of the article to its rightful owner.

Ordinarily when articles are found by an employee during and within the scope of his employment, they are awarded to the employer rather than to the employee-finder.

Treasure trove is any gold or silver in coin, plate, or bullion that is hidden by an unknown owner in the earth or other private place for an extended period. The property is not considered treasure trove unless the identity of the owner cannot be ascertained. Under early COMMON LAW, the finder of a treasure trove took title to it against everyone but the true owner. This doctrine was altered in England by a statute granting title to the crown subject to the claims of the true owner. The U.S. law governing treasure trove has, for the most part, been merged into the law governing lost property. However, certain cases have held that the old treasure trove law has not been combined into the lost property statutes. In some instances, the early common law of England has been held to apply in the absence of a statute governing treasure trove. Regardless of which principles are applied, however, in the absence of contrary statutory provision, the title to treasure trove belongs to the finder against all others with the exception of the true owner. If there is a controversy as to ownership between the true owner and the state, the owner is entitled to treasure trove.

### Confusion and Accession

Confusion and ACCESSION govern the acquisition of, or loss of title to, personal property by virtue of its being blended with, altered by, improved by, or commingled with the property of others. In confusion, the personal property of several different owners is commingled so that it cannot be separated and returned to its rightful

owners, but the property retains its original characteristics. Any fungible (interchangeable) goods can be the subject of confusion.

In accession, the personal property of one owner is physically integrated with the property of another so that it becomes a constituent part of it, losing any separate identity. Accession can make the personal property of one owner become a substantially more valuable chattel as a result of the work of another person. This transformation occurs when the personal property becomes an entirely new chattel, such as when grapes are made into wine or timber is made into furniture.

Subject to the doctrine of accession, personal property can become real property through its transformation into a fixture. A fixture is a movable item that was originally personalty (personal property) but which has become attached to, and associated with, the land and is, therefore, considered a part of the real property.

### Bailments

A BAILMENT is the rightful, temporary possession of goods by an individual other than the true owner. The individual who entrusts his property into the hands of another is called the bailor; the person who holds such property is the bailee. Ordinarily a bailment is effected for a designated purpose upon which the parties have agreed.

The word *bailment* is derived from the French term *bailler,* "to deliver." It is ordinarily regarded as a contractual relationship since the bailor and bailee—either expressly or implicitly—bind themselves to act according to specific terms. The bailee receives only control or possession of the property, and the bailor retains the ownership interests therein. While a bailment exists, the bailee has an interest in the property that is superior to all others, including the bailor, unless she violates some term of the agreement. When the purpose for which the property has been delivered has been accomplished, the property will be returned to the bailor or otherwise disposed of, according to his instructions.

A bailment differs from a sale, which is an intentional transfer of ownership of personal property in exchange for something of value, because a bailment involves only a transfer of possession or custody not of ownership. For example, a bailment is created when a person leaves his or her car and car keys at a parking garage. The parking garage receives a fee to hold the car in its custody.

### Gifts

A gift is a voluntary transfer of personalty from one individual to another without compensation or consideration or the exchange of something of value. There are two main categories of gifts: inter vivos gifts, a voluntary, unconditional transfer of property between two living persons without consideration, and causa mortis, one that is made by a donor in anticipation of imminent death. The three requirements of a valid gift are delivery, donative intent, and acceptance.

### Bona Fide Purchasers

A basic common-law principle is that an individual cannot pass a better title than she has, and a buyer can acquire no better title than that of the seller. A thief does not have title in stolen goods, so a person who purchases from the thief does not acquire title.

A bona fide purchaser is an individual who has bought property for value with no notice of any defects in the seller's title. If a seller indicates to a buyer that she has ownership or the authority to sell a particular item, the seller is prevented (estopped) from denying such representations if the buyer resells the property to a bona fide purchaser for value without notice of the true owner's rights. At common law, such an ESTOPPEL did not apply when an owner brought an item for services or repairs to a dealer in that type of goods and the dealer wrongfully sold the chattel. The bona fide purchaser, however, is now protected under such circumstances by the UNIFORM COMMERCIAL CODE (UCC).

A buyer who induces a sale through fraudulent representations acquires a VOIDABLE title from the seller. A voidable title is one which may be vacated by the seller, upon discovery of the buyer's FRAUD, at his option. The seller has the authority to transfer a good title to a bona fide purchaser for value without notice of the outstanding EQUITY. The voidable title rule is only applicable in situations where the owner is induced to part with title, not merely with possession, as a result of fraud or deception.

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**CROSS-REFERENCES**

Accession; Bailment; Chattel; Possession.

## PERSONAL REPRESENTATIVE

*A person who manages the financial affairs of another person who is unable to do so.*

A personal representative is one kind of fiduciary—an individual whom another has trusted to manage her property and money. When a person dies, a personal representative generally is required to settle the decedent's financial affairs. In some instances, a living person may need a personal representative; for example, a minor might need a personal representative to make legal decisions for her. Personal representatives can be appointed by a court, nominated by will, or selected by the person involved. Their duties are performed under the supervision of probate courts, which are governed by state law.

When someone dies leaving property, a personal representative is required to administer the decedent's estate, which involves resolving any debts and handling the distribution of property. The jurisdiction, powers, and functions connected with administering the decedent's estate are usually entrusted to special tribunals, known as probate, surrogate, or ORPHANS' COURTS. These courts supervise the actions of the personal representative.

The choice of a personal representative depends on whether the decedent left a will, the legal document instructing how his estate is to be divided. If the will names a personal representative, that person is called an *executor* (male or female) or *executrix* (female). The court will accept the representative unless he does not meet statutory qualifications. These qualifications vary from state to state but largely concern such factors as age and conflict of interest. If there is no legally valid will, the decedent is said to have died intestate. In such cases, the court appoints a personal representative for the decedent's estate. The court-appointed representative is called an *administrator* (male or female) or *administratrix* (female).

In special instances, courts appoint one of three types of administrators. They are appointed when (1) an executor cannot or will not serve (*administrator cum testamento annexo*); (2) a prior executor or administrator has not completed the estate (*administrator de bonis non*); or (3) an interim administrator (special administrator), given restricted powers over the estate, is needed until a proper legal representative can be found.

Once approved by the court, personal representatives receive official sanction to fulfill their duties. Executors receive documents called letters testamentary—administrators receive letters of administration—authorizing the representative to handle the legal affairs of a decedent. Throughout the process of administering an estate, all personal representatives serve as officers of the court. They derive their authority from the court and thus serve at the court's pleasure. Their authority can be revoked on various grounds, ranging from neglect to incompetence. Primarily, they must act on behalf of all parties and all interests in the estate. They owe the beneficiaries an absolute duty of loyalty, or fiduciary duty, to administer the estate in their best interest.

In general, the personal representatives' duties are to settle and distribute the estate. This complicated task may require the assistance of an attorney or a trust company, so-called *coexecutors.* The personal representative's first task is to collect and preserve the assets of the estate. The personal representative also oversees the appraisal of the estate's assets, where necessary. The personal representative must also pay the estate's creditors, as well as any ESTATE AND GIFT TAXES due under federal law. Finally, the representative sees to the distribution of the remaining estate among the decedent's beneficiaries. If there are no beneficiaries, the state usually receives the property.

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CROSS-REFERENCES

Executors and Administrators.

## PERSONAL SERVICE

*The actual delivery of process to the individual to whom it is directed or to someone authorized to receive it on his or her behalf.*

SERVICE OF PROCESS is the delivery of legal notice to a party in a case. Any party who is being sued is entitled to advance notice of the suit. Notice consists of a copy of the complaint and a summons to appear in court. If a party does not receive notice of a lawsuit, the court will dismiss the case.

Personal service of the complaint and summons is a form of actual notice. Actual notice occurs when the summons and complaint are delivered personally to the respondent. The two other basic forms of process service are substituted service and constructive service. Substituted service is personal delivery to the residence of the respondent or notice given to an agent of the respondent. Constructive service is notice delivered through publication in a newspaper.

If a party cannot be reached in person, substituted service may be made by mailing the summons and complaint by certified or first-class mail. If a party cannot be found, notice may be served by publication in a newspaper.

The U.S. Supreme Court has ruled that service of process should be reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to be heard. The reasonableness of the notice must be considered in light of all the circumstances. For example, if a party receiving notice lives in an apartment building with many children living in the building, one notice left on the front door of the apartment may not be sufficient because it is possible that the children may take the papers (*Greene v. Lindsey,* 456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 [1982]).

## PERSONALTY

*Goods; chattels; articles; movable property, whether animate or inanimate.*

CROSS-REFERENCES

Personal Property.

## PERSUASIVE AUTHORITY

*Sources of law, such as related cases or legal encyclopedias, that the court consults in deciding a case, but which, unlike binding authority, the court need not apply in reaching its conclusion.*

## PETIT JURY

*The ordinary panel of twelve persons called to issue a verdict in a civil action or a criminal prosecution.*

Petit jury is used interchangeably with petty jury.

## PETIT LARCENY

*A form of larceny—the stealing of another's personal property—in which the value of the property taken is generally less than $50.*

At COMMON LAW, the penalty for the offense was whipping or some other CORPORAL PUNISHMENT. Under modern-day statutes, it is usually a fine, imprisonment, or both.

## PETITION

*A written application from a person or persons to some governing body or public official asking that some authority be exercised to grant relief, favors, or privileges.*

*A formal application made to a court in writing that requests action on a certain matter.*

The FIRST AMENDMENT to the U.S. Constitution guarantees to the people the right to petition the government for the redress of grievances. Petitions are also used to collect signatures to enable a candidate to get on a ballot or put an issue before the electorate. Petitions can serve as a way of pressuring elected officials to adhere to the position expressed by the petitioners.

The right to petition the government for correction of public grievances derives from the English MAGNA CHARTA of 1215 and the English BILL OF RIGHTS of 1689. One of the colonists' objections to British rule before the American Revolution was the king's refusal to act on their petitions of redress. The Founders attempted to address this concern with the First Amendment, which affirms the right of the people to petition their government. Almost all states adopted similar guarantees of petition in their own constitutions.

Between 1836 and 1840, abolitionists collected the signatures of two million people on petitions against SLAVERY and sent them to the U.S. House of Representatives. In the early twentieth century, states passed laws allowing initia-

tive (the proposing of legislation by the people) and recall (an election to decide whether an elected official should be removed from office). Both processes start with the collection of a minimum number of signatures on a petition. Small political parties often use petitions to collect signatures to enable their candidates to be placed on the election ballot.

Petitions are also directed to courts of law and administrative agencies and boards. A petition may be made ex parte (without the presence of the opposing party) where there are no parties in opposition. For example, the executor of an estate may file a petition with the probate court requesting approval to sell property that belongs to the estate or trust.

In contested matters, however, the opposing party must be served with the petition and be given the opportunity to appear in court to argue the merits of the issues it contains. A prisoner may file a petition for a writ of HABEAS CORPUS, in which the prisoner requests a hearing to determine whether he or she is entitled to be released from custody because of unconstitutional or illegal actions by the government. The prisoner must serve the government office that prosecuted him or her with a copy of the petition. The writ of habeas corpus, like many other types of writs, is discretionary; the court is free to deny the petition.

## PETITION IN BANKRUPTCY

*A document filed in a specialized federal court to commence a proceeding to provide a means by which a debtor who is unwilling or financially unable to pay personal debts will satisfy the claims of his or her creditors as they come due.*

There are two types of petitions in BANKRUPTCY cases. A voluntary petition is filed by a debtor who wants to make arrangements for the payment of debts and be relieved of liability for them. An involuntary petition is filed by a statutorily prescribed number of creditors whose aggregate sum of claims exceed a specific amount.

A petition in bankruptcy lists the debtor's assets, liabilities, and debts so that a realistic arrangement for the payment of creditors can be devised.

## PETITIONER

*One who presents a formal, written application to a court, officer, or legislative body that requests action on a certain matter.*

*In March 1998, Aaron Wallace, president of the National Education Association, announces the collection of more than 400,000 signatures on a petition requesting increased spending on education in the state of Florida.* AP/WIDE WORLD PHOTOS

In legal proceedings initiated by a petition, the respondent is the person against whom relief is sought, or who opposes the petition. One who appeals from a judgment is a petitioner.

## PETITORY ACTION

*A legal proceeding by which the plaintiff seeks to establish and enforce his or her title to property, as distinguished from a possessory proceeding, where the plaintiff's right to possession is the issue. Such petitory actions must be based on a claim of legal title to the property, as opposed to a mere equitable interest in it.*

*In* ADMIRALTY, *suits to try title to property independent of questions concerning possession.*

*In the civil-law jurisdiction of Louisiana, a proceeding instituted by an alleged owner who does not have possession to determine ownership against one in possession.*

CROSS-REFERENCES

Admiralty and Maritime Law.

## PETTY OFFENSE

*A minor crime, the maximum punishment for which is generally a fine or a short term in a prison or a house of correction.*

In some states, a petty offense is a classification in addition to misdemeanor and felony.

Under federal law, a petty offense is any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months, a fine of not more than $5,000, or both. Since a petty offense is one that is punishable by no more than a six-month sentence, the accused is not constitutionally entitled to a jury trial, which would be in order if the accused were charged with a serious offense.

## PHARMACIST

See DRUGGIST.

## PHILADELPHIA LAWYER

*A colloquial term that was initially a compliment to the legal expertise and competence of an attorney due to the outstanding reputation of the Philadelphia bar during colonial times. More recently the term has become a disparaging label for an attorney who is skillful in the manipulation of the technicalities and intricacies of the law to the advantage of his or her client, although the spirit of the law might be violated.*

For example, an attorney who uses repeated motions for postponement of an action or excessive discovery requests as dilatory tactics primarily for the advantages that inure to his or her client, as opposed to legitimate grounds for such actions, might be regarded as a Philadelphia lawyer.

## PHOTO LINEUP

*A presentation of photographs to a victim or witness of a crime.*

A photo lineup, also known as a photo array and or photo display, is a procedure used by law enforcement personnel to discover or confirm the identity of a criminal suspect. Generally a police officer shows a set of photographs to a victim or witness and asks whether he or she recognizes one of the persons in the photographs as the perpetrator. A positive identification of a suspect can be used to place the suspect under arrest, and the act of identification may be used later as evidence in the prosecution of the defendant.

The Supreme Court has ruled that photo lineups should not be unduly suggestive (*Manson v. Brathwaite,* 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 [1977]). That is, a photo lineup should not be conducted in such a way as to highlight the suspect and elicit an identification of the suspect. If a photo lineup is unduly suggestive, any affirmative identification of a suspect may be excluded from her or his subsequent prosecution.

Police officers typically avoid suggestive photo lineups because they are interested in apprehending the right person. Toward this end, they may ask a witness to look at more than one photo lineup containing the suspect to see if the witness can identify the suspect more than once. Each photo lineup may contain as many as six or more photographs of different persons. Furthermore, to be effective, a photo lineup should contain pictures of persons who look similar to the suspect. For example, if police suspect a Caucasian male and a witness remembers seeing a blond, light-skinned male, the photo lineup will not consist of five pictures of dark-haired, dark-skinned males and one picture of the suspect.

For public safety reasons, police officers do not always take the time to arrange a photo lineup to show witnesses. In some cases officers may use only one picture of a suspect. In case of violent crime, for example, police may need to act swiftly and locate a particular suspect. In *Manson,* the Supreme Court ruled that using one photograph for the purpose of identifying a person as a criminal suspect is not unduly suggestive.

The use of photographs in a criminal investigation is just one identification procedure used by police. Other procedures include show-ups and in-person lineups. A show-up is the exhibition of a particular criminal suspect to a victim or witness shortly after the crime occurred. An in-person lineup is the live presentation of several persons, including the suspect, to the witness.

Courts examine all the circumstances surrounding an identification. To determine whether any identification is unduly suggestive and therefore inadmissible at trial, courts analyze seven factors, including the opportunity the witness had to view the suspect, the degree of attention the witness paid to the suspect, the accuracy of the witness's description before viewing the suspect or the suspect's photograph, the witness's level of certainty in identifying the suspect, and the length of time that elapsed between the crime and the witness's viewing of the suspect.

A criminal defendant does not have the right to have an attorney present at a photographic

lineup until after he or she is indicted or formally charged (*United States v. Ash,* 413 U.S. 300, 93 S. Ct. 2568, 37 L. Ed. 2d 619 [1973]). Nor does a criminal defendant have the right to a hearing, outside the presence of the jury, to make an attempt to block the presentation of photographic identifications (*Watkins v. Sowders,* 449 U.S. 341, 101 S. Ct. 654, 66 L. Ed. 2d 549 [1981]). However, a defendant does have the right to show to the judge and jury any photographic evidence used in the case, to challenge the witnesses on cross-examination, and to argue to the judge or jury that the photo identification procedure was unduly suggestive and that any identification from it should be disregarded (*United States v. Ash,* 413 U.S. 300, 93 S. Ct. 2568, 37 L. Ed. 2d 619 [1973]).

CROSS-REFERENCES

Criminal Law; Criminal Procedure; Due Process of Law; Right to Counsel.

## PHYSICAL FACT

*In the law of evidence, an event having a corporeal existence, as distinguished from a mere conception of the mind; one that is visible, audible, or tangible, such as the sound of footsteps or impressions made by human feet on the ground.*

## PHYSICIAN-ASSISTED SUICIDE

See EUTHANASIA "Euthanasia and Physician-Assisted Suicide" (In Focus).

## PHYSICIAN-PATIENT PRIVILEGE

See PHYSICIANS AND SURGEONS; PRIVILEGED COMMUNICATION.

## PHYSICIANS AND SURGEONS

Physicians and surgeons are medical practitioners who treat illness and injury by prescribing medication, performing diagnostic tests and evaluations, performing surgery, and providing other medical services and advice. Physicians and surgeons are highly trained and duly authorized by law to practice medicine.

The education and focus of chiropractors, dentists, and optometrists differ from those of physicians and surgeons. However, the laws relating to physicians and surgeons generally apply to these medical professionals as well. In addition, these HEALTHCARE providers are subject to laws regulating their specific area of practice. They are prohibited by law from practicing medicine or surgery.

A physician or surgeon does not have an unqualified right to practice medicine. The state legislature determines who is to be allowed this privilege and exercises its POLICE POWER to protect the public from deception, FRAUD, and incompetence. A legislature's authority to regulate the practice of medicine is, broadly speaking, only limited by the requirements that the rules are reasonable, bear some relation to the object to be attained, and do not violate any constitutional rights. Legislatures have the power to require a license or certificate to practice medicine within the state and to make practicing medicine without a license a criminal offense.

Statutes and regulations carefully regulate who may use the title "doctor." Use of the title or its abbreviation without an indication of the type of degree—D.O., M.D., etc.—is specifically forbidden in many states unless the person holds a physician's and surgeon's certificate.

State statutes delineate requirements for a license to practice medicine. To obtain a license, an applicant must demonstrate requisite education and knowledge. A college degree and graduation from an accredited medical school typically fulfills the education requirement, and passing a state-licensing exam demonstrates an applicant's skills. State law determines who may sit for an exam and typically limits the number of tries an applicant has to pass the exam. Specialists, such as cardiologists, ophthalmologists, pediatricians, and neurosurgeons, must usually pass further exams beyond the initial licensing exam.

Applicants typically must also meet certain physical health standards and establish that they are of good moral character. Generally speaking, good moral character means that a person is reliable, trustworthy, and not likely to deceive the public. An applicant who is refused a license because of a lack of good moral character is entitled to receive notice of the reasons and to have a hearing on the issues. State laws typically provide for JUDICIAL REVIEW of a denial, after all administrative appeals have been exhausted.

Under certain circumstances physicians licensed in another state may be permitted to waive examination. Commissioned medical officers in the ARMED SERVICES are typically exempt from a state's licensing statute when performing official medical services within the state.

State legislatures have routinely delegated the authority to supervise licensing, exam, and suspension and revocation procedures to a state board of medical examiners. A board's power is limited to the express powers given to it by statute and the implied powers necessary to carry out the express powers.

For action to be taken against a practitioner, a nexus must exist between the acts or omissions and the fitness or competency required to practice medicine. In other words, past isolated incidents unrelated to the profession are generally insufficient by themselves to form a basis for a disciplinary action.

Statutes commonly use words such as *unprofessional, dishonorable,* or *immoral conduct* when describing conduct warranting suspension or revocation. Other terms sometimes used are *gross immorality, willful or wanton misconduct, malpractice, gross violation of one's professional duties, gross misconduct in the practice of the profession,* or *grossly unprofessional conduct of a type likely to deceive or defraud.* These terms are not required to be defined with any particularity. Instead, every case is judged on its own particular facts. Some of the reasons that physicians or surgeons have had their licenses revoked or suspended are: failure to keep complete and accurate records of controlled substances, conviction of a crime (particularly one involving moral turpitude), drunkenness, ABANDONMENT of a patient, deliberate falsification of medical records, fraud in procuring a license, professional incompetence, assisting or aiding another in the unlicensed practice of medicine, and sexual imposition on a patient. A license revocation in one state may be the basis for revocation in another.

State boards are charged with the duty of investigating allegations of professional misconduct. Depending upon the licensing statute, a patient, the state or state licensing board, or any other person may instigate a complaint. During the investigative stage, before a determination has been made to institute formal revocation proceedings, no requirement exists that the physician be informed of the nature of the charges, know the name of the complainant, or participate in selecting any documents. However, a license to practice medicine cannot be revoked without DUE PROCESS OF LAW. Due process means that the physician must receive notice of the intended action and have an opportunity to be heard. The complainant has the burden to establish the facts in order to justify revocation.

Judicial review of a suspension or revocation is limited to a determination of whether the deciding board abused its discretion. A court will examine whether a sanction is so disproportionate to the offense that it is shocking to a reasonable person's sense of fairness in light of all the circumstances.

Generally speaking, a physician with a license to practice medicine has the unlimited authority to prescribe for and treat the ill and afflicted and may choose to employ any legitimate method of treatment. In some instances state law might permit a physician to practice optometry or dentistry, although the converse is never permitted.

A physician stands in a fiduciary relationship to her patients, meaning that the physician must always exercise the utmost GOOD FAITH and trust when dealing with patients. A confidential relationship exists between the parties: because a patient must feel free to disclose any information that might pertain to treatment and diagnosis, the physician has the professional obligation to keep information confidential absent a patient's consent. But a physician cannot attempt to shield his own incompetence by refusing to disclose information. Moreover, a physician may have a statutory duty to reveal information concerning a patient. Doctors are required to provide authorities with information regarding birth and death, CHILD ABUSE, and contagious or infectious diseases. A physician may also have a duty to disclose confidential information to third parties in other circumstances.

Physicians and their patients have a contractual relationship. A request for an appointment will not suffice to form a doctor-patient relationship, but a telephone call to initiate treatment might. The relationship continues until treatment is completed or upon agreement by the parties. The physician agrees to treat the patient but rarely promises a specific outcome or cure. If a doctor promises a specific outcome but fails to deliver it, the doctor may be liable for breach of contract. One example would be a surgeon who promises that cosmetic surgery will produce certain results.

A physician's conduct must always meet the standard of care set by the profession, or he may be liable for MALPRACTICE. Physicians and surgeons must possess and exercise the same level

of skill and learning ordinarily possessed and exercised by other members of their profession under similar circumstances.

Although not absolute in every instance, some of the responsibilities a physician or surgeon has toward a patient include a duty to

- Fully inform a patient of her condition;
- Notify a patient of the results of a diagnosis or test;
- Inform the patient of the need for different treatment or refer the patient to a specialist or other qualified practitioner;
- Continue medical care until proper termination of the relationship;
- Give proper notice before withdrawal from treatment;
- Not abandon a patient, including making arrangements for treatment during absences;
- Treat nonpaying patients the same as those who pay;
- Use diligence in treatment in providing all necessary care;
- Obtain a patient's informed consent before performing a medical procedure;
- Instruct others as to the care and treatment of a patient;
- Warn others of exposure to communicable and infectious diseases.

A patient has a duty to cooperate with a physician and participate in treatment and diagnosis. For example, a patient does not have a general duty to volunteer unsolicited information but is required to disclose a complete and accurate medical history upon questioning by a physician. A patient also must return for further treatment when required. Failure to cooperate or participate in treatment may result in a limited recovery for a physician's malpractice or completely bar recovery, depending upon the circumstances of the case.

Malpractice occurs when a patient is injured by a physician's bad or unskillful practices. Malpractice is the failure to do something that a reasonably careful physician or surgeon would do, or doing something a reasonably careful physician would not do, under the same circumstances. In other words, malpractice is a deviation from an established standard of practice—a failure to exercise the required degree of skill, care, and diligence or follow accepted rules. It can be willful or due to lack of skill or neglect; it can be a single act or something occurring over the course of treatment.

Ordinarily, in the absence of a special agreement, a physician need not exercise extraordinary skill. Nor must a physician anticipate consequences resulting from peculiar characteristics and conditions of a patient, if the physician has no knowledge of them or would not be expected to reasonably discover them. Not every wrongful act by a physician amounts to malpractice. A physician is ordinarily not liable for injurious consequences if she exercises the required degree of skill and care. A want of skill or care must be the proximate cause or a substantial factor in the injury or death, but not necessarily the sole cause.

The standard of care was traditionally determined with reference to the geographic locality of the treatment, meaning the level of care exercised by other physicians or surgeons in good standing in the same general line of practice in the same or similar locality. The locality standard developed when there were significant differences in the opportunities for continuing medical education and vast differences in access to hospitals. However, the twenty-first century's increased ease in dissemination of information, coupled with more uniform methods of treatment, have significantly downgraded the importance of the locality rule. Many jurisdictions now view locality as only one factor to examine rather than a conclusive limit on the degree of skill required. Other authorities have completely abandoned the locality rule in favor of a national standard.

Specialists are held to the standard of care of other specialists in the same field under similar circumstances. This typically means that specialists, because of their advanced training and knowledge, are held to a higher standard than that required of general practitioners. Even though not certified as a specialist, those who hold themselves out to be specialists or perform procedures normally done by specialists will be held to a specialist's standard.

A physician must refer a patient or seek a consultation if he knows, or should know, that the treatment of a particular patient is beyond his skill. If a physician fails to make a referral or seek a consultation, he will be held to the standard of care applicable to the appropriate specialty that should have been consulted.

A physician or surgeon is bound to follow the methods that are generally approved and recognized by the profession but is not limited to the most generally accepted treatment meth-

*States carefully regulate who may use the title "doctor" or obtain a license to practice medicine. Specialists such as pediatricians must typically pass exams beyond the initial licensing exam.*
ROBERT MAASS/CORBIS

ods. Determining whether a treatment is a respected minority treatment can present a difficult task. Nevertheless, a practitioner who otherwise adheres to the applicable standard of care will typically not be held liable for an error in judgment in choosing from different accepted treatments or diagnostic methods. A physician's actions are viewed in terms of the state of medicine at the time of the claimed malpractice, rather than on subsequent medical discoveries or knowledge.

A physician has a non-delegable duty of care, which means that the physician is responsible for injury caused by assistants, employees, agents, or apprentices, when that injury is caused by a lack of proper skill or care. For example, a surgeon who retains control over the procedures used by an anesthesiologist may be liable for the negligent actions of the anesthesiologist. Generally, a physician will not be liable for a hospital's NEGLIGENCE or the negligence of others not within his control but may be liable where the negligence is discoverable by the physician in the ordinary course of treatment.

A physician may have an affirmative duty toward a third person who is not the physician's patient when there is a foreseeable risk of harm of the third person by the patient, of which the physician is aware or should be aware. For example, this duty may arise when a psychiatric patient threatens to harm a known victim or when a patient with a sexually transmitted disease refuses to notify his sexual partners of the illness. At least in the latter case, a physician's duty would generally be limited to those persons readily identified as being in danger. To prevail on such a claim, a third party must demonstrate that she was within the scope of a foreseeable risk of harm and that negligent treatment of the patient was the proximate cause of her injuries.

A minority of states recognize WRONGFUL LIFE claims. These are actions brought by or on behalf of a disabled child, alleging that the child was born due to a doctor's negligent failure to properly advise the parents, even though the doctor did not cause the disability. The first case to recognize a wrongful life claim took place in 1980 in California, when a doctor negligently failed to detect Tay-Sachs disease (*Curlender v. Bio-Science Laboratories,* 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 [Cal. App. 1980]). The parents had specifically sought prenatal testing for the crippling disease. The severely disabled baby girl had a life expectancy of no more than four years. The court ruled that the serious nature of the harm, coupled with the fact that the disease went undetected because of a lack of due medical attention, sufficed to permit the action.

WRONGFUL BIRTH and wrongful life actions arise out of the same set of circumstances but are brought by different parties. In a wrongful life suit, the child (or someone acting on behalf of the child) is the plaintiff; in the wrongful birth case, the parents bring suit. Often the term *wrongful birth* encompasses two categories: wrongful conception or WRONGFUL PREGNANCY cases involve a woman who gave birth to an unwanted but healthy child; wrongful birth involves a child who was born with a handicap.

Wrongful pregnancy cases may arise when the defendant negligently performs a sterilization procedure or otherwise provides ineffective contraception; when a doctor negligently performs an ABORTION, resulting in the birth of a healthy child; or when a physician negligently fails to diagnose a pregnancy and the mother is thereby denied the choice of an abortion at a timely stage. A majority of states recognize a wrongful pregnancy CAUSE OF ACTION. Most, however, limit damages to the pain associated with the failed procedures. A few jurisdictions

permit recovery of child-rearing expenses, but some of those states require that the award be offset by the parents' emotional benefits of raising a healthy child.

Wrongful life claims are permitted in some jurisdictions, but some courts have ruled that the cause of action does not exist in the absence of a statute giving rise to the claim. In addition, the cause of action has been specifically eliminated by statute in some jurisdictions.

In 1989 Congress created the National Practitioner Data Bank (NPDB) to mandate collection of information regarding incompetent practitioners. The NPDB began operation on September 1, 1990; its reporting requirements are not retroactive. The data bank collects information on all malpractice payments of more than one dollar made on behalf of physicians, dentists, and other licensed healthcare practitioners. The NPDB also collects information regarding disciplinary actions taken by state medical and dental boards. Additionally, it monitors professional review actions taken by hospitals and other entities adversely affecting a physician's clinical privileges for more than 30 days and a practitioner's voluntary surrender of clinical privileges during an investigation for incompetence or improper professional conduct. The NPDB also collects information on adverse actions by professional societies against its members.

Insurers, hospitals, medical societies, and boards of medicine must report to the NPDB; plaintiffs or their attorneys may not submit reports. Practitioners receive copies of the reports against them and have an opportunity to dispute the accuracy of the information.

The data bank has been criticized because the current regulations sometimes allow "corporate shielding" to protect practitioners from being reported. Because only individuals, not entities, must be reported, a practitioner would probably not be reported when a malpractice settlement was made on behalf of an incorporated group practice without naming a specific physician. Others criticize the data bank's one-dollar requirement, arguing that "nuisance" claims under a certain amount should not be reported or that different specialties should be given different monetary thresholds before reporting is mandated.

By regulation hospitals must query the NPDB when considering a physician for a medical staff appointment or for clinical privileges. They must also query at least once every two years concerning any physician who is on its medical staff or has clinical privileges at the hospital. Boards of medical examiners, professional societies, other state licensing boards, or other healthcare entities that are entering an employment or affiliation arrangement with a physician may also request information at any time. In addition, a physician may query the NPDB concerning his own record at any time. Attorneys may have access in very limited circumstances where proof exists that a hospital failed to make a required query.

MEDICAL MALPRACTICE insurers are not allowed access to NPDB information. Access to information in the NPDB is available to entities that meet the eligibility requirements defined in the provisions of P.L. No. 99–660 and the NPDB regulations. In order to access information, entities must first register with the Data Bank. NPDB information is not available to the general public. However, the NPDB maintains an INTERNET site and makes available information in a form that does not identify any particular entity or practitioner.

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#### CROSS-REFERENCES

Health Care Law; Health Insurance; Malpractice; Managed Care; Medicaid; Medicare; Patients' Rights; Physician-Patient Privilege; Privileged Communication.

## PICKETING

*The presence at an employer's business of one or more employees and/or other persons who are publicizing a labor dispute, influencing employees*

*or customers to withhold their work or business, respectively, or showing a union's desire to represent employees; picketing is usually accompanied by patrolling with signs.*

CROSS-REFERENCES

Labor Law; Labor Union.

## PIERCE THE CORPORATE VEIL

See CORPORATIONS "Piercing the Corporate Veil" (In Focus).

## ♦ PIERCE, FRANKLIN

Franklin Pierce served as the fourteenth president of the United States from 1853 to 1857. He was the youngest person to be elected president up to that time. A northern Democrat who sought to preserve southern SLAVERY, Pierce's administration proved a failure because he antagonized the growing abolitionist movement by signing the KANSAS-NEBRASKA ACT of 1854, which gave the two new territories the option of whether to permit slavery. Pierce was unable to win renomination for a second term.

"A REPUBLIC WITHOUT PARTIES IS A COMPLETE ANOMALY. THE HISTORY OF ALL POPULAR GOVERNMENTS SHOW HOW ABSURD IS THE IDEA OF THEIR ATTEMPTING TO EXIST WITHOUT PARTIES."
—FRANKLIN PIERCE

Pierce was born on November 23, 1804, in Hillsboro, New Hampshire. His parents were Benjamin and Anna Kendrick Pierce. Pierce graduated from Bowdoin College in 1824 and returned home to take over his father's duties as postmaster, after his father entered politics. Pierce studied law with a local attorney and was admitted to the New Hampshire bar in 1827. In that same year his father was elected governor of New Hampshire, which proved helpful to Pierce's own nascent political ambitions.

Pierce was elected as a Democrat to the New Hampshire legislature in 1829 and in 1832 was elected to the U.S. House of Representatives. A strong supporter of President ANDREW JACKSON, Pierce also became associated with the cause of slavery. In 1835 he attacked the flood of abolitionist petitions addressed to the House, which contained the signatures of more than two million people. He joined southern Democrats in imposing a "gag rule" that prevented the House from receiving or debating these petitions.

In 1837 Pierce was elected to the U.S. Senate. He resigned in 1842 for personal reasons and returned to Concord, New Hampshire, to become the federal district attorney. Except for a brief tour of duty as an Army officer during the Mexican War (1846–48), Pierce remained out of the political arena until the DEMOCRATIC PARTY national convention in 1852. The three leading candidates for the presidential nomination, Lewis Cass, STEPHEN A. DOUGLAS, and JAMES BUCHANAN, failed to win the necessary votes after forty-eight ballots. The convention turned to Pierce on the forty-ninth ballot as a compromise candidate who, though virtually unknown nationally, enjoyed support from northern and southern Democrats. He easily defeated General Winfield Scott, the WHIG PARTY candidate, in November 1852.

Pierce took office in March 1853, at a time when the issue of slavery threatened to divide both the Democratic and Whig parties, as well as the nation itself. Pierce sought to ease tensions by appointing a cabinet that contained a mix of southern and northern officials. Still critical of abolitionism, he enraged the antislavery movement with his signing of the Kansas-Nebraska Act of 1854. The act repealed the MISSOURI

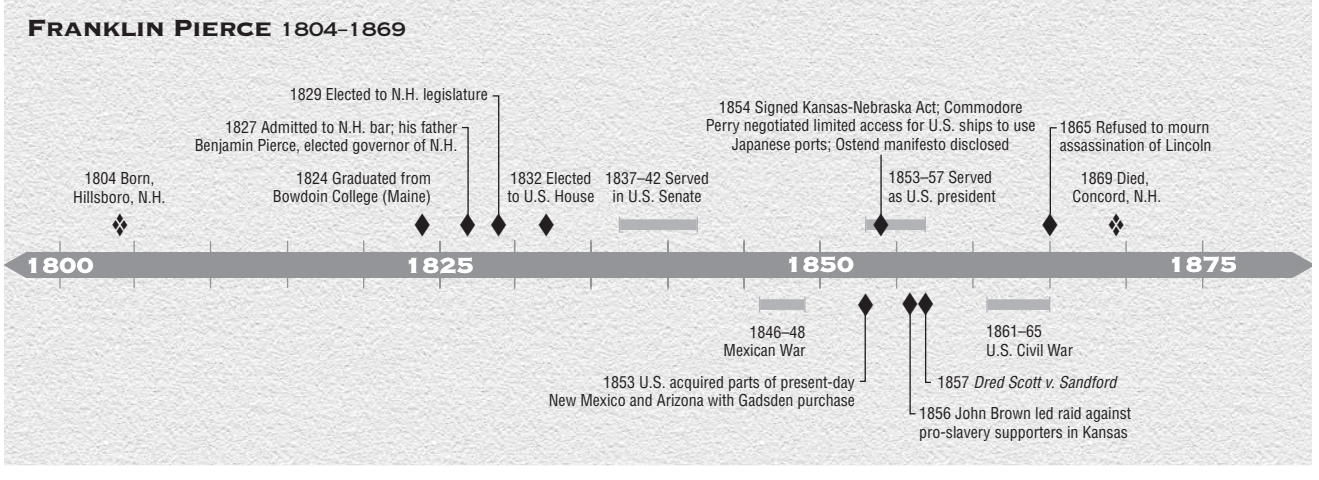

COMPROMISE OF 1820, which restricted the boundaries of slavery to the same latitude as the southern boundary of Missouri—36° 30′ north latitude. The new territories of Kansas and Nebraska were organized according to the principle of popular sovereignty, which permitted voters to determine for themselves whether slavery would be a legalized institution at the time of the territories' admission as states.

Abolitionists saw the popular sovereignty principle as a means of extending slavery northward and westward. Pierce proved weak and indecisive as violence erupted in Kansas and Nebraska. On May 25, 1856, the militant abolitionist JOHN BROWN led a raid against supporters of slavery at Pottawatomie Creek, Kansas, killing five persons. Though appalled at the raid, Pierce said nothing and did little to address the growing violence between abolitionists and supporters of slavery that soon gave the territory the name "Bleeding Kansas." His support of slavery led to defections from the Democratic party and ultimately contributed to the establishment of the antislavery REPUBLICAN PARTY.

Pierce did achieve some success in foreign affairs. In 1854 Pierce received the report of Commodore Matthew C. Perry's expedition to Japan and the news that U.S. ships would have limited access to Japanese ports. His administration acquired a strip of land near the Mexican border for $10 million in the Gadsden Purchase of 1853, negotiated a fishing rights treaty with Canada in 1854, and in 1856 signed a treaty with Great Britain resolving disputes in Central America.

However, Pierce's popularity was damaged by his secret attempt to buy Cuba from Spain. The public disclosure of the October 1854 diplomatic statement called the Ostend Manifesto shocked Congress and the public. The manifesto discussed ways in which the United States might acquire or annex Cuba with or without the willingness of Spain to sell it. Pierce was forced to disclaim responsibility for the plan, but his integrity was placed in doubt.

Pierce was not renominated by the Democratic party in 1856, largely because of his difficulties with the Kansas-Nebraska Act and his ineffective leadership. The party turned to James Buchanan, who was elected but did little to resolve the political and sectional differences over slavery.

Pierce retired from public life in 1857 and returned to Concord, New Hampshire, to practice law. He became a vocal critic of President ABRAHAM LINCOLN during the Civil War, however, attacking the EMANCIPATION PROCLAMATION of 1863. When, in April 1865, he failed to hang a flag in mourning for the assassinated Lincoln, a mob attacked his home.

Pierce died in Concord on October 8, 1869.

*Franklin Pierce.*
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## ♦ PIERREPONT, EDWARDS

Edwards Pierrepont was a well-known lawyer, judge, and orator before serving as attorney general of the United States under President ULYSSES S. GRANT.

Pierrepont was born on March 4, 1817, in North Haven, Connecticut. When baptized, he was given the name Munson Edwards Pierpont. He legally discarded his given first name and changed the spelling of his family name. He graduated from Yale University in 1837 and Yale Law School in 1840 and then moved to Columbus, Ohio, to open his first law practice. By 1845 he had returned to the East Coast and entered a legal partnership in New York City. Over the next decade, he established a reputation of being a tough trial attorney and gifted courtroom orator.

In 1857 he was elected a judge of the Superior Court of the City of New York; he held the

"A PARDON IS . . . EVIDENCE . . . THAT GUILT HAS ONCE EXISTED, BUT, AT THE SAME TIME, THAT IT HAS BEEN ENTIRELY BLOTTED OUT, SO THAT IN THE EYE OF THE LAW THE OFFENDER IS AS INNOCENT AS IF HE NEVER COMMITTED THE OFFENSE."
—EDWARDS PIERREPONT

position until 1860 when he resigned to resume the PRACTICE OF LAW.

In the years before the U.S. CIVIL WAR, Pierrepont was said to have had his fingers on the pulse of the nation. He was often asked to speak at civic and political functions, and he privately advised ABRAHAM LINCOLN on issues of the day both before and after Lincoln was elected president. During the war Pierrepont represented the government against prisoners of state confined in U.S. military prisons and forts.

As a Lincoln confidant and supporter, Pierrepont was among those who organized the president's 1864 reelection effort. When the campaign was aborted by an assassin's bullet, the government appointed Pierrepont to handle the prosecution of John H. Surratt for his part in Lincoln's murder.

Pierrepont left Washington, D.C., and returned to New York after the war, but he remained in the public eye. As a private attorney, he continued to represent high-profile clients who included railroad barons and postwar industrialists. He also resumed his interest in politics at the state level. In April 1867 he was elected to participate in an effort to revise the state constitution, and he helped to organize local support for the 1868 presidential bid of General Ulysses S. Grant.

In recognition of his efforts, Pierrepont was appointed U.S. attorney for the southern district of New York in 1869, but he resigned just six months later to join the Committee of Seventy established in 1870 to force State Senator William Marcy ("Boss") Tweed from office. (After the Civil War, New York City government was dominated by TAMMANY HALL, a corrupt and abusive DEMOCRATIC PARTY patronage organization that operated under Tweed's direction.)

Pierrepont continued to support Grant when he ran for a second term in 1872. Following Grant's reelection, Pierrepont declined a diplomatic post in Russia because he was still involved in the efforts to clean up New York City government. But when Grant offered him a cabinet post in April 1875, Pierrepont was ready to accept.

He served as attorney general of the United States from May 1875 to May 1876. On the domestic front, Pierrepont did not depart significantly from the policies of his predecessor, GEORGE H. WILLIAMS; he maintained Williams's MORATORIUM on CIVIL RIGHTS prosecutions in the South and generally ignored the issues surrounding white violence against blacks. He was more interested in restoring the international economic influence and political clout that the United States had lost during the years following the war.

As attorney general, Pierrepont is most often remembered for his contributions to INTERNATIONAL LAW, including opinions that addressed issues of natural and acquired nationality and grounds for EXTRADITION (15 Op. Att'y Gen. 15 [1875]; 15 Op. Att'y Gen. 500 [1875]).

In May 1876 Pierrepont was named U.S. minister to Great Britain. Before Pierrepont's term of service, the English court rarely gave U.S. presidents and their representatives special treatment. When President Grant visited London in 1877, Pierrepont worked to ensure that Grant would be accorded the same honors and treatment as royal heads of state. Other governments soon followed Great Britain's example in acknowledging the United State's elected leaders.

During his years in London, Pierrepont devoted much of his time to studying England's financial system. When he returned to the

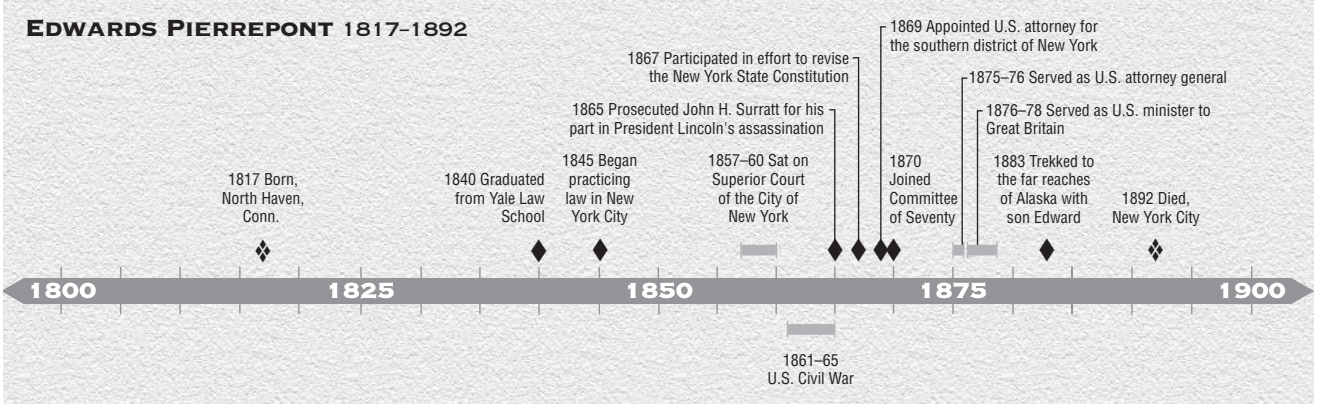

United States in 1878, he published a number of pamphlets on the subject of U.S. and international financial systems, including a controversial 1887 flyer that advocated an international treaty to establish monetary policy, and recommended a common currency based on the value of silver, rather than the gold standard of the day.

In his later years, Pierrepont continued to practice law and edited many of his famous speeches for publication. He received many awards and citations during his long career, including honorary degrees from Yale University, Columbia College in Washington, D.C., and Oxford University in England.

In May 1883, at the age of sixty-six, Pierrepont accompanied his son, Edward Willoughby Pierrepont, to the far reaches of Alaska. Upon their return, father and son published a widely praised paper entitled "From Fifth Avenue to Alaska," for which the son was awarded a fellowship in the Royal Geographical Society of England. Although the rigors of the journey took a toll on the younger man, who died in 1884, the elder Pierrepont lived until 1892. He died March 6, 1892, in New York City.

## PILOT

*In maritime law, a person who assumes responsibility for a vessel at a particular place for the purpose of navigating it through a river or channel, or from or into a port.*

The captain, or master, of a large ship has total command in the high seas. However, when a ship enters or leaves a port, or enters a river or channel, the captain turns over navigation to a local pilot. Because of safety and commercial concerns, state and federal maritime law governs the licensing and regulation of pilots.

A docking pilot directs the tugboats that pull a ship from the pier. Once the ship has cleared the pier and is under way in the harbor, the docking pilot leaves the ship and turns navigation over to a harbor pilot. Every ship that enters and leaves a port must have a harbor pilot aboard. Once the ship reaches open water, a small boat picks up the harbor pilot and returns the pilot to port. The captain then resumes full command of the ship.

The harbor pilot must have a thorough knowledge of every channel, sandbar, and other obstacle that could run the ship aground, strike another ship, or cause an accident that would endanger the ship, its crew, its cargo, and any passengers on board. The pilot must also be an experienced sailor who knows how to maneuver a ship through crowded harbors.

Either the state or federal government licenses pilots to ensure that vessels will be properly operated in state and U.S. waters. Federal law requires that federally registered pilots navigate ships on the Great Lakes, and state law regulates the need for pilots in bays, inlets, rivers, harbors, and ports. Where the waters are the boundary between two states, the owner of the ship can hire a pilot who has been licensed by either state to navigate the vessel to and from port.

State and federal laws impose qualifications for a pilot's license. A pilot must have the highest degree of skill as a sailor and may be tested on that knowledge. The individual may be required to submit written references from persons for whom he or she has served as an apprentice. In addition, the applicant must obtain a reference from a licensed pilot. The pilot may also be required to post a bond.

Once licensed, the pilot must act in a professional manner. A license can be revoked or suspended for adequate cause, such as when the pilot has operated the ship while intoxicated. The pilot has the right to appeal to a court an administrative body's decision to deny licensure or to impose discipline.

The legal rights and responsibilities of the harbor pilot's action in navigating vessels are well settled. The pilot has primary control of the navigation of the vessel, and the crew must obey any pilot order. The pilot is empowered to issue steering directions and to set the course and speed of the ship and the time, place, and manner of anchoring it. The captain is in command of the ship except for navigation purposes. The captain can properly assume command over the ship when the pilot is obviously incompetent or intoxicated.

The pilot must possess and exercise the ordinary skill and care of one who is an expert in a profession. A pilot can be held personally liable to the owners of the vessel and to other injured parties for damages resulting from NEGLIGENCE that causes a collision. The pilot will be responsible for damages if his or her handling of the ship was unreasonable, according to persons of nautical experience and good seamanship, at the time of the accident. The negligence of a pilot in

the performance of duty is a maritime TORT within the jurisdiction of a court of ADMIRALTY, which deals only with maritime actions.

CROSS-REFERENCES

Admiralty and Maritime Law; Airlines.

## PIMP

*In feudal England, a type of tenure by which a tenant was permitted to use real property that belonged to a lord in exchange for the performance of some service, such as providing young women for the use and pleasure of the lord.*

*An individual who, for a fee, supplies another individual with a prostitute for sexual purposes. To pander, or cater to the sexual desires of others in exchange for money.*

CROSS-REFERENCES

Prostitution.

## PINKERTON AGENTS

The Pinkerton National Detective Agency was founded in 1850 in Chicago by ALLAN PINKERTON. It was one of the first private detective agencies in the United States, and its agents played an important role in law enforcement in the nineteenth and early twentieth century. Pinkerton agents were employed to capture bank robbers, counterfeiters, and forgers, but they also were used to infiltrate LABOR UNIONS and disrupt strikes.

*Pinkerton Agents, hired as strikebreakers, surrendered to armed miners during the 1892 Homestead Strike in Pennsylvania.* AP/WIDE WORLD PHOTOS

Allan Pinkerton established offices throughout the country. A Pinkerton innovation was photographing criminals after arrest. The "mug shot" soon was adopted by police departments. By the 1870s the Pinkerton agency had the largest collection of mug shots in the world. Agents would clip out newspaper stories about a criminal and include this information in the criminal's file. When a crime was committed in town, the sheriff could send descriptions by witnesses to the agency, and the agents would provide a photograph and a detailed description of the suspect to law enforcement agencies in nearby communities.

In the late 1870s, coal mining operators in Pennsylvania hired Pinkerton agents to disrupt union organizing. Some agents infiltrated the Molly Maguires, a secret organization of Pennsylvania and West Virginia coal miners. After a long and highly publicized trial in which Pinkerton agents were witnesses, nineteen miners were hanged for crimes committed during the strike.

Pinkerton agents chased bandits across the United States after the Civil War, including the gang led by Jesse and Frank James. Robert Pinkerton, the son of Allan, led the group that followed and captured the Younger Brothers Gang in 1874. Pinkerton agents also pursued, unsuccessfully, Butch Cassidy (Robert Parker) and the Sundance Kid (Harry Longabough) as the pair robbed trains and banks in the southwestern United States in the late 1890s.

The Pinkerton agency remains in existence and has its headquarters in Encino, California. The agency provides investigative services, uniformed security officers, security systems, and other products and services associated with personal and business security.

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## ◆ PINKERTON, ALLAN

Allan Pinkerton was a famous nineteenth-century detective and founder of the Pinkerton National Detective Agency. Pinkerton served as a spy during the U.S. CIVIL WAR and was renowned for preventing the assassination of

President-Elect ABRAHAM LINCOLN in 1861. He became a controversial figure when large companies hired his "Pinkerton men" to break LABOR UNION strikes through the use of intimidation and violence.

Pinkerton was born on August 25, 1819, in Glasgow, Scotland. His father was a police sergeant, but as a young man Pinkerton did not seek a police job. Instead he apprenticed as a cooper and learned to make barrels. In 1842, after he completed his apprenticeship, Pinkerton emigrated to the United States. He settled in Chicago and set up a cooper's shop.

In 1843 Pinkerton moved his business to Dundee, in Kane County, Illinois. In that year he discovered and captured a gang of counterfeiters. The event changed Pinkerton's life. He became involved with police work and was appointed deputy sheriff of Kane County in 1846. He soon shifted to a similar position in Cook County, with headquarters in Chicago.

In 1850 he resigned as a deputy and started the Pinkerton National Detective Agency. This private detective agency, which specialized in railroad theft cases, became the most famous organization of its kind. Pinkerton soon opened branches in several cities. In 1866 his agents recovered $700,000 stolen from the Adams Express Company and captured the thieves.

Pinkerton's public image was enhanced by his discovery in 1861 of a plot to assassinate Abraham Lincoln as the president-elect traveled by train from Springfield, Illinois, to Washington, D.C. With the outbreak of the Civil War, Pinkerton entered the Union army as a major.

*Allan Pinkerton.*
LIBRARY OF CONGRESS

He was commissioned by General George B. McClellan to create a SECRET SERVICE of the U.S. Army to investigate criminal activity, such as payroll thefts and murder. Pinkerton also headed an organization, under the name E. J. Allan, that worked to obtain military information in the Southern states.

Following the Civil War, Pinkerton returned to his detective agency. His agency soon became an integral part in the wars between labor and management that became common in the 1870s. States enacted laws that gave corporations the authority to create their own private police

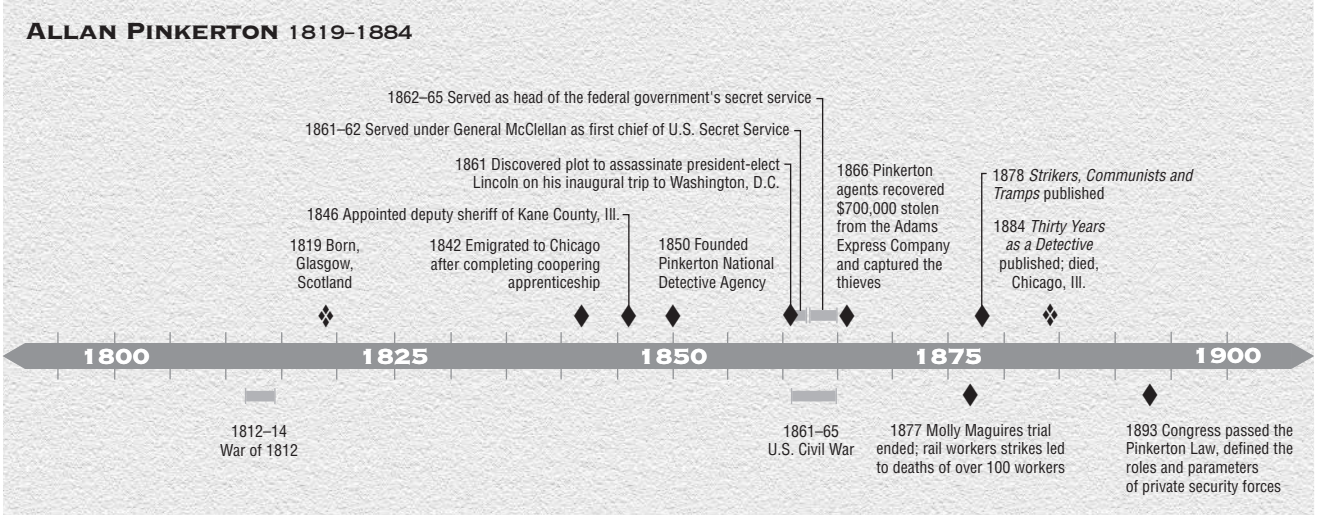

forces or to contract with established police agencies. Pinkerton created groups of armed men known as Pinkerton men, who were contracted out for a daily fee to corporations with labor problems. Their menacing attitudes and use of violence were despised by labor unions and their supporters.

In 1877 the United States was beset by a number of railroad strikes. Pinkerton's agents were used as strikebreakers, and their harsh actions toward the labor unions were criticized. James McParlan, a Pinkerton agent, infiltrated the Molly Maguires, a secret organization of Pennsylvania and West Virginia coal miners. From 1872 to 1876, McParlan became part of the Molly Maguires, who were responsible for TERRORISM in the coal fields. He later testified in a series of trials that led to the conviction and hanging of ten men for murder.

Pinkerton, an unabashed self-promoter, wrote an account called *The Molly Maguires and the Detectives* (1877). In 1878 he wrote *Strikers, Communists and Tramps* in which he defended the use of his agents as strikebreakers, arguing that he was protecting workers by opposing unionism. He wrote about his role in foiling the Lincoln assassination in *The Spy of the Rebellion* (1883) and his autobiography *Thirty Years as a Detective* (1884).

Pinkerton died on July 1, 1884, in Chicago.

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## ♦ PINKNEY, WILLIAM

William Pinkney was a lawyer, statesman, and diplomat before serving as attorney general of the United States under President JAMES MADISON.

Pinkney was born in Annapolis, Maryland, on March 17, 1764. Though his early education was sporadic during the Revolutionary war years, Pinkney was a diligent student. He originally studied medicine, but in 1783 he met Judge SAMUEL CHASE. Chase thought the young medical student would make a good lawyer and offered to tutor him. For the next three years, Pinkney read law in Chase's Baltimore office. He was admitted to the bar in 1786.

In 1787 Pinkney established a law practice in rural Harford County, Maryland. With encouragement from Chase, he also became active in local politics. In 1788 he was elected to the Maryland House of Delegates, the lower house of the legislative assembly. In the legislature, Pinkney established a reputation as an eloquent speaker and a skillful lawmaker.

By 1792 Pinkney had left his seat in the house of delegates to serve on Maryland's executive council, a body appointed to advise or assist the governor in the execution of official duties. Pinkney lived and practiced law in Annapolis during his term of council service, from 1792 to 1795.

In 1796 President GEORGE WASHINGTON appointed Pinkney to the tribunal responsible for enforcing the British Treaty of 1794 (or Jay's Treaty). This treaty, negotiated by Supreme Court Chief Justice JOHN JAY, established an international commission to arbitrate boundary disputes between the United States and Great Britain, and to settle charges of interference with merchant shipping and trade between the two countries.

Pinkney served on the commission for the next eight years. The experience made him an expert in the fields of ADMIRALTY and INTERNATIONAL LAW, but his long stay in England took a toll on his personal finances. Unlike other diplomats of his day, Pinkney was not a wealthy man. By 1804 he had decided it was time to capitalize on his acquired expertise. He returned to Maryland and established a legal practice in Baltimore. Before long, he was a familiar and respected figure in Maryland's seaports and courtrooms. In 1805 he served as attorney general of Maryland while continuing to build his private practice.

In 1806 Great Britain renewed its aggression against U.S. ships in international waters. President THOMAS JEFFERSON asked Pinkney to accompany Envoy (and future president) JAMES MONROE to England to negotiate an agreement on the shipping rights of neutrals. Though Pinkney was reluctant to leave a law practice that was just beginning to prosper, he agreed to go. It was not one of his better decisions. Monroe departed England in 1807, leaving Pinkney to serve as resident minister. Pinkney pleaded for a replacement, but Jefferson ignored him. It was four years before Pinkney was relieved of his duties by Jefferson's successor, President Madison.

When Pinkney returned to Baltimore in 1811, he found that his practice had once again been devastated by his absence. In need of

income while rebuilding his client base, he ran for, and was elected to, the Maryland state senate. By December of 1811, Pinkney had resigned his seat to accept President Madison's appointment as attorney general of the United States.

In 1811, the attorney general's post was still a part-time position that allowed the officeholder to continue in private practice—and to pursue other interests and commitments. Shortly after taking office, Pinkney chose to demonstrate his support for the WAR OF 1812 by enlisting and serving with a rifle company. This absence, and others required by Pinkney's law practice, contributed to growing sentiment that the country needed a full-time attorney general who resided in Washington, D.C. When Congress instituted a residency requirement in 1814, Pinkney chose to resign rather than put his law practice in jeopardy for a third time. Madison, who had supported the residency requirement, was disappointed with Pinkney's decision.

Even though the residency debate became the defining issue of his term, Pinkney made other contributions while in office. He advised on international trade matters, and worked with Supreme Court Justice JOSEPH STORY to improve the federal criminal code.

Friends and neighbors in Pinkney's home district apparently failed to consider his stand on the residency issue when they drafted him as a candidate for the U.S. House of Representatives in 1815. Members of Congress were not required to live in Washington, D.C., but most of them did while Congress was in session. Pinkney was elected but refused to serve.

It was almost two years before Pinkney reentered the public arena. In 1817 he accepted a diplomatic post as minister to Russia and special envoy to Naples. This time, he served only the designated term abroad.

In 1818 Pinkney returned to Baltimore and the PRACTICE OF LAW. For the next two years, he was actively involved in many of the cases heard before the U.S. Supreme Court—including two celebrated confrontations in which he bested lawyer and orator DANIEL WEBSTER (TRUSTEES OF DARTMOUTH COLLEGE V. WOODWARD, 17 U.S. (4 Wheat.) 518, 4 L. Ed. 629 [1819]; M'CULLOCH V. STATE OF MARYLAND, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 [1819]).

He also made amends for his earlier refusal to serve the people of Maryland in Congress. In 1820 he was elected to the U.S. Senate. He took his seat but did not complete the term. He died in Washington, D.C., on February 25, 1822.

*William Pinkney.* HULTON/ARCHIVE BY GETTY IMAGES

"THE FREE SPIRIT OF OUR CONSTITUTION AND OF OUR PEOPLE IS NO ASSURANCE AGAINST THE PROPENSION OF UNBRIDLED POWER TO ABUSE."
—WILLIAM PINKNEY

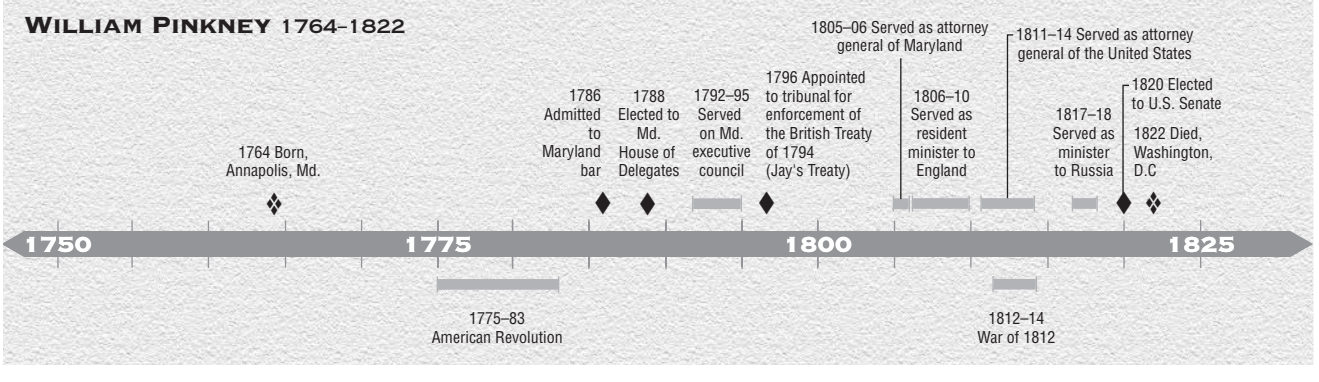

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## PIRACY

*The act of violence or depredation on the high seas; also, the theft of* INTELLECTUAL PROPERTY, *especially in electronic media.*

Piracy is a crime with ancient origins. As long as there have been ships at sea, pirates have sought to steal from them. Internationally, laws against piracy have ancient origins, too, but U.S. law developed chiefly in the eighteenth and nineteenth century. The power to criminalize piracy originated in the U.S. Constitution, which was followed by the first federal law in 1790 and crucial revisions over the next sixty years. Additionally, the United States and other nations cooperated to combat piracy in the twentieth century. This resulted in a unique shared view of jurisdiction: piracy on the high seas can be punished by any nation. In the late twentieth century, the term *piracy* grew to include COPYRIGHT violations of intellectual property such as music, films, and computer software.

*In addition to its traditional nautical connotations, piracy has come to refer to copyright violations as well. Pirated material is displayed during this press conference held by members of various trade groups to discuss the issue of pirated goods from China.* AP/WIDE WORLD PHOTOS

The Constitution addresses piracy in Article 1, Section 8. It gives Congress "the Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." Generally, the definition of pirates meant rogue operators at sea—independent criminals who hijacked ships, stole their cargo, or committed violence against their crew. But standards in all areas under the law changed in response to judicial rulings and to historical incidents, forming by the mid-1800s what became the basis for contemporary law.

In 1790 Congress enacted the first substantive antipiracy law, a broad ban on murder and ROBBERY at sea that carried the death penalty. In 1818, however, the U.S. Supreme Court ruled that the law was limited to crimes involving U.S. citizens: U.S. jurisdiction did not cover foreigners whose piracy targeted other foreigners (*United States v. Palmer,* 16 U.S. [3 Wheat.] 610). A year later, in 1819, Congress responded by passing an antipiracy law to extend U.S. jurisdiction over pirates of all nationalities.

By the mid-nineteenth century, two other important changes occurred. Penalties for certain piracy crimes—revolt and mutiny—were reduced and were no longer punishable by death. Then the Mexican War of 1846–48 brought a radical extension of the definition of a pirate. The traditional definition of an independent criminal was broadened to include sailors acting on commissions from foreign nations, if and when their commissions violated U.S. treaties with their government. The Piracy Act of 1847, which established this broader definition, marked the last major change in U.S. piracy law.

Today, the primary source of antipiracy law is title 18, chapter 81, of the United States Code, although numerous other antipiracy provisions are scattered throughout the code. Additionally, international cooperation has shaped a unique form of jurisdictional agreement among nations. Significant in bringing about this cooperation was the GENEVA CONVENTION on the High Seas of April 29, 1958 and the 1982 United Nations Convention on the Law of the Sea. The primary effect of such agreements is to allow

pirates to be apprehended on the high seas—meaning outside of territorial limits—by the authorities of any nation and punished under its own law. This standard is unique because nations are generally forbidden by INTERNATIONAL LAW from interfering with the vessels of another nation on the high seas. It arose because piracy itself has never vanished; in fact, since the 1970s, it has appeared to have undergone a resurgence.

Apart from its traditional definition, piracy also refers to copyright violations. Committed both in the United States and abroad, this form of piracy includes the unauthorized storage, reproduction, distribution, or sale of intellectual property—for example, music CDs, movie videocassettes, and even fashion designs. The term has been applied, in particular, to the piracy of computer software, which is highly susceptible to theft because of its ease of duplication. Estimates of the cost to copyright holders ranges in the billions of dollars annually. U.S. law protects copyright holders under the Copyright Act (17 U.S.C.S. § 109 [1993]), and a 1992 federal law makes software piracy a felony (Pub. L. No. 102-561, 106 Stat. 4233, codified at 18 U.S.C.A. § 2319 [1988 & 1992 Supp.]). Since the 1990s, a number of international treaties and conventions, as well as diplomatic initiatives, have sought to forge greater cooperation among nations to combat such piracy.

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Admiralty and Maritime Law; Computer Crime; Hijacking.

## ❖ PITNEY, MAHLON

Mahlon Pitney served as an associate justice of the U.S. Supreme Court from 1912 to 1922. A lawyer, legislator, and New Jersey Supreme Court judge before his appointment, Pitney was a judicial conservative who believed in "liberty of contract" and who generally opposed efforts to protect the right of workers to join unions.

Pitney was born on February 5, 1858, in Morristown, New Jersey. His father, Henry Pitney, was a lawyer and state supreme court judge. Pitney graduated from Princeton University in 1879 and then studied law with a lawyer instead of attending law school. He was admitted to the New Jersey bar in 1882. He practiced law in Dover, New Jersey, from 1882 to 1889. He returned to Morristown to assume control of his father's firm in 1889, when his father was appointed to the New Jersey Supreme Court.

Pitney began a brief political career in the 1890s. He was elected to the U.S. House of Representatives in 1895 as a Republican and served two terms. In 1899 he was elected to the New Jersey Senate, serving as president in 1901. He abandoned the political arena in 1901 when he was appointed to the New Jersey Supreme Court. He served as chancellor, the state's highest judicial post, from 1908 to 1912.

In 1912 President WILLIAM HOWARD TAFT appointed Pitney to the U.S. Supreme Court. During his ten years on the court, Pitney wrote many opinions that dealt with unions and business and their regulation by government. Pitney, an economic conservative, was generally hostile to government interference with employers and

"THE CONSTITUTION . . . IMPOSES UPON THE STATES NO OBLIGATION TO CONFER UPON THOSE WITHIN THEIR JURISDICTION EITHER THE RIGHT OF FREE SPEECH OR THE RIGHT OF SILENCE."
—MAHLON PITNEY

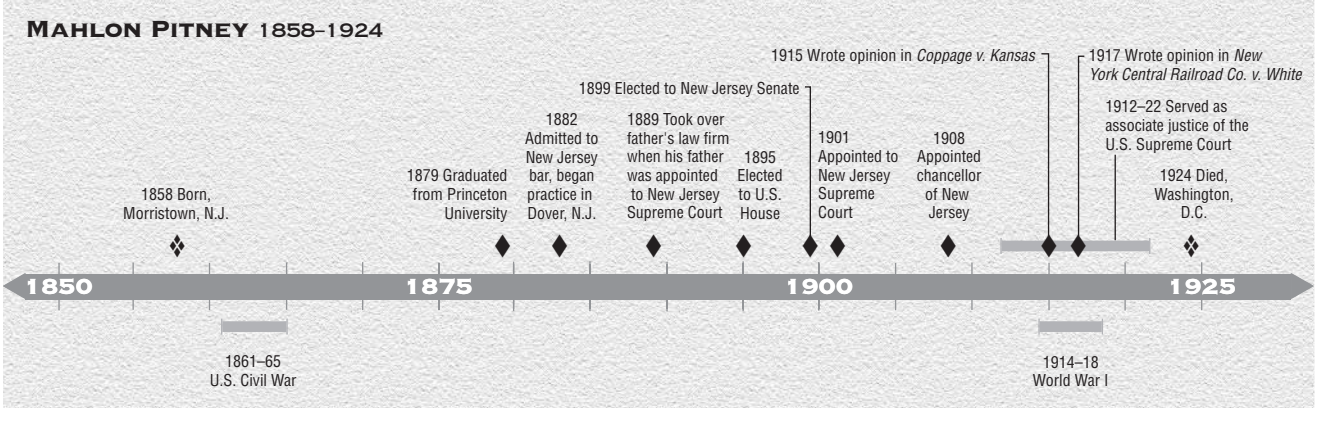

*Mahlon Pitney.*
CORBIS

employees. During the time Pitney was on the court, U.S. **LABOR UNIONS** were struggling to survive in a legal environment that favored employers. In *Coppage v. Kansas,* 236 U.S. 1, 35 S. Ct. 240, 59 L. Ed. 441 (1915), Pitney struck down a Kansas statute that prohibited an employer from using force or coercion to prevent employees from joining a union.

Pitney's hostility to unions and government regulation of business was based on his belief in individualism and unrestricted freedom in the marketplace. He subscribed to the liberty of contract theory that commanded widespread support on the Supreme Court. Pitney believed that liberty of contract was guaranteed by the **FOURTEENTH AMENDMENT** to the U.S. Constitution, which provided that no state was to "deprive any person of life, liberty or property without **DUE PROCESS** of law." Government regulation of work hours and working conditions was unconstitutional because regulation deprived employer and employee of the liberty to negotiate terms of employment. Likewise, unions hurt individualism by insisting on **COLLECTIVE BARGAINING.**

Pitney applied these beliefs to business as well. He supported antitrust statutes because monopolies, like unions, distorted the marketplace and reduced the ability of individuals and small companies to compete. Most importantly, Pitney supported state **WORKERS' COMPENSATION** statutes, which had just been introduced as a way to protect workers hurt on the job. In *New York Central Railroad Co. v. White,* 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917), and in several subsequent cases, Pitney ruled that employers were liable for the injuries suffered by their workers during the course of employment. Workers' compensation statutes changed the legal landscape for employers and employees. States created administrative systems that quickly and fairly compensated employees for their injuries. Employers were no longer able to invoke common-law **TORT** rules to avoid liability. Without Pitney's leadership on this issue, the laws might not have survived judicial scrutiny.

Pitney suffered a stroke in August 1922 and resigned from the Court in December. He died on December 9, 1924, in Washington, D.C.

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## P.J.

*An abbreviation for presiding judge, the individual who directs, controls, or governs a particular tribunal as its chief officer.*

## PLAGIARISM

*The act of appropriating the literary composition of another author, or excerpts, ideas, or passages therefrom, and passing the material off as one's own creation.*

Plagiarism is theft of another person's writings or ideas. Generally, it occurs when someone steals expressions from another author's composition and makes them appear to be his own work. Plagiarism is not a legal term; however, it is often used in lawsuits. Courts recognize acts of plagiarism as violations of **COPYRIGHT** law, specifically as the theft of another person's **INTELLECTUAL PROPERTY**. Because copyright law allows a variety of creative works to be registered as the property of their owners, lawsuits alleging plagiarism can be based on the appropriation of any form of writing, music, and visual images.

Plagiarism can take a broad range of forms. At its simplest and most extreme, plagiarism involves putting one's own name on someone

else's work; this is commonly seen in schools when a student submits a paper that someone else has written. Schools, colleges, and universities usually have explicit guidelines for reviewing and punishing plagiarism by students and faculty members. In copyright lawsuits, however, allegations of plagiarism are more often based on partial theft. It is not necessary to exactly duplicate another's work in order to infringe a copyright: it is sufficient to take a substantial portion of the copyrighted material. Thus, for example, plagiarism can include copying language or ideas from another novelist, basing a new song in large part on another's musical composition, or copying another artist's drawing or photograph.

Courts and juries have a difficult time determining when unlawful copying has occurred. One thing the plaintiff must show is that the alleged plagiarist had access to the copyrighted work. Such evidence might include a showing that the plaintiff sent the work to the defendant in an attempt to sell it or that the work was publicly available and widely disseminated.

Once access is proven, the plaintiff must show that the alleged plagiarism is based on a substantial similarity between the two works. In *Abkco Music, Inc. v. Harrisongs Music, Ltd.,* 722 F.2d 988 (2d Cir 1983), the Second Circuit Court of Appeals found "unconscious" infringement by the musician George Harrison, whose song "My Sweet Lord" was, by his own admission, strikingly similar to the plaintiff's song, "He's So Fine." Establishing a substantial similarity can be quite difficult as it is essentially a subjective process.

Not every unauthorized taking of another's work constitutes plagiarism. Exceptions are made under copyright law for so-called fair use, as in the case of quoting a limited portion of a published work or mimicking it closely for purposes of PARODY and satire. Furthermore, similarity alone is not proof of plagiarism. Courts recognize that similar creative inspiration may occur simultaneously in two or more people. In Hollywood, for example, where well-established conventions govern filmmaking, this conventionality often leads to similar work. As early as 1942, in *O'Rourke v. RKO Radio Pictures,* 44 F. Supp. 480, the Massachusetts District Court ruled against a screenwriter who alleged that a movie studio had stolen parts of his unproduced screenplay *Girls' Reformatory* for its film *Condemned Women.* The court noted that the similar plot details in both stories—prison riots, escapes, and love affairs between inmates and officials—might easily be coincidental.

Sometimes the question is one of proper attribution. In January 2002, two highly regarded historians, Stephen Ambrose and Doris Kearns Goodwin, were accused of plagiarism in *The Weekly Standard.* The magazine revealed that Ambrose (who died in October 2002) took passages from another author's work and used them in his 2001 book *The Wild Blue,* while Goodwin used passages from several authors in her 1987 book *The Fitzgeralds and the Kennedys.* Both authors apologized, acknowledging that they had erred and adding that their failure to provide proper attribution was completely inadvertent. Goodwin went so far as to address her mistakes in an essay in *Time* magazine. They agreed to correct the problem in future editions of the books in question. While some of their colleagues accepted the explanation, others questioned whether authors of such talent and prominence were in fact being disingenuous considering that both had borrowed numerous passages, not just one or two.

The INTERNET has added a new layer to the question of plagiarism, particularly among high school and college students. In the mid-1990s a number of Web sites cropped up that offered term papers, thesis papers, and dissertations for sale. These "paper mills" make it easy for students to purchase papers instead of writing their own. (The fact that many of the papers being sold are poorly written and minimally researched is apparently of little concern.) A similarly egregious problem results from the wide array of legitimate reports many Web sites make available on the Internet for research purposes. Unscrupulous students with a computer can easily copy large blocks of these reports and paste them into their own papers. Anecdotal evidence suggests that while the ease of copying information has not led to a dramatic increase in plagiarism among honest students, those who have already cheated are likely to make frequent use of electronic resources to continue cheating. Students who use the "copy-and-paste" writing method are being thwarted by instructors who simply type questionable phrases into search engines; if the passage exists in another paper, the search engine will probably find it.

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CROSS-REFERENCES

Copyright; Literary Property; Music Publishing; Publishing Law.

## PLAIN-ERROR RULE

*The principle that an appeals court can reverse a judgment and order a new trial because of a serious mistake in the proceedings, even though no objection was made at the time the mistake occurred.*

The issuance of inconsistent instructions to a jury that would result in a miscarriage of justice, for example, can furnish the basis for a new trial, even though no timely and proper objection to the instructions was made. Although a person is entitled to a fair trial, he or she is not entitled to a flawless one; the individual does not have the right to a new trial merely because a HARMLESS ERROR has been committed.

## PLAIN-MEANING RULE

*A principle used by courts in interpreting contracts that provides that the objective definitions of contractual terms are controlling, irrespective of whether the language comports with the actual intention of either party.*

The plain meaning of the contract will be followed where the words used—whether written or oral—have a clear and unambiguous meaning. Words are given their ordinary meaning; technical terms are given their technical meaning; and local, cultural, or TRADE USAGE of terms are recognized as applicable. The circumstances surrounding the formation of the contract are also admissible to aid in the interpretation.

## PLAIN VIEW DOCTRINE

*In the context of searches and seizures, the principle that provides that objects perceptible by an officer who is rightfully in a position to observe them can be seized without a* SEARCH WARRANT *and are admissible as evidence.*

The U.S. Supreme Court has developed and refined the plain view doctrine over time. In *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), the Court ruled that the seizure of two automobiles in plain view during the arrest of the defendant, along with later findings of gunpowder, did not violate the defendant's FOURTH AMENDMENT rights (protection against unreasonable SEARCH AND SEIZURE).

The Court also has drawn distinctions between *searches* and *seizures* in applying the plain view doctrine. In *Arizona v. Hicks,* 480 U.S. 321, 197 S.Ct. 1149, 94 L.Ed.2d 347 (1987), the Court held that no seizure occurred when a police officer called to the scene of a shooting incident recorded serial numbers of stereo equipment he observed in plain view, and which he believed had been stolen. Nevertheless, the officer's actions in moving the equipment to find the serial numbers constituted a search; the officer had a "reasonable suspicion" that the equipment had been stolen, but it was not supported by PROBABLE CAUSE.

## PLAINTIFF

*The party who sues in a civil action; a complainant; the prosecution—that is, a state or the United States representing the people—in a criminal case.*

## PLAINTIFF IN ERROR

*The unsuccessful party in a lawsuit who commences proceedings for appellate review of the action because a mistake or "error" has been made resulting in a judgment against him or her; an appellant.*

## PLAT

*A map of a town or a section of land that has been subdivided into lots showing the location and boundaries of individual parcels with the streets, alleys,* EASEMENTS*, and rights of use over the land of another.*

A plat is usually drawn to scale.

## PLEA

*A formal response by the defendant to the affirmative assertions of the plaintiff in a civil case or to the charges of the prosecutor in a criminal case.*

Under the old system of COMMON-LAW PLEADING, a plea was the defendant's first PLEADING in a case, the document in which he set out reasons why the plaintiff should not win on the claim made in his or her declaration. Rather than enter a plea, a defendant could file a

demurrer, which was a pleading in which the defendant argued that the plaintiff had not made out a legally sufficient case. If the defendant did not demur, he responded to the plaintiff's declaration with a plea.

There were two kinds of pleas, *dilatory* and *peremptory.* A dilatory plea did not argue against the merits of the plaintiff's claim but challenged that individual's right to have the court hear the case. It was called dilatory not because it unfairly delayed the trial but simply because it postponed the time when, if ever, the court would reach the merits of the case. A plea in abatement was a dilatory plea.

A peremptory plea, also called a plea in bar, did reach the merits of the case. It set out certain facts that the defendant claimed would bar the granting of relief to the plaintiff.

The plea could be a traverse, a full denial of the plaintiff's version of the facts. In that situation, the issue was defined, and the case went to trial for a determination in favor of one party or the other.

The plea could be a confession and avoidance, by which the defendant conceded the truth of the plaintiff's allegations but asserted new facts by which she sought to avoid the legal effect of the plaintiff's claim. For example, the defendant could admit that she had made a bargain as claimed by the plaintiff and then add that she was a minor at the time that she entered into the agreement and therefore could not be bound by it. At that point, no issue would yet have been disputed by both parties, and the plaintiff would have to respond to the plea. The plaintiff had the same range of possible responses that the defendant had had when she selected the plea, but the plaintiff's responsive pleading was called a replication. If the plaintiff raised a new question, the defendant had to respond with a rejoinder. After that, the pleading process could bounce back and forth with a surrejoinder, a rebutter, and a surrebutter. Common-law pleading thus became so complex and hypertechnical that it has now been replaced by CODE PLEADING and pleading similar to that of the federal CIVIL PROCEDURE.

A defendant could also enter a plea in a case in EQUITY. This was a special kind of answer to a bill in equity, that showed one or more reasons why the suit should be dismissed, delayed, or barred entirely. Since the procedures for cases at law and in equity have been merged, the plea in equity has also been abolished.

A criminal defendant has some options in responding to charges made against him. The rules of CRIMINAL PROCEDURE in the federal courts and many state courts permit a defendant to enter a plea of guilty, not guilty, or nolo contendere, which means "I do not wish to contest it." If a defendant fails or refuses to enter any plea at all, the court will enter a plea of "not guilty" for that individual, and then the trial may begin.

## PLEA BARGAINING

*The process whereby a criminal defendant and prosecutor reach a mutually satisfactory disposition of a criminal case, subject to court approval.*

Plea bargaining can conclude a criminal case without a trial. When it is successful, plea bargaining results in a plea agreement between the prosecutor and defendant. In this agreement, the defendant agrees to plead guilty without a trial, and, in return, the prosecutor agrees to dismiss certain charges or make favorable sentence recommendations to the court. Plea bargaining is expressly authorized in statutes and in court rules.

In federal court, for example, plea bargaining is authorized by subsection (e) of rule 11 of the Federal Rules of Criminal Procedure. Under rule 11(e), a prosecutor and defendant may enter into an agreement whereby the defendant pleads guilty and the prosecutor offers either to move for dismissal of a charge or charges, recommend to the court a particular sentence or agree not to oppose the defendant's request for a particular sentence, or agree that a specific sentence is the appropriate disposition of the case. A prosecutor can agree to take any or all of these actions in a plea agreement. Under rule 11(e), plea bargaining must take place before trial unless the parties show good cause for the delay.

Generally a judge will authorize a plea bargain if the defendant makes a knowing and voluntary waiver of his or her right to a trial, the defendant understands the charges, the defendant understands the maximum sentence he or she could receive after PLEADING guilty, and the defendant makes a voluntary confession, in court, to the alleged crime. Even if a defendant agrees to plead guilty, a judge may decline to accept the guilty plea and plea agreement if the charge or charges have no factual basis.

# Plea Bargaining: A Shortcut to Justice

Plea bargaining is widely used in the criminal justice system, yet seldom praised. Plea agreements are troublesome because they are something less than a victory for all involved. Prosecutors are loath to offer admitted criminals lighter sentences than those authorized by law. Likewise, most criminal defendants are less than enthusiastic over the prospect of openly admitting criminal behavior without the benefit of a trial. Despite the reservations of the parties, plea agreements resolve roughly nine out of every ten criminal cases. The sheer numbers have caused many legal observers to question the propriety of rampant plea bargaining.

Some critics of plea bargaining argue that the process is unfair to criminal defendants. These critics claim that prosecutors possess too much discretion in choosing the charges that a criminal defendant may face. When a defendant is arrested, prosecutors have the authority to level any charge if they possess enough facts to support a reasonable belief that the defendant committed the offense. This standard is called **PROBABLE CAUSE**, and it is a lower standard than ability to prove a charge **BEYOND A REASONABLE DOUBT**, the standard that the prosecution must meet at trial. Thus, for leverage, a prosecutor may tack on similar, more serious charges without believing that the charges can be proved beyond a reasonable doubt at trial.

Because prosecutors are evaluated in large part on their conviction rates, they are forced to try to win at all costs. According to some critics, prosecutors use overcharging to coerce guilty pleas from defendants and deprive them of the procedural safeguards and the full investigation of the trial process.

For example, assume that a defendant is arrested for trespassing. Assume further that the **TRESPASS** was an honest mistake and that the defendant was, by happenstance, on the property of a former spouse. In addition to trespassing, the prosecutor may charge the defendant, on the facts, with **STALKING** and attempted **BURGLARY**. The prospect of facing a trial on three separate criminal charges may induce the defendant to plea bargain because the potential cumulative punishment for all three crimes is severe. Ultimately the defendant may plead guilty to, and forfeit the right to a trial on, the trespassing charge, the only charge that stands a chance of being proved beyond a reasonable doubt. Such a plea bargain, claim some critics, is an illusory bargain for criminal defendants.

The practice of overcharging is impermissible, and courts may dismiss superfluous charges. However, courts are reluctant to prevent the prosecution from presenting a case on a charge that is supported by probable cause. Prosecutors have discretion in plea bargaining, and they may withdraw offers after making them. A defendant is also free to reject a plea bargain. In many cases, where a plea bargain is withdrawn or rejected and the case goes to trial, the defendant, if found guilty, receives punishment more severe than that offered by the prosecution in the plea bargain. This has been called the

The judge does not participate in plea bargain discussions. Prosecutors have discretion whether to offer a plea bargain. However, a prosecutor may not base the determination of whether to negotiate on the basis of an unjustifiable standard such as race, religion, or some other **ARBITRARY** classification.

Plea bargaining can be advantageous for both prosecutors and defendants. Prosecutors may seek a plea bargain in certain cases to save valuable court time for high-priority cases. Prosecutors often are amenable to plea bargaining with a defendant who admits guilt and accepts responsibility for a crime: plea bargaining in this context is considered the defendant's reward for confessing. Prosecutors also accept plea bargains because they are evaluated in large part according to their conviction rates and all plea bargains result in a conviction because the defendant must plead guilty as part of the plea agreement.

Criminal defendants may also benefit from plea bargaining. Plea agreements provide quick relief from the anxiety of criminal prosecution because they shorten the prosecution process. Furthermore, plea agreements usually give defendants less punishment than they would receive if they were found guilty of all charges after a full trial. For example, assume that a defendant has been charged with one count of driving under the influence and one count of possession of a controlled substance with intent to sell. If the defendant goes to trial and is found guilty on both counts, he could receive a prison sentence of several years. However, if he agrees to plead guilty to the charge of possession with intent to sell, the prosecutor may drop the driving-under-the-influence charge. The net result would be a slightly shorter prison sentence than would result with inclusion of the other count. As part of the same deal, the prosecutor also may agree to reduce the remaining charge in

"trial penalty" and it is another source of criticism of the plea bargain.

A defendant who goes to trial and is found guilty of a serious felony receives, on the average, a prison sentence that is twice as long as the sentence offered in a plea bargain for the same offense. A defendant cannot be penalized for **PLEADING** not guilty and going to trial, but the U.S. Supreme Court has not held that it is impermissible to punish defendants with sentences that are longer than those offered in plea agreements. When overcharging and the trial penalty are combined in the regular practice of plea bargaining, defendants have little choice but to plead guilty, and virtually every criminal act may be disposed of without a trial. This, according to some critics, is a perversion of the criminal justice system.

Other critics focus on the benefits that plea bargaining gives to defendants. They argue that plea bargaining softens the deterrent effect of punishment because it gives criminal defendants the power to bargain for lesser punishments. These critics note that experienced criminals are more likely to receive favorable plea bargains because they are familiar with the criminal justice system. According to these critics, plea bargaining subverts the proposition that a criminal should receive a punishment suited to the crime.

Critics of plea bargaining tend to be either scholars or crime victims. Scholars complain of prosecutorial coercion, and crime victims decry the lighter sentences that plea bargaining produces. Defenders of plea bargaining tend to be the players in the system. These are judges, prosecutors, criminal defendants, and criminal defense attorneys. The majority of these persons accept plea bargaining as a necessary tool in the administration of criminal justice. They point out that critics of plea bargaining have no solution to the lack of judicial resources. Without increased funding for more courts, judges, prosecutors, and court employees, plea bargaining is a necessity in most jurisdictions.

In response to the overcharging argument, supporters of plea bargaining note that the prosecutor's discretion in charging is a concept deeply ingrained in U.S. law, and for good reason. A prosecutor is not required to decide the case before trial. Instead the prosecutor is required to press charges based on the facts and to present evidence to support the charges. If there is no reasonable interpretation of the facts to support a certain charge, the charge will be dismissed. The judge or jury makes the final decision of whether the evidence warrants conviction on a certain offense. Defendants may receive harsher sentences upon conviction at trial, but in any case the sentence must be authorized by law. Thus, procedural safeguards effectively protect criminal defendants from the perils of overcharging.

Proponents of plea bargaining also contend that both defendants and society reap benefits. Defendants benefit because both the defendant and prosecutor help to fashion an appropriate punishment. Society benefits because it is spared the cost of lengthy trials while defendants admit to crimes and still receive punishment. Although the punishment pursuant to a plea agreement is generally less severe than that imposed upon conviction after a trial, the process nevertheless produces a deterrent effect on criminal behavior because prosecutors are able to obtain more convictions. Each conviction places a defendant under the supervision of the criminal justice system, and this decreases the defendant's freedom. Moreover, subsequent convictions after a guilty plea can be punished more harshly because defendants are punished in large part according to their criminal history.

exchange for something from the defendant. For example, the prosecutor may ask the defendant to testify against the supplier of the drugs or to build a case against the supplier by acting as an agent for the police. A reduced charge, such as from possession with intent to sell down to simple possession, would further decrease any possible prison sentence. Finally, the prosecutor may agree to recommend to the court that the defendant serve a shorter prison sentence than the maximum term allowable under the simple possession statute.

Courts have generally upheld bargains whereby one defendant agrees to testify against another defendant or to provide evidence that incriminates another suspect. Some criminal defendants have sought to challenge these arrangements when other defendants have testified against them. For example, in *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999), prosecutors struck a deal with Napoleon Douglas, a drug dealer, whereby the prosecutors agreed to reduce the charges against him if he agreed to testify against Sonya E. Singleton. A trial court convicted Singleton of conspiring to distribute drugs and of **MONEY LAUNDERING**. Singleton's attorney argued during the trial and later on appeal that the deal between the prosecutors and Douglas amounted to **BRIBERY** in violation of 18 U.S.C.A. § 201(c)(2) (2000). Although a panel of the United States Court of Appeals for the Tenth Circuit initially agreed with Singleton, the court sitting en banc overruled the panel and affirmed the conviction. According to the court, the federal bribery statute did not apply to the federal government with respect to plea bargains.

Defendants are not required to enter into plea negotiations or accept a plea agreement offer. Some defendants choose to decline a plea bargain if they believe that the risk of conviction is outweighed by the possibility of acquittal.

Other defendants may disregard the risks and make a principled choice to proceed to trial. Some of these defendants seek to use trial proceedings as a forum for expressing dissent, and others merely wish to exercise their constitutional right to a trial or to publicly declare their version of events.

Prosecutors, likewise, are not obliged to plea bargain. When the alleged crime is particularly heinous or the case is highly publicized or politically charged, a prosecutor may be reluctant to offer any deals to the defendant in deference to victims or public sentiment. For example, a prosecutor may not offer a bargain to a person accused of a brutal rape and murder because such acts are widely considered to deserve the maximum allowable punishment.

The political influence on plea bargaining is more nebulous. Because prosecutors are hired by federal, state, and local governments, they often have political ties. If a case involves a prominent member of a political party, a prosecutor may refuse to offer a plea bargain to avoid the appearance of favoritism.

When a court accepts a plea agreement, the guilty plea operates as a conviction, and the defendant cannot be retried on the same offense. However, if the defendant breaches a plea agreement, the prosecution may reprosecute the defendant. For example, assume that Defendant A, as part of the plea agreement, must testify against Defendant B. If Defendant A pleads guilty pursuant to this agreement but later refuses to testify against Defendant B, the prosecutor may seek a revocation of the plea agreement and guilty plea.

If the government breaches a plea agreement, the defendant may seek to withdraw the guilty plea, ask the court to enforce the agreement, or ask the court for a favorable modification in the sentence. The government breaches a plea agreement when it fails to deliver its part of the plea agreement. For example, if a prosecutor agrees to dismiss a certain charge but later reneges on this promise, the defendant may withdraw her guilty plea. An unenthusiastic sentence recommendation by a prosecutor is not a breach of a plea agreement (*United States v. Benchimol,* 471 U.S. 453, 105 S. Ct. 2013, 85 L. Ed. 2d 462 [1985]).

Some prosecutors demand that defendants waive certain constitutional rights in exchange for a plea bargain. One such right involves *Brady* evidence, which consists of exculpatory or IMPEACHMENT evidence that tends to prove the factual innocence of the defendant. Under the case of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the U.S. Supreme Court requires prosecutors to inform defendants of such evidence. In 2001, the U.S. Court of Appeals for the Ninth Circuit held that it was unconstitutional for prosecutors to withhold a departure recommendation on grounds that the defendant refused to waive his or her right to *Brady* evidence (*United States v. Ruiz*, 241 F.3d 1157 [9th Cir. 2001]). A unanimous Supreme Court, however, disagreed, holding that the "Constitution does not require the government to disclose material evidence prior to entering a plea agreement with a criminal defendant" (*United States v. Ruiz,* 536 U.S. 622, 122 S. Ct. 2450, 153 L. Ed. 2d 586 [2002]).

When a prosecutor or defendant revokes a plea agreement, the statements made during the bargaining period are not admissible against the defendant in a subsequent trial. This rule is designed to foster free and open negotiations. There are, however, notable exceptions. The rule applies only to prosecutors: a defendant's statements to government agents are admissible. Furthermore, a prosecutor may use statements made by the defendant during plea negotiations at a subsequent trial to impeach the defendant's credibility after the defendant testifies.

Many jurisdictions maintain statutes that require victim notification of plea bargaining. In Indiana, for example, a prosecutor must notify the victim of a felony of negotiations with the defendant or the defendant's attorney concerning a recommendation that the prosecutor may make to the court. If an agreement is reached, the prosecutor must show the agreement to the victim, and the victim may give a statement to the court at the sentencing hearing (Ind. Code § 35-35-3-2 [1996]).

Plea bargaining was not favored in colonial America. In fact, courts actively discouraged defendants from pleading guilty. Courts gradually accepted guilty pleas in the nineteenth century. As populations increased and court procedural safeguards increased, courts became overcrowded, and trials became lengthier. This made trial in every case an impossibility. By the twentieth century, the vast majority of criminal cases were resolved with guilty pleas. In the early 2000s, plea bargaining is conducted in almost every criminal case, and roughly nine out of ten plea discussions yield plea agreements.

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CROSS-REFERENCES

Beyond a Reasonable Doubt; Criminal Law; Criminal Procedure; District and Prosecuting Attorneys; Due Process of Law; Probable Cause.

## PLEA IN ABATEMENT

*In* COMMON-LAW PLEADING, *a response by the defendant that does not dispute the plaintiff's claim but objects to its form or the time or place where it is asserted.*

A plea in abatement does not absolutely defeat the plaintiff's claim because, even if the plea is successful, the plaintiff may renew the lawsuit in a proper form, time, or place. For this reason, it is called a dilatory plea, because it has the effect of postponing the time when a court considers the actual merits of the case of each party.

The plea in abatement was abolished as a particular form of response by the defendant when common-law pleading was replaced by CODE PLEADING and later by pleading rules, such as the federal Rules of Civil Procedure. Sometimes the term is still loosely used for modern procedural devices that accomplish what the old plea in abatement used to do.

CROSS-REFERENCES

Civil Procedure.

## PLEA IN BAR

*An answer to a plaintiff's claim that absolutely and entirely defeats it.*

A plea in bar sets forth matters that deny the plaintiff's right to maintain his or her lawsuit; for example, because the STATUTE OF LIMITATIONS has expired or because the claim necessarily overrides a constitutionally protected right of the defendant.

## PLEADING

*Asking a court to grant relief. The formal presentation of claims and defenses by parties to a lawsuit. The specific papers by which the allegations of parties to a lawsuit are presented in proper form; specifically the complaint of a plaintiff and the answer of a defendant plus any additional responses to those papers that are authorized by law.*

Different systems of pleading have been organized generally to serve four functions: (1) to give notice of the claim or defense; (2) to reveal the facts of the case; (3) to formulate the issues that have to be resolved; and (4) to screen the flow of cases into a particular court. Different systems may rely on the pleadings to accomplish these purposes or may use the pleadings along with other procedural devices, such as discovery, PRETRIAL CONFERENCE among the parties, or SUMMARY JUDGMENT.

Originally in ancient England, the parties simply presented themselves to a tribunal and explained their dispute. This worked well enough in the local courts and in the feudal courts where a lord heard cases involving his tenants, but the great common-law courts of the king demanded more formality. From the end of the fourteenth to the middle of the sixteenth century, the royal courts began more and more to demand written pleadings that set out a party's position in a case. Predictably the shift resulted in more formality and more rigid technical requirements that were difficult to satisfy. Thus the course of COMMON-LAW PLEADING was perilous. A claim or defense that did not exactly fit the requirements of the common-law FORMS OF ACTION was thrown out with no opportunity to amend it and come back into court.

Some relief was offered by the courts of EQUITY, which were not bound by the same complex system of pleading. Beginning in the fourteenth century, the authority of such courts increased in proportion to the rigidity of the common-law pleading. Equity was the conscience of the judicial system and was charged

with doing complete justice regardless of technicalities. Cases were tried before a single judge without a jury, and the judge could allow different claims and various parties all in one proceeding. Some pretrial discovery of the other party's evidence was permitted. The initial pleading by a petitioner in equity was the bill, but states that now have the same procedures for law and equity specify the complaint as the first pleading in all kinds of civil actions today.

Despite criticism, common-law pleading endured in England and in the United States for several centuries. Beginning in 1848, some states replaced it by law with a new system called CODE PLEADING. The statutes enacting code pleading abolished the old forms of action and set out a procedure that required the plaintiff simply to state in a complaint facts that warranted legal relief. A defendant was authorized to resist the plaintiff's demand by denying the truth of the facts in the complaint or by stating new facts that defeated them. The defendant's response is called an answer.

In 1938, federal courts began using a modern system of pleading set out in the federal Rules of Civil Procedure. This system has been so effective that many states have enacted substantially the same rules of pleading. A pleading by a plaintiff or defendant under these rules is intended simply to give the other party adequate notice of the claim or defense. This notice must give the adversary enough information so that she can determine the evidence that she wants to uncover during pretrial discovery and then adequately prepare for trial. Because of this underlying purpose, modern federal pleading is also called notice pleading. The other objectives of earlier kinds of pleading are accomplished by different procedural devices provided for in the Federal Rules of Civil Procedure.

CROSS-REFERENCES

Civil Procedure.

## PLEBISCITE

See REFERENDUM.

## PLEDGE

*A* BAILMENT *or delivery of* PERSONAL PROPERTY *to a creditor as security for a debt or for the performance of an act.*

Sometimes called *bailment,* pledges are a form of security to assure that a person will repay a debt or perform an act under contract. In a pledge one person temporarily gives possession of property to another party. Pledges are typically used in securing loans, pawning property for cash, and guaranteeing that contracted work will be done. Every pledge has three parts: two separate parties, a debt or obligation, and a contract of pledge. The law of pledges is quite old, but in contemporary U.S. law it is governed in most states by the provisions for SECURED TRANSACTIONS in article 9 of the UNIFORM COMMERCIAL CODE.

Pledges are different from sales. In a sale both possession and ownership of property are permanently transferred to the buyer. In a pledge only possession passes to a second party. The first party retains ownership of the property in question, while the second party takes possession of the property until the terms of the contract are satisfied. The second party must also have a lien—or legal claim—upon the property in question. If the terms are not met, the second party can sell the property to satisfy the debt. Any excess profit from the sale must be paid to the debtor, or first party. But if the sale does not meet the amount of the debt, legal action may be necessary.

A contract of pledge specifies what is owed, the property that shall be used as a pledge, and conditions for satisfying the debt or obligation. In a simple example, John asks to borrow $500 from Mary. Mary decides first that John will have to pledge his stereo as security that he will repay the debt by a specific time. In law John is called the *pledgor,* and Mary the *pledgee.* The stereo is referred to as *pledged property.* As in any common pledge contract, possession of the pledged property is transferred to the pledgee. At the same time, however, ownership (or title) of the pledged property remains with the pledgor. John gives the stereo to Mary, but he still legally owns it. If John repays the debt under the contractual agreement, Mary must return the stereo. But if he fails to pay, she can sell it to satisfy his debt.

Pledged property must be in the possession of a pledgee. This can be accomplished in one of two ways. The property can be in the pledgee's *actual* possession, meaning physical possession (for example, Mary keeps John's stereo at her house). Otherwise, it can be in the *constructive* possession of the pledgee, meaning that the pledgee has some control over the property, which typically occurs when actual possession is

*A sample form for pledge of shares of stock*

**Pledge of Shares of Stock**

BE IT KNOWN, for value received, the undersigned _____ (Pledgor) of _____

hereby deposits, delivers to and pledges with _____ (Pledges) of_____
as collateral security to secure the payment of the following described debt owning Pledges:

The share of stock, described as _____ shares of stock of _____ (Corporation) represented as Stock Certificates No(s).

It is further agreed:

1. Pledgee may assign or transfer said debt and the collateral pledged hereunder to any third party.
2. In the event a stock dividend or further issue of stock in the Corporation is issued to the Pledgor, the Pledgor shall pledge said shares as additional collateral for the debt.
3. That during the term of this pledge agreement, and so long as it is not in default, the Pledgor shall have full rights to vote said shares and be entitled to all dividends income, except that stock dividends shall also be pledged.
4. That during the pendency of this agreement, the Pledgor shall not issue any proxy or assignment of rights to the pledged shares.
5. The Pledgor warrants and represents it has good title to the shares being pledge, they are free from liens and encumbrances or prior pledge, and the Pledgor has full authority to transfer said shares as collateral security.
6. Upon default of payment of the debt, or breach of this pledge agreement, the Pledgee or holder shall have full rights to foreclose on the pledged shares and exercise its rights as a secured party pursuant to Article 9 of the Uniform Commercial Code; and said rights being cumulative with any other rights the Pledgee or holder may have against the Pledgor.

The Pledgor understands that upon foreclosure the pledged shares may be sold at public auction or public sale. The Pledgor shall be provided reasonable notice of any said intended sale and the Pledgor shall have full rights to redeem said shares at any time prior to said sale upon payment of the balance due hereunder, and accrued costs of collection. In the event the shares shall be sold for less than the amount then owing, the Pledgor shall be liable for any deficiency.

Upon payment of the obligation for which the shares are pledged, the shares shall be returned to the Pledgor and this pledge agreement shall be terminated.

This pledge agreement shall be binding upon and inure to the benefit of the parties, their successors, assigns and personal representatives.

Upon default the Pledgor shall pay all reasonable attorneys' fees and cost of collections.

Signed this _____ day of _____, 20____.

_____ _____
Witness Pledgor

_____ _____
Witness Pledgor

impossible. For example, a pledgee has constructive possession of the contents of a pledgor's safety deposit box at a bank when the pledgor gives the pledgee the only keys to the box.

In pledges both parties have certain rights and liabilities. The contract of pledge represents only one set of these: the terms under which the debt or obligation will be fulfilled and the pledged property returned. On the one hand, the pledgor's rights extend to the safekeeping and protection of his property while it is in possession of the pledgee. The property cannot be used without permission unless use is necessary for its preservation, such as exercising a live animal. Unauthorized use of the property is called conversion and may make the pledgee liable for damages; thus, Mary should not use John's stereo while in possession of it.

For the pledgee, on the other hand, there is more than the duty to care for the pledgor's property. The pledgee has the right to the possession and control of any income accruing during the period of the pledge, unless an agreement to the contrary exists. This income reduces the amount of the debt, and the pledgor must account for it to the pledgee. Additionally, the pledgee is entitled to be reimbursed for expenses incurred in retaining, caring for, and

protecting the property. Finally, the pledgee need not remain a party to the contract of pledge indefinitely. She can sell or assign her interest under the contract of the pledge to a third party. However, the pledgee must notify the pledgor that the contract of pledge has been sold or reassigned; otherwise, she is guilty of conversion.

## PLESSY V. FERGUSON

An 1896 decision by the Supreme Court, *Plessy v. Ferguson,* 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, upheld the constitutionality of an 1890 Louisiana statute requiring white and "colored" persons to be furnished "separate but equal" accommodations on railway passenger cars.

The plaintiff, Homer Adolph Plessy, who was seven-eights Caucasian and one-eighth African, paid for a first-class seat on a Louisiana railroad. He took a seat in the coach that was reserved for white passengers, but the conductor told him to leave the "white" car and go to the "colored" coach under threat of being expelled from the train and arrested. When Plessy refused, he was ejected from the train and imprisoned. He was prosecuted for violating the law, which he asserted was unconstitutional and violated the THIRTEENTH AMENDMENT to the U.S. Constitution, which abolished SLAVERY, and the FOURTEENTH AMENDMENT to the Constitution, which prohibited certain restrictive legislative acts by the states.

The Supreme Court agreed to decide the constitutionality of the law. It reasoned that, although the Thirteenth Amendment intended to abolish slavery, it was insufficient to protect the "colored" people from certain harsh state laws that treated them unequally. The Fourteenth Amendment was enacted "to enforce the absolute equality of the two races before the law . . . (but) it could not have been intended to abolish distinctions based upon color or to enforce social as distinguished from political equality. . . ." The Court decided that the law establishing separate but equal public accommodations and facilities was a reasonable exercise of the POLICE POWER of a state to promote the public good. "If the two races are to meet upon terms of social equality, it must be the result of voluntary consent of the individuals."

Only Justice JOHN MARSHALL HARLAN dissented, on the ground that such a law "interferes with the personal freedom of citizens" under the

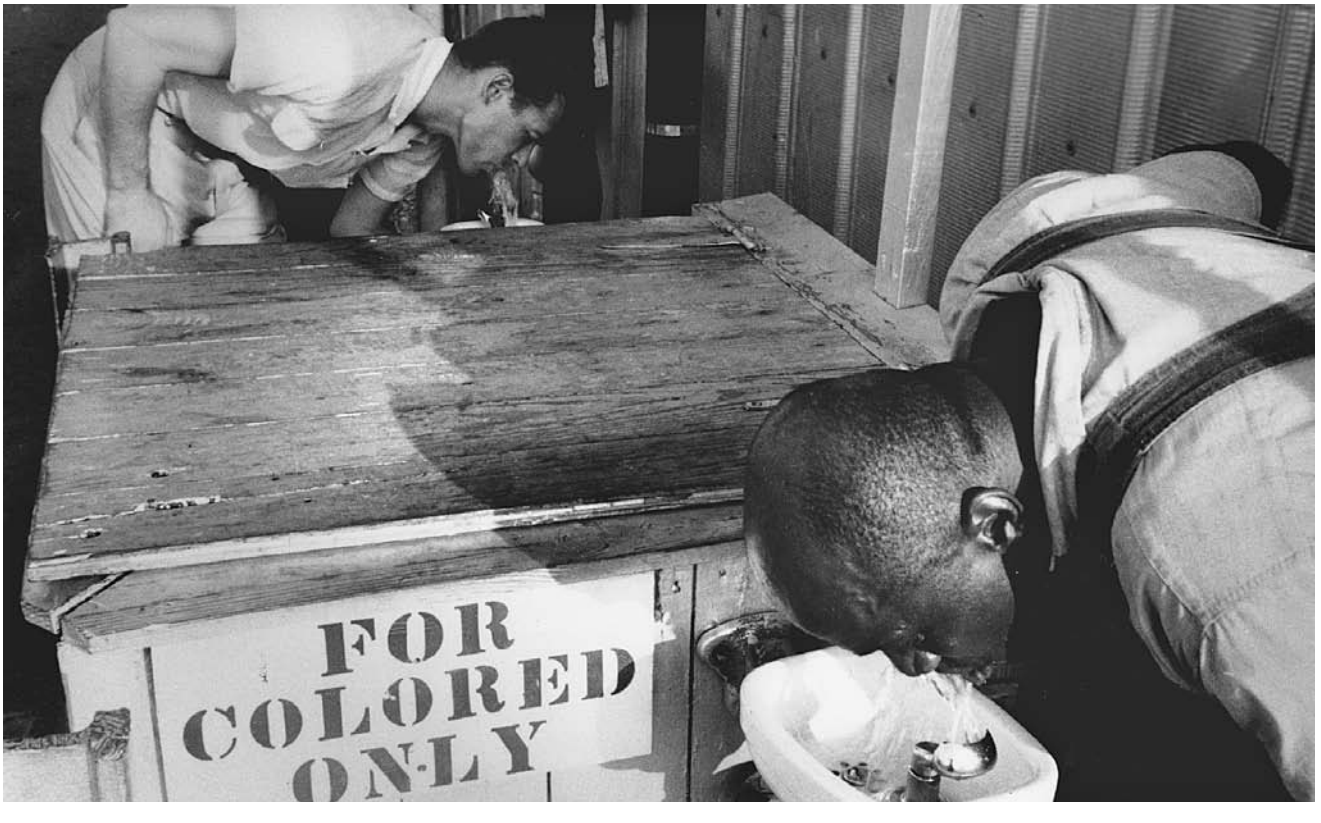


*In* Plessy v. Ferguson *(1896), the Supreme Court maintained that the Fourteenth Amendment was not intended to enforce social equality of races, a decision that stood for 58 years.*
CORBIS-BETTMANN

guise of legal equality. He maintained that the constitutional guarantees in this country were to be color-blind.

In 1954, the Supreme Court overruled this decision and recognized that separate but equal educational facilities were inherently unequal in **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). Subsequent Supreme Court decisions prohibited racial **SEGREGATION** in any public facilities and accommodations.

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CROSS-REFERENCES

Civil Rights; Civil Rights Movement; Integration; Jim Crow Laws; "Plessy v. Ferguson" (Appendix, Primary Document).

## PLURALITY

*The opinion of an appellate court in which more justices join than in any concurring opinion.*

*The excess of votes cast for one candidate over those votes cast for any other candidate.*

Appellate panels are made up of three or more justices. In some cases the justices disagree over the outcome of the case to such an extent that a majority opinion cannot be achieved. (A majority opinion is one in which the number of justices who join is larger than the number of justices who do not.) To resolve such disagreements and reach a final decision, two or more justices publish opinions called concurring opinions, and the other justices decide which of these concurring opinions they will join. The concurring opinion in which more justices join than any other is called a plurality opinion. Plurality decisions can reflect a disagreement among the justices over a legal issue in a case or can reveal deeper ideological differences among the members of the court.

The term *plurality* is also used to describe the outcome of an election that involves more than two candidates. The candidate who receives the greatest number of votes is said to have received a plurality of the votes. In contrast, the term *majority* is used to describe the outcome of an election involving only two candidates; the winner is said to have received a majority of the votes.

A candidate who has a plurality of the votes can also have a majority of the votes, but only if she receives a number of votes greater than that cast for all the other candidates combined. Mathematically, a candidate with a plurality has a majority if she receives more than one-half of the total number of votes cast. If candidate John Doe has a plurality, he has earned more votes than any other candidate, but whether he has a majority depends on how many votes he won.

CROSS-REFERENCES

Court Opinion.

# Abbreviations

| | |
|---|---|
| A. | Atlantic Reporter |
| A. 2d | Atlantic Reporter, Second Series |
| AA | Alcoholics Anonymous |
| AAA | American Arbitration Association; Agricultural Adjustment Act of 1933 |
| AALS | Association of American Law Schools |
| AAPRP | All African People's Revolutionary Party |
| AARP | American Association of Retired Persons |
| AAS | American Anti-Slavery Society |
| ABA | American Bar Association; Architectural Barriers Act of 1968; American Bankers Association |
| ABC | American Broadcasting Companies, Inc. (formerly American Broadcasting Corporation) |
| ABM | Antiballistic missile |
| ABM Treaty | Anti-Ballistic Missile Treaty of 1972 |
| ABVP | Anti-Biased Violence Project |
| A/C | Account |
| A.C. | Appeal cases |
| ACAA | Air Carrier Access Act |
| ACCA | Armed Career Criminal Act of 1984 |
| ACF | Administration for Children and Families |
| ACLU | American Civil Liberties Union |
| ACRS | Accelerated Cost Recovery System |
| ACS | Agricultural Cooperative Service |
| ACT | American College Test |
| Act'g Legal Adv. | Acting Legal Advisor |
| ACUS | Administrative Conference of the United States |
| ACYF | Administration on Children, Youth, and Families |
| A.D. 2d | Appellate Division, Second Series, N.Y. |
| ADA | Americans with Disabilities Act of 1990 |
| ADAMHA | Alcohol, Drug Abuse, and Mental Health Administration |
| ADC | Aid to Dependent Children |
| ADD | Administration on Developmental Disabilities |
| ADEA | Age Discrimination in Employment Act of 1967 |
| ADL | Anti-Defamation League |
| ADR | Alternative dispute resolution |
| AEC | Atomic Energy Commission |
| AECB | Arms Export Control Board |
| AEDPA | Antiterrorism and Effective Death Penalty Act |
| A.E.R. | All England Law Reports |
| AFA | American Family Association; Alabama Freethought Association |
| AFB | American Farm Bureau |
| AFBF | American Farm Bureau Federation |
| AFDC | Aid to Families with Dependent Children |
| aff'd per cur. | Affirmed by the court |
| AFIS | Automated fingerprint identification system |
| AFL | American Federation of Labor |

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| AFL-CIO | American Federation of Labor and Congress of Industrial Organizations |
| AFRes | Air Force Reserve |
| AFSC | American Friends Service Committee |
| AFSCME | American Federation of State, County, and Municipal Employees |
| AGRICOLA | Agricultural Online Access |
| AIA | Association of Insurance Attorneys |
| AIB | American Institute for Banking |
| AID | Artificial insemination using a third-party donor's sperm; Agency for International Development |
| AIDS | Acquired immune deficiency syndrome |
| AIH | Artificial insemination using the husband's sperm |
| AIM | American Indian Movement |
| AIPAC | American Israel Public Affairs Committee |
| AIUSA | Amnesty International, U.S.A. Affiliate |
| AJS | American Judicature Society |
| ALA | American Library Association |
| Alcoa | Aluminum Company of America |
| ALEC | American Legislative Exchange Council |
| ALF | Animal Liberation Front |
| ALI | American Law Institute |
| ALJ | Administrative law judge |
| All E.R. | All England Law Reports |
| ALO | Agency Liaison |
| A.L.R. | American Law Reports |
| ALY | *American Law Yearbook* |
| AMA | American Medical Association |
| AMAA | Agricultural Marketing Agreement Act |
| Am. Dec. | American Decisions |
| amdt. | Amendment |
| Amer. St. Papers, For. Rels. | American State Papers, Legislative and Executive Documents of the Congress of the U.S., Class I, Foreign Relations, 1832–1859 |
| AMS | Agricultural Marketing Service |
| AMVETS | American Veterans (of World War II) |
| ANA | Administration for Native Americans |
| Ann. Dig. | Annual Digest of Public International Law Cases |
| ANPA | American Newspaper Publishers Association |
| ANSCA | Alaska Native Claims Act |
| ANZUS | Australia-New Zealand-United States Security Treaty Organization |
| AOA | Administration on Aging |
| AOE | Arizonans for Official English |
| AOL | America Online |
| AP | Associated Press |
| APA | Administrative Procedure Act of 1946 |
| APHIS | Animal and Plant Health Inspection Service |
| App. Div. | Appellate Division Reports, N.Y. Supreme Court |
| Arb. Trib., U.S.-British | Arbitration Tribunal, Claim Convention of 1853, United States and Great Britain Convention of 1853 |
| Ardcor | American Roller Die Corporation |
| ARPA | Advanced Research Projects Agency |
| ARPANET | Advanced Research Projects Agency Network |
| ARS | Advanced Record System |
| Art. | Article |
| ARU | American Railway Union |
| ASCME | American Federation of State, County, and Municipal Employees |
| ASCS | Agriculture Stabilization and Conservation Service |
| ASM | Available Seatmile |
| ASPCA | American Society for the Prevention of Cruelty to Animals |
| Asst. Att. Gen. | Assistant Attorney General |
| AT&T | American Telephone and Telegraph |
| ATFD | Alcohol, Tobacco and Firearms Division |
| ATLA | Association of Trial Lawyers of America |
| ATO | Alpha Tau Omega |
| ATTD | Alcohol and Tobacco Tax Division |
| ATU | Alcohol Tax Unit |
| AUAM | American Union against Militarism |
| AUM | Animal Unit Month |
| AZT | Azidothymidine |

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| BAC | Blood alcohol concentration |
| BALSA | Black-American Law Student Association |
| BATF | Bureau of Alcohol, Tobacco and Firearms |
| BBS | Bulletin Board System |
| BCCI | Bank of Credit and Commerce International |
| BEA | Bureau of Economic Analysis |
| Bell's Cr. C. | Bell's English Crown Cases |
| Bevans | United States Treaties, etc. *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled under the direction of Charles I. Bevans, 1968–76) |
| BFOQ | Bona fide occupational qualification |
| BI | Bureau of Investigation |
| BIA | Bureau of Indian Affairs; Board of Immigration Appeals |
| BID | Business improvement district |
| BJS | Bureau of Justice Statistics |
| Black. | Black's United States Supreme Court Reports |
| Blatchf. | Blatchford's United States Circuit Court Reports |
| BLM | Bureau of Land Management |
| BLS | Bureau of Labor Statistics |
| BMD | Ballistic missile defense |
| BNA | Bureau of National Affairs |
| BOCA | Building Officials and Code Administrators International |
| BOP | Bureau of Prisons |
| BPP | Black Panther Party for Self-defense |
| Brit. and For. | British and Foreign State Papers |
| BSA | Boy Scouts of America |
| BTP | Beta Theta Pi |
| Burr. | James Burrows, *Report of Cases Argued and Determined in the Court of King's Bench during the Time of Lord Mansfield* (1766–1780) |
| BVA | Board of Veterans Appeals |
| c. | Chapter |
| $C^3I$ | Command, Control, Communications, and Intelligence |
| C.A. | Court of Appeals |
| CAA | Clean Air Act |
| CAB | Civil Aeronautics Board; Corporation for American Banking |
| CAFE | Corporate average fuel economy |
| Cal. 2d | California Reports, Second Series |
| Cal. 3d | California Reports, Third Series |
| CALR | Computer-assisted legal research |
| Cal. Rptr. | California Reporter |
| CAP | Common Agricultural Policy |
| CARA | Classification and Ratings Administration |
| CATV | Community antenna television |
| CBO | Congressional Budget Office |
| CBS | Columbia Broadcasting System |
| CBOEC | Chicago Board of Election Commissioners |
| CCC | Commodity Credit Corporation |
| CCDBG | Child Care and Development Block Grant of 1990 |
| C.C.D. Pa. | Circuit Court Decisions, Pennsylvania |
| C.C.D. Va. | Circuit Court Decisions, Virginia |
| CCEA | Cabinet Council on Economic Affairs |
| CCP | Chinese Communist Party |
| CCR | Center for Constitutional Rights |
| C.C.R.I. | Circuit Court, Rhode Island |
| CD | Certificate of deposit; compact disc |
| CDA | Communications Decency Act |
| CDBG | Community Development Block Grant Program |
| CDC | Centers for Disease Control and Prevention; Community Development Corporation |
| CDF | Children's Defense Fund |
| CDL | Citizens for Decency through Law |
| CD-ROM | Compact disc read-only memory |
| CDS | Community Dispute Services |
| CDW | Collision damage waiver |
| CENTO | Central Treaty Organization |
| CEO | Chief executive officer |
| CEQ | Council on Environmental Quality |

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| CERCLA | Comprehensive Environmental Response, Compensation, and Liability Act of 1980 |
| cert. | *Certiorari* |
| CETA | Comprehensive Employment and Training Act |
| C & F | Cost and freight |
| CFC | Chlorofluorocarbon |
| CFE Treaty | Conventional Forces in Europe Treaty of 1990 |
| C.F. & I. | Cost, freight, and insurance |
| C.F.R | Code of Federal Regulations |
| CFNP | Community Food and Nutrition Program |
| CFTA | Canadian Free Trade Agreement |
| CFTC | Commodity Futures Trading Commission |
| Ch. | Chancery Division, English Law Reports |
| CHAMPVA | Civilian Health and Medical Program at the Veterans Administration |
| CHEP | Cuban/Haitian Entrant Program |
| CHINS | Children in need of supervision |
| CHIPS | Child in need of protective services |
| Ch.N.Y. | Chancery Reports, New York |
| Chr. Rob. | Christopher Robinson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (1801–1808) |
| CIA | Central Intelligence Agency |
| CID | Commercial Item Descriptions |
| C.I.F. | Cost, insurance, and freight |
| CINCNORAD | Commander in Chief, North American Air Defense Command |
| C.I.O. | Congress of Industrial Organizations |
| CIPE | Center for International Private Enterprise |
| C.J. | Chief justice |
| CJIS | Criminal Justice Information Services |
| C.J.S. | Corpus Juris Secundum |
| Claims Arb. under Spec. Conv., Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| CLASP | Center for Law and Social Policy |
| CLE | Center for Law and Education; Continuing Legal Education |
| CLEO | Council on Legal Education Opportunity; Chief Law Enforcement Officer |
| CLP | Communist Labor Party of America |
| CLS | Christian Legal Society; critical legal studies (movement); Critical Legal Studies (membership organization) |
| C.M.A. | Court of Military Appeals |
| CMEA | Council for Mutual Economic Assistance |
| CMHS | Center for Mental Health Services |
| C.M.R. | Court of Military Review |
| CNN | Cable News Network |
| CNO | Chief of Naval Operations |
| CNOL | Consolidated net operating loss |
| CNR | Chicago and Northwestern Railway |
| CO | Conscientious Objector |
| C.O.D. | Cash on delivery |
| COGP | Commission on Government Procurement |
| COINTELPRO | Counterintelligence Program |
| Coke Rep. | Coke's English King's Bench Reports |
| COLA | Cost-of-living adjustment |
| COMCEN | Federal Communications Center |
| Comp. | Compilation |
| Conn. | Connecticut Reports |
| CONTU | National Commission on New Technological Uses of Copyrighted Works |
| Conv. | Convention |
| COPA | Child Online Protection Act (1998) |
| COPS | Community Oriented Policing Services |
| Corbin | Arthur L. Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (1950) |
| CORE | Congress on Racial Equality |
| Cox's Crim. Cases | Cox's Criminal Cases (England) |
| COYOTE | Call Off Your Old Tired Ethics |

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| CPA | Certified public accountant |
| CPB | Corporation for Public Broadcasting, the |
| CPI | Consumer Price Index |
| CPPA | Child Pornography Prevention Act |
| CPSC | Consumer Product Safety Commission |
| Cranch | Cranch's United States Supreme Court Reports |
| CRF | Constitutional Rights Foundation |
| CRR | Center for Constitutional Rights |
| CRS | Congressional Research Service; Community Relations Service |
| CRT | Critical race theory |
| CSA | Community Services Administration |
| CSAP | Center for Substance Abuse Prevention |
| CSAT | Center for Substance Abuse Treatment |
| CSC | Civil Service Commission |
| CSCE | Conference on Security and Cooperation in Europe |
| CSG | Council of State Governments |
| CSO | Community Service Organization |
| CSP | Center for the Study of the Presidency |
| C-SPAN | Cable-Satellite Public Affairs Network |
| CSRS | Cooperative State Research Service |
| CSWPL | Center on Social Welfare Policy and Law |
| CTA | *Cum testamento annexo* (with the will attached) |
| Ct. Ap. D.C. | Court of Appeals, District of Columbia |
| Ct. App. No. Ireland | Court of Appeals, Northern Ireland |
| Ct. Cl. | Court of Claims, United States |
| Ct. Crim. Apps. | Court of Criminal Appeals (England) |
| CTI | Consolidated taxable income |
| Ct. of Sess., Scot. | Court of Sessions, Scotland |
| CU | Credit union |
| CUNY | City University of New York |
| Cush. | Cushing's Massachusetts Reports |
| CWA | Civil Works Administration; Clean Water Act |
| DACORB | Department of the Army Conscientious Objector Review Board |
| Dall. | Dallas's Pennsylvania and United States Reports |
| DAR | Daughters of the American Revolution |
| DARPA | Defense Advanced Research Projects Agency |
| DAVA | Defense Audiovisual Agency |
| D.C. | United States District Court; District of Columbia |
| D.C. Del. | United States District Court, Delaware |
| D.C. Mass. | United States District Court, Massachusetts |
| D.C. Md. | United States District Court, Maryland |
| D.C.N.D.Cal. | United States District Court, Northern District, California |
| D.C.N.Y. | United States District Court, New York |
| D.C.Pa. | United States District Court, Pennsylvania |
| DCS | Deputy Chiefs of Staff |
| DCZ | District of the Canal Zone |
| DDT | Dichlorodiphenyltricloro-ethane |
| DEA | Drug Enforcement Administration |
| Decl. Lond. | Declaration of London, February 26, 1909 |
| Dev. & B. | Devereux & Battle's North Carolina Reports |
| DFL | Minnesota Democratic-Farmer-Labor |
| DFTA | Department for the Aging |
| Dig. U.S. Practice in Intl. Law | Digest of U.S. Practice in International Law |
| Dist. Ct. | D.C. United States District Court, District of Columbia |
| D.L.R. | Dominion Law Reports (Canada) |
| DMCA | Digital Millennium Copyright Act |
| DNA | Deoxyribonucleic acid |
| Dnase | Deoxyribonuclease |
| DNC | Democratic National Committee |
| DOC | Department of Commerce |
| DOD | Department of Defense |
| DODEA | Department of Defense Education Activity |
| Dodson | Dodson's Reports, English Admiralty Courts |
| DOE | Department of Energy |

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| DOER | Department of Employee Relations |
| DOJ | Department of Justice |
| DOL | Department of Labor |
| DOMA | Defense of Marriage Act of 1996 |
| DOS | Disk operating system |
| DOT | Department of Transportation |
| DPT | Diphtheria, pertussis, and tetanus |
| DRI | Defense Research Institute |
| DSAA | Defense Security Assistance Agency |
| DUI | Driving under the influence; driving under intoxication |
| DVD | Digital versatile disc |
| DWI | Driving while intoxicated |
| EAHCA | Education for All Handicapped Children Act of 1975 |
| EBT | Examination before trial |
| E.coli | Escherichia coli |
| ECPA | Electronic Communications Privacy Act of 1986 |
| ECSC | Treaty of the European Coal and Steel Community |
| EDA | Economic Development Administration |
| EDF | Environmental Defense Fund |
| E.D.N.Y. | Eastern District, New York |
| EDP | Electronic data processing |
| E.D. Pa. | Eastern-District, Pennsylvania |
| EDSC | Eastern District, South Carolina |
| EDT | Eastern daylight time |
| E.D. Va. | Eastern District, Virginia |
| EEC | European Economic Community; European Economic Community Treaty |
| EEOC | Equal Employment Opportunity Commission |
| EFF | Electronic Frontier Foundation |
| EFT | Electronic funds transfer |
| Eliz. | Queen Elizabeth (Great Britain) |
| Em. App. | Temporary Emergency Court of Appeals |
| ENE | Early neutral evaluation |
| Eng. Rep. | English Reports |
| EOP | Executive Office of the President |
| EPA | Environmental Protection Agency; Equal Pay Act of 1963 |
| ERA | Equal Rights Amendment |
| ERDC | Energy Research and Development Commission |
| ERISA | Employee Retirement Income Security Act of 1974 |
| ERS | Economic Research Service |
| ERTA | Economic Recovery Tax Act of 1981 |
| ESA | Endangered Species Act of 1973 |
| ESF | Emergency support function; Economic Support Fund |
| ESRD | End-Stage Renal Disease Program |
| ETA | Employment and Training Administration |
| ETS | Environmental tobacco smoke |
| et seq. | *Et sequentes* or *et sequentia* (“and the following”) |
| EU | European Union |
| Euratom | European Atomic Energy Community |
| Eur. Ct. H.R. | European Court of Human Rights |
| Ex. | English Exchequer Reports, Welsby, Hurlstone & Gordon |
| Exch. | Exchequer Reports (Welsby, Hurlstone & Gordon) |
| Ex Com | Executive Committee of the National Security Council |
| Eximbank | Export-Import Bank of the United States |
| F. | Federal Reporter |
| F. 2d | Federal Reporter, Second Series |
| FAA | Federal Aviation Administration; Federal Arbitration Act |
| FAAA | Federal Alcohol Administration Act |
| FACE | Freedom of Access to Clinic Entrances Act of 1994 |
| FACT | Feminist Anti-Censorship Task Force |
| FAIRA | Federal Agriculture Improvement and Reform Act of 1996 |
| FAMLA | Family and Medical Leave Act of 1993 |
| Fannie Mae | Federal National Mortgage Association |
| FAO | Food and Agriculture Organization of the United Nations |
| FAR | Federal Acquisition Regulations |

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| FAS | Foreign Agricultural Service |
| FBA | Federal Bar Association |
| FBI | Federal Bureau of Investigation |
| FCA | Farm Credit Administration |
| F. Cas. | Federal Cases |
| FCC | Federal Communications Commission |
| FCIA | Foreign Credit Insurance Association |
| FCIC | Federal Crop Insurance Corporation |
| FCLAA | Federal Cigarette Labeling and Advertising Act |
| FCRA | Fair Credit Reporting Act |
| FCU | Federal credit unions |
| FCUA | Federal Credit Union Act |
| FCZ | Fishery Conservation Zone |
| FDA | Food and Drug Administration |
| FDIC | Federal Deposit Insurance Corporation |
| FDPC | Federal Data Processing Center |
| FEC | Federal Election Commission |
| FECA | Federal Election Campaign Act of 1971 |
| Fed. Cas. | Federal Cases |
| FEHA | Fair Employment and Housing Act |
| FEHBA | Federal Employees Health Benefit Act |
| FEMA | Federal Emergency Management Agency |
| FERC | Federal Energy Regulatory Commission |
| FFB | Federal Financing Bank |
| FFDC | Federal Food, Drug, and Cosmetics Act |
| FGIS | Federal Grain Inspection Service |
| FHA | Federal Housing Administration |
| FHAA | Fair Housing Amendments Act of 1998 |
| FHWA | Federal Highway Administration |
| FIA | Federal Insurance Administration |
| FIC | Federal Information Centers; Federation of Insurance Counsel |
| FICA | Federal Insurance Contributions Act |
| FIFRA | Federal Insecticide, Fungicide, and Rodenticide Act |
| FIP | Forestry Incentives Program |
| FIRREA | Financial Institutions Reform, Recovery, and Enforcement Act of 1989 |
| FISA | Foreign Intelligence Surveillance Act of 1978 |
| FISC | Foreign Intelligence Surveillance Court of Review |
| FJC | Federal Judicial Center |
| FLSA | Fair Labor Standards Act |
| FMC | Federal Maritime Commission |
| FMCS | Federal Mediation and Conciliation Service |
| FmHA | Farmers Home Administration |
| FMLA | Family and Medical Leave Act of 1993 |
| FNMA | Federal National Mortgage Association, "Fannie Mae" |
| F.O.B. | Free on board |
| FOIA | Freedom of Information Act |
| FOMC | Federal Open Market Committee |
| FPA | Federal Power Act of 1935 |
| FPC | Federal Power Commission |
| FPMR | Federal Property Management Regulations |
| FPRS | Federal Property Resources Service |
| FR | Federal Register |
| FRA | Federal Railroad Administration |
| FRB | Federal Reserve Board |
| FRC | Federal Radio Commission |
| F.R.D. | Federal Rules Decisions |
| FSA | Family Support Act |
| FSB | Federal'naya Sluzhba Bezopasnosti (the Federal Security Service of Russia) |
| FSLIC | Federal Savings and Loan Insurance Corporation |
| FSQS | Food Safety and Quality Service |
| FSS | Federal Supply Service |
| F. Supp. | Federal Supplement |
| FTA | U.S.-Canada Free Trade Agreement of 1988 |
| FTC | Federal Trade Commission |
| FTCA | Federal Tort Claims Act |
| FTS | Federal Telecommunications System |
| FTS2000 | Federal Telecommunications System 2000 |
| FUCA | Federal Unemployment Compensation Act of 1988 |

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| FUTA | Federal Unemployment Tax Act |
| FWPCA | Federal Water Pollution Control Act of 1948 |
| FWS | Fish and Wildlife Service |
| GAL | Guardian ad litem |
| GAO | General Accounting Office; Governmental Affairs Office |
| GAOR | General Assembly Official Records, United Nations |
| GAAP | Generally accepted accounting principles |
| GA Res. | General Assembly Resolution (United Nations) |
| GATT | General Agreement on Tariffs and Trade |
| GCA | Gun Control Act |
| Gen. Cls. Comm. | General Claims Commission, United States and Panama; General Claims United States and Mexico |
| Geo. II | King George II (Great Britain) |
| Geo. III | King George III (Great Britain) |
| GHB | Gamma-hydroxybutrate |
| GI | Government Issue |
| GID | General Intelligence Division |
| GM | General Motors |
| GNMA | Government National Mortgage Association, "Ginnie Mae" |
| GNP | Gross national product |
| GOP | Grand Old Party (Republican Party) |
| GOPAC | Grand Old Party Action Committee |
| GPA | Office of Governmental and Public Affairs |
| GPO | Government Printing Office |
| GRAS | Generally recognized as safe |
| Gr. Br., Crim. Ct. App. | Great Britain, Court of Criminal Appeals |
| GRNL | Gay Rights-National Lobby |
| GSA | General Services Administration |
| Hackworth | Green Haywood Hackworth, *Digest of International Law* (1940–1944) |
| Hay and Marriott | Great Britain. High Court of Admiralty, *Decisions in the High Court of Admiralty during the Time of Sir George Hay and of Sir James Marriott, Late Judges of That Court* (1801) |
| HBO | Home Box Office |
| HCFA | Health Care Financing Administration |
| H.Ct. | High Court |
| HDS | Office of Human Development Services |
| Hen. & M. | Hening & Munford's Virginia Reports |
| HEW | Department of Health, Education, and Welfare |
| HFCA | Health Care Financing Administration |
| HGI | Handgun Control, Incorporated |
| HHS | Department of Health and Human Services |
| Hill | Hill's New York Reports |
| HIRE | Help through Industry Retraining and Employment |
| HIV | Human immunodeficiency virus |
| H.L. | House of Lords Cases (England) |
| H. Lords | House of Lords (England) |
| HMO | Health Maintenance Organization |
| HNIS | Human Nutrition Information Service |
| Hong Kong L.R. | Hong Kong Law Reports |
| How. | Howard's United States Supreme Court Reports |
| How. St. Trials | Howell's English State Trials |
| HUAC | House Un-American Activities Committee |
| HUD | Department of Housing and Urban Development |
| Hudson, Internatl. Legis. | Manley Ottmer Hudson, ed., *International Legislation: A Collection of the Texts of Multipartite International Instruments of General Interest Beginning with the Covenant of the League of Nations* (1931) |
| Hudson, World Court Reps. | Manley Ottmer Hudson, ea., *World Court Reports* (1934– ) |
| Hun | Hun's New York Supreme Court Reports |
| Hunt's Rept. | Bert L. Hunt, *Report of the American and Panamanian General Claims Arbitration* (1934) |
| IAEA | International Atomic Energy Agency |
| IALL | International Association of Law Libraries |

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| IBA | International Bar Association |
| IBM | International Business Machines |
| ICA | Interstate Commerce Act |
| ICBM | Intercontinental ballistic missile |
| ICC | Interstate Commerce Commission; International Criminal Court |
| ICJ | International Court of Justice |
| ICM | Institute for Court Management |
| IDEA | Individuals with Disabilities Education Act of 1975 |
| IDOP | International Dolphin Conservation Program |
| IEP | Individualized educational program |
| IFC | International Finance Corporation |
| IGRA | Indian Gaming Regulatory Act of 1988 |
| IJA | Institute of Judicial Administration |
| IJC | International Joint Commission |
| ILC | International Law Commission |
| ILD | International Labor Defense |
| Ill. Dec. | Illinois Decisions |
| ILO | International Labor Organization |
| IMF | International Monetary Fund |
| INA | Immigration and Nationality Act |
| IND | Investigational new drug |
| INF Treaty | Intermediate-Range Nuclear Forces Treaty of 1987 |
| INS | Immigration and Naturalization Service |
| INTELSAT | International Telecommunications Satellite Organization |
| Interpol | International Criminal Police Organization |
| Int'l. Law Reps. | International Law Reports |
| Intl. Legal Mats. | International Legal Materials |
| IOC | International Olympic Committee |
| IPDC | International Program for the Development of Communication |
| IPO | Intellectual Property Owners |
| IPP | Independent power producer |
| IQ | Intelligence quotient |
| I.R. | Irish Reports |
| IRA | Individual retirement account; Irish Republican Army |
| IRC | Internal Revenue Code |
| IRCA | Immigration Reform and Control Act of 1986 |
| IRS | Internal Revenue Service |
| ISO | Independent service organization |
| ISP | Internet service provider |
| ISSN | International Standard Serial Numbers |
| ITA | International Trade Administration |
| ITI | Information Technology Integration |
| ITO | International Trade Organization |
| ITS | Information Technology Service |
| ITT | International Telephone and Telegraph Corporation |
| ITU | International Telecommunication Union |
| IUD | Intrauterine device |
| IWC | International Whaling Commission |
| IWW | Industrial Workers of the World |
| JAGC | Judge Advocate General's Corps |
| JCS | Joint Chiefs of Staff |
| JDL | Jewish Defense League |
| JNOV | Judgment *non obstante veredicto* ("judgment nothing to recommend it" or "judgment notwithstanding the verdict") |
| JOBS | Jobs Opportunity and Basic Skills |
| John. Ch. | Johnson's New York Chancery Reports |
| Johns. | Johnson's Reports (New York) |
| JP | Justice of the peace |
| K.B. | King's Bench Reports (England) |
| KFC | Kentucky Fried Chicken |
| KGB | Komitet Gosudarstvennoi Bezopasnosti (the State Security Committee for countries in the former Soviet Union) |
| KKK | Ku Klux Klan |
| KMT | Kuomintang (Chinese, "national people's party") |
| LAD | Law Against Discrimination |

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| LAPD | Los Angeles Police Department |
| LC | Library of Congress |
| LCHA | Longshoremen's and Harbor Workers Compensation Act of 1927 |
| LD50 | Lethal dose 50 |
| LDEF | Legal Defense and Education Fund (NOW) |
| LDF | Legal Defense Fund, Legal Defense and Educational Fund of the NAACP |
| LEAA | Law Enforcement Assistance Administration |
| L.Ed. | Lawyers' Edition Supreme Court Reports |
| LI | Letter of interpretation |
| LLC | Limited Liability Company |
| LLP | Limited Liability Partnership |
| LMSA | Labor-Management Services Administration |
| LNTS | League of Nations Treaty Series |
| Lofft's Rep. | Lofft's English King's Bench Reports |
| L.R. | Law Reports (English) |
| LSAC | Law School Admission Council |
| LSAS | Law School Admission Service |
| LSAT | Law School Aptitude Test |
| LSC | Legal Services Corporation; Legal Services for Children |
| LSD | Lysergic acid diethylamide |
| LSDAS | Law School Data Assembly Service |
| LTBT | Limited Test Ban Treaty |
| LTC | Long Term Care |
| MAD | Mutual assured destruction |
| MADD | Mothers against Drunk Driving |
| MALDEF | Mexican American Legal Defense and Educational Fund |
| Malloy | William M. Malloy, ed., *Treaties, Conventions International Acts, Protocols, and Agreements between the United States of America and Other Powers* (1910–1938) |
| Martens | Georg Friedrich von Martens, ea., *Noveau recueil général de traités et autres actes relatifs aux rapports de droit international* (Series I, 20 vols. [1843–1875]; Series II, 35 vols. [1876–1908]; Series III [1909– ]) |
| Mass. | Massachusetts Reports |
| MCC | Metropolitan Correctional Center |
| MCCA | Medicare Catastrophic Coverage Act of 1988 |
| MCH | Maternal and Child Health Bureau |
| MCRA | Medical Care Recovery Act of 1962 |
| MDA | Medical Devices Amendments of 1976 |
| Md. App. | Maryland, Appeal Cases |
| M.D. Ga. | Middle District, Georgia |
| Mercy | Movement Ensuring the Right to Choose for Yourself |
| Metc. | Metcalf's Massachusetts Reports |
| MFDP | Mississippi Freedom Democratic party |
| MGT | Management |
| MHSS | Military Health Services System |
| Miller | David Hunter Miller, ea., *Treaties and Other International Acts of the United States of America* (1931–1948) |
| Minn. | Minnesota Reports |
| MINS | Minors in need of supervision |
| MIRV | Multiple independently targetable reentry vehicle |
| MIRVed ICBM | Multiple independently targetable reentry vehicled intercontinental ballistic missile |
| Misc. | Miscellaneous Reports, New York |
| Mixed Claims Comm., Report of Decs | Mixed Claims Commission, United States and Germany, Report of Decisions |
| M.J. | Military Justice Reporter |
| MLAP | Migrant Legal Action Program |
| MLB | Major League Baseball |
| MLDP | Mississippi Loyalist Democratic Party |
| MMI | Moslem Mosque, Incorporated |
| MMPA | Marine Mammal Protection Act of 1972 |
| Mo. | Missouri Reports |
| MOD | Masters of Deception |
| Mod. | Modern Reports, English King's Bench, etc. |

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| Moore, Dig. Intl. Law | John Bassett Moore, *A Digest of International Law,* 8 vols. (1906) |
| Moore, Intl. Arbs. | John Bassett Moore, *History and Digest of the International Arbitrations to Which United States Has Been a Party,* 6 vols. (1898) |
| Morison | William Maxwell Morison, *The Scots Revised Report: Morison's Dictionary of Decisions* (1908–09) |
| M.P. | Member of Parliament |
| MP3 | MPEG Audio Layer 3 |
| MPAA | Motion Picture Association of America |
| MPAS | Michigan Protection and Advocacy Service |
| MPEG | Motion Picture Experts Group |
| mpg | Miles per gallon |
| MPPDA | Motion Picture Producers and Distributors of America |
| MPRSA | Marine Protection, Research, and Sanctuaries Act of 1972 |
| M.R. | Master of the Rolls |
| MS-DOS | Microsoft Disk Operating System |
| MSHA | Mine Safety and Health Administration |
| MSPB | Merit Systems Protection Board |
| MSSA | Military Selective Service Act |
| N/A | Not Available |
| NAACP | National Association for the Advancement of Colored People |
| NAAQS | National Ambient Air Quality Standards |
| NAB | National Association of Broadcasters |
| NABSW | National Association of Black Social Workers |
| NACDL | National Association of Criminal Defense Lawyers |
| NAFTA | North American Free Trade Agreement of 1993 |
| NAGHSR | National Association of Governors' Highway Safety Representatives |
| NALA | National Association of Legal Assistants |
| NAM | National Association of Manufacturers |
| NAR | National Association of Realtors |
| NARAL | National Abortion and Reproductive Rights Action League |
| NARF | Native American Rights Fund |
| NARS | National Archives and Record Service |
| NASA | National Aeronautics and Space Administration |
| NASD | National Association of Securities Dealers |
| NATO | North Atlantic Treaty Organization |
| NAVINFO | Navy Information Offices |
| NAWSA | National American Woman's Suffrage Association |
| NBA | National Bar Association; National Basketball Association |
| NBC | National Broadcasting Company |
| NBLSA | National Black Law Student Association |
| NBS | National Bureau of Standards |
| NCA | Noise Control Act; National Command Authorities |
| NCAA | National Collegiate Athletic Association |
| NCAC | National Coalition against Censorship |
| NCCB | National Consumer Cooperative Bank |
| NCE | Northwest Community Exchange |
| NCF | National Chamber Foundation |
| NCIP | National Crime Insurance Program |
| NCJA | National Criminal Justice Association |
| NCLB | National Civil Liberties Bureau |
| NCP | National contingency plan |
| NCSC | National Center for State Courts |
| NCUA | National Credit Union Administration |
| NDA | New drug application |
| N.D. Ill. | Northern District, Illinois |
| NDU | National Defense University |
| N.D. Wash. | Northern District, Washington |
| N.E. | North Eastern Reporter |
| N.E. 2d | North Eastern Reporter, Second Series |
| NEA | National Endowment for the Arts; National Education Association |

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| NEH | National Endowment for the Humanities |
| NEPA | National Environmental Protection Act; National Endowment Policy Act |
| NET Act | No Electronic Theft Act |
| NFIB | National Federation of Independent Businesses |
| NFIP | National Flood Insurance Program |
| NFL | National Football League |
| NFPA | National Federation of Paralegal Associations |
| NGLTF | National Gay and Lesbian Task Force |
| NHL | National Hockey League |
| NHRA | Nursing Home Reform Act of 1987 |
| NHTSA | National Highway Traffic Safety Administration |
| Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| NIEO | New International Economic Order |
| NIGC | National Indian Gaming Commission |
| NIH | National Institutes of Health |
| NIJ | National Institute of Justice |
| NIRA | National Industrial Recovery Act of 1933; National Industrial Recovery Administration |
| NIST | National Institute of Standards and Technology |
| N.J. | New Jersey Reports |
| N.J. Super. | New Jersey Superior Court Reports |
| NLEA | Nutrition Labeling and Education Act of 1990 |
| NLRA | National Labor Relations Act |
| NLRB | National Labor Relations Board |
| NMFS | National Marine Fisheries Service |
| No. | Number |
| NOAA | National Oceanic and Atmospheric Administration |
| NOC | National Olympic Committee |
| NOI | Nation of Islam |
| NOL | Net operating loss |
| NORML | National Organization for the Reform of Marijuana Laws |
| NOW | National Organization for Women |
| NOW LDEF | National Organization for Women Legal Defense and Education Fund |
| NOW/PAC | National Organization for Women Political Action Committee |
| NPDES | National Pollutant Discharge Elimination System |
| NPL | National priorities list |
| NPR | National Public Radio |
| NPT | Nuclear Non-Proliferation Treaty of 1970 |
| NRA | National Rifle Association; National Recovery Act |
| NRC | Nuclear Regulatory Commission |
| NRLC | National Right to Life Committee |
| NRTA | National Retired Teachers Association |
| NSA | National Security Agency |
| NSC | National Security Council |
| NSCLC | National Senior Citizens Law Center |
| NSF | National Science Foundation |
| NSFNET | National Science Foundation Network |
| NSI | Network Solutions, Inc. |
| NTIA | National Telecommunications and Information Administration |
| NTID | National Technical Institute for the Deaf |
| NTIS | National Technical Information Service |
| NTS | Naval Telecommunications System |
| NTSB | National Transportation Safety Board |
| NVRA | National Voter Registration Act |
| N.W. | North Western Reporter |
| N.W. 2d | North Western Reporter, Second Series |
| NWSA | National Woman Suffrage Association |
| N.Y. | New York Court of Appeals Reports |
| N.Y. 2d | New York Court of Appeals Reports, Second Series |
| N.Y.S. | New York Supplement Reporter |

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| N.Y.S. 2d | New York Supplement Reporter, Second Series |
| NYSE | New York Stock Exchange |
| NYSLA | New York State Liquor Authority |
| N.Y. Sup. | New York Supreme Court Reports |
| NYU | New York University |
| OAAU | Organization of Afro American Unity |
| OAP | Office of Administrative Procedure |
| OAS | Organization of American States |
| OASDI | Old-age, Survivors, and Disability Insurance Benefits |
| OASHDS | Office of the Assistant Secretary for Human Development Services |
| OCC | Office of Comptroller of the Currency |
| OCED | Office of Comprehensive Employment Development |
| OCHAMPUS | Office of Civilian Health and Medical Program of the Uniformed Services |
| OCSE | Office of Child Support Enforcement |
| OEA | Organización de los Estados Americanos |
| OEM | Original Equipment Manufacturer |
| OFCCP | Office of Federal Contract Compliance Programs |
| OFPP | Office of Federal Procurement Policy |
| OIC | Office of the Independent Counsel |
| OICD | Office of International Cooperation and Development |
| OIG | Office of the Inspector General |
| OJARS | Office of Justice Assistance, Research, and Statistics |
| OMB | Office of Management and Budget |
| OMPC | Office of Management, Planning, and Communications |
| ONP | Office of National Programs |
| OPD | Office of Policy Development |
| OPEC | Organization of Petroleum Exporting Countries |
| OPIC | Overseas Private Investment Corporation |
| Ops. Atts. Gen. | Opinions of the Attorneys-General of the United States |
| Ops. Comms. | Opinions of the Commissioners |
| OPSP | Office of Product Standards Policy |
| O.R. | Ontario Reports |
| OR | Official Records |
| OSHA | Occupational Safety and Health Act |
| OSHRC | Occupational Safety and Health Review Commission |
| OSM | Office of Surface Mining |
| OSS | Office of Strategic Services |
| OST | Office of the Secretary |
| OT | Office of Transportation |
| OTA | Office of Technology Assessment |
| OTC | Over-the-counter |
| OTS | Office of Thrift Supervisors |
| OUI | Operating under the influence |
| OVCI | Offshore Voluntary Compliance Initiative |
| OWBPA | Older Workers Benefit Protection Act |
| OWRT | Office of Water Research and Technology |
| P. | Pacific Reporter |
| P. 2d | Pacific Reporter, Second Series |
| PAC | Political action committee |
| Pa. Oyer and Terminer | Pennsylvania Oyer and Terminer Reports |
| PATCO | Professional Air Traffic Controllers Organization |
| PBGC | Pension Benefit Guaranty Corporation |
| PBS | Public Broadcasting Service; Public Buildings Service |
| P.C. | Privy Council (English Law Reports) |
| PC | Personal computer; politically correct |
| PCBs | Polychlorinated biphenyls |
| PCIJ | Permanent Court of International Justice<br>Series A-Judgments and Orders (1922–30)<br>Series B-Advisory Opinions (1922–30)<br>Series A/B-Judgments, Orders, and Advisory Opinions (1931–40) |

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| PCIJ (cont'd.) | Series C-Pleadings, Oral Statements, and Documents relating to Judgments and Advisory Opinions (1923–42) |
| | Series D-Acts and Documents concerning the Organization of the World Court (1922 –47) |
| | Series E-Annual Reports (1925–45) |
| PCP | Phencyclidine |
| P.D. | Probate Division, English Law Reports (1876–1890) |
| PDA | Pregnancy Discrimination Act of 1978 |
| PD & R | Policy Development and Research |
| Pepco | Potomac Electric Power Company |
| Perm. Ct. of Arb. | Permanent Court of Arbitration |
| PES | Post-Enumeration Survey |
| Pet. | Peters' United States Supreme Court Reports |
| PETA | People for the Ethical Treatment of Animals |
| PGA | Professional Golfers Association |
| PGM | Program |
| PHA | Public Housing Agency |
| Phila. Ct. of Oyer and Terminer | Philadelphia Court of Oyer and Terminer |
| PhRMA | Pharmaceutical Research and Manufacturers of America |
| PHS | Public Health Service |
| PIC | Private Industry Council |
| PICJ | Permanent International Court of Justice |
| Pick. | Pickering's Massachusetts Reports |
| PIK | Payment in Kind |
| PINS | Persons in need of supervision |
| PIRG | Public Interest Research Group |
| P.L. | Public Laws |
| PLAN | Pro-Life Action Network |
| PLC | Plaintiffs' Legal Committee |
| PLE | Product liability expenses |
| PLI | Practicing Law Institute |
| PLL | Product liability loss |
| PLLP | Professional Limited Liability Partnership |
| PLO | Palestine Liberation Organization |
| PLRA | Prison Litigation Reform Act of 1995 |
| PNET | Peaceful Nuclear Explosions Treaty |
| PONY | Prostitutes of New York |
| POW-MIA | Prisoner of war-missing in action |
| Pratt | Frederic Thomas Pratt, *Law of Contraband of War, with a Selection of Cases from Papers of the Right Honourable Sir George Lee* (1856) |
| PRIDE | Prostitution to Independence, Dignity, and Equality |
| Proc. | Proceedings |
| PRP | Potentially responsible party |
| PSRO | Professional Standards Review Organization |
| PTO | Patents and Trademark Office |
| PURPA | Public Utilities Regulatory Policies Act |
| PUSH | People United to Serve Humanity |
| PUSH-Excel | PUSH for Excellence |
| PWA | Public Works Administration |
| PWSA | Ports and Waterways Safety Act of 1972 |
| Q.B. | Queen's Bench (England) |
| QTIP | Qualified Terminable Interest Property |
| Ralston's Rept. | Jackson Harvey Ralston, ed., *Venezuelan Arbitrations of 1903* (1904) |
| RC | Regional Commissioner |
| RCRA | Resource Conservation and Recovery Act |
| RCWP | Rural Clean Water Program |
| RDA | Rural Development Administration |
| REA | Rural Electrification Administration |
| Rec. des Decs. des Trib. Arb. Mixtes | G. Gidel, ed., *Recueil des décisions des tribunaux arbitraux mixtes, institués par les traités de paix* (1922–30) |
| Redmond | Vol. 3 of Charles I. Bevans, *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled by C. F. Redmond) (1969) |
| RESPA | Real Estate Settlement Procedure Act of 1974 |
| RFC | Reconstruction Finance Corporation |

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| RFRA | Religious Freedom Restoration Act of 1993 |
| RIAA | Recording Industry Association of America |
| RICO | Racketeer Influenced and Corrupt Organizations |
| RLUIPA | Religious Land Use and Institutionalized Persons Act |
| RNC | Republican National Committee |
| Roscoe | Edward Stanley Roscoe, ed., *Reports of Prize Cases Determined in the High Court Admiralty before the Lords Commissioners of Appeals in Prize Causes and before the judicial Committee of the Privy Council from 1745 to 1859* (1905) |
| ROTC | Reserve Officers' Training Corps |
| RPP | Representative Payee Program |
| R.S. | Revised Statutes |
| RTC | Resolution Trust Corp. |
| RUDs | Reservations, understandings, and declarations |
| Ryan White CARE Act | Ryan White Comprehensive AIDS Research Emergency Act of 1990 |
| SAC | Strategic Air Command |
| SACB | Subversive Activities Control Board |
| SADD | Students against Drunk Driving |
| SAF | Student Activities Fund |
| SAIF | Savings Association Insurance Fund |
| SALT | Strategic Arms Limitation Talks |
| SALT I | Strategic Arms Limitation Talks of 1969–72 |
| SAMHSA | Substance Abuse and Mental Health Services Administration |
| Sandf. | Sandford's New York Superior Court Reports |
| S and L | Savings and loan |
| SARA | Superfund Amendment and Reauthorization Act |
| SAT | Scholastic Aptitude Test |
| Sawy. | Sawyer's United States Circuit Court Reports |
| SBA | Small Business Administration |
| SBI | Small Business Institute |
| SCCC | South Central Correctional Center |
| SCLC | Southern Christian Leadership Conference |
| Scott's Repts. | James Brown Scott, ed., *The Hague Court Reports*, 2 vols. (1916–32) |
| SCS | Soil Conservation Service; Social Conservative Service |
| SCSEP | Senior Community Service Employment Program |
| S.Ct. | Supreme Court Reporter |
| S.D. Cal. | Southern District, California |
| S.D. Fla. | Southern District, Florida |
| S.D. Ga. | Southern District, Georgia |
| SDI | Strategic Defense Initiative |
| S.D. Me. | Southern District, Maine |
| S.D.N.Y. | Southern District, New York |
| SDS | Students for a Democratic Society |
| S.E. | South Eastern Reporter |
| S.E. 2d | South Eastern Reporter, Second Series |
| SEA | Science and Education Administration |
| SEATO | Southeast Asia Treaty Organization |
| SEC | Securities and Exchange Commission |
| Sec. | Section |
| SEEK | Search for Elevation, Education and Knowledge |
| SEOO | State Economic Opportunity Office |
| SEP | Simplified employee pension plan |
| Ser. | Series |
| Sess. | Session |
| SGLI | Servicemen's Group Life Insurance |
| SIP | State implementation plan |
| SLA | Symbionese Liberation Army |
| SLAPPs | Strategic Lawsuits Against Public Participation |
| SLBM | Submarine-launched ballistic missile |
| SNCC | Student Nonviolent Coordinating Committee |
| So. | Southern Reporter |
| So. 2d | Southern Reporter, Second Series |
| SPA | Software Publisher's Association |
| Spec. Sess. | Special Session |
| SPLC | Southern Poverty Law Center |
| SRA | Sentencing Reform Act of 1984 |

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|---|---|
| SS | *Schutzstaffel* (German, "Protection Echelon") |
| SSA | Social Security Administration |
| SSI | Supplemental Security Income |
| START I | Strategic Arms Reduction Treaty of 1991 |
| START II | Strategic Arms Reduction Treaty of 1993 |
| Stat. | United States Statutes at Large |
| STS | Space Transportation Systems |
| St. Tr. | State Trials, English |
| STURAA | Surface Transportation and Uniform Relocation Assistance Act of 1987 |
| Sup. Ct. of Justice, Mexico | Supreme Court of Justice, Mexico |
| Supp. | Supplement |
| S.W. | South Western Reporter |
| S.W. 2d | South Western Reporter, Second Series |
| SWAPO | South-West Africa People's Organization |
| SWAT | Special Weapons and Tactics |
| SWP | Socialist Workers Party |
| TDP | Trade and Development Program |
| Tex. Sup. | Texas Supreme Court Reports |
| THAAD | Theater High-Altitude Area Defense System |
| THC | Tetrahydrocannabinol |
| TI | Tobacco Institute |
| TIA | Trust Indenture Act of 1939 |
| TIAS | Treaties and Other International Acts Series (United States) |
| TNT | Trinitrotoluene |
| TOP | Targeted Outreach Program |
| TPUS | Transportation and Public Utilities Service |
| TQM | Total Quality Management |
| Tripartite Claims Comm., Decs. and Ops. | Tripartite Claims Commission (United States, Austria, and Hungary), Decisions and Opinions |
| TRI-TAC | Joint Tactical Communications |
| TRO | Temporary restraining order |
| TS | Treaty Series, United States |
| TSCA | Toxic Substance Control Act |
| TSDs | Transporters, storers, and disposers |
| TSU | Texas Southern University |
| TTBT | Threshold Test Ban Treaty |
| TV | Television |
| TVA | Tennessee Valley Authority |
| TWA | Trans World Airlines |
| UAW | United Auto Workers; United Automobile, Aerospace, and Agricultural Implements Workers of America |
| U.C.C. | Uniform Commercial Code; Universal Copyright Convention |
| U.C.C.C. | Uniform Consumer Credit Code |
| UCCJA | Uniform Child Custody Jurisdiction Act |
| UCMJ | Uniform Code of Military Justice |
| UCPP | Urban Crime Prevention Program |
| UCS | United Counseling Service |
| UDC | United Daughters of the Confederacy |
| UFW | United Farm Workers |
| UHF | Ultrahigh frequency |
| UIFSA | Uniform Interstate Family Support Act |
| UIS | Unemployment Insurance Service |
| UMDA | Uniform Marriage and Divorce Act |
| UMTA | Urban Mass Transportation Administration |
| U.N. | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCTAD | United Nations Conference on Trade and Development |
| UN Doc. | United Nations Documents |
| UNDP | United Nations Development Program |
| UNEF | United Nations Emergency Force |
| UNESCO | United Nations Educational, Scientific, and Cultural Organization |
| UNICEF | United Nations Children's Fund (formerly United Nations International Children's Emergency Fund) |
| UNIDO | United Nations Industrial and Development Organization |
| Unif. L. Ann. | Uniform Laws Annotated |
| UN Repts. Intl. Arb. Awards | United Nations Reports of International Arbitral Awards |

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|---|---|
| UNTS | United Nations Treaty Series |
| UPI | United Press International |
| URESA | Uniform Reciprocal Enforcement of Support Act |
| U.S. | United States Reports |
| U.S.A. | United States of America |
| USAF | United States Air Force |
| USA PATRIOT Act | Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act |
| U.S. App. D.C. | United States Court of Appeals for the District of Columbia |
| U.S.C. | United States Code; University of Southern California |
| U.S.C.A. | United States Code Annotated |
| U.S.C.C.A.N. | United States Code Congressional and Administrative News |
| USCMA | United States Court of Military Appeals |
| USDA | U.S. Department of Agriculture |
| USES | United States Employment Service |
| USF | U.S. Forestry Service |
| USFA | United States Fire Administration |
| USGA | United States Golf Association |
| USICA | International Communication Agency, United States |
| USMS | U.S. Marshals Service |
| USOC | U.S. Olympic Committee |
| USSC | U.S. Sentencing Commission |
| USSG | United States Sentencing Guidelines |
| U.S.S.R. | Union of Soviet Socialist Republics |
| UST | United States Treaties |
| USTS | United States Travel Service |
| v. | *Versus* |
| VA | Veterans Administration |
| VAR | Veterans Affairs and Rehabilitation Commission |
| VAWA | Violence against Women Act |
| VFW | Veterans of Foreign Wars |
| VGLI | Veterans Group Life Insurance |
| Vict. | Queen Victoria (Great Britain) |
| VIN | Vehicle identification number |
| VISTA | Volunteers in Service to America |
| VJRA | Veterans Judicial Review Act of 1988 |
| V.L.A. | Volunteer Lawyers for the Arts |
| VMI | Virginia Military Institute |
| VMLI | Veterans Mortgage Life Insurance |
| VOCAL | Victims of Child Abuse Laws |
| VRA | Voting Rights Act |
| WAC | Women's Army Corps |
| Wall. | Wallace's United States Supreme Court Reports |
| Wash. 2d | Washington Reports, Second Series |
| WAVES | Women Accepted for Volunteer Service |
| WCTU | Women's Christian Temperance Union |
| W.D. Wash. | Western District, Washington |
| W.D. Wis. | Western District, Wisconsin |
| WEAL | *West's Encyclopedia of American Law,* Women's Equity Action League |
| Wend. | Wendell's New York Reports |
| WFSE | Washington Federation of State Employees |
| Wheat. | Wheaton's United States Supreme Court Reports |
| Wheel. Cr. Cases | Wheeler's New York Criminal Cases |
| WHISPER | Women Hurt in Systems of Prostitution Engaged in Revolt |
| Whiteman | Marjorie Millace Whiteman, *Digest of International Law,* 15 vols. (1963–73) |
| WHO | World Health Organization |
| WIC | Women, Infants, and Children program |
| Will. and Mar. | King William and Queen Mary (Great Britain) |
| WIN | WESTLAW Is Natural; Whip Inflation Now; Work Incentive Program |
| WIPO | World Intellectual Property Organization |
| WIU | Workers' Industrial Union |
| W.L.R. | Weekly Law Reports, England |
| WPA | Works Progress Administration |
| WPPDA | Welfare and Pension Plans Disclosure Act |

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|---|---|
| WTO | World Trade Organization |
| WWI | World War I |
| WWII | World War II |
| Yates Sel. Cas. | Yates's New York Select Cases |
| YMCA | Young Men's Christian Association |
| YWCA | Young Women's Christian Association |

# WEST'S ENCYCLOPEDIA *of* AMERICAN LAW

2ND EDITION

# How to Use This Book

❚1❚ Article Title

❚2❚ Definition in italics with Latin translation provided

❚3❚ First-level subhead

❚4❚ Timeline for subject of biography, including general historical events and life events

❚5❚ Sidebar expands upon an issue addressed briefly in the article

❚6❚ Quotation from subject of biography

❚7❚ Biography of contributor to American law

❚8❚ Internal cross-reference to entry within WEAL

❚9❚ In Focus article examines a controversial or complex aspect of the article topic

❚10❚ Cross-references at end of article

❚11❚ Full cite for case

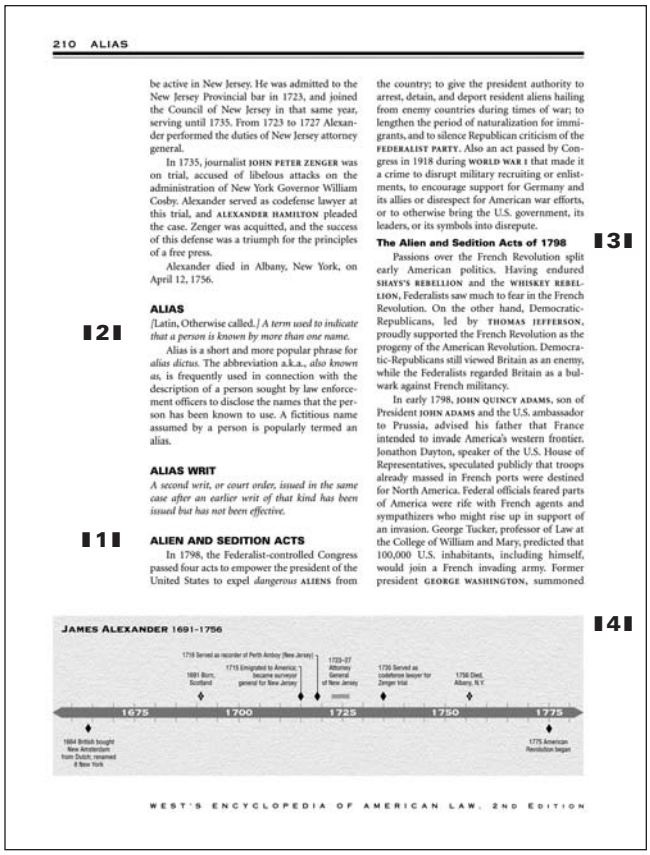



be active in New Jersey. He was admitted to the New Jersey Provincial bar in 1723, and joined the Council of New Jersey in that same year, serving until 1735. From 1723 to 1727 Alexander performed the duties of New Jersey attorney general.

In 1735, journalist JOHN PETER ZENGER was on trial, accused of libelous attacks on the administration of New York Governor William Cosby. Alexander served as codefense lawyer at this trial, and ALEXANDER HAMILTON pleaded the case. Zenger was acquitted, and the success of this defense was a triumph for the principles of a free press.

Alexander died in Albany, New York, on April 12, 1756.

**ALIAS**

❚2❚ *[Latin, Otherwise called.] A term used to indicate that a person is known by more than one name.*

Alias is a short and more popular phrase for *alias dictus.* The abbreviation a.k.a., *also known as,* is frequently used in connection with the description of a person sought by law enforcement officers to disclose the names that the person has been known to use. A fictitious name assumed by a person is popularly termed an alias.

**ALIAS WRIT**

*A second writ, or court order, issued in the same case after an earlier writ of that kind has been issued but has not been effective.*

❚1❚ **ALIEN AND SEDITION ACTS**

In 1798, the Federalist-controlled Congress passed four acts to empower the president of the United States to expel *dangerous* ALIENS from the country; to give the president authority to arrest, detain, and deport resident aliens hailing from enemy countries during times of war; to lengthen the period of naturalization for immigrants, and to silence Republican criticism of the FEDERALIST PARTY. Also an act passed by Congress in 1918 during WORLD WAR I that made it a crime to disrupt military recruiting or enlistments, to encourage support for Germany and its allies or disrespect for American war efforts, or to otherwise bring the U.S. government, its leaders, or its symbols into disrepute.

❚3❚ **The Alien and Sedition Acts of 1798**

Passions over the French Revolution split early American politics. Having endured SHAYS'S REBELLION and the WHISKEY REBELLION, Federalists saw much to fear in the French Revolution. On the other hand, Democratic-Republicans, led by THOMAS JEFFERSON, proudly supported the French Revolution as the progeny of the American Revolution. Democratic-Republicans still viewed Britain as an enemy, while the Federalists regarded Britain as a bulwark against French militancy.

In early 1798, JOHN QUINCY ADAMS, son of President JOHN ADAMS and the U.S. ambassador to Prussia, advised his father that France intended to invade America's western frontier. Jonathon Dayton, speaker of the U.S. House of Representatives, speculated publicly that troops already massed in French ports were destined for North America. Federal officials feared parts of America were rife with French agents and sympathizers who might rise up in support of an invasion. George Tucker, professor of Law at the College of William and Mary, predicted that 100,000 U.S. inhabitants, including himself, would join a French invading army. Former president GEORGE WASHINGTON, summoned

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❚5❚

## The First Payments of Social Security

After the enactment of the Social Security Act of 1935 (42 U.S.C.A. § 301 et seq.) and the creation of the Social Security Administration (SSA), the federal government had a short time to establish the program before beginning to pay benefits. Monthly benefits were to begin in 1940. The period from 1937 to 1940 was to be used both to build up the trust funds and to provide a minimum period for participation for persons to qualify for monthly benefits.

From 1937 until 1940, however, Social Security paid benefits in the form of a single, lump-sum payment. The purpose of these one-time payments was to provide some compensation to people who contributed to the program but would not participate long enough to be vested for monthly benefits.

The first applicant for a lump-sum benefit was Ernest Ackerman, a Cleveland motorman who retired one day after the Social Security Program began. During his one day of participation in the program, five cents was withheld from Ackerman's pay for Social Security, and upon retiring, he received a lump-sum payment of seventeen cents.

Payments of monthly benefits began in January 1940. On January 31, 1940, the first monthly retirement check was issued to Ida May Fuller of Ludlow, Vermont, in the amount of $22.54. Fuller died in January 1975 at the age of one hundred. During her thirty-five years as a beneficiary, she received more than $20,000 in benefits.

tions to Social Security. There is no financial need requirement to be satisfied. Once a worker qualifies for protection, his family is also entitled to protection. The entire program is geared toward helping families as a matter of social policy.

Two large funds of money are held in trust to pay benefits earned by people under OASDI: the Old Age and Survivors Trust Fund and the Disability Insurance Trust Fund. As workers and employers make payroll contributions to these funds, money is paid out in benefits to people currently qualified to receive monthly checks.

The OASDI program is funded by payroll taxes levied on employees and their employers and on the self-employed. The tax is imposed upon the employee's taxable income, up to a maximum taxable amount, with the employer contributing an equal amount. The self-employed person contributes twice the amount levied on an employee. In 2003 the rate was 6.2 percent, levied on earned income up to a maximum of $87,000.

**Old Age Benefits** A person becomes eligible for Social Security old age benefits by working a minimum number of calendar quarters. The number of quarters required for full insurance increases with the worker's age. Forty quarters is the maximum requirement. The individual is credited for income up to the maximum amount of money covered by Social Security for those years. This amount is adjusted to reflect the impact of inflation on normal earnings and ensure that a worker who pays increasing Social Security contributions during his or her work life will receive retirement benefits that keep pace with inflation.

Persons born before 1950 can retire at age 65 with full benefits based on their average income during their working years. For those born between 1950 and 1960, the retirement age for full benefits has increased to age 66. Persons born in 1960 or later will not receive full retirement benefits until age 67. Any person, however, may retire at age 62 and receive less than full benefits. At age 65, a worker's spouse who has not contributed to Social Security receives 50 percent of the amount paid to the worker.

Since 1975 Social Security benefits have increased annually to offset the corrosive effects of inflation on fixed incomes. These increases, known as cost of living allowances (COLAs), are based on the annual increase in consumer prices. Allowing benefits to increase automatically ended the need for special acts of Congress, but it has also steadily increased the cost of the Social Security Program.

have the same inheritance rights as other children. The ruling was believed to be the first on the controversial issue by any state supreme court.

Also in January 2002, Marshall addressed the Massachusetts Bar Association Conference, where she called for "a revolution in the administration of justice" stating that the court system needed to improve its management system as well as its staffing and budget controls. In March 2002, her discussion of the court system's problems were amplified in a 52-page report that was published by a blue-ribbon panel appointed by Marshall.

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**16**

*THE GOVERNMENT [THAT THE FRAMERS OF THE CONSTITUTION] DEVISED REQUIRED SEVERAL AMENDMENTS, A CIVIL WAR, AND MOMENTOUS SOCIAL TRANSFORMATION TO ATTAIN THE SYSTEM OF CONSTITUTIONAL GOVERNMENT, AND ITS RESPECT FOR THE INDIVIDUAL FREEDOMS AND HUMAN RIGHTS, THAT WE HOLD AS FUNDAMENTAL TODAY.*
*THURGOOD MARSHALL*

## MARSHALL PLAN

After **WORLD WAR II**, Europe was devastated and urgently needed an organized plan for reconstruction and economic and technical aid. The Marshall Plan was initiated in 1947 to meet this need.

The originator of the plan, U.S. Secretary of State George C. Marshall, introduced it in a speech at Harvard University on June 5, 1947. He pointed out two basic reasons for providing aid to Europe: the United States sought the reestablishment of the European countries as independent nations capable of conducting valuable trade with the United States; and the threat of a Communist takeover was more prevalent in countries that were suffering economic depression.

In 1947 a preliminary conference to discuss the terms of the program convened in Paris. The Soviet Union was invited to attend but subsequently withdrew from the program, as did other Soviet countries.

Sixteen European countries eventually participated, and, in July 1947, the Committee for European Economic Cooperation was established to allow representatives from member countries to draft a report that listed their requirements for food, supplies, and technical assistance for a four-year period.

The Committee for European Economic Cooperation subsequently became the Organization of European Economic Cooperation, an expanded and permanent organization that was responsible for submitting petitions for aid. In 1948, Congress passed the Economic Cooperation Act (62 Stat. 137), establishing funds for the Marshall Plan to be administered under the Economic Cooperation Administration, which was directed by Paul G. Hoffman.

Between 1948 and 1952, the sixteen-member countries received more than $13 billion dollars in aid under the Marshall Plan. The plan was generally regarded as a success that led to industrial and agricultural production, while stifling the Communist movement. The plan was not without its critics, however, and many Europeans believed the **COLD WAR** hostilities between the Soviet nations and the free world were aggravated by it.

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## ◊ MARSHALL, THURGOOD

Thurgood Marshall, the first African American to serve on the U.S. Supreme Court, saw law as a catalyst for social change. For nearly 60 years, as both a lawyer and a jurist, Marshall worked to dismantle the system of **SEGREGATION** and improve the legal and social position of minorities.

Marshall was born July 2, 1908, in Baltimore, the son of a Pullman porter and a schoolteacher. He was a graduate of Lincoln University, a small, all-black college in Pennsylvania, and Howard University Law School in Washington, D.C. At Howard, Marshall excelled under the guidance of Vice Dean **CHARLES HAMILTON HOUSTON**, the first African American to win a case before the U.S. Supreme Court. Houston encouraged his students to become not just lawyers but "social engineers" who could use the legal system to improve society. Marshall graduated first in his law class in 1933.

Marshall's attendance at predominantly black Howard University illustrates the barriers faced by African Americans during the early twentieth century. Although Marshall wished to attend law school at the University of Maryland (a public institution in his home town of Baltimore), he was prohibited by law from doing so because of his race. This injustice helped set Marshall on a course of opposing all forms of official segregation that denied equal opportunities to African Americans.

After law school, Marshall set up a practice in Baltimore, representing indigent clients in civil rights cases. In 1936, his mentor Houston offered him a position with the National Association for the Advancement of Colored People (**NAACP**),





and in 1940, Marshall became director of the **NAACP LEGAL DEFENSE AND EDUCATIONAL FUND**, a position he held until 1961. Determined to eliminate segregation, Marshall coordinated a nationwide campaign to integrate higher education. He filed several successful lawsuits against public graduate and professional schools that refused to accept African-American students. These suits paved the way for similar cases at the high school and elementary school levels. Marshall also journeyed throughout the deep South, traveling fifty thousand miles a year to fight **JIM CROW LAWS** (a series of laws that provided for racial segregation in the South) and to represent criminal defendants.

Marshall argued 32 cases before the U.S. Supreme Court and won 29 of them. No doubt his most famous and far-reaching triumph before the High Court was **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). In that case, the father of African-American student Linda Brown sued the school board of Topeka, Kansas, over its segregation policy. Brown was required by law to attend an all African-American school several blocks from her home even though an all white public school was located in her own neighborhood. Under Kansas law, cities of more than 15,000 people, such as Topeka, could choose to operate segregated schools. Marshall argued that these segregated schools, defended by officials as "separate but equal," were unconstitutional.

**18**

The **SEPARATE-BUT-EQUAL** doctrine originated in **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), a case allowing segregated public accommodations for whites

*Thurgood Marshall.*
LIBRARY OF CONGRESS

and blacks. In a plainspoken argument, Marshall dismissed as fallacy the notion that segregated schools offered the same educational experiences to black and white students. Sociological and psychological studies demonstrated that black children were in fact harmed by the policy of school segregation. The students' self-esteem was damaged and their future diminished when they were forced to accept inadequate facilities, equipment, and educational opportunities. Marshall argued that the only purpose segregation served was to perpetuate the myth of African-Americans' inferiority. A unanimous Court agreed and struck down the separate-but-equal doctrine, a

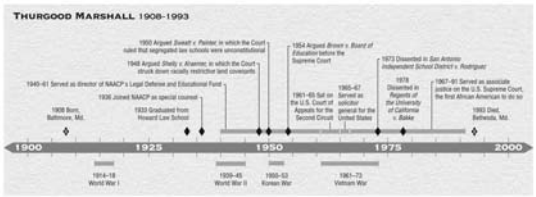






# THE FUTURE OF SOCIAL SECURITY

**19**

The payment of **OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE** (OASDI) benefits has been a cornerstone of U.S. social welfare policy since the establishment of the **SOCIAL SECURITY ADMINISTRATION** in 1935. At the same time, the long-term financial stability of OASDI has been a constant worry. In the early years of the twenty-first century, concerns about Social Security mounted as policy makers assessed the impact of the retirement of the "Baby Boom" generation. Many younger people raised the issue of "generation equity." They express doubt that Social Security benefits will be available when they retire, and anger that they will be forced to pay, through payroll taxes, for the baby boomers' retirement benefits.

Reform of the Social Security system has always been a political hot potato. Retirees and those approaching retirement form a strong **LOBBYING** force, and they zealously protect their benefits. Employers and employees are equally vocal in their opposition to higher payroll taxes to fund OASDI. Thus, changes in Social Security required bipartisan support, which materialized in the face of an impending Social Security crisis. The 1982–83 National Commission on Social Security Reform successfully secured from Congress the short-term financing of OASDI. As a result, Congress passed a series of laws meant to accumulate surpluses as a hedge against future burdens. The Social Security surplus is the amount by which revenue from the federal payroll tax exceeds the amount of Social Security benefits paid out.

IN FOCUS

Shortly after these new laws went into effect, Social Security began running a surplus. Surplus Social Security revenue can be used to fund other government programs and to help retire the national debt. During the favorable economic climate of the late 1990s, Congress began to use the surplus to pay down the federal debt, hoping to better position the government to meet its obligations to future retirees. And, in 2000, the federal government generated enough revenue so that the entire Social Security surplus was available for paying off debt.

The state of Social Security became a major campaign issue in the 2000 elections, with both Republicans and Democrats attempting to appear as though they were guardians of Social Security assets. Candidates from both parties promised to create a "lockbox," meaning that the Social Security surplus would be spent entirely on debt retirement. With the advent of fiscally lean years in the early 2000s, the lockbox approach was largely disregarded by politicians who advanced other ideas about what to do with Social Security surpluses. These ideas included using the surplus to help offset decreases in revenues brought about by tax cuts and using the surplus to fund new or expanded spending initiatives.

Analysts argue that the real issue often is clouded. It is not how to spend the surplus now, but how to maintain the long-term solvency of the Social Security trust fund. Planners estimate that the income from the trust fund will exceed expenses each year until 2020. The trust fund balances will then start to decline as investments are redeemed to meet the increased expenses from a swelling retired workforce. Although it is estimated that 75 percent of the costs would continue to be met from current payroll and income taxes, in the absence of any changes, full benefits could not be paid beginning in 2030.

In its 1996 report, the Social Security Administration's Advisory Council looked at various long-term financing options for OASDI. The council could not reach consensus on a specific long-term plan, but it did suggest several types of financing that represent a marked departure from previous efforts to fund Social Security. The council noted that past efforts have generally featured cutting benefits and raising tax rates on a "pay-as-you-go" basis. The council agreed that this approach must be changed and offered three ways of restoring financial solvency.

One approach, called Maintenance of Benefits (MB), calls for an increase in income taxes on OASDI benefits, a redirection of some revenue from other trust funds, and, most importantly, the adoption of a plan allowing the federal government to invest a portion of the trust fund assets directly in common stocks. Rates of returns on stocks have historically exceeded those on federal government bonds, where all Social Security

A person who continues to work past the retirement age may lose some benefits because Social Security is designed to replace lost earnings. If earnings from employment do not exceed the amount specified by law, the person receives the full benefits. If earnings are greater than that amount, one dollar of benefit is withheld for every two dollars in wages earned above the exempt amount. Once a person reaches age 70, however, he does not have to report earnings to the SSA, and the benefit is not reduced.

**Survivors' Benefits** Survivors' benefits are paid to family members when a worker dies. Survivors can receive benefits if the deceased worker was employed and contributed to Social





momentous victory for Marshall, affecting public schools in twenty-one states.

Marshall was appointed to the U.S. Court of Appeals for the Second Circuit in 1961, and served there until 1965 when he was named **SOLICITOR GENERAL** for the United States. He was appointed to the U.S. Supreme Court in 1967 by President **LYNDON B. JOHNSON** and served as an associate justice for 24 years.

While on the Court, Marshall was known more for his impassioned dissents than for his majority opinions. In particular, as a staunch opponent of **CAPITAL PUNISHMENT**, he regularly voiced his disagreement with the majority in death penalty cases. He was also a firm backer of **AFFIRMATIVE ACTION** and contributed one of his most famous dissents in **REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE**, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In that case, Marshall criticized the high court's ruling that a public medical school's policy of reserving 16 of 100 spots for minority students was unconstitutional. Marshall also dissented in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), disagreeing with the majority view that a Texas property tax system used to fund public education was acceptable, even though it allowed wealthier districts to provide a better school system for students in those districts than less wealthy districts could provide. Marshall objected strongly to the property tax arrangement, claiming that it deprived poor children of an equal education.

Marshall wrote the majority opinion in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968), in which the Court declared that a shopping center was a public forum from which picketers could not be barred by private owners.

Marshall retired from the Court in 1991, but continued his criticism of government policies that were detrimental to African Americans or other disenfranchised groups.

Marshall died on January 24, 1993, in Bethesda, Maryland. Upon Marshall's death, nearly 20,000 mourners filed by his casket during the 12 hours it lay in state in the Great Hall of the U.S. Supreme Court.

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CROSS-REFERENCES

**10**

*Civil Rights Movement; Integration; School Desegregation.*

## MARTIAL LAW

*The exercise of government and control by military authorities over the civilian population of a designated territory.*

**11**

Martial law is an extreme and rare measure used to control society during war or periods of civil unrest or chaos. According to the Supreme Court, the term *martial law* carries no precise meaning (*Duncan v. Kahanamoku*, 327 U.S. 304, 66 S. Ct. 606, 90 L. Ed. 688 [1946]). However, most declarations of martial law have some common features. Generally, the institution of martial law contemplates some use of military force. To a varying extent, depending on the martial law order, government military personnel have the authority to make and enforce civil and criminal laws. Certain civil liberties may be suspended, such as the right to be free from unreasonable **SEARCHES AND SEIZURES**, **FREEDOM OF ASSOCIATION**, and freedom of movement. And the writ of **HABEAS CORPUS** may be suspended (this writ allows persons who are unlawfully imprisoned to gain freedom through a court proceeding).

In the United States, martial law has been instituted on the national level only once, during the Civil War, and on a regional level only once, during **WORLD WAR II**. Otherwise, it has been limited to the states. Uprisings, political protests, labor strikes, and riots have, at various times, caused several state governors to declare some measure of martial law.

Martial law on the national level may be declared by Congress or the president. Under

# WEST'S ENCYCLOPEDIA *of* AMERICAN LAW

2ND EDITION

VOLUME 8

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## DEDICATION

*West's Encyclopedia of American Law (WEAL)* is dedicated to librarians and library patrons throughout the United States and beyond. Your interest in the American legal system helps to expand and fuel the framework of our Republic.

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# PREFACE

The U.S. legal system is admired around the world for the freedoms it allows the individual and the fairness with which it attempts to treat all persons. On the surface, it may seem simple, yet those who have delved into it know that this system of federal and state constitutions, statutes, regulations, and common-law decisions is elaborate and complex. It derives from the English common law, but includes principles older than England, along with some principles from other lands. The U.S. legal system, like many others, has a language all its own, but too often it is an unfamiliar language: many concepts are still phrased in Latin. The second edition of *West's Encyclopedia of American Law (WEAL)* explains legal terms and concepts in everyday language, however. It covers a wide variety of persons, entities, and events that have shaped the U.S. legal system and influenced public perceptions of it.

## MAIN FEATURES OF THIS SET

### Entries

This encyclopedia contains nearly 5,000 entries devoted to terms, concepts, events, movements, cases, and persons significant to U.S. law. Entries on legal terms contain a definition of the term, followed by explanatory text if necessary. Entries are arranged alphabetically in standard encyclopedia format for ease of use. A wide variety of additional features, listed later in this preface, provide interesting background and supplemental information.

**Definitions** Every entry on a legal term is followed by a definition, which appears at the beginning of the entry and is italicized. The Dictionary and Indexes volume includes a glossary containing all the definitions from *WEAL*.

**Further Readings** To facilitate further research, a list of Further Readings is included at the end of a majority of the main entries.

**Cross-References** *WEAL* provides two types of cross-references, within and following entries. Within the entries, terms are set in small capital letters—for example, LIEN—to indicate that they have their own entry in the encyclopedia. At the end of the entries, related entries the reader may wish to explore are listed alphabetically by title.

Blind cross-reference entries are also included to direct the user to other entries throughout the set.

### In Focus Essays

In Focus essays accompany related entries and provide additional facts, details, and arguments on particularly interesting, important, or controversial issues raised by those entries. The subjects covered include hotly contested issues, such as abortion, capital punishment, and gay rights; detailed processes, such as the Food and Drug Administration's approval process for new drugs; and important historical or social issues, such as debates over the formation of the U.S. Constitution.

### Sidebars

Sidebars provide brief highlights of some interesting facet of accompanying entries. They

complement regular entries and In Focus essays by adding informative details. Sidebar topics include the Million Man March and the branches of the U.S. armed services. Sidebars appear at the top of a text page and are set in a box.

### Biographies

*WEAL* profiles a wide variety of interesting and influential people—including lawyers, judges, government and civic leaders, and historical and modern figures—who have played a part in creating or shaping U.S. law. Each biography includes a timeline, which shows important moments in the subject's life as well as important historical events of the period. Biographies appear alphabetically by the subject's last name.

## ADDITIONAL FEATURES OF THIS SET

**Enhancements** Throughout *WEAL*, readers will find a broad array of photographs, charts, graphs, manuscripts, legal forms, and other visual aids enhancing the ideas presented in the text.

**Indexes** *WEAL* features a cases index and a cumulative index in a separate volume.

### Appendixes

Three appendix volumes are included with *WEAL*, containing hundreds of pages of documents, laws, manuscripts, and forms fundamental to and characteristic of U.S. law.

### Milestone Cases in the Law

A special Appendix volume entitled Milestones in the Law, allows readers to take a close look at landmark cases in U.S. law. Readers can explore the reasoning of the judges and the arguments of the attorneys that produced major decisions on important legal and social issues. Included in each Milestone are the opinions of the lower courts; the briefs presented by the parties to the U.S. Supreme Court; and the decision of the Supreme Court, including the majority opinion and all concurring and dissenting opinions for each case.

### Primary Documents

There is also an Appendix volume containing more than 60 primary documents, such as the English Bill of Rights, Martin Luther King Jr.'s Letter from Brimingham Jail, and several presidential speeches.

### Citations

Wherever possible, *WEAL* entries include citations for cases and statutes mentioned in the text. These allow readers wishing to do additional research to find the opinions and statutes cited. Two sample citations, with explanations of common citation terms, can be seen below and opposite.

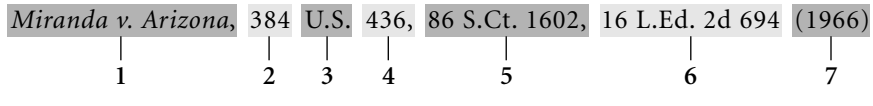


1. *Case title.* The title of the case is set in i and indicates the names of the parties. The suit in this sample citation was between Ernesto A. Miranda and the state of Arizona.
2. *Reporter volume number.* The number preceding the reporter name indicates the reporter volume containing the case. (The volume number appears on the spine of the reporter, along with the reporter name).
3. *Reporter name.* The reporter name is abbreviated. The suit in the sample citation is from the reporter, or series of books, called *U.S. Reports,* which contains cases from the U.S. Supreme Court. (Numerous reporters publish cases from the federal and state courts.)
4. *Reporter page.* The number following the reporter name indicates the reporter page on which the case begins.
5. *Additional reporter page.* Many cases may be found in more than one reporter. The suit in the sample citation also appears in volume 86 of the *Supreme Court Reporter*, beginning on page 1602.
6. *Additional reporter citation.* The suit in the sample citation is also reported in volume 16 of the *Lawyer's Edition*, second series, beginning on page 694.
7. *Year of decision.* The year the court issued its decision in the case appears in parentheses at the end of the cite.

*Brady Handgun Violence Prevention Act*, Pub. L. No. 103–159, 107 Stat. 1536 (18 U.S.C.A. §§ 921–925A)

1 2 3 4 5 6 7 8

1. *Statute title.*
2. *Public law number.* In the sample citation, the number 103 indicates this law was passed by the 103d Congress, and the number 159 indicates it was the 159th law passed by that Congress.
3. *Reporter volume number.* The number preceding the reporter abbreviation indicates the reporter volume containing the statute.
4. *Reporter name.* The reporter name is abbreviated. The statute in the sample citation is from *Statutes at Large.*
5. *Reporter page.* The number following the reporter abbreviation indicates the reporter page on which the statute begins.
6. *Title number.* Federal laws are divided into major sections with specific titles. The number preceding a reference to the U.S. Code stands for the section called Crimes and Criminal Procedure.
7. *Additional reporter.* The statute in the sample citation may also be found in the *U.S. Code Annotated.*
8. *Section numbers.* The section numbers following a reference to the *U.S. Code Annotated* indicate where the statute appears in that reporter.

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# P (cont.)

## POACHING

*The illegal shooting, trapping, or taking of game or fish from private or public property.*

The poaching of game and fish was made a crime in England in the seventeenth century, as aristocratic landowners sought to preserve their shooting and property rights. Poor peasants did most of the poaching to supplement their diets with meat and fish.

In the United States, poaching was not considered a serious problem meriting legal measures before the twentieth century, because vast expanses of undeveloped land contained abundant sources of fish and game. The increased cultivation of land and the growth of towns and cities reduced wildlife habitats in the twentieth century. In the early 1900s, the U.S. conservation movement arose with an emphasis on preserving wildlife and managing the fish and game populations. Wildlife preserves and state and national parks were created as havens for wild animals, many of which were threatened with extinction.

Because of these changing circumstances, restrictions were placed on hunting and fishing. State game and fish laws now require persons to purchase licenses to hunt and fish. The terms of these licenses limit the kind and number of animals or fish that may be taken and restrict hunting and fishing to designated times of the year, popularly referred to as hunting and fishing seasons.

Therefore, persons who fail to purchase a license, as well as those who violate the terms of their licenses, commit acts of poaching. Most poaching in the United States is done for sport or commercial profit. Rare and endangered species, which are protected by state and federal law, are often the targets of poachers.

Poaching laws are enforced by game wardens, who patrol state and national parks and respond to violations on private property. Poachers are subject to criminal laws, ranging from misdemeanors to felonies. Penalties may include steep fines, jail sentences, the FORFEITURE of any poached game or fish, the loss of hunting and fishing license privileges for several years, and the forfeiture of hunting or fishing equipment, boats, and vehicles used in the poaching.

CROSS-REFERENCES

Endangered Species Act; Environmental Law; Fish and Fishing.

## POCKET PART

*An addition to many lawbooks that updates them until a new edition is published.*

A pocket part is located inside the back cover of the book. A legal researcher should always consult it to ensure that the most current law is examined.

## POINT

*A distinct proposition or* QUESTION OF LAW *arising or propounded in a case. In the case of shares*

*of stock, a point means $1. In the case of bonds a point means $10, since a bond is quoted as a percentage of $1,000. In the case of market averages, the word point means merely that and no more. If, for example, the Dow-Jones Industrial Average rises from 8,349.25 to 8,350.25, it has risen a point. A point in this average, however, is not equivalent to $1.*

*With respect to the home mortgage finance industry, a fee or charge of one percent of the principal of the loan that is collected by the lender at the time the loan is made and is in addition to the constant long-term stated interest rate on the face of the loan.*

## POISON

*Any substance dangerous to living organisms that if applied internally or externally, destroy the action of vital functions or prevent the* CONTINUANCE *of life.*

Economic poisons *are those substances that are used to control insects, weeds, fungi, bacteria, rodents, predatory animals, or other pests. Economic poisons are useful to society but are still dangerous.*

The way a poison is controlled depends on its potential for harm, its usefulness, and the reasons for its use. The law has a right and a duty pursuant to the POLICE POWER of a state to control substances that can do great harm.

In the past, an individual who was harmed by a poison that had been handled in a careless manner could institute a lawsuit for damages against the person who had mishandled the chemical. As time went on, state statutes prescribed the circumstances under which someone was legally liable for injuries caused by a poison. For example, a sale to anyone under sixteen years of age was unlawful, and a seller was required to ensure that the buyer understood that the chemical was poisonous. It was not unusual for all poisons, drugs, and narcotics to be covered by the same statutory scheme.

Specialized statutes currently regulate poisons. Pesticides must be registered with the federal government, and those denied registration cannot be used. The ENVIRONMENTAL PROTECTION AGENCY (EPA) has issued a number of regulations governing the use of approved pesticides. Federal law also prohibits unauthorized adulteration of any product with a poisonous substance and requires clear labeling for anything sold with a poisonous ingredient. It might not be sufficient to list all the chemicals in a container or even to put the word POISON on the label. The manufacturer should also warn of the injuries that are likely to occur and the conditions under which the poison will cause harm. Stricter standards are applied to household products than to poisonous products intended to be used in a factory, on a farm, or by a specially trained person. Poisonous food products are banned. Under other federal regulations, pesticide residues on foods are prohibited above certain low tolerance levels.

Certain provisions under federal law seek to protect children from poisoning. Special packaging is required for some household products so that a child will not mistake them for food or will not be able to open containers. Federal funds are available for local programs to reduce or eliminate the danger of poisoning from lead-based paint. Under the Hazardous Substances Act (15 U.S.C.A. § 1261 et seq.), toys containing poisonous substances can be banned or subjected to recall.

## POISON PILL

*A defensive strategy based on issuing special stock that is used to deter aggressors in corporate takeover attempts.*

The poison pill is a defensive strategy used against corporate takeovers. Popularly known as corporate raiding, takeovers are hostile mergers intended to acquire a corporation. A takeover begins when a so-called aggressor tries to buy sufficient stock in another corporation, known as the target, to seize control of it. Target corporations use a wide range of legal options to deter takeovers, among which is the poison pill: a change in the company's stock plan or financial condition that is intended to make the corporation unattractive to the buyer. Despite its fanciful name, the poison pill does not destroy the target company. It is intended to affect the aggressor, which will be burdened with costs if it succeeds in its takeover. The strategy was widely adopted in the 1980s.

The poison pill is unique among antitakeover strategies. At the simplest level, takeovers are about buying stock. Corporate raiders offer shareholders an inflated price for their shares. They try to buy the company for more than its stock is worth. Although this idea seems paradoxical, raiders can reap profits from their overpriced acquisition by selling off its

divisions and assets. Some anti-takeover strategies try to deter the aggressor by selling off prize assets first, making a counter offer to shareholders, or stipulating that the current executives will receive huge payoffs after a takeover when they are fired. These strategies can injure the company or simply benefit executives. But the poison pill involves a kind of doomsday scenario for the aggressor. If the takeover is successful, it will end up paying enormous dividends to the company's current stockholders.

Essential to the use of such a strategy is that it is first established in the corporation's charter. Among other details, these charters specify shareholders' rights. They specify that companies can issue preferred stock—shares that give special dividends, or payments—to their holders. When a takeover bid begins, the company's board of directors issues this preferred stock to its current shareholders. The stock is essentially worthless and is intended to scare away the aggressor. If the takeover succeeds, the stock becomes quite valuable. It can then be redeemed for a very good price or it can be converted into stock of the new controlling company—namely, the aggressor's. Both scenarios leave the aggressor with the choice of either buying the stock at a high price or paying huge dividends on it. This is the pill's poison.

Poison pill defenses are popular but somewhat controversial. The majority of large U.S. companies had adopted them by the 1990s. Part of this popularity comes from their effectiveness in delaying a corporate takeover, during which time a target company may marshal other defenses as well. Another reason is that courts have upheld their legality. One of the first important cases in this area reached the Delaware courts in 1985 (*Moran v. Household International, Inc.,* 500 A.2d 1346). However, some critics have argued that the strategy gives company directors power at the expense of shareholders. They maintain that it can limit shareholders' wealth by thwarting potentially beneficial takeovers and allowing bad corporate managers to entrench themselves. In the 1990s such arguments spurred some investors to attempt to repeal poison pill provisions in corporate charters.

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CROSS-REFERENCES

Golden Parachute; Mergers and Acquisitions.

## POLICE

*A body sanctioned by local, state, or national government to enforce laws and apprehend those who break them.*

The police force as we know it came into being in England in the 1820s when Sir Robert Peel established London's first municipal force. Before that, policing had either been done by volunteers or by soldiers. Police officers in the twenty-first century have technological advantages at their disposal to help them solve crimes, but most rely primarily on training and instinct to do their work.

In the United States, policing was originally done by the "watch system" in which local citizens would go on patrol and look for criminal activity. As cities grew, so did the amount of crime, and it became impossible to control it through volunteers. In the mid-1840s, New York City established the first paid professional police force in the United States. By the end of the nineteenth century, major cities across the nation had their own police forces. Regional police organizations were also established. Federal policing agencies such as the U.S. Park Police (who patrolled national parks), the Postal Inspectors (who helped ensure safe mail delivery) and the Border Patrol (which kept criminals from sneaking into or out of the country) were introduced. In 1905, Pennsylvania established the nation's first state police; other states quickly followed suit.

During the first decades of the twentieth century, police forces were established in smaller municipalities, and police officers took a more active role in fighting crime and protecting citizens. The widespread introduction of telephones and automobiles made it easier for police to respond quickly to emergencies.

Over the ensuing years, many of the techniques and tools commonly associated with police work—mug shots, fingerprint analysis, centralized records, crime labs—were introduced and constantly improved. Although the

scenarios commonly created by television police shows are exaggerations of how much technology can actually do, such innovations as DNA testing have made it easier for the police to positively identify criminals.

The average duties of the modern police officer can vary widely from community to community. In a large city whose police force has dozens of divisions and neighborhood precincts, an officer's duties may be quite specialized. In a small town with a police force of only a few people, each officer will likely have to know how to do several jobs to be able to fill in for their colleagues as needed.

The duties of a police officer on the New York City police force provide an example of what the police do. New York officers are expected to patrol their assigned area, either by car or on foot. They apprehend criminals or crime suspects, stop crimes in progress, and assist people who are in trouble (such as complainants in domestic disputes or emotionally disturbed homeless individuals). They investigate crimes and crime scenes, collect evidence, and interview victims and witnesses. They help find missing persons and handle cases of alleged CHILD ABUSE. They help identify and recover stolen property, and they testify in court as necessary. They also keep detailed records of their activity by filing reports and filling out various forms.

Police officers are expected to be in good physical condition. They may have to run after a suspect, carry injured individuals, subdue suspects (who may be armed or physically strong), and carry heavy equipment. They may have periods of extreme physical activity, followed by hours of no activity at all (perhaps just sitting in a patrol car for several hours). They must also be mentally alert and emotionally able to withstand the strain of their work. Although officers in large cities or dangerous neighborhoods may have a statistically higher chance of being injured on killed on the job, all police officers know that life-and-death situations can happen anywhere.

Not accidentally, police departments, especially those in large cities, are compared to military institutions. In fact, the police and the military have a number of goals in common, including discipline, endurance, teamwork, and clearly established procedures for all operations. Even the ranks given police officers are similar to those in the military.

Not surprisingly, police officers are required to undergo often rigorous training before being sworn in. The movement for formalized training began early in the twentieth century. August Vollmer, chief of police in Berkeley, California, from 1905 to 1932, believed that police officers needed professional training at the college level. He helped found a police training academy at the University of California's Berkeley campus, and Berkeley later established the nation's first college-level CRIMINOLOGY department. Today, many COLLEGES AND UNIVERSITIES have criminology departments and offer degrees in criminal justice. Many police departments will provide tuition reimbursement or scholarships to officers who want to continue their education after they have joined the force. Some officers get their law degrees; others get advanced degrees in criminology and become college instructors.

One of the major goals of many police departments is getting cooperation from within the community. Many officers receive training in communications, and most police departments have public affairs divisions that provide information for citizens who wish to organize neighborhood watch programs or who want to get information on avoiding crime. Some police departments, for example, have increased their foot patrols, believing that the officer "walking the beat" makes people feel safer and also builds rapport with local individuals. Police also work with each other as well as with other law enforcement agencies. State, county, and local police will often come together to solve a crime that falls within their jurisdiction. Agencies such as the FEDERAL BUREAU OF INVESTIGATION, the SECRET SERVICE, the Coast Guard, and others also work with the police to help solve crimes. The emergence of computerized records and databases make it easy for police organizations across the country and even overseas to exchange information about suspects and criminals. In emergency situations (fires, explosions, or natural disasters), police officers work in tandem with fire fighters, medical professionals, or emergency service workers.

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CROSS-REFERENCES

Federal Bureau of Investigation; Police Power.

## POLICE AND GUARDS, PRIVATE

The use of private security guards and police by such entities as businesses and school campuses to protect their property, employees, and students has grown rapidly since the early 1980s. The authority of these guards, sometimes known disparagingly as "rent-a-cops," depends upon the employer and the type of security involved. Some guards are considered private employees of security firms and possess no more authority than an ordinary citizen. Other guards, such as campus police officers, are given specific authority to serve as peace officers by state law.

Private investigation firms predate the formation of the United States. During the nineteenth century and early part of the twentieth century, these firms often were employed by private companies for such purposes as breaking strikes, infiltrating LABOR UNIONS, and investigating robberies and other crimes. By the 1930s, however, the industry was in decline, and from the 1930s to the 1970s, public law enforcement officers were more prevalent than private guards.

By the early 1980s, the private security industry began to expand, and by the early 1990s, it was one of the largest growing industries in the United States. Private guards and police personnel now outnumber the total number of federal, state, and local law enforcement officers combined. Moreover, an estimated 150,000 regular police officers moonlight as private security guards. Some municipal police departments supply regular police officers to businesses and private individuals, and then pay the officers from the proceeds of the arrangement.

One of the most ubiquitous private security officers is the campus or university police officer. Institutions of higher education are generally under a duty to provide reasonable security measures to protect their students. Many states designate these private officers with powers and authority similar or analogous to regular police officers, particularly at state institutions, but also at some larger private institutions. Some campus police departments also make arrangements with local police departments to cooperate in investigating campus crimes. Under the Student Right-to-Know and Campus Security Act, Pub. L. No. 101-542, 104 Stat. 2381, all COLLEGES AND UNIVERSITIES that receive federal financial assistance are required to publish and distribute campus security policies and crime statistics to current students, employees, and the secretary of education.

In California, for example, the Regents of the University of California and the Trustees of the California State University and Colleges may employ one or more campus police officers to serve as peace officers (Cal. Educ. Code §§ 89560, 92601). These officers may only exercise their duties within one mile of the exterior boundaries of each campus, although California courts have held that officers may, in some circumstances, extend beyond these boundaries to fulfill their duties (*Baughman v. State of California*, 45 Cal. Rptr. 82 [Cal. App. 1995]). In order to qualify to become a peace officer, a candidate must be 18 years old, demonstrate good moral character based upon an investigation, and be free from any physical, emotional, or mental condition that might adversely affect the performance of his or her duties.

Some plaintiffs have sought to hold campus police officers liable for the officers' actions under a variety of legal theories. For instance, in *DeSanto v. Youngstown State University*, 2002 WL 31966960 (Oh. Ct. Cl. 2002), campus police were given the responsibility to provide security for a dance, including checking identification of the participants and requiring non-students to sign a log. Two individuals became involved in a fight, requiring the intervention of the officers. Although one of the two participants threatened to kill the other, the officers did not arrest the man who uttered the threats. Thirty minutes later, another individual killed the man against whom the threats were made. The family of the victim claimed that the officers were negligent for failing to arrest the man who made the threats. In addition, a plaintiff's expert witness testified that had the officer arrested the man who made the threats, the victim would not have been killed. Nevertheless, the court found that the theory was speculative and held in favor of the officers.

The application of the constitutional provisions governing CRIMINAL PROCEDURE has come into question in a number of cases involving security guards. If a security guard or officer

is a purely private officer, constitutional provisions generally do not apply. These private guards usually are limited by other state criminal and **TORT LAWS**, such as **ASSAULT, BATTERY, TRESPASS**, and **FALSE IMPRISONMENT**. On the other hand, if the security guard or officer is deemed a state actor, then the constitutional provisions, such as the Fourth Amendment's prohibition against unreasonable **SEARCHES AND SEIZURES**, applies. Some states, including Georgia and South Carolina, have deputized security guards with much of the same authority as regular police officers. Other states, such as Arizona, have expressly provided that security guards do not have the same authority as regular police officers.

In *Washington v. Heritage*, 61 P.3d 1190 (Wash. App. 2002), a juvenile was convicted of possession of marijuana after she was searched by city park security guards. The juvenile court in the case found that the guards were private guards, so constitutional rules of criminal procedure did not apply. However, the Washington court of appeals determined that these guards were indeed state actors because they were employed by the city government. Accordingly, the guards were required to comply with constitutional requirements, including giving the suspects *Miranda* warnings.

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**CROSS-REFERENCES**

Colleges and Universities; Police Power.

## POLICE CORRUPTION AND MISCONDUCT

*The violation of state and federal laws or the violation of individuals' constitutional rights by police officers; also when police commit crimes for personal gain.*

*Police misconduct* and *corruption* are abuses of police authority. Sometimes used interchangeably, the terms refer to a wide range of procedural, criminal, and civil violations. Misconduct is the broadest category. Misconduct is "procedural" when it refers to police who violate police department rules and regulations; "criminal" when it refers to police who violate state and federal laws; "unconstitutional" when it refers to police who violate a citizen's **CIVIL RIGHTS**; or any combination thereof. Common forms of misconduct are excessive use of physical or **DEADLY FORCE**, discriminatory arrest, physical or verbal harassment, and selective enforcement of the law.

Police corruption is the abuse of police authority for personal gain. Corruption may involve profit or another type of material benefit gained illegally as a consequence of the officer's authority. Typical forms of corruption include **BRIBERY**, **EXTORTION**, receiving or fencing stolen goods, and selling drugs. The term also refers to patterns of misconduct within a given police department or special unit, particularly where offenses are repeated with the acquiescence of superiors or through other ongoing failure to correct them.

Safeguards against police misconduct exist throughout the law. Police departments themselves establish codes of conduct, train new recruits, and investigate and discipline officers, sometimes in cooperation with civilian complaint review boards which are intended to provide independent evaluative and remedial advice. Protections are also found in state law, which permits victims to sue police for damages in civil actions. Typically, these actions are brought for claims such as the use of excessive force ("police brutality"), false arrest and imprisonment, **MALICIOUS PROSECUTION**, and **WRONGFUL DEATH**. State actions may be brought simultaneously with additional claims for constitutional violations.

Through both criminal and civil statutes, federal law specifically targets police misconduct. Federal law is applicable to all state, county, and local officers, including those who work in correctional facilities. The key federal criminal statute makes it unlawful for anyone acting with police authority to deprive or conspire to deprive another person of any right protected by the Constitution or laws of the United States (Section 18 U.S.C. § 241 [2000]). Another statute, commonly referred to as the police misconduct provision, makes it unlawful for state or local police to engage in a pattern or practice of conduct that deprives persons of their rights (42 U.S.C.A. 14141 [2000]).

Additionally, federal law prohibits discrimination in police work. Any police department receiving federal funding is covered by Title VI of the Civil Rights Act of 1964 (42 U.S.C.

§ 2000d) and the Office of Justice Programs statute (42 U.S.C. § 3789d[c]), which prohibit discrimination on the basis of race, color, national origin, sex, and religion. These laws prohibit conduct ranging from racial slurs and unjustified arrests to the refusal of departments to respond to discrimination complaints.

Because neither the federal criminal statute nor the civil police misconduct provision provides for lawsuits by individuals, only the federal government may bring suit under these laws. Enforcement is the responsibility of the JUSTICE DEPARTMENT. Criminal convictions are punishable by fines and imprisonment. Civil convictions are remedied through injunctive relief, a type of court order that requires a change in behavior; typically, resolutions in such cases force police departments to stop abusive practices, institute types of reform, or submit to court supervision.

Private litigation against police officers or departments is difficult. Besides time and expense, a significant hurdle to success is found in the legal protections that police enjoy. Since the late twentieth century, many court decisions have expanded the powers of police to perform routine stops and searches. Plaintiffs generally must prove willful or unlawful conduct on the part of police; showing mere NEGLIGENCE or other failure of due care by police officers often does not suffice in court.

Most problematically of all for plaintiffs, police are protected by the defense of immunity—an exemption from penalties and burdens that the law generally places on other citizens. This IMMUNITY is limited, unlike the absolute immunity enjoyed by judges or legislators. In theory, the defense allows police to do their job without fear of REPRISAL. In practice, however, it has become increasingly difficult for individuals to sue law enforcement officers for damages for allegedly violating their civil rights. U.S. Supreme Court decisions have continually asserted the general rule that officers must be given the benefit of the doubt that they acted lawfully in carrying out their day-to-day duties, a position reasserted in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

## History

Society has grappled with misconduct and corruption issues for as long as it has had police officers. Through the mid-to-late nineteenth century, private police forces were commonplace, and agents of Pinkerton's and other for-hire services became notorious as the muscle employers used to violently end strikes. Heavy-handed law enforcement as well as VIGILANTISM by groups such as the racist KU KLUX KLAN spurred passage of the CIVIL RIGHTS ACT of 1871, which criminalized acting under state law to deprive a person of constitutional or other rights under federal law. SECTION 1983 of the act remains a critical tool in the early 2000s for enforcing constitutional rights, with direct applicability to police misconduct cases.

The twentieth century saw multiple legal, administrative, and scholarly approaches to the problem. Some developments bore indirectly upon police misconduct, such as the passage of the Civil Rights Act of 1964, which gave new protections to citizens who had long suffered discriminatory policing. Additionally, a string of landmark Supreme Court decisions during the era gave new force both to individual privacy rights as well as to curbs upon POLICE POWER: highly influential cases resulted in the strengthening of FOURTH AMENDMENT rights against unreasonable SEARCH AND SEIZURE, evidentiary rules forbidding the use at trial of evidence tainted by unconstitutional police actions, and the establishment of the so-called Miranda Warning requiring officers to advise detained suspects of their constitutional rights.

While these decisions profoundly shaped the legal and social landscape, renewed focus on police misconduct and corruption occurred in the latter part of the century. As the pioneering criminologist Herman Goldstein argued, traditional views were based on the assumption that police abuse reflected the moral failings of individual officers—the so-called "bad cop." Public scandals began to shape a new view of the problem. In 1971, New York City organized the Knapp Commission to hold hearings on the extent of corruption in the city's police department. Police officer Frank Serpico's startling testimony against fellow officers not only revealed systemic corruption but highlighted a long-standing obstacle to investigating these abuses: the fraternal understanding among police officers known variously as "the Code of Silence" and "the Blue Curtain" under which officers regard testimony against a fellow officer as betrayal.

Broader recognition of the problem brought more ambitious reform efforts in the 1980s and 1990s. Spurred by the work of criminologists

such as Goldstein and others, police departments sought to improve organizational rules, training, and prevention and control mechanisms. Such efforts are reflected in the publication of a code of police conduct by the International Association of Chiefs of Police, more rigorous training for officers, and experimented with so-called community policing programs to improve ties between officers and the public. Several cities established joint police and civilian complaint review boards to give citizens a larger role in what traditionally had been a closed, internal process by police departments.

Among the most dramatic examples of system-wide reform is New York City's response to long-standing brutality, discrimination, and corruption within the New York City Police Department (NYPD). After flirting with civilian review of complaints against police in the 1960s, the city committed to it after public outcry over the videotaping of officers beating citizens who violated curfew in 1988. The city subsequently established its Civilian Complaint Review Board, which became an all-civilian agency in 1993. In 1992, responding to new complaints, Mayor David N. Dinkins appointed the Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department, known as the Mollen Commission. Two years later, the commission concluded that the city had alternated between cycles of corruption and reform. Afterwards, in 1995, Mayor Rudolph W. Giuliani established the full-time Commission to Combat Police Corruption (CCPC) as an entity independent from the police department. The CCPC monitors the NYPD anti-corruption policies and procedures, conducts audits, and issues public reports.

*Protesters react to the acquittal of four New York City police officers in the 1999 shooting death of Amadou Diallo.*

AP/WIDE WORLD PHOTOS

### Contemporary Problems

Despite legal safeguards and well-intentioned reforms, police problems have continued to produce headlines. The exact scope of misconduct is unknown. Misconduct complaints can be quantified on a city-by-city basis, but these data are often subjective, and far more complaints are filed than ever are evaluated at trial. Corruption is even harder to measure. As the National Institute of Justice acknowledged in its May 2000 report, *The Measurement of Police Integrity*, most corruption incidents go unreported, and data that do exist "are best regarded as measures of a police agency's anticorruption activity, not the actual level of corruption."

During the late 1990s, highly-publicized cases in New York, New Jersey, Texas, Detroit, and Cleveland exposed an apparently new trend: police drug corruption. In the Cleveland case alone, the FBI arrested 42 officers from five law enforcement agencies in 1998 on charges of conspiracy to distribute cocaine. In a 1998 report to U.S. Congressman Charles B. Rangel, the federal GENERAL ACCOUNTING OFFICE (GAO) found evidence of growing police involvement in drug sales, theft of drugs and money from drug dealers, and perjured testimony about illegal searches. The GAO survey of police commission reports and academic research suggested a troubling new dimension previously not seen in studies of police corruption. Traditionally, police corruption had been understood to involve individuals acting alone, but the new trend revealed officers working in small groups to protect and assist each other.

In 1999, this pattern emerged in one of the worst police corruption scandals in U.S. history. The scandal involved the Los Angeles Police Department's Rampart precinct and particularly its elite anti-gang unit, CRASH (Community Resources Against Street Hoodlums). Following local and federal investigations, CRASH was dismantled, some 70 officers were investigated, and several either pleaded guilty to or were convicted of crimes ranging from drug theft and peddling to assault, fabricating arrests, and filing false reports.

The Rampart scandal bore heavy costs, financially as well as in human terms. Several dozen criminal convictions credited to the work

of the corrupt officers were overturned. By 2003, the city had already paid $40 million to settle lawsuits. In a settlement with the federal government in 2000, the Los Angeles City Council accepted a CONSENT DECREE that placed the city's police department under the supervision of a federal judge for five years to implement and monitor reforms.

However, reform is no panacea. Even New York City's extensive reforms were called into doubt by two high-profile police cases in the 1990s. Both highlighted the difficulties inherent in prosecuting even apparently clear-cut misconduct. The first, in 1997, involved Haitian immigrant Abner Louima, who was shockingly beaten in a police cruiser and sodomized in a bathroom with a broom handle by four NYPD officers. Louima ultimately settled a civil case against the department for $8.7 million in 2001, one of the highest police brutality settlements ever paid and the highest by New York City since paying a $3 million settlement in the choking death of Anthony Baez in 1994.

Yet, despite much public frustration, prosecution of the officers was less conclusive. Officer Justin Volpe pleaded guilty to leading the SODOMY assault and was sentenced to 30 years in prison. However, in 1999, his fellow three officers were acquitted on charges of assault in the police cruiser; one of them, officer Charles Schwarz, was convicted of violating Louima's civil rights for holding him down during the bathroom assault. In 2000, all three were convicted of obstructing justice for their actions in covering up evidence of the attack, but these convictions were later overturned in *United States v. Schwarz*, 283 F.3d 76 (2d Cir. 2002). Ordered a new trial on the civil rights charge, Schwarz reached a plea bargain in September 2002, agreeing to be sentenced to a 5-year prison term.

The second New York controversy involved the killing in 1999 of an unarmed man. Four undercover police officers shot Amadou Diallo 41 times after stopping the Guinean immigrant in the vestibule of his apartment building, where, they said, he reached into his back pocket. Large public protests attracted activists such as Susan Sarandon and former New York mayor David Dinkins, who argued that the department's so-called Aggressive Street Crimes Unit was in fact far too aggressive. In 2000, the four officers were acquitted in a trial that supporters said vindicated them but which critics blamed on lax prosecution.

Outside the courts, mounting resentment over discriminatory misconduct by police officers has occasionally led to rioting. In contemporary experience, the Los Angeles riots in 1992 followed the acquittal of white police officers charged with the videotaped beating of black motorist RODNEY KING. In April 2001, three days of rioting in Cincinnati followed the acquittal of a white police officer on charges of shooting Timothy Thomas, a 19-year old unarmed black man.

Cities, courts, police departments, and criminologists all continue to examine ways to bring meaningful reform to police departments. Some critics have argued that misconduct and corruption are age-old problems that resist all efforts at eradication; the best society can do, in this view, is monitor and correct. Others trace recent problems to public policy that emphasizes aggressive policing of drug, gang, and street crimes. Whatever the cause and the solution, until more efficacious remedies are found, some citizens will still require protection from the very people appointed to protect and serve them.

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CROSS-REFERENCES

Civil Rights; Conspiracy; Constitutional Law; Discrimination; Fourth Amendment; Immunity; Ku Klux Klan; Pinkerton Agents; Privacy.

## POLICE POWER

*The authority conferred upon the states by the* TENTH AMENDMENT *to the U.S. Constitution and which the states delegate to their political subdivisions to enact measures to preserve and protect the safety, health,* WELFARE*, and morals of the community.*

*Police power* describes the basic right of governments to make laws and regulations for the benefit of their communities. Under the system of government in the United States, only states have the right to make laws based on their police power. The lawmaking power of the federal government is limited to the specific grants of power found in the Constitution.

The right of states to make laws governing safety, health, welfare, and morals is derived from the Tenth Amendment, which states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people." State legislatures exercise their police power by enacting statutes, and they also delegate much of their police power to counties, cities, towns, villages, and large boroughs within the state.

Police power does not specifically refer to the right of state and local government to create police forces, although the police power does include that right. Police power is also used as the basis for enacting a variety of substantive laws in such areas as ZONING, land use, fire and BUILDING CODES, gambling, discrimination, parking, crime, licensing of professionals, liquor, motor vehicles, bicycles, nuisances, schooling, and sanitation.

If a law enacted pursuant to the police power does not promote the health, safety, or welfare of the community, it is likely to be an unconstitutional deprivation of life, liberty, or property. The most common challenge to a statute enacted pursuant to the police power is that it constitutes a taking. A taking occurs when the government deprives a person of property or directly interferes with or substantially disturbs a person's use and enjoyment of his or her property.

The case of *Mahony v. Township of Hampton,* 539 Pa. 193, 651 A.2d 525 (1994) illustrates how a state or local jurisdiction can exceed its police power. *Mahony* involved a zoning ordinance enacted by the township of Hampton in Pennsylvania. The ordinance prohibited a private party from operating a gas well in a residential district but allowed the operation of such wells by the government. Jack D. Mahony, a landowner who operated a gas well, objected to the ordinance, arguing that the disparate treatment of public and private operation of gas wells was ARBITRARY and not justified by any concerns related to the police power. Mahony noted that the STATE DEPARTMENT of Environmental Regulation (DER) already regulated all gas wells in the state and that there was no factual basis for distinguishing between public and private wells.

The Supreme Court of Pennsylvania agreed with Mahony that the regulation by the DER was sufficient to secure the safety of the community. The court opined that if the township wished to further ensure gas well safety, it could require the posting of a bond with the township before granting a license to operate the well. Such a measure would ensure that the gas well was being operated by a financially secure person who would have the resources to keep the well in good repair. The court held that the total ban on private operation of gas wells in residential districts was unreasonable and that it bore no real and substantial relation to the health, safety, and welfare of the community. Therefore, the ordinance was an invalid exercise of the police power.

CROSS-REFERENCES

Eminent Domain; Land-Use Control; States' Rights.

## POLICY

*The general principles by which a government is guided in its management of public affairs, or the legislature in its measures. A general term used to describe all contracts of insurance.*

*As applied to a law, ordinance, or* RULE OF LAW*, the general purpose or tendency considered as directed to the welfare or prosperity of the state or community.*

## POLITICAL ACTION COMMITTEE

*A group not endorsed by a candidate or political party but organized to engage in political election activities, especially the raising and spending of money for "campaigning." Some political action committees (PACs) are organized solely to help defeat a candidate deemed undesirable by the group.*

PACs are most often organized around a particular trade, union, or business; they are also organized to promulgate particular social, economic, or political beliefs or agendas. For example, there are PACs formed to represent the interests of the pharmaceutical industry and the automotive industry. From an ideological perspective on ABORTION, there are both pro-life PACs and pro-choice PACs.

Some PACs are sponsored by a corporation, business, or LABOR UNION. Corporations, business interests, and LABOR UNIONS that sponsor PACs are prohibited from contributing their organizations' funds to the PACs they sponsor, but employees or members of the sponsoring organizations may contribute.

Many types of special-interest groups have established PACs, including the following examples: coal operators, hospitals, labor unions, banks, doctors, feminist groups, lawyers, insurance agents, pharmaceutical companies, and manufacturers. These groups commonly form PACs to promote their legislative goals. Some of these, such as the coal industry and labor PACs, generally give most of their donations to candidates they expect to favor their legislative agendas. Other PACs, such as those created by chiropractors or publishers, may dole out small contributions to dozens of candidates with widely varying political views.

Nearly all PACs have specific legislative agendas. Special-interest PACs are a major force in the financing of congressional campaigns. Their contributions heavily favor incumbents. These PACs' numbers and influence are growing. For example, in 1976 there were only 608 PACs; just 20 years later, in 1996, there were more than 4,000 PACs.

Some PACs are not sponsored by an organization. For example, some members of Congress have formed their own PACs. These PACs are separate from their candidate committees. This separation allows them to accept contributions and distribute larger sums than they otherwise could through their own candidate committee. A newly formed PAC must register with the FEDERAL ELECTION COMMISSION (FEC) within ten days of its formation. The PAC must provide the name and address for the PAC, its treasurer, and any affiliated organizations.

Many politicians also form *leadership PACs*. These PACs are not technically affiliated with the candidate. Rather, they are a way of raising money to help fund other candidates' campaigns. Leadership PACs are often indicative of a politician's aspirations for leadership positions in Congress or for higher office.

Although PACs are used mostly by members of the House and Senate, they also can be used in presidential campaigns. For example, in Bob Dole's presidential bid in 1994, Dole formed a leadership PAC called "Campaign America." This PAC helped contribute $62,000 to state and local candidates in Iowa. This type of money helped Dole to build a very strong base of support for his presidential bid during the Iowa primaries, although he eventually went on to lose that election bid. The laws regarding public funding for presidential candidates are technically separate from the Federal Election Campaign Act, Pub. L. 92–225, 86 Stat. 19, 2 U.S.C. § 451, and are found in the Presidential Campaign Fund Act, 26 U.S.C. §§ 9001-9012, and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031–9042.

PACs first came into existence in 1944. The Congress of Industrial Organizations (CIO) formed the first PAC to raise money for the reelection of President FRANKLIN D. ROOSEVELT. The PAC received voluntary donations from union members rather than from union treasuries; this system did not violate the Smith Connally Act of 1943, which forbade unions from contributing to federal candidates. Although commonly called PACs, federal election law refers to these accounts as "separate segregated funds" because money contributed to a PAC is kept in a bank account separate from the general corporate or union treasury.

In 1936, labor unions began spending union dues to support federal candidates sympathetic to the workers' issues. This practice was prohibited by the Smith-Connally Act of 1943, Pub. L. No. 78-89, 57 Stat. 163 (1943). Thus, labor unions, corporations, and interstate banks were effectively barred from contributing directly to candidates for federal office. In 1944, the Congress of Industrial Organizations (CIO), one of the largest labor interest groups in the nation, found a way to go around the constraints of the

Smith-Connally Act by forming the first political action committee, or PAC.

The CIO's political goal was to support the re-election of President Franklin D. Roosevelt. Because the CIO was a union and prohibited from using union money to support a federal candidate by the Smith Connally Act, the PAC circumvented the prohibitions of the act by soliciting volunteer contributions from individual union members.

In the wake of the WATERGATE political scandal in the early 1970s, Congress passed new campaign financing legislation known as the Federal Election Campaign Act (FECA). FECA was intended to do the following:

- achieve full disclosure of the sources of campaign contributions;
- limit the size of campaign contributions by wealthy individuals and organized interest groups;
- provide public funding—with spending limits—for presidential candidates; and
- enforce campaign finance rules through a new ADMINISTRATIVE AGENCY, the Federal Election Commission (FEC).

This legislation also continued older prohibitions on the use of corporation and union treasury funds in federal elections. These provisions of FECA were sustained by the Supreme Court in the leading case of *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, L. Ed. 659 (1976).

Following the 2002 midterm elections, a new set of campaign finance laws went into effect. The Bipartisan Campaign Reform Act (BCRA), Pub. L. No. 107-155, 116 Stat. 81, is considered the most sweeping change of the U.S. campaign finance system since the FECA. The legislation was sponsored by Senators JOHN MCCAIN (R-AZ) and Russ Feingold (D-WI) and Representatives Chris Shays (R-CT) and Marty Meehan (D-MA).

The BCRA is an attempt to curb the use of "soft money" in campaigns. Basically, soft money is money donated to political parties in a way that leaves the contribution unregulated. Conversely, "hard money" consists of political donations that are regulated by law through the Federal Election Commission. The soft money loophole was created, not by Congress, but by the Federal Election Commission in an administrative ruling in 1978. The law also increases the contribution limits for individuals giving to federal candidates and political parties.

PACs can donate up to $5,000 to a candidate's campaign committee for each individual election bid, and PACs can give $5,000 a year to any other PAC. PACs may receive up to $5,000 from any one individual, PAC, or party committee during any given calendar year. They can also donate up to $15,000 annually to any national party committee. PACs that affiliate with other like-minded PACs are treated as one donor for the purpose of contribution limits.

The Supreme Court has ruled that spending in support of or in opposition to a candidate that is not coordinated with any candidate cannot be limited. Such "independent expenditures" can be made by either individuals or PACs. Independent expenditures are those made on behalf of (or against) a candidate that are not coordinated with a candidate. For example, an exporters' PAC might spend $50,000 on TV ads critical of a candidate's stand on import restrictions and urge a vote against that candidate.

Political ads which urge the viewer to "vote for" or "vote against" a candidate are examples of express advocacy and must be paid for from

**PAC Campaign Contributions, 1979 to 1998**

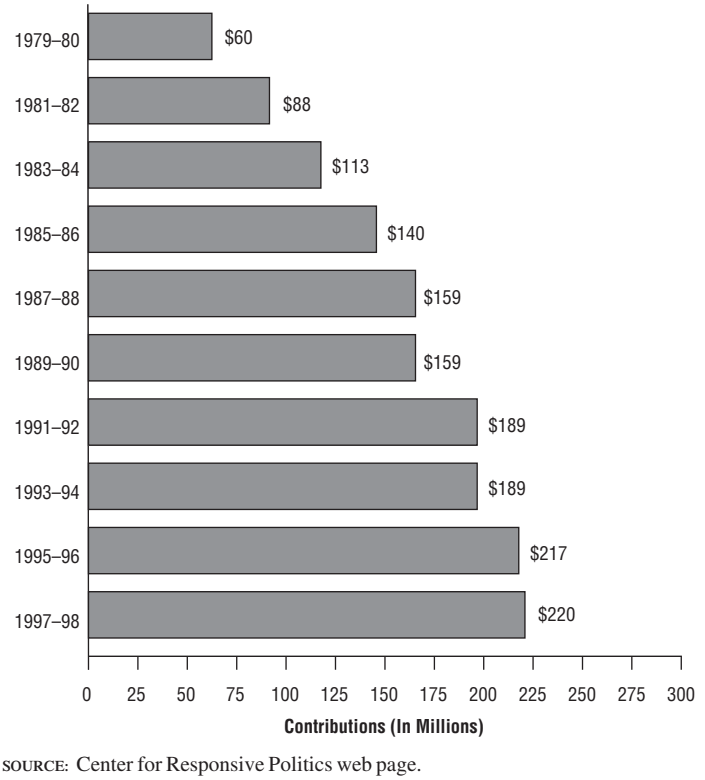


SOURCE: Center for Responsive Politics web page.

contributions which come under the restrictions of federal campaign finance laws, including prohibitions on contributions by corporations or labor unions. Advertising campaigns discussing issues—and not directly advocating the defeat or election of a candidate—are not subject to federal campaign finance laws. Thus, these "issue advocacy" campaigns are not subject to limits on spending or contributions and are not required to disclose their contributions or expenditures.

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Campaign Finance Reform.

## POLITICAL CAMPAIGN LAW

*Statutes and court rulings that govern candidates running for public office.*

Political campaign laws have been enacted to ensure fair elections and to prevent misleading or false information from being given to voters. Though federal and state laws that govern campaign financing dominate the headlines, there are a host of state laws that a candidate must follow during a campaign. A candidate who violates campaign laws risks criminal prosecution or the **FORFEITURE** of the public office.

Political campaigns are protected by the **FIRST AMENDMENT**, but **FREEDOM OF SPEECH** is not unlimited. For example, state laws prohibit candidates from using the term "reelect" in campaign signs and literature if the person is not the incumbent of that office. Candidates are also barred from making "false claims of support" that falsely state or imply the endorsement of a political party or an organization. Moreover, a candidate cannot state in printed campaign literature that specific individuals endorse the candidate without first obtaining written permission from those individuals. All of these laws speak to fraudulent **MISREPRESENTATION** by a candidate.

More difficult situations arise when one candidate alleges that another candidate has intentionally misrepresented the position of the other. Open political debate is expected in a campaign but candidates can be prosecuted if the claims are judged to be objectively false. Candidates who retract or withdraw challenged campaign literature may escape any penalties for these actions if done in a timely manner. However, false claims made in the closing days or hours of a campaign will be scrutinized more closely.

Up until the early twentieth century political campaigns were marred by corruption. Citizens traded their vote for money or the promise of a government job or benefit. Progressive Era reformers sought to diminish the power of political machines that used **BRIBERY**, as well as coercion, to assure the election of their candidates. States have enacted criminal laws that prohibit bribing persons to vote or not vote in an election. For example, a person may transport voters to the polls on election day but may not solicit votes. Persons who directly or indirectly threaten the use of force, coercion, economic **REPRISAL**, loss of employment, or other harm to compel individuals to vote or not vote for a candidate are also subject to prosecution.

Political advertising on television and radio is also subject to regulation. For example, newspaper print ads, along with radio and television broadcasts, must convey to the public that a message is a paid advertisement. Such laws seek to prevent voters from believing that the message is actually news. In addition, the name of the candidate, party, or organization that paid for the advertisement must be disclosed at the beginning or end of the advertisement. This requirement has been evaded at times when a shell organization is created to disguise the true identity of the sponsor.

Candidates who violate these types of campaigns laws can be prosecuted. A losing candidate typically lodges a complaint with the local district or county attorney, alleging certain violations. If the district attorney finds merit in the allegations a prosecution will follow. This type

of prosecution is rare but a candidate who is convicted of a campaign law violation may forfeit the nomination or office in question. However, forfeitures will occur only if it is proven that the candidate committed the act or knew that another person committed the act. Courts will reject forfeiture if the act was trivial or accidental and it would be unjust to declare forfeiture. Even if a court declines to declare forfeiture, legislatures have the right to determine their membership. Occasionally, a legislative body will refuse to seat a person who has committed campaign violations.

Candidates must follow campaign financing rules. State and federal laws authorize public financing of many campaigns. Candidates who accept public financing must abide by the strings that are attached to this funding. In addition, political campaigns must maintain financial records of contributions and expenditures, which are filed at designated times before, during, and after a campaign. Campaign committees may be fined for failing to file reports on time or for substantive violations. The **FEDERAL ELECTION COMMISSION** (FEC) oversees campaign financing for federal elections. At the state level a campaign finance board or the **SECRETARY OF STATE** may oversee this task.

CROSS-REFERENCES

Election Campaign Financing.

## POLITICAL CAMPAIGNS

See **DEMOCRATIC PARTY; ELECTION CAMPAIGN FINANCING; ELECTIONS; REPUBLICAN PARTY.**

## POLITICAL CRIME

*A serious violation of law that threatens the security or existence of the government, such as* **TREASON** *or* **SEDITION.**

## POLITICAL QUESTION

*An issue that the federal courts refuse to decide because it properly belongs to the decision-making authority of elected officials.*

Political questions include such areas as the conduct of foreign policy, the ratification of constitutional amendments, and the organization of each state's government as defined in its own constitution. The rule preventing federal courts from deciding such cases is called the political question doctrine. Its purpose is to distinguish the role of the federal judiciary from those of the legislature and the executive, preventing the former from encroaching on either of the latter. Under the rule, courts may choose to dismiss cases even if they have jurisdiction over them. However, the rule has no precise formulation, and its development since the 1960s has sometimes been unpredictable.

The Supreme Court originated the idea of political questions in the early 1800s during its formative era. As with other judicial doctrines created by the Court, the rule is interpretive and self-imposed. It is neither a result of legislation nor a part of the U.S. Constitution, although it appears to emanate from the Constitution's **SEPARATION OF POWERS.** The Court created the political question doctrine as part of the broader concept of justiciability—the issue of whether a matter is appropriate for court review. Appropriate matters are called **JUSTICIABLE** controversies and may proceed to court. Political questions are not regarded as appropriate matters; they are not justiciable and, generally, will be dismissed. The political question doctrine will not be applied to every matter that arouses fierce public debate, as seen in the Court's rulings on **ABORTION** and **AFFIRMATIVE ACTION.** As the history of the Supreme Court shows, the determination of whether an issue is justiciable is at its own discretion.

Chief Justice **JOHN MARSHALL** first used the term *political question* in 1803 at a time when the Court sought to tread delicately between warring factions of politicians in Washington. Not until 1849 was the idea elaborated, in response to a crisis in the state of Rhode Island known as the Dorr Rebellion: a political uprising had resulted in the passage of two separate state constitutions, the declaration of **MARTIAL LAW**, and the promise of military intervention by President **JOHN TYLER.** The Supreme Court was asked to settle critical constitutional questions about the nature of republican government but refused (*Luther v. Borden,* 48 U.S. [7 How.] 1, 12 L. Ed. 581 [1849]). Chief Justice **ROGER TANEY** instead delivered the first articulation of the doctrine: federal courts should leave certain constitutional questions to the legislative and executive branches in any matter that is "a political question to be settled by the political power."

From the mid-nineteenth century until the 1960s, the political question doctrine changed very little. Then the Supreme Court began to narrow it: where previously a broad rule applied,

*Richard Nixon's counsel argued that the president's refusal to comply with the subpoenas of White House tapes was a political question because it was a dispute among members of the executive branch, namely the president and special prosecutor. The Supreme Court compelled Nixon to produce the tapes, prompting him to resign on August 8, 1974.*

AP/WIDE WORLD PHOTOS

now matters that would have been rejected as political questions became justiciable controversies. In a landmark case in 1962, the Court intervened to allow a challenge to the way in which the Tennessee legislature apportioned its voting districts (**BAKER V. CARR**, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663). Again, in 1969, the Court took up a matter that previously would have been dismissed. This was its decision that the House of Representatives could not exclude a duly elected member who met all constitutional qualifications, despite the provision in Article I of the Constitution that gives both houses of Congress the power to judge qualifications (*Powell v. McCormack,* 395 U.S. 486, 89 S. Ct. 1944, 23 L. Ed. 2d 491).

These cases cast doubt on the future of the doctrine. In 1974, the Court added further uncertainty when it ruled against President Richard M. Nixon's claim of **EXECUTIVE PRIVILEGE** in the **WATERGATE** scandal (**UNITED STATES V. NIXON**, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039). It is well settled that the federal courts cannot supervise or control the decisions of the president or other executive officials. President Nixon had relied on this fact when he defied congressional subpoenas asking him to release tapes and documents made in the White House. The Court chose, however, not to adhere rigidly to the rule by holding that the demands of a fair trial and criminal justice outweighed the president's claim.

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Apportionment; Dorr, Thomas Wilson; Judicial Review; Warren Court.

## POLITICAL TRIAL

*A trial that addresses* **POLITICAL QUESTIONS**, *involves political officials, or serves political agendas. In certain circumstances the term is used in a pejorative sense to criticize a particular trial or proceeding as unfair or unjust.*

Although it is sometimes difficult to distinguish political trials from ordinary legal proceedings, political trials generally fall into one of four categories. The most familiar type of political trial is a partisan trial, which consists of criminal legal proceedings instituted by the government to solidify its power, extinguish its opposition, or flex its muscle. Such political trials, while taking place in a courtroom, have little to do with justice. Instead, partisan trials serve to promote the ideology of those holding the reins of power.

In many countries partisan trials are easy to identify because the prosecutors, judges, and defense attorneys are chosen by the government based on their allegiance to the regime's political philosophy. In other countries the government may exert subtle pressure upon judges and attorneys to influence the outcome of a case. In either situation such proceedings rarely produce a result that is fair or impartial. Some of the most notorious partisan trials took place in **ADOLF HITLER**'s Germany and **JOSEPH STALIN**'s Soviet Union where many of the judges, prosecutors, and defense attorneys served as instruments of terror and propaganda for their totalitarian leaders.

*Andrew Hamilton (standing, arm extended) defends New York printer and journalist John Peter Zenger in his 1735 political trial on charges of seditious libel.*

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A second familiar type of political trial involves the prosecution of religious and political dissenters. Since time immemorial, governments have been confronted by persons who disobey the law for reasons of conscience. Such disobedience, which can take the form of active or passive resistance, presents a dilemma for most governments.

On the one hand, governments must prosecute persons who disobey the law to maintain the integrity of the legal system. Yet if the prosecution takes place in a public forum, a political or religious dissenter is likely to question the propriety of a particular law or policy and challenge the legitimacy or competency of the existing government. On the other hand, if the government covertly silences a dissenter in private, the legal system exposes itself to charges of persecution, which compromises the public's respect for the law.

By prosecuting dissenters in open court before an impartial judge and an unbiased jury, the U.S. legal system attempts to strike a balance between the competing interests of the government and dissenters. Historically, many regimes have been unable to achieve this delicate balance. In ancient Greece 500 Athenian jurors made a martyr out of Socrates when they sentenced him to death for corrupting the youth and criticizing government officials. The Roman governor Pontius Pilate sparked concerted religious opposition to his government by condemning Jesus of Nazareth for blasphemously claiming to be the Son of God and King of the Jews. In 1735 British authorities planted the seeds of rebellion in the American colonies when they unsuccessfully prosecuted journalist **JOHN PETER ZENGER** for seditious libel.

A third common type of political trial involves nationalists who challenge a government's authority to represent them. Nationalists speak for an identifiable group of people who share a common characteristic, such as race, religion, or ethnicity. Trials of nationalists call into question both the unity of society and the

capacity of a regime to speak for the people. Governments prosecute nationalists in part to publicly affirm their ability and resolve to govern the populace. Faced with certain defeat in the short run, many nationalists still present a vigorous defense to raise political awareness and record their battle for posterity.

The 1922 trial of MOHANDAS K. GANDHI, for example, served as a lightning rod of nationalism in India by uniting opposition against the oppressive imperial government of Great Britain. The TREASON trials of Nelson Mandela in Pretoria, which took place in the late 1950s and early 1960s, similarly raised the consciousness of blacks in South Africa and focused the world's attention on the apartheid system of government. In both cases, though the nationalists were temporarily silenced by the regimes they opposed, their causes ultimately prevailed as their people were given an equal voice in the affairs of government.

The fourth type of political trial involves the trial of entire regimes, or the leading members of a particular government. When governments are overthrown by a coup or revolution, the new regime must decide how to treat members of the old regime. In some instances members of the old regime are granted clemency, and efforts are made to assimilate them into society. In other instances members of the old regime are expelled from office and banished from the country and deprived of their citizenship. However, in a great number of cases the old regime is put on trial by the new regime and prosecuted for every transgression, great and small.

These trials can serve at least two purposes. First, they can highlight the malignant qualities of the demised regime. Second, they can underscore the virtue of the new regime by tempering the vengeful calls for summary executions that regularly follow the cessation of hostilities in a revolution, civil war, or other type of military conflict. The Nuremberg WAR CRIMES trials, in which twenty-four of the top Nazis were tried by the Allied powers following WORLD WAR II, provides a modern example in which members of a vilified regime were afforded a full assortment of legal protections despite demands for summary execution.

In a limited sense all trials have a political element. As one of the three branches of government, the judiciary is an inherent part of the political system. Additionally, all trials carry with them tangible political ramifications by delineating the rights and responsibilities of civil and criminal litigants. Because many judicial decisions are considered precedent, the legal principles established in one case may be applied to other members of society in a subsequent analogous case.

However, in the United States the term *political trial* has acquired a broader meaning. A trial is generally characterized as political when it presents a question that transcends the narrow issue of guilt or innocence by implicating larger societal, cultural, or international considerations. The WATERGATE trials of the mid-1970s, for example, focused on the legal issues of breaking and entering, conspiracy, and OBSTRUCTION OF JUSTICE. However, these trials also dramatized the fall of a president and the consequences of abusing power.

Political trials often present basic dilemmas that engage the public in a common dialogue. These trials may prompt society to examine and even reconsider its fundamental values. Certain political trials, such as the Nuremberg and Watergate trials, have helped define an era or a nation.

"THE PEOPLE OF THIS CONTINENT ALONE HAVE THE RIGHT TO DECIDE THEIR OWN DESTINY."
—JAMES K. POLK

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## ♦ POLK, JAMES KNOX

James Knox Polk, eleventh president of the United States, served just one term in office, but in that time he was extremely influential in shaping the country's evolution into a large and politically formidable nation. Polk's primary achievements came in the area of foreign affairs, where he completed the annexation of Texas;

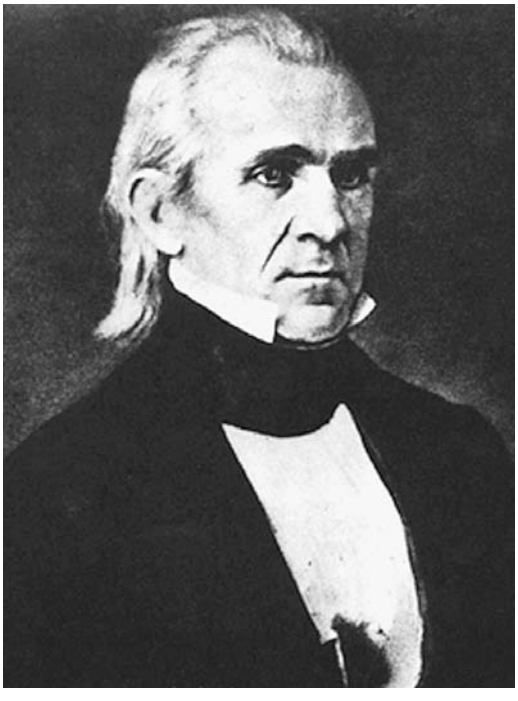

*James K. Polk.*
LIBRARY OF CONGRESS

directed the Mexican War (1846–48); and negotiated with Great Britain for the acquisition of the Oregon territory. In domestic policy, Polk was a strong advocate for lowering tariffs and establishing an independent treasury for the United States. Historians and presidential scholars consistently rate Polk among the most effective and important presidents of the United States.

James Polk was born on November 2, 1795, in Mecklenburg County, North Carolina. He graduated from the University of North Carolina at Chapel Hill and went on to study law, establishing a successful practice in Columbia, Tennessee.

Polk soon embarked on a political career, being elected to the Tennessee legislature in 1823 and the U.S. House of Representatives in 1825. In Congress, Polk fought to defend individual freedoms, the rights of the states against the centralizing tendencies of the national government, and a strict interpretation of the Constitution. In 1839 Polk was elected governor of Tennessee. However, his two-year term in office was undistinguished, and he was defeated in the 1841 and 1843 gubernatorial races.

After his second defeat, Polk's political career appeared to be over, but events took a surprising turn. MARTIN VAN BUREN, who had served as Andrew Jackson's vice president from 1833 to 1837 and as president from 1837 to 1841, was expected to be the DEMOCRATIC PARTY's presidential nominee for the 1844 election, but Van Buren's candidacy was derailed when he announced in April 1844 that he was opposed to the annexation of Texas on the grounds that it would constitute aggression against Mexico. Van Buren's support immediately eroded, because the annexation of Texas was a controversial political item widely supported by ANDREW JACKSON and his followers. By the time the Democrats held their nominating convention in late May, the party was in turmoil. Van Buren's supporters failed to generate the support needed for their candidate and Polk was nominated to be the presidential candidate instead.

The Whig presidential candidate in 1844 was the powerful and influential HENRY CLAY of Kentucky, who had held important positions in both the House and the Senate in addition to serving as SECRETARY OF STATE under JOHN QUINCY ADAMS. The campaign was hard fought and bitter. Polk eventually won with 170 electoral votes compared with Clay's 105; in the popular vote, Polk received just 38,000 more votes than Clay, out of the almost 2,700,000 votes cast.

The Polk administration added approximately 1.2 million square miles to the United States, increasing its size by fifty percent. The addition resulted from the three major foreign policy matters Polk oversaw: the annexation of Texas, the Mexican War, and negotiations with Great Britain over the Oregon territory.

Polk inherited the Texas issue from the administration of JOHN TYLER. Tyler had wrestled with Congress over methods for annexing Texas, which had existed as the independent Lone Star Republic since winning its independence from Mexico in 1836. Tyler and Congress had agreed that Texas would be given the opportunity to vote for annexation, and Polk continued this approach. The Texas congress eventually approved annexation and wrote a state constitution, which the voters approved in a general REFERENDUM. In December 1845 the U.S. Congress completed the transaction by admitting Texas as the twenty-eighth state.

The annexation led to territorial disputes that resulted in war between the United States and Mexico. For several years relations between the United States and Mexico had been rocky, primarily because the United States had made financial claims against the Mexican government. Since winning its independence from

Spain in the early 1820s, Mexico had had a series of unstable governments, and foreign nationals often had lost property during the resulting revolutions. Those individuals and their governments lodged claims against the Mexican government, and by the mid-1840s, these claims amounted to millions of dollars. This dispute over claims had soured relations between the United States and Mexico, and the annexation of Texas brought matters to a crisis. As part of the annexation agreement, the United States government had consented to recognize Texas's claim to the Rio Grande boundary and to provide military protection to defend that boundary. For its part, Mexico had never given up hope of winning back Texas, and the United States' annexation, together with the assertion of the Rio Grande boundary, the placement of U.S. troops along the border, and the longstanding claims disagreement, led Mexico to break off diplomatic relations with Washington and accuse the United States of initiating war.

In response, Polk sent a representative to negotiate with the Mexican government, offering to buy California and New Mexico and relinquish U.S. claims against Mexico in return for a recognition of the Rio Grande boundary. The Mexican government refused to negotiate, and by spring of 1846, skirmishes were beginning to break out along the border. Polk requested that Congress declare war, which it did by an overwhelming margin. Though the United States lacked a powerful professional army, volunteers signed up in droves. The war lasted until September 1847, when the Mexican government agreed to enter into peace negotiations. In the resulting agreement, the Treaty of Guadalupe Hidalgo, Mexico agreed to recognize the Rio Grande as the boundary of Texas and to cede New Mexico and upper California to the United States; for its part, the United States agreed to relinquish all claims against Mexico and to pay the Mexican government $15 million.

The third major foreign policy issue requiring Polk's attention was the dispute between the United States and Great Britain over the Oregon territory, which stretched from the northern boundary of California to the Alaska panhandle, including what is now Oregon, Washington, and British Columbia. Both countries claimed the area but had agreed in 1818 to occupy it jointly, with the provision that either party could terminate the agreement with a year's notice. The United States had repeatedly requested to resolve the issue by extending the forty-ninth parallel boundary that existed between the two countries east of the Rocky Mountains, but Britain had refused, insisting on the Columbia River as the boundary.

The situation had remained unresolved, and British fur traders had continued to dominate the area into the 1830s. At that time, however, increasing numbers of U.S. settlers migrated into Oregon and pressed the United States to address their needs and defend their interests. After the 1844 presidential election, the issue became heated. As U.S. statements on the issue became more angry and aggressive, the British government grew concerned that war might break out, and it entered into earnest negotiations with the United States. In July 1845 Polk once again offered to draw the boundary at the forty-ninth parallel, but the British minister in Washington rejected the offer. Furious, Polk withdrew the offer, instead reasserting the U.S. claim to the entire territory.

In his first message to Congress in December 1845, Polk continued this hard line on Oregon,

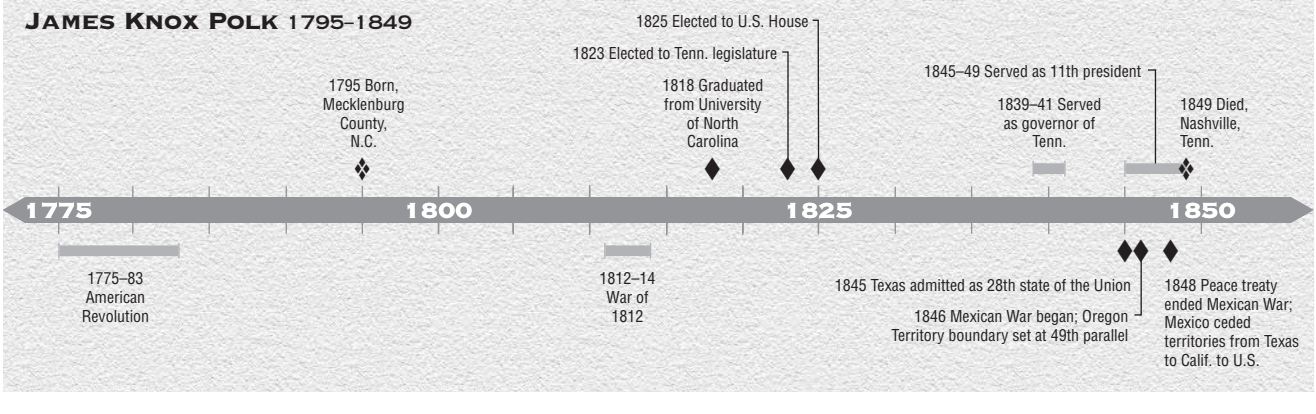

asking Congress to provide the one year's notice that the United States was terminating its joint occupancy agreement with Great Britain. In addition, he asked that jurisdiction be extended to Americans living in Oregon and that military protection be provided to emigrants along the route to Oregon. Finally, Polk reasserted the MONROE DOCTRINE, which held that North America was not open to any further colonization by European powers. Polk's tough stance apparently spurred Great Britain to renew negotiations, and this time it agreed to the forty-ninth parallel boundary. The treaty was signed on June 15, 1846.

A principal goal of Polk's domestic agenda was to eliminate the high tariffs that had been imposed in 1842 under the Tyler administration. Polk believed that low tariffs were crucial for the success of the agricultural sector, and after strong and sustained LOBBYING, he was able to persuade Congress to reduce tariffs in July 1846.

"IN THE DAYS BEFORE THE FEDERAL RULES OF CIVIL PROCEDURE, TRIAL BY AMBUSH AND SECRECY WAS CONSIDERED NORMAL IN THE COURTS OF LAW."
—MILTON POLLACK

A second focus of Polk's domestic efforts was the establishment of an independent treasury for the United States. Previously, the government's funds had been held in national banks or in various state banks, but Polk argued that the government's money should not be deposited in banks at all, but should be held in its own independent treasury.

Despite Polk's many successes, presidential scholars agree that he utterly failed in his ability to foresee the catastrophic consequences that the SLAVERY issue would have for the nation. A slaveholder with plantations in Tennessee and Mississippi, Polk never actively defended slavery, but he failed to see the importance that it would have, instead believing that it was an aggravating side issue that hampered the resolution of more important problems.

Polk left office when his term ended in 1849, remaining faithful to his election promise that he would serve only one term as president. Polk returned to Tennessee exhausted and in ill health. Just three months after leaving office, Polk died unexpectedly on June 15, 1849. He was fifty-four years old.

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## POLL TAX

*A specified sum of money levied upon each person who votes.*

Poll taxes, as a prerequisite to voting in federal elections, are prohibited by the TWENTY-FOURTH AMENDMENT to the U.S. Constitution and have been held unconstitutional with respect to state elections.

## ♦ POLLACK, MILTON

Two of the nation's great financial crises form the bookends of Milton Pollack's legal career. Pollack began his first phase of that career, as a SECURITIES lawyer, just two weeks before the 1929 STOCK MARKET crash. Sixty years later, as a federal district court judge, he used his knowledge and experience to resolve a multibillion-dollar disaster that was left when Drexel Burnham Lambert, a powerful Wall Street investment bank, collapsed into BANKRUPTCY. The lawsuits relating to Drexel were expected to drag on for decades, but under Pollack's guidance, they were resolved and completed in just over three years. Pollack considers the Drexel CLASS ACTION suit (*In re Drexel,* 960 F. 2d 285 [2d Cir. 1992]) and the resulting bankruptcy reorganization to be his "lifetime masterpieces."

Pollack was born September 29, 1906, in New York City. He attended Erasmus High School, and then Columbia College and Law School, where he received a bachelor of arts degree in 1927 and a doctor of JURISPRUDENCE degree in 1929. He was admitted to the New York bar in 1930. Pollack married Lillian Klein on December 18, 1932.

After graduation, Pollack joined the law firm of Gilman and Unger. By 1937, Gilman and Unger had become Unger and Pollack, and by 1943, Pollack had proved himself to be a force in both the legal and financial communities by winning a $4.5 million shareholder lawsuit against General Motors Corporation (*Singer v. General Motors Corp.,* 136 F. 2d 905 [2d Cir. 1943]).

In 1944, Pollack set out on his own. Over the next two decades, he established himself as an outstanding litigator.

On June 12, 1967, after almost 40 years as a practicing attorney, Pollack was appointed as U.S. district judge for the Southern District of New York by President LYNDON B. JOHNSON. Pollack authored more than 150 opinions relating to securities-regulation matters and many other issues.

In 1983, Pollack took senior (or semiretired) status. As a senior judge, he played a prominent role in major Wall Street disputes in the late 1980s and early 1990s, including the trials of JUNK BOND salesmen Michael R. Milken and Ivan F. Boesky. When the Drexel bankruptcy occurred, Pollack's lifelong experience made him the logical choice to handle the resulting avalanche of complaints and actions.

In 1989, Pollack approved a settlement that gave control over Drexel's continued operation to high-level SEC officials. The settlement required Drexel to cooperate in the government's investigation of former employees and to cut all ties with former Drexel executive Milken. In 1991, Pollack authorized the payment of $46.8 million to 80,000 persons who claimed losses from Boeksy's insider trading and securities FRAUD. That same year, Pollack approved the settlement of a class action suit by Drexel creditors who had been defrauded by the firm's securities transactions.

Pollack also presided over the 1993 trial of corporate raider Victor Posner. Because Posner had conducted illegal takeovers and had had previous criminal dealings with Milken and Boesky, Pollack barred him from ever again heading a publicly traded company. Judge Pollack barred the Posners under the Securities Law Enforcement Remedies Act of 1990 (Remedies Act) from acting as officers and directors of any public companies (Pub. L. No. 1-429, 104 Stat. 931).

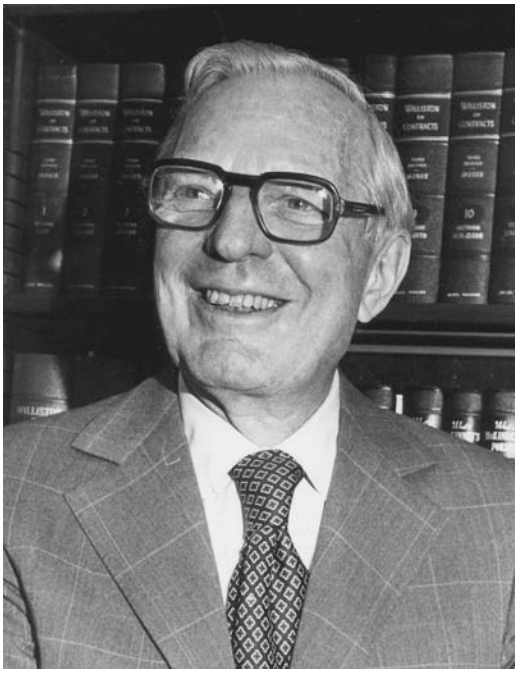

*Milton Pollack.*
AP/WIDE WORLD PHOTOS

As a senior judge, Pollack has been acknowledged as a troubleshooter who is quick to help fellow judges who have fallen behind in their work and to advise younger judges on how to address courtroom problems. In addition to a full schedule in the Southern District of New York, Pollack also hears cases in Houston, Texas, during part of the year.

Pollack was the recipient of the Edward J. Devitt Award for Distinguished Service to Jus-

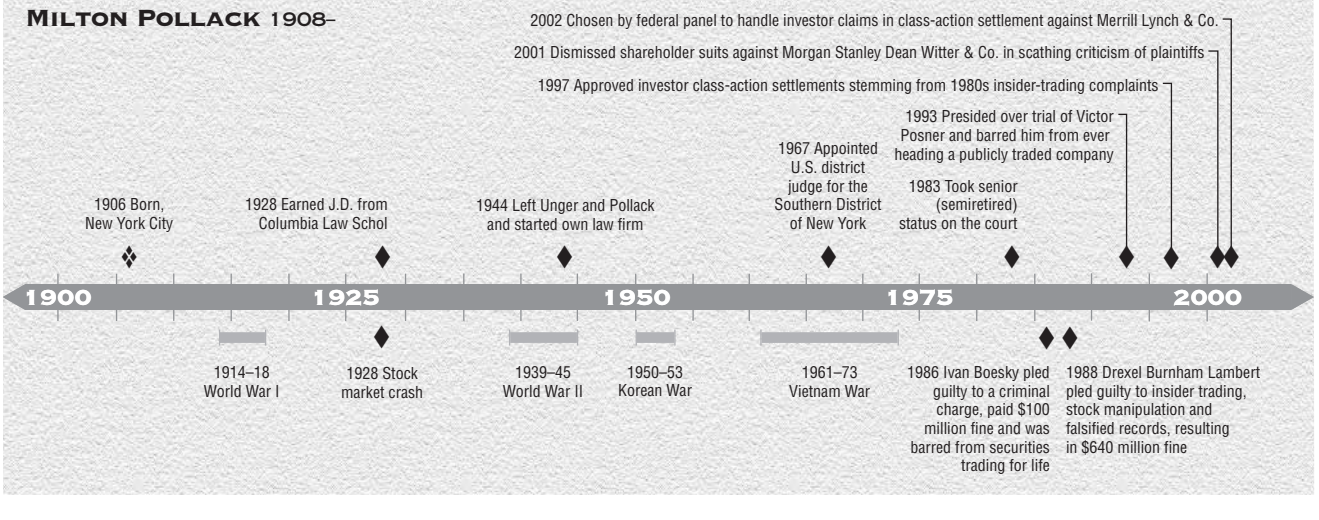

tice in 1995. The following year, he was praised for his handling of the liquidation of Drexel Burnham Lambert assets. In a 2000 interview for the federal courts' newsletter, Pollack stated his enjoyment of taking over long-delayed cases, particularly securities and trust cases, and getting them settled. In 2003, Pollack continued to work on cases of major importance.

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"MAN IS A FREE AGENT TO USE HIS TONGUE AND PEN, AS HE MAY USE HIS BRAIN AND BODY GENERALLY, FOR HIS OWN BENEFIT OR HARM IN THE CONDUCT OF HIS PRIVATE AFFAIRS."
—WALTER H. POLLAK

## ♦ POLLAK, WALTER HEILPRIN

Walter Heilprin Pollak was a lawyer and civil libertarian who is credited with convincing the U.S. Supreme Court to first adopt the **INCORPORATION DOCTRINE**, which the Court has used to extend most of the provisions of the **BILL OF RIGHTS** to limit actions by state and local governments. Pollak is also remembered for his arguments for the defense in **POWELL V. ALABAMA**, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932), which extended the **RIGHT TO COUNSEL** in death penalty cases to state criminal trials.

Pollak was born on June 4, 1887, in Summit, New Jersey. He graduated from Harvard University in 1907 and from Harvard Law School in 1910. He joined the prominent New York City law firm of Sullivan and Cromwell, but in 1912 he left for the smaller firm of Simpson, Warren, and Cardozo. Pollak worked with **BENJAMIN N. CARDOZO** before Cardozo left in 1914 to become a New York Court of Appeals judge. Following Cardozo's departure and the retirement of another partner, Pollak became partner in the firm of Englehard and Pollak.

Pollak was an ardent supporter of **FREEDOM OF SPEECH** and the Bill of Rights. He appealed to the U.S. Supreme Court Benjamin Gitlow's conviction under New York's Criminal Anarchy Act (N.Y. Penal Law §§ 160–161 [repealed 1967]) for "advocacy of criminal anarchy," which was defined as the advocacy of "the duty, necessity or propriety of overthrowing or overturning organized government by force or violence" (**GITLOW V. NEW YORK**, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 [1925]). Gitlow was convicted and sentenced to a prison term of five to ten years for distributing a left-wing pamphlet.

Pollak argued that the First Amendment's guarantees of freedom of speech and **FREEDOM OF THE PRESS** were applicable to the states because the **DUE PROCESS CLAUSE** of the **FOURTEENTH AMENDMENT** protects "liberty" from abridgement by the states. By incorporating the **FIRST AMENDMENT** provisions into the Four-

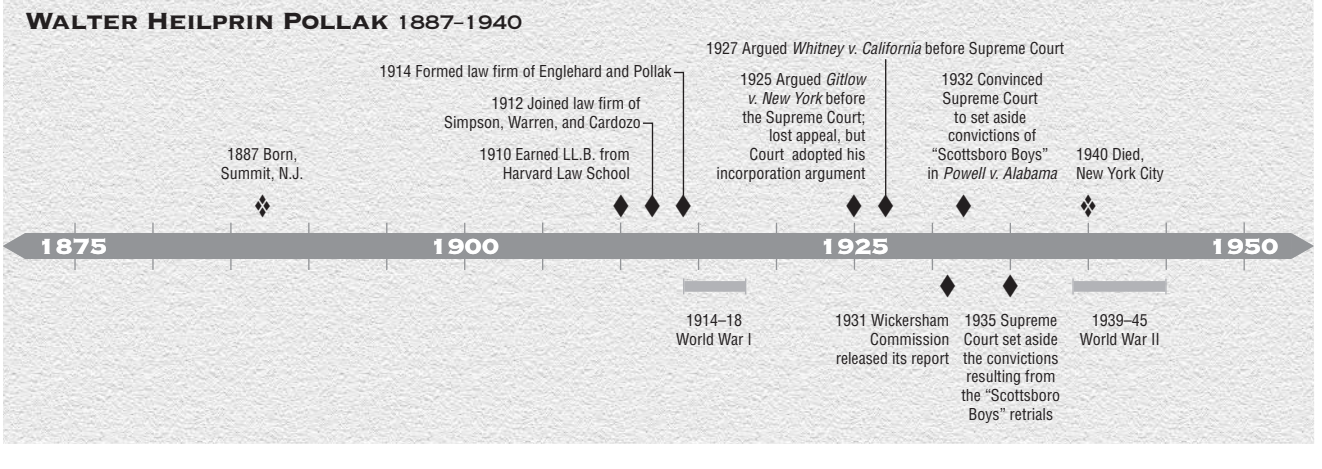

teenth Amendment, states could not restrain the free speech rights of persons such as Gitlow.

Though the Court did not agree with Pollak that the New York law was unconstitutional, it did adopt his incorporation argument, holding that freedom of speech and the press "are among the most fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."

In *Powell v. Alabama,* Pollak returned to the Supreme Court to argue on behalf of the "Scottsboro boys," a group of young African Americans sentenced to death for an alleged sexual assault on two white women. The defendants had not been provided effective legal counsel, and the trial had been a sham, evoking a public outcry in the North. Pollak convinced the Court that the defendants had been denied due process of law in violation of the Fourteenth Amendment.

Pollak also served on the staff of the National Commission of Law Observance and Law Enforcement, which came to be known as the WICKERSHAM COMMISSION. In 1931 the commission issued its fourteen-volume report, which revealed disturbing features of the U.S. criminal justice system. It brought to public attention the use of "third-degree" interrogation methods against criminal suspects and the need for more professional police forces. Pollak helped write the report on the third degree and a staff report that demonstrated that prosecutors in a particular case had condoned and probably encouraged the giving of false testimony in convicting the defendant. The Supreme Court later agreed with Pollak's conclusion on this case. In *Mooney v. Holohan,* 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935), the Court ruled that a state has denied due process if it deceives the trial judge and jury by presenting evidence known to be perjured.

Pollak died on October 2, 1940, in New York City.

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## POLLING THE JURY

*A practice whereby the jurors are asked individually whether they assented, and still assent, to the verdict; it consists of calling the name of each juror and requiring a declaration of his or her verdict before it is recorded.*

Polling can be accomplished by questioning the jurors individually or by ascertaining the fact of unanimous concurrence by general questions. Once concurrence has been determined, the polling concludes.

If unanimous concurrence, when required, does not exist upon the poll, the jury can be either discharged or ordered to resume further deliberation.

## ♦ POLLOCK, FREDERICK

As a legal scholar and historian, Sir Frederick Pollock was a leading figure in the modernization of English legal studies in the nineteenth century. Born in London on December 10, 1845, Pollock was educated at Trinity College, Cambridge, admitted to the bar in 1871, and soon

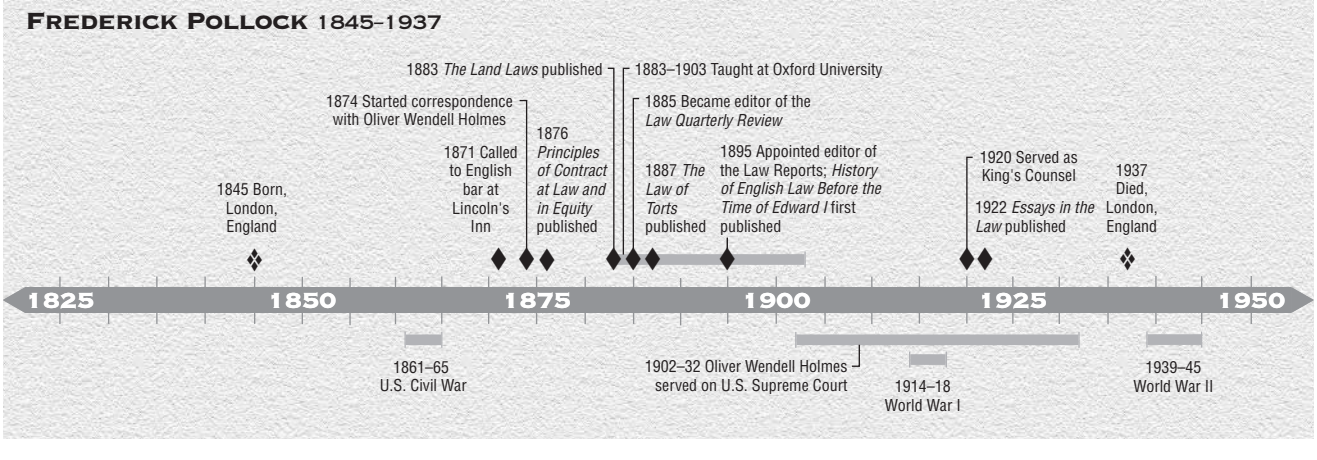

rose to eminence in his field as an author of groundbreaking histories and textbooks. He taught law in his native England and lectured briefly in the United States in 1903 and 1912. Besides his public contributions to legal scholarship, Pollock is remembered for his decades-long private correspondence with U.S. Supreme Court justice OLIVER WENDELL HOLMES JR., which was published posthumously.

Beginning in the 1870s, Pollock wrote a series of books that marked a turning point in English legal scholarship. His approach was different from that of his predecessors, who had built their work on specific applications of the law. Pollock emphasized the law's underlying principles. Written in a direct, clear style, works such as *Principles of Contract at Law and in Equity* (1876) and a companion work *The Law of Torts* (1887) became the standard legal texts for many years; more importantly, they served as models for other textbooks and thus helped to modernize English LEGAL EDUCATION.

"[THE COURTS] MAY SUPPLEMENT AND ENLARGE THE LAW AS THEY FIND IT, OR RATHER THEY MUST DO SO FROM TIME TO TIME, AS THE NOVELTY OF QUESTIONS COMING BEFORE THEM MAY REQUIRE; BUT THEY MUST NOT REVERSE WHAT HAS BEEN SETTLED."
—FREDERICK POLLOCK

Pollock possessed enormous talent and energy for scholarly work. In 1883 he began teaching at Oxford University as a professor of JURISPRUDENCE. That same year he published his classic work, *The Land Laws,* and two years later he became the first editor of the *Law Quarterly Review.* Over the next three decades, he published a number of books, including *Spinoza, His Life and Philosophy* (1880); *Possession in the Common Law* (with Robert S. Wright) (1888); *A First Book of Jurisprudence* (1896); *The Expansion of the Common Law* (1904); *The Genius of the Common Law* (1912) and *The League of Nations* (1920). Many of his books were reprinted several times, and his *History of English Law Before the Time of Edward I* (with FREDERIC W. MAITLAND) (1895; rev. ed. 1898) is still often cited by legal scholars.

Contemporary law interested Pollock as much as LEGAL HISTORY, and he played an important role in reforming the English legal system. He immersed himself in public service, variously holding positions as a member of the PRIVY COUNCIL, judge of the Admiralty Court of the Cinque Ports, King's Counsel, and chairman of the Royal Commission on the Public Records. In 1895 he was appointed editor of the Law Reports, charged with overseeing the production of reports on judicial opinions, and remained in that position for forty years. Such was his stature in the legal profession that even judges deferred to him.

Among Pollock's many admirers was his friend, Justice Holmes. The British law professor and the U.S. Supreme Court justice carried on a correspondence for sixty years. The letters contain discussions of the legal issues of the day, descriptions of their lives, and, at least by Holmes, mischievous portraits of their contemporaries. Each man admired the other's national legal system and his thinking: Pollock apparently borrowed ideas from Holmes for the first clear formulation of the doctrine of relative title—a concept related to ownership—in the 1880s. The correspondence was published as *The Holmes-Pollock Letters, 1874–1932* (1961). Pollock died in London on January 18, 1937.

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## POLLOCK V. FARMERS' LOAN & TRUST CO.

A 5–4 decision of the Supreme Court, *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed 759, *on rehearing,* 158 U.S. 601, 15 S. Ct. 912, 39 L. Ed. 1108 (1895), declared the Income Tax Act of 1894 unconstitutional and ultimately led to the enactment of the SIXTEENTH AMENDMENT, authorizing the imposition of an income tax by the federal government.

Charles Pollock—a Massachusetts stockholder employed by the New York defendant, Farmers' Loan & Trust Co.—appealed to the U.S. Supreme Court after unsuccessfully suing the defendant in federal courts to prevent it from breaching its fiduciary duty by filing returns for and paying a federal income tax. The tax was levied upon the profits that the defendant earned, including interest it received from income-producing real estate and bonds of New York City. Pollock alleged that such a tax, authorized by the Income Tax Act of 1894, was unconstitutional because it was a direct tax upon the property itself (28 Stat. 509). Article I, Section 2, of the U.S. Constitution mandated that all direct taxes be apportioned among the several states and Section 8 of the same article

required that direct taxes be uniform. Pollock argued and the Supreme Court agreed that this tax did not satisfy either requirement. The tax was levied upon the rents or income of real property held by particular corporations and businesses and was, in effect, a direct tax upon the real property itself.

Pollock also raised the issue as to the validity of the tax as levied upon New York City bonds. The Court accepted the reasoning that since states were powerless to tax the operations or property of the United States, the United States had no constitutional power to tax either state instrumentalities or property.

The Supreme Court ruled that the Income Tax Act of 1894 violated the Constitution and that the taxes imposed pursuant to it were void. It reversed the decree of the federal circuit court and remanded the case.

As a result of the decision in *Pollock v. Farmers' Loan & Trust Co.,* Congress recognized the need for a constitutional provision permitting the levy of federal income tax without APPORTIONMENT among the several states. It took, however, eighteen more years before there was sufficient support for the passage of the Sixteenth Amendment.

## POLLS

*The place where voters cast their ballots. Heads; individuals; persons singly considered.*

An objection to a particular juror is called a *challenge to the poll,* as distinguished from a *challenge to the array or panel,* which is opposition to the jury as an entity, based on a universal defect among the jurors.

## POLLUTION

*The contamination of the air, water, or earth by harmful or potentially harmful substances.*

The U.S. environmental movement in the 1960s emerged from concerns that air, water, and soil were being polluted by harmful chemicals and other toxic substances. During the industrial revolution of the nineteenth century, the mass production of goods created harmful wastes, much of which was dumped into rivers and streams. The twentieth century saw the popular acceptance of the automobile and the internal combustion engine, which led to the pollution of the air. Rapidly expanding urban centers began to use rivers and lakes as repositories for sewage.

Land pollution involves the depositing of solid wastes that are useless, unwanted, or hazardous. Types of solid waste include garbage, rubbish, ashes, sewage-treatment solids, industrial wastes, mining wastes, and agricultural wastes. Most solid waste is buried in sanitary landfills. A small percentage of municipalities incinerate their refuse, while composting is rarely employed.

Modern landfills attempt to minimize pollution of surface and groundwater. They are now located in areas that will not flood and that have the proper type of soil. Solid wastes are compacted in the landfill and are vented to eliminate the buildup of dangerous gases. Hazardous wastes, including toxic chemicals and flammable, radioactive, or biological substances, cannot be deposited in landfills, and the management of these wastes is subject to federal and state regulation. The federal government's Resource Conservation and Recovery Act (42 U.S.C.A. § 6901 et seq.) is a comprehensive regulatory statute that creates a "cradle to grave" system of controlling the entire hazardous waste life cycle.

Nuclear wastes are especially troublesome. Congress passed the Nuclear Waste Policy Act of 1982 (42 U.S.C.A. §§ 10101–226), which directed the DEPARTMENT OF ENERGY to formally begin planning the disposal of nuclear wastes and imposed most of the costs of disposal on the NUCLEAR POWER industry. Since 1986 the Department of Energy has been unsuccessful in finding an acceptable site. Yucca Mountain, Nevada, is the only place earmarked for a site study.

*Garbage is dumped in a landfill located near Sumpter Township, Michigan. Modern landfills are engineered to minimize groundwater contamination, and through federal and state regulation are off limits to the disposal of hazardous materials such as toxic or radioactive substances.*

AP/WIDE WORLD PHOTOS

Solid waste pollution has been reduced by recovering resources rather than burying them. Resource recovery includes massive systems that burn waste to produce steam, but it also includes the recycling of glass, metal, and paper from individual consumers and businesses. The elimination of these kinds of materials from landfills has prevented pollution and extended the period during which landfills can receive waste.

Land pollution also involves the accumulation of chemicals in the ground. Modern agriculture, which has grown dependent on chemical fertilizers and chemicals that kill insects, has introduced substances into the soil that kill more than pests. For many years the chemical DDT was routinely sprayed on crops to control pests. It was banned when scientists discovered that the chemical entered the food chain and was harming wildlife and possibly humans.

AIR POLLUTION is regulated by the federal government. The Clean Air Act was originally enacted in 1970 and was extensively amended in 1977 and again in 1990 (42 U.S.C.A. §§ 7401–7626; Pub. L. No. 95-95 [1977 amendments]; Pub. L. No. 101-549 [1990 amendments]). Under its provisions, every stationary and mobile pollution source must comply with emission standards as a means of cleaning up the ambient air quality in the area. This has meant that automobile emission control systems have been created and improved to meet more stringent air quality standards. Coal-burning electric power plants have been required to install filtration systems on their smokestacks, and manufacturing facilities have had to install equipment that "scrubs" polluted air clean.

WATER POLLUTION has existed longer than any other type of pollution. Depositing liquid and solid wastes in rivers, streams, lakes, and oceans was convenient and inexpensive for a company or municipality, but it eventually destroyed the ecosystems found in the water. Many large rivers became nothing more than sewers. Most troubling was the polluting of groundwater, creating serious health hazards for those people who drank water containing toxic substances.

The federal Clean Water Act (CWA) was originally enacted in 1972 and then amended in 1977 and 1987 (33 U.S.C.A. §§ 1251–1387; Pub. L. No. 95-217 [1977 amendments]; Pub. L. No. 100-4 [1987 amendments]). The CWA seeks to eliminate the "discharge of pollutants into navigable waters," to make water safe for people to fish and swim in, and to end the "discharges of toxic pollutants in toxic amounts." The CWA seeks to accomplish these goals through a variety of regulatory strategies.

CROSS-REFERENCES

Environmental Law; Environmental Protection Agency; Land-Use Control; Solid Wastes, Hazardous Substances, and Toxic Pollutants.

## POLYGAMY

*The offense of willfully and knowingly having more than one wife or husband at the same time. The offense of willfully and knowingly entering into a* second *marriage while validly married to another individual is bigamy.*

### The Crime

The law in every state prohibits a man or a woman from being married to more than one living person at a time. The crime of having more than one current spouse is called either bigamy (having two spouses) is a subset of the crime of polygamy (having more than one spouse), and the law makes no practical distinction between the two. Even in states that separately criminalize both polygamy and bigamy, either crime is committed when a married person first enters into an unlawful marriage with a second person. However, additional marriages beyond the second would support prosecution for additional criminal counts and possibly a longer sentence.

Most states base their polygamy laws on the MODEL PENAL CODE section 230.1, which provides that a person is guilty of the third-degree felony of polygamy if he or she marries or cohabits with more than one spouse at a time in purported exercise of the right of plural marriage. The crime is punishable either by a fine, imprisonment, or both, according to the law of the individual state and the circumstances of the offense. The crime of polygamy is deemed to continue until all COHABITATION with and claim of marriage to more than one spouse terminate. Polygamy laws do not apply to ALIENS who are temporarily visiting the United States, provided that polygamy is lawful in their country of origin.

The existence of a valid marriage entered into by the defendant prior to the second valid marriage is an essential element of the offense in every jurisdiction. No particular type of cere-

mony is required for the first or subsequent marriage before someone can be prosecuted for polygamy. Even persons who satisfy the requirement for a COMMON-LAW MARRIAGE can be prosecuted for entering a subsequent marriage that itself is either another common-law marriage or a traditional marriage.

Cohabitation is not typically a requisite element of the offense. Merely entering into a second marriage with knowledge that one is currently married to another living person will support an indictment for polygamy. An indictment for polygamy will not be found unlawful even if the defendant offers proof that his or her first marriage was a *voidable marriage,* or one that is valid until annulled. If neither party to a VOIDABLE marriage successfully voids the marriage by obtaining an ANNULMENT, then the remarriage of either constitutes polygamy.

Ordinarily the state in which the polygamous marriage occurred has jurisdiction over prosecution of the crime. Some statutes, however, provide that the accused may be convicted in the state where the polygamous cohabitation takes place, even though the marriage occurred elsewhere. For example, California law provides that "when the second marriage took place out of this state, proof of that fact, accompanied with proof of cohabitation thereafter in this state, is sufficient to sustain the charge." Cal. Pen. Code § 281.

### Defenses

Under certain statutes it is not considered polygamous for an individual to remarry after a certain period of time has elapsed during which the former spouse was absent and thought to be dead. For example, California exempts from its law "any person by reason of any former marriage whose husband or wife by such marriage has been absent for five successive years without being known to such person within that time to be living." Cal. Pen. Code § 282. Remarriage before the expiration of the statutory period, however, constitutes polygamy, even if the missing spouse later turns out to be dead, since the first marriage is still regarded as valid until the statutory period lapses.

In some jurisdictions a sincere and reasonable belief that a valid DIVORCE has been granted is a defense to polygamy. In most jurisdictions, however, it is not a defense. It is sometimes said that polygamy is a strict-liability offense because the prosecution need not prove a criminal intent to obtain a conviction, and defendants may not rely on erroneous legal advice, ignorance, or mistake law as a defense. However, prosecutors are more likely to pursue indictments against persons who knowingly enter into a polygamous marriage than against persons who enter a second marriage under a GOOD FAITH belief that their first marriage has been nullified.

*Tom Green, shown here with his five wives and 25 children, was found guilty of four counts of bigamy and one count of failure to pay child support in May 2001. The case marked Utah's first polygamy trial in 25 years.*

AP/WIDE WORLD PHOTOS

As mentioned above, a person who successfully annuls his or her first marriage before entering a second marriage cannot be prosecuted for polygamy. The same rule applies to persons who successfully have their marriage dissolved by divorce or nullified for any other reason before entering the second marriage. However, a divorce or annulment obtained subsequent to a second polygamous marriage is no defense. Nor will a solemnly held religious belief that it is not unlawful to have more than one spouse serve as a defense to an indictment for polygamy. In affirming the criminal conviction of a Mormon for practicing polygamy, the U.S. Supreme Court rejected the argument that a Utah law prohibiting polygamy violated either the Establishment or Free Exercise Clauses of the FIRST AMENDMENT to the federal Constitution. *(Reynolds v. United States*, 98 U.S. (8 Otto) 145, 25 L. Ed. 244 (1878).

### Origins of Anti-Polygamy Laws

The ban on polygamy originated in English COMMON LAW. In England polygamy was repudiated because it deviated from Christian norms; marriage, it was believed, properly existed only between one man and one woman. In 1866, for example, in the seminal case of *Hyde*

*v. Hyde,* 1 L.R.-P. & D., an English court remarked that "the law of [England was] . . . adapted to the Christian marriage, and it is wholly inapplicable to polygamy." During the nineteenth century, English and U.S. law did not recognize polygamous marriage in any form. Only in the late twentieth century has either nation given limited legal recognition to polygamous partners from other countries.

Anti-polygamy laws in the United States also sprang from religious conflict. In the mid-1800s, widespread public hostility arose toward the practice of polygamy by members of the Church of Jesus Christ of Latter-day Saints, known as Mormons. A small religious sect in the territory of Utah, the Mormons believed that their founder and prophet, Joseph Smith, had a divine revelation in 1843 that called for men to marry more than one woman; in 1852 the church announced that the practice was religiously superior to monogamy. This position angered critics throughout the country, ranging from religious leaders to novelists, editorialists, and particularly politicians. In 1856 the Republican party's first national platform denounced polygamy and SLAVERY as "those twin relics of barbarism."

Legal controversies over the propriety of prohibiting polygamous marriages persisted in the United States for 150 years and were expected to continue as long as sects within the Mormon religion continued to openly support the practice of plural marriage. The Church of Jesus Christ of Latter-day Saints disavowed polygamy in 1890 and excommunicates those members who practice plural marriage.

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CROSS-REFERENCES

Aliens; Common Law; Marriage.

## POLYGRAPH

*An instrument used to measure physiological responses in humans when they are questioned in order to determine if their answers are truthful.*

Also known as a "lie detector," the polygraph has a controversial history in U.S. law. First developed in the late nineteenth century, its modern incarnation is an electromechanical device that is attached to a subject's body during an interview. The discipline of polygraphy is based on the theory that by recording involuntary physiological changes in the subject, the polygraph yields data that can be interpreted to determine whether the subject is telling the truth. Supporters of the scientific validity of the polygraph claim that results are approximately 90 percent accurate. For much of the twentieth century, however, polygraph evidence was inadmissible in criminal cases on grounds of unreliability. Polygraph evidence was admissible in civil cases, however, and it was also used widely in law enforcement, government, and industry.

Polygraphy uses a variety of formats. Until the 1950s the format was the relevant/irrelevant (R/I) test; it rested on the now discredited belief that a subject produces a specific identifiable physiological response when lying. The R/I test has been replaced by the control question (CQ) format, the only format routinely used in forensic tests. Typically, a trained examiner fits a subject with sensors to measure respiration, heart rate and blood pressure, and perspiration, which the polygraph records using pens on graph paper. The examiner asks a series of questions, including control questions that are designed to provoke anxiety and denial. Later, another examiner compares these answers with answers pertaining to the matter at hand. This is known as numerical CQ testing. So-called global CQ testing includes a more subjective component: one examiner scores the test while also factoring in the subject's observable physical responses, such as movement, expression, and voice.

In U.S. courts, the use of the polygraph was first addressed in 1923. In refusing to admit polygraph evidence in a murder case, the Court of Appeals for the District of Columbia created a legal standard that would last for nearly 70 years (*Frye v. United States,* 54 App. D.C. 46, 293 F. 1013 [1923]). This standard came to be known as the *Frye* rule, or general acceptance test. To be admissible in court, novel SCIENTIFIC EVIDENCE first must have gained general acceptance in its scientific field.

The *Frye* rule applied broadly to all scientific evidence, including polygraph evidence. Other appellate courts followed the court's standard throughout most of the century, primarily

because polygraphy never gained widespread acceptance among scientists. Nonetheless, polygraph evidence was used in civil lawsuits, and police agencies, businesses, and government offices continued to use the polygraph regularly to provide evidence, screen job applicants, and investigate security risks.

Advances in polygraphy helped spur a judicial reevaluation, but more important was the adoption of the FEDERAL RULES OF EVIDENCE in the 1970s. Rule 702 set an important new standard for the admission of scientific evidence:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Over the next two decades, appellate courts authorized use of polygraph evidence in a few state courts, a trend followed by the U.S. Court of Appeals for the Eleventh Circuit and the military courts. Then, in 1993, in a case not specifically related to the polygraph, the U.S. Supreme Court held that Rule 702 replaced the *Frye* test (*Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469). In essence, the Court said that the standard of general scientific acceptance was not as important as whether EXPERT TESTIMONY can assist jurors. Soon thereafter, several federal courts reconsidered their long-standing ban on polygraph evidence and determined that they now had the discretion to permit its introduction at trial.

Congress also reexamined the use of the polygraph in industry. In 1988, lawmakers responded to civil liberty concerns about the abuse of polygraph testing in private industry by passing the Employee Polygraph Protection Act (29 U.S.C.A. §§ 2001 et seq.). The law bars preemployment testing in banking, retail, and other private industries and also makes it illegal for employers to fire, discriminate against, or discipline employees who refuse to submit to polygraph tests. The act exempts government employers, private industry when an employee is under investigation for economic injury suffered by the employer, and all security services and industries that manufacture, distribute, or dispense controlled substances.

In military trials, the situation was different. In *United States v. Scheffer,* 523 U.S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998), the Supreme Court addressed the claim of airman Edward G. Scheffer that *prohibiting* the introduction of polygraph evidence during his COURT-MARTIAL (military criminal trial) violated his constitutional rights. Under Military Rule of Evidence 707, polygraph evidence is not allowed in court-martial proceedings. So, although Scheffer, who was accused of, among other things, taking illegal drugs, passed a polygraph, it was inadmissible as evidence. A federal court of appeals reversed the court-martial, stating that excluding the polygraph evidence did, in fact, violate Scheffer's right to present a defense as guaranteed by the SIXTH AMENDMENT. Upon review, the Supreme Court upheld Military Rule of Evidence 707. In the opinion of the Court, "State and federal governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial." However, "there is simply no consensus that polygraph evidence is reliable."

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## PONZI SCHEME

*A fraudulent investment plan in which the investments of later investors are used to pay earlier investors, giving the appearance that the investments of the initial participants dramatically increase in value in a short amount of time.*

A Ponzi scheme is a type of investment FRAUD that promises investors exorbitant interest if they loan their money. As more investors participate, the money contributed by later investors is paid to the initial investors, purportedly as the promised interest on their loans. A Ponzi scheme works in its initial stages but inevitably collapses as more investors participate.

A Ponzi scheme is a variation of illegal pyramid sales schemes. In a pyramid sales plan, a person pays a fee to become a distributor. Once the person becomes a distributor, he receives commissions not only for the products he sells but also for products sold by individuals that he

*A Ponzi scheme is a type of investment fraud that promises investors exorbitant interest returns on their loans. The scheme takes its name from Charles Ponzi, who, in 1920, sold nearly $10 million in promissory notes before declaring bankruptcy and, ultimately, being sentenced for fraud.*

BETTMANN/CORBIS

brings into the business. These new distributors are beneath the person who brought them into the pyramid scheme, so they are "under the pyramid." In illegal pyramid schemes, only the people at the top of the pyramid make substantial money because they get a commission from the products sold by everyone below them. As more people become distributors, the persons lower in the pyramid have less chance to make money.

A Ponzi scheme was once was called a "bubble," but it was renamed in 1920 after Charles Ponzi and his Boston-based company had collected almost $10 million from ten thousand investors by selling promissory notes that claimed to pay 50 percent profit in forty-five days. When the scheme was exposed, a Boston bank collapsed, and investors lost most of their money.

Ponzi, an Italian immigrant, thought of profiting from the widely varying currency exchange rates for International Postal Reply Coupons (IPRCs), which were redeemed for stamps. IPRCs were intended to facilitate the sending of international mail. The sender put an IPRC, rather than a stamp, on a piece of mail going to another country, and the recipient exchanged the IPRC for the appropriate stamp in her country.

Ponzi contended that he could pay a small amount for IPRCs in weak-currency countries and then redeem them at a substantial profit in the United States. He correctly noted that a stamp transaction might yield a 400 percent profit, but the amount of profit in real terms was very small. Nevertheless, he promoted his idea through his Boston-based SECURITIES Exchange Company. In March 1920 he began soliciting funds for purchasing the IPRCs with a promised 40 percent return in ninety days. Bank interest rates at the time were just five percent. Investors started loaning Ponzi their money, and within a short time he increased the promised return on forty-five-day notes to 50 percent. He also promised a 100 percent return on funds loaned to him for ninety days. He pledged to refund money on demand to any investor before the loan period was up.

Money soon flooded Ponzi's offices. By July 1920 he was taking in $1 million a week. Ponzi made an arrangement with the Hanover Trust Company of Boston to deposit his funds. Hanover officials soon realized that Ponzi was not paying his initial investors with interest income but with the deposits of the new investors. Nevertheless, the bank eagerly sold Ponzi a large amount of its stock.

On August 2, 1920, a Boston newspaper revealed the fraud and reported that Ponzi was hopelessly insolvent. Thousands of victims immediately demanded refunds. Ponzi paid as many as he could but exhausted his funds in a week. He then declared BANKRUPTCY. In bankruptcy, the court ordered all of the persons who had been paid by Ponzi during the life of the scheme to return the proceeds to the bankruptcy trustee, who distributed the money on a pro rata basis to all of the other victims. Ponzi was eventually convicted of fraud in both state and federal court and imprisoned for several years.

The Ponzi scheme did not end with Charles Ponzi. It has proved to be a reliable scam in which persons are lured into giving their money to con artists who promise enormous financial returns. The early cycle of a Ponzi scheme appears to confirm the reliability of the investment, as some investors are paid the promised returns. The scheme is doomed to collapse when not enough new money exists to pay old obligations.

Gullible individuals are not the only victims of Ponzi schemes. In the early 1990s, John G. Bennett, Jr., and his Foundation for New Era Philanthropy lured many U.S. universities and nonprofit groups into investing millions of dollars in the foundation. Bennett promised these organizations that they would double their money in six months with the help of anonymous philanthropists. In May 1995 Prudential Securities, Inc., where most of the funds were deposited, discovered that New Era was under federal investigation and froze its accounts.

The action triggered New Era's bankruptcy. Bennett was later charged with eighty-two counts of fraud, MONEY LAUNDERING, and income TAX EVASION. As with the original Ponzi scheme, defrauded investors agreed to be reimbursed for up to 65 percent of their losses, with the money coming from groups that had deposited money with New Era early in the scheme and made a profit.

Internationally, the nation of Albania was plunged into civil unrest in 1997 when a multimillion-dollar Ponzi scheme collapsed. Many Albanians had invested large amounts of their savings in the scheme, which allegedly had the backing of Albanian government officials. Faced with economic ruin, citizens rioted against the government.

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## POPULAR NAME TABLES

*Reference charts that aid in locating statutes, if the names by which they are commonly referred to are known.*

For example, one can discover the official name and location of the SHERMAN ANTI-TRUST ACT (15 U.S.C.A. § 1 et seq.) from a popular name table.

## PORNOGRAPHY

*The representation in books, magazines, photographs, films, and other media of scenes of sexual behavior that are erotic or lewd and are designed to arouse sexual interest.*

Pornography is the depiction of sexual behavior that is intended to arouse sexual excitement in its audience. During the twentieth century, Americans debated whether pornographic material should be legally protected or banned. Those who believe pornography must be protected argue that the FIRST AMENDMENT to the U.S. Constitution guarantees freedom of expression, including sexual expression. Traditional opponents of pornography raise moral concerns, arguing that the First Amendment does not protect expression that corrupts people's behavior. Toward the end of the century, some feminists advocated suppressing pornography because it perpetuates gender stereotypes and promotes violence against women.

Pornography has been regulated by the legal standards that govern the concept of OBSCENITY, which refers to things society may consider disgusting, foul, or immoral, and may include material that is blasphemous. Pornography is limited to depictions of sexual behavior and may not be obscene.

The U.S. Supreme Court has established that obscenity is not protected by the First Amendment. The more troublesome question has been defining what is and is not obscene. In 1957, the U.S. Supreme Court, in ROTH V. UNITED STATES, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, stated that obscenity is "utterly without redeeming social importance" and therefore is not protected by the First Amendment. The *Roth* test for obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient [lewd or lustful] interest." The *Roth* test proved difficult to use because every term in it eluded a conclusive definition.

The Supreme Court added requirements to the definition of obscenity in a 1966 case involving the English novel *Memoirs of a Woman of Pleasure,* more commonly known as *Fanny Hill.* In *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General,* 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1, the Court concluded that to establish obscenity, the material must, aside from appealing to the prurient interest, be "utterly without redeeming social value" and "patently offensive because it affronts contemporary community standards relating to the description of sexual matters." The phrase "utterly without redeeming social value" allowed a loophole for pornographers. Expert witnesses

*A sample section from a popular name table*

## Section of Popular Name Table

**Revenue Act of 1942**
Oct. 21, 1942, ch. 619, 56 Stat. 798

**Revenue Act of 1943**
Feb. 25, 1944, ch. 63, 58 Stat. 21

**Revenue Act of 1945**
Nov. 8, 1945, ch. 453, 59 Stat. 556

**Revenue Act of 1948**
Apr. 2, 1948, ch. 168, 62 Stat. 110

**Revenue Act of 1950**
Sept. 23, 1950, ch. 994, 64 Stat. 906

**Revenue Act of 1951**
Oct. 20, 1951, ch. 521, 65 Stat. 452

**Revenue Act of 1962**
Pub. L. 87–834, Oct. 16, 1962, 76 Stat. 960
Short title, see 26 U.S.C. 1 note

**Revenue Act of 1964**
Pub. L. 88–272, Feb. 26, 1964, 78 Stat. 19
Short title, see 26 U.S.C. 1 note

**Revenue Act of 1971**
Pub. L. 92–178, Dec. 10, 1971, 85 Stat. 497
Short title, see 26 U.S.C. 1 note

**Revenue Act of 1978**
Publ. L. 95–600, Nov. 6, 1978, 92 Stat. 2763
Short title, see 26 U.S.C. 1 note

**Revenue Act of 1987**
Pub. L. 100–203, title X, Dec. 22, 1987, 101 Stat. 1330–382
Short title, see 26 U.S.C. 1 note

**Revenue Adjustment Act of 1975**
Pub. L. 94–164, Dec. 23, 1975, 89 Stat. 970
Short title, see 26 U.S.C. 1 note

**Revenue Adjustments Act of 1980**
Pub. L. 96–499, title XI, Dec. 5, 1980, 94 Stat. 2660

**Revenue and Expenditure Control Act of 1968**
Pub. L. 90–364, June 28, 1968, 82 Stat. 251
Short title, see 26 U.S.C. 1 note

**Revenue Forgone Reform Act**
Pub. L. 103–123, title VII, Oct. 28, 1993, 107 Stat. 1267
Short title, see 39 U.S.C. 101 note

**Revenue Reconciliation Act of 1989**
Pub. L. 101–239, title VII, Dec. 19, 1989, 103 Stat. 2301
Short title, see 26 U.S.C. 1 note

**Revenue Reconciliation Act of 1990**
Pub. L. 101–508, title XI, Nov. 5, 1990, 104 Stat. 1388–400
Short title, see 26 U.S.C. 1 note

**Revenue Reconciliation Act of 1993**
Pub. L. 103–66, title XIII, ch. 1 (§13001 et seq.), Aug. 10, 1993, 107 Stat. 416
Short title, see 26 U.S.C. 1 note

**Revised Organic Act of the Virgin Islands**
July 22, 1954, ch. 558, 68 Stat. 497 (48 U.S.C. 1541 et seq.)
Short title, see 38 U.S.C. 1541 note

**Revolutionary War and War of 1812 Historic Preservation Study Act of 1996**
Pub. L. 104–333, div. I, title VI, §603, Nov. 12, 1996, 110 Stat. 4172 (16 U.S.C. 1a–5 note)

**Reynolds Aviation Training Act**
See Army Aviation Cadet Act

**Rhinoceros and Tiger Conservation Act of 1994**
Pub. L. 103–391, Oct. 22, 1994, 108 Stat. 4094 (16 U.S.C. 5301 et seq.)
Short title, see 16 U.S.C. 5301 note

**Rhinoceros and Tiger Conservation Act of 1998**
Pub. L. 105–312, title IV, Oct. 30, 1998, 112 Stat. 2959.
Short title, see 16 U.S.C. 5301 note

**Rhode Island Indian Claims Settlement Act**
Pub. L. 95–395, Sept. 30, 1978, 92 Stat. 813 (25 U.S.C. 1701 et seq.)
Short title, see 25 U.S.C. 1701 note

**Rice Production Act of 1975**
Pub. L. 94–214, Feb. 16, 1976, 90 Stat. 181
Short title, see 7 U.S.C. 428c note

**Richard B. Russell National School Lunch Act**
June 4, 1946, ch. 281, 60 Stat. 230 (42 U.S.C. 1751 et seq.)
Short title, see 42 U.S.C. 1751 note

**Richmond National Battlefield Park Act of 2000**
Pub. L. 106–511, title V. Nov. 13, 2000, 114 Stat. 2373 (16 U.S.C. 423*l*–1 et seq.)

**Ricky Ray Hemophilia Relief Fund Act of 1998**
Pub. L. 105–369, Nov. 12, 1998, 112 Stat. 3368 (42 U.S.C. 300c–22 note)

**RICO**
See Racketeer Influenced and Corrupt Organizations Act (RICO)

**Riegle Community Development and Regulatory Improvement Act of 1994**
Pub. L. 103–325, Sept. 23, 1994, 108 Stat. 2160
Short title, see 12 U.S.C. 4701 note

**Riegle-Neal Amendments Act of 1997**
Pub. L. 105–24, July 3, 1997, 111 Stat. 238
Short title, see 12 U.S.C. 1811 note

**Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994**
Pub. L. 103–328, Sept. 29, 1994, 108 Stat. 2338
Short title, see 12 U.S.C. 1811 note

**Right of Way Act of 1891**
Mar. 3, 1891, ch. 561, §18, 26 Stat. 1101

**Right to Financial Privacy Act of 1978**
Pub. L. 95–630, title XI, Nov. 10, 1978, 92 Stat. 3697 (12 U.S.C. 3401 et seq.)
Short title, see 12 U.S.C. 3401 note

**Right to Work Law**
July 5, 1935, ch. 372, §14, 49 Stat. 457 (29 U.S.C. 164)

**Rio Grande American Canal Extension Act of 1990**
Pub. L. 101–438, Oct. 18, 1990, 104 Stat. 1001

testified that there was at least a shred of social value in the novel's depiction of sexual behavior and social relations.

The Supreme Court established the basic legal standard for pornography in MILLER V. CALIFORNIA, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). Chief Justice WARREN E. BURGER stated in *Miller* that pornographic material would be classified as obscene if it met three criteria: (1) the work, taken as a whole by an average person applying contemporary community standards, appeals to the prurient interest; (2) the work depicts sexual conduct in a patently offensive way; and (3) the work, when taken as a whole, lacks serious literary, artistic, political, or scientific value.

Burger emphasized in *Miller* that only hard-core pornography could be designated as patently offensive. He listed examples of patently offensive descriptions or representations, including representations of "ultimate sex acts" and "masturbation, excretory functions, and lewd exhibition of the genitals."

Based on *Miller,* the law distinguishes between hard-core pornography and soft-core pornography, which involves depictions of nudity and limited and simulated sexual conduct. Because it is not as graphic or explicit as hard-core pornography, soft-core pornography is protected under the First Amendment.

CHILD PORNOGRAPHY, whether hard-core or soft-core, is treated severely under the law. In 1982, the Supreme Court, in *New York v. Ferber,* 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113, held that child pornography is not a form of expression protected under the Constitution. It found that the state of New York had a compelling interest in protecting children from SEXUAL ABUSE and found a close connection between such abuse and the use of children in the production of pornographic materials. In 1990, the Court went even further in upholding a state law prohibiting the possession and viewing of child pornography (*Osborne v. Ohio,* 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98).

In the 1980s, some feminists began an attack on pornography and the way the Supreme Court had structured the legal debate using the First Amendment. Led by law professor CATHARINE A. MACKINNON and writer ANDREA DWORKIN, they proposed that women be permitted to sue pornographers for damages under CIVIL RIGHTS laws. In 1982, in an alliance with political conservatives opposed to pornography, MacKinnon and Dworkin convinced Indianapolis officials to pass a municipal ordinance based on their civil rights approach. The ordinance described pornography as "a discriminatory practice based on sex which denies women equal opportunity in society" and defined it as "the graphic sexually explicit subordination of women, whether in pictures or words," especially in a violent or degrading context. The ordinance made unlawful the production, sale, exhibition, and distribution of pornography and gave anyone injured by a person who has seen or read pornography the right to bring a civil suit against the maker or seller.

Supporters of the ordinance argued that the legislation was a civil rights measure whose purpose was to fight SEX DISCRIMINATION. In their view, the ordinance regulated conduct rather than free speech and thus did not violate the First Amendment. They argued that even if pornography was viewed as speech, it should be treated as a low-value form of speech that was not entitled to First Amendment protection.

All of these arguments were rejected by the U.S. Court of Appeals for the Seventh Circuit in *Hudnut v. American Booksellers Association, Inc.,* 771 F.2d 323 (7th Cir. 1985). The court agreed that pornography affected how people view the world and their social relations but observed that the same could be said of other speech, including expressions of racial bigotry. Yet these kinds of expression are protected as speech because to do otherwise would give the government control of "all institutions of culture" and allow it to be the "great censor and director of which thoughts are good for us." The court, adhering to the definition of obscenity first articulated in *Miller,* ruled that the ordinance's definition of pornography would cover many works that are not obscene because it would not take the value of the work as a whole into account or consider the work as a whole. The court of appeals' decision effectively ended this approach to the regulation of pornography.

In the 1990s, attention was paid to the new ways technology could supply pornography. The use of computer bulletin boards and the INTERNET to distribute pornography nationally and internationally led to the enactment of the federal Communications Decency Act of 1996 (CDA) (47 U.S.C.A. § 223). CDA was designed to outlaw obscene and indecent sexual material in cyberspace, including the Internet. In *Reno v. American Civil Liberties Union,* 521 U.S. 844, 117

# Feminist Perspectives on Pornography

Pornography is a battlefield in U.S. law. For decades, courts have struggled to find a middle ground between opponents of **OBSCENITY** and defenders of free speech. This debate began to shift in the 1970s as feminists introduced new theories. Obscenity and free speech were no longer the central issues, these critics argued. Their paramount concern was violence. They claimed a causal link between pornographic depictions of women, and crimes ranging from harassment to rape. Beginning in the 1980s, some feminists proposed legislation that sought to control pornography in new and dramatic ways. They met strong opposition, and none of their legislation survived vetoes or court challenges.

Inspired by the women's liberation movement in the 1960s, many feminists began to decry pornography as sexist. In later years, a sharper critique began to emerge. Some feminists believed that pornography was a deliberate means of subordinating women to men, thereby maintaining inequality. One leading feminist critic, **ANDREA DWORKIN**, took this theory even further. In books such as *Pornography: Men Possessing Women* (1979), Dworkin interpreted pornographic publications and films as training guides for committing sexual violence.

Dworkin's writings have divided feminists. Her detractors argue that she stands outside the mainstream of feminism. Her supporters cite high rates of sexual violence as proof that Dworkin is right. Both sides frequently debate this point. The causal link between pornography and violence rests on anecdotal evidence. Dworkin finds this evidence sufficient, and she contends that women are not believed when they report an experience of being sexually assaulted by men who view pornography. While not denying these personal accounts, critics reply that a definite link can never be scientifically established.

One prominent feminist colleague of Dworkin's is **CATHARINE A. MACKINNON**. An author and professor of law, MacKinnon is regarded as a pioneer in providing legal recourse for victims of **SEXUAL HARASSMENT** and rape. She and Dworkin created the intellectual framework for viewing pornography in a novel light: not merely as a form of speech but instead as active discrimination and violence against women. Their argument brushed aside traditional **FIRST AMENDMENT** considerations. If pornography harmed women, they claimed, then it was not deserving of legal protection as speech. This view had its first legal expression in a case they considered bringing to stop showings of the film *Deep Throat,* whose star, Linda Lovelace, contended that she was raped throughout the making of the film. Ultimately, no suit could be brought because the **STATUTE OF LIMITATIONS** had expired, but the case served as their first step toward a practical attack on pornography.

MacKinnon and Dworkin tried a legislative solution in Minneapolis in 1983. As coteachers of a course at the University of Minnesota Law School, they were invited to draft a law aimed at keeping adult bookstores out of residential neighborhoods. **ZONING** ordinances had failed in this end. MacKinnon and Dworkin proposed amending the city's **CIVIL RIGHTS** ordinance to include a new legal claim: a woman who proved that she had been harmed by pornographic material could sue its makers and distributors.

This groundbreaking approach avoided traditional definitions of obscenity. It defined pornography as the sexually explicit subordination of women in pictures or words. In the language of the proposed ordinance, subordination included images of women who "experience sexual pleasure in being raped" or in being "penetrated by objects or animals." Two provisions outlined the conditions under which a woman could bring suit: a plaintiff would have to prove that a pornographic work had harmed her in a specific way, or that it had harmed women in general. The hearings before the Minneapolis City Council galvanized debate and demonstrations. In one incident, a woman protesting pornography and its degrading aspects toward women, set herself on fire by a downtown newsstand.

S. Ct. 2329, 138 L. Ed. 2d 874 (1997), the Supreme Court overturned provisions of the CDA prohibiting transmission of obscene or indecent material by means of a **TELECOMMUNICATIONS** device. The Court held that the provisions represented a content-based restriction, in violation of the Free Speech Clause of the First Amendment.

Congress quickly responded by passing the Child Online Protection Act (COPA), which sought to limit restrictions on pornographic material to communications made for commercial purposes. The law also incorporated the three-part obscenity test that the Supreme Court formulated in *Miller v. California.* The **AMERICAN CIVIL LIBERTIES UNION** (ACLU) and a group of online Web site operators challenged the constitutionality of COPA, arguing that it was overbroad. In addition, the plaintiffs contended that the use of the community standards

The ordinance drew attacks from traditional free speech advocates, including the American Booksellers Association and the **AMERICAN CIVIL LIBERTIES UNION** (ACLU). Opponents argued that the ordinance was vague, allowing too much subjectivity in deciding what material constituted subordination. Any material, they claimed, could be deemed offensive in this way. One group making this argument called itself the Feminist Anti-Censorship Task Force (FACT). Among FACT's 50 prominent members were the authors **BETTY N. FRIEDAN**, **KATE MILLETT**, and Adrienne Rich. They filed a legal brief attacking the ordinance on the ground that it reinforced sexist stereotypes. In a strongly worded rebuttal, MacKinnon denounced the group as being apologists for male supremacists.

The Minneapolis antipornography ordinance twice failed to pass. Mayor Donald M. Fraser vetoed it in December 1983 and in July 1984. But the ordinance served as a model for others and in 1984, MacKinnon and Dworkin met with greater success in Indianapolis. Again, they proposed modifying existing ordinances with amendments that would allow any woman the means to seek an order prohibiting offensive pornography, as well as to seek damages. On April 23 and June 11, 1984, the Indianapolis–Marian County City Council passed General Ordinances 24 and 35, which amended chapter 16 of the Human Relations and Equal Opportunity Code. Indianapolis Mayor William H. Hudnut III signed the ordinances into law.

The law was challenged in *American Booksellers Ass'n v. Hudnut,* 598 F. Supp. 1316 (S.D. Ind. 1984). In 1985, it was declared unconstitutional (*Hudnut,* 771 F.2d 323 [7th Cir. 1985]). Judge Frank Easterbrook based his ruling on a long-standing tradition of First Amendment protection for "opinions that the government finds wrong or even hateful." However, he accepted the ordinance's central argument about pornography. He agreed that "depictions of subordination" tend to perpetuate subordination in other areas of life, causing sexual discrimination, harassment, rape, and domestic abuse. The U.S. Supreme Court affirmed Easterbrook's decision in 1986 (*Hudnut,* 475 U.S. 1001, 106 S. Ct. 1172, 89 L. Ed. 2d 291, *aff'd without comment, reh'g denied,* 475 U.S. 1132, 106 S. Ct. 1664, 90 L. Ed. 2d 206).

Following the Court's ruling, MacKinnon and Dworkin refined their approach in a proposed 1992 bill for the Massachusetts state legislature titled An Act to Protect the Civil Rights of Women and Children (H. 5194). Sponsored by Representative Barbara Hildt (D-Mass.), the bill focused on individuals who could prove that they were assaulted as a result of pornography. The bill allowed victims to collect damages in civil court from publishers, filmmakers, and distributors. In testimony before the Massachusetts Legislature, MacKinnon argued that pornography enjoyed better legal protection than did women. This time, opposition came from civil rights groups as well as the New York State chapter of the **NATIONAL ORGANIZATION FOR WOMEN** (NOW). NOW condemned the bill for taking the onus off criminals and placing it instead on publishers. Although considered in committee, the bill was never voted on.

MacKinnon and Dworkin's views on pornography are certainly not shared by all feminists. **NADINE STROSSEN**, professor of law at New York Law School, has written, lectured, and practiced widely in the areas of **CONSTITUTIONAL LAW**, civil liberties, and international **HUMAN RIGHTS**. Since 1991, she has served as president of the ACLU, the first woman to head the nation's largest and oldest civil liberties organization. Strossen believes that **CENSORSHIP**, and not pornography, is the true enemy of **WOMEN'S RIGHTS**. For too long, she argues, censorship has been used to repress information relevant to women. Strossen lays out her feminist perspective in *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (1995). By arguing for "procensorship," Strossen asserts, feminists such as Dworkin and Mackinnon are ultimately doing more harm than good since any restriction of free speech is detrimental to all people.

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**CROSS-REFERENCES**

Feminist Jurisprudence; Sex Discrimination.

test would give any community in the United States the ability to file civil and criminal lawsuits under COPA. This meant that the most conservative community in the country could dictate the content of the Internet.

The Supreme Court, in *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002), issued an ambiguous decision. The use of community standards did not by itself make the statute overbroad and unconstitutional under the First Amendment. Apart from that conclusion, the Court could not agree, with five of the justices producing separate opinions. Despite this situation, a majority expressed numerous reservations about the COPA, including the concern that, absent a national standard, it would be difficult for operators of Internet services to know when they had crossed a line and had subjected themselves to liability. The case was remanded to the lower

courts for a full examination of the law on all issues.

Congressional efforts to curb the spread of child pornography also ran into judicial roadblocks based on First Amendment concerns. The Child Pornography Prevention Act of 1996 (CPPA) was dealt a fatal blow when the U.S. Supreme Court, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), ruled that two of its three major provisions were unconstitutional. The Court found that some of the prohibitions contained in the act were written in a manner that resulted in the CENSORSHIP of legally protected speech as well as unprotected speech. It also could be said that the language in the act had a "chilling effect" on the exercise of free speech because it tended to inhibit not only proscribed forms of expression, but also those forms of expression that were not proscribed.

The problem with the CPPA was not that it prohibited child pornography but that its language also attempted to prohibit other pornographic material that "appear[ed] to be" or that "convey[ed] the impression" that it depicted "a minor engaging in sexually explicit conduct." This prohibition extended to "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture." Pornographic material that appears to depict minors but is actually produced through creative computer imaging or through the use of youthful-looking adults is often referred to as "virtual child pornography." Thus, the CPPA prohibited not only actual child pornography, but also pornographic material pandered as child photography, even though real children were not used.

The Supreme Court concluded that the CPPA failed to meet the *Miller* criteria because there was no requirement to prove that the material was "offensive" or that it "appealed to prurient interests." In other words, all material depicting sexual conduct of persons under 18 years of age would be prohibited, despite any underlying merit or value. Therefore, such prohibitions contained in the language of the CPPA were overbroad and, accordingly, must be rendered invalid as abridging First Amendment rights.

The House of Representatives, with the support of the President GEORGE W. BUSH's administration, passed the Child Obscenity and Pornography Prevention Act of 2002, in response to the Supreme Court decision. The Senate passed a bill in November 2002 that sought to tailor the definition of virtual child pornography to meet the *Miller* criteria set out in the Supreme Court decision. Despite this apparent agreement, the two houses disagreed over the definition of virtual child porn. The House bill presented a narrow definition, stating that computer-generated images must be "indistinguishable" from actual child pornography. The Senate bill was broader, but it included provisions that would make it hard to obtain a guilty verdict. The House rejected the Senate version, and the bill died. However, the law was finally enacted in April 2003 using the Senate definition. As with all prior congressional attacks on pornography, this law was likely to be challenged in court.

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CROSS-REFERENCES

Censorship; Freedom of Speech; Movie Rating; Telecommunications; Theaters and Shows.

## POSITIVE EVIDENCE

*Direct proof of the fact or point in issue, as distinguished from circumstantial proof; proof that if believed, establishes the truth or falsity of a fact in issue and does not arise from a presumption.*

CROSS-REFERENCES

Evidence.

## POSITIVE LAW

*Those laws that have been duly enacted by a properly instituted and popularly recognized branch of government.*

Positive laws may be promulgated, passed, adopted, or otherwise "posited" by an official or entity vested with authority by the government to prescribe the rules and regulations for a particular community. In the United States, positive laws come in a variety of forms at both the state and federal levels, including legislative enact-

ments, judicial orders, executive decrees, and administrative regulations. In short, a positive law is any express written command of the government. The belief that the only legitimate sources of law are those written rules and regulations laid down by the government is known as POSITIVISM.

## POSITIVISM

*A school of* JURISPRUDENCE *whose advocates believe that the only legitimate sources of law are those written rules, regulations, and principles that have been expressly enacted, adopted, or recognized by a government body, including administrative, executive, legislative, and judicial bodies.*

Positivism sharply separates law and morality. It is often contrasted with NATURAL LAW, which is based on the belief that all written laws must follow universal principles of morality, religion, and justice. Positivists concede that ethical theories of morality, religion, and justice may include aspirational principles of human conduct. However, positivists argue that such theories differ from law in that they are unenforceable and therefore should play no role in the interpretation and application of legislation. Thus, positivists conclude that as long as a written law has been duly enacted by a branch of government, it must be deemed valid and binding, regardless of whether it offends anyone's sense of right and wrong.

Positivism serves two values. First, by requiring that all law be written, positivism ensures that the government will explicitly apprise the members of society of their rights and obligations. In a legal system run in strict accordance with positivist tenets, litigants would never be unfairly surprised or burdened by the government imposition of an unwritten legal obligation that was previously unknown and nonexistent. The DUE PROCESS Clauses of the Fifth and Fourteenth Amendments incorporate this positivist value by mandating that all persons receive notice of any pending legal actions against them so that they can prepare an adequate defense.

Second, positivism curbs judicial discretion. In some cases judges are not satisfied with the outcome of a case that would be dictated by a narrow reading of existing laws. For example, some judges may not want to allow a landlord to evict an elderly and sick woman in the middle of winter, even if the law authorizes such action when rent is overdue. However, positivism requires judges to decide cases in accordance with the law. Positivists believe that the integrity of the law is maintained through a neutral and objective judiciary that is not guided by subjective notions of EQUITY.

Positivism has been criticized for its harshness. Some critics of positivism have argued that not every law enacted by a legislature should be accepted as legitimate and binding. For example, laws depriving African Americans and Native Americans of various rights have been passed by governments but later overturned as unjust or unconstitutional. Critics conclude that written law ceases to be legitimate when it offends principles of fairness, justice, and morality. The American colonists based their revolt against the tyranny of British law on this point.

Positivism still influences U.S. jurisprudence. Many judges continue to evaluate the viability of legal claims by narrowly interpreting the law. If a right asserted by a litigant is not expressly recognized by a statute, precedent, or constitutional provision, many judges will deny recovery.

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## ♦ POSNER, RICHARD ALLEN

Author, legal scholar, and federal judge, Richard A. Posner is one of the most influential and controversial figures in contemporary American law. Posner rose to prominence first in academia in the early 1970s, when he championed economic analysis of the law. With his faith in free-market capitalism and the goal of economic efficiency, he became one of the leaders of the so-called CHICAGO SCHOOL of antitrust theory, whose ideas left a broad mark on this area of law over the next decade and a half. In 1981, Posner was appointed to the U.S. Court of Appeals for the Seventh Circuit, and in 1993 he became its chief judge. In addition to issuing more than

"[A] PRAGMATIC APPROACH [TO LAW IS ONE] THAT IS PRACTICAL AND INSTRUMENTAL RATHER THAN ESSENTIALIST—INTERESTED IN WHAT WORKS AND WHAT IS USEFUL RATHER THAN IN WHAT 'REALLY' IS. IT IS THEREFORE FORWARD-LOOKING, VALUING CONTINUITY WITH THE PAST ONLY SO FAR AS SUCH CONTINUITY CAN HELP US COPE WITH PROBLEMS OF THE PRESENT AND THE FUTURE."
—RICHARD A. POSNER

*Richard A. Posner.* REUTERS NEWMEDIA INC./CORBIS

double the national average of judicial opinions annually, Posner has continued to publish many articles and books that range across legal, social, and intellectual topics.

Posner's ascent began immediately after his graduation from Harvard Law School in 1962. After he graduated first in his class, he clerked for U.S. Supreme Court Justice WILLIAM J. BRENNAN JR., who reportedly regarded him as one of the few geniuses he had ever known. A career as a government attorney followed, with stints on the FEDERAL TRADE COMMISSION (FTC); in the DEPARTMENT OF JUSTICE, working for solicitor general THURGOOD MARSHALL; and in President LYNDON JOHNSON's administration. During this time, Posner also served on a highly visible AMERICAN BAR ASSOCIATION commission that evaluated the FTC, which established him as a strong supporter of free-market capitalism and a critic of federal regulation.

In 1968, Posner left government service for academia. He taught at Stanford Law School for a year before leaving for the University of Chicago, where he would soon make his mark as a leading legal theorist. Economics served as the foundation for his approach; like adherents of the nineteenth-century Utilitarian movement in ENGLISH LAW, Posner believed firmly in the values of the free market and individual initiative. Many legal problems, he argued, were best approached using economic models of analysis, including those in areas that were not directly related to economics, such as criminal and CONSTITUTIONAL LAW. The approach also had implications for public policy. In one widely cited example, Posner argued that the system of child ADOPTION would be improved if parental rights were sold, because it would reduce the imbalance between supply and demand. Although some critics accused Posner of reducing complexities to simple matters of dollars and cents, his 1972 book *Economic Analysis of Law* became standard reading in many law schools over the next two decades.

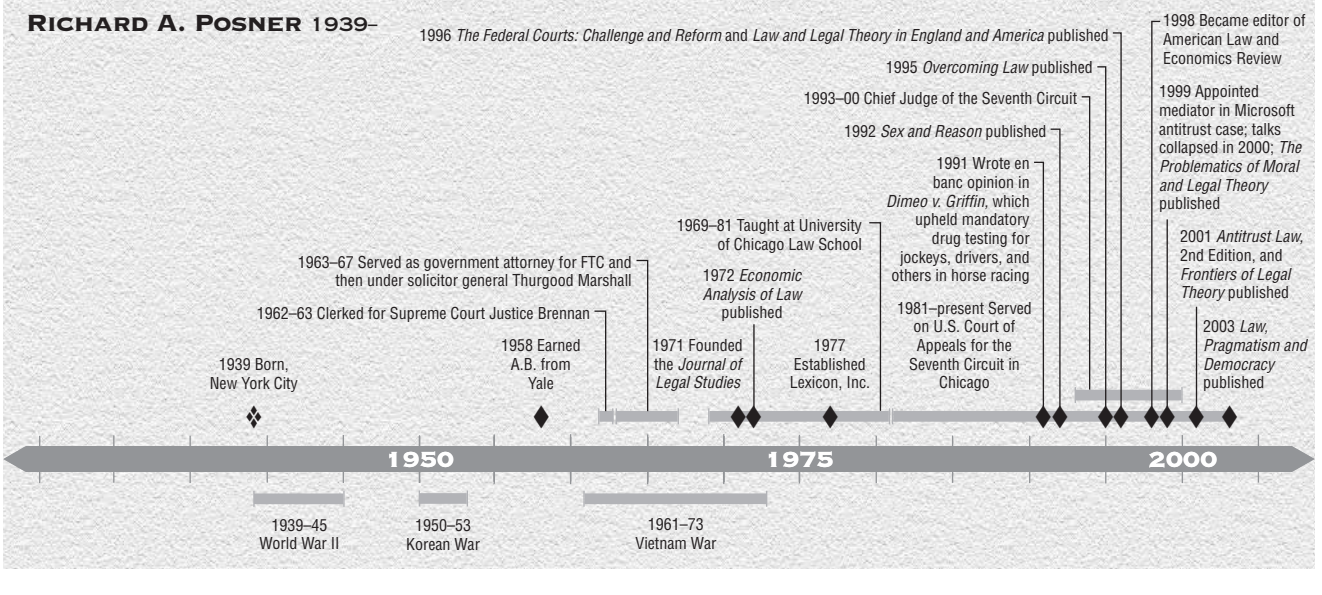

During the 1970s, Posner became a leader of the Chicago School of antitrust theory. This was a group of scholars, (mostly associated with the University of Chicago) who, like Posner, held antiregulatory and free-market views. The Chicago School sought to turn antitrust law—which is concerned with fair competition in business—on its head. At the heart of their arguments was the goal of economic efficiency. Posner and others urged the U.S. Supreme Court to abandon its critical view on so-called restraints of trade because business practices that had been thought to hurt competition actually helped it. Their theories had considerable impact on the Court and U.S. corporations for the next decade and a half.

Meanwhile, Posner's visibility grew. He published a prodigious amount of writing, established Lexecon, Inc.—a consulting firm specializing in economics and the law—and founded the *Journal of Legal Studies.* Then political fortune smiled on him: the administration of President **RONALD REAGAN** saw Posner and other members of the Chicago School as its intellectual bedfellows, providing theoretical muscle to its antiregulatory politics. In 1981, Reagan nominated Posner to the U.S. Court of Appeals for the Seventh Circuit, in Chicago.

The appointment provoked debate. In a decade and a half, Posner had accumulated a number of enemies in academia, nearly all of them on the political left. Although he considered himself a classical liberal in the tradition of **JOHN STUART MILL**, his ideas struck opponents as crass, latter-day conservatism. Leading the attack was **RONALD DWORKIN**, the prominent liberal professor of **JURISPRUDENCE** at New York University Law School and Oxford University.

Posner struck back, accusing his opponents in the professoriat of being afraid to take stands in their own work. However, he announced that he would avoid imposing his theoretical views from the bench.

As an appellate judge, Posner has defied the labels that his critics have applied to him. Some of his opinions have a conservative bent: In *Dimeo v. Griffin,* 943 F.2d 679 (7th Cir. 1991), for example, Posner wrote for an en banc majority that upheld mandatory drug testing for jockeys and others in horse racing, favoring the state of Illinois's interest in requiring the testing. Some of his other opinions have been more liberal: In *Metzl v. Leininger,* 57 F.3d 618 (7th Cir. 1995), Posner wrote an opinion that declared unconstitutional an Illinois law requiring schools to close on Good Friday, holding that the law violated the Establishment Clause of the **FIRST AMENDMENT**. Some of his opinions have employed his fascination for economics: In a 1986 case, *American Hospital Supply Corp. v. Hospital Products Limited,* 780 F.2d 589, he provided a mathematical formula for determining when **PRELIMINARY INJUNCTIONS** should be denied:

> if the harm to the plaintiff if the **INJUNCTION** is denied, multiplied by the probability that . . . the plaintiff . . . will win at trial, exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error.

Most notably, he has authored a much greater number of judicial opinions than have his peers on the federal bench. By 1994, he had averaged 77 opinions annually, as compared with the national average of 28.

Since the 1980s, Posner has exerted a strong influence on legal thought. He has argued against popular conservative criticism that judges are too aggressive and activist, asserting that judges must be able to exercise interpretative discretion. Besides being widely read and debated in academia, he found a popular audience with his 1992 book *Sex and Reason,* a critical analysis of sexual behavior. Posner is also a leading contributor to the **LAW AND LITERATURE** movement, impressing critics and supporters alike with his knowledge of jurisprudence and literary theory.

Although Posner stepped down as chief judge of the Seventh Circuit in 2000, he has remained visible. In 1999, U.S. District Judge Thomas Penfield Jackson named Posner to serve as a mediator in the Microsoft antitrust lawsuit that the federal government had brought. Posner was outspoken about the U.S. Supreme Court's decision in **BUSH V. GORE**, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000), where the U.S. Supreme Court held that the Florida Supreme Court could not constitutionally order a recount of thousands of votes for the 2000 presidential elections. In *Breaking the Deadlock*, Posner finds that the decision was abominable, but that the judgment was necessary to avoid a constitutional crisis.

Along with *Economic Analysis of the Law,* several of Posner's books are widely read among academics, including *Economics of Justice, Law and Literature,* and *Antitrust Law.* Posner has

received numerous honorary degrees, including the degree of doctor of laws from Yale University, Georgetown University, the University of Pennsylvania, Syracuse University, and Duquesne University. He also has received numerous awards and has served in a variety of capacities in several scholarly and professional organizations.

Posner is married to the former Charlene Horn. They have two sons and three grandchildren.

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CROSS-REFERENCES

Jurisprudence; Utilitarianism.

## POSSE COMITATUS

*[*Latin, Power of the county.*] Referred at* COMMON LAW *to all males over the age of fifteen on whom a sheriff could call for assistance in preventing any type of civil disorder.*

The notion of a *posse comitatus* has its roots in ancient ENGLISH LAW, growing out of a citizen's traditional duty to raise a "hue and cry" whenever a serious crime occurred in a village, thus rousing the fellow villagers to assist the sheriff in pursuing the culprit. By the seventeenth century, trained militia bands were expected to perform the duty of assisting the sheriff in such tasks, but all males age fifteen and older still had the duty to serve on the *posse comitatus.*

In the United States, the *posse comitatus* was an important institution on the western frontier, where it became known as the *posse.* At various times vigilante committees, often acting without legal standing, organized posses to capture wrongdoers. Such posses sharply warned first-time cattle rustlers, for instance, and usually hanged or shot second-time offenders. In 1876 a four-hundred-man posse killed one member of the infamous Jesse James gang and captured two others.

In 1878 the use of a *posse comitatus* was limited by the passage of the Posse Comitatus Act of 1878. This act, passed in response to the use of federal troops to enforce reconstruction policies in the southern states, prohibited the use of the U.S. Army to enforce laws unless the Constitution or an act of Congress explicitly authorized such use. This act was amended five times in the 1980s, largely to allow for the use of military resources to combat trafficking in illicit narcotics.

Though rarely used, the *posse comitatus* continues to be a modern legal institution. In June 1977, for example, the Aspen, Colorado, sheriff called out the *posse comitatus*—ordinary citizens with their own weapons—to hunt for escaped mass murderer Theodore ("Ted") Bundy. Many states have modern *posse comitatus* statutes; one typical example is the Kentucky statute enacted in 1962 that gives any sheriff the power to "command and take with him the power of the county or a part thereof, to aid him in the execution of the duties of his office" (Ky. Rev. Stat. Ann. § 70.060 [Baldwin 1996]).

"Posse Comitatus" is also the name taken by a right-wing, antitax extremist group founded in 1969 by Henry L. Beach, a retired dry cleaner and one-time member of the Silver Shirts, a Nazi-inspired organization that was established in the United States after ADOLF HITLER came to power in Germany. The group operated on the belief that the true intent of the founders of the United States was to establish a Christian republic where the individual was sovereign. Members of the group were united by the belief that the federal government was illegitimate, being operated by Jewish interests through the INTERNAL REVENUE SERVICE, the federal courts, and the FEDERAL RESERVE. The Posse Comitatus received widespread media attention in 1983 when a leader of the group, Gordon Kahl, was involved in a violent standoff with North Dakota law enforcement officers. Convicted for failure to pay taxes and then for violating the terms of his PROBATION, Kahl shot and killed three officers and wounded three others before being shot and killed himself.

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## POSSESSION

*The ownership, control, or occupancy of a thing, most frequently land or* PERSONAL PROPERTY, *by a person.*

The U.S. Supreme Court has said that "there is no word more ambiguous in its meaning than possession" (*National Safe Deposit Co. v. Stead,* 232 U.S. 58, 34 S. Ct. 209, 58 L. Ed. 504 [1914]). Depending on how and when it is used, the term *possession* has a variety of possible meanings. As a result, possession, or lack of possession, is often the subject of controversy in civil cases involving real and personal property and criminal cases involving drugs and weapons—for example, whether a renter is entitled to possession of an apartment or whether a criminal suspect is in possession of stolen property.

The idea of possession is as old as the related concepts of private property and ownership. Our modern possession laws originated in the ancient Roman doctrines of *possessio.* English NATURAL LAW inherited most of the Roman possession ideas, and later the British brought their law of possession to the American colonies. Following the WAR OF INDEPENDENCE, state and federal courts continued to use and expand upon the historical notions of possession.

### Possession versus Ownership

Although the two terms are often confused, possession is not the same as ownership. No legal rule states that "possession is nine-tenths of the law," but this phrase is often used to suggest that someone who possesses an object is most likely its owner. Likewise, people often speak of the things they own, such as clothes and dishes, as their possessions. However, the owner of an object may not always possess the object. For example, an owner of a car could lend it to someone else to drive. That driver would then possess the car. However, the owner does not give up ownership simply by lending the car to someone else.

The myriad distinctions between possession and ownership, and the many nuances of possession, are complicated even for attorneys and judges. To avoid confusion over exactly what is meant by *possession*, the word is frequently modified by adding a term describing the type of possession. For example, possession may be actual, adverse, conscious, constructive, exclusive, illegal, joint, legal, physical, sole, superficial, or any one of several other types. Many times these modifiers are combined, as in "joint constructive possession." All these different kinds of possession, however, originate from what the law calls "actual possession."

### Actual Possession

"Actual possession is what most of us think of as possession—that is, having physical custody or control of an object" (*United States v. Nenadich,* 689 F.Supp. 285 [S.D. N.Y. 1988]). Actual possession, also sometimes called *possession in fact*, is used to describe immediate physical contact. For example, a person wearing a watch has actual possession of the watch. Likewise, if you have your wallet in your jacket pocket, you have actual possession of your wallet. This type of possession, however, is by necessity very limited. Frequently, a set of facts clearly indicate that an individual has possession of an object but that he or she has no physical contact with it. To properly deal with these situations, courts have broadened the scope of possession beyond actual possession.

### Constructive Possession

Constructive possession is a legal theory used to extend possession to situations where a person has no hands-on custody of an object. Most courts say that constructive possession, also sometimes called "possession in law," exists where a person has knowledge of an object plus the ability to control the object, even if the person has no physical contact with it (*United States*

*Under the doctrine of constructive possession, those who keep valuable items in a bank safety deposit box are considered in possession of the contents of the box even though they do not have actual physical custody of the items.*

AP/WIDE WORLD PHOTOS

*v. Derose,* 74 F.3d 1177 [11th Cir. 1996]). For example, people often keep important papers and other valuable items in a bank safety deposit box. Although they do not have actual physical custody of these items, they do have knowledge of the items and the ability to exercise control over them. Thus, under the doctrine of constructive possession, they are still considered in possession of the contents of their safety deposit box. Constructive possession is frequently used in cases involving criminal possession.

### Criminal Possession

Both federal and state statutes make possession of many dangerous or undesirable items criminal. For example, the federal statute 26 U.S.C.A. § 5861 (1996) prohibits possession of certain firearms and other weapons. Likewise, the possession of other items considered harmful to the public, such as narcotics, BURGLARY tools, and stolen property, is also made criminal under various laws. Criminal possession, especially of drugs, has been a major source of controversy. Making possession a crime allows for arrests and convictions without proving the use or sale of a prohibited item.

Historically, actual possession was required for a criminal possession conviction. Beginning in the 1920s, however, courts began expanding criminal possession to include constructive possession. The federal PROHIBITION of intoxicating liquors spawned several cases involving criminal possession. In one of the first criminal cases to use constructive possession, the court found a defendant guilty of possessing illegal liquor in trunks in the actual possession of another person (*People v. Vander Heide,* 211 Mich. 1, 178 N.W. 78 [1920]). Subsequent cases, especially narcotics cases, have continued to expand the law of criminal possession.

### Possession and Intent

In civil cases intent is rarely a part of possession. However, in criminal cases possession usually requires conscious possession. In other words, the person must be conscious of the fact that the item is illegal and that he or she possesses it. A person with possession of illegal drugs may avoid conviction if he or she believed the drugs were legal. Generally, to be guilty of criminal possession, a person must either know the item is illegal when it is received or must keep possession of the object after learning it is illegal.

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CROSS-REFERENCES

Adverse Possession; Drugs and Narcotics.

## POSSESSORY ACTION

*A proceeding instituted to obtain or recover the actual possession of property, as distinguished from a proceeding that merely seeks to establish the plaintiff's title or ownership of property.*

*In* ADMIRALTY LAW, *a possessory action is one that is brought to recover the possession of a vessel that is had under a claim of title.*

For example, an eviction proceeding is a possessory action to regain control of the property from a tenant.

Under old ENGLISH LAW, a possessory action was used to regain possession of the freehold, of which the plaintiff or the plaintiff's ancestors had been wrongfully deprived by the present tenant or possessor of the property.

## POSSESSORY WARRANT

*A rare statutory remedy for the recovery of* PERSONAL PROPERTY *that has been taken by* FRAUD, *violence, enticement, or seduction, or that has disappeared and is believed to be in the detention and control of the party complained against.*

## POST MORTEM

*[*Latin, After death.*] Pertaining to matters occurring after death. A term generally applied to an autopsy or examination of a corpse in order to ascertain the cause of death or to the inquisition for that purpose by the* CORONER.

## POSTAL SERVICE

See U.S. POSTAL SERVICE.

## POSTCONVICTION REMEDIES

*A variety of relief sought by a convicted criminal to have his or her sentence vacated, set aside, or corrected because such a sentence was based upon some violation of the U.S. Constitution.*

Among the most common postconviction remedies available are the writ of HABEAS CORPUS and the writ of CORAM NOBIS.

## POSTDATE

*To designate a written instrument, such as a check, with a time or date later than that at which it is really made.*

## POSTHUMOUS CHILD

*An infant who is born subsequent to the death of the father or, in certain cases, the mother.*

At COMMON LAW and by the laws of various states, governing DESCENT AND DISTRIBUTION, a posthumous child inherits from a deceased parent's estate as an heir provided that the infant is born alive following a gestation period that shows that the child was conceived prior to the death of the father who has died intestate. Under some statutes, it is necessary that the child be born within a ten-month period subsequent to the intestate father's death in order for the infant to be considered a posthumous child.

Laws addressing a posthumous child are rapidly becoming obsolete as medical advances extend the time period over which REPRODUCTION can occur. For example, sperm and eggs may be preserved in a frozen state past the lives of their donors. It is also possible to remove sperm or eggs, or perform a Caesarian section, after a person's death. Scholars and scientists anticipate the development of additional ways for genetic material to be preserved, and children to be born, after the death of the biological parent. These developments create new legal problems and are likely to necessitate changes for laws in several areas, including survivors' benefits, inheritance, and support.

## POSTING

*In accounting, the act of transferring an original entry to a ledger. The act of mailing a document. A form of substituted* SERVICE OF PROCESS *consisting of displaying the process in a prominent place when other forms of service are unavailing.*

*In connection with* TRESPASS *statutes, the act of placing or affixing signs on private property in a manner to give notice of the trespass.*

## POSTMARITAL AGREEMENT

*An agreement made between spouses after marriage concerning the rights and responsibilities of the parties upon* DIVORCE *or the death of one of the spouses.*

Postmarital agreements, also called postnuptial agreements, are agreements made between spouses while they are married. Postmarital agreements concern the rights and responsibilities of each spouse in the event that the other spouse dies or the couple divorces. All states allow postmarital agreements, but courts must review these agreements for procedural and substantive fairness before they can be executed.

In most states the law on postmarital agreements is similar to the law on premarital agreements. Both parties must make full disclosure of their earnings and their property, and the agreement must be in writing and signed by both parties. If FRAUD, duress, or coercion was involved in the formation of the contract, a court may declare the agreement void. Some states declare that, when creating a postmarital agreement, both parties must be represented by an attorney in order for the agreement to be valid. Courts are free to strike down provisions in postmarital contracts that violate public policy.

Some states have special laws for postmarital agreements. In Minnesota, for example, the agreement may not address CHILD SUPPORT, CHILD CUSTODY, or child visitation issues, and neither party may commence an action for separation or divorce within two years of the execution of the agreement. A section in Minnesota's statute also provides that no couple with a net worth of less than $1.2 million may fashion a postmarital agreement (Minn. Stat. Ann. § 519.11 [West 1996]). In Florida, if a postmarital agreement waives a spouse's rights upon the death of the other spouse, each spouse must make full and fair disclosure of assets. No such disclosure is required in Florida for similar premarital agreements (Fla. Stat. Ann. § 732.702 [West 1996]).

Postmarital agreements are distinct from separation agreements. Separation agreements are intended to govern the rights and duties of the spouses upon separation and until a court orders a divorce decree or until a court recognizes the separation. Postmarital agreements, by contrast, are intended to govern the rights and duties of the spouses after a divorce.

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CROSS-REFERENCES

Husband and Wife.

## ♦ POUND, ROSCOE

Roscoe Pound was one of the leading figures in twentieth-century legal thought. As a scholar, teacher, reformer, and dean of Harvard Law School, Pound strove to link law and society through his "sociological jurisprudence" and to improve the administration of the judicial system. In the early decades of the century, Pound was viewed as a radical thinker for arguing that the law is not static and must adapt to the needs of society. By the 1930s, however, he was seen as a more conservative figure, fighting the growth of federal government.

Pound was born on October 27, 1870, in Lincoln, Nebraska. The son of a judge, Pound attended the University of Nebraska, earning a bachelor of arts degree in botany in 1888. His father convinced him to attend Harvard Law School, but he stayed only one year. The death of his father led Pound to return to Lincoln, where he passed the Nebraska bar examination and was admitted to the bar in 1890.

"THE LAW MUST BE STABLE, BUT IT MUST NOT STAND STILL."
—ROSCOE POUND

From 1890 to 1903, Pound practiced law, taught at the University of Nebraska, earned a doctorate in botany from the university, and served as the director of the state botanical survey. In addition, he helped organize the Nebraska Bar Association in 1900.

A gifted scholar, Pound could have had a distinguished career in the sciences, but his appointment in 1901 as a commissioner of appeals for the Nebraska Supreme Court permanently shifted his career to the law. As a commissioner he acted as a temporary appellate judge, helping to reduce a backlog of cases. His opinions emphasized substance over procedure and reflected a concern with the practical effect of the law.

In 1903 he was appointed dean of the Nebraska College of Law. His academic interests merged with his experience as a court commissioner in 1906 when he addressed the annual convention of the AMERICAN BAR ASSOCIATION in St. Paul. His speech, titled "The Causes of Popular Dissatisfaction with the Administration of Justice," was a call to improve court administration and a preview of his theory of law, called sociological JURISPRUDENCE. The speech, which has remained a classic statement on JUDICIAL ADMINISTRATION, attracted the attention of JOHN HENRY WIGMORE, the dean of Northwestern University School of Law. He asked Pound to join his faculty in 1907. Pound's two-year association with the school was marked by his organization of the First National Conference on Criminal Law and Criminology, which gathered participants from many professions to discuss ways to reform the criminal law. The conference was one of the first of Pound's efforts to give practical application to sociological jurisprudence.

In 1910, after having spent a year at the University of Chicago, Pound joined the faculty at Harvard Law School. He was appointed dean in 1916 and served until 1936. It was during this period that Pound's views and influence were at their zenith.

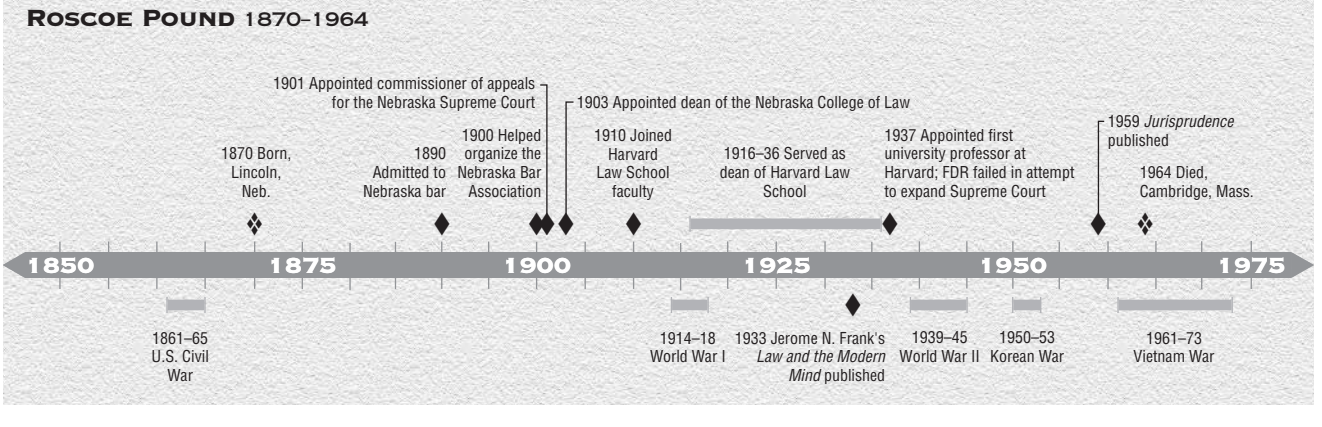

Pound's contribution to U.S. jurisprudence was to further the work that OLIVER WENDELL HOLMES JR. had begun in debunking the legal theories that had dominated during the nineteenth century. Pound fought the notion that an unchanging and inflexible NATURAL LAW formed the basis for the COMMON LAW. He did believe that some constant principles existed in the common law, particularly ones dealing with methods, to which he gave the name "taught legal tradition." Pound firmly believed that the implementation of the principles of the taught legal tradition by wise common-law judges resulted in substantive change, which reflected changes in society. As the interpreters of the common law, judges had a special duty to consider the practical effects of their decisions and to strive to ensure that judging facilitated rather than hindered societal growth.

Pound placed his sociological jurisprudence in opposition to what he termed "mechanical jurisprudence," which he characterized as a common but odious practice whereby judges woodenly applied precedent to the facts of cases without regard to the consequences. For Pound, the logic of previous precedent alone would not solve jurisprudential problems.

Despite his desire to see the law adapt to the needs of society, Pound believed that the common law should develop slowly and that it should only follow changes in society. Certainty in the law, especially in areas such as commercial and PROPERTY LAW, was often more beneficial than attempts at practical alteration. He revealed a more conservative cast of mind in his distrust of legislative statutes, arguing that the slow development of judge-made law was preferable to the radical changes often brought by legislation. His study of biology led him to believe that the law, like nature, was a seamless web and that changes in one part might produce totally unexpected and undesirable results in a distant part.

Pound's sociological jurisprudence fell out of favor in the 1930s, when the LEGAL REALISM movement attacked his philosophy. Though the legal realists and Pound had much in common, the realists, especially JEROME N. FRANK, differed over the nature of judicial decision making. Where Pound believed that judges, with the objective application of his principles of sociological jurisprudence, could logically produce the result in a given case, Frank, in his book *Law and the Modern Mind* (1933), thought otherwise. Frank maintained that not logic but the unique psychological makeup of judges was the most important factor in the resolution of a lawsuit. The realists pointed out, after analyzing many court decisions, that often a judge could support a decision for either side on a given legal issue. Therefore, they argued, judges were forced to decide cases on the basis of their subjective feelings of what was "fair" and then turn to the applicable part of the case law to furnish legal fig leaves to hide what they had actually done.

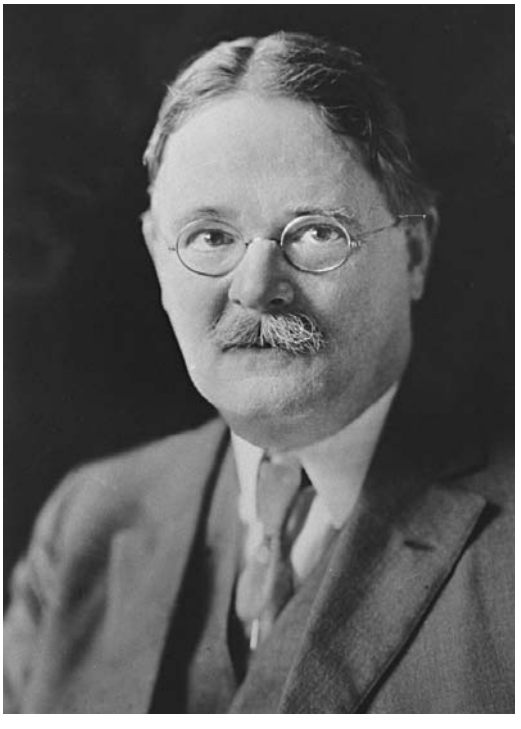

*Roscoe Pound.*
LIBRARY OF CONGRESS

Pound reacted angrily to this analysis in a series of law review articles. He believed that the RULES OF LAW, especially rules of commercial law and property, could be determined with certainty and even attain the logical coherence of propositions of Euclid. Pound conceded that it was important to study the psychology of judging, but only to prevent the aberrations the realists claimed were common. Pound thought that the realists emphasized the oddities, and not the central factors, in their analysis of the judicial system. He disliked the realists for discounting the importance of the common law and for their willingness to advocate that the law be used to change society. For Pound, the legal system worked best when the law followed society. Any attempt to make society follow the law was futile.

Pound resigned as dean of the Harvard Law School in 1936. He was appointed the first uni-

versity professor of Harvard in 1937, an appointment that permitted him to teach in any of the academic units of Harvard. An opponent of much of President FRANKLIN D. ROOSEVELT's NEW DEAL legislation, Pound was actively involved in attempts to stop the great expansion of federal administrative agencies. He continued writing during his later years, publishing his monumental five-volume *Jurisprudence* in 1959. He died on July 1, 1964, in Cambridge, Massachusetts, at the age of ninety-three.

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"Causes of Popular Dissatisfaction with the Administration of Justice" (Appendix, Primary Document); Jurisprudence; Legal Realism; "Mechanical Jurisprudence" (Appendix, Primary Document).

"THESE ARE THE DAYS FOR STRONG MEN TO COURAGEOUSLY EXPOSE WRONG."
—ADAM CLAYTON POWELL JR.

## POUR-OVER

*A clause in a will or trust that provides that, upon the death of the creator of the trust, his or her money or property will be transferred into some other existing trust.*

## ◆ POWELL, ADAM CLAYTON, JR.

Adam Clayton Powell Jr. was a prominent African American congressman, serving his district in New York City's Harlem neighborhood from 1945 to 1970. A flamboyant and often controversial political figure, Powell played a key role in passing many federal education and social welfare programs in the 1960s. Near the end of his tenure, however, Powell was embroiled with the House of Representatives over alleged ethical lapses.

Powell was born in New Haven, Connecticut, on November 29, 1908. When he was less than a year old, his father moved the family to New York City's Harlem neighborhood to accept the ministry at the Abyssinian Baptist Church. The church, which was a hundred years old, expanded under the elder Powell's leadership, in time becoming one of the largest congregations in the United States.

Powell graduated from Colgate University in 1930 and received a master of arts degree in religious education from Columbia University in 1931. He served as assistant minister and business manager of the Abyssinian Church in 1930 and succeeded his father as minister in 1936. He remained minister of the church for thirty-five years.

During the Great Depression of the 1930s, Powell acted aggressively to address racial and social injustice in New York City. In 1930 he organized picket lines and mass meetings to demand reform of Harlem Hospital, which had fired five African American doctors because of their race. Powell also used the church as an instrument of social welfare, distributing food, clothing, and temporary jobs to thousands of Harlem's destitute residents.

Powell soon was recognized as a charismatic CIVIL RIGHTS leader, adept at forcing restaurants, retail stores, bus companies, utilities, and phone companies either to hire or begin promoting African American employees. He transferred his efforts into the political arena in 1941, when he was elected as an independent to the New York City Council. During WORLD WAR II he worked for the New York State Office of Price Administration and the Manhattan Civilian Defense, as well as publishing a weekly newspaper, *The People's Voice.*

In 1944 he was elected as a Democrat to Congress, representing the Twenty-second (later Eighteenth) District. In 1947 he took a seat on the Education and Labor Committee, which was to become the base of his power and prestige. During the 1940s and 1950s, Powell challenged racial SEGREGATION in and out of the halls of Congress. He took black constituents to the House dining room that had been informally restricted to white representatives. He introduced legislation to outlaw LYNCHING and to ban discrimination in the armed forces, housing, transportation, and employment. He became famous for attaching an antidiscrimination amendment to many pieces of legislation. The so-called Powell Amendment was always unsuccessful, but it was a way to raise the issue of racial inequality before a House that was generally hostile to Powell's stand on civil rights.

His frustration at the Democratic Party's reluctance to move forward on civil rights led him in 1956 to endorse Republican President DWIGHT D. EISENHOWER for a second term. New York City DEMOCRATIC PARTY leaders were out-

raged at this act of disloyalty and waged a hard-fought campaign to defeat him in the 1958 primary election. Powell's loyal Harlem constituents rebuffed this effort.

In 1961 Powell became chairman of the Committee on Education and Labor. He proved to be an effective, if at times difficult, point man for the Kennedy and Johnson administrations. More than fifty pieces of major legislation were passed out of Powell's committee, including the school lunch program, education and training for the deaf, student loan programs, vocational training, and MINIMUM WAGE increases. Powell was instrumental in passing legislation to aid elementary and secondary education.

By 1966, however, Powell had alienated many House members because of his poor management of the committee budget, numerous and well-publicized government-funded trips abroad, and excessive absenteeism. These congressional problems were compounded by problems in his private life. Powell, despite being a minister, liked the high life. Married three times and attached to other women, he enjoyed his playboy image. Many members of Congress were shocked by this attitude.

More seriously, Powell had been charged with income TAX EVASION in 1958, but the trial ended in a hung jury. In 1960 he appeared on a New York City television show and lambasted POLICE CORRUPTION. He had previously charged on the floor of the House that a constituent, Esther James, worked for ORGANIZED CRIME in Harlem. Statements made on the House floor are covered by congressional IMMUNITY, and Powell knew he could not be sued for slander. On the television show he repeated his charge and labeled James a Mafia "bag woman."

*Adam Clayton Powell Jr.*
LIBRARY OF CONGRESS

James proceeded to sue Powell, setting in motion a chain of legal and political misfortunes for him. After James won her slander suit and obtained damages of $46,000, Powell refused to pay the judgment. He also ignored subpoenas to appear and explain his financial records. Finally the court issued two civil CONTEMPT arrest warrants for his recalcitrance.

After the warrants were issued, Powell would only return to his Harlem district to preach on Sundays, when it was illegal to serve a civil contempt warrant. The trial court then imposed a thirty-day jail sentence for failing to appear. On appeal, the New York state appellate court allowed Powell more time to comply with the subpoena but agreed with the trial court that Powell's jail sentence was not barred by congressional immunity (*James v. Powell,* 26 A.D. 2d 295, 274 N.Y.S.2d 192 [1966]). Powell was not to settle the case with James until 1969.

The James episode and allegations of congressional misconduct led the House to strip

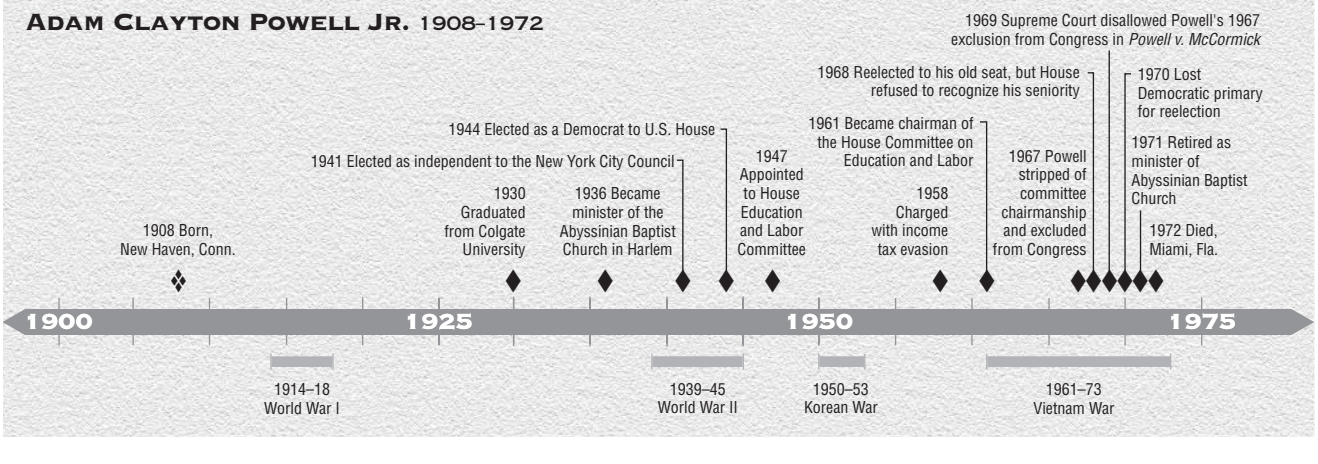

Powell of his committee chair in January 1967. In addition, the full House refused to seat him until the Judiciary Committee completed its investigation of his affairs. In February 1967 the committee recommended that Powell be censured, fined, and deprived of seniority. The full House disagreed, voting 307 to 116 to exclude him from Congress. Powell then ran in the special election to fill his vacant seat. When he won in April, he refused to take his seat. He ran again in the November 1968 election and was reelected. This time the House seated him but denied him his seniority. Powell refused to take his seat under this condition.

Following his exclusion in 1967, Powell filed a lawsuit against the House of Representatives, arguing that the House had no constitutional basis for excluding him. Typically federal courts do not entertain such lawsuits, because they deal with matters constitutionally delegated to the legislative branch. Although it appeared Powell's lawsuit was barred by the "political question" doctrine, the U.S. Supreme Court ultimately decided that it could intervene. In *Powell v. McCormack,* 395 U.S. 486, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969), the Court held that the House of Representatives could not exclude Powell, a duly elected member, who met all the constitutional qualifications of age, citizenship, and residence prescribed by the Constitution.

Powell took his House seat after the Supreme Court decision, but he lost his twenty-two years of seniority. His victory was short-lived. He lost in the June 1970 primary election and failed to get on the ballot as an independent. He retired as minister at the Abyssinian Baptist Church in 1971 and died in Miami, Florida, on April 4, 1972.

"THE GUARANTEE OF EQUAL PROTECTION CANNOT MEAN ONE THING WHEN APPLIED TO ONE INDIVIDUAL AND SOMETHING ELSE WHEN APPLIED TO A PERSON OF ANOTHER COLOR. IF BOTH ARE NOT ACCORDED THE SAME PROTECTION, THEN IT IS NOT EQUAL."
—LEWIS F. POWELL JR.

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**CROSS-REFERENCES**

Congress of the United States.

## ♦ POWELL, LEWIS FRANKLIN, JR.

Lewis Franklin Powell Jr. served as an associate justice of the U.S. Supreme Court from 1972 to 1987. Powell, who came to the Court as one of the most distinguished lawyers in the United States, was a moderate conservative who became a key "swing" vote on a Court that became divided between conservatives and liberals.

Powell was born on November 19, 1907, in Suffolk, Virginia. A descendant of Virginia families who reached back to the settlement of Jamestown in 1607, Powell attended Washington and Lee University in Lexington, Virginia. He graduated with a bachelor's degree in 1929 and a law degree in 1931. He earned a master's degree from Harvard Law School in 1932.

Powell first entered law practice in Richmond, where he remained until he was appointed to the U.S. Supreme Court in 1971. His legal career was

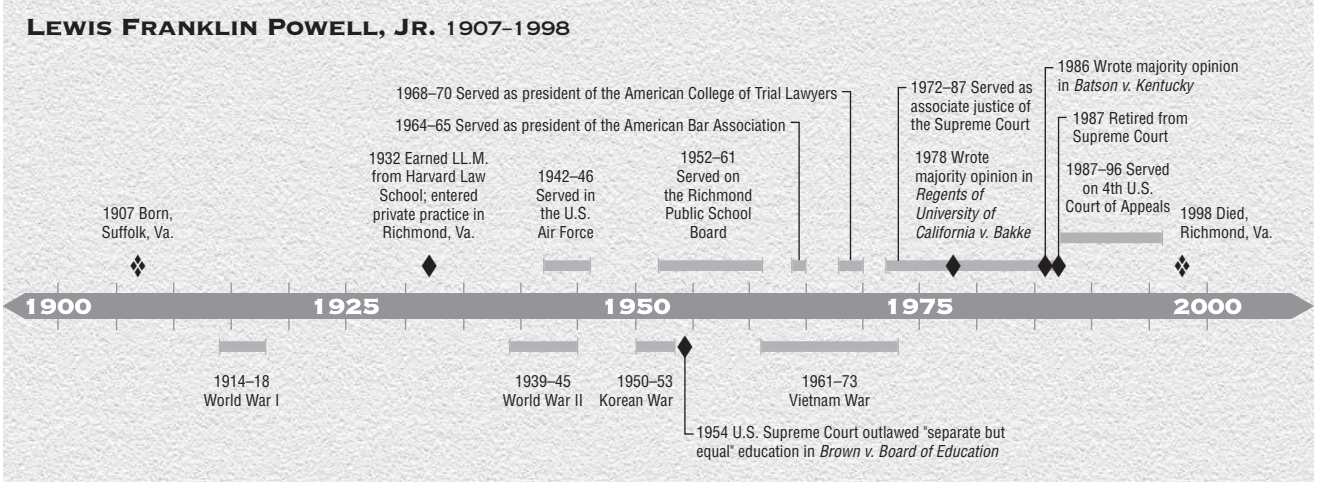

interrupted by WORLD WAR II, during which he served as a U.S. Army Corps intelligence officer. Powell's reputation grew nationally during the 1950s and 1960s. He was elected president of the AMERICAN BAR ASSOCIATION in 1964 and president of the American College of Trial Lawyers in 1968.

Unlike many U.S. Supreme Court appointees, Powell did not enter politics. He did, however, distinguish himself as a member and president of the Richmond Public School Board from 1952 to 1961, and later he was a member of the Virginia Board of Education. In the wake of BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), which prohibited state-imposed racial SEGREGATION in public schools, many southern communities pledged to defy or evade the Court decision. Some school boards closed the schools and encouraged attendance at white-only private schools, and others refused to integrate. Powell, as president of the Richmond Public School Board, peacefully integrated the school system and publicly called for cooperation rather than resistance to the INTEGRATION of society.

President RICHARD M. NIXON nominated Powell to the high court in October 1971. Nixon had offered him earlier appointments, but Powell had refused. He was easily confirmed and took his seat in January 1972. He joined a Court that was moving from a liberal majority to a more conservative makeup. Powell was a conservative on crime and law enforcement and a strong defender of integration and CIVIL RIGHTS. In the 1980s, as the Court grew more conservative, Powell moved to the center and often provided the vote that broke a 4–4 deadlock.

Powell played a key role in REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978), which concerned the legality of AFFIRMATIVE ACTION plans to remedy past RACIAL DISCRIMINATION. Powell wrote the opinion of the Court, holding that a university may consider the race of an applicant as part of its admission procedures. Powell also found, however, that the particular admissions program at issue in the case had unlawfully discriminated against Allen Bakke, a white applicant, by denying him admission to medical school solely on the basis of his race.

Powell also wrote the majority opinion in *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), which prohibited prosecutors from excluding prospective jurors on the basis of race. Under the *Batson* test, a defendant may object to a prosecutor's PEREMPTORY CHALLENGE (a removal of a prospective juror without offering a reason). The prosecutor then must "come forward with a neutral explanation for challenging black jurors." If a neutral explanation cannot be made, the juror will not be excused.

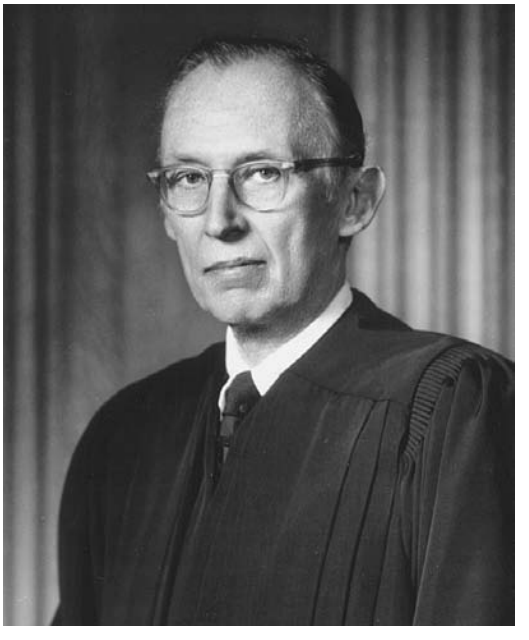

*Lewis F. Powell Jr.*
U.S. SUPREME COURT

Powell retired from the Court in 1987. He died in Richmond, Virginia, in 1998.

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CROSS-REFERENCES

Jury; School Desegregation.

## POWELL V. ALABAMA

*Powell v. Alabama,* 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932), is a watershed case in CRIMINAL LAW. The *Powell* case marked the first time that the U.S. Supreme Court reversed a state court conviction because the lower court failed to appoint counsel or give the defendants an opportunity to obtain counsel.

On March 25, 1931, nine young black men were traveling on a freight train through Alabama. Haywood Patterson, Eugene Williams, and brothers Roy and Andy Wright were friends, having grown up together in Chattanooga, Tennessee. Ozie Powell, Olen Montgomery, Charley

Weems, Willie Roberson, and Clarence Norris all hailed from different parts of Georgia. Also on the train were seven white men and two white women.

During the ride a fight broke out, and six of the seven white men were thrown off the train. The train stopped near Scottsboro, Alabama, and a sheriff's posse comprised of private citizens seized the young black men. The white females, Victoria Price and Ruby Bates, claimed that they had been raped. The bewildered black youths were roped together, herded into a truck, and driven to Scottsboro, the Jackson County seat. That night, an unruly mob demanded to lynch the youths, but Sheriff M. L. Wann kept them safe.

The youths were indicted on charges of rape on March 31, 1931. They were arraigned the same day in the Jackson County Circuit Court, where they entered pleas of not guilty. Although they faced rape charges, a capital offense at the time, they were held without an opportunity to communicate with the outside world, and no attorney came to see them. Most of the defendants were illiterate, and none had even a rudimentary knowledge of criminal law.

The court ordered that the defendants be tried in groups, with four trials in all. The trials began on April 6, 1931, just six days after the indictments were entered and less than two weeks after the defendants were arrested. The gallery in the courtroom was packed with spectators. Outside the courtroom, a parade band supplied by the Ford Motor Company played popular tunes for the thousands who could not get a seat in the gallery.

At the beginning of the first trial, Judge Alfred E. Hawkins asked the defendants if they were ready to proceed to trial. Although Hawkins previously had ordered members of the local bar to assist the defendants, no attorney answered for the defendants except Scottsboro lawyer Milo Moody and Stephen Roddy, a lawyer from Chattanooga. Moody was 70 years old. Roddy was not a member of the Alabama bar or a criminal defense attorney, and he was unfamiliar with the court rules and laws of Alabama.

Roddy and Judge Hawkins engaged in a murky exchange that made only two things clear: the defendants had not seen an attorney until the day of trial, and they would not be receiving effective representation in their capital trials. Roddy represented the defendants in a perfunctory fashion, and the court excluded evidence helpful to the defendants. Each trial lasted less than one day, and to the noisy delight of onlookers, eight of the nine defendants were convicted and sentenced to death. Only 13-year-old Roy Wright was spared: his case ended in a mistrial when the jury held out for the death penalty, which could not be enforced against a juvenile.

The convictions sparked a national debate over the fairness of the proceedings. The defendants came to be called the "Scottsboro Boys," and the U.S. Communist Party led the cause to free them. After their convictions, the youths were represented by George W. Chamlee Sr. and Joseph R. Brodsky from the International Labor Defense, an organization dominated by Communists. On appeal to the Supreme Court of Alabama, Chamlee and Brodsky argued that the defendants had not received fair trials for various reasons. Specifically, Chamlee and Brodsky argued that the convictions should be reversed because the crowd outside the courthouse had influenced the jurors, the juries in Alabama contained no black persons, and the defendants had not received adequate LEGAL REPRESENTATION. The Supreme Court of Alabama reversed the conviction of Eugene Williams on the grounds that he may have been a juvenile and should have been tried as one, but the court affirmed the other seven convictions. On March 24, 1932, the Supreme Court of Alabama ordered that the seven defendants be put to death by electrocution on August 31, 1932. The executions were postponed when the U.S. Supreme Court decided to hear the appeals.

In a 7–2 decision delivered on November 7, 1932, the Court reversed all seven convictions. Justice GEORGE SUTHERLAND, writing for the majority, began the opinion by recounting the procedural history of the case and reciting the paltry and sometimes inaccurate record of the case. Sutherland noted that the record indicated that the defendants had been represented by counsel at the ARRAIGNMENT, "But no counsel having been employed . . . the record does not disclose when, or under what circumstances, an appointment of counsel was made, or who was appointed." Sutherland also referred to the mob surrounding the defendants. Sutherland wrote that "it does not appear that the defendants were seriously threatened with . . . mob violence; but it does appear that the attitude of the community was one of great hostility." Although the intimidating atmosphere played a part in the opinion, the Supreme Court was more concerned with the procedures employed by the trial court.

*Called in to prevent a mob lynching, National Guard troops surround the young men accused in the Scottsboro rape case. (l-r) Clarence Norris, Olen Montgomery, Andy Wright, Willie Roberson, Ozie Powell, Eugene Williams, Charlie Weems, Roy Wright, and Haywood Patterson.*

BETTMANN/CORBIS

Judge Hawkins had appointed the entire bar of Scottsboro to represent the defendants, but he did not require the attorneys to accept the case. Sutherland quoted the colloquy between Hawkins and Roddy that occurred just before the trial, which revealed that no attorney was prepared to take the case. Nevertheless, Hawkins allowed the trials to go forward, "and in this casual fashion," Sutherland lamented, "the matter of counsel in a capital case was disposed of."

Sutherland began the Court's legal analysis by declaring that, although the defendants may have appeared guilty, they were nonetheless presumed to be innocent. Sutherland then proceeded to frame the issue in the case as whether the defendants were denied the assistance of counsel and, if so, whether such a denial was an infringement of their rights under the FOURTEENTH AMENDMENT to the U.S. Constitution, the amendment that makes DUE PROCESS requirements applicable to the states.

Sutherland concluded that states were obliged under the Constitution to provide the right to an attorney in a criminal case and that the right had not been extended to the defendants. Sutherland cited Supreme Court PRECEDENT for the proposition that due process can be determined by ascertaining "what were the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence." He then examined the history of the criminal defendant's right to an attorney and concluded that such a right did not exist in England until the mid-nineteenth century, that the English rule was assailed by legal analysts in England and rejected by 12 of the 13 colonies, and that it was a necessary incident to due process of law. The denial of counsel, Sutherland declared, "is so outrageous and so obviously a perversion of all sense of proportion that the rule was constantly, vigorously and sometimes passionately assailed by English statesmen and lawyers."

Sutherland still had to make the requirement of counsel applicable to the states. The passage of the Fourteenth Amendment in 1868 forbid states to "deprive any person of life, liberty, or

property, without due process of law," but it remained for the court to determine precisely what procedures constituted due process. Quoting *Hebert v. State of Louisiana,* 272 U.S. 312, 47 S. Ct. 103, 71 L. Ed. 270 (1926), Sutherland explained that due process was required if a right was "of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"

Sutherland noted that it was well established that due process in a criminal case necessarily included an opportunity to be heard. Such an opportunity could not be achieved even by intelligent laypersons.

Having established that the right to an attorney was a fundamental due process right applicable to the states, Sutherland applied the law to the facts of the case. The defendants were held incommunicado and prevented from obtaining counsel of their own choice. Sutherland declared that because of

> the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment, and close surveillance of the defendants by military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all [because] they stood in deadly peril of losing their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.

The failure of the trial court to appoint counsel was likewise a denial of due process. Hawkins had made an attempt to appoint attorneys, but it was a feeble one. Sutherland declared that the attorneys were not "given that clear appreciation of responsibility or impressed with that individual sense of duty which should and naturally would accompany the appointment of a selected member of the bar."

The *Powell* holding declared that the Due Process Clause of the Fourteenth Amendment required that state courts give defendants an opportunity to obtain counsel. It also created the rule that due process requires state courts to appoint counsel for indigent defendants in all capital cases and that a free attorney for indigent defendants in noncapital cases is required if an unfair trial would result without the appointment. *Powell* was used as precedent for other Supreme Court decisions expanding the RIGHT TO COUNSEL, as well as decisions establishing that the legal representation defendants receive should not fall below a minimum standard of effectiveness.

The defendants were retried again and again after the Supreme Court reversed their convictions. In 1935, the High Court again intervened in the prosecutions, reversing the convictions based on the fact that there were no blacks on the jury rolls (*Norris v. Alabama,* 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 [1935]).

In 1937, four of the defendants were released, but the other five defendants remained in prison. Each eventually gained release through either PAROLE or escape. In 1976, Alabama officials took a new look at the case, and Governor GEORGE WALLACE pardoned Clarence Norris. Norris, the last surviving defendant, had violated his parole by fleeing Alabama and had been at large for more than 30 years.

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#### CROSS-REFERENCES

Capital Punishment; Criminal Procedure; Incorporation Doctrine; Fourteenth Amendment; Right to Counsel.

## POWER

*The right, ability, or authority to perform an act. An ability to generate a change in a particular legal relationship by doing or not doing a certain act.*

*In a restricted sense, a liberty or authority that is reserved by, or limited to, a person to dispose of real or* PERSONAL PROPERTY, *for his or her own benefit or for the benefit of others, or that enables one person to dispose of an interest that is vested in another.*

## POWER OF ATTORNEY

*A written document in which one person (the principal) appoints another person to act as an agent on his or her behalf, thus conferring authority on the agent to perform certain acts or functions on behalf of the principal.*

*A sample document granting power of attorney*

**Power of Attorney**

**FULL POWER OF ATTORNEY**

Date: _____

I, _____ , the undersigned, of _____ ,

do hereby confer full power of attorney on _____

of _____ as true and lawful attorney-in-fact for me and in my name, place and stead, and on my behalf, and for my use and benefit, regarding the following:

FIRST: To ask, demand, litigate, recover, and receive all manner of goods, chattels, debts, rents, interest, sums of money and demands whatsoever, due or hereafter to become due and owing, or belonging to me, and to make, give and execute acquittances, receipts, satisfactions or other discharges for the same, whether under seal or otherwise;

SECOND: To make, execute, endorse, accept and deliver in my name or in the name of my aforesaid attorney all checks, notes, drafts, warrants, acknowledgments, agreements and all other instruments in writing, of whatever nature, as to my said attorney-in-fact may seem necessary to conserve my interests;

THIRD: To execute, acknowledge and deliver any and all contracts, debts, leases, assignments of mortgage, extensions of mortgage, satisfactions of mortgage, releases of mortgage, subordination agreements and any other instrument or agreement of any kind or nature whatsoever, in connection therewith, and affecting any and all property presently mine or hereafter acquired, located anywhere, which to my said attorney-in-fact may seem necessary or advantageous for my interests;

FOURTH: To enter into and take possession of any lands, real estate, tenements, houses, stores or buildings, or parts thereof, belonging to me that may become vacant or unoccupied, or to the possession of which I may be or may become entitled, and to receive and take for me and in my name and to my use all or any rents, profits or issues of any real estate to me belonging, and to let the same in such manner as to my attorney shall seem necessary and proper, and from time to time to renew leases;

FIFTH: To commence, and prosecute on my behalf, any suits or actions or other legal or equitable proceedings for the recovery of any of my lands or for any goods, chattels, debts, duties, and to demand cause or thing whatsoever, due or to become due or belonging to me, and to prosecute, maintain and discontinue the same, if he or she shall deem proper;

SIXTH: To take all steps and remedies necessary and proper for the conduct and management of my business affairs, and for the recovery, receiving, obtaining and holding possession of any lands, tenements, rents or real estate, goods and chattels, debts, interest, demands, duties, sum or sums of money or any other thing whatsoever, located anywhere, that is, are or shall be, by my said attorney-in-fact, thought to be due, owing, belonging to or payable to me in my own right or otherwise;

SEVENTH: To appear, answer and defend in all actions and suits whatsoever that shall be commenced against me and also for me and in my name to compromise, settle and adjust, with each and every person or persons, all actions, accounts, dues and demands, subsisting or to subsist between me and them or any of them, and in such manner as my said attorney-in-fact shall think proper; hereby giving to my said attorney power and authority to do, execute and perform and finish for me and in my name all those things that shall be expedient and necessary, or which my said attorney shall judge expedient and necessary in and about or concerning the premises, or any of them, as fully as I could do if personally present, hereby ratifying and confirming whatever my said attorney shall do or cause to be done in, about or concerning the premises and any part thereof.

Powers conferred on said attorney-in-fact shall not be restricted or limited by the aforementioned specifications regarding situation of representation. The rights, powers and authority of said attorney-in-fact granted in this instrument shall commence and be in full force and effect on _____, (Month & Day) _____, (Year) and such rights, powers and authority shall remain in full force and effect thereafter until I give notice in writing that such power is terminated.

It is my desire, and I so freely state, that this power of attorney shall not be affected by any subsequent disability or incapacity that may befall me.

FURTHERMORE, upon a finding of incompetence by a court of appropriate jurisdiction, this power of attorney shall be irrevocable until such time as said court determines that I am no longer incompetent.

_____

Signature

[continued]

*A sample document granting power of attorney (continued)*

**Power of Attorney**

I, _____, whose name is signed to the foregoing instrument, having been duly qualified according to the law, do hereby acknowledge that I signed and executed this power of attorney; that I am of sound mind; that I am eighteen (18) years of age or older; that I signed it willingly and am under no constraint or undue influence; and that I signed it as my free and voluntary act for the purpose therein expressed.

_____
Signature
My commission expires on _____

_____
Notary Public

Powers of attorney are routinely granted to allow the agent to take care of a variety of transactions for the principal, such as executing a stock power, handling a tax audit, or maintaining a safe-deposit box. Powers of attorney can be written to be either general (full) or limited to special circumstances. A power of attorney generally is terminated when the principal dies or becomes incompetent, but the principal can revoke the power of attorney at any time.

A special type of power of attorney that is used frequently is the "durable" power of attorney. A durable power of attorney differs from a traditional power of attorney in that it continues the agency relationship beyond the incapacity of the principal. The two types of durable power of attorney are immediate and "springing." The first type takes effect as soon as the durable power of attorney is executed. The second is intended to "spring" into effect when a specific event occurs, such as the disability of the principal. Most often, durable powers of attorney are created to deal with decisions involving either property management or HEALTH CARE.

Durable powers of attorney have become popular because they enable the principal to have her or his affairs handled easily and inexpensively after she or he has become incapacitated. Before the durable power of attorney was created, the only way to handle the affairs of an incapacitated person was to appoint a guardian, a process that frequently involves complex and costly court proceedings, as well as the often humiliating determination that the principal is wholly incapable and in need of protection. With a durable power of attorney, on the other hand, a principal can appoint someone to handle her or his affairs after she or he becomes incompetent, and the document can be crafted to confer either general power or power in certain limited circumstances. Because no judicial proceedings are necessary, the principal saves time and money and avoids the stigma of being declared incompetent.

The concept of the durable power of attorney was created in 1969 when the National Conference of Commissioners on Uniform State Laws promulgated the UNIFORM PROBATE CODE (U.P.C. § 5–501). Ten years later, the provisions of the code dealing with the durable power of attorney were modified and published as the Uniform Durable Power of Attorney Act (UDPA). All fifty states recognize some version of the durable power of attorney, having adopted either the UDPA or the Uniform Probate Code, or some variation of them. Versions of the durable power of attorney vary from state to state. Certain powers cannot be delegated, including the powers to make, amend, or revoke a will, change insurance beneficiaries, contract a marriage, and vote.

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CROSS-REFERENCES

Living Will.

## POWER OF SALE

*A clause commonly inserted in a mortgage and deed of trust that grants the creditor or trustee the right and authority, upon default in the payment of the debt, to advertise and sell the property at public auction, without resorting to a court for authorization to do so.*

Once the creditor is paid out of the net proceeds, the property is transferred by deed to the purchaser, and the surplus, if any, is returned to the debtor. The debtor is thereby completely divested of any interest in the property and has no subsequent right of redemption—recovery of property by paying the mortgage debt in full.

## POWER OF TERMINATION

*A future interest in real property whereby the grantor conveys an estate to another, called the grantee, subject to a particular condition, the breach of which forfeits the grantee's interest in the property.*

For example, A, owner of Blackacre, might convey the land "To B, but if liquor is sold on the premises, then A may reenter and repossess." A has the power to terminate the interest of B in the land if the condition occurs.

A power of termination is also known as a right of reentry.

CROSS-REFERENCES

Right of Reentry.

## PRACTICE

*Repeated or customary action; habitual performance; a succession of acts of similar kind; custom; usage. The exercise of any profession.*

*The form or mode or proceeding in courts of justice for the enforcement of rights or the redress of wrongs, as distinguished from the* SUBSTANTIVE LAW *that gives the right or denounces the wrong. The form, manner, or order of instituting and conducting an action or other judicial proceeding, through its successive stages to its end, in accordance with the rules and principles laid down by law or by the regulations and precedents of the courts.*

An attorney is actually engaged in the PRACTICE OF LAW when she maintains an office, offers to perform legal services, describes herself as an attorney on letterheads or business cards, counsels clients, negotiates with other parties or opposing counsel, and fixes and collects fees for legal work. A doctor is practicing medicine when he discovers the cause and nature of diseases, treats illnesses and injuries, or prescribes and administers medical or surgical care. Lawyers and doctors must qualify for licenses before they may practice their professions.

## PRACTICE OF LAW

*The professional tasks performed by lawyers in their offices or in court on a day-to-day basis. With the growth of specialization, it has become difficult to generalize about the practice of law. Nevertheless, common elements can be identified in the disparate typical workday of, for example, a criminal defense attorney and a probate attorney.*

The practice of law depends on lawyers having clients. Therefore, lawyers must spend time with clients or potential clients. In these meetings lawyers are expected to do more than just listen to their clients' concerns and desires. Lawyers must ask questions that help identity the legal issues at stake and use the answers to make an initial assessment of the case. If the legal and factual issues are simple a lawyer may be able to offer the client legal advice. If the issues are more complex or the facts are unclear the lawyer will defer offering advice. At the end of the meeting the client or the lawyer may decide they do not want to pursue the matter any further. If they agree to proceed, however, the client will often sign a retainer agreement that specifies what the lawyer will charge and how payments will be made.

Once a legal problem or issue has been identified the lawyer must act on the client's behalf and research the law of the state or jurisdiction. If the client wants a will or contract prepared, the lawyer will draft the document. If the client has a dispute with a party, the lawyer may contact that party or the party's attorney, to discuss the situation. If the problem cannot be resolved informally the lawyer may file a civil lawsuit with a local court and begin the litigation process. These types of actions are mirrored in the CRIMINAL LAW, where prosecutors represent the state and defense lawyers represent those persons charged with crimes. If a criminal matter cannot be resolved through a plea bargain, the case must be tried in court.

The practice of law is most public when a matter is tried before a court. In both civil and criminal hearings and trials, lawyers must understand rules of procedure and evidence. Lawyers select jurors, challenge the introduction

of evidence, make arguments to the judge and jury, propose jury instructions and do whatever is necessary to represent their clients. Lawyers also may file appeals on behalf of their clients if they lose in the trial court. Appeals require the preparation of a brief and oral argument in front of appellate judges.

An overlooked part of the practice of law is the collection of money on behalf of the client. Once a court issues a final judgment awarding damages, court costs, and attorneys' fees, an attorney must secure payment from the other party. If the party fails to pay the judgment the attorney can garnish the wages of the party and attach the party's PERSONAL PROPERTY in order to obtain the money to which the client is legally entitled.

FURTHER READINGS

Bogus, Carl T. 2001. *Why Lawsuits are Good for America: Disciplined Democracy, Big Business, and the Common Law.* New York: New York Univ. Press.

Foonberg, Jay G. 1999. *How to Start and Build a Law Practice.* 4th ed. Chicago: American Bar Association.

Hobson, Wayne K. 1986. *The American Legal Profession and the Organizational Society, 1890–1930.* New York: Garland.

Walton, Kimm Alayane. 2000. *What Law School Doesn't Teach You . . . But You Really Need to Know.* New York: Harcourt Brace Legal and Professional Publications.

CROSS-REFERENCES

Attorney-Client Privilege; Attorney Misconduct; Canons of Ethics; Ethics, Legal; Lawyer; Legal Malpractice; Professional Responsibility.

## PRAECIPE

*[*Latin, Give an order.*] An original writ, one of the forms of legal process used to commence an action. A praecipe was drawn up in the alternative and commanded the defendant to do what was ordered or to appear and show why he or she had not done it. An order that commands the clerk of a court to issue a formal writ of execution directing the enforcement of a judgment already rendered and commanding a public officer to seize the defendant's property in order to satisfy the debt.*

## PRAYER

*The request contained in a bill in* EQUITY *that the court will grant the process, aid, or relief that the complainant desires.*

In addition, the term *prayer* is applied to that segment of the bill that contains this request.

## PREAMBLE

*A clause at the beginning of a constitution or statute explaining the reasons for its enactment and the objectives it seeks to attain.*

Generally a preamble is a declaration by the legislature of the reasons for the passage of the statute, and it aids in the interpretation of any ambiguities within the statute to which it is prefixed. It has been held, however, that a preamble is not an essential part of an act, and it neither enlarges nor confers powers.

## PRECATORY LANGUAGE

*Words in a will or a trust used by the testator (the person making the will) or settlor (the person making a trust) to express a wish or desire to have his or her property disposed of in a certain way or to have some other task undertaken, which do not necessarily impose a mandatory obligation upon anyone to carry out the wish.*

Precatory language in a will or trust usually includes such terms as the testator's "request," "hope," or "desire" that property be given to a certain person or be disposed of in a particular manner. Whether such language can be viewed as mandatory, thus creating an enforceable will or trust, or whether it merely expresses the testator's wish to have something done has been a difficult issue for the courts. The court must look to the intent of the testator to determine whether the precatory language establishes an enforceable agreement.

The court usually examines a number of factors, including other language used in the will or trust, to determine the testator's intent. For example, if in her will Anne says only that she "wishes" or "would like" her house to be sold to her cousin Bill on her death, the court may find the language to be precatory and thus unenforceable because Anne was merely expressing a wish or a recommendation. But if elsewhere in the will a definite selling price is indicated, the court may conclude that Anne, despite the precatory terms used, did intend for her cousin to be offered the house because she took the additional step of specifying the price for which the property was to be disposed of at her death.

In addition to examining other language in the will or trust for clues to the testator's intent, the court may look to the relationship of the parties involved. For instance, if Tom puts language in a trust "requesting" that his daughter receive money or a particular gift, a judge may

be more apt to enforce the trust. In doing so, the court acts on the assumption that Tom and his daughter share a close personal relationship and that he would want her to be provided for following his death even if he was less than definite in the language he used in the trust.

Furthermore, language in a will or trust making a gift to charity may sometimes be upheld even if it appears to be precatory. For example, if Sue states in her will that she "would like" some of her money to be used for a particular program at a university, a court may view her language as mandatory. When a charitable organization is involved, courts, as a policy matter, tend to construe language liberally to make the gift effective.

The litigation that often results from precatory language in wills and trusts can be avoided by the careful use of clear and definite language that leaves no doubt as to how the testator wishes to dispose of her or his property. Seeking legal advice when drafting a will or trust may be the best way to prevent litigation.

FURTHER READINGS

McElwee, L.A. 1992. "Precatory Language in Wills: Mere Utterances of the Sibyl?" *Probate Law Journal* 11.

## PRECEDENT

*A court decision that is cited as an example or analogy to resolve similar* QUESTIONS OF LAW *in later cases.*

The Anglo-American common-law tradition is built on the doctrine of STARE DECISIS ("stand by decided matters"), which directs a court to look to past decisions for guidance on how to decide a case before it. This means that the legal rules applied to a prior case with facts similar to those of the case now before a court should be applied to resolve the legal dispute.

The use of precedent has been justified as providing predictability, stability, fairness, and efficiency in the law. Reliance upon precedent contributes predictability to the law because it provides notice of what a person's rights and obligations are in particular circumstances. A person contemplating an action has the ability to know beforehand the legal outcome. It also means that lawyers can give legal advice to clients based on settled RULES OF LAW.

The use of precedent also stabilizes the law. Society can expect the law, which organizes social relationships in terms of rights and obligations, to remain relatively stable and coherent through the use of precedent. The need is great in society to rely on legal rules, even if persons disagree with particular ones. Justice LOUIS D. BRANDEIS emphasized the importance of this when he wrote, "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right" (*Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 52 S. Ct. 443, 76 L. Ed. 815 [1932]).

Reliance upon precedent also promotes the expectation that the law is just. The idea that like cases should be treated alike is anchored in the assumption that one person is the legal equal of any other. Thus, persons in similar situations should not be treated differently except for legally relevant and clearly justifiable reasons. Precedent promotes judicial restraint and limits a judge's ability to determine the outcome of a case in a way that he or she might choose if there were no precedent. This function of precedent gives it its moral force.

Precedent also enhances efficiency. Reliance on the accumulation of legal rules helps guide judges in their resolution of legal disputes. If judges had to begin the law anew in each case, they would add more time to the adjudicative process and would duplicate their efforts.

The use of precedent has resulted in the publication of law reports that contain case decisions. Lawyers and judges conduct legal research in these reports seeking precedents. They try to determine whether the facts of the present case precisely match previous cases. If so, the application of legal precedent may be clear. If, however, the facts are not exact, prior cases may be distinguished and their precedents discounted.

Though the application of precedent may appear to be mechanical, a simple means of matching facts and rules, it is a more subjective process. Legal rules, embodied in precedents, are generalizations that accentuate the importance of certain facts and discount or ignore others. The application of precedent relies on reasoning by analogy. Analogies can be neither correct nor incorrect but only more or less persuasive. Reasonable persons may come to different yet defensible conclusions about what rule should prevail.

The judicial system maintains great fidelity to the application of precedents. There are times, however, when a court has no precedents to rely on. In these "cases of first impression," a court may have to draw analogies to other areas

of the law to justify its decision. Once decided, this decision becomes precedential.

Appellate courts typically create precedent. The U.S. Supreme Court's main function is to settle conflicts over legal rules and to issue decisions that either reaffirm or create precedent. Despite the Supreme Court's reliance on precedent, it will depart from its prior decisions when either historical conditions change or the philosophy of the court undergoes a major shift. The most famous reversal of precedent is BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), in which the Supreme Court repudiated the "separate but equal" doctrine of PLESSY V. FERGUSON, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896). This doctrine had legitimated racial SEGREGATION for almost sixty years but finally gave way in *Brown,* when a unanimous court ruled that separate but equal was a denial of EQUAL PROTECTION of the laws.

CROSS-REFERENCES

Case Law; Court Opinion.

## PRECEPT

*An order, writ, warrant, or process. An order or direction, emanating from authority, to an officer or body of officers, commanding that officer or those officers to do some act within the scope of their powers. Rule imposing a standard of conduct or action.*

*In* ENGLISH LAW*, the direction issued by a sheriff to the proper returning officers of cities and boroughs within his jurisdiction for the election of members to serve in parliament.*

*In old French law, a kind of letters issued by the king in subversion of the laws, being orders to the judges to do or tolerate things contrary to law.*

## PRECINCT

*A constable's or police district. A small geographical unit of government. An election district created for convenient localization of polling places. A county or municipal subdivision for casting and counting votes in elections.*

## PRECIPE

See PRAECIPE.

## PRECLUSION ORDER

*A court sanction that prevents a party who has not complied with a direction to supply information in the discovery stage of a lawsuit from later supporting or challenging designated claims or defenses related to the facts that he or she withheld.*

Rule 37 of the Federal Rules of Civil Procedure governs the granting of preclusion orders in actions brought in federal courts.

CROSS-REFERENCES

Civil Procedure.

## PREEMPTION

*A doctrine based on the* SUPREMACY CLAUSE *of the U.S. Constitution that holds that certain matters are of such a national, as opposed to local, character that federal laws preempt or take precedence over state laws. As such, a state may not pass a law inconsistent with the federal law.*

*A doctrine of state law that holds that a state law displaces a local law or regulation that is in the same field and is in conflict or inconsistent with the state law.*

Article VI, Section 2, of the U.S. Constitution provides that the ". . . Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." This Supremacy Clause has come to mean that the national government, in exercising any of the powers enumerated in the Constitution, must prevail over any conflicting or inconsistent state exercise of power. The federal preemption doctrine is a judicial response to the conflict between federal and state legislation. When it is clearly established that a federal law preempts a state law, the state law must be declared invalid.

A state law may be struck down even when it does not explicitly conflict with federal law, if a court finds that Congress has legitimately occupied the field with federal legislation. Questions in this area require careful BALANCING of important state and federal interests. Problems arise when Congress fails to make its purpose explicit, which is often the case. The court must then draw inferences based on the presumed objectives of federal law and the supposed impact of related STATE ACTION.

The federal right to regulate interstate commerce under the COMMERCE CLAUSE of the U.S. Constitution has resulted in federal preemption of state LABOR LAWS. Likewise, the Supreme Court, in *Burbank v. Lockheed Air Terminal,* 411 U.S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973), declared that state and local laws that interfere with comprehensive federal environmental laws and regulations are invalid.

*A sample preclusion order*

## Preclusion Order

**NASD REGULATION, INC.**
**OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. C10000122

Hearing Officer - GAC

**ORDER REGARDING COMPLAINANT'S MOTION FOR A PRECLUSION ORDER**

On February 6, 2001, the Department of Enforcement filed a Motion for a Preclusion Order ("Motion") requesting that Respondent be precluded "from offering any testimony or documents into evidence at the hearing or otherwise relying on or using any information that he has failed to disclose; and striking the Respondent's pre-hearing submission and witness list." Respondent filed a Memorandum in Opposition to Motion for Preclusion Order ("Opposition") on February 9, 2001.

**A. Timeline of Events**

On September 14, 2000, the Hearing Officer issued an order based on a pre-hearing conference held on September 13, 2000. In that order, the Hearing Officer established a "Schedule of Significant Events" leading up to a hearing, then scheduled for January 29–31, 2001. That schedule called for the Parties to file a witness list, exhibit list and proposed exhibits by December 12, 2000.

On October 20, 2000, Respondent filed a motion to reschedule the hearing. The basis for the request was that counsel for Respondent was scheduled to appear as counsel in an unrelated arbitration matter that conflicted with the dates set for the hearing. That motion was not opposed by Complainant. On November 3, 2000, the Hearing Officer granted Respondent's motion and rescheduled the hearing to commence on February 21, 2001.

On December 8, 2000, Enforcement filed its witness list, exhibit list, and proposed exhibits, consistent with the Hearing Officer's order of September 14, 2000. Respondent failed to file his witness list, exhibit list, and proposed exhibits by December 12, 2000 as required by the September 14, 2000 order. On December 21, 2000, Respondent filed a Motion to Amend Order but not Adjourn Hearing. In this motion, Respondent sought to adjust the deadlines for significant events leading up to the hearing, but not the date of the hearing. Significantly, Respondent sought to change the date for his submission of a witness list, exhibit list and proposed exhibits from December 12, 2000, to January 26, 2001. The motion was not opposed by Enforcement. Based on representations made in the motion, the Hearing Officer granted the motion on December 26, 2000.

On January 23, 2001, the parties filed joint stipulations. On January 24, 2001, the Parties participated in a settlement conference. On January 26, 2001, Respondent filed a Motion to Extend Time to File Exhibits Two Days. In that motion, Respondent sought an extension, from January 26, 2001 until January 30, 2001 (two business days) to file his proposed exhibits, exhibit list and witness list. As a basis for the request, Respondent noted that he was still determining whether to accept the terms of a settlement discussed at the settlement conference. The Hearing Officer granted that request, extending Respondent's time to serve and file the documents until the close of business on January 30, 2001.

On February 2, 2001, Enforcement filed its Pre-Hearing Brief, consistent with its filing obligation under the revised schedule for significant events, which required both Parties to serve and file the briefs by that day. On February 5, 2001, Respondent filed his Pre-Trial Memorandum of Law with the Office of Hearing Officers, one business day late. On February 5, 2001, Respondent also filed a witness list and list of proposed exhibits. Respondent failed to file the proposed exhibits by the deadline and failed to provide a date by which such documents would be provided. Instead, Respondent merely stated that the "exhibits are in the process of being compiled and will be filed shortly."

In his Opposition, Respondent noted that the reason for submitting the witness list and exhibit list on February 5, 2001 instead of on January 30, 2001, was that Respondent's counsel became ill over the weekend of January 27-28, and missed the next three work days.

Today, February 13, 2001, more than one week after filing that representation, and exactly one week from the commencement of the Hearing, Respondent has still not filed his proposed exhibits or notified the Hearing Panel when the documents will be produced.

**B. Respondent's Pre-Trial Memorandum of Law**

Enforcement moved to strike Respondent's Pre-Trial Memorandum of Law, based principally on the fact that it was filed and served on February 5, 2001 instead of February 2, 2001. Enforcement also argues that the brief is more than ten pages long and therefore does not comply with NASD Procedural Rule 9136(d), since it does not include a table of contents or table of cases, statutes and other authorities.

The Hearing Officer finds that the delay of one business day in submitting the pre-hearing brief will not significantly prejudice Enforcement. Respondent's failure to include the table of contents and table of authorities likewise it does not prejudice Enforcement to the extent that it would require that the pre-hearing brief be stricken. Therefore, Enforcement's motion to strike Respondent's Pre-Trial Memorandum of Law is denied.

[continued]

*A sample preclusion order (continued)*

**Preclusion Order**

**C. Respondent's Witness List**

Respondent's witness list was filed and served on February 5, 2001, rather than January 30, 2001. The witness list includes those witnesses included by Enforcement on their list, as well as the Respondent and _____, who appears to have been the Compliance Officer at Respondent's firm during the relevant period. Given that the list was only a few days late and contains the name of only one witness beyond the Respondent and those already named by Enforcement, the Hearing Officer finds that the delay in providing the witness list will not unduly prejudice Enforcement. Therefore, Enforcement's motion to strike Respondent's witness list and preclude such witness' testimony is denied.

**D. Respondent's Proposed Exhibits**

As noted above, Respondent has still not produced his proposed exhibits. Nor has Respondent sought relief from the January 30, 2001 deadline for filing and serving such documents. Finally, Respondent has given no clear date upon which he is prepared to file and serve the proposed exhibits. Respondent has failed to produce the documents despite having several extensions. Beyond having failed to comply with the order of the Hearing Officer setting forth the schedule for the submission of proposed exhibits, Respondent has also failed to comply with NASD Code of Procedure Rule 9261(a), regarding the submission of documentary evidence before a hearing. That Rule states: "[n]o later than ten days before the hearing, or at such earlier date as may be specified by the Hearing Officer, each Party shall submit to all other Parties and to the Hearing Officer copies of documentary evidence . . . each Party intends to present at the hearing."

Given Respondent's repeated failure to comply with the Hearing Officer's orders to provide the proposed exhibits, the fact that they have not yet been produced and that the hearing is now scheduled to commence in one week, the Hearing Officer finds that Enforcement would be unduly prejudiced if Respondent were now to produce proposed exhibits for the hearing. Enforcement has a right, like Respondent of receiving proposed exhibits on a timely basis, so that it can also prepare for the hearing. By reason of the foregoing, Enforcement's motion to preclude Resondent from offering exhibits at the Hearing is granted.

**SO ORDERED.**

_____

Gary Carleton
Hearing Officer

Dated: Washington, DC
February 13, 2001

In *California v. Federal Energy Regulatory Commission,* 495 U.S. 490, 110 S. Ct. 2024, 109 L. Ed. 2d 474 (1990), the Supreme Court held that state regulations imposing minimum flow rates on rivers used to generate hydroelectric power were preempted by the Federal Power Act (16 U.S.C.A. § 791 et seq. [1933]). In *Mississippi Power and Light Company v. Mississippi ex rel. Moore,* 487 U.S. 354, 108 S. Ct. 2428, 101 L. Ed. 2d 322 (1988), the Court held that the Federal Energy Regulatory Commission's regulations preempted a state's authority to set electric power rates.

At the state level, preemption occurs when a state statute conflicts with a local ordinance on the same subject matter. Preemption within the states varies with individual state constitutions, provisions for the powers of political subdivisions, and the decisions of state courts. For example, if a state legislature enacts GUN CONTROL legislation and the intent of the legislation is to occupy the field of gun control, then a municipality is preempted from enacting its own gun control ordinance.

The issue of preemption has dominated litigation over the right of states to require insurance companies and Health Maintenance Organizations (HMOs) to accept "any willing [healthcare] provider" rather than to force consumers to stay within the health providers' exclusive networks. HMOs and insurance companies have argued that the 1974 federal EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) preempted these state laws. ERISA is an extremely complex and technical set of provisions that seek to protect employee benefit programs, which include PENSION plans and HEALTHCARE plans. Healthcare providers have pointed to the comprehensive nature of ERISA as demonstrating the intent of Congress to maintain a uniform national system. Therefore, they argued, state laws must be preempted to affect this purpose.

The Supreme Court rejected the ERISA preemption argument in two cases involving HEALTH INSURANCE. In *Moran v. Rush Prudential HMO, Inc.*, 536 U.S. 355, 122 S. Ct. 2151, 153 L. Ed. 2d 375 (2002), the Supreme Court in a 5–4 decision upheld an Illinois law that required HMOs to provide independent review of disputes between the primary care physician and

the HMO. In *Kentucky Association of Health Plans, Inc. v. Miller*, 538 U.S. 329, 123 S. Ct. 1471, 155 L. Ed. 2d 468 (2003), the Court tackled the "any willing provider rule." In a unanimous decision the Court held that Kentucky laws were not preempted by ERISA. The Court concluded that the laws did not deal with employee benefit plans as defined by ERISA but instead were insurance regulations. This was an important distinction because state insurance regulations are not preempted by ERISA.

FURTHER READINGS

Hoenig, Michael. 2002. "Supreme Court Teaches Preemption Lessons." *New York Law Journal* 228 (December).

"Interstate Commerce—Preemption." 2002. *New Jersey Law Journal* 169 (July).

Walsh, Edward. 2003. "Supreme Court Sides with States on HMOs: Groups Can Be Opened to All Providers." *Washington Post* (April 3).

CROSS-REFERENCES

Federalism; States' Rights.

## PREEMPTIVE RIGHT

*The privilege of a stockholder to maintain a proportionate share of the ownership of a corporation by purchasing a proportionate share of any new stock issues.*

In most jurisdictions, an existing stockholder has the right to buy additional shares of a new issue to preserve EQUITY before others have a right to purchase shares of the new issue.

## PREFERENCE

*The act of an insolvent debtor who pays one or more creditors the full amount of their claims or a larger amount than they would be entitled to receive on a pro rata distribution.*

For example, a debtor owes three creditors $5,000 each. All three are equally entitled to payment, but the debtor has only $12,000 in assets. Instead of paying each creditor $4,000, the debtor pays two creditors in full and pays the third creditor the remaining $2,000.

The COMMON LAW does not condemn a preference. Some state statutes prescribe that certain transfers are void—of no legal force or binding effect—because of their preferential character. If a state antipreference provision protects any actual creditor of the debtor, the trustee in BANKRUPTCY can take advantage of it.

Bankruptcy law does condemn certain preferences. The bankruptcy trustee can void any transfer of property of the debtor if the trustee can establish the following:

1. The transfer was "to or for the benefit of a creditor."
2. The transfer was made for or on account of an "antecedent debt"—that is, a debt owed prior to the time of the transfer.
3. The debtor was insolvent at the time of the transfer.
4. The transfer was made within 90 days before the date of the filing of the bankruptcy petition or was made between 90 days and one year before the date of the filing of the petition to an insider who had reasonable cause to believe that the debtor was insolvent at the time of the transfer.
5. The transfer has the effect of increasing the amount that the transferee would receive in a liquidation proceeding under chapter 7 of the bankruptcy law (11 U.S.C.A. § 701 et seq.). 11 U.S.C.A. § 547.

Other statutory provisions, however, create exceptions; if a transfer comes within an exception, the bankruptcy trustee cannot invalidate the transfer even though the aforementioned five elements exist.

## PREFERRED STOCK

*Stock shares that have preferential rights to dividends or to amounts distributable on liquidation, or to both, ahead of common shareholders.*

Preferred stock is given preference over common stock. Holders of preferred stock receive dividends at a fixed annual rate. The earnings of a corporation are applied to this payment before common stockholders receive dividends. If corporate earnings are insufficient for the fixed annual dividend, the preferred stock will absorb the total amount of earnings, and the common stockholders will be precluded from receiving a dividend. When corporate income exceeds the amount that is needed to pay preferred stockholders, the remainder is generally paid to common stockholders. In special situations, the remainder may be distributed pro rata to both classes of stock, in which case the preferred stock is said to "participate" with the common stock.

Preferred stock can be cumulative or noncumulative. If it is cumulative and if the fixed dividend remains unpaid, it becomes a debit upon the surplus earnings of succeeding years. Accumulated dividends must be paid in full before common stockholders can receive dividends.

When preferred stock is noncumulative, its preference is extinguished by the failure of the corporation to have sufficient earnings to pay the fixed dividend in a given year.

## PREJUDICE

*A forejudgment; bias; partiality; preconceived opinion. A leaning toward one side of a cause for some reason other than a conviction of its justice.*

A juror can be disqualified from a case for being prejudiced, if his or her views on a subject or attitude toward a party will unduly influence the final decision.

When a lawsuit is dismissed WITHOUT PREJUDICE, it signifies that none of the rights or privileges of the individual involved are considered to be lost or waived. The same holds true when an admission is made or when a motion is denied with the designation *without prejudice.*

A dismissal without prejudice permits a new lawsuit to be brought on the same grounds because no decision has been reached about the controversy on its merits. The whole subject in litigation is as much open to a subsequent suit as if no suit had ever been brought. The purpose and effect of the words *without prejudice* in a judgment, order, or decree dismissing a suit are to prohibit the defendant from using the defense of RES JUDICATA in any later action by the same plaintiff on the subject matter. A dismissal with prejudice, however, is a bar to relitigation of the subject matter.

A decision resulting in prejudicial error substantially affects an appellant's legal rights and is often the ground for a reversal of the judgment and for the granting of a new trial.

## PRELAW EDUCATION

*A preparatory curriculum comprising introductory law courses and interdisciplinary subjects, offered to undergraduate students to instruct them in and acquaint them with the subject* MATTER OF LAW*, thereby assisting them in deciding whether to seek admission to law school and facilitating the process of law study in law school.*

COLLEGES AND UNIVERSITIES offer several types of prelaw education to undergraduate students who are interested in attending law school. Some institutions offer a prelaw major course of study leading to a degree, a few offer a six-year course of study that combines undergraduate and law school education, and almost all offer an informal prelaw curriculum that emphasizes skills and knowledge essential to the study and PRACTICE OF LAW.

The AMERICAN BAR ASSOCIATION does not recommend any particular major for law school. Although political science is a popular prelaw major, there is no specific major preferred by law schools. Law students can major in anything from engineering to history to the fine arts. Some law schools state in their catalogs that they neither recommend prelaw courses nor grant an applicant any additional consideration because he or she pursued a prelaw education.

A particular major is not important to a law school admissions committee, but good grades are critical for acceptance. In addition, admissions committees seek a diverse first-year class and may look at volunteer and extracurricular activities as well as a college transcript and the results of the Law School Admission Test (LSAT).

Law schools have no prerequisite courses for admission. However, colleges offer courses that help hone the skills that will be important to a law student. Such "lawyering" skills include analytical thinking and problem solving, critical reading, writing, and oral communication. Courses in English, composition, and speech will enhance these means of communication. The legal profession finds its basis in the formation and operation of government institutions, and courses in political science and history help develop a better understanding of these institutions. Creative thinking is also an important skill in the legal profession. Courses in math and, specifically, logic are recommended. Because law is a social science that focuses on human behavior, courses in psychology, sociology, religion, and philosophy may also be useful.

FURTHER READINGS

Basch, Margaret, 1998. "Teaching Law, Making Lawyers." *Chicago Daily Law Bulletin* 144 (December).

Maguire, Daniel L. 2002. "Future Lawyers Faced with Ethical Dilemmas." *Georgia Bar Journal* 8 (October).

CROSS-REFERENCES

Case Method; Legal Education.

## PRELIMINARY HEARING

*A proceeding before a judicial officer in which the officer must decide whether a crime was committed, whether the crime occurred within the territorial jurisdiction of the court, and whether there is* PROBABLE CAUSE *to believe that the defendant committed the crime.*

After the police have arrested a crime suspect, the suspect is entitled to a preliminary hearing. Designed as a safeguard against unreasonable arrest and detention, the hearing is conducted to determine whether there is sufficient evidence to hold the defendant for trial. State and federal rules of CRIMINAL PROCEDURE provide for when a hearing must be held and what issues must be raised, which depend in large part on whether the crime is a misdemeanor, gross misdemeanor, or felony.

The most common preliminary hearing is the initial appearance, which is also called the first appearance. Various procedural steps may be taken during the initial appearance. In minor misdemeanor cases, the initial appearance may be the only one, if the defendant pleads guilty. When the charge is more serious, the accused at the initial appearance may be informed of the charges, advised of the RIGHT TO COUNSEL and the right to remain silent, warned that any statement made may be used against the suspect in court, and advised of how to seek release on bail. In some jurisdictions, including the federal courts, a plea may be entered and bail may be set at this first appearance. In other jurisdictions, the suspect will not be allowed to make a plea if the offense is a felony or gross misdemeanor, and a preliminary hearing, also called a preliminary examination, will be promptly scheduled.

The U.S. Supreme Court, in *Gerstein v. Pugh,* 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975), mandated that persons arrested without a warrant and held by the police must be given a preliminary hearing to determine if there is probable cause. Probable cause means that a reasonable ground exists for belief in the facts, and the hearing examines whether a prudent person would believe that the suspect committed the offense in light of those facts. In *County of Riverside v. McLaughlin,* 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991), the Court made it a constitutional requirement that a prompt judicial determination of probable cause follow a warrantless search. It ruled that a determination must be made without unreasonable delay, and in no event later than forty-eight hours after arrest. Therefore, all state and federal warrantless arrests must comply with the holdings of *Gerstein* and *County of Riverside.*

In gross misdemeanor and felony cases there is typically a second appearance, which is known as the preliminary hearing or preliminary examination. Rule 5(c) of the Federal Rules of Criminal Procedure and state rules of criminal procedure follow essentially the same process for this type of hearing. Unlike the informality of a first appearance, the preliminary hearing is an adversarial proceeding, which includes the prosecutor and the defendant's attorney. This hearing tests the existence of probable cause early in the proceedings by allowing the introduction of evidence, the examination and cross-examination of witnesses, and limited forms of discovery (the disclosure of information). Although the features of a preliminary hearing or examination are similar to those of a trial, the hearing is confined to determining whether the defendant should stand trial or be released. A defendant may challenge the constitutionality of police actions, including searches, seizures, and confessions. Under the federal rules, this hearing must be conducted within ten days of the initial appearance if the defendant is in police custody, and within twenty days if the defendant is not in custody.

In felony cases in states where the GRAND JURY indictment is used to start a criminal proceeding, defendants often waive the preliminary hearing, because the grand jury will make the probable cause determination. However, some defendants request a preliminary hearing because it allows them to gain information about the basis of the prosecution's case or to move for dismissal of the case. For example, O. J. SIMPSON requested a preliminary hearing in 1994 after being charged with two counts of first-degree murder. Although Simpson's attorney, ROBERT SHAPIRO, failed to secure a dismissal, he was able to elicit information from police and forensic witnesses that proved valuable at Simpson's 1995 murder trial, which ended in Simpson's acquittal.

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## PRELIMINARY INJUNCTION

*A temporary order made by a court at the request of one party that prevents the other party from pursuing a particular course of conduct until the conclusion of a trial on the merits.*

*A sample motion for preliminary injunction*

**Preliminary Injunction**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FORD MOTOR COMPANY, a Delaware corporation,
Plaintiff,

v.

2600 ENTERPRISES, a New York not-for-profit corporation, and EMMANUEL GOLDSTEIN, a/k/a ERIC CORLEY, an individual,

Defendants.

_____/

Civil No. 01 60084 DT

Hon. Robert L.Cleland

KATHLEEN A. LANG (P34695)
Dickinson Wright PLLC
Attorneys for Plaintiff
500 Woodward Avenue, Suite 4000
Detroit, Michigan 48226
(313) XXX-XXXX

_____/

**MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff Ford Motor Company ("Ford") respectfully moves this Court, pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a Preliminary Injunction enjoining defendants 2600 Enterprises and Emmanuel Goldstein, aka Eric Corley ("Defendants") from using in any way the Internet domain name F__KGENERALMOTORS.COM to point to Ford's official website at FORD.COM, or any other website affiliated with Ford.

This motion is supported by the Verified Complaint and Plaintiff's Memorandum in Support of Motion for Preliminary Injunction filed concurrently herewith.

DICKINSON WRIGHT PLLC

By:_____
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560 E. 200 South, Suite 300
Salt Lake City, Utah 84102
(801) XXX-XXXX

DATED: April _____, 2001

**DETROIT 18260-1667 588963**

A preliminary injunction is regarded as extraordinary relief. The party against whom it is sought must receive notice and an opportunity to appear at a hearing to argue that the INJUNCTION should not be granted. A preliminary injunction should be granted only when the requesting party is highly likely to be successful in a trial on the merits and there is a substantial likelihood of irreparable harm unless the injunction is granted. If a party has shown only a limited probability of success, but has raised substantial and difficult questions worthy of additional inquiry, a court will grant a preliminary injunction only if the harm to him or her outweighs the injury to others if the injunction is denied.

## PREMARITAL AGREEMENT

*A contract made in anticipation of marriage that specifies the rights and obligations of the parties. Such an agreement typically includes terms for property distribution in the event the marriage terminates.*

A premarital agreement, also known as a prenuptial or antenuptial agreement, is a contract between two persons who intend to marry. All states recognize premarital agreements through statutes or court decisions.

A premarital agreement is an unusual contract. It is an agreement between marrying persons that, at least in part, contemplates the breakup of the marriage. The subject matter of the agreement is unique: no other contract can address such matters as CHILD CUSTODY, child education, and spousal maintenance. The relationship of the parties is special: the contract is made not by two parties operating at arm's length, but by two persons who are preparing to marry. The contract is enforceable without consideration or the exchange of value, whereas most contracts require consideration. Finally, the contract may not be enforced until years after it was first formed. Although they are exceptional, premarital agreements have become increasingly popular in the United States.

The practice of making premarital agreements is ancient. Marrying Jews have made marital contracts called *ketubahs* for more than two thousand years. The modern secular premarital agreements that exist in the United States can be traced back to sixteenth-century England. Many of the first premarital agreements were used by women as a way of protecting their own property. Until the nineteenth century, women were considered the property of their husbands, and what was the premarital property of a wife became the property of her husband. A premarital agreement became the only way for a woman contemplating marriage to retain control and possession of her own property.

Initially, the rights of women in premarital agreements were limited. Women had few contractual rights, and courts often struck down premarital agreements that favored women. This situation changed in the mid- to late nineteenth century, when states began to enact Married Women's Property Acts to protect women's property rights. After that time, the number of premarital agreements created in the United States steadily increased.

Premarital agreements can cover a variety of topics. The most common include property and financial support rights during and after marriage, personal rights and obligations of the couple during marriage, and the education and rearing of children to be born to the couple. A typical premarital agreement is used by one spouse or both spouses to keep PERSONAL PROPERTY and income separate during the marriage or to protect certain property before one spouse embarks on a risky investment or new career.

In the absence of a premarital agreement, statutes and the courts may control the property, financial, and child-rearing issues that face a divorcing couple. Under the property distribution laws in many states, a spouse who brings a large amount of cash, property, and other financial holdings to a marriage and makes them part of the marital estate (combining them with marital assets for the benefit of both parties) may lose much of that property to the other spouse upon DIVORCE. A spouse who brings substantially more money or property to a marriage may want a premarital agreement to protect some or all of those assets in the event the marriage fails.

Marrying couples have included a wide assortment of provisions in their premarital agreements. Some agreements identify who will wash dishes, who will dispose of trash, where the couple will shop, and what will occur in the event one spouse is unable to perform sexually. Couples are free to contract on any subject, as long as the agreement does not violate public policy or a criminal statute.

Some scholars and social critics argue that the premarital agreement itself is contrary to public policy. They maintain that government should promote marriage and that premarital

agreements promote divorce because they anticipate divorce. Supporters counter that premarital agreements actually promote marriage because they give married couples the ability to fashion their own relationship.

The supporters of premarital agreements have won the argument. Courts in all states recognize that marriage is, in part, a business relationship and that couples should be free to remain autonomous within a marriage. Many states have adopted the Uniform Premarital Agreement Act (UPAA), a set of laws on premarital agreements approved by the Commissioners on Uniform State Laws. The UPAA provides a list of property-related items on which couples may agree. It also includes a provision allowing couples to agree on any matter, including their personal rights and obligations.

Although all states recognize premarital agreements, courts tend to closely examine premarital agreements that are challenged by one of the parties. In many states the spouse seeking enforcement of a premarital agreement has the burden of proving its validity. Few courts hesitate to strike terms that are contrary to public policy or unconscionably unfair to one of the parties. A court may strike down all or part of the agreement if one of the parties agreed to the terms as a result of FRAUD or duress. Courts closely examine asset lists and income schedules to ensure that the parties are being forthright with each other. Couples drafting premarital agreements must be careful to explain in detail any provisions that a court might consider unfair.

Courts may strike down all or part of a premarital agreement. To be upheld, the agree-

*A sample premarital agreement*

**PREMARITAL AGREEMENT**

BE IT KNOWN, this agreement is entered into on the _____ day of _____ , 20 _____ ,

between _____ and _____.

Whereas, the parties contemplate legal marriage under the laws of the State of _____, and it is their mutual desire to enter into this agreement so that they will continue to own and control their own property, and are getting married because of their love for each other but do not desire that their present respective financial interests be changed by their marriage. Now, therefore, it is agreed as follows:

1. All property which belongs to each of the above parties shall be, and shall forever remain, their personal estate, including all interest, rents, and profits which may accrue from said property, and said property shall remain forever free of claim by the other.
2. The parties shall have at all times the full right and authority, in all respects the same as each would have if not married, to use, sell, enjoy, manage, gift and convey all property that presently belongs to him or her.
3. In the event of a separation or divorce, the parties shall have no right against each other by way of claims for support, alimony, maintenance, compensation or division of property existing of this date.
4. In the event of separation or divorce, marital property acquired after marriage shall nevertheless remain subject to division, either by agreement or judicial determination.
5. This agreement shall be binding and inure to the benefit of the parties, their successors, assigns and personal representatives.
6. This agreement shall be enforced under the law of the State of _____ at the time of the execution of this agreement.

_____ _____
Signature of Prospective Husband Date

_____ _____
Signature of Prospective Wife Date

_____ _____
Witness Date

_____ _____
Witness Date

_____ My commission expires on: _____
Notary Public

ment must have been procedurally and substantively fair at the time of execution, and it must be substantively fair at enforcement. Procedural fairness refers to the manner in which the contract was made. Both parties must give full and complete financial disclosure, and each party should have an opportunity to consult with his or her own lawyer. Although many jurisdictions allow one attorney to represent both parties to a premarital agreement, it is generally better for the parties to have separate counsel. Doing so prevents a later argument that the attorney for both parties was biased in favor of one side. It also gives a party who may be unsure about the agreement a chance to discuss it privately with a competent professional. Courts tend to be more comfortable with premarital agreements made by parties with separate counsel.

Substantive fairness means that the actual provisions in the agreement are fair to each party. Because a premarital agreement may be enforced many years after it was created, what seemed fair at the time of execution of the agreement may have become unfair by the time of its enforcement. Such a situation might arise where a wealthy person and a person of limited means married with the agreement that, in the event of a divorce, each would leave with what he or she brought to the marriage. If the marriage was brief, this arrangement may be upheld. However, if the marriage lasted many years and the spouse formerly of limited means invested substantial time and effort into advancing the couple's financial position, the agreement could later appear unfair.

Courts tend to closely scrutinize premarital agreements' provisions relating to children. Children have a special status under the law that gives them greater protection than adults receive, and many states prohibit couples from making premarital agreements that adversely affect a child's right to financial support. A court will strike down a provision that relates to any other important matter, such as a child's custody or education, if it is not in the best interests of the child.

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CROSS-REFERENCES

Family Law; Husband and Wife; Postmarital Agreement.

## PREMEDITATE

*To think of an act beforehand; to contrive and design; to plot or lay plans for the execution of a purpose.*

Premeditation refers to the decision to plan to commit a crime, generally murder. A premeditated murder is thought out beforehand, but no specific length of time is needed for premeditation.

## PREMIUM

*A reward for an act done.*

A bounty or bonus; a consideration given to invite a loan or a bargain, as the consideration paid to the assignor by the assignee of a lease, or to the transferer by the transferee of shares of stock, etc.

In granting a lease, part of the rent is sometimes capitalized and paid in a lump sum at the time the lease is granted. This is called a *premium.*

The sum paid or agreed to be paid by an insured to the underwriter (insurer) as the consideration for the insurance. The price for insurance protection for a specified period of exposure.

## PREPONDERANCE OF EVIDENCE

*A standard of proof that must be met by a plaintiff if he or she is to win a civil action.*

In a civil case, the plaintiff has the burden of proving the facts and claims asserted in the complaint. If the respondent, or defendant, files a counterclaim, the respondent will have the burden of proving that claim. When a party has the BURDEN OF PROOF, the party must present, through testimony and exhibits, enough evidence to support the claim. The amount of evidence required varies from claim to claim. For most civil claims, there are two different evidentiary standards: preponderance of the evidence, and clear and convincing evidence. A third stan-

dard, proof BEYOND A REASONABLE DOUBT, is used in criminal cases and very few civil cases.

The quantum of evidence that constitutes a preponderance cannot be reduced to a simple formula. A preponderance of evidence has been described as just enough evidence to make it more likely than not that the fact the claimant seeks to prove is true. It is difficult to translate this definition and apply it to evidence in a case, but the definition serves as a helpful guide to judges and juries in determining whether a claimant has carried his or her burden of proof.

The majority of civil claims are subjected to a preponderance of evidence standard. If a court or legislature seeks to make a civil claim more difficult to prove, it may raise the evidentiary standard to one of clear and convincing evidence.

Under some circumstances use of the low preponderance of evidence standard may be a violation of constitutional rights. For example, if a state seeks to deprive natural parents of custody of their children, requiring only proof by a preponderance of evidence is a violation of the parents' DUE PROCESS rights (*Santosky v. Kramer,* 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 [1982]). Freedom in matters of family life is a fundamental liberty interest, and the government cannot take it away with only a modest evidentiary standard. However, a court may use a preponderance of evidence standard when a mother seeks to establish that a certain man is the father of her child (*Rivera v. Minnich,* 483 U.S. 574, 107 S. Ct. 3001, 97 L. Ed. 2d 473 [1987]). Most states use the preponderance of evidence standard in these cases because they have an interest in ensuring that fathers support their children.

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CROSS-REFERENCES

Clear and Convincing Proof.

## PREROGATIVE

*An exclusive privilege. The special power or peculiar right possessed by an official by virtue of his or her office. In* ENGLISH LAW, *a discretionary power that exceeds and is unaffected by any other power; the special preeminence that the monarch has over and above all others, as a consequence of his or her sovereignty.*

The term *prerogative* is occasionally used by writers of law to refer to the object over which royal powers are exercised, such as fiscal prerogatives, which are the revenues of the king or queen.

## PREROGATIVE WRIT

*Formerly a court order issued under certain circumstances on the authority of the extraordinary powers of the monarch.*

The prerogative writs were procedendo, MANDAMUS, prohibition, QUO WARRANTO, HABEAS CORPUS, and certiorari. Today these forms of relief are also called extraordinary remedies and are issued on the strength of the inherent powers of the court to enforce its orders and to do justice. The paper granting a petition for an extraordinary remedy is still called a writ. For example, a writ of *certiorari* grants the petitioner an opportunity to appeal the decision of a lower court in a case where he or she does not have a right to appeal.

## PRESCRIPTION

*A method of acquiring a nonpossessory interest in land through the long, continuous use of the land.*

Prescription refers to a type of easement—the right to use the property of another. It requires the use of the land to have been open, continuous, exclusive, and under claim of right for the appropriate statutory period. It differs from ADVERSE POSSESSION in that adverse possession entails the acquisition of title to the property, whereas prescription relates to a right to use the property of another that is consistent with the rights of the owner.

## PRESENT

*To submit for consideration or action. Immediate, not in the future.*

*Present ability* refers to a person's immediate capacity to do an act. A *present conveyance* is made with the intention that it take effect at once.

In COMMERCIAL PAPER law, to present a check means to submit it to the drawee for acceptance or payment.

## PRESENTENCE INVESTIGATION

*Research that is conducted by court services or a* PROBATION *officer relating to the prior criminal record, education, employment, and other information about a person convicted of a crime, for the purpose of assisting the court in passing sentence.*

A presentence investigation (PSI) is prepared for persons convicted of serious crimes. In misdemeanor and gross misdemeanor offenses, the court may order a PSI, whereas in felony cases a PSI is mandatory. State and federal statutes (18 U.S.C.A. § 3553(b) [1984]) set PSI requirements and are supplemented by federal and state rules of CRIMINAL PROCEDURE.

The presentence investigation generally consists of an interview with the defendant, a review of his or her criminal record, and a review of the specific facts of the crime. The probation or court services department prepares a report that contains all of this information and makes a recommendation to the court about the type and severity of the sentence. The court always makes the final decision about the sentence, but it may be limited by federal and state sentencing guidelines, which set standard sentences based on the seriousness of the present crime and the previous criminal history of the convicted person. A sentencing guidelines worksheet is often included in the PSI to assist the court in determining whether to depart from the guidelines and enhance or reduce the severity of the standard sentence.

If the court desires more information than is otherwise available to it as a basis for determining the mental condition of the defendant, it may order the defendant to undergo a psychiatric or psychological examination.

Since the 1980s many states have allowed the victims of a crime to participate in the presentencing stage. Some states have victim loss or victim impact forms that give crime victims an opportunity to make people in the criminal justice system aware of the impact a crime has had on their lives. Victims are also encouraged to contact the probation office and provide other relevant information for the PSI.

A PSI often contains a mix of public and confidential information. Information about juveniles and crime victims, as well as psychological reports, are confidential and must be kept out of the public record.

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CROSS-REFERENCES

Sentencing.

## PRESENTMENT

*A* GRAND JURY *statement that a crime was committed; a written notice, initiated by a grand jury, that states that a crime occurred and that an indictment should be drawn.*

*In relation to* COMMERCIAL PAPER, *presentment is a demand for the payment or acceptance of a negotiable instrument, such as a check. The holder of a negotiable instrument generally makes a presentment to the maker, acceptor, drawer, or drawee.*

## PRESENTS

*The present instrument. The phrase* these presents *is used in any legal document to designate the instrument in which the phrase itself occurs.*

## PRESIDENT OF THE UNITED STATES

*The head of the* EXECUTIVE BRANCH, *one of the three branches of the federal government.*

The U.S. Constitution sets relatively strict requirements about who may serve as president and for how long. Under Article II, only a natural-born citizen of the United States is eligible to serve as president; a person born outside the United States, even if he later becomes a citizen, may not serve. In addition, a person must be at least 35 years old to become president and must have resided in the United States for at least 14 years. Under the TWENTY-SECOND AMENDMENT, which was added to the Constitution in 1951, no person may serve as president for more than two four-year terms. The amendment further provides that a person who succeeds to the office for more than two years of an unexpired term (for example, because a sitting president dies or resigns) may serve for only one additional four-year term.

Article II also sets limits on the president's authority. The article provides that the president is the commander in chief of the ARMED SERVICES. As commander in chief, the president has the power to preserve the peace by governing a captured territory until Congress establishes civil authority over it; the president also may declare MARTIAL LAW, which provides for the imposition of military authority over civilians in the event of an invasion, insurrection, disaster, or similar occurrence. In addition, the president

*The official seal of the office of the president of the United States.*
ARCHIVE PHOTOS, INC.

can end a war through a treaty or a presidential proclamation. The power to declare war, however, is vested exclusively in Congress and not the president. In a situation of an undeclared war, under the War Powers Resolution of 1973 (50 U.S.C.A. §§ 1541 et seq.) the president must consult with Congress before introducing armed forces into hostilities. Nevertheless, the practical effect of the statute is somewhat limited because it recognizes the power of the president to unilaterally deploy military forces when necessary.

As the head of the executive branch, the president executes the law but does not legislate, although he submits budgets and may propose bills to Congress. The president's legislative power is limited to approving or disapproving bills passed by Congress. If the president approves a measure, it becomes law. If he vetoes the bill, or refuses to approve it, it goes back to either the House of Representatives or to the Senate (wherever the bill first originated). If both bodies then pass the bill again by a two-thirds margin, the president's **VETO** has been overridden and he must sign it into law.

In 1996 Congress sought to give the president more control over the budget by passing a line-item veto law (2 U.S.C.A. § 691 [1996]). Under the law the president could veto portions of an appropriation bill while leaving the remainder of the legislation intact. Members of Congress challenged the law as an unconstitutional surrender of Article I congressional power that jeopardized the **SEPARATION OF POWERS**, but the Supreme Court refused to hear the case until the veto was actually used. After President Clinton used the line-time veto several entities that lost federal funds because of the veto filed a federal lawsuit. The Supreme Court, in *Clinton v. City of New York*, 524 U.S.417, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998), struck down the law. The law allowed the president to effectively amend or repeal acts of Congress, but this action was not authorized by the Constitution. The only way for the president to obtain this power would be through the passage of a constitutional amendment.

The president's executive powers also include the authority to issue proclamations and executive orders. A proclamation is a general announcement of policy, whereas an **EXECUTIVE ORDER** has the force and effect of law by carrying out a provision of the Constitution, a federal statute, or a treaty. For example, during **WORLD WAR II** President **FRANKLIN D. ROOSEVELT** issued an executive order confining Japanese American citizens to camps following the bombing of Pearl Harbor.

The president has the exclusive authority to represent the United States in its relationships with governments of other countries. Through the **SECRETARY OF STATE** and other officials, the president communicates with other nations, recognizes foreign governments, and makes agreements, including the negotiation of treaties. Treaties, however, must be approved by two-thirds of the Senate before taking effect. Executive agreements with other nations do not require Senate approval but still carry the force of law. For instance, the United States, through the president, has frequently entered into executive agreements to supply economic aid to other nations.

In domestic matters the president is advised by the cabinet, which consists of more than a dozen executive departments covering a wide range of areas, including commerce, housing, labor, and the treasury. Each department is headed by a secretary, who is responsible for its overall administration and for reporting to the president.

Should the president be unable to serve a full term, Article II and the **TWENTY-FIFTH AMENDMENT** to the Constitution provide for a line of succession. If the president dies, resigns, or is removed from office through the **IMPEACHMENT** process, the vice president becomes the acting president. This transfer of power also occurs if

the president informs both houses of Congress that he is temporarily unable to discharge the duties of president. The House of Representatives can impeach a president or indict him for TREASON, BRIBERY, or other HIGH CRIMES AND MISDEMEANORS. If the House votes to impeach, the president is not automatically removed from office; impeachment is instead a formal charge accusing the president of a crime. The articles, or charges, of impeachment are submitted to the Senate, where the president is tried, with the chief justice of the U.S. Supreme Court presiding over the proceeding. A two-thirds vote in the Senate is needed for a conviction and the removal of the president from office. ANDREW JOHNSON was impeached in 1868 and then was acquitted by only one vote. In 1974 the House Judiciary Committee voted to impeach RICHARD M. NIXON, but he resigned from office before the entire House could vote on the matter. The House of Representatives passed a bill of impeachment against President BILL CLINTON, but the Senate acquitted him of the charges in 1999.

The Supreme Court has ruled that the president has absolute IMMUNITY from civil lawsuits seeking damages for presidential actions. However, the Court ruled in *Clinton v. Jones*, 520 U.S. 681, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997), that a sitting president does not have presidential immunity from suit over conduct unrelated to his official duties. The holding came in a civil suit brought by Paula Corbin Jones against President Clinton. Jones's suit was based on conduct alleged to have occurred while Clinton was governor of Arkansas. Clinton had sought to postpone the lawsuit until after he left office.

The Court stated that it had never suggested that the president or any other public official has an immunity that "extends beyond the scope of any action taken in an official capacity." The Court has based its immunity doctrine on a functional approach, extending immunity only to "acts in performance of particular functions of his office." It also rejected Clinton's claim that the courts would violate the separation of powers between the executive and judicial branches if a court heard the suit. Finally, the Court rejected the president's contention that defending the lawsuit would impose unacceptable burdens on the president's time and energy. It seemed unlikely to the Court that President Clinton would have to be occupied with the Jones lawsuit for any substantial amount of time. The Court also expressed skepticism that denying immunity to the president would generate a "deluge of such litigation." In the history of the presidency, only three other presidents had been subject to civil damage suits for actions taken prior to holding office.

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CROSS-REFERENCES

Constitution of the United States; Electoral College; Executive Privilege; Impeachment; Presidential Powers; Separation of Powers; Watergate. See also "Presidential Speeches" section of Appendix.

## PRESIDENTIAL POWERS

*The executive authority given to the president of the United States by Article II of the Constitution to carry out the duties of the office.*

Article II, Section 1, of the Constitution provides that the "executive power shall be vested in a President of the United States," making the president the head of the EXECUTIVE BRANCH of the federal government. Sections 2 and 3 enumerate specific powers granted to the president, which include the authority to appoint judges, ambassadors, and other high-ranking government officials; VETO legislation; call Congress into special session; grant pardons; issue proclamations and orders; administer the law; and serve as commander in chief of the armed forces.

Article II gives the president authority to recommend measures for congressional consideration. Pursuant to this authority, presidents submit budgets, propose bills, and recommend other action to be taken by Congress.

### Veto Power

Under Article I, Section 7, of the Constitution, "every bill" and "every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary" must be presented to the president for approval. This "presentment" requirement does not apply to constitutional amendments, procedural rules

of each house, and several other types of legislative action.

Under the Constitution, the president has ten days (not counting Sundays) in which to consider legislation presented for approval. The president has three options: sign the bill, making it law; veto the bill; or take no action on the bill during the ten-day period. If the president vetoes the bill, it can be overridden by a two-thirds majority of both houses of Congress. If the president takes no action, the bill automatically becomes law after ten days. However, if Congress adjourns before the ten days have expired and the president has not signed the bill, it is said to have been subjected to the pocket veto, which differs from a regular veto in that the pocket veto cannot be overridden by Congress.

In 1996, Congress gave the president the authority to select particular items from appropriation bills and individually veto them. The federal line-item veto authority (2 U.S.C.A. §§ 691 & 692) gave the president the ability to impose cuts on the **FEDERAL BUDGET** without vetoing a bill in its entirety. The line-item veto, like a regular veto, could be overridden by a two-thirds majority vote of both houses.

This law was immediately challenged as a violation of **SEPARATION OF POWERS** by five members of Congress. They argued that line item veto disrupted the historic balance of powers between the legislative and executive branches and that it violated Article I, Section 7. The Supreme Court, in *Raines v. Byrd*, 521 U.S. 811, 122 S.Ct. 1700, 152 L.Ed.2d 771 (12002), refused to hear the case, dismissing it for lack of jurisdiction. The Court held that the legislators lacked legal standing to bring the lawsuit because they could show no personal injury from the new power.

The constitutionality of the line-item veto act was finally adjudicated in *Clinton v. City of New York*, 524 U.S. 417, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998). The Supreme Court ruled that the law was unconstitutional because it violated the Constitution's Presentment Clause. Under the Presentment Clause (Article I, Section 7), after a bill has passed both Houses, but "before it become[s] a Law," it must be presented to the president, who "shall sign it" if he approves it, but "return it," ("veto" it) if he does not. Nothing in this clause authorized the president to amend or repeal a bill.

The veto gives the president enormous power to influence the writing of legislation. By threatening a veto before legislation is passed, the president can force Congress to compromise and pass amendments it would otherwise find unacceptable.

*The president's executive powers include the authority to issue proclamations and executive orders. In April 2003, President George W. Bush, flanked by John Ashcroft and Mel Martinez, signs a proclamation commemorating the 35th anniversary of the Fair Housing Act.*

AP/WIDE WORLD PHOTOS

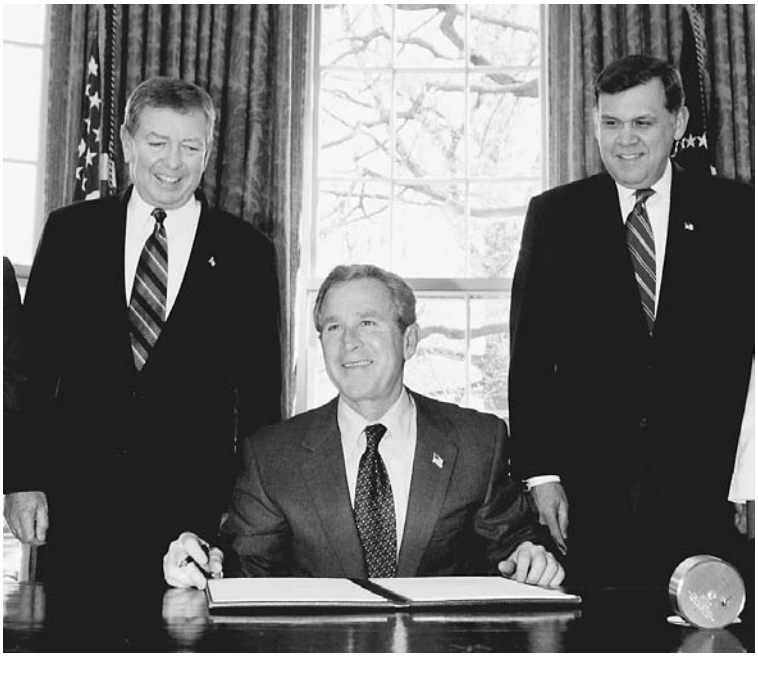

### Executive Orders

The president's executive powers also include the authority to issue proclamations and executive orders. A proclamation is the president's official announcement that the president is taking a particular action. Such an announcement is not the same as an **EXECUTIVE ORDER**, which has the force and effect of law by carrying out a provision of the Constitution, a federal statute, or a treaty. The Constitution does not expressly give the president the power to promulgate executive orders. Instead, this power has been inferred from the president's obligation to faithfully execute the laws. Proclamations and executive orders are published in the *Federal Register* to notify the country of presidential actions.

### Powers of Appointment

The president has the power to appoint ambassadors, cabinet officers, and federal judges, subject to confirmation by a majority vote of the Senate. Upper-level executive branch officials, who numbered more than 2,500 in 2002, are appointed solely at the discretion of the president or department head without Senate review. The power to appoint federal judges

gives a president the opportunity to place on the federal bench for lifelong terms persons who agree with the president's views on law and the role of the judicial system. A president is limited to serving eight years. A federal judge may serve for decades.

### Pardon Power

The president is given the power under the Constitution to "grant reprieves and pardons for offenses against the United States, except in cases of impeachment." The president may grant a full pardon to a person accused or convicted of a federal crime, releasing the person from any punishment and restoring her or his CIVIL RIGHTS. The president may also issue conditional pardons that forgive the convicted person in part, reduce a penalty a specified number of years, or alter a penalty with conditions.

A pardon is generally a private transaction between the president and an individual. However, in 1977, President JIMMY CARTER granted an AMNESTY that was, in effect, a blanket pardon to those who were either deserters or draft evaders during the VIETNAM WAR.

### Power of Impoundment

Presidential IMPOUNDMENT is the refusal of the chief executive to expend funds appropriated by Congress. THOMAS JEFFERSON was the first president to impound funds, and many other presidents have followed suit. Congress has granted the president the authority not to spend funds if it has appropriated more funds than necessary to reach its goals. However, the president does not have a limitless impoundment power. The U.S. Supreme Court, in *Train v. City of New York,* 420 U.S. 35, 95 S. Ct. 839, 43 L. Ed. 2d 1 (1975), ruled that President RICHARD M. NIXON could not order the impoundment of substantial amounts of environmental protection funds for a program he vetoed, which had been overridden by Congress. The president cannot frustrate the will of Congress by killing a program through impoundment.

### Foreign Policy Powers

The president or his designated representative, such as the SECRETARY OF STATE, has the exclusive authority to communicate with other nations, recognize foreign governments, receive ambassadors, and make executive agreements. Throughout U.S. history, Congress and the courts have granted the president great deference in conducting foreign policy. This deference is based, in part, on the need for one person, rather than 535 members of Congress, to represent and speak for a national constituency.

These powers were illustrated in the aftermath of the SEPTEMBER 11, 2001, TERRORIST ATTACKS on New York City and Washington, D.C. President GEORGE W. BUSH warned the Taliban government of Afghanistan to surrender Osama bin Laden and other terrorists or face the possibility of war. In the months leading up to the March 2003 invasion of Iraq, President Bush, Secretary of State Colin Powell, and other representatives lobbied the UNITED NATIONS for support of the U.S. position on Iraq.

In addition to the authority to recognize foreign governments, the president is empowered by Article II to make treaties with foreign nations, subject to the consent of the Senate. A treaty is an agreement between two or more nations containing promises to behave in specified ways.

Executive agreements are international compacts that the president makes with foreign nations without the approval of the Senate. They do not have the same legal status as treaties unless they are subsequently ratified by the Senate. The Constitution does not expressly give the president the power to make executive agreements. However, this power has been inferred from the president's general constitutional authority over foreign affairs. At one time, executive agreements involved minor matters, such as postal relations and the use of radio frequencies. Since the 1930s, however, presidents have negotiated important foreign policy issues through these agreements rather than through treaties. The Supreme Court has recognized that an executive agreement is legally equivalent to a treaty and therefore the supreme law of the land. Executive agreements enable the president to achieve results while avoiding the uncertainty of treaty ratification.

### Presidential War Powers

An integral part of the president's foreign policy role is the enormous power of the U.S. armed forces, over which the Constitution makes the president commander in chief. The president may threaten a foreign nation with force or actually conduct military actions to protect U.S. interests, aid U.S. allies, and maintain national security.

Although the president is commander-in-chief, Article I of the Constitution gives Congress the power to declare war. Despite this apparent

constitutional impediment, presidents since Thomas Jefferson have dispatched troops to combat situations without the prior approval of Congress. The Supreme Court held in the *Prize* cases, 67 U.S. 635, 17 L. Ed. 459; 70 U.S. 451, 18 L. Ed. 197; 70 U.S. 514, 18 L. Ed. 200; 70 U.S. 559, 18 L. Ed. 220 (1863), that the president has the authority to resist force without the need for special legislative action.

In times of crisis, the president has the power to commit U.S. forces, but the Vietnam War led Congress to place limits on the presidential war power. The War Powers Resolution of 1973 (50 U.S.C.A. §§ 1541 et seq.) restricts the president's power to mobilize the military during undeclared war. It requires the president to make a full report to Congress when sending troops into foreign areas, limits the duration of troop commitment without congressional authorization, and provides a veto mechanism that allows Congress to force a recall of troops at any time.

Following the September 11 terrorist attacks on the United States, Congress passed a resolution authorizing the president to use force to fight a WAR ON TERRORISM. President George W. Bush issued military orders in October and November 2001 that mobilized NATIONAL GUARD and Army Reserve units and directed the detention of ENEMY COMBATANTS by the military. In a controversial move, President Bush authorized military tribunals to try suspected terrorists. After the U.S. invasion of Afghanistan, many suspected terrorists were captured and moved to military prisons for indefinite terms of detention. The invasion of Iraq by U.S. and British forces in March 2003 was authorized by Congress in the fall of 2002, again giving the president as commander-in-chief broad authority to conduct a military campaign.

The president also has broad powers over domestic policy during wartime. President ABRAHAM LINCOLN issued an order to military commanders suspending HABEAS CORPUS during the Civil War, which allowed the military to arrest and detain persons without trial for an indefinite time. Congress later passed a law suspending habeas corpus, but after the Civil War, the Supreme Court, in EX PARTE MILLIGAN, 71 U.S. 2, 18 L. Ed. 281 (1866), condemned Lincoln's directive establishing military jurisdiction over civilians outside the immediate war zone.

During the early days of U.S. involvement in WORLD WAR II, President FRANKLIN D. ROOSEVELT issued orders authorizing the establishment of "military areas" from which dangerous persons could be expelled or excluded. This order was used to designate the West Coast a military area and to remove and imprison 120,000 Japanese Americans in "relocation centers" for the duration of the war. The Supreme Court upheld the relocation order in KOREMATSU V. UNITED STATES, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944), finding that the government had a compelling national security interest during a time of war to take such extreme measures.

Following the September 11 attacks on the United States, Congress passed the USA PATRIOT ACT, which gives the president increased powers to wiretap suspected terrorists without judicial supervision as well as the power to indefinitely detain ALIENS who are suspected of TERRORISM. U.S. citizens who have been held as enemy combatants in military prisons without the right to consult with an attorney or have a criminal trial have challenged the president's authority. In *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), the Fourth Circuit Court of Appeals ruled that the courts must defer to the president when dealing with issues of national security. Therefore, the president could order the indefinite detention of enemy combatants.

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CROSS-REFERENCES

Congress of the United States; Constitution of the United States; Executive Privilege; Japanese American Evacuation Cases; Separation of Powers.

## PRESS, FREEDOM OF

See FREEDOM OF THE PRESS.

## PRESUMPTION

*A conclusion made as to the existence or nonexistence of a fact that must be drawn from other evidence that is admitted and proven to be true. A* RULE OF LAW.

If certain facts are established, a judge or jury must assume another fact that the law recognizes as a logical conclusion from the proof that has been introduced. A presumption differs from an inference, which is a conclusion that a judge or jury may draw from the proof of certain facts if such facts would lead a reasonable person of average intelligence to reach the same conclusion.

A *conclusive presumption* is one in which the proof of certain facts makes the existence of the assumed fact beyond dispute. The presumption cannot be rebutted or contradicted by evidence to the contrary. For example, a child younger than seven is presumed to be incapable of committing a felony. There are very few conclusive presumptions because they are considered to be a substantive rule of law, as opposed to a rule of evidence.

A rebuttable presumption is one that can be disproved by evidence to the contrary. The FEDERAL RULES OF EVIDENCE and most state rules are concerned only with rebuttable presumptions, not conclusive presumptions.

## PRESUMPTION OF INNOCENCE

*A principle that requires the government to prove the guilt of a criminal defendant and relieves the defendant of any burden to prove his or her innocence.*

The presumption of innocence, an ancient tenet of CRIMINAL LAW, is actually a misnomer. According to the U.S. Supreme Court, the presumption of the innocence of a criminal defendant is best described as an assumption of innocence that is indulged in the absence of contrary evidence (*Taylor v. Kentucky,* 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 [1978]). It is not considered evidence of the defendant's innocence, and it does not require that a mandatory inference favorable to the defendant be drawn from any facts in evidence.

In practice the presumption of innocence is animated by the requirement that the government prove the charges against the defendant BEYOND A REASONABLE DOUBT. This DUE PROCESS requirement, a fundamental tenet of criminal law, is contained in statutes and judicial opinions. The requirement that a person suspected of a crime be presumed innocent also is mandated in statutes and court opinions. The two principles go together, but they can be separated.

The Supreme Court has ruled that, under some circumstances, a court should issue jury instructions on the presumption of innocence in addition to instructions on the requirement of proof beyond a reasonable doubt (*Taylor v. Kentucky*). A presumption of innocence instruction may be required if the jury is in danger of convicting the defendant on the basis of extraneous considerations rather than the facts of the case.

The presumption of innocence principle supports the practice of releasing criminal defendants from jail prior to trial. However, the government may detain some criminal defendants without bail through the end of trial. The EIGHTH AMENDMENT to the U.S. Constitution states that excessive bail shall not be required, but it is widely accepted that governments have the right to detain through trial a defendant of a serious crime who is a flight risk or poses a danger to the public. In such cases the presumption of innocence is largely theoretical.

Aside from the related requirement of proof beyond a reasonable doubt, the presumption of innocence is largely symbolic. The reality is that no defendant would face trial unless somebody—the crime victim, the prosecutor, a police officer—believed that the defendant was guilty of a crime. After the government has presented enough evidence to constitute PROBABLE CAUSE to believe that the defendant has committed a crime, the accused need not be treated as if he or she was innocent of a crime, and the defendant may be jailed with the approval of the court.

Nevertheless, the presumption of innocence is essential to the criminal process. The mere mention of the phrase *presumed innocent* keeps judges and juries focused on the ultimate issue at hand in a criminal case: whether the prosecution has proven beyond a reasonable doubt that the defendant committed the alleged acts. The people of the United States have rejected the alternative to a presumption of innocence—a presumption of guilt—as being inquisitorial and contrary to the principles of a free society.

CROSS-REFERENCES

Criminal Procedure; Inquisitorial System.

## PRETERMITTED HEIR

*A child or other descendent omitted from the will of a testator.*

Modern laws concerning the inheritance of property attempt to protect the rightful heirs. A pretermitted heir is a child or descendant of the

testator—the maker of a will—who has unintentionally been omitted from the will. States have enacted "pretermitted heir statutes" that protect these heirs.

The presumption of these statutes is that the testator must expressly disinherit a child or descendant in his or her will. This presumption dates back to early ROMAN LAW. If the will does not specify intention to disinherit, the law will presume that the omission of the child or descendant was unintentional. These statutes authorize the child or descendant to take the same share of the estate that he or she would have taken if the testator had died intestate, without a will. All states have fixed, objective rules for dividing property when a person dies without a will, which apply to the division of an estate for pretermitted heirs.

A pretermitted heir must be a child or descendant either living at the date of the execution of the will or born thereafter. For example, if John executes a will and his son Bob is born a week later, Bob will be considered a pretermitted heir unless John changes his will to expressly disinherit Bob. If Bob has a child and dies before John, at John's death the grandchild will share in John's estate, because he or she will take Bob's share.

Some states have specific laws that deal with a child born after the making of a will. These *after-born heir* statutes are similar to pretermitted heir provisions. The presumption is that an AFTER-BORN CHILD does not revoke a will but has the effect of modifying it.

Louisiana and Puerto Rico protect children and descendants in a different way. These jurisdictions, which come from a civil-law rather than a common-law tradition, grant heirs an indefeasible share. This share is a certain portion of the estate, usually expressed in a fixed dollar amount, and a percentage of the decedent's estate.

CROSS-REFERENCES

Descent and Distribution.

## PRETRIAL CONFERENCE

*A meeting of the parties to an action and their attorneys held before the court prior to the commencement of actual courtroom proceedings.*

A pretrial conference is a meeting of the parties to a case conducted prior to trial. The conference is held before the trial judge or a magistrate, a judicial officer who possesses fewer judicial powers than a judge. A pretrial conference may be held prior to trial in both civil and criminal cases. A pretrial conference may be requested by a party to a case, or it may be ordered by the court. Generally, the term *pretrial conference* is used interchangeably with the term *pretrial hearing.*

A pretrial conference may be conducted for several reasons: (1) expedite disposition of the case, (2) help the court establish managerial control over the case, (3) discourage wasteful pretrial activities, (4) improve the quality of the trial with thorough preparation, and (5) facilitate a settlement of the case.

Pretrial conferences are conducted in criminal cases to decide matters that do not inquire into the defendant's guilt or innocence. Under rule 17.1 of the Federal Rules of Criminal Procedure, pretrial conferences for criminal cases may be conducted to promote a fair and expeditious trial. In practice, federal and state courts use the pretrial conference in criminal cases to decide such preliminary matters as what evidence will be excluded from trial and what witnesses will be allowed to testify.

In a civil pretrial conference, the judge or magistrate, with the help of the attorneys, may (1) formulate and simplify the issues in the case, (2) eliminate frivolous claims or defenses, (3) obtain admissions of fact and documents to avoid unnecessary proof, (4) identify witnesses and documents, (5) make schedules for the submission of pretrial briefs and motions, (6) make rulings on motions submitted before the conference, (7) set dates for further conferences, (8) discuss the possibility of a settlement, and (9) discuss the consolidation or management of large, complex cases. After the conference, the judge or magistrate issues an order reflecting the results of the conference, and the order controls the future course of the case.

Generally, the substance of a pretrial conference for a criminal case is the same as that for a civil case. At the conference the judge or magistrate may make rulings on motions, eliminate repetitive evidence, and set schedules. If a preliminary issue arises after the pretrial conference, a party may request a special pretrial hearing with the court to address the issue. (This special hearing marks the distinction between pretrial hearing and pretrial conference, when such a distinction is made.) In the alternative, the parties may address such an issue in court on the first day of trial, out of the presence of the jury.

All cases are guided by procedural rules that allow parties to obtain relevant evidence from other parties. The process of turning over evidence is called discovery, and the rules that apply to obtaining evidence are called discovery rules. In civil cases, discovery refers to the right of either party to obtain evidence from the other, but in a criminal case, discovery generally refers to the right of the defendant's attorney to have access to information necessary to prepare a defense. Discovery issues are a common topic in pretrial conferences. Discovery orders that were issued prior to a pretrial conference may be reviewed for compliance at a pretrial conference, and new discovery orders may be issued after a pretrial conference.

Criminal defendants enjoy more procedural protections than do civil defendants, and the judge or magistrate must be careful to protect those rights. Generally, no criminal defendant who has requested assistance of counsel may be required to attend a pretrial conference without an attorney. No admissions made by the defendant or the defendant's lawyer during the conference may be used against the defendant in a trial unless the admissions are written and signed by the defendant and the defendant's attorney.

The judge or magistrate assigned to the case can choose to hold a pretrial conference, but the denial of a pretrial conference may be an unconstitutional denial of DUE PROCESS rights. For example, in a criminal case, a defendant has a due process right to a pretrial hearing when the defendant claims that a prosecutor has breached a plea agreement (*United States v. Ataya,* 864 F.2d 1324 [7th Cir. 1988]).

Criminal defendants must raise some issues before trial in a pretrial motion. Pretrial motions are specific requests for favorable orders from the court on particular issues. Under the Uniform Rules of Criminal Procedure, a set of model rules written by the American Law Institute and adopted by many jurisdictions, a defendant should lose the opportunity to raise the following issues if they are not raised prior to trial: defenses and objections based on defects in the indictment or formal charging instrument; requests regarding discovery, or disclosure of evidence; requests to suppress or exclude from trial potential testimony or other evidence; requests for severing the trial in cases involving codefendants; requests for the dismissal of the case; and requests for transfer of the case to another jurisdiction.

Similar requirements are imposed on prosecutors. The prosecution must tell the defendant prior to trial of its intention to use certain evidence, such as evidence obtained as a result of a search or seizure, wiretap, or other ELECTRONIC SURVEILLANCE mechanism; evidence culled from a confession, admission, or statement made by the defendant; and evidence relating to a lineup, show-up, picture, or voice identification of the defendant (Uniform Rules of Criminal Procedure 422(a)(1)).

Pretrial proceedings vary from jurisdiction to jurisdiction. In some jurisdictions courts have bifurcated the pretrial conference into dispositional conferences and trial management conferences. In St. Paul, Minnesota, for example, the district court schedules a trial management conference to discuss administrative aspects of the case, such as scheduling. The courts also schedule a dispositional conference in which the parties may discuss the possibility of a plea bargain or settlement. If no agreement between the parties is forthcoming at the dispositional conference, the case proceeds to trial, and the court schedules no further meetings between the parties until trial. The parties are, nonetheless, free to continue negotiating, and they also may request a special pretrial hearing if an issue arises after the conference but prior to trial.

The first pretrial conference in the United States was held in Michigan in 1929. Over the years, as courts became more crowded, the pretrial conference became more important. Pretrial conferences save valuable time for courts and jurors by narrowing the focus of the trial and resolving preliminary matters. They also assist the court in the fair and impartial administration of justice by facilitating discovery and reducing the element of surprise at trial. Pretrial conferences are so important in civil cases that a court may order litigants to appear at a pretrial conference and impose fines on them if they refuse to appear (*G. Heileman Brewing Co. v. Joseph Oat Corp.,* 871 F.2d 648 [7th Cir. 1989]).

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CROSS-REFERENCES

Civil Procedure; Criminal Procedure; Due Process of Law; Plea Bargaining; Right to Counsel.

## PRETRIAL PUBLICITY

The right of a criminal defendant to receive a fair trial is guaranteed by the SIXTH AMENDMENT to the U.S. Constitution. The right of the press (print and electronic media) to publish information about the defendant and the alleged criminal acts is guaranteed by the FIRST AMENDMENT. These two constitutional safeguards come into conflict when pretrial publicity threatens to deprive the defendant of an impartial jury.

The U.S. Supreme Court has grappled with the issue of pretrial publicity since the 1960s. In *Irvin v. Dowd,* 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961), the defendant, Leslie Irvin, was convicted of committing six murders in a rural area of Indiana. The crimes generated extensive media coverage. Irvin argued that the pretrial publicity prevented him from receiving a fair trial by an impartial jury. The Court agreed, noting that eight of the twelve jurors who heard the case had decided that Irvin was guilty before the trial began. Despite these admissions, the trial judge accepted as conclusive the jurors' statements that they would be able to render an impartial verdict. The Court held that the substantial publicity surrounding the case made the trial judge's determination of juror impartiality erroneous. It set out a basic rule that when pretrial publicity has been substantial, a trial court should not necessarily accept a juror's assertion of impartiality. In these cases a presumption is raised that the jurors are biased.

The Supreme Court extended this concern to the trial stage in *Sheppard v. Maxwell,* 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). Local officials allowed Dr. Samuel H. Sheppard's 1954 murder trial to degenerate into a media circus. The Cleveland media heavily publicized the case before trial and disrupted the control of the court during the trial. The jurors were exposed to intense media coverage of the case until the time they began their deliberations. Following deliberations, Sheppard was convicted of murder. Sheppard spent ten years in prison before the Supreme Court ruled that the publicity had deprived him of a fair trial. Sheppard was acquitted at his second trial.

The *Sheppard* case brought national attention to the problem of pretrial publicity. Trial judges attempted to address this problem by imposing gag orders on the press, preventing it from reporting pretrial information. The press resisted this approach and was supported by the Supreme Court in *Nebraska Press Association v. Stuart,* 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976). The Court held that the trial judge's GAG ORDER was an unconstitutional PRIOR RESTRAINT on the press.

Trial courts then attempted to close criminal trials to the public, including the press. The Supreme Court, in *Richmond Newspapers v. Virginia,* 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980), limited this approach, holding that the right of access to criminal trials is guaranteed by the First and Fourteenth Amendments. Closure will only be permitted if there is an overriding interest, such as ensuring a defendant's right to a fair trial. In this and subsequent cases, the Court has adopted a test that makes it very difficult to justify closure.

A troublesome issue for defense attorneys is whether a jury pool is so "contaminated" by pretrial publicity that it will be extremely difficult to seat an impartial jury. In *Mu'min v. Virginia,* 500 U.S. 415, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991), the Supreme Court held that the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT does not mandate that prospective jurors be asked in VOIR DIRE examinations about specific information concerning the case that they have seen or heard in the media. The Sixth Amendment's impartial jury requirement will be satisfied when jurors do not admit during voir dire that they have been prejudiced by pretrial publicity.

Faced with court decisions that make it difficult to prevent the media from reporting pretrial information, courts have several ways of overcoming prejudicial pretrial publicity. One common tactic is for the court to issue an order prohibiting the prosecutor, the defense attorney, and other trial participants from making public comments about the case. Courts often permit extensive juror questionnaires that give both

sides the chance to identify persons who have been exposed to pretrial publicity and who have already made up their minds about the guilt or innocence of the defendant. A court also may sequester the jury during the course of the trial. Another tactic is to postpone the trial until publicity dies down. In rare cases a court will change the venue of the trial to a locale less affected by the pretrial publicity.

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CROSS-REFERENCES

Criminal Law; Criminal Procedure; Due Process of Law; Freedom of the Press.

## PREVAILING PARTY

*The litigant who successfully brings or defends an action and, as a result, receives a favorable judgment or verdict.*

## PREVENTIVE DETENTION

*The confinement in a secure facility of a person who has not been found guilty of a crime.*

Preventive detention is a special form of imprisonment. Most persons held in preventive detention are criminal defendants, but state and federal laws also authorize the preventive detention of persons who have not been accused of crimes, such as certain mentally ill persons.

Preventive detention is a relatively recent phenomenon. Before the 1970s the general practice in criminal courts was to set bail for almost all criminal defendants. For defendants accused of particularly heinous crimes, courts would set the amount of bail so high that the defendants were unlikely to be released. Defendants in murder cases were held in jail without bail through the end of trial.

In the early 1970s, the District of Columbia became the first jurisdiction to experiment with preventive detention for defendants other than murder defendants. Under D.C. Code 1973, 23-1322, a defendant charged with a dangerous or violent crime could be held before trial without bail for up to 60 days. The defendant was entitled to a hearing at which the prosecutor was required to present evidence of a substantial probability that the defendant committed the alleged offense. The defendant was allowed to present evidence, cross-examine witnesses, and appeal an adverse ruling. This detention scheme was upheld by the District of Columbia Court of Appeals in *United States v. Edwards,* 430 A.2d 1321, (1981), *cert. denied,* 455 U.S. 1022 (1982).

Congress created a federal preventive detention system for criminal defendants in the Federal Bail Reform Act of 1984 (18 U.S.C.A. §§ 3141 et seq. [1996]). The act is similar to the District of Columbia law with several exceptions. Under the act, the prosecution is not required to notify a defendant that it intends to present evidence of his past crimes. The federal act allows a court to accept evidence from the prosecution without giving the defendant an opportunity to question the evidence. The federal act does not limit the defendant's detention; a defendant may be held without bail until he is found not guilty. Finally, the class of defendants eligible for preventive detention is broader in the federal act than in the District of Columbia law.

The federal act authorizes the court to conduct a preventive detention hearing upon a motion made by the prosecutor where the defendant is accused of (1) a crime of violence, (2) a crime for which the maximum sentence is life in prison or death, (3) an offense that is punishable by a prison term of ten years or more under the federal Controlled Substances Act or the Maritime Drug Law Enforcement Act, or (4) any felony if the person has been convicted of two or more violent offenses or federal drug offenses. Furthermore, a defendant may be held in preventive detention prior to trial if the court finds that he or she may flee or intimidate, threaten, or injure a prospective witness or juror. The court can make such a finding on its own, without a motion filed by the prosecutor.

Under the federal act, a court may consider several factors when it decides whether to detain a criminal defendant, including the nature and circumstance of the offense charged; the weight of the evidence against the defendant; the history and characteristics of the defendant, including his or her character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, drug and alcohol history, and criminal history; the

defendant's prior attendance at court proceedings; whether the defendant was on PAROLE, PROBATION, or other conditional release at the time of the alleged offense; and the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release.

Technically, a criminal defendant who is confined in jail through the end of trial is considered detained until the day of sentencing. Defendants sentenced to prison receive credit for the time that they serve in jail prior to the beginning of their sentence, but some defendants may go free until the day of sentencing. Under the federal act, a criminal defendant who is convicted at trial must be detained until the day of sentencing, with the following exceptions. Under 18 U.S.C.A. § 3143 (1997), a defendant who does not face a prison term may be released until the day of sentencing, and defendants who the court finds are not likely to flee and do not present a danger to the safety of any other person may also be released. If the defendant is appealing a guilty verdict, the court may release the defendant pending the outcome of the appeal if the court finds that the defendant is not dangerous and will not flee and that the appeal may yield a result favorable to the defendant.

The U.S. Supreme Court entertained a challenge to the federal act based on the EIGHTH AMENDMENT in 1987 in *United States v. Salerno,* 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697. Anthony Salerno and Vincent Cafaro, who were facing numerous federal RACKETEERING charges, were detained without bail after a detention hearing because the court believed that they posed a danger to the community. Salerno and Cafaro appealed to the Supreme Court, arguing that the court violated their DUE PROCESS rights by detaining them, and therefore essentially punishing them, on the basis of potential crimes. The defendants also argued that the federal act violated the Excessive Bail Clause of the Eighth Amendment.

By a vote of six to three, the High Court rejected both arguments. According to the majority, "The mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." The Court reasoned that to determine whether detention is punishment, it must look to the legislative intent behind the act. Because Congress formulated the act to prevent danger to the community, and not as punishment for the defendant, the detention was best characterized as regulatory and not punitive. Because the detention was not considered punishment, the defendant was due only minimal process. The Court concluded that the hearing the defendant received was sufficient process to justify the detention. The Court also rejected the defendants' excessive bail argument, noting that the Eighth Amendment prohibits only the setting of excessive bail and does not address the issue of whether bail should be available at all. All states now allow for the preventive detention of criminal defendants without bail prior to trial and for the continued detention of defendants before sentencing and during appeals.

Preventive detention may also be imposed on persons other than criminal defendants. States may detain mentally unstable individuals who present a danger to the public, including criminal defendants found not guilty by reason of insanity. In *Addington v. Texas,* 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979), the High Court ruled that a state may place mentally unstable persons in preventive detention for an indefinite period of time, but only after the government has shown by at least a PREPONDERANCE OF EVIDENCE that the person presents a danger to himself or herself or to others. If the person becomes mentally stable and shows no sign of mental illness, continued confinement of the person violates due process (*Foucha v. Louisiana,* 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 [1992]).

The Supreme Court has ruled that persons accused of dangerous crimes who become incompetent before trial may be placed in preventive detention until they are competent (*Jackson v. Indiana,* 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 [1972]). The Court also has ruled that potentially dangerous resident ALIENS may be detained pending deportation proceedings (*Carlson v. Landon,* 342 U.S. 524, 72 S. Ct. 525, 96 L. Ed. 547 [1952]; *Wong Wing v. United States,* 163 U.S. 228, 16 S. Ct. 977, 41 L. Ed. 140 [1896]). Finally, juveniles who have been arrested on the suspicion that they have committed a crime may be placed in preventive detention if they present a danger to the community (*Schall v. Martin,* 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 [1984]).

In the 1990s some states enacted laws that authorized the continued incarceration of convicted child SEX OFFENDERS after the offender had served his sentence. Such laws were challenged as violating several constitutional rights,

including the right to due process, the right to be free from CRUEL AND UNUSUAL PUNISHMENT, the right to be free from DOUBLE JEOPARDY, and the prohibition of EX POST FACTO LAWS (laws that retroactively apply criminal sanctions).

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CROSS-REFERENCES

Child Abuse; Criminal Law; Criminal Procedure; Due Process of Law; Insanity Defense.

## PRICE-FIXING

*The organized setting of what the public will be charged for certain products or services agreed to by competitors in the marketplace in violation of the* SHERMAN ANTI-TRUST ACT *(15 U.S.C.A. § 1 et seq.).*

*Horizontal* price-fixing involves agreements to set prices made among one particular class of sellers—such as producers, wholesalers, or retailers.

*Vertical* price-fixing occurs between different categories of the sellers of products and services, such as between a manufacturer and wholesaler, wholesaler and distributor, or distributor and retailer.

CROSS-REFERENCES

Antitrust Law.

## PRIGG V. PENNSYLVANIA

A pre–Civil War case, *Prigg v. Pennsylvania,* 41 U.S. (16 Pet.) 539, 10 L. Ed. 1060 (1842), declared unconstitutional all fugitive slave laws enacted by the states on the ground that the federal law provided the exclusive remedy for the return of runaway slaves.

The national debate over SLAVERY grew in intensity beginning in the 1840s. Many of the Northern states demonstrated their hostility to slavery by enacting laws that attempted to frustrate Southern slave owners who came North in search of runaway slaves. Slave owners were outraged at these laws, arguing that the federal Fugitive Slave Act of 1793 gave them the right to reclaim their property without interference by state government. In 1842 the U.S. Supreme Court resolved the issue in *Prigg v. Pennsylvania.*

Edward Prigg, a professional slave catcher, seized Margaret Morgan, a runaway slave from Maryland living in Pennsylvania. Prigg applied to a state magistrate for certificates of removal under the federal Fugitive Slave Act of 1793 and an 1826 Pennsylvania personal liberty law. Prigg needed the certificates to legally remove Morgan and her two children to Maryland. The Pennsylvania law had a higher standard of proof for demonstrating the slave owner applicant's title to the slaves. After the magistrate refused to issue the certificates, Prigg illegally returned the slaves to Maryland. Pennsylvania indicted Prigg for KIDNAPPING under the 1826 law and extradited him from Maryland. Following his conviction, Prigg appealed to the U.S. Supreme Court.

By an 8–1 vote, the Court reversed his conviction. Writing for the Court, Justice JOSEPH STORY concluded that the Pennsylvania law was unconstitutional because it conflicted with the federal act. He based his analysis on the Fugitive Slave Clause contained in Article IV, Section 2, of the U.S. Constitution. The clause directs the return of runaway slaves to the state from where they came.

Story claimed that the clause was a "fundamental article, without the adoption of which the Union could not have been formed." His historical analysis, however, was questionable. The clause was added late in the Constitutional Convention and was not debated. Nevertheless, Story concluded that the clause was a "practical necessity." Without it, every non-slaveholding state would have been at liberty to free all runaway slaves coming within its limits. This would have "created the most bitter animosities, and engendered perpetual strife between the different states."

Having established that the Fugitive Slave Clause guaranteed the rights of slave owners to reclaim runaway slaves and to prevent nonslaveholders from interfering with such property rights, Story looked to the Fugitive Slave Act of 1793 for enforcement of these rights. Story held that the constitutional provision gave Congress the authority to pass the act, stating that "where the end is required, the means are given." Pennsylvania had argued that its law

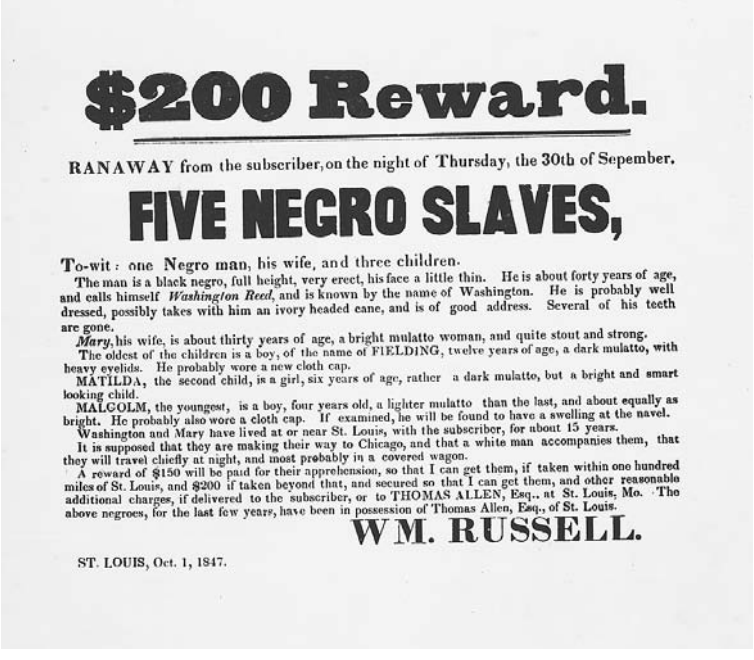

$200 Reward.

RANAWAY from the subscriber, on the night of Thursday, the 30th of September.

FIVE NEGRO SLAVES,

To-wit: one Negro man, his wife, and three children.

The man is a black negro, full height, very erect, his face a little thin. He is about forty years of age, and calls himself *Washington Reed*, and is known by the name of Washington. He is probably well dressed, possibly takes with him an ivory headed cane, and is of good address. Several of his teeth are gone.

*Mary*, his wife, is about thirty years of age, a bright mulatto woman, and quite stout and strong.

The oldest of the children is a boy, of the name of FIELDING, twelve years of age, a dark mulatto, with heavy eyelids. He probably wore a new cloth cap.

MATILDA, the second child, is a girl, six years of age, rather a dark mulatto, but a bright and smart looking child.

MALCOLM, the youngest, is a boy, four years old, a lighter mulatto than the last, and about equally as bright. He probably also wore a cloth cap. If examined, he will be found to have a swelling at the navel.

Washington and Mary have lived at or near St. Louis, with the subscriber, for about 15 years.

It is supposed that they are making their way to Chicago, and that a white man accompanies them, that they will travel chiefly at night, and most probably in a covered wagon.

A reward of $150 will be paid for their apprehension, so that I can get them, if taken within one hundred miles of St. Louis, and $200 if taken beyond that, and secured so that I can get them, and other reasonable additional charges, if delivered to the subscriber, or to THOMAS ALLEN, Esq., at St. Louis, Mo. The above negroes, for the last few years, have been in possession of Thomas Allen, Esq., of St. Louis.

WM. RUSSELL.

ST. LOUIS, Oct. 1, 1847.

*An 1847 handbill offering a reward for an escaped slave. The Supreme Court's decision in* Prigg *frustrated slave owners as Northern states obliged the Court by refusing to participate in fugitive slave proceedings.*

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was based on the POLICE POWERS given to it by the Constitution. Story rejected this argument, holding that because the federal law was based on a specific constitutional provision that was national in scope, the federal power on this issue was exclusive.

As an extension of this conclusion, Story ruled that states were not compelled to enforce the federal fugitive slave provisions. It would be inconsistent and without legal basis, he reasoned, for the Court to declare the preeminence of federal law and then require state courts to help carry out the law. Therefore, the federal government was "bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution. . . ." Though Story wished that state judges would execute the federal law, he understood that the federal government had no power to require them to do so.

Even if there had been no federal law on runaway slaves, Story, without "the slightest hesitation," found in the Fugitive Slave Clause an implied right for a slave owner or slave owner's agent to go into any state and recapture a slave. The owner of a slave "is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace, or any illegal violence."

Story expressly recognized the police power of the states to arrest, detain, or exclude runaway slaves from their borders. States had as much right to protect themselves against the "depredations and evil example" of runaways as they did against "idlers, vagabonds, and paupers." These regulations, however, "can never be permitted to interfere with or to obstruct the just rights of the owner to reclaim his slave."

The *Prigg* decision angered slavery opponents. Some state judges took Story's opinion to heart and refused to participate in federal fugitive slave proceedings. In 1843 Massachusetts passed an act that forbade any state official from participating in the return of a fugitive slave under the 1793 federal law. Other Northern states passed similar acts.

Slave owners soon became aware that the withdrawal of state support curtailed their ability to return slaves to the South. There were not enough federal magistrates to process applications under the 1793 law. This led to the FUGITIVE SLAVE ACT OF 1850, which authorized the appointment of a federal commissioner in every county in the United States who could issue certificates of removal for fugitive slaves. Persons who interfered in the process were subject to criminal penalties. The 1850 act caused many runaway slaves to move to Canada.

*Prigg* was a crucial case because it announced that slavery was a national issue that could not be disturbed by STATE ACTION. It also disclosed that the institution of slavery was woven into the Constitution.

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## PRIMA FACIE

*[*Latin, On the first appearance.*] A fact presumed to be true unless it is disproved.*

In common parlance the term *prima facie* is used to describe the apparent nature of something upon initial observation. In legal practice the term generally is used to describe two things: the presentation of sufficient evidence by a civil claimant to support the legal claim (a prima facie case), or a piece of evidence itself (prima facie evidence).

For most civil claims, a plaintiff must present a prima facie case to avoid dismissal of the case or an unfavorable directed verdict. The

plaintiff must produce enough evidence on all elements of the claim to support the claim and shift the burden of evidence production to the respondent. If the plaintiff fails to make a prima facie case, the respondent may move for dismissal or a favorable directed verdict without presenting any evidence to rebut whatever evidence the plaintiff has presented. This is because the burden of persuading a judge or jury always rests with the plaintiff.

Assume that a plaintiff claims that an employer failed to promote her based on her sex. The plaintiff must produce affirmative evidence showing that the employer used illegitimate, discriminatory criteria in making employment decisions that concerned the plaintiff. The employer, as respondent, does not have a burden to produce evidence until the plaintiff has made a prima facie case of SEX DISCRIMINATION (*Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 [1981]). The precise amount of evidence that constitutes a prima facie case varies from claim to claim. If the plaintiff does not present a prima facie case with sufficient evidence, the judge may dismiss the case. Or, if the case is being heard by a jury, the judge may direct the jury to return a verdict for the respondent.

Prima facie also refers to specific evidence that, if believed, supports a case or an element that needs to be proved in the case. The term *prima facie evidence* is used in both civil and CRIMINAL LAW. For example, if the prosecution in a murder case presents a videotape showing the defendant screaming death threats at the victim, such evidence may be prima facie evidence of intent to kill, an element that must be proved by the prosecution before the defendant may be convicted of murder. On its face, the evidence indicates that the defendant intended to kill the victim.

Statutes may specify that certain evidence is prima facie evidence of a certain fact. For example, a duly authenticated copy of a defendant's criminal record may be considered prima facie evidence of the defendant's prior convictions and may be used against the defendant in court (Colo. Rev. Stat. Ann. § 18-3-412 [West 1996]). A CIVIL LAW example is a statute that makes a duly certified copy or duplicate of a certificate of authority for a fraternal benefit society to transact business prima facie evidence that the society is legal and legitimate (Colo. Rev. Stat. Ann. § 10-14-603 [West 1996]).

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CROSS-REFERENCES

Burden of Persuasion.

## PRIMARY AUTHORITY

*Law, in various forms, that a court must follow in deciding a case.*

Primary authority mainly consists of statutes, decisions by the U.S. Supreme Court, and all judicial decisions handed down by the same court or a higher court within the same judicial system.

CROSS-REFERENCES

Secondary Authority.

## PRIMARY EVIDENCE

*An authentic document or item that is offered as proof in a lawsuit, as contrasted with a copy of, or substitute for, the original.*

Primary evidence, more commonly known as best evidence, is the best available substantiation of the existence of an object because it is the actual item. It differs from secondary evidence, which is a copy of, or substitute for, the original. If primary evidence is available to a party, that person must offer it as evidence. When, however, primary evidence is unavailable—for example, through loss or destruction—through no fault of the party, he or she may present a reliable substitute for it, once its unavailability is sufficiently established.

## PRIME LENDING RATE

*The lowest rate of interest that a financial institution, such as a bank, charges its best customers, usually large corporations, for short-term unsecured loans.*

The prime lending rate is an economic indicator and is often used as a measuring point for adjusting interest rates on other types of loans. The rate varies according to economic factors.

## PRIMOGENITURE

*The status of being the firstborn child among several children of the same parents. A rule of inheritance at* COMMON LAW *through which the oldest male child has the right to succeed to the estate of an ancestor to the exclusion of younger siblings, both male and female, as well as other relatives.*

## PRINCIPAL

*A source of authority; a sum of a debt or obligation producing interest; the head of a school. In an agency relationship, the principal is the person who gives authority to another, called an agent, to act on his or her behalf. In* CRIMINAL LAW, *the principal is the chief actor or perpetrator of a crime; those who aid, abet, counsel, command, or induce the commission of a crime may also be principals. In investments and banking, the principal refers to the person for whom a* BROKER *executes an order; it may also mean the capital invested or the face amount of a loan.*

A *principal in the first degree* is the chief actor or perpetrator of a crime. A *principal in the second degree* must be present at the commission of the criminal act and aid, abet, or encourage the principal in his or her criminal activity.

CROSS-REFERENCES

Principal and Surety.

## PRINCIPAL AND SURETY

*A contractual relationship whereby one party—the surety—agrees to pay the principal's debt or perform his or her obligation in case of the principal's default.*

The *principal* is the debtor—the person who is obligated to a creditor. The *surety* is the accommodation party—a third person who becomes responsible for the payment of the obligation if the principal is unable to pay or perform. The principal remains primarily liable, whereas the surety is secondarily liable. The creditor—the person to whom the obligation is owed—can enforce payment or performance by the principal or by the surety if the principal defaults. The creditor must always first seek payment from the principal before approaching the surety. If the surety must fulfill the obligation, then he can seek recovery from the principal after satisfying the creditor. An example of a principal and surety relationship occurs when a minor purchases a car on credit and has a parent act as a surety to guarantee payment of the car loan.

A *suretyship* arises from an agreement. The parties must be competent; there must be an offer and acceptance; and valid consideration is necessary. The parties must openly assent to the contract so that all the parties are known to each other. The surety must be identified as such so that the creditor will not hold that person primarily liable. If the face of the contract indicates a suretyship, the creditor receives sufficient notice of the three-party arrangement.

No special form of contract is needed to create a principal and surety relationship. The agreement can be consummated by written correspondence or be in the form of a bond. No particular language is needed to identify the relationship, since courts will examine the substance and not the form of the contract to determine whether a suretyship exists. Courts will rarely imply a suretyship agreement, except when an involuntary suretyship arises out of an implied oral agreement. When joint debtors obtain a loan, each is a principal for a proportionate share of the debt and a surety for the remaining amount. In practice, however, each joint debtor is a principal and is primarily liable for the entire loan if the creditor seeks repayment. A joint debtor who pays the entire debt can, however, seek contribution from the other debtors.

The surety's liability is indicated by the terms of the contract. Unless otherwise provided, a surety assumes the obligation of the principal. A surety, however, can limit his liability to a certain amount since the obligations of the principal and surety do not have to be coextensive. When a surety agrees to be accountable for a certain amount, she cannot be held responsible for a sum greater than that for which she contracted. The surety becomes liable when the principal breaches a contract with the creditor. In the absence of a contractual limitation, a surety's liability is measured by the loss or damage resulting from the default by the principal. The liability of the surety terminates when the principal's obligation is fulfilled.

## PRINCIPLE

*A fundamental, well-settled* RULE OF LAW. *A basic truth or undisputed legal doctrine; a given legal proposition that is clear and does not need to be proved.*

A principle provides a foundation for the development of other laws and regulations.

## PRINTERS INK STATUTE

*Statutes enacted in a number of states making it a misdemeanor to use representations that are untrue, deceptive, or misleading in advertisements.*

## PRIOR INCONSISTENT STATEMENTS

*Communications made by a witness before the time he or she takes the stand to testify in an action that contradict subsequent testimony given on the same exact facts.*

Prior inconsistent statements can be used in a lawsuit only to impeach (discredit) the trustworthiness of the witness' testimony. They cannot, however, be used to establish the truth of the matter they address.

The FEDERAL RULES OF EVIDENCE govern the use of prior inconsistent statements in federal courts.

## PRIOR RESTRAINT

*Government prohibition of speech in advance of publication.*

One of the fundamental rights guaranteed by the FIRST AMENDMENT to the U.S. Constitution is the freedom from prior restraint. Derived from English COMMON LAW, the rule against prior restraint prohibits government from banning expression of ideas prior to their publication. The rule against prior restraint is based on the principle that FREEDOM OF THE PRESS is essential to a free society. Attempts by government to obtain a prior restraint have largely been unsuccessful.

The rule against prior restraint was undisputed for much of U.S. history. The landmark case of NEAR V. MINNESOTA, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931), finally settled the issue, with the U.S. Supreme Court finding that the First Amendment imposed a heavy presumption against the validity of a prior restraint.

In *Near,* the Court struck down a Minnesota state law that permitted public officials to seek an INJUNCTION to stop publication of any "malicious, scandalous and defamatory newspaper, magazine, or other periodical." The statute was used to suppress publication of a small Minneapolis newspaper, the *Saturday Press,* which had crudely maligned local police and political officials, often in anti-Semitic terms. The law provided that once a newspaper was enjoined, further publication was punishable as CONTEMPT of court.

Chief Justice CHARLES EVANS HUGHES, in his majority opinion, called the law "the essence of censorship" and declared it unconstitutional. With its decision, the Court incorporated the First Amendment freedom of the press into the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT. This incorporation made freedom of the press fully applicable to the states.

Though Hughes agreed that a rule against prior restraint was needed, he acknowledged that this restriction was not absolute. The rule would not, for example, prevent government in time of war from prohibiting publication of "the sailing dates of transports or the number and location of troops." Threats to national security interests are almost certain to prevail over freedom of the press, but it has proved difficult to invoke the "national security" justification.

This was illustrated in the *Pentagon Papers* case of 1971 (NEW YORK TIMES CO. V. UNITED STATES, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822). President RICHARD NIXON's administration sought to prevent the *New York Times* and the *Washington Post* from publishing excerpts from a classified study (the Pentagon Papers) on the history of U.S. involvement in Vietnam, arguing that publication would hurt national security interests. The Supreme Court, by a 6–3 vote, held that the government's efforts to block publication amounted to an unconstitutional prior restraint.

The national security exception failed again in a 1979 case dealing with the publication of a magazine article that purported to explain the process for making a hydrogen bomb (*United States v. Progressive, Inc.,* 467 F. Supp. 990 [W.D. Wis. 1979]). The federal government obtained a preliminary injunction against *The Progressive,* stopping publication of the article until a hearing on a permanent injunction could be held. Before the hearing, however, another publication printed a similar article. The government then dropped its lawsuit, and the magazine published the original article.

Prior restraint issues have arisen over prejudicial PRETRIAL PUBLICITY in sensational criminal proceedings. The defendant's right to a fair trial by an unbiased jury must be considered as well as freedom of the press. In exceptional circumstances, a court may depart from prior restraint doctrine by restricting news coverage of a criminal case. These restrictions must be narrowly tailored, and they must not unduly restrict the right of the press to inform the public. The U.S. Supreme Court, in *Nebraska Press Association v. Stuart,* 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976), made clear, however, that these restrictions are severely limited. The Court invalidated a GAG ORDER issued by a state trial judge that forbade the publishing or broadcasting of any confessions, admissions, or facts

that strongly implicated the defendant charged with a grisly mass murder.

The rule against prior restraint does not apply to the publication of student-operated school newspapers. In *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988), the Supreme Court upheld a public school principal's decision to remove certain controversial material from the school newspaper. The principal based his decision on fears that the articles on teen pregnancy and DIVORCE would allow students to identify classmates who had encountered such difficulties. Justice BYRON R. WHITE ruled that educators did not "offend the First Amendment by exercising editorial control . . . so long as their actions are reasonably related to legitimate pedagogical concerns."

Prior restraint issues have also appeared in cases involving the picketing of clinics where ABORTIONS are performed. In *Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), the Supreme Court upheld a Colorado law that required anti-abortion demonstrators to stay at least eight feet away from anyone entering or leaving medical facilities. The protesters had argued that this restriction was a prior restraint on their First Amendment right to express their views on abortion. Justice JOHN PAUL STEVENS stated that prior restraint related to restrictions "imposed by official censorship." The Colorado law only applied if the "pedestrian does not consent to the approach." Therefore, the private individual, not the government, exercise the right not to hear the protesters views in close proximity. The protesters were free to display signs that could be seen eight feet away from the person entering or leaving the clinic.

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CROSS-REFERENCES

Incorporation Doctrine.

## PRISON

*A public building used for the confinement of people convicted of serious crimes.*

Prison is a place used for confinement of convicted criminals. Aside from the death penalty, a sentence to prison is the harshest punishment imposed on criminals in the United States. On the federal level, imprisonment or incarceration is managed by the Federal Bureau of Prisons, a federal agency within the DEPARTMENT OF JUSTICE. State prisons are supervised by a state agency such as a department of corrections.

Confinement in prison, also known as a penitentiary or correctional facility, is the punishment that courts most commonly impose for serious crimes, such as felonies. For lesser crimes, courts usually impose short-term incarceration in a jail, detention center, or similar facility.

Confining criminals for long periods of time as the primary form of punishment is a relatively new concept. Throughout history, various countries have imprisoned criminal offenders, but imprisonment was usually reserved for pretrial detention or punishment of petty criminals with a short term of confinement.

Using long-term imprisonment as the primary punishment for convicted criminals began in the United States. In the late eighteenth century, the nonviolent Quakers in Pennsylvania proposed long-term confinement as an alternative to CAPITAL PUNISHMENT. The Quakers stressed solitude, silence, rehabilitation, hard work, and religious faith. Confinement was originally intended not only as a punishment but as an opportunity for renewal through religion.

In 1790, the WALNUT STREET JAIL in Philadelphia constructed a separate cell house for the sole purpose of holding convicts. This was the first prison in the United States. The concept of long-term imprisonment became popular as the U.S. public embraced the concept of removing offenders from society and punishing them with confinement and hard labor. Before the existence of prisons, most offenders were subjected to CORPORAL PUNISHMENT or public humiliation and then released back into the community. In the nineteenth century, as the United States became more urban and industrial, poverty became widespread, and crime increased. As crime increased, the public became intolerant of even the most petty crimes and viewed imprisonment as the best method for stopping repeated criminal activity.

The early nineteenth century was filled with fierce debates about how a prison should be run. There emerged two competing ideas: the

# 1971 Attica Prison Riot

The September 1971 revolt and riot by inmates at the Attica State Correctional Facility in Attica, New York, ended in a violent response by state officials. However, during the five days inmates controlled the prison, lawyers for the inmates and prison officials sought to negotiate a peaceful solution.

During the spring and summer of 1971, the inmates at Attica had negotiated with prison administrators over a list of prisoner complaints. Among the grievances were inhumane conditions, abuse by prison guards, **ARBITRARY** release dates, a lack of racial diversity among the prison guards, and the prison's failure to give inmates a reasonable opportunity to exercise their freedom of religion. On September 9, 1971, the talks broke down and dozens of inmates revolted. Inmates managed to overtake prison guards, take hostages, and gain control of the prison facilities. One prison guard and two inmates were killed in the initial uprising.

Over the next three days the inmates met with a host of attorneys, including **CIVIL RIGHTS** and antiwar advocate **WILLIAM M. KUNSTLER**. The inmates communicated with state officials through the attorneys and submitted a list of more than two-dozen demands. They also took steps to protect the hostages from more hostile inmates by forming a human ring around the hostages.

On September 13, 1971, the commissioner of corrections submitted a settlement ultimatum to the inmates and gave them one hour to respond. If the inmates did not agree to the terms in one hour the state would use force to reclaim the prison. After two hours had passed with no response, Governor Nelson A. Rockefeller ordered an assault. Officials shut off the electricity to the prison, state police dropped tear-gas canisters from helicopters, and state troopers emptied their rifles into inmates in the prison yard. The assault was brief but bloody: 39 inmates and hostages were killed. A total of 43 deaths were ultimately attributed to the events from September 9 through 13. The state's actions in retaking the prison were heavily criticized, leading to a review commission report that called the use of force excessive.

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**CROSS-REFERENCES**

Prisoners' Rights; Riot.

Auburn System and the Eastern Penitentiary System. The Auburn System took its name from the Auburn, New York, prison, which opened in 1819. At first, the prison placed all its worst offenders in solitary confinement, but this arrangement led to nervous breakdowns and suicides. The system was modified so that inmates slept in separate cells but worked and ate together. However, the inmates were forced to remain silent. Administrators believed this code of silence would prevent prisoners from picking up bad attitudes and would promote their rehabilitation.

The Eastern Penitentiary System at Cherry Hill, Pennsylvania, opened its gates in 1829. The prison building was designed in the form of a central hub with spokes radiating from this administrative center. Small cells lined each spoke and prisoners had their own exercise space. Unlike the Auburn System, this system promoted extreme isolation. Not surprisingly, many inmates committed suicide. In time, the Auburn System prevailed, as state legislatures saw advantages in congregate living. The Auburn System encouraged prison industries to help make prisons self-supporting.

By the mid-nineteenth century, prisons existed throughout the United States. Prisoners were kept in unsanitary environments, forced to work at hard labor, and brutalized by guards. These conditions continued until the 1950s and 1960s, when heightened social and political discourse led to a renewed emphasis on rehabilitation.

# Prison Life, New Hampshire State Prison

The New Hampshire Department of Corrections oversees four prisons, three halfway houses, and one Secure Psychiatric Unit (in Concord). Prison facilities include the New Hampshire State Prison for Men in Concord, the New Hampshire State Prison for Women in Goffstown, the Lakes Region Facility in Laconia, and the Northern New Hampshire Correctional Facility in Berlin. The Lakes Region Facility is reserved for first-time offenders convicted of nonviolent crimes; the Northern New Hampshire Correctional Facility houses medium-security male inmates. It costs $19,888 per year to keep an inmate in prison in New Hampshire.

The men's prison in Concord, New Hampshire, is representative of the daily life of the average prison inmate in the United States. Upon order of the court, new prisoners are transported by sheriff deputies to the appropriate prison receiving facility. After arrival, the inmate is photographed, fingerprinted, and given prison clothing and toiletries. Prisoners must wear prison clothing and an identification card at all times. All new inmates are placed in a locked cell and are kept isolated from other prisoners until approved by prison staff for proper housing assignment.

During approximately 30 days in quarantine custody, called Reception and Diagnostic, inmates are interviewed and tested by a multidisciplinary team of prison staff. Inmates receive an orientation to prison rules and expectations, medical and dental exams, mental health assessment, religious and program orientation, and educational testing. After the diagnostic period is over, the offender moves to a correctional housing unit with similarly classified inmates.

Inmates are classified either C-5, C-4, C-3, C-2, or C-1 (C stands for "classification"). The C-5 classification is for dangerous or problem inmates. C-4 inmates are individuals who were C-5 but are working their way back to C-3 status, which is the general prison population. New prisoners are designated C-3 unless they break rules while in Reception and Diagnostic, in which case they may be classified as C-4 or C-5.

C-2 inmates are housed in a minimum security building just outside the prison walls; C-1, or work release, inmates are allowed to live in halfway houses. Though they are supervised by prison officials, they live outside the prison, preparing for reentry into the community.

Daily life for a C-5 inmate is spartan. The average C-5 inmate spends all but one hour in a cell located in the Security Housing Unit (SHU), a building separate from the rest of the prison population. A C-5 inmate has no cellmate and receives his meals in his cell. He may leave his cell for one hour of outdoor exercise a day in a cage outside the SHU. Also, for a few minutes a day, a C-5 inmate may be allowed to make collect telephone calls from a room located in the SHU.

Some C-5 inmates are allowed to work at sites located within the SHU; most of them make sheets, towels, or pockets for pants. C-5 inmates with work privileges are allowed to communicate with one another while they work. A C-5 inmate may keep reading materials. He may also watch his own television, but only when he has been in SHU for more than 30 days. Whenever a C-5 inmate leaves his cell, he is shackled by guards at the hands and feet and escorted until he reaches his destination.

The closing of one particular prison symbolized the change in correctional philosophy. Alcatraz Prison, located on an island off San Francisco, was used exclusively to place in solitary confinement convicts classified as either violent or disruptive. Rehabilitation was nonexistent in Alcatraz. The prison was filthy and rat-infested, and prisoners were held in dungeon-like cells, often chained to stone walls. Established in 1934, Alcatraz was closed in 1963, in part because its brutal treatment of prisoners symbolized an outdated penal philosophy.

By the mid-1960s, the stated purpose of many prisons was to educate prisoners and prepare them for life after prison. Many federal and state courts ordered administrators to improve the conditions inside their prisons, and the quality of life for inmates greatly improved.

In 1971, a bloody, day-long riot at the Attica Correctional Facility in New York sparked a reaction against rehabilitative ideals. More than 40 people were killed in the uprising in Attica. Shortly after the Attica riot, the Federal Bureau of Prisons began to transfer unruly federal prisoners to the Federal Penitentiary at Marion, Illinois, where they were held in solitary confinement. In 1983, after three killings in the prison, the prisoners in Marion were placed on permanent lockdown, making the entire prison a solitary confinement facility virtually overnight. Marion has remained on lockdown ever since.

A level of security more severe than C-5 is called "isolation." An inmate in isolation may not leave his cell except for one hour a day of outdoor exercise inside a cage. He may not watch television or listen to the radio and has one Bible for reading. An inmate may be kept in isolation for only a 15-day stretch, and he must be held in another setting for at least 24 hours before beginning another 15 days of isolation.

**PROTECTIVE CUSTODY** is a special classification that is similar to the C-5. Inmates in protective custody are segregated from the general population: they move about the prison in a group separate from the other inmates. Protective custody is reserved for those inmates who have requested it and have a valid fear for their safety.

C-4 inmates are held in a Close Custody Unit, which is also separate from the general population. C-4 inmates may have a few more privileges than C-5 inmates, but they do not have the full number of privileges enjoyed by the general population. They may work, they are not shackled as they move outside their cells, they may eat in the dining hall with the general population, and they have cellmates. Also, the C-4 floor plan is similar to that for C-3 inmates: each cell opens into a common area where inmates may talk and play cards or other games. However, unlike C-3 inmates, C-4 inmates may not lock themselves in their cells for privacy, they may work for only a short period of time at a specific work site, and they generally have fewer privileges and are more strictly supervised than C-3 inmates.

C-3 inmates comprise the general population. They may move about the prison facility unencumbered by restraints. They work at various jobs, some building high-quality furniture. Inmates can earn from $1.50 to over $3.00 per day, depending on the job. Those who perform highly skilled work, such as carpentry, may earn $3.50 a day. Inmates do not receive cash for their work; their earnings are banked in an account. Using their account, they may buy articles from the canteen, such as personal hygiene products, soda, candy, chips, and cigarettes. Inmates may smoke cigarettes in the common area and in their cells. However, if his cellmate objects, an inmate may not smoke in his cell.

An inmate may receive money from persons outside the prison, but he may not receive packages of personal items. He may not spend more than $200 per month, no matter how much money he has. He may buy items such as magazines, books, radios, and televisions, but only through the manufacturer.

Inmates on C-3 status enjoy the full range of educational and work opportunities available in the prison, and their days are often consumed by these activities. They may also use the law library for a certain amount of time each day.

An inmate's day begins at approximately 7:00 A.M. Those inmates scheduled to begin work before 7:00 A.M. are awakened earlier. The lights are dimmed around 10:00 P.M. and sometimes 11:00 P.M. on weekend nights. Except for C-5 inmates, restless inmates may leave their cells during the night to sit in the common area.

C-3 inmates move from place to place at the top of the hour; they have 15 minutes to reach their next destination. If they are tardy for any destination, they will be reported as being out of place. Being out of place in prison is a serious infraction. If the disciplinary board finds that an inmate was out of place, the inmate may lose the privilege to watch television, listen to the radio, or talk on the telephone. Repeated violations may result in transfer to C-5 status.

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By the 1980s, most prison administrators abandoned rehabilitation as a goal. Forced by an increasing problem with overcrowding and the resulting increase in violence, administrators returned to punishment and security as the primary purposes of prison. Though most prisons continue to operate educational and other rehabilitative programs, the rights of prison inmates have been frozen at the minimal number recognized by courts in the 1960s and 1970s. The U.S. Supreme Court has ruled against prison guard violence, but courts have generally refused to expand the rights of prison inmates. In most cases, courts have approved increased infringement of inmates' rights if prison officials declare that the restrictions are for security purposes.

## Prisoners' Rights

Prisoners' rights are limited. For the most part, jail and prison inmates may demand only a "minimal civilized measure of shelter" (*Union County Jail Inmates v. DiBuono,* 713 F.2d 984 [3d Cir. 1983]). Generally, courts follow three basic principles when deciding whether to recognize a particular right. First, an inmate necessarily gives up many rights and privileges enjoyed by the rest of society; second, an inmate does not relinquish all constitutional rights upon placement in prison; and third, the constitutional rights retained by the prison inmate must be balanced against the security concerns of the prison.

The established rights of prison inmates include **FREEDOM OF SPEECH** and religion;

*On March 21, 1963, the last of the inmates housed at Alcatraz Prison were transferred to other facilities. The permanent closing of the prison reflected the renewed emphasis on the rehabilitation of prisoners that arose during 1950s and 1960s.*

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freedom from ARBITRARY punishment (i.e., restraints, solitary confinement) on the sole basis of beliefs, religion, or racial and ethnic origin; freedom from constant physical restraints; a small amount of space for physical movement; essentials for personal hygiene and opportunity to wash; clean bedding; adequate clothing; adequate heating, cooling, ventilation, and light; and adequate nutrition.

Prisoners' rights can be infringed for security purposes. Prisoners have the right to freedom of speech, but prison officials may search their mail, deny a wide variety of reading materials, and edit the content of prison newspapers. Prisoners have the right to adequate space, but they may be confined in isolation for long periods, even years. Prisoners have the right to freedom from restraints, but their ankles and wrists may be shackled when they are moved. They may also be temporarily strapped down or otherwise restrained if officials believe that they present a danger.

Prison inmates often attempt to establish new rights in court. Issues connected to prison overcrowding, medical treatment, media access, even exposure to secondhand cigarette smoke, are among those faced by courts.

Another sensitive issue in prison is the use of prison guards of the opposite sex. Women prisoners may receive more privacy in this regard than men prisoners. For example, the Ninth Circuit Court of Appeals held in 1985 that the practice of assigning female guards to conduct strip searches on nude men and watch them while showering, urinating, and defecating did not violate any constitutional rights (*Grummett v. Rushen,* 779 F.2d 491 [1985]). However, in 1993, the same court held that it was CRUEL AND UNUSUAL PUNISHMENT to allow male guards to conduct searches on female prisoners while the female prisoners were clothed (*Jordan v. Gardner,* 986 F.2d 1521 [9th Cir. 1993]).

Prisoners retain some rights aside from those concerning living conditions. Most prisons "classify" prisoners and place them in various units according to the categories. For example, violent criminals and persons suspected of gang affiliations are often housed in high-security areas of prison, separate from the remaining prison population. When an inmate is reclassified, he or she is entitled to notice of the reclassification and a citation of reasons for the move.

Congress and most states authorize the allowance of "good time" for prison inmates. Good time is credit for time served on good behavior, and it is used to reduce sentence length. For example, an inmate may receive one day of good time credit for every three days that he behaves well. Other states withhold recognition of good behavior until the defendant has served a certain portion of the minimum sentence imposed by the court. In New Hampshire, for example, an inmate may be released for good behavior after serving two-thirds of the minimum sentence (N.H. Rev. Stat. Ann. § 651-A:12 [1983]). When an inmate has good time credits taken away, she or he is entitled to notice, a hearing before the prison board, and an opportunity to present evidence in her or his favor.

Inmates may also gain early release from prison through PAROLE, which is granted by the parole board. Prisoners have no right to parole, and the matter of early release is left to the graces of the parole board. Once released on parole, a parolee may be returned to prison for breaking one of many conditions that are normally imposed. A parolee has no right to an attorney at a parole revocation hearing, nor does an inmate have the right to an attorney at a parole hearing.

Solitary confinement is used in many prisons for violent inmates and those inmates perceived as having gang-related affiliations. Some prisons are designed specifically for it. The original prisons, as envisioned by the Quakers, called for solitary confinement, but the practice was halted because of the detrimental effects it had on prisoners. However, the practice never completely ended. In the 1980s, solitary confinement became a regular feature of prisons, and it has become the sole form of incarceration in so-called Security Housing Units or Supermax prisons.

In a Supermax prison, the cells are eight-by-ten feet and windowless. The cells are grouped in "pods." The cell doors are perforated with holes large enough for guards to see inside the cell, but small enough to obstruct the prisoner's vision and light. All a prisoner can see through the door is another white wall. Each cell is furnished with a built-in bunk with a toilet-sink unit. Nothing is allowed on the walls. Prisoners may be allowed television, radio, and books, but these are taken away as punishment for any rule infractions.

Prisoners in solitary confinement are kept in their cells, under surveillance, for 22.5 hours a day. Unlike the rest of the prison population, inmates in solitary confinement may not take advantage of educational or recreational programs. The 90 minutes outside the cell may be divided between visiting a small library, washing, and exercising in a pen connected to the pod. Prisoners are strip-searched by the guards before and after visiting any place and are placed in waist restraints and handcuffs when being escorted.

The assignment of a prisoner to solitary confinement is made by prison officials. With regard to assigning supposed gang members to solitary confinement, it is the policy in some prisons to require that the perceived gang member "debrief" officials on his or her gang activity and renounce his or her gang affiliations before being released back into the general population.

One of the most important rights possessed by prison inmates is access to the courts through HABEAS CORPUS petitions. After an inmate has exhausted all the motions and appeals available to contest the conviction and prison sentence, a final round of limited JUDICIAL REVIEW is provided through the writ of habeas corpus. Through the ancient writ of habeas corpus, a court may order the release of a prisoner wrongly held.

Habeas corpus petitions are granted only for certain constitutional violations in the prosecution of a criminal defendant. The Anti-Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C.A. § 2261 et seq., placed strict limits on this form of relief by directing federal judges to conduct habeas petition reviews according to this law. Under the act, a federal judge may not grant habeas relief on any claim adjudicated on the merits in state court unless the adjudication resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the U.S. Supreme Court. Since a state court is unlikely to defy a general principle of CONSTITUTIONAL LAW that the Supreme Court has clearly established, this review provides a few opportunities for a federal judge to examine and determine constitutional law.

Relief may be granted if the state court's judgment is based upon an unreasonable determination of the facts in light of the evidence. An application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court's ruling was incorrect. If the prisoner fails to develop all the facts in state court supporting the claim, the prisoner will not be allowed to develop any new facts in federal court.

Under the 1996 law, a federal court cannot award relief on the basis of any claim that was previously decided against the prisoner by a state court. This directive must be followed even though the federal court concludes that the state court decision was erroneous and that the prisoner's federal constitutional rights have been violated.

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CROSS-REFERENCES

Corporal Punishment; Imprisonment; Incarceration; Parole; Preventive Detention; Prisoners' Rights; Sentencing.

## PRISONER OF WAR

See RULES OF WAR.

## PRISONERS' RIGHTS

*The nature and extent of the privileges afforded to individuals kept in custody or confinement against their will because they have been convicted of performing an unlawful act.*

For most of U.S. history, the treatment of prisoners was left entirely to the discretion of prison administrators. In the late 1960s and early 1970s, the federal courts began to oversee state prison systems and develop a body of law dealing with prisoners' rights. During the 1980s, however, a more conservative Supreme Court limited prisoners' rights, and, in the 1990s, Congress enacted laws that severely restricted litigation and post-conviction appeals by prisoners.

Two statutes enacted during the 104th Congress have had a significant effect on the federal court's treatment of prisoners who seek to bring claims against prison officials. Congress passed the Prison Litigation Reform Act (PLRA) of 1995, Pub. L. 104-134, 110 Stat. 1321, to place restrictions on the ability of federal courts when they consider claims by prisoners. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, reformed the system of HABEAS CORPUS review in federal court. Although prisoners continue to bring lawsuits in federal court, these statutes have made it more difficult for prisoners to make successful claims.

### Prisoners and Detainees

A prisoner is anyone who is deprived of personal liberty against his or her will following conviction of a crime. Although not afforded all the privileges of a free citizen, a prisoner is assured certain minimal rights by the U.S. Constitution and the moral standards of the community.

Detainees are individuals who are kept in jail even though they have not yet been convicted of a crime. A majority of detainees are individuals who are unable to obtain sufficient funds to post bail and therefore cannot be released from jail pending a trial on the criminal charges.

### Historical Background

Until the 1960s, courts refused to set standards for the treatment of prisoners, claiming they lacked the authority and the expertise to do so. Courts deferred to experienced prison administrators to avoid interfering with their ability to respond to the varied, complex issues involved in a penal system, such as custody, security, rehabilitation, discipline, punishment, and limited resources.

By the late 1960s, however, prison conditions in many states were clearly intolerable. Courts began to review the claims of prisoners and to intervene regularly on their behalf. Finding that even prisoners are entitled to minimum rights, federal courts in particular exhibited renewed interest in the right of access to the courts, freedom of expression and religion, the constitutional PROHIBITION against CRUEL AND UNUSUAL PUNISHMENT, and the right to DUE PROCESS OF LAW.

### Rights of Detainees

A great number of persons are jailed before their trials. These persons, known as pretrial detainees, are ordinarily held because they are unable to satisfy the financial requirements for a bail bond.

Important law concerning the rights of pretrial detainees emerged in the 1970s. In *Bell v. Wolfish,* 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), the Supreme Court rejected the theory that pretrial detainees cannot be deprived of any right except the right to come and go as they choose. The Court criticized lower federal courts that had given detailed orders to prison administrators regarding how they should do their jobs. Although prisons cannot employ methods designed only to punish detainees before conviction, they can use suitable procedures for purposes of security and discipline.

### Rights of Citizenship

Convicted offenders are deprived of many of their CIVIL RIGHTS, both during and after

their period of incarceration. A majority of states deprive citizens of the right to vote in all state and federal elections upon conviction of a felony. Even in jurisdictions where offenders can vote after release, they ordinarily cannot obtain an absentee ballot and vote while in prison.

Conviction and incarceration for serious crimes can also lead to the total or partial loss of the right to start a lawsuit not related to imprisonment or to enter into a contract. Correction officials argue that permitting a prisoner the right to carry on business as usual creates an impossible security burden. Most states, however, permit a prisoner to be sued.

The right of a prisoner to inherit property or receive a PENSION can be affected by various state laws. Most of the legal disabilities to which prisoners are subject are upheld because they do not interfere with fundamental HUMAN RIGHTS.

### Personal Property

Prisoners have certain rights regarding PERSONAL PROPERTY in their possession. Court decisions have established the right of a prisoner to own some personal items, such as cigarettes, stationery, a watch, cosmetics, or snack foods. In certain cases, prison officials have been found to be justified in forbidding certain items because they fear that permitting inmates to accumulate some form of wealth encourages gambling, theft, and buying favors from guards. Judges have sometimes refused to support prisoner demands for the right to own such items as radios, televisions, or personal typewriters.

### Privacy

Prisoners do not have the right to expect privacy in a prison setting. Court decisions have established that prison officials can properly monitor and record prisoners' conversations, provided that the prisoner and the visitor are warned that this will be done. Prison officials cannot intrude upon conversations that are legally afforded confidentiality, such as those between the prisoner and the prisoner's attorney or spouse.

In *Hudson v. Palmer,* 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984), the Supreme Court declared that prisoners do not have a FOURTH AMENDMENT right to be free of unreasonable SEARCHES AND SEIZURES of their property because the Fourth Amendment is inapplicable to them.

### Mail

Throughout U.S. history, prison officials have severely restricted the mail of prisoners. For example, officials have opened incoming mail to catch plans and instruments of escape, weapons, PORNOGRAPHY, drugs, and other contraband. The threat of revoking mail privileges has also been used to enforce discipline. Courts have mandated, however, that prison officials offer good reasons for banning publications they consider inflammatory, obscene, or racist. A vague allegation that a book or magazine is likely to stir up trouble has been held inadequate to justify broad CENSORSHIP.

Prison administrators cannot unreasonably restrict or censor a prisoner's outgoing mail. In 1974, the Supreme Court, in *Procunier v. Martinez,* 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224, ruled that the California Department of Corrections could not censor the direct personal correspondence of prisoners unless such censorship was necessary to further important interests of the government in security, order, and rehabilitation. The Court also held that a procedure must be established to determine that censorship, when appropriate, is neither ARBITRARY nor unduly burdensome.

### Free Speech

Prisoners do not have a FIRST AMENDMENT right to speak freely. Prison officials may discipline inmates who distribute circulars calling for a mass protest against mistreatment. Administrators have traditionally limited prison newspapers to issues that promote good morale.

The restrictions against First Amendment rights to prisoners have extended to so-called "inmate law clerks." In many prisons, a certain inmate is often declared the inmate law clerk by prison authorities to consult fellow inmates about legal problems and to assist them with filling out paper work. The use of inmate clerks provides inmates with inexpensive and accessible counseling. However, prison authorities often maintain control over the clerks by preventing them from consulting with inmates without prior approval.

An inmate in a Montana prison who had violated the rules restricting unauthorized communication in his role as the inmate law clerk with another inmate brought suit claiming that the restriction violated his First Amendment rights. Although the Ninth Circuit declared that inmates have a constitutional

right to assist other inmates with their legal claims, the U.S. Supreme Court disagreed. In *Shaw v. Murphy*, 532 U.S. 223, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001), the Court, in an opinion by Justice CLARENCE THOMAS, noted that a prior ruling on prisoner-to-prisoner communications required that restrictions must be "reasonably related to legitimate and neutral government objectives." Therefore, the sole question was whether legal correspondence merited a blanket exception to this rule. Thomas made comparisons to other First Amendment restrictions of prisoners, including prohibitions against giving media interviews, organizing private LABOR UNIONS, and uncensored correspondence among inmates. The restrictions on legal correspondence were no different, according to the Court, and were not entitled to First Amendment protection.

### Visitors

The law has long recognized the importance of VISITATION RIGHTS, because such rights aid the prisoner's eventual transition back into the community by keeping the individual in touch with society.

Prisoners do not have a constitutional right to enjoy contact visits, as opposed to arrangements in which prisoners are only permitted to talk to visitors over a telephone (*Block v. Rutherford,* 468 U.S. 576, 104 S. Ct. 3227, 82 L. Ed. 2d 438 [1984]). Courts have held that restrictions on visitation must be reasonable and related only to security needs and good order. Prisoners do not have a right to engage in sexual relations with a visitor.

The issue of the right of a prisoner to communicate and see visitors becomes more significant when the proposed visitor is a news reporter. Federal courts have held that a genuine need for security must be given greater weight than access to the media. Although inmates have a First Amendment right to communicate with the media, this right can be satisfied through the mail.

Before an individual interview with a reporter is approved, prison officials can require the prisoner or reporter to complete an application that discloses the names of the persons involved and the nature of the intended discussions. Officials can also limit reporters to random interviews conducted during a tour of the prison, as opposed to prearranged interviews with specific prisoners. In addition, face-to-face interviews can be banned for any prisoner who has been placed in maximum security.

### Access to the Courts

States cannot interfere with the right of a prisoner to petition a court for relief. Neither a state nor a prison official can refuse, for any reason, to review a prisoner's applications and submit them to federal court. In addition, a state is not permitted to prohibit prisoners from having law books or legal papers in their cells on the basis that such materials tempt other prisoners to steal or create a fire hazard. If a prisoner is indigent, the state cannot require him to pay even a small fee to file legal papers with the court. However, a prisoner association cannot have filing fees waived. The right to proceed as an indigent party is allowed only for individual prisoners.

Prisoners have a fundamental right to legal counsel that requires special consideration. Prison officials must allow reasonable times and places for prisoners to communicate confidentially with their attorneys. Prisoners who cannot afford an attorney generally turn to fellow inmates who are experienced in arguing their own cases. Assistance from these JAILHOUSE LAWYERS was forbidden in most prisons until 1969, when the Supreme Court, in *Johnson v. Avery,* 393 U.S. 483, 89 S. Ct. 747, 21 L. Ed. 2d 718, held that prisons cannot completely forbid inmate assistance unless there is an alternative for prisoners.

Prisoners must be provided with writing materials and law books. Additionally, prisoners must be able to have their legal papers notarized.

### Work

Prisoners ordinarily receive token wages for work performed in prison. Courts have rejected prisoner lawsuits demanding fair wages for prisoner labor, concluding that prisoners do not have to be paid at all. Prisoners have no right to their own labor, or the benefits of it, while incarcerated.

Prisoners cannot refuse to work or choose the work they will do. Prison officials can punish prisoners for refusing to do work assigned to them.

### Food

Every prisoner is entitled to food in amounts adequate to sustain an average person. Various groups of prisoners have protested the failure of

prisons to furnish them with special diets, and prisoners with special medical needs are generally accommodated. Dietary accommodations have been made for Orthodox Jews and for Muslim prisoners, though prison officials may balance the needs for prison security and economy with the religious beliefs of the inmates.

### Religion

Prisoners must be allowed to practice their religion, obtain and keep written religious materials, see or communicate with a religious leader, and obey the rules of their religion that do not endanger order and security in the prison. In addition, wherever possible, formal religious observances for groups of inmates must be allowed on a regular basis. Prisoners can have access to religious programs broadcast on radio and television. Different religions within a particular prison must be given equal treatment.

Until 1997, when the U.S. Supreme Court overturned portions of the Religious Freedom Restoration Act (42 U.S.C.A. § 2000bb-1 [1993]), prisoners who had been denied permission to exercise their religious beliefs sought to obtain relief under this federal law. Under the law, a restriction that imposed a substantial burden on religious exercise had to further a compelling state interest in the least restrictive way to be constitutional. However, as of 2003, prisoners had not been successful in overturning restrictions under this law because courts generally agreed with prison officials that compelling state interests were at stake.

### Medical Care

Prisoners are entitled to adequate medical treatment. A prison official's refusal to provide medical care to a seriously ill inmate violates the Eighth Amendment's prohibition against cruel and unusual punishment (*Estelle v. Gamble,* 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 [1976]). In cases where the treatment is neither cruelly withheld nor intentionally mismanaged but is inept, prisoners can sue physicians in state courts for MEDICAL MALPRACTICE.

### Appearance

Prisons traditionally have strictly regulated the appearance of prisoners. In situations where prisoners have complained that they were denied opportunities to shower or shave, courts have insisted on minimum standards of human decency and personal hygiene. When necessary, courts have allowed prisons to force inmates to keep themselves clean for purposes of maintaining the health of the general prison population.

*Jesse Jackson leads inmates in prayer during a February 1997 visit to Cook County Jail in Chicago, Illinois. Prisoners have the right to practice their religion while incarcerated.*

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### Discipline and Punishment

The rules regarding conduct must be clearly defined and explained to inmates, and each prisoner must be provided with a written list of the rules when entering a correctional facility. Disciplinary rules must relate to the needs of security, good order, and good housekeeping.

A prisoner accused of breaking rules does not have all the rights of an accused at trial because a prison disciplinary proceeding is not the same as a criminal prosecution. Inmates are not entitled to an attorney at disciplinary hearings, nor are they entitled to confront or cross-examine the witnesses against them.

Prisoners must be given notice of the charges against them, the particular rules they are charged with violating, and the penalties for such infractions. A hearing can be informal for small infractions. The ordinary procedure is for the fact finder to write a statement that explains the evidence relied on and the reason for any disciplinary action taken. The punishment must reasonably relate to the seriousness of the infraction.

Prison personnel can use force in SELF-DEFENSE, stopping fights between inmates, compelling obedience to lawful orders where milder measures fail, and defending state property. Where guards use force without justification, a

prisoner does not necessarily have the right to resist. The use of tear gas and chemical mace is justified only when an immediate danger of riot or serious disorder exists.

Prison officials may punish prisoners by withdrawing certain privileges, such as seeing visitors, buying items from the commissary, or earning wages. Prisoners cannot be denied fundamental human necessities.

Segregation is the most common type of punishment used in prisons for rule breaking. Prisoners can be categorized into groups and segregated from the general inmate population for a number of other reasons as well. Each prison has its own system and titles for different degrees of segregation. Separate areas may be set aside for young prisoners, repeat offenders, or prisoners who have been sentenced to death. Homosexuals and other prisoners who have or may be subjected to SEXUAL ABUSE can be segregated. Segregation cannot be used, however, to separate prisoners according to race.

A number of prisons have more than one level of segregation, the most serious of which is solitary confinement. Punitive isolation is not unconstitutional in and of itself. Conditions in some prisons, however, have been found to be so strict that they constitute cruel and unusual punishment. A person in solitary confinement can be punished by the restriction of ordinary privileges, but a prisoner cannot be denied basic food, light, ventilation, or sanitation.

### Unconstitutional Prisons

Many federal courts have found that mere confinement in some prisons amounted to cruel and unusual punishment. The intervention of federal courts in prison reform began in the early 1970s and continued into the early 2000s. In 1996, eight jurisdictions (Alaska, Mississippi, New Mexico, Rhode Island, South Carolina, Texas, Puerto Rico, and the Virgin Islands) were under court order or a CONSENT DECREE to improve prison conditions. At the same time, major prison facilities in 32 jurisdictions were under court supervision. Typically, federal courts intervene when a facility has serious overcrowding or does not meet minimum standards.

Federal court intervention has forced states to improve prisons through the expenditure of money for new facilities, more staff, and improvements at existing prisons. However, many states have objected to what they perceive as unwarranted federal interference. Congress responded by passing the Prison Litigation Reform Act (PLRA) in 1995, which imposed substantive and procedural limitations on the ability of federal courts to issue injunctions mandating prison reform. The act also restricted the courts' ability to employ special masters to assist in prison condition cases. (A SPECIAL MASTER is a person appointed by the district court to handle the day-to-day details and oversight of a case.) The law has been challenged on many fronts by those seeking reforms in prison conditions.

Lower federal courts have confronted issues posed by the PLRA by finding that the statute restricts their ability to establish minimum prison conditions. In *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997), the First Circuit Court of Appeals ruled that the PLRA required a district court to vacate a 1979 consent decree that set conditions for confinement of pretrial detainees in Suffolk County, Massachusetts. In its decision, the court rejected the inmates' contention that the PLRA was unconstitutional because it violated the SEPARATION OF POWERS principle and the Due Process and EQUAL PROTECTION Clauses of the FOURTEENTH AMENDMENT.

The PLRA contains a section that entitles a state or local government entity to the immediate termination of "any prospective relief" previously ordered by a court. Under the act, prospective relief includes all relief other than COMPENSATORY DAMAGES. This definition meant that provisions of the consent decree dealing with the housing of prisoners could be terminated. The First Circuit found that the statute was constitutional and held that the law mandated the termination of the consent decree unless the district court made specific findings that the decree was narrowly drawn to correct a violation of federal law.

### Remedies Available to Prisoners

Prisoners who seek to protect a constitutional or civil right are entitled to complain, but they are required to pursue whatever procedures exist within the prison before taking the case to court.

The most popular vehicle for prisoner lawsuits has been a federal civil rights statute, 42 U.S.C.A. § 1983 (1871; recodified 1979). A "SECTION 1983 action" permits a prisoner to sue in federal court for an alleged deprivation of a federally protected or constitutional right by a person acting under the authority of state law. A

prisoner may sue the warden or supervisor, a guard, or the local government that owns and runs the prison.

In the early 1980s, as many as 15,000 section 1983 actions were filed each year, many of them frivolous. The Supreme Court responded by requiring many prisoners to use state TORT claims acts rather than the federal statute and the federal courts. The Court also established difficult standards of proof for prisoners to meet.

In 1995, Congress sought to restrict prisoner lawsuits by devoting numerous provisions of the Prison Litigation Reform Act to this subject. The statute requires prisoners to exhaust administrative remedies before bringing a lawsuit, expands the federal courts' ability to dismiss lawsuits filed by prisoners, imposes numerous restrictions on the fees that can be awarded to a prisoner's attorney, and forbids a prisoner from filing an action for mental or emotional injury without a prior showing of physical injury. In addition, the act imposes restrictions on the ability of prisoners to proceed without paying filing fees. Another provision requires courts to prescreen lawsuits filed by prisoners and expands the grounds for dismissal of such suits. Finally, the act grants federal courts the power to revoke the good time credits of prisoners who file frivolous or harassing lawsuits or present false testimony or evidence to the court.

A prisoner's ability to file a habeas corpus action in the federal courts challenging prison conditions was also diminished. A writ of habeas corpus is a legal document ordering anyone who is officially holding the petitioner to bring him into court to determine whether the detention is unlawful. A federal court can hear an application for a writ of habeas corpus by a state prisoner who is being held in custody, allegedly in violation of the Constitution or the laws of the United States.

Traditionally a writ of habeas corpus was granted only for the purpose of ordering an immediate release of a prisoner from all restraints. A court would have to find that the imprisonment itself was illegal, for example, if the petitioner was convicted but his constitutional rights were violated during the trial. The scope of federal habeas corpus expanded in the 1970s and early 1980s, entitling prisoners to the writ even if they were legally in custody but the conditions of the confinement violated their constitutional rights. The writ is rarely used in these circumstances, however, because federal courts prefer to improve prison conditions rather than set a convicted felon free.

Provisions of the Antiterrorism and Death Penalty Act of 1996 further limited the power of federal courts to review cases through habeas corpus review. The act lowered the applicable STATUTE OF LIMITATIONS to one year after the judgment convicting the defendant becomes final, which is generally the date of a final appeal or the final date when an appeal would be available. The act also provides several restrictions on the ability of a federal court in a habeas corpus review from reconsidering the factual and legal bases for the defendant's incarceration.

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CROSS-REFERENCES

Preventive Detention; Right to Counsel.

## PRIVACY

*In* CONSTITUTIONAL LAW, *the right of people to make personal decisions regarding intimate matters; under the* COMMON LAW, *the right of people to lead their lives in a manner that is reasonably secluded from public scrutiny, whether such scrutiny comes from a neighbor's prying eyes, an investigator's eavesdropping ears, or a news photographer's intrusive camera; and in statutory law, the right of people to be free from unwarranted drug testing and* ELECTRONIC SURVEILLANCE.

The origins of the right to privacy can be traced to the nineteenth century. In 1890, Samuel D. Warren and LOUIS D. BRANDEIS published "The Right to Privacy," an influential article that postulated a general common-law right of privacy. Before the publication of this article, no U.S. court had expressly recognized such a legal right. Since the publication of the article, courts have relied on it in hundreds of cases presenting a range of privacy issues.

In OLMSTEAD V. UNITED STATES, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928), Brandeis, then a Supreme Court justice, articulated a general constitutional right "to be let alone," which he described as the most comprehensive and

valued right of civilized people. For the next half century, the right to privacy gradually evolved. Today, every jurisdiction in the country recognizes some form of constitutional, common-law, or statutory right to privacy.

### Constitutional Law

The constitutional right to privacy protects the liberty of people to make certain crucial decisions regarding their well-being without government coercion, intimidation, or interference. Such crucial decisions may concern religious faith, moral values, political affiliation, marriage, procreation, or death. The federal Constitution guarantees the right of individuals to make these decisions according to their own conscience and beliefs. The government is not constitutionally permitted to regulate such deeply personal matters.

The right of privacy protected by the Constitution gained a foothold in GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), in which the Supreme Court struck down a state statute forbidding married adults from using BIRTH CONTROL because the statute violated the sanctity of the marital bedroom. Acknowledging that the Constitution does not mention the word *privacy* anywhere in its text, the Court held that a general right to privacy may be inferred from the express language of the First, Third, Fourth, Fifth, and Fourteenth Amendments, as well as from the interests protected by them.

The Court said that the FIRST AMENDMENT guarantees the right to peaceably assemble, which includes the liberty of any group to associate in private. The THIRD AMENDMENT prohibits the government from quartering soldiers in a private home without the consent of the owner. The FOURTH AMENDMENT forbids the government from performing warrantless and unreasonable searches of any area in which a person maintains a reasonable expectation of privacy. The FIFTH AMENDMENT safeguards the right of criminal suspects to keep secret any incriminating evidence that might help the government obtain a conviction against them. The FOURTEENTH AMENDMENT prevents states from denying its citizens certain fundamental rights that are deemed essential to the concepts of equality or liberty, including the right to autonomy, dignity, and self-determination.

The holding in *Griswold* was later used to strike down a Massachusetts statute that made illegal the distribution of contraceptives to unmarried persons (*Eisenstadt v. Baird,* 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 [1972]). In striking down this law, the Supreme Court articulated a broader view of privacy, stating that all individuals, married or single, enjoy the liberty to make certain intimate personal decisions free from government intrusion, including the decision whether to bear or sire a child. This rationale was extended in ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), which established the right of women to terminate their pregnancy at any time before the fetus reaches the stage of viability. *Roe* has subsequently been interpreted to proscribe the government from passing regulations that unduly burden a woman's right to ABORTION.

In *Cruzan v. Missouri Department of Health,* 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990), the Supreme Court again enlarged the constitutional meaning of privacy by declaring that competent patients have a right to refuse life-sustaining medical treatment, including artificial nutrition and hydration. A 1997 Supreme Court case presented the issue of whether competent but terminally ill patients may hasten their death through physician-assisted suicide (WASHINGTON V. GLUCKSBERG, 117 S. Ct. 2258). Representatives for the terminally ill patients argued that the right to physician-assisted suicide represents an essential liberty interest in controlling one of life's most significant decisions, whereas the state of Washington argued that this liberty interest is outweighed by the need to protect vulnerable individuals from irrational, ill-informed, and coerced decisions to end their lives. The Supreme Court held that the right to assistance in committing suicide is not a fundamental liberty interest protected by the DUE PROCESS CLAUSE of the Constitution, and a state's ban on assisted suicide is constitutional.

The constitutional right to privacy does not protect all forms of conduct that are pursued behind closed doors. Adults have no constitutional right to inject intravenous drugs, solicit prostitutes, or view CHILD PORNOGRAPHY. Nor do members of society have a right to be insulated from every potentially offensive activity. For example, the government may not forbid a movie theater from displaying nude scenes on a large outdoor screen that is visible to passing motorists. In *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975),

# Protecting Your Privacy

By using computer technology, companies can legally collect information about consumers, including what they buy, what medications they take, what sites on the **INTERNET** they have visited, and what their credit history is. Computer software can organize this data and prepare it for sale and use by direct marketing companies, lending institutions, insurance companies, and credit bureaus.

Although it may be legal to collect this information, individuals may legitimately take steps to protect their privacy. Here are some common ways that companies collect information and some steps consumers can take to prevent this from happening:

- *Shopper's cards.* Some grocery stores and other retail businesses offer discounts or premiums when consumers use their shopper's cards. All purchases are scanned into a computer, allowing the store to compile a list of each individual's buying habits. The store may use this information to target certain customers or may sell it to companies seeking specific types of potential customers. Consumers can protect their privacy either by not using such cards or by persuading the company to limit the distribution of the information.
- *Financial data.* Credit bureaus compile credit histories filled with personal information, which are sold to anyone without restriction. Although these credit reports are supposed to be sold only to those companies with a legitimate business interest, this is not always the case. Consumers are entitled to review their credit reports and correct any errors. If someone the consumer does not know has requested a report, the consumer can ask the credit bureau to investigate the legitimacy of the request.
- *Motor vehicle data.* An individual's motor vehicle registration is public information in most states. In many states, driver's license data (weight, age, address, driver's license number) are also public information. Automobile dealers and insurance companies collect such information. An individual can request the state motor vehicle department not to release his or her name and address to individuals or companies.

The **FEDERAL COMMUNICATIONS COMMISSION** has issued regulations restricting companies from certain forms of telephone solicitation, which has developed into a common annoyance in U.S. households. Under these regulations (47 C.F.R. § 64.1200), a company may not initiate a telephone call by using an automatic dialing system or an artificial or prerecorded voice without prior consent of the party called. Likewise, a company may not make such a call to a service for which the called party may be charged, such as a paging service or a cellular telephone service. A company is also restricted from sending an unsolicited advertisement to a telephone facsimile machine without prior permission.

A telemarketer is restricted from calling a residential telephone subscriber before 8 A.M. or after 9 P.M. local time of the party being called. Telemarketers must institute procedures for maintaining a do-not-call list in order to conduct telemarketing. If an individual requests that the telemarketer place him or her on the do-not-call list, the telemarketer must comply. The telemarketer must satisfy a number of minimum requirements, including the development of a written policy detailing the procedures that must be followed if a person asks to be placed on the do-not-call list; training of personnel to place persons on the do-not-call list; and ensuring that the person who requests to have his or her name on the list is placed on the list. If a telemarketer fails to honor the do-not-call list, it is liable to a party on the list that is contacted by a telephone solicitor employed by that telemarketer.

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**CROSS-REFERENCES**

Consumer Credit Protection Act; Consumer Fraud.

the Supreme Court said that the First Amendment right to show such films outweighs the privacy interests of offended passersby who can protect their sensitivity by averting their eyes.

## Common Law

The common law of TORTS recognizes five discrete rights of privacy. First, the common law affords individuals the right to sue when their seclusion or solitude has been intruded upon in an unreasonable and highly offensive manner. Second, individuals have a common-law right to sue when information concerning their private life is disclosed to the public in a highly objectionable fashion. Third, tort liability may be imposed on individuals or entities that publicize information that places someone in a false light. Fourth, the common law forbids persons from appropriating someone's name or likeness without his or her consent. Fifth, the common law prevents business competitors from engaging in UNFAIR COMPETITION through the theft of trade secrets.

**Intrusion upon Seclusion** One who intentionally intrudes upon the solitude or seclusion of another is subject to liability for common-law invasion of privacy. An invasion may involve a physical intrusion into a place where a person has secluded herself, such as the nonconsensual entry into someone's home, office, apartment, or hotel room. Nonphysical intrusions may also give rise to liability when they involve the use of electronic surveillance equipment, including wiretaps, microphones, and video cameras. Alternatively, a person's seclusion may be impermissibly interrupted by persistent and unwelcome telephone calls, or by the occasional window peeper. By imposing liability in such instances, the law seeks to protect a person's tranquility and equilibrium.

Not every intrusion is actionable under this common-law tort. The intrusion must be considered highly offensive to a reasonable person. Creditors are allowed to take action to collect delinquent debts but must do so in a reasonable fashion. Landlords are permitted to demand late rental payments but must do so at reasonable times. A judge or jury determines what is reasonable according to the facts of each case. Individuals have no expectation of privacy in matters that are public. Thus, businesses may examine public criminal records of prospective employees without fear of liability, and photographers may take pictures of movie stars in public places.

**Publicity that Discloses Private Information** The common law protects individuals from publicity that discloses information about their private lives. Unlike LIBEL, slander, and DEFAMATION actions, this common-law tort may give rise to liability for truthful publicity, as long as the information is published in a manner that is highly objectionable to a reasonable person and the information is of no legitimate concern to the public. Disclosure of private sexual relations, disgraceful family quarrels, humiliating illnesses, and most other intimate personal matters will normally give rise to liability for invasion of privacy, even if such disclosures are completely accurate. By discouraging the publication of such private and personal matters, the common law places a high value on the right of individuals to control the dissemination of information about themselves, including the right to filter out embarrassing and harmful facts that might influence the opinion of others.

Liability is not usually imposed for alleged injuries relating to matters that are intended for public consumption. A person's date of birth and military record, for example, are both matters of public record that may be disclosed without invading his or her privacy. Commercial proprietors that regularly deal with the public receive little protection from disclosures that relate to the price of their products, the quality of their services, or the manner in which they conduct business. Under the First Amendment, business proprietors receive less protection of their privacy interests because the U.S. Constitution seeks to promote the free and robust exchange of accurate information to allow consumers to make informed decisions.

**False-Light Publicity** The common-law tort of false-light publicity protects individuals from the public disclosure of false information about their reputation, beliefs, or activities. The information need not be of a private nature nor must it be defamatory, as must libelous and slanderous statements, before liability will be imposed. Instead, a misleading publication will give rise to liability for false-light publicity when it is placed before a large segment of the public in such a way that a reasonable person would find it highly offensive. However, publication of an inaccurate story to a single person, or a small group of people, is not considered sufficiently public to constitute publicity.

A newspaper photograph printed in close proximity to a caption suggesting criminal activ-

ity on the part of the person photographed is a classic example of false-light publicity. On the other hand, a misleading photograph, such as one that has been retouched, may not give rise to liability for false-light publicity if the photograph is accompanied by a caption that clearly explains how it has been distorted. An esteemed poet may successfully sue for false-light publicity when an inferior poem is published under the poet's name. A war hero may assert a cognizable claim for false-light publicity if a story is aired that inaccurately portrays the soldier as a coward.

Public officials, such as politicians, and public figures, such as professional athletes, rarely recover for false-light publicity. Before a public official or public figure can recover for false-light publicity, the First Amendment requires proof that a story or caption was published with knowledge of its falsity or in reckless disregard of its truth, a principle that has become known as the actual malice standard (NEW YORK TIMES CO. V. SULLIVAN, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 [1964]). In most instances, public officials and public figures have thrust themselves into the public spotlight. As a condition to accepting the benefits that accompany public recognition, the law requires that such persons accept a diminished level of protection of their privacy interests. Because the First Amendment confers less protection on public persons than it does on private individuals, the Constitution encourages the media to freely disseminate information about candidates for office, government officials, and other figures who influence or shape the course of events.

**Appropriation of Name or Likeness** One who appropriates the name or likeness of another person is subject to liability for invasion of privacy. All individuals are vested with an exclusive property right in their identity. No person, business, or other entity may appropriate someone's name or likeness without permission. Nonconsensual commercial appropriation of a person's name or likeness for advertising purposes is the most common type of conduct giving rise to liability under this common-law tort. By forbidding the nonconsensual use of a person's name or likeness, the law allows an individual to license his or her face, body, reputation, prestige, and image for remuneration.

Not every appropriation gives rise to liability for invasion of privacy. Liability will attach only when a person's name or likeness has been appropriated to obtain an immediate and direct advantage. The advantage need not yield a financial gain. However, the mere incidental use of someone's name or likeness is not a compensable appropriation.

For example, the print and electronic media may publish photographs, drawings, and other depictions of a person's name or likeness as an incidental part of their legitimate news-gathering activities without violating the common-law right to privacy. However, if a nonprofit organization uses a person's name or likeness to promote its philanthropy, it may be liable for the appropriation. The right to sue for wrongful appropriation is a personal right. Parents cannot recover damages for breach of their children's privacy, and family members cannot sue after the death of the person whose name or likeness has been misappropriated.

**Theft of Trade Secrets** Wrongful use, disclosure, or theft of a TRADE SECRET is actionable under the common law. Although the U.S. economy is generally governed by free-market principles, the common law requires businesses to compete fairly and forbids business rivals from stealing one another's INTELLECTUAL PROPERTY for commercial advantage. Although it is difficult to formulate a comprehensive list of what constitutes the improper acquisition of a trade secret, the common law generally makes it unlawful to engage in FRAUD, MISREPRESENTATION, or other forms of deception for the purpose of obtaining confidential commercial information.

Independent analysis of publicly available products or information is not an improper means of acquisition. Through a process known as reverse engineering, a competitor may lawfully purchase a rival's product, disassemble it, and subject it to laboratory analysis for the purpose of unlocking valuable information, such as a secret formula or process. However, aerial photography of a competitor's plant constitutes tortious interference with commercial privacy. Courts have reasoned that the law should not force commercial entities to expend additional resources to conceal their interior from every possible form of exterior exposure. Conversely, commercial entities may patent many of their valuable trade secrets before placing a product on the market where it can be analyzed by a competitor.

## Legislation

In addition to the constitutional and common-law principles that offer protection of pri-

# Do DNA Databases Violate Privacy?

All 50 states and the federal government maintain DNA databases of certain convicted criminals. DNA, or deoxyribonucleic acid, is the chemical that reveals a person's genetic makeup. A database containing the DNA of convicted criminals helps law enforcement find and identify repeat criminal offenders. Prior to 1998, the federal DNA database and the state databases were not completely integrated, so sharing DNA information between the states was not an easy task.

In October 1998, the **FEDERAL BUREAU OF INVESTIGATION** (FBI) began operating a nationwide DNA database called the National DNA Index System, under the DNA Identification Act of 1994 (Public Law 103 322). The system consists of the DNA databases from all 50 states and the FBI's own DNA database. As of 2003, it contained approximately 1.3 million DNA samples. The national database makes it possible for law enforcement officials in one state to compare DNA found at a crime scene with DNA samples that exist in the DNA databases of other states. When the national DNA database was installed, FBI director Louis Freeh predicted that it would be of great value to city, county, state, and federal law enforcement agencies if they work together to apprehend violent criminals.

The national DNA database in the United States is similar to the one that has been used in England since 1995. In Great Britain, the empire-wide DNA database includes DNA samples from crime scenes, from anyone convicted of a crime, and from persons who are suspects in unsolved cases. The Police Superintendents Association in England has even proposed obtaining DNA samples from every person in England. There is no plan in the United States for such widespread DNA gathering.

Who, then, should be required to provide a DNA sample? This question comes up again and again concerning the use of

vacy interests, a host of statutes and regulations have been passed to define privacy in a variety of contexts. State and federal legislation regulates the circumstances under which information from financial, educational, and government records can be revealed. State and federal legislation also prescribes the conditions under which employers may subject their employees to drug testing. Federal laws strictly limit the use of electronic surveillance in both the public and private sectors.

Congress passed the **FAIR CREDIT REPORTING ACT** of 1970 (15 U.S.C.A. § 1681 et seq.) to prevent unreasonable and careless invasions of consumer privacy. The law permits employers, lenders, and other persons to obtain a copy of an individual's credit report for a legitimate business purpose. However, businesses may not request a credit report unless it is related to a transaction initiated by the consumer, such as a job interview or bank loan.

Commercial entities may not use credit reports for the purpose of marketing. Nor may a person or entity obtain a credit report through the use of **FALSE PRETENSES**, fraud, or misrepresentation. The statute authorizes consumers to review the information contained in their own credit reports and challenge inaccuracies. Credit bureaus have an obligation to correct any inaccuracies within a reasonable amount of time after learning of them.

The **PRIVACY ACT OF 1974** (5 U.S.C.A. § 522a) requires the federal government to use fair practices in the collection and use of information about U.S. citizens and is designed to prevent federal agencies from disclosing certain personal information contained in their records. In general, federal agencies may not release government records without first obtaining consent from the persons who are referred to in the records. Every individual maintains the right to inspect federal agency records, correct mistakes, and add important details. In the event that an individual's right is infringed under this law, he or she can sue the federal government for money damages or a court order directing the agency to obey the law.

Similarly, the **FREEDOM OF INFORMATION ACT** (5 U.S.C.A. § 552 [1996]) contains limitations on the disclosure of agency information when such disclosure would constitute a "clearly unwarranted invasion of personal privacy." In most other instances, the Freedom of Information Act guarantees the right of Americans to request a copy of any reasonably identifiable record kept by a federal agency. However, the U.S. government may refuse to disclose certain sensitive information that relates to national security, foreign policy, or other classified areas. Persons who have requested information and been denied may challenge the decision in court.

DNA databases. Almost all states require that persons convicted of serious **SEX OFFENSES** give a DNA sample upon their conviction. However, the states differ on whether to mandate DNA profiling of all violent felons, persons paroled from jail, and juvenile offenders. And what about an individual who is on **PAROLE** for a past crime? Should he or she be required to retroactively provide a sample? A national DNA database may be a boon for law enforcement personnel, but it raises concern over protection of privacy.

In March 1999, U.S. Attorney General **JANET RENO** requested that a federal commission look into the possibility of requiring all arrested persons to give a DNA sample. In 2003, the **GEORGE W. BUSH** administration backed the proposal. The administration also pushed to require DNA samples from juvenile offenders. The notion that a person may be required under federal law to give a DNA sample based on the mere suspicion of criminal activity is chilling to civil libertarians. The FBI, however, insists that **DNA EVIDENCE** is the future of law enforcement and that the national database has already resulted in a number of successes. As of 2002, over six thousand DNA samples had been matched to unsolved crimes. The FBI is also quick to point out that the DNA database is a secure system, and that all users, including researchers, are required to undergo background checks.

Other proponents of the national database herald the coming of a national DNA database for its exculpatory potential. A person may easily be eliminated as a suspect through DNA evidence and, in some cases, DNA evidence can prove a convicted defendant innocent, which results in freedom and true, albeit tardy, justice. Opponents of a comprehensive national DNA database concede that DNA evidence can be exculpatory, but groups such as the **AMERICAN CIVIL LIBERTIES UNION** (ACLU) are gearing up for a legal battle that will almost certainly reach the U.S. Supreme Court.

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The Freedom of Information Act serves the twin purposes of protecting private and classified documents from disclosure while requiring the uninhibited exchange of all other information that is consistent with an open society and a democratic government.

In 1974, Congress enacted the Family Educational Rights and Privacy Act (20 U.S.C.A. § 1232g), which gives parents the right to examine the scholastic records of their children. The act broadly defines scholastic records to include all records, files, documents, and other materials containing information directly related to a student that are maintained by an educational agency or institution. The act permits only certain individuals to have access to student records, including other institution officials who have a legitimate scholastic interest in the records, such as teachers, principals, and student loan officers. Otherwise, a school must obtain consent from the student or parent before disclosing any information contained in an educational record. The Family Educational Rights and Privacy Act applies to all public schools, including **COLLEGES AND UNIVERSITIES**, and to private schools that receive federal funding.

The Right to Financial Privacy Act of 1978 (12 U.S.C.A. § 3401 et seq.) entitles bank customers to a limited expectation of privacy in their financial records by requiring that law enforcement officials follow certain procedures before information can be disclosed. Unless a customer consents in writing to the disclosure of his financial records, a bank may not produce such records for government inspection unless ordered to do so by an administrative or judicial subpoena or a lawfully executed **SEARCH WARRANT**. Other formal written requests for bank records may be granted if they are made for a legitimate law enforcement purpose. The Right to Financial Privacy Act applies to credit unions, trust companies, and savings and loan institutions.

The Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.A. § 2510 et seq.) governs the use of electronic surveillance in both the public and private sectors. In the public sector, the act outlines detailed procedures the federal government must follow before conducting any form of electronic surveillance. Pursuant to authorization by the U.S. attorney general or a specially designated assistant, federal law enforcement agents must make a sworn written application to a federal judge that specifically describes the location where the communications will be intercepted, the reasons for the interception, the expected duration of the surveillance, and the identity of those persons whose conversations will be monitored. The judge must then review the surveillance applica-

tion to ensure that it satisfies each of the statutory requirements and establishes PROBABLE CAUSE to justify electronic eavesdropping.

The Omnibus Crime Control and Safe Streets Act governs the use of electronic surveillance in the private sector as well. The act prohibits any person from intentionally using or disclosing information that has been knowingly intercepted by electronic or mechanical means without the consent of the interested person. Nearly 70 percent of all reported WIRETAPPING involves DIVORCE cases and custody battles. Often, divorcing spouses, attempting to obtain embarrassing or discrediting information against one another, plant recording and listening devices throughout the marital home. Although most federal courts have ruled that the Omnibus Crime Control and Safe Streets Act applies to interspousal electronic surveillance, some courts have created a spousal IMMUNITY from civil liability under the act in an effort to preserve any remaining remnants of marital harmony.

The Omnibus Crime Control and Safe Streets Act also governs the use of electronic surveillance in the area of employment. A number of employers videotape employee movement throughout the workplace, search employees' computer files, monitor their telephone calls, and read their electronic mail. Courts have generally permitted employers to engage in such surreptitious snooping so long as it serves a legitimate and significant business purpose.

In the rest of the private sector, the Omnibus Crime Control and Safe Streets Act applies to information intercepted from telephone satellite unscrambling devices, cellular telephones, and pagers, as well as from traditional forms of electronic surveillance, such as telephone taps, microphones, and other bugging devices. However, the act does not cover information intercepted from pen registers, which record the telephone numbers of outgoing calls, or caller identification devices, which display the telephone numbers of incoming calls, because neither captures conversations of any sort. In addition, the act does not apply to information intercepted by videotape. In a 2001 decision, *Commonwealth v. Rekasie,* 778 A.2d 624 (Pa. 2001), a Pennsylvania court held in a 4–3 decision that a defendant does not have a reasonable expectation of privacy in a telephone conversation from his home with a confidential police informant; therefore, the Commonwealth was not required to obtain a determination of probable cause before tape recording the conversation.

The Total Information Awareness (TIA) program is a federal program sponsored by the DEPARTMENT OF DEFENSE (DoD) designed to detect, classify, and identify foreign terrorists—and decipher their plans—and thereby enable the United States to take timely action to successfully PREEMPT and defeat terrorist acts. To that end, the TIA program states its objective as creating a counter-terrorism information system that: (1) increases information coverage by an order of magnitude and affords easy future scaling; (2) provides focused warnings within an hour after a triggering event occurs or an evidence threshold is passed; (3) can automatically queue analysts based on partial pattern matches and has patterns that cover 90% of all previously known foreign terrorist attacks; and (4) supports collaboration, analytical reasoning, and information sharing so that analysts can hypothesize, test, and propose theories and mitigating strategies about possible futures, so decision-makers can effectively evaluate the impact of current or future policies and prospective courses of action.

Critics of this program have been outraged that the government has implemented it. The DoD claims that it recognizes American citizens' concerns about privacy invasions and that it has certain safeguards in place to prevent this and to ensure that data are protected and used only for lawful purposes.

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT, or USAPA), Pub. L. 107-54, 115 Stat. 272, introduced a plethora of legislative changes which significantly increased the surveillance and investigative powers of law enforcement agencies in the United States. The act does not, however, provide for the system of checks and balances that traditionally safeguards civil liberties in the face of such legislation. Legislative proposals in response to the terrorist attacks of September 11, 2001, were introduced less than a week after the attacks. President GEORGE W. BUSH signed the final bill, the USA PATRIOT Act, into law on October 26, 2001. The act was a compromise version of the Anti-Terrorism Act of 2001 (ATA), a far-reaching legislative package intended to strengthen the nation's defense against terrorism. The ATA contained several provisions vastly expanding the author-

ity of law enforcement and intelligence agencies to monitor private communications and access personal information. The USA PATRIOT Act retains provisions appreciably expanding government investigative authority, especially with respect to the INTERNET. Those provisions address issues that are complex and implicate fundamental constitutional protections of individual liberty, including the appropriate procedures for interception of information transmitted over the Internet and other rapidly evolving technologies. The AMERICAN CIVIL LIBERTIES UNION and various library and booksellers' organizations filed suit in October 2002 under the Freedom of Information Act (FOIA) seeking the disclosure of information concerning implementation of the controversial USA PATRIOT Act. The lawsuit covered some of the information the JUSTICE DEPARTMENT withheld from the House Judiciary Committee in response to a set of detailed questions. A court ordered compliance with the FOIA; however, the government withheld many documents claiming national security interests. As of 2003, this controversy continued.

Genetic privacy has also been at issue in recent years. Cloning is a process by which cells are isolated from an organism through a biopsy and cultured under laboratory conditions. They grow and divide, producing new cells identical to the original cells. With the exception of sperm and egg cells, cloning from even a single cell of a mammal is possible because every cell in the organism contains a complete set of genes necessary to make an identical copy. Unlike artificial fertilization and other modern methods of conception, cloning requires just one parent. In July 2001, the House of Representatives passed the Weldon-Stupak bill, which criminalizes cloning in humans, whether for reproductive or research purposes. This bill was introduced in the Senate as the Brownback-Landrieu bill and was endorsed by President Bush. Senator Sam Brownback (R-KS) reintroduced legislation in 2003 that would ban all human cloning, including somatic cell nuclear transfer, also known as therapeutic cloning. The Human Cloning Prohibition Act of 2003 reintroduces language from Brownback's prior bill that ended in a Senate stalemate in the 107th Congress.

Alcohol and other drug testing is another form of employee surveillance that raises privacy questions in both the public and private sectors. Many legislators consider drug testing by urinalysis to be intrusive, and the practice has been regulated in at least 18 states. Three states require employers to demonstrate probable cause of illegal drug use before they can compel an employee to submit to urinalysis. Six states specify that employers can instigate drug testing only if they have reason to suspect an employee of illegal drug use. In general, however, no pervasive public policy against mandatory employee drug testing exists in either the public or private sector.

Drug testing in the workplace gained momentum in 1986 following a presidential commission report on drug abuse (*America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime*). The commission recommended drug testing in both the public and private employment sectors. Based on this recommendation, President RONALD REAGAN ordered drug testing for federal employees in positions that require a high degree of trust and confidence (Exec. Order No. 12,564, 3 C.F.R. 224 [1986]). Guidelines promulgated by the DEPARTMENT OF HEALTH AND HUMAN SERVICES established scientific and technical requirements concerning specimen collection, laboratory analysis, and interpretation of test results for the federal drug-testing program.

In response to this federal impetus, employers have dramatically increased drug testing of employees. Many state laws now encourage private employers to periodically test their employees for illegal drug use, and many private employers have asked their state legislatures to pass drug-testing laws. In the public sector, however, the U.S. Supreme Court has ruled that random drug testing of government employees constitutes a "search" that must comply with the requirements of the Fourth Amendment before it may be deemed legal (*National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 [1989]).

The meaning of the term *privacy* changes according to its legal context. In constitutional law, privacy means the right to make certain fundamental decisions concerning deeply personal matters free from government coercion, intimidation, or regulation. In this sense, privacy is associated with interests in autonomy, dignity, and self-determination. Under the common law, privacy generally means the right to be let alone. In this sense, privacy is associated with seclusion. Under statutory law, privacy often means the right to prevent the nonconsensual

disclosure of sensitive, confidential, or discrediting information. In this sense, privacy is associated with secrecy.

The privacy issues associated with genetics have led to various legal disputes. The lawsuits over genetic research and testing concern matters such as the taking of the blood or tissue; the use of the blood or tissue; the distribution of the blood or tissue; the use of previously acquired samples of blood or tissue to conduct new tests; and whether a gene can receive patent protection. One of the more emotional issues associated with genetic testing is the testing of persons without their consent. In *Norman-Bloodsaw v. Lawrence Berkeley Laboratory,* a research lab under the U.S. DEPARTMENT OF ENERGY was sued for secretly testing certain employees.

*Norman-Bloodsaw* began in 1994 when Marya Norman-Bloodsaw, a forty-one-year-old clerk in the accounting department of Lawrence Berkeley Laboratory, asked to see her medical records. When she inspected her records, Norman-Bloodsaw recognized the code for syphilis testing. Norman-Bloodsaw did not recall being told that she was being tested for syphilis, nor did she recall requesting such testing. At Norman-Bloodsaw's urging, several other employees consulted their own medical files and found that they too had been tested for genetic defects and other medical conditions without their knowledge or consent.

The secret testing seemed to establish a pattern of discrimination. Although the lab had tested all new employees for syphilis, African Americans and Latinos were re-tested for the disease. The lab also tested and re-tested its African American employees for sickle cell anemia, and women were tested regularly for pregnancy. White men were not re-tested for any diseases, except for white men who were married to black women who secretly tested for syphilis.

The lab testing by Lawrence Berkeley Laboratory allegedly constituted illegal discrimination and the violation of privacy rights. Vertis Ellis, a 47-year-old African American woman, for example, had been tested for sickle cell anemia and for pregnancy, but she had never requested the tests, authorized the tests, or received results from the tests. "I felt so violated," Ellis told *U.S. News & World Report.* "I thought, 'Oh, my God. Do they think all black women are nasty and sleep around?'" Norman-Bloodsaw, Ellis, and five other employees of Lawrence Berkeley Laboratories filed a CLASS ACTION suit against the lab, alleging violations of privacy and CIVIL RIGHTS.

Lawrence Berkeley Laboratory, the oldest research lab in the country, argued that it was not liable because the employees had all agreed to receive comprehensive physical examinations. A defendant in the case, Thomas Budinger, a former medical director of the lab, defended the testing of African-Americans for syphilis. "[T]hat's where the prevalence of the disease is," Budinger explained to Hawkins. "How come only people over a certain age would get an EKG? See the logic?" The laboratory also denied that the testing was done in secret. According to attorney Douglas Barton, the lab posted test results on a wall in the exam room. The plaintiffs in the case disputed that assertion, and they argued that they had not agreed to repeated testing without their consent, but the federal district court in San Francisco dismissed the case. According to Judge Vaughn Walker of the federal trial court in San Francisco, the tests were administered as part of a comprehensive medical examination to which [the employees] had consented.

The plaintiffs appealed the dismissal of the case to the Ninth Circuit Court of Appeals. In February 1998, the federal appeals court reversed the ruling and remanded the case for trial. *Norman-Bloodsaw v. Lawrence Berkeley Laboratory,* 135 F.3d 1260 (9th Cir. 1998). According to the appeals court, the testing violated constitutional privacy rights if the employees had not given their consent and there were no reasonable medical or public health needs that justified the testing. The testing also violated Title VII of the CIVIL RIGHTS ACT OF 1964 if the testing was conducted based on race and gender-specific traits. The appeals court put a stop to the testing and ordered the lab to delete all of the secret test results from the personnel files of the employees.

The *Norman-Bloodsaw* decision is important because it places some limits on the use of genetic testing of employees. Every year, genetic researchers are discovering new genetic predictors for diseases, and insurance companies may begin to base eligibility for their medical and life insurance policies on a person's genetic predisposition to diseases. If, for example, a person seeking insurance is genetically tested and found to have a predisposition for a fatal disease, the insurance company may wish to deny coverage.

State departments of motor vehicles (DMVs) require drivers and automobile owners to provide personal information, which may include a person's name, address, telephone number, vehicle description, SOCIAL SECURITY number, medical information, and photograph, as a condition of obtaining a driver's license or registering an automobile. Finding that many States sell this information to individuals and businesses for significant revenues, Congress enacted the Driver's Privacy Protection Act of 1994 (DPPA), which establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent. In *Reno v. Condon,* 528 U.S. 141 (2000), South Carolina and its attorney general brought suit alleging that the DPPA violates the Tenth and Eleventh Amendments to the U.S. Constitution. Concluding that the DPPA is incompatible with the principles of FEDERALISM inherent in the Constitution's division of power between the States and the federal government, the district court granted SUMMARY JUDGMENT for the State and permanently enjoined the DPPA enforcement against the State and its officers. The Fourth Circuit affirmed, concluding that the Act violates constitutional principles of federalism. The Supreme Court ruled that the DPPA is a proper exercise of Congress' authority to regulate interstate commerce under the COMMERCE CLAUSE, U.S. Const., Art. I, §8, cl. 3. The motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters related to interstate motoring. Because drivers' personal, identifying information is, in this context, an article of commerce, its sale or release into the interstate stream of business is sufficient to support congressional regulation.

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CROSS-REFERENCES

Acquired Immune Deficiency Syndrome; Consumer Credit; Death and Dying; Drugs and Narcotics; Employment Law; Libel and Slander; Parent and Child; Penumbra; Privileged Communication; *Quinlan, In re*; Search and Seizure.

## PRIVACY ACT OF 1974

The Privacy Act of 1974 (5 U.S.C.A. 552a) is a federal law that places restrictions on the federal government's collection, use, and dissemination of personal information. As with most comprehensive federal statutes, the act provides general and specific exemptions as well as an administrative appeals process.

The genesis of the Privacy Act can be traced back to 1965, when a congressional subcommittee examined privacy issues. Between 1965 and 1974, other congressional committees held hearings and issued reports on how individual privacy rights were affected by the growth of national data banks and the emergence of electronic data collection and storage. An important catalyst for the legislation was a Department of Health, Education, and Welfare report on government records and computers. The report proposed a "Code of Fair Information Practices" to be followed by all federal agencies and urged the adoption of five core principles: (1) the government should not maintain any secret records; (2) individuals must be able to see what personal information about them is stored and how it is used; (3) individuals must provide prior written consent before personal information collected for one purpose can be used for a different purpose; (4) individuals must be allowed to fix or clarify personal information about them; and (5) organizations that store or use personal data must be responsible for the information's veracity and must attempt to prevent its misuse.

Congress incorporated these principles into the Privacy Act, which applies to the EXECUTIVE BRANCH of the federal government. The executive branch encompasses administrative agencies, government corporations, and government-controlled corporations. The act does not apply to records kept by state and local governments or by private companies or organizations. Only U.S. citizens and lawfully admitted ALIENS are given rights under the act. Accordingly, nonresident foreign nationals may not invoke the provisions of the act.

Generally, the only materials that are subject to the act are those that are maintained in a system of records. The act defines "records" to include most personal information kept by an agency about an individual. A record contains individually identifiable information, such as data on a person's education, medical history, criminal history, employment history, or financial transactions. A "system of records" is a group of records from which information can be retrieved by name, SOCIAL SECURITY number, or any other identifying symbol linked to an individual. Most personal information that is kept in federal government files is subject to the Privacy Act. Therefore, the government may not, for example, share medical-history information from a MEDICARE recipient with another government agency without first obtaining the individual's written consent.

The Privacy Act gives the government the authority to withhold records from individuals if important government interests are at stake. The government may deny access based on national security or law enforcement concerns. There are two general exemptions: one that applies to all records maintained by the CENTRAL INTELLIGENCE AGENCY (CIA), and another that applies to federal CRIMINAL LAW enforcement agencies. The statute also lists seven specific exemptions that include SECRET SERVICE records involving the protection of the president, information used solely for statistical records, and various national security and law enforcement records.

Individuals who are denied access to their records may file an administrative appeal with the agency withholding the information. When a request for access is denied, the agency must explain the reason for the denial and must cite the specific statutory exemption. Individuals who can access their records, but who dispute the accuracy of the information, have the right to request a correction. The agency must acknowledge receipt of the request and must promptly make a determination whether or not to correct the record. If the agency denies the request, the individual may file an administrative appeal. If that appeal is denied, the individual has the right to JUDICIAL REVIEW by suing the agency in federal court. A lawsuit must be filed within two years from the date of the final agency denial.

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CROSS-REFERENCES

Privacy.

## PRIVATE

*That which affects, characterizes, or belongs to an individual person, as opposed to the general public.*

## PRIVATE ATTORNEY GENERAL

*A private citizen who commences a lawsuit to enforce a legal right that benefits the community as a whole.*

## PRIVATE BILL

*Legislation that benefits an individual or a locality. Also called special legislation or a private act.*

Many state constitutions prohibit the enactment of private bills or acts when a general law could apply. The prohibition of private bills, now more commonly known as special laws, applies to legislation that affects local governments or private individuals. Despite this constitutional language, private bills remain a part of the U.S. legislative process.

The constitutional disfavor of private bills is based on several concerns. The enactment of special legislation undermines the idea that laws apply to all persons in a state. The perception of favoritism reduces the credibility of the legislative process. The reality of special legislation is that the legislature fails to establish responsible and uniform statewide regulation of local government units and creates preferential and prejudicial discrimination between communities. Private bills also use legislative time and energy in small amounts, leaving the legislature less able to deal with general legislative business. Nevertheless, special legislative treatment of special problems is sometimes warranted.

Legislatures can evade the constitutional provisions banning private bills by drafting laws that apply to the entire state, at least on their face. For example, a special bill for one local unit of government or person can be drawn so that it appears to apply to all units or persons meeting specific criteria. The criteria actually limit its applicability to the one community or person the sponsors intend to affect. Population is the

most common "bogus" criterion since it is easy to use. Thus, a law that applies only to "a county with a population of more than 50,000 and between 350,000 and 400,000 acres" appears on its face to apply generally to all counties in the state that match the criteria. This type of legislative drafting hides special legislation and makes it appear to be general.

Courts will uphold special legislation if the classifications in the act are "open," meaning that other units of government or individuals will come under the law if at any time they meet the criteria in the law. In the example above, the population of a county given in the law was 50,000. If another county reaches that level of population and has the same amount of acreage, it will fall under the legislation, thus making the classification open. If the class is fixed by the facts as of some point in time, the class is closed, and is stripped of the presumption that it is an honest classification related to a legitimate legislative purpose. The class is held to be descriptive of the target community or person and makes the legislation an invalid private bill.

Legislatures can limit the number of private bills either by examining them more critically or adopting statewide legislation that gives local units adequate powers to solve issues themselves, eliminating the need for private bills.

## PRIVATE INTERNATIONAL LAW

*A branch of* JURISPRUDENCE *arising from the diverse laws of various nations that applies when private citizens of different countries interact or transact business with one another.*

Private international law refers to that part of the law that is administered between private citizens of different countries or is concerned with the definition, regulation, and enforcement of rights in situations where both the person in whom the right inheres and the person upon whom the obligation rests are private citizens of different nations. It is a set of rules and regulations that are established or agreed upon by citizens of different nations who privately enter into a transaction and that will govern in the event of a dispute. In this respect, private INTERNATIONAL LAW differs from public international law, which is the set of rules entered into by the governments of various countries that determine the rights and regulate the intercourse of independent nations.

## PRIVATE LAW

*That portion of the law that defines, regulates, enforces, and administers relationships among individuals, associations, and corporations. As used in distinction to public law, the term means that part of the law that is administered between citizen and citizen, or that is concerned with the definition, regulation, and enforcement of rights in cases where both the person in whom the right inheres and the person upon whom the obligation rests are private individuals.*

## PRIVATE ROADS

*A street or route that is designated by a public authority to accommodate a person or a group of people.*

A private road is often established because an individual needs to gain access to land; such a road can cross another person's property. A private road can be used by the general public and is open to all who wish to use it, but it primarily benefits those at whose request it was established. Unlike highways that are cared for by the public at large, private roads are maintained at the expense of the private individuals who requested the road.

Statutory regulations must be observed when a private road is designated. An applicant can recommend a certain location for the road, but the ultimate decision rests with the highway authority, which might vary the proposed route to comply with the public interest and statutory regulations. Distance, practicality, the interests of the applicant, and the least intrusive means of utilizing private property are some considerations involved in making a road. When a private right of way is requested over another person's property and the owner of the land over which the proposed route is sought provides a convenient and practical route, that passage will often be earmarked for a segment of the private road.

The authority to establish a private road is derived from the power of EMINENT DOMAIN and exists only when expressly provided by a statute. The statute must be strictly followed, especially when the private road benefits only the requesting party. Generally land is taken for the construction of a private road only in cases of necessity. The definition of necessity varies among the jurisdictions and is determined on a case-by-case basis. Some jurisdictions hold that an applicant establishes necessity when she

proves that a private road is absolutely indispensable as a means of reaching her land, whereas others only require proof of a reasonable and practical need for the road. Private roads are never opened merely because the applicant would find it a convenience. Before establishing one, the authority must consider all the facts and balance the benefit received by the limited number of people who use the road against the burden imposed on the owner of the land over which the proposed road will cross.

Most statutes require that an applicant file a petition with a court to commence a civil action for the establishment of a private road. The action is between the applicant and the owner or owners whose land will be utilized in the proposed road. The court appoints viewers, commissioners, or jurors to inspect the affected area, to decide whether the road should be established, and to suggest any needed modifications. Where statutes provide for the appointment of viewers, who subsequently find the road necessary, they will map out a route that does the least amount of damage to private property and consider the needs of the applicant. The awarding of damages to the property owner over whose land the road passes is within the exclusive discretion of the viewers. A court will review the damages award only if it is alleged that the viewers acted in a dishonest or corrupt manner.

Some statutes require the commissioners or viewers to conduct a hearing on the proposed road. Such a hearing provides for a better fact-finding procedure since the applicant and any opposing party can present arguments for or against the proposed road. If an opponent wishes to contest an application that receives a favorable report, he must file an exception, which preserves the record should the losing party decide to appeal. If no exceptions are filed during the hearing, a report that conforms to the law is binding on a court. A court must then enter a judgment, describing the location of the road and, if required by statute, limiting its use to a specified period or time.

The duty to maintain and repair a private road rests on the person or persons for whose benefit the road is established. If a large portion of the public utilize the road or if a statute requires its designation as a public highway, then the duty to maintain and repair falls on the public at large. Persons who are injured as a result of disrepair can seek to recover damages from the responsible party.

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## PRIVATEER

*A privately owned vessel that is commissioned by one power to attack merchant ships from a hostile power. The term also refers to the commander or a crew member of such a vessel.*

A privateer was commissioned by the issuance of a letter of MARQUE AND REPRISAL to commit hostile acts at sea, generally in accordance with the RULES OF WAR. Letters of marque and reprisal were issued by a state to its own subjects as well as to the subjects of neutral states. The owner of a vessel who accepted letters of marque from both belligerents was, however, deemed a pirate.

Privateering was abolished on an international scale with the ratification of the Declaration of Paris in 1856, which was signed by Great Britain, France, Turkey, Sardinia, Austria, Prussia, and Russia. The United States, Spain, Mexico, and Venezuela, however, did not consent to the declaration. The United States refused to join the treaty because the U.S. Constitution, which gives Congress the power to issue letters of marque, does not authorize it to participate in a permanent treaty abolishing privateering. Regardless, the act of privateering is considered a federal offense punishable by fine or imprisonment (18 U.S.C.A. § 1654 [2003]).

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## PRIVILEGE

*A particular benefit, advantage, or* IMMUNITY *enjoyed by a person or class of people that is not shared with others. A power of exemption against or beyond the law. It is not a right but, rather, exempts one from the performance of a duty, obligation, or liability.*

## PRIVILEGE AGAINST SELF-INCRIMINATION

The privilege against self-incrimination forbids the government from compelling any person to

give testimonial evidence that would likely incriminate him or her during a subsequent criminal case. This right enables a defendant to refuse to testify at a criminal trial and, according to the U.S. Supreme Court, "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973).

Confessions, admissions, and other statements taken from defendants in violation of this right are inadmissible against them during a criminal prosecution. Convictions based on statements taken in violation of the right against SELF-INCRIMINATION normally are overturned on appeal, unless sufficient admissible evidence is available to support the verdict. The right against self-incrimination may only be asserted by persons and does not protect artificial entities such as corporations. *Doe v. United States*, 487 U.S. 201, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988).

### Witness Privilege

A witness may refuse to answer questions or give documentary evidence only if the answer or document would incriminate the witness. An answer is considered self-incriminating if it would lead to criminal liability in any jurisdiction. The answer need only furnish a link in the chain of CIRCUMSTANTIAL EVIDENCE necessary for a conviction *Blau v. United States*, 340 U.S. 159, 71 S. Ct. 223, 95 L. Ed. 170 (1950). The answer does not have to be one that would be admissible as evidence in a criminal trial.

The privilege does not allow a witness to refuse to answer a question because the response may expose the witness to civil liability, social disgrace, loss of status, or loss of private employment. A witness may not claim the privilege on the grounds that an answer or document may incriminate a third party: it may be declared only by the witness for the witness.

In some criminal cases, a prosecutor may grant to a witness IMMUNITY from prosecution. This immunity comes in two forms: transactional and testimonial. Transactional immunity gives the witness immunity from prosecution for the criminal acts to which the witness refers in his or her statements. Testimonial immunity merely prevents the prosecution from using the statements the witness makes in a subsequent prosecution of the witness. Prosecutors have the right to grant only testimonial immunity and thereby force witnesses to testify. If the witness refuses to testify after being given testimonial immunity, he or she could be jailed for CONTEMPT of court. Furthermore, if a witness with testimonial immunity testifies falsely, the false statements may be used against the witness in a subsequent prosecution for perjury.

By contrast, if police or prosecutors summon a witness to produce self-incriminating documents, the witness may claim the privilege because a summons to produce documents is similar to a demand for testimony. *Curcio v. United States*, 354 U.S. 118, 77 S. Ct. 1145, 1 L. Ed. 2d 1225 (1952). However, police and prosecutors may force a witness to relinquish self-incriminating documents if the records pertain to a regulated public matter, such as price records kept by businesses under price regulation statutes.

### Criminal Defendant Privilege

In MIRANDA V. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Supreme Court extended the right to remain silent to pretrial CUSTODIAL INTERROGATIONS. The Court held that before a suspect is questioned, the police must apprise the suspect of his or her right to remain silent and that if he or she gives up this right, any statements may be used against the suspect in a subsequent criminal prosecution. Under *Miranda*, suspects also have a FIFTH AMENDMENT right to consult an attorney before they submit to questioning. *Miranda* applies to any situation in which a person is both held in custody by the police, which means that he or she is not free to leave, and is being interrogated, which means he or she is being asked questions that are designed to elicit an incriminating response. A person need not be arrested or formally charged for *Miranda* to apply.

*Miranda* has been scrutinized by law enforcement personnel and others since it was first decided. In 1968, Congress enacted a law, codified at 18 U.S.C.A. § 3501, that restored voluntariness as a test for admitting confessions in a federal court. The U.S. JUSTICE DEPARTMENT, however, under attorneys general of both major political parties, refused to enforce the provision, believing it to be unconstitutional. The Supreme Court, in *Dickerson v. United States*, 30 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000), ruled that this law could not revoke *Miranda*

because the 1966 decision had been made on constitutional grounds.

For criminal defendants, the privilege against self-incrimination includes the right to refuse to testify at trial. A defendant may testify at a PRELIMINARY HEARING on the admissibility of evidence without waiving the right to not testify at trial. Incriminating statements made by a defendant in a preliminary hearing are not admissible at trial, and the prosecutor may not comment on them.

The Court has held that the privilege is not compromised by laws that require persons to surrender identification to law enforcement personnel. *California v. Byers,* 402 U.S. 424, 91 S. Ct. 1535, 29 L. Ed. 2d 9 (1971). A person who is suspected of a crime may be compelled to testify before a GRAND JURY, a legislative body, or an administrative board. The person must appear and answer questions, but he may claim the privilege against self-incrimination when necessary.

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CROSS-REFERENCES

Circumstantial Evidence; Immunity; Testimony; Witnesses.

## PRIVILEGED COMMUNICATION

*An exchange of information between two individuals in a confidential relationship.*

A privileged communication is a private statement that must be kept in confidence by the recipient for the benefit of the communicator. Even if it is relevant to a case, a privileged communication cannot be used as evidence in court. Privileged communications are controversial because they exclude relevant facts from the truth-seeking process.

Generally, the laws that guide civil and criminal trials are designed to allow the admission of relevant evidence. Parties generally have access to all information that will help yield a just result in the case. Privileged communications are an exception to this rule.

Privileged communications exist because society values the privacy or purpose of certain relationships. The established privileged communications are those between wife and husband, clergy and communicant, psychotherapist and patient, physician and patient, and attorney and client.

These relationships are protected for various reasons. The wife-husband and clergy-communicant privileges protect the general sanctity of marriage and religion. The psychotherapist or physician and patient privilege promotes full disclosure in the interests of the patient's health. If patients were unable to keep secret communications with psychotherapists or physicians relating to treatment or diagnosis, they might give doctors incomplete information. If doctors received incomplete information, they might be unable to administer HEALTH CARE to the patient, which is the very purpose of the doctor-patient relationship.

The ATTORNEY-CLIENT PRIVILEGE exists for roughly the same reason as the PHYSICIAN-PATIENT PRIVILEGE. In order to secure effective representation, a client must feel free to discuss all aspects of a case without the fear that her attorney will be called at trial to repeat her statements. Likewise, to retain the client's trust and do his job properly, the attorney must be allowed to withhold from the court and opposing party private communications with the client.

A communication is not confidential, and therefore not privileged, if it is overheard by a third party who is not an agent of the listener. Agents include secretaries and other employees of the listener. For example, a communication between a psychotherapist and patient would be privileged even if the psychotherapist's secretary happened to overhear it. In such a case, the secretary could not be forced to testify about the communication. However, a communication between a psychotherapist and a patient on a public elevator occupied by third parties would not be privileged and could be used in court.

Privileged communications are not always absolute. For instance, a criminal defendant may be able to access communications between an accuser and the accuser's doctor if the defendant's interest in the disclosure, in the opinion of the court, outweighs the interest in confidentiality. The court will consider such a request only if the defendant can establish a reasonable probability that important information exists in the communication that will be relevant to the case.

Various jurisdictions may apply the concept of privilege in slightly different ways. For example, some jurisdictions distinguish between the

two parties to a communication, calling one party the keeper or holder of the privilege. Other states regard the privilege as being held, and capable of being asserted, by both parties. Some states, for example, give the **MARITAL COMMUNICATIONS PRIVILEGE** to both parties, allowing either party to avoid testifying and to prevent the other from testifying as to communications made within the privacy of the marital relationship. Other states give the privilege to the testifying spouse. This gives the testifying spouse the power to waive the privilege and testify against the other spouse.

States occasionally change their laws to give the privilege to both parties or to take it from one of the parties. For example, a state may give the privilege to both clergy and communicant. Under such a law, either party to the communication could block its disclosure. In the alternative, a state could give the privilege only to the communicant, in which case the communicant could waive the privilege and obtain testimony from the cleric. These variations reflect the struggle by the courts to balance the need for information to reach a just result against the public policy of encouraging free communication within certain relationships by making these communications privileged.

For federal cases, the law of privileged communications is governed by the state law in which the federal court sits. Within particular jurisdictions, the precise rules regarding privileged communications may be periodically redefined or adjusted as new circumstances are presented. In some states a person's relationships with sexual assault counselors, social workers, and juvenile diversion officers have been given a qualified privilege of confidentiality. In these states the court may hold a private hearing to determine whether the information is necessary to the requesting party's case or defense before ordering disclosure of the information. Many legal advocates have supported the creation of a privilege between parents and offspring, but very few courts and legislatures have recognized such a privilege.

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**CROSS-REFERENCES**

Attorney-Client Privilege; Husband and Wife; Marital Communications Privilege; Physician-Patient Privilege.

## PRIVILEGES AND IMMUNITIES

*Concepts contained in the U.S. Constitution that place the citizens of each state on an equal basis with citizens of other states in respect to advantages resulting from citizenship in those states and citizenship in the United States.*

The Privileges and Immunities Clauses are found in Article IV of the U.S. Constitution and the **FOURTEENTH AMENDMENT**. Both clauses apply only to citizens of the United States. **ALIENS** and corporations are not citizens and, therefore, are not entitled to this protection. These clauses have proven to be of little import because other constitutional provisions have been used to settle controversies. In large part the insignificance of the clauses has been based on restrictive readings of the clauses by the U.S. Supreme Court.

Article IV provides that "The Citizens of each State shall be entitled to all Privileges and Immunities in the several states." The purpose of the clause was to facilitate the unification of the independent states into one nation so that citizens traveling throughout the country would receive the same treatment as the citizens of the states through which they passed.

The privileges and immunities that are protected under Article IV include the right to receive protection from state government; the right to acquire and possess all kinds of property; the right to travel through or reside in any state for purposes of trade, agriculture, or pro-

fessional endeavors; the right to claim the benefit of the writ of HABEAS CORPUS; the right to sue and defend actions in court; and the right to receive the same tax treatment as that of the citizens of the taxing state.

This clause forbids a state from unjustly depriving citizens from other states of any rights derived from state citizenship solely on the basis of nonresidence. Yet the Supreme Court has never interpreted it to preclude all deferential treatment of in-state citizens. As a result, the Privileges and Immunities Clause does not bar differential state standards governing the practice of certain professions. Out-of-state doctors, lawyers, and other professionals may be required to prove their competency based on standards that are higher than those applied to their in-state counterparts. Tuition rates at public COLLEGES AND UNIVERSITIES are typically lower for in-state students. Out-of-state residents are charged more for hunting and fishing licenses than are in-state residents. Such discrepancies are generally accepted as justifiable because they advance legitimate state interests.

The Supreme Court has struck down state laws that infringed rights guaranteed by the Privileges and Immunities Clause of Article IV. In *Hicklin v. Orbeck*, 437 U.S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978), the Court ruled that the state of Alaska failed to show a reasonable purpose for a state law that required employers to give a hiring preference to in-state residents who applied to work on the construction of oil or gas pipelines.

However, the Supreme Court has rarely used the Privileges and Immunities Clause of Article IV to invalidate discriminatory laws. The DUE PROCESS and EQUAL PROTECTION Clauses of the Fourteenth Amendment are commonly applied to determine the validity of state laws that unjustly discriminate between residents and nonresidents of a state.

The Fourteenth Amendment's Privileges and Immunities Clause has virtually no significance in CIVIL RIGHTS law. The clause states, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." This clause protects a person's rights as a citizen of the United States from unreasonable STATE ACTION or interference.

The privileges and immunities of U.S. citizenship that cannot be unreasonably abridged by state laws include the right to travel from state to state; the right to vote for federal officeholders; the right to enter public lands; the right to petition Congress to redress grievances; the right to inform the national government of a violation of its laws; the right to receive protection from violence when in federal custody; the right to have free access to U.S. seaports; the right to transact business with and engage in administering the functions of the U.S. government; the right to have access to federal courts; and the privilege of the writ of habeas corpus.

The Supreme Court has narrowly construed the Privileges and Immunities Clause of the Fourteenth Amendment since the 1873 SLAUGHTER-HOUSE CASES, 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1873). The case involved a Louisiana state law that gave one meat company the exclusive right to slaughter livestock in New Orleans. Other packing companies were required to pay a fee for using the slaughterhouses. These companies filed suit, claiming that the law violated the Privileges and Immunities Clause of the Fourteenth Amendment.

The Court upheld the Louisiana MONOPOLY law, ruling that the Privileges and Immunities Clause had limited effect because it reached only privileges and immunities guaranteed by U.S. citizenship, not state citizenship. Because the law in question dealt with states' rights, the Fourteenth Amendment had no effect. The Court ruled that the Fourteenth Amendment was designed to grant former slaves legal equality, not to grant expanded rights to the general population. In addition, the Court was concerned that a broad interpretation of the Fourteenth Amendment would give too much power to the federal government and distort the concept of FEDERALISM, which grants the states a large measure of power and autonomy.

The Court has consistently followed the restrictive interpretation given the Privileges and Immunities Clause by this decision. The clause has little significance today in invalidating state statutes that present a constitutional question. When state laws infringe the fundamental rights of U.S. citizenship, the Court usually invokes the Equal Protection Clause to analyze the constitutionality of the state action.

However, the Supreme Court has used the Privileges and Immunities Clauses in two recent cases. In *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 118 S.Ct. 766, 139 L.Ed.2d 717 (1998), the Court ruled that a New York tax law that effectively denied only nonresident taxpayers an INCOME TAX deduction for ALIMONY

paid violated the Privileges and Immunities Clause. In *Saenz v. Doe*, 526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999), the Court struck down a California law that limited new residents to the WELFARE benefits they would have received in the state of their prior residence. It based its decision in part on the Privileges and Immunities Clause. Justice JOHN PAUL STEVENS stated that the right to travel is protected "not only by the new arrival's status as a state citizen, but also by her status as citizen of the United States." The Privileges and Immunities Clause guaranteed the right of a citizen to "become a citizen of any State of the Union." It did not permit the states to "select their citizens."

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CROSS-REFERENCES

Equal Protection.

## PRIVITY

*A close, direct, or successive relationship; having a mutual interest or right.*

Privity refers to a connection or bond between parties to a particular transaction. *Privity of contract* is the relationship that exists between two or more parties to an agreement. *Privity of estate* exists between a lessor and a lessee, and *privity of possession* is the relationship between parties in successive possession of real property.

## PRIVY

*One who has a direct, successive relationship to another individual; a coparticipant; one who has an interest in a matter; private.*

Privy refers to a person in privity with another—that is, someone involved in a particular transaction that results in a union, connection, or direct relationship with another. *Privies in blood* are the heirs of an ancestor. *Privies in estate* are people who succeed or receive an assignment of property, such as a grantor and a grantee, lessor and lessee, or assignor and assignee.

## PRIVY COUNCIL

The Privy Council is the British Crown's private council. It is composed of more than three hundred members, including cabinet members, distinguished scholars, judges, and legislators. Once a powerful body, it has lost most of the judicial and political functions it exercised since the middle of the seventeenth century and has largely been replaced by the Cabinet.

The Privy Council derived from the King's Council, which was created during the Middle Ages. In 1540 the Privy Council came into being as a small executive committee that advised the king and administered the government. It advised the sovereign on affairs of state and the exercise of the royal prerogative. It implemented its power through royal proclamations, orders, instructions, and informal letters, and also by giving directions to and receiving reports from the judges who traveled the circuits, hearing cases in cities and towns, twice a year. It concerned itself with public order and security, the economy, public works, public authorities and corporations, local government, Ireland, the Channel Islands, the colonies, and foreign affairs.

The inner circle of advisers in the Privy Council met in the royal chamber or cabinet and was therefore called the cabinet council. In the eighteenth century, the cabinet became the council for the prime minister, the leader of Parliament. The United States adopted the cabinet idea, though its legal status is not identified in the Constitution. Cabinet members are presidential advisers who serve as EXECUTIVE BRANCH department heads.

The power of the Privy Council disappeared between 1645 and 1660 during the English Civil War and the government of Oliver Cromwell. It never recovered its former position. Long policy debates shifted to Parliament, and important executive decisions went to committees. In modern days members of the Privy Council rarely meet as a group, delegating their work to committees.

The lord president of the council, who is a member of the cabinet, is the director of the Privy Council Office. The most important committee is the Judicial Committee of the Privy Council, which comprises all members of the council who have held high judicial office. Usually, however, three to five Lords of Appeal sit to hear appeals from the United Kingdom, the British Crown colonies, and members of the

Commonwealth. The committee does not give a judgment but prepares a report to the sovereign, and its decision may be implemented in an Order in Council. The work of the committee has diminished because it rarely hears ecclesiastical appeals and because many Commonwealth countries have abolished the right of appeal.

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CROSS-REFERENCES

Curia Regis.

## PRIZE

*Anything offered as a reward for a contest. It is distinguished from a* bet *or* wager *in that it is known before the event who is to give either the premium or the prize, and there is but one operation until the accomplishment of the act, thing, or purpose for which it is offered. In time of war, an enemy vessel or a ship captured at sea by a belligerent power.*

The fair market value of a prize or award is generally includible in gross income. Certain exceptions are provided where the prize or award is made in recognition of religious, charitable, scientific, educational, artistic, literary, or civic achievement providing certain other requirements are met.

*Joe and Sue Kainz display a lottery prize check in the amount of $181.5 million. Lottery winners do not receive the full amount of their prizes, because such money is taxed as income.*

REUTERS NEWMEDIA INC./CORBIS

## PRIZE COURTS

*Tribunals with jurisdiction to decide disputes involving captures made upon the high seas during times of war and to declare the captured property as a prize if it is lawfully subject to that sentence.*

In England, ADMIRALTY courts possess jurisdiction as prize courts, in addition to their customary admiralty jurisdiction. The judge of an admiralty court receives a special commission in time of war to empower him or her to conduct such proceedings.

In the United States, federal district courts have original jurisdiction to try prize cases.

CROSS-REFERENCES

Admiralty and Maritime Law.

## PRIZE LAW

*During times of war, belligerent states may attempt to interfere with maritime commerce to prevent ships from carrying goods that will aid the war effort of an opponent. After ships are captured and brought to a friendly port, a local tribunal called a* PRIZE COURT *will determine the legality of the seizure, or the destruction of the vessel and cargo if the vessel cannot be sailed to a friendly port. The body of customary* INTERNATIONAL LAW *and treaties that determines the appropriateness of such actions is referred to as prize law.*

Prize law has not been completely consistent in its development because the tribunals that rule on the seizure of the vessel are national tribunals and may reflect the interests of the belligerent state in interdicting the enemy war effort. The expanding scope of warfare and the concept of total war have also blurred the distinction between vessels subject to capture as a prize of war and those that are exempt. Some basic rules remain, however. All vessels of an enemy state are subject to seizure at any time by an opposing belligerent. Warships may be sunk immediately, and private merchant vessels are to be taken to a friendly port, if possible, for adjudication by a prize court. A neutral vessel on the high seas or in a belligerent's territorial sea may be stopped and searched, if it is suspected of carrying contraband, and may be condemned as a prize of war if any is found. Finally the right of coastal fishing vessels of any state to be free from seizure while plying their trade is almost universally recognized.

CROSS-REFERENCES

Admiralty and Maritime Law.

## PRO

[Latin, For; in respect of; on account of; in behalf of.]

## PRO BONO

*Short for* pro bono publico *[*Latin, For the public good*]. The designation given to the free legal work done by an attorney for indigent clients and religious, charitable, and other nonprofit entities.*

As members of a profession, lawyers are bound by their ethical rules to charge reasonable rates for their services and to serve the public interest by providing free legal service to indigent persons or to religious, charitable, or other nonprofit groups. A lawyer's free legal service to these types of clients is designated as pro bono service.

Lawyers have always donated a portion of their time to pro bono work, but in the United States the demand for legal services from people who cannot afford to hire an attorney has grown since the 1960s. Lawyers previously donated time on an ad hoc basis. The establishment of legal aid organizations to serve indigent persons in the 1960s changed the way attorneys obtained pro bono work. Legal aid attorneys, who were unable to satisfy all the legal needs of poor people, created programs to recruit private attorneys willing to donate some of their time. These programs recruit attorneys and then train them to handle common types of cases.

The AMERICAN BAR ASSOCIATION (ABA) has become a national leader in the effort to enhance pro bono legal services. The ABA Center for Pro Bono assists ABA members and the legal community in developing and supporting effective pro bono legal services in civil matters as part of the profession's effort to ensure access to LEGAL REPRESENTATION and the justice system. The center helps create, design, and implement pro bono programs. It sponsors an annual conference for bar leaders, pro bono program managers, legal service staff, and others involved in the delivery of pro bono legal services to poor people.

State and local bar associations also assist in the creation and maintenance of pro bono programs. Despite these efforts, the need for legal services outstrips the pro bono services provided. State court systems have explored ways to get more lawyers involved in donating their time and skills. In Minnesota, for example, the Rules of Professional Conduct for lawyers state, "A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year" (rule 6.1).

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## PRO FORMA

*As a matter of form or for the sake of form. Used to describe accounting, financial, and other statements or conclusions based upon assumed or anticipated facts.*

The phrase *pro forma,* in an appealable decree or judgment, usually means that the decision was rendered not on a conviction that it was right, but merely to facilitate further proceedings.

## PRO HAC VICE

*For this turn; for this one particular occasion. For example, an out-of-state lawyer may be admitted to practice in a local jurisdiction for a particular case only.*

## PRO RATA

*[*Latin, Proportionately.*] A phrase that describes a division made according to a certain rate, percentage, or share.*

In a BANKRUPTCY case, when the debtor is insolvent, creditors generally agree to accept a *pro rata share* of what is owed to them. If the debtor has any remaining funds, the money is divided proportionately among the creditors, according to the amount of the individual debts.

A *pro rata clause* in an automobile insurance policy provides that when an insured person has other insurance policies covering the same type of risk, the company issuing the policy with the pro rata clause will be liable only for a proportion of the loss represented by the ratio between its policy limit and the total limits of all the available insurance.

## PRO SE

*For one's own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself or herself in court.*

## PRO TANTO

*[*Latin, For so much; for as much as one is able; as far as it can go.*] A term that refers to a partial payment made on a claim.*

In an EMINENT DOMAIN case, *pro tanto* describes the partial payment made by the gov-

ernment for the taking of land. This payment is given WITHOUT PREJUDICE, and the petitioner can maintain an action for the full amount of the land.

A *pro tanto defense* is a defendant's counterclaim against the plaintiff for one-half the requested damages.

## PRO TEM

*[*Latin, For the time being.*] An abbreviation used for* pro tempore, *Latin for "temporary or provisional."*

A person who acts as a temporary substitute serves *pro tem*. The term is often used to describe the acting head of a governing body, such as the president *pro tem* of the Senate, who presides over the Senate when the vice president is unable to do so.

## PROBABLE CAUSE

*Apparent facts discovered through logical inquiry that would lead a reasonably intelligent and prudent person to believe that an accused person has committed a crime, thereby warranting his or her prosecution, or that a* CAUSE OF ACTION *has accrued, justifying a civil lawsuit.*

Probable cause is a level of reasonable belief, based on facts that can be articulated, that is required to sue a person in civil court or to arrest and prosecute a person in criminal court. Before a person can be sued or arrested and prosecuted, the civil plaintiff or police and prosecutor must possess enough facts that would lead a reasonable person to believe that the claim or charge is true.

The probable cause standard is more important in CRIMINAL LAW than it is in CIVIL LAW because it is used in criminal law as a basis for searching and arresting persons and depriving them of their liberty. Civil cases can deprive a person of property, but they cannot deprive a person of liberty. In civil court a plaintiff must possess probable cause to levy a claim against a defendant. If the plaintiff does not have probable cause for the claim, she may later face a MALICIOUS PROSECUTION suit brought by the defendant. Furthermore, lack of probable cause to support a claim means that the plaintiff does not have sufficient evidence to support the claim, and the court will likely dismiss it.

In the criminal arena probable cause is important in two respects. First, police must possess probable cause before they may search a person or a person's property, and they must possess it before they may arrest a person. Second, in most criminal cases the court must find that probable cause exists to believe that the defendant committed the crime before the defendant may be prosecuted.

There are some exceptions to these general rules. Police may briefly detain and conduct a limited search of a person in a public place if they have a reasonable suspicion that the person has committed a crime. Reasonable suspicion is a level of belief that is less than probable cause. A police officer possesses reasonable suspicion if he has enough knowledge to lead a reasonably cautious person to believe that criminal activity is occurring and that the individual played some part in it. In practice this requirement means that an officer need not possess the measure of knowledge that constitutes probable cause to STOP AND FRISK a person in a public place. In any case, an officer may not arrest a person until the officer possesses probable cause to believe that the person has committed a crime.

The requirement of probable cause for a SEARCH AND SEIZURE can be found in the FOURTH AMENDMENT to the U.S. Constitution, which states,

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

All states have similar constitutional prohibitions against unreasonable searches and seizures.

The requirement of probable cause works in tandem with the warrant requirement. A warrant is a document that allows police to search a person, search a person's property, or arrest a person. A judicial magistrate or judge must approve and sign a warrant before officers may act on it. To obtain a search or arrest warrant, officers must present to the magistrate or judge enough facts to constitute probable cause. A warrant is not required for all searches and all arrests. Courts have carved out exceptions that allow police to search and arrest persons without a warrant when obtaining a warrant would be impractical.

The precise amount of evidence that constitutes probable cause depends on the circumstances in the case. To illustrate, assume that a police officer has stopped a motor vehicle driver

for a traffic violation. In the absence of any other facts indicating criminal activity by the driver, it would be a violation of the Fourth Amendment if the officer conducted a full-blown search of the driver and the vehicle. The mere commission of a traffic violation is not, in and of itself, a fact that supports probable cause to believe that the driver has committed a crime. However, if the officer notices that the driver's eyes are bloodshot or that the driver smells of alcohol, the officer may detain and question the defendant, search him, and place him under arrest. Most courts hold that a driver's commission of a traffic violation combined with the appearance that the driver has used drugs or alcohol constitute sufficient evidence to lead a reasonable person to believe that the person is driving under the influence of drugs or alcohol.

Probable cause is not equal to absolute certainty. That is, a police officer does not have to be absolutely certain that criminal activity is taking place to perform a search or make an arrest. Probable cause can exist even when there is some doubt as to the person's guilt. Courts take care to review the actions of police in the context of everyday life, BALANCING the interests of law enforcement against the interests of personal liberty in determining whether probable cause existed for a search or arrest.

Legislatures may maintain statutes relating to probable cause. Many such statutes declare that a certain thing constitutes probable cause to believe that a person has committed a particular offense. For example, under federal law, a FORFEITURE judgment of a foreign court automatically constitutes probable cause to believe that the forfeited property also is subject to forfeiture under the federal RACKETEERING law (18 U.S.C.A. § 981(i)(3) [1986]).

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CROSS-REFERENCES

Automobile Searches; Criminal Procedure.

## PROBATE

*The court process by which a* WILL *is proved valid or invalid. The legal process wherein the estate of a decedent is administered.*

When a person dies, his or her estate must go through probate, which is a process overseen by a probate court. If the decedent leaves a will directing how his or her property should be distributed after death, the probate court must determine if it should be admitted to probate and given legal effect. If the decedent dies intestate—without leaving a will—the court appoints a PERSONAL REPRESENTATIVE to distribute the decedent's property according to the laws of DESCENT AND DISTRIBUTION. These laws direct the distribution of assets based on hereditary succession.

In general, the probate process involves collecting the decedent's assets, liquidating liabilities, paying necessary taxes, and distributing property to heirs. Probate procedures are governed by state law and have been the subject of debate and reform since the 1960s. The UNIFORM PROBATE CODE (UPC) was first proposed in 1969 by the National Conference of Commissioners on Uniform State Laws and the House of Delegates of the AMERICAN BAR ASSOCIATION. The prime focus of the UPC is to simplify the probate process. The UPC, which has been amended numerous times, has been adopted in its entirety by 16 states: Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah. The other 36 states have adopted some part of the UPC but still retain distinct procedures.

### Probate of a Will

The probate of a will means proving its genuineness in probate court. Unless otherwise provided by statute, a will must be admitted to probate before a court will allow the distribution of a decedent's property to the heirs according to its terms.

As a general rule, a will has no legal effect until it is probated. A will should be probated immediately, and no one has the right to suppress it. The person with possession of a will, usually the personal representative or the decedent's attorney, must produce it. Statutes impose penalties for concealing or destroying a will or for failing to produce it within a specified time.

Probate proceedings are usually held in the state in which the decedent had domicile or permanent residence at the time of death. If, however, the decedent owned real property in a another state, the will disposing of these assets must also be probated in that state.

To qualify as a will in probate, an instrument must be of testamentary character and comply with all statutory requirements. A document is testamentary when it does not take effect until after the death of the person making it and allows the individual to retain the property under personal control during her or his lifetime. A will that has been properly executed by a competent person—the testator—as required by law is entitled to be probated, even if some of its provisions are invalid, obscure, or cannot be implemented.

A will made as a result of FRAUD or UNDUE INFLUENCE or a will that has been altered so that all its provisions are revoked will be denied probate. If the alteration only revokes certain provisions of the will, the remaining provisions can be admitted to probate.

All separate papers, instruments, or sheets comprising the most recent of a testator's wills will be admitted to probate. Where a later will does not explicitly revoke all prior wills, two separate and distinct wills can be probated. Probate courts seek to carry out the declared intention of a testator regarding the disposition of property, and they resort to distributing property according to the law of descent and distribution only where no reasonable alternatives exist.

As a general rule, the original document must be presented for probate. Probate of a copy or duplicate of a will is not permitted unless the absence of the original is satisfactorily explained to the court. If a properly proved copy or duplicate of a will that has been lost or destroyed is presented to the court, it may be admitted to probate. Some states have special proceedings to handle such occurrences. A thorough and diligent search for the will is necessary before a copy can be probated as a lost will.

A codicil, which is a supplement to a will, is entitled to be probated together with the will it modifies, if it is properly executed according to statute. If it is complete in itself and can stand as a separate testamentary instrument independent of the will, the codicil alone can be admitted to probate. A codicil that has been subsequently revoked by another codicil is not entitled to probate.

A will made in a foreign language will be admitted to probate if the testator understood what it contained and it otherwise complies with other statutory requirements. A translation usually must accompany the will.

### Proceedings

A probate proceeding may involve either formal or informal procedures. Traditionally, probate proceedings were governed by formal procedures that required the probate court to hold hearings and issue orders involving routine matters. Consequently, the legal costs of probating an estate could be substantial. States that have adopted the UPC provisions on probate procedures allow informal probate proceedings that remove the probate court from most stages of the process, with the result that informal probate is cheaper and quicker than formal probate. Most small estates benefit from an informal probate proceeding.

The probate process begins when the personal representative files with the clerk of the probate court a copy of the death certificate along with the will and a petition to admit the will to probate and to grant letters testamentary, which authorize him or her to distribute the estate. Although the personal representative usually files the probate petition, it can be filed by any person who has a pecuniary interest in the will. In states governed by the UPC, the personal representative must elect whether to proceed with formal or informal probate at the time of filing. However, a probate proceeding may be switched from informal to formal during the course of administration, if issues so warrant.

In a formal probate proceeding, a hearing must be held to establish the death of the testator, the residency of the decedent, the genuineness of the will, its conformance with statutory requirements for its execution, and the competency of the testator at the time the will was made. These requirements are usually fulfilled by the attesting witnesses who were present at the time the will was made and who certify that it was properly executed. The number of attesting witnesses is prescribed by law. If fewer than the required number witness a will, it will be declared void, and the testator's property will pass according to the laws of descent and distribution.

When some or all of the witnesses to a will are unavailable, special steps are taken. If the required witnesses have died before the testator, the person offering the will must offer proof of death, in addition to evidence of the genuineness of the signatures and any other proof of execution available. The UPC simplifies witness issues by permitting the admission of "self-authenticating" wills. These wills contain a state-

*A sample order denying probate*

**Order Denying Probate**

**PROBATE COURT OF HAMILTON COUNTY, OHIO**
**JAMES CISSELL, JUDGE**

**ESTATE OF_____, DECEASED**

**CASE NO. _____**

**INTERLOCUTORY ORDER DENYING PROBATE OF WILL AND ENTRY SETTING REHEARING FOR ADMISSION TO PROBATE**

The Court hereby finds that the will submitted for admission to probate in the within case does not comply with the requirements R.C. 2107.03.

Pursuant to and in accordance with R.C. 2107.181, the Court hereby issues an interlocutory order denying the admission to probate of said instrument. This matter shall be set for further hearing before Judge James Cissell, no less than ten days hence on _____ _____, _____, at _____.M. Room 101, 50 William Howard Taft Center, 230 E. 9th Street Cincinnati, Ohio, so that the testimony of the witnesses may be obtained. The Court orders that notice be given to all interested parties as set forth in R.C. 2107.181

_____
Magistrate

_____
James Cissell, Probate Judge

H.C. FORM 102.30 - INTERLOCUTORY ORDER DENYING PROBATE OF WILL 02/10/03

ment signed by the witnesses that attests to the competency of the testator and other statutory requirements. Self-authentication relieves the witnesses of the burden of appearing in court and the personal representative of costly procedures if the witnesses are unavailable.

If no one objects to the will at the hearing, it will be admitted to probate.

Informal probate proceedings generally do not require a hearing. The personal representative files the death certificate and will, along with a petition to admit the will under informal probate. The clerk of probate court reviews the submissions and recommends to the court that the will be probated. Once the court issues the order for informal probate, the personal representative files a series of forms that demonstrate that notice has been given to all interested parties about the probate, the decedent's creditors have been paid, and the estate's assets have been collected, appraised, and distributed to the designated heirs.

### Contested Probate Proceedings

The probate of a will can be opposed or contested on the ground that the instrument is void because of the testamentary incapacity of the testator at the time the will was made, the failure to comply with the formalities required by law, or any matter sufficient to show the nonexistence of a valid will. When a will is contested, formal proceedings are required.

Will contests are concerned only with external validity, such as failure of due execution, fraud, mistake, undue influence, lack of testamentary capacity, or lack of intent that the instrument be a will. Issues of internal validity, such as violation of the RULE AGAINST PERPETUITIES, must be raised in proceedings at a later stage of administration. Although a will has been probated as a genuine expression of the testator's intended distribution of property upon her or his death, the estate might be disposed of according to the laws of descent and distribution if the testamentary provisions violate the law.

Only a person having some interest that will be affected by the probate can contest it. Such persons include next of kin who will receive property if the will is set aside and intestacy results, purchasers of property from the heir or heirs, administrators or personal representatives under prior wills, and the state, if there is a possibility of ESCHEAT, which means that the government will receive the property if no living heirs can be found. Creditors, however, generally are not entitled to contest the will of a debtor.

A personal representative must defend the will against attack and must employ his or her best efforts to have it sustained if he or she reasonably believes that the will is valid.

Methods by which a will can be contested generally include a contest in the court having jurisdiction over probate, an appeal from the order granting or denying probate, and separate actions to set aside the order granting or denying probate.

There is no constitutional right to trial by jury in probate or will contest proceedings. Most states, however, have statutes making a trial by jury available in a will contest. Statutes usually impose time limits on the institution of will contests.

### Agreement not to Contest

A testator can enter into a contract with her or his heirs in which they agree not to contest a will. If the contract is supported by consideration—something of value—and the agreement is otherwise valid, the heirs will be prevented from contesting the will. The beneficiaries under a will and the heirs can enter into a valid contract not to contest a will. States vary as to the remedies a party to an agreement not to contest a will has upon breach. These include an INJUNCTION against the prosecution of the contest, an action at law for damages, or a defense to the contest.

An agreement among heirs and beneficiaries not to contest a will is a way to avoid a costly will contest proceeding. The heirs and beneficiaries negotiate a settlement that may defeat the intention of the testator in how the assets are distributed. A settlement will be valid if all interested parties agree, but it must not exclude anyone entitled to property under the will. Under some statutes the compromise or settlement must be submitted to the probate court for approval.

### Guardianship of Minor Children

Wills often contain instructions on who should be appointed legal guardian of the decedent's minor children. The probate court may investigate the qualifications of the proposed guardian before granting an order of appointment. When a will does not contain a guardianship provision, the court itself must determine, based on the best interests of the children, who should be appointed guardian.

### Right of Review

A right of appeal from a probate decree is given to any person who would suffer a direct financial loss as a result of the decree. The appellate court is restricted to a consideration of the questions presented to and determined by the lower court. An issue not presented to the probate court usually will not be considered.

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CROSS-REFERENCES

Estate and Gift Taxes; Testamentary.

## PROBATE COURT

See COURT OF PROBATE.

## PROBATION

*A sentence whereby a convict is released from confinement but is still under court supervision; a testing or a trial period. Probation can be given in lieu of a prison term or can suspend a prison sentence if the convict has consistently demonstrated good behavior.*

*The status of a convicted person who is given some freedom on the condition that for a specified period he or she act in a manner approved by a special officer to whom the person must report.*

*An initial period of employment during which a new, transferred, or promoted employee must show the ability to perform the required duties.*

Probation is the period during which a person, "the probationer," is subject to critical examination and evaluation. The word *probation* is derived from *probatum,* Latin for "the act of proving." Probation is a trial period that must be completed before a person receives greater benefits or freedom.

In the criminal justice system probation is a particular type of sentence for criminal defendants. The judicial authority to order a sentence of probation is granted in statutes on the federal and state levels. Generally, probation allows a convicted defendant to go free with a suspended sentence for a specified duration during good behavior. Probationers are placed under the supervision of a probation officer and must fulfill certain conditions. If the probationer violates a condition of probation, the court may place additional restrictions on the probationer or order the probationer to serve a term of imprisonment.

A judge also may order probation in addition to a period of incarceration. For example, a sentence might consist of a jail term and, after release, probation for a specified period of months or years. Probation is generally reserved for persons sentenced to short terms in jail: it is not combined with a long prison sentence. If a person is subjected to supervision after a stay in prison, the supervision is conducted by a PAROLE officer.

Both probation and parole involve the supervision of convicted criminals, but the systems are distinct. Probation is ordered by a judge; parole is granted by a parole board. Probation is an alternative to prison; parole is the early release from prison. Probation is reserved for persons convicted of less serious offenses; parole is given to persons convicted of serious offenses.

The concept of probation in the CRIMINAL LAW was inspired in the mid-nineteenth century by JOHN AUGUSTUS, a resident of Boston. Augustus encountered a man about to be sentenced in a Boston court and believed him to be capable of reform. Augustus posted bail for the man and succeeded in getting his sentence reduced. From 1841 to 1859 Massachusetts judges released approximately 2000 offenders into Augustus's custody instead of ordering incarceration.

In 1878 Massachusetts enacted the first probation statute, and Boston hired its first probation officer. In 1880 the Massachusetts legislature approved the first statewide hiring of probation officers. By 1925 all states had laws governing probation for juveniles, and by 1939 approximately 39 states were maintaining laws on probation for adults. By 1967 adult probation was allowed by statute in all states.

Probation statutes generally identify the crimes available for a sentence of probation, or,

conversely, they identify crimes for which probation may not be ordered. In Alaska, for example, a court may not order probation if the person has been convicted of sexual assault or if the person's conviction is his second assault or ROBBERY offense within the previous ten years (Alaska Stat. § 12.55.085 [1965]).

Statutes may also identify conditions of probation. These are actions that a probationer must do or refrain from doing during probation. Though conditions may be spelled out in statutes, a sentencing judge retains wide discretion to fashion conditions according to the best interests of both the public and the defendant. In most states a probationer must not possess a firearm, commit another offense, or possess illegal drugs during the probation period. Probationers must also report regularly to a probation officer.

A judge may place additional conditions on a probationer. For example, if a defendant pleads guilty to assault, the court may order him to stay a specified distance away from the victim of the assault. In a conviction for a small amount of marijuana a judge may order the defendant to complete treatment for drug use. If a probationer violates any condition of probation, the court may order additional conditions or impose a prison sentence that does not exceed the maximum term of imprisonment that could have been imposed for the crime.

Judges in state court generally have wide discretion in sentencing. In determining whether to sentence a defendant to probation, the court may consider a variety of factors, including the nature and circumstances of the offense and the defendant's criminal history.

Probation became a sentencing option for federal judges with the 1925 passage of the Federal Probation Act (18 U.S.C.A. § 3651). This act authorized federal courts to suspend imposition of a sentence, or the execution of a sentence, in favor of probation. A defendant could be placed on up to five years' probation "upon such terms and conditions as the court deemed best" when the court was satisfied that "the ends of justice and the best interest of the public as well as the defendant [would] be served thereby."

Probation as a criminal sentence was the product of a reform movement in the criminal justice system in the early twentieth century. Part of this movement was devoted to ABOLITION of determinate sentencing or the legislative imposition of specific sentences for specific crimes. The reform movement fought for indeterminate sentencing, a method that left sentencing to the discretion of the judge and allowed the judge to fashion a sentence according to the rehabilitative needs of the criminal defendant.

Congress reversed indeterminate sentencing in federal court with the Sentencing Reform Act of 1984 (18 U.S.C.A. §§ 3551–3556). The act replaced the Federal Probation Act and established sentencing guidelines for federal judges, allowing a judge to order probation only if the offense calls for a term of imprisonment of six months or less. The act lists offenses for which revocation of probation and imposition of imprisonment are mandatory.

The Sentencing Act also changed the role of federal probation officers in the federal criminal justice system. Under the act, probation officers must gather and present evidence on facts relevant to the sentencing guidelines. This is a shift in the focus of probation officers' work. Probation officers once worked to ensure that the sentence fit the individual offender, but subsequently they endeavored to ensure that the defendant's sentence fits the offenses charged. In other words, the probation officer became less like a social worker intent on the rehabilitation of the probationer and more like an informant for the court against the probationer.

Revocation of probation in federal court in conjunction with the federal sentencing guidelines has led to confusion over the application of probation. In *United States v. Granderson,* 511 U.S. 39, 114 S. Ct. 1259, 127 L. Ed. 2d 611 (1994), Ralph Stuart Granderson Jr. was convicted of destruction of mail and sentenced to five years' probation and a fine. While on probation, Granderson tested positive for cocaine. Under 18 U.S.C.A. § 3565(a) (1984), the court was required to revoke Granderson's probation "and sentence [him] to not less than one-third of the original sentence."

At the revocation hearing the government argued that this requirement meant a term of imprisonment not less than one-third the probationary period originally ordered by the court. The court agreed and resentenced Granderson to 60 months in prison. Under the federal sentencing guidelines, Granderson could have been initially sentenced to a term of imprisonment between zero and six months.

Granderson appealed, arguing that "original sentence" did not mean a term of imprisonment equal to the length of the probationary

sentence imposed but instead referred to the prison sentence that the judge initially could have ordered. The U.S. Court of Appeals for the Eleventh Circuit agreed and vacated Granderson's sentence and ordered his release from prison. According to the court of appeals, it was "legal alchemy" to convert a long-term sentence of conditional liberty into an equally long term of imprisonment (*United States v. Granderson,* 969 F.2d 980 [11th Cir. 1992]). The federal government appealed to the U.S. Supreme Court, which affirmed the ruling.

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CROSS-REFERENCES

Parole; Presentence Investigation.

## PROBATIONER

*A convict who is released from prison provided he maintains good behavior. One who is on* **PROBATION** *whereby she is given some freedom to reenter society subject to the condition that for a specified period the individual conduct herself in a manner approved by a special officer to whom the probationer must report.*

## PROBATIVE

*Having the effect of proof, tending to prove, or actually proving.*

When a legal controversy goes to trial, the parties seek to prove their cases by the introduction of evidence. All courts are governed by **RULES OF EVIDENCE** that describe what types of evidence are admissible. One key element for the admission of evidence is whether it proves or helps prove a fact or issue. If so, the evidence is deemed probative. Probative evidence establishes or contributes to proof.

Probative facts are data that have the effect of proving an issue or other information. Probative facts establish the existence of other facts. They are matters of evidence that make the existence of something more probable or less probable than it would be without them. They are admissible as evidence and aid the court in the final resolution of a disputed issue. For example, in the case of a motor vehicle accident, a witness's testimony that she saw one automobile enter the intersection on a red light is a probative fact about whether the driver was at fault.

Evidence has probative value if it tends to prove an issue. However, probative value may refer to whether the evidence is admissible. Rules of evidence generally state that relevant evidence, which tends to prove or disprove an alleged fact, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. A trial court must use a **BALANCING** test to make this determination, but rules of evidence generally require that relevant evidence with probative value be excluded only if it is substantially outweighed by one of the dangers described in the rule.

## PROCEDURAL LAW

*The body of law that prescribes formal steps to be taken in enforcing legal rights.*

Legal rights themselves are created and defined by **SUBSTANTIVE LAW**. Different rules generally govern **CIVIL PROCEDURE** and **CRIMINAL PROCEDURE**, or the procedure followed in trials and in appeals. Federal Rules of Civil Procedure regulate actions in federal courts. Procedural law is made up of state or federal statutes, rules promulgated by individual courts, and standards established by **CONSTITUTIONAL LAW**, particularly provisions ensuring the **DUE PROCESS OF LAW**.

Procedural law is often called adjective law by legal writers.

CROSS-REFERENCES

Civil Procedure.

## PROCEDURE

*The methods by which legal rights are enforced; the specific machinery for carrying on a lawsuit, including process, the pleadings,* RULES OF EVIDENCE, *and rules of* CIVIL PROCEDURE *or* CRIMINAL PROCEDURE.

The form, manner, and order of steps taken in conducting a lawsuit are all regulated by procedural law, which regulates how the law will be administered. SUBSTANTIVE LAW creates and defines rights that exist under the law.

CROSS-REFERENCES

Civil Procedure.

## PROCEEDING

*A lawsuit; all or some part of a cause heard and determined by a court, an* ADMINISTRATIVE AGENCY, *or other judicial authority. Any legal step or action taken at the direction of, or by the authority of, a court or agency; any measures necessary to prosecute or defend an action.*

The word *proceeding* may be used for all actions or it may be used for something other than the usual type of lawsuit. For example, a special proceeding may be a particular procedure for handling a certain type of dispute. Special proceedings may be commenced by a petition or motion even when no full-fledged lawsuit is pending. They usually are confined to disputes that were not recognized under the COMMON LAW or in EQUITY. For example, a proceeding to challenge decisions made by administrative agencies may be a special proceeding.

A summary proceeding is governed by accelerated methods that produce a quick decision. This is done by elimination of a jury, a presentment, or indictment, or other elements that are allowed in regular proceedings. Summary proceedings are available only for certain types of cases, such as small claims, or in certain courts, such as a conciliation or SMALL CLAIMS COURT.

Supplementary proceedings are separate from the original action. They help a successful party collect what is owed on a judgment by summoning the defendant-debtor, requiring that individual to disclose what he or she owns, and ordering that it be delivered in order to satisfy the judgment.

## PROCEEDS

*The yield, income, money, or anything of value produced from a sale of property or a particular transaction.*

Proceeds refers to whatever is received when an item is sold or to that which results or accrues from some possession or transaction. Proceeds are classified into cash and noncash categories.

## PROCESS

*A series of actions, motions, or occurrences; a method, mode, or operation, whereby a result or effect is produced; normal or actual course of procedure; regular proceeding, as, the process of vegetation or decomposition; a chemical process; processes of nature.*

*In patent law, an art or method by which any particular result is produced. A definite combination of new or old elements, ingredients, operations, ways, or means to produce a new, improved, or old result, and any substantial change therein by omission, to the same or better result, or by modification or substitution, with different function, to the same or better result, is a new and patentable process.*

*In civil and criminal proceedings, any means used by a court to acquire or exercise its jurisdiction over a person or over specific property. A summons or summons and complaint; sometimes, a writ.*

CROSS-REFERENCES

Service of Process.

## PROCESS SERVER

*A person authorized by law to deliver papers, typically the complaint, to the defendant.*

CROSS-REFERENCES

Service of Process.

## PROCHEIN AMI

See NEXT FRIEND.

## PROCLAMATION

*An act that formally declares to the general public that the government has acted in a particular way. A written or printed document issued by a superior government executive, such as the president or governor, which sets out such a declaration by the government.*

## PROCTOR

*A person appointed to manage the affairs of another or to represent another in a judgment.*

*In* ENGLISH LAW, *the name formerly given to practitioners in ecclesiastical and* ADMIRALTY *courts who performed duties similar to those of solicitors in ordinary courts.*

In old English law, a proctor was an attorney who practiced in the ecclesiastical and admiralty courts. Proctors, also known as procurators, served a similar function as solicitors in the ordinary courts of England. The title of proctor was merged with that of solicitor in 1873, but it is sometimes used in the United States to designate practitioners in probate and admiralty courts.

The use of proctors and procurators was an important step in English law because it signified the acceptance of LEGAL REPRESENTATION. Procuration allowed one person to give power to another to act in his behalf. The proctor became the agent of the client, legally entitled to perform all actions that the client could have performed.

A "procuracy" was the writing or instrument that authorized a proctor or procurator to act. The document called a "power of attorney," which authorizes an attorney or agent to represent a person's interests, is based on this relationship. A POWER OF ATTORNEY may be general, giving the agent blanket authority to perform all necessary acts for the person, or specific, limiting the agent to certain actions.

The term *procuracy* was shortened to *proxy,* which has gained a more specific meaning. A proxy is a person who is substituted or designated by another to represent her, usually in a meeting or before a public body. Shareholders in a corporation commonly use a written proxy to give someone else the right to vote their shares at a shareholders' meeting.

## PROCURE

*To cause something to happen; to find and obtain something or someone.*

Procure refers to commencing a proceeding; bringing about a result; persuading, inducing, or causing a person to do a particular act; obtaining possession or control over an item; or making a person available for sexual intercourse.

## PRODUCE

*As a noun, the product of natural growth, labor, or capital. Articles produced or grown from or on the soil, or found in the soil.*

*As a verb, to bring forward; to show or exhibit; to bring into view or notice; as, to present a play, including its presentation in motion pictures. To produce witnesses or documents at trial in obedience to a subpoena or to be compelled to produce materials subject to discovery rules.*

*To make, originate, or yield, as gasoline. To bring to the surface, as oil. To yield, as revenue. Thus, funds are* produced *by taxation, not when the tax is levied, but when the sums are collected.*

## PRODUCING CAUSE

See PROXIMATE CAUSE.

## PRODUCT LIABILITY

*The responsibility of a manufacturer or vendor of goods to compensate for injury caused by defective merchandise that it has provided for sale.*

When individuals are harmed by an unsafe product, they may have a CAUSE OF ACTION against the persons who designed, manufactured, sold, or furnished that product. In the United States, some consumers have hailed the rapid growth of product liability litigation as an effective tool for CONSUMER PROTECTION. The law has changed from caveat emptor ("let the buyer beware") to STRICT LIABILITY for manufacturing defects that make a product unreasonably dangerous. Manufacturers and others who distribute and sell goods argue that product liability verdicts have enriched plaintiffs' attorneys and added to the cost of goods sold. Businesses have sought TORT reform from state legislatures and Congress in hopes of reducing damage awards that sometimes reach millions of dollars.

### Theories of Liability

In most jurisdictions, a plaintiff's cause of action may be based on one or more of four different theories: NEGLIGENCE, breach of WARRANTY, MISREPRESENTATION, and strict tort liability.

Negligence refers to the absence of, or failure to exercise, proper or ordinary care. It means that an individual who had a legal obligation either omitted to do what should have been done or did something that should not have been done.

A manufacturer can be held liable for negligence if lack of reasonable care in the production, design, or assembly of the manufacturer's product caused harm. For example, a manufacturing company might be found negligent if its

employees did not perform their work properly or if management sanctioned improper procedures and an unsafe product was made.

Breach of warranty refers to the failure of a seller to fulfill the terms of a promise, claim, or representation made concerning the quality or type of the product. The law assumes that a seller gives certain warranties concerning goods that are sold and that he or she must stand behind these assertions.

Misrepresentation in the advertising and sales promotion of a product refers to the process of giving consumers false security about the safety of a particular product, ordinarily by drawing attention away from the hazards of its use. An action lies in the intentional concealment of potential hazards or in negligent misrepresentation. The key to recovery on the basis of misrepresentation is the plaintiff's ability to prove that he relied upon the representations that were made. Misrepresentation can be argued under a theory of breach of express warranty or a theory of strict tort liability.

Strict liability involves extending the responsibility of the vendor or manufacturer to all individuals who might be injured by the product, even in the absence of fault. Injured guests, bystanders, or others with no direct relationship to the product may sue for damages caused by the product. An injured party must prove that the item was defective, the defect proximately caused the injury, and the defect rendered the product unreasonably dangerous.

### Historical Development

The history of the law of product liability is largely a history of the erosion of the doctrine of privity, which states that an injured person can sue the negligent person only if he or she was a party to the transaction with the injured person. In other words, a defendant's duty of reasonable care arose only from the contract, and only a party to that contract could sue for its breach. This meant that a negligent manufacturer who sold a product to a retailer, who in turn sold it to the plaintiff, was effectively insulated from liability. The plaintiff was usually without a remedy in tort because it was the manufacturer and not the retailer whose negligence caused the harm.

The privity doctrine dominated nineteenth-century law, yet courts created exceptions to avoid denying an injured plaintiff a remedy. Soon privity of contract was not required where the seller fraudulently concealed the defect or where the products were inherently or imminently dangerous to human life or health, such as poisons or guns. The decisions then began to expand these exceptions. Some courts dropped the FRAUD requirement. A concealed defect coupled with some sort of "invitation" by the defendant to use the product was enough. In a few cases, the term *imminently dangerous* was construed to mean especially dangerous by reason of the defect itself and not necessarily dangerous per se. For example, products intended for human consumption, a defective scaffold, and a coffee urn that exploded would be considered imminently dangerous.

The seminal case of MACPHERSON V. BUICK MOTOR CO., 217 N.Y. 382, 111 N.E. 1050 (N.Y. 1916), broadened the category of "inherently" or "imminently" dangerous products so as to effectively abolish the privity requirement in negligence cases. It held that lack of privity is not a defense if it is foreseeable that the product, if negligently made, is likely to cause injury to a class of persons that includes the plaintiff. Because this is essentially the test for negligence, the exception swallowed the rule. The *MacPherson* case quickly became a leading authority, and the privity rule in negligence cases soon was ignored. Increasing public sympathy for victims of industrial negligence also contributed to the demise of the rule.

In warranty, a similar privity limitation was imposed, in part because warranties were thought to be an integral part of the sales contract. Beginning in the early twentieth century, an exception to the privity rule developed for cases involving products intended for human consumption (food, beverages, drugs) and eventually also for products intended for "intimate bodily use" (e.g., cosmetics) so that the warranty in these cases extended to the ultimate consumer. In the case of express warranties, which could be said to be made to the public generally, the privity requirement was abandoned during the 1930s. For example, a manufacturer's statement in literature distributed with an automobile that the windshield was "shatterproof" constituted an express warranty to the purchaser that the windshield would not break (*Baxter v. Ford Motor Co.,* 168 Wash. 456, 12 P.2d 409 [Wash. 1932]).

But with respect to implied warranties, exception to the privity rule did not extend beyond food, drink, and similar products until

*Henningsen v. Bloomfield Motors, Inc.,* 32 N.J. 358, 161 A.2d 69 (1960). In this case, the New Jersey Supreme Court abolished the privity limitation generally and held that the implied warranties run to the foreseeable ultimate user or consumer of the product. The *Henningsen* decision, which also invalidated the manufacturer's attempted disclaimer of IMPLIED WARRANTY liability, has been followed in almost all jurisdictions.

From 1930 to 1960, various legal writers and a few judges discussed the creation of strict liability in tort for defective products. The best-known judicial exposition of this view was California Supreme Court Justice Roger John Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co. of Fresno,* 24 Cal. 2d 453, 150 P.2d 436 (1944). A number of justifications have been advanced for strict liability: negligence is often too difficult to prove; strict liability can be accomplished through a series of actions for breach of warranty; strict liability provides needed safety incentives; the manufacturer is in the best position to either prevent the harm or insure or spread the cost of the risk; and the manufacturer of a product induces consumer reliance on the expectation of the product's safety and should be made to stand behind the product.

Finally, in 1963, in *Greenman v. Yuba Power Products, Inc.,* 59 Cal. 2d 57, 377 P.2d 897, the California Supreme Court adopted strict tort liability for defective products. Within a short time, strict liability swept the country and was, as of 2003, the law in all but a few states.

### Negligence

The duty to guard against negligence and supply a safe product applies to everyone in the chain of distribution, including a manufacturer who carelessly makes a defective product, the company that uses the product to assemble something else without discovering an obvious defect, and the vendor who should exercise greater care in offering products for sale. These individuals owe a duty of care to anyone who is likely to be injured by such a product if it is defective, including the initial buyer, that person's family members, any bystanders, and persons who lease the item or hold it for the purchaser.

Additionally, the duty to exercise care involves all phases of getting a product to the consumers or users. The product must be designed in such a way that it is safe for its intended use. It must be inspected and tested at different stages, made from the appropriate materials, and assembled carefully. The product's container or packaging must be adequate. The manufacturer must also furnish adequate warnings and directions for use with the product. The seller is proscribed from misrepresenting the safety or character of the product and must disclose all defects.

### Breach of Warranty

Warranties are certain kinds of express or implied representations of fact that the law will enforce against the warrantor. Product liability law is concerned with three types of warranties involving the product's quality or fitness for use: express warranty, implied warranty of merchantability, and implied warranty of fitness for a particular purpose. These and other warranties are codified in the UNIFORM COMMERCIAL CODE (UCC), which every state has adopted, at least in part.

An express warranty can be created in one of three ways: through an affirmation of fact made by the vendor of the goods to the purchaser relating to the goods, which becomes part of the bargain; by way of a description of the goods, which is made part of the basis of the bargain; and through a sample or model, which is made part of the basis of the bargain (U.C.C. § 2-313).

An express warranty can be words spoken during negotiations or written into a sales contract, a sample, an earlier purchase of the same kind of product, or claims made in publicity or on tags attached to the product. An express warranty is created when a salesperson states that the product is guaranteed to be free from defects for one year from the date of the purchase.

Implied warranties are those created and imposed by law, and accompany the transfer of title to goods unless expressly and clearly limited or excluded by the contract. However, with respect to damages for personal injury, the UCC states that any such contractual limitations or exclusions are "prima facie unconscionable" and cannot be enforced (U.C.C. § 2-719(3)).

The implied warranty of merchantability requires that the product and its container meet certain minimum standards of quality, chiefly that the product be fit for the ordinary purposes for which such goods are sold (U.C.C. § 2-314). This requirement includes a standard of reasonable safety.

The implied warranty of fitness for a particular purpose imposes a similar requirement in cases in which the seller knows or has reason to know of a particular purpose for which the goods are required and in which the buyer is relying on the seller to select or furnish suitable goods. The seller then warrants that the goods are fit for that particular purpose (U.C.C. § 2-315). For example, assume that the buyer tells the seller, a computer supplier, that he needs a high-speed computer to manage inventory and payroll functions for his business. Once the seller recommends a particular computer to handle these requirements, the seller is making an implied warranty of fitness. If the computer cannot adequately process the inventory and payroll, the buyer may file suit.

The action for breach of one of these warranties has aspects of both tort and contract law. Its greatest value to the injured product user lies in the fact that liability for breach is strict. No negligence or other fault need be shown. However, in addition to the privity limitation, certain contract-related defenses have impaired the remedy's usefulness. These include the requirement that the seller receive reasonably prompt notice of the breach as a condition to his or her liability, the requirement that the buyer has relied upon the warranty, and the ability of the seller to limit or disclaim entirely the implied warranties. These defenses are most appropriate in cases in which a product's failure causes economic loss. The trend has been away from strict enforcement of these defenses in personal injury cases in which the action is closer to a tort action.

*A blown out Firestone ATX mounted on a wrecked Ford Explorer, which was to be used as evidence in a 2001 lawsuit against the tire company and vehicle manufacturer. Whether or not a product contains a defect is of critical importance in a product liability lawsuit.*

AP/WIDE WORLD PHOTOS

### Strict Liability

The rule of strict liability applied in product liability suits makes a seller responsible for all defective items that unreasonably threaten the personal safety of a consumer or the consumer's property. The vendor is liable if he or she regularly engaged in the business of selling such products, which reach the consumer without any substantial changes having been made in their condition. The vendor is liable even if he or she exercised care in handling the product and if the consumer bought the product somewhere else and had no direct dealings with the vendor.

### Defects

A critical issue in a product liability lawsuit is whether the product contains a defect, which is an imperfection that renders a product unsafe for its intended use. Design defects exist when a whole class of products is inadequately planned in such a way as to pose unreasonable hazards to consumers. For example, an automobile manufacturer's design of a vehicle with the fuel tank placed in such a position that it will explode upon low-speed impact can be classified as defective. In that case, products manufactured in conformity with the intended design would be defective. A production defect arises when a product is improperly assembled. For example, frames of automobiles that are improperly welded to the body at the assembly plant would be classified as a production defect.

In addition, something other than the product itself can cause it to be defective. For example, caustic chemicals should be packaged in appropriate containers. Improper labeling, instructions, or warnings on a product or its container also make a product defective. Dangerous products should carry warning labels that explain how they should be used, under what circumstances they are likely to cause harm, and what steps can be taken in an emergency involving the product.

The principle of proper labeling includes claims made in sales brochures, product displays, and public advertising. It extends beyond warranty or negligence law, because a seller is strictly liable to users or purchasers of the product who are not in privity with the seller.

A manufacturer who creates the demand for goods through print and broadcast media has the responsibility to determine that the product has the qualities represented to the general public. Some courts allow injured consumers to sue even

if they have not read a certain label or advertisement. The standard is that if the advertisement is directed toward the public at large and makes claims that a normal consumer would take into consideration when deciding to make a purchase, then the manufacturer must stand behind that claim for every member of the public.

### Cause of Injuries

The issue of causation of injuries can be complicated, particularly if the product involved is only an indirect or remote cause, or one of a number of causes. Regardless of the theory of liability, the plaintiff must prove that the product was defective when it left the hands of the defendant and that the defect was the cause of injury. These issues are ordinarily QUESTIONS OF FACT to be decided by the jury.

When the evidence indicates that an injury might have been precipitated by several causes, the question becomes whether the cause for which the defendant is liable was a substantial factor in bringing about the injury. A defendant is not necessarily liable if he is responsible for the last cause or the immediate cause of the injury. For example, a person who was injured by a cooking pot that fell apart when the person removed it from the stove might not have to show that a defect in the pot handle was the only possible explanation for the accident. The jury could still properly consider whether a defect was a concurring cause of the accident, even if they found that the plaintiff misused the pot by handling it too roughly.

### Risks

A manufacturer has the duty to make the product as safe as possible. If the manufacturer cannot do so, he has the obligation to adequately warn users and buyers of the dangers that exist. The concept of a reasonably safe product extends to all dangers likely to arise when the product is being used normally or in a way that can be anticipated, even if it is not the purpose for which it was sold. For example, a manufacturer might foresee that someone is likely to stand on a table and might be required either to make it sufficiently strong and stable for people to do so without sustaining injury or to warn customers not to stand on it.

No liability is extended to a manufacturer if a plaintiff was disappointed because he or she had unreasonable hopes for a particular product. Frequently, however, a consumer's expectations are clearly reasonable but are not met. For example, no one expects to find defective brakes in a new automobile.

In some instances, a defect might not be inherent in the product, but a consumer should be aware that care is needed. An average adult need not be warned that knives cut, that dynamite explodes, or that electrical appliances should not be used in the shower. A consumer who ignores hazards will not succeed in an action alleging product liability. However, many manufacturers print warnings about commonsense hazards to provide added protection from a lawsuit.

Traditionally, an individual must be at least as careful as a reasonably careful person. Increasing recognition has been given, however, to a more realistic standard—the occasionally careless consumer. Courts are now less interested in how obvious a danger is and more concerned with discovering how serious the risk is and how readily it could have been avoided.

A consumer who clearly misuses a product cannot recover if an injury results. For example, a person who disregards a printed warning that nail polish remover is for external use only cannot blame the manufacturer for making an imperfect product if he or she ingests it. In addition, the consumer is precluded from recovery if he or she continues to use a product that is obviously dangerous. The theory is that the consumer has assumed the risk. This rule applies, however, only to obvious defects and does not establish a duty for consumers to scrutinize every product they purchase.

Whether a consumer has assumed responsibility for using an obviously dangerous product or misused a relatively safe product depends on who the user is likely to be. The classic example is children's clothing, which generally must be at least somewhat flame-resistant, because children are less able to appreciate the danger of accidental fires.

### Unavoidable Dangers

Although manufacturers and sellers have a duty to take precautions and provide adequate warnings and instructions, the public can still obtain products that are unavoidably unsafe. A seller is not held strictly liable for providing the public with a product that is needed and wanted in spite of the potential risk of danger. Prescription drugs illustrate this principle because all of them have the potential to cause serious harm if used unreasonably.

The duty to warn consumers of unavoidable dangers presents special problems if certain individuals are likely to suffer allergic reactions. The law considers an allergy to be a reaction suffered by a minority of people that is triggered by exposure to some substance. Courts used to reject claims based on allergic reactions, reasoning that the product was reasonably safe and that the injury was caused by a defect peculiar to the individual. That approach has been abandoned, with manufacturers providing careful instructions on use and clear warnings about possible symptoms that suggest an allergic reaction.

### Multiparty Litigation

Since the 1970s, groups of plaintiffs have filed consolidated lawsuits against the manufacturers of certain products. The makers of contraceptive devices, silicone breast implants, asbestos, and tobacco products have encountered this type of multiparty litigation. In many states, one judge is appointed to handle all cases involving claims against such a manufacturer. The litigation process can prove costly for defendants because they may have to defend themselves in many different states. The resulting verdicts or negotiated settlements can also be very expensive to companies.

### Product Liability Reform

Businesses have sought relief from state legislatures and Congress regarding product liability, contending that the shifting legal standards make them vulnerable to even the most suspect claim. Some states have passed laws that provide manufacturers with the right to defend themselves by showing that their product met generally acceptable safety standards when made. This assertion is known as the state-of-the-art defense, which relieves manufacturers of the task of attempting to make a perfect product. An injured consumer cannot recover on the theory that the product would have been safe had the manufacturer incorporated safety features that were developed after the product was made. Consumer advocates have opposed such laws because they allow manufacturers to avoid liability. The advocates argue that these laws discourage innovation because higher safety standards are set as improvements are made.

Businesses have also attempted to set maximum amounts that persons can recover for PUNITIVE DAMAGES. Some states have capped awards for punitive damages. In 1996, President BILL CLINTON vetoed a bill that would have limited punitive damage awards to $250,000, or two times the economic and non-economic damages, whichever amount was greater, stating that it would deprive U.S. families of the ability to fully recover for injuries caused by defective products.

In the same year, the Supreme Court imposed its own version of product liability reform with *BMW v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). The case involved an automobile purchaser who brought action against a foreign automobile manufacturer, American distributor, and dealer based on the distributor's failure to disclose that the automobile had been repainted after being damaged prior to delivery. An Alabama circuit court entered a judgment in the case of COMPENSATORY DAMAGES of $4,000 and punitive damages of $2,000,000. The Supreme Court ruled unanimously the punitive damages award was excessive. In this case, the Court devised three factors to assist trial judges in determining whether a jury's punitive damages award were excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages award and the civil or criminal penalties authorized or imposed in comparable cases. The *BMW* case showed that there were limits under the Constitution to the amount of punitive damages that could be imposed.

### Federal Preemption of State Product Liability Law

For the most part, product liability law is governed by state law. Occasionally, the federal government will move to preempt an entire area of product liability law from state control in order to protect a certain group of manufacturers. An example of this is the Federal Biomaterials Access Assurance Act (21 U.S.C.A. §§ 1601-1606), a 1998 law that protects suppliers of materials for implantable medical devices from "unwarranted" suits by laying out the permissible basis of biomaterials supplier liability. Under the act, a biomaterials supplier may only be held liable in three situations: (1) when the supplier is a manufacturer of medical implants under the act; (2) when the supplier is a seller of medical implants; or (3) when the supplier sold materials that did not meet contractual specifications of the manufacturer.

More problematically, a court will have to decide whether an area of product liability is

affected by a federal law that does not expressly preempt product liability suits but may indicate the federal government wished such suits to be preempted. For implied PREEMPTION, the Supreme Court has recognized two subcategories: field pre-emption and conflict pre-emption. Under *field* pre-emption, a state statute is superceded when a federal statute wholly occupies a particular field and takes away state power to supplement it. *Conflict* pre-emption occurs when compliance with both the federal and state statute is impossible, and the state law stands as an obstacle to the legislative objectives of Congress.

An example of conflict preemption was *Geier v. American Honda Motor, Inc.*, 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914, (2000), in which the Court ruled against an injured motorist who brought a defective design action against the automobile manufacturer under District of Columbia tort law, contending that the manufacturer was negligent in failing to equip the automobile with a driver's side airbag. The Court ruled the law suit was preempted in that it actually conflicted with DEPARTMENT OF TRANSPORTATION (DOT) standard, promulgated under National Traffic and Motor Vehicle Safety Act, requiring manufacturers to place driver's side airbags in some but not all 1987 automobiles. The Court noted the rule of state law imposing duty to install airbag would have presented an obstacle to variety and mix of safety devices and gradual passive restraint phase-in sought by the DOT standard.

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CROSS-REFERENCES

Automobiles: Unsafe at Any Speed; Consumer Product Safety Commission; Consumer Protection; Merchantable; Nader, Ralph; Proximate Cause; Sales Law; Tort Law.

## PROFANITY

*Irreverence towards sacred things; particularly, an irreverent or blasphemous use of the name of God. Vulgar, irreverent, or coarse language.*

The use of certain profane or obscene language on the radio or television is a federal offense, but in other situations, profanity might fall within the protection of the constitutional guarantee of FREEDOM OF SPEECH.

## PROFESSIO JURIS

*The right of contracting parties to stipulate in the document the law that will govern their agreement.*

## PROFESSIONAL RESPONSIBILITY

*The obligation of lawyers to adhere to rules of professional conduct.*

As members of a profession and as officers of the court, lawyers have the responsibility of following rules of professional conduct that are mandated either by a state legislature or by the highest court in the state. Rules of professional conduct govern both the public and the private behavior of lawyers. Because they are licensed to practice by the states, lawyers who violate rules of professional conduct are likewise disciplined by the states, not the federal government. The punishment for violating a state rule of professional responsibility ranges from private or public reprimand to suspension or disbarment (permanent disqualification from practicing law in the state). To the limited extent that they practice law, judges are subject to the state code of professional conduct in addition to a CODE OF JUDICIAL CONDUCT.

The AMERICAN BAR ASSOCIATION (ABA) formulated the Model Rules of Professional Conduct in 1983 to provide uniformity and consistency in defining the professional responsibilities of lawyers. Though the ABA has no power to enforce the model rules, they serve as a guide for states in crafting rules of conduct.

### History

The public and the legal profession have long sought to prescribe ethical conduct for lawyers. Legal advocates existed in Greece as early as the fourth century B.C., and in first-century Rome, legal advisers and advocates began to play an active role in the formulation of systematized courts and the conduct of court operatives.

Advances in legal ethics made by legal advocates in Rome disappeared with the fall of the Holy Roman Empire and the onset of the medieval period in Europe. Legal conduct came under some scrutiny again in the twelfth century in Europe's emerging schools and universities,

after William the Conqueror developed England's organized courts and jury trials. However, the ruling class dominated these medieval courts, and legal ethics remained more theoretical than practical long past the medieval period.

The emergence of ethical standards for lawyers in colonial America was gradual and local. Most colonies discouraged, and some colonies expressly prohibited, the practice of remunerated LEGAL REPRESENTATION. Self-representation was the norm, and this obviated the need for a code of professional conduct.

The U.S. Constitution was an important source for the eventual formation of ethical codes for lawyers and judges. Article III of the Constitution contains substantive rules relating to law and the courts, and it establishes the judiciary as an independent government power designed to check the executive and legislative branches. In addition, many of the Constitution's amendments address specific legal processes. The SIXTH AMENDMENT, for example, sets forth general rules in criminal cases, such as the requirement of representation for defendants in criminal prosecution.

Professional associations and ethical codes for lawyers and judges began to appear in the United States in the early 1800s. States formed bar associations in the early 1800s to organize and facilitate the legal profession. The state bar associations influenced the U.S. legal system in a variety of ways and exerted control over its important players by regulating the public and private conduct of lawyers and judges.

When the U.S. CIVIL WAR ended in 1865, lawyers flooded the Southern states to take part in Reconstruction. The questionable ethics and aggressiveness of some of these lawyers caused Southern legislators to call for the regulation of lawyers. In 1887, the Alabama Bar Association adopted the first comprehensive code of ethics. Other states followed suit.

The American Bar Association was formed in Saratoga, New York, on August 21, 1878, by a group of 289 lawyers. For many years the ABA examined and debated the various state codes of ethics and, in 1908, adopted and promoted the Canons of Professional Ethics. The 32 canons were intended to be model rules that states could adopt as regulations of legal conduct. Courts or legislatures in most states adopted this first set of standards. However, legal professionals criticized the canons as being incoherent and incomplete, and the ABA replaced them in 1969 with the Model Code of Professional Responsibility.

The model code was also criticized. An amalgam of general canons, aspirational ethical considerations, and disciplinary rules, it was sometimes contradictory and often perplexing. In 1983, the ABA replaced the code with the Model Rules of Professional Conduct. The model rules consist only of enforceable rules and explanatory comments. The ABA periodically amends the model rules to make adjustments for evolving norms and changes in technology. Most states have adopted the ABA Model Rules of 1983. States that have not adopted the ABA Model Rules use the ABA Model Code of Professional Responsibility of 1969 and supply their own changes.

In 1998, the American Law Institute approved the Restatement of the Law Governing Lawyers. This project began in 1986 as an effort to address constraints imposed upon lawyers by law. This restatement does not constitute authority in any state, but rather is designed to assist courts and ethics commissions make decisions regarding the law as applicable to attorneys. The restatement complements, rather than replaces, the Model Rules, Model Code, and other state ethics codes. It draws heavily on prior decisions made by the courts and state ethics commissions.

Areas covered by the Restatement of the Law Governing Lawyers include the regulation of the legal profession; client-lawyer relationships; lawyer civil liability; confidential client information; representation of clients; and conflicts of interest. In the short period of time after its approval, several courts applied the provisions of the restatement. The restatement has already proven particularly persuasive in resolving issues that are not addressed by ethics codes.

### Areas of Professional Responsibility

Each of the many areas of lawyer responsibility contains a discrete category of ethical concerns. These areas can be organized as the lawyer-client relationship, the lawyer as counselor, the lawyer as advocate, transactions with persons other than clients, law firms and associations, public service, information about legal services, and the integrity of the profession. The rules of conduct that govern these areas are subject to interpretation, and knowledge of what specific conduct has been found to violate a rule is often necessary for a complete understanding of the rule's meaning.

**Lawyer-Client Relationship** A lawyer must follow certain ethical standards when working with a client. A lawyer must be reasonably skilled in order to represent a client on a legal matter. Though a lawyer may work on legal matters unrelated to his or her usual practice, they may not charge the client for extra time studying to become competent in that area of the law.

A lawyer must perform lawyerly duties diligently and promptly and must openly communicate with the client. A lawyer must also abide by the client's decision regarding the scope of representation and may charge only reasonable fees. Several states have adopted rules that prohibit a lawyer from having a sexual relationship with a client.

One of the most critical elements of professional responsibility is keeping confidential all information regarding representation of the client. However, in 2003, the ABA amended its confidentiality rules to now require lawyers to report any corporate crimes and FRAUD that they learn of during the course of the attorney-client relationship. In addition, a lawyer must avoid representing others with interests that conflict with those of the client.

The issues of confidentiality and the prohibition of conflicts of interest illustrate the complexity of the rules on lawyer-client relationships. Not only may a lawyer not represent interests that conflict with those of the client, but he may not represent interests that conflict with those of other clients in the law firm. For example, an attorney may not represent a defendant if another attorney in the same firm is representing the plaintiff in the same case. A firm may represent interests adverse to those of a former client if the lawyer who represented the former client is no longer with the firm. However, a firm may not represent interests adverse to those of a former client if any remaining lawyers possess confidential information regarding the particular legal matter concerning that client. But if formerly confidential information has become publicly known, the firm may represent the adverse interest.

**Lawyer as Counselor** A lawyer serves varied roles, including that of counselor. As a counselor, a lawyer renders candid advice that may refer to factors apart from the law, including moral, economic, social, and political issues relevant to the client's situation. A lawyer may act as a mediator between multiple clients but only if each client consents and the mediation can be done impartially without affecting the lawyer's responsibilities to any of the clients. Finally, with the consent of the client, a lawyer may arrange an evaluation of the client for use by a third party, usually an expert trial witness.

**Lawyer as Advocate** A lawyer is required to be an advocate for the client. This is an important obligation because U.S. law is based on the ADVERSARY SYSTEM, which gives competing litigants the principal responsibility for gathering evidence, formulating legal theories, and presenting evidence and theories at trial to a judge and jury. However, a lawyer must not go beyond the ethical boundaries of professional responsibility in a quest for legal victory. A lawyer cannot make frivolous claims or defenses, knowingly make false representations to a court, or falsify or obstruct access to potential evidence. Likewise, a lawyer must disclose all the material facts and legal precedent necessary to avoid misleading a court. A lawyer also has the responsibility of expediting litigation.

A lawyer must seek to preserve the integrity of the judicial process. Therefore, a lawyer cannot try to influence a judge, juror, or prospective juror through improper communications or make public comments on a case if the lawyer knows that the statements will prejudice the proceeding. If a lawyer knows that he will be a necessary witness at trial, he cannot serve as an advocate at the trial.

A prosecutor in a criminal case has special responsibilities. The prosecutor may not bring legal action if he knows that the charge is not supported by PROBABLE CAUSE or seek to obtain the waiver of important pretrial rights from an unrepresented defendant. The prosecutor must make reasonable efforts to allow a defendant access to counsel and must also timely disclose exculpatory or mitigating evidence and information to the defense. (Exculpatory evidence tends to clear the defendant; mitigating evidence reduces the degree of blame or fault attributable to the defendant.) The prosecutor may not subpoena a lawyer to present information on a past or present client. However, with the permission of the court after an adversarial proceeding, the prosecutor may subpoena a lawyer if the prosecutor reasonably believes that the information sought is not a privileged lawyer-client communication, the evidence is essential to the investigation or prosecution, and there is no feasible alternative way to obtain information.

Prosecutors must also refrain from making public comments that might prejudice a judicial

proceeding or heighten public condemnation of the accused. However, prosecutors do not violate their professional responsibility when making public statements for legitimate purposes, such as to provide necessary public information or to aid law enforcement. For example, if an accused escapes from custody and the prosecutor believes that the accused is armed and dangerous, the prosecutor may issue a warning to that effect, even though such a warning will increase public hostility against the accused.

**Transactions with Persons Other than Clients** A lawyer must act ethically when communicating with persons other than his client in the course of representing the client. This means that the lawyer must communicate truthfully and fairly. Thus, a lawyer must not knowingly make a false statement or assist crime or fraud by failing to disclose a material fact to a third party. A lawyer is prohibited from communicating with the client of an opposing party and may not state or imply that he is disinterested. In communicating with third parties, the lawyer must make an effort to explain his role to avoid a misunderstanding and must not illegally obtain evidence from third parties. Finally, a lawyer violates his professional responsibility when using legal devices for the sole purpose of embarrassment, delay, or burden.

**Law Firms and Associations** With the decline of the sole practitioner and the rise of law firms, lawyers in law firms have special ethical considerations. Because a firm's senior attorneys, partners, or shareholders are responsible for the misconduct of subordinate lawyers and nonlawyer assistants, the senior members must make reasonable efforts to ensure the firm's conformity with all the rules of professional conduct.

Some practices involving the internal affairs of law firms are prohibited. For example, a lawyer cannot ethically share legal fees with nonlawyers, except to issue funds to client survivors and to pay wages to employees. A lawyer's professional judgment must not be directed or regulated by a person who employs the lawyer to perform legal services for a third party. In addition, a lawyer cannot offer to make or actually make an agreement with a client restricting his own right to practice upon termination of the agreement or base a settlement between private parties on an agreement restricting another lawyer's right to practice.

**Public Service** As a professional, a lawyer is expected to contribute to the community by offering legal services to those persons who cannot afford to pay regular fees. The rules of professional responsibility do not require lawyers to render PRO BONO (free) legal services, but many states set an aspirational goal of a certain number of hours of pro bono service per year. A lawyer who fails to provide such services is not subject to discipline. However, some courts may require a lawyer to accept an unpaid appointment in a certain case.

A court may also order a lawyer to represent a particular client, with the lawyer's fees paid by the government. In such a case, the lawyer may decline the appointment only for good cause. Good cause exists if the appointment would violate the rules of professional conduct or a law or would place an unreasonable financial burden on the lawyer. It also exists if the case is so repugnant to the lawyer as to impair the lawyer's relationship with the client or ability to represent the client.

A lawyer may join a legal organization apart from the lawyer's firm. Whether these organizations are concerned with administering legal services or legal reform, the lawyer must not act in such a way as to adversely affect the interests of a client.

**Information about Legal Services** For many years it was considered unethical for a lawyer to advertise. The profession sought to eradicate the image of lawyers as "ambulance chasers," intent on benefiting from the suffering of others. However, in the 1970s the U.S. Supreme Court struck down rules of professional conduct that banned all lawyer advertising, ruling that absolute prohibition violated the FIRST AMENDMENT with *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). Nevertheless, lawyer advertising may be regulated by the state, and lawyers who violate such rules may be disciplined.

Lawyers may not make unsupported comparisons to other lawyers or create unjustified expectations. Though rules of conduct expressly approve advertising, they discourage direct contact with prospective clients when a significant motive is pecuniary gain. A lawyer may contact a family member or former client but may not solicit business from anyone if the communication involves coercion or if the prospective client has indicated a desire that the solicitation cease.

Lawyers may not advertise as recognized or certified specialists unless they are patent lawyers,

ADMIRALTY lawyers, or attorneys certified by an appropriate state regulatory authority. If a lawyer is certified as a specialist by an organization that is not recognized by the state, the lawyer may include the certification in advertising if it is accompanied by a statement that the jurisdiction has no procedure for approving the organization.

**Integrity of the Profession** Lawyers have the responsibility of maintaining the integrity of the legal profession through their personal conduct and through the monitoring of other lawyers. A lawyer or an applicant for ADMISSION TO THE BAR is prohibited from knowingly making a false statement of material fact, or failing to disclose material facts, to the members of the admissions board or to a disciplinary authority. For example, an applicant for admission to the bar violates his professional responsibility by failing to reveal a criminal arrest or conviction.

A lawyer must preserve the integrity of the judicial system. Therefore, it is professional misconduct to make a false or reckless statement concerning the quality or integrity of a judge, adjudicative officer, or candidate for judicial or legal office. A lawyer does have the obligation to report to the appropriate authority his knowledge of conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or fitness as a lawyer.

Professional misconduct encompasses a violation or attempted violation of the rules of professional responsibility, or the knowing assistance or inducement of a violation of the rules. Professional misconduct is also the commission of a criminal act reflecting adversely on the lawyer's fitness to practice law and any conduct involving dishonesty or prejudice to the administration of justice. For example, a lawyer who is convicted of deliberately failing to file an income tax return will likely be charged with and found guilty of professional misconduct.

### Enforcement of Professional Responsibility

In every state the supreme court or legislature has created a committee or board that is authorized to enforce state rules of professional conduct. This committee examines allegations of a lawyer's professional misconduct and recommends whether to reprimand him, suspend his license, place him on supervised or unsupervised PROBATION, or permanently revoke his license.

The specific procedures on professional discipline vary from state to state, but every state allows for court review of a conduct committee's recommendation to discipline a lawyer. When a lawyer's license is suspended, the lawyer may petition the state supreme court for readmission to the bar, after a time specified by the state rules. The supreme court will ask the professional responsibility committee for its recommendation on reinstatement.

*Attorney James Fett reviews documents pertaining to the lawsuit of his client, James Brazin. A lawyer is expected to communicate openly with a client, making clear the laws and processes affecting the matter at hand.*

AP/WIDE WORLD PHOTOS

#### FURTHER READINGS

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#### CROSS-REFERENCES

Attorney-Client Privilege; Attorney Misconduct; Canons of Ethics; Confidential Communication; Continuing Legal Education; Ethics, Legal; Fiduciary; Legal Advertising; Legal Malpractice; Privileged Communication; Specialization.

## PROFFER

*To offer or tender, as, the production of a document and offer of the same in evidence.*

## PROFIT

*Most commonly, the gross proceeds of a business transaction less the costs of the transaction; i.e., net proceeds. Excess of revenues over expenses for a transaction; sometimes used synonymously with net income for the period. Gain realized from business or investment over and above expenditures.*

*Accession of good, valuable results, useful consequences, avail, or gain. The benefit, advantage, or pecuniary gain accruing to the owner or occu-*

*A sample profit and loss statement*

**Profit and Loss Statement**

AB FURNITURE COMPANY
Statement of Profit and Loss for
Year Ending December 31, 20___

| | | |
|---|---|---|
| Sales | $42,700 | |
| Cost of Sales | 28,000 | |
| GROSS PROFIT | | $14,700 |
| Other Expenses: | | |
| Advertising | 800 | |
| Rental of Store | 2,400 | |
| Miscellaneous | 1,800 | |
| Salary of B | 5,200 | 10,200 |
| NET PROFIT ALLOCATED TO PARTNERS | | 4,500 |

*pant of land from its actual use; as in the familiar phrase* rents, issues and profits, *or in the expression* mesne profits.

## PROFIT A PRENDRE

*[*French, Right of taking.*] The right of persons to share in the land owned by another.*

A *profit a prendre* enables a person to take part of the soil or produce of land that someone else owns. It is a right to take from the land, as in the mining of minerals and is, therefore, distinguishable from an EASEMENT, which is a nonpossessory interest in land generally giving a person a right of way on the property of another.

CROSS-REFERENCES

Mine and Mineral Law.

## PROGRESSIVE PARTY

Beginning in the 1900s, the political history of the United States has been the story of the two mainstream political parties, the Democrats and the Republicans, and the third party movements that have grown and receded in their wake. Between 1912 and 1948, progressivism, a broadly based reform movement, had three national incarnations as the Progressive Party.

Progressivism began as a response to the transformation of American society from an agricultural-based economy to an industrial one. Many American workers, both native-born and immigrant, found themselves hindered by long hours of work in dangerous conditions, low pay, and unsafe and unsanitary housing. Reformers in the largest cities began to lobby for safer working environments, improved tenement housing, and public ownership of utilities. Others fought political corruption and the cronyism that was part of the established political machines of both parties.

In 1908, President THEODORE ROOSEVELT, who had sought to find a balance between capitalists and working people and had gained fame as the nation's chief "trustbuster," declined to run for another term. With Roosevelt's support, his friend and colleague WILLIAM HOWARD TAFT was elected president, a move that at first was hailed by a number of Progressives. The conservative Taft turned out to be a huge disappointment to the Progressives and to Roosevelt, who challenged him for the Republican presidential nomination in 1912. After losing the nomination to Taft, Roosevelt left the REPUBLICAN PARTY and gained the nomination of the Progressive Party that had been launched in 1911 as the National Progressive Republican League by Wisconsin Senator ROBERT M. LA FOLLETTE. Although La Follette had hoped to be the new party's candidate, he was outpolled by Roosevelt for the nomination.

Roosevelt campaigned vigorously on a platform that called for multiple social, economic, and political reforms, including woman suffrage, the institution of a MINIMUM WAGE and CHILD LABOR LAWS, environmental conservation, direct election of U.S. senators, and procedures permitting initiative, REFERENDUM, and recall. Although Roosevelt's Progressive Party, popularly known as the "Bull Moose Party," polled 600,000 more votes than Taft, he lost to Democratic candidate WOODROW WILSON.

In 1924, a group of Progressives, including former members of the Bull Moose Party, united with railroad union workers, an organization called the Conference for Progressive Political Action (CPPA), the AMERICAN FEDERATION OF LABOR, and the American Socialist Party to support the presidential candidacy of Robert M. La Follette. A liberal Republican, "Fighting Bob" La Follette was a three-term Wisconsin governor who broke with the Republican establishment to lead the fight for tax reform, control of railroad rates, the establishment of the direct primary, and other reform measures that were collectively labeled the "Wisconsin Idea." In 1906, La Follette, whose wife Belle Case La Follette was an attorney and champion of women's suffrage, began the first of three terms in the U.S. Senate, where he championed reform along the lines of the Wisconsin Idea and also displayed an isolationist streak, opposing U.S. entry into WORLD WAR I and also into the LEAGUE OF NATIONS.

Running against Republican CALVIN COOLIDGE and conservative Democrat JOHN W. DAVIS in 1924, La Follette and his running mate, Montana senator Burton K. Wheeler, crusaded for the dismantling of monopolistic corporations, equitable taxation of businesses, the right to COLLECTIVE BARGAINING, state ownership of PUBLIC UTILITIES, public control and protection of the country's natural resources, and an end to FRAUD and corruption in public offices. Coolidge, who had become president in August 1923 after the death of President WARREN G. HARDING, was reelected in a landslide victory. La Follette and the Progressive Party polled close to 5 million popular votes and 13 electoral votes. The only state the Progressive Party carried was La Follette's home state of Wisconsin.

Worn out by his extensive efforts at campaigning, La Follette died in June 1925. With La Follette's death, many members of his followers rejoined the Republican Party and the second materialization of the Progressive Party movement passed from the national political arena.

In 1948, the COLD WAR policies of President HARRY TRUMAN caused a group of disaffected Democrats and others to reconstitute the Progressive Party. The new Progressives nominated former U.S. vice president and commerce secretary Henry Wallace for president and Senator Glen H. Taylor from Idaho for vice president. They campaigned on a number of issues including opposition to the MARSHALL PLAN, support for CIVIL RIGHTS and WELFARE legislation, and repeal of the TAFT-HARTLEY ACT that had placed a number of restrictions on LABOR UNIONS. Support from the U.S. Communist Party caused a political backlash, and the Progressive Party's third presidential bid garnered only 2.4 percent of the national vote. In the early 2000s, the Progressive Party existed not as a national entity but as a collection of local and state organizations still championing liberal causes and reform issues.

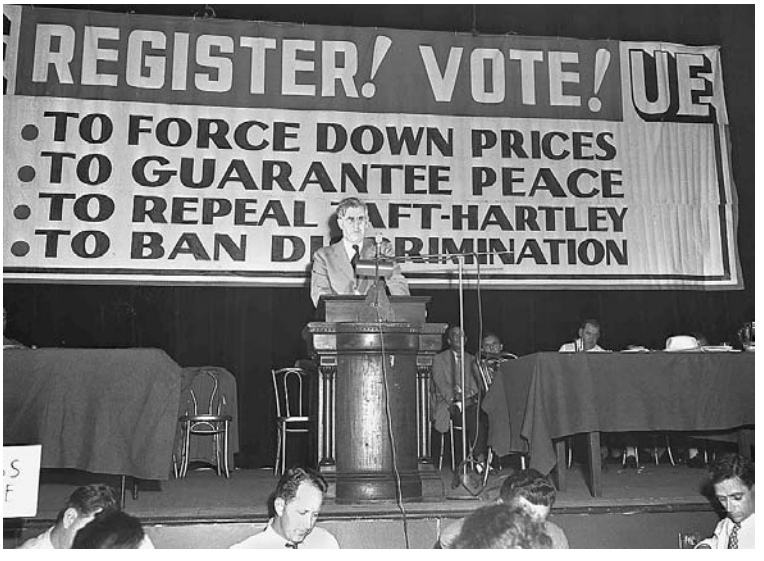


*Former U.S. vice president Henry Wallace was the Progressive Party's presidential candidate in 1948. He received 1,157,172 votes, 2.4 percent of the ballots cast.*

AP/WIDE WORLD PHOTOS

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CROSS-REFERENCES

Libertarianism; Third Party.

## PROGRESSIVE TAX

*A type of graduated tax that applies higher tax rates as the income of the taxpayer increases.*

## PROHIBITION

*The popular name for the period in U.S. history from 1920 to 1933 when the manufacture and sale of alcoholic beverages—except for medicinal or religious purposes—were illegal.*

From 1920 to 1933 the manufacture and sale of intoxicating liquors were illegal in the United States. The EIGHTEENTH AMENDMENT to the U.S. Constitution authorized Congress to prohibit alcoholic beverages, but the TWENTY-FIRST

AMENDMENT repealed this prohibition. The era of Prohibition was marked by large-scale SMUGGLING and illegal sales of liquor, the growth of ORGANIZED CRIME, and increased restriction on personal freedom.

The prohibition movement began in the 1820s in the wake of a revival of Protestantism that viewed the consumption of alcohol as sinful and a destructive force in society. Maine passed the first state prohibition law in 1846, and other states followed in the years before the U.S. CIVIL WAR.

The PROHIBITION PARTY was founded in 1869, with a ban on the manufacture and sale of intoxicating liquor as its only campaign goal. This party, like most temperance groups, derived its support from rural and small-town voters associated with Protestant evangelical churches. The Prohibition Party reached it zenith in 1892 when its candidate for president polled 2.2 percent of the popular vote. The party soon went into decline, and though it still exists, it works mainly at the local level.

The impetus for the Eighteenth Amendment can be traced to the Anti-Saloon League, which was established in 1893. The league worked to enact state prohibition laws and had great success between 1906 and 1913. By the time national prohibition took effect in January 1920, thirty-three states (63 percent of the total population) had prohibited intoxicating liquors.

The league and other prohibition groups were opposed to the consumption of alcohol for a variety of reasons. Some associated alcohol with the rising number of ALIENS entering the country, many of whom were Roman Catholic. This anti-alien, anti-Catholic prejudice was coupled with a fear of increasingly larger urban areas by the rural-dominated prohibition supporters. Saloons and other public drinking establishments were also associated with prostitution and gambling. Finally, some employers endorsed prohibition as a means of reducing industrial accidents and increasing the efficiency of workers.

When the United States entered WORLD WAR I in 1917, Congress prohibited the manufacture and importation of distilled liquor in order to aid the war effort. It also authorized the president to lower the alcoholic content of beer and wine and to restrict or forbid their manufacture.

A movement began to support elimination of intoxicating liquors by constitutional amendment. In 1917 Congress passed the Prohibition amendment and submitted it to the states for ratification. The rural-dominated state legislatures made ratification a foregone conclusion, and the Eighteenth Amendment was ratified on January 29, 1919. Congress enacted the VOLSTEAD ACT, officially known as the National Prohibition Act (41 Stat. 305 [1919]) to enforce the amendment, which became effective on January 29, 1920.

Prohibition proved most effective in small towns and rural areas. Compliance was much more difficult in urban areas, where illegal suppliers quickly found a large demand for alcohol. Cities had large immigrant populations that did not see anything morally wrong with consuming alcohol. The rise of "bootlegging" (the illegal manufacture, distribution, and sale of intoxicating liquor) by organized crime proved to be one of the unintended consequences of Prohibition.

Besides the illegal importation, manufacture, distribution, and sale of intoxicating liquors by organized crime, millions of persons evaded Prohibition by consuming "medicinal" whiskey that was sold in drugstores on real or forged prescriptions. Many U.S. industries used denatured alcohol, which was treated with noxious chemicals to make it unfit for human consumption. Nevertheless, methods were found to remove these chemicals, add water and a small amount of liquor for flavor, and sell the mixture to illegal bars, called speakeasies, or to individual customers. Finally, many persons resorted to making their own liquor from corn. This type of product could be dangerously impure and cause blindness, paralysis, and death.

*Police seize bootleg liquor during a Prohibition era raid in Detroit, Michigan.*
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

The prohibition movement lost political strength in the 1920s. The STOCK MARKET crash of 1929 and the resulting Great Depression of the 1930s further changed the political climate. Critics of Prohibition argued that the rise of criminal production and sale of alcohol made the legal ban ineffective. In addition, the general public's patronage of speakeasies bred disrespect for law and government. Finally, critics argued that legalizing the manufacture and sale of alcohol would stimulate the economy and provide desperately needed jobs.

In 1932 the DEMOCRATIC PARTY adopted a platform plank at its national convention calling for repeal. The landslide Democratic victory of 1932 signaled the end of Prohibition. The February 1933 resolution proposing the Twenty-first Amendment contained a provision requiring ratification by state conventions rather than state legislatures. This provision was included to prevent rural-dominated legislatures, which still supported Prohibition, from defeating the amendment.

The state ratification conventions quickly endorsed the amendment, with ratification of the Twenty-first Amendment coming on December 5, 1933. The amendment did allow prohibition by the states. A few states continued statewide prohibition, but by 1966 all states had repealed these provisions. Liquor in the United States is now controlled at the local level. Counties that prohibit the sale of alcohol are known as dry counties, and counties that allow the sale of alcohol are known as wet counties.

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CROSS-REFERENCES

Capone, Alphonse; Temperance Movement.

## PROHIBITION PARTY

The Prohibition Party was established in 1869, ostensibly in response to a growing concern among Americans that the sale and consumption of liquor contributed to crime and immorality. In fact, although PROHIBITION was always the top issue, the party's platform emerged as one of the most progressive of the nineteenth and early twentieth centuries. In particular, it was one of the first parties to make women's suffrage a key platform point.

After the Civil War, the liquor industry in the United States grew rapidly, even though 13 states were officially pronounced "dry." John Russell, a Methodist minister from Michigan, began organizing a national group in 1867, and, in 1869, the group met in Chicago to adopt a political platform and plot out a campaign strategy for the 1872 presidential election. The original platform placed a heavy emphasis on the evils of alcoholic beverages, but it had a surprisingly broad scope. It advocated strong government support of public education, increased accountability of government agencies, and a liberal immigration policy. The right to vote was to be guaranteed to all citizens, native or naturalized, regardless of race, color, sex, or "former social condition." The emphasis on alcoholic drink stemmed not so much from a moral opposition to liquor as from a pragmatic one. Alcohol abuse, said the Prohibitionists, led to chronic illness, job loss, spouse and CHILD ABUSE, and impoverishment. The best way to reduce social ills, they maintained, was to eliminate alcoholic consumption.

Russell was on the Prohibition Party's first ticket, as vice president; the presidential candidate was James Black, a lawyer and activist from Pennsylvania. The ticket drew only about 5,000 votes from six states. It drew only a few thousand more votes in the 1876 and 1880 elections, but it won the support of groups such as the Women's Christian Temperance Union (WCTU) and the Anti-Saloon League. In 1884, a ticket headed by the former Republican governor of Kansas, John P. St. John, won more than 153,000 votes. The 1888 ticket, which was headed by Fisk University founder Clinton B. Fisk, won nearly 250,000 votes.

John Bidwell, a rancher and former military officer from California, won more than 271,000 votes in the 1892 presidential election, the most ever won by any Prohibition candidate. Over the next quarter century, the Prohibition Party continued to draw respectable figures, although it won few major races. The most important Prohibition victory was the 1916 election of Sidney J. Catts, a lawyer, as governor of Florida.

During the period from 1890 to 1920, the Prohibition platform continued to introduce a number of progressive initiatives, including

equitable DIVORCE laws, equal wages for women, and laws against child labor. Still, the party was known primarily for its core issue. The passage of the EIGHTEENTH AMENDMENT to the U.S. Constitution in 1919, which banned the manufacture, sale, and transport of alcoholic beverages, was a victory for the Prohibitionists, as was the NINETEENTH AMENDMENT in 1920, which granted women the right to vote. But these victories ultimately made the party less relevant. The 1924 Prohibition Party presidential ticket was notable because the vice presidential candidate, Marie C. Brehm, was the first legally qualified woman candidate for a national election. However, except for a slight upsurge after national prohibition was repealed in 1932, the party drew fewer votes.

Beginning in the 1940s, the Prohibition Party became more conservative in scope. Its later platforms included support of a right-to-life agenda, opposition to gay rights legislation, and opposition to GUN CONTROL. It added prohibition of tobacco and gambling to its anti-alcohol agenda. By the late 1970s, Prohibition candidates were mainly found in local elections. Still, the party continued to run a presidential and vice presidential candidate.

In 1984, Earl F. Dodge, a Prohibition Party official from Colorado headed the presidential ticket; although he won only 4,200 votes in five states, he continued to head the presidential ticket. In the 1990s, the party split into two factions, one controlled by Dodge. Despite the split, Dodge was the party's official candidate for president in the 2000 election. He won 208 votes in one state.

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CROSS-REFERENCES

Independent Parties; Prohibition; Women's Rights.

## PROHIBITION, WRIT OF

*An order from a superior court to a lower court or tribunal directing the judge and the parties to cease the litigation because the lower court does not have proper jurisdiction to hear or determine the matters before it.*

A writ of prohibition is an extraordinary remedy that is rarely used.

## PROMISE

*A written or oral declaration given in exchange for something of value that binds the maker to do, or forbear from, a certain specific act and gives to the person to whom the declaration is made the right to expect and enforce performance or forbearance. An undertaking that something will or will not occur. It is a manifestation of intent to act, or refrain from acting, in a certain manner.*

*In the law of* COMMERCIAL PAPER, *an undertaking to pay. It must be more than an acknowledgment of an obligation.*

The person who makes the declaration is the *promisor.* The person to whom the declaration is made is called the *promisee.*

In contracts, a promise is essential to a binding legal agreement and is given in exchange for consideration, which is the inducement to enter into a promise. A promise is illusory when the promisor does not bind herself to do anything and, therefore, furnishes no consideration for a valid contract.

A promise *implied in fact* is a tacit promise that can be inferred from expressions or acts of the promisor. A promise *implied by law* can arise when no express declaration is made, but the party, in EQUITY and justice, is under a legal duty as if he had in fact actually made a promise.

## PROMISSORY ESTOPPEL

*In the law of contracts, the doctrine that provides that if a party changes his or her position substantially either by acting or forbearing from acting in reliance upon a gratuitous promise, then that party can enforce the promise although the essential elements of a contract are not present.*

Certain elements must be established to invoke promissory estoppel. A promisor—one who makes a promise—makes a gratuitous promise that he should reasonably have expected to induce action or forbearance of a definite and substantial character on the part of the promisee—one to whom a promise has been made. The promisee justifiably relies on the promise. A substantial detriment—that is, an economic loss—ensues to the promisee from action or forbearance. Injustice can be avoided only by enforcing the promise.

A majority of courts apply the doctrine to any situation in which all of these elements are present. A minority, however, still restrict its applicability to one or more specific situations from which the doctrine emanated, such as

*A sample writ of prohibition*

**Petition for a Writ of Prohibition**

Comes now the National Labor Relations Board, by _____, Solicitor General of the United States, and _____, General Counsel of the Board, and by leave of the Court first had and obtained, files this, its petition, for a writ of prohibition and for a writ of mandamus against the Honorable _____, _____, and _____, Circuit Judges of the _____, Judicial Circuit, and the other judges and officers of the United States Court of Appeals for the _____ Circuit, and respectfully represents:

1. Pursuant to authority conferred by the Act of July 5, 1935, 49 Stat. 449, the National Labor Relations Board (hereinafter called the Board) on April 8, 1938, issued an order in a cause before the Board entitled _____, directing the Republic Steel Corporation (hereinafter called the Corporation) to cease and desist from certain unfair labor pracitices and to take certain affirmative action found by the Board to be necessary to effectuate the policies of the Nation Labor Relations Act.

2. On April 18, 1938, the Corporation filed in the United States Court of Appeals for the _____ Circuit its petition, entitled _____, for review of the aforesaid order of the Board. The Corporation in its petition alleged inter alia that the order of the Board denied to the Corporation due process of law in violation of the Fifth Amendment to the Constitution of the United States for the reason that the order had been entered without affording the Corporation an opportunity to present its case by argument, oral or upon brief. The Corporation alleged further that it had not been given a hearing in accordance with the usual and accepted rules of legal procedure and the law of the land.

[Portions omitted for the purpose of illustration.]

5. Subsequent to April 25, 1938, the Board instituted the practice of specifically calling the attention of the parties in all proceedings before it to their right to submit briefs to the Board and upon request to be heard by the Board in oral argument. The Board also determined that in cases thereafter decided which had been initiated or transferred before it (unless reasons to the contrary should appear in particular cases) an intermediate report should be prepared by a trial examiner and served upon the parties or, in the alternative, that proposed findings of fact and conclusions of law should be prepared by the Board and served upon the parties, with express notice to the parties of their right to take exceptions to the intermediate report of proposed findings and upon request to be heard by the Board in argument, oral or upon brief, upon such exceptions. With respect to certain such cases already decided, in which complaint had been made of the absence of an intermediate report of proposed findings, or of lack of argument, written or oral, the Board, although advised that its orders therein were in accordance with law, nevertheless determined to vacate the orders, to restore tha cases to its docket, and to reconsider and redetermine the cases after giving full opportunities to the parties to except to proposed findings of fact and conclusions of law and after giving them express notice of their right to submit briefs to the Board and to be heard by the Board upon request in oral argument.

6. Among the cases affected by the last stated determination of the Board was _____, above referred to. On April 30, 1938, at a hearing upon a motion by the Corporation for a stay of the order of the Board in the said case, counsel for the Board, in the presence of counsel for the Corporation, advised the United States Court of Appeals for the _____ Circuit that the Board was considering vacating its order in the said case. On May 3, 1938, counsel for the Board advised the Corporation, by telegram addressed to its counsel, _____, that the Board had definitely decided to vacate its said order, and that on May 4, 1938, the said order would be so vacated.

7. Paragraph (d) of Section 10 of the Act of June 5, 1935, 49 Stat. 454, provides:

> "Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."

No transcript of the record in the aforesaid case of _____, has yet been filed in the United States Court of Appeals for the _____ Circuit, or in any other court.

[Portions omitted for purpose of illustration.]

Wherefore, the said National Labor Relations Board, the aid of this honorable Court respectfully requesting, prays:

1. That a writ of mandamus be issued out of this honorable Court directing and commanding the Honorable _____, the Honorable _____, the Honorable _____, Circuit Judges of the _____ Judicial Circuit, and the other judges and officers of the United States Court of Appeals for the _____ Circuit, to vacate the order of the said court issued on May 13, 1938, restraining the National Labor Relations Board from taking any further steps or proceedings in the case of _____ and directing the Board to file in the said court a certified transcript of the record of the proceedings before the Board in the said case.

2. That a writ of prohibition be issued out of this honorable Court prohibiting the Honorable _____, _____, and _____, Circuit Judges of the _____ Judicial Circuit, and the other judges and officers of the United States Court of Appeals for the _____ Circuit, from exercising any jurisdiction upon the petition of the Republic Steel Corporation to set aside the order of April 8, 1938, entered by the National Labor Relations Board in the case of _____ without affording the Board a reasonable opportunity to vacate its said order.

3. That pending further order of the Court herein, the Honorable _____, _____, and _____, Circuit Judges of the _____ Judicial Circuit, and the other judges and officers of the United States Court of Appeals for the _____ Circuit, be stayed or restrained from enforcing the provision of the order of the said court of May 13, 1938, directing the National Labor Relations Board forthwith to file in the court a certified transcript of the record before the Board in the case of _____.

4. That the Court grant to the National Labor Relations Board such other and further relief as may be just in the premises.

_____
Solicitor General of the United States

_____
General Counsel, National Labor Relations Board

[*Date*]

_____, being duly sworn, deposes that he is of counsel for the petitioner; that he has read the foregoing petition and that to the best of his information and belief the facts therein stated are true.

_____

Sworn to before me this _____ day of _____ 19___.

_____
Notary Public

when a donor promises to transfer real property as a gift and the donee spends money on the property in reliance on the promise.

With respect to the measure of recovery, it would be unfair to award the plaintiff the benefit of the bargain, as in the case of an express contract, since there is no bargain. In a majority of cases, however, injustice is avoided by awarding the plaintiff an amount consistent with the value of the promise. Other cases avoid injustice by awarding the plaintiff only an amount necessary to compensate her for the economic detriment actually suffered.

## PROMISSORY NOTE

*A written, signed, unconditional promise to pay a certain amount of money on demand at a specified time. A written promise to pay money that is often used as a means to borrow funds or take out a loan.*

The individual who promises to pay is the *maker,* and the person to whom payment is promised is called the *payee* or *holder.* If signed by the maker, a promissory note is a negotiable instrument. It contains an unconditional promise to pay a certain sum to the order of a specifically named person or to bearer—that is, to any individual presenting the note. A promissory note can be either payable on demand or at a specific time.

Certain types of promissory notes, such as corporate bonds or retail installment loans, can be sold at a discount—an amount below their face value. The notes can be subsequently redeemed on the date of maturity for the entire face amount or prior to the due date for an amount less than the face value. The purchaser of a discounted promissory note often receives interest in addition to the appreciated difference in the price when the note is held to maturity.

## PROMOTER

*A person who devises a plan for a business venture; one who takes the preliminary steps necessary for the formation of a corporation.*

Promoters are the people, who, for themselves or on behalf of others, organize a corporation. They issue a prospectus, obtain stock subscriptions, and secure a charter. Promoters stand in a fiduciary relationship to the proposed company and must act in GOOD FAITH in all their dealings for the proposed corporation.

## PROMULGATE

*To officially announce, to publish, to make known to the public; to formally announce a statute or a decision by a court.*

## PROOF

*The establishment of a fact by the use of evidence. Anything that can make a person believe that a fact or proposition is true or false. It is distinguishable from evidence in that proof is a broad term comprehending everything that may be adduced at a trial, whereas evidence is a narrow term describing certain types of proof that can be admitted at trial.*

The phrase *burden of proof* includes two distinct concepts, the BURDEN OF PERSUASION and the BURDEN OF GOING FORWARD. The burden of persuasion is the duty of a party to convince the trier of fact of all the elements of a CAUSE OF ACTION. The burden of going forward refers to the need of a party to refute evidence introduced at trial that damages or discredits his or her position in the action. The burden of persuasion remains with the plaintiff or prosecutor throughout the action, whereas the burden of going forward can shift between the parties during the trial.

In a civil action, the requisite degree of proof is a PREPONDERANCE OF THE EVIDENCE. The plaintiff must show that more probably than not the defendant violated his or her rights. In a criminal action, the prosecutor has the burden of establishing guilt BEYOND A REASONABLE DOUBT.

CROSS-REFERENCES

Preponderance of Evidence.

## PROPER

*Fit; correct; reasonably sufficient. That which is well adapted or appropriate.*

*Proper care* is the degree of care a reasonable, prudent person would use under similar circumstances.

A *proper party* is an individual who has an interest in the litigation. He or she can be joined—that is, brought into the action—but his or her nonjoinder will not result in a dismissal. A substantial judicial decree can still be rendered in the absence of a proper party. A proper party is distinguishable from a *necessary party* in that the latter must be joined in order to give complete relief to the litigants.

CROSS-REFERENCES

Joinder.

## PROPERTY LAW

There are two types of property: real property and PERSONAL PROPERTY. Most of the legal concepts and rules associated with both types of property are derived from English COMMON LAW. Modern law has incorporated many of these concepts and rules into statutes, which define the types and rights of ownership in real and personal property.

Personal property, also referred to as movable property, is anything other than land that can be the subject of ownership, including stocks, money, notes, PATENTS, and copyrights, as well as intangible property.

Real property is land and ordinarily anything erected on, growing on, or affixed to it, including buildings and crops. The term is also used to declare any rights that issue from the ownership of land. The terms *real estate* and *real property* generally refer to land. The term *land,* in its general usage, includes not only the face of the earth but everything of a permanent nature over or under it, including minerals, oil, and gases. In modern usage, the word *premises* has come to mean the land itself or the land with all structures attached. Residential buildings and yards are commonly referred to as premises.

The difference between real property and personal property is ordinarily easily recognizable. The character of the property, however, can be altered. Property that is initially personal in nature becomes part of realty by being annexed to it, such as when rails are made into a fence on land.

In certain cases, however, the intention or agreement of the parties determines whether property that is annexed retains its character as personal property. A LANDLORD AND TENANT might agree that the new lighting fixture the tenant attaches to the ceiling of her dwelling remains the tenant's property after the expiration of the lease.

Property may be further classified as either private or public. Private property is that which belongs to one or more persons. Public property is owned by a country, state, or political subdivision, such as a MUNICIPAL CORPORATION or a school district.

### Personal Property

Personal property can be divided into two major categories: tangible and intangible. Tangible property includes such items as animals, merchandise, and jewelry. Intangible property includes such rights as stock, bonds, patents, and copyrights.

**Possession** Possession is a property interest under which an individual to the exclusion of all others is able to exercise power over something. It is a basic property right that entitles the possessor to continue peaceful possession against everyone else except someone with a superior right. It also gives the possessor the right to recover personal property (often called chattel) that has been wrongfully taken and the right to recover damages against wrongdoers.

To have possession, an individual must have a degree of actual control over the object, coupled with an intent to possess the object and exclude others from possessing it. The law recognizes two types of possession: actual and constructive.

Actual possession exists when an individual knowingly has direct physical control over an object at a given time. For example, an individual wearing a particular piece of jewelry has actual possession of it. Constructive possession is the power and intent of an individual to control a particular item, even though it is not physically in that person's control. For example, an individual who has the key to a bank safe-deposit box, which contains a piece of jewelry that she owns, is said to be in constructive possession of the jewelry.

**Lost, Mislaid, and Abandoned Property** Personal property is considered to be lost if the owner has involuntarily parted with it and does not know its location. Mislaid property is that which an owner intentionally places somewhere with the idea that he will eventually be able to find it again but subsequently forgets where it has been placed. Abandoned property is property to which the owner has intentionally relinquished all rights.

Lost or mislaid property continues to be owned by the person who lost or mislaid it. When a person finds lost goods, the finder is entitled to possession against everyone with the exception of the true owner.

The finder of lost articles on land belonging to someone else is entitled to possession against everyone but the true owner. However, if the finder of the misplaced goods is guilty of TRESPASS, she has no right to possess the goods. The owner of the place where an article is mislaid has

a right to the article against everyone else but the true owner. Abandoned property can be possessed and owned by the first person who exercises control over it with an intent to claim it as his own. In any event, between the finder of a lost, mislaid, or abandoned article and the owner of the place where it is found, the law applies whatever rule will most likely result in the return of the article to its rightful owner.

Ordinarily when articles are found by an employee during and within the scope of her employment, they are awarded to the employer rather than to the employee who found them.

Treasure trove is any gold or silver in coin, plate, or bullion that is hidden by an unknown owner in the earth or other private place for an extended period. The property is not considered treasure trove unless the identity of the owner cannot be determined. Under early common law, the finder of a treasure trove took title to it against everyone but the true owner. The U.S. law governing treasure trove has been merged, for the most part, into the law governing lost property. In the absence of a contrary statutory provision, the title to treasure trove belongs to the finder against all others with the exception of the true owner. If there is a controversy as to ownership between the true owner and the state, the owner is entitled to the treasure trove.

**Confusion and Accession** Confusion and ACCESSION govern the acquisition of, or loss of title to, personal property by virtue of its being blended with, altered by, improved by, or commingled with the property of others. In confusion, the personal property of several different owners is commingled so that it cannot be separated and returned to its rightful owner, but the property retains its original characteristics. Any fungible (interchangeable) goods, such as grain or produce, can be the subject of confusion.

In accession, the personal property of one owner is physically integrated with the property of another so that it becomes a constituent part of it, losing any separate identity. Accession can make the personal property of one owner become substantially more valuable chattel as a result of the work of another person. This occurs when the personal property becomes an entirely new chattel, such as when grapes are made into wine or timber is made into furniture.

Subject to the doctrine of accession, personal property can become real property through its transformation into a fixture. A fixture is a movable item that was originally personal property but has become attached to, and associated with, the land and therefore is considered a part of the real property. For example, a chandelier mounted on the ceiling of a house becomes a fixture.

**Bailments** A BAILMENT is the rightful temporary possession of goods by an individual other than the true owner. The individual who entrusts his property into the hands of another is called the bailor. The person who holds the property is called the bailee. Ordinarily, a bailment is made for a designated purpose upon which the parties have agreed. For example, when a person pawns a diamond ring, she is the bailor and the pawnshop operator is the bailee. The pawnshop owner holds the ring for an agreed period as security on the loan to the bailor. The bailor is entitled to recover possession of the ring by paying back the loan within the time period. If the bailor fails to pay back the loan in time, the bailee gains ownership of the ring and may sell it.

A bailment differs from a sale, which is an intentional transfer of ownership of personal property in exchange for something of value, because a bailment involves only a transfer of possession or custody, not ownership.

**Bona Fide Purchasers** The basic common-law principle is that an individual cannot pass better title than she has and a buyer can acquire no better title than that of the seller. Because a thief does not have a title in stolen goods, a person who purchases from the thief does not acquire title.

A bona fide purchaser is an individual who has bought property for value with no notice of any defects in the seller's title. If a seller indicates to a buyer that she has ownership or the authority to sell a particular item, the seller is estopped (prevented) from denying such representations if the buyer resells the property to a bona fide purchaser for value without notice of the true owner's rights. At common law, such an ESTOPPEL did not apply when an owner brought an item for services or repairs to a dealer and the dealer wrongfully sold the chattel. The bona fide purchaser, however, was subsequently protected under such circumstances by the UNIFORM COMMERCIAL CODE, which was adopted in all states.

A buyer who induces a sale through fraudulent representations acquires a VOIDABLE title

from the seller. A voidable title may be vacated at the seller's option, upon discovery of the buyer's FRAUD. The seller has the authority to transfer good title to a bona fide purchaser for value without notice of the outstanding EQUITY. The voidable title rule is only applicable in situations where the owner is induced to part with title, not merely with possession, as a result of fraud or deception.

### Real Property

In the United States, every state has exclusive jurisdiction over the land within its borders. Each state has the power to determine the form and effect of a transfer of real property within its borders. Modern statutes have eliminated much traditional concern over the proper conveyancing of real property. In modern real estate law, real property can be conveyed by a deed, with the intention of the person conveying the property, the grantor, that the deed take effect as a conveyance. The deed must be recorded to give notice as to who legally holds title to the property.

### Estates in Real Property

In real property, an estate is the degree, nature, and extent of an individual's ownership in real estate. Several types of estates govern interests in real property. These interests include freehold estates, nonfreehold estates, concurrent estates, specialty estates, future interests, and incorporeal interests.

**Freehold Estate** A freehold estate is an estate in real property that is of uncertain duration. An individual who is in possession of a freehold estate has seisin, which means the right to immediate possession of the land. The two basic types of freehold estates in the United States are the fee simple absolute and the life estate. The fee simple absolute is inheritable; the life estate is not.

A fee simple absolute is the most extensive interest in real property that an individual can possess because it is limited completely to the individual and his heirs, assigns forever, and is not subject to any limitations or conditions. The person who holds real property in fee simple absolute can do whatever he wants with it, such as grow crops, remove trees, build on it, sell it, or dispose of it by will. The law views this type of estate as perpetual. Upon the death of the owner, if no provision has been made for its distribution, the owner's heirs will automatically inherit the land.

A life estate is an interest in property that does not amount to ownership because it is limited by a term of life, either of the individual in whom the right is vested or some other person,

*The items in this home that can be taken up and moved are personal property; the house, its fixtures, and the land on which it is situated are real property.*

JOHN HENLEY/CORBIS

or it lasts until the occurrence or nonoccurrence of an uncertain event. A life estate *pur autre vie* is an estate that the grantee holds for the life span of another person. For example, the grantor conveys the property "to grantee for the life of A."

A life estate is usually created by deed but can be created by a lease. No special language is required provided the grantor's intent to create such an estate is clear. The grantee of a life estate is called the life tenant.

A life tenant can use the land, take any crops from it, and dispose of his interest to another person. The life tenant cannot do anything that would injure the property or cause waste. Waste is the harmful or destructive use of real property by an individual who is in rightful possession of the property.

The life tenant has the right to exclusive possession subject to the rights of the grantor to enter the property to determine whether waste has been committed, collect any rent that is due, or make any necessary repairs.

A life estate is alienable; therefore, the life tenant can convey her estate. The grantee of a life tenant would thereby be given an estate *pur autre vie* because the death of the life tenant would extinguish the grantee's interest in the land. The life tenant is unable, however, to convey an estate that is greater than her own.

**Nonfreehold Estates** Nonfreehold estates are property interests of limited duration. They include tenancy for years, a tenancy at will, and a tenancy at sufferance. This type of estate arises in a landlord and tenant relationship. In such a relationship, a landlord leases land or premises to a tenant for a specific period, subject to various conditions, ordinarily in exchange for the payment of rent. Nonfreehold estates are not inheritable under the common law but are frequently assignable.

A tenancy for years must be of a definite duration; that is, it must have a definite beginning and a definite ending. The most common example of a tenancy for years is the arrangement existing between a landlord and a tenant, where property is leased or rented for a specific amount of time.

A tenancy from year to year, also called tenancy from period to period, is of indefinite duration. The lease period is for a definite term that is renewed automatically if neither party signifies an intention to terminate the tenancy. This is a common arrangement for leasing business office space or for renting a house or apartment.

A tenancy at will is a rental relationship between two parties that is of indefinite duration because either party may end the relationship at any time. It can be created either by agreement or by failure to effectively create a tenancy for years. A tenancy at will is not assignable and is categorized as the lowest type of chattel interest in land.

A tenancy at sufferance is an estate that ordinarily arises when a tenant for years or a tenant from period to period retains possession of the premises without the landlord's consent. This type of interest is regarded as wrongful possession. In this type of estate, the tenant is essentially a trespasser except that her original entry onto the property was not wrongful. If the landlord consents, a tenant at sufferance may be transformed into a tenant from period to period, once the landlord accepts rent.

**Concurrent Estates** A concurrent estate exists when property is owned or possessed by two or more individuals simultaneously. The three basic types are JOINT TENANCY, TENANCY BY THE ENTIRETY, and TENANCY IN COMMON.

Joint tenancy is a type of concurrent relationship whereby property is acquired by two or more persons at the same time and by the same instrument. A common example is the purchase of property, such as a house, by two individuals. The deed conveys title to "A and B in fee absolute as joint tenants." The main feature of a joint tenancy is the RIGHT OF SURVIVORSHIP. If any one of the joint tenants dies, the remainder goes to the survivors, and the entire estate goes to the last survivor.

A tenancy by the entirety is a form of joint tenancy arising between a HUSBAND AND WIFE, whereby each spouse owns the undivided whole of the property, with the right of survivorship. It is distinguishable from a joint tenancy in that neither party can voluntarily dispose of his interest in the property.

A tenancy in common is a form of concurrent ownership in which two or more individuals possess property simultaneously. The individuals do not own an undivided interest in the property, but rather each individual has a definable share of the property. One of the tenants may have a larger share of property than the others. There is no right of survivorship, and

each tenant has the right to dispose of his share by deed or will.

**Specialty Estates** Specialty estates are property interests in CONDOMINIUMS AND COOPERATIVES. Condominium ownership, which was introduced in the United States in 1961 and grew in popularity, allows separate ownership of individual apartments or units in a multiunit building. The purchaser becomes the owner of a particular unit and of a proportionate share in the common elements and facilities.

In cooperative ownership, the title to a multiunit building usually is vested in a corporation. The purchaser of an apartment in the building buys stock in the corporation, receiving a stock certificate and a lease to the apartment. As a stockholder, each cooperative member has an ownership interest in the corporation, which owns all the units and common areas. Each tenant pays to the corporation a fixed rent, which is applied to a single building mortgage and a real estate tax bill for the entire building, as well as to insurance premiums and maintenance costs.

**Future Interests** Future interests in real property are property rights that are not yet in existence. The privilege of possession will come into being at a designated future time. There are five basic kinds of future interests: the reversion, possibility of reverter, right of reentry for condition broken (also known as power of termination), executory interest, and remainder.

A remainder is a good example of a future interest. Remainders are subdivided into two principal categories: contingent remainders and vested remainders. A contingent remainder is based on something happening in the future. For example, Tom owns Blackacre in fee simple. While Bob and Jane are alive, Tom conveys Blackacre to Bob for life, with a remainder to the heirs of Jane. The heirs of Jane are not yet known, so they have a contingent remainder.

A vested remainder is a future interest to an ascertained person, with the certainty or possibility of becoming a present interest subject only to the expiration of the preceding property interests. If Tom owns Blackacre in fee simple and conveys Blackacre to Bob for life and then to Jane in fee simple, Jane has a vested remainder in fee that becomes a present interest upon the death of Bob. She simply has to wait for Bob's death before assuming a present interest in Blackacre.

**Incorporeal Interests** Incorporeal interests in real property are those that cannot be possessed physically because they consist of rights of a particular user or authority to enforce various agreements as to use. They include EASEMENTS, covenants, equitable servitudes, and licenses.

Easements are rights to use the property of another for particular purposes. A common type of easement in current use is the affirmative grant to a telephone company to run its line across the property of a private landowner. Easements also are used for public objectives, such as to preserve open space and conserve land. For example, an easement might preclude someone from building on a parcel of land, which would leave such property open, thereby preserving a park for the public.

## Possession

Possession is a property right or interest through which one can exercise dominion or control over something to the exclusion of all others. The owner of real property has the right to exclusive possession of her land, which includes the airspace above and the space below the surface within the exterior boundaries of the property.

An owner of real property is not entitled to possess all space above her land outward to infinity but has the right to be free from those intrusions into the space that would interfere with the reasonable occupation and QUIET ENJOYMENT of the surface. A landowner, therefore, owns as much of the space above the ground as he can possess or use in connection with the land.

Possession of property adverse to the rights of the true owner results in acquisition of title by the possessor under the doctrine of ADVERSE POSSESSION. The doctrine is based upon statutes that limit the time for recovery of property, thereby operating as a bar to one's right to recover property that has been held adversely by another for a specified length of time. For example, if A builds a fence two feet inside B's property and B fails to take legal action to have the fence removed during the specified time period, A will acquire title to the property that the fence encroached.

## Eminent Domain and Zoning

Governments have the right to acquire privately owned land through the exercise of the power of EMINENT DOMAIN. Eminent domain is the right or power of a unit of government or a

designated private individual to take private property for public use following the payment of a fair amount of money to the owner of the property. The FIFTH AMENDMENT to the U.S. Constitution states, "nor shall private property be taken for public use, without just compensation." The theory behind eminent domain is that the local government can exercise such power to promote the GENERAL WELFARE in areas of public concern, such as health, safety, or morals.

Government may control how real property is used. ZONING is the regulation and restriction of real property by a local government. The most common form of land use regulation, zoning involves the division of territory based on the character of land and structures and their fitness for particular uses. Municipalities use zoning to control and direct the development of property within their borders, according to present and potential uses of the property. Consideration is given to the conservation of property value and the most appropriate use of the land.

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CROSS-REFERENCES

Abandonment; Commingling; Land-Use Control; Recording of Land Titles; Registration of Land Titles; Sales Law; Scope of Employment; Title Insurance; Title Search.

## PROPERTY RIGHT

*A generic term that refers to any type of right to specific property whether it is personal or real property, tangible or intangible; e.g., a professional athlete has a valuable property right in his or her name, photograph, and image, and such right may be saleable by the athlete.*

## PROPERTY SETTLEMENT

*An agreement entered into by a* HUSBAND AND WIFE *in connection with a* DIVORCE *that provides for the division of their assets between them.*

Property settlements can arise through agreement of the parties, subject to approval by the court, or by court order. Once approved, the settlement functions like a contract for enforcement or modification purposes. Some states use alternate terms to describe a property settlement, such as property agreement, settlement agreement, or separation agreement.

A property settlement involves the property that the couple obtained either before marriage or during marriage. The agreement also may include such issues as maintenance (otherwise known as ALIMONY) payments to one spouse or even custody of the children.

Two types of property that must be distributed in the settlement are community or marital property and separate property. Community or marital property consists of property that is purchased by either or both of the spouses during the time they are married. Property bought during the time the couple is married is presumed to be marital property regardless of how it was actually purchased. The assumption can be overridden only by "clear and convincing" evidence of the intent for the property to be the property of just one spouse. Separate property is property that is bought by either of the spouses before the marriage. Separate property can also be property received in exchange for other separate property, the interest on separate property, or anything that does not fall into the category of marital property.

When determining how the property will be divided, several problems may arise, including the problems of commingling and transmutation. Commingling occurs when separate and marital property are combined, or dealt with together, in a bank or financial account. When this happens, there is no distinction between separate and marital property. To prevent a finding that the commingled property is therefore marital property, the spouses need to keep separate accounts and records for each item of property. Transmutation involves separate property that the spouses have treated as marital property, making it impossible to tell what type of property the spouses had intended it to be. For example, transmutation occurs when the parties took title to property jointly but in reality only one of the spouses paid for the property. The best way to prevent commingling or transmutation from becoming an issue or hurdle in getting the settlement approved is to keep clear and accurate records.

A third problem that can arise relating to the property involved is the valuation date. The valuation date can sometimes determine which spouse receives property because a meaningful change in the value of some assets can affect

their just distribution. Several dates can be applied, such as the date of trial, the date of separation, the divorce date, or the hearing date. Once the property is classified as marital or separate property and valued, the parties then must divide it between them.

The Uniform Marriage and Divorce Act (UMDA), which has been adopted in eight states, guides spouses and courts on what to consider when distributing property. The UMDA has two provisions that deal specifically with the disposition of the couple's property. One explains that the property should be fairly divided between the parties without regard to "marital misconduct." It lists factors to consider when apportioning the property, such as the "duration of the marriage, prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and need of each of the parties, custodial provisions, whether the APPORTIONMENT is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income." Contribution of the spouses to the family is also a consideration. The specific facts of each case must be examined to reach a fair and just division of property.

The other option given by the UMDA outlines a slightly different scheme of how property should be divided. First, each spouse's separate property is given to the appropriate spouse, then the rest of the property (the COMMUNITY PROPERTY) is divided without consideration of "marital misconduct." The factors to consider when making a division of the community property include the "contribution of each spouse to the acquisition of the marital property, including contribution of a spouse as homemaker; value of the property set aside to each spouse; duration of the marriage; and economic circumstances of each spouse when the division of property is to become effective." This option retains the distinction between property bought before the marriage (separate property) and property bought during the marriage (community property). Many states have adopted some form of these tests for their courts to use when dividing property at divorce. Once an agreement is decided upon, the property settlement has the same enforceability as a contract.

The settlement will usually be upheld by the courts unless it is found to be invalid. A court will rule that a property settlement is invalid if it is UNCONSCIONABLE, which means that the agreement is so unfair to one party that it must be modified. Whether an agreement is unconscionable is determined by the facts in each case. An unconscionability finding can be based on several factors relating to property settlement. Lack of disclosure by one of the parties can be one reason to find an agreement unfair. For example, if, when the parties met to discuss and divide their assets, one spouse did not reveal the existence of a particular asset, the other spouse, who later locates or hears of the asset after the property settlement has been approved, may seek to have the settlement overturned on the basis that he or she did not know of the asset at the time of the settlement. The court may modify the settlement to avoid further injustice to one party.

Another factor that could lead a court to find a settlement unfair is whether each party had independent counsel. Independent counsel is recommended when there is a large disparity between the parties' wealth. Independent counsel means that both parties choose their own counsel; if just one party selects counsel, the court could consider counsel to be nonindependent. Lack of disclosure and lack of independent counsel are two of the most common reasons why a court will find a settlement unfair to one of the parties.

The court may also find a property settlement unenforceable because of mistake, FRAUD, or UNDUE INFLUENCE. If the parties make a genuine mistake about the terms of the settlement, the court can reform or modify the settlement to correct that mistake. Fraud and undue influence are also reasons to alter or modify a property settlement. If one spouse fraudulently informs the other of property or assets during the process of negotiating the settlement, this action can be grounds for modifying the settlement. Undue influence means that one party used pressure or misrepresentations to force the other to sign or agree to the terms in the property settlement. When a court finds either fraud or undue influence, it modifies the property settlement to correct the unfairness.

Property settlements should be fair both in the process of reaching the settlement, avoiding any unconscionability or fraud, and in the division of the property, making an equal separation of the total marital assets. If the settlement is fair between the parties, the court is likely to enforce it.

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CROSS-REFERENCES

Alimony; Commingling; Divorce; Husband and Wife.

## PROPONENT

*One who offers or proposes.*

A proponent is a person who comes forward with an a item or an idea. A proponent supports an issue or advocates a cause, such as a proponent of a will.

## PROPOUND

*To offer or propose. To form or put forward an item, plan, or idea for discussion and ultimate acceptance or rejection.*

## PROPRIETARY

*As a noun, a proprietor or owner; one who has the exclusive title to a thing; one who possesses or holds the title to a thing in his or her own right; one who possesses the dominion or ownership of a thing in his or her own right.*

*As an adjective, belonging to ownership; owned by a particular person; belonging or pertaining to a proprietor; relating to a certain owner or proprietor.*

Proprietary refers to ownership or characteristics relating to ownership. It describes all the rights that the owner of property can exercise. Proprietary articles are items that are manufactured and marketed under an exclusive right.

Municipal corporations have a proprietary function, a term describing the duty or capacity of a city to enter into business ventures or to perform discretionary acts in the best interests of the citizens. Proprietary functions differ from governmental functions, which are duties that a city performs as a political subdivision of a state.

## PRORATE

*To divide proportionately. To adjust, share, or distribute something or some amount on a pro rata basis.*

## PROROGATION

*Prolonging or putting off to another day. The discontinuation or termination of a session of the legislature, parliament, or the like. In* ENGLISH LAW, *a prorogation is the* CONTINUANCE *of the parliament from one session to another, as an adjournment is a continuation of the session from day to day. In* CIVIL LAW, *giving time to do a thing beyond the term previously fixed.*

## PROSECUTE

*To follow through; to commence and continue an action or judicial proceeding to its ultimate conclusion. To proceed against a defendant by charging that person with a crime and bringing him or her to trial.*

The state, on behalf of the people, generally prosecutes a defendant accused of a crime.

## PROSECUTING ATTORNEY

See DISTRICT AND PROSECUTING ATTORNEYS.

## PROSECUTOR

*One who prosecutes another for a crime in the name of the government.*

State and county governments employ prosecutors to represent their local communities in complaints against criminal defendants. On the federal level, the president appoints prosecutors to represent the United States in complaints against criminal defendants.

In some states a prosecutor must present the court with a written statement of the charges, called an information. In other states a prosecutor is required to convene a GRAND JURY before charging a defendant with a serious crime. A grand jury is a collection of laypersons selected by the prosecutor to examine evidence and

decide whether to indict the defendant and so authorize prosecution. On the federal level, the FIFTH AMENDMENT requires prosecutors to obtain an indictment for capital or "otherwise infamous" crimes, with the exception of crimes arising out of active military service.

In most criminal cases, the prosecutor must match wits with the defense attorney who represents the defendant. Almost all criminal defendants are represented by an attorney, even if they cannot afford to pay for one. If a court does not offer LEGAL REPRESENTATION to a criminal defendant, the defendant may not be incarcerated upon conviction.

Prosecutors have a broad discretion in determining whether to prosecute a criminal defendant. A prosecutor does not have to personally believe BEYOND A REASONABLE DOUBT that the defendant committed the alleged act. A prosecutor must simply possess enough evidence to support a reasonable belief that the defendant committed the crime.

There are two notable limits on the prosecutor's discretion to prosecute. First, a prosecutor may not base a prosecution on "an unjustifiable standard such as race, religion, or other ARBITRARY classification" (*Oyler v. Boles,* 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 [1962]). For example, a prosecutor may not selectively prosecute only Chinese persons who violate laws regulating laundry facilities (YICK WO V. HOPKINS, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 [1886]).

Second, a prosecutor may not vindictively add charges because a defendant has pursued a constitutionally protected right (*Blackledge v. Perry,* 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 [1974]). For example, assume that a defendant is convicted at trial but that the conviction is reversed on appeal. If the prosecutor seeks to retry the defendant, the prosecutor may not, without more evidence, charge the defendant with more serious charges than the defendant faced in the first trial. A prosecutor may threaten a defendant with a more serious charge if the defendant refuses to plead guilty to a lesser criminal charge, but only if the prosecutor has evidence to support the more serious charge (*Bordenkircher v. Hayes,* 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 [1978]).

Prosecutors hired by the government are the only persons empowered to prosecute criminal cases. Private parties may lodge criminal complaints against persons or groups, but under state and federal statutes, only a duly authorized attorney may prosecute a criminal case. Federal and state governments can prohibit unauthorized persons from prosecuting other persons because the control of criminal prosecutions is a legitimate interest of government (*Leeke v. Timmerman,* 454 U.S. 83, 102 S. Ct. 69, 70 L. Ed. 2d 65 [1981]). This rule is sensible because it allows the government to prevent the judicial system from becoming more overburdened.

Prosecutors have many duties to perform in the course of a criminal prosecution. At the arraignment—the defendant's first appearance before the court—the prosecutor must make a bail recommendation. Bail is the amount of money that the defendant must pay the court to gain release from jail. Release for a fraction of bail may be obtained if a criminal defendant pays a bail bonds company which promises to pay the bail if the defendant does not show for future court appearances. A prosecutor may recommend that the court deny bail to an allegedly dangerous defendant to keep the defendant in jail while the case is being processed.

The prosecutor must prepare the case against the defendant. She does this by reviewing the evidence, conducting an investigation, and communicating with police officers. The prosecutor may issue directives to law enforcement personnel to find more evidence. The prosecutor also must notify the defendant of the evidence against him and must turn over any exculpatory evidence (evidence that would tend to clear the defendant) that the prosecutor possesses.

The prosecutor usually meets with the defendant or the defendant's attorney in advance of trial to discuss the case. Considering the vast number of criminal laws passed by state and federal legislatures, defendants usually face more than one criminal charge for any given criminal episode. The ability to bring multiple charges gives prosecutors a measure of bargaining power over criminal defendants. Prosecutors often are willing to drop certain charges and recommend lesser sentences for defendants who agree to plead guilty to a certain crime. This practice is called PLEA BARGAINING.

If the defendant does not wish to plead guilty, the prosecutor usually must defend the legitimacy of the prosecution at various stages before trial. In felony cases the prosecutor may be required under law to obtain permission from a grand jury before she or he can prosecute

the defendant. A grand jury is a panel of individuals that can reject a criminal prosecution for lack of evidence. If the grand jury returns a no bill, the defendant is not indicted and the case against the defendant must be dropped. If the grand jury returns a true bill, the defendant is indicted and the prosecution may proceed.

Few criminal defendants proceed to trial. More than 90 percent of all criminal prosecutions are disposed of through plea bargaining. Those criminal defendants who do proceed to trial usually mount challenges prior to trial based on the legality of evidence gathering and the sufficiency of the evidence against them. Defendants may make requests of the court. For instance, a defendant may request that the trial be moved to a different geographic location, or a defendant may ask the court to forbid the trial participants from talking to the media. The prosecutor also may challenge evidence offered by the defendant and make certain requests of the court. These challenges and requests are made in pretrial motions and hearings. If the prosecutor does not rebut or respond to the defendant's arguments regarding the evidence, the court may dismiss the case before it goes to trial.

At trial the prosecutor must prove, beyond a REASONABLE DOUBT, that the defendant committed the alleged criminal acts. The prosecutor must make an OPENING STATEMENT, present evidence and testimony, and make a closing argument. Both the prosecutor and defense attorney have the right to cross-examine witnesses and to challenge the introduction of certain testimony and other evidence. Ultimately, the court decides what evidence will be admitted into the trial and what evidence will be excluded. If the defendant is convicted, the trial judge imposes a sentence. The prosecutor may make a sentencing recommendation, but the court is not obliged to follow the recommendation.

In theory, a prosecutor's job is not to convict and send to prison as many persons as possible. The basic function of a prosecutor is to seek the truth about criminal actions. Thus, if a prosecutor discovers evidence that puts the defendant's guilt in doubt or relieves the defendant of criminal liability, the prosecutor must turn that evidence over to the defendant. If a prosecutor lacks evidence of a defendant's guilt, he or she must drop the charges or decline to press charges. In practice, prosecutors find that they are judged in the court of public opinion on the number of convictions that they obtain.

In any event, a prosecutor does not decide whether to convict a defendant. That decision is made by the fact finder: either the judge in a bench trial or the jury in a jury trial. The prosecutor only decides whether to charge the defendant and then presents the community's case to the fact finder.

Scholars disagree on the precise historical origins of the U.S. prosecutor. The modern version of the professional prosecutor likely derives from the European practice of vesting one office with the power to conduct criminal prosecutions. In England, private parties could prosecute other private parties until the eighteenth century, but English statutes creating the office of public prosecutor existed as far back as the mid-sixteenth century. In colonial America all 13 colonies established the office and position of attorney general. The colony's attorney general was charged with prosecuting crimes committed within the colony. Private prosecutions were carried out at times, but private prosecution ended around the beginning of the American Revolution in the 1770s. Historians have attributed the rise of the public prosecutor to the cost associated with private prosecutions. Few persons in colonial America had the time or resources to prosecute an alleged criminal.

The primacy of the public prosecutor became entrenched in the 1820s as the U.S. public began to press for the introduction of democracy into the criminal justice process. States began to allow the election of judges, and laws allowing the election of a prosecutor followed shortly thereafter. In 1832 Mississippi became the first state to include a provision in its constitution providing for the election of local prosecutors. Every state entering the Union after 1850 provided for either the election or employment of public prosecutors, and the position is now deeply rooted in the federal and state criminal justice systems.

Originally, public prosecutors were considered mere figureheads in the criminal justice system. Local sheriffs and even coroners had more say in the process than did the prosecutor. This situation changed by the mid-nineteenth century as more and more prosecutors were elected by the public rather than hired by the local government. The powers of the prosecutor gradually increased until the 1920s, when a drastic increase in crime led to heightened public scrutiny of the office and revela-

tions that prosecutors were being corrupted by organized criminals. By the 1940s most states had enacted statutes creating licensing requirements for the office of prosecutor. Under these statutes a person who is not licensed to practice law may not perform the work of the prosecutor even if the person has won the election. Most states also created a regular office of prosecutor instead of hiring private attorneys to work as part-time prosecutors. The power of the prosecutor's office has increased over the years.

In the early 2000s, prosecutors have more authority than ever before. They have the authority to investigate persons, grant IMMUNITY to witnesses and accused criminals, and plea bargain with defendants. Prosecutors decide what criminal charges to bring and when and where a person will answer to those charges. Courts rarely second-guess the decisions of a prosecutor, and all courts presume that a prosecutor has acted appropriately. Furthermore, prosecutors enjoy absolute immunity from suit for their courtroom work. However, they may be liable for suit when their conduct in the investigatory phase of their duties is in dispute. They may be forced to defend against a suit for MALICIOUS PROSECUTION only if they blatantly exceed the powers of their office. A prosecutor who fabricates testimony or other evidence, for instance, may be held liable in a civil suit for malicious prosecution.

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CROSS-REFERENCES

Criminal Law; Criminal Procedure; District and Prosecuting Attorneys; Malicious Prosecution; Plea Bargaining; Pretrial Conference; Right to Counsel.

## PROSPECTUS

*A document, notice, circular, advertisement, letter, or communication in written form or by radio or television that offers any security for sale, or confirms the sale of any security.*

A prospectus is a document or a publication by, or on behalf of, a corporation containing information on the character, nature, and purpose of an issue of shares, debentures, or other corporate SECURITIES that extends an invitation to the public to purchase the securities. The content of a prospectus is regulated by federal law. It must contain all material facts relating to the company and its operations so that a prospective investor can make an informed decision as to the merit of the investment. A prospectus must be furnished to an investor before any purchase is made.

## PROSTITUTION

*The act of offering one's self for hire to engage in sexual relations.*

Prostitution is illegal in all states except Nevada, where it is strictly regulated. Some state statutes punish the act of prostitution, and other state statutes criminalize the acts of soliciting prostitution, arranging for prostitution, and operating a house of prostitution. On the federal level, the MANN ACT (18 U.S.C.A. § 2421 [as amended 1986] makes it a crime to transport a person in interstate or foreign commerce for the

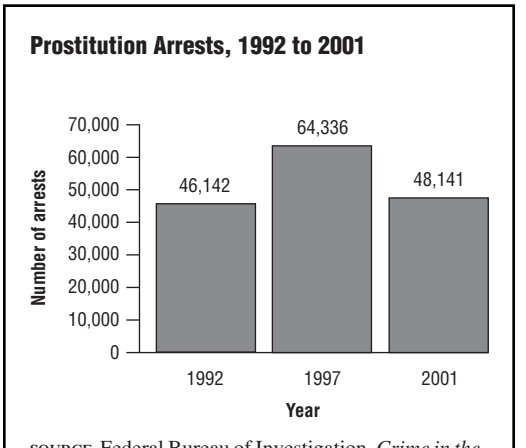


SOURCE: Federal Bureau of Investigation, *Crime in the United States 2001.*

# Commercial Sex: Repression or Legalization?

In the United States, 49 states make prostitution a crime. The only exception is Nevada, which permits brothels to operate in specific areas of the state. Since the 1970s, advocates of reform have called for either the legalization or the decriminalization of prostitution. Proponents see these approaches as a way of preventing women from being punished for making a choice on how they want to earn an income. Opponents of these changes dismiss the idea that women voluntarily choose this type of work and claim that prostitution is yet another part of the U.S. commercial sex industry, which systematically subordinates women.

Proponents of decriminalization argue that it would remove the stigma associated with prostitution and increase profits. They contend that decriminalization would also relieve the police of the costly and futile effort to stop an unstoppable practice.

Legalizing prostitution would mean regulating it. Supporters contend that this would allow the government to collect millions of dollars annually in taxes, reduce collateral crime, and protect the public from sexually transmitted diseases. Proponents point to Nevada, where the use of brothels facilitates testing for diseases and reduces the number of street prostitutes.

Other supporters of decriminalization and regulation challenge what they see as the paternalistic argument that women need to be protected from sexual exploitation. This argument, they claim, is nonsensical because it means that to protect women from exploitation, society must imprison them for engaging in prostitution.

In addition, those who favor decriminalization note that the worst form of exploitation suffered by prostitutes is from pimps. If prostitution were legal, women would generally conduct business on their own, free from the parasitic and abusive conduct of pimps.

Decriminalization supporters also cite the difference between the lax policing of off-street prostitutes and the harsh treatment of street prostitutes. These observers argue that the enforcement disparity is a matter of race and class: most street prostitutes are members of historically oppressed groups, whereas off-street prostitutes generally have middle-class backgrounds. They argue that it is unfair for society to tolerate and even promote escort services while regularly jailing street prostitutes.

Opponents of legalization of prostitution have traditionally based their opposition on the immorality of commercial sex. However, modern feminist thought has developed other arguments against the removal of legal barriers to selling sex.

Many feminists have attacked the "career-choice" argument. They see it as a corruption of feminist values that otherwise favor the economic liberty of women. They contend that, from a limited range of options constrained by economics, education, **SEXUAL HARASS-**

purpose of prostitution or for any other immoral purpose.

Prostitution, historically and currently a trade largely practiced by women, was not a distinct offense in colonial America. A prostitute could be arrested for **VAGRANCY** if she were loitering on the streets, but generally, the act of engaging in sex for money was not itself a crime.

The first prostitution statutes were enacted during the so-called Progressive political movement of the late nineteenth and early twentieth centuries. Urban areas experienced unprecedented growth during this period. Cities became the centers of industrial manufacturing and production, and they were quickly ravaged by disease and poverty. The Progressive movement emphasized education and instituted new government controls over the activities of the general population. The movement introduced the **PROHIBITION** of alcohol, which was banned from 1919 to 1933, vested government with increased power over the lives of poor persons, and created a host of new criminal laws, including laws on prostitution. Prostitution increased during this period, and it was seen as one of the biggest threats to public health because of its potential to spread debilitating venereal diseases such as syphilis and gonorrhea. Prostitutes were viewed as moral failures. The male customers of prostitutes were not held up to scorn, but the women who practiced prostitution were seen as responsible for increases in crime and the general decay of social morals.

In the nineteenth and early twentieth centuries, states began to encourage the arrest of prostitutes for such crimes as vagrancy and loitering. Congress passed the Mann Act in 1910, which criminalized interstate prostitution, and

MENT, and abuse, the decision to sell one's body cannot be deemed a choice. Even if a woman makes a conscious decision to enter prostitution, this does not redeem the trade from being the worst form of gender-based exploitation.

The "choice" argument is also undercut, argue the opponents of legalization, by the fact that the average prostitute starts working at the age of fourteen and suffers SEXUAL ABUSE, drug dependency, violence at the hands of customers, and emotional control by pimps. From this point of view, women are victims of commercial sex work.

More radical feminist critics of legalization argue that prostitution, like PORNOGRAPHY, is an example of the unequal status of women in the United States. The right to privacy arguments advanced by legalization proponents may sound reasonable, contend critics, but they mask the systematic subordination of women. Noted feminist legal scholar CATHARINE A. MACKINNON has defined pornography as "the graphic sexually explicit subordination of women, whether in pictures or words," especially in a violent or degrading context. Prostitution is worse than pornography, contend these critics, because women are subjected to sex in violent and degrading contexts.

For these more radical critics of legalization and decriminalization, making commercial sex legal would legitimize the subordinated position of women in U.S. society. Just as the legalization of casino gambling has caused a dramatic increase in the number of people gambling and the amount of money wagered, the legalization of prostitution would give the commercial sex industry the opportunity to legitimately expand. Critics argue that in a consumer culture already permeated with sexual imagery, legalization is not the answer.

Legalization critics have acknowledged, however, that prostitutes are prosecuted for their acts while their male customers usually are not. In the 1980s and 1990s, many state and local governments have sought to end this double standard by enacting laws that target customers of prostitutes. This legislation has also been triggered by residents of local communities who have grown tired of enduring the presence of customers who visit their neighborhoods. These so-called anti-john laws seek to discourage customers by impounding their cars, and, in some cases, notifying their spouses of their arrest.

Many police departments have also increased their use of police decoys—officers disguised as prostitutes who lure unsuspecting customers into arrest. In addition, customers who have been arrested may find their names listed in the local newspaper or photographs broadcast on a local CABLE TELEVISION station.

It is unlikely that prostitution will be legalized or decriminalized because few politicians would relish being associated with so morally explosive an issue as commercial sex. It is also unlikely, given prostitution's persistence throughout history, that efforts by law enforcement to prosecute prostitutes and their customers will bring an end to prostitution.

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### CROSS-REFERENCES

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state legislatures made prostitution a distinct criminal offense. The prostitute, not the customer, was the first to be penalized on the state and local levels; statutes that criminalized the solicitation of prostitution were passed later.

Historically, the enforcement of prostitution laws focused on apprehension of the prostitute. In the 1960s and 1970s, perhaps as a result of heightened social discourse on the issue of prostitution, police departments became more vigilant in their pursuit of customers. Local police in urban areas now regularly conduct "sting" operations designed to catch solicitors through the use of undercover agents posing as prostitutes. Many states have FORFEITURE statutes that give law enforcement agencies the power to seize and gain ownership of vehicles used by customers of prostitutes, and alleged customers may find their pictures published in the local newspaper.

All jurisdictions have made their prostitution statutes gender-neutral, but the prostitution relationship still usually consists of a man paying a woman for sex. There are occasional variations of the sexual identities of the participants in contemporary society, but, by and large, a prostitute is still more likely to be a woman or a girl. An increasing amount of prostitution occurs off the street by organized escort services, and prostitutes from these services have some measure of control over their lives. However, many prostitutes still work on the street, living a desperate, brutal, dangerous life at the mercy of a promoter, or pimp. Because the prostitute usually is a woman or a girl, and because prostitution can wreak havoc on the life of the prostitute, the issue of prostitution has become a matter of concern for WOMEN'S RIGHTS advocates.

## Hollywood Madam

The Los Angeles prostitution prosecution and conviction of Heidi Fleiss, dubbed the Hollywood Madam by the press, raised issues that went beyond the sensational elements of the case. Feminist groups criticized Los Angeles prosecutors for continuing the familiar pattern of targeting female prostitutes while ignoring their male customers.

Heidi Fleiss, the daughter of a prominent California pediatrician and a schoolteacher, was arrested in June 1993 for running an expensive call-girl business. Fleiss was charged with pandering, or providing prostitutes to customers. It was alleged that seventy women worked for her and that her clients included Hollywood actors, U.S. politicians, and rich foreign businessmen.

The tabloid press had made Fleiss a minor celebrity before her arrest by occasionally discussing her and publishing photographs of her. Her notoriety led the Los Angeles police to conduct a "sting" operation, in which an officer posed as a customer, hiring prostitutes at a rate of $1,500 each for a supposed party. When the women arrived for the party, they and Fleiss were arrested.

In the months that followed, titillating details emerged about Fleiss and her alleged customers. At one point Fleiss offered to reveal the names of the wealthy men who used her services if she was paid $1 million. As the case neared trial, her attorney alleged that Fleiss had been selectively prosecuted and that her male customers, whose names were in her address book, would not be charged with any crimes.

The judge dismissed Fleiss's arguments, and she was convicted of pandering on December 2, 1994. The Los Angeles chapter of the **NATIONAL ORGANIZATION FOR WOMEN** and some feminists charged that the failure to prosecute the rich and powerful customers demonstrated the double standard at work in the criminal justice system regarding prostitution offenses.

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CROSS-REFERENCES

Sex Offenses; Vice Crimes.

## PROTECTIONISM

See **IMPORT QUOTAS.**

## PROTECTIVE CUSTODY

*An arrangement whereby a person is safeguarded by law enforcement authorities in a location other than the person's home because his or her safety is seriously threatened.*

When a witness to a crime is intimidated not to testify because the alleged perpetrator or her associates have threatened physical violence against the witness or the witness's family, law enforcement authorities have the ability to offer the witness protective custody. Protective custody may last only until the end of a trial or it may last for several years. State and federal governments

operate witness protection programs that provide assistance to those who wish to cooperate but who are afraid of physical retaliation.

Until the 1960s law enforcement used protective custody infrequently. Federal prosecution of ORGANIZED CRIME figures led to the offering of witness protection to key government informers. In 1964 Joseph Valachi became the first La Cosa Nostra member to publicly testify to the existence of the organized crime group, appearing before a congressional committee. Valachi, who was facing the death penalty, agreed to testify in return for personal protection. He was held in solitary confinement for protection and given $15 a month.

Since the 1970s the Federal Witness Security Program (18 U.S.C.A. § 3521 [1970]) has grown in size. The program is used to fight organized crime, TERRORISM, gang-related crime, and narcotics trafficking. In 1995, 141 new participants were added to the program, increasing the number to 6,580 witnesses and 14,845 total participants since the program began. Also in 1995, 257 protected witnesses testified at trials against organized crime members, resulting in a substantial number of convictions.

Under the program, the U.S. attorney general is authorized to offer security to key witnesses who have physical safety concerns. The program, which is administered by the U.S. MARSHALS SERVICE, provides a new SOCIAL SECURITY number and other documents to enable the person to establish a new identity. It also provides housing, transportation of household goods to a new residence, payments to meet basic living expenses, employment assistance, and other services necessary to assist the person in becoming self-sustaining. The witness's immediate family or a person closely associated with the witness may be provided similar assistance under the program.

In return for this assistance, the witness and family members over eighteen years of age must each sign a memorandum of agreement. The witness must agree to testify and provide information to law enforcement officials. In addition, the person must agree not to commit any crime and to take all necessary steps to avoid detection. Most witnesses remain in the program for two years before pursuing their new lives on their own.

Many states have adopted similar programs for witnesses. This type of protection, however, has come under increased scrutiny. Because witnesses who are convicted criminals are given new identities and moved to new locations, local law enforcement agencies have no knowledge that potentially dangerous persons are in their communities. Murder and other serious crimes have been committed by persons assisted through witness protection.

These programs have also been challenged because a number of high-profile criminals have received favorable treatment. Some drug dealers have been allowed to keep their narcotics-generated money and have avoided prison in return for their testimony against others involved in drug trafficking. Critics argue that it makes no sense to have the government pay to relocate drug dealers and to ensure their safety. Defenders of the program argue that this is a necessary price to pay to convict more powerful crime figures.

Witness protection programs also exist in prisons. To protect witnesses serving a prison sentence, the federal government has created witness protection units within federal prisons. Protected witnesses live a more comfortable life than other prisoners, which includes having free and unlimited access to telephones and CABLE TELEVISION and the ability to use their own money to buy food, appliances, jewelry, and other items.

Aside from these witness protection programs, prisons also have protected custody units for inmates who are targets of assault or victims of SEXUAL HARASSMENT. Although conditions vary greatly in protected custody units from one institution to another, life is more restricted than in the general prison population. Some large prisons have separate protective custody facilities, but in most jails and prisons an inmate has protective custody status while housed in administrative SEGREGATION. This means that the inmate is restricted to his cell twenty-three hours a day and must take meals there as well.

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## PROTECTIVE ORDER

*A court order, direction, decree, or command to protect a person from further harassment,* SERVICE OF PROCESS, *or discovery.*

A protective order can limit the time and place where a deposition can be taken, restrict the inspection of documents in the possession of a party, or regulate or modify the enforcement of a judgment.

## PROTECTORATE

*A form of international guardianship that arises under* INTERNATIONAL LAW *when a weaker state surrenders by treaty the management of some or all of its international affairs to a stronger state.*

The extent of the reciprocal rights and duties between the protecting state and the protected state depends upon the terms of the treaty and the conditions under which other states have recognized the protectorate. Although it loses some of its independence, the protected state still exists as a state in international law and may avail itself of some of the rights of a state. Its diplomatic representatives may still enjoy normal immunities within the courts of other states, for instance, and a treaty concluded by the protecting state with a third state is not necessarily binding on the protected state.

## PROTEST

*A formal declaration whereby a person expresses a personal objection or disapproval of an act. A written statement, made by a notary, at the request of a holder of a bill or a note that describes the bill or note and declares that on a certain day the instrument was presented for, and refused, payment.*

A protest is generally made to save some right that would be waived unless a negative opinion was expressly voiced. Taxes are often paid under protest, an action by which a taxpayer reserves the right to recover the amount paid if he has sufficient evidence to prevail.

The document states the reasons for the refusal and provides for the notary to protest against all parties to the instrument declaring that they can be held liable for any loss or damages. A notice of protest is given by the holder of the instrument to the drawer or endorser of the instrument.

## PROTHONOTARY

*A title given to the principal clerk of a court.*

## PROTOCOL

*A brief summary; the minutes of a meeting; the etiquette of diplomacy.*

Protocol refers to a summarized document or the minutes of a meeting that are initialed by the parties present to indicate the accuracy of the document or minutes.

Protocol is a section of the DEPARTMENT OF STATE that is responsible for advising the government, the president, the vice president, and the SECRETARY OF STATE on matters of diplomatic procedure governed by law or international custom and practice. Protocol is the method of officially ranking or receiving government officials.

## PROVINCE

*The district into which a country has been divided; as, the province of Ontario in Canada. More loosely, a sphere of activity or a profession such as medicine or law.*

## PROVISIONAL

*Temporary; not permanent. Tentative, contingent, preliminary.*

A provisional civil service appointment is a temporary position that fills a vacancy until a test can be properly administered and statutory requirements can be fulfilled to make a permanent appointment.

## PROVISO

*A condition, stipulation, or limitation inserted in a document.*

A condition or a provision in a deed, lease, mortgage, or contract, the performance or nonperformance of which affects the validity of the instrument. It generally begins with the word *provided.*

A proviso clause in a statute excepts something from statutory requirements, qualifies the statute, or excludes some potential area of misinterpretation.

## PROVOCATION

*Conduct by which one induces another to do a particular deed; the act of inducing rage, anger, or resentment in another person that may cause that person to engage in an illegal act.*

Provocation may be alleged as a defense to certain crimes in order to lessen the severity of

the penalty normally imposed. For example, provocation that would cause a reasonable person to act in a heat of passion—a state of mind where one acts without reflection—may result in a reduction of a charge of murder to a charge of voluntary MANSLAUGHTER.

## PROXIMATE CAUSE

*An act from which an injury results as a natural, direct, uninterrupted consequence and without which the injury would not have occurred.*

Proximate cause is the primary cause of an injury. It is not necessarily the closest cause in time or space nor the first event that sets in motion a sequence of events leading to an injury. Proximate cause produces particular, foreseeable consequences without the intervention of any independent or unforeseeable cause. It is also known as legal cause.

To help determine the proximate cause of an injury in NEGLIGENCE or other TORT cases, courts have devised the "but for" or "sine qua non" rule, which considers whether the injury would not have occurred but for the defendant's negligent act. A finding that an injury would not have occurred but for a defendant's act establishes that the particular act or omission is the proximate cause of the harm, but it does not necessarily establish liability since a variety of other factors can come into play in tort actions.

Some jurisdictions apply the "substantial factor" formula to determine proximate cause. This rule considers whether the defendant's conduct was a substantial factor in producing the harm. If the act was a substantial factor in bringing about the damage, then the defendant will be held liable unless she can raise a sufficient defense to rebut the claims.

## PROXY

*A representative; an agent; a document appointing a representative.*

A proxy is a person who is designated by another to represent that individual at a meet ing or before a public body. It also refers to the written authorization allowing one person to act on behalf of another.

In corporate law, a proxy is the authority to vote stock. This authority is generally provided by the charter and bylaws of a corporation or by a state statute. If authority is not provided, a stockholder cannot vote by proxy. The record owner of the stock whose name is registered on the corporate books is the only individual who can delegate the right to vote. In the absence of an express requirement, no particular form is necessary for a proxy. It must, however, be evidenced by a sufficient written grant of authority. A proxy is not invalid if minor errors or omissions appear on the document.

Generally any power that a stockholder possesses at a corporate meeting can be delegated to a proxy. An ordinary proxy can vote on regular corporate business, such as the amendment of the bylaws. The proxy is not authorized to vote, however, on extraordinary corporate business, such as a merger, unless given special authority to do so. When a proxy acts within the scope of her authority, under agency principles, the stockholder is bound as if she acted in person.

A proxy can be revoked at any time, unless it is coupled with an interest or made expressly irrevocable. The sale of a stockholder's shares automatically revokes any proxies previously given to vote those shares. A proxy can also be revoked when the stockholder gives a subsequent proxy or attends the meeting in person. A stockholder can act as a proxy for another shareholder, but it is not necessary for a proxy to be a stockholder.

## PRUDENT PERSON RULE

*A standard that requires that a fiduciary entrusted with funds for investment may invest such funds only in* SECURITIES *that any reasonable individual interested in receiving a good return of income while preserving his or her capital would purchase.*

Historically known as the prudent or reasonable man rule, this standard does not mandate an individual to possess exceptional or uncanny investment skill. It requires only that a fiduciary exercise discretion and average intelligence in making investments that would be generally acceptable as sound.

## PUBLIC

*As a noun, the whole body politic, or the aggregate of the citizens of a state, nation, or municipality. The community at large, without reference to the geographical limits of any corporation like a city, town, or county; the people.*

*As an adjective, open to all; notorious. Open to common use. Belonging to the people at large; relating to or affecting the whole people of a state, nation, or community; not limited or restricted to any particular class of the community.*

*A sample proxy statement used by a fictional company to notify its stockholders of upcoming annual meeting of shareholders*

## Proxy Statement

**_____, INC.**
**Smith Building**
**1000 Main Street**
**Spur, Texas 77111**

**NOTICE OF ANNUAL MEETING OF SHAREHOLDERS**
**TO BE HELD ON OCTOBER 23, 2004**

To the Shareholders of
_____, INC

September 17, 2004

The annual meeting of the shareholders of _____, Inc. will be held in the Presidential Ballroom of the Longhorn Hotel, 2000 Steer Street, Spur, Texas, on Thursday, October 23, 2004, at 9 A.M., Spur time, for the following purposes:

1. To elect a Board of Directors for the ensuing year;
2. To act upon the recommendation of the Board of Directors that _____ be elected and approved as independent public accountants to examine the Company's accounts for the current fiscal year; and
3. To transact such other business as may properly come before the meeting or any adjournments thereof.

The Board of Directors has fixed the close of business on September 3, 2004, as the record date for determining shareholders entitled to notice of and to vote at the meeting.

You are cordially invited to attend the meeting in person. Even if you plan to attend the meeting, however, you are requested to sign, date and return the accompanying proxy as soon as possible.

By Order of the Board of Directors
S. A. James, Secretary

The Company has approximately 11,500 Common Shareholders, a substantial number of whom own less than 100 shares. To insure a proper representation at the meeting if you cannot attend in person, it is important that, regardless of the amount of your holdings, you fill out, sign and return the enclosed proxy promptly. A return envelope is enclosed for your convenience.

**PROXY STATEMENT**

This Proxy Statement and the accompanying form of proxy are being mailed on or about September 17, 2004 in connection with the solicitation by the management of _____ Inc. (the "Company") of proxies to be used at the annual meeting of its shareholders to be held on October 23, 2004, and any and all adjournments thereof, for the purposes set forth in the accompanying notice of the meeting. When proxies are returned properly executed, the shares represented thereby will be voted. If the proxy signed without a vote indicated in the boxes, the shares will be voted for the election as directors of the nominees named herein and in favor of the election and approval of _____ as independent public accountants to examine the Company's accounts for the current fiscal year. If a choice has been specified, however, the shares will be voted accordingly. A shareholder giving a proxy may revoke it at any time before it is voted at the meeting. In addition, a shareholder who attends the meeting may, if he wishes, vote by ballot at the meeting, thereby cancelling any proxy vote previously given.

The Company will pay the cost of soliciting proxies. In addition to the solicitation of proxies by mail, proxies may also be solicited by telephone, telegram, or personal interview by regular employees of the Company. The Company will reimburse brokerage houses and other nominees for their reasonable expenses in forwarding proxy material to beneficial owners of stock.

Whether you can attend the meeting or not, your proxy vote is important. Shares can be voted at the meeting only if the owner is present or is represented by proxy. Accordingly, it is requested that you sign and return the enclosed proxy in the envelope provided.

The principal executive offices of the Company are located in the Smith Building, 1000 Main Street, Spur, Texas 77111.

VOTING OF SHARES

Only shareholders of record at the close of business on September 3, 2004, are entitled to notice of and to vote at the meeting. At such date the Company had outstanding 4,017,281 shares of Common Stock. Each share entitles the owner of record on the record date to one vote per share on all questions submitted to shareholders.

I
ELECTION OF DIRECTORS

There are eleven directors to be elected. It is intended that the persons named in the following tabulation will be placed in nomination, and the persons named in the accompanying proxy will vote in favor of such nominees, unless contrary instructions are set forth on the proxy. Each nominee is a member of the present Board of Directors. The terms of office of all directors to be elected at this annual meeting will be until the next annual meeting of shareholders and their successors are elected and qualified. The persons named in the proxy may act with discretionary authority if any nominee should become unavailable for election, although management is not aware of any circumstances likely to render any nominee unavailable. The following information has been furnished by each nominee.

[continued]

*A sample proxy statement used by a fictional company to notify its stockholders of upcoming annual meeting of shareholders (continued)*

## Proxy Statement

| Name and Principal Occupation | Served as Director Continuously Since | Shares of Common Stock Owned Beneficially at August 29, 2004 |
|---|---|---|
| Jordy W. Evans . . . . . Chairman of the boards of directors of _____ Company, _____, Inc., _____, Inc., _____, Inc., and _____ Company, subsidiaries of the Company, and Vice Chairman of the Board of the Company. | 1990 | 69,706 |

[Portions omitted for the purpose of illustration.]

**Remuneration**—The following tabulation sets forth information regarding each director and each of the three highest paid officers of the Company whose aggregate direct remuneration exceeded $180,000 during the year ended June 30, 2004, the aggregate direct remuneration paid to all persons who served as directors and officers of the Company during that period, in each case for the portion of the period in which they served as such, the estimated annual benefits to be paid upon retirement under the existing retirement plan and Company contributions under the existing stock purchase plan.

| Name or Identity of Group | Capacities in Which Remuneration Was Received | Aggregate Direct Remuneration | Estimated Annual Benefits Under Retirement Plan | Annual Rate of Contributions Under Employee Stock Purchase Plan |
|---|---|---|---|---|
| Jackson C. Browne . . . . . | Chairman of the Board, President and Chief Executive Officer, Director | $169,337 | $60,242 | $5,450 |

[Portions omitted for purpose of illustration]

**Stock Option Information**—The 2000 Stock Option Plan and the 2003 Stock Option Plan (the "Plans") for officers and other key employees of the Company and its subsidiaries provide for the grant of five-year, qualified stock options, and ten-year, non-qualified stock options, to puchase Common Stock of the Company, in each case at an option price not less than the market value of the Common Stock on the date of grant.

As of August 29, 2004, there were outstanding qualified stock options covering 450 shares of the Common Stock and exercisable at an average option price of $52.66, which had been granted to officers under the Plans. The following tabulation sets forth certain information regarding the persons listed under "Remuneration," above, and all directors and officers of the Company as a group, with respect to non-qualified stock options granted to such persons under the Plans:

**Non-qualified Options:**

| | Granted since June 30, 2003 | | Exercised since June 30, 2003 | | | Outstanding as of August 29, 2004 | |
|---|---|---|---|---|---|---|---|
| | Shares | Average Option Price | Shares | Aggregate Purchase Price | Aggregate Market Value on Date of Purchase | Shares | Average Option Price |
| Jackson C. Browne | 86,400 | $12.90 | — | — | — | 86,400 | $12.90 |

[Portions omitted for purpose of illustration.]

II

ELECTION AND APPROVAL OF INDEPENDENT AUDITORS

The Board of Directors has approved and recommends_____ for election and approval by the meeting as independent public accountants to examine the Company's accounts for the current fiscal year. Representatives of _____, the independent public accountants of the Company for the year ended June 30, 2004, are expected to be present at the meeting with the opportunity to make a statement, if they desire to do so, and to respond to appropriate questions. The election and approval of _____ requires the affirmative vote of a majority of the shares of Common Stock present or represented and entitled to vote at the meeting. The persons named in the accompanying proxy intend to vote the proxy in favor of such election and approval, unless contrary instructions are set forth on the proxy.

The Board of Directors is aware that there are currently pending investigations and lawsuits involving various major accounting firms and has considered the fact that several such actions are pending against _____. After such consideration, the Board recommends the continuation of this firm as independent auditors of the Company's accounts. The members of the Audit committee of the Board of Directors are Messrs. Babe M. Carruth, J. O. Willis and R. B. Schramm.

ANNUAL REPORT

The Annual Report to shareholders, including financial statements, for the fiscal year ended June 30, 2004, has been mailed to all shareholders. The Annual Report is not a part of the proxy solicitation material.

OTHER BUSINESS

The Management does not intend to bring any business before the meeting other than the matters referred to in the accompanying notice and at this date has not been informed of any matters that may be presented to the meeting by others. However, if any other matters properly come before the meeting, it is intended that the persons named in the accompanying proxy will vote pursuant to the proxy in accordance with their best judgement on such matters.

By Order of the Board of Directors,
S. A. JAMES, Secretary

Dated: September 17, 2004

## PUBLIC ADMINISTRATIVE BODIES

*Agencies endowed with governmental functions.*

Public ADMINISTRATIVE AGENCIES are created by statute and only the legislature has the authority to provide for their creation. The statutory provisions that create the administrative agencies and confer functions on them determine the character of the agencies. In general, agencies represent the people and act as guardians of the public interest, not the interests of private persons. As an incident to the performance of their public functions, however, agencies can decide issues between private parties or private rights.

Administrative agencies are extensions of the legislative branch of the government and can perform acts of a legislative or quasilegislative nature. Agencies can also be part of the EXECUTIVE BRANCH of government and can be empowered to deal with matters within the scope of executive power.

Administrative agencies are continuing organizations, unaffected by changes in personnel. Ordinarily final actions of administrative officers or bodies within the scope of their authority are binding on their successors.

All persons are equally eligible to hold an administrative office unless they are excluded by some constitutional or statutory disqualification. The legislature usually establishes the qualifications of those who are to hold administrative offices. The qualifications must be reasonable in light of the functions and duties of the office. The tenure and term of administrative officers are indicated in the statute. Generally an official is entitled, and sometimes required, to hold office until a qualified successor is chosen. The power to remove an official is derived from the sovereign power of the state and is indispensable in obtaining good administration of public activities. An officer should be removed only according to law. If the office is held at the pleasure of the appointing agency, the incumbent can be removed without notice or hearing.

Generally when authority is conferred on an administrative body composed of three or more members, the authority can be exercised by less than all the members, provided all had notice of the meeting and an opportunity to attend. Membership on an administrative board ordinarily includes the right to vote, and statutory provisions governing the method of voting should be observed. The number of members for effective action is usually fixed by statute, and action by a quorum is necessary. Unless provided by statute, the authority cannot be exercised by a solitary member, or less than a majority. A statutory requirement that a quorum be present is a jurisdictional one that cannot be waived; the action of less than a quorum is void in such a case.

In the interest of orderly procedure and certainty, administrative bodies keep minutes or written records of all proceedings and actions. Administrative agencies speak through their records, and the minutes must be truthful, clear, and precise. In contested cases when an administrative agency acts in a QUASI-JUDICIAL capacity, the record should contain a summary of the facts and circumstances presented and the reasons for any administrative actions.

Administrative bodies have an inherent right to amend their records. When records are incorrect, they can be changed to reflect the truth. Typographical or clerical errors can be corrected at any time.

Records should be open for inspection by persons who have some real or proper interest in them, such as the parties to a proceeding. When the records are made public, no particular reason has to be demonstrated for inspecting them, since such records can be examined out of mere curiosity. The right of inspection, however, is subject to reasonable regulation.

Liability for the expenses of an administrative agency is usually regulated by statute. The legislature can also grant the agency the exclusive power to fix the fees for expenses incurred in the performance of its duties.

Administrative officers and agencies have no COMMON LAW or inherent jurisdiction of powers. Custom or usage cannot invest administrative officers, agencies, or bodies with authority. Their powers are wholly derived from, and limited by, the constitution, a statute, or some other legislative enactment. In addition to the express powers, the officials and agencies have whatever implied powers are reasonably necessary to effectuate the express powers and duties.

An administrative agency that originally acquires jurisdiction over a particular matter ordinarily has exclusive jurisdiction as against an agency with concurrent jurisdiction, and no coordinate body has any right to interfere. An administrative body, however, can perform its

duties in matters over which it has exclusive jurisdiction in cooperation with other public bodies and officials.

When the power and jurisdiction of federal and state agencies conflict or overlap, the federal authority is supreme and will prevail. Where Congress has preempted a particular field and has granted exclusive power over it to a federal agency, the power of a state is suspended, and a state agency has no jurisdiction, even when the particular matter sought to be administered by the state agency has not been addressed by the federal agency. The mere enactment of a federal statute authorizing a federal agency to act in a certain field does not preclude a state from enacting a statute on the same general subject and creating a state agency for its enforcement. When Congress in enacting a statute has not preempted an area, a state board or official, acting under a state statute, can assume jurisdiction and act.

As a general rule, administrative agencies or officers are not civilly liable for the consequences of their acts, when acting in GOOD FAITH within the scope of proper authority. An officer is not responsible for damages if he makes a MISTAKE OF FACT in exercising discretion or an error in ascertaining and deciding on the facts of a case, or if the law is misconstrued or misapplied.

Similarly, an administrative officer is not liable for the wrongful acts or omissions of subordinates, unless she directed, authorized, or cooperated in them. Liability results, however, when damages occur as a result of an official acting outside her scope of jurisdiction and without legal authorization.

When exercising their powers, administrative agencies must keep within the scope of the powers granted to them. They are powerless to act contrary to the provisions of the law, and they must follow the standards established by statute. They cannot ignore or transgress the statutory limitations on their power, even to accomplish what they believe to be worthwhile goals. Acts or orders that do not fall within the powers granted are wrong and void.

Persons whose rights are affected by administrative action are entitled to an impartial action free from bias, prejudice, or personal interest. When an individual or a group claims that an administrative act adversely affects a right, a presumption exists in favor of the legality and regularity of official acts of administrative officers and agencies. It is presumed that they act within the limits of the authority conferred on them and that facts exist that justify the administrative action.

Investigations by administrative agencies or officials are informal proceedings to obtain information to govern future action. They are not proceedings in which action is taken against anyone. An administrative investigation is comparable to a GRAND JURY investigation where witnesses are compelled to appear and testify.

An administrative body can be required to make certain investigations, such as when a public service commission is required to investigate the activities of a public utility. A board might also be authorized to exercise its discretion in determining when an investigation is to be made.

The form of the investigation usually depends on the nature of the question to be decided and the type of data that is needed. Investigations are ordinarily held in private, and they must be conducted so that harmful publicity will not result or influence the final outcome. In the course of its investigation, a board can review official documents and can supplement this means of inquiry by private correspondence and by conducting personal research.

Investigations by administrative agencies or officials have no parties as found in a lawsuit or criminal prosecution, and usually, there is no need to give notice of the investigation. An administrative body or official can issue a subpoena requiring a witness to appear and to testify at an investigation. In addition, a subpoena can be issued for the production of all books, papers, or other documents that are relevant to the inquiry. The subpoena is void when it does not indicate that the evidence to be produced is germane to the inquiry. A person must respond to a subpoena to the best of his ability. Compliance with a subpoena is enforceable by a court order. Although hearings can be held, as a general rule, a hearing is not an integral part of an investigation by an administrative body or official.

An administrative body or official is not bound to conduct an investigation under the strict RULES OF EVIDENCE required for courts, but particular evidence, such as HEARSAY evidence, has been held to be inadmissible. Witnesses can be called in an investigative proceeding and their testimony can be taken,

subject to cross-examination. Witnesses can even be entitled to the presence and advice of counsel. The costs and expenses of an investigation can be assessed against the particular persons or corporations involved, particularly if the complaining party receives an adverse decision.

Public administrative bodies promulgate rules and regulations. Their authority to do so and the guidelines under which the agencies perform these duties are governed by ADMINISTRATIVE LAW and administrative procedure.

FURTHER READINGS

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Osborne, David, and Ted A. Gaebler. 2000. *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector.* Cambridge, Mass.: Perseus.

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CROSS-REFERENCES

Administrative Agency; Administrative Law and Procedure; Agency; Good Faith; Usage.

## PUBLIC CONTRACT

*An agreement to perform a particular task to benefit the community at large that is financed by government funds.*

Federal, state, and local governments enter into contracts to purchase goods and services. The construction of public buildings, highways, bridges, and other structures is governed by a well-defined contractual process of competitive bidding that seeks to protect the public against the squandering of public funds and prevent abuses such as FRAUD, favoritism, and extravagance.

A public contract is a legally enforceable commitment of a party to undertake the work or improvement desired by a public authority. Public contracts are largely governed by the general law of contracts. Private individuals and corporations are held to stricter standards in their dealings with the government than in their private dealings. Conversely the government must deal fairly with those who contract with it. It can enter contracts within the limitations imposed by constitutional and statutory provisions. In addition, federal laws must be observed because most public projects receive financial aid from the federal government.

### Awarding Contracts

The method by which contracts are awarded is ordinarily regulated by statute or constitutional provision, and the prescribed method must be followed. For significant expenditures of public funds, government bodies usually must use a bidding process. In the awarding or letting of public contracts, the public body invites bids or makes "requests for proposals" so that it can award the contract to the bidder who qualifies under the terms of the governing statute. The submission of a bid in response to an invitation is considered an offer, and although it may not be freely withdrawn prior to acceptance, it does not become a contract unless and until such time as it is accepted by the proper public authority. A bid that does not respond to the terms contained in the invitation to bid is not within statutory requirements but is considered to be a new proposition or a counterproposal.

### Competitive Bidding

For major government expenditures, such as construction of public buildings and highways, government bodies require competitive bidding, which is a well-defined public process of letting a contract. Competitive bidding is a means of preventing political graft and corruption because the public nature of the process discourages favoritism and fraud. The integrity of the process is a central goal of competitive bidding. If a public official or employee is later found to have had an interest in a public contract, the agreement is void and unenforceable, and the interested parties may be subject to criminal prosecution.

To provide bidders with an opportunity to bid competitively on the same work, the appropriate public authorities must adopt plans and specifications that definitely set the extent and type of the work to be done and the materials to be furnished. The public entity itself must prepare these plans and specifications, and it must provide all prospective bidders with the same specifications from which to prepare their bids. The specifications must not be drafted so as to restrict bidding to a single bidder unless it is clearly essential to the public interest to do so.

The plans and specifications cannot be changed once an invitation for bids or the bids

themselves have been made unless all bidders are notified so that they have an opportunity to bid under new conditions. In making specifications, the public authority has wide discretion concerning the particular equipment or product that it might require as part of the contract. For example, it might designate a specific product covered by a patent held or manufactured only by one bidder.

Once the plans and specifications are prepared, the public entity must publish a public notice of its intentions to receive bids. This notice does not constitute an offer but is merely a solicitation of offers. An invitation to bid should indicate the deadline for bids to be submitted. It must be explicit in order to facilitate intelligent bidding.

Certain conditions are required of bidders. There might be a requirement that bids be properly signed and accompanied by a financial statement of the bidder. Customary additional requirements are a certificate attesting that the bidder has not colluded with others in the submission of the bid, and a bond or other security, which is conditioned on the making of a contract and the performance of work according to the contract.

A contractor's bond requires the contractor to pay a certain amount of money to the public authority if the obligations in the bond are not fulfilled. The bond contains two obligations: one for the faithful performance of the contract and the other for the protection of the right of laborers and material handlers to be paid.

A bid for the construction of public works must be in substantial and material conformity to the details contained in the bid specifications. All matters concerning the substance of the competitive bid, such as those that might affect price, quantity, quality, or manner of performance, must conform to the details indicated in the specifications. Failure to substantially comply will result in rejection of the bid, and a contract entered into based on such a bid is invalid.

A bid may be accepted if it contains minor or immaterial deviations from the specifications. Whether a deviation is material and substantial is determined by whether the bid limits fair competition by providing the deviating bidder with a substantial advantage or benefit not enjoyed by other bidders, a QUESTION OF FACT decided in light of all the circumstances of the case.

Once the time for filing bids expires, the bidder is bound by the bid as filed, which cannot be altered. A material defect cannot be corrected after the bids have been opened, but a minor defect can. If necessary information is missing from a bid when it is opened, it cannot be supplied then or later by a private understanding between the bidder and the public authority.

In general, an individual who files a bid cannot withdraw it. The benefits that will ACCRUE to a bidder under the public bidding statutes are viewed as adequate consideration to make a bid irrevocable. Some statutes, however, permit a bidder to withdraw a bid at any time prior to its acceptance. Withdrawal is generally allowed if a bidder makes an honest and GOOD FAITH mistake in calculation that has a material effect upon the substance of the contract. A bidder can withdraw a bid only if he was reasonably prompt in providing notice of the error to the public authority or if the public authority will not suffer substantial hardship when the bid is withdrawn.

Once the public authority opens the bids, it must review them within a reasonable period to determine if one should be accepted. A bid must be accepted for the formation of a public contract to occur. An acceptance and award of the contract to a bidder must be on the terms advertised because public policy proscribes granting to a successful bidder or her subcontractor a benefit that was not extended to others who submitted bids. A public body can be granted the right by statute, or it can reserve in the advertisement of bids the right to reject any and all bids, but it cannot do so arbitrarily or without good cause. A typical reason for rejection of all bids is that the bid amounts exceed the public funds allocated for the project.

Ordinarily the award of a public contract under a competitive bidding statute must be to the lowest bidder unless facts establish that another bid, although higher, is the lowest one made by a responsible bidder. The lowest responsible bidder is the contractor whose bid was in substantial conformity to the plans and specifications and who is able to perform the work at the lowest cost. The dollar amount of a contractor's bid is only one factor in determining the lowest responsible bidder. The government unit must also consider a bidder's experience, prior dealings with the government body, reputation for satisfactory work, and intention to employ local labor. The fact that a

low bidder has demonstrated delay, lack of cooperation, or poor performance on prior contracts supports a finding that the person is not the lowest responsible bidder.

Since the 1970s public contracts let by competitive bidding have been subject to AFFIRMATIVE ACTION requirements. The federal Public Works Employment Act (42 U.S.C.A. § 6701 et seq.), enacted in 1977, imposed certain conditions on public projects that receive financial assistance from the federal government. The most controversial provision prohibits any local public works project from being granted federal assistance unless at least 10 percent of its work goes to minority business enterprises. A minority business enterprise is a business in which minority group members own at least a 50 percent interest or, in the case of a publicly owned business, 51 percent of the stock is owned by minorities. When a bid is submitted, it must be accompanied by a statement that the bidder has taken steps to include the involvement of minorities in the project. The U.S. Supreme Court, in *Fullilove v. Klutznick,* 448 U.S. 448, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980), upheld the constitutionality of the 10 percent requirement, holding that the set-aside provided a way for groups previously subjected to discrimination to achieve equal economic opportunity. However, in *City of Richmond v. J. A. Croson Co.,* 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989), the Supreme Court struck down a set-aside program for minority contractors. The Court concluded that these types of affirmative action programs can only be justified to remedy prior government discrimination instead of past societal discrimination. Thus, if it cannot be shown that a city discriminated against minorities in the past, the set-aside program is an unconstitutional preference.

### Legal Challenges to Awarding of Public Contracts

A low bidder is ordinarily entitled to reasonable notice and a hearing prior to rejection of the bid unless the bidder has blatantly failed to comply with a specific contract provision, such as the minority contractor requirement. Unsuccessful bidders can start lawsuits that challenge the rejection of their bids and the awarding of a public contract to another bidder. Because public contracts are matters of public interest, taxpayers can also contest the award of a contract.

The courts ordinarily will not interfere with an action of a public official or body in accepting or rejecting bids and awarding a contract, provided that the official or organization made it fairly and honestly, in good faith, and in the interest of the public. An award that was made arbitrarily or capriciously or as result of favoritism or fraud will be subjected to judicial scrutiny. There should be a reasonable time interval between the opening of the bids and the execution of a public contract to allow a disappointed bidder to bring any complaint before a court for JUDICIAL REVIEW.

Contracts executed by public officers who do not have the authority to make contracts are void and unenforceable. A contract is void if the bidder has failed to comply with competitive bidding requirements. A contractor has the responsibility to learn whether the contract complies with the law. In general, once the courts declare a public contract void, the contractor cannot recover unpaid claims, but the government can recover any payments it made under the contract. A public entity may be obligated to pay the reasonable value of the benefits received under a void contract but only in the absence of a statutory prohibition against such arrangements.

### Contractual Rights of the Parties

A public contract can be assigned by one contractor to another where the assignment is restricted to funds due under the contract. However, it is not assignable without the consent of the public body with which the contract is made. A contractor and his or her assignee are both bound by the terms of the main contract. The contractor cannot transfer by assignment anything that was not allowed under the main contract. The law can provide that no assignment is valid unless copies of the contract and the assignment are filed with the court administrator in the county where the public works project is located.

A contractor can employ subcontractors to perform certain portions of the work. For example, in the construction of a public building, a contractor will typically hire an electrical and a mechanical subcontractor, along with subcontractors who do cement work, roofing, and painting. A subcontractor enters an agreement with an original contractor to perform part of the work that the contractor has agreed to perform in the original contract.

A public authority has the inherent right to make reasonable and necessary changes or

modifications in public contracts, according to a new agreement between the contracting parties. A public contract can also contain a provision governing its cancellation or termination under certain conditions. A public authority generally cannot lawfully rescind its contract without the contractor's consent, except in the case of fraud, mistake, or the invalidity of the contract.

A contractor is bound to the contract as agreed, and a failure to observe it will make the contractor liable for breach of contract. The contractor is entitled to recover for work completely or substantially performed in compliance with the contract. Where a substantial performance of a contract has taken place with the use of defective materials or faulty workmanship, the defects must be corrected if practicable. If correction is not possible or practicable, the contractor will be awarded the contract price reduced by the difference between the value of the defective work and its value if completed according to the terms of the contract.

A public contractor can be compensated for additional work that results from authorized changes in the plans and specifications, as well as for extra work or materials required because conditions differ from their representation in the plans and specifications. Oftentimes contractors realize the bulk of their profit from such "change orders."

When a contractor does not complete the job within the time specified, she or he has committed a breach of the contract. Some public contracts contain penalty clauses, which assess the contractor a certain amount of money for each day past completion. On the other hand, road and bridge contracts may contain clauses that reward a contractor for finishing the project ahead of schedule.

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CROSS-REFERENCES

Fraud.

## PUBLIC DEFENDER

*An attorney appointed by a court or employed by the government to represent indigent defendants in criminal actions.*

CROSS-REFERENCES

Right to Counsel.

## PUBLIC DOMAIN

*Land that is owned by the United States. In* **COPYRIGHT** *law, literary or creative works over which the creator no longer has an exclusive right to restrict, or receive a royalty for, their reproduction or use but which can be freely copied by the public.*

CROSS-REFERENCES

Public Lands.

## PUBLIC FIGURE

*A description applied in* **LIBEL AND SLANDER** *actions, as well as in those alleging invasion of privacy, to anyone who has gained prominence in the community as a result of his or her name or exploits, whether willingly or unwillingly.*

If a plaintiff in a libel or slander action qualifies as a public figure, he or she must show that the libelous or slanderous conduct of the defendant was motivated out of actual malice as required in the case of **NEW YORK TIMES CO. V. SULLIVAN**, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

## PUBLIC FORUM

See **FREEDOM OF SPEECH.**

## PUBLIC HEALTH SERVICE

The Public Health Service (PHS) is the operating division of the **HEALTH AND HUMAN SERVICES DEPARTMENT** (HHS) responsible for promoting the protection and advancement of the American population's physical and mental well-being.

*A scientist examines the West Nile virus at a Centers for Disease Control (CDC) lab in Fort Collins, Colorado. The CDC is the federal government's chief instrument for responding to public health emergencies; it also develops programs to prevent and control the spread of disease.*

AP/WIDE WORLD PHOTOS

The Public Health Service was first established by Act of July 16, 1798 (ch. 77, 1 Stat. 605), which authorized the creation of hospitals to care for U.S. merchant seamen. Subsequent legislation has substantially broadened the scope of its activities, and as of 2003 the Public Health Service accomplishes its goals through a number of agencies and programs. These entities coordinate and implement national health policy on the state and local levels, conduct medical and biomedical research, and enforce laws to ensure the safety of drugs and medical devices and to protect the public against impure foods and cosmetics. There are several sub PHS agencies or Operating Divisions, as follows.

### Agency for Health Care Policy and Research

The Agency for Health Care Policy and Research was established by the Omnibus Budget Reconciliation Act of 1989 (42 U.S.C.A. § 299 et seq.). As the federal government's focal point for health services research, the agency produces and disseminates information about the quality, medical effectiveness, and cost of healthcare. The agency's research is geared toward producing useful and accurate data concerning the design and performance of the national healthcare system, data that can be used to help improve healthcare at the federal, state, and local levels.

### Agency for Healthcare Research and Quality (AHRQ)

AHRQ supports research designed to improve the outcomes and quality of HEALTHCARE, reduce its costs, address patient safety and medical errors, and broaden access to effective services. The research sponsored, conducted, and disseminated by AHRQ provides information that helps people make better decisions about healthcare.

### Agency for Toxic Substances and Disease Registry (ATSDR)

The Agency for Toxic Substances and Disease Registry was established on April 19, 1983, by the secretary of HHS. The agency is charged with carrying out the health-related responsibilities of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C.A. § 9601 et seq.) and other federal laws concerned with the release of toxic substances into the environment. It directs programs designed to protect workers and the general public from exposure to hazardous substances and their adverse health effects; collects, analyzes, and disseminates data relating to serious diseases resulting from exposure to toxic or hazardous substances; establishes and maintains listings of areas either closed to the public or restricted in use because of toxic substance contamination; and helps the ENVIRONMENTAL PROTECTION AGENCY identify hazardous waste substances requiring regulation. It also works with private and public healthcare organizations to provide medical care and testing to individuals who may have been exposed to hazardous substances.

### Centers for Disease Control and Prevention (CDC)

The Centers for Disease Control and Prevention (CDC) was established as an operating health agency within the Public Health Service by the secretary of health, education, and welfare (the predecessor agency of HHS) on July 1, 1973. The CDC is responsible for providing leadership in the prevention and control of diseases and for responding to public health emergencies. In consultation with state and local healthcare authorities, the CDC develops and administers national programs to help prevent and control the spread of communicable and preventable diseases and to prevent chronic diseases. The agency also directs and enforces foreign quarantine activities and provides consultation to other nations on the control of preventable diseases. Since the early 1980s, the CDC has been at the forefront of the federal government's efforts to control the spread of AIDS, uncovering vital information

about the disease, discovering effective treatments, and working toward a cure.

### Food and Drug Administration

The FOOD AND DRUG ADMINISTRATION (FDA), in existence under various other titles since 1907, is one of the oldest and most influential health-related agencies within the Public Health Service. The FDA is charged with protecting the health of the nation against unsafe foods, drugs, medical devices, and cosmetics. The FDA carries out its mission through a number of centers and offices that perform a large variety of tasks, including testing and evaluating drug products for safety and effectiveness; developing standards ensuring the quality and nutritional value of foods; and testing and labeling medical devices before they are made available for use by the public.

### Health Resources and Services Administration (HRSA)

The Health Resources and Services Administration is responsible for addressing, within the Public Health Service, issues related to the access, quality, and cost of healthcare. The administration works with states and communities to help deliver healthcare to underserved areas and groups with special needs, including migrant workers, mothers and children, homeless people, immigrant populations, and individuals living in rural areas. In addition, the administration plays a key role in the federal government's campaign against AIDS, administering provisions of the Ryan White Comprehensive AIDS Research Emergency Act of 1990 (Ryan White CARE Act) (Pub. L. No. 101-381, 104 Stat. 576 [codified in scattered sections of 42 U.S.C.A.]). Through the act, the administration funds the establishment of centers to train health service professionals caring for people with AIDS and supports the renovation of health facilities serving AIDS patients. The administration also administers the National Organ Transplant Act, 42 U.S.C.A. §§201 note, 273, 274, 274a to 274e, serving as a resource for individuals seeking information about the availability and procurement of donor organs and bone marrow.

A number of bureaus within the Health Resources and Services Administration provide additional services. The Bureau of Primary Health Care administers a variety of programs related to the recruitment and training of health professionals to work in areas traditionally underserved by doctors, nurses, and other medical personnel. For example, the bureau administers the National Health Service Corps Scholarship and Loan Repayment programs, which provide financial assistance to medical, dental, and nursing students in exchange for service in areas where there is a shortage of health professionals. The Maternal and Child Health Bureau (MCH) develops and coordinates federal policies to improve healthcare delivery and services for mothers and children. MCH also administers grants to implement maternal and child health service programs on the state level, as well as other programs to help reduce infant mortality.

### Indian Health Service

The health status of American Indians and Alaska Natives is the concern of the Indian Health Service, which is the principal federal healthcare advocate for these groups. The Indian Health Service administers a comprehensive healthcare delivery system for these groups, developing and managing programs to meet their health needs. The service also helps Native American tribes obtain and use healthcare through other federal, state, and local programs.

### National Institutes of Health

The National Institutes of Health (NIH) is the principal biomedical research agency of the federal government. Within the NIH, a number of institutes conduct research in specific areas. The National Cancer Institute was created to carry out the objectives of the National Cancer Act, 42 U.S.C.A. §§ 201 note, 218, 241, 281 note, 282 to 284, 286 note, 286a to 286g, which made the conquest of cancer a national goal. The laboratories of the Cancer Institute conduct research directed toward finding effective methods for the prevention, treatment, and eventual cure of all types of cancers. The National Heart, Lung, and Blood Institute conducts research into the uses of blood and the management of blood resources, in addition to administering programs related to the prevention and treatment of hypertension, stroke, respiratory illnesses, and sickle cell anemia. Other institutes conduct research in the areas of alcohol and drug abuse, mental health, communication and neurological disorders, and aging. The National Library of Medicine is the nation's chief source of medical information. The library makes med-

ical research databases such as MEDLINE and TOXLINE, as well as other resources, available to public and private agencies, organizations, and individuals.

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CROSS-REFERENCES

Acquired Immune Deficiency Syndrome; Drugs and Narcotics; Environmental Law; Health Care Law; Immunization Programs.

### Substance Abuse and Mental Health Services Administration (SAMHSA)

SAMHSA works to improve the quality of and availability of prevention, treatment, and rehabilitative services in order to reduce illness, disability, and death, and cost to society resulting from substance abuse and mental illnesses.

## PUBLIC INTEREST

*Anything affecting the rights, health, or finances of the public at large.*

Public interest is a common concern among citizens in the management and affairs of local, state, and national government. It does not mean mere curiosity but is a broad term that refers to the body politic and the public weal. A public utility is regulated in the public interest because private individuals rely on such a company for vital services.

## PUBLIC LANDS

*Land that is owned by the United States government.*

Public land refers to the public domain, unappropriated land belonging to the federal government that is subject to sale or other disposal under general laws and is not reserved for any particular governmental or public purpose.

Much of this land was acquired early in the history of the United States as a result of purchases, wars, or treaties made with foreign countries. The federal government used this land to encourage growth, settlement, and economic development. Land that was not developed, homesteaded, or sold remained in federal ownership as public land. Today, the federal government employs principles of land use planning and environmental protection to preserve the natural resources and scenic beauty found on public land.

## PUBLIC LAW

*A general classification of law concerned with the political and sovereign capacity of a state.*

Public law is that area of constitutional, administrative, criminal, and INTERNATIONAL LAW that focuses on the organization of the government, the relations between the state and its citizens, the responsibilities of government officials, and the relations between sister states. It is concerned with political matters, including the powers, rights, capacities, and duties of various levels of government and government officials.

Public law refers to an act that applies to the public at large, as opposed to a private law that concerns private individual rights, duties, and liabilities.

Public law is the citation given to the original form of federal and some state laws. For example, the citation for the Economic Recovery Tax Act of 1981 is Pub. L. 97–34, Aug. 13, 1981, 95 Stat. 1720 (26 U.S.C.A. § 1 et seq.).

## PUBLIC OFFERING

*An issue of* SECURITIES *offered for sale to the public.*

A business can raise capital for its enterprise through the sale of securities, which include stocks, bonds, notes, debentures, or other documents that represent a share in the company or a debt owed by the company. When a company proceeds to issue the securities, it is called an offering.

There are two types of offering: private and public. A private offering is made to a limited number of persons who are so well-informed about the affairs of the company that the company does not need to file a registration statement with the state or federal government. In contrast, a public offering is made to the public at large and is governed by federal and state regulations.

Until the 1930s the public offering of securities was subject to minimal regulation. Investors had no reliable way of knowing whether the information they received about a public offer-

ing was correct and complete. Because of the lack of regulation, fraudulent public offerings were common, leading to the sale of worthless stock.

The Securities Act of 1933 (15 U.S.C.A. § 77a et seq.), enacted after the STOCK MARKET crash of 1929 and the resulting Great Depression, set in place rules and regulations for public offerings of securities in interstate commerce or through the mails. Before a public offering can be made, a company must file with the SECURITIES AND EXCHANGE COMMISSION a registration statement containing financial and other data, including the price at which shares will be offered to the public, commissions paid to those who underwrite the security, and any options to purchase that have been issued.

In addition to requiring the filing of a registration statement, the Securities Act of 1933 makes it unlawful to mail or transmit in interstate commerce any security for the purpose of sale or delivery unless it is preceded or accompanied by a prospectus (a written statement of information about the public offering) that fully discloses all material facts regarding the investment, including the financial status of the enterprise. Material facts are those that are necessary to enable a purchaser to weigh the advantages and disadvantages of the investment. The balance sheet contained in the prospectus must accurately reflect the financial status of the issuing company and should include its assets and liabilities.

Unless a company files a registration statement that is then approved by the commission, it cannot legally make the public offering. Registration of the securities does not imply that the commission has approved the issue or that it has found the registration disclosures to be accurate. It does mean that persons filing false or incomplete information with the commission subject themselves to the risk of fine or imprisonment or both. Additionally, those persons connected with making a false or incomplete registration statement or prospectus may be liable for damages to purchasers of the securities.

Intrastate securities (those not publicly offered in interstate commerce) are governed by the laws of the state in which the stock is traded. State control of intrastate securities traffic does not conflict with federal regulation of interstate transactions. Most states have enacted BLUE SKY LAWS, which regulate public offerings in a manner similar to federal securities legislation. These state laws get their name from their attempt to stop the sale of stock in fraudulent and speculative enterprises that have nothing to offer but blue sky. Many states require registration of securities before a public offering can be made. If the business seems likely to commit fraudulent acts involving prospective purchasers of its securities, state registration will be denied, and the public offering will not be allowed to go forward.

## PUBLIC POLICY

*A principle that no person or government official can legally perform an act that tends to injure the public.*

Public policy manifests the common sense and common conscience of the citizens as a whole that extends throughout the state and is applied to matters of public health, safety, and welfare. It is general, well-settled public opinion relating to the duties of citizens to their fellow citizens. It imports something that fluctuates with the changing economic needs, social customs, and moral aspirations of the people. Public policy enters into, and influences, the enactment, execution, and interpretation of legislation.

## PUBLIC UTILITIES

*Businesses that provide the public with necessities, such as water, electricity, natural gas, and telephone and telegraph communication.*

A public utility is a business that furnishes an everyday necessity to the public at large. Public utilities provide water, electricity, natural gas, telephone service, and other essentials. Utilities may be publicly or privately owned, but most are operated as private businesses.

Typically a public utility has a MONOPOLY on the service it provides. It is more economically efficient to have only one business provide the service because the infrastructure required to produce and deliver a product such as electricity or water is very expensive to build and maintain. A consequence of this monopoly is that federal, state, and local governments regulate public utilities to ensure that they provide a reasonable level of service at a fair price.

A public utility is entitled to charge reasonable rates for its product or service. Rates are generally established according to statutes and

regulations. The utility usually files a proposed rate schedule with the state public utility commission for approval. The commission holds public hearings to help decide whether the proposed schedule is fair. The commission may also require increased levels of service from the utility to meet public demand.

Until the 1930s public utilities were subjected to minimal regulation. The enactment of the Public Utility Holding Company Act of 1935 (49 Stat. 803 [15 U.S.C.A. §§ 79–92z-6]) signaled a change. A holding company is one that owns stock in, and supervises management of, other companies. The law regulates the purchase and sale of SECURITIES and assets by gas and electric utility holding companies and limits holding companies to a single coordinated utility system. The law ended abuses that allowed a small number of public utilities to control large segments of the gas and electricity market and to set higher utility rates.

Public regulation of utilities has declined since the late 1970s. Public policy is now based on the idea that competition rather than regulation is a better way to manage this sector of the economy. Airline and telephone deregulation are the most prominent examples of this shift in philosophy. Telephone deregulation was enabled by a 1982 agreement between American Telephone and Telegraph Company (AT&T) and the federal government. The federal government had sued AT&T, alleging that its monopoly on virtually all telephone service in the United States was illegal. AT&T agreed to divest itself of all local telephone companies, while retaining control of its long-distance, research, and manufacturing activities. This resulted in the creation of seven regional telephone companies with responsibility for local telephone service. Other companies now compete with AT&T for long-distance service.

At the federal level, numerous commissions oversee particular types of public utilities. These include the Federal Energy Commission, the NUCLEAR REGULATORY COMMISSION, the FEDERAL COMMUNICATIONS COMMISSION, and the SECURITIES AND EXCHANGE COMMISSION.

CROSS-REFERENCES

Nuclear Power; Telecommunications.

## PUBLICATION

*Making something known to the community at large, exhibiting, displaying, disclosing, or revealing.*

Publication is the act of offering something for the general public to inspect or scrutinize. It means to convey knowledge or give notice.

In COPYRIGHT law, publication is making a book or other written material available to anyone interested by distributing or offering it for sale. In the law of LIBEL AND SLANDER, publication means communicating the statement in issue to a third person other than the plaintiff (the individual whom the alleged defamatory statement concerns).

Publication of a will refers to the testator's informing the witnesses to the document of his or her intent to have the instrument operate as a will.

In the procedural rules governing the PRACTICE OF LAW, publication of a summons is the process of publishing it in a newspaper, when required by law, in order to notify a defendant of the lawsuit.

## PUBLISH

*To circulate, distribute, or print information for the public at large.*

*In* LIBEL AND SLANDER *law, to utter to a third person or to make public a defamatory statement; in* COMMERCIAL PAPER *law, to present an instrument for payment or declare or assert that a forged instrument is genuine.*

The meaning of the term *publish* differs according to the context in which it is used. In its broadest sense, the term *publishing* describes the act of making something known to the general public. A publication can be accomplished by speaking in a public place, printing information on paper and distributing it on the street, buying or otherwise securing time on television, placing information in a circulated newspaper or magazine, or other similar methods.

Laws can mandate specific forms of publication of certain information. For example, federal administrative agencies are required to publish their rules in the FEDERAL REGISTER. 5 U.S.C.A. sect; 552 (1996). These rules are later published in a subject-matter arrangement in the CODE OF FEDERAL REGULATIONS. Similarly, federal law requires that administrative agencies under the EXECUTIVE BRANCH publish a notice in the

*Commerce Business Daily* before entering into a contract worth more than $25,000 with a private business. 41 U.S.C.A. § 416 (1997). The notice must contain information that is relevant to the proposed job and give all qualified private businesses an opportunity to compete for the contract with the agency. An agency may use additional sources of publication, such as trade journals, magazines, newspapers of general circulation, and other mass communication media to advertise its intention to enter into a contract with a private business.

Publication of information is required by law in other areas as well. State laws require a mortgagee who has foreclosed a mortgage on real property to publish a notice in a local newspaper before conducting a sale of the property. Both state and federal laws require administrative agencies to publish notices of public hearings that will be held by the agencies. Before taking action that affects legal rights, administrative agencies hold public hearings to give members of the public an opportunity to be heard.

In libel law, a defamatory statement can give rise to civil liability if the statement is made public. To be libelous, a statement must appear in print, in a picture, or in a sign. To be considered published, the statement must be received by at least one other person apart from the speaker and the defamed person. In the law of slander, the term *publish* refers to defamatory statements that are spoken in the presence of at least one other person. A transitory, humiliating gesture that is defamatory also constitutes slander if it is published, or understood, by a third party.

The term *publish* has another meaning in the law of commercial paper. Commercial paper law relates to negotiable instruments such as bills of exchange, promissory notes, bank checks, and similar documents. In the law of commercial paper, publishing occurs when a check or other negotiable instrument is presented. Publication also occurs when a person vouches that a forged instrument is in fact genuine. By publishing a negotiable instrument, the publisher declares that the instrument is valid.

**FURTHER READINGS**

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**CROSS-REFERENCES**

Defamation; Libel and Slander.

## PUBLISHING LAW

*The body of law relating to the publication of books, magazines, newspapers, electronic materials, and other artistic works.*

Publishing law is not a discrete legal topic with its own laws. It is a collection of often disparate legal areas, such as contracts, INTELLECTUAL PROPERTY, TORTS, and the FIRST AMENDMENT.

Publishing is the act of distributing or otherwise making public a visual or literary work. The key players in publishing are publishers and authors. Publishers are those persons or organizations that dispense information to the public. The term *author* commonly describes writers and journalists, but where publishing is concerned, the term also describes photographers, filmmakers, video artists, and other artists whose work is published. Most publishers designate a lawyer to review a publishable work and identify its potential legal pitfalls. This person, called a legal liaison, may confer with outside legal counsel to ensure that the publication does not ensnare the publisher or author in legal conflict. A legal liaison should be familiar with the many legal issues peculiar to publishing, including COPYRIGHT and TRADEMARK infringement, sales, advertising, distribution policies, subscription agreements, special sales arrangements, insurance, free speech, tax matters, and antitrust concerns stemming from the publisher's membership in trade associations. Other employees of publishers, such as editors, also should be trained to spot potential legal problems with a publishable work and bring them to the attention of the legal liaison before publication.

Publishers may be held liable for omissions, mistakes, and transgressions of their authors, as well as their own omissions, mistakes, and transgressions. One of the first and foremost concerns of publishers is copyright and trademark issues. Publishers should conduct thorough research on copyright and trademark issues before publishing a work. Among other things, publishers should ensure that copyrights are properly registered; the appropriate copyright notice is placed in each work; copyrights for work published prior to the effective date of the most recent federal copyright act, the Copyright Amendments Act of 1992 (2 U.S.C.A. § 179 et seq.), are renewed; the work does not violate the copyrights or trademark rights of another publisher or author; all copyrights are duly affixed to the work; all copyrights from

# "I Can't Get No": The Publisher Satisfaction Clause

Of all the provisions in a book contract, the satisfaction clause is the most controversial. Under the satisfaction clause, a publisher may refuse to publish an author's work and demand reimbursement for any advance payments if the publisher is not satisfied with the final product.

Publishers insist on including a satisfaction clause in book contracts to protect their own interests. A publishing company typically uses the clause when it has signed a deal with an author for a book that has not been completed. Such speculative deals are common in the world of book publishing. Many authors do not write books unless they receive an advance payment, and few publishers receive completed books that need no additional work from the author.

If a publisher is interested in a book or an idea for a book, it may seek an agreement with the author to gain the copyrights to the final product. The agreement may include an advance payment for the expected final product. When the publisher makes an advance payment, it must have a way out of the contract if the author submits a final product that is unsatisfactory. Without a satisfaction clause, authors would have less incentive to submit quality work, and publishers could be faced with manuscripts requiring an unreasonable amount of editing and rewriting.

For authors, the satisfaction clause is a potential trap. Some authors have argued that a publisher may use the clause as camouflage to reject a book for an invalid reason. For example, a publisher might reject a manuscript and claim it was unsatisfactory when the real reason for the publisher's rejection was that another publisher had beaten it to press with a book on the same subject. Such a rejection would be a bad faith rejection and would give the author a **CAUSE OF ACTION** against the publisher. However, bad faith is notoriously difficult to prove in court.

For decades, courts refused to examine the motives of publishers when they invoked the satisfaction clause to terminate a book contract. The first sign of a

source materials have been released or paid for; the work does not defame anyone; the work does not invade a person's right of privacy; all obligations to authors, creators, and illustrators under the contract are being met; information from sources can be verified or has been confirmed; and any material derived from a dialogue between real people that is placed in quotation marks correctly sets forth the actual words spoken.

Failure to confirm quotations can lead to lengthy litigation if the quotations defame the speaker. In *Masson v. New Yorker Magazine Inc.,* 686 F. Supp. 1396 (N.D. Cal. 1987), *aff'd,* 881 F.2d 1452 (9th Cir. 1989), *and superseded,* 895 F.2d 1535 (9th Cir. 1990), *and rev'd,* 501 U.S. 496, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991), *on remand* 832 F. Supp. 1350 (N.D. Cal. 1993), 85 F.3d 1394 (9th Cir. 1996), psychoanalyst Jeffrey M. Masson sued *New Yorker* magazine, its publisher Alfred A. Knopf, Inc., and freelance writer Janet Malcolm after Malcolm wrote a quite unflattering article about Masson for the *New Yorker* that included quotations by Masson that Malcolm could not substantiate. The defendants ultimately prevailed but only after more than a decade of litigation.

Some publishable works run the risk of invading a person's right of privacy. A person whose privacy is invaded may recover damages for the loss of privacy, for mental and emotional distress suffered as a result of the intrusion, and for any specific injuries or financial losses stemming from the intrusion. The four basic types of privacy invasion are public disclosure of private and embarrassing facts, publicity that places an individual in a false light, intrusion into seclusion, and misappropriation of a person's name or likeness for commercial advantage. Generally, public figures do not receive as much privacy protection as do private individuals.

Publishers also must ensure that a work does not infringe upon a person's right of publicity. The right of publicity protects a person's exclusive right to control the exploitation of his name, likeness, or persona for commercial purposes. Generally, to qualify for this protection, the person must have commercially exploited his persona. A publisher violates a person's right of publicity by publishing, without consent, the person's performance, name, or likeness for advertising or trade purposes.

Several other torts may be committed in the publication of a work. Among other torts, pub-

more stringent standard of review came in 1979 in *Random House v. Gold,* 464 F. Supp. 1306 (S.D.N.Y. 1979). In *Gold,* Random House rejected author Herbert Gold's novel *Swiftie the Magician* after learning that Gold's first two books had fallen short of commercial expectations. Gold had agreed to write four books for Random House in exchange for advance payments against **ROYALTIES**.

When Random House offered to renegotiate Gold's contract, Gold sold *Swiftie the Magician* to McGraw-Hill. Random House sued and won back the advance payments to *Swiftie the Magician,* but in its opinion the court observed that broad discretion for publishers in their predictions of commercial success "may permit overreaching by publishers attempting to extricate themselves from bad deals."

The case of *Harcourt Brace Jovanovich v. Goldwater,* 532 F. Supp. 619 (S.D.N.Y. 1982), created a new approach to author-publisher contracts. In *Goldwater,* author Stephen Shadegg and politician **BARRY M. GOLDWATER** contracted with Harcourt Brace Jovanovich to publish Goldwater's memoirs. In return for the book rights, Harcourt paid to Shadegg and Goldwater a $65,000 advance. Harcourt rejected the final manuscript nineteen months after the agreement was reached without giving the authors an opportunity to make revisions and without giving them editorial assistance. Harcourt demanded a return of the advance. Shadegg and Goldwater refused, and Harcourt sued.

The court acknowledged that the law must afford a publisher "very considerable discretion," but it also noted that a publisher does not have an "absolutely unfettered license to act or not to act in any way it wishes and to accept or reject a book for any reason whatever." The *Gold* court had said nearly as much, but the *Goldwater* court made new law when it declared that "there is an implied obligation in a contract of this kind for the publisher to engage in appropriate editorial work with the author." *Goldwater* therefore created a publisher's duty to provide editorial assistance to prevent its wanton use of the satisfaction clause. An additional duty, the duty to give an author the opportunity to make a revision, was established shortly thereafter in *Dell Publishing v. Whedon,* 577 F. Supp. 1459 (S.D.N.Y. 1984).

The satisfaction clause is likely to remain a standard provision in author-publisher contracts. Under the clause, authors will be held to their obligation to produce a satisfactory manuscript—that is, one the publisher can publish. Publishers, on the other hand, must be fair in their use of the clause against an author. Courts will no longer allow publishers to walk away from any author agreement just by reciting the word "unsatisfactory."

lishers should be on guard for intentional or negligent infliction of emotional distress, incitement and negligent publication, breach of confidentiality, **TRESPASS**, assault, and **BATTERY**. Trespass, assault, and battery are most common in news-gathering situations, where the competition to break stories can lead writers, photographers, and video artists to engage in questionable behavior. Battery, for example, can occur if a photographer or interviewer intentionally touches a subject in an offensive way. An assault occurs if a person puts another person in reasonable fear of a harmful or offensive physical contact, and a person commits trespass by entering on land without permission of the legal occupant.

Infliction of emotional distress is tortious conduct that causes severe emotional distress to the subject of a work. For example, a publisher could be held liable under this theory of recovery for printing a photograph in a pornographic magazine and incorrectly identifying the person in the picture if the identified person experiences work interruptions, nightmares, terror, humiliation, or other emotional distress as a result. A plaintiff in such an action may recover for both physical and mental harm resulting from the tort. A subject need not suffer physical or bodily injury to recover damages for this tort; emotional damage is sufficient. The main issue in such torts is whether the conduct by the author or publisher was so extreme and outrageous as to permit recovery for the subject's emotional distress.

The tort of incitement is speech directed to inciting or producing imminent lawless action that is likely to incite or produce such action. Such speech must be explicit to constitute incitement. Publishers generally will not be held liable if warnings are included in the work or the publication does not produce a **CLEAR AND PRESENT DANGER** of imminent injury. Negligent publication is the unintentional publication of incorrect facts that results in injury. This tort requires that the publisher owe a specific duty of care toward the injured party. This duty is difficult, but not impossible, to establish. If, for example, a publisher markets a flight manual to airplane pilots and the manual contains errors, the publisher may be liable for injuries if an airplane crashes because its pilot followed the faulty information.

Breach of confidentiality generally arises from an individual's assertion that the pub-

## Starstruck Strikes Out

On September 7, 1977, actor Tony Curtis, inspired by the success of his first novel, *Kid Cody,* agreed with Doubleday & Company to write a "rags to riches story of a lascivious Hollywood starlet" called *Starstruck* (*Doubleday & Company v. Curtis,* 763 F.2d 495 [2d Cir. 1985], *rev'g,* 599 F. Supp. 779 [S.D.N.Y. 1984], and *cert. denied,* 474 U.S. 912, 106 S. Ct. 282, 88 L. Ed. 2d 247 [1985]). On the strength of negotiations by his agent, Irving Paul ("Swifty") Lazar, Curtis received an advance of $50,000, which would be offset against the future **ROYALTIES** expected from sales of the *Starstruck* novel. The contract specified that Curtis should submit a satisfactory manuscript by October 1, 1978, but Curtis submitted nothing until April 1980, when he delivered a partial first draft.

In August 1981, Doubleday editor Elizabeth Drew concluded that the *Starstruck* manuscript was "junk, pure and simple, " and concurred with editor Adrian Zackheim, who was "appalled at the product," that Curtis's contract should be terminated under the contract's satisfaction clause. Doubleday asked Curtis to return the advance, but Curtis refused. Doubleday then sued for recovery in the Southern District of New York, and Curtis counterclaimed for third-party payments that Doubleday had received for *Kid Cody.*

At trial, Curtis argued that Doubleday had breached the contract in bad faith. According to Curtis, Doubleday had provided inadequate editorial assistance, and it had canceled the contract to avoid the terms of a related printing contract. The trial court dismissed Doubleday's claim on the theory that it had waived its right to reject the manuscript under the satisfaction clause by waiving deadlines. The trial court also dismissed Curtis's counterclaims.

On appeal, the Second Circuit Court of Appeals reversed the dismissal of Doubleday's claim. The appeals court examined the case history and found that Curtis had refused editorial assistance offered by Doubleday, including the suggestion that Curtis consult a "novel doctor." The court also held that Doubleday had not waived its rights under the satisfaction clause, that Doubleday's editors, "who were forced to harmonize an inferior manuscript, a lucrative reprint agreement and a recalcitrant author," had acted in **GOOD FAITH**, and that Doubleday was entitled to a return of its $50,000 advance, plus interest. Curtis appealed to the United States Supreme Court, but the High Court refused to hear the appeal.

lisher had a duty not to disclose certain information about her. The duty may be expressed in a written or oral agreement between the parties. It also may be implied or required by law. Such statutes are designed to protect an individual's general privacy interest, protect certain sensitive information, or shield certain government information or functions from public knowledge. For example, some states maintain statutes that prohibit the publication of the full name of a juvenile accused of a crime. Another example is the federal statute that creates a **CAUSE OF ACTION** against persons who tape conversations without consent for criminal or tortious purposes (title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C.A. § 2520 [1997]). If a publisher or author breaches confidentiality, she may be liable to the exposed party for injuries and financial losses stemming from the publication. In some states breach of confidentiality does not itself constitute a cause of action, but aggrieved plaintiffs may seek recovery under a breach of contract or invasion of privacy action.

The First Amendment guarantee of free speech, and free press is a frequent refuge for publishers. Publishers assert the First Amendment as a defense to claims for invasion of privacy, breach of confidentiality, intentional or negligent infliction of emotional distress, incitement and negligent publication, breach of confidentiality, and right of publicity claims.

In some situations the First Amendment also provides members of the press a right of access to information. If the press has historically been granted access to a certain proceed-

ing, and if press access would further societal interests, journalists may have a right to be present at a proceeding or to gain access to certain information (*Richmond Newspapers v. Virginia,* 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 [1980]). In *Richmond,* the Supreme Court held that a First Amendment right of access prohibited trial courts from excluding journalists and the public from criminal trials.

The Supreme Court has recognized a journalist's right to access judicial documents, but it has yet to recognize a constitutional right to access all government records. However, most states, as well as the federal government, have enacted so-called sunshine laws, which, with some exceptions, give the general public access to public records.

Most publishers maintain insurance against risks of loss. In-house or outside insurance specialists may negotiate coverage for an assortment of risks, ranging from personal injury and property damage to media perils such as invasion of privacy, copyright and trademark infringement, UNFAIR COMPETITION, injuries related to faulty advertising, errors and omissions in the published product, and DEFAMATION, an intentionally false communication that injures another person's reputation or good name.

Only a handful of insurers protect against media perils because of the large potential losses involved. The few insurers that do protect against media perils do not provide coverage for all forms of media liability, and some do not offer coverage for both damage awards and legal defense costs. It is common for insurers to automatically cover authors of books in blanket policies for book publishers, but software, newspaper, and magazine publishers usually must obtain coverage for their writers by negotiating their inclusion in blanket policies.

Publishers often find that they are in legal conflict with their own authors. The conflicts between authors and publishers are usually contractual in nature, and courts use ordinary contract law principles to resolve the cases. One of the most common complaints of authors is that a publisher did not sufficiently promote their books. In deciding such a claim, a court generally looks at the facts surrounding the case to determine whether the publisher used its best efforts to market the book. Another point of conflict for authors is the satisfaction clause, a boilerplate clause in book contracts that allows publishers to reject a final manuscript and demand the return of any advances if the work is not satisfactory to the publisher.

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CROSS-REFERENCES

Art Law; Censorship; Entertainment Law; Evidence "Journalists' Privilege" (In Focus); First Amendment; Freedom of Speech; Freedom of the Press; Intellectual Property; Libel and Slander; Literary Property; Music Publishing; *New York Times Co. v. Sullivan*; *New York Times Co. v. United States*; *Roth v. United States*; Royalty; Trademarks; Tort Law.

## PUERTO RICO AND THE UNITED STATES

The legal relationship between Puerto Rico and the United States has been described in a number of ways, ranging from "colonial possession" to "dual sovereigns." Technically speaking, Puerto Rico is a territory of the United States, subject to the plenary power of Congress. At the same time, however, Puerto Rico is a commonwealth with its own constitution, bicameral legislature, chief executive, and judiciary. Home to more than 4 million people, this 3,435-square-mile Caribbean island has never achieved complete sovereignty or total independence.

### Historical Background

The island was inhabited by the Taino (Arawakan-speaking) when Christopher Columbus first saw it in 1493. The first Spanish-appointed governor named the island "Puerto Rico," meaning "wealthy port." Puerto Rico remained a Spanish colony for more than 400 years, until the SPANISH-AMERICAN WAR, which ended when Spain and the United States signed the TREATY OF PARIS on December 10, 1898. Ratified by the U.S. Senate a year later, the treaty

obliged Spain to cede sovereignty over Puerto Rico to the United States as a condition of peace.

Congress is given broad powers to govern U.S. territories by the federal Constitution. U.S.C.A. Const. Art. IV, s. 3, cl. 2. Congress exercised these powers in Puerto Rico first by establishing an interim MILITARY GOVERNMENT, which lasted until April of 1900, when it passed the Foraker Act, 31 Stat. 77. The Foraker Act declared that the inhabitants of Puerto Rico were "entitled to the protection of the United States," and established the first civil government on the island.

The act authorized the president of the United States to appoint, with the advice and consent of the Senate, the governor of Puerto Rico, its chief executive officers, and the justices of the Puerto Rico Supreme Court. The act also created the Puerto Rico legislature and authorized its popularly elected representatives to exercise local lawmaking powers, subject, in all instances, to congressional VETO. Under the act, Puerto Rico was given the right to select a "resident commissioner" to represent the island before the U.S. House of Representatives. The resident commissioner, a position that continues to exist into the twenty-first century, has authority to speak and introduce legislation before the House but has no right to vote, except on committees.

The Foraker Act established a U.S. District Court for the District of Puerto Rico and gave the president the power to appoint the presiding judge, again with the advice and consent of the Senate. In 1915 Congress assigned the District of Puerto Rico to the U.S. Court of Appeals for the First Circuit and provided that appeals from the federal district court of Puerto Rico shall be made to the First Circuit. As of 2003, judges from the First Circuit still travel to Puerto Rico twice each year to hear argument on appeals.

In 1917 Congress passed the JONES ACT, which gave U.S. citizenship to all Puerto Rican residents. 39 Stat. 951, 48 U.S.C.A. section 731. Also known as the "Organic Act," the Jones Act sought to distinguish Puerto Rico from the Philippines and Hawaii. The Philippines was already being groomed for independence, while Hawaii was being groomed for statehood. Through the Jones Act, Congress chose a third, less well-defined status for Puerto Rico as an "unincorporated territory" of the United States, which means that the benefits and protections offered by the U.S Constitution are not fully applicable to Puerto Rico. No current U.S. territories, including Puerto Rico, were deemed incorporated as of mid-2003.

### Puerto Rico Achieves Greater Autonomy

An increasing number of Puerto Ricans sought greater autonomy for the island during the 1920s and the 1930s, and these efforts began bearing fruit in the 1940s and 1950s. In 1947 Congress permitted Puerto Ricans to elect their own governor. Luis Muñoz Marín helped transform the island's agricultural-based economy into a more industrial-based one. While his programs increased Puerto Rico's total wealth, they also deepened class divisions and increased the number of residents who lived in poverty.

In 1950 Puerto Rico won the right to enact its own constitution. Ratified in 1952, the constitution declared Puerto Rico to be a "commonwealth," an anomalous status it retains as of 2003. The people of the new commonwealth were vested with powers of self-government not characteristic of the sovereignty typically exercised by citizens of a territory. Puerto Ricans were now empowered to decide for themselves how their local government would be organized. Independent of outside influence, the residents of Puerto Rico were allowed to determine the number of branches in their local government, the allocation of powers among those branches, the method of choosing officials to serve in those branches, and the duration of each official's term of office.

However, like the governments in other U.S. territories, the government of Puerto Rico still ultimately derives its authority from the consent of Congress, even if under its new constitution it also derives some of its authority from the consent of Puerto Rican residents. The Commonwealth of Puerto Rico lacks sovereignty and independence in other ways too. For example, Puerto Rico does not have control over its external relations with other nations. Puerto Rico also lacks control over the currency, highways, postal system, SOCIAL SECURITY, and mining activities and minerals, among other areas preempted by federal regulation.

### Recent Developments

Over the second half of the twentieth century, federal courts spent much time attempting to

iron out what the U.S. Supreme Court called the "unique relationship" between the United States and the Commonwealth of Puerto Rico. Federal courts have recognized that by allowing the island to draft its own constitution, Congress intended to afford Puerto Rico the degree of autonomy and independence normally associated with states in the union. *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976).

Like the federal government's relationship with the 50 states, federal courts have recognized that a dual sovereignty exists between the United States and Puerto Rico. One sphere of power is reserved for the federal government as provided in the U.S. Constitution, and another sphere of power is reserved to the commonwealth as provided by its own constitution. *United States v. Gonzalez de Modesti*, 145 F.Supp.2d 171 (D.Puerto Rico 2001). Also like the 50 states, the Commonwealth of Puerto Rico is entitled to the full benefits of the ELEVENTH AMENDMENT to the Constitution, which grants states SOVEREIGN IMMUNITY from being sued in federal court without their consent, when the suit is brought by citizens of another state or the citizens of a foreign country. *Fernandez v. Chardon*, 681 F.2d 42 (1st Cir. 1982).

Unlike residents of the 50 states, Puerto Ricans lack any representation in Congress, other than through the honorary position of resident commissioner in the House of Representatives. Puerto Ricans also lack the right to vote in U.S. presidential elections. On April 5, 2000, 11 Puerto Ricans challenged their disenfranchisement in U.S. presidential elections on grounds that it violated their constitutional rights as U.S. citizens. Finding that the right to vote is inherent in citizenship, the U.S. District Court for the District of Puerto Rico declared that U.S. citizens residing in Puerto Rico would have the right to vote in the 2000 presidential election. Less than a month before the election, however, the First Circuit overturned the district court, ruling that U.S. citizens residing in Puerto Rico do not have a right to vote in presidential elections unless Puerto Rico becomes a state or the federal Constitution is amended to recognize such a right. *Igartua De La Rosa v. United States,* 229 F.3d 80 (1st Cir. 2000).

Puerto Rico has held several referenda in the 1980s and 1990s to clarify its status. The last REFERENDUM was held in 1998. Almost 47 percent voted for statehood. Independence and two variants on commonwealth status received nearly 4 percent, combined. Fifty percent voted for "none of the above," which amounted to an ambivalent endorsement for the status quo.

*In San Juan, members of Puerto Rico's Popular Democratic Party celebrate the rejection of U.S. statehood in the December 1998 referendum.*

AP/WIDE WORLD PHOTOS

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CROSS-REFERENCES

States' Rights; Territories of the United States.

## PUFFING

*An opinion or judgment that is not made as a representation of fact.*

Puffing is generally an expression or exaggeration made by a salesperson or found in an advertisement that concerns the quality of goods offered for sale. It presents opinions rather than facts and is usually not considered a legally binding promise. Such statements as "this car is in good shape" and "your wife will love this watch" constitute puffing.

## PULLMAN DOCTRINE

See ABSTENTION DOCTRINE.

## PULLMAN STRIKE

The Pullman Strike of 1894 was one of the most influential events in the history of U.S. labor. What began as a walkout by railroad workers in the company town of Pullman, Illinois, escalated into the country's first national strike. The events surrounding the strike catapulted several leaders to prominence and brought national focus to issues concerning labor unrest, SOCIALISM, and the need for new efforts to balance the economic interests of labor and capitalism.

In 1859, 28-year-old George M. Pullman, an ambitious entrepreneur who had moved from New York to Chicago, found success as a building contractor. When a new sewage system was installed that necessitated the raising of downtown buildings by ten feet, he ran a business where he oversaw large teams of men working with huge jacks to raise the buildings. Pullman quickly became wealthy.

Continuing his penchant for innovation, Pullman turned in 1867 to the subject of railroad travel and created a new line of luxury railroad cars featuring comfortable seating, restaurants, and improved sleeping accommodations. As demand for the "Pullman coaches" grew, Pullman further demonstrated his financial acumen. He did not sell his sleeping cars; instead he leased them to railroad companies. By 1893, the Pullman Company operated over 2,000 cars on almost every major U.S. railroad, and the company was valued at $62 million.

A firm believer in capitalism and moral uplift, Pullman gathered a group of investors and began to build the nation's first model industrial town near Lake Calumet on the southwest edge of Chicago. Between 1880 and 1884, the village of Pullman was built on 4,000 acres. In addition to the company's manufacturing plants, the town contained a hotel, a school, a library, a church, and office buildings as well as parks and recreational facilities. Houses were well-built brick structures that featured cutting-edge conveniences of the era such as indoor plumbing and gas heat. Other innovations included regular garbage pick-up, a modern sewer system, and landscaped streets. An equally firm believer in the necessity of making a profit, Pullman operated his town as he operated his company, leasing the housing to his workers and selling them food, gas, and water at a 10 percent markup.

A significant drop in the country's gold reserves, prodigious spending of U.S. Treasury surpluses, and the passage in 1890 of the Sherman Silver Act led to the financial panic of 1893. The ensuing corporate failures, mass layoffs of workers, and bank closings plunged the country into a major depression. In response, the Pullman Company fired more than a third of the workforce and instituted reduced hours and wage cuts of more than 25 percent for the remaining hourly employees. Because Pullman had promised the town's investors a 6 percent return, there was no corresponding reduction in the rents and other charges paid by the workers. Rent was deducted directly from their paychecks, leaving many workers with no money to feed and clothe their families.

In desperation, many workers joined the newly established American Railway Union (ARU) that claimed a membership of 465 local unions and 150,000 workers. ARU organizer and president EUGENE V. DEBS had become nationally prominent when he led a short but successful strike against the Great Northern Railway in early 1894. In May 1894, the workers struck the Pullman Company. Debs directed the strike and widened its scope, asking other train workers outside Chicago to refuse to work on trains that included Pullman cars. While the workers did agree to permit trains carrying the U.S. mail to operate as long as they did not contain Pullman cars, the railroads refused to compromise. Instead, they added Pullman cars to all their trains, including the ones that only transported freight.

Despite repeated attempts by the union to discuss the situation with Pullman, he refused to negotiate. As the strike spread, entire rail lines were shut down. The railroads quickly formed the General Managers Association (GMA) and announced that switchmen who did not move rail cars would be fired immediately. The ARU responded with a union-wide walkout. By the end of June, 50,000 railroad workers had walked off their jobs.

The economic threat and sporadic violence led the GMA to call for federal troops to be brought in. Illinois governor John P. Altgeld, who was sympathetic to the cause of the striking workers, refused the request for troops. In July, U.S. attorney general RICHARD OLNEY, who supported the GMA, issued a broad INJUNCTION called the Omnibus Indictment that prohibited strikers and union representatives from attempting to persuade workers to abandon their jobs.

When striking workers were read the indictment and refused to disperse, Olney obtained a federal court injunction holding the workers in CONTEMPT and, in effect, declaring the strike illegal. When the workers still refused to end the strike, Debs and other leaders were arrested and Olney requested the federal troops saying they were needed to move the mail. President GROVER CLEVELAND sent more than 2,000 troops to Chicago, and fighting soon broke out between the rioting strikers and soldiers. Soldiers killed more than a dozen workers and wounded many more.

With strike leaders in prison and a growing public backlash over the looting and ARSON committed by some striking workers, the strike was effectively broken. Most of the workers returned to their jobs in August, although some were blacklisted and never again worked for the railroads. Debs was charged with contempt of court for disobeying the court injunction and conspiracy to obstruct the U.S. mail. CLARENCE DARROW, an attorney who had quit his job as general counsel of the Chicago and North Western Railway, defended Debs and the other ARU leaders, but they were convicted and spent six months in prison. They were released in November 1895.

Darrow went on to become a prominent defense attorney as well as a well-known public orator. Debs, whose contempt of court conviction was upheld by the U.S. Supreme Court in *In re Debs,* 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092 (1895), was further radicalized by his experiences. In high demand as a popular speaker particularly in the industrial states of the North, Debs became the influential leader of the Socialist Party, running for president several times between 1900 and 1920.

Pullman, who continued to regard himself as a morally upright man despite the critical findings of a presidential commission appointed to investigate the strike, died in 1897. Fearful that his body might be degraded or stolen by former strikers, Pullman's family had his body buried in a concrete and steel casket in a tomb covered with steel-reinforced concrete. In 1971, the former "company" town of Pullman was designated as a national landmark district.

The Pullman Strike of 1894 and its aftermath had an indelible effect on the course of the labor movement in the United States. The use of federal troops and the labor injunction sent a message to U.S. workers that would not change until the NEW DEAL of the 1930s. The polarization of management and labor would continue for decades.

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CROSS-REFERENCES

Blacklist; Labor Union; Strike.

## PUNISHMENT

*The imposition of hardship in response to misconduct.*

Punishments authorized in modern U.S. law include community service, monetary fines, FORFEITURE of property, restitution to victims, confinement in jail or prison, and death.

Some civil sanctions are punitive in nature. The primary aim, though, in most civil cases is to compensate the victim. However, a judge or jury may assess PUNITIVE DAMAGES against a party in a civil case if that party's conduct was especially wicked. Punitive damages are intended to punish a party or set an example for similar wrongdoers. Though onerous, punitive damages in a civil case do not carry with them the same stigma attached to criminal punishment.

Human transgressions have been punished in various ways throughout history. The standard punishments in ancient Greek and Roman societies were death, SLAVERY, mutilation (CORPORAL PUNISHMENT), imprisonment, or BANISHMENT. Some punishments were especially creative. In ancient Rome, for example, a person who murdered a close relative was enclosed in a sack with a cock, a viper, a dog, and a monkey, and then cast into the sea.

The ancient punishments were brought to England. Until the nineteenth century, the death penalty, or CAPITAL PUNISHMENT, was imposed in England for more than 200 different crimes. Most of these crimes were petty violations, such as pick-pocketing or swindling. A defendant could be hanged, burned at the stake, or beheaded. In some cases the process of death was drawn out. A person found guilty of TREASON, for example, was placed on a rack and stretched, hanged until not quite dead, then dis-

# Theories of Punishment

Governments have several theories to support the use of punishment to maintain order in society.

Theories of punishment can be divided into two general philosophies: utilitarian and retributive. The utilitarian theory of punishment seeks to punish offenders to discourage, or "deter," future wrongdoing. The retributive theory seeks to punish offenders because they deserve to be punished.

Under the utilitarian philosophy, laws should be used to maximize the happiness of society. Because crime and punishment are inconsistent with happiness, they should be kept to a minimum. Utilitarians understand that a crime-free society does not exist, but they endeavor to inflict only as much punishment as is required to prevent future crimes.

The utilitarian theory is "consequentialist" in nature. It recognizes that punishment has consequences for both the offender and society and holds that the total good produced by the punishment should exceed the total evil. In other words, punishment should not be unlimited. One illustration of consequentialism in punishment is the release of a prison inmate suffering from a debilitating illness. If the prisoner's death is imminent, society is not served by his continued confinement because he is no longer capable of committing crimes.

Under the utilitarian philosophy, laws that specify punishment for criminal conduct should be designed to deter future criminal conduct. Deterrence operates on a specific and a general level. General deterrence means that the punishment should prevent other people from committing criminal acts. The punishment serves as an example to the rest of society, and it puts others on notice that criminal behavior will be punished.

Specific deterrence means that the punishment should prevent the same person from committing crimes. Specific deterrence works in two ways. First, an offender may be put in jail or prison to physically prevent her from committing another crime for a specified period. Second, this incapacitation is designed to be so unpleasant that it will discourage the offender from repeating her criminal behavior.

Rehabilitation is another utilitarian rationale for punishment. The goal of rehabilitation is to prevent future crime by giving offenders the ability to succeed within the confines of the law. Rehabilitative measures for criminal offenders usually include treatment for afflictions such as mental illness, chemical dependency, and chronic violent behavior. Rehabilitation also includes the use of educational programs that give offenders the knowledge and skills needed to compete in the job market.

The counterpart to the utilitarian theory of punishment is the retributive theory. Under this theory, offenders are punished for criminal behavior because they deserve punishment. Criminal behavior upsets the peaceful balance of society, and punishment helps to restore the balance.

emboweled, beheaded, and quartered (cut into four pieces).

Until the nineteenth century, corporal punishment in England could consist of whipping, branding, or the cutting off of a body part. Noses, ears, hands, fingers, toes, and feet were all subject to removal for criminal acts. Often the body part sliced off was the part thought responsible for the act. A pickpocket, for example, might have a hand cut off, and a spy might lose an ear, tongue, or eye. Corporal punishment could be inflicted in addition to other punishments, such as banishment, forced labor, or short-term incarceration.

The American colonies adopted and cultivated the traditional punishments of England. The most common punishments were corporal and capital. Petty criminals were often sentenced to a combination of corporal punishment and incarceration in jail for several months. The punishment for more serious crimes was usually death.

Punishment was the most comprehensive and severe in colonies founded on religious principles. In Massachusetts, controlled by the Puritans, a woman who committed ADULTERY could be forced to wear the letter *A* in public as a punishing reminder of her conduct. Men who committed adultery were put to death, as were those who engaged in bestiality.

The witch trials in Salem, Massachusetts, illustrated the inventiveness of punishment in some of the colonies. In 1692, 19 people were executed after children claimed that several women were practicing witchcraft. One of the alleged witnesses, who refused to participate in the trials, was slowly pressed to death under the weight of heavy rocks.

After the colonies won freedom from English control, enlightened social discourse led to

The retributive theory focuses on the crime itself as the reason for imposing punishment. Where the utilitarian theory looks forward by basing punishment on social benefits, the retributive theory looks backward at the transgression as the basis for punishment.

According to the retributivist, human beings have free will and are capable of making rational decisions. An offender who is insane or otherwise incompetent should not be punished. However, a person who makes a conscious choice to upset the balance of society should be punished.

There are different moral bases for retribution. To many retributivists, punishment is justified as a form of vengeance: wrongdoers should be forced to suffer because they have forced others to suffer. This ancient principle was expressed succinctly in the Old Testament of the Judeo-Christian Bible: "When a man causes a disfigurement in his neighbour . . . it shall be done to him, fracture for fracture, eye for eye, tooth for tooth. . . ."

To other theorists, retribution against a wrongdoer is justified to protect the legitimate rights of both society and the offender. Society shows its respect for the free will of the wrongdoer through punishment. Punishment shows respect for the wrongdoer because it allows an offender to pay the debt to society and then return to society, theoretically free of guilt and stigma.

A third major rationale for punishment is denunciation. Under the denunciation theory, punishment should be an expression of societal condemnation. The denunciation theory is a hybrid of **UTILITARIANISM** and retribution. It is utilitarian because the prospect of being publicly denounced serves as a deterrent. Denunciation is likewise retributive because it promotes the idea that offenders deserve to be punished.

The U.S. conception of punishment is a combination of the utilitarian, retributive, and denunciation theories. The most widely accepted rationale for punishment in the United States is retribution. If convicted, the sentence a defendant receives is always, at least in part, a form of retribution.

A sentence may, however, combine utilitarian ideals with retribution. For example, a defendant sentenced to prison for several years is sent there to quench the public's thirst for vengeance. At the same time, educational programs inside the prison reflect the utilitarian goal of rehabilitation.

Our legal system shows its adherence to utilitarian ideals in the creation of systems such as pretrial diversion programs, **PROBATION**, and **PAROLE**. These systems seek to limit punishment to the extent necessary to protect society. The utilitarian philosophy is also reflected in the assignment of different punishments for different crimes and in the notion that the amount of punishment a convicted criminal receives should be in proportion to the harm caused by the crime. For example, murder calls for imprisonment or even the death penalty. A simple **ASSAULT AND BATTERY** with no serious injuries is usually punished with a short jail sentence or probation and a fine.

Judges generally have the discretion to fashion punishment according to the needs of both society and the defendant. This is an expression of utilitarian tenets. However, judicial discretion in sentencing is limited. In some cases statutes require judges to impose mandatory minimum prison sentences as punishment, and these laws stand as a monument to the retributive theory.

**CROSS-REFERENCES**

Utilitarianism.

the imposition of restraints on punishment. In 1791 the states ratified the **EIGHTH AMENDMENT** to the U.S. Constitution to prohibit excessive bail, excessive fines, and the infliction of cruel and unusual punishments. Because the amendment did not define "cruel and unusual punishment," lawmakers and courts have had to determine what punishments are cruel and unusual. Throughout the nineteenth century, the **CRUEL AND UNUSUAL PUNISHMENT** Clause was interpreted to prohibit only torture and barbarous punishments.

After the ratification of the Eighth Amendment, corporal punishment was replaced by incarceration in jail or prison. Capital punishment, essentially the ultimate form of corporal punishment, survived into the 1970s, when it was held to be cruel and unusual (**FURMAN V. GEORGIA**, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 [1972]). That decision was overturned four years later in **GREGG V. GEORGIA**, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), and capital punishment was restored in many jurisdictions.

The United States is the only western industrialized country to use the death penalty. Most states authorize the death penalty as a punishment for first-degree murder. Hanging, death by electrocution, and the firing squad are still used, but the most common form of capital punishment is death by lethal injection.

For more than a century after the Eighth Amendment was ratified, lawmakers and courts did not interpret its prohibition of cruel and unusual punishment to include a prohibition of disproportionate punishment. Federal and state lawmakers were free to impose punishment on convicted criminals without concern for whether the punishment fit the crime.

*Inmates at the Shutter Creek Correctional Institution near North Bend, Oregon, during September 1994. Many states use similar forms of alternative punishment in an attempt to rehabilitate first-time offenders.*

AP/WIDE WORLD PHOTOS

In 1910 the U.S. Supreme Court recognized the proportionality concept in *Weems v. United States,* 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793. In *Weems,* Paul A. Weems was convicted of falsifying a single item of a public record and sentenced to hard labor for 12 to 20 years while chained at the wrists and ankles. The Court in *Weems* examined the nature of the crime, compared Weems's sentence with punishment in other jurisdictions for the same offense, and looked at the punishment for more serious crimes within the same jurisdiction.

In light of the comparisons, the Court found that the punishment of Weems was too harsh. According to the Court, the Eighth Amendment was designed to protect against such disproportionate punishment, and it ordered the case against Weems dismissed. Since the *Weems* decision, courts and lawmakers in the United States have attempted to find the right amount of punishment for various criminal acts.

Both legislators and judges determine punishment. Legislators identify the range of punishments that a court may impose for a certain crime. Punishment for crimes is listed in federal, state, and local laws. In most cases statutes name a variety of punishments appropriate for the crime, and courts have discretion in determining the precise punishment. However, many federal and state laws on narcotics identify a mandatory minimum prison sentence that must be imposed, and this ruling removes sentencing discretion from the judge.

In *Harmelin v. Michigan,* 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1990), Ronald Harmelin challenged the punishment he received for possession of more than 650 grams of cocaine. Though he had no prior felonies, Harmelin was convicted in Michigan state court and sentenced to spend the rest of his life in prison. On appeal the U.S. Supreme Court upheld the sentence, ruling that "severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history."

Critics argue that the *Harmelin* opinion sidestepped the proportionality requirement created in earlier High Court cases and threw into doubt the standard for cruel and unusual punishment. Under *Harmelin,* proportionality is not required; what is relevant is whether the punishment has been used in the United States in the past. If it has been used, it is not unusual, and therefore not violative of the Cruel and Unusual Punishment Clause.

Because lawmakers can change laws, the list of acts that warrant punishment is not static. Before the twentieth century, many acts, such as SODOMY, adultery, and premarital sex were punished with prison terms. In most states either these acts are no longer illegal or the laws prohibiting them are no longer enforced. Possession of most psychotropic substances was not punished until the late nineteenth and early twentieth centuries. The manufacture, sale, and transportation of alcohol was punished in the United States from 1919 to 1933 (see Prohibition).

Some acts have always been illegal, but the level of punishment inflicted for the crime has fluctuated. Drunk driving, for example, is punished more severely in the early 2000s than it was before the 1970s. The possession of a small amount of marijuana used to warrant a long prison term in most jurisdictions, but modern statutes limit the punishment for this crime to monetary fines and PROBATION.

In assigning punishment for drug offenses, most laws differentiate between distribution and possession. State and federal statutes generally punish the selling or distribution of drugs more severely than possession. Repeat possession violators may receive short-term incarceration, but long prison terms are usually reserved for purveyors of illicit drugs. Lawmakers may vary the punishment within the same offense for differ-

ent forms of the same drug. Possession of crack cocaine in most states and in the federal system, for example, is punished more harshly than possession of powder cocaine.

Before the Civil War, many states in the South had separate statutory codes for slaves, which imposed more severe punishment on slaves than on free persons. For example, any attempt by a slave to commit a crime punishable by death was punished with death, but free persons were not put to death for attempts. Also, the range of acts punished under slave codes was wider than that punished under the statutory codes for free persons.

Since the end of the Civil War, statutory codes in all states have purported to punish all persons equally. However, the unfairness concerning who gets punished has not disappeared. Many analysts of punishment in the United States cite the disproportionate number of African Americans in prisons as proof of **SELECTIVE PROSECUTION** and punishment. Scholars and others have also questioned a system that punishes drug offenses more harshly than violent offenses. Critics also note disparities between punishment of impoverished persons and punishment of wealthy persons, noting that poor defendants are punished more harshly because they do not have the resources necessary to mount a vigorous defense to criminal charges.

The United States relies primarily on incarceration as punishment. However, many states have sought alternatives to incarceration. Many states use short-term boot camps to rehabilitate first-time offenders. These highly regimented camps are intended to give offenders the discipline and respect for authority necessary to succeed in society. Other states and localities are experimenting with alternatives to imprisonment for drug offenders, such as treatment, probation, and work requirements. Others have supplanted long periods of confinement with a small dose of public humiliation and a variety of deprivations.

In Nevada, for example, a person convicted of one drunk driving offense may be ordered to perform 48 hours of community service dressed in clothing that identifies the person as a drunk driving offender. Additionally, the defendant is deprived of his or her driver's license for 90 days; ordered to pay a fine ranging from $200 to $1,000; and required to attend, at the defendant's own expense, an alcohol abuse education course.

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**CROSS-REFERENCES**

Criminal Law; Drugs and Narcotics; Racketeering; Salem Witch Trials; Sentencing; Slavery.

## PUNITIVE DAMAGES

*Monetary compensation awarded to an injured party that goes beyond that which is necessary to compensate the individual for losses and that is intended to punish the wrongdoer.*

Punitive damages, also known as exemplary damages, may be awarded by the trier of fact (a jury or a judge, if a jury trial was waived) in addition to actual damages, which compensate a plaintiff for the losses suffered due to the harm caused by the defendant. Punitive damages are a way of punishing the defendant in a civil lawsuit and are based on the theory that the interests of society and the individual harmed can be met by imposing additional damages on the defendant. Since the 1970s, punitive damages have been criticized by U.S. business and insurance groups which allege that exorbitant punitive damage awards have driven up the cost of doing business.

# Sending a Message or a Plaintiff's Windfall?

Punitive damages are a controversial issue in **TORT** and **PRODUCT LIABILITY LAW**. Injured plaintiffs and their attorneys often seek punitive damages from companies that have made allegedly defective or unsafe products and have known about the defects or safety problems. Plaintiffs view punitive damages as a way of sending a message to the manufacturer and to business, in general, that it is financially unwise to cut corners or ignore safety concerns. On the other hand, defendants in these actions contend that punitive damages are unfair, unpredictable, and often excessive. In their view, the plaintiff receives a financial windfall unrelated to the actual damages in the lawsuit.

Proponents of punitive damages believe that this type of award serves a number of important societal functions, including retribution, deterrence, compensation, and law enforcement.

Supporters of punitive damages contend that one function for such an award is to provide retribution to the victim of the defendant's reckless or wanton conduct. When a person is injured by the wanton misconduct of another, the plaintiff has the right to express her outrage by extracting a judicial fine from the wrongdoer. Seeking retribution allows the plaintiff to punish an intentional lawbreaker in much the same way as the criminal justice system punishes him.

Proponents believe that the most important function that punitive damages serve is that of deterrence. As in **CRIMINAL LAW**, the predominant purpose of punitive damages is to prevent similar misconduct in the future. Because the law does not catch and punish all persons who wantonly violate the rights of others, supporters argue that punitive damages help deter misconduct by publicizing, and at times sensationalizing, the punishment of those persons found guilty of egregious misconduct. Punitive damages tell manufacturers and other businesses that financial penalties will follow if companies sell products known to be defective.

Advocates of punitive damage awards also contend that these awards serve a compensation function. Although a plaintiff may receive actual damages for the injuries suffered, many of the plaintiff's actual losses, including those involving intangible harm, are not compensable under the rules of compensatory damage liability. Punitive damages help the plaintiff to be made whole again.

Another function of punitive damages articulated by supporters is law enforcement. Without the prospect of a large punitive damage windfall, many persons would not be willing to make their claims. Punitive damages act as a law enforcement vehicle, energizing prospective plaintiffs and motivating them to enforce the **RULES OF LAW** and to promote the functions of retribution, deterrence, and compensation.

Punitive damages have been characterized as "quasi-criminal" because they stand halfway between the criminal and **CIVIL LAW**. Though they are awarded to a plaintiff in a private civil lawsuit, they are noncompensatory and in the nature of a criminal fine.

Punitive damages were first recognized in England in 1763 and were recognized by the American colonies almost immediately. By 1850, punitive damages had become a well-established part of civil law.

The purposes of punitive damages are to punish the defendant for outrageous misconduct and to deter the defendant and others from similar misbehavior in the future. The nature of the wrongdoing that justifies punitive damages is variable and imprecise. The usual terms that characterize conduct justifying these damages include *bad faith, fraud, malice, oppression, outrageous, violent, wanton, wicked,* and *reckless.* These aggravating circumstances typically refer to situations in which the defendant acted intentionally, maliciously, or with utter disregard for the rights and interests of the plaintiff.

Unless otherwise required by statute, the award of punitive damages is left to the discretion of the trier of fact. A small number of states refuse to award punitive damages in any action, and the remaining states have instituted various ways of determining when and how they are to be awarded. In some states, an award of nominal damages, which acknowledges that a legal right has been violated but little harm has been done, is an adequate foundation for the recovery of punitive damages. In other states, the plaintiff must be awarded **COMPENSATORY DAMAGES** before punitive damages are allowed.

In the absence of statutory authorization, punitive damages usually cannot be recovered in breach-of-contract actions. Punitive damages

Critics of punitive damages believe that large monetary awards are unfair, unreasonable, and not productive for society. One of their central criticisms goes to the idea of punitive damages as "quasi-criminal" punishments. Noting that proponents talk of retribution and deterrence, these critics argue that it is unfair to impose these "criminal" fines on defendants who do not have the usual safeguards of **CRIMINAL PROCEDURE**. They note that a plaintiff should satisfy a higher **BURDEN OF PROOF** than a mere "preponderance of the evidence," the usual standard in a civil trial. Some states have agreed, mandating that "clear and convincing evidence," a higher burden of proof, be used by the jury in determining whether to award punitive damages.

Critics also charge that the vagueness of standards for determining the defendant's liability for punitive damages and for calculating the award itself causes juries to make decisions based on passion, bias, and prejudice rather than on the law. The vagueness in such terms as *reckless, willful,* or *wanton* leads critics to conclude that juries have no meaningful, objective way to make an informed decision. Many states have recognized this criticism and developed a variety of procedures to instruct the jury fully and precisely and to require the trial court to assess the sufficiency of the evidence before awarding punitive damages and to issue written reasons why the award was or was not deserved in light of the legal standards.

The U.S. Supreme Court, in *BMW of North America v. Gore,* 517 U.S. 519, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), also developed guidelines for assessing punitive damages. The Court held that the "degree of reprehensibility of defendant's conduct" is the most important indication of reasonableness in measuring punitive damages. The Court also measured the possible excessiveness of a punitive damage award by applying a ratio between the plaintiff's **COMPENSATORY DAMAGES** and the amount of the punitive damages.

Critics also note that the deterrence rationale is undercut when defendants are insured against punitive damage awards. In addition, when a government employee is found liable for misconduct and punitive damages are awarded, the taxpayers must pay for the award. Taxpayers are innocent parties, making it unreasonable for them to bear the punishment for the actions of a government employee.

Critics argue that because punitive damages are noncompensatory, they provide the plaintiff with an undeserved financial windfall. The public gains no benefit when an individual receives a multimillion dollar punitive damage verdict. Some states have responded to this criticism by requiring that part of a punitive damage award be paid to the state for some type of public good.

Finally, in mass disaster cases, involving products like asbestos, a manufacturer may have to pay multiple punitive damage awards. Critics contend that allowing punitive damages to early plaintiffs may bankrupt defendants, thereby depriving later plaintiffs of compensatory damages.

For these and other reasons, the critics see punitive damages as counterproductive to the public good. Large awards result in increased costs of products and services and even discourage companies from producing products or providing services out of fear of litigation.

The controversy over punitive damages is likely to continue because it involves fundamental issues of justice, fairness, and the public good.

**CROSS-REFERENCES**

Clear and Convincing Proof; Preponderance of Evidence.

are sometimes recoverable in **TORT** actions in which breach of contract is tangentially involved.

Punitive damages will not be awarded in tort actions based on the defendant's **NEGLIGENCE** alone. The conduct must have been willful, wanton, or reckless to constitute an intentional offense. Willfulness implies a plan, purpose, or intent to commit a wrongdoing and cause an injury. For example, if an automobile manufacturer knows that the gas tank in its car will likely explode on impact but does not change the design because it does not wish to incur additional costs, the behavior could be classified as willful. Conduct is considered wanton if the individual performing the act is cognizant that it is likely to cause an injury, even though **SPECIFIC INTENT** to harm someone does not exist, such as when an individual shoots a gun into a crowd. Although the individual does not have the intent to injure anyone in particular, injury is a natural and probable consequence of the act. Recklessness is an act performed with total disregard of its foreseeable harmful consequences. Punitive damages can be awarded on the basis of an injurious act done with ill will, a wrongful or illegal motive, or without any legal justification, but a wrongful act performed in **GOOD FAITH** is an inadequate basis for such an award. For example, if a grocery sold canned goods that later turned out to be tainted, and the store did not know of the problem before selling the canned goods, it would be liable for compensatory damages to the victims who ate the food but would not be liable for punitive damages.

The measurement of punitive damages has been controversial because, traditionally, the amount to be awarded is, for the most part, within the discretion of the trier of fact. To determine the amount, the jury or court must

consider the nature of the wrongdoer's behavior, the extent of the plaintiff's loss or injury, and the degree to which the defendant's conduct is repugnant to a societal sense of justice and decency. In some states, the financial worth of the defendant can properly be considered.

Ordinarily, an award of punitive damages by a jury will not be upset as excessive or inadequate. If the trial court believes that the jury award is excessive or unwarranted by the facts, it can remove punitive damages from the final judgment, or it can reduce the amount through a procedural process called remittitur.

Since the 1980s, appellate courts have been called on to review punitive damage awards and to assess the procedural fairness involved in awarding such damages. State legislatures and the courts have attempted to craft ways of ensuring reasonable punitive damage awards, but there is no uniform approach.

The U.S. Supreme Court, in *Pacific Mutual Life Insurance v. Haslip,* 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), upheld a large punitive damage award on the grounds that the Alabama jury had received adequate jury instructions and the Alabama Supreme Court had applied a seven-factor test to assess the reasonableness of the award.

Two years later, the U.S. Supreme Court shifted its stance on how it would assess whether a punitive damage award was excessive. In *TXO Productions Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993), the Court stated that the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT to the U.S. Constitution prohibits a state from imposing a "grossly excessive" punishment on a person held liable in tort. Whether a verdict is grossly excessive must be based on an identification of the state interests that a punitive award is designed to serve. If the award is disproportionate to the interests served, it violates due process.

The Court further defined the issues surrounding excessive awards in *BMW of North America v. Gore,* 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). In this case, the plaintiff, Ira Gore, was sold a purportedly new automobile. In fact, the car had been repainted because of damage during shipping. When Gore found out, he sued BMW. During the litigation, he discovered that for many years BMW had routinely repainted cars and sold them as new. The jury awarded Gore $4,000 in compensatory damages and punitive damages of $4 million. The Alabama Supreme Court reduced the punitive damages to $2 million but upheld the reduced award.

On appeal, the U.S. Supreme Court overturned the punitive damage award. First, the Court identified the "degree of reprehensibility of defendant's conduct" as the most important indication of reasonableness in measuring a punitive damage award under the Due Process Clause. In the Court's view, the damages imposed should reflect the enormity of the defendant's offense and may not be grossly out of proportion to the severity of the offense. In Gore's case, the award was excessive because BMW's conduct did not demonstrate indifference or reckless disregard for the health and safety of others. The minor repairs it made to the cars did not affect their performance, safety features, or appearance.

Second, the Court applied the most commonly used indicator of excessiveness, the ratio between the plaintiff's compensatory damages and the amount of the punitive damages. Even though the state court reduced the punitive damages by half, the Court found the ratio of 500 to 1 to be outside the acceptable range.

Finally, the Court examined the difference between the punitive damage award and the civil or criminal sanctions that Alabama could impose for comparable misconduct. The fact that the $2 million verdict was substantially greater than Alabama's $2,000 civil fine for deceptive trade practices was another ground for finding the punitive damages excessive, according to the Court.

This decision had important consequences in civil litigation. The decision "sent a message" about punitive damages to the lower courts, strongly implying that they should do more to rein in juries that award excessive amounts. Courts have the power to reduce or throw out punitive damages. In the wake of *BMW*, many federal courts carefully applied the Supreme Court's standards and reduced punitive damages awards. State courts have been less uniform in following these standards, with some courts distinguishing the decision in order to sustain large punitive awards. However, in 2003, the Supreme Court reaffirmed the *BMW* decision and three-part analysis in *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585. The court made clear that state courts must employ this analysis or risk reversal.

Though the decision reassured some in the insurance industry, the industry has continued

to pursue "tort reform" legislation at the state and federal level. President GEORGE W. BUSH proposed his own tort reform package in 2002, which included a limit on punitive damages. This proposal would cap punitive damages at whichever is less: $250,000 or twice the economic damages.

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CROSS-REFERENCES

Product Liability.

## PURCHASE

*To buy; the transfer of property from one person to another by an agreement. Under the* UNIFORM COMMERCIAL CODE *(UCC), taking by sale, discount, negotiation, mortgage, pledge, lien, issue, reissue, gift, or any voluntary transaction.*

## PURCHASE MONEY MORTGAGE

*A security device entered into when the seller of property, as opposed to a bank or financial institution, advances a sum of money or credit to the purchaser in return for holding the mortgage on the property.*

The seller of the property, rather than a lending institution, is the mortgagee. These mortgages are given concurrently with the conveyance of the land or the transfer of the items sold.

## PURCHASE ORDER

*A document authorizing a seller to deliver goods, with payment to be made at a later date.*

A purchase order is a written authorization requesting a vendor to furnish goods to a purchaser. It is an offer from the purchaser to buy certain articles. The offer is accepted by the seller when she supplies the requested items. A contract is formed and the seller can expect payment in return for the delivered goods.

## PURE FOOD AND DRUG ACT OF 1906

The Pure Food and Drug Act of 1906 (34 Stat. 768) was the first federal law prohibiting the interstate transportation and sale of adulterated food enacted by Congress pursuant to its power under the COMMERCE CLAUSE.

Scandals concerning the purity and quality of food sold to the U.S. public became widespread as the unsanitary methods used by the food industry were disclosed. One notable example was a novel written by UPTON SINCLAIR entitled *The Jungle,* in which he exposed the dangerous working conditions as well as the unsavory products created by the Chicago meatpacking industry of the early twentieth century.

Dr. Harvey W. Wiley was instrumental in the passage of the Pure Food and Drug Act, which was subsequently amended in 1912, 1913, and 1919. The act defined adulterated food as that which is combined or packaged with another substance that adversely affects the quality or strength of the food; is substituted in whole or part by another substance; has had any essential component removed in whole or part; has been blended, coated, colored, or stained to conceal damage or inferiority; has had poisonous or harmful additions made to it; is composed of filthy or decomposed animal or vegetable matter; or is the product of a diseased animal or an animal that has died other than by slaughtering.

In 1938, Congress enacted the more stringent Federal Food, Drug, and Cosmetic Act (21 U.S.C.A. § 301 et seq.), which superseded the provisions of the Pure Food and Drug Act of 1906.

CROSS-REFERENCES

Food and Drug Administration.

## PURE SPEECH

*Written and spoken words that fall within the scope of protection provided by the* FIRST AMENDMENT *to the Constitution.*

Pure speech and other types of communication, such as picketing and SYMBOLIC SPEECH or speech plus, that involve conveying an idea or message through behavior, are safeguarded by the Constitution against ARBITRARY and unreasonable interference by the government. This right of freedom of expression is not, however, absolute. Pure speech and other communica-

tions are not protected if they present a CLEAR AND PRESENT DANGER to society or if they constitute LIBEL, OBSCENITY, or slander.

CROSS-REFERENCES

Freedom of Speech.

## PURGE

*To exonerate someone; to clear someone of guilt, charges, or accusations.*

Purging CONTEMPT is to clear an individual of contempt of court. This is generally accomplished by a formal apology to the court and the payment of a fine.

## PURPORT

*To convey, imply, or profess; to have an appearance or effect.*

The purport of an instrument generally refers to its facial appearance or import, as distinguished from the tenor of an instrument, which means an exact copy or duplicate.

## PURSUANT

*According to a prescribed method or some authority. To follow after or follow out; to execute or carry out by reason of something.*

To do an act pursuant to the law is to conform to the requirements of a statute.

## PURVIEW

*The part of a statute or a law that delineates its purpose and scope.*

Purview refers to the enacting part of a statute. It generally begins with the words *be it enacted* and continues as far as the repealing clause. The purview is distinguished from other parts of a statute, such as the title, preamble, and savings clauses.

## PUT

*An option—a right that operates as a continuing proposal—given in exchange for consideration—something of value—permitting its holder to sell a particular stock or commodity at a fixed price for a stated quantity and within a limited time period.*

A put is purchased for a fee paid to the person who agrees to accept the stock or goods if they are offered. The purchaser of this right to sell expects the price of the stock or commodity to decrease so that he can deliver the stock or commodity at a profit. If the price rises, the option need not be exercised. The reverse transaction is a call.

## PUTATIVE

*Alleged; supposed; reputed.*

A *putative father* is the individual who is alleged to be the father of an illegitimate child.

A *putative marriage* is one that has been contracted in GOOD FAITH and pursuant to ignorance, by one or both parties, that certain impediments exist to render it null and void.

## ♦ PUTZEL, HENRY, JR.

Henry Putzel Jr. served as the reporter of decisions of the U.S. Supreme Court from 1964 to 1979. Before becoming reporter, Putzel practiced law and served in a variety of important positions in the federal government. As an attorney with the JUSTICE DEPARTMENT'S CIVIL RIGHTS division, Putzel worked to curtail racially discriminatory voting practices.

Putzel was born on October 8, 1913, in Denver, Colorado. He received his undergraduate degree from Yale University in 1935 and earned a law degree from Yale in 1938. He entered private law practice in St. Louis, Missouri but left in 1942 for a position in Washington, D.C., as an attorney in the federal Office of Price Administration. In 1945, Putzel transferred to the Justice Department, where he worked in the foreign-agents registration section. He moved to the department's civil rights section in 1948. Following the U.S. Supreme Court's decision in BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), which overturned the SEPARATE-BUT-EQUAL doctrine and struck down state-mandated SEGREGATION of public schools, Putzel worked on enforcing SCHOOL DESEGREGATION. He also prosecuted individuals who had violated federal criminal civil rights laws. In 1957, he was named to head the voting and elections section of the Justice Department's civil rights division. He investigated allegations of RACIAL DISCRIMINATION in voting and election FRAUD.

The U.S. Supreme Court appointed Putzel its reporter of decisions in 1964, the thirteenth person to hold the position. As reporter, Putzel was

responsible for the accuracy of each opinion, the preparation of headnotes and a syllabus that summarizes the decisions, and the actual publication of each volume of decisions. During his 15-year tenure, he edited or co-edited 64 volumes (nos. 376–440) of the *United States Reports.* A major change in reporting procedure occurred while Putzel was reporter: The Court ordered the preparation of headnotes before the announcement of the decision, rather than after the release of the opinion, as had been the practice.

Putzel has maintained a low profile since his retirement in 1979. The SUPREME COURT HISTORICAL SOCIETY published a transcript of an interview that Putzel gave in the mid-1970s and made it available on its web site (www.supremecourthistory.org). The interview is a valuable historical document, as it captures a way of editing and publication that would soon give way to the personal computer. This technology has allowed the reporter of decisions to move slip opinions into the U.S. Reports more quickly.

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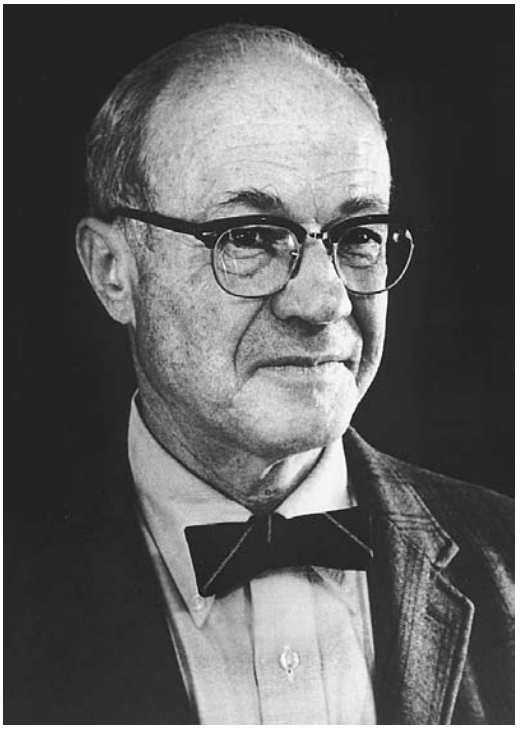

*Henry Putzel Jr.*
U.S. SUPREME COURT

## PYRAMID SALES SCHEME

See PONZI SCHEME.

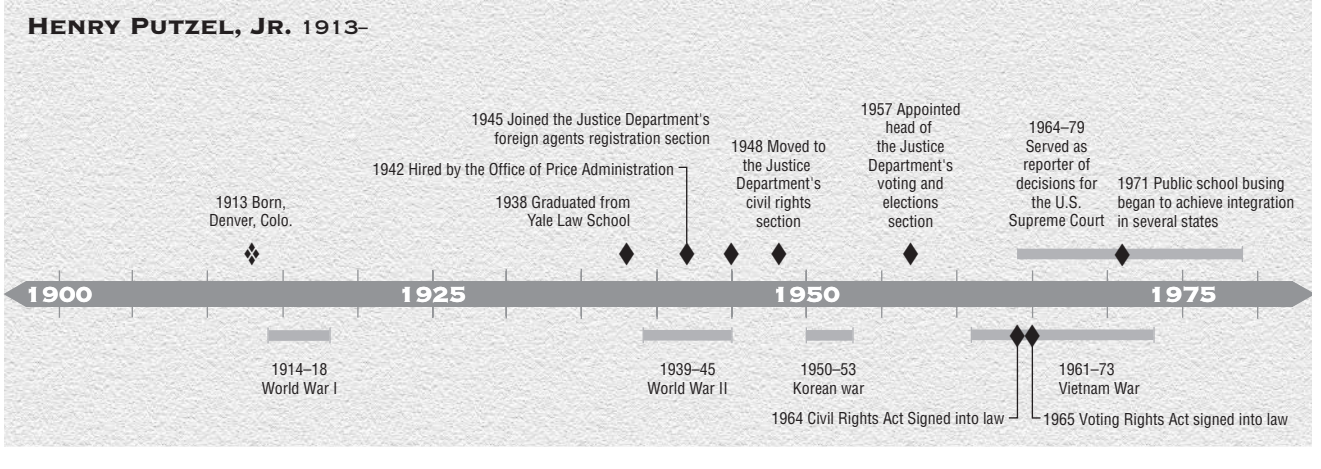

## QUA

*[*Latin, Considered as; in the character or capacity of.*] For example, "the trustee* qua *trustee [that is, in his or her role as trustee] is not liable."*

## QUALIFICATION

*A particular attribute, quality, property, or possession that an individual must have in order to be eligible to fill an office or perform a public duty or function.*

For example, attaining the age of majority is a qualification that must be met before an individual has the capacity to enter into a contract.

The term *qualification* also refers to a limitation or restriction that narrows the scope of language (such as that contained in a statute) that would otherwise carry a broader meaning.

## QUALIFIED ACCEPTANCE

*In contract law, an assent to an offer that is either conditional or partial and alters the offer by changing the time, amount, mode, or place of payment.*

In order for a contract to be valid, an acceptance of an offer must not be subject to any conditions; therefore, a qualified acceptance is tantamount to a counteroffer.

## QUANTUM MERUIT

[Latin, As much as is deserved.] *In the law of contracts, a doctrine by which the law infers a promise to pay a reasonable amount for labor and materials furnished, even in the absence of a specific legally enforceable agreement between the parties.*

A party who performs a valuable service for another party usually enters into a written contract or agreement before performing the service, particularly when the party is in the business of performing that service. For instance, most professional roofers hired to repair a roof insist on having a formal agreement with the owner of the house before beginning the repairs. In the absence of an agreement or formal contract, the roofer may be unable to recover losses in court if the transaction goes awry. Quantum meruit is a judicial doctrine that allows a party to recover losses in the absence of an agreement or binding contract.

By allowing the recovery of the value of labor and materials, quantum meruit prevents the UNJUST ENRICHMENT of the other party. A person would be unjustly enriched if she received a benefit and did not pay for it when fairness required that payment be made. Quantum meruit can be used to address situations where no contract exists or where a contract exists but for some reason is unenforceable. In such cases courts imply a contract to avoid an unjust result. Such contracts are called quasi contracts.

Quantum meruit also describes a method used to determine the exact amount owed to a person. A court may measure this amount either

by determining how much the defendant has benefited from the transaction or by determining how much the plaintiff has expended in materials and services.

The doctrine of quantum meruit was developed in the seventeenth century by the royal Court of Chancery in England. This court worked apart from the common-law courts to grant relief that was due under general principles of fairness but could not be obtained under the strict legal precedents of the common-law courts. The system of basing decisions on basic principles of fairness became known as EQUITY. The Chancery Court developed quantum meruit along with other equitable doctrines that allowed a person to recover or collect for other valuable acts performed without a contract, such as the delivery of goods or money. Some of the first cases of quantum meruit involved recovery by persons in so-called trades of common calling, such as innkeepers, tailors, blacksmiths, and tanners.

As service industries increased, so did claims for recovery under quantum meruit, and the doctrine was adopted by colonial courts. U.S. courts now apply quantum meruit principles in a wide variety of cases, including cases involving attorneys' fees, physicians' fees, construction work, government contracts, and even domestic relations suits for "palimony." Palimony is a form of financial support that is similar to ALIMONY but arises out of a nonmarital relationship.

Courts have crafted four basic elements that the plaintiff must prove before she may recover under the doctrine of quantum meruit: (1) that valuable services were rendered; (2) that the services were rendered to the defendant; (3) that the services were accepted, used, and enjoyed by the defendant; and (4) that the defendant was aware that the plaintiff, in performing the services, expected to be paid by the defendant.

The case of *Montes v. Naismith and Trevino Construction Co.*, 459 S.W.2d 691 (Tex. Civ. App. 1970), illustrates how quantum meruit works. In August 1968 Abraham Montes began oral negotiations with Abdon Perez regarding improvements Montes sought for his homestead. Perez testified that Montes brought a contract to him more than once, but that the contract was never complete, and no contract was ever signed. Despite the lack of a contract, Perez arranged for the Naismith and Trevino Construction Company to do the work on Montes's house. Montes paid $1,800 to Perez, and Perez withdrew from the transaction.

Naismith and Trevino made improvements on Montes's homestead for a total value of $3,835.36, but Montes refused to pay for the improvements. Naismith and Trevino brought suit against Montes, arguing that even though they did not have a contract with Montes, they should be paid for their labor and the materials they used in making improvements to his house. The court agreed and entered judgment for Naismith and Trevino in the amount of $1,760, the amount of the services and materials provided by Naismith and Trevino less the amount Montes had paid to Perez. The court based its ruling on the theory of quantum meruit.

The doctrine of quantum meruit is contained in court decisions and, to a lesser extent, in statutes. It can be a confusing doctrine: many courts mix quantum meruit with the similar principles of restitution and unjust enrichment. Restitution is a broad term that describes measures taken by a civil or criminal defendant to restore a victim to the status that he enjoyed before the defendant caused a loss or injury. Unjust enrichment is an equitable approach to civil relationships that covers more than just contractual situations. A civil plaintiff may recover under the doctrine of unjust enrichment by showing (1) that the plaintiff conferred a benefit on the defendant; (2) that the defendant appreciated or knew of the benefit; and (3) that, under the circumstances, it was unfair for the defendant to accept or retain the benefit without paying for it. Most courts consider quantum meruit a particular form of legal restitution that follows the basic restitutionary principle of preventing unjust enrichment.

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## QUANTUM VALEBANT

*[*Latin, As much as they were worth.*] An archaic form of* PLEADING *a lawsuit to recover payment for goods that have been sold and delivered.*

## QUARE

*[*Latin, Wherefore; for what reason; on what account.*] The introductory term used in the Latin form of a number of common-law writs at the beginning of the statement of the reason for the dispute.*

*Quare* is more commonly used in its English form, *query.*

## QUASH

*To overthrow; to annul; to make void or declare invalid; e.g., "quash a subpoena."*

Unreasonable, obviously irregular, or oppressive subpoenas, injunctions, indictments, and orders can be quashed by a court. For example, if jurors have been selected improperly, the court can quash the proceedings.

In criminal cases, if an indictment is defective to such a degree that no judgment could be made if the defendant were to be convicted, the court typically will quash the indictment. In criminal cases, a motion made by the prosecution to quash an indictment is much more likely to succeed than one made by the defense, whose motion would appear self-serving.

## QUASI

*[*Latin, Almost as it were; as if; analogous to.*] In the legal sense, the term denotes that one subject has certain characteristics in common with another subject but that intrinsic and material differences exist between them.*

A QUASI CONTRACT is an obligation invoked by law in the absence of an agreement. Its purpose is to create a legal duty where, in fact, no promise or agreement was entered into by the parties.

When an ADMINISTRATIVE AGENCY makes rules and regulations, it is acting in a quasi-legislative capacity.

## QUASI CONTRACT

*An obligation that the law creates in the absence of an agreement between the parties. It is invoked by the courts where* UNJUST ENRICHMENT, *which occurs when a person retains money or benefits that in all fairness belong to another, would exist without judicial relief.*

A quasi contract is a contract that exists by order of a court, not by agreement of the parties. Courts create quasi contracts to avoid the unjust enrichment of a party in a dispute over payment for a good or service. In some cases a party who has suffered a loss in a business relationship may not be able to recover for the loss without evidence of a contract or some legally recognized agreement. To avoid this unjust result, courts create a fictitious agreement where no legally enforceable agreement exists.

To illustrate, assume that a homebuilder has built a house on Alicia's property. However, the homebuilder signed a contract with Bobby, who claimed to be Alicia's agent but, in fact, was not. Although there is no binding contract between Alicia and the homebuilder, most courts would allow the homebuilder to recover the cost of the services and materials from Alicia to avoid an unjust result. A court would accomplish this by creating a fictitious agreement between the homebuilder and Alicia and holding Alicia responsible for the cost of the builder's services and materials.

Quasi contracts sometimes are called implied-in-law contracts to distinguish them from implied-in-fact contracts. An implied-in-law contract is one that at least one of the parties did not intend to create but that should, in all fairness, be created by a court. An implied-in-fact contract is simply an unwritten, nonexplicit contract that courts treat as an express written contract because the words and actions of the parties reflect a consensual transaction. The difference is subtle but not without practical effect.

One notable difference between the two implied contracts is that courts have no jurisdiction over quasi-contract claims against the federal government. Under the doctrine of SOVEREIGN IMMUNITY, the federal government cannot be sued without its consent. An implied-in-fact contract arises from an actual agreement that was not memorialized in writing, and if an agent of the government entered into an agreement, a court could find consent to suit on the part of the government. A quasi-contract claim, by contrast, does not allege that an agreement existed, only that one should be imposed by the court to avoid an unjust result. Because a quasi-contract claim does not allege any consent on the part of the government, it would fail under the doctrine of sovereign IMMUNITY.

A quasi contract may afford less recovery than an implied-in-fact contract. A contract implied in fact will construct the whole agreement as the parties intended, so the party seeking the creation of an implied contract may be entitled to expected profits as well as the cost of

labor and materials. A quasi contract will be created only to the extent necessary to prevent unjust enrichment. As one court has put it, contracts implied in law are "merely remedies granted by the court to enforce equitable or moral obligations in spite of the lack of assent of the party to be charged" (*Gray v. Rankin,* 721 F. Supp 115 [S.D. Miss. 1989]). The amount of recovery for an implied-in-law contract usually is limited to the cost of labor and materials because it would be unfair to force a person who did not intend to enter into a contract to pay for profits.

Quasi contracts are made possible by the doctrine of QUANTUM MERUIT (Latin for "as much as is deserved"), which allows courts to imply a contract where none exists. Quantum meruit includes implied-in-fact contracts as well as quasi contracts. Courts also use the term *quantum meruit* to describe the process of determining how much money the charging party may recover in an implied contract.

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## QUASI IN REM JURISDICTION

*The power of a court to hear a case and enforce a judgment against a party, even if the party is not personally before the court, solely because the party has an interest in real property or* PERSONAL PROPERTY *within the geographical limits of the court.*

Quasi in rem is a type of PERSONAL JURISDICTION exercised by a court over a party who owns property within the jurisdictional boundaries of the court. A court must have personal jurisdiction over the parties to a case before it can bind them with its decision. A court can gain personal jurisdiction over a party who resides in the court's home state; a court can also gain jurisdiction over an out-of-state party who has made some contact with the state or who owns property within the court's geographical limits. There are two types of jurisdiction based on property: quasi in rem and in rem.

Both in rem and quasi in rem jurisdiction are based on the presence of the party's property within the court's territorial authority. In each instance the court may exercise jurisdiction without the actual presence of the party in court. The distinction between the two types of jurisdiction involves the nature of the dispute to which each applies and the extent of the authority each conveys. In rem (Latin for "against the thing") jurisdiction applies where the dispute involves the property itself. A court exercising in rem jurisdiction has the authority to make a decision as to the property's ownership that will be binding on all the world. Quasi in rem (Latin for "sort of against the thing") jurisdiction applies to personal suits against the defendant, where the property is not the source of the conflict but is sought as compensation by the plaintiff. The authority of a court exercising quasi in rem jurisdiction is limited to a determination of the respondent's interest in the property.

A respondent in a quasi in rem proceeding is entitled to receive notice of the proceeding. If the respondent makes an appearance to defend against a quasi in rem claim, he may be forced to defend against all the claims made by the plaintiff. In many states a respondent may avoid this by making a limited appearance to defend the case on the merits with only the property located in the area at stake.

The concept of quasi in rem jurisdiction has become all but obsolete. It is no longer acceptable for a state court to gain personal jurisdiction over a defendant merely because the defendant owns property in the state. In *Shaffer v. Heitner,* 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977), the U.S. Supreme Court ruled that a respondent must have a minimum level of purposeful contacts with the forum state before a state court may gain jurisdiction over the respondent. With enough contacts a respondent is deemed to have consented to the jurisdiction of the state and its courts. The *Shaffer* Court also held that courts should consider fair play and substantial justice in determining whether to require the appearance of an out-of-state respondent. These considerations should be applied to all forms of personal jurisdiction: in personam, in rem, and quasi in rem.

The practical effect of the *Shaffer* decision is to limit the number of cases based on in rem and quasi in rem jurisdiction. Due to the increasingly interstate nature of commerce in modern society, the average person may have contacts with, or own property in, several faraway states without even knowing it. Without a narrowed treatment of quasi in rem jurisdiction, potential civil respondents would be open to suit in any number of states with which they

have no real connection. To guard against the abuse of quasi in rem jurisdiction, courts tend to closely examine intangible, movable property such as money and other negotiable instruments, such as stocks, bonds, and insurance policies. To exercise quasi in rem jurisdiction over money or other negotiable instruments, a court will examine the nature of the respondent's contacts with the state and the relation of the property to the underlying dispute.

Quasi in rem jurisdiction as a basis for personal jurisdiction has been almost completely absorbed by LONG-ARM STATUTES. These statutes help plaintiffs gain in personam jurisdiction, so quasi in rem jurisdiction, with its limited relief, is frequently unnecessary. However, if the plaintiff's home state does not have a long-arm statute and an out-of-state respondent owns property in the state, the plaintiff may seek an attachment of the property by asking the court to exercise quasi in rem jurisdiction over the property.

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## QUASI-JUDICIAL

*The action taken and discretion exercised by public administrative agencies or bodies that are obliged to investigate or ascertain facts and draw conclusions from them as the foundation for official actions.*

As a general rule, only courts of law have the authority to decide controversies that affect individual rights. One major exception to this general rule is the power of an ADMINISTRATIVE AGENCY to make decisions concerning the rights of parties. An administrative agency is a body of government created by a legislature and charged with supervision and regulation of a particular area of governmental concern. Part of the regulatory power given to an administrative agency is the power of adjudication. Under the Administrative Procedure Act (60 Stat. 237 [5 U.S.C.A. § 551 et seq.]), an agency engages in adjudication when it follows a process for the formulation of an order. With the exception of rule making, any decision by an agency that has a legal effect is a quasi-judicial action.

Complaints against administrative agencies often arise when an agent denies benefits or places restrictions on an individual. For example, a homeowner who seeks to build another structure on her property must obtain approval from a number of administrative agencies. If the local conservation agency refuses to issue a permit for the building of a new structure, the homeowner may appeal this decision in a hearing before the agency's administrative board. The board may hear testimony and examine evidence at the hearing, and then it will decide whether to issue the permit or uphold the agency's refusal.

Quasi-judicial activity is limited to the issues that concern the particular administrative agency. For example, the SOCIAL SECURITY ADMINISTRATION may resolve disputes on issues concerning SOCIAL SECURITY contributions and benefits, but it may not decide any other issues, even those related to Social Security benefits such as tax, estate, and probate questions.

An administrative agency must hold a formal hearing only when required by statute. A formal hearing is a complete hearing with the presentation of testimony, evidence, and arguments. An informal hearing usually is a simple meeting and discussion between an agent of the agency and the individual affected by the agency's actions. As a general rule, the scope of a hearing depends on the importance of the right at issue. If the INTERNAL REVENUE SERVICE attempts to take away a person's homestead, for example, a full hearing would be required. By contrast, when an agent of the Department of Safety issues a small fine for illegal parking, the agency needs to provide only a brief, one-to-one meeting with a hearing officer regarding the issuance of the fine.

Quasi-judicial action by an administrative agency may be appealed to a court of law. With a few exceptions, a plaintiff generally must exhaust all remedies available through an agency before appealing the agency's decision in a case. One notable exception is that a person may appeal directly to a court of law and bypass the quasi-judicial activity of an administrative agency if the agency's remedies would be inadequate. For instance, if the creditors of a failed bank are suing the Federal Savings and Loan Insurance Corporation, they need not go through the agency's hearings before filing suit in a court of law because the agency has adverse

interests to the creditors (*Coit Indep. Joint Venture v. FSLIC,* 489 U.S. 561, 109 S. Ct. 1361, 103 L. Ed. 2d 602 [1989]).

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CROSS-REFERENCES

Administrative Law and Procedure; Bureaucracy; Public Administrative Bodies; Regulation.

## QUASI-LEGISLATIVE

*The capacity in which a public administrative agency or body acts when it makes rules and regulations.*

When an **ADMINISTRATIVE AGENCY** exercises its rule-making authority, it is said to act in a quasi-legislative manner. Administrative agencies acquire this authority to make rules and regulations that affect legal rights through statutes. This authority is an exception to the general principle that laws affecting rights should be passed only by elected lawmakers.

Administrative agency rules are made only with the permission of elected lawmakers, and elected lawmakers may strike down an administrative rule or even eliminate an agency. In this sense quasi-legislative activity occurs at the discretion of elected officials. Nevertheless, administrative agencies create and enforce many legal rules on their own, often without the advice of lawmakers, and the rules have the force of law. This means they have a binding effect on the general public.

Examples of quasi-legislative actions abound. Dozens of administrative agencies exist on the federal level, and dozens more exist on the state and local levels, and most of them have the authority to make rules that affect substantive rights. Agencies with authority over environmental matters may pass rules that restrict the rights of property owners to alter or build on their land; departments of revenue may pass rules that affect how much tax a person pays; and local housing agencies may set and enforce standards on health and safety in housing. These are just a few of the myriad rules passed by administrative agencies.

Except where prohibited by statute or judicial precedent, quasi-legislative activity may be challenged in a court of law. Generally, a person challenging quasi-legislative activity must wait until the rule-making process is complete and the rule or regulation is set before challenging it. Moreover, a challenge to an agency's rule or regulation usually must be made first to the agency itself. If no satisfaction is received from the agency, the complainant can then challenge the rule or regulation in a court of law.

Another distinctive feature of quasi-legislative activity is the provision of notice and a hearing. When an administrative agency intends to pass or change a rule that affects substantive legal rights, it usually must provide notice of this intent and hold a public hearing. This gives members of the public a voice in the quasi-legislative activity.

CROSS-REFERENCES

Administrative Law and Procedure; Bureaucracy; Public Administrative Bodies.

## QUEEN'S BENCH

See **KING'S BENCH OR QUEEN'S BENCH.**

## QUESTION OF FACT

*An issue that involves the resolution of a factual dispute or controversy and is within the sphere of the decisions to be made by a jury.*

A question of fact is a factual dispute between litigants that must be resolved by the jury at trial. It is an issue that is material to the outcome of the case and requires an interpretation of conflicting views on the factual circumstances surrounding the case.

A question of fact is best understood by comparing it to a **QUESTION OF LAW**. Whether a particular issue in a civil case is a question of fact or law is significant because it can determine whether a party wins the case on **SUMMARY JUDGMENT**. Summary judgment is a judgment on the merits of the case without a trial. A civil respondent may move for summary judgment at any time after the suit has been filed, but a plaintiff generally must wait a short period after filing the suit (for the defendant to respond) before moving for summary judgment. In determining whether to grant a motion for summary judgment, a court may consider admissions by the parties in their pleadings, answers to interrogatories and depositions, and affidavits of personal knowledge of facts.

A court will order summary judgment in a civil case if there is no genuine issue of fact and, based on the undisputed facts, the moving party

is entitled to summary judgment as a MATTER OF LAW. If a case does not involve any questions of fact, the only issues are questions of law, so the fact-finding process of a trial is not needed.

To illustrate, suppose that a plaintiff files suit to enforce an agreement to buy a plot of real estate. The respondent declares in her answer that the agreement was oral, and the plaintiff does not deny that the agreement was oral. The court could then order summary judgment in favor of the respondent because a contract for the sale of land must be in writing to be enforceable. Assuming that no other issues are involved, the admission that the agreement was oral eliminates the only material question of fact in the case. The only issue the court would have to decide would be a question of law: whether an oral agreement for the sale of land is enforceable. It is not, so the plaintiff would lose the case without the benefit of a trial because there are no material facts for a fact finder to decide.

Even if a plaintiff challenges a respondent's answer, a respondent may still win summary judgment by proving before trial that no question of fact exists in the case. To do this, the respondent must prove that no question of fact exists by the evidentiary standard that would be used at trial. In civil trials, this standard is either a PREPONDERANCE OF THE EVIDENCE or the slightly higher standard of clear and convincing evidence.

Whether an issue is a question of fact or law is not always clear. In *Cruse v. Coldwell Banker,* 667 So. 2d 714 (Ala. 1995), Gary and Venita Cruse were shown a house advertised as new, although the sellers, Randy and Brenda Harris, were living in the house. The Cruses bought the house before making a complete inspection. Upon further inspection they discovered numerous defects, and sued the seller and the brokerage firm for FRAUD. The respondents moved for summary judgment on the grounds that the Cruses knew that the sellers were living in the house and that the Cruses signed a contract that stated that they took the house as it was, without warranties. The trial court granted the motion, ruling that no question of fact existed in the case and that the respondents were entitled to summary judgment as a matter of law. On appeal, the Alabama Supreme Court reversed the judgment. Regardless of the contract and the Cruses' knowledge of previous inhabitants, the description of the house as new carried with it an IMPLIED WARRANTY of habitability. Because no determination had been made as to whether the house was actually new, a material question of fact remained and summary judgment was inappropriate.

A question of fact receives the same treatment in a bench (non-jury) trial as it does in a jury trial. The only difference is that in a bench trial the same person resolves both questions of law and fact because the fact finder is the judge. Nevertheless, in a bench trial, a judge may not decide material questions of fact without first affording the parties the process of a trial.

On appeal, a question of fact is treated differently than a question of law. If an appellant alleges that the fact finder incorrectly decided questions of fact, an appeals court will give deference to the fact finder's decisions. The fact finder gets to see and hear all the evidence and thus is in a better position to make factual determinations than is the appeals court. If an appellant claims that the trial judge incorrectly decided a question of law, however, the appeals court will examine the trial judge's ruling more carefully. Essentially, it is more difficult to overturn a verdict based on a question of fact than a verdict based on a question of law.

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CROSS-REFERENCES

Clear and Convincing Proof; Preponderance of Evidence.

## QUESTION OF LAW

*An issue that is within the province of the judge, as opposed to the jury, because it involves the application or interpretation of legal principles or statutes.*

At any stage in a proceeding, before or during trial, a judge may have to determine whether to let a jury decide a particular issue. In making this determination, the judge considers whether the issue is a question of law or a QUESTION OF

FACT. If the question is one of fact, it should be decided by the jury at trial. If the question is one of law, the judge may decide it without affording the parties the opportunity to present evidence and witnesses to the jury.

A question of law involves the interpretation of principles that are potentially applicable to other cases. In contrast, a question of fact requires an interpretation of circumstances surrounding the case at hand. Resolving QUESTIONS OF FACT is the chief function of the jury. Resolving questions of law is a chief function of the judge.

If the pleadings and initial evidence in a case show that there are no factual disputes between the parties, a court may grant SUMMARY JUDGMENT to a party. Summary judgment is a final judgment in the case made by the court before trial. A court may grant summary judgment in a case that contains no factual disputes because such a case presents only a question, or questions, of law, so the fact-finding function of the jury is not needed.

On appeal, the trial court's ruling on a question of law generally receives closer scrutiny than a jury's findings of fact. Being present at the trial, the fact finder is in a better position than the appeals court to evaluate evidence and testimony.

An issue may be characterized on appeal as a mixed question of law and fact. A mixed question occurs when the facts surrounding the case are admitted and the rule of the applicable law is undisputed; the issue then is whether the RULE OF LAW was correctly applied to the established facts. In a criminal case, for example, assume that a trial court, over the objection of the defendant, allows the prosecution to present evidence that the defendant was identified as the perpetrator. If the defendant is found guilty and challenges the identification procedure on appeal, the question is one of both law and fact. The appeals court must decide whether the trial court correctly applied the law on DUE PROCESS in identification procedures to the particular identification procedure used in the case. In such a case, the appeals court will scrutinize both the facts and the trial judge's rulings on questions of law.

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## QUI TAM ACTIONS

*Civil actions maintained by private persons on behalf of both themselves and the government to recover damages or to enforce penalties available under a statute prohibiting specified conduct. The term* qui tam *is short for the Latin* qui tam pro domino rege quam pro se ipso in hac parte sequitur, *which means "who brings the action for the king as well as for himself."*

Qui tam actions are unusual in that the plaintiffs do not allege injuries to themselves but rather claim injuries to the government. In a successful qui tam action, the plaintiff, who is known as a *relator* or *informer,* shares any monetary recovery with the sovereign (the government).

Qui tam actions are created solely by statute. Legislatures authorize qui tam actions to encourage private citizens to assist the government in enforcing its statutes. By authorizing a qui tam action, the legislature creates a dual enforcement scheme where both private citizens and the EXECUTIVE BRANCH may redress violations of the statute creating the action. In some respects a qui tam action is similar to the more common citizens' suit, which allows a private citizen to sue to redress injuries to the public. For example, environmental statutes often authorize citizens' suits as a means for members of the public to redress injuries to the environment. In a citizens' suit, however, the plaintiff citizen alleges an injury to herself as a member of the public at large, whereas a plaintiff in a qui tam action alleges a specific injury to the government.

Although qui tam actions are relatively unknown, they have existed in England for hundreds of years and in the United States since the foundation of the government. And although qui tam actions were authorized by the very first Congress, the most important statute creating qui tam actions was the False Claims Act of 1863. During the Civil War, defense contractors frequently defrauded the Union government. In response, Congress enacted the False Claims Act, which sought to encourage private citizens who had information concerning corrupt defense contractors to come forward.

Under the original False Claims Act, a successful relator in a qui tam action was entitled to one-half of the damages and forfeitures recovered and collected from the defendant, while the other half went to the federal treasury. This procedure was frequently abused, however, as plain-

tiffs brought qui tam actions when the government had already instituted criminal investigations against defense contractors. Thus, private citizens profited from the government's efforts to stop FRAUD by defense contractors. In response, Congress barred qui tam actions based on information already known to the government at the time the civil suit was filed, even if the government had taken no action on the information. Because of this restriction and the repeal of many qui tam statutes, the qui tam action was almost extinct until 1986.

In 1986 Congress revitalized qui tam actions under the False Claims Act in response to the widespread procurement abuses by defense contractors during President Ronald Reagan's defense buildup. The 1986 amendments to the False Claims Act (31 U.S.C.A. §§ 3729 et seq.) increased the financial incentives for bringing a qui tam action while easing the jurisdictional requirements for instituting a suit. Specifically the 1986 amendments permit relators to bring qui tam actions even if the government is aware of the information on which the action is based, unless the relator obtained the information from public disclosures by the government. As a result of the amendments, the number of companies sued in qui tam actions under the False Claims Act has greatly increased. In addition to defense contractors, MEDICARE and MEDICAID providers have frequently been the target of qui tam actions. The False Claims Act is currently the only widely used statute authorizing qui tam actions.

The 1986 amendments to the False Claims Act have been challenged by defendants and other critics who assert that qui tam actions unconstitutionally delegate the executive branch's obligation to enforce statutes to unaccountable and self-interested citizens. In addition, defendants have argued that relators in qui tam actions lack legal standing to bring a lawsuit. The U.S. Constitution requires a plaintiff in a lawsuit to allege a distinct injury to himself; when a plaintiff fails to allege such an injury, he lacks standing to sue. Critics of qui tam actions point out that qui tam relators are alleging an injury to the government rather than themselves.

Despite these challenges, no court has held the qui tam provisions of the False Claims Act unconstitutional. In early 1997 the Supreme Court agreed to hear an appeal of a qui tam action under the False Claims Act but declined to review the Ninth Circuit's determination that the act's qui tam provisions are constitutional (*Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 117 S. Ct. 1871, 138 L. Ed. 2d 135 [1997]). Defenders of qui tam actions point out that the individual members of the public are, at least indirectly, hurt by fraud against the government because the government is financially supported by the public. The courts have also repeatedly recognized Congress's authority to legislate the means for implementing its policy objectives. By authorizing qui tam actions, Congress has determined that allowing citizens to sue on behalf of the government is a valid and effective means for enforcing statutes. Thus, the qui tam action remains an important weapon in redressing fraud against the government. In 1996 qui tam actions led to nearly $1.5 billion in recoveries.

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## QUICK ASSETS

*Personal property that is readily marketable.*

Quick assets are items, such as jewelry, that can be easily converted to cash for immediate use.

## QUID PRO QUO

*[*Latin, What for what or Something for something.*] The mutual consideration that passes between two parties to a contractual agreement, thereby rendering the agreement valid and binding.*

In common usage, quid pro quo refers to the giving of one valuable thing for another. Quid pro quo has the same meaning in the law but with varying implications in different contexts.

Quid pro quo, or the exchange of valuable consideration, is required for the formation of a valid contract between individuals who are not

merchants. This requirement of mutual consideration, or the exchange of something of value, indicates the sincerity of the parties' intent to adhere to the contract between them.

The term *quid pro quo* is also used in the contexts of politics and SEXUAL HARASSMENT. In politics quid quo pro can refer to the use of political office for personal benefit. For instance, an elected official might promise favorable governmental treatment to a person in exchange for something of value. This form of quid pro quo would be a violation of the law. On the federal level, the Hobbs Act (18 U.S.C.A. § 1951 [1994]) makes it a felony for a public official to extort property under color of office. Trading campaign contributions for promises of official actions or inactions are also prohibited under the act.

In the area of sexual harassment, quid pro quo describes a form of sexual blackmail. Quid pro quo sexual harassment is the conditioning of employment benefits on an employee's submission to unwelcome sexual conduct. Title VII of the CIVIL RIGHTS ACT (42 U.S.C.A. § 2000 (e)-2 [1988]) provides a remedy for quid pro quo sexual harassment. Most courts follow the Equal Employment Opportunity Commission's guidelines and hold that the necessary quid pro quo exists if submission to unwelcome sexual advances "is made either explicitly or implicitly a term or condition of an individual's employment" or if submission to unwelcome sexual advances "is used as the basis for employment decisions affecting such individual" (29 C.F.R. § 1604.11(a)(1)-(2) [1997]).

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## QUIET ENJOYMENT

*A* COVENANT *that promises that the grantee or tenant of an estate in real property will be able to possess the premises in peace, without disturbance by hostile claimants.*

Quiet enjoyment is a right to the undisturbed use and enjoyment of real property by a tenant or landowner. The right to quiet enjoyment is contained in covenants concerning real estate. Generally a covenant is an agreement between two parties to do or refrain from doing something.

Courts read a covenant of quiet enjoyment between the LANDLORD AND TENANT into every rental agreement, or tenancy. Thus a renter, or tenant, has the right to quiet enjoyment of the leased premises regardless of whether the rental agreement contains such a covenant.

In the covenant of quiet enjoyment, the landlord promises that during the term of the tenancy no one will disturb the tenant in the tenant's use and enjoyment of the premises. Quiet enjoyment includes the right to exclude others from the premises, the right to peace and quiet, the right to clean premises, and the right to basic services such as heat and hot water and, for high-rise buildings, elevator service. In many respects the implied covenant of quiet enjoyment is similar to an IMPLIED WARRANTY of habitability, which warrants that the landlord will keep the leased premises in good repair. For example, the failure to provide heat would be a breach of the implied covenant of quiet enjoyment because the lack of heat would interfere with the tenant's use of the premises and would also make the premises uninhabitable, especially in a cold climate.

Other rights related to quiet enjoyment may be tailored to specific situations. For example, at least one court has found that the ringing of smoke alarms for more than a day is an interference with a tenant's quiet enjoyment of leased premises (*Manzaro v. McCann,* 401 Mass. 880, 519 N.E.2d 1337 [1988]).

Tenants have at least two remedies for a landlord's breach of the covenant of quiet enjoyment: the tenant can cease to pay rent until the problem is solved, or the tenant can move out. A tenant who moves out may be liable for any rent owing under the agreement if a court decides that the landlord did not breach the covenant of quiet enjoyment.

A covenant of quiet enjoyment may be included in an exchange, or conveyance, of land ownership at the option of the parties to the deed. Quiet enjoyment has a slightly different scope in the context of land ownership than it has in the context of a tenancy. When a seller gives a deed to the land to another party, the seller no longer has control over the property. The covenant of quiet enjoyment, when contained in a deed to real estate, warrants that the title to the land is clear,

meaning that it has no encumbrances, or claims against it by other persons.

A warranty deed includes a covenant of quiet enjoyment. By contrast, a quitclaim deed makes no warranties regarding the title and contains no covenant of quiet enjoyment.

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## QUIET TITLE ACTION

*A proceeding to establish an individual's right to ownership of real property against one or more adverse claimants.*

An action to quiet title is a lawsuit filed to establish ownership of real property (land and buildings affixed to land). The plaintiff in a quiet title action seeks a court order that prevents the respondent from making any subsequent claim to the property. Quiet title actions are necessary because real estate may change hands often, and it is not always easy to determine who has title to the property.

A quiet title suit is also called a suit to remove a cloud. A cloud is any claim or potential claim to ownership of the property. The cloud can be a claim of full ownership of the property or a claim of partial ownership, such as a lien in an amount that does not exceed the value of the property. A title to real property is clouded if the plaintiff, as the buyer or recipient of real estate, might have to defend her full ownership of the property in court against some party in the future. A landowner may bring a quiet title action regardless of whether the respondent is asserting a present right to gain possession of the premises.

For example, assume that the seller of the property agreed to sell but died before the sale was finalized. Assume further that the seller also gave the property to a nephew in a will. In such a situation, both the nephew and the buyer have valid grounds for filing a suit to quiet title because each has a valid claim to the property.

The law on quiet title actions varies from state to state. Some states have quiet title statutes. Other states allow courts to fashion most of the laws regarding quiet title actions. Under the COMMON LAW, a plaintiff must be in possession of the property to bring a quiet title action, but many state statutes do not require actual possession by the plaintiff. In other states possession is not relevant. In some states only the person who holds legal title to the real estate may file a quiet title action, but in other states anyone with sufficient interest in the property may bring a quiet title action. Generally, a person who has sold the property does not have sufficient interest. When a landowner owns property subject to a mortgage, the landowner may bring a quiet title action in states where the mortgagor retains title to the property. If the mortgagee keeps the title until the mortgage is paid, the mortgagee, not the landowner, would have to bring the action.

The general rule in a quiet title action is that the plaintiff may succeed only on the strength of his own claim to the real estate, and not on the weakness of the respondent's claim. The plaintiff bears the burden of proving that he owns the title to the property. A plaintiff may have less than a fee simple, or less than full ownership, and maintain an action to quiet title. So long as the plaintiff's interest is valid and the respondent's interest is not, the plaintiff will succeed in removing the cloud (the respondent's claim) from the title to the property.

CROSS-REFERENCES

Cloud on Title.

## QUINLAN, IN RE

*In Re Quinlan,* 70 N.J. 10, 355 A.2d 647 (1976), was the first major judicial decision to hold that life-sustaining medical treatments may be discontinued in appropriate circumstances, even if the patient is unable or incompetent to make the decision. The New Jersey Supreme Court's decision has been followed by nearly every state appellate court to consider the issue. In addition to establishing a patient's right to refuse life-sustaining medical treatments, the *Quinlan* decision also made clear that a decision to remove or withhold life support systems from an incompetent patient would not constitute HOMICIDE or MEDICAL MALPRACTICE.

In 1975, Karen Ann Quinlan, age twenty-two, stopped breathing and lapsed into a coma. Quinlan's treating physicians determined that in addition to being comatose, Quinlan was in a "chronic persistent vegetative state" and could not survive without the assistance of a respirator. Further, the physicians believed that Quinlan had no chance of recovery and could not

*Nearly every state appellate court followed the N.J. Supreme Court ruling that allowed Karen Quinlan's parents, Joseph and Julia Quinlan (with a photograph of Karen), to withhold life-sustaining medical treatment from their comatose daughter.*

AP/WIDE WORLD PHOTOS

survive for more than a year even with the assistance of the respirator. Although Quinlan was not dead by any legal standard, her family wished to disconnect the respirator. The treating physicians, however, refused. Quinlan's father then sought judicial approval to act as Quinlan's legal guardian and to have the respirator removed.

After a lower court refused to order physicians to remove the respirator, Quinlan's father appealed to the New Jersey Supreme Court. First the court determined that a patient's decision regarding whether to continue with life-sustaining medical treatments implicates the patient's right to privacy, much as a woman's decision to terminate a pregnancy implicates the right to privacy, as established in ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

The court then proceeded to weigh Quinlan's right to privacy against the state's interest in preserving human life and defending the right of a physician to administer medical treatment according to his or her best judgment. The court found that as the degree of bodily invasion increases and the prognosis for the patient's recovery dims, the patient's right to privacy increases and the state's interest weakens. In Quinlan's case, where the medical procedures were extremely invasive and Quinlan had virtually no chance of recovering from a permanent vegetative state, the court concluded that Quinlan could choose to have the respirator discontinued, even if it meant she would die.

However, Quinlan was unable to make this decision. Thus, the court was faced with the issue of whether Quinlan's father could make the decision on her behalf. The court concluded that Quinlan's father and the rest of her family could decide whether to disconnect the respirator, stating that the "decision should be accepted by a society the overwhelming majority of whose members would, we think, in similar circumstances, exercise such a choice in the same way for themselves or for those closest to them." The court stated that Quinlan's father should act in accordance with his understanding of his daughter's best interests and not necessarily upon what his daughter would have done had she been able to express her wishes.

Although the *Quinlan* decision is most often cited as the decision that recognized the "right to die," commentators have stated that the decision's most important legacy was offering the medical profession freedom from criminal prosecution and civil liability when removing life support from patients in a chronically vegetative state. The *Quinlan* court stated that it believed the testimony of Quinlan's doctors who testified that the fear of criminal prosecution or civil liability had nothing to do with their refusal to disconnect Quinlan's respirator at her father's request and that their decision comported with standard medical practices. However, the court also believed that the fear of criminal sanctions and civil liability must have had some bearing on medical standards and practices as they then existed.

Thus, the *Quinlan* court was faced with the conflict between the patient's right to refuse invasive, life-sustaining medical procedures and the doctors' right to treat their patient as they saw fit. The court believed that the focal point in balancing these rights ought to be the possibility of the patient's returning to a cognitive and fulfilling life, as opposed to the "forced CONTINUANCE of that biological vegetative existence" to which Quinlan was doomed. In resolving Quinlan's case, the court concluded that if her attending physicians, after consulting with the hospital's ethics committee, concluded that Quinlan had no reasonable possibility of ever emerging from her comatose condition to a cognitive, sapient state, the respirator that was believed to be sustaining her life ought to be removed in accordance with her family's wishes. The physicians could not be subject to criminal or civil liability for that decision.

Ironically, the New Jersey Supreme Court's decision had little impact on Quinlan's fate. Almost six weeks after the Court's ruling, Quinlan was still attached to a respirator and more medical technology was being employed to keep her alive. Eventually Quinlan was weaned off the respirator in accordance with her family's wishes, but she still survived another nine years, although she never emerged from a comatose state.

The *Quinlan* case has influenced U.S. law by providing the framework for deciding the difficult legal issues that continue to arise as advances in medical technology allow doctors to keep patients alive, even when they have little or no chance of returning to normal life. Nearly every judicial decision since *Quinlan* has recognized a patient's right to refuse life-sustaining medical treatments. Finally, the courts have agreed with *Quinlan* that where a patient is incompetent, the right to refuse such treatments may be asserted by the patient's family or guardian.

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CROSS-REFERENCES

Death and Dying; Patients' Rights; Physicians and Surgeons.

## QUIT

*To vacate; remove from; surrender possession.*

When a tenant leaves premises that he or she has been renting, the tenant is said to quit such premises.

A *notice to quit* is written notification given by a landlord to a tenant that indicates that the landlord wants to repossess the premises and that the tenant must vacate them at a certain designated time.

## QUITCLAIM DEED

*An instrument of conveyance of real property that passes any title, claim, or interest that the grantor has in the premises but does not make any representations as to the validity of such title.*

A quitclaim deed is a release by the grantor, or conveyor of the deed, of any interest the grantor may have in the property described in the deed. Generally a quitclaim deed relieves the grantor of liability regarding the ownership of the property. Thus, the grantor of a quitclaim deed will not be liable to the grantee, or recipient of the deed, if a competing claim to the property is later discovered. A quitclaim deed is not a guarantee that the grantor has clear title to the property; rather it is a relinquishment of the grantor's rights, if any, in the property. By contrast, in a warranty deed the grantor promises that she owns the property with no cloud on the title (that is, no competing claims).

The holder of a quitclaim deed receives only the interest owned by the person conveying the deed. If the grantee of a quitclaim deed learns after accepting the deed that the grantor did not own the property, the grantee may lose the property to the true owner. If it turns out that the grantor had only a partial interest in the property, the quitclaim deedholder holds only that partial interest.

In some states a quitclaim deed does not relieve the grantor of liability for all encumbrances, or clouds, on the title. In these states a grantor must warrant that neither the grantor nor anyone associated with the grantor has a claim to the title. The grantor must defend the title for the grantee if a cloud on the title arose under or through the grantor. For example, if a contract made by the grantor resulted in a lien being placed on the property, the grantor would have to defend against that claim for the grantee, even under a quitclaim deed. If the property has changed hands several times after the cloud first appeared, however, the grantor may not be liable to the grantee.

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*A sample quitclaim deed*

**Quitclaim Deed**

**QUITCLAIM DEED**

THIS QUITCLAIM DEED, executed this _____ day of _____ (month) _____ (year),

by _____ the first party, whose post office address

is _____ and the second party, whose post office address

is _____.

WITNESSETH, that the said first party, for good consideration and for the sum of _____ Dollars ($_____) paid by the said second party, the receipt whereof is hereby acknowledged, does hereby remise, release and quitclaim unto the said second party forever, all the right title, interest and claim which the said first party has in and to the following described parcel of land, and

improvements and appurtenances thereto in the County of _____ State of _____, to wit:

IN WITNESS WHEREOF, the said first party has signed and sealed these presents the day and year first above written.

Signed, sealed and delivered in the presence of:

_____ _____
(Witness) (First Party)

_____ _____
(Witness) (Second Party)

STATE OF _____ COUNTY OF _____

On _____ (month & day), _____ (year) before me, _____, personally appeared, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to within this instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

_____

(Signature)

Affiance ____ Known ____ Unknown

ID Produced: _____

(Seal)

## QUO ANIMO

*[*Latin, With what intention or motive.*] A term sometimes used instead of the word* animus, *which means design or motive.*

## QUO WARRANTO

*A legal proceeding during which an individual's right to hold an office or governmental privilege is challenged.*

In old English practice, the writ of quo warranto—an order issued by authority of the king—was one of the most ancient and important writs. It has not, however, been used for centuries, since the procedure and effect of the judgment were so impractical.

Currently the former procedure has been replaced by an *information in the nature of a quo warranto,* an extraordinary remedy by which a prosecuting attorney, who represents the public at large, challenges someone who has usurped a public office or someone who, through abuse or neglect, has forfeited an office to which she was entitled. In spite of the fact that the remedy of quo warranto is pursued by a prosecuting attorney in a majority of jurisdictions, it is ordinarily regarded as a civil rather than criminal action. Quo warranto is often the only proper legal remedy; however, the legislature can enact legislation or provide other forms of relief.

Statutes describing quo warranto usually indicate where it is appropriate. Ordinarily it is proper to try the issue of whether a public office or authority is being abused. For example, it might be used to challenge the UNAUTHORIZED PRACTICE of a profession, such as law or medicine. In such situations, the challenge is an assertion that the defendant is not qualified to hold the position she claims—a medical doctor, for example.

In some quo warranto proceedings, the issue is whether the defendant is entitled to hold the office he claims, or to exercise the authority he presumes to have from the government. In addition, proceedings have challenged the right to the position of county commissioner, treasurer, school board member, district attorney, judge, or tax commissioner. In certain jurisdictions, quo warranto is a proper proceeding to challenge individuals who are acting as officers or directors of business corporations.

A prosecuting attorney ordinarily commences quo warranto proceedings; however, a statute may authorize a private person to do so without the consent of the prosecutor. Unless otherwise provided by statute, a court permits the filing of an information in the nature of quo warranto after an exercise of sound discretion, since quo warranto is an extraordinary exercise of power and is not to be invoked lightly. Quo warranto is not a right available merely because the appropriate legal documents are filed. Valid reason must be indicated to justify governmental interference with the individual holding the challenged office, privilege, or license.

## QUORUM

*A majority of an entire body; e.g., a quorum of a legislative assembly.*

A quorum is the minimum number of people who must be present to pass a law, make a judgment, or conduct business. Quorum requirements typically are found in a court, legislative assembly, or corporation (where those attending might be directors or stockholders). In some cases, the law requires more people than a simple majority to form a quorum. If no such defining number is determined, a quorum is a simple majority.

A quorum also might mean the number of members of a body defined as competent to transact business in the absence of the other members. The purpose of a quorum rule is to give decisions made by a quorum enough authority to allow binding action to be conducted.

In both houses of Congress, a quorum consists of a simple majority of members.

## RACIAL AND ETHNIC DISCRIMINATION

*Acts of bias based on the race or ethnicity of the victim.*

Racial and ethnic discrimination have had a long history in the United States, beginning with the importation of African slaves in the seventeenth century. The U.S. CIVIL WAR and the THIRTEENTH AMENDMENT may have ended SLAVERY, but they did not end racial discrimination. In fact, the U.S. legal system embraced for over 70 years a system of state-sponsored racial SEGREGATION in schools, transportation, and public accommodations. In addition, blacks and other minorities were denied the vote. Ethnic discrimination has also been common, beginning with the first wave of Irish immigration in the 1830s. During the nineteenth and twentieth centuries, discrimination based on race and ethnicity developed with the first arrivals of each alien group. Thus, the Chinese, the Japanese, Italians, Jews, Hispanics, Vietnamese, Somalis, and other groups have encountered hostility and bias when they tried to find jobs or places to live. Since the 1960s, federal CIVIL RIGHTS laws and Supreme Court decisions have sought to combat illegal discrimination based on race or ethnicity.

In the aftermath of the Civil War, Radical Republicans in the Congress were determined to protect the civil rights of blacks. They enacted the Thirteenth, Fourteenth, and Fifteenth Amendments partially out of concern that future congresses could easily revoke statutory solutions. The Thirteenth Amendment abolished slavery and gave Congress the power to eradicate all vestiges of INVOLUNTARY SERVITUDE. The FOURTEENTH AMENDMENT proved to be the most profound and far-reaching of all federal Reconstruction legislation. In its three main clauses, the amendment guaranteed citizens' protection from the actions of state and local officials, based on EQUAL PROTECTION, DUE PROCESS, and the concept of PRIVILEGES AND IMMUNITIES. The FIFTEENTH AMENDMENT declared that federal and state government could not deny or abridge the right to vote because of race, color, or previous condition of servitude.

Radical Republicans used these constitutional amendments as the basis for many pieces of civil rights legislation. The CIVIL RIGHTS ACTS of 1866, 1870, and 1871 are usually called the Reconstruction Civil Rights Acts. The provisions of these acts are both civil and criminal in nature, and several of these statutes have assumed great importance in modern civil rights litigation. The most important of these statutes, 42 U.S.C.A. SECTION 1983, provides that any person who under color of law subjects another individual to the deprivation of any federal right shall be liable to the injured party in an action at law or in EQUITY. A similar provision in the federal criminal code imposed penal sanctions against persons who willfully engage in such conduct (18 U.S.C.A. § 242).

The federal government ceased to enforce these and other Reconstruction statutes in the

Southern states after federal military occupation ended in 1876. African Americans lost their right to vote and were excluded from juries as the white power structure reasserted control of the political and legal systems in the South. In addition, the U.S. Supreme Court struck down civil rights laws, including a broad statute that barred racial discrimination in public transportation and accommodations, in large part because the Court perceived a dangerous tilt in the federal-state power relationship. By the end of the nineteenth century, the Supreme Court had made clear that it favored giving the states more power than the federal government in regulating the actions of their citizens. The 1896 decision in **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), which endorsed the concept of *separate but equal,* legitimized state-mandated racial segregation.

At the beginning of the twentieth century, the tidal wave of immigrants from Europe and the presence of more Chinese on the West Coast led to calls for immigration restriction. Discrimination against immigrants was commonplace. The Chinese in California had obtained a ruling a generation earlier from the Supreme Court that established a powerful legal weapon against racial or ethnic discrimination. In **YICK WO V. HOPKINS**, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), the Court stated for the first time that a state or municipal law that appears to be fair on its face will be declared unconstitutional under the Equal Protection Clause because of its discriminatory purpose.

The National Association for the Advancement of Colored People (**NAACP**) in 1909 signaled that the twentieth century battle for civil rights had begun. The NAACP used the federal courts to challenge various types of voting discrimination in the 1920s and 1930s, and, by the 1940s, it had initiated litigation against segregated public education that led to the landmark case of **BROWN V. BOARD OF EDUCATION**, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). In this case, the Court ruled that the "separate but equal" doctrine violated the Fourteenth Amendment. Though the Court mandated that the South's racially segregated schools be dismantled "with all deliberate speed," it took more than 20 years for some school districts to comply.

The modern **CIVIL RIGHTS MOVEMENT** began with the Montgomery, Alabama, bus boycott in 1955 and 1956, led by Rev. Dr. **MARTIN LUTHER KING JR.** King's approach, which centered on nonviolent civil disobedience, was met by public and private resistance in the South. In the 1960s, Congress responded by enacting a series of laws designed to end discrimination based on race and ethnicity: the Civil Rights Act of 1964 (42 U.S.C.A. § 2000e et seq.), the **VOTING RIGHTS ACT OF 1965** (42 U.S.C.A. § 1973 et seq.), and the **FAIR HOUSING ACT OF 1968** (42 U.S.C.A. § 3601 et seq.). The Supreme Court found these acts constitutional, which signaled federal dominance over matters previously thought to be within the scope of state and local governments.

As of 2003, the Civil Rights Act of 1964 is the most comprehensive civil rights legislation in U.S. history. Congress enacted it to end discrimination based on race, color, religion, national origin, and sex. Title I of the act guarantees equal voting rights by removing registration requirements and procedures biased against minorities. Title II prohibits segregation or discrimination in places of public accommodation involved in interstate commerce. Title IV deals with the desegregation of public schools, Title IV broadens the duties of the **CIVIL RIGHTS COMMISSION**, and Title VI mandates nondiscrimination in the distribution of funds under federally assisted programs. The most important section is Title VII, which bans discrimination by trade unions, schools, or employers involved in interstate commerce or doing business with the federal government. Title VII also established the **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION** (EEOC) to enforce the provisions of the act. Congress extensively amended Title VII in 1972. It authorized the EEOC to file judicial actions. Time limitations were lengthened, coverage was extended to public employees, and many clarifications were made in the statute. Title VII was amended again in 1991 to include the right to jury trials and the allowance of **COMPENSATORY DAMAGES** for intentional discrimination.

Title VII has also been the source of controversy over the policy of **AFFIRMATIVE ACTION**. Affirmative action is a concerted effort by an employer to rectify past discrimination against specific classes of individuals by giving temporary preferential treatment to the hiring and promoting of individuals from these classes until true equal opportunity is achieved. Though the Supreme Court has upheld the constitutionality of affirmative action plans, it

remained a source of litigation. However, the Supreme Court, in *Gratz v. Bollinger*, 539 U.S. ___, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003), reaffirmed the constitutionality of affirmative action in education. The Court held that higher education institutions may use race as one factor in evaluating applicants but warned against the use of racial quotas or policies that gave race too prominent a role in the selection process.

The passage of the Voting Rights Act of 1965 was a significant moment in U.S. history. For the first time, the federal government undertook voting reforms that had traditionally been left to the states. The act prohibits the states and their political subdivisions from imposing voting qualifications or prerequisites to voting or standards, practices, or procedures that deny or curtail the right of a U.S. citizen to vote because of race, color, or membership in a language minority group. Congress extended the act in 1970 and again in 1982, when its provisions were given an additional term of 25 years. The act has enabled the election of blacks and individuals from other minority populations in the South and other parts of the United States that have been identified as problem areas by the JUSTICE DEPARTMENT.

The Fair Housing Act of 1968 prohibits racial and ethnic discrimination in the rental and sale of private residences when agents or brokers handle such transactions. Transactions by private individuals are not covered. The act authorizes the HOUSING AND URBAN DEVELOPMENT DEPARTMENT (HUD) to refer cases of racial discrimination to the Justice Department for possible prosecution. The Fair Housing Act gave rise in the 1970s to cases that focused on the legality of ZONING practices. Court decisions have concluded that, absent a discriminatory purpose or intent, cities do not violate the federal Constitution through exclusionary zoning practices as a general rule. The Supreme Court's ruling in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), made it difficult to desegregate suburban communities.

Members of racial and ethnic communities are protected by a Supreme Court standard of review that places a heavy burden on the government to justify laws and regulations that are allegedly discriminatory. The Supreme Court has made race and ethnicity "suspect classification" for JUDICIAL REVIEW. This means that it will subject the government's action to "strict scrutiny" review. Using this standard reverses the ordinary presumption of constitutionality, with the government carrying the BURDEN OF PROOF that its challenged policy is constitutional. To withstand STRICT SCRUTINY, the government must show that its policy is necessary to achieve a compelling state interest. If this is proved, the state must then demonstrate that the legislation is narrowly tailored to achieve the intended result. Although strict scrutiny is not a precise test, it is far more stringent than the traditional RATIONAL BASIS TEST, which only requires the government to offer a reasonable ground for the legislation.

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CROSS-REFERENCES

Civil Rights Acts; Hate Crime; Section 1983.

## RACIAL PROFILING

*The consideration of race, ethnicity, or national origin by an officer of the law in deciding when and how to intervene in an enforcement capacity.*

Police officers often profile certain types of individuals who are more likely to perpetrate crimes. Many of these suspects are profiled because of activities observed by police officers. For example, if someone who is obviously poor is frequently seen in a more affluent neighborhood, such a person may be profiled as someone with possible criminal intent. Similarly, if an individual living in an obviously poor neighborhood has in his or her possession several expensive items, that person may be profiled as someone involved in crime, such as drugs or theft. Although this type of profiling is not always considered fair, law enforcement officers consider it necessary to identify possible criminal activity before it occurs and causes injury to others.

One of the most heated issues in law enforcement is the profiling of individuals

# Should Police Practice Racial Profiling?

The 1998 shooting death of three young minority men by state troopers during a traffic stop on the New Jersey Turnpike helped spark a national debate on the issue of so-called "racial profiling" by law enforcement officials. Critics of profiling charge that the practice is inherently racist, because law enforcement officials tend to stop and search African Americans and other minorities more often than whites. Critics also charge that aggressive stop-and-search tactics erode public confidence in law enforcement and violate the **CIVIL RIGHTS** of all citizens. In 1999, they led the charge for federal legislation to determine the extent to which racial profiling is practiced. Defenders of profiling concede that some law enforcement officials may stop and search blacks and other minorities at a disproportionately high rate. However, they ascribe this to overzealous police work and believe it can be addressed through training. Furthermore, they credit profiling, in part, with a significant decrease in America's crime rate and oppose efforts to collect data on stop-and-search tactics.

Critics of profiling acknowledge that law enforcement officials have broad discretion when it comes to stopping and searching citizens. On the highway, evidence of a traffic infraction alone is justification for stopping a motorist. Off the highway, a police officer must have a "reasonable suspicion" that a person is armed and presents a danger, and must be able to articulate why he or she felt that way. This "reasonable suspicion" standard evolved from a landmark 1968 Supreme Court decision, **TERRY V. OHIO**, 392, U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and it is significantly lower than the "probable cause" standard that police must meet to make an arrest or to obtain a **SEARCH WARRANT**. Just how much lower has been the subject of much debate and considerable litigation. The courts have consistently held that simply being of a certain race or fitting a certain type or loitering in a high-crime area does not constitute sufficient grounds for frisking. Making a furtive gesture or having a bulge in your pocket, on the other hand, does.

The extent to which racial stereotyping is used in identifying "suspicious" individuals is a key point of contention in the debate over profiling. Critics of profiling point to statistics that indicate that African American and other minority drivers are stopped and searched at a disproportionately high rate in comparison with white motorists. In Maryland, for example, a study revealed that 70 percent of those stopped and searched on a stretch of I–95 were African American—despite the fact that they represented only 17 percent of drivers on the road. A demographic expert who examined the data described the odds of this disparity's occurring by chance as "less than one in one quintillion." A similar study conducted in New Jersey in 1994–95 showed that on the southern section of the New Jersey Turnpike cars with black occupants represented only 15 percent of those violating the speed limit, yet they accounted for 46 percent of the drivers pulled over.

Profiling's detractors renounce efforts to defend profiling on the grounds that tendency toward criminality, not race or ethnicity, is being profiled as based solely upon the race, ethnicity, or national origin of the individual. Statistics show that African Americans are several times more likely to be arrested and incarcerated than white Americans. As of 2000, fewer African American men were in college than were in prison. Moreover, black children were nine times as likely as white children to have at least one parent in prison.

The most common form of racial profiling occurs when police stop, question, and search African American, Hispanic American, or members of other racial minorities disproportionately based solely on the individuals' race or ethnicity. In 1996, the television network ABC aired a report entitled "Driving While Black," in which it paid three younger black men to drive around the city of New Brunswick, New Jersey, in a Mercedes-Benz. Three officers in the city pulled over the car for a minor traffic infraction and then proceeded to search the car and the young men. The show demonstrated with little doubt that the only reason the three men were pulled over was their race. Nevertheless, the officers brought a **DEFAMATION** suit against ABC, claiming that ABC had defamed their character and had violated New Jersey's anti-wiretapping law. In 2000, a New Jersey Superior Court judge dismissed the lawsuit.

The incident in "Driving While Black" demonstrates that racial profiling does occur, but lawmakers and courts have had some difficulty controlling its influence. Under federal **CONSTITUTIONAL LAW**, a police officer who

reflecting a pattern of stereotyping by police. When police look for minorities, these critics say, it is minorities they will arrest. While acknowledging the role of aggressive policing in the recent drop in crime, they decry the deleterious effect of profiling on public confidence in law enforcement, particularly in minority communities. How many innocent citizens have to be inconvenienced, these critics ask, in order to keep the streets free of criminals?

The lack of national data on profiling has led critics of the practice to call for national legislation to study the problem. In 1999, both the House and the Senate introduced bills entitled the Traffic Stops Statistics Act of 1999 (H.R. 1443, S. 821, 106th Cong., 1st Sess.), which would have required the attorney general to conduct a study of stops for routine traffic violations by law enforcement officers. However, the bills died after committee deliberations.

Defenders of profiling are quick to deny or deemphasize its racial component. They condemn profiling solely on the basis of race, but defend profiling by looking for signs that a person might be a lawbreaker as good police work. If blacks are being stopped and searched at a disproportionately high rate as compared to whites, they charge, it is because they commit a disproportionately high number of crimes. Defenders of profiling point to statistics that show, for example, that while blacks comprise only about 13 percent of the population, they make up 35 percent of all drug arrests and 55 percent of all drug convictions.

Where there is unreasonable racial stereotyping, these defenders assert, the problem is easily solved by training and discipline. Police Academy graduates in New York City, for example, are drilled insistently on what does and does not constitute reasonable grounds for a frisk. Members of the city's elite Street Crimes Unit receive a copy of the department's training manual, "Street Encounters," which expressly stipulates that if an officer's reason for approaching someone "is a personal prejudice or bias, such as the person's race or hair length, the encounter is unlawful."

Furthermore, defenders of profiling argue that it has proven to be an effective tactic in the fight against crime. Profiling, they say, allows law enforcement officials to focus their attention on those thought most likely to commit crimes. If this sometimes results in law-abiding citizens being inconvenienced when police aggressively enforce the laws and investigate crimes, this should not cause those stopped and searched to believe that their rights were violated. As the nation's violent crime rate continues to plummet, profiling advocates ask, is it an acceptable time to change police practices that have contributed to this drop in crime?

Law enforcement groups have been almost universal in their opposition to legislation requiring a study of traffic stops, such as the the Traffic Stops Statistics Study Act. They claim that it would be costly and could lead to lawsuits against police. The bill, they say, would place an unfair burden on the police and lengthen traffic stops. In addition, collecting information on personal characteristics would likely be considered highly offensive by many individuals. If an officer is uncertain of someone's ethnic background, for example, the officer would often have to ask for this information and an uncomfortable situation could result.

In June 1999, the Massachusetts Supreme Judicial Court ruled in a 5–2 decision that police in Massachusetts cannot order people out of their cars unless they pose a threat, which is a stricter standard than the U.S. Supreme Court handed down in its decision that police may order people out of their cars on routine traffic stops. The majority opinion cited concerns of **RACIAL DISCRIMINATION** by police in its ruling, taking note of allegations that police stop African Americans disproportionately.

stops a car for a minor traffic violation may search the car and its driver if the driver consents. Such searches sometimes result in arrests if drugs or weapons are discovered, but they have become a controversial law-enforcement technique, even when such searches do not involve incidents of racial profiling. However, the frequency with which racial profiling occurs against minorities has spurred civil liberties and **CIVIL RIGHTS** groups to demand stricter limitations on when officers may request a vehicle search.

New Jersey has remained in the national spotlight with respect to incidents of racial profiling. Former New Jersey Governor Christine Todd Whitman and the state attorney general admitted that New Jersey state police had engaged in racial profiling. Late in 1999, the New Jersey state police entered into a **CONSENT DECREE** in a federal case by which the police agreed to require reasonable suspicion of a crime before asking for consent searches during traffic stops. In a decision in 2002, the New Jersey Supreme Court made the policy a mandatory requirement under the Constitution of New Jersey for all law enforcement officers in the state.

Other states have made similar concessions. In January 2003, the Maryland State Police settled a **CLASS ACTION** lawsuit brought by the **AMERICAN CIVIL LIBERTIES UNION** (ACLU) regarding the use of racial profiling in that state. The settlement included an agreement by the Maryland police to enact sweeping changes to

**Racial Profiling in Traffic Stops, 1999**

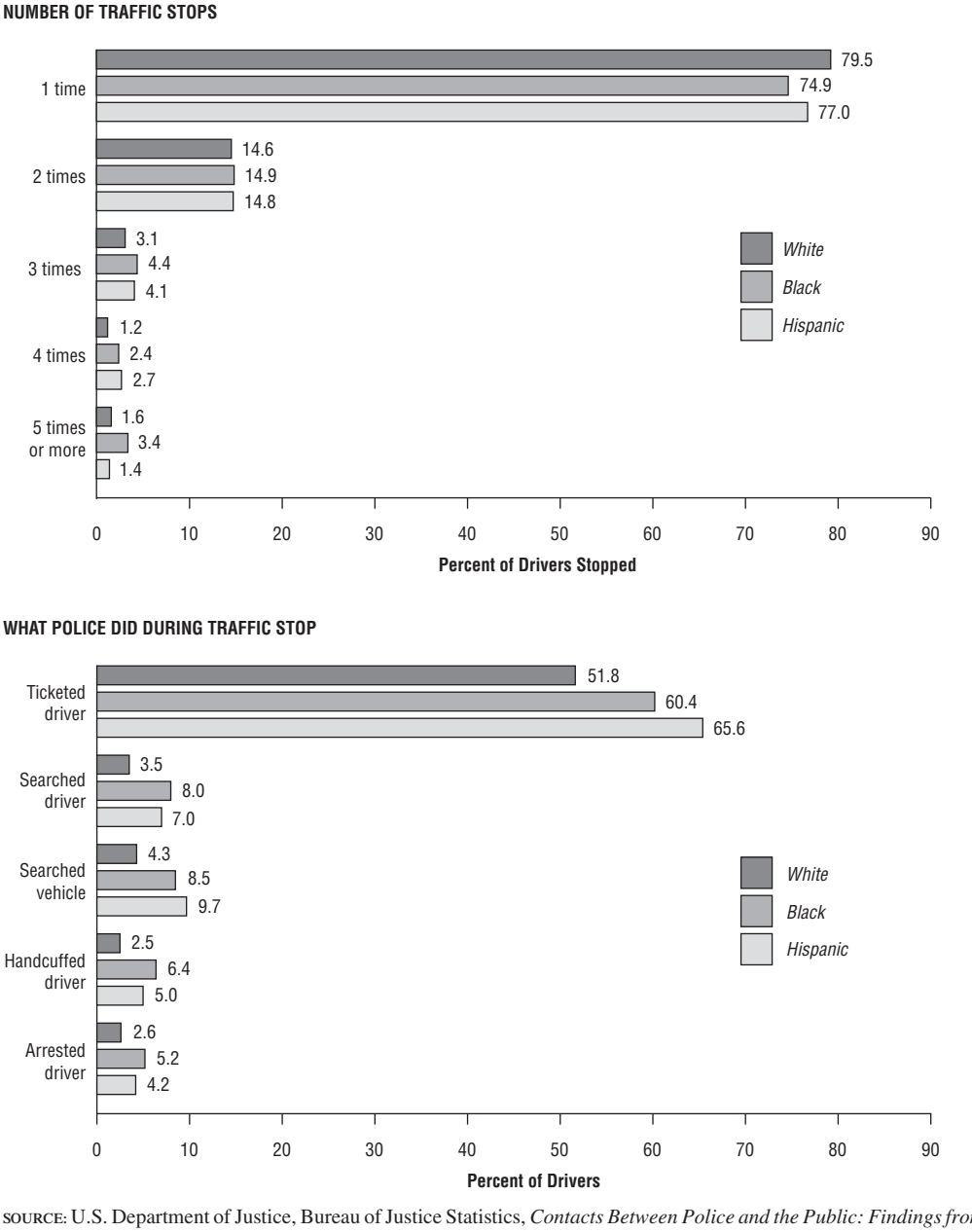


SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, *Contacts Between Police and the Public: Findings from the 1999 National Survey*.

prevent profiling of racial minorities. The ACLU has targeted other state law enforcement offices as well.

The United States has a history of racial profiling, and, in some cases, the incidents were particularly egregious. During WORLD WAR II, the U.S. government, fearful of potential spies from Japan, sent hundreds of thousands of Japanese Americans to detention camps in southern California. Many of those incarcerated were American citizens. In a decision that has largely been considered one of the most iniquitous in the history of the Supreme Court, KOREMATSU V. UNITED STATES, 323 U.S. 214, 65 S. Ct. 193, 89 L.

Ed. 2d 194 (1944), the Court found that during times of war, the military should have discretion to make decisions regarding the incarceration of certain groups and that the government's actions in incarcerating Japanese Americans were justified.

During the SEPTEMBER 11TH ATTACKS, 19 Middle Eastern terrorists carried out a terrorist plot that resulted in the destruction of the World Trade Center in New York, severe damage to the Pentagon in Washington, D.C., and a major loss of life. After the attacks, the United States announced it would wage a WAR ON TERRORISM, which included enhancements in the ability of law enforcement personnel to track, question, and even arrest individuals suspected of terrorist activities.

In the first two weeks after the attacks, federal officials arrested or detained more than 500 people. Thousands of resident ALIENS were also questioned. The vast majority of those questioned or arrested were Arab Americans or of Middle Eastern nationalities. Some commentators have suggested that the questioning of members of these nationalities and ethnic backgrounds is justified because a disproportionate number of terrorists are Arabic or Middle Eastern. However, civil rights groups have decried the practice of subjecting these individuals to questioning based solely on their race or ethnicity.

One of the most significant differences between racial profiling of African and Hispanic Americans and the profiling of potential terrorist threats is the level of support expressed by citizens for such profiling. According to statistics in 1999, 81 percent of respondents in a national poll disapproved of the practice of racial profiling, defined narrowly as the practice of police officers stopping motorists based solely on the race or ethnicity of those motorists. However, after the terrorist attacks, 58 percent of respondents in another poll favored the practice of subjecting Arabs to more intensive scrutiny when they boarded planes.

Other questions also have been raised about the profiling of Arabic and Middle Eastern individuals. Even if, in the post–September 11 period, profiling was acceptable to prevent a reoccurrence of terrorist attacks, for how long should this practice be acceptable? Moreover, if this practice is successful in preventing terrorist activities, should it be extended to other "suspect" groups, which may include African or Hispanic Americans?

These types of questions have been raised in other contexts. For example, commentators have suggested that the war on DRUGS AND NARCOTICS has clear overtones of racism. According to a study in 1986, an African American was six times as likely as a white American to go to jail for a drug related offense. By 1996, an African American was 22 times as likely to be incarcerated for such an offense. Because the war on drugs has been an ongoing battle, several commentators have suggested that profiling in this war has become perpetual.

Complaints of racial profiling are not limited to law enforcement personnel. Some department and other retail stores have been accused of denying service or giving inferior service to members of minority groups. Several establishments, including Eddie Bauer, Dillard's Department Stores, and Denny's Restaurants, have been sued in highly publicized cases in which plaintiffs have alleged that the establishments have discriminated on the basis of race. Complaints of discrimination against Arabic and Middle Eastern individuals have also been raised against private companies. In April 2003, the U.S. TRANSPORTATION DEPARTMENT submitted a complaint that American Airlines had removed from flights at least ten individuals suspected of being Middle Eastern, Southeast Asian, or Muslim.

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Civil Rights; Drugs and Narcotics; Equal Protection; Fourth Amendment; Terrorism.

## RACKETEERING

*Traditionally, obtaining or extorting money illegally or carrying on illegal business activities, usually by* ORGANIZED CRIME. *A pattern of illegal activity carried out as part of an enterprise that is owned or controlled by those who are engaged in the illegal activity. The latter definition derives from the federal Racketeer Influenced and Corruption Organizations Act (RICO), a set of laws (18 U.S.C.A. § 1961 et seq. [1970]) specifically designed to punish racketeering by business enterprises.*

Racketeering, as it is commonly understood, has always coexisted with business. In the United States, the term racketeer was synonymous with members of organized-crime operations.

Congress passed RICO as part of the Organized Crime Control Act of 1970. Organized crime in the United States had been increasing ever since the Twenty-First Amendment's PROHIBITION of alcohol was repealed in 1933. Crime groups and families that had been bootlegging moved on to other moneymaking crimes by controlling legitimate businesses and by using some of them as fronts for criminal activity. Over the years, Congress had enacted several statutes authorizing increased punishment for typical organized-crime activities such as illicit gambling rings, loan sharking, transportation of stolen goods, and EXTORTION. However, it had not passed legislation that specifically punishes the very act of committing organized crime.

Organized crime continued to proliferate in the 1960s. After investigating and debating organized-crime legislation for approximately 20 years, beginning with Senate committee hearings conducted in 1951 by Tennessee Senator Estes Kefauver, Congress finally passed RICO.

The specific goal of RICO is to punish the use of an enterprise to engage in certain criminal activities. A person who uses an enterprise to engage in a pattern of racketeering may be convicted under the RICO criminal statute (18 U.S.C.A. § 1963). An enterprise is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." A pattern is defined as "at least two acts of racketeering activity, one of which occurred after the effective date of [RICO's passage] and the last of which occurred within 10 years . . . after commission of a prior act of racketeering activity."

Racketeering activity under federal law includes a number of criminal offenses, including: BRIBERY; sports bribery; counterfeiting; felony theft from interstate shipment; EMBEZZLEMENT from PENSION and WELFARE funds; extortionate credit transactions; FRAUD relating to identification documents; fraud relating to access devices; transmission of gambling information; MAIL FRAUD; wire fraud; financial institution fraud; citizenship or naturalization fraud; obscene matter; OBSTRUCTION OF JUSTICE; obstruction of criminal investigation; obstruction of state or local law enforcement; witness tampering; retaliation against witness; interference with commerce, bribery, or extortion; interstate transportation in aid of racketeering; interstate transportation of wagering paraphernalia; unlawful welfare fund payments; prohibition of illegal gambling business; MONEY LAUNDERING; monetary transactions in property derived from unlawful activities; murder for hire; sexual exploitation of children; interstate transportation of stolen motor vehicles; interstate transportation of stolen property; sale of stolen goods; trafficking in motor vehicles and parts; trafficking in contraband cigarettes; white slave traffic; restrictions of payments and loans to labor organizations; embezzlement from union funds; BANKRUPTCY fraud; fraud in the sale of SECURITIES; felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs; and any act that is indictable under the Currency and Foreign Transactions Reporting Act.

RICO outlaws every manner in which an enterprise can be used for long-term racketeering activity. Under the law, no person may invest racketeering proceeds to acquire any interest in an enterprise; no person may acquire or maintain an interest in an enterprise through a pattern of racketeering activity; and no person associated with or employed by an enterprise may conduct that enterprise's affairs through a pattern of racketeering activity.

The punishment for violating the criminal provisions of RICO is exceptionally severe. If convicted, a defendant is fined and sentenced to not more than 20 years in prison for each RICO violation. Furthermore, the defendant must forfeit any interest, claim against, or property or contractual right over the criminal enterprise, as well as any property that constitutes the racketeering activity or that was derived from the

racketeering activity. Finally, RICO contains civil provisions that allow a party who has been injured by a RICO defendant to recover from the defendant in civil court. A successful civil RICO plaintiff may collect treble damages, or three times the amount lost to the defendant, as well as attorney's fees and other costs associated with the litigation. The intent of the many and various sanctions is to cripple, and ultimately eradicate, organized crime enterprises.

RICO employs broad definitions to sweep a wide variety of enterprise criminal activity into its purview. One of the original goals of RICO was to eliminate organized-crime families. However, because Congress could not legislate against specific persons or families, it was forced to use broad language to define racketeering and organized crime. The far-reaching language of the statute has subjected a wide range of criminal defendants to RICO's penalties. The typical RICO defendant is far from the stereotypical violent mobster. A RICO defendant can be anyone who uses a business in any way to commit two or more of the many racketeering offenses.

RICO has proved to be a powerful tool in the federal government's fight against organized crime. Many states also have enacted RICO-style statutes designed to apprehend organized crime that somehow escapes the provisions of RICO, including: Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Louisiana, Nevada, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Tennessee, Washington, and Wisconsin. While occasionally using different language, these state RICO statues generally concern the same legal areas and provide for damages similar to those under federal law. Prosecutors have used RICO against a variety of criminals and have obtained lengthy sentences for them.

According to many critics, RICO has been expanded beyond its original purpose of eradicating traditional organized-crime groups to convict petty, nonviolent criminals and sentence them to unduly long prison terms. Supporters of RICO counter that the act was intended to reach all organized crime, not just traditional organized-crime groups. Advocates of RICO argue further that the statute is not unduly harsh because the use of a business enterprise to conduct criminal activity is more dangerous and more difficult to eradicate than individual, freelance criminal activity and that, therefore, the defendants who commit acts that bring them under RICO's provisions deserve the punishment they receive.

Most observers have agreed that the civil provisions of RICO have been abused. Beginning in the late 1970s, civil attorneys began to realize the enormous moneymaking potential of RICO's civil provisions allowing payment of treble damages, fees, and costs to successful RICO plaintiffs. It became common for supposed victims to bring civil actions against anyone who was remotely and indirectly associated with a criminal enterprise and financially solvent enough to pay a RICO judgment. Some of the targets of civil RICO claims have included accountants, bankers, insurance companies, securities firms, and major corporations such as General Motors and MCI Communications. In many cases, defendants in civil RICO cases have denied any wrongdoing but have been forced to settle because they were afraid of losing and being forced to pay a significant judgment.

In 1993, the U.S. Supreme Court limited the scope of civil RICO claims with its decision in the case of *Reves v. Ernst & Young,* 507 U.S. 170, 113 S. Ct. 1163, 122 L. Ed. 2d 525. In *Reves,* an accounting firm had performed three audits of a farmers' cooperative to determine its financial health after its general manager and accountant were convicted of tax fraud. When the cooperative went bankrupt, note holders on the cooperative filed suit against 40 individuals and entities associated with the cooperative. One of the claims was a civil RICO claim against the accounting firm. The note holders claimed that the accountants participated in a scheme to inflate the value of the cooperative above its actual value, that this scheme constituted fraud, and that the accountants had participated in the operation or management of the cooperative's affairs. The high court disagreed, holding that the accounting firm's level of participation in the cooperative did not rise to the level of operation or management of the cooperative's affairs and that it therefore was beyond the reach of RICO liability.

The U.S. Supreme Court moved further to delineate the reach of RICO with three cases decided at the beginning of the 21st century. In *Beck v. Prupis*, 529 U.S. 494, 120 S.Ct. 1608, 146 L.Ed.2d 561 (U.S. Fla. 2000), the Court ruled 7–2 that a company president's termination, allegedly in furtherance of RICO conspiracy,

# RICO in Need of Reform?

When Congress passed the Racketeer Influenced and Corrupt Organizations (RICO) Act (18 U.S.C.A. § 1961 et seq.) in 1970, its intent was to mount an all-fronts attack on the infiltration of legitimate businesses by organized criminal enterprises. The RICO Act provides criminal and civil remedies, which are designed to imprison racketeers and to destroy the financial base of **ORGANIZED CRIME**. Since the act's passage, however, its civil provisions have been applied more often than its criminal provisions and have generally been used against businesses and other organizations that are not dominated by organized crime. Plaintiffs have discovered that the act's broad language allows its use in cases involving **MALPRACTICE** and "garden variety commercial fraud." Critics of this use of civil RICO have called for congressional reform.

The U.S. Supreme Court, in *Sedima S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985), upheld the constitutionality of the RICO Act and made clear that, unless amended by Congress, the statute must be interpreted broadly. The *Sedima* decision removed a number of judicially created barriers to using civil RICO against legitimate businesses.

Despite congressional attempts to limit the scope of civil RICO, only one major area of law has been removed from the RICO Act. The Private Securities Litigation Reform Act of 1995 (15 U.S.C.A. § 77 et seq.) eliminated liability for RICO claims based on securities **FRAUD**, unless the defendant has already been criminally convicted of securities fraud. The act thus removed the threat of treble (triple) damages in such cases. Congress concluded that federal securities laws generally provide adequate remedies for victims of securities fraud. Therefore, it was unnecessary and unfair to expose defendants in securities cases to the threat of treble damages and other extraordinary remedies provided by the RICO Act.

Critics of the RICO Act applaud this congressional action but argue that the same reasoning can and should be applied to other areas of **CIVIL LAW**. These critics maintain that the act's broad scope has given plaintiffs an unfair advantage in civil litigation.

One criticism of civil RICO is that no criminal convictions are necessary to win a civil case under the act. The plaintiff need only show, by a **PREPONDERANCE OF EVIDENCE**, that it is more likely than not that the ongoing criminal enterprise occurred. As a result RICO has been used in all types of civil cases to allege wrongdoing. By contrast, a criminal RICO case must be proved **BEYOND A REASONABLE DOUBT**.

In addition, the judge and jury in a criminal RICO case are prohibited from drawing an adverse inference from a defendant's invocation of the Fifth Amendment **PRIVILEGE AGAINST SELF-INCRIMINATION**. No such ban exists, however, in a civil RICO case. Critics contend that it is unfair for a party in a civil RICO case who has concerns about potential criminal liability to be forced to waive his or her **FIFTH AMENDMENT** privilege in order to mount an effective defense in the civil action. Once testimony is given in the civil case, the party has effectively waived the privilege against **SELF-INCRIMINATION**, and the testimony may be used in a subsequent

was not independently wrongful under any substantive provision of RICO, and that it thus did not give rise to a **CAUSE OF ACTION** under RICO. Justice **CLARENCE THOMAS** wrote in his majority opinion that an injury caused by an **OVERT ACT** that is not an act of racketeering or otherwise wrongful under RICO is not sufficient to give rise to a cause of action under RICO, regardless of whether there was a conspiracy that caused the plaintiff's injury.

In the 2001 case of *Cedric Kushner Promotions v. Don King,* 533 U.S. 158, 121 S. Ct. 2087, 150 L. Ed. 2d 198, (U.S. 2001), the high court ruled unanimously that the controversial boxing promoter Don King could be sued under RICO, despite the fact he was the sole owner and shareholder of his corporation. The Court, in a majority opinion written by Justice **STEPHEN BREYER**, agreed that to establish liability under Racketeer Influenced and Corrupt Organizations Act (RICO), one must allege and prove the existence of two distinct entities: a "person" and an "enterprise" that is not simply the same "person" referred to by a different name. However, Breyer stated in his opinion that "the corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." Thus, Don King the person could be separated from Don King the organization, and could be the subject of a RICO civil suit

Finally, in *Scheidler v. NOW & Operation Rescue v. NOW,* 537 U.S. 393, 123 S.Ct. 1057, 154 L. Ed. 2d 991 (2003), the court limited the use of RICO against protest groups and political

criminal prosecution. Critics contend that the RICO Act should be amended to stay (delay) a civil RICO proceeding until a criminal RICO proceeding has been concluded.

The critics of civil RICO also believe that its use has given plaintiffs an unfair tool that often serves to coerce a party to settle out of fear of a treble damages award. These critics believe that no civil RICO action should be allowed unless the party has been convicted under criminal RICO.

Critics also contend that criminal RICO has been an almost total failure in stopping the infiltration of legitimate businesses by organized crime. Not only have very few criminal RICO cases been brought to trial, but most of the defendants in those cases were not the targets Congress originally intended. According to the critics, most criminal uses of the RICO Act are redundant. Other laws exist to punish government corruption and **WHITE-COLLAR CRIMES**. The RICO Act merely enhances their penalties.

Despite these criticisms, the RICO Act has many supporters. While agreeing that the statute is broad in scope and imprecise in language, they contend that Congress wanted the act to read just this way. Congress recognized that private enforcement of the act through civil lawsuits would supplement the government's inadequate prosecution resources.

Supporters of civil RICO also point out that parties can be protected from waiving the privilege of self-incrimination. A trial court has the authority to stay a civil RICO proceeding until a criminal RICO prosecution has been concluded or the government announces that a criminal action will be commenced. In addition, a trial court may enter a protective order that keeps the information revealed by the party confidential or sealed. Finally, as in a criminal case a judge in a civil RICO action may advise a jury not to draw an adverse inference if the defendant does not testify.

Finally, supporters believe RICO actions should not be limited to organized crime. They argue that as a matter of public policy, it is reasonable to award treble damages to victims of commercial fraud and other illegal behavior that comes within the language of the act. According to civil RICO's defenders, these damage awards act as a deterrent to businesses and organizations that have created social harm by conducting business in a distinctly criminal way.

In recent years, RICO statutes have been interpreted much more narrowly than in the past. In February 2003, the Supreme Court ruled in *Scheidler v. National Organization for Women,* 537 U.S. 393 (2003), that federal RICO laws could not be used to stop antiabortion activists unless there was proof of an underlying crime (e.g., **EXTORTION**). The ruling ended a case dating to the mid-1980s, when violent antiabortion protesters targeted **ABORTION** clinics, injuring patients and clinic staff and damaging buildings and medical equipment. The **NATIONAL ORGANIZATION FOR WOMEN** (NOW) claimed that antiabortion groups were engaged in a type of nationwide racketeering conspiracy to shut down abortion clinics through the use of threats and force.

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demonstrations. In an 8–1 decision, the Court ruled that RICO could not be used as the basis for criminal charges against pro-life protestors who demonstrate outside **ABORTION** clinics. It found that claims that organizers violated RICO by engaging in a nationwide conspiracy to shut down clinics through a pattern of racketeering activity that included acts of extortion were not valid where the protestors had not obtained property, nor attempted to obtain property, nor conspired to obtain property from the abortion clinics. The Court also ruled that injunctions obtained against the abortions protesters on the basis of RICO were invalid.

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Gaming; Money Laundering; Organized Crime.

## RAILROAD

The idea of using rails for transportation was first conceived in the sixteenth century. The first railroads used wooden rails to guide horse-drawn wagons. In the eighteenth century, cast-iron wheels and rails were used in Europe and England, and by the nineteenth century, horses had been replaced by many steam-driven engines as the source of power. The first public railroad equipped for steam-powered engines was a twenty-mile track built in England in the 1820s.

In the United States, the first commercial steam-powered railroad service was provided in South Carolina. On December 25, 1830, the South Carolina Railroad pulled a short passenger train out of Charleston. Compared with the trains and lines in the early 2000s, the first trains were small and the lines were short. But the technology continued to improve, and railroads increased in number, size, and strength throughout the first half of the nineteenth century. In 1830 only 23 miles of rail existed in the United States. By the mid-1830s, more than 1,000 miles of railroad tracks had been laid, and by 1850 more than 9,000 miles of rails existed.

At first, most of the railroads were constructed in the eastern states. As the United States bought, acquired, and conquered land to the west of the colonies in the first half of the nineteenth century, many industrialists came to see the railroad as the perfect vehicle for access to the natural resources and growing markets of the West. The idea of a transcontinental railroad was born in the early 1840s. The discovery of gold in California in 1848 accelerated the plans, but the most important event that inspired the creation of a transcontinental railroad was the Civil War.

The federal government was eager to assume control over California to gain a strategic advantage over the Confederacy. Passage to California by rail was the best way to secure a link to the West. In May 1862 Congress passed the PACIFIC RAILROAD ACT, 43 U.S.C.A. § 942-3, which granted public land to the Union Pacific Railroad for each mile of track that it laid from Nebraska to California. The land grants were designed to encourage private investment in the railroads. Shortly thereafter, the Central Pacific Railroad began to compete with the Union Pacific for government land grants.

The construction of a transcontinental rail system was an enormous task. It was difficult for the private sector to find the resources to fund such an endeavor, and it became apparent to all concerned that a railroad system that spanned the entire country would not be developed without some help from the government. From 1862 to 1871, the federal government granted more than 100 million acres of land to private railroad companies to promote the construction of railroads. As the country moved westward, construction increased. As construction increased, the need to move materials and goods increased, and this created a dependency on the railroads.

The railroads became the most important service in the country from the late nineteenth century through the first part of the twentieth century. They largely supplanted the use of canals and other waterways for shipping large loads because they were faster than watercraft, operated on more direct routes, and were capable of carrying larger loads. As the public dependency on railroads increased, the railroad business became extremely profitable. Railroad companies consolidated and integrated the rail lines but maintained a vast system connecting all of the continental United States.

In 1920 the Transportation Act, 40 U.S.C.A. § 316, allowed railroads to abandon certain routes that were not profitable. As the railroads consolidated, they were forced to cut costs by laying-off workers. Congress addressed the problem by freezing railroad employment levels for three years in the Emergency Railroad Transportation Act of 1933. Shortly thereafter, the INTERSTATE COMMERCE COMMISSION mandated protections for dismissed or displaced railroad workers. As of 2003, dismissed or laid-off railroad workers are entitled to compensation, fringe benefits, moving and housing expenses, and training for new employment.

The railroad boom of the late nineteenth century not only made moguls of railroad owners but also led to MONOPOLIES in other markets, such as the coal, iron, and steel markets. Large railroad companies were able to offer lower prices to buyers than could smaller companies. Unlike other producers, the railroads did not have to pay for shipping costs. The public outcry over these unfair trade practices, and the inability of states to deal with an essentially interstate problem, forced Congress to regulate the railroad industry. Around the same time, the existing railroad companies began to support regulation of railroad prices to keep rates from dropping due to increased competition within the railroad industry itself.

## The Robber Barons

The U.S. railroad barons of the mid- to late-nineteenth century loomed over the nation's economy. Unfettered by rules and unrestrained by lawmakers and judges, the handful of railroad owners and executives could do virtually whatever they wanted. The vast fortunes they built and control they exercised not only helped to expand national frontiers but also ushered in the market controls that now limit the creation of trusts and monopolies.

The railroad barons were colorful men. Probably the most notorious was Jay Gould (1836–1892). A one-time tannery operator from New York with little education, Gould gained control of the Erie Railroad while still in his early thirties. His methods included a number of unlawful or unethical practices: issuing fraudulent stock, bribing legislators, starting price wars against competitors, betraying associates, using his newspaper to cause financial ruin, and manipulating the gold market. Gould even managed to dupe the U.S. Treasury, causing the 1869 **STOCK MARKET** panic. At the time of his death, he was worth $77 million.

The barons were passionately monopolistic. As a director of the Union Pacific Railroad, Edward Henry Harriman (1849–1909) gobbled up western competitors until he controlled the entire Pacific Coast. But he could not out-gobble James J. Hill (1838–1916), the immensely successful Canadian immigrant whose Great Northern Railway linked the North to the West. Harriman's vicious stock battle with Hill led to a mutually satisfying truce: a short-lived **MONOPOLY** called the Northern Securities Company, which the U.S. Supreme Court dissolved in 1904.

The barons' heyday began to decline at the turn of the century with increasing public outrage over unpredictable ticket prices and fluctuations in the stock market tied to the railroads. Increasing federal pressure, through laws, regulation, and court orders, ended their reign. By 1907, when the **INTERSTATE COMMERCE COMMISSION** denounced Harriman and other financiers for trying to destroy rival railroads, the age of the "robber barons" was over.

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Congress passed the SHERMAN ANTI-TRUST ACT OF 1890 (15 U.S.C.A. § 1 et seq.) to prevent monopolization and the unreasonable interference with the ordinary and usual competitive pricing or distribution system of the open market in interstate trade. In 1887 Congress passed the INTERSTATE COMMERCE ACT (24 Stat. 379), which established the Interstate Commerce Commission to regulate, in large part, the railroad industry. The commission was granted the power to set railroad rates. However, the Supreme Court struck down this grant of power, and the commission was relegated to an information-gathering agency. In 1906 Congress again granted to the Interstate Commerce Commission the power to set railroad service rates, and this grant of power survived JUDICIAL REVIEW (*Delaware, Lackawanna, & Western Railroad Co. v. United States,* 231 U.S. 363, 34 S. Ct. 65, 58 L. Ed. 269 [1913]).

Another important concern about railroads was price discrimination in railroad service. Railroads are common carriers, which describes a transportation business that offers service to the general public. The rates charged by common carriers are regulated under the theory that their service has an effect on interstate commerce, which is within the regulatory power of the federal government under Article I, Section 8, Clause 3, of the U.S. Constitution. Under its power to regulate interstate commerce, Congress prevents rate discrimination on the public railways because rate discrimination is a patently unfair trade practice that has a detrimental effect on interstate commerce and the economic health of the country. For instance, a railroad cannot charge some customers one rate for shipping on the railroad and charge a subsidiary of the railroad company a lesser rate. Passenger trains also may not discriminate in

rates or service because they offer carrier service to the general public.

Congress and the states have enacted numerous statutes and regulations to address the extraordinary number of issues presented by railroads. The subject matter of these statutes and administrative regulations ranges from safety regulations to local speed limits to rate controls. In 1966 Congress created the Federal Railroad Administration along with the TRANSPORTATION DEPARTMENT to give special attention to railroad concerns.

The success of the railroad system was not without costs. Railroad work proved to be among the most dangerous occupations in existence. Freight car derailments, undependable brakes, and the challenging task of switching heavy, rolling cars from one track to another in railroad yards all took their toll on railroad workers. Approximately 3,500 railroad workers were killed each year between 1903 and 1907, and the death toll continued at approximately one a day for several years after that.

States began to enact safety measures to protect railroad employees, but the state laws varied and did not always provide protection for workers. In 1970 Congress passed the Federal Railroad Safety Act, 49 U.S.C.A. § 20101 et seq., to achieve uniformity in railroad safety regulations. The act provides for safety enforcement procedures, track safety standards, freight car safety standards, emergency order procedures, train-marking regulations, accident report procedures, locomotive safety and inspection standards, safety appliance standards, power brake and drawbar specifications, and regulations on signal systems and train control systems.

Railroad work is still a relatively taxing occupation, but it is nowhere near as dangerous as it once was. The quality of freight equipment has improved, and due to the creation of single-unit trains, freight cars do not have to be switched from track to track as often as they once were. Most railroad-related accidents and deaths now occur at grade crossings, where railroad tracks cross roadways.

Railroad labor, management, and executive unions have been responsible for many of the gains in railroad safety. Railroad unions were some of the first unions created, and they quickly evolved to be among the most powerful.

Under the law, railroads are a special form of transportation. Railroad companies must pay taxes on their land and pay for the maintenance of their rights of way. This is not the case for other transporters. Trucking companies do not have to pay their own separate taxes for roadways, and they do not have to pay to maintain them. Barge companies do not have to pay taxes on or maintain the waterways that they use, and airlines use airports and airways built in large part with public funds. Railroad companies must pay to build and maintain their tracks because they are for their exclusive use. However, railroad companies have received some assistance from government because railroads are important to the nation's economy and because they have needed it.

In the 1930s the trucking industry made technological strides that put it in direct competition with the railroads. Pneumatic tires were created to support heavier freights, hydraulic brakes were devised to safely increase the weight of a load, and a network of paved intercity highways provided easy access and direct routes. The market advantages of trucking became apparent immediately, and the golden age of railroading came to an end after WORLD WAR II. Railroads abandoned thousands of miles of tracks and laid-off workers. The radical shift in transportation reshaped the map of the United States as small towns that depended on railroads for business turned into ghost towns.

The Regional Rail Reorganization Act of 1973 (45 U.S.C.A. §§ 701–797) consolidated the bankrupt northeastern railroads into a single railroad called ConRail, a for-profit corporation comprised of the bankrupt railroads. The consolidation resulted in some abandonments, but it eliminated duplicate mileage and helped save and maintain the most popular routes. In March 1997 ConRail was bought by CSX Corp. and Norfolk Southern Corp. It was to be divided between the two companies.

Congress gave railroad companies federal funds to upgrade the railroad system in the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C.A. § 801 et seq.). This act also shortened the length of time that railroads had to wait before abandoning a track.

President JIMMY CARTER proved to be a champion of railroad deregulation. Under Carter's watch, the Interstate Commerce Commission dropped the government controls on shipping rates for coal, eliminated regulations regarding the shipping of produce, and made it easier for railroads to abandon unprofitable lines. Congress topped off several years of rail-

road legislation with the Staggers Rail Act of 1980 (codified in scattered sections of titles 11, 45, and 49 of the U.S.C.A.). The Staggers Act eliminated government rate controls and made it still easier for railroads to abandon lines. Although the deregulation resulted in many layoffs, the changes lowered prices, made railroads more profitable, and allowed railroad companies to increase expenditures on safety measures.

The railroad system in the United States reached its peak in 1920, when approximately 272,000 miles of rails existed. As of 2003, less than 150,000 miles of rails exist. Railroads do not dominate the transportation market like they once did, but the railroad system has been pared down and stabilized. The rails remain necessary for large, bulky loads of heavy cargo. For personal transportation, the passenger service Amtrak was established in 1970 and subsidized by Congress to provide nationwide railroad passenger service at reduced rates. Amtrak and a few shorter, private lines offer passenger service in many parts of the country.

By the mid-1990s, Amtrak bordered on financial ruin. In 1997, the railroad was $83 million in debt and was becoming unable to pay its creditors. In November 1997, Congress approved the Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, 111 Stat. 2570, in an effort to save the company. The act released $5 billion in operating and capital expenses to the company each year through 2002. The goal of the legislation was for Amtrak to modernize the railroad's equipment and facilities in an effort to increase revenue and ridership.

Although funding under the statute was supposed to end in 2002, the company's financial shape worsened. By 2002, the railroad, which employs 24,000 people and runs 265 trains per day, was about $4 billion in debt, having lost $1.1 billion in 2001 alone. Congress approved short-term funding in February 2003, but many speculated that the company would have to stop services and possibly declare **BANKRUPTCY**. Amtrak's latest problems came at the same time that many of the nation's airlines had declared themselves close to declaring bankruptcy.

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**CROSS-REFERENCES**

Antitrust Law; Carriers; Commerce Clause.

## RAILROAD RETIREMENT ACT

The Railroad Retirement Act is a federal law (45 U.S.C.A. § 231 et seq.) enacted by Congress in 1937 that provides a special system of **ANNUITY**, **PENSION**, and death benefits to railroad workers.

Congress first passed the Railroad Retirement Act in 1934 to reward the hard work done by railroad workers, recognize the national benefits conferred by railroad work, and encourage the retirement of older railroad workers. By offering the means for railroad workers "to enjoy the closing days of their lives with peace of mind and physical comfort," Congress intended to provide jobs to younger workers and generally improve the operation of the railroads with stronger, more able bodies (H.R. Rep. No. 1711, 74th Cong., 1st Sess. 10 [1935]).

The U.S. Supreme Court rejected the first version of the act. In 1935 the Court ruled that the act violated the U.S. Constitution because it deprived the railroads of property without **DUE PROCESS** under the **FIFTH AMENDMENT** and because it exceeded Congress's power to regulate interstate commerce (*Railroad Retirement Board v. Alton R.R. Co.,* 295 U.S. 330, 55 S. Ct. 758, 79 L. Ed. 1468 [1935]). Congress passed a similar law the following year based on its power to tax and spend for the **GENERAL WELFARE** (49 Stat. 967 and 974). That act was put on hold by judicial order (*Alton R.R. Co. v. Railroad Retirement Board,* 16 F. Supp. 955 [D.C. 1936]). President **FRANKLIN D. ROOSEVELT** worked with Congress to reformulate the act, and in 1937 the Railroad Retirement Act emerged.

The act established the Railroad Retirement Board to administer the benefits program. The Railroad Retirement Board also administers the

benefits programs under the Railroad Unemployment Insurance Act (45 U.S.C.A. §§ 351 et seq.) and manages other railroad-related issues.

The Railroad Retirement Act was amended several times to make it similar to the benefits scheme of the SOCIAL SECURITY ACT (42 U.S.C.A. § 301 et seq.). In 1970 Congress established a Commission on Railroad Retirement to thoroughly analyze the structure of the act. The commission recommended changes, Congress negotiated with the railroad industry, and the act was overhauled in 1974.

The Railroad Retirement Act of 1974 is a complex set of requirements for benefits that essentially provides two tiers of benefits. One level is similar to a private pension plan. The benefits received on this level are determined according to earnings and career service. To qualify for these benefits, the employee must have worked in the railroad industry for at least ten years. For seasonal workers, it may take several more years of railroad work to qualify. No benefits are paid until the employee either reaches the normal retirement age under the Social Security Act (age sixty-five), or age sixty with thirty years of service.

The second and larger tier of benefits under the act provides annuities that are similar to, and a replacement of, Social Security benefits. Under the act, that portion of earnings that would normally go into a worker's Social Security account instead goes into a railroad retirement account. This account provides slightly higher returns than the average Social Security account. To qualify for this benefit, a railroad worker must work in the industry a total of ten years.

The act also provides disability benefits to disabled workers and the children or parents of deceased railroad workers. A spouse of an employee who worked in the railroad industry for ten years or more also receives individual annuities. These benefits to the spouse cease if the couple divorces.

Under the act, an employee is considered any person who received remuneration to work for any railroad company or carrier or for any railroad association that was owned by at least two businesses engaged in the railroad business.

## ♦ RAMO, ROBERTA COOPER

Roberta Cooper Ramo, the first woman to be elected president of the AMERICAN BAR ASSOCIATION (ABA), was a pathbreaker in many ways. She was also the first ABA president with a technological bent, proselytizing for decades about the need for modern management techniques and computerization in running law firms.

Ramo, the daughter of a Western clothing retailer, was born August 8, 1942, in Denver, Colorado. She graduated from the University of Colorado magna cum laude in 1964. She then entered the University of Chicago Law School, and graduated in 1967.

Ramo and her husband, Barry W. Ramo, were already pursuing their careers in tandem, to balance work and family. They had married while they both were attending the University of Colorado. When she went to law school in Chicago, he took an internship there. When he took a position at a teaching hospital at Duke University, in North Carolina, she ran into a professional wall as a woman lawyer at a time when the number of woman lawyers was still small. "I was unable even to get an interview with a law firm in Durham, Raleigh or Chapel Hill," she said. "I was the only one from my law school class without a job." Ramo's law school dean called a friend in North Carolina, the state's former governor Terry Sanford, to ask for help in finding her a job. As governor, Sanford had convinced the Ford Foundation that it ought to try developing a state foundation for distributing its grants, which led to the creation of the North Carolina Fund. In 1968, Ramo took a Nation Teaching Fellowship at Shaw University in Raleigh. After graduation, she moved with her husband to North Carolina, where she spent a year distributing Ford Foundation grants through a state foundation.

In 1970, Ramo moved to San Antonio, where she began working part-time with the 12-lawyer firm of Sawtelle, Goode, Davidson, and Troilo. She had an 18-month-old child and was seven-months pregnant when she interviewed for the job. Ramo and the law firm entered into an agreement that now is so common that it has a name—flextime. She would go in to the office earlier than most of the other lawyers, about 7:00 A.M., and leave earlier, about 2:00 P.M., taking work home with her. The agreement called for her to be paid two-thirds of what others in the firm were earning.

In 1972, the Ramos moved to Albuquerque, where Roberta had grown up, and she made a similar arrangement with another law firm, where she worked for two years. She then spent three years as a sole practitioner, from 1974 until

1977, before becoming managing partner of Poole, Kelly, and Ramo, still working in a part-time, flextime arrangement. That kind of arrangement continued until the late 1980s, when her youngest child graduated from high school. In 1993, Ramo's firm dissolved amid Chapter 11 BANKRUPTCY, and Ramo then joined the Albuquerque firm of Modrall, Sperling, Roehl, Harris, and Sisk. Her practice has been primarily in the areas of real estate, health, probate, estate planning, and commercial real estate leasing.

Over the years, despite the demands of her family and her own desire to do more than her agreed share of work, Ramo was heavily involved in community activities. She spent six years as a regent for the University of New Mexico; served on the board and executive committee of the Greater Albuquerque CHAMBER OF COMMERCE; was a director of the New Mexico Symphony Orchestra; and was a board member with numerous other professional and civic organizations. At the same time, Ramo was active in the state bar of New Mexico, chairing its Section of Business, Banking, and Corporations, and was on the board of directors of the Albuquerque Bar Association.

In the early 1970s, Ramo took her enthusiasm about the need for automation and modern management techniques in law firms nationwide, and she wrote what one member of the ABA's board of governors later described as "a revolutionary book," titled *How to Create a System for the Law Office*. The 1975 book became a best-seller year after year and proved to be the most popular book ever published by the ABA. That work brought Ramo together with Miami lawyer Samuel S. Smith, who had been lecturing around the United States on the same themes. They, along with others, began traveling and lecturing together, doing so for seven years. They eventually cofounded the ABA's Law Practice Management Section.

*Roberta Cooper Ramo.*

COURTESY OF ROBERTA C. RAMO

Having worked her way to prominence within the organization, Ramo made her first run for ABA president in 1991. Only one other woman had run for that office, in 1986, only to withdraw from the race very early when she failed to gain significant support. Ramo's bid became legendary in ABA politics, where it is not unusual for someone to run unopposed for

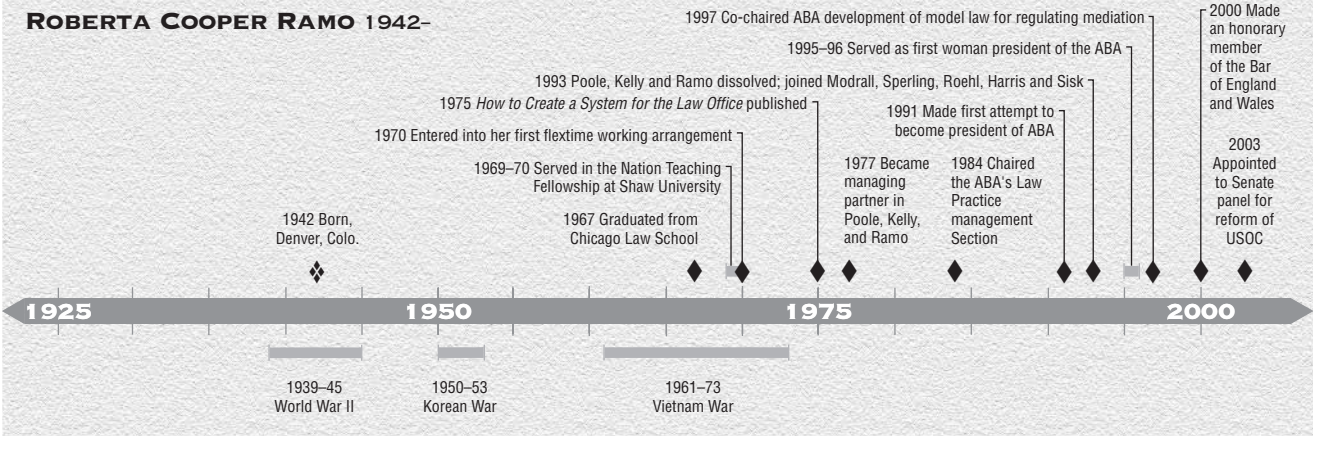

president, and where the vote usually is very quick when it concerns two candidates. For the first time, three contenders were left at the time of the election, and the voting dragged throughout the day to an unprecedented 88 ballots before Ramo finally lost.

Ramo ran again and won in 1995, serving from August of that year to August 1996. The perception and reality of the old-guard tradition in ABA leadership were so strong that a week prior to her election, the *New York Times* noted that even with two women on the U.S. Supreme Court and two women at the highest level of the JUSTICE DEPARTMENT, "another, perhaps even more formidable barrier" would soon fall, with Ramo's incoming presidency (Feb. 4, 1994).

As head of the ABA, Ramo supported a number of initiatives including fighting for the LEGAL SERVICES CORPORATION, a federally funded, nonprofit organization that provides legal help to poor persons, and the ABA National Commission on DOMESTIC VIOLENCE, which she helped to launch in 1994. She was particularly concerned with FIRST AMENDMENT rights emphasizing the ABA's position against constitutional amendments that would permit school prayer or prohibit flag-burning and other symbols of free speech. After her term as ABA president, Ramo returned to practice at the Modrall law firm. In February 2003, Ramo was appointed by the U.S. Senate to co-chair the committee that will review and suggest changes for the U.S. Olympic Committee.

"JUSTICE IS TOO IMPORTANT A MATTER TO BE LEFT TO THE JUDGES, OR EVEN TO THE LAWYERS: THE AMERICAN PEOPLE MUST THINK ABOUT, DISCUSS, AND CONTRIBUTE TO THE FUTURE OF THEIR COURTS."
—ROBERTA COOPER RAMO

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## ♦ RANDOLPH, ASA PHILIP

Asa Philip Randolph played a central role in the drive for CIVIL RIGHTS for African Americans from the 1920s to the 1970s. He was the most prominent African American labor leader during his lifetime, but his leadership went well beyond the struggle to integrate LABOR UNIONS. As the founder of the Brotherhood of Sleeping Car Porters, he confronted U.S. presidents from

*A. Philip Randolph.* FISK UNIVERSITY LIBRARY

FRANKLIN D. ROOSEVELT to JOHN F. KENNEDY over the slow pace of civil rights reform.

Randolph was born April 15, 1889, in Crescent City, Florida. He moved to New York City as a young man, where he attended City College of New York. He joined the Socialist party and campaigned against U.S. involvement in WORLD WAR I, going so far as to attack W. E. B. DU BOIS, one of the founders of the National Association for the Advancement of Colored People (NAACP), for urging African Americans to serve in the armed forces.

His life's work grew out of a request by Pullman car porters to help them organize a union. In the 1920s railroads dominated U.S. transportation. The dining cars, club cars, and sleeping cars of passenger trains were staffed by African American porters, who earned their money primarily from the tips of passengers. Ignored by the American Federation of Labor (AFL), the porters turned to Randolph for assistance.

Randolph sought from the Pullman Company recognition of the union, improved working conditions, and a MINIMUM WAGE. The struggle took twelve years, but Randolph finally achieved these goals. Despite his success the AFL continued to refuse to allow black members.

WORLD WAR II thrust Randolph into the national spotlight when, in 1941, he demanded

that President Roosevelt ban RACIAL DISCRIMINATION in defense industries. Randolph informed the president that if his demand was not met, he would organize a mass march on Washington, D.C. Roosevelt capitulated, signing an order that integrated industries accepting federal defense contracts and which established the Fair Employment Practices Committee.

The membership of the Brotherhood of Sleeping Car Porters (now part of the Brotherhood of Railway and Airline Clerks) declined in the 1950s, as airlines and automobiles became the dominant modes of long-distance transportation. Randolph continued to ascend, however, as he became vice president of the AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO) in 1957.

The only prominent African American to head a union, Randolph refused to act as a mere symbol of racial INTEGRATION. He repeatedly urged the AFL-CIO to integrate its unions, earning the displeasure of the organization's leadership, including President George Meany.

Randolph again achieved national prominence for promoting a march on Washington, D.C. In 1963 he called for a march to protest racial discrimination and to demand jobs for African Americans. He later agreed to join forces with other civil rights leaders, including Dr. MARTIN LUTHER KING JR., who had called separately for a march on Washington that would focus on the need for civil rights legislation. Randolph was given the job of organizing the march. On August 28, 1963, the March on Washington for Jobs and Freedom took place in front of the Lincoln Memorial. More than 200,000 people heard King's "I Have a Dream" speech, and many millions watched on television. Randolph played a central role in this important event.

Randolph continued in the 1960s and 1970s to lobby for civil rights legislation and jobs for African Americans. He died May 16, 1979, in New York City.

"I HAVE SPENT ALL OF MY LIFE IN THE LABOR AND CIVIL RIGHTS MOVEMENTS, WHICH IS TO SAY THAT I HAVE SPENT A LIFETIME IN SEARCH OF SOLUTIONS TO THE PROBLEM OF RACE AND THE PROBLEM OF JOBS."
—A. PHILIP RANDOLPH

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CROSS-REFERENCES

Civil Rights Movement; Labor Union.

## ♦ RANDOLPH, EDMUND JENNINGS

Edmund Jennings Randolph served as U.S. attorney general and SECRETARY OF STATE during the administration of President GEORGE WASHINGTON. Randolph previously had played a central role in the drafting of the U.S. Constitution.

Randolph was born on August 10, 1753, in Williamsburg, Virginia. He attended William and Mary College and then studied law with his father, who was a prominent lawyer and the king's attorney in the colony of Virginia. As the American Revolution approached, Randolph sided with the independence movement, while his father remained loyal to the crown. In 1775 Randolph's father, mother, and sisters left for England.

In 1775 Randolph briefly served in the Virginia militia as an aide to George Washington

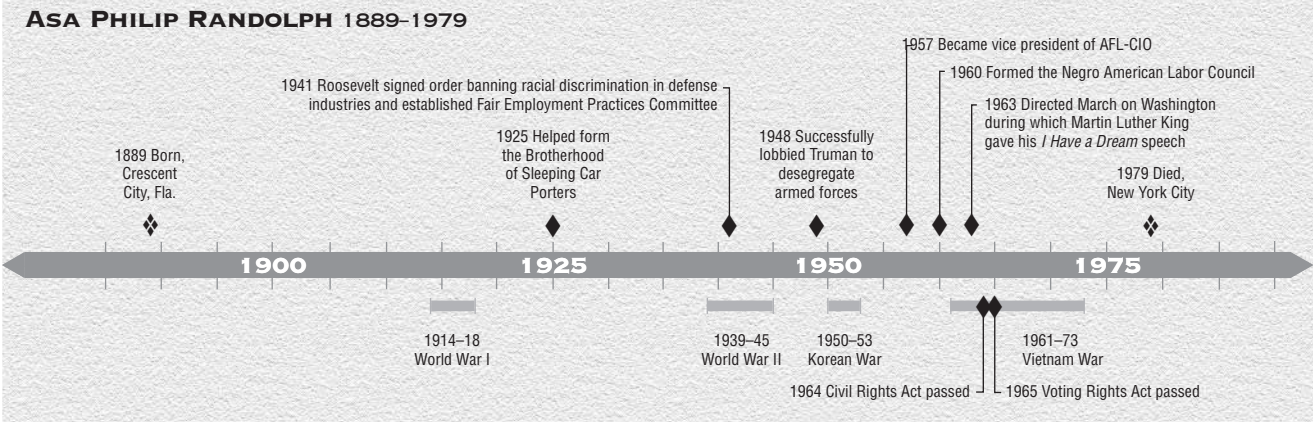

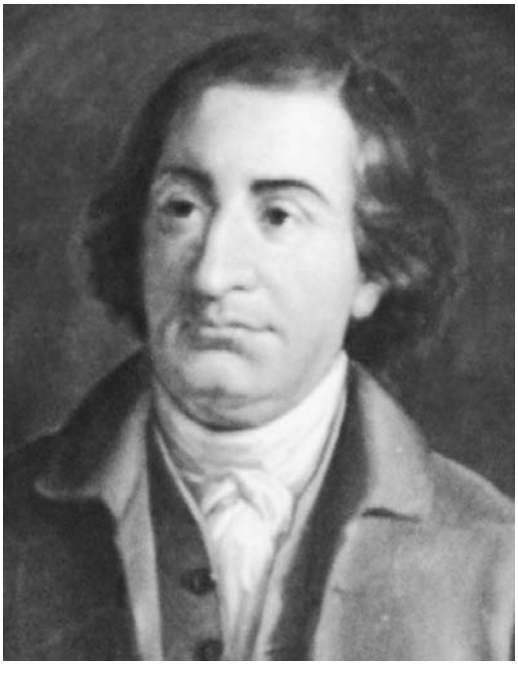

*Edmund Randolph.*
LIBRARY OF CONGRESS

"THE PREROGATIVE OF [A PRESIDENTIAL] PARDON . . . IS TOO GREAT A TRUST. THE PRESIDENT HIMSELF MAY BE GUILTY. THE TRAITORS MAY BE HIS OWN INSTRUMENTS."
—EDMUND RANDOLPH

before returning to manage his uncle's estate. Randolph's friendship with Washington continued, and soon Randolph was handling Washington's personal legal affairs.

Randolph's political career began in 1776 when he served in the Virginia Constitutional Convention. He helped draft a **BILL OF RIGHTS** and a state constitution. That same year he was appointed state attorney general, a post he held for ten years. During this period he also briefly served as mayor of Williamsburg. From 1779 to 1782, Randolph was a member of the **CONTINENTAL CONGRESS**. In 1786 he was elected governor of Virginia.

Randolph was a prominent member of the Constitutional Convention of 1787. A key issue before the convention was the structure and representation of a national legislature. Delegates from small states opposed those from large states. Randolph offered the Virginia Plan on behalf of the large states, which provided for a two-house legislature with representation of each state based on its population or wealth. **WILLIAM PATERSON** of New Jersey proposed the New Jersey Plan on behalf of the smaller states, which provided for equal representation in Congress. The matter was resolved by the Connecticut Compromise, which created a bicameral legislature with proportional representation in the lower house and equal representation of the states in the upper house.

Randolph refused to sign the final draft of the Constitution because he believed that it did not protect the rights of states and individuals. In 1788 he did, however, urge Virginia to ratify the Constitution, proclaiming the need for national unity.

From 1789 to 1794, he served as U.S. attorney general for the new national government. Following Thomas Jefferson's resignation as secretary of state, President Washington appointed Randolph to the post. France and Great Britain were at war at the time, and both countries had supporters within the United States. Randolph attempted to carry out Washington's policy of neutrality in the conflict but earned enemies on both sides.

Randolph's public career ended in a cloud of scandal in 1795, after the British minister to the United States claimed that Randolph had expressed a willingness to accept money from France to create U.S. policy favorable to that country. Though the charges were eventually shown to be untrue, Randolph resigned.

Randolph returned to Virginia and practiced law for the remainder of his life. In 1807 he

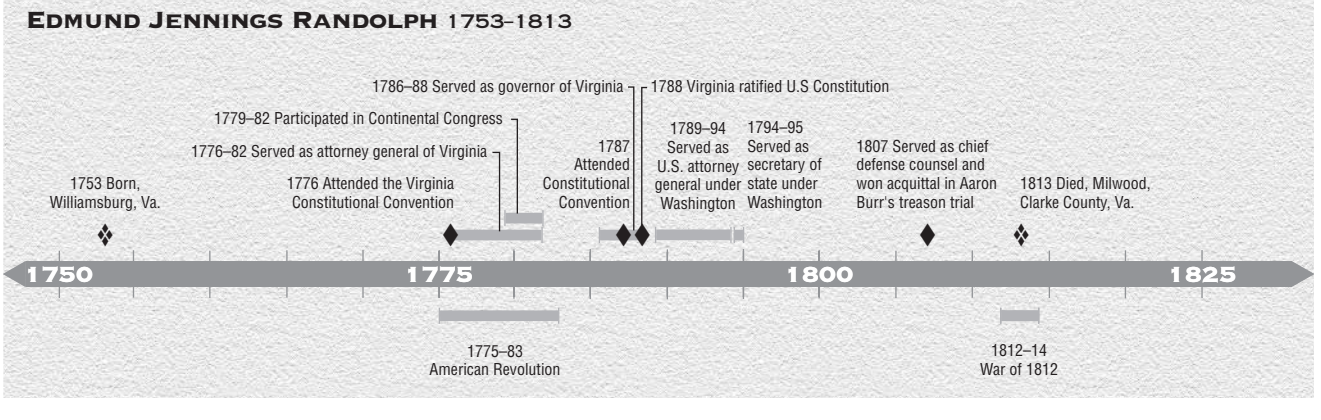

served as chief defense counsel for AARON BURR, who was on trial for TREASON. Burr was acquitted after it became clear that the charges were groundless and politically motivated.

Randolph died on September 12, 1813, at his estate in Clarke County, Virginia.

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CROSS-REFERENCES

Bill of Rights; Constitution of the United States; "The Virginia, or Randolph, Plan" (Appendix, Primary Document).

## ♦ RANKIN, JEANNETTE

Jeannette Pickering Rankin of Montana was the first woman in U.S. history to be elected to the U.S. House of Representatives. A nonconformist Republican, she served two nonconsecutive terms in the House. Rankin is best remembered for her opposition to war. In 1917 she voted against the entry of the United States into WORLD WAR I, and in 1941 she took the same position against U.S. involvement in WORLD WAR II. During the 1960s Rankin protested U.S. military action in Southeast Asia.

Rankin was born on June 11, 1880, on a ranch near Missoula, Montana. The oldest of seven children, Rankin was first among a family of high achievers. One of Rankin's sisters became dean of women at the University of Montana, and another taught in the English department there. Rankin's only brother and another sister became well-known, politically connected attorneys.

*Jeannette Rankin.*
LIBRARY OF CONGRESS

Rankin was an intelligent but undistinguished student. She graduated from the University of Montana in 1902 with a bachelor's degree in biology and then taught school for six years. In 1908 she left Montana to seek other challenges.

Earlier Rankin had visited Boston where she saw urban slums for the first time. She vowed to help improve the living and working conditions of poor Americans. In 1908 Rankin entered the New York School of Philanthropy in New York

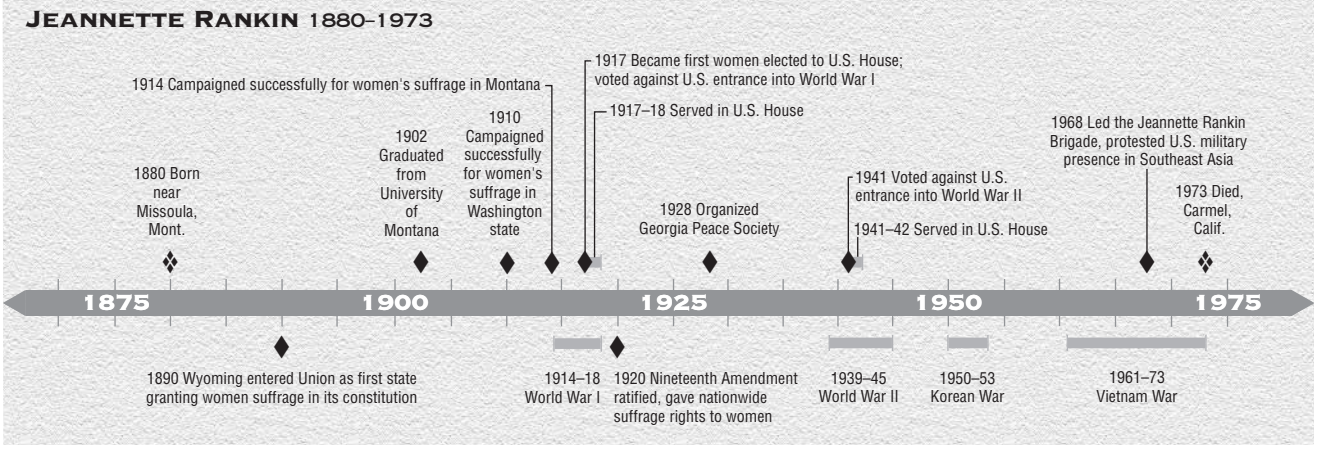

City (renamed the Columbia School of Social Work) and became a social worker.

In 1910 Rankin moved to Spokane, Washington, to work in a children's home. Inspired by the supporters of women's suffrage, Rankin concluded that good legislation was more effective than social work in solving society's problems. She joined the suffrage movement in Washington and campaigned successfully for an amendment to the state constitution that gave women the right to vote.

After victory in Washington, Rankin returned to her native Montana to work for women's suffrage. In what was a bold move at the time, Rankin addressed the state legislature on the issue, reminding lawmakers that all citizens in a democracy deserved a voice. Her LOBBYING and organizing efforts paid off, and Montana gave women the right to vote.

Rankin continued to spread her message by traveling across the country, giving pro-suffrage speeches. She became a prominent member of the National American Woman Suffrage Association. At the same time, Rankin also became involved in the turn-of-the-century peace movement, helping establish the Women's Peace Party.

"WE'RE HALF THE PEOPLE; WE SHOULD BE HALF THE CONGRESS."
—JEANNETTE RANKIN

In 1917 Rankin decided to run for election to the U.S. House of Representatives. Montana had only one congressional district at the time because of its small population. Rankin campaigned for a federal suffrage amendment, stricter employment laws to protect women and children, and continued neutrality in the war being waged in Europe. She won the election by a very narrow margin, and at age thirty-six became the first woman to serve in the U.S. House of Representatives.

Soon after she took office, Rankin's position on U.S. neutrality was tested. President WOODROW WILSON sought a U.S. declaration of war against Germany. On April 6, 1917, Rankin voted against U.S. involvement in World War I. Although forty-nine other representatives cast negative votes, Rankin's vote was widely publicized—and criticized—because she was the only female member of Congress.

Rankin was not reelected to Congress in 1918, in part because of her antiwar vote but also because she had antagonized powerful mining interests in Montana.

After her defeat Rankin resumed her work with the peace movement. She was a delegate to the Women's International Conference on Permanent Peace in Zurich where women analyzed the Versailles Peace Treaty of World War I. This process led to the formation of the Women's International League for Peace and Freedom. In 1928 Rankin organized the Georgia Peace Society and in the 1930s she was a lobbyist for the National Council for the Prevention of War.

When war erupted again in Europe in 1939, Rankin was convinced that most U.S. citizens shared her views on neutrality. She returned to Montana to run for the House of Representatives. Rankin was reelected and reentered Congress in 1941.

The bombing of Pearl Harbor by Japan on December 7, 1941, shattered widespread support for U.S. neutrality. This time when President FRANKLIN D. ROOSEVELT sought a declaration of war against Japan, Rankin was the only legislator to vote against it. Her vote, although consistent with her two decades of work in the international peace movement, was roundly criticized as unpatriotic. Rankin's political career was irreparably damaged, and she did not run for reelection.

During the 1950s and early 1960s, Rankin traveled abroad and lived modestly in Georgia. The VIETNAM WAR drew her back into the public spotlight. In 1968 she led the Jeannette Rankin Brigade, a half-million women demonstrating in Washington, D.C., against U.S. military presence in Southeast Asia. In 1969 she took part in antiwar protests in South Carolina and Georgia.

Rankin died on May 18, 1973, in Carmel, California.

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CROSS-REFERENCES

Nineteenth Amendment; Women's Rights.

## ♦ RANTOUL, ROBERT, JR.

Robert Rantoul Jr. was a Massachusetts attorney who served in various state and federal offices during his brief life. He is best remembered, however, for his denunciations of the common-law tradition, for his leadership in the CODIFI-

CATION movement, and for his defense of LABOR UNIONS.

Rantoul was born on August 13, 1805, in Beverly, Massachusetts. He attended private schools before enrolling at Harvard University. He was admitted to the Massachusetts bar and practiced law in Salem.

Rantoul served in the Massachusetts legislature for several terms before becoming U.S. attorney for the district of Massachusetts. He was briefly a Democratic member of the U.S. House of Representatives in the late 1840s. In 1851 he was elected to serve the last year of a term as U.S. senator.

Rantoul's congressional service was short but distinguished. He opposed the FUGITIVE SLAVE ACT OF 1850 and supported the expansion of railroads to the western territories. The town of Rantoul, Illinois, was named in his honor for his railroad legislation.

Nevertheless, Rantoul's importance lies in his critique of the common-law tradition and his call for the codification of all law by the legislature. The codification movement, of which Rantoul was a prominent spokesperson, attacked the COMMON LAW as unsuitable for a democratic republic. Randolph believed that allowing judges to interpret and adapt the law led to decisions about issues that were properly within the province of the legislature. Rantoul advocated that the legislature write a set of laws, to be contained in a code book, that judges would apply to the cases before them.

Rantoul presented his ideas about the common law and codification in their fullest form in a two-hour Fourth of July address at Scituate, Massachusetts, in 1836. Rantoul stated that "the Common Law is but the glimmering taper by which [English] men groped their way through the palpable midnight in which learning, wit, and reason were almost extinguished." "The Common Law," he continued, "had its origin in folly, barbarism, and feudality."

Rantoul believed that the problem in the common-law method was the discretion permitted the judge. He claimed that judge-made law is EX POST FACTO LAW and therefore unjust. Persons could not know the law because "no one knows what the law is before [the judge] lays it down." Moreover, a judge was able to rule differently from case to case.

Because the poor could not afford legal counsel, they were at a disadvantage when they entered a courtroom. Without an attorney, a person was at the mercy of the court. The only solution, Rantoul argued, was to abandon the common-law system and codify all laws into one book that everyone could read and understand.

The codification movement had limited success during the nineteenth century. Rantoul advocated a code but never tried to write one. DAVID DUDLEY FIELD, a New York attorney, wrote what became known as the Field Code of Civil Procedure. His code was enacted in 24 states, most of them in the West. California adopted it in 1872.

Rantoul also distinguished himself as an advocate for labor unions in the landmark Massachusetts case of *Commonwealth v. Hunt,* 45 Mass. (4 Met.) 111, 38 A.M. Dec. 346 (1842). Rantoul defended members of the bootmakers union who had been indicted for criminal conspiracy because they sought to bargain collectively. The charge of criminal conspiracy had been a potent weapon in preventing the formation of unions. Rantoul persuaded Chief Justice

"JUDGE-MADE LAW IS EX POST FACTO LAW, AND THEREFORE UNJUST. AN ACT IS NOT FORBIDDEN BY THE STATUTE LAW, BUT IT BECOMES BY JUDICIAL DECISION A CRIME. THE JUDICIARY . . . RUNS RIOT BEYOND THE CONFINES OF LEGISLATIVE POWER."
—ROBERT RANTOUL JR.

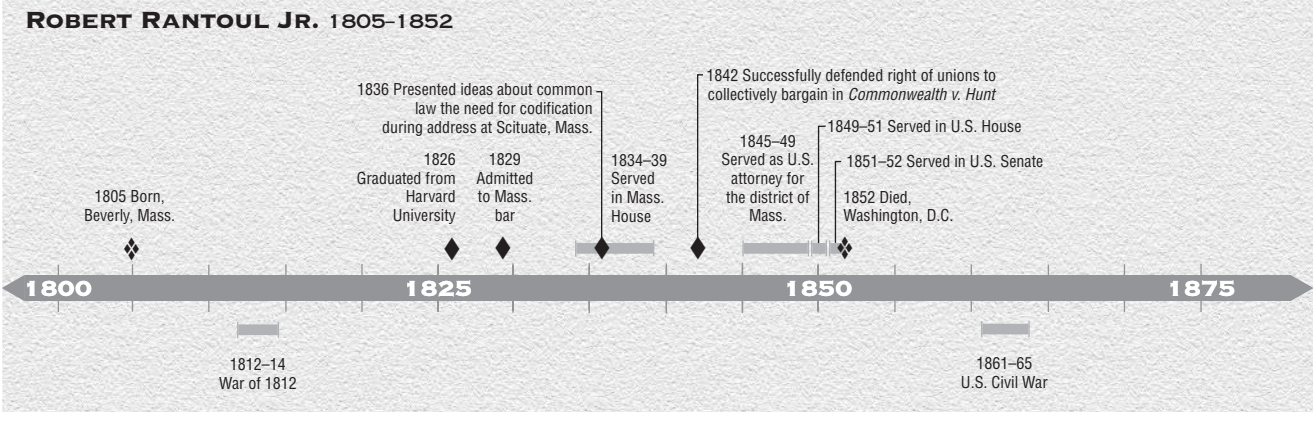

LEMUEL SHAW and the Supreme Judicial Court of Massachusetts to set aside the indictments. In his opinion, Shaw agreed with employers that competition was vital to the economy but concluded that unions stimulated competition. Shaw stated that, as long as the unions used legal methods, they were free to seek concessions from employers.

Rantoul died at age 47 on August 7, 1852, in Washington, D.C.

CROSS-REFERENCES

Field Code of New York.

## RAPE

*A criminal offense defined in most states as forcible sexual relations with a person against that person's will.*

Rape is the commission of unlawful sexual intercourse or unlawful sexual intrusion. Rape laws in the United States have been revised over the years, and they vary from state to state.

Historically, rape was defined as unlawful sexual intercourse with a woman against her will. The essential elements of the crime were sexual penetration, force, and lack of consent. Women who were raped were expected to have physically resisted to the utmost of their powers or their assailant would not be convicted of rape. Additionally, a husband could have sex with his wife against her will without being charged with rape. Beginning in the 1970s, state legislatures and courts expanded and redefined the crime of rape to reflect modern notions of equality and legal propriety.

As of the early 2000s, all states define rape without reference to the sex of the victim and the perpetrator. Though the overwhelming majority of rape victims are women, a woman may be convicted of raping a man, a man may be convicted of raping a man, and a woman may be convicted of raping another woman. Furthermore, a spouse may be convicted of rape if the perpetrator forces the other spouse to have nonconsensual sex. Many states do not punish the rape of a spouse as severely as the rape of a non-spouse.

Many states also have redefined lack of consent. Before the 1970s, many courts viewed the element of force from the standpoint of the victim. A man would not be convicted of rape of a competent woman unless she had demonstrated some physical resistance. In the absence of physical resistance, courts usually held that the sexual act was consensual. In the early 2000s in many states, the prosecution can prove lack of consent by presenting evidence that the victim objected verbally to the sexual penetration or sexual intrusion.

Lack of consent is a necessary element in every rape. But this qualifier does not mean that a person may make sexual contact with a minor or incapacitated person who actually consented. Lack of consent may result from either forcible compulsion by the perpetrator or an incapacity to consent on the part of the victim. Persons who are physically or mentally helpless or who are under a certain age in relation to the perpetrator are deemed legally incapable of consenting to sex.

Most states choose to label the crime of rape as sexual assault. Sexual assault is divided into degrees: first-, second-, third-, and fourth-degree sexual assault. West Virginia provides an illustration of how rape laws are typically written. In West Virginia, a person is guilty of sexual assault in the first degree when that person engages in sexual intercourse or sexual intrusion with another person and either inflicts serious bodily injury upon anyone or employs a deadly weapon in the commission of the act (W. Va. Code § 61-8B-3 [1996]). Additionally, a person age 14 years or older who engages in sexual intercourse or sexual intrusion with another person who is 11 years old or less is guilty of first-degree sexual assault. A person convicted of the crime of first-degree sexual assault in West Virginia faces imprisonment for at least 15 years and not more than 35 years and may be fined from $1,000 to $10,000.

In West Virginia, a person commits sexual assault in the second degree by engaging in sexual intercourse or sexual intrusion with another person without that person's consent, and the lack of consent results from forcible compulsion. Forcible compulsion is (1) physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances; (2) threat or intimidation, either express or implied, placing the victim or another person in fear of death, bodily injury, or KIDNAPPING; or (3) fear by a person under 16 years of age caused by intimidation by another person who is at least four years older than the victim.

Another way to commit second-degree sexual assault in West Virginia is to engage in sexual intercourse or sexual intrusion with someone who is physically helpless. The punishment for second-degree sexual assault is imprisonment for at least ten years but not more than 25 years and may include a fine of from $1,000 to $10,000.

# New Approach to Treating Rape Victims

A woman who has been raped often encounters painful and humiliating procedures when she reports her sexual assault. She is sent to a hospital emergency room where she may wait a long time for a medical examination and the collection of evidence that is needed to convict a suspect. She often has little privacy while she waits. In addition, she is asked to tell her story of sexual assault several times.

The National Victim Center estimates that only 16 percent of rapes in the United States are reported each year. This low reporting rate can be attributed in part to the cold, impersonal reporting process and the rape victim's fear of appearing at the trial of the suspect.

A program called SANE (Sexual Assault Nurse Examiners), established in Tulsa, Oklahoma and several other U.S. cities, seeks to treat the emotional, physical, and legal needs of rape victims with greater consideration and sensitivity. In the SANE program, female nurses are trained to handle the physical examination of the victim and to obtain physical evidence using a **SEXUAL OFFENSE** collection kit. In addition, the nurses are taught to interview the victim about the assault and to keep good records, which are critical to a successful criminal prosecution of the suspect.

Victims are seen in private rooms that are decorated to avoid the look of a sterile, hospital waiting room. The nurse examiner allows the victim to complete the examination at her own pace, in from one to five hours. A police officer is available to transport the evidence to headquarters, but is not allowed in the examining room.

Prosecutors have lauded the SANE program because its nurse examiners are better than emergency-room staff at confirming sexual contact and collecting evidence that shows the encounter was forcible rather than consensual.

SANE also gets credit for encouraging rape victims to agree to testify at the criminal trial of the suspect. It is believed that women who receive insensitive treatment during the initial stages of reporting a sexual assault do not want to proceed with prosecution. Because the SANE program treats victims with sympathy, care, and respect, women who have been examined through the program are more likely to agree to cooperate.

After the success of SANE in several cities and communities, other programs have also evolved. Several communities have developed a Sexual Assault Response Team (SART), which consists of community professionals who work jointly to minimize the trauma to victims of sexual assault when they seek medical or legal assistance. SART response teams coordinate their efforts to reduce the number of questions a victim must answer when law enforcement personnel and prosecutors collect evidence.

Members of a SART unit often consist of personnel from emergency departments and law enforcement offices. The effort is generally on a wider scale than SANE programs, and SANE and SART programs often work in conjunction with one another. Some communities have also developed programs involving Sexual Assault Forensic Examiners (SAFE), which essentially serve the same function as SANE programs.

In 2003, President **GEORGE W. BUSH** announced an initiative that would enhance the use of **DNA EVIDENCE** to solve crimes. As part of this proposal, several million dollars would be appropriated to support training and educational materials for doctors and nurses involved in treating sexual assault victims. Included in this initiative is funding for SANE, SAFE, and SART programs.

**FURTHER READINGS**

SANE-SART Website. Available online at <www.sane-sart.com> (accessed January 30, 2004).

**CROSS-REFERENCES**

Assault; Crimes; Sex Offenses; Women's Rights.

# Rape Shield Laws: Can They Be Fair?

Introduced in the 1970s, **SHIELD LAWS** sought to revolutionize rape trials. By prohibiting the introduction of a rape victim's reputation or sexual history at trial, lawmakers removed one of the age-old stigmas that had prevented the successful prosecution of rapists and had kept women from bringing cases to court. Originally, the laws met with widespread acceptance. Two decades after their adoption by most states and the federal government, however, they have given rise to a debate in which neither side is satisfied with them. Advocates say they have not worked as well as desired. Opponents argue that their effect has been to deny defendants a fair trial. The legal future of these revolutionary laws hinges on a difficult question: how can courts protect victims without curtailing the rights of defendants?

The origin of shield laws is a response to the historical prosecution of rape. Most accusations of rape assert that the victim did not give sexual consent. At **COMMON LAW** and in the present, the vast majority of rape cases have been tried in state courts before a jury. Traditionally, convictions have been notoriously hard to win. There is usually no evidence on the consent question other than the claims of the parties, making it difficult to prove lack of consent "beyond a reasonable doubt" as required in a criminal case. Hence, at trial, credibility is everything: if the accuser is not believable, the defendant is likely to be acquitted.

Defense attorneys typically challenge the accuser's credibility. For centuries, there was one effective path to such an end: to present evidence of the victim's past sexual behavior to undermine the present allegation. At common law, the victim's past sexual behavior was always considered relevant and admissible at trial. In this way, the law embodied social and moral values that put a high premium on a woman's sexuality. Conventional views of chastity regarded the sexually active woman as being promiscuous, and, in turn, promiscuity was thought to connote dishonesty. To cast doubt on the accuser's word and to show the likelihood of her having consented to sex with the defendant, defense attorneys commonly pursued evidence about her sexual life. If she had sex with men, or so the underlying belief went, how could she have been raped?

To combat these antiquated notions, rape shield laws arose through two significant developments. The sexual revolution of the 1960s dramatically changed social values regarding premarital sexual activity, and feminist legal theory became highly influential a decade later. Feminist critics attacked the premises on which the common-law origins of rape defenses were based. Their argument posed a question that only a generation earlier would have been widely dismissed: why should a woman's sexual history matter at all in relation to her claim of rape? Not only was such evidence irrelevant, they asserted, but harmful. Its use in court discouraged a woman from bringing a charge of rape because, in effect, *she* would be put on trial. Fearing a public assault on her reputation, a victim had a strong incentive not to report a rape. And when women were willing to undergo a barrage of intrusive questions, they often saw their claims mocked and their violators allowed to go free.

But for political success, passage of the laws required political support. Proponents won this support from conservative lawmakers. Although not generally known for embracing either the sexual revolution or feminist legal theory, these lawmakers backed the laws in state legislatures because they represented a solid law-and-order position. The idea that criminals sometimes improperly escape prosecution through the legal maneuver-

Third-degree sexual assault is committed when a person engages in sexual intercourse or sexual intrusion with another person who is mentally defective or mentally incapacitated, or when a person age 16 years or older has sex with a person who is less than 16 years old and is at least four years younger than the defendant. Third-degree sexual assault is punishable in West Virginia by at least one, but no more than five, years in prison and may include a fine of not more than $10,000.

The provisions that refer to the age of the victim and the perpetrator are called **STATUTORY RAPE** provisions. Statutory rape sections punish the perpetrator without regard to the consent of the victim. Such laws are in place in all states to enforce the generally accepted notions that children are incapable of consenting to sex because of their youth and innocence and that sexual intercourse or intrusion of a child by an older person is socially unacceptable and harmful to the child. The term *statutory rape* also refers to the sections that punish sex with physically and mentally incapacitated persons, who are similarly unable to consent to sex.

Rape or sexual assault statutes carefully define the type of contact that constitutes rape. In Hawaii, for example, the term *sexual penetration* is defined as "vaginal intercourse, anal intercourse, fellatio, cunnilingus, analingus, deviate

ing of defense attorneys, and that the law should close such loopholes, had become a centerpiece of the conservative legal reform agenda by the 1970s. With this backing, rape shield laws were easily adopted. By the 1990s, all but two states had them.

By the late 1980s, however, some proponents were troubled. Shield laws had not lived up to expectations. Merely providing protections to victims had not been enough to change long-standing social and legal habits. In 1987 the **NATIONAL ORGANIZATION FOR WOMEN** and twenty-five other groups reported that gender bias against women litigants was still pervasive in courtrooms. As a result, women's testimony was accorded less credibility by judges and attorneys. Also, defense attorneys continued to introduce evidence that the shield laws were designed to bar. They could succeed if the evidence was introduced creatively, chiefly because state laws left judges wide discretion and unclear direction on what to admit as evidence. While seeking to tighten the admission of evidence in general, some shield law proponents wanted the laws strengthened to exclude even more kinds of evidence, such as the type of clothing a victim was wearing at the time of an assault.

In addition to such obstacles, various exceptions weakened rape shield laws. In particular, they provided little or no protection if the victim knew her assailant. Most state statutes allowed the admission of evidence about a past sexual relationship between the accuser and the defendant, and therefore defense attorneys often attempted to persuade juries that there had been such a relationship. Behavior by a woman that was even slightly indicative of a past sexual relationship with her assailant would work against her at trial.

By the 1990s a backlash against the laws developed. Defense attorneys, law professors, and civil liberties activists maintained that the laws were unfair to criminal defendants. They had two main arguments: restrictions on the admission of evidence undermined the defense attorney's goal of providing the best defense, and more significantly, such restrictions deprived the defendant of his **SIXTH AMENDMENT** right to a full defense, including confronting his accuser and presenting witnesses in his favor. Many opponents of shield laws acknowledged that women face traditional obstacles in rape prosecutions but saw the laws as a poor remedy if they denied defendants **DUE PROCESS** and sent the innocent to jail.

Among leading opponents of shield laws was **ALAN M. DERSHOWITZ**, the celebrated Harvard law professor and criminal appellate lawyer. Dershowitz unsuccessfully appealed the 1991 rape conviction of former boxing champion Mike Tyson to the U.S. Supreme Court, which refused to hear the case. Dershowitz argued that the trial court had unconstitutionally barred admission of evidence that would have acquitted Tyson: allegations that his accuser, a nineteen-year-old woman, had previously falsely accused another man of rape to avoid angering her father about her sexual activity. Because such evidence related to the victim's past sexual history, it was ruled inadmissible. In the view of Dershowitz and other opponents, such evidence should be allowed because it can reveal an accuser's motive to lie about consensual sex with a defendant. Frustrating these critics is the fact that appellate courts have consistently upheld shield laws, despite finding that some trial courts have applied the laws unconstitutionally.

From early enthusiasm to increasing skepticism, rape shield laws have endured a difficult quarter century since their passage. Their intention was to remove barriers that prevented women from reporting rape and winning convictions. Both proponents and opponents believe reform is needed, yet they disagree on what form it should take. Proponents want to strengthen shield laws to increase protections for women. But opponents counter that the laws are already strongly biased against defendants, depriving them of fundamental liberties.

**CROSS-REFERENCES**

Dershowitz, Alan Morton; Due Process of Law; Sixth Amendment.

sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body . . . however slight." Sexual contact is "any touching of the sexual or other intimate parts of a person . . . or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts" (Haw. Rev. Stat. § 707-700 [1996]).

Most states punish lesser sexual intrusions with statutes on **SEXUAL ABUSE**. Like sexual assault statutes, sexual abuse statutes are divided into degrees based on the nature of the contact. Sexual abuse consists of nonconsensual sexual contact with another person. Lack of consent is present if the victim is a minor or physically helpless or if the victim was forcibly compelled to consent to the contact. A person convicted of sexual abuse may be fined and sentenced to a term in jail or prison. Because the crime does not involve penetration, the punishment for sexual abuse is less than that authorized for persons convicted of sexual assault.

A few states have eliminated the requirement that a competent adult rape victim physically resist the attacker. Physical resistance in some rape situations presents a greater danger to the victim. The states that have eliminated the physical requirement have found it to be unfair to

**Percentage of Rapes/Sexual Assaults[a] Reported to the Police, in 2001**

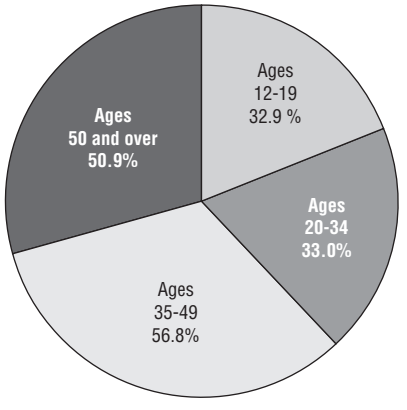


[a]Includes verbal threats of rape and sexual assault.

SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, *National Criminal Victimization Survey*, 2001

require physical resistance on the part of the victim if such resistance risks greater injury. In Michigan, for example, force or coercion "includes but is not limited to" several situations, including where the actor coerces the victim through threats of force or violence and the victim believes that the actor can carry out the threats and where the actor physically overcomes the victim through the actual application of physical force (Mich. Comp. Laws Ann. § 750.520a [West 1996]). Nowhere in Michigan's rape statutes is consent based on an analysis of the victim's physical resistance.

The states that have not eliminated physical resistance as a test for lack of consent have declined to do so for fear of convicting an adult who has sex with another adult without the knowledge that he or she is not consenting. Nevertheless, even in a state that has not eliminated the physical resistance requirement for competent adults, if the victim says "No" or otherwise verbally indicates lack of consent, the perpetrator still may be convicted of rape. This point reflects the fact that prosecutors have argued, and appeals courts have agreed, that some amount of force, no matter how slight, should be sufficient to fulfill the forcible compulsion element. The sexual penetration of a competent adult, for example, may be enough force to meet a forcible compulsion requirement, if the victim indicated a lack of consent.

Most states have so-called rape SHIELD LAWS. These laws restrict or prohibit the use of evidence respecting the sexual history of rape victims and the victims of other SEXUAL OFFENSES. Before the enactment of rape shield laws in the 1970s and 1980s, rape trials often focused on the chastity of the victim to determine whether the victim was actually raped. Rape shield laws keep the focus of a rape prosecution on the actions of the defendant rather than the prior actions of the alleged victim.

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CROSS-REFERENCES

Assault; Child Abuse; Coercion; Domestic Violence; Feminist Jurisprudence; Husband and Wife; Statutory Rape.

## RATABLE

*That which can be appraised, assessed, or adjusted through the application of a formula or percentage.*

*Ratable property* is that which is taxable or capable of being appraised or assessed.

## RATE

*Value, measure, or degree; a charge, payment, or price determined through the application of a mathematical formula or based upon a scale or standard.*

For example, an interest rate is determined by the ratio between the principal and interest.

Rate is also used synonymously with *tax.*

## RATIFICATION

*The confirmation or adoption of an act that has already been performed.*

A principal can, for example, ratify something that has been done on his or her behalf by another individual who assumed the authority to act in the capacity of an agent. In addition, proposed amendments to the U.S. Constitution must be ratified by three-quarters of the state legislatures or by conventions in three-quarters of the states.

CROSS-REFERENCES

Constitutional Amendment.

## RATIO DECIDENDI

*[*Latin, The ground or reason of decision.*] The legal principle upon which the decision in a specific case is founded.*

The *ratio decidendi* is also known as the rationale for a decision.

## RATIONAL BASIS TEST

*A judicial standard of review that examines whether a legislature had a reasonable and not an* ARBITRARY *basis for enacting a particular statute.*

Courts employ various standards of review to assess whether legislative acts violate constitutionally protected interests. The U.S. Supreme Court has articulated the rational basis test for those cases where a plaintiff alleges that the legislature has made an arbitrary or irrational decision. When a court employs the rational basis test, it usually upholds the constitutionality of the law, because the test gives great deference to the legislative branch.

A law that touches on a constitutionally protected interest must be rationally related to furthering a legitimate government interest. In applying the rational basis test, courts begin with a strong presumption that the law or policy under review is valid. The BURDEN OF PROOF is on the party making the challenge to show that the law or policy is unconstitutional. To meet this burden, the party must demonstrate that the law or policy does not have a rational basis. This is difficult to prove, because a court can usually find some reasonable ground for sustaining the constitutionality of the challenged law or policy.

For example, a state law that prohibits performing dentistry without a license deprives laypersons of their constitutionally protected rights to make contracts freely and discriminates against those unable or unwilling to obtain a license. But a court would undoubtedly uphold the constitutionality of the law because the license requirement is a rational means of advancing the state's legitimate interests in public health and safety.

For a hundred years, the rational basis test has been part of the U.S. Supreme Court's review of cases that alleged denial of EQUAL PROTECTION of the laws. State and federal laws are filled with discriminations, or classifications, of various kinds. A law that would apply universally and treat all persons equally is virtually impossible to craft. Because all laws classify by imposing special burdens or by conferring special benefits on some people and not others, there are always persons who are displeased. For example, when a state limits the privilege to purchase and consume intoxicating liquor to persons twenty-one and older, it is engaging in AGE DISCRIMINATION. But a court would find this was not a denial of equal protection because the legislature has a legitimate interest in restricting the drinking age and the law advances that interest in a rational way.

Under the Fifth and Fourteenth Amendments to the U.S. Constitution, persons are entitled to equal protection of the laws. The Supreme Court, in *Gulf, Colorado & Santa Fe Railway Co. v. Ellis,* 165 U.S. 150, 17 S. Ct. 255, 41 L. Ed. 666 (1897), first articulated the rational basis test under equal protection. The Court stated that "it is not within the scope of the FOURTEENTH AMENDMENT to withhold from States the power of classification." However, the Court continued, "it must appear" that a classification is "based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

A person challenging a law on equal protection grounds has a very difficult task. The

Supreme Court has used the rational basis standard to practice judicial restraint and to limit its ability to overturn legislation. In areas of social and economic policy, where constitutionally suspect classifications (race, religion, alienage, or national origin) are not at issue, nor are any fundamental constitutional rights at stake, a law must be upheld if there is any "reasonably conceivable state of facts that could provide a rational basis for the classification" (*United States Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 101 S. Ct. 453, 66 L. Ed. 2d 368 [1980]).

In addition, the Court does not require a legislature to articulate its reasons for enacting a statute, holding that "[i]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature" (*FCC v. Beach Communications, Inc.*, 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d 211 [1993]). Thus, the Court stated, a "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data" (*FCC v. Beach Communications*). This means that a court is permitted to find a rational basis for a law, even if it is one that was not articulated by the legislature.

Because of these factors, application of the rational basis test usually results in the upholding of the law. Nevertheless, it remains the primary test for determining the constitutionality of classifications that encroach on economic interests.

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CROSS-REFERENCES

Fifth Amendment; Fourteenth Amendment; Judicial Review.

## RAVISHMENT

*Unlawful carnal knowledge of a female by a male by force, against her will and without her consent.*

Ravishment is the same as rape, a criminal offense defined by most statutes as unlawful sexual intercourse with a female by a male with force and without her consent.

## ♦ RAWLS, JOHN BORDLEY

John Bordley Rawls was one of the major moral and political philosophers of the twentieth century. His work embraced liberalism and egalitarianism, while rejecting UTILITARIANISM and more radical political ideas. His most important work, *A Theory of Justice* (1971), discusses the idea of "justice as fairness."

Rawls was born on February 21, 1921, in Baltimore, Maryland. He earned his bachelor's degree from Princeton University in 1943 and his doctorate from Princeton in 1950. Rawls was an instructor at Princeton between 1950 and 1952, before attending Oxford University in England as a Fulbright Fellow. Upon his return to the United States in 1953, he served as a professor at Cornell University (1953–59) and the Massachusetts Institute of Technology (1960–62).

In 1962, Rawls was appointed professor of philosophy at Harvard University, an institution he served until his retirement in 1991. He continued as a professor emeritus at Harvard, however, in the late 1990s.

Rawls developed his ideas on justice in scholarly articles in the 1950s and 1960s. The

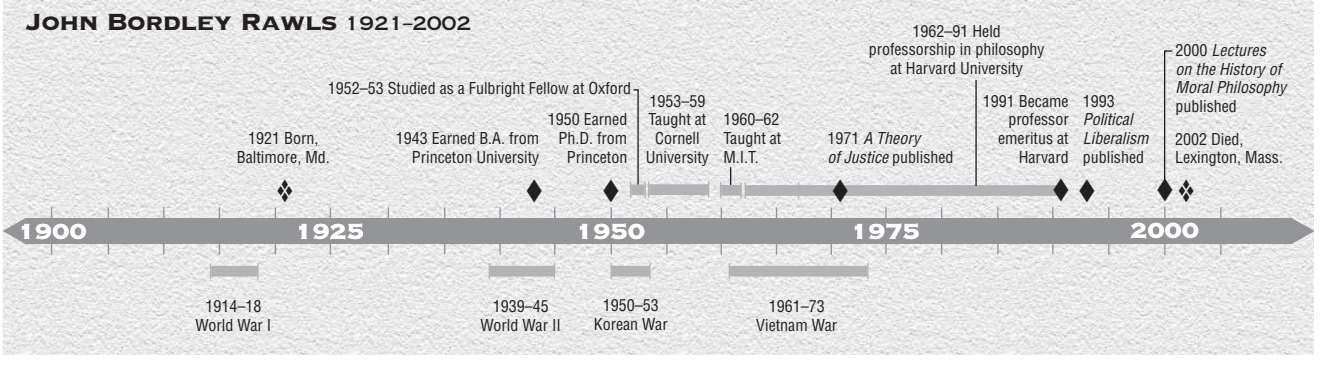

*John Rawls.* COURTESY OF THE JOHN RAWLS ESTATE

publication of *A Theory of Justice* in 1971 was the culmination of this work. The book received widespread praise for its application of analytic techniques to the substantive (rather than the methodological) issues in morality.

Rawls's theory of justice is premised on two fundamental principles of justice that, he believed, would guarantee a just and morally acceptable society. The first principle guarantees the right of each person to have the most extensive basic liberty that is compatible with the liberty of others. The second principle states that social and economic positions are to be to everyone's advantage and open to all.

One central concern for Rawls was to show how such principles would be universally adopted. Working from these principles, Rawls developed in detail a simple, but powerful, idea that he called "justice as fairness." This idea proposes that the rules of a group are fair to the extent that a person would agree to be bound by them when ignorant ("the veil of ignorance") of his own possession of characteristics that the rules of the system reward or penalize. In this "original position," a person would not agree to unfair rules because there would be the possibility that he or she would be disadvantaged by them. Thus, the original position forces a person to make moral conclusions and to adopt a generalized point of view in making a social contract.

Rawls published *Political Liberalism* in 1993 (updated in 1996), partly in response to criticism of *A Theory of Justice.* His *Collected Papers* were published in 1999, as was *The Law of Peoples; with, The Idea of Public Reason Revisited.* In 2000, his lectures while a professor at Harvard were edited and collected as *Lectures on the History of Moral Philosophy.* Harvard University Press published more essays the following year as *Justice as Fairness, a Restatement.* Rawls died on November 24, 2002, at his home in Lexington, Massachusetts.

"EACH PERSON POSSESSES AN INVIOLABILITY FOUNDED ON JUSTICE THAT EVEN THE WELFARE OF SOCIETY AS A WHOLE CANNOT OVERRIDE."
—JOHN RAWLS

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CROSS-REFERENCES

Jurisprudence; Moral Law.

## RE

*[*Latin, In the matter of; in the case of.*]*

A term of frequent use in designating judicial proceedings, in which there is only one party. Thus, "*Re* Vivian" signifies "In the matter of Vivian," or "in Vivian's Case."

CROSS-REFERENCES

In Re.

## ♦ REAGAN, RONALD WILSON

Ronald Wilson Reagan served as president of the United States from 1981 to 1989. A former radio announcer, screen actor, and governor of California, Reagan's conservative political philosophy challenged the role that the federal government played in U.S. society. An avowed opponent of big government, Reagan proposed to return power to the states and to strip the federal government of many of its regulatory functions. Although he was not successful on all fronts, Reagan changed the political landscape that had remained virtually untouched since the presidency of FRANKLIN D. ROOSEVELT.

*Ronald Reagan.*
LIBRARY OF CONGRESS

Reagan was born on February 6, 1911, in Tampico, Illinois. When he was nine years old, his family moved to Dixon, Illinois. He attended nearby Eureka College and graduated in 1932. He worked as a radio and sports announcer at several stations in Iowa before he was discovered by a Hollywood talent scout. He signed an acting contract with the Warner Brothers motion picture studio in 1937.

Reagan appeared in more than 50 movies between 1937 and the early 1950s. His most famous role was that of Notre Dame University football player George Gipp in *Knute Rockne—All American.* (From that film comes the famous quote "Win one for the Gipper.") From 1942 to 1945, he served in the U.S. Army, making training films for WORLD WAR II soldiers. It was after the war that Reagan became interested in politics, initially from his work with the Screen Actors Guild, a union that represents Hollywood film actors. Elected president of the union in 1947, Reagan was a vigorous supporter of the labor movement as well as an able negotiator with the major movie studios.

Originally a Democrat and an admirer of President Franklin D. Roosevelt, Reagan became concerned about communist influence in the Hollywood LABOR UNIONS. During the late 1940s and early 1950s, Hollywood was embroiled in a RED SCARE. The House Un-American Activities Committee (HUAC) held hearings where screen actors, screenwriters, producers, and directors were interrogated about their participation in communist organizations. Reagan initially defended his Hollywood brethren but soon backed away.

Reagan's DIVORCE from actress Jane Wyman in 1949 and his remarriage to actress Nancy Davis also had an effect on his politics. His new wife's father was a political conservative, who helped steer him toward the REPUBLICAN PARTY. As his movie career declined, his interest in politics increased. He was hired by the General Electric Company to be its traveling spokesperson and the host of the *General Electric Theater* on television. From 1954 to 1962, Reagan maintained this relationship with General Electric. His conservative ideology deepened as he gave speeches around the country, supporting U.S. business, criticizing government regulation, and attacking COMMUNISM.

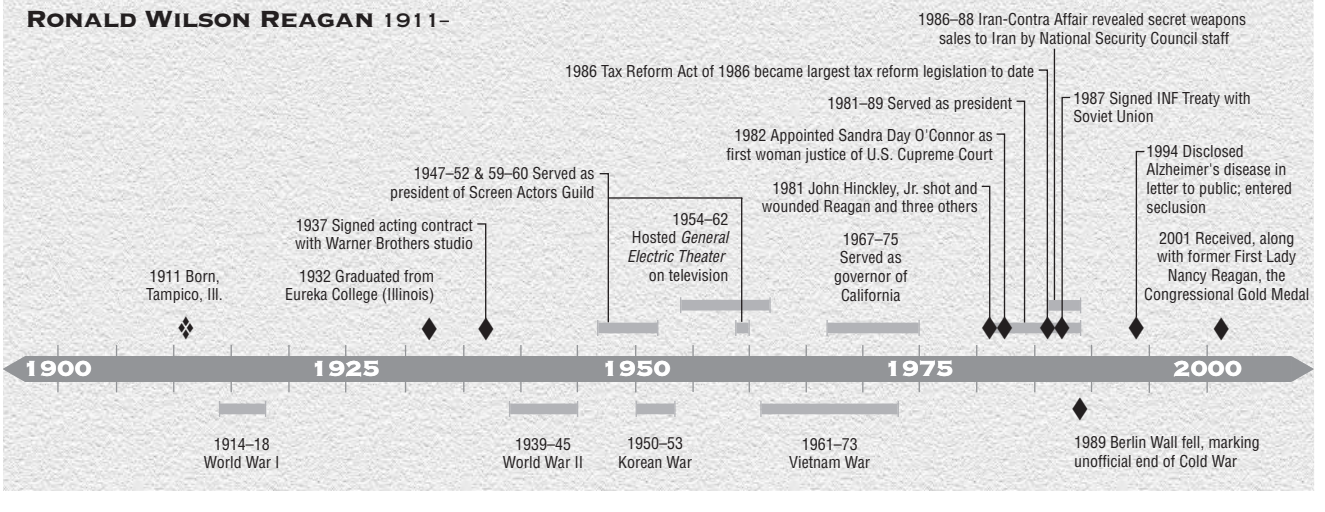

Reagan became a national political figure during the 1964 presidential campaign. An ardent supporter of Arizona Senator BARRY M. GOLDWATER, who espoused the same conservative philosophy, Reagan gave a televised speech that tried to revitalize Goldwater's sagging campaign against President LYNDON B. JOHNSON. Goldwater lost the election, but Reagan gained the attention of Republican political leaders.

At the urging of a group of prominent California businessmen, Reagan ran as the Republican candidate for governor of California in 1966. Democratic Governor Edmund ("Pat") Brown, who had defeated RICHARD M. NIXON in 1962, dismissed Reagan as a television actor and did not take him seriously. Reagan proved, however, to be a formidable opponent. A polished and effective public speaker, he spoke out against WELFARE cheaters and antiwar radicals on college campuses. He won the election by nearly one million votes, the most convincing victory ever achieved against an incumbent governor in U.S. history.

Reagan's two terms as governor (he was reelected in 1970) were marked by conflict with a Democratic-controlled legislature. He raised state income taxes, contrary to his political platform, but he justified the increase as the means of paying for a reduction in local property taxes. He implemented some reforms in welfare programs and improved the state's higher-education system.

In 1974, Reagan decided not to run for a third term as governor, setting his sights instead on the White House. In 1976, he challenged President GERALD R. FORD for the Republican party nomination. Ford, who had become president in 1974 when Richard M. Nixon resigned, was a moderate Republican whose public favor had been severely damaged by his pardon of Nixon. Reagan fell only sixty votes short of defeating Ford for the nomination.

From 1976 to 1980, Reagan prepared himself for another presidential race. He remained in the public eye through a newspaper column and radio show, in which he commented on public affairs. In 1980, he defeated his Republican rivals and was nominated for president, with GEORGE H. W. BUSH as his running mate.

Reagan easily defeated President JIMMY CARTER, whose popularity had plummeted when the national economy had suffered from high inflation and unemployment. Carter also was damaged by the Iranian hostage crisis, in which 52 Americans had been held hostage by Iran. His inability to resolve the hostage crisis, which included a failed military-rescue mission, contributed to his overwhelming defeat in November 1980. In 1984, Reagan won the largest victory in U.S. presidential history when he defeated former vice president Walter F. Mondale.

On January 21, 1981, as Reagan was being inaugurated president, Iran released the 52 hostages. With that crisis resolved, Reagan set out to cut income taxes, to reduce the FEDERAL BUDGET, to increase defense spending, and to deregulate U.S. business. On March 31, 1981, his efforts were temporarily sidetracked when John W. Hinckley Jr. shot and wounded Reagan and his press secretary, James S. Brady. Reagan made a quick and complete recovery. In the aftermath of the shooting, his popularity rose even higher.

Reagan's economic plans were built on a theory called supply-side economics. This theory asserts that when taxes are cut, the money that is put back into the economy stimulates the production of more goods and services, thereby increasing jobs, with the result that more taxes are generated than were cut at the beginning of the process. In 1981, Reagan persuaded Congress to reduce taxes over a three-year period and to impose severe budget cuts on nondefense spending.

"I BELIEVE THAT GOVERNMENT IS THE PROBLEM, NOT THE ANSWER."
—RONALD REAGAN

The results of "Reaganomics" proved mixed. The economy entered a recession in 1982, before rebounding in 1983. Inflation dropped, but government spending was not reduced sufficiently to make up for the revenue that had been forgone through tax cuts. The problem was exacerbated when Congress passed Reagan's tax-reform package in 1986. Tax rates were reduced, and millions of low-income persons were removed from the tax rolls. Consequently, the federal government borrowed money to pay for the tax cuts. The national debt doubled in size between 1981 and 1986. By the time Reagan left office, the United States had gone from a creditor nation to the world's largest debtor nation, owing half a trillion dollars to foreign investors.

Pressure on the federal budget also came from Reagan's determination to begin the largest peacetime military build-up in U.S. history. Many new weapons systems were proposed, but the cornerstone of Reagan's defense system proposal was the Strategic Defense Initiative (SDI). Dubbed "Star Wars" by the media and his critics, Reagan proposed to build an

antiballistic missile-defense system that would shoot down Soviet missiles from space. Billions of dollars were committed to research, but actual systems proved hard to devise.

In foreign affairs, Reagan came into office maintaining his strong anti-communist position, calling the Soviet Union an "evil empire." Reagan sought to negotiate **ARMS CONTROL** with the Soviet Union. In 1987, he negotiated the **INTERMEDIATE-RANGE NUCLEAR FORCES TREATY** (INF Treaty). The INF Treaty was the first agreement by which both sides destroyed existing weapons. Relations between the superpowers improved during Reagan's second term, mainly because the new Soviet premier, Mikhail Gorbachev, had sought to change the **COLD WAR** climate.

Reagan made a dramatic change in the federal courts through his appointment power. During his two terms, he filled 372 of the 736 judgeships in the federal courts. Attorneys General **WILLIAM FRENCH SMITH** and **EDWIN MEESE III** established a screening process that tried to assure Reagan that he would be appointing judges who were in agreement with his conservative philosophy. In 1982, Reagan appointed **SANDRA DAY O'CONNOR** to the U.S. Supreme Court. O'Connor was the first woman to sit on the Court. He elevated Justice **WILLIAM H. REHNQUIST** to chief justice of the Court in 1986 and appointed Judge **ANTONIN SCALIA** to the seat that Rehnquist had vacated.

Reagan encountered problems with two of his other nominees. When he nominated Judge **ROBERT H. BORK** in 1987 to succeed Justice **LEWIS F. POWELL JR.**, the nomination met a firestorm of criticism. Bork was an outspoken jurist and one of the best-known conservative judges in the country. When the Senate defeated Bork's nomination, Reagan appointed Judge **DOUGLAS H. GINSBURG.** Ginsburg withdrew his nomination after he disclosed that he had smoked marijuana. On his third attempt, Reagan successfully appointed Judge **ANTHONY M. KENNEDY** to the Court.

The last two years of the Reagan administration were consumed with the political damage caused by the **IRAN-CONTRA AFFAIR.** Members of the **NATIONAL SECURITY COUNCIL** staff had secretly sold weapons to Iran, a terrorist state that was forbidden to purchase armaments under U.S. law. One goal of the weapons sales was to facilitate the release of U.S. hostages held in Lebanon, but another goal was to use some of the proceeds to support the Nicaraguan anti-communist Contra rebels against the Marxist Sandinista government. Because Congress had forbidden U.S. support of the rebels, the actions of Reagan's staff were illegal.

In late 1986, the details of these actions began to emerge. Reagan denied any knowledge of the actions that his advisers had taken, but Senate hearings on the matter in 1987 cast doubt on the president's statements. The hearings damaged Reagan's administration because they revealed that the president apparently had been out of touch with the conduct of national affairs.

Despite Iran-Contra, Reagan left office a popular president. In 1989, he retired to California.

In 1994, Reagan made public that he had been diagnosed as suffering from Alzheimer's Disease, an incurable, degenerative neurological disease marked by gradual memory loss, aphasia, and degradation of motor functions. By revealing his disease to the public, Reagan said that he hoped to foster greater public awareness of the disease and to spur research for treatment and a cure.

On March 4, 2001, Nancy Reagan christened the United States Navy's newest Nimitz-class, nuclear powered aircraft carrier the USS *Ronald Reagan* in a ceremony at the Northrop Grumman Newport News shipyard in Newport News, Virginia. The USS *Ronald Reagan* was commissioned by the Navy on July 12, 2003, and is homeported at Naval Air Station North Island in San Diego, California.

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### CROSS-REFERENCES

"First Inaugural Address" (Appendix, Primary Document); Tax Reform Act of 1986.

## REAL

*In* CIVIL LAW, *relating to a* thing *(whether movable or immovable), as distinguished from a person. Relating to* land, *as distinguished from* PERSONAL PROPERTY. *This term is applied to lands, tenements, and hereditaments.*

## REAL ACTIONS

*Lawsuits concerning real property, or land. Under the* COMMON LAW, *one of three categories of forms of actions, the procedures by which a lawsuit was begun.*

The categories of forms of actions were real actions, for lawsuits for the recovery of land; mixed actions, for lawsuits for the recovery of land and of monetary damages for harm done to it; and personal actions, for lawsuits to recover items of PERSONAL PROPERTY or monetary damages.

## REAL ESTATE

*Land, buildings, and things permanently attached to land and buildings. Also called realty and real property.*

*Real estate* is the modern term for land and anything that is permanently affixed to it. Fixtures include buildings, fences, and things attached to buildings, such as plumbing, heating, and light fixtures. Property that is not affixed is regarded as PERSONAL PROPERTY. For example, furniture and draperies are items of personal property.

The sale and lease of real estate in the United States are major economic activities and are regulated by state and federal laws. The two major types of real estate are commercial and residential real estate. Commercial real estate involves the sale and lease of property for business purposes. Residential real estate involves the sale and rental of land and houses to individuals and families for daily living.

The sale of residential property is heavily regulated. All states require real estate agents and brokers, who earn a commission from the owner of real estate for selling the property, to be licensed. To get a license, a person must have a high school diploma, be at least eighteen years old, and pass a written test on real estate principles and law.

Since the 1970s, home buyers have been given additional protection under the law. Many states and municipalities require a seller of real estate to file a truth-in-housing statement. A seller must disclose any problems with the home, such as a wet basement or the presence of termites, on the form. Failure to disclose this information can result in the revocation of the purchase agreement or a lawsuit by the buyers against the seller for FRAUD. In addition, some laws require an inspector to visit the property to determine if there are any problems.

Most purchases of residential real estate require the buyer to obtain a mortgage from a bank or other lending institution. The lending institution receives a security interest on the real estate, which means that if the borrower defaults in paying back the mortgage, the institution can obtain title to the property and resell it to pay off the mortgage debt.

The federal government enacted the Real Estate Settlement Procedure Act of 1974 (RESPA) (12 U.S.C.A. § 2601 et seq.) to ensure that the buyer of residential real estate is made aware of the many costs associated with the sale. RESPA mandates that a federally insured lending institution give the buyer advance notice of all the costs to be paid on the date of closing the transactions. These costs typically include the cost of property surveys, appraisals, title searches, brokers' fees, and administrative and processing charges.

CROSS-REFERENCES

Sales Law.

## REAL EVIDENCE

*Probative matter furnished by items that are actually on view, as opposed to a verbal description of them by a witness.*

For example, a weapon used in the commission of a crime would be classified as real evidence.

## REAL PROPERTY

See LAND-USE CONTROL; PROPERTY LAW; ZONING.

## REALIZED

*Actual; converted into cash.*

A realized profit, for example, is a cash-in-hand gain as opposed to a paper profit, such as the increase in value of a particular stock, which could potentially be lost prior to the time it is sold.

## REASONABLE

*Suitable; just; proper; ordinary; fair; usual.*

The term *reasonable* is a generic and relative one and applies to that which is appropriate for a particular situation.

In the law of NEGLIGENCE, the reasonable person standard is the standard of care that a reasonably prudent person would observe under a given set of circumstances. An individual who subscribes to such standards can avoid liability for negligence. Similarly a reasonable act is that which might fairly and properly be required of an individual.

## REASONABLE DOUBT

*A standard of proof that must be surpassed to convict an accused in a criminal proceeding.*

Reasonable doubt is a standard of proof used in criminal trials. When a criminal defendant is prosecuted, the prosecutor must prove the defendant's guilt BEYOND A REASONABLE DOUBT. If the jury—or the judge in a bench trial—has a reasonable doubt as to the defendant's guilt, the jury or judge should pronounce the defendant not guilty. Conversely, if the jurors or judge have no doubt as to the defendant's guilt, or if their only doubts are unreasonable doubts, then the prosecutor has proven the defendant's guilt beyond a reasonable doubt and the defendant should be pronounced guilty.

Reasonable doubt is the highest standard of proof used in court. In civil litigation the standard of proof is either proof by a PREPONDERANCE OF THE EVIDENCE or proof by clear and convincing evidence. These are lower burdens of proof. A preponderance of the evidence simply means that one side has more evidence in its favor than the other, even by the smallest degree. Clear and convincing evidence is evidence that establishes a high probability that the fact sought to be proved is true. The main reason that the high proof standard of reasonable doubt is used in criminal trials is that criminal trials can result in the deprivation of a defendant's liberty or in the defendant's death, outcomes far more severe than occur in civil trials where money damages are the common remedy.

Reasonable doubt is required in criminal proceedings under the DUE PROCESS CLAUSE of the FIFTH AMENDMENT to the U.S. Constitution. In IN RE WINSHIP, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), the U.S. Supreme Court ruled that the highest standard of proof is grounded on "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."

The reasonable doubt standard is not used in every stage of a criminal prosecution. The prosecution and defense need not prove beyond a reasonable doubt that every piece of evidence offered into trial is authentic and relevant. If a prosecutor or defendant objects to a piece of evidence, the objecting party must come forward with evidence showing that the disputed evidence should be excluded from trial. Then the trial judge decides to admit or exclude it based on a preponderance of the evidence presented. A similar procedure employing a preponderance standard is used when a party challenges a variety of evidence, such as coerced confessions, illegally seized evidence, and statements extracted without the furnishing of the so-called *Miranda* warning.

The reasonable doubt standard is inapplicable to still other phases of a criminal prosecution. Lower standards of proof are permissible in PAROLE revocation proceedings, proceedings to revoke PROBATION, and prison inmate disciplinary proceedings.

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### CROSS-REFERENCES

Beyond a Reasonable Doubt; Clear and Convincing Proof; Criminal Law; Criminal Procedure; Due Process of Law; Preponderance of Evidence.

## REASONABLE FORCE

*The amount of force necessary to protect oneself or one's property. Reasonable force is a term associated with defending one's person or property from a violent attack, theft, or other type of unlawful aggression. It may be used as a defense in a criminal trial or to defend oneself in a suit alleging tortious conduct. If one uses excessive force, or more than the force necessary for such protection, he or she may be considered to have forfeited the right to defense. Reasonable force is also known as* legal force.

A person is generally justified in using force that is intended or likely to cause death or great bodily harm if the person reasonably believes that such force is necessary to prevent the com-

mission of a forcible felony. The person is also generally justified in using such extreme force to prevent or terminate another's unlawful entry into or attack upon a dwelling, if: (1) the entry is made or attempted in a violent manner and he reasonably believes that such force is necessary to prevent personal violence to himself or another then in the dwelling, or (2) he reasonably believes that such force is necessary to prevent the commission of a felony in the dwelling.

## REASONABLE PERSON

*A phrase frequently used in* TORT *and* CRIMINAL LAW *to denote a hypothetical person in society who exercises average care, skill, and judgment in conduct and who serves as a comparative standard for determining liability.*

The decision whether an accused is guilty of a given offense might involve the application of an objective test in which the conduct of the accused is compared to that of a reasonable person under similar circumstances. In most cases, persons with greater than average skills, or with special duties to society, are held to a higher standard of care. For example, a physician who aids a person in distress is held to a higher standard of care than is an ordinary person.

CROSS-REFERENCES

Negligence.

## REASONABLE TIME

*In the absence of an express or fixed time established by the parties to an agreement or contract (especially one that falls under the purview of the* UNIFORM COMMERCIAL CODE *[UCC]), any time which is not manifestly* unreasonable *under the circumstances. For example, if a contract does not fix a specific time for performance, the law will infer (and impose) a reasonable time for such performance. This is defined as that amount of time which is fairly necessary, conveniently, to do what the contract requires to be done, as soon as circumstances permit. The term "reasonable time" has other (related) applications: UCC 2-206(2) requires that acceptance of an offer be made within a "reasonable time" if no time is specified.*

*The reasonableness or unreasonableness of time used or taken by a party may be the subject of* JUDICIAL REVIEW *in light of the nature, purpose, and circumstances of each case. In considering whether there has been unreasonable delay in performance, a court may also consider other factors such as prior dealings between the parties, business routine or custom within the trade, and whether there were any objective manifestations of expectation expressed between the parties.*

## REASONABLE WOMAN

*A standard used by fact finders in* SEXUAL HARASSMENT *litigation to determine whether sexual harassment has occurred.*

Under title VII of the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. §§ 2000e–2000e-2 [1988]), it is illegal for an employer to discriminate against employees on the basis of sex. Under sexual harassment guidelines set forth by the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, the two basic types of sexual harassment are quid pro quo sexual harassment and hostile environment harassment (29 C.F.R. § 1604 [1993]). Quid pro quo harassment occurs when an employer conditions employment opportunities on an employee's submission to unwelcome sexual advances. Hostile environment harassment is unwelcome sexual conduct that interferes with an individual's employment or creates an intimidating, hostile, or offensive work environment. The standard that is used in evaluating whether a person has been subjected to sexual harassment varies from jurisdiction to jurisdiction: some use a reasonable person standard, and some use a reasonable woman standard.

In evaluating alleged sexual harassment, the reasonable person standard is an objective standard of perception based on a fictitious, reasonable person. Using this standard in a sexual harassment case, the fact finder would ask whether a reasonable person in the plaintiff's position would have felt that the respondent's actions constituted grounds for a sexual harassment claim. By contrast, a reasonable woman standard allows the fact finder to ask whether a reasonable woman in the plaintiff's position would have felt that the respondent's actions constituted sexual harassment. The difference is that the reasonable woman standard accounts for the different perceptions between men and women regarding words or actions of a sexual nature.

The courts that use the reasonable woman standard recognize a difference between men and women regarding the effect of unwanted sexual interaction. Because women historically have been more vulnerable to rape and sex-related violence than have men, these courts believe that the proper perspective for evaluating

a claim of sexual harassment is that of the reasonable woman.

FURTHER READINGS

Goldberg, Deborah B. 1995. "The Road to Equality: The Application of the Reasonable Woman Standard in Sexual Harrassment Cases." *Cardozo Women's Law Journal* 2.

CROSS-REFERENCES

Sex Discrimination; Women's Rights.

## REBATE

*Discount; diminution of interest on capital lent in consideration of prompt repayment thereof; reduction of a stipulated charge that is not credited in advance but is returned subsequent to payment in full.*

A *tax rebate* is a sum of money refunded to a taxpayer after full payment of the tax has been made.

## REBUS SIC STANTIBUS

*[*Latin, At this point of affairs; in these circumstances.*] A tacit condition attached to all treaties to the effect that they will no longer be binding as soon as the state of facts and conditions upon which they were based changes to a substantial degree.*

## REBUT

*To defeat, dispute, or remove the effect of the other side's facts or arguments in a particular case or controversy.*

When a defendant in a lawsuit proves that the plaintiff's allegations are not true, the defendant has thereby rebutted them.

*Rather than reducing retail prices, many automobile manufacturers choose to offer rebates to new car buyers.*
KIM KULISH/CORBIS SABA

## REBUTTABLE PRESUMPTION

*A conclusion as to the existence or nonexistence of a fact that a judge or jury must draw when certain evidence has been introduced and admitted as true in a lawsuit but that can be contradicted by evidence to the contrary.*

A rebuttable presumption can be overturned only if the evidence contradicting it is true and if a reasonable person of average intelligence could logically conclude from the evidence that the presumption is no longer valid. For example, a person who has been judicially declared incompetent is presumed incompetent unless there is sufficient proof, usually in the form of medical testimony, that the person has regained competency.

In CRIMINAL LAW, there is a PRESUMPTION OF INNOCENCE in favor of the accused. The prosecution must establish BEYOND A REASONABLE DOUBT that the accused committed the crime charged.

## REBUTTER

*In* COMMON-LAW PLEADING, *the response made by a defendant to a plaintiff's surrejoinder, which rebuts earlier denials made by the defendant.*

The making of a rebutter occurs in the third round of the series of pleadings made by the parties. First, there is the plaintiff's declaration which is countered by the defendant's plea. Next, the plaintiff makes a replication which is answered by the defendant in his or her rejoinder. In the third stage of PLEADING, the plaintiff makes a surrejoinder to which the defendant responds by use of the rebutter.

## RECALL

*The right or procedure by which a public official may be removed from a position by a vote of the people prior to the end of the term of office.*

Recall is the retiring of an elected officer by a vote of the electorate. Some state constitutions prescribe the procedure that must be followed in a recall—for example, requiring the filing of a petition containing the signatures of a specific number of qualified voters.

## RECAPTION

*Regaining possession of; taking back.*

Reception is a COMMON LAW remedy exercised by an individual who has been wrongfully deprived of goods. Through reception, the

owner may lawfully claim and retake goods whenever he or she finds them, as long as this is done in an orderly and legal manner. An individual who removes his borrowed car that was not returned to him from his neighbor's driveway is exercising recaption.

## RECEIPT

*Acknowledgment in writing that something of value, or cash, has been placed into an individual's possession; written confirmation of payment rendered.* Receipt of goods *refers to the act of taking physical possession of them.*

## RECEIVER

*An archaic term, used in common law and* CIVIL LAW *countries, to designate an individual who holds and conceals stolen goods for thieves. Currently an independent individual appointed by a court to handle money or property during a lawsuit.*

Courts appoint receivers to take custody, manage, and preserve money or property that is subject to litigation so that when the final judgment is rendered, the property remains available to accomplish what has been ordered. The power to appoint a receiver is rarely utilized by the courts, and only upon a showing that it is required to preserve the property. Receivership cannot properly be used to coerce a party or to gain control of a business from someone who is capable of managing it. Receivership is an extraordinary remedy, designed to benefit everyone involved. It is, however, a harsh remedy, since it involves restraining an individual's property, removing it from his control, and causing additional legal expenses.

The appointment of a receiver, which is a provisional remedy to be exercised while litigation is pending, is ordinarily prescribed by statute, as are a receiver's powers. Ordinarily a receiver can be appointed only after a lawsuit is initiated.

According to the statutes of different states, receivers have been appointed in actions for DIVORCE, the removal of a trustee, or the foreclosure of a mortgage and in proceedings for the dissolution of a corporation, for an accounting of partnership money, or for a creditor's suit. The appointment of a receiver is justified when property in dispute is allowed to deteriorate to the extent where emergency repairs are necessary, and where there is good reason to suspect that the property is going to be sold, wasted, taken out of state, misused, or destroyed if the court does not act to preserve it. A receiver can also be appointed in situations where it appears that no one with a legal right to manage certain property is present, or no mentally competent adult is entitled to hold it. A receiver is sometimes appointed to preserve property during litigation between two parties who appear to have an equal right to use the property but who are unwilling to acknowledge each other's interest.

A judge can appoint a receiver following the filing of an application, or petition, with the court. In certain instances, all those who are interested in a case join together, and in the event that the court has jurisdiction over the property and the parties, an appointment can proceed upon their consent.

An application for the appointment of a receiver is often submitted by a creditor. It might be FRAUD or collusion for a debtor to have a friendly creditor nominate an individual the debtor chooses. A receiver generally should not be appointed unless notice is served on all interested parties and a hearing is conducted where a judge determines the merits of the case. On good evidence that an emergency exists, however, a judge can grant the petition for a receivership and hold a hearing as soon as possible thereafter.

### Obligations

A receiver assumes control of all the property subject to the receivership but does not take title to the property and cannot exercise control over property outside the territorial authority of the court. Any property that has already been transferred in a fraudulent sale designed to cheat creditors is beyond the reach of the receiver; however, the receiver has the power to initiate a lawsuit, requesting that the court set aside the transfer. Any rights, such as liens or mortgages, that others have in the property remain valid. Anyone in possession of property listed in the receivership order can be compelled to turn it over to the receiver. A refusal to comply, or interference with the receivership, is punishable as a CONTEMPT of court.

A receiver does not represent the individual whose property is being administered, since the receiver is an officer of the court and is responsible to the court for protecting the interests of all opposing parties fairly. Where it is not clear how the receiver must perform his or her duty,

he or she may properly apply to the court for instructions. He or she can be removed and held financially liable for failure to obey orders of the court, for neglect of duties, or for abuse of authority. The receiver must exercise judgment in fulfilling the duties, and her decisions must be reasonable. The receiver might be required to post a bond to ensure faithful performance of the duties and is required to account to the court at regular intervals for all the property entrusted to her during, and at the termination of, the appointment.

### Compensation

A receiver has a right to be compensated for services and to be reimbursed for costs or traveling expenses. In cases where it is necessary for the receiver to hire an attorney, counsel fees are allowed. To obtain compensation, the receiver submits an itemized report of services to the court. The amount of payment depends upon the extent and value of the property, the difficulties encountered, and the time spent, as well as upon the receiver's skill, experience, and diligence and the success of his efforts. The time and manner of payment are, for the most part, left to the discretion of the court; unless authorized by the court, it is illegal for the receiver to take payment money out of the property being managed.

## RECEIVERSHIP

*A court order whereby all the property subject to dispute in a legal action is placed under the dominion and control of an independent person known as a receiver.*

Receivership is an extraordinary remedy, the purpose of which is to preserve property during the time needed to prosecute a lawsuit, if a danger is present that such property will be dissipated or removed from the jurisdiction of the court if a receiver is not appointed. Receivership takes place through a court order and is utilized only in exceptional circumstances and with or without the consent of the owner of the property.

## RECEIVING STOLEN PROPERTY

*The offense of acquiring goods with the knowledge that they have been stolen, extorted, embezzled, or unlawfully taken in any manner.*

The earliest statute that made receiving stolen property a crime was enacted in England in 1692. It provided that the receiver—the person who accepts the property—should be deemed an ACCESSORY after the fact to the theft. The crime became a separate substantive offense in 1827, and it has been similarly treated in a majority of U.S. jurisdictions.

### Elements

Receiving stolen property is defined by statute in most states. Generally it consists of four elements: (1) the property must be received; (2) it must have been previously stolen; (3) the person receiving the property must know it was stolen; and (4) the receiver must intend to deprive the owner of his or her property.

A person receives stolen property by acquiring or taking manual possession of it. Physical possession, however, is not always required. Under some statutes, it is sufficient if the accused has exercised control over the property. For example, a statute may declare that paying for the property constitutes control, regardless of whether the accused has handled it.

In many jurisdictions a belief that the property is stolen satisfies the knowledge element. It has been held that a mere suspicion does not constitute knowledge. Some statutes provide that a person has knowledge if he knows, or has reason to know, that goods are stolen. Another test is whether a reasonable person would suspect that the property was stolen. Knowledge is commonly proved by the circumstances surrounding the receipt of the property. For example, unexplained possession of goods that were recently stolen raises a presumption that the possessor received them illegally.

In order to be guilty, the receiver must intend to deprive the owner of the property. The crime is committed even if the receiver intends to obtain a reward for returning the property because she has gained a benefit from depriving the owner of possession, even temporarily.

### Defenses

An honest, although mistaken, belief that property is not stolen is a defense to the crime of receiving stolen property. Intoxication is another defense, but the intoxication must be severe enough to prevent any knowledge that the property was stolen. Infancy and insanity are also good defenses.

### Punishment

The punishment for receiving stolen property is a fine or imprisonment. The term of years imposed varies from state to state. In jurisdic-

tions where value is an element of the offense, the severity of the penalty is commensurate with the value of the goods. Where value is not an element, it might still be significant in determining the severity of the punishment.

### Civil Remedies

In a majority of states, the person whose property was stolen may bring a conversion action against the receiver of stolen property. If the accused is found to have converted the property, the victim has a choice of remedies. The victim may demand that the accused return the stolen property or may require the accused to pay the full value of the property at the time it was converted.

### Federal Law

Receiving stolen property is proscribed by federal statute (18 U.S.C.A. § 662) when it occurs within the maritime or territorial jurisdiction of the United States or when such property has moved in interstate commerce.

## RECESS

*In the practice of courts, a brief interval during which all business is suspended without an adjournment.*

A recess in legislative practice is an interval of time between sessions of the same continuous body, as opposed to the period between the final adjournment of one legislative body and the convening of another at the next regular session.

## RECIDIVISM

*The behavior of a repeat or habitual criminal. A measurement of the rate at which offenders commit other crimes, either by arrest or conviction baselines, after being released from incarceration.*

Both state and federal laws have been enacted in an attempt to reduce the number of repeat or habitual offenses. For example, Washington's habitual criminal statute imposes a minimum sentence of ten years imprisonment for persons convicted of a second felony, third misdemeanor, or third petit larceny. Furthermore, in the event that a person is convicted of a third felony, fifth misdemeanor, or a fifth petit LARCENY, the statute imposes a life sentence (Wash. Rev. Code § 9.92.090 [1996]).

Another state that has enacted a recidivism statute is California. California's recidivism statute, more commonly known as the THREE-STRIKES LAW, increases sentencing when the recidivist commits additional crimes. If the criminal is convicted of a second felony, the sentence doubles the sentence of the first-time felon, and if convicted of a third violent crime or serious felony, the person will be sentenced to triple the sentence of a first-time felon, or 25 years imprisonment, whichever is greater (Cal. Penal Code § 667 [West 1996]). The three-strikes law was passed in 1994, after a voter REFERENDUM received 71 percent support. The ballot measure was prompted by the 1993 abduction-murder of 12-year-old Polly Klaas in Petaluma, California. The killer, Richard Allen Davis, was a twice-convicted kidnapper who had been on PAROLE after serving only half of a 16-year prison term for the second KIDNAPPING. Because of the way the law is written, however, offenders with prior criminal records are being put behind bars for life for non-felony offenses such as petty theft and shoplifting.

In March 2003, the Supreme Court ruled on two separate cases *Ewing v. California,* 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003), and *Lockyer v. Andrade*,, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003), both involving California's law providing for mandatory prison terms of 25 years to life for those convicted for the third time of a felony. The Court failed to overturn the law, despite arguments that the sentences of those challenging the law constituted cruel and usual punishment in violation of the Eight Amendment. The federal government and 26 states now have a three strikes-type law, imposing as much as a life prison term for criminals convicted of a third felony.

Congress also responded to the recidivism rates in the United States by enacting the VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994 (Pub. L. No. 103-322, 108 Stat. 1796). This act mandates life imprisonment for the commission of a serious violent felony or a combination of two or more serious felonies or drug offenses.

There are many ideas on how to solve the problem of recidivism. Some of these include requiring literacy programs in penal institutions, electronic monitoring of home confinement, greater use of halfway houses, and "boot camp" programs consisting of military marching, discipline, physical training, work, classes, and drug and alcohol treatment for young, first-time offenders.

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CROSS-REFERENCES

Determinate Sentence.

## RECIPROCAL

*Bilateral; two-sided; mutual; interchanged.*

*Reciprocal obligations* are duties owed by one individual to another and vice versa. A reciprocal contract is one in which the parties enter into mutual agreements.

*Reciprocal laws* are statutes of one state that give rights and privileges to the citizens of another state if that state extends similar privileges to the citizens of the first state. A common example is the Reciprocal Enforcement of Support Act, which is a uniform law adopted in a majority of jurisdictions, by which a tribunal in the state where a wife or mother resides is able to commence proceedings for CHILD SUPPORT against a husband or father who resides in another state.

## RECITAL

*A formal statement appearing in a legal document such as a deed that is preliminary in nature and provides an explanation of the reasons for the transaction.*

The recital in a deed, for example, might indicate the reasons why the owner is selling the property.

In PLEADING, a recital is the statement of matter that is introductory to a positive allegation; it begins with the words, "For that whereas . . ." and is followed by the claim of the party.

## RECKLESSNESS

*Rashness; heedlessness; wanton conduct. The state of mind accompanying an act that either pays no regard to its probably or possibly injurious consequences, or which, though foreseeing such consequences, persists in spite of such knowledge.*

Recklessness transcends ordinary NEGLIGENCE. To be reckless, conduct must demonstrate indifference to consequences under circumstances involving peril to the life or safety of others, although no harm is intended.

## RECOGNITION

*The confirmation or* ACKNOWLEDGMENT *of the existence of an act performed, of an event that transpired, or of a person who is authorized by another to act in a particular manner.*

In tax law, a capital gain is *recognized* when a taxpayer has actually received payment. Such gain must then be reported on INCOME TAX forms, and capital gains tax must be paid on it.

In INTERNATIONAL LAW, the term *recognition* refers to the formal acknowledgment by one state that another state exists as a separate and independent government. Recognition is not a mere technicality. A state has no status among nations until it is recognized by other states, in spite of the fact that it might possess all other attributes of a state, including a definable territory and population, a recognizable government, and a certain amount of continuity or stability.

The decision to recognize a new national government is a political act that is in the discretion of the officials who are responsible for foreign policy. In the United States, the president makes the decision to recognize a country and can do so by making a formal announcement or by having another official, such as the SECRETARY OF STATE, make the announcement for him. Recognition can also be informal, such as by opening negotiations with a new state or exchanging diplomats with it.

A nation is not truly sovereign and independent unless other nations recognize its sovereignty. Formal recognition operates to assure a new state that it will be permitted to hold its place and rank as an independent political body among the nations.

Recognition takes effect from the time it is given as if the state had always existed, and a new government can carry forward international projects initiated by the old government it replaces.

Many difficulties come into play when a government is not recognized. For example, an unrecognized government is not entitled to participate in diplomatic negotiations or to have its laws applied in lawsuits or in jurisdictions.

The term *recognition* is also used in relation to armed conflicts. If a state of belligerency is recognized, then the law of war applies with all of its protections for prisoners of war and noncombatants. Recognition of a state of belligerency ordinarily comes from an uninvolved state that declares itself neutral. A neutral country is able to recognize a state of belligerency and carry on trade and diplomatic relations with both sides of the conflict.

## RECOGNIZANCE

*A recorded obligation, entered into before a tribunal, in which an individual pledges to perform a specific act or to subscribe to a certain course of conduct.*

For example, an individual who owes money might enter into a recognizance whereby she agrees to satisfy the debt.

In CRIMINAL LAW, an individual who has been found guilty of an offense can be mandated to enter into a recognizance whereby she agrees to keep the peace in the future. An individual who has been accused but not yet convicted of a criminal offense may be allowed to go free prior to the trial without being required to post a bail bond. The accused individual provides the court with a formal written statement, which declares that his failure to appear will precipitate payment to the court of a specifically indicated sum of money. This is known as a release on one's own recognizance, or personal recognizance.

## RECONCILIATION

*The restoration of peaceful or amicable relations between two individuals who were previously in conflict with one another.*

Reconciliation ordinarily implies forgiveness for injuries on either or both sides. The term is often applied to the parties to a DIVORCE who cease proceedings for the dissolution of their marriage upon a resolution of their differences. *Reconciliation* is used interchangeably with *conciliation.*

## RECONSTRUCTION

The term *Reconstruction* refers to the efforts made in the United States between 1865 and 1877 to restructure the political, legal, and economic systems in the states that had seceded from the Union. The U.S. CIVIL WAR (1861–65) ended SLAVERY, but it left unanswered how the 11 Southern states would conduct their internal affairs after readmission to the Union. Though some legal protections for newly freed slaves were incorporated into the Constitution by the Thirteenth, Fourteenth, and Fifteenth Amendments, by 1877, conservative Southern whites had reclaimed power and had begun to disenfranchise blacks.

ABRAHAM LINCOLN took the first steps toward Reconstruction in 1863 when he announced a post-war plan for the Southern states. Under these terms, a state would have to renounce slavery and agree to comply with the Constitution. The states of Louisiana, Arkansas, and Tennessee agreed to these conditions and asked that its senators and representatives be readmitted to Congress. Radical Republicans in Congress objected to this plan, contending that it would do nothing to change the Southern social system. They introduced a tougher bill that Lincoln vetoed, which left the state of Reconstruction uncertain at the time of Lincoln's assassination. The Freedmen's Bureau was established as a social welfare agency for the newly freed slaves, but little else was agreed upon. Lincoln's successor, President ANDREW JOHNSON, came from Tennessee. As governor, he had championed his state's readmission to the Union under Lincoln's terms. As president, he revealed a hostility to the use of federal power to change the Southern way of life, in part because he wanted to rebuild the DEMOCRATIC PARTY and ensure his election in 1868.

Radical Republicans became incensed when Johnson issued a general pardon for most Confederates and then issued proclamations that permitted the Southern states to rejoin the Union after holding a constitutional convention and agreeing to three conditions: repeal of the secession laws, repudiation of the Confederate debt, and ratification of the THIRTEENTH AMENDMENT, which ended slavery in the United States. However, Johnson did not require the states to permit blacks to vote. In 1866, Southern whites took back the reins of government and proceeded to pass BLACK CODES, which restricted the freedoms of the newly freed slaves. Racial SEGREGATION was established, blacks were barred from serving on juries and as appearing as witnesses, and unemployed blacks

were arrested and then auctioned off to employers to pay their fines.

In 1866, Congress passed the FOURTEENTH AMENDMENT, which extended DUE PROCESS and EQUAL PROTECTION rights to all persons and barred states from violating these rights. Over time, this amendment would be used to apply most of the BILL OF RIGHTS to the states, but, during the Reconstruction period, it was used as the basis of additional statutes that imposed federal control over the Southern states. In 1867, the Radical Republicans passed the First Reconstruction Act; three other acts would later be passed by Congress to further define the scope of Reconstruction. These acts abolished the Southern government that Johnson had authorized, placed the South back under military control, announced new state constitutional conventions, mandated that blacks be allowed to vote, and prevented former Confederate leaders from serving as public officials. By mid-1868, Congress readmitted representatives from six states, and then the remainder complied with the act's terms and were readmitted in 1870.

With these new constitutions in place, state and local elections took place. Though some blacks were elected to public office, most officeholders were white. However, most Southern whites opposed these governments and the idea of black equality. This prevalent attitude led to VIGILANTISM and TERRORISM by various groups, including the KU KLUX KLAN (KKK). These groups used terror to discourage blacks from asserting their political rights and frighten whites who collaborated with the new governments. Congress sought unsuccessfully to impeach President Johnson, but Radical Republicans assumed conditions would improve with the election of General ULYSSES S. GRANT to the presidency in 1868.

Grant disappointed supporters of Reconstruction over the ensuing eight years. Though Congress passed and the states ratified the FIFTEENTH AMENDMENT in 1870, it had very little impact in the South. The amendment prohibited voting discrimination based on race, but blacks were intimidated by the KKK and local employers and stayed away from the polls. Congress proceeded to pass three Force Acts in 1870 and 1871, wide-ranging criminal and civil laws that sought to curb vigilantism. Several parts of these Force Acts remain in effect, including the CIVIL RIGHTS tort law 42 U.S.C.A. SECTION 1983. These laws had some effect, but they required federal officers to enforce them. The desire of Northerners to continue this work had begun to ebb, and, by the end of Grant's term in 1877, it became apparent that federal efforts were grinding to a halt.

The 1876 presidential race between Republican RUTHERFORD B. HAYES and Democrat SAMUEL TILDEN ended in an ELECTORAL COLLEGE deadlock due to disputed electors from Florida and Oregon. To avoid a constitutional crisis, a commission was appointed to review the contested states and decide on a winner. In the end, the Democrats allowed Hayes to be declared the winner in exchange for a promise that Hayes would withdraw all federal troops and give Democrats a portion of the patronage rights to federal jobs.

The withdrawal of the troops symbolized the end of Reconstruction, but an earlier Supreme Court case had made clear that the legal system would resist a broad reading of the Fourteenth Amendment. In the SLAUGHTERHOUSE CASES, 83 U.S. 36, 21 L.Ed. 394 (1873), the Supreme Court read the amendment's PRIVILEGES AND IMMUNITIES CLAUSE virtually out of the Constitution. The Court effectively closed the door on the concept of privileges and immunities as an enforcement tool against state laws that restricted individual civil rights. On a 5–4 vote, the Court interpreted the clause as protecting only rights of national citizenship from the actions of the state government. This restrictive reading robbed the Privileges and Immunities Clause of any constitutional significance.

Conservative white Democrats reasserted their authority in 1877 and began to disenfranchise blacks again. They enacted "Jim Crow" segregation laws that directly challenged the Fourteenth Amendment. The Supreme Court removed the last impediment to these efforts in the CIVIL RIGHTS CASES, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883). The Court invalidated the CIVIL RIGHTS ACT of 1875, the last piece of Reconstruction legislation. This act proclaimed "the equality of all men before the law," and promised to "mete out equal and exact justice" to persons of every "race, color, or persuasion" in public or private accommodations. The law sought to prohibit racial segregation of trains, trolleys, theaters, hotels, restaurants, and other places that are open to the public. The Supreme Court struck down the act, finding that the Fourteenth Amendment only prohibited official, state-sponsored discrimination. The Fourteenth

Amendment could not reach discrimination practiced by privately owned places of public accommodation. This Fourteenth Amendment "state action" requirement remains a central tenet of modern civil rights law. The Court's holding meant that racial segregation could be imposed by private businesses. More troubling was the Court's belief, less than 20 years after the conclusion of the Civil War, that the time for concerns about equal treatment for blacks was over. The Court stated that blacks should no longer be "special favorite[s] of the law."

Reconstruction has come to be regarded as a missed opportunity for U.S. society. Many of the issues that concerned political leaders of that period returned a hundred years later in the modern CIVIL RIGHTS MOVEMENT. The Fourteenth Amendment would be revivified by the Supreme Court, and surviving parts of the Force Acts would be used again.

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CROSS-REFERENCES

Civil Rights Acts; Discrimination; Jim Crow Laws; Racial and Ethnic Discrimination.

## RECONVEYANCE

*The transfer of real property that takes place when a mortgage is fully paid off and the land is returned to the owner free from the former debt.*

## RECORDING OF LAND TITLES

*A process by which proof of ownership of real property is filed in the appropriate county office or court to allow purchasers, creditors, and other interested parties to determine the status of the property interests therein.*

The process of recording begins when a duly executed, acknowledged, and delivered document is brought to the recorder's office for filing in the record books in the county where the property is located. The recorder's office also keeps a set of indexes containing information about each document so that the document can be discovered by a title search. A majority of states have a GRANTOR-GRANTEE INDEX, a set of volumes containing an alphabetical reference to the surname of the grantor followed by the name of the grantee, a brief description of the document and the property, and the location of the filed document in the official record books. The same information is contained in the "grantee-grantor index," which is organized alphabetically by surname of the grantee. A few states use a "tract index," which organizes all of the documents according to the location of the property.

An individual who plans to purchase land commissions a title search, which involves examining the list of successive conveyances, from original owner to the present holder, that affect a parcel of land. The person conducting the title examination, usually a lawyer or title insurance examiner, prepares an "abstract of title," summarizing the chain of title and listing any liens, charges, or liabilities to which the land may be subject. The ABSTRACT OF TITLE is evidence of the marketability of the record title; a purchaser of an interest in real property will take title subject to all interests constructively disclosed or implied by the record and subject to any interests of which the purchaser has actual notice.

In nearly every state the validity of a conveyance, as between grantor (seller) and grantee (purchaser), is not affected by whether the deed is filed in the public records or not; the question is not who has possession of the deed but who owns title to the land. Before the enactment of state recording acts, the question of priority of title was generally a question of time. For example, if O, owner in fee simple of land, sells to A, giving A a deed to the land, but O later decides to sell the same land to B, B takes nothing because A was first to purchase the land, leaving O nothing to convey to B. Under state recording acts, however, if A fails to record the deed before B buys and B meets certain criteria with respect to B's status and behavior, B still receives good title from O and A takes nothing. B is considered a "bona fide purchaser" or a "purchaser in good faith," if he or she gives "valuable consideration without actual, implied or constructive notice of inconsistent outstanding rights of others . . ." (*Miller v. Hennen,* 438 N.W.2d 366, 369 [Minn. 1989]).

Three general categories of state recording acts are in use in the United States: "notice," "race," and "race-notice" recording statutes, the least common of which are the race recording acts. Under a race recording statute, if A fails to

record title, B must record his or her title before A records. (It is therefore a "race" to the recorder's office such that the first person to file has title to the property.) To prevail against an unrecorded conveyance, B must have paid value, yet there is no requirement that B be without notice of A's conveyance at the time of B's recording in order to prevail.

Unlike the race recording statute, the notice and race-notice recording statutes prevent B from prevailing if B is first to record but does so with notice of the prior unrecorded conveyance. Under a notice recording statute, if B is a bona fide purchaser and is therefore without notice of A's prior unrecorded conveyance, B will prevail regardless of whether A records before B. On the other hand, under a race-notice recording statute, B will not prevail, despite her or his bona fide purchaser status, if B does not record before A.

The recording statutes only work to the detriment of the holders of unrecorded instruments. A properly recorded document will prevail over subsequent claims, regardless of whether those claimants actually search for or find the recorded instrument. Courts often use the term "constructive notice" to describe this imputation of knowledge if a proper and reasonable investigation would have revealed the recorded instrument. Because the recording system was designed to encourage and protect reliance on the public records, no legal protection is afforded those individuals who have not significantly relied upon such records.

A purchaser with actual notice of a prior unrecorded interest in the premises will take title subject to that interest even though it may be unrecorded. Rumor or gossip usually are insufficient to provide notice, but if a purchaser has heard more reliable information about a possible adverse claim to the land, he or she is expected to make a reasonable investigation. In such cases, an individual might be charged with "inquiry notice" in addition to actual or constructive notice of previous claims. Inquiry notice is not applied in the same manner as constructive notice, which is applied automatically; it must first be shown that a suspicious fact existed to originate the duty to conduct an inquiry.

One of the most litigated aspects of notice is the universally accepted rule that a purchaser of an interest in land is deemed to have actually viewed the land before buying. The purchaser is held to inquiry notice of the facts that an inspection or a conversation with those in possession of the land would disclose. The problem occurs in determining what is possession—for example, when the holder of the unrecorded interest only uses the property for a limited purpose, such as for camping or cutting timber.

Not every instrument that has been delivered to the recorder's office and copied into the records is held to be recorded or to have provided sufficient notice within the meaning of the recording acts. The recorder's office makes no representation that the instruments it preserves are authentic and reliable, and in many cases one cannot detect the defects by solely examining the document itself. For example, the instrument may contain a forged signature, have a defective ACKNOWLEDGMENT, never have been delivered to the buyer, have been issued by a seller who is without capacity, and so on. Some states have enacted curative statutes which provide that after the passage of a certain number of years, instruments that lack seals or acknowledgments or other technical requirements are deemed to have been properly recorded.

In some cases, documents can be located only with difficulty, such as with "wild deeds"—recorded deeds not appearing in the chain of title. Most of these difficulties do not occur in tract-index systems in which all conveyances affecting a given parcel will be indexed on a single page. There are situations, however, in which the tract index shows conveyances by parties who are not in the chain of the record title. Such conveyances do not impart constructive notice of an interest. However, they may not be disregarded, and they put the purchaser to the burden of an inquiry.

The more problematic and common error occurs when the instrument has been misindexed at the recorder's office. In this situation courts generally hold that the instrument was not recorded because it was not indexed in a manner sufficient to provide constructive notice to any individual searching the record. Some states, however, provide that an instrument is deemed recorded upon its deposit in the recorder's office. In either case, the careful purchaser or grantee should return to the recorder's office a few days after recording his or her deed to ensure that it has been properly recorded.

Not all written instruments affecting real property interests are recordable. Recording statutes may explicitly provide that certain doc-

uments need not be recorded to protect the individuals in whom a property interest is created, such as with short-term leases and executory sales contracts. On the other hand, not all interests in land derive from written instruments. These types of adverse claims to title fall entirely outside the coverage of the recording acts and include the following property interests: ADVERSE POSSESSION, prescriptive EASEMENTS, implied easements, easements by necessity, and oral boundary line agreements.

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CROSS-REFERENCES

Registration of Land Titles.

## RECORDS

*Written accounts of acts, transactions, or instruments that are drawn up pursuant to legal authority by an appropriate officer and appointed to be retained as memorials or permanent evidence of matters to which they are related.*

A *public record* is a document that has been filed with, or furnished by, a governmental agency and is available to the public for inspection. For example, *title of record* to property is an ownership interest that has been duly filed in the office of public land records.

The term *record* also applies to the formal, written account of a case, which contains the history of actions taken, papers filed, rulings made, and all written opinions.

## RECOUPMENT

*To recover a loss by a subsequent gain. In* PLEADING, *to set forth a claim against the plaintiff when an action is brought against one as a defendant. Keeping back of something that is due, because there is an equitable reason to withhold it. A right of the defendant to have a deduction from the amount of the plaintiff's damages, for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the same contract.*

## RECOURSE

*The right of an individual who is holding a* COMMERCIAL PAPER, *such as a check or promissory note, to receive payment on it from anyone who has signed it if the individual who originally made it is unable, or refuses, to tender payment.*

Recourse is the right of the holder to recover against a prior endorser, who is secondarily liable. When a check is endorsed *without recourse,* it signifies that the endorser will not be liable to pay in the event that payment is refused.

## RECOVERED MEMORY

*The remembrance of traumatic childhood events, usually involving* SEXUAL ABUSE, *many years after the events occurred.*

The heightened awareness of child sexual abuse that developed in the 1980s also brought with it the controversial topic of recovered memory. Some mental health therapists contended that children repress memories of abuse so completely that years later they have no memory of it. These therapists believed that through the use of recovered memory therapy, victims are able to recover the memories of the traumatic events and begin dealing with their psychological effects. Others in the medical community, however, held deep reservations about the idea of repressed memory and the therapy techniques that purported to recover them. These critics argued that without established standards or procedures, a psychotherapist faced the danger of implanting false memories in a patient. By the mid-1990s these fears were justified, as patients won multimillion dollar verdicts against their therapists based on claims that they created false and destructive memories.

During the 1980s many adults who recovered memories of child sexual abuse through therapy sought to hold their abusers accountable in a court of law. However, under STATUTE OF LIMITATIONS provisions, the time for a lawsuit had expired. Courts and legislators responded by changing these laws. Typically, these laws provide that the action must be filed within a certain number of years after the plaintiff either reaches the age of majority or knew or had reason to know that sexual abuse caused the injury.

Once the statute of limitations problem was resolved, a number of civil lawsuits were filed alleging sexual abuse that happened many years

*In 1994 a jury awarded Gary Ramona (left) $500,000 in a malpractice suit against two therapists whom he claimed had implanted false memories of childhood sexual abuse in his daughter.*

AP/WIDE WORLD PHOTOS

before. Lawsuits against Catholic priests using recovered memories as evidence resulted in large damage awards in several cases. Criminal charges were also successfully brought against alleged abusers on the basis of recovered memory. Apart from the award of damages, some therapists believe that a trial and a confrontation between the abuser and the abused is essential to restoring the victim's mental health. In the 1980s courts allowed recovered memory testimony into evidence, despite objections by defendants that there was no scientific basis for believing memories could be recovered. In addition, defendants contended that the memories were untrue, implanted in the patient through a mixture of drug therapy and suggestive questioning.

By the early 1990s, there was a backlash against recovered memory and its use in the law. The False Memory Syndrome Foundation was established as a support group by members of families who claimed they had been falsely accused of abuse by their children through recovered memory. Mental health professionals also contested the validity of recovered memory. Some argued that it is never reliable, whereas others believed it is sometimes reliable but only when elicited by a properly trained professional. In 1994 the AMERICAN MEDICAL ASSOCIATION (AMA) adopted a policy statement that proclaimed that recovered memories of childhood sexual abuse are often unreliable and should not be assumed to be true. The AMA statement concluded that few cases in which adults make accusations of abuse can be proved or disproved using recovered memories because there is no way to distinguish the truth of memories from imagined events. That same year the American Psychiatric Association also expressed misgivings about recovered memory.

In 1994 a California jury awarded $500,000 in a malpractice case brought against two therapists by Gary Ramona, a father who claimed that the therapists had implanted false memories of childhood sexual abuse in his daughter. In 1996 a Minnesota jury awarded David and Lisa Carlson $2.5 million after the longest psychiatric malpractice trial in U.S. history. The Carlsons sued Lisa Carlson's therapist, charging that she used hypnosis, drugs, coercion, and pressure to implant false memories.

By 1995 a number of state courts had issued decisions that attacked the validity of recovered memories and held that these memories were insufficient to sustain a lawsuit unless supported by independent evidence. Statutes of limitations also continued to be a problem for those seeking to file lawsuits. For example, in *Dalrymple v. Brown*, 549 Pa. 217, 701 A. 2d 164 (1997), the Pennsylvania Supreme Court rejected a sexual assault claim based on recovered memory. The alleged victim stated that the defendant had assaulted her in 1968 and 1969 when she was a young child but she had only recovered the memories of the assaults in 1990. The defendant asked the court to dismiss the case because under Pennsylvania law the statutes of limitations required the victim to sue within two years after her eighteenth birthday.

On appeal the Pennsylvania Supreme Court rejected the plaintiff's contention that a discovery rule granted her an exemption from the two-year time limit. This rule holds that if the injured party does not originally know an injury, then the limitations period does not begin until the discovery of the injury is reasonably possible. Typical examples of the discovery rule are found in MEDICAL MALPRACTICE cases, where a doctor's error is unknown to the patient until its effects become physically evident. The court held that the discovery rule applies only

when the nature of the injury is such that plaintiffs cannot detect it, stating that "it would be absurd to argue that a reasonable person, even assuming for the sake of argument, a reasonable six year old, would repress the memory of a touching so that no amount of diligence would enable that person to know of the injury."

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CROSS-REFERENCES

Child Abuse; Statute of Limitations.

## RECOVERY

*The acquisition of something of value through the judgment of a court, as the result of a lawsuit initiated for that purpose.*

For example, an individual might obtain recovery in the form of damages for an injury.

The term *recovery* is also used to describe the amount ultimately collected, or the amount of the judgment itself.

## RECRIMINATION

*A charge made by an individual who is being accused of some act against the accuser.*

Recrimination is sometimes used as a defense in actions for DIVORCE. Traditionally the underlying theory was that a divorce could be granted only when one individual was innocent and the other guilty, and the defense of recrimination allowed the party accused of misconduct to terminate divorce proceedings by asserting guilt against the other party. As grounds for divorce were expanded, however, recrimination became more and more readily provable.

Recrimination has been limited or eliminated as a defense in some states, and others allow it only where one spouse accuses the other of ADULTERY and the defendant wants to prove that the plaintiff was also guilty of that offense. In some jurisdictions, the courts have attempted to counterbalance the plaintiff's accusation with the defendant's defense by allowing only comparable grounds to be offset by recrimination.

## RECUSE

*To disqualify or remove oneself as a judge over a particular proceeding because of one's conflict of interest. Recusal, or the judge's act of disqualifying himself or herself from presiding over a proceeding, is based on the* MAXIM *that judges are charged with a duty of impartiality in administering justice.*

When a judge is assigned to a case, she reviews the general facts of the case and determines whether she has any conflict of interest concerning the case. If a conflict of interest exists, the judge may recuse herself on her own initiative. In addition, any party in a case may make a motion to require the judge to recuse herself from hearing the case. The initial presiding judge usually determines whether or not the apparent conflict requires her recusal, and the judge's decision is given considerable deference. Some jurisdictions, however, require another judge to decide whether or not the presiding judge should be disqualified. If a judge fails to recuse himself when a direct conflict of interest exists, the judge may later be reprimanded, suspended, or disciplined by the body that oversees JUDICIAL ADMINISTRATION. In addition, in some cases where a judge presides over a matter in which he has a direct conflict of interest, any criminal conviction or civil damage award in the case may be reversed or set aside.

Generally, a judge must recuse himself if he has a personal bias or prejudice concerning a party to the lawsuit or has personal knowledge of the facts that are disputed in the proceeding. The CODE OF JUDICIAL CONDUCT, a judicial ethics code drafted by the AMERICAN BAR ASSOCIATION in 1972 and adopted by most states and the federal government, outlines situations in which a judge should disqualify himself from presiding over a matter. Canon 3C of the Judicial Code outlines these situations, including the judge's personal bias or prejudice toward a matter or its participants, personal knowledge of the facts that are disputed in a case, a professional or familial relationship with a party or an attorney, or a financial interest in the outcome of the matter. Most interpretations of the code mandate a judge's disqualification or recusal if any of these factors are present.

In some cases the parties to a proceeding may waive the judge's disqualification and allow the judge to preside over the case. The judge's disqualification is waived when both parties agree to the waiver or when one or more

of the parties continues to participate in the proceedings.

The term recusation was at one time considered an exception to jurisdiction, the effect of which was to disqualify the particular judge by reason of the judge's interest or prejudice in the proceeding.

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CROSS-REFERENCES

Canons of Judicial Ethics; Judicial Conduct.

## RED CROSS CONVENTIONS

See GENEVA CONVENTIONS, 1949.

## RED SCARE

Throughout much of the twentieth century, the United States worried about Communist activities within its borders. This concern led to sweeping federal action against ALIENS and citizens alike during periods known today as Red scares. Using the derogatory term *Red* for Communist, the phrase is a form of criticism: it implies overreaction resulting from excessive suspicion, unfounded accusation, and disregard for CONSTITUTIONAL LAW.

The first Red scare followed the Bolshevik revolution in Russia in November 1917, and lasted until 1920. It was marked by antiradical legislation in U.S. immigration law, extensive federal probes of suspected radicals and their organizations, and mass arrests and deportations of aliens. The second Red scare arose prior to WORLD WAR II, and reached new heights during the COLD WAR years.

The origins of the first Red scare lay in the Russian Revolution and the horrendous experience of WORLD WAR I. COMMUNISM was not yet perceived as the only enemy; ANARCHISM (the advocacy of violent overthrow of government and law) also caused fear. In the United States, no great effort was made to separate these two political philosophies, for they both seemed to represent a single threat: foreign attempts to undermine the nation's government and institutions. Congress responded by putting new antiradical protections in the Immigration Act of 1918 (§§ 1–3, as amended, 8 U.S.C.A. § 137 (c, e–g)). Although antagonism toward different races and beliefs had marked immigration law for decades, this change introduced political limits: it allowed for the deportation of aliens on the grounds of anarchist beliefs or membership in anarchist organizations. Riding a wave of anti-immigrant sentiment, lawmakers frequently grumbled about "foreign troublemakers."

Early in 1919, Congress began pressuring the JUSTICE DEPARTMENT to take action against radicals. It had a receptive audience in Attorney General A. MITCHELL PALMER. A self-styled enemy of foreign subversion who hoped to become president, Palmer was given to making public statements like "fully 90 percent of the communist and anarchist agitation is traceable to aliens." Then, on June 2, 1919, a bomb exploded outside Palmer's Washington, D.C., home. Found among the remains of the dead bomber was a pamphlet signed by "the anarchist fighters," warning of more violence to come. The attack set in motion changes that would leave a lasting mark on federal law enforcement: Palmer created the Radical Division of the Justice Department, and assigned a promising young bureaucrat named J. EDGAR HOOVER to head it. Within a few months, Hoover had compiled thousands of names of suspected radicals and their organizations; later, as director of the FEDERAL BUREAU OF INVESTIGATION (FBI), he would compile more.

Spurred by public expectations, the Justice Department acted in November 1919 and January 1920 by launching massive raids. More than ten thousand people were arrested—some for membership in Communist or left-wing groups, others on no greater pretext than that they looked or sounded foreign—and then jailed and interrogated with little regard for their right to DUE PROCESS. Hundreds were subsequently deported, some aboard a U.S. Navy troop transport. But the raids backfired: Congress was scandalized by the disregard shown for constitutional rights. Along with the newly formed AMERICAN CIVIL LIBERTIES UNION (ACLU) and the AMERICAN BAR ASSOCIATION, lawmakers denounced the attorney general. The raids had two unforeseen consequences for Palmer: first, they ended his presidential aspirations, and second, they dashed his hopes of seeing new federal legislation that would allow for the arrest of subversive *citizens,* much as the 1918 Immigration

Act permitted deportation of subversive *aliens.* Hoover, who had overseen the execution of the raids and some deportations, escaped reproach.

The backlash against the first Red scare did nothing to prevent a recurrence. Fears of anarchism subsided, but the onset of World War II produced new worries about fascism, Nazism, and Communism. The instigators of the second Red scare turned their gaze inward: not foreigners but U.S. citizens now seemed dangerous. These concerns led to the creation of the House Un-American Activities Committee (HUAC) in 1938. Lasting until 1969, this panel of the House of Representatives held many hearings into alleged subversion by private citizens, unions, and Hollywood. The cold war years also saw another dramatic manifestation of Red scare tactics: the Communist witch-hunts of Senator JOSEPH R. MCCARTHY, who brought unfounded accusations of Communist infiltration of the STATE DEPARTMENT and the military. Both HUAC and McCarthy benefited substantially from the cooperation of the FBI, whose durable director, Hoover, fed them information.

HUAC represented the last gasp of the Red scares. In the late 1960s and early 1970s, the cold war still had important geopolitical implications. However, federal interest in hunting down radicals had waned: a backlash against McCarthyism was one reason, as was the divisive experience of the VIETNAM WAR. Although the cold war continued until the breakup of the Soviet Union in 1991, its effects were felt primarily in foreign policy and military expansion. Today, the legacy of the Red scares to U.S. law can be measured in several ways: a greater interest in civil liberties; a decline of Congress's role as a forum for interrogating private citizens; federal reform that has curtailed the power of the FBI; and a 1990 reform of immigration law that removed anarchism and Communism as grounds for deportation (Immigration and Nationality Act of 1990, U.S.C.A. § 1101 et seq.).

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CROSS-REFERENCES

Communism "House Un-American Activities Committee" (In Focus); Goldman, Emma; Smith Act.

## REDEMPTION

*The liberation of an estate in real property from a mortgage.*

Redemption is the process by which land that has been mortgaged or pledged is bought back or reclaimed. It is accomplished through a payment of the debt owed or a fulfillment of the other conditions.

## REDLINING

*A discriminatory practice whereby lending institutions refuse to make mortgage loans, regardless of an applicant's credit history, on properties in particular areas in which conditions are allegedly deteriorating.*

The term *redlining* stems from some lenders' practice of using a red pencil to outline such areas. Redlining violates CIVIL RIGHTS statutes.

## REDRESS

*Compensation for injuries sustained; recovery or restitution for harm or injury; damages or equitable relief. Access to the courts to gain* REPARATION *for a wrong.*

## REDUCTIO AD ABSURDUM

*[*Latin, Reduction to absurdity.*] In logic, a method employed to disprove an argument by illustrating how it leads to an absurd consequence.*

## ♦ REED, STANLEY FORMAN

Stanley Forman Reed served as associate justice of the U.S. Supreme Court from 1938 to 1957. Before his appointment to the Court, Reed served as U.S. SOLICITOR GENERAL. Reed was a strong supporter of congressional power to regulate the U.S. economy but was more moderate in his support of civil liberties.

Reed was born on December 31, 1884, in Macon County, Kentucky. Educated at private schools, he graduated from Kentucky Wesleyan College in 1902. He earned a second bachelor's degree at Yale University. Reed attended law

"THE UNITED STATES . . . GRANTS TO ALL CITIZENS A RIGHT TO PARTICIPATE IN THE CHOICE OF ELECTED OFFICIALS . . . [A] CHOICE WHICH CANNOT BE NULLIFIED BY A STATE THROUGH CASTING ITS ELECTORAL PROCESS IN A FORM WHICH PERMITS . . . RACIAL DISCRIMINATION IN THE ELECTION. CONSTITUTIONAL RIGHTS WOULD BE OF LITTLE VALUE IF THEY COULD BE THUS INDIRECTLY DENIED."
—STANLEY F. REED

*Stanley F. Reed.*
CORBIS

school at both the University of Virginia and Columbia University but never completed his law degree. In 1908 he went to Paris and studied for a year at the Sorbonne.

He returned from Europe and studied for the Kentucky bar exam. He was admitted in 1910 and began a law practice as a solo practitioner in Macon County. From 1912 to 1916, he served in the Kentucky General Assembly but left to serve in the Army during **WORLD WAR I**. After the war he joined a large law firm.

President **HERBERT HOOVER** appointed Reed general counsel of the Federal Farm Board in 1929. Though Reed was a Democrat, the Republican Hoover promoted him to general counsel of the Reconstruction Finance Corporation (RFC) in 1932. The RFC was Hoover's belated attempt to use the power of the federal government to lift the U.S. economy out of the economic depression that had begun in November 1929. When **FRANKLIN D. ROOSEVELT** succeeded Hoover as president in 1933, he kept Reed in this position.

Reed continued to impress his superiors. In 1935 he was appointed U.S. solicitor general, whose duty it is to argue cases before the U.S. Supreme Court. In this position Reed was called on to defend the constitutionality of **NEW DEAL** economic programs that empowered the federal government to regulate the national economy. He met a conservative Supreme Court, with the majority of the justices opposed to these new programs. The centerpiece of the New Deal was the **NATIONAL INDUSTRIAL RECOVERY ACT OF 1933** (NIRA), 48 Stat. 195, which was designed to bolster the national economy through the enforcement of "codes of fair competition." Reed's arguments in the 1935 case that challenged the constitutionality of the NIRA (*A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570) were unsuccessful, and the act was declared unconstitutional.

Reed had mixed success defending New Deal programs before the Court. President Roosevelt, knowing that Reed believed in the New Deal, appointed him to the Supreme Court in 1938. The appointment marked the decline of conservative economic thought on the Court and helped pave the way for sustaining federal programs and policies in the future. Reed consistently upheld the right of Congress, under the power of the **COMMERCE CLAUSE** of the U.S. Constitution, to regulate the national economy.

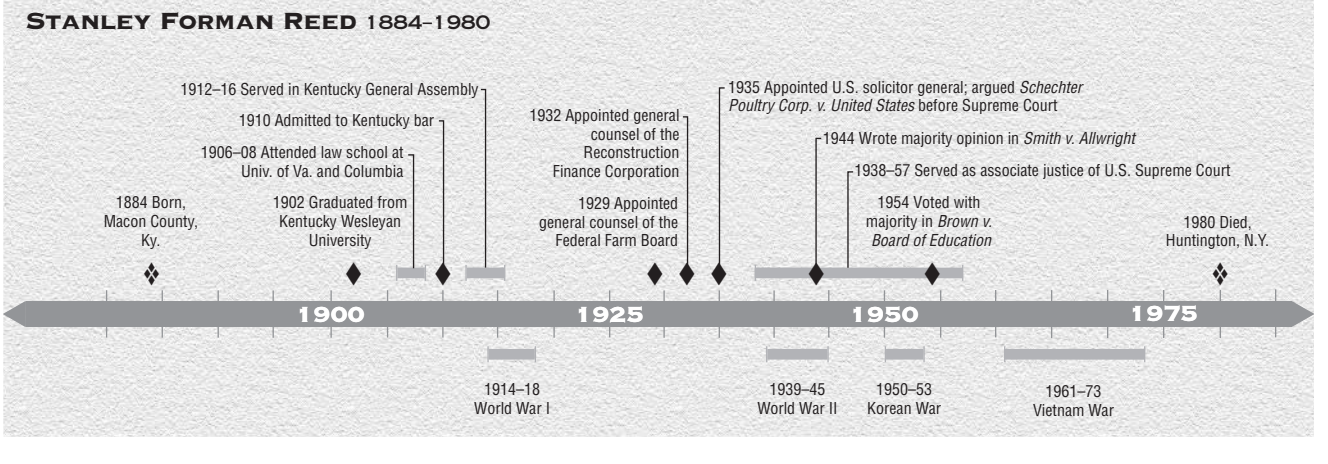

Apart from economic issues, Reed was a moderate. He wrote the majority opinion in *Smith v. Allwright,* 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944), that struck down the "white primary" in the southern states. The device effectively kept African Americans from exercising their right to vote in any meaningful sense. At that time the South was a virtual one-party system dominated by the DEMOCRATIC PARTY. State Democratic parties excluded African Americans from party membership, and state legislatures closed the primaries to everyone but party members. African Americans were thus barred from voting in the primary. The general election was a mere formality for the primary winner because there was at most token Republican opposition. Reed declared the practice unconstitutional, because it violated the Fifteenth Amendment's prohibition against denying the right to vote to citizens because of their race. Reed also voted to end the SEPARATE-BUT-EQUAL doctrine of racial SEGREGATION in BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 874 (1954).

Reed was more conservative regarding civil liberties. He supported the admission of illegally obtained evidence in criminal trials in *Wolf v. Colorado,* 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949), and wrote the opinion in *Adamson v. California,* 332 U.S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947), that declined to apply the Fifth Amendment's guarantee against SELF-INCRIMINATION to state court proceedings.

Reed retired from the Court in 1957. He died on April 2, 1980, in Huntington, New York.

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## REENTRY

See RIGHT OF REENTRY.

## REFEREE

*A judicial officer who presides over civil hearings but usually does not have the authority or power to render judgment.*

Referees are usually appointed by a judge in the district in which the judge presides. Referees aid the judge by hearing certain matters and by making recommendations concerning special or complicated issues. Judges generally delegate a portion of their judicial power to referees, who then report their recommendations to the judge concerning the issue.

The English chancery master was the forerunner of the present-day referee. In eighteenth-century England, the chancellor courts used special masters to aid the chancery in handling its expanding EQUITY jurisdiction. Accordingly, the chancery master aided the chancellor only in equitable matters, such as marriage dissolutions, trust matters, and financial accountings. U.S. jurisdictions adopted the use of special masters or referees modeled on the English chancery master.

In most jurisdictions a referee must be an attorney. Nevertheless, in some complex property or financial matters, a judge may appoint a person who is not an attorney to preside over a dispute and to make recommendations. The term *reference* usually refers to the trial and determination of issues arising in a civil action by a person appointed for that purpose by the court. An order of reference, which is also called a referral order, is the court order that appoints the referee to hear and recommend action on the issues that are specified in the order.

Judges generally appoint a referee to hear complicated matters, such as financial accountings, property lien issues, or business valuation disputes. Many jurisdictions also have referees who are appointed to hear specified special-jurisdiction matters, such as FAMILY LAW, trust and probate, and pretrial discovery disputes. Parties to an action may agree to have a matter heard by a referee. In some jurisdictions the parties' consent to the appointment of a referee to hear the matter may result in the parties' waiver of any right to a jury trial.

A referee makes recommendations to the judge or court that appoints the referee but generally does not issue enforceable orders. A referee generally cannot render judgment in a case. The referee's general duty is to provide a report to the appointing judge on the issues of fact or law that prompted the referee's appointment. It has been said that "nothing can originate before a referee, and nothing can terminate with or by the decision of a referee." Referees generally serve at the pleasure of the judge and accordingly hold less judicial authority than the appointing judge. As a judicial officer, a referee is subject to the CODE OF JUDICIAL CONDUCT.

In some jurisdictions a referee may be called a SPECIAL MASTER, court commissioner, or a magistrate. The Federal Rules of Civil Procedure, for example, allow for the appointment of

a "master," who can be a referee, an auditor, an examiner, or an assessor. Generally, however, the duties of a master are the same as those of a referee, and the appointing judge may limit the master's powers to report only on specified issues or to perform only particular acts. The federal judiciary also uses magistrate judges—judicial officers who perform a broad range of delegated or statutory duties, such as presiding over initial hearings in criminal cases, misdemeanor trials, pretrial proceedings, and the trial of civil cases. The Federal Magistrate Act of 1968 (Pub. L. No. 90-578, 82 Stat. 1107 [codified at 28 U.S.C.A. §§ 604, 631–639]) created the current system of federal magistrate judges and governs the duties of such magistrates.

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## REFERENCE

*The process by which a tribunal sends a civil action, or a particular issue in the action, to an individual who has been appointed by the tribunal to hear and decide upon it, or to obtain evidence, and make a report to the court.*

CROSS-REFERENCES

Referee.

## REFERENDUM

*The right reserved to the people to approve or reject an act of the legislature, or the right of the people to approve or reject legislation that has been referred to them by the legislature.*

The referendum power is created by state constitutions and is conferred on the citizens of a state or a local subdivision of the state. Referendum provides the people with a means of expressing their opinion on proposed legislation before it becomes operative as a law. The power of referendum does not permit the people to invalidate a law that is already operative but suspends or annuls a law that has not yet gone into effect. In this sense, referendum is similar to a governor's VETO power. Also, by referendum the people may reinstate an act that the legislature has expressly repealed.

The referendum, along with the *initiative,* are the two forms of direct legislation adopted by many states during the direct democracy movement of the early twentieth century. Referendum allows the people to state their opinion on laws that have been enacted by the legislature, and the initiative allows the people to propose their own laws. Thus, in the states that have adopted the initiative and referendum, the people essentially form another branch of the legislature, having the ability both to enact laws and to overturn laws passed by the elected legislature but not yet in effect. An initiative or a referendum passed by the people has the same force and effect as any act of the legislature. A referendum may be challenged on constitutional grounds, on grounds that proper procedures were not followed in the referendum process and election, or on grounds that the referendum or initiative was outside the scope of authority granted by the state constitution. Also, in some states the governor may veto an initiative or referendum.

The general initiative and referendum were first adopted in the United States in South Dakota in 1898, and many states soon followed. The movement toward direct legislation did not grow from a desire of the people to exercise the legislative function directly. Rather, many people distrusted their legislative bodies, believing that large corporations and powerful groups of individuals were corrupting legislation. The power of referendum made most legislation subject to the will of the people.

The referendum power is derived solely from a state's constitution and applies to that state's laws; people do not have the right to challenge federal legislation by referendum. The right of referendum and the procedure to be followed in exercising the referendum right are set forth in the state's constitution and statutes. The referendum process is essentially the same in every state. First, there must be a petition for referendum that states, among other things, the title and nature of the legislative act the petition seeks to have submitted for referendum. The petition is then circulated for signatures. Generally, anyone eligible to vote may sign a petition for referendum, even if he or she is not registered to vote. When the required number of signatures is collected, the petition is filed. If the petition is certified as sufficient, the referendum measure is placed on the election ballot for approval or rejection by the people. If the required number of votes, usually a majority of the votes cast, are in favor of the referendum, it passes. Usually, the people vote on a referendum measure during the general election, but special referendum elections also may be held.

In some states there is no limit on the referendum power, and any law may be challenged by referendum. In many states, however, the constitution creates exceptions to the referendum power for certain types of legislation. Commonly, constitutional provisions regarding referendums create an exception for laws necessary for the support of the state government and state or public institutions, because a referendum on any such measure might cause a branch of the government to cease to function. This exception applies mainly to tax and appropriation measures. Also, most states create an exception to the referendum power for laws necessary for the immediate preservation of the public peace, health, or safety, thereby allowing the legislature to exercise the **POLICE POWER** unimpaired. Finally, measures declared by the legislature to be emergency measures are usually not subject to referendum.

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## REFORM PARTY

H. Ross Perot, founder of Electronic Data Systems, Inc., ran for president in 1992 as an independent candidate and received 19 percent of the popular vote. In September 1995 Perot organized the Reform Party and was the party's 1996 presidential candidate. The Reform Party's ticket, which included Perot's running mate, Pat Choate, appeared on the ballot in every state and won eight percent of the vote.

Perot entered the 1992 presidential race in February 1992 and gradually gained substantial widespread support with his well-financed campaign and straight talk about government. Perot made campaign finance reform, national trade deficits, and the **BALANCING** of the **FEDERAL BUDGET** the main issues in his campaign. In July Perot withdrew from the race when he received critical media coverage and lost his campaign manager, Edward J. Rollins. However, public support for his candidacy persisted, and Perot reentered the race in October with former navy admiral James B. Stockdale as his running mate.

*Despite struggles with Ross Perot loyalists in the Reform Party, Pat Buchanan received the nomination as the party's presidential candidate in the 2000 election.*

AP/WIDE WORLD PHOTOS

In 1996 the Reform Party fielded several candidates in elections across the country. At the party's national convention, University of Denver professor and former Colorado governor Richard D. Lamm challenged Perot's nomination, but Perot won handily.

The Reform Party experienced some success in the late 1990s. In 1998, former professional wrestler Jesse Ventura was elected as the governor of Minnesota on the Reform Party ticket. A year later, conservative commentator **PAT BUCHANAN** quit the **REPUBLICAN PARTY** to join the Reform Party.

Despite these gains, the party engaged in a civil war in 2000 that continued to have negative implications. Ventura quit the party in February 2000, calling it "dysfunctional." A month later, Choate and Jack Gargan, who had become chairman of the party on January 1, 2000, but was later voted out of office, asked a federal court to determine which of them should be named as the proper chairman. A federal district court in Virginia named Choate as chairman, but the internal strife continued. Buchanan and his supporters clashed with Perot loyalists over the nomination for the party's candidate for the 2000 presidential election. Buchanan was eventually nominated, but the problems with the party were evident in the election. Despite spending more than $38 million for the election, Buchanan received only 448,895 total votes.

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CROSS-REFERENCES

Election Campaign Financing; Independent Parties.

## REFORMATION

*A remedy utilized by the courts to correct a written instrument so that it conforms to the* ORIGINAL INTENT *of the parties to such an instrument.*

Legal documents, such as contracts, deeds, mortgages, and trusts, are all proper subjects for reformation. Since the original intent of the parties must control, however, a totally new agreement cannot be created through reformation.

The court, in the exercise of its EQUITY powers to do justice, will reform a document only in the event that FRAUD or mutual mistake occurred in its execution.

Reformation is a remedy that is granted at the discretion of the court only where the facts and circumstances of a particular case warrant it. It will not be granted where an entirely new agreement would result between the parties or where unwarranted hardships would be imposed upon them. Only an individual who has acted in GOOD FAITH can apply to the court to have an instrument reformed.

Reformation is not available as a remedy to correct every minor error, such as typographical errors; rather, it is granted where there has been a mutual mistake that substantially affects the parties' rights and obligations. The mistake must have been in existence at the time the instrument was drawn up. A mistake in the description of land and its boundaries ordinarily justifies reformation of an agreement where the purchaser and seller intended that all the seller's property be sold to the purchaser. In addition, a MISTAKE OF LAW by which both parties to the instrument have incorrectly comprehended the legal effect of the facts and the document might also result in reformation.

## REFORMATORIES

*State institutions for the confinement of juvenile delinquents.*

Any minor under a certain specified age, generally sixteen, who is guilty of having violated the law or has failed to obey the reasonable directive of his or her parent, guardian, or the court is ordinarily treated as a delinquent under state statute. The purpose of reformatories is to impose punishment for crimes committed by INFANTS while concurrently rehabilitating the offenders through educational and vocational training so that they will become law-abiding citizens.

The powers of a state to establish and maintain reformatories, as well as the authority of its agencies to do so, are ordinarily contained in constitutional or statutory provisions. Such authority is based upon the sovereign power of the state as PARENS PATRIAE to safeguard the welfare of children within its borders by removing them from harmful environments and putting them in institutions where their development will be supervised.

Reformatories—which are also known as houses of refuge, state vocational institutions, reform schools, juvenile correction centers, and industrial or training schools—are generally not considered prisons. In some states, however, they are part of the prison system with adult inmates.

CROSS-REFERENCES

Juvenile Law.

## REFRESHING MEMORY

*The process of aiding a witness's recollection of certain details during a trial by allowing him or her to consult documents, memoranda, or books in order to better remember past transactions or events about which he or she is testifying.*

A witness is not permitted to rely completely upon such materials, nor may the witness read from them directly while giving testimony. The witness must be capable of testifying to the facts from a present, independent recollection.

## REFUGEES

*Individuals who leave their native country for social, political, or religious reasons, or who are forced to leave as a result of any type of disaster, including war, political upheaval, and famine.*

Often refugees are unwilling to return to their country of citizenship because they fear political, social, or cultural persecution. The refugees turn to other countries for protection and support. A related problem is statelessness, which occurs when one's country of citizenship has been absorbed by another nation through war or political change. The United States has

promulgated policies to aid refugees and stateless persons both internationally, through various international organizations and treaties, and domestically, through national immigration policies.

### International Refugee Policies

There have always been refugees, but their plight was first recognized as a major international problem after WORLD WAR I when the number of refugees in Europe and Asia Minor totaled in the millions. The first world institution to come to the aid of refugees was the LEAGUE OF NATIONS Office of High Commissioner for Refugees, established in 1921. Although U.S. president WOODROW WILSON was a principal founder of the League of Nations, the U.S. Senate refused to ratify the treaty on which it was based, and the United States never joined the League. This office was later called the Nansen Office in honor of the Norwegian scholar who first headed it. The Nansen Office provided assistance to 500,000 Greeks who were resettling from Asia Minor to Greece and to 500,000 Turks resettling from Greece to Turkey.

The rise of Nazi Germany led to another flood of international refugees in 1933. Because Germany would not permit the Nansen Office to assist those individuals, the League of Nations created the Office of the High Commissioner for the Refugees from Germany. By 1938 the office was expanded to help Austrian refugees fleeing the Nazis as well. The two League of Nations offices were later combined into the Office of the High Commissioner for Refugees. In 1938, 32 countries met to establish the Intergovernmental Committee for Refugees, at the urging of U.S. president FRANKLIN D. ROOSEVELT. This time the United States was a member of the organization. These organizations helped European political and social refugees in a variety of ways, for example by giving them identity and travel documents.

By 1944 all of the functions of the Office of the High Commissioner for Refugees and the Intergovernmental Committee for Refugees were assumed by the UNITED NATIONS (UN) in an office that was later called the International Refugees Organization (IRO). The United States was a member of the United Nations and participated in this international front as well. The IRO helped 1.5 million European and Asian refugees. It was dismantled in 1951, and its duties were taken over by the Office of the United Nations High Commissioner for Refugees (UNHCR).

The UNHCR is responsible for protecting international refugees and assisting with the problems created by mass movements of people resulting from civil disturbance or military conflict. The high commissioner follows policy directives handed down by the UN General Assembly. The United Nations encourages countries to admit refugees and stateless persons and provide resettlement opportunities for them. The UN also seeks to help refugees achieve self-sufficiency and family security in their new homes. Members of the United Nations agree to help refugees and stateless persons by giving them the same civil liberties afforded their nationals and the same economic rights afforded other foreign nationals.

In 1948 the United Nations also addressed the Palestinian refugee situation in the Middle East by creating a new organization, the United Nations Relief for Palestinian Refugees, later called the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). The UNRWA assisted more than 1.5 million Palestinian refugees through the early 1970s.

In 1982 the UNHCR turned its attention to the 1.2 million African refugees in Somalia, Sudan, Djibouti, Kenya, and the horn of Africa. The majority of refugees were escaping conditions of famine in the underdeveloped African countries. Also in the early 1980s, the UNHCR assisted more than 36,000 Vietnamese boat people in the South China Sea. During the 1980s, the UNHCR helped 2.9 million refugees leave Afghanistan and resettle in Pakistan.

The United Nations also helps refugees by assisting in their voluntary repatriation, or return to their home country. By 1988 the UNHCR helped at least 150,000 refugees return to their countries of origin, mostly in Africa and Central America. The UN General Assembly declared in 1988 that voluntary repatriation is the ideal solution to the problems faced by refugees.

In the late 1980s and early 1990s, the UNHCR began to study the particular problems faced by women and children refugees and called for further efforts to protect these special groups.

In addition to the United Nations and the League of Nations, various international charitable organizations, such as AMNESTY INTERNATIONAL,

**Refugees and Asylum Seekers, 1994 to 2002**

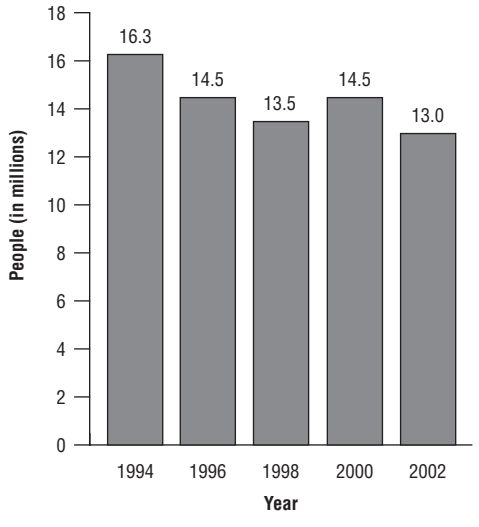


SOURCE: U.S. Committee for Refugees, *World Refugee Survey 2003.*

strive to aid refugees and stateless persons. Religious relief organizations also have aided refugees by providing food, clothing, shelter, and resettlement assistance.

### Domestic Refugee Policies

In the early years of the United States, the states were responsible for the naturalization of ALIENS, and the only requirement for being naturalized was taking a pledge of loyalty. Now the federal government closely regulates the entry of all aliens, including refugees, through the Bureau of Citizenship and Immigration Services (BCIS), formerly the Immigration and Naturalization Service (INS). The standards for naturalization have become more demanding and exacting, especially after terrorist attacks on September 11, 2001.

Before the twentieth century, the U.S. approach to admitting refugees was no different than the admission of general immigrants, which was based on quotas for each country. During WORLD WAR II, the insensitivity of this policy became evident as the United States turned away Jewish refugees because its quota for German immigrants had been met, and the refugees were forced to return to Nazi Germany.

In 1945 President HARRY S. TRUMAN signed an EXECUTIVE ORDER that gave displaced persons, or refugees, priority over other immigrants. Congress passed the War Brides Act, 59 Stat. 659, in 1945 and the Displaced Persons Act, 62 Stat. 1009, in 1948 to make the United States more responsive to international immigration and refugee situations. The War Brides Act permitted the immigration of 120,000 alien wives and children of U.S. soldiers. The Displaced Persons Act allowed for more than the previously established quotas of refugees from Poland, Germany, Latvia, Russia, and Yugoslavia to be admitted.

The Refugee Relief Act of 1953, 67 Stat. 400, allowed for the entry of 214,000 refugees during a limited period on a non-quota basis. Many Hungarian "freedom fighters" were admitted under the act in 1956. President DWIGHT D. EISENHOWER invited another 30,000 Hungarian refugees to the United States following their country's revolution. This invitation was on a "parole" status, meaning these refugees were not granted immigrant visas.

The Fair-Share Refugee Act of 1960, 74 Stat. 504, permitted the JUSTICE DEPARTMENT to admit even more refugees under PAROLE status. Under this act, many refugees from Communist and Middle Eastern countries resettled in the United States.

In the late 1970s and early 1980s, a flood of refugees from Vietnam, Cambodia, and Laos came to the United States. In 1975, 200,000 Indo-Chinese refugees arrived, and by 1985 nearly 400,000 Southeast Asians came to the United States. Throughout this period, Jewish refugees from Russia continued to be admitted to the United States.

The Refugee Act of 1980, 8 U.S.C.A. § 1525, raised the number of annual immigrants permitted from 290,000 to 320,000, of which 50,000 could be refugees. Mass admittance of refugees pursuant to the president's parole authority was not permitted, but the president was allowed to admit refugees over the 50,000 annual limit with congressional consultation.

Cuban and Haitian refugees in the early 1980s tested the ability of the United States to accommodate and assimilate refugees. The Cubans were seen as fleeing from the Communist regime of Fidel Castro and therefore were permitted entry into the United States. Flight from a Communist country was a long-standing accepted qualifying basis for refugee status. The sheer numbers of Cuban refugees who came to

the United States by boat, however, made their entry difficult, but not impossible, to process.

Unlike the Cubans, the Haitian refugees claimed that they were fleeing poverty, a condition not recognized by the United States as qualifying individuals for refugee status. However, the Haitians asserted that once they left Haiti they could not return or else they would face political persecution for having left. The U.S. government did not accept the Haitians' fear of persecution as sufficient to admit them as refugees and concluded that they were economic immigrants. The Haitians were detained in large relocation camps and then deported. In 1981 President RONALD REAGAN signed an executive order authorizing the U.S. Coast Guard to stop boats leaving Haiti and turn them around if they were transporting economic immigrants.

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CROSS-REFERENCES

Human Rights; Immigration and Naturalization; International Law.

## REFUNDING

*Reimbursing funds in restitution or repayment. The process of refinancing or borrowing money, ordinarily through the sale of bonds, to pay off an existing debt with the proceeds derived therefrom.*

## REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE

A 1978 decision by the Supreme Court, *Regents of the University of California v. Bakke,* 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750, commonly referred to as *Bakke,* held that. although the university unlawfully discriminated against a white applicant by denying him admission to its medical school solely on the basis of his race, the university may consider the race of an applicant in its admission procedure in order to attain ethnic diversity in its student body.

*Allan Bakke on his first day of medical school at the University of California, Davis, in September 1978. The Supreme Court's ruling that the university's admission plan had excluded Bakke on the basis of race allowed for Bakke's admittance but left questions of the use of race in college admissions muddled.*

AP/WIDE WORLD PHOTOS

In 1972, Allan Bakke, a 33-year-old white male engineer, applied for admission to the medical school of the University of California at Davis and was not accepted. Bakke was one of 2,664 applicants that year for 100 places. He applied again the next year and was again rejected. This second year, minority applicants with grade point averages, Medical College Admission Test scores, and other qualifications that were lower than Bakke's were accepted under a special minority admission program. This program set aside 16 of the 100 places in the entering class for minority groups titled blacks, Chicanos, Asians, and American Indians.

Following his second rejection, in 1974, Bakke instituted a lawsuit in the Superior Court of California against the university on the grounds that his rights had been violated under the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT of the U.S. Constitution; the California Constitution; and Title VI of the Civil Rights Act of 1964 (42 U.S.C.A. § 2000d et seq.), which proscribed the exclusion of any person from a federally funded program on the basis of race.

The California lower court ruled that the school's admission program was in violation of the state and federal constitutions and Title VI,

but it would not order the university to admit Bakke to the medical school because Bakke had not shown that he would have won admission had there been no special minority program. Bakke then appealed to the California Supreme Court, which ruled that it was incumbent upon the university, not Bakke, to prove that he would not have been admitted if the special program had not been in effect. The school acknowledged that it could not satisfy the requirement, and the court ordered the university to admit Bakke. The university appealed to the U.S. Supreme Court, which granted certiorari (agreed to review the case), and the court order requiring Bakke's admission was suspended pending a decision by the High Court.

The *Bakke* case aroused intense controversy. CIVIL RIGHTS supporters feared that the Court might hold that specific policies could not be employed to remedy past discrimination. On the other side of the issue stood Bakke and his supporters, charging that Bakke's civil rights were being violated simply because of his race, which happened to be white. A great deal of weight hung over the *Bakke* case as it moved through the courts, and, with enormous publicity surrounding their decision, the Supreme Court justices were keenly aware of the case's importance.

On June 27, 1978, the Court divided sharply in its decision, presenting six separate opinions. Four justices chose to address only the statutory issue of Title VI and found for Bakke, including his admission to the medical school, because the quota in the university's admission plan had clearly excluded Bakke on the basis of his race. Four justices addressed the larger constitutional issue of the Equal Protection Clause and found for the medical school because its intent was not to exclude Bakke but only to include individuals of other races for compelling government reasons. The deciding swing vote was cast by Justice LEWIS F. POWELL JR., who found for both. Powell's contention was that the Title VI plurality was correct in that the university had violated the "plain meaning" of the CIVIL RIGHTS ACT, which proscribed discrimination based on race, and ordered Bakke be admitted to the medical school. But Powell also found that the university could use "race-conscious" factors in selecting its applicants in order to achieve the benefits of a "diverse student body."

This divided decision settled the *Bakke* case, but it left the legal issue muddled: what actions, if any, could the state take to protect minorities in the marketplace? Subsequent court decisions struggled repeatedly over this primary civil rights question.

In 2003, the AFFIRMATIVE ACTION issue returned to the Supreme Court. A group of unsuccessful white applicants to the University of Michigan's undergraduate program and law school filed a lawsuit challenging the university's admission policies. The school uses a point scale to rate applicants, with grades and academics counting for more than two-thirds of the points. However, members of "underrepresented" racial and ethnic groups receive extra points, as do children of alumni and people from underrepresented geographic areas. The applicants and the Bush administration argued that giving points for race amounted to a quota, while the university contended that race was just one factor in promoting a diverse student body. The Supreme Court, in *Gratz v. Bollinger*, 539 U.S. ___, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003), reaffirmed *Bakke*. The Court held that higher education institutions may use race as one factor in evaluating applicants but, as in *Bakke*, warned against the use of racial quotas or policies that give race too prominent a role in the selection process.

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CROSS-REFERENCES

Affirmative Action; Colleges and Universities; Equal Protection; Strict Scrutiny; *United Steelworkers v. Weber.*

## REGISTER

*To record, or enter precisely in a designated place, certain information in the public records as is mandated by statute. A book of public records.*

A register contains various types of information that is available to the public, such as births, dates, and marriages.

The term *register* is also used as a designation for the public official charged with the duty of maintaining such records.

## REGISTER OF DEEDS

*The designation, in certain jurisdictions, of the public officers who record documents that establish ownership of property, mortgages, and other instruments that relate to real property in official record books provided and maintained for such purpose.*

Registers of deeds are also known as recorders of deeds.

CROSS-REFERENCES

Recording of Land Titles.

## REGISTRAR

*The public official charged with the duty of making and maintaining public records.*

Common examples are the registrars of voters and deeds.

## REGISTRATION

*Enrollment; the process of recording entries in an official book.*

For example, the names of stockholders might be registered in the official books of a corporation. Similarly motor vehicles are ordinarily registered with the state motor vehicle department, and voters are registered so that they may participate in elections. In some jurisdictions, statutes establish systems by which land titles can be registered so that the ownership of real property can always be readily ascertained through a consultation of public records.

CROSS-REFERENCES

Registration of Land Titles.

## REGISTRATION OF LAND TITLES

*A system by which ownership of real property is established through the issuance of an official certificate indicating the name of the individual in whom such ownership is vested.*

Land titles are registered through a statutory process called the *Torrens title system,* in somewhat the same way that automobile titles are now registered in most states. Under current Torrens acts, land ownership can be readily ascertained without any need for repeated examinations of voluminous public records, and the resulting titles are generally secure and marketable.

The TORRENS TITLE SYSTEM takes its name from Sir Robert R. Torrens, a native of Ireland who later became the first premier of South Australia. It is said that in 1850 Torrens first thought of applying to land the same method of registering and transferring ownership used for ships. In 1858 the first Torrens Title Act went into effect in South Australia, largely through Torrens's efforts. Although the system is known by his name, Torrens was by no means the inventor of the statutory system for land registration now in place in the United States.

Under Torrens statutes, an individual who registers title to land is required to first file an application with the appropriate court. All those who have or claim to have any interest in the property must be given notice of the proceedings so that they have an opportunity to make their claims to the land. Anyone seeking to be the registered owner of the land must show that he or she has good title "as against the world." The person need not be in actual possession of the land, however.

When title to land is established to the satisfaction of the court, it will issue a decree to settle and declare title. The decree must be entered on the records of the court and is conclusive of the rights of the parties, such as the fact of ownership and the area and boundary lines of the land. Upon registration of the decree, a designated officer, ordinarily called the *registrar of titles,* makes and files the original certificate of title in the proper register. A duplicate of the certificate must be delivered to the registered owner. Once this procedure has been completed, the land becomes registered land. Any subsequent transfers and dealings regarding it must be made according to statute.

Torrens acts were adopted in twenty states and territories between 1895 and 1917, but only eleven states now have title registration statutes in effect. Moreover, in those eleven states, the use of the Torrens title system remains optional and is confined to certain localities wherein only a relatively small proportion of the land is registered. Among several factors that may account for the lack of widespread acceptance of a title registration system are structural defects in some of the acts that have left numerous interests unaccounted for on the title certificate and have resulted in procedural problems in filing claims. Some people in states in which the system remains optional also have cited the high cost of initial registration as being prohibitive. Finally, title insurance companies, abstract companies, and title lawyers in general have vigorously opposed the Torrens title system because

universal adoption of the system would decrease the demand for title insurance and would in effect render the need for these services obsolete.

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CROSS-REFERENCES

Recording of Land Titles.

## REGRESSIVE TAX

*A tax with a rate that decreases as the taxpayer's income increases.*

The result of a regressive tax is that the lower-income taxpayer pays a larger percentage of his or her income in taxes than does the higher-income taxpayer. The opposite of the regressive tax is the progressive tax. With progressive taxes, such as the federal INCOME TAX, the effective tax rates increase as the taxpayer's income increases. The proportionate tax rate, also referred to as a flat tax rate, remains constant as income rises. Under a proportionate tax system, higher-income individuals pay a greater amount of taxes than lower-income individuals pay, but the ratio is identical.

Consumption taxes, which are taxes on consumer goods and services, are usually regressive because individuals with lower incomes spend a larger portion of their income on these goods and services than higher-income individuals do. Some examples of these consumption taxes are the taxes on alcohol and tobacco, also referred to as "sin taxes."

Some taxes can be a combination of the different tax rates. For example, the SOCIAL SECURITY tax is proportional until the taxpayer reaches the maximum income level. However, once the taxpayer's income reaches the maximum cap, all income earned over the cap is not taxed. The result is a regressive tax because the individual earning in excess of the maximum income level is paying a lower percentage of her or his income in taxes than the lower-income individual is paying.

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CROSS-REFERENCES

Taxation.

## REGULAR

*Customary; usual; with no unexpected or unusual variations; in conformity with ordinary practice.*

An individual's regular course of business, for example, is the occupation in which that person is normally engaged to gain a livelihood.

## REGULATION

*A rule of order having the force of law, prescribed by a superior or competent authority, relating to the actions of those under the authority's control.*

Regulations are issued by various federal government departments and agencies to carry out the intent of legislation enacted by Congress. Administrative agencies, often called "the bureaucracy," perform a number of different government functions, including rule making. The rules issued by these agencies are called regulations and are designed to guide the activity of those regulated by the agency and also the activity of the agency's employees. Regulations also function to ensure uniform application of the law.

Administrative agencies began as part of the EXECUTIVE BRANCH of government and were designed to carry out the law and the president's policies. Congress, however, retains primary control over the organization of the bureaucracy, including the power to create and eliminate agencies and confirm presidential nominations for staffing the agencies. Congress has also created administrative agencies that exist outside of the executive branch and are independent of presidential control. President FRANKLIN D. ROOSEVELT and the NEW DEAL plan he implemented created many new administrative agencies. Over the years administrative agencies have become more powerful participants in the overall federal government structure as Congress and the president have delegated more legislative and executive duties to them. Administrative agencies have also become responsible for many judicial functions.

The judicial and legislative functions of administrative agencies are not exactly like those of the courts or the legislature, but they are similar. Because regulations are not the work of the legislature, they do not have the effect of law in theory; but in practice, regulations can have an important effect in determining the outcome of

cases involving regulatory activity. Much of the legislative power vested in administrative agencies comes from the fact that Congress can only go so far in enacting legislation or establishing guidelines for the agencies to follow. Language that is intrinsically vague and cannot speak for every factual situation to which it is applied, as well as political factors, dictate that the agencies have much to interpret and decide in enforcing legislation. For example, SECURITIES laws prohibit insiders from profiting against the public interest, but it is left to the applicable ADMINISTRATIVE AGENCY, the SECURITIES AND EXCHANGE COMMISSION, to define "public interest." The FOOD AND DRUG ADMINISTRATION, another administrative agency, must keep unsafe food and ineffective drug products off the market, but further administrative refinement and interpretation is necessary for the agency to determine what products are "unsafe" or "ineffective." The FEDERAL COMMUNICATIONS COMMISSION must interpret laws regulating broadcasting; the TREASURY DEPARTMENT issues regulations interpreting the INTERNAL REVENUE CODE; and the Board of Governors of the FEDERAL RESERVE System issues regulations governing the actions of Federal Reserve banks. The many other administrative agencies and departments make regulations to provide clarity and guidance in their respective areas of the law.

Administrative agencies carry out legislation in several ways, including enacting regulations to carry out what the agency believes is the legislative intent. Agencies generally formulate proposed regulations and then open up rule-making proceedings in which interested parties can testify and comment on them. The agency then issues a rule or policy that binds the agency in future cases just as statutory law does.

The ADMINISTRATIVE PROCEDURE ACT OF 1946, 5 U.S.C.A. § 551 et seq., with its subsequent amendments, was designed to make administrative agencies accountable for their rule making and other government functions. It imposed a number of procedural requirements designed to make procedures among agencies more uniform. In administrative rule-making proceedings formal hearings must be held, interested parties must be given the opportunity to comment on proposed rules, and the adopted formal rules must be published in the *Federal Register.* After being published in the *Federal Register,* the regulations are subsequently arranged by subject in the *Code of Federal Regulations.* The Administrative Procedure Act has been criticized, however, because it contains a number of exemptions that allow the agencies discretion in whether or not they strictly adhere to the guidelines established in the act. Organizations such as the AMERICAN BAR ASSOCIATION are working toward eliminating such discretion in administrative agencies.

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CROSS-REFERENCES

Administrative Agency; Administrative Law and Procedure; Code of Federal Regulations; Federal Register; Public Administrative Bodies; Quasi-Legislative.

## REHABILITATION

*The restoration of former rights, authority, or abilities.*

The process of rehabilitating a witness involves restoring the credibility of the witness following IMPEACHMENT by the opposing party. Rehabilitating a prisoner refers to preparing him or her for a productive life upon release from prison.

## REHABILITATION ACT OF 1973

See DISABILITY DISCRIMINATION.

## ♦ REHNQUIST, WILLIAM HUBBS

William Hubbs Rehnquist was appointed to the U.S. Supreme Court in 1972 and was elevated to the position of chief justice in 1986. A political and judicial conservative, Rehnquist has consistently sought to limit the power of the federal government to intervene in areas that are traditionally left to the states.

Rehnquist was born on October 1, 1924, in Milwaukee, Wisconsin. In 1943, he joined the U.S. Army Air Corps and served until 1946. He then took advantage of the GI BILL to attend college at Stanford University. After graduating in 1948 with both a bachelor's and a master's degree, Rehnquist earned a second master's degree in political science from Harvard University in 1949. He then attended Stanford University Law School, where he finished first in his 1952 graduating class.

Rehnquist then served as a law clerk for U.S. Supreme Court Justice ROBERT H. JACKSON. It was during the 1952 term that the Court first

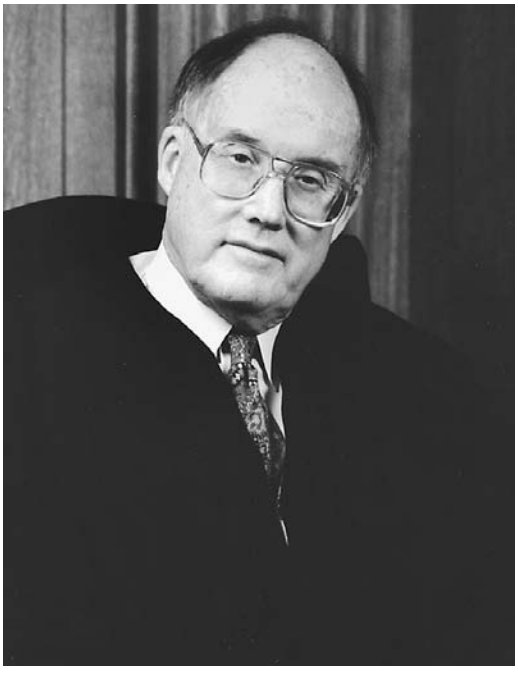

*William H. Rehnquist.* PHOTOGRAPH BY DANE PENLAND, SMITHSONIAN INSTITUTION. COLLECTION OF U.S. SUPREME COURT

heard arguments on the constitutionality of state-segregated public education. In a memorandum to Jackson that would come back to haunt him at his judicial confirmation hearings, Rehnquist argued for upholding the SEPARATE BUT EQUAL doctrine contained in PLESSY V. FERGUSON, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896).

After he left his judicial clerkship in 1953, Rehnquist relocated to Phoenix, Arizona, where he joined the state bar and entered private practice. In 1958, he served as a special state prosecutor, bringing charges against several state highway officials who were accused of FRAUD. During his years of practice, he specialized in civil litigation.

Rehnquist's path to the U.S. Supreme Court began in Arizona REPUBLICAN PARTY politics of the 1950s. Under the leadership of U.S. Senator BARRY M. GOLDWATER, the party became the dominant force in Arizona government, espousing a political view that was more rigid and doctrinaire than that of the national Republican party. Rehnquist became active in the party and made the acquaintance of RICHARD G. KLEINDIENST, an attorney who chaired the state Republican Party and who was a close adviser to Goldwater. Kleindienst served as Rehnquist's political mentor and involved him in the 1964 presidential election that Goldwater lost to President LYNDON B. JOHNSON.

In 1968, Kleindienst worked on RICHARD M. NIXON's presidential campaign. After Nixon was elected, he appointed Kleindienst to be deputy attorney general. Kleindienst in turn recommended Rehnquist for the position of assistant attorney general in charge of the Office of Legal Counsel in the U.S. JUSTICE DEPARTMENT. Attorney General JOHN N. MITCHELL was initially reluctant to hire Rehnquist, but, after interviewing him, Mitchell became convinced that Rehnquist was the right person for the job.

As head of the Office of Legal Counsel, Rehnquist supplied legal advice to all of the departments of the federal government. He also became one of the most stalwart defenders of the Nixon administration's policies. He supported PREVENTIVE DETENTION and the administration's authority to order WIRETAPPING and surveillance without a court order. He also agreed that the EXCLUSIONARY RULE in criminal cases should be abolished. This rule excludes evidence that the police have seized illegally.

In 1971, President Nixon nominated Rehnquist to the U.S. Supreme Court. Senate Democrats, concerned about Rehnquist's conservative philosophy and his actions as a member of the Nixon administration, sought to defeat the nomination. They used Rehnquist's memorandum supporting the upholding of *Plessy* as evidence that he was hostile to CIVIL RIGHTS. Despite these efforts, Rehnquist was easily confirmed.

Rehnquist joined a Court that was headed by Chief Justice WARREN E. BURGER. At the time of his appointment, the Court still had a liberal majority. Rehnquist immediately became the most conservative member of the Court. When the Court ruled in ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), that a woman had the right to an ABORTION, Rehnquist dissented. He has remained consistently opposed to abortion but has never found enough votes to overturn *Roe*.

As justices retired or died during the 1970s and early 1980s, more conservative justices were appointed to the Court. Rehnquist's views on FEDERALISM began to be adopted by his colleagues. The concept of federalism concerns the distribution of power to the states and the federal government. Until the coming of FRANKLIN D. ROOSEVELT'S NEW DEAL in the 1930s, states had much more power over regulating day-to-day life than the federal government did. The liberal WARREN COURT of the 1960s greatly

expanded the right of Congress to regulate economic and other societal activities.

By the late 1970s, Rehnquist helped convince a majority of the Court to begin to pull back from the idea that the federal government, which included the federal courts, could intrude into areas that traditionally were left to the states. In *National League of Cities v. Usery,* 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), Rehnquist held that the COMMERCE CLAUSE of the U.S. Constitution did not give Congress the power to extend federal MINIMUM WAGE and overtime standards to state and local governments.

Rehnquist wrote decisions that restricted the power of a federal court to oversee the reform of a police department (*Rizzo v. Goode,* 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 [1976]); prohibited construing nineteenth-century federal civil rights laws to allow AFFIRMATIVE ACTION (*General Building Contractors v. Pennsylvania,* 458 U.S. 375, 102 S. Ct. 3141, 73 L. Ed. 2d 835 [1982]); and prevented plaintiffs from collecting government benefits that had been wrongfully withheld by state governments (*Edelman v. Jordan,* 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 [1974]).

In cases involving CRIMINAL LAW and procedure, Rehnquist has consistently sided with law enforcement. In *Illinois v. Gates,* 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), he crafted a new rule that made it easier for police to obtain a warrant on the basis of an informant's tip. He supported the creation of a "good faith" exception to the exclusionary rule (*United States v. Leon,* 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 [1984]) and has upheld the constitutionality of pretrial detention (*United States v. Salerno,* 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 [1987]). Rehnquist has also been a consistent defender of the constitutionality of the death penalty and a consistent critic of lengthy and repetitive death penalty appeals based on the writ of HABEAS CORPUS.

In civil rights cases, Rehnquist has sought to tie affirmative action to specific discriminatory conduct against the plaintiffs, rather than to past societal wrongs. He did, however, write the majority opinion in *Meritor Savings Bank, Federal Savings Bank v. Vinson,* 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986), which applied Title VII of the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000a et seq.) to SEXUAL HARASSMENT on the job. An employer may be held liable if a "hostile work environment" is created where sexual harassment takes place.

In 2000, Rehnquist wrote the lead opinion in BOY SCOUTS OF AMERICA V. DALE, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000), where the Court held that applying a New Jersey public-accommodation law to require the Boy Scouts to admit homosexuals violated the FIRST AMENDMENT. The case had been watched closely by GAY AND LESBIAN RIGHTS advocates. Some

"JUSTICE IS TOO IMPORTANT A MATTER TO BE LEFT TO THE JUDGES, OR EVEN TO THE LAWYERS: THE AMERICAN PEOPLE MUST THINK ABOUT, DISCUSS, AND CONTRIBUTE TO THE FUTURE OF THEIR COURTS."
—WILLIAM H. REHNQUIST

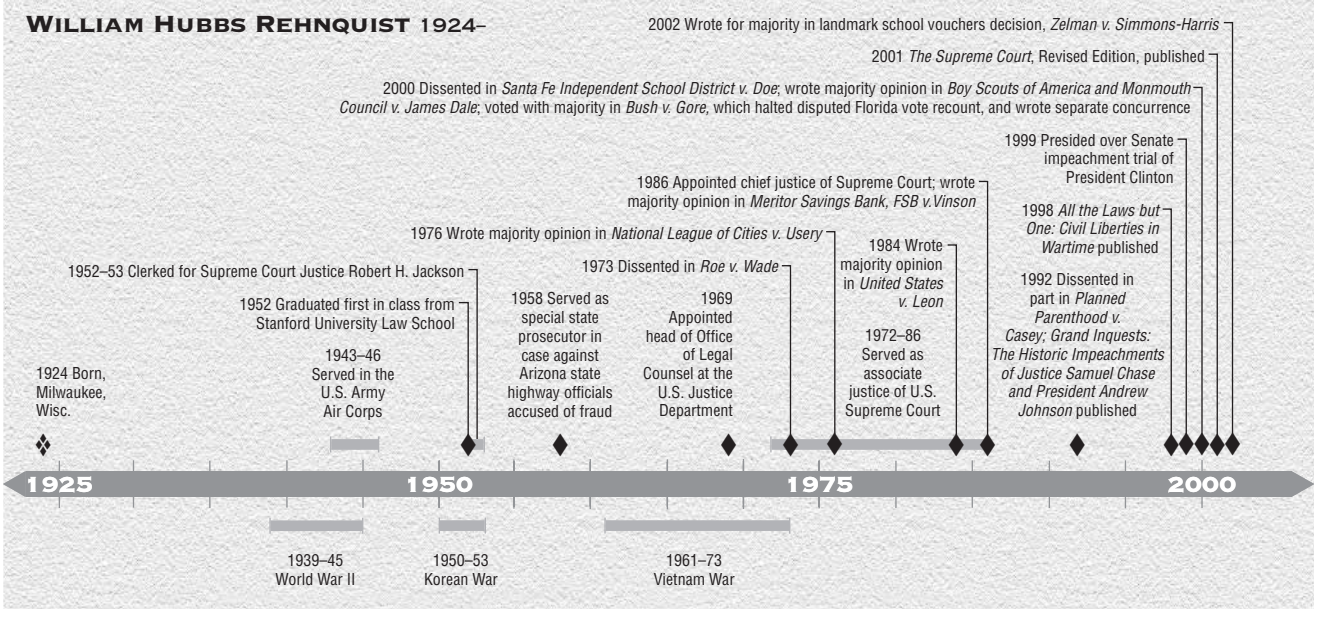

commentators suggested that Rehnquist and the majority had relied too heavily on tradition in making the ruling. However, others maintained that the decision was consistent with others in First Amendment JURISPRUDENCE.

In recognition of Rehnquist's record on the Court, President RONALD REAGAN nominated him in 1986 to succeed Chief Justice Burger. Again, there was some opposition to his nomination, but he was easily confirmed.

Although Presidents Ronald Reagan and GEORGE H. W. BUSH appointed conservatives to the Court after Rehnquist became chief justice, the Rehnquist Court has maintained a moderate course. Justices SANDRA DAY O'CONNOR, DAVID H. SOUTER, and ANTHONY M. KENNEDY, who have moderately conservative views, have resisted calls from Rehnquist and Justices ANTONIN SCALIA and CLARENCE THOMAS to overturn Court precedents, including *Roe v. Wade.*

Rehnquist presided over the Senate IMPEACHMENT trial of President BILL CLINTON during January and February 1999. He assumed the role based on Article I, Section 3 of the Constitution, which provides that the chief justice shall preside when the president of the United States is tried, but it offers no guidance as to what the chief justice's role should be. Clinton's impeachment marked the second time in U.S. history that a chief justice has presided over the impeachment trial of a president. Rehnquist shares this distinction with his predecessor, SALMON P. CHASE, who presided over the 1868 trial and subsequent acquittal of President ANDREW JOHNSON.

Rehnquist modeled the Senate proceedings after the 1868 trial. The trial little resembled a typical courtroom trial because the chief justice's authority was rigidly circumscribed. The rules mandated that senators sit mute through the trial. Only Rehnquist could ask questions upon the written request of the senators. He had the authority to decide questions of procedure and admissibility of evidence, but the Senate had the power to overturn any ruling by a simple majority vote. Rehnquist was not called upon to rule on any evidentiary issues, nor was he asked to decide what questions a witness could be asked.

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## REINSTATE

*To restore to a condition that has terminated or been lost; to reestablish.*

To reinstate a case, for example, means to restore it to the same position it had before dismissal.

## REINSURANCE

*The contract made between an insurance company and a third party to protect the insurance company from losses. The contract provides for the third party to pay for the loss sustained by the insurance company when the company makes a payment on the original contract.*

A reinsurance contract is a contract of indemnity, meaning that it becomes effective only when the insurance company has made a payment to the original policyholder. Reinsurance provides a way for the insurance company to protect itself from financial disaster and ruin by passing on the risk to other companies. Reinsurance redistributes or diversifies the risk or threat associated with the business of issuing policies by allowing the reinsured to show more assets by reducing its reserve requirements. The reinsurance industry became more popular during the late 1990s and early 2000s because natural disasters and mass TORT litigation resulted in large payouts by insurance companies. Because of the large size of the payments, some insurance companies became insolvent.

The parties to the reinsurance contract are the reinsurer, the reinsured, and the original policyholder. The reinsurer is the third party or the company issuing the reinsurance policy. Typically, reinsurers engage solely in the business of issuing reinsurance policies; however, any company that meets the requirements and is authorized to issue insurance may issue such policies. The reinsured is the insurance company that issued the first policy and is applying for reinsurance. The original policyholder or original insured is the party who purchased the original policy. When the reinsurance contract is between just the two insurance companies (the reinsured and the reinsurer), the original policyholder usually has no rights against the reinsurer.

The reinsurance policy covers the risk or liability associated with the original policy issued. The reinsurance policy must be for a specific insurable interest. The interest to be insured must exist at the time the reinsurance policy is issued; it cannot be created later. All or part of the liability of the original policy can be covered by the reinsurance, but nothing greater. The reinsurance policy cannot cover a period longer than the original policy. Generally, because the reinsurance is not a promise to pay the debt of another but to indemnify a potential liability, the STATUTE OF FRAUDS does not require the agreement to be in writing. Most often in practice, however, reinsurance policies are written to avoid problems later.

The two basic types of reinsurance are facultative reinsurance and treaty reinsurance. Facultative reinsurance is issued on an individual analysis of the situation and facts of the underlying policy. It may cover all or part of the underlying policy. By deciding coverage case by case, the reinsurer can determine if it wants the risk associated with that particular policy. Facultative reinsurance is used by the reinsured to reduce the chance of loss or risk associated with a certain policy.

Treaty reinsurance, on the other hand, is written to cover a particular class of policies issued by the reinsured. Examples of classes covered by treaty reinsurance are all property insurance policies or all casualty insurance policies written by the reinsured. Treaty reinsurance automatically passes the risk to the reinsurer for all policies that are covered by the treaty, not just one particular policy. Treaty policies are more general than facultative policies because the reinsurance decision is based on general potential liability rather than on a specific enumerated risk.

In addition to the two types of reinsurance issued, there are two ways that coverage can be allotted between the parties: either proportionally or non-proportionally. In the case of proportional reinsurance, the reinsured obtains coverage for only a portion or percentage of the loss or risk from the reinsurer. The proportion of coverage is typically based on the percentage of premiums paid to the reinsurer. For example, if the reinsured pays 40 percent of the premiums to the reinsurer, then the reinsured recovers 40 percent of its losses when it pays the original policyholder according to the original policy terms. The reinsured can only recover a portion of its total loss, not the entire amount. The amount actually paid by the reinsurer is not figured into the reinsurance contract, only the percentage of loss the policy will cover.

In contrast, non-proportional reinsurance covers a set amount of loss. A base or deductible amount is set in the reinsurance policy, and any loss exceeding that amount is paid by the reinsurer. The amount being paid by the reinsurer has no relationship to the premiums received. The reinsured, in effect, is reimbursed for all payments made under the original policy that exceed the deductible amount. The deductible amount can be figured either by each event or in the aggregate. Either type of coverage can be used in either facultative or treaty insurance contracts. The terms of the policy depend on the situation and the relationship the reinsured and the reinsurer have had in the past. Reinsurance policy terms can be made to be flexible for the appropriate facts at the time.

Although the terms of the policies can be flexible, several doctrines help to define the nature of the reinsurer and reinsured relationship. These doctrines are the duty of utmost GOOD FAITH and the doctrine of "follow the fortunes." The duty of utmost good faith has several facets, including the requirement that both parties to the reinsurance contract deal with each other with candor and honesty. The duty assumes that both parties are sophisticated and knowledgeable in the insurance industry. As a result, they should be aware of what is relevant and necessary for the other party to know. The reinsured must follow the duty by disclosing all material facts to the reinsurer that relate to or affect the original policy and its calculated risk. The reinsured must essentially put the reinsurer in the same position as it would be in when deciding about the risks and the possibility of coverage on the original policy.

In addition, the duty requires that the reinsured act with honesty in negotiating any settlement with the original policyholder. If the settlement is not handled by following the appropriate business procedures, the reinsurer may not be bound by its terms and then does not have to pay under the policy coverage.

Lastly, the duty of utmost good faith requires the reinsured to provide adequate notice of any claim or potential claim to the reinsurer. For notice to be adequate, it should be given as soon as the reinsured becomes aware of a potential claim. To be aware, the reinsured must investigate with diligence to discover these

possible claims. Notice is required to make the reinsured aware of the possible need for available funds in case a claim is filed. Notice also allows the reinsured to participate, if desired, in the defense of the underlying claim. Practically, reinsurers may also use the notice of potential claims to determine renewal of, or change in, premiums under the reinsurance contract. The duty of utmost good faith that is part of reinsurance policies requires the reinsured and reinsurer to deal honestly with each.

Also implicit to reinsurance policies is the follow-the-fortunes doctrine. "Follow the fortunes" means the reinsurer should follow along with the reinsured's payment to the original policyholder. Provided the reinsured makes a good faith payment that reasonably falls within the terms of the original policy to the policyholder, the reinsurer is then required to make payment according to the terms of the reinsurance policy. The reinsurer should make the payment even if payment is not specifically mandated under the terms of the policy but is arguably within the meaning of its terms. The doctrine is meant to encourage coverage by reinsurers and discourage unnecessary litigation by the parties over interpretation of the policy.

The follow-the-fortunes doctrine does have limits to protect the reinsurer from excessive payments. The reinsurer is not obligated to cover payments made by the reinsured that are clearly outside of the policy language. Also, the reinsurer is not obligated to follow the business fortune of the reinsured, only the insurance-related fortune of the company. The reinsurer need only indemnify for the type of loss intended by the policy, not losses due to uncollectible premiums. Losses clearly related to the business decision and not the policy are not within the scope of the doctrine. The follow-the-fortunes doctrine implies a duty by the reinsurer to indemnify reasonable payments made by the reinsured under the underlying insurance policy.

Once the policy terms and the parties' relationship are defined, several defenses are available to the parties to avoid liability. Defenses that may be available include normal contract defenses, inadequate notice and failure to disclose, or MISREPRESENTATION. Usually any defense available to either party to a contract would be available to either the reinsurer or the reinsured. Those defenses can include impossibility of performance, an act outside the parties' authority, actions by a party that are inconsistent with the policy, actions by a party that unreasonably increase the risk, or misconduct by the parties. Any defense that would be an option for a party under the original insurance policy is available for the parties to the reinsurance policy.

The defense of inadequate notice is available to the reinsurer. If the reinsured has violated its duty to give prompt and reasonable notice to the reinsurer, the reinsurer may be able to reduce or refuse payment under the policy. Because of the relationship between the parties, the reinsured is required to comply fully with all the terms of the policy or the reinsurer is not necessarily obligated. However, the reinsurer must often show that it has been prejudiced or hurt by the lack of notice in order to avoid liability on the policy.

The most common defense available to the parties is the failure to disclose (also referred to as FRAUD, misrepresentation, or concealment). This defense is tied heavily to the duty of utmost good faith because both deal with the disclosure of material facts. For the reinsurer to assert the defense of failure to disclose, the reinsured must have concealed some relevant or important information. Relevant information would include facts such as a claim previously filed under the original policy or an unusually high risk related to the original policy. The failure to disclose need not be an intentional statement known to be false; it could be the reinsured's failure to investigate and determine the truth of a fact. When deciding if a fact or information is material or relevant, the courts ask if the misrepresented or withheld information, if disclosed, would have changed the reinsurer's decision to issue the policy. The false statement alone is not enough to avoid liability; the reinsurer must have acted upon that misrepresentation in such a way that it was prejudiced. If the reinsurer's decision or action would have been different regarding the risk, it may be relieved of liability.

Generally, the original policyholder has no rights against the reinsurer. Because the original policyholder has no contract with the reinsurer, they have no obligations to each other. This arrangement can be altered by inserting language into the reinsurance policy allowing the original policyholder to obtain payment directly from the reinsurer. Such language often is effective only when the reinsured becomes insolvent or unable to pay. These clauses are not often

used because a reinsured can view such clauses as a lack of confidence in its ability to pay. The clause may be used in the case of a reassignment or sale of the policy to another insurance company to protect the original insured.

Without specific language in the policy, the original policyholder has few rights with the reinsured. If the reinsured becomes overly active in the claim process and defense, it could open itself to a direct claim. The original insured can bring an action against the reinsurer if the reinsurance policy requires the reinsurer to pay any claim directly to the original policyholder. The original policyholder is considered a third-party beneficiary and can sue either the reinsured or the reinsurer. The recovery obtained by the original policyholder cannot be more than the total loss.

FURTHER READINGS

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CROSS-REFERENCES

Contracts; Insurance; Liability.

## REJOINDER

*The answer made by a defendant in the second stage of* **COMMON-LAW PLEADING** *that rebuts or denies the assertions made in the plaintiff's replication.*

The rejoinder allows a defendant to present a more responsive and specific statement challenging the allegations made against him or her by the plaintiff.

## RELATION

*Kin; relative. The connection of two individuals, or their situation with respect to each other, who are associated, either by law, agreement, or kinship in a social status or union for purposes of domestic life, such as* **PARENT AND CHILD** *or* **HUSBAND AND WIFE.**

The doctrine of *relation* is the principle by which an act performed at one time is deemed, through a legal fiction, to have been performed at a prior time. For example, in the conveyance of real property, the final proceeding that completes the transfer of property is considered, for certain purposes, to have become effective by relation as of the day when the first proceeding took place. Relation, in essence, is the legal term for retroactive effect.

## RELATOR

*The individual in whose name a legal action is brought by a state; the individual who relates the facts on which an action is based.*

The relator is the individual upon whose complaint certain writs are issued. The relator is the party of interest in a proceeding, who is allowed to institute such proceeding in the name of the people, or in the name of the attorney general when such official has the sole right to sue. For example, if A was the relator and B was the defendant, the citation of the case would read, *State ex rel. A v. B.*

## RELEASE

*A contractual agreement by which one individual assents to relinquish a claim or right under the law to another individual against whom such claim or right is enforceable.*

The right or claim given up in a release ordinarily involves contracts or **TORTS.** A *general release* encompasses all claims that are in existence between the parties and are within their contemplation when the release is executed. A *specific release* is generally limited to the particular claims specified therein.

No particular form or language is required for a release, provided the contract is complete and clearly indicates the releasor's intention. In the absence of a specific statutory provision, releases need not be in writing.

In order for it to take effect, a release must be supported by adequate consideration. Provided something of value is received, the consideration will be deemed adequate. The consideration can take various forms—such as payment to an employee for time lost due to an injury, in exchange for a release of the employee's damage claim; or repossession of a particular item in exchange for the release or discharge of a debt.

*A sample release*

**Release**

**RELEASE**

This Release executed on the _____ day of _____, 20_____ by _____ (Releasor)

and between _____ (Releasee).

For good and valuable consideration, the receipt of which is hereby acknowledged, releasor voluntarily and knowingly executes this release with the express intention of effecting the extinguishment of obligations created by or arising out of:

Releasor, with the intention of binding itself, its spouse, heirs, legal representatives, and assigns, expressly releases and discharges Releasee and its heirs and legal representatives from all claims, demands, actions, judgments, and executions that Releasor ever had, or now has, or may have, known or unknown, against Releasee or its heirs or legal representatives created by or arising out of said claim.

In witness whereof, Releasor has executed this release on the day and year first above written.

_____

Signature

STATE OF )

COUNTY OF )

Subscribed and sworn before me on this the _____ day of _____ , 20_____.

Witness my hand and seal.

_____

My commission expires:

Notary public

## Validity

Since it is a contract, a release is subject to the same validity requirements as a contract. A voluntary release that is obtained in exchange for valuable consideration from an individual who is capable of totally understanding its legal effect is valid. An individual who signs a release has the obligation to read its contents prior to executing it; the person cannot have the release set aside because he or she has not become familiar with its contents. A release is not void merely because the bargain was unwise.

In situations where a release has been executed as a result of a mutual mistake that significantly affects the parties' rights, it can be set aside. In order to ascertain whether a release was executed under mutual mistake, all of the circumstances regarding the signing of the release must be taken into consideration, including the sum paid for release and whether the issue of liability was in dispute at the time the settlement was made.

An innocent MISREPRESENTATION that is relied upon by the releasor justifies setting aside

a release induced by it. For example, by relying on a medical diagnosis for an injury sustained, an individual might sign a release in exchange for a particular sum of money. If, subsequently, the individual discovers that the injury is more serious than was indicated by the initial diagnosis, the release can be set aside, since the claims were released based on misrepresentation.

Fraudulent representations made by the releasee and relied on by the individual who gives up the claim for injury will also invalidate a release.

### Torts

Under the COMMON LAW, when an individual who had been injured by the wrongful acts of two or more persons acting in concert—known as joint tortfeasors—executed a release to one of the defendants, the releasor was regarded as having relinquished the claim against all the defendants, unless rights against them were clearly and specifically reserved in the release.

This rule proved to be unfair, however, because it forced the injured party to give up an entire claim against all tortfeasors without necessarily being totally compensated. Few jurisdictions still apply this rule. Most states currently permit a plaintiff to continue an action against the remaining joint tortfeasors after one of them has been released from liability unless the plaintiff has made an intentional surrender of the claim or has been totally compensated. An agreement of this type is called a COVENANT not to sue—the plaintiff does not give up the lawsuit but agrees not to enforce the claim against a particular joint tortfeasor although the others are still liable.

## RELEASE TIME PROGRAM

*The name of the arrangement by which local public school boards permit students to be dismissed from classes prior to the completion of the regular school day for purposes of religious instruction.*

The FIRST AMENDMENT to the Constitution guarantees freedom of religion in both belief and practice under the Free Exercise Clause but prohibits the government from aiding and recognizing any religion under the Establishment Clause. Such constitutional mandates are binding upon the states through the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT. The state must remain neutral in its treatment of religion; at the same time, it must refrain from infringing upon a person's right to practice his or her faith. Since their creation in 1914 in Gary, Indiana, release time programs have provided a means by which students who otherwise would be deprived of an opportunity to receive religious instruction can learn about their religion. However, such programs have come under judicial scrutiny because of the claim that the involvement of public school boards in religious concerns violates the Establishment Clause.

*Vashti McCollum and her son, Terry. McCollum was successful in her 1948 challenge of an Illinois public school release time program, which the Supreme Court found unconstitutional.*
AP/WIDE WORLD PHOTOS

In the 1948 case of *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649, a release time program provided by the Champaign, Illinois, public schools was alleged to be unconstitutional. The schools offered classroom space once per week for one period of 30 to 45 minutes during the school day to private teachers to instruct interested students in religion. The students who were "released" for religious training had to present signed parental-request forms in order to attend such courses. All other students were sent to

other parts of the school building to finish the school day while this religious instruction took place. Both the "release time" students and the other students had to satisfy attendance requirements in order to comply with compulsory education laws of the state. A taxpayer named Vashti McCollum, the parent of a student, sought MANDAMUS to compel the school board to adopt and enforce regulations prohibiting all religious instruction in public schools. The state trial and appellate courts denied the writ, and the plaintiff appealed to the U.S. Supreme Court. The Court ruled that the involvement of the public school in the program of religious education was so great that it violated the First Amendment. The Court based its reasoning on the facts that public classrooms financed by taxpayers were being used for religious purposes and that, furthermore, the public system of compulsory education was being used to promote religion.

Another challenge was brought concerning a release time program in the New York City public schools in the 1952 case of *Zorach v. Clauson,* 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954. In that case, students participated in the program only upon the written request of their parents. Such pupils were "released," or permitted to leave school, for one hour of regular class time once per week, to attend religious instruction at sectarian centers. All other students remained in school. Church officials were responsible for making weekly attendance reports to the schools. The plaintiff, Tessim Zorach, a taxpayer and the parent of a student, brought an action in state court to review the action of the school board in permitting such a program. The case was brought on appeal to the U.S. Supreme Court by the plaintiff, who had been unsuccessful at the state court level. The high court affirmed the decision of the state courts, finding that the program did not violate the Constitution. It distinguished the facts of this case from those in *McCollum.* Here, the only thing that was provided by the school was an accommodation of schedules, in order to enable students to participate in a program of religious instruction. To deny the children the time to attend such instruction off of the school premises would implicitly convey a government attitude of hostility toward religion that might be violative of the constitutional guarantee of freedom of religion.

School boards have discretion in the creation of release time programs for their students, subject to the safeguards of religious freedom. Although some cooperation between public schools and sectarian officials is essential to the development of mutually agreeable arrangements, those programs that involve an excessive and complex interaction of church and state will not pass constitutional muster.

CROSS-REFERENCES

Schools and School Districts.

## RELEVANCY

*The tendency of a fact offered as evidence in a lawsuit to prove or disprove the truth of a point in issue.*

A fact offered as evidence must bear a logical relationship to a point in issue for the court to permit its admission as evidence. In addition to such relevancy, evidence must also be material; it must strongly establish the truth or falsity of a point in issue if it is to be used as proof of a particular issue.

## RELIEF

*Financial assistance provided to the indigent by the government. The redress, or benefit, given by a court to an individual who brings a legal action.*

The relief sought in a lawsuit might, for example, be the return of property wrongfully taken by another, compensation for an injury in the form of damages, or enforcement of a contract.

## RELIGION

The FIRST AMENDMENT to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first part of this provision is known as the Establishment Clause, and the second part is known as the Free Exercise Clause. Although the First Amendment only refers to Congress, the U.S. Supreme Court has held that the FOURTEENTH AMENDMENT makes the Free Exercise and Establishment Clauses also binding on states (*Cantwell v. Connecticut,* 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 [1940], and *Everson v. Board of Education,* 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 [1947], respectively). Since that incorporation, an extensive body of law has developed in the United States around both the Establishment Clause and the Free Exercise Clause.

To determine whether an action of the federal or state government infringes upon a person's right to freedom of religion, the court must decide what qualifies as religion or religious activities for purposes of the First Amendment. The Supreme Court has interpreted religion to mean a sincere and meaningful belief that occupies in the life of its possessor a place parallel to the place held by God in the lives of other persons. The religion or religious concept need not include belief in the existence of God or a supreme being to be within the scope of the First Amendment.

As the case of *United States v. Ballard,* 322 U.S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1944), demonstrates, the Supreme Court must look to the sincerity of a person's beliefs to help decide if those beliefs constitute a religion that deserves constitutional protection. The *Ballard* case involved the conviction of organizers of the I Am movement on grounds that they defrauded people by falsely representing that their members had supernatural powers to heal people with incurable illnesses. The Supreme Court held that the jury, in determining the line between the free exercise of religion and the punishable offense of obtaining property under FALSE PRETENSES, should not decide whether the claims of the I Am members were actually true, only whether the members honestly believed them to be true, thus qualifying the group as a religion under the Supreme Court's broad definition.

In addition, a belief does not need to be stated in traditional terms to fall within First Amendment protection. For example, Scientology—a system of beliefs that a human being is essentially a free and immortal spirit who merely inhabits a body—does not propound the existence of a supreme being, but it qualifies as a religion under the broad definition propounded by the Supreme Court. The Supreme Court has deliberately avoided establishing an exact or a narrow definition of religion because freedom of religion is a dynamic guarantee that was written in a manner to ensure flexibility and responsiveness to the passage of time and the development of the United States. Thus, religion is not limited to traditional denominations.

The First Amendment guarantee of freedom of religion has deeply rooted historical significance. Many of the colonists who founded the United States came to this continent to escape religious persecution and government oppression. This country's founders advocated religious freedom and sought to prevent any one religion or group of religious organizations from dominating the government or imposing its will or beliefs on society as a whole. The revolutionary philosophy encompassed the principle that the interests of society are best served if individuals are free to form their own opinions and beliefs.

**Designated Denomination of Americans in 1999**

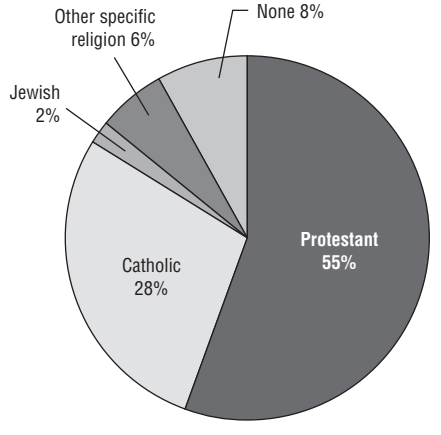


SOURCE: U.S. Census Bureau, *Statistcal Abstract of the United States*, 2000.

When the colonies and states were first established, however, most declared a particular religion to be the religion of that region. But, by the end of the American Revolution, most state-supported churches had been disestablished, with the exceptions of the state churches of Connecticut and Massachusetts, which were disestablished in 1818 and 1833, respectively. Still, religion was undoubtedly an important element in the lives of the American colonists, and U.S. culture remains greatly influenced by religion.

### Establishment Clause

The Establishment Clause prohibits the government from interfering with individual religious beliefs. The government cannot enact laws aiding any religion or establishing an official state religion. The courts have interpreted the Establishment Clause to accomplish the separation of church and state on both the national and state levels of government.

# Jesus, Meet Santa

Christmas and the **FIRST AMENDMENT** have had a rocky relationship. A decades-long battle over the place of worship and tradition in public life has erupted nearly every year when local governments sponsor holiday displays on public property. Lawsuits against towns and cities often, but not always, end with the courts ordering the removal of religious symbols whose government sponsorship violates the First Amendment. Since the 1980s, however, the outcome of such cases has become less predictable as deep divisions on the Supreme Court have resulted in new precedents that take a more nuanced view of the law. In such cases, context determines everything. Placing a nativity scene with the infant Jesus outside a town hall may be unconstitutional, for example, but the display may be acceptable if Santa Claus stands nearby.

On the question of religious displays, the First Amendment has two broad answers depending on the sponsor. Any private citizen can put up a nativity scene on private property at Christmas time: citizens and churches commonly exercise their First Amendment right to **FREEDOM OF SPEECH** to do so. But when a government sets up a similar display on public property, a different aspect of the amendment comes into play. Governments do not enjoy freedom of speech, but, instead, are controlled by the second half of the First Amendment—the Establishment Clause, which forbids any official establishment of religion. All lawsuits demanding that a crèche, cross, menorah, or other religious symbol be removed from public property allege that the government that put it there has violated the Establishment Clause.

The Supreme Court has reviewed challenges to government sponsored displays of religious symbols under the *Lemon* test. Based on criteria from several earlier decisions and named after the case *Lemon v. Kurtzman,* 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1973), the test recognizes that government must accommodate religion but forbids it to support religion. To survive constitutional review, a display must meet all three requirements or "prongs" of the test: it must have a secular (nonreligious) purpose, it must have the primary effect of neither advancing nor inhibiting religion, and it must avoid excessive entanglement between government and religion. Failing any of the three parts of the test constitutes a violation of the Establishment Clause.

Starting in the 1980s, the test began to divide the Supreme Court. Conservative justices objected because it blocked what they saw as a valid acknowledgment of the role of religion in public life; opposing them were justices who believed in maintaining a firm line between government and religion. In significant cases concerning holiday displays, the Court continued to use the *Lemon* test but with new emphasis on the question of whether the display has the effect of advancing or endorsing a particular religion.

This shift in emphasis first emerged in 1984 in a case involving a Christmas display owned and erected by the City of Pawtucket, Rhode Island, in a private park. The display included both a life-sized nativity scene with the infant Jesus, Mary, and Joseph and secular symbols such as Santa's house, a Christmas tree, striped poles, animals, and lights. Pawtucket residents successfully sued for removal of the nativity scene in federal district court, where it was found to have failed all three prongs of the *Lemon* test (*Donnelly v. Lynch,* 525 F. Supp. 1150 [D.R.I. 1981]). The decision was upheld on appeal, but, surprisingly, in *Lynch v. Donnelly,* 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984), the Supreme Court narrowly reversed in a 5–4 vote and found the entire display constitutional.

The authors of the First Amendment drafted the Establishment Clause to address the problem of government sponsorship and support of religious activity. The Supreme Court has defined the meaning of the Establishment Clause in cases dealing with public financial assistance to church-related institutions, primarily parochial schools, and religious practices in the public schools. The Court has developed a three-pronged test to determine whether a statute violates the Establishment Clause. According to that test, a statute is valid as long as it has a secular purpose; its primary effect neither advances nor inhibits religion; and it is not excessively entangled with religion. Because this three-pronged test was established in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), it has come to be known as the *Lemon* test. Although the Supreme Court adhered to the *Lemon* test for several decades, since the 1990s, it has been slowly moving away from that test without having expressly rejected it.

The Court has stated that the Establishment Clause means that neither a state nor the federal government can organize a church. The government cannot enact legislation that aids one religion, aids all religions, or prefers one religion over another. It cannot force or influence a person to participate in, or avoid, religion or force a person to profess a particular religious belief. No

The majority in *Lynch* stressed historical context, emphasizing that the crèche belonged to a tradition "acknowledged in the Western World for 20 centuries, and in this country by the people, by the **EXECUTIVE BRANCH**, by the Congress, and the courts for two centuries." The display, ruled the Court, passed each prong of the *Lemon* test. First, the city had a secular purpose in celebrating a national holiday by using religious symbols that "depicted the historical origins" of the holiday. Second, the display did not primarily benefit religion. Third, no excessive entanglement between government and religion existed. Perhaps most significantly, the Court saw the crèche as a "passive symbol": although it derived from religion, over time it had come to represent a secular message of celebration.

*Lynch* laid bare the deep divisions on the Court. By emphasizing context, the majority appeared to suggest that the ruling was limited to circumstances similar to those in the case at hand: religious symbols could be acceptable in a holiday display if used with secular symbols. The majority did not enunciate any broad new protections for governments eager to sponsor crèches. Nonetheless, the opinion did not satisfy the dissenters, who sharply criticized the majority for failing to vigorously apply the *Lemon* test. They noted that the city could easily have celebrated the holiday without using religious symbols, and they saw the crèche as nothing less than government endorsement of religion.

The emphasis on context became even more pronounced in a 1989 case, *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472. In *Allegheny,* a Pennsylvania county appealed a lower court ruling that had banned its two separate holiday displays: a crèche situated next to poinsettia plants inside the county courthouse, and an eighteen-foot menorah (a commemorative candelabrum in the Jewish faith) standing next to a Christmas tree and a sign outside a city-county office building. Each religious symbol was owned by a religious group—the crèche by the Catholic Holy Name Society and the menorah by Chabad, a Jewish organization. Viewing the displays in context, the Court permitted one but not the other, and its reasoning turned on subtle distinctions.

The Court deemed the crèche an unconstitutional endorsement of religion for two reasons. First, the presence of a few flowers around the crèche did not mediate its religious symbolism in the way that the secular symbols had done for the crèche in *Lynch.* Second, the prominent location doomed the display. By choosing the courthouse, a vital center of government, the Court said the county has sent "an unmistakable message" that it endorsed Christianity.

But the menorah passed constitutional review. Like the crèche in *Lynch,* its religious significance was transformed by the presence of secular symbols: the forty-five-foot Christmas tree and a sign from the city's mayor that read, "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are keepers of the flame of liberty and our legacy of liberty." Even so, members of the majority disagreed on precisely what message was sent by the display. Justice **HARRY A. BLACKMUN** read it as a secular message of holiday celebration. In a more complicated view, Justice **SANDRA DAY O'CONNOR** said it "acknowledg[ed] the cultural diversity of our country and convey[ed] tolerance of different choice in matters of religious belief or non-belief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens." Whatever the exact message, the majority agreed that it did not endorse religion.

Since the 1980s the thrust of Supreme Court doctrine has been to allow publicly sponsored holiday displays to include religious symbols. This expansive view of the First Amendment grew out of the Court's acknowledgment that local governments can accommodate civic tradition. Religious symbols on their own are unconstitutional. A display including such symbols may pass review, however, if it features secular symbols as well. Context is the determinant: to avoid violating the Establishment Clause, a crèche or menorah may need a boost from Santa Claus.

tax in any amount can be levied to support any religious activities or organizations. Neither a state nor the federal government can participate, whether openly or secretly, in the affairs of any religious groups.

Federal and state governments have accepted and implemented the doctrine of the separation of church and state by minimizing contact with religious institutions. Although the government cannot aid religions, it can acknowledge their role as a stabilizing force in society. For example, religious institutions, along with other charitable or nonprofit organizations, have traditionally been given tax exemptions. This practice, even when applied to religious organizations, has been deemed constitutional because the legislative aim of a property tax exemption is not to advance religion but to ensure that the activities of groups that enhance the moral and mental attitudes of the community will not be inhibited by taxation. The organizations lose the tax exemption if they undertake activities that do not serve the beneficial interests of society. Thus, in 1983, the Supreme Court decided in *Bob Jones University v. United States,* 461 U.S. 574, 103 S. Ct. 2017, 76 L. Ed. 2d 157, that nonprofit private schools that discriminated against their students or prospective students on the basis of race could not claim tax-exempt status as a charitable organization for the purposes of federal tax laws.

# Agostini v. Felton

In June 1997 the U.S. Supreme Court rolled back restrictions that it had imposed twelve years earlier on federal aid to religious schools. In a 5–4 decision in *Agostini v. Felton,* 117 S. Ct. 1997 (1997), the Court ruled that public school teachers can teach remedial education classes to disadvantaged students on the premises of parochial schools—a dramatic reversal of the Court's earlier hard line.

Federal law provides funds for such services to all children of low-income families under title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C.A. § 6301 et seq.). But in 1985 the Court barred public school instructors from teaching title I classes on parochial school premises. In *Aguilar v. Felton* (473 U.S. 402, 105 S. Ct. 3232, 87 L. Ed. 2d 290), the majority ruled that the mere presence of public employees at these schools had the effect of unconstitutionally advancing religion. To comply with the order, New York parked vans outside of parochial school property to deliver the services, a system that cost taxpayers $100 million between 1985 and 1997.

In a 1995 challenge, New York City argued that intervening cases had invalidated the Supreme Court's earlier ruling. Upon accepting the case on appeal in 1997, the Court agreed. In her majority opinion, Justice **SANDRA DAY O'CONNOR** held that *Aguilar* had been overruled by two more recent cases based on the Establishment Clause of the U.S. Constitution, *Witters v. Washington Department of Services for the Blind,* 474 U.S. 481, 106 S. Ct. 748, 88 L. Ed. 2d 846 (1986), and *Zobrest v. Catalina Foothills School District,* 509 U.S. 1, 113 S. Ct. 2462, 125 L. Ed. 2d (1993). O'Connor said that the two cases—permitting a state tuition grant to a blind person who attended a Christian college, and allowing a state-employed sign language interpreter to accompany a deaf student to a Catholic school, respectively—made it clear that the premises in *Aguilar* were no longer valid.

Although limited specifically to title I programs, the decision added fuel to another long-standing controversy. Proponents and opponents of school vouchers—a system under which parents would be able to allocate their tax dollars to their children's private school education—disputed whether the case indicated that the Court was moving toward embracing the voucher idea.

It is also believed that the elimination of such tax exemptions would lead the government into excessive entanglements with religious institutions. The exemption, therefore, is believed to create only a minimal and remote involvement between church and state—less than would result from taxation. The restricted fiscal relationship, therefore, enhances the desired separation.

**Religion and Education** The many situations in which religion and education overlap are a source of great controversy. In the early nineteenth century, the vast majority of Americans were Protestant, and Protestant-based religious exercises were common in the public schools. Legal challenges to these practices began in the state courts when a substantial number of Roman Catholics arrived in the United States. Until 1962 when the U.S. Supreme Court began to directly address some of these issues, most states upheld the constitutionality of prayer and Bible reading in the public schools.

In the 1962 case of **ENGEL V. VITALE**, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601, the Supreme Court struck down as unconstitutional a prayer that was a recommended part of the public school curriculum in the state of New York. The prayer had been approved by Protestant, Catholic, and Jewish leaders in the state. Although the prayer was nondenominational and student participation in it was strictly voluntary, it was struck down as violative of the Establishment Clause.

In 1963, the Supreme Court heard the related issues of whether voluntary Bible readings or recitation of the Lord's Prayer were constitutionally appropriate exercises in the public schools (**ABINGTON SCHOOL DISTRICT V. SCHEMPP**, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed.

2d 844). It was in these cases that the Supreme Court first formulated the three-pronged test for constitutionality. In applying the new test, the Court concluded that the exercises did not pass the first prong of the test: they were not secular in nature, but religious, and thus they violated the Establishment Clause because they violated state neutrality requirements.

Although students in public schools are not permitted to recite prayers, the practice of a state legislature opening its sessions with a nondenominational prayer recited by a chaplain receiving public funds has withstood constitutional challenge. In *Marsh v. Chambers,* 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983), the Supreme Court ruled that such a practice did not violate the Establishment Clause. In making its decision, the Court noted that this was a customary practice and that the proponents of the BILL OF RIGHTS also approved of the government appointment of paid chaplains.

The Supreme Court has also held that a religious invocation, instituted by school officials, at a public school graduation violates the Establishment Clause (LEE V. WEISMAN, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 [1992]). Subsequently, the Court made clear that even indirect school support of a prayer given by students violates the First Amendment. In *Santa Fe Independent School District v. Doe* , 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000), the Court held that a Texas public school district could not let its students lead prayers over the public address system before its high school football. The school district's sponsorship of the public prayers by elected student representatives was unconstitutional because the schools could not coerce anyone to support or participate in religion.

In 1980, the Supreme Court overturned a Kentucky statute requiring the posting of the Ten Commandments, copies of which were purchased with private contributions, in every public school classroom (*Stone v. Graham,* 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199). Although the state argued that the postings served a secular purpose, the Court held that they were plainly religious. Four of the Supreme Court's nine justices dissented from the Court's opinion and were prepared to conclude that the postings were proper based on their secular purpose.

Because the Establishment Clause calls for government neutrality in matters involving religion, the government need not be hostile or unfriendly toward religions because such an approach would favor those who do not believe in religion over those who do. In addition, if the government denies religious speakers the ability to speak or punishes them for their speech, it violates the First Amendment's right to FREEDOM OF SPEECH. The Supreme Court held in 1981 that it was unconstitutional for a state university to prohibit a religious group from using its facilities when the facilities were open for use by organizations of all other kinds (*Widmar v. Vincent,* 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440). The principles established in *Widmar* were unanimously reaffirmed by the Supreme Court in *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). In 1995, the Supreme Court held that a state university violates the Free Speech Clause when it refuses to pay for a religious organization's publication under a program in which it pays for other student organization publications (*Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700).

Facing another education and religion issue, the Supreme Court declared in *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948), that public school buildings could not be used for a program that allowed pupils to leave classes early to receive religious instruction. The Court found that this program violated the Establishment Clause because the tax-supported public school buildings were being used for the teaching of religious doctrines, which constituted direct government assistance to religion.

However, the Court held that a release-time program that took place outside the public school buildings was constitutional because it did not involved religious instruction in public school classrooms or the expenditure of public funds (*Zorach v. Clauson,* 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 [1952]). All costs in that case were paid by the religious organization conducting the program.

The U.S. Supreme Court has also held that states may not restrict the teaching of ideas on the grounds that they conflict with religious teachings when those ideas are part of normal classroom subjects. In *Epperson v. Arkansas,* 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968), the Court struck down a state statute that forbade the teaching of evolutionary theory in public schools. The Court held that the statute violated

the Establishment Clause because its purpose was to protect religious theories of creationism from inconsistent secular theories.

In *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987), the Supreme Court struck down a Louisiana "Creationism Act" which prevented any teaching of evolution in public schools unless the course was also accompanied by the teaching of biblical creationism. In his majority opinion, Justice WILLIAM BRENNAN wrote that the *Lemon* test had to be used to judge the constitutionality of the Creationism Act. The state contended that the law was simply designed to promote ACADEMIC FREEDOM by ensuring that students would hear about more than one theory on the origins of life. However, the Court noted that teachers were permitted to present more than one such theory before the law had been passed. The actual purpose of the law, then, had to be to make sure that creationism was taught if anything at all was taught. Brennan ruled that the act did not have a secular purpose and that it did not advance academic freedom. To the contrary, it restricted the abilities of teachers to teach what they deemed appropriate. Brennan also pointed out that Louisiana provided instructional packets to assist in the teaching of creationism but did not provide similar materials for the teaching of evolution. This demonstrated an interest in promoting creationism and religion.

In a 1993 case, the Supreme Court held that the Establishment Clause did not prevent a public school from providing a sign language interpreter for a deaf student who attended a religiously affiliated school within the school district (*Zobrest v. Catalina Foothills School District,* 509 U.S. 1, 113 S. Ct. 2462, 125 L. Ed. 2d 1). Commentators have noted that this case demonstrates the Court's willingness to uphold religiously neutral government aid to all school children, regardless of whether they attend a religiously affiliated school, where the aid is designed to help the children overcome a physical or learning disability. As of 2003, it was not clear, however, whether the Court would extend this holding to more general forms of aid to children in religious and public schools alike.

**Government and Religion** The closing of government offices on particular religious holidays is unconstitutional if no secular purpose is served (*Mandel v. Hodges,* 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 [1976]). But if employees won the closing through COLLECTIVE BARGAINING, it is permissible even without a secular purpose (*Americans United for Separation of Church and State v. Kent County,* 97 Mich. App. 72, 293 N.W.2d 723 [1980]).

Government display of symbols with religious significance raises Establishment Clause issues. In the 1984 case of *Lynch v. Donnelly,* 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604, the Supreme Court upheld the right of a city to erect in a park a Christmas display that included colored lights, reindeer, candy canes, a Santa's house, a Christmas tree, a "SEASONS GREETINGS" banner, and a nativity scene. The Court decided the inclusion of the nativity scene along with traditional secular Christmas symbols did not promote religion to an extent prohibited by the First Amendment.

Since the mid-1990s, displays of the Ten Commandments in public buildings other than schools has become more common. Several judges drew national attention when they posted the Ten Commandments in their courtrooms, thereby triggering litigation. Alabama trial judge Roy Moore used the publicity from his refusal to remove the Ten Commandments from his courtroom to run for and be elected chief justice of the Alabama Supreme Court in November 2000. After taking office in January 2001, he briefly avoided controversy by posting the Ten Commandments in his chambers rather than in the Supreme Court's courtroom. However, Moore installed a 5,300 pound Ten Commandments monument in the judicial building on a summer night in 2001. A group of citizens objected and filed a lawsuit in U.S. District Court. In November 2002, the federal court issued an order directing Moore to remove the monument. Moore refused and vowed to appeal the decision (*Glassroth v. Moore*, 242 F.Supp.2d 1068 [M.D.Ala.2002]). In 2003, the Eleventh Circuit Court of Appeals affirmed the lower court decision in *Glassroth v. Moore,* 335 F. 3d 1282. Despite a federal court order to remove the monument, Moore refused. Finally, in September 2003, the other members of the Alabama Supreme Court had the monument removed. Moore was suspended from office while a judicial inquiry commission reviewed his conduct.

### Free Exercise Clause

The Free Exercise Clause guarantees a person the right to practice a religion and propagate it without government interference. This right is a liberty interest that cannot be deprived with-

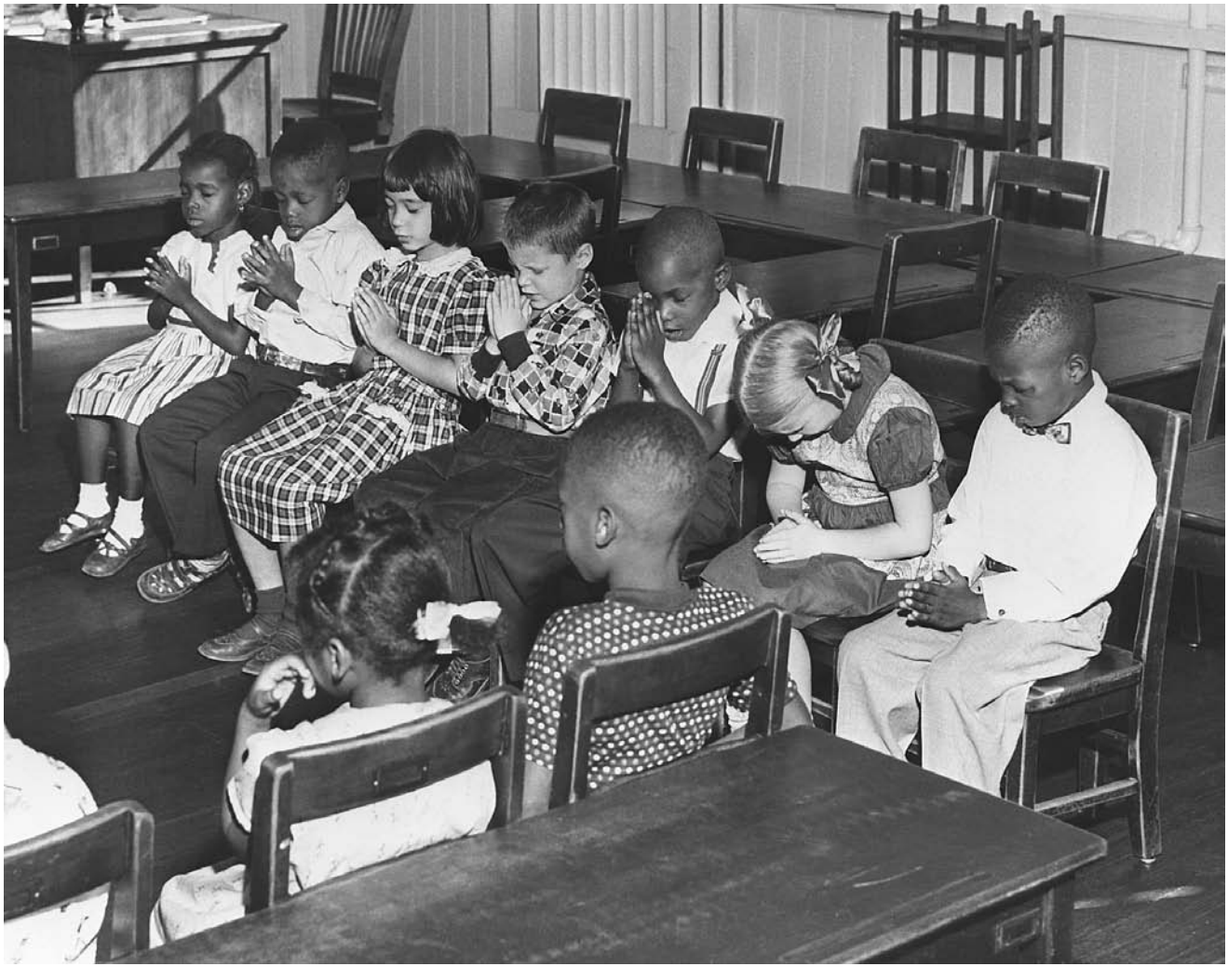

*In 1954, children say a prayer to open the first day of classes in the newly desegregated Washington, D.C., schools. Prayer continued to be a part of the daily routine in some schools for many years.*

BETTMANN/CORBIS

out DUE PROCESS OF LAW. Although the government cannot restrict a person's religious beliefs, it can limit the practice of faith when a substantial and compelling state interest exists. The courts have found that a substantial and compelling STATE INTEREST exists when the religious practice poses a threat to the health, safety, or WELFARE of the public. For example, the government could legitimately outlaw the practice of POLYGAMY that was formerly mandated by the doctrines of the Church of Jesus Christ of Latter-Day Saints (Mormons) but could not outlaw the religion or belief in Mormonism itself (*Reynolds v. United States,* 98 U.S. 145, 25 L. Ed. 244 [1878]). The Supreme Court has invalidated very few actions of the government on the basis of this clause.

Religious practices are not the only method by which a violation of the Free Exercise Clause can occur. In *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), the Supreme Court held that a public school could not expel children because they refused on religious grounds to comply with a requirement of saluting the U.S. flag and reciting the Pledge of Allegiance. In that case, the children were Jehovah's Witnesses, and they believed that saluting the flag fell within the scope of the biblical command against worshipping false gods.

A more recent decision by the Ninth Circuit Court of Appeals ignited a firestorm of controversy. The appeals court, in *Newdow v. U.S. Congress,* 292 F.3d 597 (9th Cir. 2002), ruled that Congress had violated the Establishment Clause when, in 1954, it inserted the words "Under God" into the pledge. Therefore, a California school district's daily recitation of the Pledge of Allegiance injured the daughter of an atheist father, for the pledge sent a message to her that

she was an "outsider" and not a member of the political community. The defendants vowed to petition the Supreme Court to review the case. The Ninth Circuit stayed its ruling until the Supreme Court resolved the issue by either denying review or taking the appeal.

In *Wisconsin v. Yoder,* 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972), the Supreme Court held that state laws requiring children to receive education up to a certain age impinged upon the religious freedom of the Amish who refuse to send their children to school beyond the eighth grade because they believe that doing so would impermissibly expose the children to worldly influences that conflicted with Amish religious beliefs.

In 1993, Congress passed the controversial Religious Freedom Restoration Act (RFRA), which provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government can demonstrate that the burden advances a compelling governmental interest in the least restrictive way. This statute was enacted in response to the Supreme Court's 1990 decision in *Employment Division v. Smith,* 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876. The *Smith* case involved a state law that denied UNEMPLOYMENT COMPENSATION benefits to anyone who had been fired from his or her job for job-related misconduct. This case involved two individuals who had been fired from their jobs for ingesting peyote, which was forbidden by state law. The individuals argued that their ingestion of peyote was related to a religious ceremony in which they participated. The Supreme Court ruled that the Free Exercise Clause did not require an exemption from the state law banning peyote use and that unemployment compensation could therefore lawfully be denied.

RFRA directly superseded the *Smith* decision. However, soon after it was enacted, many courts ruled that RFRA violated either the Establishment Clause or the SEPARATION OF POWERS doctrine. In the 1997 case of *City of Boerne v. P. F. Flores,* 1997 WL 345322, the U.S. Supreme Court voted 6–3 to invalidate RFRA on the grounds that Congress had exceeded the scope of its enforcement power under section 5 of the Fourteenth Amendment in enacting RFRA. Section 5 of the Fourteenth Amendment permits Congress to enact legislation enforcing the Constitutional right to free exercise of religion. However, the Court held that this power is limited to preventative or remedial measures. The court found that RFRA went beyond that and actually made substantive changes in the governing law. Because Congress exceeded its power under the Fourteenth Amendment in enacting RFRA, it contradicted vital principles necessary to maintain separation of powers and the federal-state balance and thus was unconstitutional.

Although the Free Exercise Clause protects against government action, it does not restrict the conduct of private individuals. For example, the courts generally will uphold a testator's requirement that a beneficiary attend a specified church to receive a testamentary gift because the courts refuse to question the religious views of a testator in the interest of public policy. Similarly, the Free Exercise Clause does not protect a person's religious beliefs from infringement by the actions of private corporations or businesses, although federal and state CIVIL RIGHTS laws may make such private conduct unlawful.

The government cannot enact a statute that wholly denies the right to preach or to disseminate religious views, but a state can constitutionally regulate the time, place, and manner of soliciting upon the streets and of conducting meetings in order to safeguard the peace, order, and comfort of the community. It can also protect the public against frauds perpetrated under the cloak of religion, as long as the law does not use a process amounting to a PRIOR RESTRAINT, which inhibits the free exercise of religion. In a 1951 case, the Supreme Court held that it was unconstitutional for a city to deny a Baptist preacher the renewal of a permit for evangelical street meetings, even though his previous meetings included attacks on Roman Catholicism and Judaism that led to disorder in the streets, because it constituted a prior restraint (*Kunz v. New York,* 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 280).

State laws known as Sunday closing laws, which prohibit the sale of certain goods on Sundays, have been declared constitutional against the challenge of Orthodox Jews who claimed that the laws created an economic hardship for them because their faith requires them to close their businesses on Saturdays and who therefore wanted to do business on Sundays (*Braunfield v. Brown,* 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 [1961]). The Supreme Court held that, although the law imposed an indirect burden on

**Church/Synagogue Membership, by Region, in 1999**

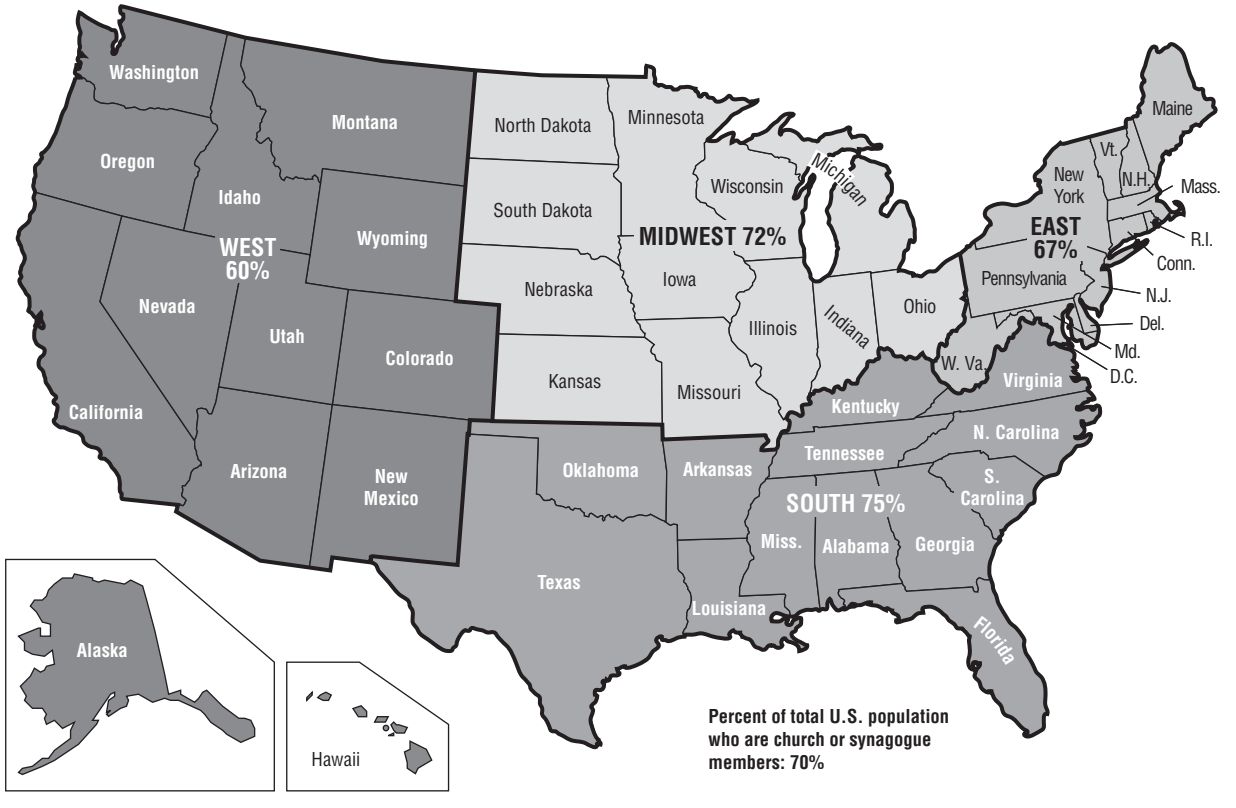


SOURCE: U.S. Census Bureau, *Statistical Abstract of the United States,* 2000.

religion, it did not make any religious practice itself unlawful.

In *United States v. Lee,* 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982), the Supreme Court upheld the requirement that Amish employers withhold SOCIAL SECURITY and unemployment insurance contributions from their employees, despite the Amish argument that this violated their rights under the Free Exercise Clause. The Court found that compulsory contributions were necessary to accomplish the overriding government interest in the proper functioning of the Social Security and unemployment systems.

The Supreme Court has also upheld the assignment and use of Social Security numbers by the government to be a legitimate government action that does not violate the Free Exercise Clause (*Bowen v. Roy,* 476 U.S. 693, 106 S. Ct. 2147, 90 L. Ed. 2d 735 [1986]).

In the 1989 case of *Hernandez v. Commissioner of Internal Revenue,* 490 U.S. 680, 109 S. Ct. 2136, 104 L. Ed. 2d 766, the Supreme Court held that the government's denial of a taxpayer's deduction from gross income of "fixed donations" to the Church of Scientology for certain religious services was constitutional. These fees were paid for certain classes required by the Church of Scientology, and the Court held that they did not classify as charitable contributions because a good or service was received in exchange for the fee paid.

In *Jimmy Swaggart Ministries v. Board of Equalization,* 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990), the Court ruled that a religious organization is not exempt from paying a state's general sales and use taxes on the sale of religious products and religious literature.

Similarly, the Court decided in *Heffron v. International Society for Krishna Consciousness*

*(ISKCON),* 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981), that a state rule limiting the sale or distribution of merchandise to specific booths was lawful, even when applied to ISKCON members whose beliefs mandated them to distribute or sell religious literature and solicit donations in public places.

Military regulations have also been challenged under the Free Exercise Clause. In *Goldman v. Weinberger,* 475 U.S. 503, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986), the Supreme Court held that the Free Exercise Clause did not require the U.S. Air Force to permit an Orthodox Jewish serviceman to wear his yarmulke while in uniform and on duty. The Court found that the military's interest in discipline was sufficiently important to outweigh the incidental burden the rule had on the serviceman's religious beliefs.

However, a law that places an indirect burden on the practice of religion so as to impede the observance of religion or a law that discriminates between religions is unconstitutional. Thus, the Supreme Court has held that the denial of unemployment compensation to a Seventh-Day Adventist who was fired from her job and could not obtain any other work because of her refusal to work on Saturdays for religious reasons was unconstitutional (*Sherbert v. Verner,* 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 [1963]). The *Sherbert* case was reaffirmed and applied in the 1987 case of *Hobbie v. Unemployment Appeals Commission of Florida,* 480 U.S. 136, 107 S. Ct. 1046, 94 L. Ed. 2d 190.

In the 1993 case of *Church of the Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472, remanded on other grounds, the High Court overturned a city law that forbade animal slaughter insofar as the law banned the ritual animal slaughter by a particular religious sect. The Court found that the law was not a religiously neutral law of general applicability but was specifically designed to prevent a religious sect from carrying out its religious rituals.

In *Cruz v. Beto,* 405 U.S. 319, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972), the Supreme Court affirmed that prisoners are entitled to their rights under the Free Exercise Clause, subject only to the requirements of prison security and discipline. Thus, the Court held that a Texas prison must permit a Buddhist prisoner to use the prison chapel and share his religious materials with other prisoners, just as any other prisoner would be permitted to so act.

States have been allowed to deny disability benefits, however, to applicants who refuse to submit to medical examinations for religious reasons. Courts have held that this is constitutional because the state has a compelling interest in verifying that the intended recipients of the tax-produced assistance are people who are legitimately entitled to receive the benefit. Likewise, states can regulate religious practices to protect the public health. Thus, state laws requiring the vaccination of all children before they are allowed to attend school are constitutional because the laws are designed to prevent the widespread epidemic of contagious diseases. Public health protection has been deemed to outweigh any competing interest in the exercise of religious beliefs that oppose any forms of medication or immunization.

A number of cases have involved the issue of whether there is a compelling state interest to require that a blood transfusion be given to a patient whose religion prohibits such treatment. In these cases, the courts look to the specific facts of the case, such as whether the patient is a minor or a mentally incompetent individual, and whether the patient came to the hospital voluntarily seeking help. The courts have generally authorized the transfusions in cases of minors or mentally incompetent patients in recognition of the compelling government interest to protect the health and safety of people. However, the courts are divided as to whether they should order transfusions where the patient is a competent adult who steadfastly refuses to accept such treatment on religious grounds despite the understanding that her or his refusal could result in death. As of 2003, the Supreme Court had not ruled on this issue, and therefore there was no final judicial opinion on the propriety of such orders.

The use of secular courts to determine intrachurch disputes has raised issues under both the Free Exercise Clause and the Establishment Clause. The Supreme Court decided in the 1871 case of *Watson v. Jones,* 80 U.S. 679, 20 L. Ed. 666, that judicial intervention in cases involving ownership and control of church assets necessarily had to be limited to determining and enforcing the decision of the highest judicatory body within the particular religious group. For congregational religious groups, such as Baptists and Jews, the majority of the congregation was considered the highest judicatory body. In hierarchical religions, such as the Roman Catholi-

cism and Russian Orthodoxy, the diocesan bishop was considered the highest judicatory authority. The Supreme Court consistently applied that principle until its 1979 decision in *Jones v. Wolf,* 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775. In that case, the Court held that the "neutral principles of law developed for use in all property disputes" could be constitutionally applied in intra-church litigation. Under this case, courts can examine the language of the church charters, real and PERSONAL PROPERTY deeds, and state statutes relating to the control of property generally.

### Religious Oaths Prohibited

The Constitution also refers to religion in Article VI, Clause 3, which provides, "No religious test shall ever be required as a qualification to any office or public trust under the United States." The provision is binding only on the federal government.

In early American history, individual states commonly required religious oaths for public officers. But after the Revolutionary War, most of these religious tests were eliminated. As of 2003, the individual states, through their constitutions or statutes, have restrictions similar to that of the U.S. Constitution on imposing a religious oath as a condition to holding a government position.

Freedom to express religious beliefs is entwined with the First Amendment guarantee of freedom of expression. The federal or state governments cannot require an individual to declare a belief in the existence of God as a qualification for holding office (*Torcaso v. Watkins,* 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 [1961]).

Congress took an unprecedented step when it passed the International Religious Freedom Act of 1998. (Pub. L.105-292, 112 Stat. 2787). The law seeks to promote religious freedom worldwide. It created a special representative to the SECRETARY OF STATE for international religious freedom. This representative serves on a U.S. Commission on International Religious Freedom, an advisory organization. The act gives the president authority to take diplomatic and other appropriate action with respect to any country that engages in or tolerates violations of religious freedom. In extreme circumstances, the president is empowered to impose economic sanctions on countries that systematically deny religious freedom.

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CROSS-REFERENCES

Charities; Ecclesiastical Courts; Flag; Immunization Programs; Parent and Child; Schools and School Districts; Scopes Monkey Trial.

## REMAINDER

*A future interest held by one person in the real property of another that will take effect upon the expiration of the other property interests created at the same time as the future interest.*

The law of real property permits a person who owns real estate to convey all or part of her rights in the property to another person or persons. Legal conveyances of property become more complicated when the person who owns the property, the grantor, gives a present interest (the right to the possession and use of the property) in the property to one person for either life or a set period of time, and also gives a future interest (also called a nonpossessory interest) in the property to another person. The future interest is called a remainder, and the holder of this interest is called the remainderman.

Remainders are subdivided into two principal categories: contingent remainders and vested remainders. A contingent remainder can be created in two different ways. First, it can be a remainder to a person not ascertained at the time the interest is created. For example, Tom owns Blackacre in fee simple, which means he owns it with no ownership limitations. While Bob and Jane are alive, Tom conveys Blackacre to Bob for life, with a remainder to the heirs of Jane. The heirs of Jane are not yet known, so they have a contingent remainder.

A remainder also will be classified as contingent, whether or not the remainderman is

ascertained, where the possibility of becoming a present interest is subject not only to the expiration of the preceding property interest but also to some specific event occurring before the expiration of the preceding interest. This event is called a special condition precedent. For example, if Tom owns Blackacre in fee and conveys Blackacre to Bob for life and then to Jane if she marries Bill, then Jane has a contingent remainder in fee, conditioned on the death of Bob and the marriage to Bill.

A vested remainder is a future interest to an ascertained person, with the certainty or possibility of becoming a present interest subject only to the expiration of the preceding property interests. If Tom owns Blackacre in fee simple and conveys Blackacre to Bob for life and to Jane in fee simple, Jane has a vested remainder in fee that becomes a present interest upon the death of Bob. As a remainderman, she simply has to wait for Bob's death before assuming a present interest in Blackacre.

For a remainder to be effective, it must be contained in the same instrument of conveyance (document, such as a deed) that grants the present interest to another person.

CROSS-REFERENCES

Estate.

## REMAND

*To send back.*

A higher court may remand a case to a lower court so that the lower court will take a certain action ordered by the higher court. A prisoner who is remanded into custody is sent back to prison subsequent to a PRELIMINARY HEARING before a tribunal or magistrate until the hearing is resumed, or the trial is commenced.

## REMEDIAL STATUTE

*A law enacted for the purpose of correcting a defect in a prior law, or in order to provide a remedy where none previously existed.*

## REMEDY

*The manner in which a right is enforced or satisfied by a court when some harm or injury, recognized by society as a wrongful act, is inflicted upon an individual.*

The law of remedies is concerned with the character and extent of relief to which an individual who has brought a legal action is entitled once the appropriate court procedure has been followed, and the individual has established that he or she has a substantive right that has been infringed by the defendant.

Categorized according to their purpose, the four basic types of judicial remedies are (1) damages; (2) restitution; (3) coercive remedies; and (4) declaratory remedies.

The remedy of damages is generally intended to compensate the injured party for any harm he or she has suffered. This kind of damages is ordinarily known as COMPENSATORY DAMAGES. Money is substituted for that which the plaintiff has lost or suffered. Nominal damages, generally a few cents or one dollar, are awarded to protect a right of a plaintiff even though he or she has suffered no actual harm. The theory underlying the award of PUNITIVE DAMAGES is different since they are imposed upon the defendant in order to deter or punish him or her, rather than to compensate the plaintiff.

The remedy of restitution is designed to restore the plaintiff to the position he or she occupied before his or her rights were violated. It is ordinarily measured by the defendant's gains, as opposed to the plaintiff's losses, in order to prevent the defendant from being unjustly enriched by the wrong. The remedy of restitution can result in either a pecuniary recovery or in the recovery of property.

Coercive remedies are orders by the court to force the defendant to do, or to refrain from doing, something to the plaintiff. An INJUNCTION backed by the CONTEMPT power is one kind of coercive remedy. When issuing this type of remedy, the court commands the defendant to act, or to refrain from acting, in a certain way. In the event that the defendant willfully disobeys, he or she might be jailed, fined, or otherwise punished for contempt. A decree for SPECIFIC PERFORMANCE commands the defendant to perform his or her part of a contract after a breach thereof has been established. It is issued only in cases where the subject matter of a contract is unique.

Declaratory remedies are sought when a plaintiff wishes to be made aware of what the law is, what it means, or whether or not it is constitutional, so that he or she will be able to take appropriate action. The main purpose of this kind of remedy is to determine an individual's rights in a particular situation.

### Nature of Remedies

Remedies are also categorized as equitable or legal in nature.

Monetary damages awarded to a plaintiff because they adequately compensate him or her for the loss are considered a legal remedy. An equitable remedy is one in which a recovery of money would be an inadequate form of relief.

Courts design equitable remedies to do justice in specific situations where money does not provide complete relief to individuals who have been injured. Injunctions, decrees of specific performance, declaratory judgments, and constructive trusts are typical examples of some kinds of equitable remedies. Restitution is regarded as either a legal or equitable remedy, depending upon the nature of the property restored.

The distinction between legal and equitable remedies originally came about because courts of law only had the power to grant legal remedies, whereas courts of EQUITY granted equitable remedies to do justice in situations where money would be inadequate relief. The courts of law and the courts of equity have merged, but the distinction still has some importance because in a number of courts, a trial by jury is either granted or refused, according to whether the remedy sought is legal or equitable. When a legal remedy is sought, the plaintiff is entitled to a jury trial, but this is not true when an equitable remedy is requested.

Sometimes a plaintiff might have both legal and equitable remedies available for the redress of personal grievances. In such a case, a plaintiff might have to exercise an ELECTION OF REMEDIES.

### Provisional Remedies

A provisional remedy is one that is adapted to meet a specific emergency. It is the temporary process available to the plaintiff in a civil action that protects him or her against loss, irreparable injury, or dissipation of the property while the action is pending. Some types of provisional remedies are injunction, receivership, arrest, attachment, and GARNISHMENT.

## REMISSION

*Extinguishment or release of a debt.*

A remission is conventional when it comes about through an express grant to the debtor by a creditor. It is tacit when the creditor makes a voluntary surrender of the original title to the debtor under private signature constituting the obligation.

The term *remission* is also used in reference to the forgiveness or condonation of an injury or offense, or the act through which a FORFEITURE or penalty is forgiven.

## REMIT

*To transmit or send. To relinquish or surrender, such as in the case of a fine, punishment, or sentence.*

An individual, for example, might remit money to pay bills.

## REMITTANCE

*Money sent from one individual to another in the form of cash, check, or some other manner.*

Financial statements sent by a creditor to a debtor frequently refer to the process of submitting a monthly remittance.

## REMITTITUR

*The procedural process by which an excessive verdict of the jury is reduced. If money damages awarded by a jury are grossly excessive as a* MATTER OF LAW*, the judge may order the plaintiff to remit a portion of the award.*

The remedy of remittitur is designed to cure an award of damages that is grossly excessive without the necessity of a new trial or an appeal. In some cases, an award by a jury is so completely out of line with the damages proven in the case that it is UNCONSCIONABLE.

Ordinarily, however, an award of PUNITIVE DAMAGES will not be upset as excessive in the absence of gross error or prejudice on the part of the jury.

Remittitur frequently occurs when a defendant requests a new trial because he or she regards the verdict for the plaintiff as excessive.

## REMOVAL

*The transfer of a person or thing from one place to another. The transfer of a case from one court to another. In this sense, removal generally refers to a transfer from a court in one jurisdiction to a court in another, whereas a change of venue may be granted simply to move a case to another location within the same jurisdiction.*

Normally a plaintiff has the right to choose the court where he or she will commence an

action. An important exception to this rule is the defendant's right, in some circumstances, to have a case removed from a state court to a federal court. Federal law explains this right of removal in detail. It is available only when the federal court has jurisdiction, or authority, to hear such a case. The right may be claimed only by a defendant; a plaintiff cannot petition for removal of a case he or she has commenced in state court, even after the defendant asserts a counterclaim against the plaintiff that would justify the exercise of federal jurisdiction.

If a plaintiff has more than one claim against a defendant, and not all of the claims qualify for removal, it is not clear whether the whole case should be sent to the applicable federal court. Sometimes the individual claims that support federal jurisdiction can be severed and heard in federal court individually. This can be done if the removable claims are sufficiently distinct that they can be determined on their own. Otherwise they must be tried together. A federal court has discretion to weigh the circumstances and decide each case on its own facts. The right of the plaintiff to pick the court must be balanced with the right of the defendant to use a federal court when there is federal jurisdiction. The same considerations apply when there are multiple defendants, and some are entitled to removal of the case but others are not. If there are multiple defendants and multiple claims, the reasoning can become rather confusing.

The process of removal raises serious questions concerning FEDERALISM, the relationship of the states and the federal government. The idea of a federal court ousting a state court from a lawsuit already pending in the state is somewhat unsettling. The removal procedure itself emphasizes the potential for conflict. A person who is sued in a state court files a petition in the nearest federal court asking for removal of the action, which has the effect of removing the action to the federal court. A copy of that petition is then filed in the state court. The state court can take no further action whatsoever unless, and until, the federal court remands, or sends, the case back to it. The procedure generally works well because federal judges are careful to recognize the legitimate interests of the states in determining causes that are not necessarily federal in nature.

CROSS-REFERENCES

Federal Question.

## RENDER

*Return; yield; pay or perform, as in charges or services.*

To *render judgment* means to pronounce, declare, or state the decision of the court in a particular case. To *render a verdict* means that a jury agrees upon and returns a written decision into court and hands the decision to the judge sitting at the trial.

## RENEWAL

*Rehabilitation; reestablishment; substitution of a new right or obligation for another of the same or similar nature.*

In regard to bonds, renewal signifies an extension of time for maturity. A stipulation for the renewal of a lease requires the making of a new lease, as opposed to an extension, which involves adding time to a leasehold agreement already in existence without executing a new instrument.

## ♦ RENO, JANET

President BILL CLINTON appointed Janet Reno to be U.S. attorney general on February 11, 1993. She was his third choice for the post. The first woman to serve as U.S. attorney general, Reno previously served as the state attorney for Florida's Dade County, which includes Miami. During her first term as attorney general, Reno sought stricter GUN CONTROL laws, lobbied for funding for more local police officers, and worked with communities to develop more effective methods of crime prevention.

Reno was born on July 21, 1938, in Miami, Florida. Her parents were journalists who worked for Miami daily newspapers. Reno attended public schools in Dade County and enrolled at Cornell University in 1956. After her graduation in 1960, she attended Harvard Law School, one of only 16 women in a class of more than 500 students. She graduated in 1963 but found that her gender made it difficult to find work as a lawyer in Miami.

In 1971, Reno was named staff director of the Florida House Judiciary Committee. In that position, she oversaw the revision of the Florida court system. In 1973, she was named counsel for the state senate's committee that is responsible for revising the Florida Criminal Code. That same year, she accepted a position in the Dade County state attorney's office. She quickly suc-

ceeded in organizing a juvenile division within the office.

Reno left the state attorney's office in 1976 to become a partner in a private Miami law firm. She was drawn back into government service in 1978 when the Dade County state attorney stepped down before the end of his term. Appointed to be state attorney, Reno was elected to a full term in November 1978, and the voters returned her to office four more times.

As state attorney, Reno managed an office of 940 employees with an annual budget of $30 million and a yearly docket of 120,000 cases. She established a career-criminal unit that worked with federal officials and local law enforcement to arrest and convict career criminals and to sentence them to substantial prison time. Reno also helped establish the Miami drug court, which has been a model for courts in the United States. The drug court provides alternative punishment for nonviolent offenders who have a drug-abuse problem. More than half of those offenders who have completed the program have remained free of drugs.

Reno also focused attention on prevention programs that enabled children to grow in a safe, constructive environment. She helped to reform the juvenile justice system and pursued delinquent fathers for CHILD SUPPORT payments.

As U.S. attorney general, Reno entered the public spotlight almost immediately. On February 28, 1993, approximately 100 agents from the BUREAU OF ALCOHOL, TOBACCO AND FIREARMS (ATF) raided the Waco, Texas, compound of the members of the Branch Davidian religious cult, who were led by David Koresh. The agents and cult members exchanged gunfire. Four ATF agents died, six cult members were killed, and 16 others were wounded.

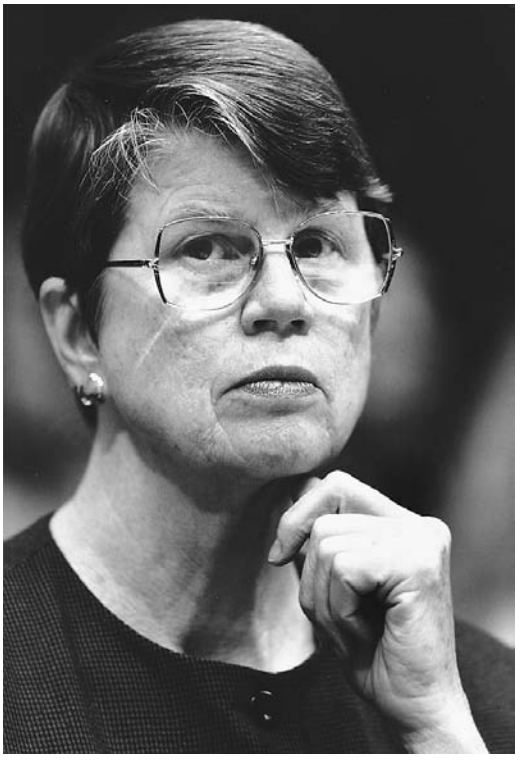

*Janet Reno.*
CORBIS-BETTMANN

After the unsuccessful raid, a long stand-off ensued. Reno oversaw the negotiations between

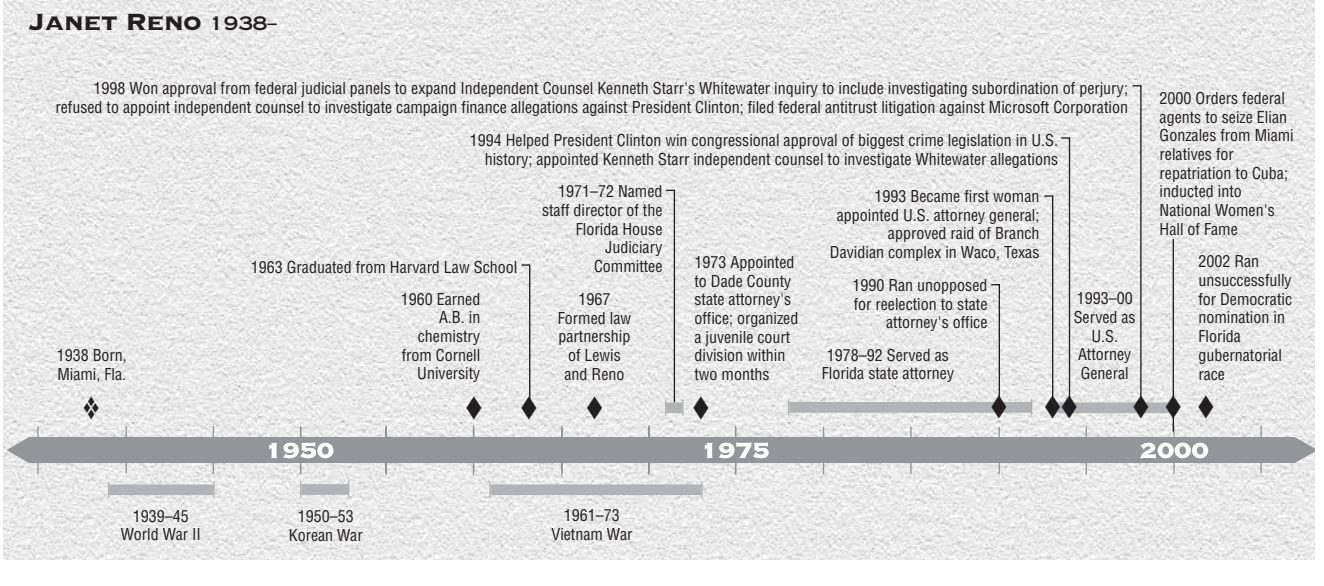

Koresh and agents of the FEDERAL BUREAU OF INVESTIGATION (FBI). For 51 days, negotiations continued, but, in April, the FBI alerted Reno that cult members were planning a mass suicide. Although Koresh had released some children, many remained in the compound.

Reno ordered an assault on the compound, which took place on April 19, 1993. Cult members started fires in three locations, which soon engulfed the wooden buildings. Approximately 86 cult members, including 17 children, died that day. Reno, expressing anguish over the loss of life, particularly the children's lives, took full responsibility for the decision to storm the compound. She came under heavy attack for having approved the plan, which she defended as having been based on the information known at the time. She conceded, however, that based on the results, it obviously had been the wrong decision.

Reno became embroiled in another major national controversy in 1999 and 2000 after fishermen found a six-year-old boy named Elian Gonzalez floating in an inner tube off the coast of Florida on Thanksgiving Day in 1999. The boy's mother and stepfather had tried to flee Cuba, but both died after their boat capsized. The boy's relatives in Miami wanted him to stay in the United States, but his father, who remained in Cuba, demanded his return.

"NOTHING CAN MAKE ME MADDER THAN LAWYERS WHO DON'T CARE ABOUT OTHERS."
—JANET RENO

For four months during 2000, the nation debated whether the boy should be returned to Cuba. Reno and the now-defunct Immigration and Naturalization Service (INS) maintained that the boy should be returned to his father, but allowed the courts to make the decision. When a federal court ruled that the boy should be returned to his father, Reno and the INS demanded that the relatives turn the boy over to authorities. The relatives refused, and Reno eventually ordered armed federal agents to enter the home of the relatives who were keeping the boy. Elian was eventually returned to his father in Cuba. Reno came under fire for a number of reasons during the controversy, most notably due to her decision to use armed guards to gain custody of the boy.

Reno's greatest achievement during the first Clinton administration was helping the president win congressional approval of the 1994 crime bill, the most substantial crime legislation in U.S. history (Pub. L. No. 103-322, 108 Stat. 1796). The $30.2 billion measure was a complex mixture of government spending and changes to previous CRIMINAL LAW. It authorized the funding of social programs, the hiring of 100,000 police officers nationwide, and the building of new prisons. Reno applauded the increased legal protections afforded to women and children under the VIOLENCE AGAINST WOMEN ACT OF 1994, which was contained in the bill, although, in 2000, the U.S. Supreme Court struck it down as unconstitutional. The NATIONAL RIFLE ASSOCIATION had protested Reno's efforts to ban 19 assault-style firearms, yet Congress included this controversial measure in the final bill. The bill also prohibited gun purchases by people who are subject to court restraining orders because of DOMESTIC VIOLENCE.

Reno has traveled throughout the United States, visiting with local officials to encourage crime prevention programs and law enforcement methods such as community policing.

Reno served two full terms as attorney general, stepping down at the end of the Clinton administration in 2001. In September 2001, she made national headlines again when she announced that she would run for governor of Florida in the 2002 election. A year later, she lost the Democratic nomination in the race to political newcomer Bill McBride.

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## RENT STRIKE

*An organized protest on the part of tenants in which they withhold the payment of consideration for the use or occupation of property from their landlord until their grievances are settled.*

A rent strike is ordinarily unlawful since a tenant who occupies leasehold premises has a legal obligation to pay rent. Even if a landlord does not make needed repairs or provide necessary services, a tenant ordinarily is not released from the obligation to pay rent unless he or she leaves the premises and can show that they were uninhabitable, or unless the tenant can demonstrate that the landlord was attempting to force him or her to move out.

Certain courts refuse to recognize rent strikes as lawful on the grounds that any failure

to pay rent constitutes a breach of the tenant's obligation and legally makes the tenant subject to eviction. A rent strike, however, is distinguishable from other failures to pay rent because its purpose is to coerce the landlord to take a particular action. Increasingly the courts have recognized that a rent strike is not an ordinary failure to pay rent. Some jurisdictions have developed procedures through which tenants are able to pay their rent into the court, or to a court-appointed receiver. The landlord receives the money only after essential repairs have been made, or the receiver can use the funds to contract for such repairs.

CROSS-REFERENCES

Landlord and Tenant.

## RENUNCIATION

*The* ABANDONMENT *of a right; repudiation; rejection.*

The renunciation of a right, power, or privilege involves a total divestment thereof; the right, power, or privilege cannot be transferred to anyone else. For example, when an individual becomes a citizen of a new country, that individual must ordinarily renounce his or her citizenship in the old country.

## RENUNCIATION OF WAR

Although INTERNATIONAL LAW makes some distinction between a just and an unjust war, state practice until the conclusion of WORLD WAR I had generally disregarded that distinction and maintained war as a legitimate means of resolving disputes or increasing the power of the state. Recognized methods for resolving disputes peacefully did exist, however; under the COVENANT of the LEAGUE OF NATIONS, for example, member states promised to utilize such methods before resorting to war.

Formal rejection of war as a means of national policy for settling controversies came in 1928 with the conclusion of the KELLOGG-BRIAND PACT. Titled the General Treaty for the Renunciation of War, the Kellogg-Briand Pact obligated signatories to abandon force in favor of negotiation, ARBITRATION, mediation, or other methods of settling disputes peacefully. Although the signatories renounced war with each other, the Kellogg-Briand Pact still permitted war for SELF-DEFENSE, for collective enforcement of international obligations, between signatories and nonparty states, and against a signatory that had derogated its obligations under the treaty by going to war.

*President Calvin Coolidge, Secretary of Commerce Herbert Hoover, and Secretary of State Frank Kellogg (all three standing), with representatives of the governments that ratified the Kellogg-Briand Pact, a formal renunciation of war.*

LIBRARY OF CONGRESS

The UNITED NATIONS Charter, which has had broader acceptance than the Kellogg-Briand Pact, carries the aims of the pact further by prohibiting the use of force or even the threat of force. The charter also attempts to impose these obligations on nonmembers in Article 2(6).

CROSS-REFERENCES

Mediation; International Law.

## RENVOI

*The process by which a court adopts the rules of a foreign jurisdiction with respect to any conflict of laws that arises.*

In some instances, the rules of the foreign state might refer the court back to the law of the forum where the case is being heard.

The term *renvoi* also refers to the rules that, in a lawsuit by a nonresident upon a cause arising locally, the capacity to sue is determined by the law of the nonresident's domicile, rather than by local law.

The doctrine of renvoi is seldom followed in the United States and has also been rejected by a number of foreign legal scholars.

## REORGANIZATION

*The process of carrying out, through agreements and legal proceedings, a business plan for winding up the affairs of, or foreclosing a mortgage upon, the property of a corporation that has become insolvent.*

Reorganization is ordinarily accomplished by way of a JUDICIAL SALE of the property of the corporation. The purchasers then often form a new corporation to which substantially all assets of the old are transferred.

CROSS-REFERENCES

Bankruptcy.

## REORGANIZATION PLAN

*A scheme authorized by federal law and promulgated by the president whereby he or she alters the structure of federal agencies to promote government efficiency and economy through a transfer, consolidation, coordination, authorization, or abolition of functions.*

A reorganization plan must specify the reorganizations that the president deems to be necessary after making an investigation. A plan may provide for

1. the transfer of the whole or a part of an agency, or of the whole or a part of the functions thereof, to the jurisdiction and control of another agency;
2. the abolition of all or a part of the functions of an agency, except that no enforcement function or statutory program shall be abolished by the plan;
3. the consolidation or coordination of the whole or a part of an agency, or of the whole or a part of the functions thereof, with the whole or a part of another agency or the functions thereof;
4. the consolidation or coordination of a part of an agency or the functions thereof with another part of the same agency or the functions thereof;
5. the authorization of an officer to delegate any of his or her functions; or
6. the abolition of the whole or a part of an agency that does not have, or on the taking effect of the reorganization plan will not have, any functions.

No more than three plans may be pending before Congress at one time. In the message conveying a reorganization plan, the president must specify, with respect to each abolition of a function encompassed in the plan, the statutory authority for the exercise of the function. The message must also estimate any reduction or increase in expenditures, itemized whenever practicable, and describe in detail any improvements in management, delivery of federal services, execution of the laws, and increases in efficiency of government operations that, it is expected, will ensue from the reorganization plan.

The president can withdraw the plan at any time prior to the conclusion of 60 calendar days of a continuous session of Congress, following the date on which the plan is submitted to Congress.

Additional contents of a reorganization plan are permitted by federal law. A reorganization plan submitted by the president

1. may change, in such cases as the president considers necessary, the name of an agency affected by a reorganization and the title of its head and shall designate the name of an agency resulting from a reorganization and the title of its head;
2. may provide for the appointment and pay of the head and one or more officers of any agency (including an agency resulting from a consolidation or other type of reorganization), if the president finds and, in the message transmitting the plan, declares that by reason of a reorganization made by the plan, the provisions are necessary;
3. shall provide for the transfer or other disposition of the records, property, and personnel affected by a reorganization;
4. shall provide for the transfer of such unexpended balances of appropriations, and of other funds, available for use in connection with a function or agency affected by a reorganization, as the president considers necessary by reason of the reorganization for use in connection with the functions affected by the reorganization, or for the use of the agency that shall have the functions after the reorganization plan is effective; and
5. shall provide for terminating the affairs of an abolished agency.

A reorganization plan can neither provide for nor have the effect of

1. creating a new executive department, abolishing or transferring an executive department or independent regulatory agency, or all the functions thereof, or consolidating two or more executive departments or two or more independent regulatory agencies, or all the functions thereof;
2. continuing an agency beyond the period authorized by law for its existence or beyond the time when it would have terminated if the reorganization had not been made;
3. continuing a function beyond the period authorized by law for its exercise or beyond the time when it would have terminated if the reorganization had not been made;

*A sample reorganization plan*

## Reorganization Plan

**Plan of Reorganization**

Background and Summary

The Bibb Company (the company) has been manufacturing and marketing textile products since 1876. The company's products include consumer products for the home, principally sheets, pillowcases, towels and other bedding and bath accessories, as well as apparel fabrics and other specialty engineered textile products used in making high-pressure hoses and other industrial products.

The company believes that its performance has been hurt by a number of factors, including a decline in juvenile product sales, poor performance from the company's terry operations and adult bedding operations, and higher cotton and polyester prices. Beginning in the second quarter of 1995, representatives of the company met with representatives of certain holders of the old subordinated notes who had formed a steering committee to discuss the possibility of restructuring the company's indebtedness.

Effective February 1, 1996, the company and the members of the steering committee entered into an agreement whereby the members of the steering committee pledged their support for the plan of reorganization. (The steering committee members hold 59.9% and 27.7% in aggregate principal amount of the 14% senior subordinated notes and 13 7/8% senior subordinated notes, respectively.) Subsequently, the company began soliciting acceptances for the plan of reorganization before it filed for bankruptcy in hopes that the time it spent in Chapter 11 would be shortened. On July 3, 1996, the company filed the plan of reorganization (the plan).

Pursuant to the terms of the plan, holders of the 14% senior subordinated notes will receive 59.9163 shares of new common stock for each $1,000 principal amount of notes held and holders of the 13 7/8% senior subordinated notes will receive 57.5963 shares of new common stock for each $1,000 principal amount of notes held. Old common stock interests will receive 5% of the new common stock to be issued and outstanding as of the Effective Date. It is estimated that old common stock holders will receive 52.0833 shares of new common stock for each share of old common stock held. All old options will be canceled.

Summary of Plan of Reorganization

*(All amounts in $millions except stock which is in shares)*

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**Unclassified**

Administrative Expense Claims

Will Receive Upon Reorganization: Paid in full in cash on the later of the Effective Date, the date the claim is allowed and such other date as mutually agreed. Claims incurred in the ordinary course of business will be paid in the ordinary course of business.

Priority Tax Claims

Will Receive Upon Reorganization: Paid in full in cash on the later of the Effective Date, the date the claim is allowed and such other date as mutually agreed. The Debtor reserves the right to pay the claims in equal annual cash payments of principal plus interest over a period not to exceed six years.

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**Class 1**

Other Priority Claims

Will Receive Upon Reorganization: Paid in full in cash on the later of the Effective Date, the date the claim is allowed and such other date as mutually agreed.

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**Class 2**

Miscellaneous Secured Claims

Will Receive Upon Reorganization: Unless the claimant agrees to less favorable treatment, either (i) the legal, equitable and contractual rights of the claim will be left unaltered; (ii) the collateral securing the claim will be transferred to the claimant; or (iii) the Debtor will provide such other treatment as will render the claim unimpaired.

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**Class 3**

Bank Claims

Will Receive Upon Reorganization: Either (i) the legal, equitable and contractual rights of the claim will be left unaltered; (ii) the claim will be paid in full in cash; or (iii) the Debtor will provide such other treatment as will render the claim unimpaired.

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[continued]

*A sample reorganization plan (continued)*

**Reorganization Plan**

**Class 4**

IRB Claims

Will Receive Upon Reorganization: Either (i) the legal, equitable and contractual rights of the claim will be left unaltered; (ii) the collateral securing the claim will be transferred to the claimant; or (iii) the Debtor will provide such other treatment as will render the claim unimpaired.

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**Class 5**

Post-Restructuring Management Claims

Will Receive Upon Reorganization: Will be paid in full in cash on the later of the Effective Date, the date the claim is allowed or such other date as mutually agreed.

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**Class 6**

Post-Restructuring Note Claims (14% Sr. Sub. Notes and 13 7/8% Sr. Sub. Notes)

Estimated Allowed Claims: 100.0 and 60.0 original aggregate principal amount, respectively

Will Receive Upon Reorganization: For each $1,000 in 14% senior subordinated notes held claimants will receive 59.9163 shares of new common stock(1). For each $1,000 in 13 7/8% senior subordinated notes held claimants will receive 57.5963 shares of new common stock(1). The distribution will be equal to 95% of the new common stock(1) outstanding as of the Effective Date. If a qualifying offer is accepted, the distribution to Class 5 will be reduced on a pro rata basis to 94.5% of the outstanding new common stock(1) as of the Effective Date.

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**Class 7**

General Unsecured Claims

Will Receive Upon Reorganization: Unless otherwise agreed, either (i) the legal, equitable and contractual rights of the claim will be left unaltered; or (ii) the Debtor will provide such other treatment as will render the claim unimpaired.

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**Class 8**

Old Equity Interests

Estimated Allowed Claims: 9969 shares outstanding

Will Receive Upon Reorganization: On the Effective Date, assuming that no old options are exercised prior to the Confirmation Date, old common stock holders will receive 52.0833 shares of new common stock(1) for each share of old common stock. This distribution will represent 5% of the new common stock, provided that if a qualifying offer is accepted, the distribution will be increased to 5 1/2% of the shares of new common stock(1). All old options which have not been exercised as of the Effective Date will be canceled.

Footnotes and Terms of Reorganization Securities

**1.**

**New Common Stock:** Par value $0.01. 12,000,000 shares authorized. Approximately 10,000,000 shares will be distributed pursuant to the terms of the plan. One vote per share.

SOURCE: Disclosure Statement and Plan of Reorganization both dated June 10, 1996 and filed July 3, 1996.

4. authorizing an agency to exercise a function that is not expressly authorized by law at the time the plan is transmitted to Congress;
5. increasing the term of an office beyond that provided by law for the office; or
6. dealing with more than one logically consistent subject matter.

A reorganization plan ordinarily is effective at the conclusion of the first period of 60 calendar days of continuous session of Congress after the date on which the plan is transmitted to it, unless, between the transmittal date and the end of the 60-day period, either house passes a resolution declaring that the house does not favor the reorganization plan. A reorganization plan can prescribe that its provisions will be effective at a time later than the date on which the plan otherwise would be effective. In addition, if both houses of Congress have defeated a resolution of disapproval, the provisions can be effective at a

time earlier than the expiration of the 60-day period.

An effective reorganization plan is published in the statutes at large, in the same volume as the public laws, and in the FEDERAL REGISTER.

If a statute is enacted, an action taken, a regulation promulgated by an agency, or a function affected by a reorganization before the effective date of the reorganization, it has, except to the extent rescinded, modified, superseded, or made inapplicable by or under authority of law, or by the abolition of a function, the same effect as if the reorganization had not been made. If, however, the statute, regulation, or other action has vested the functions in the agency from which it is removed under the reorganization plan, the function, insofar as it is to be exercised after the plan becomes effective, is regarded as vested in the agency under which the function is placed by the plan.

A suit, action, or other proceeding lawfully instituted by or against the head of an agency or other officer of the United States, in his official capacity, or in relation to the performance of his official duties, does not abate because a reorganization plan becomes effective. If a motion, an application for a court order, or a supplemental petition showing a necessity for a survival of the suit, action, or proceeding is filed at any time within 12 months after the reorganization plan takes effect, the court may allow the suit, action, or proceeding to be maintained by or against the successor of the head or officer under the reorganization achieved by the plan or, if there is no successor, against such agency or officer as the president designates.

The appropriations or portions thereof unexpended because of the operation of the reorganization plan revert to the TREASURY DEPARTMENT.

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CROSS-REFERENCES

Administrative Agency; Administrative Law and Procedure; Executive Branch.

## REPARABLE INJURY

*A* TORT, *or civil wrong, that can be compensated through the payment of pecuniary damages, as distinguished from irreparable injury or harm that is not compensable through the payment of money.*

## REPARATION

*Compensation for an injury; redress for a wrong inflicted.*

The losing countries in a war often must pay damages to the victors for the economic harm that the losing countries inflicted during wartime. These damages are commonly called military reparations. The term *reparation* may also be applied to other situations where one party must pay for damages inflicted upon another party.

In the twentieth century, military reparations have been extracted from Germany twice. After Germany's defeat in WORLD WAR I, the Allies conducted a peace conference in Paris at which they drafted the TREATY OF VERSAILLES (225 Consol. T. S. 188 [June 28, 1919]) which was extremely harsh toward Germany. Germany was compelled to deliver to the Allies one-eighth of its livestock and provide ships, railroad cars, locomotives, and other materials to replace those it had destroyed during the war. Germany also had to provide France with large quantities of coal as reparations.

The treaty required Germany to pay large yearly sums of money to the Allies, but it did not set the total amount due. A reparations commission, which was created to determine the amount, decided in 1921 to set total cash reparations at about $33 billion.

Efforts to collect the reparations failed, primarily because the German economy was in dire straits in the 1920s. U.S. financier Charles G. Dawes presided over a committee of experts to deal with this problem. In 1924 the Allies and Germany adopted the Dawes Plan, which reorganized the German national bank, placed stringent economic controls on Germany, and provided for loans to Germany, all to improve the German economy so that the country could make reparations. In 1929 Germany renegotiated its reparations requirements with the Allies. A committee headed by U.S. representative OWEN D. YOUNG reduced the amount Germany owed and ended foreign controls over the German economy. Even this reduced amount of reparations was not paid. When ADOLF HITLER came to power in 1933, he repudiated the Treaty of Versailles and the reparations provisions.

In the twentieth century, the term *reparation* has come to imply fault. However, in some circumstances nations may pay for damages inflicted by their armed forces without admitting fault or legal liability, by offering compensation

*In April 2002, Fusako Ishizuka, a Japanese American forced into a U.S. internment camp during WWII, watches a reenactment of the 1942 evacuations that took place in Watsonville, California. Most surviving internees of the camps have received reparations from the U.S. government.*

AP/WIDE WORLD PHOTOS

*ex gratia*, which is Latin for "out of grace." Such payments are usually made for humanitarian or political reasons.

For example, the United States paid Switzerland $4 million for the accidental bombing of the town of Schaffhausen during **WORLD WAR II** and paid Japan $2 million in the mid-1950s after an atomic bomb test that the United States conducted in the Pacific showered a Japanese fishing boat and its crew with radiation.

In recent years the governments of Switzerland and Germany have made efforts to provide reparations to victims of the Nazi Holocaust in the 1930s and 1940s. Swiss banks had frozen the assets of Holocaust survivors and their families after World War II and for many years they denied that those assets existed. With pressure from the international community and the United States mounting, the banks finally acknowledged in 1997 that they were holding thousands of dormant accounts and set up a restitution fund of some $1.25 billion for account holders and their survivors. An instrumental figure in the fight for Swiss reparations was U.S. Senator Alphonse D'Amato of New York, who was then chair of the Senate Banking Committee.

The U.S. government has granted reparations to the Japanese Americans who were interned during World War II as a result of **EXECUTIVE ORDER** No. 9066 signed by President **FRANKLIN D. ROOSEVELT** in February 1942. The order led to the incarceration of approximately 120,000 persons of Japanese ancestry; 77,000 were U.S. citizens and the rest legal and illegal resident **ALIENS**. The president was reacting to wartime hysteria that gripped the West Coast immediately after the Japanese attack on Pearl Harbor. As U.S. citizens began to fear a Japanese invasion of the mainland, rumors abounded about treasonous Japanese residents either communicating vital war secrets to the Japanese government or actively aiding the enemy. Though these rumors proved false, Japanese Americans suffered because of their nationality. Those interned were forced to sell their homes, furnishings, and businesses at low, distressed prices because they were only allowed to take what they could carry. Families were uprooted and spent time in relocation camps. These camps were located in inhospitable places with severe weather conditions, and they were poorly outfitted to shelter the prisoners who suffered, became ill, and in many cases died. The last of these camps did not close until 1946, six months after the end of the war.

During the war Japanese Americans sought restoration of their rights through the courts, but to no avail. In 1942 Fred Toyosaburo Korematsu was convicted for failing to report for relocation. In 1944 the U.S. Supreme Court, in **KOREMATSU V. UNITED STATES**, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194, upheld the constitutionality of the relocation orders.

For 40 years Japanese Americans sought reparations for their wartime imprisonment and loss of property. The Civil Liberties Act of 1988 (50 App. U.S.C.A. § 1989b) amounted to an apology from the U.S. government for the wartime internment of Japanese Americans. The act established a $1.25 billion trust fund for paying reparations. Each of the approximately 60,000 surviving internees received $20,000 tax free.

Reparations are also awarded to some crime victims. Several states have enacted the Uniform Crime Victims Reparation Act, which awards reparations to persons who have been victims of crimes involving physical violence. Reparations may be granted for medical and hospital costs not covered by medical insurance, lost wages, and other costs associated with a crime.

In addition, some federal statutes provide for reparations for violations of law. For example, persons suffering losses because of violations of the Commodity Futures Trading Act (7 U.S.C.A. § 18) may use the act to seek reparation against the violator.

In the late 1990s and early 2000s there was a growing interest in the idea of providing reparations to the descendants of black slaves in the United States. After the U.S. CIVIL WAR, freed black slaves were promised a new start with "40 acres and a mule" to start their own farms. That promise never materialized, and blacks remained victims of RACIAL DISCRIMINATION.

The argument for slave reparations is that the United States owes its prosperity in no small part to the millions of slaves who were brought to the United States between the sixteenth and nineteenth centuries. Most of those slaves were never compensated for their efforts. The effects of SLAVERY and the racial prejudice that went hand in hand with it, even after slavery was outlawed, put blacks at a significant socioeconomic disadvantage: fewer opportunities to get a good education, to get good jobs, and to acquire economic security. Proponents of slave reparations maintain that the U.S. government owes the descendants of slaves a formal acknowledgement and apology for the inhumanity of slavery. They also believe that the government should seek ways to provide some form of tangible restitution to slave descendants.

Opponents of reparations claim that those who seek them are merely trying to exploit national guilt and provide easy money for the descendants of slaves. Many blacks oppose reparations for that reason: they do not wish to carry the stigma of being helpless victims of their circumstances in a country known for individual achievement against daunting odds. Some opponents feel that bringing the issue to the forefront will only open old wounds and in fact increase racial tensions. Others feel that if reparations were granted, it would weaken programs such as AFFIRMATIVE ACTION because people would believe that the reparations had at last leveled the playing field for blacks and whites.

Part of what makes the issue so challenging is its logistics. Among the proponents of reparations there exists disagreement as to what form they should take. Some people think that a cash settlement is sufficient, while others want to see the creation of programs that, for instance, would provide education and HEALTHCARE funding for those in need. Moreover, there is the question of who would receive precisely which form of reparations. Not all blacks in the United States are descendants of slaves, and in some cases their slave ancestors were freed in the eighteenth century.

Congressman John Conyers of Michigan, recognizing the complexity and sensitivity of this issue, has introduced legislation each year since 1989 that would establish a commission to study reparations proposals. This commission would study the long-term economic effects of slavery on freed slaves and their descendants and determine a means of providing fair and equitable redress.

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CROSS-REFERENCES

Japanese American Evacuation Cases; Slavery; Victims of Crime.

## REPEAL

*The* ANNULMENT *or abrogation of a previously existing statute by the enactment of a later law that revokes the former law.*

The revocation of the law can either be done through an *express repeal,* whereby a statute specifically indicates that the former law shall be revoked and abrogated, or through an *implied repeal,* which arises when the later statute contains provisions that are so contrary or irreconcilable with those of the prior law that only one can remain in force.

The repeal of a law differs from the amendment thereof, because the amendment of a law involves making a change in a law that already exists, leaving a portion of the original still standing. When a law is repealed, however, it is completely abrogated.

## REPLEVIN

*A legal action to recover the possession of items of* PERSONAL PROPERTY.

Replevin is one of the oldest FORMS OF ACTION known to COMMON LAW, first appearing about the beginning of the thirteenth century. It was a legal procedure for claiming the right to have personal property returned from the possession of one who had less right to hold it than the plaintiff. Originally the action may have been available only for the recovery of goods that were illegally held past the time the defendant had the right to their possession, but soon the right was extended to cover every situation, whether the defendant wrongfully took or just withheld another's property. As time passed, if the goods themselves could not be recovered, the courts sometimes gave judgment for an amount of money representing the value of the goods. Generally, however, replevin aimed at restoring the property itself to the person entitled to possess it. The defendant could not claim as an excuse that the property belonged to someone not involved in the lawsuit because the only issue before the court was rightful possession, not title. For example, an executor of an estate could seek replevy of racehorses boarded by the decedent if the owner of the stable refused to release them. It would be no defense that the executor was not the owner of the horses.

Replevin differed from the actions of TRESPASS and TROVER in that it sought recovery of the specific items of property in dispute rather than monetary damages. Unlike trover, the plaintiff was not bound to prove that the defendant had converted the goods to his or her own use, only that the defendant wrongfully refused to give them up. Unlike trespass, the defendant in an action to replevy goods was not claiming that he or she owned the property, only that he or she was entitled to hold on to it rather than give it to the plaintiff. The action of DETINUE was available to recover property that the defendant acquired lawfully and then unlawfully refused to return, such as in an ordinary BAILMENT situation.

Like other forms of action, replevin was wrapped up in technicalities that made it unwieldy for many plaintiffs. Modern statutes have replaced the old forms with more efficient laws of CIVIL PROCEDURE; in most states, these include a particular statute regulating the recovery of personal property wrongfully withheld. These procedures generally incorporate elements of the common-law actions of detinue and replevin. The plaintiff usually initiates proceedings by serving papers showing why he or she claims the property and by posting a bond equal to double the value of the property. Then the sheriff seizes the property and, after a short period, delivers it to the plaintiff to hold until a hearing can be had on the claim. Most statutes allow the defendant to regain the property before the hearing by posting a bond of his or her own and filing an AFFIDAVIT stating that he or she is entitled to possession of the property. In some states, it is possible to punish a defendant who secretes, destroys, or disposes of the property by citing him or her for CONTEMPT of court. An uncooperative defendant or the losing party can be ordered to pay monetary damages to the other party. The bond posted by either party is a source of money to pay any costs or damages assessed against that party.

## REPLICATION

*In* COMMON-LAW PLEADING, *the response of a plaintiff to the defendant's plea in an action at law, or to the defendant's answer in a suit in* EQUITY.

Common-law PLEADING required the plaintiff to set out the claim in a declaration or, in equity, in a bill. The defendant responded with a plea or answer. When the defendant raised a new point in his or her response, the plaintiff was required to introduce an additional fact that defeated this new point. The plaintiff had an opportunity to respond in a paper called a replication. The modern equivalent is known as the reply.

## REPLY

*The* PLEADING *in which a plaintiff responds to the defendant's demand for relief asserted in a set-off or counterclaim.*

In most states and in the federal courts, a reply is permitted only when the defendant has specifically made a properly labeled counterclaim or when the court orders the plaintiff to file a formal response to an answer.

## REPORT

*An official or formal statement of facts or proceedings. To give an account of; to relate; to tell or convey information; the written statement of such an account.*

For example, one kind of report is the formal statement in writing made to a court by a *master,* a clerk, or a referee who has been appointed to inquire into a particular matter for the court. Sometimes the report of a public official is distinguished from a return. A return typically discloses something done or observed by the official, whereas a report shows the results of an investigation into matters outside the personal knowledge of the official.

Regularly published volumes of books containing accounts of decisions and opinions of various courts are sometimes referred to as reports, but more often they are called reporters.

The ANNUAL REPORT for stockholders is prepared by a corporation, a consumer report describes the qualities of a manufactured product, and a credit report assesses the creditworthiness of a business or consumer for a bank or other lender.

## REPORTER

*One who prepares a summary or gives an account. A court reporter is a person who records court proceedings as they take place and then later transcribes the account. A published volume of the decisions of a court or a group of courts.*

The National Reporter System, published by Thomson West, is the most comprehensive collection of the decisions of the appellate courts of the states and of the United States. There are 18 reporters in the National Reporter System. Eight of the units cover federal courts and ten units cover the 50 states and the District of Columbia.

All decisions, opinions, and memoranda of the U.S. Supreme Court are published in the *Supreme Court Reporter* (cited as S. Ct.). The ADVANCE SHEETS are issued semimonthly during the term of the Court. At the end of the term, two or three hardbound volumes are published, depending on the number of cases decided.

The *Federal Reporter* (F.), *Federal Reporter, Second Series* (F.2d), and *Federal Reporter, Third Series* (F.3d) contain the reported cases of the U.S. Courts of Appeal, Court of Claims, Court of Customs and Patent Appeals, and TEMPORARY EMERGENCY COURT OF APPEALS. The *Federal Supplement* (F.Supp.) reports decisions of the U.S. District Courts, the U.S. Court of International Trade, and the Judicial Panel on Multistate Litigation. *Federal Rules Decisions* (F.R.D.) contains district court opinions construing the Federal Rules of CIVIL PROCEDURE. *Military Justice Reporter* (M.J.) carries the cases of the Court of Military Appeals and Courts of Military Review. *Bankruptcy Reporter* (Bankr.) reports decisions of the U.S. BANKRUPTCY Courts and bankruptcy decisions of other federal courts.

The regional units of the National Reporter System report the opinions of the highest courts of all 50 states and the District of Columbia. In addition, these reports contain opinions of state intermediate appellate courts that are selected by the courts for publication. Many of the states have designated the unit of the National Reporter System in which their cases appear as their official reports.

The regional units of this system are the *Atlantic Reporter, Second Series* (A., A.2d); *North Western Reporter, Second Series* (N.W., N.W.2d); *Pacific Reporter, Second Series* (P., P.2d); *South Eastern Reporter, Second Series* (S.E., S.E.2d); *Southern Reporter, Second Series* (So., So.2d); and *South Western Reporter, Second Series* (S.W., S.W.2d). Because of the large volume of reported cases, three states have their own reporter units. They are the *California Reporter* (Cal. Rptr.); *Illinois Decisions* (Ill. Dec.); and *New York Supplement* and *New York Supplement, Second Series* (N.Y.S., N.Y.S.2d).

## REPOSSESSION

*The taking back of an item that has been sold on credit and delivered to the purchaser because the payments have not been made on it.*

For example, if an individual fails to render prompt payments on a new car, the car might be subject to repossession by the finance company, which has extended the credit.

## REPRESENT

*To exhibit or expose; to appear in the character of.*

When an item is represented, it is produced publicly. To represent an individual means to stand in his or her place, acting as his or her substitute or attorney.

## REPRESENTATION

*Any action or conduct that can be turned into a statement of fact.*

For example, displaying a car with an odometer reading of ten miles constitutes a representation to a prospective buyer that the car has only been driven ten miles.

The term *representation* is used in reference to any express or implied statement made by one of the parties to a contract to another, regarding a particular fact or circumstance that serves to influence the consummation of the deal.

As applied to the law of DESCENT AND DISTRIBUTION, representation is the principle by which the issue of an individual who has died inherits the portion of an estate that such person would have taken if he or she had lived.

## REPRESENTATIVE

*An individual who stands in the place of another.*

With respect to CONSTITUTIONAL LAW, a representative is an individual chosen by the electorate to serve as its spokesperson in a legislative body, such as the Senate or House of Representatives.

A PERSONAL REPRESENTATIVE is an individual who is named in a will, or appointed by a probate court, to supervise the distribution of property remaining after another individual's death.

## REPRESENTATIVE ACTION

*A legal action in which one or a few members of a class sue on behalf of themselves and other members of the same class; a lawsuit brought by the stockholders of a corporation, on its behalf, for the enforcement of a corporate right.*

CROSS-REFERENCES

Class Action.

## REPRIEVE

*The suspension of the execution of the death penalty for a period of time.*

Reprieve is generally an act of clemency that is extended to a prisoner in order to give him or her an opportunity to find a means or reason for reducing the sentence imposed.

The term *reprieve* is also used generally in reference to the withdrawal of any sentence for a period of time.

## REPRISAL

*The act of punishing another for some injury the latter caused. In terms of* INTERNATIONAL LAW, *a reprisal is the forcible taking, in time of peace, by the government of one country of the property or territory belonging to another country or belonging to the citizens of the other country, as redress intended to satisfy a claim.*

Reprisals in international law contexts were clearly defined in the *Naulilaa Case* (*Portugal v. Germany*), 2 UN Reports Of International Arbitral Awards 1012 (Portuguese-German Mixed Arbitral Tribunal, 1928): "A reprisal is an act of SELF-HELP . . . by the injured state, responding—after an unsatisfied demand—to an act contrary to international law committed by the offending state. . . . Its object is to effect REPARATION from the offending state for the offense or a return to legality by the avoidance of further offenses." The UN General Assembly in its 1970 *Declaration on Principles of International Law* declared, "States have a duty to refrain from acts of reprisal involving the use of force." Resolution 2625 (XXV).

There is a fine distinction between a "lawful reprisal," and an act of revenge or retaliation, which are always illegal under international law. Although reprisals are acts that normally would be considered illegal, circumstances can boost them into the realm of the legitimate. To be considered legitimate, reprisals must be taken in response to prior illegal attacks. A reprisal is a form of SELF-DEFENSE and can only be used as a last resort; it must be executed with the view of restoring a sense of equilibrium in international relations and ensuring future compliance with legal norms.

The notion of proportionality is important in reprisals. Any response from an aggrieved country must be proportional to the injury it sustained. For example, if an enemy uses an illegal weapon such as a chemical warhead, the concept of reprisal would permit the use of weapons that would "otherwise be unlawful in order to compel the enemy to cease its prior violation." In addition to concerns of proportionality, the methods of reprisals are also important considerations. For example, economic sanctions are generally illegal, but when they are used as a response to a prior illegal act, they are generally considered legally permissible.

Although it may seem warlike, a reprisal is not technically an act of war. Rather, it is done solely in response to conduct that violated international law. However, reprisals have the potential to provoke a war, which is why they are so strongly discouraged in international law. In fact, the Covenant of the League of Nations and the Charter of the UNITED NATIONS classify reprisals as acts endangering peace.

There are two broad categories of reprisals: forceful and non-forceful reprisals. Forceful

reprisals include using arms; non-forceful reprisals include devices such as expelling ambassadors or imposing economic sanctions. Reprisal can only occur in situations arising between nation states. There is no legitimate reprisal against a non-state actor criminal, such as the head of an international terrorist organization or drug lord.

Since SEPTEMBER 11TH ATTACKS in 2001, the actions of the U.S. government and its allies as they prosecute the WAR ON TERRORISM have focused attention on the international law governing reprisals. The pursuit of Osama bin Laden and other individuals suspected of having ties to international terrorist organizations, have drawn criticism. Critics point out that Protocol I to the Geneva Conventions forbids reprisals against civilians and civilian property. The United States is not a party to Protocol I, however, and does not consider the conventions' prohibitions against reprisals directed at all civilians to be part of customary international law. On the other hand, the United States is a party to the Geneva Convention on Civilians and follows its provisions regarding reprisals against *protected* civilians and their property. Generally, a protected person is one who finds himself or herself "in the hands" of the opposing forces.

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CROSS-REFERENCES

Restitution.

## REPRODUCTION

A woman's right to determine whether she will give birth was not legally recognized until the 1960s and 1970s, when U.S. Supreme Court decisions established that right. Until that time, women in the United States were denied access to BIRTH CONTROL and to legal abortions by state criminal laws. Since the 1970s, there has been ongoing controversy over legalized ABORTION, with the Supreme Court allowing states to impose restrictions on obtaining the procedure. In addition, medical science has developed techniques of ARTIFICIAL INSEMINATION and in vitro fertilization that enable pregnancy. These advances, in turn, have created opportunities for SURROGATE MOTHERHOOD, opening up even more legal issues dealing with reproductive rights. Because of the cultural importance placed on motherhood and the intersection of religious beliefs and public policy, the debate over reproductive rights has been contentious.

### Historical Background

In the nineteenth century, the average size of the U.S. family declined dramatically. A white woman in 1800 gave birth to an average of seven children. By the end of the century, the average was three-and-a-half children. In part, the decline was caused by the dissemination of scientific information on birth control. Many of the nineteenth-century proponents of family planning were radical social reformers who offended church and community leaders with their graphic descriptions of human REPRODUCTION.

Conservatives sought to curtail this information on birth control and abortion. The most prominent conservative watchdog was Anthony Comstock, a New York businessman who led a national reform effort against obscene materials. His work resulted in the federal COMSTOCK LAW OF 1873, which criminalized the transmission and receipt of "obscene," "lewd," or "lascivious" publications through the U.S. mail. The law specified that materials designed, adapted, or intended "for preventing conception or producing abortion" were included in the list of banned items. Some states passed "little Comstock laws" that prohibited the use of contraceptives.

Until the second half of the nineteenth century, few states had criminal laws against abortion. Women in colonial times had used abortion to dispose of the offspring of rape or seduction. Abortion was not illegal under the COMMON LAW as long as it was performed before "quickening," the period at about four months when the fetus begins to move in the womb.

State legislatures passed laws in the first half of the nineteenth century that adopted the quickening rule, and a few states allowed abortion after quickening to save the life of the mother. Abortions increased markedly in the 1850s and 1860s, especially among middle-class white women.

Religious leaders began to denounce abortion, but the AMERICAN MEDICAL ASSOCIATION (AMA) proved to be the most successful in ending legalized abortion. The AMA was formed in

# Restricting Antiabortion Protests

The legalization of **ABORTION** resulted in the creation of many groups opposed to the medical procedure. Some groups have sought to take away this reproductive right by **LOBBYING** Congress and state legislatures, and others have picketed outside clinics that offer abortion services. In the 1990s, groups such as Operation Rescue sought to prevent abortions by organizing mass demonstrations outside clinics and blockading their entrances, as well as confronting and impeding women seeking to enter the clinics.

Clinics responded by obtaining court injunctions that restricted how close abortion protestors could get to clinic property. Abortion protestors claimed that these court orders violated their **FIRST AMENDMENT** rights of assembly and free speech.

The U.S. Supreme Court, in *Schenck v. Pro-Choice Network of Western New York,* 519 U.S. 357, 117 S. Ct. 855, 137 L. Ed. 2d 1 (1997), clarified what types of restrictions a judge could impose on abortion clinic protests. The Court upheld an **INJUNCTION** provision that imposed a fixed buffer zone around the abortion clinic. In this case the buffer zone affected protests within 15 feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, and driveways and driveway entrances. Chief Justice **WILLIAM H. REHNQUIST** ruled that the government had an interest in ensuring public safety and order, promoting free flow of traffic, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services.

The Court did strike down a provision concerning floating buffer zones. These zones, which prohibited demonstrations within 15 feet of any person or vehicle seeking access to or leaving abortion facilities, "burdened more speech than was necessary" to serve the government interests cited in support of fixed zones. Thus, protestors were free to approach persons outside the 15-foot fixed buffer zone.

In 2000, though, the Court again considered the issue of a buffer zone in *Hill v. Colorado,* 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000). The Court upheld Colorado's 1993 statute, which prevented anyone from counseling, distributing leaflets, or displaying signs within eight feet of others without their consent whenever they are within 100 feet of a health-clinic entrance. The Colorado law was enacted, according to attorneys for the state, after abortion patients complained of being spat on, kicked, and harassed outside clinics. Those who challenged the law claimed it was a violation of their **FREEDOM OF SPEECH** under the First Amendment. The court found sufficient public and **STATE INTEREST** to uphold the restriction.

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**CROSS-REFERENCES**

Abortion; *Roe v. Wade.*

1847, and the all-male professional group (women were not allowed to become doctors) made abortion law reform one of its top priorities. The AMA saw abortion reform as a way to increase its influence and to drive out unlicensed practitioners of abortion. By the 1880s, medical and religious leaders had convinced all-male state legislatures (women were not allowed to vote) to impose criminal penalties on persons performing abortions and, in some states, on the women who had abortions. The laws were based on the states' POLICE POWER to regulate public health and safety. This had some justification because abortion procedures of the time were dangerous, subjecting women to sterility and, in many cases, death. In response, women turned to birth control and to illegal abortions. The legal restrictions on birth control and abortion that were created in the late nineteenth century were not be removed until the 1960s and 1970s.

### Birth Control

In the early twentieth century, a group of reformers sought to legally provide birth control information. The most prominent of these reformers was MARGARET SANGER, who coined

the term *birth control.* Sanger challenged state laws restricting birth control information, seeking to draw public support. Though the courts generally rebuffed her efforts, Sanger helped build a national movement. In 1921, she founded the American Birth Control League, which, in 1942, became the Planned Parenthood Federation of America.

Renewed legal challenges to restrictive state laws began in the 1950s. By 1960, almost every state had legalized birth control. Nevertheless, laws remained on the books that prevented the distribution of birth control information and contraceptives. A specific target was the 1879 Connecticut little Comstock law that made the sale and possession of birth control devices a misdemeanor. The law also prohibited anyone from assisting, abetting, or counseling another in the use of birth control devices.

The Supreme Court reviewed the Connecticut law in **GRISWOLD V. STATE OF CONNECTICUT**, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). Estelle Griswold was the director of Planned Parenthood in Connecticut. Just three days after Planned Parenthood opened a clinic in New Haven, Griswold was arrested. She was convicted and fined $100. The Connecticut courts upheld her conviction, rejecting the contention that the state law was unconstitutional.

The Supreme Court struck down the Connecticut birth control law on a vote of 7 to 2. In his majority opinion, Justice **WILLIAM O. DOUGLAS** announced that the law was unconstitutional because it violated an individual's right to privacy. Douglas asserted that "specific guarantees in the **BILL OF RIGHTS** have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." Thus, these "penumbras" (things on the fringe of a major region) and "emanations" added up to a general, independent right of privacy. In Douglas's view, this general right was infringed by the state of Connecticut when it outlawed birth control. He said that the state cannot be permitted "to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives."

The *Griswold* decision invalidated the Connecticut law only insofar as it invaded marital privacy, leaving open the question of whether states could prohibit the use of birth control devices by unmarried persons. In *Eisenstadt v. Baird,* 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972), the Court reviewed a Massachusetts law that prohibited unmarried persons from obtaining and using contraceptives. William Baird was arrested after giving a lecture on birth control to a college group and providing contraceptive foam to a female student. The Court struck down the law, establishing that the right of privacy is an individual right, not a right enjoyed only by married couples. Justice **WILLIAM J. BRENNAN JR.**, in his majority opinion, stated, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether or not to beget a child."

With *Griswold* and *Eisenstadt,* state prohibition of birth control information and devices came to an end. These decisions also enabled schools to give more information to students concerning sex education. Some schools even dispense contraceptives.

In 1997, the **FOOD AND DRUG ADMINISTRATION** (FDA) approved the use of emergency contraceptive, known popularly as the "morning-after pill." Developed by Canadian professor Albert Yuzpe and known as the Yuzpe Regimen, the pill contains heavy dosages of hormones that can prevent pregnancy if taken 72 hours after sexual intercourse. Proponents, including pro-choice advocates in the abortion debate, claim that it is a safe and effective method of birth control. Pro-life advocates and others denounce the pill as a form of abortion. Some critics in the medical field also claimed that repeated use of the pill could have unknown long-term effects due to its high level of hormones.

### Abortion

The establishment in *Eisenstadt* of an individual's right to privacy soon had dramatic implications for state laws that criminalized abortions. Until the 1960s, abortion was illegal in every state, except to save the mother's life. The growth of the modern feminist movement in the 1960s led to calls for the legalization of abortion, and many state legislatures began to amend their laws to permit abortion when the pregnancy resulted from a rape or when the child was likely to suffer from a serious birth defect. However, these laws generally required that a committee of doctors approve the abortion.

State legislation was swept away with the Supreme Court's controversial decision in **ROE V. WADE**, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d

147 (1973). A CLASS ACTION lawsuit challenged the state of Texas's abortion law. SARAH WEDDINGTON, the attorney for "Jane Roe," argued that the Constitution allows a woman to control her own body, including the decision to terminate an unwanted pregnancy.

The Supreme Court, on a 7–2 vote, struck down the Texas law. Justice HARRY A. BLACKMUN, in his majority opinion, relied on the prior right to privacy decisions to justify the Court's action. Blackmun concluded that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." More importantly, he stated that the right of privacy is a fundamental right. This meant that the state of Texas had to meet the STRICT SCRUTINY test of constitutional review. Texas showed a compelling state interest because it had a strong interest in protecting maternal health that justified reasonable state regulation of abortions performed after the first trimester (three months) of pregnancy. However, Texas also sought to proscribe all abortions and claimed a compelling STATE INTEREST in protecting unborn human life. Though the Court acknowledged that this was a legitimate interest, it held that it does not become compelling until that point in pregnancy when the fetus becomes "viable," capable of "meaningful life outside the mother's womb." Beyond the point of viability, the Court held that the state may prohibit abortion, except in cases in which it is necessary to preserve the life or health of the mother.

The Court rejected the argument that a fetus is a "person" as that term is used in the Constitution and thus possesses a right to life. To find a fetus to be a person would make any abortion a HOMICIDE, which would prevent a state from allowing abortions in cases of rape or in which the pregnancy endangers the life of the mother.

The *Roe* decision elicited a hostile reaction from opponents of abortion. The creation of a "pro-life" movement that sought to overturn *Roe* was immediate, becoming a new fixture in U.S. politics. Pro-life forces sought a constitutional amendment to undo the decision, but it fell one vote short in the U.S. Senate in 1983. Over time, as the composition of the Supreme Court has changed, the Court has modified its views, without overturning *Roe.*

In the 1970s, a majority of the Court resisted efforts by some states to put restrictions on a woman's right to have an abortion. In *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976), the Court struck down a Missouri law that required minors to obtain the consent of their husbands or parents before obtaining an abortion. In 1979, in *Bellotti v. Baird,* 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797, the Court invalidated a similar Massachusetts law. Both opinions emphasized the personal nature of abortion decisions and the fact that the state cannot give someone else a VETO over the exercise of one's constitutional rights.

In *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983), the Court struck down a city ordinance that required that all abortions be performed in hospitals; a twenty-four-hour waiting period must pass before an abortion could be performed; certain specified statements be made by a doctor to a woman seeking an abortion to ensure that she made a truly informed decision; and all fetal remains be disposed in a humane and sanitary manner. The Court held that these requirements imposed significant burdens on a woman's exercise of her constitutional right without substantially furthering the state's legitimate interests.

Opponents of abortion were successful, however, in preventing the payment of public funds for abortions not deemed medically necessary. In *Maher v. Roe,* 432 U.S. 464, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977), the Court upheld a Connecticut state regulation that denied MEDICAID benefits to indigent women seeking to have abortions, unless their physicians certified that their abortions were medically necessary. The Court found the law permissible because poor women were not a "suspect class" entitled to strict scrutiny review and because the regulation did not unduly burden the exercise of fundamental rights. In 1980, the Court upheld a provision of federal law, commonly known as the Hyde amendment, forbidding federal funds to support nontherapeutic abortions (*Harris v. McRae,* 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784).

During the 1980s and 1990s, the conservative majority on the Court showed more deference to state regulation of abortions. In WEBSTER V. REPRODUCTIVE HEALTH SERVICES, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989), the Court upheld a Missouri law restricting abortions that contained the statement, "the life of each human being begins at conception." On a 5–4 vote, the Court upheld a law that forbids

state employees from performing, assisting in, or counseling women to have abortions. It also prohibited the use of any state facilities for these purposes and required all doctors who would perform abortions to conduct viability tests on fetuses at or beyond 20 weeks' gestation.

In 1991, the Court upheld federal regulations imposed by the Reagan administration that barred birth control clinics that received federal funds from providing information about abortion services to their clients (*Rust v. Sullivan,* 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233). The Supreme Court found the regulation to be a legitimate condition imposed on the receipt of federal financial assistance.

The Court appeared to be ready to overturn the *Roe* precedent, but it surprised observers when it upheld *Roe* in *Planned Parenthood v. Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). The Pennsylvania law restricting abortions required spousal notification, parental consent in cases of minors, and a 24-hour waiting period before the abortion could be performed. Similar requirements had been struck down by the Court before.

On a 5–4 vote, the Court reaffirmed the essential holding of *Roe* that the constitutional right of privacy is broad enough to include a woman's decision to terminate her pregnancy. Though there was no majority opinion, the controlling opinion by Justice ANTHONY M. KENNEDY, joined by Justices SANDRA DAY O'CONNOR and DAVID H. SOUTER, defended the reasoning of *Roe* and the line of cases that followed it. However, the joint opinion abandoned the trimester framework and declared a new "undue burden" test for judging regulations of abortion. Using this test, the joint opinion upheld the parental consent, waiting period, and record-keeping and reporting provisions, but invalidated the spousal notification requirement.

### Pregnancy and Medical Developments

Artificial insemination, in vitro fertilization, and embryo transplants have created new opportunities for conceiving children. With artificial insemination, sperm from a donor is introduced into the vagina or through the cervix of a woman by any method other than sexual intercourse. Originally this technique was used when a husband was sterile or impotent, but it is now available to women regardless of whether they are married. For example, a lesbian couple could use artificial insemination to start a biological family.

**Pregnancies, Number and Outcome: 1997**

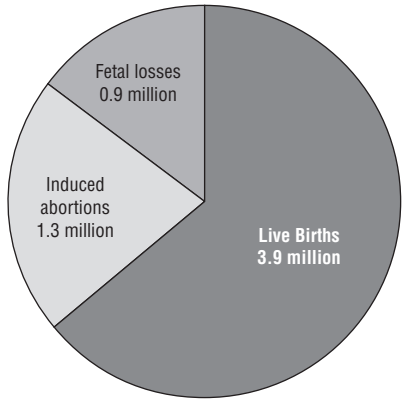


SOURCE: U.S. National Center for Health Statistics, *Monthly Vital Statistics Report,* vol. 49, No. 4, June 6, 2001.

The technique of in vitro fertilization gained international attention with the 1978 birth in England of Louise Brown, the first child conceived by in vitro fertilization. This technique involves the fertilization of the egg outside the womb. The embryo is then transferred to a woman's uterus.

Because sperm and eggs can be frozen and stored indefinitely, there are occasional legal disputes over the rights to these genetic materials when a HUSBAND AND WIFE divorce. For example, in *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998), the New York Court of Appeals determined that the custody of five frozen embryos should be determined by the terms of a contract signed by a couple with a hospital that stored the embryos. The couple had sought to become pregnant through in virto fertilization, but, after several failed attempts, decided to divorce. The husband and wife initially agreed to the terms of a CONSENT DECREE with the hospital whereby the hospital could retain the right to keep the embryos for research purposes. The wife later changed her mind and wanted custody of the embryos. The court held that the consent agreements constituted valid contracts and must be enforced. The court ruled that under the terms of the contract, the hospital should be awarded the embryos for use in research.

Other courts have considered disputes whereby one spouse wishes to use embryos for the purpose of procreation while the other wants the embryos destroyed. Several state supreme courts have held that the right of a spouse who wishes to avoid procreation is superior to the wishes of spouse who wishes to procreate. In *J. B. v. M. B.*, 783 A.2d 707 (N.J. 2001), for example, the New Jersey Supreme Court determined that a husband's right to procreate was not disturbed by its ruling that remaining frozen embryos from the husband and wife be destroyed according to the wishes of the wife.

Developments in in vitro fertilization led to surrogate motherhood, which has caused legal battles as well. In these cases, a woman agrees to be either artificially inseminated by a sperm-donor father or have a fertilized ovum inserted into her uterus. After giving birth, the surrogate mother legally surrenders the infant to the person or couple who will adopt and rear the child. The idea of surrogate motherhood is attractive to some couples because a child born of a surrogate mother will share half or all the genetic material of the parents who will raise the child.

One of the most publicized cases regarding surrogate motherhood is that of Baby M. In 1985, Mary Beth Whitehead agreed to be inseminated with the sperm of William Stern and, upon the birth of the child, relinquish her parental rights to Stern. But once the child was born, Whitehead found that she did not wish to give up the child, a girl who she named Sara. A court battle ensued, during which Stern, along with his wife, Elizabeth, were granted temporary custody of the child they had named Melissa. The court decided that Whitehead's parental rights were to be terminated, and Elizabeth Stern was granted the right to immediately adopt the child. The New Jersey Supreme Court overturned this verdict in part on February 2, 1988, restoring Whitehead's parental rights and invalidating Elizabeth Stern's ADOPTION, but granting William Stern custody of the infant.

Many surrogate mothers are close friends or relatives of the childless couple. However, the practice of commercial surrogate arrangements has increased greatly since the late 1980s. Many major cities have surrogate agencies, which are often run by doctors and lawyers who maintain lists of potential surrogate mothers and help match a woman with a couple wanting to have a baby. Commercial surrogate agencies typically charge a fee of $10,000 or more to make the arrangements, which is in addition to the surrogate mother's expenses and fees, which may range from $10,000 to $100,000.

Commercial surrogate arrangements are not legal in all states, and there is little case law on the subject. Some states declare surrogacy contracts null, void, and unenforceable because they are against public policy. Opponents of commercial surrogacy believe that such arrangements exploit the surrogate mother and turn children into a commodity. They also are concerned that if a child is born with a disability, the adoptive parents may decline to take the child. Finally, there is the issue of the surrogate mother who may not wish to surrender the child after birth.

Other medical developments have also stirred controversy. In 1997, scientists successfully cloned the first adult animal, leading to speculation that the process could be used to clone human beings. Scientists first successfully inserted DNA from one human cell into another human egg, but they do not expect successful human cloning to be possible for several years. The issue has caused heated debates focusing on the scientific, moral, and religious concerns over the possibility that an adult human could be cloned.

### Reproductive Hazards in the Workplace

Legal disputes have arisen when employers have barred pregnant women and women of childbearing age from jobs that pose potential hazards to the fetus. The Supreme Court, in *United Auto Workers v. Johnson Controls,* 499 U.S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991), ruled that a female employee cannot be excluded from jobs that expose her to health risks that may harm her fetus. The Court found that the exclusion of the women violated Title VII of the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000e et seq.) because the company policy only applied to fertile women, not fertile men. Justice Blackmun, in his majority opinion, noted that the policy singled out women on the basis of gender and childbearing capacity rather than on the basis of fertility alone. Concerns about the health of a child born to a worker at the plant were to be left "to the parents who conceive, bear, support, and raise them [the children] rather than to the employers who hire those parents."

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CROSS-REFERENCES

Abortion; Adoption; Fetal Rights; Fetal Tissue Research; Genetic Engineering; Husband and Wife; Penumbra; Sex Discrimination; Wattleton, Alyce Faye; Women's Rights.

## REPUBLIC

*That form of government in which the administration of affairs is open to all the citizens. A political unit or "state," independent of its form of government.*

The word *republic*, derived from the Latin *res publica,* or "public thing," refers to a form of government where the citizens conduct their affairs for their own benefit rather than for the benefit of a ruler. Historically republics have not always been democratic in character, however. For example, the ancient Republic of Venice was ruled by an aristocratic elite.

In the U.S. historical tradition, the belief in republicanism shaped the U.S. Revolution and Constitution. Before the revolution, leaders developed many political theories to justify independence from Great Britain. THOMAS PAINE, in his book *Common Sense* (1776), called for a representative government for the colonies and for a written constitution. Paine rejected the legitimacy of the monarchy to have a part in government. This attack on the king was echoed the following year in the Declaration of Independence, where THOMAS JEFFERSON proposed that colonists reject the monarchy and become republican citizens.

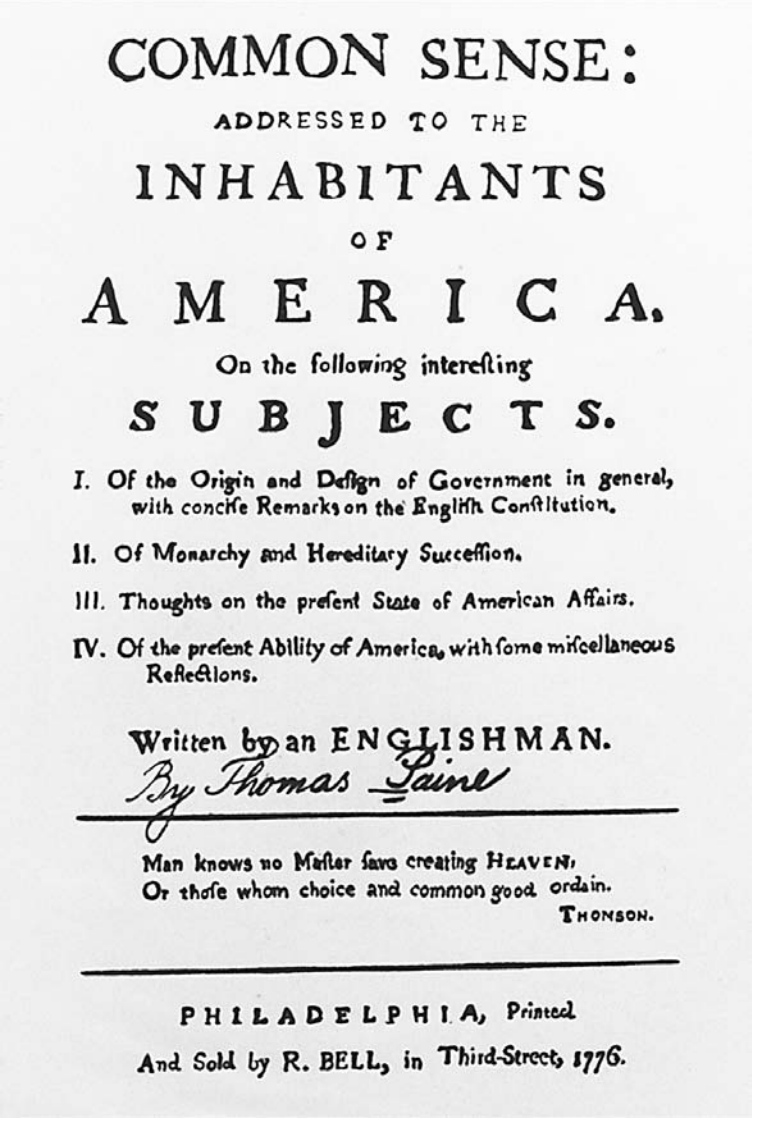

COMMON SENSE:

ADDRESSED TO THE

INHABITANTS

OF

AMERICA.

On the following intereſting

SUBJECTS.

I. Of the Origin and Deſign of Government in general, with conciſe Remarks on the Engliſh Conſtitution.

II. Of Monarchy and Hereditary Succeſſion.

III. Thoughts on the preſent State of American Affairs.

IV. Of the preſent Ability of America, with ſome miſcellaneous Reflections.

Written by an ENGLISHMAN.

By Thomas Paine

Man knows no Maſter ſave creating HEAVEN,
Or thoſe whom choice and common good ordain.
THOMSON.

PHILADELPHIA, Printed
And Sold by R. BELL, in Third-Street, 1776.

*The title page of* Common Sense *by Thomas Paine. In the book, published in 1776, Paine called for the creation of a republic in the form of a representative government with a written constitution.*

CORBIS-BETTMANN

Framers of the U.S. Constitution intended to create a republican government. Article IV, Section 4, states "The United States shall guarantee to every State in this Union a Republican Form of Government. . .." Though the language was vague, the authors of the Constitution clearly intended to prevent the rise to power of either a monarchy or a hereditary aristocracy. Article I, Section 9, states, "No Title of Nobility shall be granted by the United States," and most state constitutions have similar provisions.

The guarantee of republican government was designed to provide a national remedy for domestic insurrection threatening the state governments and to prevent the rise of a monarchy, about which there was some talk at the time.

JAMES MADISON, the author of many of the essays included in *The Federalist Papers* (1787–88), put forward a sophisticated concept of republican government. He explained in Number 10 that a republic must be contrasted with a democracy. In the eighteenth century the term "democracy" meant what is now called a pure or direct democracy, wherein legislation is made by a primary assembly of citizens, as existed in several rural Swiss cantons and in New England towns. In a pure democracy, Madison argued, there is no check on the majority to protect the weaker party or individuals and therefore such democracies "have ever been spectacles of turbulence and contention," where rights of personal security and property are always in jeopardy.

By a republic, Madison meant a system in which representatives are chosen by the citizens to exercise the powers of government. In Number 39 of *The Federalist Papers*, he returned to this theme, saying that a republic "is a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior." Generally, such leaders as Madison and JOHN ADAMS believed that republicanism rests on the foundation of a balanced constitution, involving a SEPARATION OF POWERS and checks and balances.

The republican form of government has remained a constant in U.S. politics. State constitutions follow the federal constitution in dividing powers among the legislative, executive, and judicial branches. Likewise, states have adopted the various checks and balances that exist between the three branches, including the executive VETO power and JUDICIAL REVIEW.

The U.S. Supreme Court has stayed out of controversies that involve whether the government of a state is republican in character. For example, in *Pacific States Telephone and Telegraph Co. v. Oregon*, 223 U.S. 118, 32 S. Ct. 224, 56 L. Ed. 377 (1912), the Court declined to rule whether state legislation by initiative and REFERENDUM (legislation approved directly by the people through the ballot) was inconsistent with republicanism. The Court refused to rule because it considered this issue a POLITICAL QUESTION outside its jurisdiction. It is now well established that it is the province of Congress and the president, not the courts, to decide whether the government of a state is republican in character.

CROSS-REFERENCES

Constitution of the United States; *Federalist Papers*; Locke, John.

## REPUBLICAN PARTY

The Republican Party was founded in 1854 by a group of renegade Democrats, Whigs, and political independents who opposed the expansion of SLAVERY into new U.S. territories and states. What began as a single-issue, independent party became a major political force in the United States. Six years after the new party was formed, Republican nominee ABRAHAM LINCOLN won the U.S. presidential election. The Republican Party and its counterpart, the DEMOCRATIC PARTY, became the mainstays of the nation's de facto two-party system.

Lincoln's victory in 1860 signaled the demise of the WHIG PARTY and the ascendance of Republican politics. From 1860 to 1931, the Republicans dominated U.S. presidential elections. Only two Democrats were elected to the White House during the 70-year period of Republican preeminence.

The early Republican Party was shaped by political conscience and regionalism. Throughout the early and mid-nineteenth century, states in the North and South were bitterly divided over the issues of slavery and state sovereignty. In 1854 the enactment of the KANSAS-NEBRASKA ACT inflamed political passions. Under the act residents of the new territories of Kansas and Nebraska could decide whether to permit slavery in their regions. In effect, the act invalidated the MISSOURI COMPROMISE OF 1820, which prohibited the extension of slavery in new areas of the United States. Opponents of slavery condemned the measure, and violence erupted in Kansas.

Antislavery parties had already sprung up in the United States. The abolitionist Liberty Party began in 1840, and the FREE SOIL PARTY was formed in 1848. In much the same spirit, the Republican Party arose to protest the Nebraska-Kansas Act. The new group drew support from third parties and disaffected Democrats and Whigs. After organizational meetings in 1854 in Ripon, Wisconsin, and Jackson, Michigan, the Republican Party was born.

In 1856 the Republicans nominated their first presidential candidate, John C. Frémont, a former explorer who opposed the expansion of slavery in new U.S. territories and states.

Although defeated in the national election by Democrat **JAMES BUCHANAN**, Frémont received one-third of the popular vote.

In 1860 Abraham Lincoln from Illinois was the Republican presidential nominee. Lincoln appealed not only to antislavery voters but to business owners in the East and farmers in the Midwest. The Democratic Party was in turmoil over slavery. The northern Democrats nominated **STEPHEN A. DOUGLAS**, who tried to sidestep the issue, and the southern Democrats backed John C. Breckinridge, who denounced government efforts to prohibit slavery. Lincoln defeated both candidates.

Although Lincoln's election was a triumph for the Republicans, his support was concentrated primarily in the North. Shortly after Lincoln's victory, several southern states seceded from the Union, and the bloody **U.S. CIVIL WAR** began.

Throughout the war Lincoln and his policies took a drubbing from the press and public. When Lincoln ran for reelection, the Republican Party temporarily switched its name to the Union Party. Lincoln sought a second term with Democrat **ANDREW JOHNSON** as his running mate in order to deflect criticism of the Republican Party. Johnson, from Tennessee, was one of the few southerners to support the preservation of the Union. Despite his critics Lincoln defeated the Democratic nominee, George B. McClellan, who ran on a peace platform.

After the North's victory in 1865, the Republicans oversaw Reconstruction, a period of rebuilding for the vanquished South. Lincoln favored a more conciliatory attitude toward the defeated Confederacy. Radical Republicans, however, sought a complete overhaul of the South's economic and social system. After Lincoln's assassination in 1865, the Republicans' Reconstruction policies—such as conferring citizenship and **VOTING RIGHTS** to former slaves—created long-lasting resentment among many southern whites.

Republicans depended upon the support of northern voters and courted the vote of emancipated slaves. The party fanned hostility by reminding northern voters of the South's disloyalty during the war. The Republicans were the dominant party in the United States from 1860 to 1931, and the party's base among southern whites began to grow in the 1950s, when political loyalties began to shift.

*The Republican Party nominated Abraham Lincoln and Hannibal Hamlin as candidates for president and vice president in the 1860 election.*

BETTMANN/CORBIS

During their long period of political dominance, Republicans sent the following candidates to the White House: **ULYSSES S. GRANT**, **RUTHERFORD B. HAYES**, **JAMES GARFIELD** (died in office), **CHESTER A. ARTHUR** (vice president who succeeded Garfield), **BENJAMIN HARRISON**, **WILLIAM MCKINLEY** (died in office), **THEODORE ROOSEVELT** (vice president who succeeded McKinley and was later elected on his own), **WILLIAM HOWARD TAFT**, **WARREN G. HARDING**, **CALVIN COOLIDGE**, and **HERBERT HOOVER**.

During the 1880s and 1890s, there was an important shift in party affiliation. Struggling Republican farmers throughout the Midwest, South, and West switched their political allegiance to the Democrats who promised them government assistance. The financially strapped farmers were concerned about the depressed national economy. Many turned to the populist

movement headed by Democrat WILLIAM JENNINGS BRYAN. A brilliant orator, Bryan called for the free coinage of silver currency, whereas the Republicans favored the gold standard.

Despite his popularity Bryan was defeated by Republican William McKinley in the 1896 presidential election. The Democrats appealed to farmers, but the Republicans had captured the business and urban vote. After the U.S. economy improved during the McKinley administration, supporters dubbed the Republican Party "the Grand Old Party," or the GOP, a nickname that endured.

After President McKinley was assassinated in 1901, Vice President Theodore Roosevelt assumed the presidency. He pursued ambitious social reforms such as stricter ANTITRUST LAWS, tougher meat and drug regulations, and new environmental measures. In 1912 Roosevelt and his followers broke off from the Republicans to form the Bull Moose Party. The third party split helped Democrat WOODROW WILSON defeat Republican candidate William Howard Taft.

After eight years of Democratic power, during which the U.S. fought in WORLD WAR I, the Republicans returned to the White House in 1920 with Warren G. Harding. Unable to stave off or reverse the Great Depression, the Republicans lost control of the Oval Office in 1932.

During the Great Depression, the public became impatient with the ineffectual economic policies of Republican President Herbert Hoover. Democrat FRANKLIN D. ROOSEVELT swept into the White House with a promise of a NEW DEAL for all Americans. From 1932 to 1945, Roosevelt lifted the nation from its economic collapse and guided it through WORLD WAR II. During Roosevelt's administration the Republican Party lost its traditional constituency of African Americans and urban workers. HARRY S. TRUMAN followed Roosevelt in office and in 1948 withstood a strong challenge from Republican THOMAS E. DEWEY.

Republican DWIGHT D. EISENHOWER won the presidency in 1952 and 1956. A popular World War II hero, Eisenhower oversaw a good economy and a swift end to the KOREAN WAR. Eisenhower was succeeded in 1960 by Democrat JOHN F. KENNEDY who defeated Eisenhower's vice president, Republican nominee RICHARD M. NIXON. In 1964 Republicans nominated ultraconservative BARRY M. GOLDWATER who was trounced at the polls by Democrat LYNDON B. JOHNSON, the incumbent. Johnson, Kennedy's vice president, had assumed the presidency after Kennedy's assassination in 1963.

When Republican Richard M. Nixon was elected president in 1968, he began the reduction of U.S. military troops in Southeast Asia. Nixon opened trade with China and improved foreign relations through a policy of detente with the former Soviet Union. During his term the shift of southern Democrats to the Republican Party accelerated. (In fact, from 1972 to 1988, the South was the most Republican region of the United States.)

The nadir for the Republican Party occurred in 1974 when Nixon left office in the midst of the WATERGATE scandal, a botched attempt to burglarize and wiretap the Democratic National Committee headquarters. Implicated in the scandal's cover-up, Nixon became the only president in U.S. history to resign from office. He was succeeded by Vice President GERALD R. FORD of Michigan who served the remainder of Nixon's term and pardoned the disgraced president.

Ford lost the 1976 presidential election to Democrat JIMMY CARTER of Georgia. A sour economy and the bungling of foreign affairs (most notably the Iran hostage crisis) led to Carter's defeat in 1980 by Republican challenger RONALD REAGAN and his running mate, GEORGE HERBERT WALKER BUSH.

The Republicans controlled the White House for twelve years, with Reagan serving two terms

**Political Party Identification of Adult Population, 1952 and 2000**

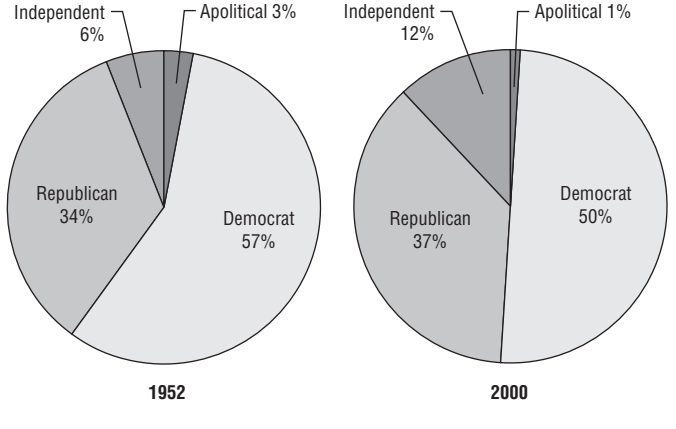


SOURCE: National Election Studies, Center for Political Studies, University of Michigan, *Guide to Public Opinion and Electoral Behavior*.

and Bush one. During Reagan's tenure, southern Democrats turned in droves to the Republican Party, embracing Reagan's politically conservative message. Pointing to widespread ticket-splitting, many analysts believe voters embraced the charismatic Reagan, not the party. Bush became president in 1988 but was defeated in 1992, by Democrat BILL CLINTON of Arkansas.

Although considered the party of business and the suburbs, the GOP has made significant inroads in traditionally Democratic areas such as labor and the South. An extremely conservative element dominated the Republican Party in the 1980s, but a more moderate wing began to exert influence in the late 1990s. Many of these moderates were elected to Congress in 1994, giving the Republicans control of both houses for the first time in more than 40 years.

### The Republican Party in the New Millennium

The 2000 presidential election signaled the end of Bill Clinton's two-term tenure as president. Candidates from both the Republican and Democratic Parties were eager to replace him. As the presidential primaries began in New Hampshire on February 1, 2001, antiabortion activist Gary Bauer, Texas governor GEORGE W. BUSH, billionaire publisher Steve Forbes, Utah senator Orrin Hatch, former UNITED NATIONS ambassador Alan Keyes, and Arizona senator JOHN MCCAIN were vying for the top spot on the Republican Party ticket, while Vice President ALBERT GORE and former New Jersey senator and professional basketball player Bill Bradley were vying for the top spot on the Democratic ticket. Bush, then 54, and Gore, then 52, eventually earned their party's nomination in August. Sixty-five-year-old RALPH NADER won the nomination for the GREEN PARTY.

The presidential race pitted Gore as the Washington veteran with vast political experience on Capitol Hill and in the White House against the more folksy Bush who billed himself as a savvy outsider capable of bringing common sense, morality, and a "compassionate conservatism" to a scandal-ridden EXECUTIVE BRANCH. Political opponents attacked Gore for his lack of charisma and Bush for his intellectual shortcomings. Although supporters maintained that the two candidates advocated widely divergent policies, many voters found little to distinguish them, while pundits and late-night talk show hosts took to characterizing Bush as "Gore-light" and Gore as "Bush-light" in reference to candidates' apparent attempts to water down their platforms to placate Middle America.

As daylight turned to twilight on election night, it became evident that Florida's 25 electoral votes held the key to victory in the U.S. Presidential race. Early returns combined with exit polling results indicated that Gore had a commanding lead in the state. By 8:00 P.M. EST, all of the major television networks projected that Gore had defeated Bush to become the nation's next president.

However, the polls had not yet closed in the Florida's panhandle, which is in the Central time zone. A few hours later, the lead swung to Bush, forcing the networks to retract their projections. By 2:15 EST, Bush appeared to have a decisive lead of about 50,000 votes, and all of the major networks declared Bush the winner. A few hours later Bush's lead had shrunk to a few thousands votes, and the networks were again forced to retract their projections.

When the votes were finally tallied on November 8, minus the late-arriving overseas ballots, Bush was ahead of Gore by 1,784 votes, or less than .5 percent of the total number of votes tabulated for the U.S. Presidency in Florida. Under Florida Election Law, a recount was automatic in these circumstances, unless Gore refused, which he did not. The recount was

**Republican National Political Convention Sites, 1856 to 2004**

| Year | Site | Year | Site |
|---|---|---|---|
| 1856 | Philadelphia | 1932 | Chicago |
| 1860 | Chicago | 1936 | Cleveland |
| 1864 | Baltimore | 1940 | Philadelphia |
| 1868 | Chicago | 1944 | Chicago |
| 1872 | Philadelphia | 1948 | Philadelphia |
| 1876 | Cincinnati | 1952 | Chicago |
| 1880 | Chicago | 1956 | San Francisco |
| 1884 | Chicago | 1960 | Chicago |
| 1888 | Chicago | 1964 | San Francisco |
| 1892 | Minneapolis | 1968 | Miami Beach |
| 1896 | St. Louis | 1972 | Miami Beach |
| 1900 | Philadelphia | 1976 | Kansas City, MO |
| 1904 | Chicago | 1980 | Detroit |
| 1908 | Chicago | 1984 | Dallas |
| 1912 | Chicago | 1988 | New Orleans |
| 1916 | Chicago | 1992 | Houston |
| 1920 | Chicago | 1996 | San Diego |
| 1924 | Cleveland | 2000 | Philadelphia |
| 1928 | Kansas City, KS | 2004 | New York City |

SOURCE: *The World Almanac* and the 2000 Republican National Convention web page.

performed by machine and was designed to correct any errors in the first machine tabulation of the vote. On November 10 the first recount was complete. Bush's lead had dwindled to 327 votes.

Emboldened by his gains in the machine recount, Gore sought a manual hand recount of votes cast in certain heavily-Democratic counties. Bush opposed any manual recount, which sparked a series of court battles that culminated before the U.S. Court. In **BUSH V. GORE** 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (U.S. 2000), the Supreme Court ruled that the system devised by the Florida Supreme Court to recount the votes cast in the state during the 2000 U.S. presidential election violated the **EQUAL PROTECTION CLAUSE** of the **FOURTEENTH AMENDMENT** to the federal Constitution. Because there was no time to create a system that was fair to both candidates, the Supreme Court effectively stopped the recount process in its tracks, allowing George W. Bush of Texas to win Florida's 25 electoral votes, enough to become the 43rd President of the United States. (Although Green Party candidate Ralph Nader won no electoral votes in any state presidential race, election experts have opined that he cost Gore thousands of popular votes in several closely contested states that Bush won. For example, 97,488 Florida voters selected Nader as their candidate.)

The 2000 election results marked the first time since 1954 that the GOP controlled the White House, Senate, and the House of Representatives. Although the Republicans lost 4 seats in the Senate and one seat in the House in 2000, they still had a nine-vote advantage in the House, while Republican Vice President Dick Cheney held the tie-breaking vote in the evenly-divided Senate. In 2002 the Republicans increased their Congressional advantage to 51–48 in the Senate (with one independent) and to 229–205 in the House (with one independent).

At the state level, Democrats gained three governorships in 2002 and Republicans lost one, with a total of 24 new governors taking office. This was the largest number of new governors since 1960. Prior to the election, party control of governors stood at 27 Republican, 21 Democratic, and two independents. After the election, party control stood at 26 Republican and 24 Democratic governors. Democrats picked up key posts in Illinois, Michigan, and Pennsylvania and won surprise victories in Kansas and Wyoming. But Republicans won in the traditionally Democratic strongholds of Georgia, Hawaii, and Maryland. Overall, the governor's office switched party control in 20 states.

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## REPUBLICATION

*The reexecution or reestablishment by a testator of a will that he or she had once revoked.*

## REPUDIATION

*The rejection or refusal of a duty, relation, right, or privilege.*

Repudiation of a contract means a refusal to perform the duty or obligation owed to the other party.

**ANTICIPATORY REPUDIATION** is an act or declaration before performance is due under a contract that indicates that the party will not perform his or her obligation on the future date specified in the contract.

## REPUGNANCY

*An inconsistency or opposition between two or more clauses of the same deed, contract, or statute, between two or more material allegations of the same* **PLEADING** *or between any two writings.*

Inconsistent defenses or claims are permitted under the Federal Rules of Civil Procedure.

CROSS-REFERENCES

Civil Procedure.

## REQUIREMENTS CONTRACT

*A written agreement whereby a buyer assents to purchase for a sufficient consideration (the inducement to enter into an agreement) all the merchandise of a designated type that he or she might require for use in his or her own established business.*

The **UNIFORM COMMERCIAL CODE** (UCC), a body of law adopted by the states that governs commercial transactions, provides that the parties must act in **GOOD FAITH** where quantity is to be measured by the requirements of the pur-

chaser or, in the case of output contracts, the output of the seller. No quantity that is unreasonably disproportionate to any stated estimate or to any normal or otherwise comparable previous output or requirements can be tendered or demanded.

Although the UCC does not explicitly make output and requirements agreements enforceable as contracts, the implication of validity is clear. The theoretical difficulty with these agreements has been that they border on being illusory. An agreement by a buyer to purchase from the seller all the particular goods that he or she requires can be interpreted to leave the buyer with a choice as to whether he or she wishes to require any goods at all. Similarly an agreement by which a seller assents to sell all of his or her output to a buyer can be interpreted as leaving the seller free to control his or her output. If read in such manner, these agreements appear to leave one of the parties free to perform or not to perform as he or she sees fit. Valid commercial reasons exist, however, for these contracts, and the courts have discovered means of upholding both output and requirements agreements if the only objection to their enforceability is that they are too indefinite. The UCC does not attempt to dictate contract terms, but it contains two rules of construction that further remove these agreements from the contention that they are too indefinite to enforce and that provide guidance to courts in regard to their enforcement.

First, the measure of the quantity entailed must be determined in good faith. The buyer in a requirements agreement or the seller in an output agreement is not free, with an uncontrolled discretion, to determine the quantity of goods that can be demanded or tendered under the agreement. An illustration of a type of agreement in which one of the parties has an uncontrolled discretion would be one in which the buyer can order as much of a specified quantity of goods "as he or she wants." Such an agreement, unless there are unusual circumstances that require a different construction of these words, leaves the buyer free to buy or not to buy at his or her discretion. It does not entail mutual duties and constitutes no more than an offer, a proposal by the seller that would become a contract with each order from the buyer, but that could be revoked by the seller at any time prior to acceptance. The buyer is not free to order or not to order at his or her discretion, if an agreement calls for the seller to sell and the buyer to buy all or a stated portion of the buyer's requirements. When the buyer has requirements, he or she must purchase them from the seller and exercise good faith in ascertaining them. The nonmerchant must act with honesty in fact; the merchant must meet this same test but must also conduct business in accordance with commercial standards of fair dealing in the trade, so that his or her requirements approximate a reasonably foreseeable figure. A seller under an output agreement must meet the same test.

Second, the UCC furnishes a center around which the quantity is to be determined. The buyer cannot demand and, therefore, the seller is not obligated to deliver, and the seller cannot tender and, therefore, the buyer is not required to accept any quantity that is unreasonably disproportionate to any estimate that the parties have stated or if no estimate was stated, to any comparable previous requirements or output. If, for example, a seller has agreed to deliver all of the buyer's requirements of a certain product, and if the buyer has been ordering approximately 500 units each month, the seller would not be obligated to deliver 1,500 units in one month, even though the buyer could prove that 1,500 units were required for his or her business. The determination of which prior period is "comparable" depends upon the nature of the business involved. The UCC does not require that the chosen comparable period be one in which the parties were dealing with each other. If this is the first output or requirements contract between the parties and no estimate is stated, the UCC permits any normal or comparable period involving the seller's output or the buyer's requirements to be employed in measuring the obligations under such an agreement.

Even though output and requirements contracts are sufficiently defined for enforcement, difficult problems of determining the obligations under these agreements arise whenever there is an unexpected shift in the demand for, or the price of, the goods involved. In these instances, a merchant might search for methods of altering production schedules or modifying output (if a seller) or requirements (if a buyer).

Attempts to increase or decrease requirements often result in disputes between the parties that require judicial intervention. In order to resolve these situations, the "unreasonably disproportionate" test of the UCC supplies a tool that, when combined with the requirement of good faith, permits the courts to resolve these

disputes. The UCC also provides that a lawful agreement that results in an exclusive dealing in goods imposes, unless otherwise agreed, an obligation by the seller to make his or her best effort to supply the goods and an obligation by the buyer to make his or her best effort to promote their sale. This requirement is a specific application of the general doctrine of good faith.

The legality of output, requirements, or other exclusive dealing contracts depends upon the application of federal or state antitrust acts, laws that protect commerce and trade from unlawful restraints, price discriminations, and price fixing. The UCC provides that only "lawful" agreements may be enforced.

## REQUISITION

*A written demand; a formal request or requirement. The formal demand by one government upon another, or by the governor of one state upon the governor of another state, of the surrender of a fugitive from justice. The taking or seizure of property by government.*

Requisition refers to the seizure of PERSONAL PROPERTY, whereas condemnation entails the taking of real property.

## RES

*[*Latin, A thing.*] An object, a subject matter, or a status against which legal proceedings have been instituted.*

For example, in a suit involving a captured ship, the seized vessel is the *res,* and proceedings of this nature are said to be in rem. *Res,* however, does not always refer to tangible PERSONAL PROPERTY. In matrimonial actions, for example, the *res* is the marital status of the parties.

## RES ADJUDICATA

See RES JUDICATA.

## RES GESTAE

*[*Latin, Things done.*] Secondhand statements considered trustworthy for the purpose of admission as evidence in a lawsuit when repeated by a witness because they were made spontaneously and concurrently with an event.*

Res gestae describes a common-law doctrine governing testimony. Under the HEARSAY rule, a court normally refuses to admit as evidence statements that a witness says he or she heard another person say. The doctrine of res gestae provided an exception to this rule. During the nineteenth century and much of the twentieth century, courts applied the exception by following an assortment of common-law rules. With the introduction of the FEDERAL RULES OF EVIDENCE, federal courts abolished res gestae as a common-law doctrine and replaced it with explicit exceptions to the ban on hearsay. To varying degrees, state RULES OF EVIDENCE are modeled on the federal rules. Although the term is now infrequently used, the legacy of res gestae is an integral part of the modern framework of hearsay evidence.

Traditionally, two reasons have made hearsay inadmissible: unfairness and possible inaccuracy. Allowing a witness to repeat hearsay does not provide the accused with an opportunity to question the speaker of the original statement, and the witness may have misunderstood or misinterpreted the statement. Thus, in a trial, counsel can object to a witness's testimony as hearsay. But in the nineteenth century, the borrowing of the concept of res gestae from ENGLISH LAW offered an exception to this rule. Res gestae is based on the belief that because certain statements are made naturally, spontaneously, and without deliberation during the course of an event, they carry a high degree of credibility and leave little room for misunderstanding or misinterpretation. The doctrine held that such statements are more trustworthy than other secondhand statements and therefore should be admissible as evidence.

As the common-law rule developed, it acquired a number of tests for determining admissibility. To be admissible, the statements must relate, explain, or characterize an event or transaction. They must be natural statements growing out of the event, as opposed to a narrative of a past, completed affair. Additionally, the statements must be spontaneous, evoked by the event itself, and not the result of premeditation. Finally, the original speaker must have participated in the transaction or witnessed the event in question. Thus, for example, a witness might testify that during a bank ROBBERY, she or he heard another person shout, "That person is robbing the bank!" and the statement could be admitted as an exception to the ban on hearsay.

In practice, cases involving res gestae were usually decided by applying some variation of these tests. In the 1959 case of *Carroll v. Guffey,* 20 Ill. App. 2d 470, 156 N.E.2d 267, an Illinois

appellate court heard the appeal of a defendant who was held liable for injuries sustained by another motorist in a car crash. The trial court had admitted the testimony of the plaintiff concerning unidentified eyewitnesses who allegedly saw the accident, over the objection of defense counsel who argued that the statements were hearsay. The appellate court ruled that the declarations of the eyewitnesses were not res gestae exceptions: they were not made concurrently with the collision, but afterward, and were only a narrative of what the eyewitnesses said had taken place. Thus the appellate court reversed the trial court's decision.

The process of refining the concept began in the 1920s, when the influential lawyer and educator Edmund M. Morgan attacked its pliability and vagueness: "[T]his troublesome expression owes its existence and persistence in our law of evidence to an inclination of judges and lawyers to avoid the toilsome exertion of exact analysis and precise thinking." In an attempt at clarification, Morgan developed seven categories for the exception. In the 1940s the Model Code of Evidence made further refinements, and by the 1970s the Federal Rules of Evidence had included elements of res gestae in Rule 803 as one of its many exceptions to the hearsay rule.

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## RES IPSA LOQUITUR

[Latin, The thing speaks for itself.] *A rebuttable presumption or inference that the defendant was negligent, which arises upon proof that the instrumentality or condition causing the injury was in the defendant's exclusive control and that the accident was one that ordinarily does not occur in the absence of* NEGLIGENCE.

Res ipsa loquitur, or *res ipsa,* as it is commonly called, is really a rule of evidence, not a rule of SUBSTANTIVE LAW.

Negligence is conduct that falls below the standard established by law for the protection of others against an unreasonable risk of harm. In order to prevail in a negligence action, a plaintiff must establish by a PREPONDERANCE OF EVIDENCE that the defendant's conduct was unreasonable in light of the particular situation and that such conduct caused the plaintiff's injury. The mere fact that an accident or an injury has occurred, with nothing more, is not evidence of negligence. There must be evidence that negligence caused the event. Such evidence can consist of direct testimony by eyewitnesses who observed the defendant's unreasonable conduct and its injurious result.

Negligence can also be established by CIRCUMSTANTIAL EVIDENCE when no direct evidence exists. Circumstantial evidence is evidence of one recognized fact or set of facts from which the fact to be determined can be reasonably inferred because it is the logical conclusion that can be drawn from all the known facts. For example, skid marks at the scene of an accident are circumstantial evidence that a car was driven at an excessive speed. The reasoning process must be based upon the facts offered as evidence, together with a sufficient background of human experience, to justify the conclusion. Evidence that merely suggests the possibility of negligence is insufficient, since negligence must appear more likely than not to have occurred. This inference must cover all the necessary elements of negligence: that the defendant owed the plaintiff a duty, which the defendant violated by failing to act according to the required standard of conduct, and that such negligent conduct injured the plaintiff.

*Res ipsa loquitur* is one form of circumstantial evidence that permits a reasonable person to surmise that the most PROBABLE CAUSE of an accident was the defendant's negligence. This concept was first advanced in 1863 in a case in which a barrel of flour rolled out of a warehouse window and fell upon a passing pedestrian. *Res ipsa loquitur* was the reasonable conclusion because, under the circumstances, the defendant was probably culpable since no other explanation was likely. The concept was rapidly applied to cases involving injuries to passengers caused by carriers, such as railroads, which were required to prove they had not been negligent. *Res ipsa loquitur,* as it is in the early 2000s applied by nearly all of the 50 states, deals with the sufficiency of circumstantial evidence and, as in some states, affects the BURDEN OF PROOF in negligence cases.

## Elements

Three basic requirements must be satisfied before a court can submit the question of negligence to the jury under *res ipsa loquitur.*

**Inference of Negligence** The plaintiff's injury must be of a type that does not ordinarily occur unless someone has been negligent. This requirement, which is the inference of negligence, allows *res ipsa* to be applied to a wide variety of situations, such as the falling of elevators, the presence of a dead mouse in a bottle of soda, or a streetcar careening through a restaurant. Although many of the cases involve freakish and improbable situations, ordinary events, such as where a passenger is injured when a vehicle stops abruptly, will also warrant the application of *res ipsa.* Commercial air travel became so safe in the late twentieth century that planes engaged in regularly scheduled commercial flights generally do not crash unless someone has been negligent. Vehicular accidents caused by a sudden loss of control, such as a car suddenly swerving off the road or a truck skidding on a slippery road and crossing into the wrong lane of traffic, justify the conclusion that such an event would not normally occur except for someone's negligence.

This inference of negligence does not mean that all other possible causes of the injurious event must be eliminated. A plaintiff using *res ipsa* to enable her case to go to the jury must prove that the defendant's negligence is the most probable cause of her injuries. The particular nature of the defendant's negligence need not be pinpointed. For instance, where a bottle of soda explodes in a supermarket immediately after its delivery by the bottler, the injured person does not have to prove that the bottler failed to notice a defect in the bottle or that the soda was overcarbonated. It is sufficient to establish that the explosion would not have occurred unless the bottler had been negligent.

Where the inference of negligence depends upon facts beyond the common knowledge of jurors, EXPERT TESTIMONY is necessary to furnish this information. Such testimony is usually presented in cases of professional negligence, such as MEDICAL MALPRACTICE. An expert witness can testify directly in regard to the inferred fact itself, such as when the expert testifies that the plaintiff's injury would not have occurred if the doctor had not been negligent.

**Exclusive Control by the Defendant** The plaintiff's injury or damage must have been caused by an instrumentality or condition that was within the exclusive control of the defendant. Some courts interpret this requirement to mean that exclusive control or management must have existed at the time of the injury. This interpretation has led to harsh results. In one case, a customer sat down in a chair in a store while waiting for a salesperson. The chair collapsed and the customer was injured. The court denied recovery to the customer in her negligence action against the store because it found that the chair was not within the exclusive control of the store but rather was under the exclusive control of the customer at the time of injury.

This application of the rule has been regarded as inflexible by many courts, since it severely restricts the type of case to which *res ipsa* can be applied. In response, many states prescribe that the negligence must occur while the defendant has control over the instrumentality. In the example of the exploding soda bottle, the negligence of the bottler occurred somewhere in the bottling process. The fact that the bottle was sitting on a supermarket shelf and was no longer in the immediate possession of the bottler does not prevent the reasonable conclusion that the injury resulted from the negligence of the bottler. The injured plaintiff must first show that the bottle was not cracked by mishandling after it left the plant of the bottler. This does not mean, however, that the plaintiff must account for every minute of the existence of the bottle from the time it left the plant. If the plaintiff can substantiate the fact of careful handling in general and the absence of unusual incidents, such as the deliberate tampering of the bottled goods by an unknown person, such facts would permit reasonable persons to conclude that the injury was more likely than not to have been caused by the defendant's negligence while he had exclusive control of the bottle.

Since there must be exclusive control by the defendant, *res ipsa* cannot be used against multiple defendants in a negligence case where the plaintiff claims he has been injured by the negligence of another. For example, a pedestrian is injured when he is struck by a car that had just collided with another vehicle. The pedestrian institutes a negligence action against one driver and seeks to have *res ipsa* applied to his case. An inference of negligence does not arise from the

*A sample certificate of reliance on* res ipsa loquitur

**Certificate of Reliance on Res Ipsa Loquitur**

[Attorney name]

[Address]

[Telephone number]

Attorney for Plaintiff, [name]

xxx Court, County of xxx
[xxx District]

| | |
|---|---|
| xxxxxx | ) No. xxx |
| Plaintiff(s) | ) |
| vs. | ) CERTIFICATE OF RELIANCE ON |
| | ) [RES IPSA LOQUITUR] [AND |
| xxxxxx | ) ON] [FAILURE TO INFORM] |
| Defendant(s) | ) (CCP §411.35(d)) |
| _____ | ) |

[Name] declares:

1. I am the attorney for plaintiff, [name], in this action.
2. This action is one for damages arising out of professional negligence.
3. A certificate of merit is not required because plaintiff intends to rely solely on [the doctrine of res ipsa loquitur] [and on] [defendant [name]'s failure to inform plaintiff of the consequences of a procedure].

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: xxxxxx _____
[Typed name]
Attorney for xxxxxx

[This certificate must be filed when the complaint is filed, in contrast to the certificate of merit, which must be filed on or before the service of the complaint.]

mere fact of the collision, since neither driver is in exclusive control of the situation. If, however, one driver is cleared of fault by some specific evidence, the jury is justified in inferring that the injury was the result of the other driver's negligence.

The requirement of exclusive control by the defendant is not applied in cases involving VICARIOUS LIABILITY or shared responsibility for the same instrumentality or condition. In one case, a person was injured when an elevator in which she was riding fell very rapidly. She brought a negligence action against both the owner of the building and the company that manufactured the elevator and had the maintenance service contract for the building. The plaintiff relied completely on *res ipsa.* The jury found for the plaintiff since a falling elevator is not the type of accident that usually occurs without negligence, so that the negligence of those in control can be inferred. The service contract between the elevator company and the building owner established the fact that they exerted joint control over the elevator. The requirement of exclusive control by a defendant of the instrumentality causing injury does not mean that only a single entity has control. Where two or more defendants are acting jointly, the doctrine of *res ipsa* can be applied to establish their negligence.

Some state courts have departed from the requirement of exclusive control and applied *res ipsa loquitur* against multiple defendants. In one case, while an anesthetized patient was

undergoing an operation for appendicitis, he suffered a traumatic injury to his shoulder. *Res ipsa* was applied against all of the doctors and hospital employees connected with the operation, although not all of them were negligent. The court based its decision on the special responsibility for the plaintiff's safety undertaken by everyone concerned.

**Freedom from Contributory Negligence** The event in question must not have been attributable to any cause for which the plaintiff is responsible. The plaintiff must not have done anything that significantly contributed to the accident that caused the injury. In one case, a water skier was injured when the propeller of the boat that had been towing him struck his arm as the boat was attempting to pick him up. He sued the driver and the owner of the boat for negligence, which could be found if *res ipsa* was applied. The plaintiff attempted to dive underwater when he saw the boat approaching him, but he was unsuccessful in escaping injury. The defendants claimed that the attempted dive caused the accident and, therefore, *res ipsa* was inapplicable.

The trial court accepted this argument, which was later rejected by the appellate court. The appellate court decided that the question of whether the attempted dive caused the accident should have been presented to the jury under *res ipsa.* It stated that a plaintiff may rely upon *res ipsa loquitur* even though he has participated in the events leading to the accident if the evidence excludes his conduct as the responsible cause. In light of the skier's testimony that he was about to be struck by the boat, as well as the testimony of other eyewitnesses, the jury could logically conclude that the attempted dive was not a cause of the accident.

### Accessibility of Evidence

In addition to the three basic requirements, a few states apply *res ipsa* in negligence cases where the evidence of the facts of the event is more accessible to the defendant than to the plaintiff. In one state, for example, a plaintiff was injured when the bleacher section in which she was sitting collapsed during a basketball game under the management and supervision of the defendant high school athletic association. She sued the association for negligence under the doctrine of *res ipsa.* The appellate court, reviewing a verdict for the plaintiff, affirmed it because "the underlying reason for the *res ipsa* rule is that the chief evidence of the true cause of the injury is practically accessible to the defendant but inaccessible to the injured person."

### The Effect of Res Ipsa

*Res ipsa loquitur* is usually used when there is no direct evidence of the defendant's negligence. The facts presented to the court must meet the three basic requirements. Once the court decides that the facts of a particular case warrant the application of *res ipsa,* it instructs the jury on the basic principles, but it is the function of the jury to decide the credibility and weight of the inference to be drawn from the known facts. The jury can conclude that the defendant was negligent, but the jury is not compelled to do so. Everything depends upon the particular facts of each case. An inference of negligence might be so clear that no reasonable person could fail to accept it. If the defendant offers no explanation, the court can direct a verdict for the plaintiff if the inference is so strong that reasonable jurors could not reach any other conclusion. Where the jury considers the question of negligence, it can decide that the facts do not logically lead to an inference of the defendant's negligence, even if the defendant did not offer any evidence in her defense. If the defendant presents evidence that makes it unlikely that she has acted negligently, the plaintiff will lose his case unless he can rebut the evidence, since such evidence destroys the inference of negligence created by *res ipsa.*

A minority of courts hold that *res ipsa* creates a rebuttable presumption of negligence. Unless the defendant offers sufficient evidence to contradict it, the court must direct a verdict for the plaintiff. Some states have gone as far as to shift the burden of proof to the defendant, requiring her to introduce evidence of greater weight than that of the plaintiff.

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CROSS-REFERENCES

Evidence; Malpractice; Negligence; Probable Cause.

## RES JUDICATA

*[*Latin, A thing adjudged.*] A rule that a final judgment on the merits by a court having jurisdiction is conclusive between the parties to a suit as to all matters that were litigated or that could have been litigated in that suit.*

The U.S. legal system places a high value on allowing a party to litigate a civil lawsuit for money damages only once. U.S. courts employ the rule of res judicata to prevent a dissatisfied party from trying to litigate the issue a second time.

Res judicata will be applied to a pending lawsuit if several facts can be established by the party asserting the res judicata defense. First, the party must show that a final judgment on the merits of the case had been entered by a court having jurisdiction over the matter. This means that a final decision in the first lawsuit was based on the factual and legal disputes between the parties rather than a procedural defect, such as the failure to serve the defendant with legal process.

Once a court makes a final decision, it enters a final judgment in the case. The judgment recites pertinent data about the case, such as the names of the parties, the fact that a jury verdict was rendered, and the disposition made. The judgment is filed with the court administrator for that judicial jurisdiction.

The party asserting res judicata, having introduced a final judgment on the merits, must then show that the decision in the first lawsuit was conclusive as to the matters in the second suit. For example, assume that the plaintiff in the first lawsuit asserted that she was injured in an auto accident. She sues the driver of the other auto under a theory of NEGLIGENCE. A jury returns a verdict that finds that the defendant was not negligent. The injured driver then files a second lawsuit alleging additional facts that would help her prove that the other driver was negligent. A court would dismiss the second lawsuit under res judicata because the second lawsuit is based on the same CAUSE OF ACTION (negligence) and the same injury claim.

Under the companion rule of COLLATERAL ESTOPPEL, the plaintiff will not be allowed to file a second lawsuit for money damages using a different cause of action or claim. Under collateral estoppel, the parties are precluded from litigating a second lawsuit using a different cause of action based on any issue of fact common to both suits that had been litigated and determined in the first suit. For example, the plaintiff who lost her auto accident case based on a theory of negligence cannot proceed with a second lawsuit based on an allegation that the driver intentionally struck her auto, thus making it an intentional TORT cause of action. A court would assert collateral estoppel because the plaintiff could have alleged an intentional tort cause of action in the original complaint.

The application of res judicata and collateral estoppel produces finality for the parties and promotes judicial economy. Parties know that when final judgment is entered and all appeals are exhausted, the case is over and the decision will be binding on all issues determined in the lawsuit.

## RESCIND

*To declare a contract void—of no legal force or binding effect—from its inception and thereby restore the parties to the positions they would have occupied had no contract ever been made.*

## RESCISSION

*The abrogation of a contract, effective from its inception, thereby restoring the parties to the positions they would have occupied if no contract had ever been formed.*

### By Agreement

Mutual rescission, or rescission by agreement, is a discharge of both parties from the obligations of a contract by a new agreement made after the execution of the original contract but prior to its performance. Rescission by mutual assent is separate from the right of one of the parties to rescind or cancel the contract for cause, or pursuant to a provision in the contract.

The parties to an executory or incomplete contract can rescind it at any time by mutual agreement, even if the contract itself contains a contrary provision. A rescission by mutual assent can properly include a promise by either or both parties to make restitution as part of the contract of rescission.

The right to rescind is limited to the parties to the contract or those legally authorized to act for them. As with other contracts, the parties to the rescission agreement must be mentally competent.

**Form** The rescission agreement can be either written or oral. An implied agreement is also effective, provided the assent of the parties can be shown by their acts and the surrounding circumstances. An express rescission of a contract as a whole is adequate and effective, without specifically designating each and every clause to be rescinded.

Unless a statute provides otherwise, an oral rescission agreement is valid, even though the contract being rescinded contains a provision that it can be altered only in writing.

**Assent** All the parties to the contract must assent to its rescission because mutual rescission involves the formation of a new contract. A meeting of minds can be reached by an offer to rescind and an acceptance by the other party. One party to a contract cannot rescind it simply by giving notice to the other party that he or she intends to do so.

Although a breach of contract by one party is not an offer to rescind, the other party can treat the repudiation as an offer to rescind that he or she can accept, leading to rescission of the contract by mutual assent. Rescission must be clearly expressed, however, and the conduct of the parties must be inconsistent with the existence of the contract. The fact that some of the materials that form part of the subject matter of the contract have been returned is not conclusive as to whether rescission has occurred.

**Consideration** An agreement to rescind a prior contract must be based on a sufficient consideration, an inducement. When a contract remains executory on both sides, an agreement to rescind by one side is sufficient consideration for the agreement to cancel on the other, and vice versa. If the contract has been executed on one side, an agreement to rescind that is made without any new consideration is void, that is to say of no legal force or binding effect.

**Operation and Effect** The mutual rights of the parties are controlled by the terms of their rescission agreement. The parties are generally restored to their original rights in regard to the subject matter. They no longer have any rights or obligations under the rescinded contract, and no claim or action for subsequent breach can be maintained.

Whether rights or obligations already accrued are abandoned when the contract is rescinded in the COURSE OF PERFORMANCE depends on the intention of the parties, as deduced from all attending facts and circumstances, and on whether the parties have reserved such rights. Recovery can be allowed, however, for partial performance.

### Wrong or Default of Adverse Party

No ARBITRARY right exists to rescind a contract. An executory contract that is VOIDABLE can be rescinded on the grounds of FRAUD, mistake, or incapacity.

A contract, whether oral or written, can be rescinded on the ground of fraud. The right to rescind for fraud is not barred because the defrauded party has failed to perform. Generally, false statements of value, or the failure to perform a promise to do something in the future without fraudulent intent, will not provide a basis for rescission for fraud or MISREPRESENTATION. A party proves sufficient grounds for rescission by showing that he or she was induced to part with some legal right or to assume some legal liability that he or she otherwise would not have done but for the fraudulent representations.

On discovering the fraud, the victimized party can affirm the contract and sue for damages. He or she might instead repudiate the contract, tender back what he or she has received, and recover what he or she has parted with, or its value; the adoption of one remedy, however, excludes the other.

A contract obtained by duress can be rescinded, and in such a case, the same rules apply as in the case of fraud. A contract cannot be avoided because of duress or coercion, however, unless the duress was sufficient to overcome completely the will of the party who is seeking to avoid the contract.

A mutual mistake concerning a material fact entitles the party affected by the mistake to rescind the contract, unless the contract has already been completed and rescission would be an injustice to the other party. Rescission can also be allowed even for a unilateral, or one-sided, mistake in order to prevent an UNJUST ENRICHMENT of the other party. On rescission, the aggrieved party can recover the money he or she has paid or the property he or she has delivered under the contract.

A contract made by a person of unsound mind can be rescinded when the parties can be restored to the status quo. This rule applies even if the opposite party was unaware of the mental condition, and the contract was fair, reasonable, and made in GOOD FAITH for adequate consideration. When one party knows of the other's incapacity, the contract can be rescinded on the ground of fraud. When both parties are sane and the contract is valid, subsequent insanity of one of the parties is not a ground for rescission, unless it affects the substance or purpose of the contract, as in the case of a personal services contract.

As a general rule, a contract cannot be rescinded because one of the parties was intoxicated at the time it was made. If, however, unfair advantage was taken of a person's intoxicated condition, or if the intoxication was induced by the party seeking to take advantage of the contract, the contract can be set aside on the ground of fraud. Similarly, habitual drunkenness that impairs a party's mental abilities can constitute a ground for rescission.

### Inadequate Consideration

Mere inadequacy of consideration is not a sufficient reason to justify rescission. When the consideration is so inadequate that it shocks the conscience of the court or is so closely connected with suspicious circumstances or misrepresentations as to provide substantial evidence of fraud, it can furnish a basis for relief.

### Nonperformance or Breach

One party to a contract can rescind it because of substantial nonperformance or breach by the other party. The party who knowingly and willfully fails to perform cannot complain that the other party to the contract has injured him or her by terminating the contract. The right to rescind does not arise from every breach but is permitted only when the breach is so substantial and fundamental that it defeats the objective of the parties in making the agreement. The breach must pertain to the essence of the contract. The act must be an unqualified refusal by the other party to perform and should amount to a decision not to be bound by the contract in the future. A party to a contract who is in default cannot, however, rescind because of a breach by the other party.

When time is of the essence in a contract, failure to perform within the time stipulated is a ground for rescission. Otherwise a delay in the time of performance is not considered a material breach justifying rescission. When performance is intended within a reasonable time, one party cannot suddenly and without reasonable notice terminate the contract while the other party is attempting in good faith to perform it.

An unconditional notice by one party that he does not intend to perform a contract is a ground for rescission by the other party. In order to justify rescission, the refusal must be absolute and unconditional.

When one party to a contract abandons it and refuses further performance or her conduct shows that she is repudiating the contract, the other party is entitled to rescission. A disagreement over the terms of the contract and a subsequent refusal to perform in a particular manner by one of the parties do not constitute an ABANDONMENT of the contract justifying rescission.

### Time

A right to rescind must be exercised promptly or within a reasonable time after the discovery of the facts that authorize the right. A reasonable time is defined by the circumstances of the particular case. The rule that rescission must be prompt does not operate where an excuse or justification for a delay is shown.

#### FURTHER READINGS

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#### CROSS-REFERENCES

Abrogation; Contracts; Fraud.

## RESCUE

*The crime of forcibly and knowingly freeing another from arrest, imprisonment, or legal custody.*

*In* ADMIRALTY AND MARITIME LAW, *the taking back of property seized as prize from the possession of the captors by the party who originally lost it.*

At COMMON LAW, the crime of rescue involved illegally freeing a prisoner. From the nineteenth century onward, such crimes became romanticized in the popular entertainment of Westerns and crime dramas, where prisoners were freed from jail by their criminal associates. Today, this form of rescue is an offense under federal law. Some states treat it as a common-law offense, whereas others define it under statute. In a different legal sense, rescue under admiralty and maritime law means the taking back of goods that have been captured at sea.

The crime of rescue has four elements. First, the arrest of a prisoner must be lawful. Second, the prisoner must be in actual custody, that is, in the personal custody of an officer or in a prison or jail. Third, at common law and under some statutes, the rescue must be forcibly made. Fourth, the prisoner must actually escape. At common law, the person guilty of rescue is

guilty of the same grade of offense, whether felony or misdemeanor, as the person who is rescued.

Under federal law, rescue of a prisoner held in federal custody is a felony. As defined by 18 U.S.C.A. § 752 (1994), rescue is the crime of instigating or assisting escape from lawful custody. The law takes its punishment provisions from the federal statute (18 U.S.C.A. § 751 [1994]) that makes it unlawful for a prisoner to escape from a place of confinement: conviction carries fines of up to $5,000 and imprisonment of up to five years for the rescue of an adult, and equivalent fines and imprisonment of up to a year for the rescue of a minor. Thus, like the common-law definition, the same punishment applies to a person aiding an escape as that given to the person escaping.

Criminal cases involving rescue can be dramatic. In the 1933 case of *Merrill v. State,* 42 Ariz. 341, 26 P.2d 110, Herbert Merrill appealed his conviction for attempting to rescue Albert De Raey from the Maricopa County, Arizona, jail. On January 10, 1933, Merrill brought acid to the jail at De Raey's request so that De Raey could use it to cut through the bars on his jail cell. Merrill was subsequently convicted of attempting to rescue under section 4537 of Arizona's Revised Code of 1928. On appeal, however, the appellate court reversed the conviction: it found that although Merrill had apparently assisted in an escape attempt, he had not forcibly attempted to effect a rescue. Thus he had been improperly charged, the conviction could not stand, and the case was sent back to the lower court.

In 1989 a California case raised the issue of when rescue is defensible. On November 5, 1986, Ronald J. McIntosh landed a helicopter on the grounds of the Federal Correctional Institution at Pleasanton, California, and then flew off with his girlfriend, Samantha D. Lopez, who was being held as a prisoner there. McIntosh was later convicted of aiding Lopez's escape and two other felonies; Lopez was convicted of escape. In a joint appeal, they alleged that their offenses were necessary to save Lopez's life because she had been threatened by prison officials and was in immediate danger (*United States v. Lopez,* 885 F.2d 1428 [9th C.C.A. 1989]). In fact, such a defense—called a necessity defense—can excuse the otherwise criminal act of escape. The appeal alleged that the trial court had improperly instructed the jury as to the availability of this defense to both defendants. However, in upholding their convictions, the appellate court found that the trial judge committed no error in the instructions with respect to Lopez, and only a **HARMLESS ERROR** where McIntosh was concerned.

Under admiralty and maritime law, rescue has another definition entirely. It means recovering goods that have been forcibly taken by one vessel from another. The property in question is referred to as a prize, and its rescue may be effected by reclaiming the property with force or by escaping. Generally, such actions occur when two belligerent powers clash, either in a limited dispute or at war.

## RESCUE DOCTRINE

*The principle that one who has, through her* **NEGLIGENCE**, *endangered the safety of another can be held liable for injuries sustained by a third person who attempts to save the imperiled person from injury.*

This doctrine is based on the idea that danger invites rescue. It also provides that one who sees a person in imminent and serious peril as the result of the negligence of another cannot be charged with contributory negligence, as a **MATTER OF LAW**, in risking his own life or serious injury in attempting a rescue, provided the attempt is not recklessly made.

CROSS-REFERENCES

Good Samaritan Doctrine.

## RESERVATION

*A clause in a deed of real property whereby the grantor, one who transfers property, creates and retains for the grantor some right or interest in the estate granted, such as rent or an* **EASEMENT**, *a right of use over the land of another. A large tract of land that is withdrawn by public authority from sale or settlement and appropriated to specific public uses, such as parks or military posts. A tract of land under the control of the Bureau of Indian Affairs to which an American Indian tribe retains its original title to ownership, or that has been set aside from the public domain for use by a tribe.*

CROSS-REFERENCES

Native American Rights.

## RESERVE

*Funds set aside to cover future expenses, losses, or claims. To retain; to keep in store for future or special use; to postpone to a future time.*

A legal reserve is a monetary account required by law to be established by insurance companies and banks as protection against losses.

A trial court reserves a point of law by setting it aside for future consideration and allowing the trial to proceed as if the question had been resolved, subject to alteration of the judgment in the event the court en banc decides the question differently.

## RESIDENCE

*Personal presence at some place of abode.*

Although the domicile and residence of a person are usually in the same place, and the two terms are frequently used as if they have the same meaning, they are not synonymous. A person can have two places of residence, such as one in the city and one in the country, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with the intent to make it a fixed and permanent home. Residence merely requires bodily presence as an inhabitant in a given place, whereas domicile requires bodily presence in that place and also an intention to make it one's permanent home.

This distinction is relevant for members of the military, who may move frequently during the course of a typical career; college students, whose state of domicile may affect whether they are eligible for scholarships and grants from a state university; and retired individuals, whose domicile will determine where they pay taxes. Domicile determines where a person votes and where a person's driver's license is issued.

CROSS-REFERENCES

Voting.

## RESIDENCY

*A duration of stay required by state and local laws that entitles a person to the legal protection and benefits provided by applicable statutes.*

States have required state residency for a variety of rights, including the right to vote, the right to run for public office, the ability to practice a profession, and the ability to receive public assistance. The courts have invalidated some residency requirements because they violate the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT, while allowing others to stand because there is a compelling state interest.

There are two types of residency requirements. A bona fide residency requirement asks a person to establish that she actually lives at a certain location and usually is demonstrated by the address listed on a driver's license, a voter registration card, a lease, an income tax return, property tax bills, or utilities bills. If a person has conducted a substantial amount of business in a state, some states will recognize that person as an actual resident and grant her certain advantages of residency. Courts have recognized the validity of imposing bona fide requirements in order for a person to receive certain rights from the states.

A durational residency requirement obligates a person to show that, in addition to being a bona fide resident of the state or its subdivision (county, city, town, school district), she has resided in the location for an additional period of time. Attempts by states to make certain fundamental rights conditional upon the durational residency of the person applying for such benefits have been challenged in court.

### Fundamental Rights

The U.S. Supreme Court has made clear that a state can impose residency requirements as a condition of eligibility for fundamental rights only under certain circumstances. A fundamental right is any right that is guaranteed by the U.S. Constitution. A state must have a compelling STATE INTEREST to justify the restriction of basic rights by the imposition of residency requirements. The courts ultimately determine whether the state has a significant interest by examining and BALANCING the interests of the state against the rights of the person. Where a residency requirement does not serve compelling state interests, it will be held unconstitutional as a denial of equal protection of the laws guaranteed by the Constitution. The courts have addressed residency requirements involving WELFARE and public housing benefits, basic medical care, and voting that are based on fundamental rights.

**Welfare** In *Shapiro v. Thompson,* 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), the Supreme Court reviewed two state laws that imposed durational residency requirements on persons applying for welfare. Both states required a person to be a resident for one year before becoming eligible for benefits. The states claimed that this discriminatory treatment of new arrivals within their borders maintained the

fiscal integrity of state public assistance programs, provided an objective method of determining residency, and encouraged new residents to seek employment.

The Court rejected these arguments, concluding that the constitutional guarantee of personal liberty gave each citizen the right to travel throughout the United States without unreasonable restrictions. This implied fundamental right of travel was restricted by the residency requirements, which were based on unsubstantiated claims of administrative convenience. Therefore the Court struck down the durational residency requirements as a violation of equal protection of the laws. The Court noted that a case-by-case examination was necessary to determine whether other types of durational requirements promoted compelling state interests or violated the constitutional right of interstate travel.

**Public Housing** Durational residency requirements were imposed as conditions for admission to low- and moderate-income public housing projects in various cities during the 1960s. The city of New Rochelle, New York, imposed a five-year residency period before a person could apply for public housing. Because the waiting list of applicants was long, a person could wait between eight and 15 years before obtaining public housing. When the law was challenged, a federal appellate court ruled that it was an unconstitutional deprivation of equal protection (*King v. New Rochelle Municipal Housing Authority,* 442 F.2d 646 [2d Cir. 1971], *cert. denied,* 404 U.S. 863, 92 S. Ct. 113, 30 L. Ed. 2d 107 [1971]). The appeals court rejected the city's contention that it had a compelling state interest to restrict public housing to longtime residents because each community has a responsibility to take care of its own citizens first. The court disagreed, finding that the city's plan created discriminatory classifications among its citizens without justification.

**Medical Services** A person who is a bona fide resident cannot be deprived of the right to receive basic medical services merely because he has not fulfilled durational residency requirements. The Supreme Court in *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974), overturned an Arizona law that stated that an indigent person must be a resident of one year in the county before receiving nonemergency hospitalization or medical care at the expense of the county. The Court ruled that medical care is a basic necessity of life to an indigent person, comparable to welfare assistance. As in the *Shapiro* case, the Court held that the residency requirement restricted the right to travel. The fact that public services would be depleted by allowing new residents the same treatment as other residents did not justify the residency requirement because a state cannot apportion its services among its citizens.

**Voting Rights** A state has the right to require bona fide residency as a prerequisite to the exercise of the right to vote in its elections. The courts have also upheld durational residency requirements for voting. Beginning in the mid-1970s, however, many states began to abandon durational requirements, making it possible for a new resident to register to vote when he applied for a state driver's license. This "motor-voter" statute was first enacted in Minnesota (Minn. Stat. Ann. § 201.161 [West 1992]), and by 1992 some 27 states had some form of motor-voter law. Congress eliminated durational residency requirements for voting with the passage of the National Voter Registration Act of 1993 (42 U.S.C.A. § 1973gg et seq.). The act allows anyone over the age of 18 to register to vote while obtaining a driver's license.

### Other Rights

Courts have upheld residency requirements involving rights that are not fundamental rights under the Constitution. These requirements govern the right to run for public office, the right to start a lawsuit in a state court, the right to attend particular public schools, the right to practice a profession, and the right to work for a government agency. The state needs to provide a rational basis for the residency requirement, which is a lesser standard of constitutional review. Generally, most statutes can be upheld on a rational basis standard because it requires the state only to offer a reasonable justification for the law.

**Candidate for Public Office** The right to become a candidate for public office is not a fundamental right. A state has the right to impose certain requirements on persons who decide to run for public office within its borders. A bona fide resident of the state or local government subdivision may run for state or local public office. A durational requirement specifying more than a short period of time will likely be struck down as a violation of equal protection.

**Jurisdiction** When a person's legal rights have been violated, he is entitled to bring a lawsuit in the courts of his state against those who have committed the violation. A state or its subdivision will not allow a person to resort to its courts unless that person can establish that he has some relationship with it that justifies the exercise of jurisdiction of the court. States typically impose residency requirements as a prerequisite to bringing a DIVORCE action. The Supreme Court, in *Sosna v. Iowa,* 419 U.S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975), upheld an Iowa durational residency requirement that prohibited the filing of a divorce action until a person had resided for one year in the state. The Court concluded that the one-year residency requirement merely delayed obtaining judicial relief and was not a permanent barrier. In addition, the state had a compelling interest to justify the one-year requirement. The Court noted that a divorce case affects both spouses, the children of the marriage, and various property rights. Iowa had a compelling interest in making sure that it, rather than another state, was the appropriate place for the lawsuit.

**Schools** Depending upon state law, the residency of a child and her parents or guardians in a particular school district determines which public elementary and secondary schools that child will attend. States can also validly establish residency requirements to help determine which students are entitled to lower tuition costs at state-operated COLLEGES AND UNIVERSITIES. Federal courts have upheld the right of a state to impose more stringent admission standards and higher tuition costs on out-of-state residents seeking to attend its institutions of higher learning. There is a reasonable basis for this residency requirement because a state university is created for the citizens of the state and is substantially supported by state taxes.

**Professional Requirements** A state has the right to establish qualifications that must be satisfied by persons seeking to practice their professions within its borders. Doctors, lawyers, optometrists, dentists, and architects must comply with state regulations that are designed to protect the public from the work of unqualified individuals. Various courts have upheld the requirement that a professional be a resident in the state in which she is seeking to practice, on the basis that the applicant's residency prior to, or during, the time she is seeking a license gives the state examining body a sufficient opportunity to investigate her character and fitness. A residency requirement, however, must accomplish this purpose or it is invalid.

**Employment** Residency requirements have been consistently upheld as valid prerequisites to municipal or civil service employment. Because there is no constitutional right to be employed by a public agency, any residency requirements must be examined to determine if they have some rational basis. Public bodies base residency requirements for their workers on a number of state interests, including the promotion of ethnic and racial balance in the community, the reduction of high unemployment rates of inner-city minority groups, the ready availability of workers in emergency situations, and the general economic benefits ensuing from local expenditures of employees' salaries. As long as a municipal employee residency requirement is rationally related to one or more of these legitimate government purposes, it does not violate the equal protection of the laws.

**Commercial Licenses** A state can require that applicants for various types of commercial licenses, such as barbers, bar owners, restaurant owners, or taxi drivers, meet certain residency requirements. This exercise of the state POLICE POWER to protect the public health and safety is valid as long as the residency requirements constitute a reasonable way of enabling the state to accomplish its legitimate goals.

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CROSS-REFERENCES

Rational Basis Test; Schools and School Districts; Voting.

## RESIDUARY CLAUSE

*A provision in a will that disposes of property not expressly disposed of by other provisions of the will.*

## RESIDUUM

*That which remains after any process of separation or deduction; a balance; that which remains of a decedent's estate after debts have been paid and gifts deducted.*

## RESOLUTION

*The official expression of the opinion or will of a legislative body.*

The practice of submitting and voting on resolutions is a typical part of business in Congress, state legislatures, and other public assemblies. These bodies use resolutions for two purposes. First, resolutions express their consensus on matters of public policy: lawmakers routinely deliver criticism or support on a broad range of social issues, legal rights, court opinions, and even decisions by the EXECUTIVE BRANCH. Second, they pass resolutions for internal, administrative purposes. Resolutions are not laws; they differ fundamentally in their purpose. However, under certain circumstances resolutions can have the effect of law.

In all legislative bodies, the process leading to a resolution begins with a lawmaker making a formal proposal called a *motion.* The rules of the legislative body determine how much support must be given to the motion before it can be put to a general vote. The rules also specify what number of votes the resolution must attract to be passed. If successful it becomes the official position of the legislative body.

As a spontaneous expression of opinion, a resolution is intended to be timely and to have a temporary effect. Typically resolutions are used when passage of a law is unnecessary or unfeasible. In many cases relevant laws already exist. The resolution merely asserts an opinion that lawmakers want to emphasize. Thus, for example, state and federal laws already criminalize illicit drugs, but lawmakers have frequently passed resolutions decrying illegal drug use. Political frustration sometimes leads lawmakers to declare their opposition to laws that they cannot change. Additionally, resolutions are common in times of emergency. War commonly brings resolutions in support of the nation's armed forces and the president (who, at other times, can be the subject of critical resolutions).

When resolutions are mere expressions of opinion, they differ fundamentally from laws. In essence, laws are intended to permanently direct and control matters applying to persons or issues in general; moreover, they are enforceable. By contrast, resolutions expressing the views of lawmakers are limited to a specific issue or event. They are neither intended to be permanent nor to be enforceable. Nor do they carry the weight of court opinions. In a certain respect, they resemble the opinions expressed by a newspaper on its editorial page, but they are nonetheless indicative of the ideas and values of elected representatives and, as such, commonly mirror the outlook of voters.

In addition to delivering statements for public consumption, resolutions also play an important role in the administration of legislatures. Lawmakers pass resolutions to control internal rules on matters such as voting and conduct. Typically legislatures also use them to conduct housekeeping: resolutions can thank a member for service to the legislature or criticize him or her for disservice. The latter form of resolution is known as *censure,* a rarely used formal process by which the legislature as a whole votes on whether to denounce a member for misdeeds.

Either house of a legislature can issue its own resolutions. When both houses adopt the same motion, it is called a *joint resolution.* Besides carrying the greater force of unanimity, the joint resolution also has a specific legal value in state and federal government. When such a resolution has been approved by the president or a chief executive—or passed with the president's approval—it has the effect of law. In some states a joint resolution is treated as a bill. It can become a law if it is properly passed and signed by the chief executive officer. In Congress a related form of action is the *concurrent resolution:* it is passed in the form of a resolution of one house with the other house in agreement. Unlike a joint resolution, a concurrent resolution does not require the approval of the president.

CROSS-REFERENCES

Congress of the United States; Legislation.

## RESPONDEAT SUPERIOR

*[*Latin, Let the master answer.*] A common-law doctrine that makes an employer liable for the actions of an employee when the actions take place within the scope of employment.*

The common-law doctrine of *respondeat superior* was established in seventeenth-century England to define the legal liability of an employer for the actions of an employee. The doctrine was adopted in the United States and has been a fixture of agency law. It provides a better chance for an injured party to actually recover damages, because under *respondeat superior* the employer is liable for the injuries caused by an employee who is working within the scope of his employment relationship.

## When Is an Employee on the Job?

The crucial question in a respondeat superior claim is whether the employee was acting within the *scope of employment:* Was the employee involved in some activity related to the job? In 1991 the Supreme Court of Virginia decided a case, *Sayles v. Piccadilly Cafeterias, Inc.,* 242 Va. 328, 410 S.E.2d 632, that illustrates how difficult answering this question can sometimes be.

The case began with a Christmas Eve accident in 1987. Charles Sayles was a passenger in an automobile hit by another car, driven by Stephen Belcastro. Both men were leaving the Christmas party held on the premises of their company, Piccadilly Cafeterias, Inc, of Richmond, Virginia. Belcastro had become intoxicated at the party and, later, explained that he was "fooling around" when he drove his car into the left-hand lane of the road, lost control, and struck the other car, injuring Sayles.

Because Belcastro was intoxicated as a result of having drinks provided by their employer at a company-sponsored event, Sayles sued Piccadilly under the doctrine of respondeat superior. The jury returned a verdict in Sayles's favor and awarded him damages of $11.5 million. The trial court set aside the judgment, however, ruling that Belcastro had been acting outside the scope of his employment when the accident occurred.

On appeal, Sayles cited a Virginia appellate case, *Kim v. Sportswear,* 10 Va. App. 460, 393 S.E.2d (1990), from the previous year. *Kim* was a **WORKERS' COMPENSATION** case whose facts were similar: it involved an employee fatally injured while attending a Korean New Year's party sponsored and hosted by the employer. The appellate court had allowed recovery of damages against the employer.

The Supreme Court of Virginia declined to follow *Kim,* however. The court noted first that *Kim* was a workers' compensation case, governed by a statute that is to be "liberally construed in favor of the claimant." The court also made several factual distinctions: employees were expected to attend the party in the *Kim* case, whereas the party in *Sayles* did not carry such expectations. Further, the injury in *Kim* took place on the employer's premises, in contrast to *Sayles,* where the collision did not occur until five minutes after the drivers had left the party. Based on these facts, the *Sayles* court held that Belcastro was not engaged in the business of serving his employer at the time of the accident and therefore the employer could not be held liable.

The legal relationship between an employer and an employee is called agency. The employer is called the principal when engaging someone to act for him. The person who does the work for the employer is called the agent. The theory behind *respondeat superior* is that the principal controls the agent's behavior and must then assume some responsibility for the agent's actions.

An employee is an agent for her employer to the extent that the employee is authorized to act for the employer and is partially entrusted with the employer's business. The employer controls, or has a right to control, the time, place, and method of doing work. When the facts show that an employer-employee (principal-agent) relationship exists, the employer can be held responsible for the injuries caused by the employee in the course of employment.

In general, employee conduct that bears some relationship to the work will usually be considered within the scope of employment. The question whether an employee was acting within the scope of employment at the time of the event depends on the particular facts of the case. A court may consider the employee's job description or assigned duties, the time, place, and purpose of the employee's act, the extent to which the employee's actions conformed to what she was hired to do, and whether such an occurrence could reasonably have been expected.

An employee is not necessarily acting outside the scope of employment merely because she does something that she should not do. An employer cannot disclaim liability simply by showing that the employee had been directed not to do what she did. A forbidden act is within the scope of employment for purposes of

*respondeat superior* if it is necessary to accomplish an assigned task or if it might reasonably be expected that an employee would perform it.

Relatively minor deviations from the acts necessary to do assigned work usually will not be outside the scope of employment. Personal acts such as visiting the bathroom, smoking, or getting a cup of coffee are ordinarily within the scope of employment, even though they do not directly entail work. When an employee substantially departs from the work routine by engaging in a frolic—an activity solely for the employee's benefit—the employee is not acting within the scope of her employment.

An employer is liable for harm done by the employee within the scope of employment, whether the act was accidental or reckless. The employer is even responsible for intentional wrongs if they are committed, at least in part, on the employer's behalf. For example, a bill collector who commits ASSAULT AND BATTERY to extract an overdue payment subjects the employer to legal liability.

Where the employer is someone who legally owes a duty of special care and protection, such as a common carrier (airplane, bus, passenger train), motel owner, or a hospital, the employer is usually liable to the customer or patient even if the employee acts for purely personal reasons. The theory underlying such liability is that employers should not hire dangerous people and expose the public to a risk while the employee is under the employer's supervision.

The employer may also be liable for her own actions, such as in hiring a diagnosed psychopath to be an armed guard. An employer, therefore, can be liable for her own carelessness and as a principal whose employee is an agent.

These rules do not allow the employee to evade responsibility for harm she has caused. Injured parties generally sue both the employee and employer, but because the employee usually is unable to afford to pay the amount of damages awarded in a lawsuit, the employer is the party who is more likely to pay.

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CROSS-REFERENCES

Employment Law.

## RESPONDENT

*In* EQUITY *practice, the party who answers a bill or other proceeding in equity. The party against whom an appeal or motion, an application for a court order, is instituted and who is required to answer in order to protect his or her interests.*

## RESPONSIVE PLEADING

*A formal declaration by a party in reply to a prior declaration by an opponent.*

Before a lawsuit goes to trial, each party makes a series of formal written declarations to the court. These declarations are called *pleadings.* Generally, they consist of factual claims, allegations, and legal defenses; the parties assert their respective versions of what happened and how they want the court to rule. Typically, this involves the plaintiff filing a complaint and the defendant responding with an answer. This process can occur several times, depending on the complexity of the case. For example, a party may amend its pleadings, which in turn allows the opposing party to answer the amended PLEADING. When the answers respond to the factual assertions of an opponent's prior pleading, for example, by denying them, they are called *responsive pleadings.* This process is also known as *joining issue.*

The distinguishing feature of a responsive pleading is that it replies to the merits of the allegations raised by an opposing party. By contrast, parties may choose to ignore the substance of an opponent's pleading and ask the court to dismiss the lawsuit on some other grounds, such as the court's lack of jurisdiction over the suit.

## REST

*To cease motion, exertion, or labor.*

In a lawsuit, a party is said to "rest," or "rest her case," when that party indicates that she has produced all the evidence that she intends to offer at that stage and submits the case either finally, or subject to the right to offer rebutting evidence after her opponent has introduced her evidence.

## RESTATEMENT OF LAW

*A series of volumes regarded as an authoritative work of legal scholarship prepared by the authors, scholars, and members of the judiciary who comprise the American Law Institute (ALI), which presents a survey of a general area of the law and the changes that have occurred therein.*

Restatements are published in the areas of contracts, TORTS, agency, trusts, conflict of laws, judgments, property, security, and restitution. The drafters of restatements take COMMON LAW rules that have been developed by judicial decisions and organize them in a manner similar to black letter law. Restatements are also based on the judicial application of statutes that have been in force for many years. For example, a restatement titled *Foreign Relations Law of the United States* summarizes U.S. law and practice in international relations.

The first series of restatements were produced from 1923 to 1944. In 1951, the ALI began working on a second series, which included updates to the topics included in the first restatement, adding new rules and expanding upon commentary. Some restatements in the second series also advocated changes in the law from the majority rule in place at the time the restatement was drafted. Moreover, new topics were added to the second series, such as the topic of Foreign Relations Law of the United States. In 1986, the ALI began work on the third series of the restatements. Although some of the topics from the first and second series, such as Agency, have been updated in the third series, many of the topics consist of subtopics of broader subjects. For example, two of the restatements in the third series are Torts: Apportionment of Liability and Trusts: Prudent Investor Rule.

Restatements are sources of secondary authority to be cited in the support or defense of a particular claim made in a lawsuit. Although not legally binding upon the courts, restatements are effective in persuading a court to accept an argument advanced in an action. They are divided into sections, each beginning with a general statement of a legal principle accompanied by explanatory text. The discussion is illustrated with particular cases and variations used as examples of the operation of the principle. When new developments occur in a particular area, a subsequent edition of the restatement is prepared and published. The restatements have individual indexes, and a single general index for all the volumes also exists. A glossary contains definitions of significant words appearing in the text.

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CROSS-REFERENCES

Shepard's® Citations.

## RESTITUTION

*In the context of* CRIMINAL LAW, *state programs under which an offender is required, as a condition of his or her sentence, to repay money or donate services to the victim or society; with respect to maritime law, the restoration of articles lost by jettison, done when the remainder of the cargo has been saved, at the general charge of the owners of the cargo; in the law of* TORTS, *or civil wrongs, a measure of damages; in regard to contract law, the restoration of a party injured by a breach of contract to the position that party occupied before she or he entered the contract.*

The general term *restitution* describes the act of restoration. The term is used in different areas of the law but carries the same meaning throughout.

The basic purpose of restitution is to achieve fairness and prevent the UNJUST ENRICHMENT of a party. Restitution is used in contractual situations where one party has conferred a benefit on another party but cannot collect payment because the contract is defective or no contract exists. For instance, assume that a person builds a barn on the property of another person. Assume further that the structure is not erected pursuant to a contract or agreement and that the owner of the property on which the barn sits refuses to pay the builder for the barn. Despite the absence of a contract, a court can order the owner to pay the builder the cost of the labor and materials under the doctrine of restitution.

Courts in seventeenth century England first developed the doctrine of restitution as a contractual remedy. The concept migrated to courts in the United States, and it has since expanded beyond its original contractual roots. Courts now apply restitution in the areas of maritime or ADMIRALTY LAW, criminal law, and torts. In admiralty law restitution may be ordered when a shipping crew must throw goods overboard to keep the ship afloat. In such a case the owner of the jettisoned goods may gain some recovery for the goods from the owners of the other cargo under the doctrine of restitution.

In criminal law restitution is a regular feature in the sentences of criminal defendants. Restitution in the criminal arena refers to an affirmative performance by the defendant that

*A group of juvenile offenders provide restitution by repainting a wall that had been covered with graffiti.*

AP/WIDE WORLD PHOTOS

benefits either the victim of the crime or the general public. If a victim can be identified, a judge will order the defendant to make restitution to the victim. For example, if a defendant is convicted of stealing a person's stereo, the defendant may be sentenced to reimburse the victim for the value of the stereo, in addition to punishment such as jail time and monetary fines.

Courts try to fashion the restitution of a criminal defendant according to the crime committed. For example, a defendant convicted of solicitation of prostitution may be ordered to perform work for a local shelter for battered women as a form of restitution to the general public.

In tort law restitution applies to the measure of damages required to restore the plaintiff to the position he or she held prior to the commission of the tort. For example, if a person is injured by another person, the injured party may collect medical expenses and lost wages as restitutionary damages. Other civil damages are distinct from restitutionary damages because they are not based on the amount required to restore the injured party to his or her former status. **PUNITIVE DAMAGES**, for example, are damages assessed against a civil defendant for the purpose of punishing the defendant's conduct, not to provide restitution.

**FURTHER READINGS**

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**CROSS-REFERENCES**

Admiralty and Maritime Law; Sentencing.

## RESTORATIVE JUSTICE

*A philosophical framework and a series of programs for the criminal justice system that emphasize the need to repair the harm done to crime victims through a process of negotiation, mediation, victim empowerment, and* **REPARATION**.

The U.S. criminal justice system historically has employed two models for dealing with crime and criminals. The retribution model emphasizes deterrence and punishment through the adversarial criminal justice process, and the rehabilitation model emphasizes the need for society to assist criminals in changing their attitudes and behavior. Since the 1970s, however, a third model, called restorative justice, has begun to find acceptance in many U.S. communities. Restorative justice emphasizes an equal concern for crime victims and offenders, while deemphasizing the importance of coercion. It also seeks to focus on the harm done to persons and relationships rather than on the violation of a law. Beyond its philosophical framework, the restorative justice model includes a number of programs for addressing the needs of crime victims, the community, and offenders.

Restorative justice began in Canada in the mid-1970s as an idea for victim-offender reconciliation. Offenders were brought to their victims' homes to see and hear how their crimes had affected the victims and the victims' families and communities. The Mennonite Church was at the forefront of the restorative justice movement, emphasizing Christian principles of personal salvation and peacemaking. Though restorative justice became more secularized in the 1980s and 1990s, many of its core principles are based on Christian beliefs about forgiveness and healing.

Originally viewed as a fringe idea, restorative justice developed respectability in the 1990s, in part because the retribution model had proved to be an expensive and seemingly ineffective way of dealing with crime in the United States. Proponents of restorative justice argue that it is a clear alternative to retribution, emphasizing the need for community involvement in addressing criminal behavior. Today restorative justice programs can be found around the world.

There are many programs and ideas associated with restorative justice. Several hundred communities have adopted the Victim Offender

Reconciliation Program (VORP), which brings the victim and the offender together to talk about the crime and its impact on the victim and to mediate a solution acceptable to both parties. In a VORP mediation, the offender recognizes the injustice he has committed and negotiates a plan to restore the victim and repair the damage. In addition to seeking financial restitution for the victim, VORP attempts to heal the victim's emotional wounds and to impress upon the offender the consequences of the crime and the need for changing behavior.

Ideally, restorative justice programs such as VORP rely on cooperation rather than coercion to make the offender feel accountable for his actions. However, coercion may be used if the goal is to encourage the offender to cooperate.

Other restorative justice programs include community service options for offenders, often with the input of crime victims; comprehensive victim services; and community advisory boards on crimes that address situations that promote crime. The concept of *circles,* which have long existed among Native Americans in the United States and Canada, has gained appeal. The victim and the offender agree to participate in a group meeting in which members of the community provide their guidance and perspectives. "Healing circles" allow the offender to express remorse while giving the victim and the community an opportunity to accept that remorse. In "sentencing circles," the community helps decide the proper response to the crime. The circle concept has worked within Native American cultures in part because they tend to be close-knit and circles require the participation of community members. *Conferencing,* which originated among the Maori of New Zealand, is used with juvenile offenders. Conferencing involves discussion and mediation, but it includes members of the community (families, community support groups, police, attorneys) along with the victim and the offender.

A prime component of restorative justice is restitution to crime victims. For example, if an offender vandalizes a car, that person must pay for the repairs. Restitution has also become part of the retribution model of justice as well, with courts making restitution to the victim along with sentencing the offender to jail or imposing a fine. In restorative justice, restitution is part of a larger goal to restore the crime victim's loss and to impress upon the offender the destructive aspects of crime.

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CROSS-REFERENCES

Sentencing; Victims of Crime.

## RESTRAINING ORDER

*A command of the court issued upon the filing of an application for an* INJUNCTION*, prohibiting the defendant from performing a threatened act until a hearing on the application can be held.*

A restraining order is an official command issued by a court to refrain from certain activity. Restraining orders are sought by plaintiffs in a wide variety of instances for the same reason: the plaintiff wishes to prevent the defendant from doing something that he or she has threatened. Restraining orders are used in a variety of contexts, including employment disputes, COPYRIGHT infringement, and cases of harassment, domestic abuse, and STALKING. All restraining orders begin with an application to the court, which decides the merits of the request by using a traditional test. Limited in their duration and effect, restraining orders are distinguished from the more lasting form of court intervention called an injunction. Generally they are sought as a form of immediate relief while a plaintiff pursues a permanent injunction.

A court submits a request for a restraining order to one of several tests. These tests vary slightly across different jurisdictions, but generally they involve the analysis of four separate factors: (1) whether the moving party will suffer irreparable injury if the relief is not granted; (2) whether the moving party is likely to succeed on the merits of the case; (3) whether the opposing party will be harmed more than the moving party is helped; and (4) whether granting the relief is in the public interest.

Usually, restraining orders are not permanent. They exist because of the need for immediate relief: the plaintiff requires fast action from the court to prevent injury. Seeking a permanent injunction can take months or years because it involves a full hearing, but the process of obtaining a restraining order can take a matter of days or weeks. For even faster

*A sample temporary restraining order*

**Temporary Restraining Order**

[*Title of Court and Cause*]

Upon the Complaint of _____ and the affidavit of _____, it is ORDERED that the defendants show cause before this Court at _____, _____ on _____, 20_____, at _____ o'clock ___.M. or as soon thereafter as counsel can be heard, why a preliminary injuction should not issue herein; and

It appearing to the court that defendants will take action which would prevent plaintiff from and interfere with her carrying out her duties as a teacher at _____ Junior High School by discharging plaintiff from her employment and that immediate and irreparable injury, loss, and damage will result to plaintiff before notice can be served and the hearing had on plaintiff's Motion for Preliminary Injunction defendants should be required by reason of the likelihood of immediate action being taken by the defendants which would disturb the present situation of the parties; it is further

ORDERED that the defendants, their agents, employees, servants, or any person acting in their behalf, be restrained from taking any action which would prevent plaintiff or interfere with her carrying out her duties as a teacher at _____ Junior High School or from discharging plaintiff from employment.

ORDERED that service of this order to show cause and temporary restraining order together with the Motion for Preliminary Injunction and Affidavit, as well as the Complaint, on defendants on or before _____, 20___, at _____ o'clock ____.M., be deemed sufficient service.

Issued at _____, _____.M., this _____ day of _____, 20_____.

_____

United States District Judge.

relief, moving parties can seek a TEMPORARY RESTRAINING ORDER (TRO). These are often issued ex parte, meaning that only the moving party is present in court. The TRO usually lasts only until an injunctive hearing involving both parties can be held.

Harassment of an individual can result in a permanent restraining order. This command of the court is also called a protective order. All states permit individuals to seek a restraining order when they are subjected to harassment by another individual or organization, typically involving behavior such as repeated, intrusive, and unwanted acts. Application for such an order usually is made to the district court. If granted, it prohibits the party named from initiating any contact with the protected party. In the 1990s most states passed anti-stalking laws designed to protect women from criminal harassment by men. These laws generally require that a plaintiff first secure a restraining order before criminal charges can be filed.

FURTHER READINGS

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## RESTRAINT OF TRADE

*Contracts or combinations that tend, or are designed, to eliminate or stifle competition, create a* MONOPOLY*, artificially maintain prices, or otherwise hamper or obstruct the course of trade as it would be carried on if it were left to the control of natural economic forces.*

As used in the SHERMAN ANTI-TRUST ACT (15 U.S.C.A. § 1 et seq.), unreasonable restraints of trade are illegal per se and interfere with free competition in business and commercial transactions. Such restraint tends to restrict production, affect prices, or otherwise control the market to the detriment of purchasers or consumers of goods and services. A restraint of trade that is ordinarily reasonable can be rendered unreasonable if it is accompanied by a SPECIFIC INTENT to achieve the equivalent of a forbidden restraint.

CROSS-REFERENCES

Antitrust Law; Combination in Restraint of Trade.

## RESTRICTIVE COVENANT

*A provision in a deed limiting the use of the property and prohibiting certain uses. A clause in contracts of partnership and employment prohibiting a contracting party from engaging in similar employment for a specified period of time within a certain geographical area.*

A COVENANT is a type of contractual arrangement. A restrictive covenant is a clause in a deed or lease to real property that limits what

the owner of the land or lease can do with the property. Restrictive covenants allow surrounding property owners, who have similar covenants in their deeds, to enforce the terms of the covenants in a court of law. They are intended to enhance property values by controlling development.

Land developers typically use restrictive covenants when they subdivide property for residential developments. A land developer, after platting the subdivision into lots, blocks, and streets, will impose certain limitations on the use of the lots in the development. These may include a provision restricting construction to single-family dwellings with no detached outbuildings, as well as specifying that the dwellings are to be built at least a specified distance from the street and from the side and back lot lines, commonly called a "set back" requirement. Another common restrictive covenant specifies a minimum square footage for dwellings. There may be a variety of other restrictive covenants that seek to control the way the development looks and is maintained. These covenants are filed with the approved plat.

A person who purchases a lot in a development with restrictive covenants must honor the limitations. When the purchaser resells the lot to a buyer, the new owner will take the property subject to the restrictive covenants, because the covenants are said to "run with the land."

If a person violates or attempts to violate one or more of the covenants, a person who is benefited by the covenants, usually an adjacent property owner, may sue to enforce the restrictions. Courts generally strictly construe restrictive covenants to allow a landowner to use her land for any purpose that is not specifically prohibited by the restrictive covenants or by the local government. Therefore, if a developer wants to restrict a subdivision to single-family residences, the developer must state "single family residential" rather than "residential" in the covenant.

Restrictive covenants at one time were used to prevent minorities from moving into residential neighborhoods. A group of homeowners would agree not to sell or rent their homes to African Americans, Jews, and other minorities by including this restriction in their real estate deeds. Until 1948 it was thought that this form of private discrimination was legal because the state was not involved. However, in *Shelley v. Kraemer,* 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), the U.S. Supreme Court held such covenants to be unenforceable in state courts because any such enforcement would amount to STATE ACTION in contravention of the FOURTEENTH AMENDMENT to the U.S. Constitution. For a state court to enforce such an agreement would foster a perception that the state approved of racially restrictive covenants. Although this kind of restrictive covenant is no longer judicially enforceable, racial restrictions are still contained in some deeds.

Apart from real estate law, restrictive covenants may be used in partnership agreements or employment contracts to protect a business if a partner or employee leaves. For example, a life insurance company may require a prospective employee to sign an employment contract in which the employee agrees not to sell life insurance in that geographical area for a specified period of time after leaving the company. If the time and geographical restrictions are reasonable, a court may enforce the restrictions. Some restrictive covenants may be so unfair, however, that a court will declare them contrary to public policy and make them legally unenforceable.

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CROSS-REFERENCES

Employment Law; Land-Use Control; Running with the Land; Zoning.

## RESTRICTIVE INDORSEMENT

*The act of a payee or other holder of an instrument, such as a check, that consists of signing his or her name upon the back of the instrument in order to transfer it to another and wording the signature in such a manner as to bar the further negotiability of the instrument.*

For example, the phrases *Pay the contents to A only,* or *to A for my use,* are restrictive indorsements and terminate the transferability of the document.

An indorsement is restrictive if it (1) is conditional; (2) purports to proscribe further transfer of the instrument; (3) includes the terms *for collection, for deposit, pay any bank,* or similar terms denoting a purpose of deposit or collection; or (4) states that it is for the benefit or use of the indorser—the one who signs the back of the instrument in order to transfer it—or of another person.

## RESULTING TRUST

*An arrangement whereby one person holds property for the benefit of another, which is implied by a court in certain cases where a person transfers property to another and gives him or her legal title to it but does not intend him or her to have an equitable or beneficial interest in the property.*

Since this beneficial interest is not given to anyone else, it is said to "result" to the person who transferred the property.

A resulting trust arises when an express trust fails. A settlor, one who creates a trust, transfers his property to a trustee, one appointed, or required by law, to execute a trust, to hold in trust for a beneficiary, one who profits from the act of another. If, without the settlor's knowledge, the beneficiary died before the trust was created, the express trust would fail for want of a beneficiary. The trustee holds the property in resulting trust for the settlor.

When an express trust does not use or exhaust all the trust property, a resulting trust arises. For example, the settlor transfers $200,000 in trust to pay the beneficiary during her lifetime $2,000 a month from principal, trust property, as opposed to income generated by investment of the principal. No other disposition is specified. The beneficiary dies after having received $20,000. The trustee holds the unexpended funds in a resulting trust for the settlor.

A purchase money resulting trust arises when one person purchases and pays for property and the name of another person is on the title. For example, a person purchases a farm for $100,000 and directs the seller to make the deed out to a third person. Nothing further appears concerning the purchaser's intention, and no relationship exists between the purchaser and the third person. In this situation, a resulting trust is created. The purchaser's intention is inferred from the absence of expressed intention that she intends the third person to have an interest in the farm. This occurs because a person usually does not intend to dispose of property without receiving something in return for it, unless she makes an express statement to the contrary, such as announcing an intention to make a gift or loan. If the purchaser is the spouse or parent of the third person, which is not the case here, it is presumed that a gift is intended. In this case, the third person holds a purchase money resulting trust for the purchaser.

A purchase money resulting trust does not arise, however, if the person who pays the purchase price manifests an intention that no resulting trust should arise. Purchase money resulting trusts have been abolished or restricted in a number of states.

The resulting trust attempts to dispose of the property in the manner the person who transferred it would have wanted if he had anticipated the situation. The court will order that the person with legal title to the trust property hold it in a resulting trust for the person who transferred it. When a charitable trust—a trust designed for the benefit of a class or the public generally—fails, a resulting trust will be invoked only if the doctrine of CY PRES is deemed not to apply. This doctrine implements the intention of a person as nearly as possible when giving the intent literal effect would be illegal or impossible.

## RETAINER

*A contract between attorney and client specifying the nature of the services to be rendered and the cost of the services.*

*Retainer* also denotes the fee that the client pays when employing an attorney to act on her behalf. When a client retains an attorney to act for her, the client thereby prevents the attorney from acting for an adversary.

A *right to retainer* refers to the authority by which the executor or administrator of the estate of a deceased person reserves out of the assets an amount sufficient to pay any debt due to him from the deceased in priority to the other creditors whose debts are of equal degree.

CROSS-REFERENCES

Executors and Administrators.

## RETALIATORY EVICTION

*The act of a landlord in ejecting or attempting to eject a tenant from the rented premises, or in refusing to renew a lease, because of the tenant's*

*complaints or participation in a tenant's union or in similar activities with which the landlord is not in accord.*

In some states, such retaliation will bar the landlord from enforcing normal eviction remedies against the tenant.

CROSS-REFERENCES

Landlord and Tenant.

## RETORSION

*A phrase used in* INTERNATIONAL LAW *to describe retaliatory action taken by one foreign government against another for the stringent or harsh regulation or treatment of its citizens who are within the geographical boundaries of the foreign country.*

The typical methods of retorsion are the use of comparably severe measures against citizens of the foreign nation found within the borders of the retaliating nation.

## RETRACTION

*In the law of* DEFAMATION*, a formal recanting of the libelous or slanderous material.*

Retraction is not a defense to defamation, but under certain circumstances, it is admissible in MITIGATION OF DAMAGES.

CROSS-REFERENCES

Libel and Slander.

## RETRO

*[*Latin, Back; backward; behind.*] A prefix used to designate a prior condition or time.*

## RETROACTIVE

*Having reference to things that happened in the past, prior to the occurrence of the act in question.*

A retroactive or retrospective law is one that takes away or impairs vested rights acquired under existing laws, creates new obligations, imposes new duties, or attaches a new and different legal effect to transactions or considerations already past. Common-law principles do not favor the retroactive effect of laws in the majority of cases, and canons of legislative construction presume that legislation is not intended as retroactive unless its language expressly makes it retroactive.

Retroactive criminal laws that increase punishment for acts committed prior to their enactments are deemed EX POST FACTO LAWS and are unenforceable because they violate Article I, Section 9, Clause 3, and Section 10, Clause 1, of the U.S. Constitution and comparable provisions of state constitutions.

## RETURN

*To bring, carry, or send back; to restore, redeliver, or replace in the custody of someone. Merchandise brought back to a seller for credit or a refund. The profit made on a sale; the income from an investment. A schedule of information required by some governmental agencies, such as the tax return that must be submitted to the* INTERNAL REVENUE SERVICE.

*The official report made by a court, body of magistrates, or other official board charged with counting votes cast in an election. The redelivery of a writ, notice, or other form of legal process to the court after its proper service on the defendant or after it cannot be served.*

For example, the Federal Rules of Civil Procedure require a plaintiff to begin an action in federal court by preparing a complaint and giving it to the court. Then the clerk of the court issues a summons and delivers the summons and complaint to a U.S. marshal or a deputy, unless the court designates someone else. That person must take the papers, called legal process, and serve them on the named defendant. The process server must promptly report back to the court the circumstances of the service or the failure to serve the papers.

This report with the process server's signature on it is called the return of service. It recites facts to demonstrate that the defendant has actually been given notice that she is required to appear in court. The failure to make a proper return does not make the service invalid or defeat its effectiveness for starting the lawsuit, but it can be grounds for disciplining the process server. The return is important to the court because it is proof that service was properly made on the correct person and that the action has been legally commenced.

CROSS-REFERENCES

Service of Process.

## RETURN DAY

*The day on which votes are counted and the election results announced. The day named in a writ or other form of legal process as the date when the response to that paper must be made.*

*The day on which an officer, such as a U.S. marshal, must file proof with the court that he or she has served legal process on a defendant or that he or she cannot serve the papers. The statement is made under oath and is called the return or return of process.*

For example, a defendant may make a motion in separate papers challenging some action taken by the plaintiff during pretrial discovery. In the motion papers, the defendant must specify the day when the plaintiff must deliver papers if he objects to the relief sought by the defendant. That date is called the return day, or return date.

## REVENUE

*Return or profit such as the annual or periodic rents, profits, interest, or income from any type of real or* PERSONAL PROPERTY*, received by an individual, a corporation, or a government.*

*Public revenues* are the sources of income that a government collects and receives into its treasury and appropriates for the payment of its expenses.

## REVERSE

*To overthrow, invalidate, repeal, or revoke.*

For example, an appeals court reverses the judgment, decree, or sentence of a lower court either by substituting its own decision or by returning the case to the lower court with instructions for a new trial.

## REVERSION

*Any future interest kept by a person who transfers property to another.*

A reversion occurs when a property owner makes an effective transfer of property to another but retains some future right to the property. For example, if Sara transfers a piece of property to Shane for life, Shane has the use of the property for the rest of his life. Upon his death, the property reverts, or goes back, to Sara, or if Sara has died, it goes to her heirs. Shane's interest in the property, in this example, is a life estate. Sara's ownership interest during Shane's life, and her right or the right of her heirs to take back the property upon Shane's death, are called reversionary interests.

A reversion differs from a remainder because a reversion arises through the operation of law rather than by act of the parties. A remainder is a future interest that is created in some person other than the grantor or transferor, whereas a reversion creates a future interest in the grantor or his or her heirs. If Sara's transfer had been "to Shane for life, then to Lily," Lily's interest would be a remainder.

CROSS-REFERENCES

Estate.

## REVERTER, POSSIBILITY OF

*A contingent future interest in real property that a grantor of a determinable fee possesses after he or she has conveyed property.*

The *possibility of reverter* arises when the grantor of real property has conveyed land subject to the possibility that the estate will return to her or to her heirs if a certain specified limitation occurs. For example, if A, owner of Blackacre in fee simple, makes the conveyance, "To B and B's heirs as long as the land is used for church purposes," then A has a possibility of reverter. A is entitled to the return of the land if B and B's heirs do not use the land for the designated purpose.

## REVIEW

*To reexamine judicially or administratively; a judicial reconsideration for purposes of correction, for example, the examination of a case by an appellate court.*

A bill of review is a proceeding in EQUITY instituted for the purpose of reversing or correcting the prior judgment of the trial court after the judgment has become final.

## REVISED STATUTES

*A body of statutes that have been revised, collected, arranged in order, and reenacted as a whole. The legal title of the collection of compiled laws of the United States, as well as some of the individual states.*

## REVIVAL OF AN ACTION

*A mechanism of legal procedure that operates at the* PLEADING *stage of litigation to subsequently renew an action that has been abated, terminated, or suspended for reasons other than the merits of the claim.*

Lawsuits abate primarily because of the death of a party. In the past, under COMMON LAW, a lawsuit terminated automatically when-

ever a party died. This rule was part of the substance of the law involved and was not merely a matter of procedure. Whether the CAUSE OF ACTION abated depended on whether the lawsuit was considered personal to the parties. Contract and property cases were thought to involve issues separate from the parties themselves. They were not personal and did not necessarily end on the death of a party. Personal injury cases, including claims not only for physical assault or negligent injuries inflicted on the body but also other injuries to the person, such as LIBEL, slander, and MALICIOUS PROSECUTION, were considered personal and abated when one of the parties died.

Today most lawsuits do not abate. Statutes permit the revival of a lawsuit that was pending when a party died. Personal representatives, such as EXECUTORS AND ADMINISTRATORS, may be substituted for the deceased party, and the lawsuit may continue. These are not the same as survival statutes, which permit the maintenance of a lawsuit on behalf of a person who has died, whether it began before the deceased's death or not. A lawsuit can be revived only if the underlying cause of action, the ground for the suit, continues to have a legal existence after the party's death. Revival statutes vary from state to state.

Matrimonial actions do not usually fall within the scope of revival statutes. An action for DIVORCE or separation is considered entirely personal and generally cannot be maintained after the death of a spouse. Different states sometimes make exceptions to settle certain questions of property ownership. The ANNULMENT of a marriage after the death of an innocent spouse may be permitted if it is clear that the marriage resulted from FRAUD and the perpetrator of the fraud would inherit property she would otherwise not be allowed to take.

CROSS-REFERENCES

Abatement of An Action.

## REVIVE

*To renew.*

For example, revival is the act of renewing the legal force of a contract or debt, either by acknowledging it or by giving a new promise, when the contract or debt is no longer a sufficient foundation for a lawsuit because it is barred by the running of the STATUTE OF LIMITATIONS.

## REVOCATION

*The recall of some power or authority that has been granted.*

Revocation by the act of a party is intentional and voluntary, such as when a person cancels a POWER OF ATTORNEY that he has given or a will that he has written. The revocation of a will takes place when a testator makes a later will containing terms that are inconsistent with the terms of an earlier will, or when the testator destroys the former will.

A revocation by operation of law or constructive revocation occurs without regard to the intention of the parties. A power of attorney, therefore, is ordinarily revoked automatically by operation of law upon the death of the principal.

## REVOKE

*To annul or make void by recalling or taking back; to cancel, rescind, repeal, or reverse.*

## REVOLUTION

*A sudden, tumultuous, and radical transformation of an entire system of government, including its legal and political components.*

In many instances, revolutions encompass society as a whole, bringing fundamental change to a culture's economic, religious, and institutional framework. Fundamental change that is incrementally wrought over time is more properly considered evolutionary rather than revolutionary. A revolution also should be contrasted with a *coup d'etat,* which generally involves the violent ousting of a particular regime or its leaders, but which otherwise leaves intact the culture's political, legal, and economic infrastructure.

In many ways law and revolution occupy polar extremes in a political system. Law serves as one of the principal edifices upon which social order is built. Revolutions, on the other hand, seek to dismantle the existing social order. Legal systems are established in part to replace private forms of justice, such as SELF-HELP and VIGILANTISM, which can lead to endless cycles of revenge. Revolutions, conversely, depend on persons who are willing to take law into their own hands.

At the same time, law can serve as the motivating force behind revolutionary activity. In writing the Declaration of Independence, THOMAS JEFFERSON explained that it had

become necessary for the colonies to dissolve their formal ties with Great Britain because the king of England had abused his autocratic power by denying Americans their inalienable rights to life, liberty, and the pursuit of happiness. These rights, Jefferson said, are guaranteed by an unwritten **NATURAL LAW**. The American Revolution, then, was fought to restore the **RULE OF LAW** in the United States, which was not fully accomplished until the power of government was subordinated to the will of the people in the state and federal constitutions.

Along these same lines, **JOHN LOCKE**, in his *Second Treatise of Government* (1690), postulated the right of all citizens to revolt against tyrants who subvert the law and oppress the populace through the wanton use of force and terror. Such tyrannical abuse of power, Locke said, may be resisted because every person is born with the rights to **SELF-DEFENSE** and self-preservation, which supersede the laws of a despotic sovereign. However, neither Jefferson nor Locke prescribed a formula to determine when governmental behavior becomes sufficiently despotic to justify revolution.

The traditional meaning of the term *revolution* has been watered down by popular culture. Every day Americans are inundated with talk of revolution. The fitness revolution, the technology revolution, the computer revolution, and the information revolution are just a few examples of the everyday usage of this term. Such common usage has diluted the meaning of revolution to such an extent that it is now virtually synonymous with benign terms such as *change, development,* and *progress.*

Yet traditional revolutions are rarely benign. The French Revolution of 1789 is historically associated with the unfettered bloodletting at the guillotine. The twentieth-century revolutions in Russia, Southeast Asia, and Central America were marked by the mass extermination and persecution of political opponents.

These revolutions demonstrate the tension separating power from the rule of law. Following a revolution, members of new regimes are inevitably tempted to "get even" with the leaders of the ousted regime to whom they attribute the commission of horrible acts while in office. Now holding the reins of sovereignty, the new regime has acquired the power to impose an expedient form of justice upon members of the old regime. This form of justice has many faces, including the confiscation of property without a hearing, forcible detention without trial, and the implementation of summary executions.

However, the rule of law requires governments to act in strict accordance with clearly defined and well-established legal procedures and principles. The rule of law disfavors **ARBITRARY** and capricious governmental action. Thus, every revolutionary regime faces a similar dilemma: how to make a deposed regime pay for its tyrannical behavior without committing acts of tyranny itself. The identity and ideological direction of a revolutionary regime is often determined by the manner in which this dilemma is resolved.

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**CROSS-REFERENCES**

Anarchism; Communism; Lenin, Vladimir Ilyich; Marx, Karl Heinrich.

## REVOLUTIONARY WAR

See **WAR OF INDEPENDENCE.**

## REVOLVING CHARGE

*A type of credit arrangement that permits a buyer or a borrower to purchase merchandise or obtain loans on a continuing basis as long as the outstanding balance of the account does not exceed a certain limit.*

Revolving charge agreements are usually made in connection with the use of a bank or a department store credit card. The term *revolving charge* is used interchangeably with the term *revolving credit.*

When all outstanding charges are paid before or on the payment due date, which is usually immediately before the date of the second billing, no interest charge is assessed against the account, although this policy might change in the future. For example, a customer charges $200 in merchandise during the first week in January and receives the statement of her outstanding balance on February 2. If the customer pays the $200 balance in full before March 2, the payment due date, no service charge is added to the account.

When the customer does not wish to pay the outstanding balance in full, she may make monthly installment payments, if the credit agreement so provides. The amount of each payment is determined according to a schedule based on a percentage of the outstanding balance of the account. A monthly interest charge is also added to the unpaid balance, usually at the rate of 1½ percent per month.

Ordinarily each customer has his own line of credit, the maximum amount that the customer is permitted to charge. Once this limit is reached, no additional merchandise can be charged to that account until some payment has been made to reduce the outstanding debt.

## REWARD

*A sum of money or other compensation offered to the public in general, or to a class of persons, for the performance of a special service.*

It is commonplace for the police to offer a reward for information leading to the arrest and conviction of an offender or for a pet owner to post notices in a neighborhood offering a reward for the return of a lost dog or cat. In legal terms, the person promising a reward is offering to enter into a contract with the person who performs the requested action, that is, turning in a criminal or returning a lost pet. Performance will be rewarded with money or some other compensation. Therefore, the legal concepts involving rewards are derived from the law of contracts.

An actual, valid offer must be made to create a contract of reward. The offer is merely a proposal or a conditional promise by the person offering the reward, known legally as the offerer. It is not a consummated contract until the requested action is performed.

The person offering the reward can do so on any terms she wishes, and the terms must be met before the reward can be recovered. The subject matter of the offer can entail the discovery of information leading to the arrest and conviction of a person, the discovery of stolen property and the apprehension of the thief, the return of lost property, or the recovery or rescue of a person.

A prize or premium can be a valid offer of a reward for exhibits, architectural plans, paintings, the best performance in a tournament, the suggestion of a name, or the achievement of the best time in a race.

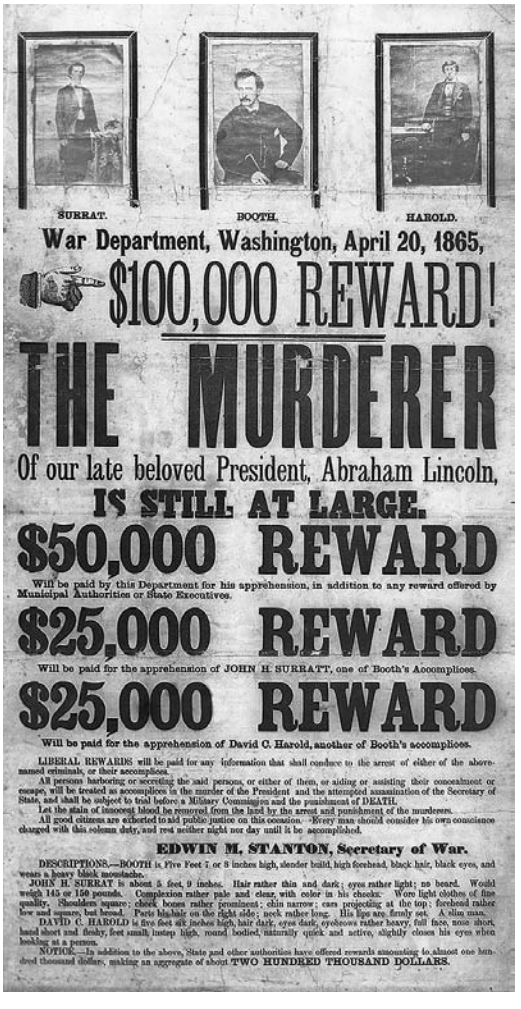
SURRATT. BOOTH. HAROLD.

War Department, Washington, April 20, 1865,

$100,000 REWARD!

THE MURDERER

Of our late beloved President, Abraham Lincoln,

IS STILL AT LARGE.

$50,000 REWARD

Will be paid by this Department for his apprehension, in addition to any reward offered by Municipal Authorities or State Executives.

$25,000 REWARD

Will be paid for the apprehension of JOHN H. SURRATT, one of Booth's Accomplices.

$25,000 REWARD

Will be paid for the apprehension of David C. Harold, another of Booth's accomplices.

LIBERAL REWARDS will be paid for any information that shall conduce to the arrest of either of the above-named criminals, or their accomplices.

All persons harboring or secreting the said persons, or either of them, or aiding or assisting their concealment or escape, will be treated as accomplices in the murder of the President and the attempted assassination of the Secretary of State, and shall be subject to trial before a Military Commission and the punishment of DEATH.

Let the stain of innocent blood be removed from the land by the arrest and punishment of the murderers.

All good citizens are exhorted to aid public justice on this occasion. Every man should consider his own conscience charged with this solemn duty, and rest neither night nor day until it be accomplished.

EDWIN M. STANTON, Secretary of War.

DESCRIPTIONS.—BOOTH is Five Feet 7, or 8 inches high, slender build, high forehead, black hair, black eyes, and wears a heavy black moustache.

JOHN H. SURRAT is about 5 feet, 9 inches. Hair rather thin and dark; eyes rather light; no beard. Would weigh 145 or 150 pounds. Complexion rather pale and clear, with color in his cheeks. Wore light clothes of fine quality. Shoulders square; cheek bones rather prominent; chin narrow; ears projecting at the top; forehead rather low and square, but broad. Parts his hair on the right side; neck rather long. His lips are firmly set. A slim man.

DAVID C. HAROLD is five feet six inches high, hair dark, eyes dark, eyebrows rather heavy, full face, nose short, head short and flesky, feet small, instep high, round bodied, naturally quick and active, slightly closes his eyes when looking at a person.

NOTICE.—In addition to the above, State and other authorities have offered rewards amounting to almost one hundred thousand dollars, making an aggregate of about TWO HUNDRED THOUSAND DOLLARS.

*This 1865 poster offered a reward for three men (John H. Surratt, John Wilkes Booth, David E. Herold) alleged to have been involved in the assassination of President Abraham Lincoln.*

LIBRARY OF CONGRESS

Any persons, including corporations, legally capable of making a contract can bind themselves by an offer of reward. Legislatures have the power to offer rewards for acts that will be of public benefit. Legislatures, however, typically empower officers, such as the governor, the U.S. attorney general, or a federal marshal, to offer rewards for certain purposes, such as the apprehension of criminals.

Unless a statute requires the offer to be in writing, the offer of reward can be made orally. An offer can be made by a private contract with a particular person or by an advertisement or public statement on television or radio, or in a newspaper, handbill, or circular.

A contract of reward, like any contract, must be supported by consideration, something of value. The consideration that supports the promise of reward is the trouble or inconvenience resulting to the person who has acted on the faith of the promise.

## Reward: Prominent Villain

Rewards have ended countless criminal careers. On occasion, the lure of money has even been enough to entice criminals to turn in their associates. Such was the downfall of the famous nineteenth-century outlaw Jesse James (1847–1882).

After the **U.S. CIVIL WAR**, James quickly became one of the most notorious bandits on the U.S. frontier. With his older brother Frank, Jesse led the so-called James Gang through several robberies and murders during the 1860s and 1870s. Their daring holdups of banks, stage coaches, and trains made them figures of romantic myth for readers and prime targets for law enforcement posses, which they long managed to evade.

A reward brought James to his end. Having barely escaped with his life after a thwarted bank **ROBBERY** in Northfield, Minnesota, in 1876 that left two of his gang dead, James hired new outlaws and lived under an alias in Missouri. In 1881 Thomas T. Crittenden, the state's governor, offered a reward of $10,000 for James's capture—dead or alive. One of the new gang members, Robert Ford, contacted the governor, then bided his time. On April 3, 1882, Ford saw his chance in James's house. When the gunslinger laid down his pistols and climbed on a chair to adjust a picture frame, Ford shot him in the head and instantly killed him. What the law had been unable to do, one of the lawless accomplished.

Because an unaccepted offer of reward grants no contractual rights, the offer can be revoked or canceled at any time prior to its acceptance by performance. Once a person has performed or partially performed the requested action, an offer of reward cannot be revoked to deprive a person of compensation. An offer must be revoked either in the way in which it was made or in a manner that gives the revocation the same publicity as the offer. A later offer, in different terms from the first, does not revoke the first offer.

Generally an offer of reward that has no time limit is considered to have been withdrawn after a reasonable time. What constitutes a reasonable period of time depends largely on the circumstances under which the offer was made. In some jurisdictions a reward for the discovery of criminal offenders only lapses when the STATUTE OF LIMITATIONS has expired against the crime.

A reward can be claimed only by a person who has complied with the conditions of the offer before it expires or is revoked. Performance can be completed by a third person, such as an agent or servant, who is acting on behalf of the claimant's interest.

When the reward is offered for information leading to an arrest and conviction, the return of property, the location of a missing person, or for other purposes, the person who furnishes the information is entitled to the reward. This rule applies even if, in the case of arrest, the person does nothing more than disclose the information and others make the physical capture. The informant need not become involved in the prosecution or appear as a witness at the offender's trial to collect the reward.

The information must be adequate and timely for a person to collect a reward. If a criminal has surrendered or the information was already known when the informant provided it, no reward will be given. Likewise, if the information does not lead to the desired end included in the initial offer, such as an arrest and conviction, or the recovery of property, the reward will be denied. However, when the reward is for the detection or discovery of an offender, a conviction is not necessary as long as the discovery or arrest occurs.

When a reward is offered for the apprehension or arrest of a criminal, a personal arrest by the claimant is usually not necessary. The arrest of the wanted person must be lawful, no matter who makes it. Those making an unlawful arrest cannot recover the reward because an agreement for an unlawful arrest is against public policy and unenforceable. If the offender voluntarily

surrenders or is en route to surrender, the captors have not earned the reward.

Generally when a reward is offered for the arrest and conviction of an offender, the person claiming the reward must have caused both the arrest and subsequent conviction because both are conditions of recovery under the contract. The reward in such a case cannot be apportioned between what is due for the arrest and what is due for the conviction.

When lost property is involved, some states have statutes that provide for a reward for the finder or for compensation for the expense of recovering and preserving the property. If only a proportionate share is returned, the finder is entitled to a proportionate part of the reward. When such a statute does not exist, however, a finder has no right to a reward for the return of property to its owner if none has been offered.

If the offered reward is definite and certain, the finder has a lien on the property in the amount of the reward until it is paid. A lien is a charge against property to secure the payment of a debt or the performance of an obligation. For example, if John offers a reward of $100 for the return of his missing motorcycle and Bob goes looking and finds it, Bob can file a lien for $100 against the motorcycle with the local court if John does not pay him the reward. If the offer is indefinite, such as one that states "liberal reward" for the return of the motorcycle, there is no lien on the property.

Except in the case of statutory rewards, the general rule is that the person who claims the reward must have performed the services knowing of the offer and for the purpose of collecting the reward. For example, if Bob happens to find John's motorcycle in a ditch and returns it to John not knowing that he had offered a $100 reward, Bob cannot claim the $100. This rule is based on the theory that without such knowledge there can be no meeting of the minds, which is essential to the formation of a contract. Knowledge of a statutory remedy is not necessary to entitle the claimant to recover it.

When a reward is offered to the public, anyone who performs the required service can claim and accept the reward, except persons who are under a duty to perform such services. A law enforcement officer, therefore, cannot claim a reward if the service performed is within the line and scope of the officer's duty. This prohibition will apply even if the officer performed the service at a time when he was not on duty or was outside his territorial jurisdiction. When, however, an officer acts beyond the scope and line of duty, there is no prohibition in claiming the reward.

A person who aids and abets the commission of a crime has no right to a reward for the arrest of the perpetrator. Similarly a person who purchases stolen property with reasonable grounds for believing it has been stolen cannot receive a reward offered for its return.

CROSS-REFERENCES

Contracts; Finding Lost Goods; Offer; Meeting of Minds; Prize Law.

## REX

*[*Latin, The king.*]* *The phrase used to designate the king as the party prosecuting an accused in a criminal action, such as an action entitled* Rex v. Doe.

## REYNOLDS V. SIMS

*Reynolds v. Sims* is a landmark case, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), in which the U.S. Supreme Court established the principle of one person, one vote based on the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT. As a result of the decision, almost every state had to redraw its legislative districts, and power shifted from rural to urban areas. All subsequent CONSTITUTIONAL LAW on APPORTIONMENT has relied on the principles established in *Reynolds v. Sims.*

*Reynolds* completed a change in direction by the Supreme Court concerning the apportionment of voting districts. Until 1962 the Court had refused to hear lawsuits that challenged legislative districting, concluding that such issues were POLITICAL QUESTIONS that were not JUSTICIABLE. In 1962 the Court, in BAKER V. CARR, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, reversed course and ruled that state legislative apportionment cases could be reviewed by the federal courts. As a result, lawsuits challenging the constitutionality of the apportionment of legislative districts were filed in many states.

*Reynolds* involved the apportionment of the Alabama state legislature. The facts in the case were common to many states also undergoing court challenges. When the Alabama Constitution of 1901 was ratified, it provided that the legislature should periodically reapportion itself. The legislature ignored this mandate,

however, and the legislative districts remained unchanged for 60 years. During that period Alabama, like other states, saw a dramatic population shift from rural to urban areas. Thus, the Alabama legislature in 1960 was dominated by rural legislators, who were unwilling to reapportion and lose power. The disparities between population and voting strength were staggering. The 1960 census revealed that only about 25 percent of the total population of the state lived in districts represented by a majority of state senators, and counties with only 27.5 percent of the total population elected a majority of state representatives. Population variance ratios of up to 41 to 1 existed in the Senate and up to 16 to 1 in the House. For example, Bullock County with a population of approximately 13,500 was allocated two seats in the Alabama House, while Mobile County with a population of 314,000 was given only three seats.

Faced with these disparities and the unwillingness of the Alabama legislature to reapportion the legislative districts based upon population, a group of citizens filed a lawsuit in federal court. The three-judge panel of federal district judges at first tried to defer to the legislature for a solution. When that failed, the judges implemented a temporary redistricting plan based on population. Alabama challenged the judges' redistricting order in the U.S. Supreme Court.

The Court ignored the claims of Alabama and other states that they should be allowed to apportion their legislative districts as they wished under the concept of FEDERALISM. This concept calls for the federal courts to abstain from making decisions that are the proper province of the states.

Chief Justice EARL WARREN, in his majority opinion, made clear that the Court had no choice but to step in. The Alabama legislature had refused to reapportion itself, leaving the citizens with few viable options to effect the change. Alabama law did not provide for an initiative procedure that would have permitted voters to decide on reapportionment. A constitutional amendment was also unlikely, as a three-fifths majority in both houses of the legislature would have to approve any proposals. With no effective political remedy, the Court was obligated to examine the issue to determine if Alabama had violated the Fourteenth Amendment's Equal Protection Clause.

The Court recognized that U.S. democracy is based on a representative form of government. The right to vote for a candidate "is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." The "debasement or dilution" of a person's vote can be just as effective as prohibiting that person from voting.

Warren concluded that minority control over the majority of state legislators could not be sanctioned. He emphasized that "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." To permit the minority to have power over the majority would be a violation of the Equal Protection Clause. Diluting the weight of a person's vote because of the location of that person's residence was as invidious a form of discrimination as if the dilution had been based on that person's race or financial status. Therefore, the Court would require that "each citizen have an equally effective voice in the election of members of his state legislature."

The Court also rejected Alabama's contention that it should be allowed to apportion its Senate based on the equal representation of units of government, in this case counties, rather than of people. Alabama's argument was based on the so-called federal analogy, a reference to the U.S. Senate, where each state has two seats regardless of population. Warren dismissed this analogy, calling it "irrelevant to state legislative redistricting schemes." He pointed out that the original constitutions of 36 states provided that representation in both legislative houses would be based completely, or predominantly, on population. In addition, there was no evidence that the Framers of the U.S. Constitution intended to establish this model for the states. The arrangements for representation in the U.S. House of Representatives and Senate were devised at the Constitutional Convention as a solution to a particular political dilemma.

Having dismissed the federal analogy, Warren stated that the Equal Protection Clause requires that both houses of a state legislature be apportioned on the basis of population. To aid the states, the Court provided guidelines that recognized that standards of state legislative apportionment cannot be hard and fast but must be fair and made in GOOD FAITH. The primary objective to be reached was "substantial equality of population." Warren made clear, however, that the Court was not mandating

perfect proportionality, for "mathematical exactness or precision is hardly a workable constitutional requirement." A state could constitutionally consider many factors other than population in devising an apportionment plan, but history, economics, and group interests were impermissible factors. Population was to be the starting point in all apportionment discussions, and if a plan debased a citizen's right to vote, it would be unconstitutional.

Warren also directed the states to reapportion their legislatures, at minimum, every ten years, based on the population figures derived from the federal decennial census. A state need not readjust its legislative districts constantly as the population changed, but the Court made clear that inaction such as that of the Alabama legislature would no longer be tolerated. If a state did not reapportion every ten years, any new redistricting plan submitted by the state would be "constitutionally suspect."

The *Reynolds* decision produced sweeping changes in state legislatures. Within two years at least one house in nearly all state legislatures had been held invalid; in most states both houses had to be reapportioned. Rural domination declined as urban areas gained a substantial number of legislative seats. The ONE-PERSON, ONE-VOTE requirement soon moved to the municipal level, where city councils and county boards also adjusted voting districts to reflect population.

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CROSS-REFERENCES

Census; Equal Protection; Fourteenth Amendment; Voting.

## ♦ RICHARDSON, ELLIOT LEE

Elliot Lee Richardson had a distinguished career in government service, including holding four different cabinet positions—the first person in U.S. history to do so. He was best known, however, for his brief tenure as U.S. attorney general under President RICHARD M. NIXON. Richardson served from May 25, 1973, to October 20, 1973, during the unfolding of the WATERGATE scandal. He resigned the office during the "Saturday Night Massacre" rather than fire the special Watergate prosecutor as Nixon had directed.

*Elliot Lee Richardson.* AP/WIDE WORLD PHOTOS

Richardson was born on July 20, 1920, in Boston, Massachusetts. He graduated from Harvard University in 1941 and then served in the U.S. Army during WORLD WAR II. Following the war, he attended Harvard Law School, where he was the president of the *Harvard Law Review.* After graduation in 1947, he served as law clerk for Judge LEARNED HAND of the U.S. Court of Appeals for the Second Circuit. In 1948, he went to Washington, D.C., to clerk for Justice FELIX FRANKFURTER at the U.S. Supreme Court.

Richardson returned to Boston in 1949 to practice law, but by 1953 he was back in Washington, serving as an assistant to Senator Leverett Saltonstall of Massachusetts. He left for Boston and private practice again in 1954 but was summoned by President DWIGHT D. EISENHOWER in 1957 to be assistant secretary of health, education, and welfare. In 1958 Richardson served as acting secretary of the department for four months. He was appointed as U.S. attorney for Massachusetts in 1959, serving until 1961, when he became special assistant attorney general.

In 1964, Richardson turned to the political arena and was elected lieutenant governor of Massachusetts. In 1966, he was elected attorney general of the state. He left state government in

1969 when President Nixon appointed him under SECRETARY OF STATE. In June 1970, Nixon named Richardson to be secretary of health, education, and welfare, a position he held until the end of Nixon's first term. Following a cabinet reshuffle, Nixon made Richardson secretary of defense in January 1973. Less than four months later, however, Nixon named Richardson to be attorney general.

Richardson's appointment came at a time of growing concern about the credibility of Nixon's assertions that the White House had not been involved in the 1972 BURGLARY of the Democratic National Committee's headquarters in the Watergate office complex in Washington, D.C. Richardson succeeded RICHARD KLEINDIENST, who left under a cloud of scandal for his involvement with Watergate and other politically charged issues.

Richardson's personal and professional integrity gave the Nixon administration new credibility. He appointed ARCHIBALD COX, a professor at Harvard Law School, as special Watergate prosecutor to investigate whether federal laws had been broken in connection with the break-in and the attempted cover-up. Richardson assured Cox, who was a personal friend, that he would have complete independence in his work.

"CERTAINTY IS THE STRAIGHTJACKET OF LIBERTY; TO DRESS A TRUTH IN AUTHORITY IS TO STULTIFY FREEDOM OF THOUGHT."
—ELLIOT LEE RICHARDSON

In July 1973, it was revealed that Nixon had secretly recorded conversations in his White House offices. Cox immediately subpoenaed the tapes of the conversations. When Nixon refused to honor the subpoena, Judge John Sirica ordered that the tapes be turned over. After the federal court of appeals upheld the order, Nixon offered Cox written summaries of the conversations in return for an agreement that no more presidential documents would be sought.

Cox refused the proposal. On Saturday, October 20, Nixon ordered Richardson to fire Cox. Richardson and his deputy attorney general, William D. Ruckelshaus, resigned rather than carry out the order. Cox was fired that night by solicitor general ROBERT H. BORK. The two resignations and the firing of Cox became known as the "Saturday Night Massacre." Although Nixon would not resign until August 9, 1974, the events of the previous October 20 signaled the beginning of the end for his administration. Richardson, on the other hand, was celebrated for his courage and integrity.

GERALD R. FORD became president upon Nixon's resignation. He named Richardson to be U.S. ambassador to Great Britain in 1975. In 1976, Ford appointed Richardson to be secretary of commerce and in 1977 chose him to serve as ambassador at large, a post he held until 1980. Richardson was a senior partner at a Washington, D.C., law firm from 1980 to 1992.

In 1996, Richardson published *Reflections of a Radical Moderate* which recorded his observations about politics and government, based on his experiences in public service. Richardson died in Boston, Massachusetts, on December 31, 1999. In 2000, the nonprofit Council for Excellence established the Elliot Richardson Prize for Excellence in Public Service.

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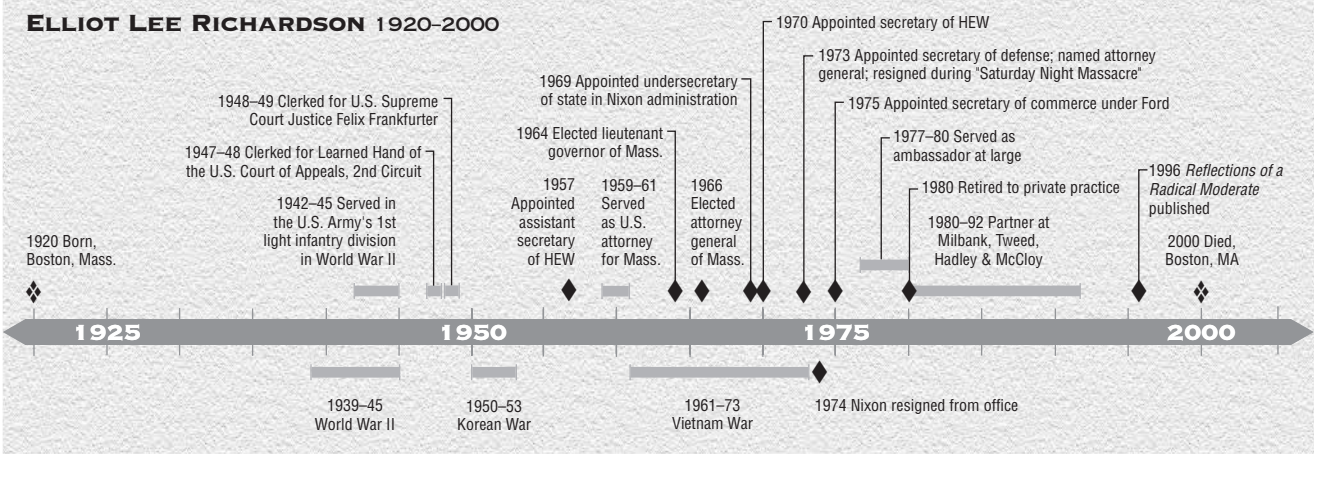

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CROSS-REFERENCES

Special Prosecutor.

## RICO

See RACKETEERING.

## RIDER

*A schedule or writing annexed to a document such as a legislative bill or insurance policy.*

A rider is an attachment, schedule, amendment, or other writing that is annexed (added) to a document in order to modify it. The changes may be small or large, but in either case the primary purpose of the rider is to avoid rewriting or redrafting the document entirely. The language of the rider is understood to be incorporated into the document. Riders are commonly used in contracts and records and also have complex uses in legislation and insurance. As part of the lawmaking process in both state legislatures and Congress, riders are typically added to bills at a late stage in their evolution. In the insurance industry, riders are added to insurance policies to modify both benefits and the conditions of coverage.

The use of riders in the legislative process is a time-honored tradition. Lawmakers do not add riders immediately but instead wait for the appropriate stage in the evolution of a bill. Traditionally legislative bills start out as proposals that are sent to committees for approval or disapproval. Once a bill successfully passes out of committee, lawmakers frequently amend it with a rider. The rider may simply add a new clause to the law that is the main subject of the bill, or it may go further and add an entirely new, unrelated law.

The addition of riders reveals much about the political agendas of lawmakers. Riders make ideal opportunities to introduce controversial or unpopular fiscal changes. Often these are attached to appropriations bills, which must be passed annually to fund the operation of state and federal government. Some lawmakers have traditionally seen such bills as the place to add extra appropriations for projects they and their constituents favor—a kind of funding known pejoratively as *pork.* Conversely, legislators may add riders that cut spending in areas that would attract public protest if the changes were the single subject of a bill and thus more noticeable.

Lawmakers' attempts to add new laws to bills through riders are sometimes controversial. Since a rider need not be related to the subject matter of the bill, legislators sometimes seize the opportunity to further their political agendas. A rider may be attached to a bill in an attempt to sneak through a measure that would not attract majority support if proposed by itself. Sometimes, too, a bill's opponents may attempt to defeat it by adding a controversial rider.

In insurance, riders change the contract, or policy, between the purchaser and the insurance company. Also known as *endorsements,* they can either expand or restrict the benefits provided by the policy. Thus, for example, personal automobile insurance policies generally cover only typical use of the vehicle. A rider specifies that commercial use of the car will make the policy null and void. This form of insurance rider is called an *exclusion.*

Riders in HEALTH INSURANCE policies have other effects. They increase the cost of the policy or even exclude coverage altogether when the purchaser has certain preexisting health conditions. For example, someone suffering from high blood pressure may pay higher costs for insurance. In certain cases the insurer may choose to issue a policy with the stipulation that it will cover certain health-related costs but not those costs associated with the preexisting condition.

## ♦ RIDGE, THOMAS JOSEPH

Tom Ridge, the forty-third governor of Pennsylvania, was thrust into the national spotlight in October 2001 when he was sworn in as the head of the newly created Office of Homeland Security. President GEORGE W. BUSH had established the office shortly after the SEPTEMBER 11TH TERRORIST ATTACKS on the World Trade Center and the Pentagon. In January 2003, Ridge became the first Secretary of the HOMELAND SECURITY DEPARTMENT, which was established after 22 domestic agencies were merged in the most significant reformation of the U.S. government since President HARRY S. TRUMAN's 1947 merger of disparate branches of the U.S. armed forces into the DEFENSE DEPARTMENT (formerly known as the War Department).

Thomas Joseph Ridge was born August 26, 1945, in Munhill, part of Pittsburgh's Steel Valley. He grew up in Erie, Pennsylvania, where his family lived in a public housing project. Hardworking and ambitious, Ridge attended Harvard

"WE CAN NEVER GUARANTEE THAT WE ARE FREE FROM THE POSSIBILITY OF TERRORIST ATTACK, BUT WE CAN SAY THIS: WE ARE MORE SECURE AND BETTER PREPARED THAN WE WERE [IN 2001]. EACH AND EVERY SINGLE DAY WE RISE TO A NEW LEVEL OF READINESS AND RESPONSE."
—TOM RIDGE

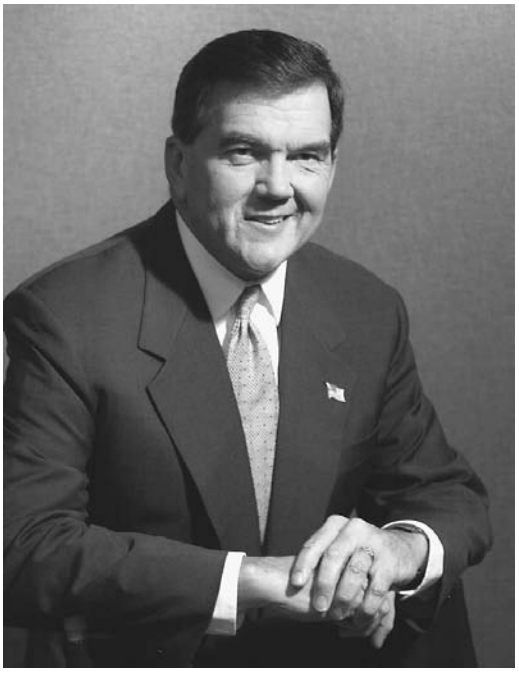

*Tom Ridge.*
AP/WIDE WORLD PHOTOS

University, graduating in 1967 with a B.A. in government studies. He started classes at Dickinson School of Law but received his draft notice that summer. Although he could have been trained as an officer with a three-year commitment, Ridge chose instead to be trained as an infantryman so that he could serve for two years and return to law school. He went to Vietnam, where he quickly rose to the position of staff sergeant and received several awards, including the Bronze Star for Valor.

Ridge returned to law school in 1970 and received his Juris Doctor degree in 1972. He worked in private practice and handled cases for the public defender's office. From 1979 to 1982, he served as an assistant Erie County district attorney. Running as a moderate Republican in a swing district, Ridge was elected to the U.S. House of Representatives in 1982, where he served until 1994.

In 1994, Ridge ran as the Republican candidate for governor. Campaigning on a platform that advocated school choice, reducing taxes, and cracking down on crime, Ridge was elected by a margin of five percent. In 1998, he was reelected by a margin of 26 percent. The 780,000-vote difference marked the largest vote for a Republican governor in Pennsylvania's history.

During his tenure as governor, Ridge supported a limited form of ABORTION rights, but also presided over a special session that led to a "three-strikes" law and hastened the state's death-penalty process. In 2000, Ridge signed the largest tax cut in the history of the state. That same year, Ridge's name was mentioned as a possible vice presidential choice until George W. Bush selected Dick Cheney.

In the days and weeks that followed the September 11th attacks, the Bush administration moved quickly to deal with Al-Qaeda, the organization thought to be behind the terrorist attacks. In addition, the administration sought to reassure an American public that was stunned and alarmed by the strategy and subsequent loss of life that had taken place. The administration established the Office of Homeland Security and created the position of director (and White House Security Adviser) who was charged with developing, coordinating, and overseeing a comprehensive national strategy aimed at strengthening the domestic defenses of the country and its citizens. On October 8, 2001, President Bush swore in Ridge as the first Director of Homeland Security, praising Ridge's strength and experience.

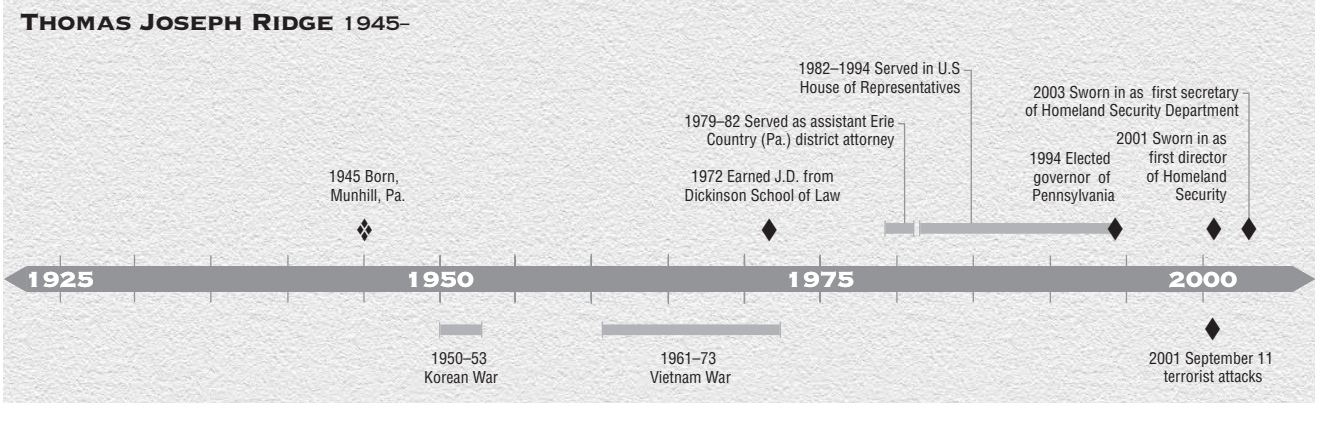

Heeding calls from many sources to upgrade the newly created office to cabinet level, Congress passed legislation that reformulated the Office of Homeland Security as the HOMELAND SECURITY DEPARTMTNENT (DHS). On January 24, 2003, Ridge was sworn in as the first Secretary of the new department. As such, he will oversee the coordination of 22 agencies and 180,000 employees as they transition from other departments and areas of government into a unified department that will have responsibility for improving security of the nation's borders and airports; providing for analysis of threats and intelligence; protecting the nation's infrastructure; including highways, bridges, ports, and nuclear facilities; and coordinating a comprehensive response in time of national emergencies.

In the early part of 2003, the DHS and its new secretary faced criticism from members of Congress and state and local governments, the media, and the public. Some poked fun at the department's color-coded threat-advisory procedure, while others complained that the federal government was burdening cities and states with expensive and time-consuming plans for strengthening domestic security while not providing federal funds needed to carry out the plans.

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## RIGHT

*In an abstract sense, justice, ethical correctness, or harmony with the* RULES OF LAW *or the principles of morals. In a concrete legal sense, a power, privilege, demand, or claim possessed by a particular person by virtue of law.*

Each legal right that an individual possesses relates to a corresponding legal duty imposed on another. For example, when a person owns a home and property, he has the right to possess and enjoy it free from the interference of others, who are under a corresponding duty not to interfere with the owner's rights by trespassing on the property or breaking into the home.

In CONSTITUTIONAL LAW, rights are classified as natural, civil, and political. Natural rights are those that are believed to grow out of the nature of the individual human being and depend on her personality, such as the rights to life, liberty, privacy, and the pursuit of happiness.

CIVIL RIGHTS are those that belong to every citizen of the state, and are not connected with the organization or administration of government. They include the rights of property, marriage, protection by law, freedom to contract, trial by jury, and the like. These rights are capable of being enforced or redressed in a civil action in a court.

Political rights entail the power to participate directly or indirectly in the establishment or administration of government, such as the right of citizenship, the right to vote, and the right to hold public office.

## RIGHT OF ACTION

*The privilege of instituting a lawsuit arising from a particular transaction or state of facts, such as a suit that is based on a contract or a* TORT*, a civil wrong.*

## RIGHT OF ELECTION

*The prerogative of a surviving spouse to accept the provision the dead spouse made in the will or to disregard the will and claim the share specified by statute.*

At death spouses commonly leave money and property to their surviving husband or wife. This estate is granted in a formal legal document known as a *will,* established by the deceased person (the decedent). But a will is not the final word on what happens to the decedent's estate. The surviving spouse may either accept the provisions of the will or choose an alternative called the *right of election.* In most states statutes specify a portion of the estate that the surviving spouse can elect to take instead of receiving the amount specified in the will. The right of election ensures that the spouse receives a fair share of the estate. The option sometimes provides a more favorable outcome for the spouse than accepting the property distribution in the will.

Historically, a surviving spouse has enjoyed protection under the law of wills. This protection is an exception to the freedom a person generally has to decide the disposition of her estate after death. By custom the maker of a will, or the *testator,* decides how her estate is to be divided. This freedom includes the right to disinherit even close relatives by leaving them nothing. Traditionally, however, the law has prevented a testator from disinheriting a spouse. The reasons for this intervention lie in the law's philosophical view of marriage as an economic union that entitles both parties to share in each other's material wealth, even after one spouse's death.

At COMMON LAW the surviving spouse was granted specific rights in the estate of the deceased spouse through the legal doctrines of *dower* and *curtesy.* These doctrines protected the spouse against total disinheritance. DOWER entitled a widow to claim a share of her husband's lands upon his death in order to support herself and her children. Curtesy functioned similarly for men. Most states have abolished these doctrines. In the few jurisdictions where they remain in effect, they are used primarily to solve problems arising when a spouse has died intestate, that is, without a will.

The right of election is available under most contemporary state laws. The surviving spouse may choose between accepting the terms of the will or receiving a share of the estate as defined by statute. This share is called a minimum or "elective" share. It varies in amount from state to state; generally, however, it is one-third of the estate if the decedent has children and one-half of the estate otherwise. Statutes may also specify minimum dollar amounts. Under a 1992 New York state law, for instance, the elective share is the greater of $50,000 or one-third of the net estate.

For some spouses, choosing the right of election is more advantageous than accepting the terms of the will. Besides protecting a spouse against total disinheritance, the right of election can be useful when the testator has left little to the spouse, when the testator has left the spouse's share in trust, or when other parties assert competing claims to the estate. Statutes establish different conditions and qualifications under which a spouse may claim the right to elect against the will; these range from estate and gift tax issues to marital status at the time of the other spouse's death.

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CROSS-REFERENCES

Descent and Distribution; Elective Share; Husband and Wife.

## RIGHT OF PUBLICITY

See TRADEMARKS.

## RIGHT OF REENTRY

*A right, retained by the grantor at the time land is conveyed, to reenter and take possession of the land if a certain condition occurs or fails to occur.*

The right of reentry, also known as the power of termination, applies to a type of interest in land known as a fee simple subject to condition subsequent. The right of reentry means that the grantee must abide by the specified condition or the grantor, or the grantor's heirs, may reenter and take back the property. For example, a grantor conveys land "to Hennepin County, but if the land is not used for a fire station, then the grantor has the right to reenter and repossess the property." Once a grantor has exercised the right of reentry, the grantee has no further right to the property.

Sometimes a right of reentry is discussed with respect to a grant in the form, "to Hennepin County as long as the land is used for a fire station." However, this grant is known as a fee simple determinable, which means that upon the county's failure to use the land for a fire station, the property reverts back to the grantor by operation of law. Technically, then, this grant requires no right of reentry because a failure to abide by its terms automatically reinstates possession in the grantor. With a true right of reentry, the transfer is not automatic, and the grantor must affirmatively reenter the land or, if that is not feasible, bring a court action to recover the property.

Leases also frequently include a right of reentry allowing the lessor to reclaim the property if the lessee fails to abide by the terms of the lease. When the lessor exercises the right of reentry and reclaims the property, the lessee has no

further right to the premises. However, the lessor may have to take reasonable care to prevent damage to any PERSONAL PROPERTY left on the premises by the lessee.

## RIGHT OF SURVIVORSHIP

*The power of the successor or successors of a deceased individual to acquire the property of that individual upon his or her death; a distinguishing feature of* JOINT TENANCY.

The right of survivorship determines what happens to a certain type of co-owned property after one of its owners dies. Under law there are many kinds of co-ownership, but the right of survivorship is found only in *joint tenancy,* a contract between two or more parties specifying their simultaneous ownership of some form of *real or personal property* such as a house, land, or money. In all joint tenancies, at the death of one of the joint tenants, ownership of the remaining property passes to the surviving tenants, or successors, who assert the right of survivorship. This is a powerful legal right because it takes precedence over other claims upon the property. Originally a right at COMMON LAW, it is recognized by statute in all states.

In order for co-owners of property to realize the right of survivorship, the property must be owned in joint tenancy. Joint tenancy describes an ownership interest in property held by two or more people called *tenants.* The tenants acquire their ownership interest in the property in the same way and at the same time, and each holds an equal share. Joint tenancies are created by deed, will, or other transfer of property. Property that is held under a different form of co-ownership can be converted into a joint tenancy by amending the title to the property.

When one of the joint tenants dies, the right of survivorship takes effect, passing the deceased tenant's interest in the property to the other joint tenant or tenants. Husbands and wives often create joint tenancies for co-ownership of their real property; under the common law this form of joint tenancy is called a TENANCY BY THE ENTIRETY. It is an attractive legal option because of the right of survivorship. Upon one spouse's death, the right of survivorship takes precedence over claims on the property by the deceased person's heirs, beneficiaries, and creditors. The right passes outside *probate*—the procedure by which a deceased person's will is approved—so legal professionals sometimes call joint tenancy a probate avoidance device. The dissolution of a marriage usually ends any subsequent claim of right of survivorship.

A joint tenancy continues as long as more than one joint tenant survives. Upon the death of one tenant, the shares of the other tenants increase equally; in a sense they absorb the ownership interest of the deceased person. This automatic process continues until only one surviving joint tenant is left; this survivor becomes the sole owner of the property.

Courts frequently hear claims based on the right of survivorship. The surviving joint tenant furnishes proof of the death of the other joint tenant as well as valid legal titles indicating that the relevant real property was held in a joint tenancy. Documentary evidence establishing the existence of a joint tenancy is generally required to overcome a challenge to the right of survivorship.

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## RIGHT OF WAY

*An* EASEMENT, *a privilege to pass over the land of another, whereby the holder of the easement acquires only a reasonable and usual enjoyment of the property, and the owner of the land retains the benefits and privileges of ownership consistent with the easement.*

*Railroads generally own the strip of land that their tracks cover, called a right of way.*

DAVID BUTOW/CORBIS SABA

Right of way is also used to describe that strip of land upon which railroad companies construct their roadbed; in this context, the term refers to the land itself, not the right of passage over it.

The term *right of way* also refers to a preference of one of two vehicles or vessels, or between a motor vehicle and a pedestrian, asserting the right of passage at the same place and time. It is not an absolute right, however, since the possessor of the right of way is not relieved from the duty of exercising due care for her own safety and that of others.

## RIGHT TO COUNSEL

*The legal responsibility for the government to provide every defendant in a criminal action with* LEGAL REPRESENTATION *that also must be deemed* effective.

The SIXTH AMENDMENT to the U.S. Constitution holds, in part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This clause grants to all defendants the right to an attorney from the moment they are taken into police custody.

The decisions of the U.S. Supreme Court have also construed this Right to Counsel Clause to mean that an impoverished, or indigent, defendant has the constitutional right to the presence of a court-appointed attorney at critical stages in the criminal proceedings. These critical stages include CUSTODIAL INTERROGATION, post-indictment lineups, preliminary hearings, ARRAIGNMENT, trial, sentencing, and the first appeal of conviction.

The Right to Counsel Clause was a reaction against the English practice of denying the assistance of an attorney in serious criminal cases and requiring defendants to appear before the court and defend themselves in their own words. The 1586 trial of Mary Stuart, Queen of Scots, illustrates the harshness of denying the assistance of counsel in a criminal case. Queen Mary was charged with TREASON for allegedly conspiring to assassinate Queen Elizabeth I. Mary asked for the assistance of counsel, PLEADING that "the laws and statutes of England are to me most unknown; I am destitute of counsellors . . . and no man dareth step forth to be my advocate" (Winick 1989, 787). Her requests were denied, and Mary was summarily convicted and executed by decapitation.

The Framers of the U.S. Constitution considered the deprivation of counsel repugnant to basic principles of criminal justice. According to the Framers, the assistance of counsel was a critical element in maintaining an accusatorial system of justice. (An accusatorial system places the burden on the prosecution to establish the guilt of the defendant. This is opposed to an INQUISITORIAL SYSTEM, wherein guilt or innocence is determined through interrogation of the defendant.)

For 150 years, the Right to Counsel Clause was construed as simply granting to a defendant the right to retain a private attorney. This did not mean that an impoverished criminal defendant had the right to a court-appointed attorney without cost. In 1932, the U.S. Supreme Court began to reverse this interpretation in POWELL V. ALABAMA, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158. In *Powell,* nine black youths were accused of raping a white girl in a train going through Alabama on March 25, 1931. A sheriff's posse rounded up the youths and held them in custody. The youths were not from Alabama, and they were not given the opportunity to contact their family.

The youths were indicted on March 31. On April 6, they were tried with the assistance of unprepared counsel and convicted, and subsequently sentenced to death. The youths thereafter received the assistance of counsel for their appeals. The Supreme Court of Alabama affirmed the convictions. The U.S. Supreme Court reversed the convictions and returned the case to the Alabama state court. According to the Court, the trial court's appointment of an unprepared attorney in a capital case is a violation of the defendant's DUE PROCESS rights.

The *Powell* decision did not mandate the appointment of an attorney for all impoverished defendants. The Court in *Powell* merely held that due process requires the appointment of prepared counsel to indigent defendants in a case that involves the death penalty. *Powell* did, however, provide the basis for the requirement of free counsel for defendants faced with serious federal charges.

In *Johnson v. Zerbst,* 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), the U.S. Supreme Court held that an indigent federal criminal defendant who faces a serious criminal charge, such as a felony, is entitled to an attorney at the expense of the government. According to the Court, the right to counsel is "one of the safeguards . . . deemed necessary to insure funda-

mental HUMAN RIGHTS of life and liberty." In making this decision, the Court noted "the obvious truth that the average defendant does not have the professional legal skill to protect himself."

Significantly, the *Johnson* opinion did not force states to provide the right to counsel for all indigent criminal defendants in state court; this right to counsel applied only to indigent defendants facing serious charges in federal court. In state court, by virtue of the *Powell* opinion, only indigent defendants accused of capital crimes had the right to a court-appointed attorney. Many states did provide for the right to an attorney for accused felons through statutes; other states did not. In 1963, the Supreme Court corrected these inequalities in GIDEON V. WAINWRIGHT, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799.

In *Gideon,* defendant Clarence Gideon was charged in a Florida state court with breaking and entering a poolroom with the intent to commit a misdemeanor. Under Florida law, this was a felony. Gideon valiantly represented himself, but he was found guilty and sentenced to five years in prison.

On appeal to the U.S. Supreme Court, Gideon was represented by ABE FORTAS, who had been appointed by the Court. Through Fortas, Gideon argued that the right to counsel was a fundamental right and essential to a fair trial. The Court agreed, stating that the "noble ideal" of a fair trial cannot be achieved "if the poor man charged with a crime has to face his accusers without a lawyer to assist him." The Court reversed Gideon's conviction, holding that all states must provide counsel to indigent defendants who face serious criminal charges. The legal basis for the decision was the Due Process Clause of the FOURTEENTH AMENDMENT to the U.S. Constitution. This clause forbids states to enact laws denying due process of law to citizens of the United States. On retrial, represented by appointed counsel, Gideon was acquitted.

In a companion case decided the same day as *Gideon,* the U.S. Supreme Court created the right to counsel for indigent defendants on appeal. In *Douglas v. California,* 372 U.S. 353, 82 S. Ct. 814, 9 L. Ed. 2d 811 (1963), defendants William Douglas and Bennie Will Meyes, represented by a single public defender, were tried jointly in a California state court and convicted of various felonies. Both defendants appealed to the California District Court of Appeal. This first appeal was granted as a matter of right to all criminal defendants. Under California law, however, indigent defendants did not have the right to an appointed attorney for the first appeal.

Douglas and Meyes, both indigent, prepared and filed their own appeal briefs. The District Court of Appeal affirmed the convictions. Meyes petitioned to the California Supreme Court for himself and on behalf of Douglas. That court denied the petition without a hearing.

On appeal to the U.S. Supreme Court, Douglas and Meyes, this time represented by Supreme Court-appointed counsel, argued that they deserved the right to an attorney on their appeal. The Court agreed, lecturing that "there can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has" (*Griffin v. Illinois,* 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 [1956]). According to the Court in *Douglas,* the EQUAL PROTECTION and Due Process Clauses of the Fourteenth Amendment prevent states from granting criminal appeals in such a way as to discriminate against poor people.

Thus, under the *Douglas* decision, a state must provide free counsel to indigent defendants on appeal, if the state offers an appeal as a matter of right. All states do allow one appeal as a matter of right. For discretionary appeals, or appeals that are not granted as a matter of right—such as appeals to the state's highest court in states with a lower reviewing court, and appeals to the U.S. Supreme Court—there is no right to counsel. However, many states maintain laws that provide free counsel to indigent defendants even for these discretionary appeals.

A year after *Gideon* and *Douglas,* the Supreme Court decided two more cases that further extended a defendant's right to counsel. In MASSIAH V. UNITED STATES, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), defendant Winston Massiah was indicted by a federal GRAND JURY on narcotics charges. Massiah retained a lawyer and pleaded not guilty. While free on bail, Massiah was contacted by a codefendant, Jesse Colson. Unbeknownst to Massiah, Colson was cooperating with federal law enforcement authorities. Massiah and Colson met and spoke in an automobile for several hours about the case, and Massiah made incriminating statements that were transmitted by radio to a federal agent located a few blocks away. The statements were used as evidence in Massiah's trial. Massiah was convicted and sentenced to nine years in prison.

On appeal to the Supreme Court, Massiah argued that he had the right to counsel while being interrogated by law enforcement, even when the interrogation was not conducted in person by an officer. The Court agreed and reversed Massiah's conviction. The Court in *Massiah* established that the police may not interrogate someone who has been indicted unless the person's attorney is present or the person has knowingly waived the right to have counsel present.

Approximately one month later, the Supreme Court extended *Massiah* in **ESCOBEDO V. ILLINOIS**, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964). In *Escobedo,* defendant Danny Escobedo was arrested and taken to police headquarters for questioning regarding the recent murder of his brother-in-law. Escobedo was not indicted for the crime. However, he was held in police custody and was not free to leave. Escobedo's retained attorney arrived at police headquarters while Escobedo was being questioned, but the police prevented the two from speaking to each other. Under interrogation, Escobedo admitted to some knowledge of the murder. Eventually, Escobedo confessed to having participated in the crime.

At trial, Escobedo's statements were admitted as evidence, and Escobedo was convicted of murder. On appeal, the Supreme Court overturned Escobedo's conviction. The Court specifically held that where an investigation is "no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect," the suspect is effectively in custody and has the right to consult a lawyer. Citing the prolific legal theorist Dean **JOHN HENRY WIGMORE**, the Court warned that any criminal justice system that relies on "compulsory self-disclosure as a source of proof must itself suffer morally thereby." The *Escobedo* opinion established that when a suspect asks to speak with an attorney, the police must comply with the request, even before formal charges have been filed against the suspect.

After this slew of right-to-counsel cases, it remained for the Supreme Court to decide what criminal charges required the availability of free counsel. Under *Johnson* and *Gideon,* a defendant had the right to counsel for all "serious" cases, but this standard proved difficult to apply. To clarify this aspect of the right to counsel, the Court seized on *Argersinger v. Hamlin,* 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972).

In *Argersinger,* the defendant, Jon Richard Argersinger, an indigent person, was charged in a Florida state court with carrying a concealed weapon. The offense carried a punishment of up to six months in prison and a $1,000 fine. Proceeding without counsel, Argersinger was convicted and sentenced to 90 days in jail.

On appeal, the Supreme Court vacated Argersinger's conviction. The Court concluded that "the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial." Under the rule formulated in *Argersinger,* an indigent defendant who is not offered the services of a court-appointed attorney at trial may not be sentenced to prison, even if the defendant is convicted of a crime for which incarceration is an authorized punishment.

The apparent fairness of the rule established in *Argersinger* can be deceiving. In *Nichols v. United States,* 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994), defendant Kenneth O. Nichols pleaded guilty in federal court to conspiracy to distribute cocaine. Nichols was sentenced to 19 years and seven months imprisonment. To justify this lengthy term, the sentencing court relied on a previous misdemeanor conviction that resulted from a trial in which Nichols was not represented by counsel. When Nichols appealed the sentence, the Supreme Court held that it is not a violation of the Sixth and Fourteenth Amendments to enhance punishment based on a prior conviction in which an indigent defendant was not afforded an attorney.

The Supreme Court has, at times, displayed considerable latitude in deciding various right-to-counsel issues. The Court has held that an indigent defendant has the right to counsel in deciding whether to submit to a psychiatric examination when statements made during that examination may be used at trial (*Estelle v. Smith,* 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 [1981]). Under *United States v. Wade,* 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967), an indigent defendant has the right to have appointed counsel present during post-indictment identification lineups. Under the Sixth Amendment, juveniles have the right to an attorney when their liberty is at stake (*Application of Gault,* 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 [1967]).

The Court has also read the Sixth Amendment to mean that a criminal defendant is enti-

tled to effective legal counsel. This means that a defendant has the right to conscientious, meaningful representation. If a defendant does not receive effective assistance of counsel at trial, the conviction will be reversed. However, the standard of proof for the defendant is high. Under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant has to prove not only that the attorney's performance was less than reasonable but that this substandard performance changed the outcome of the trial. The second factor is very hard to prove, especially when the evidence of guilt is overwhelming. Nevertheless, courts will overturn convictions when it finds that a defense lawyer was asleep during critical parts of the proceedings. Claims of ineffective counsel are often made against court-appointed lawyers, whether they are members of a public defender office or individuals chosen by a trial judge. Absent egregious behavior by a lawyer such claims are usually unsuccessful because a liberal attitude would lead to second-guessing the decisions of trial counsel by appellate courts.

The Supreme Court has been less generous on other issues. Generally, an indigent defendant has no right to counsel in a proceeding after conviction (*Pennsylvania v. Finley,* 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 [1987]). An indigent defendant does not have an *absolute* right to counsel for revocation of **PAROLE** or **PROBATION** hearings (*Gagnon v. Scarpelli,* 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 [1973]). If the parolee or probationer denies committing the offense or if there are **MITIGATING CIRCUMSTANCES** that may limit the parolee or probationer's guilt, the court may appoint an attorney. An indigent defendant has no constitutional right to an attorney for a **HABEAS CORPUS** petition (*Finley*) unless the defendant faces death, in which case he or she is entitled to an attorney for a habeas corpus petition (*McFarland v. Scott,* 512 U.S. 849, 114 S. Ct. 2568, 129 L. Ed. 2d 666 [1994]).

An indigent defendant has the right to appointed counsel during pre-indictment identification lineups conducted by the police (*Kirby v. Illinois,* 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 [1972]). *Kirby* would seem to contradict *Escobedo,* where the defendant was entitled to counsel after arrest but before indictment. However, *Escobedo* has been limited to its facts and has been construed as upholding the defendant's right against **SELF-INCRIMINATION** more than the right to counsel.

The Supreme Court has carved out other exceptions to the right to counsel after an arrest. It has allowed law enforcement officials to have ex parte contacts with defendants to determine whether the defendant is in fact represented by counsel. It has also allowed ex parte communications that are made with the consent of defendant's counsel; those made pursuant to discovery procedures, such as subpoenas; communications in the course of a criminal investigation; communications necessary to protect the life or safety of another person; and those made by a represented person, so long as the person has knowingly, intelligently, and voluntarily waived the right to have counsel present. These exceptions apply to all persons, regardless of whether they can afford their own attorney.

Finally, law enforcement officials need not advise criminal suspects of their right to an attorney until those suspects are actually taken into custody or are not free to leave the presence of the officers. This rule gives law enforcement the freedom necessary to conduct reasonable investigations for the safety of the general public.

Congress sought to restrict the ability of convicted defendants to successfully argue that they received ineffective counsel when it passed the Anti-Terrorism and Effective Death Penalty Act of 1996 (Public Law 104-132, 1996). A provision of this act states that federal courts may not grant habeas petitions unless they find that the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law." The Supreme Court has ruled that "clearly established federal law" means a decision it has rendered. In *Bell v. Cone*, 535 U.S. 685, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002), the Court had to decide which of its precedents constituted "clearly established federal law." It ruled that its more stringent precedent in *Strickland v. Washington* controlled in this case, signaling that it wished to limit successful death penalty appeals.

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**CROSS-REFERENCES**

Criminal Law; Criminal Procedure; *Gault, In re*; Juvenile Law; *Miranda v. Arizona.*

## RIGHT TO DIE

See DEATH AND DYING; EUTHANASIA.

## RIGHT-TO-WORK LAWS

*State laws permitted by section 14(b) of the* TAFT-HARTLEY ACT *that provide in general that employees are not required to join a union as a condition of getting or retaining a job.*

Right-to-work laws forbid unions and employers to enter into agreements requiring employees to join a union and pay dues and fees to it in order to get or keep a job. Twenty-one states, mostly in the South and West, have right-to-work laws.

The ability of states to pass right-to-work laws was authorized by the Taft-Hartley Act of 1947, also known as the LABOR MANAGEMENT RELATIONS ACT (29 U.S.C.A. § 141 et seq.). Taft-Hartley, which sought to curtail union power in the workplace, amended the National Labor Relations Act (NLRA) of 1935 (29 U.S.C.A. § 151 et seq.). The NLRA as first passed preempted state regulation of labor relations in interstate commerce, with the goal of developing a national LABOR LAW. Taft-Hartley departed from this goal in section 14(b) (29 U.S.C.A. § 164[b]), expressly authorizing the states to adopt right-to-work measures. Organized labor has tried repeatedly, without success, to secure the repeal of section 14(b). The Federal Railway Labor Act (45 U.S.C.A. § 151 et seq.) prevents the application of state right-to-work laws to the railroad and airline industries.

Section 14(b) works with other provisions of Taft-Hartley to limit the ability of unions to mandate compulsory union membership. Sections 8(a)(3) and 8(b)(2) prohibit a type of union security clause (a provision that describes the obligations of employees to support the union) from being inserted into a collective bargaining agreement. A *closed shop* clause obligates the employer to hire only union members and to discharge any employee who drops union membership. The CLOSED SHOP is forbidden under Taft-Hartley.

Although the act permits the *union shop,* section 14(b) allows the states to prohibit it. A union shop clause requires an employee to become a member of the union in order to retain a job, although no one needs to be a member in order to be hired; every newly hired person has a prescribed period of time to become a member.

Section 14(b) also allows states to prohibit the *agency shop.* An agency shop clause requires every company employee to pay to the union an amount equal to the union's customary initiation fees and monthly dues. It does not require the employee to become a formal member of the union, be a member before being hired, take an oath of obligation, or observe any internal rules and regulations of the union except with regard to dues. The U.S. Supreme Court, in *National Labor Relations Board v. General Motors Corp.,* 373 U.S. 734, 83 S. Ct. 1453, 10 L. Ed. 2d 670 (1963), held that an employer does not violate the NLRA by agreeing to include an agency shop clause in a bargaining agreement.

Therefore, when a state passes a right-to-work law, it prohibits both mandatory union membership and initiation fees and dues obligations of agency shops, and permits employees who do not voluntarily pay dues and initiation fees to receive the benefits the union provides. Unions call such people "free riders."

Right-to-work advocates argue that no person should be forced to become a union member or to provide financial support for a labor organization as a condition of employment. Such compulsion is said to be contrary to the U.S. concept of individual rights and FREEDOM OF ASSOCIATION. It is also alleged that compulsory unionism enables large labor organizations to exert excessive power in the workplace and in the political arena.

Organized labor believes that right-to-work laws allow free riders at the expense of their fellow workers. Opponents of these laws argue that everyone should pay a proportionate share of the costs of the union in negotiating contract benefits that will go to all. Unions also maintain that the real objective of right-to-work laws is to sow dissension among workers and thus weaken the labor movement.

The bitter controversy over right-to-work laws peaked in the 1950s, when almost every state legislature considered the issue. Some scholars suggest the importance of the issue has been exaggerated. Studies have indicated that where unions are well established, employees tend to enroll without regard to right-to-work statutes. Such laws may be more a symptom than a cause of union weakness in certain industries and geographical areas.

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CROSS-REFERENCES

Collective Bargaining; Labor Law; Labor Union.

## RIOT

*A disturbance of the peace by several persons, assembled and acting with a common intent in executing a lawful or unlawful enterprise in a violent and turbulent manner.*

Riot, rout, and UNLAWFUL ASSEMBLY are related offenses, yet they are separate and distinct. A rout differs from a riot in that the persons involved do not actually execute their purpose but merely move toward it. The degree of execution that converts a rout into a riot is often difficult to determine.

An unlawful assembly transpires when persons convene for a purpose that, if executed, would make them rioters, but who separate without performing any act in furtherance of their purpose. For example, when a restaurant owner refused to serve a certain four customers and barred them from entering the establishment, the four men remained in front of the doors of the restaurant and blocked the entrance to all other customers. Although a riot did not result from their actions, the men were arrested and convicted of unlawful assembly.

Inciting to riot is another distinct crime, the gist of which is that it instigates a breach of the peace, even though the parties might have initially assembled for an innocent purpose. It means using language, signs, or conduct to lead or cause others to engage in conduct that, if completed, becomes a riot.

Conspiracy to riot is also a separate offense. In one case, the leader of a small Marxist group took to the streets preaching revolution and organized resistance to lawful authority. Cursing the police, he spoke about how to fight and kill them and generally advocated violent means to gain political ends. The court ruled that a person who agrees with others to organize a future riot and who commits an OVERT ACT in conformity with the agreement is guilty, not of riot, but of conspiracy to riot.

In legal usage, the term *mob* is practically synonymous with riot or with riotous assembly. A federal court held that night riders were a mob and that their act of burning a building constituted the crime of riot.

### Nature and Elements

Riot is an offense against the public peace and good order, rather than a violation of the rights of any particular person. It is not commonly applied to brief disturbances, even if malicious mischief and violence are involved in the commotion. For example, a lock company was picketed in a labor dispute. When the police attempted to escort some people through the picket line, a brief general commotion, some scuffling, and an exchange of blows took place. The police testified that the entire fracas lasted about "two or three minutes." The court held that the crime of riot does not apply to brief disturbances, even those involving violence, nor to disturbances that occur during the picketing accompanying a labor dispute.

The elements that comprise the offense are determined either by the COMMON LAW or by the statute defining it. In some jurisdictions, the necessary elements are an unlawful assembly, the intent to provide mutual assistance against lawful authority, and acts of violence. Under some statutes, the elements are the use of force or violence, or threats to use force and violence, along with the immediate power of execution.

Other statutes provide that the essential elements are an assembly of persons for any unlawful purpose; the use of force or violence against persons or property; an attempt or threat to use force or violence or to do any unlawful act, coupled with the power of immediate execution; and a resulting disturbance of the peace.

The element of force or violence required under the common law means a defiance of lawful authority and the rights of other persons. Similarly the force or violence contemplated by the statutes is the united force of the participants acting in concert with the increased capacity to overcome resistance. The statutes further specify that the type of force and violence, not mere physical exertion, must threaten law-abiding nonparticipants.

### Riotous Conduct

Riots can arise from any violent and turbulent activity of a group, such as bands of people

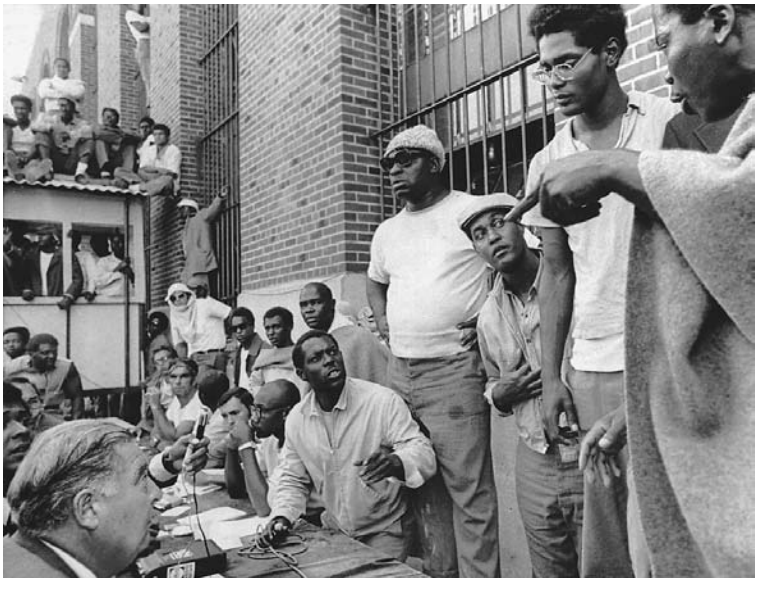

*Commissioner Russell Oswald (lower left) negotiates with inmates on September 10, 1971, during the riots at the Attica state prison.*

AP/WIDE WORLD PHOTOS

creating an uproar and displaying weapons; wildly marching on a public street; violently disrupting a public meeting; threatening bystanders with displays of force; or forcibly destroying property along the way. In one case, striking orange pickers armed with clubs, metal cables, sticks, and other weapons rushed into an orange grove and assaulted nonstriking pickers. After the nonstrikers were driven out of the grove, the strikers overturned the boxes full of picked oranges and threw oranges and boxes at the nonstrikers. The court held this to be riotous conduct. When one city was wracked by racial disturbances, the court ruled that racial disorders constituted a general riot, or a series of riots, and that whether there was a single, identifiable group or a number of riotous groups was not significant when their one common purpose was to injure and destroy.

One of the most brutal riots in the United States was the Tulsa Race Riot. In May 1921, a white man from Tulsa, Oklahoma, was allegedly assaulted by an African American man. A white mob stormed the city's Greenwood neighborhood, a prosperous community that was predominantly African American, to find the alleged assailant. Over a two-day period, 35 city blocks in Greenwood were destroyed. Private homes, businesses, and even churches were burned down, and an estimated 300 people killed.

### Number of Persons Necessary

The common law rule, and most of the statutes that define riot, require three or more persons to be involved. Some statutes fix the minimum number at two.

### Purpose of Original Assembly

The jurisdictions differ on whether the original assembly must be an unlawful one. Some require premeditation by the rioters, but others prescribe that riots can arise from assemblies that were originally lawful or as a result of groups of persons who had inadvertently assembled.

### Common Intent

A previous agreement or conspiracy to riot is not usually an element of a riot. A common intent, however, to engage in an act of violence, combined with a concert of action, is sometimes necessary. In one case, following a high school football game, a group of boys staged a "violent, brutal and indecent" assault on the color guard and band members of the visiting team. When the visitors attempted to leave, the attacks continued. On trial, the attackers claimed that the charge of riot did not apply to them because they had had no "common intent." The court held that "an intent is a mental state which can be inferred from conduct." They were found guilty of riot and the decision was affirmed on appeal.

### Terror

When a riot arises from an unlawful act, such as an assault, terror need not be shown because in every riotous situation there are elements of force and violence that are by their very nature terrifying. When a riot arises from lawful conduct, terror must be shown. For example, if a group of neighbors decides to remove a NUISANCE, such as a pile of malodorous garbage, which would be a lawful activity, but does so in a violent and tumultuous manner, terror would have to be shown before the conduct would constitute a riot. In 1999, the World Trade Organization (WTO) held a five-day meeting in Seattle, Washington. Some 45,000 protesters converged on the meeting, protesting the WTO's stand on everything from the environment to global business to HUMAN RIGHTS. What was supposed to be an organized mass movement quickly degenerated into a rampage through the city, in which buildings were vandalized, stores were looted, and police were attacked. Only one person need be alarmed to fulfill the terror requirement for a riot; in Seattle, the entire city was subjected to the terror.

### Persons Liable

Principal rioters are those who are present and actively participate in the riot. All persons present who are not actually assisting in the suppression of the riot can be regarded as participants when their presence is intentional and tends to encourage the rioters.

### Municipal Liability

In the absence of a statute, a MUNICIPAL CORPORATION, such as a city, town, or village, is not liable for injuries caused by mobs or riotous assemblages. Where statutes do impose liability, the particular statute determines the type of action one can institute against a city, town, or village.

### Defenses

There is never any justification for a riot. The only defense that can be claimed is that an element of the offense is absent. Participation is an essential element. Establishing that an individual's presence at the scene of a riot was accidental can remove any presumption of guilt.

### Suppression of Riot

Private persons can, on their own authority, lawfully try to suppress a riot, and courts have ruled that they can arm themselves for such a purpose if they comply with appropriate statutory provisions concerning the possession of firearms or other weapons. Execution of this objective will be supported and justified by law. Generally every citizen capable of bearing arms must help to suppress a riot if called upon to do so by an authorized peace officer.

The state is primarily responsible for protecting lives and property from the unlawful violence of mobs. If the militia reports to civil authorities to help quash a riot, it has the same powers as civil officers and must render only such assistance as is required by civil authorities. During the WTO riot in Seattle, 600 state troopers and 200 members of the NATIONAL GUARD were called in to assist the overwhelmed Seattle police force.

In an emergency, and in the absence of constitutional restrictions, a governor can order the intervention of the militia to suppress a riot without complying with statutory formalities. When troops are ordered to quell a riot, they are not subject to local authorities but are in the service of the state.

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## RIPARIAN RIGHTS

*The rights, which belong to landowners through whose property a natural watercourse runs, to the benefit of such stream for all purposes to which it can be applied.*

*Riparian water,* as distinguished from *flood water,* is the water that is below the highest line of normal flow of the river or stream.

CROSS-REFERENCES

Water Rights.

## RIPENESS

*The mandate contained in Article III of the Constitution that requires an appellate court to consider whether a case has matured into a controversy worthy of adjudication before it can hear the case.*

An actual, current controversy worthy of adjudication must exist before a federal court may hear a case. The court determines if a controversy between parties with adverse legal interests is of sufficient immediacy and reality to warrant judicial intervention (*Lake Carriers' Ass'n v. MacMullan,* 406 U.S. 498, 92 S. Ct. 1749, 32 L. Ed. 2d 257 [1972]).

The rationale behind the ripeness limitation is to prevent the courts from entering a controversy before it has solidified or before other available remedies have been exhausted. In disputes involving regulations or decisions promulgated by administrative agencies, a controversy is not considered ripe until the agency's decision has been formalized and the challenging parties have felt its effects. Similarly, if a state court remedy is available, a controversy is not ripe for federal court review until all state court remedies have been exhausted.

The courts generally apply a two-part test to determine if a controversy is ripe for judicial intervention. The first criterion is whether the controversy is fit for judicial decision, that is, whether it presents a QUESTION OF LAW rather than a QUESTION OF FACT. Secondly, the courts determine the impact on the parties of withholding judicial consideration. In *Abbott Laboratories*

*v. Gardner,* 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), the Supreme Court examined whether a regulation that required drug manufacturers to use labels showing both the generic and the proprietary drug names was ripe for review before it was actually enforced. The Court held that the controversy was ripe because the regulation had an immediate and expensive impact on the plaintiffs' day-to-day operations and the plaintiffs risked a substantial sanction if they did not comply with the regulation.

Ripeness is a major consideration when parties seek injunctive or declarative relief before a statute or regulation has been applied. Courts are reluctant to enter an abstract disagreement over administrative policies (*Ruckelshaus v. Monsanto,* 467 U.S. 986, 104 S. Ct. 2862, 81 L. Ed. 2d 815 [1984]). However, in some cases, the courts will hear a request for an INJUNCTION or DECLARATORY JUDGMENT if the question presented is entirely or substantially legal and if postponing a decision until after a statute or regulation is applied would work a substantial hardship on the challenging party (*Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission,* 461 U.S. 190, 103 S. Ct. 1713, 75 L. Ed. 2d 752 [1983]).

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CROSS-REFERENCES

Case or Controversy.

## RISK

*The potential danger that threatens to harm or destroy an object, event, or person.*

A risk that is specified in an insurance policy is a contingency which might or might not occur. The policy promises to reimburse the person who suffers a loss resulting from the risk for the amount of damage done up to the financial limits of the policy.

In sales transactions, the contract and the UNIFORM COMMERCIAL CODE (UCC) determine who bears responsibility for the risk of loss of the merchandise until the buyer takes possession of the goods.

## RISK ARBITRAGE

*The purchase of stock in a corporation that appears to be the target of an imminent takeover in the hope of making large profits if the takeover occurs.*

Risk arbitrage is practiced by investors called risk arbitrageurs. The strategy can return large profits if a takeover occurs but can also result in large losses if the transaction does not take place. Obviously, then, the more information an arbitrageur has about a possible takeover, the less risk the strategy involves. Buying SECURITIES of takeover candidates on the basis of rumors is legal, but it is illegal for an arbitrageur to purchase securities based on inside, or nonpublic, information. Insider trading violates rule 10(b)-5 of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78a et seq., which is a federal law that governs the operation of the stock exchanges and over-the-counter trading.

To obtain information, arbitrageurs often develop relationships with investment banking firms and corporations, as well as with other sources of information and financial backing. These activities alone do not constitute a violation of the Securities Exchange Act, but if the risk arbitrageur uses these relationships or resources to gather information that is not available to the general public, the resulting purchase of securities is illegal.

In the late 1980s, the SECURITIES AND EXCHANGE COMMISSION (SEC) began to investigate several prominent risk arbitrageurs for their roles in insider trading. This action, combined with the increasing number of corporate takeovers, brought the issue of risk ARBITRAGE to the headlines of Wall Street and the world. Between 1980 and 1988 in the U.S. District Court for the Southern District of New York alone, fifty-seven arbitrageurs were criminally prosecuted for insider trading. One of the best-known cases involved risk arbitrageur Ivan Boesky, who allegedly realized a $9.075 million net profit through stock trades he made based on nonpublic information about three different mergers and takeovers. As part of the settlement with the SEC and the federal courts, Boesky was barred from any future securities trading.

Because risk arbitrage can involve significant blocks of shares worth hundreds of thousands, even millions, of dollars, this practice can have a large impact on both the market and the value of the company's stock. Professionals in the securities field generally agree that risk arbitrage based

on inside information has a negative effect on the market, as well as on the reputation of arbitrageurs in general. Many of these commentators, however, are concerned that existing securities laws do not reach risk arbitrageurs who do not owe a fiduciary duty to the people who are harmed by the arbitrageur's use of nonpublic information. The Securities and Exchange Act specifies that a violation of rule 10(b)-5 requires the accused violator to have breached a fiduciary duty to the injured party.

*Chiarella v. United States,* 445 U.S. 222, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980), is one of the leading cases on rule 10(b)-5 liability. Vincent F. Chiarella was employed at a financial printer and, as part of his duties, handled a series of documents that detailed an upcoming takeover bid; although the names were left blank or falsified, Chiarella was able to figure out the companies involved. Then, without disclosing that he had inside information, he bought stock in the companies that were targeted in the takeover; when the takeover was made public, he sold the shares and made a profit of approximately $30,000. Shortly thereafter, Chiarella was indicted on seventeen counts of violating rule 10(b)-5. The U.S. Supreme Court reversed the conviction, however, on the grounds that Chiarella had not violated the rule because he was not a fiduciary and therefore did not have a duty to disclose.

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CROSS-REFERENCES

Mergers and Acquisitions.

## RIVERS

See BOUNDARIES; INTERNATIONAL WATERWAYS; WATER RIGHTS.

## ROBBERY

*The taking of money or goods in the possession of another, from his or her person or immediate presence, by force or intimidation.*

Robbery is a crime of theft and can be classified as LARCENY by force or by threat of force. The elements of the crime of robbery include the use of force or intimidation and all the elements of the crime of larceny. The penalty for robbery is always more severe than for larceny.

According to statistics from the FEDERAL BUREAU OF INVESTIGATION (FBI), 422,921 incidents of robbery occurred in 2001. This number was significantly lower than a decade earlier. The FBI estimated that between 1992 and 2001, the number of robberies in the United States dropped by 37.1 percent. According to the 2001 statistics, robbery accounted for 29.4 percent of violent crimes in the United States, costing victims a total of $532 million. The average loss per victim during that year was $1258.

The general elements of robbery are the taking of PERSONAL PROPERTY or money from the person or presence of another, the use of actual or constructive force, the lack of consent on the part of the victim, and the intent to steal on the part of the offender. Neither deliberation nor premeditation is necessary, nor is an express demand for the property.

Robbery requires a taking of property from the person or presence of the victim, which means that the taking must be from the victim's possession, whether actual or constructive. Property is on the victim's person if it is in his hand, in the pocket of the clothing he wears, or otherwise attached to his body or clothing. The phrase "from the presence" or "in the presence" has been construed to mean proximity or control rather than within eyesight of the victim. For example, a robber takes property from the victim's presence if the robber locks the victim in one room and then takes the valuable from another room. There is sufficient proximity even though the victim cannot see through the walls into the room where the valuables are stored.

The property taken must be close enough to the victim and sufficiently under his control that had the robber not used violence or intimidation, the victim could have prevented the taking. As an example, if a robber uses force to immobilize a property owner at one place while an ACCOMPLICE takes the owner's property from a place several miles away, the distance between the owner and the owner's property is such that the owner could not have prevented the taking even if he had been free to try to interfere.

A robbery must also include a taking or asportation, a carrying away by which the goods are taken from the victim's possession and transferred to the possession of the robber. The crime

**Types of Weapons Used in Robberies, 2001[a]**

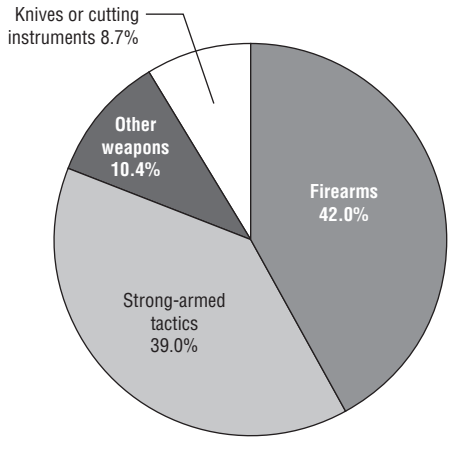


[a]Because of rounding, the percentages may not add to total.

SOURCE: FBI, *Crime in the United States*, 2001.

is complete when the robber acquires possession of the property, even for a short time. The robber does not have to transport the property away from the physical presence of the person who has lawful possession of it or even escape with it. The slightest change of location is sufficient to establish asportation. Once the robber takes possession of the property, the offense is complete, even if the robber later abandons the property.

The personal property that is taken must have some value, but the amount of its value is immaterial. The crime of robbery can be committed even if the property taken is of slight value. Actual monetary value is not essential as long as it appears that the property had some value to the person robbed.

The property does not have to be taken from the owner or holder of legal title. The robber may rob someone who has possession or custody of property, though that person is not the owner of it. The person from whom the property was taken must have exerted control over it.

The taking must be accomplished either by force or by intimidation. This element is the essence and distinguishing characteristic of the offense. Taking by force without intimidation is robbery. Taking by intimidation without the use of actual force is also robbery. Force and intimidation are alternate requirements, and either is sufficient without the other.

The force must be sufficient to effect the transfer of the property from the victim to the robber. It must amount to actual personal violence. The line between robbery and larceny from the person is not always easy to draw. For example, when a thief snatches a purse from the owner's grasp so suddenly that the owner cannot offer any resistance to the taking, the force involved is not sufficient to constitute robbery. Hence that crime would be larceny. If a struggle for the purse ensues before the thief can gain possession of it, however, there is enough force to make the taking robbery. The same is true of pickpocketing. If the victim is unaware of the taking, no robbery has occurred and the crime is larceny. But if the victim catches the pickpocket in the act and struggles unsuccessfully to keep possession, the pickpocket's crime becomes robbery.

The particular degree of force becomes important only when considered in connection with the grade of the offense or the punishment to be imposed. Evidence establishing a personal injury or a blow, or force sufficient to overcome any resistance the victim was capable of offering, is not required.

A robber may also render the victim helpless by more subtle means. Constructive force includes demonstrations of force, menace, and other means that prevent a victim from exercising free will or resisting the taking of property. Administering intoxicating liquors or drugs in order to produce a state of unconsciousness or stupefaction is using force for purposes of robbery. Constructive force will support a robbery charge.

Intimidation means putting in fear. The accused must intentionally cause the fear and induce a reasonable apprehension of danger, but not necessarily a great terror, panic, or hysteria in the victim. The fear must be strong enough to overcome the victim's resistance and cause the victim to part with the property. The victim who is not fearful of harm from the robber so long as she does what the robber says, but who expects harm if she refuses, is nevertheless "put in fear" for the purposes of robbery.

Putting the victim in fear of bodily injury is sufficient. The fear can be aroused by words or gestures, such as threatening the victim with a weapon. The threat of immediate bodily injury or death does not have to be directed at the owner of the property. It may be made to a member of the owner's family, other relatives, or even someone in the owner's company.

The force or intimidation must either precede or be contemporaneous with the taking to constitute a robbery. Violence or intimidation after the taking is not robbery. If, however, the force occurs so soon after the taking that it forms part of the same transaction, the violence is legally concurrent with the taking. Force or intimidation employed after the taking and merely as a means of escape is not a sufficient basis for a robbery charge.

Unless a statute provides otherwise, a robbery cannot be committed without criminal intent. The robber must have a SPECIFIC INTENT to rob the owner of the property. The element of force or intimidation is not a substitute for the intent to steal.

The offender's intent must be determined from his or her words and actions. A person who forcibly takes property by mistake or merely as a joke, without an intent to deprive the owner of the property permanently, is not guilty of robbery. The intent to steal must be present at the time the property is taken, but premeditation is not part of the criminal intent necessary for the commission of robbery.

Most robbery statutes distinguish between simple robbery and aggravated robbery. The most common aggravating factors are that the robber was armed with a deadly weapon or represented that he or she had a gun, that the robber actually inflicted serious bodily injury, or that the robber had an accomplice.

There are three important federal robbery statutes. The Federal Bank Robbery Act (18 U.S.C.A. § 2113) punishes robbery of property in the custody or possession of any national bank or of any bank that is insured by the federal government. Two provisions (18 U.S.C.A. §§ 2112, 2114) punish robbery when the property taken is from the U.S. mail or is property belonging to the federal government. The Hobbs Act (18 U.S.C.A. § 1951) punishes the obstruction of interstate commerce by robbery.

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CROSS-REFERENCES

Asportation; Larceny.

*Owen Josephus Roberts.*

PHOTOGRAPH BY HARRIS & EWING. COLLECTION OF U.S. SUPREME COURT

## ♦ ROBERTS, OWEN JOSEPHUS

Owen Josephus Roberts served as an associate justice of the U.S. Supreme Court for fifteen years. His years on the Court included the NEW DEAL era when the federal government, under the leadership of President FRANKLIN D. ROOSEVELT, expanded its regulation of the economy in an effort to address the effects of the Great Depression. Roberts cast the deciding vote in a major case that marked a shift in the Court's approach to such regulation.

Roberts was born on May 2, 1875, in Germantown, Pennsylvania, where he spent much of his childhood. He graduated from the University of Pennsylvania, receiving a bachelor of arts degree in 1895 and a bachelor of laws degree in 1898. In 1898 Roberts established a law practice in Philadelphia, becoming the first district attorney for Philadelphia County. Roberts also taught for twenty years at the University of Pennsylvania, serving as a law professor from 1898 to 1918. In 1924 President CALVIN COOLIDGE named Roberts special attorney for the prosecution in the TEAPOT DOME SCANDAL, which involved unethical behavior in the oil industry. In 1930 President HERBERT HOOVER appointed Roberts to the U.S. Supreme Court.

Roberts's tenure on the Supreme Court is largely remembered for the decisive fifth vote he cast in WEST COAST HOTEL V. PARRISH, 300 U.S.

"THE JUDICIAL BRANCH . . . HAS ONLY ONE DUTY—TO LAY THE ARTICLE OF THE CONSTITUTION WHICH IS INVOKED BESIDE THE STATUTE WHICH IS CHALLENGED AND TO DECIDE WHETHER THE LATTER SQUARES WITH THE FORMER."
—OWEN JOSEPHUS ROBERTS

379, 57 S. Ct. 578, 81 L. Ed. 703 (1937), which upheld the constitutionality of a Washington state MINIMUM WAGE law. The Court's decision in *West Coast Hotel* brought an end to the *Lochner* Era in CONSTITUTIONAL LAW, named after the case LOCHNER V. NEW YORK, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905). In *Lochner* the Court struck down a New York law regulating the number of hours that employees could work each week in the baking industry because it violated the free market principles embodied in the doctrine of SUBSTANTIVE DUE PROCESS, a doctrine derived from the DUE PROCESS CLAUSE of the Fifth and Fourteenth Amendments to the U.S. Constitution.

For three decades after *Lochner,* the Court invalidated numerous state and federal laws regulating businesses, including laws that prescribed certain terms and conditions of employment. After *West Coast Hotel,* the Court adopted a more permissive stance toward such laws, permitting both the state and federal governments to pass reasonable business regulations that benefit society. Roberts's vote to uphold the state minimum wage law in *West Coast Hotel* is memorable not only because it was the decisive vote in a landmark case but also because he had previously voted to strike down similar regulations on a number of occasions.

Roberts's change of heart has been characterized as "the switch in time that saved nine," suggesting that Roberts cast his vote to defeat President Roosevelt's court-packing plan. To dilute the voting power of the existing nine justices on the Supreme Court, who had been striking down much New Deal legislation, Roosevelt had proposed to expand the number of justices, a move that would enable him to add justices more favorable to his New Deal objectives. Historians disagree, however, over whether Roberts had knowledge of Roosevelt's plan at the time he cast his vote. Additionally, Roberts had previously voted in favor of state legislation that had been enacted to address the worst effects of the Great Depression, much like some of the New Deal legislation Congress had passed at the federal level. For example, in *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934), Roberts joined four other justices in upholding a Minnesota law that placed a MORATORIUM on the foreclosure of mortgages.

Roberts's constitutional JURISPRUDENCE is difficult to categorize and was somewhat unpredictable. In *Grovey v. Townsend,* 295 U.S. 45, 55 S. Ct. 622, 79 L. Ed. 1292 (1935), for example, Roberts wrote for a unanimous Court in upholding the constitutionality of white primaries, which denied African Americans the right to elect party delegates for the national convention. Three years later, in *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337, 59 S. Ct. 232, 83 L. Ed. 208 (1938), Roberts concurred with a majority of justices who relied on the EQUAL PROTECTION CLAUSE to invalidate a state statute authorizing the University of Missouri to exclude blacks from its law school.

Although Roberts upheld white primaries in *Grovey,* he supported racial minorities in KOREMATSU V. UNITED STATES, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944). In *Korematsu* the Supreme Court upheld the constitutionality of an EXECUTIVE ORDER authorizing the forcible detention of more than a hundred thousand Americans of Japanese descent during WORLD WAR II. Roberts dissented, attacking the rationale underlying the executive order, which ostensibly had been promulgated for the purpose of

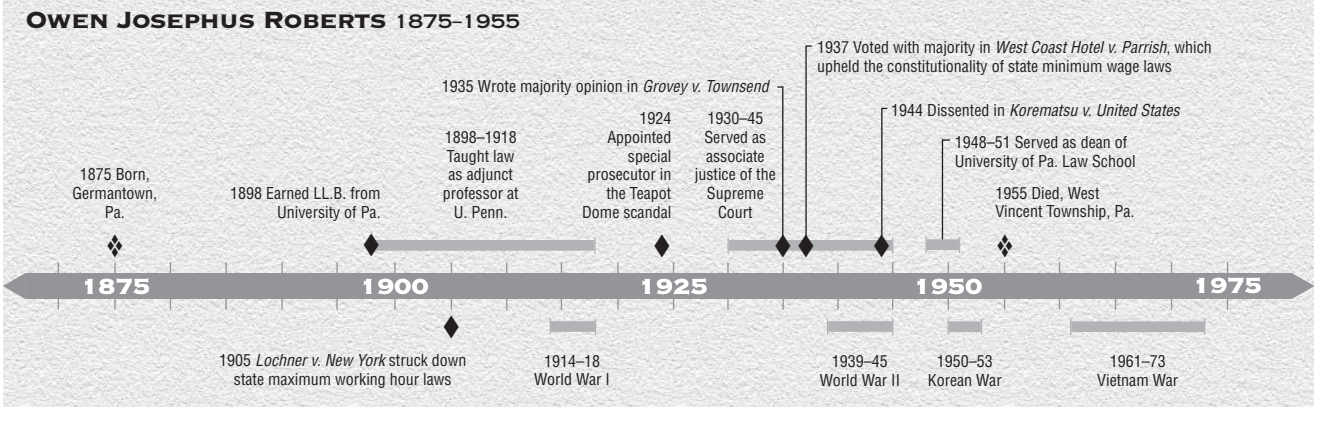

protecting the United States from risks of sabotage. Roberts argued that forcible detention was really just a euphemism for imprisonment and that Japanese Americans were being punished solely on the grounds of their ancestry "without evidence or inquiry concerning [their] loyalty and good disposition towards the United States." In this light Roberts concluded that the record revealed a clear constitutional violation.

Roberts retired from the Supreme Court in 1945. He then returned to the University of Pennsylvania where he served as dean of the law school from 1948 to 1951. Three years later, on May 17, 1955, Roberts suffered a heart attack and died at his Pennsylvania farm in West Vincent Township.

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## ROBERTS V. UNITED STATES JAYCEES

*Roberts v. United States Jaycees* was a 1984 Supreme Court decision, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462, that held that the right to FREEDOM OF ASSOCIATION guaranteed under the First and Fourteenth Amendments to the Constitution did not include the right of a commercial association to deny women admission to the organization because of their gender. In a unanimous vote, the Court emphasized that the state had a compelling interest to eliminate SEX DISCRIMINATION and assure its citizens equal access to publicly available goods and services.

The U.S. Jaycees (Jaycees) was founded as the Junior Chamber of Commerce in 1920. It is a national organization, which at the time of the litigation had more than 235,000 members. The national organization set membership requirements for local chapters, one of which limited membership to men between the ages of eighteen and thirty-five. When the Minneapolis and St. Paul chapters of the Jaycees admitted women in the mid-1970s, the U.S. Jaycees imposed a number of sanctions on those chapters for violating the bylaws. For example, it denied their members eligibility for state or national office or awards programs and refused to count their membership in computing votes at national conventions.

In December 1978 the president of the Jaycees advised both chapters that a motion to revoke their charters would be considered at a forthcoming meeting of the national board of directors. Members of both chapters filed charges of sex discrimination with the Minnesota Department of Human Rights, alleging that the exclusion of women from full membership required by the national organization's bylaws violated the Minnesota Human Rights Act (Minn. Stat. § 363.03, subd. 3 [1982]). The members argued that the Jaycees organization was a public accommodation within the meaning of the act and was therefore bound not to discriminate on the basis of gender.

The Minnesota Human Rights Department ruled that the membership policy violated the act. The Jaycees then filed suit in federal court alleging that a requirement that would force the organization to accept women as regular members would violate the male members' constitutional rights of free speech and association. The federal court certified a question to the Minnesota Supreme Court, asking whether the Jaycees organization was a "place of public accommodation" within the meaning of the state's Human Rights Act.

The supreme court answered affirmatively, concluding that the Jaycees organization is a "business" in that it sells goods and extends privileges in exchange for annual membership dues, it is a "public" business in that it solicits and recruits dues-paying members based on unselective criteria, and it is a public business "facility" in that it conducts its activities at fixed and mobile sites within the state of Minnesota.

The federal district court ruled in the state's favor, and the Jaycees appealed. The Eighth Circuit Court of Appeals reversed the decision, finding that in requiring the admission of women, the act violated the First and FOURTEENTH AMENDMENT rights of the organization's members.

The U.S. Supreme Court disagreed. In a unanimous ruling, the Court admitted that the Jaycees' freedom of association rights were infringed by the Minnesota Human Rights Act. Justice WILLIAM J. BRENNAN JR. noted that the Jaycees' freedom of association related to the expression of collective views and interests. The right of association was not absolute, however. If the state could

demonstrate a compelling state interest and show that the remedy was narrowly tailored, the prohibition on gender discrimination would be permitted.

Brennan found that the act reflected Minnesota's "strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services." This goal "plainly serves compelling state interests of the highest order."

Having found a compelling STATE INTEREST, Brennan concluded that in applying the act to the Jaycees, the state had advanced its interests in the least restrictive way. The Jaycees could not demonstrate any "serious burdens on the male members' freedom of expressive association." The Court dismissed the contention by the Jaycees that women members might have a different view or agenda than men. This contention was based on "unsupported generalizations about the relative interests and perspectives of men and women." The Court would not, stated Brennan, "indulge in the sexual stereotyping that underlies" the Jaycees' argument.

In a concurring opinion, Justice SANDRA DAY O'CONNOR stated that the Jaycees was a nonexpressive commercial association and that these associations have long been the subject of greater government regulatory control.

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CROSS-REFERENCES

Equal Protection; First Amendment; Fourteenth Amendment; Women's Rights.

## ROBINSON-PATMAN ACT

The Robinson-Patman Act is a 1936 statute (15 U.S.C.A. § 13(a–f) that amended Section 2 of the CLAYTON ACT (Oct. 15, 1914, ch. 323, 38 Stat. 730), which was the first antitrust statute aimed at price discrimination. The Robinson-Patman Act prohibits a seller of commodities from selling comparable goods to different buyers at different prices, except in certain circumstances.

The Robinson-Patman Act seeks to limit the ability of large, powerful buyers to gain price discounts through the use of their buying power. Although the act remains an important antitrust statute, private parties do not use it nearly as often as they use the Sherman Act, in part due to the Robinson-Patman Act's convoluted and complicated language. The government, which may bring an action under the Robinson-Patman Act through the FEDERAL TRADE COMMISSION (FTC), rarely initiates actions under the statute.

In fact, the Robinson-Patman Act has been severely criticized throughout its history, both for its poor drafting and the economic theory behind it. Even the Supreme Court has criticized the act on more than one occasion, stating in 1952 that it is "complicated and vague in itself and even more so in its context. Indeed, the Court of Appeals seems to have thought it almost beyond understanding" (*FTC v. Ruberoid Co.,* 343 U.S. 470, 72 S. Ct. 800, 96 L. Ed. 1081 [1952]). Nevertheless, the Robinson-Patman Act remains an important deterrent and remedy to market power abuses by large and powerful buyers.

The Robinson-Patman Act was passed during the Great Depression following the emergence of large, successful grocery-store chains. Small, independent grocery stores and their suppliers lobbied Congress to do something about the large chains, which were alleged to have exercised their superior buying power to achieve price discounts, driving small grocers out of business. The United States Wholesale Grocers Association drafted the original bill of what was to become the Robinson-Patman Act. Many critics of the act point out that Congress passed the act with the protection of small grocers and their wholesalers in mind, rather than the welfare of competition or the consumer.

The Robinson-Patman Act was intended to remedy perceived shortcomings in the Clayton Act. The federal courts had determined that the Clayton Act did not apply to price discrimination based on quantity, which was precisely what the small, independent businesses were worried about. The act considerably expanded the scope of the Clayton Act by specifically prohibiting discounts based solely on quantity, except in certain situations. The act's provisions apply both to sellers who offer discriminatory prices and buyers who knowingly receive them. The act is also intended to remedy secondary line injury, which is injury to competitors of a buyer who receives a discriminatory price, in addition to primary line injury, which refers to injury to competitors of a seller who offers a discriminatory price. Both private parties and the FTC may use the statute. A private party can obtain, in appropriate circumstances, treble damages from

a price discriminator—in other words, three times the party's actual damages.

To invoke the provisions of the Robinson-Patman Act, certain jurisdictional elements must be established. The act applies only (1) to sales (2) in commerce (3) of commodities (4) of like grade and quality. The sales requirement excludes transfers, leases, or consignment sales from the act's provisions. Other transfers that do not meet the legal definition of a *sale,* such as an offer or bid, are not covered by the act. Finally, the plural *sales* is important. The act applies only where there are two completed sales to different purchasers at different prices. The commerce specification requires at least one of the sales to be in interstate commerce, meaning that the goods must have physically crossed a state line.

The Robinson-Patman Act applies only to sales of commodities or tangible goods. The courts have determined that the act is not available to remedy discriminatory pricing of services, money (e.g., loans), insurance, electricity, advertising, or photo processing (primarily a service). In a case such as photo processing, where the product is really both a commodity and a service, the courts look to the "dominant feature" of the transaction. If the dominant feature is not a commodity, the act will not apply. Finally, the act applies only to goods of "like grade or quality." Obviously the determination of whether two goods are of like grade and quality is somewhat subjective. The courts have applied several evidentiary standards to this determination. For the act to apply, the goods must be at least reasonably interchangeable. For example, a generic and brand-name food product are of "like grade and quality" if the only real difference between them is the brand name or label itself.

After the jurisdictional elements of the Robinson-Patman Act have been satisfied, a plaintiff must establish price discrimination by the defendant and injury to competition to prove a violation of the main provisions of the act. The price discrimination element is actually easy to establish; only a difference in price in two different sales is required. The price refers to the actual price paid, net of discounts and allowances. Conversely, there is no price discrimination under the act where the same price is charged to two buyers, even if the seller's costs in serving one buyer are much higher than the costs of serving the other.

The injury to competition element is more difficult to establish. Harm to only the individual plaintiff is not enough to prove injury to competition. Although the plaintiff need not prove actual harm to competition, due to the difficulty of proving it in court, there must be at least a "reasonable possibility" that the price discrimination affected competition in the overall market for the product. As noted earlier, there are two types of injury to competition due to price discrimination: primary line injury and secondary line injury. Primary line injury refers to injury to the competitors of the seller, who lose the business of the buyers who take advantage of the seller's discriminatory price. Secondary line injury refers to injury to the competitors of the buyer, who are unable to take advantage of the discriminatory prices obtained by the buyer.

A primary line injury may be proved in two ways. A plaintiff may present evidence of the seller's intent to destroy a competitor, either by direct evidence or indirect evidence such as business tactics and unexplained price moves. Otherwise, the plaintiff must prove that the seller's discriminatory price caused a substantial change in market shares in the product. The latter is nearly impossible to prove, because courts, commentators, and economists have frequently rejected the idea that discriminatory pricing poses a long-term threat to competition. It is also difficult to prove a seller's intent to destroy a competitor, because a seller isn't likely to leave evidence of such an intent and it is difficult to infer such an intent. One way to prove intent to injure competition is to show that the seller made sales at prices below the seller's average cost of producing the product long enough to force equally efficient competitors out of business. Because of the difficulties in proving a primary line injury under the Robinson-Patman Act, plaintiffs alleging a primary line injury from a discriminatory price are more likely to seek a remedy under other antitrust statutes.

A plaintiff claiming a secondary line injury must also meet several requirements to prove injury to competition. The plaintiff must show that it competed in fact, not potentially, with a buyer who received a discriminatory price, that the price difference was substantial, and that the price difference existed over time. Once these factors are established, a presumption is created that the price discrimination injured

competition. This presumption can be overcome only by evidence proving there was no causal connection between the discriminatory price received by the buyer and lost sales or profits of the buyer's competitors.

Even if a plaintiff establishes the jurisdictional elements of a claim under the Robinson-Patman Act and proves a discriminatory price and injury to competition, the defendant may still raise defenses that will defeat the plaintiff's claim. Three main defenses exist: "meeting competition," "cost justification," and "functional availability."

Under the meeting competition defense, a discriminatory price is lawful when the seller is acting in GOOD FAITH to meet an equally low price of a competitor. This defense is absolute and will bar a claim under the Robinson-Patman Act regardless of injury to competitors or competition.

Under the cost justification defense, a seller who offered a discriminatory price may defeat a Robinson-Patman Act claim by establishing that the difference in price was justified by "differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities" in which the goods are sold. Proving cost justification is difficult because of the complicated accounting analysis required to establish the defense, and therefore it is rarely used.

Although it is not mentioned in the act itself, the functional availability defense allows a seller who offered a discriminatory price to avoid liability under the Robinson-Patman Act if the seller can prove that the discriminatory price the disfavored buyer did not receive was functionally or realistically available to that buyer. Usually this defense involves proof that the disfavored buyer was able to qualify for some discount offered by the seller but failed to take advantage of it.

The basic prohibitions and defenses are contained in Sections 2(a) and 2(b) of the Robinson-Patman Act. The act contains some special provisions as well. Sections 2(d) and 2(e) of the act deal with services and promotional payments that might be provided in connection with a sale of goods. Section 2(d) allows a seller to give discounts to buyers who perform certain services, such as promotions, that the seller would otherwise provide. Substantially similar discounts must be offered to all buyers of like goods, or else the act is violated. Section 2(e) prohibits a seller from discriminating in the furnishing of facilities and services for the processing, handling, or sale of goods.

Section 2(c) of the act prohibits bogus brokerage arrangements whereby large buyers attempt to obtain illegal discounts disguised as brokerage commissions. This provision is usually invoked where the "broker" does not actually render any service to the seller but is merely a large-volume buyer. This section also applies to certain illegal brokerage payments and commercial BRIBERY. Section 2(f) of the act specifically provides that it is unlawful for a buyer to knowingly solicit or receive an unlawfully discriminatory price.

The Robinson-Patman Act has been widely criticized throughout its history, although Congress has retained the act in its original form. The complicated and convoluted language of the act makes it difficult to understand and interpret. The courts have applied its provisions inconsistently over the years and have often confused the proof required for a violation of the Robinson-Patman Act with the standards used in cases brought under the Sherman Act (July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C.A. §§ 1 et seq.). Also, many critics suggest that the act is designed merely to protect small business and that it protects competitors rather than competition.

The act has been attacked on economic grounds as well. Most economists believe that discriminatory pricing cannot lead to MONOPOLY power and injury to competition, because the seller offering the discriminatory price cannot profitably sustain the discriminatory price long enough to drive out competitors and, more importantly, keep them out. In fact, the act may discourage competition. For example, the Supreme Court held in the widely criticized *Utah Pie* case that under the Robinson-Patman Act, a national frozen pie seller that sought to enter a new geographical market could not charge a lower price in the new market than it charged in its existing markets (*Utah Pie Co. v. Continental Baking Co.,* 386 U.S. 685, 87 S. Ct. 1326, 18 L. Ed. 2d 406 [1967]). Critics suggest that this interpretation of the act may discourage large, national sellers from entering a new market, even though the consumer and competition in the new market would benefit.

Over the last several decades, fewer and fewer enforcement agencies and private liti-

gants have used the Robinson-Patman Act, for several reasons. First, the legal precedents and theories behind the act have become so complex that plaintiffs usually resort to the more basic antitrust statutes, such as the Sherman Act. Second, the defenses to actions under the Robinson-Patman Act, such as the meeting competition defense, have become substantially more available and effective as the markets for most products have expanded and increased in sophistication.

Despite the decline in its use, the Robinson-Patman Act is still an important antitrust statute. It acts as both a deterrent and a remedy to abuses to market power by large and powerful businesses and reflects the nation's desire to offer some protection to small, family businesses against the predatory acts of national competitors.

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CROSS-REFERENCES

Antitrust Law; Sales Law; Sherman Anti-Trust Act.

*Spottswood W. Robinson III.*
BETTMANN/CORBIS

## ROBINSON, SPOTTSWOOD WILLIAM, III

Spottswood William Robinson III was a retired federal appeals court judge, who, before his appointment, was a law professor and an attorney who was actively involved in the CIVIL RIGHTS MOVEMENT. Robinson worked with THURGOOD MARSHALL and the National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund during the 1940s and 1950s to desegregate schools.

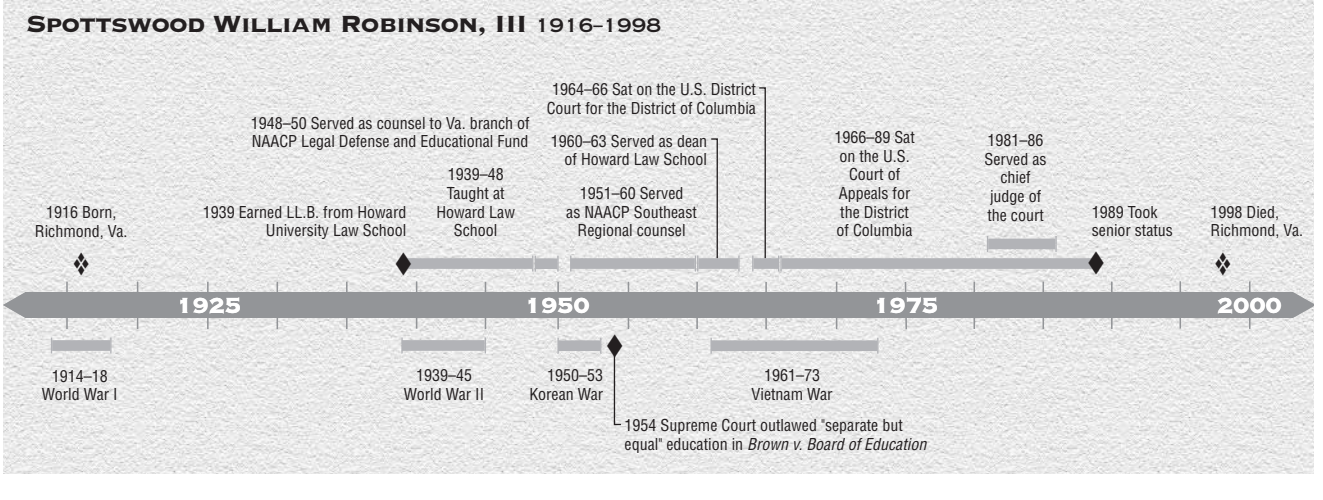

Robinson was born on July 26, 1916, in Richmond, Virginia. He attended Virginia Union University and received his LL.B. degree from Howard University School of Law in 1939. He joined the Howard Law School faculty immediately after graduation and served as a professor of law until 1948. Robinson was admitted to the Virginia bar in 1943.

During his years at Howard, Robinson worked with the dean of the law school, CHARLES HAMILTON HOUSTON, and other professors and Howard Law School graduates, in a concerted effort to end racial SEGREGATION in public schools. As counsel to the Virginia branch of the NAACP LEGAL DEFENSE AND EDUCATIONAL FUND from 1948 to 1950, Robinson pursued legal action against Virginia's segregated education system. He continued this legal attack on the SEPARATE-BUT-EQUAL doctrine as the NAACP Southeast Regional counsel in 1951, a position he retained until 1960. The NAACP's litigation ultimately led to the momentous decision of BROWN V. BOARD OF EDUCATION 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), which struck down the separate-but-equal doctrine and struck down state-mandated segregation of public schools.

Robinson established a private law practice in 1955 but returned to Howard Law School in 1960 to become its dean. During this period, he also served as a member of the U.S. COMMISSION ON CIVIL RIGHTS. In 1963, Robinson became vice president and general counsel of Consolidated Bank and Trust Company, where he served until he was appointed to the U.S. District Court for the District of Columbia in 1964.

In November 1966, President LYNDON JOHNSON appointed Robinson to the U.S. Court of Appeals for the District of Columbia Circuit. He was the first African-American to be appointed to that court. Robinson served as chief judge of the court from May 1981 to July 1986. He took senior status on September 1, 1989, and retired in 1992. Robinson died in Richmond, Virginia, on October 18, 2001.

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CROSS-REFERENCES

School Desegregation.

## ROBINSON V. CALIFORNIA

In *Robinson v. California,* 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962), the U.S. Supreme Court made two landmark rulings on the scope and meaning of the CRUEL AND UNUSUAL PUNISHMENTS CLAUSE of the EIGHTH AMENDMENT to the U.S. Constitution.

The Eighth Amendment guarantees that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." At issue in *Robinson v. California* was the constitutionality of a California CRIMINAL LAW that made being a narcotics addict a crime. To reach this issue, however, the Court first broke new ground and ruled that the Eighth Amendment applied to the states through the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT.

Lawrence Robinson was stopped on a city street by a Los Angeles police officer, who had noticed that Robinson's arms were scabbed, discolored, and filled with needle marks. The officer arrested Robinson, who was sent to the Los Angeles central jail. The next day his arms were again examined, this time by a member of the narcotics division of the police department. Based on his examination, the officer concluded the marks and discoloration were the result of the injection of unsterilized hypodermic needles into Robinson's arms. Both police officers claimed that Robinson admitted he had occasionally used narcotics.

Robinson was charged with violating a California criminal law that made it illegal to "be addicted to the use of narcotics." At his trial Robinson denied that he had told police he used narcotics and asserted that the marks on his arm were the result of an allergic condition contracted while he was in military service. Two witnesses corroborated his testimony. The jury was instructed that it could convict Robinson if it believed he was addicted to the use of narcotics. Unlike most criminal laws, which require that a person be convicted for a criminal act, in this case Robinson could be convicted for his condition, or status, as a drug addict. The jury convicted Robinson of the misdemeanor, and the California appellate courts upheld the conviction.

The U.S. Supreme Court accepted Robinson's appeal and reversed the conviction. Justice POTTER STEWART, in his majority opinion, had to cross a major constitutional barrier before ruling on the Eighth Amendment issue. Until the 1960s the Court had abided by precedent that held that the rights guaranteed to criminal defendants by the Fourth, Fifth, Sixth, and Eighth Amendments applied only to the federal courts. During the 1940s Justice HUGO L. BLACK had advocated the incorporation of these amendments into the Due Process Clause of the Fourteenth Amendment, thus making the amendments applicable to the states.

The Court eventually came around to Black's position and in 1961 started to selectively apply these rights to the states. In MAPP V. OHIO, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), the Court used the Fourteenth Amendment to apply the Fourth Amendment's EXCLUSIONARY RULE to the states; this rule prevents illegally obtained evidence from being introduced at trial. Stewart reflected this shift in position when he announced in *Robinson* that the California statute "is repugnant to the Fourteenth Amendment of the Constitution." This meant that the rights guaranteed under the Eighth Amendment now applied to the states.

Having established the right of the Court to examine state criminal law for Eighth Amendment violations, Stewart reviewed the California statute. He acknowledged that the state had a right to regulate the sale and use of illegal narcotics, establish drug treatment programs, and seek ways of improving the economic and social conditions under which drug addiction flourishes. But he also observed that the state could choose among many options in addressing the problem without violating a person's constitutional rights.

The major defect of the law was making the "status" of narcotic addiction a criminal offense, for which the offender might be prosecuted at any time before reforming his ways. Stewart was troubled that "a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there."

Establishing the criminal status of "narcotics addict" violated the ban on cruel and unusual punishment because a person addicted to drugs suffers from an illness. Stewart pointed out that government no longer makes it a criminal offense to be a person suffering from a contagious physical disease or mental illness. Those persons may legally be subject to compulsory treatment, such as quarantine or confinement, but they are not charged with a crime. An attempt by a state to do so, "in the light of contemporary human knowledge," would be a violation of the Eighth and Fourteenth Amendments.

The Court noted that even California admitted narcotic addiction was an illness that may be contracted innocently or involuntarily. In light of this admission, Stewart held that a "state law which imprisons a person thus afflicted as a criminal" inflicts cruel and unusual punishment in violation of the Fourteenth Amendment. Though Robinson would have been confined for only 90 days, "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."

In dissenting opinions, Justices TOM CLARK and BYRON WHITE argued that the Court had unfairly disturbed a "comprehensive and enlightened program for the control of narcotism based on the overriding policy of prevention and cure." Clark stated that the criminal statute was intended for persons still in the early stages of addiction who retained self-control and required short-term confinement and PAROLE with frequent drug tests. Though the law appeared penal, its provisions were very similar to those for civil commitment and treatment of addicts "who have lost the power of self-control." The civil and criminal laws shared the common purpose of rehabilitating narcotic addicts and preventing continued addiction. In light of this common purpose, opined Clark, that one law "might be labeled 'criminal' seems irrelevant." It was within the power of California to design its course of treatment.

The elimination of drug addiction as a status offense meant that the criminal justice system could only address specific actions of traffickers and users. Possession of narcotics is a crime, but the physical condition of addiction cannot be. The state may address addiction through civil commitment for drug treatment.

Despite the Court's holding that narcotics addiction is an illness, it later proved unwilling to draw the same conclusion concerning alcohol abuse. In *Powell v. Texas,* 392 U.S. 514, 88 S. Ct. 2145, 20 L. Ed. 2d 1254 (1968), the Court, by a 5–4 vote, upheld a Texas law that made it a crime to be publicly intoxicated. The Court reasoned that the Texas law was constitutional because it

did not make the status of being an alcoholic an offense but prohibited the specific offense of public intoxication. Rather than following the *Robinson* approach, the Court said that knowledge about alcoholism and the record in the case were inadequate to make the punishment of alcohol-related offenses cruel and unusual. Justice ABE FORTAS, in a dissenting opinion, argued that the *Robinson* rule should be followed and that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."

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CROSS-REFERENCES

Drugs and Narcotics; Incorporation Doctrine.

## ROCHIN V. CALIFORNIA

In *Rochin v. California,* 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952), the U.S. Supreme Court ruled that it was unconstitutional for police to pump a criminal suspect's stomach and use the resulting evidence at trial. The Court held that such conduct was "shocking to the conscience" and that the evidence must be suppressed under the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT.

On the morning of July 1, 1949, three Los Angeles County deputy sheriffs went to the home of Antonio Rochin. The police did not have a SEARCH WARRANT but had some information that Rochin was selling narcotics. Finding the outside door open, they entered the dwelling. They went to the second floor, where they forced open the door to Rochin's room. They found Rochin sitting partly dressed on the side of the bed, where his wife was lying. One of the deputies noticed two capsules on a nightstand and asked, "Whose stuff is this?" Rochin grabbed the capsules and put them in his mouth. The three deputies then wrestled with Rochin and sought to open his mouth so they could extract the pills. When this failed, the deputies handcuffed Rochin and took him to a hospital, where at their direction a doctor forced an emetic solution through a tube into Rochin's stomach. The solution induced vomiting, and in the vomited matter the deputies found two morphine capsules.

Rochin was tried and convicted of narcotics possession. The conviction was based solely on the morphine capsules, though Rochin unsuccessfully challenged their admission. After the California appellate courts upheld the conviction, Rochin filed an appeal with the U.S. Supreme Court.

At the time of *Rochin v. California,* the U.S. Supreme Court rarely intruded into the police procedures of the states. Not until the 1960s would the Court apply the BILL OF RIGHTS amendments dealing with CRIMINAL PROCEDURE to the states (despite the consistent efforts of Justices HUGO L. BLACK and WILLIAM O. DOUGLAS to incorporate these rights through the Due Process Clause of the Fourteenth Amendment).

Because of this situation, Rochin could not rely on the FOURTH AMENDMENT, which protects the people against unreasonable SEARCHES AND SEIZURES, or the FIFTH AMENDMENT, which protects a person from being a witness against himself. At that time the Fourth and Fifth Amendments applied only against the federal government. If they had applied to the states, the searches of Rochin's home and stomach would have been unconstitutional and the evidence suppressed under the Fourth Amendment's EXCLUSIONARY RULE.

A majority of the Court in *Rochin* refused to apply the Fifth Amendment to the states despite the arguments of Justices Black and Douglas in their concurring opinions. Instead, the Court relied solely on the Fourteenth Amendment's Due Process Clause as the basis for striking down the search. Justice FELIX FRANKFURTER wrote for the majority that the Due Process Clause contains a general standard of conduct by which states must abide. A state cannot offend "those canons of decency and fairness which express the notions of justice of English-speaking peoples." Due process of law requires the state to observe those principles that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

The police conduct here did more than offend "private sentimentalism about combating crime too energetically." This conduct "shock[ed] the conscience," offending even those with hardened sensibilities. The treatment

of Rochin was "too close to the rack and screw to permit of constitutional differentiation."

Frankfurter defended the SHOCK THE CONSCIENCE TEST as a responsible means of forcing states in their criminal prosecutions to "respect certain decencies of civilized conduct." Due process of law cannot be precisely defined, as it is a "historic and generative principle." It was clear to the Court that a coercive search of Rochin's stomach contents offended "the community's sense of fair play and decency" as much as a coerced verbal confession would.

At the time of *Rochin,* coerced confessions were inadmissible in state courts. The Supreme Court, in *Adamson v. California,* 332 U.S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947), had applied the Due Process Clause to reach this result. It would have been unfair to admit the morphine capsules obtained by physical abuse while suppressing a confession obtained by physical abuse. Characterizing the police action as "brutal conduct," Frankfurter concluded that allowing admission of the morphine capsules would discredit the law and "brutalize the temper of a society."

Justice Black, in his concurring opinion, agreed that the police conduct was unconstitutional but argued that the Court did not have to resort to its vague and subjective shock the conscience test. Black, noting the precise language of the Fifth Amendment, believed the Court could easily ground its authority in that amendment by incorporating it into the Fourteenth Amendment. This was preferable to the "nebulous standards" articulated by Frankfurter.

Justice Douglas, in his concurring opinion, attacked the shock the conscience test for its conclusion that California's state law that admitted evidence such as Rochin's violated "decencies of civilized conduct." He pointed out that only three states would probably exclude the *Rochin* evidence. The remaining states were served by "responsible courts with judges as sensitive as we are to the proper standards for law administration." He also noted that even the Fifth Amendment's provision against SELF-INCRIMINATION was not recognized by "all civilized legal procedures." The fact that the Framers required the Fifth Amendment to be used in federal courts made it "impossible for me to say it is not a requirement of due process for a trial in the state courthouse."

Whether *Rochin* retains any legal relevance has been much debated over the years. The Supreme Court incorporated the Fifth Amendment PRIVILEGE AGAINST SELF-INCRIMINATION into the Fourteenth Amendment in 1964 (*Malloy v. Hogan,* 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653) and the Fourth Amendment's exclusionary rule in 1961 (MAPP V. OHIO, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081). As a result, state and federal criminal constitutional rights are identical.

Some commentators believe *Rochin* is important because it stands for the proposition that the Due Process Clause provides a protection for citizens separate from, and independent of, the Bill of Rights provisions like the Fourth Amendment that have now been applied to the states. The case also shows that even if the Supreme Court were to abandon the Fourth Amendment exclusionary rule, the Due Process Clause will sometimes require exclusion of evidence in cases where police conduct is egregious enough to shock the conscience.

Other commentators and judges have expressed misgivings about the shock the conscience test. In their view, the test is too vague and gives federal judges too much power over state law enforcement. These critics argue that no clear line separates conduct that is merely offensive from conduct that shocks the conscience.

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CROSS-REFERENCES

Criminal Law; Criminal Procedure; Due Process of Law; Incorporation Doctrine; Search and Seizure; Shock-the-Conscience Test.

## ♦ RODNEY, CAESAR AUGUSTUS

Caesar Augustus Rodney served as U.S. attorney general from 1807 to 1811. His term as attorney general was unusual in that he served in both the Jefferson and Madison administrations. A member of a prominent Delaware family, Rodney held many positions in state government as well as in the federal government.

Rodney was born on January 4, 1772, in Dover, Delaware. His father was Thomas Rodney,

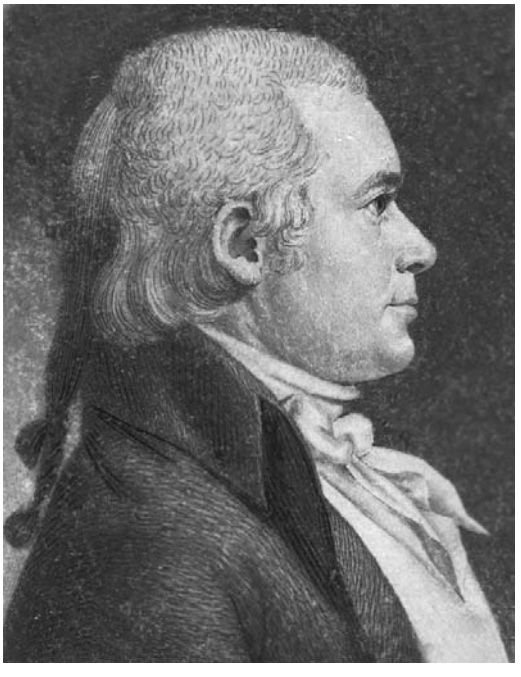

*C. A. Rodney.*
LIBRARY OF CONGRESS

an attorney, politician, and member of the Delaware Supreme Court. Rodney was named after his uncle, who was a delegate to the CONTINENTAL CONGRESS, president (governor) of Delaware, and a key signer of the Declaration of Independence.

Rodney graduated from the University of Pennsylvania in 1789. He then studied law under Joseph B. McKean in Philadelphia and was admitted to the Delaware bar in 1793. He practiced law in Wilmington and New Castle for the next few years.

Rodney, like his father and uncle, was attracted to politics. He was elected to the Delaware House of Representatives in 1796. He served in the U.S. House of Representatives from 1803 to 1805. He was a staunch supporter of President THOMAS JEFFERSON and sided with the Republicans in their political battles with the FEDERALIST PARTY. Rodney served as one of the House managers in the IMPEACHMENT trials of Judge John J. Pickering of the U.S. District Court for New Hampshire and Associate Justice SAMUEL CHASE, the only Supreme Court justice ever tried on a bill of impeachment. Both judges were Federalists and the impeachment trials were politically motivated. Pickering was found guilty, but Chase was acquitted when moderate Republicans abandoned their party on the issue of political rather than criminal impeachments.

Jefferson appointed Rodney attorney general on January 20, 1807, midway through his second term. The last two years of the Jefferson administration were relatively tranquil in the domestic sphere. President JAMES MADISON, who was a close friend and political ally of Jefferson, took office in 1809 and asked Rodney to continue in his post. Rodney resigned his position on December 5, 1811.

During the WAR OF 1812, Rodney commanded a company of volunteers in defense of the city of Baltimore. He returned to the U.S. House of Representatives in 1821 and was elected to the U.S. Senate in 1822. He resigned from the Senate in 1823 to accept an appointment as U.S. minister to the Argentine Republic. He died in Buenos Aires on June 10, 1824.

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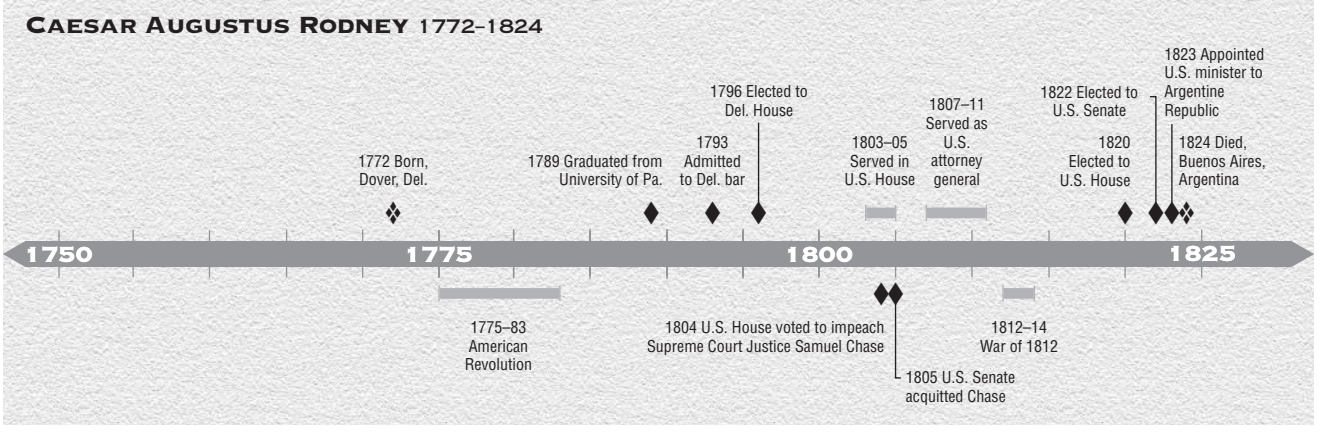

## ROE

*A fictitious surname used for an unknown or anonymous person or for a hypothetical person in an illustration.*

A lawsuit is generally named for the persons who are parties to it. When the name of a party is unknown, the court clerk may direct that the person be called a fictitious name in the papers of the lawsuit. This also may be done to hide the identity of a person who would needlessly suffer if his name were known—for example, the name of a parent who is giving up a child for ADOPTION or the name of a juvenile charged with a crime.

Frequently used fictitious party names include Richard Roe, Mary Roe, and JOHN DOE.

## ROE V. WADE

*Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), was a landmark decision by the U.S. Supreme Court that declared a pregnant woman is entitled to have an ABORTION until the end of the first trimester of pregnancy without any interference by the state.

In a 7–2 decision on January 22, 1973, the Supreme Court struck down an 1857 Texas statute that made abortion illegal except where the life of the mother was in danger. The Court's opinion, as written by Justice HARRY A. BLACKMUN, set forth guidelines for the drafting of future state legislation on the issue. In a long and detailed opinion, the Court specified the points during a woman's pregnancy when the interests of the state in the health of the mother and of the fetus emerge. *Roe* established the parameters of the abortion debate for decades to come.

The case involved an unmarried pregnant woman who was at the time identified only as Jane Roe in order to maintain her anonymity but who has since publicly identified herself as Norma McCorvey. McCorvey, a resident of Texas, wanted to have an abortion, but the existing state law prevented her from doing so. She filed a lawsuit in federal district court on behalf of herself and all other pregnant women. The suit sought to have the Texas abortion law declared unconstitutional as an invasion of her right to privacy as guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. She also sought to have an INJUNCTION, or court order, issued against the statute's enforcement so that she might go forward with the abortion. A physician, James Hubert Hallford, who was being prosecuted under the statute for two abortions he had performed, also filed suit against the law, as did a childless couple, the Does (Mary Doe and JOHN DOE). A three-judge district court combined the cases of McCorvey and Hallford and dismissed the suit brought by the Does on the grounds that neither of them had violated the law and Mary Doe was not pregnant.

*Norma McCorvey, known as Jane Roe in the abortion case of* Roe v. Wade, *withdrew her support from pro-choice groups and is now a pro-life activist.*

AP/WIDE WORLD PHOTOS

The district court agreed with McCorvey that the law was unconstitutionally vague and violated her right to privacy under the Ninth Amendment—which allows for the existence of rights, like that of privacy, not explicitly named in the Constitution's Bill of Rights—and the FOURTEENTH AMENDMENT. It refused, however to grant the injunction allowing her to go ahead with the abortion. McCorvey appealed the denial of the injunction to the U.S. Supreme Court. The Supreme Court agreed to hear the case along with another, *Doe v. Bolton,* 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), relating to a 1968 Georgia abortion statute. The Court dismissed Hallford's case because of the pending prosecutions against him. Hallford made no allegation of any substantial and immediate threat to any federal protected right that could not be asserted in his defense against the state prosecution. Nor did he allege harassment or bad-faith prosecution by the state. Hallford's case fell clearly within the ambit of the rule announced in prior Supreme Court cases

# Norma McCorvey: The Real Jane Roe

In a 1984 television interview, Norma McCorvey revealed that she is Jane Roe, the plaintiff in the most famous **ABORTION** case in U.S. history, *Roe v. Wade.* In 1994, she published an autobiography, *I Am Roe: My Life, Roe v. Wade, and Freedom of Choice,* that puts a human face on the story of Roe. In her book, McCorvey candidly recounts the difficulties of her life, including growing up with an abusive mother, spending time in reform school as an adolescent, struggling with addictions to drugs and alcohol, and coming out as a lesbian.

McCorvey was born Norma Leah Nelson on September 22, 1947, in the bayou country of Lettesworth, Louisiana. Half Cajun and part Native American, she eventually moved with her poor, working-class family to Dallas, where she has since lived most of her life. After an unsuccessful marriage to an abusive husband, she divorced and gave up a daughter to relatives. Wrestling with drug and alcohol addictions amid the counterculture swirl of the 1960s, she later gave up two more children to **ADOPTION**, including the child she carried when she brought *Roe* to court.

In September 1969, while working as a carnival freak show barker, McCorvey learned that she was pregnant for the third time and returned to Dallas. Out of work, severely depressed, with no money, she decided to seek an abortion. After being told that abortion was legal in cases of rape or **INCEST**, friends advised her to lie and say that she had been raped. However, since no police report of the fictitious rape existed, the ruse did not work. She then went to an illegal abortion clinic but found that it had been closed by the police; all that was left was an abandoned building where "dirty instruments were scattered around the room, and there was dried blood on the floor."

Eventually, McCorvey was referred to **SARAH WEDDINGTON** and Linda Coffee, young attorneys who were looking for a plaintiff to challenge the Texas abortion law. Weddington herself had been forced to go to Mexico in order to obtain an abortion during the 1960s. McCorvey agreed to participate in a lawsuit against Henry Wade, the Dallas district attorney. Although she still hoped to finish the suit in time to have an abortion, McCorvey told her attorneys, "Let's do it for other women." McCorvey chose to remain anonymous for several reasons: she feared publicity would hurt her five-year-old daughter, her parents were against abortion, and she had lied about being raped. She did not participate in court hearings in order to maintain her anonymity.

On March 3, 1970, when *Roe* was filed in court, McCorvey was six months pregnant. In June, at twenty-three years of age, she gave birth, and her child went up for adoption. On January 22, 1973, over two years too late to alter the course of her pregnancy, McCorvey learned that she had won her case: the Supreme Court had ruled that the Texas abortion law was unconstitutional.

In 1989, McCorvey decided to ally herself publicly with the abortion rights movement. Shortly before she participated in a large pro-choice rally in Washington, D.C., someone fired gunshots at her house and car, in one of many incidents of harassment she has had to endure since making her identity known. Frightened but undaunted, she joined the April 9 rally and made a speech on Capitol Hill before hundreds of thousands of people. McCorvey worked for a time at a family planning clinic and traveled around the United States giving speeches promoting the reproductive rights of women.

In August 1995, McCorvey announced that she had switched sides on the abortion debate. "I'm pro-life," McCorvey stated. "I think I have always been pro-life, I just didn't know it." McCorvey's reversal was attributed to her new friendship with the Reverend Philip ("Flip") Benham, national director of the militant antiabortion group Operation Rescue. The group had moved its national headquarters into an office next to the clinic where McCorvey worked. After being baptized by Benham, McCorvey declared that she would work on behalf of Operation Rescue.

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that a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the state is prosecuting him or her (*Samuels v. Mackell,* 401 U.S. 66, 91 S. Ct. 764, 27 L. Ed. 2d 688 [1971]; *Younger v. Harris,* 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 [1971]; *Boyle v. Landry,* 401 U.S. 77, 91 S. Ct. 758, 27 L. Ed. 2d 696 [1971]).

Justices HUGO BLACK and JOHN M. HARLAN submitted their resignations in September 1971, shortly before the beginning of the term in which the Supreme Court was scheduled to hear the arguments on the abortion cases. The case was first heard in December 1971 by seven justices, though President RICHARD NIXON had previously announced the nominations of two new justices, LEWIS F. POWELL JR. and WILLIAM H. REHNQUIST.

Powell was confirmed as an associate justice by the Senate on December 7, 1971, and Rehnquist was confirmed on December 15. Both were sworn in as associate justices on January 7, 1971, about a month after the Court had originally heard the arguments in *Roe.* Chief Justice WARREN E. BURGER chose Justice Blackmun—who had served for many years as legal counsel to the Mayo Clinic, in Rochester, Minnesota—to write the Court's original opinion, which Blackmun completed in May 1972. Blackmun's opinion would have struck down the Texas law on the grounds of vagueness, and the result of the opinion would have been that the majority of abortion statutes in the United States would have been unconstitutionally vague as well, though the Court would not have considered whether the right to an abortion was a fundamental right. However, Blackmun also recommended that the Court reconsider the case with all nine justices.

Instead of issuing Blackmun's original opinion, the Court decided to rehear the case during the following term. The Court reheard the case beginning October 11, 1972. After the rehearing, the Court, with Blackmun again writing for the majority, found the Texas abortion law to be unconstitutional. It declared that such laws "violate the DUE PROCESS CLAUSE, which protects against STATE ACTION the right to privacy, including [a] woman's qualified right to terminate her pregnancy." Rehnquist, a politically conservative justice, wrote a dissenting opinion.

In its opinion, the Court ruled that the right to terminate a pregnancy is part of a woman's right to privacy. At the same time, however, it declared that "[t]his right is not unqualified and must be considered against important state interests in regulation." The state, the Court argued, "has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life," interests that change in importance as the pregnancy progresses. In the first trimester, the Court said, the state has no interest in regulating the right of a woman to obtain an abortion. In making this decision, the Court pointed to evidence showing that the health of the mother is not endangered by an abortion during the first 12 weeks of pregnancy. According to that evidence, women are less likely to die from complications of an abortion conducted in the first trimester than from carrying their pregnancy to term. The Court also found that the state may require that all abortions be performed only by licensed physicians under medically safe conditions.

The Court found that the state's interest in regulating abortion and protecting a pregnant woman's health emerges in the second trimester. "[I]n promoting its interest in the health of the mother," the Court declared, "the state may regulate the abortion procedure in ways that are reasonably related to maternal health." It may, for example, impose requirements regarding the qualifications and licensing of those performing abortions; it may also regulate where abortions can be performed. Beyond these rules, the woman, in consultation with her physician, is free to decide whether to end her pregnancy.

In the third trimester, the interest of the state in "the potentiality of human life"—that is, the life of the fetus before birth—makes it possible to regulate and even prohibit abortions except when necessary to save the life or health of the mother. By this period, the fetus is determined to be viable—that is, capable of living outside the womb—and therefore entitled to protection by the state.

The Court did not accept arguments that the fetus be regarded as a person within the meaning of the Due Process Clause of the Fourteenth Amendment, which declares that no state shall "deprive any person of life, liberty, or property, without due process of law" (§ 1). "There is no medical or scientific proof that life is present from conception," wrote the Court.

> [W]e need not resolve the difficult question of when life begins, when those trained in the respective fields of medicine, philosophy and theology are unable to arrive at any consensus. The judiciary at this point in the

**U.S. Abortion Patients, by Age and Marital Status, in 2000[a]**

Age Group

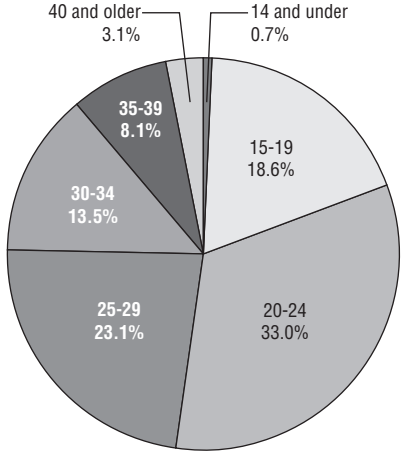


Marital Status

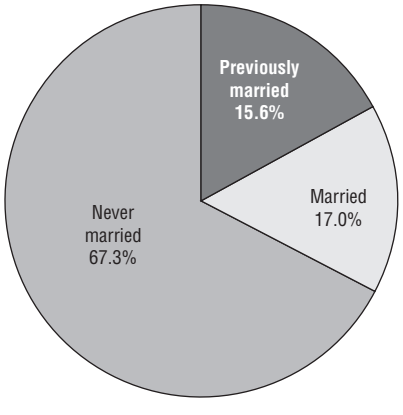


[a]Numbers may not add up to 100 due to rounding.

SOURCE: Alan Guttmacher Institute, *Patterns of the Socioeconomic Characteristics of Women Obtaining Abortions in 2000–2001*.

> development of man's knowledge is not in a position to speculate as to the answer.

As author of the Court's opinion, Justice Blackmun made it clear that abortion was an extraordinarily difficult issue:

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.
>
> In addition, population growth, POLLUTION, poverty, and racial overtones tend to complicate and not to simplify the problem.
>
> Our task, of course, is to resolve the issue by constitutional measurement free of emotion and predilection.

Although the opinion went into the "medical and medical-legal" history of the issue and quoted medical authorities frequently, the Court chose to decide the case on constitutional rather than medical or philosophical grounds. In this case, the crucial constitutional consideration was the right to privacy, which some would argue is as old as the Constitution. The most important precedent for the *Roe* decision on this issue was the 1965 Supreme Court case GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510, which clearly set forth a constitutional right to privacy—in this instance, a married couple's right to privacy when deciding whether or not to use contraceptives. *Roe* was in fact part of a gradual expansion of the right to privacy during the 1960s and 1970s, to include not only a right to freedom from physical SEARCHES AND SEIZURES, for example, but also a right to make individual decisions free of coercion, whether physical or psychological, especially in matters regarding the family and REPRODUCTION.

In his dissent in *Roe,* Justice Rehnquist differed with the majority on a number of points. For one thing, McCorvey had given birth in 1970 and had given her child up for ADOPTION. He argued that because McCorvey was no longer in the first term of her pregnancy, indeed was no longer pregnant, when her case came before the Supreme Court, the case had become hypothetical rather than actual and therefore outside the jurisdiction of the Court. Rehnquist also argued that the regulation of abortion should be left to the states and that the right of privacy had nothing to do with the case. "I have difficulty in concluding, as the Court does, that the right of 'privacy' is involved in this case," he wrote. "The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the

intent of the drafters of the Fourteenth Amendment." Moreover, in Rehnquist's view, the Texas abortion law met the test of having "a rational relation to a valid state objective." Rehnquist's fellow dissenter in *Roe,* Justice **BYRON R. WHITE**, called the decisions in *Doe* and *Roe* "an example of raw judicial power" and "an improvident and extravagant exercise of the power of judicial review" (*Doe,* 410 U.S. 179 at 221, 93 S. Ct. 762).

The *Roe* decision has largely been perceived as a victory for the abortion reform and women's rights movements and a defeat for antiabortion forces, but in many ways it was a compromise between the two sides. While antiabortion forces were unhappy with the establishment of a right to abortion for women in the first trimester of pregnancy, pro-abortion groups were displeased with the limits on abortion allowed in the last two trimesters of pregnancy. The Court also compromised in its decision as to when life begins and who is to be defined as a person with full rights under the Constitution. It did not agree with the pro-abortion movement, which declared that life does not begin until birth, or with the antiabortion movement, which maintained that life begins at conception. Instead, it chose to define the rights of the fetus as emerging when it reaches the stage of viability, when it can survive independently outside the womb. In making this decision, some have argued, the Court made personhood subject to change, particularly as science has moved the time of viability further back.

Feminists and women's rights advocates saw *Roe* as a vindication of women's reproductive rights and a step toward greater equality between the sexes. Such equality, they argued, can happen only when women have the ability to control reproduction. Others, opposed to the decision in *Roe,* believed that the Supreme Court had overstepped its bounds by effectively making new social policy, a task they felt was better left to elected members of state legislatures. Still others felt that the Court had violated the sanctity of human life by permitting abortion. In any case, *Roe* has been a far-reaching decision, affecting many spheres of U.S. life, including medicine, religion, and the family.

In the decades following *Roe,* antiabortion groups mounted continual campaigns to repeal the decision. Despite these challenges, the Supreme Court repeatedly supported the essential elements of that decision, particularly as regards the right to privacy.

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## ROGATORY LETTERS

*A commission from one judge to another judge requesting the latter to examine a witness in his or her court, with the testimony to be provided to the first judge.*

Rogatory letters can be sent to a court in a sister state or to a court or judge in a foreign country (usually they are sent through diplomatic channels). Granting the request is a matter of comity—courtesy and respect—between courts.

## ♦ ROGERS, WILLIAM PIERCE

William Pierce Rogers served as U.S. attorney general from 1957 to 1961. Rogers, who later would serve as **SECRETARY OF STATE** in the Nixon administration, distinguished himself as attorney general by vigorously enforcing **CIVIL RIGHTS** laws and seeking ways of ending racially segregated public schools.

Rogers was born on June 23, 1913, in Norfolk, New York. He graduated from Colgate University in 1934 and received his law degree from Cornell Law School in 1937. He was admitted to the New York bar in 1937 and entered private practice. Rogers was assistant district attorney

for New York County from 1938 until 1942, when he joined the U.S. Navy, serving as a lieutenant commander during **WORLD WAR II**. In 1946, after the war, he returned to his district attorney position.

Rogers's career shifted from state to federal government in the late 1940s. In 1947 and 1948, he was chief counsel of the Senate War Investigating Committee, becoming chief counsel of the Senate Permanent Subcommittee on Investigations in 1949.

In 1950, Rogers returned to private practice in New York. With the election of President **DWIGHT D. EISENHOWER**, Rogers was soon back in Washington, becoming deputy attorney general in 1953. He assisted Attorney General **HERBERT BROWNELL** in the administration of the **JUSTICE DEPARTMENT** and became a key figure in the emerging debate over civil rights. In the wake of **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), which prohibited state-imposed racial **SEGREGATION** in public schools, many southern communities pledged to defy or evade the U.S. Supreme Court decision. Some school boards closed the schools and encouraged attendance at white-only private schools, while others refused to integrate. Rogers was an advocate for federal leadership to end segregation and to promote **INTEGRATION**. He played a major role in the writing and enactment of the **CIVIL RIGHTS ACT** of 1957, 42 U.S.C.A. § 1975 et seq., the first federal civil rights legislation since the 1870s.

"THERE CAN BE NO LASTING PEACE WITHOUT A JUST SETTLEMENT OF THE PROBLEMS OF T[HE] PALESTINIANS . . . [WHICH] MUST TAKE INTO ACCOUNT THE DESIRES AND ASPIRATIONS OF [BOTH] THE REFUGEES AND THE LEGITIMATE CONCERNS OF THE GOVERNMENTS IN THE AREA."
—WILLIAM ROGERS

In November 1957, President Dwight D. Eisenhower appointed Rogers to be attorney general. Rogers continued to enforce civil rights laws and to promote a vision of an integrated society. During his tenure, he also prosecuted several high-level Justice Department officials for corruption. Rogers remained attorney general until the end of the Eisenhower administration in January 1961.

During the 1960s, Rogers resumed his law practice. In 1969, President **RICHARD M. NIXON** appointed Rogers to be secretary of state, a position that he held for the president's entire first term. Rogers played a diminished role in foreign policy, however, because Nixon and National Security Adviser **HENRY KISSINGER** assumed most of the responsibility for charting relations with other nations. Rogers's most notable accomplishment as secretary of state was in negotiating a truce between Egypt and Israel along the Suez Canal in 1970. He loyally defended the administration's **VIETNAM WAR** policies but left all major policy decisions to Kissinger.

Rogers returned to private practice in 1973. In 1986, he was asked to head a presidential commission to investigate the explosion of the *Space Shuttle Challenger*. The commission issued a report that was critical of the performance of the National Aeronautics and Space Administration.

Rogers continued to practice law as a senior partner for a number of years with the **INTERNATIONAL LAW** firm of Rogers & Wells. Rogers died January 2, 2001, in Bethesda, Maryland.

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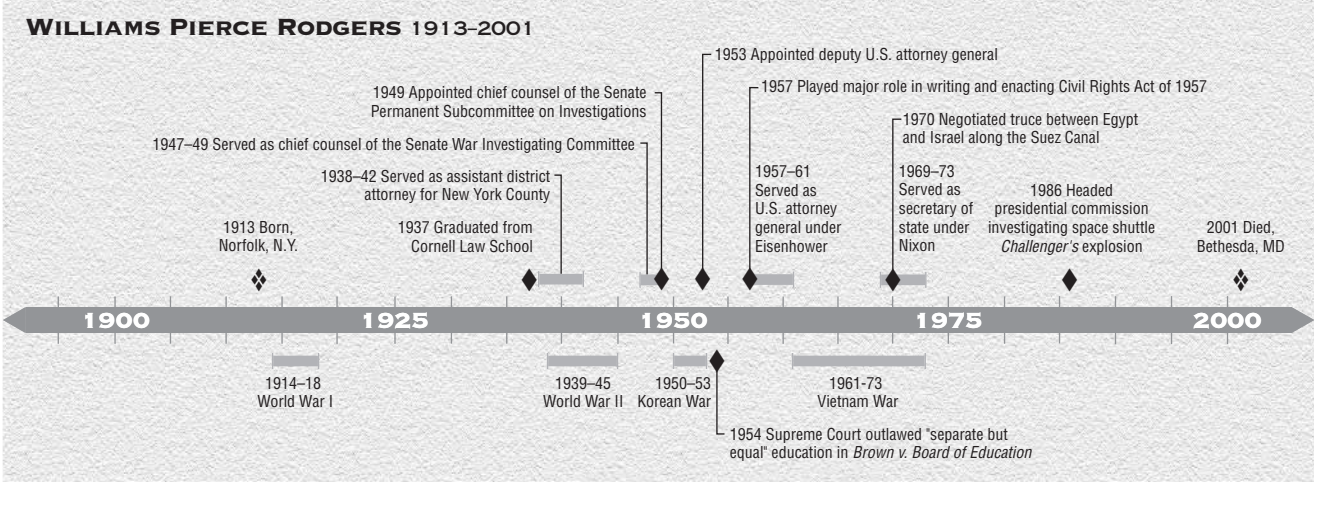

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## ROLL

*To commit a* ROBBERY *by force. A record of the proceedings of a court or public office.*

In some states, a *judgment roll* is required to be filed by the clerk of the court when he or she enters judgment. It normally contains the summons, pleadings, admissions, and each judgment and order involving the merits of the case or affecting the final judgment. In the federal courts and most state courts, judgments are recorded in the civil docket or criminal docket.

In old English practice, a judgment roll was a roll of parchment containing the entries of the proceedings in an action at law including the entry of judgment. It was filed in the treasury of the court.

A *tax roll* is a list of the persons and property subject to the payment of a particular tax, with the amounts due; it is compiled and verified in proper form to enable the collecting officers to enforce the tax.

## ROMAN LAW

Between 753 B.C. and A.D. 1453, the legal principles, procedures, and institutions of Roman law dominated Western, and parts of Eastern, civilization. The legal systems of western Europe, with the exception of Great Britain, are based on Roman law and are called civil-law systems. Even the common-law tradition found in the English-speaking world has been influenced by it. In the United States, the COMMON LAW has been paramount, but Roman law has influenced the law of the state of Louisiana, a former French territory that adopted a French civil-law code.

Roman law began as an attempt to codify a set of legal principles for all citizens. In 450 B.C. the Twelve Tables were erected in the Roman Forum. Set forth in tablets of wood or bronze, the law was put on public display, where it could be invoked by persons seeking remedies for their problems. Though the texts of the tablets have not survived, historians believe they dealt with legal procedures, TORTS, and FAMILY LAW issues.

From 753 to 31 B.C., the Roman republic developed the *jus civile,* or CIVIL LAW. This law was based on both custom and legislation and applied only to Roman citizens. By the third century B.C., the Romans developed the *jus gentium,* rules of INTERNATIONAL LAW that were applied to interactions between Romans and foreigners. Over time the *jus gentium* became a massive compendium of law produced by magistrates and governors.

Romans divided the law into *jus scriptum,* written law, and *jus non scriptum,* unwritten law. The unwritten law was based on custom and usage, while the written law came from legislation and many types of written sources, including edicts and proclamations issued by magistrates, resolutions of the Roman Senate, laws issued by the emperor, and legal disquisitions of prominent lawyers. Roman law concerned itself with every type of legal issue, including contracts, inheritance of property, family law, business organizations, and criminal acts.

Roman law steadily accumulated during the course of the empire, and over time it became contradictory and confusing. In the early sixth century A.D., the Byzantine emperor JUSTINIAN I, appointed a commission to examine the body of law and determine what should be kept and what should be discarded. From this effort came the *Corpus Juris Civilis,* a CODIFICATION of Roman law that became the chief lawbook of what remained of the Roman Empire.

The decline of the Roman Empire also led to the diminution of interest in Roman law in western Europe. The *Corpus* was unknown to western scholars for centuries. During the twelfth century, however, Roman law studies revived in western Europe. In the late eleventh century, a manuscript containing part of the *Corpus* was discovered in Pisa, Italy. The remainder of the compilation was soon recovered, and schools where Roman law could be studied were established in Bologna, Italy, and then elsewhere in Europe. By the twelfth century, commentaries on the *Corpus Juris Civilis* appeared, and in time men trained in Roman law found posts in secular and ecclesiastical bureaucracies throughout Europe.

As a result, the legal systems of the Catholic Church and of almost every country in Europe were influenced by Roman law. Around the year 1140, the scholar Gratian prepared the *Concordance of Discordant Canons,* or *Decretum.* The

*Decretum* was the largest and best-organized compendium of canon (church) law up to that time. Gratian used the *Corpus Juris Civilis* as his model, and later canonists studying the *Decretum* used the same methods that Roman lawyers applied to the *Corpus Juris Civilis.* Many scholars became masters of both Roman and CANON LAW.

Among the nations of western Europe, England, which had already established a viable common-law tradition and a system of royal courts by the time that Roman law became accessible, felt the impact of the revival of Roman law the least. Nevertheless, ENGLISH LAW drew upon Roman ADMIRALTY LAW, and the crimes of forgery and LIBEL were based on Roman models. English ecclesiastical courts applied canon law, which was based on Roman law, and the universities of Oxford and Cambridge taught canon and Roman law. Scholars have noted the similarities between the Roman and English actions of TRESPASS, and the equitable method of INJUNCTION may have been derived from canon law. Much of western European COMMERCIAL LAW, which contained Roman law, became part of English law without much change.

The legal systems of most continental European nations owe their basic structures and categories to Roman law. Scholars point to several reasons for this "reception" of Roman law. In some areas such as southern France where remnants of Roman law had survived the collapse of the Roman Empire, the *Corpus Juris Civilis* helped to explain the institutions that were already in existence. More important in ensuring the reception of Roman law were the political principles that it contained. Law that had been produced in a centralized state under a sovereign emperor could be used to buttress the arguments of the European rulers as they struggled to assert their sovereignty over the feudal nobility.

At the same time that many of these rulers were consolidating their power, they were also expanding royal administration. This created new positions in government that often were filled by men with training in Roman law. Such men compiled collections of unwritten customs, drafted statutes, and presided over the courts, all of which provided opportunities for the penetration of Roman law.

Roman law did not displace local customs. Instead, its influence was subtle and selective. A compiler of unwritten German customs might arrange the collection according to Roman principles of organization. A royal judge confronted with an issue on which customs of different regions in the kingdom disagreed might turn to Roman law, the only law in many cases that was common to the entire kingdom. Similarly, Roman law could be used when local customs offered no solutions. For example, the Roman law of contracts was particularly influential because European customary law had developed in an agrarian economy and was often inadequate for an economy in which commerce played an increasingly larger role.

After 1600 the reception of Roman law slowed in most countries but did not entirely disappear. In nineteenth-century Europe, the *Corpus Juris Civilis* provided inspiration for several codifications of law, notably the French Code Napoléon of 1804, the Austrian code of 1811, the German code of 1889, and the Swiss codes of 1889 and 1907. Through these codes, elements of Roman law spread beyond Europe. The Code Napoléon served as a model for codes in Louisiana, Québec, Canada, and most of the countries of Latin America. German law influenced Hungarian, Brazilian, Japanese, and Greek law, and Turkey borrowed from Swiss law. In addition, the law of both Scotland and the Republic of South Africa derives from Roman law.

Commentators, while noting the differences between common law and civil law, which is based on Roman law, also point out that these differences can be overemphasized. Common-law countries, like the United States, enact statutes and even comprehensive codes, such as the UNIFORM COMMERCIAL CODE, while civil-law countries have laws that have been developed by the courts and not enacted through legislation. Roman law itself contained these conflicting impulses of codification and judicial interpretation.

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## ROMER V. EVANS

*Romer v. Evans,* 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996), is a landmark and controversial decision, in which the U.S. Supreme Court declared unconstitutional an amendment to the Colorado state constitution that prohibited state and local governments from enacting any law, regulation, or policy that would, in effect, protect the CIVIL RIGHTS of gays, lesbians and bisexuals.

The amendment at issue in *Romer v. Evans,* known as Amendment 2, was placed on the November 1992 ballot following a petition drive. The amendment provided in part that neither the state nor any of its political subdivisions "shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination."

The amendment was immediately challenged in state court by eight individuals and the cities of Denver, Boulder, and Aspen, which had gay rights ordinances in effect. They sued Governor Roy Romer, Attorney General Gale Norton, and the State of Colorado. The plaintiffs argued that the amendment violated their FIRST AMENDMENT right to free expression and their FOURTEENTH AMENDMENT right to EQUAL PROTECTION of the laws. They obtained a permanent INJUNCTION in state court that prevented the amendment from going into effect.

In 1994 the Colorado Supreme Court affirmed the trial court (*Evans v. Romer,* 882 P.2d. 1335). The court applied the STRICT SCRUTINY standard in analyzing the amendment. This standard, which is the most exacting under the Equal Protection Clause, is reserved for laws or amendments that discriminate against members of traditionally suspect classes (race, alien status, national ancestry, and ethnic origin). Laws will be upheld under strict scrutiny if they are supported by a compelling state interest and are narrowly drawn to achieve that interest in the least restrictive manner possible.

Reviewing a series of U.S. Supreme Court decisions involving voter registration, legislative APPORTIONMENT, and attempts to limit the ability of certain groups to have legislation implemented through the normal political processes, the court found a common thread. The Equal Protection Clause guarantees the fundamental right to participate equally in the political process. Therefore, any attempt to infringe on that right "must be subject to strict scrutiny and can be held constitutionally valid only if supported by a compelling state interest." Where the effect of a law is to exclude a class of voters, strict scrutiny must be used.

The Colorado Supreme Court found that the ultimate result of Amendment 2 was to prohibit any legislation dealing with sexual orientation unless the state constitution was first amended to permit such measures. Unlike all other citizens, who could seek legislative redress, gays and lesbians would have to first amend the state constitution by a majority vote. Thus, the amendment singled out one form of discrimination and prevented one class of persons from using normal political processes to overturn the discrimination. This discrimination, coupled with the state's failure to offer any compelling state interests that would justify the enactment of Amendment 2, led the court to invalidate the amendment.

On appeal to the U.S. Supreme Court, Colorado argued that the amendment put gays and lesbians in the same position as all other persons and merely denied homosexuals special rights. Justice ANTHONY KENNEDY, in his majority opinion, rejected this interpretation as implausible. Relying on the Colorado Supreme Court's reading of the amendment, Kennedy quoted a passage that noted that Amendment 2 would have forced the "repeal of existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation." The enforcement of the amendment would lead to sweeping and comprehensive changes that, in Kennedy's view, put homosexuals "in a solitary class with respect to transactions and relations in both the private and governmental spheres."

These modifications would produce far-reaching changes in the legal status of gays and lesbians and the structure and operation of modern anti-discrimination laws. Kennedy pointed out that the Boulder and Denver anti-discrimination ordinances prohibited discrimination on account of sexual orientation in places of public accommodation, which include hotels, restaurants, hospitals, dental clinics, theaters, banks, common carriers, travel and insurance agencies, and shops and stores that deal with goods and services. In addition, Amendment 2 would

remove anti-discrimination protections for all transactions involving housing, the sale of real estate, insurance, health and welfare services, private education, and employment.

Based on this analysis of the potential reach of Amendment 2, Kennedy concluded that the amendment went well beyond merely depriving gays and lesbians of special rights. The amendment imposed a "special disability upon those persons alone." The only way homosexuals could obtain civil rights protection under Colorado law would be to convince enough citizens to vote to amend the state constitution. The kinds of protections that Amendment 2 would take away were those "against exclusion from an almost limitless number of transactions and endeavors that constitute civic life in a free society."

The key question for the Court was whether the amendment violated the Fourteenth Amendment's Equal Protection Clause, which promises that no person shall be denied the equal protection of the laws. In equal protection cases, the Court will uphold a legislative classification if it neither burdens a fundamental right nor targets a suspect class, and if it bears a rational relation to some legitimate end. In *Romer* this type of inquiry broke down because the amendment was both too narrow and too broad. It imposed "a broad and undifferentiated disability on a single named group," and the "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."

Justice Kennedy viewed the disqualification of gays and lesbians from the right to obtain specific protection from the law as unprecedented and a denial of equal protection "in the most literal sense." Reflecting on the constitutional tradition, he concluded that the idea of the RULE OF LAW and the guarantee of equal protection were based on "the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."

The Court drew from Amendment 2 "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." The desire to harm a politically unpopular group can never be a legitimate government interest. Colorado's primary justification for the amendment was respect for other citizens' FREEDOM OF ASSOCIATION, especially landlords or employers who have personal or religious objections to homosexuality. Kennedy concluded that the amendment's breadth was too far removed from this justification. Amendment 2 was a "status-based enactment divorced from any factual context from which we [the Court] could discern a relationship to legitimate interests." In light of the serious deficiencies in the amendment's scope and the failure of the state to articulate a legitimate STATE INTEREST, the Court ruled that Amendment 2 violated the Equal Protection Clause.

Justice ANTONIN SCALIA, in a dissenting opinion joined by Chief Justice WILLIAM REHNQUIST and Justice CLARENCE THOMAS, characterized Amendment 2 as "rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws." He criticized the majority for "imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected." Noting that the U.S. Constitution does not deal with sexual orientation, Scalia concluded that states should be permitted to resolve these kinds of issues through "normal democratic means, including the democratic adoption of provisions in state constitutions."

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CROSS-REFERENCES

Discrimination; Equal Rights; Equal Protection; Gay and Lesbian Rights; Prejudice.

## ROOSEVELT, ANNA ELEANOR

Eleanor Roosevelt, wife of U.S. President FRANKLIN D. ROOSEVELT (FDR), transformed the role of first lady and influenced the course and content of twentieth-century U.S. politics. During FDR's nearly four terms in office (1933–1945), Roosevelt was an acknowledged

political adviser with her own progressive agenda.

Roosevelt was a committed reformer. Born into wealth and privilege, she lent early and conspicuous support to child welfare laws, equal pay and employment legislation, CIVIL RIGHTS, and WOMEN'S RIGHTS. Her ideals helped define FDR's NEW DEAL and modern Democratic liberalism. Although Roosevelt was admired by many, her high political profile was harshly criticized by people who believed she was too opinionated and influential.

After FDR's death in 1945, Roosevelt continued to support social and benevolent causes throughout the United States and the world. Although no longer first lady, she secured her reputation as a tireless activist and humanitarian.

Roosevelt was born on October 11, 1884, in New York City. Her parents, Elliott and Anna Hall Roosevelt, were socially and politically prominent. Her father was the younger brother of U.S. President THEODORE ROOSEVELT.

Roosevelt's childhood was lonely; she had an emotionally detached mother and a loving but alcoholic father. Both parents died by the time Eleanor was ten years old. A serious, timid child, Roosevelt was sent by her grandmother in 1899 to Allenswood, a private girls' school near London. There she overcame her shyness and became an active, well-liked student. When Roosevelt returned to New York, she entered high society. At the same time, she taught at a settlement house in a New York slum.

Roosevelt married FDR, her distant cousin, on March 17, 1905. Her domineering mother-in-law, Sara Roosevelt, disapproved of Roosevelt and put an immediate strain on the marriage. The couple had six children, five of whom survived to adulthood.

Roosevelt was not fulfilled by running a large household and attending social functions. When FDR was elected to the New York State Senate in 1910, she turned her attention to politics. In time, she discovered her talent for political organization and strategy.

FDR became the assistant secretary of the Navy in 1913. After the United States entered WORLD WAR I, Roosevelt found an outlet for her tremendous energy, organizing Red Cross efforts and working in military canteens.

In 1918 Roosevelt discovered that FDR was having an affair with her social secretary Lucy Page Mercer. The marriage survived but became a union based primarily on politics, not love.

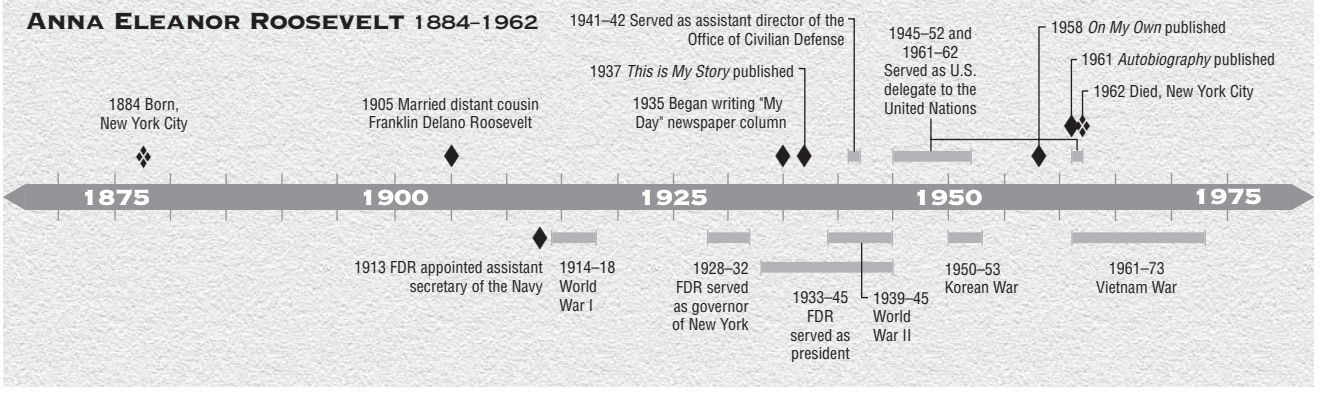

Roosevelt was determined to carve out her own niche in public service and national affairs. She became active in the League of Women Voters (although she had opposed female suffrage at one time) and the Women's TRADE UNION League. She assumed an increasingly active role in Democratic politics. In 1926 Roosevelt opened a furniture company in Hyde Park, New York, to provide jobs for unemployed workers. In 1927 Roosevelt and some colleagues founded the Todhunter School, where she was vice principal and taught government and history.

FDR was the unsuccessful Democratic candidate for vice president in the 1920 U.S. presidential election. In 1921 he contracted poliomyelitis, which left him permanently disabled. Because FDR could no longer walk independently, Roosevelt became his surrogate, filling in for him at meetings, state inspections, and public appearances. Her political skills and confidence grew in her role as FDR's emissary.

"IT IS NOT FAIR TO ASK OF OTHERS WHAT YOU ARE NOT WILLING TO DO YOURSELF."
—ELEANOR ROOSEVELT

FDR was elected governor of New York in 1928. Four years later he became the thirty-second president of the United States, defeating incumbent Republican President HERBERT HOOVER. FDR's mandate was to pull the country out of the Great Depression. His economic recovery plan, popularly known as the New Deal, included sweeping, government-sponsored programs that were supported by Roosevelt.

From the outset Roosevelt was a different kind of first lady. Visible and outspoken, she wrote her own newspaper column, entitled "My Day," from 1935 to 1962. She held regular press conferences with female reporters, and insisted on hard news coverage, not society-page trivia. Roosevelt lectured extensively throughout the United States, donating her fees to charity. Most importantly, she was FDR's legs and eyes, describing to him the actual, on-site progress of his social and economic programs.

Roosevelt wielded considerable influence over the development of the New Deal. She openly supported legislation to create the National Youth Administration, a program that provided jobs for young people. Roosevelt worked hard for measures to improve the lives of children, women, unemployed workers, minority groups, and poor people. She also encouraged the appointment of women to key positions within FDR's administration, such as the appointment of FRANCES PERKINS to secretary of labor.

Roosevelt demonstrated the courage of her convictions. In 1939 she publicly resigned her membership to the elite Daughters of the American Revolution (DAR). The DAR had denied permission to African American singer Marian Anderson to perform in Constitution Hall. Outraged at the group's racism, Roosevelt helped organize an alternate concert for Anderson at the Lincoln Memorial.

Roosevelt served in an official public capacity for a short time. From 1941 to 1942, she was assistant director of the Office of Civilian Defense (OCD). When some of her appointments were criticized, however, Roosevelt stepped down from the position.

The United States' involvement in WORLD WAR II meant increased travel for Roosevelt. As a fact finder and a morale booster, she visited U.S. armed forces throughout the world. After the war Roosevelt supported the resettlement of European Jews in newly established Israel.

FDR died of a cerebral hemorrhage on April 12, 1945. After his death Roosevelt remained in the public eye. She was one of the first U.S. delegates to the UNITED NATIONS, appointed by President HARRY S. TRUMAN in December 1945. She served as chair of the Commission on HUMAN RIGHTS and helped draft the U.N. Declaration of Human Rights.

Roosevelt also remained active in Democratic politics and organized Americans for Democratic Action, a liberal unit within the party. She backed ADLAI STEVENSON in his unsuccessful quest for the U.S. presidency in 1952 and 1956 and was a player in the 1952, 1958, and 1960 Democratic conventions. In 1952, with Republican DWIGHT D. EISENHOWER in the White House, she resigned from the U.N. Democratic President JOHN F. KENNEDY reappointed her to the post in 1961.

Roosevelt published several books, including *This Is My Story* (1937), *This I Remember* (1949), *On My Own* (1958), and *You Learn By Living* (1960).

Roosevelt died in New York City on November 7, 1962.

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## ♦ ROOSEVELT, FRANKLIN DELANO

Franklin Delano Roosevelt served as the thirty-second president of the United States from 1933 to 1945. During his unprecedented four terms in office, Roosevelt established himself as a towering national leader, leading the United States out of the Great Depression through the active involvement of the federal government in the national economy. The federal government grew dramatically in size and power as Congress enacted Roosevelt's NEW DEAL program. As president, Roosevelt was responsible for the creation of SOCIAL SECURITY, federal LABOR LAWS, rural electrification programs, and myriad projects that assisted farmers, business, and labor. During WORLD WAR II Roosevelt's leadership was vital to rallying the spirits of the citizenry and mobilizing a wartime economy. Nevertheless, Roosevelt was a controversial figure. Many economic conservatives believed his programs owed more to state SOCIALISM than to free enterprise.

Roosevelt was born on January 30, 1882, in Hyde Park, New York, the only son of James and Sara Delano Roosevelt. The young Roosevelt was taught to be a gentleman and to exercise Christian stewardship through public service. He graduated from Harvard University in 1904 and in 1905 wed ELEANOR ROOSEVELT, the niece of his fifth cousin, President THEODORE ROOSEVELT. Roosevelt attended Columbia University Law School but left without receiving a degree when he passed the New York bar exam in 1907.

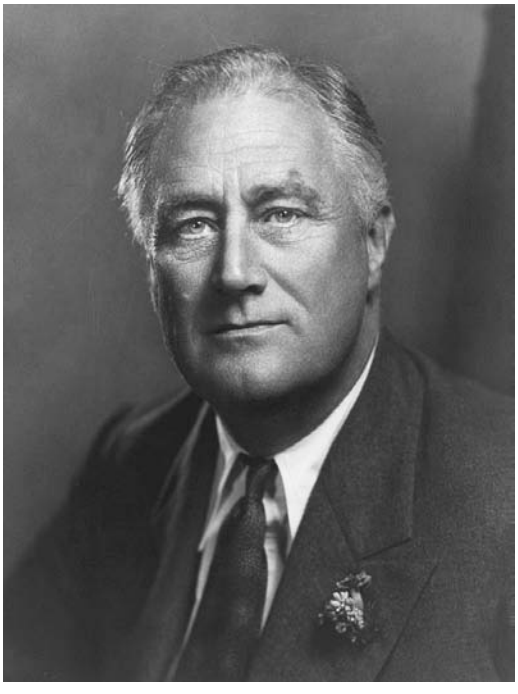

*Franklin Delano Roosevelt.*
LIBRARY OF CONGRESS

In 1910 Roosevelt was elected to the New York Senate as a member of the DEMOCRATIC PARTY. Reelected in 1912, he resigned in 1913 to accept an appointment from President WOODROW WILSON as assistant secretary of the Navy. For the next seven years, Roosevelt proved an effective administrator and an advocate of reform in the U.S. Navy.

Roosevelt was nominated for vice president on the 1920 Democratic party ticket. He waged

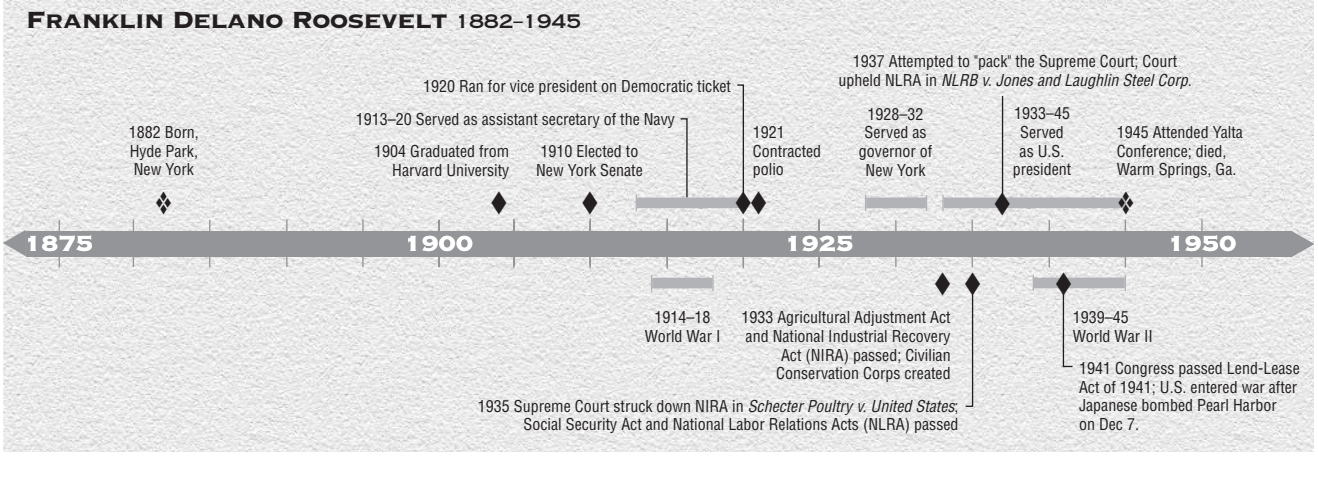

# FDR's Court Packing Plan

A conservative bloc of judges emerged on the U.S Supreme Court during the 1920s. Their conservatism was marked by a restrictive view of the federal government's power to enact a certain class of regulations falling under the heading of "administrative law." Federal **ADMINISTRATIVE LAW** is an area of law comprised of orders, rules, and regulations that are promulgated by **EXECUTIVE BRANCH** agencies that have been delegated quasi-lawmaking power by Congress. Justices **PIERCE BUTLER**, **JAMES MCREYNOLDS**, **GEORGE SUTHERLAND**, and **WILLIS VAN DEVANTER** denied that the federal Constitution gave Congress the power to delegate its lawmaking function, arguing that Article II of the Constitution expressly limited the executive branch to a law enforcement role. By the advent of the 1930s, Butler, McReynolds, Sutherland, and Van Devanter had become known as the "Four Horseman" because they consistently voted to strike down every federal law that involved any congressional delegation of lawmaking power to the executive branch.

The Four Horsemen were usually joined by Justice **OWEN ROBERTS** and Chief Justice **CHARLES HUGHES**, two conservatives of a more moderate and centrist temperament. Pitted against the conservative block was the so-called "liberal wing" of the Court, comprised of Justices **BENJAMIN CARDOZO**, **LOUIS BRANDEIS**, and **HARLAN STONE**. The Court's composition presented a potential problem for Democrat presidential candidate Franklin Delano Roosevelt (FDR), who had promised voters a "New Deal" during the 1932 election. After FDR took the oath of office, it became clear that his **NEW DEAL** entailed the creation of a vast federal regulatory bureaucracy designed to stimulate the U.S. economy and pull it out of the depression.

The potential problem FDR faced transformed into an immediate crisis during 1935, when the Supreme Court issued a series of decisions that struck blows at the heart of the New Deal. First, the Court struck down the Frazier-Lemke Act, a law that provided mortgage relief to farmers. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593 (U.S. 1935). Next the Court upheld a provision of the Federal Trade Commission Act that prohibited the president from replacing a commissioner except for cause, thereby thwarting FDR's attempt to bring the agencies in line with his regulatory policies. *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (U.S. 1935). Finally, the Court invalidated the National Industrial Recover Act, which authorized the president to prescribe codes of fair competition to bring about industrial recovery and rehabilitation. The Court said that Congress could not delegate such sweeping lawmaking powers to the executive branch without violating **SEPARATION-OF-POWERS** principles in the federal constitution. *A.L.A. Schechter Poultry Corporation v. United States,* 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (U.S 1935).

FDR postponed making an issue over the Court's decisions during the 1936 presidential campaign. But the Court continued invalidating important New Deal programs, including the Agricultural Adjustment Act and the National Bituminous Coal Act. In some of these cases Chief Justice Hughes sided with the three dissenting liberal justices, leaving Justice Roberts as the swing vote. Emboldened by his landslide victory, FDR unveiled what critics called the "Court Packing Plan."

The plan, which FDR announced on February 5, 1937, would have given the president the power to add one justice for every Supreme Court justice over age 70, up to a total of six. The older justices were not able to handle the increasing workload, FDR explained, so the additional justices would improve the Court's efficiency.

Much of the nation saw through FDR's explanation. Newspaper editors, Republicans, southern and moderate Democrats, leaders of the organized bar, and even the three liberals on the Supreme Court condemned the plan as a blatant effort to politicize the Court. Roosevelt, however, remained committed to the plan and continued pushing Congress to enact it. By April the Supreme Court appeared to have received the president's message.

In **NLRB V. JONES & LAUGHLIN STEEL CORP.**, 301 U.S. 1, 30, 57 S.Ct. 615, 621, 81 L.Ed. 893 (1937), the Supreme Court by a 5–4 vote upheld the constitutionality of the **NATIONAL LABOR RELATIONS BOARD**, a federal regulatory agency that investigates and remedies **UNFAIR LABOR PRACTICES**. Justice Roberts

cast the deciding vote. Thereafter Roberts typically voted to uphold the constitutionality of New Deal legislation that was challenged before the Court. Journalists called Roberts' change of heart "the switch in time that saved nine." Combined with Van Devanter's retirement later that year, which allowed FDR to replace him with a justice more amenable to federal regulatory programs, Roberts' move to the left of the political spectrum doomed the Court Packing Plan, as both Congress and the American people realized that the president had achieved his goal without subverting the Court.

Throughout U.S. history presidents have sought to mold the federal courts in their own political image. On balance presidents have filled the courts with high quality judges possessing strong intellects and fair-minded temperaments. On occasion, however, presidents have also become frustrated with the federal bench, especially the Supreme Court. But never has any president attempted to do what President Roosevelt tried to accomplish through the Court Packing Plan, namely change the rules of the game by which vacancies on the Court are created and filled.

Neither death nor resignation on the Court was giving the president the opportunity to shape the Court in the fashion he desired. By proposing to expand the court to as many as 15 justices, FDR could have wielded influence over the Court's **JURISPRUDENCE** for the next generation or two. But he could also have compromised the independence of the federal judiciary by turning it into an overtly political branch. Article III of the U.S. Constitution gives federal courts the power to interpret and apply the laws passed by Congress and enforced by the executive branch. Federal judges are given life tenure to insulate them from political pressures. FDR tried to alter that equation with the Court Packing Plan. Although the Supreme Court eventually placed its imprimatur of approval on the New Deal, the Court Packing Plan was defeated in what history has deemed a victory for the independence of the federal judiciary.

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a vigorous campaign in support of the presidential nominee, James M. Cox, but the Republican ticket headed by WARREN G. HARDING soundly defeated Cox and Roosevelt. After the election Roosevelt joined a Maryland bonding company and began investing in various business schemes.

Roosevelt's life changed in August 1921, when he was stricken with poliomyelitis while vacationing at Campobello Island, New Brunswick. Initially, Roosevelt was completely paralyzed, but over several years of intense therapy, he made gradual improvement. His legs, however, suffered permanent paralysis. For the rest of his life, he used a wheelchair and could walk only a few steps with the help of leg braces.

Eleanor Roosevelt believed her husband's recovery depended on his reentry into New York politics. She attended meetings, made speeches, and reported back to him on the political events of the day. By 1924 Roosevelt was at the Democratic National Convention nominating Governor Alfred E. Smith of New York for president. Smith, who lost the presidential elections in 1924 and 1928, showed Roosevelt the ways of New York state politics and pushed him to run for governor in 1928. A reluctant Roosevelt won by a narrow margin, but soon was governing as if he had won by a landslide. With the STOCK MARKET crash of October 25, 1929, the United States was thrown into a national economic depression of unprecedented severity. As governor, Roosevelt set up the first state public relief agency and tried to find ways to spark an economic recovery. His landslide reelection in 1930 made him the logical candidate to face the Republican president HERBERT HOOVER in the next presidential election.

Roosevelt was nominated for president on the third ballot of the 1932 Democratic National Convention. During the campaign Roosevelt called for the federal government to take action to revive the economy and end the suffering of the thirteen million unemployed people. Hoover advocated a more limited role for the federal government in the national economy. Roosevelt easily defeated Hoover and brought with him large Democratic majorities in both houses of Congress.

Roosevelt took office on March 4, 1933, at a time when the economy appeared hopeless. In his inaugural address he reassured the nation that "the only thing we have to fear is fear itself." He proposed a New Deal for the people of the United States and promised to use the power of the EXECUTIVE BRANCH to address the economic crisis.

During his first hundred days in office, Roosevelt sent Congress many pieces of legislation that sought to boost economic activity and restore the circulation of money through federally funded work programs. The Civilian Conservation Corps (CCC) provided unemployment relief and an opportunity for national service to young workers, while promoting conservation through reforestation and flood control work. Federal funds were given to state relief agencies for direct relief, and the Reconstruction Finance Company was given the authority to make loans to small and large businesses.

"THE TEST OF OUR PROGRESS IS NOT WHETHER WE ADD MORE TO THE ABUNDANCE OF THOSE WHO HAVE MUCH; IT IS WHETHER WE PROVIDE ENOUGH FOR THOSE WHO HAVE TOO LITTLE."
—FRANKLIN DELANO ROOSEVELT

The centerpieces of Roosevelt's New Deal legislation were the Agricultural Adjustment Act (AAA) of 1933 (7 U.S.C.A. § 601 et seq.) and the NATIONAL INDUSTRIAL RECOVERY ACT (NIRA) of 1933 (48 Stat. 195). The AAA sought to raise farm prices by giving farmers federal subsidies if they reduced their agricultural production.

The NIRA was a comprehensive attempt to manage all phases of U.S. business. It established the NATIONAL RECOVERY ADMINISTRATION (NRA) to administer codes of fair practice within each industry. Under these codes labor and management negotiated minimum wages, maximum hours, and fair-trade practices for each industry. The Roosevelt administration sought to use these codes to stabilize production, raise prices, and protect labor and consumers. By early 1934 there were 557 basic codes and 208 supplementary ones. In 1935, however, the Supreme Court struck down the NIRA in *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570.

In 1935 Roosevelt and the Congress passed the SOCIAL SECURITY ACT (42 U.S.C.A. § 301 et seq.), a fundamental piece of social welfare legislation that provided UNEMPLOYMENT COMPENSATION and pensions for those over the age of sixty-five. More groundbreaking legislation came with the passage of the WAGNER ACT, also known as the National Labor Relations Act (NLRA) of 1935 (29 U.S.C.A. § 151 et seq.), which recognized for the first time the right of workers to organize unions and engage in COLLECTIVE BARGAINING with employers.

Roosevelt handily defeated Republican Alfred M. Landon, the governor of Kansas, in the 1936 presidential election. In his second term, however, Roosevelt met more resistance to his legislative initiatives. Between 1935 and 1937, the Supreme Court struck down as unconstitutional eight New Deal programs that attempted to regulate the national economy. Most of the conservative justices who voted against the New Deal statutes were over the age of seventy. Roosevelt responded by proposing that justices be allowed to retire at age seventy at full pay. Any justice who declined this offer would be forced to have an assistant with full VOTING RIGHTS. The assistant, of course, as a Roosevelt appointee, would be more likely to be sympathetic to the president's political ideals. This plan to "pack" the Court was met with hostility by Democrats and Republicans and rejected as an act of political interference. Despite the rejection of his plan, Roosevelt ultimately prevailed. In 1937 the Supreme Court upheld the Wagner Act in NLRB V. JONES AND LAUGHLIN STEEL CORP., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893, signaling an end to the invalidation of New Deal laws that sought to reshape the national economy. From *Jones* onward the Court permitted the federal government to take a dominant role in matters of commerce.

By 1937 the national economy appeared to be recovering. In the fall of 1937, however, the economy went into a recession, accompanied by a dramatic increase in unemployment. Roosevelt responded by instituting massive government spending, and by June 1938 the economy had stabilized.

During the late 1930s, Roosevelt had also become preoccupied with foreign policy. The rise of ADOLF HITLER and Nazism in Germany, coupled with a militaristic Japanese government that had invaded Manchuria in 1933, created international tensions that Roosevelt realized might come to involve the United States. U.S. foreign policy had traditionally counseled against entanglements with other nations, and the 1930s had seen a resurgence of isolationist thought. Roosevelt, while publicly agreeing with isolationist legislators, quietly moved to enhance U.S. military strength.

With the outbreak of World War II in Europe in August 1939, Roosevelt sought to aid Great Britain and France against Germany and

Italy. The Neutrality Act of 1939 (22 U.S.C.A. § 441), however, prohibited the export of arms to any belligerent. With some difficulty Roosevelt secured the repeal of this provision so that military equipment could be sold to Great Britain and France.

In 1940 Roosevelt took the unprecedented step of seeking a third term. Although there was no constitutional prohibition against a third term, President GEORGE WASHINGTON had established the tradition of serving only two terms. Nevertheless, Roosevelt was concerned about the approach of war and decided a third term was necessary to continue his plans. He defeated the Republican nominee, Wendell L. Willkie, pledging that he would keep the United States out of war. Roosevelt's margin of victory in the popular vote was closer than in 1936, but he still won the ELECTORAL COLLEGE vote easily.

Following his reelection, Roosevelt became more public in his support of the Allies. At his urging, Congress moved further away from neutrality by passing the LEND-LEASE ACT of 1941 (55 Stat. 31). Lend-Lease provided munitions, food, machinery, and services to Great Britain and other Allies without immediate cost.

The United States entered World War II following the Japanese attack on the U.S. naval base at Pearl Harbor, Hawaii, on December 7, 1941. Roosevelt rallied a stunned citizenry and began the mobilization of a wartime economy. In his public speeches and "fireside chats" on the radio, Roosevelt imparted the strong determination that the United States would prevail in the conflict. He met with Winston Churchill, the prime minister of Great Britain, and JOSEPH STALIN, the leader of the Soviet Union, several times during the war to discuss military strategy and to plan power-sharing in the postwar world. Roosevelt, who needed the Soviet Union's cooperation in defeating Germany, sought to minimize conflicts with Stalin over postwar boundaries in Europe.

In 1944 Roosevelt decided to run for a fourth term. Though his health had seriously declined, he wished to remain commander in chief for the remainder of the war. The REPUBLICAN PARTY nominated Governor THOMAS E. DEWEY of New York for president, but again Roosevelt turned back the challenge, winning 432 electoral votes to Dewey's 99.

In February 1945 Roosevelt traveled to Yalta in the Crimea to meet with Churchill and Stalin. Germany was on the edge of defeat, but Japan's defeat did not appear imminent. Stalin accepted Roosevelt and Churchill's offer of territorial concessions in Asia in return for his promise that the Soviet Union would enter the war against Japan once Germany was defeated. At Yalta the leaders reaffirmed earlier agreements and made plans for the establishment of democratic governments in eastern Europe. The Yalta agreements were not clearly written, however, and therefore were open to differing interpretations by the Allies. Within a month after Yalta, Roosevelt sent a sharp message to Stalin concerning Soviet accusations that Great Britain and the United States were trying to rob the Soviets of their legitimate territorial interests.

Early in the war, Roosevelt decided that an effective international organization should be established after the war to replace the LEAGUE OF NATIONS. At Yalta, Roosevelt pressed for the creation of the UNITED NATIONS as a mechanism to preserve world peace. A conference attended by fifty nations was scheduled to begin on April 25, 1945, in San Francisco, California, to draft a United Nations charter. Roosevelt had planned to attend, but his health had steadily declined since the 1944 election.

Instead, Roosevelt went to his retreat in Warm Springs, Georgia, where he had begun his rehabilitation from polio in the 1920s. He died there on April 12, 1945. Vice President HARRY S. TRUMAN succeeded Roosevelt. On May 7 the war in Europe ended with Germany's surrender; four months later, on September 2, Japan also surrendered, ending the war in the Pacific.

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## ❖ ROOSEVELT, THEODORE

Theodore ("Teddy") Roosevelt served as the twenty-sixth president of the United States from 1901 to 1909. A writer, explorer, and soldier, as well as a politician, Roosevelt distinguished himself as president by advocating conservation of natural resources, waging legal battles against

*Theodore "Teddy" Roosevelt.*
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economic monopolies and trusts, and exercising leadership in foreign affairs. An energetic man with a colorful personality, Roosevelt later sought to reclaim the presidency in 1912 as the head of the **PROGRESSIVE PARTY**.

Roosevelt was born on October 27, 1858, in New York City, a descendant of a wealthy and aristocratic family that first settled in New York in the 1600s. A sickly boy, Roosevelt developed a regimen of diet and exercise that transformed him into a vigorous young man. He graduated from Harvard University in 1880 and was elected to the New York State Assembly in 1881.

Roosevelt resigned in 1884, following the death of his wife, and spent two years at his ranch in the Badlands of the Dakota Territory. During this period he developed both his association with the Wild West world of cowboys and his appreciation of the wilderness. He returned to New York City in 1886 and ran unsuccessfully for mayor. From 1889 to 1895, Roosevelt served as a civil service commissioner in Washington, D.C. In 1895 he was appointed as a reform-minded New York City police commissioner. His main occupation, however, was that of writer: he wrote many magazine articles and twelve books between 1880 and 1900.

Roosevelt's rise to national prominence came during the **SPANISH-AMERICAN WAR** of 1898. Anxious to be a part of the forces that would go to Cuba, he organized a group of cowboys and New York aristocrats into a cavalry regiment nicknamed the Rough Riders. As a lieutenant colonel, Roosevelt became a national hero and darling of the national news media when he led his Rough Riders to victory at the Battle of San Juan Hill in July 1898.

The New York **REPUBLICAN PARTY**, under the leadership of Senator Thomas C. Platt, nominated Roosevelt for governor in 1898, in the hope that his popularity could rescue a party plagued by scandal. Roosevelt was easily elected but soon offended party leaders by asserting his political independence. Platt became so frustrated with Roosevelt's reform agenda that he persuaded President **WILLIAM MCKINLEY** to make Roosevelt his vice presidential running mate in 1900. Reluctantly, Roosevelt accepted the nomination. His popularity helped McKinley win a second term. On September 6, 1901, an anarchist named Leon F. Czolgosz shot McKinley when he visited the Pan-American Exposition in Buffalo, New York. Eight days later McKinley died and Roosevelt assumed the presidency.

As president, Roosevelt sought to attack corruption and to promote economic and political reform. He insisted that government should be the arbiter of economic conflicts between capital and labor. He demonstrated his convictions by negotiating a settlement of a strike between coal miners and mine operators in 1902, the first time a president had intervened in a labor dispute. Roosevelt referred to his platform for business and labor as the Square Deal.

Roosevelt won public acclaim for being a "trust buster." By the early twentieth century, a few large companies in key industries, including railroads, oil, and steel, had stifled competition and created monopolies. In one of his first major acts, Roosevelt filed suit to dissolve the Northern Securities Company, a trust controlled by the three major railroads in the Northwest. Using the **SHERMAN ANTI-TRUST ACT OF** 1890 (15 U.S.C.A. § 1 et seq.), the Roosevelt administration successfully broke up Northern Securities; antitrust lawsuits against forty-three other major corporations soon followed.

In 1904 the Republican Party nominated Roosevelt for a second term. He easily defeated the Democratic candidate Alton B. Parker of New York. In his second term Roosevelt helped enact several groundbreaking pieces of federal legislation. Spurred in part by public concern

over the unsanitary food packing methods revealed by Upton Sinclair's 1906 novel *The Jungle,* Roosevelt pressured Congress and the meat packing industry to support the Meat Inspection Act of 1906 (21 U.S.C.A. § 601 et seq.). In 1906 Congress also passed the Pure Food and Drug Act (21 U.S.C.A. § 301 et seq.), which criminalized the misleading and harmful sale of patent medicines that made false claims about their medicinal effects. The act also established the FOOD AND DRUG ADMINISTRATION, putting in place a federal agency dedicated to CONSUMER PROTECTION. Roosevelt also was instrumental in the passage of the Hepburn Act of 1906 (34 Stat. 584), which increased the powers of the INTERSTATE COMMERCE COMMISSION (ICC), allowing the ICC to inspect the business records of railroads.

Roosevelt became the first president to play a major international role in foreign policy. His favorite motto, based on an African proverb, was "speak softly and carry a big stick." The motto epitomized Roosevelt's foreign policy, as he increased the size of the U.S. Navy and sent the fleet around the world in 1908 to demonstrate both U.S. military strength and U.S. involvement in world affairs.

Roosevelt initiated the construction of the Panama Canal in 1902, reduced domestic discord by making an agreement with Japan on limiting the number of Japanese immigrants to the United States, and negotiated the end of the Russo-Japanese War of 1904–1905 at a peace conference held in Portsmouth, Maine. He earned the Nobel Peace Prize in 1906 for mediating the peace agreement.

Perhaps the most innovative aspect of Roosevelt's presidency was his commitment to the conservation of natural resources. He lobbied successfully for funds to convert large portions of federal land into national forests. In seven years 194 million additional acres of federal land were closed to commercial development, five times more than his three predecessors had reserved for conservation purposes. Roosevelt also approved the Newlands Act of 1903 (32 Stat. 388), which called for part of the receipts from the sale of public lands in the western states and territories to be reserved for dams and reclamation projects. The legislation saved much western wildlife from extinction.

Despite his relative youth and energy, Roosevelt declined to run for another term. His progressive reforms had angered many conservative Republicans in Congress. In addition, his public comments on "race suicide," in which he lamented the declining birthrate of U.S. citizens of northern European ancestry and the accelerating birthrate of Russian and southern European immigrants, troubled many people. He approved the Republican presidential nomination of his secretary of war, WILLIAM HOWARD TAFT, in the belief that Taft was a progressive Republican. Taft won the presidency in November 1908.

After leaving office in March 1909, Roosevelt spent ten months in Africa on a hunting trip and then visited Europe. Upon his return to the United States in 1910, he was shocked at Taft's capitulation to the conservative Republicans in Congress. His animosity toward Taft grew, and in 1912 Roosevelt declared his candidacy for the Republican presidential nomination. Although he won most of the primaries, the Republican Party leaders controlled enough votes to give the nomination to Taft. Undaunted, Roosevelt

"NO MAN IS ABOVE THE LAW AND NO MAN IS BELOW IT; NOR DO WE ASK ANY MAN'S PERMISSION WHEN WE ASK HIM TO OBEY IT."
—THEODORE "TEDDY" ROOSEVELT

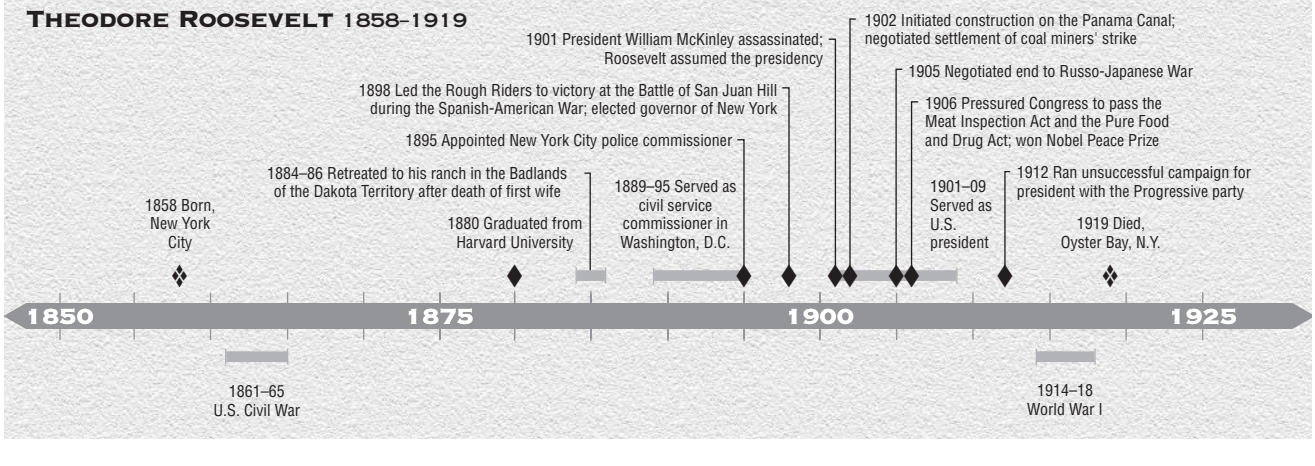

formed a third party, called the Progressive Party. Following a failed assassination attempt against him in Milwaukee, Wisconsin, in October 1912, he said that it would take more than that to kill a bull moose. Thereafter, the Progressives were nicknamed the Bull Moose Party.

Roosevelt won more votes than Taft, but the division of Republican strength allowed Democrat WOODROW WILSON to be elected president. Roosevelt grew to despise Wilson and his policies, leveling harsh criticism against Wilson's foreign policy. Incensed when Wilson denied him the opportunity to form a regiment and fight in WORLD WAR I, Roosevelt denounced Wilson's proposal for the LEAGUE OF NATIONS, even though Roosevelt himself had once advocated such an organization.

Roosevelt's health deteriorated rapidly in his last years. He died on January 6, 1919, at his home in Oyster Bay, New York.

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## ROSENBERGS TRIAL

In 1951, Julius and Ethel Rosenberg were convicted of conspiracy to commit ESPIONAGE for helping the Soviet Union acquire the secrets to the atomic bomb from the United States during WORLD WAR II. Judge Irving R. Kaufman, who presided at the trial, sentenced the Rosenbergs to death after concluding that their "betrayal . . . undoubtedly . . . altered the course of history to the disadvantage of [the United States]." The Rosenbergs maintained their innocence from the time of their arrest until they were executed. Their two sons, Michael and Robert Meeropol, have spent much of their adult lives attempting to clear their parents' names.

Morton Sobell (born April 11, 1917), a former employee of the Naval Bureau of Ordnance, was also indicted for conspiracy to commit espionage with the Rosenbergs and was named as a codefendant. During June 1950, Sobell fled to Mexico with his wife under an assumed name. After being apprehended and extradited back to the United States, Sobell was convicted of conspiracy and sentenced to 30 years in prison. He was paroled in January 1969.

Both of the Rosenbergs were members of the American Communist Party. Julius had come from an impoverished background. He had received a degree in electrical engineering from City College of New York but had had trouble obtaining and keeping employment. At the time of his arrest, he was struggling to run a small machine shop with Ethel's brother, David Greenglass. Like her husband, Ethel had come from a poor family.

The Rosenbergs' trial has been the subject of legal, political, and historical controversy for nearly half a century. Some view the Rosenbergs as martyred victims of the communist hysteria that menaced the political landscape in the United States during the 1950s. Others see them as criminals who were singularly responsible for ending the United States' nuclear monopoly and compromising the security of millions of people. The picture painted by historians has always been incomplete because many documents concerning the Rosenbergs remain classified.

The U.S. government did not indict the Rosenbergs for TREASON and might have encountered constitutional difficulties if it had pursued such an indictment. Article III, Section 3, of the Constitution defines treason as giving "aid and comfort" to the enemies of the United States. During World War II, the Soviet Union was an ally, not an enemy, of the United States. Further, the Constitution requires that every "overt act of treason" be witnessed by two persons. Yet, as the trial revealed, many of the conspiratorial acts committed by the Rosenbergs were witnessed by only one person.

The Rosenbergs' trial began on March 6, 1951, at the federal courthouse in New York City. Spectators and members of the press packed the gallery, the hallways, and the courthouse steps in an effort to catch a glimpse of the so-called atom spies in what some observers called the "trial of the century." Judge Kaufman conducted the VOIR DIRE and impaneled a jury in less than two days. Irving Saypol was the chief prosecuting attorney and was assisted by ROY COHN and James Kilsheimer. Julius Rosenberg

was represented by Emanuel Bloch, while Emanuel's father, Alexander Bloch, represented Ethel.

### The Prosecution's Case

The first witness against the Rosenbergs was Max Elitcher, a 32-year-old electrical engineer employed by the Naval Bureau of Ordnance during the 1940s. Elitcher testified that in June 1944 Julius asked him to assist the Soviet Union by providing classified information about naval equipment. Over the next several years, Elitcher said, Julius had made other references to his central role in a Soviet espionage ring with members scattered across the United States. Nonetheless, Elitcher maintained that he had never disclosed any confidential information to the Rosenbergs.

Elitcher also provided the only testimony against Sobell. Elitcher told the jurors that on several occasions Sobell had attempted to entice him to commit espionage on behalf of the Soviet Union. Elitcher recalled one instance when he had accompanied Sobell on a drive to Knickerbocker Village, where the defendant had delivered a can of film to Julius Rosenberg. Although Elitcher was unable to tell the court what, if anything, had been inside the can, he did testify that Sobell had described the contents as "too valuable to be destroyed and too dangerous to keep around."

David Greenglass, the 29-year-old brother of Ethel Rosenberg, was the prosecution's second witness. Greenglass, a member of the American Communist Party, had enlisted in the army as a machinist in 1943. In July 1944, he had been assigned to the Manhattan Project, the top secret Allied program based in Los Alamos, New Mexico, for the development of the atomic bomb. As part of his job, Greenglass had performed research on high explosives.

Greenglass testified that he had learned about the nature of the Manhattan Project in November 1944, when his wife, Ruth, had visited him in Albuquerque. Before leaving for New Mexico, Ruth had been invited to the Rosenbergs' apartment in New York City, where Ethel had disclosed that Julius had been sharing classified information with the Soviets. During the same visit, Julius had informed Ruth that her husband had been working on a project to develop an atomic bomb and proposed that David help the Soviets by stealing secrets from Los Alamos. Upon learning of Julius's invitation from Ruth, David testified that he had agreed to engage in atomic espionage for the Soviet Union.

*A New York jury convicted Julius and Ethel Rosenberg of conspiracy to commit espionage. They were executed in 1953.*

AP/WIDE WORLD PHOTOS

In January 1945, David went home to New York City on furlough and met with the Rosenbergs. David testified that during one visit he had provided Julius with a verbal description of the atomic bomb, explaining that the Los Alamos scientists were designing a high-explosive lens mold. David had accompanied this description with a packet of sketches outlining the mold. He also had provided Julius with a list of the scientists who had been working on the Manhattan Project and an overview of the Los Alamos facilities. Because some of the written material had been illegible, David told the jury, Ethel had typed his notes.

A few days later, the Greenglasses had eaten dinner at the Rosenbergs', where they had designed a plan for David to exchange information in New Mexico with a courier whom Julius would send. To enable David to identify this courier, Julius had cut a Jell-O brand gelatin box into two irregularly shaped pieces, given one piece to David, and said the other piece would be given to the courier.

The next summer, Ruth had rented an apartment in Albuquerque, where David usually had spent the weekends. During the first weekend in June, a man had visited the Greenglass apartment,

identifying himself as "Dave from Pittsburgh." The man had told the Greenglasses that he was a courier sent by "Julius." After the courier had produced the matching half of the Jell-O box, David had given him some additional sketches of the lens mold experiments.

In September 1945, David had returned to New York City on a second furlough. Meeting with Julius and Ethel at the Rosenbergs' apartment, David had drawn a cross section of the atomic bomb and had described the implosion principle underlying it. David testified that Ethel again had typed up the written material, correcting spelling and grammar where necessary. The prosecution asked David to draw a replica of the sketches that he had given to the Rosenbergs and the courier. The prosecution then called Walter Koski, a physical chemist, who testified that the sketches were "reasonably accurate" and revealed much of what the government had been attempting to keep secret at Los Alamos.

Ruth Greenglass, who testified next, corroborated the central elements of her husband's testimony. She testified that she had assisted David in procuring classified information from Los Alamos for the Rosenbergs. She also testified that the Rosenbergs had showed her a mahogany table that they had received from the Soviets as a token of their appreciation. A portion of the table was hollow, Ruth said, and a lamp had been inserted so that microfilm pictures could be taken.

As the FEDERAL BUREAU OF INVESTIGATION (FBI) had been closing in on the Greenglasses and the Rosenbergs, Ruth told the jurors, Julius had developed a plan for David and Ruth to elude law enforcement. The plan had called for David and Ruth to travel to Mexico, where a Soviet agent would be waiting with passports and cash. The agent would then escort the Greenglasses to Czechoslovakia or Russia. Although Julius had given the Greenglasses more than $4,000 to defect from the United States, Ruth testified that neither she nor David had ever left the country.

The primary corroborating witness for the Greenglasses' testimony was Harry Gold, a 40-year-old chemist who testified that he had been spying for the Soviet Union since 1935 and that he had been working with Anatoli Yakovlev, a Soviet agent, for a number of years. Gold said that Yakovlev had sent him on a vital mission to New Mexico during the first weekend of June 1945.

On Saturday, June 2, Yakovlev had instructed Gold to travel to Santa Fe, New Mexico, where he would meet with Klaus Fuchs, a nuclear scientist from Great Britain, who had been working on the Manhattan Project. During their meeting, Fuchs had provided Gold with diagrams and had written descriptions of the atomic bomb. On a previous occasion, Fuchs had given Gold a complete set of his notes from Los Alamos. In February 1950, Fuchs was captured by British intelligence and confessed to his role in the atomic espionage conspiracy. Fuchs, who received a 14-year sentence, identified Gold as the Soviet liaison he had met in Santa Fe.

Gold also testified that the day after meeting with Fuchs, he had traveled to Albuquerque, where he was scheduled to meet a man whom Yakovlev had described only as "Greenglass." Yakovlev had given Gold the matching half of the Jell-O box and had told him to bring Greenglass greetings from "Julius." When Gold had arrived at the Greenglasses' apartment, a man whom Gold identified as David Greenglass had gave him an envelope of drawings and other materials in exchange for $400.

Gold testified that he had turned this envelope over to Yakovlev, who had immediately transmitted it to the Soviet Union. Gold said that Yakovlev had subsequently thanked him for obtaining such "excellent" and "valuable" data. The prosecution introduced two exhibits to bolster Gold's testimony, a receipt indicating that Ruth Greenglass had deposited $400 into her account at the Albuquerque National Bank on June 4, 1945, and a registration card from the Albuquerque Hilton Hotel, signed by Harry Gold on June 3, 1945.

The final witness for the prosecution was Elizabeth Bentley, a 44-year-old former Soviet spy who was known to the public as the "Red Spy Queen." Bentley bragged that as a top-ranking member of the Communist Party in the United States, she had been responsible for pilfering a wide variety of industrial, military, and political secrets. Bentley then had become a double agent for the FBI and had been assigned to infiltrate and expose domestic Communist espionage networks.

In addition to testifying at the Rosenbergs' trial, Bentley had testified in a number of cases involving the prosecution of her former comrades in the American Communist Party. In each case, Bentley's testimony had verged on the theatrical. At the Rosenbergs' trial, she testified

that she had received a number of late-night, espionage-related phone calls from a man who had called himself "Julius." Bentley admitted that she had never met this man, however, and that she could not identify his voice.

### The Defense

Whereas the prosecution's theory of the case seemed relatively straightforward, the defense's strategy was enigmatic. The defendants' case was fraught with errors, ranging from minor to monumental. Most of these mistakes have been attributed to lead defense attorney Emanuel Bloch.

Bloch's first major mistake occurred during the direct examination of David Greenglass. When the prosecution sought to introduce one of the sketches that Greenglass had drawn, Bloch made a motion, asking the court to impound the exhibit. When the prosecution attempted to question Greenglass about his notes that accompanied the sketches, Bloch asked the court to clear the press and spectators from the courtroom to prevent any further leaks of atomic secrets. The prosecution, who had been expecting Bloch to challenge Greenglass's qualifications to testify as an expert regarding the scientific significance of the sketches, happily concurred with Bloch's dual motions.

As it turns out, the prosecution had reason to be relieved. Several nuclear physicists vehemently disputed whether an ordinary machinist such as Greenglass possessed sufficient experience and educational background to testify or to explain the complex principles behind the atomic bomb. In an effort to obtain executive clemency for the Rosenbergs in 1953, for example, Nobel Prize-winning physicist Harold Urey told President DWIGHT D. EISENHOWER that a "man of Greenglass's capacity is wholly incapable of transmitting the physics, chemistry, and mathematics of the bomb to anyone." Other physicists wondered why the Soviets would even want Greenglass's sketches, as they already had received diagrams of the bomb from Fuchs, a nuclear scientist. Bloch never called any scientists to challenge Greenglass's testimony.

Historians have argued that by failing to challenge Greenglass's scientific expertise and by asking the court to impound his sketches, Bloch convinced the jury that it was about to hear the secret of the atomic bomb. At least one of the Rosenberg jurors agreed with this analysis, stating that it was not until Bloch had asked the court to keep the Greenglass exhibits confidential that he had become impressed with the importance of the trial.

A second major mistake occurred when Bloch failed to cross-examine Gold. Gold was an admitted liar. During a prior legal proceeding, he had told the court that as a result of his espionage activities he "had become so tangled up in a web of lies that it was easier to continue telling an occasional lie than to try and straighten out the whole hideous mess." When the impeachment value of this prior testimony is coupled with the large number of glaring inconsistencies between Gold's testimony during the Rosenbergs' trial and his pretrial accounts of the same events, Bloch's decision against cross-examining Gold looms larger.

### The Controversy Continues

Why Bloch made these mistakes is a question that remains unanswered. Although some historians claim that he was simply a bumbling attorney, Bloch had defended a number of defendants who had been accused of espionage, and had developed a reputation as a competent litigator. Other historians have suggested that Bloch purposely botched the trial in an effort to make martyrs of the Rosenbergs as part of a larger socialist agenda. In any event, Bloch later expressed regret for his mistakes, attributing them, in part, to the politically charged legal climate of the times.

Indeed, during the early 1950s, hysteria over COMMUNISM pervaded almost every aspect of life in the United States. As a result, criminal defendants who were associated with communist influences often received less-than-impartial hearings from judges and jurors. This paranoid fear of communism began to manifest itself shortly after World War II.

Several events contributed to the concern about communism. In 1948 Greece, Turkey, and Czechoslovakia were under siege by communists. China came under communist control in the spring of 1949. On January 21, 1950, ALGER HISS, a former member of President FRANKLIN D. ROOSEVELT's administration, was convicted of perjury for statements he had made in response to espionage charges that had been lodged against him. A few weeks after the Hiss conviction, a senator from Wisconsin, named JOSEPH R. MCCARTHY startled the nation by brandishing a list of 205 communists who, he asserted, were employed by the federal government. In June

1950, the KOREAN WAR erupted, and the Rosenbergs were arrested.

This series of events affected the FBI's investigation of the Rosenberg conspiracy. J. EDGAR HOOVER, the director of the FBI, had become concerned about public perception of his organization. Some officials had begun to question whether Hoover and the FBI were acting with sufficient vigilance to extinguish the internal communist threat. With each new revelation about communist spies in the U.S. government, Hoover took more severe measures to shore up what some perceived as national security breaches. The Rosenberg case was an example of the most extreme measures taken by the FBI.

Government files demonstrate that the FBI had expressed little interest in prosecuting Ethel Rosenberg until her husband refused to confess and implicate others in his spy ring. "There is no doubt," Hoover wrote to attorney general J. HOWARD MCGRATH, that "it would be possible to proceed against other individuals" if "Julius Rosenberg would furnish details of his extensive espionage activities." "Proceeding against his wife," Hoover emphasized, "might serve as a lever in this matter." Shortly after this letter was written, Ethel was arrested and charged with the same crime as her husband.

When Julius refused to cooperate with the FBI, the government informed the defendants that the death penalty would be sought in the event of their conviction. The FBI never relented from its use of Ethel as a "lever" against Julius, ultimately executing Ethel for her role as an ACCESSORY to the crime committed by her husband and brother. Declassified documents show that the entire testimony relating to Ethel's role as a typist for her husband's espionage ring, which was the only evidence offered to implicate her in the conspiracy, had been concocted by the FBI and the Greenglasses just eight days before the trial began.

Historians have raised other suspicions with regard to the FBI's investigation of the Rosenbergs. On May 22, 1950, Gold submitted an initial, written confession to the FBI. The confession made a passing reference to Albuquerque but made no assertion that he had been sent by "Julius" to see a man named "Greenglass" from whom he had acquired secret information about the atomic bomb. Nor did the confession allude to irregularly shaped pieces of a Jell-O box or a Soviet agent named Yakovlev.

After a number of subsequent interviews with the FBI, some of which had been conducted in the presence of David Greenglass, Gold said that he was able to remember each of the missing details that he had earlier "forgotten." Walter and Miriam Schneir, authors of *Invitation to an Inquest,* have argued that these allegedly "forgotten" details were supplied to Gold by the FBI so that his story would corroborate the Greenglasses' testimony. The FBI has steadfastly maintained that it did nothing improper, unethical, or illegal to jog Gold's memory, and declassified government files from the case have offered no "smoking gun."

Many supporters of the Rosenbergs who have long suspected that the FBI manufactured evidence to strengthen its case do not deny that Julius was involved in some form of espionage for the Soviet Union. In 1995, the U.S. government released 49 decoded Soviet intelligence messages that it had intercepted during World War II. These messages offer proof that Julius, whose code name was "Liberal," was the ringleader of an espionage network of young U.S. communists who provided the Soviets with documents relating to classified radar and aircraft information.

The intercepted messages imply that Julius might have been involved in efforts to obtain information from the Manhattan Project but reveal nothing specific. Nikita Khruschev, the former Soviet premier, noted in his memoirs, however, that the Rosenbergs "provided very significant help in accelerating the production of the atomic bomb." As the federal government declassifies and releases more documents from the Rosenberg files, a clearer picture of the Rosenberg espionage network will emerge. The most recently released files suggest that Ethel did not participate in her husband's espionage efforts, due to her health.

In light of the murky questions that still surround the Rosenberg case, the jury's guilty verdict and the judge's death sentence remain a source of controversy. Supporters of the verdict and sentence point out that U.S. Supreme Court justice WILLIAM O. DOUGLAS granted a temporary stay of the Rosenbergs' execution so that the Court could consider whether to hear the case on appeal. After reviewing the Rosenbergs' petitions to determine whether they presented any legal issues that were appropriate for appellate review, the U.S. Supreme Court denied certiorari. Justice HUGO L. BLACK was the lone dis-

senter. On June 19, 1953, the day after their twenty-second wedding anniversary, the Rosenbergs were put to death in the electric chair.

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Cold War; Red Scare.

## ROSS, JOHN

As the head of the largest branch of the Cherokee nation from 1828 to 1866, John Ross led the Cherokee through a period of profound cultural change. Under Ross's leadership, the Cherokee nation engaged in a historic and controversial legal battle to preserve their sovereignty and underwent a disastrous forced march from Georgia to Oklahoma.

Ross was born near Lookout Mountain, Tennessee, on October 3, 1790. Although he was only one-eighth Cherokee by blood, Cherokee cultural identity in the early 1800s was as much a matter of upbringing and choice as genetics, and Ross was raised and considered himself a Cherokee.

In 1809 at age nineteen, Ross was sent, at the behest of both U.S. officials and Cherokee leaders, to confer with the western Cherokee, who had accepted payments from the United States in exchange for an agreement to relocate to Oklahoma. Ross's quiet and reserved manner inspired confidence among both whites and Indians, and his skill at easing the tensions with the western Cherokee greatly increased his influence within the Cherokee nation.

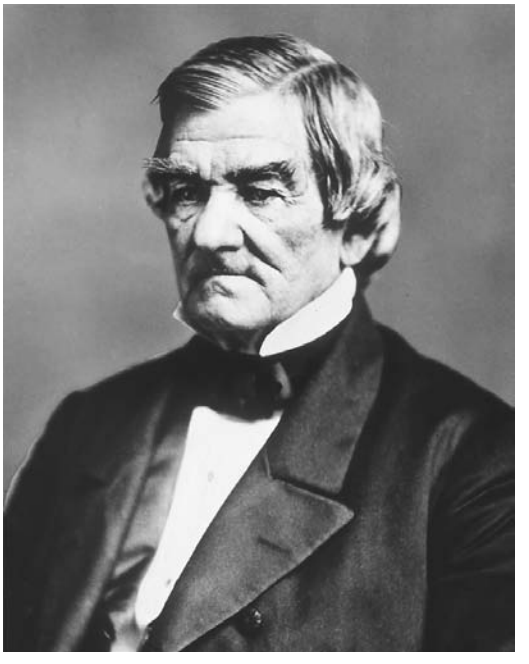

*John Ross.*
DEPARTMENT OF ANTHROPOLOGY, SMITHSONIAN INSTITUTION

Ross served as President of the National Council of the Cherokee from 1819 to 1826 and became principal chief of the eastern Cherokee in 1828. He thought the Cherokee could benefit from adopting certain aspects of European-American culture. Accordingly, with the help of two other Cherokee leaders, Major Ridge and Charles Hicks, Ross convinced many Cherokee to convert from an economy based on hunting and the fur trade to one of agriculture. Some Cherokee adopted the Southern tradition of

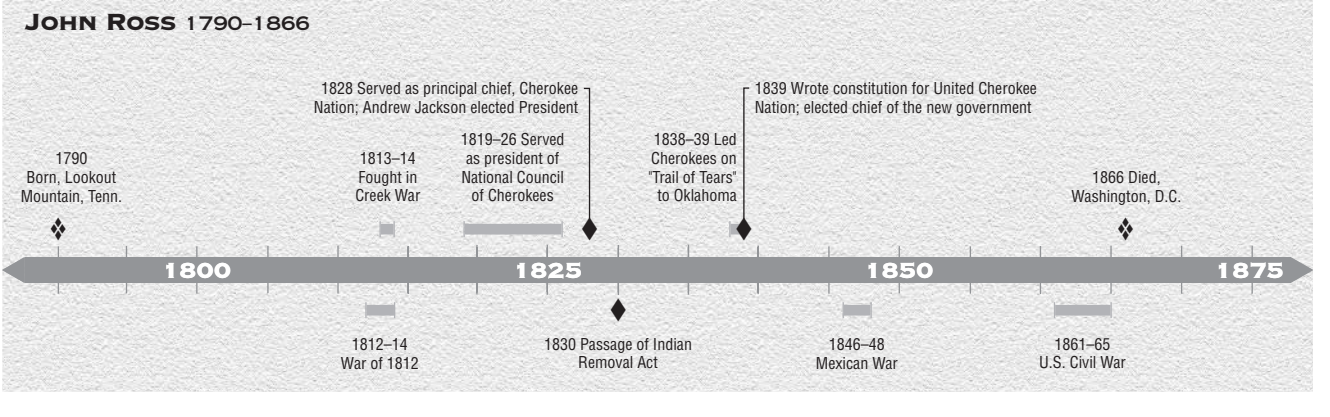

slave-holding. By the 1830s many members of the Cherokee nation were among the wealthiest individuals in what is now north Georgia. Ross himself was a slaveholder with a two hundred–acre farm.

A well-educated man, Ross promoted literacy and education, advocating that all Cherokee utilize the achievement of Sequoia, the Cherokee who had created a written lexicography for the Cherokee language. Ross's efforts brought the Cherokee from near illiteracy to over 90 percent literacy in less than three years. Ross also supported the efforts of Christian Congregationalist missionaries who wished to set up schools in Cherokee territory. When it became apparent that the missionaries' primary objective was religious conversion rather than education, however, Ross informed them that they could stay only if they focused on education. The missionaries complied.

"IF IT HAS BEEN OUR MISFORTUNE TO SUFFER WRONGS FROM THE HANDS OF OUR WHITE BRETHREN, WE SHOULD NOT DESPAIR OF HAVING JUSTICE STILL EXTENDED BY THE UNITED STATES."
—JOHN ROSS

In addition to his emphasis on literacy and education, Ross encouraged the Cherokee to adopt a written system of laws, a bicameral legislative body, and a government with legislative, judicial, and executive branches. In 1827 the Cherokee nation adopted a republican constitution, written by Ross and modeled after the U.S. Constitution.

Under Ross's leadership the Cherokee eliminated the blood feud as a primary means of settling criminal homicides. Under the customs of the blood feud, when a person was killed, the victim's clan was obligated to kill a member of the murderer's clan. This often resulted in years of feuding between clans. Through Ross's influence the blood feud was replaced with a court system, trial by jury, and a written criminal code.

Despite their embrace of many aspects of U.S. society, Ross and his people wished to preserve Cherokee sovereignty—a goal the U.S. and Georgia governments would not accept. Beginning in 1828, Georgia passed a series of laws declaring the invalidity of Cherokee sovereignty. Meanwhile, the U.S. government, under President **ANDREW JACKSON**, was advocating removal of the Cherokee to the lands west of the Mississippi, even though treaties such as the Treaty of Hopewell (1785) recognized the Cherokee's sovereign right to their lands.

Ross refused to advocate violence as a means for the Cherokee to retain their land. Having grown up with warfare, ethnic violence, and **GENOCIDE** between various Indian tribes and the Cherokee and between European-Americans and the Cherokee, Ross had witnessed the destructive effects of violence on the Cherokee nation and had also seen the disastrous results of the armed struggles of other Indian tribes against the European-Americans. Putting his faith in the U.S. legal system, he believed that the U.S. Supreme Court would recognize the Cherokee's right to their land and sovereignty. In two historic cases, *Cherokee Nation v. Georgia,* 30 U.S. 1, 8 L. Ed. 25 (1831), and *Worcester v. Georgia,* 31 U.S. 515, 8 L. Ed. 483 (1832), Ross and the Cherokee fought for legal recognition of their sovereignty. The Cherokee lost in *Cherokee Nation.* Then, in a stunning reversal, the Supreme Court recognized Cherokee sovereignty in *Worcester* and ruled that the Georgia laws claiming jurisdiction in Indian Territory were void. Both Georgia and Jackson refused to abide by the Court's decision, however. Instead, the U.S. government stepped up its efforts to relocate the Cherokee.

The Reverend John F. Schermerhorn, who was appointed by Jackson as commissioner in charge of convincing the Cherokee to leave Georgia, met with the Cherokee leaders and offered to pay them for ceding their lands. The Cherokee were split between the treaty party, led by Major Ridge, who were willing to accept the government's offer, and those like Ross, who were against the offer. When the ruling body of the Cherokee, led by Ross, refused to sign the agreement, Schermerhorn ordered Ross to be arrested.

On December 29, 1835, while Ross was being held without charge, Major Ridge and seventy-four others out of a tribe of seventeen thousand signed a treaty in what is now New Echota, Georgia, by which the Cherokee ceded all lands east of the Mississippi River in return for western lands and other considerations. All who signed received payment and land. In protest, Ross went to Washington carrying a petition with fifteen thousand signatures, 90 percent of all Cherokee. The treaty passed the U.S. Senate by one vote. David ("Davy") Crockett lost his seat in Congress for opposing Jackson's policy on Indian removal.

When Ross returned home, he found that the Georgia government had granted his property to a Georgian. In the summer of 1838, Jackson, who had refused to send U.S. troops to enforce the Supreme Court's *Worcester* decision, sent seven thousand soldiers to remove the Cherokee. Rather than leave their homeland,

more than a thousand Cherokee fled to the Great Smoky Mountains, where their descendants still live.

During the winter of 1838–39, the remaining Cherokee were forced to march from Rattlesnake Springs, Tennessee, to Tahlequah, Oklahoma, in what became known as the "Trail of Tears." Four thousand Cherokee, including Ross's wife, Quatie, died on the march.

Once in Oklahoma, Ross was reelected principal chief. Major Ridge was killed the same day for his part in the signing of the Treaty of New Echota. In Tahlequah, land was set aside for schools, a newspaper, and a new Cherokee capital. During the Civil War, the Cherokee aligned themselves with the Confederacy, believing the U.S. government untrustworthy. They also ratified a declaration repudiating all treaties with the federal government, a move that led to bad relations with the U.S. government in the first months after the defeat of the Confederacy. In September 1865, however, Ross attended the Grand Council of Southern Indians at Fort Smith, where a new treaty between the Cherokee and the federal government was prepared. This treaty declared that it rejuvenated all prior, valid treaties between the Cherokee and the government. Despite his failing health, Ross accompanied the delegation to Washington, where the treaty was signed on July 19, 1866. Less than two weeks later, on August 1, 1866, Ross died in Washington, D.C.

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Cherokee Cases; Native American Rights; *Worcester v. Georgia* (Appendix, Primary Document).

## ROSS, NELLIE TAYLOE

On January 5, 1925, Nellie Tayloe Ross became the first female governor in U.S. history. Ross's election in Wyoming occurred less than five years after U.S. women were granted the right to vote by the NINETEENTH AMENDMENT to the U.S. Constitution. As governor, Ross was known as an exceptional administrator and a polished public speaker. Although she lost her bid for reelection, Ross's single term as Wyoming's top official led to other important state and federal positions.

*Nellie Tayloe Ross.* PHOTOGRAPH BY UNDERWOOD & UNDERWOOD. LIBRARY OF CONGRESS

Ross's date of birth is unclear. It is thought that she was born in 1876 in St. Joseph, Missouri. She married William Ross, an attorney, and in 1902 moved with him to Cheyenne, Wyoming. Ross's husband had political ambitions and was elected governor of Wyoming in 1922. In 1924 he died unexpectedly while in office. Ross was approached by the DEMOCRATIC PARTY to run for the remaining two years of her late husband's term. Although Wyoming was a Republican state, Ross won the election by 8,000 votes.

Ross's victory came on the same day that Miriam ("Ma") Ferguson was elected governor of Texas. Because Ross was sworn into office two weeks before Ferguson, she is recognized as the first female governor in the United States.

As governor, Ross backed progressive public education measures. She also managed to reduce the state debt by more than $1 million. Ross supported PROHIBITION and opposed professional prizefighting, two unpopular positions that contributed to her defeat in the 1926 gubernatorial

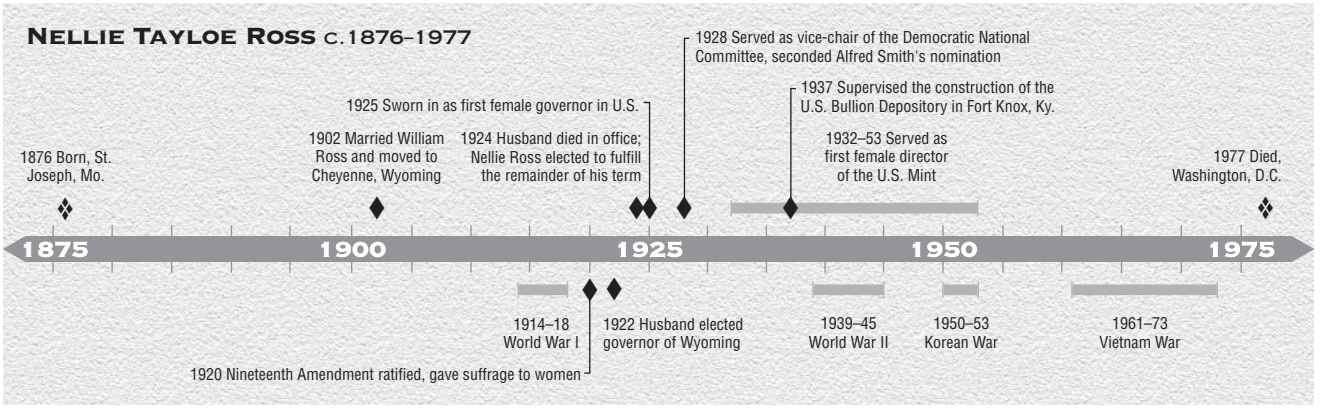


election. Her affiliation with the Democratic party was also a factor in her loss.

Ross later was elected to the Wyoming state legislature and remained active in Democratic politics at both the state and national level. In 1928 she was an influential supporter of unsuccessful Democratic presidential nominee Alfred E. Smith.

In 1932 Ross scored another first for women when she was appointed by President FRANKLIN D. ROOSEVELT to head the U.S. Mint. Ross became the Mint's first female director. She stayed there for 20 years, overseeing the Mint during the economic throes of the Great Depression and throughout a critical paper shortage during WORLD WAR II.

Ross also supervised the construction in 1937 of the U.S. Bullion Depository in Fort Knox, Kentucky. She is honored on the cornerstone of the fortified building. Ross was also the first woman to have her likeness printed on a medal made by the Mint. In 1953 she retired as director after Republican DWIGHT D. EISENHOWER was elected president.

An early role model for women in government, Ross served both Wyoming and the United States with distinction. She died in Washington, D.C., in 1977, at the approximate age of 101.

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## ROSTKER V. GOLDBERG

A U.S. Supreme Court decision, *Rostker v. Goldberg*, 453 U.S. 57, 101 S. Ct. 2646, 69 L. Ed. 2d 478 (1981), upheld the constitutionality of a male-only draft registration law enacted by Congress in 1980. Emphasizing its traditional deference to Congress in the areas of military affairs and national defense, the Court refused by a vote of 6–3 to apply PRECEDENT that might have invalidated the law because of gender discrimination. Even the dissenters, however, did not challenge the right of Congress to exclude women from combat.

*Rostker v. Goldberg* actually began years before Congress enacted the Military Selective Service Act (MSSA) (50 App. U.S.C.A. § 451 et seq.) in 1980. In 1971, during the last part of the VIETNAM WAR, Robert Goldberg and several other men challenged the male-only draft policy, arguing that EQUAL PROTECTION of the laws, as guaranteed by the FIFTH AMENDMENT, had been violated. When Congress discontinued military CONSCRIPTION in 1972, the lawsuit became inactive, but it was not dismissed. It was revived in 1980 when Congress, acting at the request of President JIMMY CARTER, revived the registration process. Carter was concerned about the Soviet Union's invasion of Afghanistan and believed that the government had to be ready to draft soldiers if the situation warranted it.

In his proposal to Congress, Carter asked for the authority to register both men and women. Congress refused to allocate funds to register women but did fund the registration of males. Carter signed MSSA, and on July 2, 1980, he ordered the registration of specified groups of young men pursuant to the authority conferred by Section 3 of the act. Registration was to commence on July 21, 1980.

At that point Goldberg's lawsuit took on new life and became a CLASS ACTION lawsuit. A

three-judge panel in the U.S. District Court for the Eastern District of Pennsylvania held a hearing on the plaintiffs' claims against Bernard Rostker, director of the SELECTIVE SERVICE SYSTEM, the agency that administers military registration. The plaintiffs again asserted that the law violated equal protection. The panel agreed, declaring it unconstitutional three days before registration was to start. Rostker requested that the court's order be stayed (temporarily lifted) pending appeal. Justice WILLIAM J. BRENNAN JR. granted the stay, allowing registration to proceed.

In his majority opinion, Justice WILLIAM H. REHNQUIST rejected the idea that MSSA violated the Fifth Amendment in authorizing the president to require the registration of males and not females. Rehnquist noted that the statute involved national defense and military affairs, areas in which the Court traditionally had deferred to Congress. Under the Constitution, Congress has broad powers to raise and regulate armies and navies. More important, Rehnquist stated, the Court's "lack of competence" had to be considered when assessing legislation in this area.

Rehnquist concluded that Congress had not acted unthinkingly or reflexively in rejecting the registration of women. He pointed out that the question had received national attention and was the subject of public debate in and out of Congress. Congress heard testimony and collected evidence during the legislative process. All these actions persuaded the Court that the decision to exempt women from registration was not the accidental by-product of a traditional way of categorizing females.

The key issue for Congress in planning a future draft was the need for combat troops. Rehnquist noted that "women as a group, unlike men as a group, are not eligible for combat" under statute and established policy. These combat restrictions meant that Congress had a legitimate basis for concluding that women "would not be needed in the event of a draft." Therefore, there was no need to register women.

Turning to the issue of equal protection, Rehnquist ruled that because of the combat restrictions on women, men and women "are not similarly situated for purposes of a draft or registration for a draft." The law did not violate equal protection because the exemption of women from registration closely related to the congressional purpose of registration as a way to "develop a pool of potential combat troops." Rehnquist concluded by noting that the "Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality."

Justices Brennan, BYRON R. WHITE, and THURGOOD MARSHALL dissented. In his dissent, Marshall lamented the majority's failure to apply the "heightened" scrutiny test announced in *Craig v. Boren,* 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976). In that case the Court held that gender-based classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives." The burden is on the party defending the classification to meet these requirements.

In Marshall's view, there was a difference between registration and conscription. He did not agree that exclusion of women from draft registration "substantially furthers the goal of preparing for a draft of combat troops," or that the registration of women "would substantially impede its efforts to prepare for such a draft." The majority had crafted a "hypothetical program for conscripting only men," where "conscripts are either assigned to those specific combat posts presently closed to women or must be available for rotation into such positions." He noted that only two-thirds of those persons conscripted in a future draft would serve in combat roles. There appeared to be no important or substantial government objective in not registering women for the draft.

Marshall, however, did not discuss the more fundamental issue of excluding women from combat. Both the majority and minority opinions assumed that it was legitimate to exclude women from the front lines. In other contexts, this type of gender-role classification has been ruled unconstitutional.

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CROSS-REFERENCES

Armed Services; Sex Discrimination; Women's Rights.

## ROTH V. UNITED STATES

The U.S. Supreme Court, in *Roth v. United States* and *Alberts v. California,* 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), issued a landmark

ruling on OBSCENITY and its relation to the FIRST AMENDMENT. The Court held that obscenity was not a protected form of expression and could be restricted by the states. In addition, the Court announced a test for courts to use in evaluating whether material was obscene.

The Court consolidated the appeals of Samuel Roth and David Alberts. Roth had been convicted of violating a federal statute (18 U.S.C.A. § 1461) that made it a crime to mail obscene advertising and reading materials. Alberts, a California mail-order seller, was convicted for keeping obscene books in violation of California law. Both the federal and state courts of appeal had upheld their respective convictions.

The issue before the Court was clear: Was obscenity entitled to protection under the First Amendment guarantees of FREEDOM OF SPEECH and press? Until *Roth,* the Court had largely ignored the constitutionality of obscenity statutes, creating the assumption that obscenity was not protected speech. Consequently, obscenity convictions were routinely upheld by the lower courts.

Justice WILLIAM J. BRENNAN JR., in his majority opinion, reviewed the history of freedom of expression and concluded that not every type of utterance was protected in the thirteen original colonies. LIBEL, blasphemy, and profanity were among the statutory crimes. In addition, that every state and the federal government had obscenity statutes showed that the First Amendment "was not intended to protect every utterance." Obscenity is denied protection because it is "utterly without redeeming social importance."

Having ruled that obscenity is not within the area of constitutionally protected speech or press, Brennan noted that sex in art and literature was not, by itself, obscene. Indeed, "sex, a great and mysterious motive force in human life" had interested "mankind through the ages; it is one of the vital problems of human interest and public concern." In the past, however, mere sexual content was enough to have a novel banned under the test courts used in assessing whether something was obscene.

For a legal definition of obscenity, U.S. courts looked to the English case of *Regina v. Hicklin,* L.R. 3 Q.B. 360 (1868). The *Hicklin* test was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." This test permitted prosecutors and judges to select objectionable words or passages without regard for the work as a whole and without respect to any artistic, literary, or scientific value the work might have.

Brennan rejected the *Hicklin* test as being "unconstitutionally restrictive of the freedoms of speech and press." It was essential that the work as a whole be evaluated before being declared obscene. Brennan endorsed the test used in both Roth's and Alberts's trials: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient [lewd or lustful] interest." The new test was applicable to both state and federal government obscenity prosecutions.

The *Roth* test did not settle the question of what is obscenity, however. In fact, the Court was drawn into a long-term inquiry over virtually every element of the new obscenity test. The Court has never reached full agreement on what constitutes an appeal to "prurient interest." The phrase "redeeming social importance" has also failed to generate a consensus. Nor, in the years immediately following *Roth,* could the Court agree on whether "community" referred to the nation as a whole or to individual states or localities.

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CROSS-REFERENCES

Freedom of Speech; Freedom of the Press; Obscenity; Pornography.

## ROUSSEAU, JEAN JACQUES

Jean Jacques Rousseau achieved prominence as a philosopher and political theorist in eighteenth-century France. A talented musical composer and botanist, Rousseau's ideas on the nature of society made him an influential figure in West-

ern thought. His belief that civilization had corrupted humankind was a central part of his philosophy. His work elevated the importance of the individual and personal liberty, providing support for U.S. revolutionary ideology.

Rousseau was born on June 28, 1712, in Geneva, Switzerland. By the age of sixteen, he had left home. In Savoy he met Baronne Louise De Warens, a wealthy woman who took Rousseau into her home and transformed him into a philosopher through a rigorous course of study. Rousseau also studied music during his time with De Warens. In 1742 he moved to Paris, where he became associated with Denis Diderot, a philosopher who was editor of the French *Encyclopédie*, a monumental work of scholarship about the arts and society. Diderot commissioned Rousseau to write articles about music for the work.

In 1750 Rousseau won a prize for his essay *Discourse on the Sciences and the Arts.* The essay announced one of Rousseau's life-long tenets: human beings are inherently good but have been corrupted by society and civilization. In 1752 he won fame as a composer for his opera *The Village Sage.* Despite the accolades, Rousseau abandoned his musical career, believing it was morally unworthy to work in the theater. Instead he pursued his investigation of society, writing *Discourse on the Origin of Inequality among Mankind* in 1752. He enlarged on his first work, criticizing civilization for its corrupting influence and praising the natural, or primitive, state as morally superior to the civilized state.

Rousseau left Paris in 1756 and secluded himself at Montmorency, so as to be closer to nature. He did not return to writing until 1761, when he wrote the romance *Julie, or the New Eloise.* The following year he wrote one of his most enduring and influential works, *The Social Contract.* The book opens with the famous sentence, "Man was born free, but he is everywhere in chains." Rousseau believed that society and government created a social contract when their goals were freedom and the benefit of the public. Government became the supreme ruler, but its existence depended on the will of the people. The social order was based on the general will, a shared belief in a common set of interests, which he believed was the natural choice of rational people. The general will was also a form of freedom, and the purpose of law was to combine the general will with the desires of the people.

Rousseau was convinced that laws could not be unjust if the general will of the people was followed. *The Social Contract* was suffused with

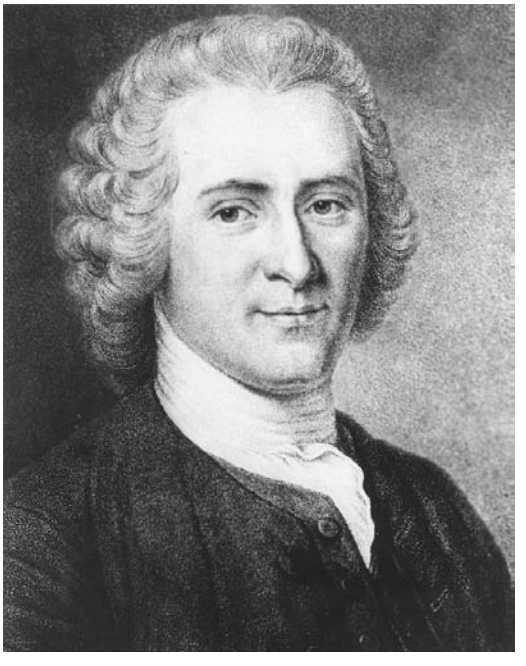

*Jean Jacques Rousseau.*
AP/WIDE WORLD PHOTOS

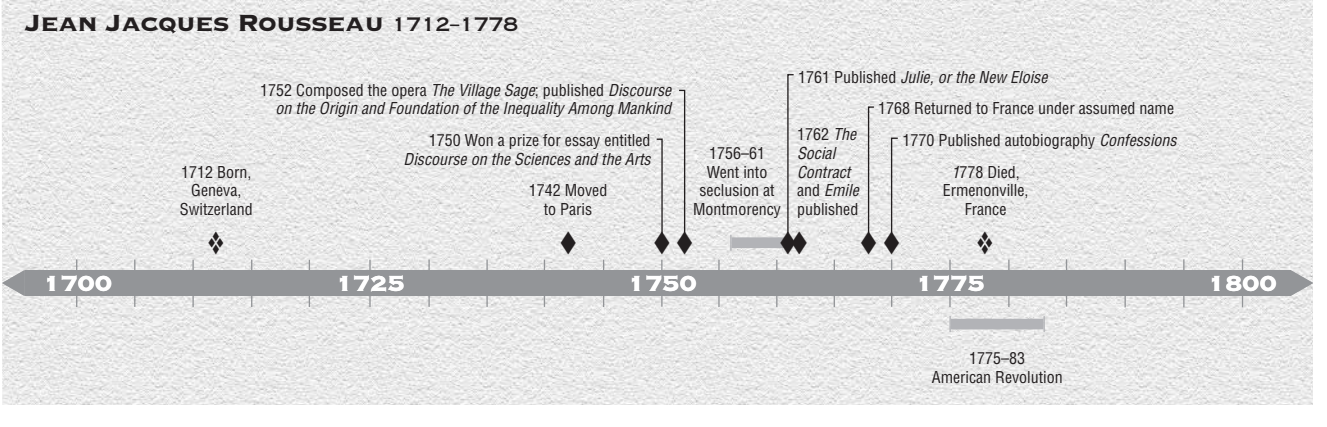

the belief that freedom and civil liberty are essential to a just society. Society should not be ruled by elites but by the general will of all people. Rousseau, like the English philosopher JOHN LOCKE (1632–1704), provided justification for the idea of a liberal society based on popular will that would be embraced by the American colonists in the years leading up to the U.S. Revolution. The American colonists believed that the social contract with England had been broken. Rousseau's belief in the primacy of the individual, however, has proved to be an idea that found its greatest acceptance in the United States.

Rousseau wrote the novel *Émile* in 1762, which was a platform for his ideas on education. He believed that the purpose of education is not to impart new information but to bring out what is inherently within each person and to encourage the full development of the human being. Children should be allowed self-expression and the opportunity to develop their own views about the world, rather than to submit to repression and conformity. Rousseau's ideas were radical for the time but have proved enduring.

"AS SOON AS ANY MAN SAYS OF THE AFFAIRS OF THE STATE, 'WHAT DOES IT MATTER TO ME?,' THE STATE MAY BE GIVEN UP FOR LOST."
—JEAN JACQUES ROUSSEAU

The political climate was hostile to Rousseau following the publication of *The Social Contract* and *Émile.* The French Catholic Church banned both books, and Rousseau was forced to begin a period in exile. Driven from Switzerland for his ideas, he eventually arrived in England, where he was befriended by the philosopher DAVID HUME. While in England he prepared a treatise on botany.

In 1768 he returned to France under an assumed name. In 1770 he completed his *Confessions*, an autobiography of relentless self-examination in which he documented the emotional and moral conflicts of his life. He died on July 2, 1778, in Ermenonville, France.

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## ROYALTY

*Compensation for the use of property, usually copyrighted works, patented inventions, or natural resources, expressed as a percentage of receipts from using the property or as a payment for each unit produced.*

When a person creates a book, song, play, or painting, the work is considered INTELLECTUAL PROPERTY. Similarly, when an inventor receives a patent on his invention, the inventor has intellectual property rights in the thing created. Typically, authors, songwriters, composers, playwrights, and inventors do not have the financial ability to fully exploit the commercial use of their creations. They must turn to businesses that specialize in the marketing of intellectual property. When a business obtains the right to market the creation, the creator usually receives compensation in the form of a royalty.

A royalty agreement is part of the contract that the creator of the work negotiates with the business that seeks to exploit the creation. A royalty can be as simple as a fixed amount of money for each copy of a book or compact disc sold by the business. For example, a novelist agrees to let a publisher publish her new book. For granting the publisher the rights to the book, the novelist will receive $3 for each copy sold. If the novelist is a best-selling author, the publisher may agree to a higher royalty rate. Book and music publishers sometimes give an advance against royalties to an author or musician when the contract is signed. For example, the novelist might receive $5,000 as an advance against her royalties. In this case the publisher will keep the first $5,000 of the royalties to cover the cash advance. Typically, if the book failed to produce enough royalties to cover the advance, the publisher would write off the difference as a loss. However, a publisher might sue an author to recover an advance if the author never produces a publishable manuscript.

A playwright's royalty may be based on a percentage of the box office receipts from each performance of the play. An inventor's royalty might be an amount per unit sold or a percentage of the profits generated by the invention. In some cases it might be both. Because a royalty is one of the terms negotiated in a contract, the type and amount will depend on the bargaining power of the parties.

Under the law royalties are PERSONAL PROPERTY. When a person dies, the heirs receive the royalties. For example, when Elvis Presley died, his estate went to his daughter Lisa Marie, who now collects the royalties from the music company that sells her father's recordings.

Royalty agreements are also used in the mineral and gas industries. These agreements have much in common with the origin of the term. For many centuries in Great Britain, the Crown owned all the gold and silver mines. A private business could mine these "royal" metals only if it made a payment, a royalty, to the Crown.

When, for example, a petroleum company wants to drill for oil on a person's land, the company negotiates a royalty agreement with the owner of the mineral rights. If the company strikes oil, the owner of the mineral rights will receive a royalty based on a percentage of the barrels pumped out of the wells. The owner may receive the royalty in kind (the actual oil) or in value (the dollar amount agreed to in the contract), based on the total production from the property.

The schedule for royalty payments is specified in the contract. Quarterly or annual payments are typical. The royalty owner has the right to make an independent accounting of the business records to ensure that the figures upon which the royalty is based are accurate.

CROSS-REFERENCES

Copyright; Entertainment Law; Literary Property; Mine and Mineral Law; Music Publishing; Patents; Publishing Law.

## ♦ RUBENSTEIN, WILLIAM BRUCE

William Bruce Rubenstein is a lawyer, law professor, and author who is recognized as a leading national expert on sexual orientation and the law. For eight years, Rubenstein was an attorney with and director of, the Lesbian and Gay Rights Project of the AMERICAN CIVIL LIBERTIES UNION (ACLU).

Rubenstein was born on September 3, 1960, in Pittsburgh, Pennsylvania. He graduated from Yale University in 1982 and earned a law degree from Harvard University in 1986. Rubenstein then served as a law clerk to a federal district court judge. He was admitted to the Pennsylvania bar in 1986 and the District of Columbia bar in 1988.

In 1987, Rubenstein joined the national office of the ACLU's Lesbian and Gay Rights Project, which has its headquarters in New York City. The national office intervenes in legal disputes involving discrimination against gays and lesbians, acts as a public policy advocate for GAY AND LESBIAN RIGHTS, and provides education for lesbians, gay men, and people with HIV and AIDS. The national office also works with local Lesbian and Gay Rights Project chapters on pending litigation and legislation.

Rubenstein is a noted legal scholar on sexual-orientation issues. He has published *Rubenstein's Cases and Materials on Sexual Orientation and the Law* (2d. ed. 1996), which is used in many U.S. law schools. In addition, he is the author of *Lesbians, Gay Men, and the Law* (1993). Rubenstein has taught courses on lesbian and gay law at Harvard and Yale Law Schools. He left the ACLU in 1995 and accepted a position as visiting professor at Stanford University Law School.

Rubenstein has continued to teach, write, and comment on significant legal issues involving sexuality and health. He has served as an

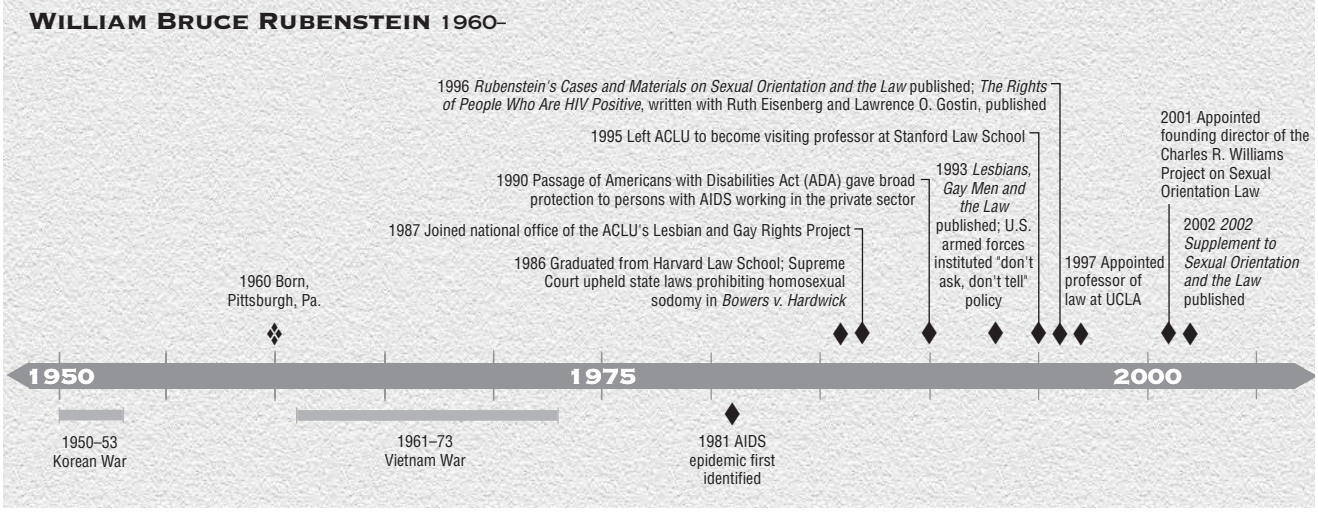

expert witness in several CLASS ACTION cases and has testified before Congress on issues of legal procedure as well as sexuality and law. In 2003, Rubenstein taught at UCLA Law School and was the founding director of the Charles R. Williams Project on Sexual Orientation Law.

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## RUBRIC OF A STATUTE

*The title of a statute indicating the objective of the legislation and providing a means of interpreting the body of the act.*

## RUBY, JACK

Jack Ruby was a nightclub owner from Dallas, Texas, who shot and killed Lee Harvey Oswald, the accused assassin of President JOHN F. KENNEDY, two days after Kennedy's assassination in Dallas. Millions of people watched on national television as Ruby shot Oswald while the Dallas police were attempting to move Oswald from the police station to another location. Questions about how Ruby was able to gain access to the police station and why he killed Oswald have never been fully answered. These questions, as well as the silencing of Oswald himself, are among the reasons why some believe that Oswald was part of a conspiracy to kill Kennedy.

*In 1964 a Texas jury convicted Jack Ruby of killing Lee Harvey Oswald, the man accused of assassinating President John F. Kennedy.*

AP/WIDE WORLD PHOTOS

Ruby was born Jack Rubenstein on March 25, 1911, in Chicago, Illinois. He quit school after sixth grade and lived a life on the streets during adolescence. He was known for his explosive temper and willingness to fight. In the early 1930s he lived in California but soon moved back to Chicago. He tried short-lived careers as a salesman, union organizer, and boxer. In 1943 he was drafted into the Army Air Force and served until 1946. In 1947 Ruby moved to Dallas to help his sister manage a nightclub she owned. He served as manager and unofficial bouncer of the club and soon became acquainted with members of the Dallas police force. He later moved to the Carousel Club and, anxious to be accepted, befriended many police officers by giving them free drinks and hospitality. The police regarded Ruby as a harmless figure who enjoyed the aura of law enforcement. Those in the criminal world considered Ruby an informer, who told the police everything he knew about criminal activity.

On November 22, 1963, President Kennedy was shot and killed in Dallas. Ruby was distraught at the news of the assassination and headed for the Dallas police headquarters. A well-known face at the police station, he was allowed into headquarters on November 23. On Sunday, November 24, Oswald was scheduled to be transferred to the county jail around 10:00 A.M., but a series of events delayed his move until 11:00 A.M. Ruby, who had parked his car one block away from the police station around that time, walked down the rampway to the basement garage of the police station. The guard at the basement entrance had momentarily left his post to stop traffic so that the police convoy with Oswald could leave the building. Ruby walked into the garage, which was filled with police officers, reporters, and camera crews. As Oswald appeared, flanked by police detectives, Ruby approached him with a .38-caliber gun and fatally shot him. Ruby was immediately arrested.

As Ruby prepared for his murder trial, his attorney, Tom Howard, prepared a defense based on the theory that the killing was a crime of passion committed without malice or premeditation by an unstable man. If this defense had been successful, Ruby would have received a maximum of five years in prison under Texas law. Before trial, however, Ruby's family discharged Howard and retained Melvin M. Belli, a well-known and controversial San Francisco attorney. Belli elected to present a defense of total insanity in the hope Ruby would be acquitted. Belli asserted that Ruby had experienced an epileptic seizure and had shot Oswald while under the influence of this impairment.

The case against Ruby was substantial. After the shooting, Ruby had given statements to the police, one of which suggested premeditation. Medical authorities did not support Belli's medical diagnosis of Ruby. On March 16, 1964, a jury convicted Ruby of premeditated murder, and he was sentenced to death.

Ruby's conviction was reversed by the Texas Court of Criminal Appeals in October 1966, but he died in prison of a blood clot, complicated by cancer, on January 3, 1967.

Many questions surrounding Ruby's motives and actions remain unanswered. The Kennedy assassination and the Oswald shooting were investigated by a presidential commission headed by Chief Justice EARL WARREN. The Warren Report, issued in 1964, concluded that the bullets that killed Kennedy had been fired by Oswald's rifle and that there was no evidence that either Oswald or Ruby was part of any conspiracy, domestic or international, to assassinate the president.

Many people were unpersuaded by the Warren Report's conclusion that Oswald acted alone. Since 1964 numerous books and theories have asserted that the Kennedy assassination was the result of a conspiracy. One theory proposed that ORGANIZED CRIME had killed Kennedy and that Ruby had underworld connections. In 1979 a committee of the U.S. House of Representatives reexamined the evidence from 1963 and concluded that there had probably been two gunmen and that a conspiracy was likely. This committee noted that in the weeks preceding the assassination Ruby had made several phone calls to persons associated with organized crime. Other commentators have discounted the phone calls, as they were made before Kennedy's trip to Dallas and the route his motorcade would take were announced.

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## RULE

*To command or require pursuant to a principle of the court, as to rule the sheriff to serve the summons.*

*To settle or decide a point of law at a trial or hearing.*

*An established standard, guide, or regulation governing conduct, procedure, or action.*

The word *rule* has a wide range of meanings in the law, as in ordinary English. As a verb, it most commonly refers to the action of a court of law in settling a legal question. When a court rules, the decision is called a *ruling.* As a noun, *rule* generally refers to either settled principles of SUBSTANTIVE LAW or procedural regulations used by courts to administer justice.

One of the most basic concepts in the Anglo-American legal tradition is called the *rule of law.* The RULE OF LAW refers to a set of rules and procedures governing human and institutional behavior that are autonomous and possess their own logic. These rules are fundamental to society and provide the guides for all other rules that regulate behavior. The rule of law argues for the legitimacy of the legal system by claiming that all persons will be judged by a neutral and impartial authority and that no one will receive special treatment. The concept of DUE PROCESS OF LAW is an important component of the rule of law.

Courts and legislatures produce substantive law in all areas of human behavior and social arrangement. Over time certain guiding principles emerge that rise to the level of a rule. When this happens, it usually means that the courts have firmly established a standard for assessing an issue. The source of a rule may be a previous set of court decisions or a legislative act that clearly sets out how the law is to be interpreted. Substantive rules help guide attorneys in giving advice to clients. For example, the RULE AGAINST PERPETUITIES governs the way in which property may be given. Knowing this rule, a lawyer can draft a legal document that will not violate the rule.

Courts of law have many procedural rules that determine how the judicial system will handle disputes. Courts have the authority, either by legislative act or by their own inherent power, to promulgate (issue) rules of procedure. State and federal courts have rules of criminal and CIVIL PROCEDURE that set out in great detail the requirements of every party to a criminal or civil proceeding. RULES OF EVIDENCE provide guidelines for what a court may properly allow into evidence at a trial.

Courts promulgate rules of professional conduct that govern the ethical behavior of attorneys. Other rules specify how many hours of CONTINUING LEGAL EDUCATION an attorney must attend to remain in good standing. Courts also issue rules on technology. For example, the highest court in a jurisdiction usually decides whether television cameras will be allowed in a courtroom and issues a rule to that effect.

There are also rules of interpretation that guide courts in making their rulings. For example, the plain-meaning rule is a general principle of statutory interpretation. If the meaning of the words in a writing (such as a statute, contract, or will) is clear, other evidence is inadmissible to change the meaning. The interpretation of criminal statutes is guided by the *rule of lenity.* A court will decline to interpret a CRIMINAL LAW so as to increase the penalty, unless it has clear evidence of legislative intent to do otherwise.

Since the 1930s the growth in the number of government administrative agencies with rule-making authority has led to thousands of rules and regulations. The *Federal Register* is an official U.S. government publication that regularly prints proposed and final rules and regulations of government agencies. The INTERNAL REVENUE SERVICE, for example, issues administrative rulings that interpret the INTERNAL REVENUE CODE.

## RULE AGAINST ACCUMULATIONS

*A principle that prohibits adding income or interest earned by a trust back into the principal of the fund beyond the time allowed by the* RULE AGAINST PERPETUITIES.

CROSS-REFERENCES

Rule Against Perpetuities.

## RULE AGAINST PERPETUITIES

*Under the* COMMON LAW*, the principle that no interest in property is valid unless it vests not later than twenty-one years, plus the period of gestation, after some life or lives in being which exist at the time of the creation of the interest.*

The courts developed the rule during the seventeenth century in order to restrict a person's power to control perpetually the ownership and possession of his or her property after death and to ensure the transferability of property. The rule includes the period of gestation to cover cases of posthumous birth.

### Vesting

A property interest vests when it is given to a person in being (someone who is currently living) and is not subject to a condition precedent. For example, if Donald Smith transfers his real property to his son Howard for life and then to Howard's children who are alive at the time of Howard's death, the children's interest is not vested. Their interest is subject to the condition precedent that they survive their father Howard. If Donald transfers his property to his son Howard for life, and then to Howard's children Ann and Richard, the children's interest is vested. Although the children's right to possess and enjoy the property might be delayed for many years, the rule does not relate to the time when property vests in actual possession but only when the property vests in interest. The interest that the children possess is known as a future interest.

Under the rule, a future interest must vest within a certain period of time. This period is limited to the duration of a life or lives in being (the "measuring lives") at the time the interest in the property is transferred, plus twenty-one years.

The period of the rule can be extended by one or more gestation periods. For purposes of the rule against perpetuities, a person is in being at the time of conception if he or she is born thereafter. Therefore the measuring life, or lives, might be the life of a person who has been conceived at the time the instrument takes effect but who is born afterward. For example, a testator—one who makes a will—leaves property "to the descendants of Jones who are living twenty-one years after the death of my last surviving child." Six months after his death, the testator's wife gives birth to their only child. This child is the measuring life, and the descendants of Jones who are alive twenty-one years after the death of the testator's child will take the property.

The period of gestation can also occur at the end of the measuring life or lives. A person conceived before but born after the death of a measuring life is considered to be in being for purposes of the rule. For example, a testator leaves his estate to his grandchildren who attain the age of twenty-one. The testator's only child, William, is born six months after the testator's death. William himself has only one child, Pamela, who is born six months after William's death. The will provisions that leave the property to Pamela are valid, and she will inherit her grandfather's estate when she reaches twenty-one.

The twenty-one year period must be added on after the deaths of the persons or person who are used as the measuring lives.

The measuring lives, or life, are usually persons who are named in the instrument creating the future interest, such as a will or a trust. Frequently the person whose life is used as the measuring life also has a preceding interest in the property, such as a person who is given life estate. A large number of persons can be used as measuring lives, as long as the date of the last survivor's death can be learned without too much difficulty. For example, a bequest by a testator who used as measuring lives all of Queen Victoria's lineal descendants living at the time of the testator's death was upheld as valid. On the date of the testator's death, 120 of the queen's lineal descendants were alive.

If the interest will not vest until after the expiration of the life or lives in being plus twenty-one years, or there is a *possibility* that the interest might not vest until after the expiration of such time, the transfer is void and fails completely. The following fact pattern is an example of a situation that would violate the rule. George Bennet owns a farm, and his son Glen and Glen's wife, Susan, live on the farm and help George manage it. Glen and Susan are childless, but George wants grandchildren. To encourage them to have children, George promises that he will give Glen a life estate in the farm and leave the remainder to George's grandchildren. He executes a will devising the farm to Glen for life and then to Glen's children when they reach the age of twenty-five. George's will creates the future interest, which takes effect at the time of his death. Glen's is the measuring life—the life in being at the time the interest is created. Since it is possible for the vesting to occur more than twenty-one years after the deaths of Glen and Susan, the devise of the future interest to the grandchildren is void. For instance, one year after George's death, Susan has a baby girl. Two years later, she has twin boys. Six months after the birth of the twin boys, both Susan and Glen are killed in an automobile accident. The interest in the farm will not vest in the three children within twenty-one years after their parent's deaths.

### Wait and See Statutes

Under the common-law rule, if there is a possibility that the future interest will not vest until after the expiration of the life or lives in being, plus twenty-one years, the interest is void. The determination is made at the time the future interest is created. In order to avoid the harshness of this rule, some states have enacted statutes providing that the validity of the interest is to be decided at the time the interest actually does vest, rather than at the time it is created. Under these statutes the courts "wait and see" if the interest does in fact vest within the period of the rule. If it does vest within the period of the life or lives in being plus twenty-one years, then the interest is valid. Under other more limited "wait and see" statutes, a decision is made at the time of the death of the life tenant or tenants. These statutes are also called second look statutes.

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Life in Being; Second Look Doctrine.

## RULE IN SHELLEY'S CASE

*An English common-law doctrine that provided that a conveyance that attempts to give a person a life estate, with a remainder to that person's heirs, will instead give both the life estate and the remainder to the person, thus giving that person the land in fee simple absolute (full ownership without restriction).*

Although *Wolfe v. Shelley,* 1 Co. Rep. 93b, 76 Eng. Rep. 206 (C.P.), generally known as *Shelley's Case,* took place in 1581, the rule that made it famous had already been in existence for

approximately 150 years. The rule was enacted to close a tax loophole that allowed people to circumvent an inheritance tax, known as a *relief.* Any person who received property by means of inheritance was required to pay the relief to the feudal lord. Attempting to save their clients money, scriveners (drafters of written instruments such as deeds and wills) came up with a plan to allow a person who would otherwise have been an heir to receive property by means of a conveyance rather than by direct inheritance. The judges quickly saw through this attempt to circumvent the tax law and adopted the rule to close the loophole. As stated in *Shelley's Case,* the rule held that "when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases, 'the heirs' are words of limitation of estate, and not words of purchase" (statement of defendant's counsel, probably SIR EDWARD COKE).

The effect of the rule was to frustrate the intent of an owner of real property who transferred her estate to another by gift or conveyance and, by the same instrument, gave a remainder to the heirs of the transferee. In that circumstance the rule would ignore the intention of the owner and give the transferee the estate in fee as opposed to a life estate. For example, in the conveyance "Owner of Blackacre conveys it to X for life, remainder to X's heirs," X would not just get a life estate as the owner desired; instead, due to the rule, X would receive both the life estate and the remainder (intended for X's heirs) in fee simple absolute as the rule worked a merger of the life estate and the remainder. Consequently, the rule effectively changed the conveyance to "Owner to X and his heirs."

Even after the relief tax was abolished in 1660 by the Statute of Tenures (12 Ar. 2, ch. 24) scriveners were careful to draft documents so as to avoid application of the rule, which still survived even though the reason for its existence had disappeared. In 1770 William Murray, Lord Mansfield, the chief justice of the Court of King's Bench declared that the rule was "a strange law" and eradicated it (*Perrin v. Blake,* 1 F. Hargrave, Collectanea Juridica 283 [K.B.]). Lord Mansfield was an innovative jurist and experienced great frustration with the feudal peculiarities that existed in English land law. Unlike many of his fellow jurists, he was deeply concerned with giving legal meaning to the intention of testators and owners of property. As a result of these dynamics, the Court of Exchequer Chamber reversed Lord Mansfield's decision in *Perrin* and reinstated the Rule in Shelley's Case in 1772, holding that the rule "was a RULE OF LAW, not a rule of construction; that is, it was explicitly recognized to be applicable regardless of intention." Consequently, this ancient rule lived on until the growing desire to give effect to the owner's intention could be stifled no longer, and Great Britain decisively and finally abolished the rule in the Law of Property Act in 1925 (15 & 16 Geo. 5, ch. 20, § 131). Today, only a handful of states in the United States continue to give effect to the rule; the vast majority prefer to give effect to the intention behind the words used to transfer property.

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CROSS-REFERENCES

Feudalism; Mansfield, William Murray, First Earl of.

## RULE OF 78

*A method of computing refunds of unearned finance charges on early payment of a loan so that the refund is proportional to the monthly unpaid balance.*

The figure *78* is the sum of the digits of one to twelve—that is, the number of months in a one-year installment contract.

## RULE OF LAW

*Rule according to law; rule under law; or rule according to a higher law.*

The rule of law is an ambiguous term that can mean different things in different contexts. In one context the term means rule according to law. No individual can be ordered by the government to pay civil damages or suffer criminal punishment except in strict accordance with well-established and clearly defined laws and procedures. In a second context the term means rule under law. No branch of government is above the law, and no public official may act arbitrarily or unilaterally outside the law. In a

third context the term means rule according to a higher law. No written law may be enforced by the government unless it conforms with certain unwritten, universal principles of fairness, morality, and justice that transcend human legal systems.

### Rule According to Law

The rule of law requires the government to exercise its power in accordance with well-established and clearly written rules, regulations, and legal principles. A distinction is sometimes drawn between power, will, and force, on the one hand, and law, on the other. When a government official acts pursuant to an express provision of a written law, he acts within the rule of law. But when a government official acts without the imprimatur of any law, he or she does so by the sheer force of personal will and power.

Under the rule of law, no person may be prosecuted for an act that is not punishable by law. When the government seeks to punish someone for an offense that was not deemed criminal at the time it was committed, the rule of law is violated because the government exceeds its legal authority to punish. The rule of law requires that government impose liability only insofar as the law will allow. Government exceeds its authority when a person is held to answer for an act that was legally permissible at the outset but was retroactively made illegal. This principle is reflected by the prohibition against EX POST FACTO LAWS in the U.S. Constitution.

For similar reasons, the rule of law is abridged when the government attempts to punish someone for violating a vague or poorly worded law. Ill-defined laws confer too much discretion upon government officials who are charged with the responsibility of prosecuting individuals for criminal wrongdoing. The more prosecutorial decisions are based on the personal discretion of a government official, the less they are based on law.

For example, the DUE PROCESS CLAUSE of the Fifth and Fourteenth Amendments requires that statutory provisions be sufficiently definite to prevent ARBITRARY or discriminatory enforcement by a prosecutor. Government officials must not be given unfettered discretion to prosecute individuals for violating a law that is so vague or of such broad applicability that evenhanded administration is not possible. Thus, a Florida law that prohibited VAGRANCY was held VOID FOR VAGUENESS because it was so generally worded that it encouraged erratic prosecutions and made possible the punishment of normally innocuous behavior (*Papachristou v. City of Jacksonville,* 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 [1972]).

Well-established and clearly defined laws allow individuals, businesses, and other entities to govern their behavior accordingly (*United States v. E.C. Investments, Inc.,* 77 F. 3d 327 [9th Cir. 1996]). Before the government may impose civil or criminal liability, a law must be written with sufficient precision and clarity that a person of ordinary intelligence will know that certain conduct is forbidden. When a court is asked to shut down a paint factory that is emitting pollutants at an illegal rate, for example, the rule of law requires the government to demonstrate that the factory owner failed to operate the business in accordance with publicly known environmental standards.

### Rule Under Law

The rule of law also requires the government to exercise its authority under the law. This requirement is sometimes explained with the phrase "no one is above the law." During the seventeenth century, however, the English monarch was vested with absolute sovereignty, including the prerogative to disregard laws passed by the House of Commons and ignore rulings made by the House of Lords. In the eighteenth century, absolute sovereignty was transferred from the British monarchy to Parliament, an event that was not lost on the colonists who precipitated the American Revolution and created the U.S. Constitution.

Under the Constitution, no single branch of government in the United States is given unlimited power. The authority granted to one branch of government is limited by the authority granted to the coordinate branches and by the BILL OF RIGHTS, federal statutory provisions, and historical practice. The power of any single branch of government is similarly restrained at the state level.

During his second term, President RICHARD M. NIXON tried to place the EXECUTIVE BRANCH of the federal government beyond the reach of legal process. When served with a subpoena ordering him to produce a series of tapes that were anticipated to link him to the WATERGATE conspiracy and cover-up, Nixon refused to comply, asserting that the confidentiality of these

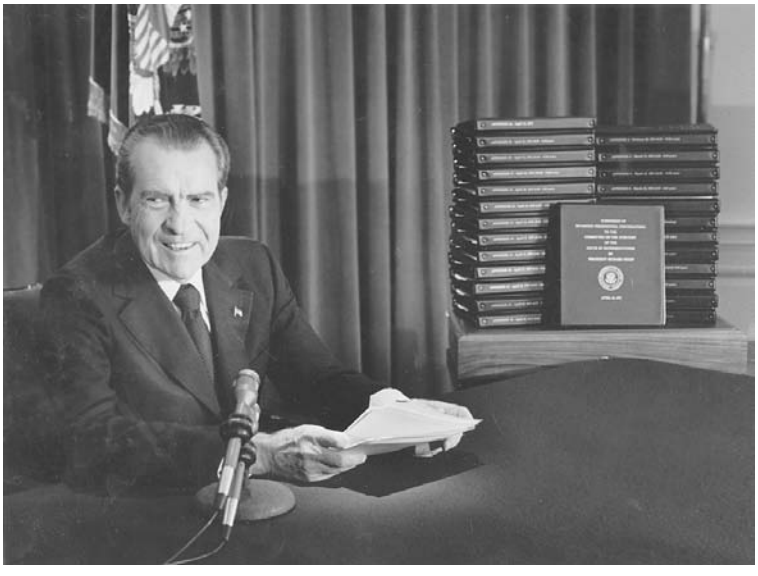

*The rule of law requiring government to exercise its authority under the law justified the Supreme Court's decision ordering President Nixon to comply with a subpoena and turn over tapes of White House conversations to a congressional impeachment probe.*

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tapes was protected from disclosure by an absolute and unqualified EXECUTIVE PRIVILEGE. In UNITED STATES V. NIXON, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), the Supreme Court disagreed, compelling the president to hand over the tapes because the Constitution forbids any branch of government from unilaterally thwarting the legitimate ends of a criminal investigation.

Members of the state and federal judiciary face a slightly different problem when it comes to the rule of law. Each day judges are asked to interpret and apply legal principles that defy clear exposition. Terms like "due process," "reasonable care," and "undue influence" are not self-defining. Nor do judges always agree about how these terms should be defined, interpreted, or applied. When judges issue controversial decisions, they are often accused of deciding cases in accordance with their own personal beliefs, be they political, religious, or philosophical, rather than in accordance with the law.

Scholars have spent centuries examining this issue. Some believe that because the law is written in such indefinite and ambiguous terms, all judicial decisions will inevitably reflect the personal predilections of the presiding judge. Other scholars assert that most laws can be interpreted in a neutral, objective, and apolitical fashion even though all judges may not agree on the appropriate interpretation. In either case the rule of law is better served when judges keep an open mind to alternative readings of constitutional, statutory, and common-law principles. Otherwise, courts run the risk of prejudging certain cases in light of their own personal philosophy.

### Rule According to Higher Law

A conundrum is presented when the government acts in strict accordance with well-established and clearly defined legal rules and still produces a result that many observers consider unfair or unjust. Before the Civil War, for example, African Americans were systematically deprived of their freedom by carefully written codes that prescribed the rules and regulations between master and slave. Even though these slave codes were often detailed, unambiguous, and made known to the public, government enforcement of them produced negative results.

Do such repugnant laws comport with the rule of law? The answer to this question depends on when and where it is asked. In some countries the political leaders assert that the rule of law has no substantive content. These leaders argue that a government may deprive its citizens of fundamental liberties so long as it does so pursuant to a duly enacted law. At the NUREMBERG TRIALS, some of the political, military, and industrial leaders of Nazi Germany unsuccessfully advanced this argument as a defense to Allied charges that they had committed abominable crimes against European Jews and other minorities during WORLD WAR II.

In other countries the political leaders assert that all written laws must conform with universal principles of morality, fairness, and justice. These leaders argue that as a necessary corollary to the axiom that "no one is above the law," the rule of law requires that the government treat all persons equally under the law. Yet the right to equal treatment is eviscerated when the government categorically denies a minimal level of respect, dignity, and autonomy to a single class of individuals. These unwritten principles of equality, autonomy, dignity, and respect are said to transcend ordinary written laws that are enacted by government. Sometimes known as NATURAL LAW or higher law theory, such unwritten and universal principles were invoked by the Allied powers during the Nuremberg trials to overcome the defense asserted by the Nazi leaders.

The rule of law is a concept explain in classical time. In Greece ARISTOTLE wrote that "law should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign in only

those matters which law is unable, owing to the difficulty of framing general rules for all contingencies." In ancient Rome the Corpus Juris Civilis established a complex body of procedural and substantive rules, reflecting a strong commitment to the belief that law, not the arbitrary will of an emperor, is the appropriate vehicle for dispute resolution. In 1215 MAGNA CHARTA reined in the corrupt and whimsical rule of King John by declaring that government should not proceed except in accordance with the law of the land.

During the thirteenth century, Thomas Aquinas argued that the rule of law represents the natural order of God as ascertained through divine inspiration and human reason. In the seventeenth century, the English jurist SIR EDWARD COKE asserted that the "king ought to be under no man, but under God and the law." With regard to the legislative power in England, Coke said that "when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the COMMON LAW will control it, and adjudge such act to be void." In the United States, ALEXANDER HAMILTON applied the rule of law to the judiciary when he argued in *The Federalist,* no. 78, that judges "have neither Force nor Will, but merely judgment."

Despite its ancient history, the rule of law was not celebrated in all quarters. The nineteenth-century English philosopher JEREMY BENTHAM described the rule of law as "nonsense on stilts." The twentieth century saw its share of political leaders who oppressed persons or groups without warning or reason, governing as if no such thing as the rule of law existed. For many people around the world, the rule of law is essential to freedom.

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Discretion in Decision Making; Due Process of Law; Judicial Review; Jurisprudence; Moral Law; Nuremberg Trials; Rule in Shelley's Case; Stare Decisis.

## RULES OF DECISION ACT

The Rules of Decision Act, (28 U.S.C.A. § 1652 [1948]) provides that where the Constitution, treaties, or acts of Congress are inapplicable, the law of the state in which the federal court is sitting should apply to civil actions.

First enacted in 1789, the act is designed to discourage forum-shopping and to avoid the unfair administration of laws in cases heard by federal courts because of the DIVERSITY OF CITIZENSHIP of the parties. The landmark decision in ERIE RAILROAD CO. V. TOMPKINS, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), interpreted the Rules of Decision Act to include not only state statutes, but also controlling judicial decisions or state COMMON LAW as constituting the laws of the state. *Erie* overruled SWIFT V. TYSON, 41 U.S. (16 Pet.) 1, 10 L. Ed. 865 (1842), which construed the Rules of Decision Act as not requiring federal courts to apply state common law in diversity cases.

## RULES OF WAR

*A body of customs, practices, usages, conventions, protocols, treaties, laws, and other norms that govern the commencement, conduct, and termination of hostilities between belligerent states or parties.*

Frequently violated and sometimes ridiculed, the rules of war have evolved over centuries. They distinguish nations whose armed forces respect some minimal standard of human decency from terrorists, marauders, and other outlaws who use illegal and unrestricted methods of warfare to achieve political, economic, or military objectives.

### Origins and Development

The modern rules of war trace their origins to the chivalric practices of medieval Europe. Feudal knights were bound by the law of

chivalry, a customary code of conduct that could be enforced in local courts throughout western Europe by a military commander of any nation. Premised on notions of justice and fairness, the law of chivalry gave birth to the distinction between soldier and civilian and the idea that women, children, and older persons should be shielded from the bloody fields of combat. The Roman Catholic Church also influenced the development of these rules, differentiating between just and unjust wars and denouncing certain weapons as odious to God.

CODIFICATION of the rules of warfare began in the nineteenth century. In 1862 President ABRAHAM LINCOLN commissioned Francis Lieber to draft a code of regulations summarizing the laws and usages of war. A year later, Lieber submitted a draft that the EXECUTIVE BRANCH promulgated as General Orders No. 1, entitled Instructions for the Government of Armies of the United States in the Field. Known as the Lieber code, this systematic articulation of the rules of war remained the official pronouncement of the U.S. Army for more than a half a century. It addressed the concept of military necessity, detailed the rights of prisoners, noncombatants, and spies, and discussed the use of poisons, unnecessary violence, and cruelty.

In 1864 the codification movement took on an international flavor when 12 nations signed a Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 129 Consol. T.S. 361, the first of a series of Red Cross initiatives for this purpose. In 1899 the United States, Mexico, Japan, Persia (now Iran), Siam (now Thailand), and 19 other nations, including all major European powers, signed a Convention with Respect to the Laws and Customs of War, 187 Consol. T.S. 429, an initiative that followed the broad outlines of the Lieber code and also addressed the relationship between an occupying power and noncombatant civilian inhabitants. In 1914 the Lieber code was replaced by an army manual entitled *The Law of Land Warfare,* which continued in the early 2000s to be enforced.

Codification of the international rules governing land, sea, and air warfare accelerated following the conclusions of World Wars I and II, the KOREAN WAR, the VIETNAM WAR, and the many other hostilities that took place during the twentieth century. In addition to building upon the principles previously established, this period witnessed the creation of several new concepts, including certain categories of WAR CRIMES, such as crimes against peace and crimes against humanity.

Crimes against peace are committed by persons who plan or wage aggressive wars. Crimes against humanity are committed by persons who knowingly participate in the deportation, enslavement, persecution, or programmatic extermination of certain segments of society during times of war. Soldiers, military leaders, political officials, members of the judiciary, industrialists, and civilians are all subject to prosecution for violating any of these rules of war.

Leaders and officials who wage aggressive war, disregard the territorial or political independence of another state, or violate the express terms of a peace settlement may be prosecuted as war criminals under the United Nations Charter. They may also be prosecuted under the Nuremberg principles, derived from the NUREMBERG TRIALS after WORLD WAR II in which the Allied powers tried 24 leading Nazis for an assortment of war crimes, including crimes against peace and crimes against humanity. The Allies later prosecuted more than a hundred German civilians, including industrialists, doctors, and judges, who were enlisted by the Nazis to further their system of terror.

### War, Terrorism, and Subversion

The rules of war do not apply to every act of hostility against an established government. Openly declared wars between sovereign states clearly implicate the rules of war. When the belligerents do not issue formal declarations of war, the legal status of a military conflict becomes murky. Isolated acts of TERRORISM or subversion, however, neither constitute acts of war nor create a state of war. Such acts are normally punishable under the criminal laws of the country in which they are perpetrated.

Wider internal disturbances within the territorial borders of a country are more difficult to classify. When such disturbances begin, the ruling government is apt to classify them as riots or rebellions, while those who cause the disturbances are likely to classify them as acts of civil war. INTERNATIONAL LAW provides no definitive classification for such hostilities. But subversive groups that acquire sustained control over substantial territory and win measurable domestic support are more likely to receive the benefit of the rules governing warfare than are small bands of insurgents whose seditious efforts are stifled and repelled.

Even when a state of war indisputably exists, the rules of war do not apply to all combatants. Regular land, air, and naval forces are typically governed by the rules of warfare. Irregular armed forces, such as guerrillas and other insurgents, are governed by these rules only when they carry their weapons openly, wear uniforms clearly displaying a recognizable emblem or insignia, conduct their operations in accordance with the laws of war, and are commanded by a superior who is responsible for subordinates.

The point of these rules is not only to distinguish combatants from noncombatants but to distinguish conventional soldiers from hired assassins, spies, and mercenaries who circumvent the customs of war in order to accomplish an end that could not be achieved by regular armed forces. Because assassins, spies, and mercenaries do not comply with the rules of war, their captors need not either. Similarly, combatants who attempt to flout the rules of war by disguising themselves in civilian clothing or enemy uniforms may be treated as ordinary criminals.

They may also be treated as "enemy" or "unlawful" combatants, a kind of purgatory between civilian status and prisoner-of-war-status. In response to the SEPTEMBER 11TH ATTACKS in 2001, the United States launched a WAR ON TERRORISM, which included a specific military operation against the Taliban government in Afghanistan and members of the al Qaeda terrorist organization conducting operations there. During that conflict, the U.S. military captured thousands of Taliban and al Qaeda forces, hundreds of whom were allegedly not complying with the rules of war, failing to wear uniforms with insignia clearly displayed, failing to carry their weapons openly, and failing to organize themselves in units subject to a hierarchical chain of command.

The United States transported approximately 650 of the captured combatants to Camp X-Ray at the naval base in Guantanamo Bay, Cuba, where they were held as "enemy" or "unlawful" combatants for the duration of the war against terrorism. President GEORGE W. BUSH issued a series of executive orders that formally denied the Guantanamo detainees prisoner-of-war-status and created military tribunals or commissions to try them for possible war crimes. Despite criticism from international observers who sought prisoner-of-war-status for the Guantanamo detainees, at least two U.S courts of appeal have allowed the president's orders to stand, one declining to exercise jurisdiction over the matter, *Al Odah v. U.S.*, 321 F.3d 1134 (D.C. Cir. 2003), and one denying that the petitioners had standing to challenge the detention, *Coalition of Clergy, Lawyers & Professors v. Bush*, 310 F.3d 1153, 1165 (9th Cir.2002). However, as of June 2003, no detainee had yet to appear before such a tribunal.

### Prisoners of War

The difference between an ordinary criminal, an ENEMY COMBATANT, and a prisoner of war is important. An ordinary criminal may be detained, prosecuted, and punished in accordance with the domestic criminal laws of the country in which the crime is committed. An enemy combatant may be detained and interrogated on foreign soil while hostilities are ongoing, without the benefit of counsel, the right to file a HABEAS CORPUS petition, or other fundamental liberties afforded by the U.S. Constitution or international law. A conventional soldier who is captured by the enemy must be humanely treated in accordance with the international rules of war. Under these rules prisoners of war are required to give their captors only enough information for identification, such as name, rank, serial number, and date of birth. According to the rules, captors may not torture prisoners to extract information from them or subject prisoners to punishment without first complying with specific legal procedures.

Under the rules of war, prisoners of war may not be punished for wrongs committed by the armed forces to which they belong, and medical and scientific experiments upon prisoners are forbidden. Captors must provide prisoners with sufficient food and beverages to maintain good health, and adequate standards of clothing, housing, sanitation, and hygiene are prescribed. To encourage accountability, captors are required to disclose the names of prisoners to the belligerent for which they were fighting when captured.

Although prisoners of war may be compelled to work while in captivity, they cannot be forced to contribute directly to the captor's war effort, and they must receive pay for their work on a scale commensurate with their rank. Prisoners are not permitted to harm their captors under the rules of war, but they may attempt to escape. Prisoners of war are entitled to full freedom of religion, and discrimination based on race, color, or ethnicity is prohibited. Given the

*U.S. Army medics treat a wounded Iraqi officer in April 2003. The rules of war require captors to provide sick and wounded soldiers with medical treatment.*

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breadth of these rights, prisoners of war often enjoy greater protection under the rules of war than they would under the domestic laws of their captor.

In certain cases being granted the status of prisoner of war can mean the difference between life and death. Summary execution of prisoners is expressly proscribed, as are orders to "take no prisoners" on the battlefield, which is tantamount to an order for their execution. The rules of war place other limitations on the use of CAPITAL PUNISHMENT and affirmatively require captors to provide sick and wounded prisoners with medical care. Violations of these rules, though not uncommon in the heat of battle, are deterred by the threat of REPRISAL. Prisoner exchanges, which benefit both sides, also provide belligerents with incentive for reciprocal compliance with these rules.

### Soldiers and Civilians

The difference between soldier and civilian is another important distinction under the rules of war. War is fought by trained soldiers armed with guns, tanks, and an assortment of other strategic weapons that they are authorized to use for tactical advantage, both offensive and defensive. The object of war is to thoroughly defeat an enemy by destroying its armed forces, which may be accomplished in an infinite number of ways, including killing and attrition. It is anticipated that much blood will be shed during a war, regardless of its length.

Civilians, by and large, are neither trained in combat nor armed, and they are not authorized to kill except in SELF-DEFENSE. However, civilians do have families to feed, mortgages to pay, and jobs to perform, obligations that are not suspended during times of war. Hence, the rules of war attempt to insulate civilians from many of the inconveniences, distractions, tragedies, and horrors of war.

War provides combatants with no IMMUNITY from ordinary criminal laws against rape and plunder, even when such transgressions are committed pursuant to an order given by a superior. Crimes committed against civilians because of their race, religion, and national origin, including GENOCIDE, are considered war crimes. Like prisoners of war, civilians may not be punished for wrongs committed by their government or military forces, and they may not be held as hostages under any circumstances.

Civilians may lose their protected status in certain circumstances. When insurgents or guerrillas live among the civilian population, soldiers may take measures to ferret out the enemy, including the use of interrogations, searches, and curfews. Although the individual liberty of civilians can be temporarily curtailed in such situations, it cannot be permanently eliminated. Protracted internment of entire villages or groups of civilians is not allowed. Civilian supporters who carry weapons or grenades forfeit their protected status, however, and may be detained as prisoners of war or saboteurs. If soldiers seek to destroy an entire village that is known to be an enemy stronghold, civilians must normally be informed of the action ahead of time and permitted to evacuate.

Military practice differs as to whether children, older persons, and pregnant women should be allowed egress from a besieged area. At the same time, it is common practice to permit clergy and medical personnel ingress to besieged locales. Once a besieged area has been overtaken, the military is considered an occupying power with the responsibility to administer the laws for the preservation of public order and public safety. Supplies of food and hospital services must be ensured.

### Military Occupation

Although an occupying power may exercise dominion over a conquered nation and acquires actual authority to administer the law, complete sovereignty is not transferred until a treaty or other settlement has been reached. An occupying power is not bound by the constitution or laws of the territory occupied, but it is prohib-

ited from altering them except in cases of military necessity. Inhabitants owe no duty of allegiance to an occupying power during a state of MARTIAL LAW.

Occupation is an important aim of warfare, enabling a belligerent to exploit an enemy's resources and deny them to a foe. The occupying power may seize any governmental property that is necessary for military operations but may not sell public land or buildings. Municipalities and institutions dedicated to religion, charity, education, arts, and sciences are exempt from seizure. The status of public officials, including members of the judiciary, cannot be changed by the occupying power, although officials can be removed for misconduct or asked to retire. Any system of public education must be allowed to continue.

Taxes may be collected from local residents, but the basic tax structure should remain intact. The occupying power is not permitted to destroy private property, except in cases of military necessity, and must fairly compensate individuals from whom it confiscates personal belongings. The occupying power may require private residents to house its troops, but the troops must honor familial rights, religious practices, and other customs in the community. In response to military occupation, allies of the conquered nation may freeze its assets or establish a naval blockade around the occupied territory.

### Aerial Warfare

Protection of civilian populations is also a primary concern of the rules governing aerial warfare. Indiscriminate bombing of undefended cities or other areas densely inhabited by civilians is considered a serious war crime. Aerial bombardment of private property that is unrelated to military operations, such as private homes, commercial establishments, philanthropic institutions, historical landmarks, and educational facilities, is also forbidden. Aerial assaults on hospitals, public or private, are banned as well.

The incidental destruction of private property during an aerial attack may not violate the rules of war, however, if the attack is carried out for military purposes. These include the interdiction of military communication and transportation, the enervation of military forces and installations, and the destruction of factories manufacturing arms or military supplies. Nonetheless, the bombing of such targets may be illegal if it endangers high concentrations of civilians, and the stated military objective is unclear or unimportant.

*During WWII, rules regarding aerial warfare were violated by both Axis and Allied forces. For example, combatant and noncombatant targets in Dresden, Germany, were the target of Allied bombs (1946).*

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Rules regarding aerial warfare are frequently violated. During World War II, both the Axis and the Allied powers engaged in bombing attacks that inflicted high casualties directly on civilian populations. In the Battle of Britain, the German Luftwaffe bombed certain English cities to weaken the residents' will to resist. Without discriminating between military and noncombatant targets, the Allies bombed Dresden and Hamburg in Germany and Tokyo and Yokohama, and the United States dropped the atomic bomb on Hiroshima and Nagasaki in Japan, killing over 100,000 Japanese civilians in the first ten seconds after the first blast. Since World War II, improved fighter planes and anti-aircraft defenses have made surgical aerial assaults more difficult.

Aircraft must be identified by external markings to allow belligerents to distinguish military from civilian aerial units. Additionally, such markings allow neutral countries to identify their own aircraft and permit the peaceful entry of aerial medical units onto a battlefield. Regardless of the nature of an aerial unit, belligerents are prohibited from firing on persons parachuting from a disabled aircraft, unless they are paratroopers engaged in an ESPIONAGE mission. Distinguishing paratroopers from other parachutists is left to the discretion of individual pilots and gunners.

### Naval Warfare

The rules governing naval warfare also leave much discretion to the participants. Although belligerent warships may attack and sink an enemy warship encountered on the high seas, they may neither attack nor sink an enemy merchant ship unless it refuses to obey a signal to stop and submit to inspection. Conversely, belligerent merchant ships are not obliged to stop or submit to inspection but may attempt to escape or act in self-defense. However, the line separating an act of self-defense from an offensive maneuver is subject to some debate. In 1916 a British merchant ship captain was court-martialed for ramming a German U-boat, despite the captain's claim that his vessel was acting in self-defense.

When an enemy warship has been captured, it becomes the property of the captor and may be sunk or brought into port. If an enemy merchant ship is captured, it must be taken into port for adjudication regarding the ownership of the vessel and its cargo pursuant to international law. In either case the passengers and crew of a captured ship may not be harmed. Captured members of enemy naval forces are entitled to treatment as prisoners of war. Shipwrecked belligerents are also entitled to humane treatment under the rules of war and may not be abandoned or refused quarter. Many of the same rules governing surface warships have been applied to submarine warfare as well.

### Weapons

All military forces, land, air, and sea, are restricted as to the type of weapons and explosives they may employ. Military forces may not use arms, projectiles, or other materials calculated to cause unnecessary suffering, such as weapons that leave fragments of glass and plastic in the body. The United Nations has condemned thermal NUCLEAR WEAPONS because of their propensity to inflict unnecessary suffering and their inability to discriminate between combatants and noncombatants or military and nonmilitary targets.

The use of poisons, poisoned weapons, and poisonous gases by any branch of the armed forces is flatly prohibited, as is the use of bacteriological materials and devices that spread disease. However, U.S. tacticians used incendiary weapons, such as napalm, and chemical herbicides, such as Agent Orange, when enemy forces concealed themselves in a jungle or forest. Several countries have objected to the use of chemical and incendiary weapons even for such limited purposes.

### Neutral Countries

All military forces are similarly bound by the rules of war with regard to neutral countries. By definition a neutral country is not a party to a military conflict between belligerent states. Unless bound by a treaty, governments are not required to remain neutral in a war, but they are presumed to be neutral unless they manifest adherence to one side or the other by word or act. Neutral countries must neither help nor harm a belligerent state nor allow a belligerent to make use of their territory or resources for military purposes. Instead, neutral states must assume a position of strict impartiality.

Neutral territory is considered an ASYLUM for prisoners of war, who become free upon reaching neutral ground. Belligerent troops may enter neutral territory to avoid capture but may be rejected or disarmed by the host country. Belligerent aircraft are not permitted to enter neutral airspace, and if they land, the host country may intern them. Belligerent warships may be granted asylum when they are in distress or in need of repairs. If belligerents abuse this privilege, however, asylum may be revoked, and their forces may be ordered to leave.

### Lawful and Unlawful Wars

The only type of war recognized by the United Nations as lawful is one fought in self-defense. The rules of warfare are not suspended, however, or otherwise rendered inapplicable merely because the grounds for fighting a particular war are unlawful. In an illegal war both the aggressor and other belligerents must still comport their behavior with the international customs, practices, and conventions of war. At the same time, some authority suggests that one belligerent may disregard certain rules of war in reprisal for its enemy's disregard of the same rules. Such reprisals have a tendency to spiral downward, however, with each act of retaliation straying further from the lawful norms of warfare.

### Enforcement

It is sometimes observed that the phrase *rules of war* constitutes an oxymoron because the business of war is treachery and chaos while rules and regulations seek to impose order and structure. No permanent and impartial international body has been created to administer the rules of war. Although the United Nations has acted with multinational support in the Korean

and Gulf Wars, and the INTERNATIONAL COURT OF JUSTICE has adjudicated claims against democratic and totalitarian regimes alike, neither body exercises sovereignty over individual member states in any meaningful sense, and powerful countries generally wield more influence over these bodies than do weaker countries.

In most instances it is left to the victorious powers to enforce the rules of war. Following World War II, for example, the Allies prosecuted the Axis powers in Europe and the South Pacific despite the claims of the vanquished that such proceedings amounted to little more than victor's justice or revenge. These claims were not entirely hollow, in that the Allies had committed a variety of war crimes themselves. During the course of the war, for example, the United States interned more than a hundred thousand Americans of Japanese descent simply because of their ancestry and dropped the atomic bomb on two Japanese cities; the British bombed civilian populations in Germany; and the Russians massacred Polish soldiers in the Katyn Forest.

Thus, the current system of international law remains imperfect. Nonetheless, international law attempts to embody the rudiments of human decency, rudiments that are reflected by the customs, practices, and rules of war.

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Armed Services; Arms Control and Disarmament; Court-Martial; Hirohito; Hitler, Adolf; Human Rights; Japanese American Evacuation Cases; Just War; *Korematsu v. United States*; Military Government; Military Law; Militia; Neutrality; Prize Law; Tokyo Trial; Uniform Code of Military Justice.

## RULING

*A judicial or administrative interpretation of a provision of a statute, order, regulation, or ordinance. The judicial determination of matters before the court such as the admissibility of evidence or the granting of a motion, which is an application for an order.*

## RUN

*To have legal validity in a prescribed territory; as in, the writ (a court order)* runs *throughout the county. To have applicability or legal effect during a prescribed period of time; as in, the* STATUTE OF LIMITATIONS *has* run *against the claim. To follow or accompany; to be attached to another thing in pursuing a prescribed course or direction; as in, the* COVENANT *(a written promise or restriction)* runs *with the land.*

## RUNNING WITH THE LAND

*Passing with a transfer of the property. A provision in a deed by which the person to whom the land is transferred agrees to maintain a fence is an example of a* COVENANT *that runs with the land.*

A covenant, a written promise or restriction on the use of land, is said to run with the land when either the obligation to perform it or the right to take advantage of it passes to the one to whom the land is transferred.

## RUSH, BENJAMIN

Benjamin Rush, a physician, teacher and political activist, is best known for being a member of the CONTINENTAL CONGRESS and one of the signers of the Declaration of Independence. His controversial medical theories showed forward vision on some subjects, but remarkably unenlightened views on others. His confidence in his own judgment led him to question the military strategy of General GEORGE WASHINGTON.

Rush was born into a strongly religious family on December 24, 1745, in Byberry Township, near Philadelphia. He was educated at a private academy and then sent to the College of New Jersey (now Princeton University). He graduated at age 14 in 1760 and then began the study of medicine. After six years as a medical apprentice in Philadelphia, Rush finished his education at the University of Edinburgh, in Scotland, where he received his medical degree in 1768. He undertook further training at a hospital in Lon-

don, England and attended medical lectures in Paris, France, where he made the acquaintance of BENJAMIN FRANKLIN. Returning to America in 1769, Rush became, at age 23, a chemistry professor at the medical school that was part of the College of Philadelphia (now the University of Pennsylvania). In 1770, he began a prolific writing career when he published the first American textbook on chemistry. He also began publishing essays on topics relating to health as well as temperance, CAPITAL PUNISHMENT, and SLAVERY. In 1774, Rush co-founded one of America's first anti-slavery societies.

Rush's prodigious schedule as a physician, teacher, writer, and lecturer did not prevent him from also becoming an ardent political activist. He published numerous tracts on colonial rights and became a member of the provincial conference of Pennsylvania. In 1776, Rush was elected to the Continental Congress, the body of delegates that met to create the political roadmap for the American colonies. As a strong advocate of the radical view that the colonies should control their own destinies, Rush was one of the signers of the Declaration of Independence. The proclamation, largely crafted by THOMAS JEFFERSON, was approved on July 4, 1776. In 1777, Rush was appointed SURGEON GENERAL of the Middle Department of the Continental Army. He resigned the appointment early in 1778 because he disagreed with the way the military hospitals were being run by his superior, who retained the support of General Washington. In return, Rush publicly questioned Washington's military judgment, giving brief support to a group who sought to replace Washington with another leader. Rush later expressed regret over his opposition to Washington.

"I ANTICIPATE THE DAY WHEN TO COMMAND RESPECT IN THE REMOTEST REGIONS IT WILL BE SUFFICIENT TO SAY I AM AN AMERICAN."
—BENJAMIN RUSH

Rush resumed his work as a physician, teacher, and lecturer. In 1783, he helped to found Dickinson College in Carlisle, Pennsylvania, and became one of its trustees. In 1786, he founded the Philadelphia Dispensary, a clinic that provided free medical services to poor people. He advocated limitations on the use of alcohol and tobacco, encouraged the use of clinical research and instruction, and advanced proposals for the study of veterinary medicine.

Rush's greatest accomplishments were in the area of mental health. He worked for years with insane patients at the Pennsylvania Hospital and sought humane treatment for them on the theory that insanity could be assuaged by medical treatment. He also deduced that many mental disorders had physical causes. His significant contributions to the study of mental illness and its causes led to Rush's appellation as the "Father of American Psychiatry". While showing considerable enlightenment on the topic of insanity, Rush espoused support for methods of treating physical ailments that were not only controversial, but also often fatal. Rush's approach to pathology was more theoretical than scientific. He was a proponent of bloodletting, purging, and other treatments that usually weakened patients and sometimes killed them.

In 1787, Rush was a member of the Pennsylvania delegation that ratified the U.S. Constitution. Ten years later, in 1797, President JOHN ADAMS appointed him as Treasurer of the U.S. Mint. Rush retained the position until his death in Philadelphia on April 19, 1813.

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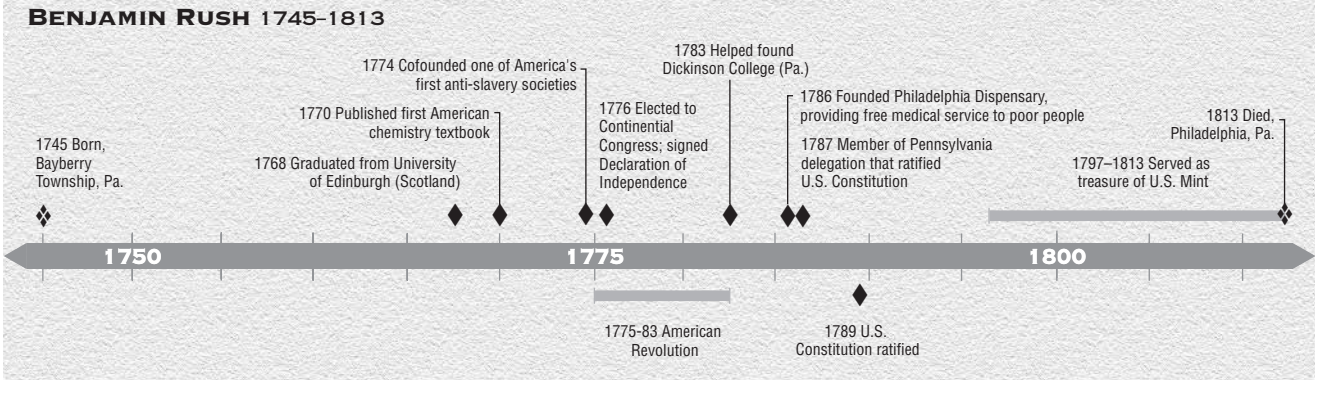

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## ♦ RUSH, RICHARD

Richard Rush served as U.S. attorney general from 1814 to 1817. Although he was recognized as an able lawyer, Rush's greatest contributions came in the field of diplomacy. He negotiated treaties that demilitarized the Great Lakes and set the northernmost boundaries between the United States and Canada. He also played a part in the establishment of the Smithsonian Institution.

Rush was born on August 29, 1780, in Philadelphia, Pennsylvania. His father was Dr. BENJAMIN RUSH, a signer of the Declaration of Independence and one of the towering intellectual figures of his day. Rush entered Princeton University in 1793 at the age of 13 and graduated in 1797. He went on to study law and was admitted to the Pennsylvania bar in 1800. In 1811 he became Pennsylvania attorney general but left that position when President JAMES MADISON appointed him comptroller of the U.S. Treasury.

In 1814, after declining the office of secretary of the treasury, Rush was appointed attorney general under President Madison. At age 34, he was the youngest attorney general in U.S. history. His major contribution was to edit the *Laws of the United States* (1815), a CODIFICATION of all federal statutes enacted between 1789 and 1815. For a short time in 1817, Rush performed the duties of the SECRETARY OF STATE and was instrumental in the drafting of the Rush-Bagot Treaty between the United States and Great Britain, which restricted the use of naval forces on the Great Lakes.

Late in 1817 Rush resigned as attorney general to serve as the U.S. minister to Britain. He remained in this position until 1825. While in London he negotiated the 1818 agreement between the two countries that fixed the forty-ninth parallel as the boundary between CANADA AND THE UNITED STATES, from the Lake of the Woods in northern Minnesota to the Rocky Mountains. Rush also participated in discussions with British foreign minister George Canning concerning South America. These discussions led to the announcement of the MONROE DOCTRINE of 1823, which declared that the Western Hemisphere was closed to further European colonization and that any European intervention would be regarded as a threat to the security of the United States.

President JOHN QUINCY ADAMS recalled Rush in 1825 to serve as his secretary of the treasury. In 1828 he was Adams's unsuccessful vice presidential running mate. In the 1830s, Rush published *A Residence at the Court of London* (1833) and returned to England, where he served as an official agent of the United States. In this capacity he received the bequest by which James Smithson founded the Smithsonian Institution in Washington, D.C. Rush became involved with the planning of the Smithsonian and served on its BOARD OF REGENTS.

In 1847 President JAMES POLK appointed Rush minister to France. He served for two years before retiring from public service and devoting himself to his writing. Rush died on July 30, 1859, in Philadelphia.

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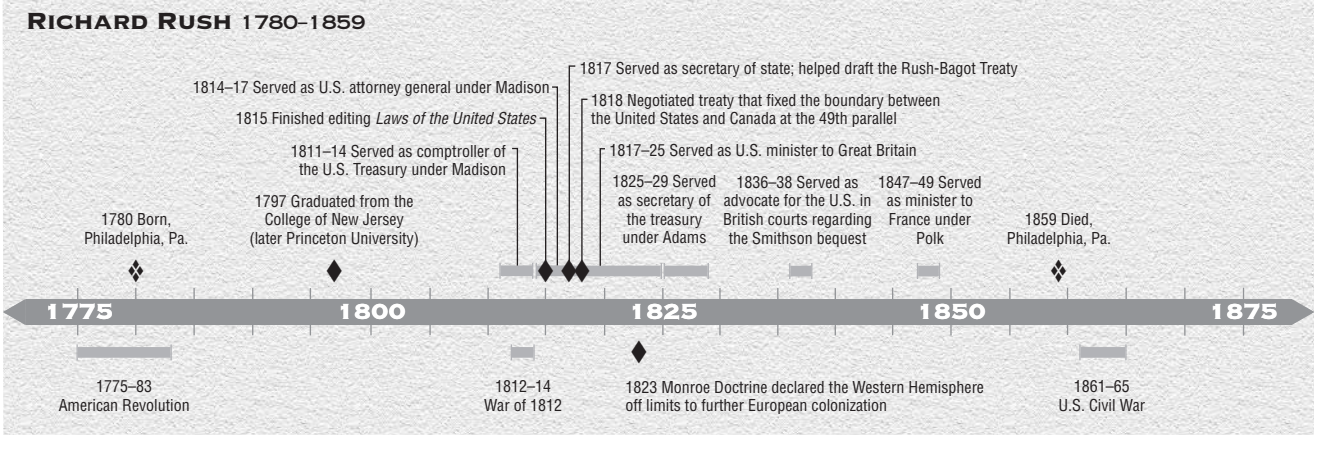

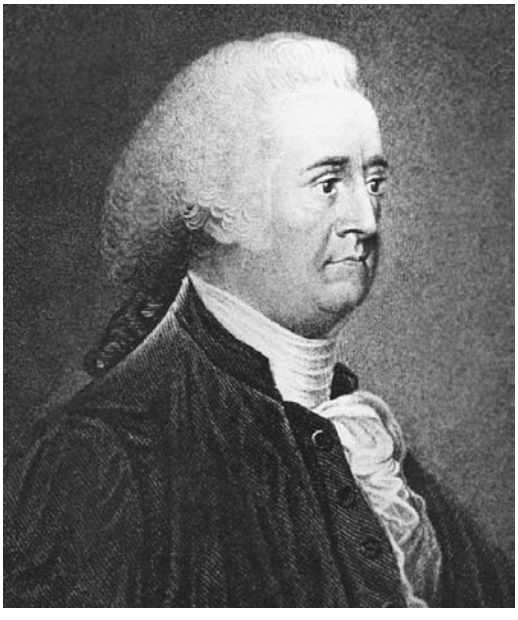

*John Rutledge.*
LIBRARY OF CONGRESS

"SO LONG AS WE MAY HAVE AN INDEPENDENT JUDICIARY, THE GREAT INTERESTS OF THE PEOPLE WILL BE SAFE."
—JOHN RUTLEDGE

## RUTLEDGE, JOHN

Few justices of the U.S. Supreme Court combined outstanding achievement with mishap and tragedy to the extent of John Rutledge. Rutledge's career spanned three decades of public service during the early years of the nation. From 1761 until the 1780s, he enjoyed success as a lawyer, politician, Revolutionary War leader, and judge in South Carolina. His prominence at the Constitutional Convention—and his role in opposing British rule—brought him national fame and made him a favorite of President GEORGE WASHINGTON. Washington appointed him to the Supreme Court twice, first in 1789 and again in 1795.

Born in September 1739 to a prominent family in Charleston, South Carolina, Rutledge was groomed for success. His wealthy physician father died when he was eleven, and thereafter his uncle, Andrew Rutledge, guided Rutledge's education. Andrew Rutledge, a lawyer and speaker of the South Carolina Commons House of Assembly, saw to it that his nephew was prepared for a legal and political career: the teenager was sent to England to study law at the Middle Temple, one of the Inns of Court, and in 1760 he was admitted to the English bar. At the age of twenty-one, Rutledge returned home, instantly won a seat in the state Assembly, and began a successful legal practice. Within a few years, Rutledge and two other lawyers were handling the affairs of South Carolina's wealthiest businessmen.

Rutledge's rise in politics was aided by his involvement in the growing revolutionary movement. In 1765 he attended the emergency conference held in New York City to discuss the colonists' anger at Britain's imposition of the Stamp Tax. Rutledge wrote an official declaration to the British House of Lords opposing the tax. When the Revolutionary War came, he led the defense of South Carolina. Rutledge's performance in the war cemented his growing national reputation, and a string of successes followed.

In 1775 Rutledge helped write the constitution for South Carolina, and a year later, he was elected president of its new state assembly. He was elected governor in 1779. From 1782 to 1784, he served in the U.S. Congress under the ARTICLES OF CONFEDERATION and then as chief judge of a court of chancery in South Carolina. He was one of the authors of the U.S. Constitution at the Constitutional Convention in Philadelphia in 1787.

At the national level, President Washington was Rutledge's chief political sponsor. He

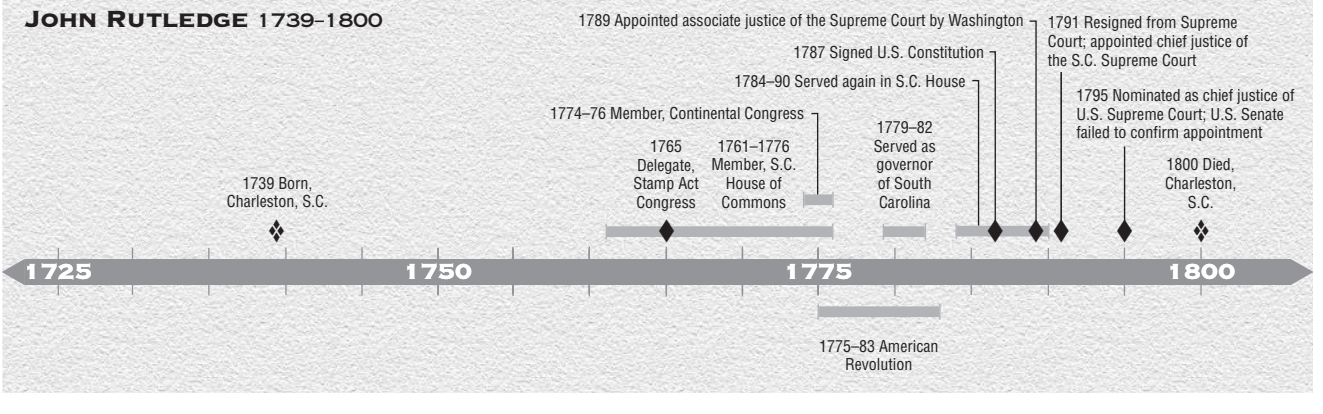

offered Rutledge a federal judgeship and appointment as minister to the Netherlands, which he declined. He accepted when Washington named him to the Supreme Court in 1789 (though not, as Rutledge had hoped, as its chief justice). The Court heard no cases during its first two years, but Rutledge traveled great distances to fulfill his duties as a judge on the southern circuit. The position did not suit him, however. Bored and upset that he was merely an associate justice, he quit the Court in 1791 and returned to South Carolina, where he became chief justice of the Court of Common Pleas.

By June 1795 Rutledge was ready to return to the Supreme Court. JOHN JAY, the chief justice, was resigning, and Rutledge wrote to Washington suggesting that he should have the position. The president agreed and promptly nominated him. Over the next six months, while awaiting Senate approval of his nomination, Rutledge, as acting chief justice, heard his only two cases and wrote his only opinion: *Talbot v. Jansen,* 3 U.S. 133, 1 L. Ed. 540 (1795), an unimportant decision concerning goods captured at sea.

In the interim Rutledge undid his career. At a meeting in Charleston in July 1795, he spoke out wildly against Jay's Treaty, a controversial postwar agreement between the United States and Britain. The treaty was highly unpopular across the nation, but Rutledge went too far, denouncing it as "prostitution" and declaring that the president should die rather than sign it. Indeed, since the death of his wife in 1792, Rutledge had been depressed, and reports of insanity had begun to spread. His supporters—Washington among them—disbelieved the rumors, but Rutledge's enemies seized on them and blocked his confirmation in the Senate in December 1795. Upon hearing the news, he jumped off a wharf into Charleston Bay. Although two passing slaves foiled his suicide attempt, Rutledge's public career was over. Seldom seen again, he died five years later, on June 21, 1800.

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## ♦ RUTLEDGE, WILEY BLOUNT, JR.

A stalwart defender of civil liberties, Associate Justice Wiley B. Rutledge Jr., sat on the U.S. Supreme Court for six years during the transitional NEW DEAL era. Rutledge was a distinguished law professor and dean who became a judge through his support of President FRANKLIN D. ROOSEVELT. In 1939 Roosevelt named him to the U.S. Court of Appeals for the District of Columbia, and four years later to the Supreme Court. From 1943 until his death in 1949, Rutledge championed the rights of minorities and unpopular groups.

*Wiley B. Rutledge Jr.*
CORBIS

Born in Cloverport, Kentucky, on July 20, 1894, Rutledge was the son of a fundamentalist Baptist minister. His father, Wiley Sr., rode the backwaters of Kentucky preaching hellfire and brimstone, often with his son in tow. By his teens, however, Rutledge had left for the University of Wisconsin where he immersed himself in debate, classical literature, and ancient languages, earning a B.A. in 1914.

In his twenties, tuberculosis and financial trouble forced Rutledge to postpone the legal education he desired. Between 1915 and 1920, he supported himself and his wife, Annabel Person, by teaching high school in Indiana, New Mexico, and finally in Colorado, where he enrolled in a full-time law program at the state university. By 1922 he had earned his law degree, and immediately accepted a job with a Boulder firm. But he left practice two years later in order to embark on a fifteen-year long career as a law

professor. He taught at three universities, promoted modern teaching methods, and ultimately served as dean at Washington University (1930–1935) and the Iowa College of Law (1935–1939). It was during these later years, while engaging in debate over local and national issues, that he developed a reputation as a champion of the underdog.

Rutledge was an ardent supporter of President Roosevelt's New Deal, a series of legislative reforms designed to pull the nation out of economic depression. Yet the U.S. Supreme Court struck down one after another of the president's programs. Roosevelt then announced his controversial plan to reorganize the federal judicial system—the so-called court-packing plan that would have filled even the Supreme Court with pro-Roosevelt justices. Rutledge backed it. In 1939 the president appointed him to the U.S. Court of Appeals for the District of Columbia, and in 1943 he appointed Rutledge to the Supreme Court.

Rutledge consistently upheld the rights of the individual, including the rights to a jury trial, to practice religion freely, to be free from unreasonable SEARCHES AND SEIZURES, and not to suffer CRUEL AND UNUSUAL PUNISHMENT. In his concurring opinion in *Schneiderman v. United States,* 320 U.S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796 (1943), he voted to restore citizenship to an immigrant who, twelve years after his naturalization, had been targeted for deportation by the JUSTICE DEPARTMENT because of membership in the Communist Party. In *Yamashita v. Styer,* 327 U.S. 1, 66 S. Ct. 340, 90 L. Ed. 499 (1946), Rutledge dissented from the denial of HABEAS CORPUS relief to Japanese general Yamashita Tomoyuki, who had been sentenced to death for WAR CRIMES on the basis of HEARSAY evidence.

Rutledge regularly joined the opinions of Justices HUGO L. BLACK, FRANK MURPHY, and WILLIAM O. DOUGLAS. He worked exhaustively, and, in the opinion of some of his brethren on the Court, too much. He died on September 10, 1949, in York, Maine, at the age of 54.

"PRECEDENT IS NOT ALL CONTROLLING IN LAW. THERE MUST BE ROOM FOR GROWTH, SINCE EVERY PRECEDENT HAS AN ORIGIN."
—WILEY BLOUNT RUTLEDGE JR.

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## RYLANDS V. FLETCHER

*Rylands v. Fletcher* was the 1868 English case (L.R. 3 H.L. 330) that was the progenitor of the doctrine of STRICT LIABILITY for abnormally dangerous conditions and activities.

The defendants, mill owners in the coal mining area of Lancashire, had constructed a reservoir on their land. The water broke through the filled-in shaft of an abandoned coal mine and flooded connecting passageways into the plaintiff's active mine nearby. In 1865, the trial court found that the defendants were ignorant of the abandoned mine shaft and free of NEGLIGENCE and decided the case in favor of the defendants.

In 1866, on appeal by the plaintiffs, the Exchequer Chamber decided to reverse the lower court and imposed strict liability on the defendants, but the case did not readily fit within the existing TORT theories. No TRESPASS had occurred since the premises of plaintiff and defendants did not adjoin; therefore, the flooding was not direct, nor was it a NUISANCE, since there was nothing offensive to the senses and the

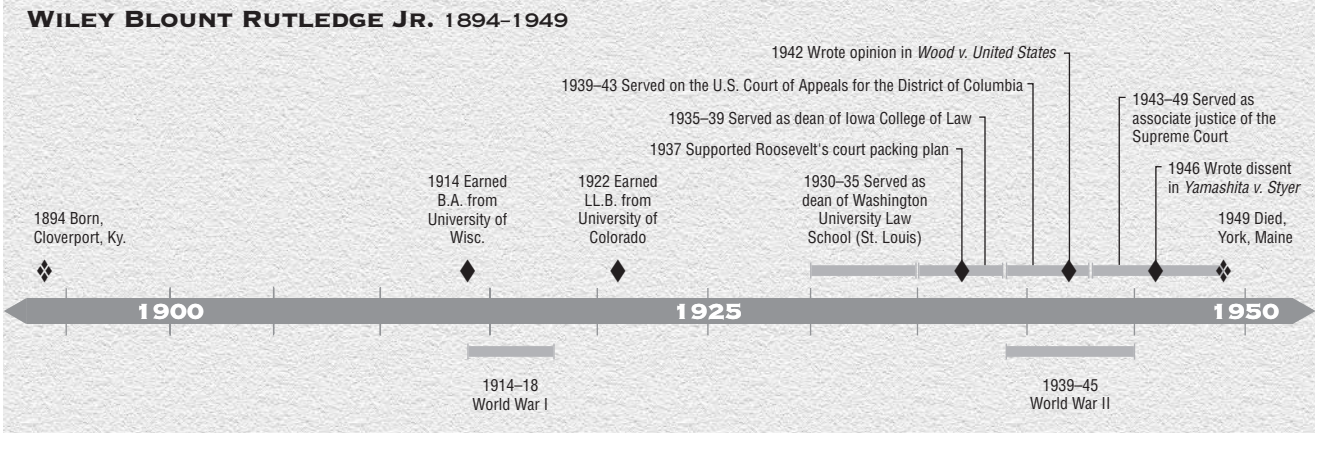

damage was not continuous or recurring. Justice Colin Blackburn, comparing the situation to trespasses involving cattle and dangerous animals, declared: "The true RULE OF LAW is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is PRIMA FACIE answerable for all the damage which is the natural consequence of its escape." This language, frequently quoted, is often erroneously regarded as the "rule" of the case.

In 1868 the defendants appealed to the House of Lords, which decided to affirm the ruling of the Exchequer Chamber, but Lord Cairns sharply limited Justice Blackburn's broad statement. Lord Cairns ruled that the principle applied only to a "nonnatural" use of the defendant's land, as distinguished from "any purpose for which it might in the ordinary course of the enjoyment of land be used." Thereby he shifted the emphasis from the mere tendency of all water to escape to the abnormal and inappropriate character of the defendant's reservoir in coal mining country. Strict liability exists for harm resulting from the miscarriage of lawful activity that, considering its place and manner, is unusual, extraordinary, or inappropriate. As a result, water collected in household pipes or a stock watering tank or a cistern is a natural use, but water collected in large tanks in dangerous proximity to the plaintiff's land is not.

The same activity might be appropriate or normal in one location but not in another; therefore, the primary basis of liability is the creation of an extraordinary risk. A water reservoir is an inappropriate use of land in a coal mining area, but not in an arid state. Blasting creates unusual and unacceptable risks in the midst of a large city, but not in remote rural areas. If the activity, such as crop dusting, is appropriate to the area, strict liability exists only if the activity is conducted in an unusual or abnormal way.

Until 1947, the English courts had liberally applied the doctrine enunciated in this case. Whereas the rule was originally stated in terms of an "escape" of that which caused the harm, subsequent cases imposed no such requirement. The rule was also extended to cover personal injuries as well as property damage. In a 1947 case, however, the House of Lords refused to impose strict liability in favor of a government inspector injured in an explosion at the defendant's munitions plant on the ground that there had been no escape of a dangerous substance from the defendant's land. Two of the judges thought that the rule did not apply to personal injuries.

At first, U.S. courts generally did not apply the *Rylands* doctrine. Curiously, a number of cases spurning the "rule" rejected it in the broad form stated by Justice Blackburn, ignoring or overlooking the fact that the final formulation by Lord Cairns was narrower. Much of the earlier hostility to the rule was probably due to the strength of the fault ethic and to a desire to protect emerging industries. At present, a majority of U.S. jurisdictions accept the rule, in name or in fact. In comparison, however, to the English decisions, U.S. cases have been slightly less liberal in applying the rule.

Even where *Rylands v. Fletcher* is expressly rejected or narrowly applied, the same result can be reached by actions for absolute nuisance or trespass.

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## S CORPORATION

*A type of corporation that is taxed under subchapter S of the* INTERNAL REVENUE CODE *(26 U.S.C.A. § 1 et seq.).*

An S corporation differs from a regular corporation in that it is not a separate taxable entity under the Internal Revenue Code. This means that the S corporation does not pay taxes on its net income. The net profits or losses of the corporation pass through to its owners.

An S corporation must conform to a state's laws that specify how a corporation must be formed. At minimum, articles of incorporation must be filed with the SECRETARY OF STATE. An S corporation must also file a special form with federal and state tax authorities that notifies them of the election of the subchapter S status.

A corporation may be granted S status if it does not own any subsidiaries, has only one class of stock, and has no more than seventy-five shareholders, all of whom must be U.S. citizens or U.S. residents. A corporation may elect S status when it is incorporated or later in its corporate life. Likewise, a corporation may elect to drop its S status at any time.

An S corporation status is attractive to smaller, family-owned corporations that want to avoid double taxation: a tax on corporate income and a second tax on amounts distributed to shareholders. This status may also make financial sense if a new corporation is likely to have an operating loss in its first year. The losses from the business can be passed through to the individual shareholder's tax return and be used to offset income from other sources.

An S corporation also avoids audit issues that surround regularly taxed corporations, such as unreasonable compensation to office-shareholders. Finally, S status may avoid problems raised by corporate accounting rules and the corporate alternative minimum tax. These problems are eliminated because the income is taxed to the shareholders.

An S corporation can deduct the cost of employee benefits as a business expense. However, shareholders who own more than two percent of the stock are not considered employees for INCOME TAX purposes and their benefits may not be deducted. Tax advantages can be achieved in some cases because income can be shifted to other family members by making them employees or shareholders (or both) of the corporation.

Appreciation of the business also can be shifted to other family members as a way to minimize death taxes when an owner dies. When an S corporation is sold, the taxable gain on the business may be less than if it had been operated as a regular corporation.

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## SABOTAGE

*The willful destruction or impairment of, or defective production of, war material or national defense material, or harm to war premises or war utilities. During a labor dispute, the willful and malicious destruction of an employer's property or interference with his normal operations.*

The objective of sabotage is to halt all production, rather than to destroy or imperil human life. The original act of sabotage is thought to have occurred not long after the introduction of machinery when someone slipped a workman's wooden shoe, called a *sabot,* into a loom in order to stop production. Sabotage is a crime.

## SACCO AND VANZETTI TRIAL

The 1921 murder trial of the young Italian immigrants Nicola Sacco and Bartolomeo Vanzetti was one of the most controversial trials in U.S. history. For some observers, the trial was a way to bring two criminals to justice. For others, the two men were innocent of the crime but were found guilty because they were immigrants and political radicals. Defenders of Sacco and Vanzetti waged a fierce legal and public relations battle to save their lives, but the men were executed in 1927.

On April 15, 1920, in South Braintree, Massachusetts, a paymaster and a security guard for a shoe company were delivering a $15,000 payroll for the business. Two men in an automobile fatally shot the two men, stole the money, and fled. Eventually, the police focused on Sacco and Vanzetti as their prime suspects.

The men appeared to be unlikely armed robbers. They had arrived in the United States in 1908. Sacco found work as a shoemaker, and Vanzetti became a fish vendor. Politically they were anarchists who opposed all governments. Their opposition to WORLD WAR I led them to emigrate from the United States to Mexico to avoid military CONSCRIPTION. They returned to the United States in 1920 and settled in Massachusetts.

The police took Sacco and Vanzetti into custody primarily on the basis of two pieces of evidence. Sacco owned a pistol of the type used in the murders, and the men were arrested at a garage attempting to reclaim a repaired automobile that had been seen in the vicinity of the South Braintree crime scene. Sacco and Vanzetti knew very little English and gave confusing and false answers during their interrogation, which diminished their credibility.

Sacco and Vanzetti were indicted on September 11, 1920, for the murders and the ROBBERY. The trial began on May 31, 1921, before Judge Webster Thayer. The defendants were represented by Fred Moore, who had been hired on their behalf by the recently formed AMERICAN CIVIL LIBERTIES UNION.

EYEWITNESS testimony at the trial was contradictory. A few witnesses gave detailed descriptions of Sacco and Vanzetti, but on cross-examination many of the details proved inaccurate. Several defense witnesses testified that Sacco had been in Boston at the time of the murders.

Prosecutor Frederick G. Katzman used the unreliable answers that the defendants had given during their initial interrogation to impugn their credibility. He also made irrelevant remarks about the defendants' unpopular political beliefs and their lack of patriotism. Judge Thayer allowed these remarks to pass. Some trial observers noted that Thayer was hostile to the defense and that he may have been biased in favor of the prosecution.

Moore argued that the defendants' poor English was at the root of the false information they provided and that they were innocent men thrown into an incomprehensible situation.

The jury convicted Sacco and Vanzetti of the murders and the robbery on July 14, 1921. The convictions drew cries of outrage from socialists, radicals, and prominent intellectuals in the United States and Europe. Investigators were hired to look for new evidence that would prove that Sacco and Vanzetti were innocent.

Over the next six years, Sacco and Vanzetti's lawyers presented many motions to Judge Thayer, asking that a new trial be granted so that new evidence could be introduced. Investigators claimed to have uncovered evidence that would refute damaging testimony of several prosecution witnesses. At that time Massachusetts law gave the trial judge the final power to reopen a case on the basis of new evidence. Thayer adamantly refused to order a new trial.

In 1925 Celestine Madeiros, a convicted murderer awaiting execution, confessed to being a member of a gang that had committed the South Braintree crimes. He absolved Sacco and Vanzetti of any involvement. Thayer refused to recognize the statement as adequate evidence to

*Nicola Sacco (r) and Bartolomeo Vanzetti in 1923. Many legal observers believed then, as now, that the men should have been granted a new trial after their conviction in 1921.*

BETTMANN/CORBIS

justify a new trial. The Supreme Judicial Court of Massachusetts agreed to review the case but affirmed the verdict (*Commonwealth v. Sacco and Vanzetti,* 255 Mass. 369, 151 N.E. 839 [1926]).

**FELIX FRANKFURTER**, a Harvard law professor and future member of the U.S. Supreme Court, believed that the trial had been a travesty of justice and labored on the many posttrial motions. He and others used the press to make their claim that Sacco and Vanzetti were victims of political and ethnic bias.

On April 9, 1927, Sacco and Vanzetti received the death sentence. This set off a storm of protest, with mass meetings throughout the United States. Massachusetts Governor Alvin T. Fuller appointed an independent advisory committee composed of two university presidents and a former judge to review the trial and its aftermath. On August 3 the governor announced that he would follow the panel's recommendation and not grant Sacco and Vanzetti clemency.

More protests erupted in many cities, and bombs were set off in New York and Philadelphia. On August 23, 1927, Sacco and Vanzetti, still maintaining their innocence, were executed in the electric chair.

The guilt or innocence of Sacco and Vanzetti continues to be debated. Most commentators agree, however, that the defendants should have been granted a new trial because the first one was tainted with political and ethnic prejudice that made a fair proceeding impossible.

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**CROSS-REFERENCES**

Anarchism.

## SAID

*Mentioned earlier. Frequently used in contracts and other legal documents, with the same force as* aforesaid.

## SAILOR

*Person who navigates ships or assists in the conduct, maintenance, or service of ships.*

Sailors have historically received special treatment under the law because of the nature of their work. Sailing a vessel through treacherous waters, often for long distances, is an isolated and dangerous undertaking. Although most countries have developed comprehensive policing methods on land, the international community has not been able to muster the resources necessary to police the entire expanse of every body of water. Thus, except when moving along coasts or on rivers, ships are essentially cut off from the rest of the world as they sail from port to port.

The unique problems sailors face have often aroused judicial concern. In 1823, for example, while serving as a circuit court justice, Supreme Court justice JOSEPH STORY wrote in *Harden v. Gordon,* 11 F. Cas. 480 (Cir. Ct. D. Maine 1823) that sailors are

> liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment.

Although sailors still face unusual challenges and dangers, their situation now is far less desperate than that described by Story in 1823. Merchant marines (professional sailors), at least in the United States, are well-paid professionals; they are represented by unions and receive the same employment benefits as other organized professionals.

Sailors sign employment contracts for specific voyages. The contract may be made with the ship itself in the ship's capacity as a corporate entity, or it may be made directly with the master of the ship. In any contract, a sailor is entitled to sail in a staunch and watertight ship that is properly equipped and handled by a competent crew. The employer must supply wholesome food during the voyage, and any sailor who becomes sick is entitled to maintenance and cure. *Maintenance and cure* is the duty of an employer to provide medical services to a sailor until the sailor recovers or the voyage ends. If a sailor requires immediate medical attention, the master of the ship may be required to change its course to find the closest hospital. A sailor's right to maintenance and cure is not limited to illnesses or injuries suffered while at sea; employers are similarly required to provide maintenance and cure for illnesses or injuries that occur during shore leave.

Courts have developed the right to maintenance and cure in deference to the sailor's difficult and unique employment situation. Fear of mutiny is one reason for providing maintenance and cure. As Story observed in *Harden,* if sailors' earnings were taken away for illnesses or injuries suffered while at sea, "the great motives for good behaviour might be ordinarily taken away."

Congress passed the Merchant Marine Act of 1920 (46 App. U.S.C.A. § 688 [1997]) to provide sailors with a remedy in federal court for employment-related injuries. The act, also known as the JONES ACT, specifically grants to a "seaman" the right to recover from an employer for the NEGLIGENCE of the employer or the unseaworthiness of the vessel. The act authorizes a trial by jury, and it also gives relatives of sailors a right to recover damages for a sailor's death.

Because Congress failed to define the term *seaman* in the Jones Act, much of the litigation involving the act has been over who qualifies for the remedies it provides. Originally only persons engaged in the navigation of a ship qualified for coverage. In 1995, in *Chandris, Inc. v. Latsis,* 515 U.S. 347, 115 S. Ct. 2172, 132 L. Ed. 2d 314, the U.S. Supreme Court suggested that a shore-based engineer who takes occasional voyages may be deemed a sailor under the act. According to the Court, to qualify as a seaman under the Jones Act, the worker's duties must contribute to the accomplishment of a vessel's mission, and the worker must have a connection to a vessel or group of vessels in navigation. The connection must be substantial in both duration and nature. Thus a shore-based person who works on the ventilation system in a ship but does not sail on a ship does not qualify as a sailor, but a shore-based vessel engineer who takes occasional voyages may be deemed a seaman under the Jones Act.

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Admiralty and Maritime Law; Soldiers' and Sailors' Civil Relief Act of 1918.

## ST. CLAIR, JAMES DRAPER

James Draper St. Clair was a distinguished attorney who attained national prominence in 1974 as special counsel to President RICHARD M. NIXON during the WATERGATE scandal. As special counsel, St. Clair defended Nixon before the U.S. House of Representatives Judiciary Committee during its IMPEACHMENT hearings against the president and argued before the U.S. Supreme Court that Nixon did not have to turn over his secretly recorded White House tapes to the Watergate special prosecutor.

St. Clair was born on April 14, 1920, in Akron, Ohio. He graduated from the University of Illinois in 1941 and served in the U.S. Navy during WORLD WAR II. Following the war, St. Clair attended Harvard Law School, graduating in 1947. He was admitted to the Massachusetts bar that year and began work at Hale and Dorr, the most prominent law firm in Boston. St. Clair remained with the firm during his entire legal career.

A skilled litigator, St. Clair assisted JOSEPH N. WELCH, a senior attorney with Hale and Dorr, at the Army-McCarthy hearings in 1954. These hearings marked a turning point in Senator Joseph R. McCarthy's four-year quest to expose supposed Communist subversion in the federal government. Welch, representing the U.S. Army, skillfully rebuffed McCarthy's charges during the televised hearings.

St. Clair returned to Washington, D.C., and political controversy in 1974, when Congress and a special criminal prosecutor moved aggressively to obtain information on Nixon's role in the Watergate scandal. By early 1973, the botched 1972 BURGLARY of the Democratic National Committee's offices in the Watergate building complex in Washington had been linked to members of Nixon's campaign and White House staff. The revelation in the summer of 1973 that Nixon had secretly recorded all conversations in the Oval Office led to demands by special prosecutor ARCHIBALD COX that Nixon surrender the tapes. Nixon refused, firing Cox. Cox's replacement, LEON JAWORSKI, renewed the demand.

Nixon then hired St. Clair to argue against disclosure of the tapes and to prevent the House of Representatives from voting impeachment charges against the president. In the Judiciary Committee proceedings, St. Clair was permitted to hear the evidence, question witnesses, and present a defense. He argued that Nixon could be impeached only on hard proof that the president had committed serious criminal acts. Most committee members believed that a president might also be impeached for wrongdoing that was not strictly criminal. In July 1974, the committee approved impeachment resolutions that charged Nixon with assisting in the Watergate cover-up, abusing his powers, and failing to honor committee subpoenas for the White House tapes.

As to the question of producing evidence, St. Clair argued that the doctrine of EXECUTIVE

"[THE SUPREME COURT] HAS THE OBLIGATION TO DETERMINE THE LAW [REGARDING EXECUTIVE PRIVILEGE]. THE PRESIDENT ALSO HAS AN OBLIGATION TO CARRY OUT HIS CONSTITUTIONAL DUTIES."
—JAMES DRAPER ST. CLAIR

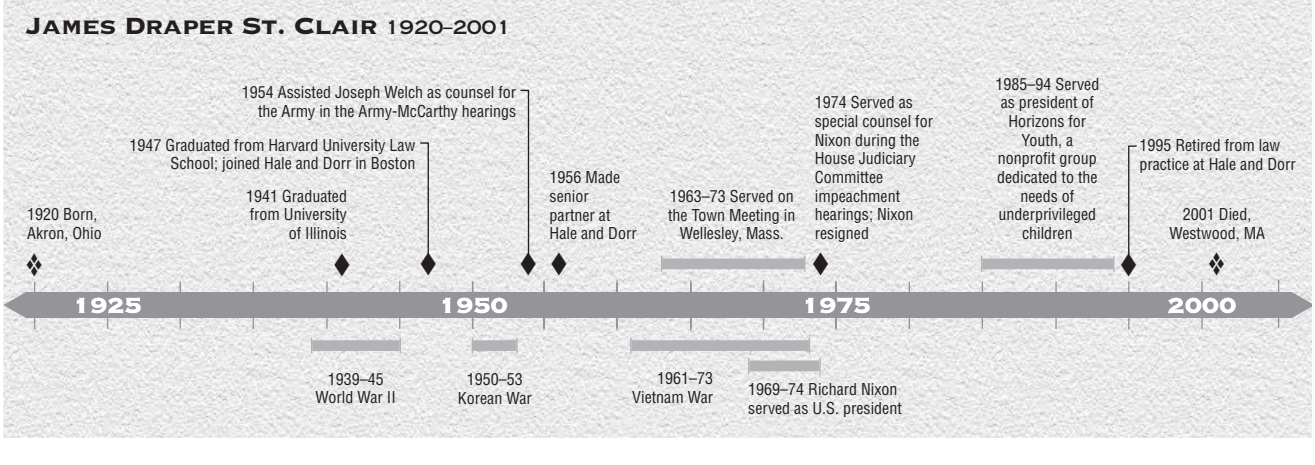

*James Draper St. Clair.*
AP/WIDE WORLD PHOTOS

**PRIVILEGE** gave Nixon the right to withhold the tapes. In **UNITED STATES V. NIXON**, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), the Supreme Court ruled that the **EXECUTIVE BRANCH** was entitled to a presumptive, qualified privilege against disclosure of presidential communications, but that the privilege was overcome by the prosecutor's need for disclosure of those communications.

Shortly after the Supreme Court decision, St. Clair learned that one of the 64 tapes in question included a conversation between Nixon and his chief of staff, H. R. (Harry Robbins) Haldeman, in which Nixon sought to stop the **FEDERAL BUREAU OF INVESTIGATION** from investigating the Watergate burglary. The conversation, which took place a few days after the 1972 burglary, was the so-called smoking gun that proved Nixon had obstructed justice. St. Clair insisted that Nixon publish the tape. After its disclosure, Nixon's political support vanished. He resigned on August 9, 1974, rather than face certain impeachment and removal from office.

Following the Nixon debacle, St. Clair returned to Boston, where he continued to practice law at Hale and Dorr for another decade before retiring. He also was a lecturer at Harvard Law School and remained active in many civic and philanthropic organizations. In the early 1990s, St. Clair was again at the center of controversy when he was asked by Mayor Raymond L. Flynn to investigate Boston Police Department practices.

St. Clair died at the age of 80 in Boston, Massachusetts, on March 10, 2001. After his death, the Boston Bar Foundation renamed their Federal Court Public Education Project the James D. St. Clair Court Education Project. The purpose of the program is to educate the general population, especially young people, about the workings of the justice system in the United States.

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## SALEM WITCH TRIALS

In 1692 the community of Salem, Massachusetts, was engulfed in a series of witchcraft afflictions, accusations, trials, and executions. During the course of the year, more than a dozen persons claimed to be afflicted by spells of black magic and sorcery that had been allegedly cast by men and women who had enlisted the supernatural powers of the devil. Most of the persons claiming to be afflicted were teenage girls.

Those persecuted for allegedly practicing witchcraft included Salem residents who deviated in some way from Puritan religious, cultural, or economic norms. Other victims of the witch craze were perceived to be enemies of the largest family in Salem. A few victims were simply weak and sickly people who were in the wrong place at the wrong time. The legal institutions offered little protection for those accused of witchcraft because the primitive Massachusetts judicial system was still governed by superstitious **RULES OF EVIDENCE** permitting testimony about malevolent apparitions and broomsticks capable of flight. Although some ordinary Salem residents doubted the credibility of the witchcraft accusations, it was not until they were joined by authorities from Boston that the witch-hunt came to a close.

The outbreak of witchcraft hysteria took place in Salem Village, a small community a few miles inland from Salem Town. Salem Village was not an autonomous entity and lacked a government of its own until 1752 when it achieved independence and became known as Danvers.

Salem Village was almost exclusively agrarian, cut off from the ports and tributaries that made Salem Town more mercantile and international in character. Although both communities were predominantly Puritan, during the seventeenth century Salem Town acquired an increasingly secular appearance through the growth of its fur, fish, and timber industries.

The Salem witch craze was largely fueled by personal differences between two families, the Putnams and the Porters. John Putnam Sr. (1579–1662) was the patriarch of the largest family in Salem. He had three sons, Thomas Putnam, Sr. (1615–86), Nathaniel Putnam (1619–1700), and John Putnam Jr. (1627–1710). John Porter Sr. (1595–1676) was the patriarch of the richest family in Salem. He had four sons, John Porter Jr. (1618–84), Joseph Porter (1638–1714), Benjamin Porter (1639–1723), and Israel Porter (1644–1706), and a daughter, Sarah Porter (1649–1725).

The Putnams were farmers who followed the simple and austere lifestyle of traditional Puritans. Although the Porters derived much of their wealth from agricultural operations as well, they were also entrepreneurs who developed commercial interests in Salem Town, throughout New England, and in the Caribbean. The Porters' diversified business interests allowed them to increase their family's wealth while the Putnam family wealth stagnated.

An interfamily rivalry began in 1672 when a dam and sawmill run by the Porters flooded the Putnam farms, resulting in a lawsuit brought by John Putnam Sr. A few years later the Putnams petitioned the town in an effort to obtain political independence for the village, and the Porters opposed them. The arrival of Reverend Samuel Parris in 1689 intensified the Putnam-Porter conflict.

Twenty-six villagers, 11 of whom were Putnams, voted to give Parris a parsonage, a barn, and two acres of land. Some villagers thought that these gifts were too generous. In October 1691 a faction of Parris-Putnam supporters was ousted from the village committee and replaced by individuals who were openly hostile to the reverend, including Daniel Andrew, the son-in-law of John Porter Sr.; Joseph Hutchinson, one of the sawmill operators responsible for flooding the Putnams' farms; Francis Nurse, a village farmer who had been involved in a bitter boundary dispute with Nathaniel Putnam; and Joseph Porter. The new committee quickly voted down a tax levy that would have raised revenue to pay the salary of Reverend Parris.

It is no coincidence, then, that the witchcraft afflictions and accusations originated in the Parris household. In February 1692 the reverend returned home from his congregation one evening to discover his nine-year-old daughter, Elizabeth Parris, her 11-year-old cousin, Abigail Williams, and their 12-year-old friend, Ann Putnam (the daughter of Thomas Putnam Jr. and Ann Putnam) gathered around the kitchen table with the Parris family slave, Tituba, who was helping the girls experiment in fortune telling. Realizing that they had been caught attempting to conjure up evil spirits, the girls soon became afflicted by strange fits that temporarily deprived them of their ability to hear, speak, and see. During these episodes of sensory deprivation, the girls suffered from violent convulsions that twisted their bodies into what observers called impossible positions.

When the girls regained control of their senses, they complained of being bitten, pinched, kicked, and tormented by apparitions that would visit them in the night. These ghostly visions, the afflicted girls said, pricked their necks and backs and contorted their arms and legs like pretzels. Witnesses reported seeing the girls extend their tongues to extraordinary lengths. After examining the afflicted girls, Dr. William Griggs, the village physician, pronounced them under an evil hand.

Nearly 200 people were accused of practicing witchcraft in Salem during the summer of 1692. Twenty accused witches were executed, 15 women and 5 men. Nineteen were hanged following conviction, and one was pressed to death for refusing to enter a plea. Four prisoners, three women and a man, died in jail. The trials began in June and continued for four months, the final executions taking place on September 22. In October the governor of Massachusetts, William Phipps, dissolved the tribunal that had been established to preside over the witchcraft prosecutions. The following spring the governor ordered the release of all the accused witches who remained incarcerated upon payment of their fines.

The persons accused of witchcraft ranged from a four-year-old girl, Dorcas Good, to an octogenarian farmer, Giles Cory. The accused also included an angry, muttering beggar, Sarah Good, who rarely attended church, and an ailing village matriarch, Rebecca Nurse, who was

respected for her goodness and piety. Yet the witchcraft accusations were far from random. Historians have identified a pattern of accusations that strongly suggests that the afflicted girls singled out social deviants, outcasts, outsiders, merchants, tradesman, and others who threatened traditional Puritan values.

For example, Sarah Osborne, one of the first persons accused of witchcraft in Salem, had earlier scandalized the village by having premarital sexual relations with an indentured servant from Ireland. Another accused witch, Martha Cory, had given birth to an illegitimate mulatto child. Tituba, an Indian slave from Barbados, relished her reputation as a sorcerer in black magic until she landed in jail after being accused of witchcraft. Bridget Bishop, the owner of a small Salem tavern known for its disorderliness, and Abigail Hobbs, a village rebel who was neither a church member nor a churchgoer, were two assertive and independent women whose scornful attitude toward Puritan social order was silenced by their arrests for practicing witchcraft.

Like Bridget Bishop, John and Elizabeth Proctor were tavern keepers on Ipswich Road, the thoroughfare separating Salem Town from Salem Village. The tavern was frequented only by persons from outside Salem Village, and its loud, debauched patrons were a source of concern for residents of the village. John Proctor was one of the first Salem residents to openly criticize the witch craze, maintaining that the afflicted girls were shamming. The day after he questioned their credibility, the afflicted girls implicated his wife in the witch conspiracy. Other Salem residents who were bold enough to express skepticism about the sincerity of the accusations made by the afflicted girls, including George Jacobs, Dorcas Hoar, Sarah Cloyce, and Susannah Martin, soon found themselves ensnared by the malignant web of witchcraft allegations.

The largest common denominator among the accused witches was the source of the complaints against them. Eight members of the Putnam family were involved in the prosecution of approximately 50 witches. Thomas Putnam Jr. signed ten legal complaints against the defendants and provided testimony against 24 accused witches. His wife, Ann Putnam was the most prominent citizen among those who were

purportedly afflicted by witchcraft, and his daughter, Ann, was the most prolific accuser, providing testimony against 48 accused witches. Members of the Porter family attempted to mobilize the village against the witch trials but were stymied when 19 of their allies found themselves facing witchcraft allegations.

Daniel Andrew, Phillip English, Francis Nurse, and George Burroughs were representative of the group of defendants accused of witchcraft by the Putnam family. Andrew was born and raised in Watertown, Massachusetts. In 1669 he moved to Salem where he married Sarah Porter, daughter of Putnam family rival John Porter Sr. Through an inheritance, Andrew and his wife received a large parcel of land, helping them become the fourth wealthiest couple in Salem Village. Andrew was also one of the Salem residents selected to replace the Putnam-Parris faction on the village committee. Along with his village committee colleagues Francis Nurse and Phillip English, Andrew was accused of practicing witchcraft by the Putnam clan. None of the three was executed.

The legal environment in Salem offered defendants few protections against fabricated allegations of witchcraft. Similar to modern legal procedure, criminal proceedings were instituted upon the filing of a formal complaint by a party allegedly injured by witchcraft. Such complaints usually prompted the issuance of an arrest warrant by a local magistrate who then conducted a preliminary examination in public to determine whether there was sufficient evidence to hold the accused in custody pending GRAND JURY deliberations. If the grand jury chose to indict a particular accused witch, the defendant was then tried by the Court of Oyer and Terminer, an emergency tribunal established by gubernatorial proclamation to resolve the burgeoning crisis. The law applied by the court was an English statute passed in 1604 during the reign of James I and carried with it the death penalty. The law prohibited "conjuration, witchcraft, and dealing with evil and wicked spirits" (Hill 1995). The indictment against the accused closely mirrored the language of the ENGLISH LAW, charging the defendants with having "killed, destroyed, wasted, consumed, pined, and lamed" certain individuals by witchcraft.

During both the preliminary examinations and the ensuing trials, the accused witches were presumed guilty. The presiding judges and magistrates frequently asked leading questions designed to elicit answers that would disclose whom the defendants had bewitched and how, instead of more neutral and impartial questions aimed at ascertaining whether they had actually bewitched anyone at all. Although juries were impaneled to determine guilt and innocence, in at least one instance the court directed the jurors to reconsider an unpopular verdict they had rendered. After further deliberations, the jury reversed itself, declaring a previously acquitted defendant guilty. No accused witches were afforded the right to legal counsel, and only those defendants who confessed were saved from the gallows upon conviction.

The afflicted girls were normally present during the courtroom proceedings. When an accused witch entered the courtroom, the afflicted girls invariably collapsed into traumatic fits of hysteria that only ceased when the accused began to confess. In contrast to the dignified courtroom decorum demanded by most U.S. judges today, the Salem witches were confronted by belligerent magistrates, rabid witnesses, and apoplectic spectators in the gallery. One defendant was struck in the head with a shoe thrown by an onlooker.

The evidence offered to incriminate the defendants typically reflected the medieval superstitions of the Puritan community. Nine witches were convicted on the strength of spectral evidence alone, meaning that the only connection between the accused and the afflicted girls was testimony that an alleged victim had been visited during the night by a ghostly figure who resembled the defendant. Other defendants were convicted based on evidence that they could not properly recite the Lord's Prayer, owned mysterious dolls and puppets, or suffered from a reputation for witchcraft in the community. Jurors were told that unusual protuberant growths proverbially represented signs of a witch's nipple through which the defendant had ostensibly consummated intimate relations with the devil or lesser demons.

The Salem witch trials came to an end when the esteemed Reverend Increase Mather from Harvard University questioned the reliability of spectral evidence. The witch trials had been based on the premise that the devil could not assume the shape of a particular person without her consent. Mather turned this premise on its head, arguing that a deceitfully evil creature like the devil could assume the likeness of even the most unwilling and innocent person. Mather

proclaimed that it is better for ten suspected witches to escape, than for one innocent person to be condemned.

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CROSS-REFERENCES

Presumption of Innocence; Religion.

## SALES LAW

*The law relating to the transfer of ownership of property from one person to another for value, which is codified in Article 2 of the* UNIFORM COMMERCIAL CODE *(UCC), a body of law governing mercantile transactions adopted in whole or in part by the states.*

The sale of a good, or an item that is moveable at the time of sale, is a transaction designed to benefit both buyer and seller. However, sales transactions can be complex, and they do not always proceed smoothly. Problems can arise at several phases of a sale, and at least one of the parties may suffer a loss. In recognition of these realities and of the basic importance of orderly commerce to society, legislatures and courts create laws governing sales of goods.

The most comprehensive set of laws on sales, the Uniform Commercial Code (UCC), is a collection of model laws on an assortment of commercial activities. The UCC itself does not have legal effect; it was written by the lawyers, judges, and professors in the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL). All states have adopted the UCC in whole or in part by enacting the model laws contained in its 11 articles.

Article 2 of the UCC deals with the sale of goods. All states with the exception of Louisiana have enacted at least some of the model laws in Article 2. Laws on the sale of real estate and the sale of services are different from laws on the sale of goods, and they are excluded from Article 2. A service contract may be covered by the provisions in Article 2 insofar as it involves the transfer of goods, and courts may use Article 2 as a reference for interpreting laws on the sale of services. Some contracts are a blend of the sale of goods and the sale of services and may be covered by Article 2. For example, the service of food by a restaurant may be considered, for some purposes, a contract for a sale of goods (U.C.C. § 2-314).

Article 2 covers sales by both private individuals and merchants. Merchants are persons engaged in the business of buying or selling goods. A small number of provisions apply only to merchants, but otherwise the provisions cover all sales.

### Contract Formation

A contract for the sale of goods can be made in any manner that shows agreement between the buyer and seller. A contract may be made orally or in writing or through any other conduct by both parties that acknowledges the existence of a contract.

To form a contract, one of the parties must make an offer, the other party must accept the offer, and consideration, or something of value, must be exchanged. An offer may be revoked without any loss to the offeror if the revocation is made before the other party accepts the offer and gives consideration. However, an offer may not be revoked for up to 90 days if it is (1) accompanied by an assurance that the offer will be kept open; (2) made by a merchant; and (3) in writing signed by the offering merchant (U.C.C. § 2-205).

If a party accepts an offer but in the process of accepting changes material terms of the offer, the acceptance may be considered a counteroffer. A counteroffer eliminates the first offer, and no contract is formed until the original offeror accepts the counteroffer and consideration is

exchanged. In contracts between merchants, additional or different terms by the offeree become part of the contract unless (1) the offer expressly limits acceptance to the terms of the offer; (2) the new terms materially alter the contract; or (3) the offeror objects within a reasonable time.

Many basic principles of contract law also apply to the sale of goods. The STATUTE OF FRAUDS requires that an agreement to sell goods at $500 or more must be in writing or it cannot be enforced in court. The writing must be signed by the party to be charged, it must contain language indicating that a contract has been made, and it must identify the parties to the contract and the quantity of goods sold. There are a few exceptions to the Statute of Frauds.

A sales contract that is UNCONSCIONABLE may be struck down in whole or in part by a court. A sale is unconscionable if a person in a superior bargaining position dictates terms that are grossly unfair to the other party. A court will determine whether a sale is unconscionable by examining the circumstances at the time the contract was made. Courts rarely find unconscionability in sales between merchants because merchants generally are more sophisticated in sales negotiations than are non-merchants.

Parties to a sale sometimes do not include all the terms of the sale at the time the agreement is made. Such omissions will not destroy the agreement if the parties intend to add terms at a later date. If the parties wish to modify an existing sales contract, the modifications should be in writing if they increase the value of the sale to $500 or more.

### Issues Arising Prior to Performance

Performance is the fulfillment of a promise in the contract. Many issues can arise in a sales contract after the contract is made and before a party's performance is required.

Sometimes performance may be made impracticable. If the goods are completely destroyed before the risk of loss has passed to the buyer, and the goods have not been destroyed through the fault of either party, the seller may be excused from performing. Risk of loss is responsibility for any damage or destruction of goods; the parties may decide in the contract when the risk of loss of the goods passes from the seller to the buyer. If the goods are only partially destroyed or have deteriorated, the buyer may demand to inspect the goods and either void the contract or accept the goods with a reduction in the contract price.

A seller may avoid performing only if the destroyed goods were specifically identified when the sale was made. For instance, if the sale is of a lamp handpicked by the buyer, the destruction of that particular lamp would excuse the seller's performance, and the seller would not be liable to the buyer for the loss. However, if the contract is simply for a lamp of a specific description, the seller could tender any lamp that meets the description, and the buyer would not be excused from performing.

There are two situations in which a party must make a substituted performance in case the agreed method of performance becomes impracticable. First, when the goods cannot be transported by the agreed-upon method of transportation, the seller must use available transportation that is a commercially reasonable substitute. Second, if an agreed-upon method of payment fails, the buyer must use a commercially reasonable substitute method of payment if one is available. If a party fails to substitute transportation or payment, that person could be liable to the other party for losses resulting from the failure.

In some cases the purpose of a sale may be frustrated by circumstances beyond the control of both buyer and seller. For example, assume that a party agrees to buy one thousand T-shirts in anticipation of a local rock concert. If the concert is cancelled after the sales contract is made, the buyer may escape the contract under the doctrine of frustration of purpose.

At times it may appear to a party that the other party will be unable to perform by the expected date. For example, assume that a party agrees to sell goods on credit. If the buyer becomes financially insolvent before the goods are delivered, the seller may demand cash before delivering the goods. If the goods are in transit, the seller may instruct the carrier to withhold delivery of the goods. A party is considered insolvent if he or she cannot pay debts as they come due, has ceased to pay debts, or has liabilities that exceed assets.

If a party has reasonable grounds to feel insecure about the other party's ability to perform, the insecure party may demand assurances before performing. For example, a seller may be insecure if a buyer falls behind in payments, or a buyer may feel insecure if a seller delivers defective goods to another party and

those goods are of a kind similar to those expected by the buyer. In such cases the concerned party may demand assurances such as an advance payment or some other AFFIRMATIVE ACTION, and if the other party does not provide any assurance, the concerned party may withhold performance. Alternatively, if the other party gives the assurance, the concerned party must follow through on his obligations. Precisely what constitutes an effective assurance is a QUESTION OF FACT that depends on the nature of the goods, the size of the contract, the length of time until performance, and similar considerations. In any case a concerned party may not make commercially unreasonable demands on a party prior to performance and then withhold performance if the other party does not meet the demands.

If a party unequivocally declares an unwillingness to perform prior to the time of performance, the other party may consider the declaration an anticipatory breach of the sales contract. An anticipatory breach operates in the same way as an actual breach and gives the nonbreaching party the right to sue for losses resulting from the breach. A refusal to give assurances after a demand for assurances may be considered an anticipatory breach. A party may retract a repudiation if the retraction is made before the aggrieved party cancels the contract.

### Seller's Obligations

Generally, the seller's primary obligations are to transfer ownership of the goods and deliver the goods. A seller may agree with the buyer to perform other obligations. For instance, a seller may agree to package or label the goods in a certain way or service the goods for a specific period of time.

A seller should convey the title to the goods free from any security interest or other lien or claim, unless the buyer was aware at the time of the sale that other persons had a claim to the goods. If the sales contract does not specify a time of delivery, the seller should deliver the goods within a reasonable time after the contract is made. Delivery should occur in one shipment unless the parties agree otherwise. If the sales agreement does not indicate where the goods are to be turned over, the delivery of the goods should occur at the seller's place of business. The tender of the goods should be at a reasonable hour of the day, and the buyer should have the ability to take the goods away.

If the goods are in the possession of a third party, or bailee, at the time of the sale, the seller must arrange matters with the bailee so that the buyer may take possession. If the goods are to be transported, there are two ways to handle delivery. The buyer and seller may agree to a shipment contract, in which case the seller must arrange for the transportation. In a shipment contract, the seller's duties for delivery are complete as soon as the goods are delivered to the carrier. With a destination contract, the seller's obligation to deliver does not end until the goods are delivered to the buyer or at a selected location.

### Warranties

In the context of the sale of goods, a WARRANTY is concerned with identifying the kind and quality of the goods that are tendered by the seller. The two basic types of warranties are express warranties and implied warranties.

An express warranty is any representation or affirmation about the goods made by the seller's words or conduct. For example, the description of the goods in the sales contract constitutes an express warranty that the goods will conform to the description.

Implied warranties are warranties that are imposed on sellers by law. A warranty of merchantability is implied in every sales contract. This warranty is a promise that the goods pass without objection in the trade, are adequately packaged, conform to all promises or affirmations of fact on the container, and are fit for the ordinary purposes for which such goods are used. The IMPLIED WARRANTY of merchantability also includes a promise that multiple goods will be of even kind and quality.

Another implied warranty recognized by courts is the warranty of fitness for a particular purpose. This warranty requires that goods be fit for an identifiable, particular purpose. It is effective only if the seller has reason to know of any particular purpose for which the goods are required and also knows that the buyer is relying on the seller's expertise to select suitable goods.

Some sellers attempt to disavow any responsibility for the quality of their merchandise. Sellers may not disclaim the warranty of merchantability unless they use the word "merchantability" in the disclaimer, which may be oral or written. If written, the disclaimer clause or term must be conspicuous. The implied warranty of fitness for a particular purpose may be

disclaimed in writing, but it cannot be disclaimed orally. In some states, statutes or court decisions prohibit the disclaimer of warranties in consumer sales.

If a seller fails to tender goods, the buyer may choose one of three remedies. First, the buyer may seek damages from the seller. Damages are the total financial losses resulting from the failure to tender. Generally, damages for non-delivery consist of the market price of the goods minus the sale price. Market price is figured by determining the market price at the time the buyer learned of the breach at the place the tender was to have been made.

Second, the buyer may cover or purchase similar goods elsewhere and then recover for losses resulting from the purchase. If the purchase price of replacement goods is greater than the original sale price, the buyer may recover the difference from the seller. The buyer must cover in GOOD FAITH, without delay, and on reasonable terms. When a seller is unable to perform a sale as agreed, the buyer should try to minimize his or her damages by covering the loss. If an aggrieved buyer fails to make reasonable efforts to cover, a court may reduce any damage award to account for the failure.

Third, a buyer may force the seller to perform by taking the seller to court and obtaining an order for SPECIFIC PERFORMANCE or maintaining an action for REPLEVIN. An action for specific performance may be ordered if the goods are unique and in other proper circumstances. Goods may be considered unique if the buyer is unable to find the goods elsewhere. An action for replevin is a method of recovering goods that is similar to specific performance. Replevin is allowed where the goods are specifically identified in the contract and the buyer is unable to cover the goods after a reasonable effort, or the circumstances indicate that the buyer will be unable to cover. If a buyer has paid only part of the sale price and the seller becomes financially insolvent within ten days of the first payment and is unable to tender the goods, the buyer may pay any remaining balance and sue to obtain the goods. This would give the buyer the goods and prevent the seller from using the goods to pay other debts.

If the buyer elects to collect damages after covering or damages for non-delivery, the buyer may collect additional damages called incidental damages and consequential damages. Incidental damages are those resulting from the seller's breach. These include expenses incurred in inspection, receipt, transportation, care, and custody of goods rightfully rejected; any commercially reasonable charges or expenses incurred in covering; and any other reasonable expense incident to a delay in tender of the goods or other breach on the part of the seller. Consequential damages include any loss that results from requirements of which the seller is aware at the time of contracting and that could not have been prevented by cover or other method, and foreseeable and avoidable injuries to persons or property resulting from a breach of warranty.

In some cases the buyer and seller may agree in the sales contract to LIQUIDATED DAMAGES. Generally, a liquidated damages clause is placed into a sales contract to fix damages at a certain amount in case a party is unable to perform. A court may strike down a liquidated damages clause if it does not bear a reasonable relationship to actual damages or anticipated damages.

If a seller tenders nonconforming goods, or goods that do not meet the specifications in the sales contract, the tender constitutes a breach of the contract. In such a situation, the buyer may either accept or reject the goods. Any recovery by the buyer will depend on whether the buyer accepts or rejects the goods.

A buyer has the right to inspect goods before accepting them. If the goods are nonconforming, the buyer may accept the goods and recover from the seller the difference between the value of the goods as warranted and their actual value with the defects.

A buyer may elect to reject nonconforming goods. To reject goods, the buyer must take some positive action to give the seller notice of the rejection. If the seller can cure the problem, the buyer should tell the seller why he is rejecting the goods or risk a reduction in damages. In transactions between merchants, a buyer should specify the problem to the seller if the seller makes a written request for a full and final written statement of all defects on which the buyer bases the rejection.

A seller has the right to cure nonconforming goods if he gives notice to the buyer and if conforming goods can be delivered before the last date for delivery under the sales contract. In any case a buyer may agree to extend the time for delivery of conforming goods. In some cases a buyer may have no choice. Under section 2–508(2) of the UCC, if a seller sends

nonconforming goods that he reasonably believed would be acceptable, the seller has additional time to deliver conforming goods if he gives notice of such intent to the buyer.

If a buyer rejects goods, the buyer may not exercise any ownership over the goods. The buyer must hold the goods for a reasonable time and permit the seller to remove them or await instructions from the seller. If the seller issues instructions to the buyer, the buyer should follow any reasonable requests. For example, if the goods are perishable and the seller has no local agent, the buyer should attempt to sell the goods for the account of the seller. The buyer then could recover the difference between the amount that the buyer could have made with the goods and the amount that the buyer actually received.

If the buyer rejects nonconforming, nonperishable goods and the seller has no agent near the buyer, the buyer should follow instructions from the seller. If the seller issues no instructions, the buyer may either store the goods for the seller's account, reship the goods to the seller, or sell the goods for the seller's account. An aggrieved buyer may then recover any losses incurred in storing, shipping, or reselling the goods.

If a buyer rejects nonconforming goods and cannot sell them, the buyer may hold the goods for the seller and recover the difference between the market price of the goods as warranted and the value of the goods as delivered. A buyer also may ask for specific performance. If the seller is unable to provide the goods as requested, the buyer may recover any money already paid toward the sale plus any consequential or incidental damages resulting from the breach.

### Buyer's Obligations

A buyer's basic obligations are to accept the goods and pay the sale price. If the goods are nonconforming, the buyer may reject the goods. If the goods conform to the specifications of the sales contract and the buyer wrongfully rejects them, the seller may choose one of four options, or a blend of two or more options.

First, the seller may sue for damages. The amount of damages for a wrongful rejection would be the sale price minus the market price of the goods, measured at the time and place of the tender. Second, the seller may sue for the price of the goods, but only if the goods cannot be resold in the seller's ordinary course of business or if circumstances indicate that resale efforts will be fruitless. Third, the seller could cancel the contract, putting an end to shipments and reserving the right to sue for damages or collect unpaid balances. Fourth, the seller could resell the goods to a third party and recover the difference between the sale price and the resale price plus any incidental damages.

The resale of wrongfully rejected goods presents a few special problems. Under section 2–706 of the UCC, the sale may be either public or private. A private sale is made personally by the seller, whereas a public sale is made with public notice and carried out by a sheriff or at a publicly held auction. In either case the sale must be commercially reasonable in method, manner, time, place, and terms. Furthermore, the seller must notify new buyers that the goods are being resold under a breached contract to disclose the potential for legal conflict.

A seller who resells wrongfully rejected goods must inform the original buyer of the resale. If wrongfully rejected goods are perishable, the seller need not give notice to the buyer of the time and place of the resale. If the resale of wrongfully rejected goods is at a public sale, only goods identified in the contract may be sold, and the sale must be made at a usual place for public sale, provided that such a site is reasonably available. If the goods are not in view of bidders at a public sale, the public notice of the sale must state the place where the goods are located, and the seller must give bidders an opportunity to inspect the goods. If the seller resells the goods for a price higher than the price in the original sales contract and the extra profit covers costs incident to the resale, the seller has no damages, and the original buyer is not liable to the seller for the wrongful rejection.

In sales where the buyer pays a deposit and then wrongfully rejects the goods, the seller may keep the goods and the deposit. However, a seller is not entitled to a deposit that far exceeds his or her actual or expected damages. Under section 2–718 of the UCC, a buyer is entitled to restitution of any amount by which the sum of the payments already made exceeds either (1) the amount of any reasonable liquidated damages clause, or (2) 20 percent of the value of the total performance for which the buyer is obligated under the contract, or $500, whichever amount is smaller.

When a buyer accepts a seller's tender of conforming goods, the buyer is obligated to pay

the sale price contained in the contract for sale. In some cases the parties may fail to agree to a price or choose to leave the price terms open. Under section 2–305 of the UCC, if a price term is left open, the price should be set in good faith at a reasonable market price at the time of delivery. If the parties intend that there is to be no contract unless a price is agreed to or fixed by a particular market indicator and the parties ultimately are unable to agree to a price term, there is no contract. In such a case the buyer must return any goods received, and the seller must return any money paid by the buyer.

Generally, a buyer has the right to pay in any manner observed in the business unless the seller demands a particular form of payment. Unless the parties agree otherwise, payment should be made when the goods are delivered to the buyer. A buyer does not have the right to inspect the goods if they are delivered cash on delivery or on similar terms, or if the contract provides for payment before inspection.

### Installment Contracts

Installment contracts have a few of their own special rules. An installment contract calls for periodic performances over a length of time. The parties may agree to make payments in any way, but if the sale price can be divided, the buyer usually makes payments on installment contracts upon each delivery of goods.

Buyers in installment sales do not have the same full rights of rejection as buyers in other sales. If a seller tenders an installment of nonconforming goods, the buyer may reject the installment only if it substantially impairs the value of that installment and cannot be cured. Under section 2–612 of the UCC, if the nonconformity is not substantial and can be cured by the seller, the buyer must accept a nonconforming installment and sue for damages.

The tender of one nonconforming installment in an installment contract for sale does not always constitute a total breach of the entire installment contract. Generally, a non-breaching party to an installment contract may cancel the contract only when a breach or cumulative breaches substantially impair the value of the entire contract.

The NCCUSL and the ALI began work in the late 1980s on a revision to Article 2 of the UCC. Work on the project seemed to be finished in 1999, when the ALI approved what it thought was the final draft of the revision. However, opposition from certain important industries, including software manufacturers, led to the withdrawal of the revision. It was feared that many states would refuse to adopt the changes because of this opposition.

The controversy surrounding the revision has centered on software, downloadable information and "smart goods." These types of goods, which include cars, refrigerators, and other appliances, use computer programs to enhance their performance. By 2002 the drafters' latest revision excluded "information" from the definition of goods, thus removing the downloading of electronic information from the reach of the Article. However, the comment section to the draft noted that Article 2 would cover the sale of smart goods, even though these goods include computer programs.

After years of work, the NCCUSL and ALI in May of 2003 adopted the revised version of Article 2. After its final review, which was being completed in 2003, the revised Article 2 will be sent to the states for their considerations in adopting the revised version. The process of state adoption will likely take a number of years.

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CROSS-REFERENCES

Carriers; Consumer Protection; Model Acts; Product Liability; Shipping Law.

## SALES TAX

*A state or local-level tax on the retail sale of specified property or services. It is a percentage of the cost of such. Generally, the purchaser pays the tax but the seller collects it as an agent for the government. Various taxing jurisdictions allow exemptions for purchases of specified items, including certain foods, services, and manufacturing equipment. If the purchaser and seller are in different states, a use tax usually applies.*

The vast majority of states impose sales taxes on their residents. The only exceptions are Alaska, Delaware, Montana, New Hampshire, and Oregon. Some states rely more heavily on sales taxes for a significant portion of revenue. Tennessee, for instance, does not impose an

INCOME TAX, so it relies heavily on sales taxes. The combined state and local sales taxes average about 9.25 percent per sale. The state of Michigan imposes a six percent sales tax, which accounts for about 28 percent of the state's total revenue. In 2002, the state collected $6.5 billion in sales taxes.

States have faced a long struggle to collect sales and taxes from retailers that are based outside the state and have no contacts with the state seeking to collect taxes. This is particularly true of companies that sell goods through mail orders or on the INTERNET. Even if an out-of-state retailer is not required to pay sales taxes within a state, the purchaser is nevertheless required to pay the sales tax on goods and services purchased through the Internet or by mail order. However, states rarely collect these taxes from the purchasers. According to a study by researchers at the University of Tennessee, states and cities in the United States lost an estimated $13.3 billion in uncollected sales taxes in 2001.

The U.S. Supreme Court has addressed the issue of states requiring out-of-state retailers to pay sales taxes on several occasions. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977), the Court required a showing of a "substantial nexus" between a taxing state and the company providing goods and services before the taxing state can require the company to pay taxes. Without this substantial nexus, a state that taxes an out-of-state retailer has violated the COMMERCE CLAUSE of the U.S. Constitution.

Subsequently, the Court applied this test to a case involving a state's attempt to tax a mail order company. *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992). In *Quill Corp.*, the state of North Dakota sought a DECLARATORY JUDGMENT that Quill Corporation, which had is main offices in Illinois, California, and Georgia, was required to pay taxes on sales with North Dakota customers. Quill had no outlets or any sales representatives in North Dakota, though it received $1 million of its annual $200 million in sales nationally from the state. The Court held that North Dakota could not tax Quill because Quill did not have a substantial nexus with the state.

In order to address the problems associated with the collection of sales taxes on the Internet, the National Governors Association drafted the Streamlined Sales and Use Tax Agreement, whereby states would agree to modify their sales and use tax laws to a more uniform structure. Thirty-one state representatives signed the agreement, though individual state legislatures would have to modify their tax statutes to conform. The agreement is designed to remove complications among the sales and use tax laws in the different states and to eliminate the potential for double taxation. Several commentators, however, have noted that such an arrangement could violate the Commerce Clause based on the decisions in *Quill Corp., Brady,* and similar cases.

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CROSS-REFERENCES

Taxation.

## SALVAGE

*The portion of goods or property that has been saved or remains after some type of casualty, such as a fire.*

The term *salvage* is defined more specifically depending on the industry referring to it. In business, salvage is any property that is no longer useful but has scrap value. An example of business salvage is obsolete equipment. In insurance, salvage is the portion of property that the insurance company takes after paying the claim for the loss. The insurance company may deduct the salvage value from the amount of the claim paid and leave the property with the insured. In ADMIRALTY or maritime law, salvage is the compensation allowed to persons who voluntarily save a ship or its cargo from impending danger. In addition to compensation, maritime salvage may be property that is recovered from vessels that were shipwrecked, derelict, or recaptured. Salvage as a legal concept typically concerns maritime salvage.

To establish a valid salvage claim under maritime law, the claimant must prove the following: the salvage was needed because of a marine peril; the claimant's service was rendered volun-

tarily and not because of an existing duty or contract; and the claimant's service contributed to the success of the salvage in whole or in part.

The element of peril is an important, yet misunderstood, element. The maritime interpretation of peril is broad and liberal. Imminent and absolute danger is not a requirement for maritime peril. If the property is in danger, or stranded "so that it [is] subject to the potential danger of damage or destruction," then peril exists (*McNabb v. O. S. Bowfin,* 565 F. Supp. 22 [W.D. Wash. 1983]). Also, the degree of peril does not determine whether the salvor will be entitled to a salvage award, but it will be considered in determining the amount of the award. According to the admiralty law of the United States, a stranded vessel that may be exposed to wind, weather, and waves is considered to be in a position where it may be destroyed and is therefore in peril.

A wide variety of services can support a claim for a salvage award. For example, a claim for salvage has been granted where the salvor provided assistance in putting out a fire when the fire was not under immediate control. A salvage service claim may even succeed where the salvor assisted in putting out a nearby fire that had the potential to endanger the vessel.

Voluntarily towing a drifting vessel to safety has also supported a claim for salvage award, even where the drifting vessel was not in danger of immediate or absolute harm and apprehension of danger was minimal. Along the same lines, towing a stranded vessel has also constituted salvage service. In the towing situation, courts have held that although there is no apprehension of immediate harm or danger, a stranded vessel is subject to high winds and other severe weather, placing the vessel in peril.

Courts have also upheld a salvage service claim when the crew, master, or officers were incapacitated, and when the vessel was exposed to a hazard of the sea as a result of its master's uncertainty.

In all situations of salvage service, the service must be entirely voluntary. The salvor cannot have provided the service pursuant to any type of contract or agreement or other existing duty. When the U.S. Navy or Coast Guard provided the salvage service, the issue as to whether those services were in fact voluntary has arisen.

When the Navy performs the salvage service, courts have held that, because salvage is not one of the functions of the Navy, any assistance provided by the Navy is voluntary, regardless of whether the Navy is in the area where the salvaged vessel is in peril. Federal law now provides that "the Secretary of Navy may settle any claim by the United States for salvage services rendered by the Department of Navy and may receive payment of any such claim" (10 U.S.C.A. § 7363 [1996]).

Similar claims by the Coast Guard have had different outcomes. According to statute, the Coast Guard may "perform any and all acts necessary to rescue and aid persons and protect and save property" (14 U.S.C.A. § 88 [1996]). Most courts and commentators have interpreted this language as creating a legal duty. Therefore, under this interpretation the government would not have a right to a salvage award for services rendered by the Coast Guard. The Fifth Circuit Court of Appeals declined to follow this interpretation in the case of *United States v. American Oil,* 417 F.2d 164 (1969). In its decision, the court held that the Coast Guard did not have a preexisting duty to perform salvage services and that the statutory language defining the Coast Guard's duties was permissive. Although the Fifth Circuit Court of Appeals may allow the United States to recover salvage awards for services rendered by the Coast Guard, other courts have declined to follow this interpretation, leaving the right of the government to recover salvage awards for services rendered by the Coast Guard still under debate.

The salvage service rendered must also have been successful, either in whole or in part. Furthermore, the salvor must have contributed to the success. The salvor, however, does not have a right to force his or her services on a distressed vessel. The doctrine of rejection applies when the master of a distressed vessel directly and unequivocally rejects the salvor's services. In that situation, the salvor does not have a right to a salvage award.

In determining the amount of the salvage award, the court will go beyond the value of the services. In 1869 the U.S. Supreme Court, in *The Blackwall,* 77 U.S. (10 Wall.) 1, 19 L. Ed. 870, set forth the following criteria in determining the amount of the award: (1) the labor expended by the salvors in rendering the salvage service; (2) the promptitude, skill, and energy displayed in rendering the service and saving the property; (3) the value of the property employed by the salvors in rendering the service and the danger

to which such property was exposed; (4) the risk incurred by the salvors in securing the property from the impending peril; (5) the value of the property saved; and (6) the degree of danger from which the property was rescued.

When a salvage award is granted, all of the parties who participated in the salvage service will share in the award based on their participation. In addition, the owner, master, and crew of the salvaged vessel are entitled to share in the award. If the salvaged property is damaged as a result of the salvage effort, the owner may claim that the salvor was negligent. If the court finds that the salvor did not adhere to a standard of reasonable care, the salvage award will be reduced depending on the degree of NEGLIGENCE.

An action for salvage is generally an in rem action. This means that the suit is brought against the property saved, such as the ship or its cargo. In the event that the property is no longer within the jurisdiction or has been destroyed, an in personam action may be brought to recover the salvage award. These salvage actions fall under the jurisdiction of the admiralty courts.

Anyone with a direct pecuniary interest in the property salved, such as the owner, may be liable for the salvage award. In addition, anyone who may be liable for the property, for instance a bailee, may also be liable for the salvage award. The persons liable for the salvage award are not necessarily the individuals who requested the salvage services.

In the event that the salvage claim involves a shipwreck, the court has "qualified jurisdiction" when the wreck site is exclusively within the waters of the contiguous zone of the United States. In addition, U.S. admiralty courts have asserted jurisdiction of wrecks in international waters when certain pieces of the wreck were brought into the jurisdiction of the court. This is based on the "first salvor rule," which protects the first salvor from losing the "trove" once it has started salving the wreck to other parties who may intervene and attempt to take over the salvage operations. Most countries recognize the right of the first salvor and will uphold a lien issued by another jurisdiction according to this rule.

According to the agreement, the convention was to become effective one year after 15 states had expressed their consent to be bound by it. In 1996 the agreement became binding, or entered into force, upon 22 countries.

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Admiralty and Maritime Law; Negligence.

## SAME EVIDENCE TEST

*A method used by courts to assess whether a criminal prosecution is barred by the* DOUBLE JEOPARDY CLAUSE *of the* FIFTH AMENDMENT *to the U.S Constitution, which guarantees that no individual shall "be subject for the same offense to be twice put in jeopardy of life or limb." Under this test, if the evidence required to support a conviction in one crime also would have supported a conviction in another, then double jeopardy exists.*

## SAN FRANCISCO VIGILANCE COMMITTEES OF 1851 AND 1856

*Self-appointed law enforcement committees that were organized to maintain order in San Francisco, California, during the mid-nineteenth century.*

As a result of the Treaty of Guadalupe Hidalgo in 1848, which concluded the Mexican War, the United States acquired a vast territory in the Southwest including California and New Mexico. After gold was discovered at Sutter's Mill in 1848, thousands of gold hunters flocked into northern California. Many of the gold rush towns where the immigrants settled had been little more than villages before the gold rush and lacked the municipal institutions that were needed to cope with the rapidly expanding populations. As government and law enforcement became increasingly disorganized and chaotic, vigilance committees were formed in many towns. The San Francisco Vigilance Committees of 1851 and 1856 provide two of the most famous examples of vigilante activity.

Before gold was discovered in 1848, the population of San Francisco had been around 800 persons. By 1851, nearly 25,000 gold seekers had

arrived, most of whom settled in or near the city. Crime quickly became a problem. In 1856, a Sacramento newspaper claimed that there had been 1400 murders in San Francisco in the previous six years and that only three murderers had been hanged.

In 1851, a group of citizens, including a large number of businesspersons, under the leadership of Sam Brannan, formed the first San Francisco Vigilance Committee. The city government had failed to curb GANGS of outlaws known as the "Regulators" or "Hounds," who preyed upon the inhabitants of the city and were suspected of having set a series of fires that had destroyed much of the city. The committee promptly sought out several of the alleged outlaws and sentenced them to death, deportation, or whipping.

In 1856, after a county supervisor named James P. Casey killed newspaper editor James King, the committee came back into existence under the leadership of William T. Coleman to combat lawlessness among the general population and corruption and mismanagement in the city government. The committee began by trying and executing Casey and Charles Cora, a notorious criminal. Next the committee barricaded the streets in an area where the crime rate was high and captured and punished all the criminals it could find within the barricades.

In the meantime, other citizens including a number of city officials and attorneys had formed the "Law and Order" faction to oppose the vigilantes. DAVID SMITH TERRY, a justice of the California Supreme Court, tried to prevent one of the vigilantes from arresting a certain Reuben Maloney on the ground that the committee had no legal authority to conduct arrests. A fight ensued in which Terry stabbed Sterling A. Hopkins, the vigilante. Although Terry was imprisoned for a few weeks, the vigilantes' attempt to put him on trial failed, and the committee disbanded a short time later. By that time, it had lost most of its supporters and its power had waned.

Although the committees declared that the safety of the public was their purpose, the committees ignored the principles of government on all levels. Their trials did not follow standard procedures, but used only a skeletal version of established legal practices.

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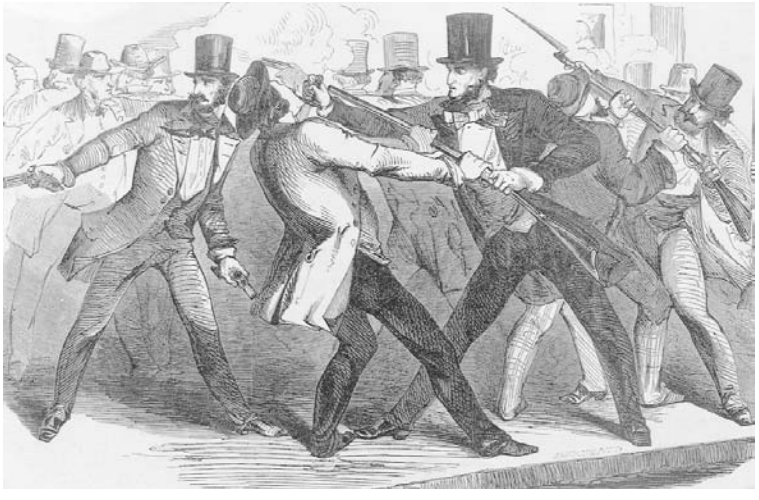

*Violence ensued when San Francisco Vigilance Committee members attempted to arrest Reuben Maloney in 1856. California Supreme Court justice David Smith Terry (top hat, center) stabbed to death vigilante Sterling A. Hopkins.*

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## SANCTION

*To assent, concur, confirm, approve, or ratify. The part of a law that is designed to secure enforcement by imposing a penalty for violation of the law or offering a reward for its observance. A punitive act taken by one nation against another nation that has violated a treaty or* INTERNATIONAL LAW.

*Sanction* is a broad term with different meanings in different contexts. *Sanction* can be used to describe tacit or explicit approval. Used in this sense, the term usually is used in assigning liability to a party who was not actively involved in wrongdoing but who did nothing to prevent it. For example, if the upper-level managers of a business knew that their employees were using unfair employment practices and did nothing to stop them, it may be said that the managers sanctioned the unfair practices.

The term *sanction* also can describe disagreement and condemnation. In CRIMINAL LAW, a sanction is the punishment for a criminal offense. The criminal sanction for a criminal defendant varies according to the crime and includes such measures as death, incarceration, PROBATION, community service, and monetary fines.

In CIVIL LAW, a sanction is that part of a law that assigns a penalty for violation of the law's provisions. The most common civil sanction is a monetary fine, but other types of sanctions exist. Depending on the case, a sanction may be

the suspension or revocation of a business, professional, or hobby license, or a court order commanding a person to do or refrain from doing something. A sanction may even be tailored to the case at hand. For instance, under rule 37 of the Federal Rules of Civil Procedure, if a party refuses to obey a discovery order, or an order to relinquish requested evidence, the court may order that the evidence sought be automatically construed in favor of the requesting party, refuse to allow the disobedient party to make claims or defenses related to the evidence, stay or postpone the case until the discovery order is obeyed, dismiss the action or render judgment for the requesting party, declare the disobedient party in CONTEMPT of court, or make any other order that is just under the circumstances.

In civil litigation, sanctions are slightly different from remedies. A remedy is the relief accorded to a victorious litigant. The remedy may be money damages, an order that forbids or commands the opposing party or parties to do or refrain from doing a certain act or acts, or some other result favorable to the victorious litigant. Remedies are not always intended to punish a person, while sanctions are always punitive. Nevertheless, remedies and sanctions are similar in that they refer to a loss that a civil litigant must bear if she is found liable for a civil wrong.

In some cases a party may have to remedy another party's loss as well as suffer criminal and civil sanctions, all for the same act. For example, if an attorney is professionally negligent in his handling of a client's case and steals funds from the client's trust account, the attorney may face a MALPRACTICE civil suit from the aggrieved client in which the client asks for money as a remedy for the malpractice. The attorney also may suffer sanctions from the professional conduct committee of the state bar association and criminal sanctions from a prosecution for the theft.

The contempt-of-court offense provides a flexible form of sanction. Contempt-of-court sanctions may be either civil or criminal. The court may order a party to pay a fine or suffer some setback in the case (civil contempt), or it may order that the party be placed in jail (criminal contempt). The basic difference between the two is that criminal contempt is an act of disrespect toward the court, whereas civil contempt acts tend to be less offensive transgressions, such as the unintentional failure to comply with discovery orders or to perform other acts ordered by the court.

A common form of sanction is the ADMINISTRATIVE AGENCY sanction against a corporation. Corporations must follow various rules passed by federal, state, and local administrative agencies authorized by lawmaking bodies to regulate specific topics of government concern. If a business does not obey agency rules that apply to it, it may face sanctions levied by the administrative agency responsible for enforcing the rules. For example, federal and state environmental protection agencies are authorized by statute to levy fines against businesses that violate environmental laws and regulations.

An international sanction is a special form of sanction taken by one country against another. International sanctions are measures that are designed to bring a delinquent or renegade state into compliance with expected rules of conduct. International sanctions may be either non-forceful or military. Military sanctions can range from cutting off access to limited strikes to full-scale war. Non-forceful international sanctions include diplomatic measures such as the withdrawal of an ambassador, the severing of diplomatic relations, or the filing of a protest with the UNITED NATIONS; financial sanctions such as denying aid or cutting off access to financial institutions; and economic sanctions such as partial or total trade embargoes. The U.N. Security Council has the authority to impose economic and military sanctions on nations that pose a threat to peace.

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## ♦ SANFORD, EDWARD TERRY

An important influence on the development of civil liberties, Edward Terry Sanford served on the U.S. Supreme Court from 1923 to 1930. Sanford was a native of Tennessee with a cosmopolitan education, and before serving on the Court, he had a private law practice, served in the JUSTICE DEPARTMENT, and was a federal district judge in his home state for fourteen years. While on the Court, Sanford's views were largely moderate, and in his lifetime, he was overshadowed by his highly visible contemporaries. Nonetheless, Sanford's opinions on civil liberties helped advance the guarantees of the BILL OF RIGHTS: in two major opinions delivered in the 1920s, he

laid the groundwork for modern Supreme Court decisions that restrict the power of states to limit **FIRST AMENDMENT** rights to **FREEDOM OF SPEECH.**

Sanford was born in Knoxville, Tennessee, on July 23, 1865, the son of a lumber and construction millionaire. He earned four degrees from the University of Tennessee and Harvard, and studied languages in France and Germany. At Harvard Law School, he distinguished himself as the editor of the *Harvard Law Review* and graduated magna cum laude. He began practicing law in Tennessee in the 1890s. He then lectured in law at the University of Tennessee from 1898 to 1906 before moving to Washington, D.C., for his first federal job.

Sanford's federal law career began in prosecution and rapidly took him to the federal bench. He joined the Justice Department in 1906 as a special assistant prosecutor, and a year later he was made an assistant attorney general. By 1908 Sanford returned to Tennessee as a federal district judge, a position he held until 1923. His specialties were **BANKRUPTCY** and **EQUITY** cases. On the bench he developed a reputation for open-mindedness, fairness, and leniency, at times reversing his own decisions. He was highly driven and nervously energetic, and would pace and chain-smoke in his chambers while considering his busy docket.

In 1923 Sanford's nomination to the Supreme Court came at the behest of his friends, Chief Justice **WILLIAM HOWARD TAFT** and Attorney General **HARRY M. DAUGHERTY**. The two men convinced President **WARREN G. HARDING** of Sanford's breadth of education and varied experience, which included service on the **LEAGUE OF NATIONS**. The nomination succeeded easily in the Senate, and Sanford sat on the Court for seven years until his death in 1930. He wrote 130 opinions, many of them addressing issues related to government, business, and especially bankruptcy.

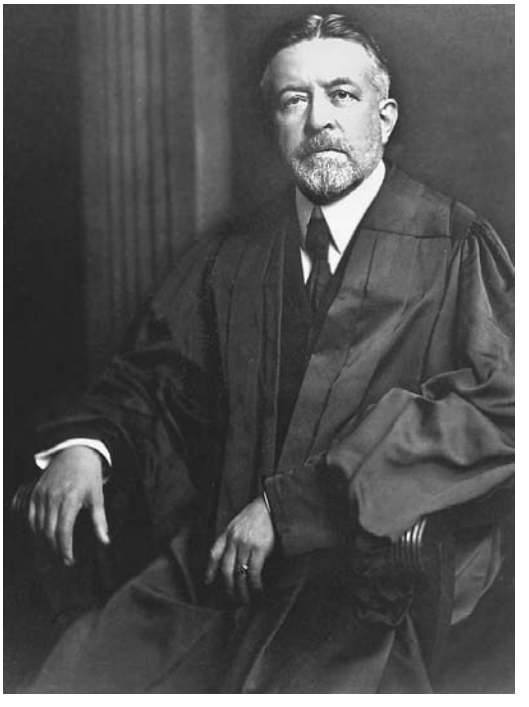

*Edward T. Sanford.*
COLLECTION OF U.S. SUPREME COURT

Although neglected by history because of the accomplishments of his celebrated contemporaries, Sanford made a major contribution in the area of civil liberties. In particular, he helped develop the so-called incorporation doctrine—the Supreme Court's view that the Bill of Rights applies not only to the federal government but also, in large part, to the states. During much of the nineteenth century, states conferred fewer rights upon their citizens than those extended by the federal Bill of Rights, even after ratification of the **FOURTEENTH AMENDMENT**. With the

"WE MAY AND DO ASSUME THAT THE FREEDOM OF SPEECH AND OF THE PRESS . . . ARE AMONG THE FUNDAMENTAL PERSONAL RIGHTS AND LIBERTIES PROTECTED . . . FROM IMPAIRMENT BY THE STATES."
—EDWARD T. SANFORD

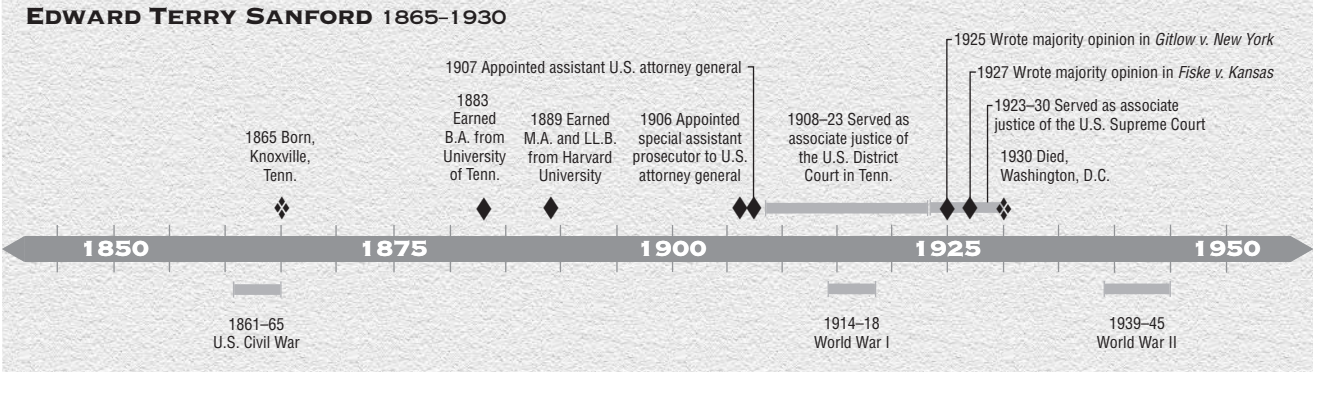

intervention of the Supreme Court, this began to change at the turn of the century. In the mid-1920s, Sanford helped effect the change in two important cases concerning freedom of speech.

The first case dealt with a state's power to control the press. In GITLOW V. NEW YORK, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925), the Court considered New York's conviction of a leftist author under the state's ANARCHY law of 1902. The broader question for the Court was, Should the First Amendment be extended to the states? Sanford's opinion upheld the conviction because, in the Court's view, states should be free to prosecute citizens who advocate violent overthrow of government. But on the broader question of the Bill of Rights, Sanford wrote that the First Amendment applied to the states through the Fourteenth Amendment. *Gitlow* served as the foundation for subsequent cases in which the Court would strike down state laws that violated the First Amendment. In 1927 the Court upheld a defense based on the doctrine enunciated in *Gitlow* in *Fiske v. Kansas,* 274 U.S. 380, 47 S. Ct. 655, 71 L. Ed. 1108. In his opinion, Sanford underscored that states must guarantee First Amendment rights.

Throughout his tenure on the Court, Sanford voted consistently with Chief Justice Taft. Sanford died at age sixty-four on March 8, 1930—the same day that Taft died.

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## ♦ SANGER, MARGARET HIGGINS

A feminist and founder of the Planned Parenthood Federation of America, Margaret Higgins Sanger battled the government and the Roman Catholic Church to establish the legitimacy of BIRTH CONTROL.

Sanger was born September 14, 1879, in Corning, New York, to Michael Higgins, an Irish stonecutter, and Annie Purcell Higgins, the daughter of an Irish day laborer. Sanger's mother, who had five more children and suffered chronic tuberculosis, died at the age of fifty in 1899. Sanger blamed her death on the strain of bearing eleven children.

Following her mother's death, Sanger began nursing training at White Plains Hospital. She often accompanied doctors to patients' homes to deliver babies, and she frequently had to deliver children herself. Many of the new mothers asked Sanger what they could do to prevent another pregnancy. She, in turn, asked the doctors, but they gave her no information and took little interest in the women's dilemma.

While completing her nursing training, Sanger met William Sanger, an architect, whom she married in 1902. He was a German Jew and a socialist who was active in the radical causes of the day.

By 1912, the Sangers and their three children had moved to Greenwich Village, where the couple became involved in politics and the arts, and entertained some of the most radical intellectuals of the time. Sanger became deeply involved with the Socialist party. While recruiting for the organization, she visited many working-class families with six and seven children that were forced to make their home in two- and three-room tenements. She found that the women lived in dread of having more children and the resulting increase in poverty, and she concluded that women needed the right to control their own bodies.

She soon began speaking publicly on the problems of family life, connecting the size of the family with the economic problems of the working class. Her speeches became so popular that she was asked to turn them into a series of articles for the *Call,* a New York socialist newspaper. In her twelve-week series, entitled "What Every Woman Should Know," Sanger explained puberty, the reproductive organs, and sexually transmitted diseases. After the paper printed an article about gonorrhea, the authorities threatened that if it published a planned article on syphilis, its mailing permit would be canceled under the Comstock Act of 1873, a strict CENSORSHIP law that barred the mailing of "obscene" material. The law was named for Anthony Comstock, a special agent of the post office with authority to open the mail and determine whether materials were obscene.

Along with her speaking and writing, Sanger returned to nursing in New York and spent much of her time assisting with home births and living with the families for several weeks afterward. She observed that the women had repeated pregnancies and were obsessed with methods of preventing conception. They sought illegal and cheap ABORTIONS, which often caused injury or death, and tried dangerous cures of their own, such as drinking turpentine and inserting instruments into the uterus. After

one woman died following her second self-induced abortion, Sanger was distraught and walked the streets for hours before returning home. That night, Sanger decided to devote her life to educating women about their bodies and methods of contraception.

Sanger began her work by scouring libraries for information on preventing conception. After months of reading and research, she was convinced that no practical information existed in the United States, and she traveled to France with her family. In Paris, Sanger found that French women were well versed in contraceptive methods. She talked to druggists, midwives, doctors, and working women, and noted formulas for suppositories and douches, which she planned to write up as a pamphlet for U.S. women.

Returning home to New York, she began publishing a monthly magazine called the *Woman Rebel.* She deliberately decided to use the publication to engage in a frank discussion of women's liberation from the fear and reality of unplanned pregnancies, knowing that she would soon run afoul of Anthony Comstock. Sanger realized that the new movement needed a name, and after much discussion, she and a group of supporters agreed to call it birth control.

In April 1914, four weeks after the first issue of the *Woman Rebel* was published, the post office notified Sanger that the magazine was unmailable under the Comstock Act. While she skirmished with Comstock over her magazine, Sanger worked on her pamphlet on contraceptive techniques, called *Family Limitation,* in which she described the practical knowledge she had gathered in Europe. Sanger visited twenty-two printers in one week, trying to find someone who would produce the pamphlet. Finally, one hundred thousand copies were printed, addressed, and stored in San Francisco, Chicago, and Pittsburgh, to be mailed on her prearranged signal, when she thought she would be safe from Comstock's interference.

In August 1914, Sanger was indicted on charges of violating the Comstock Act. When it became clear that the judge hearing her case was biased against her, she fled to Europe to gain time to prepare her case properly. She sailed from Canada under a false name and without a passport. From the ship, where she was safely

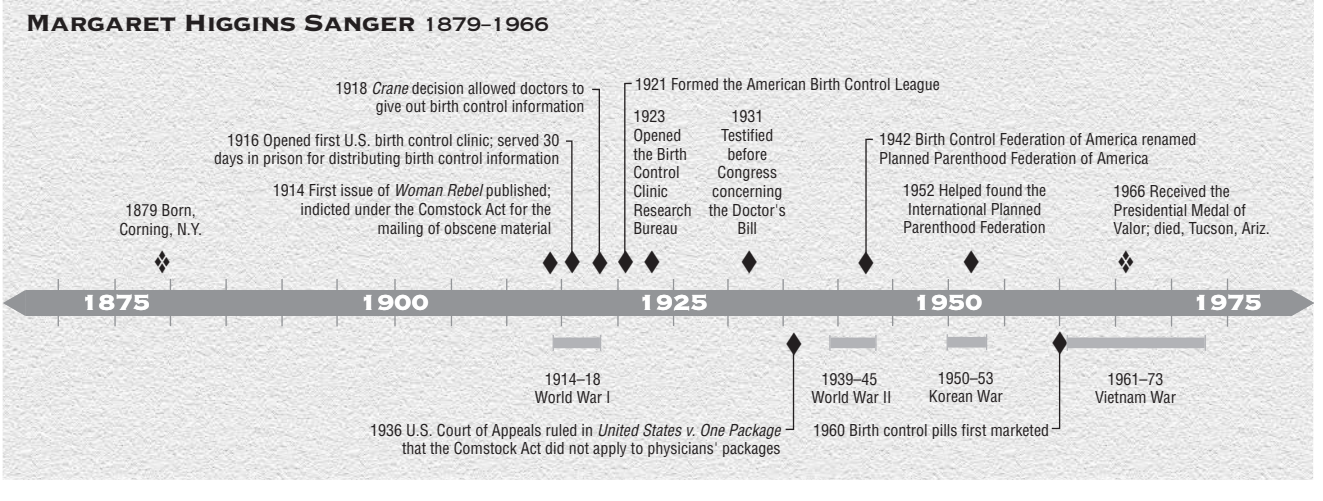

outside U.S. legal jurisdiction, Sanger sent telegrams containing the prearranged code word that indicated it was time to send out her pamphlet on contraception. After landing in Liverpool, she traveled on to London, where news of the *Woman Rebel* had made her a celebrity in radical circles. She later moved to Holland, which had the lowest infant death rate in the world and where all mothers were taught about contraception. There, Sanger learned how to examine women and advise them on which of the fifteen available birth control devices were appropriate. As a result of her experience in Europe, she learned the necessity of the medical community's involvement in the birth control movement and the importance of keeping thorough records and conducting follow-up studies.

In October 1915, Sanger sailed home. She contacted the district attorney about her case, and a hearing was scheduled for the following January. But in November 1915, the Sangers' daughter, Peggy, died of pneumonia, and Sanger sank into a severe depression. She insisted on going ahead with her trial, however, and received an outpouring of support from people across the country who had heard of her loss. Eventually, the charges were dismissed on the grounds that they were two years old and that Sanger had not made a practice of publishing obscene articles. Although this dismissal prevented the Comstock Act from being challenged in the courts, the publicity surrounding Sanger's case made the entire country aware of the birth control movement.

"A FREE RACE CANNOT BE BORN OF SLAVE MOTHERS."
—MARGARET SANGER

Sanger next notified her supporters of her intent to establish free clinics throughout the country, at which women could receive instruction in birth control. Sanger rented a storefront tenement in the Brownsville section of Brooklyn, where many newly arrived immigrants lived. The three women printed five thousand circulars in English, Yiddish, and Italian, advertising the clinic and offering contraceptive information for ten cents, and posted them around the neighborhood. The posters read, "Mothers! Can you afford to have a large family? Do you want any more children? If not, why do you have them?"

In October 1916, Sanger, along with her sister Ethel Byrne, who was a nurse, and another supporter, Fania Mindell, opened the first birth control clinic in the United States. After only nine days, over four hundred women had come to the clinic for assistance. Among them was an undercover policewoman, who arrested Sanger, Byrne, and Mindell and confiscated all the patient records, pamphlets, and contraceptives. The women were charged with disseminating birth control information and maintaining a public NUISANCE. Byrne was found guilty and sentenced to thirty days in jail, where she nearly died from a hunger strike before the governor pardoned her. Mindell was found guilty of selling copies of "What Every Woman Should Know" and fined fifty dollars. Sanger was convicted and sentenced to thirty days in the workhouse, where she gave lectures on birth control to the other inmates and taught them to read and write.

After her release, Sanger decided to focus on changing the laws on contraception and educating women about birth control techniques. Her conviction for running the birth control clinic had been upheld by the New York Supreme Court in *People v. Sanger,* 179 App. Div. 939, 166 N.Y.S. 1107 (1917), and she appealed to the state's high court, the New York Court of Appeals. In January 1918, in an opinion that became known as the *Crane* decision after the authoring judge, Frederick Crane, the appellate court upheld the lower court (*Sanger,* 222 N.Y. 192, 118 N.E. 637). But the court interpreted the criminal laws broadly, holding that doctors could give out birth control information to any married person to protect his or her health. This meant that clinics could operate freely and that they would be under the supervision of medical personnel, where Sanger thought they belonged.

By 1920, over twenty-five birth control leagues were operating, and Mindell's conviction for distributing literature about contraception was reversed, which meant that pamphlets and books could more easily be distributed. In 1921, Sanger formed the American Birth Control League. The Catholic Church came to lead the opposition to Sanger's efforts, and she continued to battle the church throughout her life.

Sanger attacked the Comstock law, establishing the National Committee for Federal Legislation for Birth Control, headquartered in Washington, D.C., to gather support for federal legislation dubbed the Doctor's Bill. By 1931, hundreds of medical, political, religious, and labor organizations supported the bill. When Sanger appeared before a subcommittee of the Senate Judicial Committee in February 1931, she testified that based on statistics for the period since the Comstock Act took effect in 1873, one-

and-a-half million women had died during pregnancy and childbirth; seven hundred thousand illegal abortions had been performed each year; and fifteen million children had died during their first year because of poverty or their mother's poor health. But the proposed legislation was vehemently opposed by the Catholic Church, the Patriotic Society, the Purity League, and other groups, and was defeated.

After further attempts to pass the legislation were unsuccessful, Sanger decided to turn to the courts. In 1933 she had had a new type of pessary (vaginal suppository) sent to Dr. Hannah Stone, in New York, and the package had been seized under the Comstock Act. Stone filed charges. After a trial, the court ruled that the doctor was entitled to the package (*United States v. One Package,* 13 F. Supp. 334 [S.D.N.Y. 1936]). The government appealed to the U.S. Court of Appeals for the Second Circuit, which upheld the lower court, ruling that the aim of the Comstock law was not to "prevent the importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well being of their patients" (*One Package,* 86 F.2d 737 [2d Cir. 1936]). In 1937 the AMERICAN MEDICAL ASSOCIATION adopted the position that all doctors should receive information about the legal dispensation of contraceptives and that new contraceptive techniques should be studied.

In 1939 the Birth Control Clinical Research Bureau and the Birth Control League merged into the Birth Control Federation of America, which was renamed the Planned Parenthood Federation of America in 1942. Sanger continued her work, initiating birth control programs in rural clinics. Here, she decided that the relatively expensive and difficult-to-use diaphragm was impractical and that women needed a birth control pill or injection. In the 1950s, she supported the work of Dr. Gregory Pincus, whose research eventually produced the birth control pill.

In 1966 at the age of eighty-two, Sanger received the Presidential Medal of Valor from LYNDON B. JOHNSON. Later that year, she died in Tucson, Arizona.

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CROSS-REFERENCES

*Griswold v. Connecticut*; Women's Rights.

## SANITY

*Reasonable understanding; sound mind; possessing mental faculties that are capable of distinguishing right from wrong so as to bear legal responsibility for one's actions.*

## SANTA CLARA COUNTY V. SOUTHERN PACIFIC RAILROAD COMPANY

An 1886 U.S. Supreme Court decision, *Santa Clara County v. Southern Pacific Railroad Company,* 118 U.S. 394, 6 S. Ct. 1132, 30 L. Ed. 118, is often cited for the principle that the term *person* as used in the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT applies to corporations as well as to natural persons.

The Southern Pacific Railroad Company refused to pay a tax assessed by the California Board of Equalization upon its franchise, roadways, roadbeds, fences, and rolling stock. The county brought an action in state court against the railroad to recover the delinquent taxes. The railroad had the action removed to the federal district court. The court agreed with the defendant that the assessment of the tax was void because the board had no jurisdiction to act. It also ruled that the defendant had been denied equal protection of the law because the assessment of the property was made at full monetary value without the discount that was given to individual property owners for outstanding mortgages on their property. The county filed a writ of error to the federal court, and the U.S. Supreme Court heard the case.

The Court agreed with the railroad that the state board had no jurisdiction to assess the tax. The assessment of taxes by the board on fences belonging to the railroad was deemed void because the board was authorized by the state constitution to assess only "the franchise, roadway roadbed, rails, and rolling stock." The Court rejected the argument that the fences constituted part of the roadway for purposes of taxation. The constitution required a separate

assessment for "land, and improvements thereon" and a state statute expressly included the term *fence* within the categories of improvements. The state board acting through the county sought to have the plaintiff liable for a single sum, incorporating taxes assessed upon various types of property, including property that the board had no power to assess. The Court declared that since part of the assessment was illegal, it could not support an action for the county to recover the entire tax; therefore, it affirmed the judgment for the defendants.

The Court did not explicitly discuss the Fourteenth Amendment in its opinion, basing its decision on the invalidity of the assessment. In its statement of the facts of the case, it did, however, set out the Fourteenth Amendment claims of the railroad. The California constitution denied "railroads and other quasi public corporations" equal protection of laws as guaranteed by the Fourteenth Amendment to the Constitution because the board did not reduce the value of property for assessment purposes by the amount of any outstanding mortgage debts on it, as it did for property owned by natural persons or other corporations. Although the Supreme Court did not specifically rule on the constitutionality of the treatment of the railroad by the state, the case of *County of Santa Clara v. Southern Pacific Railroad Company* is cited to support the principle that both corporations and natural persons are entitled to equal protection of laws pursuant to the Fourteenth Amendment to the Constitution.

# Abbreviations

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| A. | Atlantic Reporter |
| A. 2d | Atlantic Reporter, Second Series |
| AA | Alcoholics Anonymous |
| AAA | American Arbitration Association; Agricultural Adjustment Act of 1933 |
| AALS | Association of American Law Schools |
| AAPRP | All African People's Revolutionary Party |
| AARP | American Association of Retired Persons |
| AAS | American Anti-Slavery Society |
| ABA | American Bar Association; Architectural Barriers Act of 1968; American Bankers Association |
| ABC | American Broadcasting Companies, Inc. (formerly American Broadcasting Corporation) |
| ABM | Antiballistic missile |
| ABM Treaty | Anti-Ballistic Missile Treaty of 1972 |
| ABVP | Anti-Biased Violence Project |
| A/C | Account |
| A.C. | Appeal cases |
| ACAA | Air Carrier Access Act |
| ACCA | Armed Career Criminal Act of 1984 |
| ACF | Administration for Children and Families |
| ACLU | American Civil Liberties Union |
| ACRS | Accelerated Cost Recovery System |
| ACS | Agricultural Cooperative Service |
| ACT | American College Test |
| Act'g Legal Adv. | Acting Legal Advisor |
| ACUS | Administrative Conference of the United States |
| ACYF | Administration on Children, Youth, and Families |
| A.D. 2d | Appellate Division, Second Series, N.Y. |
| ADA | Americans with Disabilities Act of 1990 |
| ADAMHA | Alcohol, Drug Abuse, and Mental Health Administration |
| ADC | Aid to Dependent Children |
| ADD | Administration on Developmental Disabilities |
| ADEA | Age Discrimination in Employment Act of 1967 |
| ADL | Anti-Defamation League |
| ADR | Alternative dispute resolution |
| AEC | Atomic Energy Commission |
| AECB | Arms Export Control Board |
| AEDPA | Antiterrorism and Effective Death Penalty Act |
| A.E.R. | All England Law Reports |
| AFA | American Family Association; Alabama Freethought Association |
| AFB | American Farm Bureau |
| AFBF | American Farm Bureau Federation |
| AFDC | Aid to Families with Dependent Children |
| aff'd per cur. | Affirmed by the court |
| AFIS | Automated fingerprint identification system |
| AFL | American Federation of Labor |

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| AFL-CIO | American Federation of Labor and Congress of Industrial Organizations |
| AFRes | Air Force Reserve |
| AFSC | American Friends Service Committee |
| AFSCME | American Federation of State, County, and Municipal Employees |
| AGRICOLA | Agricultural Online Access |
| AIA | Association of Insurance Attorneys |
| AIB | American Institute for Banking |
| AID | Artificial insemination using a third-party donor's sperm; Agency for International Development |
| AIDS | Acquired immune deficiency syndrome |
| AIH | Artificial insemination using the husband's sperm |
| AIM | American Indian Movement |
| AIPAC | American Israel Public Affairs Committee |
| AIUSA | Amnesty International, U.S.A. Affiliate |
| AJS | American Judicature Society |
| ALA | American Library Association |
| Alcoa | Aluminum Company of America |
| ALEC | American Legislative Exchange Council |
| ALF | Animal Liberation Front |
| ALI | American Law Institute |
| ALJ | Administrative law judge |
| All E.R. | All England Law Reports |
| ALO | Agency Liaison |
| A.L.R. | American Law Reports |
| ALY | *American Law Yearbook* |
| AMA | American Medical Association |
| AMAA | Agricultural Marketing Agreement Act |
| Am. Dec. | American Decisions |
| amdt. | Amendment |
| Amer. St. Papers, For. Rels. | American State Papers, Legislative and Executive Documents of the Congress of the U.S., Class I, Foreign Relations, 1832–1859 |
| AMS | Agricultural Marketing Service |
| AMVETS | American Veterans (of World War II) |
| ANA | Administration for Native Americans |
| Ann. Dig. | Annual Digest of Public International Law Cases |
| ANPA | American Newspaper Publishers Association |
| ANSCA | Alaska Native Claims Act |
| ANZUS | Australia-New Zealand-United States Security Treaty Organization |
| AOA | Administration on Aging |
| AOE | Arizonans for Official English |
| AOL | America Online |
| AP | Associated Press |
| APA | Administrative Procedure Act of 1946 |
| APHIS | Animal and Plant Health Inspection Service |
| App. Div. | Appellate Division Reports, N.Y. Supreme Court |
| Arb. Trib., U.S.-British | Arbitration Tribunal, Claim Convention of 1853, United States and Great Britain Convention of 1853 |
| Ardcor | American Roller Die Corporation |
| ARPA | Advanced Research Projects Agency |
| ARPANET | Advanced Research Projects Agency Network |
| ARS | Advanced Record System |
| Art. | Article |
| ARU | American Railway Union |
| ASCME | American Federation of State, County, and Municipal Employees |
| ASCS | Agriculture Stabilization and Conservation Service |
| ASM | Available Seatmile |
| ASPCA | American Society for the Prevention of Cruelty to Animals |
| Asst. Att. Gen. | Assistant Attorney General |
| AT&T | American Telephone and Telegraph |
| ATFD | Alcohol, Tobacco and Firearms Division |
| ATLA | Association of Trial Lawyers of America |
| ATO | Alpha Tau Omega |
| ATTD | Alcohol and Tobacco Tax Division |
| ATU | Alcohol Tax Unit |
| AUAM | American Union against Militarism |
| AUM | Animal Unit Month |
| AZT | Azidothymidine |

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|---|---|
| BAC | Blood alcohol concentration |
| BALSA | Black-American Law Student Association |
| BATF | Bureau of Alcohol, Tobacco and Firearms |
| BBS | Bulletin Board System |
| BCCI | Bank of Credit and Commerce International |
| BEA | Bureau of Economic Analysis |
| Bell's Cr. C. | Bell's English Crown Cases |
| Bevans | United States Treaties, etc. *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled under the direction of Charles I. Bevans, 1968–76) |
| BFOQ | Bona fide occupational qualification |
| BI | Bureau of Investigation |
| BIA | Bureau of Indian Affairs; Board of Immigration Appeals |
| BID | Business improvement district |
| BJS | Bureau of Justice Statistics |
| Black. | Black's United States Supreme Court Reports |
| Blatchf. | Blatchford's United States Circuit Court Reports |
| BLM | Bureau of Land Management |
| BLS | Bureau of Labor Statistics |
| BMD | Ballistic missile defense |
| BNA | Bureau of National Affairs |
| BOCA | Building Officials and Code Administrators International |
| BOP | Bureau of Prisons |
| BPP | Black Panther Party for Self-defense |
| Brit. and For. | British and Foreign State Papers |
| BSA | Boy Scouts of America |
| BTP | Beta Theta Pi |
| Burr. | James Burrows, *Report of Cases Argued and Determined in the Court of King's Bench during the Time of Lord Mansfield* (1766–1780) |
| BVA | Board of Veterans Appeals |
| c. | Chapter |
| $C^3I$ | Command, Control, Communications, and Intelligence |
| C.A. | Court of Appeals |
| CAA | Clean Air Act |
| CAB | Civil Aeronautics Board; Corporation for American Banking |
| CAFE | Corporate average fuel economy |
| Cal. 2d | California Reports, Second Series |
| Cal. 3d | California Reports, Third Series |
| CALR | Computer-assisted legal research |
| Cal. Rptr. | California Reporter |
| CAP | Common Agricultural Policy |
| CARA | Classification and Ratings Administration |
| CATV | Community antenna television |
| CBO | Congressional Budget Office |
| CBS | Columbia Broadcasting System |
| CBOEC | Chicago Board of Election Commissioners |
| CCC | Commodity Credit Corporation |
| CCDBG | Child Care and Development Block Grant of 1990 |
| C.C.D. Pa. | Circuit Court Decisions, Pennsylvania |
| C.C.D. Va. | Circuit Court Decisions, Virginia |
| CCEA | Cabinet Council on Economic Affairs |
| CCP | Chinese Communist Party |
| CCR | Center for Constitutional Rights |
| C.C.R.I. | Circuit Court, Rhode Island |
| CD | Certificate of deposit; compact disc |
| CDA | Communications Decency Act |
| CDBG | Community Development Block Grant Program |
| CDC | Centers for Disease Control and Prevention; Community Development Corporation |
| CDF | Children's Defense Fund |
| CDL | Citizens for Decency through Law |
| CD-ROM | Compact disc read-only memory |
| CDS | Community Dispute Services |
| CDW | Collision damage waiver |
| CENTO | Central Treaty Organization |
| CEO | Chief executive officer |
| CEQ | Council on Environmental Quality |

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|---|---|
| CERCLA | Comprehensive Environmental Response, Compensation, and Liability Act of 1980 |
| cert. | *Certiorari* |
| CETA | Comprehensive Employment and Training Act |
| C & F | Cost and freight |
| CFC | Chlorofluorocarbon |
| CFE Treaty | Conventional Forces in Europe Treaty of 1990 |
| C.F. & I. | Cost, freight, and insurance |
| C.F.R | Code of Federal Regulations |
| CFNP | Community Food and Nutrition Program |
| CFTA | Canadian Free Trade Agreement |
| CFTC | Commodity Futures Trading Commission |
| Ch. | Chancery Division, English Law Reports |
| CHAMPVA | Civilian Health and Medical Program at the Veterans Administration |
| CHEP | Cuban/Haitian Entrant Program |
| CHINS | Children in need of supervision |
| CHIPS | Child in need of protective services |
| Ch.N.Y. | Chancery Reports, New York |
| Chr. Rob. | Christopher Robinson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (1801–1808) |
| CIA | Central Intelligence Agency |
| CID | Commercial Item Descriptions |
| C.I.F. | Cost, insurance, and freight |
| CINCNORAD | Commander in Chief, North American Air Defense Command |
| C.I.O. | Congress of Industrial Organizations |
| CIPE | Center for International Private Enterprise |
| C.J. | Chief justice |
| CJIS | Criminal Justice Information Services |
| C.J.S. | Corpus Juris Secundum |
| Claims Arb. under Spec. Conv., Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| CLASP | Center for Law and Social Policy |
| CLE | Center for Law and Education; Continuing Legal Education |
| CLEO | Council on Legal Education Opportunity; Chief Law Enforcement Officer |
| CLP | Communist Labor Party of America |
| CLS | Christian Legal Society; critical legal studies (movement); Critical Legal Studies (membership organization) |
| C.M.A. | Court of Military Appeals |
| CMEA | Council for Mutual Economic Assistance |
| CMHS | Center for Mental Health Services |
| C.M.R. | Court of Military Review |
| CNN | Cable News Network |
| CNO | Chief of Naval Operations |
| CNOL | Consolidated net operating loss |
| CNR | Chicago and Northwestern Railway |
| CO | Conscientious Objector |
| C.O.D. | Cash on delivery |
| COGP | Commission on Government Procurement |
| COINTELPRO | Counterintelligence Program |
| Coke Rep. | Coke's English King's Bench Reports |
| COLA | Cost-of-living adjustment |
| COMCEN | Federal Communications Center |
| Comp. | Compilation |
| Conn. | Connecticut Reports |
| CONTU | National Commission on New Technological Uses of Copyrighted Works |
| Conv. | Convention |
| COPA | Child Online Protection Act (1998) |
| COPS | Community Oriented Policing Services |
| Corbin | Arthur L. Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (1950) |
| CORE | Congress on Racial Equality |
| Cox's Crim. Cases | Cox's Criminal Cases (England) |
| COYOTE | Call Off Your Old Tired Ethics |

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| CPA | Certified public accountant |
| CPB | Corporation for Public Broadcasting, the |
| CPI | Consumer Price Index |
| CPPA | Child Pornography Prevention Act |
| CPSC | Consumer Product Safety Commission |
| Cranch | Cranch's United States Supreme Court Reports |
| CRF | Constitutional Rights Foundation |
| CRR | Center for Constitutional Rights |
| CRS | Congressional Research Service; Community Relations Service |
| CRT | Critical race theory |
| CSA | Community Services Administration |
| CSAP | Center for Substance Abuse Prevention |
| CSAT | Center for Substance Abuse Treatment |
| CSC | Civil Service Commission |
| CSCE | Conference on Security and Cooperation in Europe |
| CSG | Council of State Governments |
| CSO | Community Service Organization |
| CSP | Center for the Study of the Presidency |
| C-SPAN | Cable-Satellite Public Affairs Network |
| CSRS | Cooperative State Research Service |
| CSWPL | Center on Social Welfare Policy and Law |
| CTA | *Cum testamento annexo* (with the will attached) |
| Ct. Ap. D.C. | Court of Appeals, District of Columbia |
| Ct. App. No. Ireland | Court of Appeals, Northern Ireland |
| Ct. Cl. | Court of Claims, United States |
| Ct. Crim. Apps. | Court of Criminal Appeals (England) |
| CTI | Consolidated taxable income |
| Ct. of Sess., Scot. | Court of Sessions, Scotland |
| CU | Credit union |
| CUNY | City University of New York |
| Cush. | Cushing's Massachusetts Reports |
| CWA | Civil Works Administration; Clean Water Act |
| DACORB | Department of the Army Conscientious Objector Review Board |
| Dall. | Dallas's Pennsylvania and United States Reports |
| DAR | Daughters of the American Revolution |
| DARPA | Defense Advanced Research Projects Agency |
| DAVA | Defense Audiovisual Agency |
| D.C. | United States District Court; District of Columbia |
| D.C. Del. | United States District Court, Delaware |
| D.C. Mass. | United States District Court, Massachusetts |
| D.C. Md. | United States District Court, Maryland |
| D.C.N.D.Cal. | United States District Court, Northern District, California |
| D.C.N.Y. | United States District Court, New York |
| D.C.Pa. | United States District Court, Pennsylvania |
| DCS | Deputy Chiefs of Staff |
| DCZ | District of the Canal Zone |
| DDT | Dichlorodiphenyltricloro-ethane |
| DEA | Drug Enforcement Administration |
| Decl. Lond. | Declaration of London, February 26, 1909 |
| Dev. & B. | Devereux & Battle's North Carolina Reports |
| DFL | Minnesota Democratic-Farmer-Labor |
| DFTA | Department for the Aging |
| Dig. U.S. Practice in Intl. Law | Digest of U.S. Practice in International Law |
| Dist. Ct. | D.C. United States District Court, District of Columbia |
| D.L.R. | Dominion Law Reports (Canada) |
| DMCA | Digital Millennium Copyright Act |
| DNA | Deoxyribonucleic acid |
| Dnase | Deoxyribonuclease |
| DNC | Democratic National Committee |
| DOC | Department of Commerce |
| DOD | Department of Defense |
| DODEA | Department of Defense Education Activity |
| Dodson | Dodson's Reports, English Admiralty Courts |
| DOE | Department of Energy |

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|---|---|
| DOER | Department of Employee Relations |
| DOJ | Department of Justice |
| DOL | Department of Labor |
| DOMA | Defense of Marriage Act of 1996 |
| DOS | Disk operating system |
| DOT | Department of Transportation |
| DPT | Diphtheria, pertussis, and tetanus |
| DRI | Defense Research Institute |
| DSAA | Defense Security Assistance Agency |
| DUI | Driving under the influence; driving under intoxication |
| DVD | Digital versatile disc |
| DWI | Driving while intoxicated |
| EAHCA | Education for All Handicapped Children Act of 1975 |
| EBT | Examination before trial |
| E.coli | Escherichia coli |
| ECPA | Electronic Communications Privacy Act of 1986 |
| ECSC | Treaty of the European Coal and Steel Community |
| EDA | Economic Development Administration |
| EDF | Environmental Defense Fund |
| E.D.N.Y. | Eastern District, New York |
| EDP | Electronic data processing |
| E.D. Pa. | Eastern-District, Pennsylvania |
| EDSC | Eastern District, South Carolina |
| EDT | Eastern daylight time |
| E.D. Va. | Eastern District, Virginia |
| EEC | European Economic Community; European Economic Community Treaty |
| EEOC | Equal Employment Opportunity Commission |
| EFF | Electronic Frontier Foundation |
| EFT | Electronic funds transfer |
| Eliz. | Queen Elizabeth (Great Britain) |
| Em. App. | Temporary Emergency Court of Appeals |
| ENE | Early neutral evaluation |
| Eng. Rep. | English Reports |
| EOP | Executive Office of the President |
| EPA | Environmental Protection Agency; Equal Pay Act of 1963 |
| ERA | Equal Rights Amendment |
| ERDC | Energy Research and Development Commission |
| ERISA | Employee Retirement Income Security Act of 1974 |
| ERS | Economic Research Service |
| ERTA | Economic Recovery Tax Act of 1981 |
| ESA | Endangered Species Act of 1973 |
| ESF | Emergency support function; Economic Support Fund |
| ESRD | End-Stage Renal Disease Program |
| ETA | Employment and Training Administration |
| ETS | Environmental tobacco smoke |
| et seq. | *Et sequentes* or *et sequentia* (''and the following'') |
| EU | European Union |
| Euratom | European Atomic Energy Community |
| Eur. Ct. H.R. | European Court of Human Rights |
| Ex. | English Exchequer Reports, Welsby, Hurlstone & Gordon |
| Exch. | Exchequer Reports (Welsby, Hurlstone & Gordon) |
| Ex Com | Executive Committee of the National Security Council |
| Eximbank | Export-Import Bank of the United States |
| F. | Federal Reporter |
| F. 2d | Federal Reporter, Second Series |
| FAA | Federal Aviation Administration; Federal Arbitration Act |
| FAAA | Federal Alcohol Administration Act |
| FACE | Freedom of Access to Clinic Entrances Act of 1994 |
| FACT | Feminist Anti-Censorship Task Force |
| FAIRA | Federal Agriculture Improvement and Reform Act of 1996 |
| FAMLA | Family and Medical Leave Act of 1993 |
| Fannie Mae | Federal National Mortgage Association |
| FAO | Food and Agriculture Organization of the United Nations |
| FAR | Federal Acquisition Regulations |

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| FAS | Foreign Agricultural Service |
| FBA | Federal Bar Association |
| FBI | Federal Bureau of Investigation |
| FCA | Farm Credit Administration |
| F. Cas. | Federal Cases |
| FCC | Federal Communications Commission |
| FCIA | Foreign Credit Insurance Association |
| FCIC | Federal Crop Insurance Corporation |
| FCLAA | Federal Cigarette Labeling and Advertising Act |
| FCRA | Fair Credit Reporting Act |
| FCU | Federal credit unions |
| FCUA | Federal Credit Union Act |
| FCZ | Fishery Conservation Zone |
| FDA | Food and Drug Administration |
| FDIC | Federal Deposit Insurance Corporation |
| FDPC | Federal Data Processing Center |
| FEC | Federal Election Commission |
| FECA | Federal Election Campaign Act of 1971 |
| Fed. Cas. | Federal Cases |
| FEHA | Fair Employment and Housing Act |
| FEHBA | Federal Employees Health Benefit Act |
| FEMA | Federal Emergency Management Agency |
| FERC | Federal Energy Regulatory Commission |
| FFB | Federal Financing Bank |
| FFDC | Federal Food, Drug, and Cosmetics Act |
| FGIS | Federal Grain Inspection Service |
| FHA | Federal Housing Administration |
| FHAA | Fair Housing Amendments Act of 1998 |
| FHWA | Federal Highway Administration |
| FIA | Federal Insurance Administration |
| FIC | Federal Information Centers; Federation of Insurance Counsel |
| FICA | Federal Insurance Contributions Act |
| FIFRA | Federal Insecticide, Fungicide, and Rodenticide Act |
| FIP | Forestry Incentives Program |
| FIRREA | Financial Institutions Reform, Recovery, and Enforcement Act of 1989 |
| FISA | Foreign Intelligence Surveillance Act of 1978 |
| FISC | Foreign Intelligence Surveillance Court of Review |
| FJC | Federal Judicial Center |
| FLSA | Fair Labor Standards Act |
| FMC | Federal Maritime Commission |
| FMCS | Federal Mediation and Conciliation Service |
| FmHA | Farmers Home Administration |
| FMLA | Family and Medical Leave Act of 1993 |
| FNMA | Federal National Mortgage Association, "Fannie Mae" |
| F.O.B. | Free on board |
| FOIA | Freedom of Information Act |
| FOMC | Federal Open Market Committee |
| FPA | Federal Power Act of 1935 |
| FPC | Federal Power Commission |
| FPMR | Federal Property Management Regulations |
| FPRS | Federal Property Resources Service |
| FR | Federal Register |
| FRA | Federal Railroad Administration |
| FRB | Federal Reserve Board |
| FRC | Federal Radio Commission |
| F.R.D. | Federal Rules Decisions |
| FSA | Family Support Act |
| FSB | Federal'naya Sluzhba Bezopasnosti (the Federal Security Service of Russia) |
| FSLIC | Federal Savings and Loan Insurance Corporation |
| FSQS | Food Safety and Quality Service |
| FSS | Federal Supply Service |
| F. Supp. | Federal Supplement |
| FTA | U.S.-Canada Free Trade Agreement of 1988 |
| FTC | Federal Trade Commission |
| FTCA | Federal Tort Claims Act |
| FTS | Federal Telecommunications System |
| FTS2000 | Federal Telecommunications System 2000 |
| FUCA | Federal Unemployment Compensation Act of 1988 |

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| FUTA | Federal Unemployment Tax Act |
| FWPCA | Federal Water Pollution Control Act of 1948 |
| FWS | Fish and Wildlife Service |
| GAL | Guardian ad litem |
| GAO | General Accounting Office; Governmental Affairs Office |
| GAOR | General Assembly Official Records, United Nations |
| GAAP | Generally accepted accounting principles |
| GA Res. | General Assembly Resolution (United Nations) |
| GATT | General Agreement on Tariffs and Trade |
| GCA | Gun Control Act |
| Gen. Cls. Comm. | General Claims Commission, United States and Panama; General Claims United States and Mexico |
| Geo. II | King George II (Great Britain) |
| Geo. III | King George III (Great Britain) |
| GHB | Gamma-hydroxybutrate |
| GI | Government Issue |
| GID | General Intelligence Division |
| GM | General Motors |
| GNMA | Government National Mortgage Association, ''Ginnie Mae' |
| GNP | Gross national product |
| GOP | Grand Old Party (Republican Party) |
| GOPAC | Grand Old Party Action Committee |
| GPA | Office of Governmental and Public Affairs |
| GPO | Government Printing Office |
| GRAS | Generally recognized as safe |
| Gr. Br., Crim. Ct. App. | Great Britain, Court of Criminal Appeals |
| GRNL | Gay Rights-National Lobby |
| GSA | General Services Administration |
| Hackworth | Green Haywood Hackworth, *Digest of International Law* (1940–1944) |
| Hay and Marriott | Great Britain. High Court of Admiralty, *Decisions in the High Court of Admiralty during the Time of Sir George Hay and of Sir James Marriott, Late Judges of That Court* (1801) |
| HBO | Home Box Office |
| HCFA | Health Care Financing Administration |
| H.Ct. | High Court |
| HDS | Office of Human Development Services |
| Hen. & M. | Hening & Munford's Virginia Reports |
| HEW | Department of Health, Education, and Welfare |
| HFCA | Health Care Financing Administration |
| HGI | Handgun Control, Incorporated |
| HHS | Department of Health and Human Services |
| Hill | Hill's New York Reports |
| HIRE | Help through Industry Retraining and Employment |
| HIV | Human immunodeficiency virus |
| H.L. | House of Lords Cases (England) |
| H. Lords | House of Lords (England) |
| HMO | Health Maintenance Organization |
| HNIS | Human Nutrition Information Service |
| Hong Kong L.R. | Hong Kong Law Reports |
| How. | Howard's United States Supreme Court Reports |
| How. St. Trials | Howell's English State Trials |
| HUAC | House Un-American Activities Committee |
| HUD | Department of Housing and Urban Development |
| Hudson, Internatl. Legis. | Manley Ottmer Hudson, ed., *International Legislation: A Collection of the Texts of Multipartite International Instruments of General Interest Beginning with the Covenant of the League of Nations* (1931) |
| Hudson, World Court Reps. | Manley Ottmer Hudson, ea., *World Court Reports* (1934– ) |
| Hun | Hun's New York Supreme Court Reports |
| Hunt's Rept. | Bert L. Hunt, *Report of the American and Panamanian General Claims Arbitration* (1934) |
| IAEA | International Atomic Energy Agency |
| IALL | International Association of Law Libraries |

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| IBA | International Bar Association |
| IBM | International Business Machines |
| ICA | Interstate Commerce Act |
| ICBM | Intercontinental ballistic missile |
| ICC | Interstate Commerce Commission; International Criminal Court |
| ICJ | International Court of Justice |
| ICM | Institute for Court Management |
| IDEA | Individuals with Disabilities Education Act of 1975 |
| IDOP | International Dolphin Conservation Program |
| IEP | Individualized educational program |
| IFC | International Finance Corporation |
| IGRA | Indian Gaming Regulatory Act of 1988 |
| IJA | Institute of Judicial Administration |
| IJC | International Joint Commission |
| ILC | International Law Commission |
| ILD | International Labor Defense |
| Ill. Dec. | Illinois Decisions |
| ILO | International Labor Organization |
| IMF | International Monetary Fund |
| INA | Immigration and Nationality Act |
| IND | Investigational new drug |
| INF Treaty | Intermediate-Range Nuclear Forces Treaty of 1987 |
| INS | Immigration and Naturalization Service |
| INTELSAT | International Telecommunications Satellite Organization |
| Interpol | International Criminal Police Organization |
| Int'l. Law Reps. | International Law Reports |
| Intl. Legal Mats. | International Legal Materials |
| IOC | International Olympic Committee |
| IPDC | International Program for the Development of Communication |
| IPO | Intellectual Property Owners |
| IPP | Independent power producer |
| IQ | Intelligence quotient |
| I.R. | Irish Reports |
| IRA | Individual retirement account; Irish Republican Army |
| IRC | Internal Revenue Code |
| IRCA | Immigration Reform and Control Act of 1986 |
| IRS | Internal Revenue Service |
| ISO | Independent service organization |
| ISP | Internet service provider |
| ISSN | International Standard Serial Numbers |
| ITA | International Trade Administration |
| ITI | Information Technology Integration |
| ITO | International Trade Organization |
| ITS | Information Technology Service |
| ITT | International Telephone and Telegraph Corporation |
| ITU | International Telecommunication Union |
| IUD | Intrauterine device |
| IWC | International Whaling Commission |
| IWW | Industrial Workers of the World |
| JAGC | Judge Advocate General's Corps |
| JCS | Joint Chiefs of Staff |
| JDL | Jewish Defense League |
| JNOV | Judgment *non obstante veredicto* ("judgment nothing to recommend it" or "judgment notwithstanding the verdict") |
| JOBS | Jobs Opportunity and Basic Skills |
| John. Ch. | Johnson's New York Chancery Reports |
| Johns. | Johnson's Reports (New York) |
| JP | Justice of the peace |
| K.B. | King's Bench Reports (England) |
| KFC | Kentucky Fried Chicken |
| KGB | Komitet Gosudarstvennoi Bezopasnosti (the State Security Committee for countries in the former Soviet Union) |
| KKK | Ku Klux Klan |
| KMT | Kuomintang (Chinese, "national people's party") |
| LAD | Law Against Discrimination |

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| LAPD | Los Angeles Police Department |
| LC | Library of Congress |
| LCHA | Longshoremen's and Harbor Workers Compensation Act of 1927 |
| LD50 | Lethal dose 50 |
| LDEF | Legal Defense and Education Fund (NOW) |
| LDF | Legal Defense Fund, Legal Defense and Educational Fund of the NAACP |
| LEAA | Law Enforcement Assistance Administration |
| L.Ed. | Lawyers' Edition Supreme Court Reports |
| LI | Letter of interpretation |
| LLC | Limited Liability Company |
| LLP | Limited Liability Partnership |
| LMSA | Labor-Management Services Administration |
| LNTS | League of Nations Treaty Series |
| Lofft's Rep. | Lofft's English King's Bench Reports |
| L.R. | Law Reports (English) |
| LSAC | Law School Admission Council |
| LSAS | Law School Admission Service |
| LSAT | Law School Aptitude Test |
| LSC | Legal Services Corporation; Legal Services for Children |
| LSD | Lysergic acid diethylamide |
| LSDAS | Law School Data Assembly Service |
| LTBT | Limited Test Ban Treaty |
| LTC | Long Term Care |
| MAD | Mutual assured destruction |
| MADD | Mothers against Drunk Driving |
| MALDEF | Mexican American Legal Defense and Educational Fund |
| Malloy | William M. Malloy, ed., *Treaties, Conventions International Acts, Protocols, and Agreements between the United States of America and Other Powers* (1910–1938) |
| Martens | Georg Friedrich von Martens, ea., *Noveau recueil général de traités et autres actes relatifs aux rapports de droit international* (Series I, 20 vols. [1843–1875]; Series II, 35 vols. [1876–1908]; Series III [1909– ]) |
| Mass. | Massachusetts Reports |
| MCC | Metropolitan Correctional Center |
| MCCA | Medicare Catastrophic Coverage Act of 1988 |
| MCH | Maternal and Child Health Bureau |
| MCRA | Medical Care Recovery Act of 1962 |
| MDA | Medical Devices Amendments of 1976 |
| Md. App. | Maryland, Appeal Cases |
| M.D. Ga. | Middle District, Georgia |
| Mercy | Movement Ensuring the Right to Choose for Yourself |
| Metc. | Metcalf's Massachusetts Reports |
| MFDP | Mississippi Freedom Democratic party |
| MGT | Management |
| MHSS | Military Health Services System |
| Miller | David Hunter Miller, ea., *Treaties and Other International Acts of the United States of America* (1931–1948) |
| Minn. | Minnesota Reports |
| MINS | Minors in need of supervision |
| MIRV | Multiple independently targetable reentry vehicle |
| MIRVed ICBM | Multiple independently targetable reentry vehicled intercontinental ballistic missile |
| Misc. | Miscellaneous Reports, New York |
| Mixed Claims Comm., Report of Decs | Mixed Claims Commission, United States and Germany, Report of Decisions |
| M.J. | Military Justice Reporter |
| MLAP | Migrant Legal Action Program |
| MLB | Major League Baseball |
| MLDP | Mississippi Loyalist Democratic Party |
| MMI | Moslem Mosque, Incorporated |
| MMPA | Marine Mammal Protection Act of 1972 |
| Mo. | Missouri Reports |
| MOD | Masters of Deception |
| Mod. | Modern Reports, English King's Bench, etc. |

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| Moore, Dig. Intl. Law | John Bassett Moore, *A Digest of International Law,* 8 vols. (1906) |
| Moore, Intl. Arbs. | John Bassett Moore, *History and Digest of the International Arbitrations to Which United States Has Been a Party,* 6 vols. (1898) |
| Morison | William Maxwell Morison, *The Scots Revised Report: Morison's Dictionary of Decisions* (1908–09) |
| M.P. | Member of Parliament |
| MP3 | MPEG Audio Layer 3 |
| MPAA | Motion Picture Association of America |
| MPAS | Michigan Protection and Advocacy Service |
| MPEG | Motion Picture Experts Group |
| mpg | Miles per gallon |
| MPPDA | Motion Picture Producers and Distributors of America |
| MPRSA | Marine Protection, Research, and Sanctuaries Act of 1972 |
| M.R. | Master of the Rolls |
| MS-DOS | Microsoft Disk Operating System |
| MSHA | Mine Safety and Health Administration |
| MSPB | Merit Systems Protection Board |
| MSSA | Military Selective Service Act |
| N/A | Not Available |
| NAACP | National Association for the Advancement of Colored People |
| NAAQS | National Ambient Air Quality Standards |
| NAB | National Association of Broadcasters |
| NABSW | National Association of Black Social Workers |
| NACDL | National Association of Criminal Defense Lawyers |
| NAFTA | North American Free Trade Agreement of 1993 |
| NAGHSR | National Association of Governors' Highway Safety Representatives |
| NALA | National Association of Legal Assistants |
| NAM | National Association of Manufacturers |
| NAR | National Association of Realtors |
| NARAL | National Abortion and Reproductive Rights Action League |
| NARF | Native American Rights Fund |
| NARS | National Archives and Record Service |
| NASA | National Aeronautics and Space Administration |
| NASD | National Association of Securities Dealers |
| NATO | North Atlantic Treaty Organization |
| NAVINFO | Navy Information Offices |
| NAWSA | National American Woman's Suffrage Association |
| NBA | National Bar Association; National Basketball Association |
| NBC | National Broadcasting Company |
| NBLSA | National Black Law Student Association |
| NBS | National Bureau of Standards |
| NCA | Noise Control Act; National Command Authorities |
| NCAA | National Collegiate Athletic Association |
| NCAC | National Coalition against Censorship |
| NCCB | National Consumer Cooperative Bank |
| NCE | Northwest Community Exchange |
| NCF | National Chamber Foundation |
| NCIP | National Crime Insurance Program |
| NCJA | National Criminal Justice Association |
| NCLB | National Civil Liberties Bureau |
| NCP | National contingency plan |
| NCSC | National Center for State Courts |
| NCUA | National Credit Union Administration |
| NDA | New drug application |
| N.D. Ill. | Northern District, Illinois |
| NDU | National Defense University |
| N.D. Wash. | Northern District, Washington |
| N.E. | North Eastern Reporter |
| N.E. 2d | North Eastern Reporter, Second Series |
| NEA | National Endowment for the Arts; National Education Association |

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| NEH | National Endowment for the Humanities |
| NEPA | National Environmental Protection Act; National Endowment Policy Act |
| NET Act | No Electronic Theft Act |
| NFIB | National Federation of Independent Businesses |
| NFIP | National Flood Insurance Program |
| NFL | National Football League |
| NFPA | National Federation of Paralegal Associations |
| NGLTF | National Gay and Lesbian Task Force |
| NHL | National Hockey League |
| NHRA | Nursing Home Reform Act of 1987 |
| NHTSA | National Highway Traffic Safety Administration |
| Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| NIEO | New International Economic Order |
| NIGC | National Indian Gaming Commission |
| NIH | National Institutes of Health |
| NIJ | National Institute of Justice |
| NIRA | National Industrial Recovery Act of 1933; National Industrial Recovery Administration |
| NIST | National Institute of Standards and Technology |
| N.J. | New Jersey Reports |
| N.J. Super. | New Jersey Superior Court Reports |
| NLEA | Nutrition Labeling and Education Act of 1990 |
| NLRA | National Labor Relations Act |
| NLRB | National Labor Relations Board |
| NMFS | National Marine Fisheries Service |
| No. | Number |
| NOAA | National Oceanic and Atmospheric Administration |
| NOC | National Olympic Committee |
| NOI | Nation of Islam |
| NOL | Net operating loss |
| NORML | National Organization for the Reform of Marijuana Laws |
| NOW | National Organization for Women |
| NOW LDEF | National Organization for Women Legal Defense and Education Fund |
| NOW/PAC | National Organization for Women Political Action Committee |
| NPDES | National Pollutant Discharge Elimination System |
| NPL | National priorities list |
| NPR | National Public Radio |
| NPT | Nuclear Non-Proliferation Treaty of 1970 |
| NRA | National Rifle Association; National Recovery Act |
| NRC | Nuclear Regulatory Commission |
| NRLC | National Right to Life Committee |
| NRTA | National Retired Teachers Association |
| NSA | National Security Agency |
| NSC | National Security Council |
| NSCLC | National Senior Citizens Law Center |
| NSF | National Science Foundation |
| NSFNET | National Science Foundation Network |
| NSI | Network Solutions, Inc. |
| NTIA | National Telecommunications and Information Administration |
| NTID | National Technical Institute for the Deaf |
| NTIS | National Technical Information Service |
| NTS | Naval Telecommunications System |
| NTSB | National Transportation Safety Board |
| NVRA | National Voter Registration Act |
| N.W. | North Western Reporter |
| N.W. 2d | North Western Reporter, Second Series |
| NWSA | National Woman Suffrage Association |
| N.Y. | New York Court of Appeals Reports |
| N.Y. 2d | New York Court of Appeals Reports, Second Series |
| N.Y.S. | New York Supplement Reporter |

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| N.Y.S. 2d | New York Supplement Reporter, Second Series |
| NYSE | New York Stock Exchange |
| NYSLA | New York State Liquor Authority |
| N.Y. Sup. | New York Supreme Court Reports |
| NYU | New York University |
| OAAU | Organization of Afro American Unity |
| OAP | Office of Administrative Procedure |
| OAS | Organization of American States |
| OASDI | Old-age, Survivors, and Disability Insurance Benefits |
| OASHDS | Office of the Assistant Secretary for Human Development Services |
| OCC | Office of Comptroller of the Currency |
| OCED | Office of Comprehensive Employment Development |
| OCHAMPUS | Office of Civilian Health and Medical Program of the Uniformed Services |
| OCSE | Office of Child Support Enforcement |
| OEA | Organización de los Estados Americanos |
| OEM | Original Equipment Manufacturer |
| OFCCP | Office of Federal Contract Compliance Programs |
| OFPP | Office of Federal Procurement Policy |
| OIC | Office of the Independent Counsel |
| OICD | Office of International Cooperation and Development |
| OIG | Office of the Inspector General |
| OJARS | Office of Justice Assistance, Research, and Statistics |
| OMB | Office of Management and Budget |
| OMPC | Office of Management, Planning, and Communications |
| ONP | Office of National Programs |
| OPD | Office of Policy Development |
| OPEC | Organization of Petroleum Exporting Countries |
| OPIC | Overseas Private Investment Corporation |
| Ops. Atts. Gen. | Opinions of the Attorneys-General of the United States |
| Ops. Comms. | Opinions of the Commissioners |
| OPSP | Office of Product Standards Policy |
| O.R. | Ontario Reports |
| OR | Official Records |
| OSHA | Occupational Safety and Health Act |
| OSHRC | Occupational Safety and Health Review Commission |
| OSM | Office of Surface Mining |
| OSS | Office of Strategic Services |
| OST | Office of the Secretary |
| OT | Office of Transportation |
| OTA | Office of Technology Assessment |
| OTC | Over-the-counter |
| OTS | Office of Thrift Supervisors |
| OUI | Operating under the influence |
| OVCI | Offshore Voluntary Compliance Initiative |
| OWBPA | Older Workers Benefit Protection Act |
| OWRT | Office of Water Research and Technology |
| P. | Pacific Reporter |
| P. 2d | Pacific Reporter, Second Series |
| PAC | Political action committee |
| Pa. Oyer and Terminer | Pennsylvania Oyer and Terminer Reports |
| PATCO | Professional Air Traffic Controllers Organization |
| PBGC | Pension Benefit Guaranty Corporation |
| PBS | Public Broadcasting Service; Public Buildings Service |
| P.C. | Privy Council (English Law Reports) |
| PC | Personal computer; politically correct |
| PCBs | Polychlorinated biphenyls |
| PCIJ | Permanent Court of International Justice |
| | Series A-Judgments and Orders (1922–30) |
| | Series B-Advisory Opinions (1922–30) |
| | Series A/B-Judgments, Orders, and Advisory Opinions (1931–40) |

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| PCIJ (cont'd.) | Series C-Pleadings, Oral Statements, and Documents relating to Judgments and Advisory Opinions (1923–42) |
| | Series D-Acts and Documents concerning the Organization of the World Court (1922 –47) |
| | Series E-Annual Reports (1925–45) |
| PCP | Phencyclidine |
| P.D. | Probate Division, English Law Reports (1876–1890) |
| PDA | Pregnancy Discrimination Act of 1978 |
| PD & R | Policy Development and Research |
| Pepco | Potomac Electric Power Company |
| Perm. Ct. of Arb. | Permanent Court of Arbitration |
| PES | Post-Enumeration Survey |
| Pet. | Peters' United States Supreme Court Reports |
| PETA | People for the Ethical Treatment of Animals |
| PGA | Professional Golfers Association |
| PGM | Program |
| PHA | Public Housing Agency |
| Phila. Ct. of Oyer and Terminer | Philadelphia Court of Oyer and Terminer |
| PhRMA | Pharmaceutical Research and Manufacturers of America |
| PHS | Public Health Service |
| PIC | Private Industry Council |
| PICJ | Permanent International Court of Justice |
| Pick. | Pickering's Massachusetts Reports |
| PIK | Payment in Kind |
| PINS | Persons in need of supervision |
| PIRG | Public Interest Research Group |
| P.L. | Public Laws |
| PLAN | Pro-Life Action Network |
| PLC | Plaintiffs' Legal Committee |
| PLE | Product liability expenses |
| PLI | Practicing Law Institute |
| PLL | Product liability loss |
| PLLP | Professional Limited Liability Partnership |
| PLO | Palestine Liberation Organization |
| PLRA | Prison Litigation Reform Act of 1995 |
| PNET | Peaceful Nuclear Explosions Treaty |
| PONY | Prostitutes of New York |
| POW-MIA | Prisoner of war-missing in action |
| Pratt | Frederic Thomas Pratt, *Law of Contraband of War, with a Selection of Cases from Papers of the Right Honourable Sir George Lee* (1856) |
| PRIDE | Prostitution to Independence, Dignity, and Equality |
| Proc. | Proceedings |
| PRP | Potentially responsible party |
| PSRO | Professional Standards Review Organization |
| PTO | Patents and Trademark Office |
| PURPA | Public Utilities Regulatory Policies Act |
| PUSH | People United to Serve Humanity |
| PUSH-Excel | PUSH for Excellence |
| PWA | Public Works Administration |
| PWSA | Ports and Waterways Safety Act of 1972 |
| Q.B. | Queen's Bench (England) |
| QTIP | Qualified Terminable Interest Property |
| Ralston's Rept. | Jackson Harvey Ralston, ed., *Venezuelan Arbitrations of 1903* (1904) |
| RC | Regional Commissioner |
| RCRA | Resource Conservation and Recovery Act |
| RCWP | Rural Clean Water Program |
| RDA | Rural Development Administration |
| REA | Rural Electrification Administration |
| Rec. des Decs. des Trib. Arb. Mixtes | G. Gidel, ed., *Recueil des décisions des tribunaux arbitraux mixtes, institués par les traités de paix* (1922–30) |
| Redmond | Vol. 3 of Charles I. Bevans, *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled by C. F. Redmond) (1969) |
| RESPA | Real Estate Settlement Procedure Act of 1974 |
| RFC | Reconstruction Finance Corporation |

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| RFRA | Religious Freedom Restoration Act of 1993 |
| RIAA | Recording Industry Association of America |
| RICO | Racketeer Influenced and Corrupt Organizations |
| RLUIPA | Religious Land Use and Institutionalized Persons Act |
| RNC | Republican National Committee |
| Roscoe | Edward Stanley Roscoe, ed., *Reports of Prize Cases Determined in the High Court Admiralty before the Lords Commissioners of Appeals in Prize Causes and before the judicial Committee of the Privy Council from 1745 to 1859* (1905) |
| ROTC | Reserve Officers' Training Corps |
| RPP | Representative Payee Program |
| R.S. | Revised Statutes |
| RTC | Resolution Trust Corp. |
| RUDs | Reservations, understandings, and declarations |
| Ryan White CARE Act | Ryan White Comprehensive AIDS Research Emergency Act of 1990 |
| SAC | Strategic Air Command |
| SACB | Subversive Activities Control Board |
| SADD | Students against Drunk Driving |
| SAF | Student Activities Fund |
| SAIF | Savings Association Insurance Fund |
| SALT | Strategic Arms Limitation Talks |
| SALT I | Strategic Arms Limitation Talks of 1969–72 |
| SAMHSA | Substance Abuse and Mental Health Services Administration |
| Sandf. | Sandford's New York Superior Court Reports |
| S and L | Savings and loan |
| SARA | Superfund Amendment and Reauthorization Act |
| SAT | Scholastic Aptitude Test |
| Sawy. | Sawyer's United States Circuit Court Reports |
| SBA | Small Business Administration |
| SBI | Small Business Institute |
| SCCC | South Central Correctional Center |
| SCLC | Southern Christian Leadership Conference |
| Scott's Repts. | James Brown Scott, ed., *The Hague Court Reports*, 2 vols. (1916–32) |
| SCS | Soil Conservation Service; Social Conservative Service |
| SCSEP | Senior Community Service Employment Program |
| S.Ct. | Supreme Court Reporter |
| S.D. Cal. | Southern District, California |
| S.D. Fla. | Southern District, Florida |
| S.D. Ga. | Southern District, Georgia |
| SDI | Strategic Defense Initiative |
| S.D. Me. | Southern District, Maine |
| S.D.N.Y. | Southern District, New York |
| SDS | Students for a Democratic Society |
| S.E. | South Eastern Reporter |
| S.E. 2d | South Eastern Reporter, Second Series |
| SEA | Science and Education Administration |
| SEATO | Southeast Asia Treaty Organization |
| SEC | Securities and Exchange Commission |
| Sec. | Section |
| SEEK | Search for Elevation, Education and Knowledge |
| SEOO | State Economic Opportunity Office |
| SEP | Simplified employee pension plan |
| Ser. | Series |
| Sess. | Session |
| SGLI | Servicemen's Group Life Insurance |
| SIP | State implementation plan |
| SLA | Symbionese Liberation Army |
| SLAPPs | Strategic Lawsuits Against Public Participation |
| SLBM | Submarine-launched ballistic missile |
| SNCC | Student Nonviolent Coordinating Committee |
| So. | Southern Reporter |
| So. 2d | Southern Reporter, Second Series |
| SPA | Software Publisher's Association |
| Spec. Sess. | Special Session |
| SPLC | Southern Poverty Law Center |
| SRA | Sentencing Reform Act of 1984 |

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| SS | *Schutzstaffel* (German, "Protection Echelon") |
| SSA | Social Security Administration |
| SSI | Supplemental Security Income |
| START I | Strategic Arms Reduction Treaty of 1991 |
| START II | Strategic Arms Reduction Treaty of 1993 |
| Stat. | United States Statutes at Large |
| STS | Space Transportation Systems |
| St. Tr. | State Trials, English |
| STURAA | Surface Transportation and Uniform Relocation Assistance Act of 1987 |
| Sup. Ct. of Justice, Mexico | Supreme Court of Justice, Mexico |
| Supp. | Supplement |
| S.W. | South Western Reporter |
| S.W. 2d | South Western Reporter, Second Series |
| SWAPO | South-West Africa People's Organization |
| SWAT | Special Weapons and Tactics |
| SWP | Socialist Workers Party |
| TDP | Trade and Development Program |
| Tex. Sup. | Texas Supreme Court Reports |
| THAAD | Theater High-Altitude Area Defense System |
| THC | Tetrahydrocannabinol |
| TI | Tobacco Institute |
| TIA | Trust Indenture Act of 1939 |
| TIAS | Treaties and Other International Acts Series (United States) |
| TNT | Trinitrotoluene |
| TOP | Targeted Outreach Program |
| TPUS | Transportation and Public Utilities Service |
| TQM | Total Quality Management |
| Tripartite Claims Comm., Decs. and Ops. | Tripartite Claims Commission (United States, Austria, and Hungary), Decisions and Opinions |
| TRI-TAC | Joint Tactical Communications |
| TRO | Temporary restraining order |
| TS | Treaty Series, United States |
| TSCA | Toxic Substance Control Act |
| TSDs | Transporters, storers, and disposers |
| TSU | Texas Southern University |
| TTBT | Threshold Test Ban Treaty |
| TV | Television |
| TVA | Tennessee Valley Authority |
| TWA | Trans World Airlines |
| UAW | United Auto Workers; United Automobile, Aerospace, and Agricultural Implements Workers of America |
| U.C.C. | Uniform Commercial Code; Universal Copyright Convention |
| U.C.C.C. | Uniform Consumer Credit Code |
| UCCJA | Uniform Child Custody Jurisdiction Act |
| UCMJ | Uniform Code of Military Justice |
| UCPP | Urban Crime Prevention Program |
| UCS | United Counseling Service |
| UDC | United Daughters of the Confederacy |
| UFW | United Farm Workers |
| UHF | Ultrahigh frequency |
| UIFSA | Uniform Interstate Family Support Act |
| UIS | Unemployment Insurance Service |
| UMDA | Uniform Marriage and Divorce Act |
| UMTA | Urban Mass Transportation Administration |
| U.N. | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCTAD | United Nations Conference on Trade and Development |
| UN Doc. | United Nations Documents |
| UNDP | United Nations Development Program |
| UNEF | United Nations Emergency Force |
| UNESCO | United Nations Educational, Scientific, and Cultural Organization |
| UNICEF | United Nations Children's Fund (formerly United Nations International Children's Emergency Fund) |
| UNIDO | United Nations Industrial and Development Organization |
| Unif. L. Ann. | Uniform Laws Annotated |
| UN Repts. Intl. Arb. Awards | United Nations Reports of International Arbitral Awards |

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| UNTS | United Nations Treaty Series |
| UPI | United Press International |
| URESA | Uniform Reciprocal Enforcement of Support Act |
| U.S. | United States Reports |
| U.S.A. | United States of America |
| USAF | United States Air Force |
| USA PATRIOT Act | Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act |
| U.S. App. D.C. | United States Court of Appeals for the District of Columbia |
| U.S.C. | United States Code; University of Southern California |
| U.S.C.A. | United States Code Annotated |
| U.S.C.C.A.N. | United States Code Congressional and Administrative News |
| USCMA | United States Court of Military Appeals |
| USDA | U.S. Department of Agriculture |
| USES | United States Employment Service |
| USF | U.S. Forestry Service |
| USFA | United States Fire Administration |
| USGA | United States Golf Association |
| USICA | International Communication Agency, United States |
| USMS | U.S. Marshals Service |
| USOC | U.S. Olympic Committee |
| USSC | U.S. Sentencing Commission |
| USSG | United States Sentencing Guidelines |
| U.S.S.R. | Union of Soviet Socialist Republics |
| UST | United States Treaties |
| USTS | United States Travel Service |
| v. | *Versus* |
| VA | Veterans Administration |
| VAR | Veterans Affairs and Rehabilitation Commission |
| VAWA | Violence against Women Act |
| VFW | Veterans of Foreign Wars |
| VGLI | Veterans Group Life Insurance |
| Vict. | Queen Victoria (Great Britain) |
| VIN | Vehicle identification number |
| VISTA | Volunteers in Service to America |
| VJRA | Veterans Judicial Review Act of 1988 |
| V.L.A. | Volunteer Lawyers for the Arts |
| VMI | Virginia Military Institute |
| VMLI | Veterans Mortgage Life Insurance |
| VOCAL | Victims of Child Abuse Laws |
| VRA | Voting Rights Act |
| WAC | Women's Army Corps |
| Wall. | Wallace's United States Supreme Court Reports |
| Wash. 2d | Washington Reports, Second Series |
| WAVES | Women Accepted for Volunteer Service |
| WCTU | Women's Christian Temperance Union |
| W.D. Wash. | Western District, Washington |
| W.D. Wis. | Western District, Wisconsin |
| WEAL | *West's Encyclopedia of American Law,* Women's Equity Action League |
| Wend. | Wendell's New York Reports |
| WFSE | Washington Federation of State Employees |
| Wheat. | Wheaton's United States Supreme Court Reports |
| Wheel. Cr. Cases | Wheeler's New York Criminal Cases |
| WHISPER | Women Hurt in Systems of Prostitution Engaged in Revolt |
| Whiteman | Marjorie Millace Whiteman, *Digest of International Law,* 15 vols. (1963–73) |
| WHO | World Health Organization |
| WIC | Women, Infants, and Children program |
| Will. and Mar. | King William and Queen Mary (Great Britain) |
| WIN | WESTLAW Is Natural; Whip Inflation Now; Work Incentive Program |
| WIPO | World Intellectual Property Organization |
| WIU | Workers' Industrial Union |
| W.L.R. | Weekly Law Reports, England |
| WPA | Works Progress Administration |
| WPPDA | Welfare and Pension Plans Disclosure Act |

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| WTO | World Trade Organization | YMCA | Young Men's Christian Association |
| WWI | World War I | | |
| WWII | World War II | YWCA | Young Women's Christian Association |
| Yates Sel. Cas. | Yates's New York Select Cases | | |

# WEST'S ENCYCLOPEDIA *of* AMERICAN LAW

2ND EDITION

# How to Use This Book

❚1❚ Article Title

❚2❚ Definition in italics with Latin translation provided

❚3❚ First-level subhead

❚4❚ Timeline for subject of biography, including general historical events and life events

❚5❚ Sidebar expands upon an issue addressed briefly in the article

❚6❚ Quotation from subject of biography

❚7❚ Biography of contributor to American law

❚8❚ Internal cross-reference to entry within WEAL

❚9❚ In Focus article examines a controversial or complex aspect of the article topic

❚10❚ Cross-references at end of article

❚11❚ Full cite for case

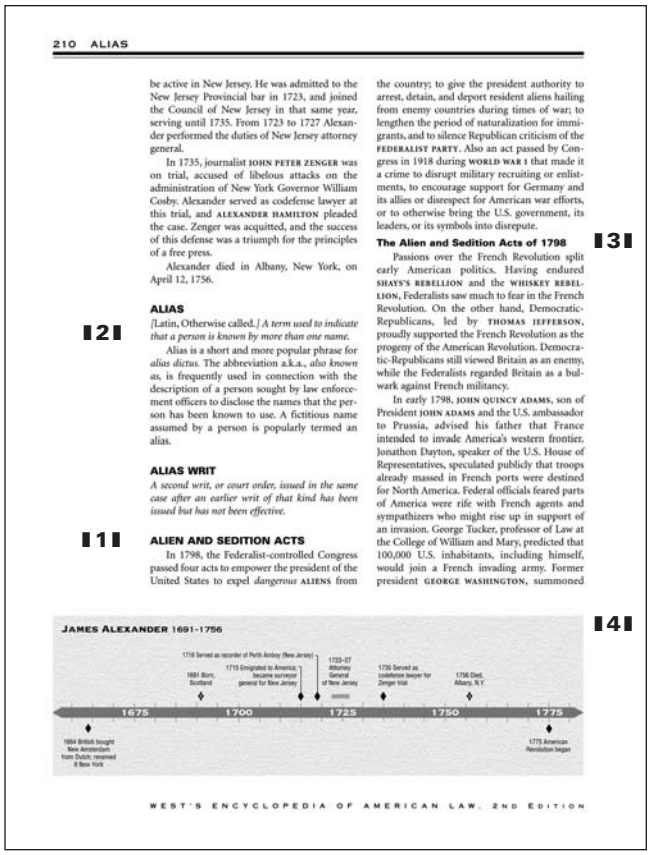



be active in New Jersey. He was admitted to the New Jersey Provincial bar in 1723, and joined the Council of New Jersey in that same year, serving until 1735. From 1723 to 1727 Alexander performed the duties of New Jersey attorney general.

In 1735, journalist JOHN PETER ZENGER was on trial, accused of libelous attacks on the administration of New York Governor William Cosby. Alexander served as codefense lawyer at this trial, and ALEXANDER HAMILTON pleaded the case. Zenger was acquitted, and the success of this defense was a triumph for the principles of a free press.

Alexander died in Albany, New York, on April 12, 1756.

**ALIAS**

❚2❚ *[Latin, Otherwise called.] A term used to indicate that a person is known by more than one name.*

Alias is a short and more popular phrase for *alias dictus.* The abbreviation a.k.a., *also known as,* is frequently used in connection with the description of a person sought by law enforcement officers to disclose the names that the person has been known to use. A fictitious name assumed by a person is popularly termed an alias.

**ALIAS WRIT**

*A second writ, or court order, issued in the same case after an earlier writ of that kind has been issued but has not been effective.*

❚1❚ **ALIEN AND SEDITION ACTS**

In 1798, the Federalist-controlled Congress passed four acts to empower the president of the United States to expel *dangerous* ALIENS from the country; to give the president authority to arrest, detain, and deport resident aliens hailing from enemy countries during times of war; to lengthen the period of naturalization for immigrants, and to silence Republican criticism of the FEDERALIST PARTY. Also an act passed by Congress in 1918 during WORLD WAR I that made it a crime to disrupt military recruiting or enlistments, to encourage support for Germany and its allies or disrespect for American war efforts, or to otherwise bring the U.S. government, its leaders, or its symbols into disrepute.

❚3❚ **The Alien and Sedition Acts of 1798**

Passions over the French Revolution split early American politics. Having endured SHAYS'S REBELLION and the WHISKEY REBELLION, Federalists saw much to fear in the French Revolution. On the other hand, Democratic-Republicans, led by THOMAS JEFFERSON, proudly supported the French Revolution as the progeny of the American Revolution. Democratic-Republicans still viewed Britain as an enemy, while the Federalists regarded Britain as a bulwark against French militancy.

In early 1798, JOHN QUINCY ADAMS, son of President JOHN ADAMS and the U.S. ambassador to Prussia, advised his father that France intended to invade America's western frontier. Jonathon Dayton, speaker of the U.S. House of Representatives, speculated publicly that troops already massed in French ports were destined for North America. Federal officials feared parts of America were rife with French agents and sympathizers who might rise up in support of an invasion. George Tucker, professor of Law at the College of William and Mary, predicted that 100,000 U.S. inhabitants, including himself, would join a French invading army. Former president GEORGE WASHINGTON, summoned

❚4❚

❚5❚

## The First Payments of Social Security

After the enactment of the Social Security Act of 1935 (42 U.S.C.A. § 301 et seq.) and the creation of the Social Security Administration (SSA), the federal government had a short time to establish the program before beginning to pay benefits. Monthly benefits were to begin in 1940. The period from 1937 to 1940 was to be used both to build up the trust funds and to provide a minimum period for participation for persons to qualify for monthly benefits.

From 1937 until 1940, however, Social Security paid benefits in the form of a single, lump-sum payment. The purpose of these one-time payments was to provide some compensation to people who contributed to the program but would not participate long enough to be vested for monthly benefits.

The first applicant for a lump-sum benefit was Ernest Ackerman, a Cleveland motorman who retired one day after the Social Security Program began. During his one day of participation in the program, five cents was withheld from Ackerman's pay for Social Security, and upon retiring, he received a lump-sum payment of seventeen cents.

Payments of monthly benefits began in January 1940. On January 31, 1940, the first monthly retirement check was issued to Ida May Fuller of Ludlow, Vermont, in the amount of $22.54. Fuller died in January 1975 at the age of one hundred. During her thirty-five years as a beneficiary, she received more than $20,000 in benefits.

tions to Social Security. There is no financial need requirement to be satisfied. Once a worker qualifies for protection, his family is also entitled to protection. The entire program is geared toward helping families as a matter of social policy.

Two large funds of money are held in trust to pay benefits earned by people under OASDI: the Old Age and Survivors Trust Fund and the Disability Insurance Trust Fund. As workers and employers make payroll contributions to these funds, money is paid out in benefits to people currently qualified to receive monthly checks.

The OASDI program is funded by payroll taxes levied on employees and their employers and on the self-employed. The tax is imposed upon the employee's taxable income, up to a maximum taxable amount, with the employer contributing an equal amount. The self-employed person contributes twice the amount levied on an employee. In 2003 the rate was 6.2 percent, levied on earned income up to a maximum of $87,000.

**Old Age Benefits** A person becomes eligible for Social Security old age benefits by working a minimum number of calendar quarters. The number of quarters required for full insurance increases with the worker's age. Forty quarters is the maximum requirement. The individual is credited for income up to the maximum amount of money covered by Social Security for those years. This amount is adjusted to reflect the impact of inflation on normal earnings and ensure that a worker who pays increasing Social Security contributions during his or her work life will receive retirement benefits that keep pace with inflation.

Persons born before 1950 can retire at age 65 with full benefits based on their average income during their working years. For those born between 1950 and 1960, the retirement age for full benefits has increased to age 66. Persons born in 1960 or later will not receive full retirement benefits until age 67. Any person, however, may retire at age 62 and receive less than full benefits. At age 65, a worker's spouse who has not contributed to Social Security receives 50 percent of the amount paid to the worker.

Since 1975 Social Security benefits have increased annually to offset the corrosive effects of inflation on fixed incomes. These increases, known as cost of living allowances (COLAs), are based on the annual increase in consumer prices. Allowing benefits to increase automatically ended the need for special acts of Congress, but it has also steadily increased the cost of the Social Security Program.

have the same inheritance rights as other children. The ruling was believed to be the first on the controversial issue by any state supreme court.

Also in January 2002, Marshall addressed the Massachusetts Bar Association Conference, where she called for "a revolution in the administration of justice" stating that the court system needed to improve its management system as well as its staffing and budget controls. In March 2002, her discussion of the court system's problems were amplified in a 52-page report that was published by a blue-ribbon panel appointed by Marshall.

FURTHER READINGS

Teicher, Stacy A. 2000." A Subtle Revolution as Women Lead the Bench." *Christian Science Monitor* (January 5).

Lavoie, Denise. 2002. "Court Rules on Posthumous Conception." *Associated Press* (January 2)

**16**

*THE GOVERNMENT [THAT THE FRAMERS OF THE CONSTITUTION] DEVISED REQUIRED SEVERAL AMENDMENTS, A CIVIL WAR, AND MOMENTOUS SOCIAL TRANSFORMATION TO ATTAIN THE SYSTEM OF CONSTITUTIONAL GOVERNMENT, AND ITS RESPECT FOR THE INDIVIDUAL FREEDOMS AND HUMAN RIGHTS, THAT WE HOLD AS FUNDAMENTAL TODAY.*
*THURGOOD MARSHALL*

## MARSHALL PLAN

After **WORLD WAR II**, Europe was devastated and urgently needed an organized plan for reconstruction and economic and technical aid. The Marshall Plan was initiated in 1947 to meet this need.

The originator of the plan, U.S. Secretary of State George C. Marshall, introduced it in a speech at Harvard University on June 5, 1947. He pointed out two basic reasons for providing aid to Europe: the United States sought the reestablishment of the European countries as independent nations capable of conducting valuable trade with the United States; and the threat of a Communist takeover was more prevalent in countries that were suffering economic depression.

In 1947 a preliminary conference to discuss the terms of the program convened in Paris. The Soviet Union was invited to attend but subsequently withdrew from the program, as did other Soviet countries.

Sixteen European countries eventually participated, and, in July 1947, the Committee for European Economic Cooperation was established to allow representatives from member countries to draft a report that listed their requirements for food, supplies, and technical assistance for a four-year period.

The Committee for European Economic Cooperation subsequently became the Organization of European Economic Cooperation, an expanded and permanent organization that was responsible for submitting petitions for aid. In 1948, Congress passed the Economic Cooperation Act (62 Stat. 137), establishing funds for the Marshall Plan to be administered under the Economic Cooperation Administration, which was directed by Paul G. Hoffman.

Between 1948 and 1952, the sixteen-member countries received more than $13 billion dollars in aid under the Marshall Plan. The plan was generally regarded as a success that led to industrial and agricultural production, while stifling the Communist movement. The plan was not without its critics, however, and many Europeans believed the **COLD WAR** hostilities between the Soviet nations and the free world were aggravated by it.

**17**

## ◊ MARSHALL, THURGOOD

Thurgood Marshall, the first African American to serve on the U.S. Supreme Court, saw law as a catalyst for social change. For nearly 60 years, as both a lawyer and a jurist, Marshall worked to dismantle the system of **SEGREGATION** and improve the legal and social position of minorities.

Marshall was born July 2, 1908, in Baltimore, the son of a Pullman porter and a schoolteacher. He was a graduate of Lincoln University, a small, all-black college in Pennsylvania, and Howard University Law School in Washington, D.C. At Howard, Marshall excelled under the guidance of Vice Dean **CHARLES HAMILTON HOUSTON**, the first African American to win a case before the U.S. Supreme Court. Houston encouraged his students to become not just lawyers but "social engineers" who could use the legal system to improve society. Marshall graduated first in his law class in 1933.

Marshall's attendance at predominantly black Howard University illustrates the barriers faced by African Americans during the early twentieth century. Although Marshall wished to attend law school at the University of Maryland (a public institution in his home town of Baltimore), he was prohibited by law from doing so because of his race. This injustice helped set Marshall on a course of opposing all forms of official segregation that denied equal opportunities to African Americans.

After law school, Marshall set up a practice in Baltimore, representing indigent clients in civil rights cases. In 1936, his mentor Houston offered him a position with the National Association for the Advancement of Colored People (**NAACP**),





and in 1940, Marshall became director of the **NAACP LEGAL DEFENSE AND EDUCATIONAL FUND**, a position he held until 1961. Determined to eliminate segregation, Marshall coordinated a nationwide campaign to integrate higher education. He filed several successful lawsuits against public graduate and professional schools that refused to accept African-American students. These suits paved the way for similar cases at the high school and elementary school levels. Marshall also journeyed throughout the deep South, traveling fifty thousand miles a year to fight **JIM CROW LAWS** (a series of laws that provided for racial segregation in the South) and to represent criminal defendants.

Marshall argued 32 cases before the U.S. Supreme Court and won 29 of them. No doubt his most famous and far-reaching triumph before the High Court was **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). In that case, the father of African-American student Linda Brown sued the school board of Topeka, Kansas, over its segregation policy. Brown was required by law to attend an all African-American school several blocks from her home even though an all white public school was located in her own neighborhood. Under Kansas law, cities of more than 15,000 people, such as Topeka, could choose to operate segregated schools. Marshall argued that these segregated schools, defended by officials as "separate but equal," were unconstitutional.

**18**

The **SEPARATE-BUT-EQUAL** doctrine originated in **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), a case allowing segregated public accommodations for whites

*Thurgood Marshall.*
LIBRARY OF CONGRESS

and blacks. In a plainspoken argument, Marshall dismissed as fallacy the notion that segregated schools offered the same educational experiences to black and white students. Sociological and psychological studies demonstrated that black children were in fact harmed by the policy of school segregation. The students' self-esteem was damaged and their future diminished when they were forced to accept inadequate facilities, equipment, and educational opportunities. Marshall argued that the only purpose segregation served was to perpetuate the myth of African-Americans' inferiority. A unanimous Court agreed and struck down the separate-but-equal doctrine, a

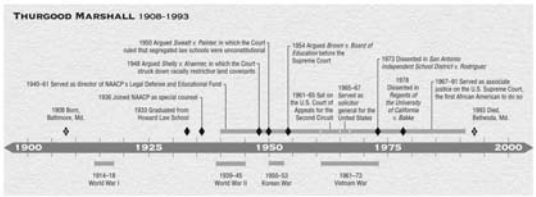






# THE FUTURE OF SOCIAL SECURITY

**19**

The payment of **OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE** (OASDI) benefits has been a cornerstone of U.S. social welfare policy since the establishment of the **SOCIAL SECURITY ADMINISTRATION** in 1935. At the same time, the long-term financial stability of OASDI has been a constant worry. In the early years of the twenty-first century, concerns about Social Security mounted as policy makers assessed the impact of the retirement of the "Baby Boom" generation. Many younger people raised the issue of "generation equity." They express doubt that Social Security benefits will be available when they retire, and anger that they will be forced to pay, through payroll taxes, for the baby boomers' retirement benefits.

Reform of the Social Security system has always been a political hot potato. Retirees and those approaching retirement form a strong **LOBBYING** force, and they zealously protect their benefits. Employers and employees are equally vocal in their opposition to higher payroll taxes to fund OASDI. Thus, changes in Social Security required bipartisan support, which materialized in the face of an impending Social Security crisis. The 1982–83 National Commission on Social Security Reform successfully secured from Congress the short-term financing of OASDI. As a result, Congress passed a series of laws meant to accumulate surpluses as a hedge against future burdens. The Social Security surplus is the amount by which revenue from the federal payroll tax exceeds the amount of Social Security benefits paid out.

IN FOCUS

Shortly after these new laws went into effect, Social Security began running a surplus. Surplus Social Security revenue can be used to fund other government programs and to help retire the national debt. During the favorable economic climate of the late 1990s, Congress began to use the surplus to pay down the federal debt, hoping to better position the government to meet its obligations to future retirees. And, in 2000, the federal government generated enough revenue so that the entire Social Security surplus was available for paying off debt.

The state of Social Security became a major campaign issue in the 2000 elections, with both Republicans and Democrats attempting to appear as though they were guardians of Social Security assets. Candidates from both parties promised to create a "lockbox," meaning that the Social Security surplus would be spent entirely on debt retirement. With the advent of fiscally lean years in the early 2000s, the lockbox approach was largely disregarded by politicians who advanced other ideas about what to do with Social Security surpluses. These ideas included using the surplus to help offset decreases in revenues brought about by tax cuts and using the surplus to fund new or expanded spending initiatives.

Analysts argue that the real issue often is clouded. It is not how to spend the surplus now, but how to maintain the long-term solvency of the Social Security trust fund. Planners estimate that the income from the trust fund will exceed expenses each year until 2020. The trust fund balances will then start to decline as investments are redeemed to meet the increased expenses from a swelling retired workforce. Although it is estimated that 75 percent of the costs would continue to be met from current payroll and income taxes, in the absence of any changes, full benefits could not be paid beginning in 2030.

In its 1996 report, the Social Security Administration's Advisory Council looked at various long-term financing options for OASDI. The council could not reach consensus on a specific long-term plan, but it did suggest several types of financing that represent a marked departure from previous efforts to fund Social Security. The council noted that past efforts have generally featured cutting benefits and raising tax rates on a "pay-as-you-go" basis. The council agreed that this approach must be changed and offered three ways of restoring financial solvency.

One approach, called Maintenance of Benefits (MB), calls for an increase in income taxes on OASDI benefits, a redirection of some revenue from other trust funds, and, most importantly, the adoption of a plan allowing the federal government to invest a portion of the trust fund assets directly in common stocks. Rates of returns on stocks have historically exceeded those on federal government bonds, where all Social Security

A person who continues to work past the retirement age may lose some benefits because Social Security is designed to replace lost earnings. If earnings from employment do not exceed the amount specified by law, the person receives the full benefits. If earnings are greater than that amount, one dollar of benefit is withheld for every two dollars in wages earned above the exempt amount. Once a person reaches age 70, however, he does not have to report earnings to the SSA, and the benefit is not reduced.

**Survivors' Benefits** Survivors' benefits are paid to family members when a worker dies. Survivors can receive benefits if the deceased worker was employed and contributed to Social





momentous victory for Marshall, affecting public schools in twenty-one states.

Marshall was appointed to the U.S. Court of Appeals for the Second Circuit in 1961, and served there until 1965 when he was named **SOLICITOR GENERAL** for the United States. He was appointed to the U.S. Supreme Court in 1967 by President **LYNDON B. JOHNSON** and served as an associate justice for 24 years.

While on the Court, Marshall was known more for his impassioned dissents than for his majority opinions. In particular, as a staunch opponent of **CAPITAL PUNISHMENT**, he regularly voiced his disagreement with the majority in death penalty cases. He was also a firm backer of **AFFIRMATIVE ACTION** and contributed one of his most famous dissents in **REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE**, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In that case, Marshall criticized the high court's ruling that a public medical school's policy of reserving 16 of 100 spots for minority students was unconstitutional. Marshall also dissented in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), disagreeing with the majority view that a Texas property tax system used to fund public education was acceptable, even though it allowed wealthier districts to provide a better school system for students in those districts than less wealthy districts could provide. Marshall objected strongly to the property tax arrangement, claiming that it deprived poor children of an equal education.

Marshall wrote the majority opinion in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968), in which the Court declared that a shopping center was a public forum from which picketers could not be barred by private owners.

Marshall retired from the Court in 1991, but continued his criticism of government policies that were detrimental to African Americans or other disenfranchised groups.

Marshall died on January 24, 1993, in Bethesda, Maryland. Upon Marshall's death, nearly 20,000 mourners filed by his casket during the 12 hours it lay in state in the Great Hall of the U.S. Supreme Court.

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CROSS-REFERENCES

**10**

*Civil Rights Movement; Integration; School Desegregation.*

## MARTIAL LAW

*The exercise of government and control by military authorities over the civilian population of a designated territory.*

**11**

Martial law is an extreme and rare measure used to control society during war or periods of civil unrest or chaos. According to the Supreme Court, the term *martial law* carries no precise meaning (*Duncan v. Kahanamoku*, 327 U.S. 304, 66 S. Ct. 606, 90 L. Ed. 688 [1946]). However, most declarations of martial law have some common features. Generally, the institution of martial law contemplates some use of military force. To a varying extent, depending on the martial law order, government military personnel have the authority to make and enforce civil and criminal laws. Certain civil liberties may be suspended, such as the right to be free from unreasonable **SEARCHES AND SEIZURES**, **FREEDOM OF ASSOCIATION**, and freedom of movement. And the writ of **HABEAS CORPUS** may be suspended (this writ allows persons who are unlawfully imprisoned to gain freedom through a court proceeding).

In the United States, martial law has been instituted on the national level only once, during the Civil War, and on a regional level only once, during **WORLD WAR II**. Otherwise, it has been limited to the states. Uprisings, political protests, labor strikes, and riots have, at various times, caused several state governors to declare some measure of martial law.

Martial law on the national level may be declared by Congress or the president. Under

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# PREFACE

The U.S. legal system is admired around the world for the freedoms it allows the individual and the fairness with which it attempts to treat all persons. On the surface, it may seem simple, yet those who have delved into it know that this system of federal and state constitutions, statutes, regulations, and common-law decisions is elaborate and complex. It derives from the English common law, but includes principles older than England, along with some principles from other lands. The U.S. legal system, like many others, has a language all its own, but too often it is an unfamiliar language: many concepts are still phrased in Latin. The second edition of *West's Encyclopedia of American Law (WEAL)* explains legal terms and concepts in everyday language, however. It covers a wide variety of persons, entities, and events that have shaped the U.S. legal system and influenced public perceptions of it.

## MAIN FEATURES OF THIS SET

### Entries

This encyclopedia contains nearly 5,000 entries devoted to terms, concepts, events, movements, cases, and persons significant to U.S. law. Entries on legal terms contain a definition of the term, followed by explanatory text if necessary. Entries are arranged alphabetically in standard encyclopedia format for ease of use. A wide variety of additional features, listed later in this preface, provide interesting background and supplemental information.

**Definitions** Every entry on a legal term is followed by a definition, which appears at the beginning of the entry and is italicized. The Dictionary and Indexes volume includes a glossary containing all the definitions from *WEAL*.

**Further Readings** To facilitate further research, a list of Further Readings is included at the end of a majority of the main entries.

**Cross-References** *WEAL* provides two types of cross-references, within and following entries. Within the entries, terms are set in small capital letters—for example, LIEN—to indicate that they have their own entry in the encyclopedia. At the end of the entries, related entries the reader may wish to explore are listed alphabetically by title.

Blind cross-reference entries are also included to direct the user to other entries throughout the set.

### In Focus Essays

In Focus essays accompany related entries and provide additional facts, details, and arguments on particularly interesting, important, or controversial issues raised by those entries. The subjects covered include hotly contested issues, such as abortion, capital punishment, and gay rights; detailed processes, such as the Food and Drug Administration's approval process for new drugs; and important historical or social issues, such as debates over the formation of the U.S. Constitution.

### Sidebars

Sidebars provide brief highlights of some interesting facet of accompanying entries. They

complement regular entries and In Focus essays by adding informative details. Sidebar topics include the Million Man March and the branches of the U.S. armed services. Sidebars appear at the top of a text page and are set in a box.

### Biographies

*WEAL* profiles a wide variety of interesting and influential people—including lawyers, judges, government and civic leaders, and historical and modern figures—who have played a part in creating or shaping U.S. law. Each biography includes a timeline, which shows important moments in the subject's life as well as important historical events of the period. Biographies appear alphabetically by the subject's last name.

## ADDITIONAL FEATURES OF THIS SET

**Enhancements** Throughout *WEAL*, readers will find a broad array of photographs, charts, graphs, manuscripts, legal forms, and other visual aids enhancing the ideas presented in the text.

**Indexes** *WEAL* features a cases index and a cumulative index in a separate volume.

### Appendixes

Three appendix volumes are included with *WEAL*, containing hundreds of pages of documents, laws, manuscripts, and forms fundamental to and characteristic of U.S. law.

### Milestone Cases in the Law

A special Appendix volume entitled Milestones in the Law, allows readers to take a close look at landmark cases in U.S. law. Readers can explore the reasoning of the judges and the arguments of the attorneys that produced major decisions on important legal and social issues. Included in each Milestone are the opinions of the lower courts; the briefs presented by the parties to the U.S. Supreme Court; and the decision of the Supreme Court, including the majority opinion and all concurring and dissenting opinions for each case.

### Primary Documents

There is also an Appendix volume containing more than 60 primary documents, such as the English Bill of Rights, Martin Luther King Jr.'s Letter from Brimingham Jail, and several presidential speeches.

### Citations

Wherever possible, *WEAL* entries include citations for cases and statutes mentioned in the text. These allow readers wishing to do additional research to find the opinions and statutes cited. Two sample citations, with explanations of common citation terms, can be seen below and opposite.

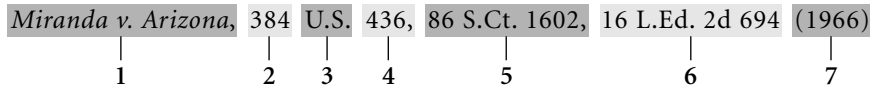


1. *Case title.* The title of the case is set in i and indicates the names of the parties. The suit in this sample citation was between Ernesto A. Miranda and the state of Arizona.
2. *Reporter volume number.* The number preceding the reporter name indicates the reporter volume containing the case. (The volume number appears on the spine of the reporter, along with the reporter name).
3. *Reporter name.* The reporter name is abbreviated. The suit in the sample citation is from the reporter, or series of books, called *U.S. Reports,* which contains cases from the U.S. Supreme Court. (Numerous reporters publish cases from the federal and state courts.)
4. *Reporter page.* The number following the reporter name indicates the reporter page on which the case begins.
5. *Additional reporter page.* Many cases may be found in more than one reporter. The suit in the sample citation also appears in volume 86 of the *Supreme Court Reporter*, beginning on page 1602.
6. *Additional reporter citation.* The suit in the sample citation is also reported in volume 16 of the *Lawyer's Edition*, second series, beginning on page 694.
7. *Year of decision.* The year the court issued its decision in the case appears in parentheses at the end of the cite.

*Brady Handgun Violence Prevention Act*, Pub. L. No. 103–159, 107 Stat. 1536 (18 U.S.C.A. §§ 921–925A)

1 2 3 4 5 6 7 8

1. *Statute title.*
2. *Public law number.* In the sample citation, the number 103 indicates this law was passed by the 103d Congress, and the number 159 indicates it was the 159th law passed by that Congress.
3. *Reporter volume number.* The number preceding the reporter abbreviation indicates the reporter volume containing the statute.
4. *Reporter name.* The reporter name is abbreviated. The statute in the sample citation is from *Statutes at Large.*
5. *Reporter page.* The number following the reporter abbreviation indicates the reporter page on which the statute begins.
6. *Title number.* Federal laws are divided into major sections with specific titles. The number preceding a reference to the U.S. Code stands for the section called Crimes and Criminal Procedure.
7. *Additional reporter.* The statute in the sample citation may also be found in the *U.S. Code Annotated.*
8. *Section numbers.* The section numbers following a reference to the *U.S. Code Annotated* indicate where the statute appears in that reporter.

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## SARBANES-OXLEY ACT OF 2002

The Sarbanes-Oxley Act of 2002 (Public Company Accounting Reform and Investor Protection Act, Pub.L. 107-204, July 30, 2002, 116 Stat. 745, July 30, 2002) was enacted by Congress in the wake of corporate and accounting scandals that led to bankruptcies, severe stock losses, and a loss of confidence in the STOCK MARKET. The act imposes new responsibilities on corporate management and criminal sanctions on those managers who flout the law. It makes SECURITIES fraud a serious federal crime and also increases the penalties for WHITE-COLLAR CRIMES. In addition, it creates a new oversight board for the accounting profession.

During the 1990s, the stock market rose dramatically in value, fueled by the promise of the INTERNET revolution as well as large corporate MERGERS AND ACQUISITIONS. Several of that decade's changes produced severe consequences during the first years of the new century. The five major U.S. accounting firms developed consulting divisions that advised corporations on ways to maximize their profits. Their advice often clashed with the traditional auditing functions and standards of these accounting firms. At worst, the accounting firms forfeited their traditional oversight function and allowed or encouraged financial reporting practices that misled investors. On the corporate side, managers were expected to produce short-term gains on a quarterly basis to satisfy investment analysts who worked for stock brokerages. These analysts were sometimes encouraged and directed by management to tout the value of questionable stocks. Some corporate managers, who skirted or broke laws that mandated honest financial reporting, transformed the drive for profitability into a lust for personal fortune. The bubble burst when the Enron Corporation filed for BANKRUPTCY in December 2001 and the accounting firm of Arthur Andersen was convicted of OBSTRUCTION OF JUSTICE for its actions in shredding Enron-related documents. As the stock market plummeted and investor confidence waned, Congress responded. Senator Paul S. Sarbanes (D-Md.) and Representative Michael Oxley (R-Ohio) worked to enact a set of provisions that would prevent future debacles such as those that ruined Enron and Arthur Andersen. President GEORGE W. BUSH, after initially downplaying the need for reform, signed the bill into law on July 30, 2002.

Under the act, the SECURITIES AND EXCHANGE COMMISSION (SEC) has the authority to prohibit, conditionally or unconditionally, permanently or temporarily, any person who has violated laws governing the issuing of stock from acting as an officer or director of an corporation if the SEC has found that such person's conduct "demonstrates unfitness" to serve as an officer or a director. The act also imposes new disclosure requirements when companies file financial reports. Under Section 302 of the act, the SEC is required to issue a rule that mandates that the principal executive officer and the principal

financial officer certify in each annual or quarterly report the accuracy of certain information. The signing officer must disclose to the auditors and audit committee any significant deficiencies in the design or operation of the internal controls, any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls, and any significant changes in the internal controls. Section 906 requires that the chief executive officer and chief financial officer provide written statements to be filed with each periodic report filed under the Securities Exchange Act of 1934 certifying that the periodic report containing the financial statements fully complies with the requirements of Sections 13(a) or 15(d) of the Securities Exchange Act of 1934 and that the information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer. A knowing violation of Section 906 is punishable by up to ten years in jail and a $1 million fine. A willful violation is punishable by up to 20 years in jail and a $5 million fine.

Section 303 prohibits any officer, director, or person acting at their direction "to fraudulently influence, coerce, manipulate, or mislead" an accountant who is conducting an audit. Under Section 304, if an issuer is required to restate its financial statements as a result of misconduct, the chief executive officer and chief financial officer must reimburse the issuer for any bonus or other incentive-based compensation paid during the twelve-month period following the improper reporting. Those officers also must pay to the company any profits realized from the sale of its securities during that twelve-month period.

The Sarbanes-Oxley Act also authorizes the establishment of a Public Company Accounting Oversight Board, which will oversee the accounting profession. Under Section 1 of the act, the board will have five financially experienced members who are appointed to five-year terms. Two of the members must be or have been certified public accountants, and the remaining three must not be, and must never have been, CPAs. The chair may be held by one of the CPA members, provided that he or she has not been engaged as a practicing CPA for five years. The board's members will serve on a full-time basis. Members of the board are appointed by the SEC "after consultation with" the chairman of the FEDERAL RESERVE BOARD and the secretary of the Treasury. No member may, concurrent with service on the Board, "share in any of the profits of, or receive payments from, a public accounting firm," other than "fixed continuing payments," such as retirement payments. The Commission may remove members "for good cause."

The Accounting Oversight Board will register accounting firms, develop auditing standards and rules of ethics for the profession, and investigate accounting firms. The board may discipline and sanction accounting firms that violate rules. It is required to "cooperate on an on-going basis" with designated professional groups of accountants and any advisory groups convened in connection with standard-setting, and although the board may, "to the extent that it determines appropriate," adopt standards proposed by those groups, it will have authority to amend, modify, repeal, and reject any standards suggested by the groups. The board must report to the SEC on its standard-setting activity on an annual basis.

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## ♦ SARGENT, JOHN GARIBALDI

John Garibaldi Sargent served as attorney general of the United States under President CALVIN COOLIDGE. He was born October 13, 1860, in Ludlow, Vermont, to John Henmon and Ann Eliza Hanley Sargent. He was schooled locally and then entered Tufts College in Boston, receiving a bachelor's degree in 1887. Early in his college years, Sargent became active in the Zeta Psi Kappa Society; through the fraternity's activities he was introduced to many of Boston's oldest and most influential political families, including the Coolidges.

After college, Sargent returned to Ludlow, where he married Mary Lorraine Gordon in 1887. Sargent studied law with attorney, and future Vermont governor, William Wallace Stickney. Following Sargent's admission to the

Vermont bar in 1890, he joined Stickney in the practice of law.

Sargent's first political appointment came in 1898 when he was named state's attorney for Windsor County, Vermont. He served until 1900 when he was appointed secretary of civil and military affairs for the state of Vermont by his law partner, who was then serving his first term as governor. After completing the two-year assignment, Sargent returned to the firm and resumed the practice of law. From 1902 to 1908, he argued the majority of his cases in federal court, and he established a national reputation as a trial lawyer.

In 1908 Sargent was named attorney general of Vermont. While in office, he was involved in one of the leading cases in the history of Vermont's highest court. In *Sabre v. Rutland Railroad Co.*, 86 Vt. 347, 85 Aik. 693 (1912), attorneys for the railroad argued that the powers enjoyed by Vermont's Public Service Commission (which regulated railroads) violated the Vermont Constitution by commingling legislative, executive, and judicial functions. Sargent, arguing for Sabre and the state, disagreed. His position was that the SEPARATION OF POWERS was only violated when one branch exercised all of the powers of another branch. The court agreed with Sargent and recognized the QUASI-JUDICIAL powers of executive-branch state agencies. The decision led the way for commissions and boards across the country to wield court-like powers.

While serving as Vermont's attorney general, Sargent also returned to school, receiving a master's degree from Tufts College in 1912. When Sargent returned to his law firm in 1913, he turned his attention to partisan politics. He supported REPUBLICAN PARTY candidates in Vermont and throughout the Northeast and

*John Sargent.*
CORBIS

campaigned vigorously for WARREN G. HARDING in 1920 and Calvin Coolidge in 1924.

Sargent was named attorney general of the United States on March 17, 1925, but only after the president's first choice, financier Charles B. Warren, withdrew after the Senate questioned his willingness to enforce ANTITRUST LAWS. Sargent proved to be a safe and noncontroversial alternative. He was confirmed in just one day, and he served from March 18, 1925, until March 4, 1929.

Sargent was not known as a leader in the fight for racial equality, but he did ask the president to commute the sentence of MARCUS GARVEY in 1927. Garvey was a political activist from Jamaica who had been convicted of MAIL FRAUD for his efforts to recruit black Americans for his Universal Negro Improvement League and

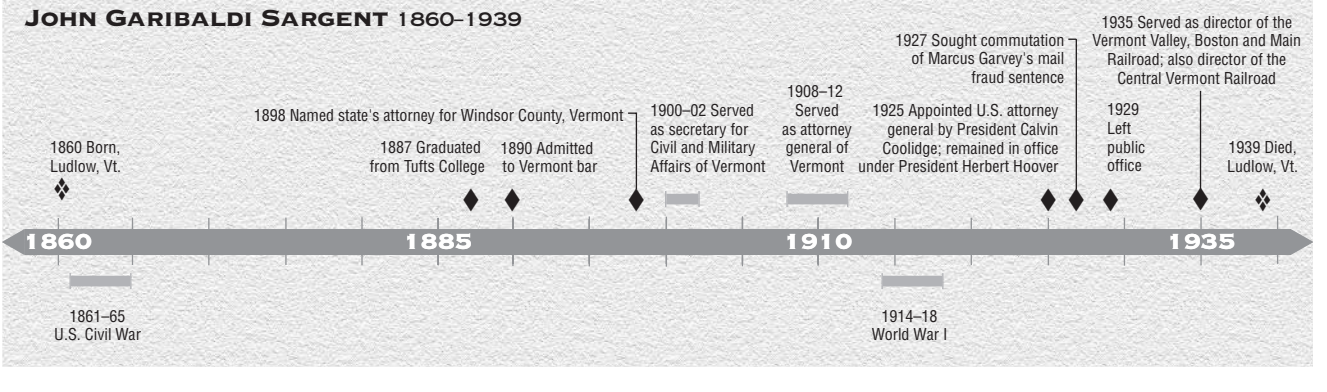

African Communities Association *Garvey v. United States,* 267 U.S. 604, 45 S. Ct. 464 (1925). The tainted proceeding against Garvey was orchestrated by an overzealous young JUSTICE DEPARTMENT attorney named J. EDGAR HOOVER.

Sargent was outspoken in his disapproval of Hoover's tactics in the Garvey case, and he was among the first attorneys general to condemn the gathering of evidence through WIRETAPPING, a tactic approved by Hoover when he was director of the FEDERAL BUREAU OF INVESTIGATION. Testifying before a congressional committee, Sargent said, "Wire tapping, ENTRAPMENT, or use of any illegal or unethical tactics in procuring information will not be tolerated. . . ."

In 1930 Sargent returned to Vermont and again took an active role in his law firm. In his later years, Sargent devoted his time and energy to local businesses and community organizations. When years of political infighting finally forced the reorganization of Vermont's railroads in the early 1930s, Sargent was appointed to oversee the process.

Sargent died at his home in Ludlow, Vermont, on March 5, 1939.

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## SATISFACTION

*The discharge of an obligation by paying a party what is due—as on a mortgage, lien, or contract—or by paying what is awarded to a person by the judgment of a court or otherwise. An entry made on the record, by which a party in whose favor a judgment was rendered declares that she has been satisfied and paid.*

*The fulfillment of a gift by will, whereby the testator—one who dies leaving a will—makes an inter vivos gift, one which is made while the testator is alive to take effect while the testator is living, to the beneficiary with the intent that it be in lieu of the gift by will. In* EQUITY*, something given either in whole or in part as a substitute or equivalent for something else.*

**Saving Clause**

All acts of limitations, whether applicable to civil causes and proceedings, or to the prosecution of offenses, or for the recovery of penalties or forfeitures, embraced in the Revised Statutes and covered by the repeal contained therein, shall not be affected thereby; but suits, proceedings, or prosecutions, whether civil or criminal, for causes arising, or acts done or committed prior to said repeal, may be commenced and prosecuted within the same time as if said repeal had not been made. July 30, 1947, c. 388, §1, 61 Stat. 633.

*An example of a saving clause*

## SAVE

*To except, reserve, or exempt; as where a statute* saves *vested—fixed—rights. To toll, or suspend the running or operation of; as, to* save *the* STATUTE OF LIMITATIONS.

## SAVING CLAUSE

*In a statute, an exception of a special item out of the general things mentioned in the statute. A restriction in a repealing act, which is intended to save rights, while proceedings are pending, from the obliteration that would result from an unrestricted repeal. The provision in a statute, sometimes referred to as the severability clause, that rescues the balance of the statute from a declaration of unconstitutionality if one or more parts are invalidated.*

*With respect to existing rights, a saving clause enables the repealed law to continue in force.*

## SAVINGS AND LOAN ASSOCIATION

*A financial institution owned by and operated for the benefit of those using its services. The savings and loan association's primary purpose is making loans to its members, usually for the purchase of real estate or homes.*

The savings and loan industry was first established in the 1830s as a building and loan association. The first savings and loan association was the Oxford Provident Building Society in Frankfort, Pennsylvania. As a building and loan association, Oxford Provident received regular weekly payments from each member and then lent the money to individuals until each member could build or purchase his own home. Building and loan associations were financial intermediaries, which acted as a conduit for the

flow of investment funds between savers and borrowers.

Savings and loan associations may be state or federally chartered. When formed under state law, savings and loan associations are generally incorporated and must follow the state's requirements for incorporation, such as providing articles of incorporation and bylaws. Although it depends on the applicable state's law, the articles of incorporation usually must set forth the organizational structure of the association and define the rights of its members and the relationship between the association and its stockholders. A savings and loan association may not convert from a state corporation to a federal corporation without the consent of the state and compliance with state laws. A savings and loan association may also be federally chartered. Federal savings and loan associations are regulated by the OFFICE OF THRIFT SUPERVISION.

Members of a savings and loan association are stockholders of the corporation. The members must have the capacity to enter into a valid contract, and as stockholders they are entitled to participate in management and share in the profits. Members have the same liability as stockholders of other corporations, which means that they are liable only for the amount of their stock interest and are not personally liable for the association's NEGLIGENCE or debts.

Officers and directors control the operation of the savings and loan association. The officers and directors have the duty to organize and operate the institution in accordance with state and federal laws and regulations and with the same degree of diligence, care, and skill that an ordinary prudent person would exercise under similar circumstances. The officers and directors are under the common-law duty to exercise due care as well as the duty of loyalty. Officers and directors may be held liable for breaches of these common-law duties, for losses that result from violations of state and federal laws and regulations, or even for losses that result from a violation of the corporation's bylaws.

The responsibilities of the officers and directors of a savings and loan association are generally the same as the responsibilities of officers and directors of other corporations. They must select competent individuals to administer the institution's affairs, establish operating policies and internal controls, monitor the institution's operations, and review examination and audit reports. Furthermore, they also have the power to assess losses incurred and to decide how the institution will recover those losses.

Prior to the 1930s, savings and loan associations flourished. However, during the Great Depression the savings and loan industry suffered. More than 1,700 institutions failed, and because depositor's insurance did not exist, customers lost all of the money they had deposited into the failed institutions. Congress responded to this crisis by passing several banking acts. The Federal Home Loan Bank Act of 1932, 12 U.S.C.A. §§ 1421 et seq., authorized the government to regulate and control the financial services industry. The legislation created the Federal Home Loan Bank Board (FHLBB) to oversee the operations of savings and loan institutions. The Banking Act of 1933, 48 Stat. 162, created the FEDERAL DEPOSIT INSURANCE CORPORATION (FDIC) to promote stability and restore and maintain confidence in the nation's banking system. In 1934, Congress passed the National Housing Act, 12 U.S.C.A. §§ 1701 et seq., which created the National Housing Administration (NHA) and the Federal Savings and Loan Insurance Corporation (FSLIC). The NHA was created to protect mortgage lenders by insuring full repayment, and the FSLIC was created to insure each depositor's account up to $5,000.

The banking reform in the 1930s restored depositors' faith in the savings and loan industry, and it was once again stable and prosperous. However, in the 1970s the industry began to feel the impact of competition and increased interest rates; investors were choosing to invest in money markets rather than in savings and loan associations. To boost the savings and loan industry, Congress began deregulating it. Three types of deregulation took place during this time.

The first major form of deregulation was the enactment of the Depository Institutions Deregulation and Monetary Control Act of 1980 (94 Stat. 132). The purpose of this legislation was to allow investors higher rates of return, thus making the savings and loan associations more competitive with the money markets. The industry was also allowed to offer money-market options and provide a broader range of services to its customers.

The second major form of deregulation was the enactment of the Garn-St. Germain Depository Institutions Act of 1982 (96 Stat. 1469). This act allowed savings and loan associations to diversify and invest in other types of loans

besides home construction and purchase loans, including commercial loans, state and municipal SECURITIES, and unsecured real estate loans.

The third form of deregulation decreased the amount of regulatory supervision. This deregulation was not actually an "official" deregulation; instead it was the effect of a change in required accounting procedures. The Generally Accepted Accounting Principles were changed to Regulatory Accounting Procedures, which allowed savings and loan associations to include speculative forms of capital and exclude certain liabilities, thus making the thrifts appear to be in solid financial positions. This resulted in more deregulation.

In the 1980s, the savings and loan industry collapsed. By the late 1980s at least one-third of the savings and loan associations were on the brink of insolvency. Eight factors were primarily responsible for the collapse: a rigid institutional design, high and volatile interest rates, deterioration of asset quality, federal and state deregulation, fraudulent practices, increased competition in the financial services industry, and tax law changes.

In an effort to restore confidence in the thrift industry, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (103 Stat. 183). The purpose of FIRREA, as set forth in Section 101 of the bill, was to promote a safe and stable system of affordable housing finance; improve supervision; establish a general oversight by the TREASURY DEPARTMENT over the director of the Office of Thrift Supervision; establish an independent insurance agency to provide deposit insurance for savers; place the Federal Deposit Insurance System on sound financial footing; create the Resolution Trust Corporation; provide the necessary private and public financing to resolve failed institutions in an expeditious manner; and improve supervision, enhance enforcement powers, and increase criminal and civil penalties for crimes of FRAUD against financial institutions and their depositors.

FIRREA increased the enforcement powers of the federal banking regulators and conferred a wide array of administrative sanctions. FIRREA also granted federal bank regulators the power to hold liable "institution-affiliated parties" who engage in unsound practices that harm the insured depository institution. The institution-affiliated parties include directors, officers, employees, agents, and any other persons, including attorneys, appraisers, and accountants, participating in the institution's affairs. FIRREA also allows federal regulators to seize the institution early, before it is "hopelessly insolvent" and too expensive for federal insurance funds to cover.

Criminal penalties were also increased, in 1990, by the CRIME CONTROL ACT, 104 Stat. 4789, which included the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990 (104 Stat. 4859). This act increased the criminal penalties "attaching" to crimes related to financial institutions.

FIRREA created the Office of Thrift Supervision (OTS) and the Resolution Trust Corporation (RTC). FIRREA eliminated the FHLBB and created the OTS to take its place. The RTC was created solely to manage and dispose of the assets of thrifts that failed between 1989 and August 1992. In addition, the FSLIC was eliminated, and the FDIC, which oversaw the banking industry, began dealing with the troubled thrifts.

The RTC was in existence for six years, closing its doors on December 31, 1996. During its existence, it merged or closed 747 thrifts and sold $465 billion in assets, including 120,000 pieces of property. The direct cost of resolving the failed thrifts amounted to $90 billion; however, analysts claim that it will take approximately 30 years to fully bail out the savings and loan associations at a cost of approximately $480.9 billion.

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## ❖ SAXBE, WILLIAM BART

William Bart Saxbe, a quotable lawyer, politician, and U.S. senator from Ohio, served as U.S. attorney general under President RICHARD M. NIXON. He also served as ambassador to India under President GERALD R. FORD.

Saxbe was born on June 24, 1916, in the farming community of Mechanicsburg, Ohio, to Bart Rockwell Saxbe, a religious and plain-spoken community leader who made his living as a cattle buyer, and Faye Henry Carey Saxbe, a political free-spirit who counted PATRICK HENRY among her ancestors. Saxbe's education seemed to be influenced by his parents' example; when he entered Ohio State University in 1936, he chose political science as his major field of study. He received a Bachelor of Arts degree in 1940. In the fall of that year, he married Ardath Louise ("Dolly") Kleinhans. They eventually had three children: William Bart Jr., Juliet Louise, and Charles Rockwell.

While attending college, Saxbe was a member of the Ohio National Guard. After college, he enlisted in the Army Air Corps, serving from 1940 to 1945. Saxbe was called to serve again during the Korean conflict in the 1950s; he was discharged from the reserve with the rank of colonel in 1963.

Immediately after WORLD WAR II, Saxbe returned to Ohio with the intention of furthering his education. He gave serious thought to pursuing a career in the ministry of the Episcopal Church, but his long-standing interest in political and community service prevailed. Saxbe entered law school at Ohio State Univversity in 1945 and, simultaneously, launched a campaign to serve in the Ohio House of Representatives. He was elected and served four terms from 1947 to 1954. Saxbe completed his law degree at the end of his second term. He served as House majority leader in 1951 and 1952, and as speaker of the House in 1953 and 1954.

*William B. Saxbe.*
AP/WIDE WORLD PHOTOS

Saxbe left the Ohio legislature at the conclusion of his fourth term. He returned to Mechanicsburg, where he raised cattle on the family farm. He also partnered with two longtime friends to establish the Columbus, Ohio, law firm of Saxbe, Boyd, and Prine. He practiced law for two years before re-entering the political arena in 1956. In 1957, he ran as the Republican candidate for state attorney general. Over the next decade, he served four terms in that state office. As attorney general, Saxbe proved to be a tough and capable crime fighter. He believed that CAPITAL PUNISHMENT was a strong deterrent and that stiff prison sentences should be imposed for gun-related crimes.

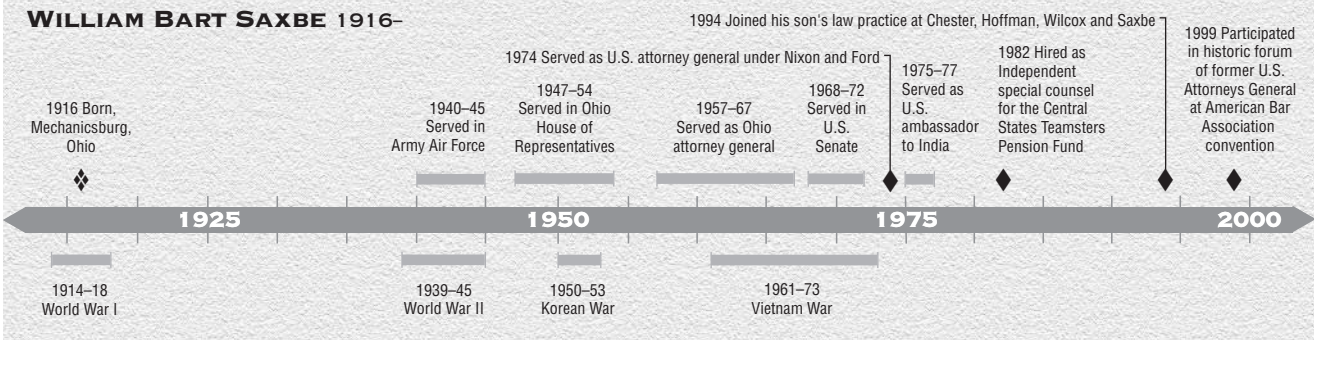

Although conservative in his views on crime and money, Saxbe described himself as "liberal on the rights of people." In 1968, Saxbe took his unique mix of fiscal conservatism and social responsibility to the electorate. He ran as the Republican candidate for a U.S. Senate seat, and he won a close election over liberal Democrat John J. Gilligan. His stand against the Pentagon's deployment of antiballistic missiles during the VIETNAM WAR surprised many of those who thought his campaign promises were mere rhetoric. Gilligan was quoted as saying, "If I had known he was going to be like this, I would have voted for him myself." Saxbe's voting record on most major issues showed that he moved gradually to the right during his four years in the U.S. Senate.

Saxbe was quickly disenchanted with life as a senator. He felt that many of his senate colleagues were sadly out of touch with the electorate. He alienated most of Washington when he said, "The first six months I kept wondering how I got [here]. After that, I started wondering how all of them did."

"I FEEL VERY STRONGLY THAT THE JUSTICE DEPARTMENT IS THE VERY HEART AND SOUL OF OUR COUNTRY, BECAUSE GOVERNMENT WITHOUT LAW IS TYRANNY."
—WILLIAM B. SAXBE

In addition to his disdain for the insulated lives of Washington politicians, Saxbe was frustrated with the pace of legislation on Capitol Hill. To address the problem, he joined forces with Senator Alan M. Cranston to develop a two-track system of moving legislation through the Senate. The system allowed less controversial bills to pass through the legislative process quickly, while more volatile measures were held for debate and discussion. When other efforts to improve the process stalled, Saxbe removed himself from the Senate entirely, by taking part in travel junkets. Saxbe's pleas for aid to East Bengal and for discontinuation of aid to Pakistan were direct results of his findings while on a trip; he considered these actions to be among his greatest achievements in the Senate.

Saxbe's frustration with Washington was not limited to the Senate. For example, Saxbe had defied protocol by challenging Nixon's Vietnam policy during a social gathering at the White House for freshman senators. In response, the president's staff kept Saxbe out of the Oval Office and away from Nixon for almost two years after that disastrous first meeting with the chief executive.

Saxbe's growing contempt for the White House staff reached a new height in 1971, when he referred to Nixon aides H. R. Haldeman and John D. Ehrlichman as "a couple of Nazis" and again in 1972 when he commented on Nixon's professed innocence in the WATERGATE scandals, saying that the chief executive sounded "like the fellow who played the piano in a brothel for twenty years, and insisted that he didn't know what was going on upstairs." (The Watergate scandals began with a break-in at the Democratic National Committee headquarters—located in the Watergate Office Towers—and eventually toppled the Nixon administration.)

In September 1973, Saxbe announced that he would not seek reelection to the Senate. Just a month later, Nixon asked him to accept an appointment as attorney general of the United States to replace ELLIOT RICHARDSON. Richardson, Nixon's third attorney general, had resigned rather than obey an EXECUTIVE ORDER to fire Watergate prosecutor ARCHIBALD COX. Saxbe was reluctant to accept the nomination, but he knew that the administration wanted to avoid a long confirmation battle and that his past criticism of the president would make him a credible candidate with both Nixon supporters and detractors.

After a two-hour discussion with Nixon, in which the president denied any knowledge or involvement in the Watergate scandals, Saxbe accepted the nomination. He took office in January 1974. His goal was to restore the Department of Justice's credibility with the U.S. public and to keep the public informed of the department's activities.

Saxbe initiated weekly news conferences at the beginning of his term but curtailed them quickly when he found that his offhand comments generated more interest than did his substantive efforts. Among Saxbe's more printable gaffes were his reference to PATTY HEARST as a common criminal and his observation that Jewish intellectuals of the 1950s were enamored with the Communist party.

As attorney general, Saxbe supported legislation limiting access to criminal records of arrested and convicted persons, and he continued to favor capital punishment and tough sentences for gun-related crimes. He conducted an investigation into the FBI's counterintelligence program—Cointelpro—and condemned the program for its harassment of left-wing groups, black leaders, and campus radicals. He also worked on two of the biggest antitrust cases in history, against IBM and AT&T.

After Nixon's resignation, Saxbe continued to serve as attorney general in the Ford adminis-

tration. He resigned in December 1974 to accept an appointment as U.S. ambassador to India.

For the next 20 years, Saxbe practiced law in Florida, Ohio, and Washington, D.C., and he remained active in REPUBLICAN PARTY politics. In March 1994, he announced that he would join the Columbus, Ohio, law firm of Chester, Hoffman, Willcox, and Saxbe, where his son was a partner.

Saxbe is often called upon to speak about the turmoil of the Watergate years and his experience in the final days of the Nixon administration. On the eve of Nixon's funeral in April 1994, Saxbe acknowledged that he had never made an attempt to see Nixon again after his resignation because the former president had lied to him about his involvement in the Watergate scandals.

Saxbe published an autobiography in 2000 while continuing to practice law at Chester, Willcox & Saxbe, where he specialized in general business law and strategic counsel. In 2002, the auditorium of Ohio State University's Moritz College of Law was named the William B. Saxbe Law Auditorium in recognition of his history of public service and his generous donations to the school.

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## SCAB

*A pejorative term used colloquially in reference to a nonunion worker who takes the place of a union employee on strike or who works for wages and other conditions that are inferior to those guaranteed to a union member by virtue of the union contract.*

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Labor Union.

## ❖ SCALIA, ANTONIN

In 1986, Antonin Scalia was appointed to the U.S. Supreme Court by President RONALD REAGAN, becoming the first American of Italian descent to serve as an associate justice. Known for his conservative judicial philosophy and narrow reading of the Constitution, Scalia has repeatedly urged his colleagues on the Court to overturn ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), the decision recognizing a woman's right to terminate her pregnancy under certain circumstances.

Scalia was born March 11, 1936, in Trenton, New Jersey. Before he began grade school, Scalia and his family moved to Elmhurst, New York, where he spent much of his boyhood. Scalia is the only child of Eugene Scalia, an Italian immigrant who taught romance languages at Brooklyn College for 30 years, and Catherine Scalia, a first-generation Italian-American who taught elementary school.

In 1953, Antonin Scalia graduated first in his class at St. Francis Xavier High School, a Jesuit military academy in Manhattan. Four years later, Scalia was valedictorian at Georgetown University, receiving a bachelor's degree in history. In the spring of 1960, Scalia graduated magna cum laude from Harvard Law School where he served as an editor for the *Harvard Law Review.* Known to his friends as Nino, Scalia was known to many of his classmates as an eager and able debater.

"JUDGES IN A REAL SENSE 'MAKE' LAW. . . . [T]HEY MAKE IT AS JUDGES MAKE IT, WHICH IS TO SAY AS THOUGH THEY WERE 'FINDING' IT—DISCERNING WHAT THE LAW IS, RATHER THAN DECREEING WHAT IT IS TODAY CHANGED TO, OR WHAT IT WILL TOMORROW BE."
—ANTONIN SCALIA

Upon graduation from law school, Scalia accepted a position as an associate attorney with a large law firm in Cleveland, Ohio, where he practiced law until 1967. He resigned to teach at the University of Virginia School of Law. In 1970, Scalia joined the Nixon Administration to serve as general counsel for the Office of Telecommunications Policy. Under President GERALD R. FORD, Scalia served as assistant attorney general for the JUSTICE DEPARTMENT, where he drafted a key presidential order establishing new restrictions on the information-gathering activities of the CENTRAL INTELLIGENCE AGENCY and FEDERAL BUREAU OF INVESTIGATION.

In 1977, Scalia left public office to become a visiting scholar at the American Enterprise Institute, a conservative think tank in Washington, D.C. During this same year, Scalia also returned to academia, accepting a position as law professor at the University of Chicago, where he developed a reputation as an expert in ADMINISTRATIVE LAW. In 1982, President Reagan appointed Scalia to the U.S. Court of Appeals for the District of Columbia, which many lawyers consider to be the second most powerful court in the country.

When Chief Justice WARREN BURGER retired in 1986, President Reagan elevated sitting justice

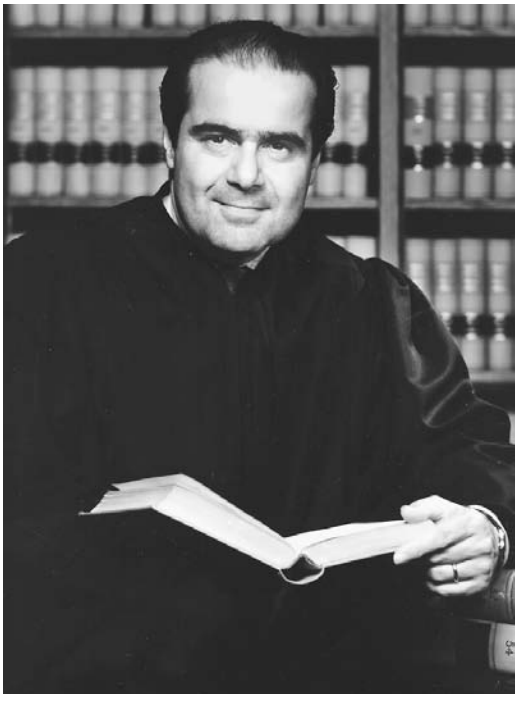

*Antonin Scalia.*
PHOTOGRAPH BY JOSEPH LAVENBURG, NATIONAL GEOGRAPHIC. COLLECTION OF U.S. SUPREME COURT

WILLIAM REHNQUIST to the chair of chief justice and nominated Scalia to fill the vacancy of associate justice. Confirmed by a vote of 98–0 in the Senate, Scalia became the first Roman Catholic to be appointed to the U.S. Supreme Court since WILLIAM J. BRENNAN JR. in 1957.

Scalia's tenure on the high court has been marked by a JURISPRUDENCE of ORIGINAL INTENT. Proponents of original intent, also called originalists, believe that the Constitution must be interpreted in light of the way it was understood at the time it was framed and ratified. According to Scalia, originalism has two virtues: preserving the SEPARATION OF POWERS in a democratic society, and curbing judicial discretion.

The Constitution delegates specific enumerated powers to the three branches of the federal government. The Legislative Branch is given the power to make law under Article I; the EXECUTIVE BRANCH is given the power to enforce the law under Article II; and the Judicial Branch is given the power to interpret and apply the law under Article III. Originalists believe that democracy is enhanced when the lawmaking power is exercised by the federal legislature because, unlike federal judges who are appointed by the president and given life tenure on the bench, members of Congress are held accountable to the electorate at the ballot box.

This separation of powers is blurred, Scalia argues, when unelected federal judges decide cases in accordance with their own personal preferences, which may be contrary to those expressed by the framers and ratifiers. In such instances, Scalia asserts, federal judges usurp the legislative function by making new law that effectively replaces the popular understanding of the Constitution at its time of adoption. The only way to curb this type of judicial discretion and to preserve the separation of powers, Scalia concludes, is by requiring federal judges to interpret and apply the Constitution in light of its original meaning. This meaning can be illuminated, Scalia says, by paying careful attention to

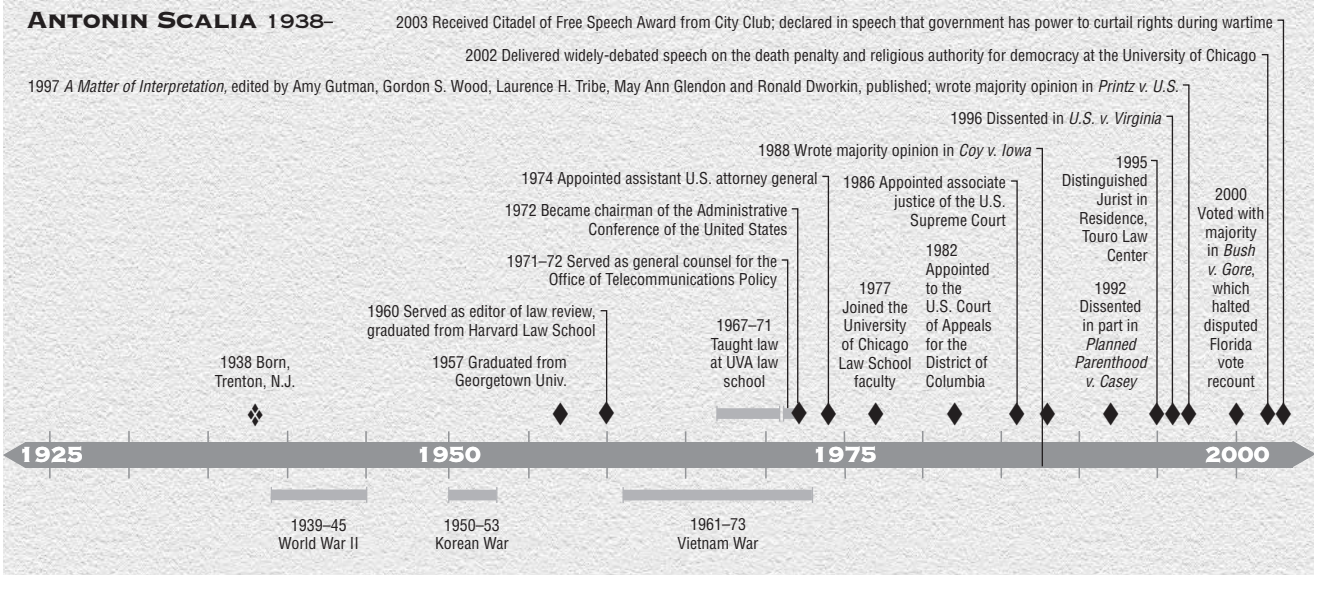

the express language of the Constitution and the debates surrounding the framing and ratification of particular provisions.

Scalia's interpretation and application of the EIGHTH AMENDMENT best exemplifies his judicial philosophy. The Eighth Amendment prohibits CRUEL AND UNUSUAL PUNISHMENT. Courts that evaluate a claim under the Cruel and Unusual Punishments Clause, Scalia argues, must determine whether a particular punishment was allowed in 1791 when the Eighth Amendment was framed and ratified. Moreover, he argues that courts must not take into account notions of the evolving standards of human decency. For example, Scalia contends that CAPITAL PUNISHMENT was clearly contemplated by the framers and ratifiers of the federal Constitution. The FIFTH AMENDMENT explicitly references capital crimes, Scalia observes, and capital punishment was prevalent in the United States when the Constitution was adopted. Whether states presently support or oppose capital punishment plays only a negligible role in Scalia's analysis.

Scalia's interpretation of the DUE PROCESS CLAUSE of the Fifth and Fourteenth Amendments provides another example of his judicial philosophy. According to Scalia, the Due Process Clause was originally understood to offer only procedural protection, such as the right to a fair hearing before an impartial judge and an unbiased jury. Nowhere in the text of the Constitution, Scalia notes, is there any hint that the Due Process Clause offers substantive protection. It is not surprising then that Scalia has dissented from U.S. Supreme Court decisions that have relied on the Due Process Clause in protecting the substantive right of women to terminate their pregnancies under certain circumstances (*Planned Parenthood v. Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 [1992]). Likewise, Scalia disagreed with the Court's decision that a state law granting VISITATION RIGHTS to grandparents was unconstitutional because it infringed upon the fundamental rights of parents to raise their children (*Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)). No such right, Scalia has commented, can be found in the express language of any constitutional provision.

Scalia has surprised some observers by his literal reading of the SIXTH AMENDMENT, which guarantees the right of criminal defendants to be "confronted with witnesses against them." In *Coy v. Iowa,* 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), Scalia wrote that the Sixth Amendment requires a face-to-face confrontation and that such an opportunity had been denied when a large screen had been placed between a defendant charged with CHILD MOLESTATION and the child who was accusing him. The Sixth Amendment, Scalia concluded, intended for courts to preserve the adversarial nature of the criminal justice system by protecting the rights guaranteed by the Confrontation Clause over governmental objections that face-to-face cross-examination may be emotionally traumatic for some victims.

Scalia drew the ire of advocates for GAY AND LESBIAN RIGHTS with his dissent in ROMER V. EVANS, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). The Court invalidated a constitutional amendment by the state of Colorado that prohibited anti-discrimination laws intended to protect gays, lesbians, and bisexuals. According to the majority in the decision, the state constitutional amendment violated the FOURTEENTH AMENDMENT of the U.S. Constitution. Scalia disagreed, writing a scathing dissent. According to Scalia, the majority opinion "places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias."

Whether Scalia is writing about the Sixth Amendment, the Eighth Amendment, or any other Constitutional provision, some regard his judicial opinions as among the most well written in the history of the U.S. Supreme Court. The clarity, precision, and incisiveness with which he writes is frequently praised. However, some of Scalia's opinions take on an acerbic quality. Often relegated to the role of dissenting justice, Scalia is not above hurling invectives at his colleagues on the Court, sometimes criticizing their opinions as silly and preposterous.

Scalia married the former Maureen McCarthy in 1960. They have nine children. Scalia has written numerous articles on a variety of issues and is the author of *A Matter of Interpretation: Federal Courts and the Law* (1997).

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## SCHECHTER POULTRY CORP. V. UNITED STATES

*A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935), is one of the most famous cases from the Great Depression era. The case tested the legality of certain methods used by Congress and President FRANKLIN D. ROOSEVELT to combat the devastating economic effects of the depression. After the U.S. Supreme Court declared the methods unconstitutional, Roosevelt publicly scolded the Court and later used the decision as one justification for a controversial plan to stock the Court with justices more receptive of Roosevelt's programs.

At the heart of the *Schechter* case was legislation passed by Congress in 1933. The NATIONAL INDUSTRIAL RECOVERY ACT (NIRA) (48 Stat. 195) was passed in response to the unemployment and poverty that swept the nation in the early 1930s and provided for the establishment of local codes for fair competition in industry. The codes were written by private trade and industrial groups. If the president approved the codes, they became law. Businesses were required to display a Blue Eagle insignia from the NATIONAL RECOVERY ADMINISTRATION to signify their compliance with the codes. Typical local codes set minimum wages and maximum hours for workers and gave workers the right to organize into unions and engage in COLLECTIVE BARGAINING with management. Codes also prescribed fair trade practices, and many codes set minimum prices for the sale of goods.

The Schechter Poultry Corporation, owned and operated by Joseph, Martin, Alex, and Aaron Schechter, was in the business of selling chickens at wholesale. The corporation purchased some of the poultry from outside the state of New York. It bought the poultry at markets and railroad terminals in New York City and sold the poultry to retailers in the city and surrounding environs. In April 1934 President Roosevelt approved the code of fair competition for the live poultry industry of the New York City metropolitan area (Live Poultry Code). In July 1934 the Schechters were arrested and indicted on 60 counts of violating the Live Poultry Code. The indictment included charges that Schechter Poultry had failed to observe the MINIMUM WAGE and maximum hour provisions applicable to workers and that it had violated a provision of the Live Poultry Code prohibiting the sale of unfit chickens. The case became popularly known as the *Sick Chicken* case.

The Schechters pleaded not guilty to the charges. At trial, the Schechters were convicted on 18 counts of violating the Live Poultry Code and two counts of conspiring to violate the Live Poultry Code. An appeals court affirmed their convictions, but the U.S. Supreme Court agreed to hear their appeal.

The Schechters presented several arguments challenging the Live Poultry Code. According to the Schechters, the code system of the NIRA was an unconstitutional ABDICATION of the legislative power vested in Congress by Article I, Section 1, of the U.S. Constitution. The Schechters argued further that their intrastate wholesale business was not subject to congressional authority under the COMMERCE CLAUSE of Article I, Section 8, Clause 3, of the Constitution and that the procedures for enforcing the NIRA codes violated the DUE PROCESS CLAUSE of the FIFTH AMENDMENT.

In support of the Live Poultry Code, the federal government argued that the code was necessary for the good of the nation. According to the government, the Live Poultry Code ensured the free flow of chickens in interstate commerce. This arrangement kept chicken prices low and helped ease, however slightly, the financial burden on the general public. The government also argued that it was within the power of Congress to enact the NIRA regulatory scheme that gave rise to the Live Poultry Code because codes such as the Live Poultry Code applied only to businesses engaged in interstate commerce.

The Court unanimously disagreed with the federal government. Under the Commerce Clause, Congress had the power to regulate commerce between the states, not intrastate commerce. The power to enact legislation on intrastate commerce was reserved to the states under the TENTH AMENDMENT to the Constitution. According to the Court, the business conducted by the Schechters was decidedly intrastate. Their business was licensed in New York, they bought their poultry in New York, and they sold it to retailers in New York. Because it was intended to reach intrastate businesses like Schechter Poultry, the Live Poultry Code

regulated intrastate commerce, and it was therefore an unconstitutional exercise of congressional power. The Court reversed the Schechters' convictions and declared the Live Poultry Code unconstitutional.

The *Schechter* decision was decided around the same time as other, similar Supreme Court decisions striking down federal attempts to address the economic crises of the depression. However, the *Schechter* decision was a particularly troublesome setback for the Roosevelt administration. The NIRA was the centerpiece of Roosevelt's plan to stabilize the national economy (the NEW DEAL), and the government's loss in the *Sick Chicken* case marked the end of the NIRA and its fair trade codes. Less than one week after the *Schechter* decision was announced, Roosevelt publicly condemned the Court. Roosevelt declared that the Court's "horse-and-buggy definition of interstate commerce" was an obstacle to national health.

Roosevelt's remarks were controversial because they appeared to cross the line that separated the powers of the EXECUTIVE BRANCH from those of the judicial branch. They sparked a national debate on the definition of interstate commerce, the role of the U.S. Supreme Court, and the limits of federal power. Several citizens and federal legislators began to propose laws and constitutional amendments in an effort to change the makeup of the Supreme Court. At first, Roosevelt refused to back any of the plans, preferring instead to wait and see if the Court would reconsider its stand and reverse the *Schechter* holding. After the Supreme Court delivered another series of opinions in 1936 that nullified New Deal legislation, Roosevelt began to push for legislation that would modify the makeup of the Court. In 1937 the Supreme Court began to issue decisions upholding New Deal legislation. Congress never enacted Roosevelt's so-called court-packing plan.

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**CROSS-REFERENCES**

Federalism.

## SCHENCK V. UNITED STATES

*Schenck v. United States,* 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919), is a seminal case in CONSTITUTIONAL LAW, representing the first time that the U.S. Supreme Court heard a FIRST AMENDMENT challenge to a federal law on free speech grounds. In upholding the constitutionality of the ESPIONAGE ACT OF 1917 (40 Stat. 217), the Supreme Court articulated the CLEAR AND PRESENT DANGER doctrine, a test that still influences the manner in which state and federal courts decide free speech issues. This doctrine pioneered new territory by drawing a line that separates protected speech, such as the public criticism of government and its policies, from unprotected speech, such as the advocacy of illegal action.

On December 20, 1917, Charles Schenck was convicted in federal district court for violating the Espionage Act, which prohibited individuals from obstructing military recruiting, hindering enlistment, or promoting insubordination among the armed forces of the United States. Schenck, who was the general secretary of the Socialist party in the United States, had been indicted for mailing antidraft leaflets to more than fifteen thousand men in Philadelphia. The leaflets equated the draft with SLAVERY, characterized conscripts as criminals, and urged opposition to American involvement in WORLD WAR I.

Schenck appealed his conviction to the Supreme Court, which agreed to hear the case. Attorneys for Schenck challenged the constitutionality of the Espionage Act on First Amendment grounds. FREEDOM OF SPEECH, Schenck's attorneys argued, guarantees the liberty of all

*The 1919* Schenck *case marked the first time the Court heard a First Amendment challenge to a federal law on free speech grounds. The Court was comprised of the following justices: (standing, l-r) Brandeis, Pitney, McReynolds, Clarke, (seated, l-r) Day, McKenna, White, Holmes, Van Devanter.*

U.S. SUPREME COURT

Americans to voice their opinions about even the most sensitive political issues, as long as their speech does not incite immediate illegal action. Attorneys for the federal government argued that freedom of speech does not include the freedom to undermine the SELECTIVE SERVICE SYSTEM by casting aspersions upon the draft.

In a 9–0 decision, the Supreme Court affirmed Schenck's conviction. Justice OLIVER WENDELL HOLMES JR. delivered the opinion. Holmes observed that the constitutionality of all speech depends on the circumstances in which it is spoken. No reasonable interpretation of the First Amendment, Holmes said, protects utterances that have the effect of force. For example, Holmes opined that the Freedom of Speech Clause would not protect a man who falsely shouts fire in a crowded theater.

"The question in every case," Holmes wrote, "is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Holmes conceded that during peacetime Schenck's vituperative leaflets might have received constitutional protection. However, Holmes said, during times of war no American has the right to speak or publish with the intent of obstructing the CONSCRIPTION process when such speech has a tendency to incite others to this unlawful purpose.

The Supreme Court's decision in *Schenck* established two fundamental principles of constitutional law. First, *Schenck* established that the First Amendment is not absolute. Under certain circumstances, the rights protected by the Freedom of Speech Clause must give way to important countervailing interests. Preserving the integrity of the military draft during wartime and protecting theater patrons from the perils of pandemonium are two examples of countervailing interests that will override First Amendment rights.

Second, *Schenck* established the standard by which subversive and seditious political speech would be measured under the First Amendment for the next fifty years. Before the government may punish someone who has published scurrilous political material, the Court in *Schenck* said, it must demonstrate that the material was published with the intent or tendency to precipitate illegal activity and that it created a clear and present danger that such activity would result.

*Schenck* did not settle every aspect of free speech JURISPRUDENCE. It left unresolved a number of crucial questions and created ambiguities that could only be clarified through the judicial decision-making process. It was unclear after *Schenck,* for example, how immediate or probable a particular danger must be before it becomes clear and present. If *Schenck* permitted the government to regulate speech that has an unlawful tendency, some observers feared, Congress could ban speech that carried with it any harmful tendency without regard to the intent of the speaker or the likely effect of the speech on the audience.

In 1969 the Supreme Court articulated the modern clear-and-present-danger doctrine in *Brandenburg v. Ohio,* 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430, stating that the government may not forbid or punish subversive speech except where it advocates or directs imminent lawless action and is likely to incite or produce such action.

Under *Brandenburg,* courts must consider the intention of the speaker or writer, as well as her ability to persuade and arouse others when evaluating the danger presented by particular speech. Courts must also consider the susceptibility of an audience to a particular form of expression, including the likelihood that certain members of the audience will be aroused to illegal action. Despite the reformulation of the clear-and-present-danger test, *Schenck* retains constitutional vitality in cases concerning the Freedom of Speech Clause, having been cited in more than one hundred state and federal judicial opinions in the 1980s and 1990s.

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Communism; *Dennis v. United States*; Smith Act.

## ♦ SCHLAFLY, PHYLLIS STEWART

The demise of the EQUAL RIGHTS AMENDMENT (ERA) on June 30, 1982, can be attributed in large part to Phyllis Stewart Schlafly. During the 1970s, Schlafly was the United States' most visi-

ble opponent of the ERA, a proposed constitutional amendment that she predicted would undermine the traditional family and actually diminish the rights of U.S. women.

The ERA stated, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." After passing Congress, the amendment was sent to the 50 states on March 22, 1972, for ratification. To become law, the amendment needed to be passed by 38 states within seven years. By 1973, 30 states had already ratified the ERA. However, as momentum for Schlafly's anti-ERA campaign grew, the ratification process slowed. Only four states approved the ERA in 1974 and 1975, and it became unlikely that pro-ERA forces could persuade four more states to ratify it. In 1977, Indiana became the last state to ratify the amendment. Despite a congressional reprieve in July 1978 that extended the ratification deadline to June 30, 1982, the ERA failed.

Schlafly was born August 15, 1924, in St. Louis, to Odile Dodge Stewart and John Bruce Stewart. She excelled academically at her parochial school, Academy of the Sacred Heart. After graduating as class valedictorian in 1941, she enrolled at Maryville College of the Sacred Heart. As a junior, she transferred to Washington University, in St. Louis, where she graduated Phi Beta Kappa in 1944. After receiving a scholarship, Schlafly earned a master's degree in political science from Radcliffe College in 1945. In 1978, she returned to Washington University and earned a law degree.

For about a year after receiving her master's degree, Schlafly worked in Washington, D.C., as a researcher for several members of Congress.

*Phyllis Schlafly.*
AP/WIDE WORLD PHOTOS

Returning to St. Louis in 1946, she became an aide and campaign worker for a Republican representative, and then worked as a librarian and researcher for a bank.

In 1949, she married Fred Schlafly, also a lawyer. After moving to Alton, Illinois, Schlafly and her husband became involved in anti-Communist activities. Schlafly was a researcher for Senator JOSEPH R. MCCARTHY during the 1950s and helped to found the Cardinal Mindszenty Foundation, an organization opposed to COMMUNISM.

"VIRTUOUS WOMEN ARE SELDOM ACCOSTED BY UNWELCOME SEXUAL PROPOSITIONS . . . OBSCENE TALK OR PROFANE LANGUAGE."
—PHYLLIS SCHLAFLY

**PHYLLIS STEWART SCHLAFLY** 1924–

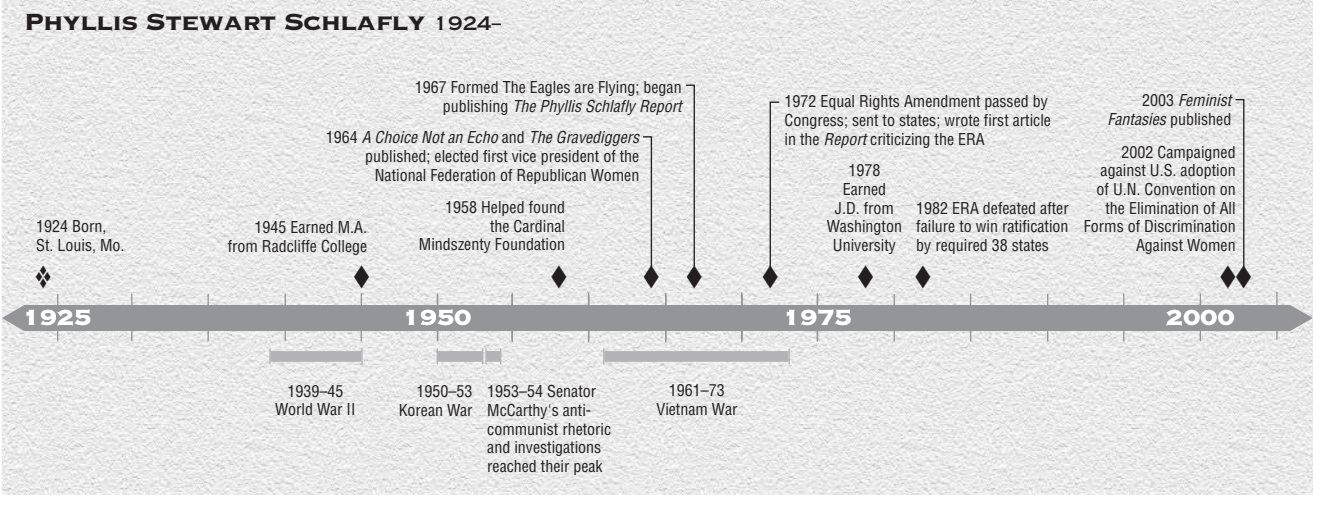

Schlafly supported Republican BARRY M. GOLDWATER's presidential campaign in 1964. Her first book, *A Choice Not an Echo,* was written in 1964 specifically for the Goldwater campaign. In 1964, Schlafly published *The Gravediggers,* a book accusing key figures in the administration of President LYNDON B. JOHNSON of deliberately undermining U.S. military strength and leaving the country vulnerable to Communist aggression. Schlafly is the author of several other books on political topics.

While raising six children, Schlafly kept her hand in community activities and Republican politics. Her interest in public policy and government affairs prompted her to run for Congress three times: once in 1952 as the GOP candidate from the Twenty-fourth District of Illinois; once in 1960 as a write-in candidate; and once in 1970 as the endorsed candidate of Chicago insurance mogul W. Clement Stone. All three campaigns were unsuccessful.

"WHEN MEN RATHER THAN THE LAW GOVERN, PEOPLE USUALLY FIND IT MORE PRUDENT TO SEEK A POWERFUL HUMAN PROTECTOR THAN TO STAND ON LEGAL RIGHTS AGAINST THE STATE."
—RUDOLF B. SCHLESINGER

Schlafly had more luck in her successful 1964 bid to be elected the first vice president of the National Federation of Republican Women. Her victory came at a time when Goldwater Republicans dominated the party. Usually, the first vice president of the federation automatically advanced to president, but in 1967, Schlafly was opposed by a more moderate candidate who ultimately defeated her. In the wake of her loss, Schlafly formed a separatist group called The Eagles Are Flying. Bolstered by a core of conservative supporters, she began publishing the *Phyllis Schlafly Report,* a newsletter assessing current political issues and candidates. In a 1972 issue of the *Report,* Schlafly wrote the first of many articles criticizing the ERA. As her personal opposition to the amendment grew, Schlafly formed Stop ERA and the Eagle Forum, organizations supported by conservative U.S. citizens, fundamentalist religious groups, and factions of the John Birch Society.

Schlafly argued that ratification of the ERA would lead to compulsory military service for all mothers, unisex toilets in public places, automatic 50 percent financial responsibility for all wives, and homosexual marriages. In 1992, Schlafly's oldest son John Schlafly disclosed his homosexuality in an interview with the *San Francisco Examiner.* He stated that he supported his mother's conservative political views, but also that gays and lesbians have family values.

Since the defeat of the ERA, Schlafly has remained active with the Eagle Forum and other conservative causes, including the antiabortion movement. She has made more than 50 appearances before congressional and state legislative committees, where she has testified on such issues as national defense, foreign policy, and family concerns. Schlafly has continued to publish her monthly newsletter, *The Phyllis Schlafly Report.* She also continues as an author, speaker and commentator.

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Republican Party; Women's Rights.

## ♦ SCHLESINGER, RUDOLF BERTHOLD

Legal scholar, author, and professor, Rudolf B. Schlesinger achieved fame for his ground-breaking work in the study of international legal systems. Schlesinger was known as the dean of comparative law, a discipline that examines the differences and similarities among the legal systems of nations. His arrival in the field during the early 1950s helped to give it both greater legitimacy and popularity in legal academia. *Comparative Law: Cases-Texts-Materials* (1950), written while Schlesinger taught at Cornell University, became a staple of law school curricula and entered its fifth edition in the late 1990s. He also wrote important studies of CIVIL PROCEDURE and international business transactions and directed a ten-year international research project on contracts.

Born in Munich, Germany, in 1909, Rudolf Berthold Schlesinger fled nazism before WORLD WAR II to live in the United States. He had earned his degree in law from the University of Munich in 1933. He developed a background in finance while working in a Munich bank, where he helped German Jews transfer their assets out of the country in order to escape persecution. In 1938, with the Nazi party gaining strength, Schlesinger emigrated to New York and promptly enrolled at Columbia Law School, where he earned his degree in 1942. He briefly practiced financial law, then served as a professor at Cornell from 1948 to 1975. Upon retirement from Cornell, he joined the faculty of the Hastings College of Law at the University of California.

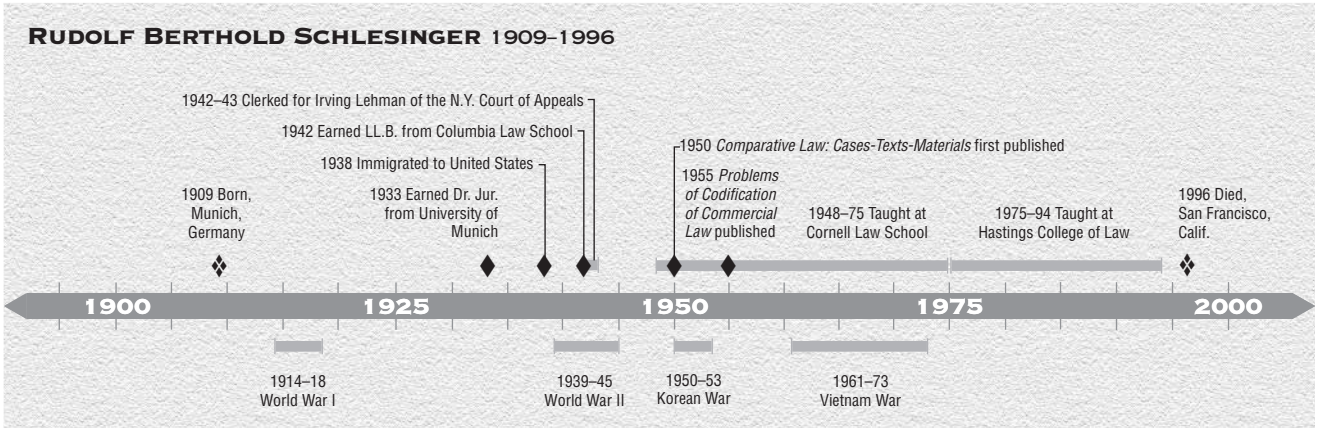


Schlesinger had an enormous impact on U.S. and European legal studies. Foremost was his pioneering 1950 book on comparative law, which ultimately influenced two generations of readers. In 1955, working on behalf of the New York Law Revision Commission, he examined the important question of whether to codify COMMERCIAL LAW. His study, *Problems of Codification of Commercial Law* (1955), anticipated the subsequent development of the UNIFORM COMMERCIAL CODE. In 1995, the *American Journal of Comparative Law* published a tribute to Schlesinger that praised his "heroic work" and noted that its influence went beyond U.S. law: "Today's serious efforts to find and develop a unitary European private law is, consciously or unconsciously, a continuation of Schlesinger's effort."

Schlesinger died on November 10, 1996, in San Francisco, when he and his wife committed suicide.

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## SCHOOL DESEGREGATION

*The attempt to end the practice of separating children of different races into distinct public schools.*

Beginning with the landmark Supreme Court case of BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the United States' legal system has sought to address the problem of racial SEGREGATION, or separation, in public schools. In *Brown,* a unanimous Supreme Court found that segregating children of different races in distinct schools violates the Equal Protection Clause of the FOURTEENTH AMENDMENT, which guarantees that "[n]o state shall . . . deny to any person . . . the EQUAL PROTECTION of the laws" (§ 1). In writing the Court's opinion, Chief Justice EARL WARREN stressed the crucial role education plays in socializing children, and he maintained that racial segregation "generates a feeling of inferiority" in children that will limit their opportunities in life. A related decision, *Brown v. Board of Education,* 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), (*Brown II*), empowered lower courts to supervise desegregation in local school districts and held that desegregation must proceed "with all deliberate speed."

A number of Supreme Court decisions in the decades since *Brown* have further defined the constitutional claims regarding desegregation first set forth in *Brown.* In many cases, these decisions have resulted in court-imposed desegregation plans, sometimes involving controversial provisions for busing students to schools outside their immediate neighborhood. Despite such judicial actions, desegregation in the United States achieved mixed success. Although many more children attend school with children of other races now than in 1954, in numerous cities, racial segregation in education remains as high as ever. Faced with the challenges of shifting populations, segregated housing patterns, impatient courts, and the stubborn persistence of racism, comprehensive school desegregation—long a hoped-for remedy to past discrimination against African Americans—remains an elusive goal.

### 1954–1970: School Desegregation After Brown

*Brown* and *Brown II* inspired a great deal of hope that the races would soon be joined in public schools and that the United States would take a giant step toward healing the racial animosities of its past. THURGOOD MARSHALL, an African American who led the National Association for the Advancement of Colored People's Legal Defense Fund in its challenge to school segregation in *Brown* and later became a justice of the Supreme Court, predicted that after *Brown,* schools would be completely desegregated within six months.

Marshall's statement proved to be wildly optimistic. By 1964, ten years after *Brown,* a Department of Health, Education, and Welfare (HEW) study indicated that only 2.4 percent of African Americans in the South were attending largely white schools. Such statistics indicated that *Brown* had led to only token INTEGRATION. By the mid-1960s, many observers felt that the Supreme Court, and the United States as a whole, had lost an opportunity to more quickly create a desegregated society. De facto segregation (segregation in fact or actuality)—as opposed to de jure segregation (segregation by law)—remained a stubborn reality, and racism remained its leading cause. Whites who did not want their children attending school with children of another race found many ways to avoid desegregation, from gerrymandering school boundaries (adjusting school boundaries to their advantage) to manipulating school transportation and construction policies. And in a phenomenon dubbed *white flight*, many transferred their children to private schools or simply moved to suburbs where few, if any, nonwhites lived.

Congress joined the Supreme Court in its efforts to assist desegregation, by passing the CIVIL RIGHTS ACT OF 1964 (28 U.S.C.A. § 1447, 42 U.S.C.A. §§ 1971, 1975a to 1975d, 2000a to 2000h-6). Among its many features, the act authorized HEW to create specific guidelines with which to measure the progress of school desegregation. In 1966, for example, these guidelines called for specific levels of integration: 16 to 18 percent of African–American children in all school districts must be attending predominantly white schools. The act also allowed HEW to cut off federal funding to school districts that did not meet integration guidelines. However, this punishment proved difficult to use as a means of enforcement.

In the mid-1960s, a judge on the Fifth Circuit Court of Appeals, JOHN MINOR WISDOM, issued a number of influential opinions that strengthened the cause of racial integration of schools. Wisdom's rulings established that it was not enough simply to end segregation; instead, school districts must actively implement desegregation. In one of these cases, *United States v. Jefferson Board of Education,* 372 F.2d 836 (5th Cir. 1966), he wrote, "[T]he only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration." Wisdom's ruling also detailed measures that the school district must take toward the goal of integration, including deciding how children were to be informed of the schools available to them for attendance, where new schools must be constructed, where transportation routes must run, and how faculty and staff were to be hired and assigned.

In 1968, the Supreme Court again addressed the issue of school desegregation, in *Green v. County School Board,* 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716, which dealt with the schools of New Kent County, a rural area in eastern Virginia. In its opinion, the Court acknowledged that the integration guidelines set forth in *Brown II* had not produced adequate results. School districts such as those of New Kent County—where in 1967, 85 percent of black children still attended an all-black school—had avoided meaningful integration. It was not enough, the Court argued, to simply end segregation and allow a "freedom-of-choice" plan—by which African–American children supposedly had the freedom to attend predominantly white schools—to be the only means of combining the races in an educational setting. In comments during Court hearings on the case, Chief Justice Warren noted that though the "fence" of outright segregation had been taken down, socially constructed "booby traps" still prevented most children from attending integrated schools.

*Green* also introduced two concepts—dual school systems and unitary school systems—that remain a part of the school desegregation debate. A dual school system is a segregated school system. In other words, it consists of separate segments—one black, the other white—existing side by side but with widely different educational conditions and outcomes. The Court in *Green* identified six indicators of a dual

**Public School Enrollment, by Race/Ethnicity, 1968 to 2000**

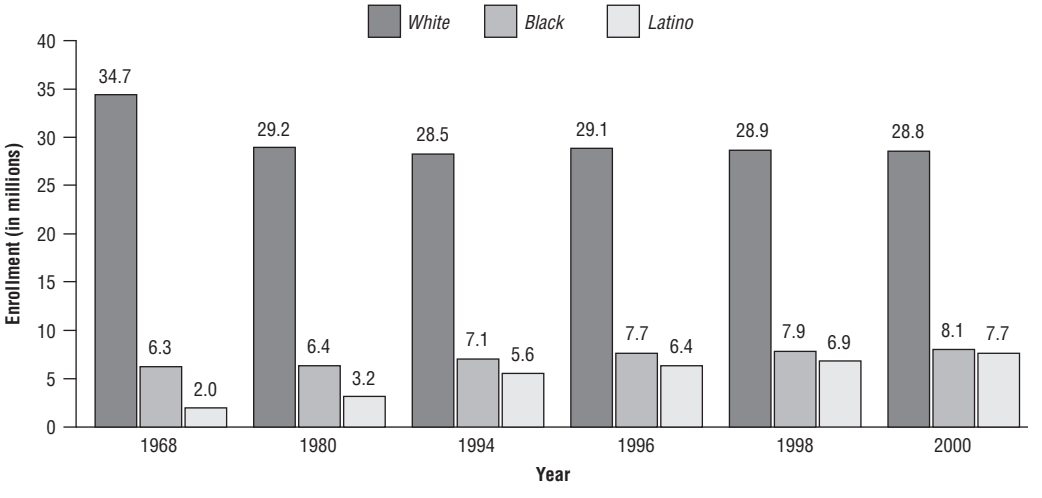


SOURCE: Harvard University, The Civil Rights Project, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, 2003.

system: racial separation of students, faculty, staff, transportation, extracurricular activities, and facilities. A unitary school system, on the other hand, is racially integrated at every level. In a later ruling, *Alexander v. Holmes County Board of Education,* 396 U.S. 19, 90 S. Ct. 29, 24 L. Ed. 2d 19 (1969), the Court described a unitary system as one "within which no person is to be effectively excluded from any school because of race or color."

Even more important, in its opinion in *Green,* the Court held that New Kent County would be expected to immediately begin remedying the lasting effects of segregation. "The burden on a school board today," the Court said, "is to come forward with a plan that promises realistically to work, and promises realistically to work *now*" (*Green*). Thus, the Court abandoned its previous position that school desegregation must proceed "with all deliberate speed" in favor of a call for immediate and prompt action.

The Court also held that the Fourteenth Amendment required action to remedy past racial discrimination—or what has come to be called AFFIRMATIVE ACTION. It found an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which RACIAL DISCRIMINATION would be eliminated root and branch" (*Green*). Moreover, school boards would have to provide meaningful statistical evidence that their school district was moving toward the goal of integration.

In a footnote to its opinion, the Court advanced suggestions for achieving school desegregation, including combining all children in a particular age range, white and black, into the same building.

*Green* and subsequent judicial decisions through 1970 caused a remarkable change in school desegregation. By 1971, HEW statistics indicated that the South had become the most racially integrated region in the United States. HEW estimated that 44 percent of African–American students attended majority white schools in the South, as opposed to 28 percent in the North and West. In many communities, however, these changes resulted in white flight. In Mississippi, for example, white public school enrollment dropped between 25 and 100 percent in the 30 school districts with the highest black enrollment.

### The 1970s: Swann and Busing

In SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971), the focus of school desegregation shifted from largely rural school districts to urban ones, a change of scene that offered new challenges to desegregation. In the rural South before the *Brown* decision,

# The Busing Debate

Busing is a plan for promoting school desegregation, by which minority students are transported to largely white schools and white students are brought to largely minority schools. It is intended to safeguard the **CIVIL RIGHTS** of students and to provide equal opportunity in public education. Busing is also an example of affirmative action—that is, the attempt to undo or compensate for the effects of past discrimination. Such action is sometimes called compensatory justice.

Busing was first enacted as part of school desegregation programs in response to federal court decisions establishing that racial **SEGREGATION** of public schools violates the **EQUAL PROTECTION CLAUSE** of the **FOURTEENTH AMENDMENT** to the Constitution. In *Green v. County School Board,* 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968), and **SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,** 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971), the Supreme Court established that federal courts could require school districts to implement busing programs as a means of achieving racial **INTEGRATION** of public schools.

However, busing was nothing new in U.S. education. Even before these decisions, nearly 40 percent of the nation's schoolchildren were bused to school. And before 1954, when the Court declared racial segregation in public schools unconstitutional in **BROWN V. BOARD OF EDUCATION,** 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, children were often bused to segregated schools that were beyond walking distance from their homes.

With the Supreme Court decisions in *Green* and *Swann,* busing became one of the most controversial topics in U.S. law and politics, particularly in the 1970s. Although the zeal for busing as a remedy for past racial injustice had waned greatly by the 1990s, busing remained a feature—if many times a limited one—of most school desegregation programs and continued to inspire heated debate.

Those who are in favor of busing claim, as did the Supreme Court in *Green* and *Swann,* that racial integration in and of itself is a worthy social goal and that busing is an effective means of achieving that goal in public education. Supporters point to the harmful legacy of segregation in education. Before *Brown,* African-American children were schooled in separate facilities that were usually inferior to the facilities used by whites, despite official claims that they were equal. Such segregation worked to keep African Americans at a disadvantage in relation to whites. It instilled feelings of inferiority in African–American children and seriously diminished their educational achievement and opportunities.

Supporters of busing also often claim that de facto (actual) segregation exists even decades after the **CIVIL RIGHTS MOVEMENT** and the striking down of racial segregation laws, which occurred in the 1960s. A largely white, wealthy upper class and a largely minority, poor underclass, they argue, are transported, employed, housed, and educated in different settings. Often wealthy people live in the suburbs, and the poor live in the cities. Growing up in their separate neighborhoods, children from higher socioeconomic levels thus have many advantages that poorer children do not: more space at home, better nutrition and **HEALTH CARE**, greater cultural and intellectual stimulation, and friends and acquaintances with higher social status providing better job and career prospects. Some even compare the isolation of impoverished minorities in the United States' inner cities with that of impoverished blacks under South Africa's former apartheid system.

Advocates of desegregation through busing assert that these existing inequalities must not become greater and that desegregation in education will go a long way toward ending them and creating a more just society. They also point out blacks and whites lived largely in the same communities or areas, and requiring that their children attend the same neighborhood schools could resolve segregation. In urban settings, however, blacks and whites lived in different neighborhoods, so combining the two races in the same schools meant transporting children, usually by bus, to institutions that were often far from their homes.

In *Swann,* the Court took the final step toward making busing a part of school desegregation plans, by giving the lower courts power to impose it as a means for achieving integration. *Swann* involved the Charlotte-Mecklenburg School District, in North Carolina, a district in which African Americans made up 29 percent of the student body. After the Supreme Court's decision in *Green,* a federal district judge ruled that the school district had not achieved adequate levels of integration: 14,000 of the 24,000 African–American students still attended schools that were all black, and most of the 24,000 did not have any white teachers. The judge called for the adoption of a desegregation plan that involved busing 13,300 additional children at an initial start-up cost of over $1 million.

The Supreme Court upheld the district court's plans. Just as in *Brown II,* it gave school

that U.S. education has historically worked to ensure a society in which class hierarchy is minimized and social mobility—both upward and downward—is maximized. Busing, they argue, will therefore help avoid the creation of a permanent underclass in the United States.

Supporters of busing also maintain that it is an affordable way to achieve school desegregation. While admitting that the initial start-up costs of a busing program can be large, they point to statistics that indicate the operating costs of compulsory busing are generally less than five percent of a school district's entire budget.

Those who oppose busing make a variety of different points against it, although they do not necessarily oppose integration itself. Opponents claim that busing serves as a distraction from more important educational goals such as quality of instruction. Busing, they hold, too easily becomes a case of form over substance, in which the form of racial integration of education becomes of greater value than the substance of what is actually taught in schools. Critics of busing would rather focus on the environment in a school and in its classrooms than on achieving a particular number of each race in a school. Justice **LEWIS F. POWELL JR.** echoed these sentiments in an opinion to a school desegregation case, *Keyes v. Denver School District,* 413 U.S. 189, 93 S. Ct. 2686, 37 L. Ed. 2d 548 (1973). In *Keyes,* he wrote that in an era of declining student achievement, it is wrong to turn the attention of communities "from the paramount goal of quality in education to a perennially divisive debate over who is to be transported where."

Critics also claim that busing causes white flight—where whites move their children from integrated public schools to private and suburban schools that are largely white—which results in an even greater disparity between white and black, rich and poor. According to this scenario, busing only exacerbates the current situation, making public schools and cities even more the exclusive province of the poor.

Some noted experts on the issue of busing have concluded that although they favor a society that is racially integrated, the social costs of busing and the resulting white flight are too high. Others have sought a middle ground on the issue by arguing that judges should choose carefully the districts in which they decide to implement busing. For example, they claim that white flight is more likely to occur in communities and schools where whites form a small minority, and that as a result, busing has higher social costs in such districts.

Another prominent complaint in the anti-busing opinion is that court-ordered busing programs represent an abuse of judicial power. According to this view, busing is an example of undesirable judicial activism. The large-scale social changes caused by transporting thousands of children many miles each day should be imposed only by an elected body of representatives such as a state legislature or Congress. Moreover, adherents of this view argue that supervising school desegregation programs only bogs down the courts and takes time away from other pressing legal matters.

Critics of busing also point out that many times, the same court that requires busing does not provide guidance as to funding it, thereby creating financial headaches for school districts. Related to this issue is the claim that busing is too costly, especially when school districts are forced to purchase new buses in order to start a busing program. In financially strapped school districts, spending on busing sometimes takes away funding for other educational priorities.

Some of those who oppose busing favor racial desegregation but do not view busing as a good way to achieve that goal. Instead, they support a gradualist approach to social reform. According to the gradualist view, it will take generations to achieve the goal of racial desegregation in education and in society as a whole. Busing only interferes with the overall goal of integration, because of the sudden and disruptive changes—including white flight—that it imposes on society.

Others oppose busing on the ground that neighborhood schools are the best way to educate children. In this camp are both those in favor of racial integration in education and those against it. Neighborhood schools, it is argued, allow par-

*(continued)*

authorities and district judges primary responsibility for school desegregation. This time, however, the Court provided more guidance. To create desegregated schools, it encouraged faculty reassignment; the redrawing of school attendance zones; and an optional, publicly funded transfer program for minority students. Most important, the Court recommended mandatory busing to achieve desegregation. It did note that busing could be excessive when it involved especially great distances. It also hinted at an end to court-imposed desegregation plans, saying, "Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies" (*Brown II*). In Court decisions decades later, these words would be cited in support of ending court-supervised school desegregation programs.

As a result of *Swann,* throughout the 1970s, courts ordered busing to achieve desegregation in many city school districts, including Boston, Cleveland, Indianapolis, and Los Angeles. However, *Swann* was one of the last desegregation opinions in which all nine justices were in complete agreement. The Court's unanimity on the issue of school desegregation, which had been the rule in every decision since *Brown,* broke

## The Busing Debate (continued)

ents to have a greater influence on their child's education by making it easier, for example, to visit the school and speak with a teacher. Such schools also give children a sense of identity and instill pride in their community. Busing children to a school across town, they argue, will not inspire pride in their school. Advocates of neighborhood schools also point to statistics that indicate that bused students are more alienated from their school and thus experience greater problems, including poorer academic performance and increased delinquency.

An even more fundamental question related to busing is whether racial integration is in itself a valuable goal for public schools. Those who take opposite sides on this question marshal different sociological evidence. In the 1950s and 1960s the Supreme Court was influenced by the "contact" theory of racial integration. According to this theory, the better one knows those of another race, the more one is able to get along with them. Sociologists reasoned, therefore, that integrated schools would increase understanding between the races and lower racial tensions.

In the same years, many studies claimed to show that racial integration would boost the self-esteem, academic achievement, and ultimately opportunities and choices of members of minorities. For example, a well-known report issued by sociologist James S. Coleman in 1966, *Equality of Educational Opportunity,* concluded that minority children improve their academic performance when they attend classes where middle-class white pupils are the majority. Coleman's report also claimed that the most important indicator of the academic performance of minority and lower-class students is the educational level of their classmates. The report was seized upon by many as a reason to institute court-imposed busing plans for school districts.

By the 1970s and later, other sociologists challenged the liberal theories that school desegregation would lead to greater racial harmony and improved academic performance by African Americans. Coleman, too, became more skeptical about busing and argued that voluntary programs were more effective than government-imposed plans in achieving school desegregation. Others went so far as to claim that integration only increases hostility and tensions between the races. African–American students who are bused, they argued, experience a decline in their educational achievement in school. Some studies have in fact shown that students who are bused grow more rather than less hostile toward the other race or races. In addition, some studies have indicated that in many schools where the desired percentages of races have been achieved through busing, students interact largely with those of their own race and thus segregation *within* the school prevents true desegregation.

By 2003 the anti-busing viewpoint appeared to have prevailed. During the 1990s federal courts released many school districts from supervision by declaring these districts free of the taint of state-imposed segregation. The 1999 release of the Charlotte-Mecklenburg district from court supervision was a symbolic moment, marking the end of an almost 30 year experiment in which the courts used busing to attempt the desegregation of public schools. That same year the Boston public schools, which had endured years of conflict over busing, ended race-based admissions and its busing program. Even cities such as Seattle, which voluntarily adopted a busing program in the 1970s, abandoned the practice in 1999.

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Civil Rights Movement.

down in the next major case, *Milliken v. Bradley,* 418 U.S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974).

*Milliken* shifted the scene of school desegregation from the South to the North—specifically, to Detroit. In *Milliken,* the Supreme Court addressed the issue of whether courts could bus suburban pupils to desegregate inner-city schools. The case dealt with federal district judge Stephen Roth's decision to join the Detroit School District with 53 of the city's 85 outlying suburbs in a desegregation decree. The proposed plan would have created a metropolitan school district with 780,000 students, of which 310,000 would be bused daily to achieve desegregation goals. The shocked white community, much like others in the South, and its elected representatives denounced the plan.

Detroit reflected the situation of many U.S. cities. Although African Americans made up only 23 percent of the city's population in 1970, they constituted 61 percent of its school-age population. Whites were underrepresented in the inner-city public schools for various reasons. Young white married couples, who constituted the demographic group most likely to have school-age children, were also the most likely to move to the suburbs. The whites who did live in

the cities tended to be older people, singles, and childless couples. Urban whites who did have school-age children often sent them to private schools.

Such a situation caused Judge Roth to ask the question, "How do you desegregate a black city, or a black school system?" (*Milliken*). Busing within city limits alone would still leave many schools 75 to 90 percent black. The only solution was one that took into consideration the entire metropolitan area of Detroit by joining the city school district with the surrounding suburban school districts.

In support of this position, Judge Roth argued that a variety of causes had led to the concentration of blacks in ghettos. Governments, he wrote in his opinion, "at all levels, federal, state and local, have combined, with . . . private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish . . . residential segregation throughout the Detroit metropolitan area" (*Bradley*). Residential segregation had resulted from a whole variety of types of discrimination that caused African Americans and members of other minorities to live in segregated neighborhoods and, as a result, attend segregated schools. Thus, Roth framed his metropolitan school desegregation plan as a remedy for past discriminatory conduct.

Judge Roth's plan promised to promote class as well as racial interaction, complicating still further the issue of desegregation. Mixing of the different classes of U.S. society became as much a goal of desegregation decrees as did mixing of different races. Such a plan, its proponents argued, might also remedy the funding inequities between different school districts and even end white flight.

In 1974, by a vote of 5–4, the Supreme Court ruled in *Milliken* that Judge Roth had wrongly included the suburbs with the city in his desegregation decree. The district court's plan, the Court held, could only be justified if de jure segregation existed in outlying suburbs; remedies to past discriminatory conduct must be limited to Detroit, since it was the only district that had such policies. Disagreeing with Roth, the Court also held that state housing practices were not relevant to the case. Writing the Court's opinion, Chief Justice WARREN E. BURGER argued for local control of school districts, over court control: "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process."

*Based on the Court's decision in* Swann, *courts ordered busing in many city school districts to achieve desegregation during the 1970s. Here, a policeman stands guard as African American students board a bus outside South Boston High School in September 1974.*

AP/WIDE WORLD PHOTOS

Many saw the *Milliken* decision as the first Supreme Court defeat for the cause of school desegregation. Some, including Justice Marshall, the first African American to sit on the Court, interpreted *Milliken* as an abandonment of the cause of racial justice. "Today's holding, . . ." Marshall wrote in his dissenting opinion, "is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law." Supporters of the decision, on the other hand, pointed to the myriad potential problems a plan like Roth's might impose, including greater bureaucratic red tape, more white flight, and even greater racial tensions.

### The 1980s and After

In the 1980s, the attitude of the public and of the courts toward activist school desegregation programs—and toward other forms of affirmative action, for that matter—became more skeptical and sometimes even hostile. Courts began to require that busing, for example, be used as a remedy only in school districts where there had been "deliberate" or "intentional" segregation. A large busing program that had been begun in

Los Angeles in 1978 was ended in 1981 through a statewide REFERENDUM that banned compulsory busing except in districts where there had been deliberate segregation. By the late 1980s and 1990s, the Supreme Court, now having the influence of more conservative justices appointed by Republican presidents RONALD REAGAN and GEORGE H. W. BUSH, established that court-ordered desegregation decrees, including busing plans, could end short of specific statistical goals of integration when everything "practicable" had been done to eliminate the vestiges of past discrimination.

Two court decisions in the early 1990s—*Board of Education v. Dowell,* 498 U.S. 237, 111 S. Ct. 630, 112 L. Ed. 2d 715 (1991), which dealt with the Oklahoma City School District, and *Freeman v. Pitts,* 503 U.S. 467, 112 S. Ct. 1430, 118 L. Ed. 2d 108 (1992), which covered the schools of DeKalb County, Georgia—addressed the manner in which court supervision of school districts and their desegregation programs might end. In *Freeman,* the Court identified three factors that may be used in such determinations: (1) whether the school system has complied with the desegregation decree's provisions, (2) whether continued judicial control is necessary or practicable to achieve compliance with any aspect of the decree, and (3) whether the school system has demonstrated to the once-disfavored race its GOOD FAITH commitment to the whole of the decree. Ultimately, the school system must be held to have engaged in a good faith effort to comply with any judicially supervised desegregation program, and to have eliminated to the extent practicable any vestiges of discrimination. *Freeman* also established that courts may end desegregation decrees in incremental stages, gradually returning administrative functions and decisions to local authorities.

In another case—*Missouri v. Jenkins,* 515 U.S. 70, 115 S. Ct. 2038, 132 L. Ed. 2d 63 (1995), which dealt with the Kansas City (Missouri) School District—the Court stopped just short of ending judicial supervision of desegregation programs. However, the decision did strike down two requirements imposed by a district court on the state of Missouri, declaring them outside that court's authority. Those two requirements would have attempted to improve the "desegregative attractiveness"—in this case, the ability to attract white students from the suburban school districts—of the school district by requiring the state to fund salary increases for all staff in the school district, as well as "quality education" programs, including magnet schools. Such "interdistrict" remedies, the Court held, are beyond the scope of the district court. The Court, citing *Milliken,* disagreed with the contention that white flight justifies an interdistrict remedy to segregation. The Court also rejected student test scores as evidence for determining whether a school district has adequately responded to judicial desegregation decrees.

Those who supported these decisions saw them as returning to local authorities their proper control over their schools. They also saw these decisions as guiding the courts back to a more proper and limited social role. The courts, they argued, should not be engaged in programs of "social engineering." Others, both black and white, simply abandoned desegregation as a goal and instead focused on improving neighborhood schools, even when those schools remain largely segregated.

Critics of these decisions have seen them as a step backward for the CIVIL RIGHTS of minorities in the United States. Such decisions, they argued, merely perpetuated racism by returning school districts to those who often do not share the goal of creating racially integrated public schools. Others have argued that the changing pattern in the judicial response to desegregation has been caused by the legal system's exhaustion and impatience in the face of complex and protracted desegregation plans. Accustomed to seeing more rapid results, district courts, according to this argument, have been eager to return the control of school districts to local authorities.

Others have argued that the Supreme Court decisions on school desegregation have ignored the effect of discriminatory housing patterns. They have maintained that without a change in segregated housing patterns, desegregation, whether in schools or in the larger society, cannot be achieved. They claim that by ignoring housing as an issue, the Supreme Court enabled white America to escape its responsibilities in creating the urban ghetto.

Still others have argued that school desegregation can yet be achieved through the court system, maintaining that social change of the kind required for true desegregation will take many years. In the mid-1990s, organizations such as the AMERICAN CIVIL LIBERTIES UNION began to focus on making the case for school desegregation on the state rather than federal level. Some state constitutions, they pointed out,

contain language more conducive to their cause. Connecticut's constitution, for example, declares that no person "shall . . . be subjected to segregation" (Conn. Const. art. 1, § 20), and Minnesota's requires that all students be given an adequate education. Lawsuits based on state constitutions have met with mixed success, prevailing in Connecticut but failing in Minnesota.

By 2003 most school districts had been released from federal court supervision. In addition, school districts had abandoned busing to achieve desegregation. The Minneapolis, Minnesota school district, which has a predominantly non-white student population, dropped busing in the late 1990s, opting instead to emphasize strong neighborhood schools. The Charlotte-Mecklenburg school district, which was at the center of the school busing controversy, ended its busing program after a federal judge ended supervision in 1999. School desegregation has not been the panacea that it was claimed to be in the heady days of *Brown.* Though significant success in integration has been achieved, as of 2003 there was little evidence that comprehensive school desegregation would come any time soon.

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**CROSS-REFERENCES**

Civil Rights Movement; Equal Protection; Schools and School Districts.

## SCHOOL PRAYER

See **ENGEL V. VITALE; RELIGION.**

## SCHOOLS AND SCHOOL DISTRICTS

School districts are quasi-municipal corporations created and organized by state legislatures and charged with the administration of public schools within the state. A quasi-municipal corporation is a political body created for the sole purpose of performing one public function. States divide up their school systems into districts because localized administration and policy making are more efficient and more responsive to community needs than one state-level bureaucracy.

A school district encompasses a specific geographical area with defined boundaries. In most areas, the head of the school district is called the superintendent. Each school district contains at least one school. Typically, a school district includes primary schools, also called grade schools, middle or junior high schools, and high schools. A school district's boundaries may be the same as the boundaries of a city. Multiple school districts may exist within larger cities, and in rural areas, a school district may encompass several towns.

Each state has numerous laws pertaining to public schools and school districts, but state statutes do not cover every educational concern. State legislatures delegate many aspects of public education to school districts. School districts have the power to fashion curricula and make rules and regulations that apply to the schools, school employees, and students within the district. School districts also have power over such matters as arranging for the construction and maintenance of educational buildings and facilities in the district. School districts may, in turn, delegate some of their powers to individual schools.

State and federal revenues pay for only about half of all educational costs. The rest of the burden for construction, maintenance, and improvement of school facilities, salaries, and other educational costs is borne by local government. Most states give school districts the power to levy local taxes for educational purposes. This taxing power is limited by the state legislature. If a school district wants to raise taxes beyond what the legislature allows, it may seek approval from the voters in the district in a **REFERENDUM** or proposition vote.

Most state legislatures require that school districts be governed by a school board, board of education, or similar body. School boards govern the school district's actions and can also take action on their own. School boards appoint

# Private School Vouchers: Church vs. State

The specifics of school tuition voucher systems vary from program to program, but generally such systems offer parents of schoolchildren a tax-funded voucher that is redeemable at the educational institution of their choice. The vouchers are issued yearly or at some other regular interval, and they pay for a certain amount of tuition fees each year at nonpublic and alternative charter schools. The most controversial programs allow parents to use the publicly funded vouchers to pay tuition at a sectarian, or religious, school.

Private school vouchers implicate at least two provisions in the U.S. Constitution: the Establishment and Free Exercise of Religion Clauses in the **FIRST AMENDMENT**. According to the U.S. Supreme Court, the Establishment Clause prohibits the federal government and the states from setting up a religious place of worship, passing laws that aid religion, and giving preference to one religion or forcing belief or disbelief in any religion (*Everson v. Board of Education,* 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 [1947]). Private school vouchers have been challenged under the Establishment Clause because they involve a form of governmental support that may be used for religious-oriented activities.

Critics of private school vouchers have charged that taxpayer support for religious schools is a patent violation of the Establishment Clause. Critics also note that because vouchers do not cover the entire amount of tuition at a private school, the option of private school remains out of reach for the lowest-income students. Opponents of private school vouchers further claim that vouchers rob public schools of funds because funding is based in part on student enrollment. Finally, critics maintain that vouchers implicate other constitutional provisions, such as the **EQUAL PROTECTION CLAUSE** of the **FOURTEENTH AMENDMENT**, because they provide taxpayer funds to institutions that may discriminate on the basis of race, religion, disability, or socioeconomic status.

Supporters of private school vouchers have argued that voucher systems are actually protected by the First Amendment. According to advocates, the First Amendment, with its guarantee of the free exercise of religion, protects vouchers because they give devoutly religious parents the same rights as less devout parents: public funding for the education of their children. In this view, educational systems without private school vouchers violate the First Amendment by discouraging religion and placing devout parents at a disadvantage. Supporters contend that vouchers merely provide some balance of rights between devoutly religious parents and less devout or nonreligious parents.

Other supporters of private school vouchers focus on the aspect of choice. Whereas public schools are increasingly perceived as inadequate and dangerous, private schools are viewed by many as offering safe, high-quality education. In response to these perceptions, legislators have offered private school vouchers as a means of escape from public schools. Supporters of private school vouchers assert that they offer potential benefits for impoverished children. Under some proposals, private school vouchers would give a limited number of low-income families another choice for their children's schooling.

Proponents of private school vouchers cite such intellectual stalwarts as **JOHN STUART MILL**, **THOMAS PAINE**, and Adam Smith as early advocates of school vouchers. Mill, Paine, and Smith did in fact argue that the fairest and most efficient way to fund public education would be to give parents money that they could spend on tuition at a school of their choice. Detractors counter that these views received no attention until 1955, the year after the Supreme Court outlawed racial **SEGREGATION** in public schools in **BROWN V. BOARD OF EDUCATION OF TOPEKA,** 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). According

superintendents, review important decisions made by the district's administrators, and fashion educational policies for the district. Most school boards are comprised of several members elected by voters who live within the boundaries of the district. In some states, school board members may be appointed by a state or local governing body or a designated government official.

School boards hold regular meetings that are open to the public. A school board must give notice to the public prior to the meeting. Notice generally is given through mailings or by publishing the time and place of the meeting in local newspapers. School board meetings give the public an opportunity to express opinions on educational policy.

State statutes set forth minimum qualifications for public school teachers. Most states require full-time teachers to have a four-year degree from a college or university and to have completed a student teaching program. States

to many voucher opponents, the real driving force behind private school vouchers is an effort to facilitate the flight of white persons from city schools that have large nonwhite student populations.

Proposals for private school voucher systems have been rejected by courts and defeated at the polls, but voucher advocates have been unrelenting. In 1998, in an 8–1 ruling, the U.S. Supreme Court refused to hear a challenge to the Wisconsin school voucher system, which was upheld as constitutional by the Wisconsin Supreme Court in *Jackson v. Benson,* 218 Wis. 2d 835, 578 N.W.2d 602 (1998). While the Court's action set no national legal precedent, it signaled a willingness by the Court to permit vouchers.

Wisconsin had been using a voucher system since 1989, but, in 1995, the Wisconsin legislature amended the law. The original voucher plan allowed up to 1.5 percent of Milwaukee public school students to attend any private nonsectarian school of their choice. The new program allowed use of the vouchers for enrollment in sectarian private schools, and it increased allowable student enrollment to 15 percent. But most significant was the mandate that monies would no longer be paid directly to the chosen schools. Instead, a state check would be paid to the student's parent or guardian, who would endorse the check and forward it to the school of choice. Opponents challenged the new law, claiming that it violated the Establishment Clause. The Wisconsin Supreme Court disagreed. It concluded that the statute did not promote religion, but rather provided parents with a "religious-neutral benefit."

The U.S. Supreme Court took up vouchers again in *Zelman v. Simmons-Harris,* 536 U.S. 639, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002). The Court, in a 5–4 decision, upheld the constitutionality of a voucher program established for Cleveland, Ohio. The voucher program pays scholarships based on family income, with a maximum annual payment of $2,250 per child. The parents are sent a check which may be used to pay tuition at private and parochial schools. For the 1999–2000 school year, approximately 3,700 children enrolled in the program, with 60 percent of the children from families at or below the poverty level. Of the 56 schools that participated, 46 were church-affiliated and actively taught Christian doctrines; 96 percent of the scholarship students attended the religious schools. The curriculum of these schools intertwined religious beliefs and secular topics.

After a parent filed suit in federal court challenging the law, the district court ruled the voucher program unconstitutional. The Sixth Circuit Court of Appeals upheld this decision, basing its ruling on a 1973 Supreme Court decision, *Committee for Public Education v. Nyquist*, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973). The Court in *Nyquist* struck down a New York tuition reimbursement plan that provided low-income parents with partial reimbursement for sending their children to private elementary and secondary schools only.

The Supreme Court overturned the Sixth Circuit decision. Chief Justice **WILLIAM REHNQUIST**, in his majority opinion, ruled that the program did not violate the Establishment Clause. Rehnquist stated that the "program is entirely neutral with respect to religion" because "it provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district." The law "permits such individuals to exercise genuine choice among options, public and private, secular and religious."

Proponents of vouchers saw *Zelman* as a major victory. They believed that the decision cleared the way for similar voucher programs throughout the United States. Opponents reiterated their concerns that voucher programs would take away public education dollars from school systems and divert them to private schools. As of 2003, only a handful of states had enacted some type of school voucher program. A number of states, however, including Louisiana, Texas, and Colorado, had legislation in the pipeline.

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may add other prerequisites, such as physical and psychological examinations and drug tests. Upon completing all the prerequisites, a teacher may obtain the license or permit necessary to teach in a particular state.

States require public school teachers to complete a probationary period before they receive tenure. In the context of employment, tenure is a status that carries with it certain rights and protections, the most important of which is the protection from summary dismissal. A teacher who has gained tenure status may not be terminated from a teaching position without the benefit of a lengthy procedure. The termination process may include a detailed account of reasons for the termination, an opportunity for the teacher to correct any problems, a hearing with school district administrators, review and judgment by school district administrators, and, finally, a meeting with the school board, which votes on whether the teacher should be dismissed. Teachers who have not attained tenure

**Pupil-Teacher Ratios for Public Schools, 1999–2000**

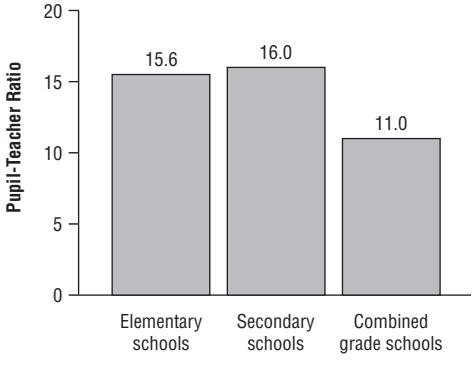


SOURCE: U.S. National Center for Education Statistics, *Schools and Staffing Survey, 1999-2000: Overview of the Data for Public, Private, Public Charter, and Bureau of Indian Affairs Elementary and Secondary Schools*.

have no recourse for a firing. In any case, a public school teacher can only be terminated for cause, or some substantial, articulable reason.

A teaching license may be revoked if the teacher engages in conduct that demonstrates unfitness to teach. The prohibited conduct varies with different states, school districts, and school boards. A criminal conviction that involves moral turpitude, such as a conviction for theft, dishonesty, or sexual assault, generally is a valid ground for revocation of a teaching license.

Schools and school districts have a great deal of control over public school students. Rules and regulations can vary from school to school and range from restrictions on appearance and hair length to prohibitions on electronic transmission devices, or beepers. Schools may not implement unreasonable rules, however. Before a student can be suspended from school for a lengthy time period, the school must give the student notice of the intent to suspend and an opportunity to be heard by school officials. Students may not be forced to pray in school or to pledge allegiance to the U.S. flag. Teachers may inflict CORPORAL PUNISHMENT to control, train, or educate a student but may use only such force as is necessary for those purposes. The amount of force that is permissible varies according to the situation, with careful consideration given to the student's age and maturity. A teacher may use more force on an older, physically mature high school student than on a younger, less mature student. Despite the general acceptance by the courts of some measure of corporal punishment, the threat of litigation makes corporal punishment a potentially risky behavior.

Beginning in the 1990s, school boards adopted ZERO TOLERANCE polices towards drugs and weapons on school grounds. Violations of zero tolerance policies typically lead to suspension or expulsion from the school. The federal Drug Free School Act and Gun Free School Act require the expulsion and arrest of students who bring illegal drugs and firearms to school. At the heart of these policies and laws is the desire to protect students and teachers and to prevent illegal activities from taking place on school district property.

However, school districts have broadened zero tolerance to include an array of infractions, including the wearing of clothing associated with GANGS and threats directed at other persons. Zero tolerance policies have attracted critics, who contend that overly rigid interpretations of the rules, coupled with severe punishments, can lead to disproportionate results. In 2001, the AMERICAN BAR ASSOCIATION (ABA) issued a statement in which it criticized zero tolerance rules for failing to take into account the individual circumstances of each case or the individual student's history. The ABA called for the end of such rigid policies. Nevertheless, the courts generally support school district zero tolerance policies, especially when drugs or weapons are the issue.

School districts have the right to require students to take drug tests if they wish to participate in athletic and extracurricular activities. The Supreme Court, in *Board of Education, Pottawatomie County v. Earls,* 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002), concluded that the drug-testing program was reasonable under the FOURTH AMENDMENT because it furthered the school district's "important interest in preventing and deterring drug use among its schoolchildren." Moreover, the Court found that violation of student privacy interests was minimal.

School districts are also not bound by rigid rules of privacy when it comes to having students grade each others papers and tests. The Supreme Court, in *Owasso Independent School District No. I-011 v. Falvo,* 534 U.S. 426, 122 S.Ct. 934, 151 L.Ed.2d 896 (2002), reviewed the scope of the federal Family Educational Rights and Privacy

# Charter Schools: The Educational Petri Dish

Most families think that they have only three choices for the education of their school-age children: a sectarian school or other form of private school that charges tuition, a free public school, or home schooling. In many states there is a fourth option: a charter school. Charter schools do not have a religious agenda and are free of cost, but they differ from the typical public school. Although charter schools are governed by the public school district in which they are located, they are free of many of the constraints imposed on other public schools in the district.

Charter schools are created to be innovative and experimental in nature and to serve as models for future changes in ordinary public schools. The classes offered by charter schools may differ in substance from classes in public schools, and the teachers may use new, alternative approaches to education. Charter schools represent an opportunity to experience a form of experimental, alternative schooling that was previously open only to students who could afford alternative private schools or who could be educated at home. Parents also like charter schools because they have a say in the school's administration.

Charter schools usually are run by a board comprised of the teachers in the school and a few of the students' parents. The board makes its own decisions on-site. Unlike other public schools, a charter school does not have to seek approval from the school district or school board before it can take action. To teach English literature, for example, the teachers at a charter school might discard the traditional texts prescribed for other public schools and assign only contemporary poetry. They might even decide that their students should study poetry by attending open poetry readings or by setting up their own regular poetry readings.

The first charter school legislation was passed in Minnesota in 1991 (Minn. Stat. Ann. §§ 120.064, 124.248 [West 1996]). Since 1991 approximately half of the states have enacted some form of charter school legislation. The details vary, but the programs share the basic goal of creating a limited number of schools where teachers may experiment with a variety of learning techniques. The schools have a high degree of independence, but they are all results oriented. Thus, each school must show a state or local governmental education agency that its students are making satisfactory progress. A state may, for example, require that students in charter schools pass a yearly achievement test to prove that they are receiving a well-rounded education.

By virtue of their experimental nature, charter schools are highly individualistic. Some schools focus on a particular area of study, such as computers, the environment, the arts, or aeronautics. A school that emphasizes computers, for instance, will have a large number of personal computers and many teachers who specialize in computer education. Other schools are designed for certain types of students, such as teenage students who have dropped out before earning their high school degree.

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Act of 1974 (FERPA) 20 U.S.C.A. § 1232 (g), which regulates the release of student education records. The Court rejected the claim that peer grading violated FERPA. To rule otherwise would "force all instructors to take time, which otherwise could be spent teaching and in preparation, to correct an assortment of daily student assignments." The Court concluded that Congress would never have meant to "intervene in this drastic fashion with traditional state functions."

A school board has power only over the public schools within its school district. Private schools must comply with generally applicable federal, state, and local laws, but they are privately owned and operated and are not obligated to follow the rules and regulations of the school

**Enrollment in Public and Private Schools, 1969 to 1999**

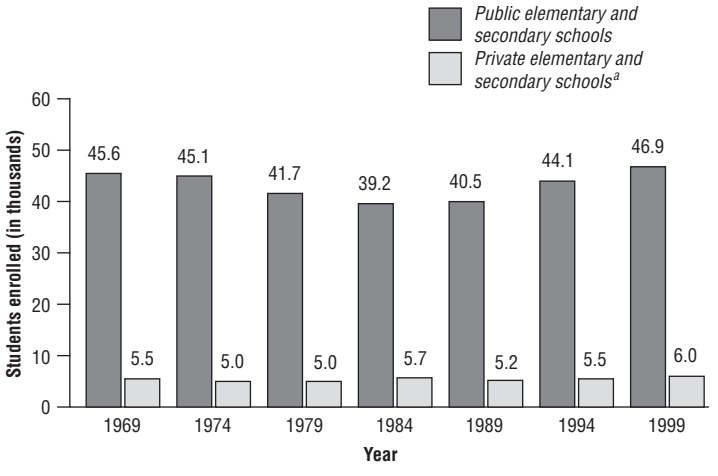


[a]All private school numbers are estimates. Beginning in fall 1980, data include estimates for an expanded universe of private schools. Therefore, these totals may differ from figures shown in other tables, and direct comparisons with earlier years should be avoided.

SOURCE: U.S. National Center for Education Statistics, *Schools and Staffing Survey, 1999-2000: Overview of the Data for Public, Private, Public Charter, and Bureau of Indian Affairs Elementary and Secondary Schools*.

district in which they are located. Private schools are not governed by the U.S. Constitution and state constitutions in the same way that public schools are. Constitutions are designed mainly to protect persons from the actions of government. Public schools are funded by governments and so must answer to constitutions, but private schools are not funded by public monies, so their actions are not deemed governmental in nature.

Public school districts have little involvement with private schools for another reason: the Establishment Clause of the FIRST AMENDMENT. Under the Establishment Clause, Congress may not make any laws respecting the establishment of, or prohibiting the free exercise of, religion. The Establishment Clause has been made applicable to the states by the U.S. Supreme Court, which has interpreted the clause to mean that public schools should be free of religious influences. This does not mean that public schools can have no connection with private schools. In many school districts, public schools share buses and textbooks with private schools, and these arrangements have not been declared unconstitutional. In 1997, in AGOSTINI V. FELTON, 521U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391, the Supreme Court reversed its decisions in *Aguilar v. Felton,* 473 U.S. 402, 105 S. Ct. 3232, 87 L. Ed. 2d 290 (1985) and *School District of the City of Grand Rapids v. Ball,* 473 U.S. 373, 105 S. Ct. 3216, 87 L. Ed. 2d 267 (1985), and held that a public school teacher may teach disadvantaged students in a private school classroom if the legislation authorizing such activity contains safeguards that prevent the teacher from advancing religion.

Many states have set up programs that challenge the limits of the Establishment Clause. Voucher programs are an example of education-related legislative experimentation with the Establishment Clause. Under a voucher program, the state provides taxpayer money to parents and guardians of public school students to be used to send the students to religious or private schools. The Supreme Court, in *Zelman v. Simmons-Harris,* 536 U.S. 639, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002), upheld the constitutionality of an Ohio program that provided low-income Cleveland parents tax-supported VOUCHERS worth $2,250 per pupil, which they could use to transfer a child to a participating private school of the family's choice. The Court stated that "Cleveland's pilot program permits individuals to exercise genuine choice among options public and private, secular and religious." The decision cleared the way for other states to adopt voucher programs.

School districts do not have power over sectarian private schools, but they do have authority over home schools. Home schooling is a form of education provided by parents or guardians.

Schools and school districts continually adapt their policies, rules, and regulations to keep pace with societal changes and to meet the needs of students and the community. Curricula, grades, attendance requirements, and age standards vary from district to district and even from school to school.

The federal government imposed new requirements on local school districts when it enacted the No Child Left Behind Act of 2001 (NCLB). The act, which was proposed by President GEORGE W. BUSH, contained sweeping reforms for the U.S. public school system and was centered on four basic principles: increased accountability by school districts, increased flexibility and local control, expanded options for parents, and an emphasis on proven teaching methods. States must develop learning standards for students and must institute annual testing to ensure that the standards have been

met. Schools that fail to perform up to expectations are to be held accountable. States that do not comply with the act risk the loss of federal aid. The NCLB, though only in its infancy, promised major changes for public education.

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## SCIENTER

[Latin, Knowingly.] *Guilty knowledge that is sufficient to charge a person with the consequences of his or her acts.*

The term *scienter* refers to a state of mind often required to hold a person legally accountable for her acts. The term often is used interchangeably with MENS REA, which describes criminal intent, but *scienter* has a broader application because it also describes knowledge required to assign liability in many civil cases.

*Scienter* denotes a level of intent on the part of the defendant. In *Ernst and Ernst v. Hochfelder,* 425 U.S. 185, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976), the U.S. Supreme Court described *scienter* as "a mental state embracing intent to deceive, manipulate, or defraud." The definition in *Ernst* was fashioned in the context of a financial dispute, but it illustrates the sort of guilty knowledge that constitutes *scienter.*

*Scienter* is relevant to the pleadings in a case. Plaintiffs and prosecutors alike must include in their pleadings allegations that the defendant acted with some knowledge of wrongdoing or guilt. If a legislative body passes a law that has punitive sanctions or harsh civil sanctions, it normally includes a provision stating that a person must act willfully, knowingly, intentionally, or recklessly, or it provides similar *scienter* requirement. Legislative bodies do not, however, always refer to *scienter* in statutes.

In the *Ernst* case, the investors in a brokerage firm brought suit against an accounting firm after the principal investor committed suicide and left a note revealing that the brokerage firm was a scam. The investors brought suit for damages against the brokerage firm's accounting firm under sections 10(b) and 10b-5 of the Securities Exchange Act of 1934 (15 U.S.C.A. § 78a et seq.), which makes it unlawful for any person to engage in various financial transgressions, such as employing any device, scheme, or artifice to defraud, or engaging in any act, practice, or course of business that operates as a FRAUD or deceit upon any person in connection with the purchase or sale of any security.

Significantly, the Securities Exchange Act does not mention any standard for intent. The courts had to decide whether a party could make a claim under the act against a person without alleging that the person acted intentionally, knowingly, or willfully.

The investors in *Ernst* did not allege that the accounting firm had an intent to defraud the investors. Rather, they alleged only that the accounting firm had been negligent in its accounting and that the NEGLIGENCE constituted a violation of the Securities Exchange Act. The Supreme Court ruled that an allegation of negligent conduct alone is insufficient to prove a violation of the Securities Exchange Act. According to the Court, the language in the act reflected a congressional intent to require plaintiffs to prove *scienter* on the part of the defendant to establish a claim under the act.

Most courts hold that reckless conduct may also constitute *scienter.* The definition of *reckless* includes conduct that reasonable persons know is unsafe or illegal. Thus, even if a defendant did not have actual knowledge that his behavior was criminal, *scienter* may be implied by his reckless actions.

In some cases the level of *scienter* required to find a defendant liable or culpable may fluctuate. In *Metge v. Baehler,* 762 F.2d 621 (1985), a group of investors brought suit against a bank, alleging that the bank had aided and abetted a

securities fraud operation. To establish a defendant's liability for aiding and abetting a securities fraud transaction, the plaintiff must prove that there was a SECURITIES LAW violation, that the defendant knew about the violation, and that the defendant substantially assisted in the violation. In sending the case back to the trial court, the U.S. Court of Appeals for the Eighth Circuit stated that in a case alleging aiding and abetting, more *scienter* is required if the plaintiff has little proof that the defendant substantially assisted in the violation. The court noted that the bank seemed blameworthy only because it failed to act on possible suspicions of impropriety and that the bank had no duty to notify the plaintiffs about the actions of others. In such a case, the court advised that "an alleged aider-abettor should be found liable only if scienter of the high 'conscious intent' variety can be proved. Where some special duty of disclosure exists, then liability should be possible with a lesser degree of scienter."

In some cases or claims, a plaintiff need not prove that the defendant acted with any *scienter.* These cases or claims are based on STRICT LIABILITY statutes, which impose criminal and civil liability without regard to the mental state of the defendant. For example, a statute that prohibits the sale of cigarettes to minors may authorize punishment for such a sale even if the seller attempted to verify the buyer's age and believed that the buyer was not a minor. Courts have held that a legislative body may not authorize severe punishment for strict liability crimes because severe punishment is generally reserved for intentional misconduct, reckless conduct, or grossly negligent conduct.

In *United States v. Wulff,* 758 F.2d 1121 (1985), the U.S. Court of Appeals for the Sixth Circuit declared that the felony provision of the MIGRATORY BIRD TREATY Act, 16 U.S.C.A. § 703 et seq., was unconstitutional because it made the sale of part of a migratory bird a felony without proof of *scienter.* According to the court, eliminating the element of criminal intent in a criminal prosecution violates the DUE PROCESS CLAUSE of the FIFTH AMENDMENT to the U.S. Constitution unless the penalty is relatively small and the conviction does not gravely besmirch the reputation of the defendant. The penalty in the act authorized two years in prison and a $2,000 fine, and the court considered that punishment too onerous to levy against a person who had acted without any *scienter.*

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CROSS-REFERENCES

Aid and Abet.

## SCIENTIFIC EVIDENCE

*Evidence presented in court that is produced from scientific tests or studies.*

Scientific evidence is evidence culled from a scientific procedure that helps the trier of fact understand evidence or determine facts at issue in a judicial proceeding. Under rule 702 of the FEDERAL RULES OF EVIDENCE and similar state court rules of evidence, "a witness qualified as an expert by knowledge, skill, experience, training, or education" may testify and offer opinions in court if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Article VII of the Federal Rules of Evidence contains other rules on EXPERT TESTIMONY and scientific evidence. All states have rules on expert testimony and scientific evidence that are similar to the rules in article VII.

Expert testimony on scientific evidence is different from ordinary testimony from laypersons. A lay witness may testify to inferences and give opinions only if they are rationally based upon the witness's perceptions of the subject of the testimony. Experts, by contrast, may give opinions and testify about possible inferences based in part on information obtained from secondhand sources and not from observation of the object of the testimony. For example, a layperson would not be allowed to take the witness stand and offer an opinion on a plaintiff's injury unless the individual had witnessed relevant information regarding the injury. However, a doctor who is certified as a specialist in the particular injury could take the stand and offer opinions on the injury based not only on an examination of the plaintiff but also on secondhand information that is normally relied on by experts in that particular field of medical study.

One of the most important issues that arises in expert testimony is which scientific procedures a court should accept as evidence. Many scientific procedures are not seriously in dispute and are accepted by courts with little or no inquisition into their validity. Examples include fingerprint tests for purposes of identification, blood tests, breathalyzer tests for alcohol consumption, and ballistics tests of bullets and their impact areas. These scientific procedures are so widely accepted that a court may take JUDICIAL NOTICE of the procedure's validity. Judicial notice means that the parties in the case do not have to present evidence to the court to establish the validity of the scientific procedure. In some instances legislatures have specifically authorized the use of scientific tests, such as breathalyzer tests for suspected drunk drivers.

Whether they are judicially noticed or legislatively mandated, scientific tests that are universally accepted must be presented by a qualified expert. A person is established as a qualified expert before the court through questioning by the attorney who is using the witness as an expert. The attorney asks a series of questions to establish that the witness has adequate education and training to testify as an expert—a process called laying a foundation for the witness. Once the court is convinced that the witness is an expert on the procedure or subject matter that will be presented as evidence, the witness gives an expert opinion to the exact procedures that were used or the factual circumstances that arose in the case at hand. For example, assume that a person sues a doctor for MEDICAL MALPRACTICE, arguing that the defendant failed to set a broken bone properly. If the plaintiff offers a bone specialist as an expert witness on the issues surrounding the care he received from the defendant, the expert witness must testify about the witness's credentials and give details about the plaintiff's treatment.

Some scientific tests and examinations that are not universally accepted are nevertheless generally considered reliable. Some examples are neutron activation analysis to determine the identity of goods, voiceprints to determine a person's identity, and genetic testing or DNA analysis. These types of scientific procedures may be accepted in the medical communities, but they are not so established that they may be judicially noticed as automatically valid sources of scientific evidence. They may be admitted as evidence, but only after an expert witness has testified to the validity of the test. In determining whether to admit scientific evidence from procedures that are not universally accepted, a court must ask whether the test is reliable. A technique's reliability depends on a number of factors, including whether the technique can be or has been tested, whether it has been subjected to peer review, whether the test procedures have been published, whether the test has a margin of error and, if so, at what rate, and whether the technique, as applied, conformed to existing standards for the test (*Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 [1993]).

In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) the U.S. Supreme Court ruled that the *Daubert* standards govern not just the admissibility of scientific evidence in federal court, but should be applied to all witnesses seeking federal court approval to testify as an expert. Thus, the Supreme Court found that a purported expert on tire failure was subject to a *Daubert* inquiry before he could be permitted to testify on the subject in a products liability trial, even if some of his proffered testimony was not wholly "scientific." The lower court had attempted to draw a distinction between *scientific* expert for which the *Daubert* standards did apply and a *technical* expert for which the *Daubert* standards did not apply. By expanding the DAUBERT TEST, the Court reemphasized the trial court's broad discretion in matters of expert testimony.

In some instances courts are reluctant to admit certain scientific evidence because the procedures yield results that are not considered sufficiently reliable to be used as evidence. Such procedures include POLYGRAPH and chemical tests that have been created to determine whether a person is telling the truth. If all parties agree that testimony derived from such procedures shall be admissible, however, a court is free to allow the evidence to be introduced.

In any case, regardless of the level of acceptance of a particular scientific procedure, the scientific evidence presented must be relevant to the issue at hand. Furthermore, the scientific evidence must have been obtained in a manner that is consistent with the way such evidence is normally obtained. For instance, assume that a physicist intends to testify to the speed of the defendant's vehicle in a personal injury case stemming from a car accident. If the physicist used different methods from those used by other

physicists in determining a vehicle's speed, the court may refuse to allow the physicist to testify as to the vehicle's speed.

An expert witness giving testimony on scientific evidence may offer opinions on issues related to that evidence. An expert witness may also give an opinion on the ultimate issue in the case. Under rule 704 of the Federal Rules of Evidence, however, an expert witness testifying with respect to the mental state or condition of a criminal defendant may not state "an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." This rule, which is applied by courts only in criminal cases, was approved by the U.S. Congress in 1984, largely in response to the outcome of the criminal prosecution of John Hinckley, who attempted to assassinate President RONALD REAGAN in 1981. Hinckley was charged with attempted assassination, assault on a federal officer, and use of a firearm in the commission of a federal offense, but was found not guilty by reason of insanity after the jury heard testimony from a psychiatrist who declared that Hinckley could not be found guilty because he lacked the knowing mental state required for a conviction on the charges.

The weight given to scientific evidence may vary according to the particular test that yielded the evidence. One party's expert testimony may be convincing, but it may not be dispositive of the case because the other party may have experts from the same field who have studied the same evidence and come to different conclusions. Experts have become indispensable to the vast majority of litigated cases, and many cases, civil and criminal alike, come down to a battle between experts. One notable exception to this trend is the PATERNITY case, in which blood test results or DNA test results can establish the ultimate issue in the case. This is true, however, only if the parties in the paternity case agree that the particular tests will be conclusive and if the tests show that the individual named as the father could not be a parent of the child in question. If the tests show that the individual named as the father could be the parent, the test results will not dispose of the case, and the parties will have to present further evidence.

Courts have the discretion to appoint an expert witness to testify to scientific evidence. Under rule 706 of the Federal Rules of Evidence and similar state court rules of evidence, a court may appoint an expert to present evidence on a particular topic and order compensation for the expert's time and effort. Typically, in a civil case, the parties must apportion the costs as the court directs. In just compensation cases under the FIFTH AMENDMENT and in criminal cases, the court orders payment for the expert out of government funds.

One of the most well-known experts on scientific evidence in the United States is Barry Scheck, a criminal defense lawyer who rose to prominence during the 1995 O.J. SIMPSON murder trial as a member of Simpson's so-called "Dream Team." In 1992 he and fellow Dream-Team member Peter Neufeld opened the National Association of Criminal Defense Lawyers' Innocence Project, a nonprofit legal clinic at the BENJAMIN N. CARDOZO School of Law in New York. Through testing of DNA EVIDENCE, the Innocence Project has helped exonerate 127 wrongly convicted inmates. Scheck, 43, has chronicled the stories of his exonerated clients in books and on the lecture circuit. He also assisted Colorado prosecutors and police officers investigating the Jon-Benet Ramsey murder case.

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CROSS-REFERENCES

Fingerprints; Forensic Science; Insanity Defense.

## SCINTILLA

*A glimmer; a spark; the slightest particle or trace.*

"Scintilla of evidence" is a metaphorical expression describing a very insignificant or trifling item of evidence. The common-law rule provides that if there is any evidence at all in a case, even a mere scintilla, that tends to support a material issue, the case cannot be taken from the jury but must be left to its decision.

## SCIRE FACIAS

[Latin, Made known.] *A judicial writ requiring a defendant to appear in court and prove why an*

*existing judgment should not be executed against him or her.*

In the law, scire facias is a judicial writ that is brought in a case that has already been before a court. *Writ* is the old English term for a judicial order. Some states still use the term. A scire facias writ commands the person against whom it is brought to appear before the court and show why the record should not be resolved in favor of the party who brought the writ.

The scire facias writ originated in England, and its use was adopted by the American colonists. In eighteenth-century England, the writ was used to repeal letters patent. Letters patent were letters written by the king or queen that granted inventors exclusive patent rights over their inventions. Any person who thought a patent was invalid based on false information or the existence of a prior invention could ask the royal Court of Chancery to request the presence of the patent holder to justify the patent. If there was a genuine dispute about the validity of the patent, the patent holder could request a trial before a jury in the Court of King's Bench. The jury resolved any issues of fact, and then the case was sent back to the Chancery. The chancellor made the final judgment on whether to revoke the patent.

The scire facias writ did not survive in patent law. Under modern law, only a person with a case or controversy with respect to a particular patent may challenge the patent. Also, a claim of patent invalidity is not tried before a royal court but a federal patent court. However, the issue of patent validity may be tried before a jury, much like the old scire facias writ.

In modern practice, the writ of scire facias is used in the enforcement and collection of judgments. When a plaintiff in a civil case obtains a money judgment against a defendant, the court order to pay the judgment may expire after a certain number of years if the judgment remains unpaid. State and federal laws allow the plaintiff to make a motion to the court before the time period expires to continue the effect of the court's order. If the plaintiff fails to make such a motion, she may file a writ of scire facias to revive the judgment. The defendant would then have to appear before the court and explain why the judgment should not be revived. If the defendant has already paid the plaintiff, or if the defendant has evidence that he owes the plaintiff nothing, the defendant may present evidence and shift the burden of proof to the plaintiff.

If the defendant is unable to defend his failure to pay the judgment, the court will order execution of the judgment. The court may order the defendant to submit to a financial status examination, to sell property to satisfy the judgment, or to take other measures to satisfy the judgment.

The writ of scire facias has been abolished on the federal level and in most states. Plaintiffs may revive an expired or dormant judgment by filing a civil claim in a court of general jurisdiction and asking for revival of the judgment. The courts that have eliminated the writ have found its complex procedures unsuited to the needs of modern society.

In some jurisdictions that still permit a scire facias writ, the writ has fallen into disuse. In Connecticut, for example, the judicially created creditor's bill has supplanted the writ. This bill creates an equitable remedy for a person who cannot enforce a judgment in a court of law. A court provides an equitable remedy based not on legal authority but on principles of fairness.

States that maintain the scire facias writ require it to be filed within a certain time after expiration of the judgment. In Texas, for example, the Civil Practice and Remedies Code specifies that a scire facias writ may be brought no later than two years after the date that the judgment became dormant (Tex. Civ. Prac. & Rem. Code Ann. § 31.002 [West 1995]).

The term *scire facias* also is used in the law to describe a particular form of judicial foreclosure of a mortgage. After a mortgagor of property defaults on payment obligations, the mortgagee may obtain a writ of scire facias, which is an order commanding the respondent to appear and explain why the mortgaged property should not be sold to satisfy the mortgage debt.

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## SCOPE OF EMPLOYMENT

*Activities of an employee that are in furtherance of duties that are owed to an employer and where the employer is, or could be, exercising some control, directly or indirectly, over the activities of the employee.*

Under the doctrine of RESPONDEAT SUPERIOR, a principal is liable for the TORTS, civil

wrongs, of an agent committed within the ambit of the agent's occupation.

The scope of employment includes all acts reasonably necessary or incident to the performance of work, including matters of personal convenience and comfort that do not conflict with specific instructions.

## SCOPES MONKEY TRIAL

The criminal prosecution of John T. Scopes was an attack by citizens of Dayton, Tennessee, on a Tennessee statute that banned the teaching of evolution in public schools. The Butler Act, passed in early 1925 by the Tennessee General Assembly, punished public school teachers who taught "that man has descended from a lower order of animals" or any theory "that denies the story of the Divine Creation of man as taught in the Bible."

Some citizens of Dayton decided to challenge the statute. On the last day of school in May 1925, they congregated in Robinson's Drug Store and devised a plan to use a willing teacher to challenge the constitutionality of the statute. According to the plan, a teacher would admit to teaching evolution and volunteer to face criminal charges under the statute. One person in the assemblage suggested John T. Scopes, a popular substitute teacher who had taught science and coached athletics at the high school for the past year.

*In May 1925, John T. Scopes challenged the Butler Act, a Tennessee state law that prohibited public school teachers from teaching evolution.*

AP/WIDE WORLD PHOTOS

Scopes agreed, and within days he was accused of criminal teachings. He was arrested, indicted, and released pending trial in the town of Dayton. He faced no jail time. If convicted of the offense, Scopes would have had to pay a fine of at least $100, but no more than $500.

News of the case touched off a national debate on creationism, evolution, and public school teaching. Vendors, preachers, journalists, and gawkers descended on the town of Dayton during the months of June and July. The case also attracted legal celebrities. General A. T. Stewart was joined by a host of special counsel for the prosecution, including WILLIAM JENNINGS BRYAN. Bryan, age 65, was a skilled speaker, veteran lawyer, and former presidential candidate. A Dayton newspaper asked the eminent litigator CLARENCE SEWARD DARROW, age 68, to defend Scopes. Darrow, an ardent opponent of religious fundamentalism, agreed to defend Scopes free of charge. He was assisted by Dudley Field Malone and Arthur Garfield Hays of the AMERICAN CIVIL LIBERTIES UNION.

The trial began on July 10 in the midst of a blistering heat wave, but the intense heat did not deter spectators. The courtroom was so crowded that the last part of the trial was held outside in the courthouse yard to accommodate the large audience.

Much of the trial was consumed by arguments on evidence and orations delivered by Bryan, Darrow, or Hays. Some of these orations were directed not toward the judge and jury but toward the gallery, which responded with jeers, cheers, and catcalls. Because Scopes did not deny that he had taught evolution, his lawyers sought to sway the jury into nullifying the statute by acquitting him in spite of the evidence. Darrow, Malone, and Hays attempted to win over the jury by attacking creationism and confirming the theory of evolution.

The most significant evidence offered by the defense did not make it into the record. Darrow placed Bryan on the witness stand and questioned him on the merits of evolution and creationism. The most memorable moments of the trial consisted of the debate between the two men. However, the examination of Bryan had little impact on the jury's decision because the jury was not present to hear it. After Bryan stepped down from the witness stand, the defense rested. The Tennessee jury found Scopes guilty.

Raulston instructed the jury that it could leave the punishment to the court. The jury did

not set the fine, so Raulston set it at $100. Scopes appealed the verdict to the Tennessee Supreme Court, arguing that the statute was unconstitutional because it violated the separation of church and state under the FIRST AMENDMENT to the U.S. Constitution. Unfortunately, his local counsel, John R. Neal, failed to file a bill of exceptions within 30 days after the trial. Without such a bill, Scopes's arguments on appeal were limited to the actual trial transcript.

The Tennessee Supreme Court did not decide whether the statute was constitutional. It held merely that the fine was invalid under the state constitution (*Scopes v. State,* 154 Tenn. 105, 289 S.W. 363 [1927]). Under article VI, section 6, of the Tennessee Constitution, a judge could not fine anyone more than $50. In the opinion, written by Chief Justice Grafton Green, the court urged the state to dismiss the case against Scopes, noting that Scopes was no longer in the employ of the state and declaring, "We see nothing to be gained by prolonging the life of this bizarre case."

Bryan died shortly after the trial. Darrow litigated several more high-profile cases, and Scopes returned to his teaching career. Scopes never had to pay the fine levied by Raulston. When asked later in life whether he had any regrets about the case, Scopes said, ". . . my decision would be the same as it was in 1925. I would go home and think about it. I would sleep on it. And the next day I would do it again."

Scopes received a measure of vindication shortly before his death in 1970. In 1968 the U.S. Supreme Court declared unconstitutional statutes that forbid the teaching of evolution (*Epperson v. Arkansas,* 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228). Since the *Epperson* case, advocates of creationism have been hard pressed to find public schools willing to teach scientific creationism. In a gradual reversal of fortune, scientific creationists have been unable to obtain equal time for the teaching of creationism in public schools. In 1987, a splintered U.S. Supreme Court ruled that a Louisiana statute that mandated equal time for the teaching of creationism violated the First Amendment because it served no identified secular purpose and had the primary purpose of promoting a particular religious belief (*Edwards v. Aguillard,* 482 U.S. 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510).

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Religion; Schools and School Districts.

## SCORCHED-EARTH PLAN

*A slang expression for a defensive tactic used by an unwilling corporate takeover target to make itself less attractive to a buyer.*

Scorched-earth tactics include selling off assets or entering into long-term contractual commitments. A difficulty with such maneuvers is that they tend to be irreversible and may permanently harm the company. As a result, they tend to be used as a last resort in a takeover struggle.

CROSS-REFERENCES

Mergers and Acquisitions.

## SCOTTSBORO CASES

See POWELL V. ALABAMA.

## SEA

See LAW OF THE SEA.

## SEABED ARMS CONTROL TREATY OF 1971

The Seabed Arms Control Treaty of 1971 was an agreement for the denuclearization of the seabed, the ocean floor, and the subsoil of the seabed. It may be regarded as a NUCLEAR NONPROLIFERATION TREATY since it limits or prevents the spread of nuclear devices to the seabed areas.

CROSS-REFERENCES

Arms Control and Disarmament.

*The Great Seal of King Edward III of England. Often used as a signature or imprimatur, seals once had a practical importance. Today, many government offices have seals, though they are mainly decorative in function.*

BRITISH MUSEUM COLLECTION

## SEAL

*To close records by any type of fastening that must be broken before access can be obtained. An impression upon wax, wafer, or some other substance capable of being impressed.*

The use of seals began at a time when writing was not common, but when every person of means possessed a coat-of-arms or other distinctive device. Great significance was attached to the use of seals as a means of distinguishing persons. With the spread of education, the signature on an instrument became more important than the seal, and seals lost their former dignity and importance.

Modern judicial decisions minimize or eliminate the distinctions between sealed and unsealed instruments, and most statutes have abolished the use of seals. Other statutes abolishing the use of private seals do not make sealed instruments unlawful, but merely render the seals ineffective. In jurisdictions that still recognize the use of seals, the seal can assume the form of a wax impression, an impression made on paper, or a gummed sticker attached to the document. The letters *L.S.,* an abbreviation for the Latin phrase *locus sigilli,* meaning "the place of the seal," can also be used in place of a material seal, as can the word *seal* or a statement to the effect that the document is to take effect as a sealed instrument.

Seals are currently used for authenticating documents, such as birth and marriage records and deeds to real property. They are also used to authenticate signatures witnessed by a NOTARY PUBLIC and in formalizing corporate documents.

In regard to contracts, at COMMON LAW a promise under seal was enforceable without the necessity of legal consideration—something of value—either because the seal was a substitute for consideration or because the existence of consideration was conclusively presumed. Although most states have abolished seals, some states have provided by statute that a seal raises a presumption of consideration. Article 2 of the UNIFORM COMMERCIAL CODE (UCC)—a body of law adopted by the states to govern commercial transactions—has eliminated the seal as consideration in commercial sales to which the act is applicable. At one time, the statute of limitations—the prescribed period during which legal proceedings must be instituted—was longer for an action brought on a contract under seal than for one not under seal.

## SEAL OF THE UNITED STATES

*The official die or signet, which has a raised emblem and is used by federal officials on documents of importance.*

The United States seal is sometimes officially known as the great seal. The SECRETARY OF STATE has custody and charge of the official seal and makes out, records, and affixes the seal to all civil commissions for officers of the United States, who are appointed by the president alone, or by the president with the advice and consent of the Senate. In order for the seal to be affixed to any commission or other instrument, the president must sign or specially warrant the commission. When the seal is affixed to an appointment, such appointment is made and the commission is valid.

Each state also has an official seal, which is carefully described by law and serves functions on the state level of government that are similar to those of the seal of the United States on the federal level.

## SEALED VERDICT

*A decision reached by the jury when the court is not in session, which is placed in a closed envelope by the jurors, who then separate.*

A sealed verdict is opened and read when the court reconvenes, and it has the same effect as if it had been returned in open court before the jury separated. However, the court holds that a sealed verdict is merely an agreement reached by the jurors and does not become final until it is read into the record and the jurors are discharged.

## SEARCH AND SEIZURE

*A hunt by law enforcement officials for property or communications believed to be evidence of crime, and the act of taking possession of this property.*

*In* INTERNATIONAL LAW, *the right of ships of war, as regulated by treaties, to examine a merchant vessel during war in order to determine whether the ship or its cargo is liable to seizure.*

### Overview

Search and seizure is a necessary exercise in the ongoing pursuit of criminals. Searches and seizures are used to produce evidence for the prosecution of alleged criminals. The police have the power to search and seize, but individuals are protected against ARBITRARY, unreasonable police intrusions. Freedom from unrestricted search warrants was critical to American colonists.

Under England's rule, many searches were unlimited in scope and conducted without justification. Customs officials could enter the homes of colonists at will to search for violations of customs and trade laws, and suspicionless searches were carried out against outspoken political activists. Searches in the colonies came to represent governmental oppression.

To guard against arbitrary police intrusions, the newly formed United States in 1791 ratified the U.S. Constitution's FOURTH AMENDMENT, which states:

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

### State Action

Law enforcement officers are entrusted with the power to conduct investigations, make arrests, perform searches and seizures of persons and their belongings, and occasionally use lethal force in the line of duty. But this power must be exercised within the boundaries of the law, and when police officers exceed those boundaries they jeopardize the admissibility of any evidence collected for prosecution. By and large, the Fourth Amendment and the case law interpreting it establish these boundaries.

The safeguards enumerated by the Fourth Amendment only apply against STATE ACTION, namely action taken by a governmental official or at the direction of a governmental official. Thus, actions taken by state or federal law enforcement officials or private persons working with law enforcement officials will be subject to the strictures of the Fourth Amendment. Bugging, WIRETAPPING, and other related snooping activity performed by purely private citizens, such as private investigators, do not receive Fourth Amendment scrutiny.

### Reasonable Expectation of Privacy

Individuals receive no Fourth Amendment protection unless they can demonstrate that they have a reasonable expectation of privacy in the place that was searched or the property that was seized. The U.S. Supreme Court explained that what "a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1976). In general the Court has said that individuals enjoy a reasonable expectation of privacy in their own bodies, PERSONAL PROPERTY, homes, and business offices. Individuals also enjoy a qualified expectation of privacy in their automobiles.

Individuals ordinarily possess no reasonable expectation of privacy in things like bank records, vehicle location and vehicle paint, garbage left at roadside for collection, handwriting, the smell of luggage, land visible from a public place, and other places and things visible in plain or open view. Houseguests typically do not possess a reasonable expectation of privacy in the homes they are visiting, especially when they do not stay overnight and their sole purpose for being inside the house is to participate in criminal activity such as a drug transaction. *Minnesota v. Carter*, 525 U.S. 83, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998). Similarly, a defendant showing only that he was a passenger in a

searched car has not shown an expectation of privacy in the car or its contents. *Rakas v. Illinois,* 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). Both the houseguest and the motor vehicle passenger must assert a property or possessory interest in the home or motor vehicle before a court will recognize any Fourth Amendment privacy interests such that would prevent a police officer from searching those places without first obtaining a warrant.

### Probable Cause and Reasonable Suspicion

Once it has been established that an individual possesses a reasonable expectation of privacy in a place to be searched or a thing to be seized, the Fourth Amendment's protections take hold, and the question then becomes what are the nature of those protections. Police officers need no justification to stop someone on a public street and ask questions, and individuals are completely entitled to refuse to answer any such questions and go about their business. However, a police officer may only search people and places when the officer has probable cause or reasonable suspicion to suspect criminal activity.

"Probable cause" means that the officer must possess sufficiently trustworthy facts to believe that a crime has been committed. In some cases, an officer may need only a reasonable suspicion of criminal activity to conduct a limited search. *Reasonable suspicion* means that the officer has sufficient knowledge to believe that criminal activity is at hand. This level of knowledge is less than that of probable cause, so reasonable suspicion is usually used to justify a brief frisk in a public area or a traffic stop at roadside. To possess either probable cause or reasonable suspicion, an officer must be able to cite specific articulable facts to warrant the intrusion. Items related to suspected criminal activity found in a search may be taken, or seized, by the officer.

### Arrest and Miranda

Under the Fourth Amendment, a *seizure* refers to the collection of evidence by law enforcement officials and to the arrest of persons. An arrest occurs when a police officer takes a person against his or her will for questioning or criminal prosecution. The general rule is that to make an arrest, the police must obtain an arrest warrant. However, if an officer has probable cause to believe that a crime has been committed and there is no time to obtain a warrant, the officer may make a warrantless arrest. Also, an officer may make a warrantless arrest of persons who commit a crime in the officer's presence. An invalid arrest is not generally a defense to prosecution. However, if an arrest is unsupported by probable cause, evidence obtained pursuant to the invalid arrest may be excluded from trial.

When an arrest is made, the arresting officer must read the *Miranda* warnings to the arrestee. The *Miranda* warnings apprise an arrestee of the right to obtain counsel and the right to remain silent. If these warnings are not read to an arrestee as soon as he or she is taken into custody, any statements the arrestee makes after the arrest may be excluded from trial.

Legal commentators have criticized *Miranda* and its subsequent line of decisions, stating that criminal suspects seldom truly understand the meaning or importance of the rights recited to them. Studies have indicated that the *Miranda* decision has had little effect on the numbers of confessions and requests for lawyers made by suspects in custody. Moreover, critics of *Miranda* cite concerns that the police may fabricate waivers, since a suspect's waiver of *Miranda* rights need not be recorded or made to a neutral party. Defenders of *Miranda* argue that it protects criminal suspects and reduces needless litigation by providing the police with concrete guidelines for permissible interrogation.

In 1999 the U.S. Court of Appeals for the Fourth Circuit fueled long-standing speculation that *Miranda* would be overruled when it held that the admissibility of confessions in federal court is governed not by *Miranda*, but by a federal statute enacted two years after *Miranda.* The statute, 18 U.S.C.A. § 3501, provides that a confession is admissible if voluntarily given. Congress enacted the statute to overturn *Miranda,* the Fourth Circuit said, and Congress had the authority to do so pursuant to its authority to overrule judicially created RULES OF EVIDENCE that are not mandated by the Constitution. *U.S. v. Dickerson*, 166 F.3d 667 (4th Cir. 1999).

The U.S. Supreme Court reversed. In an opinion authored by Chief Justice WILLIAM REHNQUIST, the Court said that, whether or not it agreed with *Miranda*, the principles of STARE DECISIS weighed heavily against overruling it. While the Supreme Court has overruled its precedents when subsequent cases have undermined their doctrinal underpinnings, that has not happened to the *Miranda* decision, which

the Court said "has become embedded in routine police practice to the point where the warnings have become part of our national culture." Although the Court acknowledged that a few guilty defendants may sometimes go free as the result of the application of the *Miranda* rule, "experience suggests that the totality-of-the-circumstances test [that] § 3501 seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to and for courts to apply in a consistent manner." *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

### The Search Warrant Requirement

A SEARCH WARRANT is a judicially approved document that authorizes law enforcement officials to search a particular place. To obtain a search warrant, a police officer must provide an account of information supporting probable cause to believe that evidence of a crime will be found in a particular place or places. The officer must also make a list of the particular places to be searched and the items sought. Finally, the officer must swear to the truthfulness of the information. The officer presents the information in an AFFIDAVIT to a magistrate or judge, who determines whether to approve the warrant.

An officer may search only the places where items identified in the search warrant may be found. For example, if the only item sought is a snowmobile, the officer may not rummage through desk drawers. Only the items listed in the warrant may be seized, unless other evidence of illegal activity is in plain view. Judges or magistrates may approve a variety of types of searches. The removal of blood from a person's body, a search of body cavities, and even surgery may be approved for the gathering of evidence. ELECTRONIC SURVEILLANCE and phone records may also be used to gather evidence upon the issuance of a warrant.

A warrant is not required for a search incident to a lawful arrest, the seizure of items in plain view, a border search, a search effected in open fields, a vehicle search (except for the trunk), an inventory search of an impounded vehicle, and any search necessitated by exigent circumstances. It is also not required for a STOP AND FRISK, a limited search for weapons based on a reasonable suspicion that the subject has committed or is committing a crime. A police officer may also conduct a warrantless search if the subject consents.

### Exceptions to Warrant Requirement

Administrative agencies may conduct warrantless searches of highly regulated industries, such as strip mining and food service. Federal and state statutes authorize warrantless, random drug testing of persons in sensitive positions, such as air traffic controllers, drug interdiction officers, railroad employees, and customs officials. In each of these types of searches, the Supreme Court has ruled that the need for public safety outweighs the countervailing privacy interests that would normally require a search warrant. However, a few lower federal courts have ruled that warrantless searches of public housing projects are unconstitutional, not withstanding the fact that residents of the public housings projects signed petitions supporting warrantless searches to rid their communities of drugs and weapons.

Nor may states pass a law requiring candidates for state political office to certify that they have taken a drug test and that the test result was negative without violating the Fourth Amendment's warrant requirement. In *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (U.S. 1997), the state of Georgia failed to show a special need that was important enough to justify such drug testing and override the candidate's countervailing privacy interests, the Court said. Moreover, the Court found, the certification requirement was not well designed to identify candidates who violate anti-drug laws and was not a credible means to deter illicit drug users from seeking state office, since the Georgia law allowed the candidates to select the test date, and all but the prohibitively addicted could abstain from using drugs for a pretest period sufficient to avoid detection.

The Supreme Court has given law enforcement mixed signals over the constitutionality of warrantless motor vehicle checkpoints. The Court approved warrantless, suspicionless searches at roadside sobriety checkpoints. These searches must be carried out in some neutral, articulable way, such as by stopping every fifth car. However, a highway checkpoint program whose primary purpose is the discovery and interdiction of illegal narcotics violates the Fourth Amendment. In distinguishing between sobriety and drug interdiction checkpoints, the Court said that the sobriety checkpoints under review were designed to ensure roadway safety, while the primary purpose of the narcotics checkpoint under review had been to uncover

evidence of ordinary criminal wrongdoing, and, as such, the program contravened the Fourth Amendment. *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (U.S. 2000).

Warrant exceptions have been carved out by courts because requiring a warrant in certain situations would unnecessarily hamper law enforcement. For example, it makes little sense to require an officer to obtain a search warrant to seize contraband that is in plain view. Under the Fourth Amendment's reasonableness requirement, the appropriateness of every warrantless search is decided on a case-by-case basis, weighing the defendant's privacy interests against the reasonable needs of law enforcement under the circumstances.

### The Exclusionary Rule and the Fruit of the Poisonous Tree Doctrine

A criminal defendant's claim of unreasonable search and seizure is usually heard in a suppression hearing before the presiding trial judge. This hearing is conducted before trial to determine what evidence will be suppressed, or excluded, from trial. When a judge deems a search unreasonable, he or she frequently applies the EXCLUSIONARY RULE.

For the entire nineteenth century, a Fourth Amendment violation had little consequence. Evidence seized by law enforcement from a warrantless or otherwise unreasonable search was admissible at trial if the judge found it reliable. This made the Fourth Amendment essentially meaningless to criminal defendants. But in 1914, the U.S. Supreme Court devised a way to enforce the Fourth Amendment. In *Weeks v. United States,* 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914), a federal agent conducted a warrantless search for evidence of gambling at the home of Fremont Weeks. The evidence seized in the search was used at trial, and Weeks was convicted. On appeal, the Supreme Court held that the Fourth Amendment barred the use of evidence secured through a warrantless search and seizure. Weeks's conviction was reversed and thus was born the exclusionary rule.

The exclusionary rule is a judicially created remedy used to deter POLICE MISCONDUCT in obtaining evidence. Under the exclusionary rule, a judge may exclude incriminating evidence from a criminal trial if there was police misconduct in obtaining the evidence. Without the evidence, the prosecutor may lose the case or drop the charges for lack of proof. This rule provides some substantive protection against illegal search and seizure.

The exclusionary rule was constitutionally required only in federal court until MAPP V. OHIO, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). In *Mapp,* the Court held that the exclusionary rule applied to state criminal proceedings through the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT. Before the *Mapp* ruling, not all states excluded evidence obtained in violation of the Fourth Amendment. After *Mapp,* a defendant's claim of unreasonable search and seizure became commonplace in criminal prosecutions.

The application of the exclusionary rule has been significantly limited by a GOOD FAITH exception created by the Supreme Court in *United States v. Leon,* 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). Under the good faith exception, evidence obtained in violation of a person's Fourth Amendment rights will not be excluded from trial if the law enforcement officer, though mistaken, acts reasonably. For example, if an officer reasonably conducts a search relying on information that is later proved to be false, any evidence seized in the search will not be excluded if the officer acted in good faith, with a reasonable reliance on the information. The Supreme Court has carved out this exception to the exclusionary rule because, according to a majority of the court, the rule was designed to deter police misconduct, and excluding evidence when the police did not misbehave would not deter police misconduct.

A companion to the exclusionary rule is the FRUIT OF THE POISONOUS TREE doctrine, established by the Supreme Court in *Nardone v. United States,* 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939). Under this doctrine, a court may exclude from trial any evidence derived from the results of an illegal search. For example, assume that an illegal search has garnered evidence of illegal explosives. This evidence is then used to obtain a warrant to search the suspect's home. The exclusionary rule excludes the evidence initially used to obtain the search warrant, and the fruit of the poisonous tree doctrine excludes any evidence obtained in a search of the home.

### The Knock and Announce Requirement

The Fourth Amendment incorporates the COMMON LAW requirement that police officers entering a dwelling must knock on the door and

announce their identity and purpose before attempting forcible entry. At the same time, the Supreme Court has recognized that the "flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." *Wilson v. Arkansas*, 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995). Instead, the Court left to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment.

The Wisconsin Supreme Court concluded that police officers are *never* required to knock and announce their presence when executing a search warrant in a felony drug investigation. But the U.S. Supreme Court overturned the state high court's decision in *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (U.S. 1997). In *Richards* the Court said Fourth Amendment does not permit a blanket exception to the knock-and-announce requirement for the execution of a search warrant in a felony drug investigation. The fact that felony drug investigations may frequently present circumstances warranting a no-knock entry, the Court said, cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case. Rather, it is the duty of a court to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement. To justify a no-knock entry, the Court stressed that police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.

The Fourth Amendment does not hold police officers to a higher standard when a no-knock entry results in the destruction of property. *U.S. v. Ramirez*, 523 U.S. 65, 118 S.Ct. 992, 140 L.Ed.2d 191 (U.S. 1998). The "reasonable suspicion" standard is still applicable. No Fourth Amendment violation occurred when, the Supreme Court found, during the execution of a "no-knock" warrant to enter and search a home, police officers broke a single window in a garage and pointed a gun through the opening. A reliable confidential informant had notified the police that an escaped prisoner might be inside the home, and an officer had confirmed that possibility, the Court said. The escapee had a violent past and reportedly had access to a large supply of weapons, and the police broke the window to discourage any occupant of the house from rushing to weapons. However, excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, the court emphasized, even though the entry itself is lawful and the fruits of the search are not subject to suppression.

### Search and Seizure at Public Schools

A public school student's protection against unreasonable search and seizure is less stringent in school than in the world at large. In *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (U.S. 1985), the U.S. Supreme Court held that a school principal could search a student's purse without probable cause or a warrant. Considering the "legitimate need to maintain an environment in which learning can take place," the Court set a lower level of reasonableness for searches by school personnel.

Under ordinary circumstances, the Court said, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. The "ordinary circumstances" justifying a warrantless search and seizure of a public school student, the Court continued, are limited to searches and seizures that take place on-campus or off-campus at school-sponsored events. Warrantless searches of public school students who are found off campus and not attending a school-sponsored event would still contravene the Fourth Amendment.

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Alcohol; Automobiles; Criminal Law; Criminal Procedure; Drugs and Narcotics; Due Process of Law; *Mapp v. Ohio*; *Miranda v. Arizona*; *Olmstead v. United States*; Plain View Doctrine; Search Warrant; *Terry v. Ohio*; Wiretapping.

## SEARCH WARRANT

*A court order authorizing the examination of a place for the purpose of discovering contraband, stolen property, or evidence of guilt to be used in the prosecution of a criminal action.*

A search warrant is a judicial document that authorizes police officers to search a person or place to obtain evidence for presentation in criminal prosecutions. Police officers obtain search warrants by submitting affidavits and other evidence to a judge or magistrate to establish PROBABLE CAUSE to believe that a search will yield evidence related to a crime. If satisfied that the officers have established probable cause, the judge or magistrate will issue the warrant.

The FOURTH AMENDMENT to the U.S. Constitution states that persons have a right to be free from unreasonable SEARCHES AND SEIZURES and that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." State constitutions contain similar provisions.

The U.S. Supreme Court has not interpreted the Fourth Amendment to mean that police must always obtain a search warrant before conducting a search. Rather, the Supreme Court holds that a search warrant is required for a search unless it fits into a recognized exception.

The exceptions to the search warrant requirement are numerous. One common exception is the search of a person incident to a lawful arrest. The Supreme Court held in *Chimel v. California,* 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), that an officer may search the arrestee as well as those areas in the arrestee's immediate physical surroundings that may be deemed to be under the arrestee's control. Other exceptions to the warrant requirement include situations in which an officer is in HOT PURSUIT of a person, in which an emergency exists, and in which the item to be searched is mobile, such as an automobile. Similarly, searches at public way checkpoints, airports, and international borders may be conducted without first obtaining a search warrant.

To obtain a search warrant, an officer must personally appear before, or speak directly with, a judge or magistrate. The officer must present information that establishes probable cause to believe that a search would yield evidence related to a crime. Probable cause exists when an officer has either personal knowledge or trustworthy HEARSAY from an informant or witness. The officer must fill out an AFFIDAVIT stating with particularity the person to be seized and searched, the area to be searched, and the objects sought. The warrant need not specify the manner in which the search will be executed.

The officer must sign the affidavit containing the supporting information establishing the grounds for the warrant. By signing the affidavit, the officer swears that the statements in the affidavit are true to the best of his or her knowledge. A police officer who lies when obtaining a warrant may be held personally liable to the searched person. According to the Supreme Court's ruling in *Anderson v. Creighton,* 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987), however, a police officer is not personally liable for a wrongful search if a reasonable officer could have believed that the warrantless search would be lawful in light of clearly established law and the information the officer possessed at the time.

Following the SEPTEMBER 11TH ATTACKS in 2001, the United States government sought to expand the means by which law enforcement personnel could investigate potential terrorist activities. The USA PATRIOT ACT OF 2001, Pub. L. No. 107-56, 115 Stat. 272, created and expanded a number of exceptions to the traditional search warrant requirements. Although a person subject to a search warrant is ordinarily entitled to notice that the warrant was issued, the USA PATRIOT Act allows magistrates to issue so-called "sneak and peak" warrants, which do not require police to notify the person subject to the search. Moreover, the act expanded the abilities of officers to install "roving" wiretaps of telephones and other communications devices used by individual suspects without naming the specific telephone carrier in the warrant. The act also expanded police officers' abilities to search stored E-MAIL and voicemail messages.

Although the provisions of the USA PATRIOT Act are purportedly designed to

*A sample affidavit for a search warrant*

**Affidavit for Search Warrant**

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY

Commissioner's Docket No. 2
Case No. 166
UNITED STATES OF AMERICA
vs.
Green Brick Constructed Building W/Green Shingled
Roof Known as 413 E. 17th Street, Covington, Kentucky
and Occupied by Southern Scientific Co.
AFFIDAVIT FOR SEARCH WARRANT

Eastern District of Kentucky
Filed Apr. 17, 1968
Davis T. McGarvey, Clerk
U.S. District Court

Before Robert Cetrulo [Commissioner], Covington, Kentucky.

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as 413 E. 17th Street, Covington, Kentucky, in the Eastern District of Kentucky, there is now being concealed certain property, namely hallucinogenic drugs, to wit: Diethyltryptamine and Diemethyltryptamine, commonly known as DET and DMT; and certain paraphernalia and chemical precursors utilized in the illicit manufacture of said drugs, which are the means and instrumentalities used to commit offenses in violation of 21 U.S.C. § 331 (q) (1) and (3) and which are also subject to seizure and condemnation under 21 U.S.C. § 334(a) (2).

And that the facts tending to establish the foregoing grounds for issuance of a Search Warant are as follows:

(SEE ATTACHED, WHICH IS MADE PART OF THIS AFFIDAVIT)

/s/ Chantland Wysor, Agent, Bureau of Drug Abuse Control

Sworn to before me and subscribed in my presence, March 31, 1968.

/s/ Robert C. Cetrulo, U.S. Commissioner

During the first part of March 1968 the Chicago Field Office of the Bureau of Drug Abuse Control received information from the New York Field Office, Bureau of Drug Abuse Control, reporting that a firm using the name of AA, 100 N. LaSalle Street, Chicago, Illinois, allegely *(sic)* a Cosmetic Firm, had ordered a large quantity of chemical precursors which are known to be used in the illicit manufacture of hallucinogenic drugs, within the meaning of the Drug Abuse Control Amendments of 1965.

Investigation then revealed the following as regards AA: Responsible person in this alleged firm is Thomas R. Anderson and it was later determined that this individual's true identity may possibly be C.M. and that the name A. is fictitious. Investigation shows that the address listed for this firm is an answering service which has been contracted to accept all telephone calls, correspondence and parcels. Persons associated with AA who transact business with the answering service are C. M. and R. T. Investigation revealed that Moore is a resident of Columbus, Ohio and Terry is a resident of Chicago, Illinois. During the month of March 1968, the answering service received parcels containing chemical precursors for utilization in the manufacture of hallucinogenic drugs, to be held for C. M. Inquiry with the U.S. Food and Drug Administration revealed that this firm is not of record with that Agency as a legitimate cosmetic firm.

Further investigation determined that arrangements had been made for C. M. to travel from Columbus, Ohio to Chicago, Illlinois, on March 29, 1968, to pick up the chemical precursors, which were being held for AA. Surveillance determined that M. did arrive in Chicago on March 29, 1968, and that on March 30, 1968, the subject did pick up the chemical precursors. Continuous surveillance on subject M. by Agents of the Bureau of Drug Abuse Control determined that the subject did leave Chicago on March 30, 1968, with the chemical precursors in his vehicle and delivered the items to Southern Scientific Company, 413 E. 17th Street, Covington, Kentucky, on that same date. After remaining inside 413 E. 17th Street for a short period of time subject M. left the rear of the bulding, walked to an alleyway behind the building and placed a cardboard container on the ground. Examination of that container revealed that it was empty and had labeled thereon "American Indole," which is a common precursor utilized in the illicit manufacturing of hallucinogens.

Surveillance determined that subject M. and an individual tentatively identified as J.S., and an unknown person, were inside Southern Scientific Company from 7:30 PM to 11:30 PM, on March 30, 1968; this being a Saturday and if the firm is legitimate these are not normal working-business hours. Surveillance again determined that the same three subjects went to the building on Sunday, March 31, 1968, at approximately 11:00 AM.

Indications that persons at Southern Scientific Company are engaged in the illegal manufacture of Hallucinogenic Drugs are: Unusual manner utilized in ordering, receiving and ultimate delivery of chemical precursors, which is a known Modus Operandi used by individuals engaged in the illicit manufacture of hallucinogenic drugs; the unusual activity at the building not during normal working-business hours; it is known that the chemical precursors in question are utilized in the illicit manufacture of Diethyltryptamine (DET) and Dimethyltryptamine (DMT), which are hallucinogenic drugs within the meaning of the Drug Abuse Control Amendments of 1965; it is a known factor that either is utilized in the illicit manufacture of DET and DMT; and during surveillance of said location of Sunday, March 31, 1968, surveillance Agents could smell strong odors coming from the building in question which is believed to be ether. In addition it is known that the chemical precursors obtained are not common in the manufacture of cosmetics.

/s/ Chantland Wysor, Agent Bureau of Drug Abuse Control

Sworn to before me, and subscribed in my presence this 31st day of March, 1968.

/s/ Robert C. Cetrulo, Commissioner

enhance the ability of law enforcement agencies to prevent terrorist activities against the United States, many of these provisions can be applied to U.S. citizens who are not engaged in such activities. Several commentators and organizations, such as the AMERICAN CIVIL LIBERTIES UNION, have criticized the act because of its detrimental impact on civil liberties. Supporters of the act counter that the attacks on September 11, 2001, could have been prevented if law enforcement had available to them some of the tools provided under the new law.

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CROSS-REFERENCES

Automobile Searches; Search and Seizure.

## SEASONABLE

*Within a reasonable time; timely.*

The term *seasonable* is usually used in connection with the performance of contractual obligations that must be completed "seasonably." The facts and circumstances of each case define a reasonable period of time.

## SEAT BELTS

*A restraining device used to secure passengers in motorized vehicles.*

Congress first passed seat-belt legislation in 1966. By the 1990s, increased measures were being taken to enforce the laws. Under section 402 of 23 U.S.C.A. (1997), a portion of federal highway funds may be withheld from states if they do not have an approved highway safety program to reduce the number and severity of traffic accidents. One of the measures a state must include in its highway safety program is a provision that encourages drivers and passengers to use seat belts. In 2003, the GEORGE W. BUSH administration proposed incentives, which would amount to $100 million in highway funding, for states to enact mandatory seat-belt laws. According to the U.S. TRANSPORTATION DEPARTMENT, "Every 1 percent increase in nationwide safety belt use means a savings of about 250 lives."

In states that require the use of seat belts by all drivers and front-seat passengers, the failure to use a seat belt is a violation that carries a fine. In most of these states, police officers do not stop persons in vehicles for failing to use a seat belt. This is called a secondary seat-belt law. In West Virginia, for example, Section 17C-15-49 of West Virginia Code states, "Enforcement . . . shall be accomplished only as a secondary action when a driver of a passenger vehicle has been detained for PROBABLE CAUSE of violating another section of this code." In other words, once a vehicle is stopped for any other infraction, the driver may be ticketed if the driver or a front-seat passenger is not belted. In other states, such as Washington and Delaware, for example, a police officer may pull over a car if he suspects a driver or a passenger of not using a seat belt. This is a called a primary seat-belt law. The fine for violating a mandatory seat-belt law usually is minimal; in Delaware, the fine is $25.

New Hampshire is the only state that does not have an adult seat-belt requirement (N.H. Rev. Stat. Ann. § 265: 107-a [1995]). Motor vehicle passengers under the age of 12, however, must wear a seat belt. The New Hampshire Department of Safety administers programs that increase public awareness of the importance of seat belts, and roadside signs placed throughout the state remind drivers that buckling up is mandatory for children and sound advice for all persons.

All states have some type of mandatory seat-belt laws for children. The laws, however, vary by state. They also vary depending on the age, weight, and height of the child. For example, in Delaware, children who are under the age of 12, or under 65 inches tall, must sit in the back seat of a car if there are active air bags in the front passenger seat. Fines for violating child seat-belt laws vary by state. In Delaware, the fine for violating the law is $28.75.

In an effort to improve child restraint safety, Congress passed Anton's Law (H.R. 5504) in November 2002. The law was named for four-year-old Anton Skeen, who was thrown from a car because the adult seat belt he was wearing was too large to hold him. The legislation, which was signed into law in December 2002, requires improved testing standards for child booster seats and also mandates that automak-

ers upgrade their current seat-belt features. In addition, the legislation requires that the National Highway Traffic Safety Administration (NTHSA) construct test dummies that can be used in simulated car crashes to determine the effectiveness of seat belts for children.

In May 2003, federal and state agencies launched a nationwide effort to mobilize support of seat-belt use. The campaign, called "Click It or Ticket," coincided with the Memorial Day holiday, traditionally one of the busiest for automobile traffic. Some 12,000 law enforcement agencies across the country set up seat-belt checkpoints between May 23 and June 1 to pull over unbuckled drivers and write them tickets. The event was widely publicized in the media to fully enforce the message that during the campaign there would be a zero-tolerance enforcement of safety-belt laws. A major focus was to educate young drivers about the importance of wearing seat belts.

The failure of a driver or front-seat passenger to wear a seat belt can have consequences in personal injury lawsuits. Under court decisions and statutes in some states, the plaintiff's failure to wear a seat belt can decrease his or her recovery for injuries in a car accident. In other states, cases and statutes hold that the failure to wear a seat belt may not be used in court as a mitigating factor in figuring the plaintiff's damages.

In states that limit the recovery of unbelted plaintiffs, courts employ various methods to mitigate damages. Under the causation approach, a plaintiff may not recover damages for injuries caused by the failure to wear a seat belt. Some states require that the plaintiff prove that the accident injuries would have occurred even if the plaintiff had worn a seat belt. Other states hold that the defendant must prove that the plaintiff's injuries would not have occurred had the plaintiff worn a seat belt. Identifying and apportioning the various factors contributing to the plaintiff's injuries is a difficult task. Personal injury cases involving unbelted plaintiffs in these states rely heavily on medical EXPERT TESTIMONY.

Under the plaintiff misconduct approach, the court examines whether the plaintiff was at fault in failing to wear a seat belt. If the plaintiff should have been wearing a seat belt under the state seat-belt laws, the failure to wear the belt may mitigate the plaintiff's damages or completely bar any recovery.

**Seat Belt Use, in 2002[a]**

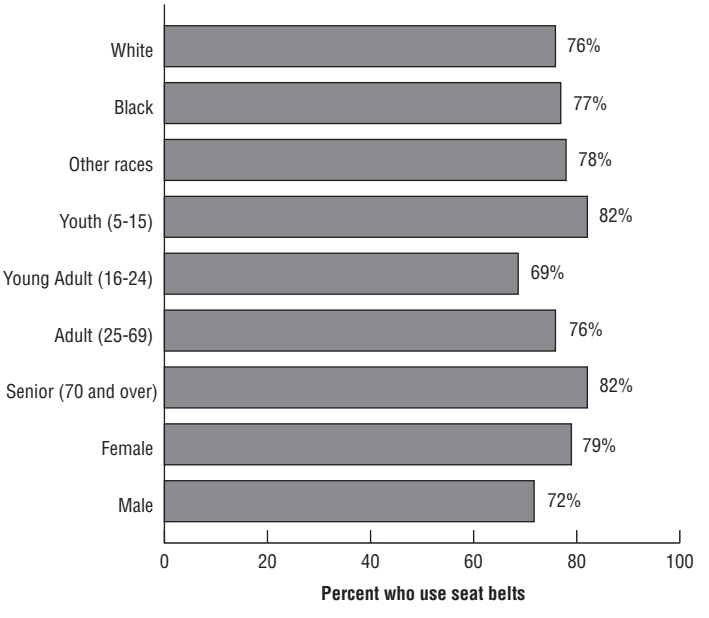


[a]Includes overall usage, i.e., both passenger cars and light trucks.

SOURCE: U.S. Department of Transportation, National Highway Traffic Safety Administration, Nation Center for Statistics and Analysis, *Safety Belt Use in 2002—Demographic Characteristics.*

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CROSS-REFERENCES

Automobiles; Mitigation of Damages.

## SEC

*An abbreviation for the* SECURITIES AND EXCHANGE COMMISSION.

## SECESSION

*The act of withdrawing from membership in a group.*

Secession occurs when persons in a country or state declare their independence from the ruling government. When a dissatisfied group

secedes, it creates its own form of government in place of the former ruling government. Secessions are serious maneuvers that lead to, or arise from, military conflict.

A secession can affect international relationships as well as the civil peace of the nation from which a group secedes. Most countries consider secession by a town, city, province, or other body to be a criminal offense that warrants retaliation using force. Because the primary mission of most governments is to maximize the comfort and wealth of its citizens, nations jealously guard the land and wealth that they have amassed. In rare cases a government may recognize the independence of a seceding state. This recognition may occur when other countries support the independence of the seceding state. However, for most countries, the involuntary loss of land and wealth is unthinkable.

Most countries have laws that punish persons who secede or attempt to secede. The United States has no specific law on secession, but the federal government and state governments maintain laws that punish SEDITION and other forms of insurrection against the government. On the federal level, for example, chapter 115 of title 18 of the U.S. CODE ANNOTATED identifies TREASON, rebellion, or insurrection, seditious conspiracy, and advocation of the overthrow of the government as criminal offenses punishable by several years of imprisonment and thousands of dollars in fines. These are the types of crimes that can be charged against persons who attempt to secede from the United States.

The U.S. CIVIL WAR was the result of the single most ambitious secession in the history of the United States. In February 1861 South Carolina seceded from the Union, and Virginia, North Carolina, Georgia, Florida, Alabama, Mississippi, Texas, Arkansas, and Tennessee followed suit shortly thereafter. These states seceded because they objected to attempts by the federal government to abolish the enslavement of black people. The mass secession led to four years of civil war and the death of hundreds of thousands of people. The seceding states established their own government called the Confederate States of America and fought the U.S. military forces with their own army. When the Confederate forces were defeated in April 1865, the seceding states rejoined the United States.

**CROSS-REFERENCES**

U.S. Civil War.

## SECOND AMENDMENT

The Second Amendment to the U.S. Constitution reads:

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

The subject matter and unusual phrasing of this amendment led to much controversy and analysis, especially in the last half of the twentieth century. Nevertheless, the meaning and scope of the amendment have long been decided by the Supreme Court.

Firearms played an important part in the colonization of America. In the seventeenth and eighteenth centuries, European colonists relied heavily on firearms to take land away from Native Americans and repel attacks by Native Americans and Europeans. Around the time of the Revolutionary War, male citizens were required to own firearms for fighting against the British forces. Firearms were also used in hunting.

In June 1776, one month before the signing of the Declaration of Independence, Virginia became the first colony to adopt a state constitution. In this document, the state of Virginia pronounced that "a well regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State." After the colonies declared their independence from England, other states began to include the right to bear arms in their constitution. Pennsylvania, for example, declared that

> the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.

The wording of clauses about bearing arms in late-eighteenth-century state constitutions varied. Some states asserted that bearing arms was a "right" of the people, whereas others called it a "duty" of every able-bodied man in the defense of society.

Pennsylvania was not alone in its express discouragement of a standing (professional) army. Many of the Framers of the U.S. Constitution rejected standing armies, preferring instead the model of a citizen army, equipped with weapons and prepared for defense. According to Framers such as Elbridge Gerry of Massachusetts and GEORGE MASON of Virginia a standing

army was susceptible to tyrannical use by a power-hungry government.

At the first session of Congress in March 1789, the Second Amendment was submitted as a counterweight to the federal powers of Congress and the president. According to constitutional theorists, the Framers who feared a central government extracted the amendment as a compromise from those in favor of centralized authority over the states. The Revolutionary War had, after all, been fought in large part by a citizen army against the standing armies of England.

The precise wording of the amendment was changed two times before the U.S. Senate finally cast it in its present form. As with many of the amendments, the exact wording proved critical to its interpretation.

In 1791 a majority of states ratified the BILL OF RIGHTS, which included the Second Amendment. In its final form, the amendment presented a challenge to interpreters. It was the only amendment with an opening clause that appeared to state its purpose. The amendment even had defective punctuation; the comma before *shall* seemed grammatically unnecessary.

Legal scholars do not agree about this comma. Some have argued that it was intentional and that it was intended to make *militia* the subject of the sentence. According to these theorists, the operative words of the amendment are "[a] well regulated Militia . . . shall not be infringed." Others have argued that the comma was a mistake, and that the operative words of the sentence are "the right of the people to . . . bear arms . . . shall not be infringed." Under this reading, the first part of the sentence is the rationale for the absolute, personal right of the people to own firearms. Indeed, the historical backdrop—highlighted by a general disdain for professional armies—would seem to support this theory.

Some observers argue further that the Second Amendment grants the right of insurrection. According to these theorists, the Second Amendment was designed to allow citizens to rebel against the government. THOMAS JEFFERSON is quoted as saying that "a little rebellion every now and then is a good thing."

The Supreme Court makes the ultimate determination of the Constitution's meaning, and it has defined the amendment as simply granting to the states the right to maintain a militia separate from federally controlled militias. This interpretation first came in *United States v. Cruikshank,* 92 U.S. 542, 23 L. Ed. 588 (1875). In *Cruikshank,* approximately one hundred persons were tried jointly in a Louisiana federal court with felonies in connection with an April 13, 1873, assault on two African–American men. One of the criminal counts charged that the mob intended to hinder the right of the two men to bear arms. The defendants were convicted by a jury, but the circuit court arrested the judgment, effectively overturning the verdict. In affirming that decision, the Supreme Court declared that "the second amendment means no more than that [the right to bear arms] shall not be infringed by Congress, and has no other effect than to restrict the powers of the national government."

In *Presser v. Illinois,* 116 U.S. 252, 6 S. Ct. 580, 29 L. Ed. 615 (1886), Herman Presser was charged in Illinois state court with parading and drilling an unauthorized militia in the streets of Chicago in December 1879, in violation of certain sections of the Illinois Military Code. One of the sections in question prohibited the organization, drilling, operation, and parading of militias other than U.S. troops or the regular organized volunteer militia of the state. Presser was tried by the judge, convicted, and ordered to pay a fine of $10.

**Firearms Manufactured in the United States, in 1999[a]**

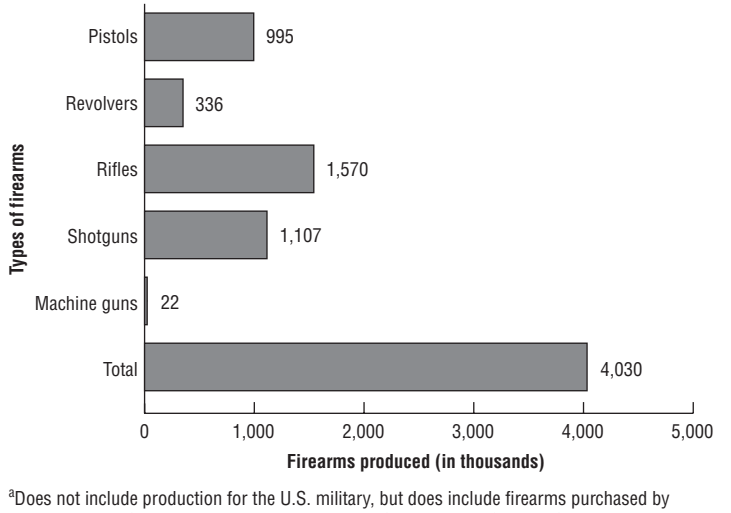


[a]Does not include production for the U.S. military, but does include firearms purchased by domestic law enforcement agencies. Also includes firearms manufactured for export.

SOURCE: U.S. Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, *Firearms Commerce in the United States, 2001/2002.*

# Private Militias

Private militias are armed military groups that are composed of private citizens and not recognized by federal or state governments. Private militias have been formed by individuals in America since the colonial period. In fact, the Revolutionary War against England was fought in part by armies comprising not professional soldiers but ordinary male citizens.

Approximately half the states maintain laws regulating private militias. Generally, these laws prohibit the parading and exercising of armed private militias in public, but do not forbid the formation of private militias. In Wyoming, however, state law forbids the very formation of private militias. Under section 19-1-106 of the Wyoming Statutes, "No body of men other than the regularly organized national guard or the troops of the United States shall associate themselves together as a military company or organization, or parade in public with arms without license of the governor." The Wyoming law also prohibits the public funding of private militias. Anyone convicted of violating the provisions of the law is subject to a fine of not more than $1,000, imprisonment of six months, or both, for each offense.

In states that do not outlaw them, private militias are limited only by the criminal laws applicable to all of society. Thus, if an armed private militia seeks to parade and exercise in a public area, its members will be subject to arrest on a variety of laws, including disturbing-the-peace, firearms, or even riot statutes.

Many private militias are driven by the insurrection theory of the Second Amendment. Under this view, the Second Amendment grants an unconditional right to bear arms for **SELF-DEFENSE** and for rebellion against a tyrannical government—when a government turns oppressive, private citizens have a duty to "insurrect," or take up arms against it.

The U.S. Supreme Court has issued a qualified rejection of the insurrection theory. According to the Court in *Dennis v. United States,* 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951), "[W]hatever theoretical merit there may be to the argument that there is a 'right' to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change." Scholars have interpreted this to mean that as long as the government provides for free elections and trials by jury, private citizens have no right to take up arms against the government.

Some people have disagreed with the Supreme Court's definition of tyranny.

On appeal to the U.S. Supreme Court, Presser argued, in part, that the charges violated his Second Amendment right to bear arms. The Court disagreed and upheld Presser's conviction. The Court cited *Cruikshank* for the proposition that the Second Amendment means only that the federal government may not infringe on the right of states to form their own militias. This meant that the Illinois state law forbidding citizen militias was not unconstitutional. However, in its opinion, the Court in *Presser* delivered a reading of the Second Amendment that seemed to suggest an absolute right of persons to bear arms: "It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States," and "states cannot . . . prohibit the people from keeping and bearing arms."

Despite this generous language, the Court refused to incorporate the Second Amendment into the **FOURTEENTH AMENDMENT**. Under the first section of the Fourteenth Amendment, passed in 1868, states may not abridge the **PRIVILEGES AND IMMUNITIES** of citizens of the United States. The privileges and immunities of citizens are listed in the Bill of Rights, of which the Second Amendment is part. Presser had argued that states may not, by virtue of the Fourteenth Amendment, abridge the right to bear arms. The Court refused to accept the argument that the right to bear arms is a personal right of the people. According to the Court, "The right to drill or parade with arms, without, and independent of, an act of congress or law of the state authorizing the same, is not an attribute of national citizenship."

The *Presser* opinion is best understood in its historical context. The Northern states and the federal government had just fought the Civil War against Southern militias unauthorized by the federal government. After this ordeal, the Supreme Court was in no mood to accept an expansive right to bear arms. At the same time, the Court was sensitive to the subject of federal encroachment on **STATES' RIGHTS**.

Several decades later, the Supreme Court ignored the contradictory language in *Presser*

Many of these people label the state and federal governments as tyrannical based on issues such as taxes and government regulations. Others cite government-sponsored racial and ethnic **INTEGRATION** as driving forces in their campaign against the federal and state governments. Many of these critics have formed private militias designed to resist perceived government oppression.

Some private militias have formed their own government. The legal problems of these private militias are generally unrelated to military activities. Instead, any criminal charges usually arise from activities associated with their political beliefs. The Freemen of Montana is one such militia. This group denied the legitimacy of the federal government and created its own township called Justus. The Freemen established its own court system, posted bounties for the arrest of police officers and judges, and held seminars on how to challenge laws its members viewed as beyond the scope of the Constitution. According to neighbors, the group also established its own common-law court system and built its own jail for the imprisonment of trespassers and government workers, or "public hirelings."

In the 1990s, the Freemen came to the attention of federal prosecutors after members of the group allegedly wrote worthless checks and money orders to pay taxes and to defraud banks and credit card companies. One Freeman had also allegedly threatened a federal judge, and some had allegedly refused to pay taxes for at least a decade.

In March 1996, law enforcement officials obtained warrants for the arrest of many of the Freemen. However, remembering the violence that occurred when officials attempted to serve arrest warrants on another armed group in Waco, Texas, in 1993, law enforcement authorities did not invade the Freemen's 960-acre ranch in Jordan, Montana. Although the Freemen constituted an armed challenge to all government authority, its beliefs and its military activities were not illegal, and most of its members were charged with nonviolent crimes, such as **FRAUD** and related conspiracy. Two men were also charged with threatening public officials. In addition, several Freemen faced charges of criminal syndicalism, which is the advocacy of violence for political goals.

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**CROSS-REFERENCES**

*Dennis v. United States.*

and cemented a limited reading of the Second Amendment. In *United States v. Miller,* 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206 (1939), defendants Jack Miller and Frank Layton were charged in federal court with unlawful transportation of firearms in violation of certain sections of the National Firearms Act of June 26, 1934 (ch. 757, 48 Stat. 1236–1240 [26 U.S.C.A. § 1132 et seq.]). Specifically, Miller and Layton had transported shotguns with barrels less than 18 inches long, without the registration required under the act.

The district court dismissed the indictment, holding that the act violated the Second Amendment. The United States appealed. The Supreme Court reversed the decision and sent the case back to the trial court. The Supreme Court stated that the Second Amendment was fashioned "to assure the continuation and render possible the effectiveness of . . . militia forces."

The *Miller* opinion confirmed the restrictive language of *Presser* and solidified a narrow reading of the Second Amendment. According to the Court in *Miller,* the Second Amendment does not guarantee the right to own a firearm unless the possession or use of the firearm has "a reasonable relationship to the preservation or efficiency of a well regulated militia."

The legislative measures that inspire most Second Amendment discussions are **GUN CONTROL** laws. Since the mid-nineteenth century, state legislatures have been passing laws that infringe a perceived right to bear arms. Congress has also asserted the power to regulate firearms. No law regulating firearms has ever been struck down by the Supreme Court as a violation of the Second Amendment.

Historically, the academic community has largely ignored the Second Amendment. However, gun control laws have turned many laypersons into scholars of the Second Amendment's history. The arguments for a broader interpretation are many and varied. Most center on the **ORIGINAL INTENT** of the Framers. Some emphasize that the Second Amendment should be interpreted as granting an unconditional personal right to bear arms for defensive and sport-

**Gun Ownership in 2002**

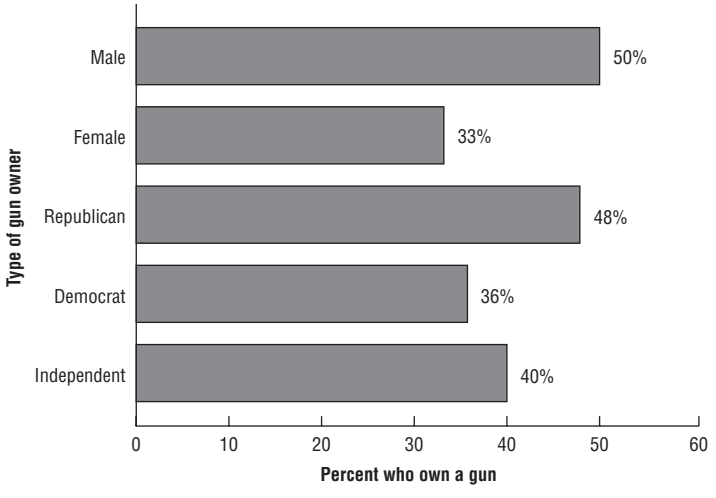


SOURCE: U.S. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics.*

ing purposes. Others adhere to an insurrection theory, under which the Second Amendment not only grants the personal right to bear arms, it gives citizens the right to rebel against a government perceived as tyrannical.

In response to these arguments, supporters of the prevailing Second Amendment interpretation maintain that any right to bear arms should be secondary to concerns for public safety. They also point out that other provisions in the Constitution grant power to Congress to quell insurrections, thus contradicting the insurrection theory. Lastly, they argue that the Constitution should be interpreted in accordance with a changing society and that the destructive capability of semiautomatic and automatic firearms was not envisioned by the Framers.

In response to the last argument, critics maintain that because such firearms exist, it should be legal to use them against violent criminals who are themselves wielding such weapons.

In the 2000s, federal courts continue to revisit the scope and detail of the Second Amendment right to bear arms. In particular federal courts have recast much of the debate as one over whether the Second Amendment protects a "collective" right or an "individual" right to bear arms. If the Second Amendment protects only a collective right, then only states would have the power to bring a legal action to enforce it and only for the purpose of maintaining a "well-regulated militia." If the Second Amendment protects only an individual right to bear arms, then only individuals could bring suit to challenge gun-control laws that curb their liberty to buy, sell, own, or possess firearms and other guns.

Not surprisingly, courts are conflicted over how to resolve this debate. In *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the U.S. Court of Appeals for the Fifth Circuit found that the original intent of the Founding Fathers supported an individual-rights interpretation of the Second Amendment, while the Ninth Circuit came to the opposite conclusion in *Nordyke v. King*, 319 F.3d 1185 (9th Cir. 2003). Although no court has concluded that the original intent underlying the Second Amendment supports a claim for *both* an individual- and a collective-rights based interpretation of the right to bear arms, the compelling historical arguments marshaled on both sides of the debate would suggest that another court faced with the same debate may reach such a conclusion.

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## SECOND LOOK DOCTRINE

*In the law of future interests, a rule that provides that even though the validity of interests created by the exercise of a power of appointment is ordinarily measured from the date the power is created, not from its exercise, the facts existing on the date of its exercise can be considered in order to determine if the* RULE AGAINST PERPETUITIES *has been violated.*

At COMMON LAW, the rule against perpetuities prescribed that no interest in property is valid unless it vests, if at all, not later than 21 years plus the period of gestation after some life or lives in being at the time of the creation of the interest. A property interest vests when it is given to a person in being and is not subject to a condition precedent (the occurrence of a designated event). This rule restricts a person's power to control the ownership and possession of her property after her death and ensures the transferability of property.

The second look doctrine has been applied to mitigate the harsh effect of the rule against perpetuities on a power of appointment—authority granted by one person by deed or will to another, the donee, to select a person or persons who are to receive property.

For example, B was the life income beneficiary (one who profits from the act of another) of a trust and the donee of a special power over the succeeding remainder—the property that passes to another after the expiration of an intervening income interest. His father, F, who predeceased him, established the trust in his will. B exercised his power through his own will, directing that the income be paid after his death to his children for the life of the survivor and that, upon the death of his last surviving child, the corpus—the main body or principal of a trust—be paid to his grandchildren. At F's death, B had two children, X and Y. No other children were born to B, and at his death, X and Y are still alive.

B's appointment is valid. The perpetuity period is measured from F's death. If only the facts existing at F's death could be considered, however, B's appointment would partly fail because of the possibility that he might have another child after F's death who would have children more than 21 years after the deaths of B, X, and Y. In considering the validity of B's appointment, however, not just the facts existing when the perpetuity period commences to run on B's appointment are considered. The facts existing at B's death can be taken into account under the second look doctrine, which thereby saves B's appointment. At B's death, it is known that no additional children were born to him after F's death. Thus B's last surviving child will be either X or Y, both of whom were "in being" at F's death and, therefore, constitute the measuring lives.

The second look doctrine is a departure from the fundamental principle that only the facts in existence when the perpetuity period commences to run can be taken into account in determining validity. Until the appointment is made, the appointed interests cannot be litigated. No useful purpose, therefore, is served by invalidating appointed interests because of what might happen after the power is created, but which at the time of exercise can no longer happen.

In some jurisdictions, this doctrine has been extended to gifts-in-default, which involve the expiration of the power, such as when the donee releases the power or dies without having exercised it.

For example, B was the life income beneficiary of a trust and the donee of a power over the succeeding remainder interest. In default of appointment (that is, B fails to name anyone to receive the property after he dies), the income after B's death was to be paid to his children for the life of the survivor, and on the death of B's last surviving child, the corpus was to be paid to B's grandchildren. B's father, F, who predeceased him, created the trust in his will. At F's death, B had two children, X and Y. B died without having additional children and without exercising his power. B was survived by X and Y.

F's death marks the commencement of the running of the perpetuity period as to the gift-in-default. Nevertheless if a second look at the facts existing at B's death is permissible, the gift-in-default is valid. The measuring lives are X and Y. If no second look is permissible, the remainder interest in favor of B's grandchildren is invalid. As of F's death, there was a possibility that B might have a child after F's death, that such a child might have survived B, and that such child might have had a child, B's grandchild, more than 21 years after the death of the survivor of B, X, and Y.

A default clause creates property interests no different from other property interests except that they are subject to divestment upon the exercise of the power. If B had not been granted a power of appointment in the above example, the interests created by the default clause would

clearly be judged on the basis of the facts existing when F died. No second look as of B's death would be permissible, unless the jurisdiction had adopted the WAIT AND SEE DOCTRINE. Until the power of appointment expires, it cannot be known whether the gift-in-default of appointment is to control the disposition of the property or whether it is to be superseded by some appointment that the donee makes. Therefore no possible delay in adjudging the validity of the remainder is entitled in examining facts that exist at the date the power expires unexercised.

Jurisdictions that do not apply the doctrine to gifts-in-default maintain that its application to appointments is justified because the appointed interests are unknown, and, consequently, it is impossible to adjudicate their validity until the appointment is made, not because it is unlikely that anyone would want to adjudicate their validity until that time. The interests created by a default clause, unlike appointed interests, are known, and their validity can be litigated before the expiration of the power. These jurisdictions reason that the rationale for taking a second look in the case of appointed interests does not apply to interests created in the default clause.

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CROSS-REFERENCES

Estate.

## SECONDARY AUTHORITY

*Sources of information that describe or interpret the law, such as legal treatises, law review articles, and other scholarly legal writings, cited by lawyers to persuade a court to reach a particular decision in a case, but which the court is not obligated to follow.*

Secondary authority is information cited by lawyers in arguments and used by courts in reaching decisions. Secondary authority is distinct from primary authority. The sources of primary authority are written laws passed by legislative bodies, prior judicial decisions, government administrative regulations, and court rules. Courts are obliged to decide cases by following the dictates of primary authority, and lawyers must make arguments based on the primary authority that is applicable to the case.

Neither lawyers nor courts are required to use secondary authority, but both may do so to buttress arguments based on primary authority. Among the most commonly cited sources of secondary authority are the RESTATEMENTS OF LAW, written by the authors, scholars, and legal professionals that make up the American Law Institute. The restatements contain suggested laws and rules on a wide assortment of legal topics ranging from contracts to TORTS to conflicts of laws.

Law reviews and other scholarly works are other commonly cited sources of secondary authority. Law reviews are articles about legal topics published by law schools and other legal organizations and written by law professors, law students, and other academics. Other groups publish legal literature that may be cited by lawyers and courts. The *American Law Reports* provide case synopses of recent legal developments with a focus on court decisions, and CONTINUING LEGAL EDUCATION programs conducted by and for attorneys produce literature that may be used by lawyers and judges.

Legal encyclopedia articles and legal dictionaries are less commonly cited in court although the U.S. Supreme Court has, on occasion, used *Black's Law Dictionary* to support its definition of a legal word or phrase.

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## SECONDARY BOYCOTT

*A group's refusal to work for, purchase from, or handle the products of a business with which the group has no dispute.*

A secondary boycott is an attempt to influence the actions of one business by exerting pressure on another business. For example, assume that a group has a complaint against the Acme Company. Assume further that the Widget Company is the major supplier to the Acme Company. If the complaining group informs the Widget Company that it will persuade the public to stop doing business with the company unless it stops doing business with Acme Company, such a boycott of the Widget Company would be a secondary boycott. The intended effect of such a boycott would be to influence

the actions of Acme Company by organizing against its major supplier.

**LABOR UNIONS** are the most common practitioners of secondary boycotts. Typically a labor union involved in a dispute with an employer will arrange a secondary boycott if less drastic measures to reach a satisfactory accord with the employer have been ineffective. Secondary boycotts have two main forms: a secondary consumer boycott, in which the union appeals to consumers to withhold patronage of a business, and a secondary employee boycott, in which the union dissuades employees from working for a particular business.

Generally a secondary boycott is considered an **UNFAIR LABOR PRACTICE** when it is organized by a labor union. Congress first acted to prohibit secondary boycotts in the **LABOR-MANAGEMENT RELATIONS ACT** of 1947 (29 U.S.C.A. § 141 et seq.), also called the **TAFT-HARTLEY ACT**. The Taft-Hartley Act was a set of amendments to the National Labor Relations Act, also known as the **WAGNER ACT** of 1935 (29 U.S.C.A. § 151 et seq.). Congress limits the right of labor unions to conduct secondary boycotts because such activity is considered basically unfair and because it can have a devastating effect on intrastate and interstate commerce and the general state of the economy.

On the federal level, the right of a labor union to arrange a secondary boycott is limited by section 8(b)(4) of the National Labor Relations Act. Under the act, no labor union may threaten, coerce, or restrain any person engaged in commerce in order to force that person to cease doing business with any other person (29 U.S.C.A. § 158(b)(4)(ii)(B)). Secondary boycotts may be enjoined, or stopped, by order of a federal court, and an aggrieved business may file suit in court against the party initiating the secondary boycott to recover any monetary damages that resulted. If the federal act somehow does not cover the actions of a labor union in a particular case, an aggrieved business may seek relief under state laws.

The statutory limitation on the right of labor unions to instigate a secondary boycott is an exception to the guarantee of free speech contained in the **FIRST AMENDMENT** to the U.S. Constitution. But in **BALANCING** free speech rights against the rights of secondary employers and the right of Congress to manage interstate commerce, Congress has carved out an important exception to the ban on secondary boycotts by labor unions. Under this section of the act, a labor union may induce a secondary boycott if the information dispensed by the labor union is truthful, does not cause a work stoppage, and has the purpose of informing the general public that the secondary neutral employer distributes a product that is produced by the primary employer. This exception is called the publicity exception to the ban on secondary boycotts by labor unions.

The publicity proviso does not cover picketing. Picketing is a physical presence at a business to publicize a labor dispute, influence customers and employees, or show a union's desire to represent employees. The U.S. Supreme Court has held that Congress may prohibit a union from picketing against a secondary employer if the picketing would predictably result in financial ruin for the picketed secondary employer (*National Labor Relations Board v. Retail Store Employees, Local 1001 [Safeco],* 447 U.S. 607, 100 S. Ct. 2372, 65 L. Ed. 2d 377 [1980]). The Supreme Court also has ruled that the publicity exception does not apply to the distribution of handbills that encourage a boycott of a shopping mall department store if the dispute is with the company constructing the department store and the boycott includes cotenants of the shopping mall who had no relationship with the construction company (*Edward J. DeBartolo Corp. v. National Labor Relations Board,* 463 U.S. 147, 103 S. Ct. 2926, 77 L. Ed. 2d 535 [1983]). In 1988 the High Court held that section 158(b)(4)(ii)(B) of 29 U.S.C.A. did not prohibit the peaceful distribution of handbills at a shopping mall urging consumers not to shop at the mall until the mall's owner promised that all mall construction would be done by contractors paying fair wages (*Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council,* 485 U.S. 568, 108 S. Ct. 1392, 99 L. Ed. 2d 645 [1988]). According to the Court, such activity did not constitute threats, coercion, or restraint and therefore did not fall within the prohibition of the National Labor Relations Act.

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Labor Law; Strike.

## SECONDARY EVIDENCE

*A reproduction of, or substitute for, an original document or item of proof that is offered to establish a particular issue in a legal action.*

Secondary evidence is evidence that has been reproduced from an original document or substituted for an original item. For example, a photocopy of a document or photograph would be considered secondary evidence. Another example would be an exact replica of an engine part that was contained in a motor vehicle. If the engine part is not the very same engine part that was inside the motor vehicle involved in the case, it is considered secondary evidence.

Courts prefer original, or primary, evidence. They try to avoid using secondary evidence wherever possible. This approach is called the best evidence rule. Nevertheless, a court may allow a party to introduce secondary evidence in a number of situations. Under rule 1003 of the FEDERAL RULES OF EVIDENCE, a duplicate is admissible unless a genuine question is raised as to its authenticity or unless it would be unfair to admit the duplicate in place of the original piece of evidence.

After hearing arguments by the parties, the court decides whether to admit secondary evidence after determining whether the evidence is in fact authentic or whether it would be unfair to admit the duplicate. However, when a party questions whether an asserted writing ever existed, or whether a writing, recording, or photograph is the original, the trier of fact makes the ultimate determination. The trier of fact is the judge if it is a bench trial; in a jury trial, the trier of fact is the jury.

Rule 1004 of the Federal Rules of Evidence lists specific exceptions to the best evidence rule. Under rule 1004, secondary evidence of a writing, recording, or photograph is admissible if (1) all originals are lost or destroyed, unless they were lost or destroyed in bad faith by the party seeking to introduce the secondary evidence; (2) no original can be obtained by judicial process or procedure; (3) the party's opponent in the case has possession of the original and does not produce it after being given sufficient notice that the evidence would be subject to examination at a court hearing; or (4) the original evidence is not closely related to a controlling issue in the case.

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CROSS-REFERENCES

Primary Evidence.

## SECONDARY MEANING

*A doctrine of* TRADEMARK *law that provides that protection is afforded to the user of an otherwise unprotectable mark when the mark, through advertising or other exposure, has come to signify that an item is produced or sponsored by that user.*

Under trademark law a mark associated with a marketed product generally cannot receive full trademark protection unless it is distinctive. Trademark protection gives the holder of a mark the exclusive right to use that mark in connection with a product.

Full trademark protection is given when the U.S. PATENT AND TRADEMARK OFFICE places the mark on the principal register of trademarks. Suggestive, ARBITRARY, and fanciful marks distinguish a product from other products, so they automatically qualify for the principal register. Descriptive and generic marks ordinarily do not qualify for the principal register. A person may not, for example, claim the right to the word "fine" in connection with a product because the word is merely descriptive. A descriptive or generic mark may, however, be placed on the supplemental register, which gives the holder of the mark a certain measure of trademark protection. If the mark acquires a secondary meaning after five years of continuous, exclusive use on the market, the mark may be placed on the principal register (15 U.S.C.A. § 1052(f)).

A descriptive or generic mark attains a secondary meaning if the producer so effectively markets the product with the mark that consumers come to immediately associate the mark with only that producer of that particular kind of goods. To illustrate, assume that an apple grower markets red apples under the term "Acme." Because the term is generic, it would

not qualify for full trademark protection at first. If, however, customers immediately recognize Acme apples as the apples produced by that grower, after five years the producer may prevent all others from using the mark "Acme" in connection with red apples.

Under 15 U.S.C.A. § 1052(a)–(d), (f), immoral or scandalous marks, national symbols, and names of living figures cannot acquire trademark protection, even through secondary meaning. Surnames generally are not given trademark protection, but a surname may qualify for protection if it acquires a secondary meaning (*Ex parte Rivera Watch Corp.,* 106 U.S.P.Q. 145, 1955 WL 6450 [Com'r 1955]).

## SECRET SERVICE

The U.S. Secret Service (USSS) is a government agency charged with preventing counterfeiting and protecting the president of the United States, other high-ranking government officials, and presidential candidates. From its establishment in 1865 until March 1, 2003, the Secret Service was housed within the TREASURY DEPARTMENT. The Secret Service was thereafter a part of the HOMELAND SECURITY DEPARTMENT. Its headquarters are in Washington, D.C., and a director, who is appointed by the president, administers the agency. It has field offices throughout the United States and overseas.

President ABRAHAM LINCOLN appointed a commission to combat the counterfeiting of U.S. currency and coins, which had led to dire economic consequences during the Civil War. He established the Secret Service in April 1865 to carry out the commission's recommendations. During the remainder of the nineteenth century the Secret Service successfully addressed the issue of counterfeiting. Its role changed after the 1901 assassination of President WILLIAM MCKINLEY, however. Congress at first informally requested the Secret Service to protect President THEODORE ROOSEVELT and in 1907 began to appropriate funds for presidential protection. In 1917, threats against the president became a felony and Secret Service protection was broadened to include all members of the First Family. In 1951, protection of the vice president and the president-elect was added. After the assassination of presidential candidate ROBERT KENNEDY in 1968, President LYNDON B. JOHNSON authorized the Secret Service to protect all presidential candidates. In 1971 Congress authorized the Secret Service to protect visiting heads of a foreign state or government; in 1975 this responsibility was broadened to include the protection of foreign diplomatic missions throughout the United States. In 1994 Congress passed a law that limits Secret Service protection of former presidents to 10 years after leaving office.

With the growing threat of TERRORISM, the mission of the Secret Service has expanded. In 2000 Congress enacted the Presidential Threat Protection Act. This law authorized the Secret Service to participate in the planning, coordination, and implementation of security operations at special events of national significance ("National Special Security Event"), as determined by the president. Following the SEPTEMBER 11TH TERRORIST ATTACKS in 2001 on New York City and Washington, D.C., Congress passed the USA PATRIOT ACT. This sprawling statute sought to respond to the attacks on many fronts. The act increased the Secret Service's role in investigating FRAUD and related activity in connections with computers. In addition it authorized the director of the Secret Service to establish nationwide electronic crimes taskforces to assist the law enforcement, private sector, and universities in detecting and suppressing computer-based crime. The law also increased the penalties for the manufacturing, possession, dealing, and passing of counterfeit U.S. or foreign obligations. Most importantly, it authorized enforcement action to be taken to protect U.S. financial payment systems while combating transnational financial crimes directed by terrorists or other criminals.

The Secret Service has established the National Threat Assessment Center (NTAC), which advises law enforcement agencies and other professionals on how to investigate and prevent targeted violence, including assassination. The NTAC has collaborated with Carnegie Mellon University to develop the Critical Systems Protection Initiative (CSPI). CSPI seeks to develop better cyber security measures, including the prevention of computer "insiders" from using networks to compromise the integrity of the system.

Though often overlooked, the Secret Service's Counterfeit Division continues to investigate counterfeiters. With the advent of color copiers and computer scanners, criminals have access to powerful tools that aid in counterfeiting. The agency's Financial Crimes Division

investigates crimes associated with financial institutions. The division's jurisdiction includes bank fraud, credit and debit card fraud, TELECOMMUNICATIONS and computer crimes, MONEY LAUNDERING, and IDENTITY THEFT.

Congress established the Homeland Security Department in 2002. The department consists of agencies that were previously housed in the various executive divisions, including the JUSTICE DEPARTMENT and the Treasury. The Secret Service was transferred from Treasury to Homeland Security, effective March 1, 2003. The agency was to remain intact and its primary mission would remain the protection of the president and other government leaders. It would have access to Homeland Security intelligence analysis. In addition, the Secret Service's fight against counterfeiting and financial crimes has been characterized as a battle to protect economic security.

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CROSS-REFERENCES

Counterfeiting; Homeland Security Department; President of the United States.

## SECRETARY GENERAL

See UNITED NATIONS.

## SECRETARY OF STATE

Holding one of the ranking positions in the president's cabinet, the secretary of state is the president's principal foreign policy adviser. In this pivotal role, the secretary undertakes the overall direction, coordination, and supervision of relations between the United States and foreign nations. The position is fourth in line of presidential succession. Like other cabinet members who implement the president's policies, the secretary heads a federal department: the STATE DEPARTMENT. As its director, the secretary oversees a vast network of U.S. offices and agencies, conducts negotiations with foreign governments, and often travels in the role of chief U.S. representative abroad. In 1997 then-president BILL CLINTON named MADELEINE K. ALBRIGHT as the first female secretary of state. Four years later, President GEORGE W. BUSH named Colin L. Powell as the first black person to hold the office.

The position of secretary of state developed shortly after the founding of the nation in the late eighteenth century. In 1781 Congress created the Department of Foreign Affairs but abolished it and replaced it with the Department of State in 1789. Lawmakers designated the secretary of state as head of the State Department with two principal responsibilities: to assist the president in foreign policy matters and to be the chief representative of the United States abroad. Nomination of the secretary was left to the president, but the appointment was made contingent upon the approval of the U.S. Senate. The first secretary of state, THOMAS JEFFERSON, served under President GEORGE WASHINGTON from 1790 to 1793.

Since the end of WORLD WAR II, the U.S. foreign policy apparatus has greatly expanded, and its principal body is the State Department. The United States maintains diplomatic relations with some 180 countries worldwide as well as ties to many international organizations, and most of this diplomatic business flows through the State Department. The secretary is aided by a deputy secretary and five undersecretaries who serve as key advisers in political affairs; economic, business, and agricultural affairs; ARMS CONTROL and international security affairs; management; and global affairs. Additionally, the secretary has general responsibility for the U.S. INFORMATION AGENCY, the Arms Control and Disarmament Agency, and the Agency for International Development.

The secretary is very important. Under the U.S. Constitution, the president has most of the power to set foreign policy; some of this power is shared by the U.S. Senate, which approves treaties as well as diplomatic and consular appointments. In practical terms the secretary of state generally becomes the architect of U.S. foreign policy by implementing the president's objectives. Not all foreign policy advice is given by the secretary, however. In 1947 the creation of the NATIONAL SECURITY COUNCIL provided the president with an additional advisory board (National Security Act of 1947, 50 U.S.C.A. §§ 401–412 [1982]).

Some secretaries have exerted enormous influence on U.S. policy—largely as a reflection

of the president under whom they served. HENRY KISSINGER, who served as secretary of state from 1973 to 1976 under presidents RICHARD M. NIXON and GERALD R. FORD, had a leading role in shaping the nation's participation in nuclear arms treaties and in the VIETNAM WAR. By contrast, Secretary of State George Schultz found his influence eclipsed by that of the National Security Council during the IRAN-CONTRA scandal that rocked the presidency of RONALD REAGAN in the mid-1980s.

Powell has maintained a particularly high profile during his tenure. Nine months after taking office, on September 11, 2001, terrorists attacked targets within the United States, causing the destruction of the World Trade Center towers in New York City and severe damage to the Pentagon in Washington, D.C. The United States immediately embarked upon a war against TERRORISM, leading to an attack on the Taliban regime in Afghanistan. Powell played a pivotal role in foreign diplomacy by meeting with several world leaders regarding the United States' involvement in Afghanistan. Powell's presence was likewise visible in such controversies as the Palestinian uprising against Israel, where Powell called upon both the Palestinians and Israel to work for peace.

On February 5, 2003, Powell appeared before the UNITED NATIONS, seeking to establish evidence that the nation of Iraq possessed weapons of mass destruction. The presentation was a precursor to the United States' eventual attack on Iraq, which resulted in the overthrow of the regime of Saddam Hussein. Powell is viewed as a realist among the members of the Bush cabinet, and his conservative views of military action are seen as a counterbalance to those of Bush and other cabinet members. In this sense, Powell maintains an unusual position as a secretary of state—a former military leader who promotes restraint in the use of military force to resolve disputes.

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Ambassadors and Consuls; Arms Control and Disarmament; International Law; State Department.

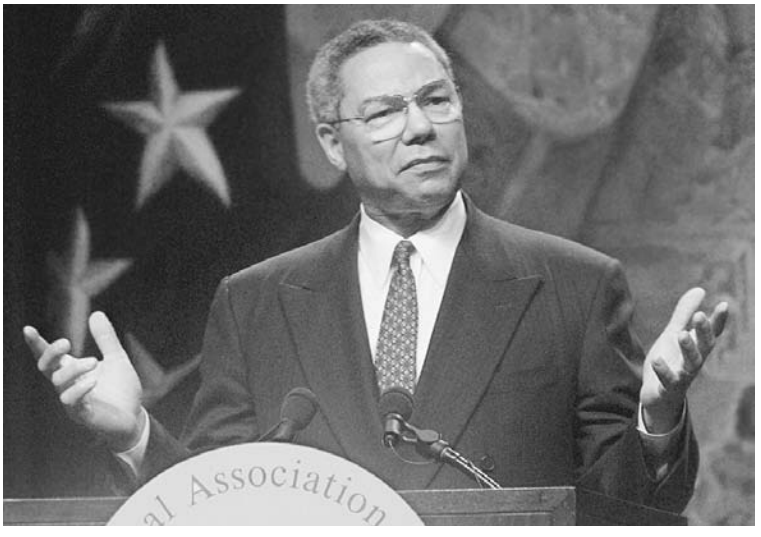

*Colin Powell, as secretary of state, directs relations between the United States and foreign countries.*

AP/WIDE WORLD PHOTOS

## SECTION

*The distinct and numbered subdivisions in legal codes, statutes, and textbooks. In the law of real property, a parcel of land equal in area to one square mile, or 640 acres.*

## SECTION 1983

Section 1983 of Title 42 of the U.S. Code is part of the CIVIL RIGHTS ACT of 1871. This provision was formerly enacted as part of the KU KLUX KLAN ACT of 1871 and was originally designed to combat post-CIVIL WAR racial violence in the Southern states. Reenacted as part of the Civil Rights Act, section 1983 is as of the early 2000s the primary means of enforcing all constitutional rights.

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

On March 23, 1871, President ULYSSES S. GRANT sent an urgent message to Congress calling for national legislation that could combat the alarming increase in racial unrest and violence in the South. Congress reacted swiftly to this request, proposing a bill just five days later. The primary objective of the bill was to provide a means for individuals and states to enforce, in

the federal or state courts, the provisions of the FOURTEENTH AMENDMENT. The proposed bill created heated debate lasting several weeks but was eventually passed on April 20, 1871.

During the first 90 years of the act, few causes of action were brought due to the narrow and restrictive way that the U.S. Supreme Court interpreted the act. For example, the phrase "person . . . [acting] under color of any statute" was not interpreted to include those wrongdoers who happened to be state or municipal officials acting within the scope of their employment but not in accordance with the state or municipal laws. Those officials were successfully able to argue that they were not acting under color of statute and therefore their actions did not fall under the mandates of section 1983. In addition, courts narrowly construed the definition of "rights, privileges, or immunities."

But the Supreme Court decisions in *Monroe v. Pape,* 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), and *Monell v. Department of Social Services,* 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), finally recognized the full scope of Congress's ORIGINAL INTENT in enacting section 1983. The Supreme Court began accepting an expansive definition of rights, privileges, or immunities and held that the act does cover the actions of state and municipal officials, even if they had no authority under state statute to act as they did in violating someone's federal rights.

### Jurisdiction

Federal courts are authorized to hear cases brought under section 1983 pursuant to two statutory provisions: 28 U.S.C.A. § 1343(3) (1948) and 28 U.S.C.A. § 1331 (1948). The former statute permits federal district courts to hear cases involving the deprivation of civil rights, and the latter statute permits federal courts to hear all cases involving a federal question or issue. Cases brought under section 1983 may therefore be heard in federal courts by application of both jurisdictional statutes.

State courts may also properly hear section 1983 cases pursuant to the SUPREMACY CLAUSE of Article VI of the U.S. Constitution. The Supremacy Clause mandates that states must provide hospitable forums for federal claims and the vindication of federal rights. This point was solidified in the Supreme Court decision of *Felder v. Casey,* 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988). The *Felder* case involved an individual who was arrested in Wisconsin and later brought suit in state court against the police officers and city for violations of his federal rights. The state court dismissed the claim because the plaintiff failed to properly comply with a state procedural law. But the Supreme Court overturned the state decision, holding that the Wisconsin statute could not bar the individual's federal claim.

To bring an action under section 1983, the plaintiff does not have to begin in state court. However, if the plaintiff chooses to bring suit in state court, the defendant has the right to remove the case to federal court.

### Elements of a Section 1983 Claim

To prevail in a claim under section 1983, the plaintiff must prove two critical points: a person subjected the plaintiff to conduct that occurred under color of state law, and this conduct deprived the plaintiff of rights, privileges, or immunities guaranteed under federal law or the U.S. Constitution.

A state is not a "person" under section 1983, but a city is a person under the law (*Will v. Michigan Department of State Police,* 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 [1989]). Similarly, state officials sued in their official capacities are not deemed persons under section 1983, but if sued in their personal capacities, they are considered to be persons. Thus if a plaintiff wants to bring a section 1983 claim against a state official, she or he must name the defendants in their personal capacity and not in their professional capacity. Like a state, a territory, such as the territory of Guam, is not considered to be a person for the purposes of section 1983.

The Supreme Court has broadly construed the provision "under color of any statute" to include virtually any STATE ACTION including the exercise of power of one "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law" (*United States v. Classic,* 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 [1941]). Thus, the wrongdoer's employment by the government may indicate state action, although it does not conclusively prove it. Even if the wrongdoer did not act pursuant to a state statute, the plaintiff may still show that the defendant acted pursuant to a "custom or usage" that had the force of law in the state. In *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970), the plaintiff

was able to prove that she was refused service in a restaurant due to her race because of a state-enforced custom of racial SEGREGATION, even though no state statute promoted racial segregation in restaurants.

A successful section 1983 claim also requires a showing of the deprivation of a constitutional or federal statutory "right." This showing is required because section 1983 creates a REMEDY when rights are violated but does not create any rights itself. It is not enough to show a violation of a federal law because all federal laws do not necessarily create federal rights. A violation of the Fourth Amendment's guarantee against unreasonable SEARCHES AND SEIZURES or a violation of the COMMERCE CLAUSE are examples of federal constitutional rights that may be deprived. Deprivation of federal statutory rights is also actionable when it can be shown that the statute creates a federal right. To show that a federal statute creates a federal right, the plaintiff must demonstrate that the federal law was designed and clearly intended to benefit the plaintiff, resulting in the creation of a federal right. For example, the Supreme Court held that a person's entitlement to WELFARE benefits under the federal SOCIAL SECURITY ACT is a federal right stemming from a federal statute that can be protected by section 1983 (*Maine v. Thiboutot,* 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 [1980]). However, the Court made clear in *Blessing v. Freestone* (520 U.S. 329, 117 S. Ct. 1353, 137 L. Ed. 2d 569 [1997]) that individuals cannot sue state and local agencies to force overall compliance with federal regulations.

If the plaintiff can demonstrate that a federal law granted her a federal right that was then violated, the defendant can defeat the plaintiff's claim by demonstrating that Congress specifically foreclosed a remedy under section 1983 for the type of injury that the plaintiff is PLEADING. The Supreme Court has held that the defendant must prove that a section 1983 action would be inconsistent with the cautious and precise scheme of remedies provided by Congress. For example, if a federal law specifically provides for a means to privately enforce that law, or if the statute does not create "rights" within the meaning of section 1983, the defendant may prevail in showing that Congress did not intend a section 1983 remedy to apply in that circumstance. It is the defendant's burden to demonstrate congressional intent to prevent a remedy under section 1983.

### Absolute and Qualified Immunities

Although section 1983 does not specifically provide for absolute IMMUNITY for any parties, the Supreme Court has deemed that some officials are immune. The Supreme Court reached this conclusion by applying the common-law principles of tort immunity that existed in the United States at the time section 1983 was enacted, assuming that Congress had intended those common-law immunities to apply without having to specifically so provide in the statute. State and regional legislators are absolutely immune, as long as they are engaged in traditional legislative functions. Local legislators, such as city council members and county commissioners, have been guaranteed absolute immunity since *Bogan v. Scott-Harris,* 523 U.S. 44, 118 S. Ct. 966, (1998). Previously, local officials were protected in some localities by state laws.

Judges have also been held to be absolutely immune from section 1983 actions, as long as they are performing adjudicative functions (*Pierson v. Ray,* 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 [1967]; STUMP V. SPARKMAN, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 [1978]). Judges are considered to be performing their adjudicative functions as long as they had jurisdiction over the subject matter at the time they acted and the action was a judicial act. A minority of lower courts have extended this absolute JUDICIAL IMMUNITY to QUASI-JUDICIAL agencies, such as PAROLE boards, when they have performed functions similar to those of judges (*Johnson v. Wells,* 566 F.2d 1016 [5th Cir. 1978]). Absolute judicial immunity has also been extended in some cases to those judicial employees who act under the direction of the judge, such as a law clerk, court administrator, paralegal, or court reporter (*Lockhart v. Hoenstine,* 411 F.2d 455 [3d Cir. 1969]).

State prosecuting attorneys who are acting within the scope of their duty in presenting the state's case are also absolutely immune from suits for damages under section 1983 claims but are not absolutely immune from suits seeking prospective relief (*Imbler v. Pachtman,* 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 [1976]). Moreover, the U.S. Supreme Court has ruled that criminal prosecutors do not have absolute immunity when engaged in actions not associated with advocacy. (*Kalina v. Fletcher,* 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 2d 471 [1997]). Other state officials who act in a prosecutorial

role are similarly immune. The Supreme Court differentiated public defenders, however, in *Polk County v. Dodson,* 454 U.S. 312, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981), holding that they do not act under color of state law when performing their duties and therefore are not in need of immunity because their conduct is not covered by section 1983.

Witnesses who testify in court are absolutely immune from section 1983 actions for damages, even if the claim arises out of the witness's perjured testimony (*Briscoe v. LaHue,* 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 [1983]).

The Supreme Court has also recognized a qualified immunity defense to section 1983 actions in certain circumstances. Most state and local officials and employees, who do not enjoy absolute immunity, are entitled to qualified immunity. Thus, a prosecuting attorney who enjoys absolute immunity in performing her prosecutorial functions may also enjoy a qualified immunity in hiring and firing subordinates. The Supreme Court has held that school board members, state mental institution administrators, law enforcement officers, prison officials, and state and local executives have qualified immunity (*Wood v. Strickland,* 420 U.S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 [1975]; *O'Connor v. Donaldson,* 422 U.S. 563, 95 S. Ct. 2486, 45 L. Ed. 2d 396 [1975]; *Pierson v. Ray,* 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 [1967]; *Procunier v. Navarette,* 434 U.S. 555, 98 S. Ct. 855, 55 L. Ed. 2d 24 [1978]; *Scheuer v. Rhodes,* 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 [1974]). Most federal circuit courts have deemed that parole board members and prison disciplinary committee members have qualified immunity (*Fowler v. Cross,* 635 F.2d 476 [5th Cir. 1981]; *Thompson v. Burke,* 556 F.2d 231 [3d Cir. 1977]). Lower courts have extended the defense of qualified immunity to a number of other officials, such as city managers, county health administrators, and state VETERANS' AFFAIRS DEPARTMENT trust officers.

While prison guards employed by the government (local, state, or federal) are covered under qualified immunity, guards who work in for-profit prison management companies are not. This issue was raised in part because of a growing trend on the part of state prison systems to hire outside companies to manage their prisons—a move that reduces the costs of hiring permanent staff. The U.S. Supreme Court ruled in a 5–4 vote in 1997 that privately employed individuals did not warrant the same level of protection. (*Richardson v. McKnight,* 521 U.S. 399, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997).)

If the defendant can raise the defense of absolute or qualified immunity, then it is his duty to plead it (*Gomez v. Toledo,* 446 U.S. 635, 100 S. Ct. 1920, 64 L. Ed. 2d 572 [1980]).

### Remedies

The Supreme Court has held that section 1983 creates "a species of tort liability" (*Imbler v. Pachtman,* 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 [1976]). Thus, the Supreme Court has held that, as in TORT LAW, a section 1983 plaintiff is entitled to receive only nominal damages, not to exceed one dollar, unless she or he can prove actual damages (*Carey v. Piphus,* 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 [1978]). The jury is not entitled to place a monetary value on the constitutional rights of which the plaintiff was deprived (*Memphis Community School District v. Stachura,* 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed. 2d 249 [1986]). Plaintiffs bear the burden, therefore, of presenting evidence of all expenses incurred, such as medical or psychiatric expenses, lost wages, and any damages due to pain and suffering, emotional distress, or damage to reputation. The plaintiff is also under a burden to mitigate his damages, and the award of damages may be reduced to the extent that the plaintiff failed to do so.

A section 1983 plaintiff is also required to prove that a federal right was violated and, similar to tort law, that the alleged violation was a proximate or legal cause of the damages that the plaintiff suffered (*Arnold v. IBM Corp.,* 637 F.2d 1350 [9th Cir. 1981]).

The Supreme Court has also held that, similar to tort law, PUNITIVE DAMAGES are available under section 1983 (*Smith v. Wade,* 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 [1983]). A plaintiff is entitled to punitive damages if the jury finds that the defendant's conduct was reckless or callously indifferent to the federally protected rights of others or if the defendant was motivated by an evil intent. The jury has the duty to assess the amount of punitive damages. Because the purpose of punitive damages is to punish the wrongdoer, such damages may be awarded even if the plaintiff cannot show actual damages (*Basista v. Weir,* 340 F.2d 74 [3d Cir. 1965]). As in tort law, the judge has the right to overturn a jury verdict if the jury awards what the judge considers to be excessive punitive damages.

Courts also have broad power to grant equitable relief to plaintiffs in section 1983 actions. Equitable remedies that courts have provided in the past include SCHOOL DESEGREGATION, restructuring of state mental health facilities, and restructuring of prisons (*United States v. City of Yonkers,* 96 F. 3d 600 [2nd Cir. 1996]; *Wyatt v. Stickney,* 344 F. Supp. 373 [M.D. Ala. 1972]; *Hutto v. Finney,* 437 U.S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 522 [1978]). When the court does provide equitable relief, it usually also provides ongoing evaluation and supervision of the enforcement of its orders.

The Civil Rights Attorney's Fee Awards Act of 1976 (42 U.S.C.A. § 1988[b]) allows for the award of reasonable attorneys' fees to the prevailing party in cases brought under various federal civil rights laws, including section 1983. This provision applies whether or not COMPENSATORY DAMAGES were awarded. This provision also applies whether the plaintiff or the defendant prevails. However, if the defendant is the prevailing party, attorneys' fees have been held to be appropriate only where the lawsuit was "vexatious, frivolous, or brought to harass or embarrass the defendant" (*Hensley v. Eckerhart,* 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 [1983]). In addition, section 1988 does not require that the attorneys' fees awarded be in proportion to the amount of damages recovered (*City of Riverside v. Rivera,* 477 U.S. 561, 106 S. Ct. 2686, 91 L. Ed. 2d 466 [1986]).

Rule 68 of the Federal Rules of Civil Procedure can lead to the adjustment of the amount of damages awarded by a jury in a section 1983 case. Enacted to encourage parties to settle their matters out of court, rule 68 provides that if the plaintiff rejected a settlement offer made by the defendant before trial that is better than the award the plaintiff ultimately received in the trial, the defendant is not liable for plaintiff's attorneys' fees incurred after the time the defendant made the settlement offer (*Marek v. Chesny,* 473 U.S. 1, 105 S. Ct. 3012, 87 L. Ed. 2d 1 [1985]). Under rule 68, section 1983 plaintiffs need to carefully consider any settlement offers made by the defendants.

### Bars to Relief

Section 1983 does not provide a specific STATUTE OF LIMITATIONS, which is a time limit in which a claim must be brought after the alleged violation occurred. But 42 U.S.C.A. § 1988 (1976) states that where the federal law does not provide a statute of limitations, state law shall apply. In determining which state statute of limitations to apply in a section 1983 case, the Supreme Court has held that in the interests of national uniformity and predictability, all section 1983 claims shall be treated as tort claims for the recovery of personal injuries (*Wilson v. Garcia,* 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 [1985]). If the state has various statutes of limitations for different intentional torts, the Supreme Court mandates that the state's general or residual personal injury statute of limitations should apply (*Owens v. Okure,* 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed. 2d 594 [1989]).

The Supreme Court has also held that state tolling statutes, which provide a plaintiff with an additional period of time in which to bring a lawsuit equal to the period of time in which the plaintiff was legally disabled, apply to section 1983 cases (*Board of Regents v. Tomanio,* 446 U.S. 478, 100 S. Ct. 1790, 64 L. Ed. 2d 440 [1980]).

Under section 1983, the statute of limitations does not begin to run until the CAUSE OF ACTION accrues. The cause of action accrues when "the plaintiff knows or has reason to know of the injury which is the basis of the action" (*Cox v. Stanton,* 529 F.2d 47 [4th Cir. 1975]). However, in EMPLOYMENT LAW cases, the Supreme Court has held that the cause of action accrues when the discriminatory act occurs (*Delaware State College v. Ricks,* 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 [1980]). Thus, if an employee is being terminated for reasons that violate section 1983, the statute of limitations begins on the day that the employee learns of the termination, not when the termination actually begins (*Chardon v. Fernandez,* 454 U.S. 6, 102 S. Ct. 28, 70 L. Ed. 2d 6 [1981]).

The legal rules of RES JUDICATA (claim preclusion) and COLLATERAL ESTOPPEL (issue preclusion) apply to section 1983 claims. This means that federal courts must give state court judgments the same preclusive effect that the law of the state in which the judgment was rendered would give. Plaintiffs need to be careful to raise all potential federal claims in cases brought in state court because they will not be allowed to bring those claims later in federal court after the state court has rendered a decision on the issues before it.

A plaintiff may waive his or her right to sue under section 1983, but such a waiver may be deemed unenforceable if "the interest in its

enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement" *Town of Newton v. Rumery,* 480 U.S. 386, 107 S. Ct. 1187, 94 L. Ed. 2d 405 [1987].

FURTHER READINGS

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CROSS-REFERENCES

Civil Rights; Remedy.

## SECURE

*To assure the payment of a debt or the performance of an obligation; to provide security.*

A debtor "secures" a creditor by giving him or her a lien, mortgage, or other security to be used in case the debtor fails to make payment.

## SECURED CREDITOR

*One who holds some special monetary assurance of payment of a debt owed to him or her, such as a mortgage, collateral, or lien.*

## SECURED TRANSACTIONS

*Business dealings that grant a creditor a right in property owned or held by a debtor to assure the payment of a debt or the performance of some obligation.*

A secured transaction is a transaction that is founded on a security agreement. A security agreement is a provision in a business transaction in which the obligor, or debtor, in the agreement gives to the creditor the right to own property owned or held by the debtor. This property, called collateral, is then held by either the debtor or the secured party to ensure against loss in the event the debtor cannot fulfill the obligations under the transaction.

The purchase of a car through financing is an example of a secured transaction. The car dealership or some other lender pays for the vehicle in return for a promise from the buyer to repay the loan with interest. The buyer receives the vehicle, but the lender retains the title to the car as security against the risk that the buyer will be unable to make the loan payments. If the buyer defaults on the payments, the lender, called the secured party, may repossess the car to recover losses from the default.

If the same transaction was unsecured, the buyer would receive the title to and possession of the car, and the lender would receive only the buyer's promise to repay the loan. If the buyer defaulted on the payments, the lender could sue the buyer, but the simple remedy of taking the property would not be available.

A security interest may be transferred, or assigned, to a third party. The party receiving the assignment becomes the secured party, and the original secured party no longer holds a claim to the collateral.

The law of secured transactions varies little from state to state because all 50 states plus the District of Columbia and the U.S. Virgin Islands have adopted Article 9, the secured transactions portion of the UNIFORM COMMERCIAL CODE (UCC). The UCC is a set of model laws written by lawyers, professors, and other legal professionals in the American Law Institute. In 1999 the institute, in conjunction with the National Conference of Commissioners of Uniform State Laws (NCCUSL), drafted a revised Article 9, which was adopted uniformly on July 1, 2001. The revisions marked the first comprehensive overhaul of Article 9 since 1972. They expand the scope of property and transactions governed by the UCC, clarify existing elements of the article, and provide guidelines for dealing with the growing phenomenon of electronic commerce.

### Common Forms of Secured Transactions

Secured transactions come in many forms, but three types are most common for consumers: pledges, chattel mortgages, and conditional sales. A pledge is the delivery of goods to the secured party as security for a debt or the performance of an act. For example, assume that one person has borrowed $500 from another. Assume further that the debtor gives a piece of expensive jewelry to the creditor. If the jewelry is to be returned to the debtor after the debt is repaid, and if the creditor has the right to take full ownership of the jewelry if the debtor does not pay the debt, the arrangement is called a pledge.

A chattel mortgage is like a pledge, but in a chattel mortgage transaction, the debtor is allowed to retain possession of the property that

is put up as collateral. If the debtor fails to repay the debt, the creditor may take ownership of the property.

A third type of secured transaction, the conditional sale, uses a purchase money security interest. A purchase money security interest arises when a creditor lends money to a borrower, who uses the money to purchase a particular item. To secure repayment of the loan, the creditor receives a lien on, or claim to, the purchased item. The lien gives the creditor a claim to the property that may be asserted if the borrower does not repay the loan.

### Common Forms of Collateral

Any property accepted as security by a creditor can serve as collateral, but generally collateral falls into one of five categories: consumer goods, equipment, farm products, inventory, and property on paper. Consumer goods are items used primarily for personal, family, or household purposes. Equipment consists of items of value used in business or governmental operations. Farm products are items such as crops, livestock, or supplies used or produced in a farming operation. Under the revised Article 9, agricultural liens can also be considered collateral. Inventory consists of goods held for sale or lease or furnished under contracts of service, raw materials, works in process, materials used or consumed in a business, and goods held for sale or lease or furnished under contracts of service.

Paper collateral consists of a writing that serves as evidence of a debtor's rights in PERSONAL PROPERTY. Stocks and bonds are examples of paper collateral. Another common form of paper collateral is chattel paper. Chattel paper is a writing that indicates that the holder is owed money and has a security interest in valuable goods associated with the debt. For example, assume that a car dealership has sold a car on financing to a buyer and has retained the title as security. The dealership may then use the security agreement with the buyer as collateral for a loan of its own from the bank. The revised Article 9 also recognizes "electronic chattel paper." This allows for the validity of so-called electronic signatures, which Article 9 refers to as "authenticated records." The electronic screens in some retail stores that allow customers to sign with a special stylus are thus just as valid as a signature in ink on a paper document.

Among the new areas governed by the revised Article 9 are commercial deposit accounts, promissory notes, and commercial TORT claims. HEALTHCARE insurance receivables are also covered, which allows doctors and hospitals to include claims against insurance companies for services to their patients as part of the collateral they offer to healthcare lenders.

### The Formalities

To be valid, a secured transaction must contain an express agreement between the debtor and the secured party. The agreement must be in writing, must be signed by both parties, must describe the collateral, and must contain language indicating a grant of a security interest to the creditor. Furthermore, something of value must be given by one party to the other party. This can be a binding commitment to extend credit, the satisfaction of an already existing claim, the delivery and acceptance of goods under a contract, or any other exchange of value sufficient to create a contract. Once these formalities have been completed, the security associated with the principal agreement is said to attach. Attachment simply means that the security side of the agreement is complete and legally enforceable.

To completely secure a secured transaction, or perfect the security, the secured party should file a financing statement with the local public records office, SECRETARY OF STATE, or other appropriate government body. Perfecting the security makes the secured party's claim official, puts the rest of the world on notice as to the creditor's rights in the property, and gives the creditor the right to take advantage of special remedies in the event the debtor does not repay the loan. A financing statement is a document that fully describes the secured transaction. The written document that created the agreement may serve as a financing statement, but the law on financing statements varies from state to state. A state may require the secured party to file a financing statement in addition to a copy of the agreement.

In most states financing statements are effective only for a limited duration, such as five years. A secured creditor may extend the length of perfection by filing a continuation statement before the designated time period has expired. If a secured creditor fails to continue the perfection, the security is not lost, but other creditors may claim the property. The secured creditor may file another financing statement, but this would require another signature from the debtor.

Amendments may be made to a financing statement. A secured party may file a statement

of release on some of the collateral once the debtor has made payments equal in value to the value of the released collateral. If the amendment adds collateral, the security for the new collateral is effective from the date of the amendment, and not the date of the filing of the original financing statement.

One exception to the filing rule occurs when the secured party has possession of the collateral. In this situation the creditor's security is complete once the parties have agreed to the primary transaction. Another exception is the purchase money security interest in consumer goods other than building fixtures and motor vehicles. The filing of a purchase money security interest for such consumer goods is optional. If a secured party to a conditional sale does not record or file the agreement, however, he may lose the security if the buyer sells the goods to a third party.

Failure to perfect the security may have drastic consequences for the secured party who does not possess the collateral, although such failure does not automatically mean that the security will be lost. If, however, another party later stakes a claim to the collateral and files the proper papers, the secured party may lose his or her claim to the property because claims that have been properly recorded or filed have priority. Thus a secured party is wise to file a financing statement and other required documents to perfect the security and protect against claims by other creditors of the debtor.

Article 9 of the UCC is primarily concerned with protecting the secured party's right to the collateral. Many sections of Article 9 delineate who has the first right to a debtor's property if multiple claims arise. Precisely who has the first right to the debtor's property depends on a number of factors, including whether the security was perfected, who the other claimant is, and the time that the claims arose.

If a security interest has not been perfected, the secured party's claim to the collateral property may be subordinate to any number of creditors. A person who has a lien on the property takes before the secured party, as does a person who has received a court order for attachment of the property. If a person buys the collateral from the debtor and did not know of the security interest, the secured party loses the property if the security was not perfected. This is true only if the buyer purchases the property in the ordinary course of business from a person who is in the business of selling goods of that particular kind. A pawnbroker, for example, is not such a seller because a pawnbroker will sell almost anything if the profit is worth the time and trouble.

The identity of the buyer may influence the outcome of a dispute between a buyer of secured goods and the secured party. Generally, a merchant, or a buyer who purchases property for a business, is held to a higher standard than a person who buys an item for personal use. Merchants are more familiar with markets than are ordinary consumers, and they may be expected to know that a seller was insolvent and that the goods being sold were subject to claims from other parties. In any case, if any buyer knows that another party has a security interest in the property at the time the buyer made the purchase, the secured party retains the first claim to the property and may keep the property out of that buyer's possession until the debt associated with the secured property is fully paid.

If two parties have a security interest in the same property, the party who filed first takes first. If the competing security interests are both unperfected, the party who was first to attach the property as collateral has priority.

Other creditors of a debtor may have the first claim on secured property. However, the federal government has priority in some instances for collection of federal tax liens. Most states have artisan's lien statutes, which give servicers of property the right to hold the property in their possession as security for payment of the service bill. If the bill remains unpaid, the servicer has priority even over a secured party who has perfected his or her interest. Once a servicer or repairperson is paid for his services, he must release the goods to either their owner or the party with the security interest in the goods.

If the debtor to a secured party defaults, the secured party who has failed to perfect the security interest may lose first claim to the secured property to a receiver or an assignee for the benefit of creditors. A receiver is a party who is appointed by the BANKRUPTCY court to manage the finances of the debtor for the benefit of the debtor's creditors. An assignee for the benefit of creditors is a person chosen by the debtor to manage all or substantially all of the debtor's property and to distribute it to creditors. A secured party who has perfected the security interest has priority over an assignee or a receiver, but even a secured party who has perfected may not receive all of the debt owed

under a security agreement by a bankrupt debtor. Federal bankruptcy laws are designed to distribute the assets of an insolvent debtor in a fair and ratable manner among all of the debtor's creditors.

### Satisfaction of the Secured Debt

Once a secured debt is repaid in full, the secured party must, upon written request by the debtor, send a termination statement to the debtor and file a termination statement with all offices that hold the financing statement. A termination statement serves as evidence that the debt has been paid in full. If the debtor makes a written request for the termination statement, the creditor must send the statement within ten days of the date of the request. Even if the debtor does not so request, the secured party must send a termination statement to offices that hold the financing statement within 30 days of the satisfaction of the debt.

### Default

If a debtor defaults on his obligations under a secured transaction, the secured party may foreclose on the security interest. Foreclosure can be accomplished in different ways. The secured party may calculate the amount of the debt owed and sue the debtor without taking possession of the property. Alternatively, unless the parties have agreed otherwise, the secured party may take possession of the collateral property and either keep it or sell it. In either case, if the value received by the secured party does not fully satisfy the debt, the secured party may sue the debtor for the deficiency.

In most states a secured party may take possession of the collateral without judicial involvement if this can be accomplished without a breach of the peace. For example, the secured party may repossess a vehicle if it is parked outdoors. If, however, the agent of the secured party must break into a garage to repossess the vehicle, such action would be a breach of the peace because it would require breaking and entering, a criminal offense.

If a consumer has defaulted on a secured transaction but has paid 60 percent or more on the debt, most states prohibit a secured party from taking the security and keeping the windfall. In such cases the secured party may either sue in court for the money outstanding or take the property and return part of the money. In other situations a secured party may be entitled to any excess value or income that results from the debtor's default.

The retention of collateral by a secured party after the debtor's default is called strict foreclosure. If a secured party decides to keep collateral in satisfaction of a debt, the secured party must send written notice to the debtor. In transactions involving collateral other than consumer goods, a secured party may be obliged to send notice of the strict foreclosure to any other parties who have security in the collateral property. If a party objects to the strict foreclosure, the secured party must sell or otherwise dispose of the collateral. If no other party objects to the strict foreclosure, the secured party may keep the collateral.

A secured party who sells or leases collateral after a debtor defaults may charge the debtor for reasonable expenses incurred in the sale or lease. This can include attorneys' fees and court costs. The money made from a sale of collateral rarely satisfies a debt because such sales do not bring favorable prices. If there is a surplus of money after the collateral is sold, all expenses are accounted for, and the sale or lease is applied to the debt, other parties holding a security interest in the collateral must be paid with the surplus money.

Unless the parties have agreed otherwise, a debtor who is in possession of the collateral and who has defaulted on the obligations in a secured transaction has the right to redeem the collateral before the secured party takes action. To avoid foreclosure of the security interest by the secured party, the debtor may pay the unpaid balance of the debt secured by the collateral, as well as any reasonable expenses incurred by the secured party in taking, holding, and preparing the foreclosure. This does not mean the debtor must pay the entire amount of the debt; rather, the debtor must make those payments that are in default. Some security agreements have an acceleration clause that makes all payments due immediately upon default, but a court may hold that such a clause should not be enforced if the debtor has brought the payments up to date before the secured party has acted on the delinquency. A secured party who violates default provisions may be liable to the debtor for losses resulting from that conduct.

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CROSS-REFERENCES

Attachment; Bankruptcy; Collateral; Consumer Credit; Express; Obligor; Security; Sales Law.

## SECURITIES

*Evidence of a corporation's debts or property.*

Securities are documents that merely represent an interest or a right in something else; they are not consumed or used in the same way as traditional consumer goods. Government regulation of consumer goods attempts to protect consumers from dangerous articles, misleading advertising, or illegal pricing practices. Securities laws, on the other hand, attempt to ensure that investors have an informed, accurate idea of the type of interest they are purchasing and its value.

Types of securities include notes, stocks, treasury stocks, bonds, debentures, certificates of interest or participation in profit-sharing agreements, collateral-trust certificates, preorganization certificates or subscriptions, transferable shares, investment contracts, voting-trust certificates, certificates of deposit for a security, and a fractional undivided interest in gas, oil, or other mineral rights. Under certain circumstances, interests in oil- and gas-drilling programs, interests in partnerships, real estate CONDOMINIUMS AND COOPERATIVES, and farm animals and land also have been found to be securities. Certain types of notes, such as a note secured by a home mortgage or a note secured by accounts receivable or other business assets, are not securities.

Both federal and state laws regulate securities. Before 1929 companies could issue stock at will. Bogus corporations sold worthless stock; other companies issued and sold large amounts of stock without considering the effect of unlimited issues on shareholders' interests, the value of the stock, and ultimately the U.S. economy. Federal securities law consists of a handful of laws passed between 1933 and 1940, as well as legislation enacted in 1970. The federal laws stem from Congress's power to regulate interstate commerce. Therefore the laws are generally limited to transactions involving transportation or communication using interstate commerce or the mail. Federal laws are generally administered by the SECURITIES AND EXCHANGE COMMISSION (SEC), established by the Securities Exchange Act of 1934 (15 U.S.C.A. § 78a et seq.). Securities regulation focuses mainly on the market for common stocks. The SARBANES-OXLEY ACT OF 2002 (Public Company Accounting Reform and Investor Protection Act, Pub.L. 107-204, July 30, 2002, 116 Stat. 745, July 30, 2002) makes securities FRAUD a serious federal crime and also increases the penalties for WHITE-COLLAR CRIMES. In addition, it creates a new oversight board for the accounting profession.

Securities are traded on markets. Some, but not all, markets have a physical location. The essence of a securities market is its formal or informal communications systems whereby buyers and sellers make their interests known and execute transactions. These trading markets are susceptible to manipulative and deceptive practices, such as manipulation of prices or "insider trading," that is, gaining an advantage on the basis of nonpublic information. To prevent such fraudulent practices, all securities laws contain general antifraud provisions.

Exchange markets, of which the New York Stock Exchange is the largest, have traditionally operated in a rigid manner by careful delineation of numbers and qualifications of members and the specific functions members may perform. Conversely, over-the-counter markets (OTC) are less structured and typically do not have a physical location.

Based upon dollar volume, the bond market is the largest. Bonds are the debt instruments issued by federal, state, and local government, as well as corporations. The bond market attracts mainly professional and institutional investors, rather than the general public. In addition, many of these obligations are exempt from direct regulatory provisions of the federal securities laws and consequently usually receive little attention from SEC regulators. However, in the mid-1980s, a debacle occurred in the JUNK BOND market, which included insider trading charges. (Junk bonds are highly risky bonds with a high yield.) The scandal, which involved the investment firm of Drexel Burnham Lambert Inc. and trader Michael R. Milken, attracted much attention and a flurry of SEC enforcement activity.

### Securities Act of 1933

The first significant federal securities law was the Securities Act of 1933 (15 U.S.C.A. § 77a et seq.), passed in the wake of the great STOCK MARKET crash of 1929. This law is essentially a disclosure statute. Although the 1933 act applies by its terms to any sale by any person of any security, it contains a number of exemptions. The most important exemption involves securities sold in certain kinds of transactions, including transactions by someone other than an issuer, underwriter, or dealer. In essence, this provision effectively exempts almost all secondary trading, which involves securities bought and sold after their original issue. Certain small offerings are also exempt.

Although the objective of the 1933 act's registration requirements is to enable a prospective purchaser to make a reasoned decision based on reliable information, this goal is not always accomplished. For example, an issuer may be reluctant to divulge real weaknesses in an operation and so may try to obfuscate some of the problems while complying in theory with the law. In addition, complex financial information can be extremely difficult to explain in terms understandable to the average investor.

Disclosure is accomplished by the registration of security offerings. In general, the law provides that no security may be offered or sold to the public unless it is registered with the SEC. Registration does not imply that the SEC approves of the issue but is intended to aid the public in making informed and educated decisions about purchasing a security. The law delineates the procedures for registration and specifies the type of information that must be disclosed.

The registration statement has two parts: first, information that eventually forms the prospectus, and second, information, which does not need to be furnished to purchasers but is available for public inspection within SEC files. Full disclosure includes management's aims and goals; the number of shares the company is selling; what the issuer intends to do with the money; the company's tax status; contingent plans if problems arise; legal standing, such as pending lawsuits; income and expenses; and inherent risks of the enterprise.

A registration statement is automatically effective 20 days after filing, and the issuer may then sell the registered securities to the public. Nevertheless, if a statement on its face appears incomplete or inaccurate, the SEC may refuse to allow the statement to become effective. A misstatement or omission of a material fact may result in the registration's suspension. Although the SEC rarely exercises these powers, it does not simply give cursory approval to registration statements. The agency frequently issues "letters of comment," also known as "deficiency letters," after reviewing registration documents. The SEC uses this method to require or suggest changes or request additional information. Most issuers are willing to cooperate because the SEC has the authority to permit a registration statement to become effective less than 20 days after filing. The SEC will usually accelerate the 20-day waiting period for a cooperative issuer.

For many years an issuer was entitled only to register securities that would be offered for sale immediately. Since 1982, under certain circumstances an issuer has been permitted to register securities for a quick sale at a date up to two years in the future. This process, known as shelf registration, enables companies that frequently offer debt securities to act quickly when interest rates are favorable.

The 1933 act prohibits offers to sell or to buy before a registration is filed. The SEC takes a broad view of what constitutes an offer. For example, the SEC takes the position that excessive or unusual publicity by the issuer about a business or the prospects of a particular industry may arouse such public interest that the publicity appears to be part of the selling effort.

Offers but not sales are permitted, subject to certain restrictions, after a registration statement has been filed but before it is effective. Oral offers are not restricted. Written information may be disseminated to potential investors during the waiting period via a specially designed preliminary prospectus. Offers and sales may be made to anyone after the registration statement becomes effective. A copy of the final prospectus usually must be issued to the purchaser.

The 1933 act provides for civil liability for damages arising from misstatements or omissions in the registration statement, or for offers made in violation of the law. In addition, the law provides for civil liability for misstatements or omissions in any offer or sale of securities, whether or not the security is registered. Finally, the general antifraud provision in the law makes it unlawful to engage in fraudulent or deceitful practices in connection with any offer or sale of securities, whether or not they are registered.

In general, any person who acquires an EQUITY whose registration statement, at the time it became effective, contained an "untrue statement of a material fact or omitted to state a material fact" may sue to recover the difference between the price paid for the security (but not more than the PUBLIC OFFERING price) and the price for which it was disposed or (if it is still owned) its value at the time of the lawsuit. A purchaser must show only that the registration statement contained a material misstatement or omission and that he or she lost money. In many circumstances the purchaser need not show that he or she relied on the misstatement or omission or that a prospectus was even received. The SEC defines "material" as information an average prudent investor would reasonably need to know before purchasing the security.

### Securities Exchange Act of 1934

The Securities Exchange Act of 1934 addresses many areas of securities law. Issuers, subject to certain exemptions, must register with the SEC if they have a security traded on a national exchange. This requirement should not be confused with the registration of an offering under the 1933 act; the two laws are distinct. Securities registered under the 1933 act for a public offering may also have to be registered under the 1934 act.

To provide the public with adequate information about companies with publicly traded stocks, issuers of securities registered under the 1934 act must file various reports with the SEC. Since 1964 this disclosure requirement has applied not only to companies with securities listed on national securities exchanges but also to companies with more than 500 shareholders and more than $5 million in assets. False or misleading statements in any documents required under the 1934 act may result in liability to persons who buy or sell securities in reliance on these statements.

Under the 1934 act, the SEC may revoke or suspend the registration of a security if after notice and opportunity for hearing it determines that the issuer has violated the 1934 act or any rules or regulations promulgated thereunder. Moreover, the 1934 act authorizes the SEC to suspend trading in any security for not more than ten days, or, with the approval of the president, to suspend trading in all securities for not more than 90 days, or to take other measures to address a major market disturbance.

**Proxy Solicitation** The 1934 act also regulates proxy solicitation, which is information that must be given to a corporation's shareholders as a prerequisite to soliciting votes. Prior to every shareholder meeting, a registered company must provide each stockholder with a proxy statement containing certain specified material, along with a form of proxy on which the security holder may indicate approval or disapproval of each proposal expected to be presented at the meeting. For securities registered in the names of brokers, banks, or other nominees, a company must inquire into the beneficial ownership of the securities and furnish sufficient copies of the proxy statement for distribution to all the beneficial owners.

Copies of the proxy statement and form of proxy must be filed with the SEC when they are first mailed to security holders. Under certain circumstances preliminary copies must be filed ten days before mailing. Although a proxy statement does not become "effective" in the same way as a statement registered under the 1933 act, the SEC may comment on and require changes in the proxy statement before mailing. Proxies for an annual meeting calling for election of directors must include a report containing financial statements covering the previous two fiscal years. Special rules apply when a contest for election or removal of directors is scheduled.

A security holder owning at least $1,000, or one percent, of a corporation's securities may present a proposal for action via the proxy statement. Upon a shareholder's timely notice to the corporation, a statement of explanation is included with the proxy statement. Security holders will have an opportunity to vote on the proposal on the proxy form. The device is unpopular with management, but shareholders have used this provision to change or challenge management compensation, the conduct of annual meetings, shareholder VOTING RIGHTS, and issues involving discrimination and pollution in company operations.

A company that distributes a misleading proxy statement to its shareholders may incur liability to any person who purchases or sells its securities based on the misleading statement. The U.S. Supreme Court has held that an omitted fact is material if a "substantial likelihood" exists that a reasonable shareholder would consider the information important in deciding how to vote. Mere NEGLIGENCE is sufficient to permit recovery; no evil motive or reckless dis-

regard need be shown. Oftentimes, an appropriate remedy might be a preliminary injunction requiring circulation of corrected materials; it may not be feasible to rescind a tainted transaction after voting. Courts have, however, sometimes ordered a new election of directors, but such action must be in the best interests of all shareholders.

**Takeover Bids and Tender Offers** Since the 1960s, increasing numbers of takeover bids and tender offers have resulted in bitter contests between the aggressor and the target of the bid. A corporate or individual aggressor might attempt to acquire controlling stock in a publicly held corporation in a number of ways: by buying it outright for cash, by issuing its own securities in exchange, or by a combination of both methods. Stock may be acquired in private transactions, by purchases through brokers in the open market, or by making a public offer to shareholders to tender their shares either for a fixed cash price or for a package of securities from the corporation making the offer.

Takeover bids that involve a public offer for securities of the aggressor company in exchange for shares of the targeted company require that the securities be registered under the 1933 act and that a prospectus be delivered to solicited shareholders. For many years, however, cash tender offers had no SEC filing requirements. The WILLIAMS ACT of 1968, 15 U.S.C.A. §§ 78l, 78m, 78n, amended many sections of the 1934 act to address problems with tender offers. Although most litigation under the Williams Act is between contending parties, courts generally focus on whether the relief sought serves to protect public stockholders.

Pursuant to the Williams Act, any person or group who takes ownership of more than 5 percent of any class of specific registered securities must file a statement within ten days with the issuer of the securities, as well as with the SEC. Required information includes the background of the person or group; the source of funds used and the purpose of the acquisition; the number of shares owned; and any relevant contracts, arrangements, or understandings. The issue of whether an acquisition has taken place, thereby triggering the filing requirement, has been the subject of litigation. Courts have disagreed on this issue when confronted with a group of shareholders who in the aggregate own more than 5 percent and who agree to act together for the purpose of affecting control of the company but who do not act to acquire any more shares.

Restrictions also apply to persons making a tender offer that would result in ownership of more than 5 percent of a class of registered securities. Such a person must first file with the SEC and furnish to each offeree a statement similar to that required of a person who has obtained more than 5 percent of registered stock. A tender offer must be held open for 20 days; a change in the terms holds an offer open at least ten more days. In addition, the offer must be made to all holders of the class of securities sought, and a uniform price must be paid to all tendering shareholders. A shareholder may withdraw tendered shares at any time while the tender offer remains open. Moreover, if the person making the offer seeks fewer than all outstanding shares and the response is oversubscribed, shares will be taken up on a pro rata basis.

The 1934 act also requires every person who directly or indirectly owns more than 10 percent of a class of registered equity securities, and every officer and director of every company with a class of equity securities registered under that section, to file a report with the SEC at the time he acquires the status, and at the end of any month in which he acquires or disposes of these securities. This provision is designed to prevent "short-swing" profits, earned when an individual with inside information engages in short-term trading.

**Antifraud Provisions** One impetus for enactment of the 1934 act was the damage caused by "pools," which were a device used to run up the prices of securities on an exchange. The pool would engage in a series of well-timed transactions, designed solely to manipulate the market price of a security. Once prices were high, the members of the pool unloaded their holdings just before the price dropped. The 1934 act contains specific provisions prohibiting a variety of manipulative activities with respect to exchange-listed securities. It also contains a catchall section giving the SEC the power to promulgate rules to prohibit any "manipulative or deceptive device or contrivance" with respect to any security. Although isolated instances of manipulation still exist, the provisions manage to prevent widespread problems.

Section 10(b) of the 1934 act contains a broadly worded provision permitting the SEC to promulgate rules and regulations to protect the

public and investors by prohibiting manipulative or deceptive devices or contrivances via the mails or other means of interstate commerce. The SEC has promulgated a rule, known as rule 10b-5, that has been invoked in countless SEC proceedings. The rule states:

> It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, (1) to employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

In the 1960s and early 1970s, the courts broadly interpreted rule 10b-5. For example, the rule was applied to impose liability for negligent misrepresentations and for breach of fiduciary duty by corporate management and to hold directors, lawyers, accountants, and underwriters liable for their failure to prevent wrongdoing by others. Beginning in 1975, the U.S. Supreme Court sharply curtailed this broad reading. Doubt exists as to the continued viability of the decisions in some of the prior cases. Nevertheless, although rule 10b-5 does not address civil liability for a violation, since 1946 courts have recognized an implied private right of action in rule 10b-5 cases, and the Supreme Court has acknowledged this implied right (*Superintendent v. Bankers Life,* 404 U.S. 6, 30 L. Ed. 2d 128, 92 S. Ct. 165 [1971]).

Rule 10b-5 applies to any purchase or sale, by any person, of any security. There are no exemptions: it applies to registered or unregistered securities, publicly held or closely held companies, and any kind of entity that issues securities, including federal, state, and local government securities.

Clauses 1 and 3 of rule 10b-5 use the terms *fraud* and *deceit.* Fraud or deceit must occur "in connection with" a purchase or sale but need not relate to the terms of the transaction. For example, in *Superintendent v. Bankers Life,* the U.S. Supreme Court found a violation of rule 10b-5 when a group obtained control of an insurance company, then sold certain securities and misappropriated the proceeds for their own benefit. In another case a publicly held corporation made misstatements in a press release. Even though the company was not engaged at that time in buying or selling its own shares, a U.S. court of appeals ruled that the statements were made "in connection with" purchases and sales being made by shareholders on the open market.

**Insider Trading** Rule 10b-5 protects against insider trading, which is a purchase or sale by a person or persons with access to information not available to those with whom they deal or to traders generally. Originally, the prohibition against insider trading dealt with purchases by corporations or their officers without disclosure of material, favorable corporate information. Beginning in the early 1960s, the SEC broadened the scope of the rule. The rule now operates as a general prohibition against any trading on inside information in anonymous stock exchange transactions, in addition to traditional face-to-face proceedings. For example, in *In re Cady, Roberts & Co.,* 40 S.E.C. 907 (1961), a partner in a brokerage firm learned from the director of a corporation that it intended to cut its dividend. Before the news was generally disseminated, the BROKER placed orders to sell the stock of some of his customers. In another case officers and employees of an oil company made large purchases of company stock after learning that exploratory drilling on some company property looked extremely promising (*SEC v. Texas Gulf Sulphur,* 401 F. 2d 833 [2d Cir. 1968]). In these cases the persons who made the transactions, or persons who passed information to those individuals, were found to have violated rule 10b-5.

However, not every instance of financial unfairness rises to the level of fraudulent activity under rule 10b-5. In *Chiarella v. United States,* 445 U.S. 222, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980), Vincent F. Chiarella, an employee of a financial printing firm, worked on some documents relating to contemplated tender offers. He ascertained the identity of the targeted companies, purchased stock in those companies, and then sold the stock at a profit once the tender offers were announced. The Supreme Court overturned Chiarella's criminal conviction for violating rule 10b-5, ruling that an allegation of fraud cannot be supported absent a duty to speak and that duty must arise from a relationship of "trust and confidence between the parties to a transaction." However, following *Chiarella,* criminal convictions of lawyers, printers, stockbro-

kers, and others have been upheld by courts that have ruled that these employees traded on confidential information that was "misappropriated" from their employers, an issue that was not raised in *Chiarella.* Moreover, courts have also ruled that the person who passes inside information to another person who then uses it for a transaction is as culpable as the person who uses it for his or her own account.

The test for materiality in a rule 10b-5 insider information case is whether the information is the kind that might affect the judgment of reasonable investors, both of a conservative and speculative bent. Furthermore, an insider may not act the moment a company makes a public announcement but must wait until the news could reasonably have been disseminated.

The Insider Trading Sanctions Act of 1984 (Pub. L. No. 98-376, 98 Stat. 1264) and the Insider Trading and Security Fraud Enforcement Act of 1988 (15 U.S.C.A. §§ 78u-1, 806-4a, and 78t-1) amended the 1934 act to permit the SEC to seek a civil penalty of three times the amount of profit gained from the illegal transaction or the loss avoided by it. The penalty may be imposed on the actual violator, as well as on the person who "controlled" the violator—generally the employing firm. A whistle-blower may receive up to 10 percent of any civil liability penalty recovered by the SEC. The maximum criminal penalties were increased from $100,000 to $1 million for individuals and from $500,000 to $2.5 million for business or legal entities.

### Regulation of the Securities Business

Only dealers or brokers who are registered with the SEC pursuant to the 1934 act may engage in business (other than individuals who deal only in exempted securities or handle only intrastate business). Firms act in three principal capacities: broker, dealer, and investment adviser. A broker is an agent who handles the public's orders to buy and sell securities for a commission. A dealer is a person in the securities business who buys and sells securities for her or his own account, and an investment adviser is paid to advise others on investing in, purchasing, or selling securities. Investment advisers are regulated under the Investment Advisers Act of 1940 (15 U.S.C.A. § 80b et seq.). This law provides for registration similar to that in the 1934 act for brokers and dealers, but its coverage is generally not as comprehensive. Certain fee arrangements are prohibited, and adverse personal interests in a transaction must be disclosed. Moreover, the SEC may define and prohibit certain fraudulent and deceptive practices.

The SEC has the power to revoke or suspend registration or impose a censure if the broker-dealer has violated federal securities laws or committed other specified misdeeds. Similar provisions apply to municipal securities dealers and investment advisers.

Problems may arise in a number of ways. For example, a broker-dealer may recommend or trade in securities without adequate information about the issuer. "Churning" is another problem. Churning occurs when a broker-dealer creates a market in a security by making repeated purchase from and resale to individual retail customers at steadily increasing prices. This conduct violates securities antifraud provisions if the broker-dealer does not fully disclose to customers the nature of the market. Churning also occurs when a broker causes a customer's account to experience an excessive number of transactions solely to generate repeated commissions. Fraudulent "scalping" occurs when an investment adviser publicly recommends the purchase of securities without disclosing that the adviser purchases such securities before making the recommendation and then sells them at a profit when the price rises after word of the recommendation spreads.

In 1990 Congress enacted the Penny Stock Reform Act (15 U.S.C.A. § 78q-2), which gives the SEC authority to regulate the widespread incidence of high-pressure sales tactics in the peddling of low-priced speculative stocks to unsophisticated investors. Dealers in penny stocks must provide customers with disclosure documents discussing the risk of such investments, the customer's rights in the event of fraud or abuse, and compensation received by the broker-dealer and the salesperson handling the transaction.

### Securities Investor Protection Corporation

The Securities Investor Protection Act of 1970 (15 U.S.C.A. § 78aaa et seq.) created the Securities Investor Protection Corporation (SIPC) to supervise the liquidation of securities firms suffering from financial difficulties and to arrange for the payment of customers' claims through its trust fund in the event of a broker-dealer's BANKRUPTCY. SIPC is a government-sponsored, private, nonprofit corporation. It

relies on the SEC and self-regulatory organizations to refer brokers or dealers having financial difficulties. In addition, SIPC has authority to borrow money (through the SEC) if its trust fund from which it pays claims is insufficient. SIPC guarantees repayment of money and securities up to $100,000 in cash equity and up to $500,000 overall per customer.

### Self-Regulatory Organizations

Although the SEC plays a major role in regulating the securities industry, regulation responsibilities also exist for self-regulatory organizations. These organizations are private associations to which Congress has delegated the authority to devise and enforce rules for the conduct of an association's members. Before 1934 stock exchanges had regulated themselves for well over a century. The 1934 act required every national security exchange to register with the SEC. An exchange cannot be registered unless the SEC determines that its rules are designed to prevent fraud and manipulative acts and practices and that the exchange provides appropriate discipline for its members.

Congress extended federal registration to non-exchange, or OTC, markets in 1938 and authorized the establishment of national securities associations and their registration with the SEC. Only one association, the National Association of Securities Dealers, had been established as of the mid 1990s.

In 1975 Congress expanded and consolidated SEC authority over all self-regulatory organizations. The SEC must give prior approval for any exchange rule changes, and it has review power over exchange disciplinary actions.

### Investment Companies

Under the Investment Company Act of 1940 (15 U.S.C.A. § 80a et seq.), investment companies must register with the SEC unless they qualify for a specific exception. Investment companies are companies engaged primarily in the business of investing, reinvesting, or trading in securities. They may also be companies with more than 40 percent of their assets consisting of "investment securities" (securities other than securities of majority owned subsidiaries and government securities). Investment companies include "open-end companies," commonly known as mutual funds. The SEC regulatory responsibilities under this act encompass sales load, management contracts, the composition of boards of directors, capital structure of investment companies, approval of adviser contracts, and changes in investment policy. In addition, a 1970 amendment imposed restrictions on management compensation and sales charges.

Every investment company must register with the SEC. Registration includes a statement of the company's investment policy. Moreover, an investment company must file ANNUAL REPORTS with the SEC and maintain certain accounts and records. Strict procedures safeguard against looting of investment company assets. Officers and employees with access to the company's cash and securities must be bonded, and LARCENY or EMBEZZLEMENT from an investment company is a federal crime. In addition, the Investment Company Act of 1940 imposes substantive restrictions on the activities of registered investment companies and persons connected with them and provides for a variety of SEC and private sanctions.

### State Regulation

State securities laws are commonly known as BLUE SKY LAWS because of an early judicial opinion that described the purpose of the laws as preventing "speculative schemes which have no more basis than so many feet of blue sky" (*Hall v. Geiger-Jones,* 242 U.S. 539, 372 S. Ct. 217, 61 L. Ed. 480 [1917]).

In 1956, the COMMISSIONERS ON UNIFORM LAWS approved the first Uniform Securities Act. A total of 37 states adopted the uniform law, though states frequently diverted from some of its provisions. The commissioners approved a second version of the act in 1985, but only six states adopted the revised version. A third version was approved in 2002. As of May 2003, the state of Missouri had adopted the 2002 version, and two other state legislatures were considering its adoption. Changes in the 2002 Uniform Securities Act include a simplified process for registering securities; more regulation of investment professionals; expanded enforcement powers of administrative agencies; new penalties for violations of the act; and several other changes.

Despite the existence of the various versions of the Uniform Securities Act, much diversity among state securities laws still exists. Typical provisions include prohibitions against fraud in the sale of securities, registration requirements for brokers and dealers, registration requirements for securities to be sold within the state, and sanctions and civil liability under certain cir-

cumstances. In addition to complying with the registration requirements of the 1933 act, a nationwide distribution of a new issue requires compliance with state blue sky provisions as well.

A majority of states have laws regulating takeovers of companies incorporated or doing business within the state. Although the courts have invalidated some of these statutes, these laws tend to aid in preserving the status quo of management.

### Securities Scandals

During the early 2000s, a number of high-profile companies became embroiled in major scandals that adversely affected consumer confidence in the companies and led to a number of investigations by the SEC. The most notorious of these scandals involved Houston-based Enron Corporation, one of the world's largest energy, commodities, and service companies. The company suffered a collapse in 2001 that resulted in the largest bankruptcy in U.S. history and numerous lawsuits alleging violations of federal securities laws.

As recent as December 2000, Enron's stock sold for $84.87 per share. However, stock prices fell throughout 2001. On October 16, 2001, the company reported losses of $638 million in the third quarter of 2001 alone. It also announced that it was reducing shareholder equity by $1.2 billion. The SEC began a formal investigation shortly thereafter regarding potential conflicts of interest within the company regarding outside partnerships. Many of the problems centered on flawed accounting practices by Enron and its accounting firm, Arthur Andersen, L.L.P. In 2002, Arthur Andersen was found guilty of obstructing justice by destroying thousands of Enron documents.

Despite the outrage surrounding the Enron fiasco, by May 2003, only 12 individuals had been charged with wrongdoing in relation to their dealings with the company. However, only seven of these individuals were insiders in the company. In August 2002, Michael Kopper, who served as an aide to Enron's chief financial officer Andrew Fastow, pleaded guilty to charges of MONEY LAUNDERING and conspiracy to commit fraud. In November 2002, the JUSTICE DEPARTMENT indicted Fastow on 78 counts, including fraud, money laundering, and OBSTRUCTION OF JUSTICE. None of the other top executives with the company, including the former chief executive officer, had been charged as of May 2003.

Enron's downfall was followed by investigations of alleged improprieties by other major companies. The major companies investigated and charged by the SEC in 2002 and 2003 included Xerox Corporation, WorldCom, Inc., and Bristol-Myers Squibb. The scandals had a major effect on the accounting profession, and the SEC was at the center of attention by those calling for enhanced disclosure requirements and enforcement mechanisms.

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CROSS-REFERENCES

Accounting; Mergers and Acquisitions; Risk Arbitrage; Stock Market; Stockholder's Derivative Suit.

## SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission (SEC) is the federal agency primarily responsible for administering and enforcing federal SECURITIES laws. The SEC strives to protect investors by ensuring that the securities markets are honest and fair. When necessary, the SEC enforces securities laws through a variety of means, including fines, referral for criminal prosecution, revocation or suspension of licenses, and injunctions.

Headquartered in Washington, D.C., the commission itself is comprised of five members appointed by the president; one position expires each year. No more than three members may be from one political party. With more than 900 employees, the agency has five regional and six district offices throughout the country and enjoys a generally favorable reputation.

### Securities Laws

Before the October 29, 1929, STOCK MARKET crash on Wall Street, a company could issue stock without disclosing its financial status. Many bogus or severely undercapitalized corporations sold stock, eventually leading to the disastrous plunge in the market and an

ensuing panic. From the havoc wreaked by the crash came the first major piece of federal securities legislation, the Securities Act of 1933 (15 U.S.C.A. § 77a et seq.). The act regulates the primary, or new issue, market. The following year, Congress provided for the creation of the Securities and Exchange Commission when it enacted far-reaching securities legislation in the Securities Exchange Act of 1934 (15 U.S.C.A. § 78a et seq.). These two laws, along with the Trust Indenture Act of 1939 (15a U.S.C.A. §§ 77aaa–77bbbb), the Investment Company Act of 1940 (15 U.S.C.A. §§ 80-1–80a-64), the Investment Advisers Act of 1940 (15 U.S.C.A. §§ 80b-1–80b-21), and the Public Utility Holding Company Act of 1935 (15 U.S.C.A. §§ 79a–79z-6) make up the bulk of federal securities laws under the jurisdiction of the SEC.

In addition to federal statutory authority, the SEC has broad rule-making authority. It has used this power to fashion procedural and technical rules, define terms used in the laws, and make substantive rules implementing the laws. The SEC also devises forms that must be used to fulfill various requirements in the statutes and rules. Moreover, the SEC engages in a significant amount of informal lawmaking through the distribution of SEC releases containing its opinions on questions of current concern. These releases are disseminated to the press, companies and firms registered with the SEC, and other interested persons. In addition to these general public statements of policy, the SEC also responds to individual private inquiries.

**Securities Act of 1933** The Securities Act of 1933 regulates the PUBLIC OFFERING of new issues. All public offerings of securities in interstate commerce or through the mails must be registered with the SEC before they can be offered and sold, subject to exemptions for specifically enumerated types of securities, such as government securities, nonpublic offerings, offerings below a certain dollar amount, and intrastate offerings. The registration provisions apply to issuers of securities or others acting on their behalf. Issuers must file a registration statement with the SEC containing financial and other pertinent data about the issuer and the securities that are being offered. The Securities Act of 1933 also prohibits fraudulent or deceptive practices in the offer or sale of securities, whether or not the securities are required to be registered.

A major part of the SEC work is to review the registration documents required by the 1933 act and determine when registration is required. Registration with the SEC is intended to allow potential investors to make an informed evaluation regarding the worth of securities. Registration does not mean that the commission approves of the issue or that the disclosures in the registration are accurate, nor does it insure an investor against loss in the purchase.

Registration requires extensive disclosure on behalf of a corporation. For example, full disclosure includes management's aims and goals; the number of shares the company is selling; what the issuer intends to do with the money; the company's tax status; contingent plans if problems arise; legal standing, such as pending lawsuits; income and expenses; and inherent risks of the enterprise. Registration consists of two parts: a prospectus, which must be furnished to every purchaser of the security, and other information and attachments that need not be furnished to purchasers but are available in SEC files for public inspection. A registration statement is generally effective 20 days after filing, but the SEC has the power to delay or suspend the effectiveness of the registration statement. When a disclosure or registration statement becomes effective, it is called a prospectus and is used to solicit orders for the security.

**Securities Exchange Act of 1934** The Securities Exchange Act of 1934 transferred responsibility for administration of the 1933 act from the FEDERAL TRADE COMMISSION to the newly created SEC. The 1934 act also provided for federal regulation of trading in already issued and outstanding securities. Other provisions include disclosure requirements for publicly held corporations; prohibitions on various manipulative or deceptive devices or contrivances; SEC registration and regulation of brokers and dealers; and registration, oversight, and regulation of national securities exchanges, associations, clearing agencies, transfer agents, and securities information processors.

The SEC has broad oversight responsibilities for the self-regulatory organizations within the securities industry. For approximately 140 years prior to 1934, stock exchanges regulated their own members. Self-regulation continues to be an important component of the industry, but as of 2003 the SEC provides additional regulation, including authority to review disciplinary actions taken by a self-regulatory organization.

The 1934 act also established the Municipal Securities Rulemaking Board and conferred oversight power upon the commission. The Municipal Securities Rulemaking Board formulates rules for the municipal securities industry. The commission has the authority to approve or disapprove most proposed rules of the board.

The 1934 act seeks to provide the public with adequate information about companies with publicly traded securities. Subject to certain exemptions, disclosure requirements apply not only to companies with securities listed on national securities exchanges but to all companies with more than 500 shareholders and more than $5,000,000 in assets. Companies must file detailed statements with the SEC when first registering under the 1934 act and must provide periodic reports as prescribed by the commission.

Under the 1934 act, the SEC also regulates the solicitation of proxies. Proxies are voting solicitations allowing stockholders to participate in the annual or special meetings of stockholders without actually attending the meeting; the proxy empowers someone else to vote on behalf of the shareholder. Detailed SEC regulations delineate the form of proxies and the information that must be furnished to stockholders. A registered company must furnish each stockholder, before every stockholder meeting, a proxy statement and a proxy form on which he or she can indicate approval or disapproval of each proposal expected to be introduced at the meeting. Companies must file with the commission copies of the proxy statement and the proxy form. The SEC may comment on the proxy statement and insist on changes before it is mailed to security holders.

The WILLIAMS ACT of 1968 (Pub. L. No. 90-439, 82 Stat. 454) amended the 1934 act to address recurring problems arising in tender offers and corporate takeovers. A tender offer is a formal request that stockholders sell their shares in response to a large purchase bid; the buyer reserves the right to accept all, none, or a certain number of shares tendered for sale. A takeover occurs when a corporation assumes control of another corporation through an acquisition or merger. Pursuant to the law as amended, any person or group that takes ownership of more than 5 percent of any class of specific registered securities must file a statement within 10 days with the issuer of the security and with the SEC. This statement provides the background of the purchaser, the source of funds used in the purchase, the purpose of the purchase, the number of shares owned, and any relevant contracts, arrangements, or understandings. In addition, no person may make a tender offer unless he or she has first filed with the SEC and provided certain specific information to each offeree. A tender offer must remain open for a minimum of 20 days and at least 10 days after any change in the terms of the offer.

The Securities Act of 1934 also requires any person who beneficially owns, whether directly or indirectly, more than 10 percent of a class of certain registered securities and every officer or director of every company with specific registered securities to report to the SEC. Reports must be filed at the time the status is acquired and at the end of any month in which such a person acquires or disposes of any EQUITY securities of that company. This provision is designed to discourage short-term trading by preventing corporate insiders from unfairly using nonpublic information.

**Investment Company Act of 1940** Pursuant to the Investment Company Act of 1940, investment companies must register with the SEC. Investment companies are companies engaged primarily in the business of investing, reinvesting, or trading in securities. They may also be companies with more than 40 percent of their assets consisting of investment securities, that is, securities other than those of majority-owned subsidiaries and government securities. Among other types of companies, this act covers "open-end companies," commonly known as mutual funds. The SEC regulatory responsibilities under this act encompass sales load, management contracts, the composition of boards of directors, capital structure of investment companies, approval of adviser contracts, and changes in investment policy. In addition, a 1970 amendment imposed restrictions on management compensation and sales charges.

The act prohibits various transactions by investment companies, unless the commission has first made a determination that the transaction is fair. Moreover, the act permits the SEC to bring a court action to enjoin the execution of mergers and other reorganization plans of investment companies if the plans are unfair to security holders. The SEC also has the power to impose sanctions pursuant to administrative proceedings for violation of this act and may file suit to enjoin

the acts of management officials involving breaches of fiduciary duties or personal misconduct and may bar such officials from office.

**Investment Advisers Act of 1940** This act provides for SEC regulation and registration of investment advisers. The act is comparable to provisions of the 1934 act with respect to broker-dealers but is not as comprehensive. Generally speaking, an investment adviser is a person who engages in the business of advising others with respect to securities and does so for compensation. Certain fee arrangements are prohibited; adverse personal interests in a transaction must be disclosed. Moreover, the SEC may define and prohibit certain fraudulent and deceptive practices.

**Other Securities Laws** The Trust Indenture Act of 1939 applies to public issues of debt securities in excess of a certain amount. This law prescribes requirements to ensure the independence of indenture trustees. It also requires the exclusion of certain types of exculpatory clauses and the inclusion of certain protective clauses in indentures. In addition, the Public Utility Holding Company Act of 1935 (15 U.S.C.A. §§ 79a–79z-6) was enacted to correct abuses in the financing and operation of electric and gas public utility holding companies; SEC functions under these provisions were substantially completed by the 1950s.

In the wake of major corporate scandals involving the Enron Corporation and the Arthur Andersen accounting firm, Congress enacted the SARBANES-OXLEY ACT OF 2002 (also known as the Public Company Accounting Reform and Investor Protection Act). The act imposes new disclosure requirements when companies file financial reports. It mandates that the SEC, by rule, requires the principal executive officer and principal financial officer to certify in each annual or quarterly report the accuracy and completeness of the information contained in the report. A knowing violation of this section is punishable by up to 10 years in jail and a $1 million fine. A willful violation is punishable by up to 20 years in jail and a $5 million fine. The act authorizes the establishment of a Public Company Accounting Oversight Board to oversee the accounting profession. The SEC appoints the five-person board. The board is charged with developing standards and enforcing them with appropriate sanctions. It must file an ANNUAL REPORT with the SEC.

## SEC Enforcement Authority

The commission enforces the myriad laws and regulations under its jurisdiction in a number of ways. The SEC may seek a court INJUNCTION against acts and practices that deceive investors or otherwise violate securities laws; suspend or revoke the registration of brokers, dealers, investment companies, and advisers who have violated securities laws; refer persons to the JUSTICE DEPARTMENT for criminal prosecution in situations involving criminal FRAUD or other willful violation of securities laws; and bar attorneys, accountants, and other professionals from practicing before the commission.

The SEC may conduct investigations to determine whether a violation of federal securities laws has occurred. The SEC has the power to subpoena witnesses, administer oaths, and compel the production of records anywhere in the United States. Generally, the SEC initially conducts an informal inquiry, including interviewing witnesses. This stage does not usually involve sworn statements or compulsory testimony. If it appears that a violation has occurred, SEC staff members request an order from the commission delineating the scope of a formal inquiry.

Witnesses may be subpoenaed in a formal investigation. A witness compelled to testify or produce evidence is entitled to see a copy of the order of investigation and be accompanied, represented, and advised by counsel. A witness also has the absolute right to inspect the transcript of his or her testimony. Typically the same privileges one could assert in a judicial proceeding, such as the Constitution's FOURTH AMENDMENT prohibition against unreasonable SEARCHES AND SEIZURES and the Fifth Amendment's PRIVILEGE AGAINST SELF-INCRIMINATION, apply in an SEC investigation. Proceedings are usually conducted privately to protect all parties involved, but the commission may publish information regarding violations uncovered in the investigation. In a private investigation, a targeted person has no right to appear to rebut charges. In a public investigation, however, a person must be afforded a reasonable opportunity to cross-examine witnesses and to produce rebuttal testimony or evidence, if the record contains implications of wrongdoing.

When an SEC investigation unearths evidence of wrongdoing, the commission may order an administrative hearing to determine responsibility for the violation and impose sanc-

tions. Administrative proceedings are only brought against a person or firm registered with the SEC, or with respect to a security registered with the commission. Offers of settlement are common. In these cases the commission often insists upon publishing its findings regarding violations.

An administrative hearing is held before an ADMINISTRATIVE LAW judge, who is actually an independent SEC employee. The hearing is similar to that of a nonjury trial and may be either public or private. After the hearing the judge makes an initial written decision containing findings of fact and conclusions of law. If either party requests, or if the commission itself chooses, the commission may review the decision. The SEC must review cases involving a suspension, denial, or revocation of registration. The commission may request oral argument, will study briefs, and may modify the decision, including increasing the sanctions imposed. Possible sanctions in administrative proceedings include censure, limitations on the registrant's activities, or revocation of registration. In 1990 SEC powers were expanded to include the authority to impose civil penalties of up to $500,000, to order disgorgement of profits, and to issue cease and desist orders against persons violating or about to violate securities laws, whether or not the persons are registered with the SEC.

The U.S. Court of Appeals for the District of Columbia or another applicable circuit court of appeals has jurisdiction to review most final orders from an SEC administrative proceeding. Certain actions by the commission are not reviewable.

The SEC may request an injunction from a federal district court if future securities law violations are likely or if a person poses a continuing menace to the public. An injunction may include a provision that any future violation of law constitutes CONTEMPT of court.

The SEC may request further relief, such as turning over profits or making an offer to rescind the profits gained from an insider trading transaction. In cases of pervasive corporate mismanagement, the SEC may obtain appointment of a receiver or of independent directors and special counsel to pursue claims on behalf of the corporation.

Willful violations may be punished by fines and imprisonment. The SEC refers such cases to the Department of Justice for criminal prosecution. "Willfulness" means only that the defendant intended the act, not that he knew that it was a violation of securities laws.

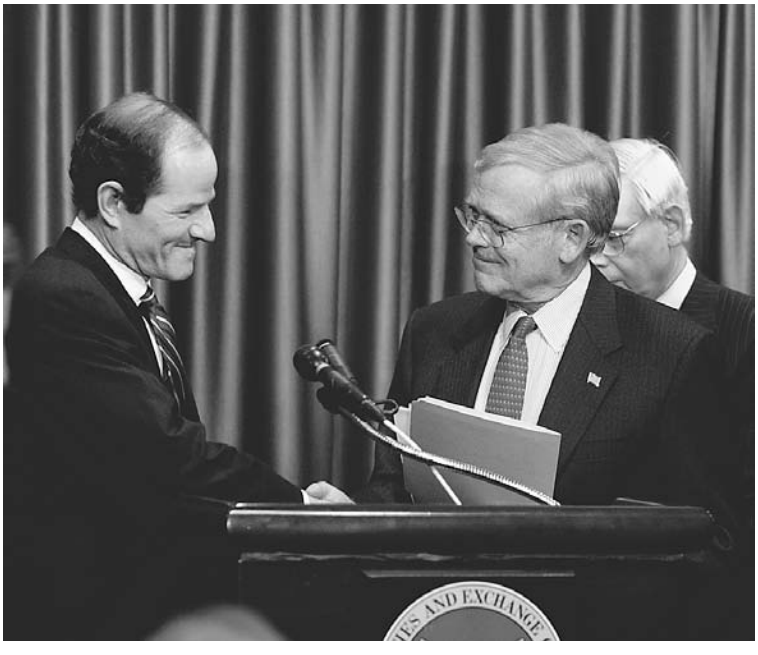

*In April 2003, William Donaldson (right), Securities and Exchange Commission chairman, and Eliot Spitzer, New York's attorney general, announce the $1.4 billion settlement of investigations of ten Wall Street firms.*

AP/WIDE WORLD PHOTOS

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**CROSS-REFERENCES**

Administrative Law and Procedure; Bonds; Mergers and Acquisitions; Securities.

## SECURITY

*Protection; assurance; indemnification.*

The term *security* is usually applied to a deposit, lien, or mortgage voluntarily given by a debtor to a creditor to guarantee payment of a debt. Security furnishes the creditor with a resource to be sold or possessed in case of the debtor's failure to meet his or her financial obligation. In addition, a person who becomes a surety for another is sometimes referred to as a "security."

*A sample security agreement*

## SECURITY AGREEMENT

AGREEMENT made this _____ (month & day), _____ (year) between _____ ("Debtor"), and _____ ("Secured Party").

1. SECURITY INTEREST. Debtor grants to Secured Party a security interest in all inventory, equipment, appliances, furnishings, and fixtures now or hereafter placed upon the premises known as _____, located at _____ (the "Premises") or used in connection therewith and in which Debtor now has or hereafter acquires any right and the proceeds therefrom. As additional collateral, Debtor assigns to Secured Party, a security interest in all of its right, title, and interest to any trademarks, trade names, contract rights, and leasehold interests in which Debtor now has or hereafter acquires. The Security Interest shall secure the payment and performance of Debtor's promissory note of even date herewith in the principal amount of _____ ($_____) and the payment and performance of all other liabilities and obligations of Debtor to Secured Party of every kind and description, direct or indirect, absolute or contingent, due or to become due now existing or hereafter arising.

2. COVENANTS. Debtor hereby warrants and covenants:

   (a) The collateral will be kept at _____, and that the collateral will not be removed from the Premises other than in the ordinary course of business.

   (b) The Debtor's place of business is _____, and Debtor will immediately notify Secured Party in writing of any change in or discontinuance of Debtor's place of business.

   (c) The parties intend that the collateral is and will at all times remain personal property despite the fact and irrespective of the manner in which it is attached to realty.

   (d) The Debtor will not sell, dispose, or otherwise transfer the collateral or any interest therein without the prior written consent of Secured Party, and the Debtor shall keep the collateral free from unpaid charges (including rent), taxes, and liens.

   (e) The Debtor shall execute alone or with Secured Party any Financing Statement or other document or procure any document, and pay the cost of filing the same in all public offices wherever filing is deemed by Secured Party to be necessary.

   (f) Debtor shall maintain insurance at all times with respect to all collateral against risks of fire, theft, and other such risks and in such amounts as Secured Party may require. The policies shall be payable to both the Secured Party and the Debtor as their interests appear and shall provide for ten (10) days written notice of cancellation to Secured Party.

   (g) The Debtor shall make all repairs, replacements, additions, and improvements necessary to maintain any equipment in good working order and condition.

   At its option, Secured Party may discharge taxes, liens, or other encumbrances at any time levied or placed on the collateral, may pay rent or insurance due on the collateral and may pay for the maintenance and preservation of the collateral. Debtor agrees to reimburse Secured Party on demand for any payment made, or any expense incurred by Secured Party pursuant to the foregoing authorization.

3. DEFAULT. The Debtor shall be in default under this Agreement upon the happening of any of the following:

   (a) Any misrepresentation in connection with this Agreement on the part of the Debtor.

   (b) Any noncompliance with or nonperformance of the Debtor's obligations under the Note or this Agreement.

   (c) If Debtor is involved in any financial difficulty as evidenced by (i) an assignment for the benefit of creditors, or (ii) an attachment or receivership of assets not dissolved within thirty (30) days, or (iii) the institution of Bankruptcy proceedings, whether voluntary or involuntary, which is not dismissed within thirty (30) days from the date on which it is filed.

   Upon default and at any time thereafter, Secured Party may declare all obligations secured hereby immediately due and payable and shall have the remedies of a Secured Party under the Uniform Commercial Code. Secured Party may require the Debtor to make it available to Secured Party at a place which is mutually convenient.

   No waiver by Secured Party of any default shall operate as a waiver of any other default or of the same default on a future occasion. This Agreement shall inure to the benefit of and bind the heirs, executors, administrators, successors, and assigns of the parties. This Agreement shall have the effect of an instrument under seal.

Date: _____ By: _____

_____
Signature

NOTE:
FILE FINANCING STATEMENTS IN OR WITHIN FIVE (5) DAYS FROM DATE.

## SECURITY COUNCIL

See UNITED NATIONS.

## SECURITY DEPOSIT

*Money aside from the payment of rent that a landlord requires a tenant to pay to be kept separately in a fund for use should the tenant cause damage to the premises or otherwise violate terms of the lease.*

A security deposit is usually in the amount of one or two months' rent. It usually must be paid at the time that the LANDLORD AND TENANT sign the lease. The landlord must place the funds in an escrow account and give the tenant any interest generated by such funds. Upon the termination of the lease, the landlord must return the security deposit to the tenant if no violations of the lease occurred. He or she may keep the security deposit or portion thereof for the amount of any damages, which can be proven, pursuant to the terms of the lease.

CROSS-REFERENCES

Landlord and Tenant.

## SEDITION

*A revolt or an incitement to revolt against established authority, usually in the form of* TREASON *or* DEFAMATION *against government.*

Sedition is the crime of revolting or inciting revolt against government. However, because of the broad protection of free speech under the FIRST AMENDMENT, prosecutions for sedition are rare. Nevertheless, sedition remains a crime in the United States under 18 U.S.C.A. § 2384 (2000), a federal statute that punishes seditious conspiracy, and 18 U.S.C.A. § 2385 (2000), which outlaws advocating the overthrow of the federal government by force. Generally, a person may be punished for sedition only when he or she makes statements that create a CLEAR AND PRESENT DANGER to rights that the government may lawfully protect (SCHENCK V. UNITED STATES, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 [1919]).

The crime of seditious conspiracy is committed when two or more persons in any state or U.S. territory conspire to levy war against the U.S. government. A person commits the crime of advocating the violent overthrow of the federal government when she willfully advocates or teaches the overthrow of the government by force, publishes material that advocates the overthrow of the government by force, or organizes persons to overthrow the government by force. A person found guilty of seditious conspiracy or advocating the overthrow of the government may be fined and sentenced to up to 20 years in prison. States also maintain laws that punish similar advocacy and conspiracy against the state government.

Governments have made sedition illegal since time immemorial. The precise acts that constitute sedition have varied. In the United States, Congress in the late eighteenth century believed that government should be protected from "false, scandalous and malicious" criticisms. Toward this end, Congress passed the Sedition Act of 1798, which authorized the criminal prosecution of persons who wrote or spoke falsehoods about the government, Congress, the president, or the vice president. The act was to expire with the term of President JOHN ADAMS.

The Sedition Act failed miserably. THOMAS JEFFERSON opposed the act, and after he was narrowly elected president in 1800, public opposition to the act grew. The act expired in 1801, but not before it was used by President Adams to prosecute numerous public supporters of Jefferson, his challenger in the presidential election of 1800. One writer, Matthew Lyon, a congressman from Vermont, was found guilty of seditious libel for stating, in part, that he would not be the "humble advocate" of the Adams administration when he saw "every consideration of the public welfare swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice" (*Lyon's Case,* 15 F. Cas. 1183 [D. Vermont 1798] [No. 8646]). Vermont voters reelected Lyon while he was in jail. Jefferson, after winning the election and assuming office, pardoned all persons convicted under the act.

In the 1820s and 1830s, as the movement to abolish SLAVERY grew in size and force in the South, Southern states began to enact seditious LIBEL laws. Most of these laws were used to prosecute persons critical of slavery, and they were abolished after the Civil War. The federal government was no less defensive; Congress enacted seditious conspiracy laws before the Civil War aimed at persons advocating secession from the United States. These laws were the precursors to the present-day federal seditious conspiracy statutes.

In the late nineteenth century, Congress and the states began to enact new limits on speech,

most notably statutes prohibiting OBSCENITY. At the outset of WORLD WAR I, Congress passed legislation designed to suppress antiwar speech. The ESPIONAGE ACT OF 1917 (ch. 30, tit. 1, § 3, 40 Stat. 219), as amended by ch. 75, § 1, 40 Stat 553, put a number of pacifists into prison. Socialist leader EUGENE V. DEBS was convicted for making an antiwar speech in Canton, Ohio (*Debs v. United States,* 249 U.S. 211, 39 S. Ct. 252, 63 L. Ed. 566 [1919]). Charles T. Schenck and Elizabeth Baer were convicted for circulating to military recruits a leaflet that advocated opposition to the draft and suggested that the draft violated the Thirteenth Amendment's ban on INVOLUNTARY SERVITUDE (*Schenck v. United States,* 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 [1919]).

The U.S. Supreme Court did little to protect the right to criticize the government until after 1927. That year, Justice LOUIS D. BRANDEIS wrote an influential concurring opinion in *Whitney v. California,* 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927), that was to guide First Amendment JURISPRUDENCE for years to come. In *Whitney* the High Court upheld the convictions of political activists for violation of federal anti-syndicalism laws, or laws that prohibit the teaching of crime. In his concurring opinion, Brandeis maintained that even if a person advocates violation of the law, "it is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on." Beginning in the 1930s, the Court became more protective of political free speech rights.

The High Court has protected the speech of racial supremacists and separatists, labor organizers, advocates of racial INTEGRATION, and opponents of the draft for the VIETNAM WAR. However, it has refused to declare unconstitutional all sedition statutes and prosecutions. In 1940, to silence radicals and quell Nazi or communist subversion during the burgeoning Second World War, Congress enacted the SMITH ACT (18 U.S.C.A. §§ 2385, 2387), which outlawed sedition and seditious conspiracy. The Supreme Court upheld the constitutionality of the act in *Dennis v. United States,* 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951).

Sedition prosecutions are extremely rare, but they do occur. Shortly after the 1993 bombing of the World Trade Center in New York City, the federal government prosecuted Sheik Omar Abdel Rahman, a blind Egyptian cleric living in New Jersey, and nine codefendants on charges of seditious conspiracy. Rahman and the other defendants were convicted of violating the seditious conspiracy statute by engaging in an extensive plot to wage a war of TERRORISM against the United States. With the exception of Rahman, they all were arrested while mixing explosives in a garage in Queens, New York, on June 24, 1993.

The defendants committed no overt acts of war, but all were found to have taken substantial steps toward carrying out a plot to levy war against the United States. The government did not have sufficient evidence that Rahman participated in the actual plotting against the government or any other activities to prepare for terrorism. He was instead prosecuted for providing religious encouragement to his coconspirators. Rahman argued that he only performed the function of a cleric and advised followers about the rules of Islam. He and the others were convicted, and on January 17, 1996, Rahman was sentenced to life imprisonment by Judge Michael Mukasey.

Following the SEPTEMBER 11TH ATTACKS of 2001, the federal government feared that terrorist networks were very real threats, and that if left unchecked, would lead to further insurrection. As a result, Congress enacted the Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272. Among other things, the act increases the president's authority to seize the property of individuals and organizations that the president determines have planned, authorized, aided, or engaged in hostilities or attacks against the United States.

The events of September 11 also led to the conviction of at least one American. In 2001, U.S. officials captured John Philip Walker Lindh, a U.S. citizen who had trained with terrorist organizations in Pakistan and Afghanistan. Lindh, who became known as the "American Taliban," was indicted on ten counts, including conspiracy to murder U.S. nationals. In October 2002, he was sentenced to 20 years in prison.

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CROSS-REFERENCES

Cold War; Communism; Freedom of Speech; Socialism.

## SEDITIOUS LIBEL

*Written or spoken words, pictures, signs, or other forms of communication that tend to defame, discredit, criticize, impugn, embarrass, challenge, or question the government, its policies, or its officials; speech that advocates the overthrow of the government by force or violence or that incites people to change the government by unlawful means.*

The crime of seditious libel was used by the British Crown to stifle political opponents and consolidate power in the seventeenth and eighteenth centuries. English juries were permitted only to decide the factual issue of whether or not the defendant had communicated the speech in public; judges decided the legal issue of whether the communication constituted seditious LIBEL. Truth was not a defense, and malicious intent to cause SEDITION was not an element of the crime.

In the United States, legal experts disputed whether the English COMMON LAW of seditious libel remained intact after the American Revolution. FEDERALIST PARTY members in Congress concluded that it did, enacting the Sedition Act of 1798, which made it a crime to "write, print, utter or publish . . . any false, scandalous and malicious" words against the government, the president, or Congress. The U.S. Supreme Court narrowed the debate in NEW YORK TIMES CO. V. SULLIVAN, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (U.S. 1964), holding that the FIRST AMENDMENT forbids public officials from recovering money damages for libel in civil court, unless they can prove that the allegedly injurious speech was defamatory, false, and made with "actual malice," or in reckless disregard of the truth.

CROSS-REFERENCES

Censorship; Freedom of Speech; Freedom of the Press; Libel and Slander.

## SEDUCTION

*The act by which a man entices a woman to have unlawful sexual relations with him by means of persuasions, solicitations, promises, or bribes without the use of physical force or violence.*

At COMMON LAW, a woman did not ordinarily have the right to sue on her own behalf; the right to sue for seduction belonged to a father who could bring an action against a man who had sexual relations with his daughter. A woman who was seduced by a marriage promise could sue for breach of promise, and if she became sexually involved with a man due to force or duress, she might be able to sue for rape or assault. Regardless of whether the woman was a legal adult or an infant, seduction was considered to be an injury to her father.

Seduction suits are rarely brought in modern times and have been eliminated by some states, primarily because they publicize the victim's humiliation.

CROSS-REFERENCES

Breach of Marriage Promise.

## SEGREGATION

*The act or process of separating a race, class, or ethnic group from a society's general population.*

Segregation in the United States has been practiced, for the most part, on African Americans. Segregation by law, or de jure segregation, of African Americans was developed by state legislatures and local lawmaking bodies in southern states shortly after the Civil War. De facto segregation, or inadvertent segregation, continues to exist in varying degrees in both northern and southern states.

De facto segregation arises from social and economic factors and cannot be traced to official government action. For example, ZONING laws that forbid multifamily housing can have the effect of excluding all but the wealthiest persons from a particular community.

De jure segregation was instituted in the southern states in the late nineteenth and early twentieth centuries. The state legislatures in the

# Yonkers, New York, Battles Segregation

In 1980, the **JUSTICE DEPARTMENT** and the Yonkers branch of the National Association of the Advancement of Colored People (**NAACP**) filed a civil lawsuit against the city of Yonkers, New York, the Yonkers School Board, and the Yonkers Community Development Agency, charging that the city had engaged in systematic segregation for the previous 30 years. The plaintiffs alleged that the city government had disproportionately restricted new subsidized housing projects to certain areas of the city already heavily populated by minorities. The case marked the first time racial segregation charges were levied against housing and school officials in the same suit.

After years of preparation and a three-month trial, the U.S. District Court for the Southern District of New York found that the defendants had in fact segregated the city's housing and schools based on racial identity. *United States v. Yonkers Board of Education* 624 F.Supp. 1276 (S.D.N.Y. 1985). The city was ordered to designate sites for public housing by November 1986, but the city refused to comply during the appeals process. The U.S. Court of Appeals for the Second Circuit upheld the **RACIAL DISCRIMINATION** rulings (837 F.2d 1181 [2nd Cir. 1987]) but did not resolve the compliance issue. The U.S. Supreme Court denied the city's petition for certiorari, and in January 1988 the parties agreed to a **CONSENT DECREE** that established a new housing plan. The Yonkers city council voted to approve the decree, which was submitted to the trial court and accepted. The city was to pass legislation outlining the new housing plan within 90 days.

The city did not pass the legislation by the deadline, and the **JUSTICE DEPARTMENT** and the Yonkers NAACP submitted a "Long-Term Plan Order" to the trial court, which ordered the city to pass the legislation by August 1, 1988. The city council did vote, but the measure was defeated 4–3. The trial court held the city and the council in **CONTEMPT**, a move affirmed by the Second Circuit. The city requested a stay of the sanctions from the Supreme Court. The stay was granted, but only for the individual council members; the city incurred stiff fines totaling nearly $1 million per day. The council, by a vote of 5–2, enacted an Affordable Housing Ordinance on September 9, 1988. In 1990, the Supreme Court ruled 5–4 that the trial court had the right to sanction the city, but it had overstepped its bounds in sanctioning the individual council members. *Spallone v. United States,* 493 U.S. 265, 111 S. Ct 625, 107, L. Ed. 2d 644 (1990).

In 1993, the Yonkers Board of Education and the Yonkers NAACP reactivated the original case, alleging that while the city schools were no longer pursuing policies that were pursued or implemented in a racially-identifiable manner, vestiges of segregation remained. The plaintiffs included the state of New York in this new suit because, they believed, the state had exacerbated the problem by continually underfunding Yonkers. The trial court agreed with the plaintiffs about the segregation and found that the city needed additional money to carry out meaningful desegregation. The court refused to hold the state of New York fiscally responsible because the state had never affirmatively participated in the segregation. *United States v. Yonkers Board of Education,* 880 F. Supp. 212 (S.D.N.Y. 1995).

The Second Circuit appeals court vacated the trial court's decision regarding the state's fiscal responsibility, holding that the state had a fiscal obligation to alleviate segregation in Yonkers. *United States v. Yonkers Board of Education,* 96 F.3d 600 (2d Cir. 1996), cert. Denied 117 U.S. 2479, 138 L. Ed.2d 988 (1996). Still another trial ensued. The state attempted to prove that there were no vestiges of segregation in the Yonkers public schools, but the court thought otherwise and ordered the city and the state to share in the costs of a second desegregation plan—devised by the court—called the "Educational Improvement Plan." *United States v. Yonkers Board of Education,* 984 F. Supp 687, 123 Ed. Law Rep 544 (1997) (S.D.N.Y.).

The next several years saw little agreement over progress or culpability, but the parties pushed on in the hope of reaching common ground. Early in 2002 a pact was announced that would provide $300 million in state funding to the school district over a five-year period, to be used to fund programs that boost

academic achievement for all city students. Under the terms of the agreement, a monitor was supposed to be assigned to ensure that the school district was living up to its promises. As of March 2003 the district had been unsuccessful in filling the position, which led some observers to question its commitment to the pact.

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**CROSS-REFERENCES**

Civil Rights Acts; Discrimination.

southern states accomplished de jure segregation by creating separate facilities, services, and areas for African Americans. Blacks were separated from the rest of society in virtually every facility, service, and circumstance, including schools, public drinking fountains, public lavatories, restaurants, theaters, hotels and motels, welfare services, hospitals, CEMETERIES, residences, military facilities, and all modes of transportation.

The quality of these facilities and services was invariably inferior to the facilities and services used by the rest of the communities. Laws in many states also prohibited miscegenation, or marriage between racially mixed couples. If an African American failed to observe segregation and used facilities reserved for white persons, she could be arrested and prosecuted.

In 1896 the U.S. Supreme Court gave explicit approval to segregation in PLESSY V. FERGUSON, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896). The High Court declared in *Plessy* that segregation did not violate the EQUAL PROTECTION CLAUSE of the U.S. Constitution's FOURTEENTH AMENDMENT if the separate facilities and services for African Americans were equal to the facilities and services for white persons. This SEPARATE-BUT-EQUAL doctrine survived until 1954.

That year, in BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the Court reversed the *Plessy* decision. In *Brown,* the Court ruled that state-sponsored segregation did violate the guarantee of equal protection under the laws provided to all citizens in the Fourteenth Amendment. The *Brown* case concerned only the segregation of schools, but the Court's rationale was used throughout the 1950s to strike down all the remaining state and local segregation laws.

In the 1960s Congress took steps to curtail segregation in private life. The CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000a et seq.) forbade segregation in all privately owned public facilities subject to any form of federal control under the Interstate Commerce Clause in Article I, Section 8, Clause 3, of the U.S. Constitution. Facilities covered by the act included restaurants, hotels, retail stores, and recreational facilities. States began to follow suit by passing laws that prohibited discrimination in housing and employment. In 1968 the Supreme Court ruled that a seller or lessor of property could not refuse to sell or rent to a person based on that person's race or color (*Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 [1968]).

In 1971 the Court held in SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971), that busing schoolchildren to different schools was an acceptable means of combating de facto segregation in schools. However, subsequent court decisions have rejected the forced INTEGRATION of predominantly white suburban school districts with largely black urban districts, and public education remains effectively segregated in many areas of the United States.

CROSS-REFERENCES

Civil Rights; Integration; Jim Crow Laws; School Desegregation. See also primary documents in "From Segregation to Civil Rights" section of Appendix.

## SEISIN

See LIVERY OF SEISIN.

## SEIZURE

*Forcible possession; a grasping, snatching, or putting in possession.*

In CRIMINAL LAW, a seizure is the forcible taking of property by a government law enforcement official from a person who is suspected of violating, or is known to have violated, the law. A SEARCH WARRANT usually must be presented to the person before his property is seized, unless the circumstances of the seizure justify a warrantless SEARCH AND SEIZURE. For example, the police may seize a pistol in the coat pocket of a person arrested during a ROBBERY without presenting a warrant because the search and seizure is incident to a lawful arrest. Certain federal and state laws provide for the seizure of particular property that was used in the commission of a crime or that is illegal to possess, such as explosives used in violation of federal law or illegal narcotics.

In the law of civil practice, the term refers to the act performed by an officer of the law under court order when she takes into custody the property of a person against whom a court has rendered a judgment to pay a certain amount of money to another. The property is seized so that it can be sold under the authority of the court to satisfy the judgment. Property can also be seized if a substantial likelihood exists that a defendant is concealing or removing property from the jurisdiction of the court so that in the event a judgment is rendered against her, the property cannot be used to pay the judgment. By attaching or seizing a defendant's property, the court prevents her from perpetrating a FRAUD on the courts.

"IGNORANCE OF THE LAW EXCUSES NO MAN; NOT ALL MEN KNOW THE LAW, BUT BECAUSE IT IS AN EXCUSE EVERY MAN WILL PLEAD, AND NO MAN CAN TELL HOW TO CONFUTE HIM."
—JOHN SELDEN

## ♦ SELDEN, JOHN

John Selden was a brilliant lawyer, author, politician, legal analyst, and historian in seventeenth-century England. John Milton, the famed poet and a contemporary of Selden, called Selden "the chief of learned men reputed in this Land."

Selden was born in Salvington, Sussex, England, in 1584. His baptismal record says only, "John, the sonne of John Selden, ye ministrell, was baptized the xxth day of December," the brevity of which indicating Selden likely was born within the customary four days of the ceremony but leaving in question the exact day of birth. The elder John Selden was a musician—a minstrel—who married Margaret Baker, the only child and, therefore, heir of a landed nobleman. The Selden family improved its status further so that by 1609 they held more than 80 acres of land and could afford to send their only surviving child to university.

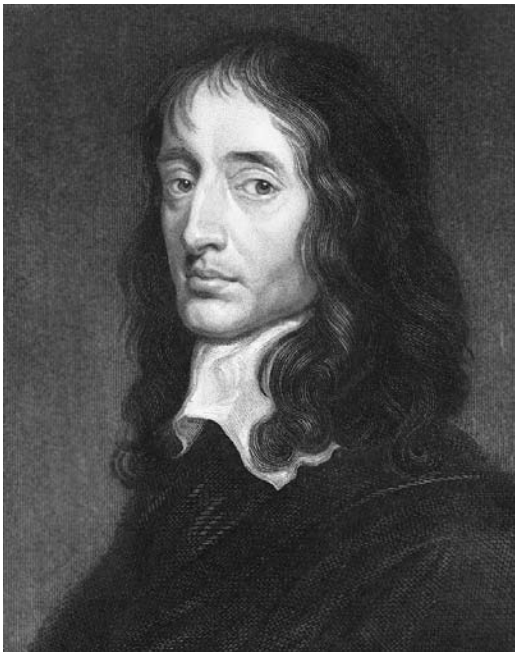

*John Selden.* BETTMANN/CORBIS

After attending Oxford University and the Inns of Court, Selden was called to the bar in 1612, and then apprenticed for at least another two years. He published a number of works about English LEGAL HISTORY before he was admitted to the bar, and he continued to write while practicing law. His earliest work was a study of Syrian mythology in the Bible, *De dis Syris,* a treatise finished in 1605 and published in 1617. It established his reputation as of one Europe's leading scholars on Asian history.

*History of Tithes,* a masterpiece of research on the history of ENGLISH LAW published in 1618, is by far his most influential work. In *History of Tithes,* Selden argued that the clergy had a legal but not a divine right to tithes, or 10 percent of a person's income. Selden also claimed that tithes were not ordained by God's law. This conclusion was controversial because it implicitly denied the divine right of kings, or the notion that monarchs were descended from rulers appointed by God, for it implied a separation of state law and divine law. The divine right of kings supported the rule that kings could not forfeit their right to the throne

through misconduct, but *Tithes* put this rule in doubt.

Three years after the publication of *Tithes,* Selden became embroiled in another controversy when he helped Parliament draft the House of Commons Protestation, a complaint to the Crown about the rights and privileges of the House of Commons. Selden professed the belief that Parliament did not owe its powers to the Crown and that the independence of Parliament was rooted in the lawful and traditional heritage of the English people. This belief, argued Selden, was supported by early records that showed that parliamentary government was an ancient Anglo-Saxon custom. King James I imprisoned Selden in the Tower of London for five weeks for what he deemed treasonous statements.

In 1623 Selden was elected to the House of Commons. He promptly earned a reputation for candor and conviction in his support of religious and civil freedoms. He also became known for his opposition to the taxation of cargo by its weight. Selden was so persuasive that the House of Commons passed a resolution prohibiting the tax. The resolution did not win the approval of King Charles I, and Selden was sent to the Tower of London for another brief stay.

Selden continued to publish works that used historical analysis to explain or correct England's order of affairs. Along with predecessor SIR EDWARD COKE (1552–1634) and protégé Sir Matthew Hale (1609–76), Selden helped provide an intellectual basis for the early seventeenth-century parliamentary revolution against the power of the Crown. In 1640 Selden became a member of the Long Parliament, a special parliament created in that year by Charles I, who had governed without a parliament for 11 years. Ironically, Selden spent his later years keeping the rolls and records for the Tower of London.

Selden's most famous work was published after his death. This was *Table Talk,* a survey of Selden's witty conversations with famous friends such as poet Ben Jonson. Published in 1689, *Table Talk* presented a more relaxed, colorful image of Selden that was not apparent in his scholarly works. Selden's emphasis on the importance of history lives on through the SELDEN SOCIETY, a group that promotes the study of English legal history.

Selden died in London on November 30, 1654.

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## SELDEN SOCIETY

The Selden Society is an association of legal historians that publishes scholarly works on the LEGAL HISTORY of England. It was founded in 1886 by English legal professionals and scholars, including the renowned historian FREDERIC WILLIAM MAITLAND. Named for the revered seventeenth-century legal historian JOHN SELDEN, the Selden Society exists to encourage the study and advance the knowledge of the history of ENGLISH LAW. Selden Society members include legal historians, lawyers, and law librarians, primarily from English-speaking countries.

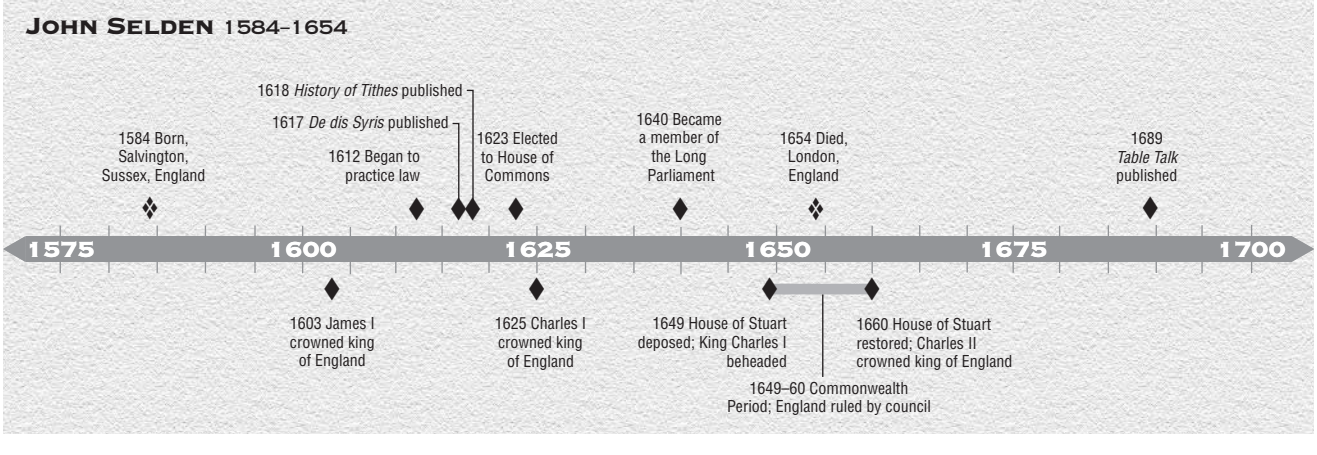

The principal activity of the Selden Society is the publication of an annual series on the history of English law. This series is of considerable value to courts in countries with legal systems that have borrowed heavily from the English legal system. The Selden Society also publishes books about various legal topics and holds lectures and symposiums about historical topics of legal significance.

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Selden Society Web site. Available online at <www.selden-society.qmw.ac.uk> (accessed January 12, 2004).

## SELECTIVE PROSECUTION

*Criminal prosecution based on an unjustifiable standard such as race, religion, or other* ARBITRARY *classification.*

Selective prosecution is the enforcement or prosecution of criminal laws against a particular class of persons and the simultaneous failure to administer criminal laws against others outside the targeted class. The U.S. Supreme Court has held that selective prosecution exists where the enforcement or prosecution of a CRIMINAL LAW is "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that the administration of the criminal law amounts to a practical denial of EQUAL PROTECTION of the law (*United States v. Armstrong,* 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 [1996], quoting YICK WO V. HOPKINS, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 [1886]). Specifically, police and prosecutors may not base the decision to arrest a person for, or charge a person with, a criminal offense based on "an unjustifiable standard such as race, religion, or other arbitrary classification" (*United States v. Armstrong,* quoting *Oyler v. Boles,* 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 [1962]).

Selective prosecution is a violation of the constitutional guarantee of equal protection for all persons under the law. On the federal level, the requirement of equal protection is contained in the DUE PROCESS CLAUSE of the FIFTH AMENDMENT to the U.S. Constitution. The Equal Protection Clause of the FOURTEENTH AMENDMENT extends the prohibition on selective prosecution to the states. The equal protection doctrine requires that persons in similar circumstances must receive similar treatment under the law.

Selective prosecution cases are notoriously difficult to prove. Courts presume that prosecutors have not violated equal protection requirements, and claimants bear the burden of proving otherwise. A person claiming selective prosecution must show that the prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose. To demonstrate a discriminatory effect, a claimant must show that similarly situated individuals of a different class were not prosecuted. For example, a person claiming selective prosecution of white Protestants must produce evidence that shows that white Protestants were prosecuted for a particular crime and that persons outside this group could have been prosecuted but were not.

The prohibition of selective prosecution may be used to invalidate a law. In *Yick Wo v. Hopkins,* the U.S. Supreme Court struck down a San Francisco ordinance that prohibited the operation of laundries in wooden buildings. San Francisco authorities had used the ordinance to prevent Chinese from operating a laundry business in a wooden building. Yet the same authorities had granted permission to eighty individuals who were not Chinese to operate laundries in wooden buildings. Because the city enforced the ordinance only against Chinese-owned laundries, the Court ordered that Yick Wo, who had been imprisoned for violating the ordinance, be set free.

CROSS-REFERENCES

Criminal Procedure.

## SELECTIVE SERVICE SYSTEM

The Selective Service System is responsible for supplying U.S. armed forces with people in the event of a national emergency. It is an independent agency of the federal government's EXECUTIVE BRANCH.

The agency was established in its first form in 1917 and is authorized by the Military Selective Service Act (50 U.S.C.A. app. 451–471a). This act, as amended, requires male citizens of the United States, and all other male persons who are in the United States and who are between the ages of eighteen and a half and twenty-six, to register for possible military service. It exempts active members of the armed forces, personnel of foreign embassies and consulates, and nonimmigrant ALIENS.

All registrants between the ages of eighteen and a half and twenty-six, except those who are deferred, are liable for training and service in the armed forces should Congress decide to conscript registrants. Those who have received a deferral are liable for training and service until age thirty-five. Aliens are not liable for training and service until they have remained in the United States for more than one year. In the event of the CONSCRIPTION of registrants into the armed forces, conscientious objectors are required to do civilian work in place of conscription.

In 1980 President JIMMY CARTER issued a proclamation (Proclamation 4771, July 2, 1980) requiring all males who were born after January 1, 1960, and who have attained age eighteen, to register with the Selective Service. Registration is conducted at U.S. post offices and at U.S. embassies and consulates outside the United States. The Selective Service maintains several field offices in addition to its headquarters in Arlington, Virginia.

CROSS-REFERENCES

Armed Services; Solomon Amendment.

## SELECTMAN OR SELECTWOMAN

*A municipal officer elected by a town in the New England states.*

A selectman possesses executive authority and is usually empowered to transact the general public business of the town. The "first selectman" usually holds a position equivalent to the position held by a mayor.

## SELF-DEALING

*The conduct of a trustee, an attorney, or other fiduciary that consists of taking advantage of his or her position in a transaction and acting for his or her own interests rather than for the interests of the beneficiaries of the trust or the interests of his or her clients.*

Self-dealing is wrongful conduct by a fiduciary. A fiduciary is a person who has duties of GOOD FAITH, trust, special confidence, and candor toward another person. Examples of fiduciary relationships include attorneys and their clients, doctors and their patients, investment bankers and their clients, trustees and trust beneficiaries, and corporate directors and stockholders. Fiduciaries have expert knowledge and skill, and they are paid to apply that knowledge and skill for the benefit of another party. Under the law, a fiduciary relationship imposes certain duties on fiduciaries because a fiduciary is in a special position of control over an important aspect of another person's life.

One important duty of a fiduciary is to act in the best interests of the benefited party. When a fiduciary engages in self-dealing, she breaches this duty by acting in her own interests instead of the interests of the represented party. For example, self-dealing occurs when a trustee uses money from the trust account to make a loan to a business in which he has a substantial personal interest. A fiduciary may make such a transaction with the prior permission of the trust beneficiary, but if the trustee does not obtain permission, the beneficiary can void the transaction and sue the fiduciary for any monetary losses that result.

The laws pertaining to self-dealing are found mainly in case law, judicial opinions, and some statutes. Case law authorizes the recovery of monetary damages from the self-dealing fiduciary.

One of the most notable statutes relating to self-dealing is 26 U.S.C.A. § 4941 (1969), which allows the INTERNAL REVENUE SERVICE to impose a five percent excise tax on each act of self-dealing by a disqualified person with a private, nonprofit foundation. Disqualified persons include substantial contributors to the foundation, foundation managers, owners of more than 20 percent of the foundation's interest, and members of the family of disqualified persons. If the self-dealing act is not timely corrected, the IRS may impose on the self-dealer an additional 200 percent excise tax on the amount of the transaction.

FURTHER READINGS

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CROSS-REFERENCES

Attorney Misconduct.

## SELF-DEFENSE

*The protection of one's person or property against some injury attempted by another.*

Self-defense is a defense to certain criminal charges as well as to some civil claims. Under both CRIMINAL LAW and TORT LAW, self-defense is commonly asserted in cases of HOMICIDE, ASSAULT AND BATTERY, and other crimes involving the attempted use of violence against an

## Self-Defense or Unjustified Shooting?

On December 22, 1984, at approximately 1:00 P.M., Troy Canty, Darryl Cabey, James Ramseur, and Barry Allen boarded an express subway train in the Bronx borough of New York City. The young black men sat in the rear section of their car. A short time later, Bernhard Goetz boarded the same car and took a seat near the youths. Goetz, a white computer technician, had been mugged some two years earlier.

Canty and Allen approached Goetz, and Canty said, "Give me five dollars." Goetz responded by standing up and firing at the youths with a handgun. Goetz fired four shots before pausing. He then walked up to Cabey and reportedly said, "You seem to be all right, here's another," whereupon he fired his fifth and final bullet into Cabey's spinal cord. Goetz had shot two of the youths in the back. Ramseur and Cabey each had a screwdriver, which they said they used to break into coin boxes and video machines.

Goetz fled the scene and traveled north to New Hampshire. On December 31, 1984, he turned himself in to police in Concord, New Hampshire. Goetz was returned to New York where he was indicted on a charge of criminal possession of a weapon. The state fought for a second **GRAND JURY**, and Goetz was eventually indicted a second time on charges of attempted murder, assault, criminal possession of a weapon, and reckless endangerment. At trial Goetz argued that he had acted in self-defense, and a jury convicted him only of illegal gun possession. Ultimately Goetz was sentenced to one year in jail and fined $5,000.

Goetz's shooting of Darryl Cabey left Cabey with brain damage and paralyzed from the chest down. Cabey sued Goetz, and in April 1996, a Bronx jury found Goetz liable for Cabey's injuries and awarded Cabey $43 million.

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individual. Statutory and case law governing self-defense is generally the same in tort and criminal law.

A person claiming self-defense must prove at trial that the self-defense was justified. Generally a person may use reasonable force when it appears reasonably necessary to prevent an impending injury. A person using force in self-defense should use only so much force as is required to repel the attack. Nondeadly force can be used to repel either a nondeadly attack or a deadly attack. DEADLY FORCE may be used to fend off an attacker who is using deadly force but may not be used to repel an attacker who is not using deadly force.

In some cases, before using force that is likely to cause death or serious bodily harm to the aggressor, a person who is under attack should attempt to retreat or escape, but only if an exit is reasonably possible. Courts have held, however, that a person is not required to flee from his own home, the fenced ground surrounding the home, his place of business, or his automobile.

A person who is the initial aggressor in a physical encounter may be able to claim self-defense if the tables turn in the course of the fight. Generally a person who was the aggressor may use nondeadly force if the victim resumes fighting after the original fight ended. If the original aggressor attacked with nondeadly force and was met with deadly force in return, the aggressor may respond with deadly force.

Courts and tribunals have historically accepted self-defense as a defense to a legal action. As a matter of public policy, the physical force or violence associated with self-defense is considered an acceptable response to aggression.

The same values that underpin self-defense support the defense of property. Generally a person has greater latitude in using physical force in the defense of her dwelling than in the defense of other property. In most jurisdictions deadly force is justified if a person unlawfully enters

onto property and the property owner reasonably believes that the trespasser is about to commit a felony or do harm to a person on the premises. Deadly force may also be justified to prevent a BURGLARY if the property owner reasonably believes the burglar intends to kill or seriously injure a person on the premises. However, a person may not, for example, rig a door handle so that any person who enters the dwelling is automatically shot by a gun. (*Katko v. Briney,* 183 N.W.2d 657 [Iowa 1971]).

Use of deadly force is never justified to protect PERSONAL PROPERTY other than a dwelling. For example, a person would not be justified in shooting a person who is taking an automobile, no matter how expensive. Reasonable nondeadly force may be used to protect such personal property.

A person may use force to defend a third person from attack. If the defender is mistaken, however, and the third party does not need assistance, most jurisdictions hold that the defender may be held liable in civil court for injuries inflicted on the supposed attacker. In criminal cases a defendant would be relieved of liability if she proved she had made a reasonable mistake.

A defendant who successfully invokes self-defense may be found not guilty or not liable. If the defendant's self-defense was imperfect, the self-defense may only reduce the defendant's liability. Imperfect self-defense is self-defense that was arguably necessary but somehow unreasonable. For example, if a person had a GOOD FAITH belief that deadly force was necessary to repel an attack, but that belief was unreasonable, the defendant would have a claim of imperfect self-defense. In some jurisdictions, the successful invocation of such a defense reduces a murder charge to MANSLAUGHTER. Most jurisdictions do not recognize imperfect self-defense.

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## SELF-DETERMINATION

*The political right of the majority to the exercise of power within the boundaries of a generally accepted political unit, area, or territory.*

The principle of self-determination is mentioned in the United Nations Charter and has often been stressed in resolutions passed by the UN General Assembly. The concept is most often used in connection with the right of colonies to independence. It does not relate to attempts at independence by groups, such as the French Canadians or the Nagas of India, who do not possess their own sovereign states.

## SELF-EXECUTING

*Anything (e.g., a document or legislation) that is effective immediately without the need of intervening court action, ancillary legislation, or other type of implementing action.*

A constitutional provision is self-executing when it can be given effect without the aid of legislation, and there is nothing to indicate that legislation is intended to make it operative. For example, a constitutional provision that any municipality by vote of four-sevenths of its qualified electors may issue and sell revenue bonds in order to pay for the cost of purchasing a municipally owned public utility is *self-executing* and effective without a legislative enactment.

Constitutional provisions are not self-executing if they merely set forth a line of policy or principles without supplying the means by which they are to be effectuated, or if the language of the constitution is directed to the legislature. As a result, a constitutional provision that the legislature shall direct by law in what manner and in what court suits may be brought against the state is not self-executing.

Just as with constitutional provisions, statutes and court judgments can be self-executing.

## SELF-EXECUTING TREATY

*A compact between two nations that is effective immediately without the need for ancillary legislation.*

A treaty is ordinarily considered self-executing if it provides adequate rules by which given rights may be enjoyed or imposed duties may be enforced. Conversely it is generally not self-executing when it merely indicates principles without providing rules giving them the force of law.

## SELF-HELP

*Redressing or preventing wrongs by one's own action* WITHOUT RECOURSE *to legal proceedings.*

*Self-help* is a term in the law that describes corrective or preventive measures taken by a private citizen. Common examples of self-help include action taken by landlords against tenants, such as eviction and removal of property from the premises, and repossession of leased or mortgaged goods, such as automobiles, watercraft, and expensive equipment. Persons may use self-help remedies only where they are permitted by law. State and local laws permit self-help in commercial transactions, TORT and NUISANCE situations, and LANDLORD AND TENANT relationships.

Self-help is permissible where it is allowed by law and can be accomplished without committing a breach of the peace. A breach of the peace refers to violence or threats of violence. For example, if a person buys a ship financed by a mortgage, the mortgage company may repossess the ship if the buyer fails to make the mortgage payments. If the buyer is present when the ship is being taken away and the buyer objects to the repossession, the mortgage company breaches the peace if it can repossess the ship only through violence or the threat of violence. In such a case, the mortgage company would be forced to file suit in court to repossess the ship. Repossessors attempt to circumvent objections by distracting or deceiving the defaulting party during the repossession.

A majority of states have banned self-help by landlords in the eviction of delinquent tenants. These legislatures have determined that the interests of the landlord in operating a profitable business must be balanced against a tenant's need for shelter. In place of the self-help remedy, states have devised expedited judicial proceedings for evictions. These proceedings make it possible for a landlord to evict a tenant without unacceptable delays while giving the tenant an opportunity to present to a court arguments against eviction.

In states that give landlords the right of self-help, landlords may evict a tenant on their own only if they can do so in a peaceful manner. The precise definition of *peaceful* varies from state to state. In some states any entry by a landlord that does not involve violence or a breach of the peace is acceptable. In other states any entry that is conducted without the tenant's consent is illegal.

In any case, if a landlord evicts a tenant through self-help, the eviction must be performed reasonably. For example, a landlord may not nail plywood across the entrance to a tenant's second-story apartment while the tenant is inside and then remove the steps leading up to the apartment. One landlord who performed such self-help faced criminal penalties after the trapped tenant and her two-year-old daughter needed the help of the local fire department to escape the apartment. A landlord who violates laws on self-help may face criminal charges and a civil suit for damages filed by the tenant.

One new form of self-help that poses interesting problems is self-help by providers of computer software. Businesses in the United States that use computers have become dependent on computer software. Sometimes when disputes have arisen between the buyer of software and the software provider, software providers have disabled the buyer's software from a remote location. In one case a software supplier called Logisticon entered into a contract with Revlon Group to provide it with computer software. After a dispute arose between the two parties, Logisticon accessed Revlon's software system and disabled it, causing Revlon to suffer $20 million in product delivery delays. Revlon brought suit against Logisticon, alleging that Logisticon had violated the contract and that it had misappropriated Revlon's trade secrets. The two parties settled the suit out of court, and the terms of the settlement remain undisclosed.

Self-help measures are controversial because they amount to taking the law into one's own hands. Opponents of self-help laws argue that they encourage unethical and sometimes illegal practices by creditors and that they diminish public respect for the law. Proponents counter that self-help, if performed peaceably, is a valuable feature of the justice system because it gives creditors an opportunity to alleviate losses and keeps small, simple disputes from glutting the court system.

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## SELF-INCRIMINATION

*Giving testimony in a trial or other legal proceeding that could subject one to criminal prosecution.*

The right against self-incrimination forbids the government from compelling any person to give testimonial evidence that would likely incriminate him during a subsequent criminal case. This right enables a defendant to refuse to testify at a criminal trial and "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings" (*Lefkowitz v. Turley,* 414 U.S. 70, 94 S. Ct. 316, 38 L. Ed. 2d 274 [1973]).

Confessions, admissions, and other statements taken from a defendant in violation of this right are inadmissible against him during a criminal prosecution. Convictions based on statements taken in violation of the right against self-incrimination normally are overturned on appeal, unless there is enough admissible evidence to support the verdict. The right of self-incrimination may only be asserted by persons and does not protect artificial entities such as corporations (*Doe v. United States,* 487 U.S. 201, 108 S. Ct. 2341, 101 L. Ed. 2d 184 [1988]).

This testimonial privilege derives from the FIFTH AMENDMENT to the U.S. Constitution. Most state constitutions recognize a similar testimonial privilege. However, the term *self-incrimination* is not actually used in the Fifth Amendment. It provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."

Although the language of the Fifth Amendment suggests that the right against self-incrimination applies only during criminal cases, the Supreme Court has ruled that it may be asserted during civil, administrative, and legislative proceedings as well. The right applies during nearly every phase of legal proceedings, including GRAND JURY hearings, preliminary investigations, pretrial motions, discovery, and the trials themselves. However, the right may not be asserted after conviction when the verdict is final because the constitutional protection against DOUBLE JEOPARDY protects defendants from a second prosecution for the same offense. Nor may the privilege be asserted when an individual has been granted IMMUNITY from prosecution to testify about certain conduct that would otherwise be subject to criminal punishment.

At the same time, the right against self-incrimination is also narrower than the Fifth Amendment suggests. The Fifth Amendment allows the government to force a person to be a witness against herself or himself when the subject matter of the testimony is not likely to incriminate the person at a future criminal proceeding. Testimony that would be relevant to a civil suit, for example, is not protected by the right against self-incrimination if it does not relate to something that is criminally inculpatory. By the same token, testimony that only subjects a witness to embarrassment, disgrace, or opprobrium is not protected by the Fifth Amendment.

The right against self-incrimination is sometimes referred to as the right to remain silent. The Self-Incrimination Clause affords defendants the right not to answer particular questions during a criminal trial or to refuse to take the witness stand altogether. When the accused declines to testify during a criminal trial, the government may not comment to the jury about his or her silence. However, the prosecution may assert during closing argument that its case is "unrefuted" or "uncontradicted" when the defendant refuses to testify (*Lockett v. Ohio,* 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 [1978]). However, before the jurors retire for deliberations, the court must instruct them that the defendant's silence is not evidence of guilt and that no adverse inferences may be drawn from the failure to testify.

In MIRANDA V. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Supreme Court extended the right to remain silent to pretrial CUSTODIAL INTERROGATIONS. The Court said that before a suspect is questioned, the police must apprise him of his right to remain silent and that if he gives up this right, any statements may be used against him in a subsequent criminal prosecution. Under *Miranda,* suspects also have a Fifth Amendment right to consult with an attorney before they

submit to questioning. *Miranda* applies to any situation in which a person is both held in "custody" by the police, which means that he is not free to leave, and is being "interrogated," which means he is being asked questions that are designed to elicit an incriminating response. A person need not be arrested or formally charged for *Miranda* to apply.

In *Mitchell v. United States,* 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999), the Supreme Court held that a person who pleads guilty to a crime does not waive the self-incrimination privilege at sentencing. The Court acknowledged that it is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the PRIVILEGE AGAINST SELF-INCRIMINATION when questioned about the details. However, the Court found a significant difference between the waiver of the right against self-incrimination in a trial and in a sentencing hearing. The concerns, which justify the cross-examination when the defendant testifies, are absent at a plea hearing. Treating a guilty plea as a waiver of the self-incrimination clause would allow prosecutors to indict a person without specifying the quantity of drugs at issue, obtain a guilty plea, and then put the defendant on the witness stand to tell the court the quantity. Such a scenario would make the defendant "an instrument of his or her own condemnation." This would undermine constitutional CRIMINAL PROCEDURE, turning an adversarial system into an inquisition.

In *Miranda* the Supreme Court examined a number of police manuals outlining a variety of psychological ploys and stratagems that they employed to overcome the resistance of defiant and stubborn defendants. Such interrogation practices, the Court said, harken back to the litany of coercive techniques used by the English government during the seventeenth century.

The Founding Fathers drafted the Fifth Amendment to forestall the use of torture and other means of coercion to secure confessions. The founders believed that coerced confessions not only violate the rights of the individual being interrogated but also render the confession untrustworthy. Once a confession has been coerced, it becomes difficult for a judge or jury to distinguish between those defendants who confess because they are guilty and those who confess because they are too weak to withstand the coercion.

Defendants may waive their Fifth Amendment right to remain silent. However, the government must demonstrate to the satisfaction of the court that any such waiver was freely and intelligently made. The Supreme Court ruled that a confession that was obtained after the suspect had been informed that his wife was about to be brought in for questioning was not the product of a free and rational choice (*Rogers v. Richmond,* 365 U.S. 534, 81 S. Ct. 735, 5 L. Ed. 2d 760 [1961]). It also held that a statement was not freely and intelligently made when a defendant confessed after being given a drug that had the properties of a truth serum (*Townsend v. Sain,* 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 [1963]).

Congressional anger at the *Miranda* decision led to the passage in 1968 of a law, 18 U.S.C.A. § 3501 (1985), that restored voluntariness as the test for admitting confessions in federal court. As long as a court could conclude that the defendant's statements were voluntary, the confession was admissible. The JUSTICE DEPARTMENT refused to employ the law, believing the law was unconstitutional. However, in the late 1990s the law was briefly revived when the Fourth Circuit Court of Appeals ruled that Congress had the authority to invalidate *Miranda.* The Supreme Court, in *Dickerson v. United States,* 30 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000), overturned this ruling. The Court reaffirmed that it had announced a constitutional rule in *Miranda.* Therefore, Congress could not revoke the decision by statute; the only option for Congress was a constitutional amendment.

The right against self-incrimination is not absolute. A person may not refuse to file an income tax return on Fifth Amendment grounds or fail to report a hit-and-run accident. The government may compel defendants to provide fingerprints, voice exemplars, and writing samples without violating the right against self-incrimination because such evidence is used for the purposes of identification and is not testimonial in nature (*United States v. Flanagan,* 34 F.3d 949 [10th Cir. 1994]). Despite the dubious grounds for the distinction between testimonial and non-testimonial evidence, courts have permitted the use of videotaped field sobriety tests over Fifth Amendment objections.

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**CROSS-REFERENCES**

Criminal Law; Criminal Procedure; Exclusionary Rule; Lineup.

## SENATE

*The upper chamber, or smaller branch, of the U.S. Congress. The upper chamber of the legislature of most of the states.*

The U.S. Constitution reserves for the Senate special powers not available to the other branch of Congress, the House of Representatives. These powers include the trial of all impeachments of federal officials; the ratification, by a two-thirds vote, of all treaties obtained by the president of the United States; and approval or rejection of all presidential appointments to the federal judiciary, ambassadorships, cabinet positions, and other significant EXECUTIVE BRANCH posts.

The Senate, with terms of six years for its members—as opposed to two years for members of the House of Representatives—and a tradition of unlimited debate, has long prided itself as the more deliberate of the two branches of Congress. Under its rules a senator may speak on an issue indefinitely, which is known as the filibuster. Sixty senators present and voting may pass a motion of cloture to stop debate.

### Members

Under Article II, Section 3, of the Constitution, the Senate is made up of two members from each state, each of whom has one vote. Unlike the House of Representatives, in which the entire chamber is up for election every two years, only one-third of the senators are up for reelection every two years.

The Constitution requires that a senator be at least thirty years of age and a U.S. citizen for a minimum of nine years. A senator must make her legal residence in the state that she represents.

The Constitution originally provided for the election of senators by state legislatures. However, the SEVENTEENTH AMENDMENT to the Constitution, adopted in 1913, mandated the election of senators by popular vote. The Senate may punish members for disorderly behavior. With the concurrence of two-thirds of the senators, it can expel a member.

When a vacancy occurs in the representation of any state in the Senate, the governor of that state issues a writ of election to fill the vacancy. The state legislature, however, can empower the governor to make a temporary appointment until the people fill the vacancy through an election.

The vice president of the United States is president of the Senate but has no vote unless the senators are equally divided on a question. His vote breaks the tie.

### Committees

The Senate uses a committee system to evaluate, draft, and amend legislation before it is submitted to the full chamber. During the 108th Congress (2003–04), the Senate had sixteen standing, or permanent, committees: Agriculture, Nutrition, and Forestry; Appropriations; Armed Services; Banking, Housing, and Urban Affairs; Budget; Commerce, Science, and Transportation; Energy and Natural Resources; Environment and Public Works; Finance; Foreign Relations; Governmental Affairs; Judiciary; Health, Education, Labor, and Pensions; Rules and Administration; Small Business; and Veterans' Affairs. The committees have an average of six to seven subcommittees. Senators typically belong to three committees and eight subcommittees. The Senate also has joint committees with the House, special committees, and investigative committees.

### Officers

The vice president acts as the president of the Senate. In the vice president's absence, that position is filled by the president pro tempore, who is usually the most senior senator of the majority party. The majority leader has significant powers in the appointment of majority senators to committees. Political parties also elect majority and minority leaders to lead their efforts in the Senate. They are assisted by an assistant floor leader (whip) and a party secretary.

Other Senate officers include the secretary, who oversees Senate finances and official Senate pronouncements related to IMPEACHMENT

# A Day in the Life of the Senate

As the bells ring in the halls of the Capitol and its office buildings, the U.S. Senate starts the day's session. The presiding officer of the Senate, sometimes the vice president but usually the president pro tempore, accompanies the Senate chaplain to the rostrum to lead the chamber in an opening prayer.

After short speeches by the majority and minority leaders, the Senate begins the "morning hour"—a session that generally lasts two hours. During this time senators introduce bills, resolutions, and committee reports and speak briefly on subjects of concern. Bills are referred to approrpiate committees at this time.

Following the morning hour, the Senate may take up executive or legislative business. If in executive session, the Senate considers treaties or nominations that the president has submitted for Senate approval. Before 1929 executive sessions were conducted behind closed doors. Since then, however, the public and the press have been allowed to observe these sessions.

Most of the Senate's time, however, is spent in legislative session. This time is used to debate and vote on bills. Bills with unanimous consent are enacted by a simple voice vote without debate, whereas more controversial bills may be debated at length and may undergo roll call votes. Some bills may not come up for a vote at all.

During debate of a bill, assistant floor leaders, or whips, from each party usually occupy the seats of the majority and minority leaders, located in the front row, center aisle, of the Senate chamber. They enforce established time limits, if any, for debate on specific bills. Frequently, only a few senators are on the Senate floor, while the majority are attending committee meetings or working in their offices. From their offices, senators may apprise themselves of Senate proceedings either through "hot lines" to the Senate floor or live television coverage on the Cable-Satellite Public Affairs Network (**C-SPAN**), which began broadcasting Senate sessions in 1986.

A Senate legislative day may end in either adjournment or recess. If the Senate adjourns, a legislative day is officially over. If it merely recesses, however, the legislative day resumes on the following calendar day. In the case of a recess, the Senate may forego the rituals of the morning hour on the next calendar day. This is frequently done to save time during busy legislative sessions.

Sometimes, when there is a filibuster or heavy legislative load, the Senate does not stop at the end of the day but continues through the night. During these night sessions, a lantern at the top of the Capitol dome remains lit. The public has access to Senate galleries at all times that the Senate is in session, day or night.

proceedings and treaty ratification, and the sergeant at arms, who serves as the law enforcement and protocol officer and organizes ceremonial functions.

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Congress of the United States; Constitution of the United States.

## SENATE JUDICIARY COMMITTEE

The U.S. Senate established the Committee on the Judiciary on December 10, 1816, as one of the original 11 standing committees. It is also one of the most powerful committees in Congress; among its wide range of jurisdictions is investigation of federal judicial nominees and

oversight of criminal justice, antitrust, and INTELLECTUAL PROPERTY legislation. Meeting each year since the Fourteenth Congress, the Judiciary Committee reviews a vast range of legal issues and advises the larger Senate on how to handle them. Just like any other congressional committee, it cannot pass laws or approve presidential nominees on its own, but its recommendations are highly regarded by the larger body.

Historically, initial issues before the Senate Judiciary Committee centered largely on the widespread western expansion and growth of the nation, with corresponding concerns about the role of the federal judiciary and JUDICIAL ADMINISTRATION. Boundary disputes between states were another early concern. The issue of SLAVERY was perhaps the most controversial, however. The committee was partially responsible for the enactment of the COMPROMISE OF 1850, which included the FUGITIVE SLAVE ACT. Also, after the Civil War, beginning in 1868, the committee shared jurisdiction to oversee federal reconstruction.

The authority to investigate nominees to the federal court system is the most powerful and controversial authority delegated to the committee. Although the U.S. Constitution grants authority to the full Senate to approve judges nominated by the president, the Senate has delegated much of this responsibility to the committee since 1868. When the president submits judicial nominations, the Senate immediately submits them to the committee for consideration. The committee votes whether to approve or disapprove a nomination of a judge, and it votes whether to submit the nomination to the full Senate for its consideration. Both votes require a majority of the members of the committee. If the Senate approves a judge, he or she receives lifetime tenure on the federal bench, barring IMPEACHMENT or retirement.

The nomination process of federal judges traditionally has caused a significant amount of controversy regarding the criteria that are used by committee members in determining whether to approve or disapprove a judicial nominee. Some commentators suggest that the nomination process should only involve considerations of ethics and professional competence, while others argue that the real considerations among committee members relate to the ideologies and philosophies of the nominees.

When President RONALD REAGAN nominated ROBERT BORK in 1987 to fill a vacancy on the U.S. Supreme Court, it was evident from the questioning during the nomination hearing that the senators took numerous factors into account. Bork, who had been a judge on the U.S. Court of Appeals for the District of Columbia and known for his conservative views, was selected by the Republican president to replace Justice LEWIS POWELL, whose views were more moderate. Both the committee and the full Senate eventually turned down Bork's nomination, based largely on ideology. Public-interest groups supporting or opposing Bork spent a reported $20 million in their attempts to influence the nomination. Similar questions of ideology and philosophy have been raised about the 1991 confirmation hearings for Justice CLARENCE THOMAS.

The publicity surrounding the nomination process in the federal judiciary did not begin until the twentieth century. Historically, few nominees appeared before the committee. Several high-profile nominees, including LOUIS BRANDEIS, HUGO BLACK, and FELIX FRANKFURTER, offered statements for the committee to consider. It is now common for all nominees to make statements before the committee.

With a high number of nominations to the federal judiciary, it is not uncommon for the committee to send nominations of judges in lower courts to subcommittees. This process continues to be lengthy.

Other areas of jurisdiction of the committee include legislative oversight of APPORTIONMENT of representatives; BANKRUPTCY; mutiny, ESPIONAGE, and counterfeiting; civil liberties; constitutional amendments; government information; holidays and celebrations; immigration and naturalization; interstate compacts; local courts in territories and possessions of the United States; national penitentiaries; PATENTS, copyrights, and TRADEMARKS; protection of trade and commerce against unlawful restraints and monopolies; and state and territory boundary lines.

After the terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001 (*See* SEPTEMBER 11TH ATTACKS), the Judiciary Committee held a number of hearings on the issues of TERRORISM and homeland defense. The committee also has taken an active role in such social issues as CIVIL RIGHTS protection, law enforcement, and reform of the criminal justice system. Controversies in 2001 extended to the cabinet nominees, including the position of attorney general. When President

GEORGE W. BUSH nominated then-Senator JOHN ASHCROFT (R-Mo.) for the position in 2001, Senator Patrick Leahy (D-Vt.) immediately indicated that he would oppose the confirmation. While Ashcroft was eventually confirmed, he also was required to appear before the committee numerous times throughout 2001 to report on issues involving the Attorney General's Office and the JUSTICE DEPARTMENT.

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## SENECA FALLS CONVENTION

The Seneca Falls Convention, which took place in Seneca Falls, New York, in July 1848, was the first national women's rights convention and a pivotal event in the continuing story of U.S. and women's rights.

The idea for the convention occurred in London in 1840 when ELIZABETH CADY STANTON and Lucretia Mott, who were attending a meeting of the World Anti-Slavery Society, were denied the opportunity to speak from the floor or to be seated as delegates. Mott and Stanton left the hall where the meeting was taking place and began to discuss the fact that while they were trying to secure rights for enslaved African Americans, American women found themselves treated unequally in numerous ways. They concluded that what was needed was a national convention in which women could take steps to secure equal rights with men. Although they agreed that the need for such a convention was a pressing one, they were not to take action on their plan for several years.

Both Stanton and Mott were progressive leaders who had been active in reform movements. Mott, a former teacher who had grown up in Boston, had become interested in women's rights when she discovered that because she was female, she was earning a salary that was exactly half that of male teachers. In 1811 she married fellow teacher James Mott and moved to Philadelphia. She became a member of the Society of Friends (also known as the Quakers) and began to travel the country speaking on the topic of religion and issues including temperance, peace, and the ABOLITION of SLAVERY. In 1833 Mott attended the founding meeting of the American Anti-Slavery Society. Shortly afterwards she founded a women's auxiliary, the Philadelphia Female Anti-slavery Society, and was elected president of the group. Her new position caused a rift within the Society of Friends, and some sought to revoke her membership. Undeterred by the conflict, Mott was an organizer of the Anti-Slavery Convention of American Women in 1837.

Stanton, the daughter of a lawyer and U.S. congressman, had studied her father's law books. In 1840 she married Henry Brewster Stanton, a lawyer and abolitionist. The command for the wife to "obey" her husband was left out of their wedding vows. Like Mott, Stanton and her husband were active members of the American Anti-Slavery Society. Following her meeting with Mott in London, Stanton returned to the United States where she began to travel and speak on the subject of women's rights. In 1848 Stanton helped circulate petitions that led to the enactment of a New York State married women's property bill. This law allowed married women to keep in their own name property they brought into the marriage. The law also gave them the right to keep the wages they had earned and to retain guardianship of their children in cases of separation or DIVORCE.

In 1848, Stanton and Mott met with Mott's sister, Martha Coffin Wright, along with Jane Hunt and Mary Ann McClintock to organize the long-awaited women's rights convention. The plan was to hold a meeting in Seneca Falls, New York (where Stanton lived), on July 19 and 20, with follow-up meetings to take place in Rochester, New York. An announcement in the *Seneca County Courier*, a local periodical, stated that there would be "A Convention to discuss the social, civil and religious condition and rights of woman" and gave the particulars. The first day of the meeting was to be exclusively for women who were "earnestly invited to attend," with the second day open to the general public to hear a speech by Lucretia Mott.

The historic meeting took place at the Wesleyan Church chapel in Seneca Falls. Despite the plan to have the first day for women only, a large crowd of both men and women sought entry to the locked chapel. A male professor from Yale volunteered to enter through an open window and once the doors were opened, the crowd streamed in. Approximately 100 to 300 people were in attendance, including many men who supported the idea of women's rights. Although the majority was Caucasian, there were also some African Americans in attendance. Because none of the women felt capable of overseeing the proceedings, James Mott presided.

On the first day, Elizabeth Cady Stanton presented the organizers' *Declaration of Sentiments and Resolutions*. The Seneca Falls declaration was carefully patterned on the Declaration of Independence that had been crafted by the colonial revolutionaries. The declaration written primarily by THOMAS JEFFERSON stated that all men are created equal. The Seneca Falls declaration held that "all men and women" are created equal and are endowed with inalienable rights including life, liberty, and the pursuit of happiness. The Declaration of Independence listed 18 charges against George III, the king of England. The *Declaration of Sentiments* described 18 charges of "repeated injuries and usurpations on the part of man toward woman" including the denial of the right to vote, unfair laws regarding separation and divorce, and inequality in regard to religion, education, and employment. It stated the hope that the convention in Seneca Falls would be followed by a series of conventions throughout the country. The 12 resolutions enunciated in the *Declaration of Sentiments* called for the repeal of laws that enforced unequal treatment of women, the recognition of women as the equals of men, the granting of the right to vote, the right for women to speak in churches, and the equal participation of women with men in "the various trades, professions, and commerce."

After much discussion and debate, the *Declaration of Sentiments and Resolutions* was passed largely as written. The biggest obstacle was the resolution that called for women's right to vote, known as woman suffrage. Numerous attendees, men and women alike, felt that the right to vote was too radical an idea to gain public acceptance. Lucretia Mott was open to discarding the resolution, but Stanton held firm with strong support from the prominent African–American abolitionist FREDERICK DOUGLASS. After Douglass stated that "Suffrage is the power to choose rulers and make laws, and the right by which all others are secured," the woman suffrage resolution passed by a very narrow margin.

*A depiction of Elizabeth Cady Stanton speaking to attendees of the Seneca Falls Convention on July 19, 1848. Stanton presented the "Declaration of Sentiments and Resolutions."*
CORBIS

After two days of vigorous discussion and debate, 100 women and men signed the Seneca Falls Declaration, although some later removed their names after being subjected to intense criticism. A storm of sarcasm and protest broke out after the convention prompting Frederick Douglass to write that a discussion of ANIMAL RIGHTS would have brought forth less opposition than a call for women's rights. James Gordon Bennett, publisher of the widely read *New York Herald*, published the entire declaration as a gesture of ridicule. Welcoming the publicity, Stanton and many of the Seneca Falls attendees hailed Bennett's move as a way to disseminate their message on a broader scale.

For the next several decades, Stanton, Mott and temperance supporter SUSAN B. ANTHONY led the struggle for women's rights including the vote. Stanton helped co-found the National Woman Suffrage Association (NWSA) in 1869. The following year the FIFTEENTH AMENDMENT that secured the right to vote for African–American males was ratified by Congress. In 1876

Mott and the NWSA issued a *Declaration and Protest of the Women of the United States* that renewed the fight for women's rights and sought the IMPEACHMENT of political leaders who permitted women to be taxed while denying them representation and who also did not allow women on juries thus denying them the right to a trial by a jury of their peers. Mott, who continued to actively support the abolition of slavery as well as temperance, peace, and women's rights, died in 1880. In 1890 the NWSA merged with a rival organization, the American Woman Suffrage Association, to form the National American Woman Suffrage Association. Stanton was elected president. She was succeeded in 1892 by Anthony. In 1878 Stanton had drafted a federal woman suffrage amendment that continued to be introduced in each new term of Congress. Stanton died in 1902 and her amendment continued to be brought up until it was passed in the form of the NINETEENTH AMENDMENT to the U.S. Constitution in 1920. At the time that woman suffrage passed, only one signer from the 1848 Seneca Falls Convention, Charlotte Woodward, lived long enough to cast her ballot.

Despite the long delay before women were politically enfranchised, the movement that emanated from the Seneca Falls convention made slow but inexorable progress. Some colleges began to admit women as students and more states enacted married women's property acts.

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CROSS-REFERENCES

"Seneca Falls Declaration of Sentiments" (Appendix, Primary Document); Women's Rights.

## SENIOR CITIZENS

*Elderly persons, usually more than sixty or sixty-five years of age.*

People in the United States who are more than sixty years of age are commonly referred to as *senior citizens* or *seniors.* These terms refer to people whose stage in life is generally called old age, though there is no precise way to identify the final stage of a normal life span. People are said to be senior citizens when they reach the age of sixty or sixty-five because those are the ages at which most people retire from the workforce.

U.S. law and society recognize the special needs of senior citizens. The most important aid to senior citizens is the SOCIAL SECURITY program. More than twenty-five million Americans receive old-age benefits each month under federal OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE, and those payments amount to almost $20 billion a year. Senior citizens who are age sixty-five or older qualify for a full benefit payment by having been employed for the mandatory minimum amount of time and by having made contributions to Social Security. A person may retire at age sixty-two and receive less than full benefits. There is no financial need requirement to be satisfied.

Because of enormous financial pressures on the Social Security program, changes have been made that will push the retirement age higher in the coming decades. Persons born before 1950 can retire at age sixty-five with full benefits based on the average income during working years. Those born between 1950 and 1960 can retire at age sixty-six with full benefits. For those born in 1960 or later, full benefits will be awarded for retirement at age sixty-seven.

Senior citizens are also protected by the MEDICARE program. This program provides basic HEALTH CARE benefits to recipients of Social Security and is funded through the Social Security Trust Fund. Medicare is divided into a hospital insurance program and a supplementary medical insurance program. The hospital insurance plan covers reasonable and medically necessary treatment in a hospital or skilled nursing home, meals, regular nursing care services, and the cost of necessary special care. Medicare also pays for home health services and hospice care for terminally ill patients.

Medicare's supplementary medical insurance program is financed by monthly insurance premiums paid by people who sign up for coverage, combined with money contributed by the federal government. The government contributes the major portion of the cost of the program, which is funded out of general tax revenues. Persons who enroll pay a regular monthly premium and also a small annual deductible fee for any medical costs incurred during the year above the amount funded by the

## How to Avoid Being Defrauded

Local law enforcement agencies, state attorneys general, the federal Consumer Protection Agency, and groups such as the **AMERICAN ASSOCIATION OF RETIRED PERSONS** provide information to senior citizens on how to avoid being defrauded. These organizations advise the following:

- Watch out if a caller promises prizes for buying products such as vitamins, beauty and health aids, or office supplies. These products are sold at outrageously inflated prices, costing a buyer $500 to $2,000 for items with a value of less than $100.
- Never give a caller your credit card number or checking account number.
- Be especially cautious if a caller reaches you when you are feeling lonely. The person may call day after day until you feel that the caller is a friend, not a stranger trying to sell you something.
- If you think a caller is dishonest, hang up the phone. If a caller is trying to cheat you, it is not rude to end the conversation.
- Never act in haste. If a caller is pressuring you to make a quick decision, consult with friends and family or your state or local consumer protection office before taking a financial risk.
- Always remember that if you really win a prize, you will get it absolutely free, with no fee required.
- Beware if you have been cheated by con artists. They sell information to other con artists, who are likely to call.
- Remember, con artists are liars. They will say anything to get your money.
- If it sounds too good to be true, it usually is not true. Be skeptical of offers that promise rewards greatly out of proportion to your investment.

government. Once the deductible has been paid, Medicare pays 80 percent of any medical bills.

Some warm-weather states such as Arizona and Florida have senior citizen retirement communities. These planned communities allow only senior citizens to buy or rent housing. Many seniors feel more independent and secure in a retirement community than in an ordinary neighborhood. Legal provisions in a retirement community's development plan are incorporated into the deeds of all property owners, prohibiting, for example, children from residing in the community. In this way, the special nature of the neighborhood is preserved.

However, not all senior citizens wish to retire from the workforce. Amendments to the federal Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C.A. § 621 et seq.) have eliminated the age of mandatory retirement for most employees and have made the act applicable to more workers. The ADEA itself prohibits employers from discriminating on the basis of age.

Senior citizens also are concerned about crime. Because of their physical vulnerability and personal isolation, they are robbed more often than are the members of other age groups. Seniors are also the most likely group in society to be swindled. The **AMERICAN ASSOCIATION OF RETIRED PERSONS** and state and local governments seek to educate senior citizens about mail and telemarketing schemes that defraud thousands of seniors each year.

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# Scamming the Elderly

Senior citizens are often the victims of street crimes, such as **ROBBERY** and assault. But they are more often the target of trained con artists who use a variety of techniques to trick senior citizens into giving them money for their fraudulent schemes. Whether it is a promise of a lucrative investment, a free vacation, or a great deal on home repair, senior citizens too often succumb to a variety of scams.

It is estimated that U.S. consumers lose up to $60 billion annually to **CONSUMER FRAUD**. An estimated 50 percent of phone scam victims are over the age of sixty-five. Convicted con artists report that senior citizens are more trusting than younger persons. Some commentators attribute this to the fact that today's senior citizens grew up and matured in a society that was less threatening. Nevertheless, a study by the **AMERICAN ASSOCIATION OF RETIRED PERSONS** indicates that the stereotypical victim—a lonely, forgetful, gullible senior—bears little resemblance to the persons who are scammed. Victims are relatively affluent, educated, well-informed, and connected with their communities. Most, however, are not aware that con artists use the telephone to accomplish their fraudulent schemes. They believe that the person on the other end of the phone line is honest and hardworking.

Legitimate telemarketing is big business, generating nearly $460 billion a year in sales. It is estimated that about $40 billion a year is lost to fraudulent telemarketers. The dishonest telemarketers are fly-by-night operators working out of leased space with banks of telephones staffed by trained con artists. Once they steal enough money in a location, they quickly pack up and move to another city, leaving their victims with little chance to reclaim their money.

A common scam involves bogus prize announcements. A senior will receive a phone call and be told that he has won the grand prize in a contest. The senior is told to either buy a product or pay shipping and taxes ranging from $200 to $24,000. When the prize arrives, it turns out to be cheap junk, worth a small fraction of the amount the senior has paid.

Con artists also use junk mail for their fraudulent contest solicitations. One of the scams that is most financially ruinous to a senior, whether it is done by phone or mail, is a "contest" set up in stages. The solicitations announce that the senior is in a select group eligible for a grand prize but that she must send in an entry fee to participate. Once the fee, ranging from $5 to $20, is paid, the process is repeated over and over, as the

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CROSS-REFERENCES

Age Discrimination; Consumer Protection; Death and Dying; Elder Law; Health Care Law; Health Insurance; Pension.

## SENIOR INTEREST

*A right that takes effect prior to others or has preference over others.*

For example, a first mortgage is an interest that is senior to a second mortgage and all subsequent mortgages.

## SENIORITY

*Precedence or preference in position over others similarly situated. As used, for example, with reference to job seniority, the worker with the most years of service is first promoted within a range of jobs subject to seniority, and is the last laid off, proceeding so on down the line to the youngest in point of service. The term may also refer to the priority of a lien or encumbrance.*

A person who holds a lien or has an encumbrance against the property of another, so that her claim must be satisfied before any others, has seniority or priority.

An employee has seniority if he is among those with the most years of service at the place of employment. Such seniority entitles the employee to compete for promotion to jobs for which junior (less senior) employees would be ineligible or would receive less consideration. Traditionally, it also gives him the status of being among the last to lose his job in case of lay-offs.

In the 1984 case of *Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561, 104 S. Ct. 2576, 81 L. Ed. 2d 483, the Supreme Court upheld the validity of a seniority system that protected the jobs of white firefighters with seniority at the expense of recently hired black firefighters. The fire department in Memphis, Tennessee, implemented the traditional seniority principle of "last hired, first fired." In 1981 three white firefighters who otherwise would have kept their

contest promoters make more solicitations to the senior. Each time the senior "advances" from one stage to another, she must pay a new entry fee. Some seniors have lost tens of thousands of dollars by spending $5 to $20 at a time.

Another phone scam is based on convincing the victim that an extremely profitable business opportunity is available, but only for a limited time. With the promise of becoming millionaires, some seniors have sent thousands of dollars to con artists who give little, if anything, in return.

Fewer than 10 percent of people cheated out of their money report the **FRAUD** to authorities. Some seniors are embarrassed or ashamed to report the crime, fearing that they will look foolish for their gullible behavior. Some con artists even keep con games going by threatening to expose seniors to their family and friends.

Another scam plays on the anger and shame of seniors who have been duped by fraudulent telemarketers. A caller offers to help the senior recover the money the senior had paid to other dishonest companies in hopes of receiving a prize. The caller asks the senior to pay a fee ranging from $200 to $800 for this service. The services typically turn out to be worthless.

The "bank examiner" scam has been perpetrated on senior citizens for generations. An elderly person, usually living alone, gets a call from a con artist posing as a bank examiner. The senior is told that the examiner is investigating a bank teller suspected of embezzling money by falsifying withdrawal receipts. The teller gives each customer the amount asked for and steals a small amount with each transaction. The con artist asks the senior to withdraw $5,000 from his savings account and give it to a detective waiting outside the bank. The money, the senior is told, will be used as evidence and returned with a reward. Once the senior hands over the money, he usually never hears from the con artist. Some scams, however, involve a second call and a plea for another $5,000 withdrawal.

Fraudulent home repair services are a bane to all consumers, but seniors are often the victims. A large **ORGANIZED CRIME** group, known by law enforcement agencies as the Travelers, move from town to town. They go into a neighborhood and tell homeowners that they have finished a home repair job nearby and are willing to fix their houses with leftover materials at an extremely low price. These scam artists demand their money up front. Whether it is painting the exterior of a house, fixing a leaky roof, or sealing a drive-way, these con artists do little or no work and are quickly out of town before the homeowners realize they have been tricked.

Because of the growing population of senior citizens, law enforcement agencies have sought to educate seniors about telephone fraud and other common scams. Pamphlets distributed to senior citizens and community programs tell seniors to hang up the phone if they are pressured to part with their money and to toss the "you've won a prize" mailing in the wastebasket.

jobs under the system were laid off for a month while minority firefighters with less seniority continued working. This change in the seniority system resulted from an **INJUNCTION** to enforce consent decrees that resolved equal employment opportunity cases in Memphis. The lower court fashioned the decrees to remedy the past discriminatory practices of the fire department in its hiring and promotion of minorities. The district court concluded that the seniority system was not a bona fide one under section 706(g) of Title VII of the **CIVIL RIGHTS ACT OF 1964** since lay-offs made pursuant to it would have a racially discriminatory effect. The court, therefore, directed the modification of the system to increase and maintain the percentage of black firefighters. The court of appeals affirmed the revision of the seniority system but disagreed with the holding that the system was not bona fide.

On certiorari, the Supreme Court decided that the district court exceeded its authority in issuing the injunction that ultimately led to the lay-off of the senior white firefighters. The injunction was not a proper remedy. There was no finding that any of the black employees protected by the revised system had been a direct victim of discrimination, a requirement imposed by the Court in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977). The Court, however, did not decide whether the **CONSENT DECREE** was valid or whether the Memphis Fire Department could, on its own, protect the jobs of black firefighters at the expense of their white colleagues who had more seniority.

CROSS-REFERENCES

Affirmative Action; Civil Rights; Employment Law; Equal Protection; Labor Law.

## SENTENCING

*The post-conviction stage of the criminal justice process, in which the defendant is brought before the court for the imposition of a penalty.*

If a defendant is convicted in a criminal prosecution, the event that follows the verdict is called sentencing. A sentence is the penalty ordered by the court. Generally, the primary goals of sentencing are punishment, deterrence, incapacitation, and rehabilitation. In some states, juries may be entitled to pronounce sentence, but in most states, and in federal court, sentencing is performed by a judge.

For serious crimes, sentencing is usually pronounced at a sentencing hearing, where the prosecutor and the defendant present their arguments regarding the penalty. For violations and other minor charges, sentencing is either predetermined or pronounced immediately after conviction.

Sentencing in the United States has undergone several dramatic transformations. In the eighteenth century, the sentencing of criminal defendants was left to juries. If a defendant was convicted, the jury decided the facts that would affect sentencing, and a predetermined sentence was imposed based on those findings. In the late eighteenth century, legislatures began to prescribe imprisonment as punishment, replacing such punishments as public whipping and confinement in stocks.

Beginning in the late nineteenth century, legislatures began to pass statutes that left sentencing to the discretion of judges. This movement toward indeterminate sentencing allowed judges to order a sentence tailored to the needs of both the defendant and society. Under sentencing statutes, a sentence could be any combination of PROBATION, fines, restitution (repayment to victims), imprisonment, and community service. Judges were allowed to consider a wide range of evidence in fashioning a sentence, including MITIGATING CIRCUMSTANCES.

In the 1950s, Congress passed a spate of federal legislation requiring that judges impose mandatory minimum sentences for drug offenses. These laws directed that defendants must serve a minimum number of years in prison upon conviction for certain offenses, and prevented judges from reducing sentences in consideration of mitigating factors. In the 1960s, these laws came under attack for failing to deter drug crimes. Moreover, prosecutors were reluctant to prosecute mandatory minimum cases because they were considered unjustly severe.

By the late 1970s, indeterminate sentencing had fallen into disfavor. Many perceived that crime rates were soaring, and a powerful lobby emerged demanding sentencing reform. These critics argued for longer prison sentences, and they also pushed for uniformity in sentencing, noting that discretionary sentencing produced widely various sentences for the same crime.

Several states' legislatures enacted sentencing guidelines in the 1970s and early 1980s. These guidelines increased punishment for criminal offenses and limited judicial discretion in sentencing by identifying the punishment required upon conviction for a particular offense. Under many of the new sentencing statutes, PAROLE for prison inmates was either abolished or restricted to certain offenses. Conservatives hailed this "truth-in-sentencing" framework as a victory over liberal judges. Liberals endorsed sentencing reform because it purported to eliminate the possibility of racial disparity in sentencing.

Following the lead of these state legislatures, Congress passed the Sentencing Reform Act of 1984 (SRA) (Pub. L. No. 98-473, 98 Stat. 1987 [1984] [codified in 18 U.S.C.A. §§ 3551–3556 (1988 & Supp. V 1993)]). The SRA abolished parole for federal prisoners and reduced the amount of time off granted for good behavior.

The SRA also established the U.S. SENTENCING COMMISSION (USSC) and directed it to create a new sentencing system (28 U.S.C.A. §§ 991(b), 994(a)(1)-(2) [1988]). Between 1984 and 1987, the USSC crafted the Federal Sentencing Guidelines. Since Congress did not object to the guidelines, they became effective on November 1, 1987 (28 U.S.C.A. § 994 [1988 & Supp. V 1993]).

The Federal Sentencing Guidelines shift the focus in sentencing from the offender to the offense. The guidelines categorize offenses and identify the sentence required upon conviction. Judges are allowed to increase or decrease sentences or depart from the guidelines, but only if they have a very good explanation and clearly state the reasons on the record.

Upward departures, or increases in sentences, are easy to achieve under section 1B1.2 of the sentencing guidelines. This section allows the sentencing judge to consider all "relevant conduct," including the circumstances surrounding the conviction, offenses that were committed at the same time as the charged offense but were not charged, prior convictions, and acts for which the defendant was previously tried but acquitted.

In limited circumstances, judges may decrease a sentence. For example, a judge may downwardly depart if the defendant accepts responsibility for the crime or committed the crime to avoid a more serious offense. Prosecutors often challenge decreased sentences on appeal, and they usually win because the guidelines call for adherence in all but exceptional cases.

Prosecutors receive tremendous discretion in the sentencing process, and they have virtually taken over the sentencing process in federal court. Under the guidelines, prosecutors can easily increase or decrease a sentence by tinkering with the number of counts either in the initial charge or pursuant to a plea agreement. For example, a prosecutor may not use evidence of certain conduct in pursuing a criminal charge. However, upon conviction or a guilty plea, the prosecutor can, in the sentencing hearing, introduce that evidence to increase the defendant's sentence. At this point, if the prosecutor is able to prove by a PREPONDERANCE OF THE EVIDENCE that the defendant committed the acts, the court is obliged to increase the defendant's sentence.

Furthermore, state police officers and prosecutors can make secret decisions about what cases to refer to federal prosecutors. State prosecutors can thus pressure defendants to enter a guilty plea in state court to avoid federal sentencing. The decision on whether to move the court for a downward departure in exchange for substantial assistance to law enforcement is also left to the prosecutor.

At first, many federal judges refused to recognize the Federal Sentencing Guidelines. In *Mistretta v. United States,* 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989), the U.S. Supreme Court held that the guidelines did not violate the SEPARATION-OF-POWERS doctrine and were not an excessive delegation of legislative power. Since the *Mistretta* decision, federal courts have

**Felons Sentenced to Prison by State and Federal Courts in 1996**

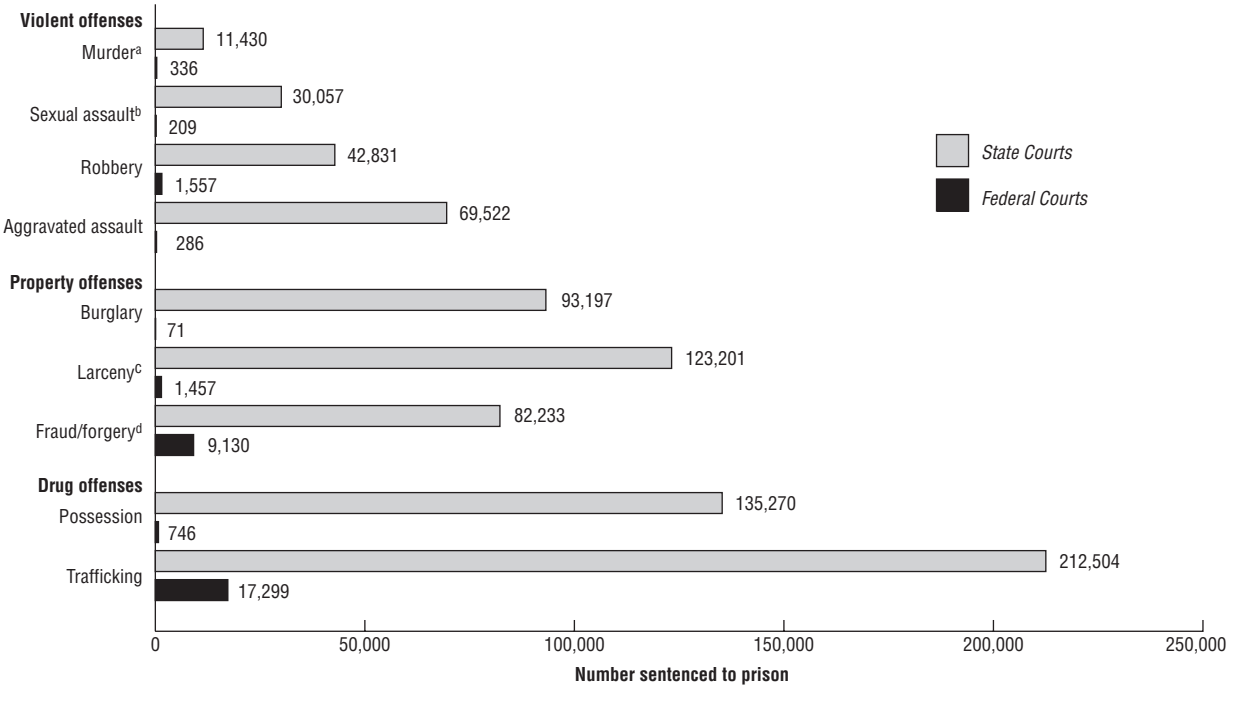


[a]Does not include negligent manslaughter.
[b]Includes rape.
[c]Includes motor vehicle theft.
[d]Includes embezzlement.

SOURCE: U.S. Department of Justice, Office of Justice Programs, *Felony Sentences in the United States, 1996.*

# Sentencing Guidelines: Fair or Unfair?

Sentencing guideline systems for determining criminal sentences have dramatically changed the way punishment is meted out in U.S. courtrooms. Twenty-two states and the federal government use sentencing guidelines, which require a judge to calculate a criminal sentence using a mathematical formula. Points are assigned based on the defendant's offenses, prior criminal record, and other factors. A total is calculated, and the sentence is computed. A judge has very little room to depart from the sentence mandated by the guidelines.

There has been controversy over the fairness and the legitimacy of using sentencing guidelines, with the most criticism directed at the U.S. Sentencing Guidelines. The criticism comes mostly from defense attorneys and judges, who argue that the guidelines give prosecutors too much power in the criminal justice system and give too little discretion to judges to shape a sentence to fit the individual defendant. Defenders of sentencing guidelines contend that they are a vast improvement over the way sentencing has traditionally been done, eliminating "judge shopping" and the **ARBITRARY** and disparate sentencing practices that come with unbridled judicial discretion.

Congress authorized the U.S. Sentencing Guidelines in 1984. The U.S. Sentencing Guidelines Commission, a seven-member panel appointed by the president and confirmed by the Senate, issued the first set of guidelines in 1987. The guidelines have been constantly changed, mostly by the commission, but also by congressional legislation. In addition, Congress has exercised its **VETO** power over amendments proposed by the commission. By 1996 the federal guidelines had grown to an 850-page manual, containing complex formulas for computing different types of sentences.

Proponents of federal sentencing guidelines believe that they reduce sentencing disparity and guarantee harsher punishment for federal felons, many of whom are convicted for selling illegal narcotics. Before the guidelines were created, the proponents argue, defendants tried to avoid judges who handed out tough sentences and to find one who would be lenient. Thus, in one court a bank robber would get an eighteen-year sentence, while in another a robber convicted of the same crime would receive only five years in prison. In addition, there was evidence to suggest that minorities received the harshest treatment. Sentencing guidelines have, therefore, reduced the arbitrary dispensation of punishment.

Proponents also contend that because the guidelines provide predictable sentences, they serve as a deterrent to crime.

abandoned the indeterminate approach to sentencing and have used the sentencing guidelines to determine criminal sentences.

As part of the Comprehensive **CRIME CONTROL ACT** of 1984 (Pub. L. No. 98-473, Title II, October 12, 1984, 98 Stat. 1976 to 2193), Congress passed legislation requiring mandatory minimum sentences for drug and firearm offenses (Pub. L. No. 98-473, §§ 503(a), 1005(a), 98 Stat. 2069, 2138 [1984] [amending 21 U.S.C.A. § 860 (formerly § 845a), 18 U.S.C.A. § 924(c)]). In 1986, as public fears of drug abuse increased, Congress enacted the Anti-Drug Abuse Act of 1986 (Pub. L. No. 99-570, 100 Stat. 3207 [1986]). This act created mandatory minimum sentences for drug trafficking and distribution, using the quantity of the drug involved to determine the minimum terms of imprisonment. In 1988, Congress broadened the mandatory minimums to cover conspiracy in certain drug offenses (Anti-Drug Abuse Act of 1988 [Pub. L. No. 100-690, § 6470(a), 102 Stat. 4377 (21 U.S.C.A. §§ 846, 963 [1988])]).

The 1988 act also established a minimum sentence for simple possession of crack cocaine. Under 21 U.S.C.A. § 844(a) (1988 & Supp. II 1990 & Supp. III 1991), a first-time offender caught with five grams of a mixture or substance containing a "cocaine base" must be sentenced to no less than five years in prison. In contrast, a person must possess at least five hundred grams of powder cocaine to receive a five-year sentence (21 U.S.C.A. §§ 841(b)(1)(B) (ii)-(iii) [1982 & Supp. V 1987]).

In 1994, Congress moved to limit the applicability of mandatory minimums to low-level, nonviolent drug offenders. Under 18 U.S.C.A. § 3553(f), a judge may use the guidelines instead of the statutory minimum sentence if (1) the defendant does not have a criminal history of more than one point (one minor conviction, such as a petit misdemeanor); (2) the defendant did not use violence or credible threats or a firearm in the offense and did not coerce another to do so; (3) the offense did not result in death or serious bodily injury; (4) the defendant

Criminals know the formula of past conviction plus new conviction equals a certain criminal sentence. Criminals no longer can play the angles in the criminal justice system to their advantage but must face a definite punishment.

Defenders of the guidelines also believe that the reduction of judicial discretion reduces the stress suffered by federal trial judges. No longer do judges have to wrestle with their emotions in devising an appropriate sentence. The guidelines provide an efficient means of delivering a criminal sentence that conforms to public policy goals set out by Congress and the guidelines commission.

Critics of the federal guidelines contend that while the idea of uniform criminal sentences may seem attractive, in practice the guidelines have created another arbitrary system of sentencing. A major criticism is the shift in power from the judge to the federal prosecutor. Because the criminal charge will trigger, upon conviction, a particular sentence in the guidelines, a prosecutor's charging decision is the most important one in the case. A prosecutor can determine whether a defendant's time in prison is short or long by manipulating the charges and a case's extenuating circumstances.

Critics argue that prosecutorial discretion has replaced judicial discretion, allowing defendants who hire defense counsel knowledgeable in the workings of the guidelines to negotiate plea agreements that reduce the charges and accompanying jail time. Defendants with less **EFFECTIVE COUNSEL** receive longer sentences. Critics point to the disparate sentences received by defendants involved in the same crime. Therefore, it is clear that prosecutors can manipulate the charges, with judges powerless to change the sentencing outcome.

Critics, especially federal judges, decry the loss of discretion to shape a criminal sentence that is appropriate to the individual. The federal guidelines impose mathematical formulas, reducing a human being to the number of points on a sentencing grid worksheet. Judges are forced to ignore the particular circumstances of the case and the individual and hand out the sentence dictated by the guidelines. Those judges who depart from the guidelines and give more lenient or more severe sentences invariably invite appellate review of their decisions.

Another criticism is that the guidelines reflect political concerns more than penological ones. Critics charge that Congress, in its zeal to be regarded as tough on crime, has imposed severe penalties that are out of proportion to the nature of some of the offenses. In addition, Congress has vetoed some sentencing commission revisions to the guidelines that it has regarded as politically unacceptable.

Critics also object to the growing complexity of the guidelines, analogizing the various provisions to the **INTERNAL REVENUE CODE**. The sentencing commission's continuous revisions, contend critics, have undermined the stability of the guidelines and lessened the goals of predictability and uniformity.

**CROSS-REFERENCES**

Determinate Sentence; Three Strikes Laws.

was not an organizer of others in the offense and was not engaged in a continuing criminal enterprise (such as a **RACKETEERING** scheme or the functioning of a street gang); and (5) by the time of the sentencing hearing, the defendant has informed the prosecutor of all the facts surrounding the case, including facts regarding offenses related to the case.

Also in 1994, Congress exercised its power over sentencing by passing the **VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994** (Pub. L. No. 103-322, September 13, 1994, 108 Stat. 1796). Under provisions of this act, violent offenders convicted of their third felony must be sentenced to life imprisonment (Pub. L. No. 103-322, §§ 70001–70002, 108 Stat. 1796, 1982–1985 [1984] [codified as amended at 18 U.S.C.A. §§ 3559, 3582(c)(1)(A) (1988)]).

Mandatory minimums are not the same as the Federal Sentencing Guidelines. Mandatory minimum sentences remove all discretion from the sentencing judge, whereas the guidelines allow for some leeway. In *United States v. Madkour,* 930 F.2d 234 (2d Cir. 1991), Michael P. Madkour, a recent graduate of the University of Vermont with no criminal record, received a mandatory minimum sentence of five years in federal prison for possessing more than one hundred marijuana plants with an intent to manufacture marijuana. Under the guidelines, the prison sentence would have been 15 to 21 months.

The most common punishments identified in state statutes are community service, probation, fines, restitution, and imprisonment. In the 1990s, some southeastern states authorized sentences of hard labor on chain **GANGS**. Many states have also reinstated the death penalty. Death penalty sentences are usually delivered by a jury, not a judge, and only after a hearing.

Criminal defendants are sentenced at a sentencing hearing. In the hearing, the judge may consider all relevant evidence, testimony, and a presentence report from a probation or court services officer. The **RULES OF EVIDENCE** do not apply in presentencing hearings, so **HEARSAY** and other fallible evidence may be introduced.

*In 1995 a South Carolina juvenile court judge sentenced 15-year-old Tonya Kline to be shackled to her mother, Deborah Harter, for six weeks.* AP/WIDE WORLD PHOTOS

In both federal and state courts, the sentencing hearing is preceded by a presentence investigation and report. These are conducted by a court services or probation officer, who then submits the report to all parties to the prosecution. At the hearing, the prosecutor and defendant are entitled to argue against the recommendations for sentencing made in the presentence report.

In many states, courts still possess the authority to craft sentences within the bounds of sentencing statutes. In these states, criminal statutes contain a sentencing provision that identifies minimum and maximum punishments for specific crimes. For example, in Georgia, a person convicted of hunting alligators without a license "shall be punished by a fine of not less than $500.00 and, in the discretion of the sentencing court, imprisonment for not more than 12 months" (Ga. Code Ann. § 27-3-19). This means that the judge *must* order a fine of at least $500 and *may* also order imprisonment of up to 12 months.

Many states have also passed so-called three-strikes-and-you're-out laws. Under these laws, when a person receives a third criminal conviction, the person's sentence is enhanced considerably. California's version of the three-strikes law has been at the center of attention in the legal community due to two high-profile cases that eventually reached the U.S. Supreme Court. Under California's law, if a person with two prior felony convictions is convicted for a third time, he or she will receive a greatly enhanced sentence. Cal. Pen. Code Ann. § 667 (West 1999). Some defendants have received convictions of 25 to 50 years for petty thefts.

In one California case, Leandro Andrade was convicted of stealing five video tapes from a K-Mart store. The petty theft charges were tried as felonies, and when he was convicted, he received two consecutive 25 years sentences. In another case, Gary Ewing, who was on parole from a nine-year prison term, was convicted of stealing three golf clubs. He received a sentence of 25 years. Both Andrade and Ewing appealed their sentences, alleging that California's law constituted CRUEL AND UNUSUAL PUNISHMENT in violation of the EIGHTH AMENDMENT to the U.S. Constitution.

The Supreme Court disagreed with both Andrade and Ewing. In *Ewing v. California*, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003), the Court held that Ewing's sentence was not grossly disproportionate and, thus, not in violation of the Eighth Amendment. The crime he committed constituted a felony, and the decision of the California legislature to enhance the sentence of a repeat offender was within the discretion of the legislature. The Court also upheld the conviction of Andrade in *Lockyer v. Andrade*, 538 U.S. 63, 123 S. Ct. 1166, L. Ed. 2d (2003). The Andrade's case, the court found that the Ninth Circuit Court of Appeals had erred in granting HABEAS CORPUS relief because a California state court had not contradicted established federal law when it ruled that the California statute was constitutional. The Ninth Circuit had previously ruled that the three-strikes law violated the Eighth Amendment.

Opponents of DETERMINATE SENTENCING claim that it will result in increased crowding of prisons and greater costs of incarnation. Proponents note that the enhanced sentencing will result in long-term cost savings because repeat offenders will no longer be on the street. These supporters say that the state and federal governments will save on property loss, losses from pain and suffering, lost wages, police security, and medical insurance costs resulting from the crimes of these offenders.

Some judges who have become dissatisfied with high rates of RECIDIVISM have exercised their sentencing discretion by meting out innovative punishments intended to address the specific criminal conviction or the conviction history of the specific criminal. For example, a judge in Wilmington, North Carolina, gave a shoplifter the option of either serving a prison

term or standing outside J.C. Penney carrying a sign that advised passersby of her transgression. Similarly, in Seattle, a youthful car thief was sentenced to 90 days in detention, a monetary fine, and 16 months of supervision, during which time he was required to wear a sign saying, "I'm a car thief." Critics, including the AMERICAN CIVIL LIBERTIES UNION (ACLU) deplore such punishments as forms of public humiliation.

Juvenile court judges possess tremendous discretion in sentencing. In 1995, Judge Wayne Creech, of the Berkeley County Family Court, in South Carolina, ordered 15-year-old Tonya Kline to be physically tied, 24 hours a day, to her mother, Deborah Harter. This order was imposed on Kline and Harter after Kline was charged with truancy, shoplifting, and housebreaking. Under the tethering conditions, Kline and Harter were allowed to separate only to go to the bathroom and to shower.

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CROSS-REFERENCES

Capital Punishment; Corporal Punishment; Criminal Law; Criminal Procedure; Drugs and Narcotics; Incarceration; Juvenile Law; Plea Bargaining; Prison.

## SEPARATE BUT EQUAL

*The doctrine first enunciated by the U.S. Supreme Court in* PLESSY V. FERGUSON, *163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), to the effect that establishing different facilities for blacks and whites was valid under the* EQUAL PROTECTION CLAUSE *of the* FOURTEENTH AMENDMENT *as long as they were equal.*

The theory of separate but equal was used to justify segregated public facilities for blacks and whites until in BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the Supreme Court recognized that "separate but equal" schools were "inherently unequal." The principle of "separate but equal" was further rejected by the CIVIL RIGHTS ACTS (42 U.S.C.A. § 2000a et seq.) and in subsequent cases, which ruled that racially segregated public facilities, housing, and accommodations violated the constitutional guarantee of equal protection of laws.

CROSS-REFERENCES

Civil Rights; Integration; "Plessy v. Ferguson" (Appendix, Primary Document).

## SEPARATE MAINTENANCE

*Money paid by one married person to the other for support if they are no longer living as* HUSBAND AND WIFE. *Commonly it is referred to as separate support and follows from a court order.*

See ALIMONY.

## SEPARATION

*A termination of* COHABITATION *of* HUSBAND AND WIFE *either by mutual agreement or, in the case of* judicial separation, *under the decree of a court.*

CROSS-REFERENCES

Divorce.

## SEPARATION OF CHURCH AND STATE

See RELIGION.

## SEPARATION OF POWERS

*The division of state and federal government into three independent branches.*

The first three articles of the U.S. Constitution call for the powers of the federal government to be divided among three separate branches: the legislative, the executive, and the judiciary branch. Under the separation of powers, each branch is independent, has a separate function, and may not usurp the functions of another branch. However, the branches are interrelated. They cooperate with one another

*A sample separation agreement*

**SEPARATION AGREEMENT**

_____
(name and address)

referred to as Husband and

_____
(name and address)

referred to as Wife, agree:

The parties were lawfully married on _____, _____, at

_____
(name and location)

Troubles have occurred between the parties, and they have agreed to live separate and apart.

The parties nevertheless desire to resolve certain issues and consequently, have entered into this agreement.

The parties have children born of this marriage who are as follows:

Name Age Date of Birth

1). _____ _____ _____

2). _____ _____ _____

3). _____ _____ _____

The parties have made a complete disclosure to one another of financial matters and each is satisfied that they have had sufficient disclosure of the parties individual and joint finances.

The parties have each been advised by counselors of their own choice regarding their legal rights and any disclosures made herein.

The husband shall assume the following debts and shall not hold the wife responsible for the same:

_____

_____

_____

The wife shall assume the following debts and shall not hold the husband responsible for the same:

_____

_____

_____

Neither party shall incur any further debts which may result in joint liability. In the event that either party incurs a debt on joint credit of the parties, that party shall be responsible for the total amount of that debt.

As child support, _____ (husband/wife) shall pay support _____ (weekly, monthly) the amount of

_____ Dollars ($_____).

The (husband/wife) shall maintain health insurance for the benefit of _____ .

Personal property of the parties shall be divided as follows:

The Husband shall have the following property: _____

_____

_____

The Wife shall have the following property: _____

_____

_____

[continued]

*A sample separation agreement (continued)*

**SEPARATION AGREEMENT**

If any debts are associated with the items of property divided herein, the party receiving the same shall assume the debt and hold the other party harmless from such debts.

Any property not specifically divided herein shall be subject to distribution at a later time.

The _____ (husband/wife) shall have temporary possession of the residence owned by the parties located at

_____.

Expenses related to the residence shall be borne by the parties as follows:

Husband: _____

_____

Wife: _____

_____

The parties agree that this agreement is intended to be a final disposition of the matters agreed upon herein. This agreement may be introduced into evidence and incorporated in a final decree of dissolution of marriage. In the event that any disputes occur regarding this agreement, the prevailing party shall be entitled to reasonable attorney's fees regarding such enforcement.

_____ _____
**Signature of Husband** **Date**

_____ _____
**Signature of Wife** **Date**

_____ _____
**Witness for Husband** **Date**

_____ _____
**Witness for Wife** **Date**

_____ My commission expires on:
**Notary Public**

**Warning:**

**These forms are provided AS IS. They may not be any good. Even if they are good in one jurisdiction, they may not work in another. And the facts of your situation may make these forms inappropriate for you. They are for informational purposes only, and you should consult an attorney before using them.**

and also prevent one another from attempting to assume too much power. This relationship is described as one of checks and balances, where the functions of one branch serve to contain and modify the power of another. Through this elaborate system of safeguards, the Framers of the Constitution sought to protect the nation against tyranny.

Under the separation of powers, each branch of government has a specific function. The legislative branch—the Congress—makes the laws. The executive branch—the president—implements the laws. The judiciary—the court system—interprets the laws and decides legal controversies. The system of federal taxation provides a good example of each branch at work. Congress passes legislation regarding taxes. The president is responsible for appointing a director of the INTERNAL REVENUE SERVICE to carry out the law through the collection of taxes. The courts rule on cases concerning the application of the tax laws.

Under the system of checks and balances, each branch acts as a restraint on the powers of the other two. The president can either sign the legislation of Congress, making it law, or VETO it. The Congress, through the Senate, has the power of advise and consent on presidential appointments and can therefore reject an appointee. The courts, given the sole power to interpret the Constitution and the laws, can uphold or overturn acts of the legislature or rule

on actions by the president. Most judges are appointed, and therefore Congress and the president can affect the judiciary. Thus at no time does all authority rest with a single branch of government. Instead, power is measured, apportioned, and restrained among the three government branches. The states also follow the three-part model of government, through state governors, state legislatures, and the state court systems.

Our system of government in the United States is largely credited to JAMES MADISON and is sometimes called the Madisonian model. Madison set forth his belief in the need for balanced government power in *The Federalist,* No. 51. However, the concept of separation of powers did not originate with Madison. It is often attributed to the French philosopher BARON MONTESQUIEU, who described it in 1748. At the Constitutional Convention of 1787, Madison played a leading role in persuading the majority of the Framers to incorporate the concept into the Constitution.

CROSS-REFERENCES

Congress of the United States; Constitution of the United States; Judicial Review; President of the United States; Presidential Powers; Supreme Court of the United States.

## SEPTEMBER 11TH ATTACKS

On September 11, 2001, in the deadliest case of domestic TERRORISM in the history of the United States, a group of 19 terrorists hijacked four U.S. airliners for use as missiles against targets in New York City and Washington, D.C. The events shocked the country and the world and focused the U.S. government on a worldwide WAR ON TERRORISM. During the 18 months following the attacks, the United States engaged in military operations in Afghanistan and Iraq, causing changes in the regimes of both countries.

At 8:45 A.M. (EST), American Airlines Flight 11, hijacked after departing from Boston, crashed into the north tower of the World Trade Center. Approximately 18 minutes later, another hijacked Boston flight, United Airlines Flight 175, crashed into the south tower of the World Trade Center. Within an hour of the attacks, the Port Authority shut down all tunnels and bridges in the New York area, and the FEDERAL AVIATION ADMINISTRATION (FAA) shut down all New York airports. Soon thereafter, the FAA took the unprecedented step of halting all air traffic nationwide.

About an hour after the initial attack against the World Trade Center, a Boeing 757, American Airlines Flight 77, crashed into the Pentagon. The crash happened at approximately the same time as an evacuation at the White House. At 10:05 A.M., the south tower of the World Trade Center collapsed. At 10:10 A.M., part of the Pentagon collapsed.

As the Pentagon was attacked, another hijacked flight, United Airlines Flight 93, crashed in Pennsylvania, killing everyone aboard. Later, it was discovered that the passengers attempted to overcome the four hijackers. Passengers had learned their likely fates from cell phone calls informing them about the World Trade Center crashes. Government authorities later speculated that the plane's hijackers could have been targeting Camp David, the White House, or the U.S. Capitol building.

At 10:28 A.M., the north tower of the World Trade Center collapsed from the top down. As with the collapse of the first tower, debris rained down and a huge cloud of smoke and dust enveloped a wide area. Hundreds of rescue workers died as they attempted to evacuate the people from the buildings.

President GEORGE W. BUSH was visiting a Florida elementary school when he learned of the attacks. He quickly departed, stopping at Barksdale Air Force Base in Louisiana and Offut Air Force Base in Nebraska, before heading back to Washington. During the afternoon, Osama Bin Laden and the militant Islamic group, al Qaeda, surfaced as the main suspects. In an address to the nation during the evening of September 11, Bush vowed that the United States would make no distinction between terrorists committing the attacks and those nations harboring them, although he did not name Osama bin Laden, the leader of al Qaeda, until more evidence could be collected against him.

Bin Laden, one of 50 children of a billionaire Saudi family, purportedly uses his approximately $300 million inheritance to fund al Qaeda. Al Qaeda (Arabic, "the Base") was organized by bin Laden in the late 1980s, bringing together "Arabs who fought in Afghanistan against the Soviet invasion," according to the U.S. STATE DEPARTMENT. Al Qaeda's goal, the U.S. government says, is to "establish a pan-Islamic Caliphate throughout the world by working with allied Islamic extremist groups to overthrow regimes it deems 'non-Islamic' and

expelling Westerners and non-Muslims from Muslim countries."

In 1998, bin Laden issued a *fatwah*, a religious edict calling for attacks on U.S. civilians. He had previously issued a fatwah urging the killing of U.S. troops. Bin Laden and his organization are believed responsible for the October 2000 attack on the U.S.S. *Cole* in Aden, Sudan, which killed 17. He has been indicted for the 1998 embassy bombings in Kenya and Tanzania, where 224 died and thousands more were injured; four al Qaeda members were convicted in connection with those incidents. He has also been charged in connection with events in Somalia in October 1993, in which 18 U.S. servicemen died. His terrorist activities garnered him a spot on the Federal Bureau of Investigation's Ten Most Wanted Fugitives List in 1999.

On October 7, 2001, the United States sent warplanes and cruise missiles to Afghanistan to attack al Qaeda military installations and terrorist camps supported by the Taliban regime of that country. Great Britain joined the strikes, with intelligence efforts and logistical support provided by France, Germany, Australia, Canada, and others. In all, about 40 nations joined in a coalition with the United States, President Bush reported in an address to the country shortly after the strikes began.

The president characterized the fight against terrorism as involving military commitments, law enforcement actions, legislative and diplomatic actions, financial actions, and assistance to Afghanistan. Concurrent with the air strikes, Bush announced a humanitarian component of "Operation Enduring Freedom": airlifts of food, medicine, and supplies to the Afghan people. On October 8, 2001, he issued an **EXECUTIVE ORDER** establishing the **HOMELAND SECURITY DEPARTMENT**, to "coordinate the executive branch's efforts to detect, prepare for, protect against, respond to, and recover from terrorist attacks within the United States."

The air attacks against Afghanistan were followed by a controlled ground assault, as the United States assisted the Northern Alliance, a foe of the Taliban regime, in toppling the existing Afghan government. By December 2001, the Taliban had effectively been removed from power, and the United States and other nations began a process of rebuilding that country. Although bin Laden was constantly targeted during the attacks, the United States failed to capture him during the attack on the Taliban regime (it is unknown as to whether he was killed during the attack). As of June 2003, bin Laden was believed to remain at large.

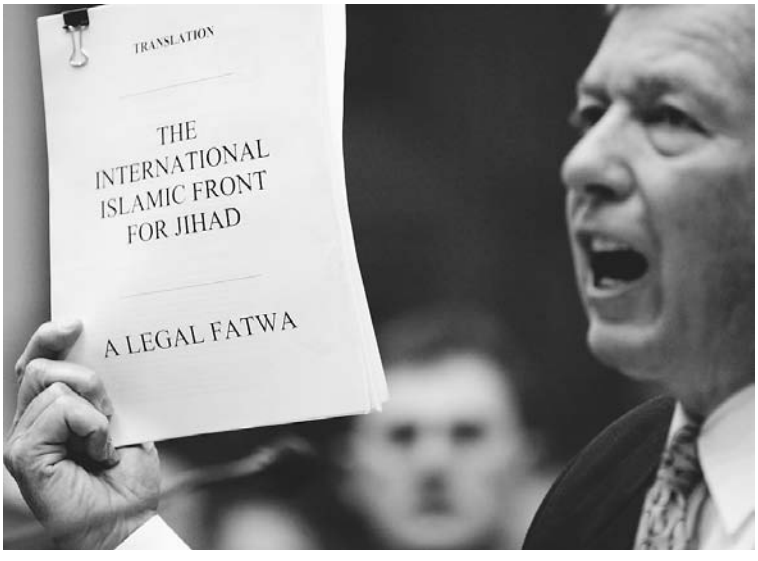


*John Ashcroft appears before the House Judiciary Committee in June 2003 to testify about the USA PATRIOT Act and defend efforts used since the September 11th attacks to prevent further acts of terrorism.* AP/WIDE WORLD PHOTOS

In December 2001, U.S. officials raided the offices of two Muslim charities headquartered in Illinois, the Global Relief Foundation (GRF) and the Benevolence International Foundation (BIF). These organizations were believed to have contributed money to terrorists who planned unspecified attacks on the United States. The crackdown on these groups was also a result of the U.S. government's belief that bin Laden and the al Qaeda network use charitable groups, manufacturing companies, and credit card **FRAUD** to raise money for terrorist operations. Cracking down on the fund-raising became one of the U.S. government's strategies for defeating terrorism.

Congress responded to the attacks, with the urging of the president, by passing the **USA PATRIOT ACT OF 2001**, Pub. L. No. 107-56, 115 Stat. 272, the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, and other legislation designed to provide enhanced protection against further attacks. The United States has also continued its assault on terrorists and the nations that harbor them since September 11. In March 2003, the United States attacked Iraq, purportedly for Iraq's violation of resolutions banning its possession of weapons of mass destruction. The Bush administration suspected that Iraqi leader Saddam Hussein gave support to bin Laden and al Qaeda, and the attacks on Iraq have been seen by many as a continuation of the **WAR ON TERRORISM**.

The September 11th attacks also had a devastating impact on the U.S. airline industry. American Airlines and United Airlines each lost two planes during the attack, and the U.S. government ordered that all planes in the country remain grounded for a week following the attacks. In response to the heavy losses incurred by the airlines, Congress enacted the Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230, which was signed into law 11 days after the September 11th attacks. The act was designed to compensate air carriers for their losses during and after the attacks and also to preserve the continued vitality of the air transportation system in the United States. Despite this legislation, United Airlines filed for BANKRUPTCY in 2002, and American Airlines bordered on bankruptcy during much of the period following the attacks.

The attacks had a greater impact on the victims of the attacks and their families. As part of Public Law Number 107-42, Congress enacted the September 11th Victim Compensation Fund to provide a form of recovery for the victims of the attacks. The U.S. Attorney General's Office administers the fund through a SPECIAL MASTER. Recovery under these provisions is limited to those who were physically injured during the attacks, so victims of non-physical, economic loss cannot recover. As of May 2003, fund administrators had issued 495 award letters to victims of the attacks and their families. The average award to the family of a deceased victim is $1.44 million.

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CROSS-REFERENCES

Terrorism; War on Terrorism.

## SEQUESTRATION

*In the context of trials, the isolation of a jury from the public, or the separation of witnesses to ensure the integrity of testimony. In other legal contexts the seizure of property or the freezing of assets by court order.*

In jury trials, judges sometimes choose to sequester the jurors, or place them beyond public reach. Usually the jurors are moved into a hotel, kept under close supervision twenty-four hours a day, denied access to outside media such as television and newspapers, and allowed only limited contact with their families.

Although unpopular with jurors, sequestration has two broad purposes. The first is to avoid the accidental tainting of the jury, and the second is to prevent others from intentionally tampering with the jurors by bribe or threat. Trial publicity, public sentiment, interested parties, and the maneuverings and machinations of lawyers outside the courtroom can all taint the jurors' objectivity and deny the defendant a fair trial. Judges are free to sequester the jury whenever they believe any of these factors may affect the trial's outcome.

Jury sequestration is rare. Typically ordered in sensational, high-profile criminal cases, sequestration begins immediately after the jury is seated and lasts until the jury has delivered its verdict. It is unusual for juries to be sequestered longer than a few days or a week. Occasionally, however, jurors are sequestered for weeks. The 1995 trial of former football star O. J. (Orenthal James) Simpson for murder was highly unusual: the Simpson jury was sequestered for eight and a half months—half as long as the period Simpson was imprisoned while under arrest and on trial. The experience provoked protest from the jurors and calls for legal reform.

The sequestration of witnesses differs from that of jurors. Whereas jurors are kept away from the public, witnesses typically are ordered not to attend the trial—or follow accounts of it—until they are to testify. This judicial order is intended to assure that the witnesses will testify concerning their own knowledge of the case without being influenced by testimony of prior witnesses. Witness sequestration also seeks to strengthen the role of cross-examination in developing facts.

Other definitions of sequestration relate to property. In CIVIL LAW, *sequester* has three distinct meanings. First, it means to renounce or disclaim, as when a widow appears in court and disclaims any interest in the estate of her deceased husband; the widow is said to

sequester. Second, it means to take something that is the subject of a controversy out of the possession of the contending parties and deposit it in the hands of a third person; this neutral party is called a sequestor. Third and most commonly, sequestration in civil law denotes the act of seizing property by court order.

In litigation and EQUITY practice, sequestration also refers to court-ordered confiscation of property. When one party sues another over an unpaid debt, the plaintiff may secure a writ of attachment. As another form of sequestration, this legal order temporarily seizes the alleged debtor's property in order to secure the debt or claim in the event that the plaintiff is successful. In equity practice—an antiquated system of justice that is now incorporated into civil justice—courts seize a defendant's property until the defendant purges herself of a charge of CONTEMPT.

In INTERNATIONAL LAW, the term *sequestration* signifies confiscation. Typically, it means the appropriation of private property to public use. Following a war, sequestration means the seizure of the property of the private citizens of a hostile power, as when a belligerent nation sequesters debts due from its own subjects to the enemy.

## SERIATIM

*[*Latin, Severally; separately; individually; one by one.*]*

## SERJEANT AT LAW

*In English* LEGAL HISTORY*, an elite order of attorneys who had the exclusive privilege of arguing before the Court of Common Pleas and also supplied the judges for both Common Pleas and the Court of the King's Bench.*

For six centuries starting in the 1300s, the serjeants at law ranked above all other attorneys in the kingdom. Only twelve hundred men were ever promoted to the dignity of serjeant, the last dying in 1921. Although the serjeants have never had an exact counterpart in the United States, the order has had a lasting impact on U.S. law: it has been cited as a reason for regarding U.S. attorneys as officers of the court and specifically for requiring court-appointed attorneys to subsidize the LEGAL REPRESENTATION of clients who cannot afford private attorneys.

The serjeants at law originated in the Court of Common Pleas, one of the four superior courts at Westminster, in the fourteenth century. They had an antecedent in the thirteenth-century legal practitioners known as *countors,* a term from the French meaning storytellers. Countors helped formulate the plaintiff's counts, or causes of action, and the preparatory work called *counting.* In the fourteenth century their role evolved and became a profession. The countors became *servientes ad legem,* or serjeants at law.

The serjeants were an exalted order. Paid by the Crown and admitted to practice before a single court, they belonged to a closed society that had significant power. Only serjeants could argue in the Court of Common Pleas, and their ranks provided the only candidates for judges of the Common Pleas and the King's Bench. By the fifteenth century, regard for the serjeants was so high that no practitioner in the legal profession was considered their equal.

Serjeants came from the elite of the legal profession. The chief justice of the Common Pleas prepared a list of seven or eight of the best lawyers who had at least sixteen years' experience, and the chancellor selected the new inductees. At their induction, an elaborate ceremony, they swore to serve the king's people. The serjeants' costume also distinguished them from other English attorneys. They wore a long, loose garment called a tabard, a hood, and a close-fitting white headdress called a coif. Eventually, from this costume, the serjeants became known as the ORDER OF THE COIF. The influence of the serjeants declined in the eighteenth century, and by the nineteenth century, their MONOPOLY on the Court of Common Pleas had ended. After the reorganization of the English justice system with the JUDICATURE ACTS of 1875, no more serjeants were created.

In U.S. law, the legacy of the serjeants derives from their role as officers of the court. The position was similar to holding public office and, as such, carried duties: the serjeants could be commanded to serve indigent clients. In the twentieth century, U.S. federal courts turned to this tradition for justification in viewing attorneys as officers of the court who also could be appointed to serve the needy. A significant example is the opinion in *United States v. Dillon,* 346 F.2d 633 (9th Cir. 1965), where the Ninth Circuit Court of Appeals required a court-appointed attorney to subsidize the costs of vacating the conviction of an indigent client. In citing "an ancient and established tradition" for this practice, the court looked in part to the English tradition of the serjeants at law.

## SERVICE

*Any duty or labor performed for another person.*

*The delivery of a legal document that notifies the recipient of the commencement of a legal action or proceeding in which he or she is involved.*

The term *service* has various meanings, depending upon the context of the word.

Under feudal law, tenants had a duty to render service to their lords in exchange for use of the land. The service required could take many forms: monetary payments, farm products, loyalty, attendance upon the lord as an armed horseman, carrying the king's banner, providing a sword or a lance, or plowing or other farm labor done for the king.

In contract law, service refers to an act or deed, rather than property. It is a duty or labor done by a laborer under the direction and control of the one for whom the service is performed. The term implies that the recipient of the service selects and compensates the laborer. It is the occupation, condition, or status of being a servant and often describes every kind of employment relationship. In addition, *service* may be used to denote employment for the government, as in the terms *civil service, military service* or *the armed service,* or *public service.*

In the area of domestic relations, the term refers to the uncompensated work, guidance, and upkeep an injured or deceased family member previously provided for the family; the injury or death of the provider of these services means that the work will have to be obtained from another source and at a price. In this context the term traditionally was restricted to the "services" of a wife under the theory that the husband's duty was to provide support and the wife's duty was to provide service. After injury to his wife, a husband could bring an action on his own behalf against the responsible party for compensation of the loss of her aid, assistance, comfort, and society. The modern view holds that a wife may also sue for the loss of assistance and society of her husband.

Service also means the delivery of a writ, summons and complaint, criminal summons, or other notice or order by an authorized server upon another. Proper service thereby provides official notification that a legal action or proceeding against an individual has been commenced.

**CROSS-REFERENCES**

Feudalism; Service of Process.

## SERVICE MARK

*A* TRADEMARK *that is used in connection with services.*

Businesses use service marks to identify their services and distinguish them from other services provided in the same field. Service marks consist of letters, words, symbols, and other devices that help inform consumers about the origin or source of a particular service. Roto-Rooter is an example of a service mark used by a familiar plumbing company. Trademarks, by contrast, are used to distinguish competing products, not services. Whereas trademarks are normally affixed to goods by means of a tag or label, service marks are generally displayed through advertising and promotion.

Service marks are regulated by the law of UNFAIR COMPETITION. At the federal level, service mark infringement is governed by the LANHAM TRADEMARK ACT of 1946 (15 U.S.C.A. § 1051 et. seq.). At the state level, service mark infringement is governed by analogous INTELLECTUAL PROPERTY statutes that have been enacted in many jurisdictions. In some states service mark infringement may give rise to a CAUSE OF ACTION under the COMMON LAW. Because service marks are a particular type of trademark, the substantive and procedural rules governing both types of marks are fundamentally the same.

The rights to a service mark may be acquired in two ways. First, a business can register the mark with the government. Most service marks are eligible for registration with the U.S. PATENT AND TRADEMARK OFFICE. Several state governments have separate registration requirements. Once a service mark has been registered, the law typically affords protection to the first mark filed with the government. Second, a business may acquire rights to a service mark through public use. However, a mark must be held out to the public regularly and continuously before it will receive legal protection. Sporadic or irregular use of a service mark will not insulate it from infringement.

To receive protection, a service mark must also be unique, unusual, or distinctive. Common, ordinary, and generic marks rarely qualify for protection. For example, a professional association of physicians could never acquire exclusive rights to register a service mark under the name "Health Care Services." Such a mark does little to distinguish the services provided by the business and tells consumers nothing about the HEALTH

*A sample trademark/service mark application*

## Trademark/Service Mark Application

**COMMONWEALTH OF VIRGINIA**
**STATE CORPORATION COMMISSION**

**APPLICATION FOR REGISTRATION OF A TRADEMARK OR SERVICE MARK**
(Please type or print)

Applicant (owner) name and address:_____

_____

Contact person name and address:_____

_____Daytime phone:_____ Fax number:_____

Applicant is a:_____Applicant's state or jurisdiction of formation: _____
(entity type i.e. corporation, partnership, etc)

Kind of mark (check one):Trademark _____ Service Mark _____

Identify the trademark or service mark (or attach an exhibit of the exact mark): _____

_____

Class number(s) of goods or services (see 21 VAC 5-120-100):_____

Describe the product(s) or service(s) the mark represents (identifies):_____

_____

Date mark was first used **anywhere** by applicant or applicant's predecessor: _____

Date mark was first used **in Virginia** by applicant or applicant's predecessor: _____

**PLEASE NOTE: A specimen of the mark must accompany this application.**

The applicant asserts that it is the owner of this mark and that the mark is in use in the Commonwealth of Virginia. No other person has registered this mark or has the right to use this mark in Virginia, either in the identical form thereof or in such near resemblance thereto as to be likely, when applied to the goods or services of such person, to cause confusion or mistake, or to deceive.

(**NOTE:** The application must be signed in the name of the applicant, either by the applicant or by a person authorized by the applicant. The application must be sworn to by the person who signed the name of the applicant.)

Signature:_____Date: _____

Signer's Name:_____Title:_____
(print or type)

State of:_____, County/City of:_____, to-wit:

The foregoing application was subscribed and sworn to before me by _____

on the _____ day of _____, _____.

My Commission Expires:_____ Notary Public: _____

TM 1 (7/99)

CARE practitioners involved. The law would give full legal protection to these same doctors, however, if they applied for a mark under the name "Snap and Jerk Chiropractic Services."

Once a business has established a vested right in a service mark, the law forbids other businesses from advertising their services with deceptively similar marks. Service mark infringement occurs when a particular mark is easily confused with other marks already established in the same trade and geographic market. Greater latitude is given when businesses that share similar marks are in unrelated fields or offer services in different consumer markets. For example, a court would be more inclined to allow two businesses to share the same mark when one business provides pest control services in urban areas, while the other provides film developing services in rural areas.

Two remedies are available for service mark infringement: injunctive relief (court orders restraining defendants from infringing on a plaintiff's service mark), and money damages (compensation for any losses suffered by an injured business). Both remedies are normally available whether a claim for infringement is pursued under state or federal law. However, the Lanham Act allows an injured business to recover significantly greater damages for infringement of a federally registered mark than it could recover under comparable state legislation.

Service marks protect the good will and reputation earned by businesses that have invested time, energy, and money in bringing quality services to the public. Service marks also encourage competition by requiring businesses to associate their marks with the quality of services they offer. In this way service marks function as a barometer of quality upon which consumers may rely when making decisions to purchase. However, service marks are often infringed, and consumers grow leery when inferior services are passed off as a competitor's through use of a deceptively similar mark. Thus legal protection of service marks can save consumers from making improvident expenditures for services of dubious or unknown origin.

CROSS-REFERENCES

Consumer Protection; Trademarks.

## SERVICE OF PROCESS

*Delivery of a writ, summons, or other legal papers to the person required to respond to them.*

Process is the general term for the legal document by which a lawsuit is started and the court asserts its jurisdiction over the parties and the controversy. In modern U.S. law, process is usually a summons. A summons is a paper that tells a defendant that he is being sued in a specific court that the plaintiff believes has jurisdiction. Served with the summons is a complaint that contains the plaintiff's allegations of wrongdoing by the defendant and the legal remedy sought by the plaintiff. The summons also informs the defendant that he has a specified number of days under law to respond to the summons and complaint. If the defendant does not respond, the plaintiff may seek a default judgment from the court, granting the plaintiff the legal relief specified in the complaint.

Rules of CIVIL PROCEDURE and CRIMINAL PROCEDURE determine the proper form of legal process and how it should be served. The rules vary among federal and state courts, but they are meant to give the defendant notice of the proceedings and to command him to either respond to the allegations or to appear at a specified time and answer the claim or criminal charge. The concept of notice is critical to the integrity of legal proceedings. DUE PROCESS forbids legal action against a person unless the person has been given notice and an opportunity to be heard.

Process must be properly served on all parties in an action. Anyone who is not served is not bound by the decision in the case. A person who believes that proper service has not taken place may generally challenge the service without actually making a formal appearance in the case.

Whether service was proper is usually determined at a pretrial hearing. A defendant must request a special appearance before the court. A special appearance is made for the limited purpose of challenging the sufficiency of the service of process or the PERSONAL JURISDICTION of the court. No other issues may be raised without the proceeding becoming a general appearance. The court must then determine whether it has jurisdiction over the defendant.

### Methods of Service

Three basic methods are used for service of process: (1) actual, or personal, service, (2) substituted service, and (3) service by publication. Although each method is legally acceptable, PERSONAL SERVICE is preferred because it is the most effective way of providing notice and it is difficult for the defendant to attack its legality.

Personal service means in-hand delivery of the papers to the proper person. Traditionally personal service was the only method of service allowed by law because it was best suited to give the defendant notice of the proceedings.

Substituted service is any method used instead of personal service. Forms of substituted service vary among different jurisdictions, but all are intended to offer a good chance that the defendant actually will find out about the proceedings. If a defendant is not at home, many states permit service by leaving the summons and complaint with any person at the defendant's home who is old enough to understand the responsibility of accepting service. Some states permit service by affixing the summons and complaint to the entrance of the defendant's home or place of business and then mailing a copy of the papers to that individual at his last known address. This method is often called "nail and mail" service. A number of states allow service simply by mailing the papers to the defendant's actual address; registered mail is generally required. States also consider service valid if the defendant's property is attached, or legally seized, within the state and the papers are then mailed to him.

Under the laws of some states, substituted service may be used only after diligent efforts to effect personal service have failed. Some forms of substituted service may have to be tried before others can be used. Other states permit substituted service at any time or after a single attempt to find the defendant and serve the papers personally.

A third method of service is publication of a notice in a newspaper. Publication is also called constructive service because the court construes it to be effective whether the defendant actually reads the notice or not. Generally, service by publication is allowed only by leave of the court, which usually grants permission only when the plaintiff can show that no other method of service can be effected. Usually the legal notice must be published in at least one newspaper of general circulation where the defendant is likely to be found or where the court is located, or in both places. Ordinarily the notice must be published on more than one occasion, such as once a week for three weeks.

In truth, courts realize that defendants rarely read notices published in newspapers, but the effort must be made when the defendant cannot be found and served in any other way. Plaintiffs prefer not to use publication because it is expensive and a court might later find that the defendant could have been served personally.

### Where Process May Be Served

Legal papers may have to be served within the geographical reach of the jurisdiction, or authority, of the court. If the service itself is the basis for the court's jurisdiction over the defendant, then the service usually must be made within the state. For lower-level courts, service may have to be made within the county where the court is located. Trial courts of general jurisdiction usually permit service anywhere within the state. Service of process for an action in a federal district court may be made anywhere within the state where the court sits or, for some parties, any place in the United States that is not more than one hundred miles from the courthouse.

A variety of statutes permit state courts to exercise authority over persons not physically present within the state. These are called LONG-ARM STATUTES. They specify factors, other than the defendant's physical presence within the state, that provide sufficient justification for the court to exercise jurisdiction over the defendant, such as doing business within the state or having an automobile accident within the state. When one of these factors exists, the prospective defendant can be served with legal process outside the state because the service itself is not the basis of the court's jurisdiction.

Substituted or constructive methods of service may be used on a defendant who comes within the long-arm jurisdiction of the state. For example, many states permit a plaintiff to serve an out-of-state resident who was involved in a traffic accident in the state by serving legal process on the attorney general of the defendant's state and then sending copies to the defendant at his residence. The statute makes the attorney general the agent for the service of process on out-of-state drivers. Such a statute is based on the theory that a nonresident driver has consented to this method of service by using the highways and facilities within the state.

### Who Must Be Served

Service of process is effective only if the right person is served. When the defendant can be described but not named, service by publication can be made with a fictional name like Richard Roe. Where the defendant is not a natural per-

son but a corporation, statutes generally provide for effective service on a managing agent, a director, an officer, or anyone designated an agent in the corporation's application for a charter or a license to do business within the state.

If the person to be sued is a child or a person incapable of managing his own legal affairs, service may be made on a parent, guardian, or someone else entrusted with the defendant's care or affairs. The plaintiff may ask the court to designate a proper person when there is doubt. An estate can be sued by service of process on an executor or administrator. The plaintiff may ask the court to appoint such a person if none has yet been named.

When more than one person is being sued, each of them must be served. For example, if a partnership is sued, each partner must be served.

### When Papers Can Be Served

The proper time for service of process depends on the law of the jurisdiction. Service must be made within the time that the STATUTE OF LIMITATIONS allows for starting that particular kind of action because it is service that starts the lawsuit.

Many states have long prohibited personal or substituted service on Sunday. Service is also prohibited on legal holidays in some states.

### Process Servers

Every jurisdiction specifies who may serve process. Many states take a simple approach and allow service by any person over the age of 18 who is not a party to the suit. Under federal law service of anything other than a summons, complaint, or subpoena must be made by a U.S. marshal, a deputy marshal, or someone else appointed by the court. Some states also follow this procedure and designate that such qualified service shall be by a sheriff or similar peace officer.

In some jurisdictions anyone who serves more than a specified small number of summonses a year must be licensed. Laws generally provide for fines or imprisonment of a process server who fails to obtain a required license. A court will not dismiss cases started with service by an unlicensed process server.

For the most part, courts have allowed process servers to use any means necessary to serve papers on reluctant defendants as long as no law is broken. For example, a process server can knock on the defendant's door and state that he has a package for the defendant. If the defendant opens the door, the resulting service of process is valid.

A defendant cannot avoid the service of process by refusing to accept delivery of the papers. Many cases have upheld service where the process server dropped the papers at the defendant's feet, hit the defendant in the chest with them, or even laid them on the defendant's car when he refused to get out or open the door.

### Invalid Service

The tricks of serving process papers can, however, reach a point that the courts will not tolerate because they subvert the purpose of service or threaten to disrupt the administration of justice. The most intolerable abuse is called sewer service. It is not really service at all but is so named on the theory that the server tossed the papers into the sewer and did not attempt to deliver them to the proper party. Sewer service is a FRAUD on the court, and an attorney who knowingly participates in such a scheme can be disbarred.

Anyone who serves process must file an AFFIDAVIT of service with the court, giving details of the delivery of the papers. If the facts in an affidavit of service falsely assert that the papers were delivered, the person who swears to them can be prosecuted for the crime of perjury. In addition, the plaintiff's action will not have commenced. If the statute of limitations has expired by the time the true facts of the improper service are disclosed, the action is completely barred and the plaintiff has lost the right to sue.

Service is also invalid if the defendant has been enticed into the jurisdiction by fraud. Courts have ruled that luring a potential defendant into the state in order to serve him with process when no other grounds exist to assert jurisdiction over him in that state violates the individual's right to due process of law. Service of process by fraud is null and void.

### Immunity from Service of Process

Courts typically grant IMMUNITY from process to anyone who comes within reach of the authority of the court only because he is required to participate in judicial proceedings. The purpose of this immunity is to ensure a fair trial by encouraging the active and willing participation of witnesses and parties. If a witness was discouraged from coming into a state

because of the risk of being sued in that state, justice would not be served.

Immunity also protects nonresident attorneys, parties, and witnesses from being served with process in unrelated actions while attending, or traveling to, criminal or civil trials within a state. This immunity has been extended to protect out-of-state parties who enter a state not for trial but to settle a controversy out of court. Diplomatic personnel, ambassadors, and consuls who are in the United States on official business are also immune from process.

## SERVICEMEN'S READJUSTMENT ACT OF 1944

See GI BILL.

## SERVITUDE

*The state of a person who is subjected, voluntarily or involuntarily, to another person as a servant. A charge or burden resting upon one estate for the benefit or advantage of another.*

INVOLUNTARY SERVITUDE, which may be in the form of SLAVERY, peonage, or compulsory labor for debts, is prohibited by the THIRTEENTH AMENDMENT to the U.S. Constitution. Article I, Section 9, of the original Constitution had given Congress the power to restrict the slave trade by the year 1808, which it did, but slavery itself was not prohibited until the Thirteenth Amendment was enacted in 1865. The slave trade had begun in the American colonies in the seventeenth century and involved the forcible taking and transport of Africans and others to sell as slaves. The Thirteenth Amendment's prohibition against slavery encompasses situations where an individual is compelled by force, coercion, or imprisonment, and against his will, to labor for another, whether he is paid or not.

The term *servitude* is also used in PROPERTY LAW. In this context, servitude is used with the term *easement,* a right of some benefit or beneficial use out of, in, or over the land of another. Although the terms *servitude* and *easement* are sometimes used as synonyms, the two concepts differ. A servitude relates to the servient estate or the burdened land, whereas an EASEMENT refers to the dominant estate, which is the land benefited by the right. Not all servitudes are easements because they are not all attached to other land as APPURTENANCES (an appurtenance is an appendage or that which belongs to something else).

All servitudes affecting lands are classified as either personal or real. Personal servitudes are established for the benefit of a particular person and terminate upon the death of that individual. A common example of a personal servitude is the use of a house. Real servitudes, also called landed servitudes, benefit the owner of one estate through some use of a neighboring estate.

At CIVIL LAW, real servitudes are divided into two types: rural and urban. Rural servitudes are established for the benefit of a landed estate; examples include a right of way over a servient tenement and a right of access to a spring, sandpit, or coal mine. Urban servitudes are established for the benefit of one building over another; some examples are a right of support, a right to a view, and a right to light. Despite the name *urban servitude,* the buildings do not have to be in a city.

Servitudes are also classified as positive and negative. A positive servitude requires the owner of the servient estate to permit something to be done on her property by another. A negative servitude does not bind the servient owner in this manner but merely restrains her from using the property in a manner that would impair the easement enjoyed by the owner of the dominant estate.

## SESSION

*The sitting of a court, legislature, council, or commission for the transaction of its proper business.*

A session can be the period of time within any one day during which the body is assembled and engaged in business. In a more extended sense, the session can be the whole space of time from the first assembling of the body to its adjournment.

A *joint session* is the convening of the two houses of a legislative body to sit and act together as one body, instead of separately in their respective houses.

As applied to a court, the word *session* is not strictly synonymous with the word *term.* The session of a court is the time during which it actually sits each day for the transaction of judicial business. A term of a court is the period fixed by law—usually amounting to many days or weeks—during which it is open for judicial business and during which it can hold sessions from day to day. The two words are, however, frequently used interchangeably.

## SET ASIDE

*To cancel, annul, or revoke a judgment or order.*

## SET DOWN

*To list a case in a court calendar or docket for trial or hearing during a particular term.*

## SET-OFF

*A demand made by the defendant against the plaintiff that is based on some transaction or occurrence other than the one that gave the plaintiff grounds to sue.*

The set-off is available to defendants in civil lawsuits. Generally, civil actions are brought by plaintiffs seeking an award of damages for injuries caused by the defendant. In customary practice the plaintiff files the suit and the defendant answers it. The defendant may assert a *counterclaim* against the plaintiff based on an event or transaction other than the event or transaction that forms the basis of the plaintiff's suit. A set-off is a counterclaim with the particular goal of defeating or diminishing the amount the defendant will have to pay if the plaintiff's suit succeeds.

The set-off has two distinctive features. It must be based on an entirely different claim from that of the plaintiff, and it must be a valid legal claim that the defendant could bring as a separate suit. For example, a stereo store sues a customer for $700 due in outstanding payments on a CD player. However, the customer's car was damaged in the store's parking lot when the store's delivery van backed into it, and the repairs cost $500. As the defendant, the customer has the right to assert a counterclaim for damages to the car; if the customer is successful, the set-off reduces the amount owed to the plaintiff store so that the defendant owes the plaintiff only $200.

The remedy of *recoupment* is similar in effect to a set-off but differs from it in several respects. Whereas a set-off is based on a different claim, recoupment is a common-law remedy based specifically on the contract between the plaintiff and defendant that gave rise to the suit. It allows defendants to claim damages against the plaintiff under two conditions: where the plaintiff has not complied with some contractual obligation or where the plaintiff has violated some duty that the law imposed in the making or performance of the contract. Recoupment usually occurs in cases where the plaintiff has performed only a portion of the contract and sues for compensation for the partial performance. For example, the defendant in the stereo store's action might demand recoupment for the store's failure to service the stereo under its WARRANTY.

Like all counterclaims, set-off and recoupment seek to achieve justice by BALANCING the plaintiff's and the defendant's rights. They are designed to prevent a plaintiff from recovering complete damages from a defendant who has suffered injury or damages caused by the plaintiff. They can also save time and money. By combining the entire controversy within one action, recoupment and set-off prevent the courts from being inundated with multiple lawsuits.

## SETBACK

*A distance from a curb, property line, or structure within which building is prohibited.*

Setbacks are building restrictions imposed on property owners. Local governments create setbacks through ordinances and BUILDING CODES, usually for reasons of public policy such as safety, privacy, and environmental protection. Setbacks prevent landowners from crowding the property of others, allow for the safe placement of pipelines, and help to preserve wetlands. Setbacks form boundaries by establishing an exact distance from a fixed point, such as a property line or an adjacent structure, within which building is prohibited. Generally, prospective buyers learn that land is subject to setback provisions when they are considering purchasing it. This information is important to future development plans, because setbacks remain in effect until changed by law or special action of a local government.

Setbacks can significantly affect a property owner's right to develop land or to modify existing structures on the land. For this reason they can influence property values; severe restrictions on land can decrease its value. Violating setback provisions can lead to legal action against a property owner, and penalties can include fines as well as an order to remove noncompliant structures. Property owners whose desire to build is stymied by setbacks have few remedies. They can petition their local government by applying for a variance—a special permission to depart from the requirements of ZONING ordinances—but variances are generally granted only in cases of extreme hardship. Litigation over setbacks is common.

**CROSS-REFERENCES**

Land-Use Control.

## SETTLE

*To agree, to approve, to arrange, to ascertain, to liquidate, or to reach an agreement.*

Parties are said to settle an account when they examine its items and ascertain and agree upon the balance due from one to the other. When the person who owes money pays the balance, he or she is also said to settle it. A trust is settled when its terms are established and it goes into effect.

The term *settle up* is a colloquial rather than legal phrase that is applied to the final collection, adjustment, and distribution of the estate of a decedent, a bankrupt, or an insolvent corporation. It includes the processes of collecting the property, paying the debts and charges, and remitting the balance to those entitled to receive it.

## SETTLEMENT

*The act of adjusting or determining the dealings or disputes between persons without pursuing the matter through a trial.*

In civil lawsuits, settlement is an alternative to pursuing litigation through trial. Typically, it occurs when the defendant agrees to some or all of the plaintiff's claims and decides not to fight the matter in court. Usually, a settlement requires the defendant to pay the plaintiff some monetary amount. Popularly called *settling out of court,* a settlement agreement ends the litigation. Settlement is a popular option for several reasons, but a large number of cases are settled simply because defendants want to avoid the high cost of litigation. Settlement may occur before or during the early stages of a trial. In fact, simple settlements regularly take place before a lawsuit is even filed. In complex litigation, especially CLASS ACTION suits or cases involving multiple defendants, a settlement requires court approval.

Civil lawsuits originate when a claimant decides that another party has caused him or her injury and files suit. The plaintiff seeks to recover damages from the defendant. The defendant's attorney will evaluate the plaintiff's claim. If the plaintiff has a strong case and the attorney believes defendant is likely to lose, the attorney may recommend that the defendant settle the case. By settling, the defendant avoids the financial cost of litigating the case. Trials are often extremely expensive because of the amount of time required by attorneys, and even alternatives to trials, such as mediation and ARBITRATION, can be costly. In deciding whether to settle a claim, attorneys act as intermediaries. The parties to the suit must decide whether to offer, accept, or decline a settlement.

The cost of litigation is only one factor that encourages settlement. Both plaintiffs and defendants are often motivated to settle for other reasons. For one thing litigation is frequently unpleasant. The process of discovery—in which both sides solicit information from each other—can cause embarrassment because considerable personal and financial information must be released. Litigation can also have a harmful impact on the public reputation of the parties. Employers, for example, sometimes settle SEXUAL HARASSMENT claims in order to avoid unwanted media exposure or damage to employee morale.

Like litigation itself, settlement is a process. Generally, the easiest time to settle a dispute is before litigation begins, but many opportunities for settlement present themselves. As litigation advances toward trial, attorneys for both sides communicate with each other and with the court and gauge the relative strength of their cases. If either of the parties believes he is unlikely to prevail, he is likely to offer a settlement to the other party.

Litigation ends when a settlement is reached. The plaintiff typically agrees to forgo any future litigation against the defendant, and the defendant agrees to pay the plaintiff some monetary amount. Additionally, settlements can require the defendant to change a policy or stop some form of behavior.

Often, the exact terms of settlements are not disclosed publicly, particularly in high-profile cases where the defendant is seeking to protect a public reputation. In high-profile cases, settlements are often followed by a public statement by the defendant. It is not unusual for a large company to settle with a plaintiff for an undisclosed amount and then to issue a statement saying that the company did nothing wrong.

In some forms of litigation, settlement is more complex. In class actions, for example, attorneys represent a large group of plaintiffs, known as the class, who typically seek damages from a company or organization. Courts review the terms of a class action settlement for fairness. Complexities also arise in cases involving multiple defendants. In particular, when only

some of the defendants agree to settle, the court must determine the share of liability that accrues to those defendants who choose to pursue litigation.

FURTHER READINGS

Practising Law Institute (PLI). 1996. *Class Action Settlements,* by Roberta D. Liebenberg, Ralph G. Wellington, and Sherrie R. Savett. Corporate Law and Practice Course Handbook series: Financial Services Litigation, PLI order no. B4-7153.

———. 1996. *Settlement,* by Norma Polizzi. Litigation and Administrative Practice Course Handbook Series: Litigation, PLI order no. H4-5247.

———. 1995. *Damages and Settlements in Sex Harassment Cases,* by Richard G. Moon. Litigation and Administrative Practice Course Handbook Series: Litigation, PLI order no. H4-5213.

## SETTLEMENT STATEMENT

*A breakdown of costs involved in a real estate sale.*

Before real estate is sold, federal law requires both the buyer and seller to provide a settlement statement. This official document lists all the costs involved in the sale. A settlement statement is typically prepared by either a lender or a third party known as an escrow agent, who must follow the regulations set forth in the Real Estate Settlement Procedures Act of 1974 (RESPA) (12 U.S.C.A. § 2601 et seq.). RESPA is a CONSUMER PROTECTION law enforced by the federal HOUSING AND URBAN DEVELOPMENT DEPARTMENT (HUD).

Historically, the secondary costs in real estate transactions have been expensive. These costs include broker's fees and appraiser's fees, some of which are required by lenders in real estate deals. Buyers and sellers have not always known the full extent of these costs in advance. Responding to the maze of hidden costs during the early 1970s, both the secretary of HUD and the administrator of Veterans' Affairs petitioned Congress on behalf of reform that would reduce the likelihood of unpleasant surprises for consumers.

RESPA set forth four goals. First, it attempted to improve advance disclosure of settlement costs to home buyers and sellers. Second, it sought to eliminate corruption in the form of kickbacks or referral fees that unfairly inflate settlement costs. Third, it aimed to reduce the amounts home buyers are required to deposit in an escrow account—in this case, a bank account established to ensure the payment of real estate taxes and insurance. Finally, Congress wished to modernize an outmoded system of local record keeping of land title information.

Besides a full accounting of sale costs, RESPA requires lenders to keep settlement statement records for five years or until they dispose of the loan. It provides no civil penalties for lenders who fail to properly disclose information. However, section 8, which includes anticorruption measures, sets forth criminal and civil penalties for illegal referral fees: it is designed to keep intermediaries in the deal from cheating consumers by piling up costs.

In the 1990s the scope of RESPA expanded. Initially RESPA had only covered home purchase loans, but it grew to include refinances and subordinate lien loans with the enactment of the Housing and Community Development Act of 1992 (Pub. L. No. 102-550, 106 Stat. 3672). These changes took effect in 1994 after HUD amended its rules (24 C.F.R. pt. 3500). As a result, lenders providing EQUITY or second mortgage loans, home improvement financing, and mobile home financing came under the regulation of RESPA.

The expansion of RESPA brought complaints from the finance industry about the burden of excess regulation. Yet with the signing of the Housing and Community Development Act by the usually antiregulatory President GEORGE H. W. BUSH, Washington signaled its approval of the benefits for consumers in regulating costs in real estate transactions.

## SETTLOR

*One who establishes a trust—a right of property, real or personal—held and administered by a trustee for the benefit of another.*

## SEVEN BISHOPS' TRIAL

A turning point in the history of ENGLISH LAW, the Seven Bishops' Trial, 12 Howell's State Trials 183 (1688), involved issues of church and state, the authority of the monarchy, and the power of the judiciary. In 1688 King James II brought the proceeding against seven prominent bishops of the Church of England. For defying a controversial order of the king, the prelates were accused of seditious libel, a grave offense that constituted rebellion against the Crown. Their successful defense against the charge helped to encourage the opposition to the king that culminated six months later in the so-called Glorious Revolution of 1688. The king fled, and subsequently

## Settlement Statement

**A. Settlement Statement** | **U.S. Department of Housing and Urban Development** | OMB Approval No. 2502-0265

**B. Type of Loan**

| 1. ☐ FHA 2. ☐ FmHA 3. ☐ Conv. Unins. 4. ☐ VA 5. ☐ Conv. Ins. | 6. File Number: | 7. Loan Number: | 8. Mortgage Insurance Case Number: |
|---|---|---|---|

**C. Note:** This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

| D. Name & Address of Borrower: | E. Name & Address of Seller: | F. Name & Address of Lender: |
|---|---|---|
| | | |

| G. Property Location: | H. Settlement Agent: | |
|---|---|---|
| | Place of Settlement: | I. Settlement Date: |

| **J. Summary of Borrower's Transaction** | | **K. Summary of Seller's Transaction** | |
|---|---|---|---|
| **100. Gross Amount Due From Borrower** | | **400. Gross Amount Due To Seller** | |
| 101. Contract sales price | | 401. Contract sales price | |
| 102. Personal property | | 402. Personal property | |
| 103. Settlement charges to borrower (line 1400) | | 403. | |
| 104. | | 404. | |
| 105. | | 405. | |
| **Adjustments for items paid by seller in advance** | | **Adjustments for items paid by seller in advance** | |
| 106. City/town taxes to | | 406. City/town taxes to | |
| 107. County taxes to | | 407. County taxes to | |
| 108. Assessments to | | 408. Assessments to | |
| 109. | | 409. | |
| 110. | | 410. | |
| 111 | | 411. | |
| 112. | | 412. | |
| **120. Gross Amount Due From Borrower** | | **420. Gross Amount Due To Seller** | |
| **200. Amounts Paid By Or In Behalf Of Borrower** | | **500. Reductions In Amount Due To Seller** | |
| 201. Deposit or earnest money | | 501. Excess deposit (see instructions) | |
| 202. Principal amount of new loan(s) | | 502. Settlement charges to seller (line 1400) | |
| 203. Existing loan(s) taken subject to | | 503. Existing loan(s) taken subject to | |
| 204. | | 504. Payoff of first mortgage loan | |
| 205. | | 505. Payoff of second mortgage loan | |
| 206. | | 506. | |
| 207. | | 507. | |
| 208. | | 508. | |
| 209. | | 509. | |
| **Adjustments for items unpaid by seller** | | **Adjustments for items unpaid by seller** | |
| 210. City/town taxes to | | 510. City/town taxes to | |
| 211. County taxes to | | 511. County taxes to | |
| 212. Assessments to | | 512. Assessments to | |
| 213. | | 513. | |
| 214. | | 514. | |
| 215. | | 515. | |
| 216. | | 516. | |
| 217. | | 517. | |
| 218. | | 518. | |
| 219. | | 519. | |
| **220. Total Paid By/For Borrower** | | **520. Total Reduction Amount Due Seller** | |
| **300. Cash At Settlement From/To Borrower** | | **600. Cash At Settlement To/From Seller** | |
| 301. Gross Amount due from borrower (line 120) | | 601. Gross amount due to seller (line 420) | |
| 302. Less amounts paid by/for borrower (line 220) | ( ) | 602. Less reductions in amt. due seller (line 520) | ( ) |
| **303. Cash** ☐ **From** ☐ **To Borrower** | | **603. Cash** ☐ **To** ☐ **From Seller** | |

Section 5 of the Real Estate Settlement Procedures Act (RESPA) requires the following: • HUD must develop a Special Information Booklet to help persons borrowing money to finance the purchase of residential real estate to better understand the nature and costs of real estate settlement services; • Each lender must provide the booklet to all applicants from whom it receives or for whom it prepares a written application to borrow money to finance the purchase of residential real estate; • Lenders must prepare and distribute with the Booklet a Good Faith Estimate of the settlement costs that the borrower is likely to incur in connection with the settlement. These disclosures are manadatory.

Section 4(a) of RESPA mandates that HUD develop and prescribe this standard form to be used at the time of loan settlement to provide full disclosure of all charges imposed upon the borrower and seller. These are third party disclosures that are designed to provide the borrower with pertinent information during the settlement process in order to be a better shopper.

The Public Reporting Burden for this collection of information is estimated to average one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number. The information requested does not lend itself to confidentiality.

[continued]

*A sample settlement statement*

## Settlement Statement

| L. Settlement Charges | | | Paid From Borrowers Funds at Settlement | Paid From Seller's Funds at Settlement |
|---|---|---|---|---|
| **700. Total Sales/Broker's Commission based on price $** | **@** | **% =** | | |
| Division of Commission (line 700) as follows: | | | | |
| 701. $ to | | | | |
| 702. $ to | | | | |
| 703. Commission paid at Settlement | | | | |
| 704. | | | | |
| **800. Items Payable In Connection With Loan** | | | | |
| 801. Loan Origination Fee | % | | | |
| 802. Loan Discount | % | | | |
| 803. Appraisal Fee | to | | | |
| 804. Credit Report | to | | | |
| 805. Lender's Inspection Fee | | | | |
| 806. Mortgage Insurance Application Fee to | | | | |
| 807. Assumption Fee | | | | |
| 808. | | | | |
| 809. | | | | |
| 810. | | | | |
| 811. | | | | |
| **900. Items Required By Lender To Be Paid In Advance** | | | | |
| 901. Interest from to | @$ | /day | | |
| 902. Mortgage Insurance Premium for | | months to | | |
| 903. Hazard Insurance Premium for | | years to | | |
| 904. | | years to | | |
| 905. | | | | |
| **1000. Reserves Deposited With Lender** | | | | |
| 1001. Hazard insurance | months@$ | per month | | |
| 1002. Mortgage insurance | months@$ | per month | | |
| 1003. City property taxes | months@$ | per month | | |
| 1004. County property taxes | months@$ | per month | | |
| 1005. Annual assessments | months@$ | per month | | |
| 1006. | months@$ | per month | | |
| 1007. | months@$ | per month | | |
| 1008. | months@$ | per month | | |
| **1100. Title Charges** | | | | |
| 1101. Settlement or closing fee | to | | | |
| 1102. Abstract or title search | to | | | |
| 1103. Title examination | to | | | |
| 1104. Title insurance binder | to | | | |
| 1105. Document preparation | to | | | |
| 1106. Notary fees | to | | | |
| 1107. Attorney's fees | to | | | |
| (includes above items numbers: | | ) | | |
| 1108. Title insurance | to | | | |
| (includes above items numbers: | | ) | | |
| 1109. Lender's coverage | $ | | | |
| 1110. Owner's coverage | $ | | | |
| 1111. | | | | |
| 1112. | | | | |
| 1113. | | | | |
| **1200. Government Recording and Transfer Charges** | | | | |
| 1201. Recording fees: Deed $ | ; Mortgage $ | ; Releases $ | | |
| 1202. City/county tax/stamps: Deed $ | ; Mortgage $ | | | |
| 1203. State tax/stamps: Deed $ | ; Mortgage $ | | | |
| 1204. | | | | |
| 1205. | | | | |
| **1300. Additional Settlement Charges** | | | | |
| 1301. Survey to | | | | |
| 1302. Pest inspection to | | | | |
| 1303. | | | | |
| 1304. | | | | |
| 1305. | | | | |
| **1400. Total Settlement Charges (enter on lines 103, Section J and 502, Section K)** | | | | |

**Previous editions are obsolete**

**form HUD-1 (3/86)**
**ref Handbook 4305.2**

*A sample settlement statement (continued)*

England had a new monarchy and a new **BILL OF RIGHTS**. The bishops' challenge to authority and the subsequent expression of popular political will were important precedents that helped to inspire later revolutionaries among the American colonists.

The trial took place against a backdrop of anti-Catholicism. The English Parliament had restricted the rights of Catholics to hold public office and engage in other activities. James II was a devout Catholic, however, and believed that it was his duty to protect the rights of English Catholics. Accordingly, on April 4, 1687, he issued the First Declaration of Indulgence, which suspended the restrictions and led directly to Catholics holding public offices. A year later, on April 27, 1688, James repeated his first order and went further: to better inform the citizenry, he commanded the Anglican clergy to read his Second Declaration of Indulgence in their churches.

The king's order was universally unpopular. Seven senior prelates took action. Led by William Sancroft, the archbishop of Canterbury, they sent the king a petition professing their loyalty to him but also indicating their refusal to read the declaration in church. The petition enraged James, especially since the ostensibly private statement was published throughout the kingdom. Viewing the bishops' petition as an act of rebellion, he began the process of prosecuting them for **SEDITIOUS LIBEL**. In such a case, the accused were required to post a payment called a recognizance or else await trial in prison. This the bishops refused to do, claiming that as members of the House of Lords, they were exempt from paying recognizances. The bishops' claim may have been a bit audacious in that the exemption probably did not extend to such serious offenses. In any event James promptly jailed the bishops in the Tower of London.

At trial both sides argued over the issue of **SEDITION**. The Crown maintained that the bishops should have taken their grievances to the king's courts or appealed to Parliament for action. Their failure to do so amounted to an attempt to incite popular hostility against the king. Lawyers for the bishops argued that they had simply exercised the same rights available to all English subjects. Anyone, they asserted, was free to petition the king when legal rights were infringed. Four judges presided at the trial. In giving their opinion on the law to the jury, they divided equally over whether the bishops had committed seditious libel. Boldly, the jury ruled against the Crown.

*A depiction of the June 1688 release of the Seven Bishops following their acquittal on charges of seditious libel against King James II, one of the first major decisions against an executive branch of government.* BETTMANN/CORBIS

The acquittal of the bishops had immediate and lasting implications. The verdict of not guilty was received with great popular acclaim and contributed to exactly what the king had feared—rebellion. During James's dispute with the bishops, his second wife had given birth to a son. Hitherto James's heir apparent had been Mary, his Protestant daughter from his first marriage, who was married to William of Orange, the ruler of the Netherlands. Now the birth of a son aroused fear that James would be succeeded by a Catholic. Accordingly, a coalition of nobles, encouraged by the popular response to the bishops' acquittal, invited the Protestant William of Orange and Mary to assume the throne. The so-called Glorious Revolution of 1688 saw King James II flee to France, while William and his wife Mary became king and queen. Their appointment by Parliament underscored that institution's supremacy as the maker of law in England; in a short time, the nation had not only new sovereigns but also a new Bill of Rights.

The significance of the Seven Bishops' Trial reached beyond England. Historically, it marked one of the first major decisions against an **EXECUTIVE BRANCH** of government. A jury had nullified what it considered an unjust law. Thus, historians see the case as marking the emancipation of the judiciary from executive control. This

lesson was not lost on the American colonists. They viewed the case as an exercise of popular political will against a tyrannical monarch; as such, it inspired early American republicans (and ultimately revolutionaries) who believed in the decentralization of power.

## SEVENTEENTH AMENDMENT

The Seventeenth Amendment to the U.S. Constitution reads:

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

The Seventeenth Amendment, which was ratified in 1913, provided for the direct election of U.S. senators by citizens. Until 1913 state legislatures had elected U.S. senators. Ratification of the amendment followed decades of insistence that the power to elect senators should be placed in the hands of ordinary voters. This successful struggle marked a major victory for *progressivism*—the early twentieth-century political movement dedicated to pushing government at all levels toward reform. In addition to serving the longer-range goals of the reformers, the campaign on behalf of the amendment sought to end delays and what was widely perceived as corruption in the election of senators by state legislatures.

From 1787 until 1913, the U.S. Constitution specified that state legislatures would elect U.S. senators. Article 1, Section 3, reads:

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

In giving the elective power to the states, the framers of the Constitution hoped to protect state independence. The framers were suspicious of majority rule and sought to restrain what they regarded as the potentially destructive forces of democracy. Thus, while providing for direct election to the House of Representatives, they countered this expression of the people's will by allowing legislatures to select members of the Senate. At the Constitutional Convention, the proposal for state election of senators aroused no controversy. Only one proposal for senatorial election by popular vote was offered, and it was soundly defeated. The states were receptive and did not protest when the Constitution was sent to them for ratification. Nor, over the next decades, did the system incur more than occasional criticism.

By the late nineteenth century, however, political opinion was changing in favor of a more fully participatory democracy. Starting in the 1880s, the concentration of elective power in the hands of state legislatures provoked criticism. The critics complained that the legislatures were dominated by party bosses who prevented citizen participation and thwarted popular political action. The critics also pointed to practical and ethical problems: lengthy deadlocks, which sometimes resulted when legislatures could not agree upon a candidate, and alleged BRIBERY. Progressivism, the reform movement that sought to address social inequities by broadening government power, helped to bring about this change in outlook. Under the pressure of the Progressive movement and the popular belief that citizens were capable of choosing their own senators, the states began to bend. By the turn of the century, several states were holding popular elections that served as advisories to the legislatures in selecting senators.

Over the next decade, increasing calls for change reached Congress, where the resistance to change was considerable. Federal lawmakers argued that direct election would strip states of their independence and sovereignty. The pressure continued to increase, however, until by 1910, thirty-one state legislatures had requested that Congress hold a constitutional convention to propose an amendment. The next year Congress buckled and passed the amendment; within two years, the amendment had been ratified by the states. It read, in relevant part:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote.

Only ten states opposed ratification.

Ratification of the Seventeenth Amendment introduced significant changes to Congress. When states elected senators, they exercised the power of *instruction*—they could direct their senators to vote a certain way on important matters. The Seventeenth Amendment formally ended this power, for now senators were beholden to the voters. Historians and legal scholars continue to debate the other effects of the amendment. Some view it as a grave surrender of state sovereignty; others see it as a benign or even positive outgrowth of popular will. Direct election has seemingly contributed to the decline in the power of party bosses, but its impact upon the actual practice of Senate business has been negligible.

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Congress of the United States.

## SEVENTH AMENDMENT

The Seventh Amendment to the U.S. Constitution reads:

> In suits at **COMMON LAW**, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

The Seventh Amendment to the U.S. Constitution guarantees the right to a jury trial in most civil suits that are heard in federal court. However, before the Seventh Amendment right to a jury trial attaches, a lawsuit must satisfy four threshold requirements. First, it must assert a claim that would have triggered the right to a jury trial under the English common law of 1791, when the Seventh Amendment was ratified. If a lawsuit asserts a claim that is sufficiently analogous to an eighteenth-century English common-law claim, a litigant may still invoke the Seventh Amendment right to a jury trial even though the claim was not expressly recognized in 1791 (*Markman v. Westview Instruments,* 517 U.S.370, 116 S. Ct. 1384, 134 L. Ed. 2d 577 [1996]). Claims brought under a federal statute that confer a right to trial by jury also implicate the Seventh Amendment (*Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry,* 494 U.S. 558, 110 S. Ct. 1339, 108 L. Ed. 2d 519 [1990]).

Second, a lawsuit must be brought in federal court before a litigant may invoke the Seventh Amendment right to a jury trial. This right is one of the few liberties enumerated in the **BILL OF RIGHTS** that has not been made applicable to the states through the doctrine of selective incorporation (*Minneapolis & St. Louis Railroad v. Bombolis,* 241 U.S. 211, 36 S. Ct. 595, 60 L. Ed. 961 [1916]). The Seventh Amendment does not apply in state court even when a litigant is enforcing a right created by federal law. However, most state constitutions similarly afford the right to trial by jury in civil cases.

Third, a lawsuit must assert a claim for more than $20. Because nearly all lawsuits are filed to recover much larger sums, this provision of the Seventh Amendment is virtually always met.

Fourth, a lawsuit must assert a claim that is essentially legal in nature before the Seventh Amendment applies. There is no right to a jury trial in civil actions involving claims that are essentially equitable in nature (*Tull v. United States,* 481 U.S. 412, 107 S. Ct. 1831, 95 L. Ed. 2d 365 [1987]). Lawsuits that seek injunctions, **SPECIFIC PERFORMANCE**, and other types of nonmonetary remedies are traditionally treated as equitable claims. Lawsuits that seek money damages, conversely, are traditionally treated as legal claims. However, these traditional categories of law and **EQUITY** are not always neatly separated.

If the monetary relief sought is only "incidental" to an equitable claim for an **INJUNCTION**, the right to a jury trial will be denied (*Stewart v. KHD Deutz of America,* 75 F.3d 1522 [11th Cir. 1996]). Even if a lawsuit is couched in terms of a legal claim for monetary relief, a court will deny a litigant's request for a jury trial if an

essentially equitable claim is being asserted. Lawsuits seeking restitution, though representing claims for monetary reimbursement, have been treated as equitable claims for the purposes of the Seventh Amendment (*Provident Life and Accident Insurance v. Williams,* 858 F. Supp. 907 [W.D. Ark. 1994]). On the other hand, an employee's action for back pay under Title VII of the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. §§ 2000e et seq.) represents a legal claim despite the fact that the statute characterizes the remedy as equitable (*Local No. 391 v. Terry*).

When a lawsuit involves mixed QUESTIONS OF LAW and equity, litigants may present the legal questions to a jury under the Seventh Amendment, while leaving the equitable questions for judicial resolution (*Snider v. Consolidation Coal Co.,* 973 F.2d 555 [7th Cir. 1992]). For example, an action to recover attorneys' fees pursuant to a written agreement normally would be decided by a jury in accordance with the common law of contracts. However, in a subsequent proceeding to determine the amount of attorneys' fees owed, equitable principles of accounting would normally be applied by a judge alone (*McGuire v. Russell Miller, Inc.,* 1 F.3d 1306 [2nd Cir. 1993]). Any factual determinations made by the jury in the first proceeding would be binding on the judge during the second proceeding (*Lebow v. American Trans Air,* 86 F.3d 661 [7th Cir. 1996]).

Some types of lawsuits present issues that are neither wholly legal nor entirely equitable. In many such cases, the Seventh Amendment offers no protection. For example, there is no right to trial by jury for lawsuits that involve issues of maritime law or ADMIRALTY rights (*Parsons v. Bedford,* 28 U.S. [3 Pet.] 433, 7 L. Ed. 732 [1830]). Nor is the Seventh Amendment implicated in proceedings that relate to the naturalization (*Luria v. United States,* 231 U.S. 9, 34 S. Ct. 10, 58 L. Ed. 101 [1913]) or deportation (*Gee Wah Lee v. United States,* 25 F.2d 107 [5th Cir. 1928]), of ALIENS. Litigants also have no Seventh Amendment right to trial by jury in lawsuits brought against the federal government (*Lehman v. Nakshian,* 453 U.S. 156, 101 S. Ct. 2698, 69 L. Ed. 2d 548 [1981]).

The underlying rationale of the Seventh Amendment was to preserve the historic line separating the province of the jury from that of the judge in civil cases. Although the line separating questions of law from QUESTIONS OF FACT is often blurred, the basic functions of judges and juries are clear. Judges are charged with the responsibility of resolving issues concerning the admissibility of evidence and instructing jurors regarding the pertinent laws governing the case. Judges are also permitted to comment on the evidence, highlight important issues, and otherwise express their opinions in open court as long as each factual question is ultimately submitted to the jury. However, a judge may not interject her personal opinions or observations to such an extent that they impair a litigant's right to a fair trial (*Rivas v. Brattesani,* 94 F.3d 802 [2nd Cir. 1996]).

Juries perform three main functions. First, jurors are charged with the responsibility of listening to the evidence, ascertaining the relevant facts, and drawing reasonable inferences that are necessary to reach a verdict. Second, jurors are required to heed the instructions read by the court and apply the governing legal principles to the facts of the case. Third, jurors are obliged to determine the legal consequences of the litigants' behavior through the process of group deliberation and then publicly announce their verdict.

The Seventh Amendment expressly forbids federal judges to "re-examin[e]" any "fact tried by a jury" except as allowed by the common law. This provision has been interpreted to mean that no court, trial or appellate, may overturn a jury verdict that is reasonably supported by the evidence (*Taylor v. Curry,* 17 F.3d 1434 [4th Cir. 1994]). A jury must be allowed to hear a lawsuit from start to finish unless it presents a legal claim that is completely lacking an evidentiary basis (*Gregory v. Missouri Pacific Railroad,* 32 F.3d 160 [5th Cir. 1994]).

Together with the DUE PROCESS CLAUSE of the FIFTH AMENDMENT, the Seventh Amendment guarantees civil litigants the right to an impartial jury (*McCoy v. Goldston,* 652 F.2d 654 [6th Cir. 1981]). A juror's impartiality may be compromised by communications with sources outside the courtroom, such as friends, relatives, and members of the media. The presence of even one partial, biased, or prejudiced juror creates a presumption that the Seventh Amendment has been violated (*Haley v. Blue Ridge Transfer Co.,* 802 F.2d 1532 [4th Cir. 1986]). A litigant seeking to overcome this presumption bears a heavy burden to establish the harmlessness of an unauthorized jury communication. In *Haley,* for example, the Supreme Court overturned a verdict against the defendant because

jurors had communicated with an outside source who attempted to persuade them to side with the plaintiff.

Although every juror must be impartial, there is no Seventh Amendment right to a jury of 12 persons. In *Colgrove v. Battin,* 413 U.S. 149, 93 S. Ct. 2448, 37 L. Ed. 2d 522 (1973), the Supreme Court ruled that the quality of the deliberation process is not impaired when the size of a jury is reduced from 12 to six members. The Court cited one study suggesting that smaller juries promote more robust deliberations. Regardless of a jury's size, the Seventh Amendment requires unanimity among jurors who hear civil cases in federal court (*Murray v. Laborers Union Local No. 324,* 55 F.3d 1445 [9th Cir. 1995]). By contrast, the SIXTH AMENDMENT to the Constitution does not require juror unanimity in criminal trials, except in death penalty cases.

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CROSS-REFERENCES

Incorporation Doctrine.

## SEVERABLE

*That which is capable of being separated from other things to which it is joined and maintaining nonetheless a complete and independent existence.*

The term *severable* is used to describe a contract that can be divided and apportioned into two or more parts that are not necessarily dependent upon each other. For example, a seller accepted a buyer's order for sixty dozen hats and caps of different sizes and colors. He shipped all but five dozen to the buyer, who then refused to accept the order. The seller brought an action against the buyer for breach of contract. There was no evidence to show that the contract called for delivery of the whole order at one time. The court held that the buyer could not escape liability because the seller had failed to ship five dozen hats and caps, since the order calling for hats and caps of different patterns, sizes, and colors constituted a "severable contract."

The term *severable* is also used in connection with statutes. A severable statute is one that after an invalid portion of it has been stricken remains self-sustaining and capable of separate enforcement without regard to the stricken provisions.

## SEVERAL

*Separate; individual; independent.*

In this sense, the word *several* is distinguished from joint. When applied to a number of persons, the expression *severally liable* usually implies that each person is liable alone.

CROSS-REFERENCES

Joint and Several Liability.

## SEVERALTY OWNERSHIP

*Sole proprietorship of property; individual dominion.*

## SEVERANCE

*The act of dividing, or the state of being divided.*

The term *severance* has unique meanings in different branches of the law. Courts use the term in both civil and criminal litigation in two ways: first, when dividing a lawsuit into two or more parts, and second, when deciding to try multiple defendants' cases separately. In addition, severance also describes several actions relevant to property and EMPLOYMENT LAW.

In civil suits severance refers to the division of a trial into two or more parts. Plaintiffs in civil suits base their cases on a cause of action—facts that give the plaintiff the right to sue. For reasons of judicial economy, the court may order the lawsuit divided into two or more independent causes of action. This type of severance occurs only when each distinct CAUSE OF ACTION could be tried as if it were the only claim in controversy. As a result of severance, the court renders a separate, final, and enforceable judgment on each cause. A second type of severance occurs in cases involving multiple defendants. The court may sever one or more defendants from the trial and try their cases separately.

Severance works somewhat differently in federal criminal trials. When these cases involve the indictment of more than one defendant, usually only one trial is held. This process is

called JOINDER. Rule 8 of the Federal Rules of Criminal Procedure permits the joinder of the indictments of two or more defendants if they are alleged to have participated in the same act or transaction. For policy reasons courts prefer using joinder to holding separate trials because it saves time and money. However, joinder can create potential prejudices against a defendant, resulting in greater likelihood of conviction, and thus a defense attorney will often ask the court to sever his client's case. Less often, the prosecution requests severance because it believes joinder will prejudice its case. Severance results in a defendant being tried separately on one or all of the pending charges.

Severance is not automatic. Federal rule 14 allows judges broad discretion in deciding whether to grant severance. To be successful, a defense motion for severance must show that concerns for the defendant's right to a fair trial outweigh the goals of joinder. Concerns for judicial economy and efficiency make trial courts reluctant to grant severance, and rarely do appellate courts overturn a lower court decision to refuse severance. One of the most successful grounds for seeking severance arises when a defendant wishes not to testify on all counts in a trial but chooses to claim her FIFTH AMENDMENT privilege on one or more counts.

In property and employment law severance is used in several different contexts. First, it applies to JOINT TENANCY, a form of shared ownership of real property. Joint tenancy requires each tenant to share in the four unities of time, title, interest, and possession. When any of these unities no longer applies to any or all of the joint tenants, the joint tenancy is said to be severed, and the tenancy is terminated. Second, in regard to real property, severance is the cutting and removal of anything that is attached to the land, such as standing timber or crops. Third, severance is used when the government exercises its power to take private property for public use through the right of EMINENT DOMAIN. If only part of the property is taken and the value of the remaining property depreciates because of the government's proposed use of the taken share, the owner is entitled to compensation called severance damage. Fourth, severance pay is an amount of money paid to employees upon the termination of their employment. It is usually based on the employee's salary and duration of employment.

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## SEX DISCRIMINATION

*Discrimination on the basis of gender.*

Women have historically been subjected to legal discrimination based on their gender. Some of this discrimination has been based on cultural stereotypes that cast women primarily in the roles of wives and mothers. In the patriarchal (male-dominated) U.S. society, women have been viewed as the "weaker sex," who needed protection from the rough-and-tumble world outside their homes. Such beliefs were used as justifications for preventing women from voting, holding public office, and working outside the home. In a culture that portrayed wives as appendages of their husbands, women have often been invisible to the law.

The ability of women to use the law to fight sex discrimination in employment, education, domestic relations, and other spheres is a recent development. With the passage of Title VII of the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000e et seq.), discrimination in employment based on sex became illegal. In the 1970s and 1980s, the U.S. Supreme Court began to wrestle with the implications of sex discrimination in many contexts, often with conflicting or ambiguous results. Employers and social institutions have sought to justify discriminatory treatment for women on the basis of long-held traditions. In some cases the Court has agreed, while in others the justifications have been dismissed as cultural stereotypes that have no basis in fact.

### Historical Background

To reshape gender roles, women have had to overcome centuries of tradition, much of which originated in medieval England. After the Norman Conquest in 1066, the legal status of a married woman was fixed by COMMON LAW. The identity of the wife was merged into that of the husband; he was a legal person but she was not. Upon marriage, he received all her PERSONAL PROPERTY and managed all property that she owned. In return, the husband was obliged to support his wife and children.

This legal definition of marriage persisted in the United States until the middle of the nineteenth century, when states enacted married women's property acts. These acts conferred

# Sex Discrimination and Title VII: An Unusual Political Alliance

The legislative battle to pass the **CIVIL RIGHTS ACT OF 1964** (42 U.S.C.A. § 2000e et seq.) required the leadership of President **LYNDON B. JOHNSON** and the bipartisan support of legislators from outside the South. The original draft of title VII of the act, which prohibits employment discrimination, limited its scope to discrimination based on race, color, religion, and national origin. Sex was not included as a "protected class" because supporters of the bill feared such a provision might kill the act itself.

In February 1964 Representative Howard W. Smith, a powerful Democrat from Virginia, offered an amendment to include sex as a protected class. Supporters of the bill were suspicious of Smith's motives, as he had, for three decades, consistently opposed **CIVIL RIGHTS** laws prohibiting racial discrimination. Many suspected that he was including sex discrimination in title VII in an attempt to break the bipartisan consensus for the entire bill.

Smith, however, claimed he had no ulterior motive. Since the 1940s he had formed a loose alliance with the National Woman's party (NWP), a feminist organization headed by **ALICE PAUL**. Since 1945 Smith had been a sponsor of the **EQUAL RIGHTS AMENDMENT**, which Paul had originally drafted in 1923. Smith said he had introduced the amendment to title VII at the request of Paul and the NWP.

Sponsors of the bill urged that the amendment be defeated, but female representatives, such as Martha W. Griffiths of Michigan, led a bipartisan effort to adopt the amendment. The amendment was passed by a vote of 164 to 133, with most southern Democrats voting for it. The Senate then adopted the House language. If Smith and the other southerners thought the amendment would scuttle the bill, they were mistaken. The law was enacted on July 2, 1964, with Smith and other southern Democrats voting against the entire bill. Nevertheless, Smith had proved an unlikely hero for **WOMEN'S RIGHTS**.

legal status upon wives and permitted them to own and transfer property in their own right, to sue and be sued, and to enter into contracts. Although these acts were significant advances, they dealt only with property a woman inherited. The husband, by placing title in his name, could control most of the assets acquired during marriage, thereby forcing his wife to rely on his bounty.

The passage of the married women's property acts resulted from the efforts of feminist reformers, including LUCY STONE, ELIZABETH CADY STANTON, and SUSAN B. ANTHONY. The feminist political movement began in the nineteenth century with the call for female suffrage. At a convention in Seneca Falls, New York, in 1848, a group of women and men drafted and approved the Declaration of Sentiments. This declaration, which was modeled on the language and structure of the Declaration of Independence, was a BILL OF RIGHTS for women, including the right to vote. Stone, Stanton, and Anthony were persistent critics of male refusal to grant women political and social equality. Not until the NINETEENTH AMENDMENT to the U.S. Constitution was ratified in 1920, however, did women have VOTING RIGHTS in the United States.

The U.S. Supreme Court confronted the issue of sex discrimination in *Bradwell v. Illinois,* 83 U.S. 130, 21 L. Ed. 442 (1872). MYRA BRADWELL sought to practice law in Illinois, but the Illinois Supreme Court refused to admit her to the bar because she was a woman. Bradwell appealed to the U.S. Supreme Court, arguing that the refusal to grant her a license violated the PRIVILEGES AND IMMUNITIES CLAUSE of the FOURTEENTH AMENDMENT. By an 8–1 vote, the Court rejected Bradwell's argument. Though the majority opinion was on the argument that the Privileges and Immunities Clause applied only to matters involving U.S. citizenship and not state citizenship, a concurring opinion written by Justice JOSEPH P. BRADLEY and signed by two

other justices revealed the cultural stereotypes that lay behind the legal analysis. Observing that there is "a wide difference in the respective sphere and destinies of man and woman," Bradley went on to write that the "natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." For Bradley, the "paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

By the late nineteenth century, mass immigration from Europe to the industrialized cities of the United States had resulted in many immigrant women seeking work in factories. Though the Supreme Court was hostile to state laws that sought to regulate working conditions, the Court was more hospitable to laws aimed at protecting women in the workplace. The idea that women were the weaker sex and needed special treatment constituted discrimination based on sex, but the Court willingly embraced the concept. The landmark case in this regard was *Muller v. Oregon,* 208 U.S. 412, 28 S. Ct. 324, 52 L. Ed. 551 (1908). The Court upheld an Oregon law that prohibited the employment of women for more than ten hours a day, in large part because of the brief submitted in support of the law by LOUIS D. BRANDEIS. The brief contained information about the possible injurious effects of long work hours on women's health and morals, as well as on the health and welfare of their children, including their unborn children. Brandeis emphasized the differences between women and men. The Court unanimously agreed, noting that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence."

WORLD WAR II played a decisive role in changing the social status of women. Large numbers of women left the home and entered the industrial workplace when men joined the ARMED SERVICES. Many women performed jobs that were previously thought to be beyond their physical and mental abilities. Though these women were unceremoniously fired after the war to free up jobs for returning servicemen, many traditional social assumptions about women had been shaken.

By the 1970s women had begun to compete with men for managerial and professional positions. Nevertheless, sex discrimination in employment and other areas of U.S. society remained a troubling issue. Congress, state legislatures, and the courts began to address the legality of this type of discrimination.

### Sex Discrimination Laws

The first significant piece of federal legislation that dealt with sex discrimination was the Equal Pay Act (EPA) of 1963 (29 U.S.C.A. § 206(d)), which amended the FAIR LABOR STANDARDS ACT of 1938 (29 U.S.C.A. §§ 201–219) by prohibiting discrimination in the form of different compensation for jobs requiring equal skill, effort, and responsibility.

The inclusion of a prohibition against gender-based discrimination in Title VII of the Civil Rights Act of 1964 was a landmark achievement, though the provision was added by opponents of the comprehensive act in a last-minute attempt to prevent its passage. Title VII defines sex discrimination in employment as including failure or refusal to hire, discrimination in discharge, classification of employees or applicants so as to deprive individuals of employment opportunities, discrimination in apprenticeship and on-the-job training programs, retaliation for opposition to an unlawful employment practice, and sexually stereotyped advertisements relating to employment (42 U.S.C.A. §§ 2000e-2(a) & (d), 2000e-3(a) & (b)).

The Pregnancy Discrimination Act (PDA) of 1978 (42 U.S.C.A. § 2000e(k)) was the congressional response to the ruling of the Supreme Court in *General Electric Co. v. Gilbert,* 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976), that an employer's refusal to grant pregnancy disability benefits under an otherwise all-inclusive short-term disability insurance program did not violate Title VII. The PDA prohibits discrimination against employees on the basis of pregnancy and childbirth with respect to employment and benefits.

In an interesting twist, men have found themselves the victims of sex discrimination when the issue of pregnancy and CHILD CARE arises. The case of Kevin Knussman provides a cautionary tale for men and women who are planning to become parents. Knussman, a 17-year veteran of the Maryland State Police, asked for a leave of absence from work in October 1994, a leave to which he was entitled under the Family and Medical Leave Act (Pub. L. 103-93, 1993). He asked for four to eight weeks of unpaid leave but was turned down. In November, his wife was hospitalized with complications

from the pregnancy, and he again asked for leave. He was informed that a new state law allowed only ten days of unpaid leave for "secondary caregiver," which was how he was viewed by his employer unless his wife was severely incapacitated. Knussman was told that if he did not return to work after the ten-day period his job would be in jeopardy.

Knussman filed federal suit in April 1995 against his employer (*Knussman v. Ste of Maryland,* No. B-95-1255), claiming that his rights under FMLA had been violated—as had his Fourteenth Amendment right of equal protection under the law. After nearly four years, during which the Maryland State Police claimed that they had merely been confused by the new statute, a jury awarded Knussman $375,000 for emotional suffering. Interestingly, during this time the Knussmans had a second child, and Knussman's request for 12 weeks of paid leave was granted.

Other legislation aimed at eradicating sex-based discrimination was also passed during this era. The Equal Credit Opportunity Act (15 U.S.C.A. § 1691) prohibits discrimination on the basis of sex or marital status in the extension of credit. Title IX of the Education Amendments of 1972 (20 U.S.C.A. §§ 1681–1686) prohibits educational institutions receiving federal financial assistance from engaging in sex discrimination, including the exclusion of individuals from noncontact team sports on the basis of sex. (In 1982 the Supreme Court extended this prohibition to sex-stereotyped admissions and employment practices of schools.)

### The Equal Rights Amendment

The boldest attempt to outlaw sex discrimination was Congress's passage in 1972 of a constitutional amendment, popularly known as the EQUAL RIGHTS AMENDMENT (ERA). The ERA, which had originally been introduced in Congress in 1928, stated that "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." It gave Congress the authority to enforce this provision by appropriate legislation.

The ERA, like all constitutional amendments, had to be ratified by at least three-fourths of the states to become part of the Constitution. At first the amendment was met with enthusiasm and little controversy in the state legislatures. By 1976 the ERA had been ratified by 35 of the needed 38 states. In the late 1970s, however, conservative groups mounted strong opposition in those states that had yet to ratify. Opponents contended that the ERA would lead to women in combat, unisex bathrooms, and the overturning of legitimate sex-based classifications. Although Congress extended the period for ratification until 1982, the ERA ultimately failed to win approval from the required 38 states.

*Kevin Knussman, with his wife Kim (seated) and ACLU lawyer Sara Mandelbaum, won a four-year legal battle with the Maryland State Police who had denied him unpaid parental leave during the latter stages of his wife's pregnancy in 1994.* AP/WIDE WORLD PHOTOS

### Judicial Review of Sex-Based Discrimination

With the defeat of the ERA, constitutional interpretation in the area of sex discrimination has been largely based on the Fourteenth Amendment. In 1971, in *Reed v. Reed,* 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225, the Supreme Court extended the application of the EQUAL PROTECTION CLAUSE of the Fourteenth Amendment to gender-based discrimination in striking down an Idaho law that preferred men to women as probate administrators.

In *Reed* the Court appeared to be moving toward making sex a "suspect classification" under the Fourteenth Amendment. The SUSPECT CLASSIFICATION doctrine holds that laws classifying people according to race, ethnicity, and religion are inherently suspect and are subject to the STRICT SCRUTINY test of JUDICIAL REVIEW. Strict scrutiny forces the state to provide a compelling state interest for the challenged law and demonstrate that the law has been narrowly tailored to achieve its purpose. Although strict scrutiny is not a precise test, it is far more stringent than the traditional RATIONAL BASIS TEST, which requires only that the government offer a

**Leading Occupations for Women, in 2001**

| Occupation | Total Employed (Men and Women) | Percent Women | Ratio of Women's Earnings to Men's Earnings |
|---|---|---|---|
| Managers and administrators | 8,018 | 31.0 | 65.5 |
| Secretaries | 2,404 | 98.4 | N.A. |
| Cashiers | 2,974 | 76.9 | 89.3 |
| Registered nurses | 2,162 | 93.1 | 87.9 |
| Sales supervisors and proprietors | 4,836 | 41.1 | 70.5 |
| Nursing aides, orderlies, and attendants | 2,081 | 90.0 | 89.7 |
| Elementary school teachers | 2,216 | 82.5 | 94.9 |
| Bookkeepers, accounting and auditing clerks | 1,621 | 92.9 | 93.7 |
| Waiters and waitresses | 1,347 | 76.4 | 87.3 |
| Receptionists | 1,047 | 96.9 | N.A. |
| Accountants and auditors | 1,657 | 58.8 | 72.0 |
| Investigators and adjusters, excluding insurance | 1,171 | 75.0 | 89.4 |
| Hairdressers and cosmetologists | 854 | 90.4 | N.A. |
| Secondary school teachers | 1,304 | 58.5 | 91.9 |
| General office clerks | 903 | 83.7 | 96.0 |

SOURCE: U.S. Department of Labor, Women's Bureau, *20 Leading Occupations of Employed Women*, 2001.

reasonable ground for the legislation. Therefore, making sex a suspect classification would have dramatically improved the chances that sex-based laws would be struck down.

The Supreme Court, however, has declined to make sex a suspect classification. Nevertheless, it has invalidated a number of sex-based policies under a "heightened scrutiny" or "intermediate scrutiny" test. In *Craig v. Boren,* 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), the Court articulated its intermediate standard of review for sex-based policies. According to this test, "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." Presumably, this test is stricter than the rational basis test but less strict than the compelling state interest test.

In *Craig* the Court struck down an Oklahoma law that outlawed the sale of beer containing less than 3.2 percent alcohol to females under the age of 18 and males under the age of 21. Oklahoma argued that the law was a public safety measure and purported to show that men between 18 and 21 were more likely to be arrested for drunk driving than were women in the same age bracket. The Court rejected this argument, holding that the state had failed to demonstrate a substantial relationship between its sexually discriminatory policy and its admittedly important interest in traffic safety.

In *Orr v. Orr,* 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979), the Court reviewed an Alabama law that required divorced men, under certain circumstances, to make ALIMONY payments to their ex-wives but exempted women in the same circumstances from paying alimony to their ex-husbands. The state argued that this policy was designed to compensate women for economic discrimination produced by the institution of marriage. Though the Court accepted that such compensation was an important state interest, it concluded that the law was not substantially related to the achievement of this objective. Justice WILLIAM J. BRENNAN JR., in his majority opinion, pointed out that wives who were not dependent on their husbands benefited from the disparate treatment.

In other cases, however, the Court has upheld gender-based policies. In one of its most controversial decisions, ROSTKER V. GOLDBERG, 453 U.S. 57, 101 S. Ct. 2646, 69 L. Ed. 2d 478 (1981), the Court upheld the constitutionality of a male-only draft registration law, the Military Selective Service Act (MSSA) of 1980 (50 U.S.C.A. App. § 451 et seq.). In his majority opinion, Justice WILLIAM REHNQUIST rejected the idea that the MSSA violated the FIFTH AMENDMENT by authorizing the president to require the registration of males and not females. Rehnquist noted that the statute involved national defense and military affairs, an area that the Court had

accorded the greatest deference. He concluded that Congress had not acted unthinkingly or reflexively in rejecting the registration of women. He pointed out that the question had received national attention and was the subject of public debate in and out of Congress.

Rehnquist noted that "women as a group, unlike men as a group, are not eligible for combat" under statute and established policy. These combat restrictions meant that Congress had a legitimate basis for concluding that women "would not be needed in the event of a draft." Therefore, there was no need to register women. The law did not violate equal protection because the exemption of women from registration was closely related to the congressional purpose of registration as a way to "develop a pool of potential combat troops." In upholding the draft law, the Court avoided applying the intermediate scrutiny test.

### Sex Discrimination by Educational Institutions

Numerous state-operated or publicly operated or supported educational institutions have limited enrollment to one sex. The Supreme Court first addressed whether such limitations on enrollment constituted sex discrimination in *Mississippi University for Women v. Hogan,* 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982). The Court voted 5 to 4 to require the Mississippi University for Women to admit a male student to its nursing school. In defending its refusal to admit Joe Hogan, the school argued that having a school solely for women compensated for sex discrimination in the past and that the presence of men would detract from the performance of female students.

Writing for the majority, Justice SANDRA DAY O'CONNOR rejected both of the school's arguments. O'Connor rejected the "compensation" argument as contrived since the school had made no showing that women had historically lacked opportunities in the field of nursing. As for the concern that the presence of men would hurt the performance of female students, O'Connor pointed out that the school had been willing to admit Hogan to classes on a noncredit basis. In the Court's view, the principal effect of the female-only nursing program was to "perpetuate the stereotyped view of nursing as an exclusively woman's job."

In 1996 the Supreme Court again addressed the issue of educational sex discrimination in the highly publicized case of UNITED STATES V. VIRGINIA, U.S., 116 S. Ct. 2264, 135 L. Ed. 2d 735. The Court ruled that the Virginia Military Institute (VMI), a publicly funded military college, must give up its all-male enrollment policy and admit women. The all-male policy violated the Equal Protection Clause of the Fourteenth Amendment.

The lower federal courts had upheld the VMI admission policy, basing their decision on the need to preserve the "VMI experience," a physically and emotionally demanding military regimen that has remained the same since the early nineteenth century. Co-education would prevent both men and women from undergoing the "VMI experience" and would distract the male cadets. During the litigation the state of Virginia proposed the establishment of a parallel program for women, called the Virginia Women's Institute for Leadership (VWIL), with VMI remaining an all-male institution.

The Supreme Court rejected the arguments advanced by the courts below. Justice RUTH BADER GINSBURG, writing for the majority, stated that "Neither the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women." Ginsburg rejected Virginia's contention that single-sex education yields such important educational benefits that it justified the exclusion of women from VMI. The generalizations about the differences between men and women that the state offered to justify the exclusion of women were suspect. According to Ginsburg, the generalizations were too broad and stereotypical, with the result that predictions about the downgrading of VMI's stature if women were admitted were no more than self-fulfilling prophecies. The categorical exclusion of women from VMI denied equal protection to women.

The Court was also unimpressed with the creation of the VWIL as a remedy for the constitutional violation of equal protection. Justice Ginsburg noted numerous deficiencies, pointing out that VWIL afforded women no opportunity to "experience the rigorous military training for which VMI is famed."

### Sex Discrimination to Protect Fetal Health

In the 1980s female employees in certain industries complained that they were barred from certain jobs because the employer believed the jobs exposed women to health hazards that

could affect their ability to reproduce and could also affect the health of a fetus. The Supreme Court, in *UAW v. Johnson Controls,* 499 U.S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991), ruled that a female employee cannot be excluded from jobs that expose her to health risks that might harm a fetus she carries. The Court found that the exclusion of the women violated Title VII of the Civil Rights Act of 1964 because the company policy applied only to fertile women, not fertile men. The Court noted that the policy singled out women on the basis of gender and childbearing capacity rather than on the basis of fertility alone. If a job presented potential dangers to the worker or the worker's fetus, it was up to the worker to decide whether to accept the position.

### Gender Bias in the Courts

Beginning in the 1980s, many state court systems have established task forces to investigate the existence of gender bias in the courts. The reports of these task forces have documented sex discrimination, with its victims more often women than men. The task forces have found that much gender-biased behavior is unconscious and that the manifestations of bias, although often subtle, are deeply ingrained in state judicial systems. For example, the studies have noted the existence of stereotypes concerning victims of DOMESTIC VIOLENCE and sexual assault; many judges believe that women who are beaten by a spouse or raped have provoked the attack. These studies also have shown that judges do not always treat men and women equally in the courtroom. For example, judges may identify women appearing before them by their first name but use professional titles or "Mister" when addressing men. In response to these findings, states have set up judicial educational programs on the dangers of gender-based stereotypes and have modified judges' and lawyers' codes of conduct to explicitly prohibit gender-biased behavior. These task forces have also recommended that more women be appointed to the bench.

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## SEX OFFENSES

*A class of sexual conduct prohibited by the law.*

Since the 1970s this area of the law has undergone significant changes and reforms. Although the commission of sex offenses is not new, public awareness and concern regarding sex offenses have grown, resulting in the implementation of new RULES OF EVIDENCE and procedure, new police methods and techniques, and new approaches to the investigation and prosecution of sex offenses.

### Forcible Sex Offenses

Forcible rape and SODOMY are sexual offenses that have been widely recognized since the beginning of American COMMON LAW. Rape was defined as an act of forcible sexual intercourse with a female other than the perpetrator's wife. Modern legislation in the United States has expanded that definition to include the act of forcible sexual intercourse with any person, even the spouse of the actor. The offense of rape combines the crime of assault (fear of imminent bodily harm) with the elements of fornication (sexual intercourse between two unmarried persons) or ADULTERY (sexual intercourse with someone other than the actor's spouse).

Sodomy is defined as anal intercourse but is often used in the law as a generic classification including bestiality (sexual intercourse with an animal) and fellatio and cunnilingus (two forms of oral sex). These forms of sexual conduct were outlawed because widely accepted religious beliefs and moral principles dictate that they are unnatural forms of sexual activity, often called "crimes against nature." Forcible rape and sodomy are generally perceived as similarly grave offenses.

Most state criminal statutes require some physical penetration in order to consummate the crime of rape or sodomy, but many statutes

have a low threshold for demonstrating penetration, calling only for a showing of "some penetration, however slight." Completion of the sex act as evidenced by orgasm, ejaculation, or achievement of sexual gratification, however, is not required to prove a rape or sodomy case.

Most forcible sex offense statutes do require some forcible compulsion to submit and earnest resistance. However, courts will consider the circumstances of the attack, including the characteristics of the perpetrator and the victim, the presence of a weapon, threats of harm, and the assault itself, in assessing the victim's resistance. Statutes do not require victims to resist if to do so would be futile or dangerous.

Although modern statutes have eliminated the marital rape exception, some states still have some form of restrictions in the prosecution of the crime of marital rape. For example, some states will only prosecute marital rape claims if the couple is legally separated or have filed for DIVORCE. However, due to legal criticism and growing public awareness of spousal abuse, the trend in the United States is toward the elimination of all exceptions to the prosecution of these crimes.

In the 1990s, the public became more aware of issues involving violence in the home among family members. Many studies showed that women are far more likely to be victims of violence at the hand of a husband or boyfriend than by a stranger. Victims of DOMESTIC VIOLENCE or rape are believed to be reluctant to report these crimes for fear of continued or retaliatory violence. In response to these issues, Congress enacted the VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994 (42 U.S.C.A. §§ 3796dd et seq.). One part of that act is the section entitled the Safe Homes for Women Act of 1994 (18 U.S.C.A. §§ 2261 et seq.). This section created new federal crimes and penalties for domestic violence.

### Non-Forcible Sex Offenses

Non-forcible sex offenses include sexual conduct with individuals that the law assumes are not capable of giving consent to sexual acts. Because of this legal principle, it is said that in non-forcible sex offense cases, lack of consent by the victim may be a MATTER OF LAW. In other words, statutes will assume that underage, physically helpless, and mentally incompetent victims are incapable of giving consent to sexual acts and will not consider consent as a valid defense to the crime.

The age at which criminal statutes acknowledge that an individual is capable of consenting to sexual acts varies by state. Most jurisdictions have special statutes for sex offenses committed with an underage victim, usually termed STATUTORY RAPE laws. In some states non-forcible sexual acts with an underage individual are considered as serious as forcible sexual acts. In other states forcible sexual acts are deemed more serious and are punished more severely. Where the offense is committed forcibly with an underage individual, the more serious statute and punishments will apply. It does not matter if the perpetrator reasonably believed that the victim was of the age of consent because MISTAKE OF FACT is no defense in a statutory rape case.

The law also considers physically helpless and mentally disabled victims to be incapable of giving consent to sexual acts. Physically helpless individuals include those who are unconscious, paralyzed, restrained, or otherwise incapable of resisting the sexual acts. Mentally disabled victims may include those who are permanently mentally disabled or those who are drugged and in a temporary state of mental disability. Some state statutes even include involuntarily intoxicated individuals in the category of temporarily mentally disabled victims. Although mistake of fact is no defense for sexual offenses with a minor, it is a defense for a physically helpless or mentally disabled adult victim if the perpetrator can show that he reasonably believed that the victim was not physically helpless or mentally disabled.

**Fornication and Adultery** Fornication (sexual intercourse between two unmarried persons) and adultery (sexual intercourse with someone other than one's spouse) are non-forcible sex offenses that have been recognized since early American common law. These acts are still unlawful under some state statutes. Fornication, however, has been eliminated as a criminal offense in most jurisdictions as a result of a more liberal view of the role of public law in mandating moral principles. However, neither fornication nor adultery is prosecuted with much regularity. The requirements of penetration that must be proved in other sexual offenses involving sexual intercourse also must be proved for fornication and adultery.

**Consensual Sodomy** Consensual sodomy statutes outlaw the act of sodomy even when it is

# Do Offender Laws Protect Public Safety or Invade Privacy?

The enactment of state and federal sex offender notification and registration laws came at a furious pace in the 1990s and has continued through the 2000s. Legislators and their constituents have endorsed notification and registration as simple but effective ways of protecting public safety. Even though support for such laws has been overwhelming, concerns have been raised by some legal commentators that these laws invade the privacy of released sex offenders and make it difficult for them to rebuild their lives.

Defenders of these laws note that requiring released offenders to register with the police is an easy way for police to keep tabs on potentially dangerous persons. With the release of large numbers of sex offenders into the general population, public safety demands that the police know where these potentially dangerous persons live. In the event of a new sex offense, the police have the ability to round up possible suspects quickly. Registration also gives police in nearby towns and cities the opportunity to share information on suspects and to help locate suspects for questioning.

The law's proponents believe, however, that notification is the most important element. Prior to the passage of **MEGAN'S LAW** in New Jersey, as well as similar laws throughout the United States, citizens did not know when a released sex offender moved in next door or down the block. Because certain sex offenders are likely to commit criminal acts again, no notification means that offenders can use their anonymity to help conceal their criminal pursuits. Community notification laws rob the released offender of anonymity by letting neighbors know the offender's criminal history and his place of residence. Public safety is enhanced, and, armed with this information, neighbors can be on guard and assist in the monitoring of the released offender's activities.

Communities also use notification to prevent a released offender from moving into the neighborhood. Once a public hearing is held and information is distributed, landlords often become reluctant to rent housing to a person who makes community members apprehensive. Even if the released offender does move into the community, the person will be isolated from his neighbors. Communities are therefore empowered to take control of their neighborhoods and assert their right to safe and secure homes.

Defenders of these laws agree that registration and notification do have an impact on the lives of released sex offenders. However, they believe that society as a whole should have more rights than an individual sex offender. Felons, for example, are not entitled to vote or possess firearms and can suffer other civil disabilities because of their criminal convictions. Registration and notification are legitimate civil disabilities that flow from the underlying criminal act. Public safety mandates that such laws be used effectively.

Critics of registration and notification are troubled by the departure these laws take from the traditional belief that once individuals serve a criminal sentence, they have paid their debt to society and should be allowed to reenter society without significant restrictions on privacy or liberty. According to the critics, released offenders share the same expectations of privacy as other citizens. Though some courts have acknowledged that notification laws infringe upon sex offenders' privacy interest by disseminating in a packaged form, various pieces of the registrant's personal history, the state's strong interest in protecting its citizens through public disclosure substantially outweighs the sex offenders' privacy interest. Critics contend that such rulings are a slippery slope, for they provide future legislatures with the opportunity to broaden the types of crimes that are subject to notification. Society will always have a strong interest in protecting its citizens, thereby allowing more intrusive government actions over an individuals' right to privacy.

Critics also believe registration and notification laws constitute **CRUEL AND UNUSUAL PUNISHMENTS**, which are banned by the **EIGHTH AMENDMENT**. These laws are penal, because they subject the released offender to additional punishment. Defenders of the laws may

consensual, meaning that it is accomplished without the use of force. The view supporting these statutes, which still exist in a minority of states, is that sodomy is an unnatural act, and when the act is consensual, all participants are guilty of wrongdoing. However, since the 1980s, most state courts have overturned consensual sodomy laws, calling them unconstitutional prohibitions of sexual conduct between two consenting adults.

The Supreme Court addressed the issue of the constitutionality of consensual sodomy laws in *Bowers v. Hardwick,* 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986). In *Bowers* two consenting men were found engaged in sodomy in a private home in a state that had an antisodomy law. The Supreme Court found no basis in the Constitution supporting the argument that homosexuals have a fundamental right to

claim that notification is merely a way to provide information to the public, but the impact on released offenders clearly can feel like punishment. Critics note that convicted sex offenders now have difficulty finding a place to live. Communities often use this information to prohibit entry or to try to remove the individuals from their surroundings. Offenders who do move into the community are subjected to taunts and threats, and their property is sometimes vandalized. It is unfair and unconstitutional, the critics allege, to subject individuals who have served the sentence of the court to another layer of punishment that is indefinite in length or scope.

Opponents further claim that notification has a detrimental effect on rehabilitating a released offender. Public notification may have improved personal safety, but it has also created public hysteria. Sex offenders are viewed as modern-day lepers, increasing the difficulty for them to find and retain jobs. For those released offenders who truly want to make a new life, notification makes such an effort almost impossible.

In addition, critics argue that notification laws undermine a community by promoting fear. Notification may inflame passions and sometimes lead to mob rule. Instead of providing rehabilitation or deterrence, notification shames convicted offenders in a way that registration and other civil disabilities do not. Though such laws satisfy a public demand that officials crack down on offenders, critics remain skeptical as to whether such laws truly promote public safety enough to justify their intrusiveness.

The criticisms of Megan's laws ultimately led to two cases that reached the U.S. Supreme Court in 2003. In *Smith v. Doe I,* ___ U.S. ___, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), the Court upheld Alaska's version of Megan's Law against a challenge that this law constitutes an **EX POST FACTO LAW** in violation of the U.S. Constitution. The same day, the Court in *Connecticut Department of Public Safety v. Doe,* ___ U.S. ___, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003) held that Connecticut's version of Megan's Law does not deprive sex offenders of procedural **DUE PROCESS OF LAW**.

In *Smith*, the Court reviewed an argument that because Alaska's sex offender law applies to sex offenders who committed acts prior to the enactment of the statute, the law inflicted retroactive punishment and thus constituted an ex post facto law. In a 6–3 opinion written by Justice **ANTHONY M. KENNEDY**, the Court rejected the argument, finding that the law was designed to protect the public from sex offenders, rather than to punish sex offenders themselves. Under the Supreme Court's doctrine governing the Ex Post Facto Clause, if a law establishes civil proceedings that are not punitive in nature, then the law does not violate the Constitution even if offenders convicted prior to the statute must adhere to certain regulatory consequences, such as registering as sex offenders. Since the Court found that Alaska's legislature intended to establish a civil proceeding, rather than to impose punishment, the law was constitutional.

In *Connecticut Department of Public Safety v. Doe,* a unanimous Court rejected an argument that sex offenders were denied procedural due process because they were not afforded an opportunity to determine whether they were dangerous to the public. Chief Justice **WILLIAM REHNQUIST**, writing for the Court, found that the sex offenders were not entitled to a hearing about their dangerousness because the sex offenders' propensity for danger was not an issue of consequence under Connecticut's law. Because the law applies to all convicted sex offenders, rather than only those who are considered dangerous, dangerousness was not a material under the state statute. Accordingly, Connecticut's Megan's Law does not deprive the offenders of any procedural due process rights.

Although the Court's decisions in 2003 strongly indicate that the Court was inclined to uphold Megan's Laws, the Court did not address several key issues, such as whether these sex offender laws violate the offenders' **SUBSTANTIVE DUE PROCESS** or **EQUAL PROTECTION** rights. Several legal commentators expected that Megan's Laws would continue to be challenged in the courts, and it might take years before all of these issues were finally resolved.

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Child Abuse; Equal Protection; Megan's Law; Substantive Due Process.

engage in sodomy. In 2003, however, the Court reversed its ruling in **LAWRENCE V. TEXAS**, 538 U.S. ___, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). The situation of the case was similar to *Bowers*: two men were found having consensual sex in a private home by Houston police, who had been called to the residence on a reported weapons disturbance. The men were arrested because a Texas statute made it a crime for two people of the same sex to engage in "deviate sexual intercourse." In a 6–3 decision, the Court ruled that the Texas statute outlawing a same sex couple from having intimate conduct was unconstitutional under the **DUE PROCESS CLAUSE**.

**Polygamy** **POLYGAMY**, another non-forcible sex offense, is the crime of marrying more than

one spouse while the marriage to a first spouse is still valid and existing. Bigamy is when a person has exactly two spouses at the same time. Bigamy per se consists simply of a person's attempt to marry another person while already married. Bigamy per se does not require a showing of living together as HUSBAND AND WIFE or of sexual intercourse. Most statutes state that the person must know of the continued validity of the first marriage to be guilty of bigamy. Thus, if a woman reasonably believed that her husband was dead, which would have ended their marriage, she could marry another man without violating bigamy/polygamy statutes.

**Indecent Exposure** Indecent exposure, also called public lewdness, is the intentional exposure of one's genitals to unwilling viewers for one's sexual gratification. This crime is generally classified as a misdemeanor (a less serious crime).

**Obscenity and Pornography** OBSCENITY and PORNOGRAPHY are non-forcible sex offenses that have proven very difficult for the legislatures and courts to define. In MILLER V. CALIFORNIA, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), the Supreme Court held that material is pornographic or obscene if the average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest, that it depicts sexual conduct in a patently offensive way, and that taken as a whole, it lacks serious literary, artistic, political, or scientific value. The Supreme Court has also held that obscenity and CHILD PORNOGRAPHY are not protected by the FIRST AMENDMENT.

With the advent of new technology, the law has changed to address and encompass more methods of disseminating obscene and pornographic materials. For example, current laws forbid obscenity and pornography transmitted via television and CABLE TELEVISION programs, telephone services, and the INTERNET.

The Internet in particular is one of the fastest-growing media for the transmission of information. Because the Internet is easily accessible to children as well as adults, many leaders advocate the restriction of obscene or pornographic material via the Internet. In 1996, Congress passed the Communications Decency Act (47 U.S.C.A. §§ 230, 560, 561), which made it a felony to place indecent or patently offensive material on the Internet that is accessible to children. However, this act came under fire almost immediately as violating the First Amendment. In 1997, the Supreme Court in *Reno v. American Civil Liberties Union,* 521 U.S. 1025, 117 S. Ct. 2329, 138 L. Ed. 2d 874, struck down the indecent and patently offensive provisions of the act as unconstitutional.

### Other Sex-related Offenses

Another sex-related offense is INCEST (sexual intercourse with a close relative). Generally, laws against incest forbid sexual intercourse with those close relatives that the law forbids one from marrying.

Prostitution is another offense in and of itself, but that crime is often intermingled with other sex offenses, such as statutory rape or adultery where the prostitute or the john (the customer) is underage or married to someone else, respectively. Another criminal offense commonly charged in conjunction with other sex offenses is the offense of impairing the morals of a minor. Prosecutions for that offense are generally pursued when the evidence is insufficient to support a statutory or forcible rape or sodomy charge.

### Child Sexual Assault

Child sexual assault, long considered to be one of the most horrific of sexual offenses, presents many difficult issues to courts and legislatures. One controversial issue is the BALANCING of the defendant's right to confront an accuser versus the need to protect child witnesses from undue trauma in facing their abusers. The Supreme Court has considered this issue in several cases. In *Coy v. Iowa,* 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), the Court held that it is a violation of the right of confrontation to allow a child victim to testify in court separated from the defendant by a screen. But in *Maryland v. Craig,* 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), the Court upheld the use of a one-way closed-circuit television to receive the out-of-court testimony of a child witness. In *Craig* the Court held that the defendant does not have an absolute right to confront his accuser face-to-face, especially where it is necessary to protect a child victim from trauma.

In 1990, in response to the alarming increase in reported CHILD ABUSE cases, Congress enacted the Victims of Child Abuse Act, 42 U.S.C.A. §§ 13001 et. seq. It requires professionals who work with children to report all sus-

pected cases of child abuse. It also amended the United States Criminal Code to ensure that the rights of children are protected in court proceedings. As a result, the JUSTICE DEPARTMENT created model rules to guide law enforcement officers, investigators, prosecutors, and any person officially involved in a child abuse case, in the "proper and appropriate treatment of child victims and witnesses." For example, a child witness does not have to be physically present in an open court. He or she may present testimony via closed-circuit television or videotaped deposition.

Every state, and the District of Columbia, Puerto Rico, and the Virgin Islands have mandatory reporting statutes that require certain individuals who work with children to report suspected cases of child abuse or neglect. The general definition of child abuse is any nonaccidental injury or pattern of injuries, including sexual molestation, to a child under the age of 18. The individuals who must report these cases include doctors, teachers, social workers, CHILD CARE providers, and psychologists. In some states priests, ministers, coroners, and attorneys are included. Individuals who report suspected abuse or neglect, even if their suspicions turn out to be false, are protected by IMMUNITY against legal action as long as they acted in GOOD FAITH. Reporters may also ask to be kept anonymous when making such allegations.

### Prosecution of Sex Offenses

The prosecution of sex offenses differs in many respects from the prosecution of other crimes. The experience of the victim is very different from that of the victims of other crimes, the reaction of the police may be different, and sex offense prosecutions present many difficult issues. The Uniform Crime Reports and other national studies indicate that rape is the most underreported crime. Because of the victims' emotional trauma and the widespread bias in the legal system, whether perceived or real, many rape victims do not want to report the crime because they do not want to undergo the ordeal of testifying at the criminal trial.

Well-trained police officers are taught about the difficulties presented in sex offense investigations and prosecutions, including their own susceptibility to societal biases toward sex offenses. Some police departments have specially trained sex offense detectives, including female officers, who may reduce the amount of trauma victims undergo in reliving and recounting their injuries.

Investigators' biases may be manifested in several ways. They may disbelieve or doubt the victim, which may discourage the victim from cooperating with police investigations. In child sex offense cases, defendants often have argued that the police officers or prosecuting attorneys coerced or powerfully suggested certain facts until the child victim adopted them as real.

### Prosecution of Non-Forcible Sex Offenses

Some non-forcible sex offenses have been called victimless crimes, because the victim has been difficult to identify. For example, in the case of prostitution, it is argued that neither the prostitute nor the customer is a victim because they each willingly enter into the agreement. However, some argue that society itself is the victim of such crimes. Others argue that the prostitute is in fact the victim, even though she willingly commits the act, and that statutes should protect the individual from herself.

Society's responsibility to protect individuals from themselves is the rationale accepted for non-forcible sex offenses involving minors. These statutes simply assume that minors are not able to make sound judgments for themselves. Similar theories support statutes prohibiting sexual conduct with mentally impaired individuals.

For other non-forcible sex offenses such as adultery or bigamy, statutes are based on the premise that society strives to protect families and their stability. However, such justifications are not as easily applied to the sex offenses of fornication and consensual sodomy.

Prosecuting attorneys have some discretion to choose which non-forcible sex offenses to prosecute. Where the constitutionality of a statute is at issue, such as statutes forbidding consensual sodomy, prosecutors generally choose not to enforce those statutes through prosecution. Adultery and fornication are other non-forcible sex offenses that are rarely prosecuted.

Private individuals who are not the victims of the particular sex offense, whether forcible or non-forcible, do not have a legal right of action against the offender. Prosecuting attorneys carry out the public function of pursuing criminal complaints against sex offenders on behalf of the people of the state.

### Constitutionality Issues

Many statutes making sexual conduct criminal have been attacked as unconstitutional. The most common claims made are that the statutes are too vague, violate personal rights to privacy, or violate the EQUAL PROTECTION CLAUSE.

The Supreme Court considered the argument that statutes violating sodomy are unconstitutionally vague in *Rose v. Locke,* 423 U.S. 48, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975). The *Rose* case involved a state statute that forbade "crimes against nature," and the defendants argued that the terms of the statute were imprecise and vague. The Supreme Court held that the statute did not violate the Constitution because even though the language may have been imprecise, it was still possible to determine the meaning of the statute so as to provide sufficient warning to people who may be affected by it. Courts have held that "crimes against nature" include sodomy, fellatio, and cunnilingus.

Statutes forbidding obscene language or conduct have also been challenged because they are vague. Specifically, critics claim that it is not clear what is considered obscene. State legislatures have attempted to define or describe the term *obscene,* but this often results in the use of other arguably vague terms such as *lewd, lascivious,* and *wanton.*

Sex offense statutes have also been challenged on the ground that they violate an individual's right to privacy. The Supreme Court addressed this argument in the 1986 case of *Bowers v. Hardwick,* when it held that there is no federal privacy right to engage in same-sex acts. Since *Bowers* many state courts issued similar rulings. However, the Supreme Court, in its 2003 landmark *Lawrence* decision, changed the landscape. According to the Court, private conduct is protected under the Due Process Clause, and as such, *Bowers* "should be and now is overruled." In his opinion, Justice ANTHONY KENNEDY stated, "The petitioners are entitled to respect for their private lives."

Sex offense laws have also been challenged on the ground that they violate equal protection guarantees under the Constitution. Most courts have followed the Supreme Court's decision in *Michael M. v. Superior Court,* 450 U.S. 464, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981), that they do not.

The *Michael M.* case involved a state statutory rape law that prohibited sexual intercourse with a woman who is under 18 years old and who is not the perpetrator's wife. Thus, only males were liable under the law. The defendant was a 17-year-old boy who had sexual intercourse with a 16-year-old girl. The defendant argued that the statute violated the Equal Protection Clause of both the federal and state constitutions. The Supreme Court held that the "obviously discriminatory classification" was justified by the important STATE INTEREST in protecting women who, unlike men, can become pregnant and suffer the harmful and inescapable consequences of pregnancy. It has also been held that non-statutory rape laws do not violate the Equal Protection Clause in the following cases: *State v. Kelley,* 111 Ariz. 181, 526 P.2d 720 (1974), *cert. denied,* 420 U.S. 935, 95 S. Ct. 1143, 43 L. Ed. 2d 411 (1975); *Wilson v. State,* 288 So. 2d 480 (Fla. 1974); *State v. Lorenze,* 592 S.W.2d 523 (Mo. Ct. App. 1979); *State v. Rivera,* 62 Haw. 120, 612 P.2d 526 (1980); *Griffin v. Warden,* 277 S.C. 288, 286 S.E.2d 145 (1982).

### Evidentiary Issues

A modern and revolutionary means of identifying criminal defendants in sex offense cases is the use of DNA EVIDENCE, often called DNA fingerprinting. Most of the cells of the body and bodily fluids contain a copy of the individual's DNA. Because every person has unique DNA (with the exception of identical twins) it can be used as reliably as a fingerprint in identifying someone. The Florida District Court of Appeals, in *Andrews v. State,* 533 So. 2d 841 (1988), *review denied,* 542 So. 2d 1332 (1989), was the first appellate court in the country to uphold the admissibility of DNA evidence in a criminal case. The *Andrews* case involved DNA testing of semen left at the crime scene that matched the DNA of the defendant. The court permitted the admission of the DNA evidence on the ground that it was considered scientifically reliable. Most states now permit such evidence to eliminate an individual from the list of criminal suspects.

DNA testing has also been used to examine evidence from crime scenes gathered years before DNA testing was available. These tests have been successful in many post-conviction proceedings to show that the individual convicted and incarcerated was not the actual offender. Thus, DNA evidence has secured the release of many innocent people.

DNA evidence has been successfully challenged based on the laboratory's methods of

running or performing the DNA tests. Human error can render unreliable results and make the basis for a challenge to such evidence in any trial. These attacks generally affect the weight of the evidence but usually do not make the evidence inadmissible.

### Rape Shield Laws

Rape SHIELD LAWS are state statutes that restrict the admission of a rape victim's sexual history into evidence in rape trials. British and American common law routinely admitted evidence of a rape complainant's past sexual history. It was believed that this evidence could bear adversely on the complainant's credibility as a witness. In addition, courts adhered to the belief that if a woman had consented to sexual activities in the past, it was an indication that she was more likely to have consented to the sexual acts alleged.

Rape law reform gathered momentum in the 1970s and resulted in the enactment of rape shield laws in every jurisdiction in the United States in little more than a decade. Some states enacted special laws and other states amended their existing evidentiary rules to greatly restrict evidence of a rape victim's sexual history. However, there are several general exceptions in which such evidence is deemed relevant and thus admissible.

If the prosecution raises the issue of the complainant's physical condition, by arguing that the defendant was the source of pregnancy, sexually transmitted disease, or semen found on the complainant, the defendant may bring up the complainant's sexual history to show that another man was the actual source. Defendants may also introduce such evidence to show the complainant's MODUS OPERANDI (method of operating), most commonly used to demonstrate that the complainant regularly exchanged sexual favors for money; in other words, that she was known as a prostitute.

Another exception to most rape shield laws is using past sexual history of the complainant's sexual relations with the defendant to show that if she consented in the past, she was more likely to have consented on the occasion in which she alleges rape. Some states also permit evidence of prior sexual history to show that the defendant was informed of something that led him to believe that the complainant would readily consent to sex, thereby negating the defendant's mens rea (criminal intent) necessary to convict him. Past sexual history can also be introduced like any other evidence where it contradicts the witness's previous testimony, showing that the witness has been untruthful when testifying under oath.

Evidence that a complainant has previously fabricated sexual assault charges is also generally admissible to impeach the complainant's credibility as a witness. Finally, past sexual history may be admitted into evidence to show the complainant's motive to testify falsely. For example, a complainant may be trying to explain a pregnancy or hide the fact that she had sex with someone other than her boyfriend.

### HIV and AIDS

Like other areas of law, sex offense law has been affected by the health concerns related to the human immunodeficiency virus (HIV) and ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) epidemic.

In 1990, Congress passed the Ryan White Comprehensive AIDS Resource Emergency Act (42 U.S.C.A. §§ 300ff et seq.), which requires states to prosecute people who knowingly or intentionally expose others to the virus through sexual contact, blood or tissue donations, or sharing of hypodermic needles. States must do so in order to be eligible for federal grant money.

Some states have used traditional criminal statutes to prosecute such offenders, by charging them with attempted murder or assault. For example, in *State v. Haines,* 545 N.E.2d 834 (Ind. Ct. App. 1989), the defendant was convicted of attempted murder for biting, scratching, spitting, and throwing blood on others with the intent to infect them with his HIV condition. In *Zule v. State,* 802 S.W.2d 28 (Tex. Ct. App. 1990), the court upheld the conviction of aggravated sexual assault and transmission of HIV where the defendant, who knew that he was HIV positive, engaged in sodomy with a 15-year-old boy who, two years later, tested positive for HIV.

Approximately half of the states have specific statutes that address the crime of knowingly transmitting HIV through sexual and other conduct. For a defendant to know that he is HIV positive is enough to establish intent under these statutes. Many of these statutes forbid "intimate contact" or conduct reasonably likely to result in the transmission of "bodily fluids." These statutes have withstood constitutionality challenges that they are vague (*People v. Dempsey,* 242 Ill. App. 3d 568, 610 N.E.2d 208

[1993]; *People v. Russell,* 158 Ill. 2d 23, 630 N.E.2d 794 [1994]. Consent is generally a defense to these crimes; however, lack of medical evidence supporting a likelihood of transmission or a lack of actual transmission of the disease is not a defense.

Another legal development that has arisen over the public concern about HIV and AIDS is mandatory AIDS testing of accused and convicted sexual offenders. In 1990, Congress passed the CRIME CONTROL ACT (42 U.S.C.A. §§ 3756 et seq.), which requires HIV testing of sex offenders when specifically requested by a victim of sexual assault. In response, most states enacted laws requiring individuals accused of certain crimes to be tested for AIDS. Some states mandate pre-conviction testing; others require post-conviction testing. In some states, testing is permitted if the alleged victim can demonstrate a compelling need to have the test results.

These laws have been challenged in the courts on the grounds that they violate privacy rights, FOURTH AMENDMENT rights against unreasonable searches, and the PRESUMPTION OF INNOCENCE of criminal defendants. Most courts have rejected such claims based on the Supreme Court's decision in *Schmerber v. California,* 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), that a routine blood alcohol test is not a substantial intrusion into one's bodily integrity. Reasoning by analogy, most courts have held that a blood test for AIDS, where necessary to further an important government interest in the health and safety of the victim, is constitutional.

### Sexual Psychopath Legislation

Approximately 20 states have statutes that address dangerous sex offenders and sexual psychopaths. These statutes are designed to protect public safety by removing habitual sex offenders from society for extended periods of time. Criminal defendants treated differently from others based on their classification as sexual psychopaths have challenged these laws, arguing that they violate the Equal Protection and the Due Process Clauses, but the laws have withstood such challenges (*Kansas v Hendricks,* 521 U.S. 346 [1997]; *Seling v. Young,* 531 U.S. 250 [2001]).

These statutes require that the court must specifically find that the sex offender suffers from mental illness that leads to sexually deviant behavior, and that the behavior is likely to continue in the future, in order to classify the offender as a sexual psychopath. These statutes also permit the state to retain custody of the sexual psychopath, or sexually dangerous person, until he or she is cured of the mental illness. In effect, this allows the state to impose an indeterminate, and often lifetime, sentence.

### Sex Offender Registration and Community Notification

Because of growing public concern, since the 1980s, over RECIDIVISM (repeated offenses) among sexual offenders, all states have enacted sex offender registration acts. In 1994, Congress passed legislation that required states to enact such laws in order to receive certain federal funding (42 U.S.C.A. § 14071).

Although these laws vary in scope and effect, they share the common goal of protecting the public by requiring repeat sex offenders to register their names and addresses with local law enforcement officials. Some statutes allow the public to have access to this information. Other statutes, commonly called community notification laws, mandate that all residents in a certain geographic area be notified before a convicted sex offender moves into their neighborhood.

There have been numerous constitutional challenges to sex offender registration acts; however, most courts have found no constitutional violations. Specific attacks that have been unsuccessfully made include the arguments that the statutes constitute CRUEL AND UNUSUAL PUNISHMENT, they are EX POST FACTO LAWS (laws that retroactively punish behavior), they are bills of attainder (acts of the legislature to impose punishment without a court trial), they constitute DOUBLE JEOPARDY (multiple prosecutions for the same offense), or they violate the offender's right to privacy.

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CROSS-REFERENCES

Child Molestation; Criminal Law; Criminal Procedure; Family Law; Gay and Lesbian Rights; Sexual Abuse; Victims' Rights.

## SEXUAL ABUSE

*Illegal sex acts performed against a minor by a parent, guardian, relative, or acquaintance.*

*Sexual abuse* is a general term for any type of sexual activity inflicted on a child by someone with whom the child is acquainted. It is considered an especially heinous crime because the abuser occupies a position of trust. Until the 1970s the prevalence of sexual abuse was seriously underestimated. Growing awareness of the problem led legislatures to enact reporting requirements, which mandate that any professional person (doctor, nurse, teacher, social worker) who knows or has reason to believe that a child is being abused report this information to the local WELFARE agency or law enforcement department. Statistics vary widely about the level of sexual abuse, but most researchers agree that it occurs at a higher rate than previously believed. Experts on the subject estimate that more than 130,000 children a year are sexually abused in the United States.

Perpetrators of sexual abuse are prosecuted under state CRIMINAL LAW statutes that have been toughened for sexual assaults on minors. The prosecution of reported sexual abuse has required children to testify in court about the abuse. Children are often unwilling to testify against the abuser, who may be a family member and may exert control over their victim. To relieve these pressures, courts have allowed the use of closed-circuit television to protect the child witness from the trauma of testifying in court before the defendant, expanded the HEARSAY evidence exception to allow testimony about what the child said if the child lacks a motive to lie or if the child uses sexual terminology unexpected of a child, and made rules that suspended the STATUTE OF LIMITATIONS until the abusive conduct is discovered.

During the 1980s a rash of sexual abuse cases involving day care centers drew national attention. The McMartin preschool case in Manhattan Beach, California, which began in 1984, accused a group of day care employees of sexual abuse and bizarre rituals of animal sacrifice. Though none of the defendants was ever convicted, similar allegations around the United States resulted in 113 convictions.

A difference of opinion exists within the legal and medical communities over the truthfulness of child witness testimony in sexual abuse cases. Prosecutors and some health professionals argue that children do not lie. Defense attorneys and social researchers contend that faulty interviewing by parents, psychologists, and law enforcement can lead children to make up stories. Leading questions and demands that a child reveal abuse can press the child into making false statements in order to please the questioner.

The debate over child witnesses has led many law enforcement agencies to develop standard investigatory protocols that seek to prevent contamination of the child's testimony. Interviews are routinely videotaped to document the interview process.

Apart from criminal remedies, in the 1980s CHILD ABUSE victims gained the ability to sue their abusers for damages. Before that time, civil remedies were available only for child victims who filed claims soon after attaining the age of majority. State courts and legislatures accepted the concept of repressed memory, in which traumatic episodes are repressed by the victim for many years. As of 2003, in more than 23 states, adults who "recover" their memories of childhood sexual abuse, either spontaneously or

**Victims of Sexual Assault, by Age**

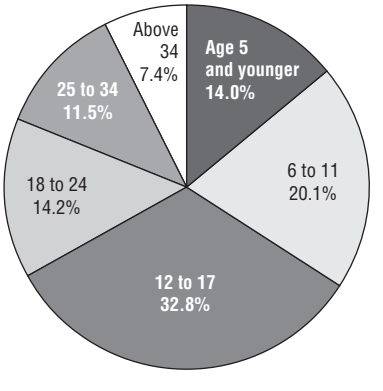


SOURCE: Department of Justice, Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported to Law Enforcement*, 2000.

# Child Testimony in Day Care Center Sexual Abuse Cases

Between 1983 and 1991, a series of cases involving allegations of sexual abuse by day care center workers drew national attention. During this period, investigations of suspected sexual abuse of preschool children by their teachers took place in more than 100 U.S. cities. Many persons were convicted of crimes, but others were either acquitted or had their convictions overturned on appeal. The key issue in these cases was whether the children involved had told the truth or whether their testimony had been tainted by the way they were interviewed by parents, social workers, and psychologists. Though this type of multiple victim, multiple offender sexual abuse charge has disappeared, the issue of the credibility of children discussing sexual matters and sexual abuse remains a charged issue.

The most famous case involved the McMartin preschool in Manhattan Beach, California. In 1984 authorities charged Virginia McMartin, age 76; her daughter Peggy McMartin Buckey; her grandson Raymond Buckey; a granddaughter; and three female teachers with sexually abusing 120 children. The children reported violent rituals where rabbits were mutilated and the children were forced to touch corpses. Eventually prosecutors dropped charges for lack of evidence against everyone except Peggy Buckey and her son Raymond. They went on trial in 1987.

In January 1990, after the longest (two-and-a-half years) and most expensive ($15 million) criminal trial in U.S. history, Peggy and Raymond Buckey were acquitted on 52 counts of **CHILD MOLESTATION**. The jury deadlocked on 12 counts of molestation against Raymond Buckey and on one count of conspiracy against both defendants. The charge against Peggy Buckey was dismissed, but Raymond was retried on 8 of the 13 counts. In July 1990 his second trial ended in a mistrial, and the case was finally dismissed.

The McMartin preschool case revealed troubling questions about the way the investigation had been conducted and how evidence had been obtained from young children. The initial allegation of abuse was made by a mother later diagnosed as paranoid schizophrenic. She accused Raymond Buckey of molesting her son. The police investigated and declined to file charges because of lack of evidence. The Manhattan police chief then sent a letter to the 200 parents of past or present McMartin preschool students and alleged that Buckey may have molested their children. Parents were urged to question their children about any sexual abuse.

through psychiatric and psychological counseling, may bring a civil lawsuit against the perpetrator. These states have rewritten their laws to start the statute of limitations from the time the victim knows or has reason to know that sexual abuse occurred.

During the 1980s and 1990s, many lawsuits were filed using these new laws. Adults successfully sued a number of Roman Catholic priests for sexual abuse that the victims had endured many years before. Health professionals argued that the victims needed the lawsuits as much for therapeutic as legal reasons. Confronting the abuser and holding the abuser accountable for the actions is a significant step for the victim, who often feels shame, guilt, and responsibility for the abuse.

However, a controversy arose over the validity of recovered memories. The dispute centers on memories that are coaxed or brought forth through the efforts of therapists. Some experts in law and mental health question the veracity of these memories and challenge their use as the evidentiary basis for lawsuits over conduct that allegedly occurred years, and sometimes decades, in the past. They contend that these are "implanted memories," brought about by hypnosis, truth serums, and therapists' suggestive remarks. They are also troubled that therapists may be allowed to testify as expert witnesses, when there is no **SCIENTIFIC EVIDENCE** to support their theories regarding recovered memories.

A 1994 California lawsuit by Gary Ramona was the first case in the United States in which an alleged abuser won a large damages award against the therapist who had treated his child. Ramona's daughter Holly had filed suit, accusing her father of sexually molesting her when she was a child. As a result of the lawsuit and the charges, Ramona's wife divorced him and he lost his high-paying job. He argued that Holly's recollections were the result of the psychiatrist's giving her the hypnotic drug sodium amytal and then eliciting from her confabulations, or false but coherent memories spliced together from

The letter caused a panic. Hundreds of children were given medical exams and interviewed by a group of psychologists at a counseling center. During these interviews, children were asked leading and suggestive questions and were rewarded for giving the "right" answers. Children reported bizarre events, including being taken into subterranean passages at the school where animal sacrifices were performed. No passages nor any traces of animal sacrifices were found at the school. Several children reported that they were taken on airplanes and molested.

At trial the jurors had difficulty distinguishing between fact and fantasy in the children's accounts. The prosecution argued that children seldom lie about abuse but that they are often reluctant to disclose what has happened to them. Therefore, the prosecution said, a therapist interviewing a child will often use suggestive questioning, prompting, and manipulation to encourage the child to disclose the truth about sexual abuse. As for the bizarre tales, they were simply the children's way of dealing with what had happened to them. The jurors did not accept these explanations, expressing concern that the children's testimony had been influenced by adults. The videotapes of the interviews showed therapists asking leading questions and the children appearing to try to provide answers that would please the interviewers.

Prosecutors and many therapists contend that children rarely lie about sexual abuse and that the implanting of false memories through leading and suggestive questions is unlikely. They worry that refusing to believe children's testimony victimizes the children a second time and sends a message that society does not want to hear about sexual abuse.

Others are more skeptical. About 20 studies have shown that suggestive questioning about events that never happened can contaminate young children's memories with fantasies. When police, social workers, therapists, and prosecutors conduct multiple interviews, details they provide in their questions and statements are likely to find their way into the statements of children. Children will use their imagination and confabulate stories that are richly detailed but are a mix of fact and fantasy. This is not to say that children are not to be believed. Children rarely lie when they spontaneously disclose abuse on their own or when a person seeks the complete story with the least probing or leading yes-no questions.

The McMartin preschool outcome has forced investigators to learn better ways of asking children questions. Many interviewers are trained to gain a child's trust, evaluate the child's ability to remember and give details of past events, and let the child tell what happened in her own words. Interviews are generally videotaped to allow both the prosecution and the defense to evaluate the investigator's methods.

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true events, that convinced Holly that she had been abused by her father. The jury agreed with the father, awarding him $500,000. The jury concluded that the recovered memories were unreliable and that the methods used to elicit them were improper.

The issue of sexual abuse perpetrated by Roman Catholic priests generated substantial interest beginning in 2000 when the Archdiocese of Portland, Oregon, agreed to pay an undisclosed amount to 22 plaintiffs who alleged that they had been abused by Father Maurice Grammond. The victims, ranging in age from 39 to 71, initially sued for $44 million. They claimed that the then 80-year-old Grammond had abused them and that neither Portland's archbishop nor the archdiocese took any action, such as warning parishioners, even though there had been complaints about the priest's behavior. The archdiocese apologized publicly and agreed to head a task force that would examine how abuse complaints were being handled and how to make the process work better.

A little more than a year later, in February 2002, a former priest in the Boston archdiocese, John Geoghan, was sentenced to up to 10 years in prison for molesting a 10-year-old boy. Geoghan, who had been defrocked in 1998, allegedly abused 130 children over a 30-year period. The Geoghan case opened up a much larger issue when it was revealed that the Boston archdiocese had allowed Geoghan to remain in positions that gave him access to children. Boston's cardinal, Bernard F. Law, was singled out because he was responsible for allowing Geoghan to keep ministering to children. Law said that he knew of Geoghan's problems and believed that he had been successfully treated for them. When the case of another Boston priest, Paul Shanley, came to light in April—and when the press found out that Cardinal Law had given Shanley a recommendation when he transferred to a west coast diocese even though he knew about Shanley's proclivities—the archdiocese of Boston was thrown into turmoil. To add to the difficulty, the archdiocese had agreed to settle

with several of Geoghan's victims but the number of alleged victims continued to increase. The archdiocese eventually said that it had to back out of the settlement agreement due to lack of adequate funds. Facing increasing outrage and no longer able to carry out his duties effectively, Law gave his resignation to Pope John Paul II in December 2002. In August 2003 John Geoghan was killed in prison by a fellow prison inmate.

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CROSS-REFERENCES

Children's Rights; Infants.

## SEXUAL HARASSMENT

*Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that tends to create a hostile or offensive work environment.*

Sexual harassment is a form of SEX DISCRIMINATION that occurs in the workplace. Persons who are the victims of sexual harassment may sue under Title VII of the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000e et seq.), which prohibits sex discrimination in the workplace.

The federal courts did not recognize sexual harassment as a form of sex discrimination until the 1970s, because the problem originally was perceived as isolated incidents of flirtation in the workplace. Employers are now aware that they can be sued by the victims of workplace sexual harassment. The accusations of sexual harassment made by ANITA F. HILL against Supreme Court Justice CLARENCE THOMAS during his 1991 confirmation hearings also raised societal consciousness about this issue.

Courts and employers generally use the definition of sexual harassment contained in the guidelines of the U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC). This language has also formed the basis for most state laws prohibiting sexual harassment. The guidelines state:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when
>
> 1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
> 2. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individuals, or
> 3. such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. (29 C.F.R. § 1604.11 [1980])

A key part of the definition is the use of the word *unwelcome.* Unwelcome or uninvited conduct or communication of a sexual nature is prohibited; welcome or invited actions or words are not unlawful. Sexual or romantic interaction between consenting people at work may be offensive to observers or may violate company policy, but it is not sexual harassment.

The courts have generally concluded that a victim need not say or do a particular thing to indicate unwelcomeness. Instead, a court will review all of the circumstances to determine whether it was reasonably clear to the harasser that the conduct was unwelcome. The courts have recognized that victims may be afraid to express their discomfort if the harasser is their boss or is physically intimidating. Victims may be coerced into going along with sexual talk or activities because they believe they will be punished or fired if they protest. Consent can be given to a relationship and then withdrawn when the relationship ends. Once it is withdrawn, continued romantic or sexual words or actions are not protected by the past relationship and may be sexual harassment.

The law prohibits unwelcome "sexual" conduct and words or actions "of a sexual nature." Some conduct, such as hugging, may be sexual or nonsexual and must be evaluated in context. Sexual harassment may be physical, such as kissing, hugging, pinching, patting, grabbing, blocking the victim's path, leering or staring, or standing very close to the victim. It may also be verbal, which may be oral or written and could include requests

# Same-Sex Sexual Harassment

Sexual harassment in the workplace is usually associated with a heterosexual employee making unwelcome sexual advances to another heterosexual employee of the opposite gender. There are also cases where a homosexual employee harasses an employee of the same sex. But can a heterosexual employee sexually harass another heterosexual employee of the same gender?

The Supreme Judicial Court of Massachusetts, in *Melnychenko v. 84 Lumber Company,* 424 Mass. 285, 676 N.E.2d 45 (1997), concluded that same-sex sexual harassment is prohibited under state law regardless of the sexual orientation of the parties.

Leonid Melnychenko and two other employees at a Massachusetts lumberyard were subjected to humiliating verbal and physical conduct by Richard Raab and two other employees. Raab loudly demanded sexual favors from the men, exposed himself, and simulated sexual acts. Eventually the three employees quit their jobs with the lumber company and sued, claiming that sexual harassment was the reason for their departure.

At trial, the judge concluded that Raab's actions were not "true romantic overtures to the plaintiffs, and that they were not inspired by lust or sexual desire." Raab, who was "physically violent and sadistic," sought to "degrade and humiliate" the men.

The trial judge and the Supreme Judicial Court agreed that Raab's behavior constituted sexual harassment because it interfered with the three plaintiffs' work performance by creating an intimidating, hostile, humiliating, and sexually offensive work environment. Raab's sexual orientation did not excuse the conduct. The unwelcome sexual advances and requests for sexual favors were more than lewd horseplay and raunchy talk. They constituted sexual harassment.

In a subsequent case involving charges of same-sex sexual harassment, the Supreme Court held in *Oncale v. Sundowner Offshore Services, Inc., et al.,* 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d. 201 (U.S. 1998), that Title VII prohibits sexual harassment even when the harasser and target of harassment are of the same sex. Joseph Oncale worked for Sundowner Offshore Services on an oil platform in the Gulf of Mexico from August to November 1991. Oncale's supervisor and two co-workers forcibly subjected Oncale to humiliating sex-related actions in the presence of the rest of the crew. Oncale had even been threatened with rape. Oncale complained to other supervisors, but no remedial action was taken. Oncale eventually quit, requesting that Sundowner indicate that he voluntarily left due to sexual harassment and verbal abuse. He subsequently filed a Title VII action in the U.S. District Court for the Eastern District of Louisiana.

The Fifth Circuit ruled against Oncale, stating that the Title VII prohibition against sexual harassment does not include same-sex sexual harassment, even harassment as blatant as Oncale's supervisor exposing his penis and placing it on Oncale's body, and also, along with two co-workers, attacking Oncale in a shower and forcing a bar of soap into his anus while threatening rape. Justice Scalia wrote the opinion for a unanimous court that reversed the lower court. In a strongly worded opinion, he complained of the lack of common sense demonstrated by the lower courts that had hitherto excluded same-sex claims, and also those that had conditioned liability on a same-sex sexual harasser being gay or lesbian.

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**CROSS-REFERENCES**

Assault; Civil Rights Acts; Sex Offenses.

# Clarence Thomas and Anita Hill Hearings

The issue of sexual harassment drew national attention during the 1991 Senate hearings on the confirmation of **CLARENCE THOMAS** to the U.S. Supreme Court. **ANITA FAYE HILL**, a professor at the University of Oklahoma Law Center, accused Thomas of sexually harassing her when she worked for him at the U.S. Department of Education and the **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION** (EEOC) between 1981 and 1983. The public disclosure of the allegations resulted in nationally televised hearings before the **SENATE JUDICIARY COMMITTEE**.

The hearings, which drew a large national viewing audience, raised questions about Thomas's behavior, Hill's credibility, and the nature of sexual harassment in the workplace. The demeanor of the 12 white male members of the Senate Judiciary Committee and the questions they asked Hill raised the ire of many women's groups, who saw in the senators' behavior an unwillingness to acknowledge the dynamics of sexual harassment.

Thomas, then a judge on the U.S. Court of Appeals for the District of Columbia, had been nominated by President **GEORGE H. W. BUSH** to fill the seat vacated by Justice **THURGOOD MARSHALL**. Thomas's opponents, including many Democrats and interest groups, tried to block his nomination because they did not want Thomas, an outspoken conservative African American, replacing Marshall, an African American and one of the few remaining liberals on the Court. After questioning Thomas at length, the Judiciary Committee deadlocked 7–7 on whether to recommend the nominee to the full Senate and then sent the nomination to the floor without a recommendation. Nevertheless, it appeared that Thomas would win confirmation by a comfortable, though not necessarily large, margin.

Then on October 6, 1991, Anita Hill publicly accused Thomas of sexual harassment. The charges rocked the Senate. Hill had been contacted earlier by Senate staff members, and she told them of her allegations. The Judiciary Committee asked the **FEDERAL BUREAU OF INVESTIGATION** (FBI) to talk to Hill and Thomas about the allegations. The FBI produced a report that was inconclusive, being largely a matter of "he said, she said." The allegations would probably never have come to public attention except that Hill's statement was leaked to National Public Radio (NPR). Once NPR broke the story, Thomas's confirmation was thrown into doubt. In response, the Judiciary Committee announced that Thomas and Hill would be given a chance to testify before the committee.

The Hill-Thomas hearings took place the weekend of October 11th. Hill testified that after she had refused to date Thomas, he had initiated a number of sexually oriented conversations, some of which alluded to pornographic films. She provided vivid details about these conversations, but her credibility was questioned by Thomas supporters who suggested, among other things, that Hill might have fantasized the conversations. Senator Arlen Specter (R-Pa.) interrogated Hill as if she were a criminal suspect and suggested that she might be

or demands for dates or sex, sexual jokes, comments about the victim's body or clothing, whistles, catcalls, or comments or questions about the victim's or harasser's social life or sexual life. Sexual harassment may also be visual, such as cartoons, pictures, or objects of a sexual nature.

The laws against sexual harassment are violated when "submission to such conduct is made either explicitly or implicitly a term or condition of . . . employment." This language refers to what is sometimes called quid pro quo sexual harassment, in which a victim's hire, job security, pay, receipt of benefits, or status depends on her or his response to a superior's sexual overtures, comments, or actions. The quid pro quo may be direct, as when a superior explicitly demands sexual favors and threatens firing if the demands are not met, or it may be indirect, as when a superior suggests that employment success depends on "personality" or "friendship" rather than competence.

Sexual harassment also occurs when sexual conduct or communication "unreasonably interfer[es] with an individual's work performance." Tangible loss of pay, benefits, or the job itself is not required for sexual harassment to be claimed and proven. Generally, occurrences must be significant or repeated or both for substantial interference to be established.

Unreasonable interference can occur between coworkers of equal status as well as between superiors and subordinates. The employer of the coworker may be legally liable for such harassment if the employer knows or should know about it and fails to take timely and appropriate responsive action.

charged with perjury. Other senators wondered why she had followed Thomas from the **EDUCATION DEPARTMENT** to the EEOC if he had sexually harassed her. She replied that the harassment seemingly had ended and that she was uncertain about the future of her job at Education.

Thomas forcefully denied all of Hill's allegations and portrayed himself as the victim of a racist attack. According to him, Hill's allegations were "charges that play into racist, bigoted stereotypes." He reminded the committee that historically, when African American men were lynched, they were almost always accused of sexual misconduct, and he characterized the hearings as a "high-tech lynching."

Thomas's impassioned defense proved to be effective. It not only disarmed his Democratic opponents on the committee, who in the opinion of many commentators failed to question Thomas effectively, but it also won him sympathy throughout the country. A *New York Times*/CBS News poll taken October 28, 1991, found that 58 percent of the respondents believed Thomas: only 24 percent believed Hill.

The committee also heard from witnesses who said that Hill had discussed the harassment with them during the time she worked for Thomas. Thomas's supporters produced several men as character references, one of whom alleged that Hill's statements were a product of romantic fantasy. Several women who would have testified that Thomas exhibited similar behavior with them either declined to testify after seeing the committee's grilling of Hill or were not called by the committee.

Thomas was confirmed two days after the hearings, on a vote of 52–48, the narrowest margin for a Supreme Court justice since 1888.

Thomas's confirmation did not end the controversy. Some commentators characterized the hearings as a perversion of the process and suggested that Hill's charges should have been aired in closed committee hearings. Others criticized Hill as a pawn of liberal and feminist interest groups that sought to derail Thomas's nomination by any means. Some critics also accused Hill of being an active participant in the move to defeat Thomas; they claimed that she was a Democrat who pretended to be a Republican so as to appear politically impartial.

Hill's defenders were outraged by the committee's treatment of her. They described her plight as typical of women who bring sexual harassment claims. Unless the woman has third-party testimony backing up her charges, the "he said, she said" scenario always favors the man. The senators' questioning of Hill's motivations was also evidence of how men fail to understand sexual harassment. Many of the senators saw her as either a liar, a publicity seeker, or an emotionally disturbed woman who fantasized the alleged incidents. In response, T-shirts appeared that stated "I believe Anita Hill." There was also concern that Hill's treatment might discourage women from reporting sexual harassment. The Thomas-Hill hearings were a watershed event in the discussion of sexual harassment.

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The sexual harassment lawsuit filed in 1994 by Paula Jones against President **BILL CLINTON** highlighted this workplace issue. In 1991 Jones was an employee of the Arkansas Industrial Development Commission and Clinton was governor of Arkansas. Jones claimed that while working at an official conference at a Little Rock hotel, she was persuaded by a member of the Arkansas state police to visit the governor in a business suite at the hotel. She alleged that Clinton made sexual advances that she rejected. Jones also claimed that because she rejected his advances, her superiors dealt with her in a rude and hostile manner and changed her job duties.

Clinton denied the charges and sought to delay the lawsuit until after he left the presidency. The Supreme Court rejected this argument in *Clinton v. Jones,* 520 U.S. 681, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997), and he was forced to defend himself. In 1998 the federal district court dismissed her action, ruling that there was no proof that Jones was emotionally injured or punished in the workplace for rejecting Clinton's advances. Jones appealed this ruling but agreed to drop her lawsuit in return for $850,000. She also dropped her previous demand that Clinton apologize or make an admission of guilt.

The most far-reaching part of the EEOC definition is that dealing with a hostile or offensive working environment. The U.S. Supreme Court upheld the concept of a hostile work environment as actionable under the 1964 Civil Rights Act in *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 49 (1986). The Court rejected a narrow reading of the statute,

under which an employer could not be held liable for sexual harassment unless the employee's salary and promotions were affected by the actions.

In the *Vinson* case, plaintiff Michelle Vinson, an employee of Meritor Savings Bank, claimed that her male supervisor, Sidney Taylor, had sexually harassed her. Taylor made repeated demands for sexual favors, and the pair engaged in sexual relations at least 40 times. Vinson testified that she engaged in sexual relations because she feared losing her job if she refused. The harassment stopped after Vinson began a steady relationship with a boyfriend. One year later, Taylor fired Vinson for excessive use of medical leave. Although the bank had a procedure for reporting harassment, Vinson had not used it because it required her to report the alleged offenses to her supervisor—Taylor.

Justice WILLIAM H. REHNQUIST, writing for the Court, established several basic principles for analyzing hostile environment cases. First, for sexual harassment to be actionable, it must be severe enough to change the conditions of the victim's employment and create an abusive working environment. Here, Rehnquist implied that isolated occurrences of harassment (such as the telling of a dirty joke or the display of a sexually explicit photograph) would not constitute a hostile work environment.

Second, Rehnquist made clear that there is a difference between voluntary behavior and welcome behavior. Noting that Vinson and Taylor's sexual relations were voluntary, Rehnquist rejected the conclusion that Vinson's willingness constituted a defense to sexual harassment. The critical issue was whether the sexual advances were welcome. If sexual advances are unwelcome, the inequality of power between a supervisor and subordinate strongly suggests that the employee engages in sexual relations out of fear.

Third, Rehnquist held that courts must view the totality of the circumstances when deciding the issue of welcomeness. In *Vinson,* however, the Court did not address the question of whose perspective should be used in determining whether certain behavior so substantially changes the work environment that it becomes abusive: should the standard be that of a reasonable man, a REASONABLE WOMAN, or a reasonable person?

In *Robinson v. Jacksonville Shipyards,* 760 F. Supp. 1486 (M.D. Fla. 1991), federal district judge Howell Melton applied the reasonable woman test to determine if the work environment was abusive to women. He held that a reasonable woman exposed to the pictures of nude or partially nude women that were posted in the workplace and to the sexually demeaning remarks and jokes by male workers would find that the work environment at the shipyards was abusive. The totality of the circumstances would lead a reasonable woman to these conclusions.

The Ninth Circuit Court of Appeals echoed this reasoning in *Ellison v. Brady,* 924 F.2d 872 (1991). In *Ellison,* the court rejected the reasonable person standard in favor of the reasonable woman standard. The court believed that using the reasonable person standard would risk enforcing the prevailing level of discrimination because that standard would be male biased.

Even with the acceptance of the reasonable woman standard by the courts, the diversity of outcomes in harassment claims created confusion as to what constitutes harassment. In *Harris v. Forklift Systems,* 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 295 (1993), the Supreme Court attempted to clarify this issue. Teresa Harris had filed a discrimination claim based on the behavior of the company president, Charles Hardy. Hardy had insulted Harris and other women with demeaning references to their gender and with unwanted sexual innuendo.

The district court ruled that although Hardy's comments were sufficiently offensive to cause discomfort for a reasonable woman, they did not rise to the level of interfering with that woman's work performance. The court also held that Harris had not been injured by the comments.

The Supreme Court overruled the lower court, holding that courts must not focus their inquiry on concrete psychological harm, which is not required by Title VII of the Civil Rights Act. To maintain such a requirement would force employees to submit to discriminatory behavior until they were completely broken by it. So long as the workplace environment would reasonably be perceived as hostile or abusive, it did not need also to be psychologically injurious.

Thus, the plaintiff in a hostile work environment case must show that sexually harassing behavior is more than occasional, but need not document an abusive environment that causes actual psychological injury. The courts recognize that a hostile work environment will detract

from employees' job performance, discourage employees from remaining in their positions, and keep employees from advancing in their careers. The Title VII guiding rule of workplace equality requires that employers prevent a hostile work environment.

In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), the Supreme Court sought to clarify the confusing state of sexual harassment law. It held that an employee could sue for damages for sexual harassment under Title VII even if the employee did not suffer any adverse job consequences, such as demotion or termination. The Court stated that under Title VII, an employee who refuses "unwelcome and threatening sexual advances of supervisor, yet suffers no adverse, tangible job consequences" may recover damages from an employer. The employee does not have to show that the employer was negligent or at fault for the supervisor's actions to recover damages. The Court based its new standard on principles of agency law. Agency law describes the responsibilities of employers and employees to each other and to third parties. The Court invoked the agency principle that makes employers liable for the TORTS of employees who act or speak on behalf of the employer and whose apparent authority the victimized employee relies upon.

The Court, however, also provided employers with more protection in *Ellerth.* If a supervisor has harassed an employee, but no tangible employment action is taken against the employee, the employer may present an AFFIRMATIVE DEFENSE. This defense includes a showing that the employer exercised reasonable care to prevent and correct sexually harassing behavior. A company's policy against sexual harassment would be relevant to demonstrate reasonable care. The defense also allows the employer to show that the employee had unreasonably failed to take advantage of the employer's anti-harassment procedures.

*Ellerth* gave employers an additional incentive to institute policies against sexual harassment. A first step is determining if a problem exists. Some companies conduct informal surveys of their employees concerning sexual harassment. In addition, employers often inspect the workplace for objectionable material, such as photographs of nude people or insensitive or explicit jokes with sexual connotations.

Employers typically include a policy against sexual harassment in personnel policies or employee handbooks. These policies use the EEOC definition of prohibited conduct as a guideline. The prohibited conduct must be stated in an understandable way.

A complaint procedure is typically part of the policy. Most employers recognize that a prompt and thorough investigation of a complaint, followed by appropriate disciplinary action, can minimize liability. These procedures usually specify to whom a victim of harassment can complain if the victim's supervisor is the alleged harasser. Companies also routinely train supervisors to recognize sexual harassment. Finally, some employers provide sexual harassment training for all their employees as a way of trying to improve workplace culture and behavior, as well as minimizing their legal liability.

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CROSS-REFERENCES

Employment Law; Women's Rights.

"PUT SIMPLY, A DEFENSE ATTORNEY'S JOB IS TO SEE TO IT THAT THE MAN OR WOMAN WHO STANDS UNDER . . . SCRUTINY DOES NOT STAND ALONE."
—ROBERT SHAPIRO

## SHAM

*False; without substance.*

A sham PLEADING is one that is good in form but is so clearly false in fact that it does not raise any genuine issue.

## ♦ SHAPIRO, ROBERT LESLIE

Robert Leslie Shapiro is a prominent West Coast defense lawyer. He entered private practice in 1972 after a brief stint as a prosecutor. Within a decade, he was representing film stars, producers, professional athletes, and other celebrities. Shapiro is known for his calm, tactful manner in negotiations and for building relationships with law enforcement agencies and the press. In 1994, he turned these abilities to the defense of O.J. (Orenthal James) Simpson in a case that was followed closely throughout the nation.

Shapiro was born on September 2, 1942, in Plainfield, New Jersey. While still a child, he moved to California with his family. He later studied finance at the University of California, Los Angeles, and then law at Loyola Law School. After earning his law degree in 1968, he joined the Los Angeles County District Attorney's Office as an assistant district attorney. That same office also served as a stepping stone for another noted West Coast attorney, JOHNNIE L. COCHRAN JR., who later became Shapiro's colleague on the Simpson defense team. In 1972, Shapiro left the public sector for private practice.

Shapiro's first well-known case was his defense of Linda Lovelace, an adult film star who had been charged with a cocaine offense in 1975. Shapiro got the charges dismissed. Famous figures in sports and entertainment began to call on Shapiro. He represented television comedian Johnny Carson, New York Mets outfielder Vince Coleman, film producer Robert Evans, and Christian Brando, the son of actor Marlon Brando. Shapiro also won an acquittal for his friend, attorney F. (Francis) Lee Bailey, who had been charged with drunk driving.

After two decades of success, Shapiro published some of his insights for other lawyers. In February 1993, he wrote an essay called "Using the Media to Your Advantage," which was published by the National Association of Criminal Defense Lawyers. The essay's message was that big cases are tried as much in the media as in court, and usually to the prosecution's advantage. Prosecutors know how to play to reporters, and defense attorneys usually do not. Shapiro contended that media headlines proclaiming an arrest destroy the PRESUMPTION OF INNOCENCE and instead create a presumption of guilt. Shapiro believed that combating the public mind-set that "if the press said it, it must be true," is the defense attorney's most challenging task. He advised defense lawyers to get to know reporters, to look into the camera, and to speak in sound bites, so that the defense's position also finds its way into news reports.

Shapiro's most prominent case was the trial of former football star O.J. SIMPSON for the 1994 murders of his ex-wife, Nicole Brown Simpson, and her friend, Ronald Lyle Goldman. One of Shapiro's first moves in the case was to arrange for Simpson's surrender to Los Angeles police, something that he had done for other clients. Instead of surrendering as arranged, however, Simpson fled, leaving a suicide note; shortly thereafter, he led police on a long, slow-speed chase along Los Angeles freeways, driven by his friend and former Buffalo Bills teammate, Al "A.C." Cowlings. Massive publicity followed, putting the case and Shapiro under virtually ceaseless scrutiny.

Shapiro worked to ensure that the defense's perspective would be part of the media's coverage of the case. He also assembled a powerful team of lawyers and scientific experts to prepare for trial. Shapiro's team of experts, though widely praised, may have been as big a challenge as the media, for the many well-known attorneys did not always agree on strategy or on who should play what role. Serious disagreements arose within the team, including one between Shapiro and Bailey, whom Shapiro accused of trying to undermine his reputation. Although Shapiro handled most of the early trial work, it was Cochran who

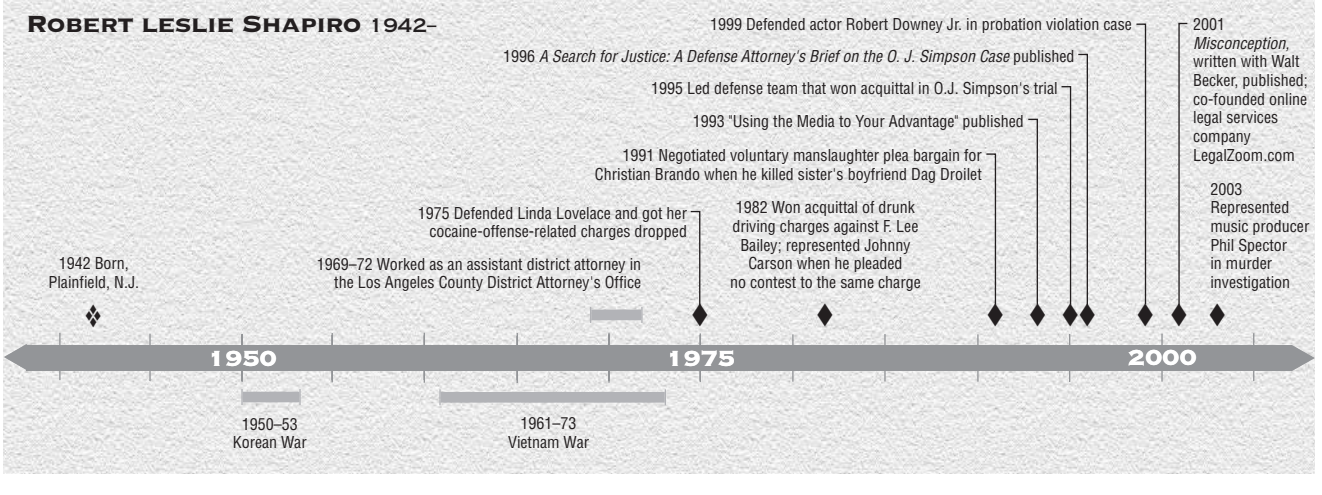

assumed the lead role toward the end of the trial, delivering the most widely quoted defense remarks in the closing arguments.

Simpson was ultimately acquitted of murder, and the team that Shapiro had assembled disbanded. By the trial's conclusion in 1995, Shapiro had gained nationwide fame for his part in one of the most widely followed cases in U.S. history.

In 1996, Shapiro published his recounting of the Simpson trial in a book titled *The Search for Justice: A Defense Attorney's Brief on the O.J. Simpson Case.* In recent years, Shapiro has practiced law as a partner in the firm of Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro. He also cofounded LegalZoom, an online provider of legal documentation services.

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## SHARE

*A portion or part of something that may be divided into components, such as a sum of money. A unit of stock that represents ownership in a corporation.*

## ♦ SHAW, LEMUEL

Lemuel Shaw served as chief justice of the Supreme Judicial Court of Massachusetts from 1830 to 1860. Shaw was a judicial pioneer. His long career as a judge coincided with a crucial period in the development of the United States, and his personal, idiosyncratic opinions fashioned legal doctrines that accommodated the tumultuous changes of the time. It is likely that no other state judge in the nineteenth century wielded the same influence as Shaw in the areas of commercial and CONSTITUTIONAL LAW. This influence was not merely on law in his state: Shaw's ideas and precedents were adopted nationally. Many decades after his death in 1861, Shaw's ideas still affected EMPLOYMENT LAW and civil rights cases.

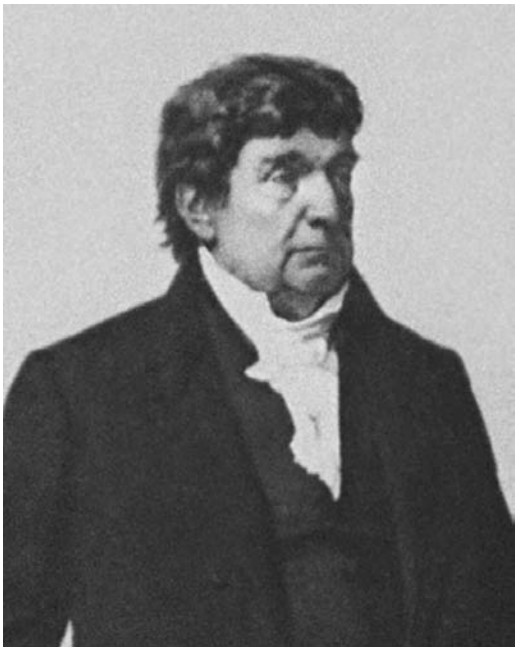

*Lemuel Shaw.*
LIBRARY OF CONGRESS

Born on January 9, 1781, in West Barnstable, Massachusetts, Shaw was the second son of the Reverend Oaks Shaw, who taught his son English, the classics, and the Bible. In 1800 Shaw graduated from Harvard University with high distinction. A brief writing career led to studying law with a Boston lawyer, and in 1804 Shaw was admitted to the bar in both New Hampshire and Massachusetts. Over the next two decades, he practiced some law while immersing himself in his home state's politics. He was by turns a JUSTICE OF THE PEACE, an ardent Federalist organizer, a delegate to the Massachusetts Constitutional Convention of 1820, and a state senator in 1821 and 1822.

"[WHILE] THE MAINTENANCE OF SEPARATE SCHOOLS TENDS TO DEEPEN AND PERPETUATE THE ODIOUS DISTINCTION OF CASTE, . . . PREJUDICE, IF IT EXISTS, IS NOT CREATED BY LAW, AND PROBABLY CANNOT BE CHANGED BY LAW."
—LEMUEL SHAW

Shaw's decision to devote himself fully to legal practice marked the turning point in his career. From 1823 on, he devoted himself to the practice of COMMERCIAL LAW. The nation was in the process of transforming itself from an agrarian society into a modern urban industrial one. Alert to the changes underway, Shaw became wealthy and prominent as a lawyer to growing industrial concerns. In 1830, on the basis of this reputation, Governor LEVI LINCOLN offered Shaw the office of chief justice of the Supreme Judicial Court of Massachusetts. Shaw took the offer despite the sacrifice of a lucrative career and the prospect of long absences from his family.

Shaw's opinions broke from precedent. In *Farwell v. Boston and Worcester Rail Road,* 45

Mass. (4 Met.) 49 (1842), he denied recovery of damages to a railroad worker whose hand was lost due to the NEGLIGENCE of another worker. The injured worker had sued the employer. Shaw's concern was to limit the liability of employers, and he accomplished this by importing from English COMMON LAW the so-called FELLOW-SERVANT RULE. This rule protected employers from being sued in such cases on the theory that workers know that they take risks and that their salaries are compensation enough. By introducing to U.S. law this doctrine, which became widely popular, Shaw hoped to benefit the commonwealth with unhindered industrial growth. His decision helped frustrate injured workers' claims for more than a half century, until the advent of WORKERS' COMPENSATION laws in the early twentieth century eviscerated the doctrine in most jurisdictions.

Yet Shaw was not against labor. In his best-known and most praised decision, Shaw cleared the way for LABOR UNIONS to operate freely in Massachusetts. *Commonwealth v. Hunt,* 45 Mass. (4 Met.) 111 (1842), freed the state's unions from the prevailing judicial application of the law of criminal conspiracy to labor actions. In the twentieth century, the opinion has been hailed as the foremost nineteenth-century ruling on labor unions because it removed from them the stigma of criminality.

Shaw's views on CIVIL RIGHTS were among his most controversial. He was praised by abolitionists and condemned by southern slave states for his opinion in *Commonwealth v. Aves,* 35 Mass. (18 Pick.) 193 (1836). *Aves* held that a slave brought voluntarily into the state became free and could not be required by his or her master to leave to return to SLAVERY. But subsequently, Shaw always denied writs of HABEAS CORPUS to free fugitive slaves. In 1849 he upheld the SEGREGATION of black schoolchildren in *Roberts v. City of Boston,* 59 Mass. (5 Cush.) 198. As the first in a line of state and federal cases that supported school segregation, Shaw's opinion in *Roberts* was cited by the Supreme Court in 1896 when it upheld a Louisiana law requiring the separation of races in railroad cars in the infamous case of PLESSY V. FERGUSON, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256.

Shaw's thirty years on the Massachusetts bench ended with his retirement in 1860. He died in Boston on March 30, 1861.

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## SHAW V. HUNT

In 1996 the U.S. Supreme Court dealt a severe blow to states' attempts to create election districts containing a majority of minority voters to ensure minority representation. In *Shaw v. Hunt,* 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207, the Court ruled that the redrawing of a North Carolina congressional district into a "bizarre-looking" shape to include a majority of African Americans could not be justified by the VOTING RIGHTS ACT OF 1965 (42 U.S.C.A. § 1973c), because it violated the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT to the U.S. Constitution.

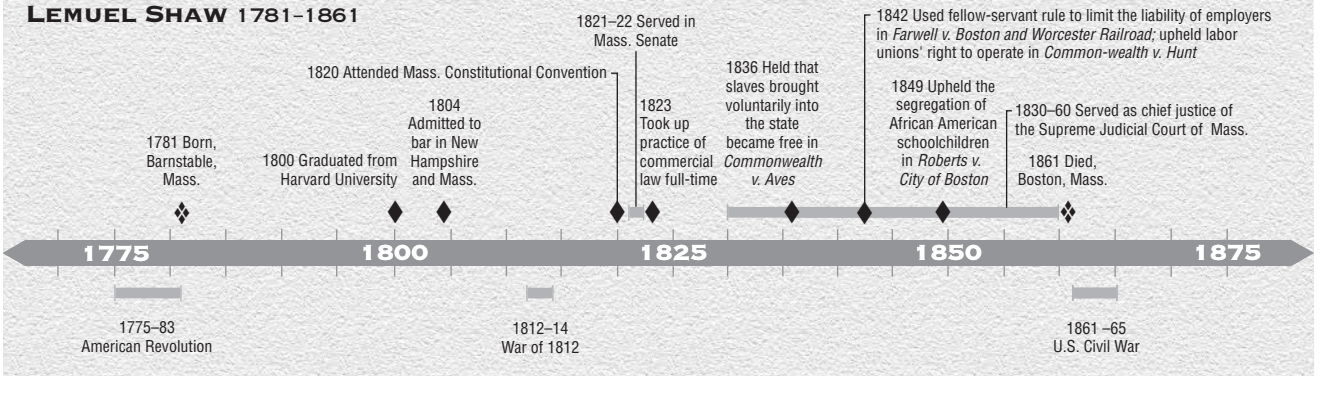

The case arose out of two disputed congressional election districts created by the North Carolina legislature following the 1990 census. North Carolina increased its congressional delegation from 11 to 12 seats in the House of Representatives. In 1991 the state legislature reapportioned the election districts and included one black-majority district. The JUSTICE DEPARTMENT, which under the Voting Rights Act must "preclear" redistricting plans, rejected it. The department found that one black-majority district was insufficient in a state where 22 percent of the population is black.

In 1992 the North Carolina legislature prepared a new plan that created two black-majority districts, the First and the Twelfth. In November 1992 Eva Clayton and Mel Watt were elected from these districts, the first blacks to represent North Carolina since 1901. However, the REPUBLICAN PARTY and five white voters challenged the two election districts in federal court. The white plaintiffs argued that the two districts amounted to unlawful racial gerrymandering.

The Twelfth District was worm-shaped, stretching 160 miles from Gastonia to Durham, hugging the thin line of Interstate 85. The district was so narrow at one point that drivers in the northbound lane of the interstate were in the district while drivers in the southbound lane were in another district. Of the ten counties through which the district passed, five were cut into three different districts, with some towns divided. The First District was hook-shaped, with fingerlike extensions. It had been compared to a "Rorschach ink-blot test" and a "bug splattered on a windshield."

A three-judge panel reviewed the claims of the plaintiffs and dismissed the case. The court ruled that the plaintiffs had failed to state an equal protection claim because favoring minority voters was not discriminatory in the constitutional sense and the plan did not lead to proportional underrepresentation of white voters statewide (808 F. Supp. 461 [E.D.N.C. 1992]).

An appeal followed to the U.S. Supreme Court (*Shaw v. Reno,* 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 [1993]), which laid the groundwork for the Court's 1996 decision. On a 5–4 vote, the Supreme Court reversed the three-judge panel and reinstated the lawsuit, ruling that the plaintiffs did have a CAUSE OF ACTION under the Fourteenth Amendment's Equal Protection Clause. Justice SANDRA DAY O'CONNOR, in her majority opinion, noted the long history of court cases involving efforts by southern states to restrict voting rights for black Americans. In *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960), the state of Alabama redefined the boundaries of the city of Tuskegee "from a square to an uncouth twenty-eight-sided figure" to exclude black voters from the city limits. The passage of the Voting Rights Act of 1965 had a dramatic effect on these kinds of practices. By the early 1970s, voter registration had significantly improved for black voters. But black voters were frustrated in their efforts to elect their candidates because of multimember or at-large districts, which diluted their votes and enabled the white majority to elect its candidates. In 1982 Section 2 of the Voting Rights Act was amended to prohibit legislation that results in the dilution of a minority's voting strength, regardless of the legislature's intent.

It was against this background that O'Connor shaped her analysis. Reviewing the two districts in dispute, she found it "unsettling how closely the North Carolina plan resembles the most egregious racial gerrymandering of the past." O'Connor agreed that prior cases had never made race-conscious redistricting "impermissible in all circumstances," yet agreed with the plaintiffs that the redistricting was "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."

Under a constitutional challenge regarding the Equal Protection Clause, legislation that involves racial classification requires a court to use the STRICT SCRUTINY standard of review. A law will be upheld under strict scrutiny if it is supported by a compelling state interest and is narrowly drawn to achieve that interest in the least restrictive manner possible. O'Connor agreed that district lines "obviously drawn for the purpose of separating voters by race" required application of the strict scrutiny standard.

In examining the districts, O'Connor held that race-based districts will be considered suspect if they disregard traditional districting principles "such as compactness, contiguity, and respect for political subdivisions." These "objective" criteria are required because in reapportionment, "appearances do matter." O'Connor stated that a reapportionment plan that draws in

persons of one race from widely separated geographic and political boundaries and "who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." This type of redistricting reinforces "impermissible racial stereotypes" and may "exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract."

O'Connor also characterized the redistricting plan as "pernicious," sending a message to voters that elected officials are to represent members of their voting group and not their entire constituency. For these reasons, the majority concluded that a reapportionment statute may be challenged when the plaintiffs claim that the plan is an "effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."

The Court remanded the case to the lower court, directing it to apply the standards articulated in the opinion to its analysis of the congressional districts. The lower-court panel ruled that the redistricting plan was narrowly tailored to serve compelling state interests and did not violate equal protection (861 F. Supp. 408 [E.D.N.C. 1994]). The plaintiffs again appealed.

In *Shaw v. Hunt,* the Court again split 5–4, with Chief Justice WILLIAM H. REHNQUIST writing the majority opinion that struck the redistricting plan. Compared with the first Court opinion, the decision was relatively brief and to the point. Rehnquist applied the strict scrutiny test because race was the predominant consideration in drawing the district lines. Therefore, North Carolina had to prove that its scheme was narrowly tailored to serve a compelling state interest. This burden, the majority concluded, it did not meet.

Rehnquist found the three "compelling interests" asserted by North Carolina to be lacking in merit. In addition, none was narrowly tailored. North Carolina had claimed that it had an interest in eradicating the effects of past discrimination, but the lower court had found that this interest did not precipitate the use of race in the redistricting plan. As Rehnquist noted, to prove a "compelling interest," North Carolina had to show that the alleged objective was the legislature's "actual purpose" for the redistricting plan. Therefore, the state could not assert this interest after the fact.

North Carolina also asserted a compelling interest in complying with Section 5 of the Voting Rights Act, arguing that it was the state's duty to follow the mandates of the Justice Department in the preclearance process and create two rather than one black-majority districts. Rehnquist rejected this interest because the Court disagreed with the Justice Department that Section 5 requires maximizing the number of black-majority districts wherever possible. Under the legislature's original plan, it had only proposed one black-majority district. Rehnquist concluded that this maximization policy was not grounded in Section 5; therefore, no compelling interest was at stake.

Rehnquist also saw no merit in the state's argument that under section 2 of the Voting Rights Act it had a compelling interest to create a second black-majority district. North Carolina contended that failure to do so would have brought a charge under Section 2 that it was diluting minority voting strength by confining most African Americans to one district. Rehnquist found this contention misplaced because a potential Section 2 violation could only be lodged if the minority group was "geographically compact." In this case the original one-district plan was anything but compact.

In 2001 the U.S. Supreme court made a final ruling on the issue in Hunt v. Cromartie, 526 U.S. 541, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001). Here the court ruled that a largely black district is constitutional, but only if it is drawn to satisfy political, rather than racial motives.

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#### CROSS-REFERENCES

Apportionment; Elections; Gerrymander; Voting.

## SHAYS'S REBELLION

A revolt by desperate Massachusetts farmers in 1786, Shays's Rebellion arose from the economic

hardship that followed the WAR OF INDEPENDENCE. Named for its reluctant leader, Daniel Shays, the rebellion sought to win help from the state legislature for bankrupt and dispossessed farmers. More than a thousand rebels blocked courts, skirmished with state militia, and were ultimately defeated, and many of them were captured. But the rebellion bore fruit. Acknowledging widespread suffering, the state granted relief to debtors. More significantly, the rebellion had a strong influence on the future course of federal government. Because the federal government had been powerless under the ARTICLES OF CONFEDERATION to intervene, the Framers created a more powerful national government in the U.S. Constitution.

Three years after peace with Great Britain, the states were buffeted by inflation, devalued currency, and mounting debt. Among the hardest hit was Massachusetts. Stagnant trade and rampant unemployment had devastated farmers who, unable to sell their produce, had their property seized by courts in order to pay off debts and overdue taxes. Hundreds of farmers were dispossessed; dozens of them were jailed. The conditions for revolt were ripe, stoked by rumors that the state's wealthy merchants were plotting to seize farm lands for themselves and turn the farmers into peasants.

The rebellion that followed came in two stages. The first steps were taken in the summer and fall of 1786. In five counties, mobs of farmers stopped the courts from sitting. Their goal was to stop the trials of debtors until elections could be held. They hoped that a new legislature would follow the example of other states by providing legal relief for them. This action provoked the state's governor, James Bowdoin, into sending out the state militia. Reluctantly, Daniel Shays, a destitute 39-year-old former captain in the Continental Army, was pressed into leadership of the insurgents. Shays sought to prevent the court from sitting in Springfield, and on September 26, he defied the state militia with his own force of 500 men. The men prevailed at first, forcing the court to adjourn. But with the capture of another rebel leader in November, the rebellion collapsed.

By December the rebels had regrouped for another stand. Because they feared that this time the state was going to indict them on charges of TREASON, they marched on the federal arsenal in Springfield on January 25, 1784, planning to continue on to the courthouse. Shays had some 1,100 men under his command. But the militia there, under the command of Major General William Shepherd, easily held them off: four people died before a single cannon volley dispersed Shays's men, who were pursued and arrested. Despite scattered resistance, the rebellion was crushed by February 4.

However, by popularizing the plight of debtors, the defeated rebels succeeded in their goals. Massachusetts elected a new legislature that quickly acceded to several demands of Shays's followers, chiefly by enacting relief measures. Moreover, although 14 of the rebel leaders were convicted and sentenced to death, they all received pardons or short prison sentences. Within a year's time, the state was prosperous again and enmities had cooled.

The most lasting and significant impact came at the federal level. In light of the events in Massachusetts, it was clear to the congress of the Confederation that it lacked the legal power to send aid to the states in a time of crisis. Only six years earlier, the 13 original states had drawn up their governing document, the Articles of Confederation. Now the congress invited the states to send delegates to a convention in Philadelphia in May 1787 to revise the Articles. This plan was quickly dropped in favor of much broader action—the drafting of a new constitution that would establish a more powerful national government. In part due to the weaknesses exposed by Shays's Rebellion, many delegates at the Constitutional Convention gave support to greater federal power, ultimately embodied in the Constitution.

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CROSS-REFERENCES

Constitution of the United States.

## SHELLEY'S CASE

See RULE IN SHELLEY'S CASE.

## SHELTER

*A general term used in statutes that relates to the provision of food, clothing, and housing for specified individuals; a home with a proper environment that affords protection from the weather.*

## SHEPARDIZING

*A term used in the legal profession to describe the process of using a citator to discover the history of a case or statute to determine whether it is still good law.*

The expression is derived from the act of using *Shepard's Citations.* An individual checking a citation by shepardizing a case will be able to find out various information, such as how often the opinion has been followed in later cases and whether a particular case has been overruled or modified.

CROSS-REFERENCES

Shepard's® Citations.

## SHEPARD'S® CITATIONS

*A set of volumes published primarily for use by judges when they are in the process of writing judicial decisions and by lawyers when they are preparing briefs, or memoranda of law, that contain a record of the status of cases or statutes.*

*Shepard's Citations* provide a judicial history of cases and statutes, make note of new cases, and indicate whether the law in a particular case has been followed, modified, or overruled in subsequent cases. They are organized into columns of citations, and various abbreviations indicate whether a case has been overruled, superseded, or cited in the dissenting opinion of a later case.

The term *shepardizing* is derived from the act of using Shepard's citators.

## SHEPPARD, SAMUEL H.

In 1954 a sensational murder trial laid the groundwork for a significant U.S. Supreme Court ruling on the rights of criminal defendants to a fair trial. Dr. Samuel H. Sheppard, a prominent Cleveland osteopath, was convicted of murdering his pregnant wife, Marilyn Sheppard. He was sentenced to life in prison, where he remained before his appeal reached the Supreme Court in 1966. The Court ordered a new trial, which led to Sheppard's eventual acquittal. *Sheppard v. Maxwell,* 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600, became the leading case on PRETRIAL PUBLICITY, shaping how judges have since treated the difficult problem of guaranteeing a defendant a fair trial in the face of massive media attention.

On July 4, 1954, 31-year-old Marilyn Sheppard who was four months pregnant, was bludgeoned to death in the bedroom of the couple's impressive Lake Erie, Pennsylvania home. According to Sheppard, he had been sleeping on a downstairs couch when he heard noises and moans coming from the bedroom where his wife was sleeping. He ran to help her but was knocked unconscious by a bushy-haired man. He awoke to find that his wife had been murdered and then chased the intruder across the lawn where he was knocked out a second time. After awakening outside the house, he immediately telephoned the mayor of Cleveland, his friend, and related the story.

Both prosecutors and the media seized on Sheppard as the murderer. Even before his arrest three weeks later, police interrogated Sheppard at the coroner's inquest without his lawyer present. Rumors of marital difficulties and Sheppard's alleged extra-marital affairs, led the Cleveland newspapers to sensationalize the case until it became notorious nationwide.

At the trial in the fall of 1954, prosecutors had no clear-cut motive to explain why Sheppard had allegedly killed his wife. The best they could offer was the intimation that he had been having an affair with a former laboratory technician. Following a chaotic trial, in which the media had telephones, special tables, opportunities to photograph the jurors, and even interviews with the judge on the courthouse steps, the jury returned a guilty verdict. Sheppard received a life sentence.

From 1954 to 1966, Sheppard continuously appealed the jury's verdict. He argued that pretrial publicity had destroyed his chance of a fair trial by prejudicing jurors. His appeals failed until 1964, when U.S. District Court Judge Carl A. Weinman ruled in his favor (*Sheppard v. Maxwell,* 231 F. Supp. 37 [S.D. Ohio]). Without addressing Sheppard's innocence or guilt, Weinman held that he had been denied DUE PROCESS because negative reporting by the Cleveland press had adversely affected the jurors' verdict. But a year later, the U.S. Court of Appeals in Cincinnati overruled Judge Weinman (*Sheppard v. Maxwell,* 346 F.2d 707 [6th Cir. 1965]). The appeals court said that qualified jurors are able to make thoughtful rulings in the face of publicity.

But the U.S. Supreme Court ruled that Sheppard's trial had been prejudiced by pretrial publicity. So virulent had been the negative publicity that prejudice could safely be presumed, the Court held. It blamed the trial judge for not

minimizing the effect of the publicity, which it likened to a circus atmosphere. The decision heightened consideration of criminal defendant's SIXTH AMENDMENT right to due process. Significantly, the Court did not seek to curtail the FREEDOM OF THE PRESS to report on trials. Instead, the Court said that in a case where a defendant's rights are threatened by pretrial publicity, the trial judge must protect the defendant. This, it said, could be accomplished by taking such measures as isolating the jury through a process called SEQUESTRATION, in which jury members are shielded from contact with the outside world during the course of a trial.

Although the Supreme Court did not rule on Sheppard's guilt or innocence, it reversed his conviction and ordered a new trial. In November 1966, 13 years after his conviction, he stood trial again. This time, represented by the high-profile attorney F. LEE BAILEY, Sheppard was acquitted. Four years later, after a brief career as a professional wrestler named "Killer Sheppard," a despondent Sheppard died on April 7, 1970, from liver complications caused by heavy drinking.

In 1995 Sheppard's son, Sam Reese Sheppard, used his father's estate to file a lawsuit against Ohio for the wrongful imprisonment of Dr. Sheppard. To win the case, Sheppard had to prove that his father was innocent, a more difficult standard than for the acquittal Dr. Sheppard was granted at his retrial. Sheppard hoped to prove his father's innocence using new DNA EVIDENCE. Although he said his sole intention was to clear his father's name, Sheppard stood to receive as much as $2 million in damages for the ten years his father spent in jail.

The younger Sheppard and his attorneys suggested that Marilyn Sheppard may have been killed by Richard Eberling, a window washer who had been employed by the Sheppards at the time of the murder. In 1984 Eberling had been convicted of killing an elderly woman named Ethel Durkin in order to inherit her estate. In 1996 Durkin's former nurse stated that Eberling had told her that he had killed Marilyn Sheppard. Eberling, who was in prison for Durkin's murder denied making the statement.

In February 1997 the Sheppard family attorneys announced that DNA testing conducted by Dr. Mohammed Tahir showed that the blood found in the Sheppard home the night of Marilyn's murder could conceivably be that of Richard Eberling. In September of that year Sam Reese Sheppard had his father's remains exhumed in order to conduct DNA testing. In March 1998 the Sheppard attorneys stated that the results of the DNA testing excluded Dr. Sheppard from the bloodstains found at the murder scene. In July 1998 Eberling died in prison. The state had the bodies of Mrs. Sheppard and the fetus she was carrying exhumed in 1999 so that DNA and other tests could be conducted. Prosecutors stated that the test results still pointed to Dr. Sheppard as the murderer.

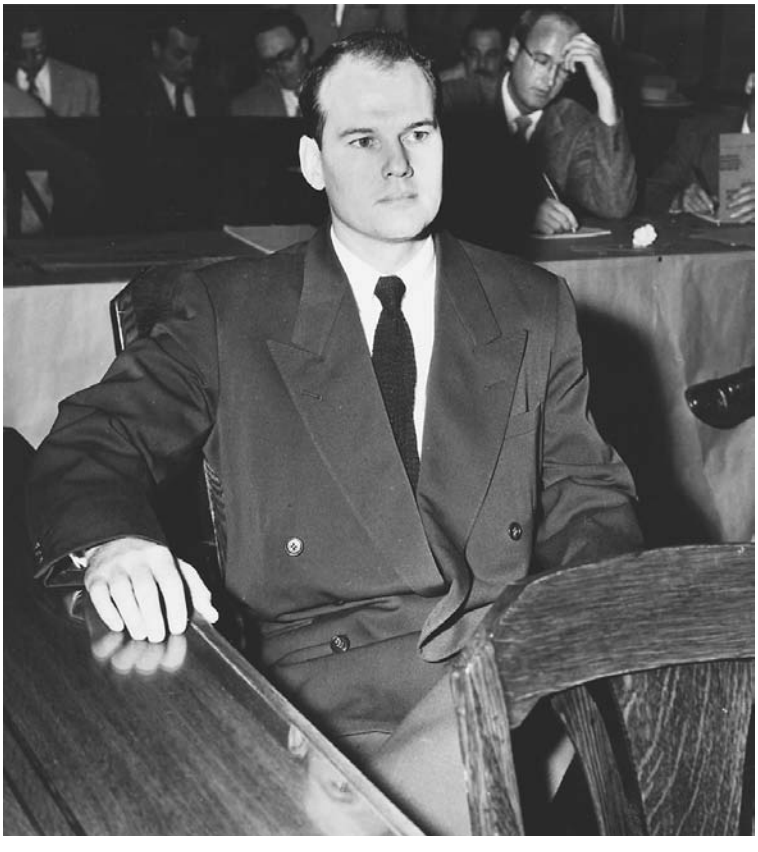

*Physician Sam Sheppard spent over a decade in prison for the murder of his wife before he was acquitted in a second trial ordered by the Supreme Court.* AP/WIDE WORLD PHOTOS

The wrongful imprisonment trial commenced in February 2000. Led by William Mason, Ohio prosecutors maintained their position that Dr. Sheppard killed his wife. They challenged Tahir's DNA results, saying Tahir used contaminated DNA samples. Prominent trial lawyer F. Lee Bailey, who defended Dr. Sheppard during his retrial in 1966, was the first witness. Bailey testified that the 1954 trial was a conspiracy between police, prosecutors, the court, and newspapers to convict an innocent man.

The younger Sheppard testified about the night of the murder that took place when he was seven. He said there was no tension between his parents when his mother tucked him into bed that night. In the early morning hours, his uncle

and a neighbor woke him to tell him "something terrible had happened." Anticipating the defense's case, Sheppard admitted that his father had extramarital sexual relations while Marilyn recovered from sexual problems.

While Sheppard testified, the prosecutors had a surprise for the jury. Although Sheppard always said he was more interested in clearing his father's name than making money, prosecutor William Mason disclosed in open court that Sheppard once asked for $3.2 million to settle the case out of court. The judge described Mason's disclosure as "improper" because the offer had been confidential. Mason's tactic worked, however, as jurors got to hear damaging evidence they should not have heard.

When it came time for the prosecutors' case, they belittled Tahir's DNA evidence as "mumbo jumbo." They said Dr. Sheppard was a playboy who had an affair with his lab technician and then killed his pregnant wife to get out of the marriage. Dr. Robert White used medical records to testify that Dr. Sheppard's story of being knocked out by an intruder was shaky. In closing arguments, Prosecutor William Mason said to the jury, "It may just be that you are being asked to award the killer's son for the killer bludgeoning his wife."

After listening to testimony for two months, the jury deliberated for less than three hours on April 12, 2000, before finding in favor of the Ohio prosecutors. In a short statement after his loss, Sam Reese Sheppard said, "The Sheppard family may be bloodied, but we are unbowed. We've been unbowed for 45 years. We'll be unbowed for all time."

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CROSS-REFERENCES

DNA Evidence; First Amendment; Sequestration.

## SHERIFF

*Usually the chief peace officer of a county.*

The modern office of sheriff in the United States descends from a one-thousand-year-old English tradition: a "shire-reeve" (shire-keeper) is the oldest appointment of the English crown. Because county governments were typically the first established units of government in newly settled American territories, sheriffs were among the first elected public officials in an area and thus developed a leading role in local law enforcement.

A dichotomy frequently exists today between a sheriff's jurisdiction and the jurisdiction of a local police department. A metropolitan area may encompass an entire county or more; police departments and sheriffs will often maintain concurrent jurisdiction in the overlapping area. A sheriff may assume that a local police department will do its duty in enforcing the law, but the primary obligation rests with the sheriff and requires him to act when evidence of neglect of that duty exists.

Some state constitutions specifically provide for the office of sheriff, and state legislatures frequently establish conditions of office. Sheriffs are typically chosen in a county election. To serve as sheriff, an individual must usually meet certain requirements: residence within the jurisdiction, no criminal record, U.S. citizenship, and compliance with provisions guarding against nepotism. Sometimes officeholders must also satisfy certain age, physical, and educational requirements. A sheriff typically takes an oath and posts a bond upon taking office to ensure the faithful performance of the duties of the office. Compensation typically consists of commissions or fees for particular services performed, a fixed salary, or a combination of fees and salary.

State statutes or state constitutions regulate many duties of a sheriff and emphasize preserving the peace and enforcing criminal laws. Sheriffs arrest and commit to jail felons and other lawbreakers, including pretrial detainees and sentenced prisoners. They transport prisoners to state penal facilities and mental patients to state commitment facilities. In addition, a sheriff is usually responsible for the custody and care of the county courthouse and the jail, attends upon courts of record in serving process, and often has the power to summon jurors. As an officer of the court, a sheriff is subject to a court's orders and direction. Sheriffs also have the power to serve process, including summons, mesne (intermediate) process, and final process.

State statutes define a sheriff's role in serving process. Generally a sheriff is the proper officer

to execute all writs returnable to court, unless another person is appointed. A sheriff must execute process without attempting to determine its validity. A court will not direct or advise a sheriff as to the manner of executing process, but she has a duty to effect service promptly, respectfully, and without unnecessary violence. A sheriff must exercise due diligence but need not expend all possible efforts in effecting service.

As part of the traditional common-law duties passed down from the English, sheriffs retain the power to summon the aid of a posse, or POSSE COMITATUS, as it is sometimes called. Ideally, a posse furnishes immediate, able-bodied assistance to a sheriff in need. For example, a sheriff may summon bystanders to assist in recapturing an escaped prisoner. These persons are neither officers nor private citizens. They are generally clothed with the same protection of the law as the sheriff and have full authority to provide the sheriff with any necessary assistance.

Sheriffs also levy writs of attachment, that is, the seizure of a debtor's property pursuant to a court order. The sheriff must safeguard seized goods from damage or loss, but he does not absolutely ensure their safety. Generally, property that is lost, destroyed, or damaged by something other than a sheriff's neglect will not result in liability for the sheriff. After seizure, the goods are sold at a sheriff's auction to satisfy creditors' claims. A sheriff decides the time, manner, and place of a JUDICIAL SALE, collects purchase monies, and distributes the proceeds pursuant to court instructions. A sheriff may not purchase property at a sheriff's sale.

In general, a sheriff may be liable in damages to any person injured as a consequence of a breach of duty connected with the office. A sheriff may not exceed the authority given by law: a sheriff who uses legal authority for illegal conduct is liable as if she had acted without process of law. Some instances where liability may be imposed include a negligent failure to seize sufficient available property that would reasonably be expected to satisfy a debt, a failure to execute process delivered for execution, a levy upon the wrong party, or an excessive levy. Liability is in a personal capacity, not in an official capacity. Limited IMMUNITY usually protects a sheriff from liability for acts performed in conjunction with official duties but will not shield her from liability caused by overstepping the authority of the office.

A sheriff typically has broad discretion in appointing, removing, and setting conditions of employment for deputies. A deputy is said to be clothed with the power and authority of the sheriff with respect to the sheriff's ministerial duties. For example, a deputy may act for the sheriff in the service and return of process, in making an execution or other judicial sale (including the appraisal of the property as a prerequisite to such sale), in executing a deed to a purchaser, in serving an execution for taxes, and in serving a GARNISHMENT summons.

A deputy's acts, breaches, or misconduct committed in the performance of official duties may result in liability on the sheriff's behalf. For example, in the absence of statutory authority to the contrary, a sheriff could be held liable for a deputy's reckless or wanton acts during an arrest, NEGLIGENCE in caring for and protecting prisoners, or failure to serve process or return a writ.

A sheriff may be removed from office for a variety of reasons, including habitual intoxication or intoxication on the job; misconduct in office, such as misuse of public funds or property; refusal to enforce the law; mistreatment of prisoners; neglect of duty; nepotism; or conviction of a crime.

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CROSS-REFERENCES

Service of Process.

## SHERIFF'S DEED

*A document giving ownership rights in property to a buyer at a sheriff's sale (a sale held by a sheriff to pay a court judgment against the owner of the property). A deed given at a sheriff's sale in foreclosure of a mortgage. The giving of said deed begins a* STATUTORY REDEMPTION *period.*

## SHERMAN ANTI-TRUST ACT

The Sherman Anti-Trust Act of 1890 (15 U.S.C.A. §§ 1 et seq.), the first and most significant of the U.S. ANTITRUST LAWS, was signed into law by President BENJAMIN HARRISON and is named after its primary supporter, Ohio Senator JOHN SHERMAN.

The prevailing economic theory supporting antitrust laws in the United States is that the

public is best served by free competition in trade and industry. When businesses fairly compete for the consumer's dollar, the quality of products and services increases while the prices decrease. However, many businesses would rather dictate the price, quantity, and quality of the goods that they produce, without having to compete for consumers. Some businesses have tried to eliminate competition through illegal means, such as fixing prices and assigning exclusive territories to different competitors within an industry. Antitrust laws seek to eliminate such illegal behavior and promote free and fair marketplace competition.

Until the late 1800s the federal government encouraged the growth of big business. By the end of the century, however, the emergence of powerful trusts began to threaten the U.S. business climate. Trusts were corporate holding companies that, by 1888, had consolidated a very large share of U.S. manufacturing and mining industries into nationwide monopolies. The trusts found that through consolidation they could charge MONOPOLY prices and thus make excessive profits and large financial gains. Access to greater political power at state and national levels led to further economic benefits for the trusts, such as tariffs or discriminatory railroad rates or rebates. The most notorious of the trusts were the Sugar Trust, the Whisky Trust, the Cordage Trust, the Beef Trust, the Tobacco Trust, John D. Rockefeller's Oil Trust (Standard Oil of New Jersey), and J. P. Morgan's Steel Trust (U.S. Steel Corporation).

Consumers, workers, farmers, and other suppliers were directly hurt monetarily as a result of the monopolizations. Even more important, perhaps, was that the trusts fanned into renewed flame a traditional U.S. fear and hatred of unchecked power, whether political or economic, and particularly of monopolies that ended or threatened equal opportunity for all businesses. The public demanded legislative action, which prompted Congress, in 1890, to pass the Sherman Act. The act was followed by several other antitrust acts, including the CLAYTON ACT of 1914 (15 U.S.C.A. §§ 12 et seq.), the Federal Trade Commission Act of 1914 (15 U.S.C.A. §§ 41 et seq.), and the ROBINSON-PATMAN ACT of 1936 (15 U.S.C.A. §§ 13a, 13b, 21a). All of these acts attempt to prohibit anticompetitive practices and prevent unreasonable concentrations of economic power that stifle or weaken competition.

The Sherman Act made agreements "in restraint of trade" illegal. It also made it a crime to "monopolize, or attempt to monopolize . . . any part of the trade or commerce." The purpose of the act was to maintain competition in business. However, enforcement of the act proved to be difficult. Congress had enacted the Sherman Act pursuant to its constitutional power to regulate interstate commerce, but this was only the second time that Congress relied on that power. Because Congress was somewhat uncertain of the reach of its legislative power, it framed the law in broad common-law concepts that lacked detail. For example, such key terms as *monopoly* and *trust* were not defined. In effect, Congress passed the problem of enforcing the law to the EXECUTIVE BRANCH, and to the judicial branch, it gave the responsibility of interpreting the law. Still, the act was a far-reaching legislative departure from the predominant laissez-faire philosophy of the era.

Initial enforcement of the Sherman Act was halting, set back in part by the decision of the Supreme Court in *United States v. E. C. Knight Co.,* 156 U.S. 1, 15 S. Ct. 249, 39 L. Ed. 325 (1895), that manufacturing was not interstate commerce. This problem was soon circumvented, and President THEODORE ROOSEVELT promoted the antitrust cause, calling himself a "trustbuster." In 1914, Congress established the Federal Trade Commission (FTC) to formalize rules for fair trade and to investigate and curtail unfair trade practices. As a result, a number of major cases were successfully brought in the first decade of the century, largely terminating trusts and basically transforming the face of U.S. industrial organization.

During the 1920s, enforcement efforts were more modest, and during much of the 1930s, the national recovery program of the NEW DEAL encouraged industrial collaboration rather than competition. During the late 1930s, an intensive enforcement of antitrust laws was undertaken. Since WORLD WAR II, antitrust enforcement has become increasingly institutionalized in the Antitrust Division of the JUSTICE DEPARTMENT and in the Federal Trade Commission, which over time, was granted greater authority by Congress. Justice Department enforcement activities against cartels are particularly vigorous, and criminal sanctions are increasingly sought. In 1992, the Justice Department expanded its enforcement policy to cover foreign company conduct that harms U.S. exports.

### Restraint of Trade

Section one of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is hereby declared to be illegal." The broad language of this section has been slowly defined and narrowed through judicial decisions.

The courts have interpreted the act to forbid only unreasonable restraints of trade. The Supreme Court promulgated this flexible rule, called the Rule of Reason, in *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911). Under the Rule of Reason, the courts will look to a number of factors in deciding whether the particular restraint of trade unreasonably restricts competition. Specifically, the court considers the makeup of the relevant industry, the defendants' positions within that industry, the ability of the defendants' competitors to respond to the challenged practice, and the defendants' purpose in adopting the restraint. This analysis forces courts to consider the pro-competitive effects of the restraint as well as its anticompetitive effects.

The Supreme Court has also declared certain categories of restraints to be illegal per se: that is, they are conclusively presumed to be unreasonable and therefore illegal. For those types of restraints, the court does not have to go any further in its analysis than to recognize the type of restraint, and the plaintiff does not have to show anything other than that the restraint occurred.

Restraints of trade can be classified as horizontal or vertical. A horizontal agreement is one involving direct competitors at the same level in a particular industry, and a vertical agreement involves participants who are not direct competitors because they are at different levels. Thus, a horizontal agreement can be among manufacturers or retailers or wholesalers, but it does not involve participants from across the different groups. A vertical agreement involves participants from one or more of the groups—for example, a manufacturer, a wholesaler, and a retailer. These distinctions become difficult to make in certain fact situations, but they can be significant in determining whether to apply a per se rule of illegality or the Rule of Reason. For example, horizontal market allocations are per se illegal, but vertical market allocations are subject to the rule-of-reason test.

### Concerted Action

Section one of the Sherman Act prohibits concerted action, which requires more than a unilateral act by a person or business alone. The Supreme Court has stated that an organization may deal or refuse to deal with whomever it wants, as long as that organization is acting independently. But if a manufacturer and certain retailers agree that a manufacturer will only provide products to those retailers and not to others, then that is a concerted action that may violate the Sherman Act. A company and its employees are considered an individual entity for the purposes of this act. Likewise, a parent company and its wholly owned subsidiaries are considered an individual entity.

Evidence of a concerted action may be shown by an express or written agreement, or it may be inferred from CIRCUMSTANTIAL EVIDENCE. Conscious parallelism (similar patterns of conduct among competitors) is not sufficient in and of itself to imply a conspiracy. The courts have held that conspiracy requires an additional element such as complex actions that would benefit each competitor only if all of them acted in the same way.

Joint ventures, which are a form of business association among competitors designed to further a business purpose, such as sharing cost or reducing redundancy, are generally scrutinized under the Rule of Reason. But courts first look at the reason that the JOINT VENTURE was established to determine whether its purpose was to fix prices or engage in some other unlawful activity. Congress passed the National Cooperative Research Act of 1984 (15 U.S.C.A. §§ 4301-06) to permit and encourage competitors to engage in joint ventures that promote research and development of new technologies. The Rule of Reason will apply to those types of joint ventures.

### Price Fixing

The agreement to inhibit price competition by raising, depressing, fixing, or stabilizing prices is the most serious example of a per se violation under the Sherman Act. Under the act, it is immaterial whether the fixed prices are set at a maximum price, a minimum price, the actual cost, or the fair market price. It is also immaterial under the law whether the fixed price is reasonable.

All horizontal and vertical price-fixing agreements are illegal per se. Horizontal price-

fixing agreements include agreements among sellers to establish maximum or minimum prices on certain goods or services. This can also include competitors' changing their prices simultaneously in some circumstances. Also significant is the fact that horizontal price-fixing agreements may be direct or indirect and still be illegal. Thus, a promotion or discount that is tied closely to price cannot be raised, depressed, fixed, or stabilized, without a Sherman Act violation. Vertical price-fixing agreements include situations where a wholesaler mandates the minimum or maximum price at which retailers may sell certain products.

### Market Allocations

Market allocations are situations where competitors agree to not compete with each other in specific markets, by dividing up geographic areas, types of products, or types of customers. Market allocations are another form of price fixing. All horizontal market allocations are illegal per se. If there are only two computer manufacturers in the country and they enter into a market allocation agreement whereby manufacturer A will only sell to retailers east of the Mississippi and manufacturer B will only sell to retailers west of the Mississippi, they have created monopolies for themselves, a violation of the Sherman Act. Likewise, it is an illegal agreement that manufacturer A will only sell to retailers C and D and manufacturer B will only sell to retailers E and F.

Territorial and customer vertical market allocations are not per se illegal but are judged by the Rule of Reason. In 1985, the Justice Department announced that it would not challenge any restraints by a company that has less than 10 percent of the relevant market or whose vertical price index, a measure of the relevant market share, indicates that collusion and exclusion are not possible for that company in that market.

### Boycotts

A boycott, or a concerted refusal to deal, occurs when two or more companies agree not to deal with a third party. These agreements may be clearly anticompetitive and may violate the Sherman Act because they can result in the elimination of competition or the reduction in the number of participants entering the market to compete with existing participants. Boycotts that are created by groups with market power and that are designed to eliminate a competitor or to force that competitor to agree to a group standard are per se illegal. Boycotts that are more cooperative in nature, designed to increase economic efficiency or make markets more competitive, are subject to the Rule of Reason. Generally, most courts have found that horizontal boycotts, but not vertical boycotts, are per se illegal.

### Tying Arrangements

When a seller conditions the sale of one product on the purchase of another product, the seller has set up a TYING ARRANGEMENT, which calls for close legal scrutiny. This situation generally occurs with related products, such as a printer and paper. In that example, the seller only sells a certain printer (the tying product) to consumers if they agree to buy all their printer paper (the tied product) from that seller.

Tying arrangements are closely scrutinized because they exploit market power in one product to expand market power in another product. The result of tying arrangements is to reduce the choices for the buyer and exclude competitors. Such arrangements are per se illegal if the seller has considerable economic power in the tying product and affects a substantial amount of interstate commerce in the tied product. If the seller does not have economic power in the tying product market, the tying arrangement is judged by the Rule of Reason. A seller is considered to have economic power if it occupies a dominant position in the market, its product is advantaged over other competing products as a result of the tying, or a substantial number of consumers has accepted the tying arrangement (evidencing the seller's economic power in the market).

### Monopolies

Section two of the Sherman Act prohibits monopolies, attempts to monopolize, or conspiracies to monopolize. A monopoly is a form of market structure where only one or very few companies dominate the total sales of a particular product or service. Economic theories show that monopolists will use their power to restrict production of goods and raise prices. The public suffers under a monopolistic market because it does not have the quantity of goods or the low prices that a competitive market could offer.

Although the language of the Sherman Act forbids all monopolies, the courts have held that the act only applies to those monopolies

attained through abused or unfair power. Monopolies that have been created through efficient, competitive behavior are not illegal under the Sherman Act, as long as honest methods have been employed. In determining whether a particular situation that involves more than one company is a monopoly, the courts must determine whether the presence of monopoly power exists in the market. Monopoly power is defined as the ability to control price or to exclude competitors from the marketplace. The courts look to several criteria in determining market power but primarily focus on market share (the company's fractional share of the total relevant product and geographic market). A market share greater than 75 percent indicates monopoly power, a share less than 50 percent does not, and shares between 50 and 75 percent are inconclusive in and of themselves.

In focusing on market shares, courts will include not only products that are exactly the same but also those that may be substituted for the company's product based on price, quality, and adaptability for other purposes. For example, an oat-based, round-shaped breakfast cereal may be considered a substitutable product for a rice-based, square-shaped breakfast cereal, or possibly even a granola breakfast bar.

In addition to the product market, the geographic market is also important in determining market share. The relevant geographic market, the territory in which the firm sells its products or services, may be national, regional, or local in nature. Geographic market may be limited by transportation costs, the types of product or service, and the location of competitors.

Once sufficient monopoly power has been proved, the Sherman Act requires a showing that the company in question engaged in unfair conduct. The courts have differing opinions as to what constitutes unfair conduct. Some courts require the company to prove that it acquired its monopoly power passively or that the power was thrust upon them. Other courts consider it an unfair power if the monopoly power is used in conjunction with conduct designed to exclude competitors. Still other courts find an unfair power if the monopoly power is combined with some predatory practice, such as pricing below marginal costs.

**Attempts to Monopolize** Section two of the Sherman Act also prohibits attempts to monopolize. As with other behavior prohibited under the Sherman Act, courts have had a difficult time developing a standard that distinguishes unlawful attempts to monopolize from normal competitive behavior. The standard that the courts have developed requires a showing of SPECIFIC INTENT to monopolize along with a dangerous probability of success. However, the courts have no uniform definition for the terms *intent* or *success.* Cases suggest that the more market power a company has acquired, the less flagrant its attempt to monopolize must be.

**Conspiracies to Monopolize** Conspiracies to monopolize are unlawful under section two of the Sherman Act. This offense is rarely charged alone, because a conspiracy to monopolize is also a combination in restraint of trade, which violates section one of the Sherman Act.

In accordance with traditional conspiracy law, conspirators to monopolize are liable for the acts of each co-conspirator, even their superiors and employees, if they are aware of and participate in the overall mission of the conspiracy. Conspirators who join in the conspiracy after it has already started are liable for every act during the course of the conspiracy, even those events that occurred before they joined.

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CROSS-REFERENCES

Antitrust Law; Mergers and Acquisitions; Unfair Competition; Vertical Merger.

## SHERMAN COMPROMISE

The Philadelphia Convention convened in 1787 to discuss the establishment of a new federal government to replace the unsatisfactory system that existed under the ARTICLES OF CONFEDERATION.

Representatives from twelve of the thirteen states attended the meeting; Rhode Island feared changes in the existing monetary system and refused to send delegates. One of the most pressing issues was the formation of a legislative body that would fairly represent the interests of the states.

ROGER SHERMAN of Connecticut proposed a plan known as the Sherman Compromise, or Connecticut Compromise. Sherman advocated a bicameral legislature with the two houses of Congress composed of members from all the states; the number of delegates to the House of Representatives would be determined by the population of each state, but each state would be equally represented in the Senate. The plan was accepted and is the basis for the congressional representation of today.

CROSS-REFERENCES

Constitution of the United States.

## ♦ SHERMAN, JOHN

John Sherman was an attorney who devoted most of his professional life to public service. He served in the U.S. House of Representatives, the U.S. Senate, and the cabinets of Presidents RUTHERFORD B. HAYES and WILLIAM MCKINLEY. An unsuccessful candidate for president, Sherman is best known for sponsoring the SHERMAN ANTI-TRUST ACT OF 1890 (15 U.S.C.A. § 1 et seq.), the landmark federal legislation that sought to prevent industrial monopolies.

Sherman was born on May 10, 1823, in Lancaster, Pennsylvania. His father was a judge and his older brother, William Tecumseh Sherman, became a renowned Union general during the Civil War. Sherman was admitted to the Ohio bar in 1844 and established a successful law practice in Mansfield, Ohio. Soon, however, his interests turned to politics.

Elected to the U.S. House of Representatives as a Republican in 1854, Sherman soon gained a reputation as an expert on government finance. He served as chair of the House Ways and Means Committee, the chief budgetary body, from 1859 to 1861. Sherman was then elected to the Senate, where he served from 1861 to 1877. From 1867 to 1877, he chaired the Senate Finance Committee.

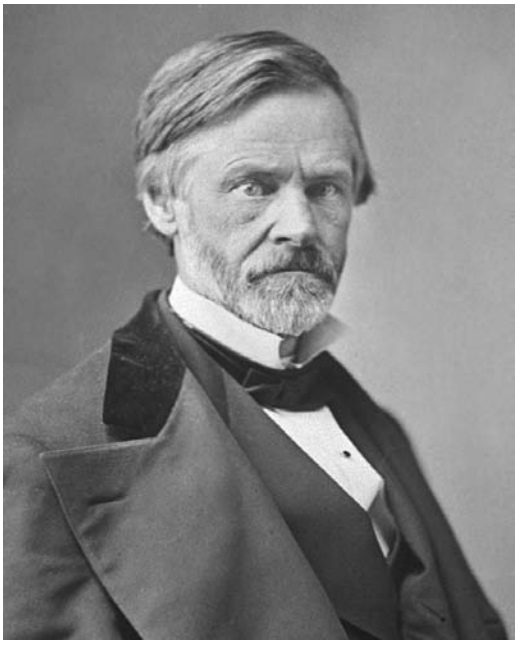

*John Sherman.* LIBRARY OF CONGRESS

During the 1870s Sherman's fiscal policies drew national attention. As a senator, he helped establish a national banking system, but he aroused the wrath of farmers in 1873 when he secured the passage of a bill that discontinued the coinage of silver dollars. As secretary of the treasury during the Hayes administration (1877–1881), he placed the United States on the gold standard. Ultimately, however, he was forced to compromise and support legislation that restored the silver dollar as legal tender.

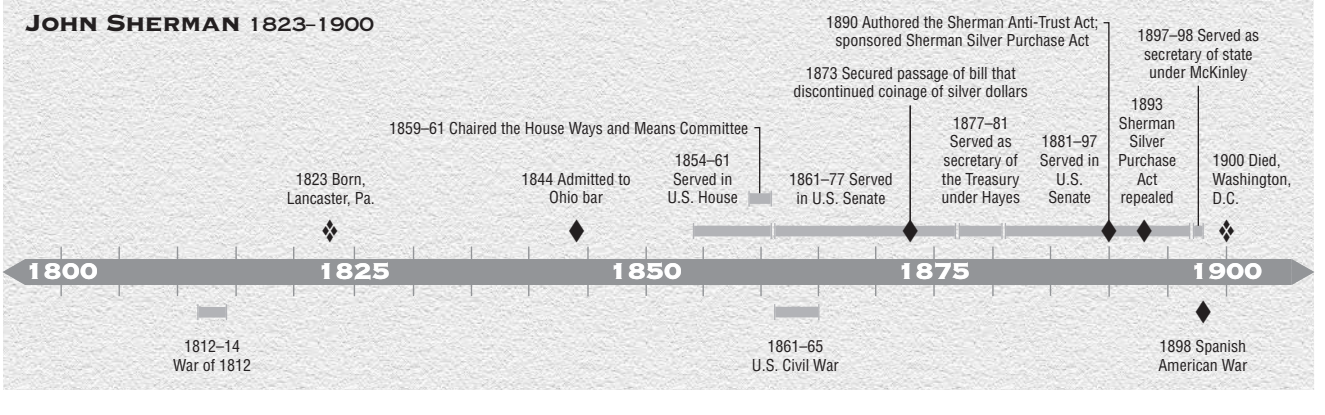

Although Sherman was a conservative, he was a master of political compromise, always willing to grant small concessions to his opponents. This skill, however, proved fatal to his higher political ambitions. He lost the Republican presidential nomination in 1880, 1884, and 1888.

Sherman was reelected to the Senate in 1880, serving until 1897. During the late 1880s, public concern mounted about the increasing concentration of economic power in monopolistic businesses. Sherman's 1888 presidential bid had focused on this problem, and in 1890 he became the author of the antitrust act that bears his name. The Sherman Anti-Trust Act deliberately contained general language that required the Supreme Court to define its scope. Though not always an effective tool, the act remains a central part of federal antitrust enforcement.

Sherman continued to be a force in government currency policy. In 1890 he sponsored the Sherman Silver Purchase Act (28 Stat. 4), which required the federal government to increase its purchase of silver by 50 percent. The act was designed as a subsidy for silver miners, but was repealed in 1893 in the aftermath of a financial panic.

President McKinley appointed Sherman SECRETARY OF STATE in 1897, but Sherman soon realized that leaving the Senate had been a mistake. An opponent of U.S. imperial ambitions, he resigned on April 25, 1898, the day Congress declared war against Spain. Two years later, on October 22, 1900, Sherman died in Washington, D.C.

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CROSS-REFERENCES

Antitrust Law; Monopoly; Sherman Anti-Trust Act.

## ♦ SHERMAN, ROGER

Roger Sherman was a colonial and U.S. politician and judge who played a critical role at the Constitutional Convention of 1787, devising a plan for legislative representation that was accepted by large and small states. His actions at the convention in Philadelphia came near the end of a distinguished life in public service.

Sherman was born on April 19, 1721, in Newton, Massachusetts. He was admitted to the Massachusetts bar in 1754 and later served as a JUSTICE OF THE PEACE. In 1761 Sherman moved to New Haven, Connecticut, where he established a business as a merchant. From 1764 to 1785 he served in the Connecticut legislature and was a superior court judge from 1766 to 1788. During these years Sherman became recognized as a national political leader. Though conservative, he was an early supporter of American independence from Great Britain.

Sherman's belief in independence led him to serve as a delegate to the CONTINENTAL CONGRESS from 1774 to 1784. He was instrumental in the creation of the Declaration of Independence in 1776 and signed the declaration. He also helped draft the ARTICLES OF CONFEDERATION.

After America won its independence, Sherman devoted himself to Connecticut politics, serving as the first mayor of New Haven from

"[THE EXECUTIVE BRANCH] IS NOTHING MORE THAN AN INSTITUTION FOR CARRYING THE WILL OF THE LEGISLATURE INTO EFFECT."
—ROGER SHERMAN

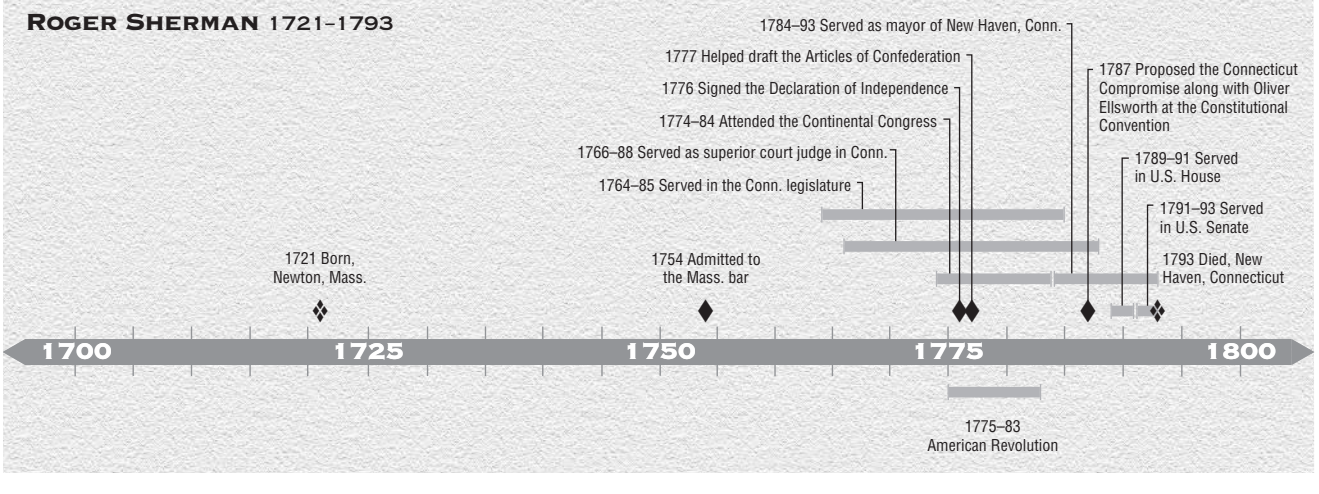

*Roger Sherman.* PRINT BY JOHN F. WEIR AFTER A MINIATURE PAINTING BY JOHN TRUMBULL. LIBRARY OF CONGRESS

1784 to 1793. He also helped revise Connecticut statutes, eliminating material related to the state's former colonial status.

In 1787 Sherman was a member of the Constitutional Convention in Philadelphia. He recognized that the Articles of Confederation had not provided a stable and secure method of national government. The convention, however, was soon divided over the issue of legislative representation. The small states feared a federal Congress apportioned by population, in which a few large states would control most of the seats. Therefore, WILLIAM PATERSON of New Jersey proposed a plan that provided for equal representation in Congress. EDMUND RANDOLPH of Virginia, speaking for the interests of the large states, proposed a plan for a bicameral legislature, with representation in both houses based on population or wealth.

Neither side would yield on the issue of representation. Sherman, along with OLIVER ELLSWORTH, proposed the Connecticut Compromise, or Great Compromise. This plan created a bicameral legislature, with proportional representation in the lower house and equal representation in the upper house. All revenue measures would originate in the lower house. The compromise was accepted, and the convention soon approved the Constitution.

Sherman served in the U.S. House of Representatives from 1789 to 1791 and in the U.S. Senate from 1791 to 1793. He strongly supported the establishment of a national bank and the enactment of a tariff.

Sherman died on July 23, 1793, in New Haven, Connecticut.

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CROSS-REFERENCES

Congress of the United States; Constitution of the United States.

## SHIELD LAWS

*Statutes affording a privilege to journalists not to disclose in legal proceedings confidential information or sources of information obtained in their professional capacities. They restrict or prohibit the use of certain evidence in sexual offense cases, such as evidence regarding the lack of chastity of the victim.*

### Journalist Shield Laws

Journalist shield laws, which afford news reporters the privilege to protect their sources, are controversial because the privilege must be balanced against a variety of competing government interests such as the right of the government to apprehend criminals and to prevent the impairment of GRAND JURY investigations. Still, most states have enacted such laws, based on the FIRST AMENDMENT guarantee of FREEDOM OF THE PRESS. There is no federal journalist shield law, however, because the U.S. Supreme Court has refused to interpret the First Amendment as mandating a news reporter's privilege.

There is a long history behind the current state statutes that provide a privilege for journalists to protect the sources of their information. BENJAMIN FRANKLIN's older brother James was jailed for refusing to reveal the source of a story he published in his newspaper. The first reported case, however, was not until 1848 when a reporter was jailed for CONTEMPT of the Senate for refusing to disclose who had given him a copy of the secret proposed treaty to end the Mexican-American War (*Ex Parte Nugent,* 18 F. Cas. 471 [Cir. Ct. D.C.]). Similar conflicts between a reporter's desire to keep sources confidential and the demands of the courts or legislatures for disclosure continued throughout the nineteenth century. During the early 1900s,

journalists repeatedly were brought to the witness stand to reveal their sources in the growing number of news stories about labor unrest and municipal corruption.

These early conflicts led to the advancement of several legal theories that justified the reporter's refusal to disclose. For example, reporters maintained that they were acting pursuant to a journalistic code of ethics, that their employers would not let them reveal their sources, that they were relying on the PRIVILEGE AGAINST SELF-INCRIMINATION, and that the forced disclosure of sources amounted to the taking of proprietary information. However, the courts did not widely accept any of these theories because the COMMON LAW did not recognize reporters' privilege.

Legislatures were more receptive to the journalists' plight, and the states began to enact privilege statutes, albeit slowly. In 1898, Maryland became the first state to enact such a privilege, and 33 years later, New Jersey was the second state to do so. By 1973, half of the states had followed suit. Legislatures enacted their statutes under various theories, such as the claim that the public interest in the free flow of information is useless without a journalist's right of access to information, and that journalists must rely on confidential informants to gain access to information. Legislatures also accepted the argument that journalists are entitled to privilege rights in their professions, similar to those of doctors, lawyers, or clergy. Critics point out that the professional privilege of doctors, lawyers, or clergy belongs to the client, not the professional; it is the client's right to assert the privilege and withhold information. Critics also contend that journalists are not in a service business like other professionals who are afforded privileges.

The states that did enact journalist shield laws generally enacted them in a hasty manner, resulting in many different types of laws that often did not provide adequate protection. As a result, journalists began to rely instead on the theory that the First Amendment freedom of the press supports the journalist privilege.

In the late 1960s, with the trial of the CHICAGO EIGHT, a group of antiwar activists, the reporters' privilege entered a new era of heightened public awareness and controversy. A large number of press subpoenas were issued in that case, perhaps as a result of the growing adversarial stance taken by journalists who, during the VIETNAM WAR, had become increasingly skeptical of government officials.

In 1972, the U.S. Supreme Court rejected the argument of reporters' privilege. In *Branzburg v. Hayes,* 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626, the Court held that news reporters do not have a right under the First Amendment to refuse to appear or testify before a grand jury. The Court stated that the burden on newsgathering in not allowing reporters' privilege was not sufficient to override the compelling public interest in law enforcement and effective grand jury proceedings. Lower courts that interpreted this decision did so narrowly. For example, they tended to limit the scope of the privilege to investigations before grand juries.

Following the Supreme Court decision, Congress, in 1975, passed Federal Rule of Evidence 501 concerning privileges. Under this rule, privilege as outlined in state law is to be applied in all civil actions and proceedings. LEGISLATIVE HISTORY behind the enactment of Federal Rule of Evidence 501 indicates that Congress intended it to provide qualified reporters' privilege. A number of problems have arisen, however, concerning the scope and application of this privilege.

One such dilemma is determining to whom the privilege applies. Unlike other privileged professionals, journalists are not licensed or certified in any manner. Many state statutes attempt to define a journalist as one who communicates via newspaper, is employed by a newspaper, or whose communication is classified as "news." The question then becomes whether books, magazine articles, or pamphlets are encompassed in the definition of a newspaper. Some of the broader state statutes do cover these media. Most state statutes also protect television and radio broadcasts, although some limit protection to "news" programs. In addition, some courts have held that documentary films should be included in the scope of the privilege protection.

Another question is how the term *news* should be defined. Statutes seldom define the term, and some commentators are not convinced that an adequate definition can be devised. Presumably poetry or works of fiction are not news, but it is a more difficult question when considering sensationalism or gossip. Some legal scholars advocate avoiding consideration of the supposed worth of the communication and making the privilege available to those

who generally acquire information for public dissemination.

Another important issue that arises under state statutes that protect only the journalist's sources is whether a "source" can only be a human informant or whether it can include a book, document, tape recording, or photograph. These and many other issues have led to varying court decisions based on the particular state statute and facts before the court.

### Rape Shield Laws

In the context of criminal SEX OFFENSES, rape shield laws forbid certain evidence in the trial that is believed to be prejudicial and harassing. These statutes are called rape shield laws because they first originated in the context of rape cases.

Up until the 1970s, under the common law in England and the United States, evidence of a rape victim's past sexual conduct was broadly admissible and accepted in every rape case. It was believed that if a rape victim consented to sex in the past, she was more likely to have consented to the sexual acts that she claimed amounted to rape. This evidence was also admitted under the theory that a woman's past sexual history could be important in assessing her credibility as a witness. The common-law rules discouraged women from bringing rape charges for fear they would be embarrassed and humiliated at trial.

Great strides were made to reform such rules in the 1970s. These efforts were very successful, and within little over a decade every jurisdiction in the United States had reformed its laws to prohibit using a woman's past sexual history in rape cases. Special evidentiary rules were enacted on the state and federal level to protect the privacy of the victim, and to encourage rape victims to report offenses and to participate in the prosecution of offenses.

Typical rape shield laws provide that in a prosecution for rape, attempted rape, or conspiracy to commit rape, reputation or opinion evidence of the alleged victim's prior sexual conduct is not admissible. Evidence of specific instances of the victim's prior sexual conduct is also inadmissible except in the following circumstances: (1) the evidence regards the sexual conduct between the victim and the defendant and is introduced to show consent; (2) the evidence is introduced to prove an alternate source or origin of semen, disease, or pregnancy; (3) the evidence regards the immediate surrounding circumstances of the alleged crime; or (4) the evidence of previously chaste character is necessary to the successful prosecution of the particular criminal charge.

The procedure involved in introducing evidence covered by rape shield laws is also fairly typical. Generally the defendant must make a motion supported by an offer of proof in which the defendant details what evidence he wishes to introduce and why. The court will generally require that a hearing be held out of the presence of the jury to review the motion and hear arguments in support of and against the motion. If the court finds some of the evidence admissible pursuant to one of the exceptions under the applicable laws, an order must be issued stating the scope of the evidence that may be admitted.

Rape shield laws have expanded to include other evidence that legislatures deem prejudicial, such as clothing of the victim that the defendant tries to introduce to show that the victim consented to or asked for the sexual contact. Those state statutes that do restrict the admissibility of clothing, however, make exceptions where it is introduced to show a struggle (or lack thereof) or proof of the presence (or absence) of bodily fluid such as semen or blood. Rape shield laws have also been expanded in most states to protect victims of all different sexual offenses, regardless of the victim's age or sex.

Defendants have challenged the constitutionality of rape shield laws on many occasions, generally arguing that the laws violate their right to DUE PROCESS and their right to confront their accuser. However, the constitutionality of these laws has consistently been upheld. Specifically, courts have held that the state's interest in protecting sexual assault victims from harassment and humiliation at trial, as well as the highly prejudicial effect such evidence may have on a jury, outweighs the rights of the defendant that may be implicated.

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## SHIFTING THE BURDEN OF PROOF

*The process of transferring the obligation to affirmatively prove a fact in controversy or an issue brought during a lawsuit from one party in a legal controversy to the other party.*

When the individual upon whom the BURDEN OF PROOF initially rested has brought evidence that tends to prove a particular fact or issue, the other party then takes on the duty to rebut such fact or issue through the use of defensive or contradictory evidence.

CROSS-REFERENCES

Burden of Proof.

## SHIPPING LAW

*The area of maritime law that is concerned with ships and the individuals employed in or around them, as well as the shipment of goods by merchant vessels.*

U.S. shipping law is a complex body of customs, legislation, international treaties, and court decisions dealing with the rights and responsibilities of ownership and operation of vessels that travel on the high seas. Much of the COMMERCIAL LAW surrounding transportation of goods by ship involves contractual agreements between the shipowner and the party wishing to ship the goods. However, these agreements generally are based on long-standing customs and business practices peculiar to the shipping industry.

### Registration and Ownership

A sovereign nation has the authority to regulate all vessels that fly its flag on the high seas. Congress, accordingly, is empowered to enact legislation controlling domestic merchant ships that sail the high seas. Title 46 of the United States Code Annotated, entitled Shipping, contains most of the pertinent federal laws regarding U.S. shipping.

All the ships in the U.S. merchant fleet are registered in the United States and completely staffed by U.S. citizens. Because of the higher labor costs associated with employing U.S. personnel, many ships are registered in other countries to avoid this labor requirement.

Ships can be owned by either one person or co-owners. Because of the enormous cost of merchant vessels, the majority are held by more than one owner. A bill of sale is the ordinary evidence of title to, and ownership of, a vessel. Between co-owners, the right to control and use the vessel is generally reserved for the majority interest. In the event that co-owners absolutely cannot come to an agreement on how to use the vessel, one or more of them may obtain a court decree for sale of it. In general, however, a part owner shares in the profits and expenses from use of the ship in proportion to her interest.

### Agents

The owners of merchant vessels are bound by the acts of their agents and must pay for all services, supplies, and repairs that they order. A ship's husband is the general agent of the owner for affairs conducted in the home port of the vessel. Generally known as the managing owner, he determines that the ship is prepared for navigation and commercial use. In the absence of express authority, a ship's husband usually is powerless to bind the co-owners for money borrowed on the account of the vessel. He is entitled to be reimbursed for services rendered and to be paid for expenditures incurred.

### Shipping Contracts

The great majority of contracts governing the transportation of goods by ships are made either by bills of lading or charter parties. The term *charter party* is a corruption of the Latin *carta partita,* or "divided charter." It is used to describe three types of contracts dealing with the use of ships owned or controlled by others. Under a demise charter, the shipowner gives possession of the vessel to the charterer, who engages the ship's master and crew, arranges for repairs and supplies, takes on the cargo, and acts much like the owner during the term of the charter.

A more common arrangement is the time charter. In this arrangement, the shipowner employs the master and crew, and the charterer only acquires the right, within contractual limits, to direct the movements of the ship and decide what cargoes are to be transported during the charter period. Under both demise and time charters, the charterer pays "charter hire" for the use of the ship at a specified daily or monthly rate.

The third type is the voyage charter, which is a contract of affreightment, or carriage. Essentially, a voyage charter is a contract to rent all or part of the cargo space of a merchant vessel on one voyage or a series of voyages. When a charterer contracts for only a portion of the cargo space, the governing contract is called a space charter. Under a voyage charter, it is customary for the master or her agent to issue a bill of lading to the shipper, who is usually the charterer. However, the voyage charter remains the governing contract.

A bill of lading is an ACKNOWLEDGMENT, by the master or owner, that serves as confirmation of the receipt of the goods specified to be taken aboard the vessel. Each charterer is entitled to receive a bill of lading from the shipowner or an agent of the owner. In ordinary transactions, a bill of lading, signed by the master, is binding upon the owner of a vessel. It can circumvent disputes that might otherwise arise over whether goods were ever received and their condition when placed upon the vessel.

**Twenty Largest Merchant Fleets in the World, in 2002**

Vessels of 1,000 gross tons and over. As of January 1, 2003.

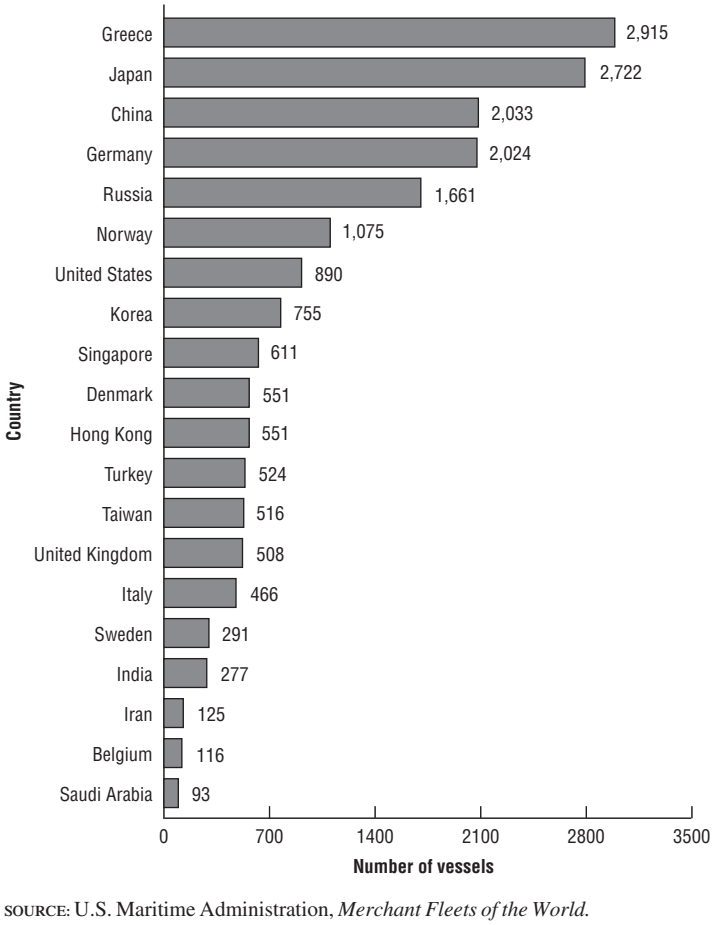


SOURCE: U.S. Maritime Administration, *Merchant Fleets of the World.*

Ocean bills of lading are usually in order form, calling for delivery of the order to the shipper or some other designated party. This type of bill of lading may be negotiated similarly to a check, draft, or negotiable instrument, which means that a bona fide purchaser of the bill of lading takes it free and clear of any defects not appearing on its face. A bona fide purchaser is one who has purchased property for value without any notice of any defects in the title of the seller. Therefore, if cargo is externally damaged on shipment but the damage is not recorded on the bill of lading, the carrier will be barred from establishing that the cargo was damaged before it came into the carrier's custody. Once a bill of lading issued under a voyage charter is negotiated to a bona fide purchaser, it becomes the governing contract between the carrier and the holder of the bill.

Under the Carriage of Goods by Sea Act (46 U.S.C.A. §§ 1300 et seq. [2000]), a "clause paramount" must be included in any bill of lading involving a contract for transportation of goods by sea from U.S. ports in foreign trade. This clause states that the bill of lading is subject to the act, which governs the rights, obligations, and liabilities of the issuer to the holder of the bill of lading in regard to the loss or damage of goods.

When a ship strands or collides with another vessel, cargo loss or damage may occur. If the damage was caused by a sea peril or an error in navigation, the carrier will not be liable if the goods were being carried under a statutory or contractual provision based on the 1923 Brussels Convention on Limitation on Liability. If, however, the damage was caused by the carrier's failure to exercise due diligence to make the ship seaworthy and to ensure that it was properly staffed, equipped, and supplied, the carrier will be held responsible.

### Maritime Liens

When a ship is charged with a maritime TORT, or when services have been rendered to it to facilitate its use in navigation and the shipowner has not paid for the services, a maritime lien can be placed on the ship. A maritime

lien is a special property right in a ship given to a creditor by law as security for a debt or claim. The ship may be sold and the debt paid out of the proceeds.

The Maritime Lien Act (46 U.S.C.A. §§ 971–975 [2000]) provides that an action can be brought in rem, against the vessel, cargo, or freight itself. Under the act, the ship is personified to the extent that it may sometimes be held responsible under circumstances in which the shipowner would not be liable. For example, where a state law requires that a local pilot guide the ship in and out of the harbor, the pilot's NEGLIGENCE is not imputed to the shipowner. In rem proceedings allow the ship itself to be charged with the pilot's fault and make it subject to a maritime lien enforceable in court.

In an in rem proceeding, the vessel, cargo, or freight can be arrested and kept in the custody of the court unless the owner posts a bond or some other security. Usually the owner posts security to avoid an arrest, and the property is never taken into custody. Where the owner fails to post security and the plaintiff is awarded a judgment against the vessel, the court will order that the property be sold or the freight released to satisfy the judgment.

### Marine Insurance

Marine insurance plays an important role in the shipping industry and in shipping law. Most shipowners carry hull insurance on their ships and protect themselves against claims by third parties by purchasing "protection and indemnity" insurance. Cargo is usually insured against the perils of the sea, which are defined as natural accidents peculiar to the sea. For example, storms, waves, and all types of actions caused by wind and water are classified as perils of the sea. If a shipowner or cargo owner wishes to be protected against losses incurred from war, the owner must purchase separate war-risk insurance or pay an additional premium to include war risk in the basic policy.

### Salvage

In shipping law, salvage is the compensation allowed to persons who voluntarily assist in saving a vessel or its cargo from impending or actual peril from the sea. Generally salvage is limited to vessels and their cargoes, or to property lost in the sea or other NAVIGABLE WATERS, that have been subsequently found and rescued. Except for salvage performed under contract, the rescuer, known as the salvor, must act voluntarily without being under any legal duty to do so. As long as the owner or the owner's agent remains on the ship, unwanted offers of salvage may be refused. Typical acts of salvage include releasing ships that have run aground or on reefs, raising sunken ships or their cargo, or putting out fires.

The salvor has a maritime lien on the salvaged property, in an amount determined by a court based on the facts and circumstances of the case. The salvor may retain the property until the claim is satisfied or until security to meet an award is given. The owner may elect to pay salvage money to the salvor or to not reclaim the property.

### General Average

Under the law of general average, if cargo is jettisoned in a successful effort to refloat a grounded vessel, the owners of the vessel and the cargo saved are required to absorb a proportionate share of the loss to compensate the owner of the cargo that has been singled out for sacrifice. All participants in the maritime venture contribute to offset the losses incurred. The law of general average became an early form of marine insurance.

The YORK-ANTWERP RULES of General Average establish the rights and obligations of the parties when cargo must be jettisoned from a ship. These uniform rules on the law of general average are included in private shipping agreements and depend on voluntary acceptance by the maritime community. The rules are incorporated by reference into most bills of lading, contracts of affreightment, and marine insurance policies.

The rules provide for the shipowner to recover the costs of repair, loading and unloading cargo, and maintaining the crew, if these expenses are necessary for the safe completion of the voyage. Claims are generally made against the insurer of the cargo and the shipowner's insurance underwriters.

### Personal Tort Liability

Until 1920, U.S. seapersons who were injured or killed as a result of negligence by a shipowner, master, or a fellow seaperson had a difficult time obtaining compensation through a tort action. Shipowners often defeated such actions by claiming contributory negligence on the injured

seaperson's part. In addition, under federal law the seaperson did not have a right to a jury trial.

Congress enacted the JONES ACT of 1920 (46 U.S.C.A. § 688) to correct these problems. It granted the seaperson a right to a jury trial and abolished the contributory negligence defense. Under the act, an injured seaperson or a PERSONAL REPRESENTATIVE in the event of the seaperson's death can sue the shipowner if the injury or death occurred in the course of the seaperson's employment on, or in connection with, a vessel.

In addition, Congress granted rights to those persons who work near ships in the Longshoremen's and Harbor Workers' Compensation Act of 1927 (33 U.S.C.A. §§ 901–910). This act established a federal system to compensate maritime workers for work-related injuries.

"... TO DECLARE UNLAWFUL RESIDENCE WITHIN THE COUNTRY TO BE AN INFAMOUS CRIME, PUNISHABLE BY DEPRIVATION OF LIBERTY AND PROPERTY ... [WITHOUT] A JUDICIAL TRIAL ... IS NOT CONSISTENT WITH THE THEORY OF OUR GOVERNMENT."
—GEORGE SHIRAS JR.

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Policy Research Project on Texas Seaport and Waterborne Commerce and Its Role in International Trade. 1996. *Port-Related State Programs and Federal Legislative Issues: A Report.* Austin: Lyndon B. Johnson School of Public Affairs, University of Texas at Austin.

CROSS-REFERENCES

Admiralty and Maritime Law; Carriers; Collision; Common Carrier.

## ♦ SHIRAS, GEORGE, JR.

George Shiras Jr. served on the U.S. Supreme Court as an associate justice from 1892 to 1903. Plucked by political necessity at the age of sixty from his highly successful law practice, Shiras, who had never been a judge or politician, brought a lawyerly, pragmatic perspective to the Court. He wrote some opinions in favor of civil liberties, occasionally blocked the Court's full embrace of laissez-faire economics, and became notorious as the justice whose vote in 1895 torpedoed the new federal INCOME TAX. This last decision, for which Shiras was incorrectly blamed, ultimately led to the ratification of the SIXTEENTH AMENDMENT in 1913.

Shiras was born in Pittsburgh, Pennsylvania, on January 26, 1832, to a wealthy brewing family. He attended Yale Law School in 1853. Two years later he completed his training at a law office in Allegheny County, Pennsylvania, before starting a legal practice with his brother. The practice specialized in representing the railroads

*George Shiras Jr.* LIBRARY OF CONGRESS

and other big industries during the boom era of Pittsburgh. So successful was Shiras that, by the late 1880s, he was earning the then-phenomenal income of $75,000 annually. He developed no national reputation, steering clear of partisan politics even when the state legislature nominated him for a senate seat. Independent in nature, he sometimes represented interests opposed to his business clients.

In 1892 President BENJAMIN HARRISON nominated Shiras to fill the vacancy on the Supreme Court left by the death of Justice JOSEPH P. BRADLEY. Like Bradley, Shiras was a Pennsylvania Republican, and convention dictated that Bradley's replacement be of similar political and geographic origin. Thus for political reasons Shiras was a good choice, even though he had no judicial or political experience. Strong opposition to the nomination came from the president's enemies. But support from powerful, private figures, including Andrew Carnegie, was ultimately persuasive.

When Shiras joined the Court, the chief issue of the day was regulation of business. The Court was conservative, believing in the hands-off policy of laissez-faire economics. Shiras usually joined his fellow justices in voting to restrict antitrust and labor legislation. But he occasionally stood apart, as in *Brass v. North Dakota,* 153

U.S. 391, 14 S. Ct. 857, 38 L. Ed. 757 (1894), where he upheld state power to regulate. Moreover, he was committed to civil liberties. In *Wong Wing v. United States,* 163 U.S. 228, 16 S. Ct. 977, 41 L. Ed. 140 (1896), he wrote a landmark opinion extending basic rights to Chinese immigrants; it held that Congress had unconstitutionally allowed federal authorities to summarily sentence illegal Chinese ALIENS to twelve months of hard labor without indictment or a jury trial.

In his lifetime, Shiras became notorious for having cast the swing vote to kill the first peacetime federal income tax. The tax, passed in 1894, was a popular response to the growing disparity in income levels caused by industrial growth. The case was POLLOCK V. FARMERS' LOAN & TRUST, 158 U.S. 601, 15 S. Ct. 912, 39 L. Ed. 1108, decided in three parts in 1895. The final vote, on May 20, was 5–4 against. Critics vilified Shiras for apparently changing his mind from an earlier vote. For nearly three decades, his reputation suffered until, after his death, it was persuasively argued that another justice had provided the swing vote. *Pollock* led directly to the ratification of the Sixteenth Amendment in 1913, allowing Congress to levy a federal income tax.

Shiras stepped down from the Court in 1903 at age seventy. He died on August 2, 1924, in Pittsburgh.

FURTHER READINGS

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## SHOCK-THE-CONSCIENCE TEST

*A determination of whether a state agent's actions fall outside the standards of civilized decency.*

The U.S. Supreme Court established the "shock-the-conscience test" in ROCHIN V. CALIFORNIA, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952). Based on the Fourteenth Amendment's prohibition against states depriving any person of "life, liberty, or property without due process of law," the test prohibits conduct by state agents that falls outside the standards of civilized decency. Little used since the 1960s, the test has been criticized for permitting judges to assert their subjective views on what constitutes "shocking."

The *Rochin* decision was made during an era when the Supreme Court still adhered to the precedent that the BILL OF RIGHTS applied only to actions by the federal government. Thus, all the rights afforded federal criminal defendants in the Fourth, Fifth, and Sixth amendments were not available to state criminal defendants. This reading made the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT difficult to apply to state actions.

The Supreme Court, in *Twining v. New Jersey,* 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908), concluded that some of the rights contained in the Bill of Rights "are of such a nature that they are included [with]in the conception of due process of law" and are applicable to the states. But succeeding generations of justices had difficulty defining a test that would reveal which rights were important enough to apply to state and local government. In 1937 the Court considered whether a right was "of the very essence of a scheme of ordered liberty" or "implicit in the concept of ordered liberty"

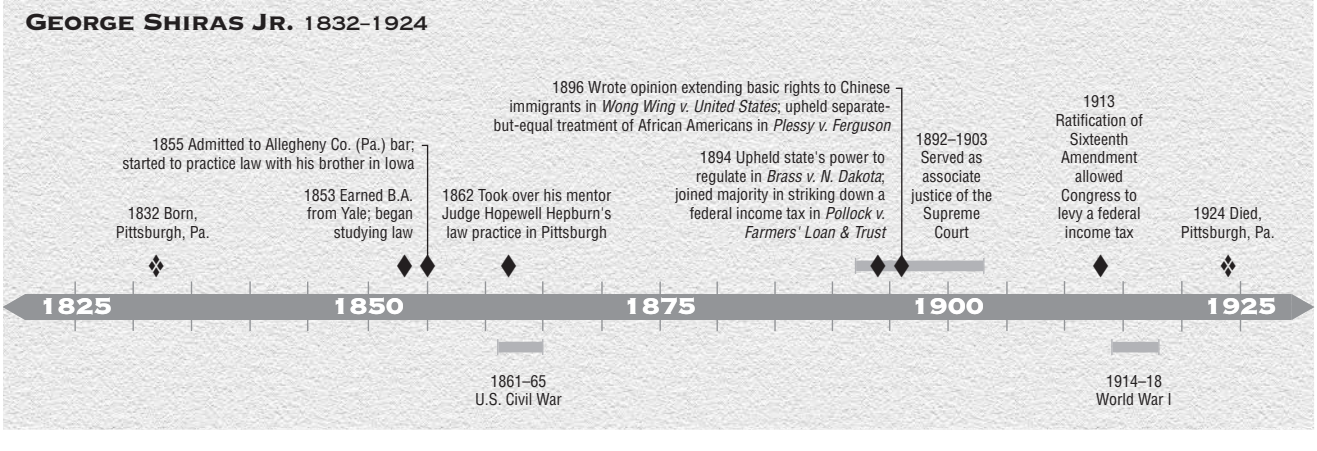

(*Palko v. Connecticut,* 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288). Only those rights that were found "fundamental" or "implicit in the concept of ordered liberty" were made applicable to prevent STATE ACTION.

In *Rochin* three state law enforcement officers, acting on information that Antonio Rochin was selling narcotics, illegally entered Rochin's room. When the officers noticed two capsules on a bedside table, Rochin grabbed the capsules and put them in his mouth. The three officers then wrestled with Rochin and sought to open his mouth so they could extract the pills. When this failed, the officers handcuffed Rochin and took him to a hospital, where at their direction a doctor forced an emetic solution through a tube into Rochin's stomach. The solution induced vomiting, and in the vomited matter the deputies found two morphine capsules. Rochin was convicted of narcotics possession. The conviction was based solely on the morphine capsules, which Rochin had vainly sought to have suppressed as evidence.

Justice FELIX FRANKFURTER, writing for the Court, held that such conduct by state agents, although not specifically prohibited by explicit language in the Constitution, "shocks the conscience" in that it offends "those canons of decency and fairness which express the notions of justice of English-speaking peoples." Due process of law requires the state to observe those principles that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

The Court reasoned that to permit the use of such capsules as evidence under the circumstances would "afford brutality the cloak of law." The officers' conduct "shocks the conscience," offending even those with "hardened sensibilities. They are methods too close to the rack and screw to permit of constitutional differentiation." Therefore, the Court reversed Rochin's conviction because the stomach pumping violated the Due Process Clause.

Since *Rochin,* the Supreme Court has made most of the rights enumerated in the first eight amendments also applicable to state action by selectively incorporating them, one by one, into the scope of the Fourteenth Amendment's Due Process Clause. Justices HUGO L. BLACK and WILLIAM O. DOUGLAS, who, in their concurring opinions in *Rochin,* had argued for incorporation of the FOURTH AMENDMENT, were instrumental in diminishing the importance of the shock-the-conscience test. They believed that the test was too general and that its vagueness allowed judges to apply their subjective judgment as to what was shocking and what offended the Due Process Clause.

Nevertheless, *Rochin* remains important because it stands for the proposition that the Due Process Clause provides a protection for persons separate from, and independent of, the Bill of Rights provisions that have now been applied to the states.

## SHOP-BOOK RULE

*A doctrine that allows the admission into evidence of books that consist of original entries made in the normal course of a business, which are introduced to the court from proper custody upon general authentication.*

In the law of evidence, the shop-book rule is one of several exceptions to the rule against HEARSAY.

## SHOP STEWARD

*A* LABOR UNION *official elected to represent members in a plant or particular department. The shop steward's duties include collection of dues, recruitment of new members, and initial negotiations for settlement of grievances.*

CROSS-REFERENCES

Labor Union.

## SHOPLIFTING

*Theft of merchandise from a store or business establishment.*

Although the crime of shoplifting may be prosecuted under general LARCENY statutes, most jurisdictions have established a specific category for shoplifting. Statutes vary widely, but generally the elements of shoplifting are (1) willfully taking possession of or concealing unpurchased goods that are offered for sale (2) with the intention of converting the merchandise to the taker's personal use without paying the purchase price. Possession or concealment of goods typically encompasses actions both on and outside the premises.

Concealment is generally understood in terms of common usage. Therefore, covering an object to keep it from sight constitutes concealment, as would other methods of hiding an object from a shop owner. A shopper's actions

and demeanor in the store, her lack of money to pay for merchandise, and the placement of an object out of a retailer's direct view are all examples of CIRCUMSTANTIAL EVIDENCE that may establish intent.

Shoplifting costs businesses billions of dollars every year. To enable store owners to recoup some of their losses, most states have enacted civil recovery or civil demand statutes. These laws enable retailers to seek restitution from shoplifters. Criminal prosecution is not a prerequisite to a civil demand request. Typically, a representative of or attorney for a victimized business demands a statutorily set compensation in a letter to the offender. If an offender does not respond favorably to the civil demand letter, the retailer may bring an action in SMALL CLAIMS COURT or another appropriate forum.

To forestall any allegations of coercion, many companies initiate civil recovery proceedings only after the shoplifter has been released from the store's custody. It is a criminal offense to threaten prosecution if a civil demand is not paid. Moreover, if a store accuses a customer of shoplifting and the individual is acquitted or if a store makes an erroneous detention, the store may face claims of FALSE IMPRISONMENT, EXTORTION, DEFAMATION, or intentional or negligent infliction of emotional distress.

FURTHER READINGS

Sennewald, Charles A., and John H. Christman. 1992. *Shoplifting.* Boston: Butterworth-Heinemann.

## SHORT CAUSE

*A legal matter that will not take up a significant amount of the time of the court and may be entered on the list of short causes upon application of one of the parties, where it will be dealt with more expediently than it would be in its regular order.*

The time permitted for a short cause, which is also known as a short calendar, varies from one court to another.

## SHORT SALE

*A method of gaining profit from an anticipated decline in the price of a stock.*

An individual who sells short sells either stock or SECURITIES that he or she does not own and that are not immediately ready for delivery. Generally the seller borrows the shares needed to cover the sale from a BROKER and then delivers these shares to the buyer. The seller deposits an amount that is equal to the value of the borrowed shares with the broker. This amount stays on deposit with the broker until the stock is returned. The seller must ultimately return the same number of shares of the same stock to the broker, and the transaction is not fully executed until the stock is returned. The broker lending the stock is entitled to all the benefits he or she would have received if the stock had not been lent. When a dividend is paid, then the seller-borrower is required to pay the broker-lender an amount equal to the dividend.

## SHOW CAUSE

*An order by a court that requires a party to appear and to provide reasons why a particular thing should not be performed or allowed and mandates such party to meet the* PRIMA FACIE *case set forth in the complaint or* AFFIDAVIT *of the applicant.*

A SHOW CAUSE ORDER mandates that an individual or corporation make a court appearance to explain why the court should not take a proposed action. In the event that such individual or corporation does not appear or provide adequate reasons why the court should take no action, action will be taken by the court.

## SHOW CAUSE ORDER

*A court order, made upon the motion of an applicant, that requires a party to appear and provide reasons why the court should not perform or not allow a particular action and mandates this party to meet the* PRIMA FACIE *case set forth in the complaint or* AFFIDAVIT *of the applicant.*

A show cause order, also called an order to show cause, mandates that an individual or corporation make a court appearance to explain why the court should not take a proposed action. A court issues this type of order upon the application of a party requesting specific relief and providing the court with an affidavit or declaration (a sworn or affirmed statement alleging certain facts). A show cause order is generally used in CONTEMPT actions, cases involving injunctive relief, and situations where time is of the essence.

A show cause order can be viewed as an accelerated motion. A motion is an application to the court for an order that seeks answers to questions that are collateral to the main object of the action. For example, in a civil lawsuit the plaintiff generally requests from the defendant

*A sample show cause order*

## Show Cause Order

982(a)(30)

| NAME OF PARTY OR ATTORNEY (*and state bar number if attorney*):<br>ADDRESS WHERE YOU WANT MAIL SENT:<br><br>TELEPHONE NO.: FAX NO. (*Optional*):<br>E-MAIL ADDRESS (*Optional*):<br>ATTORNEY FOR (*Name*):<br>**SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME:<br>PLAINTIFF/PETITIONER:<br><br>DEFENDANT/RESPONDENT: | *FOR COURT USE ONLY* |
|---|---|
| **APPLICATION AND ORDER FOR REISSUANCE OF ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER** | CASE NUMBER: |

1. ☐ Plaintiff ☐ Petitioner (*name*):
   requests the court to reissue the *Order to Show Cause and Temporary Restraining Order ("Order to Show Cause")* originally issued as follows:
   a. *Order to Show Cause* was issued on (*date*):
   b. *Order to Show Cause* was last set for hearing on (*date*):
   c. *Order to Show Cause* has been reissued previously (*number of times*):
2. ☐ Plaintiff ☐ Petitioner requests reissuance of the Order to Show Cause because
   a. ☐ defendant ☐ respondent was unable to be served as required before the hearing date.
   b. ☐ other (*specify*):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

**ORDER**

3. THE COURT ORDERS that the *Order to Show Cause* issued as shown in item 1 above is reissued and reset for hearing in this court as follows:

   a. Date: Time: Dept.: Room:

   at the street address of the court shown above.

   b. ☐ By the close of business on the date of this order, a copy of this order and any proof of service must be given to the law enforcement agencies named in the Order to Show Cause as follows:
      (1) ☐ Plaintiff ☐ Petitioner must deliver.
      (2) ☐ Plaintiff's ☐ Petitioner's attorney must deliver.
      (3) ☐ The clerk of the court must deliver.
   c. A copy of this order must be attached to documents to be served on defendant, as directed in the Order to Show Cause, and must be served on defendant with the Order to Show Cause.
   d. **ALL OTHER ORDERS CONTAINED IN THE ORDER TO SHOW CAUSE REMAIN IN FULL FORCE AND EFFECT UNLESS MODIFIED BY THIS ORDER**. The Order to Show Cause and this Order expire on the date and time of the hearing shown in the box above unless extended by the court.

Date:

JUDICIAL OFFICER

Form Approved for Optional Use
Judicial Council of California
982(a)(30) [New January 1, 2002]

**APPLICATION AND ORDER FOR REISSUANCE OF ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER**

Code Civ. Proc., § 527(d)(5)

documents pertinent to the case. If the defendant refuses to provide the documents or does not make a timely response to the request, the plaintiff may file a motion with the court asking that it issue an order to compel the defendant to produce the documents.

A show cause order is similar to a motion but it can produce a court order on the requested relief much more quickly than a motion can. For example, after a motion is served on the opposing party, that party has a certain number of days under the jurisdiction's rules of CIVIL PROCEDURE to prepare a response. A show cause order is submitted to a judge, who reads the applicant's papers and decides the deadline for the responding party's submission of papers. The judge may order an opposing party to appear "forthwith" in urgent cases. The judge may hear arguments on the matter at some place other than the courthouse, if necessary, and may allow papers to be served on opposing parties by a method not ordinarily permitted.

A judge may include in the show cause order a TEMPORARY RESTRAINING ORDER or stay that maintains the status quo as long as the matter is pending before the court. At the hearing on the show cause order, if the responding party fails to rebut the prima facie case (evidence sufficient to establish a fact if uncontradicted) made by the applicant, the court will grant the relief sought by the applicant.

## SHOW-UP

*The live presentation of a criminal suspect to a victim or witness of a crime.*

A show-up usually occurs immediately or shortly after a crime has occurred. If law enforcement personnel see a person who they suspect is the perpetrator of a very recent crime, the officers may apprehend the suspect and bring him back to the scene of the crime and show him to witnesses, or the officers may take the suspect to a police station and bring the witnesses to the station. This method of identification of a criminal suspect is a legitimate tool of law enforcement and is encumbered by few judicial restraints.

The U.S. Supreme Court has ruled that an unnecessarily suggestive identification procedure is a violation of DUE PROCESS (*Stovall v. Denno,* 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 [1967]). Evidence from such an identification should be excluded from a trial of the suspect. A show-up is inherently suggestive because police generally do not present to a witness a person who they believe is innocent of wrongdoing. Nevertheless, show-ups do not violate due process if they are conducted near the scene of the crime and shortly after the crime was committed.

Show-ups are a valuable and practical tool in apprehending criminals. If a witness affirmatively identifies a suspect as the perpetrator of a crime, police can detain the suspect without delay to serve the interests of public safety. If a witness fails to identify the subject of a show-up as the perpetrator, the show-up will result in the quick release of the innocent suspect and allow police to redirect their efforts.

A show-up should be conducted shortly after a crime has been committed. If police do not apprehend a suspect until the next day, or several days or weeks afterward, they will have time to conduct a traditional, in-person lineup. One exception is when a traditional lineup is impractical. For example, if the sole witness to a crime is bedridden and approaching death, police may bring the suspect to the victim even if the crime occurred several days before the show-up (*Stovall*).

A show-up should not be performed for a witness unless the witness has displayed an ability to make a clear identification of the perpetrator of the crime. A show-up for a witness who cannot cite any identifying characteristics of the perpetrator may be unnecessarily suggestive and may be excluded from a subsequent trial of the suspect.

Because a show-up generally involves detention of a criminal suspect, police must have a reasonable suspicion that the suspect committed a crime before subjecting the suspect to a show-up. This is a low level of certainty and need only be supported by enough articulable facts to lead a reasonable officer to believe that the suspect may have committed a crime.

CROSS-REFERENCES

Criminal Law; Criminal Procedure.

## SIC

Latin, In such manner; so; thus.

A misspelled or incorrect word in a quotation followed by "[sic]" indicates that the error appeared in the original source.

## SICK CHICKEN CASE

See SCHECHTER POULTRY CORP. V. UNITED STATES.

## SIERRA CLUB

The Sierra Club is a nonprofit, member-supported public interest organization that promotes conservation of the natural environment by influencing public policy decisions. In addition, the Sierra Club organizes participation in wilderness activities for its members, including mountain climbing, backpacking, and camping. It is the oldest and largest nonprofit, grassroots environmental organization in the world, with more than 700,000 members. In mid-2003, the Sierra Club consisted of the national organization, located in San Francisco, California, 65 chapters, and approximately 365 local groups.

The organization was founded on June 4, 1892, by a group of 162 California residents. The Sierra Club's first president was John Muir, a pioneer in the promotion of national parks and the protection of the environment. Muir involved the club in political action, leading a successful fight to preserve Yosemite as a national park. Muir and the club also lobbied for the creation of national parks at the Grand Canyon and Mt. Rainier in the late nineteenth century. The Sierra Club drew national attention during the administration of President THEODORE ROOSEVELT, when Muir got the president interested in creating more national parks.

The Sierra Club did not seek members outside of California until 1950, when membership stood at 10,000. Membership has increased dramatically since that time, due in large part to the club's intense interest in protecting the environment. Since 1970 the club has played a major role in gaining legislative support for many federal environmental protection measures, including the establishment of the ENVIRONMENTAL PROTECTION AGENCY and the Arctic National Wildlife Refuge and the passage of the ENDANGERED SPECIES ACT, the Clean Air Act, the Clean Water Act, the National Forest Management Act, and the Alaska National Interest Lands Conservation Act. The Sierra Club has also campaigned for similar state legislation.

During the 1990s, the Sierra Club filed lawsuits seeking to require the federal government to enforce provisions of the Endangered Species Act and the Clean Air Act. The organization also protested global trade that did not include adequate environmental protection controls. In the early 2000s the Sierra Club also advocated for the cleanup of toxic wastes, resolving the problems of solid waste disposal, promoting sustainable population and family planning, and fighting to reverse ozone depletion and global warming. In 2003 the Sierra Club highlighted the evasion of state and local POLLUTION controls by many of the nation's "animal factories," sprawling establishments where thousands of animals are produced and housed in strict confinement before being transported to slaughterhouses.

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### CROSS-REFERENCES

Environmental Law; Environmental Protection Agency.

## SIGHT DRAFT

*A* COMMERCIAL PAPER *that is payable upon presentment.*

When a draft or bill of exchange is payable at sight, money may be immediately collected upon presentment to the drawee named in the instrument.

## SIGNATURE

*A mark or sign made by an individual on an instrument or document to signify knowledge, approval, acceptance, or obligation.*

The term *signature* is generally understood to mean the signing of a written document with one's own hand. However, it is not critical that a signature actually be written by hand for it to be legally valid. It may, for example, be typewritten, engraved, or stamped. The purpose of a signature is to authenticate a writing, or provide notice of its source, and to bind the individual signing the writing by the provisions contained in the document.

Because a signature can obligate a party to terms of a contract or verify that the person

intended to make a last will and testament, the law has developed rules that govern what constitutes a legally valid signature. The INTERNET and other forms of telecommunication have created the need to transact legally binding agreements electronically. Almost all states have passed laws that recognize the validity of "digital signatures."

### Requisites and Validity

When an instrument must be signed, it is ordinarily adequate if the signature is made in any commonly used manner. Variations between the signature and the name appearing in the body of the instrument do not automatically invalidate the instrument.

In the absence of a statutory prohibition, an individual can use any character, symbol, figure, or designation he wishes to adopt as a signature, and if he uses it as a substitute for his name, he is bound by it. For example, if a contract refers to "William Jones" but Jones signs his name "Bill Jones," the contract is still enforceable against him. An individual can also use a fictitious name or the name of a business firm. A signature might also be adequate to validate an instrument even if it is virtually illegible. The entire name does not have to be written, and the inclusion of a middle name is not significant.

An individual satisfies the signing requirement when someone who has been duly authorized to sign for him does so. In the event a statute mandates an instrument be signed in person, the signature must be made in the signer's own hand or at his request and in his presence by another individual.

In a situation where an individual intends to sign as a witness but instead inadvertently signs the instrument in the place where the principal is to sign, the fact that he should have signed as a witness can be shown. Conversely when a signer intends to sign as a principal but instead signs in the place for a witness, that fact can also be shown.

### Abbreviations, Initials, or Mark

In situations that do not require a more complete signature, an instrument can be properly signed when the initial letter or letters of the given name or names are used together with the surname (J. Doe), when only the full surname is used (Doe), when only the given name is used (John), or even when only the initials are used (J. D.).

A mark is ordinarily a cross or *X* made in substitution for the signature of an individual who is unable to write. In the absence of contrary statutory provision, a mark can be used by an individual who knows how to write but is unable to do so because of a physical illness or disability. A mark has the same binding effect upon the individual making it as does a signature. In some statutes a signature is defined as including a mark made by an individual who is infirm or illiterate.

Generally the name of the person who makes his mark can be written by anyone, and the mark is not necessarily invalidated because the individual writing the name accompanying the mark misspells the name. In the absence of a statute that requires a name to accompany the mark, the validity of the mark as a signature is not affected by the fact that a name does not accompany it.

When a mark is used as a signature, it can be put wherever the signature can appear. When there is a requirement that the name must accompany the mark, the fact that the mark and the name are not in immediate proximity does not invalidate the mark.

Certain statutes mandate that a witness must attest to a signature made by a mark. Under such statutes, if the mark is not properly witnessed, the instrument is not signed and is legally ineffective. These laws were enacted to prevent FRAUD, because it is difficult, if not impossible, to later determine if the alleged signer actually made the mark.

### Hand of Party or Another

A signature can be written by the hand of the purported signer, either through the signer's unaided efforts or with the aid of another individual who guides the signer's pen or pencil. In cases when the maker's hand is guided or steadied, the signature is the maker's act, not the act of the assisting individual.

A signature can generally be made by one individual for another in his presence and at his direction, or with his assent, unless prohibited by statute. A signature that is made in this manner is valid, and the individual writing the name is regarded merely as an instrument through which the party whose signature is written exercises personal discretion and acts for himself.

### Method

Ordinarily a signature can be affixed in a number of different ways. It can be hand writ-

ten, printed, stamped, typewritten, engraved, or photographed. This allows, for example, a business to issue its payroll checks with the signature of its financial officer stamped rather than handwritten.

### Digital Signatures

The computer and TELECOMMUNICATIONS have changed how work is done and how it is exchanged. Both business and the legal system have begun to explore ways of using the Internet and other forms of electronic communication to transact work. Court systems cannot permit the electronic filing of legal documents, however, unless the documents have been authenticated as coming from the sender. Similarly, businesses will not enter into contracts using the Internet or E-MAIL unless they can authenticate that the other contracting party actually made the agreement. Computers and digital scanners can reproduce handwritten signatures, but they are susceptible to forgery.

A solution has been the legal recognition of "digital signatures." The majority of states have enacted statutes that allow digital signatures in intrastate transactions. In 2000, President BILL CLINTON signed into law the Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464, also called the E-Sign Act, which essentially validates electronic contracts in interstate and foreign commerce. The act does not apply to certain types of documents, including wills, DIVORCE notices, and documents that are associated with court proceedings.

A digital signature is based on cryptography, which uses mathematical formulas, or algorithms, to scramble messages. Using encryption and decryption software, the sender can scramble the message and the recipient can unscramble it. To affix a digital signature to an electronic document, a signer must obtain electronic "keys." The keys are assigned in pairs: a private key and a public key.

A person creates his keys using a software program. The digital signature is affixed to the electronic document using the private key. The "signer" types in a password, similar to a personal identification number for an automatic teller machine. The private key then generates a long string of numbers and letters that represent the digital signature, or public key. The recipient of the message runs a software program using this public key to authenticate that the document was signed by the private key and that the document has not been altered during transmission.

It is mathematically infeasible for a person to derive another person's private key. The only way to compromise a digital signature is to give another person access to the signature software and the password to the private key.

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CROSS-REFERENCES

Authentication.

## SIMPLE

*Unmixed; not aggravated or compounded.*

A simple assault, for example, is one that is not accompanied by any circumstances of aggravation, such as assault with a deadly weapon.

*Simple interest* is a fixed amount paid in exchange for a sum of money lent. The interest generated on the amount borrowed does not itself earn interest, unlike interest earned where parties agree to compound interest.

## ♦ SIMPSON, O. J.

The criminal and civil trials of Orenthal James ("O. J.") Simpson, a former football star, actor, and television personality, regarding the murders of his former wife, Nicole Brown Simpson, and Ronald Goldman, a local restaurant waiter, were two of the most controversial and highly publicized proceedings in U.S. legal history. The lengthy criminal trial, which ended in Simpson's acquittal for the two murders in October

1995, was nationally televised. In the civil trial, in which the estates of the two murder victims sued Simpson for damages for the victims' WRONGFUL DEATHS, a jury in February 1997 awarded the heirs of the victims a total of $33.5 million. In both proceedings, but especially in the criminal trial, the issue of race played a dominant role. Simpson, an African American, was portrayed by his attorneys as another victim of the racist beliefs and behavior of members of the Los Angeles Police Department (LAPD).

In the early hours of June 13, 1994, the bodies of Nicole Brown Simpson and Ronald Goldman were found lying in a pool of blood outside Nicole Simpson's Brentwood, California, condominium. Both victims had been brutally stabbed to death on the evening of June 12, but there were no eyewitnesses. After the slayings, Nicole Simpson's dog was found wandering around the upscale neighborhood with bloody paws.

Simpson voluntarily gave an interview to LAPD detectives the day after the murder. Five days after the murders, LAPD charged Simpson with the deaths, citing a trail of evidence they said linked the celebrity to the crime scene, including a bloody glove found outside the condominium that allegedly matched one found at Simpson's estate. On the day Simpson was to surrender to police, he and a friend, Al C. Cowlings, disappeared. Simpson left behind a note professing his love for Nicole, claiming his innocence, and implying that he would commit suicide. Police traced calls from Simpson's cellular phone, locating him in a vehicle traveling on a Los Angeles freeway. The ensuing slow-speed chase, which was nationally televised from helicopter cameras, ended back at Simpson's Brentwood home, where he was arrested.

Simpson's criminal trial began on January 25, 1995. He had assembled a team of lawyers that included ROBERT L. SHAPIRO, JOHNNIE L. COCHRAN JR., a leading Los Angeles defense attorney, F. LEE BAILEY, a nationally known criminal defense attorney, ALAN M. DERSHOWITZ, a Harvard law professor, Gerald F. Uelman, the dean of Stanford University Law School, and Barry Scheck and Peter J. Neufeld, New York attorneys skilled in handling DNA EVIDENCE. The group of prosecutors from the Los Angeles county attorney's office was led by MARCIA R. CLARK and Christopher A. Darden. Presiding at the trial was Superior Court Judge Lance A. Ito.

In its opening statements the prosecution argued that Simpson's history of DOMESTIC VIOLENCE against Nicole Brown Simpson showed a link to her murder. His pattern of abuse and his need to control his former wife culminated, according to Clark, in her murder, "the final and ultimate act of control." Goldman was murdered, continued Clark, because he got in the way, arriving at the Brentwood condominium to return a pair of misplaced eyeglasses at the same time that Simpson was attacking Nicole Brown Simpson.

The defense team, which Cochran dominated, asserted that the LAPD fabricated the physical evidence and that Simpson had been on his way to a golf outing in Chicago when the crimes were committed.

The prosecution presented the testimony of neighbors in the vicinity of the murder scene and of a limousine driver who arrived early at Simpson's home that night to establish that Simpson had time to commit the murders and return home shortly after the driver arrived. It also introduced the "bloody glove" found behind Simpson's guest house, a glove that matched one found at the crime scene. The prosecution called DNA experts to testify that blood found at the crime scene matched Simpson's blood and that blood from both of the victims was found in Simpson's vehicle and on socks found in his bedroom. In addition, a bloody shoe print found at the crime scene appeared to match an expensive brand of shoes that Simpson had owned, but which could not be found.

The defense team aggressively challenged almost every prosecution witness but leveled its harshest attacks on the credibility of the LAPD. Scheck attacked the way the blood and fiber evidence was collected and suggested that the police had used blood from a sample given by the defendant to concoct false evidence. Scheck and Neufeld also challenged the credibility of the prosecution's DNA experts, subjecting the jury to weeks of highly technical discussion of DNA analysis.

The defense also argued that the police had rushed to judgment that Simpson was the prime suspect. Cochran and Bailey cross-examined the police officers who had gone to Simpson's home early on the morning after the murders. These officers had not sought a SEARCH WARRANT but went into the residence based on the belief that Simpson himself might have been the target of

*The criminal trial of former football great O.J. Simpson was among the most highly publicized trials in U.S. history. Simpson was acquitted of murder, but found guilty of wrongful death in a later civil trial.* AP/WIDE WORLD PHOTOS

the murderer. The defense challenged this justification and attempted to show that one of the officers, Mark Fuhrman, was a racist who planted the bloody glove that morning. Events in the trial confirmed that Fuhrman had lied under oath when he said he had not said the word "nigger" in the past ten years. As the prosecution case proceeded, the defense used every opportunity to demonstrate to the predominantly African American jury that the police had engaged in a conspiracy to frame Simpson.

The dramatic point of the trial was the prosecution's request that Simpson try on the bloody gloves. Simpson, wearing thin plastic gloves, strained to pull on the leather gloves and announced that they were too small and did not fit. This proved to be a damaging incident for the prosecution. In his closing argument, Cochran repeatedly stated, "If the gloves don't fit, you must acquit."

In October 1995, after 266 days of trial, the jury found Simpson not guilty of the murders. Cochran, in his closing argument, had implored the jury to acquit Simpson and send a message to the LAPD and white America that African Americans should not be the victims of a racist police and justice system. According to opinion polls, his argument sounded a strong chord in African Americans, because a majority of them believed that Simpson was innocent. Polls also showed that, in contrast, most whites believed that Simpson was guilty.

Despite the acquittal, Simpson had to defend himself in a civil lawsuit filed by the parents of Nicole Brown Simpson and Ronald Goldman. In contrast to the criminal trial, the civil case was not televised, thereby reducing the intensity of the press coverage. In addition, the plaintiffs had the opportunity to depose many witnesses before trial, including Simpson, who did not testify at the criminal trial.

The plaintiffs' lead attorney, Daniel M. Petrocelli, fiercely examined Simpson at the deposition and again at the trial, pointing out the inconsistencies in his various accounts. Petrocelli mocked Simpson's contention that he had never beaten Nicole Brown Simpson, despite police reports, photographs, and testimony of other witnesses. The most crucial piece of evidence became the bloody shoe print at the crime scene. At his deposition Simpson said he had never owned a pair of the "ugly-assed shoes" that had made the shoe print. Simpson repeated this claim at trial, but Petrocelli produced thirty-one photographs of Simpson at public events showing that he had indeed worn the exact model of shoes prior to the murders. Finally Petrocelli argued that Simpson committed the murders because he could not control his temper: when Nicole Brown Simpson rejected him for good in the spring of 1994, he erupted in the same uncontrollable rage that had caused him to lash out at her in the past, only this time he used a knife.

In February 1997 the jury awarded the plaintiffs $8.5 million in COMPENSATORY DAMAGES and $25 million in PUNITIVE DAMAGES. The jury awarded the punitive damages based on an expert's testimony that Simpson could earn $25 million over the rest of his life by trading on his notoriety with book deals, movie contracts, speaking tours, and memorabilia sales. The jury did not want Simpson to profit from the crimes. Superior Court Judge Hiroshi Fujisaki, who had conducted the trial, upheld the damages award. Simpson announced that he planned to appeal the case.

The plaintiffs obtained a court order permitting the seizure of many of Simpson's assets to pay the multimillion-dollar judgment. Simpson, who had regained custody of his two children that he had with Nicole Brown Simpson, claimed he was near financial insolvency. Never-

theless, the plaintiffs' attorneys returned to court numerous times in 1997 seeking disclosure of Simpson's assets, contending that he was attempting to hide them.

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CROSS-REFERENCES

Cameras in Court; DNA Evidence.

## SIMULTANEOUS DEATH

*Loss of life by two or more individuals concurrently or pursuant to circumstances that render it impossible to ascertain who predeceased whom.*

The issue of who died first frequently arises in cases determining the inheritance of property from spouses who die simultaneously. Generally the answer must be derived from all the surrounding circumstances. At COMMON LAW, the law would not intervene and make the assumption that one individual or another had died first but would await proof, no matter how slight that might be. Since this created a problem when no satisfactory proof existed, various states enacted statutes allowing judges to presume that one individual survived another under certain circumstances.

Because those state statutes that created presumptions proved inadequate, a majority of the states enacted the Uniform Simultaneous Death Act. Although some slight variations exist from one state to another, the law essentially provides that property will be inherited or distributed as if each person had outlived the other. This prevents the property from passing into the estate of a second person who is already deceased only to be distributed immediately from that estate, a wasteful procedure that precipitates additional legal proceedings, costs, and estate taxes.

The Simultaneous Death Act cannot be applied if evidence exists that one individual outlived the other. The act only applies when it cannot be determined who died first. Ordinarily the persons involved need not have died in a common disaster but might have died in different places and under different circumstances, and it still might be impossible to prove that one survived the other. A 1985 Illinois case provides an example of where Simultaneous Death Act was held inapplicable because the court found it possible to ascertain who died first.

*Janus v. Tarasewicz*, 135 Ill.App.3d 936, 482 N.E.2d 418, 90 Ill.Dec. 599 (Ill.App. 1 Dist. 1985) arose out of a freakish series of events that began in the Chicago area in 1982. Adam Janus unluckily purchased a bottle of Tylenol capsules that had been laced with cyanide by an unknown perpetrator prior to its sale at retail. On the evening of September 29, 1982, the day of Adam's death, his brother, Stanley Janus, and Stanley's wife, Theresa Janus, having just returned from their honeymoon, gathered in mourning at Adam's home with other family members. Not yet knowing how Adam died, Stanley and Theresa innocently compounded the tragedy by taking some of the contaminated capsules themselves. Upon their arrival at the intensive care unit of a hospital emergency room, neither showed visible vital signs. Hospital personnel never succeeded in establishing any spontaneous blood pressure, pulse, or signs of respiration in Stanley and pronounced him dead. Hospital personnel did succeed in establishing a measurable, though unsatisfactory, blood pressure in Theresa. Although she had very unstable vital signs, remained in a coma, and had fixed and dilated pupils, she was placed on a mechanical respirator and remained on the respirator for two days before she was pronounced dead on October 1, 1982.

Stanley had a $100,000 life-insurance policy that named Theresa as primary beneficiary and his mother, Alojza Janus, as contingent beneficiary. The 1953 version of the Uniform Simultaneous Death Act, in force in Illinois, provides that if there is no sufficient evidence that the insured and beneficiary have died otherwise than simultaneously, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary. The Illinois Court of Appeals held the act to be inapplicable because a PREPONDERANCE OF THE EVIDENCE established that Theresa survived Stanley, albeit by only a couple of days. The result: the proceeds of Stanley's $100,000 policy did not go to his mother,

Alojza, as contingent beneficiary, but to Theresa's father, Jan Tarasewicz, as administrator of her estate.

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CROSS-REFERENCES

Death and Dying; Estate and Gift Taxes.

## ♦ SINCLAIR, UPTON BEALL

Upton Beall Sinclair was a famous American writer and essayist whose book *The Jungle*, an exposé of Chicago's meatpacking industry, shocked the nation and led to the passage of the Pure Food and Drug Act in 1906.

Sinclair was born September 20, 1878, to a prominent but financially troubled family in Baltimore, Maryland. Sinclair's father was a liquor salesman who was also an alcoholic. His mother, a teetotaler, came from a wealthy background. In 1888, the Sinclair family moved to New York. Sinclair's father sold hats but spent his earnings on alcohol. Sinclair, who became a teetotaler like his mother, moved between two different financial worlds—the relative life of poverty with his father and mother and the affluence he experienced when visiting his mother's well-to-do parents. He later stated that experiencing the two extremes helped make him a socialist.

"I AIMED AT THE PUBLIC'S HEART, AND BY ACCIDENT I HIT IT IN THE STOMACH."
—UPTON SINCLAIR

Sinclair began to write "dime novels" (books of pulp fiction that sold for 10 cents) when he was a teenager. At age 14, he attended New York City College, financing his education by writing for newspapers and magazines. In 1897, Sinclair enrolled at Columbia University. He continued to write prodigiously, a habit that became lifelong. By the time he died, Sinclair had published close to one hundred books.

In 1901, Sinclair released his first book, *Springtime and Harvest*, later republished as *King Midas*. Around the same time, he became involved in the socialist movement. He was an avid reader of socialist classics and *Appeal to Reason,* a socialist-populist journal. Socialists maintain that inequalities in the distribution of wealth are best solved by either direct state ownership of key industries or through regulation of private business. In 1905, Sinclair joined with authors Jack London and Florence Kelley and labor attorney CLARENCE DARROW to establish the Intercollegiate Socialist Society.

During this period Sinclair also became interested in the works of such investigative journalists as Lincoln Steffens and Ida Tarbell, who publicly exposed corruption in U.S. government and industry. This type of investigative reporting came to be known as "muckraking," thanks in part to Sinclair. In 1904, the editor of *Appeal to Reason* commissioned him to write a novel about the immigrants who worked in the meat packing industry. After seven weeks of research, Sinclair produced his sixth book, *The Jungle*, a novel about a young Lithuanian immigrant who finds work in the stockyards of Chicago. Sinclair's frank portrayal of the unsanitary and miserable working conditions of those who labored in the meat packing industry, was serialized in 1905 where it began to create a furor.

Unable to find a publisher for his book, Sinclair, after six rejections, published the novel himself. He took out an ad in *Appeal to Reason,* and received 972 advance orders. When the publisher Doubleday heard the numbers, the company took on the book. *The Jungle* was published

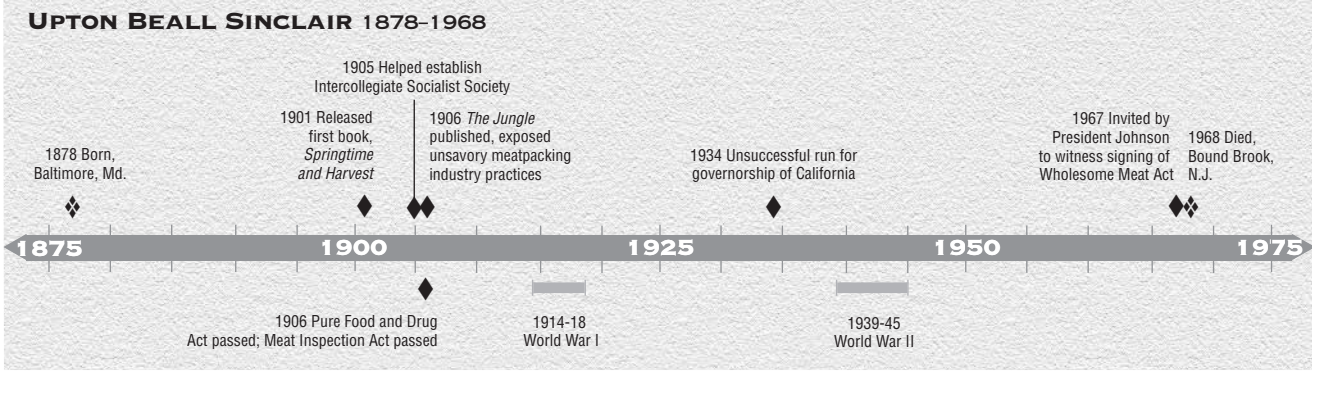

in 1906 and immediately sold over 150,000 copies. Over the next few years the book was translated into 17 languages and became an international best-seller.

Horrified at the description of the filthy conditions in which the meat packers worked, and even more dismayed at the offal and other repellant ingredients that were part of the meats they were consuming, the American public demanded immediate and widespread reform. President THEODORE ROOSEVELT met with Sinclair at the White House and launched an investigation into the practices of the meat packing industry. Although the beef industry and other producers of consumable products, including pharmaceutical companies, had vigorously fought federal regulation of their industries, Sinclair's revelations helped turn the tide.

Bowing to the swelling chorus of public indignation, Congress passed the PURE FOOD AND DRUG ACT OF 1906, which prohibited foreign and interstate commerce in adulterated or fraudulently labeled food and drugs. Under the new law, such products could be seized and destroyed and offenders faced fines and prison sentences. Congress also passed the Meat Inspection Act of 1906, which attempted to regulate the inspection of the slaughtering and processing of animals sold for human consumption.

Sinclair put his newfound wealth into a cooperative living experiment he established in Englewood, New Jersey. When a fire destroyed the commune in 1907, Sinclair was financially unable to rebuild it. He followed *The Jungle* with a number of other muckraking novels, including *King Coal* (1917), *Oil!* (1927), and *Boston* (1928). None, however, achieved the same popularity.

Sinclair eventually moved to California where he became actively involved in politics. He ran unsuccessfully for public office on the Socialist ticket and organized a socialist reform movement known as End Poverty in California (EPIC). In 1934, he ran for governor of California on the Democratic ticket, but was defeated by Republican incumbent Frank Merriam.

Sinclair returned to writing in the 1940s, producing his famous Lanny Budd series, which is composed of 11 novels that deal with American politics from about 1913 until 1953. The third book in the series, *Dragon's Teeth* (1942), recounts the rise of Nazism. It received the Pulitzer Prize for fiction in 1943, the only major literary award given to Sinclair.

In the 1950s, Sinclair moved to Arizona with his second wife, Mary Craig Kimbrough, for health reasons. When Craig died in 1961, the two had been married almost 50 years. Sinclair remarried at the age of 83. He spent his later years writing and occasionally lecturing. In 1962, he released his autobiography. In 1967, a year before his death, Sinclair was invited to the White House by President LYNDON JOHNSON to witness the signing of the Wholesome Meat Act of 1967, which expanded the earlier meat inspection act of 1906. In 1968, the socialist crusader, who proved that one man can bring about reform, died in his sleep on November 25, 1968, in Bound Brook, New Jersey.

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## SINE DIE

*[*Latin, Without day.*] Without day; without assigning a day for a further meeting or hearing.*

A legislative body adjourns sine die when it adjourns without appointing a day on which to appear or assemble again.

## SINE QUA NON

*[*Latin, Without which not.*] A description of a requisite or condition that is indispensable.*

In the law of TORTS, a causal connection exists between a particular act and an injury when the injury would not have arisen but for the act. This is known as the but for rule or *sine qua non* rule.

## SINGLE NAME PAPER

*A type of* COMMERCIAL PAPER, *such as a check or promissory note that has only one original signer or more than one maker signing for the exact same purpose.*

A single name paper is distinguishable from a *suretyship* where, for a certain sum, one individual cosigns to support another individual's debt.

## SINGLE NAME PARTNERSHIP

*A business arrangement whereby two or more individuals, the partners, unite their skill, capital,*

## Partnership Fictitious Name

**PARTNERSHIP FICTITIOUS NAME CERTIFICATE**
SECRETARY OF STATE
SFN 7006 (4-99)

FOR OFFICE USE ONLY

ID #

WO #

Filed By

Expiration Date

**1. FILING FEES**

A. For new certificate for first two partners $25.00
For each additional partner (not to exceed $250) 3.00
B. For fictitious name used by a limited partnership or limited liability partnership 25.00
C. For amended certificate 25.00

2. This certificate is a
☐ New registration with a five year duration.
☐ Amended registration with a continuing duration.

**SEE REVERSE SIDE FOR FEES, FILING AND MAILING INSTRUCTIONS**

**TYPE OR PRINT LEGIBLY** For reference, see North Dakota Century Code, Chapter 45-11.

3. Fictitious name

4. Fictitious name is used by
☐ General partnership ☐ Limited partnership
☐ Limited liability partnership

5. If a fictitious name is used by a limited partnership or a limited liability partnership, the name of the limited partnership or limited liability partnership is

6. Federal ID #

7. Address of principal place of business (Street/RR, and PO Box if applicable, city, state, zip+4

8. State of origin

9. Telephone #

10. Toll-free telephone #

11. The general partners, their Social Security/Federal ID #, and the addresses of their principal places of business **(this section may be left blank when number 5 indicates the fictitious name is used by a limited partnership)**

| NAME | SOCIAL SECURITY/ FEDERAL ID # | COMPLETE ADDRESS Street/RR | PO Box | City | State | Zip + 4 |
|---|---|---|---|---|---|---|
| | | | | | | |
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| | | | | | | |

12. A brief description of the nature of business to be transacted in North Dakota

13. "I (we), and (the) above named general partner(s) have read the foregoing certificate, know the contents, and believe(s) the information provided is correct."

Signature / Date

Signature / Date

Signature / Date

Signature / Date

Signature / Date

Signature / Date

Signature / Date

Signature / Date

14. Name of person to contact about this application Daytime telephone #

*A sample form for a single (or fictitious) name partnership or business*

## Partnership Fictitious Name

**INSTRUCTIONS FOR PARTNERSHIP FICTITIOUS NAME CERTIFICATE**

Every partnership transacting business in North Dakota under a fictitious name, or a name not showing the names of all the partners, must file a Fictitious Name Certificate with the Secretary of State. Whenever there is a **change** in the general partners who are **members** of a partnership transacting business in North Dakota under a fictitious name, **an amended certificate must be filed**. **When the fictitious name itself changes, the certificate on file must be canceled and a new Fictitious Name Certificate must be filed.**

Every limited partnership and every limited liability partnership transacting business in North Dakota under a name other than the legal name as registered with the Secretary of State, must file a Fictitious Name Certificate with the Secretary of State.

The following numbers correspond to the numbered sections on the front of this form.

1. (a) The fictitious name certificate filing fee is **$25** if there are two partners. If there are more than two partners, an additional fee of $3 per additional partner must be paid. However, the fee shall not exceed a total fee of $250.
   (Checks must be payable to "Secretary of State" and must be for U.S. negotiable funds. Payment may also be made by credit card using VISA, Master Card, or Discover.)
   (b) The fictitious name certificate filing fee is $25 when the fictitious name is used by a limited partnership or a limited liability partnership.
   (c) The fee for an amended fictitious name certificate is $25.
2. Check whether this certificate is a new registration with the Secretary of State, or a certificate amending a previous registration.
   A new registration has a duration of five years. The duration of an amended registration is five years from the date of the original registration.
3. The fictitious name:
   (a) May not contain the word "corporation", "company", "incorporated", "limited liability company", or "limited", or an abbreviation of one of such words. This does not preclude the word "limited" from being used in conjunction with the word "partnership".
   (b) Must include the words "limited partnership" or the abbreviation "L.P." or "LP" if fictitious name is filed to be used by a limited partnership, or must include the words "limited liability partnership" or either of the abbreviations "L.L.P." or "LLP" if used by a limited liability partnership. If the fictitious name is to be used by a North Dakota professional limited liability partnership, it may contain either the words "professional limited liability partnership" or "limited liability partnership" or one of the following abbreviations: "P.L.L.P", "PLLP", "L.L.P.", or LLP". A foreign professional limited liability partnership may use a name required or authorized in the state of origin.
   (c) May not be the same as, or deceptively similar to, any corporate name, limited liability company name, trade name, limited partnership name, foreign limited partnership name, or partnership fictitious name certificate on file with the secretary of state. (See North Dakota Century Code, Section 45-11-01)
   If the fictitious name is the same as, or similar to a name registered, the partnership must obtain consent to use of name from the previously registered entity. An original consent to use of name signed by a principal of the previously registered name must be filed with the fictitious name certificate and the fee of $10. A form for consent to use of name is not prescribed by the Secretary of State.
   The name on an amended fictitious name certificate must be identical to that originally filed. The name does not need to be researched for availability since the right to the name was secured with the original registration.
4. Distinguish whether the partnership using the fictitious name is a general or limited partnership, or limited liability partnership.
5. If the fictitious name is being used by a limited partnership or a limited liability partnership, give the correct name as registered with the North Dakota Secretary of State.
6. To properly maintain partnership records, the partnership's Federal ID number is required.
7. A complete address of the principal place of business is required. **In this section, as well as all other sections requiring addresses on this certificate, an address must include a street or rural address, a postal box number if applicable, and the city, state, and zip code plus 4.**
8. Provide the state of organization if fictitious name is used by a limited partnership or a limited liability partnership.
9. The telephone number of the partnership's principal place of business is requested in order to provide better service to a filing partnership.
10. Provide a toll-free telephone number if the partnership has one. A toll-free number will expedite services to the partnership for the duration of the filing.
11. Provide the full names of all the **current** general partners, their social security or Federal ID numbers, and complete mailing addresses of their principal places of business.. (See definition of "complete address" in number 7.) If adequate space is not provided to list all general partners, attach an additional schedule listing all other general partners.
    If a general partner is either a corporation, a limited liability company, a limited partnership, a limited liability partnership, or another general partnership using a fictitious name, **the general partner must be registered separately with the Secretary of State before this fictitious name certificate will be effected.**
    The name and principal place of business of a general partner on this fictitious name certificate must be **exactly** as separately registered with the Secretary of State. Any name change or change of principal address required for the separate registration of the general partner will require a simultaneous change to the fictitious name certificate.
    Section 11 **does not need to be completed if number 5** indicates that the fictitious name is used by **a limited partnership.**
12. Provide a brief and specific description of the nature of the business to be transacted in North Dakota. "General business purposes" will not be accepted.
13. The certificate must bear original signatures of **one or more** of the general partners and the date on which each signed.
14. Provide the name and daytime telephone number of the person to contact for any issues related to this application.

**EXPEDITING PROCESS:** Be sure to complete number 14. If the fictitious name certificate is being submitted by someone other than the partnership, provide a cover letter with the name and telephone number of the responsible individual so that any deficiencies on the form can be remedied by telephone.

**MAILING INSTRUCTIONS:**
Send an **original** certificate AND **filing fees** to:

Secretary of State
State of North Dakota
600 E Boulevard Ave Dept 108
Bismarck ND 58505-0500

Telephone: 701-328-4284
ND Toll Free: 800-352-0867 (Option 1)
Fax: 701-328-2992
Home Page: http://www.state.nd.us/sec

**RENEWALS:** Every fictitious name certificate filed with the Secretary of State must be renewed every five years from the date of the initial filing. Forms for renewal are prescribed by the Secretary of State and are sent to the address of the principal place of business at least sixty days before the deadline for renewal. Therefore, it is imperative that the principal place of business address is always current with the Secretary of State.

SFN 7006 (4-99)

*A sample form for a single (or fictitious) name partnership or business (continued)*

*and work in exchange for a proportional allocation of the profits and losses incurred but who engage in business under one name rather than the names of all the partners.*

Although technically not a legal term, the phrase *single name partnership* describes the situation when a traditional partnership arrangement deviates from the custom of using the surnames of all its partners (except for silent partners) to conduct its activities. The partners select one name, whether it be the name of one partner, an acronym of their names, or a fictitious name. This assumed name must be set out under the provision for the name in the partnership agreement. A single name partnership is also known as an assumed or fictitious name partnership.

Almost all states require by statute that such a partnership file an assumed or fictitious name certificate with the SECRETARY OF STATE or other appropriate official. In addition to the assumed name, the certificate sets out the full names and addresses of the individuals doing business under that name. Some jurisdictions also mandate that a notice to file the certificate appear under the legal notice column in designated newspapers.

The registration requirement is designed to provide the public with information about the persons with whom they choose to do business or extend credit.

Failure to file an assumed or fictitious name partnership agreement might constitute a misdemeanor under state penal laws, resulting in a fine upon conviction.

## SINGLE PROPRIETORSHIP

See SOLE PROPRIETORSHIP.

## SIT

*To hold court or perform an act that is judicial in nature; to hold a session, such as of a court,* GRAND JURY, *or legislative body.*

## SITUS

*[*Latin, Situation; location.*] The place where a particular event occurs.*

For example, the situs of a crime is the place where it was committed; the situs of a trust is the location where the trustee performs his or her duties of managing the trust.

## SIXTEENTH AMENDMENT

The Sixteenth Amendment to the U.S. Constitution reads:

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

Congress passed the Sixteenth Amendment to the U.S. Constitution in 1909, and the states ratified it in 1913. The ratification of the amendment overturned an 1895 U.S. Supreme Court decision that had ruled a 2 percent federal flat tax on incomes over $4,000 unconstitutional (POLLOCK V. FARMER'S LOAN & TRUST CO., 157 U.S. 429, 15 S. Ct. 673, 39 L. Ed. 759). Article I of the Constitution states that "direct taxes shall be apportioned among the several states . . . according to their respective numbers." By a 5–4 vote, the Court in *Pollock* held that the new INCOME TAX was a direct tax insofar as it was based on incomes derived from land and, as such, had to be apportioned among the states. Because the law did not provide for APPORTIONMENT, it was unconstitutional.

The decision was unpopular and took the public by surprise because a federal income tax levied during the U.S. CIVIL WAR had not been struck down. Critics contended that the conservative majority on the *Pollock* Court was seeking to protect the economic elite. Industrialization had led to the creation of enormous corporate profits and personal fortunes, which could not be taxed to help pay for escalating federal government services. The DEMOCRATIC PARTY made the enactment of a constitutional amendment a plank in its platform beginning in 1896.

The language of the Sixteenth Amendment addressed the issue in *Pollock* concerning apportionment, repealing the limitation imposed by article I. Soon after the amendment was ratified, Congress established a new personal income tax with rates ranging from 1 to 7 percent on income in excess of $3,000 for a single individual.

### FURTHER READINGS

Jensen, Erik M. 2001. "The Taxing Power, the Sixteenth Amendment, and the Meaning of 'Incomes'." *Arizona State Law Journal* 33 (winter).

Oring, Mark, and Steve Hampton. 1994. "*Cheek v. United States* and the Tax Protest Movement: An Historical Reassessment of the Sixteenth Amendment." *University of West Los Angeles Law Review* 25 (annual).

CROSS-REFERENCES

Apportionment; Income Tax.

## SIXTH AMENDMENT

The Sixth Amendment to the U.S. Constitution reads:

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

The Sixth Amendment to the U.S. Constitution affords criminal defendants seven discrete personal liberties: (1) the right to a SPEEDY TRIAL; (2) the right to a public trial; (3) the right to an impartial jury; (4) the right to be informed of pending charges; (5) the right to confront and to cross-examine adverse witnesses; (6) the right to compel favorable witnesses to testify at trial through the subpoena power of the judiciary; and (7) the right to legal counsel. Ratified in 1791, the Sixth Amendment originally applied only to criminal actions brought by the federal government.

Over the past century, all of the protections guaranteed by the Sixth Amendment have been made applicable to the state governments through the doctrine of selective incorporation. Under this doctrine, the Due Process and EQUAL PROTECTION Clauses of the FOURTEENTH AMENDMENT require each state to recognize certain fundamental liberties that are enumerated in the BILL OF RIGHTS because such liberties are deemed essential to the concepts of freedom and equality. Together with the SUPREMACY CLAUSE of Article VI, the Fourteenth Amendment prohibits any state from providing less protection for a right conferred by the Sixth Amendment than is provided under the federal Constitution.

### Speedy Trial

The right to a speedy trial traces its roots to twelfth-century England, when the Assize of Clarendon declared that justice must be provided to robbers, murderers, and thieves "speedily enough." The Speedy Trial Clause was designed by the Founding Fathers to prevent defendants from languishing in jail for an indefinite period before trial, to minimize the time in which a defendant's life is disrupted and burdened by the anxiety and scrutiny accompanying public criminal proceedings, and to reduce the chances that a prolonged delay before trial will impair the ability of the accused to prepare a defense. The longer the commencement of a trial is postponed, courts have observed, the more likely it is that witnesses will disappear, that evidence will be lost or destroyed, and that memories will fade.

A person's right to a speedy trial arises only after the government has arrested, indicted, or otherwise formally accused the person of a crime. Before the point of formal accusation, the government is under no Sixth Amendment obligation to discover, investigate, accuse, or prosecute a particular defendant within a certain amount of time. The Speedy Trial Clause is not implicated in post-trial criminal proceedings such as PROBATION and PAROLE hearings. Nor may a person raise a speedy-trial claim after the government has dropped criminal charges, even if the government refiles those charges at a much later date. However, the government must comply with the fairness requirements of the Due Process Clause during each juncture of a criminal proceeding.

The U.S. Supreme Court has declined to draw a bright line separating permissible pretrial delays from delays that are impermissibly excessive. Instead, the Court has developed a BALANCING test in which length of delay is just one factor to consider when evaluating the merits of a speedy-trial claim. The other three factors that a court must consider are the reason for delay, the severity of prejudice, or injury, suffered by the defendant from delay, and the stage during the criminal proceedings in which the defendant asserted the right to a speedy trial. Defendants who fail to assert this right early in a criminal proceeding, or who acquiesce in the face of protracted pretrial delays, typically lose their speedy-trial claims.

Defendants whose own actions lengthen the pretrial phase normally forfeit their rights under the Speedy Trial Clause as well. For example, defendants who frivolously inundate a court with pretrial motions are treated as having waived their rights to a speedy trial (*United States v. Lindsey,* 47 F.3d 440 [D.C. Cir. 1995]). In such situations, defendants are not allowed to benefit from their own misconduct. On the

other hand, delays that are attributable to the government, such as those due to prosecutorial NEGLIGENCE in misplacing a defendant's file, will violate the Speedy Trial Clause (*United States v. Shell,* 974 F.2d 1035 [9th Cir. 1992]).

A delay of at least one year in bringing a defendant to trial following arrest will trigger a presumption that the Sixth Amendment has been violated, with the level of judicial scrutiny increasing in direct proportion to the length of delay (*United States v. Gutierrez,* 891 F. Supp. 97 [E.D.N.Y. 1995]). The government may overcome this presumption by offering a "plausible reason" for the delay (*United States v. Thomas,* 55 F.3d 144 [4th Cir. 1995]). Courts generally will condone longer delays when the prosecution has requested additional time to prepare for a complex or difficult case. When prosecutors have offered only implausible reasons for delay, courts traditionally have dismissed the indictment, overturned the conviction, or vacated the sentence, depending on the remedy requested by the defendant.

### Public Trial

The right to a public trial is another ancient liberty that Americans have inherited from Anglo-Saxon jurisprudence. During the seventeenth century, when the English Court of Oyer and Terminer attempted to exclude members of the public from a criminal proceeding that the Crown had deemed to be sensitive, defendant John Lilburn successfully argued that immemorial usage and British COMMON LAW entitled him to a trial in open court where spectators are admitted. The Founding Fathers believed that public criminal proceedings would operate as a check against malevolent prosecutions, corrupt or malleable judges, and perjurious witnesses. The public nature of criminal proceedings also aids the fact-finding mission of the judiciary by encouraging citizens to come forward with relevant information, whether inculpatory or exculpatory.

Under the Public Trial Clause, friends and relatives of a defendant must be initially permitted to attend trial. However, the right to a public trial is not absolute, and parents, spouses, and children will be excluded if they disrupt the proceedings (*Cosentino v. Kelly,* 926 F. Supp. 391 [S.D.N.Y. 1996]). Toddlers and infants, ranging from one month to two years in age, may be summarily excluded from a courtroom consistent with the Sixth Amendment, even if the judge fails to articulate a reason for doing so (*United States v. Short,* 36 M.J. 802 [A.C.M.R. 1993]). Children in this age group are too young to understand legal proceedings, are easily agitated, and present a substantial risk of hindering a trial with distractions.

The Sixth Amendment right to a public trial is personal to the defendant and may not be asserted by the media or the public in general. However, both the public and media have a qualified FIRST AMENDMENT right to attend criminal proceedings. The First Amendment does not accommodate everyone who wants to attend a particular proceeding. Nor does the First Amendment require courts to televise any given legal proceeding. Oral arguments before the U.S. Supreme Court, for example, have never been televised.

Courtrooms are areas of finite space and limited seating in which judges diligently attempt to maintain decorum. In cases that generate tremendous public interest, courts sometimes create lottery systems that randomly assign citizens a seat in the courtroom for each day of trial. A separate lottery may be established for the purpose of determining which members of the media are permitted access to the courtroom on a given day, although local and national newspapers and television stations may be given a permanent courtroom seat. Members of the media and public who are excluded from attending trial on a given day are sometimes provided admission to an audio room where they can listen to the proceedings.

In rare cases, criminal proceedings will be closed to all members of the media and the public. However, a compelling reason must be offered before a court will follow this course. For example, when the First Amendment rights of the media to attend a criminal trial collide with a defendant's Sixth Amendment right to a fair trial, the defendant's Sixth Amendment right takes precedence, and the legal proceeding may be closed (*In re Globe Newspaper,* 729 F.2d 47 [1st Cir. 1984]).

Criminal proceedings also have been conducted in private when the complaining witness is a child who is young and immature and is being asked to testify about an emotionally charged issue such as SEXUAL ABUSE (*Fayerweather v. Moran,* 749 F. Supp. 43 [D.R.I. 1990]). If the court determines that only one stage of a legal proceeding will be jeopardized by the presence of the public or the media, then only that

stage should be conducted in private (*Waller v. Georgia,* 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 [1984]). For example, if a witness is expected to testify about classified government information or confidential trade secrets, the court may clear the courtroom for the duration of such testimony, but no longer.

The right to a public trial extends to pretrial proceedings that are integral to the trial phase, such as jury selection and evidentiary hearings (*Rovinsky v. McKaskle,* 722 F.2d 197 [5th Cir. 1984]). Despite the strong constitutional preference for public criminal trials, both courts-martial and juvenile delinquency hearings typically are held in a closed session, even when they involve criminal wrongdoing. In all other proceedings, the defendant may waive his right to a public trial, in which case the entire criminal proceeding can be conducted in private.

### Right to Trial by an Impartial Jury

In both England and the American colonies, the Crown retained the prerogative to interfere with jury deliberations and to overturn verdicts that embarrassed, harmed, or otherwise challenged the authority of the royal government. Finding such interference unjust, the Founding Fathers created a constitutional right to trial by an impartial jury. This Sixth Amendment right, which can be traced back to the MAGNA CHARTA in 1215, does not apply to juvenile delinquency proceedings (*McKeiver v. Pennsylvania,* 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 [1971]), or to petty criminal offenses, which consist of crimes punishable by imprisonment of six months or less (*Baldwin v. New York,* 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437 [1970]).

The Sixth Amendment entitles defendants to a jury pool that represents a fair cross section of the community. From the jury pool, also known as a venire, a panel of jurors is selected to hear the case through a process called VOIR DIRE. During voir dire, the presiding judge, the prosecution, and attorneys for the defense are allowed to ask members of the jury pool a variety of questions intended to reveal any latent biases, prejudices, or other influences that might affect their impartiality. The jurors who are ultimately impaneled for trial need not represent a cross section of the community as long as each juror maintains impartiality throughout the proceedings. The presence of even one biased juror is not permitted under the Sixth Amendment (*United States v. Aguon,* 813 F.2d 1413 [9th Cir. 1987]).

A juror's impartiality may be compromised by sources outside the courtroom, such as the media. Jurors may not consider newspaper, television, and radio coverage before or during trial when evaluating the guilt or innocence of the defendant. Before trial, judges will take special care to filter out those jurors whose neutrality has been compromised by extensive media coverage. During trial, judges will instruct jurors to avoid exposing themselves to such extraneous sources. Exposure to information about the trial from an extraneous source, whether it be the media, a friend, or a family member, creates a presumption of prejudice to the defendant that can only be overcome by persuasive evidence that the juror can still render an impartial verdict (*United States v. Rowley,* 975 F.2d 1357 [8th Cir. 1992]). Failure to overcome this presumption will result in the reversal of any conviction.

The Sixth Amendment requires a trial judge to inquire as to the possible racial biases of prospective jurors when defendants request such an inquiry and there are substantial indications that racial prejudice could play a decisive role in the outcome of the case (*United States v. Kyles,* 40 F.3d 519 [2d Cir. 1994]). But an all-white jury does not, by itself, infringe on a black defendant's right to an impartial jury despite her contention that white jurors are incapable of acting impartially due to their perceived ignorance of inner-city life and its problems (*United States v. Nururdin,* 8 F.3d 1187 [7th Cir. 1993]). However, if a white juror is biased by an indelible prejudice against a black defendant, he will be stricken from the jury panel or venire.

For similar reasons, jurors are not permitted to begin deliberations until all of the evidence has been offered, the attorneys have made their closing arguments, and the judge has read the instructions. Federal courts have found that premature deliberations are more likely to occur after the prosecution has concluded its case in chief and before the defense has begun its presentation (*United States v. Bertoli,* 40 F.3d 1384 [3d Cir. 1994]). Federal courts have also determined that once a juror has expressed a view, he is more likely to view the evidence in a light most favorable to that initial opinion. If premature deliberations were constitutionally permitted, then the government would obtain an unfair advantage over defendants because many jurors would enter the final deliberations with a

prosecutorial slant (*United States v. Resko,* 3 F.3d 684 [3d Cir. 1993]).

Although a jury must be impartial, there is no Sixth Amendment right to a jury of 12 persons. In *Williams v. Florida,* 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970), the U.S. Supreme Court ruled that a jury of at least six persons is "large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a cross-section of the community." Conversely, the Court has declared that a jury of only five members is unconstitutionally small (*Ballew v. Georgia,* 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 [1978]).

Similarly, there is no Sixth Amendment right to a unanimous jury (*Apodaca v. Oregon,* 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 [1972]). The "essential feature of a jury lies in the interposition between the accused and the accuser of the common sense judgment of a group of laymen," the Court wrote in *Apodaca.* "A requirement of unanimity," the Court continued, "does not materially contribute to the exercise of that judgment." If a defendant is tried by a six-person jury, however, the verdict must be unanimous (*Burch v. Louisiana,* 441 U.S. 130, 99 S. Ct. 1623, 60 L. Ed. 2d 96 [1979]).

### Notice of Pending Criminal Charges

The Sixth Amendment guarantees defendants the right to be informed of the nature and cause of the accusation against them. Courts have interpreted this provision to have two elements. First, defendants must receive notice of any criminal accusations that the government has lodged against them through an indictment, information, complaint, or other formal charge. Second, defendants may not be tried, convicted, or sentenced for a crime that materially varies from the crime set forth in the formal charge. If a defendant suffers prejudice or injury, such as a conviction, from a material variance between the formal charge and the proof offered at trial, the court will vacate the verdict and sentence.

The Sixth Amendment notice requirement reflects the efforts of the Founding Fathers to constitutionalize the common law concept of fundamental fairness that pervaded civil and criminal proceedings in England and the American colonies. Receiving notice of pending criminal charges in advance of trial permits defendants to prepare a defense in accordance with the specific nature of the accusation. Defendants who are incarcerated by totalitarian governments are frequently not apprised of pending charges until the trial begins. By requiring substantial conformity between the criminal charges and the incriminating proof at trial, the Sixth Amendment eliminates any confusion as to the basis of a particular verdict, thereby decreasing the chances that a defendant will be tried later for the same offense in violation of DOUBLE JEOPARDY protections.

Many appeals have focused on the issue of what constitutes a material variance. In *Stirone v. United States,* 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960), the U.S. Supreme Court found a material variance between an indictment charging the defendant with illegal importing activities, and the trial evidence showing that the defendant had engaged in illegal exporting activities. In *United States v. Ford,* 88 F.3d 1350 (4th Cir. 1996), the U.S. Court of Appeals for the Fourth Circuit found a material variance between an indictment charging the defendant with a single conspiracy, and the trial evidence demonstrating the existence of multiple conspiracies.

However, no material variance was found between an indictment that charged a defendant with committing a crime in Little Rock, Arkansas, and trial evidence showing that the crime was actually committed in North Little Rock, because both cities were within the jurisdiction of the court hearing the case (*Moore v. United States,* 337 F.2d 350 [8th Cir. 1964]). Nor was a material variance found in a check forgery case where the indictment listed the middle name of the defendant and the forged instrument included only a middle initial (*Helms v. United States,* 310 F.2d 236 [5th Cir. 1962]).

### Confrontation of Adverse Witnesses

The Sixth Amendment guarantees defendants the right to be confronted by witnesses who offer testimony or evidence against them. The Confrontation Clause has two prongs. The first prong assures defendants the right to be present during all critical stages of trial, allowing them to hear the evidence offered by the prosecution, to consult with their attorneys, and otherwise to participate in their defense. However, the Sixth Amendment permits courts to remove defendants who are disorderly, disrespectful, and abusive (*Illinois v. Allen,* 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 [1970]). If an unruly defendant insists on remaining in the court-

room, the Sixth Amendment authorizes courts to take appropriate measures to restrain him. In some instances, courts have shackled and gagged recalcitrant defendants in the presence of the jury (*Stewart v. Corbin,* 850 F.2d 492 [9th Cir. 1988]). In other instances, defiant defendants have been removed from court and forced to watch the remainder of trial from a prison cell, through closed-circuit television.

The second prong of the Confrontation Clause guarantees defendants the right to face adverse witnesses in person and to subject them to cross-examination. Through cross-examination, defendants may test the credibility and reliability of witnesses by probing their recollection and exposing any underlying prejudices, biases, or motives to distort the truth or lie. Confrontation and cross-examination are vital components of the U.S. adversarial system.

Although defendants are usually given wide latitude in exercising their rights under the Confrontation Clause, courts retain broad discretion to impose reasonable restrictions on particular avenues of cross-examination. Defendants may be forbidden from delving into areas that are irrelevant, collateral, confusing, repetitive, or prejudicial. Similarly, defendants may not pursue a line of questioning solely for the purpose of harassment. For example, courts have prohibited defendants from cross-examining alleged rape victims about their sexual histories because such questioning is frequently demeaning and is unlikely to elicit answers that bear more than a remote relationship to the issue of consent (*Bell v. Harrison,* 670 F.2d 656 [6th Cir. 1982]).

In exceptional circumstances, defendants may be prevented from confronting their accusers face-to-face. If a judge determines that a fragile child would be traumatized by testifying in front of a defendant, the Sixth Amendment authorizes the court to videotape the child's testimony outside the presence of the defendant and later replay the tape during trial (*Spigarolo v. Meachum,* 934 F.2d 19 [2d Cir. 1991]). However, counsel for both the prosecution and defense must be present during the videotaped testimony. If neither the defendant nor her attorney are permitted the opportunity to confront a witness, even if the witness is a small child whose welfare might be harmed by rigorous cross-examination, the Sixth Amendment has been violated (*Tennessee v. Deuter,* 839 S.W.2d 391 [Tenn. 1992]).

Occasionally, defendants are denied the opportunity to confront and cross-examine their accusers under the controversial rules of HEARSAY evidence. Hearsay is a written or verbal statement made out of court by one person, and that is later repeated in court by another person who heard or read the statement, and presented for the truth of the matter asserted. Because such out-of-court statements are not typically made under oath or subject to cross-examination, the law treats them as untrustworthy when introduced into evidence by a person other than the original declarant. When hearsay statements are offered for their truth, they generally are deemed inadmissible by state and federal law.

However, certain hearsay statements, such as dying declarations, excited utterances, and officially kept records, are deemed admissible when made under reliable circumstances. Dying declarations are considered reliable when made by persons who have been informed of their impending death because such persons are supposedly more inclined to tell the truth. Excited utterances are considered reliable when made spontaneously and without time for premeditation. Business and public records are considered reliable when kept in the ordinary and official course of corporate or government activities. The prosecution may introduce all four types of evidence, as well as other "firmly rooted" exceptions to the hearsay rule, without violating the Sixth Amendment, even though the defendant is not afforded the opportunity to confront or to cross-examine the out-of-court declarant (*United States v. Jackson,* 88 F.3d 845 [10th Cir. 1996]).

### Compulsory Process for Favorable Witnesses

As a corollary to the right of confrontation, the Sixth Amendment guarantees defendants the right to use the compulsory process of the judiciary to subpoena witnesses who could provide exculpatory testimony or who have other information that is favorable to the defense. The Sixth Amendment guarantees this right even if an indigent defendant cannot afford to pay the expenses that accompany the use of judicial resources to subpoena a witness (*United States v. Webster,* 750 F.2d 307 [5th Cir. 1984]). Courts may not take actions to undermine the testimony of a witness who has been subpoenaed by the defense. For example, a trial

judge who discourages a witness from testifying by issuing unnecessarily stern warnings against perjury has violated the precepts of the Sixth Amendment (*Webb v. Texas,* 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed. 2d 330 [1972]).

A statute that makes particular persons incompetent to testify on behalf of a defendant is similarly unconstitutional. At issue in *Washington v. Texas,* 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), was a state statute prohibiting accomplices from testifying for one another. Overturning the statute as a violation of the Sixth Amendment Compulsory Process Clause, the U.S. Supreme Court wrote that the defendant was denied the right to subpoena favorable witnesses "because the state arbitrarily denied him the right to put on the stand a witness who was physically present and mentally capable of testifying to events that he had personally observed and whose testimony was relevant and material to the defense."

Under certain circumstances, the prosecution may be required to assist the defendant in locating potential witnesses. In *Roviaro v. United States,* 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957), the defendant was charged with the illegal sale of heroin to "John Doe." When the prosecution refused to disclose the identity of John Doe, the U.S. Supreme Court concluded that the Sixth Amendment had been abridged because the disclosure of Doe's identity may have produced "testimony that was highly relevant and . . . helpful to the defense."

Defendants also have a Sixth Amendment right to testify on their own behalf. Before the American Revolution, defendants were not permitted to take the witness stand in Great Britain and in many of the colonies. The common law presumed all defendants to be incompetent to give reliable or credible testimony on their own behalf because of their vested interest in the outcome of the trial. Each defendant, regardless of his innocence or guilt, was declared incapable of offering truthful testimony when his life, liberty, or property was at stake. The Sixth Amendment laid this common law rule to rest in the United States. The amendment permits, but does not require, a defendant to testify on his own behalf.

### Right to Counsel

Because of the law's complexity and the often substantial deprivations that a criminal conviction can produce, the Sixth Amendment provides criminal defendants with a RIGHT TO COUNSEL. A defendant's Sixth Amendment right to counsel attaches when the government initiates adversarial criminal proceedings, whether by way of formal charge, PRELIMINARY HEARING, indictment, information, or ARRAIGNMENT (*United States v. Larkin,* 978 F.2d 964 [7th Cir. 1992]). Unlike the right to a speedy trial, this Sixth Amendment right does not arise at the moment of arrest unless the government has already filed formal charges (*Kirby v. Illinois,* 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 [1972]). However, defendants may assert a FIFTH AMENDMENT right to consult with an attorney during CUSTODIAL INTERROGATION by the police, even though no formal charges have been brought and no arrest has been made (MIRANDA V. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 [1966]).

Defendants do not enjoy a Sixth Amendment right to be represented by counsel during every phase of litigation that follows the initiation of formal adversarial proceedings by the state. Instead, defendants may only assert this right during "critical stages" of the proceedings (*Maine v. Moulton,* 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 [1985]). A critical stage of prosecution includes every instance in which the advice of counsel is necessary to ensure a defendant's right to a fair trial or in which the absence of counsel might impair the preparation or presentation of a defense (*United States v. Hidalgo,* 7 F.3d 1566 [11th Cir. 1993]).

Obviously, the trial is a critical stage in any criminal proceeding, as are jury selection, sentencing, and nearly every effort by the government to elicit information from the accused, including interrogation. However, courts are divided on the issue of whether the state may perform a consensual search of a defendant's premises without the advice or presence of counsel. At the same time, courts generally agree that pretrial hearings involving issues related to bail, the suppression of evidence, or the viability of the prosecution's case all qualify as critical stages of criminal proceedings (*Smith v. Lockhart,* 923 F.2d 1314 [8th Cir. 1991]). The U.S. Supreme Court has ruled that the denial of counsel during a critical stage amounts to an unconstitutional deprivation of a fair trial, warranting the reversal of conviction (*United States v. Cronic,* 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 [1984]).

Courts also generally agree on a number of instances that do not constitute critical stages.

For example, pretrial scientific analysis of fingerprints, blood samples, clothing, hair, handwriting, and voice samples have all been ruled to be noncritical stages (*United States v. Wade,* 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 [1967]). Nor is a **PROBABLE CAUSE** hearing sufficiently critical to trigger the right to counsel (*Gerstein v. Pugh,* 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 [1975]). Each of these noncritical stages has been described as a preliminary facet of criminal prosecution that is largely unassociated with the more adversarial phases invoking the right to counsel.

If a defendant cannot afford to hire an attorney, the Sixth Amendment requires that the trial judge appoint one on her behalf (**GIDEON V. WAINWRIGHT,** 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 [1963]). In instances where an indigent defendant has some financial resources, she may be required to reimburse the government for a portion of the fees paid to the court-appointed lawyer. The Sixth Amendment right of indigent criminal defendants to receive a court-appointed lawyer applies to every case involving a felony offense and to all other cases in which the defendant is actually incarcerated for any length of time, regardless of whether the crime is categorized as a misdemeanor or petty offense (*Argersinger v. Hamlin,* 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 [1972]).

Persons who have been convicted of crimes may not compel a court-appointed attorney to file an appeal that the attorney believes is frivolous. In *Anders v. California*, 368 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), the U.S. Supreme Court set out a procedure that an attorney must follow to request either withdrawal from the case or to have the court dispose of the case without a full legal review. However, in *Smith v. Robbins,* 528 U.S. 259, 120 S.Ct. 746, 145 L. Ed. 2d 756 (2000) the Court ruled that its precedent was not a "straitjacket" and that states were free to come up with procedures that protected both the criminal client and his attorney.

However, if an indigent defendant is prosecuted for a non-felony offense that is punishable by a potential jail or prison sentence, the Sixth Amendment is not violated if he is denied a court-appointed attorney as long as no penalty of incarceration is actually imposed (*Scott v. Illinois,* 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 [1979]). In other words, an indigent defendant has no Sixth Amendment right to a court-appointed lawyer in a non-felony case when the only punishment he receives is a fine, the **FORFEITURE** of property, or some other penalty not involving incarceration. Thus, in a forfeiture proceeding where the government seized almost $300,000 from an arrested drug smuggler, the Sixth Amendment right to counsel was not infringed when the court denied the smuggler's request for a court-appointed attorney because no jail or prison sentence was ultimately imposed (*United States v. $292,888.04 in U.S. Currency,* 54 F.3d 564 [9th Cir. 1995]).

Nor is the Sixth Amendment right to counsel infringed when an indigent defendant is denied a court-appointed lawyer of her choice (*Ford v. Israel,* 701 F.2d 689 [7th Cir. 1983]). The selection of counsel to represent an indigent defendant is within the discretion of the trial court. The attorney selected need not be a great litigator, a savvy negotiator, or the best attorney available. Rather, the court-appointed lawyer must be a member in good standing of the bar who gives the client his complete and undivided loyalty, as well as a zealous and **GOOD FAITH** defense (*United States v. Cariola,* 323 F.2d 180 [3rd Cir. 1963]). The quality of representation need not be perfect but only effective and competent enough to assure the defendant due process of law (*Pineda v. Bailey,* 340 F.2d 162 [5th Cir. 1965]). If the attorney representing a defendant is incompetent, whether the attorney has been appointed by the court or privately retained, the Sixth Amendment right to the effective assistance of counsel has been violated.

The U.S. Supreme Court has reviewed numerous ineffective counsel claims. In *Glover v. United States,* 531 U.S. 198, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001), the Court allowed review based on ineffective counsel at the sentencing stage. In *Roe v. Flores-Ortega,* 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000), the Court considered whether a defense lawyer must always consult with a defendant regarding an appeal of the conviction. The Court rejected a bright-line rule that would have mandated such a consultation, ruling that each case must be analyzed using a set of standards. In death-penalty cases, the Court had been more willing to vacate convictions based on ineffective counsel. However, in *Mickens v. Taylor,*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002), the Court departed from what has come to be known as the "death is different" standard. This standard requires less hard evidence of prejudice because of ineffective counsel. The Court ruled

that the convicted murderer's ineffective counsel claim must be analyzed by the "but for" test. The general rule mandates that the defendant show that "but for" the lawyer's conduct the result of the trial would have been different.

The court may replace any attorney, publicly appointed or privately retained, if that is in the best interests of the defendant. A court will normally replace an attorney who has a conflict of interest that prevents her from faithfully discharging her obligation of loyalty to the client. Courts also retain the prerogative to deny a defendant's request to substitute attorneys if the request comes too late in the proceedings, is made solely to delay the trial, or is not for a good reason. However, if a defendant demonstrates a good reason for the substitution of attorneys, such as a complete breakdown in communication between lawyer and client, the court must honor the request for substitution unless a compelling reason exists for denying it. The efficient administration of justice is one reason that has been deemed sufficiently compelling to deny such requests (*United States v. D'Amore,* 56 F.3d 1202 [9th Cir. 1995]).

Finally, all defendants have a Sixth Amendment right to decline the representation of counsel and proceed on their own behalf. Defendants who represent themselves are said to be proceeding pro se. However, defendants who wish to represent themselves must first make a knowing and intelligent waiver of the Sixth Amendment right to counsel before a court will allow them to do so. (*Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 [1975]). Courts must ensure that the defendant appreciates the disadvantages of appearing *pro se* and that he understands the potential consequences. The defendant must be informed that the presentation of a defense in a criminal case is not a simple matter of telling a story, but that it requires skills in examining a witness, knowledge of the RULES OF EVIDENCE and procedure, and persuasive oratory abilities. However, the U.S. Supreme Court has declined to apply this rule *pro se* appeals. In *Martinez v. Court of Appeal of California, Fourth Appellate District,* 528 U.S. 152, 120 S.Ct. 684, 145 L. Ed. 2d 597 (2000), the Court held that *Faretta* did not apply and that the state appeals court could require that an attorney be appointed to conduct the criminal appeal. In so ruling, the Court made clear that the Sixth Amendment does not apply to appellate proceedings.

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Cameras in Court; Clarendon, Constitutions of; Courtroom Television Network; Criminal Law; Criminal Procedure; Freedom of the Press; Incorporation Doctrine; Juvenile Law; Peremptory Challenge; Pretrial Publicity; Sequestration; Sexual Abuse; Shield Laws.

## S.J.D.

*An abbreviation for doctor of judicial science, a degree awarded to highly qualified individuals who have successfully completed a prescribed course of legal doctorate study after having earned J.D. and LL.M. degrees.*

S.J.D. is more commonly abbreviated J.S.D.

## SLANDER

See LIBEL AND SLANDER.

## SLATING

*The procedure by which law enforcement officials record on the blotter information about an individual's arrest and charges, together with identification and facts about his or her background.*

The term *slating* is used synonymously with booking.

## SLAUGHTER-HOUSE CASES

The U.S. Supreme Court ruling in the *Slaughter-House* cases, 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1873), was the first High Court decision to interpret the FOURTEENTH AMENDMENT, which had been ratified in 1870. In a controversial decision, the Court, on a 5–4 vote, interpreted the PRIVILEGES AND IMMUNITIES CLAUSE of the amendment as protecting only rights of national citizenship from the actions of the state government. This restrictive reading robbed the Privileges and Immunities Clause of any constitutional significance.

The case involved three lawsuits filed by Louisiana meat-packing companies, challenging a Louisiana state law that allowed one meat company the exclusive right to slaughter livestock in New Orleans. Other packing companies were required to pay a fee for using the slaughterhouses. The state justified this MONOPOLY as a way to prevent health risks to people who lived near slaughterhouses, at a time when there was no refrigeration and no way to control insects. The company that was awarded the monopoly and accompanying financial windfall was politically connected to state legislators, inviting charges of corruption.

The three companies filed suit, claiming that the law violated the Privileges and Immunities Clause of the Fourteenth Amendment. They argued that this clause protected the right to labor freely. The Louisiana law restricted their freedom to butcher meat. Their challenge was unsuccessful in state court, after which they appealed to the U.S. Supreme Court.

The Supreme Court affirmed the state court. Justice SAMUEL F. MILLER, writing for the majority, ruled that the Privileges and Immunities Clause had limited effect because it only reached privileges and immunities guaranteed by U.S. citizenship, not state citizenship. The clause was meant only to prohibit a state from restricting the rights of noncitizens within its borders if it did not similarly limit the rights of its citizens. Miller noted that because the action challenged privileges of state citizenship, the Privileges and Immunities Clause did not apply.

Some of the rights of national citizenship enumerated by Miller included the right to travel from state to state, the right to vote for federal officeholders, the right to petition Congress to redress grievances, and the right to use the writ of HABEAS CORPUS. Any restriction on these national rights of citizenship by a state would be unconstitutional under the Privileges and Immunities Clause. In the case of the meat packers, however, the Court concluded that no national citizenship right was at stake.

Miller also expressed concern that an expansive reading of the Privileges and Immunities Clause would shift too much power to the federal courts and Congress. In his view the Fourteenth Amendment was designed to grant former slaves legal equality, not to grant expanded rights to the general population. The concept of FEDERALISM, which grants the states a large measure of power and autonomy, played a role in the majority's decision. The Court reasoned that Congress and the states could not have contemplated the expansion of federal power as argued by the meat packers.

The four dissenting justices thought otherwise, believing that the Fourteenth Amendment was intended to do more than just protect the newly freed slaves. Justice STEPHEN J. FIELD, in a dissent joined by the other justices, maintained, "The privileges and immunities designated are those which of right belong to the citizens of all free governments." He saw the clause as a powerful tool to keep state government out of the affairs of business and the economy.

The Privileges and Immunities Clause no longer had any constitutional impact. The Supreme Court came to rely on the DUE PROCESS and EQUAL PROTECTION CLAUSES of the Fourteenth Amendment to protect persons from unconstitutional actions by state government.

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CROSS-REFERENCES

Due Process of Law; Equal Protection.

## SLAVERY

*A civil relationship in which one person has absolute power over the life, fortune, and liberty of another.*

### History

At some point in history, slavery has plagued nearly every part of the world. From ancient Greece to the modern Americas, innumerable governments have sanctioned the complete control of certain persons for the benefit of other persons, usually under the guise of social, mercantile, and technological progress.

The U.S. legacy of slavery began in the early seventeenth century. However, the stage for U.S. slavery was set as early as the fourteenth century, when the rich nations of Spain and Portugal began to capture Africans for enslavement in Europe. When Spain, Portugal, and other European countries conquered and laid claim to the

# Amistad: Mutiny on a Slave Ship

African slaves occasionally revolted against their masters, and the result was usually severe punishment for the slaves. The mutiny of fifty-four slaves on the Spanish ship *Amistad* in 1839 proved an exception, however, as the U.S. Supreme Court granted the slaves their freedom and allowed them to return to Africa.

The fifty-four Africans were **KIDNAPPED** in West Africa, near modern-day Sierra Leone, and illegally sold into the Spanish slave trade. They were transported to Cuba, fraudulently classified as native Cuban slaves, and sold to two Spaniards. The slaves were then loaded on the schooner *Amistad,* which set sail for Haiti.

Three days into the journey, the slaves mutinied. Led by Sengbe Pieh, known to the Spanish crew as Cinque, the slaves unshackled themselves, killed the captain and the cook, and forced all but two of the crew to leave the ship. The Africans demanded to be returned to their homeland, but the crew tricked them and sailed toward the United States. In August 1839 the ship was towed into Montauk Point, Long Island, in New York.

Cinque and the others were charged with murder and **PIRACY**. A group of abolitionists formed the Amistad Committee, which organized a legal defense that sought the slaves' freedom. U.S. President **MARTIN VAN BUREN**, pressed by Spain to return the slaves without trial, hoped the court would find the slaves guilty and order them returned to Cuba. The federal circuit court dismissed the murder and piracy charges because the acts had occurred outside the jurisdiction of the United States. It referred the case to the federal district court for trial to determine if the slaves must be returned to Cuba.

At the trial the slaves argued that there was no legal basis for returning them to Cuba because the importation of slaves from Africa was illegal under Spanish law. The district court agreed, ruling that the Africans were free and should be transported home. Van Buren ordered an immediate appeal to the Supreme Court.

Former president **JOHN QUINCY ADAMS** represented the slaves before the Supreme Court, making an impassioned argument for their freedom. The Court, in *United States v. Libellants of Schooner Amistad,* 40 U.S. 518 (15 Pet. 518), 10 L. Ed. 826, affirmed the district court and agreed that the Africans were free persons. By the end of 1841, thirty-five of the *Amistad* survivors had sailed for Sierra Leone; the rest remained in the United States.

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New World of the Caribbean and West Indies in the late sixteenth century, they brought along the practice of slavery. Eventually, slavery expanded to the north, to colonial America.

The first Africans in colonial America were brought to Jamestown by a Dutch ship in 1619. These 20 Africans were indentured servants, which meant that they were to work for a certain period of time in exchange for transportation and room and board. They were assigned land after their service and were considered free Negroes. Nonetheless, their settlement was involuntary.

The status of Africans in colonial America underwent a rapid evolution after 1619. One early judicial decision signaled the change in European attitudes toward Africans. In 1640, three Virginia servants—two Europeans and one African—escaped from their masters. Upon recapture, a Virginia court ordered the European servants to serve their master for one more year and the African servant to serve his master, or his master's assigns, for the rest of his life.

As early as 1641, colonial Massachusetts recognized slavery as a legal institution, announcing in its Body of Liberties that "[t]here shall never be any bond slaverie . . . unless it be lawful Captives taken in just warres, and such strangers as willingly sell themselves or are sold to us." Twenty years later, just two generations after the arrival of the first Africans in colonial America,

the first statute recognizing African slavery was passed in Virginia.

In the mid-1600s, Virginia colonists began to take note of the phenomenal agricultural production occurring in the Caribbean and West Indies. The extreme labor demands and savage punishments of European colonists there had depleted the population of productive Amerindian slaves, but those same colonists were continuing to prosper. By purchasing masses of able-bodied pubescent and adult Africans, the colonists avoided waiting for a slave population to increase by native birth, and in the scramble for quick, easy, and substantial profits in the New World, this strategy gave them an edge. Virginia colonists, eager to achieve the same prosperity, endeavored to sanction African slavery.

In 1661, Virginia colonists enacted a law that legitimized African slavery and provided that the status of an African child would be determined by the status of its mother. If the mother of a child was a slave, then her child was doomed to slavery. In the following years, colonial Virginia passed more laws that severely restricted the rights of African slaves and expanded the rights of owners of African slaves. Each of the original colonies eventually followed Virginia's lead by enacting similar laws that promoted or recognized the enslavement of Africans.

Most of the first African slaves were captured in Africa by the Dutch or by fellow Africans. They were then manacled and delivered in crowded, brutal conditions across the Atlantic Ocean by the Dutch West India Company, an organization formed in Holland for the sole purpose of trafficking in slaves. English companies such as the East India Company and the Royal African Company also contributed to the seventeenth-century American slave trade. Although untold numbers of Africans died en route, the profitable slave trade so increased the African slave population in America that by the late 1600s, European colonists were already beginning to anticipate insurrections and slave revolts. By 1750, populations of displaced Africans would range from an estimated 550 in New Hampshire to over 101,000 in Virginia.

From the beginning, African slaves resisted their servitude by running away, fighting back, poisoning food, and plotting revolts. The first Europeans to openly denounce slavery and work for its ABOLITION were Quakers, or members of the Society of Friends, who were concentrated in Pennsylvania. As early as 1688, the Quakers publicly declared that slavery was at odds with Christianity. Along with other European abolitionists, they actively worked to help African slaves escape their owners.

The legal treatment of African slaves varied slightly from colony to colony according to the area's economic structure. Northern colonies such as Massachusetts, Connecticut, and Rhode Island relied on the export of various local commodities such as fish, liquor, and dairy products, so their involvement with African slavery was in large part limited to slave trading. Nonetheless, the New England colonies sanctioned the use of slave labor, and they enacted codes that prevented African slaves from exercising such basic rights as FREEDOM OF ASSOCIATION and movement. Though generally regarded as less harsh than those of such southern colonies as Virginia and the Carolinas, the New England slave codes nevertheless legalized the enslavement of Africans.

The middle colonies—New York, Pennsylvania, Delaware, and New Jersey—also had codes that promoted the slave industry and deprived African slaves of most basic rights. Laws were often tailored especially for African slaves. In New York, for example, any slave found 40 miles north of Albany was presumed to be escaping to Canada and could be executed upon the oath of two witnesses. In New York City, slaves could not appear on the street after dark without a lighted lantern. From 1700 to 1740, growth of the African slave population in New York outdistanced growth of the European population and gave the city the largest slave population in the region. Many of these slaves provided domestic service to wealthy families. Except in New York, slavery in the middle colonies was not widespread, because the commercial economies and small-scale agriculture practiced by the Germans, Swedes, and Danes in this region did not require it. Further, many settlers in the rural areas of the middle colonies were morally opposed to slavery. Neither of these conditions prevailed in the southern colonies.

Georgia was originally established as a slavery-free English colony in 1733, but the prohibition against slavery was repealed in 1750 after repeated entreaties from European settlers. The economies of colonial Virginia, Maryland, and North and South Carolina centered on large-scale agricultural production. The vast majority of the South's colonial agrarians profited at first from the sale of

# Reparations

The U. S. government enacted the **THIRTEENTH AMENDMENT** to abolish slavery, but it has never formally apologized to African Americans for their enslavement nor offered financial reparations to compensate them for their peonage. Since the end of the **U.S. CIVIL WAR** there have been occasional calls by African Americans for reparations, but political and legal efforts have always failed. However, in the 1990s a new movement for slavery reparations began to coalesce, led by a group of scholars and lawyers. This group has been encouraged by the payment of reparations to Jewish Holocaust victims by German corporations that employed slave labor and by the U.S. government's payment of $60,000 to every Japanese American person held in detention camps during **WORLD WAR II**. Nevertheless, the slavery reparations issue arouses strong emotions in those opposed to the idea. In addition, legal doctrines make the prospect of court victories unlikely.

The idea of reparations is rooted in the field order issued by Union General William Tecumseh Sherman as he conquered several Southern states during the last months of the Civil War. Sherman's order authorized the distribution of 40 acres of Southern land to each freed slave and the loan of a government mule to work the land. The promise of "40 acres and a mule" proved illusory, however, as Congress failed to ratify such a program. In short order Southern whites reclaimed their land and Southern blacks became sharecroppers, renting out land in return for a meager financial return.

A reparations lawsuit against the U.S. **TREASURY DEPARTMENT** was dismissed in 1915, but in the 1920s **MARCUS GARVEY** made reparations part of his Black Nationalist program. In the 1950s and 1960s Elijah Muhammad, leader of the **NATION OF ISLAM**, preached black separatism and called on the government to give blacks land as reparations for slavery. During the **CIVIL RIGHTS MOVEMENT** of the 1960s reparations were ignored, with leaders focusing on political and civil equality. However, by the late 1960s a new, more radical form of Black nationalism started to emphasize the need for economic justice. In 1969 James Forman issued a "Black Manifesto" that demanded $500 million as reparations "due us as people who have been exploited and degraded, brutalized, killed, and persecuted." Again, reparations were ignored and the issue appeared dead. It was resurrected, however, in 1989 when Representative John Conyers (D-Mich.) introduced a resolution that sought to establish a commission that would study reparations for African Americans. The resolution went nowhere, but Conyers has continued to introduce it every year, to no avail.

The modern debate over reparations began in earnest with the publication of Randall M. Robinson's bestseller, *The Debt: What America Owes Blacks*. Robinson argued that the value of slave labor over the course of 246 years of American slavery easily reached into the trillions of dollars. He noted that slaves picked and processed cotton, which fueled commerce and industry throughout the United States. Robinson called on the government to establish independent community trust funds that would distribute money into the community to fund black-owned businesses and to fund education and training programs. He disavowed the direct payment of reparations to individuals. Harvard Law School Professor Charles Ogletree and other lawyers and scholars joined Robinson to form the Reparations Coordinating Committee. The committee has explored suing the U.S. government, and in 2002 it filed suit against several U.S. corporations that allegedly profited from slavery during the nineteenth century. A 2001 California law has aided the group's efforts, for it requires all insurance com-

tobacco, rice, and indigo. These products were planted, cultivated, and harvested exclusively by African slaves on vast farms known as plantations. Plantation production relied on manual labor and in order to be successful required huge numbers of workers, and thus the southern colonies found their needs met by the widespread enslavement of Africans.

Because of the importance of slavery to the plantation-based economies, slave codes in the southern colonies were made quite elaborate. For example, South Carolina prevented slave owners from working their slaves for more than 15 hours a day in spring and summer and more than 14 hours a day in fall and winter. Slave owners were also warned against undue cruelty to slaves. At the same time, Europeans were not allowed to teach African slaves to read or write; freedom of movement was severely restricted for slaves; liquor could not be sold to slaves; and whippings, mutilations, and other forms of punishment for slaves were explicitly authorized by law.

The laws regarding slaves reflected the **TERRORISM** and paternalism of slavery. A slave had a nebulous right to **SELF-DEFENSE**, but a slave owner was allowed to restrain and punish a slave with impunity. A slave owner could not beat a slave publicly, but a slave could not avoid pun-

panies doing business in California to report on any policies issued to slaveholders prior to 1865. A number of prominent companies revealed in their 2002 filings that they had issued slave insurance and thereby profited from slavery.

The debate over reparations has divided along racial lines. A 2002 opinion poll found that 80 percent of African Americans endorsed a formal apology for slavery from the U.S. government and 67 percent were in favor of monetary reparations. This contrasted sharply with white respondents; 30 percent of whites supported an apology while only 4 percent thought that monetary compensation was appropriate. Opposition to reparations falls into three main arguments. First, opponents note that all former slaves are dead and that living descendants do not deserve payments for their ancestors' losses. This is quite different from the U.S. government's payments to living Japanese Americans for their detention during World War II. A second objection is more practical: who would get the money and how much would each person receive? Critics point out that some African Americans were not slaves before the Civil War and that other blacks immigrated to the United States since the **ABOLITION** of slavery. It would be exceedingly difficult to sort out the descendants of slaves. A third objection centers on making current white Americans liable for the sins of the past. Critics note that millions of people entered the United States from Europe, Asia, and South American between 1865 and today. These individuals, as well as the descendants of non-slaveholding Americans, should not be forced to pay their tax dollars to compensate for a reprehensible system they had nothing to do with. In addition, some African-American scholars have voiced concerns about the symbolic consequences of seeking reparations. They contend that this cause reinforces the role of blacks as victims and looks to the past rather than the future.

Proponents of reparations respond by arguing that financial compensation will not go to individuals, thus eliminating the practical difficulties of identifying claimants. They also contend that slavery, along with the 100 years of repression and discrimination following the Civil War, have directly injured African Americans living today. They point out that the U.S. government is an ongoing organization that is responsible for its actions, whether or not individuals were present at the time of the actions in question. Finally, they believe that while the money is important, the demand for restitution will encourage the healing of old wounds.

Most commentators believe that reparations will not be achieved through the legal system, due to many substantive and procedural doctrines. In *Cato v. United States,* 70 F.3d 1103 (9th Cir. 1995), a federal appeals court dismissed a lawsuit that sought reparations and an apology from the U.S. government. The court found that it had no jurisdiction to consider the case. First, private citizens cannot sue the federal government under the doctrine of **SOVEREIGN IMMUNITY**. Second, the plaintiffs did not have standing to bring the suit because they could not show they were personally injured by slavery. The court made clear that generalized class-based grievances cannot be heard in a court of law. The court concluded that the plaintiffs should press their claims with Congress. Based on this ruling, many commentators have expressed skepticism that the 2002 lawsuit against several corporations would succeed. The companies will also be able to demonstrate that prior to the Civil War slavery was legal.

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**CROSS-REFERENCES**

Civil Rights Movement; Emancipation Proclamation; Reconstruction.

ishment for a crime committed at an owner's command. A free Negro could not voluntarily submit to slavery for a price, and Europeans were not allowed to subject a free African to slavery by treating one as a slave for any length of time. Every African was presumed to be a slave, however, until she or he could prove otherwise. This presumption was abolished in the northern states shortly after the United States won its independence from England, but it remained unchanged in the southern states until the end of the **U.S. CIVIL WAR**.

Not all Africans were slaves. Some free Africans had bought their freedom, some were the descendants of Jamestown's first free African servants, some had escaped their owner, and some had been freed, or manumitted, by their owner. A slave owner could not free a slave if doing so left the slave unable to pay his or her debts. Some statutes allowed a slave owner to free only slaves who could work and support themselves, and other statutes required a slave owner to provide continuing financial support to freed slaves.

In some areas in the South, manumission of a slave was illegal, but the law did not prevent a slave owner from sending or taking slaves to another state to set them free. In states where

manumission was legal, an owner could free a slave by executing a deed declaring the slave's liberty. Generally, the deed had to be filed in a county clerk's office or authorized or proved in court. Some states allowed for the manumission of slaves in the slave owner's will. A gift of land to a slave by a slave owner was often held to be a manumission of the slave, since only a free individual could own land. A manumitted slave was entitled to work for wages and to own land and PERSONAL PROPERTY through acquisition or inheritance.

After the United States won the WAR OF INDEPENDENCE, Vermont, Pennsylvania, New Hampshire, Connecticut, Rhode Island, New York, and New Jersey all passed legislation that gradually abolished slavery. These northern states, inspired mostly by the revolutionary, liberal philosophies of the period, began advocating expanding notions of freedom that were being rejected in Delaware, Maryland, Virginia, the Carolinas, and Georgia.

In May 1787, delegations from each of the 13 colonies began to meet in Philadelphia to devise a federal constitution. The Constitutional Convention was to begin on May 14, but few representatives had arrived by then, and it was postponed. On May 25, seven states were represented, and the convention began. Delegates from the various colonies continued to arrive through June, with the last ones coming from New Hampshire on July 22, four days before the convention was adjourned. Slavery was just one topic on a very long agenda.

The abolition of the U.S. enslavement of Africans was not seriously entertained at the convention. Virginia's GEORGE MASON and many delegates from the northern states argued against any recognition of slavery in the Constitution, but the overriding concern at the convention was to unify the states under a system of government that left substantial control of social and POLITICAL QUESTIONS to the individual states. It seemed clear to the majority of the representatives that a country founded on individual freedoms could not participate in slave trading, but it was equally clear that if the widespread enslavement of Africans by the southern states were prohibited by the new federal government, there would be no United States.

North Carolina, South Carolina, and Georgia insisted that a state's right to import slaves be left untouched. Delegates from other states argued for the abolition of slavery, and still other delegates wanted no hint of the practice included in the Constitution. A committee comprising one delegate from each state was dispatched to settle the issue. The committee returned with a constitutional clause, couched in the negative, that made slave trade vulnerable to prohibition after the year 1800. The strange set of bedfellows produced by this issue—New Jersey, Pennsylvania, Delaware, and Virginia were against the clause—illustrated the variety of considerations at play.

After further debate and modification by the entire convention, the Slave Trade Clause was inserted into Section 9 of Article I: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight." Attached to this language was another clause that allowed for the imposition of a tax or duty on such importation, not to exceed $10 for "each Person" (read, "each Slave").

The one other opaque reference to slavery in the Constitution was the so-called Three-fifths Compromise. In Article I, Section 2, the Framers wrote that the population of a state, for purposes of determining taxation and representation in the House of Representatives, would be measured by counting the "Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." This language struggled mightily to avoid the mention of African slavery but was understood as allowing the southern states to count each slave as three-fifths of a person in a government census.

This method of population measurement, three-fifths, was actually developed by Congress in 1783, during debate over state representation in the federal government. The northern states opposed the inclusion of African slaves in the determination of population because the southern states contained thousands of African slaves who played no part in the political process. The southern states argued that a state's African slave population reflected its true power and wealth, which should in turn be reflected in its federal representation. The northern states eventually compromised with the southern states to allow five African slaves to equal three free men for

purposes of population determinations and federal representation.

At the Constitutional Convention, standing alone, the three-fifths proviso did not immediately satisfy the majority of states. Opposition to the measure was not organized: no single cause unified the dissatisfied states, and no split occurred between slave states and free states. Opposition also was not based on the morality of counting slaves as less than full citizens: very little wrangling took place over this concern, and an amendment to count slaves as whole persons was rejected by a vote of 8–2. Eventually, the three-fifths ratio was adopted for the Constitution, but only after direct taxation of the states was also tied to state population. Thus, the only compromise regarding the recognition of African slaves grew from struggles over money and political power, not a concern over morality. A showdown between the slave states and the free states over African slavery never occurred. Although the United States was to cease the purchase and sale of slaves, the practice of slavery in the southern states survived the Constitutional Convention.

While all this politicking was taking place, the land in the southern states was fast becoming infertile. Farmers and plantation owners realized they needed to diversify their crops to save the soil. Shortly after the Constitution was ratified in 1789, the southern states sought the development of a cotton gin in order to convert agricultural production from rice, tobacco, and indigo to cotton. The cotton gin, which mechanically extracted cotton seeds, was eventually designed by Eli Whitney and Phineas Miller in 1792. The production of cotton did not require large start-up funds, and with the cotton gin for seed removal, African slaves had more time for cultivation. These changes all added up to large profits for southern plantation owners. With the help of New England slave traders, the plantation owners imported African slaves by the tens of thousands in the years following the Constitutional Convention. Nevertheless, in March 1807, Congress passed a law prohibiting the importation of African slaves. Effective January 1, 1808, in fulfillment of the suggestion contained in Article I, Section 2, of the Constitution, the U.S. slave trade officially ended. But a state's right to sanction slavery did not.

In the early 1800s, the United States was expanding, and the question of slavery began to consume the country. In 1819, leaders in the U.S. House of Representatives proposed a bill that would allow the Missouri Territory to enter the Union as a slave state. Although northern legislators outnumbered southern legislators at the time, House Speaker HENRY CLAY, of Kentucky, arranged an accord between enough congressional members to pass a version of the bill that admitted Missouri as a slave state. In exchange for legal slavery in Missouri, the southern legislators agreed to limit the northern boundaries of slavery to the same latitude as the southern boundary of Missouri. Thus were the terms of the MISSOURI COMPROMISE OF 1820, which became a watershed in the U.S. experience with slavery.

In its constitution, Missouri declared it would not allow slaves to be emancipated without their owner's consent. Furthermore, free African Americans were not allowed to enter the state. Antislavery congress members objected to the latter clause on the ground that it violated the federal Constitution's mandate that "the Citizens of each State shall be entitled to all PRIVILEGES AND IMMUNITIES of Citizens in the several States" (art. IV, § 2). African Americans had, after all, gained citizenship in the northern states.

Again Clay maneuvered votes in Congress. Missouri agreed not to discriminate against citizens from other states, but did so in a resolution that was abstract and unclear and left unsettled the question of precisely who was a citizen of the several states. In 1821, Missouri's constitution was approved, and Missouri was officially a slave state.

Once Missouri was admitted to the Union as a slave state, Maine was admitted as a free state; the Senate had refused to accept Maine until the House altered its position on Missouri. As a result, in 1821, the Union consisted of 12 free states, 12 slaves states, and a deepening divide between the two.

European settlements pressed westward. After the United States acquired the Southwest by force in the Mexican War, it again faced the question of slavery. In 1850, Congress altered the geographic limits on slavery established by the Missouri Compromise. California was admitted as a free state, but the Utah and New Mexico Territories were opened to slavery. The KANSAS-NEBRASKA ACT of 1854 further eroded the dictates of the Missouri Compromise by admitting slavery in those territories.

One particular case brought by a slave came to a head in the 1850s and caught the attention of the Republican presidential candidate for the 1860 election, former Illinois congressman ABRAHAM LINCOLN. In DRED SCOTT V. SANDFORD, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857), Dred Scott sued the widow of his deceased owner in Missouri state court, asking for his freedom. The dispute began in 1834 and ended with an 1857 Supreme Court decision confirming Scott's slave status. The decision galvanized abolitionists in the north, and Lincoln railed against the decision in his campaign for the presidency. The decision also strengthened the resolve of pro-slavery forces in the South. As the struggle for power between slavers and emancipators intensified, the geographic lines proscribing slavery, drawn and redrawn, were fast becoming battle lines.

In 1860, Republican Abraham Lincoln won the presidency on an anti-slavery platform, and like-minded Republicans gained a majority in Congress. In February 1861, with the abolition of slavery imminent, South Carolina seceded from the Union, and Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Texas, Arkansas, and Tennessee soon followed suit. Before Lincoln's inauguration in March, the Confederacy was in place. On April 12, the Confederates attacked South Carolina's Fort Sumter, and the U.S. internal war over the issue of slavery had begun.

Many early American colonists had believed they were justified in enslaving Africans because Africans were not Christians. After the American Revolution, as the country became polarized over the issue of slavery, slavery supporters in the South worked to clear the southern states of anti-slavery leaders and their forces. One abolitionist, for example, was beaten, tarred and feathered, set afire, doused in water, and whipped. As late as the 1820s, more than one hundred abolitionist groups operated in the slave states, but by the 1840s, virtually none was left. Slavers in the southern states also began to cultivate more ambitious rationales for African slavery. Slavery supporters cited essays written by the ancient Greek philosopher ARISTOTLE that declared that slavery was the natural order of things.

Aristotle had claimed that slaves were slaves because they had allowed themselves to become enslaved. This was just and right, his theory continued, because if those with strong bodies (Africans, to U.S. slavers) performed the labor, those with upright bodies (European colonists and their descendants) would have the time and energy for technological and economic advancement. U.S. slavery enthusiasts expanded on the theories of Aristotle and other philosophers to explain that it was the Africans' lot in life to be slaves because it was inherent in their nature to be servile and hardworking. Other southern slavers forwent any philosophy of slavery and simply enjoyed the luxuries realized through the enslavement of Africans.

Throughout the Civil War, President Lincoln and the U.S. Congress were busy passing federal legislation on the subject of slavery. On August 6, 1861, Congress passed the Confiscation Act, which allowed the United States to lay claim to any property used in insurrection against it. Under this act, slaves who served in the Confederate army were to be set free upon capture by Union forces. In June 1862, Lincoln signed a bill passed by Congress that abolished slavery in all territories owned by the federal government. On January 1, 1863, Lincoln issued the EMANCIPATION PROCLAMATION, which declared that all slaves in the United States were free persons and that they were to remain free persons.

In April 1865, the Confederate army surrendered to the Union forces. This event touched off a flurry of constitutional amendments. The THIRTEENTH AMENDMENT, which abolished slavery, was ratified by Congress on December 6, 1865. The FOURTEENTH AMENDMENT, ratified July 9, 1868, was designed to, in part, establish former slaves as full citizens and ensure that no African American would be deprived of any of the privileges and immunities that come with citizenship. The Fourteenth Amendment also deleted the offensive three-fifths ratio from the measurement of populations in Section 2 of Article I, and declared that debts relating to the loss or emancipation of slaves were illegal and void. The FIFTEENTH AMENDMENT, ratified February 3, 1870, gave male African Americans and male former slaves the right to vote.

African slavery in the United States continued to haunt the country long after its abolition. In the North, SEGREGATION of African Americans from the European populations was a reality, if not sanctioned by law. Beginning in the 1880s, many southern states enacted BLACK CODES, or JIM CROW LAWS, which restricted the freedom of movement and expression of African

Americans and enforced their segregation from the rest of society.

### Contemporary Issues Surrounding Slavery

Notions of slavery in the United States have expanded to include any situation in which one person controls the life, liberty, and fortune of another person. All forms of slavery are now widely recognized as inherently immoral and thoroughly evil. Slavery still occurs in various forms, but when it does, accused offenders are aggressively prosecuted. Federal statutes punish by fine or imprisonment the enticement of persons into slavery (18 U.S.C.A. § 1583), and the holding to or selling of persons into INVOLUNTARY SERVITUDE (§ 1584). In addition, whosoever builds a ship for slave carriage, serves on a ship carrying slaves, or owns a slave-carrying ship will be fined or imprisoned under 18 U.S.C.A. §§ 1582, 1586, and 1587, respectively.

The statute 18 U.S.C.A. § 1581 prohibits peonage, which is involuntary servitude for the payment of a debt. Labor camps are perhaps the most common violators of the law against peonage. The operators of some labor camps keep victims for work in fields through impoverished conditions, threats, acts of violence, and alcohol consumption. Offenders often provide rudimentary shelter to migrant workers and demand work in return, which can constitute involuntary servitude. An individual can also be convicted of sale into involuntary servitude for delivering victims under FALSE PRETENSES to such labor camps.

In the late 1990s and early 2000s, much of the debate surrounding slavery related to movements urging the U.S. government to pay reparations to descendants of slaves. Supporters of this movement suggest that cash payments made to these descendants is justified to compensate the victims of slavery for years of hardship, harm, and indignities. Local governments in such cities as Dallas, Chicago, Detroit, and Cleveland have urged Congress to consider this form of payment. Opponents of reparations note that the costs of reparations, if given to the extent that some supporters urge, would cost the federal government trillions of dollars. Moreover, many critics question how these cash payments would be made and how recipients would be identified for receiving them.

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CROSS-REFERENCES

Celia, a Slave; Civil Rights; Civil Rights Acts; Constitution of the United States; Douglass, Frederick; Fugitive Slave Act of 1850; Indenture; Ku Klux Klan; Ku Klux Klan Act; *Prigg v. Pennsylvania*; Republican Party; States' Rights; Taney, Roger Brooke. See also primary documents in "Slavery" section of Appendix.

## SLIP DECISION

*A copy of a judgment by the U.S. Supreme Court or other tribunal that is printed and distributed almost immediately subsequent to the time that it is handed down by the court.*

## SLIP LAW

*A copy of a bill that is passed by a state legislature and endorsed by the governor, or passed by Congress and signed by the president, and is printed and distributed almost immediately.*

## SMALL BUSINESS

*A type of enterprise that is independently owned and operated, has few employees, does a small amount of business, and is not predominant in its area of operation.*

CROSS-REFERENCES

Sole Proprietorship.

## SMALL BUSINESS ADMINISTRATION

The Small Business Administration (SBA) is a federal agency that seeks to aid, counsel, assist, and protect the interests of small business. The

SBA ensures that small business concerns receive a fair portion of federal government purchases, contracts, and subcontracts, as well as of the sales of government property. The agency is best known for its loans to small business concerns, state and local development companies, and the victims of floods or other catastrophes.

The SBA was created by the Small Business Act of 1953 (67 Stat. 232 [15 U.S.C.A. § 631 et seq.]) and derives its present authority from this act and the Small Business Investment Act of 1958 (15 U.S.C.A. § 661).

### Financial Assistance

The SBA provides guaranteed loans to small businesses to help them finance plant construction, conversion, or expansion and acquire equipment, facilities, machinery, supplies, or materials. It also provides them with working capital. Since 1976 farms have been considered to be small business concerns.

The SBA also provides loan guarantees to finance residential or commercial construction. The administration may finance small firms that manufacture, sell, install, service, or develop specific energy measures. In an effort to reach more businesses, the SBA provides loans and grants to private, nonprofit organizations that, in turn, make small loans and provide technical assistance to small businesses.

Through its Surety Bond Guarantee Program, the SBA helps to make the contract bonding process accessible to small and emerging contractors who find bonding unavailable. A bond is posted as a guarantee that the contracted work will be performed. If the work is not performed, the money pledged in the bond will be used to cover the contractor's default. The SBA program guarantees to reimburse the issuer of the bond up to 90 percent of losses incurred under bid, payment, or performance bonds issued to small contractors on contracts valued up to $1.25 million.

### Disaster Assistance

The SBA lends money to help the victims of floods, riots, or other catastrophes repair or replace most disaster-damaged property. Direct loans with subsidized interest rates are made to assist individuals, homeowners, businesses, and small agricultural cooperatives without credit elsewhere that have sustained substantial economic injury resulting from natural disasters.

### Investment Assistance

The administration licenses, regulates, and provides financial assistance to small business investment companies and section 301(d) licensees (formerly minority enterprise small business investment companies). The sole function of these investment companies is to provide venture capital in the form of EQUITY financing, long-term loan funds, and management services to small business concerns.

### Government Contracting

The SBA works closely with the purchasing agencies of the federal government and with the leading U.S. contractors in developing policies and procedures that will increase the number of contracts awarded to small businesses.

The administration has a number of services that help small firms obtain and fulfill government contracts. It sets aside suitable government purchases for competitive award to small business concerns and provides an appeal procedure for a low-bidding small firm whose ability to perform a contract is questioned by the contracting officer. The SBA maintains close ties with prime contractors and refers qualified small firms to them. In addition, it works with federal agencies in setting goals for procuring prime contracts and subcontracts for small businesses, especially those owned by women and members of disadvantaged groups.

### Business Initiatives

The SBA is recognized for its longtime effort to provide education, counseling, and information to small business owners and prospective owners. It has increasingly relied on forging partnerships with nongovernmental groups to deliver business education and training programs at low cost. For example, the Service Corps of Retired Executives (SCORE) provides one-on-one counseling free of charge.

The Business Information Center (BIC) program is an innovative approach to providing a one-stop location for information, education, and training. Components of BIC include the latest computer hardware and software, an extensive small business reference library, and a collection of current management videotapes.

The SBA also produces many pamphlets and publications about a variety of business and management topics. It has also established SBA Online, a toll-free electronic bulletin board for small businesses.

### Minority Enterprise Development

Sections 7(j) and 8(a) of the Small Business Act provide for the Minority Enterprise Development Program, designed to promote business ownership by socially and economically disadvantaged persons. Participation is available to small businesses that are at least 51 percent unconditionally owned, controlled, and managed by one or more individuals determined by the SBA to be socially and economically disadvantaged. Program participants receive a wide variety of services, including management and technical assistance, loans, and federal contracts.

### Advocacy

The Office of Advocacy serves as a leading advocate within public policy councils for the more than 22 million small businesses in the United States. The office, which is headed by the chief counsel for advocacy, lobbies Congress, the EXECUTIVE BRANCH, and state agencies concerning the interests and needs of small business. The office also is a leading source of information about the state of small business and the issues that affect small business success and growth.

### Women's Business Ownership

The Office of Women's Business Ownership (OWBO) provides assistance to the increasing number of women business owners and acts as their advocate in the public and private sector. It is the only office in the federal government specifically targeted to women business owners, assisting them through technical, financial, and management information and business training, skills counseling, and research.

The OWBO has established 54 training centers in 28 states and the District of Columbia, which provide community-based training for women at every stage of their entrepreneurial careers. In addition, the office created the Women's Network for Entrepreneurial Training, a one-year mentoring program linking experienced entrepreneurs with women whose businesses are poised for growth. This program is designed to help women avoid the common mistakes of new business owners.

### Small Business Development Centers

Small Business Development Centers provide counseling and training to existing and prospective small business owners. The 950 centers operate in every state, as well as in Puerto Rico, the U.S. Virgin Islands, and Guam. Each center is a partner with state government in economic development activities to support and assist small businesses.

### Administration

Between 1953 and 2002 SBA programs assisted almost 20 million small businesses. Between 1991 and 2000 the SBA aided almost 435,000 small businesses in receiving more than $94.6 billion in loans. The SBA continues to increase participation by minority-owned businesses by means of its minority small business program and publication of informational materials in Spanish.

The SBA has its headquarters in Washington, D.C. It maintains ten regional offices and has field offices in most major U.S. cities.

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#### CROSS-REFERENCES

License; Small Business.

## SMALL CLAIMS COURT

*A special court, sometimes called conciliation court, that provides expeditious, informal, and inexpensive adjudication of small claims.*

Every state has established a small claims or conciliation court to resolve legal disputes involving an amount of money that is less than a set dollar amount. At one time, $1,000 was the limit. However, many courts have raised the limit to $3,000, and a few will hear disputes involving amounts of up to $5,000 or more. Small claims courts and the rules that govern them emphasize informality and timely resolution of disputes. Most parties represent themselves in small claims court, in part because the facts of the dispute are simple but also because it makes little economic sense to pay attorneys' fees.

The first small claims court was created in Cleveland in 1913. Within a few years every state had such a court of limited jurisdiction. Small claims courts are attractive for consumers who want to collect a small debt or recover damages

*A sample application to file a small claims (commercial) complaint*

**Application to File a Small Claim**

**APPLICATION TO FILE SMALL CLAIM/COMMERCIAL CLAIM**

_____ **CITY COURT:** **COUNTY OF** _____

FILING FEE - Money Order, Certified Bank Checks or Cash only (No **Personal or Business Checks accepted)**

| **Type of Claim:** | **Filing Fee:** | **(Check one)** |
|---|---|---|
| Small Claim | $10.00 - Claim of $1,000 or less | _____ |
| (Individual suing individual or company) | $15.00 - Claim exceeding $1,000 | _____ |
| Commercial Claim | $20.00 + $4.79 postage | _____ |
| (Company suing company or individual - see reverse for limitation on number of filings and required Certificate of Authority)(An additional $4.79 is required for each additional defendant) | | |
| Consumer Transaction | $20.00 + $4.79 postage | _____ |
| (Company suing individual - see reverse for definition of Consumer Transaction, limitation on number of filings, Certificate of Authority and Demand Letter Certification)(An additional $4.79 is required for each additional defendant if you are suing multiple defendants) | | |
| Counterclaim | $3.00 + $ .37 postage | _____ |

Date: _____

Name of Claimant (list all necessary parties): _____

_____
Address (if commercial claim, give Principal Office Address)

Telephone no.: _____
(Work) (Home)

against

Name of Defendant (list all necessary parties): _____
(if a business - provide business name AND name of individual who owns/operates/manages business)

_____
Address (Home or Bus./Place of Employment must be in County - except for counterclaims) (Telephone no.)

Amount of Claim $ _____ (Do not include filing fee)

Name of Claim to include all pertient information including descriptions, dates, addresses, etc.

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____ _____
Date Signature of Person Filing Claim

for a faulty product or for shoddy service. However, small claims courts are used heavily by businesses and PUBLIC UTILITIES that want to collect payments from customers for unpaid bills. In a single court session, a department store, utility company, or hospital may obtain judgments against a long list of debtors, making the process very economical.

To bring an action in small claims court, a person must complete a form that is available from the local court administrator. The person must provide the correct names and addresses of

all defendants, make a simple statement of the dispute, and state a claim for the amount of money involved. As plaintiff in the action, the person must pay a small filing fee, usually less than $100, to the court administrator. If the plaintiff is successful in the lawsuit, he can recover the filing fee from the defendant, together with any money awarded.

A copy of the plaintiff's statement must be properly served upon the defendant or the action will be dismissed. In some states a deputy sheriff or a process server must personally serve a small claims court summons and complaint for a small fee. In many states, however, service can be accomplished by mailing a copy of the complaint to the defendant. In these jurisdictions it is essential to have an accurate name and address for the defendant.

When the defendant is a corporation, a plaintiff can check with the office of the SECRETARY OF STATE or corporate registration department to obtain the correct address because a corporation must register the name and address where it can be served with legal process. No restriction ordinarily exists on the type of individual or business that can be sued in small claims court, but a defendant must live, work, or have an office within the area served by the court.

Once the defendant is served with the statement, she will be on notice that a hearing has been scheduled on the matter. A defendant may file a counterclaim growing out of the same dispute against the plaintiff. For example, a plaintiff sues a landscape contractor for planting diseased and dying trees. The plaintiff asks for money to pay to have the trees removed and for a refund of money already paid to the contractor. The contractor could file a counterclaim, disputing the plaintiff's allegations and demanding payment still owed by the plaintiff.

Hearings may be conducted by a judge or by a judicial officer who is not a judge but is usually an attorney. Some sessions of small claims court may be held in the evening so that people need not miss work to attend court. Generally there is no jury, and the judge or judicial officer will make a decision at the end of the presentation of the evidence.

The informality of small claims court extends to courtroom procedure. The rules of CIVIL PROCEDURE and evidence, which in other courts must be rigorously followed, are generally relaxed in small claims court. Nevertheless, HEARSAY testimony (where one witness attempts to tell what another person said) is not admitted. Most small claims courts also will not allow affidavits or notarized statements into evidence because the other side cannot cross-examine the witness. Therefore, a party must bring witnesses to testify to events that they have observed.

Once the court makes a decision, the losing party has a period of time to file an appeal. The appealing party must pay a filing fee to initiate the new review, which in most states results in a new trial before a court of general jurisdiction. The new trial will be conducted with more formality.

If the losing party does not appeal the case, judgment will be entered for the winning party. Once judgment is entered, the losing party can voluntarily pay the amount awarded. If the losing party refuses to pay, the party holding the judgment can take steps to make the judgment collectible. A court can enter an order authorizing the sheriff to serve a writ of execution on the losing party. This writ permits the sheriff to seize and sell assets to pay the judgment.

Though small claims court is an attractive option for many persons, it is not designed to handle complicated litigation or areas of the law that deal with human relationships. Thus, small claims courts do not hear DIVORCE, CHILD SUPPORT, or other FAMILY LAW cases.

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## SMART MONEY

*Vindictive, punitive, or exemplary damages given by way of punishment and example, in cases of gross misconduct of a defendant.*

## SMITH ACT

The Smith Act (54 Stat. 670) of 1940 proscribed, among other things, the advocacy of the forcible or violent overthrow of the government. The act became the analogue of the New York Criminal Anarchy Act sustained in GITLOW V. NEW YORK, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925).

New York had passed that law in 1902, shortly after the assassination of President WILLIAM MCKINLEY. Between the occupation of Czechoslovakia and the Ribbentrop-Molotov pact of 1939, the House of Representatives drafted the Smith Act because of a fear that there might be a repetition of the anarchist agitation that had occurred in 1900 or the antipathy toward alien radicalism that had surfaced in 1919. Congress was also worried about Nazi or Communist subversion after war broke out in Europe.

Under a 1956 amendment to the Smith Act, if two or more persons conspire to commit any offense described in the statute, each is subject to a maximum fine of $20,000 or a maximum term of imprisonment of twenty years, or both, and is ineligible for employment by the United States or its agencies for five years after conviction. The Smith Act, as enacted in 1940, contained a conspiracy provision, but effective September 1, 1948, the Smith Act was repealed and substantially reenacted as part of the 1948 recodification, minus the conspiracy provision. On June 25, 1948, the Federal general conspiracy statute was passed, effective September 1, 1948, which contained the same provisions as the deleted conspiracy section of the original Smith Act except that the showing of overt acts was required and the maximum penalty became five years' imprisonment instead of ten (18 U.S.C.A. § 2385). The general conspiracy statute became operative, with respect to conspiracies to violate the Smith Act, substantially in the same manner and to the same extent as previously.

The conspiracy provisions of the Smith Act and its provisions defining the substantive offenses have been upheld. An intent to cause the overthrow of the government by force and violence is an essential element of the offenses. The advocacy of peaceful change in U.S. social, economic, or political institutions, irrespective of how fundamental or expansive or drastic such proposals might be, is not forbidden.

A conspiracy can exist even though the activities of the defendants do not culminate in an attempt to overthrow the government by force and violence. A conspiracy to advocate overthrow of the government by force or violence, as distinguished from the advocacy itself, can be constitutionally restrained even though it consists of mere preparation because the existence of the conspiracy creates the peril.

An agreement to advocate forcible overthrow of the government is not an unlawful conspiracy under the Smith Act if the agreement does not call for advocacy of action; the act covers only advocacy of action for the overthrow of the government by force and violence rather than advocacy or teaching of theoretical concepts. Those to whom the advocacy is directed must be urged to do something, immediately or in the future, rather than merely to believe in a doctrine. A Smith Act conspiracy requires an agreement to teach people to engage in tangible action toward the violent overthrow of the existing government as soon as possible.

An individual defendant cannot be convicted of willful adherence to a Smith Act conspiracy unless something said by the defendant or communicated to another person manifests her understanding that, beyond supporting the idea and objective of violent overthrow of the existing government, particular action to that end is to be advocated. Advocacy of immediate action is not necessary; advocacy of action at a crucial time in the future when the time for action would seem ripe and success would seem achievable is sufficient. There must be a plan to use language reasonably calculated to incite the audience to employ violence against the government. The use of lawful speech, an agreement to share abstract revolutionary doctrine, and an agreement to use force against the government in the future do not constitute a conspiracy to use illegal language. Cooperative action on the part of a number of persons comprising a political party having as its goal the overthrow of the government by force and violence violates the conspiracy provision.

The "membership clause" of the Smith Act has also been the subject of controversy. Although the Smith Act does not proscribe mere membership in an organization that advocates the forcible overthrow of the government as a theoretical matter, it does cover active members who, with a culpable knowledge and intent, engage in significant action to achieve this objective or commit themselves to undertake such action. Present advocacy of future action for violent overthrow violates the Smith Act, but an expression of sympathy with the purported illegal conduct is not within the ambit of the statute. Guilt cannot be imputed to a person solely on the basis of his associations.

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Anarchism; Communism; *Dennis v. United States*; Red Scare.

## ♦ SMITH, MARY LOUISE

Mary Louise Smith was a **REPUBLICAN PARTY** activist who became the first woman to serve as head of the party's national committee. Though she was a political moderate, Smith's advocacy of **ABORTION** rights and the **EQUAL RIGHTS AMENDMENT** (ERA) during the 1970s ran counter to the ideology of the party's conservative majority. Her outspoken manner disturbed the Republican Party leadership, which sought to bar her from the 1996 Republican National Convention.

Smith was born on October 16, 1914, in Eddyville, Iowa. She attended Iowa State University, graduating with a degree in social work in 1935. She married Elmer M. Smith, a physician, and moved with him to Eagle Grove, Iowa. Smith raised three children and soon became active in local politics, winning a seat on the Eagle Grove school board.

Smith's life changed when she began to work in the local Republican Party organization. Soon she was working at the county and state levels, becoming the leader of the Iowa Federation of Republican Women. In 1964 Smith became the alternate delegate to the Republican National Convention and vice-chair of the Iowa presidential campaign of the party's nominee, Senator **BARRY M. GOLDWATER** of Arizona. In that same year, Smith was elected to the Republican National Committee, the party's most powerful leadership organization.

Smith remained a member of the Republican National Committee during the 1960s and early 1970s. After President **RICHARD M. NIXON** resigned from the presidency in 1974 because of his involvement in the **WATERGATE** scandals, President **GERALD R. FORD** sought to restore the credibility of the Republican Party and separate it from the scandals of the Nixon administration. One step he took to accomplish these objectives was to appoint Smith as chair of the Republican National Committee in 1974. As the first woman to head a major U.S. political party, Smith drew national attention for her commitment to abortion rights and the ratification of the Equal Rights Amendment.

In 1976 Smith was the first woman to organize and call to order a national presidential nominating convention of a major political party. President Ford won the Republican nomination, turning back an attempt by conservatives to nominate **RONALD REAGAN**, then governor of California. **JIMMY CARTER** defeated Ford in the November election, though, and in 1977 Smith resigned as chair of the party. She remained on the national committee until 1984.

President Reagan appointed Smith to the U.S. **CIVIL RIGHTS COMMISSION** in 1980 but soon regretted his action. Smith publicly criticized Reagan for his policies on **CIVIL RIGHTS** and the lack of women in his administration. Because of her criticisms, Smith was not reappointed to the commission in 1983.

Smith returned to Iowa and continued to seek a more moderate course for Republican politics, which was dominated by political and social conservatives. Though the ERA failed to be ratified by its 1982 deadline, Smith continued to advocate equal rights for women. She also became an outspoken proponent for **GAY AND LESBIAN RIGHTS**.

By 1996 Smith had been pushed to the margins of the Republican Party. Party leaders sought to exclude her from the 1996 Republican

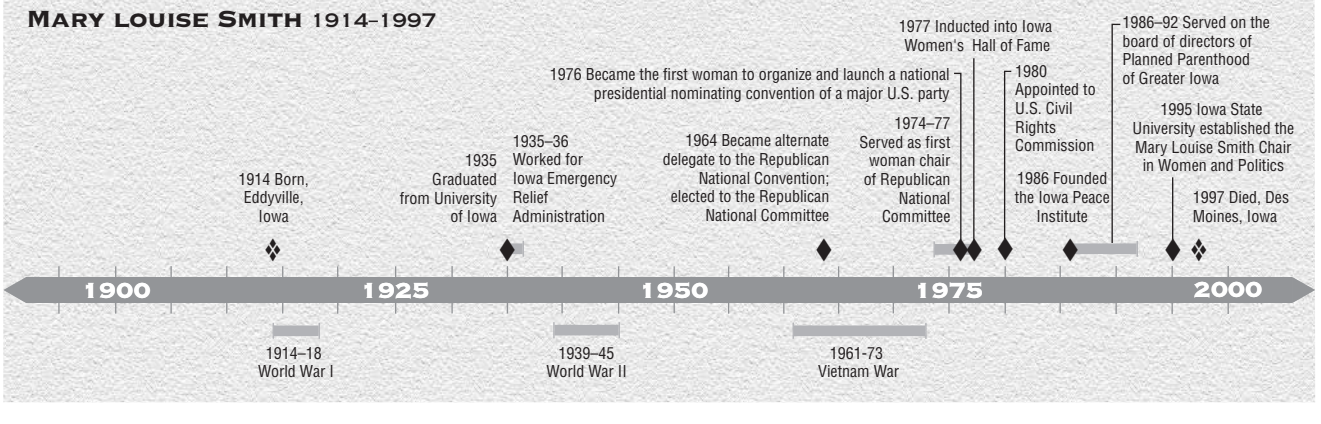

National Convention because delegates feared she might make public statements that were out of step with party ideology. At the last minute, a party leader secured her entrance to the convention floor by giving her a ticket as a member of the convention's security personnel.

Though outspoken, Smith was an admired figure in Iowa politics. As founder of the Iowa Women's Political Caucus, she was inducted into the Iowa Women's Hall of Fame in 1977. In 1991 Smith created the Women's Archives project at Iowa State University, and in 1995 the university honored her by creating the Mary Louise Smith endowed chair in women and politics.

Smith died on August 22, 1997, in Des Moines, Iowa.

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CROSS-REFERENCES

Abortion; Equal Rights Amendment; Women's Rights.

## ♦ SMITH, ROBERT

Robert Smith was a lawyer and statesman who served as attorney general of the United States under President THOMAS JEFFERSON and as SECRETARY OF STATE under President JAMES MADISON.

Smith's father, John Smith, a native of Strabane, Ireland, immigrated to the American colonies in the 1740s. By 1759, he was living in Baltimore and had established himself as a merchant and shipping agent. In 1766, he financed the building of Baltimore's first market house and the development of the city's first residential neighborhood. He was an advocate of independence for the American colonies and active in politics and the military.

Smith was born in November 1757 in Lancaster, Pennsylvania. He came of age at the height of the American Revolution and, like his father and his brother, Samuel Smith, volunteered to serve. He distinguished himself at the Battle of Brandywine, but his experience convinced him that he was not suited to a military career.

After the war, Smith attended the College of New Jersey (later Princeton University). He graduated in 1781 and went on to study law. Following his ADMISSION TO THE BAR, he established a practice in Baltimore, and looked after family business interests while his father served the first of two terms in the Maryland state senate.

By 1793, Smith had followed his father into the political arena. He served in the Maryland state senate from 1793 to 1796 and in the Maryland House of Delegates from 1796 to 1800. While in the house of delegates, he served a concurrent term on Baltimore's city council.

In 1801, Smith was appointed secretary of the Navy when his brother stepped down from that post following an appropriations dispute with Congress. Up to that time, military appropriations had not been monitored or controlled as closely as other government expenditures—and President Jefferson and members of his cabinet had become increasingly concerned about moneys drawn from the Treasury by the Secre-

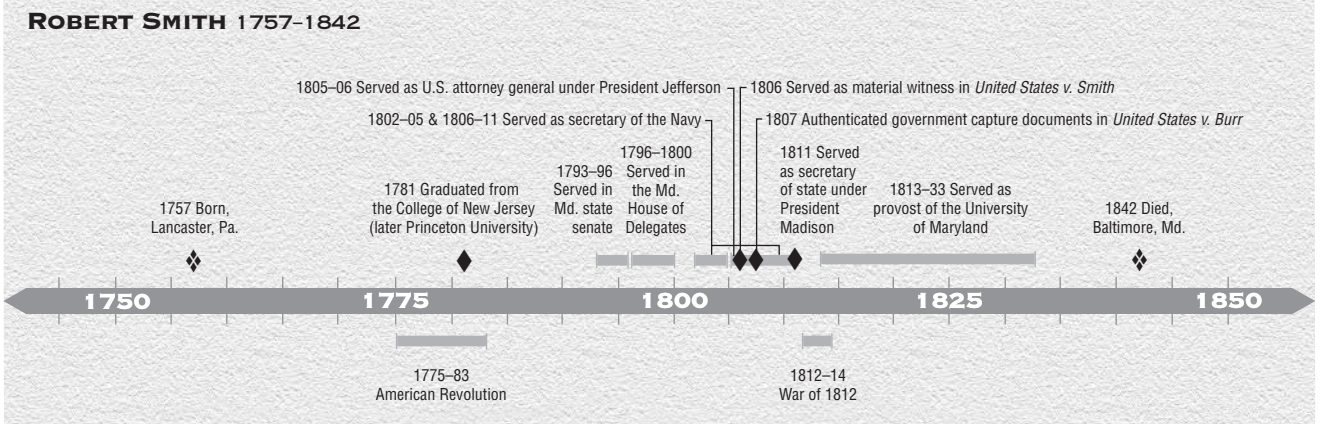

taries of War and the Navy. When the cabinet curtailed lump-sum payments and demanded an itemized accounting of how funds were spent, Smith's brother considered the demands to be a personal attack, and he resigned. Smith, who had a far better understanding of business and accounting practices, was less inclined to view the increased scrutiny as an attack on his character.

Most historians record that Smith served as secretary of the Navy from January 1802 to March 1805, but there are indications that he continued to act as secretary during his appointment as attorney general of the United States from March 1805 to the end of the year. Though his was an official appointment as attorney general, he argued no cases before the U.S. Supreme Court and wrote no opinions.

There are reasons to believe that Smith's cabinet service as secretary of the Navy and official duties as attorney general were curtailed for personal as well as political reasons. By 1805, his family had been involved in a number of incidents that caused embarrassment in Washington, D.C. One celebrated event covered by Washington papers was a party given by Smith and his wife for a niece who married Napoléon Bonaparte's brother. Elizabeth Patterson Bonaparte scandalized Washington with her transparent ball gown, and offended the British ambassador with her suggestive dancing.

In January 1806, Smith was asked by the president to consider an appointment as chancellor of Maryland and chief judge of the District of Baltimore. (*Chancellor* is the name given to the presiding judge of a court of chancery.) Smith declined the opportunity and remained in Washington.

By July 1806, Smith was once again acting as the secretary of the Navy. In *United States v. Smith,* 27 F. Cas. 1192 (D.N.Y. July 15, 1806), he was called to testify in this capacity as a material witness in a New York trial. And in *United States v. Burr,* 25 F. Cas. 55 (D. Va. Aug. 31, 1807), Smith, as secretary of the Navy, was asked to verify the authenticity of government documents ordering Aaron Burr's capture.

Smith was named secretary of state on March 6, 1811, by President Madison. He served until November 25, when Madison called for his resignation. Madison intimates regarded Smith as an "ornamental" secretary of state because Madison, who had been secretary of state in the Jefferson administration, continued to discharge the duties of his previous office while serving as president. Before calling for Smith's resignation, Madison attempted to ease him out of office by offering him an embassy post in Russia. Smith declined the offer and decided to return to Baltimore.

In 1813, Smith was appointed provost of the University of Maryland. For the next twenty years, he devoted his time to building the university's prestige and securing its financial future.

Smith died in Baltimore on November 26, 1842.

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## ❖ SMITH, WILLIAM FRENCH

William French Smith served as U.S. attorney general from 1981 to 1985. A longtime friend

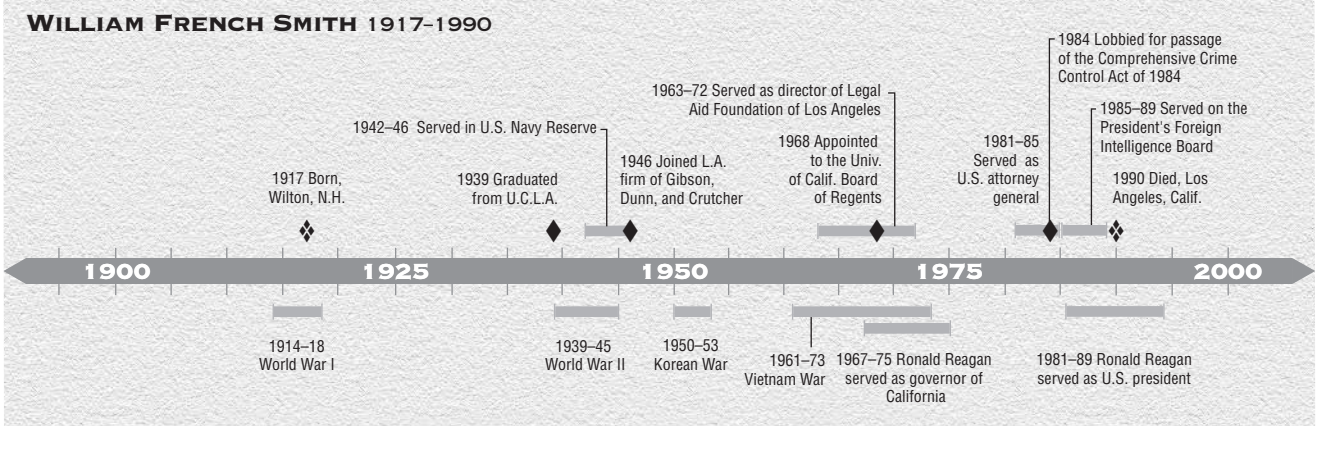

and confidant of President RONALD REAGAN, Smith helped formulate the conservative policies that came to be identified with the Reagan administration.

Smith was born on August 26, 1917, in Wilton, New Hampshire. He graduated from the University of California at Los Angeles in 1939 and from the Harvard Law School in 1942. From 1942 to 1946, Smith served in the U.S. Navy Reserve, reaching the rank of lieutenant.

In 1946 Smith joined the Los Angeles law firm of Gibson, Dunn, and Crutcher, one of the largest and most prominent corporate firms in California. He specialized in LABOR LAW, eventually becoming a senior partner and head of the firm's labor department. He enjoyed a reputation as a tough but flexible negotiator. He served as a director of the Legal Aid Foundation of Los Angeles from 1963 to 1972.

"WE HAVE LOST CONTROL OF OUR BORDERS. WE HAVE PURSUED UNREALISTIC POLICIES. WE HAVE FAILED TO ENFORCE OUR LAWS EFFECTIVELY."
—WILLIAM FRENCH SMITH

During the 1960s Smith became active in conservative REPUBLICAN PARTY politics. During Arizona Senator BARRY M. GOLDWATER's 1964 presidential campaign, Smith met Ronald Reagan, who was working for Goldwater. Smith was impressed by Reagan's views and his political potential and was a member of a small group of southern California business leaders who urged Reagan to run for governor in 1966. After Reagan was elected governor, Smith became his personal adviser. In 1968 Reagan appointed him to the University of California Board of Regents. Smith later served three terms as chairman of the board.

Smith remained a close adviser to Reagan after he left the governorship and began his quest for the presidency. When Reagan was elected president in 1980, one of his first appointments was the naming of Smith as his attorney general.

During Smith's tenure, the JUSTICE DEPARTMENT shifted its position on a number of issues, including ABORTION, CIVIL RIGHTS, and ANTITRUST LAWS. Adhering to his conservative political views, Smith urged the U.S. Supreme Court to reassess its rulings in earlier abortion cases and to accord greater deference to states that wished to restrict abortions. The Justice Department also placed less emphasis on AFFIRMATIVE ACTION as a means of addressing past RACIAL DISCRIMINATION and on mandatory busing as a means of creating integrated public school systems. Although Smith maintained that he vigorously enforced civil rights laws, his critics argued that the department filed fewer cases in the areas of housing and educational discrimination than it did under previous administrations.

In creating antitrust policy, Smith contended that bigness in business is not necessarily bad and that the government should be concerned only with grossly anticompetitive behavior. He was instrumental in developing a more tolerant policy toward mergers. This shift in the federal government's antitrust position has been credited with contributing to the wave of MERGERS AND ACQUISITIONS that occurred during the 1980s.

Smith also pursued a strong anticrime initiative, increasing the resources used to fight the distribution and sale of illegal narcotics by 100 percent. He also successfully lobbied for the passage of the Comprehensive CRIME CONTROL ACT of 1984 (Pub. L. No. 98-473, 98 Stat. 1838), a sweeping measure that included revised federal rules on bail and the establishment of a commission to create new federal sentencing guidelines.

In January 1984 Smith announced his resignation, saying that he wished to work on President Reagan's reelection campaign and to return to private life. He did not leave office, however, until February 1985. This delay was caused by the difficulties that his eventual successor, EDWIN MEESE III, encountered in obtaining Senate confirmation.

Smith died on October 29, 1990, in Los Angeles. His memoirs were published the following year.

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Affirmative Action.

## SMUGGLING

*The criminal offense of bringing into, or removing from, a country those items that are prohibited or upon which customs or excise duties have not been paid.*

Smuggling is the secret movement of goods across national borders to avoid CUSTOMS DUTIES or import or export restrictions. It typically occurs when either the customs duties are high enough to allow a smuggler to make a large profit on the clandestine goods or when there is a strong demand for prohibited goods, such as narcotics or weapons. The United States polices

smuggling through various federal agencies, including the U.S. Customs Service, the U.S. Border Patrol, the U.S. Coast Guard, and the **DRUG ENFORCEMENT ADMINISTRATION** (DEA).

Federal law prohibits the importation of a number of items that are injurious to public health or welfare, including diseased plants or animals, obscene films and magazines, and illegal narcotics. Importation of certain items is prohibited for economic or political purposes. For example, the United States bans trade with Cuba, which means that Cuban cigars may not be legally imported. This restriction inevitably results in the smuggling of Cuban cigars into the United States. Federal law also bans the export of military weapons or items related to the national defense without an export permit.

In addition, federal law prohibits the importation of goods on which required customs or excise duties have not been paid. Such duties are fixed by federal law to raise revenue and to influence commerce.

Travelers at international borders can properly be stopped by customs agents, required to identify themselves, and asked to submit to a search. To combat smuggling, customs agents have the authority to search an individual and his baggage or any packages or containers sent into the country. Within the United States, police cannot conduct searches unless they have a warrant, **PROBABLE CAUSE** to suspect unlawful activity, or the consent of the individual being searched. Such requirements do not apply to border searches. Customs agents have a right to search anyone at a border for no reason at all, although they ordinarily only conduct extensive and thorough searches of individuals who arouse suspicion. By the late 1990s, new technology, including x-ray machines that examine commercial vehicles, had been installed by the Border Patrol at border stations in the Southwest. The DEA has also enhanced its technology for combating smuggling in the Southwest through **WIRETAPPING** of drug cartel members. In addition, law enforcement agencies have developed "drug courier profiles" that help customs agents identify and question individuals who are likely to be carriers of narcotics.

Smugglers use two methods to move goods. One is to move cargoes undetected across borders. Smugglers move illegal narcotics from Mexico into remote areas of the Southwest United States using airplanes, trucks, and human "mules." These "mules" walk across an isolated region of the Mexico-U.S. border with backpacks full of illegal narcotics.

*One method of smuggling is concealment. A U.S. Customs official at the Miami International Airport displays a package of heroin found inside a suspect's shoes.*

AP/WIDE WORLD PHOTOS

The other method is one of concealment. For example, a smuggler may hide illegal narcotics in unlikely places on ships or cars, in baggage or cargo, or on a person. Some drug couriers swallow containers of narcotics to avoid detection of the drugs if searched.

In the event that a traveler possesses anything that he or she did not declare to customs inspectors, or any prohibited items, the traveler can be compelled to pay the required duties, plus penalties, and can also be arrested. Customs agents can seize the illegal goods.

Federal law imposes harsh sanctions for the offense of smuggling. An individual can be convicted merely for having illegal goods in his or her possession if she or he fails to adequately explain their presence. Anyone who is guilty of knowingly smuggling any goods that are prohibited by law or that should have come through customs, or who receives, buys, sells, transports, or aids in the commission of one of these acts can be charged with a felony and can also be assessed civil penalties. The merchandise itself, as well as any vessel or vehicle used to transport it, can be forfeited to the United States under **FORFEITURE** proceedings.

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Drugs and Narcotics; Search and Seizure.

## SOCIAL SECURITY

*A federal program designed to provide benefits to employees and their dependants through income for retirement, disability, and other purposes. The social security program is funded through a federal tax levied on employers and employees equally.*

The Social Security Program was created by the SOCIAL SECURITY ACT OF 1935 (42 U.S.C.A. § 301 et seq.) to provide OLD AGE, SURVIVORS, AND DISABILITY INSURANCE benefits to the workers of the United States and their families. The program, which is administered by the Social Security Administration (SSA), an independent federal agency, was expanded in 1965 to include HEALTH INSURANCE benefits under the MEDICARE program and to assist the states in establishing UNEMPLOYMENT COMPENSATION programs. Unlike WELFARE, which is financial assistance given to persons who qualify on the basis of need, Social Security benefits are paid to an individual or his family on the basis of that person's employment record and prior contributions to the system.

### History

As a general term, *social security* refers to any plan designed to protect society from the instability that is caused by individual catastrophes, such as unemployment or the death of a wage earner. It is impossible to predict which families will have to endure these burdens in a given year, but disaster can be expected to strike a certain number of households each year. A government-sponsored plan of social insurance spreads the risk among all members of society so that no single family is completely ruined by an interruption of, or end to, incoming wages.

Germany was the first industrial nation to adopt a program of social security. In the 1880s Chancellor Otto von Bismarck instituted a plan of compulsory sickness and old age insurance to protect wage earners and their dependents. Over the next 30 years, other European and Latin American countries created similar plans with various features to benefit different categories of workers.

In the United States, the federal government accepted the responsibility of providing pensions to disabled veterans of the Revolutionary War. Pensions were later paid to disabled and elderly veterans of the Civil War. The first federal old age pension bill was not introduced until 1909, however. To fill this void, many workers joined together to form beneficial associations, which offered sickness, old age, and funeral benefit insurance. The federal government encouraged people to set aside money for future emergencies with a popular postal savings plan. People who could not manage were helped, if at all, by private charity because it was generally believed that those who wanted to help themselves would.

Congress enacted the Social Security Act of 1935 as part of the economic and social reforms that made up President FRANKLIN D. ROOSEVELT'S NEW DEAL. The act provided for the payment of monthly benefits to qualified wage earners who were at least 65 years old or payment of a lump-sum death benefit to the estate of a wage earner who died before reaching age 65.

In 1939 Congress created a separate benefit for secondary beneficiaries—the dependent spouses, children, widows, widowers, and parents of wage earners—to soften the economic hardship created when they lost a wage earner's support. Such beneficiaries are entitled to benefits because the wage earner made contributions to the plan. Beneficiaries can receive their payments directly upon the retirement or death of the worker.

Social Security originally protected only workers in industry and commerce. It excluded many classes of workers because collecting their contributions was considered too expensive or inconvenient. Congress exempted household workers, farmers, and workers in family businesses, for example, because it believed that they were unlikely to maintain adequate employment records. In the 1950s, however, Congress extended Social Security protection to most self-employed individuals, most state and local government employees, household and farm workers, members of the armed forces, and members of the clergy. Federal employees, who previously had their own retirement and benefit system, were given Social Security coverage in 1983.

### Old Age, Survivors, and Disability Insurance

Federal Old Age, Survivors, and Disability Insurance (OASDI) benefits are monthly payments made to retired people, to families whose wage earner has died, and to workers who are unemployed because of sickness or accident. Workers qualify for such protection by having been employed for the mandatory minimum amount of time and by having made contribu-

## The First Payments of Social Security

After the enactment of the Social Security Act of 1935 (42 U.S.C.A. § 301 et seq.) and the creation of the Social Security Administration (SSA), the federal government had a short time to establish the program before beginning to pay benefits. Monthly benefits were to begin in 1940. The period from 1937 to 1940 was to be used both to build up the trust funds and to provide a minimum period for participation for persons to qualify for monthly benefits.

From 1937 until 1940, however, Social Security paid benefits in the form of a single, lump-sum payment. The purpose of these one-time payments was to provide some compensation to people who contributed to the program but would not participate long enough to be vested for monthly benefits.

The first applicant for a lump-sum benefit was Ernest Ackerman, a Cleveland motorman who retired one day after the Social Security Program began. During his one day of participation in the program, five cents was withheld from Ackerman's pay for Social Security, and upon retiring, he received a lump-sum payment of seventeen cents.

Payments of monthly benefits began in January 1940. On January 31, 1940, the first monthly retirement check was issued to Ida May Fuller of Ludlow, Vermont, in the amount of $22.54. Fuller died in January 1975 at the age of one hundred. During her thirty-five years as a beneficiary, she received more than $20,000 in benefits.

tions to Social Security. There is no financial need requirement to be satisfied. Once a worker qualifies for protection, his family is also entitled to protection. The entire program is geared toward helping families as a matter of social policy.

Two large funds of money are held in trust to pay benefits earned by people under OASDI: the Old Age and Survivors Trust Fund and the Disability Insurance Trust Fund. As workers and employers make payroll contributions to these funds, money is paid out in benefits to people currently qualified to receive monthly checks.

The OASDI program is funded by payroll taxes levied on employees and their employers and on the self-employed. The tax is imposed upon the employee's taxable income, up to a maximum taxable amount, with the employer contributing an equal amount. The self-employed person contributes twice the amount levied on an employee. In 2003 the rate was 6.2 percent, levied on earned income up to a maximum of $87,000.

**Old Age Benefits** A person becomes eligible for Social Security old age benefits by working a minimum number of calendar quarters. The number of quarters required for full insurance increases with the worker's age. Forty quarters is the maximum requirement. The individual is credited for income up to the maximum amount of money covered by Social Security for those years. This amount is adjusted to reflect the impact of inflation on normal earnings and ensure that a worker who pays increasing Social Security contributions during his or her work life will receive retirement benefits that keep pace with inflation.

Persons born before 1950 can retire at age 65 with full benefits based on their average income during their working years. For those born between 1950 and 1960, the retirement age for full benefits has increased to age 66. Persons born in 1960 or later will not receive full retirement benefits until age 67. Any person, however, may retire at age 62 and receive less than full benefits. At age 65, a worker's spouse who has not contributed to Social Security receives 50 percent of the amount paid to the worker.

Since 1975 Social Security benefits have increased annually to offset the corrosive effects of inflation on fixed incomes. These increases, known as cost of living allowances (COLAs), are based on the annual increase in consumer prices. Allowing benefits to increase automatically ended the need for special acts of Congress, but it has also steadily increased the cost of the Social Security Program.

# The Future of Social Security

The payment of **OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE** (OASDI) benefits has been a cornerstone of U.S. social welfare policy since the establishment of the **SOCIAL SECURITY ADMINISTRATION** in 1935. At the same time, the long-term financial stability of OASDI has been a constant worry. In the early years of the twenty-first century, concerns about Social Security mounted as policy makers assessed the impact of the retirement of the "Baby Boom" generation. Many younger people raised the issue of "generation equity." They express doubt that Social Security benefits will be available when they retire, and anger that they will be forced to pay, through payroll taxes, for the baby boomers' retirement benefits.

Reform of the Social Security system has always been a political hot potato. Retirees and those approaching retirement form a strong **LOBBYING** force, and they zealously protect their benefits. Employers and employees are equally vocal in their opposition to higher payroll taxes to fund OASDI. Thus, changes in Social Security required bipartisan support, which materialized in the face of an impending Social Security crisis. The 1982–83 National Commission on Social Security Reform successfully secured from Congress the short-term financing of OASDI. As a result, Congress passed a series of laws meant to accumulate surpluses as a hedge against future burdens. The Social Security surplus is the amount by which revenue from the federal payroll tax exceeds the amount of Social Security benefits paid out.

Shortly after these new laws went into effect, Social Security began running a surplus. Surplus Social Security revenue can be used to fund other government programs and to help retire the national debt. During the favorable economic climate of the late 1990s, Congress began to use the surplus to pay down the federal debt, hoping to better position the government to meet its obligations to future retirees. And, in 2000, the federal government generated enough revenue so that the entire Social Security surplus was available for paying off debt.

The state of Social Security became a major campaign issue in the 2000 elections, with both Republicans and Democrats attempting to appear as though they were guardians of Social Security assets. Candidates from both parties promised to create a "lockbox," meaning that the Social Security surplus would be spent entirely on debt retirement. With the advent of fiscally lean years in the early 2000s, the lockbox approach was largely disregarded by politicians who advanced other ideas about what to do with Social Security surpluses. These ideas included using the surplus to help offset decreases in revenues brought about by tax cuts and using the surplus to fund new or expanded spending initiatives.

Analysts argue that the real issue often is clouded. It is not how to spend the surplus now, but how to maintain the long-term solvency of the Social Security trust fund. Planners estimate that the income from the trust fund will exceed expenses each year until 2020. The trust fund balances will then start to decline as investments are redeemed to meet the increased expenses from a swelling retired workforce. Although it is estimated that 75 percent of the costs would continue to be met from current payroll and income taxes, in the absence of any changes, full benefits could not be paid beginning in 2030.

In its 1996 report, the Social Security Administration's Advisory Council looked at various long-term financing options for OASDI. The council could not reach consensus on a specific long-term plan, but it did suggest several types of financing that represent a marked departure from previous efforts to fund Social Security. The council noted that past efforts have generally featured cutting benefits and raising tax rates on a "pay-as-you-go" basis. The council agreed that this approach must be changed and offered three ways of restoring financial solvency.

One approach, called Maintenance of Benefits (MB), calls for an increase in income taxes on OASDI benefits, a redirection of some revenue from other trust funds, and, most importantly, the adoption of a plan allowing the federal government to invest a portion of the trust fund assets directly in common stocks. Rates of returns on stocks have historically exceeded those on federal government bonds, where all Social Security

A person who continues to work past the retirement age may lose some benefits because Social Security is designed to replace lost earnings. If earnings from employment do not exceed the amount specified by law, the person receives the full benefits. If earnings are greater than that amount, one dollar of benefit is withheld for every two dollars in wages earned above the exempt amount. Once a person reaches age 70, however, he does not have to report earnings to the SSA, and the benefit is not reduced.

**Survivors' Benefits** Survivors' benefits are paid to family members when a worker dies. Survivors can receive benefits if the deceased worker was employed and contributed to Social

funds are now invested. If the returns were to continue, the MB plan would maintain Social Security benefits for all income groups of workers and reassure younger workers that they will get their money's worth when they retire.

A second approach, labeled the Individual Accounts (IA) plan, would create individual accounts that would work alongside Social Security. The IA plan would increase the income taxation of benefits, accelerate the scheduled increase in retirement age, reduce the growth of future benefits to middle- and upper-income workers, and increase employees' mandatory contributions to Social Security by 1.6 percent. This increase would be allocated to individual investment accounts held by the government and controlled by the worker, but with a limited set of investment options available. It is estimated that the combined income from both funds would yield essentially the same benefits as promised under the current system for all groups.

A third approach, labeled the Personal Security Accounts (PSA) plan, would create larger, fully funded individual accounts that would replace a portion of Social Security. Under this plan, five percent of an individual's current payroll tax would be invested in his PSA, which he then could use to invest in a range of financial instruments. The rest of his payroll tax would be used to fund a modified OASDI program. It would provide a flat dollar amount (the equivalent of $410 monthly in 1996), in addition to the proceeds of the individual's PSA. This approach would also change the taxation of benefits and move eligibility for early retirement benefits from age 62 to 65. The combination of the flat benefit payment and the income from the PSA would exceed, on average, the benefits promised under the current system.

In 2001, the concept of individual accounts was once again proposed, this time by the **GEORGE W. BUSH** administration's Commission to Strengthen Social Security (CSSS). The CSSS introduced the idea of Social Security individual accounts, also called Personal Retirement Accounts (PRAs). PRAs would earn a market return over the workers' lives and replace some of the retirement benefits promised by Social Security. These plans are also known as "carve-outs" because they *carve out* or redirect some portion of a worker's 12.4 percent Social Security payroll tax into a personal retirement account that can be invested in stocks and bonds. The accounts would be owned and presumably managed by individual workers.

Any type of personal retirement account privatizes a portion of Social Security, which means a significant shift in the way Social Security is funded. Proponents claim that they will generate more advance funding for Social Security's long-term obligations. They would also result in a higher level of national saving for retirement. In addition, advocates point to the fact that individuals gain more control over their future because they are allowed to invest as much or as little in Social Security plans and private retirement plans as they choose.

The PRA system, however, raises several concerns:

- Would the government be permitted to manipulate the **STOCK MARKET** or make politically motivated investment decisions with PRA funds?
- Would inexperienced investors make poor investment choices and be left to suffer the consequences?
- Would a precipitous stock market decline cause workers to lose their retirement funds?

According to the CSSS, the answer to all these questions is "no." Under the current system, retirees receive only a one to two percent return on government bond investments. Even under the worst stock market conditions, an individual historically has been guaranteed a lifetime real return (based on 63 years) of 6.3 percent. The CSSS also promises that all retirees will be paid out a guaranteed minimal "safety net," regardless of stock market performance.

The debate on both sides continues, and will not likely be resolved until legislation is passed by Congress that would allow PRAs. One thing remains clear, however, some type of reform has to be enacted to protect a system that is predicted to evaporate in the coming years.

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Security long enough for someone his or her age to qualify for Social Security.

Both mothers and fathers earn protection for their families by working and contributing to Social Security. If a wage earner dies, his unmarried children are entitled to receive benefits. If the child of a wage earner becomes permanently disabled before age 22, he or she can continue to receive survivors' benefits at any age unless she becomes self-supporting or marries.

Survivors' benefits can also go to a surviving spouse when the worker dies. A surviving spouse who retires can begin collecting survivors' benefits as early as age 60. If a worker dies leaving a divorced spouse who was married to the worker for at least ten years, the ex-spouse

**Sources of Income for the Aged, in 2001**

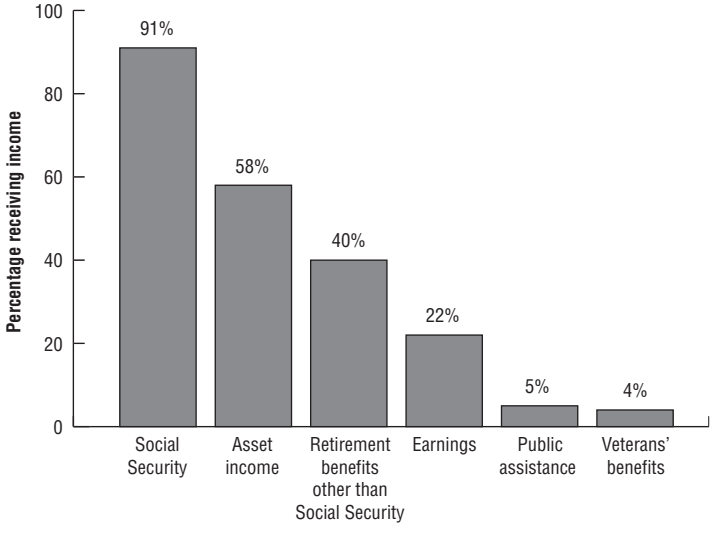


SOURCE: Social Security Administration, *Income of the Aged Chartbook*, 2001.

can receive survivors' benefits at age 60 if she retires. In addition to monthly checks, the worker's widow or widower, or if there is none, another eligible person, may receive a lump-sum payment of $255 on the worker's death.

**Disability Benefits** In the 1970s, the SSA became responsible for a new program, Supplemental Security Income (SSI). The original 1935 Social Security Act had included programs for needy aged and blind individuals, and in 1950 programs for needy disabled individuals were added. These three programs were known as the "adult categories" and were administered by state and local governments with partial federal funding. Over the years the state programs became more complex and inconsistent until as many as 1,350 administrative agencies were involved and payments varied more than 300 percent from state to state. In 1969 President RICHARD M. NIXON identified a need to reform these and related welfare programs. In 1972 Congress federalized the "adult categories" by creating the SSI program and assigned responsibility for it to the SSA.

A person who becomes unable to work and expects to be disabled for at least 12 months or who will probably die from the condition can receive SSI payments before reaching retirement age. Workers are eligible for disability benefits if they have worked enough years under Social Security prior to the onset of the disability. The amount of work credit needed depends on the worker's age at the time of the disability. That time can be as little as one and one-half years of work in the three years before the onset of the disability for a worker under 24 years of age, but it is never more than a total of ten years.

A waiting period of five months after the onset of the disability is imposed before SSI payments begin. A disabled worker who fails to apply for benefits when eligible can sometimes collect back payments. No more than 12 months of back payments may be collected, however. Even if workers recover from a disability that lasted more than 12 months, they can apply for back benefits within 14 months of recovery. If workers die after a long period of disability without having applied for SSI, their family may apply for disability benefits within three months of the date of the worker's death. The family members are also eligible for survivors' benefits.

A disability is any physical or mental condition that prevents the worker from doing substantial work. Examples of disabilities that meet the Social Security criteria include brain damage, heart disease, kidney failure, severe arthritis, and serious mental illness.

The SSA uses a sequential evaluation process to decide whether a person's disability is serious enough to justify the awarding of benefits. If the impairment is so severe that it significantly affects "basic work activity," the worker's medical data are compared with a set of guidelines known as the Listing of Impairments. A claimant found to suffer from a condition in this listing will receive benefits. If the condition is less severe, the SSA determines whether the impairment prevents the worker from doing his former work. If not, the application will be denied. If so, the SSA proceeds to the final step, determining whether the impairment prevents the applicant from doing other work available in the economy.

At this point, the SSA uses a series of medical-vocational guidelines that consider the applicant's residual functional capacity as well as his age, education, and experience. The guidelines look at three types of work: one type is for persons whose residual physical capacity enables them to perform only "sedentary" work on a sustained basis, another for those able to do "light" work, and a third for those able to do "medium" work.

If the SSA determines that an applicant can perform one of these types of work, benefits will be denied. A claimant may appeal this decision and ask for a hearing in which to present further evidence, including personal testimony. If the recommendation of the ADMINISTRATIVE LAW judge conducting the hearing is adverse, the claimant may appeal to the SSA Appeals Council. If the claimant loses his appeal, he may file a civil action in federal district court seeking review of the agency's adverse determination.

Persons who meet the OASDI disability eligibility requirements may receive three types of benefits: monthly cash payments, vocational rehabilitation, and medical insurance. Provided proper application has been made, cash payments begin with the sixth month of disability. The amount of the monthly payment depends upon the amount of earnings on which the worker has paid Social Security taxes and the number of his eligible dependents. The maximum for a family is usually roughly equal to the amount to which the disabled worker is entitled as an individual plus allowances for two dependents.

Vocational rehabilitation services are provided through a joint federal-state program. A person receiving cash payments for disability may continue to receive them for a limited time after beginning to work at or near the end of a program of vocational rehabilitation. Called the "trial work period," this period may last as long as nine months.

Medical services are available through the Medicare Program (a federally sponsored program of hospital and medical insurance). A recipient of OASDI disability benefits begins to participate in Medicare 25 months after the onset of disability.

In 1980 Congress made many changes in the disability program. Most of these changes focused on various work incentive provisions for both Social Security and SSI disability benefits. The SSA was directed to review current disability beneficiaries periodically to certify their continuing eligibility. This produced a massive workload for the SSA and one that was highly controversial, as persons with apparently legitimate disabilities were removed from SSI. By 1983 the reviews had been halted.

The Contract with America Advancement Act of 1996 (Pub. L. No. 104-121) changed the basic philosophy of the disability program. New applicants for Social Security or SSI disability benefits are no longer eligible for benefits if drug addiction or alcoholism is a material factor in their disability. Unless they can qualify on some other medical basis, they cannot receive disability benefits. Individuals in this category already receiving benefits had their benefits terminated as of January 1, 1997.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. L. No. 104-193), which concerns welfare reform, terminated SSI eligibility for most noncitizens. Previously, lawfully admitted ALIENS could receive SSI if they met the other requirements. All existing noncitizen beneficiaries were to be removed from the rolls unless they met one of the exceptions in the law.

### Medicare

The Medicare Program provides basic HEALTHCARE benefits to recipients of Social Security and is funded through the Social Security Trust Fund. President HARRY S. TRUMAN first proposed a medical care program for the aged in the late 1940s, but it was not enacted until 1965, when Medicare was established as one of President Lyndon B. Johnson's GREAT SOCIETY programs (42 U.S.C.A. § 1395 et seq.).

The Medicare Program is administered by the Health Care Financing Administration (HCFA). The federal government enters into contracts with private insurance companies for the processing of Medicare claims. To qualify for Medicare payments for their services, healthcare providers must meet state and local licensing laws and standards set by the HCFA.

Medicare is divided into a hospital insurance program and a supplementary medical insurance program. The Medicare hospital insurance plan is funded through Social Security payroll taxes. It covers reasonable and medically necessary treatment in a hospital or skilled nursing home, meals, regular nursing care services, and the cost of necessary special care.

Medicare's supplementary medical insurance program is financed by a combination of monthly insurance premiums paid by people who sign up for coverage and money contributed by the federal government. The government contributes the major portion of the cost of the program, which is funded out of general tax revenues. Persons who enroll pay a small annual deductible fee for any medical costs incurred above that amount during the year and also a regular monthly premium. Once the deductible has been paid, Medicare pays 80 per-

cent of all bills incurred for physicians' and surgeons' services, diagnostic and laboratory tests, and other services, but does not pay for routine physical checkups, drugs, and medicines, eyeglasses, hearing aids, dentures, and orthopedic shoes. Doctors are not required to accept Medicare patients, but almost all do.

Medicare's hospital insurance is financed by a payroll tax of 2.9 percent, divided equally between employers and employees. The money is placed in a trust fund and invested in U.S. Treasury SECURITIES. The fund accumulated a surplus during the 1980s and early 1990s. It was projected that the fund would run out of money by the early 2000s as outlays arose more rapidly than future payroll tax revenues, but this proved not to be the case.

### The Future of Social Security

From its modest beginnings, Social Security has grown to become an essential facet of modern life. In 1940 slightly more than 222,000 people received monthly Social Security benefits. In 2002, 39.2 million people received Old Age and Survivors Insurance, 7.2 million received disability insurance, and 41.1 million were covered by Medicare. One in seven individuals received a Social Security benefit, and more than 90 percent of all workers were covered by Social Security. As of 2003, the SSI program had nearly doubled in size since its inception in 1974.

By the 1980s the Social Security Program faced a serious long-term financing crisis. President RONALD REAGAN appointed a blue-ribbon panel, known as the Greenspan Commission, to study the issues and recommend legislative changes. The final bill, signed into law in 1983 (Pub. L. 98-21, 97 Stat. 65), made numerous changes in the Social Security and Medicare Programs; these changes included taxing Social Security benefits, extending Social Security coverage to federal employees, and increasing the retirement age in the twenty-first century.

By the 1990s, however, concerns were again raised about the long-term financial viability of Social Security and Medicare. Various ideas and plans to ensure the financial stability of these programs were put forward. The budget committees in both the House of Representatives and the Senate established task forces to investigate proposals for Social Security reform. Other task forces, such as one established by the National Conference of State Legislatures, investigated the impact of Social Security reform on interests at the state and local levels. By the end of the 1990s, the federal government had achieved a budget surplus, and President BILL CLINTON and some members of Congress advocated use of the surplus to save Social Security. However, no political consensus as to what changes should be made had emerged by the end of the 1990s.

The issue of Social Security was at the center of a major debate between GEORGE W. BUSH and AL GORE during the 2000 presidential election debates. Bush advocated then, as he did after assuming the presidency, that employees who pay into the Social Security system should be allowed to pay the funds into personal retirement accounts. Under this proposal, employees would have the option of converting these funds into other investments, such as stock. However, during the first three years of his presidency, Bush did not successfully establish this initiative.

As of December 2002, the annual cost of Social Security represented 4.4 percent of the gross domestic product. The Social Security Administration predicted that the OASDI tax income would fall short of outlays by 2018, and the OASDI trust fund was predicted to be exhausted by 2042, though some commentators refuted this finding. The total combined OASDI assets in 2002 amounted to $1.378 trillion.

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Disability Discrimination; Elder Law; Health Care Law; Senior Citizens.

## SOCIAL SECURITY ACT OF 1935

The Social Security Act (42 U.S.C.A. § 301 et seq.), designed to assist in the maintenance of

the financial well-being of eligible persons, was enacted in 1935 as part of President FRANKLIN D. ROOSEVELT'S NEW DEAL.

In the United States, SOCIAL SECURITY did not exist on the federal level until the passage of the Social Security Act of 1935. This statute provided for a federal program of old-age retirement benefits and a joint federal-state venture of UNEMPLOYMENT COMPENSATION. In addition, it dispensed federal funds to aid the development at the state level of such programs as vocational rehabilitation, public health services, and child welfare services, along with assistance to the elderly and the handicapped. The act instituted a system of mandatory old-age insurance, issuing benefits in proportion to the previous earnings of persons over sixty-five and establishing a reserve fund financed through the imposition of payroll taxes on employers and employees. The original levy was 1 percent, but the rate has increased over the years. Only employees in industrial and commercial occupations were eligible for protection under the Social Security Act of 1935, but numerous important amendments have expanded the categories of coverage.

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Medicare.

## SOCIALISM

*An economic and social theory that seeks to maximize wealth and opportunity for all people through public ownership and control of industries and social services.*

The general goal of socialism is to maximize wealth and opportunity, or to minimize human suffering, through public control of industry and social services. Socialism is an alternative to capitalism, where the means and profits of production are privately held. Socialism became a strong international movement in the early nineteenth century as the Industrial Revolution brought great changes to production methods and capacities and led to a decline in working conditions. Socialist writers and agitators in the United States helped fuel the labor movement but were often branded as radicals and jailed under a variety of laws that punished attempts to overthrow the government. Although government programs such as SOCIAL SECURITY and WELFARE incorporate some socialist tenets, socialism has never posed a serious challenge to capitalism in the United States.

One of the early forms of socialism was the communitarian movement, popularized by the brothers George and Frederick Evans, who came to New York from England in 1820. Communitarianism, which was based on the ideals of the French theorists JEAN-JACQUES ROUSSEAU and François-Noël Babeuf, involved the pursuit of utopian living in small cooperative communities. Cooperative living gained greater popularity under the utopian socialists, such as the Welsh industrialist Robert Owen and the French philosopher Charles Fourier. Owen's followers established a self-sufficient utopian community in New Harmony, Indiana, in 1825 and Fourier's followers did the same in the 1830s and 1840s on the east coast. Both of these efforts failed, however.

In 1848, the German philosophers KARL MARX and Friedrich Engels introduced scientific socialism with their extremely influential work, the *Communist Manifesto.* Scientific socialism became the definitive ideology of a second, more powerful phase of socialism. Scientific socialism applied the dialectic method of the German philosopher GEORG HEGEL to the political and social spheres. Using discussion and reasoning as a form of intellectual investigation, Marx and Engels identified a historical progression in human society from SLAVERY to FEUDALISM and finally to capitalism.

Under capitalism—defined as a global system based on technology transcending national boundaries— society was divided into two components: the bourgeoisie, who owned the methods of production, and the proletariat, the laborers who operated the production facilities to produce goods. Marx and Engels predicted the disappearance of the middle class and ultimately a revolution as the vast proletariat wrested the methods of production from the control of the small bourgeoisie elite. This revolution would usher in an era when resources were owned by the people as a whole and markets were subject to cooperative administration.

The *Communist Manifesto* made less of an impact in the United States than in Europe, in part because the nation's attention was focused on the issue of slavery and the growing division between the North and South. When these tensions escalated into the Civil War, a great increase in industrialization led to the emergence of socialist labor organizations. At the same time, political REFUGEES from Europe contributed socialist theories to labor and

political movements. In 1866, socialists who had been heavily influenced by German immigrants helped create the National Labor Union. Their efforts led to an 1868 statute (15 Stat. 77) establishing the eight-hour day for federal government workers; however, it went ignored and unenforced. The National Labor Union disappeared a few years after the death of its founder, William Sylvis, in 1869, but the ties between labor and socialism remained.

As socialists across Europe and the United States debated and extrapolated on Marx's initial definitions and their application under widely varying conditions, socialism gradually divided into three major philosophies: revisionism, ANARCHISM, and bolshevism. Revisionist socialism promoted gradual reform, compromise, and nonviolence. Initially, "reform" meant the nationalization of state and local public works and large-scale industries. Dedicated to democratic ideals, revisionists believed they could achieve civilized progress and higher consciousness through economic justice and complete equality.

Anarchic socialism, best exemplified by the Russian Mikhail Bakunin (1814–1876), sought the ABOLITION of both property and the state. Under anarchic socialism society would be composed of small collectives of producers, distributors, and consumers. Anarchism reflected the desire of the dispossessed to eliminate bourgeois institutions altogether. Like its contemporary syndicalism in France, anarchic socialism sought the immediate implementation of the dictatorship of the proletariat.

Bolshevism advocated the use of a select revolutionary cadre to seize control of the state. Bolshevists asserted that this cadre was needed to raise the consciousness of the proletariat and move toward a socialist future through absolute dictatorship. Their preferred method of redistributing wealth and resources was authoritarian collectivism, commonly known as COMMUNISM. Under authoritarian collectivism the state would own and distribute all goods and services. In envisioning this role for the state, the Bolshevists rejected both classical and theoretical socialism. Their only tie to classical socialism, besides the rhetorical one, was their view of the state as having a role in ameliorating the suffering brought about by industrial capitalism.

The Knights of Labor, which was formed in 1871 in Philadelphia, became the first truly national and broadly inclusive union in the United States. Revisionists worked within this union and other labor and third-party groups, often in leadership roles, to achieve definable goals that would culminate in a socialist state. Preaching reform, education, and cooperation, the union grew in numbers until 1886. In May of that year, during a strike sanctioned by the Knights against the McCormick Harvester plant in Chicago, an unknown person threw a bomb into the ranks of police sent to disperse a public gathering organized by anarchist socialists. The HAYMARKET RIOT, as it became known, set the stage for the first RED SCARE in U.S. history. Eight anarchist leaders were charged with murder on the basis of speech defined as conspiracy. The use of a judge-selected jury and his instructions to them led to the conviction of the anarchists, four of whom were sentenced to death and hanged. The U.S. Supreme Court could find no principle of federal law to review the case.

The reaction that followed the riot signaled the end of anarchism as a force in U.S. politics. It was also the end of the first phase of inclusive, or industrial unionism, as opposed to trade unions. Under the pressure of economic downturns, factionalization, and the stigma of being affiliated with anarchists, the Knights of Labor declined into a negligible force.

Throughout the 1880s and 1890s, the revisionists attempted to unionize various companies, including Andrew Carnegie's Homestead Steel in 1892. Private armies and the Pennsylvania state militia were used to break up the strike. In 1894, EUGENE V. DEBS (1855–1926), head of the American Railway Union (ARU), organized a strike against the Pullman Palace Car Company. The SHERMAN ANTI-TRUST ACT OF 1890, ostensibly passed to curb the accelerating trend of monopolization, was used to stop the ARU strike. When the ARU ignored the INJUNCTION granted under authority of the act, Debs was sentenced to six months in prison for CONTEMPT of court. On appeal the sentence was upheld by the U.S. Supreme Court in *In re Debs,* 158 U.S. 564, 15 S. Ct. 900, 39 L. Ed. 1092 (1895).

Despite this setback, Debs had proven himself to be a significant leader and orator. As such, he took a key role in the U.S. socialist movement. In 1897, he formed the Social Democratic Party. In 1905, Debs moved more to the left, and with WILLIAM D. "BIG BILL" HAYWOOD and Mary Harris "Mother" Jones he co-founded the INDUSTRIAL WORKERS OF THE WORLD. The "Wobblies," as they were called, represented the

legacy of direct action advocated by the earlier anarchists.

In the early twentieth century, socialists called for changes to currency and taxation, an eight-hour day, an end to adulteration of food, more attention to product safety, improved working conditions, urban sanitation, and relief for the poor and homeless. Congress took notice of these demands and passed various laws granting the government the authority to regulate industry. Socialism peaked in 1912, when Debs garnered six percent of the popular vote in the presidential election.

The Supreme Court, however, was slow to recognize workers' rights and government regulation of industry. The Court repeatedly struck down state laws restricting the number of hours that women and children could work on the ground that the laws violated the doctrine of liberty of contract. In 1910, the first real antitrust victory came when the Court forced Standard Oil to divest itself of some of its operations. The ruling, however, was limited in scope (*Standard Oil v. United States,* 221 U.S. 1, 31 S. Ct. 502).

During WORLD WAR I (1914–1918) socialism faced new setbacks in the United States as federal legislation was passed outlawing any acts of disloyalty toward U.S. war efforts. The ESPIONAGE ACT OF 1917 (codified in scattered sections of 22 and 50 U.S.C.A.) imposed sentences of up to 20 years in prison for anyone found guilty of aiding the enemy, interfering with the recruitment of soldiers, or in any way encouraging disloyalty. The act was also used to prevent socialist literature from being sent through the mail. Many socialists were imprisoned for antiwar activities and the Wobblies, in particular, were main targets. Debs was jailed again, this time for interfering with military recruitment in violation of the Espionage Act. Again the Supreme Court upheld the conviction (*Debs v. United States,* 249 U.S. 211, 39 S. Ct. 252, 63 L. Ed. 566 [1919]).

After World War I democratic socialists came into power, alone or as part of coalition governments, in Germany, France, Great Britain, and Sweden. They all faced the problem of how to make socialist principles viable within a capitalist system. Only in Sweden, and only after a lengthy conflict, were labor and capital able to cooperate to establish a socialist system without abandoning socialism's philosophic foundation.

In the United States, socialists faced another wave of repression during the strikes that erupted after the war. The Russian Revolution of 1917 had aroused new fears of Bolshevism, which led to greater intolerance. Under the auspices of the JUSTICE DEPARTMENT, Attorney General A. MITCHELL PALMER conducted raids against individuals and organizations considered a threat to U.S. institutions. The nationwide arrest of dissidents ultimately prompted the Supreme Court to reconsider federal protection of individual rights. Justices OLIVER WENDELL HOLMES JR. and LOUIS D. BRANDEIS argued for greater protection of the right to voice unpopular ideas.

The Great Depression marked another turning point for socialism. Overproduction, underconsumption, and speculation led to an implosion of markets, a result predicted by Marx. One response was powerful centralized governments in the form of totalitarian regimes such as those of ADOLF HITLER in Germany and JOSEPH STALIN in the Soviet Union. Socialism was revived by the British economist John Maynard Keynes who advocated that the government stimulate consumption and investment during economic downturns. Previously used only on a limited scale, deficit financing, as it came to be called, was now used by socialists in Europe and liberals in the United States to revive capitalism. Many countries still use Keynesian economics to provide a bridge between capitalism and socialism.

As the Depression deepened from 1929 to 1933, U.S. socialism attracted more adherents, but its influence was still relatively slight. In the 1932 presidential elections, Socialist Party candidate Norman M. Thomas won only 267,000 votes. Increasingly made up of middle-class intellectuals, socialists became isolated from the needs and demands of workers. Socialism's greatest achievement during this period was President FRANKLIN D. ROOSEVELT'S NEW DEAL program, which expanded government services to help the poor and stimulate economic growth. The Supreme Court, however, struck down much of the New Deal legislation, most notably, the NATIONAL INDUSTRIAL RECOVERY ACT (48 Stat. 195) in 1935 (SCHECHTER POULTRY CORP. V. UNITED STATES, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570). Only when Roosevelt threatened to enlarge the Court to include justices with his perspective did the Court begin to uphold New Deal legislation.

The year 1935 was marked by success, however, with the passage of the WAGNER ACT, also

known as the National Labor Relations Act of 1935 (29 U.S.C.A. §§ 151 et seq.). The act, which was the first national recognition of labor's right to organize, was the culmination of 80 years of socialist-labor efforts. Ironically, the socialists' message lost its urgency with the broadening of workers' rights and regulatory reform.

Following WORLD WAR II, and with the coming of the COLD WAR, politicians and the public began to equate socialism with communism. People with socialist backgrounds, who had been part of the Roosevelt administration, were denied employment, fired, and blacklisted during the late 1940s and 1950s. In 1951, in *Dennis v. United States* (341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137), the Supreme Court upheld the SMITH ACT (18 U.S.C.A. § 2385), which had been passed in 1940. The decision established the legality of anti-subversive legislation under the theory that a vast underground horde of communists was working for the violent overthrow of the government.

At the helm of the anti-communist movement was Senator JOSEPH R. MCCARTHY of Wisconsin, who proclaimed that communists had infiltrated U.S. politics on a broad scale. Meanwhile the House Un-American Activities Committee tried suspects in the popular media, destroying numerous careers in the arts, entertainment, and politics. Only when McCarthy charged that the U.S. Army had been infiltrated by communists and then failed to prove his allegations did his power decline.

By the time the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. §§ 2000a et seq.) was passed, socialist precepts had again become acceptable topics of conversation. The remedies that politicians and scholars proposed for urban blight, poverty, and inequitable distribution of wealth drew heavily on the traditional socialist tenet that the state should play a role in alleviating suffering and directing society toward desirable ends. The socialist perspective on the treatment of third-world nations in the transnational capitalist system also influenced protests against the VIETNAM WAR.

After the McCarthy era, however, the organized socialist movement in the United States was in disarray, with membership down and leaders splintering off into various factions. The two major socialist groups to emerge were the right wing Socialist Party USA and the more left-leaning Democratic Socialists of America (DSA). In 1976, the Socialist Party USA ran a candidate in the presidential elections for the first time in 20 years. The party has included a candidate in almost every presidential election since then.

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## SOCIALIST PARTY OF THE UNITED STATES OF AMERICA

The Socialist Party of the United States of America (SP-USA) is one of several parties claiming to be the heir to the country's original organized Socialist movement, the Socialist Labor Party (SLP). Support for the party has fluctuated over the years, but it remains a vigorous advocate of radical change of economic and social policy in the United States.

Originally called the Workingmen's party when it was organized in 1876, the party was renamed in 1877. Most of its members were immigrants from the large industrial U.S. cities. In 1890 Marxist Daniel De Leon joined the SLP and became editor of its newspaper, *The People.* Under De Leon's leadership the SLP adopted a Marxist view that advocated revolution in order to free workers from the bonds of capitalism. In 1892 the SLP ran Simon Wing as a presidential candidate. The SLP continued to run presiden-

tial candidates for many years; however, electoral strength for the party reached a peak in 1898 when the SLP candidate fielded 82,204 votes.

In 1898 EUGENE DEBS and other veterans of the American Railway Union's national strike against the Pullman Company organized the Socialist DEMOCRATIC PARTY (SDP). The majority of SDP members were laborers who had been born in the United States. In 1901 one wing of the SLP merged with Eugene Debs' Social Democratic Party (SDP) at a unity convention in Indianapolis, Indiana. The newly merged Socialist Party of the United States of America was a mix of people harboring moderate to radical views including Marxists, Christians, pro-Zion and anti-Zion Jewish reformers, pacifists, populists, anarchists, and others. The continuing reform versus revolution debate was blunted by the adoption of platforms that envisioned revolution as the ultimate goal, while advocating immediate reform measures, but the party faced continuous internal conflict due to the variety of opinions held by its members.

The Socialist party sought to become a major component of the American political system. Debs ran as the party's presidential candidate in 1908, 1912, and 1920, polling over 915,000 votes in 1920. In 1919 a major ideological divide within the party caused a number of members to split off and form what eventually became the Communist Party of the United States. In 1924 the Socialist party did not field a presidential candidate, but instead it supported the campaign of Senator ROBERT LA FOLLETTE of Wisconsin who ran on the PROGRESSIVE PARTY ticket. La Follette polled 5 million popular votes but carried only his home state. The Great Depression of the early 1930s increased support for the Socialist party; its 1932 presidential candidate, Norman Thomas, received 896,000 votes.

After that election the membership and political impact of the Socialist party began to decline. The heterogeneity of views led to conflicts among various party factions, and over the years these factions were subject to numerous splits and mergers. Some members left to join the Communist party because they felt the Socialist agenda was not sufficiently radical. Others became Democrats, theorizing that working with a major political party was the most viable means of achieving reform.

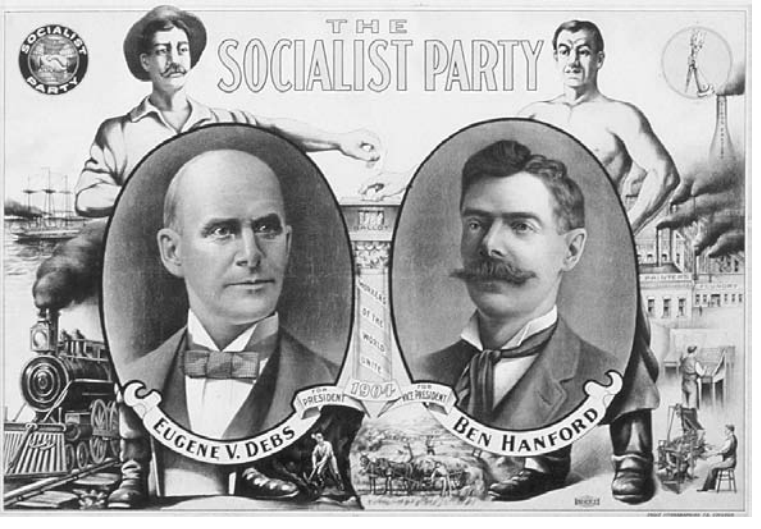


*Eugene V. Debs and Ben Hanford were the Socialist Party candidates for president and vice president in 1904.* CORBIS

In 1976 the Socialist party ran a presidential candidate for the first time in 20 years. Since then the party has fielded presidential candidates in 1988, 1992, 1996, and 2000. In 2000 the presidential candidate, David McReynolds, a peace activist and former party chair, earned ballot status in seven states. Since 1973, the Socialist party has concentrated on grassroots organizing and having an impact on local politics.

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Marx, Karl Heinrich; Socialism.

## SOCRATIC METHOD

See LANGDELL, CHRISTOPHER COLUMBUS.

## SODOMY

*Anal or oral intercourse between human beings, or any sexual relations between a human being and an animal, the act of which may be punishable as a criminal offense.*

The word *sodomy* acquired different meanings over time. Under the COMMON LAW,

sodomy consisted of anal intercourse. Traditionally courts and statutes referred to it as a "crime against nature" or as copulation "against the order of nature." In the United States, the term eventually encompassed oral sex as well as anal sex. The crime of sodomy was classified as a felony.

Because homosexual activity involves anal and oral sex, gay men were the primary target of sodomy laws. Culturally and historically, homosexual activity was seen as unnatural or perverse. The term *sodomy* refers to the homosexual activities of men in the story of the city of Sodom in the Bible. The destruction of Sodom and Gomorrah because of their residents' immorality became a central part of Western attitudes toward forms of non-procreative sexual activity and same-sex relations.

Beginning with Illinois in 1961, state legislatures reexamined their sodomy statutes. Twenty-seven states repealed these laws, usually as a part of a general revision of the criminal code and with the recognition that heterosexuals engage in oral and anal sex. In addition, state courts in 10 states applied state constitutional provisions to invalidate sodomy laws. As of early 2003, eight states had laws that barred heterosexual and homosexual sodomy. Three other states barred sodomy between homosexuals.

In *Bowers v. Hardwick,* 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), the U.S. Supreme Court upheld the Georgia sodomy statute. Michael Hardwick was arrested and charged with sodomy for engaging in oral sex with a consenting male adult in his home. A police officer was let into Hardwick's home to serve a warrant and saw the sexual act. Although the state prosecutor declined to prosecute the case, Hardwick brought suit in federal court asking that the statute be declared unconstitutional.

On a 5–4 vote, the Court upheld the law. Writing for the majority, Justice BYRON R. WHITE rejected the argument that previous decisions such as the Court's rulings on ABORTION and contraception had created a right of privacy that extended to homosexual sodomy. Instead, the Court drew a sharp distinction between the previous cases, which involved "family, marriage, or procreation," and homosexual activity.

The Court also rejected the argument that there is a fundamental right to engage in homosexual activity. Prohibitions against sodomy were in the laws of most states since the nation's founding. To the argument that homosexual activity should be protected when it occurs in the privacy of a home, White stated that "otherwise illegal conduct is not always immunized whenever it occurs in the home." Because the claim in the case involved only homosexual sodomy, the Court expressed no opinion about the constitutionality of the statute as applied to acts of heterosexual sodomy.

The *Bowers* decision was severly criticized. Justice LEWIS POWELL, who voted with the majority, later stated that he had made a mistake in voting to affirm the law. In July 2003 the Supreme Court reversed itself on the issue of sodomy. In LAWRENCE V. TEXAS, 539 U.S. ___, 123 S. Ct. 2472, 156 L. Ed. 2d 508, in a 6–3 decision, the Court invalidated a Texas anti-homosexual sodomy law by invoking the constitutional rights to privacy.

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Gay and Lesbian Rights; Sex Offenses.

## SOFTWARE

*Intangible* PERSONAL PROPERTY *consisting of mathematical codes, programs, routines, and other functions that controls the functioning and operation of a computer's hardware.*

Software instructs a computer what to do. (The computer's physical components are called hardware.) *Computer software* is the general

term for a variety of procedures and routines that harness the computational power of a computer to produce, for example, a general operating system that coordinates the basic workings of the computer or specific applications that produce a database, a financial spreadsheet, a written document, or a game. Computer programmers use different types of programming languages to create the intricate sets of instructions that make computing possible.

Until the personal computer revolution began in the 1980s, software was written mainly for business, government, and the military, which employed large mainframe computers as hardware. With the introduction of personal computers, which have rapidly increased in power and performance, software has emerged as an important commercial product that can be marketed to individuals and small business as well as big business and the government.

Software is, under the law, **INTELLECTUAL PROPERTY** and therefore entitled to protection from persons who seek to exploit it illegally. Software can be protected through the use of trade secrets, **COPYRIGHT**, **PATENTS**, and **TRADEMARKS**.

**TRADE SECRET** protection may apply to unpublished works and the basic software instructions called source code. Typically trade secrets will be effective if a company develops software and wishes to prevent others from finding out about it. A person who works on developing the software will be required to sign a nondisclosure agreement, which is a contract that obligates the person signing it to keep the project a secret.

Once software is developed and is ready to be sold, it can be copyrighted. Copyright protects the expression of an idea, not the idea itself. For example, a person could not copyright the idea of a computer database management system but could copyright the structure and content of a database software program that expresses the idea of a database system.

Court decisions appear to have limited copyright protection for some features of software. In *Apple Computer v. Microsoft Corporation,* 35 F.3d 1435 (9th Cir. 1994), the court held that Apple Computer could not copyright the graphical user interface (GUI) it had developed for its Macintosh computer. Microsoft Corporation's Windows software program contained a GUI nearly identical to Apple's. The court stated that Microsoft and other software developers were free to copy the "functional" elements of Apple's GUI because there are only a limited number of ways that the basic GUI can be expressed differently.

In *Lotus Development Corp. v. Borland International,* 49 F.3d 807 (1st Cir. 1995), Lotus alleged that Borland had copied the hierarchical menu system of the Lotus 1-2-3 spreadsheet program, which contained 469 commands, in its Quattro spreadsheet program. The court of appeals ruled that Borland had not infringed on Lotus's copyright because the menu command hierarchy was a "method of operation," which is not copyrightable under federal copyright law (17 U.S.C.A. § 102(b)).

Patent law supplies another avenue of protection for software companies. A patent protects the idea itself. It is often an unattractive option, however, because it takes a significant amount of time, usually two years, and money to obtain a patent from the U.S. **PATENT AND TRADEMARK OFFICE**. The patent process is complicated and technical, with the applicant required to prove to the Patent and Trademark Office that a patent is deserved. Because the shelf life of a software program is often short, seeking a patent for the program is often impractical.

Trademark law protects the name of the software, not the software itself. Protecting a name from being used by others can be more valuable than other forms of protection.

When software is leased or sold, the purchaser usually must agree to accept a software license. When a business negotiates with a software company, it will sign a license agreement that details how the software is to be used and limits its distribution. A software license is an effective tool in preventing **PIRACY**.

When consumers buy software from a software company or through a third-party business, they find in the packaging a software license. The license is typically on the sealed envelope that contains the software media, which itself is sealed in plastic wrapping. These "shrink-wrap licenses" describe contractual conditions regarding the purchaser's use of the software. The opening of the shrink-wrap, according to the license, constitutes acceptance of all of the terms contained in the license agreement.

The purchaser is informed that the software is licensed and not sold to the purchaser. By retaining title to the software, the computer software company seeks to impose conditions upon

the purchaser, or licensee, that are not otherwise permissible under federal copyright law. The principal terms of the shrink-wrap license include prohibiting the unauthorized copying and renting of the software, prohibiting reverse engineering (figuring out how the software works) and modifications of the software, limiting the use of the software to one computer, disclaiming warranties, and limiting liabilities.

The enforceability of shrink-wrap licenses has been challenged in the courts. The prevailing view is that when mass-market prepackaged software is sold, the transaction is a sale of goods and not a true license agreement. The key issue is whether the license document is part of an enforceable contract. Defenders of shrink-wrap licenses argue that the purchaser agrees to the conditions of the license after breaking the packaging seal and therefore contract law must uphold the written terms of the contract. Opponents argue that the sequence of events in the typical software purchase transaction is skewed. The purchaser is not aware of the license agreement until after the sale is consummated. The purchaser's acceptance of the license agreement is inferred when he or she opens the package or uses the software. However, the purchaser does not sign the license agreement. She may not even read the terms of the license agreement and, in any case, does not expressly agree to them.

In *Step-Saver Data Systems v. Wyse Technology,* 939 F.2d 91 (1991), the Third Circuit Court of Appeals held that the shrink-wrap license did not become part of the contract and therefore was not a valid modification to a previously existing contractual relationship for the sale of prepackaged computer software. The court concluded that, under the UNIFORM COMMERCIAL CODE § 2-207, a contract had existed prior to the opening of the package, the license contained new terms that materially altered the contract, and the purchaser did not expressly accept these terms. Because of these conclusions, the license agreement was invalid and unenforceable.

Lawsuits involving the software industry have not been limited to intellectual property disputes. In 1998, the U.S. Justice Department brought an antitrust lawsuit against Microsoft Corporation, alleging that the company had illegally taken advantage of its software MONOPOLY to stifle competitors in the software market. A federal district judge in 1999 found Microsoft guilty of violating ANTITRUST LAWS and in 2000 ordered that the company be divided into two separate companies, *U.S. v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001). However, a federal appellate court in 2001 overruled the district court's ruling, though it upheld the finding that Microsoft had violated antitrust laws. In 2002, Microsoft and the JUSTICE DEPARTMENT reached a settlement whereby Microsoft agreed to disclose sensitive technology to its competitors and to allow manufacturers and customers to remove Microsoft icons from some of the features in the company's system software.

Software developers have legitimate concerns about software piracy. Counterfeiting is an international problem that results in the sale of millions of dollars of pirated software. The Software Publisher's Association (SPA) and the Business Software Alliance (BSA) are major organizations that combat software piracy. The SPA is the leading international trade association for the personal computer software industry. Both SPA and BSA have collected millions of dollars worldwide from companies that have used pirated software. Most companies using pirated software are reported by former employees.

Piracy can take a number of forms. Computer users can commit piracy by using a single copy of licensed software to install on multiple computers. Similarly, copying disks and swapping disks inside and outside of the workplace can constitute forms of software piracy. The INTERNET has likewise become a major source for illegally pirated software. A number of websites offer full, pirated programs that can be downloaded for free or exchanged with other users. Although the BSA, SPA and other organizations have sought to track these providers and take them offline, such sites still exist.

A number of programs are available to protect software against piracy. Many companies require users to enter special pass codes that correspond to the specific copies purchased by the users. Other software must be registered directly with the company over the Internet. Although piracy still exists at a significant rate, the BSA estimated that software piracy during 2001 cost companies $10.97 billion. Nonetheless, statistics indicate that piracy has been on the decline since the mid-1990s. Among the reasons noted by the BSA for this reduction are the employment of more effective means of distributing legal copies of software and a reduction in the price of software over the previous decade.

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CROSS-REFERENCES

Computer-Assisted Legal Research; Computer Crime; E-Mail; Internet; Sales Law.

## SOFTWARE PUBLISHERS ASSOCIATION

See CONSUMER SOFTWARE PIRACY "Software Publisher's Association" (Sidebar).

## SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1918

Congress passed the first Soldiers' and Sailors' Civil Relief Act in 1918 (50 App. U.S.C.A. § 501 et seq.). This act was designed to protect the CIVIL RIGHTS and legal interests of individuals in the ARMED SERVICES during WORLD WAR I and ensure that they would not be distracted by legal obligations at home. The act did not prevent persons from suing service members. Rather, it allowed a court to stay civil proceedings against them. The act authorized a court to suspend legal actions against a member of the armed forces during his time of service if the court determined that he was unable to defend himself in court because of active duty.

Congress passed a revised version of the act in 1940. The major difference between it and the original was that the 1940 act authorized courts to postpone proceedings against service members beyond the time of active duty and until they were capable of protecting their interests. The 1940 act had three objectives concerning service members: to suspend civil judicial actions until they could appear in court, to provide them peace of mind during their fighting in WORLD WAR II, and to give them time to return home after service to protect their endangered interests. Congress has amended the act several times since 1940, usually to keep courts from interpreting the act too narrowly against service members. In addition, Congress has expanded coverage of the act to include all members of the armed forces including reservists. In 2002 Congress brought members of the NATIONAL GUARD under the provisions of the law when "under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days . . . for purposes of responding to a national emergency declared by the President and supported by Federal funds."

The act provides service members with three types of relief from judicial proceedings. They may request a stay of proceedings, a reopening of a default judgment, or a stay of execution against a judgment. To obtain any relief, a court first must find that the service members' ability to defend their cases was affected by their service.

Service members may postpone proceedings during service or within 60 days after service. Service members or acquaintances of service members may apply for a stay of proceedings with the court, or the court may decide on its own to issue a stay. If a stay is issued, the case remains postponed until the court determines that the service member's ability to defend against the suit is no longer affected by his or her military service.

If service members fail to obtain a stay of the proceedings and the trial court issues a default judgment, service members may reopen the case. To reopen a default judgment, service members must apply with the trial court while still on active duty or within 90 days of discharge. Congress has allowed service members to reopen only those default judgments that were rendered during the service members' terms of service or within 30 days after discharge. Reopening a default judgment gives a service member an opportunity to present his or her defense to the lawsuit.

If a service member is unable to obtain a stay or reopen a default judgment, he or she may stay the execution of the judgment. This does not eliminate the default judgment; rather, it gives the service member time to appeal the judgment and prevents authorities from taking the property of the service member in satisfaction of the judgment during the appeal process.

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CROSS-REFERENCES

Military Law; National Guard.

## SOLE PROPRIETORSHIP

*A form of business in which one person owns all the assets of the business, in contrast to a partnership or a corporation.*

A person who does business for himself is engaged in the operation of a sole proprietorship. Anyone who does business without formally creating a business organization is a sole proprietor. Many small businesses operate as sole proprietorships. Professionals, consultants, and other service businesses that require minimum amounts of capital often operate this way.

A sole proprietorship is not a separate legal entity, like a partnership or a corporation. No legal formalities are necessary to create a sole proprietorship, other than appropriate licensing to conduct business and registration of a business name if it differs from that of the sole proprietor. Because a sole proprietorship is not a separate legal entity, it is not itself a taxable entity. The sole proprietor must report income and expenses from the business on Schedule C of her or his personal federal income tax return.

A major concern for persons organizing a business enterprise is limiting the extent to which their personal assets, unrelated to the business itself, are subject to claims of business creditors. A sole proprietorship gives the least protection because the personal liability of the sole proprietor is generally unlimited. Both the business assets and the personal assets of the sole proprietor are subject to claims of the sole proprietorship's creditors. In addition, existing liabilities of the sole proprietor will not be extinguished upon the dissolution or sale of the sole proprietorship.

Unlike the managers of a corporation or a partnership, a sole proprietor has total flexibility in managing and controlling the business. The organizational expenses and level of formality in a sole proprietorship are minimal as compared with those of other business organizations. However, because a sole proprietorship is not a separate legal entity, it terminates when the sole proprietor becomes disabled, retires, or dies. As a result, a sole proprietorship lacks business continuity and does not have a perpetual existence as does a corporation.

For working capital, a sole proprietorship is generally limited to the individual funds of the sole proprietor, along with any loans from outsiders willing to provide extra capital. During her lifetime, a sole proprietor can sell or give away any asset because the business is not legally separate from the sole proprietor. At the death of the sole proprietor, the business is usually dissolved. The proprietor's estate, however, can sell the assets or continue the business.

CROSS-REFERENCES

S Corporation.

## SOLICITATION

*Urgent request, plea, or entreaty; enticing, asking. The criminal offense of urging someone to commit an unlawful act.*

The term *solicitation* is used in a variety of legal contexts. A person who asks someone to commit an illegal act has committed the criminal act of solicitation. An employee who agrees in an employment contract not to solicit business after leaving her employer and then mails a letter to customers asking for business may be sued by the former employer for violating the non-solicitation clause of the contract. The letter constitutes a solicitation. However, if the person had placed a newspaper advertisement, this would not have been a solicitation because a solicitation must be addressed to a particular individual.

Many solicitations in everyday life appear to be legal. For example, a telemarketer who tries to sell a legitimate product by calling potential customers is making a solicitation. It may or may not be legal, however, depending on the laws of the states where the telemarketer and the caller reside. If either of the states requires that telemarketers register with the state government, then the legality of the solicitation will depend on whether the telemarketer met this registration requirement. Failure to register may make the telemarketing company liable for civil fines or criminal penalties.

Solicitation laws and regulations govern specific types of organizations and economic activities. For example, charitable organizations must

register with state agencies before legally soliciting money. The federal SECURITIES AND EXCHANGE COMMISSION has rigid rules concerning the solicitation of shareholders for votes involving changes in corporate structure or leadership.

Criminal solicitation commonly involves crimes such as prostitution and drug dealing, though politicians have been convicted for solicitation of a bribe. The crime of solicitation is completed if one person intentionally entices, advises, incites, orders, or otherwise encourages another to commit a crime. The crime solicited need not actually be committed for solicitation to occur.

When law enforcement agencies seek to curtail prostitution, they use decoy operations. A person who offers to perform a sex act with an undercover officer for money can be arrested for solicitation of prostitution. Police decoys are also used to nab customers. When a person looking to pay for sex approaches a decoy officer and makes, by words or gestures, this request, the person can be arrested for solicitation of prostitution. Similar operations are used to reduce the sale of narcotics.

## SOLICITOR

*A type of practicing lawyer in England who handles primarily office work.*

*The title of the chief law officer of a government body or department, such as a city, town, or* MUNICIPAL CORPORATION.

England has two types of practicing lawyers: solicitors and barristers. Unlike the United States, where a lawyer is allowed to handle office and trial work, England has developed a division of labor for lawyers. Solicitors generally handle office work, whereas barristers plead cases in court. However, there is some overlap. Solicitors may appear as legal counsel in the lower courts, and barristers often prepare trial briefs and other written documents. Barristers depend on solicitors to provide them with trial work because they are not allowed to accept work on their own.

The distinction between solicitors and barristers was originally based on their roles in the English court system. Solicitors were lawyers who were admitted to practice in EQUITY courts, whereas barristers were lawyers who practiced in common-law courts. The modern English judicial system has abolished this distinction. Barristers may appear in legal and equitable court proceedings, and solicitors handle out-of-court lawyering.

The role of the solicitor is similar to that of a lawyer in the United States who does not appear in court. The solicitor meets prospective clients, hears the client's problems, gives legal advice, drafts letters and documents, negotiates on the client's behalf, and prepares the client's case for trial. When a court appearance appears inevitable, the solicitor retains a barrister on the client's behalf. The solicitor instructs the barrister on how the client wishes to proceed in court.

There are more solicitors than barristers because most legal work is done outside the courtroom. Solicitors are required to take a law school course, but they must serve an apprenticeship with a practicing solicitor for five years (three years for a college graduate) before becoming fully accredited.

The regulation and administration of solicitors is managed by the Law Society, a voluntary group incorporated by Parliament. The Law Society is similar to U.S. bar associations, setting standards of professional conduct, disciplining solicitors for ethical violations, and maintaining a client compensation fund to repay losses that result from dishonesty by solicitors.

In the United States, the term *solicitor* generally has not been applied to attorneys. Some towns and cities in the Northeast have called their chief law enforcement officer a solicitor, rather than a chief of police.

Also, the officer in the JUSTICE DEPARTMENT who represents the government in cases before the U.S. Supreme Court is called the SOLICITOR GENERAL.

## SOLICITOR GENERAL

*An officer of the U.S.* JUSTICE DEPARTMENT *who represents the federal government in cases before the U.S. Supreme Court.*

The solicitor general is charged with representing the EXECUTIVE BRANCH of the U.S. government in cases before the U.S. Supreme Court. This means that the solicitor and the solicitor's staff are the chief courtroom lawyers for the government, preparing legal briefs and making oral arguments in the Supreme Court. The solicitor general also decides which cases the United States should appeal from adverse lower-court decisions.

Congress established the office of solicitor general in 1870 as part of the legislation creating the Department of Justice. Although early solicitors occasionally handled federal trials, for the most part the solicitor general has concentrated on appeals to the Supreme Court. In this role the solicitor has come to serve the interests of both the executive branch and the Supreme Court.

The federal government litigates thousands of cases each year. When a government agency loses in the federal district court and the federal court of appeals, it usually seeks to file a petition for a writ of certiorari to the Supreme Court. The Court uses this writ procedure as a tool for discretionary review. The solicitor general reviews these agency requests and typically will reject most of them. This screening function reduces the workload of the Supreme Court in processing petitions, and it enhances the credibility of the solicitor general when he or she requests certiorari. The Court grants review in approximately 80 percent of the certiorari petitions filed by the solicitor general, compared with only 3 percent filed by other attorneys.

The solicitor general occasionally files AMICUS CURIAE (friend of the court) briefs in cases where the U.S. government is not a party but important government interests are at stake. Sometimes the Court itself will request that the solicitor file a brief where the government is not a party. The Court also allows the solicitor general to participate in oral arguments as an amicus.

Four former solicitors general later served on the Supreme Court: WILLIAM HOWARD TAFT, STANLEY F. REED, ROBERT H. JACKSON, and THURGOOD MARSHALL.

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## SOLID WASTES, HAZARDOUS SUBSTANCES, AND TOXIC POLLUTANTS

Millions of homes and residential neighborhoods contain hidden killers such as lead, mercury, and cyanide. These harmful substances can cause cancer, neurological damage, and even death. They can also hurt various aspects of the environment, including the wilderness, wildlife, and aquatic life.

In many instances, these harmful substances cause environmental and residential damage by migrating through the soil from nearby landfills. Both state and federal governments regulate landfills and the pollutants deposited there. Federal regulation comes in the form of legislation; state regulation comes through state and local legislation as well as common-law principles.

### Legislation

**Solid Wastes** Solid waste is useless, unwanted, and discarded material lacking sufficient liquid content to be free-flowing. More than 10 billion tons of solid waste is generated each year in the United States, most of it from agricultural activities. This waste is primarily produced by farm animals, slaughterhouses, and crop harvesting. The mining industry is another major producer of solid waste, generating over 2 billion tons a year. Its solid waste comes from the extraction, beneficiation (preparation for smelting), and processing of ores and minerals. But residential and commercial wastes are probably more familiar to the average person. These include everything from plastic bottles, aluminum cans, and rubber tires to yard trimmings, food wastes, and discarded appliances.

Solid waste management, which involves the storage, collection, transportation, processing, recovery, and disposal of solid waste, has been a daunting task. The United States spends more than $6 billion a year on it, most of which goes to collection and transportation. Most solid waste is transported to dumps and landfills; the rest is incinerated. In 1970, when Congress began studying solid waste, as many as 90 percent of the dumps and 75 percent of the municipal incinerators were considered inadequate, and were major polluters of air, land, and water.

Disposal sites pose two chronic problems for communities. First, they are an aesthetic NUISANCE, or an "eyesore." The federal Highway Beautification Act of 1965 (23 U.S.C.A. §§ 131 et seq.) targeted this problem with some success. The second, more vexatious problem is created by disease-carrying agents that transmit bacteria from landfills to nearby human populations. Such agents include water, wind, soil, birds, insects, and rodents.

In the late 1980s and early 1990s, state and federal attention turned to productive uses for landfills, such as resource recovery. Resource recovery, sometimes called reclamation or salvage, is the process by which energy and other resources are extracted from solid waste for recycling or reuse. Aluminum cans and plastic bottles are two forms of solid waste that can be both recycled and reused. Energy extracted from solid waste has been used to generate steam, electricity, and fuel.

Federal regulation of solid waste is governed by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. §§ 690 et seq., sometimes called the Solid Waste Disposal Act. When enacting the RCRA, Congress stated that "land is too valuable a national resource to be needlessly polluted by discarded materials, [yet] most solid wastes are disposed of on land in open dumps and sanitary landfills." At the same time, Congress determined that millions of tons of solid waste were being buried each year that could have been treated and salvaged. Better technology must be developed, Congress concluded, to recover useful resources from solid wastes.

The RCRA defines solid waste as garbage, refuse, and sludge generated by treatment plants and AIR POLLUTION control facilities. Other discarded materials, such as semisolid and some liquid materials, are also included within the RCRA's broad definition of solid waste. Excluded from this definition are solid and dissolved materials from domestic sewage and irrigation systems, both of which are regulated at the state and local levels.

Under the RCRA, the administrator of the ENVIRONMENTAL PROTECTION AGENCY (EPA) is required to publish guidelines for the collection, storage, transportation, treatment, and disposal of solid waste. During the first several years after the RCRA's enactment, particularly during President Ronald Reagan's administration, the EPA was slow to enact any guidelines whatsoever. In 1987, four environmental groups sued the EPA in an effort to compel the agency to fulfill its responsibilities under the RCRA. After that case was settled, the EPA began promulgating a number of guidelines concerning solid waste management, three of which govern the management of paper products, oil lubricants, and retread tires.

Paper is the largest single component, by both weight and volume, of municipal solid waste. More than 50 million tons of such waste are discarded each year, primarily in solid waste landfills. Oil lubricants are also discarded in massive amounts. Of the more than 1.2 billion gallons of oil generated each year, 30 percent is discharged into sewers and land. The numbers of discarded tires is equally staggering. Over 4 billion tires have been dumped into landfills and stockpiles around the country, and that number grows by 200 million each year. Because tires do not biodegrade, they provide enduring shelter for many rodents and insects, both carriers of disease.

The guidelines drafted by the EPA were designed to diminish the magnitude of these problems by encouraging technological innovation, recycling, and reuse. In particular, the guidelines require that such waste be treated through new or available technology so that valuable resources can be identified and separated from materials that are truly waste. These guidelines may be enforced by the state or federal governments, as well as by private individuals through so-called citizen suits. Criminal and civil penalties are imposed on offenders who fail to comply with the guidelines. Violators may also face additional penalties imposed by state and local governments that have enacted solid waste regulations of their own.

**Generation and Recovery of Municipal Waste in the United States, 1960 to 2000**

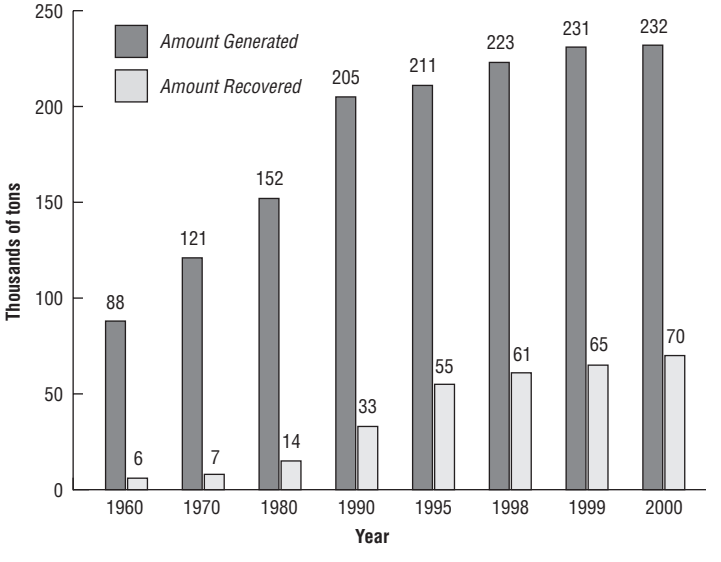


SOURCE: U.S. Environmental Protection Agency, *Municipal Solid Waste in the United States: 2000 Facts and Figures.*

**Materials Generated in Municipal Solid Waste, in 2000**

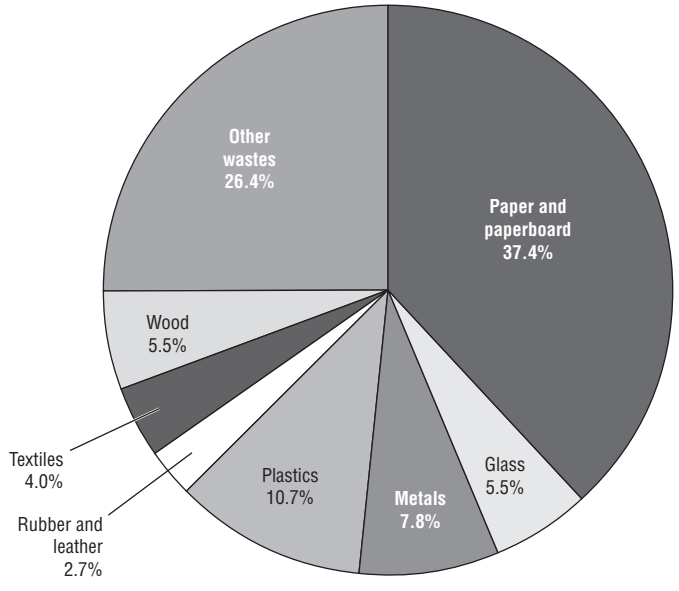


SOURCE: U.S. Environmental Protection Agency, *Municipal Solid Waste in the United States: 2000 Facts and Figures.*

**Hazardous Substances and Toxic Pollutants**

The alarming dangers posed by hazardous substances and toxic pollutants were brought to the fore in Niagara Falls, New York, where the infamous Love Canal incident took place. The canal was originally excavated in the 1890s as part of an unsuccessful scheme to divert the Niagara River for hydroelectric power. Between 1942 and 1953, Hooker Chemical Corporation filled the canal with drums containing 21,800 tons of hazardous and toxic chemicals. Later, Hooker sold the dump site to the Niagara Falls School Board for $1, with a deed containing a provision that relieved the chemical company of liability for any harm resulting from hazardous and toxic materials deposited at the canal.

A school was built near the site, and a residential neighborhood grew up surrounding the canal. But as the drums holding the chemicals gradually corroded, their contents migrated from the canal through the neighboring residential soil. In the late 1970s, following several years of heavy rainfall, the presence of the chemicals became more apparent as sludge seeped into basements and emitted toxic fumes. Numerous lawsuits soon followed.

Regulation of hazardous and toxic materials is marked by its nomenclature. Hazardous substances are defined by federal law as "solid wastes" that "cause, or significantly contribute to an increase in mortality or illness" or "pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed" (42 U.S.C.A. § 6903). Toxic pollutants, a subset of hazardous substances, include pollutants that "after discharge and upon exposure, ingestion or inhalation . . . [by] any organism" will "cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions, . . . or physical deformations in such organisms or their offspring" (33 U.S.C.A. § 1362).

Because toxic pollutants are a subset of hazardous materials, a pollutant may be hazardous without being toxic, but not vice versa. The EPA has published a list of pollutants it deems toxic, including arsenic, asbestos, benzene, cyanide, DDT, lead, mercury, nickel, and silver. Pollutants not included on this list, such as acetic acid, ammonia, and cobalt, may still be considered hazardous if they pose a substantial threat to human health or the environment.

Myriad federal and state regulations govern the management of hazardous and toxic materials. The manufacturing of hazardous chemicals is governed at the federal level by the Toxic Substance Control Act (TSCA), 42 U.S.C.A. § 9604. The purpose of the TSCA is to identify potentially harmful substances before they are manufactured and placed in the market, in order to protect the public from any "unreasonable risk." Pursuant to the TSCA, the EPA has adopted rules requiring manufacturers to test chemicals that "enter the environment in substantial quantities" or present a likelihood of "substantial human exposure." The TSCA also requires manufacturers to give the EPA notice 90 days before they begin manufacturing any new chemicals.

Facilities that transport, store, and dispose of hazardous and toxic substances, also called TSDs, are governed by the RCRA. The RCRA provides "cradle-to-grave" regulation of toxic and hazardous substances based partly on their persistence, degradability, corrosiveness, and flammability. TSDs must obtain a permit under the RCRA before they are allowed to manage toxic or hazardous materials. To obtain a permit, the applicant must demonstrate the ability to manage such materials in compliance with strin-

gent standards. One of these standards requires TSDs to take corrective action immediately after any improper release of toxic chemicals.

The RCRA makes landfills the last alternative for the disposal of hazardous and toxic materials. Before land disposal is permitted under the RCRA, TSDs must comply with treatment standards that mandate the use of certain technology to minimize the harmfulness of particular substances. When land disposal is authorized, new landfills must use double liners and groundwater monitoring systems unless the EPA finds that an alternative design or practice would be equally effective in preventing hazardous and toxic materials from migrating through the soil. The EPA has broad powers under the RCRA to inspect TSDs for violations.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9622, is the third major piece of federal legislation governing hazardous and toxic materials. Congress established CERCLA in 1980 to deal with thousands of inactive and abandoned hazardous waste sites in the United States. CERCLA directs the EPA to identify sites at which hazardous or toxic substances may have been released, and ascertain the parties potentially responsible for cleaning up these sites. Potentially responsible parties (PRPs) include the owners and operators of sites where hazardous material has been discharged, as well as the dischargers themselves.

CERCLA imposes joint and several liability on responsible parties, which means that once liability is established among a group of owners, operators, and dischargers, any one of them could be held liable for the entire cost of cleanup. Although responsible parties can seek reimbursement from each other, the wealthiest defendants are usually stuck with the CERCLA cleanup bills.

Some responsible parties escape liability because they cannot be identified or located. Others have become insolvent or bankrupt. In such situations, CERCLA's Superfund provisions are triggered. The Superfund creates a multibillion-dollar hazardous substance trust fund for cleaning up seriously contaminated sites in which the responsible parties avoid liability. Revenue for the Superfund is raised through federal appropriation and taxes paid by some TSDs.

The sale and distribution of pesticides is governed at the national level by a separate piece of legislation known as the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C.A. §§ 136 et seq. Under FIFRA, no pesticide may be introduced into the stream of commerce without approval by the administrator of the EPA. A pesticide will not be approved if the administrator finds it is likely to "cause unreasonable adverse effects on the environment." The reasonableness of an adverse environmental effect is measured by taking into account the economic, social, and environmental costs and benefits of the pesticide.

### Common Law

In addition to the remedies provided under federal and state legislation for injuries caused by solid waste, hazardous substances, and toxic pollutants, common-law principles of nuisance, TRESPASS, and NEGLIGENCE provide alternative avenues of recourse against landfill owners. The common-law doctrine of nuisance gives injured landowners a CAUSE OF ACTION when "substantial" injuries result from an "unreasonable" use of a particular landfill. The gravity of the injury and the reasonableness of the use are measured by a cost-benefit analysis in which the utility and appropriateness of the landfill's activities are balanced against the value of the landowner's interests.

Under the COMMON LAW of trespass, landowners can recover for *any* unlawful interference with their rights or interests. Trespass requires proof that the landfill owner intentionally or knowingly interfered with the landowner's rights or interests. Mere accidental or inadvertent interferences will not suffice.

Landowners suffering injuries from accidents and inadvertence can turn to the common law of negligence, which allows recovery for injuries caused by a landfill owner's failure to act with reasonable care.

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CROSS-REFERENCES

Air Pollution; Environmental Law; Land-Use Control; Pollution; Water Pollution.

## SOLOMON AMENDMENT

The Solomon Amendment, 50 U.S.C.A. App. § 462(f), is federal legislation that denies male college students between the ages of 18 and 26 who fail to register for the military draft (under the Selective Service Act, 50 U.S.C.A. App. § 451 et seq.) eligibility to receive financial aid provided by the Basic Educational Opportunity Grant Program.

Registration for the draft, which had been suspended on July 1, 1973, resumed in 1980. To compel compliance with the registration requirement, Congress enacted the Solomon Amendment, sponsored by Gerald B. H. Solomon (R-N.Y.). The amendment provides that applicants for financial aid under the Basic Educational Opportunity Grant Program certify that they have satisfied the registration requirement relating to the draft. In 1984 the U.S. Supreme Court upheld the constitutionality of the Solomon Amendment in *Selective Service System v. Minnesota Public Interest Research Group,* 468 U.S. 841, 104 S. Ct. 3348, 82 L. Ed. 2d 632.

CROSS-REFERENCES

Armed Services; Selective Service System.

## SOLVENCY

*The ability of an individual to pay his or her debts as they mature in the normal and ordinary course of business, or the financial condition of owning property of sufficient value to discharge all of one's debts.*

## SON OF SAM LAWS

*Laws that enable a state to use the proceeds a criminal earns from recounting his or her crime in a book, movie, television show, or other depiction. The laws are named after David Berkowitz, a New York serial killer who left a note signed "Son of Sam" at the scene of one of his crimes.*

Since 1977 forty-two states and the federal government have enacted various types of Son of Sam laws that take any proceeds a criminal earns for selling the story of his crime and give them to the victims of the crime or to a victims' compensation fund. Since a 1991 U.S. Supreme Court ruling struck down the New York law as unconstitutional, states have sought ways to modify their laws to avoid similar decisions. Despite the apparent virtue of denying criminals the ability to profit from their crimes, serious FIRST AMENDMENT issues have been raised about Son of Sam laws.

The New York legislature enacted the first Son of Sam law (N.Y. Exec. Law § 632-a) in 1977 after it learned that David Berkowitz was planning to sell his story of serial killing. The statute affected an accused or convicted person who contracted to speak or write about her crime. It required the person contracting with the criminal to turn over the criminal's proceeds to the state's Crime Victims Compensation Board, which established an escrow account for the benefit of the crime's victims and publicized the existence of the account. To obtain funds, a victim had to bring a civil action and obtain a judgment against the criminal within three years (originally five years) of the establishment of the account. At the end of this time period, the criminal received any funds in the account upon showing that no actions were pending against her.

Forty-one other states adopted similar laws, and the federal government established such a process in the VICTIMS OF CRIME ACT OF 1984 (18 U.S.C.A. §§ 3681–3682). In a few states, victims may apply directly to a victims' compensation program rather than sue the criminal directly. Some states seek to prevent criminals from ever profiting from their crimes by retaining any money remaining in the escrow account at the end of the statutory period. Under the federal statute, a court directs the disposition of the remaining funds and may require that part or all of the money be turned over to the Federal Crime Victims Fund.

The constitutionality of the New York Son of Sam law was challenged in *Simon and Schuster, Inc. v. New York Victims Crime Board,* 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991). This case involved profits from the book *Wiseguy: A Life in a Mafia Family,* a nonfiction work about ORGANIZED CRIME in New York City, published by Simon and Schuster. Nicholas Pileggi wrote the book with the paid cooperation of Henry

Hill, a career criminal who agreed in 1980 to testify against organized crime figures. The book told Hill's life story from 1955, when he first became involved with crime, until 1980.

Simon and Schuster argued that the law was based on the content of a publication and therefore violated the First Amendment. The Court agreed. Writing for a unanimous Court, Justice SANDRA DAY O'CONNOR struck down the law, concluding, "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."

The Son of Sam law singled out income derived from expressive activity and was directed only at works having a specified content. Because of the financial disincentive to publication that the act created, and its differential treatment among authors, the Court applied the strictest form of review to the New York law. The Court acknowledged that the state had a compelling interest in compensating victims from the fruits of crime but concluded that the law was not narrowly tailored to achieve that interest. The New York law was over-inclusive, applying to works on any subject as long as the work expressed the author's thoughts or recollections about the crime, however tangentially or incidentally. If the author admitted to committing the crime, it did not matter whether she was ever actually accused or convicted. Under this standard, works by St. Augustine, HENRY DAVID THOREAU, and MALCOLM X would be covered because their writings discussed crimes that they committed.

The *Simon and Schuster* decision has put the validity of all Son of Sam laws in doubt. New York quickly amended its law to apply to any economic benefit to the criminal derived from the crime, not just the proceeds from the sale of the offender's story. This redefinition was intended to eliminate the unconstitutional regulation of expressive activity and reconceptualize the law as a regulation of economic proceeds from crime.

The Supreme Court did not strike down all Son of Sam laws as unconstitutional, yet states have followed New York in modifying their statutes to designate that all profits of the offender be subject to attachment, not just those derived from selling his crime story. It remains unclear, however, whether these other laws will withstand a First Amendment challenge.

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CROSS-REFERENCES

Freedom of Speech; Publishing Law; Victims of Crime.

## ♦ SONOSKY, MARVIN J.

Marvin J. Sonosky's legal work on behalf of Native Americans resulted in victories in Con-

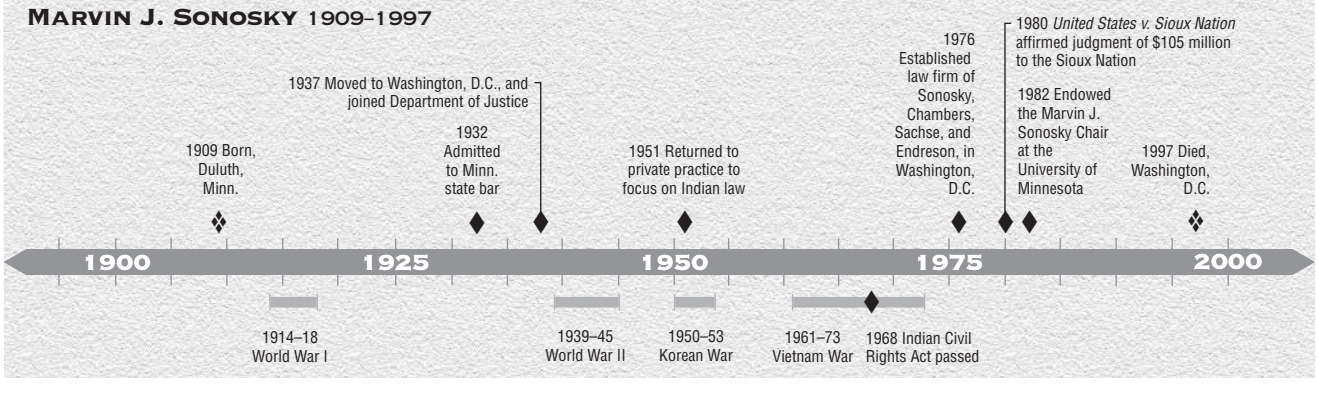

gress and the courts. Sonosky championed Indian causes during his long career as an attorney, representing several tribes. His single greatest accomplishment was winning the *Black Hills* case, a 24-year legal odyssey in which the Sioux nation asserted its claim to sacred ground taken by the federal government a century earlier.

Born on February 20, 1909, in Duluth, Minnesota, Sonosky completed his undergraduate and law studies at the University of Minnesota and was admitted to the state bar in 1932. He practiced briefly in Duluth before moving to Washington, D.C., in 1937 to join the JUSTICE DEPARTMENT. He spent more than a decade as a special assistant to the attorney general in the Justice Department's Lands Division.

In 1951 Sonosky returned to private practice with a focus on Indian law. Over the next three decades, he would successfully represent the Assiniboin, Shoshone, and Sioux tribes in a number of cases involving land claims against the federal government. His work went beyond trial practice; his clients were often stymied by discriminatory federal laws, especially in the area of court jurisdiction, and Sonosky's efforts helped to remove barriers that prevented their full use of the federal courts.

Sonosky played a leading role in the effort by the Sioux to reclaim the Black Hills of South Dakota. The case had a long history: the Sioux had temporarily ceded title to the land to the federal government in 1876 under controversial circumstances. They began attempting to reclaim the land in the 1920s, but legal mismanagement stalled their claim until the late 1950s, when the Sioux turned to Sonosky and his colleague Arthur Lazarus.

Sonosky and Lazarus spent 24 years fighting the case in various courts, Congress, and even the White House. Legislative reform was necessary for their victory, and they helped change the Indian Claims Commission Act of 1946 (Ch. 959, § 1, Pub. L. No. 79-726 [omitted from 25 U.S.C.A. § 70 on termination of the commission on September 30, 1978, pursuant to Pub. L. No. 94-465, sec. 2, 90 Stat. 1990 (1976)]) as well as bring about passage of the Indian CIVIL RIGHTS ACT of 1968 (Pub. L. No. 90-284, tit. II, 82 Stat. 77 [codified at 25 U.S.C.A. §§ 1301–1303 (1988)]).

Their success was mixed. In 1980 the U.S. Supreme Court affirmed a judgment for the Sioux in the amount of $105 million (*Sioux Nation v. United States,* 602 F.2d 1157 [Ct. Cl. 1979], *aff'd.,* 448 U.S. 371, 100 S. Ct. 2716, 65 L. Ed. 2d 844 [1980]). Although the amount represented the largest judgment ever won by Native Americans against the federal government, the Sioux refused it, preferring return of the land to a monetary award. The attorneys, who had accepted the case on a contingency fee basis, received a $10 million legal fee from the federal Court of Claims.

In 1976 Sonosky established the firm of Sonosky, Chambers, Sachse, and Endreson in Washington, D.C. As one of the leading firms specializing in Indian law, its work includes LOBBYING, general tribal practice, mineral and natural resources issues, and representation of tribes before federal agencies. In 1982 Sonosky endowed the Marvin J. Sonosky Chair at the University of Minnesota. He remained active at his firm until his death on July 16, 1997, in Washington, D.C.

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CROSS-REFERENCES

Native American Rights.

## SONY CORP. OF AMERICA V. UNIVERSAL CITY STUDIOS

In *Sony Corp. of America v. Universal City Studios,* 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984), also known as the *Betamax* case, the U.S. Supreme Court determined that Sony, a manufacturer of videocassette recorders (VCRs) did not infringe on copyrights owned by Universal City Studios and Walt Disney Productions by manufacturing and marketing Betamax VCRs. (The Court's opinion uses the terms *videotape recorders* and *VTRs* in referring to VCRs.) Universal and Disney, which owned copyrights on many popular television programs in the late 1970s, sued Sony after Sony introduced its Betamax VCR in 1976. Universal and Disney claimed that the Copyright Revision Act (17 U.S.C.A. § 101 et seq. [1976]) did not permit home viewers to record their television

programs without their permission. The studios argued that Sony contributed to the copyright infringement by enabling and encouraging Betamax owners to record the copyrighted television programs.

The Supreme Court, in a 5–4 vote, determined that Sony did not infringe on the studios' copyrights by manufacturing and marketing Betamax VCRs. The decision, which analyzed difficult questions of copyright law, turned on two important legal concepts. First, the Court held that home recording of copyrighted television programs is a "fair use" of the copyrighted material and, thus, does not violate the Copyright Act. The Court's discussion of the "fair use doctrine" makes the *Betamax* case a landmark decision in copyright law. The Court also held that Sony was not liable for "contributory infringement" of the studios' copyrights. In other words, Sony was not liable to Universal and Disney for supplying television viewers with the means to record copyrighted television programs.

In 1976 Sony introduced the Betamax videocassette recorder. The Betamax was the first compact, affordable VCR available to consumers. Sony encouraged potential Betamax buyers to engage in "time-shift viewing" by recording television programs and viewing them later. Universal and Disney believed that the unauthorized recording of television programs by home viewers infringed on the copyrights they held on those programs. The studios filed suit in federal district court against Sony, Sony's U.S. subsidiary, Sony's advertising agency, four retailers of Betamax VCRs, and one individual Betamax owner.

The district court ruled against Universal and Disney, finding an implied exemption for home video recording in the 1976 Copyright Revision Act (*Universal City Studios, Inc. v. Sony Corp. of America,* 480 F. Supp. 429 [C.D. Calif. 1979]). The district court also held that Sony was not a contributory infringer of the studios' copyrights because it did not know that home video recording was an infringement when it manufactured and sold the VCRs. Most importantly, the district court held that home video recording was a fair use of the copyrighted television programs. Universal and Disney believed that the district court was the first court to hold that copying copyrighted material for mere entertainment or convenience could be a fair use, and they immediately appealed.

The Ninth Circuit Court of Appeals reversed the district court, holding that private home videotaping infringed on the studios' copyrights (*Universal City Studios, Inc. v. Sony Corp. of America,* 659 F. 2d 963 [1981]). The appeals court also determined that Sony was liable to the studios for contributory infringement because it knew that Betamax VCRs would be used to reproduce copyrighted programs. The Supreme Court agreed to hear Sony's appeal.

On January 17, 1984, the Supreme Court announced its decision reversing the Ninth Circuit court, holding that Sony had not infringed on copyrights held by Universal and Disney by manufacturing and marketing Betamax VCRs. The Court was sharply divided, and both Justice JOHN PAUL STEVENS, who wrote for the majority, and Justice HARRY A. BLACKMUN, who wrote for the dissent, issued lengthy opinions. As noted earlier, the *Betamax* case focused on two main issues: (1) whether home recording of copyrighted television programs constitutes a "fair use" of the copyrighted material, and (2) whether Sony committed "contributory infringement" by selling VCRs, thereby enabling VCR owners to copy the copyrighted television programs.

Article I of the U.S. Constitution grants Congress the power to pass laws to protect the works of "Authors and Inventors" from copying by others. Pursuant to this power, Congress created copyrights and PATENTS. To encourage creativity, Congress gave copyright holders the exclusive right to their creative works. The courts, however, have permitted reproduction of copyrighted works without the copyright holder's permission for a "fair use"; the copyright owner does not possess the exclusive right to a fair use. For example, a teacher may reproduce limited portions of a copyrighted book for the purpose of teaching without the permission of the author. This concept is referred to as the "fair use doctrine," which was codified by Congress in the Copyright Revision Act of 1976 (17 U.S.C.A. § 107). The *Betamax* decision is one of the most important cases interpreting this doctrine.

In determining that home recording of copyrighted television programs was a fair use under the copyright laws, the Supreme Court focused on the noncommercial nature of home recording. The Court stated that noncommercial use of copyrighted material is presumptively fair. The majority of the Court agreed

with the district court that home recording of copyrighted television programs simply does not harm the owners of the copyrights. The Court noted that television programs are broadcast free of charge and that Betamax VCRs enable viewers to watch programs they might otherwise miss. The Court also pointed out that copyright owners besides Universal and Disney had testified at trial that they did not object to the home recording of their television programs. Based on all of these factors, the Court held that home recording of copyrighted television programs constitutes a fair use of the copyrighted material.

Clearly, Sony was not itself infringing on the copyrights owned by Universal and Disney, regardless of whether home recording of television programs could be considered a fair use. Thus, the studios argued instead that Sony was liable for *contributory* infringement of their copyrights. The studios' theory was that Sony supplied the means for the copyright infringement and actively encouraged infringement through advertising. The Supreme Court rejected the studios' argument. The Court agreed that contributory infringement of a copyright could occur in certain circumstances; however, manufacturing and marketing the Betamax could not constitute contributory infringement because the Betamax was capable of a number of uses that did not infringe on any copyrights. As examples of non-infringing uses, the Court noted that many copyright owners did not object to having their television programs recorded. Also, the Betamax could be used to play rented or purchased tapes of copyrighted programs, thereby compensating the copyright holders for the right to view their works.

Justices Blackmun, THURGOOD MARSHALL, LEWIS F. POWELL JR., and WILLIAM H. REHNQUIST dissented in an opinion by Blackmun. First, the dissent found that home recording of copyrighted television programs was not a fair use of the copyrighted material. Blackmun stated that "when a user reproduces an entire work and uses it for its original purpose, with no added benefit to the public, the doctrine of fair use usually does not apply." Although the majority found no harm in allowing VCR owners to record copyrighted television programs, the dissent claimed that these recordings could harm the owners of the copyrights. The dissent pointed out, for example, that persons who tape television programs for later viewing are much more likely to skip through the commercials that ultimately pay for the television program, thereby potentially reducing advertising revenue. Also, the television ratings system, on which advertising prices are based, is unable to account for taped programs. The dissent further believed that Sony could be liable to the studios for contributory infringement of their copyrights, stating that "if virtually all of the product's use . . . is to infringe, contributory liability may be imposed." The dissent would have remanded the case to determine whether the Betamax VCRs were used primarily for infringing or non-infringing uses.

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CROSS-REFERENCES

Broadcasting; Intellectual Property.

## ♦ SOUTER, DAVID HACKETT

David Hackett Souter was appointed to the U.S. Supreme Court on July 25, 1990, by President GEORGE H. W. BUSH. Chosen by the Bush administration because of his conservative judicial style, Souter has proven to be a moderate justice whose personality and temperament have enabled him to build a centrist coalition that has garnered support from the Court's ideological extremes.

Souter was born on September 17, 1939, in Melrose, Massachusetts, six miles north of Boston. The only son of Joseph Souter, a bank manager, and Helen Souter, a gift store clerk, the future associate justice was remembered by his childhood friends as an intense, intelligent, and family-oriented person who was endowed with a sharp wit, but no athletic ability. At age eleven Souter and his parents moved to a ten-acre farm in the rural community of East Weare, New Hampshire.

In 1957 Souter graduated second in a class of two hundred at Concord High School where his classmates named him the most literary, most sophisticated, and most likely to succeed. During high school Souter was named president of the National Honor Society and coeditor of the yearbook. According to legend, the only time Souter got into trouble as a teenager was when he stayed past closing time at the local historical society.

After high school Souter attended Harvard University. Graduating magna cum laude with a philosophy major in 1961, Souter was inducted into Harvard's prestigious chapter of Phi Beta Kappa, considered by many to be the nation's highest undergraduate academic award. Souter wrote his senior thesis on Supreme Court Justice **OLIVER WENDELL HOLMES JR.**, which helped him earn a Rhodes Scholarship to study at Oxford University, where he received a bachelor's degree in **JURISPRUDENCE** in 1963.

Upon returning to the United States, Souter entered Harvard Law School, quickly developing a reputation as a serious student and an independent thinker. However, Souter was not prone to debate issues with his peers or volunteer in class. Although Souter was a solid law student, he graduated without academic honors and was not chosen for a place on the *Harvard Law Review,* Harvard's esteemed legal journal, which was a highly coveted position among the students.

In 1966 Souter joined Orr and Reno, a leading New Hampshire firm that handled corporate, probate, tax, and **FAMILY LAW** cases. Not feeling sufficiently challenged or stimulated by private practice, Souter went to work for the New Hampshire attorney general, ascending from assistant attorney general in 1968 to deputy attorney general in 1971 to attorney general in 1976. Souter did very little prosecuting during his tenure with the attorney general's office, directly handling only nine cases in ten years.

In 1978 Souter was appointed to the bench as a superior court judge in New Hampshire. Attorneys who appeared before Souter described him as an even-handed trial judge with a penchant for detail. Five years later Souter was elevated to the New Hampshire Supreme Court, where he authored more than two hundred opinions and established himself as an assertive judge who often questioned lawyers during oral arguments.

In February 1990 President Bush appointed Souter to the U.S. Court of Appeals for the First Circuit. Five months later, before Souter had written his first opinion as a federal judge, Bush appointed Souter to the U.S. Supreme Court. Subsequently confirmed by a Senate vote of 90–9, Souter became the 105th jurist to serve on the nation's highest court.

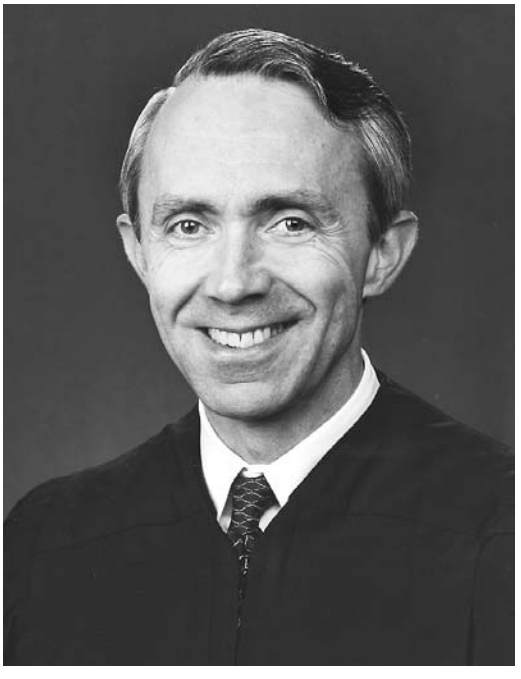

*David H. Souter.*
SUPREME COURT HISTORICAL SOCIETY

Souter disappointed those in the Bush administration who hoped he would provide the decisive fifth vote for the conservative wing of the Court, comprised of Chief Justice **WILLIAM H. REHNQUIST** and Associate Justices **ANTONIN SCALIA, CLARENCE THOMAS,** and **SANDRA DAY O'CONNOR**. Instead, Souter proved to be a temperate justice, with a mainstream judicial philosophy. He took some positions that upset conservatives and other positions that upset liberals.

Souter offended liberals when he voted to uphold federal regulations that prohibited doctors from providing **ABORTION** counseling at federally funded clinics, despite objections that such regulations violated the **FIRST AMENDMENT** (*Rust v. Sullivan,* 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 [1991]). Some liberals were again dismayed when Souter voted to affirm a state ban on nude dancing in *Barnes v. Glen Theatre,* 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991), even though four dissenting justices said the ban violated freedom of expression. Souter also regularly votes in favor of **CAPITAL PUNISHMENT**.

"[I]N THE FIELD OF STATE CONSTITUTIONAL LAW . . . IF WE PLACE TOO MUCH RELIANCE ON FEDERAL PRECEDENT WE WILL RENDER THE STATE RULES A MERE ROW OF SHADOWS; IF WE PLACE TOO LITTLE, WE WILL RENDER STATE PRACTICE INCOHERENT."
—DAVID H. SOUTER

On the other hand, many conservatives were distraught by Souter's concurring opinion in LEE V. WEISMAN, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992), which relied on the Establishment Clause of the First Amendment to declare unconstitutional a nonsectarian prayer delivered by a clergyman at a public high school graduation ceremony. In ROMER V. EVANS, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996), Souter joined the Court's majority opinion that relied on the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT to strike down a Colorado constitutional provision prohibiting all legislative, executive, and judicial action designed to protect homosexuals from discrimination. Many conservatives were also upset when Souter voted to invalidate the male-only admissions policy at the University of Virginia Military Institute because it discriminated against women who sought entrance to the school's citizen-soldier program (UNITED STATES V. VIRGINIA, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 [1996]).

Observers increasingly recognized Souter as the intellectual leader of the emerging moderate core of the Supreme Court. In a number of important decisions, Souter allied himself with Justices ANTHONY M. KENNEDY and O'Connor to forge an influential coalition that has been joined by members of the Court's ideological extremes. In this regard Souter has played a critical role in building a consensus of judicial philosophy among the Supreme Court justices.

In *Planned Parenthood v. Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), for example, the state of Pennsylvania asked the Supreme Court to overturn ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), the decision guaranteeing women the right to terminate their pregnancies under certain circumstances. After oral arguments, five justices—Rehnquist, Scalia, O'Connor, Kennedy, and BYRON R. WHITE—expressed serious reservations about the holding in *Roe.* Based on these reservations, Rehnquist was prepared to draft a majority opinion that would have gutted virtually every tenet in the 1973 precedent.

Before Rehnquist finished writing the opinion, however, Souter, O'Connor, and Kennedy met outside the presence of the other justices to discuss the case. Following this meeting, the three justices presented a joint opinion that affirmed the central holding of *Roe.* Neither the state nor federal governments, the joint opinion in *Casey* stressed, may pass laws that place an "undue burden" on a woman's right to have an abortion. Souter, O'Connor, and Kennedy drew support from the traditionally liberal JOHN PAUL STEVENS and HARRY A. BLACKMUN, who concurred in principle with the joint opinion, and from the traditionally conservative Rehnquist, who concurred in judgment.

### Opinions in the Early 2000s

As of mid-2003 Souter continued to occupy a pivotal seat on the Supreme Court, using his polite and friendly personality, his patient and contemplative temperament, and his diligent work ethic to earn respect and win support across the ideological spectrum. However, many

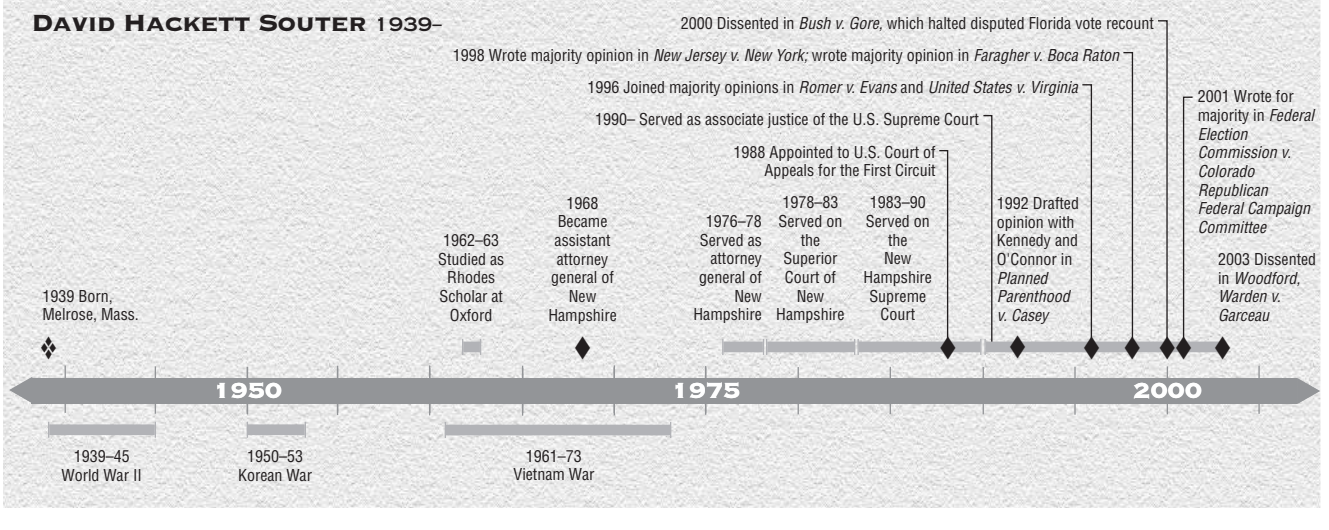

of his more noteworthy decisions between 1995 and 2003 came in a dissenting role.

For example, Souter dissented from a Supreme Court decision holding that a sentence of two consecutive terms of 25 years to life in prison under California's Career Criminal Punishment Act, also known as the Three Strikes Law, on a conviction of two counts of petty theft with a prior conviction, was neither contrary to, nor an unreasonable application of, clearly established federal law. *Lockyer v. Andrade*, 123 S.Ct. 1166, 155 L.Ed.2d 144 (U.S. 2003). The defendant had been convicted of stealing videotapes worth $154. The defendant "did not somehow become twice as dangerous to society when he stole the second handful of videotapes," Souter said. "His dangerousness may justify treating one minor felony as serious and warranting long incapacitation, but a second such felony does not disclose greater danger warranting substantially longer incapacitation," Justice Souter argued. If the defendant's sentence is not grossly disproportionate to his crime under the Eighth Amendment's proportionality analysis for determining whether a punishment is cruel and unusual, Souter concluded, the principle would have "no meaning" in any other case to which it might apply.

Souter also dissented from a majority ruling that officers may conduct a routine, suspicionless drug interdiction without informing bus passengers that they have the right not to cooperate and to refuse consent to searches. *United States v. Drayton*, 536 U.S. 194, 122 S.Ct. 2105, 153 L.Ed.2d 242 (U.S. 2002). The Court's decision expanded upon an earlier case holding that the **FOURTH AMENDMENT** permits police officers to approach bus passengers at random to ask questions and to request their consent to searches, provided a reasonable person would understand that he or she is free to leave. Souter conceded that "[a]nyone who travels by air today submits to searches of the person and luggage as a condition of boarding the aircraft," and that "is universally accepted that such intrusions are necessary to hedge against risks that . . . even small children understand." However, "the commonplace precautions of air travel have not, thus far, been justified for ground transportation . . . and no such conditions have been placed on passengers getting on trains or buses." There is therefore an air of unreality about the Court's explanation that bus passengers consent to searches of their luggage to "enhanc[e] their own safety and the safety of those around them," Souter wrote.

Many of Souter's recent dissenting opinions have earned him a growing reputation as a liberal-leaning justice who broadly interprets the constitutional rights of criminal defendants. However, Souter sided against the defendant in *Atwater v. City of Lago Vista*, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (U.S. 2001), where he wrote the majority opinion in a 5–4 decision holding that the Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine.

The case arose when a Texas police officer observed that a motorist driving a pickup truck, as well as her two children, were not wearing seatbelts. Souter rejected the motorist's contention that "founding-era common-law rules" forbade peace officers from making warrantless misdemeanor arrests except in cases of "breach of the peace," a category the motorist claimed was then understood narrowly as covering only those non-felony-level offenses "involving or tending toward violence." In the years leading up to American independence, Souter observed, Parliament repeatedly extended express warrantless search authority to cover misdemeanor-level offenses not amounting to or involving any violent breach of the peace. Souter refused to mint a new rule of **CONSTITUTIONAL LAW** forbidding custodial arrest, even upon **PROBABLE CAUSE**, when conviction could not ultimately carry any jail time and the government could show no compelling need for immediate detention.

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## SOUTHEAST ASIA TREATY ORGANIZATION

The Southeast Asia Treaty Organization (SEATO) was an alliance organized pursuant to

the Southeast Asia Defense Treaty to oppose the growing communist influence in Southeast Asia. The United States, the United Kingdom, France, Australia, New Zealand, Thailand, the Philippines, and Pakistan signed the treaty and accompanying Pacific Charter in Manila on September 8, 1954. The treaty became operative in February 1955 and bound the signatories to mutual aid to resist armed attack or subversion; an armed attack on one signatory was interpreted as a danger to all.

Headquartered in Bangkok, SEATO relied on the military forces of member nations rather than commanding its own standing forces, as did the NORTH ATLANTIC TREATY ORGANIZATION. In its first few years of operation, SEATO's effectiveness was not tested, but at the beginning of the 1960s, conflicts in South Vietnam and Laos challenged the strength of the alliance and ultimately found it lacking. France withdrew from military cooperation in SEATO in 1967, and Great Britain refused active military cooperation in the Vietnam conflict. Moreover, a 1960s dispute between Pakistan and India further undermined the efficacy of the alliance: Pakistan drew closer to communist China, while the United States provided aid to India.

In 1972 Pakistan completely withdrew from the alliance; in 1974 France suspended its membership payments. In September 1975 the signatories decided to phase out the operations, and SEATO was formally dissolved on June 30, 1977. The collective defense treaty remains in effect, however.

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## SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE

As a principal organization of the CIVIL RIGHTS MOVEMENT, the Southern Christian Leadership Conference (SCLC) championed the use of nonviolent direct action to end legal and social discrimination against African Americans. Identified strongly with its original leader, the Reverend MARTIN LUTHER KING JR., the SCLC organized and sponsored many protest marches and demonstrations during the late 1950s and the 1960s. Although the group's influence declined after King's assassination in 1968, the SCLC continues to work for the betterment of the lives of African Americans.

The SCLC emerged in the wake of a successful boycott of buses in Montgomery, Alabama, by the city's black citizens in 1955, which had led to a December 1956 Supreme Court ruling upholding the desegregation of those buses (*Gayle v. Browder,* 352 U.S. 903, 77 S. Ct. 145, 1 L. Ed. 2d 114). Prodded by African American social activist Bayard Rustin, who hoped to carry the Montgomery victory to the rest of the South, King and other clerics formed the Southern Negro Leaders Conference, forerunner of the SCLC, during a meeting in Atlanta in January 1957. King—who had gained national renown through his role as head of the Montgomery Improvement Association, the organizer of the bus boycott—was a natural choice to lead the group. Other early SCLC leaders included the Reverends Ralph D. Abernathy and Fred Shuttlesworth. Later in 1957, the group changed its name to the Southern Christian Leadership Conference.

The SCLC hoped to initiate Gandhian, nonviolent direct action throughout the South. It hoped that such action would secure racial desegregation, voting rights, and other gains for African Americans. Through this approach, the SCLC sought to take the CIVIL RIGHTS cause out of the courtroom and into the community, hoping to negotiate directly with whites for social change. As one of its first actions, the group led the 1957 Prayer Pilgrimage to Washington, D.C., which drew an estimated twenty-five thousand people. In 1959, it organized a youth march on Washington, D.C., that attracted forty thousand people.

Despite these successful marches, the SCLC was hampered by disorganization during its early years. It experienced difficulty in meeting many of its major goals during the late 1950s, particularly in voter registration. It charted a new course in the early 1960s, when it recruited leaders such as the Reverends Wyatt T. Walker and Andrew J. Young. Between 1960 and 1964, the number of full-time SCLC staff members grew from five to sixty, and the organization's effect on the civil rights movement reached its zenith.

The SCLC's growth allowed it to coordinate historic demonstrations that played a vital role

in the civil rights movement. In April 1963, the SCLC led protests and boycotts in Birmingham, Alabama, that prompted violent police repression. Television viewers around the United States were shocked at the violence they saw directed at the clearly peaceful demonstrators. The SCLC won the sympathy of the nation again in a difficult 1965 civil rights campaign in Selma, Alabama, which also drew a violent response from whites. These protests are widely credited with hastening the passage of the **CIVIL RIGHTS ACT OF 1964** (42 U.S.C.A. § 2000a et seq.) and the **VOTING RIGHTS ACT OF 1965** (42 U.S.C.A. § 1973 et seq.), laws that granted African Americans many of the gains they had been seeking.

By the mid-1960s, other African Americans began to question whether nonviolent direct action could achieve significant changes for their communities. More radical civil rights groups, notably the **STUDENT NONVIOLENT COORDINATING COMMITTEE** and the **CONGRESS OF RACIAL EQUALITY**, publicly renounced the nonviolent approach of the SCLC. They pointed to the poverty and de facto (actual) **SEGREGATION** experienced by African Americans in the northern cities, and argued that the SCLC's tactics were ineffective in the urban ghetto.

King and the SCLC were sensitive to such criticism, and increasingly began to focus their attention on the North. By 1967, the SCLC launched several new operations there: the Chicago Freedom Movement, Operation Breadbasket, and the Poor People's Campaign. It brought in young, new leaders, including a divinity student named **JESSE JACKSON**, to lead these efforts.

The SCLC suffered a staggering setback when King was assassinated in April 1968. The group had always been closely identified with the charismatic preacher, and his death cost it the vital leadership, publicity, and fund-raising he had provided. Abernathy became president of the organization. By 1972, the staff had declined to twenty and leaders such as Young and Jackson had moved on to other pursuits.

Joseph E. Lowery succeeded Abernathy as president of the SCLC in 1977. The Atlanta-based group has continued to work for the improvement of the lives of African Americans through leadership training and citizen education. It has also created campaigns to battle drug abuse and crime.

*Early leaders of the Southern Christian Leadership Conference, Revs. Martin Luther King Jr., Fred Shuttlesworth, and Ralph D. Abernathy speak at a press conference in Birmingham, Alabama, in May 1963.*

AP/WIDE WORLD PHOTOS

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**CROSS-REFERENCES**

Integration; Jim Crow Laws; NAACP; Parks, Rosa Louise McCauley.

## SOUTHERN POVERTY LAW CENTER

The Southern Poverty Law Center (SPLC) is an internationally known nonprofit organization that files **CLASS ACTION** lawsuits to fight discrimination and unequal treatment; it also tracks hate groups and runs a program to educate Americans about racism, anti-Semitism, and other forms of intolerance. The organization has received numerous awards and accolades for its work. It has also been the subject of vociferous attacks by racist and anti-Semitic groups as well as "white power" advocates.

Based in Montgomery, Alabama, the SPLC was founded in 1971 by attorneys Morris Dees and Joseph J. Levin Jr. along with CIVIL RIGHTS leader JULIAN BOND. Dees graduated from the University of Alabama Law School in 1960 and started a private law practice in the state's capitol city Montgomery. In 1967 Dees began to gain notoriety for being willing to handle unpopular civil rights cases. Levin, who had returned home from army service to join his father's law practice, indicated his interest in the type of cases Dees was handling. The two attorneys started a law practice that specialized in civil rights cases. Their practice eventually developed into the Southern Poverty Law Center. Levin functioned as legal director of the Center from 1971 to 1976. During that period Levin worked on more than 50 significant civil rights cases. Levin left the center in 1976 but continued his involvement with the Center serving as president and board chair. In 1996 Levin returned to Montgomery to become the center's chief executive officer. Julian Bond, a civil rights activist who co-founded the STUDENT NONVIOLENT COORDINATING COMMITTEE (SNCC) in 1960 and later served four terms on the board of the National Association for the Advancement of Colored People (NAACP), became the first president of the center. In 2003 he continued to serve as president emeritus.

The center has specialized in class action lawsuits that challenge SEGREGATION in numerous spheres. One case from the 1970s resulted in the election of 17 African American legislators to the Alabama General Assembly. Until 1972 there were no African Americans among the Alabama State Troopers. A lawsuit filed by the center that year resulted in a decision requiring the state to hire one qualified African American trooper for each Caucasian trooper hired until the former comprised 25 percent of the force. State officials fought the order and the case was litigated all the way to the U.S. Supreme Court. In 1987 the Court decided in favor of the plaintiffs. By 1995 opposition had ended and in 2003, the Alabama State Troopers had the highest percentage of minority officers of any state in the nation.

In 1976 the center challenged the inhumane conditions of Alabama prisons. Since prevailing in that case, the center has worked with state officials to reform the prison system. In 1995 the state reestablished a practice whereby prison inmates were shackled together as they worked along the state highways. The center sued the state and eventually obtained an agreement prohibiting the use of "chain gangs" in Alabama.

The center has also challenged Georgia state officials and their eligibility guidelines for providing services to children with learning disabilities as well as advocating for the provision of adequate care and health services for persons with mental retardation. In addition to LOBBYING for better care for emotionally disturbed children in foster care, the center has sought more assistance for adults with mental illness. The center also challenged Alabama's failure to provide MEDICAID recipients with medically necessary transportation. A federal court upheld the center's action, and in 1996 the state began operating a program that helped provide affordable transportation to more than 40,000 Medicaid recipients. Although this ruling was overturned on appeal, the state continued to provide non-emergency Medicaid transportation.

The center has also successfully fought for safer working conditions for employees of the Alabama's cotton mills, for fair housing treatment for African Americans in Alabama who faced RACIAL DISCRIMINATION when trying to lease apartments, for tax EQUITY in Kentucky, and for the removal of the Confederate battle flag from the dome of Alabama's state capitol building. Additionally, the center has waged and won major battles over the convictions of a number of cases where inmates in southern states have faced CAPITAL PUNISHMENT.

In response to the resurgence of the KU KLUX KLAN (KKK) in 1981, the center began to monitor hate activity. In the early 2000s the center's Intelligence Project was tracking the activities of more than 600 active hate groups including the KKK, Neo-Nazis, Black separatists, and other racist and extremist organizations. The center's quarterly periodical, *Intelligence Report*, provides comprehensive information on these groups to law enforcement agencies as well as the media and the general public. Center staff conduct training sessions regarding these groups for law enforcement agencies, schools, and community groups. In addition the center offers online hate-crime training on its Web site in conjunction with the Federal Law Enforcement Training Center and Auburn University Montgomery.

In addition to being the subject of continuous vitriolic attacks by extremist organizations,

whose activity it monitors, the center was the subject of strong criticism by Washington, D.C.-based writer Ken Silverstein. Writing in the November 2000 issue of *Harper's Magazine*, Silverstein accused the center of raising millions of dollars from fund-raising and investments but spending only a portion of the money raised on its civil rights programs. In 2003 the center continued to promote its "Teach Tolerance" campaign throughout the United States.

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CROSS-REFERENCES

Civil Rights; Civil Rights Acts; Discrimination; Ku Klux Klan.

## SOVEREIGN IMMUNITY

*The legal protection that prevents a sovereign state or person from being sued without consent.*

Sovereign immunity is a judicial doctrine that prevents the government or its political subdivisions, departments, and agencies from being sued without its consent. The doctrine stems from the ancient English principle that the monarch can do no wrong.

### Suits against the United States

In early American history, the courts supported the traditional view that the United States could not be sued without congressional authorization (**CHISHOLM V. GEORGIA**, 2 U.S. [2 Dall.] 419, 478, 1 L. Ed. 440 [1793]; *Cohens v. Virginia,* 19 U.S. [6 Wheat.] 264, 412, 5 L. Ed. 257 [1821]). This **IMMUNITY** applied to suits filed by states as well as individuals (*Kansas v. United States,* 204 U.S. 331, 27 S. Ct. 388, 51 L. Ed. 510 [1906]). Thus, for many years, those who had contract and **TORT** claims against the government had no legal recourse except through the difficult, inconvenient, and often tardy means of convincing Congress to pass a special bill awarding compensation to the injured party on a case by case basis.

The federal government first began to waive its sovereign immunity in areas of law other than torts. In 1855 Congress established the U.S. Court of Claims, a special court created to hear cases against the United States involving contracts based upon the Constitution, federal statutes, and federal regulations. In 1887 Congress passed the **TUCKER ACT** (28 U.S.C.A. §§ 1346 (a) (2), 1491) to authorize federal district courts to hear contractual claims not exceeding $10,000 against the United States. Other **SPECIAL COURTS** were later created for particular types of nontort claims against the federal government. The U.S. Board of General Appraisers was created in 1890 and was replaced in 1926 by the U.S. Customs Court, and the U.S. Court of Customs Appeals was created in 1909 and then replaced in 1926 by the U.S. Court of Customs and Patent Appeals. These courts handled complaints about duties levied on imports. The Board of Tax Appeals, created in 1924 to handle internal revenue complaints, was replaced in 1942 by the Tax Court of the United States.

Not until 1946, however, did Congress address the issue of liability for torts committed by the government's agencies, officers, or employees. Until 1946 civil servants could be individually liable for torts, but they were protected by sovereign immunity from liability for tortious acts committed while carrying out their official duties. But the courts were not always consistent in making that distinction.

Finally, in 1946 Congress passed the Tort Claims Act (28 U.S.C.A. §§ 1346(b), 2671–2678), which authorized U.S. district courts to hold the United States liable for torts committed by its agencies, officers, and employees just as the courts would hold individual defendants liable under similar circumstances. This general waiver of immunity had a number of exceptions, however, including the torts of **BATTERY**, **FALSE IMPRISONMENT**, false arrest, **MALICIOUS PROSECUTION**, **ABUSE OF PROCESS**, **LIBEL**, slander, **MISREPRESENTATION**, deceit, interference with contractual rights, tort in the fiscal operations of the Treasury, tort in the regulation of the monetary system, and tort in combatant activities of the armed forces in wartime.

By 1953 the U.S. Supreme Court had drawn distinctions under the Tort Claims Act between tortious acts committed by the government at the planning or policy-making stage and those

committed at the operational level. In *Dalehite v. United States,* 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953), the Supreme Court held that the Tort Claims Act did not waive sovereign immunity as to tortious acts committed at the planning stage; immunity applied only to torts committed at the operational stage.

Congress also waived sovereign immunity in cases seeking injunctive or other nonmonetary relief against the United States in a 1976 amendment to the Administrative Procedure Act (5 U.S.C.A. §§ 702–703).

### Suits against the States

The doctrine of sovereign immunity applies to state governments within their own states, but it was not initially clear whether states had immunity as to suits involving other states or citizens of other states. In the 1793 case of *Chisholm v. Georgia,* the U.S. Supreme Court permitted a North Carolina citizen to sue Georgia for property that Georgia had seized during the American Revolution. The states' strong disapproval of the Court's decision in *Chisholm* led to the prompt adoption of the ELEVENTH AMENDMENT to the U.S. Constitution in 1795. The Eleventh Amendment specifically grants immunity to the states as to lawsuits by citizens of other states, foreign countries, or citizens of foreign countries in the federal courts. This limitation was judicially extended to include suits by a state's own citizens in *Hans v. Louisiana,* 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890).

The U.S. Supreme Court still has jurisdiction to hear suits by one state against another. In addition, the courts have construed the Eleventh Amendment as permitting appellate proceedings in cases originally instituted by a state if the defendant asserted rights under the U.S. Constitution, statutes, or treaties (*Cohens v. Virginia*), or in cases against state officials alleged to have violated such rights (*Osborn v. Bank of the United States,* 22 U.S. [9 Wheat.] 738, 6 L. Ed. 204 [1824]). The latter category has resulted in extensive litigation in federal courts against state and local officers alleged to have violated the CIVIL RIGHTS ACT of 1871 (42 U.S.C.A. SECTION 1983). Claims brought under the act are not subject to sovereign immunity.

However, the FOURTEENTH AMENDMENT does allow Congress to abrogate state sovereign immunity. Section 5 grants Congress the enforcement power to advance the goals of the amendment, which include the guarantees of DUE PROCESS and EQUAL PROTECTION of the laws. Congress has used this power to apply modern CIVIL RIGHTS laws as well as patent and TRADEMARK LAWS to state governments. This power was not questioned until the mid-1990s, when the Supreme Court began to issue decisions that strike down the application of federal statutes to the state governments. In *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), the Court established a two-part test for determining whether Congress abrogated the states' immunity when enacting a particular statute. It ruled that absent a state's waiver, states retain their sovereign immunity unless (1) Congress unequivocally expressed its intent to abrogate the immunity, and (2) Congress acted pursuant to a valid exercise of its enforcement power under Section 5 of the Fourteenth Amendment. The Court held that, in order to satisfy the first prong of the test, Congress must make its intent to abrogate the States' immunity unmistakably clear.

The Court proceeded to apply this two-part test in a series of cases. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,* 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999), the Court ruled that the state of Florida could invoke its sovereign immunity to block federal lawsuits against it by a bank charging it with patent and trademark law violations. The Court found that Congress had clearly intended to abrogate state sovereign immunity but had failed to satisfy the second part of the test. The Court stated that "Congress must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." Because Congress had failed to identify a pattern of patent infringement by the states or a pattern of constitutional violations, the Eleventh Amendment barred the laws' application to the states.

The Supreme Court, in *Alden v. Maine,* 527 U.S 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999), ruled that a group of state employees could not sue their state employer using the provisions of the FAIR LABOR STANDARDS ACT (29 U.S.C.A. 201 et seq.). In *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), the Court found that the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C.A. §§621-634, did not apply to state governments. The ADEA could not be applied because under the second part of the *Seminole*

*Tribe* test, there must be a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Using this standard, the Court found that the ADEA was not "appropriate legislation." The Court noted that age is not a SUSPECT CLASSIFICATION under the Equal Protection Clause of the Fourteenth Amendment. Therefore, states may "discriminate on the basis of age without offending the Fourteenth Amendment if the age classification is rationally related to a legitimate state interest." The ADEA prohibited "substantially more state employment decisions and practices than would likely be held unconstitutional" under the equal protection, rational basis standard.

The Supreme Court also invalidated the application of part of the Americans with Disabilities Act (ADA), Pub. L. 101-336 (1990), to state government. In *University of Alabama v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001), the Court struck down ADA applicability to damage lawsuits involving alleged disability employment discrimination by state governments. Congress could only be authorized to include the states within ADA reach if it identified a history and pattern of unconstitutional employment discrimination against DISABLED PERSONS. However, the Court concluded that the legislative record "simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled." The Court asserted that Congress had published only a handful of incidents to support this conclusion. Absent a compelling historical pattern of discrimination, such as the RACIAL DISCRIMINATION against African Americans that justified the VOTING RIGHTS ACT OF 1965, the Court saw no merit in stripping states of their immunity from citizen lawsuits for money.

The Court continued its promotion of states' rights in *Federal Maritime Commission v. South Carolina State Ports Authority,* 535 U.S. 743, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002). In this case the Court demonstrated its continuing commitment to FEDERALISM by extending a state's sovereign immunity to federal ADMINISTRATIVE LAW proceedings. Though the case involved a fairly obscure federal commission, the Court's precedent could be extended to the many federal agencies and commissions that oversee the environmental and natural resources.

The Supreme Court did restrict Eleventh Amendment immunity, on procedural grounds, in *Lapides v. Board of Regents of the University System of Georgia,* 535 U.S. 613, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002). In this action the Court ruled that states could not claim Eleventh Amendment immunity when they voluntarily remove a case to federal court. By doing so the Court concluded that the state had voluntarily waived its immunity, thereby giving a plaintiff the chance to argue the merits of the case. The decision was likely to encourage states to litigate actions in state court if state law waives sovereign immunity.

In state court actions, immunity continues to be allowed in the absence of consent to be sued. Depending on the type of case, however, different levels of immunity may apply. Absolute immunity is generally allowed for judges and QUASI-JUDICIAL officers, such as prosecuting attorneys and PAROLE board members. For executive officers, immunity is a function of the amount of discretion they possess to make decisions and the circumstances in which they act (*Scheuer v. Rhodes,* 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 [1974]). But immunity has been denied to officials acting in excess of statutory authority (*Greene v. Louisville and Interurban Railroad Co.,* 244 U.S. 499, 37 S. Ct. 673, 61 L. Ed. 1280 [1917]) or under an unconstitutional statute (*Ex parte Young,* 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 [1908]). Immunity has been allowed when state property is involved or the state is an essential party for granting relief (*Cunningham v. Macon and Brunswick Railroad Co.,* 109 U.S. 446, 3 S. Ct. 292, 27 L. Ed. 992 [1883]).

Until a Supreme Court decision in 1979, it was generally assumed, and decided by a court in at least one case (*Paulus v. South Dakota,* 52 N.D. 84, 201 N.W. 867 [1924]), that a state's immunity must be recognized not only in its own courts but also in the courts of other states throughout the country. The U.S. Supreme Court addressed the issue in *Nevada v. Hall,* 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979). That case involved an employee of the University of Nevada who was driving in California on official business and injured a California resident in an automobile accident. The Supreme Court held that the common-law doctrine of sovereign immunity had not passed to the states when the United States was created; therefore, it is up to the states to decide whether to recognize

and respect the immunity of other states. Thus, the Supreme Court held in *Hall* that California could properly refuse to respect Nevada's sovereign immunity in the California courts.

Like the federal government, the states often relied on private laws to provide relief to specific individuals who would otherwise be unable to sue due to sovereign immunity doctrines. Recognizing that this arrangement was an inefficient and nonuniform way to provide relief from immunity doctrines, the states began to waive all or parts of their immunity from lawsuits. Many states created administrative bodies with limited capacity to settle claims against the state. Several states authorized suits against municipal corporations, counties, and school districts whose officers or employees injured individuals while performing proprietary, but not government, services. The distinction between proprietary and government services proved impossible to apply uniformly. Under modern law government services are widely considered to include police services, fire department services, and public education. Depending on the state involved, streets, sidewalks, bridges, parks, recreational facilities, electricity suppliers, gas suppliers, and airport functions can be considered either government or proprietary services.

As of 2003, most states had waived their immunity in various degrees at both the state and local government levels. Generally, state supreme courts first abolished immunity via judicial decisions; later, legislative measures were enacted at the state and local level to accept liability for torts committed by civil servants in the performance of government functions. The law varied by state and locality, however.

### Suits against Foreign Governments

Until the twentieth century, mutual respect for the independence, legal equality, and dignity of all nations was thought to entitle each nation to a broad immunity from the judicial process of other states. This immunity was extended to heads of state, in both their personal and official capacities, and to foreign property. In the 1812 case of *The Schooner Exchange v. M'Faddon,* 11 U.S. (7 Cranch.) 116, 3 L. Ed. 287, a ship privately owned by a U.S. citizen was seized in French waters by Napoleon's government and converted into a French warship. When the ship entered the port of Philadelphia, the original owner sought to regain title, but the Supreme Court respected the confiscation of the ship because it occurred in accordance with French law in French waters.

With the emergence of socialist and Communist countries after WORLD WAR I, the traditional rules of sovereignty placed the private companies of free enterprise nations at a competitive disadvantage compared to state-owned companies from socialist and Communist countries, which would plead immunity from lawsuits. European and U.S. businesses that engaged in transactions with such companies began to insist that all contracts waive the sovereign immunity of the state companies. This situation led courts to reconsider the broad immunity and adopt instead a doctrine of restrictive immunity that excluded commercial activity and property.

Western European countries began waiving immunity for state commercial enterprises through bilateral or multilateral treaties. In 1952 the U.S. STATE DEPARTMENT decided that, in considering future requests for immunity, it would follow the shift from absolute immunity to restrictive immunity. In 1976 Congress passed the Foreign Sovereign Immunities Act (28 U.S.C.A. § 1601 et seq.) to provide foreign nations with immunity from the jurisdiction of U.S. federal and state courts in certain circumstances. This act, which strives to conform to INTERNATIONAL LAW, prohibits sovereign immunity with regard to commercial activities of foreign states or their agencies or with regard to property taken by a foreign sovereign in violation of international law. Customary international law has continued to move toward a restrictive doctrine.

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Federal Tort Claims Act; Feres Doctrine; Immunity; Judicial Immunity; Section 1983; Tort Law.

## SOVEREIGNTY

*The supreme, absolute, and uncontrollable power by which an independent state is governed and from which all specific political powers are*

*derived; the intentional independence of a state, combined with the right and power of regulating its internal affairs without foreign interference.*

Sovereignty is the power of a state to do everything necessary to govern itself, such as making, executing, and applying laws; imposing and collecting taxes; making war and peace; and forming treaties or engaging in commerce with foreign nations.

The individual states of the United States do not possess the powers of external sovereignty, such as the right to deport undesirable persons, but each does have certain attributes of internal sovereignty, such as the power to regulate the acquisition and transfer of property within its borders. The sovereignty of a state is determined with reference to the U.S. Constitution, which is the supreme law of the land.

## SPANISH-AMERICAN WAR

The Spanish-American War of 1898 lasted only a few months. It resulted in a U.S. victory that not only ended Spain's colonial rule in the Western Hemisphere but also marked the emergence of the United States as a world power, as it acquired Puerto Rico, the Philippines, and Guam. THEODORE ROOSEVELT'S military exploits in Cuba catapulted him onto the national stage and led to the vice presidency and, ultimately, the presidency.

The conflict had its origins in Spain's determined effort in the 1890s to destroy the Cuban independence movement. As the brutality of the Spanish authorities was graphically reported in U.S. newspapers, especially Joseph Pulitzer's *New York World* and William Randolph Hearst's *New York Journal,* the U.S. public began to support an independent Cuba.

In 1897 Spain proposed to resolve the conflict by granting partial autonomy to the Cubans, but the Cuban leaders continued to call for complete independence. In December 1897, the U.S. battleship *Maine* was sent to Havana to protect U.S. citizens and property. On the evening of February 15, 1898, the ship was sunk by a tremendous explosion, the cause of which was never determined. U.S. outrage at the loss of 266 sailors and the sensationalism of the New York press led to cries of "Remember the *Maine*" and demands that the United States intervene militarily in Cuba.

President WILLIAM MCKINLEY, who had originally opposed intervention, approved an April 20 congressional resolution calling for immediate Spanish withdrawal from Cuba. This resolution precipitated a Spanish declaration of war against the United States on April 24. Congress immediately reciprocated and declared war on Spain on April 25, stating that the United States sought Cuban independence but not a foreign empire.

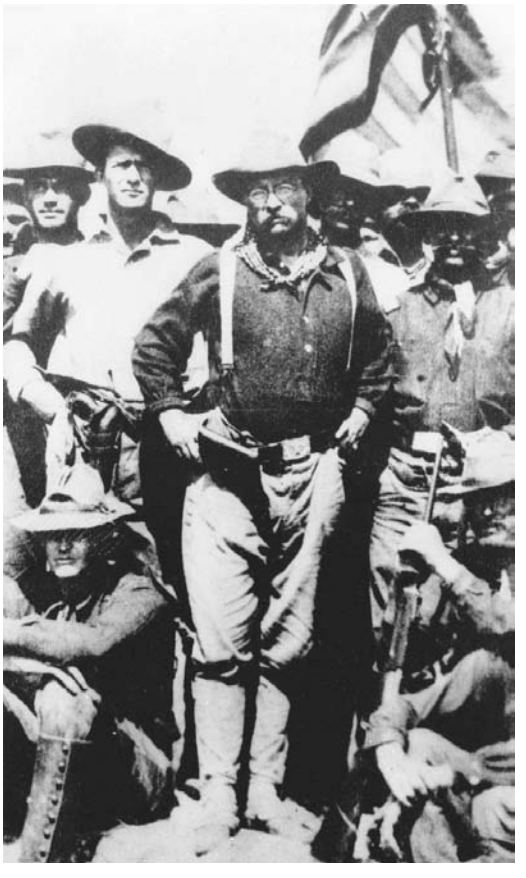

*Teddy Roosevelt emerged as one of the Spanish-American War's great heroes. He was photographed along with members of the First Volunteer Cavalry, the "Rough Riders," atop San Juan hill in 1898.*

AP/WIDE WORLD PHOTOS

The war itself was brief due to the inferiority of the Spanish forces. On May 1, 1898, the Spanish fleet in Manila Bay in the Philippines was destroyed by the U.S. Navy under the command of Commodore George Dewey. On July 3, U.S. troops began a battle for the city of Santiago, Cuba. Roosevelt and his First Volunteer Cavalry, the "Rough Riders," led the charge up San Juan Hill; he emerged as one of the war's great heroes. With the sinking of the Spanish fleet off the coast of Cuba on July 3 and the capture of Santiago on July 17, the war was effectively over.

An ARMISTICE was signed on August 12, ending hostilities and directing that a peace conference be held in Paris by October. The parties signed the TREATY OF PARIS on December 12, 1898. Cuba was granted independence, and

Spain agreed to pay the Cuban debt, which was estimated at $400 million. Spain gave the United States possession of the Philippines and also ceded Puerto Rico and Guam to the United States. Many members of the U.S. Senate opposed the treaty, however. They were concerned that the possession of the Philippines had made the United States an imperial power, claiming colonies just like European nations. This status as an imperial power, they argued, was contrary to traditional U.S. foreign policy, which was to refrain from external entanglements. The Treaty of Paris was ratified by only one vote on February 6, 1899.

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## SPECIAL APPEARANCE

*The act of presenting oneself in a court and thereby submitting to the court's jurisdiction, but only for a specific purpose and not for all the purposes for which a lawsuit is brought.*

A party makes a special appearance before a state court for the sole purpose of objecting to the court's jurisdiction over that party. If the party makes a general appearance to respond to the lawsuit, instead of a special appearance, then COMMON LAW dictates that the party thereby waives any objection to the court's jurisdiction over her. A party may object to the court's jurisdiction for a number of reasons, such as when SERVICE OF PROCESS was insufficient or defective, there is a variance between the complaint and the summons, or the lawsuit was brought in the wrong court. When a party wants to make a jurisdictional objection, she has the right to appear for the special purpose of making that objection, but according to common law, the party must clearly and specifically state to the court that she is specially appearing.

Rule 12(b) of the Federal Rules of Civil Procedure has abolished the distinction between general and special appearances for federal courts. Therefore, parties can raise a jurisdictional objection along with other defenses in a responsive pleading in federal court. However, if a party wishes to make the jurisdictional objection initially without having to prepare a full responsive PLEADING, the federal courts will permit that party to do so if he specially appears.

Some states have followed the Federal Rules of Civil Procedure and have eliminated for state court matters the distinction between general and special appearances. Many states still acknowledge the distinction, however, and some specifically provide for the distinction by statute.

## SPECIAL ASSESSMENT

*A real property tax proportionately levied on homeowners and landowners to cover the costs of improvements that will be for the benefit of all upon whom it is imposed.*

For example, a special assessment might be made to pay for sidewalks or sewer connections.

## SPECIAL COURTS

*Bodies within the judicial branch of government that generally address only one area of law or have specifically defined powers.*

The best-known courts are courts of general jurisdiction, which have unlimited trial jurisdiction, both civil and criminal, within their jurisdictional area. At the federal level, these are called district courts. At the state level, these courts have many different titles, including district court, trial court, county court, circuit court, municipal court, and superior court. Appellate courts of general jurisdiction review the decisions of inferior courts and are typically called either courts of appeal or supreme courts.

The bulk of U.S. courts, however, are special courts, which include all courts of limited and specialized jurisdiction that are not courts of general jurisdiction or appellate courts. A special court generally addresses only one or a few areas of law or has only specifically defined powers.

Special courts in the United States developed out of the English custom of handling different kinds of cases by establishing many different special courts. Many of the special courts established in the United States during colonial times and shortly after the Constitution was adopted have been abolished, but new special courts continue to be created, especially at the state and local level. Special courts now handle the vast majority of all cases brought in the United

States. The majority of all cases brought in any particular state jurisdiction go to special courts.

Special courts exist for both civil and criminal disputes. Cases tried in special, limited-jurisdiction criminal courts, such as traffic court or misdemeanor court, may be reheard in a general-jurisdiction trial court without an appeal upon the request of the parties.

Special courts do not include the many ADMINISTRATIVE LAW courts that exist at both the federal and state government level; administrative courts are considered part of the EXECUTIVE BRANCH, rather than the judicial branch. However, a general-jurisdiction court that hears only specific kinds of cases, such as a landlord-tenant branch of a general-jurisdiction trial court, is usually considered a special court.

Special courts differ from general-jurisdiction courts in several other respects besides having a more limited jurisdiction. Cases are more likely to be disposed of without trial in special courts, and if there is a trial or hearing, it is usually heard more rapidly than in a court of general jurisdiction. Special courts usually do not follow the same procedural rules that general-jurisdiction courts follow; often special courts proceed without the benefit or expense of attorneys or even law-trained judges.

The judges who serve in special courts are as varied as the special courts themselves. Most special court judges obtain their positions through election, rather than through the merit selection system common in general-jurisdiction courts. In addition, the majority of special court judges are not lawyers. In *North v. Russell*, 427 U.S. 328, 96 S. Ct. 2709, 49 L. Ed. 2d 534 (1976), the U.S. Supreme Court upheld the use of nonlawyer judges in special courts as constitutional as long as a trial de novo (a new trial) in a court of general jurisdiction with a lawyer-judge is given upon the request of the parties.

### State and Local Special Courts

The states and localities have created many special courts. Juvenile courts are special courts that have jurisdiction over delinquent, dependent, and neglected children. Juvenile courts have special rules to protect the privacy of the juveniles before them, such as requiring that only the initials and not the full names of juveniles be used in court paperwork so that their identities are not revealed to the public. Juvenile court proceedings are closed to the public, and generally the records are sealed.

Probate courts are special courts of limited jurisdiction that generally have powers over the probate of wills and the administration of estates. In some states probate courts are empowered to appoint guardians or approve the ADOPTION of minors.

Small-claims courts, called conciliation courts in some states, provide expeditious, informal, and inexpensive adjudication of small claims. The jurisdiction of small-claims courts is usually limited to the collection of small debts and accounts. In most states parties are allowed to represent themselves in small-claims court, and some states prohibit lawyers from representing the parties.

Many states have also established family courts that typically have jurisdiction over several types of cases, including CHILD ABUSE and neglect proceedings, child and spousal support proceedings, PATERNITY determinations, CHILD CUSTODY proceedings, juvenile delinquency proceedings, and marital dissolutions.

Several states have established tax courts that have jurisdiction to hear appeals in all tax cases and have the power to modify or change any valuation, assessment, classification, tax, or final order. Massachusetts is unique in that it has a land court with exclusive jurisdiction over all applications for registration of title to land within the commonwealth, writs of entry and various petitions for clearing title to real estate, petitions for determining the validity and extent of municipal ZONING ordinances and regulations, and all proceedings for foreclosure.

Some states still have justice's courts, inferior tribunals of limited jurisdiction presided over by justices of the peace. These courts are the primary legacy of the special courts of colonial times. Most states, however, have abolished justice's courts and transferred their powers and duties to courts of general jurisdiction.

Some cities have established mayor's courts in which the mayor sits with the powers of a police judge or magistrate with respect to offenses committed within the city, such as traffic or ordinance violations. In other states these courts are called police courts and are not presided over by the mayor.

### Federal Special Courts

Congress has established several special courts to adjudicate federal matters. ADMIRALTY courts are federal district courts that have jurisdiction over admiralty and maritime actions

pursuant to federal statute (28 U.S.C.A. § 1333). BANKRUPTCY courts are federal courts that are concerned exclusively with the administration of bankruptcy proceedings; they were also created pursuant to federal statute (28 U.S.C.A. § 1334). The U.S. TAX COURT tries and adjudicates controversies involving deficiencies or overpayments in income, estate, and gift taxes. U.S. magistrates try misdemeanor cases and conduct preliminary proceedings in civil and criminal proceedings.

The U.S. COURT OF APPEALS FOR VETERANS CLAIMS was created in 1988 to review decisions of the Board of Veterans' Appeals, which hears cases involving benefit programs for veterans and their dependents. Cases appealed from the Court of Veterans Appeals are heard by the U.S. court of appeals for the applicable federal circuit.

The U.S. Court of Federal Claims was created in 1982 to replace the former Court of Claims. Its powers are mandated by federal statute (28 U.S.C.A. §§ 1491 et seq.). The Claims Court has jurisdiction to render money judgments upon any claim against the United States based on the Constitution, a federal statute, or a federal regulation; any claim based on an express or implied contract with the United States; or any claim for liquidated or unliquidated damages in cases not sounding in TORT (not involving torts).

The Court of International Trade has jurisdiction over any civil action against the United States arising from federal laws governing import transactions. It also has jurisdiction to review determinations as to the eligibility of workers, firms, and communities for adjustment assistance under the Trade Act of 1974 (19 U.S.C.A. §§ 2101 et seq.). Insular courts are special courts created by Congress with jurisdiction over insular possessions (island territories) of the United States, such as Puerto Rico.

Military courts include courts-martial, courts of military review, the U.S. Court of Appeals for the Armed Forces, and the Military Court of Inquiry, These courts are designed to deal exclusively with issues arising under MILITARY LAW, which governs the armed forces. Courts-martial are ad hoc military courts, convened under authority of the UNIFORM CODE OF MILITARY JUSTICE (10 U.S.C.A. §§ 801 et seq.) to try and punish violations of military law committed by persons subject to that law. The courts of military review are intermediate appellate criminal courts, established by the Military Justice Act of 1968 (10 U.S.C.A. § 866) to review COURT-MARTIAL convictions of members of their respective ARMED SERVICES in which the punishment imposed extends to death, dismissal or punitive discharge, or confinement for one year or more. The U.S. Court of Appeals for the Armed Forces (USCAAF), formerly known as the Court of Military Appeals, which was created by Congress in 1950 (10 U.S.C.A. § 867), functions as the primary civilian appellate tribunal responsible for reviewing court-martial convictions of all the services. Cases heard by the Courts of Military Review may be appealed to the USCAAF; any appeals from that court are heard by the U.S. Supreme Court. The Military Court of Inquiry is a court of special and limited jurisdiction, convened to investigate specific matters and advise whether further proceedings should be pursued.

A Court for the Trial of Impeachments is a tribunal empowered to try any officer of government or other person brought to its bar by the process of IMPEACHMENT. At the national level, the Senate is the Court for the Trial of Impeachments of federal officers, and in most states the upper house of the legislature is the Court for the Trial of Impeachments of state officers.

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Federal Courts; Jurisdiction; Judiciary; Juvenile Law; Military Law; State Courts.

## SPECIAL DAMAGES

*Pecuniary compensation for injuries that follow the initial injury for which compensation is sought.*

The terminology and classification of types of damages is varied, at times contradictory, and

often confusing. The term "special damages" is one such term that can produce uncertainty, depending on the jurisdiction and context in which it is invoked.

Special damages are sought in lawsuits based on contract and TORT. They are asked for in addition to "general damages." These two types are classified as COMPENSATORY DAMAGES and are both designed to return persons to the position they were in prior to the alleged injury. For example, if a person was injured in an automobile accident, the victim could seek damages that would cover medical expenses, damage to the motor vehicle, and the loss of earnings now and in the future. Each of these would be classified as special damages. If the victim sought a money award for pain and suffering, mental anguish, and loss of consortium, these would be classified as general damages. Thus, special damages are based on measurable dollar amounts of actual loss, while general damages are for intangible losses that can be inferred from special damages as well as other facts surrounding the case. In this description special damages are damages that are reduced to a "sum certain" before trial. This description is typically used in tort actions.

However, the definitions of special and general damages are reversed in contractual disputes. Thus, general damages in contract would include the difference between contract and market prices, the difference between the value of the goods as delivered and as warranted, and interest on money that has been wrongfully withheld. In contrast, special damages would include all other damages. In contract special damages and "consequential" damages are virtually interchangeable. In this context the losses flowing out of the breached contract could be compensated for as special damages. For example, the lost profits that resulted from the failure of the seller to deliver the goods could be claimed as special damages. However, it is commonplace for sellers to require buyers to sign a contract excluding the recovery of special or consequential damages.

In addition, special damages are sometimes described in statutes when the legislature seeks to identify specific types of awards that are available when the state or a private person violates a person's rights. For example, a statute may list the special damages plaintiffs are entitled to if their real property is improperly taken through EMINENT DOMAIN.

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CROSS-REFERENCES

Lawsuit; Restitution.

## SPECIAL MASTER

*A representative of the court appointed to hear a case involving difficult or specialized issues.*

Special masters are officers of the court who serve in a QUASI-JUDICIAL role at the pleasure of the appointing court. Special masters are employed in complex civil actions where their expertise would assist the court in developing the record. In addition, special masters may be established by Congress to assist in the administration of claims against the government.

Rule 53 of the Federal Rules of Civil Procedure (FRCP) provides the authority for the appointment of special masters by U.S. District Courts. Because state civil procedure rules are modeled on the FRCP, similar authority is granted to state trial courts. Rule 53 defines the word *master* to include referees, auditors, examiners, and assessors. Special masters are compensated for their work. The court sets the rate of compensation, and the parties must pay these costs. However, when a federal magistrate judge serves as a master, no additional compensation is paid.

Reference of a case to a master "shall be the exception and not the rule" according to Rule 53. When a matter is to be tried before a jury, a referral to a special master is appropriate only if the issues are complicated. If a case is not to be tried before a jury, a special master is appropriate only when "some exceptional condition requires it." The Supreme Court, in *La Buy v. Howes Leather Company,* 352 U.S. 249, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957), ruled that court congestion that delayed cases for long periods did not, by itself, become an exceptional condition that justified the appointment of a special master. In addition, the complexity of the case must be extreme, as many fields of CIVIL LAW are complex. To rule otherwise would deprive parties of their right to a jury trial. Though the Court made the appointment of special masters

more difficult, lower courts have used masters when they could justify the complexity and exceptional nature of the case.

The appointing court may specify or limit the powers of the master and may also limit the issues the master considers. However, once given this appointing order the special master has the authority to regulate all proceedings and to compel the production of documents and other evidence. In addition, the master may put witnesses and parties under oath and may examine them. Once the evidence has been taken, the special master files a report with the appointing court. This report may contain findings of fact and conclusions of law. Once a master's report has been filed in a non-jury case, the court must accept the findings of fact unless they are clearly erroneous. In a jury action the master's findings are admissible as evidence of the matters found and may be read to the jury.

Special masters have been called upon to review and administer agreements made by parties through consent orders. Masters have helped federal courts run school districts and oversee prison systems that had been found to violate the rights of inmates. Environmental lawsuits have also been an area in which the courts have used special masters. In some lawsuits masters have been called upon to review a defendant's internal documents to see whether they may remain confidential because they are attorney-client work product.

Congress established the September 11 Victim Compensation Fund of 2001 to compensate the victims of the terrorist attacks and their families. Congress created the position of special master to administer the claims process. Attorney General JOHN ASHCROFT appointed Kenneth R. Feinberg to serve in that capacity. Feinberg has sole authority to determine what each claimant will receive. His rulings are not appealable to a court of law because claimants must waive this right when they apply to the fund for compensation. If they do not agree to this condition they must file a civil lawsuit against private parties they believe were negligent for the SEPTEMBER 11TH ATTACKS of 2001.

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CROSS-REFERENCES

Judge; Judiciary; Litigation.

## SPECIAL PROSECUTOR

See INDEPENDENT COUNSEL.

## SPECIAL TERM

*In court practice in some jurisdictions, a branch of the court system held by a single judge for hearing and deciding motions and equitable actions in the first instance.*

This type of term is called special to distinguish it from a general term, which is ordinarily held by three judges sitting en banc to hear appeals or to hear and determine cases brought during the regular session of the court.

## SPECIAL WARRANTY DEED

*A written instrument that conveys real property in which the grantor (original owner) only covenants to warrant and defend the title against claims and demands by him or her and all persons claiming by, through, and under him or her.*

In the special warranty deed, the grantor warrants that neither he nor anyone claiming under him has encumbered the property and that he will defend the title against defects arising under and through him, but no others.

A general warranty deed, in contrast, warrants and defends the title against all claims whatsoever by anyone. In some jurisdictions the special warranty deed is called a quitclaim deed, but in other jurisdictions they are different types of instruments.

## SPECIALIZATION

*A career option pursued by some attorneys that entails the acquisition of detailed knowledge of, and proficiency in, a particular area of law.*

As the law in the United States becomes increasingly complex and covers a greater number of subjects, more and more attorneys are

narrowing their practice to a limited field or fields. Even small-town general practitioners limit the range of matters they handle to some degree, if only out of practical necessity. Although specialization has become commonplace, the formal recognition and regulation of specialties are still controversial issues in the legal profession.

In the 1950s, the AMERICAN BAR ASSOCIATION (ABA) considered whether it should identify, recognize, and regulate legal specialists. In 1969, the ABA decided not to promulgate a national plan to regulate legal specialization until some initial specialization plans could be studied at the state level. In 1971, California became the first state to adopt a pilot specialization program. Florida adopted a designation plan in 1976, and Texas adopted a full certification plan in 1980. Several other states followed suit in the 1980s.

In the late 1970s, the ABA adopted several ethical and disciplinary rules in the *Moral Code of Professional Responsibility* that addressed some of the issues presented by attorney specialization. Disciplinary rule 2-102(5) restricted the headings that attorneys could list themselves under in telephone books or other directories. Disciplinary rule 2-102(6) allowed lawyers to list the areas of law in which they practiced but did not allow them to state that they specialized in those fields. Disciplinary rule 2-105 prohibited lawyers from holding themselves out as specialists in certain areas of law, except for patent and TRADEMARK lawyers in states that authorized and approved of those fields of specialization. Ethical consideration 2-14 also suggested that with the exception of ADMIRALTY, trademark, and patent lawyers, lawyers should not represent to the public that they are specialists with special training or ability.

Also in the late 1970s, the ABA House of Delegates adopted a resolution that recommended that several elements be included in any state specialization program. The ABA Standing Committee on Specialization began assisting states in defining and identifying specialty fields and in establishing basic regulatory guidelines.

In 1979, the ABA adopted the Model Plan of Specialization, which incorporated the earlier principles and guidelines developed by the Standing Committee on Specialization. The ABA reached a compromise between two popular types of specialization plans that had developed in the states: designation and certification plans. Designation plans established basic requisites for specialist recognition, such as a minimum number of years in practice and a minimum number of CONTINUING LEGAL EDUCATION classes, but did not review the expertise of the applicants through an examination. Under the designation plans, lawyers had to apply to designate themselves as specialists in a certain field, and that application had to be approved by the state. However, the standards were not very stringent.

In contract, certification plans required a prior review of the applicant's credentials, such as through a written examination, and also required certain minimum standards. Most certifying mechanisms required that applicants be licensed to practice law, be substantially involved in a particular area of law (such as devoting 25 percent of their practice to their specialty), and be involved in continuing LEGAL EDUCATION and peer review.

The growth of state specialization plans was boosted considerably after the U.S. Supreme Court's decision in *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977), in which the Court held that states cannot prevent lawyers from advertising. Court decisions since *Bates* have held that states may regulate attorney advertising to protect the public from false, misleading, or deceptive advertising. Many state specialization plans, therefore, were developed to regulate how lawyers portrayed themselves and their practice areas to the public through advertising and other communications.

In 1983, the ABA adopted the Model Rules of Professional Conduct, some of which addressed the issues presented by attorney specialization. Model rule 7.4, for example, provided that a lawyer could not state or imply that he was a specialist in any area, except admiralty, patent, or trademark law, unless he was specially certified or recognized under a formal state specialization plan. By that time attorneys were being certified by several national organizations, such as the National Board of Trial Advocacy (NBTA), which certified trial specialists. Because the states were not overseeing the specialization process, the issue arose as to whether attorneys certified by such organizations could call themselves specialists. The courts addressed this issue by suggesting that states either screen the certifying organizations or require them to issue disclaimers indicating that they were not authorized by the state.

In 1993, the ABA adopted a voluntary set of national standards for specialization, and established a process for accrediting private organizations that certify lawyers as specialists. National organizations authorized to certify specialists include the NBTA, the American Board of Certification, and the National Elder Law Foundation.

By the early 2000s, 18 states had formal plans for the recognition and regulation of legal specialties. That number continues to grow, as states adopt designation or certification plans, or some variation of the two. These plans recognize a number of specialty areas, including civil trial practice, criminal trial practice, FAMILY LAW, tax law, and real estate law. The ABA has drafted model standards for specialization in several other areas as well; these standards include the administrative procedures necessary to implement the plans.

Certification rules vary from state to state, but each lawyer must fulfill four major requirements to be deemed a certified specialist. He must provide evidence of substantial involvement in the specialty area and references from lawyers and judges. He must have completed 36 credit hours of specialty continuing legal education in the three years preceding the application. He must have been admitted to practice and be a member in good standing in one or more states. And, finally, he must be recertified at least every five years and be subject to revocation of the certification for failure to meet the program's requirements.

Despite the growing trend toward lawyer specialization, there is widespread opposition to formal specialization plans. Many lawyers feel that the state's interest in regulating claims of expertise is not as important as the individual's FIRST AMENDMENT right to advertise. Other lawyers, especially general practitioners, feel that the formal recognition of specialization detracts from the presumption that any lawyer licensed to practice law is competent to handle any legal problem. They also fear that formal specialization programs will lead to a class system, with general practitioners or nonspecialists relegated to a second-class status. Attorneys who practice in rural or isolated areas make the practical objection that due to their locations, they do not have access to enough continuing legal education opportunities to qualify as specialists.

Attorneys who support specialization plans argue that the plans lead to more competent lawyers by requiring specialists to attend many continuing legal education courses and to provide evidence of their expertise before being recognized as specialists. Some also argue that specialization plans lead to improved delivery of legal services to the public by providing more accurate information about lawyers and their specialties.

As lawyers advertise in increasing numbers, they are also finding more formats in which to advertise such as telephone books, radio, television, newspapers, journals, magazines, the INTERNET, direct mail, and billboards. Although advertising makes it easier for the public to find a lawyer and learn more about that lawyer, it can lead to MISREPRESENTATION or misunderstanding. Thus, in dealing with the issue of legal specialization, the legal profession is striving to reach a compromise between the need to protect the public from false or misleading advertisement and the First Amendment right of lawyers to advertise with minimal state regulation.

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CROSS-REFERENCES

Ethics, Legal; Legal Advertising.

## SPECIALTY

*A contract under seal.*

A specialty is a written document that has been sealed and delivered and is given as security for the payment of a specifically indicated debt. The term *specialty debt* is used in reference to a debt that is acknowledged to be due by an instrument under seal.

## SPECIFIC INTENT

*The mental purpose, aim, or design to accomplish a specific harm or result by acting in a manner prohibited by law.*

The term *specific intent* is commonly used in criminal and TORT LAW to designate a special state of mind that is required, along with a phys-

ical act, to constitute certain crimes or torts. Specific intent is usually interpreted to mean intentionally or knowingly. Common-law LARCENY, for example, requires both the physical act of taking and carrying away the property of another and the mental element of intent to steal the property. Similarly, common-law BURGLARY requires breaking and entering into the dwelling of another with an intent to commit a felony therein. These crimes and others that require a specific-intent element are called *specific-intent crimes* and are distinguished from *general-intent crimes.* General-intent crimes require only a showing that the defendant intended to do the act prohibited by law, not that the defendant intended the precise harm or the precise result that occurred.

Courts have defined specific intent as the subjective desire or knowledge that the prohibited result will occur (*People v. Owens,* 131 Mich. App. 76, 345 N.W.2d 904 [1983]). Intent and motive are commonly confused, but they are distinct principles and differentiated in the law. Motive is the cause or reason that prompts a person to act or fail to act. Intent refers only to the state of mind with which the act is done or omitted. Because intent is a state of mind, it can rarely be proved with direct evidence and ordinarily must be inferred from the facts of the case. Evidence of intent is always admissible to prove a specific-intent crime, but evidence of motive is only admissible if it tends to help prove or negate the element of intent.

Courts generally allow a wide range of direct and CIRCUMSTANTIAL EVIDENCE to be introduced at trial in order to prove the difficult element of criminal or tortious intent. In addition, the doctrine of presumed intent may be helpful in proving specific intent because it holds individuals accountable for all the NATURAL AND PROBABLE CONSEQUENCES of their acts.

A defendant may testify at trial as to his intent. Whether the defendant intended to break the law does not matter, however; rather, the issue is whether he intended to do that which is unlawful. For example, a defendant may maintain that he took money without permission in order to buy food for his hungry children and that he intended to repay the money. In such a case, the defendant's intent to repay the money does not negate the fact that he intentionally took money that did not belong to him without permission. In addition, it does not matter that he planned to feed his children with the money, because that is his motive in acting, not his intent.

An individual will be guilty or liable for a crime or tort if she had the intent to commit the crime or tort, even though the intended injury occurred in an unexpected way. For example, suppose that an assassin tries to shoot a person but misses and hits an automobile gasoline tank. If the tank explodes and kills the intended victim, the assassin is still guilty of murder even though the victim's death did not occur in the manner intended.

A defendant still possessed the element of intent even though his intended act could not possibly have succeeded as planned. Suppose, for example, that a burglar intended to break into a house and steal an original painting. Once he broke in, however, he discovered that the painting had been removed or that it was just a print and not an original painting at all. The burglar still had the necessary intent for burglary.

Because specific intent is an essential element in proving many torts and crimes, defendants often argue that they did not possess the specific intent required and therefore are not guilty or liable for the crime or tort committed. In fact, most jurisdictions recognize by statute or case law certain defenses to the formation of specific intent. For example, a defendant may argue that at the time a crime was committed she was intoxicated and that her mental impairment kept her from formulating the specific intent to commit the crime. Voluntary intoxication is not a defense to the commission of general-intent crimes, but in many jurisdictions it is a defense to specific-intent crimes. In other jurisdictions voluntary intoxication is never a defense to the commission of a crime. Most jurisdictions permit the defense of involuntary intoxication even if they do not recognize voluntary intoxication. Courts generally permit expert witness testimony on the issue of whether the defendant had the ability to form specific intent.

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CROSS-REFERENCES

Criminal Law; Tort Law.

## SPECIFIC LEGACY

*A gift by will of designated* PERSONAL PROPERTY.

A specific legacy is revoked if the testator—the maker of the will—no longer owned the property at the time of his or her death or the property no longer existed. In some jurisdictions, a court will continue a provision for a specific legacy as one for a demonstrative legacy if it is clear that the testator intended the heir to receive the gift in any event.

## SPECIFIC PERFORMANCE

*An extraordinary equitable remedy that compels a party to execute a contract according to the precise terms agreed upon or to execute it substantially so that, under the circumstances, justice will be done between the parties.*

Specific performance grants the plaintiff what he actually bargained for in the contract rather than damages (pecuniary compensation for loss or injury incurred through the unlawful conduct of another) for not receiving it; thus specific performance is an equitable rather than legal remedy. By compelling the parties to perform exactly what they had agreed to perform, more complete and perfect justice is achieved than by awarding damages for a breach of contract.

Specific performance can be granted only by a court in the exercise of its EQUITY powers, subsequent to a determination of whether a valid contract that can be enforced exists and an evaluation of the relief sought. As a general rule, specific performance is applied in breach of contract actions where monetary damages are inadequate, primarily where the contract involves land or a unique chattel (PERSONAL PROPERTY). Damages for the breach of a contract for the sale of ordinary personal property are, in most cases, readily ascertainable and recoverable so that specific performance will not be granted.

An important advantage to this remedy is that, since it is an order of an equity court, it is supported by the enforcement power of that court. If the defendant refuses to obey that order, she can be cited for criminal CONTEMPT and even imprisoned. The defendant can also be cited for civil contempt for continuing to refuse to obey the order and can be incarcerated until she agrees to obey it. In such a situation, it is said that "she has the keys to freedom in her pocket," which signifies that the defendant can release herself by complying with the court order. These enforcement powers are one of the principal reasons why plaintiffs seek specific performance of contracts.

### Right to Specific Performance

Specific performance is ordered only on equitable grounds in view of all the conditions surrounding the particular case. The determining factor is whether, in equity and good conscience, the court should specifically enforce the contract because the legal remedy of monetary damages would inadequately compensate the plaintiff for the loss.

### Valid Contract

The remedy of specific performance presupposes the existence of a valid contract between the parties to the controversy. The terms of the contract must be definite and certain. This is significant because equity cannot be expected to enforce either an invalid contract or one that is so vague in its terms that equity cannot determine exactly what it must order each party to perform. It would be unjust for a court to compel the performance of a contract according to ambiguous terms interpreted by the court, since the court might erroneously order what the parties never intended or contemplated.

### Plaintiff's Conduct

A plaintiff seeking specific performance of a contract must have contracted in GOOD FAITH. If the plaintiff has acted fraudulently or has taken unfair advantage of superior bargaining power in drafting extremely harsh contract terms with respect to the defendant, the plaintiff has thereby contravened the doctrine of clean hands. Under that doctrine, the court will deny relief to a party who has acted unjustly in regard to a transaction for which that party is seeking the assistance of the court.

A classic example of the clean hands doctrine involved Charles Flowers, an outstanding college football player who was drafted by the New York Giants and Los Angeles Chargers. In

November 1959, he signed to play football with the Giants. According to the college rules, however, any player who signed a contract to play for a professional team was ineligible for further intercollegiate games. Because Flowers wanted to play in the Sugar Bowl on January 1, 1960, he and the Giants agreed to keep his signing of the contract confidential, deceiving his college, the opposing team, and the football public in general. One of the terms of the contract provided that it was binding only when approved by the commissioner of football. Part of the plan was that the contract would not be submitted for approval until after January 1. Flowers subsequently attempted to withdraw from the contract, but the Giants promptly filed it with the commissioner, who approved it on December 15. Public announcement was withheld until after January 1.

On December 29, Flowers negotiated a better contract with the Chargers and signed it after the Sugar Bowl game. He notified the Giants on December 29 that he was withdrawing from his contract with them and returned his uncashed bonus checks. The Giants sought specific performance of their contract with Flowers. The court denied relief because the Giants did not come into equity with clean hands (*New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc.,* 291 F.2d 471 [5th Cir. 1961]).

Equitable relief will be denied to anyone who has acted unjustly or with bad faith in the matter in which she seeks relief, irrespective of any impropriety in the behavior of the defendant. The misconduct does not necessarily have to be of such nature as to be punishable as a crime or to justify any legal proceedings. Any intentional act concerning the CAUSE OF ACTION that violates the standards of fairness and justice is sufficient to prohibit the granting of equitable relief. The Giants club accepted from Flowers what it claimed to be a binding contract, but it agreed that it would represent to the public that there was no contract in order to deceive others who had a material interest in the matter. If there had been a straightforward execution of the contract, followed by its filing with the commissioner, none of these legal problems would have existed. The Giants created the situation by their devious conduct and, therefore, had no right to obtain relief from a court of equity. The court refused to specifically enforce the contract.

At all times, a plaintiff must be willing to "do equity," which means that the plaintiff must fulfill whatever equitable obligations the court imposes upon her in order to do what is just and fair to the defendant. A person will be granted specific performance only if that person has done, has offered to do, or is ready and willing to do all acts that were required of her to execute the contract according to its terms.

### Inadequate Legal Remedy

Specific performance will be denied where money would adequately compensate the plaintiff for the loss. The court determines whether money would be adequate after examining the subject matter of the contract itself. If it is land, money is inadequate because land is traditionally viewed as being unique, in that no two parcels of land are exactly alike. An award of damages will not enable the plaintiff to acquire the same parcel of land anywhere else.

If the contract involves the sale of ordinary chattels—such as furniture, appliances, or machinery—rather than land, the general measure of damages for breach of contract is the difference between the market price and the contract price. Damages are adequate since the item could be easily repurchased on the open market and the buyer would be compensated for the amount he was compelled to spend in excess of the original contract price. The UNIFORM COMMERCIAL CODE (UCC) (a body of law adopted by the states that governs commercial transactions) permits specific performance for the breach of a sales contract for goods under limited circumstances.

Specific performance will be granted where the contract involves a unique chattel; the court determines whether a chattel is unique. A rare stamp collection is a unique chattel for purposes of specific performance, whereas stock listed on the New York or American Stock Exchange is not unique. Antiques, heirlooms, or one-of-a-kind items are considered unique because money cannot replace their value to the plaintiff. The claim that an object has sentimental value to the plaintiff is not, in and of itself, sufficient to justify specific performance. When the sentiment or personal desire for the object is based upon facts and circumstances that endow the item with a special value so that it becomes a family heirloom, specific performance will be granted.

Damages are inadequate if the estimate is difficult to make, such as in a requirements contract—a written agreement whereby one party

assents to purchase from the other all the merchandise of a designated type that he might require for his business. The same principle applies where the chattel is scarce and cannot be readily repurchased on the open market even though it is not unique. Where the same contract combines unique and ordinary items, the entire contract will be specifically enforced.

As a general rule, breaches of personal service contracts are compensated at law by damages unless the services are unique. In such a case, the contract usually contains a negative covenant that prohibits a person from practicing her profession or performing those unique services for anyone else within a certain distance from a former employer for a specified period of time. The employer would seek to specifically enforce this negative COVENANT against the person who violates it. These provisions, sometimes called covenants not to compete, are enforced only if they are reasonable in scope; otherwise monetary damages are awarded. A court will never specifically enforce an employment contract by ordering an employee to work for an employer because the THIRTEENTH AMENDMENT to the Constitution prohibits SLAVERY.

Insolvency of the defendant, which prevents the plaintiff from collecting damages, does not determine whether specific performance will be granted. The court ascertains only whether an adequate legal remedy exists, not whether the defendant has the financial resources to pay the judgment.

### Supervision of Performance

As a general rule, equity will not order acts that it cannot supervise. In many instances, specific performance is denied where courts would be unduly burdened with the task of supervising the performance. Supervision is a particular problem in building or repair contracts because the court lacks the technical expertise, means, or agencies to learn exactly what tasks the contractor is performing or whether she is performing them properly.

There are, however, certain exceptions to this rule. If the plans for the building are clearly defined, or if there has been sufficient partial performance so that supervision of the remainder is not difficult, the court might grant specific performance for its completion. An attempt to enforce a building repair contract is more problematic for the court. It must initially determine what repairs are to be made and the time within which they are to be performed; then it must decide whether there has been substantial performance and, if not, whether the defendant had any excuse. Usually an adequate remedy at law exists in the form of damages that represent the excess of the construction cost paid over the original contract price. Where damages are inadequate, however, the court can order specific performance.

### Defenses

A contract that is unenforceable because it has not complied with the STATUTE OF FRAUDS (an old ENGLISH LAW, adopted in the United States, that requires certain contracts to be in writing) cannot be enforced through specific performance.

LACHES is an equitable defense (matter asserted to diminish a plaintiff's cause of action or to defeat recovery) that prevents the enforcement of a contract by specific performance. Laches is an unreasonable delay in asserting a right with the result that its enforcement would cause injury, prejudice, or disadvantage to others. Laches is applied only where enforcement of a right will cause injustice.

The doctrine of clean hands is a defense in an action for specific performance. As explained in the discussion of the case of Charles Flowers, a court will deny specific performance if the plaintiff has acted in bad faith or fraudulently in the same transaction for which he is seeking relief.

A contract might not be specifically enforced if, as a result of superior bargaining power, the plaintiff takes unfair advantage of the defendant who is in a debilitated position. This situation transpires when the consideration (the inducement to enter into a contract) is so inadequate as to "shock the conscience," or when "sharp dealings" are involved, such as where the defendant is ill. Failure to disclose material facts to the defendant that, if revealed, would have prevented a contract from being made is a ground to deny specific performance.

Mistakes and misrepresentations in the terms of a contract might constitute a defense against specific performance. If such mistakes are sufficient to justify RESCISSION of a contract, they are sufficient to prevent the enforcement of the contract. A court will enforce only a contract with definite and certain terms.

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## SPECULATIVE DAMAGES

*Alleged injuries or losses that are uncertain or contingent and cannot be used as a basis of recovery for* TORT *or contract actions.*

An individual cannot be compensated for mere speculative probability of future loss unless he can prove that such negative consequences can reasonably be expected to occur. The amount of damages sought in a lawsuit need not be established with absolute certainty provided they are anticipated with reasonable certainty. Where the plaintiff cannot establish with reasonable certainty that any injury resulted from the act of omission complained of, he might be entitled to recover nominal damages. Mere uncertainty concerning the measure or extent of damages does not preclude their recovery in either tort or contract cases.

When an individual seeks to recover COMPENSATORY DAMAGES, she must establish evidence of their nature and extent as well as some data from which they can be calculated. No extensive recovery can be founded upon guesswork alone. Recovery must be backed with evidence that justifies an inference that the damage award is a fair and reasonable form of compensation for the injury incurred. In addition, when compensatory damages can be proved with approximate accuracy and determined with some degree of certainty, it is essential that they be so proved. If evidence of damage from various causes exists, but no evidence is available as to the portion of damage that the defendant caused, the proof is too uncertain to allow the jury to award damages against the defendant.

## SPEECH, FREEDOM OF

See FREEDOM OF SPEECH.

## SPEECH OR DEBATE CLAUSE

Article I, Section 6, Clause 1, of the U.S. Constitution states in part,

> for any Speech or Debate in either House, [senators and representatives] shall not be questioned in any other place.

The purpose of the clause is to prevent the arrest and prosecution of unpopular legislators based on their political views.

The U.S. Supreme Court has gradually defined and redefined the Speech or Debate Clause in several cases over the years. The first case concerning the Speech and Debate Clause was *Kilbourn v. Thompson,* 103 U.S. (13 Otto) 168, 26 L. Ed. 377 (1880). The Court has interpreted the Speech or Debate Clause to mean that members of Congress and their aides are immune from prosecution for their "legislative acts." This does not mean that members of Congress and their aides may not be prosecuted. Rather, evidence of legislative acts may not be used in a prosecution against a member of Congress or a congressional aide.

The main controversy surrounding the Speech or Debate Clause concerns the scope of the phrase "legislative acts." The phrase obviously encompasses speeches and debates on the floor of the Senate or the House of Representatives. According to the Supreme Court, voting, preparing committee reports, and conducting committee hearings also are legislative acts, but republishing legislative materials for distribution to constituents and accepting a bribe to influence a vote are not.

Legislators and their aides have invoked the Speech or Debate Clause with varying results. In May 1994 former Illinois congressman Daniel Rostenkowski was indicted for allegedly devising schemes to defraud the federal government of money and Rostenkowski's fair and honest services. Rostenkowski argued in part that he could not be prosecuted for misappropriating a Clerk Hire Allowance by using it to pay employees for personal services rather than for official work because the allowance was connected with hiring a clerk, which is a legislative activity. In *United States v. Rostenkowski,* 59 F.3d 1291 (D.C. Cir. 1995), the U.S. Court of Appeals for the District of Columbia rejected this argument, noting that the indictment had not charged that the persons who performed the personal services had any relationship whatsoever to the legislative process.

In contrast, the clerk of the House of Representatives and other House personnel have been shielded from an employment discrimination suit by the Speech or Debate Clause. In *Browning*

*v. Clerk, U.S. House of Representatives,* 789 F.2d 923 (D.C. Cir. 1986), the U.S. Court of Appeals for the District of Columbia Circuit held that the clerk and other House personnel did not have to answer to charges of employment discrimination brought by an official House reporter because the employee's duties were directly related to the legislative process.

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CROSS-REFERENCES

Congress of the United States.

## SPEECH PLUS

*A form of expression in which behavior is used by itself or in coordination with written or spoken words to convey an idea or message.*

Speech plus, which is known as SYMBOLIC SPEECH, involves the communication of ideas through the combination of language and action—such as the burning of a draft card while stating opposition to the military—as opposed to pure speech, which involves the use of written or oral words alone. Like any other mode of expression, speech plus may be entitled to protection from interference by the government pursuant to the guarantee of the FIRST AMENDMENT to the Constitution, depending upon the nature of the expression, the circumstances in which it is expressed, and the danger it poses to society. Speech plus is often called *speech plus conduct.*

CROSS-REFERENCES

Freedom of Speech.

## SPEED, JAMES

James Speed served as U.S. attorney general under President ABRAHAM LINCOLN.

Speed was born March 11, 1812, in Jefferson County, Kentucky. He was the son of Kentucky pioneers John Speed and Lucy Gilmer Fry Speed and counted among his ancestors a Revolutionary War hero (Captain James Speed) and an English historian (John Speed). Speed attended local schools and then St. Joseph's College, Bardstown, Kentucky. After graduating from St. Joseph's in 1828, he was employed for several years as a clerk in the local circuit and county courts. Finding he had an interest in the law, in 1831, he enrolled at Transylvania University, in Lexington, Kentucky, for further study.

In 1833 he moved to Louisville, Kentucky, and opened a law office. He was also offered—and accepted—a teaching position at Louisville University. While living in Louisville, Speed met and married Jane Cochran, the daughter of a local wholesale merchant. With her encouragement, he ran for a seat in the state legislature and was elected in 1841. However, his antislavery opinions proved to be unpopular with many of his constituents, and he left the legislature after one term to resume teaching.

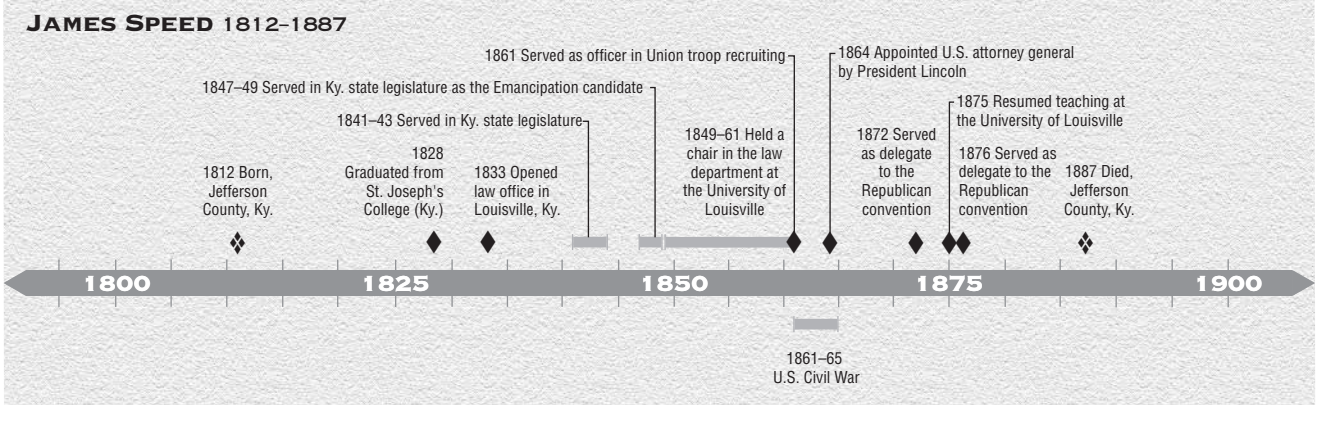

Speed entered politics again in 1847. He was elected to the state legislature as the Emancipation candidate, then lost his seat in 1849 to a pro-slavery rival. Speed's early political fortunes in his home state were closely tied to Kentucky's internal pre–Civil War struggle over SLAVERY. As a border state, it experienced frequent shifts in the balance of power and popular opinion, between antislavery and pro-slavery forces.

In the years between his 1849 defeat and the beginning of the Civil War, Speed held a chair in the law department at the University of Louisville. There, he developed a reputation as a man of integrity and ability—even among those who disagreed with his antislavery views. When President Lincoln needed help to hold Kentucky in the Union at the outbreak of the war, he called on Speed.

Lincoln and Speed had met as young men and maintained a close friendship throughout the years. Speed's younger brother, Joshua Fry Speed, was also a confidant of Lincoln's and acted as the president's emissary with the Southern states on a number of occasions before and during the war. Kentucky's refusal to join the Confederacy can be largely attributed to the efforts of the Speed brothers.

When the Civil War began, Speed honored President Lincoln's request to recruit Union troops from Kentucky. He acted as the mustering officer in 1861 for the first call for Kentucky volunteers. Throughout the war, Speed worked tirelessly for the Union cause. In 1864 he was rewarded for his loyalty when Lincoln named him U.S. attorney general.

At the close of the war, Speed initially held a moderate view of how the Union should deal with the secessionists. But the assassination of President Lincoln caused him to develop a less forgiving stance, a tougher, Radical Republican position. After the assassination, Speed maintained that "the rebel officers who surrendered to General Grant have no homes within the loyal states and have no right to come to places which were their homes prior to going into rebellion." And in an 1865 opinion, Speed concluded that in killing Lincoln, John Wilkes Booth had acted as a public enemy on behalf of the Confederacy. He recommended that Booth and his accomplices be tried for their offenses by a military tribunal rather than a civil court.

Speed resigned his cabinet post in 1866 when he found himself opposed to the policies of President ANDREW JOHNSON. Afterward, he toured the United States speaking about his friendship and professional association with the late president Lincoln.

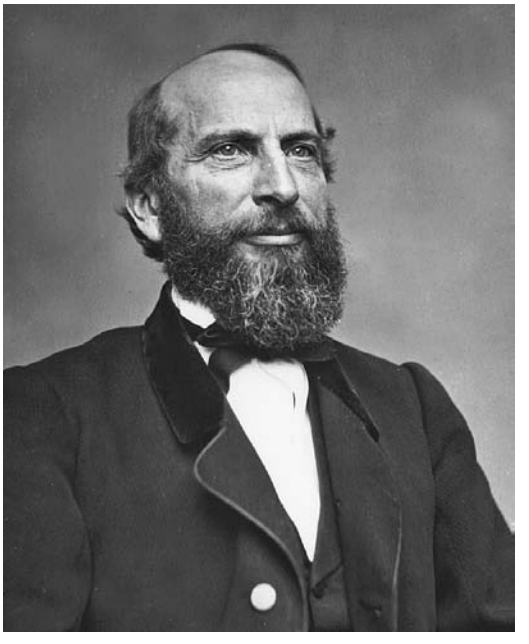

*James Speed.*
LIBRARY OF CONGRESS

Speed resumed his teaching duties at the University of Louisville in 1875. He continued to play a role in state and national politics, acting as a delegate to the Republican conventions of 1872 and 1876. His last public appearance was on May 4, 1887, when he delivered to the Loyal League of Cincinnati a speech on his association with Lincoln and his lifelong efforts to preserve the Union. Speed died at his home in Jefferson County, Kentucky, on June 25, 1887.

"PEACE IS THE NORMAL CONDITION OF A COUNTRY, AND WAR ABNORMAL, NEITHER BEING WITHOUT LAW, BUT EACH HAVING LAWS APPROPRIATE TO THE CONDITION OF SOCIETY."
—JAMES SPEED

## SPEEDY TRIAL

The SIXTH AMENDMENT to the U.S. Constitution guarantees all persons accused of criminal wrongdoing the right to a speedy trial. Although this right is derived from the federal Constitution, it has been made applicable to state criminal proceedings through the U.S. Supreme Court's interpretation of the DUE PROCESS and EQUAL PROTECTION Clauses of the FOURTEENTH AMENDMENT.

The right to a speedy trial is an ancient liberty. During the reign of HENRY II (1154–1189), the English Crown promulgated the Assize of Clarendon, a legal code comprised of 22 articles, one of which promised speedy justice to all litigants. In 1215 the MAGNA CHARTA prohibited the king from delaying justice to any person in the realm. Several of the charters of the Ameri-

can colonies protected the right to a speedy trial, as did most of the constitutions of the original 13 states.

The Founding Fathers intended the Speedy Trial Clause to serve two purposes. First, they sought to prevent defendants from languishing in jail for an indefinite period before trial. Pretrial incarceration is a deprivation of liberty no less serious than post-conviction imprisonment. In some cases pretrial incarceration may be more serious because public scrutiny is often heightened, employment is commonly interrupted, financial resources are diminished, family relations are strained, and innocent persons are forced to suffer prolonged injury to reputation.

Second, the Founding Fathers sought to ensure a defendant's right to a fair trial. The longer the commencement of trial is postponed, the more likely it is that witnesses will disappear, memories will fade, and evidence will be lost or destroyed. Of course, both the prosecution and the defense are threatened by these dangers, but only the defendant's life, liberty, and property are at stake in a criminal proceeding.

The right to a speedy trial does not apply to every stage of a criminal case. It arises only after a person has been arrested, indicted, or otherwise formally accused of a crime by the government. Before the point of formal accusation, the government is under no Sixth Amendment obligation to investigate, accuse, or prosecute a defendant within a specific amount of time.

Nor does the Speedy Trial Clause apply to post-trial criminal proceedings, such as PROBATION and PAROLE hearings. If the government drops criminal charges during the middle of a case, the Speedy Trial Clause does not apply unless the government later refiles the charges, at which point the length of delay is measured only from the time of refiling. However, the fairness requirements of the Due Process Clause apply during each juncture of a criminal case, and an unreasonably excessive delay can be challenged under this constitutional provision even if the delay occurs before formal accusation or after conviction.

The U.S. Supreme Court has declined to draw a bright line separating permissible pretrial delays from delays that are impermissibly excessive. Instead, the Court has developed a BALANCING test in which the length of delay is just one factor to be considered when evaluating the merits of a speedy trial claim. The other factors to be considered by a court include the reason for the delay, the severity of prejudice suffered by the defendant from the delay, and the stage during the criminal proceedings at which the defendant asserted the right to a speedy trial.

A delay of at least one year in bringing a defendant to trial following arrest will trigger a presumption that the Sixth Amendment has been violated, with the level of judicial scrutiny increasing in direct proportion to the length of delay. A longer delay may be deemed constitutional, however, and a shorter delay may be deemed unconstitutional, depending on the circumstances.

Longer delays will be permitted to accommodate the schedules of important witnesses, and to allow the prosecution to prepare for a complex case. Longer delays will also be tolerated when a defendant is dilatory in asserting the right to a speedy trial. In general, defendants must assert their Sixth Amendment right in a timely motion before the trial court. If the defendant fails to assert the right in this manner or acquiesces in the face of protracted pretrial delays, she or he may not raise the issue for the first time on appeal, unless the defendant's failure to raise the issue earlier was due to her or his attorney's NEGLIGENCE. Defendants who delay prosecution by inundating the trial court with frivolous pretrial motions are also treated as having forfeited their rights to a speedy trial. The law does not allow defendants to profit from their own wrong under these circumstances.

Delays shorter than a year will be ruled unconstitutional if the reason for delay offered by the prosecution is unpersuasive or inappropriate. Delays attributable to prosecutorial misconduct, such as the deliberate attempt by the government to delay a proceeding and hamper the defense, will run afoul of the Speedy Trial Clause. Prosecutorial negligence, such as misplacing a defendant's file or losing incriminating evidence, is also considered an inappropriate reason for delay. Additionally, delays shorter than a year will be deemed unconstitutional when the delay has severely limited the opportunity for the accused to defend himself. For example, the death of an alibi witness who would have been available for a timely trial is considered PRIMA FACIE evidence of prejudice under the Speedy Trial Clause.

Despite the strictures of the Speedy Trial Clause, criminal justice has not always moved

swiftly in the United States. During the 1970s federal courts had backlogs of thousands of cases on their dockets. Lengthy pretrial delays clogged local jails at great expense to taxpayers. Increasing numbers of defendants were jumping bail while free during extended pretrial release. In 1974 Congress enacted the Speedy Trial Act (18 U.S.C.A. §§ 3161 et seq.) to ameliorate the situation.

Unlike the balancing test created by the Supreme Court to evaluate a claim under the Speedy Trial Clause, the Speedy Trial Act establishes specific time limits between various stages of federal criminal proceedings. The act requires federal authorities to file an information or indictment within 30 days of a defendant's arrest. A prosecutor who knows that an accused is incarcerated at the time of indictment must take immediate steps to initiate prosecution. If a defendant enters a plea of not guilty, trial must commence within 70 days from the filing of the information or indictment or 70 days from the first appearance of the accused in court, whichever is later.

Certain types of delays are exempted from the act's time limitations. For example, the act exempts delays caused by the absence of the defendant, the unavailability of an essential witness, or the conduct of a codefendant. Delays resulting from a defendant's involvement in other legal proceedings are typically exempted as well. Additionally, the act gives courts discretion to grant the prosecution a CONTINUANCE in the interests of justice. Courts are also given discretion to dismiss charges when a defendant suffers prejudice from a pretrial delay that is of a kind not exempted under the act.

The Speedy Trial Act has been held to apply to both citizens and non-citizens alike. See *United States v. Restrepo*, 59 F. Supp. 2d 133 (D. Mass. 1999). However, since the SEPTEMBER 11TH ATTACKS in 2001, the United States has sought to enhance the abilities of immigration officials and other law enforcement officers to prevent further terrorist attacks. Under the USA PATRIOT ACT OF 2001, Pub. L. No. 107-56, 115 Stat. 272, the attorney general may certify a non-citizen as a terrorist if reasonable grounds exist to believe that the non-citizen has been engaged in terrorist activities. If the attorney general certifies the non-citizen as a terrorist, the act mandates the detention of the non-citizen. If the terrorist is deemed to be a threat to national security, or if emergency or other extraordinary circumstances are present, the federal government may detain the person for six months or longer. Accordingly, a suspected terrorist could be detained for a significant period of time without criminal charges or deportation proceedings brought against the suspect.

Many state jurisdictions have passed legislation similar to the Speedy Trial Act. Like the federal act, most state legislation permits courts to provide prosecutors with additional time upon a showing of exceptional circumstances. Most state laws also authorize courts to dismiss charges that have not been brought within a reasonable amount of time following arrest or indictment. Thus, these defendants faced with an unreasonable pretrial delay have a number of constitutional and statutory provisions that may provide them with effective relief.

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CROSS-REFERENCES

Criminal Law; Criminal Procedure; Due Process of Law; Incorporation Doctrine.

## SPENDING POWER

*The power of legislatures to tax and spend.*

Spending power is conferred to state and federal legislatures through their constitution. JUDICIAL REVIEW of legislative spending varies from state to state, but the law of federal spending informs courts in all states.

The power of the U.S. Congress to tax and spend for the GENERAL WELFARE is granted under Article I, Section 8, Clause 1, of the U.S. Constitution: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." This clause is known as the Spending Power Clause or the General Welfare Clause. The Spending Power Clause does not grant to Congress the power to pass all laws for

the general welfare; that is a power reserved to the states under the TENTH AMENDMENT. Rather, it gives Congress the power to control federal taxation and spending.

Before 1913, federal spending was relatively minuscule and was generally reserved for military support in time of war. Federal revenues were generated through tariffs on imports, excise taxes on certain activities and professions, and state and local property taxes. In 1913, the States ratified the SIXTEENTH AMENDMENT to the Constitution, which guaranteed to Congress the power to lay and collect income taxes on individuals. The federal INCOME TAX, hailed for its uniformity and fairness, paved the way for a massive expansion in the scope of the federal government.

Federal spending increased dramatically in the 1930s. Congress created new federal agencies and spending programs to manage the economic effects of the Great Depression, and the U.S. Supreme Court was forced to decide a spate of challenges to federal spending programs.

In 1936, the Court construed the Spending Power Clause as giving Congress broad power to spend for the general welfare (*United States v. Butler,* 297 U.S. 1, 56 S. Ct. 312, 80 L. Ed. 477). According to the *Butler* decision, under the Spending Power Clause Congress was not limited to spending money to carry out the direct grants of legislative power found elsewhere in the Constitution; rather, it could tax and spend for what it determined to be the general welfare of the country. Because Congress has discretion to determine what is the general welfare, no court since *Butler* has ever invalidated a federal spending program on the ground that the general welfare of the country was not being promoted.

There are circumstances, however, when congressional spending power receives serious scrutiny. One example is when Congress seeks to withhold federal funds from states that refuse to enact laws consistent with federal mandates. Incident to the Spending Power Clause, Congress may condition a state's receipt of federal revenues on the fulfillment of certain criteria. For example, assume Congress wants all schoolteachers to obtain a master's degree. The Constitution does not grant Congress the power to pass a law to that effect. However, Congress may appropriate federal money that states can obtain if they enact legislation requiring a master's degree.

When Congress allocates conditional funding, it must do so unambiguously, so that states and other affected parties are adequately advised of their choices and are aware of the consequences of noncompliance. Conditional federal spending must relate to a national interest, as opposed to state, local, or individual interests. Finally, conditional spending may be invalidated if it is excessively coercive. For example, withholding of an excessively high percentage of federal funds may be invalidated by a court.

According to many constitutional scholars, conditional federal spending is a violation of state sovereignty over matters reserved to the states. Without a meaningful check on conditional federal spending, Congress can withhold federal benefits from states under the Spending Power Clause on any rational condition it desires. This has the effect of creating one central government, a system that was repugnant to the Framers of the Constitution when not properly balanced with the rights of state governments. Indeed, THOMAS JEFFERSON predicted that the Spending Power Clause would reduce the Constitution "to a single phrase, that of instituting a Congress, with power to do . . . whatever evil they pleased." Proponents of conditional federal funding argue that it does not force states to change their laws, and that states are free to forgo the receipt of some federal funds in order to retain their autonomy.

Nevertheless, conditional federal spending has been used in a number of ways to persuade states to change their laws. For example, Congress frequently uses highway funds to encourage changes in traffic-safety related statutes. In *South Dakota v. Dole,* 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987), the U.S. Supreme Court reviewed a federal statute authorizing the U.S. secretary of transportation to withhold a percentage of federal highway funds from states that refused to raise the legal drinking age to 21. According to the Court, the federal government's interest in a uniform drinking age related to highway safety because, in part, young persons in states with higher drinking ages were driving to border states with lower drinking ages. The conditional spending was upheld because it had a federal purpose (improving interstate highway safety) and the condition (establishing a uniform legal drinking age) was related to the spending purpose.

Congress has also enacted spending schemes favorable to minority small-business owners, in

an effort to combat the effects of RACIAL DISCRIMINATION. In *Adarand Constructors v. Peña,* 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995), the U.S. Supreme Court reviewed a federal spending program designed to provide federal highway construction contracts to disadvantaged business enterprises. Under the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA) (Pub. L. No. 100-17, 101 Stat. 132), Congress appropriated certain funds to the TRANSPORTATION DEPARTMENT (DOT). The DOT was obliged to spend not less than 10 percent of those funds on businesses certified as "owned and operated by socially and economically disadvantaged individuals" (§ 106(c)(1)). These individuals were defined by STURAA as members of racial minorities and women.

Despite submitting the lowest bid for a subcontract to build guardrails for the Central Federal Lands Highway Division (part of the DOT), Adarand Constructors lost the contract to a business certified as disadvantaged. Adarand brought suit against Frederico F. Peña, secretary of transportation, arguing that the spending scheme violated the EQUAL PROTECTION component of the FIFTH AMENDMENT DUE PROCESS CLAUSE. The district court granted SUMMARY JUDGMENT to the secretary, and the court of appeals affirmed, but the Supreme Court vacated the judgment. According to the Court, federal spending based on racial classifications should be subject to STRICT SCRUTINY to determine whether the means employed by the spending scheme were narrowly tailored to achieve a compelling federal interest. This decision overruled precedent, and signaled a greater willingness of the Court to examine the way in which Congress and states exercise their spending power.

Some constitutional provisions expressly prohibit certain federal spending. Under the FIRST AMENDMENT, Congress may not spend federal money in the aid of religion. Under Article II, Section 1, Clause 7, Congress may not increase or decrease the salary of a president during his or her term. Under the FOURTEENTH AMENDMENT, Congress may not spend money on "any debt or obligation incurred in aid of insurrection or rebellion against the United States."

Congressional spending limits also may be found in the Constitution. If, for example, Congress allocates federal funding for libraries on the condition that all libraries ban certain literature, the spending scheme may run afoul of the First Amendment guarantee of free speech.

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CROSS-REFERENCES

Congress of the United States; Federal Budget; Federalism; New Deal.

## SPENDTHRIFT

*One who spends money profusely and improvidently, thereby wasting his or her estate.*

Under various statutes, a spendthrift is a person who wastes or reduces her estate through excessive drinking, gambling, idleness, or debauchery in a manner that exposes that individual or her family to indigence or suffering or who exposes the government to expense for the support of that person or her family.

When authorized by law, a guardian can manage a spendthrift's property. The purpose of the guardianship is to protect the ward and her property from her wasteful habits. Statutes that provide for the guardianship of spendthrifts are based on the right of the government to protect the property of its citizens for the benefit of themselves and their families and the community.

CROSS-REFERENCES

Spendthrift Trust.

## SPENDTHRIFT TRUST

*An arrangement whereby one person sets aside property for the benefit of another in which, either because of a direction of the settlor (one who creates a trust) or because of statute, the beneficiary (one who profits from the act of another) is unable to transfer his or her right to future payments of income or capital, and his or her creditors are unable to subject the beneficiary's interest to the payment of his or her debts.*

Spendthrift trusts are usually established with the object of providing a fund for the maintenance of another person, known as the spendthrift, while also protecting the trust against the beneficiary's imprudence, extravagance, and inability to manage financial affairs. For example, a settlor establishes a spendthrift trust for his son, a compulsive gambler, who spends money injudiciously with no concern for the future. Under the terms of the $400,000 trust, which is to be administered by the family's lawyer, the son is to receive $15,000 a year. Any words that indicate the settlor's intention to impose a direct restraint on the transferability of the beneficiary's interest can be used to create a spendthrift trust.

Such trusts do not limit the rights of the spendthrift's creditors to the property after it is received by the beneficiary from the trustee (one appointed or required by law to execute a trust). The creditors cannot compel the trustee to pay them directly. This means that any of the spendthrift's creditors can seek to have the money the spendthrift has already received applied to satisfy their claims. A creditor's claims to future payments under the trust, however, are restrained. The spendthrift's creditors cannot reach the $15,000 that he is to be paid in a subsequent year until it is actually paid out to him. If such a person could dispose of his right to receive income from the trust, his incompetence or carelessness might lead him to anticipate his income and transfer to monetary lenders and creditors the right to receive future income as it became due. By restricting the spendthrift so that he can do nothing with the income until it is paid into his hands by the trustee, he is more likely to be protected, at least to some extent, against impoverishment.

A spendthrift trust can continue for the life of the beneficiary or be limited to a period of years.

A settlor cannot create a spendthrift trust for herself. If the settlor attempts to do so, the trust is valid but the spendthrift clause is legally ineffective as to the present and future creditors of the property owner. To allow otherwise would be to provide unscrupulous people with the opportunity to shelter their property before engaging in speculative business enterprises and to mislead creditors into believing that the settlor still owned the property because she appeared to be receiving its income, thereby fraudulently deceiving creditors who might rely on the former financial property of the debtor.

In some states, under the doctrine of "surplus income," creditors can reach any trust income that exceeds what is necessary to support and educate the beneficiary. The court hears evidence as to the amount necessary to support the beneficiary in the manner to which he has been accustomed. Any excess of trust income over the sum will be awarded to the creditor and paid directly to her by the trustee. A few states have enacted statutes fixing the percentage of trust income that is exempt from creditor's claims that have been legally determined in a court action.

Certain classes are permitted to reach the beneficiary's interest in a spendthrift trust on the ground of public policy in many states. These include persons whom the beneficiary is legally bound to support, such as a spouse and children; persons who render necessary personal services to the beneficiary, such as a physician; and persons whose services preserve the beneficiary's interest in the trust. TORT claims against the beneficiary as well as claims by a state or the United States, such as for INCOME TAX, are not subject to spendthrift provisions.

In some states, when a beneficiary and spouse are divorced and the spouse has been awarded ALIMONY, the trustee of the trust cannot be compelled to pay the full amount of alimony until the court that has jurisdiction over the administration of the trust deems it to be fair.

The majority of states authorize spendthrift trusts; those that do not will void such provisions so that the beneficiary can transfer his or her rights and the creditors can attach the right to future income.

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## SPIN-OFF

*The situation that arises when a parent corporation organizes a subsidiary corporation, to which it transfers a portion of its assets in exchange for all of the subsidiary's capital stock, which is subsequently transferred to the parent corporation's shareholders.*

When a spin-off occurs, the shareholders of the parent corporation are not required to surrender any of their parent corporation stock in exchange for the subsidiary's stock.

In the event that the distribution of stock to the parent corporation's shareholders amounts to a dividend, the distribution can be taxed pursuant to provisions of INCOME TAX statutes.

## SPLIT DECISION

*A decision by an appellate court that is not unanimous.*

When the members of an appellate court cannot reach full agreement, a split decision occurs. A split decision is distinct from a unanimous decision in which all the judges join in agreement. In a split decision, the will of the majority of the judges is binding, and one member of the majority delivers the opinion of the court itself. One or more members of the minority can also write a dissent, which is a critical explanation of the minority's reasons for not joining in the majority decision. A court that reaches a split decision is called a divided court. Split decisions cannot occur at the trial level because there only one judge presides. Instead, split decisions occur in state and federal appellate courts, including state supreme courts and the U.S. Supreme Court. Split decisions also occur in regulatory boards, government commissions, and juries (where a split decision can result in a hung or deadlocked jury).

Although split decisions carry the same legal authority as unanimous decisions, they have a problematic place in U.S. JURISPRUDENCE. Most important, they can reflect significant disagreement among the members of a court: for example, the judges may not fully agree on a constitutional question, the application of precedents in case law, or the interpretation of a statute. Occasionally, a split decision indicates sharp divisions over an issue that has not yet been settled in the law. In appealing such a case to a higher court, appellees often note that the lower court has rendered a split decision in order to impress upon the higher court that the decision in question is less than wholly convincing. A split decision may be seen as less stable than a unanimous one, allowing more room for a change in the law as society and the court's composition change.

Split decisions by the U.S. Supreme Court attract special attention, particularly when the vote is 5–4. At such times, and especially in the face of controversial cases that are accompanied by sharply worded dissents, the Court is described as "deeply divided." Not surprisingly, since the Court is the final arbiter of U.S. law, a split decision is often seen as an indication of the justices' divergent legal and political ideologies. Legal scholars and reporters, who traditionally assess the justices' political leanings, frequently pay special attention to split decisions when analyzing the Court's decisions for a given term.

Some commentators have argued that a deeply divided Supreme Court fails in its duty to provide guidance to lower courts and also loses legitimacy in the eyes of the public. Justice FELIX FRANKFURTER feared such a possibility in 1955, when the Court was preparing to consider the question of miscegenation laws which prohibited interracial marriage. Frankfurter urged the Court not to hear the case because he feared that a split decision would plunge the Court into "the vortex of the present disquietude . . . [and] embarrass the carrying-out of the Court's decree." Nevertheless, unanimous agreement by the Court is not the rule. Many of the twentieth century's most controversial cases have produced split decisions, including the decisions to uphold AFFIRMATIVE ACTION (REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 [1978]) and to uphold a woman's right to an ABORTION (ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 [1973]).

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CROSS-REFERENCES

Court Opinion.

## SPLIT-OFF

*The process whereby a parent corporation organizes a subsidiary corporation to which it transfers part of its assets in exchange for all of the subsidiary's capital stock, which is subsequently transferred to the shareholders of the parent corporation in exchange for a portion of their parent stock.*

A split-off differs from a spin-off in that the shareholders in a split-off must relinquish their shares of stock in the parent corporation in order to receive shares of the subsidiary corporation whereas the shareholders in a spin-off need not do so.

## SPLIT-UP

*An arrangement whereby a parent corporation transfers all of its assets to two or more corporations and then winds up its affairs.*

When a split-up occurs, the shareholders of the parent corporation surrender the total amount of their stock in exchange for stock in the transferee corporation.

## SPOILS SYSTEM

See PATRONAGE.

## SPOLIATION

*Any erasure, interlineation, or other alteration made to* COMMERCIAL PAPER*, such as a check or promissory note, by an individual who is not acting pursuant to the consent of the parties who have an interest in such instrument.*

A spoliator of evidence in a legal action is an individual who neglects to produce evidence that is in her possession or control. In such a situation, any inferences that might be drawn against the party are permitted, and the withholding of the evidence is attributed to the person's presumed knowledge that it would have served to operate against her.

## ♦ SPORKIN, STANLEY

As an attorney, regulator, and outspoken federal judge, Stanley Sporkin often embraced controversy in his 30 years of federal service. Sporkin first earned national recognition in the 1970s for his criminal investigations into corporate misbehavior as the director of enforcement at the SECURITIES AND EXCHANGE COMMISSION (SEC). From 1981 to 1986, he was general counsel of the CENTRAL INTELLIGENCE AGENCY (CIA). In 1986, President RONALD REAGAN appointed him to the U.S. District Court for the District of Columbia. Throughout the 1980s and 1990s, Sporkin attracted widespread comment for his passionate and idiosyncratic rulings on major cases involving business regulation and antitrust. Frequently, he found himself in conflict with the U.S. Court of Appeals for the District of Columbia, which often overruled him. A writer and speechmaker, Sporkin is widely known in law circles for his reformist views on legal ethics, sentencing guidelines, and the federal judiciary.

Sporkin was born in Philadelphia, Pennsylvania, in 1932. He earned his law degree from

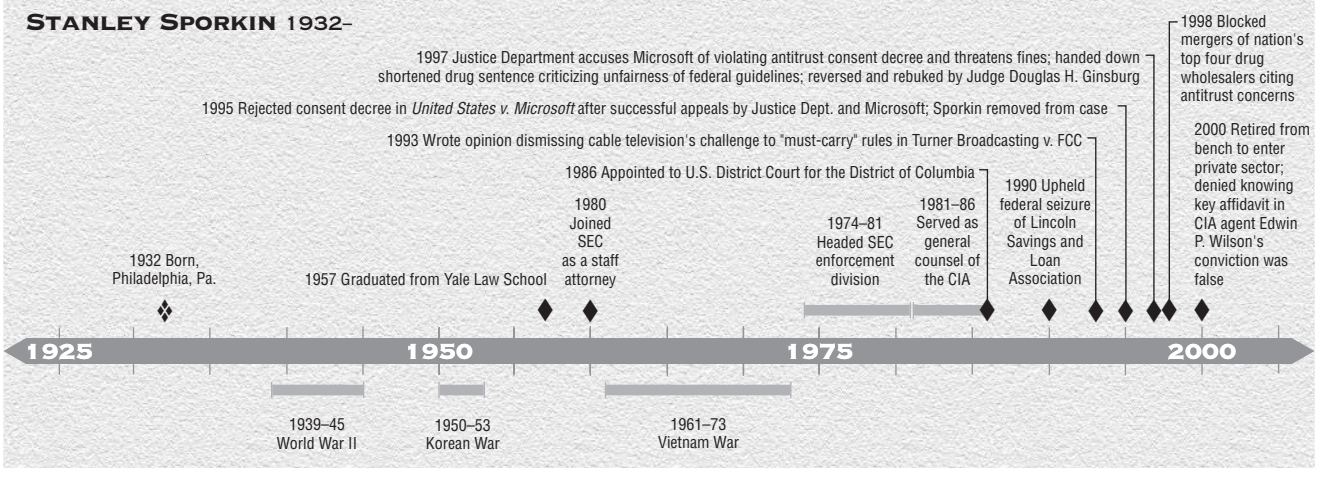

Yale University in 1957, and worked in private practice before joining the SEC as a staff attorney in 1960.

The SEC, which was created in 1934 to oversee the SECURITIES laws that protect shareholders, had a quiet, even moribund reputation. This began to change in 1972, when an enforcement division was added. When Sporkin took charge of enforcement in 1974, the division vigorously pursued criminal cases against U.S. corporations. In particular, Sporkin prosecuted a series of cases involving the use of corporate funds for political contributions that had come to the surface during the WATERGATE scandal; his investigations uncovered illegal domestic and foreign expenditures. Critics thought he had gone too far and exceeded the SEC's jurisdiction. Nevertheless, his eight-year tenure survived federal oversight review and helped set the stage for even tougher compliance practices in later years.

Sporkin left the SEC, in 1981, to serve as general counsel to the CIA. After five years, Reagan appointed him to the U.S. District Court for the District of Columbia, which hears major federal cases involving regulation. There he showed the same zeal he displayed at the SEC. In upholding the federal seizure of the Lincoln Savings and Loan Association in 1990, he criticized the attorneys and accountants for the savings and loan with a widely quoted comment on their failure to blow the whistle on violations: "Where were the professionals . . . while these clearly improper transactions were being consummated?" In 1993, as part of a three-judge panel, he wrote the opinion dismissing the FIRST AMENDMENT challenge of CABLE TELEVISION companies to the constitutionality of federal rules requiring that they carry broadcast stations (*Turner Broadcasting v. FCC,* 819 F. Supp. 32 [D.D.C. 1993]).

Sporkin's most controversial decision came in 1995 in one of the most widely followed antitrust cases of the decade. Following a four-year investigation, the JUSTICE DEPARTMENT had entered an agreement with computer software giant Microsoft, Inc., to reform licensing practices that the department said were monopolistic. Under provisions in the Tunney Act (15 U.S.C.A. § 16(e) [1988]), Sporkin had the authority to review the CONSENT DECREE to determine if it was in the public interest. In addition to criticizing Microsoft during the hearings, he took the rare step of allowing its competitors to file FRIEND-OF-THE-COURT (AMICUS CURIAE) briefs anonymously in order to protect them from retaliation by Microsoft. Ultimately, Sporkin rejected the consent decree as being insufficient and ordered the Justice Department to expand its investigation (*United States v. Microsoft Corp.,* 159 F.R.D. 318 [D.D.C. 1995]).

In a surprising move, both the Justice Department and Microsoft filed separate appeals. Not only did both parties win, but Sporkin was removed from the case by the U.S. Court of Appeals for the District of Columbia Circuit for apparent bias; the court then remanded the case to another judge with orders to approve the consent decree (*United States v. Microsoft Corp.,* 56 F.3d 1448 [D.C. Cir. 1995]).

In 1999, Sporkin assumed senior (semiretired) status, but retired as a federal judge in January 2000. He then became a partner at the Washington, D.C., office of Weil, Gotshal & Manges, one of the world's largest law firms. Sporkin focused on issues concerning the SEC and corporate governance; he also acted as an arbitrator and a mediator.

In addition to his uncompromising work as a lawyer and judge, Sporkin distinguished himself as a legal critic. He has written on the need for separate codes of ethical conduct for various disciplines within the law, urged for the adoption of multimedia presentations of evidence in courtrooms, and argued against what he sees as unfairness in the federal sentencing guidelines for drug offenses.

"PLAINTIFFS HAVE COME BEFORE THIS COURT, NOT BECAUSE THEIR FREEDOM OF SPEECH IS SERIOUSLY THREATENED, BUT BECAUSE THEIR PROFITS ARE; TO DRESS UP THEIR COMPLAINT IN FIRST AMENDMENT GARB DEMEANS THE PRINCIPLES FOR WHICH THE FIRST AMENDMENT STANDS AND THE PROTECTION IT WAS DESIGNED TO AFFORD."
—STANLEY SPORKIN

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## SPORTS LAW

*The laws, regulations, and judicial decisions that govern sports and athletes.*

Sports law is an amalgam of laws that apply to athletes and the sports they play. It is not a single legal topic with generally applicable principles. Sports law touches on a variety of matters, including contract, TORT, agency, antitrust, constitutional, labor, TRADEMARK, SEX DISCRIMINATION, criminal, and tax issues. Some laws depend on the status of the athlete, some laws differ according to the sport, and some laws vary for other reasons.

# Come Back, Shane: The Movement of Professional Sports Teams

One of the most controversial issues in modern professional sports is the mobility of professional sports franchises. Teams in the four major sports leagues—the National Basketball Association (NBA), Major League Baseball (MLB), the National Hockey League (NHL), and the National Football League (NFL)—have long been capable of moving their franchises from one city to another, with the requisite approval of the other teams in the league. Nevertheless, the practice did not become common until the late twentieth century. The incidence of franchise movement became a plague in the 1990s, as owners of sports franchises sought to offset rising player salaries and maximize the values of their teams.

Many people perceive professional sports teams as beneficial for the local economy and essential to an area's civic identity. Professional sports teams have been credited with providing jobs and injecting millions of dollars into local economies. The presence of a professional sports franchise from one of the four major sports is often regarded as a prerequisite to becoming a "big league" city or state. As Wisconsin state representative Marlin Schneider joked in 1995, "Without the Milwaukee Brewers, Milwaukee Bucks, and Green Bay Packers, [Wisconsin] ain't nothing but another Nebraska." With so much money and status on the line, professional sports teams have become highly sought after, and their movements from city to city have led to public outrage, lawsuits, and legislative proposals.

The owners of professional sports teams have been able to obtain generous deals from city and state officials by threatening to move their franchises. If the owners do not receive the support they seek, they move their team to a more accommodating city. Typical benefits include the use of sports facilities at below-market rents and taxpayer funding for the construction and maintenance of new facilities. Most of the funding comes from the team's home state, but some funding comes from the federal government.

At times, owners have moved their teams even after receiving what they demanded. Harris County, Texas, incurred $67.5 million in bond indebtedness in 1987 to finance stadium improvements to keep the Houston Oilers football team from moving to Jacksonville, Florida. The Oilers began playing in Nashville, Tennessee in 1998 as the Tennessee Oilers, and in February 1999 the team changed its name to the Tennessee Titans. Fortunately for Harris County, Houston was awarded an expansion team in October 1999, which became known as the Houston Texans.

Owners have been able to achieve their powerful bargaining positions largely through the judicial construction of **ANTITRUST LAWS**. Courts have given each major league the power to restrain trade by limiting the number of franchises within the league. At the same time, courts have limited the ability of the leagues to prevent team relocations by finding that such restrictions are unreasonable restraints of trade. For example, a federal court found that the NFL rule requiring the approval of three-fourths of the teams in the league before a team could move was an unreasonable restraint of trade (*Los Angeles Memorial Coliseum Commission v. NFL,* 726 F.2d 1381 [9th Cir. 1984]).

The judicial holdings have emboldened the owners of professional sports teams. The owners' willingness to move their teams has led to frenzied bidding wars between cities and the relocation of many franchises.

The idea of building a new stadium outside Los Angeles to bring a franchise back to the area after nearly a decade was discussed at a meeting of NFL officials in Philadelphia, Pennsylvania in May 2003. Los Angeles had two teams, the Rams and the Raiders, both of which left after the end of the 1994 season. (The Rams headed to St. Louis, Missouri, while the Raiders returned to their former home of Oakland, just outside San Francisco.) Although one option for giving Los Angeles a franchise would be to expand the NFL, another is to find a team that would be willing to relocate. Among the teams that expressed an interest in relocating to Los Angeles (the nation's number two television market) were the Indianapolis Colts and the Minnesota Vikings. Interestingly, Los Angeles almost got an expansion team in 1999, after well-known entertainment **BROKER** Michael Ovitz promised to head up a proposal to build a new stadium. The NFL determined that there were too many questions at the time about financing, which was why Houston got the expansion franchise instead.

The owners' laissez-faire attitude has been roundly criticized by fans, but owners have simply followed their best business instincts. Owning a professional

### Amateur Athletes

A common misconception about amateurs and professionals is that professionals are paid to play sports whereas amateur athletes are not. Amateur athletes often receive some compensation for their efforts. In ancient Greece, for example, victorious athletes in the Olympics were handsomely rewarded for their efforts. As of the early 2000s many college athletes receive academic scholarships for playing on a college team. Remuneration for amateur athletes is even promoted with federal legislation. The Amateur

sports team is a risky, speculative endeavor, and owners must act to protect their interests and maximize the values of their franchises. Owners are split on the issue of franchise relocation. Most owners understand that much of the value of their franchises depends on fan loyalty and that loyalty decreases as teams move. At the same time, the antitrust decisions have created a seller's market for owners, allowing them to seek the best deal possible. If another city is more willing to provide support for a team, there is little reason for the owner to stay put.

The most important bargaining chip for many owners is the team's stadium or arena. Typically, owners lease a stadium or arena for a certain number of years. When the lease is up, or sometimes before it has expired, an owner may demand public funding for a new stadium or improvements to the old stadium. If the city or state does not ante up for a new stadium or improvements, the owner threatens to move the team. Sometimes the community reluctantly foots the bill. When this happens, persons who object to the public financing of an essentially private business may attempt to stop the funding through the judiciary, but they usually fail. Most courts hold that the use of public funds to build or improve sports stadiums is a legal expenditure for a legitimate public purpose. Sometimes a community refuses to bow to an owner's demands and the team leaves. Other times the city or state attempts to prevent the relocation of a team by taking legal action.

The city of Baltimore, Maryland, tried to keep its NFL team, the Colts, through the exercise of **EMINENT DOMAIN**. Eminent domain is the power of a government to take private property for public use, with compensation to the party deprived of the property. In early 1984 the Baltimore Colts were having difficulty obtaining a satisfactory lease for Baltimore's Memorial Stadium. Owner Robert Irsay began to receive solicitations from the city of Indianapolis, Indiana, for the Colts to play in the city's Hoosier Dome. In February 1984 the Maryland Senate entertained a bill that would give the city of Baltimore the authority to condemn and take over professional sports franchises, but it postponed a vote on the bill.

On February 28, 1984, the U.S. Court of Appeals for the Ninth Circuit announced its decision in the *Los Angeles Memorial Coliseum* case, which affirmed the right of Oakland Raiders' owner Al Davis to move the team to Los Angeles. The NFL told Irsay in a private meeting that, in light of the decision in the Raiders' case, it would not oppose any move by the Colts. Irsay continued to negotiate for a financial package that would keep the Colts in Baltimore until he learned that the Maryland Senate had passed the eminent domain legislation.

Irsay decided to move the Colts to Indianapolis immediately. That day, vice president and general manager Michael Chernoff arranged for a moving company to come to the Colts' training facility and load the team equipment into vans. The Colts left Baltimore, their home city for thirty years, during the night of March 28–29, 1984.

On March 30, 1984, the Maryland Senate passed an emergency bill that gave the city of Baltimore the power of eminent domain over the team. The city immediately passed an ordinance that authorized the condemnation and then filed a petition in court, seeking to acquire the Colts by eminent domain and to prevent the team from doing anything to further the movement of the franchise, but it was too late. A federal court eventually held in December 1985 that Baltimore did not have the power of eminent domain over the Colts because it had not attempted to compensate the franchise and because the franchise had relocated to another state (*Indianapolis Colts v. Mayor of Baltimore,* 741 F.2d 954 [7th Cir. 1984], *cert. denied,* 470 U.S. 1052, 105 S. Ct. 1753, 84 L. Ed. 2d 817 [1985]).

Sports fans in Baltimore grew even more beleaguered after the Colts' departure. Their last remaining major professional sports team, the Baltimore Orioles, threatened to move if it did not get a new stadium. In 1990 the state of Maryland was forced to spend millions in taxpayer funds to build a new stadium to keep the Orioles. In 1996 Baltimore regained an NFL franchise at the expense of Cleveland, which lost its beloved Browns after fifty years in part because Baltimore offered the Browns free rent at a new football stadium. The city of Baltimore enjoyed the new Baltimore Ravens' inaugural season in 1996 as dedicated Browns fans suffered through the same nightmare that Colts fans endured in 1984.

Lawmakers on the federal, state, and local levels have proposed legislation that would help communities hang on to their professional sports teams. In 1995 and 1996, several legislators in the U.S. Congress proposed laws that would allow leagues to make their own rules restricting the movement of franchises. For all the activity, no legislation changing the application of antitrust laws to professional sports teams has been passed.

The Minnesota Twins have been threatening to leave the state unless they get a new ballpark paid for by the state, and even had a contract signed by at least one prospective out of state buyer. When that deal fell through and Minnesota refused to build them a new stadium, Major League baseball almost contracted (eliminated) their franchise.

**CROSS-REFERENCES**

Antitrust Law; Eminent Domain; Franchise; Restraint of Trade.

Sports Act of 1978 (36 U.S.C.A. § 391) created the Athletic Congress, a national governing body for amateur athletes, which administers a trust fund that allows amateur athletes to receive funds and sponsorship payments without losing their amateur status.

The most basic difference between amateur athletic events and professional events lies in their rewards for participation. Amateur events, by definition, do not reward victors with a prize of great value. Professional events, by contrast, reward participants and victors with money

# 1919 Black Sox Scandal

The 1919 Black Sox scandal is the most famous example of athletes conspiring with gamblers to fix the outcome of a sporting event. Eight members of the Chicago White Sox were charged with taking bribes to lose the 1919 World Series to the Cincinnati Reds. The most prominent player charged was "Shoeless" Joe Jackson, the star outfielder for the White Sox. It was alleged that the players received $70,000 to $100,000 for losing the World Series five games to three.

During the World Series, a number of sportswriters suspected that White Sox players were throwing the games. The writers published their charges after the series ended, but by the beginning of the 1920 **BASEBALL** season, it appeared nothing would come of the allegations. However, a federal **GRAND JURY**, presided by Judge **KENESAW MOUNTAIN LANDIS**, was impaneled in September 1920. Within days, four of the players, including Jackson, admitted that they had taken bribes to lose games in the 1919 series. The eight players were indicted.

The team suspended the players, and they went on trial in the summer of 1921. They were acquitted on insufficient evidence, under suspicious circumstances. Key pieces of evidence were missing from the grand jury files, including the players' confessions. No gamblers were ever brought to trial for **BRIBERY**, though it was alleged that New York **RACKETEER** Arnold Rothstein was behind the plan to fix the World Series.

Major league baseball had named Landis commissioner of baseball in 1921, in an attempt to restore the integrity of the game. The day after the eight White Sox players were acquitted, Landis banned them from baseball for life.

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**CROSS-REFERENCES**

Landis, Kenesaw Mountain.

and/or other prizes. An accomplished athlete may choose to compete as an amateur if her sport does not have a thriving professional organization. Some athletes can make a living in amateur sports because victories in high-profile amateur events can lead to advertising deals and other business opportunities.

Amateur sports can be divided into two categories: restricted and unrestricted competition. Restricted competition includes elementary school, high school, and college athletics. Sports on these levels are controlled by athletic conferences, associations, and leagues connected to schools and colleges. Athletes in restricted competition must be eligible to play. Eligibility is determined by conferences, associations, and leagues formed by the schools.

Unrestricted competition is open to all amateur athletes, with some qualifications. The Olympics is an example of unrestricted competition. Although only a select few amateur athletes are chosen to represent the United States, any person may seek entry into this elite group by entering recognized contests in the years before the Olympiad and qualifying for tryouts.

Whether an athlete is eligible to compete in amateur events depends on the rules of the governing conference, league, or association. Many events formerly reserved for amateurs, such as the Olympics, were opened to professionals in the 1980s and 1990s. Gymnasts, figure skaters, soccer players, track stars, and other athletes once concerned with maintaining amateur status now may enjoy the fruits of professional competitions without losing access to prestigious amateur events. Often difficult eligibility issues for amateur athletes do not concern professional status. Qualification requirements for particular events and rules prohibiting drug use are among the more challenging roadblocks.

Eligibility requirements for amateur athletes are many and varied. Generally, amateur athletes

do not have an absolute right to participate in sports events. In analyzing whether an athlete is eligible to participate, a court must first decide whether the individual has a right to play, as opposed to a mere privilege to play. Privileges can be revoked by the grantor of the privilege. If the individual has a right to participate, the court examines the individual's relationship with the institution denying access. If the institution is private, the dispute generally is decided according to contract or tort principles. If the institution is a public school or university, or any other publicly funded organization, courts change their analysis.

When public funds are involved, the institution is deemed a state actor, and the institution's action is subject to the DUE PROCESS and EQUAL PROTECTION Clauses of the Fourteenth Amendment. Due process usually consists of notice to the person affected by the STATE ACTION and an opportunity for the aggrieved person to argue against the action. Courts also strike down vague, overbroad, and overly restrictive regulations by state institutions on due process grounds.

The Fourteenth Amendment's Equal Protection Clause, as interpreted by courts, requires that similarly situated persons receive equal treatment under the law. If a classification touches on a fundamental right, such as freedom of religion or the right to marry, or if it is based on a suspect criterion, such as race or national origin, a court will strictly scrutinize the classification to see whether it promotes a compelling interest of the institution. Because participation of amateurs in sports is not a fundamental right, ordinarily the exclusion of amateurs from participation is not subjected to STRICT SCRUTINY.

If a regulation of amateur sports does not infringe on a fundamental right or burden a suspect class, courts determine whether the regulation bears a rational relationship to a legitimate STATE INTEREST. This is a lower level of inquiry than strict scrutiny, but it does not give public institutions the unlimited freedom to act unreasonably in the absence of fundamental rights or suspect class concerns. In 1981 the Texas Supreme Court struck down the state high school athletic association's non-transfer rule, which declared all non-seniors ineligible for varsity football and basketball competition for one year following their transfer to a new school. The purpose of the act was to discourage the recruiting of student athletes. According to the court, the rule was over-inclusive because it presumed that a student athlete who had switched schools had been recruited and did not give the student the opportunity to rebut the presumption (*Sullivan v. University Interscholastic League,* 616 S.W.2d 170 [1981]).

The rights of student athletes can be infringed by reasonable measures that are implemented for sound public policy reasons. Eligibility criteria can vary from school to school, and even from sport to sport. No pass-no play rules, or rules that keep flunking students off school teams, are permissible in light of the government's overriding interest in educating children. Schools may artificially control the number of student athletes, allowing students to be cut from popular sports to keep athlete-to-coach ratios at manageable levels.

Schools may enact other limitations, such as rules limiting the number of sports a student can play at one time and rules authorizing students to be suspended or expelled from athletics for consuming alcohol or using other drugs. Discovery of student-athlete drug use was made easier under a 1995 U.S. Supreme Court decision. In *Vernonia School District 47J v. Acton,* 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995), the Court held that random drug testing of student athletes does not violate the constitutional right to be free from unreasonable SEARCHES AND SEIZURES.

The National Collegiate Athletic Association (NCAA) is the most important administrative body governing sports on the college level. Many COLLEGES AND UNIVERSITIES are members of the NCAA, and they give the association the authority to exercise control over their student-athletes, coaches, and other athletic operatives. The NCAA, headquartered in Shawnee, Kansas, arranges for television and radio contracts and performs other functions to promote the well-being of college sports.

The NCAA exerts a tremendous amount of control over its members. Under NCAA rules, college athletes must meet and maintain a certain grade-point average before playing, may not hire an agent while playing for a college, and may not participate in an annual professional draft of college athletes without losing their eligibility. The NCAA may discipline coaches and scouts for violating restrictions on the recruiting of high school athletes. Athletes may be suspended or banned from a team for alcohol and

other drug use. Each team has its own set of rules that complement the NCAA rules.

Most courts hold that participation in intercollegiate athletics is not a constitutionally protected interest. However, one federal district court has recognized a student athlete's limited property interest in college athletics. In *Hall v. University of Minnesota,* 530 F. Supp. 104 (1982), University of Minnesota basketball guard Mark Hall, who had a satisfactory grade-point average, was kept off the basketball team when he failed to earn enough credits for a particular academic program. Hall appealed the decision, arguing that his application to a different college within the university had been rejected in bad faith and without due process. U.S. District Court Judge Miles W. Lord held that Hall had a sufficient property interest in playing basketball because the competition would affect his ability to be drafted by a professional team, and Lord ordered the school to let Hall play.

College athletic scholarships are unusual agreements that can pose problems for schools, athletes, and courts. A typical athletic scholarship requires the athlete to maintain certain grade levels and to perform as an athlete for the school in exchange for tuition, books, and other educational expenses. Most courts treat scholarships as contracts, with obligations and rights assigned to both parties. One party may be liable to the other if a breach of the contract occurs. For instance, a college may revoke the scholarship of an athlete who fails to maintain good grades or violates any other condition of the scholarship. A school, for its part, may violate its obligations by failing to provide an education to a student athlete. At least one court has held that a school violates its duties under an athletic scholarship if it fails to provide a student athlete meaningful access to its academic curriculum (*Ross v. Creighton University,* 957 F.2d 410 [7th Cir. 1992]).

The revenues produced by some college sports have made college athletics a multimillion-dollar entertainment industry. Although student-athletes are an integral part of the entertainment, most contemporary courts do not view them as employees of their schools. Thus, a school is not liable under workers' compensation statutes to a student-athlete if the student-athlete is injured in an accident related to the student's sport. For tax purposes, most courts examine the scholarship agreements of most students to determine whether they bargained for the scholarship money. If the students bargained for the scholarship money in return for services, the money can be taxed. Under INTERNAL REVENUE SERVICE regulations and revenue rulings, scholarship funds for student-athletes are exempt from federal tax if the college does not require the student to participate in a particular sport, requires no particular activity in lieu of participation, and does not cancel the scholarship if the student cannot participate. Funds for such athletic scholarships may be taxed if they exceed the expenses for tuition, fees, room, board, and necessary supplies. As of 1996, the Internal Revenue Service had never challenged the tax-exempt status of student-athletes on scholarship.

### Sex Discrimination

Women and girls have long been excluded from many sports. In the 1970s Congress passed Title IX of the 1972 Education Amendments (20 U.S.C.A. §§ 1681–1688 [1994]) to ban sex discrimination in publicly funded educational programs. After a round of litigation, followed by legislative amendments, a presidential VETO, and a congressional override of the veto, Title IX was modified to give women and girls equal access to sports programs in schools that receive any measure of federal funding.

Under Title IX schools must provide athletic opportunities to females that are proportionate to those provided to males. Courts do not require that complete equality occur overnight. Most courts engage in a three-pronged analysis to determine whether a school is fulfilling its obligations. First, the court examines whether athletic participation opportunities are provided to each sex in numbers substantially proportionate to their enrollment. If a school does not provide substantially proportionate participation opportunities, the court then determines whether the school can demonstrate a history of expanding the athletic programs for the underrepresented sex. If the school cannot so demonstrate, the court then asks whether the interests and abilities of the underrepresented sex have been accommodated by the school. If the court finds that the school has not accommodated student-athletes of the underrepresented sex, it may rule that the school is in violation of Title IX and order the school to take affirmative steps toward more equal treatment between the sexes.

Traditionally, courts have differentiated between contact and noncontact sports in determining a female's right to participation. A

school may refrain from offering a contact sport for females if the reasoning is not based on an archaic, paternalistic, overbroad view of women. Courts are hesitant to mandate the creation of new teams, but most have no problem ordering that qualified females be allowed to play on exclusively male teams.

Title IX was passed in 1972. Since that time, the number of female athletes in intercollegiate sports has increased from 30,000 to about 150,000 in 2003. However, the law has not been universally applauded. Several schools have cut minor men's programs, such as wrestling, swimming, and track, in order to comport with the ratios required under Title IX. Although advocates of Title IX dispute that the law is the sole reason for these programs being cut, coaches and other supporters of the minor men's programs have protested that Title IX is unfair to the male athletes involved in these sports.

In 2003, the Commission on Opportunity in Athletics, which was assembled by Secretary of Education Rod Paige, submitted a report to Paige suggesting that Title IX needed reform. The report suggested that the reform was necessary to save some men's sports in order to preserve men's opportunities to participate in athletics. The report was met with vocal opposition. Two women on the commission filed a minority report with Paige, and the president of the NCAA voiced his disapproval of the suggestions in the commission's report.

In addition to claims based on Title IX, sex-based classifications by publicly funded entities are also subject to equal protection claims. Courts review such claims under an intermediate standard of review. Specifically, a sex-based classification must serve an important government interest and must be substantially related to the achievement of that interest. High school girls in Arkansas used the Equal Protection Clause of the FOURTEENTH AMENDMENT to abolish a school rule that limited the girls' basketball games to half-court play. In *Dodson v. Arkansas Activities Association,* 468 F. Supp. 394 (1979), a federal district court in Arkansas ruled that the half-court rule deprived the girls of their equal protection rights because it was based solely on tradition and not on any supportable sex-based reason.

### Professional Athletes

Professional athletes are paid for their services. Professional sports organizations use many relationships and a similarly high number of agreements and contracts to support their industries. The parties involved include team owners, promoters, athletes, agents, lawyers, accountants, advertisers, builders, carriers, journalists, media outlets, politicians, courts, and the governing body of the particular sport.

For the professional athlete, the most immediate concern is the employment contract. The contract between the athlete and the employer determines the rights and duties of both parties. These contracts are bargained agreements, and the bargaining power of the respective parties is reflected in the terms. Unproven or average athletes generally obtain contracts for a salary and benefits that are less than those received by athletes of proven skill. Most professional leagues that have a players' union negotiate with management or promoters to draft a standard player's contract. A standard player's contract is a document that establishes basic rights and privileges for the athletes. Owners, managers, and promoters may violate agreements with unions if they tender contracts that offer fewer rights and privileges than are contained in the standard player's contract.

Because their sport enjoyed widespread popularity before any other sport, BASEBALL players led other professional athletes in the reform of laws on professional sports contracts. The earliest and most infamous of the contract issues addressed by baseball players was the reserve clause. This clause, placed into contracts by the owners of professional baseball teams, prevented a player from playing for another team for at least one year following the expiration of his contract. Owners of teams could trade or sell players to other teams, but players had no say in the decision about what team they would play on. The intent of the clause was to keep players on the same team to build the team's identity and increase fan loyalty. Players objected to the clause because it restricted their right to freely market their skills and their right to choose where they would live and play baseball.

The reserve clause was used in the first professional baseball league, the National League, in the late nineteenth century, and it survived until 1975. For years, the Supreme Court and other federal courts held that professional baseball was not subject to ANTITRUST LAWS because the game held a special place in American society. Antitrust laws prevent businesses from engaging

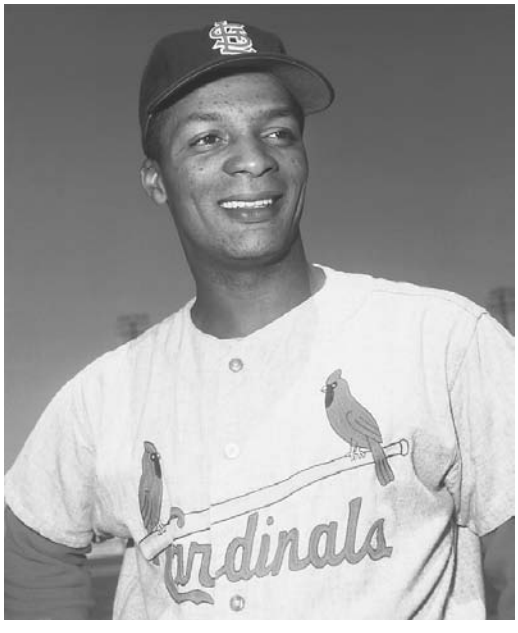


*From 1970 to 1972, outfielder Curt Flood challenged Major League Baseball's antitrust exemption in court and lost. His challenge set the stage for a later challenge to baseball's "reserve clause."*

BETTMANN/CORBIS

in acts that restrain free trade if the commercial activity affects interstate commerce. Applying antitrust laws to professional baseball would have made it illegal for owners of professional baseball teams to restrain trade with the reserve clause. Players challenged the clause but lost in court.

In 1966 the Major League Baseball Players Association (MLBPA) hired Marvin Miller as its first executive director. Miller was instrumental in winning concessions from the owners of the major league teams. In 1970, after threats of strikes and hours of **COLLECTIVE BARGAINING**, the Major League Baseball Players Relations Committee, representing the major league teams, agreed with the MLBPA to the neutral **ARBITRATION** of their disputes. Arbitration is a process whereby two disputing parties agree to have their dispute settled by a third party.

The players' movement for market freedom suffered a temporary setback when St. Louis Cardinals star center fielder Curt challenged baseball's antitrust exemption and lost. Flood was traded in 1969 to the Philadelphia Phillies when he was at the peak of his career. Flood refused to play for the Phillies, and he sat out the entire 1970 season. That year, Flood filed suit in federal court against Bowie Kuhn, then the commissioner of Major League Baseball. Flood argued that the actions of major league baseball club owners violated the federal antitrust laws, **CIVIL RIGHTS** laws, laws prohibiting peonage, and laws on **SLAVERY**, including the **THIRTEENTH AMENDMENT** to the Constitution. The Supreme Court disagreed, holding that major league baseball maintained a special exemption from antitrust laws under Supreme Court precedent and that any changes in the law should come from Congress. Major league baseball remains the only professional sport to which courts have not applied antitrust laws.

In 1974 pitchers Andy Messersmith of the Los Angeles Dodgers and Dave McNally of the Baltimore Orioles played the entire season without new contracts. Both pitchers were paid their previous year's salary (Messersmith received a slight raise), but both had refused to sign their contracts. At the end of the season they declared that they were free agents because the reserve clause in the last contract they had signed lasted for only one year. The club owners argued that the clause could be renewed unilaterally (by one party, here, the owners), year after year. Messersmith and McNally brought their cases to a panel of arbitrators, and the panel held that the reserve clause was actually an option clause: it gave the teams an additional option year to sign a player to a new contract. Without a new contract, the player was a free agent and could market his service to other professional teams.

After almost a century of attempts to shake the reserve clause through the court system, major league baseball players finally gained their freedom through collective bargaining and arbitration. The decision was upheld on appeal, and baseball players instantly gained bargaining power. In 1976 the players relations committee agreed to remove the reserve clause from standard contracts and install a system of **FREE AGENCY** that gave free-agent status after six years of service to players who did not otherwise qualify through the option clause. By 2003 the average salary for major league baseball players was $2.3 million, compared to an average salary of $19,000 in 1967.

As of 2003, baseball players are free to negotiate contracts with any number of clauses. A player may sign a contract that guarantees a salary for a certain number of years, negotiate clauses that limit the club's right to trade the player, and enjoy the benefits of incentive clauses, or clauses in the contract that grant extra compensation in the event the player achieves certain goals. A last vestige of the reserve clause remains in some contracts as the option clause. This clause states that in the event the player and the team cannot come to terms on a new con-

tract upon the expiration of a contract, the club may retain the player for another year at a percentage of his previous year's salary, usually 90 percent. Players with bargaining power do not sign contracts with such option clauses.

Another product of Miller's collective bargaining for the MLBPA was arbitration of salary disputes. The MLBPA was concerned about a perceived tendency of club owners to collude against demanding players. Specifically, players who played out their options were finding that no teams were interested in hiring them for their fair market value. In 1976, the year after the Messersmith-McNally case, the MLBPA and the club owners agreed that any player with at least two years of experience who was ineligible for free agency could renegotiate his salary through a neutral arbitrator.

The spirit of cooperation over salaries was short lived. In 1986 the MLBPA alleged that the club owners had colluded against free agents by agreeing amongst themselves to offer relatively low salaries to free agents. The MLBPA filed a grievance in 1986, and in 1988 an arbitration panel ordered the teams to pay more than $10 million to 139 players who had been harmed by the collusion. In 1988 another arbitration panel found that the club owners had continued to collude over the 1987 and 1988 seasons to keep player salaries low or keep players out of the game, and in 1990 the owners were forced to pay players more than $100 million in lost salaries. The arbitration process is applied to a number of disputes between players and management, including disputes about fines, suspensions, and other punitive measures taken by a club or by the league.

Labor issues are another chief concern of professional athletes. In major sporting leagues, players' unions and management enter into collective bargaining agreements that establish standards and cover the basic rights and duties of all major league players and club owners. Collective bargaining agreements address such issues as club discipline, injury grievances, noninjury grievances, discipline by the commissioner of Major League Baseball, standard player's contract, college drafts, option clauses, terminations of contracts, base salaries, access to personnel files, medical rights, retirement and insurance benefits, and the duration of the existing collective bargaining agreement.

Collective bargaining agreements last only for specified periods of time, so occasionally they need to be renewed. If the players are collectively unable to come to an agreement with the club owners, players may go on strike to gain what they feel they deserve or prevent the owners from enforcing detrimental regulations, such as a salary cap on the amount a club can spend on its payroll. The 1994–95 professional hockey season was shortened by a players' strike. The MLBPA also conducted a strike that began on August 12, 1994, lasted through the end of the 1994 season, and ended in March 1995. The players conducted the strike to thwart a proposed salary cap, and it ended without a new collective bargaining agreement or a final resolution of the salary cap issue.

The four most popular team sports in the United States—baseball, football, basketball, and hockey—have created leagues that exercise monopolistic powers. Owners of the professional teams in Major League Baseball, the National Football League (NFL), the National Basketball Association, and the National Hockey League have been able to keep the number of franchises lower than they would be in a free market. This artificially created scarcity gives owners of these teams leverage to force fans and taxpayers in cities across the country to provide billions of dollars in subsidies or risk losing pro-

**Major League Baseball Players' Average Salaries, 1969 to 2002**

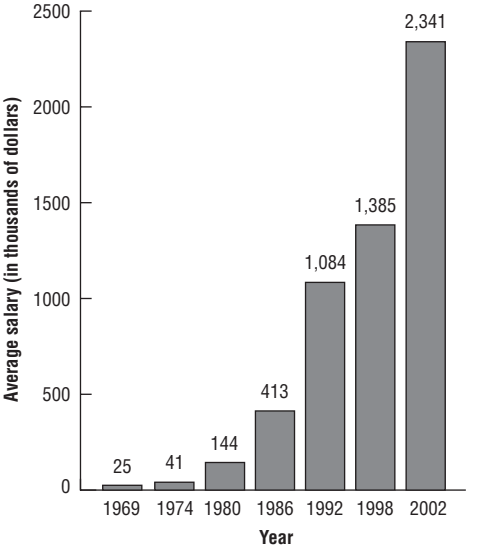


SOURCE: Major League Baseball web page.

fessional sports entertainment. The scarcity also ensures a high level of talent in the league, making the creation of new leagues difficult.

Courts and legislators have been successful in removing some elements of antitrust activity, such as limits on the freedom of movement of players. One court has held that the National Football League violated antitrust laws by unreasonably restricting the right of owners to move their franchises (*Los Angeles Memorial Coliseum Commission v. National Football League,* 726 F.2d 1381 [9th Cir. 1984]). However, by and large, courts and legislators have been unable or unwilling to strike down or repeal other monopolistic activities. Legislators have even taken steps to give certain leagues special privileges. Under federal law the NFL may enter into agreements with television networks to pool and sell a unitary video package (15 U.S.C.A. § 1291 [1966]). Another federal law allows blackouts of nonlocal NFL games televised into home territories when the home team is playing and blackouts of home games in the home team's territory (15 U.S.C.A. § 1292 [1966]).

A professional sport is a complex business for the average athlete, and many athletes require the services of an agent. Agents negotiate personal service contracts with teams or individual promoters, and they manage the personal affairs of their clients. Agents may handle such concerns as taxes, financial planning, money management, investments, INCOME TAX preparation, incorporation, estate planning, endorsements, medical treatment, counseling, development of a career after sports, insurance, and legal matters. The agent is a fiduciary of the client-athlete, which means that the agent has a responsibility to act with the utmost care and GOOD FAITH and to act in the athlete's best interests. Agents must avoid activities that conflict with the interests of the client-athlete, and they must inform the athlete of any circumstances that might affect the athlete's rights or interests. Many states require that agents obtain a license and post a security bond before they may work in the state.

### Torts in Sports

Many sports pose serious dangers to participants. Generally, a person who suffers a sports-related injury may recover for medical expenses and other losses if the injury was caused by the NEGLIGENCE of another party. Injuries and damages resulting from intentional torts, such as BATTERY or assault, likewise are recoverable.

Courts generally decide suits involving injuries to athletes, spectators, and other parties involved in sports according to basic tort laws. If a party owes a duty of care toward another party and that duty is breached, the party owing the duty is liable for any injuries suffered by the party to whom the duty is owed that result from the breach. The level of care that must be exercised depends on the situation: dangerous situations require a high degree of care, whereas less dangerous situations require less care. Expectations may also play a part. For example, a spectator who is hit by a foul ball while sitting in the stands at a baseball game cannot recover for injuries because most fans know that stray balls in the stands are an inescapable by-product of baseball. However, a patron who is standing in the interior walkway of a stadium concourse may recover for injuries resulting from a foul ball. A spectator in the unfamiliar environs of a stadium is not aware of the dangers and thus is owed a greater duty of care by the baseball organization.

Athletes may recover for injuries resulting from another party's negligence or intentional acts. In both professional and amateur contact sports, athletes consent to some physical contact, but courts do not find that participants consent to contact that goes outside the bounds of the game.

In some cases schools may be held liable for injuries to athletes. If an employee of the school, such as a coach, teacher, or referee, fails to properly supervise a student and the student suffers an injury as a result of the failure to supervise, the school may be held liable for its employee's negligence. Generally, coaches, teachers, and referees must exercise reasonable care to prevent foreseeable injuries.

Defendants in sports-related personal injury suits may possess any number of defenses. One of the most successful of these defenses is that the party assumed the risk of being injured by playing in or watching the sporting event. Defendants also may argue that the plaintiff was negligent and therefore should recover only a portion of his damages or nothing at all. For example, a plaintiff may have ignored warnings or signed a document that waived the defendant's liability for any injury suffered by the plaintiff. Finally, public institutions may argue that they are immune from suit under the doc-

trine of SOVEREIGN IMMUNITY, a judicial doctrine that prohibits suits against government entities unless such suits have been explicitly authorized by the government. Legislators have made many public institutions open to lawsuits, and in cases in which a public institution still enjoys IMMUNITY, courts often find ways to circumvent immunity and attach liability.

### Criminal Liability for On-the-Field Conduct

On rare occasions, some athletes have been subjected to criminal actions against them for their conduct during an athletic contest. Regarding hockey, many teams of which are located in Canada, a few players have been convicted of such crimes as assault in Canadian tribunals. Such was the case with Martin James McSorley, commonly known as Marty, who was convicted of assault with a weapon by a Provincial Court in British Columbia, Canada, in 2000. McSorley, a member of the Boston Bruins, engaged in a series of altercations on the ice with Donald Brashear, a member of the Vancouver Canucks. In the waning seconds of the game, McSorley swung his stick at Brashear, hitting him on the right temple. When Brasher fell, he hit his head on the ice and began having a seizure. Brasher missed more than a month of the season. McSorley, who was eventually suspended for one year by the National Hockey League, received an 18-month conditional discharge by the Canadian court in lieu of a prison sentence. However, he was ordered not to play in any game in which Brashear was also a participant.

McSorley's case is a rather rare example of an athlete being convicted of a crime for on-the-field activities. Even some of the more infamous instances of violence during sporting events—such as one involving heavyweight boxer Mike Tyson who bit the ear of opponent Evander Holyfield in 1997—have resulted in fines and suspensions by the sport's governing bodies, rather than criminal actions.

### Exposure of Athletes' Off-the-Field Legal Problems

When athletes run afoul of the law outside of sporting events, the stories often garner national attention. During the 1990s and early 2000s, a number of athletes were involved in high-profile criminal trials, some of whom were convicted for their crimes. Two of the more well-known examples were Mike Tyson's conviction for rape in 1992, leading to a six-year sentence, and Hall-of-Fame football player O. J. Simpson's trial for the double murder of Nicole Brown Simpson and Ronald Goldman in 1995, in which Simpson was acquitted.

Sociologists disagree as to the primary cause of some athletes' legal problems. Some say the reason is athletes are pampered throughout their childhood and early adulthood because of their athletic prowess. Given that these athletes have been shielded from rules that apply to everyone else, they have difficulty adjusting when they turn professional and earn a great deal of money, sometimes in the tens of millions of dollars. Other sociologists note that many athletes involved in these off-the-field incidents endured a rough childhood. Moreover, statistics show that the crime rate of professional athletes is no higher than the general population. Some argue that the public perceives athletes' legal problems in a different light because of the intense media scrutiny that accompanies these problems.

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CROSS-REFERENCES

Drugs and Narcotics; Employment Law; Entertainment Law; Monopoly; Rational Basis Test.

## SPOT ZONING

*The granting to a particular parcel of land a classification concerning its use that differs from the classification of other land in the immediate area.*

Spot zoning is invalid because it amounts to an ARBITRARY, capricious, and unreasonable treatment of a limited area within a particular district and is, therefore, a deviation from the comprehensive plan.

CROSS-REFERENCES

Land-Use Control; Zoning.

## SPOUSAL ABUSE

See DOMESTIC VIOLENCE.

## SQUATTER

*An individual who settles on the land of another person without any legal authority to do so, or without acquiring a legal title.*

In the past, the term *squatter* specifically applied to an individual who settled on public land. Currently it is used interchangeably with *intruder* and *trespasser.*

## SS

*An abbreviation used in the portion of an* AFFIDAVIT, PLEADING, *or record known as the statement of venue.*

The abbreviation is read as "to wit" and is intended to be a contraction of the Latin term *scilicet.*

## STALE CHECK

*A document that is a promise to pay money that is held for too long a period of time before being presented for payment.*

A check is considered to be stale when it is outstanding for a period of six months or more. A bank is not obligated to pay a stale check.

CROSS-REFERENCES

Commercial Paper.

## STALIN, JOSEPH

Joseph Stalin was the leader of the Soviet Union and the Communist party from 1929 to 1953. He used ruthless methods to consolidate his power and ruled the Soviet Union by terror. His actions shaped the relationship between the United States and the Soviet Union, leading to the COLD WAR after WORLD WAR II.

Stalin was born Iosif Vissarionovich Dzhugashvili on December 21, 1879, in Gori, now in the Republic of Georgia. He adopted the name Stalin, meaning "man of steel," in 1910. The son of peasants, his academic prowess led to a scholarship at a theological seminary. While studying for the priesthood, he began reading the works of KARL MARX. He soon left the seminary and joined the Social-Democratic party in 1899. His revolutionary activities led to his arrest and exile to Siberia seven times between 1902 and 1913. He escaped six times.

He aligned himself with the Bolshevik faction of the party, which was under the leadership of VLADIMIR ILYICH LENIN. Lenin named Stalin to the Bolshevik's Central Committee in 1912 and in 1913 named him editor of the party newspaper, *Pravda.* He spent from 1913 until early 1917 in Siberian exile, returning to St. Petersburg to aid the Bolsheviks in overthrowing first the monarchy and then the provisional government. The November 1917 Bolshevik revolution put Lenin in charge. Stalin became a top aide to Lenin and helped the regime in winning a civil war against those who opposed the Bolsheviks.

In the early 1920s, Stalin began plotting to gain power. Before Lenin died in 1924, he expressed misgivings about Stalin's use of power. Nevertheless, Stalin joined in a three-man leadership group, called a troika, to govern the Soviet Union after Lenin's death. He quickly pushed aside all his rivals, including Leon Trotsky, and became the supreme ruler by 1929.

During the 1930s Stalin collectivized all private farms in the Soviet Union and in the process sent a million farmers into exile. He embarked on a process of "russification," which put minority nationalities under strict control of the national government. In 1939, in concert with the Nazi government of ADOLF HITLER, Stalin invaded eastern Poland. In 1940 he conquered the Baltic countries of Estonia, Latvia, and Lithuania.

Stalin also encouraged the growth of COMMUNISM throughout the world. The Communist

party of the United States grew rapidly during the Great Depression of the 1930s, in the process raising questions whether the party was a mere tool of Stalin and the international Communist movement. As a result of concerns about Communist subversion, Congress enacted the **SMITH ACT** (54 Stat. 670) in 1940. The legislation required **ALIENS** to register and be fingerprinted by the federal government. More importantly, the act made it illegal not only to conspire to overthrow the government but to advocate or conspire to advocate its overthrow. The U.S. Supreme Court upheld the constitutionality of the act in *Dennis v. United States,* 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951).

Stalin's 1939 nonaggression pact with Hitler proved futile: Hitler invaded the Soviet Union in 1941. Stalin then aligned the Soviet Union with the United States and Great Britain in World War II. When the war in Europe ended in 1945, the Soviet Army occupied Eastern Europe and a large part of Germany. Stalin ignored agreements between the Allies and proceeded to impose Communist rule on these occupied countries.

The United States and Great Britain perceived Stalin's actions as attempts to force Communism on the world. In the late 1940s, the Soviet Union was captioned by the United States as the Red Menace, seeking to subvert democracy and capitalism. Stalin pushed the United States to the brink of a third world war when he ordered the blockade of Berlin in 1948 and 1949.

Fears about Communism were further stirred by the arrest of **JULIUS AND ETHEL ROSENBERG** in 1950 for providing the Soviet Union with secrets about the atomic bomb. To many people, the Rosenbergs were tools of Stalin and the Communist conspiracy. Other people, however, saw them as victims of political hysteria. The Rosenbergs were executed in 1953, yet several generations of historians have argued over their guilt or innocence.

Stalin's hard-line policies were met in kind by the West. In 1949 the United States created the **NORTH ATLANTIC TREATY ORGANIZATION,** which committed U.S. forces to the defense of Europe. The outbreak of the **KOREAN WAR** in 1950, which was started by Communists in North Korea, led to the deployment of U.S. troops to stave off Communist aggression. Stalin's determination to expand Soviet power and influence created the climate for the Cold War. The United States practiced a policy of containment, with the goal of preventing the spread of Communism.

*Joseph Stalin expanded the influence of the Soviet Union following World War II by refusing to withdraw Soviet forces from much of Germany and Eastern Europe.*

AP/WIDE WORLD PHOTOS

In his later years, Stalin literally rewrote the Soviet history books, turning himself into a heroic, godlike figure. Those who opposed him were exiled to Siberian labor camps or executed. Always suspicious of those around him, in 1953 he prepared to purge more party leaders. His plans were cut short, however, when he suffered a brain hemorrhage and died on March 5, 1953, in Moscow.

Stalin's methods were replicated by later Soviet leaders. The demise of European Communist regimes in the 1980s and the collapse of the Soviet Union in the 1990s signaled an end to Stalinism.

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**CROSS-REFERENCES**

Communism; Red Scare.

## STALKING

*Criminal activity consisting of the repeated following and harassing of another person.*

## How to Stop a Stalker

Although antistalking laws give police and prosecutors the tools to arrest and charge stalkers with serious criminal offenses, victims of stalking have an important role to play in making these laws work. Law enforcement officials, **DOMESTIC VIOLENCE** counselors, and mental health professionals offer the following advice to victims on how to stop a stalker:

- *Know the law.* Because antistalking laws are new, some police officers may not know how the laws work. A stalking victim should visit the public library or a county law library and obtain a copy of the state's antistalking law. Victims should show the police the law when filing the stalking complaint and ask whether they should first seek a protective order against the stalker. In some states a violation of a protective order converts a stalking charge from a misdemeanor to a felony.
- *Cooperate with prosecutors.* Many stalking victims refuse to prosecute the stalker, thereby leaving themselves vulnerable to continued threats and violence. Some victims fear that prosecution will provoke worse behavior from the perpetrator. Nevertheless, victims should use the legal system and break any bond that may exist between themselves and the stalker.
- *Protect yourself.* Persons who are stalked should take steps to protect themselves and those around them. Neighbors and coworkers should be informed about the stalker, be given a photograph of the suspect, and be instructed on what to do if the stalker is sighted. Security officers at the victim's workplace should be provided with this information. Caller ID, which identifies telephone callers, should be installed on the victim's telephone. If the stalker makes repeated phone calls, the victim should ask the police to set up a phone tap.
- *Collect evidence.* A stalking victim should collect and preserve evidence that can be used to prosecute and convict the stalker. Police suggest that the victim keep a diary of stalking and other crimes committed by the perpetrator. It is also a good idea to photograph property destroyed by the stalker and any injuries inflicted by the stalker. The victim should keep all letters or notes written by the stalker and all answering machine tapes that contain messages from the perpetrator.

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Stalking is a distinctive form of criminal activity composed of a series of actions that taken individually might constitute legal behavior. For example, sending flowers, writing love notes, and waiting for someone outside her place of work are actions that, on their own, are not criminal. When these actions are coupled with an intent to instill fear or injury, however, they may constitute a pattern of behavior that is illegal. Though anti-stalking laws are gender neutral, most stalkers are men and most victims are women.

Stalking first attracted widespread public concern when a young actress named Rebecca Shaeffer, who was living in California, was shot to death by an obsessed fan who had stalked her for two years. The case drew extensive media coverage and revealed how widespread a problem stalking was to both celebrity and noncelebrity victims. Until the enactment of anti-stalking laws, police had little power to arrest someone who behaved in a threatening but legal way. Even when the suspect had followed his victim, sent her hate mail, or behaved in a threatening manner, the police were without legal recourse. Law enforcement could not take action until the suspect acted on his threats and assaulted or injured the victim.

In general, stalking victims are women from all walks of life. Some are trying to end a relationship with a man, often one who has been abusive. The persons involved may be married or divorced or may have been sexual partners. In other cases the stalker and the victim may know

one another casually or be associated in an informal or formal way. For example, they may have had one or two dates or talked briefly but were not sexual partners, or they may be coworkers or former coworkers. In a small number of situations, the stalker and the victim do not know one another. Cases involving celebrities and other public figures usually fall into this category.

Advocates of battered women have estimated that up to 80 percent of stalking cases occur in a domestic context, though there is little data on how many stalkers and victims are former intimates, how many murdered women were stalked beforehand, or how many stalking incidents overlap with DOMESTIC VIOLENCE. According to estimates provided by the National Violence Against Women Prevention Research Center, over one million women and approximately 350,000 men are victims of stalkers each year.

Research also indicates that teenagers are subjected to stalking and that they have difficulty extricating themselves from such situations. Stalkers may include a high school classmate or an older man with whom a teenager has developed a relationship. When a teenage stalker is involved, the victim may have difficulty convincing law enforcement and school officials that the behavior is more than adolescent "boys will be boys" conduct.

The motivations for stalking are many. They include the desire for contact and control, obsession, jealousy, and anger and stem from the real or imagined relationship between the victim and the stalker. The stalker may feel intense attraction or extreme hatred. Many stalkers stop their activity when confronted by police intervention, but some do not. The more troublesome stalker may exhibit a personality disorder, such as obsessive-compulsive behavior, which leads him to devote an inordinate amount of time to writing notes and letters to the intended target, tracking the victim's movements, or traveling in an attempt to achieve an encounter.

The potentially dangerous consequences and the terrifying helplessness victims experienced led to calls for legislation criminalizing stalking. California enacted the first anti-stalking law in 1990. Eventually, all 50 states and the District of Columbia passed legislation that addresses the problem of stalking. Initially these laws varied widely, containing provisions that made the laws virtually unenforceable due to ambiguities and the dual requirements to show specific criminal intent and a credible threat. Many states have

**Stalking Activities Engaged in by Stalkers**

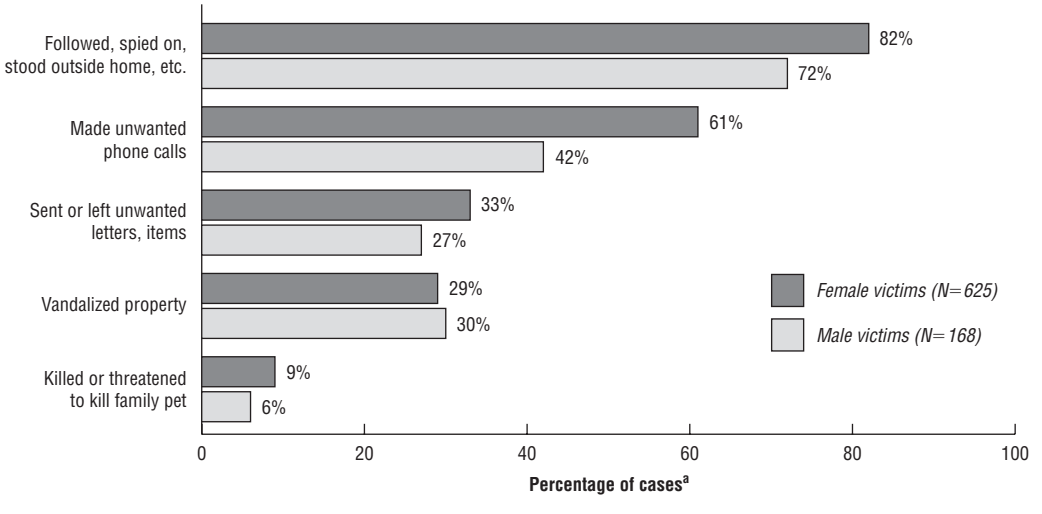


[a]Percentages exceed 100% because the question had multiple responses.

SOURCE: U.S. Department of Justice, National Institute of Justice & Centers for Disease Control and Prevention, *Stalkings in America: Findings From the National Violence Against Woman Survey*, 1998.

amended these stalking statutes to broaden definitions, refine wording, stiffen penalties, and emphasize the suspect's pattern of activity.

In most states, to charge and convict a defendant of stalking, several elements must be proved BEYOND A REASONABLE DOUBT. These elements include a course of conduct or behavior, the presence of threats, and the criminal intent to cause fear in the victim.

A course of conduct is a series of acts that, viewed collectively, present a pattern of behavior. Some states stipulate the requisite number of acts, with several requiring the stalker to commit two or more acts. States designate as stalking a variety of acts, ranging from specifically defined actions, such as nonconsensual communication or lying in wait, to more general types of action, such as harassment.

Most states require that the stalker pose a threat or act in a way that causes a reasonable person to feel fearful. The threat does not have to be written or verbal to instill fear. For example, a stalker can convey a threat by sending the victim black roses, forming his hand into a gun and pointing it at her, or delivering a dead animal to her doorstep.

To be convicted of stalking in most states, the stalker must display a criminal intent to cause fear in the victim. Various statutes require the conduct of the stalker to be "willful," "purposeful," "intentional," or "knowing." Many states do not require proof that the defendant intended to cause fear as long as he intended to commit the act that resulted in fear. In these states, if the victim is reasonably frightened by the alleged perpetrator's conduct, the intent element of the crime has been met.

Defendants have challenged the constitutionality of anti-stalking statutes in many states. They alleged that the laws are so vague that they violate DUE PROCESS OF LAW or are so broad that they infringe upon constitutionally protected speech or activity. Generally the courts have rejected these arguments and have upheld the anti-stalking laws.

Once a stalker is arrested, the prosecutor will ask the court to impose strict pretrial release conditions requiring the defendant to stay away from the victim. Violation of these conditions can lead to the revocation of bail and enhanced penalties at sentencing.

Before a stalker is arrested, a victim may obtain a civil protection, or restraining, order that directs the defendant not to contact or come within the vicinity of the victim. If the defendant violates the protection order, a court may hold him in CONTEMPT, impose fines, or incarcerate him, depending on state law. In some states a stalking penalty is enhanced if the stalker violates a protective order.

Protective orders can serve as the first formal means of intervening in a stalking situation. The order puts the stalker on notice that his behavior is unwanted and that if his behavior continues, police can take more severe action. However, enforcement of a protection order has proved difficult, leaving the victim with not much more than a legal document to try to restrain a violent stalker.

Many states have both misdemeanor and felony classifications for stalking. Misdemeanors generally carry a jail sentence of up to one year. Felony sentences range from three to five years, with the ability to enhance the penalty if one or more elements are present. For example, if the defendant brandished a gun, violated a protective order, committed a previous stalking offense, or directed his conduct toward a child, the sentence may be increased. In some states repeat offenses can result in incarceration for as long as ten years.

At the federal level, a number of statutes have been enacted to protect victims of stalkers. These include the Full Faith and Protection provisions of the VIOLENCE AGAINST WOMEN ACT (18 U.S.C.A. § 2265–2266 [2000]), which mandate nationwide enforcement of orders of protection, including harassment and stalking, and the Interstate Stalking Act (18 U.S.C.A. § 2261A [1996]), which makes it a criminal offense to travel across state lines to stalk another person. The act also makes it a crime to stalk a person across state lines using mail, E-MAIL, or the INTERNET. Such crimes are punishable from five years to life in prison.

Despite the nationwide awareness of stalking and the response of the criminal justice system, many women do not report these crimes to police. Failure to report stalking may be based on the private nature of the events and the belief that no purpose would be served by reporting the crime. Police departments and prosecutors have been criticized for continuing to minimize the seriousness of stalking and failing to provide adequate protection for victims. In addition, critics have claimed that courts are too lenient in sentencing stalkers.

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CROSS-REFERENCES

Victims' Rights.

*Colonists protest the Stamp Act of 1765 by burning Stamp Act papers in Boston.*
LIBRARY OF CONGRESS

## STAMP ACT

The Stamp Act was the English act of 1765 requiring that revenue stamps be affixed to all official documents in the American colonies. In 1765 the British Parliament, under the leadership of Prime Minister George Grenville, passed the Stamp Act, the first direct tax on the American colonies. The revenue measure was intended to help pay the debt incurred by the British in fighting the French and Indian War (1754–63) and to pay for the continuing defense of the colonies. Unexpectedly and to Parliament's great surprise, the Stamp Act ignited colonial opposition and outrage, leading to the first concerted effort by the colonists to resist Parliament and British authority. Though the act was repealed the following year, the events surrounding the tax protest became the first steps towards revolution and independence from England.

By the mid-eighteenth century, the economies of the American colonies had matured. The colonies chafed under the rules of British mercantilism, which sought to exploit the colonies as a source of raw materials and a market for the mother country. During the French and Indian War, the colonies asserted their economic independence by trading with the enemy, flagrantly defying customs laws, and evading trade regulations. These actions convinced the British government to bring the colonies into proper subordination and to use them as a source of revenue.

The colonists had become accustomed to a limited degree of British regulation of trade. The Navigation Acts of 1660, for example, stipulated that no goods or commodities could be imported into or exported out of any British colony except in British ships. Later legislation stipulated that rice, molasses, beaver skins, furs, and naval stores could be shipped only to England. Duties were also imposed on the shipment of certain articles, such as rum and spirits. However, the Stamp Act was the first direct tax, a tax on domestically produced and consumed items, that Parliament ever levied upon the colonists.

The Stamp Act was designed to raise almost one-third of the revenue to support the military establishment permanently stationed in the colonies at the end of the French and Indian War. The act placed a tax on newspapers, almanacs, pamphlets and broadsides, legal documents of all kinds, insurance policies, ship's papers, licenses, and even playing cards and dice. These documents and objects had to carry a tax stamp. The act was to be enforced by stamp agents, with penalties for violating the act to be imposed by vice-admiralty courts, which sat without juries.

Parliament passed the act without debate. Similar stamp acts had become an accepted part of raising revenues in England, leading parliamentary leaders to mistakenly believe that the measure would generate some grumbling but

not defiance. The colonies thought otherwise, interpreting the Stamp Act as a deliberate attempt to undercut their commercial strength and independence. They were also concerned about the implicit assault on their rights to trial by jury, the unprecedented use of a direct tax as a means of raising imperial revenue, and the all-inclusive character of the law that applied to all thirteen colonies.

The colonists raised the issue of taxation without representation. Some colonists drew a distinction between the English regulation of trade, which was viewed as legal, and the English imposition of internal taxes on the colonies, which was perceived to be illegal. Theories and arguments against the Stamp Act were distributed from assembly to assembly in the form of "circulars." PATRICK HENRY introduced seven resolutions against the Stamp Act in the Virginia House of Burgesses, five of which were passed. All seven resolutions were reprinted in newspapers such as the *Virginia Resolves.* These and other pamphlets pressed Parliament to repeal the act.

In October 1765 nine of the thirteen colonies sent delegates to New York to attend the Stamp Act Congress. The congress issued a "Declaration of Rights and Grievances," declaring that English subjects in the colonies had the same "rights and liberties" as the king's subjects in England. The congress, noting that the colonies were not represented in Parliament, concluded that no taxes could be constitutionally imposed on them except by their own legislatures. Petitions embracing these resolutions were prepared for submission to the king, the House of Commons, and the House of Lords.

The Stamp Act also led to the formation of formal opposition groups in the colonies. The Sons of Liberty, which remained active until the American Revolution, grew directly out of the Stamp Act controversy. Often organized by men of wealth and standing in the community, Sons of Liberty groups were active in towns throughout the colonies, and their members often engaged in violent acts. In Boston, for example, an angry mob forced the stamp agent to resign.

Colonial merchants also organized an effective economic boycott, with merchants in New York, Boston, and Philadelphia entering into nonimportation agreements. The drop in trade was dramatic, leading to the BANKRUPTCY of some London merchants. In addition, businesses flouted the act by carrying on their trade without purchasing the required stamps.

The virulence of the opposition to the Stamp Act surprised the colonists as much as the British government. The costs of simply maintaining order in the colonies threatened to negate any economic advantages of the legislation. BENJAMIN FRANKLIN, as the colonial agent for Pennsylvania, testified before the House of Commons in early 1766 that any attempt to enforce the Stamp Act by the use of troops might bring on rebellion. His call for repeal was joined by a committee of English merchants, which cited the dire economic consequences the act was producing. When Grenville's government fell from power, the new prime minister, Marquis of Rockingham, moved quickly to resolve the issue. In February 1766 the repeal of the Stamp Act was approved by the House of Commons. The House of Lords, under pressure from the king, approved the repeal as well, which became effective in May 1766. Nevertheless, in the Declaratory Act of March 1766, Parliament ominously asserted that it had full authority to make laws that were legally binding on the colonies.

England's need for revenue and Parliament's conviction that it alone, in the empire, was sovereign did not end with the repeal of the Stamp Act. New and harsher laws were enacted in succeeding years, producing a predictable reaction from the colonies. The full significance of the Stamp Act crisis is that it served as the initial event unifying all the colonies in their resistance to parliamentary authority. The opponents to the act laid a theoretical foundation for later revolutionary thought in their elaboration of the doctrine of consent by the governed. The act led to the creation of enduring resistance groups, such as the Sons of Liberty, which were capable of springing into action at the least provocation. And it established precedents for later resistance, including the use of a congress, the issuance of circulars, the resort to legislative resolves, and the adoption of economic sanctions. Most importantly, the Stamp Act crisis made the colonists more aware of the identity of their interests, which would ultimately lead them to think of themselves as "Americans."

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## STAMP TAX

*A pecuniary charge imposed upon certain transactions.*

A stamp tax is, for example, levied when ownership of real property is transferred. The tax is paid either by purchasing stamps that are then glued to the deed or by the use of metering machines that imprint the stamps on the deed.

## ◆ STANBERY, HENRY

Henry Stanbery served as attorney general of the United States from 1866 to 1868 under President ANDREW JOHNSON.

Stanbery, the son of Jonas Stanbery, a physician, was born February 20, 1803, in New York. He moved with his family from New York to Zanesville, Ohio, in 1814. An excellent student, Stanbery required greater academic challenge than early Zanesville schools could provide. Recognizing his scholastic aptitude, his father made arrangements for him to attend Washington College, in Pennsylvania. He graduated in 1819 at the age of sixteen.

Stanbery studied law, and he was admitted to the bar in 1824 when he came of age. The same year, he entered into practice with Thomas Ewing, an attorney from Lancaster County, Ohio. They worked together for more than twenty years and handled a wide variety of cases.

Stanbery's growing prominence in the Ohio courts made him a natural candidate for public office. He dissolved his longtime partnership with Ewing in 1846 and moved to Columbus to serve as Ohio's first attorney general. He also served as a delegate to the convention that framed the Ohio state constitution in 1851. After the constitutional convention, Stanbery reestablished his private practice—first in Cincinnati (1853) and later in northern Kentucky (1857). He maintained an active law practice throughout the U.S. CIVIL WAR.

After the Civil War, Stanbery became embroiled in the conflict and controversy surrounding Johnson's presidency. Johnson supported the policies of reconstruction and reconciliation favored by the late president ABRAHAM LINCOLN, but his efforts were met with strong opposition from Radical Republicans in the Senate. Johnson's first attorney general, JAMES SPEED, resigned in 1866 when he could no longer support presidential initiatives.

Amid this turmoil, Stanbery was asked to step in, and accepted the post of attorney general. Almost immediately, he was nominated by Johnson to fill a U.S. Supreme Court vacancy left by the death of Justice JOHN CATRON. Most senators liked the new attorney general and recognized him to be an able lawyer, but Radical Republicans were determined to prevent the confirmation of *any* nominee put forth by Johnson. To ensure that Johnson would not be able to fill the vacancy, the Senate enacted legislation to reduce the number of High Court justices from ten to seven as vacancies occurred. Accordingly, the seat for which Stanbery had been considered in April 1866 was abolished, and his nomination was never considered.

Although sixty-three years old and in failing health, Stanbery served Johnson as a loyal and active attorney general. Prior to Stanbery's

"THE CONSTITUTION IS NOT SILENT. IT PROVIDES FOR INSURRECTION, WHETHER SMALL OR GREAT; . . . WHETHER IN ONE STATE OR MANY."
—HENRY STANBERY

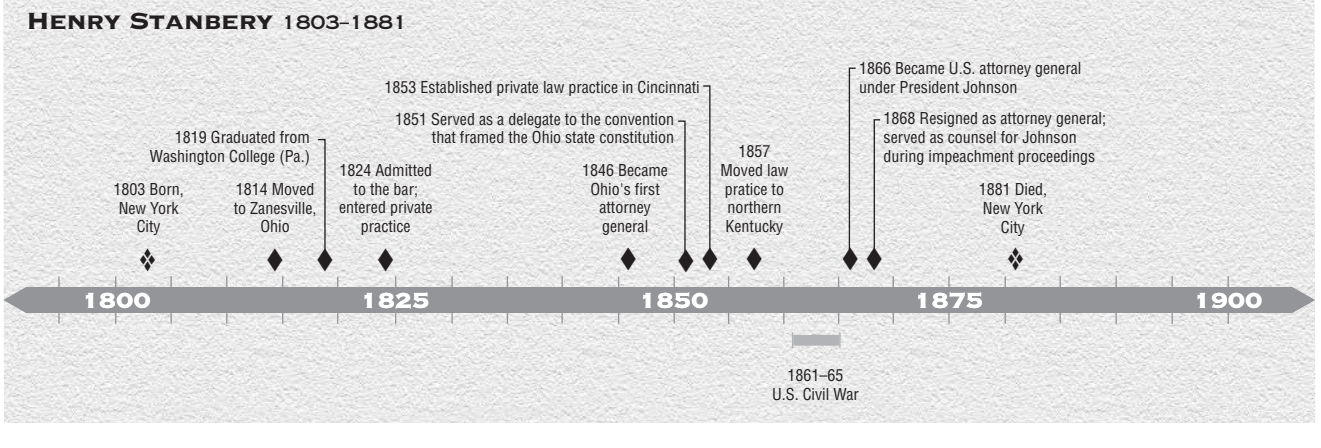

appointment, the president had vetoed early CIVIL RIGHTS legislation and was eager to restore full jurisdiction to Southern state courts. As attorney general, Stanbery supported Johnson by refusing to encourage enforcement of the CIVIL RIGHTS ACTS or providing any guidance to U.S. attorneys seeking to implement them.

When Johnson faced IMPEACHMENT by the Senate in March 1868, Stanbery resigned his office to serve as the president's counsel. So poor was Stanbery's physical health during Johnson's impeachment trial that he submitted most of his arguments in writing. Upon termination of the trial, Johnson sought to reappoint his friend and counsel as attorney general, but the Senate rejected Stanbery's reinstatement.

Stanbery remained in Washington, D.C., for the next few years and continued to participate in high-profile cases of the Reconstruction Era—including a number of cases that tested the constitutionality of the government's criminal prosecutions of the KU KLUX KLAN.

In the mid-1870s, Stanbery returned to Ohio and served a short term as president of the Cincinnati Bar Association. In retirement, he wrote occasionally on political and legal topics, but he devoted most of his time to the management of his vast property holdings. The year before his death, a newspaper account identified him as the largest property owner in Campbell County, Kentucky. Stanbery died in New York on June 26, 1881.

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## STAND

*The location in a courtroom where the parties and witnesses offer their testimony. To appear in court; to submit to the jurisdiction of the court.*

*To stand trial,* for example, means to try, or be tried on, a particular issue in a particular court.

## STAND MUTE

*The state of affairs that arises when a defendant in a criminal action refuses to plead either guilty or not guilty.*

When a defendant stands mute, the court will generally order a not guilty plea to be entered.

## STANDARD DEDUCTION

*The name given to a fixed amount of money that may be subtracted from the adjusted gross income of a taxpayer who does not itemize certain living expenses for* INCOME TAX *purposes.*

## STANDING

*The legally protectible stake or interest that an individual has in a dispute that entitles him to bring the controversy before the court to obtain judicial relief.*

Standing, sometimes referred to as standing to sue, is the name of the federal law doctrine that focuses on whether a prospective plaintiff can show that some personal legal interest has been invaded by the defendant. It is not enough that a person is merely interested as a member of the general public in the resolution of the dispute. The person must have a personal stake in the outcome of the controversy.

The standing doctrine is derived from the U.S. Constitution's Article III provision that federal courts have the power to hear "cases" arising under federal law and "controversies" involving certain types of parties. In the most fundamental application of the philosophy of judicial restraint, the U.S. Supreme Court has interpreted this language to forbid the rendering of ADVISORY OPINIONS.

Once a federal court determines that a real case or controversy exists, it must then ascertain whether the parties to the litigation have standing. The Supreme Court has developed an elaborate body of principles defining the nature and scope of standing. Basically, a plaintiff must have suffered some direct or substantial injury or be likely to suffer such an injury if a particular wrong is not redressed. A defendant must be the party responsible for perpetrating the alleged legal wrong.

Most standing issues arise over the enforcement of an allegedly unconstitutional statute, ordinance, or policy. One may challenge a law or policy on constitutional grounds if he can show that enforcement of the law or implementation of the policy infringes on an individual constitutional right, such as FREEDOM OF SPEECH. For example, in TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, 393 U.S.

503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), high school officials in Des Moines, Iowa, had suspended students for wearing black armbands to school to protest U.S. involvement in the VIETNAM WAR. There was no question that the parents of the students had standing to challenge the restrictions on the wearing of armbands. Mere ideological opposition to a particular government policy, such as the Vietnam War, however, is not sufficient grounds to challenge that policy in court.

A significant economic injury or burden is sufficient to provide standing to sue, but in most situations a taxpayer does not have standing to challenge policies or programs that she is forced to support. In *Frothingham v. Mellon,* 288 F. 252 (C.A.D.C. 1923), the Supreme Court denied a federal taxpayer the right to challenge a federal program that she claimed violated the TENTH AMENDMENT, which reserves certain powers to the states. The Court said that a party must show some "direct injury as the result of the statute's enforcement, and not merely that he suffers in some indefinite way common with people generally."

Although the Supreme Court made a narrow exception to this prohibition on taxpayer suits in *Flast v. Cohen,* 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968), granting standing to a taxpayer to challenge federal spending that would benefit parochial schools, the Court has never gone beyond that. In fact, there is some doubt as to the vitality of the *Flast* decision. In 1974 the Court denied standing to a taxpayer who sought to challenge Congress's exempting the CENTRAL INTELLIGENCE AGENCY from the constitutional requirement under Article I, Section 9, Clause 7, that government expenditures be publicly reported (*United States v. Richardson,* 418 U.S. 166, 94 S. Ct. 2940, 41 L. Ed. 2d 678). Since *Richardson* the Court has continued to maintain the traditional barrier against taxpayer lawsuits.

The issue of standing has played a crucial role in CLASS ACTION lawsuits, especially those filed by environmental groups. In *Sierra Club v. Morton,* 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972), the Court denied standing to an environmental group that was challenging a decision by the secretary of the interior. The Court ruled that the SIERRA CLUB had not demonstrated that its members would be substantially adversely affected by the secretary's decision. Later environmental class actions have overcome the standing hurdle by including specific harms that group members would suffer, thus avoiding the Court's rule against generalized concerns.

The issue of standing is more than a technical aspect of the judicial process. A grant or denial of standing determines who may challenge government policies and what types of policies may be challenged. Those who believe that the federal courts should not increase their power generally believe standing should be used to limit access to the courts by persons or groups seeking to change public policy. They believe the legislative branch should deal with these types of issues. Opponents of a strict standing test complain that plaintiffs never get a chance to prove their case in court. They believe that justice should not be denied by the application of judicially created doctrines such as standing.

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## ♦ STANFORD, AMASA LELAND

"A MAN WILL NEVER CONSTRUCT ANYTHING HE CANNOT IMAGINE." —LELAND STANFORD

Amasa Leland Stanford, known as Leland Stanford, along with partners Charles Crocker, Mark Hopkins, and Collis P. Huntington (the Big Four), founded the Central Pacific and Southern Pacific Rail Roads, and laid the tracks that would eventually link a nation. In the course of building the first transcontinental railroad, Stanford dominated California business, politics, and social life for almost fifty years.

Stanford was born on March 9, 1824, in Watervliet, New York. He was one of eight children born to Josiah Stanford and Elizabeth Phillips Stanford. His father was a prominent farmer and a prosperous merchant, who supplied building materials for the town's public works projects. Growing up, Stanford worked on the family farm and helped his father with local road and bridge construction. His boyhood work on the local transportation infrastructure sparked an interest that would fuel his life's work.

Stanford's early education included attendance at the local public school and some home schooling. At eighteen, he enrolled at the Clinton Liberal Institute, in Clinton, New York. He completed his education at New York's Cazenovia Seminary. At twenty-one, he began clerking with the law firm of Wheaton, Doolittle, and Hadley, in Albany, New York. Three years later, in 1845, Stanford was admitted to the bar.

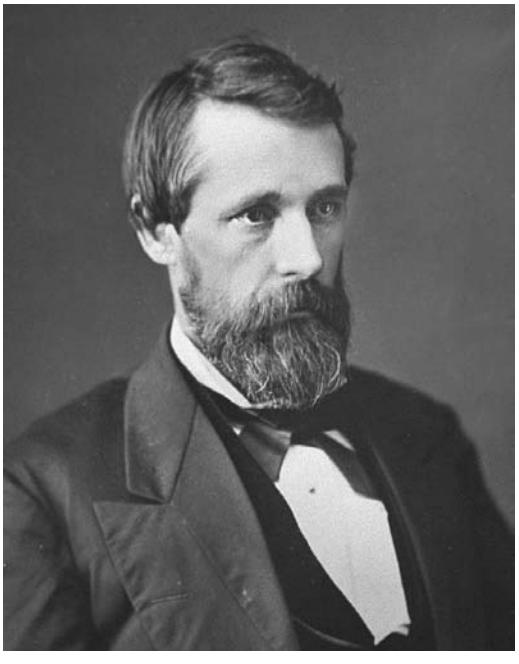

*Leland Stanford.*
LIBRARY OF CONGRESS

Like many young men of his era, Stanford saw tremendous opportunity for those who moved west. In 1848 he settled in Port Washington, Wisconsin, to establish a law practice. While Stanford was establishing his professional career in Wisconsin, several of his brothers headed to California, eager to apply their skills as merchants in its mining camps and growing towns.

In the spring of 1852, Stanford sent his wife, Jane Elizabeth Lathrop Stanford, to stay with her family in Albany, and he followed his brothers to the Pacific Coast. By all accounts, Stanford arrived in California with little or no money. His brothers provided him with a stock of miners' supplies and set him up as a merchant in a mining town. His business there was very successful. Popular with the miners and trained in the law, Stanford was often called upon to mediate claim disputes and other problems.

Convinced that his future was in California, Stanford persuaded his wife to join him there. In 1856 they established a home in Sacramento. Stanford continued to be involved with his brothers and their business interests, but he devoted most of his time—unsuccessfully—to politics.

He ran as a Republican candidate for state treasurer in 1857 and for governor in 1859. He was defeated in both races, but the campaigns made him a well-known political figure throughout the state. Finally, in 1861, when the outbreak of the U.S. CIVIL WAR split the state DEMOCRATIC PARTY, Stanford was successful in a bid for the governor's seat.

As the state's first Republican governor, he faced two immediate challenges: the possibility that California would split from the Union, and a serious flooding of the Sacramento River (which was so extensive that Stanford had to crawl out the window of his home and row himself to his inauguration). Stanford held California safely in the Union, and he coped with the damage caused by the flood. After providing for flood victims, and promoting minor administrative and legislative reforms, Stanford spent much of his time as governor pursuing his interest in railroads as a growing industry.

Just before the Civil War, President ABRAHAM LINCOLN signed the PACIFIC RAILROAD ACT, authorizing the construction of a transcontinental railroad from Omaha to Sacramento. Despite the coming war, investors and entrepreneurs across the United States looked for ways to participate in, and profit from, the new venture.

Prior to his election as governor, Stanford and three other Sacramento merchants—

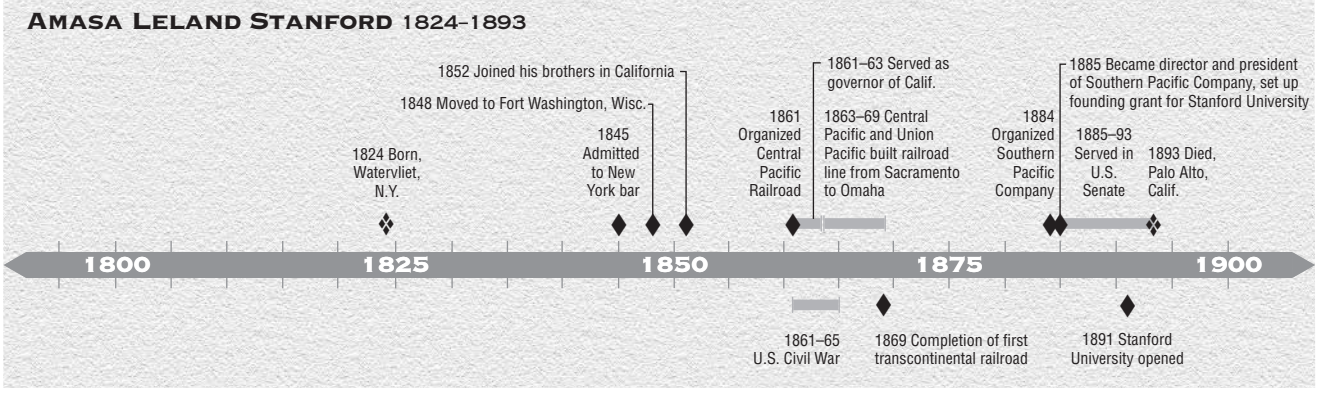

Crocker, Hopkins, and Huntington—had financed railroad feasibility surveys and had organized the Central Pacific Rail Road Company on June 28, 1861. Stanford was named president.

During his two-year term as governor, Stanford committed a substantial amount of public money to the construction of the Central Pacific Rail Road. Any apprehensions Stanford may have had about mingling his official actions with his private interests were overshadowed by his conviction that a rail connection with the East would benefit all citizens of California.

When his term as governor expired, Stanford left government to construct his railroad. On January 8, 1863, workers from the Central Pacific Rail Road Company began laying track at Front and K Streets in Sacramento—one year before the Union Pacific started work in the East. Six years later, on May 10, 1869, Stanford drove a gold spike in the final section of track at Promontory Point, Utah. The Central Pacific Rail Road united the West with the rest of the country, and secured Stanford's place in railroad history.

After completion of the East-West link, Stanford continued to work with his partners. The four devoted their time to strengthening and expanding their railroad properties. In 1884, they organized the Southern Pacific Company as a holding company. In 1885, the Southern Pacific Company leased the Southern Pacific Rail Road, the Central Pacific Rail Road, and other system properties, and became the dominant unit of the organization. Stanford served as president and director of the Central Pacific Rail Road Company from its inception until his death in 1893. He was director of the Southern Pacific Company from 1885 to 1893, and president from 1885 to 1890. He was director of the Southern Pacific Rail Road from 1889 to 1890.

Though no public accounting has ever been made of the profits Stanford and his partners drew from the construction of the Central Pacific and Southern Pacific Rail Roads, it is known that the enterprise made them all enormously wealthy. Stanford lived in grand style in Sacramento, and later in San Francisco. He also owned Palo Alto, a ranch in Tehama County, where he cultivated vineyards and bred racing stock. Stanford's horse-training methods were widely adopted, and his interest in how horses moved at high speeds prompted him to sponsor early experiments in motion picture photography.

Today, the Palo Alto ranch is the site of Stanford University, a memorial to Stanford's only child. Leland Stanford Jr. died in 1884, at the age of fifteen, while touring in Italy. He had been his father's pride and joy. Stanford had placed him on an elaborate silver tray and presented him to guests at a party shortly after his birth in 1869. The tray can still be seen at the Leland Stanford House in Sacramento.

Devastated by the death of his son and looking for a new challenge, Stanford allowed himself to be drafted by the REPUBLICAN PARTY as a candidate for the U.S. Senate. He was elected in 1885. It is generally conceded that Stanford was not suited to life as a senator. He was often absent and showed little enthusiasm for the work. His election also caused friction with his long-time business partners, who had supported another candidate. In spite of his poor performance—and poor health—he was reelected in 1891, and served until his death two years later.

The five-foot eleven-inch, 268-pound railroad giant succumbed to heart problems at his Palo Alto ranch on June 21, 1893. Upon his death, the bulk of his estate passed to his wife, who used it to support the university founded by Stanford and named for their son. Stanford is interred with his son and his wife in the family mausoleum on the Stanford University campus.

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## ♦ STANTON, EDWIN McMASTERS

Edwin McMasters Stanton served as U.S. attorney general from December 1860 to March 1861, at a time when the southern states were moving toward secession from the Union. He later served as secretary of war during the U.S. CIVIL WAR under President ABRAHAM LINCOLN and was a key figure in the events that led to the IMPEACHMENT of President ANDREW JOHNSON.

Stanton was born on December 19, 1814, in Steubenville, Ohio. He attended Kenyon College and studied law. He was admitted to the Ohio bar in 1836 and began his law practice in Cadiz, Ohio. From 1837 to 1839, Stanton was a county prosecutor. In 1842 he was elected reporter of the decisions of the Ohio Supreme Court. In

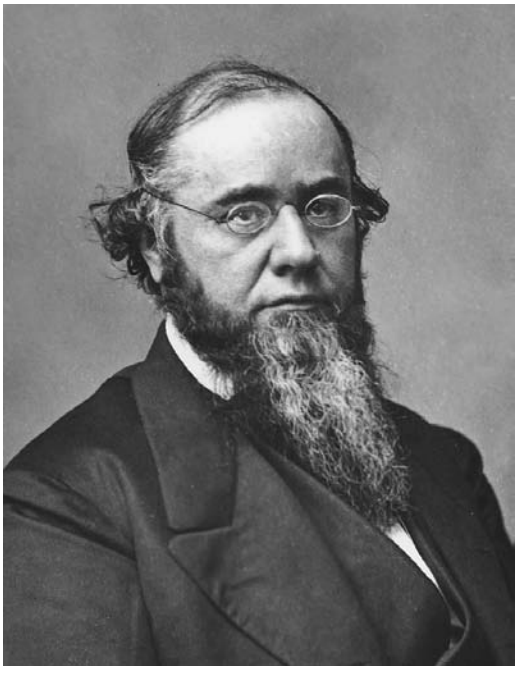

*Edwin M. Stanton.*
LIBRARY OF CONGRESS

1847 Stanton moved to Pittsburgh, Pennsylvania, where he established a successful law practice.

A skilled trial and appellate advocate, Stanton soon established a specialty in litigating federal law issues. In 1856 he relocated to Washington, D.C., where he argued several important cases before the U.S. Supreme Court. In 1858 he successfully defended the state of California in land FRAUD cases involving Mexican land acquired by the United States.

President JAMES BUCHANAN asked Stanton to serve as attorney general in late 1860, as Buchanan's term drew to a close. Southern politicians, worried that the next president, Abraham Lincoln, would implement antislavery measures, discussed secession from the Union. Stanton was a Democrat but he opposed SLAVERY. He counseled Buchanan not to abandon Fort Sumter, a fortification in the harbor of Charleston, South Carolina, that was held by Union forces. Stanton also secretly advised Republican leaders of cabinet discussions involving secession.

In 1862 President Lincoln appointed Stanton secretary of war. During the remainder of the Civil War, Stanton proved to be an effective administrator, minimizing corruption and increasing the efficiency of the military by ensuring that the necessary supplies and troops were available. He continually argued for a more aggressive prosecution of the war, a position that provoked violent quarrels with military commanders.

After the assassination of Lincoln in April 1865, Stanton played a leading role in the investigation and prosecution of the conspirators. Lincoln's successor, Andrew Johnson, retained Stanton as secretary of war, but they soon clashed over Johnson's Reconstruction program for the South. Stanton sought stricter policies against the South and worked with the Radical Republicans in Congress, who were Johnson's bitterest enemies, to achieve his aims.

In 1867 Johnson asked Stanton to resign because of this betrayal, but Stanton refused. He defended his actions under the TENURE OF OFFICE ACT (14 Stat. 430), which prohibited the removal of any federal official without senatorial consent when the official's appointment had originally been approved by the Senate. The

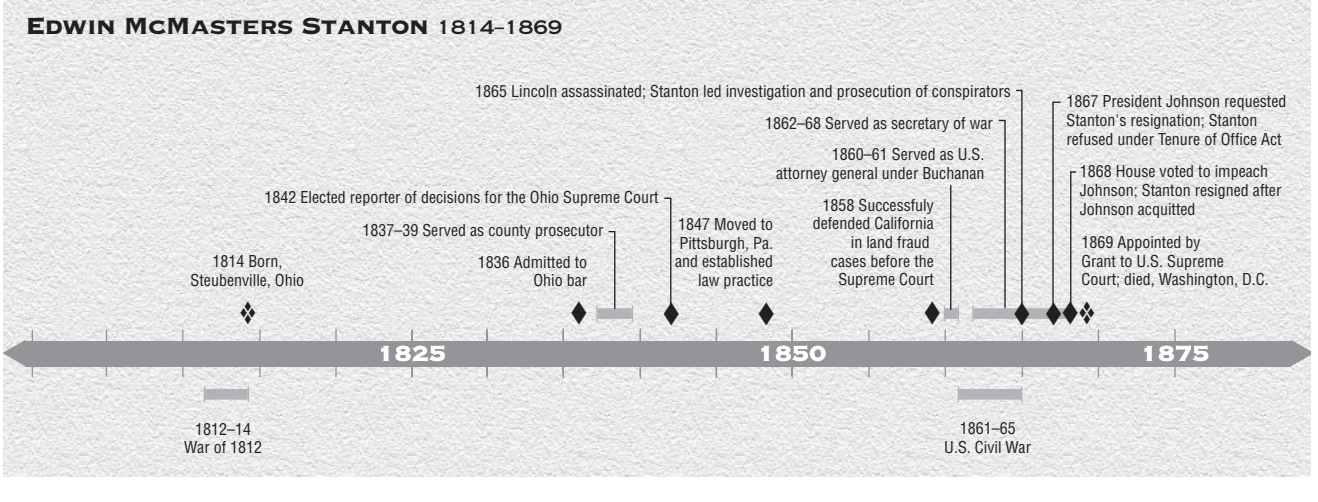

Radical Republicans had passed this act in 1867 over Johnson's VETO as a way of preventing the president from removing officials opposed to his Reconstruction policies.

Johnson ignored the Tenure of Office Act and appointed Lorenzo Thomas secretary of war. Johnson's action led to his impeachment by the House of Representatives, but the Senate acquitted him by one vote in 1868. After the acquittal Stanton finally resigned his cabinet post.

Stanton returned to private practice but his health was failing. In 1869 President ULYSSES S. GRANT appointed Stanton to the U.S. Supreme Court, but he died on December 24, 1869, in Washington, D.C., before he could assume the position.

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*Elizabeth Cady Stanton.*
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

## ♦ STANTON, ELIZABETH CADY

The opening salvo in the battle for WOMEN'S RIGHTS was fired in 1848 by the grande dame of U.S. feminism, Elizabeth Cady Stanton. When Stanton and colleague Lucretia Mott organized the nation's first women's rights convention in 1848, in Seneca Falls, New York, they sought nothing less than a revolution. They pressed for equal education, better employment opportunities, and the vote for women—radical notions in the mid–nineteenth-century United States. For fifty years, Stanton was a key strategist and standard-bearer for the feminist movement. Along with fellow suffragist SUSAN B. ANTHONY and other activists, she helped elevate the legal, social, and political status of U.S. women.

Stanton was born November 12, 1815, in Johnstown, New York. She was the middle daughter of Daniel Cady and Margaret Livingston Cady, a prominent couple in Johnstown. Elizabeth was one of eleven children, but all five of her brothers and one sister died during childhood. In some ways, Stanton was raised by her parents as a substitute for those deceased brothers. Unlike most girls of her generation, Stanton participated in athletic activities and excelled in courses typically reserved for males, such as

"THE BIBLE AND THE CHURCH HAVE BEEN THE GREATEST STUMBLING BLOCKS IN THE WAY OF WOMEN'S EMANCIPATION."
—ELIZABETH CADY STANTON

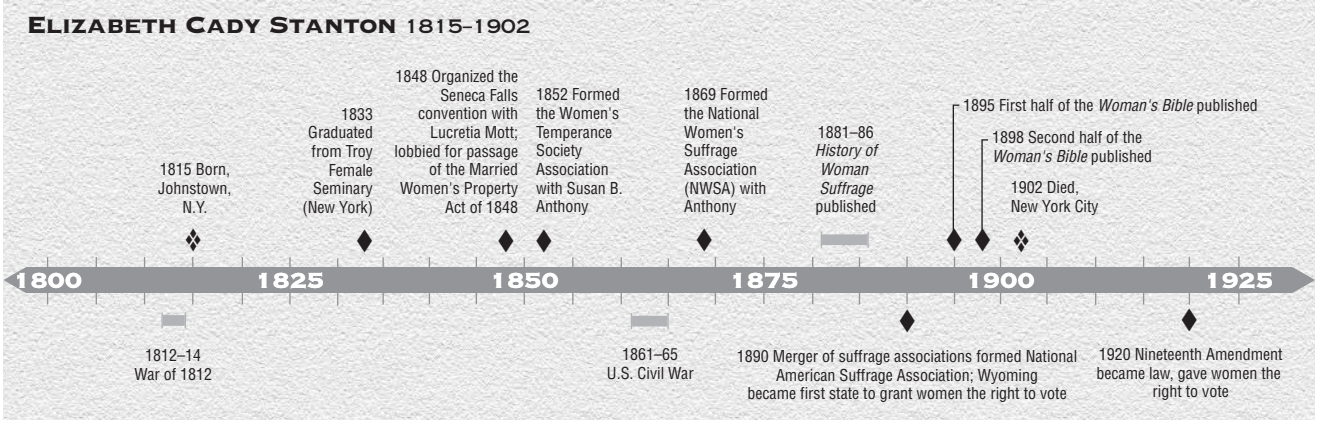

Latin, Greek, logic, philosophy, and economics. Stanton's father, a lawyer and a New York Supreme Court judge, even encouraged her to study law with him, although later he regretted his actions: as an adult, Stanton used her legal knowledge to craft well-reasoned arguments for women's rights, a cause he disliked.

After she graduated from Johnstown Academy in 1830 at age fifteen, Stanton's ambition was to attend New York's Union College. Her enrollment was impossible, however, because Union, like every other college in the entire nation, did not admit women as students. (Ohio's Oberlin College was the first U.S. college to accept female students, in 1834.) Instead of Union College, Stanton attended Troy Female Seminary, in Troy, New York. She graduated in 1833.

Stanton returned to Johnstown, where she divided her time between the pleasant diversions of upper-class life and the important social causes of the day. Despite her parents' objections, she married an abolitionist, Henry Brewster Stanton, in 1840. From the beginning of their marriage, Stanton insisted on being addressed in public by her full name. Throughout her long life, only her political enemies called her Mrs. Henry Stanton.

While attending an international antislavery conference in London with her new husband in 1840, Stanton met Mott, a Quaker activist involved in the nascent U.S. women's movement. Stanton and Mott became quick friends and allies. Both were outraged over the refusal of the male antislavery leaders to seat female delegates at the London conference. Back in the United States, the two corresponded and sometimes joined forces in abolitionist activities. They also finalized plans for the nation's first women's rights convention.

In 1848, one hundred women and men gathered in Seneca Falls for the historic convention. The agenda included a speech by renowned African American abolitionist FREDERICK DOUGLASS, and a proposal to adopt Stanton's manifesto, the Declaration of Rights and Sentiments. The Seneca Falls declaration was inspired by the U.S. Declaration of Independence. It boldly proclaimed that all men and women were equal and that women deserved greater protection under the law. The declaration called for the expansion of employment and educational opportunities for women, and the right for women to vote. After lengthy debate, it was adopted in its entirety by the convention.

The SENECA FALLS CONVENTION was derided by the press—prompting Stanton to complain that its participants "were neither sour old maids, childless women, nor divorced wives as the newspapers declared them to be." Nevertheless, the convention succeeded in bringing women's issues to the political forefront.

After Seneca Falls, Stanton was an acknowledged leader of the U.S. women's movement. She soon joined forces with Anthony, the country's most prominent suffragist. For the next fifty years, Anthony was Stanton's staunchest feminist ally.

In addition to women's rights and ABOLITION, Stanton was involved in temperance, the movement to ban the sale and consumption of alcohol in the United States. Combining temperance with women's rights made sense to Stanton, both philosophically and practically. Drunken men destroyed the lives of powerless wives and children. Without laws to protect them, women who were married to chronic drinkers often faced physical abuse and financial ruin. The Married Women's Property Act of 1848 addressed this imbalance in legal power. Stanton helped win passage of the law by conducting an exhaustive petition drive throughout the state of New York.

Although Stanton supported temperance wholeheartedly, she was angered that the movement's male leaders were just as misguided as the abolitionists at the London antislavery conference. When Stanton attempted to participate in a Sons of Temperance meeting, she was summarily removed from the building. She and Anthony formed their own group, the Woman's State Temperance Society, in 1852.

The women's movement stalled around the time of the U.S. CIVIL WAR because many of its supporters focused exclusively on abolition. As president of the National Woman's Loyal League, Stanton helped gather four hundred thousand signatures on petitions in support of the THIRTEENTH AMENDMENT abolishing SLAVERY. After the war, Stanton and Anthony were bitterly disappointed when their abolitionist colleagues refused to support the inclusion of women in either the FOURTEENTH AMENDMENT, which granted African American males citizenship, or the FIFTEENTH AMENDMENT, which gave those males the right to vote. Stanton and Anthony formed the National Woman's Suffrage Association in 1869 with the sole purpose of winning the vote for women.

Because Stanton was busy with her family of seven children, she initially worked at her home on VOTING RIGHTS strategy while Anthony traveled the country delivering lectures. Later, this arrangement changed as Stanton became a sought-after speaker during the 1870s in the lyceum movement, a series of cultural and educational programs for adults.

As Stanton grew older, she became even more radical in her thinking. She shocked people with her pro-divorce, pro-labor, and antireligion opinions. In particular, her book *Woman's Bible,* published partially in 1895 and partially in 1898, drew fire because in it, Stanton lambasted what she viewed as the male bias of the Bible. When Stanton suggested that all organized religion oppressed women and should therefore be abolished, many felt she had gone too far. These unpopular opinions explain why some feminists disassociated themselves from Stanton and looked exclusively to Anthony for leadership.

Stanton also helped compile three of the six volumes of the less controversial *History of Woman Suffrage,* published from 1881 to 1886, with coauthor Matilda Joslyn Gage.

On Stanton's eightieth birthday, she was honored at a gala in New York City's Metropolitan Opera House. Looking back at her life, she told a crowd of six thousand people that she had been warned repeatedly against organizing the Seneca Falls convention. People told her it was a huge mistake because God had set the bounds of a woman's world and she should be satisfied with it. Stanton remarked that it was exactly this type of repressive attitude that led to her embrace of the women's movement.

Stanton died October 26, 1902, in New York City, at the age of eighty-six. Although she did not witness the passage of the NINETEENTH AMENDMENT, which gave nearly 25 million U.S. women the right to vote in 1920, she left her imprint on it.

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Temperance Movement.

## STAR CHAMBER

*An ancient high court of England, controlled by the monarch, which was abolished in 1641 by Parliament for abuses of power.*

The English court of Star Chamber was created by King Henry VII in 1487 and was named for a room with stars painted on the ceiling in the royal palace of Westminster where the court sat. The Star Chamber was an instrument of the monarch and consisted of royal councillors and two royal judges. The jurisdiction of the court was based on the royal prerogative of administering justice in cases not remediable in the regular courts of law.

The Star Chamber originally assisted with some administrative matters, but by the 1530s it had become a pure court, relieving the king of the burden of hearing cases personally. It was a court of EQUITY, granting remedies unavailable in the common-law courts. As such, the court was an informal body that dispensed with "due process" as it was then understood.

During Henry VII's reign (1485–1509), about half the cases involved real property. During the sixteenth and early seventeenth centuries, the Star Chamber became a useful tool in dealing with cases involving members of the aristocracy who often defied the authority of the regular courts. It was during this period, moreover, that the court acquired criminal jurisdiction, hearing cases on issues concerning the security of the realm, such as SEDITION, criminal LIBEL, conspiracy, and forgery. Later, FRAUD and the punishment of judges came within its jurisdiction.

The importance of the Star Chamber increased during the reigns of James I (1603–25) and Charles I (1625–49). Under Archbishop William Laud, the court became a tool of royal oppression, seeking out and punishing religious and political dissidents. In the 1630s Laud used the Star Chamber to persecute a group of Puritan leaders, most of whom came from the gentry, subjecting them to the pillory and CORPORAL PUNISHMENT. Though the Star Chamber could not mete out CAPITAL PUNISHMENT, it inflicted everything short of death upon those found guilty. During this time the court met in secret, extracting evidence by torturing witnesses and handing out punishments that included mutilation, life imprisonment, and enormous fines. It turned equity's traditionally broad discretion into a complete disregard for the law. The Star Chamber sometimes acted

on mere rumors in order to suppress opposition to the king.

The Star Chamber's ARBITRARY use of power and the cruel punishments it inflicted produced a wave of reaction against it from Puritans, advocates of common-law courts, and others opposed to the reign of Charles I. In 1641 the Long Parliament abolished the court and made reparations to some of its victims.

The term *star chamber* has come to mean any lawless and oppressive tribunal, especially one that meets in secret. The constitutional concept of DUE PROCESS OF LAW is in part a reaction to the arbitrary use of judicial power displayed by the Star Chamber.

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## STARE DECISIS

[Latin, Let the decision stand.] *The policy of courts to abide by or adhere to principles established by decisions in earlier cases.*

In the United States and England, the COMMON LAW has traditionally adhered to the precedents of earlier cases as sources of law. This principle, known as stare decisis, distinguishes the common law from civil-law systems, which give great weight to codes of laws and the opinions of scholars explaining them. Under stare decisis, once a court has answered a question, the same question in other cases must elicit the same response from the same court or lower courts in that jurisdiction.

The principle of stare decisis was not always applied with uniform strictness. In medieval England, common-law courts looked to earlier cases for guidance, but they could reject those they considered bad law. Courts also placed less than complete reliance on prior decisions because there was a lack of reliable written reports of cases. Official reports of cases heard in various courts began to appear in the United States in the early 1800s, but semiofficial reports were not produced in England until 1865. When published reports became available, lawyers and judges finally had direct access to cases and could more accurately interpret prior decisions.

For stare decisis to be effective, each jurisdiction must have one highest court to declare what the law is in a precedent-setting case. The U.S. Supreme Court and the state supreme courts serve as precedential bodies, resolving conflicting interpretations of law or dealing with issues of first impression. Whatever these courts decide becomes judicial precedent.

In the United States, courts seek to follow precedent whenever possible, seeking to maintain stability and continuity in the law. Devotion to stare decisis is considered a mark of judicial restraint, limiting a judge's ability to determine the outcome of a case in a way that he or she might choose if it were a matter of first impression. Take, for example, the precedent set in ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, the 1973 decision that defined a woman's right to choose ABORTION as a fundamental constitutional right. Despite the controversy engendered by the decision, and calls for its repudiation, a majority of the justices, including some conservatives who might have decided *Roe* differently, have invoked stare decisis in succeeding abortion cases.

Nevertheless, the principle of stare decisis has always been tempered with a conviction that prior decisions must comport with notions of good reason or they can be overruled by the highest court in the jurisdiction.

The U.S. Supreme Court rarely overturns one of its precedents, but when it does, the ruling usually signifies a new way of looking at an important legal issue. For example, in the landmark case BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the Supreme Court repudiated the SEPARATE-BUT-EQUAL doctrine it endorsed in PLESSY V. FERGUSON, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896). The Court ignored stare decisis, renouncing a legal precedent that had legitimated racial SEGREGATION for almost sixty years.

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Case Law; Judicial Review.

## ♦ STARR, KENNETH WINSTON

Kenneth Starr has served as a judge on the court of appeals, as U.S. SOLICITOR GENERAL, and

came to national attention as the **INDEPENDENT COUNSEL** who investigated President **BILL CLINTON** and his administration. Appointed as independent counsel in 1994, Starr garnered both vilification and praise for his investigation into the Arkansas land deal known as **WHITEWATER** and the investigation into the president's affair with Monica Lewinsky, a young White House intern.

Starr was born in Vernon, Texas, on July 21, 1946, to Willie and Vannie Starr. His father was a minister for the Church of Christ in Thalia, Texas; he also barbered and sold milk from the family cow. The children had a strict upbringing commensurate with their father's calling. When Starr was young, the family moved to San Antonio, where he was elected class president of Sam Houston High during his junior and senior years. He first became interested in the political process during the 1960 presidential campaign between **JOHN F. KENNEDY** and **RICHARD M. NIXON**.

After high school graduation, Starr attended Harding College, a school affiliated with the Church of Christ and located in Searcy, Arkansas. To help defray his expenses, he sold Bibles door-to-door. According to one of his roommates, Starr did not deviate from his conservative upbringing. Nevertheless, as an editor of the college newspaper, Starr reportedly defended the rights of **VIETNAM WAR** protesters, although he supported the war.

To better pursue his interest in politics, Starr transferred to George Washington University, graduating in 1968. He obtained a master's degree from Brown University, then attended Duke University Law School. At Duke he served as an editor of the *Duke Law Journal*. After graduation in 1973, Starr clerked for a federal appellate judge in the District of Columbia, worked briefly as an associate in a law firm, then was selected to clerk for Supreme Court Chief Justice **WARREN E. BURGER**.

*Ken Starr.*
AP/WIDE WORLD PHOTOS

In private practice after his clerkship, Starr became acquainted with **WILLIAM FRENCH SMITH**. When **RONALD REAGAN** appointed Smith to be attorney general in 1981, Starr joined the **JUSTICE DEPARTMENT**. Starr's typically conservative opinions generally meshed well with those of the Reagan administration.

"WHAT I FEAR IS AN AGE OF CONSTITUTIONAL ILLITERACY."
—KEN STARR

**KENNETH WINSTON STARR** 1946–

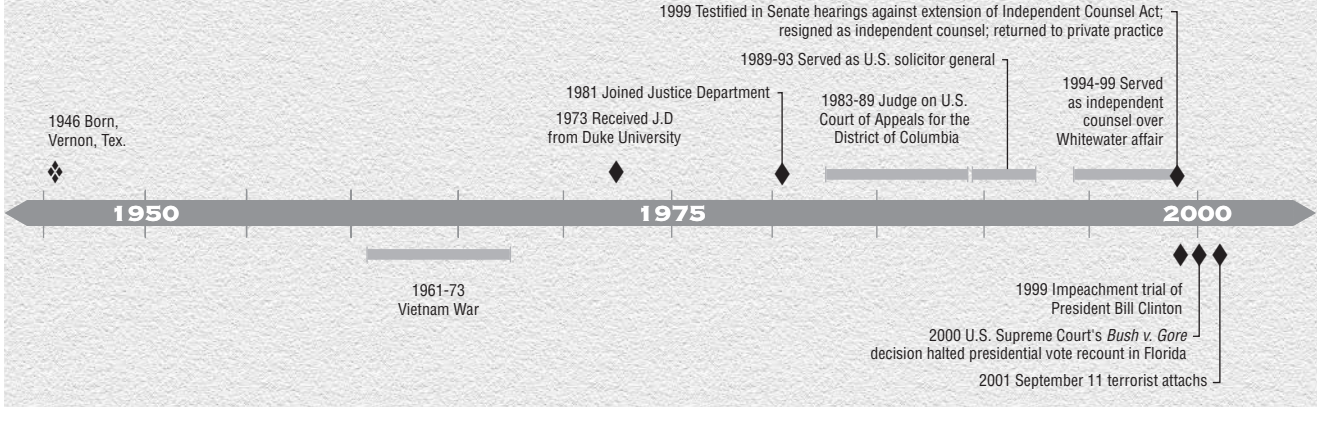

However, Starr disagreed with the administration when it supported a Christian evangelical college's efforts to retain certain tax benefits after it was disclosed that the institution had discriminated against minorities.

Reagan rewarded Starr with an appointment to the U.S. Court of Appeals for the District of Columbia, which is considered the most prestigious federal appellate court. In 1983, at age 37, Starr was the youngest person ever to be appointed to the court of appeals. During his six-year tenure, Starr consistently displayed his conservative ideology, but inspired respect from both conservatives and liberals for his judicial integrity.

Starr accepted the position of solicitor general offered him by President GEORGE H.W. BUSH in 1989. His duties as solicitor general included arguing cases on behalf of the United States in the Supreme Court and deciding which government cases merited appeal. He returned to private practice when President Clinton took office. On August 5, 1994, a three-judge panel selected Starr to replace Robert B. Fiske Jr. as independent counsel for the inquiry into the Whitewater affair clouding the Clinton administration.

Although Fiske had already done so, Starr investigated Bill and Hillary Clinton's connection to the failure of the Madison Guaranty Savings & Loan, a bank in Little Rock, Arkansas, owned by James and Susan McDougal, business partners of the Clintons. Susan McDougal refused to testify before Starr's GRAND JURY, and consequently served about 18 months in prison on CONTEMPT charges. Starr also reopened an investigation into the 1993 death of White House counsel Vincent W. Foster Jr. Fiske had concluded that Foster had committed suicide, but conspiracy theories abounded that Foster had been murdered. Starr's July 1997 report concluded that the death was a suicide. At the request of Attorney General JANET RENO, Starr also investigated the 1993 firing of White House travel employees at a time when friends of the Clintons were getting into the travel business, and the misappropriation of FBI files on Republicans by White House staffers.

Starr took an unprecedented step when he called HILLARY CLINTON to testify before a grand jury in 1996. Starr had earlier subpoenaed from Hillary Clinton's Little Rock law firm billing records relating to her work for the failed Madison Guaranty. Some of the records were missing until early 1996, when they were discovered in the Clintons' private living quarters of the White House. Starr sought the First Lady's testimony to determine whether the Clintons or others in the administration had hidden evidence or otherwise tried to obstruct justice.

Starr faced significant criticism from the beginning of his tenure for the perceived partisan nature of his investigation, as well as for the cost of the investigation, estimated at $40 million through 1998. Starr was also criticized for a paucity of results. Former Arkansas governor Jim Guy Tucker was convicted of conspiracy for actions in a real estate scheme from his days as a lawyer in public practice, and Susan and Jim McDougal were found guilty of criminal charges. Webster Hubbell, Hillary Clinton's former law partner and high-ranking Justice Department official, pleaded guilty in 1994 to two counts of TAX EVASION and MAIL FRAUD. David Hale, a former municipal judge and businessman, was convicted on FRAUD and conspiracy charges and has claimed that he was pressured by Clinton to make an illegal loan, but these charges are unsubstantiated. Starr failed to obtain convictions in a 1996 trial involving bank officers accused of misappropriating funds, which he tried to link to Clinton's 1986 campaign for governor.

In early 1998, revelations involving President Clinton and White House intern Monica Lewinsky began to surface, and Starr's office was immediately in the midst of controversy. Starr sanctioned the wiring of Pentagon employee Linda R. Tripp, a confidant of Lewinsky, in order to learn more about the alleged affair between the president and Lewinsky, and to discover any attempts to conceal the affair. Despite significant criticism that he had gone too far, Starr continued with his investigation, claiming there was a need to determine whether President Clinton had committed perjury or obstructed justice in connection with a SEXUAL HARASSMENT case brought against Clinton by former Arkansas state employee, Paula Corbin Jones.

In early January 1998, Lewinsky offered an AFFIDAVIT in the Jones case denying that she had had a sexual relationship with the president. On January 17, 1998, Clinton made the same denial in a deposition in the *Jones* case. Starr's investigation was further complicated in April 1998 when Federal District Judge SUSAN WEBBER WRIGHT dismissed the Jones lawsuit before trial. Dismissal of the lawsuit engendered further criticism for Starr when he refused to drop

his perjury and OBSTRUCTION OF JUSTICE investigation.

In July 1998, Starr subpoenaed President Clinton to testify before the grand jury. The subpoena was later withdrawn when Clinton agreed to testify voluntarily. Clinton also voluntarily provided to the office of independent counsel a vial of blood to determine whether a dress of Lewinsky's was stained with his semen. The president testified via videotape to the grand jury on August 17, 1998.

Later that day, he admitted in a televised speech that he had had an "inappropriate" relationship with Lewinsky, but he steadfastly maintained that he had not committed perjury or obstructed justice. In the speech, Clinton severely castigated Starr's investigation, a move that angered many of the president's supporters. However, the investigator became the investigated on October 30, 1998, when a federal judge approved a special inquiry into whether Starr's office had leaked secret grand jury information.

In September 1998, Starr delivered his report and 36 boxes of accompanying evidence to Capitol Hill, detailing the president's sexual conduct and setting out possible grounds for IMPEACHMENT. Although Clinton continued to enjoy significant support from the public, the Starr Report prompted the House Judiciary Committee to open an investigation into Clinton's actions in October 1998. Starr testified before the House Judiciary Committee for 12 hours in November 1998, and the next month the committee sent four ARTICLES OF IMPEACHMENT to the full House. The four articles were pared to two by the full House in December—one article for perjury before a grand jury, and another for obstruction of justice in the Jones lawsuit. Clinton was acquitted in February 1999.

Prosecutions by the office of independent counsel continued in the first half of 1999, but showed signs of slowing down. Susan McDougal was acquitted in late April on an obstruction of justice charge, and the jury failed to reach a verdict on two counts of criminal contempt. In May 1999, a mistrial was declared when the jury failed to reach a verdict in the case of Julie Hiatt Steele, whom Starr charged had obstructed justice and made false statements regarding the investigation of alleged misconduct by the president toward Kathleen Willey, a former White House volunteer. Starr later announced that he would not retry either McDougal or Steele.

On June 30, 1999, Webster Hubbell plead guilty to charges that he lied to bank regulators to conceal work by himself and Hillary Clinton on an Arkansas land development project when they were partners in Little Rock. Hubbell was sentenced to a year of PROBATION. Finally, Starr scored a victory when federal judge Susan Webber Wright held President Clinton in civil contempt for lying in his deposition in the Jones sexual harassment lawsuit.

Senate hearings began in February 1999 to determine whether the Independent Counsel Act, enacted in 1974 in the wake of the WATERGATE scandal, should be allowed to expire. Kenneth Starr testified against extension of the law. Congress allowed the Independent Counsel Act to expire in June 1999. Starr resigned his post in October 1999 and was succeeded by senior litigation counsel Robert W. Ray. In September 2000 Ray announced that he was closing the Whitewater inquiry based on insufficient evidence. The total cost of the investigation was estimated to be $70 million dollars in public funds.

After he resigned, Starr returned to private practice at the Washington, D.C.-based firm of Kirkland & Ellis. In the 2000s, he continued to practice law, lecture, and write. He also served as an adjunct professor at New York University, and a distinguished visiting professor at George Mason University School of Law in Virginia. In 2002, Starr published *First Among Equals: The Supreme Court in American Life.*

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## START TREATIES

The Strategic Arms Reduction Talks (START) Treaties, START I (1991) and START II (1993), provided for large cuts in the nuclear arms possessed by the United States and the Soviet Union (later the Russian Federation). START I was the first arms-control treaty to reduce, rather than merely limit, the strategic offensive nuclear arsenals of the United States and the

Soviet Union. The United States and Russia have also negotiated additional treaties, including START II (1993), START III (1997), and the Strategic Offensive Reduction Treaty (SORT) (2002).

## START I

The Soviet Union and the United States began the START negotiations in 1982, following the disappointing results of the Strategic Arms Limitation Talks (SALT), which had not led to significant reductions in the number of nuclear arms possessed by the superpowers. Nine years later, on July 31, 1991, presidents GEORGE H. W. BUSH of the United States and Mikhail Gorbachev of the Soviet Union signed the 700-page START Treaty (START I), formally designated as the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms.

START I provided for the reduction of U.S. nuclear capacity by roughly 15 percent and Soviet capacity by 25 percent within seven years after ratification. The treaty contained a number of verification procedures, including on-site inspections with spot checks, monitoring of missile-production plants, and the exchange of data tapes from missile tests.

Although START I reductions appeared formidable, critics noted that they simply returned both countries to the levels of nuclear arms that they had possessed in 1982, when negotiations had begun. Both superpowers still maintained the capacity to destroy each other several times over. Others claimed that because START I allowed for the modernization and expansion of certain weapon categories by both parties, it would lead to a continuation of the arms race.

## START II

Changes in the political climate between the superpowers, particularly the dissolution of the Soviet Union in the summer of 1991, inspired further START negotiations. In September 1991, President Bush declared that the superpowers had an historic opportunity to negotiate significant reductions in NUCLEAR WEAPONS. He made a significant gesture toward this goal by calling U.S. long-range bombers off 24-hour alert and discontinuing development of the MX missile.

New Russian president Boris Yeltsin reciprocated Bush's conciliatory gestures when he announced on January 25, 1992, that Russia "no longer consider[ed] the United States our potential adversary" and declared that his country would no longer target U.S. cities with nuclear missiles. Four days later, President Bush announced further arms cuts in his State of the Union address, including cancellation of the B-2 bomber, the mobile Midgetman missile, and advanced cruise missiles. Yeltsin later responded with an even more ambitious proposal to reduce nuclear arsenals to an amount between 2,000 and 2,500 warheads each and to eliminate strategic nuclear weapons entirely by the year 2000. Although the latter goal proved too radical to implement, the former would be nearly achieved.

Yeltsin and Bush fulfilled their historic announcements in June 1992 by signing an accord, the Joint Understanding on the Elimination of MIRVed ICBMs (multiple warhead intercontinental ballistic missiles) and Further Reductions in Strategic Offensive Arms, that promised to reduce their combined nuclear arsenals from about 15,000 warheads to 6,000 or 7,000 by the year 2003. According to Bush, "With this agreement, the nuclear nightmare recedes more and more for ourselves, for our children, and for our grandchildren."

The June 1992 accord led to the development of START II, formally called the Treaty Between the United States of America and the Russian Federation on the Further Reduction and Limitation of Strategic Offensive Arms. It was signed by Bush and Yeltsin on January 3, 1993. Under its provisions, the United States and Russia would each have between 3,000 and 3,500 warheads by 2003, an amount roughly two-thirds that of pre-START levels. Warheads on submarine-launched ballistic missiles would be limited to no more than 1,750 for each country. The treaty also required the elimination of all land-based heavy ICBMs and multiple warhead missiles. As a result, ICBMs may carry only one nuclear warhead, a development that many agreed would lead to improved strategic stability.

In December 1994, President BILL CLINTON of the United States and the leaders of the nations of Belarus, Kazakhstan, Russia, and the Ukraine—the former Soviet republics still possessing nuclear arms—formally ratified the START I treaty into force, clearing the way for

further consideration of START II by the U.S. Senate. On January 26, 1996, the U.S. Senate ratified the START II Treaty on a vote of 87-4.

The START II treaty was originally scheduled to be implemented by January 2003. However, a 1997 protocol extended the deadline until December 2007 due to concerns by Russian leaders about their ability to meet the earlier date. Because the U.S. Senate has failed to ratify the 1997 protocol, START II has not yet entered into force.

### START III and SORT

Clinton and Yeltsin negotiated for a START III treaty, which would have reduced the number of deployed strategic warheads to between 2,000 and 2,500. The two leaders agreed to a framework in March 1997, and the negotiations were scheduled to begin after the START II treaty entered into force. However, because START II never became effective, the START III treaty was never negotiated. The most significant aspects of the START III treaty were proposed provisions regarding the destruction of warheads.

Five years after the START III negotiations stalled, President GEORGE W. BUSH and Russian President Vladimir Putin signed the SORT treaty, in which the United States and Russia agreed to reduce their strategic nuclear arsenals to an amount between 1,700 and 2,200 warheads each. These limitations are similar to the proposed START III treaty, but the new SORT treaty does not contain provisions regarding the destruction of warheads or the destruction of delivery vehicles for nuclear weapons. As of May 2003, neither the U.S. Senate nor the Russian Duma had ratified the treaty. The proposed implementation and expiration dates for the treaty occur in 2012.

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Arms Control and Disarmament.

## STATE

*As a noun, a people permanently occupying a fixed territory bound together by common habits and custom into one body politic exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace and of entering into international relations with other states. The section of territory occupied by one of the United States. The people of a state, in their collective capacity, considered as the party wronged by a criminal deed; the public; as in the title of a case, "The State v. A. B." The circumstances or condition of a being or thing at a given time.*

*As a verb, to express the particulars of a thing in writing or in words; to set down or set forth in detail; to aver, allege, or declare. To set down in gross; to mention in general terms, or by way of reference; to refer.*

## STATE ACTION

*A requirement for claims that arise under the* DUE PROCESS CLAUSE *of the* FOURTEENTH AMENDMENT *and* CIVIL RIGHTS *legislation, for which a private citizen seeks relief in the form of damages or redress based on an improper intrusion by the government into his or her private life.*

The U.S. Supreme Court has established that the protections offered by the Fourteenth and Fifteenth Amendments to the U.S. Constitution apply only to actions authorized or sanctioned by state law. The "state-action" requirement means that private acts of RACIAL DISCRIMINATION cannot be addressed under these amendments or the federal civil rights laws authorized by the amendments.

The Fourteenth Amendment prohibits a state from denying any person due process of law and the EQUAL PROTECTION of the law. The FIFTEENTH AMENDMENT prohibits a state from infringing on a person's right to vote. Both amendments were passed after the Civil War to guarantee these constitutional rights to newly freed slaves. During Reconstruction, Congress enacted many laws that it claimed were based on these amendments. Armed with this constitutional authority, Congress, in the CIVIL RIGHTS ACT of 1875, sought to prohibit racial discrimination by private parties in the provision of public accommodations, such as hotels, restaurants, theaters, and public transportation.

The Supreme Court struck down the 1875 act in the *Civil Rights* cases, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883). It held that under the Fourteenth Amendment, "it is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment." The Court relied on language of the amendment that provides that "no state" shall engage in certain specified conduct.

This restrictive reading of the state-action requirement permitted racial discrimination to flourish in the South. For example, the Supreme Court upheld the "white primary," a device used to circumvent the Fifteenth Amendment, in *Grovey v. Townsend,* 295 U.S. 45, 55 S. Ct. 622, 79 L. Ed. 1292 (1935). The Court reasoned that because political parties were private organizations, their primary elections did not constitute state action.

The Supreme Court began to move away from a strict state-action requirement in the 1940s. In *Smith v. Allwright,* 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944), the Court struck down the WHITE PRIMARY as violative of the Fifteenth Amendment, thus overruling *Grovey.* The Court now found that primary elections played an important part in the democratic process and must be considered as officially sanctioned by the state.

The Court extended this type of analysis in *Shelley v. Kraemer,* 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), ruling that racially discriminatory restrictive covenants affecting real estate were unenforceable in state courts, because any such enforcement would amount to state action in contravention of the Fourteenth Amendment. Groups of homeowners used restrictive covenants to prevent the sale or rental of their homes to African Americans, Jews, and other minorities. A restriction was included in their real estate deeds forbidding such sale or rental. Until 1948 this form of private discrimination was thought to be legal because the state was not involved.

By the 1960s the Supreme Court was applying a more sophisticated analysis to determine if the state-action requirement had been met. In *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961), the Court found state action when a state agency leased property to a restaurant that refused to serve African Americans. It stated that state action in support of discrimination exists when there is a "close nexus" between the functions of the state and the private discrimination.

Nevertheless, the Court has not abandoned the state-action requirement. In *Moose Lodge v. Irvis,* 407 U.S. 163, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972), a racially restrictive private club refused to serve the African American guest of a white member. The Court determined that the mere grant of a liquor license did not convert the private club's discriminatory policy into state action under the Fourteenth Amendment.

CROSS-REFERENCES

Civil Rights Cases; Integration.

## STATE COURTS

*Judicial tribunals established by each of the fifty states.*

Each of the fifty state court systems in the United States operates independently under the constitution and the laws of the particular state. The character and names of the courts vary from state to state, but they have common structural elements.

State governments create state courts through the enactment of statutes or by constitutional provisions for the purpose of enforcing state law. Like the federal court system, the judicial branch of each state is an independent entity, often called "the third branch" of government (the other two being the executive and legislative branches). Though independent, state courts are dependent on the state legislatures for the appropriation of money to run the judicial system. Legislatures also authorize court systems to establish rules of procedure and sometimes direct the courts to investigate problems in the legal system.

Most states have a multilevel court structure, including a trial court, an intermediate court of appeals, and a supreme court. Only eight states have a two-tiered system consisting of a trial court and a supreme court. Apart from this general structure, the organization of state courts and their personnel are determined by the laws that created the court system and by the court's own rules.

State courts are designed to adjudicate civil and criminal cases. At the trial level, there are courts of limited and general jurisdiction. Limited jurisdiction courts, sometimes called inferior courts, handle minor civil cases, such as small claims or conciliation matters, and lesser crimes that are classified as misdemeanors. The persons who judge these cases may be part-time

judges, and some states still allow persons not trained in the law to hear these cases. A JUSTICE OF THE PEACE falls within this category and handles typically minor matters such as traffic violations. Courts of general jurisdiction, also known as superior courts, handle major civil matters and more serious crimes, called felonies.

Some states have a large number of trial courts. They can include small claims, municipal, county, and district courts. Since the 1980s, some states have simplified their systems, creating a unified trial court that hears all matters of limited and general jurisdiction.

Intermediate courts of appeal consider routine appeals brought by losing parties in the trial courts below. These are "error correcting" courts, which review the trial court proceedings to determine if the trial made errors in procedure or law that resulted in an incorrect decision. If the court determines that an error was made (and it was not a HARMLESS ERROR), it reverses the decision and sends it back to the trial court for another proceeding. Intermediate courts of appeal are supposed to interpret the precedents of the state's supreme court. However, in every state there are many areas of law in which its supreme court has not ruled, leaving the appellate courts free to make decisions on what the law should be. These courts process thousands of cases a year, and losing parties generally have a right to appeal to these courts, no matter how dubious the merits of the appeal.

The supreme court of a state fulfills a role similar to the U.S. Supreme Court. A state supreme court interprets the state constitution, the statutes enacted by the state legislature, and the body of state COMMON LAW. A supreme court is a precedential court: its rulings govern the interpretation of the law by the trial and appellate courts. A supreme court also administers the entire state court system, and the chief justice of the court is the spokesperson for the judiciary. In New York and Maryland, the highest court is called the court of appeals. In New York, the trial court is called the supreme court. These and other names for courts are based on historical circumstances but do not alter the substance of the work these courts perform.

The supreme court also establishes rules of procedure for all state courts. These rules govern civil, criminal, and juvenile court procedure, as well as the admission of evidence. State supreme courts also promulgate codes of professional responsibility for lawyers.

State courts have become highly organized systems. Beginning in the late 1960s, federal money helped states rethink how they deliver services. All states have a professional state court administrator, who administers and supervises all facets of the state court system, in consultation with the trial, appellate, and supreme courts. Research and planning functions are now common, and state courts rely heavily on computers for record keeping and statistical analysis.

At the county level, court administrators, previously known as clerks of court, oversee the operations of the trial courts. Court clerks, officers, bailiffs, and other personnel are called upon to make the system work. Judges have court reporters, who record trial proceedings either stenographically or electronically, using audio or video recording devices.

State court judges, unlike federal judges, are not appointed for life. Most states require judges to stand for election every six to ten years. An election may be a contest between rival candidates, or it may be a "retention election," which asks the voters whether or not a judge should be retained.

## STATE DEPARTMENT

The U.S. Department of State is part of the EXECUTIVE BRANCH of government and is principally responsible for foreign affairs and foreign trade. It advises the president on the formulation and execution of foreign policy. As chief executive, the president has overall responsibility for the foreign policy of the United States. The Department of State's primary objective in the conduct of foreign relations is to promote the long-range security and well-being of the United States. The department determines and analyzes facts relating to U.S. overseas interests, makes recommendations on policy and future action, and takes the necessary steps to carry out established policy. In so doing, the department engages in continuous consultations with the Congress, other U.S. departments and agencies, and foreign governments; negotiates treaties and agreements with foreign nations; speaks for the United States in the UNITED NATIONS and in more than 50 major international organizations in which the United States participates; and represents the United States at more than 800 international conferences annually.

The Department of State, the senior executive department of the U.S. government, was

# The State Department's Country Reports on Human Rights Practices

One of the U.S. State Department's most important tasks is to submit to Congress annual reports on the state of **HUMAN RIGHTS** in countries throughout the world. The *Country Reports on Human Rights Practices,* as the book containing these reports is titled, contains extensive and detailed information that allows Congress and the State Department to make better decisions regarding U.S. policy toward foreign nations.

The State Department has submitted country reports to Congress each year since 1977. In the first year, the reports covered 82 countries, and by 1995 that number had grown to 194.

U.S. embassy staff members in each country write the preliminary report about the country. They obtain information from government and military officials, journalists, academics, and human rights activists. Embassy staff members often put themselves at great risk in collecting human rights information in countries with extensive rights violations. State Department staff members then edit the reports. They attempt to gather still more evidence from international human rights groups, international bodies such as the **UNITED NATIONS**, and other sources.

The country reports are prefaced by an overview of human rights developments around the world, written by the assistant secretary of the Democracy, Human Rights, and Labor Division of the State Department. This overview summarizes the international human rights situation, identifies those nations with serious rights violations, and comments on the state of democracy around the world.

Each report begins with basic information regarding the government and economy of a nation, followed by detailed information on the status of human rights in the country.

The 1995 report about Brazil serves as an example of the extensive detail in the country reports. The Brazil report chronicles significant human rights abuses in that country, including killings by police and military death squads, the murder of street children in Rio de Janeiro, and numerous instances of torture. The report also describes the social, political, and legal factors in Brazil that contribute to human rights violations. These include overloaded courts and prisons, corruption of public officials and police, widespread poverty, and ineffective investigation into police and military brutality.

Each report also analyzes the human rights situation for women, racial and ethnic minorities, and workers in the country. The report about Brazil indicates a high incidence of physical abuse of women, while noting that the country has increased the number of special police stations assigned the task of preventing crimes against women. Serious violations against the rights of indigenous peoples are also recorded, including atrocities committed by the military and private parties during land disputes. On the subject of workers' rights, the Brazil report details unsafe working conditions, use of child labor in sugar and charcoal production, and use of forced labor in mining and agriculture.

**FURTHER READINGS**

"Country Reports on Human Rights Practices." 2001. Available online at <www.state.gov/g/drl/rls/hrrpt/2001> (accessed February 27, 2004).

**CROSS-REFERENCES**

Genocide; Human Rights.

established by an act of July 27, 1789, as the Department of Foreign Affairs and was renamed Department of State by an act of September 15, 1789.

### Office of the Secretary

**Secretary of State** The SECRETARY OF STATE, the principal foreign policy adviser to the president, is responsible for the overall direction, coordination, and supervision of U.S. foreign relations and for the interdepartmental activities of the U.S. government overseas. The secretary is the first-ranking member of the cabinet, is a member of the NATIONAL SECURITY COUNCIL, and is in charge of the operations of the department, including the Foreign Service.

**Department of State**

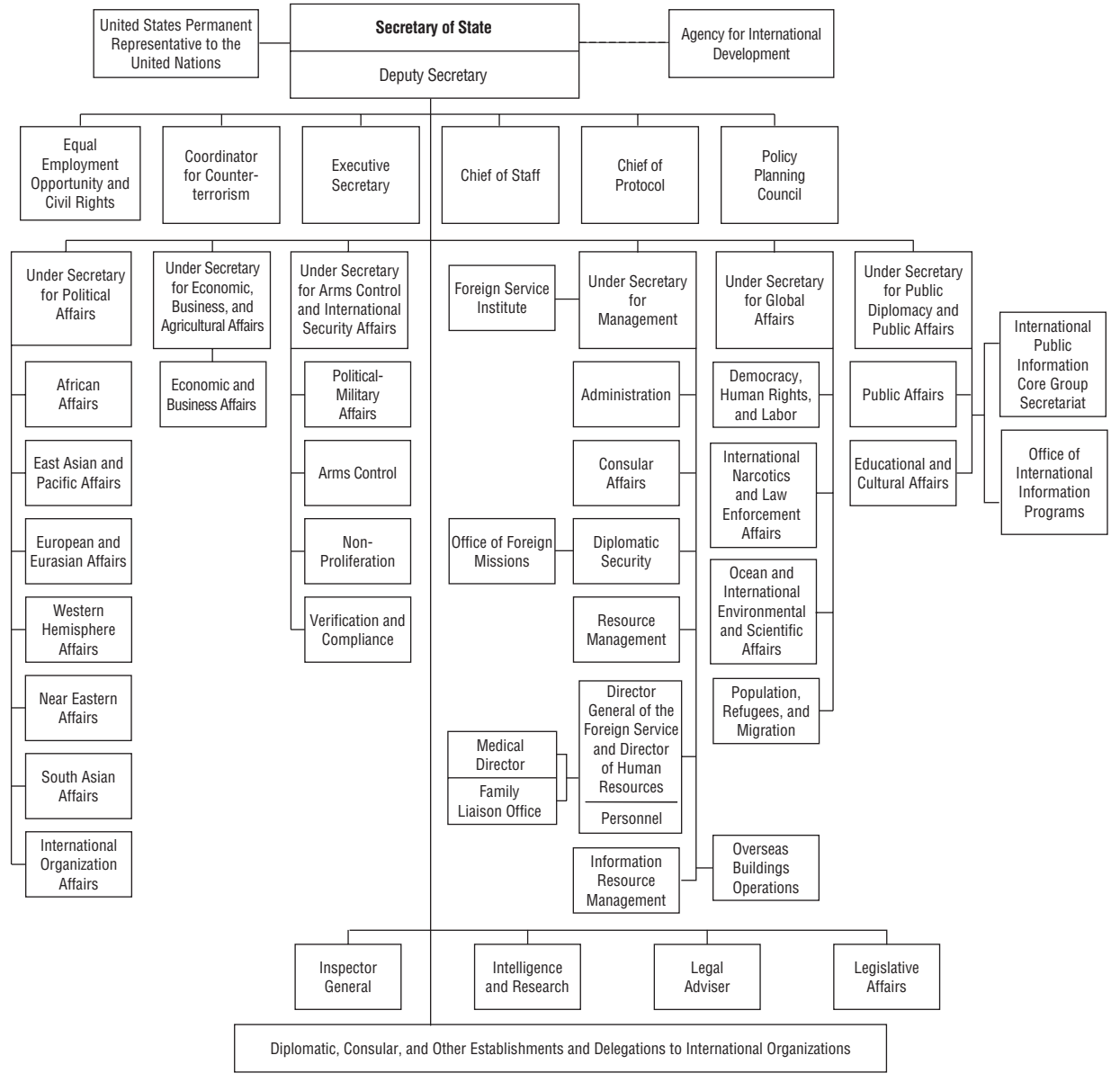


The office of the secretary includes the offices of the deputy secretary, under secretaries, assistant secretaries, counselor, legal adviser, and inspector general.

**Economic and Agricultural Affairs** The under secretary for economic and agricultural affairs is principal adviser to the secretary and deputy secretary of state on the formulation and conduct of foreign economic policy. Specific areas for which the under secretary is responsible include international trade, agriculture, energy, finance, transportation, and relations with developing countries.

**International Security Affairs** The under secretary for international security affairs is responsible for ensuring the integration of all elements of the Foreign Assistance Program as an effective instrument of U.S. foreign policy and serves as chair of the Arms Transfer Management Group. Other areas of responsibility

include international scientific and technological issues, communications and information policy, and technology transfers.

**Regional Bureaus** Six geographic bureaus, each directed by an assistant secretary, are responsible for U.S. foreign affairs activities throughout the world. These bureaus are organized by region as the bureaus of African Affairs, European and Canadian Affairs, East Asian and Pacific Affairs, Inter-American Affairs, Near Eastern Affairs, and South Asian Affairs. The regional assistant secretaries also serve as chairs of interdepartmental groups in the National Security Council system. These groups discuss and decide issues that can be settled at the assistant secretary level, including those arising out of the implementation of National Security Council decisions. They prepare policy papers for consideration by the council and contingency papers on potential crisis areas for council review.

### Functional Areas

**Diplomatic Security** The Bureau of Diplomatic Security, established under the Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended (22 U.S.C.A. § 4803 et seq.), provides a secure environment for conducting U.S. diplomacy and promoting U.S. interests worldwide. The assistant secretary of state for diplomatic security is responsible for security and protective operations abroad and in the United States, counter-terrorism planning and coordination, security technology development, foreign government security training, and personnel training.

The Security Awareness Staff directs the development and execution of bureau-wide security and information awareness policies and programs, press and media relations, and public awareness. The Security Awareness Program provides information on diplomatic security concerns and is a focal point for responding to public inquiries and maintaining media relations on diplomatic security issues and events. The Training Support Division provides publications and training videotapes on diplomatic security concerns.

The Private Sector Liaison Staff maintains daily contact with and actively supports the U.S. private sector by disseminating timely, unclassified security information concerning the safety of U.S. private-sector personnel, facilities, and operations abroad. The staff operates the Electronic Bulletin Board, a computerized, unclassified security information database accessible to U.S. private-sector enterprises. It also provides direct consultation services to the private sector concerning security threats abroad.

The Overseas Security Advisory Council promotes cooperation on security-related issues between U.S. private-sector interests worldwide and the Department of State, as provided in 22 U.S.C.A. § 2656 and the Federal Advisory Committee Act, as amended (5 U.S.C.A. app.). The council serves as a continuing liaison and provides for operational security cooperation between department security functions and the private sector. The council also provides for regular and timely exchange of information between the private sector and the department concerning developments in protective security. Additionally, it recommends methods and provides material for coordinating security planning and implementation of security programs.

**Economic and Business Affairs** The Bureau of Economic and Business Affairs has overall responsibility for formulating and implementing policy regarding foreign economic matters, including resource and food policy, international energy issues, trade, economic sanctions, international finance and development, and aviation and maritime affairs.

**Intelligence and Research** The Bureau of Intelligence and Research coordinates programs of intelligence, analysis, and research for the department and other federal agencies and produces intelligence studies and current intelligence analyses essential to the determination and execution of foreign policy. Through its Office of Research, the bureau maintains liaisons with cultural and educational institutions and oversees contract research and conferences on foreign affairs subjects.

**International Communications and Information Policy** The Bureau of International Communications and Information Policy is the principal adviser to the secretary of state on international TELECOMMUNICATIONS policy issues affecting U.S. foreign policy and national security. The bureau acts as a coordinator with other U.S. government agencies and the private sector in the formulation and implementation of international policies relating to a wide range of rapidly evolving communications and information technologies. The bureau promotes U.S. telecommunications interests bilaterally and multilaterally.

**International Narcotics and Law Enforcement Affairs** The Bureau of International Narcotics and Law Enforcement Affairs is responsible for developing, coordinating, and implementing international narcotics control assistance activities of the Department of State as authorized under sections 481 and 482 of the Foreign Assistance Act of 1961, as amended (22 U.S.C.A. §§ 2291, 2292). It is the principal point of contact with and provides advice on international narcotics control matters for the OFFICE OF MANAGEMENT AND BUDGET, the National Security Council, and the White House OFFICE OF NATIONAL DRUG CONTROL POLICY in ensuring implementation of U.S. policy in international narcotics matters. The bureau provides guidance on narcotics control matters to chiefs of missions and directs narcotics control coordinators at posts abroad. It also communicates or authorizes communication as appropriate with foreign governments on drug control matters including negotiating, concluding, and terminating agreements relating to international narcotics control programs.

**International Organization Affairs** The Bureau of International Organization Affairs provides guidance and support for U.S. participation in international organizations and conferences. It leads in the development, coordination, and implementation of U.S. multilateral policy. The bureau formulates and implements U.S. policy toward international organizations, with particular emphasis on those organizations that make up the United Nations system.

**Legal Advisor** The legal advisor advises the secretary and, through the secretary, the president, on all matters of INTERNATIONAL LAW arising in the conduct of U.S. foreign relations. The legal advisor also provides general legal advice and services to the secretary and other officials of the department on matters with which the department and overseas posts are concerned.

**Consular Affairs** The Bureau of Consular Affairs, under the direction of the assistant secretary, is responsible for the administration and enforcement of the provisions of the immigration and nationality laws, insofar as they concern the department and the Foreign Service, for the issuance of passports and visas and related services, and for the protection and welfare of U.S. citizens and interests abroad.

Approximately 5 million passports are issued each year by the Passport Office of the bureau, which has agencies in Boston, Chicago, Honolulu, Houston, Los Angeles, Miami, New Orleans, New York, Philadelphia, San Francisco, Seattle, Stamford, and Washington, D.C.

**Political-Military Affairs** The Bureau of Political-Military Affairs provides guidance and coordinates policy formulation on national security issues, including nonproliferation of weapons of mass destruction and missile technology, nuclear and conventional ARMS CONTROL, defense relations and security assistance, and export controls. It acts as the department's primary liaison with the DEFENSE DEPARTMENT. The bureau also participates in all major arms control, nonproliferation, and other security-related negotiations.

The bureau's major activities are designed to further U.S. national security objectives by stabilizing regional military balances through negotiations and security assistance, negotiating reductions in global inventories of weapons of mass destruction and curbing their proliferation, maintaining global access for U.S. military forces, inhibiting adversaries' access to militarily significant technologies, and promoting responsible U.S. defense trade.

**Protocol** The Chief of Protocol is the principal adviser to the U.S. government, the president, the vice president, and the secretary of state on matters of diplomatic procedure governed by law or international custom and practice. The office is responsible for visits of foreign chiefs of state, heads of government, and other high officials to the United States, operation of the president's guest house, Blair House, and conduct of official ceremonial functions and public events. It also is charged with the accreditation of more than 100,000 embassy, consular, international organization, and other foreign government personnel and members of their families throughout the United States. In addition, the office determines entitlement to diplomatic or consular IMMUNITY.

**Office of International Information Programs** In 1999 Congress dissolved the U.S. INFORMATION AGENCY and transferred its functions to the Office of International Information Programs. This office designs for and distributes INTERNET and print publications to media, government officials, and the general public in 140 countries. It emphasizes the electronic

distribution of information through various Web sites and CD-ROMS.

### Foreign Service

Foreign relations are conducted principally by the U.S. Foreign Service. In 1996 representatives at 164 embassies, 12 missions, 1 U.S. liaison office, 1 U.S. interests section, 66 consulates general, 14 consulates, 3 branch offices, and 45 consular agencies throughout the world reported to the Department of State on the foreign developments that had a bearing on the welfare and security of the United States. These trained representatives provided the president and the secretary of state with much of the raw material from which foreign policy is made and with the recommendations that help shape it.

Ambassadors are the personal representatives of the president and report to the president through the secretary of state. Ambassadors have full responsibility for implementation of U.S. foreign policy by any and all U.S. government personnel within their country of assignment, except those under military commands. Their responsibilities include negotiating agreements between the United States and the host country, explaining and disseminating official U.S. policy, and maintaining cordial relations with that country's government and people.

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CROSS-REFERENCES

Ambassadors and Consuls; Arms Control and Disarmament; International Law; Treaty.

## STATE INTEREST

*A broad term for any matter of public concern that is addressed by a government in law or policy.*

State legislatures pass laws to address matters of public interest and concern. A law that sets speed limits on public highways expresses an interest in protecting public safety. A statute that requires high school students to pass competency examinations before being allowed to graduate advances the state's interest in having an educated citizenry.

Although the state may have a legitimate interest in public safety, public health, or an array of other issues, a law that advances a state interest may also intrude on important constitutional rights. The U.S. Supreme Court has devised standards of review that govern how a state interest will be constitutionally evaluated.

When a law affects a constitutionally protected interest, the law must meet the RATIONAL BASIS TEST. This test requires that the law be rationally related to a legitimate state interest. For example, a state law that prohibits a person from selling insurance without a license deprives people of their right to make contracts freely. Yet the law will be upheld because it is a rational means of advancing the state interest in protecting persons from fraudulent or unscrupulous insurance agents. Most laws that are challenged on this basis are upheld, as there is usually some type of reasonable relation between the state interest and the way the law seeks to advance that interest.

When a law or policy affects a fundamental constitutional right, such as the right to vote or the right to privacy, the STRICT SCRUTINY test will be applied. This test requires the state to advance a compelling state interest to justify the law or policy. Strict scrutiny places a heavy burden on the state. For example, in ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), the state interest in protecting unborn children was not compelling enough to overcome a woman's right to privacy. When the state interest is not sufficiently compelling, the law is struck down as unconstitutional.

## STATE LOTTERY

*A game of chance operated by a state government.*

Generally a lottery offers a person the chance to win a prize in exchange for something of lesser value. Most lotteries offer a large cash prize, and the chance to win the cash prize is typically available for one dollar. Because the number of people playing the game usually exceeds the number of dollars paid out, the lottery ensures a profit for the sponsoring state.

Lotteries can come in a variety of forms, but there are three basic versions: instant lotteries, general lotteries, and lotto. Instant lotteries offer immediate prizes and consist of such games as

## Go West, Young Lottery Player

Lotteries are ancient games, long predating the founding of the United States. Their popularity in Europe, and especially in England, helps explain why the first lotteries were held in the American colonies in 1612. The colonies were under the command of the British Crown, which did not permit them to levy taxes. But the British did authorize the Virginia Company of London to hold games for its benefit—at least until the scheme backfired. The lotteries drained the Crown's pockets and helped the upstart colonies, and within a decade, the colonists' own domestic lotteries had replaced them. A century later, the colonists held lotteries to raise funds for the **WAR OF INDEPENDENCE**.

During the eighteenth and nineteenth centuries, lotteries played an important role in building the new nation. Its banking and taxation systems were still in their infancy, necessitating ways to raise capital quickly for public projects. Lotteries helped build everything from roads to jails, hospitals, and industries and provided needed funds for hundreds of schools and colleges. Famous American leaders like **THOMAS JEFFERSON** and **BENJAMIN FRANKLIN** saw great usefulness in them: Jefferson wanted to hold a lottery to retire his debts, and Franklin to buy cannons for Philadelphia. Lotteries expanded in the 1800s, prompting Congress in 1812 to authorize them in the District of Columbia. By midcentury, eastern states alone raised over $66 million annually, and lotteries were starting up in the West.

Despite their significance to early U.S. history, lotteries fell out of favor in the late 1800s. Corruption, moral uneasiness, and the rise of bond sales and standardized taxation proved their downfall. Only Louisiana, with a notorious lottery known as The Serpent, still held a state-run game at the end of the century. Congress put a stop to it with the Anti-Lottery Act of 1890 (Act of September 19, 1890, ch. 908, 26 Stat. 465), a federal ban on the use of the mails for conducting lotteries that effectively ended the games for the next seventy years.

New Hampshire swept in the modern era of state-sponsored lotteries in 1964. In 1974 Congress relaxed regulations for the benefit of the growing number of states holding the games (Pub. L. No. 93-583, 88 Stat. 1916 [1975]; H.R. Rep. No. 1517, 93d Cong., 2d Sess. [1974]).

scratch-off tickets and pull tabs. A general lottery is a drawing with a payout based on a percentage of the amount in the aggregate wagering pot; because all numbers bet for the particular game are included in the drawing, a winner is guaranteed. Lotto is similar to a general lottery in that the winning number is chosen in a drawing. However, the winning number in a lotto game is chosen by a computer, and the computer may not pick a number or sequence of numbers that is held by a player. If no player has a number that matches the number chosen by the computer, the cash prize rolls over into the next game's drawing. Lotto usually generates more money than other lotteries. A player must match a long sequence of numbers, and this raises the odds against the players, which in turn makes it more likely that the cash prize will increase. Most of the other forms of lotteries are spin-offs of these three basic forms.

More than thirty states have state-run lotteries. These lotteries are administered by state agents and agencies, such as a director of the state lottery and a state lottery board. State legislatures create lotteries and lottery agencies in statutes. These statutes specify details of the game, such as the length of time a winner has to claim a prize after the relevant drawing, the documentation a winner must present to claim a prize, the manner of payment of the prize, and procedures in case a prize is won by a corporation or other legal entity.

State statutes also specify just how the money generated by the lotteries will be used. Many states direct that the profits should go into the state's general revenue fund, whereas other states earmark the profits for a particular endeavor, such as public school education, care of SENIOR CITIZENS, or economic development.

# States Gamble on Gambling

As the ultimate high-odds game, a lottery produces very few winners. Since the rush to legalize government lotteries began in the 1970s, states have capitalized tremendously on the game's drastic odds. Thirty-nine states and the District of Columbia reaped over $42 billion in 2002, more than double the revenues reported just seven years earlier. Supporters tout the game as an easy revenue-raiser and a painless alternative to higher taxes. Opponents attack it as dishonest, unseemly, and undependable. They argue that the social and administrative costs do not actually skirt taxation but instead put the state in the role of con artist. It is also criticized as a regressive tax on the poor.

The case for lotteries is largely about funding state government. Lotteries are frequently publicized as an alternative to raising taxes. Seldom is there much enthusiasm for cutting back on cherished state programs and services, even as federal subsidies to states shrink. Better, say lottery supporters, to offer citizens a choice: play or pay. Unlike paying mandatory income, property, or sales tax, buying lottery tickets is a personal decision. Funding government by lottery is quite different from funding it by taxation: under taxation, states can depend on a set amount of revenue each year from a captive base of taxpayers; under a lottery, revenue projections assume that enough tickets will be sold so that those who choose not to play are free to do so.

Besides casting lotteries as an alternative to taxes, supporters put forth other arguments in favor of lotteries, from the public's love to gamble to the desire to siphon money away from illegal gambling to simply keeping up with the Joneses—i.e., other states that draw residents and dollars across state boundaries.

The U.S. gambling industry may generate as much as $600 billion annually. (The American Gaming Association claims that this figure is high because it measures money wagered rather than actually spent; the organization claims that gambling is a $63 billion a year industry.) The **FEDERAL BUREAU OF INVESTIGATION** estimates that illegal gambling brings in as much as another $100 billion annually. Supporters argue that both of these figures support the benefit of lotteries—to respond to the public's demand for gambling and to diminish the profits of illegal gambling.

The public demand for gambling is so great, say supporters, that states that do not offer lotteries lose potential revenues to neighboring states that do. When New Hampshire instituted its state lottery in 1964, it was the only legal lottery in the country. It sold more tickets outside the state than in New Hampshire. The pattern has been repeated ever since. States without lotteries see gambling money disappear into neighboring states, which fund their programs with it, necessitating a local lottery as a defensive mechanism.

Critics of lotteries attack the notion of lotteries substituting for taxation. Operating the games can require relatively high administrative overhead. In the early 1990s, the national average was 6 percent of revenues, and the highest rate was 29 percent in Montana. Costs result chiefly from the need to advertise constantly. Fickle players can always stray into competing states for tickets, satisfy gambling urges at casinos, or lose interest. For this reason, lottery revenues are far less dependable than tax revenues, and states can easily find themselves spending more and earning less than projected.

Some states have learned this lesson the hard way. Maryland, for example, faced a budget crisis in the early 1990s after heavily promoting a lottery game called El Gordo, anticipating $8 million to $10 million in revenues. When players failed to buy enough tickets, the state's profit after expenses was only $73,626.

States must be careful to observe the dictates of the statute that creates the lottery or lotteries. Other kinds of **GAMING** that are not strictly limited to chance are not allowed under state lottery statutes. Indeed, most states make gambling a criminal offense and provide exceptions only for state lotteries and gaming by Native American tribes. A state may not, for example, sponsor a game that involves wagering against a house, such as a dice game, blackjack, or shell games. In *Western Telcon, Inc. v. California State Lottery,* 13 Cal. 4th 475, 917 P.2d 651, 53 Cal. Rptr. 2d 812 (1996), the Supreme Court of California ruled that a keno game offered by the California State Lottery (CSL) was not authorized under proposition 37, the 1984 initiative measure that created the state lottery. In keno, players try to match between one and ten numbers to a set of twenty numbers that are selected at random. Players pay a nominal fee for the opportunity to receive a large payoff. Keno, according to the court, did not meet the statutory definition of lottery because it was a game that persons played against the CSL, which, as banker, bet against each participant that the participant would not correctly guess the numbers to be drawn. This

California experienced another kind of problem in fiscal year 1991–92, as drooping lottery sales forced it to exceed the 16 percent limit on administrative expenses specified by law. The shortfall led to a dispute over what to do with the interest earned on the state lottery fund, and reformers had to act to ensure that it would be used as intended. They passed Chapter 1236, which requires that all interest be used to benefit public education.

Such problems lead critics to another complaint: states exaggerate the benefits of lotteries. In education, lottery proceeds may provide little help. The Educational Research Service (ERS), a think tank, has argued that lotteries are actually insignificant. Because lottery revenues are occasionally substituted for regular funding, ERS maintains, this unstable source of revenue yields no more for schools than they would have received otherwise, with an additional drawback—taxpayers, reassured that ticket sales are footing the bill, balk at the idea of raising taxes when shortfalls occur. Critics also scoff at claims that lotteries hurt illegal gambling. Most studies have found only inconclusive evidence that they have any effect at all on crime syndicates, and law enforcement agencies report that illegal gambling remains as healthy as it was before states reenacted lotteries.

Two popular moral arguments are advanced against lotteries. The first attacks the notion of voluntary taxation. Far from being the boon that the word *voluntary* suggests, critics say, the lottery is a form of regressive taxation that hurts those least able to afford it. (Taxes are considered regressive when they put a disproportionate burden on different taxpayers; a sales tax, which everyone pays at the same rate regardless of their personal wealth, is one example.) The evidence shows that the poor and working classes play lotteries the most. Some people say that preying on the illusory hopes of the poor is an unseemly way to avoid taxing the more affluent.

The second moral objection is to the hidden social costs. Opponents of gambling have long held that players run the proven risk of addiction. In general, governments legislate against and spend money, warning citizens about high-risk behaviors. But in the case of lotteries, they do the reverse: lottery advertising encourages playing often, and games are frequently redesigned to bring players back for more. No state blatantly tells its citizens to spend more than they should; yet no state stops anyone from going overboard, and it is doubtful that any could do so. The scope of the problem of compulsive lottery playing is difficult to measure, but commonly cited estimates in the 1990s indicated lottery players accounted for 9 percent of all compulsive gamblers nationwide. A few states, such as New Jersey, have run hotlines for addicts. Others have considered doing so. A spate of crimes associated with compulsive lottery playing—from **EMBEZZLEMENT** to bank holdups—captured newspaper headlines in the mid-1990s and prompted further hand-wringing by state officials, but little action.

Although the debate would go on, state lotteries were expected to continue. Their sheer profitability makes them alluring to legislators who would rather not propose higher taxes, and the chance of winning big keeps players hooked. In all likelihood, the success of most states ensures that the rest will eventually join the bandwagon. Critics continue to fault lawmakers for relying on high-risk gambling, conning hapless players, plowing huge sums back into the games, and ignoring the resulting social costs. Yet, unlike arguments against lotteries a century ago, these complaints have mostly fallen on deaf ears, and lotteries have been skillfully transformed in the public eye from a vice into a form of entertainment. Jackpots, as every lottery player knows, speak louder than words.

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**CROSS-REFERENCES**

Gaming; Taxation.

kind of game did not offer a prize by chance. Instead, the CSL could win all the bets and never have to pay a prize, or it could lose all the bets and pay a prize to each participant. This kind of gaming was too similar to a banking game, and the court noted that "the voters, in Proposition 37, did not establish a state gambling house, but a state lottery."

State lotteries often are planned to augment or even supplant other sources of state revenues, such as taxes. Whether they can actually achieve this objective depends on the lotteries' ability to attract players.

**FURTHER READINGS**

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*A billboard advertises the South Carolina Education Lottery. State statutes specify how the money generated by lotteries will be used.*

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## STATEMENT OF AFFAIRS

*A document that must be filed in* BANKRUPTCY, *which sets forth answers to questions concerning the debtor's past and present financial situation.*

The term *statement of affairs* is also used to describe a type of balance sheet that shows immediate liquidation amounts, as opposed to acquisition or original costs, and is generally prepared when insolvency or bankruptcy is about to take effect.

## STATE'S EVIDENCE

*A colloquial term for testimony given by an* ACCOMPLICE *or joint participant in the commission of a crime, subject to an agreement that the person will be granted* IMMUNITY *from prosecution if she voluntarily, completely, and fairly discloses her own guilt as well as that of the other participants.*

State's evidence is slang for testimony given by criminal defendants to prosecutors about other alleged criminals. A criminal defendant may agree to provide assistance to prosecutors in exchange for an agreement from the prosecutor that he will not be prosecuted. This agreement is commonly called turning state's evidence.

A criminal defendant who turns state's evidence may be offered a plea bargain or may have all criminal charges against him dismissed, depending on the nature of the case against the testifying defendant and the largesse of the prosecutor. A prosecutor may give a testifying defendant full immunity, which means the defendant cannot be charged with any crime related to the testimony he provides. A lesser form of immunity is called use immunity. Use immunity means that the prosecutor agrees only that she will not use any of the testimony given by the testifying defendant in any subsequent prosecution of that defendant.

Turning state's evidence plays an important role in the criminal justice system, in large part because the system is overwhelmed by criminal prosecutions. To ease the caseload, prosecutors regularly exercise their power to offer to drop or decrease charges in exchange for a plea of guilty. Another by-product of the backlog of cases is that prosecutors are most concerned with successfully prosecuting the most dangerous criminals. For these reasons, prosecutors commonly ask petty criminal defendants who have access to other alleged criminals to obtain evidence from the criminals.

For instance, assume that a person who has been arrested for possession of marijuana is willing to work with law enforcement to obtain inculpatory evidence from the dealer of the marijuana. To do so, the defendant would return to the dealer after the arrest, purchase marijuana in a transaction monitored by law enforcement, and then give the marijuana to the authorities as evidence.

A prosecutor may drop charges against a petty criminal in exchange for substantial assis-

tance to law enforcement authorities in the prosecution of more dangerous criminals. Alternatively, a prosecutor may offer a plea bargain and ask the court to impose a sentence that is less severe than the sentence normally imposed for the crime.

State and federal sentencing statutes govern the effect of providing substantial assistance. Courts usually follow the recommendations of the prosecutor, but they are not obliged to do so. On the federal level, for example, section 5K1.1 of the Federal Sentencing Guidelines states that a court may evaluate the significance and usefulness of the assistance rendered by the defendant, the truthfulness and reliability of the defendant, the nature of the defendant's assistance, and other factors in determining whether to impose a relatively light sentence.

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CROSS-REFERENCES

Criminal Law; Criminal Procedure; Plea Bargaining.

## STATES' RIGHTS

*A doctrine and strategy in which the rights of the individual states are protected by the U.S. Constitution from interference by the federal government.*

The history of the United States has been marked by conflict over the proper allocation of power between the states and the federal government. The federal system of government established by the U.S. Constitution recognized the sovereignty of both the state governments and the federal government by giving them mutually exclusive powers as well as concurrent powers. In the first half of the nineteenth century, arguments over states' rights arose in the context of SLAVERY. From the 1870s to the 1930s, economic issues shaped the debate. In the 1950s racial SEGREGATION and the CIVIL RIGHTS MOVEMENT renewed the issue of state power. By the 1970s economic and political conservatives had begun to call for a reduction in the power and control of the federal government and for the redistribution of responsibilities to the states.

At the Constitutional Convention in 1787, delegates represented state governments that had become autonomous centers of power. The Constitution avoided a precise definition of the locus of sovereignty, leaving people to infer that the new charter created a divided structure in which powers were allocated between the central government and the states in such a way that each would be supreme in certain areas.

Nevertheless, defenders of states' rights were concerned that a powerful, consolidated national government would run roughshod over the states. With ratification of the Constitution in doubt, the Framers promised to add protection for the states. Accordingly, the TENTH AMENDMENT was added to the Constitution as part of the BILL OF RIGHTS. The amendment stipulates that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This amendment became the constitutional foundation for those who wish to promote the rights and powers of the states vis-à-vis the federal government.

In the early years of the Republic, states' rights were vigorously protected. An early argument involved whether or not states were subject to the jurisdiction of the Supreme Court and the federal government. In CHISHOLM V. GEORGIA, 2 U.S. (2 Dall.) 419, 1 L. Ed. 440 (1793), a South Carolina businessman sued the state of Georgia in order to collect for payment of supplies. The state of Georgia maintained that it was a sovereign body, and so could not be sued since it was not subject to the authority of federal courts. The Supreme Court dismissed this argument and ruled that the conduct of the states was subject to JUDICIAL REVIEW. In response, states' rights advocates pushed for passage of the ELEVENTH AMENDMENT, which limits the rights of persons to sue a state in federal court.

In 1798, THOMAS JEFFERSON and JAMES MADISON proposed the VIRGINIA AND KENTUCKY RESOLVES to clarify the role of states in checking the powers of the federal government. The resolutions were in response to passage of the ALIEN ENEMIES AND SEDITION ACTS of 1798 (1 Stat. 570, 1 Stat. 596), which restricted a number of personal liberties. In proposing the Virginia and Kentucky Resolves of 1798, Jefferson argued that the "sovereign and independent states" had the right to "interpose" themselves between their citizens and improper national legislative actions and to "nullify" acts of Congress they deemed unconstitutional. The resolutions started the seed of the doctrines of nullification and interposition, later employed

by New England states during the WAR OF 1812, and by South Carolina in opposing federal tariff legislation in 1832.

From the early 1800s until the end of the Civil War in 1865, states' rights played a major role in the U.S. political process. The doctrine was most fully articulated in the writings of South Carolina statesman and political theorist JOHN C. CALHOUN. Calhoun contended that if acts of the federal government ran contrary to state or local interests, then states had the right to nullify said acts. Calhoun further proposed that states had the right to dissolve their contractual relationship with the federal government rather than submit to policies they saw as destructive to their local self-interests. Followers of Calhoun linked states' rights to slavery, and thus, protecting slavery became the equivalent of protecting regional Southern interests. In 1860, seven Southern states seceded from the Union to form the Confederate States of America. The constitution of the Confederacy began, "We, the people of the Confederate States, each State acting in its own sovereign and independent character . . . ."

Northern leaders were also prepared to manipulate the concept of states' rights. As early as the 1820s, Northern legislatures enacted personal liberty laws as devices to block the enforcement of the federal fugitive slave law. Such laws were struck down by the Supreme Court in PRIGG V. PENNSYLVANIA, 41 U.S. (16 Pet.) 539, 10 L. Ed. 1060 (1842). However, when Congress enacted the more stringent FUGITIVE SLAVE ACT OF 1850, Northerners responded by again creating personal liberty laws in general defiance of federal fugitive slave policy.

The defeat of the South in the Civil War ended the dispute, and Congress enacted the Fourteenth and Fifteenth Amendments, in part, to prevent states from denying certain basic rights to U.S. citizens. Although the Supreme Court substantially restricted the power of these amendments during the late nineteenth century, it did so indirectly, relying on states' rights arguments to justify its actions. The judicial philosophy of the times was also marked by laissez-faire capitalism. Thus, the Court would invoke the Tenth Amendment to strike down federal laws that were characterized as hostile to state interests and then use the FOURTEENTH AMENDMENT to strike down state legislation that sought to regulate business, labor, and the economy.

This trend continued into the twentieth century. Until the 1930s, the Court frequently used the Tenth Amendment as a device for striking down federal measures, from CHILD LABOR LAWS to major pieces of President FRANKLIN D. ROOSEVELT's NEW DEAL legislation. Hundreds of state regulatory statutes were also overturned. Only when the states sought to restrict unions or control dissenters did the Court sustain these efforts.

By the late 1930s, however, New Deal policies had dramatically increased the size and power of the federal government. Proponents of states' rights argued against extensive use of the COMMERCE CLAUSE, which gave the federal government the power to regulate interstate commerce, and the federal government's power to tax for the GENERAL WELFARE. Given the desperate economic situation, such arguments fell on deaf ears. By the end of WORLD WAR II, centralized authority rested with the federal government.

States' rights were revived in the late 1940s over the matter of race. In the 1948 election, Democrat HARRY S. TRUMAN pushed for a more aggressive CIVIL RIGHTS policy. Southern opponents, known as the "Dixiecrats," bolted the DEMOCRATIC PARTY and ran their own candidate, J. STROM THURMOND. Their "states' rights" platform called for continued racial segregation and denounced proposals for national action on behalf of civil rights.

Desegregation efforts of the 1950s and 1960s, including the Supreme Court's decision in BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), which ruled that racially segregated public schools were unconstitutional, also met with Southern resistance. Segregationists again argued for state sovereignty, and developed programs of massive resistance to racial INTEGRATION in public education, public facilities, housing, and access to jobs.

Beginning in the 1960s, other states' rights proponents started stressing the need for local control of government. One reason was the introduction of federal WELFARE and subsidy programs. The concern was that along with federal money would come federal control.

By the end of the twentieth century, a number of efforts were being made to curtail the broad power of the federal government. For example, in *National League of Cities v. Usery,* 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245

(1976), the U.S. Supreme Court ruled that Congress had exceeded its power to regulate interstate commerce when it extended federal MINIMUM WAGE and overtime standards to state and local governments. Determination of state government employees' wages and hours is one of the "attributes of sovereignty attaching to every state government," attributes that "may not be impaired by Congress." Less than ten years later, however, the Court overruled *National League* in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). Nevertheless, the 5–4 majority in *Garcia* and the Court's difficulty in articulating a coherent Tenth Amendment JURISPRUDENCE have left this area of states' rights muddled.

The 1980s saw a major shift in government policy. President RONALD REAGAN agreed with the public that the federal government was becoming too involved in state government affairs. As a result, a major focus of his administration was to reduce the size and power of the federal government. States were given more authority to experiment with policy initiatives, especially social programs, which had previously been directed from Washington. Subsequent administrations followed suit. In the early 2000s, however, political analysts commented that a new trend was afoot: both Republicans and Democrats were pushing for federal laws that would PREEMPT state laws, especially state laws that attempted to regulate financial corporations and other types of business.

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Federalism; Fifteenth Amendment; Fourteenth Amendment; Kentucky Resolutions.

## STATES' RIGHTS PARTY

The States' Rights Party, also known as the Dixiecrat Party, was a short-lived political entity founded by Democrats in the South as an alternative to the DEMOCRATIC PARTY and its 1948 presidential platform. In 2003, remarks expressing a nostalgic view of the States' Rights Party ignited a firestorm of controversy that led to the resignation of Republican TRENT LOTT as Senate majority leader.

The issue of states' rights has been paramount in southern politics and culture since the former British colonies evolved into the United States of America. Advocates of states' rights held that the states retained all the rights that had not been specifically delegated to the federal government. Any attempt by the federal government to exercise powers not specifically enunciated in the Constitution, was seen as an illegal usurpation of powers that rightfully belonged to the individual states. This view was one of the motivating factors of the Civil War and did not diminish with the defeat of the Confederate Army in 1865. In the period immediately after that war, the REPUBLICAN PARTY was seen as the party of ABRAHAM LINCOLN and the abolitionist forces that had not only vanquished the South but also had presided over the period known as Reconstruction. As a result, white southerners chose to join the Democratic Party and to elect only Democratic candidates to local and state office. So one-sided was this electoral system that for a number of years, the former Confederate states were known as the "solid South".

In the decades that followed Reconstruction the Democratic Party experienced change and evolution regarding its official views on a number of issues including CIVIL RIGHTS and INTEGRATION. Southern Democrats had begun to feel extremely uncomfortable in the party that they viewed as having become far too liberal. In 1947 President HARRY S. TRUMAN gave a speech to the National Association for the Advancement of Colored People (NAACP) that called for the federal government to be the vigilant protector of the civil rights of all Americans. Truman repeated the phrase "all Americans" leaving no doubt that he meant African Americans should be among those who were guaranteed equality of opportunity. This speech was anathema to the southern Democrats who were staunch supporters of SEGREGATION and the preservation of "white power".

*Strom Thurmond, then governor of South Carolina, was nominated as the presidential candidate by delegates to the States' Rights Party Convention held in July 1948.*

AP/WIDE WORLD PHOTOS

In 1948 the Republicans, for the second time, chose New York governor **THOMAS E. DEWEY** to be their presidential candidate. In July 1948 the Democrats held a convention in which they nominated Harry S. Truman, the former vice-president who had succeeded **FRANKLIN D. ROOSEVELT** when the latter died on April 12, 1945. The linchpin of the 1948 Democratic Party platform became its support for civil rights legislation. Many Democrats were wary of supporting the platform because they feared that the party would splinter over the opposing views of civil rights. The delegates from the southern states were vocal in their opposition, and other delegates began to waver. Then **HUBERT H. HUMPHREY**, the delegate from Minnesota and mayor of Minneapolis, gave a speech in which he urged his fellow delegates to "get out of the shadow of states' rights and walk forthrightly into the bright sunshine of human rights!" Humphrey's passionate words were the catalyst for the majority of the Democratic Party delegates to vote for the platform planks that called for a federal anti-lynching law, the **ABOLITION** of **POLL TAXES** in federal elections, desegregation of the armed forces, and creation of a permanent Fair Employment Practices Committee that would prevent **RACIAL DISCRIMINATION** in federal jobs.

As many had feared, a majority of southern delegates, including all 22 members of the Mississippi delegation and 13 from Alabama, walked out of the convention and formed their own party—the States' Rights Democratic Party. The Dixiecrats, as they were also known, held a one-day convention on July 17, 1948, in Birmingham, Alabama, in which they nominated South Carolina governor **STROM THURMOND** for president and chose Mississippi governor Fielding L. Wright as their vice-presidential candidate.

The States' Rights Party sought to take votes from both the Democratic and Republican parties by emphasizing the sovereignty of the states and by denouncing Truman and the Democratic Party's proposed civil rights legislation as an immense threat to the states. In Alabama the Dixiecrats succeeded in preventing President Truman's name from being placed on the election ballot.

The Democratic Party was greatly weakened by the defection of the conservative Dixiecrats and also by the liberals who had left to join the **PROGRESSIVE PARTY** that nominated former vice president and secretary of agriculture Henry A. Wallace to be its presidential candidate. Nevertheless, President Harry S. Truman won reelection. Although Truman was reelected over Dewey by a very narrow margin, that vote resulted in the biggest upset in the history of United States presidential campaigns.

The States' Rights Party carried South Carolina, Mississippi, Louisiana, and Alabama. Thurmond and Wright received approximately 1.2 million votes and 39 electoral votes. In 1954 Thurmond was elected as a Democratic senator. Thurmond joined with other conservative Democrats and used the filibuster and other political strategies to oppose civil rights legislation. Thurmond was reelected in 1956 and 1960. In 1964 Thurmond led a number of conservative southern national and state elected officials who switched from the Democratic to the Republican Party. Thurmond was reelected in 1966, 1972, 1978, 1984, 1990, and 1996. After being reelected in 1996 the 94-year-old Thurmond, announced that he would finish out his term but would no longer run for reelection.

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CROSS-REFERENCES

Democratic Party.

## STATUS

*The standing, state, or condition of an individual; the rights, obligations, capacities, and incapacities that assign an individual to a given class.*

For example, the term *status* is used in reference to the legal state of being an infant, a ward, or a prisoner, as well as in reference to a person's social standing in the community.

## STATUS OFFENSE

*A type of crime that is not based upon prohibited action or inaction but rests on the fact that the offender has a certain personal condition or is of a specified character.*

Vagrancy—the act of traveling from place to place with no visible means of support—is an example of a status offense.

## STATUS QUO

*[*Latin, The existing state of things at any given date.*]* Status quo ante bellum *means the state of things before the war. The* status quo *to be preserved by a preliminary injunction is the last actual, peaceable, uncontested status which preceded the pending controversy.*

## STATUTE

*An act of a legislature that declares, proscribes, or commands something; a specific law, expressed in writing.*

A statute is a written law passed by a legislature on the state or federal level. Statutes set forth general propositions of law that courts apply to specific situations. A statute may forbid a certain act, direct a certain act, make a declaration, or set forth governmental mechanisms to aid society.

A statute begins as a bill proposed or sponsored by a legislator. If the bill survives the legislative committee process and is approved by both houses of the legislature, the bill becomes law when it is signed by the executive officer (the president on the federal level or the governor on the state level). When a bill becomes law, the various provisions in the bill are called statutes. The term *statute* signifies the elevation of a bill from legislative proposal to law. State and federal statutes are compiled in statutory codes that group the statutes by subject. These codes are published in book form and are available at law libraries.

Lawmaking powers are vested chiefly in elected officials in the legislative branch. The vesting of the chief lawmaking power in elected lawmakers is the foundation of a representative democracy. Aside from the federal and state constitutions, statutes passed by elected lawmakers are the first laws to consult in finding the law that applies to a case.

The power of statutes over other forms of laws is not complete, however. Under the U.S. Constitution and state constitutions, federal and state governments are comprised of a system of checks and balances among the legislative, executive, and judicial branches. As the system of checks and balances plays out, the executive and judicial branches have the opportunity to fashion laws within certain limits. The EXECUTIVE BRANCH may possess certain lawmaking powers under the federal or state constitutions, and the judiciary has the power to review statutes to determine whether they are valid under those constitutions. When a court strikes down a statute, it in effect creates a law of its own that applies to the general public.

Laws created through judicial opinion stand in contradistinction to laws created in statutes. Case law has the same legally binding effect as statutory law, but there are important distinctions between statutes and case law. Case law is written by judges, not by elected lawmakers, and it is written in response to a specific case before the court. A judicial opinion may be used as precedent for similar cases, however. This means that the judicial opinion in the case will guide the result in similar cases. In this sense a judicial opinion can constitute the law on certain issues within a particular jurisdiction. Courts can establish law in this way when no statute exists to govern a case, or when the court interprets a statute.

For example, if an appeals court holds that witness testimony on memory recovered through therapy is not admissible at trial, that decision will become the rule for similar cases within the appeals court's jurisdiction. The decision will remain law until the court reverses itself or is reversed by a higher court, or until the state or federal legislature passes a statute that overrides the judicial decision. If the courts strike down a statute and the legislature passes a similar statute, the courts may have an opportunity to declare the new statute unconstitutional.

This cycle can be repeated over and over if legislatures continually test the constitutional limits on their lawmaking powers.

Judicial opinions also provide legal authority in cases that are not covered by statute. Legislatures have not passed statutes that govern every conceivable dispute. Furthermore, the language contained in statutes does not cover every possible situation. Statutes may be written in broad terms, and judicial opinions must interpret the language of relevant statutes according to the facts of the case at hand. Regulations passed by administrative agencies also fill in statutory gaps, and courts occasionally are called on to interpret regulations as well as statutes.

Courts tend to follow a few general rules in determining the meaning or scope of a statute. If a statute does not provide satisfactory definitions of ambiguous terms, courts must interpret the words or phrases according to ordinary rules of grammar and dictionary definitions. If a word or phrase is technical or legal, it is interpreted within the context of the statute. For example, the term *interest* can refer to a monetary charge or ownership of property. If the term *interest* appears in the context of a statute on real estate ownership, a court will construe the word to mean property ownership. Previous interpretations of similar statutes are also helpful in determining a statute's meaning.

Statutes are not static and irreversible. A statute may be changed or repealed by the lawmaking body that enacted it, or it may be overturned by a court. A statute may lapse, or terminate, under the terms of the statute itself or under legislative rules that automatically terminate statutes unless they are reapproved before a certain amount of time has passed.

Although most legal disputes are covered at least in part by statutes, TORT and contract disputes are exceptions, in that they are largely governed by case law. CRIMINAL LAW, patent law, tax law, PROPERTY LAW, and BANKRUPTCY law are among the areas of law that are covered first and foremost by statute.

CROSS-REFERENCES

Judicial Review; Legislation; Legislative History; Statutory Construction.

## STATUTE OF FRAUDS

*A type of state law, modeled after an old* ENGLISH LAW*, that requires certain types of contracts to be in writing.*

U.S. law has adopted a 1677 English law, called the Statute of Frauds, which is a device employed as a defense in a breach of contract lawsuit. Every state has some type of statute of frauds; the law's purpose is to prevent the possibility of a nonexistent agreement between two parties being "proved" by perjury or FRAUD. This objective is accomplished by prescribing that particular contracts not be enforced unless a written note or memorandum of agreement exists that is signed by the persons bound by the contract's terms or their authorized representatives.

The statute of frauds is invoked by a defendant in a breach of contract action. If the defendant can establish that the contract he has failed to perform is legally unenforceable because it has not satisfied the requirement of the statute, then the defendant cannot be liable for its breach. For example, suppose that a plaintiff claims that a defendant agreed to pay her a commission for selling his building. If the defendant can demonstrate that no commission contract was signed, the statute of frauds will prevent the plaintiff from recovering the commission.

The English Statute of Frauds, which was enacted by Parliament in 1677, applied to only specific types of contracts. These included promises to a creditor of another to pay that individual's debts when they became due, a marriage contract or promise to marry, other than the mutual promises of a man and woman to wed, a contract for the sale of real estate, and a contract that cannot be performed within one year of its formation and has not been completely performed by one side.

States have expanded the application of the statute to other categories of contracts, such as a life insurance contract that is not to be performed within the lifetime of the person making the promise. It also applies to a contract to bequeath or devise property by will and to a contract that authorizes an agent to sell real property for a commission.

A strict application of the statute of frauds can produce an unjust result. A party, who in GOOD FAITH believes a contract exists and therefore spends time and money to perform the contract, would be unable to force the other party to perform because the agreement was not in writing. Therefore, courts often employ the term *part performance* to determine whether a plaintiff's conduct based on her belief that a contract exists justifies enforcement of the contract even

though it has failed to comply with the statute of frauds. Part performance refers to acts performed by the plaintiff in reliance on the performance of the duties imposed on the defendant by the terms of the contract. The plaintiff's actions must be substantial in order to demonstrate that he actually has relied on the terms of the contract.

When the alleged contract involves real property, the acts of taking possession and making part payment—when performed in reliance upon an oral contract under circumstances that clearly show a buyer-seller relationship—are usually sufficient to remove a contract from the requirements of the statute of frauds. The oral contract, therefore, would be enforced. However, payment or possession alone generally will not suffice to overcome the statute of frauds.

Where services have been performed based upon a contract that is unenforceable because of the statute of frauds, the value of those services can nevertheless be recovered on the basis of *quantum meruit,* or the reasonable value of those services. If a person performs services in reliance on an oral promise that he will inherit certain property and that promise is not fulfilled, that individual can sue the decedent's estate on a QUANTUM MERUIT basis for the reasonable value of his services.

If a contract is unenforceable, a person can recover expenses incurred at the other party's request even though they pertain to the unenforceable contract. The recovery of expenses is not affected because the law implies a promise by the defendant to pay for expenses incurred at her request, and liability is not based upon breach of contract.

If one party has performed in reliance on an oral contract and will be irreparably harmed if the contract is not enforced, some courts apply the theory of EQUITABLE ESTOPPEL to prevent the statute of frauds from being employed as a defense. Equitable estoppel holds that if a person has so altered his position that justice demands the enforcement of the contract, the court will enforce the contract even though it fails to comply with the statute.

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CROSS-REFERENCES

Quasi Contract.

## STATUTE OF LIMITATIONS

*A type of federal or state law that restricts the time within which legal proceedings may be brought.*

Statutes of limitations, which date back to early ROMAN LAW, are a fundamental part of European and U.S. law. These statutes, which apply to both civil and criminal actions, are designed to prevent fraudulent and stale claims from arising after all evidence has been lost or after the facts have become obscure through the passage of time or the defective memory, death, or disappearance of witnesses.

The statute of limitations is a defense that is ordinarily asserted by the defendant to defeat an action brought against him after the appropriate time has elapsed. Therefore, the defendant must plead the defense before the court upon answering the plaintiff's complaint. If the defendant does not do so, he is regarded as having waived the defense and will not be permitted to use it in any subsequent proceedings.

Statutes of limitations are enacted by the legislature, which may either extend or reduce the time limits, subject to certain restrictions. A court cannot extend the time period unless the statute provides such authority. With respect to civil lawsuits, a statute must afford a reasonable period in which an action can be brought. A statute of limitations is unconstitutional if it immediately curtails an existing remedy or provides so little time that it deprives an individual of a reasonable opportunity to start a lawsuit. Depending upon the state statute, the parties themselves may either shorten or extend the prescribed time period by agreement, such as a provision in a contract.

### Criminal Actions

A majority of states have a statute of limitations for all crimes except murder. Once the statute has expired, the court lacks jurisdiction to try or punish a defendant.

Criminal statutes of limitations apply to different crimes on the basis of their general classification as either felonies or misdemeanors. Generally, the time limit starts to run on the date the offense was committed, not from the time

## Recovered Memory: Stopping the Clock

Statutes of limitations are intended to encourage the resolution of legal claims within a reasonable amount of time. Courts and legislatures have had to reconsider the purpose of time limits in dealing with the controversial issue of **RECOVERED MEMORY** by child **SEXUAL ABUSE** victims. For the most part, the clock has been stopped until a victim remembers the abuse.

In the 1980s some mental health therapists began exploring the nature of child sexual abuse. They contended that memories of childhood trauma are so disturbing that the child represses them. Many years later, while in therapy or by happenstance, the person remembers the traumatic events. Therapists built on this concept, working with patients to fully recover these memories.

Victims of child sexual abuse who sought to sue their abusers for damages faced a statute of limitations question: Had the time expired to file a civil lawsuit because the memory of abuse was not recovered until many years after the actual abuse? Courts that faced this issue for the first time sought ways to circumvent the time barrier. One method was to apply the "discovery rule" found in **TORT LAW**. The discovery rule applies if the injury is one that is not readily perceptible as having an external source. Thus, a person who has serious mental health problems but does not know the cause will be allowed to toll (suspend the running of) the statute of limitations until he or she discovers that the injury was caused by the defendant's tortious conduct.

Legislatures have been urged to amend their statutes of limitations to permit recovered memory plaintiffs to sue their abusers. Between 1989 and 1995 24 states had amended their laws. By 2003, 42 states had codified some form of a recovered-memory law on their books, while one state admitted recovered-memory evidence pursuant to its **COMMON LAW** rules. Typically recovered-memory laws provide that the action must be filed within a certain number of years after the plaintiff either reaches the age of majority or knew or had reason to know that sexual abuse caused the injury. Because of these judicial and legislative changes, many lawsuits have been filed alleging child sexual abuse that occurred many years before, sometimes as long as 20 years earlier.

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#### CROSS-REFERENCES

Child Abuse; Sexual Abuse; Sex Offenses.

the crime was discovered or the accused was identified. The running of the statute may be suspended for any period the accused is absent from the state or, in certain states, while any other indictment for the same crime is pending. This suspension occurs so that the state will be able to obtain a new indictment in the event the first one is declared invalid.

### Civil Actions

In determining which statute of limitations will control in a civil action, the type of CAUSE OF ACTION that the claim will be pursued under is critical. States establish different deadlines depending on whether the cause of action involves a contract, personal injury, LIBEL, FRAUD, or other claim.

Once the cause of action is determined, the date of the injury must be fixed. A cause of action ordinarily arises when the party has a right to apply to the proper court for relief. Some states, for example, require a person to bring a lawsuit for breach of contract within six years from the date the contract was breached. The action cannot be started until the contract has actually been violated, even though serious disagreements between the parties might have occurred earlier. Conversely, the time limit

within which to bring an action for fraud does not begin until the fraud has been discovered.

### Waiving the Defense

A court cannot force a defendant to use a statute of limitations defense, but it is usually in the person's best legal interests to do so. Nevertheless, defendants do sometimes waive the defense. The defense may be waived by an agreement of the parties to the controversy, provided that the agreement is supported by adequate consideration. For example, a debtor's agreement to waive the statute of limitations in exchange for a creditor's agreement not to sue is valuable consideration that prevents the debtor from using the defense.

A defendant may be unable to use the limitations defense due to her agreement, conduct, or representations. To be estopped, or prevented, from using this defense, a defendant need not have signed a written statement, unless required by statute. The defendant must, however, have done something that amounted to an affirmative inducement to the plaintiff to delay bringing the action. Statements that only attempt to discourage a person from bringing a suit or mere negotiations looking toward an amicable settlement will not estop a defendant from invoking the statute of limitations.

### Tolling the Statute

Statutes of limitations are designed to aid defendants. A plaintiff, however, can prevent the dismissal of his action for untimeliness by seeking to *toll* the statute. When the statute is tolled, the running of the time period is suspended until some event specified by law takes place. Tolling provisions benefit a plaintiff by extending the time period in which he is permitted to bring suit.

Various events or circumstances will toll a statute of limitations. It is tolled when one of the parties is under a legal disability—the lack of legal capacity to do an act—at the time the cause of action accrues. A child or a person with a mental illness is regarded as being incapable of initiating a legal action on her own behalf. Therefore, the time limit will be tolled until some fixed time after the disability has been removed. For example, once a child reaches the age of majority, the counting of time will be resumed. A personal disability that postpones the operation of the statute against an individual may be asserted only by that individual. If a party is under more than one disability, the statute of limitations does not begin to run until all the disabilities are removed. Once the statute begins to run, it will not be suspended by the subsequent disability of any of the parties unless specified by statute.

Mere ignorance of the existence of a cause of action generally does not toll the statute of limitations, particularly when the facts could have been learned by inquiry or diligence. In cases where a cause of action has been fraudulently concealed, the statute of limitations is tolled until the action is, or could have been, discovered through the exercise of due diligence. Ordinarily, silence or failure to disclose the existence of a cause of action does not toll the statute. The absence of the plaintiff or defendant from the jurisdiction does not suspend the running of the statute of limitations, unless the statute so provides.

The statute of limitations for a debt or obligation may be tolled by either an unconditional promise to pay the debt or an acknowledgement of the debt. The time limitation on bringing a lawsuit to enforce payment of the debt is suspended until the time for payment established under the promise or ACKNOWLEDGMENT has arrived. Upon that due date, the period of limitations will start again.

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## STATUTE OF USES

*An* ENGLISH LAW *enacted in 1535 to end the practice of creating uses in real property by changing the purely equitable title of those entitled to a use into absolute ownership with the right of possession.*

The Statute of Uses was a radical statute forced through a recalcitrant English Parliament in 1535 by a willful King Henry VIII. Essentially, the statute eliminated a sleight of hand that had been fashioned by landholders to avoid paying royal fees associated with land. These royal fees,

called feudal incidents, had been slipping away from the Crown for a century or so before the statute was passed.

Landholders in sixteenth-century England were supposed to hold their land at the will of a lord, who worked in the service of the king or queen. In exchange for the land, landholders were obliged to pay certain fees to the lord, who kept some and turned the rest over to the Crown. Many of the royal incidents associated with real property were exacted by the Crown when the landholder died. However, the Crown could collect incidents only if the legal title passed from the landholder to an heir.

In the fourteenth and fifteenth centuries, landholders had devised a way to both profit from their land and avoid feudal incidents. The landholders would place their property in the name of one person for the benefit of a third party. This third party, called the cestui que use, the beneficiary of the use, was either the original landholder or a person of the landholder's choosing. The arrangement created a form of land ownership, or estate in land, called a use.

Soon courts began to recognize the right of a landholder, as feoffor, to give possession of his land to a peasant tenant while giving legal title to a third party, or feoffee. They also enforced agreements between a feoffor and feoffee in which the feoffee held title to the land only for the benefit of the cestui que use.

Under the COMMON LAW, when legal title to land was held by more than one feoffee, partial title did not pass to the deceased feoffee's heirs upon the death of a feoffee. Instead, the deceased feoffee's portion of the title passed to the other feoffees. A landholder, as a feoffor, could give legal title to several feoffees and add a new feoffee to the legal title upon the death of any feoffee. Under this system, the death of a title-holding feoffee did not give rise to an inheritance incident. Thus, a landholder could avoid feudal incidents while he himself or a person of his choosing continued to reap profits from the land.

By giving legal title to two or more feoffees, a feoffor also was able to avoid other royal incidents, such as marriage fees and other fees associated with the death of a landholder. If the property was held in other persons' names, a landholder could also avoid losing the property due to debt or felony conviction. By the end of the fifteenth century, almost all of the land in England was owned in use. Because most of the land was owned by a relatively small number of wealthy landowners, in most cases the actual title owners did not actually live on their parcels of land. Another consequence was that the Crown had lost substantial revenues due to the avoidance of the land-based feudal incidents.

King Henry VIII attempted to reclaim these lost revenues with the passage of the Statute of Uses. Under the act, the full title to land was automatically given to the person for whom the property was being used, the cestui que use. The act also reinstated the old feudal rule of primogeniture, which held that land should go to the oldest son upon the death of the landowner.

Landholders strenuously objected to the statute. Over the next four years they conducted a Pilgrimage of Grace to London in an effort to convince the king and Parliament to eliminate primogeniture and reverse the ABOLITION of the use estate.

The campaign caused Henry VIII to loosen the royal grip on land ownership. In 1540 Parliament passed the Statute of Wills, which abolished primogeniture and gave landholders the right to devise their property to whomever they pleased in a written will and testament. However, Parliament did not abolish the Statute of Uses.

Immediately after the act was passed, landholders set about creating loopholes. The courts also were hostile to the legislation. They accommodated landholders by giving the statute a strict technical construction and by expanding other methods for landholders to put their property in the name of another person while keeping it for their own use or profit or for the use or profit of another person. In particular, the English courts expanded the concept of the trust to fill the void. A land trust is an arrangement whereby one person holds full title to property for the benefit of another person, who may direct the management and use of the property.

Courts focused on the difference between a trust and a use to achieve essentially the same result for landowners. In a trust the title owner plays some active role in connection with the use of the property. In contrast, with a bare use, the feoffee performed no work in connection with the property and served only as a strawperson. If a feoffee was performing duties in connection with the property, the land was not in use, courts reasoned, but in trust. Many of the rules on land trusts that developed in response to the Statute of Uses were adopted in the United States and continue in effect today.

In 1660 Parliament abolished all remaining feudal incidents associated with land in the Statute of Tenure. This obviated the need for a Statute of Uses because there no longer was any need to evade feudal incidents. The Statute of Uses was finally repealed by Parliament in 1925 by the Law of Property Act (12 & 13 Geo. 5, ch. 16, sec. 1(7)).

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CROSS-REFERENCES

Feudalism.

## STATUTE OF WILLS

*An early* ENGLISH LAW *that provided that all individuals who owned land were permitted to leave or devise two-thirds of their property to anyone by written will and testament, effective upon their death.*

The Statute of Wills (32 Hen. 8, c. 1) gave to landowners in England the right to dispose of land through a written will. Before the Statute of Wills was enacted by the English Parliament in 1540, landowners did not have the right to determine who would become the new owner of the land upon their death. The inheritance of land was dependent on whether the deceased landowner was survived by a competent relative or descendant. Generally, if a landowner died with no relatives, the land reverted into the possession of the Crown. This reversion was called ESCHEAT.

The Statute of Wills made it possible for a landholder to decide who would inherit the land upon his death. The statute was passed a mere four years after the STATUTE OF USES banned the practice of splitting the title to land to avoid paying royal fees associated with the property. The Statute of Wills was seen as a policy retreat by King Henry VIII, who faced tremendous opposition from landowners seeking relief from royal control of land.

Some of the procedures created by the Statute of Wills remain effective in modern law. The statute required that wills be in writing, that they be signed by the person making the will, or testator, and that they be properly witnessed by other persons. If any of these requirements was not met, the will could not be enforced in court. These requirements exist today in state law and are intended to ensure that wills are not fabricated and that the testator's intent is fulfilled.

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## STATUTE OF YORK

*An* ENGLISH LAW *enacted in 1318 that required the consent of Parliament in all legislative matters.*

The Statute of York was an important step toward the development of a constitutional monarchy in England. The law was enacted in the city of York in 1318, at a time when King Edward II was attempting to reassert his control over the kingdom.

Historians generally regard Edward II as an unqualified failure as king. Seven years before the Statute of York, the nobility had forced him to accept the Ordinances of 1311, which required baronial consent for foreign war, restricted the Crown's power to interfere with the judicial system, and required the king to obtain the advice and consent of the barons in Parliament for a long list of officials he wished to appoint.

Edward II regained political strength in 1318 and managed to have the Ordinances repealed. The Statute of York, however, specified that the "consent of the prelates, earls, and barons, and of the community of the realm" was required for legislation. Though some historians believe the statute restored baronial control over English government, many historians see the phrase "community of the realm" as signifying a shift of power to those outside the noble class. In addition, the powers of the king were constrained.

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## STATUTES AT LARGE

*An official compilation of the acts and resolutions of each session of Congress published by the Office of the Federal Register in the National Archives and Record Service.*

The Statutes at Large are divided into two parts: the first is composed of public acts and joint resolutions; the second includes private acts and joint resolutions, concurrent resolutions, treaties, proposed and ratified amendments to the Constitution, and presidential proclamations. Volumes from 1951 to the present are arranged by public law number; older volumes are arranged by chapter number.

The *Statutes at Large* are considered the official publication of the law for citation purposes when titles of the United States Code have not been enacted as positive law.

## STATUTORY

*Created, defined, or relating to a statute; required by statute; conforming to a statute.*

A statutory penalty, for example, is punishment in the form of a fine, prison sentence, or both, that is imposed against an offender for committing some statutory violation.

## STATUTORY CONSTRUCTION

See CANONS OF CONSTRUCTION.

## STATUTORY RAPE

*Sexual intercourse by an adult with a person below a statutorily designated age.*

The criminal offense of statutory rape is committed when an adult sexually penetrates a person who, under the law, is incapable of consenting to sex. Minors and physically and mentally incapacitated persons are deemed incapable of consenting to sex under rape statutes in all states. These persons are considered deserving of special protection because they are especially vulnerable due to their youth or condition.

Most legislatures include statutory rape provisions in statutes that punish a number of different types of sexual assault. Statutory rape is different from other types of rape in that force and lack of consent are not necessary for conviction. A defendant may be convicted of statutory rape even if the complainant explicitly consented to the sexual contact and no force was used by the actor. By contrast, other rape generally occurs when a person overcomes another person by force and without the person's consent.

The actor's age is an important factor in statutory rape where the offense is based on the victim's age. Furthermore, a defendant may not argue that he was mistaken as to the minor's age or incapacity. Most rape statutes specify that a rape occurs when the complainant is under a certain age and the perpetrator is over a certain age. In Minnesota, for example, criminal sexual conduct in the first degree is defined as sexual contact with a person under thirteen years of age by a person who is more than thirty-six months older than the victim. The offense also is committed if the complainant is between thirteen and sixteen years old and the actor is more than forty-eight months older than the complainant (Minn. Stat. Ann. § 609.342 [West 1996]).

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CROSS-REFERENCES

Child Abuse; Sexual Abuse.

## STATUTORY REDEMPTION

*The right granted by legislation to a mortgagor, one who pledges property as security for a debt, as well as to certain others, to recover the mortgaged property after a foreclosure sale.*

Statutory redemption is the right of a mortgagor to regain ownership of property after foreclosure. A mortgagor is a person or party who borrows money from a mortgagee to purchase property. The arrangement between a mortgagor and mortgagee is called a mortgage. Foreclosure is the termination of rights to property bought with a mortgage. Most foreclosures occur when the mortgagor fails to make mortgage payments to the mortgagee. After foreclosing a mortgage, the mortgagee may sell the property at a foreclosure sale. Statutory redemption gives a mortgagor a certain period of time, usually one year, to pay the amount that the property was sold for at the foreclosure sale. If the mortgagor pays all of the foreclosure sale price before the end of one year after the foreclosure sale, or within the statutory redemption period, the mortgagor can keep the property.

A mortgagor in a state that offers statutory redemption may stay on the premises after foreclosure during the statutory redemption period.

If the mortgagor does not redeem the property by the end of the period, the purchaser at the foreclosure sale receives title to, and possession of, the property.

In states that have redemption statutes, an individual mortgagor cannot waive a statutory redemption period. Many states that offer statutory redemption make a special exception for corporations, which may waive the statutory redemption period if it is incompatible with the reorganization or dissolution of the corporation.

Approximately half of all states have passed statutes that allow mortgagors to redeem property after a mortgage foreclosure. The states that allow statutory redemption have done so to drive up foreclosure sale prices for the benefit of both the defaulting mortgagor and creditors of the mortgagor who have obtained an interest in the property. Statutory redemption is designed to prevent extremely low sale prices by giving the mortgagor an opportunity to match the sale price. Some legal commentators have observed, however, that statutory redemption has failed to increase the amount of bids on foreclosed property because title to property that is subject to statutory redemption is so uncertain. Because the mortgagor could redeem the property within a year and creditors of the mortgagor could make claims to the property, potential buyers of foreclosed property adjust their bids to account for these hazards.

Statutory redemption is distinct from equitable redemption. Equitable redemption is the right of a defaulting mortgagor to reclaim property by paying all past due mortgage payments anytime prior to foreclosure. Statutory redemption, by contrast, begins at the point of foreclosure and requires that the defaulting mortgagor pay the full foreclosure sale price. Equitable redemption is a common-law concept, which means it exists as law in the form of judicial opinions. All state courts have recognized a mortgagor's right to equitable redemption.

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## STAY

*The act of temporarily stopping a judicial proceeding through the order of a court.*

A stay is a suspension of a case or a suspension of a particular proceeding within a case. A judge may grant a stay on the motion of a party to the case or issue a stay sua sponte, without the request of a party. Courts will grant a stay in a case when it is necessary to secure the rights of a party.

There are two main types of stays: a stay of execution and a stay of proceedings. A stay of execution postpones the enforcement of a judgment against a litigant who has lost a case, called the JUDGMENT DEBTOR. In other words, if a civil litigant wins money damages or some other form of relief, he may not collect the damages or receive the relief if the court issues a stay. Under rule 62 of the Federal Rules of Civil Procedure, every civil judgment is stayed for ten days after it is rendered. An additional stay of execution lasts only for a limited period. It usually is granted when the judgment debtor appeals the case, but a court may grant a stay of execution in any case in which the court feels the stay is necessary to secure or protect the rights of the judgment debtor.

The term *stay of execution* may also refer to a halt in the execution of a death penalty. This kind of stay of execution normally is granted when a court decides to allow an additional appeal by a condemned prisoner. Such stays of execution may be granted by executives, such as governors or the president of the United States, or by appeals courts.

A stay of proceedings is the stoppage of an entire case or a specific proceeding within a case. This type of stay is issued to postpone a case until a party complies with a court order or procedure. For example, if a party is required to deposit collateral with the court before a case begins, the court may order the proceedings stayed for a certain period of time or until the money or property is delivered to the court. If the party fails to deposit the collateral, the court may cite the party for CONTEMPT of court and impose a fine or order incarceration.

A court may stay a proceeding for a number of reasons. One common reason is that another

action is under way that may affect the case or the rights of the parties in the case. For instance, assume that a defendant faces lawsuits from the same plaintiffs in two separate cases involving closely related facts. One case is filed in federal court, and the other case is filed in state court. In this situation one of the courts may issue a stay in deference to the other court. The stay enables the defendant to concentrate on one case at a time.

The term *stay* may also be used to describe any number of legal measures taken by a legislature to provide temporary relief to debtors. For example, under section 362(a) of the Bankruptcy Code, a debtor who files for bankruptcy receives an automatic stay immediately upon filing a voluntary bankruptcy petition. Used in this sense, the term *stay* refers to the right of the debtor to keep creditors at bay during the resolution of the bankruptcy case.

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CROSS-REFERENCES

Capital Punishment.

## STEERING

*The process whereby builders, brokers, and rental property managers induce purchasers or lessees of real property to buy land or rent premises in neighborhoods composed of persons of the same race.*

Steering is an unlawful practice and includes any words or actions by a real estate sales representative or BROKER that are intended to influence the choice of a prospective buyer or tenant. Steering violates federal fair housing provisions that proscribe discrimination in the sale or rental of housing.

## STEINEM, GLORIA

Gloria Steinem is one of the most important feminist writers and organizers of the late twentieth century. Since the 1960s, Steinem has been a political activist and organizer who has urged equal opportunity for women and the breaking down of gender roles. As a writer she has produced influential essays about the need for social and cultural change.

Steinem was born on March 25, 1934, in Toledo, Ohio. Her parents divorced when she was 11 years old. Steinem enrolled at Smith College in 1952 and graduated in 1956. After graduation she went to India to study at the universities of Delhi and Calcutta. It was there that she began publishing freelance articles in newspapers.

In the 1960s, Steinem continued to pursue a writing career, working first for a political satire magazine in New York. Her breakthrough came in 1963 with the publication of her article "I Was a Playboy Bunny," which retold her experiences working in the Manhattan Playboy Club. For the next few years, her articles appeared in many national women's magazines. Steinem also wrote comedy scripts for a weekly political satire television show, *That Was the Week That Was.*

Her attention shifted to politics in 1968 when Steinem began writing a column for *New York* magazine. During the late 1960s, the "women's liberation movement" began and Steinem soon became a leading supporter of the movement. In 1971 she, along with BETTY FRIEDAN, BELLA ABZUG, and SHIRLEY CHISHOLM,

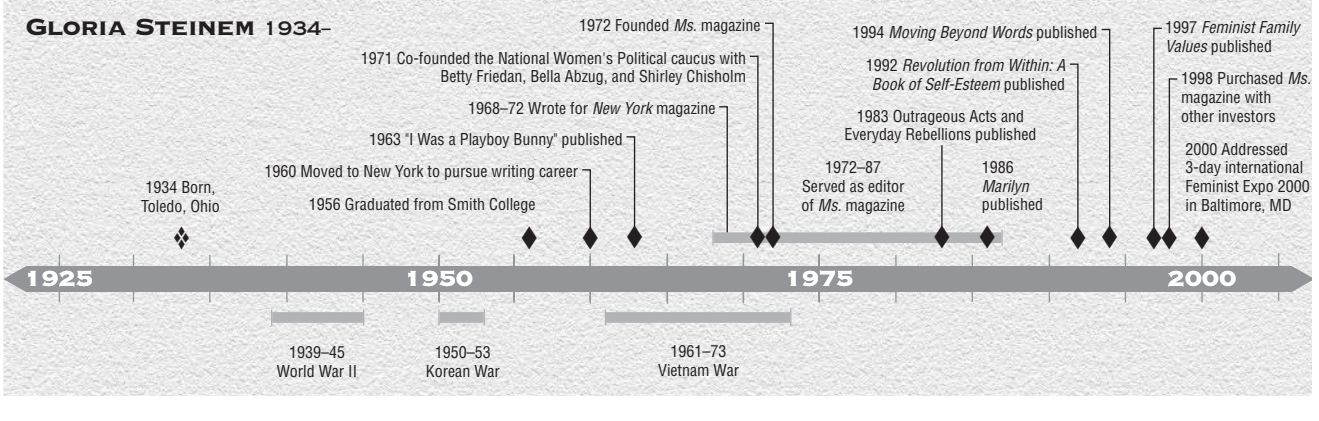

founded the National Women's Political Caucus. The mission of the caucus was to identify and encourage women to run for political office.

In 1972, Steinem founded and served as editor of *Ms.* magazine. *Ms.* addressed feminist issues, including reproductive rights, employment discrimination, sexuality, and gender roles. The magazine presented Steinem with a platform to air her views about the contemporary social scene. That same year Steinem was one of the cofounders of the Ms. Foundation for Women, a nonprofit organization that pioneered the concept of giving money to programs that addressed the specific concerns of women. At that time less than one percent of foundation grants were given to programs that supported women's issues such as DOMESTIC VIOLENCE, female-friendly legislation, and economic disparities.

Since the 1970s, Steinem has been a spokesperson for many feminist causes. She has sought to protect ABORTION rights, establish rape crisis centers, and guarantee work environments free from sexual discrimination. Steinem has distinguished between "erotica" and PORNOGRAPHY, believing that nonviolent sexual material is acceptable but pornography should be banned. More radical feminists have criticized Steinem for these and other positions, arguing that she seeks legal changes that falsely promise equal opportunity and fair treatment.

Despite these criticisms, Steinem has remained a popular public figure, traveling across the United States and worldwide, and lecturing to packed audiences. In addition, she is a prolific writer, regularly contributing articles to magazines and newspapers; she also provides political commentary on television, radio, and the INTERNET. A collection of her articles and essays, *Outrageous Acts and Everyday Rebellions,* was published in 1983. In 1986, she published *Marilyn,* a biography of film star Marilyn Monroe retold from a feminist perspective. In *Revolution from Within: A Book of Self-Esteem* (1992), Steinem looked inward, discussing ways that women could empower themselves. And, in 1994, she wrote *Moving Beyond Words,* a collection of essays on the politics of gender.

In addition to her numerous awards and honorary degrees, in 1993, Steinem was inducted into the National Women's Hall of Fame in Seneca Falls, New York. In 2000, she astonished observers by getting married at the age of 66 to an entrepreneur she had met at a Voters for Choice (VFC) fundraiser in 1999. Steinem is president of VFC, which is a bipartisan POLITICAL ACTION COMMITTEE that supports candidates working for reproductive freedom. In May 2002, Steinem and her supporters celebrated the thirtieth anniversary of the founding of *Ms.* magazine.

*Gloria Steinem.*
COURTESY OF GLORIA STEINEM

"ECONOMIC SYSTEMS ARE NOT VALUE-FREE COLUMNS OF NUMBERS BASED ON RULES OF REASON, BUT WAYS OF EXPRESSING WHAT VARYING SOCIETIES BELIEVE IS IMPORTANT."
—GLORIA STEINEM


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CROSS-REFERENCES

Dworkin, Andrea; Feminist Jurisprudence; Ireland, Patricia; MacKinnon, Catharine Alice; Millett, Katherine Murray; Sex Discrimination; Women's Rights.


## STENOGRAPHER

*An individual who records court proceedings either in shorthand or through the use of a paper-punching device.*

A court stenographer is an officer of the court and is generally considered to be a state or public official. Appointment of a court stenographer is

largely governed by statute. A stenographer is ordinarily appointed by the court as an official act, which is a matter of public record. She is an official under the control of the court and is, therefore, generally subject to its direction. She is not under the dominion and control of the attorneys in a case. The term of office of a court stenographer is also regulated by statute in most cases.

The stenographer has the duty to attend court and to be present, or on call, throughout the entire trial, so that the court and the litigants can be protected by a complete record of the proceedings. The stenographer must take notes of what occurs before the court and transcribe and file the notes within the time permitted. The notes must comply with provisions requiring the stenographer to prepare and sign a certificate stating that the proceedings, evidence, and charges levied against the defendant were fully and accurately taken at the trial and that the transcript represents an accurate translation of the notes.

Some statutes provide that a judge who appoints the stenographer also has the power to remove him. Other statutes fix the term of office; in which case a stenographer cannot be removed at a judge's pleasure, even though the judge has the power to appoint him.

The compensation of a court stenographer may be in the form of an annual salary, a per diem allowance, or an allowance for work actually performed. In the absence of a statute fixing the fees, a duly appointed stenographer is entitled to be reasonably compensated. Some statutes require that a stenographer's fees must be paid by the parties.

## STERILIZATION

*A medical procedure where the reproductive organs are removed or rendered ineffective.*

Legally mandated sterilization of criminals, or other members of society deemed "socially undesirable," has for some time been considered a stain on the history of U.S. law. The practice, also known as eugenics, originated early in the twentieth century. In 1914, a Model Eugenical Sterilization Law was published by Harry Laughlin at the Eugenics Records Office. Laughlin proposed the sterilization of "socially inadequate" persons, which translated as anyone "maintained wholly or in part by public expense." This would include the "feebleminded, insane, blind, deaf, orphans, and the homeless." At the time the model law was published, 12 states had enacted sterilization laws. Such laws were seen to benefit society since they presumably reduced the burden on taxpayers of maintaining state-run facilities. Eventually, these laws were challenged in court.

In BUCK V. BELL, 274 U.S. 200 (1927), OLIVER WENDELL HOLMES JR. wrote the infamous opinion that upheld the constitutionality of a Virginia sterilization law, fueling subsequent legislative efforts to enact additional sterilization laws. By 1930, 30 states and Puerto Rico had passed laws mandating sterilization for many criminal or moral offenses. Nearly all of the states with such laws imposed mandatory sterilization of mentally defective citizens. Nineteen states required sterilization for parents of children likely to experience various disorders. Six states encouraged sterilization for individuals whose children might be "socially inadequate."

Finally, the Supreme Court struck down an Oklahoma law mandating involuntary sterilization for repeat criminals in *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942). Justice WILLIAM O. DOUGLAS's opinion broadly defined the right to privacy to include the right to procreate, and concluded that the government's power to sterilize interfered with an individual's basic liberties.

By mid-century, legal attitudes had changed, and many state sterilization laws were held to be unconstitutional under the EIGHTH AMENDMENT prohibiting CRUEL AND UNUSUAL PUNISHMENT.

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## ❖ STEVENS, JOHN PAUL

A member of the U.S. Supreme Court since 1975, John Paul Stevens has developed a reputation as a judicial centrist on the High Court, although many of his more well-known opinions are marked by a liberal bent.

Born on April 20, 1920, Stevens descended from Nicholas Stevens, who emigrated to America in 1659 after serving as a brigadier general in

Oliver Cromwell's army. Stevens's father was a businessman and lawyer; he designed Chicago's Stevens Hotel and was its original managing director.

A political moderate during his college days at the University of Chicago, Stevens graduated Phi Beta Kappa in 1941. During WORLD WAR II he served with the U.S. Navy and was awarded the Bronze Star. After the war he studied law at Northwestern University School of Law in Chicago, graduating first in his class in 1947.

Stevens began his legal career as a law clerk for U.S. Supreme Court Justice WILEY B. RUTLEDGE. In 1948 he joined the Chicago firm of Poppenhausen, Johnston, Thompson, and Raymond, specializing in litigation and ANTITRUST LAW. In 1951 he served as associate counsel on a study of MONOPOLY power for a subcommittee of the Judiciary Committee of the House of Representatives. Upon returning to Chicago in 1952, Stevens founded the firm of Rothschild, Stevens, Barry, and Meyers. Along with his private practice, he taught antitrust law at the Northwestern University and the University of Chicago law schools throughout much of the 1950s. He also served for a time as a member of the U.S. attorney general's National Committee to Study Antitrust Laws.

In 1970 President RICHARD M. NIXON appointed Stevens as a judge of the U.S. Court of Appeals for the Seventh Circuit. He became known for his scholarly abilities and his carefully written, clear, and succinct opinions. His first opinion on the court of appeals was a dissent in a challenge to the summary incarceration of an antiwar activist who had disrupted a legislative session (*Groppi v. Leslie,* 436 F.2d 331 [1971]). Stevens viewed the incarceration as unconstitutional, and the following year his minority view was vindicated by a unanimous Supreme Court (404 U.S. 496, 92 S. Ct. 582, 30 L. Ed. 2d 632).

The liberal Supreme Court justice WILLIAM O. DOUGLAS retired in 1975, providing President GERALD R. FORD his only opportunity to make a Supreme Court appointment. Stevens received high praise and active support from Ford's attorney general, EDWARD LEVI, and unqualified support from the AMERICAN BAR ASSOCIATION. During the Senate confirmation hearing, Stevens remarked that he believed that litigants should know how judges viewed the arguments and that it was important to make a record to note diverse views for reference in later cases.

*John Paul Stevens.*
LIBRARY OF CONGRESS

Stevens was unanimously confirmed on December 17, 1975, and took his oath of office two days later.

"IT IS NOT OUR JOB TO APPLY LAWS THAT HAVE NOT YET BEEN WRITTEN."
—JOHN PAUL STEVENS

Until Stevens became a justice, new justices were typically seen but not heard. Instead, they usually joined dissents or concurrences without offering their own opinions. Stevens did not fit that pattern. During the 1976–77 term, Stevens had seventeen separate majority concurrences and twenty-seven separate dissents, far more than any other justice.

From the start, Stevens evinced a concern that the legal system give particular care to ensure the rights of the underprivileged, including ALIENS, illegitimate children, and prisoners. However, Stevens cannot easily be classified as either a judicial liberal or a conservative. In a judicial context, a conservative judge generally will not decide issues that he or she believes are within the province of legislatures. Moreover, a conservative typically votes to enhance government power in a conflict between government interests and individual rights. A judicial liberal, on the other hand, tends to favor individual interests and will look beyond the bounds of a statute and past interpretations of the Constitution to decide social policy questions.

For example, although Stevens is generally perceived as being sympathetic to the rights of prisoners, his sympathy has not necessarily translated into leniency for criminal defendants. Stevens wrote the opinion in *United States v. Ross,* 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982), wherein the Court held that police may search compartments and containers within a vehicle even though the contents are not in plain view, as long as the search is based on PROBABLE CAUSE. Probable cause, the same standard needed to obtain a SEARCH WARRANT, is typically determined by a magistrate, but this case effectively gave that power to the police in searches of vehicle containers.

Stevens's nomination was opposed by some women's groups that claimed that he was unresponsive in several sexual discrimination cases while on the court of appeals. In 1981 he voted to uphold the all-male draft (ROSTKER V. GOLDBERG, 453 U.S. 57, 101 S. Ct. 2646, 69 L. Ed. 2d 478), and in another case he declined to consider the theory of COMPARABLE WORTH. On the other hand, he has typically voted to uphold ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), and limit restrictions to a woman's right to ABORTION (*Planned Parenthood v. Casey,* 510 U.S. 1309, 114 S. Ct. 909, 127 L. Ed. 2d 352 [1994] and *Rust v. Sullivan,* 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 [1991]). In *Clinton v. Jones,* 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997), Stevens spoke for a unanimous Court in allowing a SEXUAL HARASSMENT lawsuit against President BILL CLINTON to go forward. Stevens ruled that the Constitution does not afford a president temporary immunity—except in the most exceptional circumstances—for civil litigation arising from events that occurred before the president took office. The Court also held that Clinton was not entitled to a stay of proceedings during his term in office.

One of Stevens's earliest opinions was *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310, (1976). He wrote for a plurality of the Court, upholding Detroit ZONING ordinances that prevented the concentration of "adult" establishments. The case was significant because the ordinance in question did not require a finding that the establishment dealt in legally obscene materials as a prerequisite to legal action. Before the ruling in *Young,* sexually-oriented material that was not legally obscene appeared to be entitled to complete FIRST AMENDMENT protection. Stevens wrote that the material in question was so sexually explicit as to be entitled to less protection than other speech, stating that "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." He reasoned that the zoning restriction

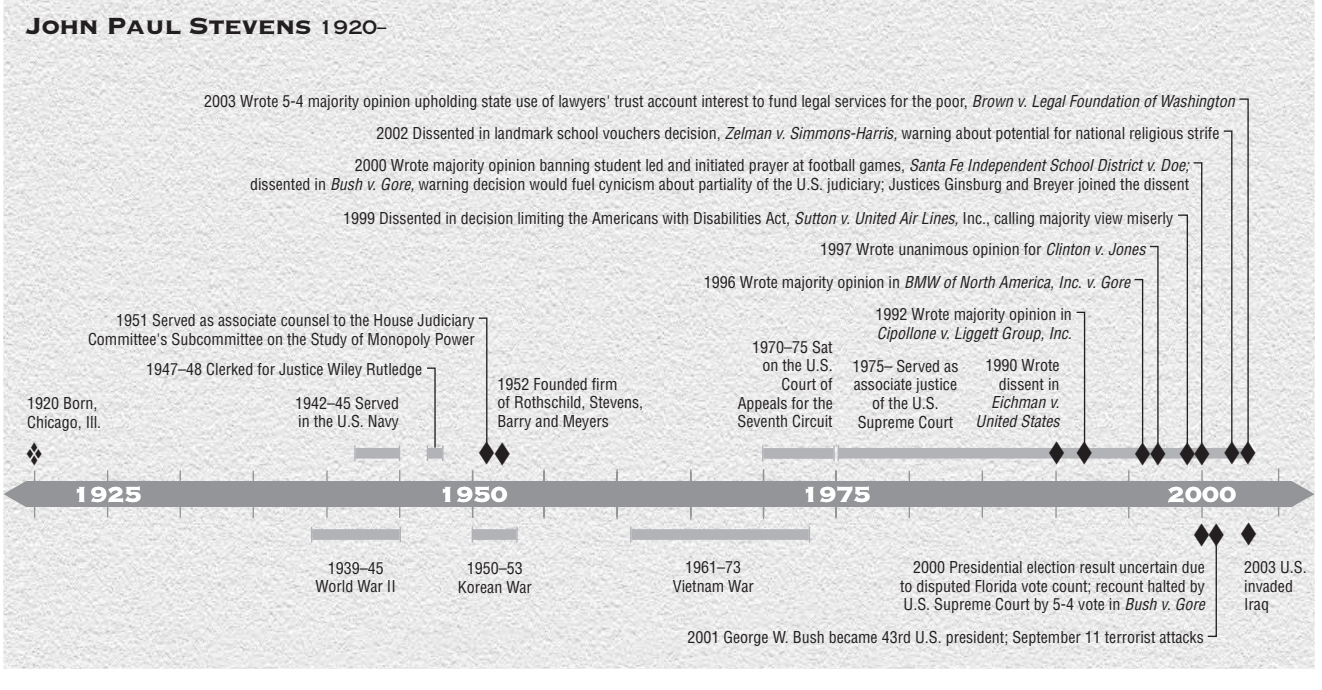

did not totally prohibit the availability of the material and was a reasonable action by the city to further its interest in preserving the quality of urban life. This ruling has been the basis for other restrictions that fall short of an outright prohibition of communication that is sexually explicit but not obscene.

Justice Stevens, along with Justices POTTER STEWART and LEWIS F. POWELL JR., acted as a swing vote in a series of death penalty cases in the mid-1970s. The Court upheld death penalty statutes providing for discretion in imposition but overturned those calling for mandatory death sentences. Stevens voted against the death penalty in cases of rape and dissented from a 1989 decision permitting an execution for someone who committed a murder at age sixteen or seventeen.

In *Eichman v. United States,* 496 U.S. 310, 110 S. Ct. 2404, 110 L. Ed. 2d 287 (1990), the Supreme Court ruled that flag burning was a form of expression protected by the First Amendment and overturned a federal statute that attempted to protect flags. The majority ruled that the statute had to withstand the most exacting scrutiny and could not be upheld under the First Amendment. Stevens wrote a dissent joined by conservative Chief Justice WILLIAM H. REHNQUIST and two other justices, maintaining that the statute was consistent with the First Amendment.

Stevens wrote the opinion in *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), the first case in which the High Court overturned a jury's PUNITIVE DAMAGES award. A jury awarded an automobile owner $4 million (later reduced to $2 million) when the manufacturer failed to disclose a refinished paint job on a new BMW. Stevens called the award "grossly excessive" and set out criteria to determine the propriety of punitive damage awards. The four dissenting justices in the case argued that the ruling improperly intruded into states' prerogatives.

In 1992 Stevens wrote the opinion for CIPOLLONE V. LIGGETT GROUP, INC., 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), possibly exposing the tobacco industry to huge adverse verdicts for money damages by opening the door to increased litigation for smoking-related deaths. In a 7–2 decision, the Court ruled that cigarette manufacturers that lie about the dangers of smoking or otherwise misrepresent their products can be sued under state laws. Because cigarette labeling is governed by federal law, at issue was whether federal law preempts state common-law liability lawsuits. The Court ruled that federal suits are the only avenue for pursuing failure-to-warn cases or claims of omissions in the manufacturer's advertising or promotions. Litigants may sue in state court, however, for claims of breaches of express warranties, claims that cigarette advertisements are fraudulent, and claims that a company hid the dangers of smoking from state authorities or conspired to mislead smokers.

Stevens also authored WALLACE V. JAFFREE, 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985), holding that a state cannot provide a moment of silence at the beginning of the school day for the express purpose of facilitating meditation or prayer. The Court held that the Alabama statute in question did not pass constitutional scrutiny.

### Recent Decisions

Over the last eight years, Stevens's opinions have continued to cross the political spectrum, despite the tendency for observers to cast him as one of the "liberal" justices. In *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002), Stevens wrote a 6–3 majority opinion ruling that a prison inmate had been subjected to CRUEL AND UNUSUAL PUNISHMENT in violation of the EIGHTH AMENDMENT when prison guards handcuffed him to a hitching post as punishment for disruptive behavior, even though the inmate had already been subdued. Stevens said that the prison guards knowingly subjected the inmate to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation.

That same year Stevens also wrote a 6–3 majority opinion ruling that the execution of mentally retarded criminals violates the Eighth Amendment's guarantee against cruel and unusual punishment. ATKINS V. VIRGINIA, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). Citing "evolving standards of decency," Stevens said that his decision was informed by the consensus reflected in deliberations of the American public, legislators, scholars, and judges that have taken place over the thirteen years since *Penry v. Lynaugh*, 492 U.S. 302, 109

S. Ct. 2934, 106 L. Ed. 2d 256 (1989). In *Penry*, the Supreme Court held that two state statutes prohibiting the execution of the mentally retarded, even when added to the fourteen states that had rejected CAPITAL PUNISHMENT completely, did not provide sufficient evidence of a national consensus. In *Atkins*, though, Stevens emphasized that sixteen additional states had passed laws barring execution of the mentally retarded since the *Penry* decision was handed down.

Stevens surprised many observers with his dissenting opinion in *Kyllo v. United States,* 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001), where five justices found that the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constituted a "search" within the meaning of the FOURTH AMENDMENT, and thus the use of that device was presumptively unreasonable without a warrant. Justice Stevens argued that thermal imaging did not constitute a Fourth Amendment search because it detected only heat radiating from the external surface of the house.

Stevens surprised no one with his dissenting opinion in BUSH V. GORE, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000), however, where seven justices concluded that the process devised by the Florida Supreme Court to recount the popular vote in the 2000 presidential election violated the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT. Only five justices agreed that there was insufficient time to fashion a remedy that would fairly and lawfully allow the votes of Florida residents to be accurately counted for either presidential candidate. As a result, the nation's high court effectively ordered the Florida recount to stop, which meant that GEORGE W. BUSH would become the forty-third president of the United States.

In his dissenting opinion, Justice Stevens argued that the Equal Protection Clause does not limit the states' power to design their electoral processes—including substantive standards for determining whether a vote had been legally cast. Consequently, Stevens believed that the U.S. Supreme Court should have deferred to the Florida Supreme Court's interpretation of those standards and allowed the recount to continue. Under the majority's own reasoning, Stevens wrote, the appropriate course of action would have been to remand the case so the Florida high court could establish more specific procedures for implementing the legislature's uniform general standard of "voter intent." But in "the interest of finality," Stevens continued, "the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent—and are therefore legal votes under state law—but were for some reason rejected by ballot-counting machines."

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## ♦ STEVENSON, ADLAI EWING

Adlai Ewing Stevenson was a lawyer, statesman, and unsuccessful DEMOCRATIC PARTY candidate for the presidency in 1952 and 1956. An eloquent and witty speaker, Stevenson served as chief U.S. delegate to the UNITED NATIONS during the Kennedy administration.

Stevenson was born on February 5, 1900, in Los Angeles, California, and moved with his family to Bloomington, Illinois, in 1906. He graduated from Princeton University in 1922 and studied law at Northwestern University. He was admitted to the Illinois bar in 1926 and established a successful law practice in Chicago.

By the early 1930s Stevenson had set his sights on public service, following the course of his grandfather, Adlai E. Stevenson, who was vice president of the United States during the administration of President GROVER CLEVELAND (1893–1897). Stevenson joined the NEW DEAL administration of President FRANKLIN D. ROOSEVELT in 1933, serving as special legal adviser to the Agricultural Adjustment Administration. In 1934 he became general counsel for the Federal Alcohol Bureau.

Though Stevenson returned to his Chicago law practice in 1934, he remained an active civic leader. He headed the Chicago Bar Association's Civil Rights Committee and became the chair of the Chicago chapter of the Committee to Defend America by Aiding the Allies. This committee, composed of prominent business and civic leaders, worked to overcome U.S. isolationist foreign policy and provide aid to Great

Britain and France at the beginning of WORLD WAR II.

Stevenson rejoined the Roosevelt administration in 1941 as special assistant to the secretary of the Navy, and in 1943 he led a mission to Italy to establish a U.S. relief program. In 1945 Stevenson moved to the STATE DEPARTMENT, where he became a key participant in the establishment of the United Nations (U.N.). He was senior adviser to the U.S. delegation at the first meeting of the U.N. General Assembly in London in 1946 and was a U.S. delegate at meetings of the assembly in New York in 1946 and 1947.

In 1948 Stevenson returned to Illinois and ran as the Democratic candidate for governor. He was elected by the largest majority ever recorded in the state. He proved an effective chief executive, revitalizing the civil service, establishing a merit system for the hiring of state police, improving the care of patients in state mental hospitals, and increasing state aid to public education.

When President HARRY S. TRUMAN announced that he would not seek reelection in 1952, Democratic leaders urged Stevenson to seek the nomination. Although Stevenson declined to campaign for the nomination, the 1952 Democratic National Convention in Chicago drafted him as their presidential candidate. Stevenson ran a vigorous campaign but proved no match for the Republican candidate and popular war hero, General DWIGHT D. EISENHOWER. Eisenhower easily defeated Stevenson in 1952 and again in 1956.

Stevenson spent the 1950s practicing law in Chicago and serving as a spokesperson for the Democratic Party. At the 1960 Democratic National Convention in Los Angeles, a small group of liberals again sought to draft Stevenson for president. The effort failed and Senator JOHN F. KENNEDY of Massachusetts was nominated.

*Adlai Stevenson.*
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"THE ESSENCE OF A REPUBLICAN GOVERNMENT IS NOT COMMAND. IT IS CONSENT."
—ADLAI STEVENSON

Kennedy appointed Stevenson U.S. ambassador to the United Nations and gave him cabinet rank. Stevenson was deeply disappointed, however, believing he was the best-qualified person to serve as SECRETARY OF STATE. Despite his disappointment, Stevenson carried out his role at the United Nations with distinction. During the CUBAN MISSILE CRISIS of October 1962, Stevenson had a dramatic confrontation with the Soviet Union's delegate, telling the delegate he was prepared to wait "until Hell freezes over" for an answer to his question about Soviet missiles in Cuba.

Stevenson died on July 14, 1965, in London, England.

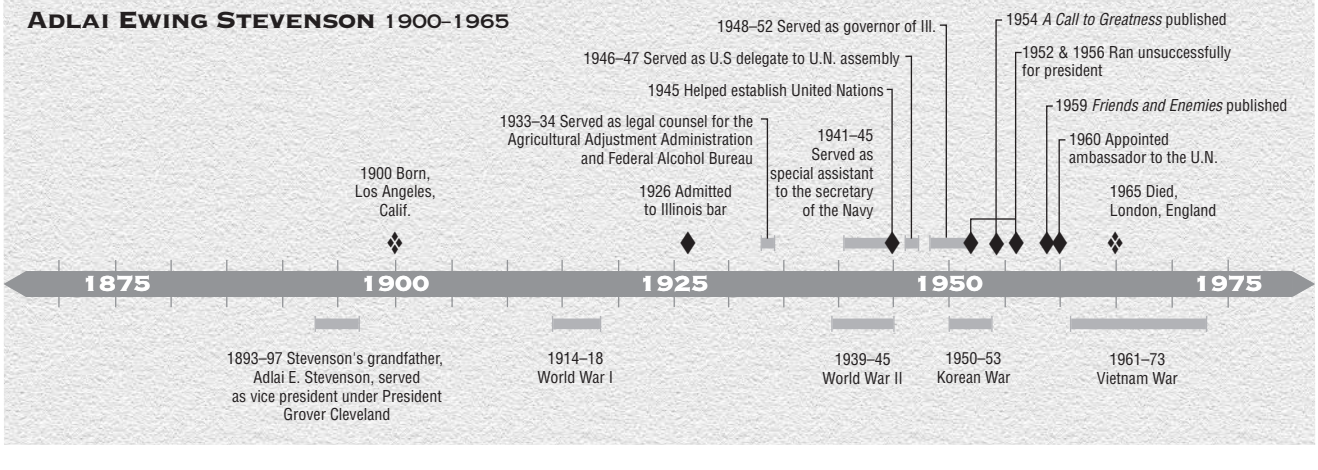

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## ♦ STEWART, POTTER

As an associate justice from 1958 to 1981, Potter Stewart charted a middle course during a vigorous era on the U.S. Supreme Court. Before his appointment to the Court by President DWIGHT D. EISENHOWER, Stewart practiced law, served in local government in his native Cincinnati, Ohio, and sat on the Sixth Circuit Court of Appeals from 1954 to 1958. He joined the Supreme Court during a period when the Court was changing the social and political landscape by extending CIVIL RIGHTS and liberties under Chief Justice EARL WARREN, yet Stewart remained a moderate during his twenty-three-year tenure. Pragmatism, unpredictability, and plainspoken opinions were his hallmarks. His penchant for witty phrases made him highly quotable, but his inconsistent voting record left only an ambiguous mark on U.S. law. At age forty-three, he was among the youngest appointees to the Court and, at age sixty-six, also one of the youngest justices to retire from it.

"SWIFT JUSTICE DEMANDS MORE THAN JUST SWIFTNESS."
—POTTER STEWART

Born in Jackson, Michigan, on January 23, 1915, Stewart came from old money and a family steeped in law and politics. Educated at University School, Hotchkiss, as well as at Yale, Cambridge, and Yale Law School, he earned his law degree from Yale in 1941. A stint on Wall Street followed. He served in the U.S. Navy during WORLD WAR II and returned to Ohio after the war. After working for a large law firm in his home state, Stewart briefly followed his father's footsteps into politics. James Garfield. Stewart had been mayor of Cincinnati and a justice of the Ohio Supreme Court. Potter Stewart served on the city council and as vice mayor, but he soon abandoned political life to build his own legal practice.

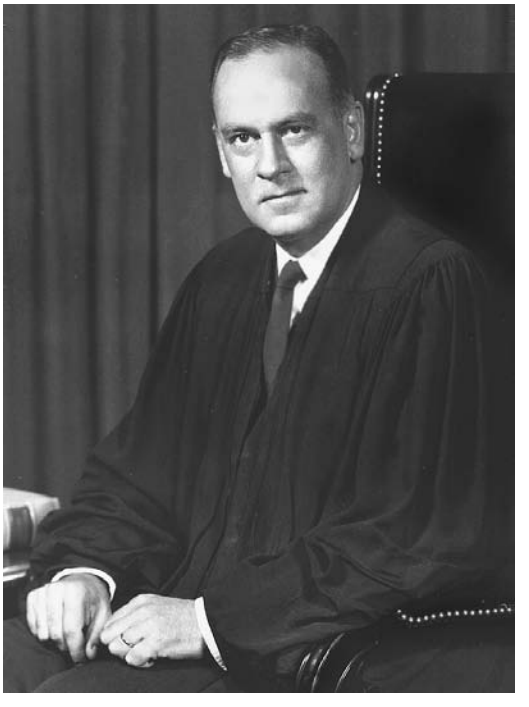

*Potter Stewart.* PHOTOGRAPH BY CHASE LTD. COLLECTION OF U.S. SUPREME COURT

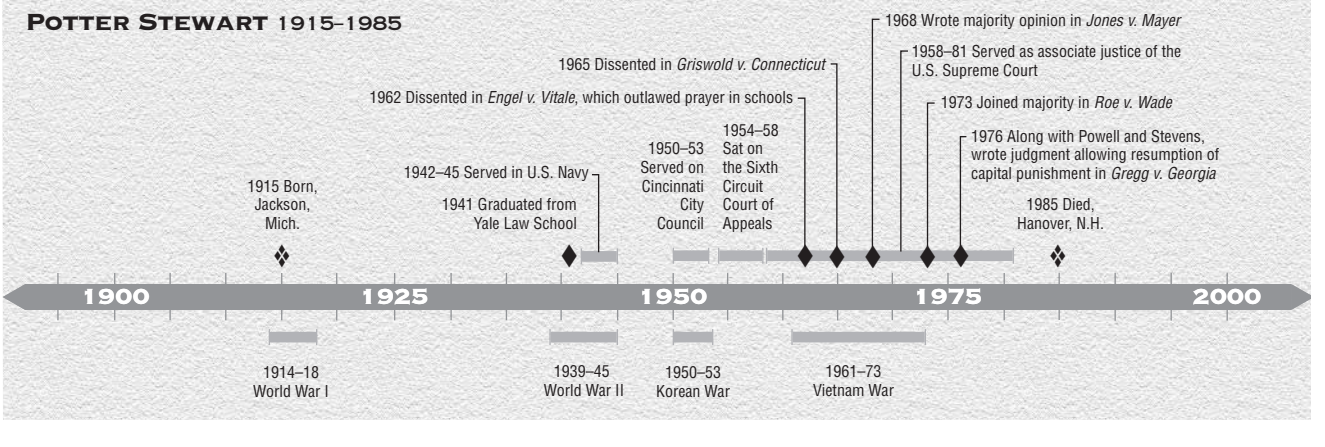

In 1954 President Eisenhower appointed Stewart to the federal bench. Stewart's high profile in the Ohio bar made him an attractive candidate for the Sixth Circuit Court of Appeals, where he served for the next four years. He was widely respected for his competence and efficiency as an appellate judge, and Eisenhower returned to him in 1958 when a seat opened on the Supreme Court. Although southern senators who disliked his embrace of SCHOOL DESEGREGATION offered scattered opposition to his appointment, the nomination easily succeeded.

On the Supreme Court, Stewart was a moderate justice. He was criticized for indecision, chiefly because he was often the unpredictable swing vote in cases that pitted the Warren Court's activist and judicial restraint blocs against each other. Stewart, however, followed his instincts on the Court without obvious resort to ideology or doctrine. To the question of whether he was liberal or conservative, he replied, "I am a lawyer," explaining that the labels had little value for him in the political sphere and even less in law. Stewart's approach in his opinions is notable for its plain-edged pragmatism. He blasted a state's anti-contraception laws as "uncommonly silly" in GRISWOLD V. CONNECTICUT (381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d [1965]), and in another case, he wrote of OBSCENITY, stating, "I know it when I see it" (*Jacobellis v. Ohio,* 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 [1964]).

In the arena of civil rights and liberties, Stewart's moderate outlook clearly revealed itself. He sided with claimants in 52 percent of these cases. Among his most notable decisions in favor of civil liberties was *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968), in which the WARREN COURT upheld measures that protected African Americans against discrimination in housing. Stewart's pragmatism did not allow for subjectivity, however. Although he regarded Connecticut's ban on the use of contraceptives as silly, he found the law constitutional and dissented from the majority in *Griswold v. Connecticut.* He maintained his moderate outlook in his later years on the Court. He agreed with the majority's expansion of a right to privacy in the landmark ABORTION case, ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), but he also attacked the Court's tendency to invalidate any state law it found unwise.

Stewart's legacy on the Court defies easy categorization. At best he is remembered for his pragmatism and at worst for leaving a less than cohesive body of opinions. He retired from the Court in 1981 and died in Hanover, New Hampshire, on December 7, 1985.

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## ♦ STIMSON, HENRY LEWIS

Henry Lewis Stimson was a lawyer and a distinguished public servant, occupying key posts in the administrations of five presidents between 1911 and 1945. As SECRETARY OF STATE, he sought disarmament, while as secretary of war he advocated the use of the atomic bomb against Japan in WORLD WAR II.

"THE BOMBS DROPPED ON HIROSHIMA AND NAGASAKI ENDED THE WAR. THEY ALSO MADE IT WHOLLY CLEAR THAT WE MUST NEVER HAVE ANOTHER WAR."
—HENRY L. STIMSON

Stimson was born on September 21, 1867, in New York City. He earned a bachelor's degree from Yale in 1888, a master's degree from Harvard University in 1889, and a bachelor of laws degree from Harvard in 1890. He was admitted to the New York bar in 1891 and joined the law firm headed by Elihu Root, a prominent attorney and influential figure in the REPUBLICAN PARTY.

In 1906 President THEODORE ROOSEVELT appointed Stimson U.S. attorney for the Southern District of New York. He left the post in 1909 to run as the Republican nominee for governor of New York. Although he lost the 1910 election, his stock continued to rise. President WILLIAM HOWARD TAFT named Stimson secretary of war in 1911, a position he held until the end of the Taft administration in 1913. He then returned to his New York law practice.

Stimson did not reenter public service until 1927, when President CALVIN COOLIDGE named him governor of the Philippine Islands. In 1929 President HERBERT HOOVER elevated Stimson to secretary of state, a position that put him on the world stage. As secretary, Stimson sought to continue the policy of military disarmament, participating in the London Naval Conference of 1930.

*Henry L. Stimson.*
LIBRARY OF CONGRESS

Following the Japanese invasion of Manchuria in 1931, Stimson wrote a diplomatic note to both China and Japan, informing them that the United States would not recognize territorial or other changes made in violation of U.S. treaty rights. The "Stimson Doctrine" was invoked as the rationale for successive economic embargoes against Japan during the 1930s.

With the election of President FRANKLIN D. ROOSEVELT, a Democrat, in 1932, Stimson returned to his law practice and private life. By the end of the 1930s, however, with the growing belligerence of Germany and Japan, Stimson emerged as an opponent of U.S. isolationist policies. When World War II began in 1939, Stimson became a leading member of the Committee to Defend America by Aiding the Allies, urging the U.S. government to provide aid to Great Britain and France.

President Roosevelt, who also sought to help the Allies, appointed Stimson secretary of war in 1940. By appointing a Republican to this key post, Roosevelt strengthened bipartisan support for his foreign policy. Stimson remained secretary of war during World War II and received praise for his quiet but firm administration of the war effort.

In 1945, acting as chief presidential adviser on atomic programs, Stimson directed the Manhattan Project, which resulted in the creation of the atomic bomb. He recommended to President HARRY S. TRUMAN that atomic bombs be dropped on Japanese cities of military importance. Truman followed his advice, ordering the bombing of Hiroshima and Nagasaki that brought a swift end to World War II. Stimson defended his recommendation, arguing that the bombings ended the war quickly and therefore saved more lives than were lost.

Stimson left office in September 1945. He published his autobiography, *On Active Service in Peace and War,* in 1948. He died on October 20, 1950, in Huntington, New York.

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## STIPULATION

*An agreement between attorneys that concerns business before a court and is designed to simplify or shorten litigation and save costs.*

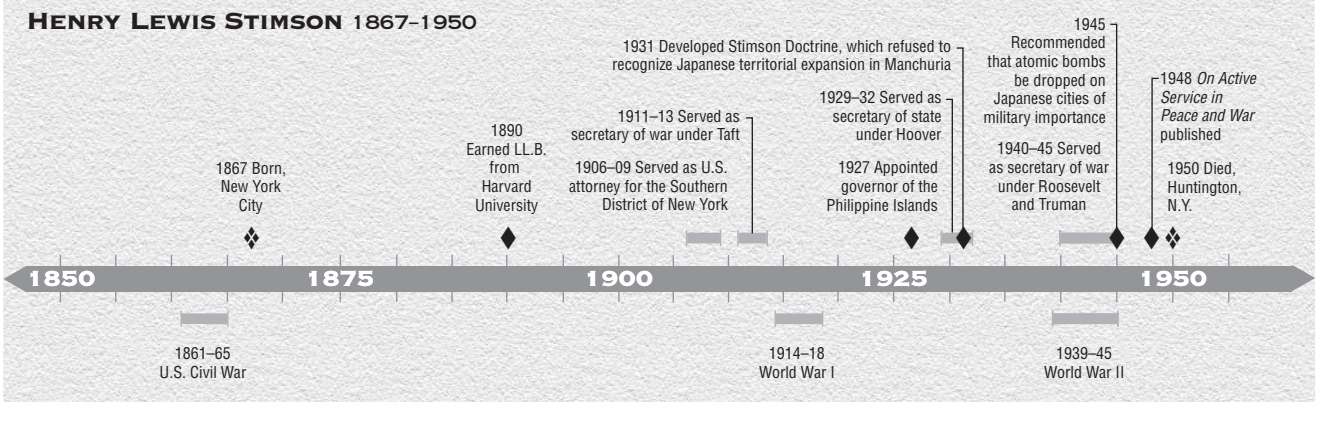

*Examples of stipulations stated by counsel in open court*

**Stipulations Stated by Counsel in Open Court**

[*Title of Court and Cause*]

Mr. A _____ : Your Honor, I think we can state for the record the following stipulated matter—and Mr. X _____ can correct me if I'm wrong— that:

Mr. _____ , who is a boat captain and patrols the offshore waters of the State of _____ in the _____ limit, would testify that in the 20____ fishing season, the only season in which he has been employed with the Commission, which would be relevant to this proceeding, that he did not see the _____ fishing vessels operating in State of _____waters for purposes of fishing.

We would have testimony from Mr. _____ , who is a fish spotter for_____ Corporation, who has been a fish spotter for _____ years with _____ Corporation and eight years previously with another company. He would testify that he is fully able to recognize the various boats of different companies and he has during the last three seasons seen no fishing by vessels owned by _____ or _____. He would also testify that in years past, running back for _____ to _____ years, I believe he said, that there has been substantially little or no fishing by _____ or _____.

Mr. _____ , also a fish spotter for _____ Corporation for _____ years, and _____ years previously with another company, would indicate that he has in the past three seasons seen _____ vessels only rarely in State of _____ waters engaged in fishing, but that in years past, perhaps _____ years past, _____ , did engage in some fishing of a substantial nature in State of _____ waters.

Judge _____: Thank you, Mr. _____.

Mr. X _____.

Mr. X _____ : I would like to add to that, your Honor, that both Mr. _____ and Mr._____ are employees of _____ Corporation, which is mentioned in the affidavits and briefs; that Mr. _____ , I believe would testify that the quantity of_____ fish available in State of _____ waters has dropped significantly in the last three or four years and is continuing to drop, and I believe he said that was true generally of the _____ Coast Fisheries, save for the _____ area, which this year experienced some increase. They would—

Judge _____ : Is that quantity, you said, quantity of fish?

Mr. X _____: Quantity, yes, sir, of _____ fish.

I believe that they would also verify, for what it's worth, your Honor, that the men, the Captains and crews of the plaintiffs' boats, are largely residents of the State of _____ in the _____ area, and I believe that two of these gentlemen, Mr. _____ and Mr. _____ , formerly worked for the plaintiffs in the _____ fishery themselves.

May I have just one more moment?

Judge _____ : Yes.

Mr. X _____ : May it please the Court, we have one further stipulation, bearing on the same subject matter, which is that Mr. _____ , if asked, would testify that a full boatload of fish, average boat size, on today's market is worth about $_____ and that even with the refrigerated equipment available on the boats today that _____ fish would begin to deteriorate, begin to spoil, after about a week.

Judge _____ : All right, sir.

Mr. A _____ , do you have any disagreement with that?

Mr. A _____ : We would agree that he would testify to that; yes, sir.

Judge _____ : All right.

Mr. A _____ : We would like, for the purposes of the information of the Court, to clarify that Mr. _____ , the defendant, is Chairman of the _____ , and that weights upon his inability to be here, your Honor.

Judge _____ : There is no question that as much as $10,000, and more is involved in this case, is there?

Mr. X _____ : I don't think so, your Honor.

Mr. A _____ : No, sir.

This is with regard to the appropriateness of an injunctive relief. That's why we intended to introduce this evidence.

During the course of a civil lawsuit, criminal proceeding, or any other type of litigation, the opposing attorneys may come to an agreement about certain facts and issues. Such an agreement is called a stipulation. Courts look with favor on stipulations because they save time and simplify the matters that must be resolved. Stipulations are voluntary, however, and courts may not require litigants to stipulate with the other side. A valid stipulation is binding only on the parties who agree to it. Courts are usually bound by valid stipulations and are required to enforce them.

Parties may stipulate to any matter concerning the rights or obligations of the parties. The litigants cannot, however, stipulate as to the validity or constitutionality of a statute or as to what the law is, because such issues must be determined by the court.

Stipulations may cover a variety of matters. Parties are permitted to make stipulations to dismiss or discontinue an action, to prescribe the issues to be tried, or to admit, exclude, or withdraw evidence. During a court proceeding, attorneys often stipulate to allow copies of papers to be admitted into evidence in lieu of originals or to agree to the qualifications of a witness. The parties can also enter into agreements concerning the testimony an absent witness would give if he were present, and the stipulated facts can be used in evidence. Such evidentiary devices are used to simplify and

expedite trials by dispensing with the need to prove uncontested factual issues.

Generally, parties to an action can stipulate as to an agreed statement of facts on which to submit their case to the court. Stipulations of this nature are encouraged by the courts. A number of other stipulations have been held to be valid, including those that relate to attorneys' fees and costs.

A stipulation does not need to be in a particular form, provided it is definite and certain. A number of statutes and court rules provide that stipulations reached out of court must be in writing to prevent fraudulent claims of oral stipulation, circumvent disputes concerning the terms of the stipulation, and relieve the court of the burden of resolving such disputes. Though an oral stipulation in open court is binding, a stipulation made in the judge's chamber must be in writing.

## STOCK

*A security issued by a corporation that represents an ownership right in the assets of the corporation and a right to a proportionate share of profits after payment of corporate liabilities and obligations.*

Shares of stock are reflected in written instruments known as stock certificates. Each share represents a standard unit of ownership in a corporation. Stock differs from consumer goods in that it is not used or consumed; it does not have any intrinsic value but merely represents a right in something else. Nevertheless, a stockholder is a real owner of a corporation's property, which is held in the name of the corporation for the benefit of all its stockholders. An owner of stock generally has the right to participate in the management of the corporation, usually through regularly scheduled stockholders' (or shareholders') meetings. Stocks differ from other SECURITIES such as notes and bonds, which are corporate obligations that do not represent an ownership interest in the corporation.

The value of a share of stock depends upon the issuing corporation's value, profitability, and future prospects. The market price reflects what purchasers are willing to pay based on their evaluation of the company's prospects.

Two main categories of stock exist: common and preferred. An owner of common stock is typically entitled to participate and vote at stockholders' meetings. In addition to common stock, some corporate bylaws or charters allow for the issuance of preferred stock. If a corporation does not issue preferred stock, all of its stock is common stock, entitling all holders to an equal pro rata division of profits or net earnings, should the corporation choose to distribute the earnings as dividends. Preferred stockholders are usually entitled to priority over holders of common stock should a corporation liquidate.

Preferred stocks receive priority over common stock with respect to the payment of dividends. Holders of preferred stock are entitled to receive dividends at a fixed annual rate before any dividend is paid to the holders of common stock. If the earnings to pay a dividend are more than sufficient to meet the fixed annual dividend for preferred stock, then the remainder of the earnings will be distributed to holders of common stock. If the corporate earnings are insufficient, common stockholders will not receive a dividend. In the alternative, a remainder may be distributed pro rata to both preferred and common classes of the stock. In such a case, the preferred stock is said to "participate" with the common stock.

A preferred stock dividend may be cumulative or noncumulative. In the case of cumulative preferred stock, an unpaid dividend becomes a charge upon the profits of the next and succeeding years. These accumulated and unpaid dividends must be paid to preferred stockholders before common stockholders receive any dividends. Noncumulative preferred stock means that a corporation's failure to earn or pay a dividend in any given year extinguishes the obligation, and no debit is made against the succeeding years' surpluses.

Par value is the face or stated value of a share of stock. In the case of common stocks, par value usually does not correspond to the market value of a stock, and a stated par value is of little significance. Par is important with respect to preferred stock, however, because it often signifies the dollar value upon which dividends are figured. Stocks without an assigned stated value are called no par. Some states have eliminated the concept of par value.

Blue chip stocks are stocks traded on a securities exchange (listed stock) that have minimum risk due to the corporation's financial record. Listed stock means a company has filed an application and registration statement with both the SECURITIES AND EXCHANGE COMMISSION and a securities exchange. The registration

statement contains detailed information about the company to aid the public in evaluating the stock's potential. Floating stock is stock on the open market not yet purchased by the public. Growth stock is stock purchased for its perceived potential to appreciate in value, rather than for its dividend income. Penny stocks are highly speculative stocks that usually cost under a dollar per share.

**CROSS-REFERENCES**

Securities; Stock Market.

## STOCK DIVIDEND

*A corporate distribution to shareholders declared out of profits, at the discretion of the directors of the corporation, which is paid in the form of shares of stock, as opposed to money, and increases the number of shares.*

When a corporation declares a stock dividend, it adds undivided profits, which cannot be used to pay dividends, to the capital invested in the corporation, to reflect the additional shares it is issuing. The stockholder's increased number of shares represent the same proportion of the value of the company as the stockholder originally held (that is, the stockholder owns the same percentage of the corporation as prior to the declaration of the stock dividend); however, the cash value of an individual share is not reduced.

Shares issued as stock dividends are evidence that additional assets have been added to the capital. The value of the shares of a corporation often, but not always, increases following a stock dividend. A stock dividend is actually a part of corporation bookkeeping.

A stock split is different from a stock dividend in that no adjustment is made to the capital; instead, the number of shares representing the capital increase. The cash value of an individual share, therefore, decreases in proportion to the size of the stock split.

## STOCK MARKET

*The various organized stock exchanges and over-the-counter markets.*

The trading of SECURITIES such as stocks and bonds is conducted in stock exchanges, which are grouped under the general term *stock market.* The stock market is an important institution for capitalist countries because it encourages investment in corporate securities, providing capital for new businesses and income for investors. In the 1990s large numbers of ordinary persons came to own stock through PENSION funds, deferred employee savings plans, investment clubs, or mutual funds.

*The trading of stocks on the stock market involves millions of shares per day and has a direct effect on the U.S. economy. As a result, the stock market is closely regulated by the federal government.*

AP/WIDE WORLD PHOTOS

The New York Stock Exchange is the oldest (formed in 1792) and largest stock exchange in the United States, but other exchanges operate in many major U.S. cities. The activities of the stock market are closely monitored by the federal SECURITIES AND EXCHANGE COMMISSION to prevent the manipulation of stock prices and other activities that lessen investor confidence.

Stock exchanges are private organizations with a limited number of members. Stock brokerage houses generally cannot purchase seats on an exchange. Instead, a member of the firm holds a seat personally. In some cases several partners of a brokerage house will be members of an exchange. The price of a seat fluctuates depending on the state of the economy, but seats on the New York Stock Exchange have sold for more than $1 million.

Some exchange members are specialists in particular types of securities, while others act as agents for other brokers. A small number of brokers who pay an annual fee but are not members also have access to the trading floor.

A stock exchange is essentially a marketplace for stocks and bonds, with stockbrokers earning

small commissions on each transaction they make. Stocks that are handled by one or more stock exchanges are called listed stocks. For a corporation's stock to be listed on an exchange, the company must meet certain exchange requirements. Each exchange has its own criteria and standards, but in general a company must show that it has sufficient capital and is in sound financial condition. Once a company is listed, trading in its stock will be suspended if the company's financial condition deteriorates to the point that it no longer meets the exchange's minimum requirements.

When individuals wish to purchase a stock, they place an order with a brokerage house. The BROKER gets a quotation or price and sends the order to the firm's representative on the floor of the stock exchange. The representative negotiates the sale and notifies the brokerage house. Transactions happen rapidly, and each one is recorded on a computer system and sent immediately to an electronic ticker that displays stock information on a screen. At one time this information was generally only available at stock brokerage houses, but the daily stock ticker is now available on television and through the INTERNET.

New York Stock Exchange transactions may be made in three ways. A cash transaction requires payment and delivery of the stock on the day of purchase. A regular transaction requires payment and delivery of the stock by noon on the third day following a full business day. Around 95 percent of stock is purchased under these terms. Finally, purchase can be made through a seller's option contract, which requires payment and delivery of the stock within any specified time not exceeding 60 days, though seven days is the most common period.

All transactions not made in the stock exchanges take place in over-the-counter (OTC) trading. An OTC transaction is not an auction on the stock exchange floor but a negotiation between a seller and a buyer. Most sales of bonds occur in OTC trading as do most new issues of securities. In the 1980s discount OTC brokerage firms appeared, offering lower commissions on stock transactions for investors who were willing to do more research on their own. By the 1990s these firms had proliferated.

Dealers in OTC trading are not confined just to large cities, as are stock exchanges, but can be found in many locations throughout the United States. In 1971 these firms were linked to an electronic communications system and became the National Association of Securities Dealers Automated Quotations (NASDAQ). By the 1990s NASDAQ had become the second largest U.S. stock market.

During the late 1990s, a number of investors began engaging in a process called "day trading," whereby investors would purchase stock shares and then attempt to sell them quickly thereafter when the prices rose. The phenomenon corresponded with the development of stock trading over the Internet, which allowed individuals to trade stocks through their computers without the need for a stockbroker. Many individuals who traded over the Internet also engaged in day trading. Although day trading has some potential for success, analysts have warned that investments take time to develop in order to be successful. Sta-

**Dow Jones Performance After Major U.S. National Security Events**

| Event | Date | % Change for Day[a] | 6-Months Later | 1-Year Later |
|---|---|---|---|---|
| Terrorist Attack | 09/11/01 | −7.12% | 10.47% | −10.66% |
| Oklahoma Bombing | 04/19/95 | 0.68% | 14.92% | 32.46% |
| WTC Bombing | 02/26/93 | 0.17% | 8.41% | 14.07% |
| Operation Desert Storm | 01/16/91 | 4.57% | 18.73% | 30.14% |
| Panama & Noriega | 12/15/89 | −1.53% | 7.17% | −5.32% |
| Reagan Shot | 03/30/81 | −0.26% | −14.56% | −17.12% |
| Vietnam Conflict | 02/26/65 | −0.41% | −0.81% | 5.48% |
| Kennedy Assassination | 11/22/63 | −2.89% | 12.04% | 21.58% |
| Sputnik Launched | 10/04/57 | −2.01% | −4.59% | 15.60% |
| Korean War | 06/25/50 | −4.65% | 2.36% | 9.34% |
| Pearl Harbor | 12/07/41 | −3.50% | −9.48% | −1.37% |
| Lusitania Sinks | 05/07/15 | −4.54% | 36.01% | 32.75% |

[a]If the event occurred after the U.S. market closed or on a non-trading day, the % change for day reflects the next trading day's activity.

SOURCE: Dow Jones web page.

tistics showed that only 10 percent of day traders maintained profitable results, and by the early 2000s, it had become clear that this type of trading would likely result in losses for investors.

The health of the U.S. economy is typically measured by the stock market. When stock prices rise and there is a "bull market," U.S. business is assumed to be doing well. When stock prices fall and there is a "bear market," a downturn in business and the economy is assumed.

The stock market suffered through the early 2000s as a number of major events caused the U.S. economy to take a sharp downturn. The SEPTEMBER 11TH TERRORIST ATTACKS in 2001 caused the New York Stock Exchange (NYSE) to close for a period of six days, the longest closing since 1933. On Monday, September 17, the Dow Jones Industrial Average suffered its greatest point loss in history after the NYSE reopened following the attacks. The U.S. economy slumped after the attacks, and the stock market continued to struggle through much of 2003.

Scandals involving major U.S. corporations had a similarly crippling effect on the stock market. Several large companies were found to have misstated their earnings through faulty or fraudulent accounting practices. In many of these cases, the companies overstated their profits, misleading their investors. Companies involved in such scandals included Enron Corporation, WorldCom, Adelphia, and Xerox. The scandal involving Enron also led to the conviction of accounting firm Arthur Andersen, L.L.P. for obstructing justice when the firm admitted to destroying thousands of Enron documents.

The scandals have led to widespread mistrust of the U.S. corporate world. The SEC issued new rules during 2002 and 2003 regarding accounting practices and conflicts of interest among corporate officers in response to the scandals. The rules were designed to regain the trust of the public and investors following the scandals, but the stock market continued to fluctuate throughout much of 2003.

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CROSS-REFERENCES

Common Stock; Preferred Stock.

## STOCK WARRANT

*A certificate issued by a corporation that entitles the person holding it to buy a certain amount of stock in the corporation, usually at a specified time and price.*

A stock warrant differs from a stock option only in that an option is offered to employees and a warrant to the general public. A warrant gives the person holding it a right to subscribe to capital stock.

## STOCKHOLDER'S DERIVATIVE SUIT

*A legal action in which a shareholder of a corporation sues in the name of the corporation to enforce or defend a legal right because the corporation itself refuses to sue.*

A stockholder's derivative suit is a type of litigation brought by one or more shareholders to remedy or prevent a wrong to the corporation. In a derivative suit, the plaintiff shareholders do not sue on a CAUSE OF ACTION belonging to themselves as individuals. Instead, they sue in a representative capacity on a cause of action that belongs to the corporation but that for some reason the corporation is unwilling to pursue. The real party in interest is the corporation, and the shareholders are suing on its behalf. Most often, the actions of the corporation's executives are at issue. For example, a shareholder could bring a derivative suit against an executive who allegedly used the corporation's assets for personal gain.

A derivative suit is different from a direct suit brought by a shareholder to enforce a claim based on the shareholder's ownership of shares. These direct suits involve contractual or statutory rights of the shareholders, the shares themselves, or rights relating to the ownership of shares. Such direct suits include actions to recover dividends and to examine corporate books and records.

The principal justification for permitting derivative suits is that they provide a means for shareholders to enforce claims of the corporation against managing officers and directors of the corporation. Officers and directors, who are in control of the corporation, are unlikely to authorize the corporation to bring suit against themselves. A derivative suit permits a shareholder to prosecute these claims in the name of

the corporation. Other justifications for derivative litigation are that it prevents multiple lawsuits, ensures that all injured shareholders will benefit proportionally from the recovery, and protects creditors and preferred shareholders against diversion of corporate assets directly to shareholders.

In a derivative suit, the shareholder is the nominal plaintiff, and the corporation is a nominal defendant, even though the corporation usually recovers if the shareholder prevails. Nevertheless, derivative litigation is essentially three-sided because the defendants include the persons who are alleged to have caused harm to the corporation or who have personally profited from corporate action. The claim of wrongdoing against these defendants is the central issue in a derivative suit, and the interest of the corporation is usually adverse to these defendants. Thus, individual defendants are usually represented by attorneys other than the attorneys for the corporation. The corporation may play different roles in a derivative suit. It may be an active party in the litigation, be entirely passive, or side with the individual defendants and argue that their conduct did not harm the corporation.

Generally, the plaintiff shareholder is not required to have a large financial stake in the litigation. As a result, the plaintiff's attorney is often the principal mover in filing a derivative suit; the attorney locates a possible derivative claim and then finds an eligible shareholder to serve as plaintiff. Consequently the attorney may have a much more direct and substantial financial interest in the case and its outcome than the plaintiff shareholder who is a purely nominal participant in the litigation. Because most derivative suits are taken on a CONTINGENT FEE basis, the plaintiff's attorney will receive compensation only on the successful prosecution of the suit or by its settlement. Such a recovery is justified on the theory that it encourages meritorious shareholder suits.

Most derivative suits are settled and thus do not go to trial and appeal. The lead attorney for the plaintiff usually determines whether a proposed settlement is acceptable. The fee to be paid to the lead attorney is usually negotiated as part of the overall settlement of a derivative suit. All aspects of the settlement are subject to JUDICIAL REVIEW and approval, however.

Derivative suits have proved controversial. Corporations complain that most litigation is brought at the behest of entrepreneurial attorneys who first find a potential violation and then find a shareholder qualified to maintain the derivative suit. Critics charge that the objective of these suits is to obtain a settlement with the principal defendants and the corporation that provides the attorney with a generous fee. In return for the attorney's fee, the plaintiff "goes away."

Derivative suits involve shareholder enforcement of corporate obligations, which may intrude on the traditional management powers of the board of directors. Since the 1980s boards of directors have had considerable success in reasserting control over derivative litigation.

States have enacted laws that put a financial roadblock in the way of derivative actions. A minority of states require that the plaintiff make a demand on the shareholders, which is very expensive, before a derivative suit is filed. The shareholder demand requirement may be excused if the plaintiff can show adequate reasons for not making the effort. Many states require certain plaintiff shareholders in derivative suits to give the corporation security for reasonable expenses, including attorneys' fees, that the corporation or other defendants may incur in connection with the lawsuit. Despite these efforts to restrain derivative actions, they have not prevented the filing of doubtful claims by attorneys seeking a quick settlement.

Almost all states require the plaintiff to allege and prove that he first made a GOOD FAITH effort to obtain action by the corporation before filing a derivative suit. This good faith demand requirement is contained in state corporation laws and rules of court. A typical provision is Rule 23.1 of the Federal Rules of Procedure, which states that the plaintiff's complaint must "allege with particularity the efforts, if any, made by the plaintiff to obtain the action he or she desires from the board of directors or comparable authority and the reasons for his or her failure to obtain the action or for not making the effort."

Plaintiffs have generally not made these demands, however, and have instead sought to convince the court that there were good reasons for not doing so. Much of this reluctance to make a demand can be traced to changes in the corporate law of Delaware in the 1980s. Delaware, which is the principal state of incorporation for the vast majority of publicly held corporations, empowers a corporation to appoint a litigation committee from its board of

directors to review shareholder demands. If the litigation committee finds no merit in a demand, it can decide that the suit should not be pursued, and the court must accept the committee's decision and dismiss the case. The development of the litigation committee has expedited the disposition of many doubtful derivative claims and possibly some meritorious ones as well.

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Derivative Action.

*Harlan Fiske Stone.*
PHOTOGRAPH BY HARRIS & EWING. COLLECTION OF U.S. SUPREME COURT

## STOMACH PUMPING CASE

See ROCHIN V. CALIFORNIA.

## ♦ STONE, HARLAN FISKE

Harlan Fiske Stone served as associate justice of the U.S. Supreme Court from 1925 to 1941 and as chief justice from 1941 to 1946. A believer in judicial restraint, he was also a defender of CIVIL RIGHTS and civil liberties. Stone was often a lone dissenter in the 1920s and 1930s when conservatives, who dominated the Court, struck down state and federal legislation that sought to regulate business and working conditions.

Stone was born on October 11, 1872, in Chesterfield, New Hampshire. He graduated from Amherst College in 1894 and Columbia Law School in 1898. Admitted to the New York bar the year of his graduation, Stone became a member of a prominent New York City law firm. He was also a part-time instructor at Columbia Law School from 1899 to 1902. In 1902 Stone left his law firm to become a professor of law at Columbia. From 1910 to 1923 he was dean of the law school. He resigned in 1924 to join Sullivan and Cromwell, the most prestigious law firm in New York City.

In 1924 President CALVIN COOLIDGE appointed Stone attorney general. The JUSTICE DEPARTMENT had been tarnished by the TEAPOT DOME SCANDAL during the administration of

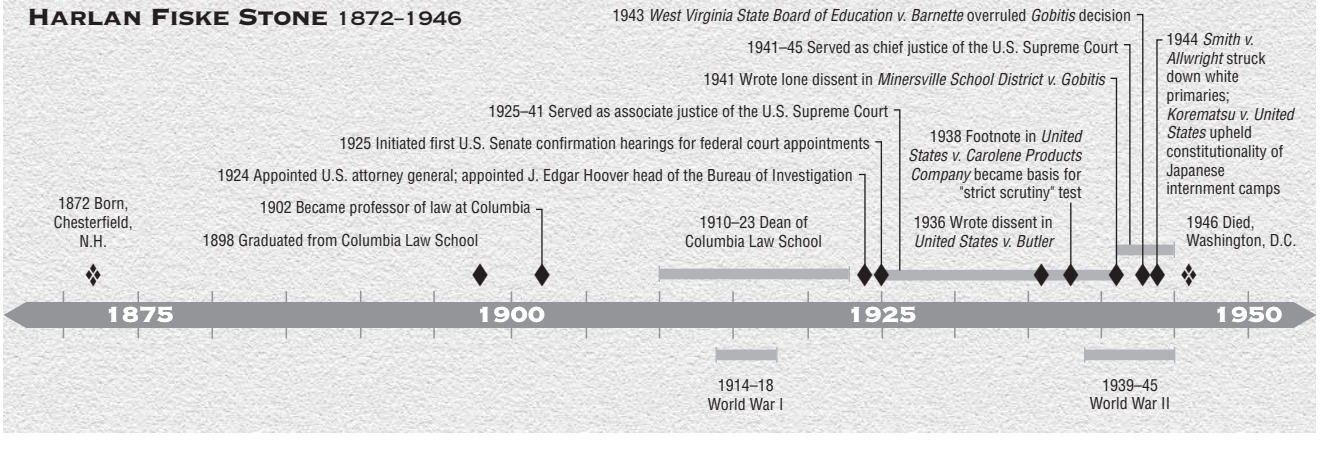

Coolidge's predecessor, President WARREN G. HARDING. In addition, the Bureau of Investigation (BI), the forerunner of the FEDERAL BUREAU OF INVESTIGATION (FBI), had become a home to political cronyism and corruption. Stone appointed J. EDGAR HOOVER to head the BI and institute wide-ranging reforms. Stone's administration of the Department of Justice drew praise from Congress and President Coolidge.

Coolidge nominated Stone to the Supreme Court in 1925. Some senators were fearful that Stone's Wall Street connections would cause him to favor business interests. Responding to these concerns, Stone proposed that he appear before the SENATE JUDICIARY COMMITTEE to answer questions. The committee accepted, thereby creating the now-traditional confirmation process used for federal court appointments. Stone was easily confirmed.

"THE LAW [SHOULD NOT BE SEEN AS] A HERMETICALLY SEALED COMPARTMENT OF SOCIAL SCIENCE, TO BE EXPLORED AND ITS PRINCIPLES FORMULATED WITHOUT REFERENCE TO THOSE SOCIAL AND ECONOMIC FORCES WHICH CALL LAW INTO EXISTENCE."
—HARLAN FISKE STONE

In the 1920s the Court was dominated by conservative justices who struck down many state and federal laws that sought to regulate labor, business, commerce, and working conditions. Stone dissented from these decisions, arguing that the Court should exercise judicial restraint and allow Congress and state legislatures to craft laws that address pressing social and economic problems.

With the election of President FRANKLIN D. ROOSEVELT in 1932, the Supreme Court's hostility to government regulation drew even greater attention as it declared unconstitutional a host of NEW DEAL economic reforms. Stone wrote a biting dissent in the case of *United States v. Butler,* 297 U.S. 1, 56 S. Ct. 312, 80 L. Ed. 477 (1936), which involved a processing tax paid by farmers to fund subsidies paid to eligible farmers under Roosevelt's Agricultural Adjustment Act. The act was declared unconstitutional because all farmers were taxed but only specific farmers received benefits. Stone argued that the subsidies were valid.

Although Stone was a Republican and President Roosevelt a Democrat, Roosevelt appointed Stone chief justice in 1941. Stone's tenure as chief justice was marked by bitter fighting among the justices, which has been blamed partly on Stone's inability to negotiate and build a consensus.

Stone's commitment to civil liberties was demonstrated in *Minersville School District v. Gobitis,* 310 U.S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940). He was the lone dissenter when the Court upheld a state law that required Jehovah's Witnesses to salute the flag, even though this conflicted with their religious beliefs. Stone argued that the law infringed on the FIRST AMENDMENT right to the free exercise of religion. Three years later his view was endorsed by the Court in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), when it overruled *Gobitis.*

In the area of civil rights, Stone helped move the Court from tacit acceptance of the racially discriminatory status quo in the southern states to a more aggressive stance. In *United States v. Classic,* 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941), the Court ruled that the federal government could regulate party primaries to prevent election FRAUD that resulted in the failure to count African American votes. Three years later the Court struck down the WHITE PRIMARY, which excluded African Americans from southern Democratic parties and Democratic primary elections (*Smith v. Allwright,* 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 [1944]). Stone played a pivotal role in deciding these cases.

Stone contributed to modern constitutional analysis in a famous footnote to his opinion in *United States v. Carolene Products Company,* 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938). Known as FOOTNOTE FOUR, it stated that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and which may call for a more searching judicial scrutiny." This footnote became the basis for the "strict scrutiny" test, which the Court applies to assess the constitutionality of legislation concerning the rights of racial minorities, religious sects, ALIENS, prisoners, and other "discrete and insular minorities." Under STRICT SCRUTINY the government must demonstrate more than just a rational basis for legislation. It must show a compelling state interest and prove that the legislation is narrowly tailored to meet that interest.

Stone's tenure, however, was not unblemished. In KOREMATSU V. UNITED STATES, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944), he upheld the forced relocation of Japanese Americans to detention camps during WORLD WAR II. The decision was based on the wartime powers of the president to take emergency actions for national security reasons.

Stone died on April 22, 1946, in Washington, D.C.

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Footnote 4; Japanese American Evacuation Cases.

## ♦ STONE, LUCY

Lucy Stone was one of the first leaders of the WOMEN'S RIGHTS movement in the United States. A noted lecturer and writer, Stone spent most of her life working for women's suffrage. She is also believed to be the first married woman in the United States to keep her maiden name.

Stone was born on August 13, 1818, in West Brookfield, Massachusetts. Determined to attend college, she went to work as a teacher at the age of sixteen to earn money for the tuition. Nine years later she entered Oberlin College, the first coeducational college in the United States. While at Oberlin she formed the first women's college debating society. Stone was a fiery and forceful orator.

After graduating in 1847, Stone became a lecturer for the Massachusetts Anti-Slavery Society, one of the leading abolitionist organizations of its time. Stone became convinced that parallels existed between the positions of women and slaves. In her view both were expected to be passive, cooperative, and obedient. In addition, the legal status of both slaves and women was inferior to that of white men. Stone persuaded the society to allow her to spend part of her time speaking on the topic of women's rights. In 1850 she organized the first national Women's Rights Convention in Worcester, Massachusetts.

*Lucy Stone.*
LIBRARY OF CONGRESS

In 1855 Stone married Henry B. Blackwell, an Ohio merchant and abolitionist. The couple entered into the marriage "under protest"; at their wedding they read and signed a document explicitly protesting the legal rights that were given to a husband over his wife. They omitted the word "obey" from the marriage vows and promised to treat each other equally. Stone also announced that she would not take her husband's name and would be addressed instead as Mrs. Stone. This action drew national attention,

"THE FLOUR-MERCHANT . . . AND THE POSTMAN CHARGE US NO LESS ON ACCOUNT OF OUR SEX, BUT WHEN WE ENDEAVOR TO EARN MONEY TO PAY ALL THESE, THEN, INDEED, WE FIND THE DIFFERENCE."
—LUCY STONE

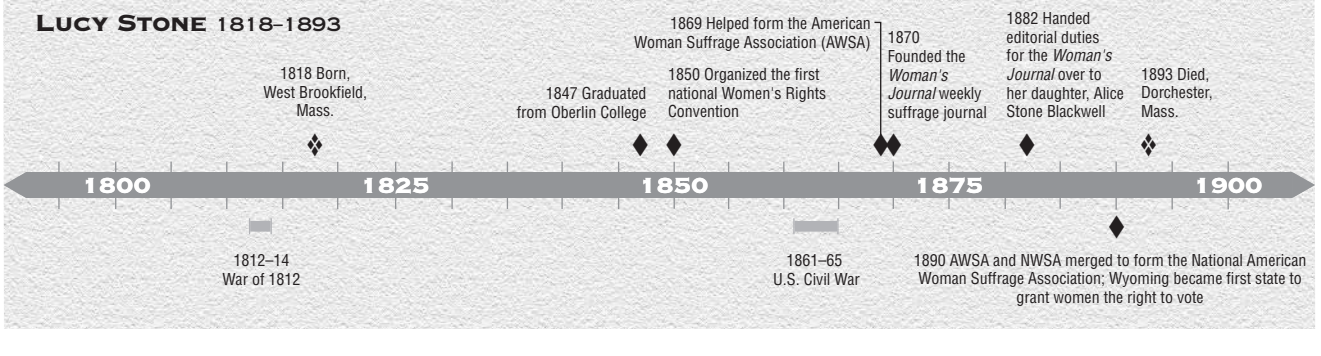

and women who retained their maiden names were soon known as "Lucy Stoners."

After the Civil War Stone and Blackwell shifted their energies to women's suffrage. Although Stone was in agreement with ELIZABETH CADY STANTON and SUSAN B. ANTHONY on the goal of women's suffrage, she differed as to the best way to secure the vote for women. In 1869 Stone helped form the American Woman Suffrage Association (AWSA). The AWSA worked for women's suffrage on a state by state basis, seeking amendments to state constitutions. Stanton and Anthony established a rival organization, the National Woman Suffrage Association (NWSA), that sought an amendment to the U.S. Constitution similar to the FIFTEENTH AMENDMENT that gave nonwhite men the right to vote. Whereas the AWSA concentrated on women's suffrage, the NWSA took a broader approach, LOBBYING for improvements in the legal status of women in areas such as FAMILY LAW as well as for suffrage.

Stone also helped found the *Woman's Journal,* a weekly suffrage journal, in 1870. She edited the journal for many years, eventually turning the task over to her daughter, Alice Stone Blackwell, in 1882. As editor, Stone focused on the AWSA's goal of suffrage.

In 1890 the AWSA and the NWSA merged into the National American Woman Suffrage Association (NAWSA). Stone became the chair of the executive committee, and Stanton served as the first president. In that same year, Wyoming became the first state to meet Stone's goal as it entered the Union with a constitution that gave women the right to vote.

Stone died on October 19, 1893, in Dorchester, Massachusetts.

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Nineteenth Amendment.

## STOP AND FRISK

*The situation in which a police officer who is suspicious of an individual detains the person and runs his hands lightly over the suspect's outer garments to determine if the person is carrying a concealed weapon.*

One of the most controversial police procedures is the *stop and frisk* search. This type of limited search occurs when police confront a suspicious person in an effort to prevent a crime from taking place. The police frisk (pat down) the person for weapons and question the person.

A stop is different from an arrest. An arrest is a lengthy process in which the suspect is taken to the police station and booked, whereas a stop involves only a temporary interference with a person's liberty. If the officer uncovers further evidence during the frisk, the stop may lead to an actual arrest, but if no further evidence is found, the person is released.

Unlike a full search, a frisk is generally limited to a patting down of the outer clothing. If the officer feels what seems to be a weapon, the officer may then reach inside the person's clothing. If no weapon is felt, the search may not intrude further than the outer clothing.

Though police had long followed the practice of stop and frisk, it was not until 1968 that the Supreme Court evaluated it under the Fourth Amendment's protection against unreasonable searches and seizures. Under FOURTH AMENDMENT case law, a constitutional SEARCH AND SEIZURE must be based on PROBABLE CAUSE. A stop and frisk was usually conducted on the basis of reasonable suspicion, a somewhat lower standard than probable cause.

In 1968 the Supreme Court addressed the issue in TERRY V. OHIO, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889. In *Terry* an experienced plainclothes officer observed three men acting suspiciously; they were walking back and forth on a street and peering into a particular store window. The officer concluded that the men were preparing to rob a nearby store and approached them. He identified himself as a police officer and asked for their names. Unsatisfied with their responses, he then subjected one of the men to a frisk, which produced a gun for which the suspect had no permit. In this case the officer did not have a warrant nor did he have probable cause. He did suspect that the men were "casing" the store and planning a ROBBERY. The defendants argued the search was unreasonable under the Fourth Amendment because it was not supported by probable cause.

The Supreme Court rejected the defendants' arguments. The Court noted that stops and frisks are considerably less intrusive than full-blown arrests and searches. It also observed that

the interests in crime prevention and in police safety require that the police have some leeway to act before full probable cause has developed. The Fourth Amendment's reasonableness requirement is sufficiently flexible to permit an officer to investigate the situation.

The Court was also concerned that requiring probable cause for a frisk would put an officer in unwarranted danger during the investigation. The "sole justification" for a frisk, said the Court, is the "protection of the police officer and others nearby." Because of this narrow scope, a frisk must be "reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." As long as an officer has reasonable suspicion, a stop and frisk is constitutional under the Fourth Amendment.

After *Terry* this type of police encounter became known as a "*Terry* stop" or an "investigatory detention." Police may stop and question suspicious persons, pat them down for weapons, and even subject them to nonintrusive search procedures such as the use of metal detectors and drug-sniffing dogs. While a suspect is detained, a computer search can be performed to see if the suspect is wanted for crimes. If so, he or she may be arrested and searched incident to that arrest.

Investigatory detention became an important law enforcement technique in the 1980s as police sought to curtail the trafficking of illegal drugs. In *United States v. Sokolow,* 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989), the Supreme Court ruled that police have the power to detain, question, and investigate suspected drug couriers. The case involved a *Terry* stop at an international airport, during which the defendant aroused suspicion by conforming to a controversial "drug courier profile" developed by the Drug Enforcement Agency (DEA). The Court said that the DEA profile gave the officer reasonable suspicion, "which is more than a mere hunch but less than probable cause."

The Supreme Court has become increasingly permissive regarding what constitutes reasonable suspicion. In *Alabama v. White,* 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990), the Court upheld a *Terry* stop of an automobile based solely on an anonymous tip that described a certain car that would be at a specific location. Police went to the site, found the vehicle, and detained the driver. The police then found marijuana and cocaine in the automobile. The Court observed that it was a "close case" but concluded that the tip and its corroboration were sufficiently reliable to justify the investigatory stop that ultimately led to the arrest of the driver and the seizure of the drugs.

However, the Court retreated from this holding in *Florida v. J. L.*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (U.S. 2000), in which it ruled that an anonymous tip identifying a person who is carrying a gun is not, without more reason, sufficient to justify a police officer's stop and frisk of that person. The U.S. Supreme Court concluded that the tip, stating that a young black male was standing at a particular bus stop, wearing a plaid shirt, and carrying a gun, lacked sufficient reliability to provide reasonable suspicion to make a Terry stop. After announcing its decision in *Florida v. J. L.,* the Court vacated two other state court decisions with similar fact patterns, one from Ohio (*Morrison v. Ohio*, 529 U.S. 1050, 120 S.Ct. 1552, 146 L.Ed.2d 457 [U.S. 2000]) and one from Wisconsin (*Williams v. Wisconsin*, 529 U.S. 1050, 120 S.Ct. 1552, 146 L.Ed.2d 457 U.S. [2000]).

In the Ohio case, the Ohio Court of Appeals upheld a Terry stop that was based on a phone call to the police from an anonymous informant who stated that there were two males walking westward on a particular avenue in a particular area and that one of the males was carrying a weapon in his pocket. According to the Ohio Court of Appeals, the Terry stop was supported by sufficient reasonable suspicion because significant aspects of the anonymous caller's predictions were verified. In the Wisconsin case, the Wisconsin Supreme Court ruled that the police had reasonable suspicion to conduct an investigatory stop based on an anonymous tip that individuals were dealing drugs from a vehicle parked within view of the tipster and their confirmation, within four minutes of the tip, of readily observable information offered by the tipster, even though the officers did not independently observe any suspicious activity. In *Florida v. J. L.*, however, the U.S. Supreme Court stated that an accurate description of a subject's readily observable location and attributes does not show that the tipster had knowledge of concealed criminal activity.

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CROSS-REFERENCES

Automobile Searches; Criminal Law; Drugs and Narcotics.

## STOP ORDER

*A direction by a customer to a stock* BROKER, *directing the broker to wait until a stock reaches a particular price and then to complete the transaction by purchasing or selling shares of that stock.*

## STOP PAYMENT ORDER

*Revocation of a check; a notice made by a depositor to his or her bank directing the bank to refuse payment on a specific check drawn by the depositor.*

An individual who writes a check can revoke it unless it has been certified, accepted, or paid. If a bank pays a check after a timely stop payment order by the depositor, the bank is usually liable to the depositor for the amount paid.

**Stop Payment Letter**

Send certified mail, with "Restricted Delivery" return receipt requested.

Date:_____(*write date here*)

_____ (*write name of person who wrote the check here*)

_____ (*write address of check writer here*)

Dear _____: (*write name of person who wrote the check here*)

_____ (*write your/payee's name here*) is the payee of a check you wrote for $_____ on _____ (*write amount of check and check date here*).

The check was not paid because you stopped payment, and I demand payment. You may have a good faith dispute about whether you owe the full amount. If you do not have a good faith dispute with me and fail to pay (1) the full amount of the check in cash, (2) a bank service charge of an amount not to exceed $25 for the first check written for which payment was stopped and an amount not to exceed $35 for each subsequent check written and then stopped before payment, and (3) the costs to mail this letter, within 30 days after this letter was mailed, you could be sued and held responsible to pay at least both of the following:

1. The amount of the check; and
2. Damages of at least $100 or, if higher, three times the amount of the check up to $1,500.

If the court determines that you do have a good faith dispute with me, you won't have to pay the service charge, triple damages, or mailing cost. If you stopped payment because you have a good faith dispute with me, you should try to work out your dispute with me. You can contact me at:_____ (*write your name here*)

_____ (*write your street address, city, state, and phone number here*)

You may wish to contact a lawyer to discuss your legal rights and responsibilities.

_____ (*sign your name*)

*A sample record of a stop payment request*

## STOPPAGE IN TRANSIT

*The right of a seller to prevent the delivery of goods to a buyer after such goods have been delivered to a common carrier for shipment.*

CROSS-REFERENCES

Sales Law.

## ♦ STORY, JOSEPH

Joseph Story served as associate justice of the U.S. Supreme Court from 1811 to 1845. One of the towering figures in U.S. LEGAL HISTORY, Story shaped U.S. law both as a judge and as the author of a series of legal treatises. Some legal commentators believe Story's treatises were as influential in the development of nineteenth-century U.S. law as the works of the English jurists SIR WILLIAM BLACKSTONE and SIR EDWARD COKE had been earlier.

Story was born on September 18, 1779, in Marblehead, Massachusetts. He graduated from Harvard University in 1798 and read the law with Samuel Sewall. He established a practice in Salem, Massachusetts, in 1801 and quickly

developed an impressive professional career, becoming a director and eventually the president of the Merchant's Bank of Salem. He became a member of the DEMOCRATIC PARTY and was elected to the state legislature in 1805. He served part of a term in the U.S. House of Representatives from 1808 to 1809 and then returned to the state legislature in 1810. The following year he was elected speaker of the house.

In November 1811 President JAMES MADISON appointed Story, at the age of only thirty-two, to the U.S. Supreme Court. Madison hoped that Story would help move the Court in a more democratic direction, correcting the aristocratic tendencies of the federal bench, which had been dominated by the Federalists. In particular, Madison sought to check the influence of Chief Justice JOHN MARSHALL, whose nationalist philosophy led him to construe federal powers broadly. THOMAS JEFFERSON was opposed to the appointment, however, believing that Story did not subscribe to the Democratic party belief in according deference to state governments.

Jefferson proved to be correct as Story quickly revealed an inclination to accept most of Marshall's principles. In MARTIN V. HUNTER'S LESSEE, 14 U.S. 304, 4 L. Ed. 97 (1816), the U.S. Supreme Court reviewed a decision by the Virginia Supreme Court declaring a section of the federal JUDICIARY ACT OF 1789 unconstitutional. In his majority opinion, Story reversed the state supreme court and affirmed the Supreme Court's power to review the highest state courts in all civil cases involving the federal Constitution, statutes, and treaties. This decision was a key component of federal judicial power and antithetical to Jefferson's conception of state-federal relations.

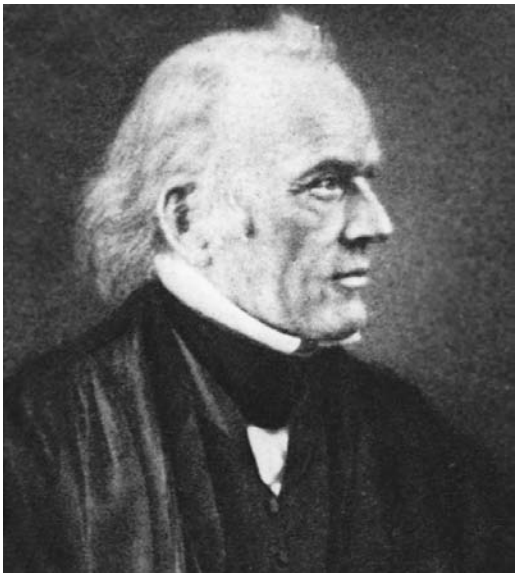

*Joseph Story.*
LIBRARY OF CONGRESS

In TRUSTEES OF DARTMOUTH COLLEGE V. WOODWARD, 17 U.S. 518, 4 L. Ed. 629 (1819), Story joined in Chief Justice Marshall's holding that the grant of a corporate charter was a contract with the state. As the state had not reserved a power of amendment, the charter grantees were immune from destructive state interference. Story noted that this corporate IMMUNITY should be extended only to private, not public, corporations. In making this distinction, Story articulated for the first time that the public character of a corporation turned not on the services it performed but on the identity of the contributors of its capital. Thus, a corporation that was chartered to serve the public, such as a bank, would be considered a private corporation if it was owned by private individuals, and its charter could not be withdrawn or amended in the

"[THE LAW] IS A JEALOUS MISTRESS AND REQUIRES A LONG AND CONSTANT COURTSHIP. IT IS NOT TO BE WON BY TRIFLING FAVORS, BUT BY LAVISH HOMAGE."
—JOSEPH STORY

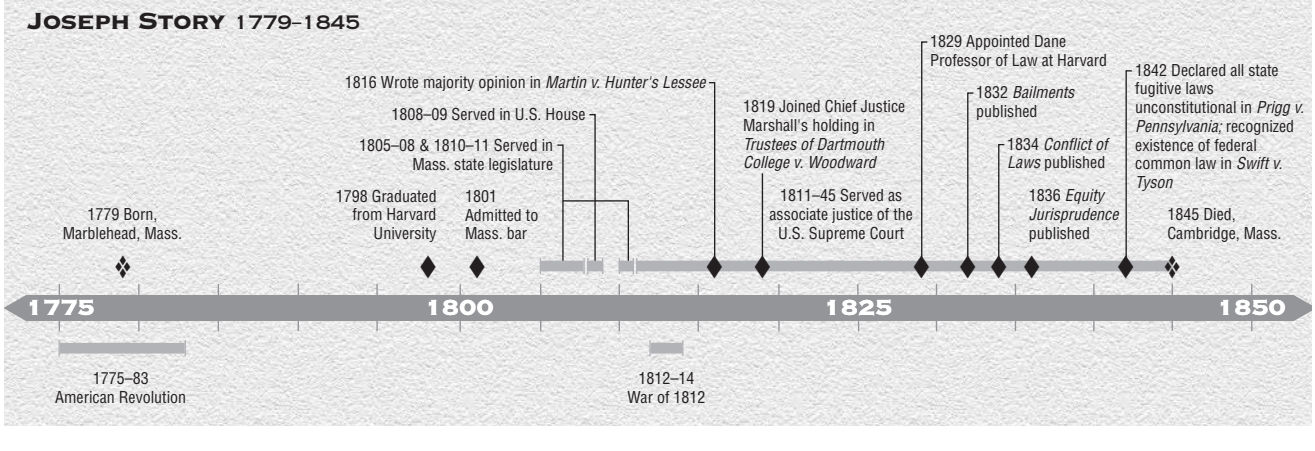

absence of a legislative reservation at the time of the original grant. This definition of private corporations by reference to their capitalization was critical to corporate development in the nineteenth century.

Story's most controversial decision came in PRIGG V. PENNSYLVANIA, 41 U.S. 539, 10 L. Ed. 1060 (1842), which involved the federal FUGITIVE SLAVE ACT OF 1793. Many northern states demonstrated their hostility to SLAVERY by enacting laws designed to frustrate southern slave owners who came north in search of runaway slaves. Slave owners were outraged at these laws and argued that the federal act gave them the right to reclaim their property without interference by state governments.

Story, writing for an 8–1 majority, declared unconstitutional all fugitive slave laws enacted by the states because the federal law provided the exclusive remedy for the return of runaway slaves. Story also ruled, however, that states were not compelled to enforce the federal fugitive slave provisions. It would be inconsistent and without legal basis, he reasoned, for the Court to declare the preeminence of federal law and then require state courts to help carry out that law.

*Prigg* was a crucial decision because it announced that slavery was a national issue that could not be disturbed by STATE ACTION. It angered many opponents of slavery and hurt Story's reputation in the north. Some state judges took Story's opinion to heart and refused to participate in federal fugitive slave proceedings.

Story's other major contribution on the Court was the development of "federal common law," which was first articulated in the 1842 CIVIL PROCEDURE case of SWIFT V. TYSON, 41 U.S. 1, 10 L. Ed. 865. The controversy arose on a technical question involving the negotiability of a commercial bill of exchange. New York and other states were divided over whether the bill was negotiable. Under the federal Judiciary Act of 1789, the federal courts were instructed to follow state laws when deciding cases between parties from two different states.

Story, who believed the negotiability of such bills was crucial to the development of a national commercial community, declared that the decisions of the New York courts—based not on legislative statutes but on interpretations of the common law—were not "laws" binding on federal judges. Common-law decisions were only "evidence" of the appropriate law. Story concluded that it was the duty of federal courts to examine evidence from all relevant state common-law jurisdictions before proclaiming the governing rule.

Story's opinion came to stand for the proposition that a general federal COMMON LAW existed that federal courts were free to apply in virtually all common-law matters of private law. The idea of federal common law promoted national uniformity but also constituted a revolutionary expansion of federal jurisdiction. The Supreme Court overruled this proposition in ERIE RAILROAD CO. V. TOMPKINS, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), declaring that federal courts must apply the law of the state, whether it is statutory or case law.

Story's influence went beyond his court decisions. In 1829 he was appointed to be the first Dane Professor of Law at Harvard. He remained in this position the rest of his life while simultaneously serving on the Supreme Court and acting as president of the Salem bank.

The endowment that Nathan Dane had given to Harvard Law School also paid for the publication of Story's many legal commentaries and treatises, which summarized and codified various areas of the law. Story's works included *Bailments* (1832), *Bills of Exchange* (1843), *Conflict of Laws* (1834), *Equity Jurisprudence* (1836), *Equity Pleading* (1838), *Federal Constitution* (1833), and *Promissory Notes* (1845). They served as valuable reference works for lawyers, judges, and legislators and had a profound influence on the development of COMMERCIAL LAW in particular. Alexis de Tocqueville, the French author of *Democracy in America* (1835–1840), a classic analysis of U.S. society and government, used Story's constitutional commentaries in writing his work.

Story died on September 10, 1845, in Cambridge, Massachusetts.

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## ♦ STOUT, JUANITA KIDD

Juanita Kidd Stout was the first African American woman to be elected judge in the United States. Before her election to the Pennsylvania bench, Stout worked in the Philadelphia district

attorney's office. She later was appointed to the Pennsylvania Supreme Court, becoming the first African American woman to serve on that court.

Stout was born on March 7, 1919, in Wewoka, Oklahoma, the daughter of schoolteachers Henry Maynard Kidd and Mary Alice Kidd. She earned a bachelor's degree from the University of Iowa in 1939. At that time no accredited colleges in Oklahoma admitted African Americans. Between 1939 and 1942, Stout taught music in the high schools at Seminole and Sand Springs, Oklahoma. In 1942, she moved to Washington, D.C., and worked in a law office, which led to her decision to become a lawyer.

Stout graduated from the University of Indiana Law School in 1948. She taught at Florida A&M University in 1949 and Texas Southern University in 1950. In 1950, she became an administrative assistant to a federal appeals court judge in Philadelphia. She left this position in 1954 and went into private practice. In 1955, she joined the city's district attorney's office, serving as chief appellate attorney.

In September 1959, Governor David L. Lawrence appointed Stout a judge of the Philadelphia municipal court. Stout ran for a full term on the bench in November of that year and was elected, making her the first African American woman to be elected to a judgeship. In 1969, she was elected to the Philadelphia Court of Common Pleas and was reelected in 1979, both times receiving the highest number of votes of the Philadelphia Bar Association with respect to judicial qualifications.

During the 1960s, Stout gained national recognition for her vigorous fight against crime and juvenile delinquency. She wrote numerous articles about race, crime, and justice, and toured six African countries in 1967, lecturing at law schools, colleges, and high schools.

*Juanita Kidd Stout.*
AP/WIDE WORLD PHOTOS

In 1988, Stout was appointed to the Pennsylvania Supreme Court. Her tenure was brief, however, because an age limit specified by the state constitution forced her to retire one year later at age 70. Stout returned to the Philadelphia Court of Common Pleas to serve as a senior judge, where she continued to speak out on racial and gender bias in the courts. Over the years Stout gave numerous speeches and was the recipient of many awards. In 1988, she was chosen Justice of the Year by the National Association of Women

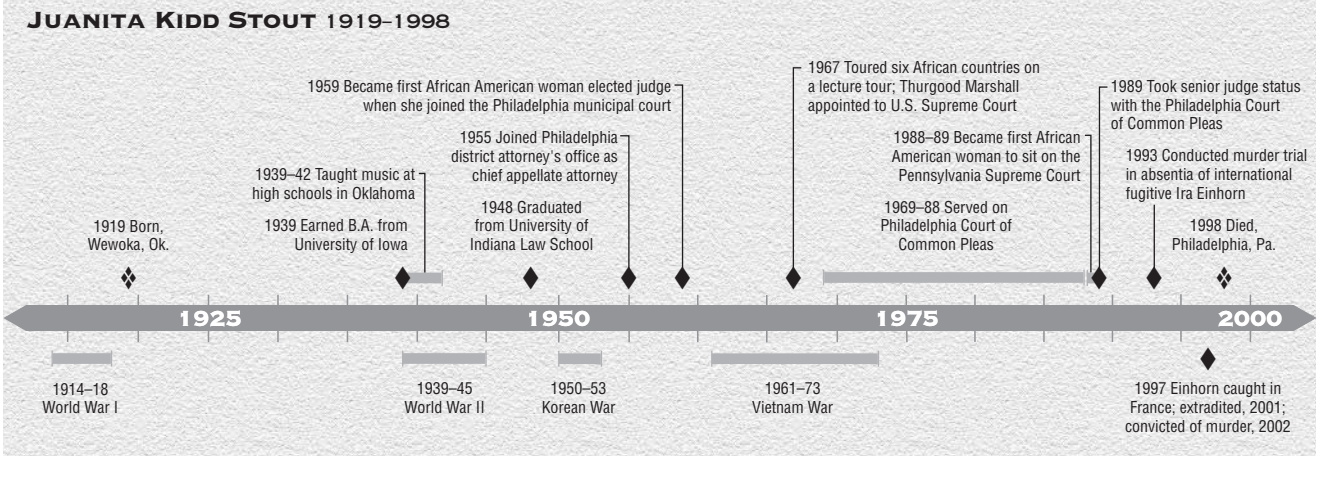

Judges. Stout died August 21, 1998, in Philadelphia, Pennsylvania.

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## STOWE, HARRIET BEECHER

Harriet Beecher Stowe, author of one of America's most famous and popular books, helped to strengthen the ABOLITION movement by bringing white Americans and people around the world to the realization of the cruelties and misery endured by black slaves in the 1850s. Her book, *Uncle Tom's Cabin,* was one of the biggest sellers of the nineteenth century, second only to sales of the Bible. Since its publication, the book has never been out of print.

Stowe was born June 14, 1811, in Litchfield, Connecticut. She was the seventh child of prominent Congregationalist minister Lyman Beecher and his wife Roxana Foote Beecher, who died when Harriet was five. The Stowes grew up in an environment steeped in a Protestant tradition that demanded living a pious and moral life. Stowe's younger brother, HENRY WARD BEECHER, eventually became one of the country's most famous preachers and a major leader of the abolition movement. Her sister, Catharine, established several schools for young women throughout the United States.

"WOMEN ARE THE REAL ARCHITECTS OF SOCIETY."
—HARRIET BEECHER STOWE

Stowe attended Catharine's Hartford Female Seminary, one of the only schools open to young women at the time. She received an excellent education, and blossomed as a writer under her sister's tutelage. In 1832, she accompanied her sister and father to Cincinnati, Ohio, where Catharine opened another school and their father became president of Lane Theological Seminary. The following year, in 1833, Stowe coauthored and published her first book—a children's geography—under her sister's name.

*Harriet Beecher Stowe.* NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

In 1834, Harriet Beecher married widower Calvin Stowe, a poorly paid professor of biblical literature at Lane. During the first seven years of her marriage, Stowe bore five of the seven children they would ultimately have. In order to support their rapidly expanding family, she began writing magazine articles, essays, and other works. In 1843, Stowe published a collection of short stories called *The Mayflower.*

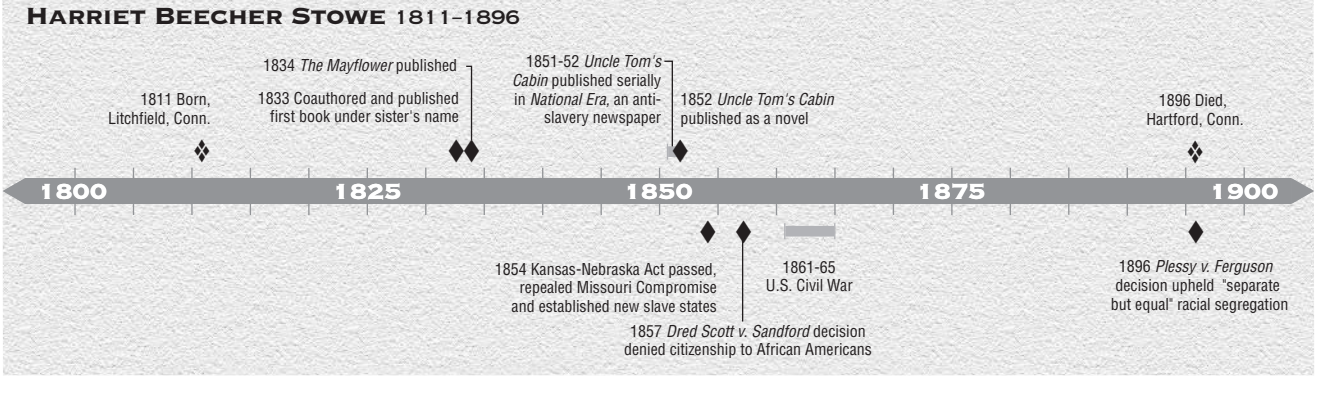

During the 18 years she lived in Cincinnati, Stowe became an observer of the conflicting worlds of abolitionism and SLAVERY. Across the Ohio River was the slave state of Kentucky. Stowe's family helped to hide runaway slaves. Her husband and brother aided one runaway by transporting her to the next station on the Underground Railroad, the name given to the system of guides and safe houses that enabled escaped Southern slaves to reach freedom and safety in Northern states and Canada. Stowe was engrossed by firsthand accounts and newspaper and magazine articles detailing the horrors of the slave trade and the terrifying incidents that took place as slaves tried to escape.

In 1850, Calvin Stowe got a teaching position at Bowdoin College and the Stowe family moved to Brunswick, Maine. It was there that Stowe penned most of her soon-to-be classic. In 1851–1852, *The National Era*, an antislavery paper based in Washington, D.C., published in serial form, Stowe's moving account of several members of a slave family and their desperate attempt to flee from a system that rendered them the property of white owners. Stowe's narrative struck an immediate chord. Despite the newspaper's small circulation, word of mouth and the passing of issues among neighbors immediately gave Stowe's tale a larger audience.

In March 1852, her story was published as *Uncle Tom's Cabin, or, Life Among the Lowly*. The book became an immediate best-seller with sales reaching 500,000 copies by 1857. With its dramatic narrative and heart-rending scenes of the slave Eliza fleeing across a frozen river with her small son in her arms to prevent him from being sold away from her, Stowe's book helped sway much of the public to support, or at least sympathize with, the abolitionist cause. While many Southerners criticized the book, Stowe's harrowing tale gained an increasingly wider audience. Stowe used her newfound renown to speak and write against slavery. In particular, she urged women to become active and to use their powers of persuasion to influence others on the subject.

Although none of her later writings had the impact of *Uncle Tom's Cabin,* Stowe continued to write numerous stories, essays, and articles. Between 1862 and 1884 she published almost one book per year. Stowe died on July 1, 1896, in Hartford, Connecticut.

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CROSS-REFERENCES

Abolition; Slavery.

## STRADDLE

*In the stock and commodity markets, a strategy in options contracts consisting of an equal number of put options and call options on the same underlying share, index, or commodity future.*

A straddle is a type of option contract that gives the holder of the contract the option to either buy or sell or not buy or sell the SECURITIES or commodities specified in the contract. To understand how a straddle works, a basic understanding of options is required. An option is a type of contract used in the stock and commodity markets, in the leasing and sale of real estate, and in other areas where one party wants to acquire the legal right to buy or sell something from another party within a fixed period of time.

In the stock and commodity markets, options come in two primary forms, known as "calls" and "puts." A call gives the holder the option to buy stock or a commodities futures contract at a fixed price for a fixed period of time. A put gives the holder the option to sell stock or a commodities futures contract at a fixed price for a fixed period of time.

An option has four components: the underlying security, the type of option (put or call), the strike price, and the expiration date. Take, for example, a "National Widget November 100 call." National Widget stock is the underlying security, November is the expiration month of the option, 100 is the strike price (sometimes referred to as the exercise price), and the option is a call, giving the holder of the call the right, not the obligation, to buy 100 shares of National Widget at a price of 100 (any number of shares can be involved, but usually options are sold for 100 shares or multiples of 100).

A straddle is the purchase of a call and a put with the same strike price, the same expiration date, and the same underlying security. For example, the purchase of a National Widgets November 95 call and the simultaneous purchase

of a National Widgets November 95 put while the stock price is about 95 would be a straddle.

With highly volatile stocks or commodities that are likely to make big moves, investors may want to hedge because they do not know which way the investment will move. The use of a straddle allows the investor to spread the risk, preventing a total loss but also precluding the maximum profit that comes with a favorable put or call. The investor knows that either the put or the call option will not be exercised in a straddle, so a key factor in assessing potential profit is the cost of purchasing the put versus the cost of the call.

CROSS-REFERENCES

Stock Market.

## STRAIGHT-LINE DEPRECIATION

*A method employed to calculate the decline in the value of income-producing property for the purposes of federal taxation.*

Under this method, the annual depreciation deduction that is used to offset the annual income generated by the property is determined by dividing the cost of the property minus its expected salvage value by the number of years of anticipated useful life.

## STRANGER

*A third person; anyone who is not a party to a particular legal action or agreement.*

For example, all those who are not parties to a particular contract are considered strangers to the contract.

## STRATEGIC ARMS LIMITATION TALKS (SALT)

See ARMS CONTROL AND DISARMAMENT.

## STRATEGIC ARMS REDUCTION TALKS (START)

See ARMS CONTROL AND DISARMAMENT.

## STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION

*Retaliatory lawsuits intended to silence, intimidate, or punish those who have used public forums to speak, petition, or otherwise move for government action on an issue.*

The term *strategic lawsuits against public participation,* known by the acronym SLAPPs, applies to a variety of different types of lawsuits, including those claiming LIBEL, DEFAMATION, business interference, or conspiracy. The term was coined by Professors George W. Pring and Penelope Canan of the University of Denver, who began to study this form of litigation in 1984. Pring and Canan define SLAPPs using four criteria: "[SLAPPs] (1) involve communications made to influence a government action or outcome, (2) which result in civil lawsuits (complaints, counterclaims, or cross-claims), (3) filed against non-governmental individuals or groups (4) on a substantive issue of some public interest or social significance."

In a typical SLAPP, an individual or citizens' group—the *target* (using Pring and Canan's terminology), or defendant—is sued by the *filer,* or plaintiff, for alleged wrongdoing simply because that individual or group has used constitutionally protected rights to persuade the government to take a particular course of action. SLAPPs have been directed against individuals and groups that have spoken in public forums on a wide variety of issues, particularly against real estate development, the actions of public officials, environmental damage or POLLUTION, and unwanted land use. They have also been used against those who have worked publicly for the rights of consumers, workers, women, minorities, and others. SLAPP defendants have been sued for apparently lawful actions such as circulating a petition, writing to a local newspaper, speaking at a public meeting, reporting violations of the law, or participating in a peaceful demonstration.

For example, a Colorado environmental protection group opposed a commercial development and was eventually sued by the developer for $40 million. The lawsuit claimed that the environmental group was guilty of "conspiracy" and "abuse of process" (*Lockport Corporation v. Protect Our Mountain Environment,* No. 81CV973 [Dist. Ct., Jefferson County, Colo. 1981]). The suit dragged on for several years, cost the environmental group much time and money, and eventually resulted in its demise. Although the development did not go forward, many group members vowed that they would refrain from future community involvement out of fear of legal retribution.

A number of real estate developers have tried to prevent subdivision residents from opposing ZONING changes by attaching restrictive covenants to sales contracts. A typical

COVENANT might stipulate that the purchaser signs the contract on the condition that he or she will not oppose any re-zoning plans for adjacent properties acquired by the developer.

Such a RESTRICTIVE COVENANT was successfully challenged in the case of *Providence Construction Company v. Bauer,* 494 S.E. 2d 527 [Ga. App.1997]. Providence owned a subdivision in Cobb County, Georgia, and its deeds included a restrictive covenant to keep residents from opposing zoning changes. When Providence sought to have land next to the subdivision re-zoned, several residents protested to government officials and circulated petitions. Providence sued for breach of contract and tortuous interference of contractual relations. It later dropped the suit against all but one resident who continued to protest the re-zoning. The resident, Dave Bauer, moved for SUMMARY JUDGMENT at trial and the court granted his request. Providence went to the Georgia Court of Appeals, which upheld the lower court's ruling. Under Georgia's anti-SLAPP law, plaintiffs must show that their suit is not being filed to suppress the right to free speech. The court said that Providence's covenant was too vague in its limitation of speech, because it prohibited residents from opposing actions that could affect the subdivision's character and property values.

Others who have been targeted by SLAPPs include a group of parents who voiced concern over unsafe school buses at a school board meeting, only to become defendants in a $680,000 suit for libel filed by the bus company, and neighbors who protested renewal of a bar's liquor license and were then faced with an $8 million libel suit initiated by the bar owner.

Judges dismiss the majority of SLAPPs as a violation of constitutional rights, generally on the grounds that the defendant's activities are protected by the Petition Clause of the FIRST AMENDMENT to the Constitution. That clause establishes "the right of the people . . . to petition the Government for a redress of grievances." However, in those cases where a SLAPP is not quickly dismissed, the expense of the litigation for SLAPP defendants, both in time and money, often serves as punishment itself and dissuades individuals from speaking out in the future. Individuals who have been hit with a SLAPP—or "SLAPPed"—often report a feeling of having been sued into silence and feel dissuaded from participating in public life again—quite often the very effect intended by the SLAPP filer. Although a SLAPP filer usually loses in court, he or she may achieve the goal of silencing future political opposition.

For these reasons, the legal system has widely viewed SLAPPs as an example of the use of law for the purpose of intimidation and as a threat to citizen involvement and public participation. SLAPPs, critics contend, attempt to privatize public debate and have a chilling effect on public speech and involvement.

Those who defend SLAPPs claim that SLAPP plaintiffs have as much right to fight for their rights as SLAPP defendants. It is equally wrong, they say, to conclude that all SLAPP plaintiffs are malicious as it is to conclude that all SLAPP defendants have honorable intentions. Moreover, the First Amendment protects free speech but not slander or libel. Most SLAPP defenders dislike the term SLAPP because they feel it can unfairly taint legitimate defamation actions.

SLAPPs date back to the earliest years of the United States, when citizens occasionally were sued for speaking out against corruption in government. Courts generally dismissed such lawsuits, however, and SLAPPs fell into general disuse until the 1960s and 1970s. During those decades a wave of political activism concerning many issues—from the environment to minority rights—sparked suits claiming defamation, libel, and business interference from affected parties, particularly corporations and business interests. By the 1980s and 1990s, many observers claimed that SLAPPs were seriously hampering participation in the U.S. political system.

Individuals and governments reacted to the growth of SLAPPs in a number of different ways. Targets of SLAPP cases sometimes have countersued—a process known as a *SLAPPback*—often making many of the same claims as the SLAPP filer: MALICIOUS PROSECUTION, ABUSE OF PROCESS, defamation, and business interference. Those who have filed SLAPPbacks generally have been successful in court and have won large cash settlements from juries. Advocates of SLAPPbacks say that they are a necessary deterrent to SLAPP filers.

Rulings of the U.S. Supreme Court have increasingly supported the rapid JUDICIAL REVIEW and dismissal of SLAPPs. Using standards developed in earlier cases (*Eastern Railroad Presidents' Conference v. Noerr Motor*

*Freight, Inc.,* 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 [1961], and *United Mine Workers v. Pennington,* 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 [1965]), the Court ruled in *City of Columbia v. Omni Outdoor Advertising Inc.,* 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991), that the First Amendment's Petition Clause protects "a concerted effort to influence public officials regardless of intent or purpose." The Court held that SLAPPs should be dismissed in all cases except those in which the target's activities are not genuinely directed at gaining favorable government action.

A number of states have passed laws intended to prevent SLAPPs and protect the right to participate in public activism. Washington became the first state to pass an anti-SLAPP law in 1989. By 2002, another 19 states had enacted similar legislation, and still more states were debating anti-SLAPP bills. The Minnesota Citizens Participation Bill of 1994 (Minn. Stat. § 554.01-05), for example, protects public participation by requiring a court to dismiss a SLAPP unless the filer can prove that the target's activities were not directed toward producing government action. The law also shifts the burden of proof to the SLAPP filer and allows the SLAPP target to collect attorneys' fees, costs, and damages if the SLAPP is unsuccessful.

FURTHER READINGS

Hillberry, Rhonda. 1995. "Warning: Signing That Petition Could Get You Sued!" *Law and Politics* (July).

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CROSS-REFERENCES

Environmental Law.

## STRAW MAN

*An individual who acts as a front for others who actually incur the expense and obtain the profit of a transaction.*

In the terminology employed by real estate dealers, a straw man is an individual who acts as a conduit for convenience in holding and transferring title to the property involved. For example, such a person might act as an agent for another in order to take title to real property and execute whatever documents and instruments the principal directs with respect to the transaction.

## STREET RAILROAD

*A railway that is constructed upon a thoroughfare or highway to aid in the transportation of people or property along the roadway.*

Street railroads run at moderate rates of speed and make frequent stops at particular points within a town or city. Subways and elevated railroads that are built above the surface of the roadway are two common examples of street railroads.

Municipal corporations have the authority to regulate the operation of street railroads within their boundaries. This power is generally vested in a board of commission, which sets regulations for the protection of individuals and property. Common requirements mandate street railroads to (1) restrict the speed at which the cars operate; (2) provide the cars with reliable brakes; (3) furnish the cars with signal lights and sound devices; and (4) keep all tracks clear of ice and snow during periods of inclement weather.

## STRICT CONSTRUCTION

*A close or narrow reading and interpretation of a statute or written document.*

Judges are often called upon to make a construction, or interpretation, of an unclear term in cases that involve a dispute over the term's legal significance. The common-law tradition has produced various precepts, maxims, and rules that guide judges in construing statutes or private written agreements such as contracts. Strict construction occurs when ambiguous language is given its exact and technical meaning, and no other equitable considerations or reasonable implications are made.

A judge may make a construction only if the language is ambiguous or unclear. If the language is plain and clear, a judge must apply the PLAIN MEANING of the language and cannot consider other evidence that would change the meaning. If, however, the judge finds that the words produce absurdity, AMBIGUITY, or a literalness never intended, the plain meaning does not apply and a construction may be made.

In CRIMINAL LAW, strict construction must be applied to criminal statutes. This means that a criminal statute may not be enlarged by implication or intent beyond the fair meaning of the language used or the meaning that is reasonably justified by its terms. Criminal statutes, therefore, will not be held to encompass offenses and

*Street railroads, such as this elevated transit line in Chicago, provide an alternative to automobile or bus transportation.*

BETTMANN/CORBIS

individuals other than those clearly described and provided for in their language. The strict construction of criminal statutes complements the rule of lenity, which holds that ambiguity in a criminal statute should be resolved in favor of the defendant.

Strict construction is the opposite of liberal construction, which permits a term to be reasonably and fairly evaluated so as to implement the object and purpose of the document. An ongoing debate in U.S. law concerns how judges should interpret the law. Advocates of strict construction believe judges must exercise restraint by refusing to expand the law through implication. Critics of strict construction contend that this approach does not always produce a just or reasonable result.

**CROSS-REFERENCES**

Canons of Construction; Plain-Meaning Rule.

## STRICT FORECLOSURE

*A decree that orders the payment of a mortgage of real property.*

A strict foreclosure decree sets out the amount due under the mortgage, orders it to be paid within a particular time limit, and provides that if payment is not made, the mortgagor's right and equity of redemption are forever barred and foreclosed. If the mortgagor does not pay within the time designated, then title to the property vests in the mortgagee without any sale thereof.

## STRICT LIABILITY

*Absolute legal responsibility for an injury that can be imposed on the wrongdoer without proof of carelessness or fault.*

Strict liability, sometimes called absolute liability, is the legal responsibility for damages, or injury, even if the person found strictly liable was not at fault or negligent. Strict liability has been applied to certain activities in TORT, such as holding an employer absolutely liable for the torts of her employees, but today it is most commonly associated with defectively manufactured products. In addition, for reasons of public policy, certain activities may be conducted only if

the person conducting them is willing to insure others against the harm that results from the risks the activities create.

In PRODUCT LIABILITY cases involving injuries caused by manufactured goods, strict liability has had a major impact on litigation since the 1960s. In 1963, in *Greenman v. Yuba Power Products,* 59 Cal. 2d 57, 377 P.2d 897, the California Supreme Court became the first court to adopt strict tort liability for defective products. Injured plaintiffs have to prove the product caused the harm but do not have to prove exactly how the manufacturer was careless. Purchasers of the product, as well as injured guests, bystanders, and others with no direct relationship with the product, may sue for damages caused by the product.

An injured party must prove that the item was defective, that the defect proximately caused the injury, and that the defect rendered the product unreasonably dangerous. A plaintiff may recover damages even if the seller has exercised all possible care in the preparation and sale of the product.

In tort law strict liability has traditionally been applied for damages caused by animals. Because animals are not governed by a conscience and possess great capacity to do mischief if not restrained, those who keep animals have a duty to restrain them. In most jurisdictions the general rule is that keepers of all animals, including domesticated ones, are strictly liable for damage resulting from the TRESPASS of their animals on the property of another. Owners of dogs and cats, however, are not liable for their pets' trespasses, unless the owners have been negligent or unless strict liability is imposed by statute or ordinance.

For purposes of liability for harm other than trespass, the law distinguishes between domesticated and wild animals. The keeper of domesticated animals, which include dogs, cats, cattle, sheep, and horses, is strictly liable for the harm they cause only if the keeper had actual knowledge that the animal had the particular trait or propensity that caused the harm. The trait must be a potentially harmful one, and the harm must correspond to the knowledge. In the case of dogs, however, some jurisdictions have enacted statutes that impose absolute liability for dog bites without requiring knowledge of the dog's viciousness.

Keepers of species that are normally considered "wild" in that region are strictly liable for the harm these pets cause if they escape, whether or not the animal in question is known to be dangerous. Because such animals are known to revert to their natural tendencies, they are considered to be wild no matter how well trained or domesticated.

Strict liability for harm resulting from abnormally dangerous conditions and activities developed in the late nineteenth century. It will be imposed if the harm results from the miscarriage of an activity that, though lawful, is unusual, extraordinary, exceptional, or inappropriate in light of the place and manner in which the activity is conducted. Common hazardous activities that could result in strict liability include storing explosives or flammable liquids, blasting, accumulating sewage, and emitting toxic fumes. Although these activities may be hazardous, they may be appropriate or normal in one location but not another. For example, storing explosives in quantity will create an unusual and unacceptable risk in the midst of a large city but not in a remote rural area. If an explosion occurs in the remote area, strict liability will be imposed only if the explosives were stored in an unusual or abnormal way.

CROSS-REFERENCES

Negligence; Proximate Cause; *Rylands v. Fletcher.*

## STRICT SCRUTINY

*A standard of* JUDICIAL REVIEW *for a challenged policy in which the court presumes the policy to be invalid unless the government can demonstrate a compelling interest to justify the policy.*

The strict scrutiny standard of judicial review is based on the EQUAL PROTECTION CLAUSE of the Fourteenth Amendment. Federal courts use strict scrutiny to determine whether certain types of government policies are constitutional. The U.S. Supreme Court has applied this standard to laws or policies that impinge on a right explicitly protected by the U.S. Constitution, such as the right to vote. The Court has also identified certain rights that it deems to be fundamental rights, even though they are not enumerated in the Constitution.

The strict scrutiny standard is one of three employed by the courts in reviewing laws and government policies. The *rational basis test* is the lowest form of judicial scrutiny. It is used in cases where a plaintiff alleges that the legislature has made an ARBITRARY or irrational decision. When employed, the RATIONAL BASIS TEST usu-

ally results in a court upholding the constitutionality of the law, because the test gives great deference to the legislative branch. The *heightened scrutiny test* is used in cases involving matters of discrimination based on sex. As articulated in *Craig v. Boren,* 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), "classifications by gender must serve *important* governmental objectives and must *be substantially related* to the achievement of those objectives."

Strict scrutiny is the most rigorous form of judicial review. The Supreme Court has identified the right to vote, the right to travel, and the right to privacy as fundamental rights worthy of protection by strict scrutiny. In addition, laws and policies that discriminate on the basis of race are categorized as *suspect classifications* that are presumptively impermissible and subject to strict scrutiny.

Once a court determines that strict scrutiny must be applied, it is presumed that the law or policy is unconstitutional. The government has the burden of proving that its challenged policy is constitutional. To withstand strict scrutiny, the government must show that its policy is necessary to achieve a compelling state interest. If this is proved, the state must then demonstrate that the legislation is narrowly tailored to achieve the intended result.

The case of ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), which invalidated state laws that prohibited ABORTION, illustrates the application of strict scrutiny. The Court held that the right to privacy is a fundamental right and that this right "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Based on these grounds, the Court applied strict scrutiny. The state of Texas sought to proscribe all abortions and claimed a compelling STATE INTEREST in protecting unborn human life. Though the Court acknowledged that this was a legitimate interest, it held that the interest does not become compelling until that point in pregnancy when the fetus becomes "viable" (capable of "meaningful life outside the mother's womb"). The Court held that a state may prohibit abortion after the point of viability, except in cases where abortion is necessary to preserve the life or health of the mother, but the Texas law was not narrowly tailored to achieve this objective. Therefore, the state did not meet its BURDEN OF PROOF and the law was held unconstitutional.

CROSS-REFERENCES

Civil Rights; Equal Protection; Sex Discrimination; Voting.

## STRIKE

*A work stoppage; the concerted refusal of employees to perform work that their employer has assigned to them in order to force the employer to grant certain demanded concessions, such as increased wages or improved employment conditions.*

A work stoppage is generally the last step in a labor-management dispute over wages and working conditions. Because employees are not paid when they go on strike and employers lose productivity, both sides usually seek to avoid it. When negotiations have reached an impasse, however, a strike may be the only bargaining tool left for employees.

Employees can strike for economic reasons, for improvement of their working conditions, or for the mutual aid and protection of employees in another union. In addition, even if they do not have a union, employees can properly agree to stop working as a group; in that case they are entitled to all the protections that organized strikers are afforded.

LABOR UNIONS do not have the right to use a strike to interfere with management prerogatives or with policies that the employer is entitled to make that do not directly concern the employment relationship. A strike must be conducted in an orderly manner and cannot be used as a shield for violence or crime. Intimidation and coercion during the course of a strike are unlawful.

### Federal Labor Law

The development of labor unions in the nineteenth century was met by employer hostility. The concept of COLLECTIVE BARGAINING between employer and employee was viewed as antithetical to the right of individual workers and their employers to negotiate wages and working conditions—a concept known as liberty of contract. When unions did strike, they were left to deal with management without legal protections. Employers fired strikers and obtained injunctions from courts that ordered unions to end the strike or risk CONTEMPT of court.

The unequal bargaining power of unions was remedied in the 1930s with the passage of two important federal LABOR LAWS. In 1932, Congress passed the NORRIS-LAGUARDIA ACT (29 U.S.C.A. §§ 101 et seq.), which severely limited

## A Lexicon of Labor Strikes

Over the years different types of labor strikes have acquired distinctive labels. The following are the most common types of strikes, some of which are illegal:

- *Wildcat strike* A strike that is not authorized by the union that represents the employees. Although not illegal under law, wildcat strikes ordinarily constitute a violation of an existing collective bargaining agreement.
- *Walkout* An unannounced refusal to perform work. A walkout may be spontaneous or planned in advance and kept secret. If the employees' conduct is an irresponsible or indefensible method of accomplishing their goals, a walkout is illegal. In other situations courts may rule that the employees have a good reason to strike.
- *Slowdown* An intermittent work stoppage by employees who remain on the job. Slowdowns are illegal because they give the employees an unfair bargaining advantage by making it impossible for the employer to plan for production by the workforce. An employer may discharge an employee for a work slowdown.
- *Sitdown strike* A strike in which employees stop working and refuse to leave the employer's premises. Sitdown strikes helped unions organize workers in the automobile industry in the 1930s but are now rare. They are illegal under most circumstances.
- *Whipsaw strike* A work stoppage against a single member of a bargaining unit composed of several employers. Whipsaw strikes are legal and are used by unions to bring added pressure against the employer who experiences not only the strike but also competition from the employers who have not been struck. Employers may respond by locking out employees of all facilities that belong to members of the bargaining unit. Whipsaw strikes have commonly been used in the automobile industry.
- *Sympathy strike* A work stoppage designed to provide **AID AND COMFORT** to a related union engaged in an employment dispute. Although sympathy strikes are not illegal, unions can relinquish the right to use this tactic in a **COLLECTIVE BARGAINING** agreement.
- *Jurisdictional strike* A strike that arises from a dispute over which **LABOR UNION** is entitled to represent the employees. Jurisdictional strikes are unlawful under federal **LABOR LAWS** because the argument is between unions and not between a union and the employer.

the power of federal courts to issue injunctions in labor disputes. The act imposed strict procedural limitations and safeguards to prevent abuses by the courts. The National Labor Relations Act (Wagner Act) of 1935 (29 U.S.C.A. §§ 151 et seq.) clearly established the right of employees to form, join, or aid labor unions. The act authorized collective bargaining by unions and gave employees the right to participate in "concerted actions" to bargain collectively. The major concerted action was the right to strike.

Federal labor laws require a 60-day waiting period before workers can strike to force termination or modification of an existing collective bargaining agreement. The terms of the agreement remain in full force and effect during this period, and any employee who strikes can be fired. The 60-day "cooling-off period" begins when the union serves notice on the employer or when the existing contract ends. This provision does not affect the right of employees to strike in protest of some UNFAIR LABOR PRACTICE of their employer. It does help to prevent premature strikes, however.

### Status

Strikes can be divided into two basic types: economic and unfair labor practice. An economic strike seeks to obtain some type of economic benefit for the workers, such as improved wages and hours, or to force recognition of their union. An unfair labor practice strike is called to protest some act of the employer that the employees regard as unfair.

When employees strike, the employer may continue operating the business and can hire

replacement workers. Upon settlement of an unfair labor practice strike, the strikers must be reinstated as soon as they offer unconditionally to return to work, even if the replacement workers must be fired.

In economic strikes, however, the employer is not required to take back the strikers immediately upon the settlement of the dispute. Economic strikers are still categorized as employees and are entitled to reinstatement in the event vacancies occur, but the employer does not have to reinstate any worker who has found substantially equivalent work elsewhere or who has given the employer a legitimate and substantial reason for not reinstating that worker. The hiring of permanent replacement workers has become an important management weapon against economic strikes, giving the employer the ability to hire a nonunion workforce and to threaten the local union with destruction. U.S. labor unions have been unsuccessful in persuading Congress to amend the National Labor Relations Act to provide immediate job reinstatement to economic strikers.

An employee has no right to be paid while on strike, nor does the employee have a right to claim UNEMPLOYMENT COMPENSATION benefits, unless state law provides the benefit. Employees who refuse to cross a picket line on principle are treated in the same way as strikers, but those who are kept from their jobs through fear of violence are entitled to collect unemployment compensation.

Employees forfeit their right to maintain the employment relationship if their strike is illegal. For example, public employees are generally forbidden to strike. If they do, they risk dismissal. In 1981, President RONALD REAGAN responded to an illegal strike by federal air traffic controllers by dismissing more than ten thousand employees.

Ordinarily, however, a strike is legal if employees are using it to exert economic pressure upon their employer in order to improve the conditions of their employment. A strike is unlawful if it is directed at someone other than the employer or if it is used for some other purpose. Federal law prohibits most boycotts or picketing directed at a party not involved in the primary dispute. These tactics are known as secondary boycotts or secondary picketing, and they are strictly limited so that businesses that are innocent bystanders will not become victims in a labor dispute that they cannot resolve.

### Unlawful Tactics

Picketing can be regulated by statute because of the potential for violence inherent in this activity. Mass picketing is unlawful under federal law because large unruly crowds could be used for the purpose of intimidation. Employees are entitled to picket in small numbers outside the employer's facilities, but they cannot block entrances or demonstrate in front of an employer's home. Picketing is lawful when it is used to inform the public, the employer, or other workers about the dispute. However, it cannot be used to threaten people or to provoke violence.

A strike is generally lawful if it is peaceful. A strike is never a legal excuse for violence, and acts of physical violence and damage to property will be viewed as criminal acts. Employers who use violence against strikers are subject to the same penalties.

A union or an employer can be fined or adjudged guilty of an unfair labor practice and ordered to cease and desist when violent actions occur. An INJUNCTION from a state court can stop the strike or picketing. Because no labor disputes can proceed without minor problems, an isolated minor incident, such as name-calling or a shove, does not end the right to strike.

### Union Members

Labor unions can fine or expel members who cross picket lines, fail to honor a lawful strike, or indulge in violence during a strike. In addition, they can discipline members for conduct antagonistic to the union, such as spying for the employer or participating in an unauthorized strike. A union member is entitled to a written notice of specific charges against him and a full and fair hearing before he can be expelled.

### Settlement

Strikes are ordinarily settled by negotiation between the employer and the employees or the union that represents them. An employer who does not want to engage in negotiations can cease operations entirely. However, an employer cannot avoid bargaining by relocating or by assigning the same work to another plant owned by the company. If the employer and employees bargain in GOOD FAITH, they generally settle their differences and sign a collective bargaining agreement.

FURTHER READINGS

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*breaking and Unionbusting in the United States.* Athens: Ohio Univ. Press.

Zinn, Howard. 2002. *Three Strikes: Miners, Musicians, Salesgirls and the Fighting Spirit of Labor's Lost Century.* Boston: Beacon Press.

CROSS-REFERENCES

Labor Law.

## STRING CITATION

*A series of references to cases that establish legal precedents and to other authorities that appear one after another and are printed following a legal assertion or conclusion as supportive authority.*

For example, in preparing a brief, an attorney might set forth a particular assertion based upon the facts of the case and applicable law and immediately thereafter make a list of all the cases that lend support to it.

## STRONG-ARM PROVISION

*The segment of the federal* BANKRUPTCY *law that grants the trustee the rights of the most secured creditor, so that he or she is able to seize all of the debtor's property for proper distribution.*

## ❖ STRONG, WILLIAM

William Strong served as associate justice of the U.S. Supreme Court from 1870 to 1880. He is best remembered for his majority opinion in the controversial case of *Knox v. Lee* (argued concurrently with *Parker v. Davis*), 79 U.S. (12 Wall.) 457, 20 L. Ed. 287 (1871), commonly known as one of the *Legal Tender Cases.*

Strong was born on May 6, 1808, in Somers, Connecticut. He graduated from Yale University in 1828 and received a master's degree from the same institution in 1831. He attended Yale Law School and was admitted to the Pennsylvania bar in 1832. He practiced law in Reading, Pennsylvania, for fifteen years.

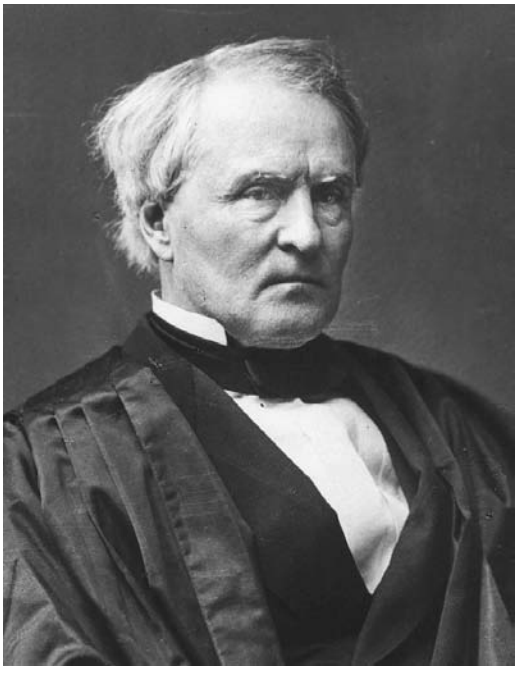

*William Strong.* THE GRANGER COLLECTION, NEW YORK

In 1847, Strong entered politics with his election as a Democratic member of the U.S. House of Representatives. He left Congress in 1851 and re-entered private practice. In 1857, Strong began a term as a justice of the Pennsylvania Supreme Court. He remained on the bench until 1868, when he resumed private law practice, this time in Philadelphia, Pennsylvania. During the Civil War, Strong changed his political affiliation from Democrat to Republican. This move proved auspicious for him, as President ULYSSES S. GRANT, a Republican, appointed Strong to the U.S. Supreme Court in 1870 to replace the retiring Justice ROBERT C. GRIER, a Pennsylvania Democrat.

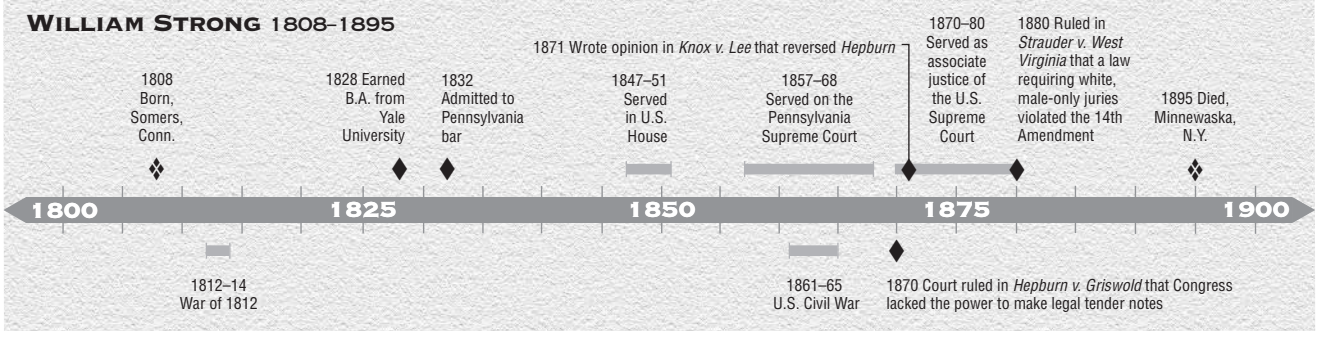

Strong's appointment and first year on the Court were marked by controversy concerning the *Legal Tender Cases.* On the day he was nominated, the Court announced its decision in *Hepburn v. Griswold,* 75 U.S. (8 Wall.) 603, 19 L. Ed. 513 (1870), which concerned the Legal Tender Act of 1862 (12 Stat. 345). The act, passed during the Civil War to finance the Union war effort, authorized the creation of paper money not redeemable in gold or silver. About $430 million worth of "greenbacks" were put into circulation, and by law this money had to be accepted for all taxes, debts, and other obligations, even those contracted before passage of the act.

The Court in *Hepburn* ruled, by a 4–3 vote, that Congress lacked the power to make the notes legal tender because the law violated the Fifth Amendment's guarantee against deprivation of property without DUE PROCESS OF LAW. Grant's appointment of Strong and JOSEPH P. BRADLEY to the Supreme Court on the same day in 1870 was perceived as a court-packing scheme that was designed to overturn *Hepburn.*

This view proved correct. With Strong and Bradley on the bench, the Court agreed to reconsider the constitutionality of the Legal Tender Act. In 1871, Strong wrote the majority opinion in *Knox v. Lee,* which reversed the *Hepburn* decision. This time, the vote was 5–4, in favor of the act. Strong held that Congress had the authority to pass monetary acts such as the greenbacks law during a time of national emergency.

During the 1870s, numerous CIVIL RIGHTS CASES came before the Court. In *Blyew v. United States,* 80 U.S. (13 Wall.) 581, 20 L. Ed. 638 (1872), Strong ruled that the federal government could not use a CIVIL RIGHTS law to prosecute a white man who was accused of murdering several African-Americans because the victims were not persons "in existence" as required by the act, and because the interests of witnesses were not strong enough to give the federal government exclusive jurisdiction over the crime. The crime had occurred in Kentucky, where black witnesses were prohibited by law from testifying against whites. In *Strauder v. West Virginia,* 100 U.S. (10 Otto) 303, 25 L. Ed. 664 (1880), Strong ruled that a law that allowed only white males to serve as jurors violated the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT.

Following his resignation from the Court in 1880, Strong devoted his time to many religious causes and organizations. He led the National Reform Association, which proposed a constitutional amendment that would have proclaimed Jesus Christ as the supreme authority. Although he disclaimed the idea of a national church, Strong believed that Christian principles should govern many facets of U.S. society. Strong died on August 19, 1895, in Minnewaska, New York.

## ♦ STROSSEN, NADINE M.

Nadine M. Strossen is a lawyer and law professor who, in 1991, became the first woman president of the AMERICAN CIVIL LIBERTIES UNION (ACLU).

Born August 18, 1950, in Jersey City, New Jersey, Strossen moved with her family to Hopkins, Minnesota, at the age of eight. When she was growing up, she expected to pursue a traditional career, perhaps as a teacher. As an outstanding member of her high school debate team, she was impressed with her teammates' analytical skills and encouraged the boys among them to pursue a legal career. She did not envision a similar path until she became involved in debate and took an interest in feminist causes while at Radcliffe College. After graduating from Radcliffe, she attended Harvard Law School, where she was editor of the law review, and graduated from Harvard magna cum laude in 1975.

After law school, Strossen was awarded a judicial clerkship at the Minnesota Supreme Court, then practiced law in several law firms. In 1984, she left private practice and began teaching at the School of Law of New York University. She joined the faculty at New York Law School in 1988, specializing in CONSTITUTIONAL LAW, federal courts, and HUMAN RIGHTS.

Strossen has been a member of the ACLU since 1985, having served on the organization's executive committee and as its general counsel. The ACLU has adopted controversial, unpopular positions on issues ranging from free speech and ABORTION rights to the rights of accused persons. Strossen has used steady, unrelenting persuasion, rather than confrontation, to educate others about the importance of safeguarding the individual liberties that are the heart of the U.S. Constitution.

In the late 1980s and into the 1990s, Strossen and the ACLU found themselves in an ironic and seemingly contradictory position when new ideas about multiculturalism began to take root on college campuses. Proponents of these ideas

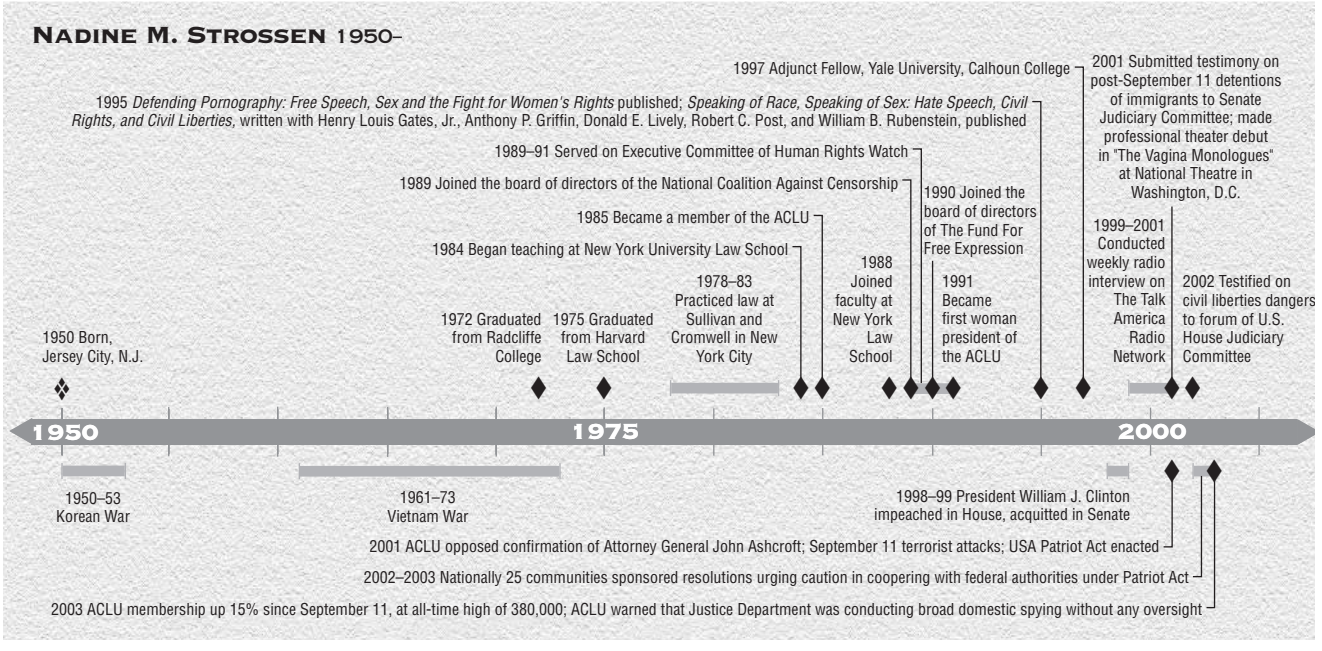


seemed to espouse goals in common with the ACLU: protecting minority groups from discrimination, bias, hatred, or exclusion. However, in an effort to rid institutions of hatred and harassment, some academic groups adopted speech codes that banned the use of certain words or symbols they considered hateful, demeaning, violent, or merely inconsiderate. Such words were sometimes called "politically incorrect," or not "PC." Strossen and the ACLU vehemently opposed these codes because they, they argued, such codes violate the FIRST AMENDMENT and discourage discussion of important but inflammatory subjects such as race and gender.

Strossen believes that the free and open exchange of ideas, even ideas that may be repugnant, is essential in a free society, and may actually defuse the hatred and bigotry that underlie racist or sexist expressions. However, Strossen maintains that laws imposing enhanced penalties for crimes motivated by bias or hatred differ from speech codes and are constitutional.

Similar to the controversy over speech codes is the debate over whether sexually explicit material can be constitutionally banned. During the 1980s, a group of feminists, led by ANDREA DWORKIN and CATHARINE A. MACKINNON, began a movement to outlaw all sexually explicit materials on the ground that they condone conduct that is violent, dangerous, and degrading to women. Strossen and the ACLU argue that such materials are speech rather than conduct, and that even if most U.S. citizens find them offensive, their publication and dissemination are protected by the U.S. Constitution.

Strossen contends that a prohibition on all sexually explicit material is a simplistic solution that only serves to drive the perpetrators underground. She says that CENSORSHIP does not solve the underlying problems of violence and discrimination and may ultimately be used as a means of oppressing the very groups it is intended to protect.

Strossen is committed to defending free speech whenever it is threatened, even if she disagrees with the individual or group being targeted. For example, she is opposed to Supreme Court decisions that limit the activities of antiabortion protesters, even though the ACLU has always defended a woman's right to reproductive freedom. Strossen believes that penalties imposed on antiabortion activists infringe on the activists' exercise of free speech.

In addition to working with the ACLU, Strossen has served on the boards of the Fund for Free Expression, the National Coalition against Censorship, the Coalition to Free Soviet Jews, Middle East Watch, Asia Watch, and HUMAN RIGHTS WATCH. She is a frequent lecturer on college campuses through the United States and abroad; and serves as political commentator on a variety of national news programs. Strossen also has written extensively in

the areas of constitutional law, civil liberties, and international human rights. In 2000, New York University Press republished her 1995 book *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* with a new introduction by the author.

In the 2000s, Strossen continued to write and comment extensively on constitutional issues while teaching at New York Law School and functioning as president of the ACLU.

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CROSS-REFERENCES

Hate Crime; Pornography.

## STRUCK JURY

*A special jury chosen in a manner whereby an appropriate official prepares a panel containing the names of forty-eight potential jurors and the parties strike off names until the number of jurors is reduced to twelve.*

## STUDENT NON-VIOLENT COORDINATING COMMITTEE

As a focal point for student activism in the 1960s, the Student Nonviolent Coordinating Committee (SNCC, popularly called Snick) spearheaded major initiatives in the CIVIL RIGHTS MOVEMENT. At the forefront of INTEGRATION efforts, SNCC volunteers gained early recognition for their lunch counter sit-ins at whites-only businesses and later for their participation in historic demonstrations that helped pave the way for the passage of landmark federal CIVIL RIGHTS legislation in 1964 and 1965. SNCC made significant gains in voter registration for blacks in the South, where it also ran schools and health clinics. Later adopting a more radical agenda, it ultimately became identified with the BLACK POWER MOVEMENT and distanced itself from traditional civil rights leaders, before disbanding in 1970.

SNCC grew out of the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (SCLC), led by MARTIN LUTHER KING JR. On Easter 1960, SCLC executive director, ELLA J. BAKER, organized a meeting at Shaw University, in Raleigh, North Carolina, with the goal of increasing student participation in the civil rights movement. Students were already taking action on their own: in February, they had staged a sit-in at a Woolworth store in Greensboro, North Carolina, refusing to leave the whites-only lunch counter. One hundred and forty students met with Baker and representatives of other civil rights organizations at the Easter conference, where SNCC was conceived and founded. SNCC soon set up offices in Atlanta. Among its earliest members were JOHN LEWIS, a divinity student; Marion S. Barry Jr., a future mayor of Washington, D.C.; and JULIAN BOND, a future Georgia state senator and liberal activist leader.

In its statement of purpose, dated April 1960, SNCC embraced a philosophy of nonviolence:

> We affirm the philosophical or religious ideal of non-violence as the foundation of our purpose, the presupposition of our faith, and the manner of our action. . . . By appealing to conscience and standing on the moral nature of human existence, nonviolence nurtures the atmosphere in which reconciliation and justice become actual possibilities.

One method of non-violent protest adopted by SNCC was the sit-in. Used to integrate businesses in northern and border states as early as 1943, this tactic was a risky undertaking in the segregated South of 1960. What SNCC met at lunch counter sit-ins was far from a spirit of reconciliation: whites taunted the demonstrators, poured ketchup and sugar on their heads, and sometimes hit them. SNCC volunteers persevered, and by late 1961, sit-ins had taken place in over one hundred southern communities.

The pressure brought by these actions soon increased as SNCC rallied white and black students to a number of causes. In 1961, it joined members of the CONGRESS OF RACIAL EQUALITY (CORE) in a series of Freedom Rides—interstate bus trips through the South aimed at integrating bus terminals. Over the next three years, in states such as Georgia and Mississippi, SNCC began a grassroots campaign aimed at registering black voters. It also opened schools in order to teach illiterate farmers, and it established health clinics. In a 1964 project called Freedom Summer, it sent hundreds of white and black volunteers, mostly northern, middle-class students, to Mississippi to test the newly passed CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000a et seq.). Throughout these endeavors, volunteers were met with beatings and jailings,

*Stokely Carmichael, chairman of the Student Non-violent Coordinating Committee, speaks before a crowd of students on the campus of Florida A&M University in April 1967. Under the leadership of Carmichael, SNCC took a more radical course in an effort to gain political, economic, and legal liberation for African Americans.*

AP/WIDE WORLD PHOTOS

and three civil rights workers were slain in Mississippi during Freedom Summer.

By the mid 1960s, tensions had developed within the civil rights movement. Under King, SCLC stayed its course. Frustrated by the pace of civil rights gains and doubtful of traditional methods, SNCC and CORE became increasingly aggressive. In 1965, after the nation watched televised footage of black marchers being beaten in Selma, Alabama, SNCC decided to hold a second march, in which King chose to participate. More assaults and a murder followed. In their wake, President **LYNDON B. JOHNSON** appealed to the nation for stronger civil rights legislation. Consequently, the Selma marches hastened the passage of the **VOTING RIGHTS ACT OF 1965** (42 U.S.C.A. § 1973 et seq.).

SNCC took a more radical course under the leadership of activist **STOKELY CARMICHAEL.** As a dramatically successful SNCC field organizer in Lowndes County, Mississippi, Carmichael had increased the number of registered black voters there from 70 to 2600. He was elected chairman of SNCC in 1966, the year in which he coined the term *black power.* According to the organization's position paper, titled *The Basis of Black Power,* its message of political, economic, and legal liberation, rather than integration, for blacks marked a turning point in the civil rights movement: "In the beginning of the movement, we had fallen into a trap whereby we thought that our problems revolved around the right to eat at certain lunch counters or the right to vote, or to organize our communities. We have seen, however, that the problem is much deeper." SNCC, which now called the National Association for the Advancement of Colored People (**NAACP**) reactionary and white U.S. citizens 180 million racists, was joined in espousing harsher views by CORE and the newly formed **BLACK PANTHER PARTY FOR SELF-DEFENSE.**

Along with the new rhetoric came new policies. SNCC purged white members from its ranks, declaring that they should work to rid their own communities of racism. When SNCC members began carrying guns, Carmichael's explanation drew a line between the old guard and the vanguard: "We are not King or SCLC. They don't do the kind of work we do nor do they live in the same areas we live in" (Johnson 1990, 71). The organization subsequently deepened this division by pulling out of the White House Conference on Civil Rights.

Toward the end of its existence, SNCC was torn apart by troubles. In 1966, clashes with the police in several cities began when 80 police officers raided SNCC's Philadelphia office, charging that dynamite was stored there. The **FEDERAL BUREAU OF INVESTIGATION,** which had been **WIRETAPPING** SNCC since 1960, targeted the group in 1967 for a Counterintelligence Program effort aimed at disrupting it. Critics blamed Carmichael's inflammatory speeches for causing riots, and he left to join the Black Panthers. Amid growing militancy and an expanded vision that included antiwar protest, financial support began to dry up. SNCC disbanded in 1970 shortly after its last chairman, H. Rap Brown, went underground to avoid arrest.

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**CROSS-REFERENCES**

Carmichael, Stokely; Civil Rights Movement; Integration.

## STUMP V. SPARKMAN

See JUDICIAL IMMUNITY "Stump v. Sparkman" (Sidebar).

## SUA SPONTE

*[*Latin, Of his or her or its own will; voluntarily.*]*

For example, when a court takes action on its own motion, rather than at the request of one of the parties, it is acting *sua sponte.*

## SUB NOMINE

*[*Latin, Under the name; in the name of; under the title of.*]*

## SUB SILENTIO

*[*Latin, Under silence; without any notice being taken.*]*

Passing a thing *sub silentio* may be evidence of consent.

## SUBCONTRACTOR

*One who takes a portion of a contract from the principal contractor or from another subcontractor.*

When an individual or a company is involved in a large-scale project, a contractor is often hired to see that the work is done. The contractor, however, rarely does all the work. The work that remains is performed by subcontractors, who are under contract to the contractor, who is usually designated the general or prime contractor. Subcontractors may, in turn, hire their own subcontractors to do part of the work that they have contracted to perform.

Building construction is a common example of how the contractor-subcontractor relationship works. The general contractor takes prime responsibility for seeing that the building is constructed and signs a contract to do so. The cost of the contract is usually a fixed sum and may have been derived from a bid submitted by the contractor. Before offering the bid or before contract negotiations begin, the general contractor normally asks the subcontractors to estimate the price they will charge to do their part of the work. Thus, the general contractor will collect information from electricians, plumbers, dry wall installers, and a host of other subcontractors.

Once construction begins, the general contractor coordinates the construction schedule, making sure the subcontractors are at the building site when needed so that the project remains on schedule. The sequencing of construction and the supervision of the work that the subcontractors perform are key roles for the general contractor.

Subcontractors sign contracts with the general contractor that typically incorporate the agreement between the general contractor and the owner. A subcontractor who fails to complete work on time or whose work is not acceptable under the general contract may be required to pay damages if the project is delayed because of these problems.

A subcontractor's biggest concern is getting paid promptly for the work and materials provided to the project. The general contractor is under an obligation to pay the subcontractors any sums due them unless the contract states otherwise. Some contracts state that the subcontractors will not be paid until the general contractor is paid by the owner. If the owner refuses to pay the general contractor for work a subcontractor has performed, the subcontractor has the right to file a mechanic's lien against the property for the cost of the unpaid work.

When changes are made to the project during construction, subcontractors expect to be paid for the time and materials expended on the change. Subcontractors must receive formal approval to make the change and have a cost attached to the change before doing the work. Otherwise, when they submit a compensation request, it may be denied either because too much time has passed or because the general contractor or the owner believes the work performed was within the scope of the original project.

## SUBJECT MATTER JURISDICTION

*The power of a court to hear and determine cases of the general class to which the proceedings in question belong.*

For a court to have authority to adjudicate a dispute, it must have jurisdiction over the parties and over the type of legal issues in dispute. The first type of jurisdiction is called PERSONAL JURISDICTION; the other is subject matter jurisdiction. Personal jurisdiction will be found if the persons involved in the litigation are present in the state or are legal residents of the state in which the lawsuit has been filed, or if the transaction in question has a substantial connection to the state.

Subject matter jurisdiction refers to the nature of the claim or controversy. The subject matter may be a criminal infringement, MEDICAL MALPRACTICE, or the probating of an estate. Subject matter jurisdiction is the power of a court to hear particular types of cases. In state court systems, statutes that create different courts generally set boundaries on their subject matter jurisdiction. One state court or another has subject matter jurisdiction of any controversy that can be heard in courts of that state. Some courts specialize in a particular area of the law, such as probate law, FAMILY LAW, or JUVENILE LAW. A person who seeks custody of a child, for example, must go to a court that has authority in guardianship matters. A DIVORCE can be granted only in a court designated to hear matrimonial cases. A person charged with a felony cannot be tried in a criminal court authorized to hear only misdemeanor cases.

In addition to the legal issue in dispute, the subject matter jurisdiction of a court may be determined by the monetary value of the dispute—the dollar amount in controversy. Small claims courts, also known as conciliation courts, are limited by state statutes to small amounts of money in controversy, ranging from $1,000 to $5,000 depending upon the state. Therefore, if a plaintiff sues a defendant in SMALL CLAIMS COURT for $50,000, the court will reject the lawsuit because it lacks subject matter jurisdiction based on the amount in controversy. The amount in controversy limitations are designed to regulate the flow of litigation in the various courts of the state, ensuring that complicated disputes over large sums of money will be heard in courts that have the time and resources to hear such cases.

The U.S. Constitution gives jurisdiction over some types of cases to federal courts only. Cases involving AMBASSADORS AND CONSULS or public ministers, ADMIRALTY and maritime cases, and cases in which the United States is a party must be heard in federal courts. Congress has also created subject matter jurisdiction by statute, mandating that antitrust suits, most SECURITIES lawsuits, BANKRUPTCY proceedings, and patent and COPYRIGHT cases be heard in federal courts.

The Constitution also allows federal district courts to hear cases involving any rights or obligations that arise from the Constitution or other federal law. This is called federal question jurisdiction. Federal courts also have diversity jurisdiction, which gives the courts authority to hear cases involving disputes among citizens of different states. If, however, the amount in controversy is less than $10,000, federal question and diversity jurisdiction will not apply, and the case must be brought in state court. Even if the $10,000 amount is satisfied, a plaintiff may start the lawsuit in state court. A defendant, however, may seek to have the case moved to the federal court in that state by filing a transfer request called a removal action.

A defendant who believes that a court lacks subject matter jurisdiction to hear the case may raise this issue before the trial court or in an appeal from the judgment. If a defect in subject matter jurisdiction is found, the judgment will usually be rendered void, having no legal force or binding effect.

## SUBLETTING

*The leasing of part or all of the property held by a tenant, as opposed to a landlord, during a portion of his or her unexpired balance of the term of occupancy.*

A landlord may prohibit a tenant from subletting the leased premises without the landlord's permission by including such a term in the lease. When subletting is permitted, the original tenant becomes, in effect, the landlord of the sublessee. The sublessee pays the rent to the tenant, not the landlord. The original tenant is not, however, relieved of his or her responsibilities under the original lease with the landlord.

A sublease is different from an assignment where a tenant assigns all of his or her rights under a lease to another. The assignee takes the place of the tenant and must deal with the landlord provided the landlord permits it. The original tenant is no longer responsible to the landlord who consents to the termination of their landlord-tenant relationship.

CROSS-REFERENCES

Landlord and Tenant.

## SUBMERGED LANDS

*Soil lying beneath water or on the oceanside of the tideland.*

Minerals found in the soil of tidal and submerged lands belong to the state in its sovereign right. The federal government, however, has full control over all the natural resources discovered

in the soil under the ocean floor beyond the three-mile belt extending from the ordinary low-water mark along the coast.

## SUBMISSION OF CONTROVERSY

*A procedure by which the parties to a particular dispute place any matter of real controversy existing between them before a court for a final determination.*

Some states have enacted laws that authorize parties in a legal dispute to bypass the normal procedures for resolving a civil lawsuit and use a process called submission of controversy. For a court to hear a case under a submission of controversy, the parties must agree to all the facts and present only questions of law for the court to resolve.

A submission of controversy dispenses with the need for the plaintiff to file a summons and complaint and the defendant to file an answer. Instead, the parties must agree to a statement of facts, because the court does not take evidence in such a proceeding. The agreement to the facts must be absolute, without reservations, and unequivocal and must stipulate all of the facts necessary for a complete determination of the controversy. The parties must also describe a CAUSE OF ACTION, explain why the court has jurisdiction over the parties, and propose what relief is being sought from the court.

Once the facts of the controversy are agreed upon, the court cannot dispute them. It must hold a trial or hearing on the questions of law in dispute and then render a decision that determines how the law applies to the stipulated facts. The inability of the court to judge the facts as a jury would distinguishes the submission of controversy from a trial without a jury.

The statutes that grant this right determine the type of controversies that can be submitted. Submission of controversy is not available in cases when the relief cannot be given or when the controversy involves a matter of public policy. A submission can only be granted when the controversy affects the private rights of the parties.

Like any case presented to a court, the controversy must present a QUESTION OF LAW, which must be real, and it must be one that can be followed by an effective judgment. The parties cannot submit abstract or moot questions for the purpose of obtaining the advice of the court. Nor will a court decide a question of law that does not arise from the facts in the case.

Submission of controversy is not used very often because of the difficulty in getting parties to agree to the facts of the case. Without such an agreement, this procedure cannot be used. Some states have repealed their statutes because the process has fallen into disfavor. ARBITRATION and mediation are more commonly used to resolve disputes informally and without filing a lawsuit. Under both of these ALTERNATIVE DISPUTE RESOLUTION mechanisms, the parties may still present their version of the facts, but the process is informal and usually more timely than a submission of controversy.

## SUBMIT

*To offer for determination; commit to the judgment or discretion of another individual or authority.*

To submit evidence means to present or introduce it. Similarly a political issue might be submitted to the voters' judgment.

## SUBORDINATION

*To put in an inferior class or order; to make subject to, or subservient. A legal status that refers to the establishment of priority between various existing liens or encumbrances on the same parcel of property.*

A *subordination agreement* is a contract whereby a creditor agrees that the claims of specified senior creditors must be paid in full before any payment on a subordinate debt can be paid to the subordinate creditor.

A *subordination clause* in a mortgage is a provision that gives a subsequent mortgage priority over one that has been executed at an earlier date.

## SUBORNATION OF PERJURY

*The criminal offense of procuring another to commit perjury, which is the crime of lying, in a material matter, while under oath.*

It is a criminal offense to induce someone to commit perjury. In a majority of states, the offense is defined by statute.

Under federal CRIMINAL LAW (18 U.S.C.A. § 1622), five elements must be proved to convict a person of subornation of perjury. It first must be shown that the defendant made an agreement with a person to testify falsely. There must be proof that perjury has in fact been committed and that the statements of the perjurer were

*A sample subordination agreement*

**Subordination Agreement**

**SUBORDINATION AGREEMENT (FULL)**

FOR VALUABLE CONSIDERATION, receipt of which is acknowledged, _____ (Creditor), the beneficiary of a security interest granted by _____ (Debtor), dated _____(month & day),_____ (year) hereby agrees to fully subordinate to_____ (Senior Creditor) the creditor's security interest against the debtor in the following amount: _____ ($_____).

Signed this _____ day of _____ (month), _____ (year).

Creditor: _____

Agreed to: _____

Debtor: _____

material. The prosecutor must also provide evidence that the perjurer made such statements willfully with knowledge of their falsity. Finally, there must be proof that the procurer had knowledge that the perjurer's statements were false.

When there is a criminal conspiracy to suborn perjury, the conspirators may be prosecuted whether or not perjury has been committed. It is also quite common to join both subornation of perjury and OBSTRUCTION OF JUSTICE counts in a single indictment when they arise from the same activity.

The Federal Sentencing Guidelines recognize two types of circumstances that enhance the criminal sentence for subornation of perjury. An offense causing or threatening to cause physical injury to a person, or property damage, in order to suborn perjury is one circumstance. The other is when subornation of perjury resulted in substantial interference with the administration of justice, which includes a premature or improper termination of a felony investigation, an indictment, a verdict, or any judicial determination based on perjury, false testimony, or other false evidence, or the unnecessary expenditure of substantial government or court resources.

Under 18 U.S.C.A. § 1622, a person convicted of subornation of perjury may be fined $2,000 and sentenced to up to five years in prison.

## SUBPOENA

[Latin, Under penalty.] *A formal document that orders a named individual to appear before a duly authorized body at a fixed time to give testimony.*

A court, GRAND JURY, legislative body, or ADMINISTRATIVE AGENCY uses a subpoena to compel an individual to appear before it at a specified time to give testimony. An individual who receives a subpoena but fails to appear may be charged with CONTEMPT of court and subjected to civil or criminal penalties. In addition, a person who has been served with a subpoena and has failed to appear may be brought to the proceedings by a law enforcement officer who serves a second subpoena, called an instanter.

A subpoena must be served on the individual ordered to appear. In some states a law enforcement officer or process server must personally serve it, whereas other states allow service by mail or with a telephone call. It is most often used to compel witnesses to appear at a civil or criminal trial. A trial attorney may

*A sample subpoena*

**Subpoena in a Criminal Case**

**UNITED STATES DISTRICT COURT**

_____ DISTRICT OF _____

**V.**

**SUBPOENA IN A CRIMINAL CASE**

**Case Number:**

TO:

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

| PLACE | COURTROOM |
|---|---|
| | DATE AND TIME |

☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

| U.S. MAGISTRATE JUDGE OR CLERK OF COURT | DATE |
|---|---|
| (By) Deputy Clerk | |

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

**PROOF OF SERVICE**

| | DATE | PLACE |
|---|---|---|
| RECEIVED BY SERVER | | |
| SERVED | DATE | PLACE |
| SERVED ON (PRINT NAME) | FEES AND MILEAGE TENDERED TO WITNESS ☐ YES ☐ NO AMOUNT $_____ | |
| SERVED BY (PRINT NAME) | TITLE | |

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____ (DATE)

_____ (SIGNATURE OF SERVER)

_____ (ADDRESS OF SERVER)

ADDITIONAL INFORMATION

AO89 (Rev. 7/95) Subpoena in a Criminal Case

receive an assurance from a person who says that she will appear in court on a certain day to testify, but if a subpoena is not issued and served on the witness, she is not legally required to appear.

It is up to the attorneys in a case to request subpoenas, which are routinely issued by the trial court administrator's office. The subpoena must give the name of the legal proceedings, the name of the person who is being ordered to appear, and the time and place of the court hearing.

Legislative investigating committees also issue subpoenas to compel recalcitrant witnesses to appear. Congressional investigations of political scandal, such as the WATERGATE scandals of the Nixon administration, the IRAN-CONTRA scandal of the Reagan administration, and the WHITEWATER scandal of the Clinton administration, rely on subpoenas to obtain testimony.

A subpoena that commands a person to bring certain evidence, usually documents or papers, is called a SUBPOENA DUCES TECUM, from the Latin "under penalty to bring with you." This type of subpoena is often used in a civil lawsuit where one party resists giving the other party documents through the discovery process. If a court is convinced that the document request is legitimate, it will order the production of documents using a subpoena duces tecum.

A party may resist a subpoena duces tecum by refusing to comply and requesting a court hearing. One of the most famous refusals of a subpoena was RICHARD M. NIXON's reluctance to turn over the tape recordings of his White House office conversations to the Watergate special prosecutor. Nixon fought the subpoena all the way to the Supreme Court in UNITED STATES V. NIXON, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). The Court upheld the subpoena, leading Nixon to resign his office a short time later.

## SUBPOENA DUCES TECUM

[Latin, Under penalty to bring with you.] *The judicial process used to command the production before a court of papers, documents, or other tangible items of evidence.*

A subpoena duces tecum is used to compel the production of documents that might be admissible before the court. It cannot be used to require oral testimony and ordinarily cannot be used to compel a witness to reiterate, paraphrase, or affirm the truth of the documents produced.

Although frequently employed to obtain discovery during litigation, a subpoena duces tecum may not be used for a "fishing expedition" to enable a party to gain access to massive amounts of documents as a means of gathering evidence. The subpoena should be sufficiently definite so that a respondent can identify the documents sought without a protracted or extensive search. Moreover, a person ordinarily is required to produce only documents in her possession or under her control and supervision. A subpoena duces tecum may be used to compel the production of the papers and books of a business, however.

A subpoena duces tecum is not limited to parties to a lawsuit but may also be used for others who have relevant documents. In the absence of a valid excuse, an individual served with a subpoena duces tecum must produce the items sought, although a subordinate may comply instead. A subpoena duces tecum may be challenged by a motion to quash, modify, or vacate the subpoena or by a motion for a protective order. The subpoena might not be permitted if alternative methods for obtaining the information sought are available. Determining whether a subpoena duces tecum should be enforced is a discretionary matter within the judgment of the court.

## SUBROGATION

*The substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that he or she who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or* SECURITIES.

There are two types of subrogation: *legal* and *conventional.* Legal subrogation arises by operation of law, whereas conventional subrogation is a result of a contract.

The purpose of subrogation is to compel the ultimate payment of a debt by the party who, in EQUITY and good conscience, should pay it. This subrogation is an equitable device used to avoid injustice.

Legal subrogation takes place as a matter of equity, with or without an agreement. The right of legal subrogation can be either modified or extinguished through a contractual agreement. It cannot be used to displace a contract agreed upon by the parties.

Conventional subrogation arises when one individual satisfies the debt of another as a result of a contractual agreement that provides that any claims or liens that exist as security for the debt be kept alive for the benefit of the party who pays the debt. It is necessary that the agreement be supported by consideration; however, it does not have to be in writing and can be either express or implied.

The facts of each case determine the issue of whether or not subrogation is applicable. In general, the remedy is broad enough to include every instance in which one party, who is not a mere volunteer, pays a debt for which a second party is primarily liable and which, in equity and good conscience, should have been discharged by the second party. Subrogation is a highly favored remedy that the courts are inclined to extend and apply liberally.

The ordinary equity maxims are applicable to subrogation, which is not permitted when there is an adequate legal remedy. The plaintiff must come into court with clean hands, and the person who seeks equity must do equity. The remedy is not available when there are equal or superior equities in other individuals who are in opposition to the party seeking subrogation. The remedy is denied when the person seeking subrogation has interfered with the rights of others, committed FRAUD, or been negligent.

The right to subrogation accrues upon payment of the debt. The subrogee is generally entitled to all the creditor's rights, privileges, priorities, remedies, and judgments and is subject only to whatever limitations and conditions were binding on the creditor. He does not, however, have any more extensive rights than the creditor.

## SUBSCRIBE

*To write underneath; to put a signature at the end of a printed or written instrument.*

A *subscribing witness* is an individual who either sees the execution of a writing or hears its acknowledgment and signs his or her name as a witness upon the request of the executor of the agreement.

In relation to the law of corporations, a subscriber is one who has made an agreement to take a portion of the original issue of corporate stock.

## SUBSCRIPTION

*The act of writing one's name under a written instrument; the affixing of one's signature to any document, whether for the purpose of authenticating or attesting it, of adopting its terms as one's own expressions, or of binding one's self by an engagement which it contains. A written contract by which one engages to take and pay for capital stock of a corporation, or to contribute a sum of money for a designated purpose, either gratuitously, as in the case of subscribing to a charity, or in consideration of an equivalent to be rendered, as a subscription to a periodical, a forthcoming book, a series of entertainments, or the like.*

Subscriptions, such as those made to charities, are also known as pledges and can be either oral or written.

State law determines the enforceability of oral and written subscriptions. Courts have regarded subscriptions that are not supported by some consideration as mere offers that become legally binding when accepted or when the recipient of the promise has acted in reliance on the offers. The promise that forms the subscription need not be to pay money but might be for the performance of other acts, such as to convey land or provide labor for construction.

A subscription contract does not have to be in a particular form, or even in writing, provided the promisor clearly indicates an intention to have such an agreement or contract. Where a state law mandates a writing, the subscriber's name can be signed to the contract by the individual who solicits the contribution for the organization, if that person is authorized to do so by the subscriber.

The offered subscription must be accepted if it is to legally bind the subscriber. It is essential that acceptance occur within a reasonable time, since, as an offer, the subscription can be revoked any time prior to its acceptance. A subscription is also revocable upon notice given by the subscriber if a condition upon which it is based has not been performed. A subscriber may be prevented from claiming revocation in situations where it would be contrary to the interests of justice.

Where the subscriber dies or becomes insane prior to an acceptance of the subscription or the furnishing of consideration for it, the subscription lapses and is legally ineffective.

Courts, as a matter of policy, uphold subscriptions if any consideration can be found. In a situation where the recipient of the subscription has begun work or incurred liability in reliance upon it, such action constitutes a consideration. A benefit to the subscriber, although

it is enjoyed by her in common with others or with the general public, is also deemed sufficient consideration for the promise.

The discovery of any false representations made intentionally for the purpose of deceiving an individual making a charitable subscription justifies the cancellation of the subscription. The FRAUD must bear a relation to the subject matter of the contract. If an individual is told that the subscription will go to finance the development of a recreation center for a student group when, in fact, it will be used to fund an arsenal for a group of political extremists, that individual is entitled to cancel the subscription. A subscription that has for its purpose the accomplishment of ends that are contrary to public policy is invalid.

In situations where the terms of a subscription are vague or ambiguous, the court will interpret its meaning. Factors for evaluation include the subject matter of the agreement, the inducement that influenced the subscription, the circumstances under which it was made, and its language. The contractual rights against a subscriber may be assigned, unless the terms of the subscription expressly proscribe this. Any conditions required by a subscription contract must be satisfied before the contract will be enforced. The conditions of a subscription may include the time of performance or the requirement of a program of matching corporate grants. Where a subscription indicates that any material change in the plan or purpose for which the subscription was made cannot be done without the consent of the subscriber, the subscriber will be released from the obligation if such a change is made without consent.

In the event that an enterprise is abandoned prior to the time that its purpose, which was the basis of the subscription, is accomplished, the courts will not ordinarily enforce the subscription against the subscriber. There is an implied condition at law that an enterprise cannot be abandoned but must be in existence when payment is demanded. In order to relieve the subscriber from his duties, however, it is essential that there be a complete ABANDONMENT or frustration of the project. In cases where the project is partially completed, a cessation of work due to the shortage of funds precipitated by the failure of pledgors to pay the full amount of their pledges is not a complete abandonment relieving the subscriber from liability. This is also true when a project is temporarily suspended because of financial difficulties or because the purpose of the subscription is substantially accomplished, but the enterprise is subsequently stopped.

When the subscriber's liability has become fixed, based upon a fulfillment of all conditions, he must pay the subscription according to its terms. In cases where the promise is to pay as the work progresses, the work need not be completed before payment is due.

A subscription is a type of contract, and, therefore, the remedies for its breach are the same as those for breach of contract and include damages and SPECIFIC PERFORMANCE.

## SUBSIDIARY

*Auxiliary; aiding or supporting in an inferior capacity or position. In the law of corporations, a corporation or company owned by another corporation that controls at least a majority of the shares.*

A subsidiary corporation or company is one in which another, generally larger, corporation, known as the parent corporation, owns all or at least a majority of the shares. As the owner of the subsidiary, the parent corporation may control the activities of the subsidiary. This arrangement differs from a merger, in which a corporation purchases another company and dissolves the purchased company's organizational structure and identity.

Subsidiaries can be formed in different ways and for various reasons. A corporation can form a subsidiary either by purchasing a controlling interest in an existing company or by creating the company itself. When a corporation acquires an existing company, forming a subsidiary can be preferable to a merger because the parent corporation can acquire a controlling interest with a smaller investment than a merger would require. In addition, the approval of the stockholders of the acquired firm is not required as it would be in the case of a merger.

When a company is purchased, the parent corporation may determine that the acquired company's name recognition in the market merits making it a subsidiary rather than merging it with the parent. A subsidiary may also produce goods or services that are completely different from those produced by the parent corporation. In that case it would not make sense to merge the operations.

Corporations that operate in more than one country often find it useful or necessary to create subsidiaries. For example, a multinational corporation may create a subsidiary in a country to obtain favorable tax treatment, or a country may require multinational corporations to establish local subsidiaries in order to do business there.

Corporations also create subsidiaries for the specific purpose of limiting their liability in connection with a risky new business. The parent and subsidiary remain separate legal entities, and the obligations of one are separate from those of the other. Nevertheless, if a subsidiary becomes financially insecure, the parent corporation is often sued by creditors. In some instances courts will hold the parent corporation liable, but generally the separation of corporate identities immunizes the parent corporation from financial responsibility for the subsidiary's liabilities.

One disadvantage of the parent-subsidiary relationship is the possibility of multiple taxation. Another is the duty of the parent corporation to promote the subsidiary's corporate interests, to act in its best interest, and to maintain a separate corporate identity. If the parent fails to meet these requirements, the courts will perceive the subsidiary as merely a business conduit for the parent, and the two corporations will be viewed as one entity for liability purposes.

CROSS-REFERENCES

Mergers and Acquisitions; Parent Company.

## SUBSTANCE

*Essence; the material or necessary component of something.*

A matter of substance, as distinguished from a matter of form, with respect to pleadings, affidavits, indictments, and other legal instruments, entails the essential sufficiency, validity, or merits of the instrument, as opposed to its method or style.

## SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION

The Substance Abuse and Mental Health Services Administration (SAMHSA), an operating division of the HEALTH AND HUMAN SERVICES DEPARTMENT (HHS), was established in 1992 by the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act (Pub. L. No. 102-321). SAMHSA provides national leadership in the prevention and treatment of addictive and mental disorders, through programs and services for individuals who suffer from these disorders. SAMSHA works in partnership with states, communities, and private organizations in order to provide treatment and rehabilitative services to affected persons. In fiscal year 2002 the agency's budget was over three billion dollars. SAMSHA employs about 550 staff members.

Within SAMHSA are several major centers designated to carry out its purposes. The Center for Substance Abuse Prevention (CSAP) develops and implements federal policy for the prevention of alcohol and drug abuse, and analyzes the effect of other federal, state, and local programs also designed to prevent such abuse. CSAP administers and operates grant programs for the prevention of alcohol and drug abuse among specific populations, such as high-risk youth and women with dependent children, and in particular settings, including schools and the workplace. CSAP also supports training for health professionals working in alcohol and drug abuse education and prevention.

The Center for Substance Abuse Treatment (CSAT) provides national leadership in developing and administering programs focusing on the treatment of substance abuse. CSAT works with states, local communities, and HEALTHCARE providers by providing financial assistance to improve and expand programs for treating substance abuse. CSAT, like CSAP, also focuses on specific populations by administering and evaluating grant programs like the Comprehensive Residential Drug Prevention and Treatment Program, which treats women who abuse substances, and their children, and helps to train healthcare providers working in substance abuse prevention.

The Center for Mental Health Services (CMHS) promotes, on the federal level, the prevention and treatment of mental disorders, by identifying national mental health goals and developing strategies to meet them. CMHS works to improve the quality of programs that serve both the individuals suffering from these disorders and their families. Like other component centers carrying out the goals of SAMHSA, CMHS administers grants and programs that help states and local governments provide mental healthcare and services. CMHS also works with the alcohol, drug abuse, and mental health institutes of the National Institutes of Health,

the principal biomedical research agency of the federal government, in researching the effective delivery of mental health services.

The Office of Management, Planning, and Communications (OMPC) is responsible for the financial and administrative management of SAMHSA components, including their personnel management and computer support functions. OMPC also monitors and analyzes pending legislation affecting SAMHSA components and acts as a liaison between SAMHSA and congressional committees. In addition, OMPC oversees the public affairs activities of SAMHSA, including public relations and interaction with the media to facilitate coverage of SAMHSA programs and objectives. Finally, OMPC collects and compiles alcohol and drug abuse prevention and treatment literature and supports the CSAP National Clearinghouse for Alcohol and Drug Information. The clearinghouse then disseminates its materials to state and local governments, healthcare and drug treatment programs, healthcare professionals, and the general public.

Over the years SAMSHA has identified new topics and activities that build on prevention goals and systems of care for persons dealing with mental illness, substance use or abuse. SAMSHA research has provided the basis for numerous initiatives regarding community-based prevention, identification, and treatment programs. Despite these efforts SAMSHA issued a press release in January 2003 indicating that prescription drug abuse by teenagers and young adults was continuing to increase.

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CROSS-REFERENCES

Addict; Drugs and Narcotics.

## SUBSTANTIAL

*Of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable.*

The right to FREEDOM OF SPEECH, for example, is a substantial right.

## SUBSTANTIATE

*To establish the existence or truth of a particular fact through the use of competent evidence; to verify.*

For example, an EYEWITNESS might be called by a party to a lawsuit to substantiate that party's testimony.

## SUBSTANTIVE DUE PROCESS

*The substantive limitations placed on the content or subject matter of state and federal laws by the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.*

In general, substantive due process prohibits the government from infringing on fundamental constitutional liberties. By contrast, procedural due process refers to the procedural limitations placed on the manner in which a law is administered, applied, or enforced. Thus, procedural due process prohibits the government from arbitrarily depriving individuals of legally protected interests without first giving them notice and the opportunity to be heard.

The Due Process Clause provides that no person shall be "deprived of life, liberty, or property without due process of law." When courts face questions concerning procedural due process, the controlling word in this clause is *process.* Courts must determine how much process is due in a particular hearing to satisfy the fairness requirements of the Constitution. When courts face questions concerning substantive due process, the controlling issue is *liberty.* Courts must determine the nature and the scope of the liberty protected by the Constitution before affording litigants a particular freedom.

### Historical Development

The concept of DUE PROCESS has its roots in early ENGLISH LAW. In 1215 MAGNA CHARTA provided that no freeman should be imprisoned, disseised, outlawed, exiled, or destroyed, unless by the "law of the land." As early as 1354 the words "due process of law" were used to explain the protections set forth in Magna Charta. By the end of the fourteenth century, "law of the land" and "due process of law" were considered virtually synonymous in England. According to the seventeenth-century English jurist SIR EDWARD COKE, "due process of law"

and "law of the land" possessed both substantive and procedural qualities. Substantively, Coke believed that the liberty to pursue a livelihood, the right to purchase goods, and the right to be free from anti-competitive practices were all protected by the "law of the land" and "due process of law." Procedurally, Coke associated these terms with indictment by GRAND JURY and trial by petit jury.

When the Founding Fathers drafted the FIFTH AMENDMENT, it was unclear whether the Due Process Clause possessed any substantive qualities. Some prominent Americans, including ALEXANDER HAMILTON, understood the Due Process Clause to provide only procedural safeguards. Several states, however, followed the English practice of equating due process with the substantive protections offered by statutes and the COMMON LAW. This divergent understanding of due process continues today. During the first 60 years after the ratification of the Constitution, the Due Process Clause was confined to a procedural meaning. Over the next 140 years, however, due process of law took on a pervasive substantive meaning.

The year 1856 marked the introduction of substantive due process in U.S. JURISPRUDENCE. In that year the U.S. Supreme Court faced a constitutional challenge to the MISSOURI COMPROMISE OF 1820, a federal law that abolished SLAVERY in the territories. Under Missouri law, slaves who entered a free territory remained free for the rest of their lives. When a slave named Dred Scott returned to Missouri after visiting the free territory in what is now Minnesota, he sued for emancipation. Denying his claim, in DRED SCOTT V. SANDFORD, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1856), the Supreme Court ruled that the Due Process Clause protects the liberty of certain persons to own African American slaves. Because the Missouri Compromise deprived slave owners of this liberty in the territories, the Supreme Court declared it invalid.

After *Dred Scott* the doctrine of substantive due process lay dormant for nearly half a century. In LOCHNER V. NEW YORK, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), the Supreme Court reinvigorated the doctrine by invalidating a state law that regulated the number of hours employees could work each week in the baking industry. Maximum hour laws, the Court ruled, interfere with the liberty of contract guaranteed by the Due Process Clause. The Court said that the liberty of contract allows individuals to determine the terms and conditions of their employment, including the number of hours they work during a given period.

Over the next 32 years, the Supreme Court relied on *Lochner* in striking down several laws that interfered with the liberty of contract. Most of these laws were enacted pursuant to the inherent POLICE POWERS of state and federal governments. Police powers give lawmakers the authority to regulate health, safety, and welfare. For example, in *Adkins v. Children's Hospital,* 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923), the Supreme Court invalidated a MINIMUM WAGE law that had been enacted by the federal government pursuant to its police powers. Minimum wage laws, the Court said, violate the liberty of contract guaranteed to workers by the Due Process Clause.

By 1936 the doctrine of substantive due process had grown increasingly unpopular. The Court had invoked the doctrine to strike down a series of federal laws enacted as part of President FRANKLIN D. ROOSEVELT'S NEW DEAL, an economic stimulus program aimed at ameliorating the worst conditions of the Great Depression. On February 5, 1937, Roosevelt announced his court-packing plan, a proposal designed to enlarge the Supreme Court by enough justices to give the EXECUTIVE BRANCH control over the federal judiciary. One month later the Supreme Court released its decision in WEST COAST HOTEL CO. V. PARRISH, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937).

In *West Coast Hotel* the Supreme Court upheld a Washington State minimum wage law over due process objections. Although the Court did not completely abandon the doctrine of substantive due process, it circumscribed its application. Because liberty of contract is not specifically mentioned in any provision of the federal Constitution, the Court said, this liberty must yield to competing government interests that are pursued through reasonable means. *West Coast Hotel* precipitated the onset of modern substantive due process analysis.

### Modern Analysis

Since 1937 the Court has employed a two-tiered analysis of substantive due process claims. Under the first tier, legislation concerning economic affairs, employment relations, and other business matters is subject to minimal judicial scrutiny, meaning that a particular law will be overturned only if it serves no rational govern-

ment purpose. Under the second tier, legislation concerning fundamental liberties is subject to heightened judicial scrutiny, meaning that a law will be invalidated unless it is narrowly tailored to serve a significant government purpose.

The Supreme Court has identified two distinct categories of fundamental liberties. The first category includes most of the liberties expressly enumerated in the BILL OF RIGHTS. Through a process known as "selective incorporation," the Supreme Court has interpreted the Due Process Clause of the FOURTEENTH AMENDMENT to bar states from denying their residents the most important freedoms guaranteed in the first ten amendments to the federal Constitution. Only the SECOND AMENDMENT right to bear arms, the THIRD AMENDMENT right against involuntary quartering of soldiers, and the Fifth Amendment right to be indicted by a grand jury have not been made applicable to the states. Because these rights remain inapplicable to state governments, the Supreme Court is said to have "selectively incorporated" the Bill of Rights into the Due Process Clause of the Fourteenth Amendment.

The second category of fundamental liberties includes those liberties that are not expressly enumerated in the Bill of Rights but which are nonetheless deemed essential to the concepts of freedom and equality in a democratic society. These unenumerated liberties are derived from Supreme Court precedents, common law, moral philosophy, and deeply rooted traditions of U.S. LEGAL HISTORY. The word *liberty* cannot be defined by a definitive list of rights, the Supreme Court has stressed. Instead, it must be viewed as a rational continuum of freedom through which every facet of human behavior is safeguarded from ARBITRARY impositions and purposeless restraints. In this light, the Supreme Court has observed, the Due Process Clause protects abstract liberty interests, including the right to personal autonomy, bodily integrity, self-dignity, and self-determination.

These interests often are grouped to form a general right to privacy, which was first recognized in GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), where the Supreme Court struck down a state statute forbidding married adults from using BIRTH CONTROL on the ground that the law violated the sanctity of the marital relationship. In *Griswold* the Supreme Court held that the First, Fourth, Fifth, and Ninth Amendments create a PENUMBRA of privacy, which serves to insulate certain behavior from governmental coercion or intrusion. According to the Court, this penumbra of privacy, though not expressly mentioned in the Bill of Rights, must be protected to establish a buffer zone or breathing space for those freedoms that are constitutionally enumerated.

Seven years later, in *Eisenstadt v. Baird,* 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972), the Supreme Court struck down a Massachusetts statute that made illegal the distribution of contraceptives to unmarried persons. In striking down this law, the Supreme Court enunciated a broader view of privacy, stating that all persons, married or single, enjoy the liberty to make certain intimate decisions free from government restraint, including the decision of whether to bear or beget a child. *Eisenstadt* foreshadowed the decision in ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), where the Supreme Court ruled that the Due Process Clause guarantees women the right to have an ABORTION during the first trimester of pregnancy without state interference. *Roe* subsequently was interpreted to prevent state and federal governments from passing laws that unduly burden a woman's right to terminate her pregnancy (WEBSTER V. REPRODUCTIVE HEALTH SERVICES, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 [1989]).

The liberty interest protected by the Due Process Clause places other substantive limitations on legislation regulating intimate decisions. For example, the Supreme Court has recognized a due process right of parents to raise their children as they see fit, including the right to educate their children in private schools (*Pierce v. Society of the Sisters,* 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 [1925]). Parents may not be compelled by the government to educate their children at public schools without violating principles of substantive due process. The Supreme Court also has ruled that members of extended families, such as grandparents and grandchildren, enjoy a due process right to live under the same roof, despite housing ordinances that limit occupation of particular dwellings to immediate relatives (*Moore v. City of East Cleveland,* 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 [1977]).

During the 1990s the Supreme Court was asked to recognize a general right to die under the doctrine of substantive due process. Although the Court stopped short of establish-

ing such a far-reaching right, certain patients may exercise a constitutional liberty to hasten their deaths under a narrow set of circumstances. In *Cruzan v. Missouri Department of Health,* 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990), the Supreme Court ruled that the Due Process Clause guarantees the right of competent adults to make advanced directives for the withdrawal of life-sustaining measures should they become incapacitated by a disability that leaves them in a persistent vegetative state. Once it has been established by clear and convincing evidence that a mentally incompetent and persistently vegetative patient made such a prior directive, a spouse, parent, or other appropriate guardian may seek to terminate any form of artificial hydration or nutrition.

The U.S. Court of Appeals for the Ninth Circuit cited *Cruzan* in support of its decision establishing the right of competent, but terminally ill, patients to hasten their deaths by refusing medical treatment when the final stages of life are tortured by pain and indignity (*Compassion in Dying v. Washington,* 79 F.3d 790 [1996]). In WASHINGTON V. GLUCKSBERG, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997), however, the Supreme Court reversed this decision, holding that there is no due process right to assisted suicide.

The liberty interest recognized by the doctrine of substantive due process permits individuals to lead their lives free from unreasonable and arbitrary governmental impositions. Nevertheless, this liberty interest does not require the absence of all governmental restraint. Economic regulations will be upheld under the Due Process Clause so long as they serve a rational purpose, while noneconomic regulations normally will be sustained if they do not impinge on a fundamental liberty and otherwise are reasonable.

The U.S. Supreme Court continues to revisit the concept of substantive due process. In 2003 the Supreme Court was asked to review the constitutionality of a Texas statute criminalizing homosexual SODOMY. The statute made it a misdemeanor for a person to engage in "deviate sexual intercourse" with another individual of the same sex, but did not prohibit such conduct when undertaken with a person of the opposite sex. The defendant, an adult male, was arrested for violating the statute by engaging in consensual homosexual relations in the privacy of his home. The Court found that Texas Penal Code section 21.06 violated substantive due process by creating this double standard governing the legality of oral and anal sex between heterosexual and homosexual partners. LAWRENCE V. TEXAS, 539 U.S.___, 123 S.Ct. 2472, 156 L.Ed.2d 508 (U.S., Jun 26, 2003). Justice ANTHONY KENNEDY wrote the 6–3 decision.

Overruling a 17-year-old precedent, Kennedy said that history and tradition are the starting point, but not in all cases the ending point, of substantive due process inquiry. In *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), which rejected a claim advocating recognition for an almost identical substantive due process liberty interest, Kennedy maintained that the Court had failed to appreciate the nature and scope of the liberty interest at stake. "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward [in that case], just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse," Justice Kennedy explained. Although "[t]he laws involved in *Bowers* and here are . . . statutes that purport to do no more than prohibit a particular sexual act. . . . [t]heir penalties and purposes . . . have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home," the Court continued. The statutes in question "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."

The deficiencies in *Bowers* became even more apparent in the years following its announcement, Justice Kennedy observed. The 25 states with laws prohibiting sodomy in *Bowers* had been reduced to 13 by 2003, and four of those 13 states applied their laws only against homosexual conduct. But even in the states where homosexual sodomy is proscribed, Kennedy emphasized, there is a pattern of nonenforcement with respect to consenting adults acting in private. Thus, the Court concluded that homosexuals enjoy a constitutionally protected liberty under the Due Process Clause and that liberty gives them a right to engage in private consensual sexual activity without intervention of government.

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**CROSS-REFERENCES**

Death and Dying; Due Process; Incorporation Doctrine; Labor Law; *Quinlan, In re*; Rational Basis Test; Strict Scrutiny; Unenumerated Rights.

## SUBSTANTIVE LAW

*The part of the law that creates, defines, and regulates rights, including, for example, the law of contracts,* TORTS*, wills, and real property; the essential substance of rights under law.*

Substantive law and procedural law are the two main categories within the law. Substantive law refers to the body of rules that determine the rights and obligations of individuals and collective bodies. Procedural law is the body of legal rules that govern the process for determining the rights of parties.

Substantive law refers to all categories of public and private law, including the law of contracts, real property, torts, and CRIMINAL LAW. For example, criminal law defines certain behavior as illegal and lists the elements the government must prove to convict a person of a crime. In contrast, the rights of an accused person that are guaranteed by the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution are part of a body of criminal procedural law.

U.S. substantive law comes from the COMMON LAW and from legislative statutes. Until the twentieth century, most substantive law was derived from principles found in judicial decisions. The common-law tradition built upon prior decisions and applied legal precedents to cases with similar fact situations. This tradition was essentially conservative, as the substance of law in a particular area changed little over time.

Substantive law has increased in volume and changed rapidly in the twentieth century as Congress and state legislatures have enacted statutes that displace many common-law principles. In addition, the National Conference of Commissioners on Uniform State Laws and the American Law Institute have proposed numerous model codes and laws for states to adopt. For example, these two groups drafted the UNIFORM COMMERCIAL CODE (UCC), which governs commercial transactions. The UCC has been adopted in whole or substantially by all states, replacing the common law and divergent state laws as the authoritative source of substantive COMMERCIAL LAW.

**CROSS-REFERENCES**

Model Acts; Uniform Acts.

## SUBSTITUTED SERVICE

*Service of process upon a defendant in any manner, authorized by statute or rule, other than* PERSONAL SERVICE *within the jurisdiction; as by publication, by mailing a copy to his or her last known address, or by personal service in another state.*

## SUCCESSION

*The transfer of title to property under the law of* DESCENT AND DISTRIBUTION. *The transfer of legal or official powers from an individual who formerly held them to another who undertakes current responsibilities to execute those powers.*

## SUCCESSION OF STATES

Succession occurs when one state ceases to exist or loses control over part of its territory, and another state comes into existence or assumes control over the territory lost by the first state. A central concern in this instance is whether the international obligations of the former state are taken over by the succeeding state. Changes in the form of government of one state, such as the replacement of a monarchy by a democratic form of government, do not modify or terminate the obligations incurred by the previous government.

When the state ceases to exist, however, the treaties it concluded generally are terminated and those of the successor state apply to the territory. These include political treaties like alliances, which depend on the existence of the state that concluded them. But certain obliga-

tions, such as agreements concerning boundaries or other matters of local significance, carry over to the successor state. More difficult to determine is the continuing legality of treaties granting concessions or contract rights. Scholarly opinion has diverged on this aspect of succession, and state practice has likewise divided. Consequently each case must be studied on its merits to determine whether the rights and duties under the contract or concession are such that the successor state is bound by the obligations of the previous state.

## SUE

*To initiate a lawsuit or continue a legal proceeding for the recovery of a right; to prosecute, assert a legal claim, or bring action against a particular party.*

## SUFFER

*To admit, allow, or permit.*

The term *suffer* is used to convey the idea of ACQUIESCENCE, passivity, indifference, or abstention from preventive action, as opposed to the taking of an affirmative step.

## SUFFRAGE

*The right to vote at public elections.*

## SUI GENERIS

*[*Latin, Of its own kind or class.*] That which is the only one of its kind.*

## SUI JURIS

*[*Latin, Of his or her own right.*]*

*Possessing full social and* CIVIL RIGHTS*; not under any legal disability, or the power of another, or guardianship. Having the capacity to manage one's own affairs; not under legal disability to act for one's self.*

## SUICIDE

*The deliberate taking of one's own life.*

Under COMMON LAW, suicide, or the intentional taking of one's own life, was a felony that was punished by FORFEITURE of all the goods and chattels of the offender. Under modern U.S. law, suicide is no longer a crime. Some states, however, classify attempted suicide as a criminal act, but prosecutions are rare, especially when the offender is terminally ill. Instead, some jurisdictions require a person who attempts suicide to undergo temporary hospitalization and psychological observation. A person who causes the death of an innocent bystander or would-be rescuer while in the process of attempting suicide may be guilty of murder or MANSLAUGHTER.

**Suicide Rate in the United States, 1990 to 2000**

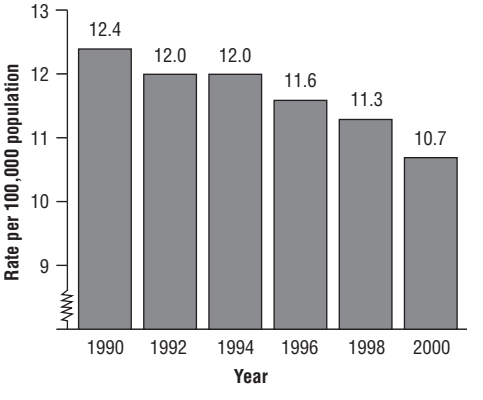


SOURCE: American Association of Suicidology, *Official Final Data on Suicide in the United States*, 2000.

More problematic is the situation in which someone helps another to commit suicide. Aiding or abetting a suicide or an attempted suicide is a crime in all states, but prosecutions are rare. Since the 1980s the question of whether physician-assisted suicide should be permitted for persons with terminal illnesses has been the subject of much debate, but as yet this issue has not been resolved.

The debate over physician-assisted suicide concerns persons with debilitating and painful terminal illnesses. Under current laws a doctor who assists a person's suicide could be charged with aiding and abetting suicide. Opponents of decriminalizing assisted suicide argue that decriminalization would lead to a "slippery slope" that would eventually result in doctors being allowed to assist persons who are not terminally ill to commit suicide.

The debate on physician-assisted suicide intensified after 1990 when Dr. JACK KEVORKIAN, a retired Michigan pathologist, began to attend many suicides. Kevorkian admitted to obtaining carbon monoxide and instructing persons who suffered from terminal or degenerative diseases

on how to administer the gas so they would die. Despite the efforts of Michigan legislators and prosecutors to convict Kevorkian of murder, the pathologist, who was dubbed "Doctor Death," successfully fought the charges. Three murder charges were dismissed by Michigan courts, and in 1994 Kevorkian was acquitted of violating Michigan's assisted suicide law (Mich. Comp. Laws § 752.1021 et seq.). Despite Kevorkian's acquittals other assisted suicide advocates believe his methods have actually hurt the cause. In 1997 the U.S. Supreme Court held that neither the DUE PROCESS CLAUSE (WASHINGTON V. GLUCKSBERG, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772) nor the EQUAL PROTECTION CLAUSE (*Vacco v. Quill,* 521 U.S. 743, 117 S. Ct. 2293, 138 L. Ed. 2d 834) of the FOURTEENTH AMENDMENT includes a right to assisted suicide.

After four acquittals, Kevorkian was convicted in March 1999 of second-degree murder and delivery of a controlled substance by a jury in Pontiac, Michigan. Kevorkian administered a lethal injection in September 1998 to Thomas Youk, a 52-year-old man who suffered from amyotrophic lateral sclerosis, or Lou Gehrig's disease, a fatal neurological disorder that slowly disables its victims. Kevorkian performed the procedure on the CBS television program *60 Minutes* amid great controversy.

At the time of his trial, Kevorkian represented himself, insisting that only he could explain to the jury that he did not intend to kill Youk but to end his suffering. The jury nevertheless reached a guilty verdict. Although he could have been sentenced to life in prison, he was sentenced to ten to 25 years in prison. He sought unsuccessfully for three years to appeal his conviction.

Kevorkian was not entirely alone in his crusade to legalize assisted suicide. In 1994, Oregon voters passed the Oregon Death with Dignity Act (DWDA), which allows physicians to prescribe lethal medication to Oregon residents who request it. The statute requires that the patient must be 18 years or older, must be able to make and communicate HEALTHCARE decisions, and have been diagnosed with a terminal illness that likely will result in death within six months. While physicians may make the prescription, patients must self-administer it, since the DWDA specifically prohibits "lethal injection, mercy killing, or active euthanasia." Oregon is the only jurisdiction in the world that has legalized physician-assisted suicide.

The Oregon legislature enacted the DWDA after residents voted in favor of the law twice, 51 percent in favor in 1994, then 60 percent in 1997. The law originally went into effect in 1994 but immediately was suspended by court injunctions pending legal challenges. After the Supreme Court rendered its decisions in *Glucksberg* and *Vacco*, the Ninth Circuit Court of Appeals lifted the INJUNCTION. The Oregon law went into effect on October 27, 1997.

Between 1998 and 2001, between 70 and 96 patients—the exact numbers are disputed—committed suicide under the act. In November 2001, U.S. attorney general JOHN ASHCROFT issued a directive stating that physicians who prescribe lethal doses of drugs to end the lives of terminally ill patients would be subjected to criminal charges and have their medical licenses revoked or suspended. Ashcroft issued this directive pursuant to the Controlled Substances Act and reversed the position previously taken by former attorney general JANET RENO, who determined that the Oregon statute was outside the scope of the Controlled Substances Act. Members of Congress, including Senator Orrin Hatch (R-Utah) and Representative Henry Hyde (R-IL), also unsuccessfully sought to pass federal legislation that would have revoked the registration of Oregon physicians who participated in assisted suicide efforts.

In response to Ashcroft's order, the state of Oregon brought suit against the attorney general, seeking a permanent injunction to prevent him and the U.S. JUSTICE DEPARTMENT from enforcing the directive. In April 2002, U.S. District Court Judge Robert E. Jones issued the injunction and also criticized Ashcroft for his handling of the directive. According to Jones, the Controlled Substances Act was not intended to override a state's decision concerning what constitutes legitimate medical practice, at least in the absence of federal law prohibiting such a practice. The judge also found that Congress never intended, through the Controlled Substances Act or other federal law, to grant blanket authority to the attorney general or the Drug Enforcement Agency to define what constitutes the legitimate practice of medicine.

The DWDA has strict requirements that are designed to prevent abuse of the act. Patients must make two verbal requests for lethal medication separated by at least 15 days, plus a written request. Two physicians must inde-

pendently confirm that the patient has a terminal illness likely to result in death within six months and that the patient is capable to make and communicate healthcare decisions. If either physician believes the patient suffers from depression or any other psychiatric disorder, he or she must refer the patient for counseling. The prescribing physician must request, but not require, the patient to inform his or her next of kin of the suicide decision. The prescribing physician also must inform the patient of alternatives to suicide, including hospice care and pain control, and give the patient the opportunity to change his or her mind after the 15 day waiting period.

The strict DWDA requirements have not silenced its critics. Opponents in the medical community, including Physicians for Compassionate Care, believe that physician-assisted suicide is contrary to the profession's purpose—to promote health. Religious opponents, including the Roman Catholic Church, Mormons, and Christian fundamentalists, feel that suicide of any kind devalues life. Not Dead Yet, an organization of DISABLED PERSONS, believes that states should instead enact legislation to improve access to health and hospice care, and the overall quality of life, for terminally ill patients. Many opponents are concerned that poor or uneducated patients will be pressured by family members or the healthcare insurance industry to chose death over life with its medically expensive consequences.

To the supporters of physician-assisted suicide, the issue is a matter of personal autonomy and control. The Hemlock Society, an organization that supports physician-assisted suicide, claims that terminally ill patients must be allowed to end their lives voluntarily rather than suffer through the painful and disabling effects of a terminal illness.

CROSS-REFERENCES

Death and Dying; Euthanasia; Patients' Rights; Physicians and Surgeons.

## SUIT

*A generic term, of comprehensive signification, referring to any proceeding by one person or persons against another or others in a court of law in which the plaintiff pursues the remedy that the law affords for the redress of an injury or the enforcement of a right, whether at law or in* EQUITY.

## SUMMARY

*As a noun, an abridgment; brief; compendium; digest; also a short application to a court or judge, without the formality of a full proceeding.*

*As an adjective, short; concise; immediate; peremptory; off-hand; without a jury; provisional; statutory. The term as used in connection with legal proceedings means a short, concise, and immediate proceeding.*

A SUMMARY JUDGMENT is a final decision in a civil action that does not involve lengthy presentations of evidence. It totally circumvents the need for trial because there is no genuine issue of fact concerning specified questions in the lawsuit that must be decided. In such an action, the party who believes that she is entitled to prevail as a MATTER OF LAW makes a motion for summary judgment. In deciding such a motion, the court considers the entire record of the case and, if the evidence warrants it, can even grant a summary judgment to the party who did not ask for it. Summary judgment is *governed* in federal courts by the Federal Rules of Civil Procedure and in state courts by state codes of civil procedure.

## SUMMARY JUDGMENT

*A procedural device used during civil litigation to promptly and expeditiously dispose of a case without a trial. It is used when there is no dispute as to the material facts of the case and a party is entitled to judgment as a* MATTER OF LAW.

Any party may move for summary judgment; it is not uncommon for both parties to seek it. A judge may also determine on her own initiative that summary judgment is appropriate. Unlike with pretrial motions to dismiss, information such as affidavits, interrogatories, depositions, and admissions may be considered on a motion for summary judgment. Any evidence that would be admissible at trial under the RULES OF EVIDENCE may support a motion for summary judgment. Usually a court will hold oral arguments on a summary judgment motion, although it may decide the motion on the parties' briefs and supporting documentation alone.

The purpose of summary judgment is to avoid unnecessary trials. It may also simplify a trial, as when partial summary judgment dispenses with certain issues or claims. For example, a court might grant partial summary judgment in a personal injury case on the issue

of liability. A trial would still be necessary to determine the amount of damages.

Two criteria must be met before summary judgment may be properly granted: (1) there must be no genuine issues of material fact, and (2) the MOVANT must be entitled to judgment as a matter of law. A genuine issue implies that certain facts are disputed. Usually a party opposing summary judgment must introduce evidence that contradicts the moving party's version of the facts. Moreover, the facts in dispute must be central to the case; irrelevant or minor factual disputes will not defeat a motion for summary judgment. Finally, the law as applied to the undisputed facts of the case must mandate judgment for the moving party. Summary judgment does not mean that a judge decides which side would prevail at trial, nor does a judge determine the credibility of witnesses. Rather, it is used when no factual questions exist for a judge or jury to decide.

The moving party has the initial burden to show that summary judgment is proper even if the moving party would not have the BURDEN OF PROOF at trial. The court generally examines the evidence presented with the motion in the light most favorable to the opposing party. Where the opposing party will bear the burden of proof at trial, the moving party may obtain summary judgment by showing that the opposing party has no evidence or that its evidence is insufficient to meet its burden at trial.

Jurisdictions vary in their requirements for opposing a summary judgment motion. Federal rule of civil procedure 56 governs the applicability of summary judgment in federal proceedings, and each state has its own rules. In some states it is sufficient if the party opposing the motion merely calls the court's attention to inconsistencies in the pleadings and the movant's evidence without introducing further evidence. This approach rarely results in a court's granting summary judgment. On the other hand, other jurisdictions, including federal courts, do not permit a party opposing summary judgment to rest on the pleadings alone. Once the movant has met the initial burden of showing the absence of a genuine issue of material fact, the burden shifts to the opposing party to introduce evidence to contradict the movant's allegations.

## SUMMARY PROCEEDINGS

*An alternative form of litigation for the prompt disposition of legal actions.*

Legal proceedings are regarded as summary when they are shorter and simpler than the ordinary steps in a suit. Summary proceedings are ordinarily available for cases that require prompt action and generally involve a small number of clearcut issues.

## SUMMARY PROCESS

*A legal procedure used for enforcing a right that takes effect faster and more efficiently than ordinary methods. The legal papers—a court order, for example—used to achieve an expeditious resolution of the controversy.*

Because summary process deprives a defendant of all the time and legal defenses usually available, a plaintiff may invoke it only when specifically permitted by law. For example, some states provide for a special procedure for evicting a tenant without the normal delays of a lawsuit, and some states allow summary process for resolving incidental issues that arise between the parties during the pendency of a lawsuit.

## SUMMONS

*The paper that tells a defendant that he or she is being sued and asserts the power of the court to hear and determine the case. A form of legal process that commands the defendant to appear before the court on a specific day and to answer the complaint made by the plaintiff.*

The summons is the document that officially starts a lawsuit. It must be in a form prescribed by the law governing procedure in the court involved, and it must be properly served on, or delivered to, the defendant. If the prescribed formalities are not observed, the court lacks authority to hear the dispute.

In the federal district courts, the summons is prepared by the attorney for the plaintiff and given to the clerk of the court where the case will be heard. When the plaintiff's complaint, setting out his claim, is filed with the court, the clerk signs the summons and gives it and a copy of the complaint to a U.S. marshal or to someone else appointed to serve the papers. Once the summons and complaint are served on the defendant, she must respond to them within twenty days or whatever other time the court allows.

Some states follow this same procedure, but other states allow service of the summons and complaint by delivery directly to the defendant. In those states, the lawsuit is considered begun as soon as the defendant receives the papers,

*A sample summons*

**Summons**

**United States District Court**
**DISTRICT OF**

SUMMONS IN A CIVIL CASE

_____ V. _____ CASE NUMBER: _____

TO: (*Name and address of defendant*)

**YOU ARE HEREBY SUMMONED** and required to serve upon PLAINTIFF'S ATTORNEY (*name and address*)

as answer to the complaint which is herewith served upon you, within _____ days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

_____ _____
CLERK DATE

_____
(BY) DEPUTY CLERK

**RETURN OF SERVICE**

_____
DATE
Service of the Summons and Complaint was made by me[1]

_____ _____
NAME OF SERVER (*Print*) TITLE

*Check one box below to indicate appropriate method of service*

☐ Served personally upon the defendant. Place where served: _____

☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left: _____

☐ Returned unexecuted: _____

☐ Other (specify): _____

**STATEMENT OF SERVICE FEES**

TRAVEL SERVICES TOTAL

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ _____
Date Signature of Server

_____
Address of Server

[1]As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure

**AO 440 (Rev. 10/93) Summons in a Civil Action**

even though nothing has yet been filed with a court. Actions commenced in this way are sometimes called "hip pocket" suits.

CROSS-REFERENCES

Service of Process.

## SUMNER, CHARLES

Charles Sumner served as U.S. senator from Massachusetts for 23 years starting in 1851. His career in the Senate was a turbulent one, marked by much controversy.

Sumner was born January 6, 1811, in Boston, Massachusetts. Sumner graduated from Harvard University with a bachelor of arts degree in 1830 and a bachelor of laws degree in 1833.

After his ADMISSION TO THE BAR in 1834, Sumner traveled through Europe from 1837 to 1840 to analyze foreign judicial systems. When he returned to the United States, he became interested in reform issues and emerged as a reform leader and an abolitionist. He was instrumental in the development of the Free-Soil Party in 1848 and endorsed MARTIN VAN BUREN, the candidate of that party, in the presidential election of 1848.

Sumner staunchly opposed SLAVERY and advocated the revocation of the FUGITIVE SLAVE ACT OF 1850 (9 Stat. 462). He vehemently attacked the Kansas-Nebraska Bill of 1854 (10 Stat. 277), which allowed residents of new territories to determine the slavery issue for their areas. In 1856, in a speech known as "The Crime Against Kansas," Sumner attacked STEPHEN A. DOUGLAS, the originator of the bill, and South Carolina senator Andrew Pickens Butler, who strongly supported slavery. After the scathing oration, Sumner was beaten with a cane by Representative Preston Smith Brooks, who was related to Senator Butler. The injuries Sumner sustained prevented him from actively participating in senatorial affairs for the next three years.

*Charles Sumner.* NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

In 1861 Sumner became the presiding officer of the Senate Committee on Foreign Relations. He held that position until 1871, when his radical behavior resulted in his removal from that office.

During the Reconstruction period, Sumner was a member of the radical Republican faction. He opposed President Andrew Johnson's conservative policy toward the South and advocated a policy that would allow freed men to own land that was previously a part of their owner's estates. Sumner also believed that the state legislatures should control the school system, and

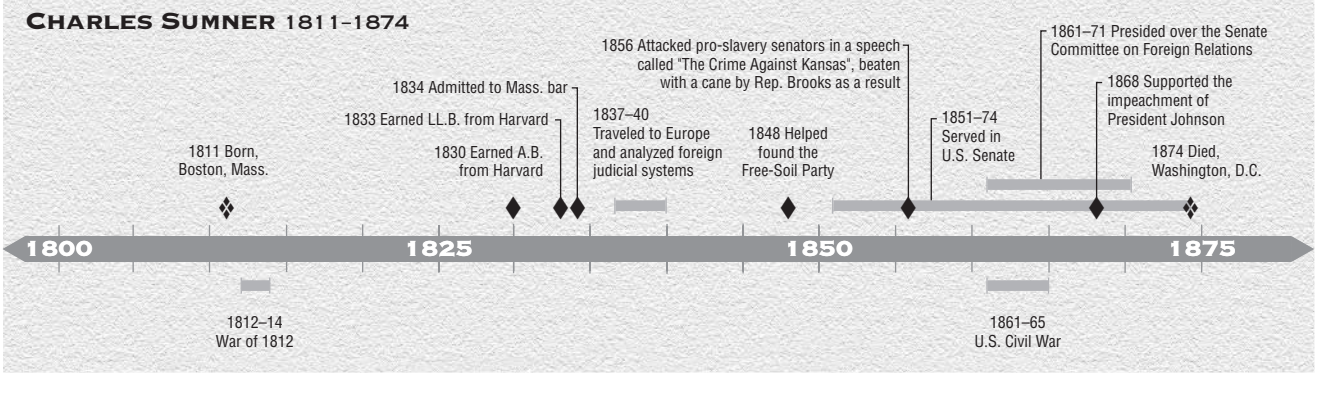

that all races should be allowed to attend public schools. Sumner and Johnson were often at odds over their conflicting policies, and Sumner supported the IMPEACHMENT of the president in 1868.

Sumner did not fare any better with the new administration of President ULYSSES S. GRANT. He opposed Grant's policy to annex Santo Domingo and demanded large reparations from Great Britain because that country had aided the Confederacy during the Civil War by supplying ships. Secretary of State Hamilton Fish spoke against Sumner's policy toward the British, saying that it interfered with current relations with that country. In 1871 Sumner was asked to leave his post as chairman of the Foreign Relations Committee, but he remained in the Senate until his death March 11, 1874, in Washington, D.C.

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CROSS-REFERENCES

Abolition; Kansas-Nebraska Act.

## SUMPTUARY LAWS

*Rules made for the purpose of restraining luxury or extravagance.*

Sumptuary laws are designed to regulate habits, especially on moral or religious grounds. They are particularly directed against inordinate expenditures on apparel, drink, food, and luxury items.

These laws existed in Rome and were enacted in a variety of forms in England during the Middle Ages to regulate the ornateness of dress and to impose dietary restrictions. Sumptuary laws varied according to classes, with peasants being subjected to a different set of rules than the gentry. The primary purpose of the laws was to distinguish the different classes of people, and often, a person's social class could be determined by something as simple as the style or length of his or her coat.

Today sumptuary laws are ecclesiastical in nature and not part of the U.S. legal system.

## SUNDAY CLOSING LAWS

See BLUE LAWS.

## SUNSET PROVISION

*A statutory provision providing that a particular agency, benefit, or law will expire on a particular date, unless it is reauthorized by the legislature.*

Federal and state governments grew dramatically in the 1950s and 1960s. Many EXECUTIVE BRANCH administrative agencies were established to oversee government programs. The escalation of government budgets and the perception that government bureaucracy was not accountable led Congress and many state legislatures in the 1970s to enact "sunset" laws.

Sunset laws state that a given agency will cease to exist after a fixed period of time unless the legislature reenacts its statutory charter. Sunset provisions differ greatly in their details, but they share the common belief that it is useful to compel the Congress or a state legislature to periodically reexamine its delegations of authority and to assess the utility of those delegations in the light of experience.

There are two types of sunset provisions. In some instances the statute creating a particular ADMINISTRATIVE AGENCY contains a sunset provision applicable only to that agency. In other instances a state may enact a general sunset law that may eliminate any agency that is unable to demonstrate its effectiveness.

Sunset provisions have had a checkered history. Although they were popular at the state level in the 1970s and early 1980s, sunset laws have produced mixed results, and many states have repealed ineffective sunset legislation. Few agencies have been terminated under sunset provisions, in part because agencies develop constituents who do not want the service to end. In addition, the cost of disbanding agencies and reassigning work can be expensive.

Attempts to pass a federal sunset law in the 1990s, which would have required formal reauthorization of federal programs every ten years, were unsuccessful. Advocates of accountability have abandoned the idea of "sunsetting" agencies and have sought to strengthen agency reauthorization requirements by incorporating rigorous performance measurements and enforcing appropriate discipline in government.

In addition to their application to government agencies, sunset provisions have been applied to laws themselves and to benefits, such

as immigration benefits. Without reauthorization by the legislature, the law or benefit ceases on a particular date.

## SUNSHINE LAWS

*Statutes that mandate that meetings of governmental agencies and departments be open to the public at large.*

Through sunshine laws, administrative agencies are required to do their work in public, and as a result, the process is sometimes called "government in the sunshine." A law that requires open meetings ordinarily specifies the only instances when a meeting can be closed to the public and mandates that certain procedures be followed before a particular meeting is closed. The FREEDOM OF INFORMATION ACT (5 U.S.C.A. § 552) requires agencies to share information they have obtained with the public. Exceptions are permitted, in general, in the interest of national security or to safeguard the privacy of businesses.

CROSS-REFERENCES

Administrative Agency; Administrative Law and Procedure.

## SUPERIOR

*One who has a right to give orders; belonging to a higher grade.*

A superior is someone or something entitled to command, influence, or control. In the judicial system, a superior court has general or extensive jurisdiction, as opposed to an inferior court. A superior court bears a different meaning in different states. In some states, it is a tribunal of intermediate jurisdiction between the trial courts and the chief appellate court; in other states, however, it is the name given to trial courts.

In the law of NEGLIGENCE, a superior force is an uncontrollable and irresistible force that produces results that could not be avoided.

In real property, a holder of a superior estate has an EASEMENT, or a nonpossessory interest in land, in an inferior estate.

## SUPERSEDE

*To obliterate, replace, make void, or useless.*

Supersede means to take the place of, as by reason of superior worth or right. A recently enacted statute that repeals an older law is said to supersede the prior legislation.

A *superseding cause* is an act of a third person or some intervening force that prevents a tortfeasor from being held liable for harm to another. A supervening act is one that insulates an actor from responsibility for negligently causing a dangerous condition that results in an injury to the plaintiff.

## SUPERSEDEAS

*The name given to a writ, a court order, from a higher court commanding a lower court to suspend a particular proceeding.*

A supersedeas is a writ that suspends the authority of a trial court to issue an execution on a judgment that has been appealed. It is a process designed to stop enforcement of a trial court judgment brought up for review. The term is often used interchangeably with a stay of proceeding.

## SUPERVENING

*Unforeseen, intervening, an additional event or cause.*

A *supervening cause* is an event that operates independently of anything else and becomes the proximate cause of an accident.

For an event to fall within the doctrine of supervening NEGLIGENCE, also known as LAST CLEAR CHANCE, four conditions must be satisfied. These conditions are that the injured party has already come into a perilous position; the tortfeasor in the exercise of ordinary prudence becomes or ought to have become aware that the party in peril cannot safely avoid injury; the tortfeasor has the opportunity to save the other person from harm; and he or she fails to exercise such care.

## SUPPLEMENTARY PROCEEDINGS

*A proceeding in which a* JUDGMENT DEBTOR *is summoned into court for questioning by a* JUDGMENT CREDITOR *who has not received payment.*

A supplementary proceeding provides the creditor with a chance to discover whether the debtor has any money or property that can be used to satisfy the judgment. If the debtor is found to have money or property, the court can order the debtor to use it to satisfy the judgment.

## SUPPORT

*As a verb, furnishing funds or means for maintenance; to maintain; to provide for; to enable to*

*continue; to carry on. To provide a means of livelihood. To vindicate, to maintain, to defend, to uphold with aid or countenance.*

*As a noun, that which furnishes a livelihood; a source or means of living; subsistence, sustenance, maintenance, or living.*

Support includes all sources of living that enable a person to live in a degree of comfort suitable and befitting her station in life. Support encompasses housing, food, clothing, health, nursing, and medical needs, along with adequate recreation expenses. Most states impose a legal duty on an individual to support his or her spouse and children.

CROSS-REFERENCES

Child Support.

## SUPPRESS

*To stop something or someone; to prevent, prohibit, or subdue.*

To suppress evidence is to keep it from being admitted at trial by showing either that it was illegally obtained or that it is irrelevant.

## SUPRA

[Latin, Above; beyond.] *A term used in legal research to indicate that the matter under current consideration has appeared in the preceding pages of the text in which the reference is made.*

## SUPREMACY CLAUSE

Article VI, Section 2, of the U.S. Constitution is known as the Supremacy Clause because it provides that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." It means that the federal government, in exercising any of the powers enumerated in the Constitution, must prevail over any conflicting or inconsistent state exercise of power.

The concept of federal supremacy was developed by Chief Justice JOHN MARSHALL, who led the Supreme Court from 1801 to 1835. In MCCULLOCH V. MARYLAND, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819), the Court invalidated a Maryland law that taxed all banks in the state, including a branch of the national bank located at Baltimore. Marshall held that although none of the enumerated powers of Congress explicitly authorized the incorporation of the national bank, the NECESSARY AND PROPER CLAUSE provided the basis for Congress's action. Having established that the exercise of authority was proper, Marshall concluded that "the government of the Union, though limited in its power, is supreme within its sphere of action."

After the Civil War, the Supreme Court was more supportive of STATES' RIGHTS and used the TENTH AMENDMENT, which provides that the powers not delegated to the federal government are reserved to the states or to the people, to justify its position. It was not until the 1930s that the Court shifted its position and invoked the Supremacy Clause to give the federal government broad national power. The federal government cannot involuntarily be subjected to the laws of any state.

The Supremacy Clause also requires state legislatures to take into account policies adopted by the federal government. Two issues arise when STATE ACTION is in apparent conflict with federal law. The first is whether the congressional action falls within the powers granted to Congress. If Congress exceeded its authority, the congressional act is invalid and, despite the Supremacy Clause, has no priority over state action. The second issue is whether Congress intended its policy to supersede state policy. Congress often acts without intent to PREEMPT state policy making or with an intent to preempt state policy on a limited set of issues. Congress may intend state and federal policies to coexist.

Some federal legislation preempts state law, however, usually because Congress believes its law should be supreme for reasons of national uniformity. For example, the National Labor Relations Act of 1935 (WAGNER ACT) (29 U.S.C.A. § 151 et seq.) preempts most state law dealing with LABOR UNIONS and labor-management relations.

In *Pennsylvania v. Nelson,* 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956), the Supreme Court developed criteria for assessing whether federal law preempts state action when Congress has not specifically stated its intent. These criteria include whether the scheme of federal regulations is "so pervasive as to make the inference that Congress left no room for the States to supplement it," whether the federal interest "is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject," or whether the enforcement of a state law "presents a serious danger of conflict with the administration of the federal program."

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CROSS-REFERENCES

Federalism; Preemption.

## SUPREME COURT

*An appellate tribunal with high powers and broad authority within its jurisdiction.*

The U.S. government and each state government has a supreme court, though some states have given their highest court a different name. A supreme court is the highest court in its jurisdiction. It decides the most important issues of constitutional and statutory law and is intended to provide legal clarity and consistency for the lower appellate and trial courts. Because it is the court of last resort, a supreme court's decisions also produce finality. In addition, a supreme court oversees the administration of the jurisdiction's judicial system.

A supreme court is established by a provision in the state or federal constitution. The legislative bodies of the jurisdiction enact statutes that create a court system and provide funding for it. A supreme court usually consists of five, seven, or nine judges, who are called justices. In the federal courts, the justices are appointed for life, whereas the states have a variety of selection methods. Typically the state governor will appoint a state supreme court justice, and then he will stand for election within two years to serve a full term, which may be from six to twelve years. A judicial election may involve a contest between the justice and another candidate, or it may be a retention election, where the voters must decide whether the judge should be retained for another term.

A supreme court consists of the justices, their administrative support staff, law clerks, and staff attorneys. As an appellate court, it is limited to reviewing trial proceedings and, if applicable, intermediate appellate court decisions. No new testimony is taken, and the arguments before the court by the parties are confined to points of SUBSTANTIVE LAW and procedure. A supreme court holds public proceedings, called oral arguments, in which the attorneys for the parties are given a short amount of time to advocate their positions and answer questions from members of the court. The justices, who have been briefed on the case prior to the oral arguments, conduct a conference on the case following the oral arguments.

At this meeting the justices express their opinions and vote on the case. The chief justice typically assigns a member of the court to write the majority opinion. Once a justice circulates an opinion to the court, the other justices are free to comment, criticize, and offer suggestions on how the opinion can be improved. The author of the opinion generally tries to accommodate the other justices' ideas. However, if a fundamental difference arises during the circulation process, justices may shift sides and change the outcome of the decision. At that point, a justice in the new majority will be assigned to write the opinion. A justice is always permitted to file a dissenting opinion if she disagrees with the outcome.

Once the court releases an opinion, it is published in an official report. The decision of the court is generally final, absent special circumstances. If the court's decision is based on an interpretation of a constitutional provision, it is final unless the constitution is amended or the court reverses itself at some later time. This is rarely done. For example, the U.S. Supreme Court decision in ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), legalized ABORTION based on a constitutional right of privacy. Those opposed to abortion have sought to have Congress pass a constitutional amendment to overturn the decision or to convince the Court to reverse its decision, but without success.

If a supreme court's decision is based on statutory interpretation, its reading of legislative intent or purpose may be overridden by the legislature. A law can be enacted that "corrects" the court and directs it to honor specific intentions of the legislature.

Every supreme court has a procedure to limit the number of cases it hears. The U.S. Supreme Court uses a writ of certiorari, which is a legal PLEADING that requests the Court to hear the case. State supreme courts have similar pleadings, sometimes called petitions for review, which also allow the court discretion in choosing cases to consider. Typically cases are chosen

to resolve conflicts in the lower courts or to decide new legal issues.

Apart from discretionary review, supreme courts permit direct appeal, or appeal by right, on a limited set of cases. At the state level, appeals of first-degree murder and death penalty cases are heard by supreme courts, bypassing the intermediate court of appeals. The U.S. Supreme Court hears direct appeals of cases involving federal reapportionment, disputes between states, and a few other issues.

Supreme courts also administer their judicial systems, overseeing the trial and intermediate appellate courts. In addition, supreme courts enact the rules of procedure that govern the workings of their court systems. Examples include rules of civil, criminal, and appellate procedure, as well as RULES OF EVIDENCE. Most state supreme courts also oversee the admission of attorneys to the bar and discipline attorneys for ethical violations.

CROSS-REFERENCES

Court Opinion; State Courts.

## SUPREME COURT HISTORICAL SOCIETY

The Supreme Court Historical Society (the Society) is a nonprofit organization incorporated in the District of Columbia. It is dedicated to expanding public awareness of the history and heritage of the SUPREME COURT OF THE UNITED STATES and to preserving historical documents and artifacts relating to the Court's history. The Society conducts public and educational programs, publishes books and periodicals, supports historical research, and collects antiques and period pieces to enhance an appreciation of the history behind the U.S. Constitution and its first interpreters. It supports its programs through member contributions, grants, gifts, and a small endowment. The Society is located in the Opperman House on East Capitol Street in Washington, D.C. It also maintains its own website located at <www.supremecourthistory.org>.

Founded in 1974 by the late Chief Justice WARREN E. BURGER, the Society has approximately 6,000 individual members who volunteer services on its standing and ad hoc committees; the committees report to an elected Board of Trustees. The Chief Justice of the United States serves as Honorary Chairman of the Society. Former Chief Justice Burger served as the Society's first chairman. Retired Associate Justice BYRON R. WHITE is an honorary member of the Board of Trustees.

The Society's most ambitious historic project to date has been the research and publication of the first six volumes of the *Documentary History of the Supreme Court, 1789 to 1800.* This series is projected to require at least two more volumes and represents the reconstruction of an accurate record of the development of the federal judiciary in the formative decade between 1789 and 1800. The series has been published by the Columbia University Press. Another scholarly publication is the Society's *Supreme Court of the United States 1789–1990: An Index to Opinions Arranged by Justice,* which is updated periodically. The three-volume publication is the only printed resource of all the opinions of each justice and thus provides easy reference to each individual's contribution to the United States Reports, the official record of the Court's opinions. Additionally, a pilot program of oral recorded histories, documenting the careers and service of retired Supreme Court Justices, has been in progress. Thus far, the Society has completed oral histories of the late Associate Justices HARRY BLACKMUN, WILLIAM J. BRENNAN JR., THURGOOD MARSHALL, and LOUIS F. POWELL.

Semi-annually, the Society publishes the *Journal of Supreme Court History,* which features articles by the justices, noted academicians, solicitors general, and other noted contributors. Special topic publications by the Society include *The Supreme Court in the Civil War, The Jewish Justices of the Supreme Court Revisited: Brandeis to Fortas,* and *The Supreme Court in World War II.* The Society's quarterly newsletter for its members contains short historical articles and news of programs and activities.

For the general public, the Society co-publishes an ongoing illustrated history of the Court, *Equal Justice Under Law,* in conjunction with the National Geographic Society. In cooperation with Congressional Quarterly, Inc., the Society published *The Supreme Court Justices: Illustrated Biographies, 1789–1995,* a collection of biographies of 108 current and former justices.

Another important part of the Society's activities is its co-sponsorship of the National Heritage Lecture, rotating the hosting of the annual event with the White House Historical Association and the U.S. Capitol Historical Society. Along with Street Law, Inc., it also conducts the Supreme Court Summer Institute, a program for secondary school teachers to help them

develop in their students an awareness of their rights and duties as citizens. It has developed a special "landmark cases" volume as an education tool for teachers, that provides extensive information on some of the Court's most important cases, many of which have been included in states' standards for teaching history and government. In 2000 the Society launched a special initiative for high school teachers in the Washington, D.C., public schools.

Finally, the Society conducts an acquisition program, working closely with the Court Curator's office, to locate, acquire, and display the Court's permanent collection of busts and portraits of justices, as well as period furnishings, original documents, and private papers, and other artifacts relating to the Court and its history. Many of these items are on display or otherwise made available for the benefit of the Court's one million annual visitors.

FURTHER READINGS

U.S. Supreme Court Historical Society website. Available online at <www.supremecourthistory.org> (accessed February 1, 2004).

## SUPREME COURT OF THE UNITED STATES

The Supreme Court of the United States is the highest federal court. Although it was explicitly recognized in Article III of the Constitution, it was not formally established until passage of the JUDICIARY ACT OF 1789 (1 Stat. 73) and was not organized until 1790. Though its size and jurisdiction have changed over time, the Supreme Court has fulfilled its two main functions: acting as the final interpreter of state and federal law and establishing procedural rules for the federal courts.

### Composition

The Supreme Court, sometimes called the High Court, is comprised of a chief justice and eight associate justices. Article III provides that the justices of the Court are to be appointed by the president of the United States with the advice and consent of the Senate. Once appointed, a justice may not be removed from office except by congressional IMPEACHMENT. Because of this provision, many justices have remained on the bench into their eighties.

In 1789 the Court initially consisted of six members, but membership was increased to seven in 1807. In 1837 an eighth and ninth justice were added, and in 1863 the number rose to ten. Congress lowered the number to eight to prevent President ANDREW JOHNSON from appointing anyone, and since 1869 the Court has consisted of nine justices.

The only modern attempt to alter the size of the Court occurred in 1937, when President FRANKLIN D. ROOSEVELT attempted to "pack" the Court by trying to add justices more sympathetic to his political ideals. Between 1935 and 1937, the Supreme Court struck down as unconstitutional numerous pieces of Roosevelt's NEW DEAL program that attempted to regulate the national economy. Most of the conservative judges who voted against the New Deal statutes were over the age of 70. Roosevelt proposed that justices be allowed to retire at age 70 with full pay. Any judge who declined this offer would be forced to have an assistant with full VOTING RIGHTS. This plan was met with hostility by Democrats and Republicans and ultimately rejected as an act of political interference.

When the office of chief justice is vacant, the president may choose the new chief justice from among the associate justices but does not need to do so. Whenever the chief justice is unable to perform his or her duties or the office is vacant, the associate justice who has been on the Court the longest performs the duties. The Court can take official action with as few as six members joining in deliberation. However, extremely important cases will sometimes be postponed until all nine justices can participate.

### Court Term

The Court sits in Washington, D.C., and begins its term on the first Monday in October of each year. It may also hold adjourned terms or special terms whenever required. These special calendars are reserved for emergency matters that usually occur when the Court is in recess between July and October. Between October and June 30 of the following year, the Court hears oral arguments for each case in its courtroom, confers and votes on the case, and then assigns a justice to write the majority opinion. An opinion must be released on every case by the end of the Court's term. However, if the Court cannot agree on how to resolve a case, it may hold the case over until the next term and schedule further oral arguments.

### Administration of the Court

The law provides for the appointment of a clerk of the Supreme Court, a deputy clerk, a

marshal, a court reporter, a librarian, judicial law clerks, secretaries to the justices, and an administrative assistant to help with court management. The law provides for the printing of Supreme Court decisions to ensure that they will be available to the public. The Court also disseminates its opinions electronically through its website. In addition, it posts its court calendar, docket, and orders on its website.

*The official seal of the U.S. Supreme Court.*
COLLECTION OF THE CURATOR OF U.S. SUPREME COURT

### Jurisdiction

The Judiciary Act of 1789 gave the Supreme Court authority to hear certain appeals brought from the lower federal courts and the state courts. The Court was also given power to issue various kinds of orders, or writs, to enforce its decisions.

Article III of the Constitution declares that the Supreme Court shall have original jurisdiction "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a state shall be a party. . . ." Original jurisdiction is the authority to hear a case from the outset. Nevertheless, Congress has enacted legislation giving the district courts concurrent jurisdiction in cases dealing with ambassadors and foreign consul as well as in cases between the U.S. government and one or more state governments. The Supreme Court retains exclusive jurisdiction only in suits between state governments, which often involve boundary disputes. These cases arise infrequently and are usually placed before special masters who hear the evidence, make findings, and recommend a decision that is acceptable to the Court.

Article III states that the Supreme Court's appellate jurisdiction extends to all federal cases "with such Exceptions, and under such Regulations as the Congress shall make." Appellate cases coming to the Court from the lower federal courts usually come from the 13 courts of appeals, although they may come from the Court of Military Appeals or, under special circumstances, directly from the district courts. Appellate cases may also come from the state courts of last resort, usually a state's supreme court.

Until 1891 losing parties in the lower federal courts and state courts of last resort had the right to appeal their cases to the Supreme Court. The Court's docket was crowded with appeals, many of which raised routine or frivolous claims. In 1891 Congress created nine courts of appeals to correct errors in routine cases. (28 U.S.C.A. ch. 3). This reduced the Supreme Court's caseload, but parties often retained statutory rights to have their cases reviewed by the Court.

In 1925 Congress reformed, at the Court's insistence, the Supreme Court's appellate jurisdiction by restricting the categories of cases in which litigants were afforded an appeal by right to the Supreme Court. In addition, the JUDICIARY ACT of 1925, 43 Stat. 936, gave the Court the power to issue writs of certiorari to review all cases, federal or state, posing "federal questions of substance." The writ of certiorari gives the Court discretionary review, allowing it to address some issues and ignore others. Because of these reforms, the courts of appeals are the final decision-making courts in 98 percent of federal cases.

In 1988 Congress passed the Act to Improve the Administration of Justice, 102 Stat. 663. This law eliminated most appeals by right to the Supreme Court, requiring the Court to hear appeals only in cases involving federal CIVIL RIGHTS laws, legislative reapportionment, federal antitrust actions, and a few other matters. As a result of this growth in discretionary jurisdiction, the Supreme Court has the ability to set its own agenda.

A party who seeks review of a decision petitions the Court for a writ of certiorari, an ancient PLEADING form that grants the right for review. The justices deliberate in private on whether the issues presented by the case are significant enough to merit review. They operate under an informal rule of four, which means that certiorari will be granted if any four

justices favor it. If certiorari is granted, the justices can decide the case on the papers submitted or schedule a full argument before the Court. If certiorari is denied, the matter ends there. With discretionary review, the justices have complete freedom in deciding whether to hear the case, and no one may question or appeal their decision.

The Supreme Court also has special jurisdiction to answer certified questions sent to it from a federal court of appeals or from the U.S. Claims Court. The Supreme Court can either give instructions that the lower court is bound to follow or require the court to provide the record so that the Supreme Court can decide the entire lawsuit. Certification is rarely used.

### Decisions

The decisions of the Supreme Court, whether by a denial of certiorari or by an opinion issued following oral argument, are final and cannot be appealed. A Supreme Court decision based on an interpretation of the Constitution may be changed by constitutional amendment. Congress may modify a decision that is based on the interpretation of an act of Congress by passing a law that directs the Court as to congressional intent and purpose. However, Congress has no power to modify a High Court decision that is based on the Court's interpretation of the Constitution. Finally, the Court may overrule itself, although it rarely does so.

### Rule Making

Congress has conferred upon the Supreme Court the power to prescribe rules of procedure that the Court and the lower federal courts must follow. The Court has promulgated rules that govern civil and criminal cases in the district courts, BANKRUPTCY proceedings, ADMIRALTY cases, copyrights cases, and appellate proceedings.

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CROSS-REFERENCES

Judicial Review.

## SURCHARGE

*An overcharge or additional cost.*

A surcharge is an added liability imposed on something that is already due, such as a tax on tax. It also refers to the penalty a court can impose on a fiduciary for breaching a duty.

In EQUITY, surcharging means to show that a particular item, in favor of the party surcharging, should be included in an account that is alleged to be settled or complete.

## SURETY

*An individual who undertakes an obligation to pay a sum of money or to perform some duty or promise for another in the event that person fails to act.*

## SURGEON GENERAL

The U.S. Surgeon General is charged with the protection and advancement of health in the United States. Since the 1960s the surgeon general has become a highly visible federal public health official, speaking out against known health risks such as tobacco use, and promoting disease prevention measures such as exercise and community water fluoridation.

The U.S. Surgeon General's Office is a unit of the Office of Public Health and Science, which is a major component of the HEALTH AND HUMAN SERVICES DEPARTMENT (HHS). The surgeon general is appointed by the president and serves as a highly recognized symbol of the federal government's commitment to protecting and improving public health.

The surgeon general performs four major functions: promoting disease prevention and health in the United States through special health initiatives, advising the president and the secretary of the HHS on public health issues, encouraging the enhancement of public health practice in the professional disciplines, and administering the PUBLIC HEALTH SERVICE Commission Corps in ongoing and emergency response activities. The corps is comprised of approximately 6,000 doctors, nurses, pharmacists, and scientists.

The surgeon general oversees research on public health matters and writes reports that

inform the medical profession and the public about ways of preventing disease. These reports have dealt with topics such as tobacco use, HIV and AIDS prevention, drug abuse, and the need for physical exercise.

The 1964 report of surgeon general Dr. Luther L. Terry on tobacco, entitled *Smoking and Health,* is perhaps the most famous example of how the surgeon general draws public attention to public health concerns. In 1964, 46 percent of all U.S. citizens smoked, and smoking was accepted in offices, airplanes, and elevators. Television programs were sponsored by cigarette brands. Terry's report concluded that smoking causes cancer. This conclusion became the foundation for later efforts to ban tobacco advertising from television, to restrict smoking in public places, and to place warning labels on cigarette packages. Since the 1964 report, smoking rates have declined from 46 percent to 25 percent.

Other surgeons general have sparked public controversy as well. In the 1980s Dr. C. Everett Koop's advocacy of the use of condoms to reduce the spread of HIV and AIDS angered religious groups and others. Dr. M. Joycelyn Elders, who was sworn in as surgeon general in September 1993, was forced to resign in December 1994 for promoting masturbation for young people as a way to avoid teenage pregnancy and sexually transmitted diseases.

FURTHER READINGS

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CROSS-REFERENCES

Health Care Law.

## SURPLUSAGE

*Extraneous matter; impertinent, superfluous, or unnecessary.*

In pleadings, surplusage refers to allegations that are not relevant to the CAUSE OF ACTION. Under the Federal Rules of Civil Procedure, upon a motion, a court can strike from the pleadings any surplusage, such as an insufficient defense or an immaterial matter.

## SURPRISE

*An unexpected action, sudden confusion, or an unanticipated event.*

As a ground for a new trial, surprise means the condition in which a party to a lawsuit is unexpectedly placed and that is detrimental to that party's case. The situation must be one that the party could not reasonably have anticipated and that could not be guarded against or prevented.

When a party is taken by surprise by the testimony of his or her own witness, the party may be permitted to discredit the witness by showing that the witness made prior contradictory or inconsistent statements.

## SURREBUTTER

*In* COMMON-LAW PLEADING, *the plaintiff's factual reply to the defendant's rebutter or answer.*

Surrebutter is governed by the same rules as replication and is no longer required under modern practice and PLEADING.

## SURREJOINDER

*In the second stage of* COMMON-LAW PLEADING, *the plaintiff's answer to the defendant's rejoinder.*

## SURRENDER

*To give up, return, or yield.*

The word *surrender* presupposes the possession or ownership of the thing that is to be returned or given up. It indicates a transfer of title as well as possession, but it does not express or in any way suggest the transaction of a sale and delivery. Instead, it involves yielding or delivering in response to a demand. A surrender may be compelled or it may be voluntary.

In landlord-tenant law, surrender occurs when a tenant agrees to return the leased premises to the landlord before the expiration of the lease and the landlord agrees to accept the return of the premises.

In this respect a surrender differs from ABANDONMENT, which is simply a unilateral act on the part of the tenant. In contrast, a surrender arises through a mutual agreement between the lessor and lessee.

Surrender is used in many areas of SUBSTANTIVE LAW. For example, in CRIMINAL LAW it refers to a suspect's giving up to the police. In insurance law the "cash surrender" value is the amount of money a person will receive when he elects to end a policy and take the proceeds allocated under the insurance contract.

# The Surgeon General and a Smoke-Free Future

In the early 2000s smokers risk more than their health. Bans and restrictions on smoking have swept through nearly every walk of public life, driving smokers out of offices, restaurants, and public buildings. Some firms even limit hiring to nonsmokers. Since the mid-1960s, the antismoking movement has changed social attitudes and laws that govern this age-old habit. Leading this change were numerous studies warning that exposure to secondhand smoke kills thousands of U.S. citizens each year. Increasingly provoked by the antismoking clampdown, smokers' rights groups and the U.S. tobacco industry protest what they see as discriminatory treatment.

Laws against smoking date back to the late nineteenth century, when 14 states prohibited cigarettes. Contemporary antismoking efforts began with a U.S. surgeon general's report in 1964 endorsing medical findings that smoking causes cancer. Congress required warning labels on tobacco products in 1965. In 1967 the **FEDERAL COMMUNICATIONS COMMISSION** (FCC) mandated that broadcasters carry antismoking messages in proportion to tobacco advertisements. This ruling led to the disappearance of tobacco ads from television and radio.

In the 1970s, public concern shifted. A long-standing awareness of smokers' personal health risks was surmounted by growing fears about hazards to the public in general. Increased attention to secondhand smoke, or environmental tobacco smoke (ETS), fueled this significant change. A 1972 report by the U.S. Surgeon General's Office, containing a chapter on ETS, gave antismoking activists a powerful new weapon (The Health Consequences of Smoking: A Report of the Surgeon General). Restrictions on public smoking began to appear. In 1973 the Civil Aeronautics Board required airlines to provide separate smoking and nonsmoking sections. States passed clean indoor air acts to protect the health of nonsmokers, beginning with Arizona in 1973 (Ariz. Rev. Stat. Ann. § 36-601.01). The U.S. tobacco industry lobbied strongly against such measures and defeated a 1977 California bill, but momentum was with the antismoking movement. By the early 1990s, all but five states had enacted some form of state antismoking law.

The next victory for nonsmokers came in a landmark 1976 court case that upheld a worker's right to a smoke-free work environment (*Shimp v. New Jersey Bell Telephone,* 145 N.J. Super. 516, 368 A. 2d 408 [N.J. 1976]). Donna Shimp, an office worker, successfully sued her employer after complaining that an allergy to smoke caused her physical suffering. Her employer installed an exhaust fan, but when this proved ineffective, Shimp was asked to move to a different work site; the move amounted to a demotion and pay cut. In *Shimp,* the court ruled that workers who are especially sensitive to smoke must not be subjected to it in the course of performing their job. The court's opinion cited clear and overwhelming evidence that cigarette smoke poses general health hazards by contaminating the air.

A turning point came in 1986 when Surgeon General **C. EVERETT KOOP** issued a report titled *The Health Effects of Involuntary Smoking.* The report concluded that ETS causes lung cancer and other diseases in nonsmokers. It carried a dramatic warning: separating smokers and nonsmokers within the same airspace might reduce—but could not eliminate—the hazards of breathing ETS. Koop's report coincided with a study by the National Academy of Sciences that reached similar conclusions. Although the tobacco industry disputed these findings, the reports galvanized the antismoking movement.

The first effect on federal legislation was seen in December 1987, when Congress enacted an amendment to the Federal Aviation Act of 1958 (§404[d][1][A]) that placed a two-year ban on smoking on all domestic airline flights of less than two hours' duration.

Debate over the amendment was fierce. Supporters of the ban included flight attendants and a coalition of health groups, including the American Cancer Society. Their argument centered on the perils of ETS. The airline industry noted that smoking on airplanes created many problems, ranging from damage to aircraft interiors to the difficulty of purifying recirculated cabin air. Opponents, particularly members from tobacco-producing states, argued that the ban would depress tobacco prices. They also said it would be difficult to enforce. But enforcement proved effective because Congress granted the **FEDERAL AVIATION ADMINISTRATION** (FAA) the power to fine violators without resort to judicial intervention. After the two-year ban expired, Congress passed a law permanently banning smoking on all domestic airline flights under six hours' duration (103 Stat.

## SURROGATE COURT

*A tribunal in some states with* **SUBJECT MATTER JURISDICTION** *over actions and proceedings involving, among other things, the probate of wills, affairs of decedents, and the guardianship of the property of* **INFANTS**.

## SURROGATE MOTHERHOOD

*A relationship in which one woman bears and gives birth to a child for a person or a couple who then adopts or takes legal custody of the child; also called mothering by proxy.*

1098 [49 U.S.C.A. § 1374(d) app.]), which went into effect February 25, 1990.

Surgeon General Koop's report also sparked a surge of state legislation. In June 1989, New Jersey became the third state in the nation, after Kansas and Utah, to ban smoking in buildings owned by boards of education. The New Jersey law, New Jersey Statutes Annotated, section 26.3D-17(b) (West 1990 Supp.), was aimed at preventing teenagers from picking up the smoking habit. Many other states passed antismoking laws as well, including Virginia, a tobacco industry stronghold. Virginia's law, Code of Virginia Annotated, section 15.1-291.2 (West 1990 Supp.), restricted smoking in public places such as common areas of schools, government buildings, and restaurants. A more comprehensive New York law, New York Public Health Law I, sections 1399-n to 1399-x (McKinney 1990), took effect January 1, 1990, and targeted most public areas and workplaces. The law permitted smoking at work in limited areas as long as all present agree to allow it.

Federal policy making followed this trend. In 1987 the **GENERAL SERVICES ADMINISTRATION** (GSA) banned smoking in its 6,900 federal buildings, and Amtrak, the federal passenger rail line, imposed new limits on smoking in its trains, effective April 1, 1990. Also in 1990, the **INTERSTATE COMMERCE COMMISSION** banned smoking on interstate buses.

Private bans on smoking also increased. Some companies, such as Turner Broadcasting, in Atlanta, Georgia and Northern Life Insurance, in Seattle, Washington refused to hire smokers.

Many smokers view laws dictating when and where they may smoke as an infringement of their personal rights. However, a federal appeals court in 1987 rejected the argument that the U.S. Constitution protects the right to smoke. In *Grusendorf v. City of Oklahoma,* 816 F.2d 539 (10th Cir. 1987), the court upheld a city fire department's dismissal of a trainee for smoking during a lunch break in violation of a policy prohibiting smoking both on and off the job. The ruling said this limit on individual liberty was justified by a rational purpose: namely, to protect the health of employees in an industry that demands that its workers be in good physical condition.

Supported by civil libertarians and tobacco industry **LOBBYING**, smokers have had some success seeking laws designed to protect them from being fired or passed over for job promotions. By 1992, 13 states had passed smokers' rights legislation. Not everywhere have such laws been successful, however. In New Jersey, Governor James J. Florio vetoed smokers' rights legislation in January 1991. The New Jersey bill would have protected smokers in much the same way **CIVIL RIGHTS** laws now protect people against job discrimination on the basis of race, religion, and sex. Florio refused to put smoking into that category.

On January 7, 1993, the **ENVIRONMENTAL PROTECTION AGENCY** (EPA) handed antismoking forces further ammunition in a report on secondhand smoke ("Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders" [EPA Report EPA/600/6-90/006F]). Based on several years of research, the report designated ETS as a potent carcinogen that kills about 3,000 U.S. citizens annually and causes hundreds of thousands of respiratory illnesses in children. Strikingly, the agency placed ETS in the same risk category as radon and asbestos.

Reaction to the EPA risk assessment was swift and dramatic. In the six months that followed, approximately 145 local governments banned smoking in public buildings. Los Angeles passed far-reaching legislation that banned smoking in most restaurants. Effective August 2, 1993, the law applied to some 7,000 indoor restaurants, permitting smoking only in outdoor seating areas. Violators face citations of up to $250, and restaurant owners who permit indoor smoking face jail sentences of up to six months and $1,000 fines. An effort to repeal the controversial law was soon underway.

Although the U.S. Surgeon General's Office did not reach its hoped-for goal of a smoke-free United States by 2000, antismoking laws have continued to proliferate. As of May 2003, according to the American Nonsmokers' Rights Foundation, more than 1,600 municipalities in the United States had some sort of smoking restrictions. Probably the most noteworthy development is the growing number of municipalities that are banning smoking from restaurants and bars. Nonsmokers in New York City found a staunch ally in Mayor Michael Bloomberg, who lobbied relentlessly for a smoke-free workplace ordinance that went into effect in April 2003. Boston implemented a similar ban a month later. Tobacco firms remain resolutely opposed to further controls, arguing that these would endanger a legitimate $350 billion industry. But the trends since the mid-1960s suggest that smokers will find fewer and fewer places to light up legally.

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**CROSS-REFERENCES**

Tobacco; Tobacco Institute.

In surrogate motherhood, one woman acts as a surrogate, or replacement, mother for another woman, sometimes called the intended mother, who either cannot produce fertile eggs or cannot carry a pregnancy through to birth, or term.

Surrogate mothering can be accomplished in a number of ways. Most often, the husband's sperm is implanted in the surrogate by a procedure called **ARTIFICIAL INSEMINATION.** In this case, the surrogate mother is both the genetic

# Does Surrogacy Involve Making Families or Selling Babies?

Medical science continues to devise new procedures and treatments that test the boundaries of law and ethics. One such result is modern surrogate motherhood, which has been made possible by **ARTIFICIAL INSEMINATION** and in vitro fertilization.

Surrogate motherhood has both advocates and detractors, each with strong arguments in their favor. A number of important questions lie at the heart of the debate over the ethics and legality of surrogacy: Does surrogacy necessarily involve the exploitation of the woman serving as the surrogate mother, or turn her into a commodity? What rights does the surrogate mother have? Is surrogacy equivalent to baby selling? Should brokers or third parties be allowed to make a profit from surrogacy arrangements?

**The Case Against Surrogacy** Nearly all opponents of surrogacy find it to be a morally repugnant practice, particularly when it involves a commercial transaction. Many base their opposition on religious grounds, whereas others judge it using philosophical, legal, or political criteria.

The Roman Catholic Church is just one of many religious institutions that oppose surrogacy. It is against all forms of surrogacy, even altruistic surrogacy, which does not involve the payment of a fee to the surrogate. It holds that surrogacy violates the sanctity of marriage and the spiritual connection between mother, father, and child. It finds commercial surrogacy to be especially offensive. Commercial surrogacy turns the miracle of human birth into a financial transaction, the church maintains, reducing the child and the woman bearing it to objects of negotiation and purchase. It turns women into reproductive machines and exploiters of children. The church argues that surrogacy also leads to a confused parent-child relationship that ultimately damages the institution of the family.

Some feminists oppose surrogacy because of its political and economic context. They disagree with the notion

mother and the birth, or gestational mother, of the child. This method of surrogacy is sometimes called traditional surrogacy.

Less often, when the intended mother can produce fertile eggs but cannot carry a child to birth, the intended mother's egg is removed, combined with the husband's or another man's sperm in a process called in vitro fertilization (first performed in the late 1970s), and implanted in the surrogate mother. This method is called gestational surrogacy.

Surrogacy arrangements are categorized as either commercial or altruistic. In commercial surrogacy, the surrogate is paid a fee plus any expenses incurred in her pregnancy. In altruistic surrogacy, the surrogate is paid only for expenses incurred or is not paid at all.

The first recognized surrogate mother arrangement was made in 1976. Between 1976 and 1988, roughly 600 children were born in the United States to surrogate mothers. Since the late 1980s, surrogacy has been more common: between 1987 and 1992, an estimated 5,000 surrogate births occurred in the United States.

The issue of surrogate motherhood came to national attention during the 1980s, with the *Baby M* case. In 1984 a New Jersey couple, William Stern and Elizabeth Stern, contracted to pay Mary Beth Whitehead $10,000 to be artificially inseminated with William Stern's sperm and carry the resulting child to term. Whitehead decided to keep the child after it was born, refused to receive the $10,000 payment, and fled to Florida. In July 1985, the police arrested Whitehead and returned the child to the Sterns.

In 1987 the New Jersey Superior Court upheld the Stern-Whitehead contract (**IN RE BABY M.**, 217 N.J. Super. 313, 525 A.2d 1128). The court took all parental and **VISITATION RIGHTS** away from Whitehead and permitted the Sterns to legally adopt the baby, whom they named Melissa Stern. A year later, the New Jersey Supreme Court reversed much of this decision (*In re Baby M.*, 109 N.J. 396, 537 A.2d 1227). That court declared the contract unenforceable but allowed the Sterns to retain physical custody of the child. The court also restored some of Whitehead's parental rights, including visitation rights, and voided the **ADOPTION** by the Sterns. Most important, the decision voided all surrogacy contracts on the ground that they conflict with state public policy. However, the court still permitted voluntary surrogacy arrangements.

that women freely choose to become surrogates. They argue that coercion at the societal level, rather than the personal level, causes poor women to become surrogate mothers for rich women. If surrogacy contracts are legalized, they maintain, the reproductive abilities of a whole class of women will be turned into a brokered commodity. Some feminists have gone so far as to call surrogacy reproductive prostitution.

Other critics join with Catholics and feminists to decry surrogacy as baby selling and a vehicle for the exploitation of poor women.

**The Case for Surrogacy** Advocates for surrogate motherhood propose it as a humane solution to the problem of infertility. They note that infertility is common, affecting almost one out of six couples, and that surrogacy may represent the only option for some couples who wish to have children to whom they are genetically related. Advocates also point out that infertility is likely to increase as more women enter the workforce and defer childbirth to a later age, when fertility problems are more common.

Advocates of surrogacy also argue that ADOPTION does not adequately meet the needs of infertile couples who wish to have a baby. They point out that there are many times more couples than available INFANTS. Moreover, couples must wait three to seven years on average to adopt an infant. Here, too, social trends have contributed to a greater call for alternative reproductive options. Most important, an increased use of contraceptives and ABORTION and a greater acceptance of unwed mothers have led to a shortage of adoptable babies.

Those who favor commercial surrogacy object to characterizations of the practice as baby selling. A surrogacy contract, they assert, is a contract to bear a child, not to sell a child. Advocates of surrogacy see payment to a surrogate as a fee for gestational services, just like the fees paid to lawyers and doctors for their services. Some advocates even argue that the prohibition of commercial surrogacy infringes on a woman's constitutional right to contract.

Surrogacy is also supported by those who believe that society is served best when the liberty of individuals is maximized. They claim that women and society as a whole benefit from the increased opportunity of choice offered by surrogacy.

Advocates also maintain that in a successful surrogacy arrangement, all parties benefit. The intended parents take home a cherished child, and the surrogate receives a monetary reward and the satisfaction of knowing that she has helped someone realize a special goal.

The *Baby M.* decision inspired state legislatures around the United States to pass laws regarding surrogate motherhood. Most of those laws prohibit or strictly limit surrogacy arrangements. Michigan responded first, making it a felony to arrange surrogate mother contracts for money and imposing a $50,000 fine and five years' imprisonment as punishment for the offense (37 Mich. Comp. Laws § 722.859). Florida, Louisiana, Nebraska, and Kentucky enacted similar legislation, and Arkansas and Nevada passed laws permitting surrogacy contracts under judicial regulation.

In 1989 the AMERICAN BAR ASSOCIATION (ABA) drafted two alternative model laws involving surrogate motherhood. These laws are not binding but are intended to guide states as they formulate their own laws. One legalizes the practice of surrogate motherhood and makes surrogacy contracts enforceable in court; the other bars the enforcement of contracts in which a surrogate mother is paid to have a child and then give up any claim to the child.

Under either ABA model, states legalizing surrogate contracts limit them to agreements between a surrogate mother and a married couple. A genetic link must be established between the couple and the child, by the husband's supplying sperm or the wife's contributing an egg, or both. To be valid, the contract must be approved by a judge before conception takes place, and it must be accompanied by proof that the wife is unable to bear a child. The surrogate mother has the right to repudiate the contract up to 180 days after conception, in which case she may keep the child. If she does not repudiate the contract during that time, the couple becomes the child's legal parents 180 days after conception.

In 1993 the California Supreme Court issued a landmark ruling declaring surrogacy contracts legal in California. The case, *Johnson v. Calvert,* 5 Cal. 4th 84, 19 Cal. Rptr. 2d 494, 851 P.2d 776, involved a surrogacy contract between a married couple, Mark Calvert and Crispina Calvert, and Anna L. Johnson. Crispina Calvert was unable to bear children. In 1990 the Calverts and Johnson signed a surrogacy contract in which the Calverts agreed to pay Johnson $10,000 to carry an embryo created from the Calverts' ovum and sperm. Disagreements ensued, and later that year, Johnson became the first surrogate mother to seek custody of a child to whom she was not genetically related.

*A sample surrogate parenting agreement*

## Surrogate Parenting Agreement

**SURROGATE PARENTING AGREEMENT**

This Agreement is made on _____ (Date), by and between _____ , a married woman (Referred to as Surrogate), _____ , her husband (Referred to as Surrogate's Husband), who both reside at _____ (Address) and _____ , (Referred to as Natural Father), who resides at _____ (Address).

RECITALS

This Agreement is made with reference to the following facts:

A. Natural Father is a married man over the age of _____ (_____) (Eighteen (18) or Applicable Age Required by Statute) years who desires to enter into this Agreement, the sole purpose of which is to enable the Natural Father and his wife, who cannot conceive, to have a child who is biologically related to the Natural Father.

B. Surrogate and Surrogate's Husband are over the age of _____ (_____) (Eighteen (18)) years and both desire and are willing to enter into this Agreement subject to the terms and conditions contained in this Agreement. NOW THEREFORE, in consideration of the mutual promises, representations, terms and conditions contained in this Agreement, the parties agree as follows:

SECTION ONE

Surrogate represents that she is capable of conceiving children. Surrogate understands and agrees that in the best interests of the child she will not form or attempt to form a parent-child relationship with any child or children she may conceive, carry to term, and give birth to, pursuant to this Agreement.

SECTION TWO

Surrogate and Surrogate's Husband have been married since _____ (Date). Surrogate's Husband agrees with the purposes and provisions of this Agreement and acknowledges that his wife, Surrogate, shall be artificially inseminated pursuant to the provisions of this Agreement. Surrogate's Husband agrees that in the best interests of the child he will not form or attempt to form a parent-child relationship with any child or children Surrogate may conceive by artificial insemination, as described in this agreement, and agrees to freely and readily surrender immediate custody of the child to Natural Father.

Surrogate's Husband further agrees to terminate his parental rights to such child. Surrogate's Husband acknowledges he will do all acts necessary to rebut the presumption of paternity of any offspring conceived and born pursuant to this Agreement as provided by law, including blood testing and/or HLA testing.

SECTION THREE

Surrogate shall be artificially inseminated with the semen of Natural Father by a physician. Surrogate, upon becoming pregnant, agrees she will carry the embryo (or fetus) until delivery. Surrogate and Surrogate's Husband, agree that they will cooperate with any background investigation into Surrogate's medical, family, and personal history and warrants the information to be accurate to the best of their knowledge and belief. Surrogate and Surrogate's Husband agree to surrender custody of the child to Natural Father, to institute, and cooperate, in proceedings to terminate their respective parental rights to such child, and to sign any and all necessary affidavits, documents, and papers in order to further the intent and purposes of this Agreement. Surrogate and Surrogate's Husband understand that the child is being conceived for the sole purpose of giving such child to Natural Father, its natural and biological father. Surrogate and Surrogate's Husband agree to sign all necessary affidavits and other documents, prior to and subsequent to the birth of the child, and to voluntarily participate in any paternity proceedings necessary for the Natural Father's name to be entered on the child's birth certificate as the natural or biological father.

SECTION FOUR

The consideration for this Agreement which is compensation for services and expenses, and should in no way be construed as a fee for the termination of parental rights or as payment in exchange for a consent to surrender the child for adoption, in addition to other provisions contained in this Agreement, shall be as follows:

1. _____ ($_____) dollars shall be paid to Surrogate, for services and expenses in carrying out Surrogate's obligations under this Agreement, immediately upon surrender to Natural Father custody of the child born pursuant to the provisions of this Agreement.

2. The consideration to be paid to Surrogate shall be deposited with _____ (Referred to as Custodian), the representative of Natural Father, at the time of the signing of this Agreement and shall be held in escrow until completion of the duties and obligations of Surrogate as provided for in this Agreement.

3. Natural Father shall pay the expenses incurred by Surrogate, pursuant to her pregnancy, which are specifically defined as follows:

(a) All medical, hospitalization, pharmaceutical, laboratory, and therapy expenses, incurred as a result of Surrogate's pregnancy, not covered or allowed by her present health and major medical insurance, including all extraordinary medical expenses and all reasonable expenses for treatment of any emotional, mental, or other problems related to such pregnancy. In no event, however, shall any such expenses be paid or reimbursed after a period of _____ (_____) months has elapsed since the date

[continued]

*A sample surrogate parenting agreement (continued)*

**Surrogate Parenting Agreement**

of the termination of the pregnancy. This agreement specifically excludes expenses for lost wages or other non-itemized incidentals related to such pregnancy.

(b) Natural Father shall not be responsible for any medical, hospitalization, pharmaceutical, laboratory, or therapy expenses occurring _____ (_____) months after the birth of the child, unless the medical problem incident to such expenses was known and treated by a physician prior to the expiration of the _____ (_____) month period and written notice advising of this treatment is given to Custodian, as representative of Natural Father, by certified mail, return receipt requested.

(c) Natural Father shall be responsible for the total cost of all paternity testing. Such paternity testing may, at the option of Natural Father, be required prior to release of the Surrogate fee from escrow. If Natural Father is conclusively determined not to be the biological father of the child as a result of an HLA test, this Agreement will be deemed breached and Surrogate shall not be entitled to any fee, and Natural Father shall be entitled to reimbursement of all medical and related expenses from Surrogate and Surrogate's Husband.

(d) Natural Father shall be responsible for Surrogate's reasonable travel expenses incurred at the request of Natural Father pursuant to this Agreement.

SECTION FIVE

Surrogate and Surrogate's Husband are aware, understand, and agree to assume all risks, including the risk of death, which are incidental to conception, pregnancy, childbirth, and includes, but is not limited to, complications subsequent to such childbirth.

SECTION SIX

Surrogate and Surrogate's Husband, hereby agree to undergo psychiatric evaluation by _____ , a psychiatrist, as designated by Natural Father. Natural Father shall pay for the cost of such psychiatric evaluation. Prior to their evaluations, Surrogate and Surrogate's Husband shall sign a medical release permitting dissemination to Custodian or Natural Father and his wife copies of the report prepared as a result of such psychiatric evaluations.

SECTION SEVEN

Surrogate and Surrogate's Husband hereby agree it is the exclusive and sole right of Natural Father to name such child born pursuant to this agreement.

SECTION EIGHT

Child, as referred to in this agreement, shall include all children born simultaneously pursuant to the inseminations contemplated in this Agreement.

SECTION NINE

In the event of the death of Natural Father prior or subsequent to the birth of such child, it is understood and agreed by Surrogate and Surrogate's Husband, the child will be placed in the custody of Natural Father's wife.

SECTION TEN

In the event the child is miscarried prior to the _____ (____) (Fifth or as the Case May Be) month of pregnancy, no compensation, as enumerated in Section Four, Paragraph 1, shall be paid to Surrogate. However, the expenses enumerated in Section Four, Paragraph 3 shall be paid or reimbursed to Surrogate. In the event the child is miscarried, dies, or is stillborn subsequent to the _____ (_____) (Fourth or as the Case May Be) month of pregnancy the Surrogate shall receive _____ ($_____) dollars in lieu of the compensation enumerated in Section Four, Paragraph 1. In the event of a miscarriage or stillbirth as described above, this agreement shall terminate, and neither Surrogate nor Natural Father shall be under any further obligation under this Agreement.

SECTION ELEVEN

Surrogate and Natural Father shall each undergo complete physical and genetic examination and evaluation, under the direction and supervision of a licensed physician, to determine whether the physical health and well-being of each is satisfactory. Such physical examination shall include testing for AIDS and venereal diseases including, but not limited to, syphilis, herpes, and gonorrhea. Such AIDS and venereal disease testing shall be done prior to, but not limited to, each series of inseminations.

SECTION TWELVE

In the event that pregnancy has not occurred within a reasonable time in the opinion of Natural Father, this Agreement shall terminate by written notice to Surrogate, at the residence provided to the Custodian by the Surrogate (from Custodian, as representative of the Natural Father).

SECTION THIRTEEN

Surrogate agrees she will not abort the child once conceived except if, in the professional medical opinion of the inseminating physician, such action is necessary for the physical health of Surrogate or the child has been determined by such physician to be physiologically abnormal. Surrogate further agrees, at the request of such physician, to undergo amniocentesis or similar tests to detect genetic and congenital defects. In the event such test reveals the fetus is genetically or congenitally abnormal, Surrogate agrees to abort the fetus on

[continued]

*A sample surrogate parenting agreement (continued)*

**Surrogate Parenting Agreement**

demand of Natural Father. The fee paid to Surrogate in this circumstance will be in accordance to Section Ten. If Surrogate refuses to abort the fetus upon demand of Natural Father, Natural Father's obligations, as stated in this Agreement, shall cease except as to obligations of paternity imposed by statute.

Natural Father recognizes that some genetic and congenital abnormalities may not be detected by amniocentesis or other tests, and, therefore, if proven to be the biological father, assumes the legal responsibility for any child who may possess genetic or congenital abnormalities.

SECTION FOURTEEN

Surrogate agrees to adhere to all medical instructions given her by the inseminating physician as well as her independent obstetrician. Surrogate also agrees not to smoke cigarettes, drink alcoholic beverages, use illegal drugs, or take prescription or nonprescription medications without written consent from her physician. Surrogate agrees to follow a prenatal medical examination schedule to consist of no fewer visits than: one (1) visit per month during the first _____ (_____) (Seven or as the Case May Be) months of pregnancy, two (2) visits (each to occur at two-week intervals) during the _____ (_____) and _____ (_____) (Eighth and Ninth or as the Case May Be) months of pregnancy.

SECTION FIFTEEN

Prior to signing this Agreement, each party has been given the opportunity to consult an attorney of his or her own choice concerning the terms and legal significance of the agreement and the effect it has upon any and all interests of the parties to this Agreement.

SECTION SIXTEEN

Each party acknowledges that he or she has carefully read and understands every word in this Agreement, realizes its legal effect, and is signing this agreement freely and voluntarily. None of the parties has any reason to believe the other party or parties did not understand fully the terms and effects of this Agreement, or that the other parties did not freely and voluntarily execute this Agreement.

SECTION SEVENTEEN

In the event any of the provisions of this Agreement are deemed to be invalid or unenforceable, such invalid or unenforceable provision may be severed from the remainder of this Agreement and shall not cause the invalidity or unenforceability of the reminder of this Agreement. If such provision shall be deemed invalid due to its scope or breadth, then such provision shall be deemed valid to the extent of the scope or breadth permitted by law.

SECTION EIGHTEEN

This Agreement shall be executed in three copies, each of which shall be deemed an original. One copy shall be given to Custodian, another copy to Natural Father, and the third copy to Surrogate.

SECTION NINETEEN

This instrument embodies the entire Agreement of the parties with respect to the subject matter of surrogate parenting. There are no promises, terms, conditions, or obligations other than those contained in this Agreement, and this Agreement shall supersede all previous communications, representations, or agreements, either verbal or written, among the parties.

SECTION TWENTY

This Agreement cannot be modified except by written agreement signed by all the original parties.

SECTION TWENTY-ONE

This Agreement has been drafted, negotiated, and executed and shall be governed by, and enforced in accordance with, the laws of the State of _____.

_____ _____
Signature of Surrogate Mother Date

_____ _____
Signature of Surrogate's Husband Date

_____ _____
Signature of Natural Father Date

**Warning:**

**These forms are provided AS IS. They may not be any good. Even if they are good in one jurisdiction, they may not work in another. And the facts of your situation may make these forms inappropriate for you. They are for informational purposes only, and you should consult an attorney before using them.**

After the child's birth, the Calverts were awarded custody. Johnson appealed the decision. The state supreme court finally upheld the legality of surrogacy contracts under both the state and federal constitutions. The court held such contracts valid whether or not the surrogate mother provides the egg. The U.S. Supreme Court declined to hear Johnson's appeal.

In many states, surrogacy contracts are considered unenforceable because of existing adoption laws designed to discourage "baby selling." These laws may, for example, forbid any consent to adoption given prior to the birth of the child. They may also make it illegal for a birth mother to receive payment for consenting to give up a child or for an intermediary or **BROKER** to receive a fee for arranging an adoption. In states with these laws, a surrogate mother who wishes to keep the child rather than give it up for adoption may successfully challenge an already established surrogacy contract.

Laws concerning artificial insemination can also conflict with surrogacy agreements. Some states have laws maintaining that semen donors are not legally the fathers of children created with their sperm. These laws were originally designed to facilitate the development of sperm banks. In a surrogacy arrangement, they conflict with an attempt to adopt the surrogate child. Increasingly, states are drafting laws that clarify the legal status of surrogacy arrangements, including who is the rightful parent of a child born through surrogate mothering.

State laws differ in the way they handle surrogate motherhood contracts. Most state laws on the issue are designed to prevent or discourage surrogacy. Four states (Florida, Nevada, New Hampshire, and Virginia) specifically allow surrogacy contracts under certain conditions. Several other states (Arizona, Indiana, Louisiana, Michigan, Nebraska, New York, North Dakota, and Tennessee) specifically prohibit surrogacy contracts as void and in violation of public policy. In some states (Kentucky, Michigan, Utah, and Washington, as well as the District of Columbia) entering into a surrogacy contract or assisting in procuring such a contract is a criminal act, punishable by fine, imprisonment, or both.

State laws likewise vary in the way they handle disputes over custody. Surrogacy laws in Michigan and Washington make custody determinations on a case-by-case basis, attempting to reach the decision that best serves the interests of the child. In New Hampshire and Virginia, such laws presume that the contracting couple are the legal parents but give the surrogate a period of time to change her mind. In North Dakota and Arizona, the surrogate and her husband are the legal parents of the child.

*Mark and Crispina Calvert, holding a picture of their son, won a landmark 1993 case in which the California Supreme Court ruled on the legality of surrogacy contracts in California.*

AP/WIDE WORLD PHOTOS

The **COMMISSIONERS ON UNIFORM LAWS** created a stir when it amended the Uniform Parentage Act to authorize gestational agreements as valid contracts. According to the prefatory note to the uniform act, the commissioners determined that such agreements had become commonplace during the 1990s, so the law was merely designed to provide a legal framework for such agreements. However, several organizations have decried the inclusion of these provisions. As of 2003, two states, Texas and Washington, had adopted the new uniform act, while legislatures in four other states were considering its adoption.

**FURTHER READINGS**

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CROSS-REFERENCES

Adoption; Child Custody; Family Law; Parent and Child.

## SURTAX

*An additional charge on an item that is already taxed.*

A surtax is a tax on a tax. For example, if a person pays one hundred dollars of tax on one thousand dollars of income, a 5 percent surtax would amount to an additional five dollars.

## SURVEILLANCE

See ELECTRONIC SURVEILLANCE; WIRETAPPING.

## SURVIVORS INSURANCE

See OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE.

## SURVIVORSHIP

See RIGHT OF SURVIVORSHIP.

## SUSPECT CLASSIFICATION

*A presumptively unconstitutional distinction made between individuals on the basis of race, national origin, alienage, or religious affiliation, in a statute, ordinance, regulation, or policy.*

The U.S. Supreme Court has held that certain kinds of government discrimination are inherently suspect and must be subjected to strict judicial scrutiny. The suspect classification doctrine has its constitutional basis in the FIFTH AMENDMENT and the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT, and it applies to actions taken by federal and state governments. When a suspect classification is at issue, the government has the burden of proving that the challenged policy is constitutional.

The concept of suspect classifications was first discussed by the Supreme Court in KOREMATSU V. UNITED STATES, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944). The Court upheld the "relocation" of Japanese Americans living on the West Coast during WORLD WAR II, yet Justice HUGO L. BLACK, in his majority opinion, stated that

> all legal restrictions which curtail the CIVIL RIGHTS of a single group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

Though it is now widely recognized that no compelling justification existed for the relocation order and that racial prejudice rather than national security led to the forced removal of Japanese Americans, *Korematsu* did signal the Court's willingness to apply the Equal Protection Clause to suspect classifications.

STRICT SCRUTINY of a suspect classification reverses the ordinary presumption of constitutionality, with the government carrying the burden of proving that its challenged policy is constitutional. To withstand strict scrutiny, the government must show that its policy is necessary to achieve a compelling state interest. If this is proved, the state must then demonstrate that the legislation is narrowly tailored to achieve the intended result. Although strict scrutiny is not a precise test, it is far more stringent than the traditional RATIONAL BASIS TEST, which only requires the government to offer a reasonable ground for the legislation.

Race is the clearest example of a suspect classification. For example, the Supreme Court in *Loving v. Virginia,* 388 U.S. 1, 87 S. Ct. 1817, 198 L. Ed. 2d 1010 (1967), scrutinized a Virginia statute that prohibited interracial marriages. The Court noted that race was the basis for the classification and that it was, therefore, suspect. The Court struck down the law because Virginia failed to prove a compelling STATE INTEREST in preventing interracial marriages. Legislation discriminating on the basis of religion or ethnicity, as well as those statutes that affect fundamental rights, also are inherently suspect. The Supreme Court has not recognized age and gender as suspect classifications, though some lower courts treat gender as a suspect or quasi-suspect classification.

CROSS-REFERENCES

Equal Protection; Japanese American Evacuation Cases.

## SUSPENDED SENTENCE

*A sentence given after the formal conviction of a crime that the convicted person is not required to serve.*

In criminal cases a trial judge has the ability to suspend the sentence of a convicted person. The judge must first pronounce a penalty of a fine or imprisonment, or both, and then suspend the implementation of the sentence.

There are two types of suspended sentences. A judge may unconditionally discharge the defendant of all obligations and restraints. An unconditionally suspended sentence ends the court system's involvement in the matter, and the defendant has no penalty to pay. However, the defendant's criminal conviction will remain part of the public record. A judge may also issue a conditionally suspended sentence. This type of sentence withholds execution of the penalty as long as the defendant exhibits good behavior. For example, if a person was convicted of shoplifting for the first time, the judge could impose thirty days of incarceration as a penalty and then suspend the imprisonment on the condition that the defendant not commit any crimes during the next year. Once the year passes without incident, the penalty is discharged. If, however, the defendant does commit another crime, the judge is entitled to revoke the suspension and have the defendant serve the thirty days in jail.

Whether a conditionally suspended sentence is considered equivalent or complementary to a PROBATION order or is considered an entirely distinct legal action depends on the jurisdiction. Under a probation order, the convicted person is not incarcerated but is placed under the supervision of a probation officer for a specified length of time. A person who violates probation will likely have his probation revoked and will have to serve the original sentence.

In some jurisdictions a postponement of sentencing is also considered to be a suspended sentence. A postponement of a criminal sentence means that the judge does not pronounce a penalty immediately after a conviction. Courts use postponement and conditionally suspended sentences to encourage convicted persons to stay out of trouble. In most cases courts will impose these types of conditional sentences for less serious crimes and for persons who do not have a criminal record. Where there is overcrowding in jails, suspended sentences for petty crimes may be used to prevent further congestion.

## SUSPICION

*The apprehension of something without proof to verify the belief.*

Suspicion implies a belief or opinion based upon facts or circumstances that do not constitute proof.

## SUSTAIN

*To carry on; to maintain. To affirm, uphold or approve, as when an appellate court sustains the decision of a lower court. To grant, as when a judge sustains an objection to testimony or evidence, he or she agrees with the objection and gives it effect.*

## ♦ SUTHERLAND, GEORGE

George Sutherland served as associate justice of the U.S. Supreme Court from 1922 to 1938. A conservative jurist, Sutherland opposed the efforts of Congress and state legislatures to regulate business and working conditions. During the 1930s he was part of a conservative bloc that ruled unconstitutional major parts of President FRANKLIN D. ROOSEVELT'S NEW DEAL program.

"[THE] SADDEST EPITAPH WHICH CAN BE CARVED IN MEMORY [FOR] A VANISHED LIBERTY IS THAT IT WAS LOST BECAUSE ITS POSSESSORS FAILED TO STRETCH FORTH A SAVING HAND WHILE YET THERE WAS TIME."
—GEORGE SUTHERLAND

Sutherland was born on March 25, 1862, in Buckinghamshire, England. When Sutherland was a young child, his parents emigrated to the United States, settling in Provo, Utah. Sutherland graduated from Brigham Young University in 1881 and attended the University of Michigan Law School in 1882 and 1883. He was admitted to the Michigan bar in 1883 but returned that same year to Utah, where he established a law practice in Salt Lake City.

Sutherland took an interest in politics and served in the territorial legislature. In 1896, after Utah had become a state, Sutherland was elected to the first Utah Senate as a REPUBLICAN PARTY member. In 1901 he was elected to the U.S. House of Representatives, and in 1905 he became a U.S. senator from Utah.

Despite Sutherland's reputation as a political conservative in Congress, he did support President Theodore Roosevelt's reform programs. He also supported WORKERS' COMPENSATION legislation for railroad workers and the NINETEENTH AMENDMENT to the U.S. Constitution, which

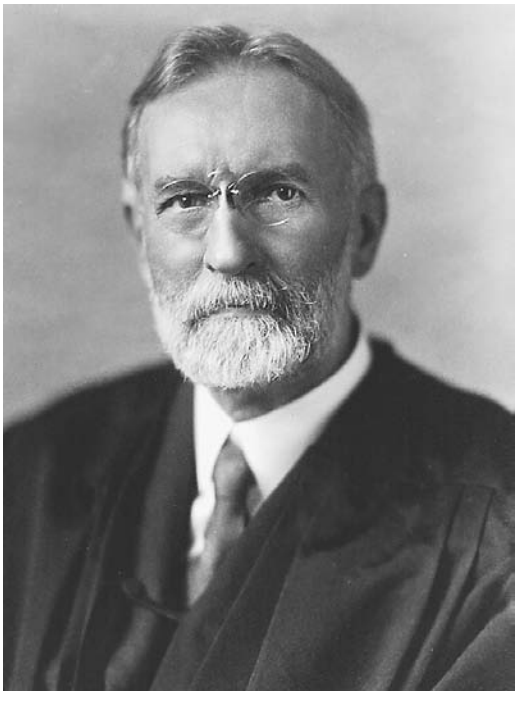

*George Sutherland.*
PHOTOGRAPH BY HARRIS & EWING. COLLECTION OF U.S. SUPREME COURT

provided for women's suffrage. Nevertheless, he believed that individual rights were paramount and that government should not intrude on most economic activities.

After being defeated in the 1916 Senate election, Sutherland became involved in national Republican politics and served as an adviser to President WARREN G. HARDING, who was elected in 1920. Sutherland's name had been mentioned for several years as a possible Supreme Court appointee, and in September 1922 Harding nominated Sutherland to the Court.

Sutherland joined a Supreme Court dominated by conservatives. Like the conservative majority, Sutherland believed in the doctrine of SUBSTANTIVE DUE PROCESS, which held that the DUE PROCESS Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution could be invoked to impose limits on the substance of government regulations and other activities by which government affects "life, liberty, and property." Since the 1880s the Supreme Court had invoked substantive due process to strike down a variety of state and federal laws that regulated working conditions, wages, and business activities.

Sutherland also adhered to the concept of liberty of contract, which held that the government should not interfere with the right of individuals to contract with their employers concerning wages, hours, and working conditions. Sutherland wrote the majority opinion in *Adkins v. Children's Hospital,* 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923), in which the Court struck down a federal MINIMUM WAGE law for women workers in the District of Columbia. Sutherland concluded that employer and employee had the constitutional right to negotiate whatever terms they pleased concerning wages. Sutherland rejected the idea that Congress had the authority to correct social and economic disparities that hurt society in general.

With the STOCK MARKET crash of 1929 and the Great Depression of the 1930s, the conservative majority on the Court came under intense public and political scrutiny. Franklin D. Roosevelt's election in 1932 signaled a change in philosophy concerning the role of the federal government. Roosevelt's New Deal was premised on national economic planning and the creation of administrative agencies to regulate business and labor. This was anathema to Sutherland and his conservative brethren.

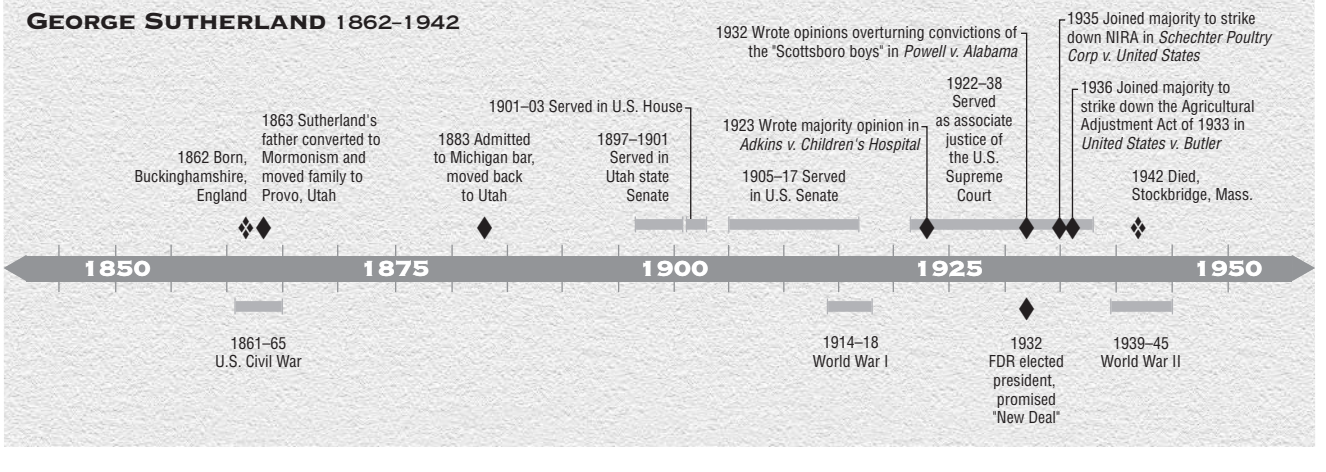

From 1933 to 1937 the Court struck down numerous New Deal measures. Sutherland, along with Justices JAMES C. MCREYNOLDS, WILLIS VAN DEVANTER, and PIERCE BUTLER, formed the core of opposition to federal efforts to revitalize the economy and create a social safety net. The so-called Four Horsemen helped strike down as unconstitutional the NATIONAL INDUSTRIAL RECOVERY ACT OF 1933 in *Schechter Poultry Corporation v. United States,* 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935), and the Agricultural Adjustment Act of 1933 in *United States v. Butler,* 297 U.S. 1, 56 S. Ct. 312, 80 L. Ed. 477 (1936).

Roosevelt responded by proposing a court-packing plan that would have added an additional justice to the Court for each member over the age of seventy. This plan targeted the Four Horsemen and, if implemented, would have canceled out their votes. Although Roosevelt's plan was rejected by Congress, the national debate over the role of the federal government and the recalcitrance of the Supreme Court led more moderate members of the Court to change their positions and vote in favor of New Deal proposals. With the tide turning, Sutherland retired in 1938.

Despite his conservative views on government and business, Sutherland defended liberty rights as well as property rights. In POWELL V. ALABAMA, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932), Sutherland overturned the convictions of the "Scottsboro boys," a group of young African Americans sentenced to death for an alleged sexual assault on two white women. Sutherland ruled that the SIXTH AMENDMENT guarantees adequate legal counsel in state criminal proceedings.

Sutherland died on July 18, 1942, in Stockbridge, Massachusetts.

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## SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

During the 15 years that followed the Supreme Court's momentous SCHOOL DESEGREGATION decision in BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), school boards throughout the South did little to eliminate racial separation in the public schools. In some cases school boards merely announced a race-neutral school attendance policy. In other cases white-dominated school boards closed schools that were ripe for INTEGRATION and instead built new schools in suburban areas that would be virtually white-only. The NAACP and the federal government became increasingly frustrated by these methods and sought relief in the federal courts. As federal courts began to issue desegregation plans, questions arose over whether court-ordered supervision of local schools was proper. In *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed.2d 554 (1971) (also known as *North Carolina State Board of Education v. Swann*, the Supreme Court issued another landmark decision, ruling that federal courts could exercise their remedial powers to end a dual school system divided by race. The Court made clear that when school boards refused to act in GOOD FAITH, the federal courts had broad discretion to order, implement, and oversee the desegregation of school systems. In addition, the Court endorsed the use of busing to ensure desegregation. *Swann* was a controversial decision that guided federal courts for almost 30 years. By the late 1990s, however, federal courts had ended oversight of school desegregation and busing began to lose favor.

The Charlotte-Mecklenburg school system included the city of Charlotte and the surrounding Mecklenburg County, North Carolina. The school district was very large, encompassing over 550 square miles of territory. During the 1968–1969 school year 84,000 pupils attended 107 schools in the district, with 71 percent of the students white and 29 percent black. Of the 24,000 black students, 21,000 attended schools within the city of Charlotte. Of that number, 14,000 black students attended 21 schools with were either completely black or more than 99 percent black. These statistics demonstrated that the racial SEGREGATION persisted 15 years after the *Brown* decision. James E. Swann and a number of other black parents filed suit in 1965, asking the federal court to mandate that the school system be desegregated. The school board responded by passing a plan based on geographic ZONING with a free-transfer provision. Swann and the other plaintiffs returned to court

in 1968 and asked again for a plan that would dismantle the dual system and impose a unitary system upon the school district.

The district court conducted many hearings on the issues and found that the school district had drawn school attendance zones in such a way as to result in segregated education. The key issue, however, was how to remedy this situation. The school board proposed closing seven schools and restructuring attendance zones. The court found little merit in this proposal, finding that more than half the black and white students would remain in heavily segregated schools. The court appointed an expert, Dr. John Finger, to prepare another desegregation plan. The "Finger Plan" slightly modified the school board's plans for high school and junior high school students but was more drastic when it came to handling the 76 elementary schools in the system. This plan proposed using zoning, paring, and other grouping techniques so that student bodies in the school district would range from nine percent to 38 percent black. Black students in grades one through four would be bused from the inner city to predominantly white schools in the suburbs, while white students in the fifth and sixth grades would be bused to predominantly black schools in Charlotte. Under this plan, nine inner city schools were grouped with 24 suburban schools.

The Supreme Court, in a unanimous decision, upheld the desegregation plan and outlined what powers a federal court could employ to desegregate a public school system. Chief Justice WARREN BURGER, writing for the Court, noted that it had issued a second *Brown* decision in 1955 that addressed the need for school systems to move with "all deliberate speed" to end state-imposed segregated school systems. *Brown v. Board of Education,* 349 U.S. 249, 75 S. Ct. 753, 99 L. Ed. 1083 (1955). Despite the Court's desire that desegregation decisions be made by local school boards, it concluded that very little progress had been made when it issued its 1968 decision, *Green v. County School Board,* 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968). In *Green* the Court set out standards for measuring success in creating a unitary school system that no longer displayed the vestiges of segregation. The decision had made clear that school districts must take definite action to desegregate all aspects of public education or face court-imposed action. With *Swann,* Chief Justice Burger saw the opportunity to "make plain" and to "amplify guidelines" that would assist school districts and the lower federal courts.

The Court first stated that once a school district had been found in violation of the Fourteenth Amendment's EQUAL PROTECTION CLAUSE, a district court's "equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Though judges could only employ these vast powers on the basis of a constitutional violation, once a violation had been established a court could fashion a remedy based on the scope of the violation. Chief Justice Burger rejected the school board's claim that Title IV of the CIVIL RIGHTS ACT OF 1964 limited the federal courts' ability to implement the *Brown* decision. He concluded that the 1964 act restricted the courts from dealing with "de facto segregation," where racial imbalance in the schools had occurred without the discriminatory actions of state officials. The North Carolina schools had been segregated by state laws and therefore were subject to correction by the federal courts.

Chief Justice Burger addressed four main issues concerning student assignments to particular schools: (1) the use of racial balance or quotas; (2) the elimination of one-race schools; (3) limitations on attendance zones; and (4) the use of busing to correct state-enforced racial school segregation. As to the first issue, Burger emphasized that courts should not use a "fixed mathematical" ratio of white to black students for each school. A school district did not have the obligation to ensure that "every school in every community must always reflect the racial composition of the school system as a whole." In the case of the Charlotte-Mecklenburg schools, however, the court-approved ratio of 71 percent to 29 percent was "no more than a starting point in the process of shaping of a remedy." The limited use of this ratio was within the discretion of the district court.

As to one-race schools, Chief Justice Burger found that these would require "close scrutiny to determine that school assignments are not part of state-enforced segregation." Moreover, where a school system has a history of segregation, the courts were warranted to presume that one-race schools had been created as a result of past or present discriminatory action. As to the altering of school attendance zones, the Court admitted that federal courts had employed "drastic" gerrymandering to ensure a mix of white and black students. Such actions were acceptable as "interim

corrective measure[s]" and were not "beyond the broad remedial powers of a court."

The use of busing to desegregate public schools was the most controversial remedy imposed by the federal courts. Chief Justice Burger noted that bus transportation had been an integral part of U.S. schools for years and that 39 percent of public school children had been bused during the 1969–1970 school year. The "normal" use of bus transportation, coupled with the finding that neighborhood school attendance zones would not dismantle the dual school system, led the Court to conclude that busing was an acceptable remedy. Burger pointed out that under the desegregation plan many students would actually have shorter bus rides. To rule out busing would doom desegregation.

The Court pointed out that the school system would someday be judged unitary and that the federal court would withdraw from its oversight of the system. At that point the school board would be free to consider how it wanted to draw its attendance zones. This happened in 1999 when the district court released the Charlotte-Mecklenburg district from its order. The school district then ended busing and returned to neighborhood attendance zones. Segregation of the school district also returned.

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CROSS-REFERENCES

Civil Rights Acts; Discrimination.

## SWAT TEAMS

First developed in the 1960s by local law enforcement agencies, Special Weapons and Tactics units, or SWAT teams, have become common in police departments throughout the United States. These teams generally consist of small numbers of highly trained officers who use specialized weapons and tactics to handle high-risk situations. Although SWAT teams have been used successfully during countless numbers of altercations since their development, some critics charge that their use exceeds the traditional POLICE POWER given to the states.

SWAT teams began during the turbulent 1960s. In August 1966, Charles Joseph Whitman climbed a tower on the campus of the University of Texas at Austin and shot 47 people, killing 15. The incident took place during a 90-minute span, and police officers were ill-equipped to handle the situation. Officers eventually climbed the tower and reached Whitman's position, killing him after he tried to shoot the officers.

Police departments recognized that their forces needed officers trained to handle these types of incidents. The Los Angeles Police Department (LAPD) had struggled to contend with rioters during the 1966 Watts riots. Officers found that traditional police and riot-control tactics were ineffective against the disorganized nature of the mobs they faced. During the same year, LAPD officers were ambushed by Jack Ray Hoxsie, who began a shooting spree from within his home. Officers failed in their attempts to shoot back at Hoxsie. The officers were successful in subduing the situation only after they threw tear gas through a broken window and then stormed the house.

Former LAPD Police Chief Daryl Gates is credited with developing the first SWAT team in 1966. Gates was then a patrol area commander in charge of the Metro Division of the LAPD. The division was a floating police unit responsible for handling unusual criminal activity within the city of Los Angeles. Gates and others in the LAPD studied guerrilla warfare tactics of the U.S. military, determining that new teams trained to handle these dangerous situations needed to be smaller, with each member of the team given a specific purpose.

The LAPD SWAT teams gained notoriety in 1969 when one of the teams was used to serve an arrest warrant on two members of the BLACK PANTHERS, a radical and armed activist group known nationally for espousing revolutionary politics. The mission was successful. Five years later, the LAPD SWAT force, in conjunction with federal SWAT teams, engaged in an altercation with the Symbionese Liberation Army (SLA), best known for its KIDNAPPING of publishing heiress PATTY HEARST. During the altercation between the SWAT team members and the SLA, the house in which the SLA members were hiding caught fire, eventually killing the six members.

The number of SWAT teams in police departments began to rise during the 1970s and has risen steadily ever since. An estimated 89

percent of police departments in cities with populations of more than 50,000 maintain SWAT teams. The vast majority of federal law enforcement agencies have also established specialized response units. SWAT is among a number of names given to such units by federal and local agencies. Others include Special Response Team (SRT), Emergency Response Team (ERT), Special Emergency Response Team (SERT), and Emergency Services Unit (ESU).

SWAT teams are designed to work only in extraordinary circumstances, such as those involving hostages, hijackers, and suspects who have barricaded themselves. The most common use of SWAT teams is to assist other officers in serving arrest warrants when the subject of the warrant is considered a high risk. SWAT teams generally enter and secure the premises where the subject is located so that officers charged with serving the warrant can do so. The use of SWAT teams is rather common in the apprehension of suspected drug dealers, who are often armed and considered dangerous.

In 1981, Congress passed the Military Cooperation with Law Enforcement Officials Act, which allows the U.S. military to provide equipment and facilities for civilian police in the war on drugs. As a result, SWAT teams could be armed with military-style, high-tech arms and other equipment to carry out their functions. Moreover, many members of SWAT teams receive their training from military units. The result is that some SWAT teams now resemble paramilitary units more than they represent a division of a civilian police force.

The widespread use of SWAT teams has been criticized as the militarization of civilian law enforcement. Critics note that some SWAT teams are now used in routine police matters and that the paramilitary approach adopted by the SWAT teams is not appropriate for enforcement of the law. Law enforcement supporters often respond that criminals are much more dangerous than they were in the past and that traditional civilian policing methods are ineffective against many types of criminals.

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CROSS-REFERENCES

Police Power.

## ♦ SWAYNE, NOAH HAYNES

Noah Haynes Swayne served as associate justice of the U.S. Supreme Court from 1862 to 1881. A prominent Ohio attorney for almost forty years before becoming a judge, Swayne was President ABRAHAM LINCOLN's first Supreme Court appointment. His tenure on the Court was relatively undistinguished.

Swayne was born on December 7, 1804, in Frederick County, Virginia. He studied law with two Virginia attorneys and was admitted to the Virginia bar in 1823. His antislavery views proved troublesome, however, and he moved his law practice to Coshocton, Ohio. Appointed county attorney in 1826, Swayne soon became involved in DEMOCRATIC PARTY politics. An ardent supporter of President ANDREW JACKSON, Swayne was elected to the Ohio state legislature in 1829. In 1830 Jackson named him U.S. district attorney, a position he held for almost ten years. He moved to Columbus, Ohio, to administer his office.

By 1840 Swayne had returned to private practice, but he served on many public commissions in Ohio, including a commission to arbitrate a boundary dispute between Ohio and Michigan. He left the Democratic party in 1856 because he disagreed with the party's support of SLAVERY and joined the newly formed REPUBLICAN PARTY. As a lawyer, he represented several runaway slaves in legal proceedings in which slaveholders sought to reclaim their property.

In 1862 Justice JOHN MCLEAN, an Ohio native and friend of Swayne, died suddenly. Swayne used his Ohio political connections to lobby for an appointment to the Supreme Court. President Lincoln nominated Swayne in January 1862. He was confirmed two days later.

Though Swayne spent almost twenty years on the Supreme Court, he left no mark on the institution. An inveterate politician, he lobbied for the position of chief justice in 1864 and 1873. During the U.S. CIVIL WAR, he was a consistent supporter of Lincoln's emergency war measures, including the imposition of MARTIAL

*Noah H. Swayne.* ARCHIVE PHOTOS, INC.

LAW and the issuance of paper money called "greenbacks," which were not redeemable for gold or silver. In addition, he upheld the constitutionality of a federal INCOME TAX imposed during the Civil War (*Springer v. United States,* 102 U.S. (12 Otto) 586, 26 L. Ed. 253 [1881]).

Swayne retired from the Court in 1881. He died on June 8, 1884, in New York City.

## SWIFT V. TYSON

For almost one hundred years, the U.S. Supreme Court's decision in *Swift v. Tyson,* 41 U.S. (16 Pet.) 1, 10 L. Ed. 865 (1842), allowed the federal courts to create their own body of civil COMMON LAW in cases in which the parties were from different states. In exercising its diversity jurisdiction, a federal court was free to ignore the pertinent common law of the state in which it sat and apply federal common law. Though it was intended to encourage the development of a uniform set of COMMERCIAL LAW principles, the *Swift* decision was sharply criticized as an unwarranted intrusion into areas reserved to state courts.

*Swift* involved a legal dispute over the law of negotiable instruments. A negotiable instrument is a document by which one party promises to pay either money or goods to another party, called the bearer. For example, a check written on a person's bank account is a negotiable instrument. Negotiable instruments used by business are called COMMERCIAL PAPER and played an important role in the U.S. economy in the early nineteenth century. An unresolved issue was whether the bearer could assign a bill of exchange to a third party, who could then collect on the obligation.

The question of assignments was at the heart of *Swift.* A third-party assignee of a bill of exchange drawn in New York presented it for payment and was refused. The third party, who was not a New York resident, sued in New York federal district court. The New York common law held that a bill of exchange could not be assigned, and the federal judge ruled accordingly. Because New York was the leading commercial center in the United States, this ruling had serious implications for the national economy.

On appeal, the Supreme Court overturned the decision by reinterpreting the federal RULES OF DECISION ACT, originally section 34 of the JUDICIARY ACT OF 1789 (1 Stat. 73). In its original form, the act provided that "the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of

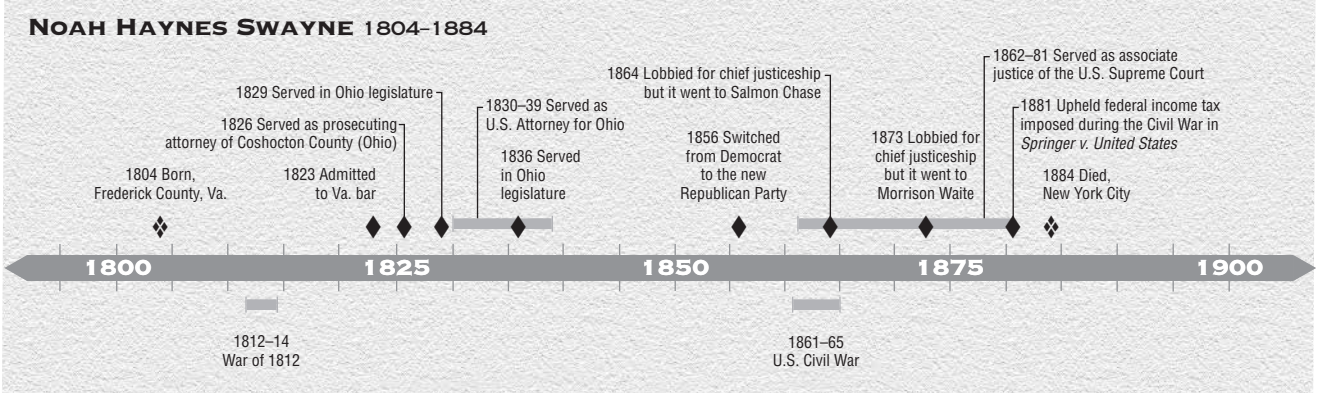

the United States in cases where they apply." The main issue before the Court concerned the meaning of the word *laws.* Was the word limited to legislatively enacted statutes or did it include state common-law decisions as well?

Justice JOSEPH STORY, writing for a unanimous Court, concluded that the term *laws* did not include common-law decisions. Such decisions were "at most, only evidence of what the laws are, and are not, of themselves, laws." Except for decisions of a "local" nature, such as those dealing with real estate, a federal judge was not required to apply a "general" state common-law rule involving commerce to a diversity-based case. Under the act a federal judge could apply only state statutes to a legal dispute.

Story, who was the leading U.S. authority on commercial law and commercial paper, believed it was imperative for the growth of the U.S. economy that the United States develop a uniform national law of commerce for the federal courts to apply. Therefore, he declared that federal common law permitted the assignment of commercial paper. Economic and legal historians have concluded that *Swift* did contribute to the growth of multistate transactions and the national economy. Businesses were able to assign commercial paper without fear that a state would invalidate the assignment.

Nevertheless, the decision angered many who believed a federal common law interfered with the right of states to develop their own principles of commercial law. The *Swift* doctrine also led to situations in which the SUBSTANTIVE LAW applied to litigants might be determined simply by the fortuity of their residences. Two cases might have different legal results depending only on whether the plaintiff and the defendant were from the same state or from different states. This led to significant unfairness and forum shopping. For example, in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab and Transfer Co.,* 276 U.S. 518, 48 S. Ct. 404, 72 L. Ed. 681 (1928), a Kentucky corporation dissolved and reincorporated in Tennessee to obtain the benefit of substantive federal common law against another Kentucky corporation.

Faced with mounting criticism of *Swift,* in 1938 the Supreme Court overturned the decision in ERIE RAILROAD CO. V. TOMPKINS, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. Federal courts were again required to apply state law, whether statutory or common, in diversity jurisdiction cases. In a radical shift from *Swift,* federal district courts periodically refer questions to state supreme courts, asking for a ruling on what the state law is on a specific issue.

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## SYLLABUS

*A headnote; a short note preceding the text of a reported case that briefly summarizes the rulings of the court on the points decided in the case.*

The syllabus appears before the text of the opinion. The syllabus generally is not part of the opinion of the court but is prepared by a legal editor employed by a private law book company that publishes court decisions to serve as a quick reference for a researcher. Some courts prepare the syllabus for their own decisions, but in many states the syllabus has no legal effect. Ohio is one exception, however, where the court-prepared syllabus is part of the decision and is considered a statement of the law. In most states, only the opinion of the court containing the original statement of the grounds for the opinion may be used in legal papers in a lawsuit to convince a court or jury of a particular point of law.

CROSS-REFERENCES

Court Opinion.

## SYMBOLIC DELIVERY

*The constructive conveyance of the subject matter of a gift or sale, when it is either inaccessible or cumbersome, through the offering of some substitute article that indicates the donative intent of the donor or seller and is accepted as the representative of the original item.*

For example, when one individual wishes to make a gift of a car to another individual, he or she might do so by handing over the keys and all documents indicating ownership thereof. In the law of real property, the transfer of a twig or clod of dirt from the grantor of land to the grantee was LIVERY OF SEISIN that constituted symbolic delivery of the right of legal possession or ownership of land pursuant to a freehold estate. Today the transfer of a deed from the seller to a buyer demonstrates the change in ownership of property.

## SYMBOLIC SPEECH

*Nonverbal gestures and actions that are meant to communicate a message.*

The term *symbolic speech* is applied to a wide range of nonverbal communication. Many political activities, including marching, wearing armbands, and displaying or mutilating the U.S. flag, are considered forms of symbolic expression. The U.S. Supreme Court has held that this form of communicative behavior is entitled to the protection of the FIRST AMENDMENT to the U.S. Constitution, but the scope and nature of that protection have varied.

The Supreme Court first gave symbolic speech First Amendment protection in *Stromberg v. California,* 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931). The Court overturned a California statute that prohibited the display of a red flag as a "sign, symbol or emblem of opposition to organized government." But not until the VIETNAM WAR era did the Court articulate the rules to be followed in determining whether symbolic expression is entitled to the protection of the First Amendment.

In *United States v. O'Brien,* 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), the Court reviewed the conviction of David Paul O'Brien for violating a 1965 amendment to the Selective Service Act (50 U.S.C.A. App. §§ 451 et seq.) that prohibited any draft registrant from knowingly destroying or mutilating his draft card. O'Brien had burned his Selective Service card on the steps of the South Boston Courthouse at a rally protesting the Vietnam War. He claimed that his act of burning his card was symbolic speech protected by the First Amendment. The government argued that it could prohibit this conduct because it had a legitimate interest in requiring registrants to have draft cards always in their possession as a means of ensuring the proper functioning of the military draft.

The Supreme Court sided with the government, with Chief Justice EARL WARREN rejecting "the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express his idea." When "speech" and "nonspeech" elements are combined in the same course of conduct, a lesser burden will be placed on the government to justify its restrictions. Accordingly, the Court announced the appropriate constitutional standard:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. Applying this test to the statute involved in *O'Brien,* the Court found the law constitutional.

A less defiant form of symbolic speech was extended constitutional protection during the Vietnam War. In TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), high school officials in Des Moines, Iowa, had suspended students for wearing black armbands to school to protest U.S. involvement in the Vietnam War. Justice ABE FORTAS, in his majority opinion, rejected the idea that the school's response was "reasonable" because it was based on the fear that the wearing of the armbands would create a disturbance. Fortas ruled that the wearing of the armbands was "closely akin to 'pure speech' which . . . is entitled to comprehensive protection under the First Amendment. . . ." Public school officials could not ban expression out of the "mere desire to avoid discomfort and unpleasantness that always accompany an unpopular viewpoint."

Political protesters have often used the U.S. flag as a vehicle to express opposition to government policies. During the Vietnam War era, the mutilation or burning of the flag became commonplace. Such actions angered many people, and legislation was passed at the state level to prohibit this conduct. In *Street v. New York,* 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969), the Supreme Court had the opportunity to address the question of whether flag burning is entitled to constitutional protection as symbolic speech. However, the Court focused on the element of verbal expression also presented in this case and effectively avoided the symbolic speech issue. In a 1974 case, the Court did strike down a Washington state law that prohibited the display of the U.S. flag with "extraneous material" attached to it (*Spence v. Washington,* 418 U.S. 405, 94 S. Ct. 2727, 41 L. Ed. 2d 842).

The *Street* decision left open the question of whether flag burning per se was a form of symbolic speech protected by the First Amendment. In 1989, in the highly publicized case of TEXAS V. JOHNSON, 491 U.S. 397, 109 S. Ct. 2533, 105 L.

# Flag Burning: Desecration or Free Expression?

The Supreme Court's decision in **TEXAS V. JOHNSON**, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989), striking down a Texas law that made burning the U.S. flag a crime, was endorsed by the **AMERICAN CIVIL LIBERTIES UNION** (ACLU) and other groups that seek to preserve freedom of expression under the **FIRST AMENDMENT**. Other groups and individuals, however, were dismayed that the Court would strike down a law that protected the symbol of the United States. Congress responded by passing the federal Flag Protection Act of 1989, 103 Stat. 777, which made flag burning a federal crime. When the Supreme Court struck down the federal law in *United States v. Eichman,* 496 U.S. 310, 110 S. Ct. 2404, 110 L. Ed. 2d 287 (1990), opponents of flag burning began to campaign for a constitutional amendment that would make such a law constitutional.

The proponents of a flag protection amendment have been led by the Citizens Flag Alliance (CFA), a nonpartisan, nonprofit national coalition that includes more than one hundred organizations and is funded, in large part, by the **AMERICAN LEGION**. The proposed amendment states that "Congress shall have power to prohibit the physical desecration of the flag of the United States." The House of Representatives overwhelmingly passed the amendment in June 1995, but the Senate defeated the amendment by three votes in December 1995.

Despite this defeat, the CFA has continued to campaign for the amendment, noting that opinion polls consistently show that 80 percent of U.S. citizens support the amendment. In addition, forty-nine state legislatures have passed resolutions asking Congress to pass a flag protection amendment—eleven more states than are needed to ratify an amendment. The amendment was reintroduced in Congress in 1997. The House passed the measure by a vote of 310–114, but a vote in the Senate was delayed.

Proponents of the amendment contend that it does not restrict freedom of expression or limit the First Amendment. They note that there have always been limits on free speech and that the Supreme Court has never regarded the guarantees of the First Amendment as absolute. Proponents point to Chief Justice **WILLIAM H. REHNQUIST**'s dissent in *Johnson,* in which he characterized flag burning as "the equivalent of an inarticulate grunt or roar" and the flag as a national symbol deserving of protection.

In addition, supporters of the amendment deny that flag burning is

Ed. 2d 342, the Court surprised many observers by ruling that flag burning was protected. After publicly burning the U.S. flag outside the 1984 Republican National Convention in Dallas, Texas, Gregory Lee Johnson was charged with violating a Texas law prohibiting flag desecration. Johnson was convicted at trial, but his conviction was reversed by the Texas Court of Criminal Appeals, which held that the law violated the First Amendment. On a 5–4 vote, the U.S. Supreme Court agreed.

Writing for the majority, Justice **WILLIAM J. BRENNAN JR.** noted that "[t]he expressive, overtly political nature of [Johnson's] conduct was both intentional and overwhelmingly apparent." It was clear that "Johnson was convicted for engaging in expressive conduct." Rejecting the assertion by Texas that the law prevented breaches of the peace, the Court concluded that "Johnson's conduct did not threaten to disturb the peace. Nor does the State's interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression."

Chief Justice **WILLIAM H. REHNQUIST**, in a dissenting opinion, dismissed the idea that flag burning was a form of symbolic speech. On the contrary, he stated, "flag burning is the equivalent of an inarticulate grunt or roar that . . . is most likely to be indulged in not to express any particular idea, but to antagonize others. . . ." Rehnquist argued that the flag "as the symbol of our Nation, [has] a uniqueness that justifies a governmental prohibition against flag burning. . . ."

The *Johnson* decision angered conservatives, who called for a constitutional amendment to place flag burning beyond the First Amendment's protection. When the amendment proposal failed to gain support, Congress passed the federal Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777, which made flag burning a federal crime. In *United States v. Eichman,* 496 U.S. 310, 110 S. Ct. 2404, 110 L. Ed. 2d 287 (1990), the Court struck down the Flag Protec-

symbolic speech. They argue that the act of flag desecration is conduct rather than speech and is thus outside the First Amendment's protection. The Supreme Court's decisions have regarded flag burning as protected symbolic speech, however, so this argument can only prevail if the Court's interpretation is overridden by an amendment to the Constitution.

Supporters of the amendment contend that the flag has a special place in U.S. society and culture and serves as a unifying symbol for a heterogeneous nation. Because of its unique status, the flag must be honored and respected. They argue that the freedom to desecrate the flag is not a fundamental freedom deeply rooted in the First Amendment. Therefore, they conclude, it is reasonable for a balance to be struck between the rights of the individual and her responsibility to society. In this instance societal values should prevail over individual interests.

Proponents of the amendment strenuously object to the charge that they are restricting **FREEDOM OF SPEECH**. The amendment does not prevent a person from criticizing, in speech or writing, the government, government officials, or even the flag itself. The amendment simply gives Congress the authority to pass legislation that prohibits the desecration of the U.S. flag.

Opponents of the amendment, led by the ACLU, insist that the passage of the flag amendment would limit freedom of expression and restrict the First Amendment. They point out that the word *desecration* is a religious concept that means to profane or violate the sanctity of something. According to opponents, the flag amendment would implicitly constitutionalize the flag as the sacred or divine object of the United States. Such an action would run counter to the **BILL OF RIGHTS**.

Opponents of the amendment contend that flag burning is a rare event that does not merit the amending of the Constitution. No more than five or six persons were prosecuted annually for flag burning before the *Johnson* decision. Opponents worry that once a flag desecration amendment is passed, it will open the door to the revocation of other individual freedoms. The Constitution and the Bill of Rights were designed to prevent the tyranny of the majority. Just because a flag desecration amendment has broad support does not make it right. Once flag burning is banned, legislators and pressure groups will seek to restrict other freedoms.

Those opposed to the amendment also argue that the Supreme Court's decision in *Johnson* contained the best reason for rejecting it. As Justice **WILLIAM J. BRENNAN JR.** stated, "We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents." Opponents see the toleration of actions such as flag burning as a sign and source of national strength. In their view the flag stands for the freedoms each U.S. citizen enjoys, including the right to burn that very symbol.

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tion Act as applied to flag burning as a means of political protest.

Many commentators have criticized the way the Supreme Court has treated the symbolic speech area. In particular, observers have noted that the line between "speech" and nonverbal "conduct" is impossible to draw and that the real emphasis should be placed on the motive behind the government regulation. This approach would determine whether the regulation was intended to censor certain ideas or whether it was directed at the noncommunicative impact of the behavior.

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CROSS-REFERENCES

Censorship; Freedom of Speech.

## SYNDICATE

*An association of individuals formed for the purpose of conducting a particular business; a* **JOINT VENTURE**.

A syndicate is a general term describing any group that is formed to conduct some type of business. For example, a syndicate may be formed by a group of investment bankers who underwrite and distribute new issues of **SECURITIES** or blocks of outstanding issues. Syndicates can be organized as corporations or partnerships.

Newspaper or press syndicates came into existence after the Civil War. A press syndicate sells the exclusive rights to entertainment features, such as gossip and advice columns, comic strips, and serialized books, to a subscribing newspaper in each territory. These "syndicated" features, which appear simultaneously around the United States, can generate large sums for the creators of the features and for the syndicate that sells them. Similarly, when television programs are syndicated, one station in each television market is allowed to broadcast a popular game show or rebroadcast a popular network series. A syndicated show may be televised at different times depending on the schedule of the local station. In contrast, on network television, a program is televised nationally at one scheduled time.

The term *syndicate* is also associated with ORGANIZED CRIME. In the 1930s, the term *crime syndicate* was often used to describe a loose association of racketeers in control of organized crime throughout the United States. For example, the infamous "Murder, Inc." of the 1930s, which was part of a national crime syndicate, was founded to threaten, assault, or murder designated victims for a price. A member of the crime syndicate anywhere in the United States could contract with Murder, Inc., to hire a "hit man" to kill a person.

## SYNDICATED CRIME

See ORGANIZED CRIME.

## SYNOPSIS

*A summary; a brief statement, less than the whole.*

A synopsis is a condensation of something—for example, a synopsis of a trial record.

## TABLE OF CASES

*An alphabetized list of the judicial decisions that are cited, referred to, or explained in a book with references to the sections, pages, or paragraphs where they are cited.*

A table of cases is commonly found in either the prefix or appendix of the book.

## TACIT

*Implied, inferred, understood without being expressly stated.*

*Tacit* refers to something done or made in silence, as in a *tacit agreement.* A *tacit understanding* is manifested by the fact that no contradiction or objection is made and is thus inferred from the situation and the circumstances.

## TACKING

*The process whereby an individual who is in* ADVERSE POSSESSION *of real property adds his or her period of possession to that of a prior adverse possessor.*

In order for title to property to vest in an adverse possessor, occupancy must be continuous, regular, and uninterrupted for the full statutory period. If privity exists between the parties, such that one possessor gives possession of the land to the next, the time periods that the successive occupants have had possession of the property may be added or tacked together to meet the continuity requirement.

Tacking is allowed only when no time lapses between the end of one occupant's possession and the beginning of another's occupancy. In addition, possession by the prior occupant must have been adverse or under color of title.

## ♦ TAFT, ALPHONSO

Alphonso Taft served as attorney general of the United States from 1876 to 1877, under President ULYSSES S. GRANT.

"THE GOVERNMENT IS NEUTRAL, AND, WHILE PROTECTING ALL, IT PREFERS NONE AND DISPARAGES NONE."
—ALPHONSO TAFT

Taft was born November 5, 1810, in Townsend, Vermont, to pioneers Peter Rawson Taft and Sylvia Howard Taft. He was well aware of his family's long history and tradition of public service in the American colonies. His father was a descendant of Edward Rawson, a 1636 settler who had served as secretary of the Massachusetts Province. Other Taft family members held positions of responsibility and influence in communities all along the eastern seaboard.

Although Taft's parents were of modest financial means, they had a strong commitment to education, and Taft was well schooled. Taft left Vermont to attend Yale University in 1829, where he received a bachelor of arts degree in 1833 and his law degree in 1836.

Like many young men of his day, Taft saw his future in the West. In 1839 Taft moved to Cincinnati, Ohio, and opened his law practice. On August 29, 1841, he married Fanny Phelps, the daughter of family friends Charles Phelps and Eliza Houghton Phelps. Fanny died in 1852.

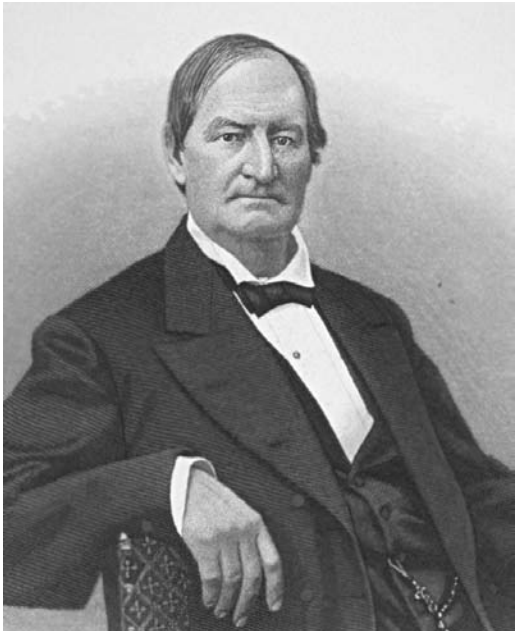

*Alphonso Taft.*
ARCHIVE PHOTOS, INC.

Taft remarried in 1853, to Louise Maria Torret. They had three sons and one daughter, including WILLIAM HOWARD TAFT, who became the twenty-seventh president of the United States and the tenth chief justice of the U.S. Supreme Court.

Taft played an important role in organizing his influential friends to support the national Republican effort, and he is personally credited with the birth of the REPUBLICAN PARTY in Cincinnati. He was chosen to represent Hamilton County at the first Republican National Convention, in 1856. He later sought to represent Ohio's first district in the thirty-fifth Congress. He ran as a Republican candidate, but was defeated. He remained active in Republican party politics for most of his life.

In 1865 Taft was appointed to fill the remaining term of a Cincinnati superior court judge. Later that year, he was elected in his own right, and he served as a judge of the Superior Court of Cincinnati from 1865 to 1872.

In 1872 Taft left the bench to practice law with his grown sons. He took an active role in the establishment and organization of the Cincinnati Bar Association, and he was elected the first president of the new organization in March 1872. Taft's political, judicial, and legal activities during the late 1860s and early 1870s elevated him to national attention, so few were surprised when President Grant appointed him secretary of war in March 1876. (It was a position his son William Howard Taft would also hold thirty years later, under President THEODORE ROOSEVELT.) Only two months later, Grant named Taft to be attorney general.

Taft served as attorney general from May 1876 to January 1877. In November 1876, the government's policy of suspending pay to sailors who were jailed or removed from duty was challenged. Taft rendered an opinion finding "nothing in the law of the naval service which justifies the view that confinement or suspension from duty under sentence of COURT-MARTIAL is attended by FORFEITURE or loss of pay" (15 Op. Att'y Gen. 175, 176).

Following his term as attorney general, Taft made several unsuccessful bids for elected office. He was defeated in his run for a U.S. Senate seat in 1878. And he was defeated in two attempts at the Ohio governor's seat, in 1877 and 1879.

In April 1882, he was named U.S. ambassador to the Austro-Hungarian Empire. In 1884 Taft was offered the ambassadorship to Russia. He accepted, and served until August 1885.

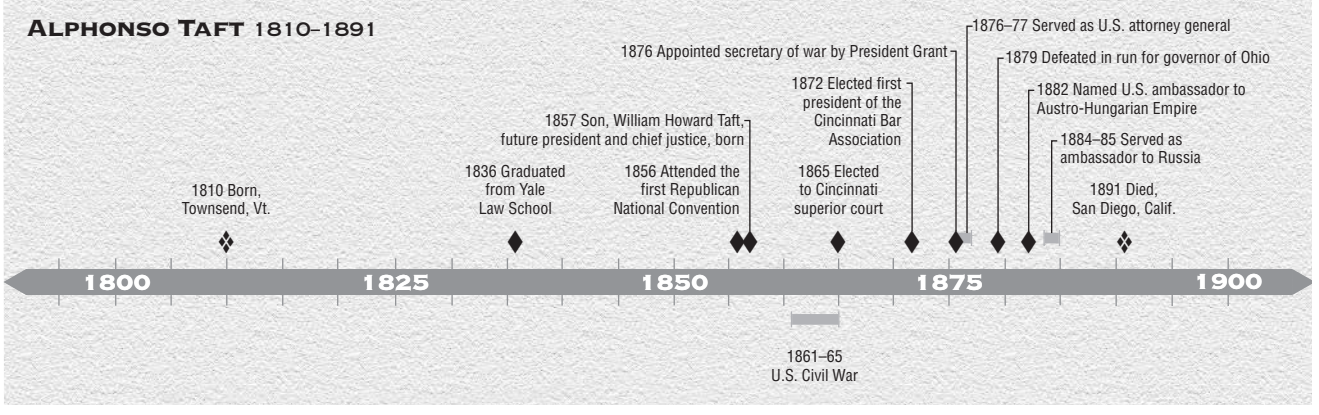

At the close of his foreign service, Taft settled in California. In retirement, he devoted his time to a number of educational institutions, including Yale University, where he was a fellow of the college, and the University of Cincinnati, where he was a charter trustee. After his death on May 21, 1891, in San Diego, the University of Cincinnati's Alphonso Taft School of Law was named in his honor.

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## TAFT-HARTLEY ACT

Over President HARRY S. TRUMAN's VETO, the Taft-Hartley Act—which is also called the Labor-Management Relations Act (29 U.S.C.A. § 141 et seq.)—was passed in 1947 to establish remedies for UNFAIR LABOR PRACTICES committed by unions. It included amendments to the National Labor Relations Act, also known as the WAGNER ACT of 1935 (29 U.S.C.A. § 151 et seq.), which were crafted to counteract the advantage that LABOR UNIONS had gained under the original legislation by imposing corresponding duties on unions. Prior to the amendments, the National Labor Relations Act had proscribed unfair labor practices committed by management.

The principal changes imposed by the act encompass the following: prohibiting secondary boycotts; abolishing the CLOSED SHOP but allowing the union shop to exist under conditions specified in the act; exempting supervisors from coverage under the act; requiring the NATIONAL LABOR RELATIONS BOARD (NLRB) to accord equal treatment to both independent and affiliated unions; permitting the employer to file a representation petition even though only one union seeks to represent the employees; granting employees the right not only to organize and bargain collectively but also to refrain from such activities; allowing employees to file decertification petitions for elections to determine whether employees want to revoke the designation of a union as their bargaining agent; declaring certain union activities to constitute unfair labor practices; affording to employers, employees, and unions new guarantees of the right of free speech; proscribing strikes to compel an employer to discharge an employee due to his or her union affiliation, or lack of it; and providing for settlement by the NLRB of certain jurisdictional disputes.

The act also makes collective bargaining agreements enforceable in federal district court, and it provides a civil remedy for damages to private parties injured by secondary boycotts. The statute thereby marks a shift away from a federal policy encouraging unionization, which has been embodied in the Wagner Act, to a more neutral stance, which maintains the right of employees to be free from employer coercion.

CROSS-REFERENCES

Labor Law; Labor Union.

## ♦ TAFT, WILLIAM HOWARD

William Howard Taft is the only person to serve as both president and Supreme Court chief justice of the United States. A gifted judge and administrator, Taft helped modernize the way the U.S. Supreme Court conducted its business and was the driving force behind the construction of the Supreme Court Building in Washington, D.C.

"THE ORDINARY RESULT OF HUMAN PUNISHMENT IS THAT THOSE NEAR TO THE CRIMINAL, OR DEPENDENT UPON HIM, SUFFER IN MANY CASES MORE THAN HE DOES."
—WILLIAM HOWARD TAFT

Taft was born on September 15, 1857, in Cincinnati, Ohio. His father, ALPHONSO TAFT, served as secretary of war and attorney general in President Ulysses S. Grant's administration. Taft graduated from Yale University in 1878 and earned a law degree from Cincinnati Law College (now University of Cincinnati College of Law) in 1880. He established a law practice in Cincinnati and served as assistant prosecuting attorney for Hamilton County, Ohio, from 1881 to 1883. Taft was assistant county solicitor from 1885 to 1887 and a superior court judge from 1887 to 1890.

Though only thirty-three years old, Taft lobbied President BENJAMIN HARRISON for a seat on the U.S. Supreme Court in 1890. Although Harrison demurred, he did make Taft U.S. SOLICITOR GENERAL, the person who argues on behalf of the federal government before the Supreme Court. Taft won sixteen of the eighteen cases he argued before 1892, when Harrison appointed him to the U.S. Court of Appeals for the Sixth Circuit.

The jurisdiction of the Sixth Circuit included Chicago and other industrialized cities of the Midwest, which were the scenes of conflict between LABOR UNIONS and large manufacturing

*William Howard Taft.*
LIBRARY OF CONGRESS

companies. Taft, like most conservative judges of his time, upheld the use of the labor **INJUNCTION** to prevent labor strikes and violence. The use of the injunction removed an important bargaining tool and seriously weakened labor unions. Taft, however, did believe workers had a right to organize and could legally strike, if the strike was peaceful.

Taft left the court in 1900 at the request of President **WILLIAM MCKINLEY**. In the aftermath of the **SPANISH-AMERICAN WAR** (1898), the United States had taken possession of the Philippine Islands. Taft was chosen to lead a commission that would help establish a civil government in the islands and end military rule. In 1901 he became the first civilian governor of the Philippines and drew praise from the Philippine people for his administration. Taft reluctantly returned to Washington in 1904 at the request of President **THEODORE ROOSEVELT** to become secretary of war. As secretary, Taft supervised the construction of the Panama Canal, established the U.S. Canal Zone, and helped negotiate a treaty that ended the Russo-Japanese War in 1905.

When Roosevelt declined to run for another term in 1908, Taft was nominated as the Republican candidate. He easily defeated the Democratic candidate, **WILLIAM JENNINGS BRYAN**, in the general election and assumed office in 1909 as Roosevelt's political heir. Taft's administration proved to be lackluster at best, however. Though he was an able administrator, he lacked the political skills necessary to succeed in Washington. He alienated Roosevelt and other liberal Republicans by appeasing conservative Republicans, splitting the party in the process.

Taft did carry on Roosevelt's "trust-busting" initiatives, attacking business trusts under the **SHERMAN ANTI-TRUST ACT** (15 U.S.C.A. § 1 et seq.) and supporting the Mann-Elkins Act of 1910 (49 U.S.C.A. § 1 et seq.), which gave more power to the **INTERSTATE COMMERCE COMMISSION**. He also established the **LABOR DEPARTMENT**. In foreign affairs Taft adopted a policy of "dollar diplomacy" as an economic substitute for military aid to underdeveloped countries.

Taft's political downfall began in 1910 with his support of Speaker of the House of Representatives Joseph Cannon, a conservative Republican who ran the House with an iron fist. Liberals had counted on Taft to help them break Cannon's power, but he refused. When Taft

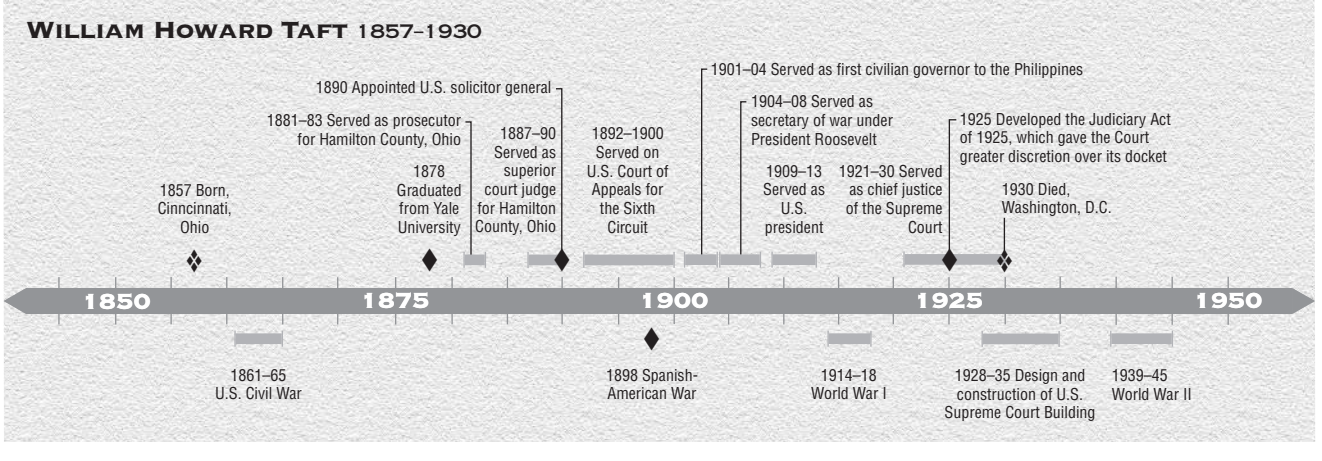

approved the development of Alaskan coal resources, he drew public criticism from Gifford A. Pinchot of the Forestry Service, a promoter of conservation and Roosevelt's close ally.

In 1912 Roosevelt ran against Taft for the Republican presidential nomination. When Taft won the endorsement, Roosevelt formed the PROGRESSIVE PARTY, effectively guaranteeing that Democrat WOODROW WILSON would be elected president. Taft carried only Utah and Vermont and split the Republican vote with Roosevelt, allowing Wilson to win handily.

After leaving the presidency, Taft became a law professor at Yale University. During WORLD WAR I he served on the National War Labor Board and advocated the establishment of the LEAGUE OF NATIONS and U.S. participation in that world organization.

In 1921 President WARREN G. HARDING appointed Taft chief justice of the United States Supreme Court. On a Court dominated by conservatives, Taft usually went along with his brethren in striking down laws that sought to regulate business and labor practices.

Taft distinguished himself more as an administrator than as a judge. He developed and lobbied for the JUDICIARY ACT OF 1925, 43 Stat. 936, which gave the Court almost complete discretion over its docket. Under Taft the Court developed the writ of certiorari process, whereby a party files a petition seeking review by the Court. Because only a small fraction of these petitions are granted, the process has dramatically reduced the work of the Court. Taft also lobbied Congress for funds to construct a separate building for the Court. Although he did not live to see its completion, the Supreme Court Building, which was designed by CASS GILBERT, proved to be a lasting monument to Taft's administrative talents.

Taft's health began to fail in 1928, and he was forced to resign from the Court in February 1930. He died on March 8, 1930, in Washington, D.C.

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## TAIL

*Limited, abridged, reduced, or curtailed.*

An *estate in tail* is a legally recognizable interest of inheritance that goes to the heirs of the donee's body instead of descending to the donee's heirs generally. The heirs of the donee's body are his or her lawful issue (children, grandchildren, great-grandchildren, and so on, in a direct line for as long as the descendants endure in a regular order and course of descent). Upon the death of the first owner to die without issue, the estate tail ends.

CROSS-REFERENCES

Entail.

## TAKEOVER

*To assume control or management of a corporation without necessarily obtaining actual title to it.*

A *takeover bid* or tender offer is a proposal made by one company to purchase shares of stock of another company, in order to acquire control thereof.

CROSS-REFERENCES

Mergers and Acquisitions.

## TAKINGS CLAUSE

See EMINENT DOMAIN; FIFTH AMENDMENT.

## TALESMAN

*An individual called to act as a juror from among the bystanders in a court.*

A talesman refers to a person who is summoned as an additional juror to make up for a deficiency in a jury panel.

"TO THE OLD ADAGE THAT DEATH AND TAXES SHARE A CERTAIN INEVITABLE CHARACTER, FEDERAL JUDGES MAY BE EXCUSED FOR ADDING ATTORNEY'S FEES CASES."
—EDWARD ALLEN TAMM

## ♦ TAMM, EDWARD ALLEN

Edward Allen Tamm served the federal bench with distinction for almost forty years, as a district and appellate court judge. For much of his life, he was a guiding force in the field of judicial ethics. His committee work for the U.S. Judicial Conference helped to set the standards for judicial conduct throughout the nation and to instill public confidence in the fair administration of justice. (The Judicial Conference is the principal machinery through which the federal court system operates. This group establishes the standards and shapes the policies governing the federal judiciary.)

Tamm was born April 21, 1906, in St. Paul, Minnesota. Shortly afterward, his family moved

to Washington State. Tamm attended Mount Saint Charles College, in Helena, Montana, and the University of Montana. In 1928 he moved to Washington, D.C., and he earned his doctor of JURISPRUDENCE degree from Georgetown University Law School in 1930.

After graduating from law school, Tamm joined the FEDERAL BUREAU OF INVESTIGATION (FBI). There, he advanced quickly, achieving a promotion to assistant director in 1934. From 1940 to 1948, he worked closely with Director J. EDGAR HOOVER as a special assistant and, as such, traveled around the world. In 1945, Tamm served as special adviser to the U.S. delegation to the U.N. Conference on International Organizations. During the WORLD WAR II years, Tamm also served his country in the Navy Reserve, attaining the rank of lieutenant commander.

In 1948 Tamm was appointed U.S. district judge for the District of Columbia by President HARRY S. TRUMAN. Because of Tamm's background with the FBI and his lack of trial experience, the appointment was met with mixed reaction. Eventually confirmed, Tamm served the district court for the next seventeen years. At the time of his appointment, the district court not only handled federal cases but also was a court of general jurisdiction for the District of Columbia. This meant that Tamm handled local cases, including traffic and small claims issues, as well as federal issues. Therefore, Tamm had ample opportunity to develop his skills as a trial judge. He heard a wide variety of cases that normally would have been tried before state courts.

As a district judge, Tamm cultivated an interest in JUDICIAL ADMINISTRATION. He established a reputation for knowing how to move cases through the court. In the late 1950s, Tamm chaired a district courts committee to explore the use of electronic equipment for court reporting. He also pioneered the use of six-member juries for civil cases. His vision was a long time coming, but in the mid-1990s, electronic court reporting methods were widely used, and six-member jury panels for civil matters were the rule in most of the nation's federal courts.

Tamm was elevated to the U.S. Court of Appeals for the District of Columbia Circuit in 1965, by President LYNDON B. JOHNSON. Tamm's work on the trial bench deeply influenced his opinion writing as an appellate judge. His opinions were usually short and to the point; they were written to provide trial courts with a clear guide to the proper application of the law—and not to impress the reader with the judge's literary skill.

The case for which Tamm is best known is often called the *Seven Dirty Words* case—*Pacifica Foundation v. FCC,* 556 F.2d 9, 181 U.S. App. D.C. 132 (D.C. Cir. Mar. 16, 1977). In it, Tamm set aside a FEDERAL COMMUNICATIONS COMMISSION (FCC) ruling that a recording containing seven specific words (referring to such things as sexual acts and portions of human anatomy) could not be aired on the radio. He wrote that the FCC order banning air play of the explicit excerpts from George Carlin's *Occupation Foole* album carried the agency into the "forbidden realm of censorship." Tamm's decision was ultimately overturned by the U.S. Supreme Court, in a 5–4 ruling concluding that neither the FIRST AMENDMENT guarantee of free speech nor federal law against broadcast CENSORSHIP barred the FCC from revoking the license of any station that aired explicit material

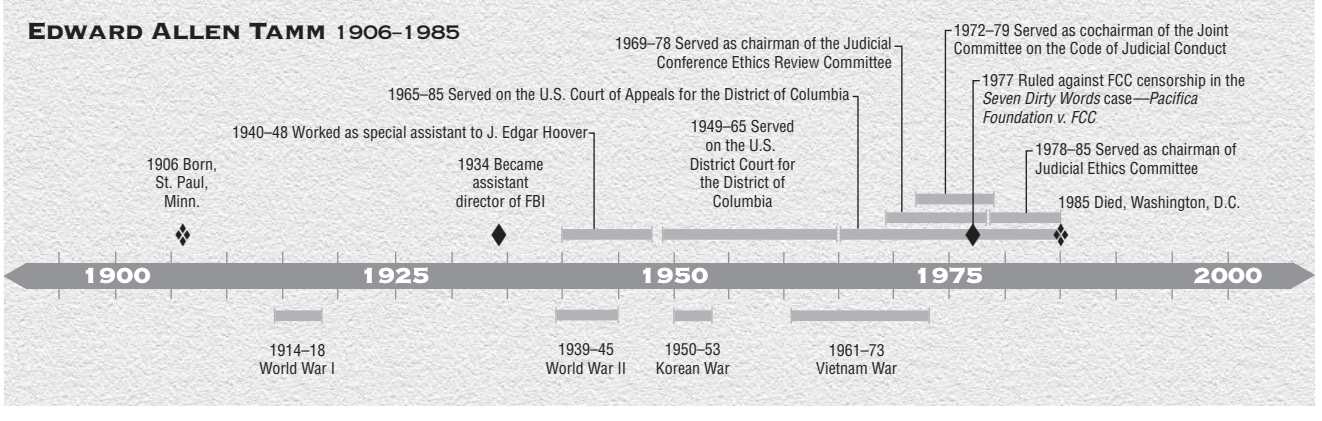

during the daytime or early evening hours (*Pacifica Foundation,* 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 [1978]).

As an appellate judge, Tamm continued his commitment to improving the administration of justice and increased his participation on Judicial Conference committees. During these years, Tamm also took up the cause of monitoring judicial ethics. He served as chairman of the Judicial Conference Ethics Review Committee (1969–78), chairman of the Judicial Ethics Committee (1978–85), member of the Judicial Conference Committee on Court Administration (1970–85), cochairman of the Joint Committee on the Code of Judicial Conduct (1972–79), and member of the Advisory Committee on Federal Rules of Appellate Procedure (1979–85). As chairman of the committee responsible for administering both self-imposed Judicial Conference ethical standards and, later, congressionally mandated financial reporting, Tamm personally examined or reviewed the thousands of financial statements submitted by federal judges and employees each year.

Tamm died on September 22, 1985, at his home in Washington, D.C. He was survived by his wife of fifty years, Grace Monica Sullivan Tamm.

In the spring of 1986, Tamm was posthumously awarded the Devitt Distinguished Service to Justice Award, which is administered by the American Judicature Society. This award is named for Edward J. Devitt, a former chief U.S. district judge for Minnesota. It acknowledges the dedication and contributions to justice made by all federal judges, by recognizing the specific achievements of one judge who has contributed significantly to the profession. Tamm was acknowledged for administrative innovations that improved the performance of the courts and for his work in promoting and monitoring judicial ethics.

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**CROSS-REFERENCES**

Judicial Conference of the United States.

## TAMMANY HALL

Political machines have traditionally wielded influence in U.S. society, and one of the most notorious was Tammany Hall in New York. Controlled by the DEMOCRATIC PARTY, the power of Tammany Hall grew to such an extent that its members dominated New York government for nearly two centuries.

*The members of Tammany Hall had a corrupt stonghold on New York City politics from the early 1800s until the 1930s.*

AP/WIDE WORLD PHOTOS

Founded by William Mooney in 1789, Tammany Hall was originally a fraternal and patriotic organization first called the Society of St. Tammany, or the Columbian Order. The name *Tammany* evolved from Tamanend, a legendary Delaware Indian chief, and the members of Tammany Hall used many Indian words to designate their various titles. Each trustee was a sachem, and the presiding officer was a grand sachem; the only person to receive the honor of great grand sachem was a president of the United States. The member who served as secretary was known as a scribe, and the building that housed the Tammany meetings was called a wigwam.

From these innocent beginnings, Tammany Hall grew into a political force. Affiliates of the organization actively participated in politics in the early nineteenth century. In 1812 the association moved into the first Tammany Hall with a membership of approximately fifteen hundred members. By 1821 the association was receiving widespread support in New York City. Unfortunately Tammany Hall was also gaining a reputation for corruption, control, and subterfuge.

In 1854 Tammany Hall member Fernando Wood was elected mayor of New York City. From then until 1933, City Hall was dominated almost exclusively by Tammany Hall.

The most corrupt and infamous member of Tammany Hall was William Marcy Tweed, called "Boss" Tweed. He served as a state senator in 1868 and, with his followers, known as the Tweed Ring, dominated state government and defrauded New York City of millions of dollars.

The corruption continued under subsequent Tammany Hall leaders, such as "Honest John" Kelly, Richard F. Croker, and Charles F. Murphy. By 1930, however, Samuel Seabury had begun to direct revealing inquiries against the city magistrates' courts. These investigations led to the downfall of Tammany Hall and the resignation of incumbent mayor James J. Walker in 1932. Fiorello LaGuardia was elected mayor in 1933, and an anti-Tammany Hall era began. The once-powerful Tammany Hall machine was resurrected briefly in the 1950s by politician Carmine DeSapio but never regained the stronghold in New York politics that it once enjoyed.

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"WE MUST LOOK AT THE INSTITUTION OF SLAVERY AS PUBLICISTS, AND NOT AS CASUISTS. IT IS A QUESTION OF LAW, AND NOT A CASE OF CONSCIENCE."
—ROGER BROOKE TANEY

## TAMPER

*To meddle, alter, or improperly interfere with something; to make changes or corrupt, as in tampering with the evidence.*

## ♦ TANEY, ROGER BROOKE

Roger Brooke Taney served as chief justice of the U.S. Supreme Court from 1836 to 1864. During his almost thirty years on the bench, Taney sought to encourage economic growth and competition by rendering decisions that reshaped the traditional law concerning property rights and commerce. Although he served with great distinction on the Court, he is best known as the author of the infamous decision in Dred Scott's case, DRED SCOTT V. SANDFORD, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857). This decision fueled sectional hostility and moved the nation closer to civil war.

Taney was born on March 17, 1777, in Calvert County, Maryland. A descendant of an aristocratic tobacco-growing family, Taney graduated from Dickinson College in 1795, studied law, and was admitted to the Maryland bar in 1799. That same year he was elected to a one-year term in the Maryland House of Delegates. Taney practiced briefly in Annapolis before settling in Frederick, where he soon was recognized as a distinguished attorney.

Taney was elected to the Maryland Senate in 1816 as a member of the FEDERALIST PARTY. Despite the party's belief in a strong national government, Taney endorsed STATES' RIGHTS. By the time he left the Senate in 1821, the Federalist party was on the verge of extinction. Taney switched his allegiance to the DEMOCRATIC PARTY and soon became an influential figure in the Maryland state party leadership. He was elected Maryland attorney general in 1826 and served until 1831.

President ANDREW JACKSON appointed Taney U.S. attorney general in 1831. Taney supported the president's opposition to rechartering the Second Bank of the United States and helped him write the VETO message. Jackson and the Democrats saw the bank as a dangerous institution that would enhance the power of the national government. Having vetoed the rechartering, in 1833 Jackson ordered Secretary of the Treasury William J. Duane to withdraw the deposits of the federal government from the bank, but Duane resigned instead. Jackson then appointed Taney secretary of the treasury so that he could carry out the order. Confirmation of Taney's appointment as treasury secretary was frustrated by members of the WHIG PARTY in the U.S. Senate, but by that time Taney had succeeded in distributing the federal funds among several state banks.

Taney returned to private practice, but President Jackson wanted him on the U.S. Supreme Court. In 1835 he nominated Taney as an associate justice, but the Senate, still disgruntled about the bank deposit issue, refused to confirm the appointment. The composition of the Senate soon changed, however, and upon the death of JOHN MARSHALL in 1836, Taney was nominated and confirmed as chief justice.

In his first major opinion as chief justice, in the case of CHARLES RIVER BRIDGE V. PROPRIETORS OF WARREN BRIDGE, 36 U.S. (11 Pet.) 420, 9 L. Ed. 773 (1837), Taney wrote for the majority of a divided Court. Taney decided that a franchise to operate a toll bridge that had been granted by the state of Massachusetts in the late eighteenth century, in the absence of explicit provisions, could not be construed as granting a MONOPOLY to the toll bridge operator. There-

fore, when the Massachusetts state legislature later granted another franchise to operate a competing toll bridge nearby, the legislature did not violate Article I, Section 10, of the U.S. Constitution, which forbids states from impairing the obligation of contracts. The opinion demonstrated Taney's belief that economic development could best be promoted and the public good most expeditiously furthered by fostering competition.

Until *Dred Scott* Taney had demonstrated a reluctance to make the Supreme Court the arbiter of national political issues. By the mid-1850s, however, the national debate over SLAVERY had almost reached the boiling point. Taney believed a decision by the Court would have a tempering effect on the country. He was clearly wrong.

Dred Scott was a slave owned by an army surgeon, John Emerson, who resided in Missouri. In 1836 Emerson took Scott to Fort Snelling, in what is now Minnesota, but was then a territory in which slavery had been expressly forbidden by the MISSOURI COMPROMISE OF 1820. In 1846 Scott sued for his freedom in a Missouri state court, arguing that his residence in a free territory released him from slavery. The Missouri Supreme Court rejected his argument, and Scott appealed to the U.S. Supreme Court.

The Court heard arguments in *Dred Scott* in 1855 and 1856. The Court could have properly disposed of the case on narrow procedural grounds, but Taney decided that the Court needed to address the status of slavery in the territories. He wrote a tortuous opinion, arguing that because of the prevailing attitudes toward slavery and African Americans in 1787–1789, when the Constitution was drafted and ratified, a slave was not and never could become a federal citizen. In addition, Taney ruled that the free descendants of slaves were not federal citizens and that property in slaves was entitled to such protection that Congress could not constitutionally forbid slavery in the territories.

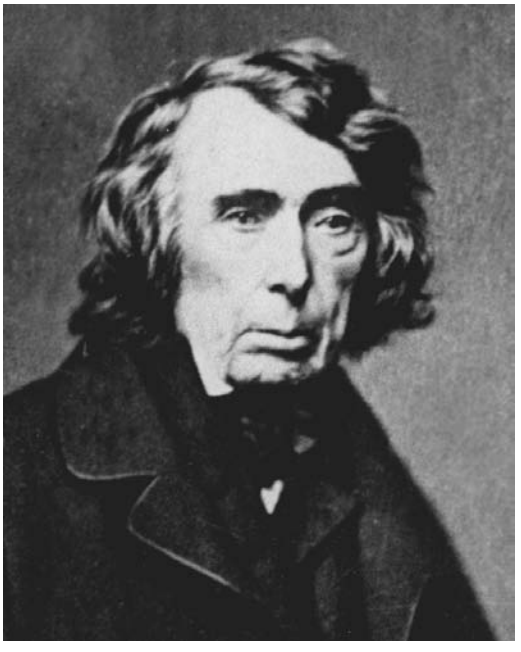

*Roger Taney.*
PHOTOGRAPH BY MATHEW BRADY. LIBRARY OF CONGRESS

The immediate effect of the *Dred Scott* decision was to convince abolitionists that the South and the Supreme Court planned to impose slavery throughout the Union. Taney was attacked as a former slave owner (though he had freed his slaves, whom he had inherited) and was called wicked, cowardly, and hypocritical. With the outbreak of the Civil War in 1861, it became clear that Taney's decision had failed to achieve its essential purpose.

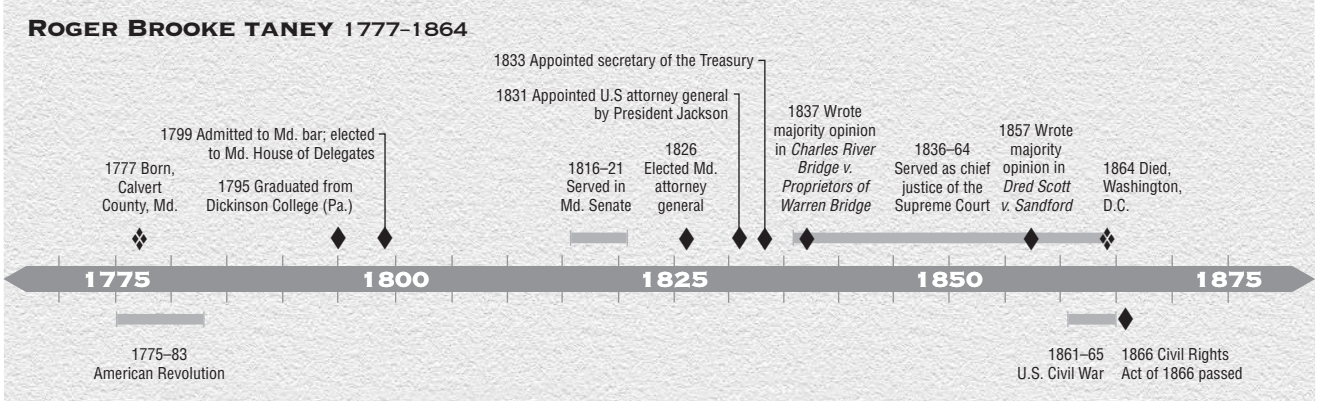

Taney remained loyal to the Union during the Civil War, yet his effectiveness and that of the Court had been seriously compromised by *Dred Scott.* Taney sought to protect constitutional rights during the Civil War, ruling that even in wartime the EXECUTIVE BRANCH and the military had no power to suspend constitutional protections (*Ex Parte Merryman,* 17 Fed. Cas. 144 [1861]). Though Taney saw the Court as a restraining influence on the exercise of ARBITRARY power by other branches of government, his efforts were ineffective. The Radical Republican–controlled Congress and President ABRAHAM LINCOLN ignored the pronouncements of the Court. From Lincoln's EMANCIPATION PROCLAMATION and the CIVIL RIGHTS ACT of 1866 (14 Stat. 27) through the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, the Republicans repeatedly repudiated *Dred Scott.* Nevertheless, Taney continued to hold the office of chief justice until his death on October 12, 1864, in Washington, D.C.

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## TANGIBLE

*Possessing a physical form that can be touched or felt.*

Tangible refers to that which can be seen, weighed, measured, or apprehended by the senses. A tangible object is something that is real and substantial. An automobile is an example of tangible PERSONAL PROPERTY.

## TARIFF

*The list of items upon which a duty is imposed when they are imported into the United States, together with the rates at which such articles are taxed.*

The term *tariff* is also used in reference to the actual custom or duty payable on such items.

CROSS-REFERENCES

Customs Duties; Import Quotas.

## TAX AVOIDANCE

*The process whereby an individual plans his or her finances so as to apply all exemptions and deductions provided by tax laws to reduce taxable income.*

Through tax avoidance, an individual takes advantage of all legal opportunities to minimize his or her state or federal INCOME TAX, gift tax, or estate tax. An individual may, for example, avoid federal income tax by investing a large sum of money in municipal bonds, since the interest on such bonds is not considered taxable income on which federal tax is due. Interest on the same amount of money placed in a savings account must be included as taxable income.

Tax avoidance must be distinguished from TAX EVASION, which is the employment of unlawful methods to circumvent the payment of taxes. Tax evasion is a crime; tax avoidance is not.

## TAX COURT

*A specialized federal or state court that decides cases involving tax-related controversies.*

All state governments and the federal government provide a means of adjudicating cases dealing with taxation. Tax courts deal solely with tax disputes, which may involve the valuation of real property, the amount of tax the state or federal revenue agency seeks to collect, or the tax status of a PENSION plan or a charitable organization.

The U.S. Tax Court is organized under Article I of the U.S. Constitution (26 U.S.C.A. § 7441). Currently an independent judicial body in the legislative branch, the court was originally created as the U.S. Board of Tax Appeals, an independent agency in the EXECUTIVE BRANCH, by the Revenue Act of 1924 (43 Stat. 336) and continued by the Revenue Act of 1926 (44 Stat. 105) and the INTERNAL REVENUE CODES of 1939, 1954, and 1986. The court's name was changed to the Tax Court of the United States by the Revenue Act of 1942 (56 Stat. 957), and the Article I status and change in name to U.S. Tax Court were effected by the Tax Reform Act of 1969 (83 Stat. 730).

The court is composed of nineteen judges. Its strength is augmented by senior judges who may be recalled by the chief judge to perform further judicial duties and by fourteen special trial judges who are appointed by the chief judge and serve at the pleasure of the court. The chief judge is elected biennially from among the nineteen judges of the court.

The Tax Court tries and adjudicates controversies involving deficiencies or overpayments in income, estate, gift, and generation-skipping transfer taxes in cases where deficiencies have been determined by the commissioner of Internal Revenue. It also hears cases started by transferees and fiduciaries who have been issued notices of liability by the commissioner.

The Tax Court has jurisdiction to redetermine excise taxes and penalties imposed on private foundations. It also has jurisdiction over excise taxes with regard to public charities, qualified pension plans, and real estate investment trusts.

At the option of the individual taxpayer, simplified procedures may be used for the trial of small tax cases. In a case conducted under these procedures, the decision of the court is final and is not subject to review by any court. The jurisdictional maximum for such cases is $10,000 for any disputed year.

In disputes relating to public inspection of written determinations by the INTERNAL REVENUE SERVICE (IRS), the Tax Court has jurisdiction to restrain disclosure or to obtain additional disclosure of written determinations or background files.

The Tax Court also has jurisdiction to make declaratory judgments relating to the qualification of retirement plans, including pension, profit sharing, stock bonus, ANNUITY, and bond purchase plans; the tax-exempt status of a charitable organization, qualified charitable donee, private foundation, or private operating foundation; and the status of interest on certain government obligations. Under the Technical and Miscellaneous Revenue Act of 1988 (102 Stat. 3342), the Tax Court also has injunctive authority over certain assessment procedures, authority to review certain assessments and levies, and authority to hear and decide appeals by taxpayers concerning the denial of administrative costs by the IRS.

All decisions, other than those in small tax cases, are subject to review by the U.S. COURTS OF APPEALS and thereafter by the U.S. Supreme Court upon the granting of a writ of certiorari.

The office of the court and all of its judges are located in Washington, D.C., with the exception of a field office located in Los Angeles, California. The court conducts trial sessions at various locations in the United States as convenient to taxpayers as is practicable. Each trial session is conducted by a single judge or a special trial judge. All proceedings are public and are conducted judicially in accordance with the court's rules of practice and the RULES OF EVIDENCE applicable in trials without a jury in the U.S. District Court for the District of Columbia. A fee of $60 is required for filing a petition. Practice before the court is limited to practitioners admitted under the court's rules.

State tax courts are generally part of the executive branch of government. These courts handle cases from taxpayers that are primarily concerned with the valuation of real and PERSONAL PROPERTY.

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## TAX DEED

*A written instrument that provides proof of ownership of real property purchased from the government at a* TAX SALE*, conducted after the property has been taken from its owner by the government and sold for delinquent taxes.*

## TAX EVASION

*The process whereby a person, through commission of* FRAUD*, unlawfully pays less tax than the law mandates.*

Tax evasion is a criminal offense under federal and state statutes. A person who is convicted is subject to a prison sentence, a fine, or both. The failure to file a federal tax return is a misdemeanor, but a consistent pattern of failure to file for several years will constitute evidence that these failures were part of a scheme to avoid the payment of taxes. If this pattern is established, the violator may be charged with a felony under section 7201 of the INTERNAL REVENUE CODE.

The U.S. Supreme Court, in *Spies v. United States,* 317 U.S. 492, 63 S. Ct. 364, 87 L. Ed. 418 (1943), ruled that an OVERT ACT is necessary to

give rise to the crime of INCOME TAX evasion. Therefore, the government must show that the taxpayer attempted to evade the tax rather than passively neglected to file a return, which could be prosecuted under section 7203 as a misdemeanor. A person who has evaded taxes over the course of several years may be charged with multiple counts for each year taxes were allegedly evaded.

According to the Supreme Court in *Sansone v. United States,* 380 U.S. 343, 85 S. Ct. 1004, 13 L. Ed. 2d 882 (1965), a conviction under section 7201 requires proof BEYOND A REASONABLE DOUBT as to each of three elements: the existence of a tax deficiency, willfulness in an attempted evasion of tax, and an affirmative act constituting an evasion or attempted evasion of the tax.

An affirmative act is anything done to mislead the government or conceal funds to avoid payment of an admitted and accurate deficiency. Affirmative behavior can take two forms: the evasion of assessment and the evasion of payment. Affirmative acts of evasion include evading taxes by placing assets in another's name, dealing in cash, and having receipts or debts paid through and in the name of another person. Merely failing to pay assessed tax, without more, does not constitute tax evasion.

The keeping of a double set of books or the making of false invoices or documents can be proof of tax evasion. In some cases the mailing of a false return may constitute the overt act required under section 7201.

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*Calling the bill a victory for fairness, President Ronald Reagan signs the Tax Reform Act of 1986 into law on the south lawn of the White House.*

AP/WIDE WORLD PHOTOS

CROSS-REFERENCES

Taxation; Tax Avoidance.

## TAX RATE

*The amount of charges imposed by the government upon personal or corporate income, capital gains, gifts, estates, and sales that are within its statutory authority to regulate.*

*Tax rate schedules* are utilized by taxpayers whose taxable incomes exceed certain designated amounts. Separate schedules are provided for married individuals who file jointly, unmarried people who maintain a household, single people, estates, trusts, and married couples who file separate returns.

CROSS-REFERENCES

Income Tax; Taxation.

## TAX REFORM ACT OF 1986

The Tax Reform Act of 1986 (100 Stat. 2085, 26 U.S.C.A. §§ 47, 1042) made major changes in how income was taxed. The act either altered or eliminated many deductions, changed the tax rates, and eliminated several special calculations that had been permitted on the basis of marriage or fluctuating income. Though the act was the most massive overhaul of the tax system in decades, some of its key provisions were changed in the Revenue Reconciliation Act of 1993 (107 Stat. 416).

The 1986 act reduced the number of INCOME TAX rates to two rates of 15 percent and 28 percent for most taxpayers, although a third rate of 33 percent was imposed on income within a certain upper-middle income bracket. Congress and the administration of President RONALD REAGAN believed a policy of low rates on a broad tax base would stimulate the economy and end an era of complex tax laws and regulations that mainly benefited those who knew how to manipulate the system.

The 1986 act also sought to eliminate special incentives that made tax shelters attractive and the tax law more complicated. Income derived from real estate became distinguishable on the basis of whether it was "active" or "passive." Passive income is income derived from a situation in which the taxpayer does not have an active management role, but it does not include capital gains on stocks, interest income on bonds, or interest on money market accounts. Before 1986 wealthy individuals could use passive income

losses from a real estate tax shelter to offset active income. The 1986 act limited the deduction of passive losses to the amount of passive income but allowed taxpayers to carry forward any excess passive losses to the next year.

The act also eliminated the deductibility of nonmortgage consumer interest payments such as interest on credit card balances, automobile loans, and life insurance loans. It also established the floor for miscellaneous expenses at two percent of adjusted gross income for taxpayers who itemized deductions.

Individual Retirement Accounts (IRAs) once allowed a taxpayer to invest before-tax dollars and enjoy tax-free compounding of interest. The 1986 statute ended full deductibility of IRAs for single employees covered by qualified retirement plans and earning more than $35,000 annually. For married employees the cutoff for full deductibility was set at $50,000. In addition, the law imposed a penalty on withdrawals of IRA contributions before the age of fifty-nine and a half years.

Another retirement plan, the KEOGH PLAN, permitted under section 401(k), once allowed a taxpayer to invest up to $30,000 a year without paying taxes on this income. The ceiling dropped to $7,000 in 1987.

The act also eliminated a provision that had enabled two-income married couples to reduce their taxes. A couple can no longer take a deduction based on the lower salary of the two; the deduction had allowed them to pay the same tax on the lower salary as a single person would pay on that amount. The act also abolished "income averaging." Formerly, individuals whose incomes varied considerably from year to year could average their income over several years, a calculation that resulted in lower taxes owed in the years of highest income.

The ballooning FEDERAL BUDGET deficits of the late 1980s and early 1990s led Congress to make changes in the 1986 act. The 1993 Revenue Reconciliation Act revamped the rate structure, imposing rates of 15, 28, 31, 36, and 39.6 percent. The act also limited itemized deductions for upper-income taxpayers and removed the limit on earned income subject to MEDICARE tax. The 1993 act also established tax incentives for selected groups and reduced the amount that can be deducted for moving expenses and meals and entertainment.

CROSS-REFERENCES

Taxation.

## TAX RETURN

*The form that the government requires a taxpayer to file with the appropriate official by a designated date to disclose and detail income subject to taxation and eligibility for deductions and exemptions, along with a remittance of the tax due or a claim for a refund of taxes that were overpaid.*

The federal and state governments specify the deadlines for filing tax returns without incurring any additional interest or penalties for lateness. For most income taxpayers, the deadline of April 15 of the year following the close of the tax year for which the report is filed applies to both federal and many state returns. For persons who have made taxable gifts, the federal gift tax return is due annually on or before April 15 of the year following the tax year (as opposed to the former requirement of quarterly filing). For executors or administrators of estates that owe estate tax, a federal estate tax return must be filed within nine months of the date of death of the decedent. States may have comparable deadlines for gift and estate tax returns.

CROSS-REFERENCES

Estate and Gift Taxes; Income Tax.

## TAX SALE

*A transfer of real property in exchange for money to satisfy charges imposed thereupon by the government that have remained unpaid after the legal period for their payment has expired.*

Tax sales are authorized by state statutes to collect taxes that are long overdue to the state government from negligent or unwilling individuals.

### Requirements

Any sale of real property for delinquent taxes must be conducted in compliance with legally imposed requirements, or it is not valid. Ordinarily the tax collector is required to make and publish a list of property on which taxes have not been paid. Such a list must contain an adequate description of each parcel of land to be sold, the owner's name, the amount due, and the period of time for which the taxes are due. The interest permitted by law on the delinquent taxes, penalties for default in payment, and the costs incurred for the sale may be included in the amount due. Certain states mandate that this delinquency list must be filed or recorded in the office of the county clerk, and statutes may indicate specifically the newspapers in which the list is to be published.

### Notice

The purpose of a notice of a tax sale is to warn the owner of the property that it will be sold and to furnish information to prospective buyers. Failure to provide notice to the owner renders any subsequent sale of the property invalid. This rule is consistent with DUE PROCESS requirements that any individual must be given notice and opportunity to defend himself or herself before being deprived of his or her property. The notice given to the owner must adequately describe the property, the amount of tax owed, and for what years it is due.

### Manner

State statutes regulate the manner in which tax sales may be conducted. Ordinarily the sale is open to the public in order to ascertain that a fair price for the property will be obtained in the open market. A private sale is valid, however, when authorized by statute.

### Price

The general rule is that land offered at a tax sale must bring at least the total amount of taxes due on it, plus legal costs and charges. In some jurisdictions, a sale for a smaller amount is invalid.

In the event that the land is sold at the tax sale for a price that exceeds the amount owed, the sale might be valid, depending upon the state; however, the excess must be given to the delinquent taxpayer.

### Buyer

Any individual who is not disqualified by statute may purchase land at a tax sale provided he or she is the highest bidder. Upon payment of the amount bid, the buyer will be given a tax deed that serves as proof of his or her ownership of the property. Certain states mandate that a tax sale be confirmed in a court proceeding before the purchaser actually takes title or ownership to the property.

A state, county, MUNICIPAL CORPORATION, or other governmental unit may buy land sold at a tax sale only if authorized by statute.

### Redemption

The owner of property that is the subject of a tax sale is given a statutory right of redemption —that is, if, within a certain period, the owner pays the back taxes plus any other legal charges due, he or she will regain complete ownership of the property free of the prior tax debt. The public policy behind such a statute is to provide the taxpayer with every reasonable opportunity to redeem property since FORFEITURE of land has always been regarded as a drastic remedy. Generally any individual interested in the property sold for taxes is entitled to redeem it if his or her interest in the property will be affected by the purchaser taking complete ownership of the land, such as in the case of an individual who has a life estate in the property.

Redemption must occur within the time and in the manner specified by the statute.

### Sale Prohibited

Courts can proscribe a tax sale in cases where (1) a sale would be unlawful, so that the buyer's ownership of the land would be open to question; (2) the taxes have been paid; (3) the levy or assessment was unlawful or fraudulent; or (4) the valuation was grossly excessive.

Where errors or irregularities exist in the assessment that could have been rectified if promptly brought to the attention of the proper authorities, the tax sale will not be enjoined if such errors have no effect upon the substantial justice of the tax or the liability of the property for its satisfaction.

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## TAXABLE INCOME

*Under the federal tax law, gross income reduced by adjustments and allowable deductions. It is the income against which tax rates are applied to compute an individual or entity's tax liability. The essence of taxable income is the accrual of some gain, profit, or benefit to a taxpayer.*

CROSS-REFERENCES

Income Tax.

## TAXABLE SITUS

*The location where charges may be levied upon* PERSONAL PROPERTY *by a government, pursuant to provisions of its tax laws.*

The situs of property for tax purposes is determined on the basis of whether the state imposing the tax has adequate contact with the property it is seeking to tax so that the particular tax is justified in fairness. Ordinarily personal property has its taxable situs in the place where its owner is domiciled or in the state where the owner has a true, fixed, and permanent home.

## TAXATION

*The process whereby charges are imposed on individuals or property by the legislative branch of the federal government and by many state governments to raise funds for public purposes.*

The theory that underlies taxation is that charges are imposed to support the government in exchange for the general advantages and protection afforded by the government to the taxpayer and his or her property. The existence of government is a necessity that cannot continue without financial means to pay its expenses; therefore, the government has the right to compel all citizens and property within its limits to share its costs. The state and federal governments both have the power to impose taxes upon their citizens.

### Kinds of Taxes

The two basic kinds of taxes are *excise taxes* and *property taxes.*

**Excise Tax** An excise tax is directly imposed by the law-making body of a government on merchandise, products, or certain types of transactions, including carrying on a profession or business, obtaining a license, or transferring property. It is a fixed and absolute charge that does not depend upon the taxpayer's financial status or the value that the taxed property has to the taxpayer.

An estate tax is a tax that is placed on, and paid by, the estate of a decedent prior to the distribution of the property among the heirs in exchange for the privilege of transferring the property. Individuals who inherit property may be required to pay an inheritance tax on the value of the particular property received. Gift taxes are incurred by an individual who gives another a valuable gift.

Another type of excise tax is a sales tax, which is placed on certain goods and services. Precisely what goods and services are taxed is determined by the individual state legislatures. In some instances, a sales tax placed upon expensive items that are considered luxuries is known as a *luxury tax.*

A *corporate tax* is an excise tax imposed upon the privilege of conducting business in the corporate capacity, which provides certain advantages to individuals, such as limited liability. It is measured by the income of the corporation involved.

Other common examples of excise taxes are those imposed upon the processing of meat, tobacco, cheese, and sugar.

**Property Tax** A property tax takes the taxpayer's wealth into account, as represented by the taxpayer's income or the property he or she owns. INCOME TAX, for example, is a property tax that is assessed and levied upon the taxpayer's income; *property taxes* are imposed mainly on real property.

**Direct and Indirect Taxes** Taxes are also classified as direct and indirect. A direct tax is one that is assessed upon the property, business, or income of the individual who is to pay the tax. Conversely *indirect taxes* are taxes that are levied upon commodities before they reach the consumer who ultimately pays the taxes as part of the market price of the commodity. A common example of an indirect tax is a *value-added tax,* which is paid on the value added to the product at each stage of production, distribution, and sales.

### Federal Tax

The Constitution and laws passed by Congress have given the U.S. government authorization to collect various taxes. For example, duties are taxes imposed upon imports and can be either advalorem (a percentage of the value of the property) or specific (a fixed amount). An impost is another name for an import tax. Congress may not, however, tax exports.

The SIXTEENTH AMENDMENT to the Constitution gives Congress the power to impose a federal income tax. Congress has also enacted laws that allow the federal government to tax estates remaining after people die and gifts made while people are alive.

### State Tax

States possess the inherent power to levy both property and excise taxes. The TENTH AMENDMENT to the Constitution, which reserves to the states powers that have neither been granted to the United States nor proscribed to the states by the Constitution, implicitly

**Materials Generated in Municipal Solid Waste, in 2000**

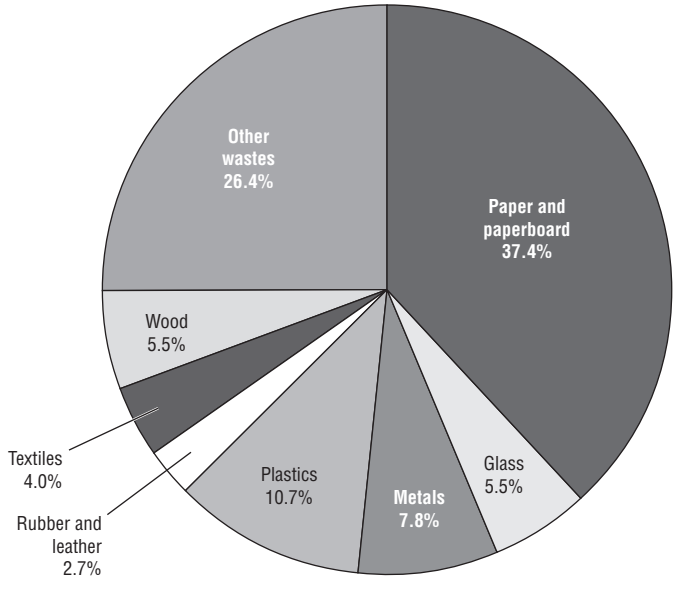


SOURCE: U.S. Environmental Protection Agency, *Municipal Solid Waste in the United States: 2000 Facts and Figures.*

acknowledges this fundamental right. A state may raise funds by taxation in aid of its own welfare, provided the tax does not constitute unjust discrimination among those who are to share the tax burden. Property taxes, for example, may properly be imposed on landowners within the jurisdiction. In addition, the state may levy income, gift, estate, and inheritance taxes upon its residents.

The question of whether states should be able to tax sales conducted over the INTERNET has generated increased interest as states scramble for additional funding in the wake of budget deficits. Technically, these transactions are taxable. A U.S. Supreme Court ruling in 1992, however, stated that states can only require sellers to collect taxes if they have a physical presence in the same state as the consumer. The reason, said the Court in *Quill Corp. v. North Dakota,* 504 U.S. 298 112 S. Ct. 1904, 119 L. Ed. 2d 91, is that the current system of 7,500 taxing jurisdictions across the country makes it too complicated for online retailers to collect sales taxes fairly and efficiently. In 1998 Congress imposed a three-year MORATORIUM against any Internet taxes; the moratorium was renewed for two years in 2001. Online businesses and consumers have supported these moratoria for the obvious reason that taxes would cost money and affect sales, as well as the less obvious reason that tracking Internet sales would violate individual privacy by generating records of who is purchasing what.

The National Governors Association (NGA) initiated the Streamlined Sales Tax Project (SSTP) in 2000 with the goal of adopting uniform tax rates among the states and thus making it easier for online retailers to collect taxes. NGA hopes to complete SSTP by the end of 2005.

## Equality

Equality is a fundamental principle of taxation. The taxing power of the legislature must always be exercised in such a way that the burdens imposed by taxation are laid as equally as possible on all classes. The progressive tax, which imposes a higher rate of taxation upon individuals with large incomes than on those with small incomes, is an attempt to achieve this objective.

Equality in taxation is achieved when no higher rate in proportion to value is imposed on one individual or his or her property than on other people or property in similar circumstances. Equality does not mandate that the benefits that arise from taxation should be enjoyed by all the people in equal degree or that each individual should share in each particular benefit. For example, the fact that a HUSBAND AND WIFE have no children or choose to send their children to private school does not signify that they are permitted to stop paying their share of school tax.

## Uniformity

The principle of uniformity of taxation bears a close relation to the concept of equality because similar items are taxed equally only if the mode of assessment is the same or uniform.

A tax that is levied upon property must be in proportion or according to its value, ordinarily determined as its fair cash or fair market value. This requirement protects equality and uniformity of taxation by preventing ARBITRARY or inconsistent methods of determining how much tax is due. This requirement applies only to property taxes, not to excise taxes.

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CROSS-REFERENCES

Customs Duties; Estate and Gift Taxes; Internal Revenue Service; Tax Rate; Taxpayer Bill of Rights.

## TAXING COSTS

*The designation given to the process of determining and charging to the losing party in a legal action the expenses involved in initiating or defending the action, to which the successful side is lawfully entitled.*

CROSS-REFERENCES

Costs.

## TAXPAYER BILL OF RIGHTS

*A federal or state law that gives taxpayers procedural and substantive protection when dealing with a revenue department concerning a tax collection dispute.*

Perceived abuses by the federal INTERNAL REVENUE SERVICE (IRS) during tax audits led to the enactment of the "Omnibus Taxpayer Bill of Rights" in 1988 (Pub. L. No. 100-647). A second set of provisions was enacted in 1996 (Pub. L. No. 104-168) to give taxpayers increased leverage in dealings with the IRS. The 1988 act also spurred many states to enact similar taxpayer bill of rights laws.

Although the rights given to taxpayers under these federal acts do not reduce the chance of being audited or diminish IRS authority to penalize taxpayers for inaccuracies or cheating on their returns, the provisions correct many of the perceived abuses in IRS auditing and collection procedures. The bill of rights seeks to relieve taxpayers from the unfettered discretion of IRS agents. Congress stated that the aim of the 1988 act was "to inject reason and protection for individual rights into the tax collection process."

The bill of rights requires the IRS to explain the audit and collection process to the taxpayer before any initial audit or collection interviews and to include on all tax notices a description of the basis for taxes, interest, or penalties due. The bill also requires the IRS to inform taxpayers of their rights, including the right to be represented by an attorney or tax accountant, whenever an audit notice is sent. The bill allows the taxpayer to make an audio recording of the interview with the IRS agent, provided prior notice is given. An actual audit interview can be stopped, WITHOUT PREJUDICE, so that the taxpayer can consult with an attorney or accountant. Another key provision prohibits the IRS from imposing quotas or goals on agents with respect to the number of returns they audit and the amount of taxes and fines collected.

The 1988 act created the Office of Taxpayer OMBUDSMAN, which served as the primary advocate for taxpayers within the IRS. The 1996 act shifted this role to the newly established Office of the Taxpayer Advocate. This office helps taxpayers resolve problems with the IRS, identifies areas in which taxpayers have problems in dealings with the IRS, proposes changes in the administrative practices of the IRS, and suggests potential legislative changes that may reduce these problems. To ensure independence from the IRS, the Taxpayer Advocate reports directly to Congress twice a year.

The Taxpayer Advocate also has broad authority to issue Taxpayer Assistance Orders. These orders can release property or require the IRS to cease any action, or refrain from taking any action, that will cause significant hardship as a result of the administration of the internal revenue laws.

Under the bill of rights, before the IRS can put a lien on or seize taxpayer property, it must give the taxpayer thirty days' notice instead of the previous ten days' notice. Taxpayers are permitted to sue the IRS for damages suffered as a result of tax or property collection actions or refusals to release a lien; they can be awarded court costs and legal and administrative fees if they win an administrative or court action against the IRS.

Under the bill of rights, the IRS is authorized to make installment agreements with taxpayers to alleviate the burden on a taxpayer who would experience financial hardship if forced to make a lump-sum payment. The IRS must give thirty days' notice before altering, modifying, or terminating a previously agreed upon installment agreement, unless the change is caused by a determination that the collection of tax is in jeopardy.

Another provision of the law states that if the IRS believes additional taxes are owed, the agency must send the taxpayer a written notice that explains and identifies all amounts due. The IRS must also describe the procedures that it will use to collect any amounts due. Previously, the IRS generally explained the basis for a tax deficiency but was not required to explain penalties or how they would be collected. Instead, the IRS simply sued the taxpayer.

The bill of rights gives the IRS authority to abate interest for delays or unreasonable errors caused by nondiscretionary procedural acts of the IRS or by IRS managerial acts such as loss of records by the IRS or transfers, extended illnesses, leave, or professional training of IRS personnel.

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CROSS-REFERENCES

Income Tax; Taxation.

## TAXPAYER'S SUIT

*An action brought by an individual whose income is subjected to charges imposed by the state or federal government, for the benefit of that individual and others in order to prevent the unlawful diversion of public funds.*

For example, because every taxpayer of a town has an interest in the preservation of an orderly government, many state laws grant individual taxpayers the right to sue town officers, boards, or commissions to recover money that has been wrongfully spent.

"LET US INVOKE A CONTINUANCE OF THE SAME PROTECTING CARE WHICH HAS LED US FROM SMALL BEGINNINGS TO THE EMINENCE WE THIS DAY OCCUPY . . . WHICH SHALL ACKNOWLEDGE NO LIMITS BUT THOSE OF OUR OWN WIDE-SPREAD REPUBLIC."
—ZACHARY TAYLOR

## ♦ TAYLOR, ZACHARY

Zachary Taylor served as the twelfth president of the United States from 1849 until his death in 1850. A famous military general, Taylor was an apolitical leader who accomplished little during his sixteen months in office.

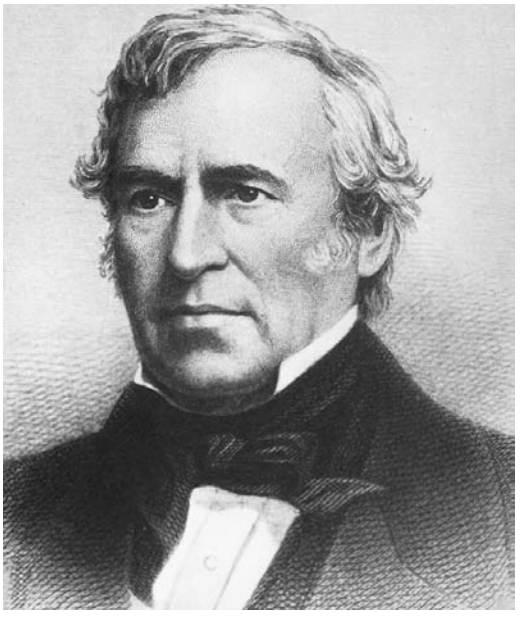

*Zachary Taylor.* LIBRARY OF CONGRESS

Taylor was born on November 24, 1784, in Orange County, Virginia, but moved as a child to Kentucky. He enlisted in the U.S. Army in 1808 and was commissioned as a first lieutenant in the infantry that same year. Taylor quickly emerged as a military hero during the WAR OF 1812 while serving under General WILLIAM HENRY HARRISON. He distinguished himself during the Black Hawk War in 1832 and the Second Seminole War in Florida between 1835 and 1842. He was promoted to brigadier general in 1837 after his victory at the Battle of Lake Okeechobee.

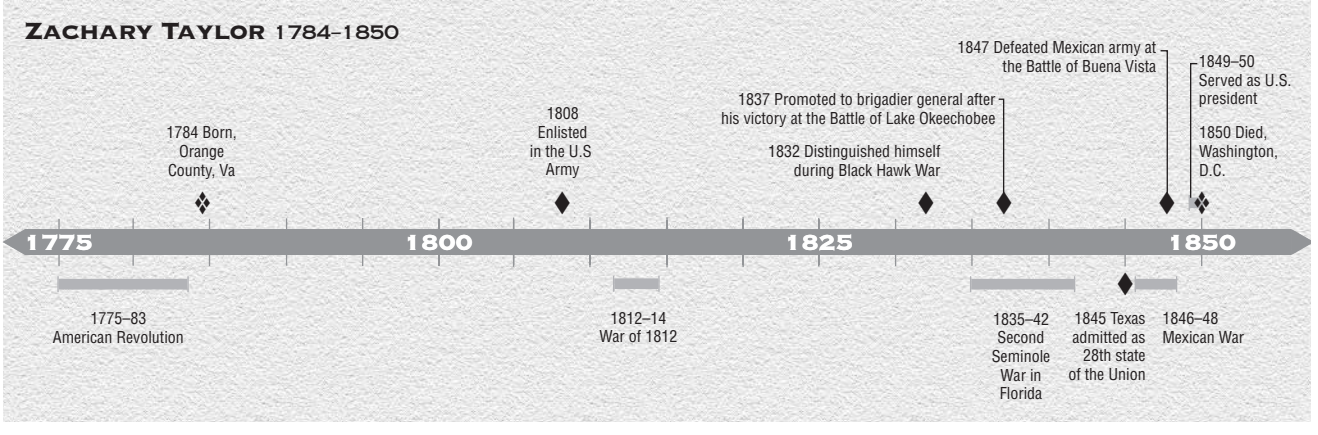

In 1845, soon after the annexation of Texas, President JAMES K. POLK ordered Taylor and an army of four thousand men to the Rio Grande. Border hostilities with Mexico over the boundary between the two countries escalated into full battles in May of 1845. Taylor's troops defeated an invading Mexican army at the Battles of Palo Alto and Resaca de la Palma. That same month the United States declared war on Mexico.

Taylor and his army invaded Mexico and advanced to Monterrey, capturing the city in late September. His military career was put in doubt, however, when a letter became public in which Taylor criticized President Polk and his secretary of war, William L. Marcy. An angry Polk could not relieve the popular war hero of his command, but he stripped Taylor of his best troops and ordered him to adopt a defensive posture. Taylor, who was nicknamed "Old Rough and Ready," disobeyed Polk's orders and defeated a Mexican army that outnumbered his troops by four to one at the Battle of Buena Vista in February 1847. This stunning victory guaranteed Taylor the status of national hero.

The WHIG PARTY nominated Taylor as its presidential candidate in 1848, even though Taylor had no interest in politics (he had never voted in an election) and was a slave owner. Taylor defeated the Democratic candidate, Lewis Cass, in the November general election.

Taylor's brief service as president was unremarkable. Having no political background, Taylor was unprepared for the give-and-take of Washington politics. The biggest issue facing him was statehood for California and New Mexico, which had been acquired from Mexico as a result of the war. Although he owned slaves, Taylor was opposed to the expansion of SLAVERY into the new territories, a position that alienated Southern Whigs and Democrats in Congress. When California voted to prohibit slavery, the South opposed its admission to the Union. Attempts by Senator HENRY CLAY of Kentucky to negotiate a compromise were rebuffed by Taylor.

As this political conflict unfolded in the summer of 1850, Taylor contracted cholera. He died on July 9, 1850, in Washington, D.C.

Taylor was succeeded by Vice President MILLARD FILLMORE, who quickly agreed to resolve the Mexican territories issue with the COMPROMISE OF 1850. This act admitted California into the Union as a free state, gave the territories of Utah and New Mexico the right to determine the slavery issue for themselves at the time of their admission to the Union, outlawed the slave trade in the District of Columbia, and gave the federal government the right to return fugitive slaves in the FUGITIVE SLAVE ACT (9 Stat. 462).

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## TEAPOT DOME SCANDAL

The presidential administration of WARREN G. HARDING, from 1921 to 1923, was characterized by scandal and corruption, the most controversial of which was the Teapot Dome oil scandal.

Conservation was a popular cause throughout the first quarter of the twentieth century and was encouraged by various presidents. As a result, several oil reserves for the exclusive use of the U.S. Navy were established in Wyoming and California. The oil was kept in storage places called domes, one of which, located near Casper, Wyoming, was christened Teapot Dome due to a rock formation in the area that resembled a teapot.

Although many politicians favored the establishment of the oil reserves, others believed they were superfluous. One opponent of the oil policy was Senator Albert B. Fall of New Mexico, who sought to make the reserves accessible to private industry.

In 1921, Senator Fall was selected as secretary of the interior in the Harding cabinet. Authority over the oil fields was transferred from the Department of the Navy to the INTERIOR DEPARTMENT, with the consent of Edwin Denby, Secretary of the Navy. Fall was in a position to lease the oil reserves, without public bidding, to private parties. In 1922, Harry F. Sinclair, president of the Mammoth Oil Company, received rights to Teapot Dome, and Edward L. Doheny, a friend of Fall and prominent in the Pan-American Petroleum and Transport Company, leased the Elk Hills fields in California. Fall received approximately four hundred thousand dollars in exchange for his favoritism.

Senator Thomas J. Walsh of Montana initiated a Senate investigation of the oil reserve lands at the recommendation of Senator ROBERT M. LAFOLLETTE of Wisconsin. Eventually, the U.S. Supreme Court declared the leases inoperative, and the oil fields at Teapot Dome and Elk Hills were returned to the U.S. government.

*Albert B. Fall (left), U.S. secretary of the interior, and Harry F. Sinclair, president of the Mammoth Oil Company, received prison terms for their roles in the Teapot Dome Scandal—Fall for accepting bribes and Sinclair for contempt of court.*

BETTMANN/CORBIS

Sinclair served nine months in prison for CONTEMPT of court, but both he and Doheny were found not guilty of BRIBERY. Fall, who had left the cabinet in 1923, was found guilty in 1929 of accepting bribes; his punishment was one year in prison and a fine of $100,000. President Harding died in office in 1923, never aware of the notoriety of his administration.

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## TELECOMMUNICATIONS

*The transmission of words, sounds, images, or data in the form of electronic or electromagnetic signals or impulses.*

From the introduction of the telegraph in the United States in the 1840s to the present-day INTERNET computer network, telecommunication has been a central part of American culture and society. What would we do without telephone, radio, broadcast television, CABLE TELEVISION, satellite television, fax machines, cellular telephones, and computer networks? They have become integral parts of our everyday lives. And as telecommunication technology advanced, the more complicated the TELECOMMUNICATIONS industry became. As a result, federal and state governments attempted to regulate the pricing of telecommunication systems and the content of transmitted material. The Telecommunications Act of 1996 (Pub. L. No. 104-104), however, deregulated much of the telecommunication industry, allowing competition in markets previously reserved for government-regulated monopolies.

### Telegraph

The first telegraph system in the United States was completed in 1844. Originally used as a way of managing railroad traffic, the telegraph soon became an essential means of transmitting news around the United States. The Associated Press was formed, in 1848, to pool telegraph expenses; other "wire services" soon followed.

Many telegraph companies were formed in the early years of the business, but by 1856 Western Union Telegraph Company had become the first dominant national telegraph system. In 1861, it completed the first transcontinental line, connecting San Francisco first to the Midwest and then on to the East Coast. As worldwide interest increased in applications of the telegraph, the International Telegraph Union was formed, in 1865, to establish standards for use in international communication. In 1866, the first transatlantic cables were completed.

The telegraph era came to an end after WORLD WAR II, with the advent of high-speed transmission technologies that did not use telegraph and telephone wires. By 1988, Western Union was reorganized to handle money transfers and related services.

### Telephone Systems

The invention of the telephone in the late nineteenth century led to the creation of the American Telephone and Telegraph Company (AT&T). The company owned virtually all telephones, equipment, and long-distance and local wires for personal and business service in the national telephone system. Smaller companies seeking a part of the long-distance telephone market challenged AT&T's MONOPOLY in the 1970s.

In 1982, the U.S. JUSTICE DEPARTMENT allowed AT&T to settle a lawsuit alleging antitrust violations because of its monopolistic holdings. AT&T agreed to divest itself of its local operating companies by January 1, 1984, while retaining control of its long-distance, research, and manufacturing activities. Seven regional telephone companies (known as the Baby Bells) were given responsibility for local telephone service. Other companies now compete with AT&T to provide long-distance service to telephone customers.

In an effort to spur competition, however, the Telecommunications Act of 1996 allowed the seven regional phone companies to compete in the long-distance telephone market. The act also permitted AT&T and other long-distance carriers, as well as cable companies, to sell local telephone service.

Local telephone rates are regulated by state commissions, which also work to see that the regional telephone companies provide good maintenance and services. In addition, the use of a telephone for an unlawful purpose is a crime under state and federal laws, as is the WIRETAPPING of telephone conversations.

In 2002, the U.S. Supreme Court issued two rulings that had a significant impact on large regional telephone companies. The first was *Verizon Communications v. FCC* 535 U.S. 467, 122 S.Ct. 1646, 152 L. Ed. 2d 701, which had beginnings in the 1990s. Under the 1996 Telecommunications Act, multiple local exchange carriers (LECs) are allowed to compete in the same market. Incumbent LECs, or ILECs, are those that already have a presence in a market. Competing LECs (CLECs) are providers that want to enter an ILEC's market. The ILECs are required to share their telecommunications network with the CLECs for a GOOD FAITH negotiated price (47 U.S.C.A. Secs. 251–52). They must form a written agreement; if there are points of contention in the agreement, they must be submitted for binding ARBITRATION to the state utility commission. That decision may be appealed to a federal district court if either side believes that it constitutes a violation of the act.

Several LECs and state utility commissions challenged the FEDERAL COMMUNICATIONS COMMISSION (FCC), the federal agency charged with regulating communications, over the way it mandated pricing formulas. The Eighth Circuit Court of Appeals sided with the plaintiffs in *Iowa Utilities Board v. FCC,* 120 F.3d 753 (8th Cir. 1997). The Supreme Court reversed the Eighth Circuit's decision, concluding that the FCC was within its rights to establish a pricing methodology, and ordered the appellate court to determine whether that methodology met the requirements of the 1996 act (*AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 835 (1999). In *Iowa Utilities Board v. FCC,* 219 F.3d 744 (8th Cir. 2000), the appellate court ruled that the FCC pricing rules were invalid.

On appeal, the Supreme Court again reversed the Eighth Circuit, observing that the FCC's methodology had been designed so that smaller companies could enter and compete more easily in local phone markets. The ILECs preferred a methodology that would have increased the amount they were allowed to charge the CLECs. The increase would have amounted to billions of dollars in charges. Moreover, the Court held that the FCC also has the authority to force ILECs to combine leased elements upon request by a CLEC. These include local, long-distance, Internet, and pay-per-call information and entertainment services.

In a decision that involved two cases, the Supreme Court ruled that state utility commissions and individual commissioners may be sued in federal court by long-distance phone companies that disagree with the way they are enforcing federal laws (*Verizon Maryland v. Public Service Commission of Maryland,*535 U.S. 635, 122 S. Ct. 1753, 152 L.Ed. 2d 871 (2002), *Mathias v. Worldcom Technologies, Inc.,* 535 U.S. 682, 122 S. Ct. 1780 (Mem), 152 L.Ed.2d 911(2002).

In the first of these cases, Bell Atlantic Maryland, the region's ILEC, had refused to pay reciprocal compensation to Worldcom, a CLEC. The second case involved the same issue, except that the ILEC in question was Ameritech Illinois. Under the 1996 Telecommunications Act, local calls trigger the ILEC's obligation to offer reciprocal compensation, while long-distance calls do not. The Maryland and Illinois ILECs refused to offer reciprocal compensation when their customers made phone calls to Internet service providers that were customers of the CLECs, arguing that a call to an Internet service provider is a long-distance call even though the number may be local. They reasoned that a phone call to another person connects the caller to that person, but a connection to the Internet gives the caller access to websites and information around the world—hence, a long-distance call.

The Maryland Public Service Commission and the Illinois Commerce Commission, respectively, rejected this argument, and the ILECs sued them in federal court, along with individual commissioners and the CLECs in question. The federal courts upheld the utility commission's decisions; the Forth and Seventh Circuit Courts did so, as well, on appeal (*Bell Atlantic Maryland, Inc, v. MCI WorldCom, Inc.,* 240 F.3d 279 [4th Cir. 2001]; *Illinois Bell Telephone Co. v. Worldcom Technologies, Inc.,* 179 F.3d 566 7th Cir. [1999]). One of the arguments made by the ILECs was that federal courts had no jurisdic-

tion over these cases under the Telecommunications Act.

The Supreme Court held that the 1996 Telecommunications Act is a federal law, and as such, federal courts should be able to enforce the law by hearing cases brought against state regulators. As for whether individual commissioners could be sued, the Court cited *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed 714 (1908), and said that state officials can be sued in their official capacity as long as the suit alleges an ongoing violation of federal law, and as long as the relief sought can be characterized as prospective (looking toward the future).

### Radio

In the early twentieth century, radio was regarded primarily as a device to make maritime operations safer and a potential advancement of military technology. During WORLD WAR I, however, entrepreneurs began to recognize the commercial possibilities of radio. By the mid-1920s, commercial radio stations were operating in many parts of the United States, and owners began selling air time for advertisements. The Federal Radio Commission was created, in 1927, to assign applicants designated frequencies under specific engineering rules and to create and enforce standards for the broadcasters' privilege of using the public's airwaves.

The commission later became the Federal Communications Commission (FCC), which was established by the Communications Act of 1934 (47 U.S.C.A. § 151 et seq.). The FCC issues licenses to radio and television stations, which permit the stations to use specific frequencies to transmit programming. Licenses are issued only on a showing that public convenience, interest, and necessity will be served and that an applicant satisfies certain requirements, such as citizenship, good character, financial capability, and technical expertise.

Before 1996, the FCC restricted persons or entities from acquiring excessive power through ownership of a number of radio and television facilities. The rule was based on the assumption that if one person or company owned most or all of the media outlets in an area, the diversity of information and programming on these stations would be restricted.

The Telecommunications Act of 1996 eliminated the limit on the number of radio stations that one entity may own nationally. The FCC was also directed to reduce the restrictions on locally owned radio stations. Congress determined that less regulation was in the public interest.

In addition, the FCC seeks to prohibit the broadcast of obscene and indecent material. The Supreme Court has upheld regulations banning obscene material, because OBSCENITY is not protected by the FIRST AMENDMENT. It also permits the FCC to prohibit material that is "patently offensive," and either "sexual" or "excretory," from being broadcast during times when children are presumed to be in the audience (*FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 [1978]).

### Television

The commercial exploitation of television did not begin in the United States until the late 1940s. The FCC followed its example from radio and established licensing procedures for stations seeking permission to transmit television signals. It became the oversight body for the U.S. television industry.

The FCC has applied to television a prohibition similar to that imposed on radio against the broadcast of obscene and indecent material. For purposes of parental control, the Telecommunications Act of 1996 mandated the establishment of an advisory committee to rate video programming that contains indecent material. The act also stated that, by 1998, new television sets had to be equipped with a so-called V-chip to allow parents to block programs with a predesignated rating for sex and violence.

Cable television became a viable commercial form of telecommunication in the 1980s. Both the FCC and local governments had an interest in regulating cable systems, with municipalities awarding a cable system franchise to one vendor. Cable operators negotiated system requirements and pricing with local governments, but federal law imposed some restrictions on rates to consumers. Concerns about rate regulation led Congress to enact the Cable Television CONSUMER PROTECTION and Competition Act of 1992 (Pub. L. No. 102-385). The act gave the FCC greater control of the cable television industry and set rate structures to control the price of cable subscriptions. The Telecommunications Act of 1996, however, reversed the 1992 act by ending all rate regulation. The act also allowed the seven regional telephone companies to compete in the cable television market to end the monopoly that cable systems had enjoyed under the previous regulatory scheme.

For customers who cannot obtain cable television programming, the transmission of television signals by satellite has been a practical solution. Since their introduction in the 1990s, direct broadcast satellite systems have competed with cable television systems, offering high-quality video and audio signals, and access to a wide range of programming.

### Transmission of Digital Data

In the 1980s and 1990s, the use of digital data transmission revolutionized the communication of words, images, and sounds. Computer-driven means of telecommunication have made possible electronic mail (E-MAIL), the sharing of computer files, and, most importantly, the Internet.

The Internet is a network of computers linking the United States with the rest of the world. Originally developed as a way for U.S. research scientists to communicate with each other, by the mid-1990s the Internet had become a popular form of telecommunication for personal computer users. Written text represents a significant portion of the Internet's content, in the form of both E-mail and articles posted to electronic discussion forums. In the mid-1990s, the appearance of the World Wide Web made the Internet even more popular. The Web is a multimedia interface that allows for the transmission of what are known as Web pages, which resemble pages in a magazine. In addition to combining text and pictures or graphics, the multimedia interface makes it possible to add audio and video components. Together these various elements have made the Internet a medium for communication and for the retrieval of information on virtually any topic.

The federal government has attempted to regulate this form of telecommunication. Congress passed the Electronic Communications Privacy Act of 1986 (ECPA) (18 U.S.C.A. § 2701 et seq. [1994]), also known as the Wiretap Act, which made it illegal to read private E-mail. The ECPA extended to electronic mail most of the protection already granted to conventional mail. This protection, however, has not been extended to all E-mail that is transmitted in the workplace.

A controversial issue in the workplace is whether an employer should be able to monitor the E-mail messages of its employees. An employer has a strong legal and financial motive to prohibit unauthorized and inappropriate use of its E-mail system. Under the Wiretap Act, a company is not restricted in its ability to review messages stored on its internal E-mail system. In addition, interception of electronic communications is permitted when it is done in the ordinary course of business or to protect the employer's rights or property. This exception would apply when, for example, an employer has reasons to suspect that an employee is using the E-mail system to disclose information to a competitor or to send harassing messages to a coworker. Finally, the prohibitions of the Wiretap Act do not apply if the employee whose messages are monitored has explicitly or implicitly consented to such monitoring.

Congress sought to curb the transmission of indecent content on the Internet and other computer network telecommunications systems by enacting the Communications Decency Act (CDA) (47 U.S.C.A. § 223(a)-(h)), as part of the Telecommunications Act of 1996. The CDA made it a federal crime to use telecommunications to transmit "any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication." It includes penalties for violations of up to five years imprisonment and fines of up to $250,000.

In *Reno v. American Civil Liberties Union,* 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997), the Supreme Court struck down the "indecent" provision as a violation of the First Amendment right of free speech.

### Standards in Telecommunication

Certain telecommunication methods have become standards in the telecommunication industry because devices with different standards cannot communicate with each other. Standards are developed either through the widespread use of a particular method or by a standard-setting organization. The International Telecommunication Union, a UNITED NATIONS agency which sits in Geneva, Switzerland, and one of its operational bodies, the International Telegraph and Telephone Consultative Committee, play a key role in standardizing telecommunication methods. For example, the committee's standards for the fax machine that were adopted in the 1980s facilitated the dramatic increase in use of this form of telecommunication.

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CROSS-REFERENCES

Broadcasting; Electronic Surveillance; Employment Law; Entertainment Law; Fairness Doctrine; Privacy; Pornography.

## TELEVISION

Television is the most powerful medium of mass communication seen regularly by most persons in the United States. Television signals may be delivered by using antennas (broadcast), communication satellites, or cable systems. Because of television's societal impact, the federal government regulates companies that operate television systems.

Experimental television systems were developed in the 1930s, but commercial exploitation did not occur in the United States until the late 1940s. Initially, television signals were broadcast from antennas and received by a television set in a person's home or business. Improved technology led to the replacement of black-and-white images with color signals in the 1960s.

The FEDERAL COMMUNICATIONS COMMISSION (FCC), which was established by the Communications Act of 1934 (47 U.S.C.A. § 151 et seq.), originally was charged with the regulation of radio. With the introduction of television and the need for television stations to obtain FCC licenses to use broadcast frequencies, the FCC assumed sole jurisdiction over the television industry.

Television broadcasts may be regulated for content. Typically, this regulation has focused on broadcasts of allegedly obscene or indecent material. The U.S. Supreme Court has upheld regulations banning obscene material, as OBSCENITY is not protected by the FIRST AMENDMENT to the U.S. Constitution. It has also permitted the FCC to prohibit material that is "patently offensive" and either "sexual" or "excretory" from being broadcast during times when children are presumed to be in the audience (*FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 [1978]).

The Telecommunications Act of 1996 (Pub. L. No. 104-104) mandated the establishment of an advisory committee for the rating of video programming that contains indecent materials for purposes of parental control. The act also required televisions with screens 13 inches or larger, manufactured after 1998, to be equipped with a so-called V chip to allow parents to block programs having a predesignated rating for sex and violence. In 1998, the FCC approved the program rating system developed by the networks to assist parents in monitoring the shows their children watch.

CABLE TELEVISION has grown tremendously since the 1980s. Cable television originally served communities in mountainous regions that had difficulty receiving broadcast transmissions. Many communities solved this problem by erecting tall receiving towers to capture broadcast signals and retransmit them over wires running from the tower to homes that subscribed to this service.

During the 1970s and 1980s, large corporations installed cable systems in every large metropolitan area in the United States, as well as in many rural areas. Independent programming was transmitted on cable systems by companies such as Home Box Office (HBO) and Cable News Network (CNN).

Although cable television could not be categorized as broadcasting in the traditional sense, the FCC adopted the first general federal regulation of cable systems. Local government also became involved, as each municipality had to award a cable system franchise to one vendor. Cable operators negotiated system requirements and pricing with local governments, but federal law imposed some restrictions on rates to consumers.

The Telecommunications Act of 1996 deregulated cable television rates, in part because of increased interest by telephone companies in entering the cable market by sending programming through existing phone lines. The act permits phone companies to provide video programming directly to subscribers in their service areas.

Even prior to deregulation in 1996, companies in the telecommunications industry had been involved in major mergers. In 1985, Capital Cities acquired the ABC network, and one year later, General Electric acquired NBC. In 1995, two major mergers occurred, as Westinghouse bought CBS for a reported $5.4 billion, and the Walt Disney Company purchased Capital Cities/ABC for a reported $19 billion. Disney went on to purchase or otherwise acquire a wide

range of cable networks as well, including ESPN, Fox Family Worldwide, the History Channel, and E! Entertainment Television.

Since deregulation, companies have merged to create even larger media conglomerates. A number of commentators have questioned whether the presence of a few enormous entities would stifle competition in the industry. Others questioned whether federal antitrust policy would need to be adapted to address concerns about such large corporations owning multiple media entities. Many of these questions have gone unanswered, and in many ways consumers have benefited from the products that these conglomerates offer. For instance, since the late 1990s, the ABC network has enhanced its sports coverage through its association with ESPN by offering dual coverage of certain sporting events, such as professional football.

For customers who cannot obtain cable television programming, the transmission of television signals by satellite has been a practical solution. In the 1990s, however, direct broadcast satellite (DBS) systems began to compete with cable television systems by going after a broader consumer base. The DBS systems offer high-quality video and audio signals, and access to a wide range of programming.

The development of digital high-definition television (HDTV) was the broadcast television industry's top priority in the 1990s and into the 2000s. HDTV, which has a significantly finer picture resolution than an ordinary television screen, requires additional broadcast frequencies, which the FCC must license to broadcasters. Broadcast television, which saw its viewership steadily drop as cable and DBS became popular, sees HDTV as a way to reclaim its market share.

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CROSS-REFERENCES

Fairness Doctrine; Mass Communications Law.

## TEMPERANCE MOVEMENT

The TEMPERANCE MOVEMENT in the United States first became a national crusade in the early nineteenth century. An initial source of the movement was a groundswell of popular religion that focused on abstention from alcohol. Evangelical preachers of various Christian denominations denounced drinking alcohol as a sin. People who drank, they claimed, lost their faith in God and ceased to observe the teachings of Jesus.

Other supporters of the first temperance movement objected to alcohol's destructive effects on individuals, communities, and the nation as a whole. According to these activists, the consumption of alcohol was responsible for many personal and societal problems, including unemployment, absenteeism in the workplace, and physical violence. Scores of short stories and books published in the mid-nineteenth century described in dramatic detail the abuse suffered by the families of alcoholics. Alcoholics were characterized as dangerous to themselves, their families, and even their nation's security. In the words of temperance advocate Lyman Beecher, a drunk electorate would "dig the grave of our liberties and entomb our glory."

The temperance movement was marked by an undercurrent of ethnic and religious hostility. Some of the first advocates were people of Anglo-Saxon heritage who associated alcohol with the growing number of Catholic immigrants from Ireland and the European continent. Supposedly, the Catholics were loud and boisterous as a result of too much drinking.

Most of the first temperance advocates were sincerely concerned for the welfare of others, however, and were not motivated by such faulty perceptions. The public's rate of alcohol consumption was, in fact, increasing steadily during the nineteenth century, and the reformers saw the banishment of alcohol not as a punishment but as necessary to an orderly, safe, and prosperous society. Despite its good intentions, the first movement splintered. The largest rift occurred between a minority of abolitionists, who favored the promotion of total abstinence from alcohol, and the majority of reformers, who favored only abstinence from hard liquor.

Although it lacked cohesion, the first temperance movement yielded some legislative reforms. In 1846, Maine became the first state to enact a law prohibiting liquor consumption. Twelve other states followed suit, but the laws were difficult to enforce, and public support for the laws quickly waned. By 1868 Maine was the only state left with a liquor PROHIBITION law, and the temperance movement appeared to have come and gone.

*Carry Nation, a well-known prohibitionist, holds a Bible and a hatchet. Nation often used a hatchet to smash liquor bottles and furniture in saloons.*

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Groups such as the Women's Christian Temperance Union (WCTU) and the Anti-Saloon League were at the forefront of the onslaught on alcohol. Members of these groups spoke publicly in favor of Prohibition and lobbied elected officials for laws banning the consumption of alcohol. Some of the more active members disrupted business at saloons and liquor stores. One of the most visible prohibitionists, Carry Nation, used a hatchet to smash liquor bottles and break furniture in saloons.

In the 1870s some prohibitionists began to form political parties and nominate candidates for public office. Leaders in the so-called Progressive movement were instrumental in the resurgence of the temperance movement. The Progressives called for sweeping governmental controls in response to perceived social crises, and they began to promote the abolition of alcohol as part of a plan to clean up cities and eliminate poverty. By the time **WORLD WAR I** began in 1914, an increasing number of politicians were advocating a ban on alcohol, and the conservation efforts for the war gave the temperance movement additional momentum.

Congress enacted the Lever Act of 1917 (40 Stat. 276) to outlaw the use of grain in the manufacture of alcoholic beverages, and many state and local governments passed laws prohibiting the distribution and consumption of alcohol. Two years later, the states ratified the **EIGHTEENTH AMENDMENT** to the U.S. Constitution, which prohibited the manufacture, transportation, and sale of alcoholic beverages in the United States. The complete ban on alcohol was put into effect by the Volstead Act (41 Stat. 305). President **WOODROW WILSON** vetoed the act, but Congress overrode the **VETO** and the United States became officially dry in January 1920.

The effect of Prohibition was to drive drinking underground. Saloons were replaced by speakeasies, hidden drinking places that, in some areas, were tolerated by local police. The more enterprising individuals set up homemade stills to produce alcohol for their own consumption. Others turned to bootlegging, or the illegal sale of alcohol. Prices on the black market were markedly higher than they had been prior to Prohibition, and gangsters used violence to acquire and maintain control over the highly profitable bootlegging business. Bootlegging was so profitable because so many people wanted to drink alcohol. Federal, state, and local law enforcement officials found themselves at war not only with gangsters, but with the general public as well.

Popular support for Prohibition quickly waned after the Eighteenth Amendment was passed, but it took thirteen years to end it. **HERBERT HOOVER**, who served as president from 1929 to 1933, supported Prohibition, calling it "an experiment noble in purpose." Hoover was defeated in his bid for reelection, however, and in 1933 President **FRANKLIN D. ROOSEVELT** called for an amendment to the Volstead Act that would legalize light wine and beer consumption. The bill passed quickly and received widespread public support, and Congress set about the task of repealing Prohibition. On December 5, 1933, the **TWENTY-FIRST AMENDMENT** to the U.S. Constitution was ratified, and the "noble experiment" was dismantled.

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CROSS-REFERENCES

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## TEMPORARY EMERGENCY COURT OF APPEALS

Congress created the Temporary Emergency Court of Appeals (TECA) in 1971, 85 Stat. 749, specifically to hear cases from district courts regarding the Economic Stabilization Act of 1970 (84 Stat. 799). The idea for TECA grew out of the Emergency Court of Appeals (1942–61), which had adjudicated price control measures passed during WORLD WAR II. TECA had nine judges and its own set of rules and procedures for its first case in February 1972. The act that created TECA expired in 1972, but Congress enacted the Emergency Petroleum Allocation Act of 1973 (82 Stat. 627), which granted it authority over controversies arising from the new law. The Energy Policy and Conservation Act of 1975 (89 Stat. 871) and the Emergency Natural Gas Act of 1977 (91 Stat. 4) further elongated TECA's existence and expanded its oversight. In 1992, however, TECA ceased to exist when the U.S. Circuit Court of Appeals for the Federal (D.C.) Circuit assumed its duties and abolished it by an act of October 29, 1992, effective April 30, 1993, 106 Stat. 4507.

## TEMPORARY RESTRAINING ORDER

*A court order that lasts only until the court can hear further evidence.*

A TEMPORARY RESTRAINING ORDER (TRO) is a court order of limited duration. A TRO commands the parties in the case to maintain a certain status until the court can hear further evidence and decide whether to issue a preliminary injunction.

Under federal and state rules of CIVIL PROCEDURE, a person may obtain a TRO by visiting a judge or magistrate without notice to, or the presence of, the adverse party. A TRO may be issued by a court only if (1) it appears from specific facts shown in a signed, sworn AFFIDAVIT or complaint that immediate irreparable injury, loss, or damage will result to the applicant before the adverse party or the adverse party's attorney can be heard in opposition; and (2) the applicant's attorney describes to the court in writing the efforts, if any, that have been made to give notice to the adverse party and gives reasons to support the claim that notice should not be required.

Temporary restraining orders are extraordinary measures because they are court orders issued against a party without notice to that party and without giving the party an opportunity to argue against the order. A TRO usually lasts only two or three days, until the court can hear both sides of the issue and decide whether to issue a preliminary INJUNCTION. A court generally hears arguments on the preliminary injunction as soon as possible after the TRO is issued. On the federal level, rule 65 of the Federal Rules of Civil Procedure mandates that a TRO should not last longer than ten days, and that a TRO may be renewed only for an additional ten days. State courts have similar provisions in their rules of civil procedure.

The immediate potential for irreparable harm is the gravamen of the TRO. If an applicant is unable to prove that the harm suffered will be irreparable or that the irreparable harm is imminent, a court will not approve a TRO. Assume that a person purchases a car with financing from the dealership. The buyer then becomes embroiled in a dispute with the dealership over the car and stops making payments; the dealership responds by threatening to repossess the car. If the buyer applies for a TRO preventing the dealership from taking the car, a court would likely refuse the request, because the loss of the car is not imminent. Moreover, the loss of a car is not an irreparable injury; a court would likely expect the buyer to carry on with other modes of transportation.

Now assume that the purchased vehicle is a large utility van that the buyer has customized to use in her catering business. The loss of the van for a few days would be disastrous to the business and could eventually lead to BANKRUPTCY, so the buyer would likely be able to obtain a TRO, provided the harm was sufficiently imminent.

The adverse party cannot appeal the issuance of a TRO to a higher court. The best remedy for an adverse party is to obtain a court hearing as soon as possible on the issuance of a preliminary injunction. PRELIMINARY INJUNCTIONS may be appealed to higher courts.

TROs are commonly issued in situations involving STALKING and harassment or damage to property. Other common TRO situations include UNFAIR COMPETITION and TRADEMARK, COPYRIGHT, or patent infringement, all of which involve potentially irreparable damage to a party's economic livelihood.

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## TENANCY

*A situation that arises when one individual conveys real property to another individual by way of a lease. The relation of an individual to the land he or she holds that designates the extent of that person's estate in real property.*

A *tenancy* is the occupancy or possession of land or premises by lease. The occupant, known as the tenant, must acquire control and possession of the property for the duration of the lawful occupancy. A tenancy can be created by any words that indicate the owner's intent to convey a property interest on another individual.

CROSS-REFERENCES

Landlord and Tenant.

## TENANCY BY THE ENTIRETY

*A type of concurrent estate in real property held by a* HUSBAND AND WIFE *whereby each owns the undivided whole of the property, coupled with the* RIGHT OF SURVIVORSHIP, *so that upon the death of one, the survivor is entitled to the decedent's share.*

A TENANCY BY THE ENTIRETY allows spouses to own property together as a single legal entity. Under a tenancy by the entirety, creditors of an individual spouse may not attach and sell the interest of a debtor spouse: only creditors of the couple may attach and sell the interest in the property owned by tenancy by the entirety.

There are three types of concurrent ownership, or ownership of property by two or more persons: tenancy by the entirety, JOINT TENANCY, and TENANCY IN COMMON. A tenancy by the entirety can be created only by married persons. A married couple may choose to create a joint tenancy or a tenancy in common. In most states a married couple is presumed to take title to property as tenants by the entirety, unless the deed or conveyancing document states otherwise.

The most important difference between a tenancy by the entirety and a joint tenancy or tenancy in common is that a tenant by the entirety may not sell or give away his interest in the property without the consent of the other tenant. Upon the death of one of the spouses, the deceased spouse's interest in the property devolves to the surviving spouse, and not to other heirs of the deceased spouse. This is called the right of survivorship.

Tenants in common do not have a right of survivorship. In a tenancy in common, persons may sell or give away their ownership interest. Joint tenants do have a right of survivorship, but a joint tenant may sell or give away her interest in the property. If a joint tenant sells her interest in a joint tenancy, the tenancy becomes a tenancy in common, and no tenant has a right of survivorship. A tenancy by the entirety cannot be reduced to a joint tenancy or tenancy in common by a conveyance of property. Generally, the couple must DIVORCE, obtain an ANNULMENT, or agree to amend the title to the property to extinguish a tenancy by the entirety.

FURTHER READINGS

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## TENANCY IN COMMON

*A form of concurrent ownership of real property in which two or more persons possess the property simultaneously; it can be created by deed, will, or operation of law.*

TENANCY IN COMMON is a specific type of concurrent, or simultaneous, ownership of real property by two or more parties. Generally, concurrent ownership can take three forms: JOINT TENANCY, TENANCY BY THE ENTIRETY, and tenancy in common. These forms of concurrent ownership give individuals a choice in the way that co-ownership of property will be carried out. Each type of tenancy is distinguishable from the others by the rights of the co-owners.

Usually, the term *tenant* is understood to describe a person who rents or leases a piece of property. In the context of concurrent estates, however, a tenant is a co-owner of real property.

All tenants in common hold an individual, undivided ownership interest in the property. This means that each party has the right to alienate, or transfer the ownership of, her ownership interest. This can be done by deed, will, or other conveyance. In a tenancy by the entirety (a concurrent estate between married persons), neither tenant has the right of alienation with-

out the consent of the other. When a tenant by the entirety dies, the surviving spouse receives the deceased spouse's interest, thus acquiring full ownership of the property. This is called a RIGHT OF SURVIVORSHIP. Joint tenants also have a right of survivorship. A joint tenant may alienate his property, but if that occurs, the tenancy is changed to a tenancy in common and no tenant has a right of survivorship.

Another difference between tenants in common and joint tenants or tenants by the entirety is that tenants in common may hold unequal interests. By contrast, joint tenants and tenants by the entirety own equal shares of the property. Furthermore, tenants in common may acquire their interests from different instruments: joint tenants and tenants by the entirety must obtain their interests at the same time and in the same document.

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## TENANCY IN COPARCENARY

*A type of concurrent estate in real property by which property rights were acquired only through intestacy by the female heirs when there were no surviving male heirs.*

This type of estate, which has only historical value today, occurred when an ancestor left no son who could take property by primogeniture.

## TENANT

*An individual who occupies or possesses land or premises by way of a grant of an estate of some type, such as in fee, for life, for years, or at will. A person who has the right to temporary use and possession of particular real property, which has been conveyed to that person by a landlord.*

CROSS-REFERENCES

Landlord and Tenant.

## TENDER

*An offer of money; the act by which one individual offers someone who is holding a claim or demand against him or her the amount of money that the offeror regards and admits is due, in order to satisfy the claim or demand, in the absence of any contingency or stipulation attached to the offer.*

The two essential characteristics of tender are an unconditional offer to perform, together with manifested ability to do so, and the production of the subject matter of tender. The term is generally used in reference to an offer to pay money; however, it may properly be used in reference to an offer of other kinds of property.

CROSS-REFERENCES

Tender Offer.

## TENDER OFFER

*A proposal to buy shares of stock from the stockholders of a corporation, made by a group or company that desires to obtain control of the corporation.*

A tender offer to purchase may be for cash or some type of corporate security of the acquiring company—for example, stock, warrants, or debentures. Such an offer is sometimes subject to either a minimum or maximum that the offeror will accept and is communicated to the stockholders through newspaper advertisements or a general mailing to the complete list of stockholders. Tender offers are subject to regulations by state and federal SECURITIES laws, such as the WILLIAMS ACT (15 U.S.C.A. § 78a et seq.).

CROSS-REFERENCES

Mergers and Acquisitions; Stock Warrant.

## TENDER YEARS DOCTRINE

*A doctrine rarely employed in* CHILD CUSTODY *disputes that provides that, when all other factors are equal, custody of a child of tender years—generally under the age of thirteen years—should be awarded to the mother.*

The TENDER YEARS DOCTRINE is a judicial presumption that operates in DIVORCE cases to give custody of a young child to the mother. Most states have eliminated this presumption, and some courts have held that the tender years doctrine violates the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT to the U.S. Constitution because it discriminates on the basis of sex.

Early English COMMON LAW originally gave custody of the children of divorcing parents to the father. Women had few individual rights until the nineteenth century; most of their rights were derived through their fathers and husbands. Under these conditions women had no right to raise their children after a divorce.

In the early nineteenth century, Mrs. Caroline Norton, a prominent London hostess,

author, and journalist, began to campaign for the right of women to have custody of their children. Norton, who had undergone a divorce and been deprived of her children, was able to convince the British Parliament to enact legislation to protect mothers' rights. The result was the Custody of Infants Act of 1839, which gave some discretion to the judge in a child custody case and established a presumption of maternal custody for children under the age of seven years. In 1873 Parliament extended the presumption of maternal custody until a child reached sixteen years of age. Courts made exceptions in cases in which the father established that the mother had committed ADULTERY.

Many courts and legislatures in the United States adopted the tender years presumption. To grant custody of a child to a father was "to hold nature in CONTEMPT, and snatch helpless, puling infancy from the bosom of an affectionate mother, and place it in the coarse hands of the father." The mother was "the softest and safest nurse of infancy" (*Ex parte Devine,* 398 So. 2d 686 [Ala. 1981], quoting *Helms v. Franciscus,* 2 Bland Ch. [Md.] 544 [1830]).

The tender years presumption in child custody cases persisted for more than one hundred years, with the majority of states recognizing the presumption. In the latter half of the twentieth century, courts and legislatures began to reverse decisions and repeal laws that recognized the tender years presumption in favor of gender-neutral considerations. In most states the best interests of the child are now the primary consideration in child custody cases, and the primary caretaker is presumed to be the best parent to handle primary custody of a small child. Some state courts have gone so far as to hold that the tender years doctrine violates the Equal Protection Clause of the state constitution. (See, e.g., *King v. Vancil,* 34 Ill. App. 3d 831, 341 N.E.2d 65 [Ill. 1975].)

A small number of states still recognize the tender years presumption, but only in certain cases. In *Pennington v. Pennington,* 711 P.2d 254 (Utah 1985), the Supreme Court of Utah stated that it had "long expressed a preference for placing very young children in the mother's custody." The court noted, however, that "the preference operates only when all other things are equal." The *Pennington* court held that the best interests of the child were to be given primary consideration, and it went on to affirm the award of child custody to the father in the case.

In other areas of the law, the term *tender years* may refer to a law that creates special rules for small children. For example, some states enact special laws governing HEARSAY evidence in child SEX ABUSE cases. These tender years laws create exceptions to evidentiary rules by allowing the introduction of hearsay statements and videotaped testimony of children under a certain age.

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CROSS-REFERENCES

Child Abuse; Children's Rights; Family Law; Sexual Abuse.

## TENEMENT

*A comprehensive legal term for any type of property of a permanent nature—including land, houses, and other buildings as well as rights attaching thereto, such as the right to collect rent.*

In the law of EASEMENTS, a dominant tenement or estate is that for which the advantage or benefit of an easement exists; a servient tenement or estate is a tenement that is subject to the burden of an easement.

The term *tenement* is also used in reference to a building with rooms or apartments that are leased for residential purposes. It is frequently defined by statute, and its meaning therefore varies from one jurisdiction to another.

## TENNESSEE VALLEY AUTHORITY

In 1933, U.S. President FRANKLIN DELANO ROOSEVELT approved the passage of the TENNESSEE VALLEY AUTHORITY ACT (16 U.S.C.A. § 831 et

seq.). The act provided for a source of hydroelectric power, control of a troublesome flood situation, revitalization of forest areas, and navigation and economic benefits for the region. These goals, announced during a devastating nationwide depression, made the Tennessee Valley Authority (TVA) an ambitious project of the era.

The idea for the project was originally developed in 1918, when two nitrate facilities and a dam were constructed at Muscle Shoals, Alabama, on the Tennessee River. Previously the area had been prone to severe floods, and water travel was impeded by sandbanks. The area had abundant natural resources, but the surrounding basin was depleted, and the region had experienced a depressed economy even before the hard times suffered throughout the nation in the Depression of the 1930s.

Politicians and developers of the project envisioned a growth of industry and water power in the Tennessee Valley, as well as the manufacture of low-priced fertilizer and public control of the valuable resources. Debates over whether the project area should be rented to private parties or be controlled by the government continued throughout the 1920s. Senator GEORGE W. NORRIS of Nebraska was instrumental in the passage of measures by Congress advocating government control, but these bills did not receive presidential approval until 1933, when Roosevelt based his Tennessee Valley plan on the Norris proposals.

Roosevelt's Tennessee Valley Act authorized the establishment of a corporation owned by the federal government and directed by Arthur E. Morgan, the chairman, and Harcourt A. Morgan, and David Lilienthal. The early years of TVA were fraught with adversity, particularly when its constitutionality was questioned. Disputes between the directors and an investigation conducted by Congress hampered its initial achievements, but the TVA continued its work despite these difficulties.

The TVA succeeded in its projected goals. Since the development of its dams and reservoirs, the region has not been subjected to serious floods. The electrical system developed by the TVA afforded the region power at a low cost, and throughout the decades, power development has been extended to include coal and nuclear systems. The TVA also benefited agrarian interests by encouraging conservation, replenishment of forests, and agricultural and fertilizer research. Although the power program of the TVA is financially self-supporting today, other programs conducted by the authority are financed primarily by appropriations from Congress.

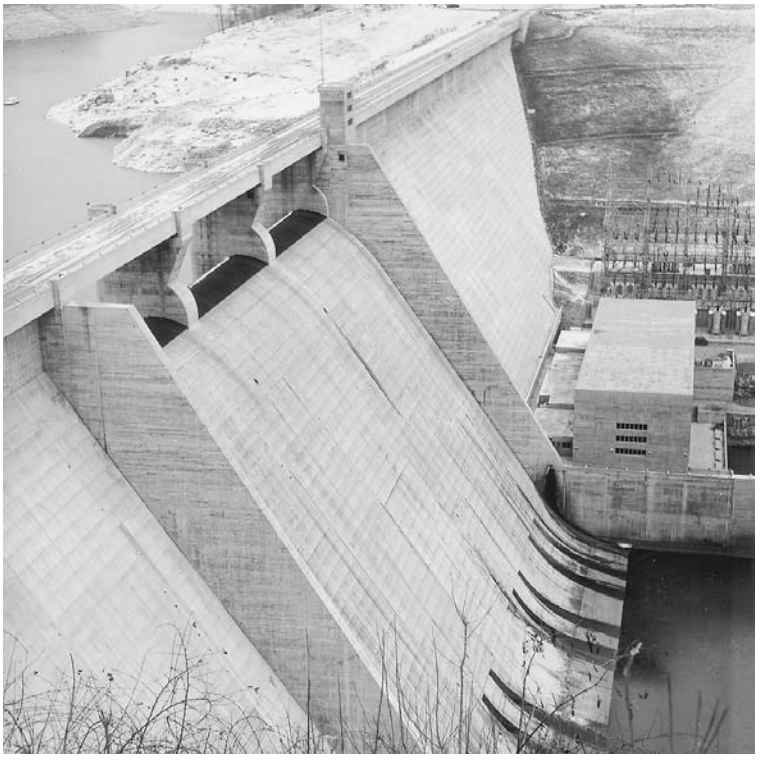

*The Norris Dam was one of the first major projects of the Tennessee Valley Authority in 1942.*

LIBRARY OF CONGRESS

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## TENNESSEE VALLEY AUTHORITY ACT

The Tennessee Valley Authority Act was passed by the U.S. Congress in 1933 to establish the TENNESSEE VALLEY AUTHORITY (TVA), an autonomous federal corporate agency responsible for the integrated development of the Tennessee River basin. The concept of the TVA Act (16 U.S.C.A. § 831 et seq.) initially appeared in the early 1920s, when Senator GEORGE W. NORRIS introduced a plan to have the government assume the operation of the Wilson Dam and other installations the government had constructed at Muscle Shoals, Alabama, for national security reasons during WORLD WAR I. President CALVIN COOLIDGE and President HERBERT HOOVER, in 1928 and 1931, respectively, vetoed the legislation. In 1933, President FRANKLIN

DELANO ROOSEVELT reworked the legislation, and Congress passed the TVA Act. This version significantly expanded the scope of the previous legislation in that it propelled the federal government into a comprehensive scheme of regional planning and development. This marked the first time one agency was directed to coordinate the entire resource development of a major region, and the endeavor served as the prototype for similar river projects.

The TVA was responsible for resolving the problems arising from serious floods, substantially eroded land, a lackluster economy, and continual emigration from the region. It has revitalized the economy of the Tennessee River basin, particularly by the construction of reservoirs and multipurpose dams. Other noteworthy projects of the TVA, executed in conjunction with local authorities, have included malaria control; tree planting; the development of mineral, fish, and wildlife resources; land conservation; educational and social programs; and the construction of recreational facilities adjacent to reservoir banks.

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## TENOR

*An exact replica of a legal document in words and figures.*

For example, the tenor of a check would be the exact amount payable, as indicated on its face.

## TENTH AMENDMENT

The Tenth Amendment to the U.S. Constitution reads:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

Ratified in 1791, the Tenth Amendment to the Constitution embodies the general principles of FEDERALISM in a republican form of government. The Constitution specifies the parameters of authority that may be exercised by the three branches of the federal government: executive, legislative, and judicial. The Tenth Amendment reserves to the states all powers that are not granted to the federal government by the Constitution, except for those powers that states are constitutionally forbidden from exercising.

For example, nowhere in the federal Constitution is Congress given authority to regulate local matters concerning the health, safety, and morality of state residents. Known as POLICE POWERS, such authority is reserved to the states under the Tenth Amendment. Conversely, no state may enter into a treaty with a foreign government because such agreements are prohibited by the plain language of Article I to the Constitution.

At the time the states adopted the Tenth Amendment, two primary conceptions of government were under consideration. Many federalists supported a centralized national authority, with power concentrated in a single entity. This type of government was exemplified by the English constitutional system, which vested absolute authority in the monarchy during the seventeenth century and in Parliament during the eighteenth century.

On the other hand, many anti-federalists supported a more republican form of government consisting of a loose confederation of sovereign states that would form an alliance only for the purpose of mutual defense. The ARTICLES OF CONFEDERATION, which governed the 13 states in national matters until 1787, when the Constitution was ratified, epitomized this form of government. Under the Articles of Confederation, the national government was unable to levy and collect taxes on its own behalf.

Many federalists, such as JAMES MADISON, argued that the Tenth Amendment was unnecessary because the powers of the federal government are carefully enumerated and limited in the Constitution. Because the Constitution does not give Congress, the president, or the federal judiciary the prerogative to regulate wholly local matters, Madison concluded that no such power existed and no such power would ever be exercised. However, British oppression had made the Founding Fathers fearful of unchecked centralized power. The Tenth Amendment was enacted to limit federal power. Although it appears clear on its face, the Tenth Amendment has not been consistently applied.

Before the Civil War, nearly every state urged a broad reading of the Tenth Amendment. Although no state wanted a federal government that was impotent against internal enemies or foreign aggressors, many state politicians chal-

lenged the authority of the federal government to regulate any matter that could otherwise be handled by local authorities. For example, immediately after the U.S. Revolution, all 13 states resisted federal efforts to force local governments to return the property of British loyalists taken during the war. During the first half of the nineteenth century, Southern states objected to federal legislation that attempted to limit SLAVERY. State sovereignty reached its height when 11 states seceded from the Union to form the Confederacy.

Following the Civil War, the Tenth Amendment was virtually suspended. For a number of years during the Reconstruction era, the federal government occupied the former Confederate states with military troops and required each occupied state to ratify the Civil War Amendments, which outlawed slavery, gave African Americans the right vote, and declared the equality of all races. To a large extent the federal government ran local matters in Southern states during this period.

In 1883, the Tenth Amendment regained some of its force. In that year the Supreme Court invalidated the federal CIVIL RIGHTS ACT of 1875 (18 Stat. 335), which criminalized RACIAL DISCRIMINATION in public accommodations, such as hotels and restaurants, because it violated state sovereignty under the Tenth Amendment (CIVIL RIGHTS CASES, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 [1883]). In 1909, the Supreme Court struck down the White Slave Traffic Act (34 Stat. 898), which Congress had passed to prohibit the harboring of alien women for the purposes of prostitution, because it violated the Tenth Amendment (*Keller v. United States,* 213 U.S. 138, 29 S. Ct. 470, 53 L. Ed. 737 [1909]).

Nine years later the Court struck down another congressional law prohibiting the interstate shipment of products that had been manufactured by certain businesses that employed children under the age of 14 (HAMMER V. DAGENHART, 247 U.S. 251, 38 S. Ct. 529, 62 L. Ed. 1101 [1918]). "In interpreting the Constitution," the Court said in *Hammer,* "it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them the powers not expressly delegated to the national government are reserved."

During the depth of the Great Depression, the Tenth Amendment returned to a dormant condition. President FRANKLIN ROOSEVELT worked with Congress to pass the NEW DEAL, a series of programs designed to stimulate the troubled economy. After the Supreme Court upheld a provision of the National Labor Relations Act (mandatory COLLECTIVE BARGAINING) in NLRB V. JONES & LAUGHLIN STEEL CORP., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937), Congress began exercising unprecedented lawmaking power over state and local matters. For the next 40 years, the Supreme Court upheld congressional authority to regulate a variety of matters that had been traditionally addressed by state legislatures. For example, in one case the Supreme Court upheld the Agricultural Adjustment Act of 1938 (7 U.S.C.A. §§ 1281 et seq.) over objections that it allowed Congress to regulate individuals who produced and consumed their own foodstuffs entirely within the confines of a family farm (*Wickard v. Filburn,* 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 [1942]).

The Tenth Amendment enjoyed a brief resurgence in 1976 when the Supreme Court held that the application of the FAIR LABOR STANDARDS ACT of 1938 (29 U.S.C.A. §§ 201 et seq.) to state and local governments was unconstitutional. In *National League of Cities v. Usery,* 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), the Court said that the MINIMUM WAGE and maximum

Congress of the United States,
begun and held at the City of New York, on
Wednesday the fourth of March, one thousand seven hundred and eighty nine.
THE
RESOLVED
ARTICLES
Article the first
Article the second
Article the third
Article the fourth
Article the fifth
Article the sixth
Article the seventh
Article the eighth
Article the ninth
Article the tenth
Article the eleventh
Article the twelfth
Frederick Augustus Muhlenberg Speaker of the House of Representatives
John Adams Vice President of the United States and President of the Senate

*In this 1789 draft of the Bill of Rights, the Tenth Amendment to the Constitution appears as Article the Twelfth, reserving to the states or to the people powers not delegated to the federal government.*
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

hour provisions of this act significantly altered and displaced the states' abilities to structure employment relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These services, the Court emphasized, are historically reserved to state and local governments. If Congress may withdraw from the states the authority to make such fundamental employment decisions, the Court concluded, "there would be little left of the states' separate and independent existence," or of the Tenth Amendment.

*National League of Cities* proved to be an unworkable constitutional precedent. It cast doubt on congressional authority to regulate many aspects of local affairs that most of society had come to rely upon. It was unclear, for example, whether the Occupational Safety and Health Administration (OSHA), a federal agency established by Congress to regulate workplace safety, retained any constitutional authority after the Supreme Court announced its decision in *National League of Cities.*

The Supreme Court eliminated these concerns by overturning *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). In *Garcia* the Court upheld the minimum wage and maximum hour provisions of the Fair Labor Standards Act as it applied to a city-owned public transportation system. In reaching this decision, the Court said that if certain states are worried about the extent of federal authority over a particular local matter, the residents of such states should contact their senators and representatives who are constitutionally authorized to narrow federal regulatory power through appropriate legislation. JUDICIAL REVIEW of federal regulations under the Tenth Amendment, the Supreme Court suggested, is not the proper vehicle to achieve this end.

The ebb and flow of Tenth Amendment JURISPRUDENCE reflects the delicate constitutional balance created by the Founding Fathers. The states ratified the Constitution because the Articles of Confederation created a national government that was too weak to defend itself and could not raise or collect revenue. Although the federal Constitution created a much stronger centralized government, the Founders did not want the states to lose all of their power to the federal government, as the colonies had lost their powers to Parliament. The Tenth Amendment continues to be defined as courts and legislatures address the balance of federal and state power.

FURTHER READINGS

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Killenbeck, Mark R., ed. 2002. *The Tenth Amendment and State Sovereignty: Constitutional History and Contemporary Issues.* Lanham, Md.: Rowman & Littlefield.

CROSS-REFERENCES

Constitution of the United States; *Federalist Papers*; States' Rights.

## TENURE

*A right, term, or mode of holding or occupying something of value for a period of time.*

*In feudal law, the principal mode or system by which a person held land from a superior in exchange for the rendition of service and loyalty to the grantor.*

*The status given to an educator who has satisfactorily completed teaching for a trial period and is, therefore, protected against summary dismissal by the employer.*

*A length of time during which an individual has a right to occupy a public or private office.*

In a general sense, the term *tenure* describes the length of time that a person holds a job, position, or something of value. In the context of academic employment, tenure refers to a faculty appointment for an indefinite period of time. When an academic institution gives tenure to an educator, it gives up the right to terminate that person without good cause.

In medieval England, tenure referred to the prevailing system of land ownership and land possession. Under the tenure system, a landholder, called a tenant, held land at the will of a lord, who gave the tenant possession of the land in exchange for a good or service provided by the tenant. The various types of arrangements between the tenant and lord were called tenures. The most common tenures provided for military service, agricultural work, economic tribute, or religious duties in exchange for land.

CROSS-REFERENCES

Feudalism.

## TENURE OF OFFICE ACT

The assassination of President ABRAHAM LINCOLN on April 14, 1865, left the post–Civil War United States in the hands of his ineffectual and unpopu-

lar successor, ANDREW JOHNSON. It became Johnson's responsibility to determine a reconstruction policy, and he incurred the anger of the Radical Republicans in Congress when he chose a moderate treatment of the rebellious South.

Congress sought to diminish Johnson's authority to select or remove officials from office, and the Radical Republicans particularly wanted to protect Lincoln's secretary of war, EDWIN M. STANTON. Stanton, a valuable member of the existing cabinet, supported the Radicals' Reconstruction policies and openly opposed Johnson. On March 2, 1867, Congress enacted the Tenure of Office Act (14 Stat. 430), which stated that a U.S. president could not remove any official originally appointed with senatorial consent without again obtaining the approval of the Senate.

Andrew Johnson vetoed the measure and challenged its effectiveness when he removed the dissident Stanton from office. Stanton refused to leave, and the House of Representatives invoked the new act to initiate IMPEACHMENT proceedings against Johnson in 1868. The president was acquitted, however, when the Senate failed by one vote to convict him. Stanton subsequently relinquished his office, and the Tenure of Office Act, never a popular measure, was repealed in 1887.

**FURTHER READINGS**

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# Abbreviations

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|---|---|
| A. | Atlantic Reporter |
| A. 2d | Atlantic Reporter, Second Series |
| AA | Alcoholics Anonymous |
| AAA | American Arbitration Association; Agricultural Adjustment Act of 1933 |
| AALS | Association of American Law Schools |
| AAPRP | All African People's Revolutionary Party |
| AARP | American Association of Retired Persons |
| AAS | American Anti-Slavery Society |
| ABA | American Bar Association; Architectural Barriers Act of 1968; American Bankers Association |
| ABC | American Broadcasting Companies, Inc. (formerly American Broadcasting Corporation) |
| ABM | Antiballistic missile |
| ABM Treaty | Anti-Ballistic Missile Treaty of 1972 |
| ABVP | Anti-Biased Violence Project |
| A/C | Account |
| A.C. | Appeal cases |
| ACAA | Air Carrier Access Act |
| ACCA | Armed Career Criminal Act of 1984 |
| ACF | Administration for Children and Families |
| ACLU | American Civil Liberties Union |
| ACRS | Accelerated Cost Recovery System |
| ACS | Agricultural Cooperative Service |
| ACT | American College Test |
| Act'g Legal Adv. | Acting Legal Advisor |
| ACUS | Administrative Conference of the United States |
| ACYF | Administration on Children, Youth, and Families |
| A.D. 2d | Appellate Division, Second Series, N.Y. |
| ADA | Americans with Disabilities Act of 1990 |
| ADAMHA | Alcohol, Drug Abuse, and Mental Health Administration |
| ADC | Aid to Dependent Children |
| ADD | Administration on Developmental Disabilities |
| ADEA | Age Discrimination in Employment Act of 1967 |
| ADL | Anti-Defamation League |
| ADR | Alternative dispute resolution |
| AEC | Atomic Energy Commission |
| AECB | Arms Export Control Board |
| AEDPA | Antiterrorism and Effective Death Penalty Act |
| A.E.R. | All England Law Reports |
| AFA | American Family Association; Alabama Freethought Association |
| AFB | American Farm Bureau |
| AFBF | American Farm Bureau Federation |
| AFDC | Aid to Families with Dependent Children |
| aff'd per cur. | Affirmed by the court |
| AFIS | Automated fingerprint identification system |
| AFL | American Federation of Labor |

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| AFL-CIO | American Federation of Labor and Congress of Industrial Organizations |
| AFRes | Air Force Reserve |
| AFSC | American Friends Service Committee |
| AFSCME | American Federation of State, County, and Municipal Employees |
| AGRICOLA | Agricultural Online Access |
| AIA | Association of Insurance Attorneys |
| AIB | American Institute for Banking |
| AID | Artificial insemination using a third-party donor's sperm; Agency for International Development |
| AIDS | Acquired immune deficiency syndrome |
| AIH | Artificial insemination using the husband's sperm |
| AIM | American Indian Movement |
| AIPAC | American Israel Public Affairs Committee |
| AIUSA | Amnesty International, U.S.A. Affiliate |
| AJS | American Judicature Society |
| ALA | American Library Association |
| Alcoa | Aluminum Company of America |
| ALEC | American Legislative Exchange Council |
| ALF | Animal Liberation Front |
| ALI | American Law Institute |
| ALJ | Administrative law judge |
| All E.R. | All England Law Reports |
| ALO | Agency Liaison |
| A.L.R. | American Law Reports |
| ALY | *American Law Yearbook* |
| AMA | American Medical Association |
| AMAA | Agricultural Marketing Agreement Act |
| Am. Dec. | American Decisions |
| amdt. | Amendment |
| Amer. St. Papers, For. Rels. | American State Papers, Legislative and Executive Documents of the Congress of the U.S., Class I, Foreign Relations, 1832–1859 |
| AMS | Agricultural Marketing Service |
| AMVETS | American Veterans (of World War II) |
| ANA | Administration for Native Americans |
| Ann. Dig. | Annual Digest of Public International Law Cases |
| ANPA | American Newspaper Publishers Association |
| ANSCA | Alaska Native Claims Act |
| ANZUS | Australia-New Zealand-United States Security Treaty Organization |
| AOA | Administration on Aging |
| AOE | Arizonans for Official English |
| AOL | America Online |
| AP | Associated Press |
| APA | Administrative Procedure Act of 1946 |
| APHIS | Animal and Plant Health Inspection Service |
| App. Div. | Appellate Division Reports, N.Y. Supreme Court |
| Arb. Trib., U.S.-British | Arbitration Tribunal, Claim Convention of 1853, United States and Great Britain Convention of 1853 |
| Ardcor | American Roller Die Corporation |
| ARPA | Advanced Research Projects Agency |
| ARPANET | Advanced Research Projects Agency Network |
| ARS | Advanced Record System |
| Art. | Article |
| ARU | American Railway Union |
| ASCME | American Federation of State, County, and Municipal Employees |
| ASCS | Agriculture Stabilization and Conservation Service |
| ASM | Available Seatmile |
| ASPCA | American Society for the Prevention of Cruelty to Animals |
| Asst. Att. Gen. | Assistant Attorney General |
| AT&T | American Telephone and Telegraph |
| ATFD | Alcohol, Tobacco and Firearms Division |
| ATLA | Association of Trial Lawyers of America |
| ATO | Alpha Tau Omega |
| ATTD | Alcohol and Tobacco Tax Division |
| ATU | Alcohol Tax Unit |
| AUAM | American Union against Militarism |
| AUM | Animal Unit Month |
| AZT | Azidothymidine |

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| BAC | Blood alcohol concentration |
| BALSA | Black-American Law Student Association |
| BATF | Bureau of Alcohol, Tobacco and Firearms |
| BBS | Bulletin Board System |
| BCCI | Bank of Credit and Commerce International |
| BEA | Bureau of Economic Analysis |
| Bell's Cr. C. | Bell's English Crown Cases |
| Bevans | United States Treaties, etc. *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled under the direction of Charles I. Bevans, 1968–76) |
| BFOQ | Bona fide occupational qualification |
| BI | Bureau of Investigation |
| BIA | Bureau of Indian Affairs; Board of Immigration Appeals |
| BID | Business improvement district |
| BJS | Bureau of Justice Statistics |
| Black. | Black's United States Supreme Court Reports |
| Blatchf. | Blatchford's United States Circuit Court Reports |
| BLM | Bureau of Land Management |
| BLS | Bureau of Labor Statistics |
| BMD | Ballistic missile defense |
| BNA | Bureau of National Affairs |
| BOCA | Building Officials and Code Administrators International |
| BOP | Bureau of Prisons |
| BPP | Black Panther Party for Self-defense |
| Brit. and For. | British and Foreign State Papers |
| BSA | Boy Scouts of America |
| BTP | Beta Theta Pi |
| Burr. | James Burrows, *Report of Cases Argued and Determined in the Court of King's Bench during the Time of Lord Mansfield* (1766–1780) |
| BVA | Board of Veterans Appeals |
| c. | Chapter |
| $C^3I$ | Command, Control, Communications, and Intelligence |
| C.A. | Court of Appeals |
| CAA | Clean Air Act |
| CAB | Civil Aeronautics Board; Corporation for American Banking |
| CAFE | Corporate average fuel economy |
| Cal. 2d | California Reports, Second Series |
| Cal. 3d | California Reports, Third Series |
| CALR | Computer-assisted legal research |
| Cal. Rptr. | California Reporter |
| CAP | Common Agricultural Policy |
| CARA | Classification and Ratings Administration |
| CATV | Community antenna television |
| CBO | Congressional Budget Office |
| CBS | Columbia Broadcasting System |
| CBOEC | Chicago Board of Election Commissioners |
| CCC | Commodity Credit Corporation |
| CCDBG | Child Care and Development Block Grant of 1990 |
| C.C.D. Pa. | Circuit Court Decisions, Pennsylvania |
| C.C.D. Va. | Circuit Court Decisions, Virginia |
| CCEA | Cabinet Council on Economic Affairs |
| CCP | Chinese Communist Party |
| CCR | Center for Constitutional Rights |
| C.C.R.I. | Circuit Court, Rhode Island |
| CD | Certificate of deposit; compact disc |
| CDA | Communications Decency Act |
| CDBG | Community Development Block Grant Program |
| CDC | Centers for Disease Control and Prevention; Community Development Corporation |
| CDF | Children's Defense Fund |
| CDL | Citizens for Decency through Law |
| CD-ROM | Compact disc read-only memory |
| CDS | Community Dispute Services |
| CDW | Collision damage waiver |
| CENTO | Central Treaty Organization |
| CEO | Chief executive officer |
| CEQ | Council on Environmental Quality |

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| CERCLA | Comprehensive Environmental Response, Compensation, and Liability Act of 1980 |
| cert. | *Certiorari* |
| CETA | Comprehensive Employment and Training Act |
| C & F | Cost and freight |
| CFC | Chlorofluorocarbon |
| CFE Treaty | Conventional Forces in Europe Treaty of 1990 |
| C.F. & I. | Cost, freight, and insurance |
| C.F.R | Code of Federal Regulations |
| CFNP | Community Food and Nutrition Program |
| CFTA | Canadian Free Trade Agreement |
| CFTC | Commodity Futures Trading Commission |
| Ch. | Chancery Division, English Law Reports |
| CHAMPVA | Civilian Health and Medical Program at the Veterans Administration |
| CHEP | Cuban/Haitian Entrant Program |
| CHINS | Children in need of supervision |
| CHIPS | Child in need of protective services |
| Ch.N.Y. | Chancery Reports, New York |
| Chr. Rob. | Christopher Robinson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (1801–1808) |
| CIA | Central Intelligence Agency |
| CID | Commercial Item Descriptions |
| C.I.F. | Cost, insurance, and freight |
| CINCNORAD | Commander in Chief, North American Air Defense Command |
| C.I.O. | Congress of Industrial Organizations |
| CIPE | Center for International Private Enterprise |
| C.J. | Chief justice |
| CJIS | Criminal Justice Information Services |
| C.J.S. | Corpus Juris Secundum |
| Claims Arb. under Spec. Conv., Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| CLASP | Center for Law and Social Policy |
| CLE | Center for Law and Education; Continuing Legal Education |
| CLEO | Council on Legal Education Opportunity; Chief Law Enforcement Officer |
| CLP | Communist Labor Party of America |
| CLS | Christian Legal Society; critical legal studies (movement); Critical Legal Studies (membership organization) |
| C.M.A. | Court of Military Appeals |
| CMEA | Council for Mutual Economic Assistance |
| CMHS | Center for Mental Health Services |
| C.M.R. | Court of Military Review |
| CNN | Cable News Network |
| CNO | Chief of Naval Operations |
| CNOL | Consolidated net operating loss |
| CNR | Chicago and Northwestern Railway |
| CO | Conscientious Objector |
| C.O.D. | Cash on delivery |
| COGP | Commission on Government Procurement |
| COINTELPRO | Counterintelligence Program |
| Coke Rep. | Coke's English King's Bench Reports |
| COLA | Cost-of-living adjustment |
| COMCEN | Federal Communications Center |
| Comp. | Compilation |
| Conn. | Connecticut Reports |
| CONTU | National Commission on New Technological Uses of Copyrighted Works |
| Conv. | Convention |
| COPA | Child Online Protection Act (1998) |
| COPS | Community Oriented Policing Services |
| Corbin | Arthur L. Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (1950) |
| CORE | Congress on Racial Equality |
| Cox's Crim. Cases | Cox's Criminal Cases (England) |
| COYOTE | Call Off Your Old Tired Ethics |

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| CPA | Certified public accountant |
| CPB | Corporation for Public Broadcasting, the |
| CPI | Consumer Price Index |
| CPPA | Child Pornography Prevention Act |
| CPSC | Consumer Product Safety Commission |
| Cranch | Cranch's United States Supreme Court Reports |
| CRF | Constitutional Rights Foundation |
| CRR | Center for Constitutional Rights |
| CRS | Congressional Research Service; Community Relations Service |
| CRT | Critical race theory |
| CSA | Community Services Administration |
| CSAP | Center for Substance Abuse Prevention |
| CSAT | Center for Substance Abuse Treatment |
| CSC | Civil Service Commission |
| CSCE | Conference on Security and Cooperation in Europe |
| CSG | Council of State Governments |
| CSO | Community Service Organization |
| CSP | Center for the Study of the Presidency |
| C-SPAN | Cable-Satellite Public Affairs Network |
| CSRS | Cooperative State Research Service |
| CSWPL | Center on Social Welfare Policy and Law |
| CTA | *Cum testamento annexo* (with the will attached) |
| Ct. Ap. D.C. | Court of Appeals, District of Columbia |
| Ct. App. No. Ireland | Court of Appeals, Northern Ireland |
| Ct. Cl. | Court of Claims, United States |
| Ct. Crim. Apps. | Court of Criminal Appeals (England) |
| CTI | Consolidated taxable income |
| Ct. of Sess., Scot. | Court of Sessions, Scotland |
| CU | Credit union |
| CUNY | City University of New York |
| Cush. | Cushing's Massachusetts Reports |
| CWA | Civil Works Administration; Clean Water Act |
| DACORB | Department of the Army Conscientious Objector Review Board |
| Dall. | Dallas's Pennsylvania and United States Reports |
| DAR | Daughters of the American Revolution |
| DARPA | Defense Advanced Research Projects Agency |
| DAVA | Defense Audiovisual Agency |
| D.C. | United States District Court; District of Columbia |
| D.C. Del. | United States District Court, Delaware |
| D.C. Mass. | United States District Court, Massachusetts |
| D.C. Md. | United States District Court, Maryland |
| D.C.N.D.Cal. | United States District Court, Northern District, California |
| D.C.N.Y. | United States District Court, New York |
| D.C.Pa. | United States District Court, Pennsylvania |
| DCS | Deputy Chiefs of Staff |
| DCZ | District of the Canal Zone |
| DDT | Dichlorodiphenyltricloro-ethane |
| DEA | Drug Enforcement Administration |
| Decl. Lond. | Declaration of London, February 26, 1909 |
| Dev. & B. | Devereux & Battle's North Carolina Reports |
| DFL | Minnesota Democratic-Farmer-Labor |
| DFTA | Department for the Aging |
| Dig. U.S. Practice in Intl. Law | Digest of U.S. Practice in International Law |
| Dist. Ct. | D.C. United States District Court, District of Columbia |
| D.L.R. | Dominion Law Reports (Canada) |
| DMCA | Digital Millennium Copyright Act |
| DNA | Deoxyribonucleic acid |
| Dnase | Deoxyribonuclease |
| DNC | Democratic National Committee |
| DOC | Department of Commerce |
| DOD | Department of Defense |
| DODEA | Department of Defense Education Activity |
| Dodson | Dodson's Reports, English Admiralty Courts |
| DOE | Department of Energy |

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| DOER | Department of Employee Relations |
| DOJ | Department of Justice |
| DOL | Department of Labor |
| DOMA | Defense of Marriage Act of 1996 |
| DOS | Disk operating system |
| DOT | Department of Transportation |
| DPT | Diphtheria, pertussis, and tetanus |
| DRI | Defense Research Institute |
| DSAA | Defense Security Assistance Agency |
| DUI | Driving under the influence; driving under intoxication |
| DVD | Digital versatile disc |
| DWI | Driving while intoxicated |
| EAHCA | Education for All Handicapped Children Act of 1975 |
| EBT | Examination before trial |
| E.coli | Escherichia coli |
| ECPA | Electronic Communications Privacy Act of 1986 |
| ECSC | Treaty of the European Coal and Steel Community |
| EDA | Economic Development Administration |
| EDF | Environmental Defense Fund |
| E.D.N.Y. | Eastern District, New York |
| EDP | Electronic data processing |
| E.D. Pa. | Eastern-District, Pennsylvania |
| EDSC | Eastern District, South Carolina |
| EDT | Eastern daylight time |
| E.D. Va. | Eastern District, Virginia |
| EEC | European Economic Community; European Economic Community Treaty |
| EEOC | Equal Employment Opportunity Commission |
| EFF | Electronic Frontier Foundation |
| EFT | Electronic funds transfer |
| Eliz. | Queen Elizabeth (Great Britain) |
| Em. App. | Temporary Emergency Court of Appeals |
| ENE | Early neutral evaluation |
| Eng. Rep. | English Reports |
| EOP | Executive Office of the President |
| EPA | Environmental Protection Agency; Equal Pay Act of 1963 |
| ERA | Equal Rights Amendment |
| ERDC | Energy Research and Development Commission |
| ERISA | Employee Retirement Income Security Act of 1974 |
| ERS | Economic Research Service |
| ERTA | Economic Recovery Tax Act of 1981 |
| ESA | Endangered Species Act of 1973 |
| ESF | Emergency support function; Economic Support Fund |
| ESRD | End-Stage Renal Disease Program |
| ETA | Employment and Training Administration |
| ETS | Environmental tobacco smoke |
| et seq. | *Et sequentes* or *et sequentia* (“and the following”) |
| EU | European Union |
| Euratom | European Atomic Energy Community |
| Eur. Ct. H.R. | European Court of Human Rights |
| Ex. | English Exchequer Reports, Welsby, Hurlstone & Gordon |
| Exch. | Exchequer Reports (Welsby, Hurlstone & Gordon) |
| Ex Com | Executive Committee of the National Security Council |
| Eximbank | Export-Import Bank of the United States |
| F. | Federal Reporter |
| F. 2d | Federal Reporter, Second Series |
| FAA | Federal Aviation Administration; Federal Arbitration Act |
| FAAA | Federal Alcohol Administration Act |
| FACE | Freedom of Access to Clinic Entrances Act of 1994 |
| FACT | Feminist Anti-Censorship Task Force |
| FAIRA | Federal Agriculture Improvement and Reform Act of 1996 |
| FAMLA | Family and Medical Leave Act of 1993 |
| Fannie Mae | Federal National Mortgage Association |
| FAO | Food and Agriculture Organization of the United Nations |
| FAR | Federal Acquisition Regulations |

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| FAS | Foreign Agricultural Service |
| FBA | Federal Bar Association |
| FBI | Federal Bureau of Investigation |
| FCA | Farm Credit Administration |
| F. Cas. | Federal Cases |
| FCC | Federal Communications Commission |
| FCIA | Foreign Credit Insurance Association |
| FCIC | Federal Crop Insurance Corporation |
| FCLAA | Federal Cigarette Labeling and Advertising Act |
| FCRA | Fair Credit Reporting Act |
| FCU | Federal credit unions |
| FCUA | Federal Credit Union Act |
| FCZ | Fishery Conservation Zone |
| FDA | Food and Drug Administration |
| FDIC | Federal Deposit Insurance Corporation |
| FDPC | Federal Data Processing Center |
| FEC | Federal Election Commission |
| FECA | Federal Election Campaign Act of 1971 |
| Fed. Cas. | Federal Cases |
| FEHA | Fair Employment and Housing Act |
| FEHBA | Federal Employees Health Benefit Act |
| FEMA | Federal Emergency Management Agency |
| FERC | Federal Energy Regulatory Commission |
| FFB | Federal Financing Bank |
| FFDC | Federal Food, Drug, and Cosmetics Act |
| FGIS | Federal Grain Inspection Service |
| FHA | Federal Housing Administration |
| FHAA | Fair Housing Amendments Act of 1998 |
| FHWA | Federal Highway Administration |
| FIA | Federal Insurance Administration |
| FIC | Federal Information Centers; Federation of Insurance Counsel |
| FICA | Federal Insurance Contributions Act |
| FIFRA | Federal Insecticide, Fungicide, and Rodenticide Act |
| FIP | Forestry Incentives Program |
| FIRREA | Financial Institutions Reform, Recovery, and Enforcement Act of 1989 |
| FISA | Foreign Intelligence Surveillance Act of 1978 |
| FISC | Foreign Intelligence Surveillance Court of Review |
| FJC | Federal Judicial Center |
| FLSA | Fair Labor Standards Act |
| FMC | Federal Maritime Commission |
| FMCS | Federal Mediation and Conciliation Service |
| FmHA | Farmers Home Administration |
| FMLA | Family and Medical Leave Act of 1993 |
| FNMA | Federal National Mortgage Association, "Fannie Mae" |
| F.O.B. | Free on board |
| FOIA | Freedom of Information Act |
| FOMC | Federal Open Market Committee |
| FPA | Federal Power Act of 1935 |
| FPC | Federal Power Commission |
| FPMR | Federal Property Management Regulations |
| FPRS | Federal Property Resources Service |
| FR | Federal Register |
| FRA | Federal Railroad Administration |
| FRB | Federal Reserve Board |
| FRC | Federal Radio Commission |
| F.R.D. | Federal Rules Decisions |
| FSA | Family Support Act |
| FSB | Federal'naya Sluzhba Bezopasnosti (the Federal Security Service of Russia) |
| FSLIC | Federal Savings and Loan Insurance Corporation |
| FSQS | Food Safety and Quality Service |
| FSS | Federal Supply Service |
| F. Supp. | Federal Supplement |
| FTA | U.S.-Canada Free Trade Agreement of 1988 |
| FTC | Federal Trade Commission |
| FTCA | Federal Tort Claims Act |
| FTS | Federal Telecommunications System |
| FTS2000 | Federal Telecommunications System 2000 |
| FUCA | Federal Unemployment Compensation Act of 1988 |

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| FUTA | Federal Unemployment Tax Act |
| FWPCA | Federal Water Pollution Control Act of 1948 |
| FWS | Fish and Wildlife Service |
| GAL | Guardian ad litem |
| GAO | General Accounting Office; Governmental Affairs Office |
| GAOR | General Assembly Official Records, United Nations |
| GAAP | Generally accepted accounting principles |
| GA Res. | General Assembly Resolution (United Nations) |
| GATT | General Agreement on Tariffs and Trade |
| GCA | Gun Control Act |
| Gen. Cls. Comm. | General Claims Commission, United States and Panama; General Claims United States and Mexico |
| Geo. II | King George II (Great Britain) |
| Geo. III | King George III (Great Britain) |
| GHB | Gamma-hydroxybutrate |
| GI | Government Issue |
| GID | General Intelligence Division |
| GM | General Motors |
| GNMA | Government National Mortgage Association, "Ginnie Mae" |
| GNP | Gross national product |
| GOP | Grand Old Party (Republican Party) |
| GOPAC | Grand Old Party Action Committee |
| GPA | Office of Governmental and Public Affairs |
| GPO | Government Printing Office |
| GRAS | Generally recognized as safe |
| Gr. Br., Crim. Ct. App. | Great Britain, Court of Criminal Appeals |
| GRNL | Gay Rights-National Lobby |
| GSA | General Services Administration |
| Hackworth | Green Haywood Hackworth, *Digest of International Law* (1940–1944) |
| Hay and Marriott | Great Britain. High Court of Admiralty, *Decisions in the High Court of Admiralty during the Time of Sir George Hay and of Sir James Marriott, Late Judges of That Court* (1801) |
| HBO | Home Box Office |
| HCFA | Health Care Financing Administration |
| H.Ct. | High Court |
| HDS | Office of Human Development Services |
| Hen. & M. | Hening & Munford's Virginia Reports |
| HEW | Department of Health, Education, and Welfare |
| HFCA | Health Care Financing Administration |
| HGI | Handgun Control, Incorporated |
| HHS | Department of Health and Human Services |
| Hill | Hill's New York Reports |
| HIRE | Help through Industry Retraining and Employment |
| HIV | Human immunodeficiency virus |
| H.L. | House of Lords Cases (England) |
| H. Lords | House of Lords (England) |
| HMO | Health Maintenance Organization |
| HNIS | Human Nutrition Information Service |
| Hong Kong L.R. | Hong Kong Law Reports |
| How. | Howard's United States Supreme Court Reports |
| How. St. Trials | Howell's English State Trials |
| HUAC | House Un-American Activities Committee |
| HUD | Department of Housing and Urban Development |
| Hudson, Internatl. Legis. | Manley Ottmer Hudson, ed., *International Legislation: A Collection of the Texts of Multipartite International Instruments of General Interest Beginning with the Covenant of the League of Nations* (1931) |
| Hudson, World Court Reps. | Manley Ottmer Hudson, ea., *World Court Reports* (1934– ) |
| Hun | Hun's New York Supreme Court Reports |
| Hunt's Rept. | Bert L. Hunt, *Report of the American and Panamanian General Claims Arbitration* (1934) |
| IAEA | International Atomic Energy Agency |
| IALL | International Association of Law Libraries |

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| IBA | International Bar Association |
| IBM | International Business Machines |
| ICA | Interstate Commerce Act |
| ICBM | Intercontinental ballistic missile |
| ICC | Interstate Commerce Commission; International Criminal Court |
| ICJ | International Court of Justice |
| ICM | Institute for Court Management |
| IDEA | Individuals with Disabilities Education Act of 1975 |
| IDOP | International Dolphin Conservation Program |
| IEP | Individualized educational program |
| IFC | International Finance Corporation |
| IGRA | Indian Gaming Regulatory Act of 1988 |
| IJA | Institute of Judicial Administration |
| IJC | International Joint Commission |
| ILC | International Law Commission |
| ILD | International Labor Defense |
| Ill. Dec. | Illinois Decisions |
| ILO | International Labor Organization |
| IMF | International Monetary Fund |
| INA | Immigration and Nationality Act |
| IND | Investigational new drug |
| INF Treaty | Intermediate-Range Nuclear Forces Treaty of 1987 |
| INS | Immigration and Naturalization Service |
| INTELSAT | International Telecommunications Satellite Organization |
| Interpol | International Criminal Police Organization |
| Int'l. Law Reps. | International Law Reports |
| Intl. Legal Mats. | International Legal Materials |
| IOC | International Olympic Committee |
| IPDC | International Program for the Development of Communication |
| IPO | Intellectual Property Owners |
| IPP | Independent power producer |
| IQ | Intelligence quotient |
| I.R. | Irish Reports |
| IRA | Individual retirement account; Irish Republican Army |
| IRC | Internal Revenue Code |
| IRCA | Immigration Reform and Control Act of 1986 |
| IRS | Internal Revenue Service |
| ISO | Independent service organization |
| ISP | Internet service provider |
| ISSN | International Standard Serial Numbers |
| ITA | International Trade Administration |
| ITI | Information Technology Integration |
| ITO | International Trade Organization |
| ITS | Information Technology Service |
| ITT | International Telephone and Telegraph Corporation |
| ITU | International Telecommunication Union |
| IUD | Intrauterine device |
| IWC | International Whaling Commission |
| IWW | Industrial Workers of the World |
| JAGC | Judge Advocate General's Corps |
| JCS | Joint Chiefs of Staff |
| JDL | Jewish Defense League |
| JNOV | Judgment *non obstante veredicto* ("judgment nothing to recommend it" or "judgment notwithstanding the verdict") |
| JOBS | Jobs Opportunity and Basic Skills |
| John. Ch. | Johnson's New York Chancery Reports |
| Johns. | Johnson's Reports (New York) |
| JP | Justice of the peace |
| K.B. | King's Bench Reports (England) |
| KFC | Kentucky Fried Chicken |
| KGB | Komitet Gosudarstvennoi Bezopasnosti (the State Security Committee for countries in the former Soviet Union) |
| KKK | Ku Klux Klan |
| KMT | Kuomintang (Chinese, "national people's party") |
| LAD | Law Against Discrimination |

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|---|---|
| LAPD | Los Angeles Police Department |
| LC | Library of Congress |
| LCHA | Longshoremen's and Harbor Workers Compensation Act of 1927 |
| LD50 | Lethal dose 50 |
| LDEF | Legal Defense and Education Fund (NOW) |
| LDF | Legal Defense Fund, Legal Defense and Educational Fund of the NAACP |
| LEAA | Law Enforcement Assistance Administration |
| L.Ed. | Lawyers' Edition Supreme Court Reports |
| LI | Letter of interpretation |
| LLC | Limited Liability Company |
| LLP | Limited Liability Partnership |
| LMSA | Labor-Management Services Administration |
| LNTS | League of Nations Treaty Series |
| Lofft's Rep. | Lofft's English King's Bench Reports |
| L.R. | Law Reports (English) |
| LSAC | Law School Admission Council |
| LSAS | Law School Admission Service |
| LSAT | Law School Aptitude Test |
| LSC | Legal Services Corporation; Legal Services for Children |
| LSD | Lysergic acid diethylamide |
| LSDAS | Law School Data Assembly Service |
| LTBT | Limited Test Ban Treaty |
| LTC | Long Term Care |
| MAD | Mutual assured destruction |
| MADD | Mothers against Drunk Driving |
| MALDEF | Mexican American Legal Defense and Educational Fund |
| Malloy | William M. Malloy, ed., *Treaties, Conventions International Acts, Protocols, and Agreements between the United States of America and Other Powers* (1910–1938) |
| Martens | Georg Friedrich von Martens, ea., *Noveau recueil général de traités et autres actes relatifs aux rapports de droit international* (Series I, 20 vols. [1843–1875]; Series II, 35 vols. [1876–1908]; Series III [1909– ]) |
| Mass. | Massachusetts Reports |
| MCC | Metropolitan Correctional Center |
| MCCA | Medicare Catastrophic Coverage Act of 1988 |
| MCH | Maternal and Child Health Bureau |
| MCRA | Medical Care Recovery Act of 1962 |
| MDA | Medical Devices Amendments of 1976 |
| Md. App. | Maryland, Appeal Cases |
| M.D. Ga. | Middle District, Georgia |
| Mercy | Movement Ensuring the Right to Choose for Yourself |
| Metc. | Metcalf's Massachusetts Reports |
| MFDP | Mississippi Freedom Democratic party |
| MGT | Management |
| MHSS | Military Health Services System |
| Miller | David Hunter Miller, ea., *Treaties and Other International Acts of the United States of America* (1931–1948) |
| Minn. | Minnesota Reports |
| MINS | Minors in need of supervision |
| MIRV | Multiple independently targetable reentry vehicle |
| MIRVed ICBM | Multiple independently targetable reentry vehicled intercontinental ballistic missile |
| Misc. | Miscellaneous Reports, New York |
| Mixed Claims Comm., Report of Decs | Mixed Claims Commission, United States and Germany, Report of Decisions |
| M.J. | Military Justice Reporter |
| MLAP | Migrant Legal Action Program |
| MLB | Major League Baseball |
| MLDP | Mississippi Loyalist Democratic Party |
| MMI | Moslem Mosque, Incorporated |
| MMPA | Marine Mammal Protection Act of 1972 |
| Mo. | Missouri Reports |
| MOD | Masters of Deception |
| Mod. | Modern Reports, English King's Bench, etc. |

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| Moore, Dig. Intl. Law | John Bassett Moore, *A Digest of International Law,* 8 vols. (1906) |
| Moore, Intl. Arbs. | John Bassett Moore, *History and Digest of the International Arbitrations to Which United States Has Been a Party,* 6 vols. (1898) |
| Morison | William Maxwell Morison, *The Scots Revised Report: Morison's Dictionary of Decisions* (1908–09) |
| M.P. | Member of Parliament |
| MP3 | MPEG Audio Layer 3 |
| MPAA | Motion Picture Association of America |
| MPAS | Michigan Protection and Advocacy Service |
| MPEG | Motion Picture Experts Group |
| mpg | Miles per gallon |
| MPPDA | Motion Picture Producers and Distributors of America |
| MPRSA | Marine Protection, Research, and Sanctuaries Act of 1972 |
| M.R. | Master of the Rolls |
| MS-DOS | Microsoft Disk Operating System |
| MSHA | Mine Safety and Health Administration |
| MSPB | Merit Systems Protection Board |
| MSSA | Military Selective Service Act |
| N/A | Not Available |
| NAACP | National Association for the Advancement of Colored People |
| NAAQS | National Ambient Air Quality Standards |
| NAB | National Association of Broadcasters |
| NABSW | National Association of Black Social Workers |
| NACDL | National Association of Criminal Defense Lawyers |
| NAFTA | North American Free Trade Agreement of 1993 |
| NAGHSR | National Association of Governors' Highway Safety Representatives |
| NALA | National Association of Legal Assistants |
| NAM | National Association of Manufacturers |
| NAR | National Association of Realtors |
| NARAL | National Abortion and Reproductive Rights Action League |
| NARF | Native American Rights Fund |
| NARS | National Archives and Record Service |
| NASA | National Aeronautics and Space Administration |
| NASD | National Association of Securities Dealers |
| NATO | North Atlantic Treaty Organization |
| NAVINFO | Navy Information Offices |
| NAWSA | National American Woman's Suffrage Association |
| NBA | National Bar Association; National Basketball Association |
| NBC | National Broadcasting Company |
| NBLSA | National Black Law Student Association |
| NBS | National Bureau of Standards |
| NCA | Noise Control Act; National Command Authorities |
| NCAA | National Collegiate Athletic Association |
| NCAC | National Coalition against Censorship |
| NCCB | National Consumer Cooperative Bank |
| NCE | Northwest Community Exchange |
| NCF | National Chamber Foundation |
| NCIP | National Crime Insurance Program |
| NCJA | National Criminal Justice Association |
| NCLB | National Civil Liberties Bureau |
| NCP | National contingency plan |
| NCSC | National Center for State Courts |
| NCUA | National Credit Union Administration |
| NDA | New drug application |
| N.D. Ill. | Northern District, Illinois |
| NDU | National Defense University |
| N.D. Wash. | Northern District, Washington |
| N.E. | North Eastern Reporter |
| N.E. 2d | North Eastern Reporter, Second Series |
| NEA | National Endowment for the Arts; National Education Association |

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| NEH | National Endowment for the Humanities |
| NEPA | National Environmental Protection Act; National Endowment Policy Act |
| NET Act | No Electronic Theft Act |
| NFIB | National Federation of Independent Businesses |
| NFIP | National Flood Insurance Program |
| NFL | National Football League |
| NFPA | National Federation of Paralegal Associations |
| NGLTF | National Gay and Lesbian Task Force |
| NHL | National Hockey League |
| NHRA | Nursing Home Reform Act of 1987 |
| NHTSA | National Highway Traffic Safety Administration |
| Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| NIEO | New International Economic Order |
| NIGC | National Indian Gaming Commission |
| NIH | National Institutes of Health |
| NIJ | National Institute of Justice |
| NIRA | National Industrial Recovery Act of 1933; National Industrial Recovery Administration |
| NIST | National Institute of Standards and Technology |
| N.J. | New Jersey Reports |
| N.J. Super. | New Jersey Superior Court Reports |
| NLEA | Nutrition Labeling and Education Act of 1990 |
| NLRA | National Labor Relations Act |
| NLRB | National Labor Relations Board |
| NMFS | National Marine Fisheries Service |
| No. | Number |
| NOAA | National Oceanic and Atmospheric Administration |
| NOC | National Olympic Committee |
| NOI | Nation of Islam |
| NOL | Net operating loss |
| NORML | National Organization for the Reform of Marijuana Laws |
| NOW | National Organization for Women |
| NOW LDEF | National Organization for Women Legal Defense and Education Fund |
| NOW/PAC | National Organization for Women Political Action Committee |
| NPDES | National Pollutant Discharge Elimination System |
| NPL | National priorities list |
| NPR | National Public Radio |
| NPT | Nuclear Non-Proliferation Treaty of 1970 |
| NRA | National Rifle Association; National Recovery Act |
| NRC | Nuclear Regulatory Commission |
| NRLC | National Right to Life Committee |
| NRTA | National Retired Teachers Association |
| NSA | National Security Agency |
| NSC | National Security Council |
| NSCLC | National Senior Citizens Law Center |
| NSF | National Science Foundation |
| NSFNET | National Science Foundation Network |
| NSI | Network Solutions, Inc. |
| NTIA | National Telecommunications and Information Administration |
| NTID | National Technical Institute for the Deaf |
| NTIS | National Technical Information Service |
| NTS | Naval Telecommunications System |
| NTSB | National Transportation Safety Board |
| NVRA | National Voter Registration Act |
| N.W. | North Western Reporter |
| N.W. 2d | North Western Reporter, Second Series |
| NWSA | National Woman Suffrage Association |
| N.Y. | New York Court of Appeals Reports |
| N.Y. 2d | New York Court of Appeals Reports, Second Series |
| N.Y.S. | New York Supplement Reporter |

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| N.Y.S. 2d | New York Supplement Reporter, Second Series |
| NYSE | New York Stock Exchange |
| NYSLA | New York State Liquor Authority |
| N.Y. Sup. | New York Supreme Court Reports |
| NYU | New York University |
| OAAU | Organization of Afro American Unity |
| OAP | Office of Administrative Procedure |
| OAS | Organization of American States |
| OASDI | Old-age, Survivors, and Disability Insurance Benefits |
| OASHDS | Office of the Assistant Secretary for Human Development Services |
| OCC | Office of Comptroller of the Currency |
| OCED | Office of Comprehensive Employment Development |
| OCHAMPUS | Office of Civilian Health and Medical Program of the Uniformed Services |
| OCSE | Office of Child Support Enforcement |
| OEA | Organización de los Estados Americanos |
| OEM | Original Equipment Manufacturer |
| OFCCP | Office of Federal Contract Compliance Programs |
| OFPP | Office of Federal Procurement Policy |
| OIC | Office of the Independent Counsel |
| OICD | Office of International Cooperation and Development |
| OIG | Office of the Inspector General |
| OJARS | Office of Justice Assistance, Research, and Statistics |
| OMB | Office of Management and Budget |
| OMPC | Office of Management, Planning, and Communications |
| ONP | Office of National Programs |
| OPD | Office of Policy Development |
| OPEC | Organization of Petroleum Exporting Countries |
| OPIC | Overseas Private Investment Corporation |
| Ops. Atts. Gen. | Opinions of the Attorneys-General of the United States |
| Ops. Comms. | Opinions of the Commissioners |
| OPSP | Office of Product Standards Policy |
| O.R. | Ontario Reports |
| OR | Official Records |
| OSHA | Occupational Safety and Health Act |
| OSHRC | Occupational Safety and Health Review Commission |
| OSM | Office of Surface Mining |
| OSS | Office of Strategic Services |
| OST | Office of the Secretary |
| OT | Office of Transportation |
| OTA | Office of Technology Assessment |
| OTC | Over-the-counter |
| OTS | Office of Thrift Supervisors |
| OUI | Operating under the influence |
| OVCI | Offshore Voluntary Compliance Initiative |
| OWBPA | Older Workers Benefit Protection Act |
| OWRT | Office of Water Research and Technology |
| P. | Pacific Reporter |
| P. 2d | Pacific Reporter, Second Series |
| PAC | Political action committee |
| Pa. Oyer and Terminer | Pennsylvania Oyer and Terminer Reports |
| PATCO | Professional Air Traffic Controllers Organization |
| PBGC | Pension Benefit Guaranty Corporation |
| PBS | Public Broadcasting Service; Public Buildings Service |
| P.C. | Privy Council (English Law Reports) |
| PC | Personal computer; politically correct |
| PCBs | Polychlorinated biphenyls |
| PCIJ | Permanent Court of International Justice<br>Series A-Judgments and Orders (1922–30)<br>Series B-Advisory Opinions (1922–30)<br>Series A/B-Judgments, Orders, and Advisory Opinions (1931–40) |

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| PCIJ (cont'd.) | Series C-Pleadings, Oral Statements, and Documents relating to Judgments and Advisory Opinions (1923–42) |
| | Series D-Acts and Documents concerning the Organization of the World Court (1922 –47) |
| | Series E-Annual Reports (1925–45) |
| PCP | Phencyclidine |
| P.D. | Probate Division, English Law Reports (1876–1890) |
| PDA | Pregnancy Discrimination Act of 1978 |
| PD & R | Policy Development and Research |
| Pepco | Potomac Electric Power Company |
| Perm. Ct. of Arb. | Permanent Court of Arbitration |
| PES | Post-Enumeration Survey |
| Pet. | Peters' United States Supreme Court Reports |
| PETA | People for the Ethical Treatment of Animals |
| PGA | Professional Golfers Association |
| PGM | Program |
| PHA | Public Housing Agency |
| Phila. Ct. of Oyer and Terminer | Philadelphia Court of Oyer and Terminer |
| PhRMA | Pharmaceutical Research and Manufacturers of America |
| PHS | Public Health Service |
| PIC | Private Industry Council |
| PICJ | Permanent International Court of Justice |
| Pick. | Pickering's Massachusetts Reports |
| PIK | Payment in Kind |
| PINS | Persons in need of supervision |
| PIRG | Public Interest Research Group |
| P.L. | Public Laws |
| PLAN | Pro-Life Action Network |
| PLC | Plaintiffs' Legal Committee |
| PLE | Product liability expenses |
| PLI | Practicing Law Institute |
| PLL | Product liability loss |
| PLLP | Professional Limited Liability Partnership |
| PLO | Palestine Liberation Organization |
| PLRA | Prison Litigation Reform Act of 1995 |
| PNET | Peaceful Nuclear Explosions Treaty |
| PONY | Prostitutes of New York |
| POW-MIA | Prisoner of war-missing in action |
| Pratt | Frederic Thomas Pratt, *Law of Contraband of War, with a Selection of Cases from Papers of the Right Honourable Sir George Lee* (1856) |
| PRIDE | Prostitution to Independence, Dignity, and Equality |
| Proc. | Proceedings |
| PRP | Potentially responsible party |
| PSRO | Professional Standards Review Organization |
| PTO | Patents and Trademark Office |
| PURPA | Public Utilities Regulatory Policies Act |
| PUSH | People United to Serve Humanity |
| PUSH-Excel | PUSH for Excellence |
| PWA | Public Works Administration |
| PWSA | Ports and Waterways Safety Act of 1972 |
| Q.B. | Queen's Bench (England) |
| QTIP | Qualified Terminable Interest Property |
| Ralston's Rept. | Jackson Harvey Ralston, ed., *Venezuelan Arbitrations of 1903* (1904) |
| RC | Regional Commissioner |
| RCRA | Resource Conservation and Recovery Act |
| RCWP | Rural Clean Water Program |
| RDA | Rural Development Administration |
| REA | Rural Electrification Administration |
| Rec. des Decs. des Trib. Arb. Mixtes | G. Gidel, ed., *Recueil des décisions des tribunaux arbitraux mixtes, institués par les traités de paix* (1922–30) |
| Redmond | Vol. 3 of Charles I. Bevans, *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled by C. F. Redmond) (1969) |
| RESPA | Real Estate Settlement Procedure Act of 1974 |
| RFC | Reconstruction Finance Corporation |

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| RFRA | Religious Freedom Restoration Act of 1993 |
| RIAA | Recording Industry Association of America |
| RICO | Racketeer Influenced and Corrupt Organizations |
| RLUIPA | Religious Land Use and Institutionalized Persons Act |
| RNC | Republican National Committee |
| Roscoe | Edward Stanley Roscoe, ed., *Reports of Prize Cases Determined in the High Court Admiralty before the Lords Commissioners of Appeals in Prize Causes and before the judicial Committee of the Privy Council from 1745 to 1859* (1905) |
| ROTC | Reserve Officers' Training Corps |
| RPP | Representative Payee Program |
| R.S. | Revised Statutes |
| RTC | Resolution Trust Corp. |
| RUDs | Reservations, understandings, and declarations |
| Ryan White CARE Act | Ryan White Comprehensive AIDS Research Emergency Act of 1990 |
| SAC | Strategic Air Command |
| SACB | Subversive Activities Control Board |
| SADD | Students against Drunk Driving |
| SAF | Student Activities Fund |
| SAIF | Savings Association Insurance Fund |
| SALT | Strategic Arms Limitation Talks |
| SALT I | Strategic Arms Limitation Talks of 1969–72 |
| SAMHSA | Substance Abuse and Mental Health Services Administration |
| Sandf. | Sandford's New York Superior Court Reports |
| S and L | Savings and loan |
| SARA | Superfund Amendment and Reauthorization Act |
| SAT | Scholastic Aptitude Test |
| Sawy. | Sawyer's United States Circuit Court Reports |
| SBA | Small Business Administration |
| SBI | Small Business Institute |
| SCCC | South Central Correctional Center |
| SCLC | Southern Christian Leadership Conference |
| Scott's Repts. | James Brown Scott, ed., *The Hague Court Reports*, 2 vols. (1916–32) |
| SCS | Soil Conservation Service; Social Conservative Service |
| SCSEP | Senior Community Service Employment Program |
| S.Ct. | Supreme Court Reporter |
| S.D. Cal. | Southern District, California |
| S.D. Fla. | Southern District, Florida |
| S.D. Ga. | Southern District, Georgia |
| SDI | Strategic Defense Initiative |
| S.D. Me. | Southern District, Maine |
| S.D.N.Y. | Southern District, New York |
| SDS | Students for a Democratic Society |
| S.E. | South Eastern Reporter |
| S.E. 2d | South Eastern Reporter, Second Series |
| SEA | Science and Education Administration |
| SEATO | Southeast Asia Treaty Organization |
| SEC | Securities and Exchange Commission |
| Sec. | Section |
| SEEK | Search for Elevation, Education and Knowledge |
| SEOO | State Economic Opportunity Office |
| SEP | Simplified employee pension plan |
| Ser. | Series |
| Sess. | Session |
| SGLI | Servicemen's Group Life Insurance |
| SIP | State implementation plan |
| SLA | Symbionese Liberation Army |
| SLAPPs | Strategic Lawsuits Against Public Participation |
| SLBM | Submarine-launched ballistic missile |
| SNCC | Student Nonviolent Coordinating Committee |
| So. | Southern Reporter |
| So. 2d | Southern Reporter, Second Series |
| SPA | Software Publisher's Association |
| Spec. Sess. | Special Session |
| SPLC | Southern Poverty Law Center |
| SRA | Sentencing Reform Act of 1984 |

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| SS | *Schutzstaffel* (German, "Protection Echelon") |
| SSA | Social Security Administration |
| SSI | Supplemental Security Income |
| START I | Strategic Arms Reduction Treaty of 1991 |
| START II | Strategic Arms Reduction Treaty of 1993 |
| Stat. | United States Statutes at Large |
| STS | Space Transportation Systems |
| St. Tr. | State Trials, English |
| STURAA | Surface Transportation and Uniform Relocation Assistance Act of 1987 |
| Sup. Ct. of Justice, Mexico | Supreme Court of Justice, Mexico |
| Supp. | Supplement |
| S.W. | South Western Reporter |
| S.W. 2d | South Western Reporter, Second Series |
| SWAPO | South-West Africa People's Organization |
| SWAT | Special Weapons and Tactics |
| SWP | Socialist Workers Party |
| TDP | Trade and Development Program |
| Tex. Sup. | Texas Supreme Court Reports |
| THAAD | Theater High-Altitude Area Defense System |
| THC | Tetrahydrocannabinol |
| TI | Tobacco Institute |
| TIA | Trust Indenture Act of 1939 |
| TIAS | Treaties and Other International Acts Series (United States) |
| TNT | Trinitrotoluene |
| TOP | Targeted Outreach Program |
| TPUS | Transportation and Public Utilities Service |
| TQM | Total Quality Management |
| Tripartite Claims Comm., Decs. and Ops. | Tripartite Claims Commission (United States, Austria, and Hungary), Decisions and Opinions |
| TRI-TAC | Joint Tactical Communications |
| TRO | Temporary restraining order |
| TS | Treaty Series, United States |
| TSCA | Toxic Substance Control Act |
| TSDs | Transporters, storers, and disposers |
| TSU | Texas Southern University |
| TTBT | Threshold Test Ban Treaty |
| TV | Television |
| TVA | Tennessee Valley Authority |
| TWA | Trans World Airlines |
| UAW | United Auto Workers; United Automobile, Aerospace, and Agricultural Implements Workers of America |
| U.C.C. | Uniform Commercial Code; Universal Copyright Convention |
| U.C.C.C. | Uniform Consumer Credit Code |
| UCCJA | Uniform Child Custody Jurisdiction Act |
| UCMJ | Uniform Code of Military Justice |
| UCPP | Urban Crime Prevention Program |
| UCS | United Counseling Service |
| UDC | United Daughters of the Confederacy |
| UFW | United Farm Workers |
| UHF | Ultrahigh frequency |
| UIFSA | Uniform Interstate Family Support Act |
| UIS | Unemployment Insurance Service |
| UMDA | Uniform Marriage and Divorce Act |
| UMTA | Urban Mass Transportation Administration |
| U.N. | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCTAD | United Nations Conference on Trade and Development |
| UN Doc. | United Nations Documents |
| UNDP | United Nations Development Program |
| UNEF | United Nations Emergency Force |
| UNESCO | United Nations Educational, Scientific, and Cultural Organization |
| UNICEF | United Nations Children's Fund (formerly United Nations International Children's Emergency Fund) |
| UNIDO | United Nations Industrial and Development Organization |
| Unif. L. Ann. | Uniform Laws Annotated |
| UN Repts. Intl. Arb. Awards | United Nations Reports of International Arbitral Awards |

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| UNTS | United Nations Treaty Series |
| UPI | United Press International |
| URESA | Uniform Reciprocal Enforcement of Support Act |
| U.S. | United States Reports |
| U.S.A. | United States of America |
| USAF | United States Air Force |
| USA PATRIOT Act | Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act |
| U.S. App. D.C. | United States Court of Appeals for the District of Columbia |
| U.S.C. | United States Code; University of Southern California |
| U.S.C.A. | United States Code Annotated |
| U.S.C.C.A.N. | United States Code Congressional and Administrative News |
| USCMA | United States Court of Military Appeals |
| USDA | U.S. Department of Agriculture |
| USES | United States Employment Service |
| USF | U.S. Forestry Service |
| USFA | United States Fire Administration |
| USGA | United States Golf Association |
| USICA | International Communication Agency, United States |
| USMS | U.S. Marshals Service |
| USOC | U.S. Olympic Committee |
| USSC | U.S. Sentencing Commission |
| USSG | United States Sentencing Guidelines |
| U.S.S.R. | Union of Soviet Socialist Republics |
| UST | United States Treaties |
| USTS | United States Travel Service |
| v. | *Versus* |
| VA | Veterans Administration |
| VAR | Veterans Affairs and Rehabilitation Commission |
| VAWA | Violence against Women Act |
| VFW | Veterans of Foreign Wars |
| VGLI | Veterans Group Life Insurance |
| Vict. | Queen Victoria (Great Britain) |
| VIN | Vehicle identification number |
| VISTA | Volunteers in Service to America |
| VJRA | Veterans Judicial Review Act of 1988 |
| V.L.A. | Volunteer Lawyers for the Arts |
| VMI | Virginia Military Institute |
| VMLI | Veterans Mortgage Life Insurance |
| VOCAL | Victims of Child Abuse Laws |
| VRA | Voting Rights Act |
| WAC | Women's Army Corps |
| Wall. | Wallace's United States Supreme Court Reports |
| Wash. 2d | Washington Reports, Second Series |
| WAVES | Women Accepted for Volunteer Service |
| WCTU | Women's Christian Temperance Union |
| W.D. Wash. | Western District, Washington |
| W.D. Wis. | Western District, Wisconsin |
| WEAL | *West's Encyclopedia of American Law,* Women's Equity Action League |
| Wend. | Wendell's New York Reports |
| WFSE | Washington Federation of State Employees |
| Wheat. | Wheaton's United States Supreme Court Reports |
| Wheel. Cr. Cases | Wheeler's New York Criminal Cases |
| WHISPER | Women Hurt in Systems of Prostitution Engaged in Revolt |
| Whiteman | Marjorie Millace Whiteman, *Digest of International Law,* 15 vols. (1963–73) |
| WHO | World Health Organization |
| WIC | Women, Infants, and Children program |
| Will. and Mar. | King William and Queen Mary (Great Britain) |
| WIN | WESTLAW Is Natural; Whip Inflation Now; Work Incentive Program |
| WIPO | World Intellectual Property Organization |
| WIU | Workers' Industrial Union |
| W.L.R. | Weekly Law Reports, England |
| WPA | Works Progress Administration |
| WPPDA | Welfare and Pension Plans Disclosure Act |

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| WTO | World Trade Organization |
| WWI | World War I |
| WWII | World War II |
| Yates Sel. Cas. | Yates's New York Select Cases |
| YMCA | Young Men's Christian Association |
| YWCA | Young Women's Christian Association |

# WEST'S ENCYCLOPEDIA *of* AMERICAN LAW

2ND EDITION

# How to Use This Book

❚1❚ Article Title

❚2❚ Definition in italics with Latin translation provided

❚3❚ First-level subhead

❚4❚ Timeline for subject of biography, including general historical events and life events

❚5❚ Sidebar expands upon an issue addressed briefly in the article

❚6❚ Quotation from subject of biography

❚7❚ Biography of contributor to American law

❚8❚ Internal cross-reference to entry within WEAL

❚9❚ In Focus article examines a controversial or complex aspect of the article topic

❚10❚ Cross-references at end of article

❚11❚ Full cite for case

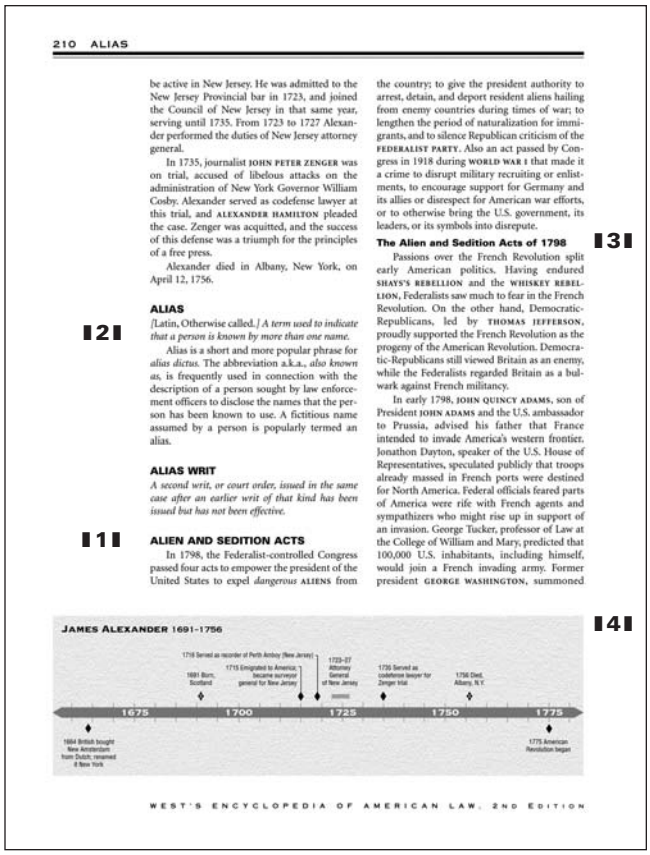



be active in New Jersey. He was admitted to the New Jersey Provincial bar in 1723, and joined the Council of New Jersey in that same year, serving until 1735. From 1723 to 1727 Alexander performed the duties of New Jersey attorney general.

In 1735, journalist JOHN PETER ZENGER was on trial, accused of libelous attacks on the administration of New York Governor William Cosby. Alexander served as codefense lawyer at this trial, and ALEXANDER HAMILTON pleaded the case. Zenger was acquitted, and the success of this defense was a triumph for the principles of a free press.

Alexander died in Albany, New York, on April 12, 1756.

**ALIAS**

❚2❚ *[Latin, Otherwise called.] A term used to indicate that a person is known by more than one name.*

Alias is a short and more popular phrase for *alias dictus.* The abbreviation a.k.a., *also known as,* is frequently used in connection with the description of a person sought by law enforcement officers to disclose the names that the person has been known to use. A fictitious name assumed by a person is popularly termed an alias.

**ALIAS WRIT**

*A second writ, or court order, issued in the same case after an earlier writ of that kind has been issued but has not been effective.*

❚1❚ **ALIEN AND SEDITION ACTS**

In 1798, the Federalist-controlled Congress passed four acts to empower the president of the United States to expel *dangerous* ALIENS from the country; to give the president authority to arrest, detain, and deport resident aliens hailing from enemy countries during times of war; to lengthen the period of naturalization for immigrants, and to silence Republican criticism of the FEDERALIST PARTY. Also an act passed by Congress in 1918 during WORLD WAR I that made it a crime to disrupt military recruiting or enlistments, to encourage support for Germany and its allies or disrespect for American war efforts, or to otherwise bring the U.S. government, its leaders, or its symbols into disrepute.

❚3❚ **The Alien and Sedition Acts of 1798**

Passions over the French Revolution split early American politics. Having endured SHAYS'S REBELLION and the WHISKEY REBELLION, Federalists saw much to fear in the French Revolution. On the other hand, Democratic-Republicans, led by THOMAS JEFFERSON, proudly supported the French Revolution as the progeny of the American Revolution. Democratic-Republicans still viewed Britain as an enemy, while the Federalists regarded Britain as a bulwark against French militancy.

In early 1798, JOHN QUINCY ADAMS, son of President JOHN ADAMS and the U.S. ambassador to Prussia, advised his father that France intended to invade America's western frontier. Jonathon Dayton, speaker of the U.S. House of Representatives, speculated publicly that troops already massed in French ports were destined for North America. Federal officials feared parts of America were rife with French agents and sympathizers who might rise up in support of an invasion. George Tucker, professor of Law at the College of William and Mary, predicted that 100,000 U.S. inhabitants, including himself, would join a French invading army. Former president GEORGE WASHINGTON, summoned

❚4❚

❚5❚

## The First Payments of Social Security

After the enactment of the Social Security Act of 1935 (42 U.S.C.A. § 301 et seq.) and the creation of the Social Security Administration (SSA), the federal government had a short time to establish the program before beginning to pay benefits. Monthly benefits were to begin in 1940. The period from 1937 to 1940 was to be used both to build up the trust funds and to provide a minimum period for participation for persons to qualify for monthly benefits.

From 1937 until 1940, however, Social Security paid benefits in the form of a single, lump-sum payment. The purpose of these one-time payments was to provide some compensation to people who contributed to the program but would not participate long enough to be vested for monthly benefits.

The first applicant for a lump-sum benefit was Ernest Ackerman, a Cleveland motorman who retired one day after the Social Security Program began. During his one day of participation in the program, five cents was withheld from Ackerman's pay for Social Security, and upon retiring, he received a lump-sum payment of seventeen cents.

Payments of monthly benefits began in January 1940. On January 31, 1940, the first monthly retirement check was issued to Ida May Fuller of Ludlow, Vermont, in the amount of $22.54. Fuller died in January 1975 at the age of one hundred. During her thirty-five years as a beneficiary, she received more than $20,000 in benefits.

tions to Social Security. There is no financial need requirement to be satisfied. Once a worker qualifies for protection, his family is also entitled to protection. The entire program is geared toward helping families as a matter of social policy.

Two large funds of money are held in trust to pay benefits earned by people under OASDI: the Old Age and Survivors Trust Fund and the Disability Insurance Trust Fund. As workers and employers make payroll contributions to these funds, money is paid out in benefits to people currently qualified to receive monthly checks.

The OASDI program is funded by payroll taxes levied on employees and their employers and on the self-employed. The tax is imposed upon the employee's taxable income, up to a maximum taxable amount, with the employer contributing an equal amount. The self-employed person contributes twice the amount levied on an employee. In 2003 the rate was 6.2 percent, levied on earned income up to a maximum of $87,000.

**Old Age Benefits** A person becomes eligible for Social Security old age benefits by working a minimum number of calendar quarters. The number of quarters required for full insurance increases with the worker's age. Forty quarters is the maximum requirement. The individual is credited for income up to the maximum amount of money covered by Social Security for those years. This amount is adjusted to reflect the impact of inflation on normal earnings and ensure that a worker who pays increasing Social Security contributions during his or her work life will receive retirement benefits that keep pace with inflation.

Persons born before 1950 can retire at age 65 with full benefits based on their average income during their working years. For those born between 1950 and 1960, the retirement age for full benefits has increased to age 66. Persons born in 1960 or later will not receive full retirement benefits until age 67. Any person, however, may retire at age 62 and receive less than full benefits. At age 65, a worker's spouse who has not contributed to Social Security receives 50 percent of the amount paid to the worker.

Since 1975 Social Security benefits have increased annually to offset the corrosive effects of inflation on fixed incomes. These increases, known as cost of living allowances (COLAs), are based on the annual increase in consumer prices. Allowing benefits to increase automatically ended the need for special acts of Congress, but it has also steadily increased the cost of the Social Security Program.

have the same inheritance rights as other children. The ruling was believed to be the first on the controversial issue by any state supreme court.

Also in January 2002, Marshall addressed the Massachusetts Bar Association Conference, where she called for "a revolution in the administration of justice" stating that the court system needed to improve its management system as well as its staffing and budget controls. In March 2002, her discussion of the court system's problems were amplified in a 52-page report that was published by a blue-ribbon panel appointed by Marshall.

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**[6]**

*THE GOVERNMENT [THAT THE FRAMERS OF THE CONSTITUTION] DEVISED REQUIRED SEVERAL AMENDMENTS, A CIVIL WAR, AND MOMENTOUS SOCIAL TRANSFORMATION TO ATTAIN THE SYSTEM OF CONSTITUTIONAL GOVERNMENT, AND ITS RESPECT FOR THE INDIVIDUAL FREEDOMS AND HUMAN RIGHTS, THAT WE HOLD AS FUNDAMENTAL TODAY.*
*THURGOOD MARSHALL*

## MARSHALL PLAN

After **WORLD WAR II**, Europe was devastated and urgently needed an organized plan for reconstruction and economic and technical aid. The Marshall Plan was initiated in 1947 to meet this need.

The originator of the plan, U.S. Secretary of State George C. Marshall, introduced it in a speech at Harvard University on June 5, 1947. He pointed out two basic reasons for providing aid to Europe: the United States sought the reestablishment of the European countries as independent nations capable of conducting valuable trade with the United States; and the threat of a Communist takeover was more prevalent in countries that were suffering economic depression.

In 1947 a preliminary conference to discuss the terms of the program convened in Paris. The Soviet Union was invited to attend but subsequently withdrew from the program, as did other Soviet countries.

Sixteen European countries eventually participated, and, in July 1947, the Committee for European Economic Cooperation was established to allow representatives from member countries to draft a report that listed their requirements for food, supplies, and technical assistance for a four-year period.

The Committee for European Economic Cooperation subsequently became the Organization of European Economic Cooperation, an expanded and permanent organization that was responsible for submitting petitions for aid. In 1948, Congress passed the Economic Cooperation Act (62 Stat. 137), establishing funds for the Marshall Plan to be administered under the Economic Cooperation Administration, which was directed by Paul G. Hoffman.

Between 1948 and 1952, the sixteen-member countries received more than $13 billion dollars in aid under the Marshall Plan. The plan was generally regarded as a success that led to industrial and agricultural production, while stifling the Communist movement. The plan was not without its critics, however, and many Europeans believed the **COLD WAR** hostilities between the Soviet nations and the free world were aggravated by it.

**[7]**

## ◊ MARSHALL, THURGOOD

Thurgood Marshall, the first African American to serve on the U.S. Supreme Court, saw law as a catalyst for social change. For nearly 60 years, as both a lawyer and a jurist, Marshall worked to dismantle the system of **SEGREGATION** and improve the legal and social position of minorities.

Marshall was born July 2, 1908, in Baltimore, the son of a Pullman porter and a schoolteacher. He was a graduate of Lincoln University, a small, all-black college in Pennsylvania, and Howard University Law School in Washington, D.C. At Howard, Marshall excelled under the guidance of Vice Dean **CHARLES HAMILTON HOUSTON**, the first African American to win a case before the U.S. Supreme Court. Houston encouraged his students to become not just lawyers but "social engineers" who could use the legal system to improve society. Marshall graduated first in his law class in 1933.

Marshall's attendance at predominantly black Howard University illustrates the barriers faced by African Americans during the early twentieth century. Although Marshall wished to attend law school at the University of Maryland (a public institution in his home town of Baltimore), he was prohibited by law from doing so because of his race. This injustice helped set Marshall on a course of opposing all forms of official segregation that denied equal opportunities to African Americans.

After law school, Marshall set up a practice in Baltimore, representing indigent clients in civil rights cases. In 1936, his mentor Houston offered him a position with the National Association for the Advancement of Colored People (**NAACP**),





and in 1940, Marshall became director of the **NAACP LEGAL DEFENSE AND EDUCATIONAL FUND**, a position he held until 1961. Determined to eliminate segregation, Marshall coordinated a nationwide campaign to integrate higher education. He filed several successful lawsuits against public graduate and professional schools that refused to accept African-American students. These suits paved the way for similar cases at the high school and elementary school levels. Marshall also journeyed throughout the deep South, traveling fifty thousand miles a year to fight **JIM CROW LAWS** (a series of laws that provided for racial segregation in the South) and to represent criminal defendants.

Marshall argued 32 cases before the U.S. Supreme Court and won 29 of them. No doubt his most famous and far-reaching triumph before the High Court was **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). In that case, the father of African-American student Linda Brown sued the school board of Topeka, Kansas, over its segregation policy. Brown was required by law to attend an all African-American school several blocks from her home even though an all white public school was located in her own neighborhood. Under Kansas law, cities of more than 15,000 people, such as Topeka, could choose to operate segregated schools. Marshall argued that these segregated schools, defended by officials as "separate but equal," were unconstitutional.

**[8]**

The **SEPARATE-BUT-EQUAL** doctrine originated in **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), a case allowing segregated public accommodations for whites and blacks. In a plainspoken argument, Marshall dismissed as fallacy the notion that segregated schools offered the same educational experiences to black and white students. Sociological and psychological studies demonstrated that black children were in fact harmed by the policy of school segregation. The students' self-esteem was damaged and their future diminished when they were forced to accept inadequate facilities, equipment, and educational opportunities. Marshall argued that the only purpose segregation served was to perpetuate the myth of African-Americans' inferiority. A unanimous Court agreed and struck down the separate-but-equal doctrine, a

*Thurgood Marshall.*
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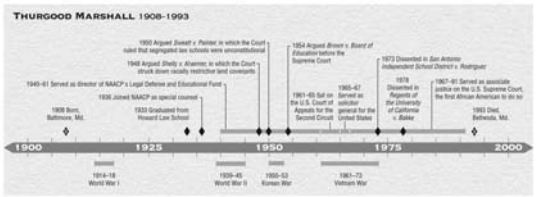






# THE FUTURE OF SOCIAL SECURITY

**[9]**

The payment of **OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE** (OASDI) benefits has been a cornerstone of U.S. social welfare policy since the establishment of the **SOCIAL SECURITY ADMINISTRATION** in 1935. At the same time, the long-term financial stability of OASDI has been a constant worry. In the early years of the twenty-first century, concerns about Social Security mounted as policy makers assessed the impact of the retirement of the "Baby Boom" generation. Many younger people raised the issue of "generation equity." They express doubt that Social Security benefits will be available when they retire, and anger that they will be forced to pay, through payroll taxes, for the baby boomers' retirement benefits.

Reform of the Social Security system has always been a political hot potato. Retirees and those approaching retirement form a strong **LOBBYING** force, and they zealously protect their benefits. Employers and employees are equally vocal in their opposition to higher payroll taxes to fund OASDI. Thus, changes in Social Security required bipartisan support, which materialized in the face of an impending Social Security crisis. The 1982–83 National Commission on Social Security Reform successfully secured from Congress the short-term financing of OASDI. As a result, Congress passed a series of laws meant to accumulate surpluses as a hedge against future burdens. The Social Security surplus is the amount by which revenue from the federal payroll tax exceeds the amount of Social Security benefits paid out.

IN FOCUS

Shortly after these new laws went into effect, Social Security began running a surplus. Surplus Social Security revenue can be used to fund other government programs and to help retire the national debt. During the favorable economic climate of the late 1990s, Congress began to use the surplus to pay down the federal debt, hoping to better position the government to meet its obligations to future retirees. And, in 2000, the federal government generated enough revenue so that the entire Social Security surplus was available for paying off debt.

The state of Social Security became a major campaign issue in the 2000 elections, with both Republicans and Democrats attempting to appear as though they were guardians of Social Security assets. Candidates from both parties promised to create a "lockbox," meaning that the Social Security surplus would be spent entirely on debt retirement. With the advent of fiscally lean years in the early 2000s, the lockbox approach was largely disregarded by politicians who advanced other ideas about what to do with Social Security surpluses. These ideas included using the surplus to help offset decreases in revenues brought about by tax cuts and using the surplus to fund new or expanded spending initiatives.

Analysts argue that the real issue often is clouded. It is not how to spend the surplus now, but how to maintain the long-term solvency of the Social Security trust fund. Planners estimate that the income from the trust fund will exceed expenses each year until 2020. The trust fund balances will then start to decline as investments are redeemed to meet the increased expenses from a swelling retired workforce. Although it is estimated that 75 percent of the costs would continue to be met from current payroll and income taxes, in the absence of any changes, full benefits could not be paid beginning in 2030.

In its 1996 report, the Social Security Administration's Advisory Council looked at various long-term financing options for OASDI. The council could not reach consensus on a specific long-term plan, but it did suggest several types of financing that represent a marked departure from previous efforts to fund Social Security. The council noted that past efforts have generally featured cutting benefits and raising tax rates on a "pay-as-you-go" basis. The council agreed that this approach must be changed and offered three ways of restoring financial solvency.

One approach, called Maintenance of Benefits (MB), calls for an increase in income taxes on OASDI benefits, a redirection of some revenue from other trust funds, and, most importantly, the adoption of a plan allowing the federal government to invest a portion of the trust fund assets directly in common stocks. Rates of returns on stocks have historically exceeded those on federal government bonds, where all Social Security

A person who continues to work past the retirement age may lose some benefits because Social Security is designed to replace lost earnings. If earnings from employment do not exceed the amount specified by law, the person receives the full benefits. If earnings are greater than that amount, one dollar of benefit is withheld for every two dollars in wages earned above the exempt amount. Once a person reaches age 70, however, he does not have to report earnings to the SSA, and the benefit is not reduced.

**Survivors' Benefits** Survivors' benefits are paid to family members when a worker dies. Survivors can receive benefits if the deceased worker was employed and contributed to Social





momentous victory for Marshall, affecting public schools in twenty-one states.

Marshall was appointed to the U.S. Court of Appeals for the Second Circuit in 1961, and served there until 1965 when he was named **SOLICITOR GENERAL** for the United States. He was appointed to the U.S. Supreme Court in 1967 by President **LYNDON B. JOHNSON** and served as an associate justice for 24 years.

While on the Court, Marshall was known more for his impassioned dissents than for his majority opinions. In particular, as a staunch opponent of **CAPITAL PUNISHMENT**, he regularly voiced his disagreement with the majority in death penalty cases. He was also a firm backer of **AFFIRMATIVE ACTION** and contributed one of his most famous dissents in **REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE**, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In that case, Marshall criticized the high court's ruling that a public medical school's policy of reserving 16 of 100 spots for minority students was unconstitutional. Marshall also dissented in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), disagreeing with the majority view that a Texas property tax system used to fund public education was acceptable, even though it allowed wealthier districts to provide a better school system for students in those districts than less wealthy districts could provide. Marshall objected strongly to the property tax arrangement, claiming that it deprived poor children of an equal education.

Marshall wrote the majority opinion in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968), in which the Court declared that a shopping center was a public forum from which picketers could not be barred by private owners.

Marshall retired from the Court in 1991, but continued his criticism of government policies that were detrimental to African Americans or other disenfranchised groups.

Marshall died on January 24, 1993, in Bethesda, Maryland. Upon Marshall's death, nearly 20,000 mourners filed by his casket during the 12 hours it lay in state in the Great Hall of the U.S. Supreme Court.

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CROSS-REFERENCES

**[10]**

*Civil Rights Movement; Integration; School Desegregation.*

## MARTIAL LAW

*The exercise of government and control by military authorities over the civilian population of a designated territory.*

**[11]**

Martial law is an extreme and rare measure used to control society during war or periods of civil unrest or chaos. According to the Supreme Court, the term *martial law* carries no precise meaning (*Duncan v. Kahanamoku*, 327 U.S. 304, 66 S. Ct. 606, 90 L. Ed. 688 [1946]). However, most declarations of martial law have some common features. Generally, the institution of martial law contemplates some use of military force. To a varying extent, depending on the martial law order, government military personnel have the authority to make and enforce civil and criminal laws. Certain civil liberties may be suspended, such as the right to be free from unreasonable **SEARCHES AND SEIZURES**, **FREEDOM OF ASSOCIATION**, and freedom of movement. And the writ of **HABEAS CORPUS** may be suspended (this writ allows persons who are unlawfully imprisoned to gain freedom through a court proceeding).

In the United States, martial law has been instituted on the national level only once, during the Civil War, and on a regional level only once, during **WORLD WAR II**. Otherwise, it has been limited to the states. Uprisings, political protests, labor strikes, and riots have, at various times, caused several state governors to declare some measure of martial law.

Martial law on the national level may be declared by Congress or the president. Under

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# PREFACE

The U.S. legal system is admired around the world for the freedoms it allows the individual and the fairness with which it attempts to treat all persons. On the surface, it may seem simple, yet those who have delved into it know that this system of federal and state constitutions, statutes, regulations, and common-law decisions is elaborate and complex. It derives from the English common law, but includes principles older than England, along with some principles from other lands. The U.S. legal system, like many others, has a language all its own, but too often it is an unfamiliar language: many concepts are still phrased in Latin. The second edition of *West's Encyclopedia of American Law (WEAL)* explains legal terms and concepts in everyday language, however. It covers a wide variety of persons, entities, and events that have shaped the U.S. legal system and influenced public perceptions of it.

## MAIN FEATURES OF THIS SET

### Entries

This encyclopedia contains nearly 5,000 entries devoted to terms, concepts, events, movements, cases, and persons significant to U.S. law. Entries on legal terms contain a definition of the term, followed by explanatory text if necessary. Entries are arranged alphabetically in standard encyclopedia format for ease of use. A wide variety of additional features, listed later in this preface, provide interesting background and supplemental information.

**Definitions** Every entry on a legal term is followed by a definition, which appears at the beginning of the entry and is italicized. The Dictionary and Indexes volume includes a glossary containing all the definitions from *WEAL*.

**Further Readings** To facilitate further research, a list of Further Readings is included at the end of a majority of the main entries.

**Cross-References** *WEAL* provides two types of cross-references, within and following entries. Within the entries, terms are set in small capital letters—for example, LIEN—to indicate that they have their own entry in the encyclopedia. At the end of the entries, related entries the reader may wish to explore are listed alphabetically by title.

Blind cross-reference entries are also included to direct the user to other entries throughout the set.

### In Focus Essays

In Focus essays accompany related entries and provide additional facts, details, and arguments on particularly interesting, important, or controversial issues raised by those entries. The subjects covered include hotly contested issues, such as abortion, capital punishment, and gay rights; detailed processes, such as the Food and Drug Administration's approval process for new drugs; and important historical or social issues, such as debates over the formation of the U.S. Constitution.

### Sidebars

Sidebars provide brief highlights of some interesting facet of accompanying entries. They

complement regular entries and In Focus essays by adding informative details. Sidebar topics include the Million Man March and the branches of the U.S. armed services. Sidebars appear at the top of a text page and are set in a box.

### Biographies

*WEAL* profiles a wide variety of interesting and influential people—including lawyers, judges, government and civic leaders, and historical and modern figures—who have played a part in creating or shaping U.S. law. Each biography includes a timeline, which shows important moments in the subject's life as well as important historical events of the period. Biographies appear alphabetically by the subject's last name.

## ADDITIONAL FEATURES OF THIS SET

**Enhancements** Throughout *WEAL*, readers will find a broad array of photographs, charts, graphs, manuscripts, legal forms, and other visual aids enhancing the ideas presented in the text.

**Indexes** *WEAL* features a cases index and a cumulative index in a separate volume.

### Appendixes

Three appendix volumes are included with *WEAL*, containing hundreds of pages of documents, laws, manuscripts, and forms fundamental to and characteristic of U.S. law.

### Milestone Cases in the Law

A special Appendix volume entitled Milestones in the Law, allows readers to take a close look at landmark cases in U.S. law. Readers can explore the reasoning of the judges and the arguments of the attorneys that produced major decisions on important legal and social issues. Included in each Milestone are the opinions of the lower courts; the briefs presented by the parties to the U.S. Supreme Court; and the decision of the Supreme Court, including the majority opinion and all concurring and dissenting opinions for each case.

### Primary Documents

There is also an Appendix volume containing more than 60 primary documents, such as the English Bill of Rights, Martin Luther King Jr.'s Letter from Brimingham Jail, and several presidential speeches.

### Citations

Wherever possible, *WEAL* entries include citations for cases and statutes mentioned in the text. These allow readers wishing to do additional research to find the opinions and statutes cited. Two sample citations, with explanations of common citation terms, can be seen below and opposite.

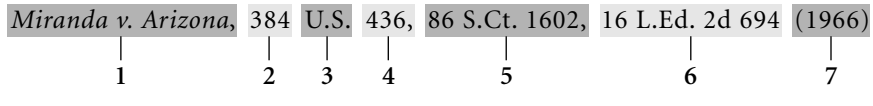


1. *Case title.* The title of the case is set in i and indicates the names of the parties. The suit in this sample citation was between Ernesto A. Miranda and the state of Arizona.
2. *Reporter volume number.* The number preceding the reporter name indicates the reporter volume containing the case. (The volume number appears on the spine of the reporter, along with the reporter name).
3. *Reporter name.* The reporter name is abbreviated. The suit in the sample citation is from the reporter, or series of books, called *U.S. Reports,* which contains cases from the U.S. Supreme Court. (Numerous reporters publish cases from the federal and state courts.)
4. *Reporter page.* The number following the reporter name indicates the reporter page on which the case begins.
5. *Additional reporter page.* Many cases may be found in more than one reporter. The suit in the sample citation also appears in volume 86 of the *Supreme Court Reporter*, beginning on page 1602.
6. *Additional reporter citation.* The suit in the sample citation is also reported in volume 16 of the *Lawyer's Edition*, second series, beginning on page 694.
7. *Year of decision.* The year the court issued its decision in the case appears in parentheses at the end of the cite.

*Brady Handgun Violence Prevention Act*, Pub. L. No. 103–159, 107 Stat. 1536 (18 U.S.C.A. §§ 921–925A)

1 2 3 4 5 6 7 8

1. *Statute title.*
2. *Public law number.* In the sample citation, the number 103 indicates this law was passed by the 103d Congress, and the number 159 indicates it was the 159th law passed by that Congress.
3. *Reporter volume number.* The number preceding the reporter abbreviation indicates the reporter volume containing the statute.
4. *Reporter name.* The reporter name is abbreviated. The statute in the sample citation is from *Statutes at Large.*
5. *Reporter page.* The number following the reporter abbreviation indicates the reporter page on which the statute begins.
6. *Title number.* Federal laws are divided into major sections with specific titles. The number preceding a reference to the U.S. Code stands for the section called Crimes and Criminal Procedure.
7. *Additional reporter.* The statute in the sample citation may also be found in the *U.S. Code Annotated.*
8. *Section numbers.* The section numbers following a reference to the *U.S. Code Annotated* indicate where the statute appears in that reporter.

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## TERM

*An expression, word, or phrase that has a fixed and known meaning in a particular art, science, or profession. A specified period of time.*

The term of a court is the legally prescribed period for which it may be in session. Although the session of the court is the time that it actually sits, the words *term* and *session* are frequently used interchangeably.

In reference to a lease, a term is the period granted during which the lessee is entitled to occupy the rented premises. It does not include the period of time between the creation of the lease and the entry of the tenant. Similarly when used in reference to estates, the term is the period of time for which an estate is granted. An estate for five years, for example, is one with a five-year term.

A term of office is the time during which an official who has been appointed or elected may hold the office, perform its functions, and partake of its emoluments and privileges.

## TERM LIMITS

See ELECTIONS.

## TERM OF ART

*A word or phrase that has special meaning in a particular context.*

A term of art is a word or phrase that has a particular meaning. Terms of art abound in the law. For example, the phrase *double jeopardy* can be used in common parlance to describe any situation that poses two risks. In the law, DOUBLE JEOPARDY refers specifically to an impermissible second trial of a defendant for the same offense that gave rise to the first trial.

The classification of a word or phrase as a term of art can have legal consequences. In *Molzof v. United States,* 502 U.S. 301, 112 S. Ct. 711, 116 L. Ed. 2d 731 (1992), Shirley M. Molzof brought suit against the federal government after her husband, Robert E. Molzof, suffered irreversible brain damage while under the care of government hospital workers. The federal government conceded liability, and the parties tried the issue of damages before the U.S. District Court for the Western District of Wisconsin. Molzof had brought the claim as executor of her husband's estate under the FEDERAL TORT CLAIMS ACT (FTCA) (28 U.S.C.A. §§ 1346(b), 2671–2680 [1988]), which prohibits the assessment of PUNITIVE DAMAGES against the federal government. The court granted recovery to Molzof for her husband's injuries that resulted from the NEGLIGENCE of federal employees, but it denied recovery for future medical expenses and for loss of enjoyment of life. According to the court, such damages were punitive damages, which could not be recovered against the federal government.

The U.S. Court of Appeals for the Seventh Circuit agreed with the trial court, but the U.S. Supreme Court disagreed. According to the Court, punitive damages is a legal term of art

that has a widely accepted common-law meaning under state law. Congress was aware of this meaning at the time it passed the FTCA. Under traditional common-law principles, punitive damages are designed to punish a party. Since damages for future medical expenses and for loss of enjoyment of life were meant to compensate Molzof rather than punish the government, the Court reversed the decision and remanded the case to the Seventh Circuit.

## TERMINATION

*Cessation; conclusion; end in time or existence.*

When used in connection with litigation, the term signifies the final determination of the action.

The termination or cancellation of a contract signifies the process whereby an end is put to whatever remains to be performed thereunder. It differs from RESCISSION, which refers to the restoration of the parties to the positions they occupied prior to the contract.

The termination of a lease refers to the severance of the LANDLORD AND TENANT relationship before the leasehold term expires through the ordinary passage of time.

*Mary Eliza Church Terrell.* THE GRANGER COLLECTION, NEW YORK

"IF WE FIGHT, WE GET OUR RIGHTS. WE'RE SECOND-CLASS CITIZENS BECAUSE WE SIT IDLY BY."
—MARY ELIZA CHURCH TERRELL

## ♦ TERRELL, MARY ELIZA CHURCH

Mary Eliza Church Terrell was an influential African American writer, lecturer, and social activist, whose work began when the SEPARATE-BUT-EQUAL doctrine of racial SEGREGATION was adopted by the U.S. legal system and ended as the U.S. Supreme Court, in BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), rejected the doctrine of state-sponsored segregation. Terrell was also an advocate of WOMEN'S RIGHTS, including the right to vote.

Mary Church was born on September 23, 1863, in Memphis, Tennessee. She was raised in a middle-class family and attended Oberlin College in Ohio, graduating in 1884. She taught at Wilberforce University in Xenia, Ohio, in

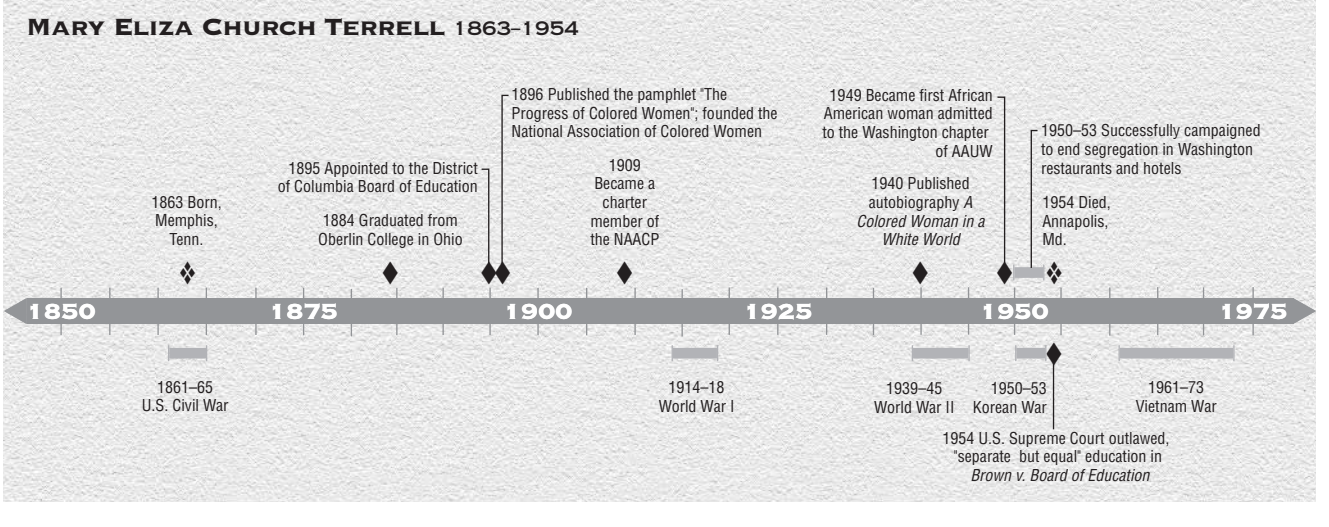

1885 and at a secondary school in Washington, D.C., in 1886 before taking a two-year tour of Europe. In 1888 she obtained a master's degree from Oberlin and married Robert Heberton Terrell, an attorney who would become the first African American municipal judge in Washington, D.C.

Terrell became an active member of the National American Suffrage Association and focused her attention on the special concerns of African American women. In her 1896 pamphlet, "The Progress of Colored Women," Terrell noted the "almost insurmountable obstacles" that had confronted African American women. Not only were "colored women with ambition and aspiration handicapped on account of their sex, but they are everywhere baffled and mocked on account of their race."

In 1896 Terrell founded the National Association of Colored Women and established its headquarters in Washington, D.C. As the first president, Terrell used the association as a means of achieving educational and social reform and bringing an end to racial and SEX DISCRIMINATION. She was appointed to the District of Columbia Board of Education in 1895, the first African American woman to hold such a position.

Terrell became a charter member of the National Association for the Advancement of Colored People (NAACP) in 1909 and continued her CIVIL RIGHTS crusade through the 1950s. She worked for the end of racial segregation and other barriers that affected the rights of African Americans. In 1949 Terrell was admitted to the Washington chapter of the American Association of University Women, ending the association's all-white membership policy. In 1950, at age eighty-seven, Terrell began a campaign to end segregation in restaurants and hotels in Washington, D.C. Three years later she achieved her goal.

Terrell published her autobiography, *A Colored Woman in a White World,* in 1940. She died on July 24, 1954, in Annapolis, Maryland.

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## TERRITORIAL COURTS

*Federal tribunals that serve as both federal and state courts in possessions of the United States—such as Guam and the Virgin Islands—that are not within the limits of any state but are organized with separate legislatures and executive and judicial officers appointed by the president.*

Territorial courts are legislative courts created by Congress pursuant to its constitutional power under Article I, Section 8, Clause 9, to create tribunals inferior to the Supreme Court. They are not constitutional courts created by Article III of the Constitution. Congress vests territorial courts with jurisdiction comparable to that exercised by federal district courts. Congress can, however, impose restrictions and duties on territorial courts that cannot be imposed on federal district courts, such as limiting the tenure of the members of the bench. Once a territory is admitted to the Union as a state, the jurisdiction of its territorial court is extinguished. Pending cases are transferred to the appropriate tribunals according to the nature of the particular action.

The Supreme Court reviews decisions rendered by territorial courts if they satisfy certain requirements.

## TERRITORIAL WATERS

*The part of the ocean adjacent to the coast of a state that is considered to be part of the territory of that state and subject to its sovereignty.*

In INTERNATIONAL LAW the term *territorial waters* refers to that part of the ocean immediately adjacent to the shores of a state and subject to its territorial jurisdiction. The state possesses both the jurisdictional right to regulate, police, and adjudicate the territorial waters and the proprietary right to control and exploit natural resources in those waters and exclude others from them. Territorial waters differ from the high seas, which are common to all nations and are governed by the principle of freedom of the seas. The high seas are not subject to appropriation by persons or states but are available to everyone for navigation, exploitation of resources, and other lawful uses. The legal status of territorial waters also extends to the seabed and subsoil under them and to the airspace above them.

From the eighteenth to the middle of the twentieth century, international law set the width of territorial waters at one league (three

nautical miles), although the practice was never wholly uniform. The United States established a three-mile territorial limit in 1793. International law also established the principle that foreign ships are entitled to innocent passage through territorial waters.

By the 1970s, however, more than forty countries had asserted a twelve-mile limit for their territorial waters. In 1988 President RONALD REAGAN issued Executive Proclamation 5928, which officially increased the outer limit of U.S. territorial waters from three to twelve miles (54 Fed. Reg. 777). This limit also applies to Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, and the Northern Mariana Islands. The Reagan administration claimed the extension of the limit was primarily motivated by national security concerns, specifically to hinder the operations of spy vessels from the Soviet Union that plied the U.S. coastline. Another reason for the extension was the recognition that most countries had moved to a twelve-mile limit. In 1982, at the Third United Nations Conference on the Law of the Sea, 130 member countries ratified the Convention on the LAW OF THE SEA, which included a recognition of the twelve-mile limit as a provision of customary international law. Although the United States voted against the convention, 104 countries had officially claimed a twelve-mile territorial sea by 1988.

CROSS-REFERENCES

Law of the Sea; Navigable Waters.

## TERRITORIALITY

*A term that signifies a connection or limitation with reference to a particular geographic area or country.*

## TERRITORIES OF THE UNITED STATES

*Portions of the United States that are not within the limits of any state and have not been admitted as states.*

The United States holds three territories: American Samoa and Guam in the Pacific Ocean and the U.S. Virgin Islands in the Caribbean Sea. Although they are governed by the United States, the territories do not have statehood status, and this lesser legal and political status sets them apart from the rest of the United States.

The three U.S. territories are not the only U.S. government land holdings without statehood status. These various lands fall under the broad description of insular political communities affiliated with the United States. Puerto Rico in the Caribbean and the Northern Mariana Islands in the Pacific Ocean belong to the United States and have the status of commonwealth, a legal and political status that is above a territory but still below a state.

The United States also has a number of islands in the Pacific Ocean that are called variously territories and possessions. U.S. possessions have the lowest legal and political status because these islands do not have permanent populations and do not seek self-determination and autonomy. U.S. possessions include Baker, Howland, Kingman Reef, Jarvis, Johnston, Midway, Palmyra, and Wake Islands.

Finally, land used as a military base is considered a form of territory. These areas are inhabited almost exclusively by military personnel. They are governed largely by military laws, and not by the political structures in place for commonwealths and territories. The United States has military bases at various locations around the world, including Okinawa, Japan, and Guantanamo Bay, Cuba.

A precise definition of territories and territorial law in the United States is difficult to fashion. The U.S. government has long been in the habit of determining policy as it goes along. The United States was established through a defensive effort against British forces and then through alternately defensive and offensive battles against Native Americans. From this chaotic beginning, the United States has struggled to fashion a coherent policy on the acquisition and possession of land.

The U.S. Constitution does not state exactly how the United States may acquire land. Instead, the Constitution essentially delegates the power to decide the matter to Congress. Article IV, Section 3, Clause 1, of the Constitution provides that "New States may be admitted by the Congress into this Union; but no new State shall be formed . . . by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." The same section of the Constitution gives Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

Under INTERNATIONAL LAW the United States and other nation-states may acquire additional territory in several ways, including occupation of territory that is not already a part of a state; conquest, where allowed by the international community; cession of land by another nation in a treaty; and accretion, or the growth of new land within a nation's existing boundaries.

Through various statutes and court opinions, Congress and the U.S. Supreme Court have devised a system that gives Congress and the president control over U.S. territories. Congress delegates some of its policy-making and administrative duties to the Office of Insular Affairs within the INTERIOR DEPARTMENT. The president of the United States appoints judges and executive officers to offices in the territories. Congress devises court systems for the territories, and the Supreme Court may review decisions made by territorial courts.

Congress may pass laws governing a territory with due deference to the customs and sensibilities of the native people. Congress may not pass territorial laws that violate a fundamental constitutional right. Such rights have not been defined concretely by the Supreme Court in the context of territorial law, but they can include the right to be free from unreasonable SEARCHES AND SEIZURES, the right to FREEDOM OF SPEECH, and the rights to EQUAL PROTECTION and DUE PROCESS (*Torres v. Commonwealth of Puerto Rico,* 442 U.S. 465, 99 S. Ct. 2425, 61 L. Ed. 2d 1 [1979]).

Persons living in U.S. territories do not have the right to vote for members of Congress. They may elect their own legislature, but the laws passed by the territorial legislature may be nullified by Congress. Each territory may elect a delegate who attends congressional sessions, hearings, and conferences in Washington, D.C. These delegates may propose legislation and vote on legislation in committees, but they may not participate in final votes.

U.S. territories have less political power than do U.S. commonwealths. Commonwealths are afforded a higher degree of internal political autonomy than are territories. Congress and the commonwealth work together to fashion a political system that is acceptable to both parties. By contrast, Congress tends to impose its will on territories. Commonwealth status once inevitably led to statehood, but such a progression is no longer automatic.

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CROSS-REFERENCES

Louisiana Purchase; Territorial Courts.

## TERRITORY

*A part of a country separated from the rest and subject to a particular jurisdiction.*

The term *territory* has various meanings in different contexts. Generally, the term refers to a particular or indeterminate geographical area. In a legal context, territory usually denotes a geographical area that has been acquired by a particular country but has not been recognized as a full participant in that country's affairs. In the United States, Guam is one example of a territory. Though it is considered a part of the United States and is governed by the U.S. Congress, Guam does not have full rights of statehood, such as full representation in Congress or full coverage under the U.S. Constitution.

The term *territory* is also used in the law to describe an assigned area of responsibility. A salesperson, for example, may work in a certain area. A salesperson's territory may be legally significant in a contract case. Assume that Sally has agreed to sell widgets on commission in a specific territory on the condition that no other seller from the widget supplier will do business in that territory. If the supplier arranges for another seller to encroach on Sally's territory, Sally may take legal action against the supplier.

CROSS-REFERENCES

Territories of the United States.

## TERRORISM

*The unlawful use of force or violence against persons or property in order to coerce or intimidate a government or the civilian population in furtherance of political or social objectives.*

Since the SEPTEMBER 11TH ATTACKS on the United States in 2001, which resulted in the

# The Oklahoma City Bombing

In June 1997 the murder and conspiracy trial of Timothy J. McVeigh ended in the death sentence. The 29-year-old former Army sergeant was convicted of bombing the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995. The blast, which claimed 168 lives, was the worst terrorist act ever committed on U.S. soil. McVeigh pleaded not guilty, but the elaborate case mounted by federal prosecutors led to a swift jury verdict of guilty on all 11 counts.

After a nationwide manhunt, investigators from the **FEDERAL BUREAU OF INVESTIGATION** (FBI) had linked McVeigh to the blast using remnants of a Ryder rental truck believed to have carried the bomb. At trial, prosecutors established further ties: telephone records and testimony by the owner of the rental office suggested McVeigh had rented the truck under an alias in Junction City, Kansas, two days before the bombing. Residue from explosives had also been found on McVeigh's clothing.

Prosecutors portrayed McVeigh as an antigovernment extremist. The defendant's sister, Jennifer McVeigh, told the court that he was angry over the government's destruction of the Branch Davidian compound in Waco, Texas, in April 1993, and that he had hinted at taking action. Personal correspondence was introduced as evidence in an effort to round out the portrait of McVeigh as a follower of far-right politics, who was disillusioned and willing to commit acts of terror. Key testimony came from Michael J. Fortier, an Army friend and co-conspirator who had surveyed the Federal Building with McVeigh, and his wife, Lori Fortier. The Fortiers said that McVeigh wanted the bombing to start a civil war.

Led by Oklahoma attorney Stephen Jones, the defense team was critical of every phase of the prosecution. Defense attorneys attacked the methodology of the FBI in preparing physical evidence as well as the government's witnesses. In particular, they charged that the Fortiers were liars who hoped to escape prison time and to profit financially from their testimony. Maintaining that McVeigh was railroaded, the defense pointed to the existence of a human leg found in the ruins of the building to suggest that the actual Oklahoma City bomber had died in the explosion.

After the jurors returned a guilty verdict on June 2, the trial moved into an unusual penalty phase. The defense, seeking leniency, made a lengthy presentation about the Waco siege, at which McVeigh had been present, in what seemed to observers an odd effort to explain his motives in Oklahoma City. It also called to the stand William McVeigh, who made an emotionally charged appeal for his son's life. But the statements of survivors who had lost family and friends in the Oklahoma massacre apparently swayed the jurors, who decided on execution.

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Venue "Venue and the Oklahoma City Bombing Case" (Sidebar).

destruction of the World Trade Center in New York City and severe damage to the Pentagon in Washington, D.C., the United States has changed its priorities to focus upon eradicating terrorism in the world. Terrorism involves the systematic use of terror or violence to achieve political goals. The targets of terrorism include government officials, identified individuals or groups, and innocent bystanders. In most cases terrorists seek to overthrow or destabilize an existing political regime, but totalitarian and dictatorial governments also use terror to maintain their power.

### Domestic Terrorism

The attacks of September 11, 2001, constituted the most severe terrorist attacks ever com-

**International Terrorist Incidents, 1981 to 2002**

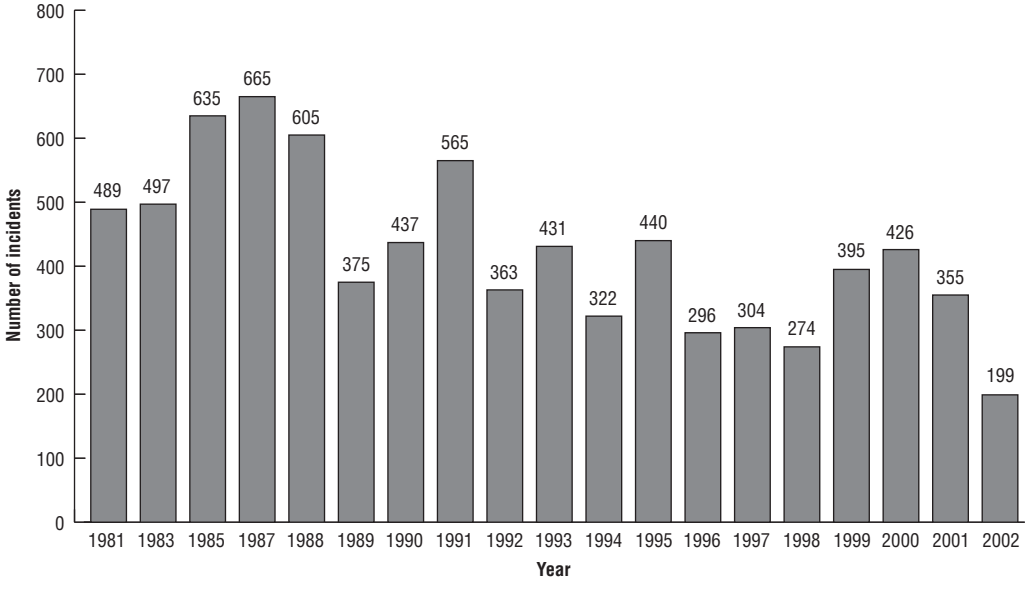


SOURCE: U.S. State Department, *Patterns of Terrorism*, 2002.

mitted on U.S. soil. However, these were certainly not the first acts of terrorism carried out against the United States by foreign terrorists, nor were they the first attacks carried out against the World Trade Center. In February 1993, a bombing of the World Trade Center killed six people and injured more than a thousand others. The bomb left a crater 200 by 1,000 feet wide and five stories deep. The FEDERAL BUREAU OF INVESTIGATION (FBI) and the Joint Terrorist Task Force identified and helped bring to trial 22 Islamic fundamentalist conspirators. The trial revealed extensive plans for terrorist acts in the United States, including attacks on government facilities.

During the 1990s, the United States also became more concerned about domestic terrorist activities carried out by U.S. citizens without any foreign involvement. Beginning in 1978, an individual who came to be known as the Unabomber targeted university scientists, airline employees, and other persons he associated with a dehumanized, technology driven society. The suspect killed three people and injured 23 others with package bombs. At the Unabomber's insistence, major newspapers published his 35,000-word manifesto describing his anti-technology philosophy. In April 1996, a suspect, Theodore Kaczynski, was arrested for crimes associated with the Unabomber. After a rather bizarre trial, in 1998, Kaczynski pled guilty in exchange for a sentence of life without the possibility of PAROLE.

However, it was the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, on April 19, 1995, that galvanized concerns about domestic terrorism. The bombing killed 168 people and injured more than 500 others. The FBI arrested Timothy J. McVeigh and Terry Nichols, who were charged with murder and conspiracy. McVeigh and Nichols were connected to the right-wing militia movement, which opposes the powers held by the federal government and believes in the right of its members to bear arms.

In June 1997, McVeigh was found guilty of murder and conspiracy, and sentenced to death. He attempted to appeal his conviction for three years, but gave up in late 2000. On June 11, 2001, McVeigh was executed by lethal injection. Nichols faced similar charges in his 1997 trial. He was acquitted on charges of first- and second-degree murder, but was found guilty of conspiring to use a weapon of mass destruction and INVOLUNTARY MANSLAUGHTER. A federal judge sentenced Nichols to life in prison without the

possibility of parole. However, at the state level, Nichols faced 161 counts of first-degree murder, which could result in the death penalty. The Oklahoma state trial was scheduled to begin in March 2004.

A year after the Oklahoma City bombing, a bomb erupted at Atlanta's Centennial Olympic Park during the celebration of the Olympic Games in July 1996. The bomb killed one woman and injured 111 others in what President BILL CLINTON called an "evil act of terror." The initial investigation focused on Richard Jewell, a security guard at the park. At first Jewell was considered to be a hero when he alerted authorities to a knapsack containing a pipe bomb. Shortly thereafter, however, he was considered a prime suspect. After a later investigation cleared Jewell of wrongdoing, he sued a number of media outlets for DEFAMATION.

During the next seven years, the Atlanta bombings remained largely unresolved. On May 31, 2003, authorities arrested Eric Rudolph, who is considered the primary suspect. Authorities also suspect Rudolph of bombing abortion clinics in Atlanta and Birmingham, Alabama, as well as the bombing of a gay and lesbian nightclub in Atlanta.

Congress has responded to the threat of domestic terrorism with the enactment of several laws. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214. The law allocated $1 billion to fund federal programs to combat terrorism. The act also established a federal death penalty for terrorist murders and strengthened penalties for crimes committed against federal employees while performing their official duties. In addition, the act increased the penalties for conspiracies involving explosives and for the possession of nuclear materials, criminalized the use of chemical weapons, and required plastic explosives to contain "tagging" elements in the explosive materials for detection and identification purposes.

Following the attacks of September 11, Congress, at the urging of President GEORGE W. BUSH, moved swiftly to enact the Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272. The act seeks to enhance domestic security against terrorism by setting up a Counterterrorism Fund in the U.S. Treasury, and appropriating money for combating terrorism to the FBI's Technical Support Center. It also increases the president's authority to seize the property of foreign persons, organizations, or countries that the president determines have planned, authorized, aided, or engaged in hostilities or attacks against the United States. Other provisions of the act focus on enhancing surveillance procedures used by federal law enforcement personnel, and attempts to control MONEY LAUNDERING, which is believed to be a major source of income for terrorist organizations.

One year later, Congress enacted the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. The act formally endorsed the establishment of the HOMELAND SECURITY DEPARTMENT, which had been created through EXECUTIVE ORDER by President Bush in 2001. The Homeland Security Act reorganized several federal agencies to fall under the authority of the Homeland Security Department in an effort to coordinate the government's efforts. The American public has become familiar with the new department because of the color-coded Homeland Security Advisory System, which indicates the likely threat of terrorist attacks against the United States. The two lowest levels are *low* (coded in green) and *guarded* (coded in blue). The other three levels include *elevated* (yellow), *high* (orange), and *severe* (red). Throughout much of 2003, the level was set at *elevated* or *high* due to a number of threats identified by department officials.

### International Terrorism

The September 11 attacks have been viewed as a continuation of a series of deadly terrorist activities that had taken place overseas. In the late twentieth century, terrorism became a tool of political groups in Europe, the Middle East, and Asia. The growth of international terrorism led to KIDNAPPINGS, HIJACKING of airplanes, bombing of airplanes and buildings, and armed attacks on government and public facilities. In the 1980s, several countries, including Libya, Iran, and Iraq, were identified as supporting international terrorism by providing training, weapons, and safe havens.

Interests of the United States overseas were major targets of terrorism. In November 1979, a group of Islamic students overran the U.S. embassy in Iran and took many hostages. Although some of the hostages were later freed, the Iranians detained 52 American hostages for a period of 444 days until they were released in January 1981, just after the swearing-in of Pres-

ident RONALD REAGAN. In 1983, a 12,000-pound truck bomb exploded in a U.S. compound in Beirut, Lebanon, killing 241 American soldiers.

By the 1990s, the terrorist organization al Qaeda (Arabic for "the Base"), led by Saudi dissident Osama Bin Laden, developed as the primary culprit in terrorist attacks on U.S. interests at home and abroad. Al Qaeda is believed to be responsible for the 1993 attacks on the World Trade Center and, later, the September 11 attacks. On August 7, 1998, truck bombs exploded nearly simultaneously at the U.S. embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya. The blasts killed 224 people, including 12 Americans, and injured another 4,600. Four members of al Qaeda were later convicted for their part in the bombings. In October 2000, an al Qaeda operative conducted a suicide attack on the *U.S.S. Cole*, resulting in the deaths of 17 sailors and injuries to over 30 others.

The activities of Bin Laden and al Qaeda were well known prior to the September 11 attacks. Bin Laden had issued a religious edict, known as a *fatwah*, calling for attacks on U.S. troops and civilians.

Although many members of al Qaeda are Middle-Eastern, U.S. officials, in 2001, captured John Philip Walker Lindh, a U.S. citizen who had trained with terrorist organizations in Pakistan and Afghanistan. Lindh fought for the Taliban government of Afghanistan even after the September 11 attacks. Lindh, who became known as the "American Taliban," was indicted on ten counts, including conspiracy to murder U.S. nationals. He reached a plea bargain with federal prosecutors and pleaded guilty to supplying services to the Taliban. In October 2000, he was sentenced to 20 years in prison.

The United States has responded to international terrorist organizations and the nations that support them through a variety of military actions. In March 1986, President Reagan ordered the military to conduct a strike on Libya, which was believed to have been responsible for the bombing of a nightclub in Germany as well as other terrorist acts. After the embassy bombings in Tanzania and Kenya in 1998, President Clinton ordered strikes on al Qaeda military camps in Afghanistan. However, these attacks appeared to have little effect upon the terrorist activities of the organizations that perpetrated the violent acts.

Following the September 11 attacks, the United States changed its strategy regarding terrorists significantly. President Bush announced that the United States would consider nations that harbor terrorists as equally responsible for terrorist activities. In the latter part of 2001, the United States led an international coalition that removed the Taliban regime from power in Afghanistan. In March 2003, the United States led another coalition in an attack on Iraq, which the Bush administrated asserted had supported terrorist organizations such as al Qaeda. Within weeks, Iraq's leader, Saddam Hussein, was removed from power.

The attacks on Iraq did not receive support from a number of nations, including traditional U.S. allies Germany and France. Moreover, the removal of the regimes in Afghanistan and Iraq did not appear to end the threat of terrorism in the Middle East or elsewhere. In May 2003, shortly after the United States declared that the active phases of its armed military operations in Iraq had concluded, terrorists bombed residential compounds in Riyadh, Saudi Arabia, killing at least 34 people, including nine Americans. Four days after the Saudi Arabia attacks, bombs erupted in Casablanca, Morocco, killing 43 people. Authorities suspect that al Qaeda operatives were responsible.

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War on Terrorism.

## TERRY V. OHIO

In *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), the U.S. Supreme Court ruled that the FOURTH AMENDMENT to the U.S. Con-

stitution permits a law enforcement officer to stop, detain, and frisk persons who are suspected of criminal activity without first obtaining their consent, even though the officer may lack a warrant to conduct a search or **PROBABLE CAUSE** to make an arrest. Now known as a *Terry* stop, this type of police encounter is constitutionally permissible only when an officer can articulate a particularized, objective, and reasonable basis for believing that criminal activity may be afoot or that a given suspect may be armed and dangerous.

The case stemmed from an incident in Cleveland, Ohio, in 1963. Police officer Martin McFadden observed three men engaging in suspicious behavior near the corner of Euclid Avenue and Huron Road. One of the suspects was the defendant, John Terry. Along with codefendant Richard Chilton and a third man, known only as Katz, Terry was seen pacing in front of a downtown store. Occasionally, the men would pause to confer with each other. More often, McFadden witnessed the men peering into the store's front window. Over a period of ten to twelve minutes, the three men looked into the same store window approximately 24 times.

Based on his training as an officer and 39 years of experience on the police force, including 35 as a detective, McFadden believed that the suspects were "casing" the store for a **ROBBERY**. Attempting to forestall a possible robbery, McFadden approached the three men and identified himself as a police officer. Not being familiar with any of the suspects, McFadden asked for their names. When the men mumbled unintelligibly in response, McFadden grabbed Terry, quickly patted down his overcoat, and discovered a .38-caliber revolver. After removing the pistol from Terry's coat pocket, McFadden patted down the other two suspects, finding another revolver in Chilton's overcoat. Katz was not armed.

Terry and Chilton were charged with carrying concealed weapons. Prior to trial the two defendants brought a motion to suppress the incriminating evidence seized by McFadden. The defendants argued that the weapons were inadmissible because McFadden had discovered them during an unlawful search. McFadden, the defendants pointed out, possessed neither a valid **SEARCH WARRANT** authorizing the pat down nor probable cause to detain them. Denying their motion to suppress, the court scheduled the matter for trial where both defendants were found guilty. The Supreme Court of Ohio affirmed the convictions, and the defendants appealed to the nation's highest court. The U.S. Supreme Court divided its opinion into three parts.

First, the Supreme Court ruled that the defendants enjoyed qualified protection from temporary police detention under the Fourth Amendment. Before a court will examine the propriety of police activity under the Fourth Amendment, it must first determine whether the interests asserted by a defendant are constitutionally protected. The Fourth Amendment governs areas where individuals maintain a reasonable expectation of privacy, including a zone of personal freedom in which every individual is secure from unnecessary and unreasonable governmental intrusion. Walking down the streets of Cleveland, the Court said, Terry and Chilton held a reasonable expectation that their personal liberty would not be unlawfully restrained by law enforcement.

Second, the Court ruled that the defendants' freedom was effectively impeded by their encounter with McFadden. Any time a police officer accosts an individual to detain him for questioning, the Court emphasized, the officer has "seized" that person within the meaning of the Fourth Amendment. It would be nothing less than "torture of the English language," the Court added, to suggest that McFadden's pat down of the suspects' clothing was anything other than a "search" as that term is defined in the Constitution.

Third, the Court ruled that McFadden acted reasonably during his encounter with the defendants. Acknowledging that the Constitution generally requires probable cause to effect an arrest and a lawfully executed warrant to conduct a search, the Court identified a third area of police activity that is permissible under the Fourth Amendment, though it may amount to neither a full-blown search nor a technical arrest. The central inquiry under the Fourth Amendment, the Court wrote, is whether the police have acted reasonably under the circumstances. The express language of the Fourth Amendment does not prohibit all warrantless searches performed without probable cause, but only those that are unreasonable.

In dealing with rapidly unfolding and increasingly dangerous situations, the Court said, police may find it impractical or impossible

to obtain a search warrant before choosing to intervene. In other situations, injury or harm may result to bystanders if law enforcement is made to wait until it has probable cause before acting. The Court indicated that the Fourth Amendment gives law enforcement flexibility to investigate, detect, and prevent criminal activity. According to *Terry,* this flexibility includes the right of police officers to stop persons suspected of criminal activity and detain them for questioning. If during questioning police are led to believe that a suspect is armed and dangerous, an officer may frisk the suspect without violating the Fourth Amendment.

In this case the Court noted that McFadden personally witnessed the two defendants engaging in what appeared to be preparations for a robbery. It would have been negligent, the Court thought, for McFadden to have turned a blind eye to such behavior. Given that he chose to investigate further, the Court said, it was reasonable for McFadden to assure himself that none of the suspects was armed, especially after they failed to respond intelligibly to his request for identification. In patting down and frisking the defendants, McFadden chose a prudent course to stave off threats to his security and the security of others.

The Court reached its holding by BALANCING the legitimate needs of law enforcement against the privacy interests of individuals. Forcible detention of individuals for questioning is far from a petty indignity. Even a limited search of outer clothing, the Court stressed, constitutes a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." At the same time, law enforcement must not be restricted from performing its job in a proficient manner. The Fourth Amendment does not restrict police from intervening until after a crime has been committed. Crime prevention is a bona fide goal of law enforcement, the Court said, and the Fourth Amendment places only reasonable restrictions upon pursuit of that goal.

Outlining these restrictions, the Court said that no police officer may lawfully stop and detain a person for questioning unless the officer first observes unusual conduct that arouses a reasonable suspicion of criminal activity. A stop may be no longer than necessary to confirm or dispel an officer's suspicion and must not be unnecessarily restrictive or intrusive. During the period of detention, no searches may be performed unless the officer has an objective and particularized basis for believing the suspect is armed and dangerous. Any search must be limited to the suspect's outer clothing and may be performed only for the purpose of discovering concealed weapons. Evidence obtained during searches that comport with these restrictions, the Court said, is admissible under the Fourth Amendment. Evidence obtained in violation of the limitations set forth in *Terry* may be suppressed under the EXCLUSIONARY RULE.

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CROSS-REFERENCES

Search and Seizure; Stop and Frisk.

## TEST CASE

*A suit brought specifically for the establishment of an important legal right or principle.*

The term *test case* describes a case that tests the validity of a particular law. Test cases are useful because they establish legal rights or principles and thereby serve as precedent for future similar cases. Test cases save the judicial system the time and expense of conducting proceedings for each and every case that involves the same issue or issues.

To illustrate, assume that Congress passes a law that makes using a cellular phone while driving a misdemeanor punishable by up to one year in jail and a fine of $10,000. Such a law would likely be challenged by a large number of cell phone owners, all of whom are in essentially identical circumstances and all of whom have the same arguments against the law. In such a situation, attorneys representing the plaintiffs might look for a case with a sympathetic set of facts with which to challenge the law. For example, they might select a case involving a driver who was charged with violating the law when she used her cell phone to request medical assistance for a family member. Other observant law firms would postpone or otherwise delay their

own similar cases to wait for the outcome of the test case.

A test case need not concern a new law. Suppose, for example, an attorney or client is dissatisfied with the current state of a particular law and has strong arguments in favor of changing it. If the facts of the case give the attorney or client a good chance of prevailing, the case may be called a test case because the outcome would change the law for future persons in similar circumstances.

In some cases, a person may choose to violate an existing law to provoke a lawsuit, prosecution, or penalty. The person may then challenge the lawsuit, prosecution, or penalty and use the case to try and change the law through a judicial opinion. In *Druker v. Commissioner of Internal Revenue,* 697 F.2d 46 (2d Cir. 1982), *cert. den.,* 461 U.S. 957, 103 S. Ct. 2429, 77 L. Ed. 2d 1316 (1983), for example, James O. and Joan Druker, a married couple, intentionally used the lower tax rates for unmarried individuals in computing their 1975 and 1976 INCOME TAX because they believed the federal tax scheme was unconstitutional under the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT. Before the INTERNAL REVENUE SERVICE (IRS) could take action against the Drukers, the Drukers filed suit against the commissioner of the IRS. The Drukers were unsuccessful, but had they received a favorable disposition, they would have succeeded in changing the law on federal taxation of married couples.

CROSS-REFERENCES

Case Law; Stare Decisis.

## TESTACY

*The condition or state of leaving a valid will at one's death to direct the distribution of one's estate.*

## TESTAMENT

*Another name for a will.*

## TESTAMENTARY

*Relating to wills.*

An individual is said to have testamentary capacity to make a will when that person has sufficient mental ability to comprehend what he or she is doing, the nature and extent of his or her property, the natural objects (which means appropriate persons or recipients) of his or her bounty, and the interrelationships among these three concepts.

## TESTATE

*One who dies leaving a valid will, or the description of this status.*

## TESTATOR

*One who makes or has made a will; one who dies leaving a will.*

A testator is a person who makes a valid will. A will is the document through which a deceased person disposes of his property. A person who dies without having made a will is said to have died intestate.

A testator must be of sound mind when making a will. In part to ensure that a testator is of sound mind, states require that the signing of a will be witnessed by multiple persons. A testator also should be making the will without duress and free of coercion from other persons. If the testator is not acting of her own free will in consenting to the terms of the will, a court may later void all or part of it.

## TESTIFY

*To provide evidence as a witness, subject to an oath or affirmation, in order to establish a particular fact or set of facts.*

Court rules require witnesses to testify about the facts they know that are relevant to the determination of the outcome of the case. Under the law a person may not testify until he is sworn in. This requirement is usually met by a witness swearing to speak the truth. A person who does not believe in appealing to God may affirm to the court that the testimony about to be given is the truth.

A witness may testify as to facts directly observed, which is called direct evidence; facts learned indirectly, which is called CIRCUMSTANTIAL EVIDENCE; or, in the case of an expert, an opinion the expert has formed based on facts embodied in a hypothetical question. The parties to the court proceeding are free to question a witness as to the truthfulness of the testimony or the competence of the witness.

The FIFTH AMENDMENT to the U.S. Constitution gives the defendant in a criminal trial the right not to testify, so as to avoid SELF-INCRIMINATION.

In addition, the rule that a person must testify when called as a witness has several exceptions based on the existence of a special relationship between the defendant and the potential witness. Among the most important of these exceptions are confidential communications between a husband and a wife, an attorney and a client, a doctor and a patient, and a priest and penitent.

The RULES OF EVIDENCE govern what a person may testify about at a court proceeding. Though there are numerous exceptions, generally a witness may not testify about what she heard another say if that testimony is offered to prove the truth of the matter asserted. Such testimony is known as HEARSAY. For example, if the witness testifies that he heard that JOHN DOE was married and this statement is offered to prove that John Doe was married, it is hearsay and the court will strike the testimony from the record.

CROSS-REFERENCES

Attorney-Client Privilege; Marital Communications Privilege; Physician-Patient Privilege; Privileged Communication.

## TESTIMONY

*Oral evidence offered by a competent witness under oath, which is used to establish some fact or set of facts.*

Testimony is distinguishable from evidence that is acquired through the use of written sources, such as documents.

## TEXAS V. JOHNSON

In *Texas v. Johnson,* 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989), the U.S. Supreme Court was asked to review the constitutionality of a Texas statute prohibiting the desecration of certain venerated objects, including state and national flags. The defendant was convicted under the statute for burning the U.S. flag during a political demonstration. In striking down the statute, the Supreme Court ruled that flag burning is SYMBOLIC SPEECH protected by the Free Speech Clause of the FIRST AMENDMENT to the U.S. Constitution. The case splintered the nine Supreme Court justices, much as the issue of flag burning splintered the rest of the nation.

The case stemmed from an incident during the 1984 Republican National Convention in Dallas, Texas. Outside the convention center a group of demonstrators marched through the streets to protest the policies of President RONALD REAGAN. Several demonstrators distributed literature, shouted slogans, and made speeches. One demonstrator, Gregory Lee Johnson, unfurled a U.S. flag, doused it with kerosene, and set it on fire. While the flag burned, several protestors chanted: "America, the red, white, and blue, we spit on you." Several bystanders were offended by the flag burning, and one took the flag's remains home to his backyard where he buried them. No violence or altercations took place at any time during the demonstration, however.

Johnson was convicted of desecrating a venerated object in violation of Texas Penal Code section 42.09(a)(3) (1989). He was sentenced to one year in prison and fined $2,000. His conviction was affirmed by the Fifth District Court of Appeals in Dallas. Johnson's case was then reviewed by the Texas Court of Criminal Appeals, which reversed his conviction, holding that the state could not punish Johnson for burning the U.S. flag under these circumstances (*Johnson v. State,* 755 S.W.2d 92 [Tex. Crim. App. 1988]). The Free Speech Clause, the court ruled, forbids the government from establishing an orthodox symbol of national unity that is insulated from public criticism, symbolic or otherwise.

In a 5–4 decision the U.S. Supreme Court affirmed the holding of the Texas Court of Criminal Appeals. Joined by Justices THURGOOD MARSHALL, HARRY A. BLACKMUN, ANTONIN SCALIA, and ANTHONY KENNEDY, Justice WILLIAM J. BRENNAN JR. wrote the majority opinion for the Court. Chief Justice WILLIAM H. REHNQUIST, joined by Justices SANDRA DAY O'CONNOR, BYRON WHITE, and JOHN PAUL STEVENS, wrote the dissenting opinion. The majority opinion was divided into two parts.

First, the Court ruled that flag burning is expressive conduct for First Amendment purposes. The Court noted that the defendant's method of protest was not confined to the written or spoken word, which traditionally receives the most constitutional protection from governmental restraint. Nevertheless, the Court said, flag burning could not be fairly characterized as mere conduct devoid of any communicative qualities, which traditionally receives little or no protection under the Free Speech Clause. Instead, the Court observed, the defendant burned the flag as the symbolic culmination of an ardent political demonstration. "The expressive, overtly political nature of the conduct," the

Court wrote, "was both intentional and overwhelmingly apparent."

Symbolic expression has long been associated with the U.S. flag under the federal Constitution. In *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), the Supreme Court ruled that public school children cannot be compelled to salute the flag when doing so would violate their religious beliefs, which are protected by the First Amendment. In *Spence v. Washington,* 418 U.S. 405, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974), the Court ruled that the Free Speech Clause guarantees the right of individuals to attach a peace symbol to the flag in protest of U.S. foreign policy. Finally, in *Smith v. Goguen,* 415 U.S. 566, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974), the Court ruled that individuals enjoy a First Amendment right to express themselves by affixing the flag to articles of clothing, even if that means allowing certain individuals to display the flag on the seat of their pants. Each of these cases was cited by the Court in *Texas v. Johnson* to illustrate that the defendant's method of protest was just another manifestation of symbolic expression involving the U.S. flag.

Second, the Supreme Court ruled that the interests asserted by the government were insufficient to overcome the defendant's right to engage in symbolic expression. The government had argued that the Texas statute represented a legislative attempt to prevent societal disorder, which presumably would result if flag burning were permitted. But the Court determined that the defendant's actions neither resulted in disorder nor created a substantial likelihood that disorder would ensue. Although several onlookers were seriously offended by the defendant's symbolic protest, the Court said that the First Amendment is designed to protect even the most disagreeable speech unless it is likely to produce imminent lawlessness, such as a breach of the peace. Had disorder resulted on this particular occasion, the Court pointed out, the defendant could have been prosecuted under the relevant provisions of the Texas Penal Code prohibiting breach of the peace. Because no arrests were made for breaching the peace, the Court held, the government's interest in preventing disorder was not implicated in this case.

The government also argued that the Texas flag desecration statute was a justifiable means of promoting national unity. The national flag, the government contended, is the country's most visceral image of nationhood, reflecting the solidarity of the 50 states for the common good. Flag burning, by contrast, tends to cast doubt on the strength of this image, the government asserted, causing Americans to question whether the United States is really united at all. The Supreme Court agreed with the government in part, acknowledging that the flag has come to symbolize 200 years of nationhood no less than the combination of letters found in the word "America."

At the same time, the Court cautioned, the flag does not mean the same thing to everyone. For some Americans the flag stands for an imperialistic foreign policy and a legacy of CIVIL RIGHTS violations. The defendant no doubt had his own list of things symbolized by the flag. In prohibiting flag burning and other forms of desecration, the Court continued, the state of Texas was attempting to prescribe a single patriotic meaning for this national political symbol. The Court noted, however, that the government has no constitutional authority to restrict the content of political expression, whether it be written, spoken, or symbolic, without offering a compelling reason for doing so.

In this case, no compelling reasons were offered. If the flag were protected from desecration under the First Amendment, the Court reasoned, the government might seek to protect other national symbols from destruction as well, including copies of the federal Constitution and the Declaration of Independence. The Court was unwilling to allow the government to embark on this path for fear of where it might lead. The only proper remedy for the state of Texas, the Court emphasized, was to publicly encourage proper respect for the flag by honoring it through state-sponsored ceremonies such as Flag Day. In the marketplace of ideas, the Court opined, the only way to combat pernicious speech is through persuasive countervailing speech. The First Amendment requires individuals to persuade each other with sound arguments, not silence each other through governmental suppression.

In his dissenting opinion, Chief Justice Rehnquist wrote that "No other American symbol has been as universally honored as the flag." The chief justice paid tribute to the men and women of the armed forces who have sacrificed their lives to preserve the freedom symbolized by the flag. According to the chief justice, flag

burning evinces a distinct lack of respect for the memory of those who have fought and died for the cause of liberty in the United States. While burning the flag might be considered expressive conduct, Rehnquist argued, the state of Texas, as well as every other state in the Union, has a compelling interest in preserving it from destruction and desecration.

Justice Brennan tried to address some of the concerns raised by Rehnquist in a brief paragraph included in the Court's majority opinion. "We are tempted to say . . ." Brennan wrote, "that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today." The Court's decision, Brennan stressed, underscores the "principles of freedom and inclusiveness that the flag best reflects" and reaffirms "the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength."

The Court applied the same approach to a federal flag burning law as it did to the Texas statute. After the decision in *Johnson*, President GEORGE H. W. BUSH proposed a constitutional amendment banning the burning and desecration of the American flag. Congress rejected this approach and instead passed the Flag Protection Act of 1989, Pub. L. 101-131, 103 Stat. 777, believing it had addressed the concerns of the Supreme Court and that the statute did not violate the First Amendment. Within minutes after the law went into effect, Shawn Eichman burned several flags on the steps of the U.S. Capitol. That same night, Mark John Haggerty set fire to a U.S. flag in front of the U.S. Courthouse in Seattle. Eichman and Haggerty were arrested and charged with violating the act. The district courts dismissed the charges, ruling that the act violated the holding in *Johnson.*

The Supreme Court, in *United States v. Eichman,* 496 U.S. 310, 110 S. Ct. 2404, 110 L. Ed. 2d 287 (1990) struck down the Flag Protection Act on a 5–4 vote. Justice Brennan, in his majority opinion, held that Congress cannot enact a law curtailing an individual's right to symbolic political expression. The act was not content-neutral because it allowed prosecution for disrespectful burning but allowed for respectful burning. In addition, the government may not ban the expression of an idea simply because it finds the idea offensive. The asserted intent of Congress to protect the "physical integrity" was a transparent ruse; Congress had sought to ban protected symbolic expression.

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CROSS-REFERENCES

Freedom of Speech.

## TEXAS V. WHITE

In the aftermath of the U.S. CIVIL WAR, several questions about the legal status of the Southern states that had seceded from the Union remained unanswered. These questions included whether these states had, in fact, left the Union, whether the acts of the secessionist governments had legal effect after the war, and whether the imposition of military rule by the president and Congress on these states during the postwar Reconstruction meant that the states were not fully restored to the Union.

The Supreme Court addressed these issues in *Texas v. White,* 74 U.S. (7 Wall.) 700, 19 L. Ed. 227 (1869), which involved a dispute over the payment of U.S. bonds. In 1850 Texas had received $10 million in bonds from the United States in settlement of boundary claims. The bonds were payable to the state and redeemable after December 31, 1864. Texas law required the governor to endorse the bonds before they could be redeemed or transferred. When Texas seceded from the Union in 1862, however, the Confederate legislature repealed the gubernatorial endorsement requirement and established a military board to sell the bonds to finance the war effort.

In 1865 George White and John Chiles, among others, purchased the bonds in exchange for cotton and medicine. None of the bonds were endorsed by the governor. After the war the people of Texas convened and established a constitution under which they elected a governor in 1866. The convention also authorized the governor to seek recovery of the bonds. In 1867 Congress enacted the Reconstruction Acts, which created five military districts in Texas, each with a military commander. The military rule was imposed to ensure the restoration of civil peace in the Southern states and to protect the rights of the newly freed slaves.

Texas filed suit in the U.S. Supreme Court seeking recovery of the bonds sold to White and

Chiles and subsequently resold to citizens of many states. The state also asked that the United States be enjoined from paying the bonds because they had not been endorsed by the governor and were past due when presented for payment. White argued that Texas had no right to bring the suit and that the Supreme Court had no jurisdiction to hear the case because Texas's status as a state had changed due to its secession during the Civil War. Thus, federal law was not applicable at the time the bonds were transferred.

The Supreme Court rejected the bondholders' arguments. Chief Justice SALMON P. CHASE, in his majority opinion, held that the Constitution "in all its provisions, looks to an indestructible Union, composed of indestructible States." Once a territory gained admission to the Union as a state, its relationship to the Union was perpetual and indissoluble unless terminated by revolution or consent of the states. Therefore, the secession of the insurgent government from the Union was void. Texas remained a state during the Civil War, and its citizens were still citizens of the United States.

The defeat of the secessionist Texas regime left Texas without a lawful government, and its rights as a member of the Union were suspended. The Court ruled that under the Guarantee Clause of the U.S. Constitution the U.S. government had the right to provide Texas with a republican form of government. Hence, the president was authorized to establish a provisional government. This action, which had been ratified by Congress in the Reconstruction Acts, buttressed the federal government's right to oversee the post–Civil War South.

Based on these principles, the Court easily disposed of the substantive issues. The Court held that the state had retained title to the bonds. The contract made by the illegal secessionist government with White and other bondholders was void, as this government had no legal authority to make the contract. The bonds themselves were not negotiable because they were not endorsed by the governor. The repealing statute enacted by the Confederate government was void because of its illegal purpose. The bondholders who had purchased the bonds from White and Chiles could be denied payment because they had assumed a risk of bad title, as the bonds were already past due and were sold at a price substantially lower than face value.

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## THEATERS AND SHOWS

*Comprehensive terms for places where all types of entertainment events can be viewed, including films, plays, and exhibitions.*

Since these types of entertainment affect the public interest, they may properly be subjected to government regulation. The power to regulate must, however, be exercised reasonably since it restrains the free speech rights of performers, filmmakers, and distributors. A city is not permitted to prohibit all theaters or shows, for example, but it can properly set forth regulations governing fire safety and crowd control. In addition, minors, unaccompanied by a parent or guardian, can be forbidden to attend shows or performances after dark or deemed "adult entertainment." Public séances for money-making purposes are sometimes unlawful because they can be used to cheat certain individuals. Temporary shows likely to attract large crowds over a short period of time, such as outdoor rock music concerts, must be approved in advance by authorities who must supervise plans to protect the health and safety of both the people attending the show and those who reside in the area. Local regulations may require that theater buildings be constructed with flameproof materials for floors, walls, seats, curtains, and carpeting; that, in general, a certain amount of light be on even during performances; and that exits large enough to handle crowds be placed at different sides of the building and clearly marked. Theaters are ordinarily required to have ushers on duty to maintain order by supervising the movement of crowds.

### Ticket Sales

To protect the public, a number of communities have enacted statutes regulating the resale of tickets for any kind of theater or show in order to discourage speculation, which weakens the market for the tickets. Such measures also prevent scalping (the process whereby large numbers of tickets purchased at the normal price in order to create a shortage are then sold at extremely inflated prices). A state or local gov-

ernment may make it a criminal offense to sell a ticket for more than the price stamped on it.

Frequently the statutory scheme that proscribes resale of tickets for more than the printed price includes special provisions for ticket brokers, who are in the business of selling tickets for a number of theaters to members of the public. Brokers are strictly regulated to protect the public from FRAUD, EXTORTION, and exorbitant rates. A dishonest BROKER could possibly sell tickets for performances not scheduled, sell seats already sold, or scalp the tickets. For the public protection, a state or city may require anyone reselling tickets to be licensed and may revoke the license of any broker who abuses the privilege.

### Obscenity

Communities have a proper interest in placing limitations upon OBSCENITY in theaters. It is deemed appropriate to protect unsuspecting or unwilling adults from assaults of indecency and to protect children from graphic displays of PORNOGRAPHY. The U.S. Supreme Court has interpreted the Constitution to permit individuals to view obscene materials in the privacy of their own homes; however, since theaters are public places, the law may regulate indecent exhibitions, even where everyone present expected to view pornography and willingly entered. Some states, however, decline to prosecute the spectators under such circumstances. Exhibitors of lewd films in coin-operated booths in amusement arcades cannot claim any right of privacy even though patrons view the films alone in the booths.

CENSORSHIP of obscene shows is lawful; however, it is sometimes difficult to determine what is obscene. The U.S. Supreme Court has decided that works that describe or depict sexual conduct can be regulated if, when taken as a whole, they appeal to a prurient interest, portray sexual conduct in a patently offensive way, and lack serious literary, artistic, political, or scientific value. In addition, the Supreme Court has said that communities may apply their own local standards in judging shows, which has led to conflicting decisions in various courts.

A state can regulate theaters and shows in order to control pornography in a number of ways. For example, a state might require distributors or exhibitors who handle films commercially to be licensed, and may revoke the license of anyone who traffics in obscene films. Certain states and municipalities have set up a board of censors who are authorized to view films prior to their exhibition to the public. The concept of censorship by PRIOR RESTRAINT is in direct conflict with notions of free speech.

CROSS-REFERENCES

Entertainment Law; First Amendment; Freedom of Speech; Movie Rating; X Rating.

## THEFT

*A criminal act in which property belonging to another is taken without that person's consent.*

The term *theft* is sometimes used synonymously with LARCENY. *Theft,* however, is actually a broader term, encompassing many forms of deceitful taking of property, including swindling, EMBEZZLEMENT, and FALSE PRETENSES. Some states categorize all these offenses under a single statutory crime of theft.

CROSS-REFERENCES

Burglary; Robbery.

## THEODOSIAN CODE

*The legal code of the Roman Empire promulgated in* A.D. *438 by the emperor Theodosius II of the East and accepted by the emperor Valentinian III of the West.*

The Theodosian Code was designed to eliminate superfluous material and to organize the complex body of imperial constitutions that had been in effect since the time of the emperor Constantine I (306–337). It was derived primarily from two private collections: the Gregorian Code, or Codex Gregorianus, a collection of constitutions from the emperor Hadrian (117–138) down to Constantine compiled by the Roman jurist Gregorius in the fifth century; and the Hermogenian Code, or Codex Hermogenianus, a collection of the constitutions of the emperors Diocletian (284–305) and Maximian (285–305) prepared by the fifth-century jurist Hermogenes to supplement the Gregorian Code. The Theodosian Code was one of the sources of the CIVIL LAW, the system of Roman JURISPRUDENCE compiled and codified in the Corpus Juris Civilis in A.D. 528–534 under the direction of the Byzantine emperor Justinian. Until the twelfth century, when the Corpus Juris Civilis became known in the West, the Theodosian Code was the only authentic body of civil law in widespread use in Western Europe.

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CROSS-REFERENCES

Roman Law.

## THIRD AMENDMENT

The Third Amendment to the U.S. Constitution reads:

> No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Ratified in 1791, the Third Amendment to the U.S. Constitution sets forth two basic requirements. During times of peace, the military may not house its troops in private residences without the consent of the owners. During times of war, the military may not house its troops in private residences except in accordance with established legal procedure. By placing these limitations on the private quartering of combatants, the Third Amendment subordinates military authority to civilian control and safeguards against abuses that can be perpetrated by standing armies and professional soldiers.

The Third Amendment traces its roots to ENGLISH LAW. In 1689, the English Bill of Rights prohibited the maintenance of a standing army in time of peace without the consent of Parliament. Less than a century later Parliament passed the Quartering Acts of 1765 and 1774, which authorized British troops to take shelter in colonial homes by military fiat (order). During the American Revolution, British Red Coats frequently relied on this authorization, making themselves unwelcome guests at private residences throughout the colonies. By 1776 the DECLARATION OF INDEPENDENCE was assailing the king of England for quartering "large bodies of troops among us" and keeping "standing armies without the consent of our legislature."

Against this backdrop, a number of colonies enacted laws prohibiting the nonconsensual quartering of soldiers. The Delaware Declaration of Rights of 1776, for example, provided that "no soldier ought to be quartered in any house in time of peace without the consent of the owner, and in time of war in such a manner only as the legislature shall direct." Similar expressions also appeared in the Maryland Declaration of Rights of 1776, the Massachusetts Declaration of Rights of 1780, and the New Hampshire Bill of Rights of 1784. Originally drafted by JAMES MADISON in 1789, the Third Amendment embodies the spirit and intent of its colonial antecedents.

Primarily because the United States has not been regularly confronted by standing armies during its history, the Third Amendment has produced little litigation. The Supreme Court has never had occasion to decide a case based solely on the Third Amendment, though the Court has cited its protections against the quartering of soldiers as a basis for the constitutional right to privacy (GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 [1965]). In lower federal courts, Third Amendment claims typically have been rejected without much discussion.

However, in 1982, the U.S. Court of Appeals for the Second Circuit issued the seminal interpretation of the Third Amendment in *Engblom v. Carey,* 677 F.2d 957 (1982). *Engblom* raised the issue of whether the state of New York had violated the Third Amendment by housing members of the NATIONAL GUARD at the residences of two correctional officers who were living in a dormitory on the grounds of a state penitentiary. The governor had activated the guard to quell disorder at the penitentiary during a protracted labor strike.

Although the Second Circuit Court did not decide whether the Third Amendment had been violated, it made three other important rulings. First, the court ruled that under the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT, the Third Amendment applies to action taken by the state governments no less than it applies to actions by the federal government. Second, the court ruled that the two correctional officers were "owners" of their residences for the purposes of the Third Amendment, even though they were renting their dormitory room from the state of New York. Any person who lawfully possesses or controls a particular dwelling, the court said, enjoys a reasonable expectation of privacy in that dwelling that precludes the nonconsensual quartering of soldiers. Third, the court ruled that members of the National Guard are "soldiers" governed by the strictures of the Third Amendment.

No federal court has had the opportunity to reexamine these Third Amendment issues since *Engblom.*

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CROSS-REFERENCES

Bill of Rights; Incorporation Doctrine.

## THIRD DEGREE

*A colloquial term used to describe unlawful methods of coercing an individual to confess to a criminal offense by overcoming his or her free will through the use of psychological or physical violence.*

*The least serious grade of a specific crime—the grades being classified by the law according to the circumstances under which the crime is committed—for which the least punishment specified by statute will be imposed.*

## THIRD PARTY

*A generic legal term for any individual who does not have a direct connection with a legal transaction but who might be affected by it.*

A *third-party beneficiary* is an individual for whose benefit a contract is created even though that person is a stranger to both the agreement and the consideration. Such an individual can usually bring suit to enforce the contract or promise made for his or her benefit.

A *third-party action* is another name for the procedural device of IMPLEADER, which is used in a civil action by a defendant who wants to bring a third party into a lawsuit because that party will ultimately be liable for all, or part of, the damages that may be awarded to the plaintiff.

## THIRTEENTH AMENDMENT

The Thirteenth Amendment to the U.S. Constitution reads:

> *Section 1.* Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> *Section 2.* Congress shall have power to enforce this article by appropriate legislation.

The Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution were approved by Congress and ratified by the states after the U.S. CIVIL WAR. Known collectively as the Civil War Amendments, they were designed to protect individual rights. The Thirteenth Amendment forbids INVOLUNTARY SERVITUDE or SLAVERY, except where the condition is imposed on an individual as punishment for a crime.

For many decades, however, the goals of the Civil War Amendments were frustrated. Due perhaps to the waning public support for postwar Reconstruction and the nation's lack of sensitivity to individual rights, the U.S. Supreme Court severely curtailed the application of the amendments. The Supreme Court thwarted the amendments in two ways: by restrictively interpreting the substantive provisions of the amendments and by rigidly confining Congress's enforcement power.

Congress enacted a number of statutes to enforce the provisions of the Civil War Amendments, but by the end of the nineteenth century, most of those statutes had been overturned by the courts, repealed, or nullified by subsequent legislation. For example, Congress enacted the CIVIL RIGHTS ACT of 1875 (18 Stat. 336), which provided that all persons should have full and equal enjoyment of public inns, parks, theaters, and other places of amusement, regardless of race or color. Although some federal courts upheld the constitutionality of the act, many courts struck it down. These decisions were then appealed together to the U.S. Supreme Court and became known as the CIVIL RIGHTS CASES, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883). The cases involved theaters in New York and California that would not seat African Americans, a hotel in Missouri and a restaurant in Kansas that would not serve African Americans, and a train in Tennessee that would not allow an African American woman in the "ladies" car.

The Supreme Court struck down the Civil Rights Act of 1875 by an 8–1 vote, holding that Congress had exceeded its authority to enforce the Thirteenth and Fourteenth Amendments. The Court held that private discrimination against African Americans did not violate the Thirteenth Amendment's ban on slavery. Following this decision, several northern and western states began enacting their own bans on discrimination in public places. But many other states did the opposite: they began codifying racial SEGREGATION and discrimination in laws that became known as the JIM CROW LAWS.

In 1896, the U.S. Supreme Court decided the case of PLESSY V. FERGUSON, 163 U.S. 537, 16 S.

Ct. 1138, 41 L. Ed. 256, in which it upheld segregation on railroad cars. Desegregationists had hoped that the Supreme Court would acknowledge that the federal government's power to regulate interstate commerce allowed it to ban segregation on public transportation. But the Court avoided this issue, holding that this particular railway was a purely local line. In addition, the Court found that the segregation rules did not violate the Thirteenth Amendment because they did not establish a state of involuntary servitude, although they did distinguish between races. In a lone dissent, Justice JOHN MARSHALL HARLAN argued that the "arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution."

During the next six decades, the U.S. Supreme Court continued to uphold segregation of the races in schools, public accommodations, public transportation, and various other aspects of public life, so long as the treatment of the races was equal. The Court refused to hear cases arguing that the Thirteenth Amendment was violated by private covenants between whites who agreed not to sell or lease their homes to African Americans. Thus, the covenants were allowed to stand. Gradually, though, the Supreme Court's narrow view of the Civil War Amendments expanded, resulting in significant changes in civil and CRIMINAL LAW. This expansion began in 1954, when the Court overturned its decision in *Plessy v. Ferguson* and outlawed the separate-but-equal doctrine (BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 [1954]).

Although the Supreme Court had declared invalid the Civil Rights Act of 1875, it had not invalidated an earlier act, the Civil Rights Act of 1866 (42 U.S.C.A. § 1982). The Civil Rights Act of 1866 was specifically enacted to enforce the Thirteenth Amendment's ban on slavery. By 1968, the U.S. Supreme Court was relying on the act to prohibit individuals from discriminating against racial minorities in the sale or lease of housing (*Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 [1968]). The *Jones* decision was issued just weeks after Congress enacted the first federal fair housing laws.

In reaching their decision the Supreme Court first had to decide whether Congress had the power to enact the Civil Rights Act of 1866. Justice POTTER STEWART, writing for the majority, turned to the Thirteenth Amendment and observed that it was adopted to remove the "badges of slavery" and that it gave Congress power to effect that removal. Stewart wrote:

> Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. . . . [W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

The Supreme Court continues to address issues that arise under the Thirteenth Amendment. In the 1988 case of *United States v. Kozminski,* 487 U.S. 931, 108 S. Ct. 2751, 100 L. Ed. 2d 788, the Court explored the meaning of the term *involuntary servitude.* This case addressed the Thirteenth Amendment as well as a federal criminal statute (18 U.S.C.A. § 1584) that forbids involuntary servitude. At issue in the case were two mentally challenged men in poor health who had been kept laboring on a farm. The men worked seven days a week, 17 hours a day, initially for $15 per week and then for no pay at all. Their employers used various forms of physical and psychological threats and force to keep the men on the farm. The Court held that "involuntary servitude" requires more than mere psychological coercion; it also requires physical or legal coercion. But, the Court noted, the Thirteenth Amendment was designed not only to abolish slavery of African Americans, but also to prevent other forms of compulsory labor akin to that slavery.

Observing that the definition of slavery has shifted since the Civil War, courts have held that involuntary servitude does not necessarily require a black slave and a white master (*Steirer v. Bethlehem Area School District,* 789 F. Supp. 1337 [E.D. Pa. 1992]). The courts have found that religious sects may be guilty of subjecting an individual to involuntary servitude if the sect knowingly and willfully holds an individual against her will (*United States v. Lewis,* 644 F. Supp. 1391 [W.D. Mich.], *aff'd,* 840 F.2d 1276 (6th Cir. 1986). In addition, forcing a mental patient to perform nontherapeutic labor may be a form of involuntary servitude (*Weidenfeller v. Kidulis,* 380 F. Supp. 445 [E.D. Wis. 1974]).

The Thirteenth Amendment does not prohibit the government from compelling citizens

to perform certain civic duties, such as serving on a jury (*Hurtado v. United States,* 410 U.S. 578, 93 S. Ct. 1157, 35 L. Ed. 2d 508 [1973]) or participating in the military draft (*Selective Draft Law* cases, 245 U.S. 366, 38 S. Ct. 159, 62 L. Ed. 349 [1918]).

A related statute is the Anti-Peonage Act (42 U.S.C.A. § 1994). Peonage is defined as compulsory service based upon the indebtedness of the peon to the master. The courts have held that neither the Thirteenth Amendment nor the Anti-Peonage Act prevents a convicted person from being required to work on public streets as part of his sentence (*Loeb v. Jennings,* 67 S.E. 101 (Ga. 1910), *aff'd,* 219 U.S. 582, 31 S. Ct. 469, 55 L. Ed. 345 [1911]). In addition, neither of these laws prevents the government from garnishing wages or using the court's CONTEMPT power to collect overdue taxes or CHILD SUPPORT (*Beltran v. Cohen,* 303 F. Supp. 889 [N.D. Cal. 1969]; *Knight v. Knight,* 996 F.2d 1225 [9th Cir. 1993]).

The courts have also held that state workfare programs that require or encourage citizens to obtain gainful employment in order to participate in the state's public assistance programs do not constitute involuntary servitude or peonage (*Brogan v. San Mateo County,* 901 F.2d 762 [9th Cir. 1990]). In another interesting application of these laws, a federal court held that a high school program that required all students to complete 60 hours of community service in order to graduate did not constitute involuntary servitude or peonage (*Steirer v. Bethlehem Area School District,* 789 F. Supp. 1337 [E.D. Pa. 1992]).

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CROSS-REFERENCES

Civil Rights; Fifteenth Amendment; Fourteenth Amendment.

## ♦ THOMAS, CLARENCE

Associate Justice Clarence Thomas survived tense, nationally televised Senate confirmation hearings in 1991 to become the second African American in U.S. history to reach the Supreme Court.

Thomas was born June 23, 1948, in Pin Point, Georgia, a small town near Savannah. He attended Savannah's Saint Benedict the Moor, Saint Pius X High School, and Saint John Vianney Minor Seminary. When he graduated from Saint John in 1967, he was the only African American in his class. After just one year as a seminarian at Missouri's Immaculate Conception Seminary, Thomas abandoned his plans to become a priest. Instead, he enrolled in Massachusetts's Holy Cross College. After graduating in 1971, he attended Connecticut's Yale University Law School, and earned a doctor of JURISPRUDENCE degree in 1974.

Thomas married Kathy Grace Ambush in 1971. The couple had a son, Jamal Thomas, in 1973, and divorced in 1984. In 1986, he married Virginia Lamp, a political activist and a lawyer for the U.S. LABOR DEPARTMENT.

Thomas's first job out of law school was as assistant to Missouri's Republican attorney general John C. Danforth. Thomas specialized in tax and environmental issues. In 1977, he accepted a position in the law department of Monsanto Chemical Corporation. Thomas returned to public service in 1979, when Danforth was elected to the U.S. Senate. Danforth invited Thomas to work for him as a legislative aide in Washington, D.C.

Thomas's star rose quickly during the Republican administration of President RONALD REAGAN. In 1981, he was appointed assistant secretary in the civil rights division of the U.S. EDUCATION DEPARTMENT. It was here that his path crossed that of ANITA HILL, a recent Yale University Law School graduate. In 1982, when Thomas became chair of the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC), Hill also moved to the federal agency.

In 1990, Thomas became a federal judge for the Court of Appeals for the District of Columbia. In 1991, President GEORGE H. W. BUSH nominated Thomas to the U.S. Supreme Court. During the confirmation process, Hill accused Thomas of sexually harassing her while she worked for him at the EEOC. After tense hearings before the U.S. Senate, Thomas was confirmed by a vote of 52–48.

"WE DO NOT START FROM THE PREMISE THAT [STATUTORY] LANGUAGE IS IMPRECISE. INSTEAD, WE ASSUME THAT IN DRAFTING . . . LEGISLATION, CONGRESS SAID WHAT IT MEANT."
—CLARENCE THOMAS

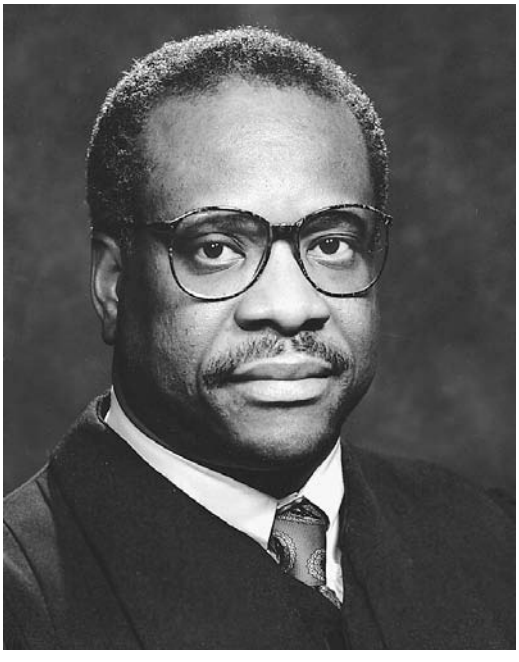

*Clarence Thomas.*
U.S. SUPREME COURT

On October 18, 1991, he was sworn in as the 106th justice of the U.S. Supreme Court.

Thomas is known as a conservative justice, voting to uphold STATES' RIGHTS and limit the powers of the federal government. He has frequently voted with Justice ANTONIN SCALIA and Chief Justice WILLIAM REHNQUIST. Legal commentators have noted that Thomas rarely asks questions during the Court's oral arguments. Thomas has not been the author of any groundbreaking decisions, but has written many dissenting opinions.

Several books have been published about the Supreme Court's only African American justice including two unauthorized biographies published in 2001. Numerous publishers sought the rights to Thomas's memoirs, and in January 2003, HarperCollins announced that it would publish Thomas's account of his life. Thomas received an advance of more than $1 million for the book, which is expected to be published in 2005.

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## ♦ THOMPSON, SMITH

Smith Thompson served as associate justice of the U.S. Supreme Court from 1824 until his death in 1843. A prominent member of the New York bar and chief justice of the New York Supreme Court, Thompson also served as secretary of the navy during President JAMES MONROE's administration.

Thompson was born on January 17, 1768, in New York City, New York. After graduating from Princeton University in 1788, he studied law with Gilbert Livingston, a member of a politically powerful family, and JAMES KENT, a towering figure in U.S. JURISPRUDENCE. Thompson was admitted to the New York bar in 1792. When Kent left the law firm in 1795, Thompson became Livingston's partner and eventually married Livingston's daughter Sarah.

Thompson was elected to the New York legislature in 1800 and then used Livingston's political connections to obtain an appointment to

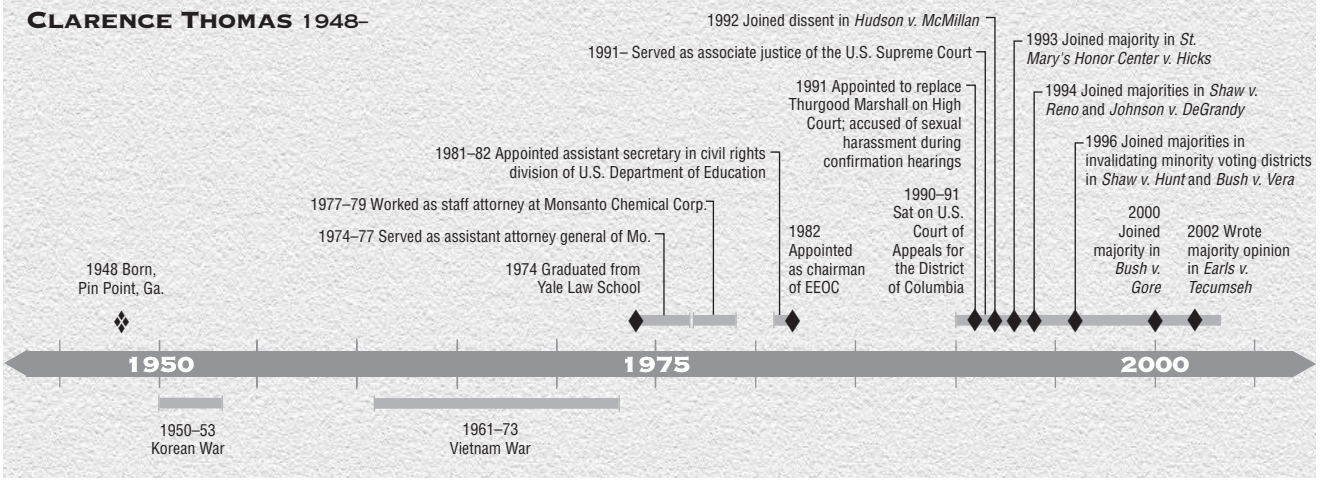

*Smith Thompson (etching by Albert Rosenthal).* CORBIS

the state supreme court in 1802. He was promoted to chief justice in 1814, in which position he presided until 1818.

President Monroe appointed Thompson secretary of the navy in 1819. As head of the department, Thompson earned Monroe's trust and respect. Although he had presidential ambitions, Thompson agreed to accept Monroe's offer of a seat on the U.S. Supreme Court, joining the Court in 1824. In 1828, however, he returned to politics, running unsuccessfully for the governorship of New York even though he did not resign from the bench.

As a justice, Thompson believed that the states should be allowed to regulate commerce unless their laws directly conflicted with federal law. This position put him in conflict with Chief Justice JOHN MARSHALL and Justice JOSEPH STORY, who interpreted the Constitution's COMMERCE CLAUSE as giving the federal government the exclusive right to regulate interstate commerce. Thompson wrote the concurring opinion in the landmark case of *Ogden v. Saunders,* 25 U.S. (12 Wheat.) 213, 6 L. Ed. 606 (1827), which held that any law passed after the execution of a contract, in this case a New York insolvency statute, was part of the contract. In another important case, *Kendall v. United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524, 9 L. Ed. 1181 (1838), Thompson supported the right of federal courts to issue a writ of MANDAMUS to compel a cabinet officer to perform nondiscretionary, ministerial obligations.

Thompson died on December 18, 1843, in Poughkeepsie, New York.

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## ♦ THOREAU, HENRY DAVID

Henry David Thoreau was a nineteenth-century philosopher and writer who denounced materialistic modes of living and encouraged people to act according to their own beliefs of right and wrong, even if doing so required breaking the law. His writings, especially his call for nonviolent resistance to government injustice, have inspired many later reformers.

Thoreau was born on July 12, 1817, in Concord, Massachusetts. He graduated from Harvard College in 1837. During his college years, he was greatly influenced by Ralph Waldo Emerson, the

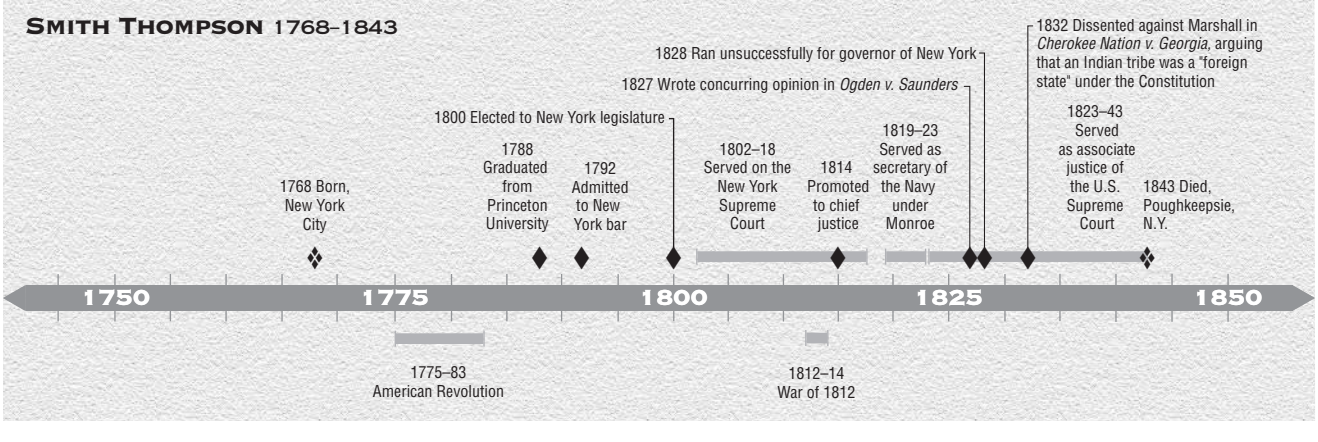

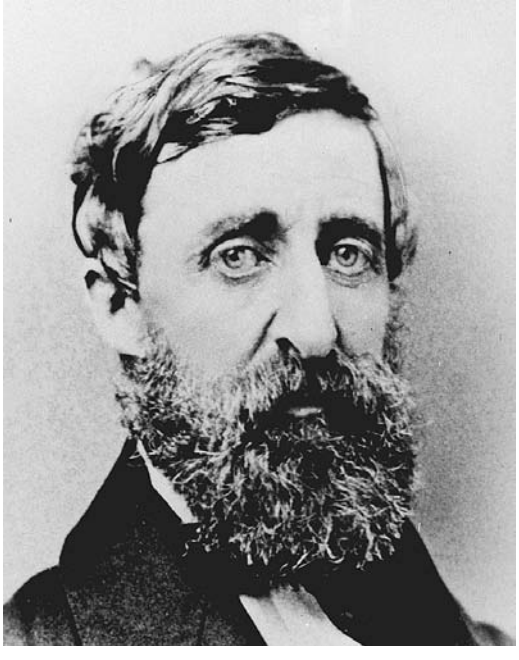

*Henry David Thoreau.*
LIBRARY OF CONGRESS

leader of the transcendental movement. Thoreau became a personal friend of the eminent author and spent several years as Emerson's houseguest. Their long friendship was a significant influence on Thoreau's writing and philosophy.

Through Emerson, Thoreau met many other brilliant thinkers and writers of the time, including Margaret Fuller, Nathaniel Hawthorne, and Amos Bronson Alcott. This group of transcendentalists supported a plain and simple lifestyle spent searching for the truth beyond one's taught beliefs. Unlike some of the other transcendentalists, Thoreau lived out many of their beliefs. Thoreau's first work, *A Week on the Concord and Merrimack Rivers,* was published in 1849 and is considered the definitive statement of his transcendalist beliefs.

"I WISH TO LIVE DELIBERATELY, TO FRONT ONLY THE ESSENTIAL FACTS OF LIFE, AND SEE IF I COULD LEARN WHAT IT HAD TO TEACH."
—HENRY DAVID THOREAU

For several years in the 1830s and 1840s, Thoreau refused to pay **POLL TAXES** to the government as a way of protesting **SLAVERY**, which the government permitted. The poll tax was levied on all men over the age of twenty. Thoreau was finally jailed overnight for this refusal in 1841 but was bailed out by his relatives who paid his back taxes for him.

From July 4, 1845, to September 6, 1847, Thoreau lived alone at Walden Pond, Massachusetts, on a plot of land owned by Emerson. There Thoreau devoted his time to studying nature and writing. While at Walden Pond, he wrote *Walden,* a collection of essays about nature and human nature that was published in 1854.

Later Thoreau became outraged by the Mexican War, which he believed was caused by greed for Mexican land, and by the **FUGITIVE SLAVE ACT**, which helped slave owners recover escaped slaves. As a result of this outrage, Thoreau wrote an essay that was published in 1849 under the title *Civil Disobedience* (Thoreau's original title was *Resistance to Civil Government*). The essay contended that each person owes a greater duty to his own conscience and belief system than is owed to the government. Thus, Thoreau encouraged people to refuse to obey laws that they believe are unjust.

*Civil Disobedience* also supported theories of **ANARCHY** based upon Thoreau's insistence that people misuse government. He argued that the Mexican War was started by just a few people who used the U.S. government as a tool. Thoreau maintained that because the U.S. system of government was slow to correct itself through the will of the majority, people should immediately withdraw their support from government and act according to their beliefs of what is right.

Thoreau did not approve of violent resistance to government, however. He advocated peaceful or passive resistance. In 1859, when **JOHN BROWN** staged a violent revolt against

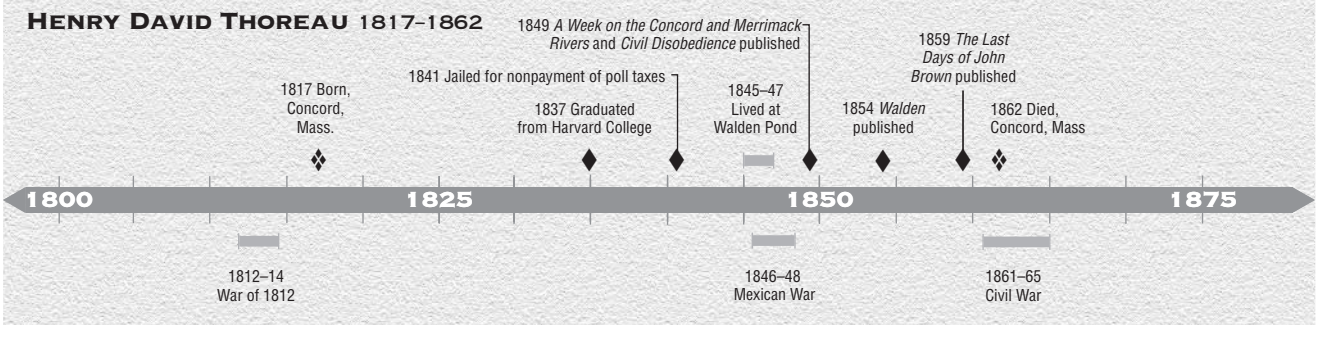

slavery, Thoreau believed that Brown was right in acting according to his beliefs even though his actions were against the law. Although Thoreau did not admire the violent method that Brown used in trying to stop slavery, Thoreau did admire Brown's commitment to doing what he believed was right. In 1859 Thoreau published *The Last Days of John Brown,* an essay describing how Brown's actions convinced many Northerners that slavery must be totally abolished.

Thoreau's writings and philosophy greatly influenced many important world figures. For example, the reformer Leo Tolstoy of Russia, MOHANDAS GANDHI of India, MARTIN LUTHER KING JR., and other leaders of the U.S. CIVIL RIGHTS MOVEMENT were inspired by Thoreau's ideas. Thoreau died of tuberculosis on May 6, 1862, in Concord, Massachusetts.

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Anarchism.

## ♦ THORNBURGH, RICHARD LEWIS

Richard Lewis Thornburgh served as U.S. attorney general from 1988 to 1991, working for the Reagan and Bush administrations. A former governor of Pennsylvania, Thornburgh put a strong emphasis on criminal enforcement during his tenure and moved away from the ideological social issues favored by his predecessor, EDWIN MEESE III.

Thornburgh was born on July 16, 1932, in Carnegie, Pennsylvania. He graduated from Yale University with an engineering degree in 1954 and earned a law degree from the University of Pittsburgh in 1957. After his admission to the Pennsylvania bar in 1958, he joined the Pittsburgh law firm of Kirkpatrick, Lockhart, Johnson, and Hutchinson.

In 1969 President RICHARD M. NIXON appointed Thornburgh U.S. attorney for western Pennsylvania. He served as U.S. attorney until 1975, when he joined the JUSTICE DEPARTMENT as an assistant attorney general. As head of the department's criminal division, Thornburgh was instrumental in setting up the public integrity section that investigated alleged improprieties by department personnel.

After leaving office in 1977, Thornburgh returned to the Kirkpatrick law firm in Pittsburgh, but he was intent on beginning a political career. In 1978 he was elected governor of Pennsylvania, an office he held until 1987. In his early days as governor, Thornburgh was thrust into the national limelight. The nuclear accident at the Three Mile Island NUCLEAR POWER plant in the spring of 1979 set off a wave of panic in Pennsylvania. Thornburgh was credited with bringing calm to the state.

"THIS COLLECTIVE AMNESIA THAT SEEMS TO AFFECT THE WHITE HOUSE STAFF WOULD CONCERN ME IF I WERE THE PRESIDENT."
—RICHARD THORNBURGH

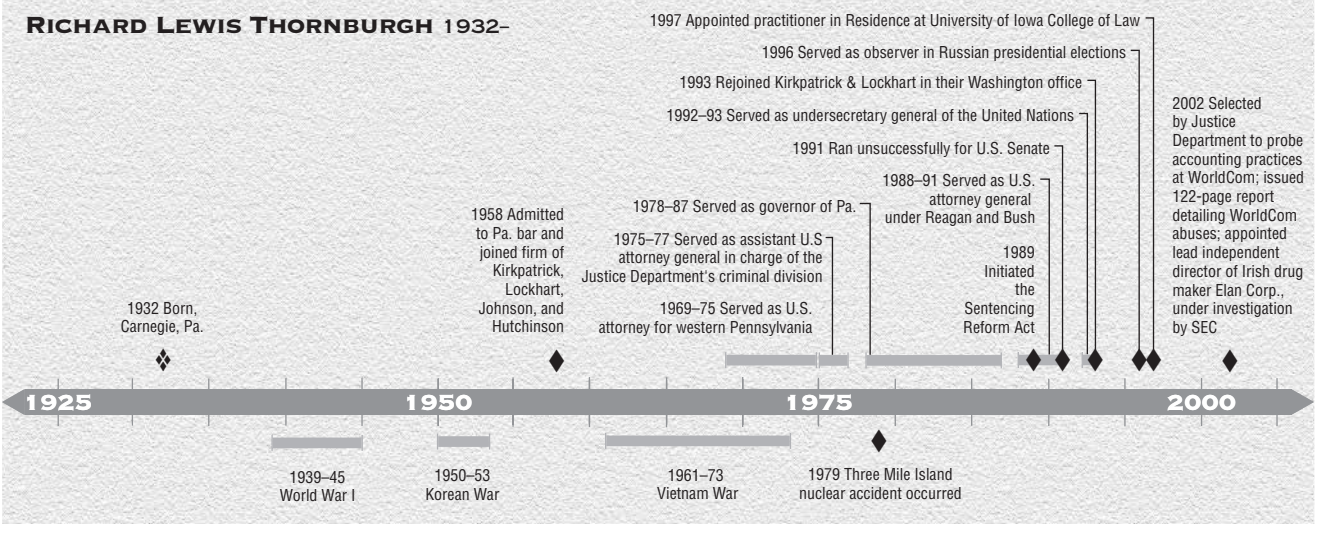

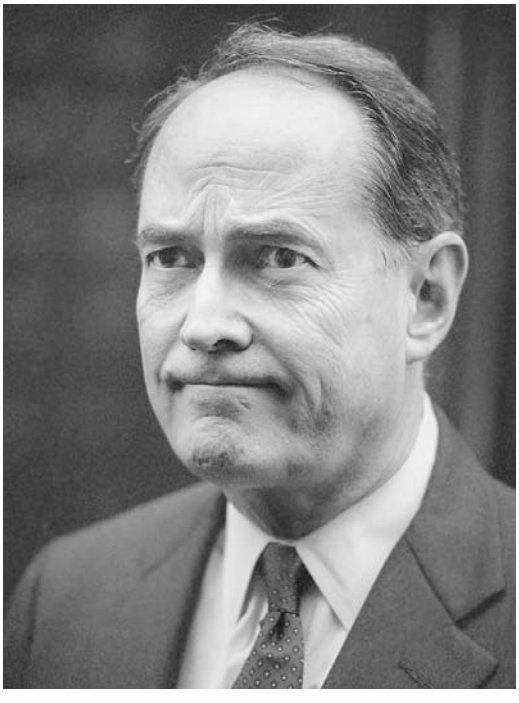

*Richard L. Thornburgh.*
UPI/CORBIS-BETTMANN

In July 1988 President RONALD REAGAN appointed Thornburgh U.S. attorney general, succeeding Edwin Meese. Meese had become a controversial figure in the Reagan administration. He had stressed social issues such as ABORTION and PORNOGRAPHY and had pushed for an end to AFFIRMATIVE ACTION. Meese also had come under scrutiny for possible criminal conflict-of-interest charges. He resigned only after an INDEPENDENT COUNSEL declined to file criminal charges.

Taking office under these circumstances, Thornburgh sought to restore integrity and credibility to the department. During the last months of the Reagan administration, he moved to revitalize management of the department, refocus its energies on prosecuting crimes involving guns or drugs, and aggressively pursue white-collar criminals.

His early months in office convinced President GEORGE H. W. BUSH to reappoint Thornburgh attorney general. His tenure in the Bush administration drew criticism from some conservative groups for his prosecution of environmental crimes and for his strong enforcement of CIVIL RIGHTS protection for DISABLED PERSONS. Within the department, his management style provoked criticism. Career department officials called him aloof and alleged that he employed political partisanship in the administration of justice.

Thornburgh resigned as attorney general in July 1991 to run for the U.S. Senate from Pennsylvania in a special election. Harris Wofford, his Democratic opponent, had been appointed senator to fill the seat until the special election. At the beginning of the campaign, Thornburgh enjoyed a 40-point lead in the opinion polls. Wofford, however, argued that the country needed a national HEALTH INSURANCE system and reminded voters of the economy, which was in recession. Thornburgh's lead crumbled. Wofford easily defeated him, earning 55 percent of the vote to Thornburgh's 45 percent.

In 1992 President Bush appointed Thornburgh undersecretary general of the UNITED NATIONS, a position he held until 1993. Thornburgh rejoined the Kirkpatrick law firm's Washington, D.C., office and served as a legal commentator on several television network news and talk shows. His autobiography was published in 2003.

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## THREATS

*Spoken or written words tending to intimidate or menace others.*

Statutes in a number of jurisdictions prohibit the use of threats and UNLAWFUL COMMUNICATIONS by any person. Some of the more common types of threats forbidden by law are those made with an intent to obtain a pecuniary advantage or to compel a person to act against his or her will. In all states, it is an offense to threaten to (1) use a deadly weapon on another person; (2) injure another's person or property; or (3) injure another's reputation.

It is a federal offense to threaten to harm the president or to use the mail to transmit threatening communications. These laws must be balanced against FIRST AMENDMENT rights.

Unlawful communications include, among other things, the use of threats to prevent another from engaging in a lawful occupation and writing libelous letters or letters that tend to provoke a breach of the peace. The use of intimidation for purposes of collecting an unpaid

debt has been held to constitute an unlawful communication but might be prosecuted as EXTORTION.

A mere threat that does not cause any harm is generally not actionable. When combined with apparently imminent bodily harm, however, a threat is an assault for which the offender might be subject to civil or criminal liability. In most jurisdictions, a plaintiff can recover damages for the intentional infliction of severe mental or emotional suffering caused by threats or unlawful communications.

In those jurisdictions that have statutes prohibiting unlawful communications, such as letters that tend to provoke a breach of the peace, a violation of the statute gives rise to a civil action for damages.

## THREE STRIKES LAWS

*Criminal statutes that mandate increased sentences for repeat offenders, usually after three serious crimes.*

Beginning in the early 1990s, states began to enact mandatory sentencing laws for repeat criminal offenders. These statutes came to be known as "three strikes laws," because they were invoked when offenders committed their third offense. By 2003 over half the states and the federal government had enacted three strikes laws. The belief behind the laws was that getting career criminals off the streets was good public policy. However, the laws have their critics, who charge that sentences are often disproportionate to the crimes committed and that incarceration of three strikes inmates for 25 years to life would drive up correctional costs. Nevertheless, the U.S. Supreme Court has upheld three strikes laws and has rejected the argument that they amount to CRUEL AND UNUSUAL PUNISHMENT.

The state of Washington passed the first three strikes law in 1993. Anyone convicted of three separate violent felonies must be sentenced to life in prison with no chance for PAROLE. The state of California followed, in 1994, by enacting a three strikes law that mandates a sentence of 25 years to life for a third felony conviction. Unlike Washington, the California law counts nonviolent felonies, such as BURGLARY and theft, as "strike" offenses. The popularity of the three strikes law in California has been pronounced. By 2001 over 50,000 criminals had been sentenced under the new law, far more than any other state, with almost one-quarter of the inmates facing a minimum of 25 years in prison. Not surprisingly, California's law has drawn the most attention in the debate over three strikes statutes.

The California law originally gave judges no discretion in setting prison terms for three strikes offenders. However, the California Supreme Court ruled, in 1996, that judges, in the interest of justice, could ignore prior convictions in determining whether an offender qualified for a three strikes sentence. Prosecutors have the greatest discretion; they may decide whether to count certain crimes as strikes when they file their criminal complaint. Critics have charged that this system introduces the worst of both worlds: mandatory sentences for those charged under the law and unequal application of the law. The disparity in prosecutorial use of the Californian law has meant that the law is rarely used in San Francisco but is used heavily in other parts of the state.

Supporters of three strikes laws have argued that the plummeting crime rates of the 1990s were due in part to this tough new sentencing scheme. They especially rely on California statistics, which cite the fact that approximately 1,200 offenders are sentenced per year in California under the three strikes law. They call the law a success since offenders are off the street for at least 25 years and are not able to harm the public again.

The three strikes sentencing of offenders who have committed a number of violent crimes has rarely drawn much criticism. Concerns about the fairness and proportionality of the law have been raised when an offender is sent to prison for 25 years for shoplifting or some other minor property crime. Critics note that a 25-year sentence for a third strike shoplifting offense is the same sentence meted out to those who commit murder. Long sentences for relatively minor offenses, they contend, amounts to cruel and unusual punishment, which is barred by the EIGHTH AMENDMENT. By the late 1990s a number of appeals had been raised in state and federal courts based on the disproportionality argument.

The case of Leandro Andrade became a focal point in the argument over the constitutionality of California's three strikes law. Andrade was convicted of two counts of petty theft for shoplifting a total of nine videotapes from two Kmart stores. The value of the tapes stolen amounted to $153.54. Under California law, a

# Have Three-Strikes Laws Worked to Reduce Recidivism?

Most state and federal laws impose stiffer sentences for repeat offenders, but they do not impose punishments as harsh as "Three Strikes and You're Out" (TSAYO) laws. TSAYO laws mandate that a heavy sentence be imposed on persons who are convicted of a third felony. The minimum prison sentence required by such laws is typically between 25 years and life. The federal government and more than two dozen states have passed TSAYO legislation since 1992.

TSAYO legislation is designed to protect society from dangerous individuals who show a pattern of lawlessness, incapacitate repeat felony offenders by keeping them behind bars, and deter others from committing similar criminal offenses. National criminal justice statistics show that the number of violent crimes has precipitously dropped over the last eight years. TSAYO legislation is not without its critics, however. In 1998 several studies called into doubt the effectiveness of three-strikes laws. Constitutional challenges have been leveled against TSAYO laws at both the state and federal levels, but courts and legislatures have resisted overturning them.

In 1994 Congress passed the **VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT** (VCCLEA). Public Law 103–322, September 13, 1994, 108 Stat 1796. It imposes a mandatory sentence of life imprisonment without **PAROLE** on defendants who are convicted of a serious violent federal felony when they have two or more prior serious violent felonies or one or more serious violent felony convictions and one or more serious drug offense convictions. The first two convictions may be for state or federal offenses, but the third conviction must be for a federal offense before the VCCLEA three-strikes provision applies.

VCCLEA defines "serious violent felony" to include murder, voluntary **MANSLAUGHTER**, assault with intent to commit murder or rape, aggravated **SEXUAL ABUSE**, **KIDNAPPING**, aircraft **PIRACY**, **ROBBERY**, **CARJACKING**, **EXTORTION**, **ARSON**, and firearms use or possession, among others. 18 U.S.C.A. 3559. Offenses committed at the state level need not be deemed a felony by the state to trigger the VCCLEA three-strikes provision as long as the state offense is "seriously violent," meaning the offense is similar to those specified by the VCCLEA. "Serious drug offense" is defined by the VCCLEA as knowingly or intentionally manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense enumerated controlled substances. Drug offenses committed at the state level are considered "serious" under VCCLEA if they would be punishable by the federal controlled substances laws.

The impetus behind TSAYO laws came from a string of highly publicized cases in which a crime victim was viciously attacked by a repeat offender on parole. One of the most publicized cases was that of 12-year-old Polly Klaas from California. In 1993 she was kidnapped, molested, and murdered by Richard Allen Davis, a **SEX OFFENDER** with a long history of criminal convictions. Polly's father, Marc, appeared on a number of national television programs to attack the criminal justice system's lenient treatment of repeat felony offenders and to advocate the enactment of three-strikes laws. Relatives of other victims, concerned citizens, prosecutors, and politicians followed suit.

Washington state's legislature was the first to respond, passing TSAYO legislation in 1993. West's RCWA 9.94A.392 et seq. The law mandates life in prison after conviction on any three of about 40 felonies, ranging from murder to robbery and vehicular assault. Defendants convicted under this law are not eligible for parole, nor may their sentence be suspended or shortened. California and 11 other states passed similar laws in 1994. Nine more states were added to the list a year later. By the year 2000 more than 24 states had adopted TSAYO laws of their own. Georgia took matters a step further, enacting a "Two Strikes and You're Out" law. Ga. Code Ann. S 17–10–6.1(b). Felons convicted of the state's most serious crimes only twice are sentenced to

petty theft charge is usually a misdemeanor with a penalty of up to six months in county jail and a fine of up to $1,000. However, the prosecutor had the discretion to elevate the charges to felony level offenses. Andrade, who was a heroin addict, had a string of burglary, theft, and drug convictions on his criminal record. The prosecutor charged him with two counts of felony theft and a jury convicted Andrade on both counts.

These separate convictions, along with a prior first-degree burglary conviction, triggered the three strikes law. Because the two thefts were treated as separate incidents, the three strikes law was applied to both charges, leading to two consecutive terms of 25 years to life in prison. Andrade could not apply for parole until he served 50 years in prison, at which time he would be 87 years old. The California courts upheld this

life in prison without parole. Known as "the seven deadly sins," these crimes are murder, armed robbery, rape, kidnapping, aggravated **SODOMY**, aggravated **CHILD MOLESTATION**, and aggravated sexual **BATTERY**.

Despite their popularity in the early 1990s, TSAYO laws have come under severe attack in the late 1990s. In 1998 several studies were released that questioned the effectiveness of such laws. Four studies were largely responsible for driving the debate: one by the Rand Institute, one by the National Institute of Justice, one by the Justice Policy Institute, and one by the Campaign for Effective Crime Policy, a nonpartisan group comprised of wardens, prosecutors, and law enforcement officials.

The studies revealed two kinds of results. In most states, little had changed. Washington had convicted 66 people under its TSAYO law. Arkansas had 12 convictions and Alaska, Connecticut, Louisiana, Maryland, North Carolina, Pennsylvania, Vermont, and New Jersey had no more than six. Wisconsin had invoked its law only once, while no one in Utah, Virginia, Montana, Tennessee, New Mexico, or Colorado had ever been prosecuted for a third-strike offense. Instead, the states that let their TSAYO laws lay idle were still seeking harsh punishments for dangerous recidivists, but under repeat-offender statutes that had been on the books for decades. In other words, for these states the TSAYO laws represented a symbolic measure that neither improved nor diminished a prosecutor's ability to keep dangerous recidivists off the streets. Similarly, the studies showed that only 35 offenders had been convicted of a third strike at the federal level through 1997.

The results were vastly different in California and Georgia. California had imprisoned more than 4,800 criminals for 25 years to life on third strikes; the state also identified more than 40,000 second-strike offenders who would await such a sentence were they subsequently convicted for any one of roughly 500 crimes. Georgia had sent approximately 1,000 defendants to prison for life without parole under its two strikes law and identified another 1,000 offenders eligible for that fate were they to subsequently commit one of the "seven deadly sins."

These studies did more than arm opponents of TSAYO laws with evidence of disparate results. They suggested that the laws had been enforced more often against minority offenders than against white offenders. In California only 1,237 of the more than 4,800 defendants sentenced for a third strike were white; 2,138 were African American, 1,262 were Latino, and 201 were classified as "other." The studies further indicated that these minority offenders were mostly being punished for nonviolent third strikes. Statistics demonstrated that more than twice as many defendants' third-strike offenses were for drug possession or petty theft as for murder, rape, or kidnapping. Some of these nonviolent third strikes included seemingly innocuous offenses, such as shoplifting, stealing packages of steak, and drinking alcohol at a liquor store without paying for it.

Proponents of TSAYO laws have not been dissuaded by these results. Prosecutors say that these laws remain a vital tool for them to hang over the heads of first- and second-time offenders. They contend that seemingly "harmless" third-strike offenses are often isolated from the first and second strikes that place the defendant in a less sympathetic context. For example, an individual who was prosecuted for a third strike after he stole a bottle of vitamins had eight prior convictions, one of which was for robbery. Another individual who was prosecuted for bigamy under California's TSAYO law had prior convictions for armed robbery. Prosecutors also point to statistics reflecting a dramatic decline in violent crime over the last eight years as conclusive proof of TSAYO laws' effectiveness.

Opponents of TSAYO laws acknowledge that prison populations have drastically increased in some states due in part to incarceration of third-strike offenders, but they question whether this result is entirely good. Reports indicate that prisons in California and Georgia are severely overcrowded. The Georgia Department of Corrections estimates that it needs nearly 14,000 more beds and a budget increase of 25 percent to accommodate the overflowing prison population. In the meantime, state prisons have erected tents as cell blocks, moved bunks into common areas, and housed three inmates in cells designed for two.

California officials have predicted that its prisons will experience a shortage of 70,000 beds from convictions under the state's TSAYO laws. They also predict that the number of inmates age 50 to 64 will increase 80 percent by 2013, and the number of prisoners 65 and older will increase by 144 percent. They agonize over booming medical costs spent to treat

*(continued)*

sentence as proportionate. The Ninth Circuit Court of Appeals ruled that Andrade's sentence was unconstitutional because it was grossly disproportionate. Although the California law was unconstitutional as applied, the Ninth Circuit refused to hold that the "three strikes and you're out" law was generally unconstitutional.

The Supreme Court, in a 5–4 decision, overturned the Ninth Circuit decision and upheld the constitutionality of the three strikes law as applied to Andrade (*Lockyer v. Andrade,* 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 [2003]. The Court held that federal courts must give due deference to state court sentencing decisions. In a prior ruling the Court had stated that legislatures must be given "broad discretion to fashion a sentence that fits within the scope of the proportionality principle." The "precise" contours

## HAVE THREE-STRIKES LAWS WORKED TO REDUCE RECIDIVISM? (CONTINUED)

geriatric prisoners and worry that the money being spent on them comes from funds designated for schools, roads, and neighborhood programs. According to one study, California spends about $1,000 on medical expenses for the average inmate, but more than $6,000 a year for inmates older than 50.

While these figures have caused concern among even the staunchest proponents of three-strikes legislation, no TSAYO law has been repealed at the state or federal level. Even legislative proposals to study the law's impact have been rejected in California, being vetoed first by a Republican governor and then by a Democratic one. The fact that California's TSAYO law is regularly used by state prosecutors and universally hated by defendants, the governors said, speaks for itself.

The U.S. Court of Appeals for the Ninth Circuit became the first state or federal court to strike down a TSAYO law in *Andrade v. Attorney General of State of California*, 270 F.3d 743 (9th Cir. 2001). The defendant in that case, Leandro Andrade, received a prison sentence of 50 years to life for petty theft of $154 worth of children's videotapes from two Kmart stores. Petty theft is a misdemeanor in California, punishable by no more than six months in jail. However, California law provides that petty theft by a person with a prior conviction for a property crime is a "wobbler" offense, meaning the crime can be prosecuted as either a misdemeanor or a felony. Andrade had no prior violent offenses, but because he had previously committed three burglaries in one day, his two instances of shoplifting were prosecuted as felonies, and the trial court imposed an indeterminate life sentence with no possibility of parole until after he had served 50 years of his sentence. Andrade was 37-years-old when he started serving his sentence.

"The punishment raised an inference of gross disproportionality when compared to defendant's crime," the Ninth Circuit wrote. Even in light of the defendant's six prior nonviolent felony and misdemeanor convictions, the sentence was substantially more severe than sentences for most violent crimes in California and was unusual even when compared to applications of TSAYO laws applied to violent felons in other states, the Ninth Circuit concluded. The Ninth Circuit also concluded that the California Supreme Court, in upholding the defendant's sentence, failed to give proper consideration to the U.S. Supreme Court's decision in *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), a case holding that a life sentence under a South Dakota recidivist law for writing a bad check amounted to **CRUEL AND UNUSUAL PUNISHMENT**.

The state of California appealed, and the U.S. Supreme Court reversed. *Lockyer v. Andrade*, ___ U.S. ___ 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). Writing for a five-person majority, Justice **SANDRA DAY O'CONNOR** noted that the Ninth Circuit overturned the California Supreme Court's decision pursuant to a **HABEAS CORPUS** petition. However, O'Connor wrote, 28 U.S.C.A. § 2254(d)(1) only gives federal courts authority to overturn state court decisions in habeas proceedings if the state court decision was contrary to or an unreasonable application of clearly established federal law.

Although O'Connor agreed that *Solem* and *Lockyer* were similar cases, she emphasized that a decision may only be deemed "contrary to clearly established precedent" if the state court applied a rule that contradicts the governing law set forth in the Supreme Court's cases or confronts facts that are materially indistinguishable from a Supreme Court decision and the state court nevertheless arrives at a different result. This did not happen here, O'Connor said. The defendant in *Solem* was sentenced to life in prison without the possibility of parole, while the defendant in *Lockyer* became eligible for parole after serving 50 years of his sentence. This fact made the two cases materially different, O'Connor said, and justified the California Supreme Court's decision upholding Andrade's sentence.

**CROSS-REFERENCES**

Cruel and Unusual Punishment; Determinate Sentence; Recidivism; Parole.

of this principle were "unclear," which meant that state courts had more latitude to uphold sentences such as Andrade's. The Court further held that Andrade's sentence was not grossly disproportionate.

Justice **DAVID SOUTER**, in a dissenting opinion, sided with the Ninth Circuit's views. A prior Supreme Court decision had voided a life sentence given to a repeat offender for committing a theft valued at $150. Justice Souter argued that Andrade's criminal background, coupled with the petty thefts, was strikingly similar. Though Andrade would be eligible for parole at age 87, it constituted "the practical equivalence of a life sentence without parole." Souter was also troubled by the state's use of the two minor theft charges, just weeks apart, as the second and third strikes. In his view, "Andrade did not somehow become twice as dangerous to society when he stole the second handful of videotapes." A 25-

year sentence would have been reasonable but 50 years was disproportionate.

Though critics of the law were disappointed by the decision, they argued that the economic cost of incarcerating three strikes inmates may ultimately lead to the repeal of such laws. In California it will cost an estimated $700 million per year to incarcerate these offenders, and over a billion dollars to construct new prisons to house the escalating number of inmates. As the state contends with caring for an aging prison population it will be forced to decide whether it wants to allocate limited resources to maintain the three strikes law.

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CROSS-REFERENCES

Determinate Sentence; Prisoners' Rights.

## THRIFT SUPERVISION, OFFICE OF

See OFFICE OF THRIFT SUPERVISION.

## ♦ THURMOND, JAMES STROM

James Strom Thurmond began serving as U.S. senator from South Carolina in 1954; when he died at the age of one hundred in 2003, he was the oldest and longest-serving senator in U.S. history. An outspoken opponent of federal CIVIL RIGHTS legislation for most of his career, Thurmond softened his views in the 1970s. He remained a controversial political figure, however, until the end.

Thurmond was born on December 5, 1902, in Edgefield, South Carolina. Thurmond's father, John William Thurmond, was an attorney who served as county prosecutor and later as U.S. district attorney. He was also a powerful political leader in Edgefield County. Strom, as he preferred to be called, graduated from Clemson University in 1923. He was a teacher and athletic coach in several South Carolina school districts before becoming superintendent of education for Edgefield County in 1929.

While serving as superintendent, Thurmond studied law under his father, who had become a state judge. In 1930, Thurmond was admitted to the South Carolina bar. He became a full-time attorney in 1933 and soon became county attorney. It was then that Thurmond decided to pursue a political career. He was elected as a state senator in 1933, serving until 1938, when he gave up his office to accept an appointment as a state circuit judge. He took a leave of absence in 1942 to serve with the 82nd Airborne Division during WORLD WAR II.

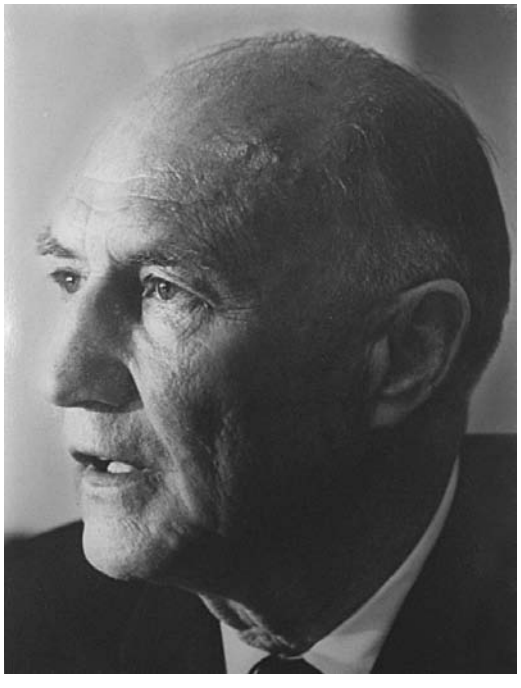

*Strom Thurmond.*
LIBRARY OF CONGRESS

On his return to South Carolina, Thurmond resumed his political career. He was elected governor in 1947, serving until 1951. Thurmond believed, as most southern Democrats did, that state-enforced racial SEGREGATION was legitimate public policy and that the federal government had no authority to end it. At the 1948 national DEMOCRATIC PARTY convention, southern Democrats on the platform committee removed President HARRY S. TRUMAN's proposals for civil rights legislation. When the convention, under the leadership of HUBERT H. HUMPHREY, restored Truman's proposals, many southern Democrats, including Thurmond, walked out of the convention and started a splinter party, the States' Rights Democratic party. It was popularly known as the Dixiecrat party.

The Dixiecrats nominated Thurmond to run for president in the 1948 election. President Truman won the election, winning 28. Republican nominee THOMAS E. DEWEY won 16 states,

"I DON'T KNOW HOW I GOT SUCH A REPUTATION AS A SEGREGATIONIST. . . . I GUESS IT WAS BECAUSE WHEN I WAS THE GOVERNOR OF SOUTH CAROLINA IT WAS MY DUTY TO UPHOLD THE LAW AND THE LAW REQUIRED SEGREGATION, SO I WAS JUST DOING MY DUTY."
—STROM THURMOND

and Thurmond won four southern states, the third largest independent electoral vote in U.S. history. Thurmond left the governorship in 1951 and resumed the practice of law in Aiken, South Carolina. In 1954, he was elected to the U.S. Senate as a write-in candidate, the first person ever to be elected to the Senate or any other major office by this method. He took the unusual step of resigning in April 1956 to fulfill a 1954 campaign promise that he would allow a REFERENDUM on his service in two years. He was reelected in November 1956 and again in 1960, 1966, 1972, 1978, 1984, 1990, and 1996.

During the 1950s and 1960s, Thurmond was a leading opponent of federal civil rights legislation and social WELFARE programs. His opposition to the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000a et seq.) and President Lyndon B. Johnson's policies led Thurmond in 1964 to switch to the REPUBLICAN PARTY. Changing political parties is always unusual for political leaders, but it was especially so for Thurmond. The Democratic Party dominated the southern states, making them virtually one-party states. Thurmond's defection to the Republican Party was a significant act, signaling a major shift in political power in the South that would accelerate in the 1970s and 1980s.

For much of his Senate career, Thurmond served on the Armed Services Committee, the Judiciary Committee, and the Veterans' Affairs Committee. From 1981 to 1987 he was chair of the Judiciary Committee, where he helped President RONALD REAGAN secure Senate confirmation of his judicial appointments. During this period he was also president pro tempore of the Senate. The president pro tempore presides over the Senate when the vice president is absent. From 1988 to 1996 Thurmond chaired the Armed Services Committee.

Thurmond served as adjunct professor of political science at Clemson and distinguished lecturer at its Strom Thurmond Institute. His name has been attached to many public buildings, highways, and other public works in South Carolina.

After Thurmond's 1996 reelection, he announced he would not run again but would finish out his term. In 1997, at age 94, Thurmond, who had served in office during the terms of ten U.S. presidents, became the longest-serving senator in U.S. history. In 2001, Thurmond, who had been hospitalized several times, took up permanent residence at Washington's Walter Reed Army Medical Center. In 2002, South Carolinians elected Republican Lindsey Graham to replace Thurmond, whose term expired in January 2003.

A nostalgic reference to Thurmond's past became the subject of controversy when staffers and friends held a 100th birthday party for him in December 2002. At the party, which was attended by numerous current and former staff, legislators, and lobbyists, Republican Majority Leader TRENT LOTT hailed Thurmond and stated that if others had followed the example of Mississippi and voted Thurmond president in 1948, the country "wouldn't have had all these problems over all these years." Lott's remark about the days of the Dixiecrats and the platform of segregation proved so controversial that Lott was forced to resign his position as majority leader. Thurmond was in such frail health that it was unclear whether he was aware of the impact of the event. His health failed to improve over the next several months, leading to his

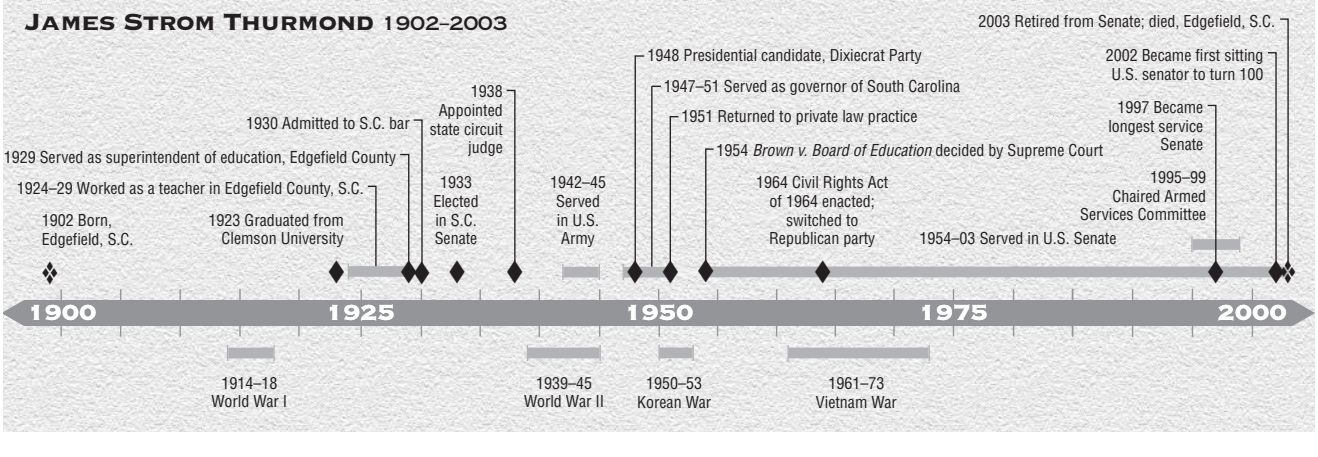

death on June 26, 2003, in Edgefield, South Carolina.

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## ♦ TILDEN, SAMUEL JONES

Samuel Jones Tilden was a New York lawyer, political reformer, governor, and Democratic candidate for president in the famous disputed election of 1876. Tilden's acceptance of his defeat in the election may have prevented civil unrest.

Tilden was born on February 9, 1814, in New Lebanon, New York. He attended Yale University and studied law at New York University before being admitted to the New York bar in 1841. Although Tilden suffered frequent illnesses during his life, he soon became a successful corporate attorney, representing powerful railroad and business entities.

In the 1840s Tilden became active in New York DEMOCRATIC PARTY politics. He served in the New York Assembly in 1846 and was a member of the state constitutional conventions in 1846 and 1847. Opposed to SLAVERY, he actively supported the Union during the U.S. CIVIL WAR.

In 1868 Tilden began his rise to political prominence. He presided over the New York State Democratic Committee and led a reform movement that collected evidence and prosecuted the notorious Tweed Ring, the corrupt Democratic political machine that controlled and defrauded New York City. Tilden's reforms led to his election as governor of New York in 1874. He continued to enhance his reputation as reformer when he exposed the Canal Ring, a conspiracy of politicians and contractors who had defrauded the state of money intended to pay for the construction of canals.

*Samuel J. Tilden.*
LIBRARY OF CONGRESS

In 1876, as a result of his accomplishments in New York, Tilden won the Democratic nomination for president and ran against the Republican candidate RUTHERFORD B. HAYES. The campaign was close and heated. Tilden won a majority of the popular votes, and preliminary returns showed that he had 184 of the 185 electoral votes needed to win. Hayes had 165 electoral votes. The electoral votes for Florida, Louisiana, and South Carolina, however, were in dispute, and the status of one of Oregon's three electors also was in question. Republicans

"NEW YORK [CANNOT] REMAIN THE CENTER OF COMMERCE AND CAPITAL FOR THIS CONTINENT, UNLESS IT HAS AN INDEPENDENT BAR AND AN HONEST JUDICIARY."
—SAMUEL J. TILDEN

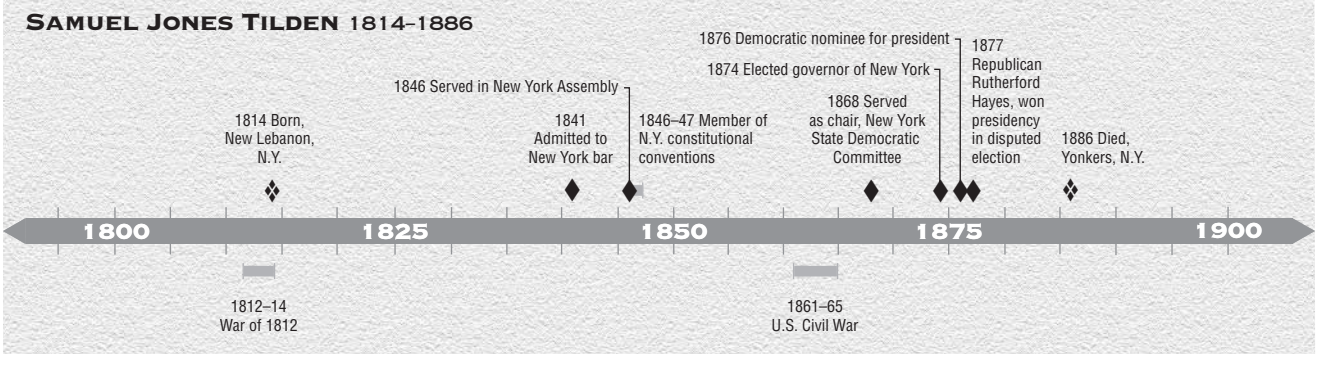

quickly calculated that if Hayes received every one of the disputed votes, he would win the presidency by a vote of 185 to 184.

Congress was charged under the Constitution with resolving the electoral claims. It created an electoral commission, composed of five members from the House of Representatives, four from the Senate, and five justices from the Supreme Court. The legislative membership was evenly divided between Democratic and Republican members. The commission voted to award all the disputed votes to Hayes. Tilden, who had shown no leadership during this crisis and had made no effort to marshal support, acquiesced, fearing that any further efforts to fight the result would lead to violence. Southern Democrats also went along with the commission's result in exchange for the withdrawal of federal troops from the South and the end of Reconstruction. Hayes removed the troops by the end of April 1877.

After his defeat, Tilden retained influence in the Democratic party. He was considered for the party's presidential nomination in 1880 and 1884, but he declined the opportunity on both occasions.

Tilden died on August 4, 1886, in Yonkers, New York. A wealthy man, Tilden left the bulk of his estate in trust for the establishment of a free public library for New York City. This bequest eventually was used to help build the New York City Library in Manhattan.

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## TIME

It is legally recognized that time is divided into years, months, weeks, days, hours, minutes, and seconds. The time kept by a municipality is known as civic time. A local government may not use a system of time different from that adopted by its state legislature. During daylight saving time, the customary time system is advanced one hour to take advantage of the longer periods of daylight during the summer months.

### Time Zones

In the past, the states followed various standards of time until the railroads of the nation cooperated in establishing a standard time zone system, which was then adopted by federal statutes. Under the standard time zone system, the continental United States is divided into four different zones. The time in each zone is based upon the mean solar time at a specified degree of longitude west from Greenwich, England. Eastern standard time is based on the mean solar time at 75° longitude west; Central standard time, on 90° longitude west; Mountain time, on 105° longitude west; and Pacific time on 120° longitude west.

### Calculations

A year is the period during which the earth revolves around the sun. A calendar year is 365 days, except for every fourth year, which is 366 days. The year is divided into twelve months. A week ordinarily means seven consecutive days, either beginning with no particular day, or from a Sunday through the following Saturday. A day is twenty-four hours, extending from midnight to midnight. When distinguished from night, however, a day refers to the period from sunrise to sunset.

In calculating a specified number of days, it is customary to exclude the first and include the last. As a consequence, when a lease provides that it shall continue for a specified period from a particular day, that day is excluded in computing the term. This rule is applied in calculating the time for matters of practice and procedure. The rule governs, for example, the period in which a lawsuit may be commenced, so that the day the CAUSE OF ACTION accrues is excluded for STATUTE OF LIMITATIONS purposes.

The general rule is that when the last day of a period within which an act is to be performed falls on a Sunday or a holiday, that day is excluded from the computation. The act may rightfully be done on the following business day. This rule has been applied in figuring the deadline for conducting a meeting of corporate shareholders; for filing a claim against a dead person's estate; for filing a statement proposing a new ordinance for a MUNICIPAL CORPORATION; for recording a mortgage; and for redeeming property from a sale foreclosing a mortgage.

## TIME DRAFT

*A written order to pay a certain sum in money that is payable at a particular future date.*

Time drafts, sometimes called time bills or time loans, are frequently used by merchants to finance the transportation of goods.

*A sample time draft*

**Time Draft**

**WESTERN HEMISPHERE TRADING COMPANY**
Troy/Deckerville, Michigan USA

Draft No.:

Date: / /

Reference:

Advising Bank:

*For Value Received,*

At_____ (_____) Days after the Sight of this Bill of Exchange

Pay against this Bill of Exchange to the Order of **Ourselves**

the Sum of **XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX and 00/100 U.S. Dollars (US$ xxxxxxxxxxxxxxxxxx.xx)**

effective payment to be made in U.S. Dollars only without deduction for and free of any tax, import levy or duty, present or future, of any nature under the laws of the United States or any political subdivision thereof or therein.

Drawn under **Issuing Bank**, Xxxxx, Xxxxx, Documentary Credit

LC No.:

Dated : / /

TO: **ISSUING BANK**
Street Address
City
Country

**WESTERN HEMISPHERE TRADING COMPANY**

by: _____
(Authorized Signature)

CROSS-REFERENCES

Commercial Paper.

## TIME IS OF THE ESSENCE

*A phrase in a contract that means that performance by one party at or within the period specified in the contract is necessary to enable that party to require performance by the other party.*

Failure to act within the time required constitutes a breach of the contract. The general rule is that time is not of the essence unless the contract expressly so provides. As a result, with respect to real estate transactions, the modern view is that time is not of the essence unless the parties have manifested such an intent. The same is generally true in construction contracts and in contracts relating to the manufacture of goods. When time is not of the essence, courts generally permit parties to perform their obligations within a reasonable time.

## TIME, PLACE, AND MANNER RESTRICTIONS

*Limits that government can impose on the occasion, location, and type of individual expression in some circumstances.*

The FIRST AMENDMENT to the U.S. Constitution guarantees FREEDOM OF SPEECH. This guarantee generally safeguards the right of individuals to express themselves without governmental restraint. Nevertheless, the Free Speech Clause of the First Amendment is not absolute. It has never been interpreted to guarantee all forms of speech without any restraint whatsoever. Instead, the U.S. Supreme Court has repeatedly ruled that state and federal governments may place reasonable restrictions on the time, place, and manner of individual expression. Time, place, and manner (TPM) restrictions accommodate public convenience and promote order by regulating traffic flow, preserving property interests, conserving the environment, and protecting the administration of justice.

The Supreme Court has developed a four-part analysis to evaluate the constitutionality of TPM restrictions. To pass muster under the First Amendment, TPM restrictions must be content-neutral, be narrowly drawn, serve a significant government interest, and leave open alternative channels of communication. Application of this analysis varies in accordance with the circumstances of each case.

The rationale supporting a particular TPM restriction may receive less rigorous scrutiny when the government seeks to regulate speech of lower value such as OBSCENITY and fighting words. Obscene speech includes most hard-core PORNOGRAPHY, while fighting words include offensive speech that would incite a reasonable person to violence. Conversely, the government must offer "compelling" reasons for regulating highly valued forms of expression, such as political speech. Some speech, such as commercial advertisements, is valued less than political speech but more than obscenity or fighting words. The government may impose reasonable TPM restrictions on this intermediate category of speech only if it can advance a "significant" or "important" reason for doing so.

Time restrictions regulate when individuals may express themselves. At certain times of the day, the government may curtail or prohibit speech to address legitimate societal concerns, such as traffic congestion and crowd control. For example, political protesters may seek to demonstrate in densely populated cities to draw maximum attention to their cause. The First Amendment permits protesters to take such action, but not whenever they choose. The Supreme Court has held on more than one occasion that no one may "insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech" (*Cox v. Louisiana,* 379 U.S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471 [1965]). In most instances a commuter's interest in getting to and from work outweighs an individual's right to tie up traffic through political expression.

Place restrictions regulate where individuals may express themselves. The Supreme Court has recognized three forums of public expression: traditional public forums, limited public forums, and nonpublic forums. Traditional public forums are those places historically reserved for the dissemination of information and the communication of ideas. Consisting of parks, sidewalks, and streets, traditional public forums are an especially important medium for the least powerful members of society who lack access to other channels of expression, such as radio and television. Under the First Amendment, the government may not close traditional public forums but may place reasonable restrictions on their use.

The reasonableness of any such restriction will be evaluated in light of specific guidelines that have been established by the Supreme Court. First, a restriction must be content-neutral, which means the government may not prohibit entire classes of expression, such as speech concerning poverty, drug abuse, or race relations. Second, a restriction must be viewpoint-neutral, which means that it must apply uniformly to all speech; that is, it may not silence only those speakers whom the government opposes or sanction only those whom the government supports. Third, a restriction must burden speech no more than is necessary to serve an important government interest. Restrictions that are carefully aimed at controlling the harmful consequences of speech, such as litter, unrest, and disorder, will normally satisfy these guidelines.

Limited public forums are those places held out by the government for civic discussion. Capitol grounds, courthouses, state fairs, and public universities have all qualified as limited public forums for First Amendment purposes. Although the government may designate such places as sites for public speech under certain circumstances, the Supreme Court has recognized that individual expression is not the sole objective served by limited public forums. For example, courthouses are primarily designed to administer justice, though important social discourse often takes place on the courthouse steps. Consequently, the First Amendment gives the government greater latitude in regulating limited public forums than traditional public forums.

The government is allowed to regulate nonpublic forums with even greater latitude. Nonpublic forums include privately owned property and publicly owned property devoted almost exclusively to purposes other than individual expression. Airports, jailhouses, military bases, and private residential property have all been deemed to be nonpublic forums under the First Amendment. Public sidewalks and streets that abut private property normally retain their status as traditional public forums, however (*Frisby v. Schultz,* 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420 [1988]).

In nonpublic forums the government may impose speech restrictions that are reasonably related to the forum's function, including restrictions that discriminate against particular viewpoints. For example, in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983), the Supreme

Court ruled that a rival teachers' union could be denied access to public school mailboxes, even though the elected union representative had been given access by the educational association. This restriction was reasonable, the Court said, in light of the elected representative's responsibilities to negotiate labor agreements on behalf of the union.

Manner restrictions regulate the mode of individual expression. Not every form of expression requires use of the written or spoken word. Some of the most visceral impressions are made by SYMBOLIC SPEECH. Symbolic speech can include something as complicated as an algebraic equation or as simple as the nod of a head. Under the First Amendment, symbolic expression often takes the form of political protest. Flag burning is an example of symbolic speech that the Supreme Court found to be protected by the Free Speech Clause (TEXAS V. JOHNSON, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 [1989]).

When the government attempts to regulate symbolic expression, courts balance the competing interests asserted by the litigants. Regulations that are targeted at suppressing a symbolic message will be closely scrutinized by the judiciary, while regulations that serve compelling government interests unrelated to the expression of ideas will be subject to less exacting judicial scrutiny. For example, in *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984), the Supreme Court upheld a federal regulation that prohibited sleeping in certain national parks, despite the objections of protesters who had camped out in a national park to symbolize the plight of the homeless. The Court said that the regulation was not aimed at suppressing symbolic expression, because it applied to all persons, and not just the protesters involved in the case. The Court also noted that the regulation was reasonably designed to preserve national parks by minimizing the wear and tear that can be caused by campers. Finally, the Court emphasized that the protesters were free to carry out their vigil at other venues across the country.

All TPM restrictions must provide speakers with alternative channels for communicating ideas or disseminating information. Unlike millionaire moguls and corporate giants, the average person on the street does not commonly communicate through the mass media. Most people do not hold press conferences, and if they did, few members of the media would attend. Instead, the great bulk of communication takes place through the circulation of leaflets, handbills, and pamphlets, which most people can distribute and read in a cheap and efficient manner. As a result, courts are generally sensitive to protecting these modes of communication, and TPM restrictions limiting their distribution usually founder.

The INTERNET, however, has fast become an easy alternative for mass distributing information. As such, it is often difficult to apply TPM restrictions. For example, politicians use bulk E-MAIL as a quick way to reach thousands, even millions, of their constituents. Called "political spam," this method of campaigning has both advocates and detractors. Opponents claim that unsolicited political e-mails are an invasion of privacy. As precedence, they point to the Eighth Circuit ruling in *Van Bergen v. Minnesota,* 59 F.3d 1541 (1995), which upheld a Minnesota state law prohibiting candidates from using a device that automatically dialed residential telephone numbers and played a prerecorded political campaign message. According to the court, "the telephone system is a private channel of communication," and the Minnesota law rightfully placed restrictions on time, manner, and place of speech.

Proponents claim that e-mail is not as equally invasive as a telephone call since e-mail gives the receiver an opportunity to ignore content by simply deleting the message. They also point to the benefits of political e-mail. First, given the large price tag of running a campaign, political e-mails provide a very real way to cut costs. In addition, they contend that e-mail provides a more direct way for politicians to connect with voters, since e-mail offers a back-and-forth method of communication. Most important, advocates stress that both political debate and communication over the Internet are protected by the First Amendment (*Reno v. ACLU,* 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 [1997].

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CROSS-REFERENCES

Compelling State Interest.

## TIME-PRICE DIFFERENTIAL

*A method whereby a seller charges one amount for the immediate cash payment of merchandise and another amount for the same item or items when payment is rendered at a future date or in installments.*

The immediate payment price is called the *cash-price;* the later price is known as the *time-price* or *credit-price.* The *time-price differential* is the difference between the two prices.

## TIMELY

*Existing or taking place within the designated period; seasonable.*

A legal action is timely filed, for example, when it is brought within the time period set by the STATUTE OF LIMITATIONS.

The meaning of the term *timely* must, in a number of situations, be determined on the basis of the facts and circumstances of each individual case. Courts have extensive discretion in determining whether a particular party has acted in a timely manner in filing papers, serving notices, or bringing motions in a legal action.

## TIMESHARE

*A form of shared property ownership, commonly in vacation or recreation condominium property, in which rights vest in several owners to use property for a specified period each year.*

Timeshare ownership of vacation or recreation condominium property is a popular choice for persons who wish to secure a long-term commitment to a particular location. Timesharing is common in Hawaii, Florida, Arizona, Colorado, and Mexico, as well as in certain other popular vacation spots in the United States. When a person signs a contract to purchase a "timeshare," she is agreeing to pay the owner of the property a sum of money for the exclusive right to use or occupy the property for a specified time during the year. One or two weeks is the typical period that may be purchased. Usually, the timeshare agreement is made for improved property, such as a vacation home or a particular unit in a condominium complex.

The form of a timeshare agreement varies. Usually, the person has the right of exclusive use of the unit during the same time each year or other specified period. Each timeshare unit is considered an estate or interest in real property, separate and distinct from all other timeshare estates in the same unit or any other unit. Therefore, estates may be separately conveyed and encumbered.

The cost of purchasing a timeshare depends on the time of year selected; premium prices are charged for the most popular times of the year. The annual maintenance fee for the condominium unit and the annual property taxes are divided proportionally among the timeshare owners. A person who does not plan to use the property during the specified period may rent the timeshare to a third party, but the company managing the property may require that it broker such transactions and receive a fee for the rentals.

Timeshare agreements are affected by various federal and state statutes. States generally require developers of timeshares to file detailed statements that demonstrate compliance with all applicable statutory requirements. For example, states typically require the developer to fully disclose how the project is to be financed and to give examples of all contracts, deeds, fact sheets, and other instruments that will be used in marketing, financing, and conveying timeshare interests. Some states also require information from the developer concerning the management of the project, including a copy of the management agreement, disclosure of any relationship between the developer and the management company, and a statement as to whether the management agent will be bonded or insured.

CROSS-REFERENCES

Condominiums and Cooperatives.

## TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT

In the landmark case of *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), the U.S. Supreme Court extended the First Amendment's right to freedom of expression to public school students. The ruling, which occurred during the VIETNAM WAR, granted stu-

dents the right to express their political opinions as long as they did not disrupt the classroom. The Court made clear that public school administrators and school boards could not restrict FIRST AMENDMENT rights based on a general fear of disruption.

The case grew out of political opposition to the Vietnam War. In December 1965 a group of students in the Des Moines public school system decided to protest the war. John Tinker, 15 years old, his 13-year-old sister Mary Beth, and 16-year-old Christopher Eckhardt sought to publicize their antiwar position and their support for a truce by wearing black armbands to school in the weeks leading up to the Christmas holidays. School administrators became aware of the plan to wear armbands and immediately adopted a new policy that prohibited the wearing of armbands. Students who refused to remove them would be suspended until they agreed not to wear them. The three students, who were aware of the policy, arrived at their schools a few days later wearing the armbands. They were promptly suspended and sent home. They did not return to school until after the holiday season, when their planned protest period had expired.

The three teenagers filed a CIVIL RIGHTS lawsuit in federal court through their fathers, asking that the court issue an INJUNCTION that would bar the school system from disciplining the students. The district court sided with the school board, concluding that the schools had acted reasonably to prevent a disturbance of school discipline. The Eighth Circuit Court of Appeals upheld this ruling on an evenly divided vote. The students then brought their case to the Supreme Court.

The Court, in a 7–2 decision, overturned the lower court rulings. Justice ABE FORTAS, in his majority opinion, stated at the outset that students and teachers do not "shed their constitutional rights to FREEDOM OF SPEECH or expression at the schoolhouse door." However, he acknowledged that the Court had upheld the authority of school officials to "prescribe and control conduct in the schools." Thus, the issue before the Court concerned the area where the First Amendment rights of students collided with the rights of school administrators to maintain order and discipline.

Justice Fortas noted that the actions taken by the three students had not been disruptive or aggressive. The protest was a "silent, passive expression of opinion," that had led to the suspension of only five students out of the 18,000 enrolled in the Des Moines schools. Though a few hostile comments had been made to the students who were wearing armbands, there had been no threats or acts of violence. Based on this factual record, Fortas found puzzling the district court's finding that the school had reasonable grounds for barring the armbands. The principals may have had general and nonspecific fears of a disturbance, but such fears were not sufficient to overcome the students' First Amendment rights. He pointed out that any departure from the normal school regimen was liable to cause trouble. However, the risk of a word or symbolic expression causing a disturbance was the "sort of hazardous freedom" that made the country strong and vigorous. The school system could not ban a particular expression of opinion unless it could show its actions were based on more than the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."

In the case of the Des Moines schools there had been no findings that the armbands would substantially interfere with school operations or harm the rights of other students. Justice Fortas concluded that the principals sought to avoid controversy concerning the Vietnam War. This conclusion was reinforced by the fact that the schools had banned only the black armbands. The schools permitted students to wear political campaign buttons and even the Iron Cross, which was a symbol of Nazism. Students could not be singled out for their political views without that action being a violation of the First Amendment.

Justice Fortas concluded his opinion with a lecture on free speech and public schools. He stated that public schools were not "enclaves of totalitarianism," with school officials wielding absolute authority over their students. Students could not be regarded as "closed-circuit recipients" of state indoctrination. Therefore, absent a specific demonstration of "constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." Students were entitled to this freedom whether in a classroom, a hallway, a cafeteria, or an athletic field. Absent a showing by school officials that the expression "materially disrupts class work or involves substantial disorder or invasion of the rights of others," students must be guaranteed freedom of speech. In Fortas's view, free-

dom of speech was not confined to a "telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom." Because the three students had not disrupted their schools with their passive displays of political protest, they were protected by the First Amendment.

Justice HUGO BLACK, in a dissenting opinion, angrily lamented the Court's endorsement of permissiveness. He argued that the conduct in question had been disruptive and that school officials had the right to control their classrooms. Black stated that it was a "myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases." Teachers were hired to teach, and students were sent to school to learn; neither teacher nor students were sent into publicly funded schools to express their political views. Black foresaw an ominous future where students used the Court's decision to assert total control of their schools.

Justice Black's prophecy proved false. In addition, the Supreme Court issued decisions in the coming years that gave more power to school administrators to regulate student conduct. Nevertheless, the *Tinker* decision changed the legal landscape for students who sought to exercise their First Amendment rights.

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CROSS-REFERENCES

First Amendment; Protest.

## TITHING

*In Western ecclesiastical law, the act of paying a percentage of one's income to further religious purposes. One of the political subdivisions of England that was composed of ten families who held freehold estates.*

Residents of a tithing were joined in a society and bound to the king to maintain peaceful relations with each other. The person responsible for the administration of the tithing was called the tithing-man; he was a forerunner of the constable.

## TITLE

*In* PROPERTY LAW*, a comprehensive term referring to the legal basis of the ownership of property, encompassing real and* PERSONAL PROPERTY *and intangible and tangible interests therein; also a document serving as evidence of ownership of property, such as the certificate of title to a motor vehicle.*

*In regard to legislation, the heading or preliminary part of a particular statute that designates the name by which that act is known.*

*In the law of* TRADEMARKS*, the name of an item that may be used exclusively by an individual for identification purposes to indicate the quality and origin of the item.*

In the law of property, title in its broadest sense refers to all rights that can be secured and enjoyed under the law. It is frequently synonymous with absolute ownership. Title to property ordinarily signifies an estate in fee simple, which means that the holder has full and absolute ownership. The term does not necessarily imply absolute ownership, however; it can also mean mere possession or the right thereof.

The title of a statute is ordinarily prefixed to the text of a statute in the form of a concise summary of its contents, such as "An act for the prevention of the abuse of narcotics." Other statutes are given titles that briefly describe the subject matter, such as the "Americans with Disabilities Act." State constitutions commonly provide that every bill introduced in the state legislature must have a single subject expressed by the bill's title. Congress is under no such restriction under the U.S. Constitution, but House and Senate rules do have some guidelines for federal bills and statutes. Many, though not all, federal statutes have titles.

Under trademark law, if a publisher adopts a name, or title, for a magazine and uses it extensively in compliance with the law, the publisher may acquire a right to be protected in the exclusive use of that title. A trademark of the title can only be acquired through actual use of the title in connection with the goods, in this example, the magazine. Merely planning to use the title does not give rise to legally enforceable trademark rights.

CROSS-REFERENCES

Title Insurance; Title Search.

## TITLE INSURANCE

*A contractual arrangement entered into to indemnify loss or damage resulting from defects or prob-*

*lems relating to the ownership of real property, or from the enforcement of liens that exist against it.*

Title insurance is ordinarily taken out by a purchaser of the property, or by an individual lending money on the mortgage, in an amount equivalent to the purchase price of the property. To be entitled to coverage, the purchaser typically pays one lump sum premium, usually at the day of the closing. Title insurance companies are specially organized for this purpose. They retain complete sets of abstracts of title or duplicates of the record, hire expert title examiners, and prepare all types of conveyances and transfers. Following a title search, such companies furnish a *certificate of title,* indicating the findings of the title examiner with respect to the state of the title to the property involved. Title insurance companies are liable only for a lack of care, skill, or diligence on the part of their examiner when a title certificate is issued up to the face amount of the policy. An *insurance of title,* however, warrants the validity of the title in any and all events.

CROSS-REFERENCES

Recording of Land Titles; Registration of Land Titles.

## TITLE SEARCH

*The process of examining official county records to determine whether an owner's rights in real property are good.*

A title search is conducted to discover whether there are any defects in the ownership of a particular tract of land. An ABSTRACT OF TITLE, prepared by the examiner subsequent to such an investigation, is a condensed history of the title to the land.

CROSS-REFERENCES

Recording of Land Titles; Registration of Land Titles.

## TO WIT

*That is to say; namely.*

## TOBACCO

For centuries the leaves of the tobacco plant have been used for making smoking tobacco and chewing tobacco. Tobacco contains small amounts of nicotine, a stimulant that acts on the heart and other organs and the nervous system when tobacco is inhaled, ingested, or absorbed. Nicotine's effect on the nervous system causes people to become addicted to it, and the stimulating effects make smoking and chewing tobacco pleasurable. Concentrated amounts of nicotine are poisonous, however. Although the use of tobacco was condemned on occasion in the past, not until the latter half of the twentieth century were concerted efforts made to curb tobacco use in the United States.

### History

Before the arrival of Europeans in America, Native Americans were growing and harvesting tobacco to be smoked in pipes. Europeans exploring America learned of this practice and took tobacco seeds back to Europe where tobacco was grown and used as a medicine to help people relax. European physicians believed that tobacco should be used only for medicinal purposes. Commercial production of tobacco began in the colony of Virginia in the early seventeenth century where it soon became an important crop. The expansion of tobacco farming, especially in the southern colonies, contributed to the demand for and practice of SLAVERY in America. Most tobacco grown in the American colonies was shipped to Europe until the Revolutionary War, when manufacturers began using their crops to produce chewing and smoking tobacco.

The use of tobacco for other than medicinal purposes was controversial: the Puritans in America believed that tobacco was a dangerous narcotic. Nevertheless, chewing and smoking tobacco became increasingly popular. Cigars were first manufactured in the United States in the early nineteenth century. Hand-rolled cigarettes became popular in the mid-nineteenth century, and by the 1880s, a cigarette-making machine had been invented. In the twentieth century tobacco use, especially cigarette smoking, continued to expand in the United States.

By the 1960s, however, scientists had confirmed that smoking could cause lung cancer, heart disease, and other illnesses. Some cigarette manufacturers reacted to these findings by reducing the levels of nicotine and tar in their cigarettes, but the medical community established that these measures did not eliminate the health risks of smoking. Subsequently, extensive research linked cigarette smoking and tobacco chewing to many serious illnesses.

In 2001, the American Lung Association estimated that over 400,000 deaths per year in the United States were directly attributable to smoking, which resulted in HEALTH CARE costs

# Cipollone v. Liggett Group, Inc.

*Cipollone v. Liggett Group, Inc.,* 693 F. Supp. 208 (D.N.J. 1988), *aff'd in part, rev'd in part,* 893 F.2d 541 (3d Cir. [N.J.] 1990), *cert. granted,* 499 U.S. 935, 111 S. Ct. 1386, 113 L. Ed. 2d 443 (1991), *aff'd in part, rev'd in part,* 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), was the first case in which a former smoker recovered monetary damages against the U.S. tobacco industry. It is also considered a landmark tobacco case because of the legal precedent it established.

Rose Cipollone smoked cigarettes manufactured by defendant Lorillard for forty years. She started smoking at an early age because she thought it was the cool and grown-up thing to do and soon found that she could not stop the habit. Cipollone developed lung cancer, requiring the removal of her right lung. She died before her case went to trial, but her husband pursued her claims on her behalf.

Cipollone brought fourteen claims against Liggett Group, Inc., Philip Morris, Inc., and Lorillard, including **STRICT LIABILITY**, **NEGLIGENCE**, breach of **WARRANTY**, intentional **TORT**, and conspiracy. The intentional tort claims included the allegation that the tobacco companies had fraudulently misrepresented that smoking was safe through their advertising and conspired to keep the public from learning about the **SCIENTIFIC EVIDENCE** that clearly demonstrated the health hazards of smoking.

The tobacco companies argued that Rose Cipollone knowingly chose to smoke and therefore accepted all of the dangers and health consequences associated with it. On the other hand, the tobacco companies vehemently maintained that there is no medical or scientific basis to show that smoking is linked to cancer or other diseases.

The *Cipollone* case lasted ten years and included the filing of one hundred motions, four **INTERLOCUTORY** appeals, four months of trial, an appeal from the jury verdict, two petitions of certiorari to the U.S. Supreme Court, and argument and then reargument before the Court. Although the jury in the first trial awarded the plaintiff $400,000 in damages, the verdict was ultimately overturned on appeal due to technical mistakes, and a retrial was ordered. By that time, the three legal firms representing the plaintiff had spent collectively more than $6.2 million on the case and could not afford to continue. In contrast, the defendants spent $40 million and never had to pay one cent to the Cipollones.

This case made history at the pretrial stage because the court ordered the tobacco industry to release thousands of pages of confidential internal documents that the plaintiff needed to prove that the tobacco industry conspired to prevent the public from being informed of the health hazards of smoking (649 F. Supp. 664). The court also held that, because of the enormous public interest in these documents, they could be released to third parties and used in other related cases (113 F.R.D. 86 [D.N.J. 1986]; 822 F.2d 335 [3d Cir. 1987], *cert. denied,* 479 U.S. 1043, 107 S. Ct. 907, 93 L. Ed. 2d 857 [1987]). However, the defendants were still able to protect the most damaging documents by asserting the **ATTORNEY-CLIENT PRIVILEGE** and the work product doctrine (140 F.R.D. 684). Without those damaging documents, the jury rejected the plaintiff's theories of conspiracy or **MISREPRESENTATION**, but did find in her favor on the claim of breach of the express warranty that cigarettes were safe.

*Cipollone* is also the definitive case regarding the **PREEMPTION** of state tort claims by the Federal Cigarette Labeling and Advertising Act (FCLAA) (79 Stat. 282). The Supreme Court held that the FCLAA preempts state law damage claims that are based on a cigarette manufacturer's failure to warn of the health risks of smoking and its neutralization of the federally mandated warnings through advertising techniques, to the extent that those claims rely on omissions or inclusions in the manufacturer's advertisements or promotions (505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 [1992]). However, the Supreme Court also held that the FCLAA does not preempt claims that are based on strict liability, negligent design, express warranty, intentional **FRAUD** and misrepresentation, or conspiracy.

**FURTHER READINGS**

Bajalia, Mark. 1993. "The Supreme Court Renders Its Decision: Federal Preemption, the Cigarette Act and *Cipollone*." *National Trial Lawyer* 5 (May).

Fenswick, C.F. 1993. "Supreme Court Takes Middle Ground in Cigarette Litigation." *Tulane Law Review* 67 (February).

of over $90 billion. Tobacco is responsible for more deaths in the United States than car accidents, ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS), alcohol, illegal drugs, homicides, suicides, and fires combined.

Medical research has not only proven that smoking is injurious to the health of the smoker, but it has also established that nonsmokers can be harmed by inhaling the cigarette smoke of others. This type of smoke is called secondhand smoke, passive smoke, involuntary smoke, or environmental tobacco smoke (ETS). In 1993, the ENVIRONMENTAL PROTECTION AGENCY (EPA) classified ETS as a known human (Group A) carcinogen because it causes lung cancer in adult nonsmokers and impairs the respiratory and cardiovascular health of nonsmoking children. ETS, which is the third leading preventable cause of death in the United States, contains the same carcinogenic compounds as are found in the smoke inhaled by smokers.

As these research findings have appeared, concern over tobacco's effect on health has played an important role in encouraging government regulation of tobacco. At the same time, however, the popularity of tobacco use has resulted in considerable political and financial strength for the tobacco industry. By the 1990s tobacco had become the seventh largest cash crop in the United States, and tobacco growers and manufacturers were realizing $47 billion annually. With such revenues available, the tobacco industry has been able to exert significant influence over tobacco regulation. In a report released by the Campaign for Tobacco-Free Kids, the American Heart Association, and the American Lung Association, the tobacco industry contributed more than $3 million in "soft money" funds to political candidates and political committees, in 2001. Because the industry is also central to the economies of many tobacco-producing states, members of Congress from those states have opposed restrictions on tobacco companies.

Despite the tobacco companies' efforts, the industry is subject to extensive federal and state regulation. Among the federal agencies with minor regulatory interests in tobacco and tobacco products are the BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, the Tax and Trade Bureau, the HEALTH AND HUMAN SERVICES DEPARTMENT, the Agriculture Department, and the INTERNAL REVENUE SERVICE. Federal agencies with broader power to regulate tobacco include the FEDERAL TRADE COMMISSION (FTC), the FEDERAL COMMUNICATIONS COMMISSION (FCC), and, the most recent to assert jurisdiction, the FOOD AND DRUG ADMINISTRATION (FDA).

### Federal Regulation of Tobacco Advertising and Labeling

In the 1950s, the federal government began to regulate the sale and production of chewing and smoking tobacco because of the growing concern over its adverse effects on the health of consumers. Traditionally, the FTC was the federal agency primarily responsible for the regulation of tobacco products, especially with regard to labeling and advertising. In 1955, the FTC promulgated guidelines that prohibited cigarette advertisements from carrying therapeutic health claims. In 1964, the commission issued a Trade Regulation Rule on Cigarette Labeling and Advertising that strictly controlled the advertising and labeling of tobacco products. The FTC claimed that the failure to warn consumers of the dangers of smoking constituted an unfair and deceptive trade practice under the Federal Trade Commission Act (15 U.S.C.A. § 41 [1994]).

Shortly after the FTC issued its trade regulation rule, Congress intervened by enacting the Federal Cigarette Labeling and Advertising Act (FCLAA) (15 U.S.C.A. §§ 1331 et seq. [2000]), which was more moderate than the FTC regulation and preempted agency action. The FCLAA required that a health warning be conspicuously displayed on all packages and cartons of cigarettes. As originally enacted, the FCLAA required only the warning, "Caution: Cigarette Smoking May Be Hazardous to Your Health." Subsequently, however, this act was amended to require more explicit warnings. Under amendments added in 1984, cigarette manufacturers must use one of the following labels to satisfy the health warning requirement:

> SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy.
>
> SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.
>
> SURGEON GENERAL'S WARNING: Smoking by Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight.
>
> SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

# National Clean Air Debate

On April 5, 1994, the Occupational Safety and Health Administration (OSHA) published proposed nationwide indoor air quality regulations that would prevent smoking in all indoor workplaces, including office buildings, government buildings, restaurants, stores, and bars, except in designated smoking areas with separate ventilation systems (59 Fed. Reg. 15,968–16,039). OSHA provided a public comment period followed by public hearings, which were extended a number of times, and finally closed the hearings in January 1996. OSHA also sought post-hearing comments, but by the end of 1997 the administration had not announced when, or whether, it would issue its final rules addressing this controversial topic. The dispute over the OSHA regulations frames the larger debate between advocates and opponents of smoking regulations.

Proponents of the indoor air quality regulations argue that if people are freely allowed to smoke in the workplace, they contaminate the air that nonsmokers breathe, subjecting everyone around them to severe health consequences. Proponents cite decades of scientific and medical studies that demonstrate the health effects of environmental tobacco smoke (ETS). They refer to studies that show that ETS causes lung cancer and heart disease in adults and various respiratory disorders in children.

Various government agencies support OSHA's proposed regulations. The U.S. **SURGEON GENERAL** has published numerous reports warning of the dangers of ETS. The **LABOR DEPARTMENT** reported to OSHA that 83 percent of all worker health complaints related to indoor air quality are linked to ETS. Since 1992, the U.S. **ENVIRONMENTAL PROTECTION AGENCY** has classified ETS as a known Group A human carcinogen. Various other medical and research organizations support the proposed regulations as well. The National Academy of Sciences has warned of the dangers of ETS. A 1995 study published in the *Journal of the American Medical Association* found that nicotine levels in the air at work sites with no restrictions on smoking were triple the amount considered hazardous by U.S. regulatory standards.

Proponents of the regulations are concerned for the health of the non-smokers, but they also cite many economic reasons for instituting the indoor air quality regulations nationwide. For example, employers must pay more for **HEALTH INSURANCE** for their employees when their employees smoke or are exposed to ETS. Employers also suffer productivity losses when their employees are sick or disabled due to smoking-related illnesses. Smoking also causes premature deaths in employees, which results in a productivity loss to the employer. When smoking is allowed in the workplace, there is more trash, such as cigarette butts, to clean up. Proponents of the smoking regulations also argue that computer equipment, carpets, furniture, and other furnishings need more maintenance and must be replaced more frequently when smoking is permitted in the workplace. Finally, employers who are forced to choose between the rights of smoking workers and the rights of nonsmoking workers fear that they will be liable for nonsmoker injuries. For example, under the Americans with Disabilities Act, 104 Stat. 327, if ETS prevents a worker from being able to perform her job, the employer may be responsible for allowing the ETS in the workplace.

Opponents of the indoor air quality regulations include restaurant, bar, and hotel owners, trade associations, cigarette manufacturers, smokers, and those who seek to protect individual freedoms from government regulation. Activist organizations that promote smokers' rights include the National Smokers Alliance, the United Smokers Association, and the American Puffer Alliance. These groups point out that their numbers are large; in fact, there are approximately 52 million Americans who do not support the crusade to stop smoking. Further, many of these groups stand for principles of tolerance, fairness, and inclusion and seek to promote accommodation of the wishes of smokers as well as nonsmokers.

Opponents of the regulations argue that exposure to ETS really is not as dangerous to nonsmokers as many anti-smoker groups contend. In fact, the opponents have scientific research to

The warning labels must also appear on all cigarette advertising, including magazine advertisements and billboards.

In 1986, Congress enacted the Comprehensive Smokeless Tobacco Health Education Act (CSTHEA) (15 U.S.C.A. §§ 4401 et seq.), which requires smokeless tobacco products to carry one of the following warning labels:

"WARNING: THIS PRODUCT MAY CAUSE MOUTH CANCER"

"WARNING: THIS PRODUCT MAY CAUSE GUM DISEASE AND TOOTH LOSS"

"WARNING: THIS PRODUCT IS NOT A SAFE ALTERNATIVE TO CIGARETTES."

The CSTHEA also requires all manufacturers, packagers, and importers of smokeless tobacco to provide the secretary of the **HEALTH AND HUMAN SERVICES DEPARTMENT** with a list of all ingredients used in the manufacture of the

support their theories. In addition, they attack contrary studies as being statistically flawed and claim that any conclusions showing an association between ETS and disease are really due to confounding variables in the studies. Other opponents, particularly restaurant, bar, and hotel owners, reject the proposed workplace smoking ban as overly restrictive and likely to lead to a serious financial loss to business owners. Some opponents of the regulations focus on the fact that their freedom to smoke is a liberty interest and a privacy right that is being impinged.

A large opponent of the proposed indoor air quality regulations is the Center for Indoor Air Research (CIAR), a nonprofit, independent research organization founded in 1988 by three large tobacco companies. CIAR has been instrumental in providing research results to refute those that suggest that ETS is harmful. A 1992 study conducted by CIAR concluded that moderate amounts of smoking indoors will not interfere with acceptable air quality. CIAR also conducted a study to determine the quantities of ETS that people are actually exposed to in the workplace. Finding that most people are exposed to very little ETS on the job, CIAR concluded that the federal government does not need to regulate smoking in the workplace. Another CIAR study that examined workplace smoking policies, ventilation, and indoor air quality concluded that the role ETS plays in contributing to poor indoor air quality is very minor, if it plays any role at all. The findings from this study show that OSHA's proposal to require separate ventilation systems for smoking areas is unnecessarily restrictive. Another CIAR study concerning indoor air quality, published in 1992, and criticized by a congressional subcommittee in 1994 as being flawed due to falsified or fabricated data, concluded that the levels of ETS in "light smoking" rooms were very similar to the levels of ETS in "nonsmoking" rooms within hundreds of different office buildings.

In addition to quoting studies conducted by CIAR and other tobacco-industry-funded organizations, opponents of the OSHA regulations cite to studies that were not funded by the tobacco industry and thus do not convey the appearance of bias. For example, a 1995 study by the **CONGRESSIONAL RESEARCH SERVICE** (CRS), the research arm of the **LIBRARY OF CONGRESS**, found no statistically significant correlation between ETS and lung cancer.

Restaurant and bar owners nationwide fear that the regulations will cause a decline in their business and result in serious financial consequences for them. In fact, these groups can already demonstrate the validity of their fears: studies of restaurants in cities and states that already have smoking bans have shown that these businesses have suffered an average decline of 24 percent in sales.

Others argue that banning smoking in the workplace is an infringement of personal rights. Specifically, they argue that workplace smoking bans violate the right to privacy and liberty interests protected by the Constitution. Opponents of the proposed nationwide ban can cite to judicial decisions that hold that federal regulations imposed on smoking employees must have a rational basis related to on-the-job performance. (In *Grusendorf v. Oklahoma City,* 816 F.2d 539 [10th Cir. 1987], a one-year smoking ban for firefighter trainees was upheld.) Other courts have held that employers cannot prohibit all smoking on their property if a ban violates a collective bargaining agreement (*Johns-Manville Sales Corp. v. International Ass'n of Machinists,* 621 F.2d 756 [5th Cir. 1980]). In addition, several states have enacted "smokers' rights laws" that stop employers from regulating off-duty smoking habits of employees and from discriminating against employees or job applicants based on their smoking habits outside the workplace. Opponents of OSHA's proposed indoor air quality regulations argue that employers likewise have no right to impinge upon their employees' freedom to smoke while at work.

Smokers also argue that their decision to smoke and the risks involved are no different from other personal lifestyle choices. If smoking is banned in the workplace, then there is no limit as to what other risky, but legal, behaviors may be banned in the workplace. For example, employers could prohibit the consumption of fatty foods. The crux of the issue, argue opponents, is that smoking is a legal activity and smokers should be left alone in deciding which risks they want to take in their lives.

**CROSS-REFERENCES**

Air Pollution; Employment Law; Environmental Law; Privacy; Tobacco.

product, as well as the quantity of nicotine contained in the product. The act further requires the secretary to report biennially to Congress with a summary of research on the health effects of smokeless tobacco, information about whether its ingredients pose a health risk, and recommendations for legislative or administrative action. Finally, the act requires the FTC to report biennially to Congress about the state of smokeless tobacco sales, advertising, and marketing practices and also to make recommendations for legislative or administrative action. Amendments to the FCLAA require similar reports on smoking tobacco products.

In 1967, the FCC decided to act upon citizen complaints it had received regarding broadcast cigarette advertising. The FCC implemented a rule requiring any station that broadcasts cigarette advertising to also air public service announcements prepared by various health

organizations in an effort to inform listeners and viewers of the dangers of smoking. This FCC regulation was challenged in the courts but upheld under the FAIRNESS DOCTRINE, which requires broadcasters to provide a balanced representation and fair coverage of controversial issues of public importance (*Banzhaf v. FCC,* 405 F.2d 1082 [D.C. Cir. 1968]).

A few years later, Congress also intervened on the issue of broadcast advertising, electing to ban all television and radio advertising of cigarettes. Congress enacted the Public Health Cigarette Smoking Act of 1969 (Pub. L. No. 91-222, § 6, 84 Stat. 87, 89), which was codified as an amendment to the earlier FCLAA. The new regulations took effect in 1971 and prohibited all advertising of cigarettes and small cigars via electronic communication, subject to the jurisdiction of the FCC (15 U.S.C.A. § 1335). The tobacco companies challenged the constitutionality of the Public Health Cigarette Smoking Act, but it was upheld by the courts (*Capital Broadcasting Co. v. Mitchell,* 333 F. Supp. 582 [D.D.C. 1971], *aff'd mem.,* 405 U.S. 1000, 92 S. Ct. 1289, 321 L. Ed. 2d 472 [1982]). Beginning in 1986, Congress also made it illegal to advertise smokeless tobacco on any medium of electronic communication that is subject to the jurisdiction of the FCC (15 U.S.C.A. § 4402(f)).

**Federal Excise Taxes Collected on Tobacco Products, in 2000**

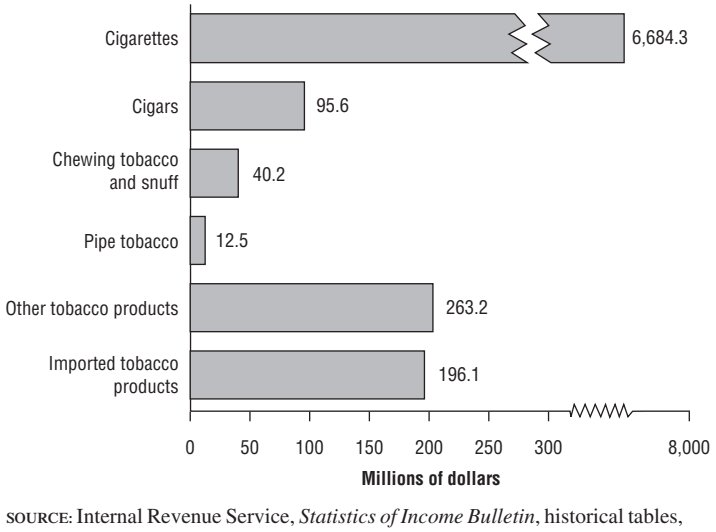


SOURCE: Internal Revenue Service, *Statistics of Income Bulletin*, historical tables, available online at IRS web site.

The FCLAA, as amended by the Public Health Cigarette Smoking Act of 1969, did not work wholly to the detriment of the tobacco industry. Some legal commentators argue that it actually benefited the tobacco companies. The warning labels that were required to help inform consumers of the health risks associated with tobacco worked to provide the manufacturers with a shield against TORT liability. In fact, before the matter was taken up by the U.S. Supreme Court in 1992, several circuit courts held that the FCLAA had preempted (previously addressed) state claims against the tobacco companies based on a failure-to-warn legal theory (*Pennington v. Vistron Corp.,* 876 F.2d 414 [5th Cir. 1989]; *Roysdon v. R. J. Reynolds Tobacco Co.,* 849 F.2d 230 [6th Cir. 1988]; *Palmer v. Liggett Group,* 825 F.2d 620 [1st Cir. 1987]; *Stephen v. American Brands,* 825 F.2d 312 [11th Cir. 1987]).

In CIPOLLONE V. LIGGETT GROUP, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 [1992], the U.S. Supreme Court held that the FCLAA had preempted state law damage. In effect, because tobacco companies were federally mandated to include warning labels on their products, they were essentially immune from product-liability suits. The Supreme Court held, however, that the FCLAA did not PREEMPT claims based on STRICT LIABILITY, negligent design, express WARRANTY, intentional FRAUD and MISREPRESENTATION, or conspiracy. This means that companies could be sued for knowingly withholding or falsifying information about health risks associated with the use of tobacco products.

The tobacco industry also benefited indirectly from the FCLAA's ban on advertising because when television advertising ceased, so did the antismoking public service messages that broadcasters were previously required to air. In fact, Judge Skelly Wright, the author of the dissenting opinion in *Capital Broadcasting Co.,* noted that the Public Health Cigarette Smoking Act of 1969 was a legislative coup on the part of the tobacco industry. Wright accurately predicted that the loss of the broadcast antismoking messages would result in a rise in cigarette consumption.

### Federal and State Regulation of Tobacco through Taxation

Even though cigarettes cannot be advertised on radio or television, they are the most heavily advertised product in the United States. In the

early 1990s, in an attempt to raise revenue for the federal government, bills were introduced in Congress to restrict the amount of advertising expenses that tobacco manufacturers could deduct from their gross income. (In 1993, tobacco companies deducted an estimated $1 billion from their gross income for advertising expenses.) The proposed bills would have used the extra revenue to fund education programs to stop underage smokers and to reduce the federal deficit. The bills did not become law, however.

States have long collected excise taxes on sales of cigarettes. As of 2003, New Jersey imposed the highest excise tax, at $2.05 per pack, and Kentucky (a tobacco-producing state) had the lowest, at 3 cents per pack. Excise taxes were also imposed on chewing tobacco products. Studies completed in the 1980s demonstrated that as the price of chewing and smoking tobacco increases, consumption of those products decreases.

### Federal Regulation of Tobacco as a Drug

In 1988, the SURGEON GENERAL of the United States issued a report detailing the addictive effects of nicotine. Later scientific studies confirmed this finding. Despite this research the tobacco companies continued to deny that any relation existed between smoking and disease or that smoking was addictive. In an April 1994 congressional hearing on nicotine manipulation, the chief executive officers of seven tobacco companies testified under oath that they believed nicotine is not addictive and that smoking has not been shown to cause cancer. Later, however, some former tobacco company officials publicly confessed that cigarette manufacturers had long known about the health hazards of smoking and had deliberately concealed that information from the public.

The first and perhaps best known of these officials was Jeffrey Wigand, the former head of research at Brown and Williamson, one of the large tobacco companies. Voluminous internal records showing that cigarette manufacturers were aware of the dangers of smoking, including the addictive properties of nicotine, were also leaked to the public. One paralegal at Brown and Williamson copied more than four thousand documents and provided them to tobacco opponents. An annotated compilation of those documents was published, in 1996, under the title *The Cigarette Papers.* As a direct result of this growing body of information demonstrating that the manufacturers knew that nicotine in smoking and chewing tobacco can lead to addiction, the FDA, in 1994, began examining whether nicotine qualified as a drug under the Food, Drug and Cosmetic Act (21 U.S.C.A. §§ 301 et seq.), and thus could be regulated as such by the FDA.

The FDA had formerly asserted jurisdiction over tobacco products only to the extent that they carried therapeutic claims. By 1996, however, the FDA had determined that cigarettes and other tobacco products are intended by their manufacturers to be delivery devices for nicotine, a drug resulting in significant pharmacological effects on the body, including addiction. Based on the Food, Drug and Cosmetic Act definition of a drug as an article "intended to affect the structure or any function of the body" and on the FDA's determination that the cigarette and smokeless tobacco manufacturers "intend" these effects, the FDA declared, in August 1996, that it had jurisdiction to regulate tobacco products.

The FDA then announced that it would begin by regulating the sale and distribution of cigarettes and smokeless tobacco products to children and adolescents. The issue of children smoking has aroused widespread concern. Studies in the 1990s demonstrated that despite state laws prohibiting the use of tobacco before the age of 18, children had easy access to tobacco products and many had become regular smokers before their eighteenth birthday. In 1996, the FDA estimated that 4.5 million children and adolescents in the United States smoke and that another 1 million children use smokeless tobacco. Accordingly, the FDA promulgated a proposed rule to reduce children's access to tobacco and limit its appeal to them. The final FDA rule treated nicotine addiction as a pediatric disease because the use of tobacco products and the resulting nicotine addiction begin predominantly in children and adolescents. The FDA concluded that children do not fully understand the risks associated with consuming tobacco and that they are vulnerable to the sophisticated marketing techniques used by the tobacco industry. As a result, the FDA regulations governed tobacco products' promotion, labeling, and accessibility to children and adolescents.

The tobacco companies sued in federal court, arguing that the FDA lacked the statutory

authority to impose regulations on tobacco The Supreme Court, in *FDA v. Brown & Williamson Tobacco Corp.* 529 U.S. 120, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000), struck down the FDA regulations. The Court, in a 5–4 decision, held that the Food, Drug, and Cosmetic Act, read as a whole, along with recent tobacco legislation passed by Congress, clearly showed that the FDA did not have the authority to regulate tobacco products. The Court acknowledged that the case involved "one of the most troubling public health problems facing our Nation today: the thousands of premature deaths that occur each year because of tobacco use." Yet, the Court also pointed out that "Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products," and that it has "repeatedly acted to preclude any agency from exercising significant policymaking authority in the area."

### State Regulation of Tobacco

State and local governments are also involved in the regulation of tobacco and tobacco products. Such regulations typically restrict the use of tobacco by minors, require licenses for those who sell tobacco products, and restrict vending machine and individual cigarette sales. The scope of state and local regulation is limited, however, because it may not extend to areas already being regulated by the federal government. For example, because the FCLAA regulates advertising based on smoking and health considerations, states and localities can restrict advertising only for other reasons, such as to protect citizens' aesthetic sensibilities, to control the location or types of cigarette displays, or to protect children from promotions blatantly aimed at them as consumers.

Whether the FCLAA preempts state regulation of promotions aimed at children has been disputed in the courts. In *Penn Advertising v. City of Baltimore,* 862 F. Supp. 1402 (D. Md. 1994), *aff'd,* 63 F.3d 1318 (4th Cir. 1995), *vacated by Penn Advertising v. Schmoke,* 518 U.S. 1030, 116 S. Ct. 2575, 135 L. Ed. 2d 1090, the court held that the FCLAA did not preempt a local ordinance that barred cigarette advertising in certain locations where children were likely to be found, such as near schools.

However, in *Lorillard Tobacco Corp. v. Reilly,* 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001), the Supreme Court struck down a state regulation that prohibited tobacco ads within one thousand feet of public playgrounds, parks, and schools. The Court reaffirmed its holding that the FCLAA preempted most state regulation of advertising. States were free to use ZONING restrictions to limit the size and location of advertisements of all products, not just tobacco products. The state regulation in this case was invalid because it dealt only with tobacco advertising. In addition, the regulation violated the FIRST AMENDMENT because it unduly restricted commercial free speech.

### Clean Indoor Air Acts

Armed with information showing the effects of ETS, the federal, state, and local governments began considering statutes to prohibit smoking in nonresidential buildings. Federal laws were passed to restrict smoking in transportation systems (49 C.F.R. § 1061.1 [1991]), in government buildings (41 C.F.R. § 101-20.105-3 [1991]), and aboard domestic airline flights (14 C.F.R. § 129.29). Federal regulation of private-sector workplaces has yet to take effect. Federal legislation was proposed, but the tobacco industry was able to muster great resistance to it.

States and localities have responded to the concern over ETS by regulating smoking in various public areas. In 2003, 41 states and the District of Columbia had some form of regulation in place. A minority of states have enacted indoor air quality acts, similar to the rules proposed by the Occupational Safety and Health Administration (OSHA). Some local governments have passed laws restricting smoking in places of entertainment, restaurants, and workplaces and on public transportation. Most of the state and local smoking regulations do not ban smoking in the workplace entirely, but limit smoking to designated areas or private offices.

Many private employers have voluntarily restricted smoking in the workplace. A 1985 survey found that more than 33 percent of employers were already regulating smoking in the workplace, and by 1991 that number had grown to 85 percent. By the late 1990s many private businesses had established policies that made it nearly impossible for employees to work and smoke. For example, some businesses do not allow anyone who has smoked within a certain time period to enter the building. Other businesses raised rates for HEALTH INSURANCE for employees who smoke. Indeed, businesses are motivated to regulate smoking in part because of the higher absenteeism and increased health care costs of employees who smoke.

### Tobacco Litigation

Tobacco litigation can be divided into three distinct time frames based on the types of claims pursued and the legal theories on which those claims were based. The first wave of tobacco litigation (1954–1973) involved cases based mainly on the theories of deceit, breach of express and implied warranties, and NEGLIGENCE. Cases filed during the second wave of tobacco litigation (1983–1992) were based on the legal theories of failure to warn and strict liability. Neither of the first two waves of litigation proved to be successful for the plaintiffs.

The first wave of litigation was characterized by the tobacco industry's adamant claims that smoking and chewing tobacco products were not harmful to consumers. Plaintiffs during that time did not have the extensive medical studies demonstrating serious health consequences that are available today to support their claims. Thus, plaintiffs had a difficult time establishing the essential element of proximate cause (causal connection to the injury) in their tort cases. By the time of the second wave of tobacco litigation, the connection between smoking and illness had been firmly established, but the tobacco industry was still able to argue with great success that smokers assumed the risks of smoking by freely deciding to smoke. The FCLAA's requirement that a warning label be placed on all cigarette packaging and advertising supported the tobacco companies' defenses of contributory negligence and ASSUMPTION OF THE RISK.

During the first two waves of litigation, the tobacco companies were also successful in using their size and financial strength to make litigation as difficult as possible for the plaintiffs. The tobacco industry filed and argued every conceivable motion, took countless depositions, and sent out extensive interrogatories. As a result, it was extremely burdensome and expensive for plaintiffs and their attorneys to pursue their cases.

The third wave of tobacco litigation began in the early 1990s and consisted of CLASS ACTION suits brought by those injured by tobacco products, and medical cost reimbursement suits brought by states and insurance companies. The claims in the third wave were based on proven medical theories. First, plaintiffs could demonstrate that tobacco companies knew that nicotine is pharmacologically active and highly addictive but hid that knowledge and, in fact, denied it under oath. Second, plaintiffs could show that tobacco companies manipulated nicotine levels in their products in an attempt to foster addiction in their consumers. Common legal theories used in the third wave of litigation included fraud, intentional and negligent misrepresentation, emotional distress, violation of CONSUMER PROTECTION statutes, breach of express and implied warranties, strict liability, conspiracy, antitrust, negligent performance of a voluntary undertaking, UNJUST ENRICHMENT or indemnity, civil claims under the Federal RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO) ACT (18 U.S.C.A. §§ 1961 et seq. [1970]), and various criminal theories.

Litigation began with the certification of two class action suits (*Broin v. Philip Morris,* 641 So. 2d 888 [Fla. App. 3d Dist. 1994], *review denied, Philip Morris Inc. v. Broin,* 654 So. 2d 919 [Fla. 1995], and *Castano v. American Tobacco,* 84 F.3d 734 [5th Cir. 1996]). The class members in *Broin* were nonsmoking flight attendants who claimed that they suffered from various illnesses caused by their exposure to ETS from air travelers' cigarettes. *Castano* was based on plaintiffs' claims that tobacco companies intentionally manipulated nicotine levels, even though the companies knew that nicotine was a hazardous and addictive substance. The *Castano* class consisted of all nicotine-dependent persons or their estates, heirs, family members, or "significant others" in the United States and its territories and possessions, who have bought and smoked cigarettes manufactured by the defendants.

Because of the breadth of the class, the U.S. Court of Appeals for the Fifth Circuit ruled that the plaintiffs in *Castano* should not have been certified as a class; had the court allowed the case to proceed, it would likely have become the largest class action in U.S. history. After the decertification of the *Castano* class, plaintiffs' lawyers decided to pursue statewide class action suits in state courts around the nation.

Lawsuits since *Castano* have sought to eliminate the problem of certifying a large class. For example, *Engle v. R. J. Reynolds,* 672 So. 2d 39 [Ct. App. Fla. 3d Dist. 1996], *review denied,* 682 So. 2d 1100 (Fla. 1996), involved essentially the same claims as *Castano,* but the class was much smaller. The class certified in *Engle* consisted of Florida citizens and residents, and their survivors, who had suffered, presently suffer, or have died from diseases and other medical conditions caused by their addiction to cigarettes.

The *Engle* class action was allowed to proceed, which made it the first class action lawsuit against tobacco companies to go to trial. In 2000, a six-person jury awarded the class members a record $145 billion in PUNITIVE DAMAGES.

A wave of state reimbursement suits began in 1994, when the state of Mississippi filed an unprecedented lawsuit on behalf of the state's taxpayers against the tobacco industry to recoup the state's share of MEDICAID costs incurred as a result of tobacco-related illnesses (*Moore v. American Tobacco,* No. 94-1429 [Miss. Chan. Ct. 1994]). The state of Mississippi proceeded on legal theories of unjust enrichment and restitution, based on the fact that the state's taxpayers had been directly injured by the actions of the tobacco industry because they were forced to pay Medicaid costs associated with tobacco-related illnesses.

In 1994, the state of Minnesota filed a medical cost reimbursement suit, with the insurance company Blue Cross-Blue Shield of Minnesota as co-plaintiff. When West Virginia filed its medical reimbursement lawsuit, it named as defendants not only tobacco companies, but also the Kimberly-Clarke Corporation, developer of the tobacco reconstitution process that enables tobacco companies to manipulate nicotine levels. In 1995, the state of Florida filed a lawsuit against the tobacco industry under Florida's Medicaid Third-Party Liability Act, effectively preventing tobacco industry defendants from prevailing under defenses of ASSUMPTION OF RISK and contributory negligence. Texas filed suit, in 1996, and brought claims based in part on the RICO Act and on theories of mail and wire fraud, antitrust violations, and public NUISANCE. The state of Washington additionally sued the law firms that had represented the tobacco companies for many years, arguing that they unlawfully helped their clients keep certain documents confidential.

Eventually, the tobacco companies were forced to seek a national settlement of all state tobacco claims. In 1996, the Brooke Group and Liggett Group, two of the largest U.S. tobacco companies, settled with the states of West Virginia, Florida, Mississippi, Massachusetts, and Louisiana. This settlement was noteworthy because it represented the end of the tobacco industry's unified effort to avoid paying out monetary damages. After this settlement the major tobacco companies began intensive negotiations with all 50 state attorneys general.

By 1998, the states of Florida, Minnesota, Mississippi, and Texas had negotiated individual settlements worth billions of dollars to each state. The remaining 46 states continued to negotiate with the tobacco companies and, in November 1998, a deal was reached. The key elements of the settlement included the payment to the states of $206 billion over a 25-year period, funding to support research on programs to reduce youth smoking, limitations on advertising and sporting event sponsorship, and a ban on cartoon characters in advertising and "branded" merchandise (e.g., T-shirts). In addition, the companies agreed to disband the TOBACCO INSTITUTE, the Council for Tobacco Research, and the Council for Indoor Air Research. While supposedly neutral, these groups disseminated false information about the safety of tobacco products and lobbied against increased tobacco regulation. The companies also agreed to establish a website that would contain all documents produced in state and other smoking and health-related lawsuits.

The federal government has also pursued a similar course against the tobacco industry, seeking billions of dollars in damages. The government filed suit, in 1998, asserting that smoking causes cancer and other serious illnesses. These illnesses cost the federal government $25 billion annually in health care claims. It sought to recover more than four decades' worth of expenses, plus damages. In 2001, a federal district court dismissed two of the three claims, allowing only the RICO theory of liability to move forward (*United States v. Philip Morris Inc.,* 153 F. Supp. 2d 32 [D.D.C.2001]). By 2003, the government and the companies had not resolved the litigation and it was unclear whether a settlement might be reached.

Despite the national settlement with the states, the tobacco companies continue to defend themselves in lawsuits waged by individuals claiming health problems caused by either smoking or breathing secondhand smoke. In order to obtain the maximum benefit, plaintiffs' attorneys organize and work together. Plaintiffs also have access to new evidence obtained from internal tobacco company documents and former tobacco industry researchers to significantly bolster their cases. For example, the Minnesota Court of Appeals decided in *State ex rel. Humphrey v. Philip Morris Inc.,* 606 N.W.2d 676

(Minn. App.2000), that tobacco company documents could be released to the public. During the initial Minnesota tobacco trial, the judge ordered the companies to release many internal documents. Since the parties settled before a verdict was reached, the tobacco companies sought to prevent public access to the documents given to the plaintiffs. The appeals court ruled that the trial court had properly examined the issues and that the documents could be released to the public. The appeals court also pointed out that many of the documents had already been disseminated publicly. The ruling cleared the way for a massive release of internal documents and indices that would aid other plaintiffs in their pending lawsuits against tobacco companies.

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## TOBACCO INSTITUTE

The Tobacco Institute (TI) was a public relations and LOBBYING organization that represented the interests of the twelve companies that funded it. Over time the TI came to be perceived as a controversial organization. While the TI maintained that its mission was to increase awareness of the historic role of tobacco and its place in the national economy and to foster understanding of tobacco-related issues, tobacco industry critics charged it with using sophisticated propaganda techniques and high-powered lobbying to manipulate public opinion and public policy.

The Tobacco Institute was founded in 1958 by the major U.S. tobacco manufacturers and has an estimated annual budget of more than $20 million. It was headquartered in Washington, D.C., and had a staff of 50. The institute's publications included two ANNUAL REPORTS, *Tax Burden on Tobacco* and *Tobacco Industry Profile*. It also published historic, economic, and topical material.

The TI was established in response to a growing public health movement in the 1950s against smoking. From its inception, the institute stressed the contribution of tobacco to the U.S. economy and the preservation of tobacco farms. It also stressed the inconclusiveness and inconsistency of antismoking findings and supported the rights of individual smokers to smoke in public places. The TI publicized the research findings of the Council for Tobacco Research, an organization funded by the tobacco companies, which disputed critics' claims that tobacco has harmful effects and addictive properties. Historically, the TI fought efforts to raise the federal cigarette tax and to label tobacco products as being hazardous to health.

For decades TI lobbying efforts in Washington, D.C., proved effective. Aside from informing legislators about tobacco-related issues, the TI made significant political contributions through its POLITICAL ACTION COMMITTEE. In December 1997, it sponsored an all-expense-paid trip to Arizona for members of Congress and their staffs to discuss the proposed $368 billion national tobacco settlement that would compensate states that were suing the tobacco industry for smoking-related HEALTH CARE costs and fund antismoking programs.

As part of the November 1998 settlement between the tobacco companies and 46 states, the former agreed to disband the institute. On January 29, 1999, the Tobacco Institute ceased operations.

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Addict; Surgeon General; Tobacco.

## ♦ TODD, THOMAS

Thomas Todd served as an associate justice of the U.S. Supreme Court from 1807 to 1826. Trained as a land surveyor and as a lawyer, Todd's handful of opinions on the Court mostly concerned land claims.

Todd was born in King and Queen County, Virginia, on January 23, 1765. As a teenager, he served briefly in the Revolutionary War before attending Liberty Hall, now called Washington and Lee University. Todd studied surveying before moving to Kentucky (which was then part of Virginia) in 1784, after his first cousin, Harry Innes, was appointed to the Kentucky district of the Virginia Supreme Court. Todd was admitted to the Kentucky bar in 1788, but he gained positions of influence by becoming a recorder.

Todd was the clerk for the ten conventions called between 1784 and 1792 to arrange Ken-

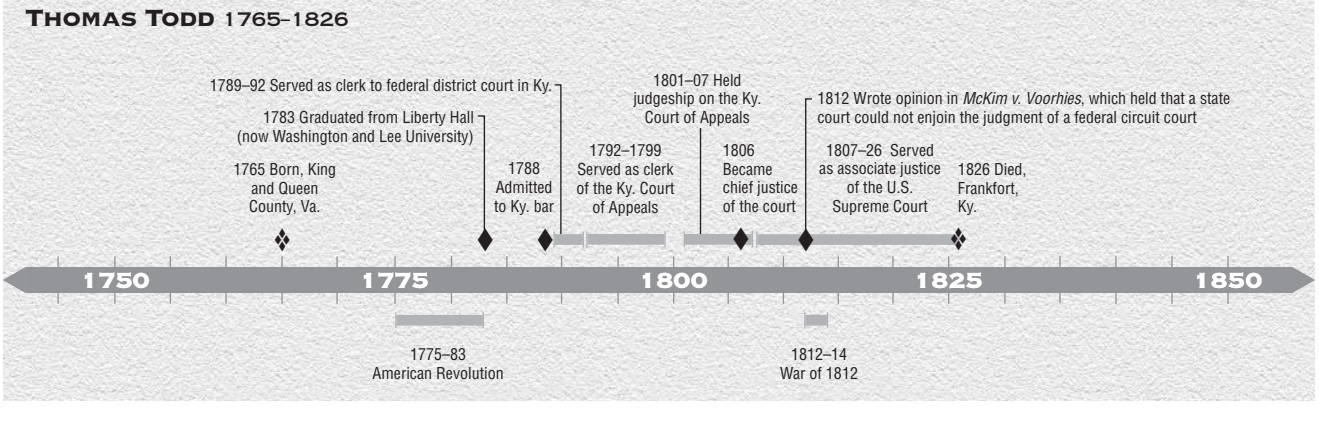

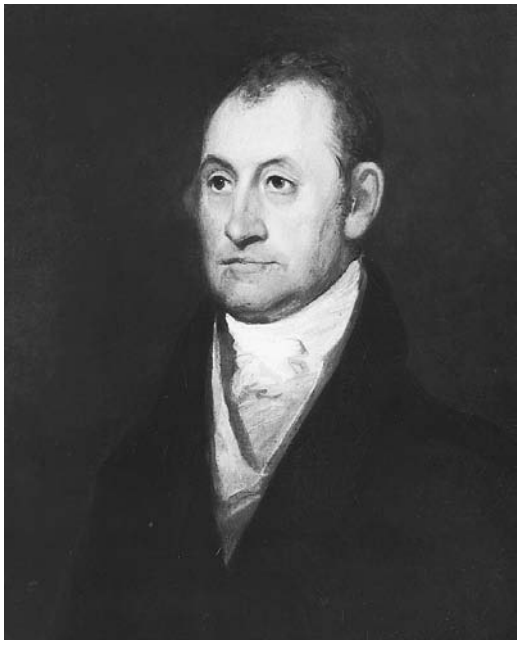

*Thomas Todd.* ETCHING BY ALBERT ROSENTHAL. THE GRANGER COLLECTION, NEW YORK

tucky's separation from Virginia. He served as clerk to the federal district court in Kentucky (1789–1792), clerk of the Kentucky House of Representatives (1792), and clerk of the Kentucky Court of Appeals (1792–1799). When the Kentucky Supreme Court was created in 1799, Todd was named as its first chief clerk. Two years later, he was named as a judge on that court.

Todd proved adept at resolving the land disputes created by the complicated law that Kentucky had inherited from Virginia. In 1806, he was named chief judge of the Kentucky Supreme Court but served only briefly in that position.

In 1807, the U.S. Supreme Court was expanded to seven members. The western states (i.e., Kentucky, Tennessee, and Ohio) urged President THOMAS JEFFERSON to nominate Todd to the new seat, as the new justice would be responsible for presiding as a judge in the newly established Seventh Circuit. Jefferson agreed and nominated Todd in early 1807. Todd took his seat in 1808.

During his time on the Court, Todd served under Chief Justice JOHN MARSHALL. Although they had different political beliefs, Todd adopted Marshall's views on constitutional construction. Todd's knowledge of land laws made him a valuable member of the Court, even though he wrote very few opinions. His absence from the Court for six terms because of illness, family matters, and the difficulty of traveling to Washington also diminished his effectiveness. Todd died on February 7, 1826, in Frankfort, Kentucky.

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## TOKYO TRIAL

After WORLD WAR II eleven of the Allied Powers (Australia, Canada, China, France, India, the Netherlands, New Zealand, the Philippines, the Soviet Union, the United Kingdom, and the United States) prosecuted twenty-eight of Japan's top military, political, and diplomatic leaders for an assortment of WAR CRIMES committed in Southeast Asia between 1928 and 1945. Known as the Tokyo trial for the city in which it took place, this legal proceeding stands along side the NUREMBERG TRIALS for its contribution to INTERNATIONAL LAW and the RULES OF WAR.

American involvement in World War II formally began on December 8, 1941, when the United States declared war on Japan, and formally ended on September 2, 1945, when the Japanese surrendered in Tokyo Bay aboard the USS *Missouri.* For more than a decade before the war, the Japanese military had been expanding its foothold on the Asiatic mainland. During the war itself, Japan invaded or attacked Burma, China, Indochina, the Philippines, Malaysia, Manchuria, Wake Island, Hong Kong, Singapore, and the Aleutians, committing an array of atrocities. The Tokyo trial was the Allies' effort to hold Japan responsible for its crimes during this period of military aggression.

The International Military Tribunal for the Far East (IMT) was established on January 19, 1946, by order of General Douglas MacArthur, the supreme commander of Allied Forces in the South Pacific. MacArthur appointed eleven judges to preside, one from each of the Allied countries participating in the proceeding. All decisions made by the IMT were by majority vote, with MacArthur retaining plenary power over appeals. Because the vanquished government of Japan consented to the jurisdiction of

*Hideki Tojo—the highest ranking official prosecuted by the Allies during the International Military Tribunal for the Far East (aka the Tokyo Trial)—stands in the witness box (far right).*

AP/WIDE WORLD PHOTOS

the IMT, the tribunal sidestepped some of the murkier legal issues confronting the judges at Nuremberg who had faced repeated challenges to their authority under international law.

Each of the participating Allied Powers was represented by a chief prosecutor and a support staff comprised of assistant prosecutors, investigators, and miscellaneous other personnel. The defendants were represented by over one hundred attorneys, three-quarters Japanese and one-quarter American, plus a support staff of their own. The prosecution began opening statements on May 3, 1946, and took 192 days to present its case. The defense opened its case on January 27, 1947, and finished its presentation 225 days later. The IMT delivered its judgment over a period of 4 days, concluding the trial on November 12, 1948. During 818 public sessions held by the IMT, 230 translators were employed, 419 witnesses gave testimony, 4,336 exhibits were introduced, and more than 53,000 pages of transcript were printed.

Although the IMT heard evidence regarding fifty-five counts of war crimes, most of the transgressions fell into one of three categories: crimes against peace, crimes against humanity, and conventional war crimes. Crimes against peace included the planning, initiating, and waging of "aggressive war," which was broadly defined as any hostile military act that violated the territorial boundaries or political independence of a sovereign nation. Crimes against humanity included the murder, persecution, and enslavement of civilian populations. Conventional war crimes included violations of the international rules and customs of warfare that have been recognized by civilized societies and govern hostilities between combatants, the behavior of occupying powers, and the treatment of prisoners of war (POWs).

The prosecution offered compelling evidence that the defendants had violated more than a hundred international treaties and committed countless war crimes over the previous twenty years. In particular, the evidence showed that when Japan invaded Nanking, China in 1937, at least 20,000 women were raped by Japanese soldiers, and at least 100,000 civilians were slaughtered. Thousands of Chinese civilians were captured during the massacre and deported to Japanese labor camps where they were forced to work at gunpoint. Other evidence revealed that the Japanese army had brutally marched 50,000 U.S. POWs across the Bataan peninsula in 1942. Many of these prisoners were underfed, dehydrated, and malnourished, while some were tortured, shot, and buried alive in what became known as the "Bataan Death March." Additionally, prosecution witnesses gave testimony that U.S., Soviet, Filipino, and Chinese POWs had been used as subjects in barbaric scientific experiments performed at Japanese concentration camps throughout the war.

The IMT spent six months reaching judgment and drafting its 1,781-page opinion. Nine judges were persuaded by the prosecution's evidence, and two were not. The judges from France and India wrote separate dissenting opinions. Twenty-five defendants were found guilty of committing war crimes; seven of them were sentenced to death by hanging, 16 to life imprisonment, one to a term of 20 years, and one to a term of seven years. Two defendants died before the proceedings ended, and one was declared incompetent to stand trial by reason of insanity.

The highest ranking official prosecuted by the Allies was Hideki Tojo, the prime minister of Japan during the attack on Pearl Harbor in Hawaii in 1941. He was found guilty of waging aggressive war and sentenced to death. Tojo's predecessor, Kuki Hirota, was prime minister during Japan's invasion of China in 1937. He was convicted of crimes against humanity and sentenced to death for negligently failing to stop the massacre at Nanking after learning about the terror and carnage in its early stages. **HIROHITO**, the Japanese emperor during World War II, was

spared from prosecution as a condition of Japan's surrender in 1945.

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## TOLL

*A sum of money paid for the right to use a road, highway, or bridge. To postpone or suspend. For example, to toll a* STATUTE OF LIMITATIONS *means to postpone the running of the time period it specifies.*

## TONKIN GULF RESOLUTION

In August 1964 Congress passed the Tonkin Gulf Resolution (78 Stat. 384), approving and supporting President Lyndon B. Johnson's determination to repel any armed attack against U.S. forces in Southeast Asia. Johnson subsequently relied on the measure as his chief authorization for the escalation of the VIETNAM WAR.

The resolution was prompted by Johnson's report to Congress that the North Vietnamese had fired upon two U.S. destroyers in international waters in the Gulf of Tonkin, off the coast of North Vietnam. Johnson requested that Congress grant him wide PRESIDENTIAL POWERS to respond to the attacks of the North Vietnamese. Both houses of Congress voted overwhelmingly in favor of the resolution; only two senators opposed it and no representatives. The resolution gave the president power to "take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." According to the resolution, its purpose was to promote international peace and security and support the defense of U.S. naval vessels lawfully present in international waters from deliberate and repeated attacks by naval units of the Communist regime in Vietnam.

It was later revealed that the federal government had drafted the Tonkin Gulf Resolution fully six months before the attacks on the U.S. vessels occurred. It was also revealed that the United States provoked the attack by assisting the South Vietnamese in mounting clandestine military attacks against the North Vietnamese. Although the two U.S. vessels attacked were actually on intelligence-gathering missions, the North Vietnamese could not distinguish them from the South Vietnamese raiding ships. Johnson had also exaggerated the gravity of the attack itself, which did not harm either of the ships.

Although no formal declaration of war was ever issued for the Vietnam War, the JUSTICE DEPARTMENT and the STATE DEPARTMENT relied on the Tonkin Gulf Resolution as the functional equivalent. Thus, Johnson was able to send U.S. troops to Vietnam without an official war declaration. In early 1965 the Viet Cong raided a U.S. air base in South Vietnam, killing seven Americans. In response to that action, and in accordance with the Tonkin Gulf Resolution, Johnson began a large-scale escalation of U.S. involvement in the Vietnam War. The number of U.S. soldiers in South Vietnam grew from 25,000 in early 1965 to 184,000 by the end of that year. The escalation continued, and by 1968 543,000 U.S. soldiers were in South Vietnam.

Although the war initially had widespread support, by 1968 growing numbers of Americans had begun to protest and question Johnson's decisions to escalate U.S. involvement. For a number of reasons, the public felt the president had deceived them. In the 1964 presidential elections, Johnson had campaigned on a promise to keep U.S. troops out of the fighting in Vietnam. In addition, the public learned through the release of the Pentagon Papers that the Tonkin Gulf incident was actually instigated by the United States and was not as damaging as the government had suggested. Some CONSTITUTIONAL LAW authorities argued that it was irrelevant whether Congress was deceived by the executive in passing the Tonkin Gulf Resolution because the resolution provided that Congress could repeal it at any time. In addition, the scholars argued that Congress had the power to stop appropriating money to support the war effort.

In January 1971 Congress repealed the Tonkin Gulf Resolution. President RICHARD M. NIXON continued the war effort, however, by relying on the commander in chief provisions of the U.S. Constitution. Congress continued to

appropriate money to support the war effort. The Vietnam War was the longest, costliest, and most controversial war in U.S. history, and the Tonkin Gulf Resolution was the focal point of much of the controversy.

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CROSS-REFERENCES

*New York Times Co. v. United States*; Vietnam War; War Powers Resolution.

## TONTINE

*An organization of individuals who enter into an agreement to pool sums of money or something of value other than money, permitting the last survivor of the group to take everything.*

The holders of tontine life insurance contracts enter into an agreement to pay premiums for a certain amount of time before they gain the right to acquire dividends. In the event that a policyholder dies during the tontine policy, his or her beneficiary will be entitled to benefits, but no dividends. The earnings that ordinarily would be used to pay dividends are accumulated during the tontine period and subsequently given only to policyholders who are still alive at the end of the term. This type of policy is known as a dividend-deferred policy. A number of states proscribe such policies.

## TORRENS TITLE SYSTEM

*A system for recording land titles under which a court may direct the issuance of a certificate of title upon application by the landowner.*

The Torrens title system is a method of registering titles to real estate. Real estate that is recorded using this method is also called *registered property* or *Torrens property.* The system is used in the British Commonwealth countries, including Canada, and in Europe but has not been widely adopted in the United States. The first U.S. Torrens system was enacted by Illinois in 1897.

The system is named after Sir Robert R. Torrens, who introduced it in South Australia in 1858 and later lobbied for its adoption in other parts of the country. He wrote several books on the subject, arguing that his system simplified the transfer of real property and eliminated the need for repeated examinations of land titles.

Under the traditional system of transferring, or conveying, land, the history of the property in question must be examined to ensure that the seller can convey good title to the purchaser. When property is sold, a deed is filed and recorded with the county land office; the deed contains the names of the seller and the buyer; the ownership relationship of the sellers and buyers, if more than one seller or one buyer is involved (for example, joint tenants or tenants in common); and the legal description of the property being transferred. This information is abstracted from each deed and recorded in a document called an ABSTRACT OF TITLE. An attorney or a real estate title examiner inspects each entry to determine that good title has been passed with each transaction. If any problems exist with the title, they must be remedied before the purchaser may obtain good title.

A Torrens system does away with this process. A court or bureau of registration operates the system, with an examiner of titles and a registrar as the key officers. The owner of a piece of land files a petition with the registrar to have the land registered. The examiner of titles reviews the LEGAL HISTORY of the land to determine if good title exists. If good title does exist, the registrar issues a certificate of title to the owner. This certificate is ordinarily conclusive as to the person's rights in the property and cannot be challenged or overcome by a court of law. If a mistake is made by the examiner of titles, an insurance fund pays the person who holds a claim against the land. The fees charged to examine and register property pay for the insurance fund and the operation of the registration office.

When the owner sells the property, the certificate alone is evidence of good title, eliminating the need for a new examination of title. The purchaser presents the deed and the certificate of title to the registrar, who records the purchaser's name on the title.

The one drawback to a Torrens system is the initial cost of registering the property. The system is most effective when unimproved land is subdivided for the first time because it reduces the number of deed entries an examiner must review.

CROSS-REFERENCES

Recording of Land Titles; Registration of Land Titles; Title Search.

## TORT LAW

*A body of rights, obligations, and remedies that is applied by courts in civil proceedings to provide relief for persons who have suffered harm from the wrongful acts of others. The person who sustains injury or suffers pecuniary damage as the result of tortious conduct is known as the plaintiff, and the person who is responsible for inflicting the injury and incurs liability for the damage is known as the defendant or tortfeasor.*

Three elements must be established in every tort action. First, the plaintiff must establish that the defendant was under a legal duty to act in a particular fashion. Second, the plaintiff must demonstrate that the defendant breached this duty by failing to conform his or her behavior accordingly. Third, the plaintiff must prove that he suffered injury or loss as a direct result of the defendant's breach.

The law of torts is derived from a combination of common-law principles and legislative enactments. Unlike actions for breach of contract, tort actions are not dependent upon an agreement between the parties to a lawsuit. Unlike criminal prosecutions, which are brought by the government, tort actions are brought by private citizens. Remedies for tortious acts include money damages and injunctions (court orders compelling or forbidding particular conduct). Tortfeasors are subject to neither fine nor incarceration in civil court.

The word *tort* comes from the Latin term *torquere,* which means "twisted or wrong." The English COMMON LAW recognized no separate legal action in tort. Instead, the British legal system afforded litigants two central avenues of redress: TRESPASS for direct injuries, and actions "on the case" for indirect injuries. Gradually, the common law recognized other civil actions, including DEFAMATION, LIBEL, and slander. Most of the American colonies adopted the English common law in the eighteenth century. During the nineteenth century, the first U.S. legal treatises were published in which a portion of the common law was synthesized under the heading of torts.

Over the last century, tort law has touched on nearly every aspect of life in the United States. In economic affairs, tort law provides remedies for businesses that are harmed by the unfair and deceptive trade practices of a competitor. In the workplace, tort law protects employees from the intentional or negligent infliction of emotional distress. Tort law also helps regulate the environment, providing remedies against both individuals and businesses that pollute the air, land, and water to such an extent that it amounts to a NUISANCE.

Sometimes tort law governs life's most intimate relations, as when individuals are held liable for knowingly transmitting communicable diseases to their sexual partners. When a loved one is killed by a tortious act, surviving family members may bring a WRONGFUL DEATH action to recover pecuniary loss. Tort law also governs a wide array of behavior in less intimate settings, including the operation of motor vehicles on public roadways.

The law of torts serves four objectives. First, it seeks to compensate victims for injuries suffered by the culpable action or inaction of others. Second, it seeks to shift the cost of such injuries to the person or persons who are legally responsible for inflicting them. Third, it seeks to discourage injurious, careless, and risky behavior in the future. Fourth, it seeks to vindicate legal rights and interests that have been compromised, diminished, or emasculated. In theory these objectives are served when tort liability is imposed on tortfeasors for intentional wrongdoing, NEGLIGENCE, and ultrahazardous activities.

### Intentional Torts

An intentional tort is any deliberate interference with a legally recognized interest, such as the rights to bodily integrity, emotional tranquility, dominion over property, seclusion from public scrutiny, and freedom from confinement or deception. These interests are violated by the intentional torts of assault, BATTERY, trespass, FALSE IMPRISONMENT, invasion of privacy, conversion, MISREPRESENTATION, and FRAUD. The intent element of these torts is satisfied when the tortfeasor acts with the desire to bring about harmful consequences and is substantially certain that such consequences will follow. Mere reckless behavior, sometimes called willful and wanton behavior, does not rise to the level of an intentional tort.

Under certain circumstances the law permits individuals to intentionally pursue a course of conduct that will necessarily result in harm to others. The harm that results from such conduct is said to be outweighed by more important interests. Self-preservation is one such interest and is embodied in the right of SELF-DEFENSE. Individuals may exert sufficient force in self-

# Breast Implant Lawsuits

When a company produces a dangerous or defective product that injures an individual, the injured person may sue the company in a products-liability tort action, demanding compensation for the injuries. To prevail in a products-liability action, the plaintiff must demonstrate that the injury-causing product was defective, that the defect existed at the time the product left the control of the defendant, and that such defect was the proximate cause of the plaintiff's injury. If many individuals have been injured by the same product, the court may permit the filing of a **CLASS ACTION** lawsuit, in which a small number of plaintiffs represent the entire group of injured victims.

One of the more controversial class actions involved the silicone breast-implant litigation. Notwithstanding a class totaling more than 400,000 plaintiffs, a settlement that offered more than $3 billion in compensation for their alleged injuries, and a federal government ban on the product, no evidence was ever provided that conclusively linked silicone breast implants with any form of serious disease. In fact, following the settlement at least two scientific studies affirmatively concluded that no such link exists. In the wake of those studies, manufacturers have sought government approval to resume selling silicone breast implants to the public.

In 1962 Dow Corning became the first company to manufacture and market silicone breast implants. The implants consisted of a rubbery silicone envelope containing silicone gel. Plastic surgeons soon discovered that a certain (and as yet undetermined) percentage of implants rupture on their own, either because of trauma to the breast or because the implant simply tears. In many cases, the gel stays either in the implants or in the immediate vicinity. In rare cases, the gel may migrate through the body. Moreover, the implants themselves are permeable, and minute amounts of silicone gel can seep through the implants and remain in nearby tissue or migrate throughout the body.

For many years, breast implants were essentially unregulated by the government. The **FOOD AND DRUG ADMINISTRATION** (FDA) did not have jurisdiction over medical devices, including breast implants, until the 1976 Medical Devices Amendment to the Food, Drug and Cosmetic Act (MDA) became law. The MDA "grandfathered-in" existing devices, such as breast implants, allowing them to remain on the market until the FDA could classify and regulate them. In 1982 the FDA proposed classifying silicone-gel breast implants as Class III devices, the most stringently regulated category. The FDA expressed concern about the scar tissue that forms around the implant, about potential long-term toxic effects of silicone that might leak from the implants, and about possible health effects from the silicone polymers from which the implant shells were made.

That same year Maria Stern filed the first silicone-breast-implant-related **PRODUCT LIABILITY** suit against Dow Corning, Inc., after her implants ruptured. Testifying before a jury sitting in the U.S. District Court for the Northern District of California, Stern said that she suffered from chronic fatigue and joint pains before and after the implants were removed. Although her doctors speculated that Stern's problems had been caused by the silicone migrating throughout her body, they offered no valid scientific proof of causation. However, Stern did demonstrate that the company had acted irresponsibly by failing to conduct any research into the possible ill effects of silicone on the human body despite evidence that Dow Corning knew that implants could leak and rupture. A jury found for the plaintiff and awarded Stern $200,000 in damages. The jury also awarded her $1.2 million in **PUNITIVE DAMAGES**. After the trial judge upheld the awards, the case was settled before appeal for an undisclosed sum, and the record was sealed.

The media did not immediately pick up on the Stern settlement or the smattering of similar lawsuits that were pending in state and federal courts around the country. After several relatively uneventful years following a series FDA hearings in the late 1980s, however, NBC aired an episode of *Face to Face with Connie Chung* which focused on the dangers of breast implants. The December 1990 show frightened and outraged thousands of implant recipients. Chung referred to silicone gel as "an ooze of slimy gelatin that could be poisoning women." She interviewed several women who blamed implants for causing their auto-immune diseases, but Chung never ques-

tioned the presumed link. Chung concluded the segment by showing viewers pictures of Sybil Goldrich, whose chest had been disfigured by operations to remove her implants.

On July 9, 1991, a deadline expired for implant manufacturers to prove the safety of their product to the FDA, and no manufacturer offered any convincing proof on the matter. A year later the FDA ordered that silicone breast implants be removed from the market. Thereafter, the number of breast-implant lawsuits filed against manufacturers rose dramatically. By 1992 plaintiffs had filed 3,558 individual lawsuits against Dow Corning alone. In June 1992, the federal Judicial Panel on Multidistrict Litigation certified a multi-district class-action lawsuit against the major implant manufacturers, including Dow Corning, Bristol-Myers Squibb, Baxter International, and Minnesota Mining & Manufacturing Co.

In September 1993 the parties tentatively agreed to settle the class-action products liability lawsuit for $4.75 billion. But settlement ultimately collapsed after 440,000 women registered for the settlement, forcing Dow Corning, the largest contributor to the settlement, to file for **BANKRUPTCY** in 1995. On November 30, 1998, U.S. Bankruptcy Judge Arthur Spector approved Dow Corning's $4.5 billion plan to emerge from bankruptcy, which included $3.2 billion to settle implant claims with more than 170,000 women. Eventually, the other implant manufacturers entered similar settlement agreements with most of the remaining plaintiffs. More than 90 percent of the eligible class-action plaintiffs accepted the defendants' settlement offers. The remaining plaintiffs opted-out of the class settlement, which allowed them to sue the defendants individually.

A little more than a year after the class action was settled, a scientific panel appointed by the court overseeing the settlement released the results of its breast-implant study, finding that there was no sufficient scientific basis to link silicone implants to cancer, connective tissue diseases, immune system dysfunctions, or any other disease. On June 21, 1999, the Institute of Medicine of the National Academy of Sciences issued a congressionally funded report that reached the same conclusion.

In March of 2003 two California-based companies announced their desire to re-introduce silicone breast implants into the stream of commerce, and the FDA agreed to hold safety hearings and reconsider its ban on the product. The potential return of silicone gel-filled implants came at a time when more women were looking to increase their breast size: the American Society of Plastic Surgeons reported more than 206,300 breast augmentations in 2001, up from about 32,600 in 1992.

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**CROSS-REFERENCES**

Class Action.

defense to repel an imminent threat of bodily harm. DEADLY FORCE may only be used by persons who reasonably believe that their lives are endangered and for whom there are no reasonable means of escape. Reasonable force, but not deadly force, may be employed in defense of property.

Consent is a defense to virtually every intentional tort. The law will not compensate persons who knowingly allow someone to injure them. However, consent must be given freely and voluntarily to be effective. Consent induced by coercion, duress, UNDUE INFLUENCE, or chicanery is not legally effective. Nor is consent legally effective when given by an incompetent person. Consent to intentional torts involving grievous bodily harm is also deemed ineffective in a number of jurisdictions.

## Negligence

Most injuries that result from tortious behavior are the product of negligence, not intentional wrongdoing. Negligence is the term used by tort law to characterize behavior that creates unreasonable risks of harm to persons and property. A person acts negligently when his behavior departs from the conduct ordinarily

expected of a reasonably prudent person under the circumstances. In general, the law requires jurors to use their common sense and life experience in determining the proper degree of care and vigilance with which people must lead their lives to avoid imperiling the safety of others.

Not every accident producing injury gives rise to liability for negligence. Some accidents cannot be avoided even with the exercise of reasonable care. An accident that results from a defendant's sudden and unexpected physical ailment, such as a seizure or a blackout, generally relieves the defendant of liability for harm caused during his period of unconsciousness. However, defendants who have reason to know of such medical problems are expected to take reasonable precautions against the risks the problems create. In some jurisdictions unavoidable accidents are called ACTS OF GOD.

ASSUMPTION OF RISK is another defense to negligence actions. This defense prevents plaintiffs from recovering for injuries sustained as a result of a relationship or transaction they entered with full knowledge and acceptance of the risks commonly associated with such undertakings. Assumed risks include most of those encountered by spectators attending sporting events. However, the law will not assume that individuals accept the risk of intentionally inflicted harm or damage, such as injuries resulting from ASSAULT AND BATTERY.

### Strict Liability

In some cases tort law imposes liability on defendants who are neither negligent nor guilty of intentional wrongdoing. Known as STRICT LIABILITY, or liability without fault, this branch of torts seeks to regulate those activities that are useful and necessary but that create abnormally dangerous risks to society. These activities include blasting, transporting hazardous materials, storing dangerous substances, and keeping certain wild animals in captivity.

A distinction is sometimes drawn between moral fault and legal fault. Persons who negligently or intentionally cause injury to others are often considered morally blameworthy for having failed to live up to a minimal threshold of human conduct. On the other hand, legal fault is more of an artificial standard of conduct that is created by government for the protection of society.

Persons who engage in ultrahazardous activities may be morally blameless because no amount of care or diligence can make their activities safe for society. However, such persons will nonetheless be held legally responsible for harm that results from their activities as a means of shifting the costs of injury from potential victims to tortfeasors. As a matter of social policy, then, individuals and entities that engage in abnormally dangerous activities for profit must be willing to ensure the safety of others as a price of doing business.

Consumers who have been injured by defectively manufactured products also rely on strict liability. Under the doctrine of strict PRODUCT LIABILITY, a manufacturer must guarantee that its goods are suitable for their intended use when they are placed on the market for public consumption. The law of torts will hold manufacturers strictly liable for any injuries that result from placing unreasonably dangerous products into the stream of commerce, without regard to the amount of care exercised in preparing the product for sale and distribution and without regard to whether the consumer purchased the product from, or entered into a contractual relationship with, the manufacturer.

### Causation

Causation is an element common to all three branches of torts: strict liability, negligence, and intentional wrongs. Causation has two prongs. First, a tort must be the cause in fact of a particular injury, which means that a specific act must actually have resulted in injury to another. In its simplest form, cause in fact is established by evidence that shows that a tortfeasor's act or omission was a necessary antecedent to the plaintiff's injury. Courts analyze this issue by determining whether the plaintiff's injury would have occurred "but for" the defendant's conduct. If an injury would have occurred independent of the defendant's conduct, cause in fact has not been established, and no tort has been committed. When multiple factors have led to a particular injury, the plaintiff must demonstrate that the tortfeasor's action played a substantial role in causing the injury.

Second, plaintiffs must establish that a particular tort was the proximate cause of an injury before liability will be imposed. The term *proximate cause* is somewhat misleading because it has little to do with proximity or causation. Proximate cause limits the scope of liability to those injuries that bear some reasonable relationship to the risk created by the defendant.

Proximate cause is evaluated in terms of foreseeability. If the defendant should have foreseen the tortious injury, he or she will be held liable for the resulting loss. If a given risk could not have been reasonably anticipated, proximate cause has not been established, and liability will not be imposed.

When duty, breach, and proximate cause have been established in a tort action, the plaintiff may recover damages for the pecuniary losses sustained. The measure of damages is determined by the nature of the tort committed and the type of injury suffered. Damages for tortious acts generally fall into one of four categories: damages for injury to person, damages for injury to PERSONAL PROPERTY, damages for injury to real property, and PUNITIVE DAMAGES.

### Damages

Personal injury tort victims must normally recover all their damages—past, present, and future—during a single lawsuit. Damages may be recovered for physical, psychological, and emotional injury. Specifically, these injuries may include permanent disability, pain and suffering, disfigurement, humiliation, embarrassment, distress, impairment of earning capacity, lost wages or profits, medical costs, and out-of-pocket expenses. Courts typically rely on EXPERT TESTIMONY to translate such losses into dollar figures.

Plaintiffs suffering damage to personal property must elect between two methods of recovery. First, plaintiffs may elect to recover the difference between the value of the property before the tort and the value of the property after it. Second, plaintiffs may elect to recover the reasonable costs of repair for damaged personal property. However, if the property is destroyed, irreparable, or economically infeasible to repair, damages are measured by the replacement value of the property. Persons who are temporarily deprived of personalty may sue to recover the rental value of the property for the period of deprivation.

Damages for injury to real property may be measured by the difference in the realty's value before and after the tort. Alternatively, plaintiffs may elect to recover the reasonable costs of restoring the property to its original condition. In either case plaintiffs may also recover the rental value of their property if its use and enjoyment has been interrupted by tortious behavior. Mental, emotional, and physical harm that is sustained in the process of a tortious injury to real property is compensable as well.

Punitive damages, called exemplary damages in some jurisdictions, are recoverable against tortfeasors whose injurious conduct is sufficiently egregious. Although punitive damages are typically awarded for injuries suffered from intentional torts, they can also be awarded against tortfeasors who act with reckless indifference to the safety of others. Because one purpose of punitive damages is to punish the defendant, plaintiffs may introduce evidence regarding a tortfeasor's wealth to allow the jury to better assess the amount of damages necessary for punishment. Such evidence is normally deemed irrelevant or prejudicial in almost every other type of damage claim.

In addition to damages for past tortious conduct, plaintiffs may seek injunctive relief to prevent future harm. Manufacturing plants that billow smoke that pollutes the air, companies that discharge chemicals that poison the water, and factories that store chemicals that migrate through the soil create risks of injury that are likely to recur over time. In tort law, operations that produce recurring injuries like these are called nuisances. If the harmfulness of such operations outweighs their usefulness, plaintiffs may successfully obtain a court order enjoining or restraining them.

### Immunity

Certain individuals and entities are granted IMMUNITY from both damage awards and assessments of liability in tort. An immunity is a defense to a legal action where public policy demands special protection for an entity or a class of persons participating in a particular field or activity. Historically, immunity from tort litigation has been granted to government units, public officials, charities, educational institutions, spouses, parents, and children.

Government immunity, also known as SOVEREIGN IMMUNITY, insulates federal, state, and local governments from liability for torts that an employee commits within the scope of his or her official duties. Public policy, as reflected by legislation, common-law precedent, and popular opinion, has required courts to protect the government from unnecessary disruptions that invariably result from civil litigation. Similarly, educational institutions generally have been immunized from tort actions to protect students and faculty from distraction.

In a number of states, tortfeasors have been given immunity from liability if they are related to the victim as husband or wife, or parent or child. These states concluded that family harmony should not be traumatized by the adversarial nature of tort litigation. Charities and other philanthropic organizations have been given qualified immunity from tort liability as well. This immunity is based on the fear that donors would stop giving money to charities if the funds were used to pay tort claims.

Over the last quarter century, nearly every jurisdiction has curtailed tort immunity in some fashion. Several jurisdictions have abolished tort immunity for entire groups and entities. The movement to restrict tort immunity has been based in part on the RULE OF LAW, which requires all persons, organizations, and government officials to be treated equally under the law. Despite the efforts of this movement, tort immunity persists in various forms at the federal, state, and local levels.

### Tort Reform Initiatives

The damages recovered by those injured as a result of a tortious act of another are often paid for by insurance companies. This is particularly true in MEDICAL MALPRACTICE cases. Doctors must pay significant medical liability insurance premiums in order to stay in business. When a doctor commits MALPRACTICE, the patient may receive an award of hundreds of thousands of dollars to millions of dollars. As insurance companies continue to pay these hefty awards, the rates for insurance premiums often rise sharply.

The medical profession and medical liability insurance companies have engaged in a nationwide campaign to place limitations on the amount of damages that a patient who has been subject to medical malpractice can recover. Under the guise of "tort reform," supporters advocate placing limitations on the recovery of noneconomic damages, including pain and suffering and loss of consortium. In 1975, California enacted the Medical Injury Compensation Reform Act, which limits recovery of noneconomic damages at $250,000 and restricts the amount of fees that may be recovered by lawyers. California's law has served as a model for six other states that have adopted similar tort-reform bills. Other state legislatures have considered similar tort-reform initiatives.

President GEORGE W. BUSH has advocated federal legislation that would place a $250,000 cap on noneconomic damages at the national level. According to Bush, the federal government spends $28 billion per year on medical liability insurance costs and defensive medical costs. Opponents of such a measure claim that many of the problems associated with insurance costs are the result of poor business practices by insurance companies. Opponents also maintain that capping damages for pain and suffering restricts the ability of patients to recover only an ARBITRARY amount from a negligent doctor. Supporters of the initiative claim that capping damages will lower medical costs to the general population.

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CROSS-REFERENCES

"But For" Rule; Consumer Protection; Environmental Law; Federal Tort Claims Act; Feres Doctrine; *MacPherson v. Buick Motor Co.*; Product Liability; *Rylands v. Fletcher.*

## TORTFEASOR

*A wrongdoer; an individual who commits a wrongful act that injures another and for which the law provides a legal right to seek relief; a defendant in a civil tort action.*

CROSS-REFERENCES

Tort Law.

## TORTIOUS

*Wrongful; conduct of such character as to subject the actor to civil liability under* TORT LAW.

In order to establish that a particular act was tortious, a plaintiff must prove that an actionable wrong existed and that damages ensued from that wrong.

CROSS-REFERENCES

Tort Law.

## TOTTEN TRUST

*An arrangement created by a person depositing his or her own money in his or her own name in a bank account for the benefit of another.*

*A sample Totten trust*

**Totten Trust**

I, _____ [*name of depositor*], hereby establish with

_____ [*name of bank*] a savings account under Savings Account Number _____.
I agree to be bound by the articles of incorporation, bylaws, and regulations of the bank in existence on the date of this instrument or made or amended subsequent to the execution of this instrument, regardless of whether notice of new or amended articles of incorporation, bylaws, or regulations are given to me.

All deposits made by me at any time are for the benefit of _____[*name of beneficiary*]

of _____ [*residence of beneficiary*].
Upon my death, I agree that the entire balance in the savings account shall be distributed to the following beneficiary who survives the depositor:

[*List name and address of the beneficiary*]

_____

I reserve the right to make additional deposits to the account, and to withdraw all or any part of the account at any time, subject only to the bylaws and regulations of the bank. I reserve the right to amend or revoke this agreement at any time and to change the beneficiary or beneficiaries of the savings account at any time without the consent of the beneficiary or any other person. During my lifetime, the interest in this savings account shall not be assignable or anticipated in any way by the beneficiary. The interest in this savings account shall not be subject in any way to the claims of the beneficiary's creditors.

DATED: _____, 20_____

_____
[*Signature of Depositor*]

A Totten trust is a tentative trust, revocable at will, until the depositor dies or completes the gift in his or her lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary. If the depositor dies before the beneficiary without revocation or some resolute act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.

The beneficiary need not know about the arrangement, and the depositor is entitled to deposit and withdraw funds from the account as he or she deems fit. The depositor can even close out or revoke the account without obtaining the beneficiary's permission. When the depositor dies, any funds in the account automatically become the property of the beneficiary, but they might be subject to the claims of the decedent's creditors. Totten trusts are usually established to avoid the inconvenience of making a will and the expense and delay of probate and administration. Such an arrangement is known as a testamentary substitute, since a will is thereby obviated. Frequently such trusts are established because the depositor wants to conceal his or her financial situation from others.

## ♦ TOUCEY, ISAAC

Isaac Toucey served as U.S. attorney general from 1848 to 1849. A leading Connecticut politician before his appointment by President JAMES POLK, Toucey went on to serve as secretary of the navy in the administration of JAMES BUCHANAN.

Isaac Toucey was born on November 5, 1796, in Newtown, Massachusetts. He studied law as a young man and was admitted to the Connecticut bar in 1818. After practicing law in Hartford, Connecticut, for several years, he was appointed state's attorney in 1822, and held that office until 1835.

In 1835, Toucey was elected to the U.S. House of Representatives as a member of the DEMOCRATIC PARTY. He left Congress in 1839 and returned to Connecticut. Alhough he was reappointed state's attorney in 1842, his political ambitions remained paramount. He became governor of Connecticut in 1846.

President Polk took office in 1845. His first attorney general was JOHN Y. MASON, who left the position after a year to become secretary of the navy. Mason's successor, NATHAN CLIFFORD, remained until 1848, when Polk sent him to Mexico to negotiate the treaty that ended the Mexican War and ceded California to the United

States. In June 1848, with less than a year left in his administration, Polk appointed Toucey to be attorney general. Toucey's brief tenure, which ended in March 1849, was unremarkable.

Nevertheless, Toucey capitalized on the national stature he attained as attorney general. He was elected a Connecticut state senator in 1850 and a U.S. senator in 1852. In March 1857, Toucey resigned from the Senate to become secretary of the navy for President Buchanan. He remained as secretary for the entire presidential term, which ended in March 1861.

After retiring from politics and government service, Toucey returned to Connecticut and resumed the practice of law. He died on July 30, 1869, in Hartford.

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## TOWAGE SERVICE

*An act by which one vessel, known as the tug, supplies power in order to draw another vessel, called the tow.*

Towing involves dragging a vessel forward in the water through the use of a rope or cable attached to another vessel. Various state laws require that bright lights be placed upon vessels that are towing or being towed.

## TOWN

*A civil and political subdivision of a state, which varies in size and significance according to location but is ordinarily a division of a county.*

A town, which is a type of MUNICIPAL CORPORATION, can be formed by a state legislature when a large number of dwellings have concentrated in a particular location. A town is a creation of the state, designed and authorized to perform certain governmental functions on the local level. Its main purpose is to exercise the power of the state to promote greater prosperity, safety, convenience, health, and the common good of the general community.

The terms *township* and *town* are frequently used interchangeably in certain geographic locations, although in some parts of the United States the term township denotes a group of several towns.

Since towns can be formed only from contiguous territory, tracts of land that are entirely separate cannot be included in a town. Subject to constitutional restrictions, ordinarily, the state legislature has full power to create, enlarge, diminish, consolidate, and otherwise alter the boundaries of towns without the consent of those affected.

### Powers

In general, towns have only the powers conferred upon them by the state legislature. However, the capacity of a town to acquire and hold real property has long been recognized under English COMMON LAW. Towns are, therefore, generally given the power to construct their own public buildings and usually have the power to lease their property.

Towns are ordinarily granted the power to enact ordinances concerning local matters, provided the ordinances are reasonable and protect the GENERAL WELFARE of the public to an appreciable degree. For example, a town might enact ZONING ordinances to restrict the use of land in

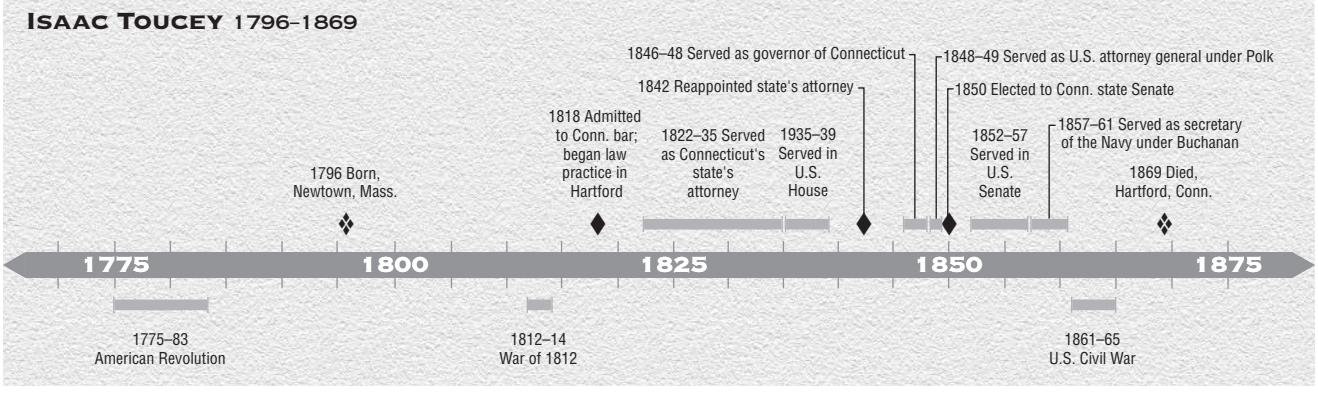

certain designated areas to safeguard the public health and safety.

Ordinances enacted by a town are subject to JUDICIAL REVIEW, especially concerning their reasonableness.

### Meetings

Town meetings or boards are the primary vehicles by which a town governs itself since in many states a town exercises its powers by vote of a town meeting or a town council. Town meetings serve both legislative and executive functions; qualified residents meet to discuss and vote, if necessary, on matters dealing with their self-government. In most states, a person who pays town taxes is eligible to vote at the town meeting. State statutes regulate all kinds of town meetings as well as the business to be transacted and the conduct that is acceptable.

### Boards or Councils

Town boards or councils are created by the legislative power of the state for the supervision of town affairs. All of their duties are either legislative or administrative in character. Their powers include selecting police officers and town attorneys, effecting public improvements, and providing for the audit and payment of claims against the town.

The selectmen of a town are officers elected by the towns to the boards to execute general business and to exercise various executive powers. Generally a board can function only when a majority of selectmen are present at a meeting. A selectman is ineligible to vote on propositions in which he or she has a financial interest in cases where his or her vote may be decisive. Town boards speak by their records, which are maintained by the town clerk in a record book. In general, other duties of the town clerk include the issuance of calls for town meetings and the performance of the general secretarial duties.

### Taxation

A town is permitted to raise revenue through taxation only if the state legislature has granted it the power to do so. Township boards or the electors at a town meeting can decide the amount of taxes needed for township purposes, or the normal operating expenses of the town, such as for maintenance of the highways. A small part of the tax may be set aside for miscellaneous or emergency expenses. In addition, a town may properly impose taxes for special purposes, such as the erection of a town hall. All property not legally exempt within the limits of a town or a township is subject to assessment and taxation by it.

Upon the levy of a town tax, inhabitants must pay the tax to the appropriate officer, ordinarily the town tax collector. Failure to do so, or failure to pay taxes on property correctly assessed, will entitle the town to a lien on the property, which means that the property cannot be sold until the taxes have been paid. After a number of years prescribed by statute, the town can have the taxpayer's property sold at a TAX SALE to pay the overdue taxes plus any accrued interests and costs. Any excess funds will be given to the taxpayer.

### Taxpayer's Suit

Since every taxpayer of a town has a vital interest in, and a right to, the preservation of an orderly and lawful government, a number of statutes give the individual taxpayer the right to bring an action against officers, boards, or commissions of a town to recover money that has been wrongfully spent. This type of legal action is commonly known as a taxpayer's suit.

### Claims

To protect their funds, towns or townships generally establish a regular and orderly procedure for the allowance and payment of claims against them, which must be followed before any claim will be satisfied. The courts may review the decision of boards permitting or disallowing claims against towns or townships.

Claims against the town may be settled or submitted to ARBITRATION at the direction of town supervisors or following a vote at a town meeting.

## TOWNSHEND ACTS

The Revolutionary War in America was the result of a series of acts levied against the colonists by the English Parliament. One of these measures, the Townshend Acts, not only contributed to the American Revolution but precipitated the BOSTON MASSACRE as well.

In 1767 Parliament decided to reduce the property tax in England. To compensate for the deficit, Charles Townshend, chancellor of the exchequer, proposed legislation that would raise revenue from various taxes directed at the colonists. These laws, called the Townshend Acts, imposed duties on the importation of such articles as lead, glass, paint, tea, and paper into

the colonies. The money collected from the colonists was to be applied to the payment of wages of English officials assigned to the colonies.

In addition to the taxes, the acts also provided for the maintenance of the American Board of Customs Commissioners in Boston. A third aspect of the legislation involved the disbanding of the New York legislature. This assembly had staunchly opposed and refused to accept the Quartering Act of 1765, and all its meetings were suspended until it complied with the unpopular act.

Antagonism between the colonists and English officials over the Townshend Acts increased, and English troops were sent to quell disturbances. Agitation continued, and on March 5, 1770, the Boston Massacre occurred when English soldiers fired into a crowd of hostile colonists, killing five men.

The colonists drafted nonimportation agreements and boycotted English goods. English merchants felt the loss of revenue, and in 1770 the Townshend Acts were repealed with the exception of a tax on tea. This tax, retained to reaffirm the right of Parliament to levy taxes on the colonists, led to the Boston Tea Party.

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CROSS-REFERENCES

Boston Massacre Soldiers; Stamp Act; "Townshend Acts" (Appendix, Primary Document).

## TOWNSHIP

*In a government survey, a square tract of land six miles on each side, constituting thirty-six square miles. In some states, the name given to the political subdivision of a county.*

CROSS-REFERENCES

Town.

## TRACING

*An equitable remedy that allows persons to track their assets after they have been taken by* FRAUD, *misappropriation, or mistake. The remedy is also used in* BANKRUPTCY, *commercial transactions, and property disputes in marital dissolution cases.*

Persons who have been victims of fraud, misappropriation, or mistake may reclaim their property through the equitable remedy called tracing. Tracing makes such victims secured creditors in bankruptcy claims, which means by law they are the first to claim their share of a bankrupt's assets. Tracing can be invoked only if two requirements are met: victims must be able to identify their property and must show that they have a claim of restitution in kind. This means a victim must prove that he has interest in a specific property and that he is not simply someone to whom the defendant owed a debt. Once an individual satisfies these requirements a bankruptcy court will declare that the property never belonged to the person in bankruptcy, so it does not belong to the bankruptcy trustee, who distributes the proceeds to the bankrupt's creditors.

The tracing of assets can be difficult once money is moved into bank accounts or property is sold and the proceeds used to purchase other property. However, there are many tracing rules that aid courts in determining if and how much a person can recover. For example, if a person is defrauded of real estate and the perpetrator of the fraud sells the property and invests the proceeds in corporate stock, the victim may be able to claim the stock. The victim could not use tracing to recover the real estate from a third person who was a GOOD FAITH purchaser (i.e., the individual did not know that the seller had defrauded the victim) and had paid a reasonably equivalent value.

The UNIFORM COMMERCIAL CODE (UCC) gives secured creditors the right to trace their collateral into proceeds of its sale and to trace these proceeds through commingled bank accounts. Therefore, if a business pledges their fleet of trucks to secure a loan, the creditor is entitled to the proceeds of the sale of the trucks by the debtor.

Tracing is also used in FAMILY LAW where a divorcing HUSBAND AND WIFE had separate assets before and during the marriage. Tracing can be used to determine if these assets have been commingled, such as joint contributions toward the purchase of a home. In this area, as in other fields covered by tracing, the rules can become very complex and require the testimony of expert witnesses versed in accounting and sophisticated financial transactions.

## TRADE DRESS

*A product's physical appearance, including its size, shape, color, design, and texture.*

In addition to a product's physical appearance, trade dress may also refer to the manner in which a product is packaged, wrapped, labeled, presented, promoted, or advertised, including the use of distinctive graphics, configurations, and marketing strategies. In intellectual property law, a CAUSE OF ACTION for trade dress infringement may arise when the trade dress of two businesses is sufficiently similar to cause confusion among consumers. In such situations the business with the more established or recognizable trade dress will ordinarily prevail. Two remedies are available for trade dress infringement: injunctive relief (a court order restraining one party from infringing on another's trade dress) and money damages (compensation for any losses suffered by an injured business).

Like TRADEMARKS, trade dress is regulated by the law of UNFAIR COMPETITION. At the federal level, trade dress infringement is governed primarily by the Lanham Trademark Act (15 U.S.C.A. § 1051 et seq.); at the state level, it is governed by similar INTELLECTUAL PROPERTY statutes and various common-law doctrines. Both state and federal laws prohibit businesses from duplicating, imitating, or appropriating a competitor's trade dress in order to pass off their merchandise to unwary consumers.

To establish a claim for trade dress infringement, a company must demonstrate the distinctiveness of its product's appearance. Trade dress will not receive protection from infringement unless it is unique, unusual, or widely recognized by the public. Courts have found a variety of trade dress to be distinctive, including magazine cover formats, greeting card arrangements, waitress uniform stitching, luggage designs, linen patterns, cereal configurations, and the interior and exterior features of commercial establishments. In certain contexts courts may find that distinctive color combinations are protected from infringement, as when a federal court found the silver, blue, and white foiled wrapping in which Klondike ice cream bars are packaged to be part of an identifiable trade dress (*AmBrit v. Kraft,* 812 F.2d 1531 [11th Cir. 1986]).

Goods that are packaged or promoted in an ordinary, unremarkable, or generic fashion normally receive no legal protection under the law of trade dress. For example, containers shaped like rockets and bombs are considered hackneyed devices for marketing fireworks and will not be insulated from trade dress infringement. At the same time, something as simple as a grille on the front end of an automobile may be considered sufficiently original if the manufacturer takes deliberate and tangible steps to promote that aspect of the vehicle over a long period of time.

The law of trade dress serves four purposes. First, the law seeks to protect the economic, intellectual, and creative investments made by businesses in distinguishing their products. Second, the law seeks to preserve the good will and reputation that are often associated with the trade dress of a particular business and its merchandise. Third, the law seeks to promote clarity and stability in the marketplace by encouraging consumers to rely on a business's trade dress when evaluating the quality of a product. Fourth, the law seeks to increase competition by requiring businesses to associate their own trade dress with the value and quality of the goods they sell.

Trade dress is different from a trademark, SERVICE MARK, or TRADE NAME. Trademarks are words, symbols, phrases, mottos, logos, emblems, and other devices that are affixed to goods to demonstrate their authenticity to consumers. Levi's jeans, Nabisco cookies, Bic pens, Ford trucks, Rolex watches, and Heinz ketchup are just a few examples of well-known trademarks. Service marks identify services rather than goods. Roto-Rooter, for example, is the service mark of a familiar plumbing company. Trade names distinguish entire businesses from each other, as opposed to their individual goods and services. Coca-Cola, for example, uses its trade name to distinguish itself from other soft drink manufacturers. Under state and federal law, it is advantageous for businesses to register their trademarks, service marks, and trade names with the government. Conversely, trade dress has no formal registration requirements and receives legal protection simply by being distinctive and recognizable.

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## TRADE NAME

*Names or designations used by companies to identify themselves and distinguish their businesses from others in the same field.*

Trade names are used by profit and nonprofit entities, political and religious organizations, industry and agriculture, manufacturers and producers, wholesalers and retailers, sole proprietorships and joint ventures, partnerships and corporations, and a host of other business associations. A trade name may be the actual name of a given business or an assumed name under which a business operates and holds itself out to the public.

Trade name regulation derives from the COMMON LAW of UNFAIR COMPETITION. The common law distinguishes between TRADEMARKS and trade names. Trademarks consist of symbols, logos, and other devices that are affixed to goods to signify their authenticity to the public. The common law of trade names encompasses a broader class of INTELLECTUAL PROPERTY interests, including TRADE DRESS and service marks. Trade dress is used by competitors to distinguish their products by visual appearance, including size, shape, and color, while service marks are used by competitors to distinguish their services from each other. Gradually, the law of trade dress and service marks has evolved into separate causes of action, independent from the law of trade name infringement.

To maintain a CAUSE OF ACTION for trade name infringement, a plaintiff must establish that it owned the right to operate its business under a certain name and that the defendant violated this right by use of a deceptively similar name. The right to use a particular trade name ordinarily is established by priority of adoption. In states that require registration of trade names, a business may acquire the rights to a trade name by being the first to file for protection with the appropriate governmental office, usually the SECRETARY OF STATE. In states that do not require registration, a business may acquire the rights to a trade name through public use, which means that the law will afford protection only if it can be demonstrated that a business and its trade name have become inseparable in the public's mind. Under federal law businesses may acquire the rights to a trade name only through regular and continued public use of an individual name. Federal law will not protect trade names that are used sporadically or irregularly.

Once a business has established the right to use a particular trade name, it must then prove that the defendant fraudulently attempted to pass itself off as the plaintiff through use of a deceptively similar name. Not every trade name that resembles an existing one will give rise to liability for infringement. The law will not forbid two unrelated businesses from using the same trade name so long as their coexistence creates no substantial risk of confusion among the public. For instance, two businesses may call themselves "Triple Play" if one business is a video store and the other is a sports bar and grill. By the same token, the law permits businesses in different geographic markets to use identical trade names, unless the good will and reputation of an existing business extend into the market where a new business has opened.

A greater degree of protection is afforded to fanciful trade names than to names in common use. Generic words that are widely used to describe any number of businesses in the same field may not be appropriated by a single competitor. For example, a professional partnership of attorneys would receive no trade name protection for emblazoning the name "law office" across its front doors. Such a name would be considered generic in nature, telling consumers nothing unique or unusual about that particular business. The same partnership would receive full protection for a name that identifies the firm by the individual names of each partner in the office.

Trade name regulation serves four purposes. First, the law seeks to protect the economic, intellectual, and creative investments made by businesses in distinguishing their trades. Second, the law seeks to preserve the good will and reputation that are often associated with a particular trade name. Third, the law seeks to promote clarity and stability in the marketplace by encouraging consumers to rely on a merchant's trade name when evaluating the quality of its merchandise. Fourth, the law seeks to increase competition by requiring businesses to associate their own trade names with the value and quality of their goods and services.

Both state and federal laws provide protection against trade name infringement. At the

federal level, trade names are regulated by the Lanham Trademark Act (15 U.S.C. § 1051 et seq.). At the state level, trade names are regulated by analogous intellectual property statutes and various common-law doctrines. In general, the law of trade name infringement attempts to protect consumers from deceptive trade practices. The law does not treat consumers as unwitting dupes and may require them to make reasonable distinctions between competitors under appropriate circumstances. When consumers have been deceived by use of a deceptively similar trade name, an injured business may avail itself of two remedies for infringement: injunctive relief (a court order restraining one party from infringing on another's trade name) and money damages (compensation for any losses suffered by the injured business).

CROSS-REFERENCES

Lanham Act.

## TRADE SECRET

*Any valuable commercial information that provides a business with an advantage over competitors who do not have that information.*

In general terms trade secrets include inventions, ideas, or compilations of data that are used by a business to make itself more successful. Specifically, trade secrets include any useful formula, plan, pattern, process, program, tool, technique, mechanism, compound, or device that is not generally known or readily ascertainable by the public. Whatever type of information is represented by a trade secret, a business must take reasonable steps to safeguard it from disclosure.

Absolute secrecy is not required, however. Commercial privacy need only be protected from ESPIONAGE that can be reasonably anticipated and prevented. Trade secrets may be revealed to agents, employees, and others ordinarily entrusted with such information, so long as it is understood that the information is confidential and disclosure is forbidden. At the same time, keeping information strictly confidential does not make it a trade secret unless the information is useful or valuable. Information that is common knowledge will never receive protection as a trade secret. Information must rise to a sufficient level of originality, novelty, or utility before a court will recognize it as a commodity.

Similarly, merely because something has been classified as a trade secret does not make every public disclosure of it the theft of a trade secret. For liability to attach for trade secret theft, the owner of valuable commercial information must demonstrate that it was appropriated through a breach of contract, a violation of a confidence, the use of surreptitious surveillance, or other improper means. For example, most employees who work in a commercially sensitive field are required to sign a contract prohibiting them from disclosing their employer's trade secrets to a competitor or the general public. These contracts normally bind employees even after their employment relationship has ended.

In the absence of a contractual obligation, employees and others may still be held liable for disclosing a trade secret if a court finds they had reason to know that the information was valuable and were expected to keep it confidential. For example, engineers and scientists who consult on a commercial project are ordinarily bound by a duty of strict confidentiality that precludes them from later sharing any information they acquire or using it to facilitate their own research. Although many businesses require consultants to sign a nondisclosure agreement before beginning work on a sensitive project, this duty of confidentiality arises from the circumstances surrounding a particular venture, independent of any formal agreement reached between the parties.

Imposition of liability for theft of a trade secret is not contingent upon a relationship between the owner of commercial information and the individual or entity that appropriated it. Liability may be premised solely on the means used to acquire confidential commercial information. Industrial espionage, which includes both aerial and ELECTRONIC SURVEILLANCE, is an indefensible means of acquiring a trade secret. TRESPASS, BRIBERY, FRAUD, and MISREPRESENTATION are similarly illegal. However, the law permits businesses to purchase a competitor's products and subject them to laboratory analysis for the purpose of unlocking hidden secrets of the trade. Called "reverse engineering," this process is considered by some courts to be the only proper means of obtaining valuable commercial information without the owner's consent.

The owner of a trade secret has the exclusive right to its use and enjoyment. Like any other

property right, a trade secret may be sold, assigned, licensed, or otherwise used for pecuniary gain. If the owner of a trade secret knowingly permits it to enter the public domain, however, he has waived the right to its exclusive use and enjoyment. An owner who has been injured by the wrongful disclosure or appropriation of a trade secret may pursue two remedies: injunctive relief and damages. An **INJUNCTION** (a court order restraining or compelling certain action) is the proper remedy when the owner of a trade secret desires to prevent its ongoing use by the individual or entity who wrongfully appropriated it. Money damages are the appropriate remedy when theft of a trade secret has resulted in a measurable pecuniary loss to its owner.

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## TRADE UNION

*An organization of workers in the same skilled occupation or related skilled occupations who act together to secure for all members favorable wages, hours, and other working conditions.*

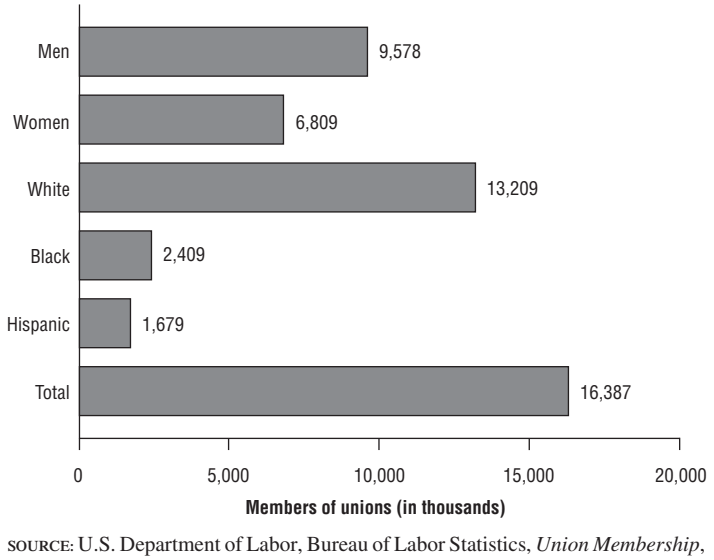


SOURCE: U.S. Department of Labor, Bureau of Labor Statistics, *Union Membership*, annual.

Trade unions in the United States were first organized in the early nineteenth century. The main purpose of a trade union is to collectively bargain with employers for wages, hours, and working conditions. Until the 1930s trade unions were at a severe disadvantage with management, mainly because few laws recognized the right of workers to organize. With the passage of the National Labor Relations Act (**WAGNER ACT**) of 1935 (29 U.S.C.A. § 151 et seq.), the right of employees to form, join, or aid **LABOR UNIONS** was recognized by the federal government.

Trade unions are entitled to conduct a strike against employers. A strike is usually the last resort of a trade union, but when negotiations have reached an impasse, a strike may be the only bargaining tool left for employees.

There are two principal types of trade unions: craft unions and industrial unions. Craft unions are composed of workers performing a specific trade, such as electricians, carpenters, plumbers, or printers. Industrial union workers include all workers in a specific industry, no matter what their trade, such as automobile or steel workers. In the United States, craft and industrial unions were represented by different national labor organizations until 1955. The craft unions that dominated the **AMERICAN FEDERATION OF LABOR** (AFL) opposed organizing industrial workers.

During the 1930s several AFL unions seeking a national organization of industrial workers formed the Committee for Industrial Organization (CIO). The CIO aggressively organized millions of industrial workers who labored in automobile, steel, and rubber plants. In 1938 the AFL expelled the unions that had formed the CIO. The CIO then formed its own organization and changed its name to Congress of Industrial Organizations. In 1955 the AFL and CIO merged into a single organization, the AFL-CIO.

Membership in U.S. trade unions has fallen since the 1950s, as the number of workers in the manufacturing sector of the U.S. economy has steadily declined. Union membership in 1995 comprised just 14.9 percent of the workforce, compared with a high of 34.7 percent in 1954.

CROSS-REFERENCES

Collective Bargaining; Labor Law.

## TRADE USAGE

*Any system, custom, or practice of doing business used so commonly in a vocation, field, or place that an expectation arises that it will be observed in a particular transaction.*

The concept of trade usage recognizes that words and practices take on specialized meanings in different areas of business. Though these common understandings may not be set out explicitly in a written sales or service agreement, the courts will generally employ them when construing a commercial contract. In the United States, the UNIFORM COMMERCIAL CODE (UCC), which has been adopted in some form in all fifty states, permits trade usage to be used in the interpretation of sales agreements.

Trade usage supplements, qualifies, and imparts particular meanings to the terms of an agreement for the purpose of the agreement's interpretation. Contractual language cannot be interpreted out of the context of the agreement of the parties.

The enforcement of contractual promises protects the justified expectations of the promisee, the person to whom the promises were made. Trade usage emphasizes such expectations. If a particular trade follows a practice so regularly that the promisee is justified in expecting that the promisor considered that practice when making the promise, the practice becomes a part of the agreement between the parties. Sometimes usage becomes so common in an industry that written trade codes are compiled to provide specific language on contract interpretation.

Section 1-2.05 of the UCC adopts the principle of trade usage. In a contractual dispute, the party who asserts a trade usage must prove the "existence and scope of such usage." If the trade usage is proved, a court may use it to "supplement or qualify terms of an agreement." The express terms of an agreement and trade usage must be construed "wherever reasonable as consistent with each other." If the construction is unreasonable, however, the court will ignore trade usage and apply the express terms of the agreement.

In the absence of evidence to the contrary, courts assume that when persons in business employ trade terms, they intend the terms to have their commercial significance. To counter this assumption, the parties must expressly state within the contract their intention to render the terms devoid of their trade significance and reduce them to their ordinary meaning. The failure to do so indicates the parties' intention to use the trade terms according to their commercial meaning.

The contract language does not have to be ambiguous before a court may consider trade usage. To protect against unfair surprise, however, evidence of trade usage is inadmissible unless sufficient notice has been provided to the other party.

CROSS-REFERENCES

Sales Law.

## TRADEMARKS

*Distinctive symbols of authenticity through which the products of particular manufacturers or the salable commodities of particular merchants can be distinguished from those of others.*

A trademark is a device, word or combination of words, or symbol that indicates the source or ownership of a product or service. A trademark can be a name, such as Adidas, or a symbol, such as McDonald's golden arches, or it can be a combination of the two, such as when the NIKE name is written with the "swoosh" symbol beneath it. In very limited cases, a shape or even a distinctive color can become a trademark.

People rely on trademarks to make informed decisions about the products they buy. A trademark acts as a guarantee of the quality and origin of a particular good. A competing manufacturer may not use another company's trademark. The owner of a trademark may challenge any use of the mark that infringes upon the owner's rights.

The presence of trademark protection for the name or logo of a company or product is often indicated by the small symbol of an *R* in a circle placed near the trademark. The *R* means that the mark is a registered trademark and is a warning that the law prevents unauthorized use of it. A party may indicate that it is claiming rights to a particular mark by displaying a *TM* rather than an *R* symbol. Marks bearing the *TM* symbol are not registered, but the presence of the symbol shows an intent to register.

### Origins and Development of Trademark Law

Trademark law in the United States is governed by the Trademark Act of 1946, also known

## In the King's Name

Although Elvis Presley died in 1977, his name and likeness have been trademarked by Elvis Presley Enterprises (EPE). EPE earns millions of dollars each year through a licensing program that grants licensees the right to manufacture and sell Elvis Presley merchandise worldwide. EPE also operates two restaurants and an ice cream parlor at Graceland, the Elvis Presley home in Memphis, Tennessee, which Presley fans consider to be a shrine to the king of rock and roll.

In 1995 EPE filed suit in federal court, alleging that a Houston, Texas, nightclub operating under the name "The Velvet Elvis" infringed on EPE's trademarks (*Elvis Presley Enterprises, Inc. v. Capece,* 950 F. Supp. 783 [S.D. Texas 1996]). The name of the nightclub comes from a black velvet painting of Presley that hangs in the back lounge of the bar. Newspaper advertisements for the club depicted images and likenesses of Presley and made explicit references to the singer, including "The King Lives," "Viva la Elvis," and "Elvis has *not* left the building."

The court ruled that the name "The Velvet Elvis" did not create the likelihood of confusion as to the "Elvis" trademarks held by EPE. The court agreed with the club owner that the bar was meant to **PARODY** 1960s popular culture. Replete with lava lamps, beaded curtains, vinyl furniture, and black velvet nude paintings, the bar was a humorous jab at the culture that created the Presley myth. Even if EPE operated its own "Elvis" nightclub, the Houston bar would not create confusion as to the EPE trademarks. The court noted that the typical customers of The Velvet Elvis were young professionals ranging in age from their early twenties to their late thirties. The majority of Presley fans were middle-aged white women.

The court also ruled, however, that the use of Presley's name and likeness in advertisements infringed on the EPE trademarks. The advertisements did not indicate that the nightclub was a parody of 1960s popular culture, and therefore they created the likelihood of confusion as to the sponsorship of the nightclub.

The court ordered the owner of The Velvet Elvis not to display in his advertisements the image of Elvis or make direct references to his identity as a celebrity or to emphasize the word *Elvis* in the name The Velvet Elvis. Apart from this remedy, the court dismissed all other relief sought by EPE. The nightclub could continue, in the words found on its menu, as "The King of Dive Bars."

as the LANHAM ACT (15 U.S.C.A. § 1051 et seq). The Lanham Act defines trademarks as including words, names, symbols, or combinations thereof that a person uses or intends to use in commerce to distinguish his or her goods from those made or sold by another. Potential trademarks are categorized by the functions they perform. Within trademark law are several specialized terms used to categorize marks that may be subject to protection. The categories are form, mode of use, and, most commonly, strength. The four subcategories of strength are generic, descriptive, suggestive, and arbitrary or fanciful.

A generic name is the common name for a product and will never be considered a trademark. *Shoe, ball, hat,* and *lightbulb* are all generic product names. Some marks that do not begin as generic may later become generic if the public adopts the mark as the general name for that product. Examples of marks that were not originally generic but later became so are *cellophane* and *aspirin.* Generic marks are not "strong" because they are not distinctive. To give trademark status to the generic or common name of a product would prevent all other manufacturers of the product from identifying it. To prevent that from occurring, granting trademark status to the generic name of a product is prohibited.

A descriptive term tells the consumer something about the product and may only become a trademark after it has acquired secondary meaning. This occurs after a period of time during which the term's association with that product is exclusive. This acquisition of secondary meaning is sufficient to make a mark distinct, meaning that in the eyes of consumers it has come to represent that products bearing the mark come

from a particular source. The mark "Brooklyn Dodgers" is an example of a descriptive mark that is exclusively associated with a professional baseball team formerly from New York.

A suggestive term, rather than describing the product, merely makes a subtle suggestion about the type of product and its qualities. It requires consumers to use their imaginations to make the intellectual jump between the suggestion and the actual product. For those reasons, it can be a trademark immediately upon use. Examples of suggestive marks are Orange Crush (orange-flavored soft drink), Playboy (sexually oriented magazine for men), and Ivory (white soap).

When distinguishing between descriptive and generic terms, courts try to determine the viewpoint of the prospective consumer. Courts look for the meaning that the buyer of a product assigns to the contested word. Courts may also look at the term as used by dictionaries, third parties, trademark owners, texts, PATENTS, newspapers, literature, and surveys. Use of a term as a common name indicates that the word may be the generic name of a product.

The strongest marks are arbitrary and fanciful marks, which need not acquire secondary meaning. They are strong because they bear little or no relationship to the products with which they are affiliated, and thus their use is not unfair to others trying to compete in the marketplace with similar products. Arbitrary marks are common words used in an uncommon way and are used in connection with the goods in a way that does not describe the goods or suggest anything about them. Examples include Camels in reference to cigarettes and Dial as the name of a brand of soap. Fanciful words, on the other hand, are invented and (at least at the time they are first applied to the goods) have no dictionary meaning. Examples of fanciful marks are Kodak, Exxon, and Rolex.

These considerations force a producer to select or create a symbol or name for its product that is suitable for trademark protection. A producer labors to create a good name for a product, and a protected trademark prevents competitors from unfairly capitalizing on the reputation of that name. When trying to decide what mark is appropriate, the potential trademark owner should keep in mind a fundamental rule of trademark selection: in most situations, one will not be allowed to use a trademark that another entity already uses. Before an entity incorporates under a certain name, or attempts to sell a service or product bearing a particular name, it should conduct a search or hire an attorney to investigate prior or existing use of the name. Those companies that fail to conduct this kind of a search or blatantly ignore existing use of a trademark are likely to face a lawsuit by any existing owner of the mark. Such a lawsuit may lead to a court order to stop any infringing use and an award of damages to the holder of the mark.

Uniqueness is a major consideration to the potential trademark owner, regardless of whether the mark is descriptive, suggestive, and arbitrary or fanciful. The fewer unique characteristics a mark possesses, the less legal protection it receives. The potential trademark owner must consider whether others need to use a particular mark in conjunction with a product in order to compete. A unique mark that bears little relationship to the product is preferred over a mark that is more generic.

A company has a better chance of procuring protection for a mark when, by using the mark, it is the first to cause consumers to see an association between the mark and the product.

The Lanham Act distinguishes trademarks from trade names and service marks and also addresses certification marks and collective marks. A SERVICE MARK is used to identify and distinguish the services of one company from another, such as Sears for retail stores, and American Express for credit cards. A TRADE NAME or commercial name distinguishes and identifies a business. The same name or portion of a name may also serve as a trademark, trade name, or service mark. An example is the name Ford Motor Company, which is the trade name of a company that builds and sells cars and trucks that bear the trademark "Ford." In short, trademarks apply to products, service marks to services, and trade names to businesses.

Certification marks endorse products and certify approval of their origin, quality, or authenticity. A certification mark is not the property of the maker of the products upon which the mark will be affixed. Examples are the Union Label in garments and various seals of approval. When the provider of goods or services belongs to an association, it often advertises or attaches a collective mark to announce that relationship. The mark is used on products or services not provided by the owner of the mark, typically as a symbol guaranteeing quality and taking advantage of the supposed benefits to the

consumer that stem from the product's association with the owner of the mark.

### Trademark Registration

Traditionally, trademark rights had depended on prior use, but since 1988 a party with a genuine intent to use a mark may apply for trademark registration. The applicant must intend to use the mark in commerce and must intend to do so in order to sell a product, not merely to reserve rights for future use.

Registration begins with application to the commissioner of patents and trademarks in the PATENT AND TRADEMARK OFFICE. Registration of a mark means that others will be presumed to know that the mark is owned and protected. By itself, registration is considered evidence that the registrant has ownership and that the registration is valid.

Registration benefits the trademark owner because it suggests that the registrant did everything necessary to protect its mark. While trademark rights actually stem from use, a party may have difficulty convincing a court that it had good reasons to not register a mark for which it now claims a protected right. This is particularly so when a claimed symbol's status as a trademark is uncertain, such as in a dispute over the design of a product as a trademark.

One may apply with either the principal register or supplemental register of the Patent and Trademark Office. The principal register is for arbitrary, fanciful, suggestive, or descriptive marks that have acquired secondary meaning or distinctiveness. The supplemental register is for descriptive terms capable of acquiring secondary meaning. Once a mark establishes secondary meaning, it can be transferred to the principal register.

Registration with the principal register is preferable to supplemental registration for many reasons. Principal registration is proof that the mark is valid, registered, and the INTELLECTUAL PROPERTY of the registrant, which has exclusive rights to use the mark in commerce. Further, a registered mark is presumed to have been in continuous use since the application filing date. After five years of continuous use, a registered mark may not be contested. Registration with the principal register means that a potential infringer will be considered to know about the registrant's claim of trademark ownership. The owner of a mark registered with the principal register has the right to bring suit in federal court. Those who counterfeit registered marks face criminal and civil penalties. The owner of a trademark that registers with the principal register and deposits the registration with the U.S. Customs Service can prevent goods bearing infringing marks from being imported.

A mark on the supplemental register may become a trademark, but its status as such has not yet been determined. For this reason, the presumption created by registration with the principal register, that the registrant can be the only valid owner, does not apply to supplemental registration.

The owners of registered trademarks can lose their rights in a number of ways. When a trade or the general public adopts a trademark as the name for a type of goods, the mark is no longer distinctive and the rights to it are lost. The owner of trademark rights must be vigilant to ensure that this does not occur. For instance, the Rollerblade company introduced a new product of roller skates where the wheels are arranged in a single line (offering performance similar to the blade on an ice skate) rather than side by side. Initially Rollerblade was the only company selling this type of skates, and the name Rollerblade became widely known. When competing producers of this new skate emerged on the marketplace, the consuming public often used the word *rollerblade* to describe the type of skates, no matter what company was making and selling them. Further, the public often called the activity of using such skates, no matter the manufacturer, rollerblading. The Rollerblade company spent millions of dollars in advertising and lawsuits to ensure that the trademark Rollerblade was not used to describe a product whose proper generic name is in-line skates. To protect its rights to the trademark, the Rollerblade company must actively oppose any use by competitors or consumers of the words *rollerblade* or *rollerblading* to describe generic in-line skates and the activity of in-line skating.

Registrants forfeit rights to their marks if they use them deceptively, use them in fraudulent trades, or abandon them. Registrants abandon their marks by failing to renew within ten years or by deliberately transferring rights with consent.

### Trademark Infringement

Once they have established their trademarks, owners have the duty to guard against infringe-

*A sample trademark/service mark application*

## Trademark/Service Mark Application

**COMMONWEALTH OF VIRGINIA**
**STATE CORPORATION COMMISSION**

**APPLICATION FOR REGISTRATION OF A TRADEMARK OR SERVICE MARK**
(Please type or print)

Applicant (owner) name and address:_____

_____

Contact person name and address:_____

_____Daytime phone:_____ Fax number:_____

Applicant is a:_____Applicant's state or jurisdiction of formation: _____
(entity type i.e. corporation, partnership, etc)

Kind of mark (check one):Trademark _____ Service Mark _____

Identify the trademark or service mark (or attach an exhibit of the exact mark): _____

_____

Class number(s) of goods or services (see 21 VAC 5-120-100):_____

Describe the product(s) or service(s) the mark represents (identifies):_____

_____

Date mark was first used **anywhere** by applicant or applicant's predecessor: _____

Date mark was first used **in Virginia** by applicant or applicant's predecessor: _____

**PLEASE NOTE: A specimen of the mark must accompany this application.**

The applicant asserts that it is the owner of this mark and that the mark is in use in the Commonwealth of Virginia. No other person has registered this mark or has the right to use this mark in Virginia, either in the identical form thereof or in such near resemblance thereto as to be likely, when applied to the goods or services of such person, to cause confusion or mistake, or to deceive.

(**NOTE:** The application must be signed in the name of the applicant, either by the applicant or by a person authorized by the applicant. The application must be sworn to by the person who signed the name of the applicant.)

Signature:_____Date: _____

Signer's Name:_____Title:_____
(print or type)

State of:_____, County/City of:_____, to-wit:

The foregoing application was subscribed and sworn to before me by _____

on the _____ day of _____, _____.

My Commission Expires:_____ Notary Public: _____

TM 1 (7/99)

ment and to be vigilant to preserve and protect their rights. The Lanham Act aids owners in protecting their rights and protects consumers from being tricked or confused by misleading marks.

The six most common causes of action in infringement lawsuits charge that a defendant has infringed on a plaintiff's registered trademark; undermined a plaintiff's unregistered mark in a manner that affects commerce; violated common-law trademark infringement standards and UNFAIR COMPETITION principles; violated state deceptive trade practice laws; diluted a plaintiff's trademark; and misappropriated a plaintiff's mark.

Trademark infringement claims generally involve the issues of likelihood of confusion, counterfeit marks, and dilution of marks. Likelihood of confusion occurs in situations where consumers are likely to be confused or misled about marks being used by two parties. To constitute infringement, this confusion must be probable, not merely possible. The complaining party must show that because of the similar marks, many consumers are likely to be confused or misled about the source of the products that bear these marks.

In a likelihood of confusion CAUSE OF ACTION, the defendant can defend on the basis that confusion is not likely or that although confusion may be likely, the plaintiff has behaved improperly regarding the mark or the mark is somehow defective.

The Lanham Act defines a counterfeit mark as being "identical with, or substantially indistinguishable from, a registered mark." All counterfeits are infringements. The product or service bearing the counterfeit mark must be of the same type of product or service bearing the protected mark. The defendant must have knowingly produced or trafficked a counterfeit mark.

Dilution is lessening the individuality or impact of a mark. The usefulness of a trademark depends on its recognizability and individuality. In cases of dilution, the challenged mark does not necessarily have to be used on products in direct competition with the products of the complaining party, nor is it necessary that the mark is causing confusion. The complaining party only needs to show that the strength and impact of the registered mark is somehow lessened by the presence of similar marks. A trademark owner uses its mark as a means of recognition and as a symbol representing its goodwill, and when similar marks flood the marketplace, this message is considered to be diluted. The product or service thus becomes psychologically less identifiable and less distinguishable. Trademark law prohibits this dilution and prevents the infringing party from unfairly profiting from an association with an established name.

To establish an infringement cause of action based on dilution, the plaintiff must initially show that its trademark is genuinely unique. Similar to the standard for confusion, dilution because of defendant's conduct must be likely or probable, rather than merely possible.

The defendant in an infringement case can invoke any of several affirmative defenses. An AFFIRMATIVE DEFENSE is a response that attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of the claim. The defendant can argue that the plaintiff abandoned the trademark or that the mark is generic. Defendants may claim that they made "fair use" of the mark, in that their purpose for using the mark did not unfairly compete with the plaintiff. Another affirmative defense is that the plaintiff has "unclean hands" from acting in an unfair or deceptive manner. The defendant can charge that the plaintiff engaged in trademark misuse and used the mark in a manner that went against the public policy that allowed the trademark to be granted in the first place. The defendant may charge the plaintiff with fraudulent use of a trademark. The defendant can argue that the plaintiff violated ANTITRUST LAWS, which are designed to protect commerce and trade against unlawful restraints, price fixing, and monopolies. Finally, the defendant can offer the affirmative defense of LACHES, which provides that the party that unreasonably delays in asserting legal rights forfeits them.

### Trademark Rights Versus Publicity Rights

Every person enjoys the legal right to control the commercial value of his or her identity (i.e., name, face, likeness, voice), and to prevent others from exploiting that value for profit without permission. The law of TORTS calls this right the "right of publicity," and defines infringement as any nonconsensual use of a person's identity that is likely to damage its commercial value. Falsity or deception is not an element of a claim for infringement. Rather, to trigger infringement

of the right of publicity, the plaintiff's identity must be "identifiable" from the defendant's unauthorized commercial use, whatever form that use might take.

Courts and commentators often compare trademark rights to publicity rights because each set of rights is a form of intellectual property that grants owners the exclusive power to commercially exploit their property. But the right of publicity is only analogous to the law of trademarks and not identical. The key to the right of publicity is the commercial value of a human identity, while the key to the law of trademarks is the use of a word or symbol in such a way that it identifies and distinguishes a commercial source. Thus, while a trademark identifies and distinguishes a commercial source of goods and services, the "persona" protected by right of publicity law identifies a single human being.

Nor should the right of publicity be confused with the right of privacy. Courts recognize that the two rights are clearly separable and rest on quite different legal policies: the right to privacy protects against intrusion upon an individual's private self-esteem and dignity, while the right of publicity protects against commercial injury caused by the nonconsensual commercial appropriation of an individual's personality. Damages for invasion of privacy are usually measured by the mental and physical distress suffered by the plaintiff. On the other hand, damages for infringement of the right to publicity are measured by the loss in business value of the plaintiff's identity. Put simply, publicity rights protect against an injury to the pocketbook, while privacy rights protect against an injury to the psyche.

The right of publicity is not absolute. The use of a name or likeness incidental to the dissemination of a news story in which a person is properly and fairly presented is not actionable as a violation of the right of publicity. However, according to some authorities, the right of publicity can extend to the publication of one's name or picture in nonadvertising portions of a magazine or broadcast.

**FURTHER READINGS**

Dinwoodie, Graeme B., and Mark D. Janis. 2004. *Trademarks and Unfair Competition: Law & Policy.* New York: Aspen.

*Trademarks A to Z.* 2004. Mechanicsburg: Pennsylvania Bar Institute.

*Trademarks Throughout the World.* 2003. 4th ed. St. Paul, Minn.: West.

**CROSS-REFERENCES**

Copyright.

## TRADING STAMPS AND COUPONS

*A comprehensive term for any type of tickets, certificates, or order blanks that can be offered in exchange for money or something of value, or for a reduction in price when a particular item is purchased.*

U.S. businesses attempt to attract customers by using advertising, promising low prices, and claiming to offer high-quality goods and services. Another way of attracting business is by offering potential customers incentives, such as trading stamps, coupons, and price rebates. Though trading stamps have declined in popularity since the 1960s, the idea of awarding some type of credit for purchasing goods and services has survived. When commercial airlines award "frequent-flier miles" to their passengers, they are offering a variation on the trading stamp concept.

Trading stamps became popular during the Great Depression of the 1930s. They are printed stamps that can be saved and pasted into booklets until the individual collecting them has a sufficient number to exchange them for a particular item of merchandise. A trading stamp company negotiates agreements that allow retail merchants to give stamps to customers in proportion to how much they spend at the merchant's store. When the books are filled, they can be offered in exchange for merchandise provided by the trading stamp company through a catalog or at a redemption center. In effect, the customer receives an additional benefit for the price she pays for merchandise.

The merchant receives the benefit of the advertising done by the trading stamp company. The merchant also expects to attract more customers than a merchant who charges the same price for goods but does not offer stamps. The trading stamp company earns money by selling the stamps to the retailer.

In the heyday of trading stamp collection, various trading stamp companies competed for this lucrative market, which drew much of its business from grocery stores. The largest and most famous was the Sperry and Hutchinson (S&H) Company, which offered S&H Green Stamps. S&H filed lawsuits in the 1960s to pre-

vent its stamps from being brokered by persons and companies other than licensed retailers. Though the lawsuits were unsuccessful, the downfall of trading stamps came from retail merchandisers who offered consumers price discounts large enough to lure them from merchants who offered stamps. In addition, in the burgeoning consumer economy of the 1960s and 1970s, merchandise was easily affordable, and consumers were no longer willing to defer their purchases while they patiently collected stamps.

Though trading stamps have virtually disappeared, the concept is still used. For example, airline frequent-flier miles allow the customer who flies commercial airlines to accumulate miles toward free tickets. The airlines believe that a person will prefer to "earn" miles by flying with one company. Computer technology has also spurred experiments with recording points electronically when a person makes a retail purchase.

Whether the points are measured in stamps or miles, the law recognizes them as tokens of legal obligations. The points are not merchandise in and of themselves, but they do represent a promise by the company offering the incentive to redeem them for something of value. Ownership of the stamps, miles, or points remains with the offering company. This gives the company the ability to control the manner in which the rights represented by the incentives can be transferred.

Merchandise coupons are a popular way to attract business to a particular store or to a particular product. Coupons can be printed and distributed in advertising circulars, newspapers, and magazines or be enclosed with packaging for a product. A coupon gives rise to legal obligations based upon its terms. In general, the coupon constitutes proof of a promise by a manufacturer to give something of value to an individual who purchases the product of the manufacturer and presents the coupon for redemption. The coupon may be in the form of a rebate to be mailed to the purchaser from the manufacturer. To obtain a cash rebate, the purchaser must usually send in the rebate coupon and a sales slip as proof of purchase of the product, but individual companies may impose different requirements.

A number of coupons offer a discount that is granted at the time of purchase. The coupon informs the merchant that it may be returned to the manufacturer for the face value of the coupon plus a small service charge for each coupon returned. The merchant is required to submit proof that a sufficient amount of stock was purchased to have made the sales claimed.

The promise of the manufacturer on the coupon constitutes a unilateral contract that is enforceable as soon as a retail merchant accepts the offer of the manufacturer. The manufacturer has the right to require proof of purchase as a condition to performing the contract.

The obligations that are created by advertising coupons may be enforceable by criminal penalties as well as by contract law. In many jurisdictions misuse of coupons is a form of business FRAUD. For example, a merchant who returns thousands of coupons to a manufacturer and claims a refund without ever having sold the product may be guilty of a criminal offense in some jurisdictions.

## TRANSCRIPT

*A generic term for any kind of copy, particularly an official or certified representation of the record of what took place in a court during a trial or other legal proceeding.*

A *transcript of record* is the printed record of the proceedings and pleadings of a case, required by the appellate court for a review of the history of the case.

## TRANSFER

*To remove or convey from one place or person to another. The removal of a case from one court to another court within the same system where it might have been instituted. An act of the parties, or of the law, by which the title to property is conveyed from one person to another.*

Transfer encompasses the sale and every other method, direct or indirect, of (1) disposing of property or an interest therein or possession thereof; or (2) fixing a lien (a charge against property to secure a debt) absolutely or conditionally, voluntarily or involuntarily, with or without judicial proceedings, in the form of a conveyance, sale, payment, pledge, lien, mortgage, gift, or otherwise. The term *transfer* has a general meaning and can include the act of giving property by will.

Transfer is the comprehensive term used by the UNIFORM COMMERCIAL CODE (UCC)—a body of law adopted by the states that governs

mercantile transactions—to describe the act that passes an interest in an instrument (a written legal document) from one person to another.

## TRANSFER OF ASSETS

*The conveyance of something of value from one person, place, or situation to another.*

The law recognizes that persons are generally entitled to transfer their assets to whomever they wish and for whatever reason. The most common means of transfer are wills, trusts, and gifts. Increasingly, however, persons are transferring property and money in order to qualify for government-funded nursing care or to avoid paying creditors or the INTERNAL REVENUE SERVICE. State and federal laws prohibit transfers that defraud creditors, however. If a creditor can show that a transfer was made in bad faith and for the purpose of avoiding a lawful debt, the transfer will be voided.

A will is a common way of transferring assets. The testator, the person writing and signing the will, states in writing how the assets of his estate shall be divided and transferred upon his death. The estate of the testator is subject to inheritance taxes, but the remainder is transferred to the heirs and beneficiaries in the will. If a person dies intestate, without writing a will, state statutes direct how the assets shall be divided and transferred among family members.

For persons who have substantial assets, the transfer may be accomplished by using a trust. There are many types of trusts, some of which are part of a will and go into effect upon the death of the testator. Instead of being transferred directly to persons, the assets are transferred to a trustee, who distributes funds based on the terms in the trust documents. The use of a trust generally reduces inheritance taxes. A person may also transfer assets to a trust while living to reduce her INCOME TAX burden. Income earned by the trust will be taxed to the trust, which usually is in a lower tax bracket than the person transferring the assets. The trust must benefit others, however, not just the person transferring the assets.

Living persons may also make gifts to others. An inter vivos gift, which takes effect during the lifetime of the donor and the donee, is irrevocable when made. Federal tax law permits a person to give up to $10,000 yearly to each recipient without having to pay any gift tax or file a gift tax return. All gifts in excess of the annual exclusions are taxable.

Other types of transfers of assets have also become popular in the United States. Some middle-class older persons, faced with the high cost of nursing home care and wanting to leave their property to their children, transfer all their assets to their children. By doing so, the older person can meet income and net asset guidelines to qualify for government-subsidized nursing home care. State and federal governments have sought to prevent this practice because it takes funds away from those who are truly indigent.

A growing trend is transferring assets to avoid paying court judgments. Companies offer "asset-protection plans" that seek to insulate, for example, a doctor from the possibility of paying a large MALPRACTICE damages award. By transferring assets to a foreign country, the plan makes it difficult to ascertain the amount of the doctor's assets. Also, collecting on a judgment in a foreign court is often impossible.

A more radical device is transferring assets outside the United States to a foreign trust, which manages the assets and distributes funds to the beneficiaries. The foreign trustee controls the assets and is not subject to a lawsuit seeking collection of a judgment against the transferee. Critics charge that besides allowing a person to avoid paying a debt, foreign trusts encourage income TAX EVASION. Defenders of asset protection contend that the purpose of foreign trusts is to avoid lawsuits, not taxes.

## TRANSFER TAX

*The charge levied by the government on the sale of shares of stock. A charge imposed by the federal and state governments upon the passing of title to real property or a valuable interest in such property, or on the transfer of a decedent's estate by inheritance, devise, or bequest.*

The states also impose transfer tax on deeds used to convey real property.

## TRANSITORY ACTION

*A lawsuit that can be commenced in any place where personal* SERVICE OF PROCESS *can be made on the defendant.*

Common examples of transitory actions are lawsuits brought to recover damages in breach of contract or TORT actions. Transitory actions are distinguishable from local actions, which can

be brought only where the subject matter of the controversy exists. For example, the classic type of local action is one in which title to real property will be directly affected by the judgment of the court. Such actions generally must be tried in the county where the particular property is located.

## TRANSNATIONAL CORPORATION

*Any corporation that is registered and operates in more than one country at a time; also called a multinational corporation.*

A transnational, or multinational, corporation has its headquarters in one country and operates wholly or partially owned subsidiaries in one or more other countries. The subsidiaries report to the central headquarters. The growth in the number and size of transnational corporations since the 1950s has generated controversy because of their economic and political power and the mobility and complexity of their operations. Some critics argue that transnational corporations exhibit no loyalty to the countries in which they are incorporated but act solely in their own best interests.

U.S. corporations have various motives for establishing a corporate presence in other countries. One possible motive is a desire for growth. A corporation may have reached a plateau meeting domestic demands and anticipate little additional growth. A new foreign market might provide opportunities for new growth.

Other corporations desire to escape the protectionist policies of an importing country. Through direct foreign investment, a corporation can bypass high tariffs that prevent its goods from being competitively priced. For example, when the European Common Market (the predecessor of the European Union) placed tariffs on goods produced by outsiders, U.S. corporations responded by setting up European subsidiaries.

Two other motives are more controversial. One is preventing competition. The most certain method of preventing actual or potential competition from foreign businesses is to acquire those businesses. Another motive for establishing subsidiaries in other nations is to reduce costs, mainly through the use of cheap foreign labor in developing countries. A transnational corporation can hold down costs by shifting some or all of its production facilities abroad.

Transnational corporations with headquarters in the United States have played an increasingly dominant role in the world economy. This dominance is most pronounced in the developing countries that rely primarily on a narrow range of exports, usually primary goods. A transnational corporation has the ability to disrupt traditional economies, impose monopolistic practices, and assert a political and economic agenda on a country.

Another concern with transnational corporations is their ability to use foreign subsidiaries to minimize their tax liability. The INTERNAL REVENUE SERVICE (IRS) must analyze the movement of goods and services between a transnational company's domestic and foreign operations and then assess whether the transfer price that was assigned on paper to each transaction was fair. IRS studies indicate that U.S. transnational corporations have an incentive to set their transfer prices so as to shift income away from the United States and its higher corporate tax rates and to shift deductible expenses into the United States. Foreign-owned corporations doing business in the United States have a similar incentive. Critics argue that these tax incentives also motivate U.S. transnational corporations to move plants and jobs overseas.

## TRANSNATIONAL LAW

*All the law—national, international, or mixed—that applies to all persons, businesses, and governments that perform or have influence across state lines.*

Transnational law regulates actions or events that transcend national frontiers. It involves individuals, corporations, states, or other groups—not just the official relations between governments of states.

An almost infinite variety of transnational situations might arise, but there are rules or law bearing upon each. Since applicable legal rules might conflict with each other, "choice of law" is determined by rules of conflict of laws or private international law. The choice, usually between rules of different national laws, is made by a national court.

In other types of situations, the choice might be between a rule of national law and a rule of "public international law," in which case the choice is made by an international tribunal or some nonjudicial decision-maker, such as an appointed body.

CROSS-REFERENCES

International Law.

## TRANSPORTATION DEPARTMENT

The U.S. Department of Transportation (DOT) establishes overall transportation policy for the United States. Under the DOT umbrella are 11 administrations whose jurisdictions include highway planning, development, and construction; urban mass transit; railroads; aviation; and the safety of ports, highways, and oil and gas pipelines. Decisions made by the department in conjunction with appropriate state and local officials can significantly affect other programs such as land planning, energy conservation, scarce resource utilization, and technological change.

The DOT was established by Congress in 1966 (49 U.S.C.A. § 102) "to assure the coordinated, effective administration of the transportation programs of the Federal Government" and to develop "national transportation policies and programs conducive to the provision of fast, safe, efficient, and convenient transportation at the lowest cost consistent therewith." The department became operational in April 1967 with elements transferred from eight other major departments and agencies. As of 2003, it consists of the office of the secretary and 11 operating administrations whose heads report directly to the secretary and have highly decentralized authority.

### Office of the Secretary of Transportation

The DOT is administered by the secretary of transportation, who is the principal adviser to the president in all matters relating to federal transportation programs. The secretary administers the department with the assistance of a deputy secretary of transportation, an associate deputy secretary, the assistant secretaries, a general counsel, the inspector general, and several directors and chairpersons.

### Federal Aviation Administration

The FEDERAL AVIATION ADMINISTRATION (FAA), formerly the Federal Aviation Agency, was established by the Federal Aviation Act of 1958 (49 U.S.C.A. § 106) and became a component of the DOT in 1967. The FAA is charged with regulating air commerce in ways that best promote its development and safety and fulfill the requirements of national defense; controlling the use of the navigable airspace of the United States by regulating both civil and military operations in that airspace in the interest of safety and efficiency; promoting, encouraging, and developing civil AERONAUTICS; and consolidating research and development with respect to air navigation facilities.

The FAA is responsible for installing and operating air navigation facilities; developing and operating a common system of air traffic control and navigation for both civil and military aircraft; and developing and implementing programs and regulations to control aircraft noise, sonic booms, and other environmental effects of civil aviation.

In addition, the FAA operates a network of airport traffic control towers, air route traffic control centers, and flight service stations. It develops air traffic rules and regulations and allocates the use of the airspace. It also provides for the security control of air traffic to meet national defense requirements.

The FAA is responsible for the location, construction or installation, maintenance, operation, and quality assurance of federal visual and electronic aids to air navigation. The agency operates and maintains voice/data communications equipment, radar facilities, computer systems, and visual display equipment at flight service stations, airport traffic control towers, and air route traffic control centers.

The agency maintains a national plan of airport requirements, administers a grant program for the development of public use airports to assure and improve safety and to meet current and future airport capacity needs, evaluates the environmental impacts of airport development, and administers an airport noise compatibility program with the goal of reducing noncompatible uses around airports. It also develops standards and technical guidance on airport planning, design, safety, and operations and provides grants to assist public agencies in airport system and master planning and airport development and improvement.

The FAA provides a system for registering aircraft and recording documents that affect title or interest in the aircraft, aircraft engines, propellers, appliances, and spare parts.

Under the Federal Aviation Act of 1958 and the International Aviation Facilities Act (49 U.S.C.A. § 1151), the agency promotes aviation safety and civil aviation abroad by exchanging

aeronautical information with foreign aviation authorities; certifying foreign repair stations, air personnel, and mechanics; negotiating bilateral airworthiness agreements to facilitate the import and export of aircraft and components; and providing technical assistance and training in all areas of the agency's expertise.

One important FAA function is the regulation and promotion of the U.S. commercial space transportation industry. It licenses the private-sector launching of space payloads on expendable launch vehicles and commercial space launch facilities. The FAA also sets insurance requirements for the protection of persons and property and ensures that space transportation activities comply with U.S. domestic and foreign policy.

### Federal Highway Administration

The Federal Highway Administration became a component of the DOT in 1967. It administers the highway transportation programs of the DOT under Title 23 U.S.C.A., and other pertinent legislation. The administration oversees highway transportation in its broadest scope, seeking to coordinate highways with other modes of transportation to achieve the most effective balance of transportation systems and facilities.

The administration administers the federal aid highway program, which provides funding to the states to assist in constructing highways and making highway and traffic operations more efficient. This program provides for the improvement of approximately 159,000 miles of the National Highway System, which includes the 43,000-mile DWIGHT D. EISENHOWER system of interstate and defense highways and other public roads. The federal government generally provides 90 percent of the funding for the construction and preservation of the interstate system, and the relevant states provide 10 percent. For projects not on the interstate system and most projects on other roads, 80 percent of the funding comes from the federal government and 20 percent from the states.

The administration is also responsible for the Highway Bridge Replacement and Rehabilitation Program, which assists in the inspection, analysis, and rehabilitation or replacement of bridges on public roads. In addition, it administers an emergency program to assist in the repair or reconstruction of federal aid highways and certain federal roads that have suffered serious damage over a wide area from natural disasters or catastrophic failures.

The Congestion Mitigation and Air Quality Improvement (CMAQ) Program provides funding to reduce AIR POLLUTION. Transportation improvement projects and programs that reduce transportation-related emissions are eligible for funding. Funds can be used for highway, transit, and other transportation purposes.

The administration is responsible for several highway-related safety programs, including a state and community safety program jointly administered with the National Highway Traffic Safety Administration and a highway safety construction program to eliminate road hazards and improve rail-highway crossing safety. These safety construction programs fund activities that remove, relocate, or shield roadside obstacles; identify and correct hazardous locations; eliminate or reduce hazards at railroad crossings; and improve signs, pavement markings, and signals.

Under the provisions of the Surface Transportation Assistance Act of 1982 (23 U.S.C.A. § 101), the administration is authorized to establish and maintain a national network for trucks, review state programs regulating truck size and weight, and assist in obtaining uniformity among the states in commercial motor carrier registration and taxation reporting. The administration works cooperatively with states and private industry to achieve uniform safety regulations, inspections and fines, licensing, registration and taxation, and accident data for motor carriers.

The agency also exercises federal regulatory jurisdiction over the safety performance of all commercial motor carriers engaged in interstate or foreign commerce. It deals with more than 330,000 carriers and approximately 36,000 shippers of hazardous materials. The administration conducts reviews at the carrier's facilities to determine the safety of the carrier's over-the-road operations. These reviews may lead to prosecution or other sanctions against violators of the federal motor carrier safety regulations or the hazardous materials transportation regulations.

The Commercial Motor Vehicle Safety Act of 1986 (49 U.S.C.A. § 2701) authorizes the administration to establish national standards for a single commercial vehicle driver's license for state issuance, a national information system

clearinghouse for commercial driver's license information, knowledge and skills tests for licensing commercial vehicle drivers, and disqualification of drivers for serious traffic offenses, including alcohol and drug abuse. The agency administers the Motor Carrier Safety Assistance Program, a partnership between the federal government and the states, under the provisions of sections 401–404 of the Surface Transportation Assistance Act of 1982 (49 U.S.C.A. §§ 2301–2304).

### Federal Railroad Administration

The purpose of the Federal Railroad Administration is to promulgate and enforce rail safety regulations, administer railroad financial assistance programs, conduct research and development in support of improved railroad safety and national rail transportation policy, provide for the rehabilitation of Northeast Corridor rail passenger service, and consolidate government support of rail transportation activities.

The administration administers and enforces the federal laws and related regulations designed to promote safety on railroads and exercises jurisdiction over all areas of rail safety, such as track maintenance, inspection standards, equipment standards, and operating practices. It also administers and enforces regulations enacted pursuant to railroad safety legislation for locomotives, signals, safety appliances, power brakes, hours of service, transportation of explosives and other dangerous articles, and the reporting and investigation of railroad accidents. Railroad and related industry equipment, facilities, and records are inspected, and required reports are reviewed. In addition, the administration educates the public about safety at highway-rail grade crossings and the danger of trespassing on rail property.

### National Highway Traffic Safety Administration

The National Highway Traffic Safety Administration (NHTSA) was established by the Highway Safety Act of 1970 (23 U.S.C.A. § 401). The NHTSA carries out programs concerning the safety performance of motor vehicles and related equipment and the safety of motor vehicle drivers, occupants, and pedestrians. The administration conducts general motor vehicle programs aimed at reducing the damage that motor vehicles sustain as a result of crashes. It also administers the federal odometer law, issues theft prevention standards, and promulgates average fuel economy standards for passenger and nonpassenger motor vehicles.

Under the NHTSA program, Federal Motor Vehicle Safety Standards are issued that prescribe safety features and levels of safety-related performance for vehicles and motor vehicle equipment. Damage susceptibility, crashworthiness, and theft prevention are studied and reported to Congress and the public.

The Energy Policy and Conservation Act, as amended (42 U.S.C.A. § 6201), sets automotive fuel economy standards for passenger cars for model years 1985 and thereafter. The NHTSA has the option of altering the standards for the post-1985 period. The NHTSA develops and promulgates mandatory fuel economy standards for light trucks for each model year and administers the fuel economy regulatory program. The administration also establishes rules for collecting and reporting information concerning manufacturers' ability to meet fuel economy standards. This information is used to evaluate technological alternatives and manufacturers' economic ability to meet fuel economy standards.

The NHTSA maintains a national register of information on individuals who have had their licenses to operate a motor vehicle revoked, suspended, canceled, or denied, or who have been convicted of certain traffic-related violations, such as driving while impaired by alcohol or other drugs. The information obtained from the register assists state licensing officials in determining whether to issue a driver's license.

The Highway Safety Act provides federal matching funds to states and local communities to assist them with their highway safety programs. Areas of primary emphasis include impaired driving, occupant protection, motorcycle safety, police traffic services, pedestrian and bicycle safety, emergency medical services, speed control, and traffic records. The NHTSA provides guidance and technical assistance in all of these areas. The Highway Safety Act also provides incentive funds for encouraging states to implement effective impaired-driving programs and to encourage the use of safety belts and motorcycle helmets.

### Federal Transit Administration

The Federal Transit Administration (FTA) was established as a component of the DOT in 1968. The FTA works with public and private

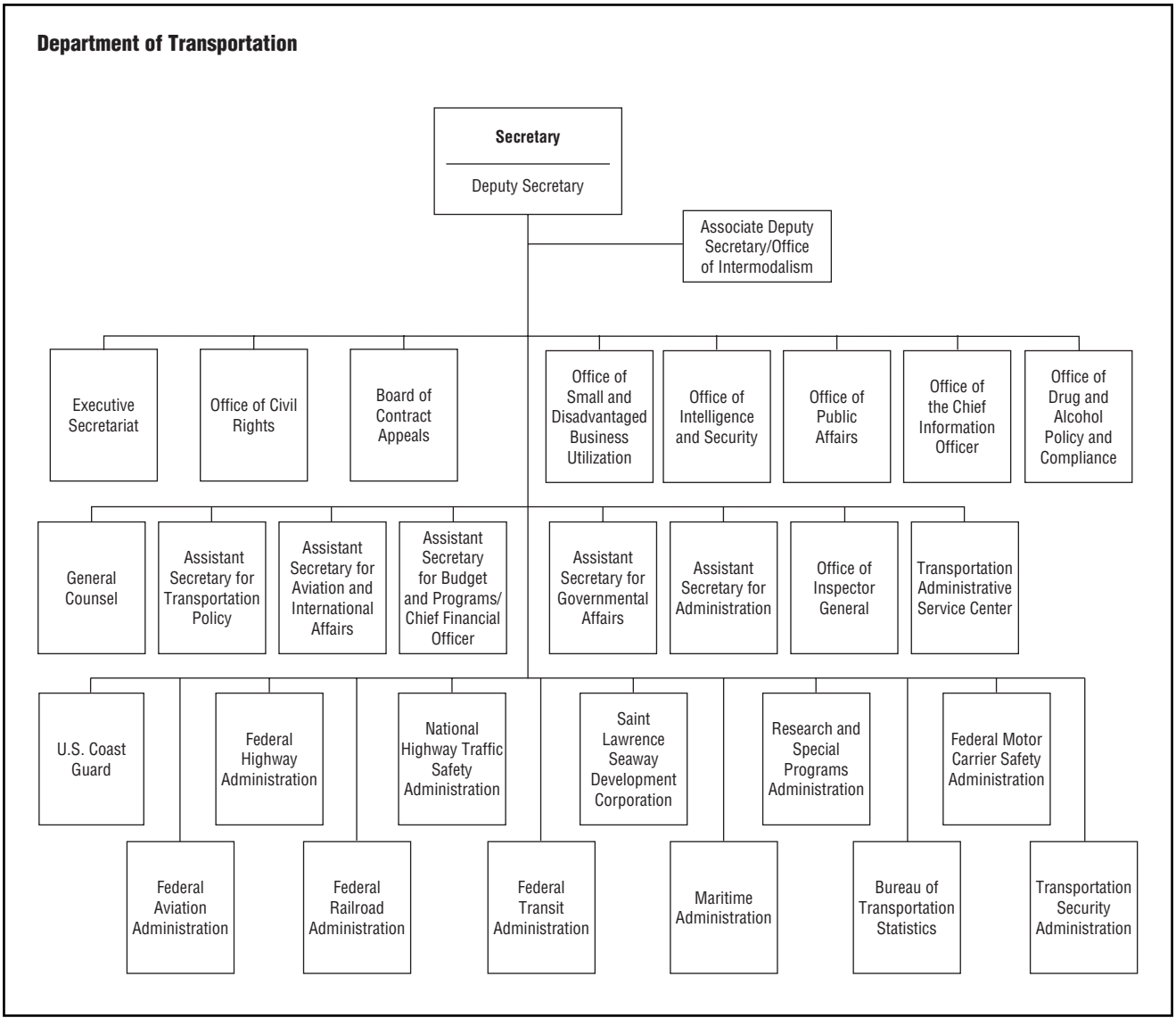


mass transportation companies to develop improved mass transportation facilities, equipment, techniques, and methods. The administration encourages the planning and establishment of area-wide urban mass transportation systems, helps state and local governments finance such systems, and provides financial assistance to state and local governments to increase mobility for older, disabled, and economically disadvantaged persons.

### Maritime Administration

The Maritime Administration was transferred to the DOT in 1981. The Maritime Administration conducts programs to aid in the development, promotion, and operation of the U.S. merchant marine. It is also charged with organizing and directing emergency merchant ship operations.

Through the Maritime Subsidy Board, the Maritime Administration handles subsidy programs under which the federal government, subject to statutory limitations, pays the difference between certain costs of operating ships under the U.S. flag and foreign competitive flags. The government also subsidizes the difference between the costs of constructing ships in U.S. and foreign shipyards. The Maritime Administration provides financing guarantees for the construction, reconstruction, and reconditioning of ships and enters into capital construction fund agreements that grant tax deferrals on moneys to be used for the acquisition, construction, or reconstruction of ships.

The administration constructs or supervises the construction of merchant-type ships for the federal government. It helps industry generate increased business for U.S. ships and conducts programs to promote domestic shipping and to develop ports, facilities, and intermodal transport.

Under emergency conditions the Maritime Administration charters government-owned ships to U.S. operators, requisitions or procures ships owned by U.S. citizens, and allocates them to meet defense needs. It maintains a National Defense Reserve Fleet of government-owned ships that it operates through ship managers and general agents when required for the national defense. An element of this activity is the Ready Reserve Force, consisting of a number of ships that can be activated for quick response.

The administration regulates sales to ALIENS and transfers to foreign registry of ships that are fully or partially owned by U.S. citizens. It also disposes of government-owned ships found nonessential for national defense.

The administration operates the U.S. Merchant Marine Academy in Kings Point, New York, where young people are trained to become merchant marine officers, and conducts training in shipboard firefighting in Earle, New Jersey, and Toledo, Ohio. It also administers a federal assistance program for the maritime academies operated by California, Maine, Massachusetts, Michigan, New York, and Texas.

### St. Lawrence Seaway Development Corporation

The St. Lawrence Seaway Development Corporation was established by Congress in 1954 (33 U.S.C.A. §§ 981–990) as an operating administration of the DOT. The corporation, a wholly government-owned enterprise, is responsible for the development, operation, and maintenance of the part of the St. Lawrence Seaway that is between the port of Montreal and Lake Erie and within the territorial limits of the United States. It is the function of the Seaway Corporation to provide a safe, efficient, and effective water artery for maritime commerce, both in peacetime and in time of national emergency.

The corporation coordinates its activities with its Canadian counterpart, particularly with respect to overall operations, traffic control, navigation aids, safety, navigation dates, and related programs designed to fully develop the seaway system. The corporation encourages the development of traffic through the Great Lakes/St. Lawrence Seaway system in order to contribute to the economic and environmental development of the entire region.

### Research and Special Programs Administration

The Research and Special Programs Administration was established in 1977. It is responsible for hazardous materials transportation and pipeline safety, transportation emergency preparedness, safety training, and transportation research and development activities.

The SEPTEMBER 11, 2001, TERRORIST ATTACKS, when four commercial airliners were hijacked by terrorists who flew two of them into the World Trade Center towers in New York City and one into the Pentagon (the fourth crashed into a field in Pennsylvania), had a significant impact on the Department of Transportation. In November 2001, Congress passed legislation that created within the DOT the Transportation Security Administration (TSA), an agency established to increase airport security. The following November the Homeland Security Act was passed, which authorized the establishment of the HOMELAND SECURITY DEPARTMENT. On March 1, 2003, the new department assumed management of the United States Coast Guard and the Transportation Security Administration, both of which had been operating administrations of the DOT.

Although no longer in charge of overseeing the protection of airline passengers, the Department of Transportation remained responsible for the safety of Americans traveling on the nation's highways. To that end the Federal Highway Administration (FHWA) was making efforts in early 2003 to collaborate with other DOT components, federal agencies, state and local officials, business associations and the private sector to develop a plan for "emergency transportation operations preparedness." The purpose of the plan is to engage in regional and local cooperation and planning to facilitate the safe, continuous movement of people and goods during a national security event or emergency.

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CROSS-REFERENCES

Airlines; Automobiles.

## ♦ TRASK, MILILANI B.

Mililani B. Trask, a native Hawaiian attorney, is the leader of a Hawaiian sovereignty movement that seeks the establishment of a separate nation for native Hawaiians and the return of the state-managed lands to which native Hawaiians are legally entitled.

Trask was born into a politically active family. Her grandfather, David Trask Sr., was a territorial senator, and her uncle, David Trask Jr., became a prominent labor leader who organized a powerful union for state government employees. Trask graduated from the Kamehameha Schools, an educational institution set up by Princess Bernice Pauahi Bishop, of Hawaii, for native Hawaiian children. She attended Johnston College, University of Redlands in California, but left school before graduating to work with labor organizer CÉSAR CHÁVEZ's field-workers and the Black Panther Childcare Project. Trask received a bachelor of arts degree in political science from San Jose State University in 1974, and graduated from the University of Santa Clara School of Law in 1978, at the age of 27.

"ALL THE TALK NOW IS ABOUT MODELS OF SOVEREIGNTY. A MODEL IS JUST A PROTOTYPE. IT'S NOT REAL. WE'RE NOT A MODEL. A MODEL DOESN'T HAVE 25,000 PEOPLE."
—MILILANI B. TRASK

Trask returned to Hawaii and joined the growing native struggle over land control and development. She began community organizing on sovereignty issues, setting up conferences and workshops and doing extensive legal research into native land claims.

In 1987, Trask and others founded the group Ka Lahui Hawai'i (the Hawaiian People). Ka Lahui is a self-proclaimed sovereign Hawaiian nation with over ten thousand members; a democratic constitution with a bill of rights; and four branches of government—including an elected legislature (the Pakaukau), representing 33 districts, and a judiciary system made up of elected judges and an elders council. Voting is restricted to native Hawaiians. Trask has twice been elected *kia'aina* of the group, the equivalent of governor or prime minister.

Trask hopes the nation will eventually be rooted in the nearly two hundred thousand acres of Hawaiian homelands and the 1.4 million acres of original Hawaiian lands ceded to the state by the federal government. In Ka Lahui Hawai'i, according to Trask, native Hawaiians would have a relationship similar to that existing between the United States and federally recognized Native American tribes and native Alaskans. The tribes, whose members have dual status as citizens of the United States and as "citizens" of the tribe, can impose taxes, make laws, and control their lands.

Trask also is one of the founders of the Indigenous Women's Network, a coalition of Native American women advocating for issues including improved housing, HEALTH CARE, HUMAN RIGHTS, and community-based economic development. From 1998 to 2000 Trask served as Trustee at Large to the Office of Hawaiian Affairs (OHA). In 2000, she resigned her membership in Ka Lahui Hawai'i but has remained active in public affairs. In 2002, Trask began serving a three-year term as the Pacific

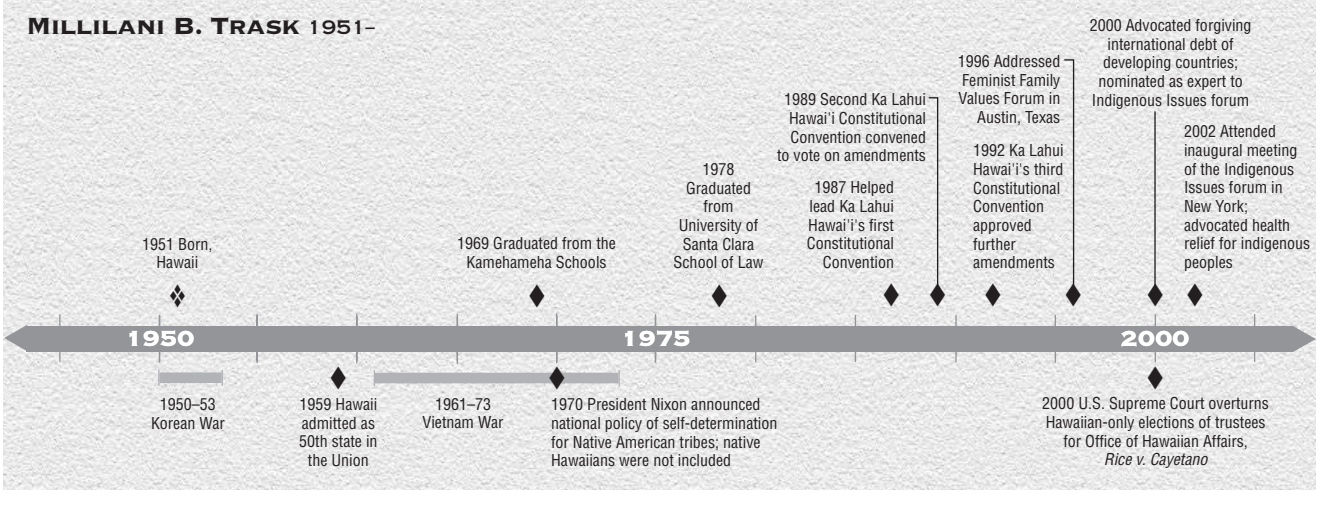

representative to the 16-member UNITED NATIONS Permanent Forum on Indigenous Issues.

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CROSS-REFERENCES

Native American Rights.

## TRAVERSE

*In* COMMON-LAW PLEADING, *a denial of the plaintiff's assertions.*

For example, a plaintiff could bring a lawsuit in order to collect money that he claimed the defendant owed him. If the defendant answered the plaintiff's claim by stating in answer that she did not fail to pay the money owed on the date it was due, this is a denial of a fact essential to the plaintiff's case. The defendant can be said to traverse the plaintiff's declaration of an outstanding debt, and her plea itself could be called a traverse.

The system of common-law pleading has been replaced throughout the United States by CODE PLEADING and by rules patterned on the system of pleading in Federal CIVIL PROCEDURE, but lawyers still use the word *traverse* for a denial. In some instances, it has taken on specialized meanings for different purposes. For example, in criminal practice, a traverse is a denial of the charges in an indictment that usually has the effect of delaying a trial on the indictment until a later term of the court. A traverse jury is one that hears the claims of the plaintiff and denials of the defendant—a trial jury or petit jury. A traverse hearing may be a pretrial hearing to determine whether the court has authority to hear the case—as when the defendant denies having been properly served with the plaintiff's summons and complaint.

## ❖ TRAYNOR, ROGER JOHN

Among the most influential and highly esteemed jurists of the twentieth century, Roger J. Traynor was a professor, author, and justice of the California Supreme Court from 1940 to 1970. During Traynor's six years as chief justice, that court was regarded as the preeminent state court in the nation. Readily open to reform and to novel legal ideas, Traynor made long-lasting contributions to various areas of the law including taxes, NEGLIGENCE, and FOURTH AMENDMENT jurisprudence. In addition to hundreds of judicial opinions, Traynor also wrote prodigiously as a legal scholar and contributed to a number of legal reform efforts.

Born in Park City, Utah, on February 12, 1900, Traynor was the son of a miner. In the 1920s he studied law and political science at the University of California at Berkeley, where he simultaneously earned a J.D. and Ph.D. while editing the *California Law Review.* In 1928 he joined the law school staff. Over the next 12 years, he served as a consultant to various state and national agencies, including the U.S. TREASURY DEPARTMENT. In California his advisory work led to major reforms of sales and use taxes (1933 Cal. Stat. 2599 and 1935 Cal. Stat. 1297), personal income taxes (1943 Cal. Stat. 2354), and bank and corporation franchise taxes (1929 Cal. Stat. 19).

"UNABLE LIKE SOLOMON TO CARVE THE CHILD, [A COURT] MAY CARVE OUT OF THE SUM OF CUSTODIAL RIGHTS, CERTAIN RIGHTS TO BE EXERCISED BY EACH PARENT."
—ROGER JOHN TRAYNOR

In 1940 Governor Culbert Olson appointed Traynor to the California Supreme Court, making him the first law school professor to be appointed directly to the court. Although he had little experience in private practice, Traynor had earned renown as one of the nation's leading tax scholars. Over the next three decades, he wrote more than 950 opinions and continued his scholarly work, writing more than 75 law review articles on a wide variety of topics.

Traynor had a reformist philosophy, viewing the law as a fluid, changing force that was necessarily responsive to the needs of society. He believed that a judge can and should change the law. Among his most influential opinions was his concurrence in *Escola v. Coca Cola Bottling Co.,* 24 Cal. 2d 453, 150 P.2d 436 (1944), which would dramatically change PRODUCT LIABILITY LAW. Traynor's idea that consumers should be entitled to sue the manufacturers of defective products was novel at the time. Yet, two decades later, the idea was embraced by the full California Supreme Court (*Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 [1963]) and soon became the law of the land.

Traynor's jurisprudence amounted to a historic reform of long-standing common-law doctrines, and his ideas influenced courts

nationwide. His precedent-setting opinions included *People v. Cahan,* 44 Cal. 2d 434, 282 P.2d 905 (1955), which restricted the admissibility of illegally secured evidence, and *Muskopf v. Corning Hospital District,* 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961), which eliminated the defense of sovereign immunity—the doctrine that precludes bringing suit against the government without its consent—in TORT cases.

In 1964 Governor Edmund G. Brown Sr. elevated Traynor to the position of chief justice. Over the next six years, the California Supreme Court became the most prestigious state court in the nation. Among the innovations Traynor introduced was the use of law review citations in the court's opinions, thus ensuring that legal scholarship would inform legal opinion. Upon his retirement from the court at the age of 70, he was praised for his work in transforming and modernizing the COMMON LAW. His accomplishments were compared to the reform efforts of BENJAMIN CARDOZO, the legendary New York appellate justice.

After his retirement from the court, Traynor chaired the American Bar Association's Special Committee on Standards of Judicial Conduct, which produced, in 1972, modern standards for the governance of judges. Traynor taught at Hastings College of the Law, the University of Virginia, University of Utah, and as a visiting professor at Cambridge University in England. He also served as chair of the National Press Council. Traynor died in San Francisco, California, on May 13, 1983.

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CROSS-REFERENCES

Fourth Amendment; Negligence; Product Liability; Sovereign Immunity.

## TREASON

*The betrayal of one's own country by waging war against it or by consciously or purposely acting to aid its enemies.*

The Treason Clause traces its roots back to an English statute enacted during the reign of Edward III (1327–1377). This statute prohibited levying war against the king, adhering to his enemies, or contemplating his death. Although this law defined treason to include disloyal and subversive thoughts, it effectively circumscribed the crime as it existed under the COMMON LAW. During the thirteenth century, the crime of treason encompassed virtually every act contrary to the king's will and became a political tool of the Crown. Building on the tradition begun by Edward III, the Founding Fathers carefully delineated the crime of treason in Article III of the U.S. Constitution, narrowly defining its elements and setting forth stringent evidentiary requirements.

Under Article III, Section 3, of the Constitution, any person who levies war against the United States or adheres to its enemies by giving them AID AND COMFORT has committed treason within the meaning of the Constitution. The term *aid and comfort* refers to any act that man-

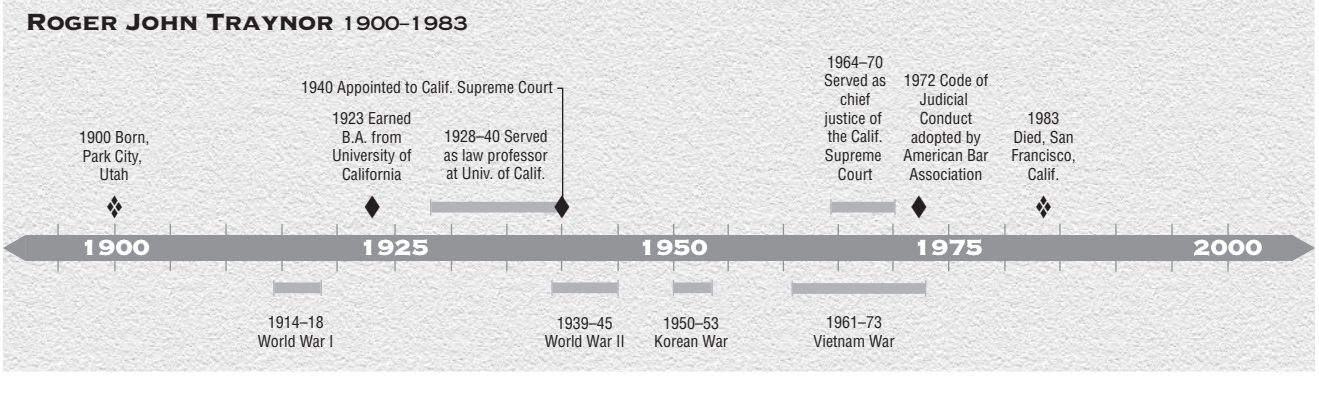

ifests a betrayal of allegiance to the United States, such as furnishing enemies with arms, troops, transportation, shelter, or classified information. If a subversive act has any tendency to weaken the power of the United States to attack or resist its enemies, aid and comfort has been given.

The Treason Clause applies only to disloyal acts committed during times of war. Acts of disloyalty during peacetime are not considered treasonous under the Constitution. Nor do acts of ESPIONAGE committed on behalf of an ally constitute treason. For example, JULIUS AND ETHEL ROSENBERG were convicted of espionage, in 1951, for helping the Soviet Union steal atomic secrets from the United States during WORLD WAR II. The Rosenbergs were not tried for treason because the United States and the Soviet Union were allies during World War II.

Under Article III a person can levy war against the United States without the use of arms, weapons, or military equipment. Persons who play only a peripheral role in a conspiracy to levy war are still considered traitors under the Constitution if an armed rebellion against the United States results. After the U.S. CIVIL WAR, for example, all Confederate soldiers were vulnerable to charges of treason, regardless of their role in the secession or insurrection of the Southern states. No treason charges were filed against these soldiers, however, because President ANDREW JOHNSON issued a universal AMNESTY.

The crime of treason requires a traitorous intent. If a person unwittingly or unintentionally gives aid and comfort to an enemy of the United States during wartime, treason has not occurred. Similarly, a person who pursues a course of action that is intended to benefit the United States but mistakenly helps an enemy is not guilty of treason. Inadvertent disloyalty is never punishable as treason, no matter how much damage the United States suffers.

As in any other criminal trial in the United States, a defendant charged with treason is presumed innocent until proved guilty BEYOND A REASONABLE DOUBT. Treason may be proved by a voluntary confession in open court or by evidence that the defendant committed an OVERT ACT of treason. Each overt act must be witnessed by at least two people, or a conviction for treason will not stand. By requiring this type of direct evidence, the Constitution minimizes the danger of convicting an innocent person and forestalls the possibility of partisan witch-hunts waged by a single adversary.

Unexpressed seditious thoughts do not constitute treason, even if those thoughts contemplate a bloody revolution or coup. Nor does the public expression of subversive opinions, including vehement criticism of the government and its policies, constitute treason. The FIRST AMENDMENT to the U.S. Constitution guarantees the right of all Americans to advocate the violent overthrow of their government unless such advocacy is directed toward inciting imminent lawless action and is likely to produce it (*Brandenburg v. Ohio,* 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 [1969]). On the other hand, the U.S. Supreme Court ruled that the distribution of leaflets protesting the draft during WORLD WAR I was not constitutionally protected speech (SCHENCK V. UNITED STATES, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 [1919]).

Because treason involves the betrayal of allegiance to the United States, a person need not be a U.S. citizen to commit treason under the Constitution. Persons who owe temporary allegiance to the United States can commit treason. ALIENS who are domiciliaries of the United States, for example, can commit traitorous acts during the period of their domicile. A subversive act does not need to occur on U.S. soil to be punishable as treason. For example, Mildred Gillars, a U.S. citizen who became known as Axis Sally, was convicted of treason for broadcasting demoralizing propaganda to Allied forces in Europe from a Nazi radio station in Germany during World War II.

Treason is punishable by death. If a death sentence is not imposed, defendants face a minimum penalty of five years in prison and a $10,000 fine (18 U.S.C.A. § 2381). A person who is convicted of treason may not hold federal office at any time thereafter.

The English common law required defendants to forfeit all of their property, real and personal, upon conviction for treason. In some cases, the British Crown confiscated the property of immediate family members as well. The common law also precluded convicted traitors from bequeathing their property through a will. Relatives were presumed to be tainted by the blood of the traitor and were not permitted to inherit from him. Article III of the U.S. Constitution outlaws such "corruption of the blood" and limits the penalty of FORFEITURE to "the life of the person attainted." Under this provision

relatives cannot be made to forfeit their property or inheritance for crimes committed by traitorous family members.

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## TREASURY DEPARTMENT

The U.S. Department of the Treasury performs four basic functions: formulating and recommending economic, financial, tax, and fiscal policies; serving as financial agent for the U.S. government; enforcing the law; and manufacturing coins and currency. The Treasury Department was created by an act of September 2, 1789 (31 U.S.C.A. § 301). Many subsequent acts have affected the development of the department and created its numerous bureaus and divisions. On March 1, 2003, the newly-created HOMELAND SECURITY DEPARTMENT took control of several treasury divisions: the U.S. Customs Service, the SECRET SERVICE, and the Federal Law Enforcement Training Center.

### Secretary of the Treasury

As a major policy adviser to the president, the secretary of the treasury has primary responsibility for formulating and recommending domestic and international financial, economic, and tax policy, participating in the formulation of broad fiscal policies that have general significance for the economy, and managing the public debt. The secretary also oversees the activities of the department in carrying out its major law enforcement responsibility, serving as the financial agent for the U.S. government, and manufacturing coins, currency, and other products for customer agencies.

In addition, the secretary has many responsibilities as chief financial officer of the government. The secretary serves as chair pro tempore of the Economic Policy Council and as U.S. governor of the INTERNATIONAL MONETARY FUND, the International Bank for Reconstruction and Development, the Inter-American Development Bank, and the African Development Bank. The Office of the Secretary includes the offices of deputy secretary, general counsel, inspector general, the under secretaries, the assistant secretaries, and treasurer.

### Bureau of Alcohol, Tobacco, Firearms and Explosives

The Bureau of Alcohol, Tobacco, and Firearms was established by Treasury Department Order No. 221, effective July 1, 1972. The order transferred the functions, powers, and duties arising under laws relating to alcohol, tobacco, firearms, and explosives from the INTERNAL REVENUE SERVICE to the bureau. On December 5, 1978, Treasury Department Order No. 120-1 assigned to the bureau responsibility for enforcing chapter 114 of title 18 of the United States Code (18 U.S.C.A. § 2341 et seq.) relating to interstate trafficking in contraband cigarettes. The Anti-Arson Act of 1982, 96 Stat. 1319, gave the bureau the additional responsibility of addressing commercial ARSON nationwide.

The bureau is responsible for enforcing and administering firearms and explosives laws, as well as laws covering the production, taxation, and distribution of alcohol and tobacco products. The bureau performs two basic functions: criminal enforcement and regulatory enforcement.

The criminal enforcement branch of the bureau seeks to stop illegal trafficking, possession, and use of firearms, destructive devices, and explosives and also tries to suppress trafficking in illicit distilled spirits and contraband cigarettes. The objectives of the regulatory enforcement branch of the bureau include determining and ensuring the full collection of revenue due from legal alcohol, tobacco, firearms, and ammunition manufacturing industries; fulfilling the bureau's responsibility to ensure product integrity and provide health warning statements; and preventing commercial BRIBERY, consumer deception, and other improper trade practices in the alcohol beverage industry.

The Bureau of Alcohol, Tobacco, Firearms and Explosives is now part of the Department of Justice.

### Office of the Comptroller of the Currency

The Office of the Comptroller of the Currency (OCC) was created on February 25, 1863 (12 Stat. 665), as a bureau of the Treasury Department. Its primary mission is to regulate national banks. The OCC is headed by the

**Department of the Treasury**

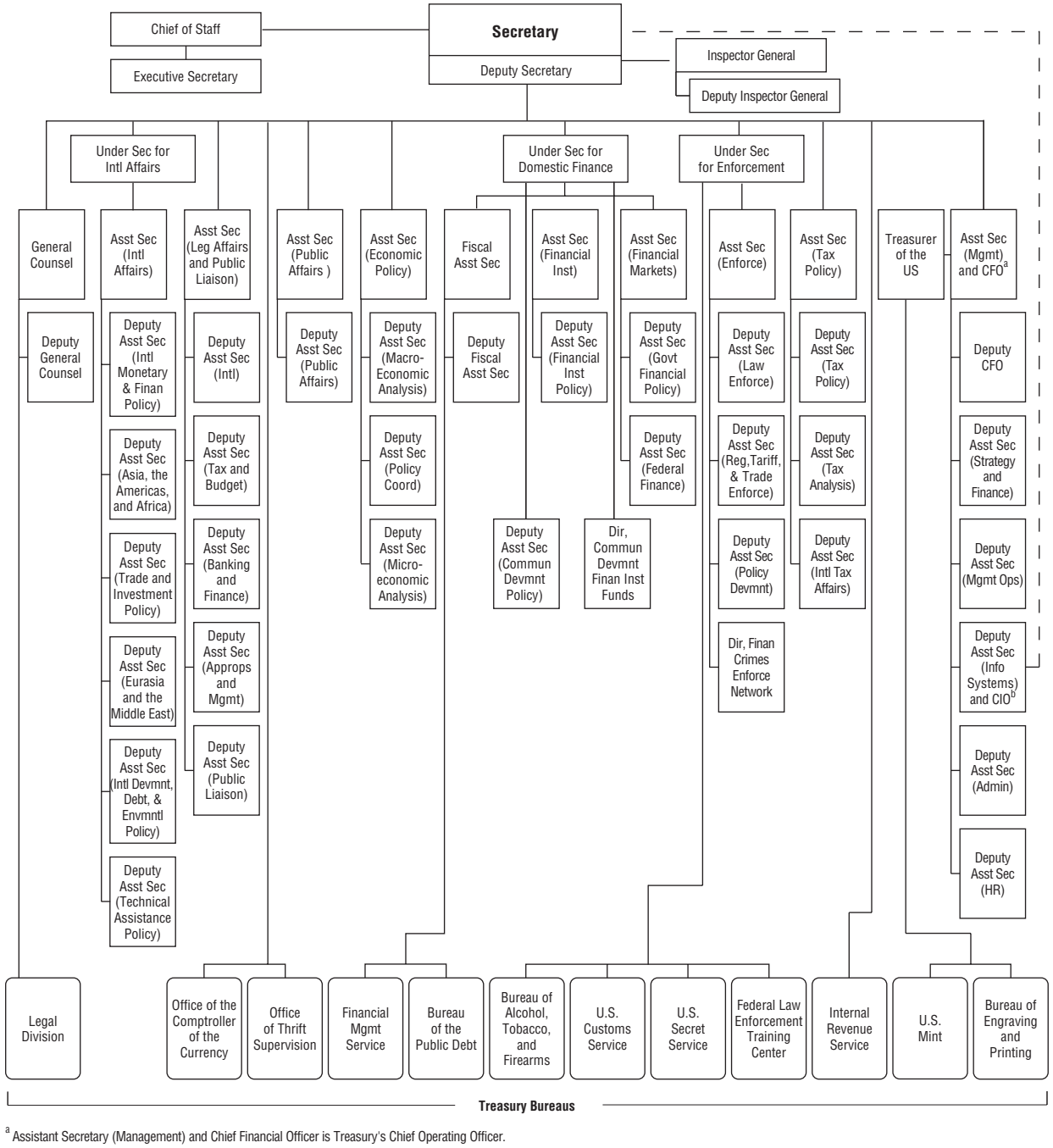


[a] Assistant Secretary (Management) and Chief Financial Officer is Treasury's Chief Operating Officer.

[b] Deputy Assistant Secretary (Info Systems) is the Chief Info Officer.

comptroller, who is appointed for a five-year term by the president with the advice and consent of the Senate. By statute, the comptroller also serves a concurrent term as director of the FEDERAL DEPOSIT INSURANCE CORPORATION.

The OCC supervises approximately 3,300 national banks, including their trust activities and overseas operations. The OCC has the power to examine banks; approve or deny applications for new bank charters, branches, or mergers; take

*The Bureau of Engraving and Printing, a branch of the Treasury Department, is responsible for designing and printing all U.S. paper currency. Here, a bureau employee examines newly printed bills.*

CHARLES O'REAR/CORBIS

enforcement action—such as bank closures—against banks that are not in compliance with laws and regulations; and issue rules, regulations, and interpretations related to banking practices. Each bank is examined annually through a nationwide staff of approximately 2,400 bank examiners supervised by six district offices. The OCC is independently funded through assessments on the assets of national banks.

### Bureau of Engraving and Printing

The Bureau of Engraving and Printing operates on basic authorities conferred by an act of July 11, 1862 (31 U.S.C.A. § 303), and additional authorities contained in past appropriations made to the bureau that are still in force. A working capital fund was established in accordance with the provisions of section 2 of the act of August 4, 1950, as amended (31 U.S.C.A. § 5142), which placed the bureau on a completely reimbursable basis. The bureau is headed by a director, who is appointed by the secretary of the treasury and reports to the treasurer of the United States.

At the Bureau of Engraving and Printing, the artistry of the engraver is combined with the most technologically advanced printing equipment to produce U.S. SECURITIES. The bureau designs, prints, and finishes all U.S. paper currency (FEDERAL RESERVE notes), as well as U.S. postage stamps, treasury securities, certificates, and other security products, including White House invitations and military identification cards. It is also responsible for advising and assisting federal agencies in the design and production of other government documents that, because of their innate value or for other reasons, require security or counterfeit-deterrence characteristics.

The bureau has its headquarters in Washington, D.C., and operates a second currency manufacturing plant in Fort Worth, Texas.

### Financial Management Service

The mission of the Financial Management Service (FMS) is to improve the quality of government financial management. The service is committed to helping its government customers achieve success. The FMS serves taxpayers, the Treasury Department, federal program agencies, and government policymakers by linking program and financial management objectives and by providing financial services, information, and advice to its customers.

The FMS is responsible for programs to improve cash management, credit management, debt collection, and financial management systems throughout the government. For cash management, the service issues guidelines and regulations and assists other agencies in managing financial transactions to maximize investment earnings and reduce the interest costs of borrowed funds. For credit management, the service issues guidelines and regulations and helps program agencies manage credit activities, including loan programs, so as to improve all parts of the credit cycle, such as credit extension, loan servicing, debt collection, and write-off procedures. The service works with other agencies to take advantage of new automation technology and improve financial management systems and government handling of payments, collections, and receivables.

The service issues approximately 426 million treasury checks and close to 407 million electronic fund transfer payments annually for federal salaries and wages, payments to suppliers of goods and services to the federal government, INCOME TAX refunds, and payments under major government programs such as SOCIAL SECURITY and veterans' benefits. The FMS also supervises the collection of government receipts and operates and maintains the systems for collecting these receipts. The service works with all federal agencies to improve the availability of collected funds and the reporting of collection information to the treasury.

### Internal Revenue Service

The Office of the Commissioner of Internal Revenue was established by an act of July 1, 1862

(26 U.S.C.A. § 7802). The Internal Revenue Service (IRS) is responsible for administering and enforcing the internal revenue laws and related statutes, except those relating to alcohol, tobacco, firearms, and explosives. Its mission is to collect the proper amount of tax revenue at the least cost to the public and in a manner that warrants the highest degree of public confidence in the service's integrity, efficiency, and fairness.

To achieve that purpose, the IRS seeks to achieve the highest possible degree of voluntary compliance with the tax laws and regulations. It advises the members of the public of their rights and responsibilities, determines the extent of compliance and the causes of noncompliance, administers and enforces the tax laws, and seeks more efficient ways of accomplishing its mission.

The IRS determines, assesses, and collects internal revenue taxes, determines PENSION plan qualifications and exempt organization status, and prepares and issues rulings and regulations to supplement the provisions of the INTERNAL REVENUE CODE.

The sources of most revenues collected are individual income tax, social insurance, and retirement taxes. Other major sources include the corporation income, excise, estate, and gift taxes.

### U.S. Mint

The establishment of a mint was authorized by an act of April 2, 1792 (1 Stat. 246). The Bureau of the Mint was established by an act of February 12, 1873 (17 Stat. 424) and recodified on September 13, 1982 (31 U.S.C.A. §§ 304, 5131). The name was changed to the U.S. Mint by secretarial order dated January 9, 1984.

The primary mission of the mint is to produce an adequate volume of circulating coinage for the United States to conduct its trade and commerce. The mint also produces and sells numismatic coins, American eagle gold and silver bullion coins, and national medals. In addition, the Fort Knox Bullion Depository is the primary storage facility for the nation's gold bullion.

### Bureau of the Public Debt

The Bureau of the Public Debt was established on June 30, 1940, pursuant to the Reorganization Act of 1939 (31 U.S.C.A. § 306). Its mission is to borrow the money needed to operate the federal government, account for the resulting public debt, and issue treasury securities to refund maturing debt and raise new money.

The bureau fulfills its mission through six programs: commercial book-entry securities, direct access securities, savings securities, government securities, market regulation, and public debt accounting. The bureau issues and auctions treasury bills, notes, and bonds and manages the U.S. Savings Bond Program.

In addition, the bureau implements the regulations for the government securities market. These regulations provide for investor protection while maintaining a fair and liquid market for government securities.

### Office of Thrift Supervision

The OFFICE OF THRIFT SUPERVISION (OTS) was established as a bureau of the Treasury Department in August 1989 and became operational in October 1989 as part of a major reorganization of the thrift regulatory structure mandated by the Financial Institutions Reform, Recovery and Enforcement Act (103 Stat. 183). In that act, Congress gave the OTS authority to charter federal thrift institutions and serve as the primary regulator of approximately 1,700 federal and state-chartered thrifts belonging to the Savings Association Insurance Fund.

The office's mission is to regulate savings associations in order to maintain the safety, soundness, and viability of the industry and to support the industry's efforts to meet housing and other financial services needs. The OTS carries out this responsibility through risk-focused supervision that includes adopting regulations governing the savings and loan industry, examining and supervising thrift institutions and their affiliates, and enforcing compliance with federal laws and regulations. In addition to overseeing thrift institutions, the OTS also regulates, examines, and supervises holding companies that own thrifts and controls the acquisition of thrifts by such holding companies.

The office is headed by a director appointed by the president and confirmed by the Senate to serve a five-year term. The director also serves on the boards of the Federal Deposit Insurance Corporation and the Neighborhood Reinvestment Corporation.

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Alcohol, Tobacco, Firearms, and Explosives, Bureau of; Banks and Banking; Drugs and Narcotics; Estate and Gift Taxes; Federal Budget; Homeland Security Department; Savings and Loan Association; Smuggling; Tariff; Taxation.

## TREASURY STOCK

*Corporate stock that is issued, completely paid for, and reacquired by the corporation at a later point in time.*

Treasury stock or shares may be purchased by the corporation, or reacquired through donation, FORFEITURE, or some other method. It is then regarded as the PERSONAL PROPERTY of the corporation and part of its assets. The corporation can sell the stock for cash or credit, for par value or market value, or upon any terms that it could be sold by a stockholder. Shares that the corporation has not issued in spite of its authority to do so are ordinarily not regarded as treasury shares but are merely unissued shares.

## TREATIES IN FORCE

*A publication compiled by the Treaty Affairs Staff, Office of the Legal Adviser,* STATE DEPARTMENT, *which lists treaties and other international agreements of the United States that are on record with the Department of State.*

*Treaties in Force* lists those treaties and other agreements that had not expired on the date of publication, had not been repudiated by the parties, had not been replaced by other agreements, or had not otherwise been terminated. It employs the term *treaties* in its broad, generic sense as alluding to all international agreements of the United States. In its narrower sense, in the United States, the word *treaties* denotes international agreements executed by the president with the advice and consent of two-thirds of the Senate.

This publication also includes agreements in force between the United States and foreign nations that the president has made pursuant to, or in accordance with, existing legislation or a treaty, subject to congressional approval or effectuation, or under and in accordance with the president's power under the Constitution.

## TREATISE

*A scholarly legal publication containing all the law relating to a particular area, such as* CRIMINAL LAW *or* LAND-USE CONTROL.

Lawyers commonly use treatises in order to review the law and update their knowledge of pertinent case decisions and statutes.

## TREATY

*A compact made between two or more independent nations with a view to the public* WELFARE.

A treaty is an agreement in written form between nation-states (or international agencies, such as the UNITED NATIONS, that have been given treaty-making capacity by the states that created them) that is intended to establish a relationship governed by INTERNATIONAL LAW. It may be contained in a single instrument or in two or more related instruments such as an exchange of diplomatic notes. Various terms have been used for such an agreement, including treaty, convention, protocol, declaration, charter, COVENANT, pact, act, statute, exchange of notes, agreement, *modus vivendi* ("manner of living" or practical compromise), and understanding. The particular designation does not affect the agreement's legal character.

Though a treaty may take many forms, an international agreement customarily includes four or five basic elements. The first is the preamble, which gives the names of the parties, a statement of the general aims of the treaty, and a statement naming the plenipotentiaries (the persons invested with the power to negotiate) who negotiated the agreement and verifying that they have the power to make the treaty. The substance of the treaty is contained in articles that describe what the parties have agreed upon; these articles are followed by an article providing for ratification and the time and place for the exchange of ratifications. At the end of the document is a clause that states "in witness whereof the respective plenipotentiaries have affixed their names and seals" and a place for signatures and dates. Sometimes additional articles are appended to the treaty and signed by the plenipotentiaries along with a declaration stating that the articles have the same force as those contained in the body of the agreement.

Article II, Section 2, Clause 2, of the U.S. Constitution gives the president the power to negotiate and ratify treaties, but he must obtain the advice and consent of the Senate (in practice solicited only after negotiation); two-thirds of the senators present must concur. Article I, Section 10, of the Constitution forbids the states to enter into a "treaty, alliance, or confederation," although they may enter into an "agreement or compact" with other states, domestic or foreign, but only with the consent of Congress.

The U.S. Supreme Court, in *Missouri v. Holland,* 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641 (1920), established that U.S. treaties are superior to state law. Acts of Congress, however, are equivalent to a treaty. Thus, if a treaty and a law of Congress are inconsistent, the one later in time prevails. The Court has never found a treaty to be unconstitutional, and few treaties have been challenged. In general, the Court views a dispute over a treaty as a POLITICAL QUESTION outside its jurisdiction.

Traditionally, international law required treaties to be ratified in the same form by all parties. Consequently, reservations or amendments proposed by one party had to be accepted by all. Because of the large number of participating states, this unanimity rule has proved difficult to enforce in modern multilateral treaties sponsored by international agencies for the purpose of creating legal regimes or codifying rules of international law. Where agreement exists on the essential elements of a treaty, international law increasingly is allowing reservations as to minor points not unanimously accepted. Treaties for which ratification is specified come into effect upon the exchange of ratifications between the parties or upon deposit of the ratifications with a designated party or international agency, such as the Secretariat of the United Nations.

A treaty may be terminated in accordance with specifications in the treaty or by consent of the parties. War between the parties does not invariably terminate treaties, as some treaties are made to regulate the conduct of hostilities and treatment of prisoners. Other treaties may be suspended for the duration of the hostilities and then resumed. An unjustified, unilateral abrogation of a treaty may give rise to possible international claims for any injury suffered by the other parties.

Treaties are usually interpreted according to the ordinary sense of their words in context and the apparent purposes to be achieved. If the meaning of the language is unclear or there is doubt that it expresses the intention of the parties, the work product of the negotiation process may be consulted as well as other extrinsic evidence.

## TREATY OF PARIS

The Treaty of Paris of 1783 ended the U.S. Revolutionary War and granted the thirteen colonies political independence. A preliminary treaty between Great Britain and the United States was signed in 1782, but the final agreement was not signed until September 3, 1783.

The surrender of the British army at Yorktown, Virginia, on October 19, 1781, ended the major military hostilities of the Revolutionary War, but sporadic fighting, mostly in the south and west, continued for more than a year. The defeat led to the resignation of the British prime minister, Lord North. The coalition cabinet formed after North's resignation decided to begin peace negotiations with the colonial revolutionaries.

The negotiations began in Paris, France, in April 1782. The U.S. delegation included BENJAMIN FRANKLIN, JOHN ADAMS, JOHN JAY, and Henry Laurens, while the British were represented by Richard Oswald and Henry Strachey. The negotiators concluded the preliminary treaty on November 30, 1782, but the agreement did not take effect until Great Britain concluded treaties with France and Spain concerning other British colonies.

The United States ratified the preliminary treaty on April 15, 1783. In the final agreement that was signed in September 1783, the British recognized the independence of the United States. The treaty established generous boundaries for the United States: U.S. territory would extend from the Atlantic Ocean to the Mississippi River in the west, and from the Great Lakes and Canada in the north to the thirty-first parallel in the south. The U.S. fishing fleet was guaranteed access to the fisheries off the coast of Newfoundland.

Under the treaty navigation of the Mississippi River was to be open to both the United States and Great Britain. Creditors of both countries were not to be impeded from collecting their debts, and Congress was to recommend to the states that loyalists to the British cause during the war be treated fairly and have their rights and confiscated property restored.

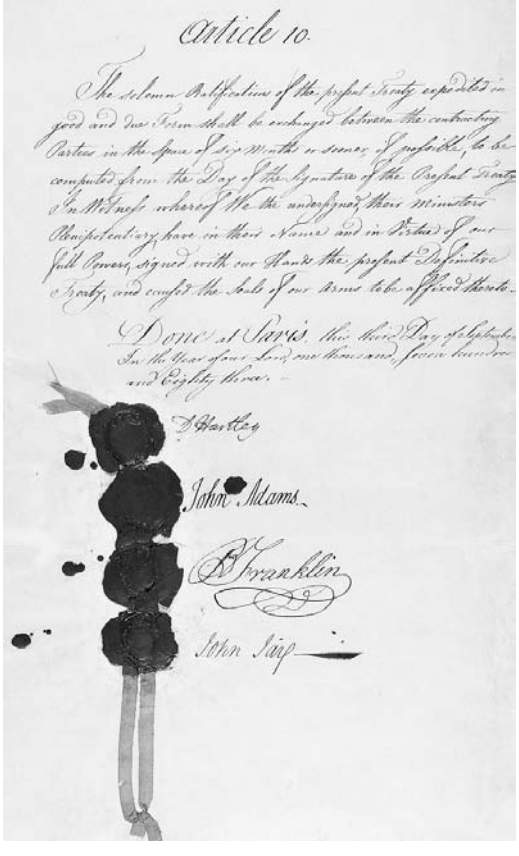
Article 10.

The solemn Ratifications of the present Treaty expedited in good and due Form shall be exchanged between the contracting Parties in the Space of Six Months or sooner if possible, to be computed from the Day of the Signature of the present Treaty. In Witness whereof We the undersigned their Ministers Plenipotentiary have in their Names and in Virtue of our full Powers, signed with our Hands the present Definitive Treaty, and caused the Seals of our Arms to be affixed thereto.

Done at Paris the third Day of September In the Year of our Lord one thousand seven hundred and Eighty three.

D. Hartley

John Adams

B. Franklin

John Jay

*The signature page of the Treaty of Paris, signed by Great Britain's representative, David Hartley, and by U.S. representatives John Adams, Benjamin Franklin, and John Jay.*
CORBIS

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**CROSS-REFERENCES**

"Treaty of Paris" (Appendix, Primary Document); War of Independence.

## TREATY OF VERSAILLES

The Treaty of Versailles was the agreement negotiated during the Paris Peace Conference of 1919 that ended WORLD WAR I and imposed disarmament, reparations, and territorial changes on the defeated Germany. The treaty also established the LEAGUE OF NATIONS, an international organization dedicated to resolving world conflicts peacefully. The treaty has been criticized for its harsh treatment of Germany, which many historians believe contributed to the rise of Nazism and ADOLF HITLER in the 1930s.

President WOODROW WILSON played an important role in ending the hostilities and convening a peace conference. When the United States entered the war in January 1917, Wilson intended to use U.S. influence to end the long cycle of peace and war in Europe and create an international peace organization. On January 8, 1918, he delivered an address to Congress that named Fourteen Points to be used as the guide for a peace settlement. Nine of the points covered new territorial consignments, while the other five were of a general nature. In October 1918 Germany asked Wilson to arrange both a general ARMISTICE based on the Fourteen Points and a conference to begin peace negotiations. On November 11 the armistice was concluded.

The Paris Peace Conference began in January 1919. The conference was dominated by David Lloyd George of Great Britain, Georges Clemenceau of France, and Wilson of the United States, with Vittorio Orlando of Italy playing a lesser role. These leaders agreed that Germany and its allies would have no role in negotiating the treaty.

The first of Wilson's Fourteen Points stated that it was essential for a postwar settlement to have "open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view." Wilson's lofty vision, however, was undercut in Paris by secret treaties that Great Britain, France, and Italy had made during the war with Greece, Romania, and each other.

In addition, the European Allies demanded compensation from Germany for the damage their civilian populations had suffered and for German aggression in general. Wilson's loftier ideas gave way to the stern demands of the Allies.

The Treaty of Versailles was signed on June 28, 1919, in the Hall of Mirrors of the Palace of Versailles. The terms dictated to Germany included a war guilt clause, in which Germany accepted responsibility as the aggressor in the war. Based on this clause, the Allies imposed reparations for war damage. Though the treaty did not specify an exact amount, a commission established in 1921 assessed $33 billion of reparations.

The boundaries of Germany and other parts of Europe were changed. Germany was required to return the territories of Alsace and Lorraine to France and to place the Saarland under the supervision of the League of Nations until 1935. Several territories were given to Belgium and Holland, and the nation of Poland was created from portions of German Silesia and Prussia.

The Austro-Hungarian Empire was dismantled, and the countries of Austria, Hungary, Czechoslovakia, Bulgaria, and Romania were recognized. All German overseas colonies in China, the Pacific, and Africa were taken over by Great Britain, France, Japan, and other Allied nations.

France, which had been invaded by Germany in 1871 and 1914, was adamant about disarming Germany. The treaty reduced the German army to 100,000 troops, eliminated the general staff, and prohibited Germany from manufacturing armored cars, tanks, submarines, airplanes, and poison gas. In addition, all German territory west of the Rhine River (Rhineland), was established as a demilitarized zone.

The Treaty of Versailles also created the League of Nations, which was to enforce the treaty and encourage the peaceful resolution of international conflicts. Many Americans were opposed to joining the League of Nations, however, and despite Wilson's efforts, the U.S. Senate failed to ratify the treaty. Hence, instead of signing the Treaty of Versailles, the United States signed a separate peace treaty with Germany, the Treaty of Berlin, on July 2, 1921. This treaty conformed to the Versailles agreement except for the omission of the League of Nations provisions.

The Treaty of Versailles has been criticized as a vindictive agreement that violated the spirit of Wilson's Fourteen Points. The harsh terms hurt the German economy in the 1920s and contributed to the popularity of leaders such as Hitler who argued for the restoration of German honor through remilitarization.

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## TREBLE DAMAGES

*A recovery of three times the amount of actual financial losses suffered which is provided by statute for certain kinds of cases.*

The statute authorizing treble damages directs the judge to multiply by three the amount of monetary damages awarded by the jury in those cases and to give judgment to the plaintiff in that tripled amount. The CLAYTON ACT (15 U.S.C.A. § 12 et seq.), for example, directs that treble damages be awarded for violations of ANTITRUST LAWS.

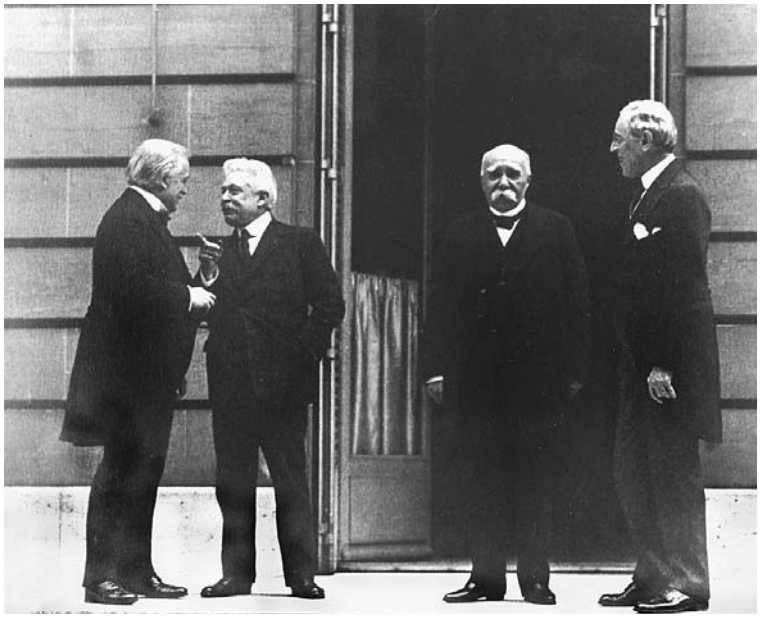

*Most of the terms of the Treaty of Versailles were set at the Paris Peace Conference, which was dominated by (l-r) Lloyd George of Great Britain, Vittorio Orlando of Italy, Georges Clemenceau of France, and Woodrow Wilson of the United States.*

LIBRARY OF CONGRESS

## TRENT AFFAIR

The *Trent* affair, which occurred during the early years of the U.S. CIVIL WAR, challenged the traditional concepts of freedom of the seas and the rights of neutrals and almost precipitated a war between the United States and Great Britain.

In 1861, the newly established Confederacy appointed two emissaries to represent its government overseas. James Murray Mason was assigned to London, England, and John Slidell was sent to Paris, France. The two envoys successfully made their way to Havana, Cuba, where they boarded an English ship, the *Trent,* which set sail on November 7. The next day, the *San Jacinto,* a Union warship under the command of Captain Charles Wilkes, an officer in the U.S. Navy, intercepted the *Trent.* Wilkes acted upon his own authority and detained the English ship. He ordered a search of the *Trent,* and when the two Confederates were discovered, he ordered them to be transferred to the *San Jacinto* and transported to Fort Warren in Boston. The *Trent* was allowed to continue without further interference.

Although Wilkes was praised by Northerners and several members of the cabinet of President ABRAHAM LINCOLN for his action against the Confederacy, his disregard for their rights as a neutral power angered the English. Wilkes had

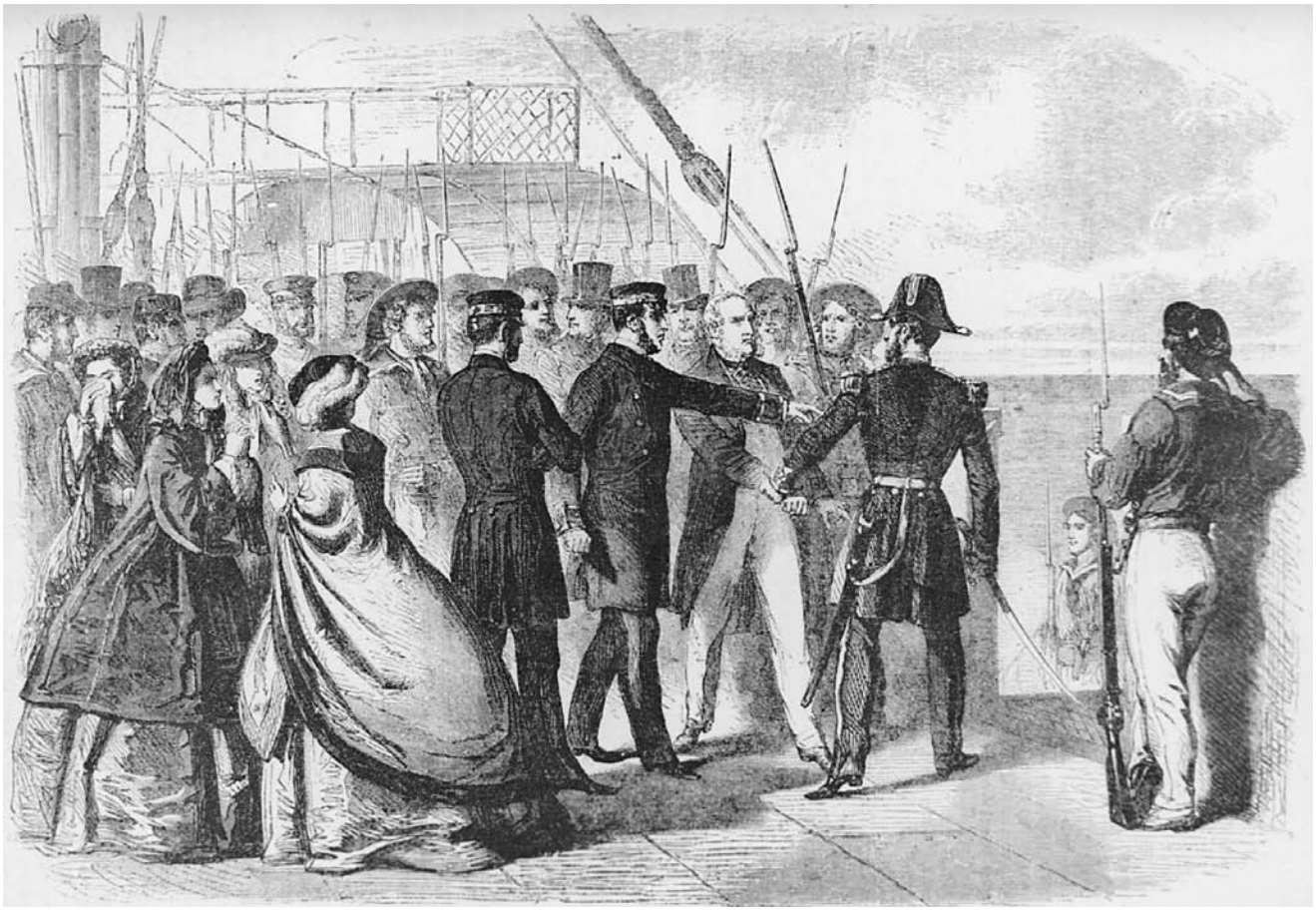

*J.M. Mason, a confederate emissary bound for London, is removed from the* Trent, *an English vessel. Mason and John Slidell, another confederate emissary, were removed to the U.S. warship* San Jacinto *in November 1861 and taken to Fort Warren in Boston.*

BETTMANN/CORBIS

made the error of conducting the operation by himself rather than ordering the ship to port to undergo legal proceedings to determine if England had violated the rules of neutrality. Since Wilkes had not followed established legal procedure, he had no right to remove any cargo, human or otherwise, from another vessel.

English tempers flared and threats of war were issued. The English demands included a public apology and the release of the two Confederates. The English representative to the United States awaited orders to return to England if these demands were not met.

In England, however, news of the impending death of Prince Albert diverted attention from the *Trent* affair. When the English demands were received in the United States, Charles Francis Adams, U.S. diplomat to England, was ordered to explain to the English that Wilkes had acted of his own accord, without instructions from the government. In the meantime, Secretary of State William H. Seward studied the matter carefully; he knew that Wilkes's conduct had not been correct. Seward was also aware that he had two choices: war with England or release of the incarcerated Confederates. In a communiqué to England, Seward admitted the mistake of Wilkes, reported the release of Mason and Slidell, and upheld the sanctity of freedom of the seas. War with England was averted, and navigation rights were maintained.

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**CROSS-REFERENCES**

Admiralty and Maritime Law.

## TRESPASS

*An unlawful intrusion that interferes with one's person or property.*

**TORT LAW** originated in England with the action of trespass. Initially trespass was any wrongful conduct directly causing injury or loss;

in modern law trespass is an unauthorized entry upon land. A trespass gives the aggrieved party the right to bring a civil lawsuit and collect damages as compensation for the interference and for any harm suffered. Trespass is an intentional tort and, in some circumstances, can be punished as a crime.

### Common-Law Form of Action

Trespass is one of the ancient FORMS OF ACTION that arose under the COMMON LAW of England as early as the thirteenth century. It was considered a breach of the king's peace for which the wrongdoer might be summoned before the king's court to respond in a civil proceeding for the harm caused. Because the king's courts were primarily interested in land ownership disputes, the more personal action of trespass developed slowly at first.

Around the middle of the fourteenth century, the clerks of the king's courts began routinely giving out writs that permitted a plaintiff to begin a trespass action. Before that time criminal remedies for trespass were more common. The courts were primarily concerned with punishing the trespasser rather than compensating the landowner. From the beginning a defendant convicted of trespass was fined; a defendant who could not pay the fine was imprisoned. The fine in this criminal proceeding developed into an award of damages to the plaintiff. This change marked the beginning of tort action under the common law.

As trespass developed into a means of compelling the defendant to compensate the plaintiff for injury to his property interests, it took two forms: an action for trespass on real property and an action for injury to PERSONAL PROPERTY.

In an action for trespass on land, the plaintiff could recover damages for the defendant's forcible interference with the plaintiff's possession of his land. Even the slightest entry onto the land without the plaintiff's permission gave the plaintiff the right to damages in a nominal sum.

An action for trespass to chattels was available to seek damages from anyone who had intentionally or forcibly injured personal property. The injury could include carrying off the plaintiff's property or harming it, destroying it, or keeping the plaintiff from holding or using it as she had a right to do.

Later, an additional CAUSE OF ACTION was recognized for injuries that were not forcible or direct. This action was called *trespass on the case* or *action on the case* because its purpose was to protect the plaintiff's legal rights, rather than her person or land, from intentional force.

Over the years the courts recognized other forms of actions that permitted recovery for injuries that did not exactly fit the forms of trespass or trespass on the case. Eventually, writs were also issued for these various types of actions. For example, a *continuing trespass* was a permanent invasion of someone's rights, as when a building overhung a neighbor's land. A *trespass for mesne profits* was a form of action against a tenant who wrongfully took profits, such as a crop, from the property while he occupied it. A *trespass to try title* was a form of action to recover possession of real property from someone who was not entitled to it. This action "tried title" so that the court could order possession for the person who turned out to be the rightful owner.

These common-law forms of action had serious shortcomings. A plaintiff who could not fit her complaint exactly into one of the forms could not proceed in court, even if she obviously had been wronged. Modern law has remedied this situation by enacting rules of CIVIL PROCEDURE that replace the common-law forms with more flexible ways of wording a civil complaint. The various trespass actions are still important, however, because modern property laws are largely based on them. The rights protected remain in force, and frequently even the old names are still used.

### Trespass to Land

In modern law the word *trespass* is used most commonly to describe the intentional and wrongful invasion of another's real property. An action for trespass can be maintained by the owner or anyone else who has a lawful right to occupy the real property, such as the owner of an apartment building, a tenant, or a member of the tenant's family. The action can be maintained against anyone who interferes with the right of ownership or possession, whether the invasion is by a person or by something that a person has set in motion. For example, a hunter who enters fields where hunting is forbidden is a trespasser, and so is a company that throws rocks onto neighboring land when it is blasting.

Every unlawful entry onto another's property is trespass, even if no harm is done to the property. A person who has a right to come onto

the land may become a trespasser by committing wrongful acts after entry. For example, a mail carrier has a privilege to walk up the sidewalk at a private home but is not entitled to go through the front door. A person who enters property with permission but stays after he has been told to leave also commits a trespass. Moreover, an intruder cannot defend himself in a trespass action by showing that the plaintiff did not have a completely valid legal right to the property. The reason for all of these rules is that the action of trespass exists to prevent breaches of the peace by protecting the quiet possession of real property.

In a trespass action, the plaintiff does not have to show that the defendant intended to trespass but only that she intended to do whatever caused the trespass. It is no excuse that the trespasser mistakenly believed that she was not doing wrong or that she did not understand the wrong. A child can be a trespasser, as can a person who thought that she was on her own land.

Injury to the property is not necessary for the defendant to be guilty of trespass, although the amount of damages awarded will generally reflect the extent of the harm done to the property. For example, a person could sue birdwatchers who intruded onto his land but would probably receive only nominal damages. A farmer who discovers several persons cutting down valuable hardwood trees for firewood could recover a more substantial amount in damages.

Trespassers are responsible for nearly all the consequences of their unlawful entry, including those that could not have been anticipated or are the result of nothing more wrongful than the trespass itself. For example, if a trespasser carefully lights a fire in the stove of a lake cabin and a fault in the stove causes the cabin to burn down, the trespasser can be held liable for the fire damage.

Courts have had to consider how far above and below the ground the right to possession of land extends. In *United States v. Causby,* 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946), the U.S. Supreme Court held the federal government liable for harm caused to a poultry business by low-altitude military flights. The Court concluded that because the airspace above land is like a public highway, ordinary airplane flights cannot commit trespass. In this case, however, the planes were flying below levels approved by federal law and regulations, so the government was held responsible. Its activity was a "taking" of private property, for which the FIFTH AMENDMENT to the U.S. Constitution requires just compensation.

It may be a trespass to tunnel or mine under another person's property, to force water or soil under the property, or to build a foundation that crosses under the boundary line. Underground encroachments are usually an exception to the rule that no harm needs to be shown in order to prove a trespass. Generally, trespass actions are permitted only where there is some damage to the surface or some interference with the owner's rights to use her property.

### Trespass by One Entitled to Possession

In nearly all states, a person who forcibly enters onto land is guilty of a crime, even if that person is entitled to possession of the land. For example, a landlord who personally tries to eject a tenant creates a potentially explosive situation. To discourage such "self help," the states provide legal procedures for the rightful owner to use to recover his land. Many states do not let the illegal occupant sue the rightful owner in trespass for his forcible entry, but the occupant can sue for ASSAULT AND BATTERY or damage to her personal property.

### Continuing Trespass

A trespass is continuing when the offending object remains on the property of the person entitled to possession. A building or fence that encroaches on a neighbor's property creates a continuing trespass, as does a tree that has fallen across a boundary line. Some courts have allowed a series of lawsuits where there is a continuing trespass, but the prevailing view is that the dispute should be settled in its entirety in one action.

The remedies can be tailored to the particular kind of harm done. A defendant might have to pay damages to repair the plaintiff's property or compensate the plaintiff for the diminished value of her property. Where a structure or object is on the plaintiff's property, the defendant may be ordered to remove it.

### Defenses

In some cases a defendant is not liable for trespass even though she has intruded onto another's property. Public officials, for example, do not have any special right to trespass, but a housing inspector with a SEARCH WARRANT can

enter someone's building whether the owner consents or not. A police officer can pursue a criminal across private property without liability for trespass. The police officer's defense to a claim of trespass is her lawful authority to enter.

A hotel employee who enters a guest's room to perform housekeeping services is not a trespasser because it is customary to assume that guests want such services. If charged with trespass by the guest, the hotel would claim the guest consented to the employee's entry.

A landlord does not have the right to enter a tenant's apartment whenever the landlord wants. However, the landlord usually has the right to enter to make repairs. The landlord must arrange a reasonable time for the repairs, but the tenant's consent to this arrangement is either contained in the lease or is implied from the landlord's assumption of responsibility for making repairs inside the apartment.

A person is not guilty of trespass if he goes onto another's land to protect life or property during an emergency. For example, a passerby who sees someone pointing a gun at another person may cross onto the property and subdue the person with the gun. Someone at the scene of a traffic accident may go onto private property to pull a victim from one of the vehicles.

Permission to enter someone else's property can be given either by consent or by license. Consent simply means giving permission or allowing another onto the land. For example, a person who lets neighborhood children play in her yard has given consent. Consent may be implied from all the circumstances. A homeowner who calls a house painter and asks for an estimate cannot later complain that the painter trespassed by coming into her yard.

Sometimes consent to enter another's land is called a license, or legal permission. This license is not necessarily a certificate and may be in the form of a written agreement. For example, an electric company might have a license to enter private property to maintain electrical lines or to read the electric meter. The employees cannot act unreasonably when they make repairs, and they and the company are liable for any damage they cause to the property.

### Duty to Trespassers

A homeowner is limited in what he can do to protect his family and property from trespassers. The homeowner cannot shoot children who keep cutting across the lawn or set traps or deadly spring-operated guns to kill anyone who trespasses on the property. DEADLY FORCE in any manner is generally not justifiable except in SELF-DEFENSE while preventing a violent felony. Mere trespass is not a felony.

The owner or person in possession of real property can be held liable if guests are injured on the property because of the owner's NEGLIGENCE. A property owner generally does not have the same duty to make the premises safe for a trespasser, however. A trespasser assumes the risk of being injured by an unguarded excavation, a fence accidentally electrified by a falling wire, or a broken stair. The occupant of real property has a duty only to refrain from intentionally injuring a trespasser on the premises.

These general rules have several exceptions, however. A property owner who knows that people frequently trespass at a particular place on his land must act affirmatively to keep them out or exercise care to prevent their injury. If the trespasser is a child, most states require an occupant of land to be more careful because a child cannot always be expected to understand and appreciate dangers. Therefore, if the property owner has a swimming pool, the law would classify this as an *attractive nuisance* that could be expected to cause harm to a child. The property owner must take reasonable precautions to prevent a trespassing child from harm. In this case the erection of a fence around the swimming pool would likely shield the property owner from liability if a child trespassed and drowned in the pool.

### Criminal Trespass

At common law a trespass was not criminal unless it was accomplished by violence or breached the peace. Some modern statutes make any unlawful entry onto another's property a crime. When the trespass involves violence or injury to a person or property, it is always considered criminal, and penalties may be increased for more serious or malicious acts. Criminal intent may have to be proved to convict under some statutes, but in some states trespass is a criminal offense regardless of the defendant's intent.

Some statutes consider a trespass criminal only if the defendant has an unlawful purpose in entering or remaining in the place where he has no right to be. The unlawful purpose may be an attempt to disrupt a government office, theft, or ARSON. Statutes in some states specify that a

trespass is not criminal until after a warning, either spoken or by posted signs, has been given to the trespasser. Criminal trespass is punishable by fine or imprisonment or both.

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CROSS-REFERENCES

Eminent Domain; Landlord and Tenant.

## TRESPASS TO TRY TITLE

*Another name for an* EJECTMENT *action to recover possession of land wrongfully occupied by a defendant.*

## TRIAL

*A judicial examination and determination of facts and legal issues arising between parties to a civil or criminal action.*

In the United States, the trial is the principal method for resolving legal disputes that parties cannot settle by themselves or through less formal methods. The chief purpose of a trial is to secure fair and impartial administration of justice between the parties to the action. A trial seeks to ascertain the truth of the matters in issue between the parties and to apply the law to those matters. Also, a trial provides a final legal determination of the dispute between the parties.

The two main types of trials are civil trials and criminal trials. Civil trials resolve civil actions, which are brought to enforce, redress, or protect private rights. In general, all types of actions other than criminal actions are civil actions. In a criminal trial, a person charged with a crime is found guilty or not guilty and sentenced. The government brings a criminal action on behalf of the citizens to punish an infraction of criminal laws.

The cornerstone of the legal system in the United States is the jury trial. Many of the opinions of the U.S. Supreme Court, which set forth the law of the land, are based on the issues and disputes raised in jury trials. The jury trial method of resolving disputes is premised on the belief that justice is best achieved by pitting the parties against each other as adversaries, with each party advocating its own version of the truth. Under the ADVERSARY SYSTEM, the jury, a group of citizens from the community, decides which facts in dispute are true. A judge presides at the trial and determines and applies the law. At the end of the trial, the judge will enter a judgment that constitutes the decision of the court. The parties must adhere to the judgment of the court.

Not all trials are jury trials. A case may also be tried before a judge. This is known as a court trial or a bench trial. A court trial is basically identical to a jury trial, except the judge decides both the facts and the law applicable to the action. A criminal defendant is always entitled to a trial by jury. Also, common-law civil claims usually are tried by jury. Often, however, actions created by statute may be tried only before the court. In some court trials, the court will have an ADVISORY JURY. The advisory jury observes the proceedings just as an ordinary jury would, but the judge need not accept the advisory jury's verdict.

### Historical Background

Jury trials were introduced in the Massachusetts Bay Colony, in 1628, because King James of England declared that certain crimes in the colonies were to be tried before juries. In early civil trials, the parties could choose, by mutual consent, a jury or court trial. Criminal defendants could also choose a jury or court trial. By the late 1600s, several colonies were holding jury trials, but jury trials were unavailable to many citizens.

During the revolutionary period, many documents noted the importance of jury trials. The colonists feared that they could not get a fair trial before a judge who usually was appointed by the king or his representatives. The First CONTINENTAL CONGRESS declared, in 1774, that the colonists were entitled to the "great and inestimable privilege of being tried by their peers of the vicinage." The 1775 Declaration of Causes and Necessities and Taking Up Arms specifically noted the deprivation of jury trials as a justification for forcibly resisting English rule. The Declaration of Independence noted that many colonists were not permitted jury trials.

The constitution of Virginia, which is considered the first written constitution of modern republican government, contained a bill of rights providing for a jury of 12 and a unanimous verdict in criminal cases, and trial by jury

in civil cases. After several other states adopted similar provisions in their constitutions, the U.S. Constitution was drafted to require trial by jury in criminal cases. Although the Constitution did not provide for jury trials in civil cases, the first Congress incorporated trial by jury in civil cases into the Bill of Rights. Since that time, trial by jury has become universal in the courts of the United States, although juries are not used in all cases.

## Pretrial Matters

Technically, a trial begins after the preliminary matters in the action have been resolved and the jury or court is ready to begin the examination of the facts. The trial ends when the examination is completed and a judgment can be entered. The trial of a jury case ends on the formal acceptance and recording of a verdict decisive of the entire action. Before the trial may begin, however, certain preliminary matters must be resolved.

**Venue** Venue refers to the particular county or city in which a court with jurisdiction may conduct a trial. The proper venue for most trials is the city or county in which the injury in dispute allegedly occurred or where the parties reside. Venue may, however, be changed to a different jurisdiction. Sometimes the proper venue for a trial is difficult to determine, such as in cases involving multinational corporations or class actions involving plaintiffs from many different states. The venue for a criminal trial can change if a defendant persuades the trial court that he cannot obtain a fair trial in that venue. For example, a defendant may request a change of venue because he feels that extensive PRETRIAL PUBLICITY has prejudiced the public.

**Pretrial Motions and Conference** Motions may be made by the parties at any time prior to trial and may have a significant impact on the case. For example, in a criminal case, the trial judge might rule that the primary piece of incriminating evidence is not admissible in court. In a civil case, the judge might grant SUMMARY JUDGMENT, which means that no significant facts are in dispute and judgment may be entered without the need for a trial. Before the trial begins, the court holds a PRETRIAL CONFERENCE with the parties' attorneys. At the pretrial conference, the parties narrow the issues to be tried and decide on a wide variety of other matters necessary to the disposition of the case.

**Public vs. Closed Trials** Although most trials are presumptively open to the public, sometimes a court may decide to close a trial. Generally a trial may be closed to the public only to ensure order and dignity in the courtroom or to keep secret sensitive information that will come to light during the trial. Thus, a trial might be closed to the public to protect classified documents, protect trade secrets, avoid intimidation of witnesses, guard the safety of undercover police officers, or protect the identity of a juvenile. Although trials are usually open to the public, most jurisdictions do not permit television cameras or other recording devices in the courtroom. A growing minority of states permits cameras in the courtroom, although the judge still has the discretion to exclude the cameras if he or she feels that their presence will interfere with the trial.

## Trial Participants

**Judge** The judge presides over the court and is the central figure in a trial. It is the presiding judge's responsibility to conduct an orderly trial and to assure the proper administration of justice in his court. The judge decides all legal questions that arise during the trial, controls the presentation of evidence by the parties, instructs the jury, and generally directs every aspect of the trial. The judge must be impartial, and any matter that lends even the appearance of impartiality to the trial may disqualify the judge. Because of his importance, the presiding judge must be present in court from the opening of the trial until its close and must be easily accessible during jury trials while the jury is deliberating on its verdict.

The judge holds a place of honor in the courtroom. The judge sits above the attorneys, the parties, the jury, and the witness stand. Everyone in the courtroom must stand when the judge enters or exits the courtroom. The judge is addressed as "your Honor" or "the Court." In the United States, judges usually wear black robes during trials, which signify the judges' importance. The judge will conduct the trial with dignity. If the judge feels that a person is detracting from the dignity of the proceedings or otherwise disrupting the courtroom, he or she may have the person removed.

A trial judge has broad powers in his courtroom. In general, the presiding judge has discretion on all matters relating to the orderly conduct of a trial, except those matters regulated

by rule or statute. The judge controls routine matters such as the time when court convenes and adjourns and the length of a recess. When the parties offer evidence, the judge rules on any legal objections. The judge also instructs the jury on the law after all of the evidence has been submitted.

Although the judge has broad discretion during the trial, his rulings must not be ARBITRARY or unfair. Also, the judge must not prejudice the jury against any of the parties. Unless special circumstances are present, however, a party can do little during the trial if it disagrees with a ruling by the judge. The judge's decision is usually final for the duration of the trial, and the party's only recourse is to appeal the judge's decision after the trial has ended.

**Parties** In a trial, the term *party* refers to an individual, organization, or government that participates in the trial and has an interest in the trial's outcome. The main parties to a lawsuit are the plaintiff and the defendant. In a civil trial, the plaintiff initiates the lawsuit and seeks a remedy from the court for private civil wrongs allegedly committed by the defendant or defendants. There may be more than one plaintiff in a civil trial if they allege similar wrongs against a common defendant. In a criminal trial, the plaintiff is the government, and the defendant is an individual accused of a crime.

A party in a civil trial may be represented by counsel or may represent himself. Each party has a fundamental right to be present at every critical stage of the proceedings, although this right is not absolute. A party may, however, choose not to attend the trial and be represented in court solely by an attorney. The absence of a party does not deprive the court of jurisdiction. The court must afford the parties the opportunity to be present, but if the opportunity is given, a party's absence does not affect the court's right to proceed with the civil trial.

In a criminal trial, the government is represented by an attorney, known as the prosecutor, who seeks to prove the guilt of the defendant. Although a criminal defendant may represent himself during trial, he is entitled to representation by counsel. If a defendant cannot afford an attorney, the court will appoint one for him. A criminal defendant has a constitutional right in most jurisdictions to be present at every critical stage of the trial, from jury selection to sentencing. Also, many court decisions have held that the trial of an accused without his presence at every critical stage of the trial violates his constitutional right to DUE PROCESS. A defendant may waive this right and choose not to attend the trial or portions of the trial.

**Jury** The jury is a group of citizens who are charged with finding facts and reaching a verdict based on the evidence presented during the trial. The jury renders a verdict decisive of the action by applying the facts to the law, which is explained to the jury by the judge. The jury is chosen from the men and women in the community where the trial is held. The number of jurors required for the trial is set by statute or court rule. Criminal trials usually require 12 jurors, whereas civil trials commonly use six-person juries. Also, alternate jurors are selected in the event that a regular juror becomes unable to serve during the trial. Longer trials require more alternate jurors. The jurors sit in the jury box and observe all of the evidence offered during the trial. After the evidence is offered, the judge instructs the jury on the law, and the jury then begins deliberations, after which it will render a verdict based on the evidence and the judge's instructions on the law. In civil trials, the jury determines whether the defendant is liable for the injuries claimed by the plaintiff. In criminal trials, the jury determines the guilt of the accused.

**Attorneys** Every party in a trial has the right to be represented by an attorney or attorneys, although a party is free to conduct the trial himself. If a party elects to be represented by an attorney, the court must hear the attorney's arguments; to refuse to hear the attorney would deny the party DUE PROCESS OF LAW. In a criminal trial, the defendant has a right to be represented by an attorney, or attorneys, of his choosing. If the defendant cannot afford an attorney, and the crime is more serious than a petty offense, the court will appoint one for him. An indigent party in a civil lawsuit is generally not entitled to a court-appointed attorney, although a court may appoint an attorney to represent an indigent prisoner in a CIVIL RIGHTS case.

The attorneys are present in a trial to represent the parties, but they also have a duty to see that the trial is fair and impartial. The trial judge may dismiss an attorney or impose other sanctions for improper conduct. Thus, attorneys must at all times conform their conduct to the law. Attorneys must avoid any conduct that might tend to improperly influence the jury.

Also, attorneys' conduct is governed by various ethical rules. Within these bounds, however, the attorney may zealously represent her client and conduct the trial as she sees fit.

**Witnesses** Witnesses provide the chief means by which evidence is offered in a trial. Through witnesses, a party will attempt to establish the facts that make up the elements of his case. A witness may testify on virtually any matter if the matter is relevant to the issues in the trial and the witness observed or has knowledge of the events to which he is testifying. Witnesses are also used to provide the foundation for documents and other physical evidence. For example, if the state wishes to introduce the defendant's fingerprints from a crime scene in a criminal trial, it must call as a witness the police officer who identified the fingerprints in order for the fingerprints to be admitted as evidence. The police officer would testify that he found the fingerprints at the crime scene and that he determined that the fingerprints matched the defendant's fingerprints.

A witness must testify truthfully. Before giving testimony in a trial, a witness takes an oath or affirmation to tell the truth; a witness who refuses the oath or affirmation will not be permitted to testify. A typical oath states, "I swear to tell the truth, the whole truth and nothing but the truth, so help me God." The exact wording of the oath is not important, however. As long as the judge is satisfied that the witness will tell the truth, the witness may take the witness stand. A witness who testifies falsely commits the crime of perjury.

Virtually anyone may be a witness in a trial. Generally, a person is competent to be a witness in a trial if he is able to perceive, remember, and communicate the events to which he is to testify and understands his obligation to tell the truth. Thus, even a young child may be a witness, as long as the judge is satisfied that the child is able to relate the events to which he will testify and understands that he must tell the truth. Similarly, people with mental disabilities may testify at a trial if they meet the same criteria.

One special type of witness is an expert witness. Normally, a witness may only testify as to what she saw, heard, or otherwise observed. An expert witness, if properly qualified, may offer her opinion on the subject of her expertise. Expert witnesses are used when the subject matter of the witness's testimony is outside the jury's common knowledge or experience. Expert witness testimony is often extremely important in lawsuits. For example, in a criminal trial where the defendant pleads the INSANITY DEFENSE, the experts' opinions on whether the defendant was insane at the time of the crime will most likely decide the outcome of the trial.

**Support Personnel** A number of people may assist the trial judge in conducting the trial. The court reporter, also known as the stenographer, records every word stated during the trial, except where the judge holds a conference off the record. The court reporter prepares an official transcript of the trial if a party requests it. The bailiff is an officer of the court who keeps order in the courtroom, has custody of the jury, and has custody of prisoners who appear in the courtroom. In federal court, U.S. MARSHALS have custody of prisoners who appear in court. A language interpreter is present in a courtroom when a party or witness is unable to speak English. Finally, most judges have a law clerk who assists the judge in conducting research and drafting legal opinions.

## Trial Process

**Jury Selection** Although a trial does not technically begin until after the jury is seated, jury selection, or VOIR DIRE, is commonly referred to as the first stage of a trial. At the beginning of a trial, the jury is chosen from the jury pool, a group of citizens who have been randomly selected from the community for jury duty. The judge and the attorneys representing the parties question each of the prospective jurors. If a prospective juror is for any reason not able to judge the evidence fairly, he will not be allowed to sit on the jury. This is known as a challenge for cause. A prospective juror may be challenged for conviction of a serious crime, a financial interest in the outcome of the controversy, involvement in another proceeding concerning one of the parties, a business, professional, personal, or family relationship with a party, or any other reason that might indicate bias.

In addition to challenges for cause, the parties' attorneys may issue a certain number of peremptory challenges against prospective jurors. An attorney may use a PEREMPTORY CHALLENGE to keep any prospective juror off the jury even if he has no reason to believe that the prospective juror would judge the trial unfairly. A peremptory challenge may not be based on race, however.

Once the jurors and alternate jurors are seated, the judge usually gives the jury preliminary instructions on the law. The purpose of the preliminary instructions is to orient the jurors and explain their duties. Typically, the judge will summarize the jurors' duties, instruct them on how to conduct themselves during recesses, and describe how trials are conducted. The judge may summarize the nature of the CAUSE OF ACTION and the applicable law. The preliminary instructions usually last only a few minutes.

**Opening Statements** After the judge gives the preliminary instructions, the attorneys for the parties give their opening statements to the jury. During opening statements, the lawyers outline the issues in the case and tell the jury what they expect the evidence will prove during the trial. The purpose of the OPENING STATEMENT is to give a general picture of the facts and issues to help the jury better understand the evidence. The opening statements usually last ten to thirty minutes, although sometimes they are much longer. The judge can limit the time for opening statements.

Usually an attorney will present her opening statement as a story, giving a chronological overview of what happened from the party's viewpoint. Although the attorneys will present the case in the best possible light for their clients, the opening statements should be factual, not argumentative. The opening statements are not evidence, and the attorneys should not offer their opinion of the evidence. Attorneys are not permitted to make statements that cannot be supported by the evidence they expect to present during the trial.

**Cases in Chief** After the opening statements, the plaintiff, who has the burden of proving his allegations, begins his case in chief, in which he attempts to prove each element of each legal claim alleged in the complaint (civil) or indictment (criminal). After the plaintiff has concluded his case in chief (and assuming the judge does not dismiss the plaintiff's claim for lack of proof), the defendant presents his case in chief. The defendant presents evidence to refute the plaintiff's proof and establish any AFFIRMATIVE DEFENSES. The defendant may also present evidence to support claims he has against the plaintiff (counterclaims) or third parties (cross-claims).

During the case in chief, a party may offer evidence of any type in any order it wishes. Before the evidence may be presented to the jury, however, it must be admitted into evidence by the judge. If a party objects to the admission of any evidence, the judge must rule on the objection. The admission of evidence is governed by the RULES OF EVIDENCE. Each jurisdiction has its own rules of evidence, but the rules in most jurisdictions are patterned after the FEDERAL RULES OF EVIDENCE. The rules of evidence are extensive and require hours of study by trial attorneys. If the judge determines that evidence offered by a party is admissible under the rules, she will admit the evidence.

During their cases in chief, the parties have four possible sources of proof: witnesses, exhibits, stipulations, and JUDICIAL NOTICE. The parties elicit proof from a witness through an examination. The party who calls the witness conducts the initial examination, known as the direct examination. The party's attorney asks the witness questions designed to elicit testimony helpful to his case. After the direct examination is completed, the opposing party may cross-examine the witness. During cross-examination, a party will often attempt to discredit the witness's testimony by questioning the truthfulness of the witness or raising inconsistencies or weaknesses in the witness's testimony. In most jurisdictions a party may only cross-examine the witness about the subjects discussed in the testimony given during the direct examination. The party who originally called the witness may continue to question the witness following the cross-examination. This is known as redirect examination and is usually used to clarify or rebut issues raised during the cross-examination. The other party could then recross-examine the witness concerning the testimony offered during the redirect examination. In some jurisdictions the judge may ask the witness questions, and a few jurisdictions permit the jury to ask the witness questions, usually written questions read by the judge.

Witnesses can offer proof in a variety of ways. Most commonly, a witness will simply describe what she saw, heard, or observed to establish events making up elements of a party's claim. For example, in an ASSAULT AND BATTERY trial, the plaintiff might call a witness to testify that she saw the defendant strike the victim. A witness might be used to establish the foundation for the admission of other evidence, such as business records. Many jurisdictions allow character witnesses. Usually used in criminal cases,

character witnesses can offer evidence of specific character traits or evidence of truthfulness or untruthfulness.

Rules of evidence govern the testimony of witnesses. Although the rules are far too extensive to discuss in depth, several rules are important in every trial. Rule 402 states the basic tenet of evidence law: evidence that is relevant to a fact in issue in the trial is admissible, and evidence that is not relevant is not admissible (subject to various exceptions stated in the rules). Virtually any evidence may be excluded from a trial under this rule if the trial judge believes that it will not help prove a fact at issue in the trial. Rule 802 is the Hearsay Rule, which prohibits a witness from testifying about statements made out of court, unless special circumstances apply. Such statements are known as hearsay statements and are thought to be unreliable evidence. Thus, generally, witnesses may only testify about their own knowledge and observations. The Hearsay Rule contains many complicated exceptions, however, and is often criticized as being too rigid and overly complicated.

Although the rules of evidence apply to both criminal and civil trials, certain rules have heightened importance in criminal trials. Rule 609 generally prohibits the admission of evidence that a witness has been previously convicted of a crime when the evidence is used to attack the witness's credibility. Evidence of prior convictions *is* admissible to attack the credibility of a witness when the prior crime was serious or involved dishonesty or false statement. The judge can still exclude such evidence if a long period of time has passed since the conviction or if the evidence would unduly prejudice the jury. This rule is often important when a criminal defendant with a criminal record is considering whether to testify in his defense. Also, Rule 608 generally prohibits evidence attacking the character of a witness. However, the rule does allow evidence concerning the veracity of the witness. A party may not offer evidence of the truthfulness of a witness, however, unless the other party has questioned the witness's credibility. Finally, although not specifically a rule of evidence, the FIFTH AMENDMENT of the U.S. Constitution provides that a witness cannot be compelled to testify if the testimony could lead to the witness's SELF-INCRIMINATION.

Besides witnesses, exhibits are the other principal form of evidence in a trial. The four principal types of exhibits are real objects (guns, blood, machinery), items used for demonstration (diagrams, models, maps), writings (contracts, promissory notes, checks, letters), and records (private business and public records). Before an exhibit may be admitted as evidence in a trial, a foundation for its admissibility must be laid. To provide foundation, the party offering the exhibit need only establish that the item is what it purports to be. The foundation for the evidence may come from witness testimony or other methods. As with witness testimony, the admissibility of exhibits is governed by rules of evidence and is within the discretion of the trial judge.

The third type of evidence that the parties may offer during their case in chief is the stipulation. A stipulation is an agreement between the parties that certain facts exist and are not in dispute. Stipulations are shown or read to the jury. The purpose of a stipulation is to make the presentation of undisputed evidence more efficient. For example, the parties might stipulate that an expert witness is an expert in her field so that time is not wasted establishing the witness's credentials.

Judicial notice is the fourth method of offering evidence to the jury. If the judge takes judicial notice of a fact, the fact is assumed true and admitted as evidence. Judges take judicial notice of facts that are commonly known in the jurisdiction where the trial is held (the Empire State Building is in Manhattan) and facts that are easily determined and verified from a reliable source (it rained in Manhattan on May 28, 2001). As with stipulations, the primary purpose of judicial notice is to speed the presentation of evidence that is relevant but not in dispute. When a party finishes offering evidence to the jury, he rests his case.

**Rebuttals** After the defendant rests her case in chief, and any motions are decided, the plaintiff may introduce evidence that rebuts the defendant's evidence. Rebuttal evidence is usually offered to prove a defense to the defendant's counterclaims or to refute specific evidence introduced by the defendant. Finally, the defendant may rebut evidence offered during the plaintiff's rebuttal case. This is known as the defendant's surrebuttal case.

**Motions** Although motions might be made on a variety of issues at any moment in a trial, certain important motions are made during vir-

tually every trial. After the plaintiff rests his case in chief, the defendant usually moves for a directed verdict. (This motion has different names in different jurisdictions. In criminal cases, this type of motion is often called a motion for judgment of acquittal. The substance of the motion is the same in virtually every jurisdiction.) A motion for directed verdict asserts that the plaintiff failed to establish a critical element of his claim during his case in chief. If the plaintiff has failed to offer any evidence to support an element of his claim, the judge will enter judgment for the defendant. The defendant need not offer any evidence; the trial is over. For purposes of the motion, the judge will consider all of the plaintiff's evidence in the light most favorable to the plaintiff. For example, the judge will consider all of the testimony offered by the plaintiff's witnesses to be true. Although motions for directed verdict are made in virtually every trial, they seldom are granted.

After the defendant's case in chief, the plaintiff may move for a directed verdict on any of the defendant's affirmative defenses and counterclaims. The motion is identical to a defendant's motion for a directed verdict, except that the judge will consider the defendant's evidence in the light most favorable to the defendant. If the defendant has offered evidence to support all of the elements of her AFFIRMATIVE DEFENSE or counterclaim, the plaintiff's motion for directed verdict is denied. Finally, either party may make a motion for directed verdict after the close of all evidence. Again the judge considers the evidence in the light least favorable to the party making the motion and decides whether PROBATIVE evidence supports the nonmoving party's claims.

**Closing Arguments** After both sides have rested, the attorneys give their closing arguments. During closing arguments, the attorneys attempt to persuade the jury to render a verdict in their clients' favor. Typically, the attorneys tell the jury what the evidence has proved, how it ties into the jury instructions (which the attorneys and judge agreed upon in a conference held before closing arguments), and why the evidence and the law require a verdict in their favor. Because closing arguments provide the attorneys with their last chance to persuade the jury, the closing arguments often provide the most dramatic moments of a trial. Closing arguments typically last 30 to 60 minutes, although they can take much longer.

In most jurisdictions, the plaintiff argues first and last. That is, the plaintiff argues first, then the defendant argues, and then the plaintiff makes a rebuttal argument. Actually, the party with the BURDEN OF PROOF usually argues first and last. This is almost always the plaintiff, but sometimes the only issues remaining for the jury to decide are affirmative defenses or counterclaims raised by the defendant. Also, a few jurisdictions allow only one argument per side, and in a few of these, the defendant argues first, plaintiff last.

**Jury Instructions** After the attorneys have completed their closing arguments, the judge instructs the jury on the law applicable to the case. In most jurisdictions the judge will both read the instructions and provide written instructions to the jury. A few jurisdictions only read the instructions. The jury will also be given verdict forms. On the verdict form, the jury will indicate how it finds on each of the claims presented during the trial. Sometimes the jury may be given a special verdict form asking how the jury finds on a specific issue of fact or law. The jury instructions normally last ten or 15 minutes, although they may take much longer in complex cases.

**Jury Deliberations and Verdict** After the judge has finished instructing the jury, the jury retires to the jury room to begin deliberations. At this time the alternate jurors are dismissed, although some jurisdictions allow the alternate jurors to participate in deliberations. The court bailiff brings the exhibits and written instructions to the jury room and safeguards the jury's privacy during deliberations.

It is largely up to the jury to decide how to organize itself and conduct the deliberations. The judge usually only instructs the jurors to select a foreperson to preside over the deliberations and to sign the verdict forms that reflect their decisions. Jurors sometimes have questions during their deliberations. Usually, they write their questions and give them to the bailiff, who takes them to the judge. The judge confers with the attorneys and sends a written response to the jury. A jury might deliberate anywhere from a few minutes to several days.

Usually the jury must reach a unanimous verdict, although majority verdicts are sometimes allowed in civil cases. If the jury tells the judge it cannot reach a verdict, the judge usually gives the jury some further instructions

and returns it to the jury room for further deliberations. If the jury still cannot reach a verdict, however, the jury is deadlocked, and a mistrial is declared. The case must then be retried.

Usually, however, the jury reaches a verdict. When the jury reaches a verdict and signs the verdict forms, it notifies the judge that it has reached a decision. The attorneys, if they are not in the courtroom, are called, and everyone returns to the courtroom. The judge asks the foreperson if the jury has reached a verdict. The foreperson responds "yes," and the verdict forms are read aloud, usually by the court clerk. In most jurisdictions the parties may POLL THE JURY by asking each individual juror if he or she agrees with the verdict. Obviously, in a court trial without an advisory jury, there is no jury deliberation or verdict. The judge simply enters a judgment based on the applicable law and his own view of the facts.

**Posttrial Motions and Appeal** Although a jury trial technically ends when the verdict is read, the attorneys normally file post-trial motions. The losing party often will file a motion for JUDGMENT NOTWITHSTANDING THE VERDICT. This motion asks the judge to set aside the jury's verdict as manifestly against the weight of the evidence presented at the trial and to enter judgment for the moving party instead. This motion is not applicable to a court trial. Also, the losing party will often move for a new trial, claiming that errors made during the trial by the judge require the case to be retried. Usually the judge will conduct a hearing on post-trial motions.

After the judge decides the post-trial motions, she enters judgment in accordance with the jury verdict and the post-trial motions. Once the judge enters the judgment, the court loses jurisdiction, and the case ends in the trial court. If the losing party still believes that errors in the trial caused an incorrect judgment, it may appeal to an appellate court. The appellate court may agree and order a new trial, in which case the trial process begins anew.

FURTHER READINGS

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CROSS-REFERENCES

Civil Procedure; Criminal Procedure; Right to Counsel.

## TRIANGLE SHIRTWAIST COMPANY FIRE

The Triangle Shirtwaist Company fire that took place in New York City on March 25, 1911, remains a landmark event in the history of U.S. industrial disasters. The fire that claimed the lives of 146 people, most of them immigrant women and girls, caused an outcry against unsafe working conditions in factories and sweatshops located in New York and in other industrial centers throughout the United States and became the genesis for numerous workplace safety regulations on both the state and federal level.

The ten-storey Asch building, owned by Max Blanck and Isaac Harris, was located at the corner of Washington Place and Greene Street in New York City. The top three floors of the building housed the Triangle Shirtwaist Factory. The Triangle Company, like its competitors, used subcontractors for the manufacture of women's clothing. Under this system, workers dealt directly with subcontractors who paid them extremely low wages and required them to work long hours in unsafe conditions. The Triangle Company was the largest manufacturer of shirtwaists in the city, employing approximately 700 people. While the subcontractors, foremen, and a few others were male, the great majority of the workers were female. Most of the Triangle workers, who ranged in age from 15 to 23, were Italian or European Jewish immigrants. Many of them spoke little English. Their average pay was $6 per week, and many worked six days a week in order to earn a little more money.

Like many of their fellow immigrants in other factories throughout the city, the Triangle Shirtwaist workers labored from 7 in the morning until 8 at night with one half-hour break for lunch. They spent their time hunched over heavy, dangerous sewing machines that were operated by foot pedals. The rooms in which they worked were dirty, dim, and poorly ventilated. The finished shirtwaists hung on lines above the workers' heads and bundles of material, trimmings, and scraps of fabric were piled high in the cramped aisles between the machines. Most of the doors were locked on the theory that locked doors prevented the workers from stealing material.

In November 1909, these conditions led the local LABOR UNION to call for a strike against the Triangle Shirtwaist Company. Over the next few weeks, the strike spread to the city's other shirt-

waist manufacturers. Although local newspapers referred to the general strike as the "uprising of the ten thousand," estimates of the actual number of women workers who participated in the walk out range from 20,000 to 30,000. Predictably, government officials, the media, and the public split into two camps with unions, labor organizations, and blue collar workers supporting the strikers while businesses and industrial leaders denounced them.

Although the manufacturers tried a number of tactics to break the strike including mass arrests and the use of thugs to beat and threaten the workers, public opinion appeared to reside with labor. In February 1910 the opposing groups reached a settlement which gave the strikers a slight wage increase. Although the strikers thought they had gained a shorter workweek and better working conditions, no changes were made. In particular, union demands for better fire safety were not addressed.

Saturday shifts generally ended earlier than weekday shifts. On Saturday, March 25, 1911, workers in other parts of the building had left at around noon. Many of the 500 workers present that day at the Triangle Company had begun to put away their work and to put on their hats and coats in anticipation of the factory's 4:45 P.M. quitting time. At approximately 4:30 P.M. the cry of "Fire!" was heard on the eighth floor. Pandemonium ensued as flames began to leap over the piles of rags that littered the floor. While a few workers attempted to throw buckets of water at the fire, terrified women and girls struggled to make their way to the narrow stairway or the factory's single fire escape. Others crowded into one of two elevators (one was not in service) as the fire spread to the ninth and tenth floors.

Most of the workers on the eighth floor were able to make their way to safety. Workers on the tenth floor where company offices were located received a phone call about the fire and were able to climb to the roof of the fireproof building where they made their way to the adjoining New York University building and were rescued. Those on the ninth floor were not as lucky. The fire moved so quickly, that the corpses of some were found still seated in front of their sewing machines. As the conflagration built, the workers on that floor found no way to escape. The exit doors, which swung inward, were locked. The one working elevator, after making its way down with the first load of workers, stopped working. The number of workers on the fire escape was so great that it gave way and collapsed, killing a number of girls and women who were on it. Some women tried to slide down the elevator cables but lost their grip and plunged to their deaths. As horrified onlookers watched, other desperate workers began breaking windows and jumping from the ninth floor to the street.

As corpses piled up on the sidewalks outside the building, two fire fighting companies arrived followed by several others but found themselves helpless. Their ladders only extended to the sixth floor and their hoses were too short to be of use. They tried to use safety nets, but girls and women jumped in groups of three and four breaking the nets and fatally hitting the concrete pavement. In less than 15 minutes a total of 146 women and girls had died from burns, suffocation, or falls from the fire escape, the elevator shafts, or the ninth floor. Although the remains of most of the workers were identified within one week, seven remained unidentified.

The gruesome events of the day consumed the city of New York for a number of weeks. Most people were repulsed at the horrific way in which the women had died and the lack of safety precautions that had led to the massive loss of life. However, some defended the right of businesses to operate as they saw fit and to remain free from government safety regulations which they saw as government intervention. Many government officials pronounced themselves powerless to impose safety regulation.

An investigation ensued and the owners of the company were ordered to stand trial on charges of MANSLAUGHTER. The exact cause of the fire was never determined, although many contended it was caused by a spark from one of the sewing machines or a carelessly tossed cigarette. Blanck and Harris were acquitted by a jury charged with deciding whether they knew that the doors were locked at the time of the fire. The families of 23 of the victims filed civil suits against the owners, and in 1914 a judge ordered them to pay $75 to each of the families. Three days after the fire, the Triangle Company inserted a notice in trade papers stating that the company was doing business at 9-11 University Place. Within days, New York City's Building Inspection Department found that the company's new building was not fireproof, and the company had already permitted the exit to the factory's one fire escape to be blocked.

Immediately after the fire, numerous organizations held meetings to look into improving working conditions in factories and other places of work. A committee of 25 citizens, including FRANCES PERKINS and HENRY L. STIMSON—who later became cabinet members in President FRANKLIN D. ROOSEVELT's administration—was created as a first step in establishing a Bureau of Fire Prevention. A nine-member Factory Investigating Commission, chaired by state senators Alfred E. Smith (the Democratic presidential candidate in 1928), Robert W. Wagner, and union leader SAMUEL GOMPERS, worked from 1911 to 1914 to investigate fire safety as well as other conditions affecting the health and welfare of factory workers.

In 1912 the New York State Assembly enacted legislation that required installation of automatic sprinkler systems in buildings over seven stories high that had more than 200 people employed above the seventh floor. Legislation also provided for fire drills and the installation of fire alarm systems in factory buildings over two stories high that employed 25 persons or more above the ground floor. Additional laws mandated that factory waste should not be permitted on factory floors but instead should be deposited in fireproof receptacles. Because of the bodies found in the open elevator shafts of the Asch Building, legislation was enacted that required all elevator shafts to be enclosed.

The scope of safety laws was expanded by legislation that limited the number of hours that minors could work and prohibited children under the age of 16 from operating dangerous machinery. Many laws passed by the New York Assembly in the wake of the Triangle Shirtwaist Factory fire were the basis of similar workplace safety legislation in numerous states throughout the country.

Another byproduct of the fire was an increased support for unions, particularly the International Ladies' Garment Workers Union (ILGWU). The ILGWU, to which some Triangle company employees had belonged, helped form the Joint Relief Committee which collected moneys to be distributed to the families of the lost workers. The union gained thousands of new members in industrial centers around the country and helped to lobby for stricter safety regulations, many of which eventually were encoded in federal legislation passed during the administration of President Roosevelt. These laws, in turn, were the genesis of the U.S. LABOR DEPARTMENT's Occupational Safety and Health Administration (OSHA). OSHA was established in 1971 by the OCCUPATIONAL SAFETY AND HEALTH ACT to improve workplace safety conditions for the nation's workers who numbered 111 million in 2003.

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## TRIBUNAL

*A general term for a court, or the seat of a judge.*

In ROMAN LAW, the term applied to an elevated seat occupied by the chief judicial magistrate when he heard causes.

## ◆ TRIMBLE, ROBERT

Robert Trimble served as associate justice of the U.S. Supreme Court from 1826 until his death in 1828. A prominent Kentucky attorney and judge, Trimble was a strong nationalist who supported the views of Chief Justice JOHN MARSHALL.

Trimble was born on November 17, 1776, in Augusta County, Virginia. His family moved to central Kentucky when Trimble was a young boy. He was educated at the Kentucky Academy in Woodford County, Kentucky, before reading the law with two prominent attorneys in the area. He was admitted to the Kentucky bar in 1800 and established a lucrative law practice in Paris, Kentucky.

In 1802 Trimble was elected to the Kentucky legislature. In 1807 he was appointed to the Kentucky Court of Appeals. He resigned in 1809 to return to his law practice. In 1813 Trimble was appointed U.S. district attorney and then returned to the bench when President JAMES MADISON named him a U.S. district judge in 1817. In 1820 Trimble also served on a boundary

"THE ILLUSTRIOUS FRAMERS OF THE CONSTITUTION COULD NOT BE IGNORANT THAT THERE WERE, OR MIGHT BE, MANY CONTRACTS WITHOUT OBLIGATION, AND MANY OBLIGATIONS WITHOUT CONTRACTS."
—ROBERT TRIMBLE

*Robert Trimble.*
ETCHING BY ALBERT ROSENTHAL. THE GRANGER COLLECTION, NEW YORK

commission that settled a dispute between Kentucky and Tennessee.

President JOHN QUINCY ADAMS appointed Trimble to the U.S. Supreme Court in 1826, making him the first U.S. district judge to serve on the Court. Trimble's nomination did not go smoothly, however, as he encountered opposition from the Kentucky congressional delegation. The opposition was based on Trimble's nationalist views, which ran counter to the STATES' RIGHTS position of the Kentucky legislators. Despite the opposition Trimble was confirmed.

Trimble joined the Court at a time when Chief Justice Marshall's nationalist philosophy was dominant. The Court's preference for construing federal powers broadly aroused concerns that the federal government would become too powerful and upset the balance of power between it and the states. During his brief time on the Court, Trimble adhered to the nationalist philosophy, emphasizing the supremacy of federal laws over state laws. He did, however, differ from Marshall in *Ogden v. Saunders,* 25 U.S. (12 Wheat.) 213, 6 L. Ed. 606 (1827). Trimble ruled that a state BANKRUPTCY law that applied to debts incurred after the passage of the statute did not violate the Contract Clause in Article I of the U.S. Constitution. Marshall disagreed and issued his only judicial dissent.

Trimble died on August 25, 1828, in Paris, Kentucky.

## TROVER

*One of the old common-law* FORMS OF ACTION*; a legal remedy for conversion, or the wrongful appropriation of the plaintiff's* PERSONAL PROPERTY.

Early in its history, the English COMMON LAW recognized the rights of a person whose property was wrongfully held (or detained). Such a person could bring an action of DETINUE to recover the goods or, later, could bring an action on the case to recover the value of the goods. In the course of the sixteenth century, the action of trover developed as a specialized form of action on the case.

The action of trover originally served the plaintiff who had lost property and was trying to recover it from a defendant who had found it. Soon the lost and found portions of the plaintiff's claim came to be considered a legal fiction. The plaintiff still included them in the complaint, but they did not have to be proved, and the defendant had no right to disprove them. This brought the dispute immediately to the

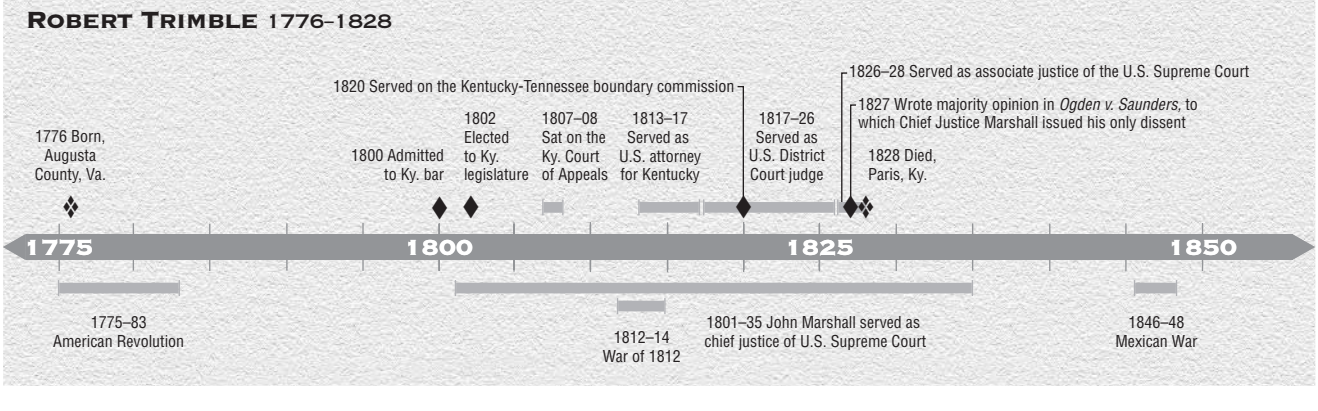

issue of whether the plaintiff had a right to property that the defendant would not give over to him or her. For some cases, it still was necessary for the plaintiff to demand a return of the property and be refused before he or she could sue in trover. It was reasonable to expect an owner to ask for his or her watch, for example, before the repairperson holding it could be sued for damages. The measure of damages in trover was the full value of the property at the time the conversion took place, and this was the amount of money the plaintiff recovered if he or she won the lawsuit.

Trover proved to be more convenient for many plaintiffs than the older action of detinue because a defendant could defeat a plaintiff in detinue by WAGER OF LAW. This meant that the defendant could win the case by testifying under oath in court and having eleven neighbors swear that they believed him or her. In addition, the plaintiff in trover was not obligated to settle for a return of the property, regardless of its current condition, and did not have to prove that he or she had made a demand for the property if the defendant had stolen it. Since it was the plaintiff who selected the form of the action, he or she was more likely to choose trover over detinue.

Today the ancient forms of action have been abolished, but the word *trover* is still used sometimes for an action to recover possession of personal property, and its history has contributed to developments in this area of the law.

### TRUE BILL

*A term endorsed on an indictment to indicate that a majority of* GRAND JURY *members found that the evidence presented to them was adequate to justify a prosecution.*

## ♦ TRUMAN, HARRY S.

Harry S. Truman served as the thirty-third president of the United States from 1945 to 1953. Truman, who became president upon the death of President FRANKLIN D. ROOSEVELT on April 12, 1945, made some of the most momentous decisions in U.S. history, including the dropping of atomic bombs on Hiroshima and Nagasaki, Japan, the rebuilding of Europe under the MARSHALL PLAN, and the fighting of the KOREAN WAR. A defender of Roosevelt's NEW DEAL domestic programs, in 1948 Truman fought unsuccessfully for a federal CIVIL RIGHTS law that would have outlawed RACIAL DISCRIMINATION in employment. Though Truman was unpopular when he left office, by the 1960s his reputation had rebounded dramatically. Many political historians consider him one of the greatest U.S. presidents.

Truman was born on May 8, 1884, in Lamar, Missouri, the son of a farmer and mule trader. After graduation from high school in Independence, Missouri, in 1910, Truman held a succession of jobs. During WORLD WAR I, he entered the U.S. Army and distinguished himself as a captain of a gunnery unit during fighting in France. After the war Truman's career choices did not improve. He became a partner in a men's clothing store but lost his savings when the business went bankrupt in the postwar economic depression.

At that point Truman entered politics, developing an association with Thomas J. Pendergast, the Democratic leader who ran Kansas City and Jackson County, Missouri. With Pendergast's backing, Truman became a county judge in 1922, at a time when a law degree was not required to be a judge. Truman proved an able judge and administrator, but anti-Pendergast forces defeated him in 1924. He was reelected to the judgeship in 1926, however, and served until 1934. During this period Truman studied law at the Kansas City School of Law.

"DEMOCRACY IS BASED ON THE CONVICTION THAT MAN HAS THE MORAL AND INTELLECTUAL CAPACITY, AS WELL AS THE INALIENABLE RIGHT, TO GOVERN HIMSELF WITH REASON AND JUSTICE."
—HARRY S. TRUMAN

In 1934 Pendergast had difficulty finding a U.S. senatorial candidate. He selected Truman, his fourth choice, and in November 1934 Truman was elected amid rumors that Pendergast had rigged the votes in Jackson County to ensure the victory.

As a U.S. senator, Truman was viewed at first as a Pendergast stooge, but he soon convinced his colleagues of his independence and intelligence. An ardent defender of Roosevelt's New Deal programs, Truman entered the national limelight during WORLD WAR II as the head of a Senate committee that investigated defense spending. Truman drew praise for uncovering graft, mismanagement, and inefficiency in the U.S. war production industries.

In 1944 Roosevelt, who was running for an unprecedented fourth term, replaced Vice President Henry A. Wallace with Truman. After his reelection Roosevelt had little to do with his new vice president; before his death on April 12, 1945, he met only twice with Truman.

When he assumed office, Truman faced grave decisions in both domestic and foreign policy as World War II drew to a close. The fight-

*Harry S. Truman.*
LIBRARY OF CONGRESS

ing in Europe ended with Germany's surrender on May 7, 1945. Truman attended the Potsdam Conference in July to discuss the postwar future of Europe, but little was decided besides the division of Germany into zones to be governed by the Allies. U.S. relations with the Soviet Union began to chill as it became apparent that the Soviets would maintain control over Eastern Europe.

In August 1945 Truman approved the use of atomic bombs against Japan. On August 6 a bomb was dropped on Hiroshima, and three days later Nagasaki was also devastated by nuclear attack. Japan opened peace negotiations on August 10 and surrendered on September 2. Truman justified his actions based on the belief that without the use of the atomic bombs, U.S. troops would have had to invade the Japanese mainland at great loss of military and civilian life.

By 1946 it was clear that an official "cold war" existed between the United States and the Soviet Union. Truman maintained a strong stand against the Soviets and the danger of Communist intervention in Europe. In 1947 he announced the Truman Doctrine, which promised U.S. aid to countries that resisted Communist aggression. Based on this doctrine, Truman provided military and financial assistance to Greece and Turkey to help them to remain independent.

Truman followed up this initiative with the Marshall Plan of 1947. This plan aided the restoration of Western Europe by providing massive amounts of financial aid to rebuild the European infrastructure. In 1949 Truman encouraged the acceptance of the **NORTH ATLANTIC TREATY ORGANIZATION** (NATO), by which the United States and European nations not under Communist rule pledged mutual protection against aggression.

On the domestic front, Truman faced a difficult situation. In 1946 the **REPUBLICAN PARTY** won control of both the U.S. House of Representatives and the Senate for the first time in a generation. Truman fought unsuccessfully to prevent the passage of the **TAFT-HARTLEY ACT**, also known as the **LABOR MANAGEMENT RELATIONS ACT** (29 U.S.C.A. § 141 et seq.), which restricted some of the powers that **LABOR**

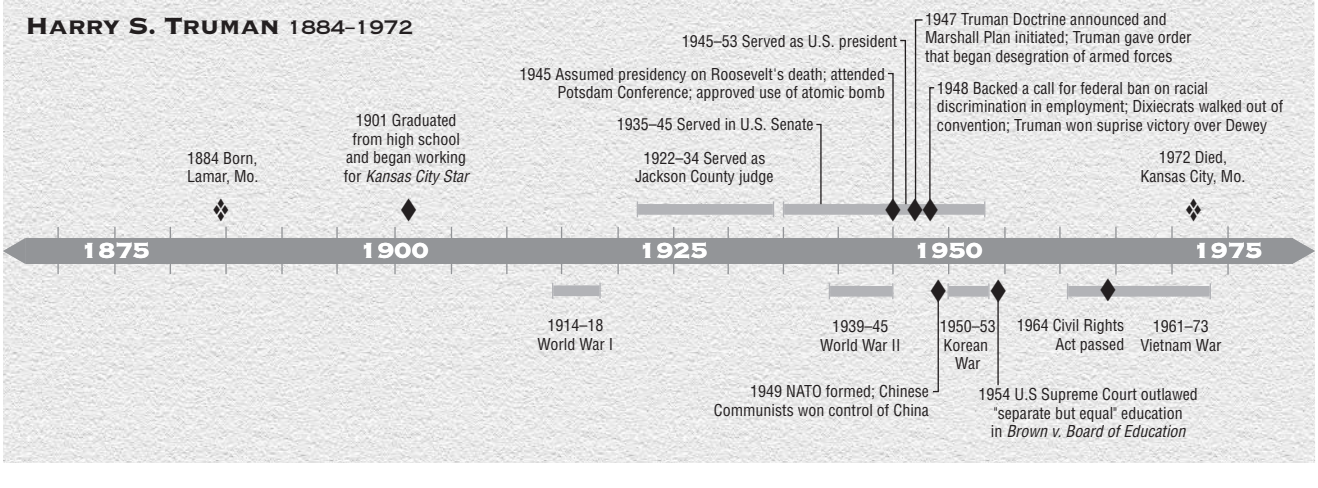

UNIONS had acquired in the 1930s. By 1948 it appeared that Truman would not win election to a full term.

At the Democratic National Convention in Philadelphia, Pennsylvania, Truman backed a platform plank that called for a federal civil rights bill that would ban racial discrimination in employment. Many southern Democrats walked out of the convention, formed the segregationist Dixiecrat Party, and nominated South Carolina governor STROM THURMOND for president. A left-wing offshoot, the PROGRESSIVE PARTY, nominated Henry Wallace, Roosevelt's vice president before Truman, for president. The Republican Party nominated New York governor THOMAS E. DEWEY, who in the early weeks of the campaign appeared to have an insurmountable lead.

Truman demonstrated his political acumen by calling the Republican Congress back into session after the political conventions to consider his legislative proposals. When the Republicans turned these aside, he labeled them the "do nothing Congress" and began a cross-country campaign during which he delighted crowds with his "give 'em hell" speeches. To the surprise of most commentators, Truman beat Dewey by 114 electoral votes.

Truman made little progress on his domestic agenda, which he called the Fair Deal. His second term was beset with foreign problems. The Chinese Communists won control of their country, and in 1950 North Korea invaded South Korea. Truman authorized the sending of U.S. troops to Korea under the sponsorship of the UNITED NATIONS to prevent the fall of South Korea to the Communist North Koreans. After General Douglas MacArthur led U.S. troops deep into North Korea, the Communist Chinese joined the fighting and pushed the U.S. forces back. Soon the war was a stalemate.

Truman's popularity declined after he removed MacArthur from his command for insubordination—the general had stated publicly that the United States should bomb China. Domestically, Truman took the controversial step of seizing the steel industry in 1952 to prohibit a strike that would have crippled the national defense. In YOUNGSTOWN SHEET & TUBE CO. V. SAWYER, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952), popularly known as the *Steel Seizure* case, the U.S. Supreme Court refused to allow the government to seize and operate the steel mills and rejected Truman's argument that he had inherent executive power to issue the seizure order.

In 1952 Truman decided not to run for a second term. He retired to Independence, Missouri, to oversee the Truman presidential library but remained a prominent Democratic leader for the remainder of his life. He died on December 26, 1972, in Kansas City, Missouri.

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## TRUST

*A relationship created at the direction of an individual, in which one or more persons hold the individual's property subject to certain duties to use and protect it for the benefit of others.*

Individuals may control the distribution of their property during their lives or after their deaths through the use of a trust. There are many types of trusts and many purposes for their creation. A trust may be created for the financial benefit of the person creating the trust, a surviving spouse or minor children, or a charitable purpose. Though a variety of trusts are permitted by law, trust arrangements that are attempts to evade creditors or lawful responsibilities will be declared void by the courts.

The law of trusts is voluminous and often complicated, but generally it is concerned with whether a trust has been created, whether it is a public or private trust, whether it is legal, and whether the trustee has lawfully managed the trust and trust property.

### Basic Concepts

The person who creates the trust is the settlor. The person who holds the property for another's benefit is the trustee. The person who is benefited by the trust is the beneficiary, or *cestui que trust.* The property that comprises the trust is the trust res, corpus, principal, or subject matter. For example, a parent signs over certain stock to a bank to manage for a child, with

instructions to give the dividend checks to him each year until he becomes 21 years of age, at which time he is to receive all the stock. The parent is the settlor, the bank is the trustee, the stock is the trust res, and the child is the beneficiary.

A fiduciary relationship exists in the law of trusts whenever the settlor relies on the trustee and places special confidence in her. The trustee must act in GOOD FAITH with strict honesty and due regard to protect and serve the interests of the beneficiaries. The trustee also has a fiduciary relationship with the beneficiaries of the trust.

A trustee takes legal title to the trust res, which means that the trustee's interest in the property appears to be one of complete ownership and possession, but the trustee does not have the right to receive any benefits from the property. The right to benefit from the property, known as equitable title, belongs to the beneficiary.

The terms of the trust are the duties and powers of the trustee and the rights of the beneficiary conferred by the settlor when he created the trust.

State statutes and court decisions govern the law of trusts. The validity of a trust of real property is determined by the law of the state where the property is located. The law of the state of the permanent residence (domicile) of the settlor frequently governs a trust of PERSONAL PROPERTY, but courts also consider a number of factors—such as the intention of the settlor, the state where the settlor lives, the state where the trustee lives, and the location of the trust property—when deciding which state has the greatest interest in regulating the trust property.

As a general rule, personal property can be held in a trust created orally. Express trusts of real property, however, must be in writing to be enforced. When a person creates a trust in his will, the resulting testamentary trust will be valid only if the will itself conforms to the requirements of state law for wills. Some states have adopted all or part of the UNIFORM PROBATE CODE, which governs both wills and testamentary trusts.

### Private Trusts

An express trust is created when the settlor expresses an intention either orally or in writing to establish the trust and complies with the required formalities. An express trust is what people usually mean when they refer to a trust.

Every private trust consists of four distinct elements: an intention of the settlor to create the trust, a res or subject matter, a trustee, and a beneficiary. Unless these elements are present, a court cannot enforce an arrangement as a trust.

**Intention** The settlor must intend to impose enforceable duties on a trustee to deal with the property for the benefit of another. Intent can be demonstrated by words, conduct, or both. It is immaterial whether the word *trust* is used in the trust document. Sometimes, however, the words used by the settlor are equivocal and there is doubt whether the settlor intended to create a trust. If the settlor uses words that express merely the desire to do something, such as the terms *desire, wish,* or *hope,* these precatory words (words expressing a wish) may create a moral obligation, but they do not create a legal one. In this situation a court will consider the entire document and the circumstances of the person who attempted to create the trust to determine whether a trust should be established.

The settlor must intend to create a present trust. Demonstrating an intent to create a trust in the future is legally ineffective. When a settlor does not immediately designate the beneficiary, the trustee, or the trust property, a trust is not created until the designations are made.

**Res or Subject Matter** An essential element of every trust is the trust property or res. Property must exist and be definite or definitely ascertainable at the time the trust is created and throughout its existence. Although stocks, bonds, and deeds are the most common types of trust property, any property interest that can be freely transferred by the settlor can be held in trust, including PATENTS, copyrights, and TRADEMARKS. A mere expectancy—the anticipation of receiving a gift by will, for example—cannot be held in trust for another because no property interest exists at that time.

If the subject matter of a trust is totally destroyed, the trust ends. The beneficiary might have a claim against the trustee for breach of trust, however, if the trustee was negligent in failing to insure the trust property. If insurance proceeds are paid as a result of the destruction, the trust should be administered from them.

**Trustee** Any person who has the legal capacity to take, hold, and administer property for her own use can take, hold, and administer property in trust. Nonresidents of the state in which the trust is to be administered can be trustees. State law determines whether an alien can act as a trustee.

A corporation can act as a trustee. For example, a trust company is a bank that has been named by a settlor to act as trustee in managing a trust. A partnership can serve as a trustee if state law permits. An unincorporated association, such as a LABOR UNION or social club, usually cannot serve as a trustee.

The United States, a state, or a MUNICIPAL CORPORATION can take and hold property as trustee. This arrangement usually occurs when a settlor creates a trust for the benefit of a military academy or a state college, or when the settlor sets aside property as a park for the community.

The failure of a settlor to name a trustee does not void a trust. The court appoints a trustee to administer the trust and orders the person having legal title to the property to convey it to the appointed trustee.

If two or more trustees are appointed, they always hold the title to trust property in JOINT TENANCY with the RIGHT OF SURVIVORSHIP. If one joint tenant dies, the surviving joint tenant inherits the entire interest, not just her proportionate share.

A trustee cannot resign without the permission of the court unless the trust instrument so provides or unless all of the beneficiaries who are legally capable to do so consent to the resignation. The court usually permits the trustee to resign if continuing to serve will be an unreasonable burden for the trustee and the resignation will not be greatly detrimental to the trust.

The removal of a trustee is within the discretion of the court. A trustee can be removed for habitual drunkenness, dishonesty, INCOMPETENCY in handling trust property, or the dissipation of the trustee estate. Mere friction or incompatibility between the trustee and the beneficiary is insufficient, however, to justify removal unless it endangers the trust property or makes the accomplishment of the trust impossible.

**Beneficiary** Every private trust must have a designated beneficiary or one so described that his identity can be learned when the trust is created or within the time limit of the RULE AGAINST PERPETUITIES, which is usually measured by the life of a person alive or conceived at the time the trust is created plus 21 years. This RULE OF LAW, which varies from state to state, is designed to prevent a person from tying up property in a trust for an unlimited number of years.

A person or corporation legally capable of taking and holding legal title to property can be a beneficiary of a trust. Partnerships and unincorporated associations can also be beneficiaries. Unless restricted by law, ALIENS can also be beneficiaries.

A class of persons can be named the beneficiary of a trust as long as the class is definite or definitely ascertainable. If property is left in trust for "my children," the class is definite and the trust is valid. When a trust is designated "for my family," the validity of the trust depends on whether the court construes the term to mean immediate family—in which case the class is definite—or all relations. If the latter is meant, the trust will fail because the class is indefinite.

When an ascertainable class exists, a settlor may grant the trustee the right to select beneficiaries from that class. However, a trust created for the benefit of any person selected by the trustee is not enforceable.

If the settlor's designation of an individual beneficiary or a class of beneficiaries is so vague or indefinite that the individual or group cannot be determined with reasonable clarity, the trust will fail.

The beneficiaries of a trust hold their equitable interest as tenants in common unless the trust instrument provides that they shall hold as joint tenants. For example, three beneficiaries each own an undivided one-third of the equitable title in the trust property. If they take as tenants in common, upon their deaths their heirs will inherit their proportionate shares. If, however, the settlor specified in the trust document that they are to take as joint tenants, then upon the death of one, the two beneficiaries will divide his share. Upon the death of one of the remaining two, the lone survivor will enjoy the complete benefits of the trust.

### Creation of Express Trusts

To create an express trust, the settlor must own or have POWER OF ATTORNEY over the property that is to become the trust property or must have the power to create such property. The settlor must be legally competent to create a trust.

A trust cannot be created for an illegal purpose, such as to defraud creditors or to deprive a spouse of her rightful elective share. The purpose of a trust is considered illegal when it is aimed at accomplishing objectives contrary to public policy. For example, a trust provision that

encourages DIVORCE, prevents a marriage, or violates the rule against perpetuities generally will not be enforced.

If the illegal provision pertains to the whole trust, the trust fails in its entirety. If, however, it does not affect the entire trust, only the illegal provision is stricken, and the trust is given effect without it.

### Methods of Creation

A trust may be created by an express declaration of trust, a transfer in trust made either during a settlor's lifetime or under her will, an exercise of the power of appointment, a contractual arrangement, or statute. The method used for creating the trust depends on the relationship of the settlor to the property interest that is to constitute the trust property.

**Declaration of Trust** A trust is created by a declaration of trust when the owner of property announces that she holds it as a trustee for the benefit of another. There is no need for a transfer because the trustee already has legal title. An oral declaration is usually sufficient to transfer equitable title to personal property, but a written declaration is usually required with respect to real property.

**Trust Transfers** A trust is created when property is transferred in trust to a trustee for the benefit of another or even for the benefit of the settlor. Legal title passes to the trustee, and the beneficiary receives equitable title in the property. The settlor has no remaining interest in the property. A transfer in trust can be executed by a deed or some other arrangement during the settlor's lifetime. This is known as an inter vivos trust or living trust.

**Powers of Appointment** A power of appointment is the right that one person, called the donor, gives in a deed or a will to another, the donee, to "appoint" or select individuals, the appointees, who should benefit from the donor's will, deed, or trust. A person holding a general power of appointment can create a trust according to the donor's direction by appointing a person as trustee to hold the trust property for anyone, including herself or her estate. If that person holds a special power of appointment, she cannot appoint herself.

**Contracts** Trusts can be created by various types of contractual arrangements. For example, a person can take out a life insurance policy on his own life and pay the premiums on the policy. The insurer, in return, promises to pay the proceeds of the policy to an individual who is to act as a trustee for an individual named by the insured. The trustee is given the duty to support the beneficiary of this trust from the proceeds during the beneficiary's life. The insured as settlor creates a trust by entering into a contract with the insurance company in favor of a trustee. The trust, called an insurance trust, is created when the insurance company issues its policy.

**Statute** Statutes provide for the creation of trusts in various instances. In the case of WRONGFUL DEATH, statutes often provide that a right of action exists in the surviving spouse or executor or administrator of the decedent with any recovery held in trust for the designated beneficiaries.

### Protection of Beneficiary's Interest from Creditors

Various trust devices have been developed to protect a beneficiary's interest from creditors. The most common are spendthrift trusts, discretionary trusts, and support trusts. Such devices safeguard the trust property while the trustee retains it. Once funds have been paid to the beneficiary, however, any attempt at imposing restraint on the transferability of his interest is invalid.

**Spendthrift Trusts** A SPENDTHRIFT TRUST is one in which, because of either a direction of the settlor or statute, the beneficiary is unable to transfer his right to future payments of income or capital, and creditors are unable to obtain the beneficiary's interest in future distributions from the trust for the payment of debts. Such trusts are ordinarily created with the aim of providing a fund for the maintenance of another, known as the spendthrift, while at the same time protecting the trust against the beneficiary's shortsightedness, extravagance, and inability to manage his financial affairs. Such trusts do not restrict creditors' rights to the property after the beneficiary receives it, but the creditors cannot compel the trustee to pay them directly.

The majority of states authorize spendthrift trusts. Those that do not will void such provisions so that the beneficiary can transfer his rights and creditors can reach the right to future income.

**Discretionary Trusts** A discretionary trust authorizes the trustee to pay to the beneficiary

only as much of the income or capital of the trust as the trustee sees fit to use for that purpose, with the remaining income or capital reserved for another purpose. This discretion allows the trustee to give the beneficiary some benefits under the trust or to give her nothing. The beneficiary cannot force the trustee to use any of the trust property for the beneficiary's benefit. Such a trust gives the beneficiary no interest that can be transferred or reached by creditors until the trustee has decided to pay or apply some of the trust property for the beneficiary.

**Support Trusts** A trust that directs that the trustee shall pay or apply only so much of the income and principal as is necessary for the education and support of a beneficiary is a support trust. The interest of the beneficiary cannot be transferred. Paying money to an assignee of the beneficiary or to creditors would defeat the objectives of the trust. Support trusts are used, for the most part, in jurisdictions that prohibit spendthrift trusts.

## Charitable Trusts

The purpose of a CHARITABLE TRUST is to accomplish a substantial social benefit for some portion of the public. The law favors charitable trusts by according them certain privileges, such as an advantageous tax status. Before a court will enforce a charitable trust, however, it must examine the alleged charity and evaluate its social benefits. The court cannot rely on the settlor's view that the trust is charitable.

To be valid, a charitable trust must meet certain requirements. The settlor must have the intent to create a charitable trust, there must be a trustee to administer the trust, which consists of some trust property, and the charitable purpose must be expressly designated. The beneficiary must be a definite segment of the community composed of indefinite persons. Selected persons within the class must actually receive the benefit. The requirements of intention, trustee, and res in a charitable trust are the same as those in a private trust.

**Charitable Purpose** A charitable purpose is one that benefits, improves, or uplifts humankind mentally, morally, or physically. The relief of poverty, the improvement of government, and the advancement of religion, education, or health are some examples of charitable purposes.

**Beneficiaries** The class to be benefited in a charitable trust must be a definite segment of the public. It must be large enough so that the community in general is affected and has an interest in the enforcement of the trust, yet it must not include the entire human race. Within the class, however, the specific persons to benefit must be indefinite. A trust "for the benefit of orphans of veterans of the 1991 Gulf War" is charitable because the class or category of beneficiaries is definite. The indefinite persons within the class are the individuals ultimately selected by the trustee to receive the provided benefit.

A trust for designated persons or a trust for profit cannot be a charitable trust. A trust to "erect and maintain a hospital" might be charitable even though the hospital charges the patients who are served, provided that any profits are used solely to continue the charitable services of the hospital.

As a general rule, a charitable trust may last forever, unlike a private trust. In a private trust, the designated beneficiary is the proper person to enforce the trust. In a charitable trust, the state attorney general, who represents the public interest, is the proper person to enforce the trust.

**Cy Pres Doctrine** The doctrine of CY PRES, taken from the phrase *cy pres comme possible* (French for "as near as possible"), refers to the power of a court to change administrative provisions in a charitable trust when the settlor's directions hinder the trustee in accomplishing the trust purpose. A court also has the power under the cy pres doctrine to order the trust funds to be applied to a charitable purpose other than the one named by the settlor. This will occur if it has become impossible, impractical, or inexpedient to accomplish the settlor's charitable purpose. Because a charitable trust can last forever, many purposes become obsolete because of changing economic, social, political, or other conditions. For example, a trust created in 1930 to combat smallpox would be of little practical value today because medical advances have virtually eliminated the disease. When the cy pres doctrine is applied, the court reasons that the settlor would have wanted her general charitable purposes implemented despite the changing conditions.

The cy pres doctrine can be applied only by a court, never by the trustees of the trust, who

must execute the terms of the trust. Trustees can apply to the court, however, for cy pres instructions when they believe that the trust arrangements warrant it.

### Management

The terms of a trust instrument, when a writing is required, or the statements of a settlor, when she creates a trust, set specific powers or duties that the trustee has in administering the trust property. These express powers, which are unequivocal and directly granted to the trustee, frequently consist of the power to sell the original trust property, invest the proceeds of any property sold, and collect the income of the trust property and pay it to the beneficiaries. The trustee also has implied powers that the settlor is deemed to have intended because they are necessary to fulfill the purposes of the trust.

A settlor can order the trustee to perform a certain act during the administration of the trust, such as selling trust realty as soon as possible and investing the proceeds in bonds. This power to sell is a mandatory or an imperative power. If the trustee fails to execute this power, he has committed a breach of trust. The beneficiary can obtain a court order compelling the trustee to perform the act, or the court can order the trustee to pay damages for delaying or failing to use the power. The court can also remove the trustee and appoint one who will exercise the power.

Courts usually will not set aside the decision of a trustee as long as the trustee made the decision in good faith after considering the settlor's intended purpose of the trust and the circumstances of the beneficiaries. A court will not tell a trustee how to exercise his discretionary powers. It will only direct the trustee to use his own judgment. If, however, the trustee refuses to do so or does so in bad faith or arbitrarily, a beneficiary can seek court intervention.

A trustee, as a fiduciary, must administer the trust with the skill and prudence that any reasonable and careful person would use in conducting her own financial affairs. The trustee's actions must conform to the trust purposes. Failure to act in this manner will render a trustee liable for breach of trust, regardless of whether she acted in good faith.

A trustee must be loyal to the beneficiaries, administering the trust solely for their benefit and to the exclusion of any considerations of personal profit or advantage. A trustee would violate her fiduciary duty and demonstrate a conflict of interest if, for example, she sold trust property to herself.

A trustee has the duty to defend the trust and the interests of the beneficiaries against baseless claims that the trust is invalid. If the claim is valid, however, and it would be useless to defend against such a challenge, the trustee should accede to the claim to avoid any unnecessary waste of property.

Trust property must be designated as such and segregated from a trustee's individual property and from property the trustee might hold in trust for others. This requirement enables a trustee to properly maintain the property and allows the beneficiary to easily trace it in the event of the trustee's death or insolvency.

Generally, a trustee is directed to collect and distribute income and has the duty to invest the trust property in income-producing assets as soon as is reasonable. This duty of investment is controlled by the settlor's directions in the trust document, court orders, the consent of the beneficiaries, or statute. Some states have statutes that list various types of investments that a trustee may or must make. Such laws are known as legal list statutes.

One of the principal duties of a trustee is to make payments of income and distribute the trust principal according to the terms of the trust, unless otherwise directed by a court. Unless a settlor expressly reserves such power when creating the trust, she cannot modify its payment provisions. In addition, the trustee cannot alter the terms of payment without obtaining approval of all the beneficiaries. Courts are empowered to permit the trustee to deviate from the trust terms with respect to the time and the form of payment, but the relative size of the beneficiaries' interests cannot be changed. If a beneficiary is in dire need of funds, courts will accelerate the payment. This is called "hastening the enjoyment."

### Revocation or Modification

The creation of a trust is actually a conveyance of the settlor's property, usually as a gift. A trust cannot be cancelled or set aside at the option of the settlor should the settlor change his mind or become dissatisfied with the trust, unless the trust instrument so provides. If the settlor reserves the power to revoke or modify only in a particular manner, he can do so only in that manner. Otherwise, the revocation or mod-

ification can be accomplished in any manner that sufficiently demonstrates the settlor's intention to revoke or modify.

### Termination

The period of time for which a trust is to operate is usually expressly prescribed in the trust instrument. A settlor can state that the trust shall last until the beneficiary reaches a particular age or until the beneficiary marries. When this period expires, the trust ends.

When the duration of a trust is not expressly fixed, the basic rule is that a trust will last no longer than necessary for the accomplishment of its purpose. A trust to educate a person's grandchildren would terminate when their education is completed. A trust also concludes when its purposes become impossible or illegal.

When all the beneficiaries and the settlor join in applying to the court to have the trust terminated, it will be ended even though the purposes that the settlor originally contemplated have not been accomplished. If the settlor does not join in the action, and if one or more of the purposes of the trust can still be attained by continuing the trust, the majority of U.S. courts refuse to grant a decree of termination. Testamentary trusts cannot be terminated.

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CROSS-REFERENCES

Honorary Trust; Resulting Trust; *Vidal v. Girard's Executors.*

## TRUST COMPANY

*A corporation formed for the purpose of managing property set aside to be used for the benefit of individuals or organizations.*

The settlor (the individual who creates the trust) names the trust company in order to ascertain that the property will be handled in accordance with his or her wishes as delineated in the terms of the trust.

Trust companies sometimes act as fiscal agents for corporations by attending to the registration and transfer of their stocks and bonds, serving as a trustee for their bond and mortgage creditors, and transacting general banking and loan business.

## TRUST DEED

*A legal document that evidences an agreement of a borrower to transfer legal title to real property to an impartial third party, a trustee, for the benefit of a lender, as security for the borrower's debt.*

A trust deed, also called a deed of trust or a Potomac mortgage, is used in some states in place of a mortgage.

## TRUST RECEIPT

*A document by which one individual lends money to purchase something and the borrower promises to hold the item for the benefit of the lender until such time as the debt is paid.*

A trust receipt was a device used before the adoption of the UNIFORM COMMERCIAL CODE (UCC); it is now governed by Article 9 of the UCC, which concerns SECURED TRANSACTIONS. A trust receipt stated that the buyer had possession of the goods for the benefit of the financier. Currently there ordinarily must be a security agreement, together with the filing of a financing statement, to protect a lender's interest in goods purchased on credit by a buyer.

## TRUSTEE

*An individual or corporation named by an individual, who sets aside property to be used for the benefit of another person, to manage the property as provided by the terms of the document that created the arrangement.*

A trustee manages property that is held in trust. A trust is an arrangement in which one person holds the property of another for the benefit of a third party, called the beneficiary. The beneficiary is usually the owner of the property or a person designated as the beneficiary by the owner of the property. A trustee may be either an individual or a corporation.

Trusts are useful for investment purposes, and they offer various tax advantages. Another purpose of trusts is to keep the trust property, usually money, out of the hands of the owner. This may be desirable if the beneficiary of the trust is incompetent, immature, or a spendthrift.

Trustees have certain obligations to the beneficiary of the trust. State statutes may address the duties of a trustee, but much of the law covering such obligations is often found in a state's case law, or court opinions.

A trustee is a fiduciary of the trust beneficiary. A fiduciary is legally bound to act, within the confines of the law, in the best interests of the beneficiary. A trustee is in a special position of confidence in relation to the beneficiary because the trustee has control of property that is essentially owned by the beneficiary.

Most trustees possess special knowledge about trusts and investments. By contrast, many beneficiaries are ignorant of such matters. This special knowledge is another feature of the trustee-beneficiary relationship that makes a trustee a fiduciary. A trustee must submit honest reports to the beneficiary and keep the beneficiary informed of all matters relevant to the trust.

Trustees must fulfill the terms of the trust, which address such matters as when and how the trust property will be given to the beneficiary and the kinds of transactions the trustee may conduct with the trust property. Unless the terms of the trust state otherwise, a trustee may invest trust property but must use reasonable skill and judgment in making the investments. In some states a trustee is required by statute to make certain investments under certain conditions, but most states let trustees decide on their own whether to invest the trust property. However, a trustee may not invest property if it is prohibited by the terms of the trust.

In BANKRUPTCY cases a court may appoint a trustee to manage the funds of the insolvent party. Trustees who are appointed by bankruptcy courts are paid for their services from public funds. Trustees who manage trusts for private parties also are paid for their services, but their compensation comes from the creator of the trust or from the trust's funds.

## TRUSTEES OF DARTMOUTH COLLEGE V. WOODWARD

The legal structure of the modern U.S. business corporation had its genesis in *Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518, 4 L. Ed. 629 (1819), which held that private corporate charters are protected from state interference by the Contracts Clause of the U.S. Constitution (art. I, § 10).

Dartmouth College was founded in 1769 by Reverend Eleazer Wheelock as a school for missionaries and Native Americans. During the 1750s, Wheelock financed the school with his own money. He launched an extensive fundraising effort in England and Scotland in the 1760s and received generous contributions. However, his benefactors wanted assurances that the money they were sending overseas would be properly spent. To allay their concerns, Wheelock instituted a management structure by which an English board controlled the school's finances and a colonial board managed the everyday affairs of the school and its missions. In 1769, Wheelock obtained a corporate charter from the royal governor of New Hampshire. The charter outlined the governing structure of the school, including the English and colonial boards of trustees.

After Wheelock's death in 1779, his son, John Wheelock, assumed the presidency of Dartmouth College. During the ensuing years, various circumstances, including the American Revolution, brought severe hardships to the college. Funding was scarce, land titles were uncertain, and the value of the college's assets diminished. Disputes arose between Wheelock and the colonial—now U.S.—board of trustees over the administration of the college, and in August 1815, a group of dissatisfied board members prepared resolutions to remove Wheelock from office. A struggle for control followed, and the dissident faction, composed of Republicans who wanted the state of New Hampshire to control the school, enlisted the support of the legislature. In December 1816, the legislature passed a law that renamed the college Dartmouth University and made it a public school controlled by a state-appointed governing board.

The controlling faction on the old board, most of whom were Federalists who supported Wheelock, wanted to maintain Dartmouth College's private, sectarian character. They maintained that the school's charter was a contract between King George III and the trustees. Because Article I, Section 10, of the U.S. Constitution prohibits states from passing any law that impairs contractual obligations, they argued that the legislature could not alter the governing method prescribed in the charter. The Republicans maintained that because the charter was handed down by the English monarchy before the American Revolution, it had no legal effect in a U.S. court. Furthermore, they contended

that even if the charter was valid, it was not a contract within the meaning of Article I, Section 10, but rather an amendable legislative act.

In February 1817, the trustees filed a lawsuit against William H. Woodward, a former secretary of the old board who had transferred his allegiance and become the secretary-treasurer of the new state-appointed board. The suit claimed that the legislature's actions violated the old board's constitutional freedom of contract and petitioned the court to compel Woodward to return the college's records, books, and seal, and to pay $50,000 in damages. The New Hampshire Supreme Court ruled against the plaintiffs, holding that Dartmouth College's charter was not a contract entitled to constitutional protection (*Dartmouth College,* 1 N.H. 111 [1817]).

The trustees appealed to the U.S. Supreme Court and enlisted the brilliant lawyer and orator DANIEL WEBSTER to argue their cause. An 1801 graduate of Dartmouth, Webster made an impassioned plea to the Court to uphold the original charter and maintain the school's private character. He argued that the school was created out of the bounty of its founder and that the founder conferred on the trustees certain rights. Although the institution may have some public characteristics, Webster contended that it was still a private enterprise whose trustees could not be deprived of their property, immunities, or privileges without DUE PROCESS OF LAW. He further argued that a charter constitutes a contract in the fullest sense of the law because it includes all the elements of a contract: competent parties, subject matter, mutual consideration, agreement of the parties, and mutual obligations. Webster reminded the justices of the dangers of unchecked legislative power. He argued that no less than the future of all private colleges hung in the balance of the Court's decision and that if the New Hampshire statute were upheld, all colleges would be subject to the vagaries of politics. He concluded his arguments by addressing Chief Justice JOHN MARSHALL: "It is, sir, as I have said, a small college. And yet there are those who love it." Webster's eloquence reportedly moved some observers, including Marshall, to tears.

The parties completed their arguments near the end of the Court's 1818 term. At the close of the term, Justice Marshall announced that the Court was undecided and would continue its consideration of the case to the 1819 term. On February 2, 1819, Marshall read the Court's opinion, which he had written: "The opinion of the court . . . is, that [the charter] is a contract, the obligation of which cannot be impaired without violating the constitution." The Court held that Wheelock and the college's trustees had received the charter in return for their agreement to operate the school under the terms of the charter. This mutual obligation was the basis of the Court's finding that a contract existed and that the contract fell within the Contracts Clause's protection.

Marshall's opinion defined a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law." According to the Court, a corporation possesses only the properties and powers conferred upon it by law. Dartmouth College was a corporation and, as a party to the contract created by the charter, could enforce its constitutional right to be free from impairment of its obligation.

The *Dartmouth College* case had far-reaching implications. By establishing that private corporate charters are contracts protected by the Constitution, this decision enabled business corporations to operate under whatever terms are dictated in their charters, without fear of interference by the state. This freedom was an important agent in the enormous growth of corporations in the nineteenth and early twentieth centuries, a necessary adjunct to the development of the U.S. economy. In addition, the case was the first to recognize that a corporation is a "person" for legal purposes, able to sue and be sued. It also established the principle that vested property rights, such as those granted in a corporate charter, fall within the purview of the Contracts Clause. By so doing, the decision established that the Contracts Clause protects the right to acquire and dispose of property. This protection, in turn, encouraged economic venture and development.

Although the *Dartmouth College* case is most often cited for its effect on the law of business corporations, it also significantly influenced the development of higher education in the United States. By confirming the autonomy of Dartmouth College as a private institution, the Court ensured that other private colleges would operate free of state interference. The decision probably influenced the growth of public colleges, as the only schools states could legally control were those founded by the states. Finally, by prohibiting the legislature from interfering with Dartmouth's trustees, faculty, and students, the

Court, perhaps inadvertently, bolstered the concepts of ACADEMIC FREEDOM and tenure for academic faculty. Webster, in his arguments before the justices, implored them to protect the Dartmouth faculty's "sacred" property rights, to which they were entitled by virtue of their forgoing "the advantages of professional and public employments, . . . to devote themselves to science and literature, and the instruction of youth."

The *Dartmouth College* case was criticized by some as awarding free rein to corporations and usurping state regulatory power. However, the case was interpreted not to prevent states from regulating businesses but rather to restrict states from interfering with a corporation's charter provisions. In fact, states have always regulated business corporations to benefit the public interest. The Court made it clear through subsequent decisions that *Dartmouth College* was not to be interpreted as corporate carte blanche. For example, in *Providence Bank v. Billings,* 29 U.S. (4 Pet.) 514, 7 L. Ed. 939 (1830), the plaintiff argued that its charter implied an exemption from taxation and that a general tax on banks would be a burden on its freedom of contract. The Court held that the *Dartmouth College* doctrine did not prohibit states from taxing banks. Corporations have the legal characteristics of any individual, and all individuals are obligated to share in the public burden of taxation. A further refinement of the doctrine came in *West River Bridge v. Dix,* 47 U.S. (6 How.) 507, 12 L. Ed. 535 (1848), in which the Court held that all contracts are subject to the superseding power of EMINENT DOMAIN and "the preexisting and higher authority of the laws of nature, of nations, or of the community." That higher authority gives states the right to tax and regulate corporations.

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CROSS-REFERENCES

Academic Freedom; Colleges and Universities; Corporations.

## TRUSTIES

*Prison inmates who through their good conduct earn a certain measure of freedom in and around the prison in exchange for assuming certain responsibilities.*

A prison trusty might, for example, be charged with the responsibility of maintaining order among fellow inmates.

## TRUTH IN LENDING ACT

The Truth in Lending Act is contained in Title I of the CONSUMER CREDIT PROTECTION ACT (15 U.S.C.A. § 1601 et seq.). The CCPA is designed to assure that every customer who needs CONSUMER CREDIT is given meaningful information concerning the cost of such credit. The Truth in Lending Act requires that the terms in transactions involving consumer credit be fully explained to the prospective debtors. It sets forth three basic rules: (1) a creditor cannot advertise a deal that ordinarily is not available to anyone except a preferred borrower; (2) advertisements must contain either all of the terms of a credit transaction or none of them; and (3) if the credit is to be repaid in more than four payments, the agreement must indicate, in clear and conspicuous print, that "the cost of credit is included in the price quoted for the goods and services." This law does not impose regulations upon the advertising media, only upon the prospective creditor.

CROSS-REFERENCES

Consumer Protection.

## ♦ TRUTH, SOJOURNER

Sojourner Truth was a nineteenth-century African American evangelist who embraced abolitionism and WOMEN'S RIGHTS. A charismatic speaker, she became one of the best-known abolitionists of her day.

Born a slave around 1797 in Ulster County, New York, Isabella Baumfree, as she was originally named, lived with several masters. She bore at least five children to a fellow slave named Thomas and took the name of her last master,

Isaac Van Wagener, in 1827. She was freed in 1828 when a New York law abolished SLAVERY within the state, and with the help of Quaker friends, she recovered a young son who had been illegally sold into slavery in the South.

In 1829 she moved to New York City and worked as a domestic servant. Since childhood she had experienced visions and heard voices, which she attributed to God. Her mystic bent led her to become associated with Elijah Person, a New York religious missionary. She worked and preached with Person in the streets of the city, and in 1843 she had a religious experience in which she believed that God commanded her to travel beyond New York to spread the Christian gospel. She took the name Sojourner Truth and traveled throughout the eastern states as an evangelist.

Truth soon became acquainted with the abolitionist movement and its leaders. She adopted their message, speaking out against slavery. Her speaking tours expanded as abolitionists realized her effectiveness as a lecturer. In 1850 she toured the Midwest and drew large, enthusiastic crowds. Because she was illiterate, she dictated her life story, *The Narrative of Sojourner Truth,* and sold the book at her lectures as a means of supporting herself.

In the early 1850s, she met leaders of the emerging women's rights movement, most notably Lucretia Mott. Truth recognized the connection between the inferior legal status of African Americans and women in general. Soon she was speaking before women's rights groups, advocating the right to vote. Her most famous speech was entitled *Ain't I a Woman?*

During the 1850s, Truth settled in Battle Creek, Michigan, but went to Washington, D.C., in 1864 to meet with President ABRAHAM LINCOLN. She remained in Washington to help the war effort, collecting supplies for black volunteer regiments serving in the Union army and helping escaped slaves find jobs and homes.

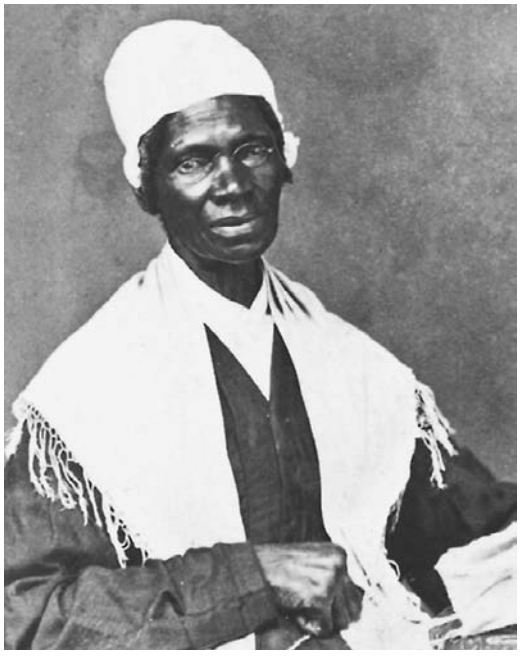

*Sojourner Truth.*
ARCHIVE PHOTOS, INC.

After the war she joined the National Freedmen's Relief Association, working with former slaves to prepare them for a different type of life. Truth believed that former slaves should be given free land in the West, but her "Negro State" proposal failed to interest Congress. Nevertheless, during the 1870s she encouraged African Americans to resettle in Kansas and Missouri.

Truth remained on the public speaking circuit until 1875, when she retired to Battle Creek. She died there on November 26, 1883.

"THERE IS A GREAT STIR ABOUT COLORED MEN GETTING THEIR RIGHTS, BUT NOT A WORD ABOUT COLORED WOMEN; IF COLORED MEN GET THEIR RIGHTS AND NOT COLORED WOMEN THEIRS, YOU SEE THE COLORED MEN WILL BE MASTERS OVER THE WOMEN, AND IT WILL BE JUST AS HARD AS IT WAS BEFORE."
—SOJOURNER TRUTH

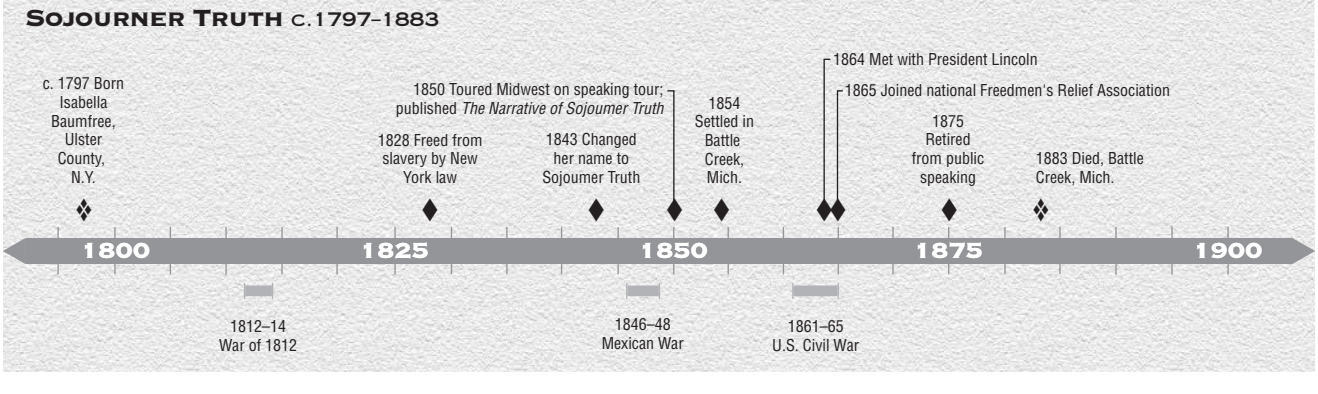

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CROSS-REFERENCES

Abolition; "Ain't I a Woman?" (Appendix, Primary Document).

## TRY

*To litigate a legal controversy; to argue a lawsuit in court as an attorney; to sit in the role of a judge or jury to investigate and decide upon* QUESTIONS OF LAW *and fact presented in such an action.*

## TUCKER ACT

Enacted by the U.S. Congress in 1887 to remedy inadequacies in the original statutory measures that created the Court of Claims (now the U.S. Claims Court) in 1855, the Tucker Act (28 U.S.C.A. § 1346) extended the jurisdiction of the Court of Claims to claims founded upon the Constitution, acts of Congress, or regulations of executive departments. The court was also empowered to entertain claims for liquidated and unliquidated damages in nontort actions. It retained jurisdiction to hear contract cases, which it was given under the 1855 measure.

## TURPITUDE

*Conduct that is unjust, depraved, or shameful; that which is contrary to justice, modesty, or good morals.*

Moral turpitude is a term that frequently appears in statutes, especially those providing that if a witness has been convicted of a crime involving moral turpitude, that conviction can be used to impeach his or her credibility. Similar statutes authorize revocation of a professional license for conduct involving moral turpitude.

## TUSKEGEE SYPHILIS STUDY

The Tuskegee Syphilis Study constituted one of the most shameful acts in the history of American medicine. The repercussions of this study, which allowed 400 African American men afflicted with syphilis to go untreated for a period of almost 40 years, are felt to this day. It resulted in new laws governing medical experiments on humans, and—some would argue—a legacy of suspicion of the medical community that continues among many African Americans.

The study began in 1932, at the hospital of the prestigious Tuskegee Institute, a traditionally African American college located in Alabama. The U.S. PUBLIC HEALTH SERVICE sponsored it, and white physicians within the public health service administered it. The purpose of the study was to determine the effects of syphilis in African American men. At the time the study began, there was no cure for syphilis, a sexually-transmitted disease that causes sores and rashes in its early stages and serious blood vessel and heart problems, mental disorders, blindness, nerve system problems, and even death in its latter stages.

There were treatments for syphilis available when the study began, but it was decided to withhold even those from participants without their knowledge and chart the course of untreated syphilis in African American males. Four hundred men with syphilis were initially enrolled in the project, mostly poor uneducated African American tenant farmers from the surrounding area, along with 200 uninfected men who served as controls. The first published report of the study was issued in 1936, and reports were issued every four to six years after that.

In the late 1940s, penicillin first became available to the general public as a cure for syphilis. However, the decision was made not to make it available to study participants, who were allowed to continue in the study without any treatment for their disease. They were continually supplied with placebos, and no attempt was made to inform them of possible alternatives to the "medicine" that they were being given. As late as 1969 the Centers for Disease Control recommended the study continue.

Finally in 1972, following unflattering news reports, the study was finally shut down, and those subjects that were still part of the study received penicillin. A report was issued by the Department of Health, Education and Welfare that stated that the study was "scientifically unsound and its results are disproportionately meager composed with known risks to the human subjects involved." The U.S. Congress, led by Senator EDWARD KENNEDY, held hearings in 1973 on the Tuskegee Syphilis Study.

Those hearings resulted in the 1974 passage of the National Research Act of 1974 (42 U.S.C. §§ 201 et seq) which established institutional review and an ethic guidance program for all future research studies done under the auspices of the U.S. government. It stated in part "that each entity which applies for a grant, contract, or cooperative agreement under this chapter for any project or program which involves the conduct of biomedical or behavioral research involving human subjects submit in or with its application for such grant, contract, or cooperative agreement assurances satisfactory to the Secretary that it has established a board (to be known as an Institutional Review Board) to review biomedical and behavioral research involving human subjects conducted at or supported by such entity in order to protect the rights of the human subjects of such research."

In the meantime, a lawsuit was filed in 1973, on behalf of the survivors of the study and the heirs and representatives of the participants who had since died, against the various federal government agencies, the State of Alabama, the private foundation that provided original funding, and individual physicians working for the U.S. Public Health Service. Eventually, a monetary settlement of $10 million was reached with the parties. Each surviving subject was to be paid $37,500, each heir or representative of a diseased subject received $15,000, each member of the control group received $16,000, and the heir or a representative of each control subject received $5,000.

In 1997, in a White House ceremony, President BILL CLINTON apologized for the federal government's role in the Tuskegee Syphilis Study. He spoke of the mistrust and racial animus that resulted from the study to a group of survivors of the study and their families. He added: "We can look you in the eye and finally say on behalf of the American people, what the United States government did was shameful, and I am sorry."

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CROSS-REFERENCES

Patients' Rights.

## ♦ TUTTLE, ELBERT PARR

Elbert Parr Tuttle will be remembered as an influential jurist of the CIVIL RIGHTS era. As judge, and later chief judge, of the old Fifth Circuit Court of Appeals, he ruled on cases from six southern states (Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas) through the storm of civil rights litigation following BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954)—the landmark 1954 Supreme Court decision that held racial SEGREGATION in public education to be against the law.

Because racial segregation was law throughout most of the South, the Fifth Circuit became the United States' proving ground for civil rights in the late 1950s and 1960s. Tuttle and fellow judges John R. Brown, of Houston, Texas, Richard T. Rives, of Montgomery, Alabama, and

"LIKE LOVE, TALENT IS ONLY USEFUL IN ITS EXPENDITURE, AND IT IS NEVER EXHAUSTED."
—ELBERT TUTTLE

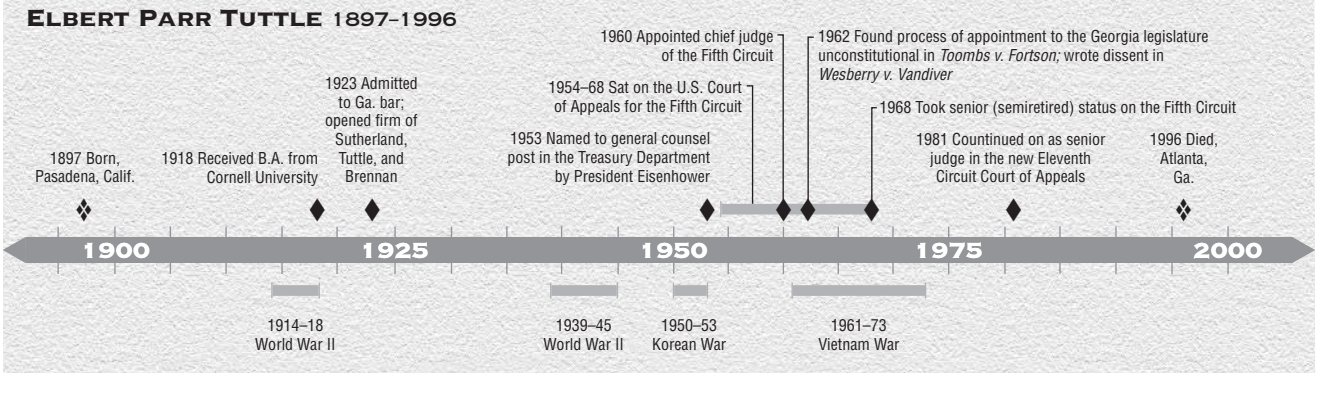

JOHN MINOR WISDOM, of New Orleans—known derisively as the Four—faced delaying tactics, political pressures, and all manner of threats as they worked to make the Supreme Court's landmark ruling a reality in key states of the old Confederacy.

The judges of the Fifth Circuit changed the South, and therefore the nation. Under their gavels, JIM CROW LAWS were declared unconstitutional, African Americans were granted VOTING RIGHTS, RACIAL DISCRIMINATION in jury selection was curbed, state universities and colleges were desegregated, and equal opportunity in education became a reality.

Tuttle probably reflected on his own schooling when championing equal education for all. He was born July 17, 1897, in Pasadena, California. In 1906, Tuttle's father, Guy Harmon Tuttle, moved his family to Hawaii so that he could accept a position as bookkeeper on a sugar plantation. Young Tuttle, and his older brother Malcolm, were enrolled at the Punahou Academy, in Honolulu, where *they* were the minority students among classmates of native Hawaiian, Chinese, Japanese, and Portuguese descent.

Tuttle returned to the mainland in 1914 to enter college. He received his bachelor of arts degree in 1918 and bachelor of law degree in 1923 from Cornell University.

Following law school, Tuttle and his brother-in-law, William Sutherland, started to look for a promising location to establish a law practice. After investigating several locations in the South, they settled on Atlanta. Also in 1923, after being admitted to the Georgia bar, they opened the firm of Sutherland, Tuttle, and Brennan.

Though Tuttle specialized in tax litigation, he also tried several civil rights cases, including a battle to win a new trial for a black man convicted of raping a white woman, and a challenge to a Georgia statute under which a black man had been sentenced to twenty years on a chain gang for distributing Communist party literature. At a time when PRO BONO work (work donated for the public good) was unusual, Tuttle frequently represented people who could not afford an attorney.

Tuttle began organizing support for REPUBLICAN PARTY candidates in Georgia and was acknowledged as a state Republican leader by the late 1940s. He said he allied himself with the Republican party because he was appalled at the whites-only policies of Georgia's DEMOCRATIC PARTY.

In 1953 President DWIGHT D. EISENHOWER named Tuttle to a general counsel post in the TREASURY DEPARTMENT. In 1954 just three months after SCHOOL DESEGREGATION was struck down by the Supreme Court's *Brown* decision, the president asked Tuttle to sit on the U.S. Court of Appeals for the Fifth Circuit.

It was not easy for Tuttle to decide whether to accept the president's offer. Nevertheless, mindful of the social and legal upheaval that would follow the Supreme Court's decision, he chose to take on the challenge. Though he received threats and hate mail for following the *Brown* decision, Tuttle faced frustrated segregationists head on—and in the process helped to change the course of a nation.

Two of Tuttle's early opinions on the Fifth Circuit helped to shape the political history of the state of Georgia. In *Toombs v. Fortson,* 205 F. Supp. 248 (1962), Tuttle found the process of appointment to the Georgia legislature to be unconstitutional and ordered it changed. In *Wesberry v. Vandiver,* 206 F. Supp. 276 (1962), Tuttle wrote a dissenting opinion concerning congressional district reapportionment; on appeal, the U.S. Supreme Court agreed with his dissent. Although Tuttle was in favor of correcting the malapportionment that diminished the power of black votes, he believed that such action should arise from the states, not the courts.

By 1961 Tuttle had become the Fifth Circuit's chief judge. During his tenure, he decided many landmark cases involving Jim Crow laws, voting rights, jury discrimination, employment discrimination, reapportionment, and school desegregation—including the order to admit JAMES MEREDITH, an African American, to the then all-white University of Mississippi in 1962. Tuttle stepped down as chief judge in 1968, taking senior (or semiretired) status. He died June 23, 1996, in Atlanta, Georgia.

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### CROSS-REFERENCES

Apportionment; Integration.

## TWELFTH AMENDMENT

The Twelfth Amendment to the U.S. Constitution reads:

> The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

The Twelfth Amendment was proposed on December 9, 1803, and ratified on July 27, 1804. It superseded Article 2, Section 2, Clause 3, and changed the method used to select the president and vice president in the ELECTORAL COLLEGE. The amendment resulted from the emergence of the two-party system and the presidential election of 1800.

The Framers of the U.S. Constitution provided for an indirect method of presidential selection. Under this arrangement each state was authorized to appoint as many electors as it had senators and representatives in Congress. This electoral college, as it came to be called, was empowered to choose the president, and the person receiving the second highest number of votes served as vice president. Each elector voted for two individuals without specifying which he wanted for president. It was assumed that the electors would act independently of the people in making their selections.

In the 1790s, however, the two-party system developed, and the FEDERALIST PARTY and the DEMOCRATIC-REPUBLICAN PARTY became bitter rivals. The two parties selected their slates of electors, which reduced the independent role of the electors. In 1796 JOHN ADAMS, a Federalist, defeated THOMAS JEFFERSON, a Democratic-Republican, for president, but Jefferson served as Adams's vice president because he had the second highest vote total.

The presidential election of 1800 precipitated the Twelfth Amendment. The two Democratic-Republican candidates—Thomas Jefferson, the presidential candidate, and AARON BURR, the vice presidential candidate—received the same number of votes. The tie threw the election into the House of Representatives. After thirty-five ballots the House chose Jefferson as president, but the divisive battle took so long that it aroused fears that there would be no president to take office on inauguration day.

The amendment was quickly and overwhelmingly ratified. Of the sixteen states then admitted to the Union, only Delaware and Connecticut rejected the amendment.

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## TWENTIETH AMENDMENT

The Twentieth Amendment to the U.S. Constitution reads:

> *Section 1.* The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.
>
> *Section 2.* The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.
>
> *Section 3.* If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.
>
> *Section 4.* The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.
>
> *Section 5.* Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.
>
> *Section 6.* This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

The Twentieth Amendment was proposed on March 2, 1932, and ratified on January 23, 1933. The amendment moved the date on which new presidential and vice presidential terms begin as well as the date for beginning new congressional terms, ended the abbreviated congressional session that had formerly convened in even-numbered years, and fixed procedures for presidential succession if the president-elect dies before inauguration day.

Senator GEORGE W. NORRIS of Nebraska was the primary sponsor of the Twentieth Amendment. He was concerned about the gap between the holding of federal elections on the first Tuesday in November and the installation of the newly elected officials in March of the following year. The Constitution specified that the presidential and vice presidential terms should begin on March 4 and the congressional terms on March 3. As a result, senators and representatives who were defeated in November could remain in office and vote on measures for four months, thereby earning the name "lame ducks."

The Constitution also required Congress to hold an abbreviated session in even-numbered years from early December until the next Congress convened in March. These "lame duck" sessions were generally unproductive, as the members engaged in virtually no legislative activity. At the same time, however, these sessions provided the opportunity for defeated members to vote on measures without any accountability to the voters.

Under the Twentieth Amendment, the presidential and vice presidential terms begin on January 20, and congressional terms begin on January 3. The lame duck session requirement was also abolished.

Another section of the amendment deals with presidential succession should the president-elect die before taking office. The amendment provides that the vice president elect shall become the president-elect and take office on January 20; the amendment also authorizes Congress to legislate on other matters of presidential succession.

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## TWENTY-FIFTH AMENDMENT

The Twenty-fifth Amendment to the U.S. Constitution reads:

> *Section 1.* In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.
>
> *Section 2.* Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall

take office upon confirmation by a majority vote of both Houses of Congress.

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

*Section 4.* Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

The Twenty-fifth Amendment was proposed on July 6, 1965, and ratified on February 10, 1967. The amendment establishes the procedure for replacing the president or vice president when either office is vacant. The amendment, which was proposed in the aftermath of the assassination of President **JOHN F. KENNEDY** in 1963, has been used during the presidential terms of **RICHARD M. NIXON**, **GERALD R. FORD**, and **RONALD REAGAN**.

Section 1 of the amendment states that in the event of "the removal of the President from office or of his death or resignation, the Vice President shall become President." This section reaffirmed a precedent set by Vice President **JOHN TYLER**, in 1841, when President **WILLIAM HENRY HARRISON** died after only one month in office. Tyler rejected the concept of serving as acting president during the remaining 47 months of Harrison's term. Instead, he announced that he would assume the full duties and powers of the office and become president.

Section 2 of the amendment established a new procedure for selecting a vice president if a vacancy occurs. This section was enacted in reaction to the situation after the Kennedy assassination. When Vice President **LYNDON B. JOHNSON** assumed the presidency on November 22, 1963, the Constitution left the office of vice president unfilled. Under the Constitution, if Johnson had died or been removed from office, his successor would have been the Speaker of the House of Representatives, who at the time was John McCormick, then in his eighties. Section 2 permits the president to choose a vice president, subject to confirmation by a majority vote of both houses of Congress.

Section 2 was used twice in the 1970s in the wake of political scandals in the Nixon administration. In 1973, Gerald R. Ford became the first person chosen as vice president using this method. Nixon appointed Ford to replace Vice President Spiro T. Agnew, who resigned in the face of criminal **BRIBERY** charges. When Nixon resigned in August 1974 because of the **WATERGATE** scandal, Ford became president. Ford then appointed Nelson A. Rockefeller as vice president under the authority of Section 2.

Sections 3 and 4 of the amendment deal with presidential disability. Several presidents have been temporarily disabled during their terms of office, but until the amendment, the Constitution contained no provision for the temporary replacement of a disabled president and provided no guidance as to who would have actual decision-making authority should the president become disabled. President **WOODROW WILSON**, for example, was seriously disabled by a stroke in 1919 and was totally incapacitated for a number of weeks. His wife, Edith, took on much of the responsibility of the office, an arrangement that aroused sharp criticism.

Section 3 deals with a situation in which the president communicates in writing to Congress that he is "unable to discharge the powers and duties" of the office. The vice president then assumes the role of acting president. The vice president continues in this role unless and until the president is able to transmit a declaration to the contrary.

Section 4 deals with the more difficult situation of a president who is unable or unwilling to acknowledge the inability to perform the duties of the office. The section authorizes the vice president and a majority of the presidential cabinet members to determine whether the president is unable to discharge the powers and duties of the office. If they agree that the president is incapacitated, the vice president immediately becomes acting president. The president may transmit to Congress a statement declaring that no inability exists and resume the duties of president. The vice president and the majority of the cabinet, however, may send a declaration to Congress within four days disputing the assertion of the president that he is able to discharge the duties of the office. If this happens, Congress must vote by a two-thirds majority in both houses that the president is unable to serve. Otherwise, the president will reassume office.

The disability procedures were used for eight hours on July 13, 1985, when President Reagan underwent surgery for cancer. Vice President GEORGE H.W. BUSH temporarily assumed the powers and duties of the office as acting president. Section 4 was also invoked on June 29, 2002, when President GEORGE W. BUSH, who was set to undergo a colonoscopy, temporarily transferred power to Vice President Dick Cheney. Vice President Cheney acted as president from 7:09 A.M. until 9:24 A.M., when President Bush transmitted a letter announcing that he was resuming his duties.

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## TWENTY-FIRST AMENDMENT

The Twenty-first Amendment to the U.S. Constitution reads:

> *Section 1.* The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> *Section 2.* The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.
>
> *Section 3.* This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

The Twenty-first Amendment was proposed on February 20, 1933, and ratified on December 5, 1933. It is the only amendment to repeal another amendment, the Eighteenth, and the only one to be ratified by state conventions rather than by state legislatures.

Repeal of the EIGHTEENTH AMENDMENT ended fourteen years of PROHIBITION, a failed national experiment that sought to eliminate the consumption of intoxicating liquors. Though consumption was reduced, federal and state law enforcement officials could not prevent the illegal manufacture and sale of "bootleg" alcohol. ORGANIZED CRIME profited from the ban on alcohol, which enabled criminals such as Chicago gangster AL CAPONE to become multimillionaires. Critics of Prohibition argued that the increase in crime and lawlessness offset any gains from reducing the consumption of liquor.

Prohibition was supported most strongly in rural areas. In urban areas enforcement was difficult. Cities had large populations of immigrants who did not see anything morally wrong with consuming alcohol. In the early 1930s, as production and sales of illegal liquor continued to rise, the onset of the Great Depression led to calls for repeal of the Eighteenth Amendment. A legalized liquor industry would provide more jobs at a time when millions were out of work.

At its national convention in 1932, the DEMOCRATIC PARTY adopted a platform plank calling

for repeal. The landslide Democratic victory of 1932 signaled the end of Prohibition. In February 1933 a resolution proposing the Twenty-first Amendment was introduced in Congress; it contained a provision requiring ratification by state conventions rather than by state legislatures. Though Article V of the Constitution authorizes this ratification method, it had never been used. Supporters of repeal did not want the state legislatures, which generally were dominated by rural legislators supportive of Prohibition, to vote against ratification.

During 1933 thirty-eight states elected delegates to state conventions to consider the amendment. Almost three-quarters of the voters supported repeal in these elections. Therefore, it was not surprising that the ratification conventions certified the results and ratified the Twenty-first Amendment on December 5, 1933.

Section 2 of the amendment gives states the right to prohibit the transportation or importation of intoxicating liquors. Many states enacted their own prohibition laws in the 1930s, but all had been repealed by 1966. The regulation of liquor is now primarily a local issue.

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## TWENTY-FOURTH AMENDMENT

The Twenty-fourth Amendment to the U.S. Constitution reads:

> *Section 1.* The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.
>
> *Section 2.* The Congress shall have power to enforce this article by appropriate legislation.

The Twenty-fourth Amendment was proposed on August 27, 1962, and ratified on January 23, 1964. It prohibits the federal government or the states from making voters pay a poll tax before they can vote in a national election. A poll tax, also called a head tax, is a tax collected equally from all voters. The amendment was proposed as a CIVIL RIGHTS measure because southern states had used the poll tax to keep African Americans from voting.

POLL TAXES were commonly imposed in the United States at the time the Constitution was adopted but had fallen into disuse by the mid-nineteenth century. After the ratification of the FIFTEENTH AMENDMENT in 1870, the poll tax was revived in the South as a way to prevent African Americans, who were mostly poor, from voting. The poll tax also denied poor whites the right to vote. Typically, the unpaid fees would accumulate from election to election, making it more difficult for poor persons to find the economic resources to qualify for voting.

In *Breedlove v. Suttles,* 302 U.S. 277, 58 S. Ct. 205, 82 L. Ed. 252 (1937), the U.S. Supreme Court ruled that poll taxes, by themselves, did not violate the Fourteenth or Fifteenth Amendments. *Breedlove* led to the introduction of the first poll tax constitutional amendment in 1939 and to efforts to abolish the poll tax through STATE ACTION. By 1960 only five southern states still had poll taxes.

The abolition of the poll tax was not a controversial issue, even at a time of fierce southern resistance to racial desegregation. The amendment was limited to federal elections, however, leaving state elections outside its scope. Following the ratification of the Twenty-fourth Amendment, the Supreme Court abandoned the *Breedlove* precedent. In *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966), the Court struck down poll taxes in state and local elections, ruling that such taxes violated the Fourteenth Amendment's Equal Protection Clause.

## TWENTY-SECOND AMENDMENT

The Twenty-second Amendment to the U.S. Constitution reads:

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

office of President or acting as President during the remainder of such term.

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

The Twenty-second Amendment was proposed on March 24, 1947, and ratified on February 27, 1951. The amendment imposed term limits on the office of president of the United States.

The Framers of the Constitution vested power in a single executive, elected for a term of four years. Participants at the Constitutional Convention discussed the wisdom of limiting presidential terms, but in the end the convention refused to limit the number of terms. The Framers believed a four-year term and an independent ELECTORAL COLLEGE would prevent a president from seeking more than two terms.

President GEORGE WASHINGTON declined the offer of a third term, as did THOMAS JEFFERSON. Once the tradition of serving no more than two terms had been established in the early 1800s, it became a canon of U.S. politics. President FRANKLIN D. ROOSEVELT ignored the tradition in 1940, however, when he chose to run for a third term. He did so in the belief that U.S. involvement in WORLD WAR II was imminent. In making his bid for a third term, Roosevelt ignored the advice of some members of the DEMOCRATIC PARTY. In 1944, with the war raging, Roosevelt was elected to an unprecedented fourth term. In declining health when elected, he died in 1945.

After the 1946 election, which produced Republican majorities in both houses of Congress, the Republicans sought to prevent a repetition of Roosevelt's actions. The Twenty-second Amendment was introduced in 1947 and adopted in 1951. The amendment prohibits a person from serving more than two four-year terms. A person who serves more than two years of a term to which some other person was elected president may be elected only for one full term. For example, if a president dies in the first year of the term, the vice president who becomes president may be elected to only one four-year term. If, however, the president dies in the third year of the term, the vice president would be eligible to serve a maximum of ten years.

## TWENTY-SEVENTH AMENDMENT

The Twenty-seventh Amendment to the U.S. Constitution reads:

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

The long history of the Twenty-seventh Amendment is curious and unprecedented. The amendment was first drafted by JAMES MADISON in 1789 and proposed by the First Congress in 1789 as part of the original BILL OF RIGHTS. The proposed amendment did not fare well, as only six states ratified it during the period in which the first ten amendments were ratified by the requisite three-fourths of the states. The amendment was largely neglected for the next two centuries; Ohio was the only state to approve the amendment in that period, ratifying it in 1873.

In 1982 Gregory Watson, a twenty-year-old student at the University of Texas, wrote a term paper arguing for ratification of the amendment. Watson received a 'C' grade for the paper and then embarked on a one-man campaign for the amendment's ratification. From his home in Austin, Texas, Watson wrote letters to state legislators across the country on an electric typewriter. During the 1980s, as state legislatures passed pay raises, public debate over the raises reached a fever pitch and state legislatures began to pass the measure, mostly as a symbolic gesture to appease voters. Few observers believed that the amendment would ever be ratified by the required thirty-eight states, but the tally of ratifying states began to mount. On May 7, 1992, Michigan became the thirty-eighth state to ratify the amendment, causing it to become part of the U.S. Constitution.

The effect of the Twenty-seventh Amendment is to prevent salary increases for federal legislators from taking effect until after an intervening election of members of the House of Representatives. The amendment is an expression of the concern that members of Congress, if left to their own devices, may choose to act in their own interests rather than the public interest. Because the amendment postpones salary increases until after an election, members of Congress may not immediately raise their own salaries. All Representatives must endure an election before a pay raise takes effect because Representatives are elected once every two years; Senators need not necessarily succeed in an elec-

tion before a pay raise takes effect unless the pay raise is approved within two years of the Senator's next re-election effort.

The ratification process of the Twenty-seventh Amendment was by far the longest-running amendment effort in the history of the United States. Before the Twenty-seventh Amendment was ratified, the longest it had taken to ratify an amendment was four years. That measure, the TWENTY-SECOND AMENDMENT limiting the president to two terms in office, was ratified in 1951. The proposed EQUAL RIGHTS AMENDMENT, which would have become the Twenty-seventh Amendment had it passed, failed to win ratification by the required thirty-eight states during the ten-year period Congress had allowed for its consideration by the states.

The gradual manner in which the Twenty-seventh Amendment was passed has raised questions about its validity, with concerns centering on the wisdom of allowing changes to the Constitution without reference to the passage of time. In *Dillon v. Gloss,* 256 U.S. 368, 41 S. Ct. 510, 65 L. Ed. 994 (1921), the U.S. Supreme Court stated a requirement that ratification of amendments be contemporaneous with their proposal, but in *Coleman v. Miller,* 307 U.S. 433, 59 S. Ct. 972, 83 L. Ed. 1385 (1939), the High Court left it for Congress to decide whether a ratification was contemporaneous with its proposal. In *Boehner v. Anderson,* 809 F.Supp. 138 (D.D.C. 1992), aff'd, 30 F.3d 156, 308 U.S.App.D.C. 94 (1994), the District Court for the District of Columbia rejected a challenge to the constitutionality of pay raises in the Ethics Reform Act of 1989, Pub. L. 101-194, 103 Stat 1716 (1989). The court observed that the pay raises complied with the Twenty-seventh Amendment because they took effect after an election had intervened.

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## TWENTY-SIXTH AMENDMENT

The Twenty-sixth Amendment to the U.S. Constitution reads:

> *Section 1.* The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.
>
> *Section 2.* The Congress shall have the power to enforce this article by appropriate legislation.

The Twenty-sixth Amendment was proposed on March 23, 1971, and ratified on July 1, 1971. The ratification period of 107 days was the shortest in U.S. history. The amendment, which lowered the voting age from twenty-one to eighteen, was passed quickly to avert potential problems in the 1972 elections.

The drive for lowering the voting age began with young people who had been drawn into the political arena by the VIETNAM WAR. Proponents argued that if eighteen-year-olds were old enough to be drafted into military service and sent into combat, they were also old enough to vote. This line of argument was not new. It had persuaded Georgia and Kentucky to lower the minimum voting age to eighteen during WORLD WAR II. The one flaw in the argument was that women were not drafted and were not allowed to serve in combat units if they enlisted in the armed forces.

Nevertheless, the drive for lowering the voting age gained momentum. In 1970 Congress passed a measure that lowered the voting age from twenty-one to eighteen in both federal and state elections (84 Stat. 314).

The U.S. Supreme Court, however, declared part of this measure unconstitutional in *Oregon v. Mitchell,* 400 U.S. 112, 91 S. Ct. 260, 27 L. Ed. 2d 272 (1970). The decision was closely divided. Four justices believed Congress had the constitutional authority to lower the voting age in all elections, four justices believed the opposite, and one justice, HUGO L. BLACK, concluded that Congress could lower the voting age by statute only in federal elections, not in state elections.

The Court's decision allowed eighteen-year-olds to vote in the 1972 presidential and congressional elections but left the states to decide if they wished to lower the voting age in their state elections. The potential for chaos was clear. Congress responded by proposing the Twenty-sixth Amendment, which required the states as well as the federal government to lower the voting age to eighteen.

## TWENTY-THIRD AMENDMENT

The Twenty-third Amendment to the U.S. Constitution reads:

> *Section 1.* The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:
>
> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.
>
> *Section 2.* The Congress shall have power to enforce this article by appropriate legislation.

The Twenty-third Amendment was proposed on June 16, 1960, and ratified on March 29, 1961. The amendment rectified an omission in the Constitution that prevented residents of the District of Columbia from voting in presidential elections.

Article I of the Constitution gives Congress the authority to accept land from the states and administer it as the seat of national government. The District of Columbia was organized under this provision from land given to the federal government by Virginia and Maryland.

The government of the city of Washington and the District of Columbia has been dominated by Congress for most of the district's history. Congress is empowered by Article I to exercise exclusive authority over the seat of government. In the 1820s Congress allowed citizens of the district to vote for a mayor and city council. In 1871 Congress created a territorial form of government for the district. All the officials, including a legislative assembly, were appointed by the president. This system was abandoned in 1874, when Congress reestablished direct control over the city government.

From the 1870s until 1961, residents of the district were denied all rights to vote. Though residents paid federal and local taxes and were drafted into the military services, they could not vote. The Twenty-third Amendment gave district residents the right to vote for president. Under the amendment the number of the district's electors cannot exceed that of the state with the smallest population. In practice, this means that the district elects three presidential electors.

The amendment did not address the issue of representation in Congress. Later, a constitutional amendment that would have given residents the right to vote for congressional representatives was proposed, but it failed to win ratification. In 1970 Congress created the position of nonvoting delegate to the House of Representatives, to be elected by the district's residents.

## TYING ARRANGEMENT

*An agreement in which a vendor conditions the sale of a particular product on a vendee's promise to purchase an additional, unrelated product.*

In a tying arrangement, the product that the vendee actually wants to purchase is known as the "tying product," while the additional product that the vendee must purchase to consummate the sale is known as the "tied product." Typically, the tying product is a desirable good that is in considerable demand by vendees in a given market. The tied product is normally less desirable, of poorer quality, or otherwise difficult to sell. For example, motion picture distributors frequently tie the sale of popular video cassettes to the purchase of second-rate films that are piling up in their warehouses for lack of demand.

Tying arrangements are governed by the law of UNFAIR COMPETITION. Such arrangements tend to restrain competition by requiring buyers to purchase inferior goods that they do not want or more expensive goods that they could purchase elsewhere for less. In addition, competitors may reduce their prices to below market level to attract purchasers away from prospective tying arrangements. Competitors who sell their products at below-market prices for an extended period can suffer enormous losses or go out of business.

Not every tying arrangement is illegal under the law of unfair competition. Four elements must be proved to establish that a particular tying arrangement is illegal. First, the tying arrangement must involve two different products. Manufactured products and their component parts, such as an automobile and its engine, are not considered different products and may be tied together without violating the law. However, the law does not permit a shoe manufacturer to tie the purchase of promotional T-shirts to the sale of athletic footwear because these items are considered unrelated.

Second, the purchase of one product must be conditioned on the purchase of another product. A buyer need not actually purchase a tied product in order to bring a claim. If a vendor refuses to sell a tying product unless a tied product is purchased, or agrees to sell a tying product separately only at an unreasonably high price, a court will declare the tying arrangement illegal. If a buyer can purchase a tying product separately on nondiscriminatory terms, however, there is no tie.

Third, a seller must have sufficient market power in a tying product to restrain competition in a tied product. Market power is measured by the number of buyers the seller has enticed to enter a particular tying arrangement. Sellers expand their market power by enticing additional buyers to purchase a tied product. However, sellers are prohibited from dominating a given market by locking up an unreasonably large share of prospective buyers in tying arrangements.

Fourth, a tying arrangement must be shown to appreciably restrain commerce. Evidence of anticompetitive effects includes unreasonably high prices for tied products and unreasonably low prices for competing products in a tied market. A plaintiff need not establish that a business has actually controlled prices through a tying arrangement, as is required to establish certain monopolistic practices, but only that prices and other market conditions have been significantly influenced.

Tying arrangements are regulated at both the state and the federal level. At the federal level, tying arrangements are regulated by the SHERMAN ANTITRUST ACT (15 U.S.C.A. § 1) and the CLAYTON ACT (15 U.S.C.A. § 14). At the state level, tying arrangements are regulated by analogous statutes and various common-law doctrines. At either level both purchasers and businesses that are injured by illegal tying arrangements have two remedies available: money damages (compensation for pecuniary losses) and injunctive relief (a court order restraining a business from tying its products).

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## ♦ TYLER, JOHN

John Tyler served as the tenth president of the United States from 1841 to 1845. A political maverick and a proponent of STATES' RIGHTS, Tyler was the first vice president to succeed to the office because of the death of a president. Rejecting the concept of an acting president, Tyler established the right of the vice president to assume the powers and duties of president.

"THE GREAT PRIMARY AND CONTROLLING INTEREST OF THE AMERICAN PEOPLE IS UNION—UNION NOT ONLY IN THE MERE FORMS OF GOVERNMENT . . . BUT UNION FOUNDED IN AN ATTACHMENT OF . . . INDIVIDUALS FOR EACH OTHER."
—JOHN TYLER

Tyler was born into a politically active family on March 29, 1790, in Greenway, Virginia. He graduated from the College of William and Mary in 1807 and was admitted to the Virginia bar in 1809. He began his political career in 1811 when he was elected as a member of the DEMOCRATIC PARTY to the Virginia legislature. In 1817 he was elected to the U.S. House of Representatives, where he remained until 1821. During his years in the House, he was a consistent supporter of states' rights, believing that the role of the federal government should be limited. Tyler, who owned slaves, objected to the MISSOURI

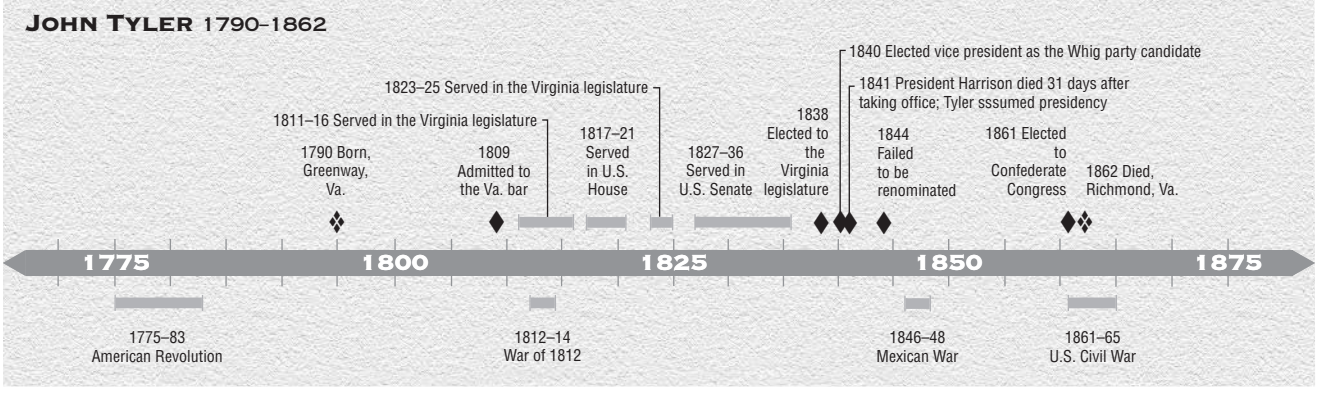

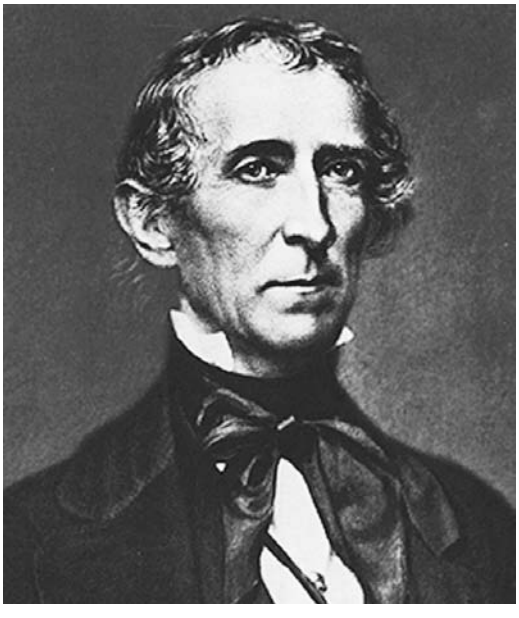

*John Tyler.*
DAGUERROTYPE BY MATHEW BRADY. LIBRARY OF CONGRESS

**COMPROMISE OF 1820**, which placed restrictions on the expansion of **SLAVERY** to new states.

In 1823 Tyler returned to the Virginia legislature, where he served two years. In 1825 he was elected governor of Virginia, and in 1827 he was elected to the U.S. Senate.

During his nine years in the Senate, Tyler opposed several of President Andrew Jackson's policies though he and Jackson were both Democrats. In 1832 South Carolina issued its nullification policy, declaring its right as a state to reject federal tariff regulations. Jackson, in retaliation, initiated the Force Act of 1833 (4 Stat. 633), which permitted the president to use the military, if necessary, to collect tariff revenues. Tyler did not agree with South Carolina's actions, but he vehemently opposed Jackson's use of federal power to bring the state to heel.

Tyler lost the support of Virginia Democrats when he refused to reverse his 1834 vote of censure against Jackson for removing deposits from the **BANK OF THE UNITED STATES**. In 1836, when the Virginia legislature gave him a direct order to change his vote, Tyler resigned from the Senate rather than obey. He returned to Virginia, where he was elected again to the Virginia legislature in 1838.

In the presidential election of 1840, the **WHIG PARTY** sought to broaden its northern political base by selecting a vice presidential candidate who could attract southern voters. Accordingly, Tyler was chosen to be the vice presidential candidate to run with **WILLIAM HENRY HARRISON**, known as "Tippecanoe" from the battle where he had defeated Chief Tecumseh of the Shawnee tribe. In a campaign devoid of political ideas, the political slogan "Tippecanoe and Tyler too" popularized the two Whig candidates, who won the election.

The elderly Harrison died thirty-one days after becoming president, and Tyler assumed the presidency on April 4, 1841. As the first vice president to become president because of the death of the chief executive, Tyler rejected the idea that he serve as acting president. Though the U.S. Constitution was silent on the matter of succession, Tyler announced that he would assume the full powers and duties of the office, setting a precedent that would be followed by other vice presidents. (Procedures for presidential succession were added to the Constitution by the **TWENTY-FIFTH AMENDMENT** in 1967.)

Tyler's maverick streak, which had once stung the Democrats, soon offended the Whigs. Still a staunch supporter of states' rights, Tyler twice vetoed a Whig-sponsored act establishing a national bank. As a result, his entire cabinet resigned, with the exception of the **SECRETARY OF STATE, DANIEL WEBSTER**. For the remainder of his term, Tyler was a chief executive without a political party. Consequently, his accomplishments were few. He did approve the annexation of Texas and he signed the Preemption Act of 1841 (5 Stat. 453), which gave squatters on government land the right to buy 160 acres of land at the minimum auction price without competitive bidding.

After leaving office in 1845, Tyler continued to defend states' rights. In 1861, before the outbreak of the Civil War, Tyler directed the Washington conference, which was convened in a final attempt to avert war. When that meeting failed, Tyler favored secession and was elected as a member of the Confederate Congress. He died on January 18, 1862, in Richmond, Virginia, however, before he could take his seat in the secessionist Congress.

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## UCC

*An abbreviation for the* UNIFORM COMMERCIAL CODE.

## UCCC

*An abbreviation for the* UNIFORM CONSUMER CREDIT CODE.

## UCMJ

*An abbreviation for the* UNIFORM CODE OF MILITARY JUSTICE *(10 U.S.C.A. § 801 et seq.).*

## ULTIMATE FACTS

*Information essential to a plaintiff's right of action or a defendant's assertion of a defense.*

The concept of ultimate facts used to be an essential part of preparing a PLEADING in a civil action. Until the late 1930s, the rules of CIVIL PROCEDURE in federal and state courts required parties to plead on the basis of a statement of facts constituting the CAUSE OF ACTION or defense. These ultimate facts alleged the substance of the cause of action and were distinguished from evidentiary facts, which concerned the particular events of the case, and conclusions of law. The highly technical distinctions among ultimate facts, evidentiary facts, and conclusions of law created great confusion and often led to the dismissal of cases based on a pleading mistake.

The development of these distinctions can be traced to the 1848 New York Code of Civil Procedure, which was largely drafted by DAVID DUDLEY FIELD. During the next few decades, most of the states, except those on the East Coast, adopted what came to be known as the Field Code. The Field Code was a significant improvement over common-law systems of procedure. However, the code required that the complaint contain "a plain and concise statement of the facts constituting plaintiff's cause of action," and used the pleading as a way of narrowing and defining the dispute rather than as a general means of initiating a civil action.

Over time, however, CODE PLEADING became very technical and required the pleader to set forth the facts underlying and demonstrating the existence of the cause of action. The pleading of ultimate facts was necessary, while the inclusion of evidentiary facts and conclusions of law was improper. Judges and attorneys found it difficult, if not impossible, to draw meaningful and consistent distinctions among these three terms. With no clear dividing line between a fact that demonstrated a cause of action and one that introduced specific evidence, courts made formal and often ARBITRARY decisions that were unrelated to the merits of the case. Courts demanded a high degree of specificity and bound the parties to prove the ultimate facts alleged or lose the lawsuit. This requirement was particularly harsh because it forced a party to allege detailed facts early in the case when there was still uncertainty over what facts had occurred.

By the 1930s legal commentators agreed that the need to plead ultimate facts was hindering the cause of justice. The Federal Rules of Civil Procedure, which were adopted in 1938, eliminated the ultimate fact requirement and changed the philosophy behind the plaintiff's complaint and the defendant's answer. In place of ultimate facts, rule 8(a) provides that the complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Likewise, the defendant "shall state in short and plain terms" the defenses to the plaintiff's complaint. The rules do not require that only facts be alleged. Most states have adopted the federal rules in whole or in part, and the need to state ultimate facts in a pleading is no longer of great importance.

## ULTRA VIRES

[Latin, Beyond the powers.] *The doctrine in the law of corporations that holds that if a corporation enters into a contract that is beyond the scope of its corporate powers, the contract is illegal.*

The doctrine of ultra vires played an important role in the development of corporate powers. Though largely obsolete in modern private corporation law, the doctrine remains in full force for government entities. An ultra vires act is one beyond the purposes or powers of a corporation. The earliest legal view was that such acts were void. Under this approach a corporation was formed only for limited purposes and could do only what it was authorized to do in its corporate charter.

This early view proved unworkable and unfair. It permitted a corporation to accept the benefits of a contract and then refuse to perform its obligations on the ground that the contract was ultra vires. The doctrine also impaired the security of title to property in fully executed transactions in which a corporation participated. Therefore, the courts adopted the view that such acts were VOIDABLE rather than void and that the facts should dictate whether a corporate act should have effect.

Over time a body of principles developed that prevented the application of the ultra vires doctrine. These principles included the ability of shareholders to ratify an ultra vires transaction; the application of the doctrine of ESTOPPEL, which prevented the defense of ultra vires when the transaction was fully performed by one party; and the prohibition against asserting ultra vires when both parties had fully performed the contract. The law also held that if an agent of a corporation committed a TORT within the scope of the agent's employment, the corporation could not defend on the ground that the act was ultra vires.

Despite these principles the ultra vires doctrine was applied inconsistently and erratically. Accordingly, modern corporation law has sought to remove the possibility that ultra vires acts may occur. Most importantly, multiple purposes clauses and general clauses that permit corporations to engage in any lawful business are now included in the articles of incorporation. In addition, purposes clauses can now be easily amended if the corporation seeks to do business in new areas. For example, under traditional ultra vires doctrine, a corporation that had as its purpose the manufacturing of shoes could not, under its charter, manufacture motorcycles. Under modern corporate law, the purposes clause would either be so general as to allow the corporation to go into the motorcycle business, or the corporation would amend its purposes clause to reflect the new venture.

State laws in almost every jurisdiction have also sharply reduced the importance of the ultra vires doctrine. For example, section 3.04(a) of the Revised Model Business Corporation Act, drafted in 1984, states that "the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act." There are three exceptions to this prohibition: it may be asserted by the corporation or its shareholders against the present or former officers or directors of the corporation for exceeding their authority, by the attorney general of the state in a proceeding to dissolve the corporation or to enjoin it from the transaction of unauthorized business, or by shareholders against the corporation to enjoin the commission of an ultra vires act or the ultra vires transfer of real or PERSONAL PROPERTY.

Government entities created by a state are public corporations governed by municipal charters and other statutorily imposed grants of power. These grants of authority are analogous to a private corporation's articles of incorporation. Historically, the ultra vires concept has been used to construe the powers of a government entity narrowly. Failure to observe the statutory limits has been characterized as ultra vires.

In the case of a private business entity, the act of an employee who is not authorized to act

on the entity's behalf may, nevertheless, bind the entity contractually if such an employee would normally be expected to have that authority. With a government entity, however, to prevent a contract from being voided as ultra vires, it is normally necessary to prove that the employee actually had authority to act. Where a government employee exceeds her authority, the government entity may seek to rescind the contract based on an ultra vires claim.

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CROSS-REFERENCES

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## UMPIRE

*A person chosen to decide a question in a controversy that has been submitted to* ARBITRATION *but has not been resolved because the arbitrators cannot reach agreement, or one who has been chosen to be a permanent arbitrator for the duration of a collective bargaining agreement.*

Arbitration is the submission of a dispute to an unbiased third person designated by the parties to the controversy, who agree in advance to comply with the decision. Arbitration is quicker, less expensive, and more informal than a court proceeding. Commercial arbitration and labor arbitration are commonplace in the United States. Persons who hear these types of dispute resolution cases are called arbitrators and umpires. Umpires are used either to break an impasse in arbitration or to serve as specialized, long-term decision makers.

An arbitrator is a person selected by the parties to hear the dispute. An arbitrator must be mutually agreed upon by the parties and may be named, for example, in a labor-management COLLECTIVE BARGAINING agreement or may be chosen after the dispute has arisen. In labor arbitration a single arbitrator may hear a case, but frequently a three-member arbitration panel hears the dispute. The three members consist of an arbitrator selected by management, another chosen by labor, and a chairperson selected either by the parties or by the two arbitrators appointed by the parties. The arbitrators selected by the parties act like advocates, but the chairperson is expected to be neutral.

If the three-person panel cannot agree on a decision, the arbitrators may name an umpire to decide the controversy. The umpire acts independently and is vested with the sole authority to decide the issues that have been presented.

An umpire is also sometimes used in labor-management grievance proceedings. In this situation a single, permanent umpire is appointed to resolve disputes for the term of the collective bargaining agreement. The umpire becomes familiar with the economic, financial, and day-to-day working conditions of an industry and may rely on precedents developed by previous umpires. This form of umpire system began in the anthracite coal mining industry in the early 1900s and has been used in other industries, including clothing manufacturing and newspaper printing.

CROSS-REFERENCES

Alternative Dispute Resolution; Grievance Procedure; Labor Law; Labor Union.

## UNAUTHORIZED PRACTICE

*The performance of professional services, such as the rendering of medical treatment or legal assistance, by a person who is not licensed by the state to do so.*

The unauthorized practice of a profession is prohibited by state laws. Violators of these laws are generally subject to criminal sanctions, but what constitutes unauthorized practice is constantly changing and is the subject of dispute. For example, persons opposed to laws that ban the unauthorized PRACTICE OF LAW argue that the legal profession uses these statutes to maintain a MONOPOLY over legal services, many of which can be performed by nonlawyers.

The professions have sought the enactment of unauthorized practice statutes in part to protect the public from persons who are not trained to give professional assistance and who may give substandard treatment. The elements of a profession include a rigorous course of training, the certification of competency by a professional society or state agency, state licensure, and an obligation to follow a code of ethics. Based on these elements, the professions and most state legislatures believe that the public interest is best served by restricting the performance of medical,

legal, and other services to the members of their respective professions.

The unauthorized practice of law has become a matter of public debate. Nonlawyers can read laws, interpret laws, draft documents, and proceed in legal matters on their own behalf, but in most states they cannot draft documents for others, give specific legal advice, or appear in court for another person. Nevertheless, most states allow nonlawyers to sell legal forms and general instructions and offer typing services for completing legal documents. Those critical of lawyers contend that nonlawyers should be permitted to draft simple legal documents because they can provide their services at a considerably lower price than an attorney.

The existence of statutes prohibiting the unauthorized practice of law does not guarantee that those statutes will be enforced, an issue that is a concern to the legal profession. Enforcement is difficult both because proof of the unauthorized practice of law is difficult to obtain and because many prosecutors place a low priority on pursuing these violations.

In 1998, Nolo Press, a Berkeley, California, publisher of popular legal SELF-HELP books, found itself the target of the Texas Unauthorized Practice of Law (UPL) committee. This committee, a subcommittee of the Texas Supreme Court, claimed that Nolo's products put individuals at risk because consumers saw Nolo as a legitimate and "official" legal resource. Nolo contended that it was in no way representing itself as a substitute for actual legal advice. The company's goal was to provide legal information to consumers in plain English, thus allowing them to decide whether to seek further advice or handle their legal problems themselves. Nolo sued the UPL, claiming among other things, that the committee's attempt to bar Nolo publications was in violation of the FIRST AMENDMENT. Nolo was joined in the suit by the Texas Library Association and the American Association of Law Librarians. Numerous organizations criticized the UPL committee's action, including many Nolo customers. In June 1999, the Texas State Legislature passed HB 1507, which exempts self-help legal materials, such as Nolo's, from UPL prosecution as long as the materials contain disclaimers that they do not constitute actual legal advice. (Nolo's products had carried such disclaimers for many years). The case against Nolo was officially dropped on September 21, 1999.

A person who has been harmed by relying on the advice of someone not authorized to practice a profession may sue that person in a tort action for damages sustained.

CROSS-REFERENCES

License.

## UNCONSCIONABLE

*Unusually harsh and shocking to the conscience; that which is so grossly unfair that a court will proscribe it.*

When a court uses the word *unconscionable* to describe conduct, it means that the conduct does not conform to the dictates of conscience. In addition, when something is judged unconscionable, a court will refuse to allow the perpetrator of the conduct to benefit.

In contract law an unconscionable contract is one that is unjust or extremely one-sided in favor of the person who has the superior bargaining power. An unconscionable contract is one that no person who is mentally competent would enter into and that no fair and honest person would accept. Courts find that unconscionable contracts usually result from the exploitation of consumers who are often poorly educated, impoverished, and unable to find the best price available in the competitive marketplace.

Contractual provisions that indicate gross one-sidedness in favor of the seller include provisions that limit damages against the seller, limit the rights of the purchaser to seek court relief against the seller, or disclaim a WARRANTY. State and federal CONSUMER PROTECTION and CONSUMER CREDIT laws were enacted to prevent many of these unconscionable contract provisions from being included in sales contracts.

Unconscionability is determined by examining the circumstances of the parties when the contract was made; these circumstances include, for example, the bargaining power, age, and mental capacity of the parties. The doctrine is applied only where it would be an affront to the integrity of the judicial system to enforce such contracts.

Unconscionable conduct is also found in acts of FRAUD and deceit, where the deliberate MISREPRESENTATION of fact deprives someone of a valuable possession. Whenever someone takes unconscionable advantage of another person, the action may be treated as criminal fraud or the civil action of deceit.

No standardized criteria exist for measuring whether an action is unconscionable. A court of law applies its conscience, or moral sense, to the facts before it and makes a subjective judgment. The U.S. Supreme Court's "shock the conscience test" in **ROCHIN V. CALIFORNIA**, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952), demonstrates this approach. The Court ruled that pumping the stomach of a criminal suspect in search of drugs offends "those canons of decency and fairness which express the notions of justice of English-speaking peoples." The Court relied on these general historical and moral traditions as the basis for ruling unconstitutional an unconscionable act.

## UNDERINCLUSIVENESS

*A characteristic of a statute or administrative rule dealing with* **FIRST AMENDMENT** *rights and other fundamental liberty interests, whereby the statute prohibits some conduct but fails to prohibit other, similar conduct.*

An underinclusive law is not necessarily unconstitutional or invalid. The U.S. Supreme Court has recognized that all laws are underinclusive and selective to some extent. If a law is substantially underinclusive, however, it may be unconstitutional.

The case of *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993), illustrates unconstitutional underinclusiveness. The Church of Lukumi Babalu Aye is a religious sect that practices Santeria, which involves the ritual killing of animals. Shortly after officials of the city of Hialeah, Florida, learned that the church had purchased property in that city, the city passed certain ordinances for the stated purpose of promoting public health and preventing cruelty to animals. Because the ordinances prohibited the ritual killing of animals, the church's practice of animal sacrifice was made illegal.

According to the Supreme Court, the ordinances infringed on the freedom of the church to practice its religion. Furthermore, the ordinances were so underinclusive in their attempt to promote public health and prevent animal cruelty that they violated the First Amendment to the U.S. Constitution. The ordinances failed to punish other, nonreligious conduct that endangered the city's interest in animal **WELFARE**, such as fishing or hunting for sport. The ordinances also failed to cover other, nonreligious animal killing that threatened the city's interest in public health. The ordinances did not, for example, prevent hunters from bringing animal carcasses to their homes. Ultimately, the Court concluded, the ordinances had "every appearance of a prohibition that society is prepared to impose upon Santeria worshippers but not upon itself."

If a law infringes on constitutionally protected free speech, press, or associational rights, it may be unconstitutionally underinclusive if it is based on the content of the speech or somehow regulates ideas. In *R.A.V. v. City of St. Paul,* 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), the Supreme Court struck down a hate speech ordinance that prohibited "the display of a symbol which one knows or has reason to know 'arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.'" A youth in St. Paul, Minnesota, had been prosecuted under the ordinance for burning a cross in the yard of an African American family. The Court held that the law was unconstitutionally underinclusive under the First Amendment because it punished only certain speech addressing particular topics; the law addressed the content, rather than the manner, of the speech.

A law is not necessarily invalid just because it is underinclusive. For example, a statute that prohibited the use of loudspeaker systems near a hospital might be underinclusive for failing to prohibit shouting or the use of car horns in the same area. This type of underinclusiveness concerns only the manner of delivering speech, however, and is therefore more likely to pass constitutional scrutiny than a statute that prohibits speech on particular subjects.

**CROSS-REFERENCES**

Hate Crime; Time, Place, and Manner Restrictions.

## UNDERSTANDING

*A general term referring to an agreement, either express or implied, written or oral.*

The term *understanding* is an ambiguous one; in order to determine whether a particular understanding would constitute a contract that is legally binding on the parties involved, the circumstances must be examined to discover whether a meeting of the minds and an intent to be bound occurred.

**CROSS-REFERENCES**

Meeting of Minds.

## UNDERTAKING

*A written promise offered as security for the performance of a particular act required in a legal action.*

In a criminal case, an undertaking of bail is security for the appearance of the defendant. In the event the defendant fails to appear, the amount posted as bail is forfeited.

An undertaking with adequate security is a bond. The term is used in a general sense to refer to any type of promise or stipulation.

## UNDERWRITE

*To insure; to sell an issue of stocks and bonds or to guarantee the purchase of unsold stocks and bonds after a public issue.*

The word *underwrite* has two meanings. To issue an insurance policy on the life of a person or on property of another is to underwrite that person or property; hence insurance companies are also referred to as underwriters.

The other meaning refers to the issuing of stocks or bonds by a corporation or a government agency to raise capital. The underwriter is a company, often an investment bank, that agrees to sell the SECURITIES. Under its contract with the corporation, the underwriter agrees to pay for any unsold shares.

An underwriter operates by purchasing all of the new issue of stocks or bonds from the corporation at one price and selling the issue in smaller lots to public investors at a price high enough to cover the expenses associated with the sale and to provide a profit. When making a PUBLIC OFFERING of securities, an underwriter is responsible for setting the offering price. It uses its knowledge of the STOCK MARKET and current interest rates and yields to determine the likely demand for the issue.

Typically, an underwriter does not underwrite and distribute a security issue alone but instead organizes a syndicate for the venture. Syndicates are often used when the amount of capital sought by a corporation is much larger than a single underwriter cares to risk. By dividing the underwriting of the securities issue, the risk is spread among the various members of the syndicate. The firm that originates the issue acts as manager of the syndicate.

If an underwriter cannot organize a syndicate large enough to cover the entire issue, it usually will arrange with stock brokerage firms to purchase shares at a reduced price, called a concession. This price reduction provides the brokerage firms with a margin to cover expenses and a small profit upon resale.

A corporation selects an underwriter either through private negotiation of a contract or through competitive bidding. In a bidding process, the corporation sets the terms of the issue and then invites potential underwriters to submit bids. The issue is then sold to the highest bidder.

## UNDUE INFLUENCE

*A judicially created defense to transactions that have been imposed upon weak and vulnerable persons that allows the transactions to be set aside.*

Virtually any act of persuasion that overcomes the free will and judgment of another, including exhortations, importunings, insinuations, flattery, trickery, and deception, may amount to undue influence. Undue influence differs from duress, which consists of the intentional use of force, or threat of force, to coerce another into a grossly unfair transaction. Blackmail, EXTORTION, bad faith threats of criminal prosecution, and oppressive ABUSE OF PROCESS are classic examples of duress.

Four elements must be shown to establish undue influence. First, it must be demonstrated that the victim was susceptible to overreaching. Such conditions as mental, psychological, or physical disability or dependency may be used to show susceptibility. Second, there must be an opportunity for exercising undue influence. Typically, this opportunity arises through a confidential relationship. Courts have found opportunity for undue influence in confidential relationships between HUSBAND AND WIFE, fiancé and fiancée, PARENT AND CHILD, trustee and beneficiary, administrator and legatee, GUARDIAN AND WARD, attorney and client, doctor and patient, and pastor and parishioner. Third, there must be evidence that the defendant was inclined to exercise undue influence over the victim. Defendants who aggressively initiate a transaction, insulate a relationship from outside supervision, or discourage a weaker party from seeking independent advice may be attempting to exercise undue influence. Fourth, the record must reveal an unnatural or suspicious transaction. Courts are wary, for example, of testators who make abrupt changes in their last will and testament after being diagnosed with a terminal illness or being declared incompetent, especially

if the changes are made at the behest of a beneficiary who stands to benefit from the new or revised testamentary disposition.

Nevertheless, courts will examine the facts closely before finding that a transaction has been tainted by undue influence. Mere suspicion, surmise, or conjecture of overreaching is insufficient. The law permits loved ones and confidants to advise and comfort those in need of their support without fear of litigation. Courts are also aware that the doctrine of undue influence can be used as a sword by the vindictive and avaricious who seek to invalidate a perfectly legal transaction for personal gain. When undue influence is found to have altered a transaction, however, courts will make every effort to return the parties to the same position they would have occupied had the overreaching not occurred.

## UNEMPLOYMENT COMPENSATION

*Insurance benefits paid by the state or federal government to individuals who are involuntarily out of work in order to provide them with necessities, such as food, clothing, and shelter.*

Unemployment compensation for U.S. workers was established by the federal SOCIAL SECURITY ACT OF 1935 (42 U.S.C.A. §§ 301 et seq.). Unemployment insurance provides workers who have lost their job through no fault of their own with monetary payments for a given period of time or until they find a new job. This compensation is designed to give an unemployed worker time to find a new job equivalent to the one lost without major financial distress. Unemployment compensation is also justified as a way to provide the U.S. economy with consumer spending during an economic downturn.

The mass unemployment during the Great Depression of the 1930s led to the enactment of the federal unemployment compensation law. States had resisted establishing their own unemployment compensation plans because the first states to tax employers to fund such a plan would lose business and jobs to other states. Therefore, a federal program was needed. Much of the federal plan was implemented under the Federal Unemployment Tax Act of 1935 (26 U.S.C.A. §§ 3301 et seq.). In 1938, Congress enacted the Railroad Unemployment Insurance Act (42 U.S.C.A. §§ 351 et seq.), which provides unemployment compensation for railroad workers who lose their jobs.

**Reasons for Unemployment, May 2003[a]**

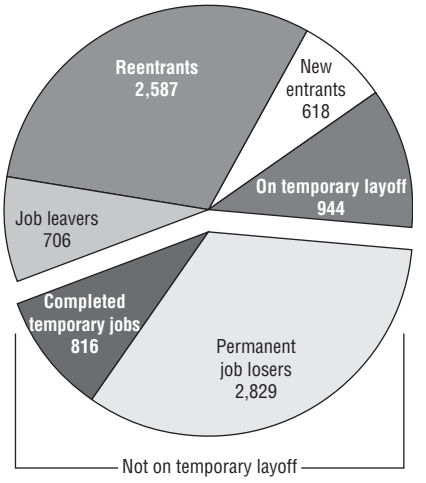


**Numbers are in thousands**

[a]Numbers are not seasonally adjusted.

SOURCE: U.S. Department of Labor, Bureau of Labor Statistics, *Employment Situation*.

A combination of federal and state taxes is levied on employers to fund state-administered programs that meet minimum federal standards. Federal funds are also used for administrative costs and to set up employment offices that attempt to match workers with new jobs. In 2000, approximately 125 million individuals, or 97 percent of all wage earners, were covered by unemployment compensation programs. During that same year, an average of 38 percent of unemployed individuals were receiving some sort of unemployment benefits.

In general, a tax on employers provides the funds to pay unemployment compensation. An employer who has more than a specified minimum number of employees is ordinarily required to file regular reports that disclose the number of employees and the amount of their wages, including tips. A standard or basic rate is charged against the employer based on the amount of wages paid. If the employer does not lay off employees, the employer will be entitled to a credit. An employer's record is unaffected if an employee quits or is discharged for good cause. An employer of eight or more persons is permitted to subtract what he pays to the state unemployment compensation fund from his federal unemployment tax.

**Duration of Unemployment, May 2003[a]**

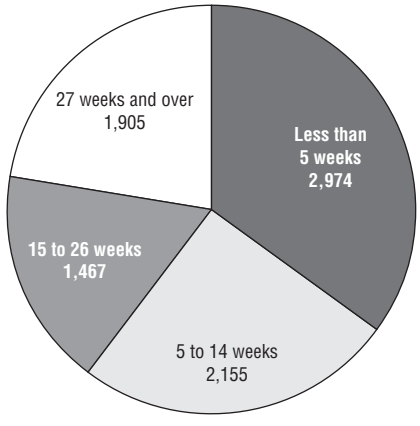


**Numbers are in thousands**

[a]Numbers are not seasonally adjusted.

SOURCE: U.S. Department of Labor, Bureau of Labor Statistics, *Employment Situation*.

Each state establishes which employers are obligated to pay state unemployment taxes. Ordinarily a state will require payment of the tax from every individual, partnership, or corporation that pays wages to a specified minimum number of people to do work. Certain types of employment are excluded from mandated coverage, including some agricultural labor, some charitable or nonprofit work, and some government work.

Any individual who qualifies under the terms of the state unemployment compensation law is entitled to collect benefits. To be eligible, an individual must have worked for a certain minimum number of weeks and earned wages in at least the amount set by state law. Certain states will pay reduced benefits where part-time work provides only a small amount of money. Individuals who are self-employed are not entitled to unemployment compensation

A state may not discriminate because of gender or religious beliefs in the awarding of unemployment compensation. In *Wimberly v. Labor and Industrial Relations Commission,* 479 U.S. 511, 107 S. Ct. 821, 93 L. Ed. 2d 909 (1987), the U.S. Supreme Court ruled that no person may be denied compensation solely on the basis of pregnancy or the termination of pregnancy. The Court, in *Hobbie v. Unemployment Appeals Commission,* 480 U.S. 136, 107 S. Ct. 1046, 94 L. Ed. 2d 190 (1987), held that a state may not deny unemployment benefits to a worker who is discharged for refusing to work because of religious beliefs that he or she adopted after becoming employed.

Unemployment compensation is paid for a certain number of weeks. However, during economic recessions the federal government has provided emergency assistance to allow states to extend the time during which individuals can receive benefits. The states are allowed to use money they have deposited in special accounts of the federal Unemployment Trust Fund. For a state to use this emergency benefit system, the unemployment rate usually must reach a designated percentage within the state or the country.

An unemployed worker is not required to submit proof that he needs money or that he has no other means of support. Anyone who qualifies has a right to collect benefits because payments are designed to replace part of the wages lost during temporary periods of unemployment. Severance pay does not necessarily preclude payment of benefits, but some state laws treat it as earnings for the amount of time such payments cover and do not allow payment of unemployment compensation until that time has expired. Accumulated vacation time, vacation pay, or a leave of absence also postpone or prevent the payment of benefits.

Ordinarily, state unemployment compensation statutes provide benefits for those who are unemployed because of their employer's inability to provide work for them. An employee who is discharged may receive benefits unless he was discharged for good cause. Good cause for discharge usually is related to recent misconduct on the job. Misconduct in private life or during off-duty hours may constitute good cause for firing an employee if it affects the person's work. Carelessness, disregard for the employer's interest, intoxication, the use of illegal drugs, illegal work slowdowns, use of abusive language, absenteeism, and habitual lateness can be reasons for a discharge and denial of unemployment benefits. A person denied benefits may appeal this determination, first to a state administrative office and then to a court of law.

An unemployed worker is required to be available for work. This means that the person must actively seek a new job while collecting benefits. In cases where it appears that the person is not willing and able to work, he has no right to receive unemployment compensation.

Workers who leave a job to find a better job or to attend school are not eligible for benefits. An individual who is too ill to work, who has no means of transportation, or who refuses to accept more than a small amount of work to avoid forfeiting retirement benefits is not regarded as being available for work. Employees who are on strike generally cannot collect unemployment compensation. However, individuals in such circumstances may qualify for other types of government aid.

An individual who is out of work is given no guarantee that he will find an attractive and convenient job. If jobs are available, even outside the person's local area, he is required to find one. An individual is not, however, disqualified from receiving unemployment compensation merely because he has recently moved, except in cases where no employment is available in the new locality. An unemployed worker cannot decline to accept a new job because he does not like the wages or hours. A person who refuses to accept a job is no longer entitled to receive unemployment compensation if the job is reasonable and suited to his skills.

In 2000, the LABOR DEPARTMENT issued rules that allowed states to provide unemployment compensation benefits to parents after the birth or ADOPTION of a child. An extension of the Family and Medical Leave Act of 1993, the new Birth and Adoption Unemployment Compensation (BAA-UC) was to be funded by individual state unemployment compensation funds. Several states took steps to initiate programs, but no state adopted legislation. Opponents of the program claimed that it was contrary to federal compensation policy, which is in place for individuals who are unemployed through no fault of their own. They also contended that BAA-UC would put an additional tax burden on employers, and that it would deflate a compensation system that was already in funding jeopardy. In 2003, the Labor Department moved to dismantle the program.

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CROSS-REFERENCES

Employment Law; Labor Law; New Deal; Old-Age, Survivors, and Disability Insurance; Workers' Compensation.

## UNENUMERATED RIGHTS

*Rights that are not expressly mentioned in the written text of a constitution but instead are inferred from the language, history, and structure of the constitution, or cases interpreting it.*

Typically, the term *unenumerated rights* describes certain fundamental rights that have been recognized by the U.S. Supreme Court under the U.S. Constitution. In addition, state courts have recognized unenumerated rights emanating from the principles enunciated by their own state constitutions. No comprehensive list of unenumerated rights has ever been compiled nor could such a list be readily produced precisely because these rights are unenumerated.

Nevertheless, a partial list of unenumerated rights might include those specifically recognized by the Supreme Court, such as the right to travel, the right to privacy, the right to autonomy, the right to dignity, and the right to an ABORTION, which is based on the right to privacy. Other rights could easily be added to this list, and no doubt will be in the future. In WASHINGTON V. GLUCKSBERG, 117 S. Ct. 2258 (1997), the Supreme Court ruled that there is no unenumerated constitutional right to die.

Unenumerated rights commonly are derived through a reasoned elaboration of express constitutional provisions. The FIRST AMENDMENT, for example, guarantees FREEDOM OF SPEECH but says nothing about the nature of the speech protected. Through the process of interpretation, the Supreme Court has held that the Free Speech Clause protects both verbal and nonverbal expression, as well as communicative conduct. The right to engage in offensive symbolic expression, such as flag burning, forms an essential part of the freedoms contemplated by the First Amendment, freedoms that are integral to maintaining an open and democratic society (TEXAS V. JOHNSON, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 [1989]). Judicial protection of such unenumerated rights, the Court has reasoned, helps establish a PENUMBRA or buffer that insulates expressly enumerated liberties from governmental encroachment.

Courts are ordinarily reluctant to recognize new unenumerated rights. Most judges are sensitive to accusations of "inventing" new liberties out of whole cloth. Critics charge that judges who recognize new unenumerated rights are imposing their personal values on the law, rather than faithfully interpreting the text of the Constitution. The role of judges, these critics contend, is solely to apply the law, while only legislators are empowered to make new law through the exercise of value-laden judgments.

The Supreme Court attempts to deflect such criticism by relying on history as justification for its decisions recognizing certain unenumerated rights. For example, the Fifth and Fourteenth Amendments to the U.S. Constitution prohibit the government from depriving any person of life, liberty, or property without "due process of law." Yet the amendments do not define "due process," nor do they address issues such as how much process is due during a given legal proceeding. Although the Supreme Court has interpreted this provision to require procedural fairness in civil and criminal litigation, each procedural right the Court has recognized is technically unenumerated because the DUE PROCESS CLAUSE offers no hints as to what legal procedures it contemplates.

In criminal cases the Supreme Court has held that the Due Process Clause guarantees every defendant the right to be presumed innocent by the trier of fact, either a judge or a jury, until proved guilty BEYOND A REASONABLE DOUBT by the government (IN RE WINSHIP, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 [1970]). In reaching this decision, the Supreme Court stated that the REASONABLE DOUBT and PRESUMPTION OF INNOCENCE standards have been associated with the concept of due process since early colonial times. By citing history and tradition as the basis for many of its controversial decisions, the Supreme Court provides an answer to its critics who claim that unenumerated rights have no basis other than personal predilections of the judges who recognize them.

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Posner, Richard A. 1992. "Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights." *University of Chicago Law Review* 59 (winter).

CROSS-REFERENCES

Bill of Rights; Due Process of Law; Fourteenth Amendment; Judicial Review.

## UNETHICAL CONDUCT

*Behavior that falls below or violates the professional standards in a particular field. In law, this can include* ATTORNEY MISCONDUCT *or ethics violations. The standards for conduct to be observed by attorneys can be found in the Code of Professional Responsibility; members of the judiciary adhere to those found in the Canons of Judicial Ethics.*

## UNFAIR COMPETITION

*Any fraudulent, deceptive, or dishonest trade practice that is prohibited by statute, regulation, or the* COMMON LAW.

The law of unfair competition serves five purposes. First, the law seeks to protect the economic, intellectual, and creative investments made by businesses in distinguishing themselves and their products. Second, the law seeks to preserve the good will that businesses have established with consumers. Third, the law seeks to deter businesses from appropriating the good will of their competitors. Fourth, the law seeks to promote clarity and stability by encouraging consumers to rely on a merchant's good will and reputation when evaluating the quality of rival products. Fifth, the law seeks to increase competition by providing businesses with incentives to offer better goods and services than others in the same field.

Although the law of unfair competition helps protect consumers from injuries caused by deceptive trade practices, the remedies provided to redress such injuries are available only to business entities and proprietors. Consumers who are injured by deceptive trade practices must avail themselves of the remedies provided by state and federal CONSUMER PROTECTION laws. In general, businesses and proprietors injured by unfair competition have two remedies: injunctive relief (a court order restraining a competitor from engaging in a particular fraudulent or deceptive practice) and money damages (compensation for any losses suffered by an injured business).

### General Principles

The freedom to pursue a livelihood, operate a business, and otherwise compete in the marketplace is essential to any free enterprise system. Competition creates incentives for businesses to earn customer loyalty by offering quality goods at reasonable prices. At the same time, competition can also inflict harm. The freedom to compete gives businesses the right to lure customers away from each other. When one business entices enough customers away from competitors, those rival businesses may be forced to shut down or move.

The law of unfair competition will not penalize a business merely for being successful in the marketplace. Nor will the law impose liability simply because a business is aggressively marketing its product. The law assumes, however, that for every dollar earned by one business, a dollar will be lost by a competitor. Accordingly, the law prohibits a business from *unfairly* profiting at a competitor's expense. What constitutes unfair competition varies according to the CAUSE OF ACTION asserted in each case. These include actions for the infringement of PATENTS, TRADEMARKS, and copyrights; actions for the wrongful appropriation of TRADE DRESS, trade names, trade secrets, and service marks; and actions for the publication of defamatory, false, and misleading representations.

### Interference with Business Relations

No business can compete effectively without establishing good relationships with its employees and customers. In some instances parties execute a formal written contract to memorialize the terms of their relationship. In other instances business relations are based on an oral agreement. Most often, however, business relations are conducted informally with no contract or agreement at all. Grocery shoppers, for example, typically have no contractual relationship with the supermarkets they patronize.

Business relations are often formalized by written contracts. Merchant and patron, employer and employee, labor and management, wholesaler and retailer, and manufacturer and distributor all frequently reduce their relationships to contractual terms. These contractual relationships create an expectation of mutual performance—that each party will perform its part under the contract's terms. Protection of these relationships from outside interference facilitates performance and helps stabilize commercial undertakings. Interference with contractual relations upsets expectations, destabilizes commercial affairs, and increases the costs of doing business by involving competitors in petty squabbles or litigation.

Virtually any contract, whether written or oral, qualifies for protection from unreasonable interference. Noncompetition contracts are a recurrent source of litigation in this area of law. These contracts commonly arise in professional employment settings where an employer requires a skilled employee to sign an agreement promising not to go to work for a competitor in the same geographic market. Such agreements are generally enforceable unless they operate to deprive an employee of the right to meaningfully pursue a livelihood. An employee who chooses to violate a noncompetition contract is guilty of breach of contract, and the business that lured the employee away may be held liable for interfering with an existing contractual relationship in violation of the law of unfair competition.

Informal trade relations that have not been reduced to contractual terms are also protected from outside interference. The law of unfair competition prohibits businesses from intentionally inflicting injury upon a competitor's informal business relations through improper means or for an improper purpose. Improper means include the use of violence, UNDUE INFLUENCE, and coercion to threaten competitors or intimidate customers. For example, it is illegal for a business to blockade the entryway to a competitor's shop or impede the delivery of supplies with a show of force. The mere refusal to deal with a competitor, however, is not considered an improper means of competition, even if the refusal is motivated by spite.

Any malicious or monopolistic practice aimed at injuring a competitor may constitute an improper purpose of competition. Monopolistic behavior includes any agreement between two or more people that has as its purpose the exclusion or reduction of competition in a given market. The SHERMAN ANTI-TRUST ACT OF 1890 (15 U.S.C.A. §§ 1 et seq.) makes such behavior illegal by forbidding the formation of contracts, combinations, and conspiracies in restraint of trade. Corporate MERGERS AND ACQUISITIONS that suppress competition are prohibited by the CLAYTON ACT of 1914, as amended by the ROBINSON-PATMAN ACT of 1936 (15 U.S.C.A. §§ 12 et seq.).

The Clayton Act also regulates the use of predatory pricing, tying agreements, and exclusive dealing agreements. Predatory pricing is the use of below-market prices to inflict pecuniary injury on competitors. A tying agreement is an agreement in which a vendor agrees to sell a particular good on the condition that the vendee buy an additional or "tied" product. Exclusive dealing agreements require vendees to satisfy all of their needs for a particular good exclusively through a designated vendor. Although none of these practices is considered inherently illegal, any of them may be deemed improper if it manifests a tendency to appreciably restrain competition, substantially increase prices, or significantly reduce output.

### Trade Name, Trademark, Service Mark, and Trade Dress Infringement

Before a business can establish commercial relations with its customers, it must create an identity for itself, as well as for its goods and services. Economic competition is based on the premise that consumers can distinguish between products offered in the marketplace. Competition is made difficult when rival products become indistinguishable or interchangeable. Part of a business's identity is the good will it has established with consumers, while part of a product's identity is the reputation it has earned for quality and value. As a result, businesses spend tremendous amounts of resources to identify their goods, distinguish their services, and cultivate good will.

The four principal devices businesses use to distinguish themselves are trade names, trademarks, service marks, and trade dress. Trade names are used to identify corporations, partnerships, sole proprietorships, and other business entities. A TRADE NAME may be the actual name of a business that is registered with the government, or it may be an assumed name under which a business operates and holds itself out to the public. For example, a husband and wife might register their business under the name "Sam and Betty's Bar and Grill," while doing business as "The Corner Tavern." Both names are considered trade names under the law of unfair competition.

Trademarks consist of words, symbols, emblems, and other devices that are affixed to goods for the purpose of signifying their authenticity to the public. The circular emblem attached to the rear end of vehicles manufactured by Bavarian Motor Works (BMW) is a familiar example of a TRADEMARK designed to signify meticulous craftsmanship. Whereas trademarks are attached to goods through tags and labels, service marks are generally displayed through advertising. As their name suggests, service marks identify services rather than goods. Orkin pest control is a well-known example of a SERVICE MARK.

Trade dress refers to a product's physical appearance, including its size, shape, texture, and design. Trade dress can also include the manner in which a product is packaged, wrapped, presented, or promoted. In certain circumstances particular color combinations may serve as a company's trade dress. For example, the trade dress of Chevron Chemical Company includes the red and yellow color scheme found on many of its agricultural products (*Chevron Chemical Co. v. Voluntary Purchasing Groups, Inc.,* 659 F.2d 695 [5th Cir. 1981]).

To receive protection from infringement, trade names, trademarks, service marks, and trade dress must be distinctive. Generic language that is used to describe a business or its goods and services rarely qualifies for protection. For example, the law would not allow a certified public accountant to acquire the exclusive rights to market his business under the name "Accounting Services." Such a name does nothing to distinguish the services offered by one accountant from those offered by others in the same field. A court would be more inclined to confer protection upon a unique or unusual name like "Accurate Accounting and Actuarial Acumen."

When competitors share deceptively similar trade names, trademarks, service marks, or trade dress, a cause of action for infringement may exist. The law of unfair competition forbids competitors from confusing consumers through the use of identifying trade devices that are indistinguishable or difficult to distinguish. Actual confusion need not be demonstrated to establish a claim for infringement, so long as there is a likelihood that consumers will be confused by similar identifying trade devices. Greater latitude is given to businesses that share similar identifying trade devices in unrelated fields or in different geographic markets. For example, a court would be more likely to allow two businesses to share the name "Hot Handguns," where one business sells firearms downtown, and the other business runs a country western theater in the suburbs.

Claims for infringement are cognizable under both state and federal law. At the federal level, infringement claims may be brought under the Lanham Trademark Act (15 U.S.C.A. §§ 1051 et seq.). At the state level, claims for infringement may be brought under analogous INTELLECTUAL PROPERTY statutes and miscellaneous common-law doctrines. Claims for infringement can be strengthened through registration. The first business to register a trademark or a service mark with the federal government is normally protected against any subsequent appropriation by a competitor. Although trade names may not be registered with the federal government, most states require businesses to register their trade names, usually with the SECRETARY OF STATE, and provide protection for the first trade name registered. Trade dress typically receives legal protection by being distinctive and recognizable without any formal registration requirements at the state or federal level.

### Theft of Trade Secrets and Infringement of Copyrights and Patents

The intangible assets of a business include not only its trade name and other identifying devices but also its inventions, creative works, and artistic efforts. Broadly defined as trade secrets, this body of commercial information may consist of any formula, pattern, process, program, tool, technique, mechanism or compound that provides a business with the opportunity to gain advantage over competitors. Although a TRADE SECRET is not patented or copyrighted, it is entrusted only to a select group of people. The law of unfair competition awards individuals and businesses a property right in any valuable trade information they discover and attempt to keep secret through reasonable steps.

The owner of a trade secret is entitled to its exclusive use and enjoyment. A trade secret is valuable not only because it enables a company to gain advantage over a competitor but also because it may be sold or licensed like any other property right. In contrast, commercial information that is revealed to the public, or at least to a competitor, retains limited commercial value. Consequently, courts vigilantly protect trade secrets from disclosure, appropriation, and theft. Businesses or opportunistic members of the general public may be held liable for any economic injuries that result from their theft of a trade secret. Employees may be held liable for disclosing their employer's trade secrets, even if the disclosure occurs after the employment relationship has ended.

Valuable business information that is disclosed to the public may still be protected from infringement by COPYRIGHT and patent law. Copyright law gives individuals and businesses the exclusive rights to any original works they create, including movies, books, musical scores, sound recordings, dramatic creations, and pantomimes. Patent law gives individuals and businesses the right to exclude all others from making, using, and selling specific types of inventions, such as mechanical devices, manufacturing processes, chemical formulas, and electrical equipment. Federal law grants these exclusive rights in exchange for full public disclosure of an original work or invention. The inventor or author receives complete legal protection for her intellectual efforts, while the public obtains valuable information that can be used to make life easier, healthier, or more pleasant.

Like the law of trade secrets, patent and copyright law offers protection to individuals and businesses that have invested considerable resources in creating something useful or valuable and wish to exploit that investment commercially. Unlike trade secrets, which may be protected indefinitely, patents and copyrights are protected only for a finite period of time. Applications for copyrights are governed by the Copyrights Act (17 U.S.C.A. § 401), and patent applications are governed by the Patent Act (35 U.S.C.A. § 1).

### False Advertising, Trade Defamation, and Misappropriation of a Name or Likeness

A business that successfully protects its creative works from theft or infringement may still be harmed by FALSE ADVERTISING. Advertising need not be entirely false to be actionable under the law of unfair competition, so long as it is sufficiently inaccurate to mislead or deceive consumers in a manner that inflicts injury on a competitor. In general, businesses are prohibited from placing ads that either unfairly disparage the goods or services of a competitor or unfairly inflate the value of their own goods and services. False advertising deprives consumers of the opportunity to make intelligent comparisons between rival products. It also drives up costs for

consumers who must spend additional resources in examining and sampling products.

Both federal and state laws regulate deceptive advertising. The Lanham Trademark Act regulates false advertising at the federal level. Many states have adopted the Uniform Deceptive Trade Practices Act, which prohibits three specific types of representations: (1) false representations that goods or services have certain characteristics, ingredients, uses, benefits, or quantities; (2) false representations that goods or services are new or original; and (3) false representations that goods or services are of a particular grade, standard, or quality. Advertisements that are only partially accurate may give rise to liability if they are likely to confuse prospective consumers. Ambiguous representations may require clarification to prevent the imposition of liability. For example, a business that accuses a competitor of being "untrustworthy" may be required to clarify that description with additional information if consumer confusion is likely to result.

Trade DEFAMATION is a close relative of false advertising. The law of false advertising regulates inaccurate representations that tend to mislead or deceive the public. The law of trade defamation regulates communications that tend to lower the reputation of a business in the eyes of the community. Trade defamation is divided into two categories: LIBEL AND SLANDER.

Trade libel generally refers to written communications that tend to bring a business into disrepute, whereas trade slander refers to defamatory oral communications. Before a business may be held liable under either category of trade defamation, the FIRST AMENDMENT requires proof that a defamatory statement was published with "actual malice," which the Supreme Court defines as any representation that is made with knowledge of its falsity or in reckless disregard of its truth (NEW YORK TIMES V. SULLIVAN, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 [1964]). The actual malice standard places some burden on businesses to verify, prior to publication, the veracity of any attacks they level against competitors in print or electronic media.

It is also considered tortious for a business to use the name or likeness of a famous individual for commercial advantage. All individuals are vested with an exclusive property right in their identity. No person, business, or other entity may appropriate an individual's name or likeness without permission. Despite the existence of this common-law TORT, businesses occasionally associate their products with popular celebrities without first obtaining consent. A business that falsely suggests that a celebrity has sponsored or endorsed one of its products will be held liable for money damages equal to the economic gain derived from the wrongful appropriation of the celebrity's likeness.

### A Simpler Definition

The law of unfair competition includes several related doctrines. Nevertheless, some courts have attempted to simplify the law by defining unfair competition as any trade practice whose harm outweighs its benefits. The U.S. legal system is a cornerstone of the free enterprise system. But the freedom to compete does not imply the right to engage in predatory, monopolistic, fraudulent, deceptive, misleading, or unfair competition. On balance, competition becomes unfair when its effects on trade, consumers, and society as a whole are more detrimental than beneficial.

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#### CROSS-REFERENCES

Antitrust Law; Lanham Act; Monopoly; Noncompete Agreement; Tying Arrangement.

## UNFAIR LABOR PRACTICE

*Conduct prohibited by federal law regulating relations between employers, employees, and labor organizations.*

Before 1935 U.S. LABOR UNIONS received little protection from the law. Employers used many tactics to prevent employees from joining unions and to disrupt union activities in the workplace. The passage of the National Labor Relations Act (NLRA) of 1935, also known as the WAGNER ACT (29 U.S.C.A. § 151 et seq.), marked the beginning of affirmative federal government support of unionization and COLLECTIVE BARGAINING. The NLRA prohibits employers from

# Banning the Permanent Replacement of Economic Strikers: Fair or Unfair?

The National Labor Relations Act (NLRA) of 1935, also known as the **WAGNER ACT** (29 U.S.C.A. § 151 et seq.), affirms the right of employees to strike in order to force an employer to provide better wages or working conditions. Workers who strike for economic gain may be permanently replaced by the employer, however, as long as the replacement workers do not receive better terms than those offered to the strikers. The NLRA prohibits the replacement of workers who strike to protest an unfair labor practice.

Unions have long sought to amend the NLRA to prohibit the permanent replacement of striking workers in all strikes, not just unfair labor practice strikes. They see the use of permanent replacement workers as the ultimate unfair labor practice and argue that it gives the employer disproportionate bargaining power in labor-management negotiations over wages and working conditions. Meanwhile employers contend that banning permanent replacement workers would give unions too much power and would cripple U.S. business.

Legislation that would ban permanent replacement workers has been defeated repeatedly in Congress. After the last congressional defeat of such legislation, President **BILL CLINTON** issued **EXECUTIVE ORDER** No. 12,954 on March 8, 1995 (60 FR 13023). This order barred businesses that permanently replace striking workers from receiving federal contracts. The president concluded that the hiring of permanent replacements escalated labor disputes and led to longer strikes, both of which are contrary to sound labor policy.

A coalition of business groups immediately challenged the order. In *Chamber of Commerce of the United States v. Reich,* 74 F.3d 1322 (D.C. Cir. 1996), a three-judge federal appeals panel struck down the executive order, ruling that federal **LABOR LAW** preempted executive action. Efforts by some state legislatures to ban permanent replacement workers have also been struck down on the basis that the NLRA preempts **STATE ACTION**.

Union leaders continue to seek modification of the NLRA. The leaders of big industrial unions blame the loss of some strikes on the hiring of permanent replacements. Though employers have had the right to hire permanent replacements for decades, the unions contend that employers have only used this type of hardball tactic on a consistent basis since the 1980s. According to the unions, the loss of strikes because of this tactic has demoralized their members and put unions on the defensive in wage and working condition negotiations.

Unions argue that it is unfair for U.S. workers to lose their jobs when they exercise the fundamental right to strike. The

taking certain actions against their employees and the unions that represent them. A prohibited action is called an unfair labor practice.

Section 158 of the NLRA lists employer actions that constitute **UNFAIR LABOR PRACTICES**. Section 158(a)(1) prohibits employers from interfering with the rights of employees to establish, belong to, or aid labor organizations; to conduct collective bargaining through the employees' chosen representatives; and to participate in concerted activities, such as strikes, for the purpose of collective bargaining or other mutual aid or protection.

Section 158(a)(3) outlaws employer-formed or -dominated "company unions." Section 158(a)(3) forbids employers to discriminate in hiring, firing, and other aspects of employment on the basis of union activity. Section 158(a)(4) prohibits firing or discriminating against any employee because he has filed charges or testified before the agency charged with enforcing the statute. Section 158(a)(5) requires employers to engage in collective bargaining with employee representatives.

The NLRA proved to be an effective tool for labor unions. Union membership and economic power grew so rapidly between 1935 and 1945 that the business community complained that unions were abusing their new strength. As a result, in 1947 Congress passed the **TAFT-HARTLEY ACT**, also known as the **LABOR-MANAGEMENT RELATIONS ACT** (29 U.S.C.A. § 141 et seq.), which amended the NLRA by prohibiting certain union activities as unfair labor practices. These activities include secondary boycotts (boycotts against the employer's customers or suppliers), jurisdictional strikes over work assignments, and strikes to force an employer to discharge an employee on account of her union affiliation or lack of it.

hiring of permanent replacements is a strikebreaking tactic that undermines the COLLECTIVE BARGAINING process set out by the NLRA by ultimately giving employers the upper hand in negotiations. An employer's express or implied threat to hire permanent replacements also threatens union solidarity, as members question the wisdom of going on strike.

In addition, unions are concerned that the hiring of permanent replacements can result in the demise of the union at the company that has been struck. Replacement workers, who are subjected to the threats and taunts of strikers, are unlikely to join the union at some future time. Thus, the employer not only prevails in a labor strike but also secures a nonunion workforce.

Apart from the effect on union-management relations and bargaining power, supporters of a ban on permanent replacements contend that consumers are hurt by such hiring. They argue that permanent replacements threaten the reliability and quality of products because those workers are less experienced and cannot perform as well as those with longtime service to a company.

U.S. businesses, however, believe strongly in the right to hire permanent replacement workers. They reject the idea that hiring temporary replacement workers during a strike is a viable option. Temporary replacements must be fired after an economic strike has been settled because union workers are entitled to reclaim their jobs. Employers point out that temporary workers require a substantial investment in training and that it is difficult to promote morale and loyalty among workers whose jobs will end with the resolution of the strike. Employers argue that it is more efficient to hire permanent replacements and provide them with sufficient training to ensure that the quality and reliability of a company's products will not suffer.

Defenders of replacement workers also believe that the right to hire during a strike is essential to the balance that exists between labor and business. The right of labor to strike for better wages and working conditions is matched by the right of business to hire permanent replacements. If permanent replacements were banned, employers would be forced to capitulate to overreaching union economic demands or face more frequent and crippling strikes.

In addition, nonunion employers fear that a ban on replacement workers would give unions more leverage in organizing workers. A union could promise that workers who joined the union would be able to resume their jobs after a strike for economic demands, no matter how excessive.

Business leaders also contend that a ban on permanent replacement workers would drive up labor costs, which would be bad for the national economy. A ban would give unions too much power and encourage them to strike. Businesses assert that permitting the hiring of permanent replacements deters unions from striking and leads to more reasonable and productive collective bargaining.

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The NLRA also established the NATIONAL LABOR RELATIONS BOARD (NLRB) as an ADMINISTRATIVE AGENCY to administer and interpret the unfair labor practice provisions. The NLRB hears allegations of unfair labor practices and makes rulings, which may be appealed in the federal courts.

CROSS-REFERENCES

Labor Law; Labor Union.

## UNIFORM ACTS

*Laws that are designed to be adopted generally by all the states so that the law in one jurisdiction is the same as in another jurisdiction.*

Uniform acts or laws are prepared and sponsored by the National Conference of Commissioners on Uniform State Laws, whose members are experienced lawyers, judges, and professors of law generally appointed to the commission by state governors. Uniform acts or laws are adopted, in whole or substantially, by individual states at their option. Uniform laws are intended to promote fairness through the equal operation of standards upon the citizens of all states without distinction or discrimination. One uniform law, the Uniform Controlled Substances Act, is a comprehensive law that governs the use, sale, and distribution of DRUGS AND NARCOTICS in most states.

CROSS-REFERENCES

Model Acts.

## UNIFORM CODE OF MILITARY JUSTICE

The Uniform Code of Military Justice (UCMJ) was enacted by Congress in 1950 (10 U.S.C.A. § 801 et seq.) to establish a standard set of procedural and substantive criminal laws for all the

U.S. military services. (It went into effect the following year.) The UCMJ applies to all members of the military, including those on active duty, students at military academies, prisoners of war, and, in some cases, retired or reserve personnel. The UCMJ changed MILITARY LAW in several ways, especially by providing substantial procedural safeguards for an accused, such as the right to be represented by counsel, to be informed of the nature of the accusation, to remain silent, and to be told of these rights.

Military law exists separately from civilian law. The rights of individuals serving in the ARMED SERVICES are not as extensive as civilians rights because the military is regulated by the overriding demands of discipline and duty. Recognizing this need for a separate body of regulations to govern the military, Article I, Section 8, Clause 14, of the Constitution empowers Congress "to make Rules for the Government and Regulation of the land and naval Forces."

Until the enactment of the UCMJ, the Army and Navy each had its own system of military justice, known as the Articles of War in the Army and the Articles for the Government of the Navy. The UCMJ ensures that any accused member of the armed services will be subject to the same substantive charges and procedural rules and that he or she will be guaranteed identical procedural safeguards.

Some provisions of the UCMJ concern COMMON LAW crimes, such as murder, rape, LARCENY, and ARSON. The elements of these offenses do not differ from those in state codes. Other provisions deal with offenses that are unique to the military, including absence offenses, duties-and-orders offenses, superior-subordinate relationship offenses, and combat-related offenses.

Absence offenses include absence without leave (art. 86, 10 U.S.C.A. § 886) and desertion (art. 85, 10 U.S.C.A. § 885). These are the most prevalent crimes in the military. Approximately 75 percent of all courts-martial involve charges of being absent without leave under article 86.

Duties-and-orders offenses include failure to obey an order or regulation (art. 92, 10 U.S.C.A. § 892) and being intoxicated on duty (art. 112, 10 U.S.C.A. § 912). Superior-subordinate relationship offenses include violations such as CONTEMPT for officials (art. 88, 10 U.S.C.A. § 888) and mutiny (art. 94, 10 U.S.C.A. § 894). Combat-related offenses include misbehavior before the enemy (art. 99, 10 U.S.C.A. § 899) and misconduct as a prisoner (art. 105, 10 U.S.C.A. § 905).

The UCMJ also includes the so-called General Articles (arts. 133 and 134, 10 U.S.C.A. §§ 933, 934), which proscribe certain conduct in nonspecific terms. Article 133 makes unlawful any conduct by an officer that is "unbecoming to an officer and a gentleman." Article 134 proscribes "all disorders and neglects to the prejudice of a good order and discipline . . ., [and] all conduct of a nature to bring discredit upon the armed forces." The constitutionality of these articles was upheld in the face of a FIRST AMENDMENT challenge in *Parker v. Levy*, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974).

Article 15 (10 U.S.C.A. § 815) of the UCMJ provides for nonjudicial punishment. Most minor violations of the UCMJ are processed under this article. The accused appears before his commanding officer, who passes judgment and imposes the sentence, if any. The military favors nonjudicial punishment because it gives the commanding officer a direct method of discipline, the process is quick and efficient, and the accused's record is not marred by a COURT-MARTIAL conviction.

Procedurally, the UCMJ provides for a three-level system of courts that is similar to the structure of civilian courts. Criminal matters are handled by courts-martial, which are analogous to civilian trial courts. There are three types of court-martial: the general court-martial, the special court-martial, and the summary court-martial. A general court-martial is used for serious offenses. The court has five or more members, but a defendant also has the right to have a military judge hear the case. The prosecutor, defense counsel, and military judge in a general court-martial must be lawyers. The military judge advises the court on matters of law and makes rulings as to the introduction of evidence. A general court-martial may impose any penalty that is authorized by the UCMJ as punishment for the offense.

A special court-martial concerns itself with intermediate-level offenses. The court has three or more members, but the defendant may elect to be tried by a military judge. The maximum sentence that may be imposed by a special court-martial is six months of confinement, forfeiture of pay, reduction in rank, and a bad-conduct discharge.

A summary court-martial may be used only to prosecute enlisted personnel for minor offenses. Only one officer hears the case, and the maximum penalty is confinement for one month, forfeiture of two-thirds of a month's pay, and reduction in rank.

Under the UCMJ, all cases in which the sentence involves death, a punitive discharge, or imprisonment for a term of one year or more must be reviewed by a Court of Criminal Appeals (CCA). A CCA must also affirm any sentence imposed by a court-martial before the sentence can be executed. Each branch of the armed services has its own CCA. Generally, a three-judge panel reviews court-martial convictions and sentences. CCA judges may be commissioned officers or civilians, but all must be lawyers.

The U.S. Court of Appeals for the Armed Forces (USCAAF), formerly known as the Court of Military Appeals, is the highest civilian court responsible for reviewing the decisions of military courts. It is an appellate court and consists of three civilian judges appointed by the president to serve 15-year terms. The USCAAF hears all cases where the death penalty is imposed, all cases forwarded by the JUDGE ADVOCATE general of each service for review after CCA review, and certain discretionary appeals. Its decisions are appealable to the U.S. Supreme Court.

The UCMJ has been attacked by critics who believe that it severely and unnecessarily restricts First Amendment and other constitutional rights of military personnel. Article 15's nonjudicial punishment has been criticized as susceptible to abuse, bias, and conflicts of interest. Because the military courts are necessarily different from civilian courts, the U.S. Supreme Court has limited the jurisdiction of the UCMJ. Discharged soldiers cannot be court-martialed for offenses committed while in the military. Civilian employees of the armed forces overseas and civilian dependents of military personnel accompanying them overseas are also not subject to the UCMJ. In addition, a crime committed by a member of the armed services must be related to military service in order for the UCMJ to apply.

Early in 2001, the National Institute of Military Justice, an independent nonprofit organization, sponsored the creation of a five-member panel of experienced military leaders to coincide with the 50th anniversary of the UCMJ. Chaired by Walter Cox III, a former chief judge of the USCAAF, it was known as the Cox Commission, and it collected information and heard testimony on the UCMJ's effectiveness after half a century. Based on its findings, the Cox Commission concluded that certain elements of the UCMJ were in need of reform. One recommendation was that military judges should be given more autonomy and that commanding officers should assume a lesser role in pretrial court-martial activity. These changes, noted the commission, would help ensure fair and impartial trials for defendants. The commission also recommended that death-penalty cases should be tried by a court-martial panel of 12 (in some trials, the number has been as few as five); that panels should be instructed not to consider race as a factor in their deliberations; and that the number of attorneys with capital-case experience should be increased. Another recommendation was that the UCMJ should revise its sexual-misconduct regulations to make them less ARBITRARY. The commission noted that the sexual-misconduct provisions from the original UCMJ were outdated in the twenty-first century and that they were at least in part responsible for several of the notorious sexual-misconduct scandals within the military during the 1990s. Although not requested by the military or any other part of the government, the recommendations were submitted to the House and Senate Armed Forces Committee and the Pentagon for their review.

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## UNIFORM COMMERCIAL CODE

*A general and inclusive group of laws adopted, at least partially, by all the states to further uniformity and fair dealing in business and commercial transactions.*

The Uniform Commercial Code (UCC) is a set of suggested laws relating to commercial transactions. The UCC was one of many uni-

form codes that grew out of a late nineteenth-century movement toward uniformity among state laws. In 1890 the AMERICAN BAR ASSOCIATION, an association of lawyers, proposed that states identify areas of law that could be made uniform throughout the nation, prepare lists of such areas, and suggest appropriate legislative changes. In 1892 the National Conference of Commissioners on Uniform State Laws (NCCUSL) met for the first time in Saratoga, New York. Only seven states sent representatives to the meeting.

In 1986 the NCCUSL offered up its first act, the Uniform Negotiable Instruments Act. The NCCUSL drafted a variety of other UNIFORM ACTS. Some of these dealt with commerce, including the Uniform Conditional Sales Act and the Uniform Trust Receipts Act. The uniform acts on commercial issues were fragmented by the 1930s and in 1940, the NCCUSL proposed revising the commerce-oriented uniform codes and combining them into one uniform set of model laws. In 1941 the American Law Institute (ALI) joined the discussion, and over the next several years lawyers, judges, and professors in the ALI and NCCUSL prepared a number of drafts of the Uniform Commercial Code.

In September 1951 a final draft of the UCC was completed and approved by the American Law Institute (ALI) and the NCCUSL, and then by the House of Delegates of the American Bar Association. After some additional amendments and changes, the official edition, with explanatory comments, was published in 1952. Pennsylvania was the first state to adopt the UCC, followed by Massachusetts. By 1967 the District of Columbia and all the states, with the exception of Louisiana, had adopted the UCC in whole or in part. Louisiana eventually adopted all the articles in the UCC except articles 2 and 2A.

The UCC is divided into nine articles, each containing provisions that relate to a specific area of COMMERCIAL LAW. Article 1, General Provisions, provides definitions and general principles that apply to the entire code. Article 2 covers the sale of goods. Article 3, COMMERCIAL PAPER, addresses negotiable instruments, such as promissory notes and checks. Article 4 deals with banks and their handling of checks and other financial documents. Article 5 provides model laws on letters of credit, which are promises by a bank or some other party to pay the purchases of a buyer without delay and without reference to the buyer's financial solvency. Article 6, on bulk transfers, imposes an obligation on buyers who order the major part of the inventory for certain types of businesses. Most notably, article 6 provisions require that such buyers notify creditors of the seller of the inventory so that creditors can take steps to see that the seller pays her debts when she receives payments from the buyer. Article 7 offers rules on the relationships between buyers and sellers and any transporters of goods, called carriers. These rules primarily cover the issuance and transfer of warehouse receipts and bills of lading. A bill of lading is a document showing that the carrier has delivered an item to a buyer. Article 8 contains rules on the issuance and transfer of stocks, bonds, and other investment SECURITIES. Article 9, SECURED TRANSACTIONS, covers security interests in real property. A security interest is a partial or total claim to a piece of property to secure the performance of some obligation, usually the payment of a debt. This article identifies when and how a secured interest may be created and the rights of the creditor to foreclose on the property if the debtor defaults on his obligation. The article also establishes which creditors can collect first from a defaulting debtor.

The ALI and the NCCUSL periodically review and revise the UCC. Since the code was originally devised, the House of Delegates of the American Bar Association has approved two additional articles: article 2A on PERSONAL PROPERTY leases, and article 4A on fund transfers. Article 2A establishes model rules for the leasing or renting of personal property (as opposed to real property, such as houses and apartments). Article 4A covers transfers of funds from one party to another party through a bank. This article is intended to address the issues that arise with the use of new technologies for handling money.

Most states have adopted at least some of the provisions in the UCC. The least popular article has been article 6 on bulk transfers. These provisions require the reporting of payments made, which many legislators consider an unnecessary intrusion on commercial relationships.

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**CROSS-REFERENCES**

Commissioners on Uniform Laws; Contracts; Llewellyn, Karl Nickerson; Model Acts; Sales Law.

## UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT

The Uniform Computer Information Transactions Act (UCITA) was promulgated to fill a void in existing contract law in the treatment of computer information. In a preface to UCITA, its creators wrote, "Our economy has experienced fundamental change . . . legal rules that are not relevant to commercial practice or that are uncertain in application inhibit contracting or raise transaction costs. UCITA was drafted in response to this fundamental economic change and need for clarity in the law."

UCITA had a somewhat complex history. It was originally envisioned as a new Article 2B of the UNIFORM COMMERCIAL CODE, but its various drafts were unable to satisfy the needs of the affected companies and consumers. Consequently, the National Conference Commission on Uniform State Laws (NCCUSL) decided to redraft the proposal as UCITA, narrower than what had been envisioned for the UCC. It was first introduced in 1999.

UCITA applies to computer-information transactions, defining them as "an agreement or the performance of it to create, modify, transfer, or license computer information or informational rights in computer information." UCITA further defines computer information as "information in electronic form that is obtained from or through the use of a computer or that is in digital or equivalent form capable of being processed by a computer." This definition includes a copy of information in that form and any documentation or packaging associated with the copy.

UCITA applies only where there are computer-information transactions, if computer information is not the primary matter of the transaction but is a secondary matter, UCITA applies only to the portion of transaction involving computer information. UCITA applies to agreements to create, modify, transfer, or distribute computer software, interactive multimedia products, computer data and databases, INTERNET and online information and other computer-information transactions. Other than those areas that do not fit into the definitions of computer information or computer-information transaction, UCITA expressly states that it does not apply to (a) financial services transactions; (b) motion pictures or audio or visual programming, other than in (i) a mass-market transaction or (ii) a submission of an idea or information or release of informational rights that may result in making a motion picture or a similar information product; or sound recordings, musical works, or phonorecords, or an enhanced sound recording, other than in the submission of an idea or information or release of informational rights that may result in the creation of such material or a similar information product; (c) compulsory licenses; (d) employment contracts; (e) contracts that do not require that information be furnished as computer information or in which the form of the information as computer information is otherwise significant with respect to the primary subject matter of the transaction; or (f) subject matter within the scope of other UCC Articles.

Despite these exceptions, UCITA affects a variety of different contracts. As the preface puts it, "UCITA governs access by Fortune 500 companies to sophisticated databases as well as distribution of software to the general public; it also covers custom software development and the acquisition of various rights in multimedia products." Included in its scope are shrink-wrap licenses and click-wrap agreements, both of which it validates; it also recognizes electronic records, authentication, and agents. The provisions of UCITA include general provisions, contract formation and terms, contract construction, warranties, transfer of interests and rights, performance, breach of contract, and remedies.

"UCITA is the first uniform contract law designed specifically to address the new information economy," according to its preface. Critics have assailed it as anti-consumer and probusiness, and they have claimed that its protections mostly protect the software industry. In response, the NCCUSL amended UCITA 38 times, adding such consumer protections to permit public criticism of the performance of the computer information and making it clear that a buyer must have the opportunity to review the

terms of an agreement in order for the terms to be enforceable. It now also explicitly states that other laws will continue to apply where known defects are undisclosed. Nonetheless, states have been slow to adopt UCITA, and as of 2003 only Maryland and Virginia have adopted its provisions.

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## UNIFORM CONSUMER CREDIT CODE

The Uniform Consumer Credit Code (UCCC) is a model statute that provides standards for credit transactions entered into by individuals who purchase, use, maintain, and dispose of products and services. The UCCC was originally approved by the National Conference of Commissioners on Uniform State Laws in 1968. It was revised in 1974 following criticism from consumer groups and has been adopted in nine states: Colorado, Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, Utah and Wyoming. South Carolina and Wisconsin have enacted CONSUMER PROTECTION codes that are substantially similar to the UCCC, and many states have included particular provisions from it in their CONSUMER CREDIT laws.

The UCCC is designed to provide protection to consumers who buy goods and services on credit. It attempts to simplify, clarify, and update legislation governing consumer credit and USURY, which is the illegal charging of high interest rates. The UCCC also sets ceilings on the rates consumers can be charged for credit.

Other provisions protect consumers against unfair practices by certain consumer credit suppliers by limiting the ability of creditors to use state court systems to execute on a consumer debtor's assets or to garnish a consumer debtor's wages. In addition, confession of judgment clauses are barred from consumer credit contracts. Such clauses require a person who borrows money or buys on credit to agree in advance to allow the attorney for the lender to get a court judgment against the borrower in the event of default without even telling the borrower.

The UCCC also seeks to comply with the disclosure regulations in consumer credit transactions in accordance with the federal CONSUMER CREDIT PROTECTION ACT of 1968 (16 U.S.C.A. § 1601 et seq.), which mandates that consumers purchasing on credit be given complete information on the interest rate, its calculation, the total amount of interest over the life of the contract, payment due dates, late penalties, and collection costs.

The UCCC was also proposed as a means of making the law of consumer credit, including administrative rules, more uniform throughout the fifty states. Because it has only been adopted in whole in nine states, the UCCC has not completely met this objective. Nevertheless, the many analogous provisions in state and federal consumer credit laws suggest a common purpose.

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## UNIFORM CRIME REPORTS

*Annual publications containing criminological data compiled by the* FEDERAL BUREAU OF INVESTIGATION *(FBI) and intended to assist in identifying law enforcement problems, especially with regard to: murder and non-negligent* MANSLAUGHTER*, forcible rape,* ROBBERY*, aggravated assault,* BURGLARY*, larceny-theft, motor vehicle theft, and* ARSON*. These studies provide a nationwide view of crime because they are based on statistics submitted by law enforcement agencies across the United States.*

Critics of the Uniform Crime Reports have argued that local police departments may shape their record-keeping practices to produce results that will lend support to departmental positions on issues relating to crime and crime control. Most observers generally acknowledge, however, that the potential for manipulation in record-keeping is not so great as to detract from the essential accuracy of the overall trends depicted in the Uniform Crime Reports.

The FBI makes current and historical reports available online at <www.fbi.gov/ucr/ucr.htm>.

## UNIFORM PROBATE CODE

The Uniform Probate Code (UPC) is a comprehensive statute that unifies, clarifies, and modernizes the laws governing the affairs of decedents and their estates, certain transfers accomplished other than by a will, and trusts and their administration. The UPC was originally approved by the National Conference of Commissioners on Uniform State Laws and the House of Delegates of the AMERICAN BAR ASSOCIATION in 1969. The purpose of the UPC is to modernize probate law and probate administration and to encourage uniformity through the adoption of the code by all fifty states. The UPC, which has been amended numerous times, has been adopted in its entirety by sixteen states: Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah. The other thirty-four states have adopted parts of the UPC, but in general the UPC has not succeeded in providing a uniform body of substantive and procedural probate law.

The UPC contains seven substantive articles. Article I contains general provisions, definitions, and jurisdictional topics. Article II governs wills and intestate succession, which occurs when a person dies without leaving a will. Article III deals with the probate of wills and the administration of estates, article IV concerns the probating of estates in states other than the domicile of the decedent, article V extends protection to persons under disability and their property, and article VI governs nonprobate transfers of property. Article VII contains comprehensive provisions on trust administration.

The prime objective of the UPC is to simplify the probate process. For example, article III provides for supervised and unsupervised administration of probate. For estates with few assets and no disputes among the beneficiaries, the UPC allows unsupervised administration. In this case the executor of the will, who is called a PERSONAL REPRESENTATIVE in the UPC, handles the probating of the estate without direct supervision by the probate court. The personal representative handles every step of the probate process by filing a series of simple forms with the probate court. Unsupervised administration reduces the cost of probate and speeds up the process. Probate courts are freed from dealing with routine matters and may concentrate their efforts on estates with substantial assets or contested matters, where supervised administration is necessary.

The adoption of the UPC by state legislatures has been fought both by attorneys, who are opposed to unsupervised administration and to the overturning of current state laws governing probate, and by bonding companies, which stand to lose business because unsupervised probate does not require the posting of a bond. In light of this opposition, the Commissioners on Uniform State Laws have developed freestanding acts from similar provisions integrated into the UPC. This technique permits provisions, such as those involving powers of attorney and guardianship, to become law without disturbing other parts of a state's probate code.

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### CROSS-REFERENCES

Descent and Distribution; Executors and Administrators.

## UNILATERAL CONTRACT

*A contract in which only one party makes an express promise, or undertakes a performance without first securing a reciprocal agreement from the other party.*

In a unilateral, or one-sided, contract, one party, known as the offeror, makes a promise in exchange for an act (or abstention from acting) by another party, known as the offeree. If the offeree acts on the offeror's promise, the offeror is legally obligated to fulfill the contract, but an offeree cannot be forced to act (or not act), because no return promise has been made to the offeror. After an offeree has performed, only one enforceable promise exists, that of the offeror.

A unilateral contract differs from a BILATERAL CONTRACT, in which the parties exchange mutual promises. Bilateral contracts are com-

monly used in business transactions; a sale of goods is a type of bilateral contract.

Reward offers are usually unilateral contracts. The offeror (the party offering the reward) cannot impel anyone to fulfill the reward offer. An offeree can sue for breach of contract, however, if the offeror does not provide the reward after the offeree has fulfilled the contract's requirements.

## UNION SHOP

*A type of business in which an employer is allowed to hire a nonunion worker, who, however, must subsequently join the union in order to be permitted to continue work.*

A union shop is different from a CLOSED SHOP; in the latter situation, the employee must be a union member before being hired.

CROSS-REFERENCES

Labor Law; Labor Union.

## UNITED FARM WORKERS OF AMERICA

The United Farm Workers of America (UFW) began in 1962 as a coalition of poorly paid migrant farm workers and grew into a powerful LABOR UNION that has consistently fought to increase wages and improve working conditions for its members. In addition to these issues, the UFW has advocated for stronger environmental protections, better housing, and other social justice issues.

The story of the UFW is inextricably intertwined with the biography of its founder, CÉSAR CHÁVEZ. Chávez was born on March 31, 1927, on a small farm in Arizona. After the Chávez family lost the farm (which had been in the family since the 1880s), they moved to California where they became migrant workers. Migrant workers moved from farm to farm picking crops for growers who generally paid low wages and provided no benefits. Entire families harvested fruits and vegetables, moving north as the crops ripened. Migrant housing consisted of dilapidated metal shacks most of which did not have indoor plumbing or running water. Working conditions were uniformly hot, dirty, and dismal. As pesticide application increased, no protection was provided to the workers who picked the crops with their bare hands. The first wave of migrant workers in the fields of California were small farmers and laborers from Arkansas, Kansas, Oklahoma, and Texas who were unable to make a living due to drought and the depression of the 1930s. This group was followed in the 1940s by foreign workers, primarily Mexicans, who were called "braceros."

Chávez and his family labored with the other migrant workers traveling from field to field. In 1952 Chávez became involved with the Community Service Organization (CSO) that helped Mexicans and other Latinos to become citizens, register to vote, and to improve their living conditions. After 10 years of doing organization work for the CSO, Chávez resigned in 1962 to become a full-time organizer of farm workers. Originally called the National Farm Workers Association (NFWA), the new organization grew rapidly.

In 1965 the NFWA began a boycott of grape growers in Delano, California. The strike lasted five years. In 1966 Chávez and his followers began a 340-mile trek from Delano to the state capitol in Sacramento to bring the plight of the farm workers to national attention. The march started with 75 people and ended in a rally of 10,000 people on the capitol steps. That same year Schenley Vineyards and the NFWA negotiated the nation's first union contract between a grower and a farm union. Also in 1966, the NFWA merged with the mostly Filipino American members of the Agricultural Workers Organizing Committee (AWOC) to form the United Farm Workers (UFW).

As the strike continued and the story of the farm workers became more widely known in the United States and abroad, many Americans rallied to their cause and joined the boycott of table grapes. By 1970 more than 65 percent of California's grape growers had signed contracts with the UFW. In order to avoid a similar UFW boycott, a number of Salinas Valley lettuce and vegetable growers signed contracts with the Teamsters Union. In response, the UFW called for a boycott of lettuce and more than 10,000 farm workers in California's Central Coast went on strike. In 1972 as membership continued to increase, the UFW became the United Farm Workers of America, AFL-CIO.

By 1979 the UFW had won pay increases and signed contracts with a significant number of growers of lettuce and other produce. The organization's membership had grown to approximately 100,000. Conflicts with the Teamsters Union, the murder of several UFW supporters, and the election of Republican governor George Deukmejian, whose administration supported

*Arturo Rodriguez, president of the United Farm Workers, and Dolores Huerta, the union's co-founder, lead an August 2002 march in Sacramento, California. In the background, a marcher holds aloft a portrait of César Chávez, co-founder of the UFW.*

AP/WIDE WORLD PHOTOS

the growers, led to setbacks for the movement as thousands of farm workers were fired, and UFW membership began to decline.

In the mid-1980s and early 1990s Chávez and the UFW continued to fight for improved conditions for farm workers. On April 23, 1993, Chávez died in his sleep at the home of a farm worker in San Luis, Arizona. Six days later 35,000 mourners walked behind Chávez's casket during his funeral in Delano. In 1994 President BILL CLINTON posthumously awarded the Medal of Freedom—the nation's highest civilian honor—to Chávez.

Veteran UFW leader Arturo S. Rodriguez succeeded Chávez as president. In 1994 Rodriguez and his supporters retraced the step of Chávez's historic trek in 1966. Over 20,000 UFW workers and supporters gathered again on the capitol steps to mark the start of the new UFW campaign to organize and empower farm workers. The reinvigorated UFW signed up more workers in California as well as in Florida and the state of Washington. In the early 2000s, the UFW was continuing to fight for better wages, win new COLLECTIVE BARGAINING rights, and gain better housing and sanitation for workers as well as restrict the use of DDT and other dangerous pesticides.

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CROSS-REFERENCES

Chávez, César; Labor Law; Labor Union.

## UNITED NATIONS

As of 2003, The United Nations (UN) is an organization of 191 states that strives to attain international peace and security, promotes fundamental HUMAN RIGHTS and equal rights for men and women, and encourages social progress. The successor to the LEAGUE OF NATIONS, the United Nations stems from the 1941 Inter-Allied Declaration signed by representatives of 14 countries (not including the United States) and the Atlantic Charter signed by President FRANKLIN D. ROOSEVELT and Prime Minister Winston Churchill of the United Kingdom. In 1942, 26 countries met in Washington, D.C., and signed the Declaration by United Nations in a cooperative effort to triumph over German dictator ADOLF HITLER during WORLD WAR II. In addition, wartime conferences in Moscow, Tehran, Yalta, and Washington, D.C. (at the Dumbarton Oaks estate in Georgetown), laid the foundation of the future organization. On June 25, 1945, delegates from 50 nations met in San Francisco and unanimously adopted the Charter of the United Nations. By October 24, 1945, China, France, the United States, the Soviet Union, the United Kingdom, and a majority of the charter's other signatories had ratified it, and the United Nations was officially established. Shortly thereafter the U.S. Congress unanimously invited the United Nations to set up headquarters in the United States, and the organization chose New York City as its permanent home.

The United Nations is open to all "peace-loving" states, a requirement construed liberally over the years. The United Nations consists of six major organs: the General Assembly, the Security Council, the Economic and Social Council, the Secretariat, the INTERNATIONAL COURT OF JUSTICE (World Court), and the

Trusteeship Council. The Trusteeship Council, which was established to encourage governments to prepare trust territories for self-government or independence, has largely completed its original task of supervising 11 non-self-governing territories. In 1994 the Security Council terminated the Trusteeship Agreement of Belau, a trust territory in the western Pacific that had been administered by the United States. As all other trust territories had previously obtained independence or self-government, the Trusteeship Council amended its rules and as of 2003 meets only as situations requiring action arise.

The main deliberative body of the United Nations, the General Assembly, somewhat resembles a parliament; each nation has one vote. The General Assembly has no power to compel any action by a member state, however. It only has the right to discuss and make recommendations on matters within the scope of the UN Charter. Headed by a president elected at each session, the assembly ordinarily meets from mid-September to mid-December; other sessions are held as necessary. Ordinary matters require only a majority vote, but important matters, such as recommendations on peace and security, election of members to the Security Council or the Economic and Social Council, or admission of member states, require a two-thirds majority. The assembly also approves the UN budget (including peacekeeping operations), sets policies, determines programs for the UN Secretariat, and, in conjunction with the Security Council's recommendation, appoints the UN secretary-general, the chief administrative officer of the United Nations.

The Security Council has the primary responsibility for maintaining peace and security. Five permanent members—the United States, China, France, the Russian Federation (replacing the Soviet Union), and the United Kingdom—join ten other members elected by the General Assembly for two-year terms. A representative of each member of the Security Council must always be present at UN headquarters so that the council can convene any time peace is threatened. Unlike the other UN organs, member states are obligated under the charter to carry out economic and diplomatic decisions by the council. All decisions require nine votes, but on all questions except procedural matters, the permanent members must vote unanimously or abstain. This VETO power has been exercised many times and can seriously undermine the Security Council's ability to take bold steps in tenuous situations.

*The United Nations Security Council meets at U.N. headquarters in New York in June 1999 to vote on a resolution relating to the Kosovo peace process.*
AFP/CORBIS

The Security Council usually seeks peaceful means such as mediation or settlement when international peace is threatened. Peacekeepers may be sent to prevent the outbreak of a conflict, or the council may issue a cease-fire directive once fighting has begun. The Security Council may impose economic sanctions and order collective military action.

The United Nations was involved in 56 peacekeeping operations between 1948 and 2003; military personnel are drawn from member states; more than 750,000 persons have served. Almost 1,800 peacekeepers have lost their lives. In 2003, 14 UN operations deployed approximately 37,000 personnel, including troops, civilian police, and military observers, from 89 countries.

The reality of UN peacekeeping efforts often falls short of the organization's ideals. For example, in the early 1990s UN troops attempted to restore order and provide humanitarian relief during the civil war in Somalia. Warring Somali factions greatly impeded the troops' efforts, however, and in 1995 the UN forces withdrew without succeeding in their mission. In addition, UN members sometimes pledge support for a mission but fail to deliver tangible evidence of that support. In 1994 the secretary-general determined that 35,000 troops would be needed to deter attacks on so-called safe areas in Bosnia and Herzegovina. Member states authorized fewer than 8,000 troops and took a year to provide them. Nevertheless, the United Nations has had some successes: its operations in Kashmir, Cyprus, Lebanon, Suez, Cambodia, and Mozambique have

been highly praised. The UN established six new missions in 1998–2000 in the Democratic Republic of the Congo, the Central African Republic, East Timor, Kosovo, Sierra Leone, and Ethiopia-Eritrea to deal with conflicts and crisis. The United Nations also monitored or observed elections in El Salvador, Nicaragua, Haiti, and South Africa.

The Economic and Social Council, which has 54 members, coordinates the economic and social work of the United Nations and its specialized agencies and institutions. Among other tasks, the council recommends and directs activities to promote economic growth in developing countries, promotes the observance of human rights, and attempts to foster cooperation in creating housing, controlling population growth, and preventing crime.

Fourteen specialized agencies are separate, autonomous organizations connected to the United Nations by specific agreements, mainly through the Economic and Social Council. Specialized agencies include the World Health Organization (WHO), the **WORLD BANK**, the **INTERNATIONAL MONETARY FUND** (IMF), and the U.N. Educational, Scientific, and Cultural Organization (UNESCO).

UNICEF, the United Nations Children's Fund (originally the United Nations International Children's Emergency Fund), is a semiautonomous organization reporting to the General Assembly and the Economic and Social Council. UNICEF has programs in 144 countries that address children's needs, including immunization, nutrition, primary **HEALTH CARE**, and education. A joint UNICEF-WHO program claims to have immunized 80 percent of the world's children against polio, tetanus, measles, whooping cough, diphtheria, and tuberculosis.

The United Nations also provides humanitarian aid for countries stricken by war, natural disaster, or famine through UNICEF, the World Food Programme, and other UN programs. In addition, the Office of the UN High Commissioner for Refugees, part of the Secretariat, helps assist and protect many millions displaced by strife.

With a staff numbering in the thousands, the Secretariat carries out the United Nations day-to-day functions in New York and throughout the world. Headed by the secretary-general, the Secretariat's staff represents nearly every member country. The Security Council recommends a candidate for secretary-general to the General Assembly, which appoints the secretary-general for a five-year term. In addition to administrative duties, the secretary-general plays an active role in worldwide peacemaking through diplomacy, by employing mediators, or by sending representatives to negotiate settlements or otherwise assist in resolving conflicts.

The International Court of Justice, also known as the World Court, is the judicial branch of the United Nations and meets in The Hague, Netherlands. The General Assembly and the Security Council elect its 15 judges for nine-year terms. Jurisdiction applies only to countries, not individuals. Unless required by a treaty, a country is not obligated to submit to the court's jurisdiction. However, a country agreeing to have a matter determined by the World Court is obligated to comply with the court's decision.

Competing needs, shifting alliances, problems of managing a huge worldwide bureaucracy, and the inevitable politics of the organization make it difficult for the United Nations to attain the goals set forth in its charter. Financial difficulties present further challenges. The United Nations is funded by dues from member states and is prohibited from borrowing from financial institutions. By the late 1990s the United States was responsible for a substantial part of the debt by failing to pay its dues. However, after the **SEPTEMBER 11, 2001, TERRORIST ATTACKS**, President **GEORGE W. BUSH** moved quickly to pay off the debt. By December 2001 the UN had received $1.67 billion from the United States, which amounted to payment of two-thirds of the debt. These payments, coupled with the payment of almost $5 billion of annual dues by members placed the UN in better financial shape that it had been in many years. It established a $150 million reserve fund for peacekeeping missions because of its improved financial condition.

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CROSS-REFERENCES

International Law; International Monetary Fund.

## UNITED STATES–CANADA FREE TRADE AGREEMENT

See NORTH AMERICAN FREE TRADE AGREEMENT.

## UNITED STATES GOVERNMENT MANUAL

*A comprehensive directory, published annually, that contains general information about the federal government with emphasis on the* EXECUTIVE BRANCH *and regulatory agencies, and also information about Congress and the Judicial Branch.*

In the *United States Government Manual,* the description of each executive department and ADMINISTRATIVE AGENCY is described according to (1) relevant statutes that created and affect the agency or its institutional antecedents; (2) an explanation of the functions and authority of the agency; (3) facts concerning subsidiary units, bureaus, and agencies; (4) the names and functions of the major officials of the agency; (5) organizational charts; and (6) sources of information provided by the agency.

The *United States Government Manual* is available through *GPO Access* online at <www.access.gpo.gov/nara/browse-gm-02.html>.

## UNITED STATES V. _____

See name of opposing party; e.g., NIXON, UNITED STATES V.

## UNITED STEELWORKERS V. WEBER

In *United Steelworkers Union v. Weber,* 443 U.S. 193, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979), the U.S. Supreme Court held that an employer could grant preferential treatment to racial minorities under a private, voluntary AFFIRMATIVE ACTION program. Affirmative action is a concerted effort by an employer to rectify past discrimination against specific classes of individuals by giving temporary preferential treatment to individuals from these classes when hiring and promoting until true equal opportunity is achieved. The use of affirmative action to correct past RACIAL DISCRIMINATION in employment resulted from the passage of title VII of the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000e et seq.). Affirmative action has proved controversial; many white people claim that it is in fact "reverse discrimination."

Brian Weber, a white production worker at a Kaiser Aluminum plant in Gramercy, Louisiana, claimed that the company's efforts to increase the number of African Americans in historically segregated categories of employment unfairly prejudiced white workers like himself. In 1974 Kaiser and the United Steelworkers signed a collective bargaining agreement that contained an affirmative action plan designed to eliminate the substantial racial imbalance in Kaiser's craft workforce. Craft trainees were to be selected on the basis of seniority, with the provision that 50 percent of the openings would be reserved for African American workers until the percentage of African American craftworkers in a plant equaled the percentage of African Americans in the local workforce. During the first year the plan was in operation, seven African American and six white workers were selected for craft training. Several of the successful African American applicants had less seniority than Weber.

Weber filed suit, claiming that the minority admissions quota violated the ban in title VII on racial discrimination in employment. The district court and the court of appeals agreed with him, but the Supreme Court, on a 5–2 vote, with two members not participating, reversed the lower courts and held that the Kaiser plan was valid.

Justice WILLIAM J. BRENNAN JR., in his majority opinion, agreed that Weber's literal interpretation of the act had some justification but noted that the whole purpose of title VII was to "better the plight of the Negro in our economy." African Americans had been excluded from craft positions such as carpenter, electrician, plumber, and painter throughout U.S. history. To adopt Weber's position would prevent employers from voluntarily seeking ways of correcting past discrimination. Brennan wrote that "[i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice [constituted] the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial SEGREGATION and hierarchy."

The Court held that an affirmative action program was legal if it did not "unnecessarily trammel" the interests of white employees, lead to their discharge, or permanently prevent their promotion. The Kaiser plan was not permanent but ended when the percentage of skilled African Americans in the plant matched the percentage of African Americans in the local

workforce. Therefore, the Court concluded that the affirmative action program was designed to correct a manifest racial imbalance rather than maintain racial balance.

Justice **WILLIAM H. REHNQUIST**, in a dissenting opinion, contended that the language of title VII made it unlawful to discriminate on the basis of race. He argued that Congress made a commitment to equality in hiring, not to "preferential treatment of minorities." The Kaiser plan, even though temporary, imposed a "racial quota."

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CROSS-REFERENCES

Civil Rights; Employment Law; Equal Employment Opportunity Commission; Equal Protection; *Wygant v. Jackson Board of Education.*

## UNITIES

*In real property law, the four characteristics that are peculiar to property owned by several individuals as joint tenants.*

The four unities are unity of time, unity of title, unity of interest, and unity of possession.

Unity of time is a characteristic because each joint tenant receives his or her interest at the same time—that is, upon delivery of the deed to the property. Unity of title exists because each tenant receives his or her title from the same grantor, and unity of interest because each tenant owns an undivided interest in the property. Unity of possession exists because each tenant has the right of possession of every part of the whole property.

CROSS-REFERENCES

Estate; Joint Tenancy.

## UNITRUST

*A right of property, real or personal, held by one person, the trustee, for the benefit of another, the beneficiary, from which a fixed percentage of the net fair market value of the assets, valued annually, is paid each year to the beneficiary.*

A unitrust, also known as a charitable remainder trust, is a legal device defined by federal tax laws that is frequently used by wealthy individuals who wish to make a substantial contribution to a school or charitable organization. To establish a unitrust, a donor transfers property to a trust, while retaining the right to receive payments from the trust for a term chosen by the donor. The payments may continue for the lifetime of the trust's named beneficiaries, a fixed term of not more than twenty years, or a combination of the two. Usually, the term is for the donor's life and the life of the donor's spouse. When the term has ended, the trust estate is paid to a public charity designated by the donor.

The unitrust donor irrevocably transfers assets, usually cash, **SECURITIES**, or real estate, to a trustee of the donor's choice. The trustee could be the charitable organization that will ultimately receive the assets or a bank trust department. During the unitrust's term, the trustee invests the unitrust's assets and pays a fixed percentage of the unitrust's current value, as determined annually, to the income beneficiaries. If the unitrust's value goes up from one year to the next, its payout increases proportionately. Likewise, if the unitrust's value goes down, the amount it distributes also declines. Payments must be at least five percent of the trust's annual value and are made out of trust income, or trust principal if income is not adequate. Payments may be made annually, semiannually, or quarterly. When the unitrust term ends, the unitrust's principal passes to the designated charitable organization to be used for the purposes the donor has designated.

A unitrust can be financially attractive to a donor because he is allowed a charitable deduction on his income tax return equal to the present value of the charitable organization's remainder interest in the unitrust, as determined by reference to U.S. Treasury Regulations. The deduction is based on the fair market value of the asset transferred, the payout rate chosen, and either the age and number of beneficiaries or the term of years.

CROSS-REFERENCES

Charitable Trust; Charities.

## UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948

See HUMAN RIGHTS.

## UNJUST ENRICHMENT

*A general equitable principle that no person should be allowed to profit at another's expense without making restitution for the reasonable value of any property, services, or other benefits that have been unfairly received and retained.*

Although the unjust enrichment doctrine is sometimes referred to as a quasi-contractual remedy, unjust enrichment is not based on an express contract. Instead, litigants normally resort to the remedy of unjust enrichment when they have no written or verbal contract to support their claim for relief. In such instances litigants ask a court to find a contractual relationship that is implied in law, a fictitious relationship created by courts to do justice in a particular case.

Unjust enrichment has three elements. First, the plaintiff must have provided the defendant with something of value while expecting compensation in return. Second, the defendant must have acknowledged, accepted, and benefited from whatever the plaintiff provided. Third, the plaintiff must show that it would be inequitable or UNCONSCIONABLE for the defendant to enjoy the benefit of the plaintiff's actions without paying for it. A court will closely examine the facts of each case before awarding this remedy and will deny claims for unjust enrichment that frustrate public policy or violate the law.

In some circumstances unjust enrichment is the appropriate remedy when a formally executed agreement has been ruled unenforceable due to incapacity, mistake, impossibility of performance, or the STATUTE OF FRAUDS. In certain states, for example, contracts with minors are VOIDABLE at the minor's discretion because persons under the age of majority are deemed legally incapable of entering into contracts. But if the minor has received a benefit from the other party's performance before nullifying the contract, the law of unjust enrichment will require the minor to pay for the fair market value of the benefit received. If the adult used duress or UNDUE INFLUENCE to induce the minor to enter the contract, however, the court will deny recovery in unjust enrichment because the adult lacked "clean hands."

In other circumstances unjust enrichment is the appropriate remedy for parties who have entered a legally enforceable contract, but where performance by one party exceeds the precise requirements of the agreement. For example, suppose a homeowner and a builder have entered into a legally binding contract under which the builder is to construct a two-car garage. One day the owner returns to her residence and discovers that in addition to constructing a two-car garage, the builder has paved the driveway. The owner says nothing about the driveway but later refuses to compensate the builder for the paving job. The builder has a claim for unjust enrichment in an amount representing the reasonable value of the labor and materials used in paving the driveway.

Suppose, instead, that after completing half the job, the builder tells the owner that he cannot finish the garage as originally agreed, but that he wants to be paid for the work he has done. The owner balks at this demand, arguing that the builder has breached his contractual obligations and is entitled to nothing. A minority of jurisdictions would allow the builder to recover the reasonable value of his services, minus any damages suffered by the owner as a result of the breach. A majority of jurisdictions, however, adhere to the rule that a party who fails to perform contractual obligations has no remedy regardless of the amount of hardship he might endure.

The doctrine of unjust enrichment also governs many situations where the litigants have no contractual relationship. For example, the law finds an implied promise to pay for emergency medical treatment that is neither requested nor consented to by a patient. In some jurisdictions the law finds an implied promise to pay for life-saving medical treatment even when a patient objects to receiving it. The law also requires parents to reimburse a person who voluntarily supplies necessaries such as food, shelter, and clothing to their children. As these examples demonstrate, unjust enrichment is a flexible remedy that allows courts great latitude in shifting the gains and losses between the parties as EQUITY, fairness, and justice dictate.

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CROSS-REFERENCES

Quasi Contract.

## UNLAWFUL

*Contrary to or unauthorized by law; illegal.*

When applied to promises, agreements, or contracts, the term denotes that such agreements have no legal effect. The law disapproves of such conduct because it is immoral or contrary to public policy. *Unlawful* does not necessarily imply criminality, although the term is sufficiently broad to include it.

## UNLAWFUL ASSEMBLY

*A meeting of three or more individuals to commit a crime or carry out a lawful or unlawful purpose in a manner likely to imperil the peace and tranquillity of the neighborhood.*

The FIRST AMENDMENT to the U.S. Constitution guarantees individuals the right of freedom of assembly. Under the COMMON LAW and modern statutes, however, the meeting of three or more persons may constitute an unlawful assembly if the persons have an illegal purpose or if their meeting will breach the public peace of the community. If they actually execute their purpose, they have committed the criminal offense of riot.

Under the common law, when three or more individuals assembled for an illegal purpose, the offense of unlawful assembly was complete without the commission of any additional OVERT ACT. Some modern state statutes require both assembly and the commission of one of the acts proscribed by the statutes, even if the purpose of the assembly is not completed. Generally, an unlawful assembly is a misdemeanor under both common law and statutes.

The basis of the offense of unlawful assembly is the intent with which the individuals assemble. The members of the assembled group must have in mind a fixed purpose to perform an illegal act. The time when the intent is formed is immaterial, and it does not matter whether the purpose of the group is lawful or unlawful if they intend to carry out that purpose in a way that is likely to precipitate a breach of the peace.

An assembly of individuals to carry on their ordinary business is not unlawful. Conversely, when three or more persons assemble and act jointly in committing a criminal offense, such as ASSAULT AND BATTERY, the assembly is unlawful. All those who participate in unlawful assemblies incur criminal responsibility for the acts of their associates performed in furtherance of their common objective. The mere presence of an individual in an unlawful assembly is enough to charge that person with participation in the illegal gathering.

Political gatherings and demonstrations raise the most troublesome issues involving unlawful assembly. The line between protecting freedom of assembly and protecting the peace and tranquillity of the community is often difficult for courts to draw. In the 1960s, in a series of decisions involving organized public protests against racial SEGREGATION in southern and border states, the U.S. Supreme Court threw out breach-of-the-peace convictions involving African Americans who had participated in peaceful public demonstrations. For example, in *Edwards v. South Carolina,* 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963), the Court held that the conviction of 187 African American students for demonstrating on the grounds of the state capitol in Columbia, South Carolina, had infringed on their "constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances."

In *Adderley v. Florida,* 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966), however, the Court also made clear that assemblies are not lawful merely because they involve a political issue. In this case Harriet L. Adderley and other college students had protested the arrest of CIVIL RIGHTS protesters by blocking a jail driveway. When the students ignored requests to leave the area, they were arrested and charged with TRESPASS. The Court held that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."

In general, a unit of government may reasonably regulate parades, processions, and large public gatherings by requiring a license. Licenses cannot, however, be denied based on the politi-

cal message of the group. Persons who refuse to obtain a license and hold their march or gathering may be charged with unlawful assembly.

CROSS-REFERENCES

Freedom of Speech; Time, Place, and Manner Restrictions.

## UNLAWFUL COMMUNICATIONS

*Spoken or written words tending to intimidate, menace, or harm others.*

The guarantee of FREEDOM OF SPEECH in the FIRST AMENDMENT to the U.S. Constitution is not absolute. Many state and federal criminal laws prohibit persons from making threats and other unlawful communications. In addition, a person who makes unlawful communications may be sued in a civil tort action for damages resulting from the threats or communications.

It is unlawful to threaten a person with the intent to obtain a pecuniary advantage or to compel the person to act against her will. This type of threat constitutes the crime of EXTORTION. For example, Colorado law states that any person "who communicates threats to another person with the intention thereby to obtain anything of value or any acquittance, advantage, or IMMUNITY is guilty of extortion" (C.S.S. § 28-3.1-543).

Nineteen states have laws against terrorizing or making terroristic threats. Terrorizing usually means threatening to commit a crime of violence or unlawfully causing the evacuation of a building or facility. Terroristic threat is generally defined as threatening to kill another with the intent of putting that person in fear of imminent death and under circumstances that would reasonably cause the victim to believe that the threat will be carried out.

Many states have also enacted antistalking laws, which deal with unwanted communications. STALKING is a criminal activity consisting of a series of actions that are designed to threaten but, taken individually, might constitute legal behavior. For example, sending flowers, writing love notes, and waiting for someone outside her place of work are actions that, on their own, are not criminal. When these actions are coupled with an intent to injure or instill fear, however, they may constitute a pattern of behavior that is illegal. A stalking victim may ask a court to issue a protection or RESTRAINING ORDER that directs the defendant not to communicate or come within the vicinity of the victim. If the defendant persists in communicating with the victim, a court may hold the defendant in CONTEMPT, impose fines, or incarcerate the defendant, depending on state law.

Other specialized criminal offenses also deal with unlawful communications. For example, threatening to harm the president of the United States and using the U.S. mail to transmit threatening communications are federal offenses.

Under the civil TORT actions of LIBEL AND SLANDER, a person who defames the good name and reputation of another may be sued for damages. The action of libel is based on a written defamatory communication, and a slander action is based on oral DEFAMATION. In addition, a plaintiff can recover damages for the intentional infliction of severe mental or emotional suffering or for the unreasonable intrusion upon his privacy caused by threats or unlawful communications.

## UNLAWFUL DETAINER

*The act of retaining possession of property without legal right.*

The term *unlawful detainer* ordinarily refers to the conduct of a tenant who is in possession of an apartment or leased property and refuses to leave the premises upon the expiration or termination of the lease. Typically, the landlord wishes to evict the tenant for not paying the rent or for endangering the safety of the other tenants or the landlord's property.

Under COMMON LAW a landlord was personally permitted to enter and remove a tenant by force for nonpayment or violation of the lease. U.S. state laws, however, require a landlord to file what is called an unlawful detainer action in a court of law. To satisfy the DUE PROCESS rights guaranteed to the tenant by the FIFTH AMENDMENT to the U.S. Constitution, the landlord must strictly follow the statutory procedures, or the tenant can challenge the unlawful detainer proceedings on technicalities and force the landlord to start over again.

Each state has its own type of unlawful detainer proceeding. In Minnesota, for example, the landlord must show cause (have a legitimate reason) to bring such an action. According to Minnesota law, legitimate reasons include the tenant's nonpayment of rent, other breach of the lease, or refusal to leave after notice to vacate has been properly served and the tenancy's last day has passed (Minn. Stat. § 566.03 [1992]).

Both landlords and tenants must take a number of steps in an unlawful detainer action. In Minnesota, for example, the landlord must file a complaint against the tenant in district court. The landlord must then serve the tenant with a summons (at least seven days before the court date) ordering the tenant to appear in court (Minn. Stat. § 566.05). Within seven to fourteen days after the summons is issued, a court hearing takes place, and both the tenant and the landlord are asked to give their sides of the story (Minn. Stat. § 566.05). The judge then delivers a decision. If the judge decides that the tenant has no legal reason for refusing to leave or pay the rent, the judge orders the tenant to vacate and, if necessary, orders the sheriff to force the tenant out.

If the tenant can show that immediate eviction will cause substantial hardship, however, the court may give the tenant up to one week in which to move. A delay based on hardship is not available if the tenant is causing a NUISANCE or seriously endangering the safety of other residents, their property, or the landlord's property (Minn. Stat. § 566.09, subd. 1).

If a tenant has paid the landlord or the court the amount of rent owed, but is unable to pay the interest, costs, and attorney's fees, the court may issue a writ of restitution that permits the tenant to pay these amounts during the period the court delays issuing an eviction order (Minn. Stat. § 504.02, subd. 1). If the unlawful detainer action was brought because the tenant had not paid the rent, and the landlord prevails, the tenant may pay the back rent plus costs and still remain in possession of the unit, provided payment is made before possession of the rental unit is delivered to the landlord. If the action was brought because the tenant withheld the rent due to disrepair, and the tenant prevails, the judge may order that the rent be abated (reduced) in part or completely.

Only a sheriff or sheriff's deputy can physically evict a tenant. The tenant must be given notice that an eviction order has been issued. Most states give the tenant at least twenty-four hours' notice before the sheriff arrives to perform the actual eviction.

FURTHER READINGS

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CROSS-REFERENCES

Landlord and Tenant.

## UNLIQUIDATED

*Unassessed or settled; not ascertained in amount.*

An unliquidated debt, for example, is one for which the precise amount owed cannot be determined from the terms of the contractual agreement or another standard.

## UNWRITTEN LAW

*Unwritten rules, principles, and norms that have the effect and force of law though they have not been formally enacted by the government.*

Most laws in America are written. The U.S. CODE, the CODE OF FEDERAL REGULATIONS, and the Federal Rules of Civil Procedure are three examples of written laws that are frequently cited in federal court. Each state has a similar body of written laws. By contrast, unwritten law consists of those customs, traditions, practices, usages, and other maxims of human conduct that the government has recognized and enforced.

Unwritten law is most commonly found in primitive societies where illiteracy is prevalent. Because many residents in such societies cannot read or write, there is little point in publishing written laws to govern their conduct. Instead, societal disputes in primitive societies are resolved informally, through appeal to unwritten maxims of fairness or popularly accepted modes of behavior. Litigants present their claims orally in most primitive societies, and judges announce their decisions in the same fashion. The governing body in primitive societies typically enforces the useful traditions that are widely practiced in the community, while those practices that are novel or harmful fall into disuse or are discouraged.

Much of INTERNATIONAL LAW is a form of primitive unwritten law. For centuries the RULES OF WAR governing hostilities between belligerents consisted of a body of unwritten law. While some of these rules have been codified by international bodies such as the UNITED NATIONS, many have not. For example, retaliatory reprisals against acts of TERRORISM by a foreign government are still governed by unwritten customs in the international community. Each nation also retains discretion in formulating a response to the aggressive acts of a neighboring state.

In the United States, unwritten law takes on a variety of forms. In CONSTITUTIONAL LAW the Supreme Court has ruled that the DUE PROCESS CLAUSE of the Fifth and Fourteenth Amend-

ments to the U.S. Constitution protects the right to privacy even though the word *privacy* is not mentioned in the written text of the Constitution. In COMMERCIAL LAW the UNIFORM COMMERCIAL CODE permits merchants to resolve legal disputes by introducing evidence of unwritten customs, practices, and usages that others in the same trade generally follow. The entire body of COMMON LAW, comprising cases decided by judges on matters relating to TORTS and contracts, among other things, is said to reflect unwritten standards that have evolved over time. In each case, however, once a court, legislature, or other government body formally adopts a standard, principle, or MAXIM in writing, it ceases to be an unwritten law.

CROSS-REFERENCES

Case Law; Trade Usage.

## UPSET PRICE

*The dollar amount below which property, either real or personal, that is scheduled for sale at an auction is not to be sold.*

An upset price is intended as a minimum price. In a decree for a JUDICIAL SALE, it constitutes a direction to the officer conducting the sale not to accept any bid that falls below the fixed price. In a final decree in a foreclosure sale, an upset price should be sufficient to cover costs and allowances made by the court, the certificates and interest of the receiver, and any liens in existence.

## U.S. CHAMBER OF COMMERCE

The U.S. Chamber of Commerce is the world's largest not-for-profit federation of businesses, representing more than 3 million businesses and organizations in the United States. As of 2003, the chamber was comprised of 3000 state and local chambers and 830 business associations. There were also 92 U.S. Chambers of Commerce abroad. Businesses that make up the chamber range from Fortune 500 companies to home-based operations consisting of one or two people. Approximately 96 percent of the chamber membership consists of businesses with fewer than 100 employees. The chamber states that its mission is to "advance human progress through an economic, political, and social system based on individual freedom, incentive, initiative, opportunity, and responsibility." The chamber has historically been an influential lobbyist for legislation that favors the free enterprise system. It looks to its membership to help define policy on national issues critical to business. Once a policy is developed, the chamber informs Congress and the administration of the business community's recommendations on legislative issues and government policies.

The U.S. CHAMBER OF COMMERCE was founded in 1912 at a conference called by President WILLIAM HOWARD TAFT in Washington, D.C. At the time of the conference, there were many local chambers of commerce throughout the United States. Chambers are now organized at the local, state, and regional levels, and all of them may hold membership in the national organization. The headquarters of the national chamber is in Washington D.C. It is controlled by a large national board of directors, with a chair and president elected by the board each year.

The chamber's policy division provides members with the opportunity to influence pro-business issues in Washington through the use of satellite video conferences and town hall meetings that are broadcast directly from the chamber offices. The division convenes meetings of business leaders and also provides opportunities for chamber members to meet with and question congressional candidates in small, informal gatherings.

The chamber's Small Business Institute (SBI) seeks to provide small business professionals and their employees with self-study training programs and interactive satellite seminars. Subjects include marketing, management, productivity, technology, and forecasting. The chamber also offers an online catalog that provides access to books, audio programs, videotapes, and software that deal with business topics.

Several affiliated organizations work closely with the chamber. The Center for International Private Enterprise (CIPE) was formed under congressional mandate in 1983. CIPE has sponsored nearly 200 programs promoting economic growth and democratic development in more than 40 countries worldwide as part of a program called the National Endowment for Democracy. The National Chamber Foundation (NCF) is a public policy research organization that concentrates on economic and business issues. It researches and analyzes issues and provides educational tools to improve understanding of economics and

business. The Center for Leadership Development, the educational division of the NCF, conducts training for chamber and association managers and business executives.

The chamber publishes for its members the *Nation's Business*, a monthly magazine aimed at the owners and top management of small businesses. The magazine provides practical information about running and expanding an established business.

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CROSS-REFERENCES

National Association of Manufacturers.

## U.S. CIVIL WAR

The U.S. Civil War, also called the War between the States, was waged from April 1861 until April 1865. The war was precipitated by the secession of eleven Southern states during 1860 and 1861 and their formation of the Confederate States of America under President Jefferson Davis. The Southern states had feared that the new president, ABRAHAM LINCOLN, who had been elected in 1860, and Northern politicians would block the expansion of SLAVERY and endanger the existing slaveholding system. Though Lincoln did free Southern slaves during the war by issuing the EMANCIPATION PROCLAMATION, he fought primarily to restore the Union.

The war began on April 12, 1861, when Confederate artillery fired on Fort Sumter in Charleston, South Carolina. In the ten weeks between the fall of Fort Sumter and the convening of Congress in July 1861, Lincoln began drafting men for military service, approved a naval blockade of Southern ports, and suspended the writ of HABEAS CORPUS. The U.S. Supreme Court upheld Lincoln's authority to take these actions in the *Prize* cases, 67 U.S. (2 Black) 635, 17 L. Ed. 459; 70 U.S. (3 Wall.) 451, 18 L. Ed. 197; 70 U.S. (3 Wall.) 514, 18 L. Ed. 200; 70 U.S. 559, 18 L. Ed. 220 (1863). The Court concluded that the president had the authority to resist force without the need for special legislative action.

On July 21, 30,000 Union troops marched on Richmond, Virginia, the capital of the Confederacy. They were routed at the Battle of Bull

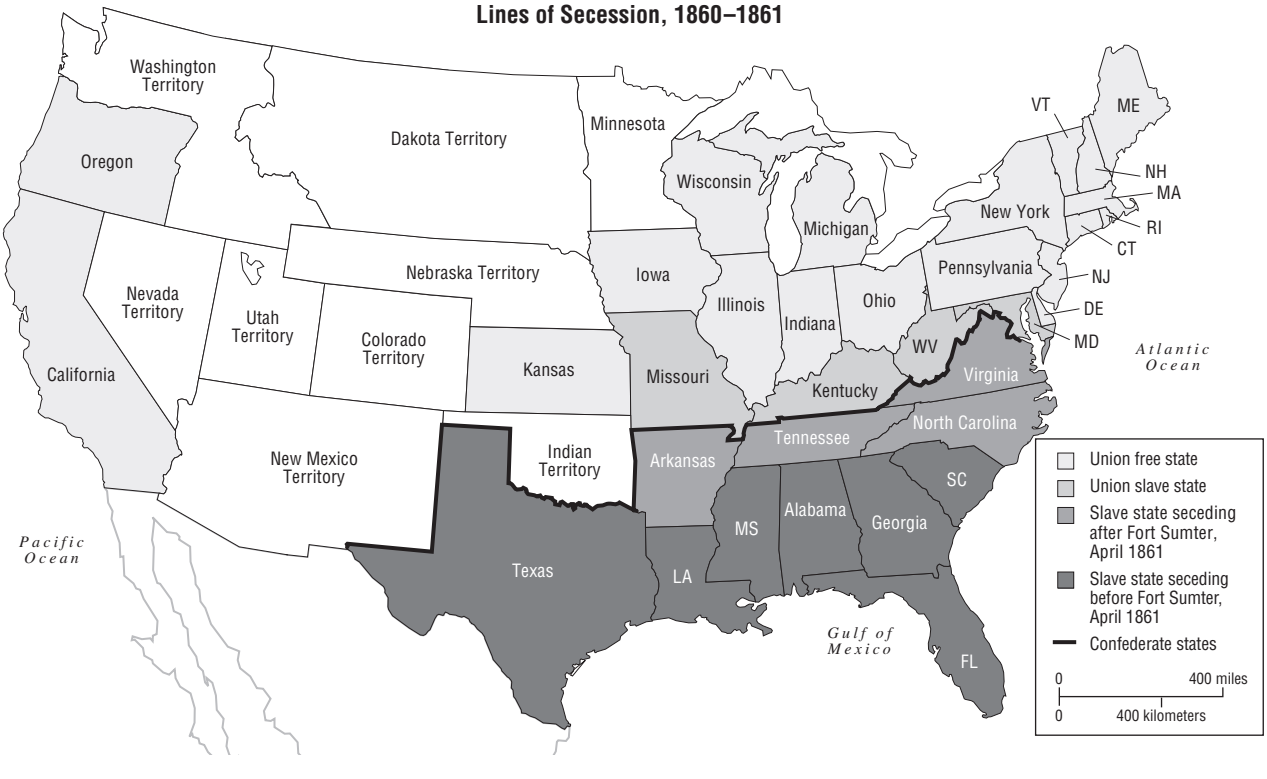


*Map of the continental United States labelled Lines of Secession, 1860–1861.*

ILLUSTRATION BY CHRISTINE O'BRYAN. GALE GROUP

Run and forced to retreat to Washington, D.C. The defeat shocked Lincoln and Union leaders, who called for 500,000 new troops for the Union Army of the Potomac.

General ULYSSES S. GRANT brought the Union its first victory in February 1862, when his troops captured Forts Henry and Donelson in Tennessee. Grant fought in the Battles of Shiloh and Corinth, Tennessee, before forcing the surrender of Vicksburg, Mississippi, on July 4, 1862.

The Army of the Potomac, however, did not have such success. A Union summer offensive against Confederate forces led by General Robert E. Lee fared badly. Union forces were defeated at the Seven Days Battle and later that summer at the Second Battle of Bull Run. Lee then invaded Maryland but was checked at Antietam on September 17, 1862.

Lincoln despaired at the poor leadership demonstrated by the commanders of the Army of the Potomac. He replaced General George B. McClellan with General A. E. (Ambrose Everett) Burnside, but when Burnside faltered, Lincoln appointed General Joseph Hooker commander. Hooker proved no better. His attempt to outmaneuver Lee's forces at Chancellorsville, Virginia, in May 1863 led to defeat, retreat, and Hooker's dismissal as commander. Lee then invaded Pennsylvania, where a chance encounter of small units led to the Battle of Gettysburg on July 1. The new Union commander, General George G. Meade, directed a successful defense at Gettysburg, forcing Lee to return to Virginia.

In March 1864 Lincoln gave Grant command of the Union armies. Grant planned a campaign of attrition that would rely on the Union's overwhelming superiority in numbers and supplies. Though Union forces would suffer enormous casualties as a result of this strategy, he concluded that the devastation experienced by the Confederate troops would be even greater.

In the late summer of 1864, Grant sent General William T. Sherman and his troops into Georgia. Sherman captured and burned the city of Atlanta in September and then set out on his march through Georgia, destroying everything in his path. He reached Savannah on December 10 and soon captured the city.

In the spring of 1864, Grant commanded the Army of the Potomac against Lee's forces in the Wilderness Campaign, a series of violent battles that took place in Virginia. Battles at Spotsylvania and Cold Harbor extracted heavy Union casualties, but Lee's smaller army was, as Grant had hoped, devastated. Grant laid siege to Petersburg for ten months, pinning down Lee's troops and slowly destroying their morale.

*General Robert E. Lee surrenders his Confederate forces to General Ulysses S. Grant at Appomattox Court House on April 9, 1865, signalling the end of the Civil War.*
CORBIS

By March 1865 Lee's army had suffered numerous casualties and desertions. Grant began the final advance on April 1 and captured Richmond on April 3. On April 9, 1865, at Appomattox Court House, Lee surrendered his Confederate forces, signaling an end to the Civil War.

The casualties had been enormous for both sides. More than 359,000 Union soldiers had died, while the Confederate dead numbered 258,000.

The war ended slavery. On September 22, 1862, Lincoln had announced the ABOLITION of slavery in areas occupied by the Confederacy effective January 1, 1863. The wording of the Emancipation Proclamation on that date had made clear that slavery was still to be tolerated in the border states and areas occupied by Union troops so as not to jeopardize the war effort. Lincoln was uncertain that the Supreme Court would uphold the constitutionality of his action, so he lobbied Congress to adopt the THIRTEENTH AMENDMENT to the U.S. Constitution, which abolished slavery.

Lincoln's wartime suspension of the writ of habeas corpus meant that military commanders could arrest persons suspected of being sympathetic to the Confederacy and have them imprisoned indefinitely. After the war the Supreme Court, in EX PARTE MILLIGAN, 71 U.S. 2, 18 L. Ed. 281 (1866), condemned Lincoln's directive establishing military jurisdiction over civilians outside the immediate war zone. The Court

strongly affirmed the fundamental right of a civilian to be tried in a regular court of law with all the required procedural safeguards.

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## U.S. CODE

*A multivolume publication of the text of statutes enacted by Congress.*

Until 1926, the positive law for federal legislation was published in one volume of the Revised Statutes of 1875, and then in each subsequent volume of the statutes at large. In 1925, Congress authorized the preparation of the U.S. Code and appointed a revisor of statutes to extract all the sections of the Revised Statutes of 1875 that had not been repealed and all of the public laws that were still in effect from the Statutes at Large since 1873. These laws were rearranged into fifty titles and published in four volumes as the U.S. Code, 1926 edition. Thereafter, an annual cumulative supplement containing all the laws passed since 1926 was published. In 1932, a new edition of the code was published, which incorporated the cumulative supplements to the 1926 edition. This became the U.S. Code, 1932 edition. Every six years, a new edition of the code is published, incorporating the annual cumulative supplements prepared since the previous edition.

## U.S. CODE ANNOTATED®

*A multivolume work published by West Group that contains the complete text of federal laws enacted by Congress that are included in the U.S. Code, together with case notes (known as annotations) of state and federal decisions that interpret and apply specific sections of federal statutes, plus the text of presidential proclamations and executive orders.*

The U.S. Code Annotated, popularly referred to by its abbreviation U.S.C.A., also includes editorially prepared research aids, such as cross-references to related statutory sections, historical notes, and library references, that facilitate research. U.S.C.A. is also available online and in CD-ROM format.

## U.S. COMMISSIONERS

*The former designation for U.S. magistrates.*

## U.S. CONSTITUTION

See CONSTITUTION OF THE UNITED STATES.

## U.S. COURT OF APPEALS FOR VETERANS CLAIMS

After nearly four decades of debate on the subject, Congress exercised its power under Article I of the Constitution and passed the Veterans Judicial Review Act of 1988 (VJRA) (102 Stat. 4105 [38 U.S.C.A. § 4051] [recodified at 38 U.S.C.A. § 7252 (1991)]). Originally called the U.S. Court of Veterans Appeals, the new court came into existence on November 18, 1988, the day President GEORGE H. W. BUSH signed the VJRA. Subsequent legislation changed the name of the court on March 1, 1999, to the U.S. Court of Appeals for Veterans Claims.

One of several specialized federal courts established by Congress under Article I—including the U.S. Court of Military Appeals, the U.S. Court of Federal Claims, and the U.S. Tax Court—the U.S. Court of Appeals for Veterans Claims exercises exclusive jurisdiction over the decisions of the Board of Veterans Appeals (BVA). People seeking veterans' benefits who are turned down by the BVA may appeal their case to the U.S. Court of Appeals for Veterans Claims. Claimants may further avail themselves of the judiciary by appealing unfavorable U.S. Court of Appeals for Veterans Claims decisions to the limited review of the U.S. Court of Appeals for the Federal Circuit and ultimately to the SUPREME COURT OF THE UNITED STATES.

In the mid-1980s, 75 million U.S. citizens—one-third of the population of the United States—were eligible for some form of veterans' benefits. Then, as in the early 2000s, war veterans and their dependents and survivors could apply to one of the 58 regional offices of the VETERANS ADMINISTRATION (VA) for disability, loan eligibility, education, and other benefits. In an average year in the 1980s, nearly 800,000 disability claims were filed, about half of which were granted by the regional offices. Before the U.S. Court of Appeals for Veterans Claims was created, people whose claims were turned down had limited recourse, which did not include review by a court of law. If a regional office of the VA denied a claim, the claimant could appeal that decision within the VA to the BVA. If the

BVA denied the appeal—which it did in about 75 percent of cases—the claimant had just one remaining option: to reopen the claim on the basis of new and material evidence and begin the process over again.

Consisting of one chief judge and two to six associate judges—all appointed to a term of 15 years by the president of the United States with the advice and consent of the Senate—the U.S. Court of Appeals for Veterans Claims has the "power to affirm, modify, or reverse a decision of the [BVA] or to remand the matter, as appropriate" (38 U.S.C.A. § 4051(a) [recodified at 38 U.S.C.A. § 7252(a) (1991)]). (When a court remands a case, it sends the case back to the lower court or, in the instance of the BVA, ruling body.) The Veterans Appeals Court's primary mission, according to Associate Judge John J. Farley, is to review cases for errors of law. As an appellate court, the U.S. Court of Appeals for Veterans Claims cannot hear new testimony or allow new evidence to be introduced in a case. Cases are heard by judges sitting alone, in panels of three, or en banc (all together).

The U.S. Court of Appeals for Veterans Claims heard its first case—*Erspamer v. Derwinski,* 1 Vet. App. 3, 58 U.S.L.W. 2556—in February 1990. Jean A. Erspamer, the widow of Ernest Erspamer, a Minnesota veteran exposed to radiation during atomic bomb tests in the Pacific in 1946, asked the court to compel the VA to take action on her claims for disability compensation and death benefits. Erspamer's husband had in June 1979 filed with the VA a claim for service-connected disability payments. After he died of leukemia in 1980, Erspamer continued to seek VA benefits and was eventually successful in her quest—after the Veterans Appeals Court heard her case.

In July 1999 the court issued a decision which held that the VETERANS AFFAIRS DEPARTMENT (VA) did not have a duty to assist veterans in developing their claims unless those claims were "well-grounded." In response Congress passed the Veterans Claims Assistance Act (VCAA) of 2000 (Pub.L. 106-475, Nov. 9, 2000, 114 Stat. 2096). Signed into law by President BILL CLINTON in November 2000, the act eliminated the "well-grounded" language and stated that the VA was required to provide assistance in developing claims unless there was no reasonable possibility that VA aid would help the veteran's claim.

Based in Washington, D.C., but able to convene anywhere in the country, the U.S. Court of Appeals for Veterans Claims can only decide cases or controversies presented to it. The court is not a policy-making body and thus may not conduct policy actions, such as reviewing the VA schedule of disability ratings. While most of the cases heard by the U.S. Court of Appeals for Veterans Claims concern issues of entitlement to disability or survivor's benefits, the court has also heard cases relating to education benefits, life insurance, and home foreclosures.

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CROSS-REFERENCES

Veterans Affairs Department; Veterans of Foreign Wars; Veterans' Rights.

## U.S. COURTS OF APPEALS

The U.S. Courts of Appeals are intermediate federal appellate courts. Created in 1891 pursuant to Article III of the U.S. Constitution, the courts relieve the U.S. Supreme Court from the burden

**U.S. Courts of Appeals Case Filings, 1993 to 2002**

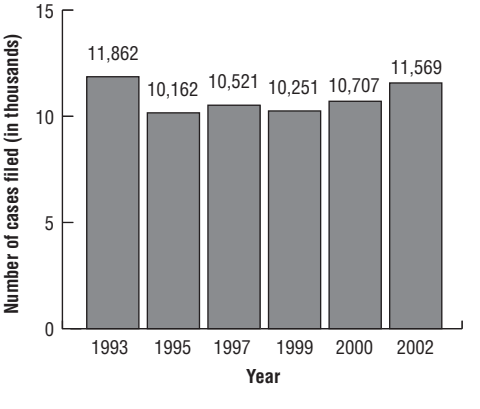


SOURCE: Administrative Offices of the U.S. Courts, *Judicial Business of the United States Courts*, 1997 and 2002.

**U.S. Courts of Appeals**

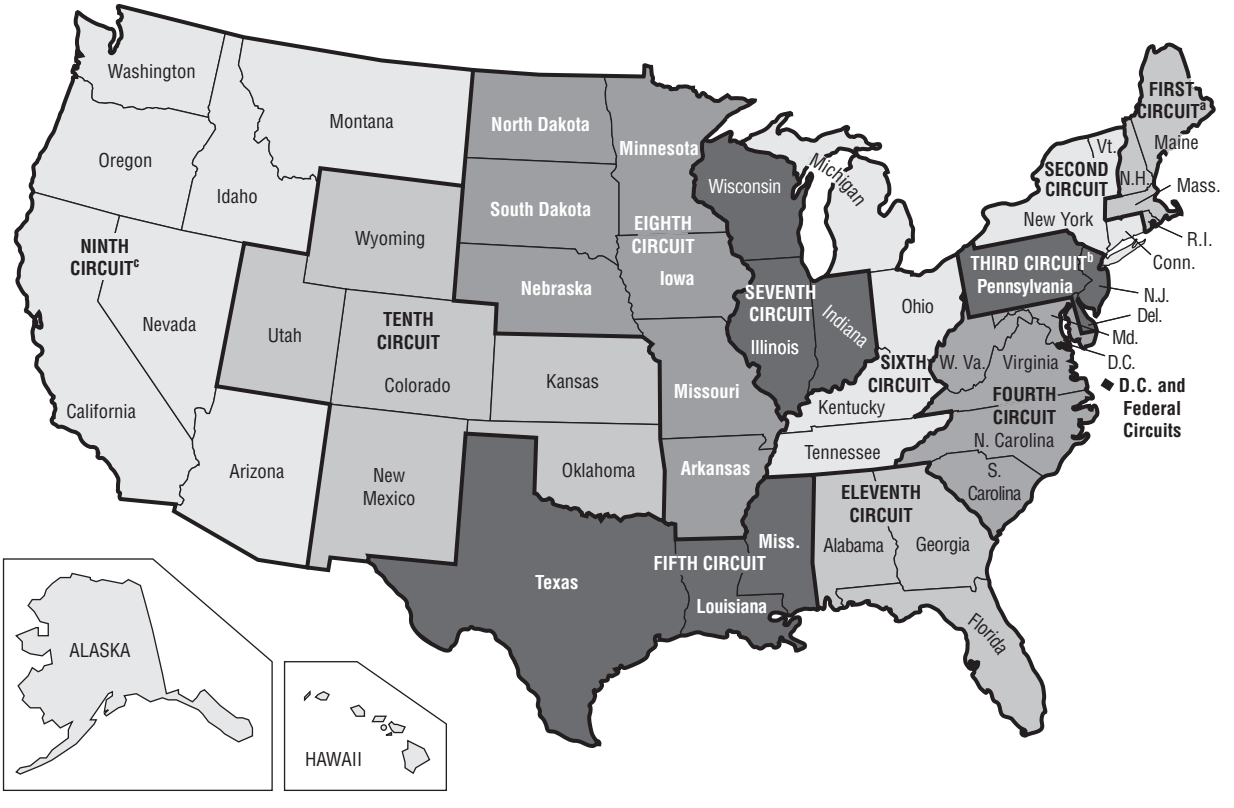


[a]First Circuit also includes Puerto Rico
[b]Third Circuit also includes U.S. Virgin Islands
[c]Ninth Circuit also includes Guam and Northern Mariana Islands

SOURCE: Administrative Offices of the U.S. Courts web page.

of handling all appeals from cases decided by federal trial (district) courts. These appellate courts have jurisdiction to review all final decisions and some INTERLOCUTORY decisions of federal district courts. In addition, the courts review and enforce orders of numerous federal administrative bodies.

A typical appeal from a district court decision consists of the trial court record, oral arguments, and supporting briefs. A three-judge panel usually considers each appeal. A court may sit *en banc,* however—that is, with all judges of the circuit present. A decision by a court of appeals is final, unless the SUPREME COURT OF THE UNITED STATES accepts the case for review.

Each state is assigned on the basis of its geographical location to one of eleven judicial circuits. The District of Columbia has its own circuit; U.S. territories are assigned to the first, third, and ninth circuits. The more than 175 circuit judges are appointed by the president, subject to the advice and consent of the Senate.

In addition to the twelve circuits, Congress created the U.S. Court of Appeals for the Federal Circuit in 1982. This court is the successor to the former U.S. Court of Customs and Patent Appeals and the U.S. Court of Claims. The court has nationwide jurisdiction and hears appeals from federal district courts in patent cases, contract cases, and certain other civil actions in which the United States is a defendant. It also hears appeals from the U.S. Court of International Trade, the U.S. Court of Federal Claims, and the U.S. Court of Veterans Appeals. The court also reviews certain administrative rulings, rule making by the VETERANS AFFAIRS

DEPARTMENT, and certain decisions by the U.S. Senate Select Committee on Ethics, in addition to other matters.

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CROSS-REFERENCES

Federal Courts.

## U.S. DEPARTMENT OF . . .

See specific department; e.g., INTERIOR DEPARTMENT.

## U.S. INFORMATION AGENCY

The U.S. Information Agency (USIA) was the public diplomacy arm of the U.S. government. The USIA existed "to further the national interest by improving United States relations with other countries and peoples through the broadest possible sharing of ideas, information, and educational and cultural activities" (22 U.S.C.A. § 1461 [1988]). Generally, this intention meant that the USIA was responsible for sharing information about the United States with the citizens of other countries.

The roots of the USIA developed from information efforts made during WORLD WAR I and WORLD WAR II. During World War I, the Committee on Public Information was created to inform the world of U.S. aims in the war. In 1938 the federal government began to promote cultural relations with Latin America through the STATE DEPARTMENT's Division of Cultural Cooperation. In 1940 the government sent its first international radio broadcasts into Latin America.

During World War II, the Office of War Information conducted information and propaganda campaigns aimed at enemy countries and occupied territories. To assist in the campaign, the government expanded its radio broadcasts. In 1942, during a broadcast in the German language, an announcer first used the term "voice of America" to describe the broadcast. The name stuck, and the international news and information broadcast was called the Voice of America ever afterward.

In 1948 Congress passed the United States Information and Educational Exchange Act (ch. 36, 62 Stat. 6, [codified as amended at 22 U.S.C.A. § 1431 et seq. (1988 & Supp. V 1993)]). This act, known as the Smith-Mundt Act, created the U.S. International Communication Agency (USICA). According to the Smith-Mundt Act, the USICA was created to distribute information to other countries about the "United States, its people, and [its] policies" (Pub. L. No. 80-402, § 501 1948 U.S.C.C.A.N. [79 Stat.] 6, 9 [1948] [codified at 22 U.S.C.A. § 1431 et seq., as amended]).

The USICA gained status as an independent federal agency under President DWIGHT D. EISENHOWER'S REORGANIZATION PLAN No. 8 of 1953 (18 Fed. Reg. 4562 [1953], reprinted in 22 U.S.C.A. § 1461 app. at 763 [West 1990]). The USICA was renamed the U.S. Information Agency in 1982, but the function of the agency remained the same.

The USIA used a variety of methods to disseminate information. These included the Voice of America radio broadcast system, radio and television broadcast service to Cuba, the Worldnet Satellite television service, educational and cultural exchanges, and magazines, films, and information centers in foreign countries.

Until 1994, when Congress modified this rule, the USIA was prohibited from disseminating its program materials within the United States (22 U.S.C.A. § 1461-1a [1988]). The primary reason for this restriction was the desire to avoid creating a powerful propaganda agency to guide public opinion, such as the information ministries in Nazi Germany and the Soviet Union. Congress also wanted to isolate government-sponsored programming from competition with domestic commercial media outlets.

The fall of COMMUNISM and technological advances prompted a reorganization of the USIA structure and activities. In 1992 the USIA stopped publishing *Problems of Communism,* an anti-Communist magazine. *Problems of Communism* was the only USIA material ever disseminated within the United States. In 1994 Congress created the Broadcasting Board of Governors to oversee a new USIA International Broadcasting Bureau. Under the International Broadcasting Act (Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236 [1994]), the bureau was charged with oversight of the property and programming of government broadcasting, including the Voice of America and its commercial counterparts, Radio Free Europe and Radio Liberty. The bureau was

also put in charge of a newly created Radio Free Asia.

Congress has also modified the ban on dissemination of USIA materials within the United States. In a 1994 amendment to the Smith-Mundt Act, Congress provided that the ban "shall not prohibit the [USIA] from responding to inquiries from members of the public about its operations, policies, or programs" (22 U.S.C.A. § 1461-1a). The wording of this amendment does not require the USIA to distribute its materials within the United States. Rather, it requires only that the USIA respond to inquiries about its materials.

Also in 1994, the USIA began publishing its English-language news stories on the INTERNET computer system. Though the stories include a disclaimer stating that the information is intended for international audiences only, the USIA has no way to enforce this restriction. Furthermore, Worldnet, the federal government television service, was transmitted by satellite, and anyone who had a satellite dish could receive the broadcast. Thus, technology circumvented the prohibition on domestic dissemination of USIA programs.

In 2000 a settlement was announced in a CLASS ACTION in which 1,100 women claimed that they had faced SEX DISCRIMINATION while seeking employment with the USIA and VOA. In one of the nation's largest discrimination settlements, the government agreed to pay $508 million plus back pay to the plaintiffs.

In October 1999, under a plan advanced by then-Senator JESSE HELMS, the 47-year-old USIA was integrated into the State Department. The work of the USIA is now carried out by the State Department Office of International Information Programs.

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CROSS-REFERENCES

State Department.

## U.S. MAGISTRATES

See MAGISTRATE.

## U.S. MARSHALS SERVICE

The U.S. Marshals Service, a division of the JUSTICE DEPARTMENT, is the oldest federal law enforcement agency, having served as a link between the executive and judicial branches of the government since 1789. The president appoints U.S. marshals for terms of four years. The Senate must confirm the appointments, but the president has the power to remove marshals before the expiration of their terms.

The U.S. marshals are the chief law officers of the federal courts. A marshal is appointed for each of the 94 federal judicial districts in the United States. The U.S. ATTORNEY GENERAL designates the marshal's office location in each district. The marshals direct the activities of approximately 4,000 officers and personnel stationed at more than 350 locations throughout the United States and its territories.

The service is responsible for providing support and protection for the federal courts, including security for more than 700 judicial facilities and more than 2,000 federal judges and magistrates, as well as trial participants such as jurors and attorneys. In recent year this responsibility has increased due to a dramatic escalation in threats against members of the judiciary. The service also operates the Federal Witness Security Program, committed to ensuring the safety of endangered government witnesses.

U.S. marshals maintain custody of and transport thousands of federal prisoners annually, execute court orders and arrest warrants, and apprehend most federal fugitives. They seize, manage, and sell property forfeited to the government by drug traffickers and other criminals and assist the Justice Department's Asset Forfeiture Program.

The service's Special Operations Group responds to emergencies such as civil disturbances and terrorist incidents and restores order during riots and mob violence. The service also operates the U.S. Marshals Service Training Academy.

The director of the U.S. Marshals Service, who is appointed by the president, supervises the operations of the service throughout the United States and its territories. The director is assisted by a deputy director and an associate director for administration.

*Included among the duties of U.S. marshals is the protection of federal trial participants. A U.S. marshal escorts Ted Kaczynski (the "Unabomber") to a vehicle waiting outside a federal courthouse in Sacramento, California, in January 1998.* AP/WIDE WORLD PHOTOS

Immediately after the **SEPTEMBER 11, 2001, TERRORIST ATTACKS**, deputy U.S. Marshals began assisting search and rescue efforts at the World Trade Center and at the Pentagon. Within 48 hours, the marshals coordinated many aspects of the U.S. response to the attacks from protecting airports to locating and apprehending potential suspects. In 2003 the U.S. Marshals Service continued to be involved in the government's continuing war on terror in addition to carrying out the agency's regular duties.

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**CROSS-REFERENCES**

Riot; Witnesses.

## U.S. POSTAL SERVICE

The U.S. Postal Service (USPS) processes and delivers mail to individuals and businesses within the United States. The service seeks to improve its performance through the development of efficient mail-handling systems and operates its own planning and engineering programs. The service is also responsible for protecting the mails from loss or theft and apprehending those who violate postal laws.

The postal service was created as an independent establishment of the **EXECUTIVE BRANCH** by the Postal Reorganization Act (39 U.S.C.A. § 101 et seq.), which was approved August 12, 1970. The U.S. Postal Service began operations on July 1, 1971, replacing the Post Office Department, which after years of financial neglect and fragmented control had proved unable to process the mail efficiently. Despite the availability of new technology, as well as skyrocketing mail volume, the department handled mail the same way it did in the 1870s.

As of 2002 the postal service had approximately 750,000 employees and handled more than 200 billion pieces of mail annually. The chief executive officer of the postal service, the postmaster general, is appointed by the nine governors of the postal service, who are appointed by the president, with the advice and consent of the Senate, for overlapping nine-year terms. The governors and the postmaster general appoint the deputy postmaster general, and these 11 people constitute the board of governors.

In addition to its national headquarters, the postal service has area and district offices, which supervise approximately 38,000 post offices, branches, stations, and community post offices throughout the United States.

In order to expand and improve service to the public, the postal service is engaged in customer cooperation activities, including the development of programs for both the general public and major customers. The consumer advocate, a postal **OMBUDSMAN**, represents the interests of the individual mail customer in matters involving the postal service by bringing complaints and suggestions to the attention of top postal management and solving the problems of individual customers. To provide postal services that are responsive to public needs, the postal service operates its own planning, research, engineering, real estate, and procurement programs, which are specially adapted to postal requirements. The service also maintains close ties with international postal organizations.

The postal service is the only federal agency whose employment policies are governed by **COLLECTIVE BARGAINING**. Labor contract negotiations affecting all bargaining unit personnel are conducted by the Labor Relations or Human Resources divisions. These divisions also handle personnel matters involving employees not covered by collective bargaining agreements.

The U.S. Postal Inspection Service is the federal law enforcement agency with jurisdiction over criminal matters affecting the integrity and security of the mail. It operates as the inspector general for the postal service. Postal inspectors enforce more than 100 federal statutes involving MAIL FRAUD, mail bombs, CHILD PORNOGRAPHY, illegal drugs, mail theft, and other postal crimes. The inspectors are also responsible for the protection of all postal employees. In addition, inspectors audit postal contracts and financial accounts.

Most postal regulations are contained in postal service manuals covering domestic mail, international mail, postal operations, administrative support, employee and labor relations, financial management, and procurement.

In recent years the U.S. Postal Service has gained national attention on several fronts as it sought to compete with private delivery services such as Federal Express and United Parcel Service. In the middle 1990s, the USPS began sponsoring a professional bicycling team that gained worldwide renown when team member Lance Armstrong won the prestigious Tour de France for five consecutive years beginning in 1999. In 2002 the USPS announced a postal rate increase to 37 cents for first-class mail, citing declining revenues and the loss of hundreds of millions of dollars due to the terrorist attacks of September 11, 2001, and the fears generated by the mailing of several anthrax-contaminated letters shortly thereafter.

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CROSS-REFERENCES

Collective Bargaining Agreement; Mail Fraud.

## U.S. SENTENCING COMMISSION

The U.S. Sentencing Commission is the agency responsible for the establishment of sentencing policies and procedures for the federal court system. The first task of the commission was to develop a uniform set of sentencing guidelines for the federal courts. The commission also collects and analyzes information on topics concerning federal crime and sentencing. In addition, the commission gives advice and assistance to Congress and to the EXECUTIVE BRANCH regarding the development of policies related to crime and criminal acts. The commission was created in 1984 in response to shifting views of penology in the United States.

The history of sentencing in the United States has been marked by evolution and fluctuation. In the late 1800s and early 1900s, the criminal justice profession embraced the rehabilitation model of punishment. This theory held that criminals were subject to rehabilitation and that taking into account the offender's life experience and looking at any extenuating circumstances could best effect such rehabilitation. Using this model many states established a system of "indeterminate sentencing." Under this system, both state and federal judges had the discretion to impose a sentence that took into account the defendant's character and background as well as the type of crime that had been committed. As a result, judges could sentence offenders to a wide range of penalties ranging from PROBATION to a maximum sentence. When a judge sentenced an offender to prison, PAROLE boards were charged with determining whether an offender should serve the entire sentence imposed by a judge or be subject to early release for good behavior while incarcerated.

By the 1950s and 1960s, the theories surrounding effective punishment changed again. Facing criticism that indeterminate sentencing was giving judges and parole boards too much discretion and not reducing crime, a number of state legislatures passed laws that called for mandatory minimums for certain crimes. Proponents of the deterrence model contended that people would be deterred from committing crimes if the consequences are sufficiently severe and called for the enactment of sentencing guidelines. By 1980 the guideline concept gained a number of adherents among elected officials and the general public. State legislatures began to pass reform acts that incorporated determinate sentencing guidelines to insure that offenders who committed the same or similar crimes and had similar criminal histories would receive equivalent sentences.

In response to the same complaints about indeterminate sentencing at the federal level,

Congress passed the Sentencing Reform Act of 1984 (SRA) (Pub. L. 98-473, title II, ch. II, Oct. 12, 1984, 98 Stat. 1987). The act abolished federal parole and reduced to 54 days a year the amount of time credited to inmates for good behavior. The act also created the United States Sentencing Commission as an independent federal agency that is part of the judicial branch of government. The commission, which is based in Washington, D.C., has seven voting members who are appointed by the president and confirmed by the Senate. At least three of the commissioners must be federal judges and no more than four can belong to the same political party. The attorney general of the United States and the chair of the U.S. Parole Commission are *ex-officio* members of the commission. Commissioners served six-year terms. The commission has approximately 100 employees divided into seven offices, four of which deal with substantive policy issues. The four policy offices are General Counsel, Monitoring, Policy Analysis, and Education and Sentencing Practice. The three support offices are Special Counsel, Legislative and Governmental Affairs, and Administration and Planning. Commission staff consists of attorneys, researchers, data technicians, administrative support staff, a public information component, and congressional liaisons.

One of the commission's first tasks was the development of sentencing guidelines for the federal courts. Major criminal offenses that are typically sentenced in federal courts include drug trafficking, FRAUD, immigration offenses, and bank robberies. The commission's sentencing guidelines went into effect on November 1, 1987. The guidelines assign most federal crimes to one of 43 "offense levels" based on the severity of the offense. Each offender is also categorized within one of six "criminal history categories" based on his or her past criminal record. The guidelines utilize a table that shows the point at which the offense level and criminal history intersect. The point of intersection determines the guideline range for that particular offense. The guidelines allow a small amount of discretion for judges to alter a sentence. However, restrictions apply to these modifications which are termed "departures." The judge must have specific grounds for departing from the sentence dictated by the guidelines, and the reasons must be listed in the trial record. The guidelines grant more flexibility for a judge who chooses to increase the amount of time an offender can be imprisoned than for a judge to decrease a sentence. Sentences outside the guideline range are subject to review, and all sentences are subject to review for incorrect application of the guidelines.

Judges who object to having their discretion reduced and rehabilitation advocates have sought to repeal or change the commission's guidelines. The Supreme Court upheld the constitutionality of the federal guidelines in *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). A number of judges have continued to voice their opposition to a system that they allege sometimes dictates a severe sentence for minor criminal conduct and does not permit them to make modifications absent unusual circumstances. Other critics have charged that prosecutors can tailor the charges against the offender in such a way as to predetermine the ultimate sentence.

Approximately 50,000 offenders are sentenced annually in the federal courts, so the work of the commission has a tremendous impact on the nation's system of criminal justice. The commission continues to refine the sentencing guidelines based on the collection and analysis of court decisions, sentencing-related research, and input from criminal justice experts. In 1995 the commission, by a vote of 4–3, recommended that the guidelines be changed to equalize the penalties for selling crack cocaine and powdered cocaine. The commission found that there was no scientific basis or other justification for the disparity that required the same sentence for the sale of 1 gram of crack cocaine as for the sale of 100 grams of powder cocaine. For the first time in the history of the commission, Congress rejected the agency's recommendations. While the Senate did not vote on the recommendation, the House voted 332–83 to continue the 100 to 1 disparity in the penalty.

Members of the criminal defense bar, judges, and other members of the criminal justice community continued to seek an end to the disparity, citing the commission's own research which showed that the average sentence for the sale of crack cocaine was longer than the average sentences for ROBBERY, ARSON, SEXUAL ABUSE, and MANSLAUGHTER. The commission's *1999 Sourcebook of Federal Sentencing Statistics* also indicated that while the majority of crack users in the United States are Caucasian, 94 percent of those sentenced for the sale of crack cocaine are

African American or Hispanic. The controversy continued into the early 2000s.

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CROSS-REFERENCES

Sentencing.

## U.S. SUPREME COURT

See SUPREME COURT OF THE UNITED STATES.

## U.S. TRADE REPRESENTATIVE, OFFICE OF

The Office of the Special Trade Representative was created by Congress in the Trade Expansion Act of 1962 (19 U.S.C.A. § 1801) and implemented by President JOHN F. KENNEDY in EXECUTIVE ORDER No. 11,075 on January 15, 1963 (27 FR 473). This agency was authorized to negotiate all trade agreements under the Tariff Act of 1930 (19 U.S.C.A. § 1351) and the Trade Expansion Act of 1962. As part of the Trade Act of 1974 (19 U.S.C.A. § 2171), Congress established the office as a cabinet-level agency within the Executive Office of the President and gave it other powers and responsibilities for coordinating trade policy.

In 1980 the Office of the Special Trade Representative was renamed the Office of the U.S. Trade Representative (USTR). USTR refers both to the agency and to the agency's head, the U.S. trade representative. President JIMMY CARTER's Executive Order No. 12,188 of January 4, 1980 (45 FR 989), authorized the USTR to set and administer overall trade policy. The USTR was also designated as the nation's chief trade negotiator and as the representative of the United States in major international trade organizations.

The U.S. trade representative is a cabinet-level official with the rank of ambassador who is directly responsible to the president and the Congress. The USTR is responsible for developing and coordinating U.S. international trade, commodity, and direct investment policy and for leading or directing negotiations with other countries on such matters. Through an interagency structure, the USTR coordinates trade policy, resolves agency disagreements, and frames issues for presidential decision. The agency has offices in Washington, D.C., and Geneva, Switzerland.

The agency provides trade policy leadership and negotiating expertise in its major areas of responsibility. Among these areas are the following: all matters within the World Trade Organization (WTO), formerly the GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT); trade, commodity, and direct investment matters dealt with by international institutions such as the Organization for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD); export expansion policy; industrial and services trade policy; international commodity agreements and policy; bilateral and multilateral trade and investment issues; trade-related INTELLECTUAL PROPERTY protection issues; and import policy.

Interagency coordination is accomplished by the USTR through the Trade Policy Review Group (TPRG) and the Trade Policy Staff Committee (TPSC). These groups, which are administered and chaired by the USTR, are composed of 17 federal agencies and offices. They develop and coordinate U.S. government positions on international trade and trade-related investment issues. The final tier of the interagency trade policy mechanism is the National Economic Council (NEC), chaired by the president. The NEC deputies committee considers decision memoranda from the TPRG, as well as particularly important or controversial trade-related issues.

The USTR also serves as vice chairperson of the Overseas Private Investment Corporation (OPIC), is a nonvoting member of the EXPORT-IMPORT BANK, and serves on the National Advisory Committee on International Monetary and Financial Policies. The USTR does not handle several significant trade and related policy areas, however. These include export financing, export controls, multilateral development bank lending, and international fisheries, aviation, and maritime policies.

The private sector plays a continuing role in trade negotiations through the mechanism of advisory committees. The advisory system is comprised of several committees with differing responsibilities. The Advisory Committee on

Trade Policy and Negotiations is a presidentially appointed group of 45 members representing significant sectors of the U. S. economy that have international trade concerns. The committee provides policy guidance on various trade issues. This advisory process was extremely helpful during the creation of the NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) and other trade initiatives. The committee's role has been expanded to include advice on the development and implementation of overall U.S. trade policy and on priorities for actions to implement such policy.

In the Trade Act of 1974, Congress broadened and codified the trade representative's policy-making and negotiating functions and established close congressional consultative, advisory, and oversight relationships with the agency. Five members from each House are formally appointed as official congressional advisers on trade policy, and additional members may be appointed as advisers on particular issues or negotiations.

In 2003 the USTR released its 2003 Inventory of Trade Barriers, an ANNUAL REPORT that documents foreign trade barriers to U.S. exports and gives examples that show the elimination or reduction of such barriers. Highlights of the report included the need for enforcement of intellectual property rights and enforcement of trade agreements with regard to a number of countries in Africa as well as Brazil, Canada, China, the European Union, Japan, Korea, and Russia.

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CROSS-REFERENCES

Export-Import Bank of the United States; Intellectual Property.

## USA PATRIOT ACT OF 2001

The USA PATRIOT Act of 2001 is a 342-page, sprawling piece of legislation that contains more than 150 sections and amends more than 15 federal laws. The law's full name is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, hence the acronym USA PATRIOT Act. It deals primarily with combating TERRORISM and gives the EXECUTIVE BRANCH of the federal government more tools to fight suspected terrorist activity, but it also aroused the anger of civil libertarians. Critics of the act have charged that the government gained the power to investigate and detain persons with little oversight from the courts.

In the aftermath of the SEPTEMBER 11, 2001, TERRORIST ATTACKS, U.S. political leaders sought to address terrorism with new vigor. President GEORGE W. BUSH and Attorney General JOHN ASHCROFT presented Congress with proposed legislation on September 17, 2001, that focused on intelligence gathering, immigration, criminal justice, and MONEY LAUNDERING. The administration sought new powers to conduct searches of people suspected of terrorism; to detain and deport persons suspected of terrorist involvement; and to remove STATUTES OF LIMITATIONS on terrorism. In addition, the administration wanted the JUSTICE DEPARTMENT to have the power to place wiretaps on the phones and computers of anyone suspected of terrorism. This initial proposal became the framework for the USA PATRIOT Act, which was first introduced in the House of Representatives on October 2. A similar law was introduced in the Senate on October 4, and on October 12 it passed on a vote of 96–1, with only Senator Russell Feingold (D-Wisc.) dissenting. The House passed its version the next day on another lopsided vote, 337–79. The bills incorporated what the administration wanted, but it also gave the government the authority to conduct secret searches of a suspect's property. The two bodies resolved differences between their bills, and both houses passed the act on October 25. President Bush signed the bill into law on October 26. Because of objections about the scope of the authority given to the executive branch, Congress placed a "sunset" clause in the act. Many of the provisions would expire in five years if not re-authorized by Congress.

The act sets out the following purposes: "to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and . . . other purposes." It is divided into ten main categories

called titles. They include enhancing domestic security against terrorism; enhancing surveillance procedures; abating money laundering; protecting the borders; removing obstacles to investigating terrorism; providing for victims of terrorism, public safety officers, and their families; increasing information sharing; strengthening the criminal laws against terrorism; improving intelligence; and miscellaneous provisions.

Title I, on enhancing domestic security against terrorism, sets up a Counterterrorism Fund in the U.S. Treasury and appropriates money for combating terrorism to the FEDERAL BUREAU OF INVESTIGATION's Technical Support Center. It also increases the president's authority to seize the property of foreign persons, organizations, or countries that the president determines have planned, authorized, aided, or engaged in hostilities or attacks against the United States. Finally, Title I instructs the U.S. SECRET SERVICE to develop a national network of electronic-crime task forces to investigate electronic crimes, including, but not limited to, potential terrorist attacks.

Title II, which concerns enhancing surveillance procedures, contains some of the act's most controversial provisions. Prior to the passage of the USA PATRIOT Act, the federal government could conduct wiretaps with limited restrictions under the Foreign Intelligence Surveillance Act (FISA) only when foreign intelligence was the primary purpose. Now, the government could use FISA wiretaps, which lack certain constitutional protections, to conduct criminal investigations as long as foreign intelligence is a "significant" purpose of the investigation. Title II gives law enforcement broad authority to share acquired information with other federal departments. The act allows FISA authorities to compel an INTERNET service provider to turn over information about a user's E-MAIL activity, and a business to turn over personal information that simply is related to a criminal investigation. Finally, Title II allows authorities executing search warrants to delay notice of the search under certain circumstances, thus limiting a citizen's ability to assert his or her constitutional rights before the search occurs.

Title III contains provisions to fight money laundering, as many terrorist groups finance their operations with money received from illegal drug and SMUGGLING activities. Title IV, on border control, authorizes appropriations necessary to triple the number of U.S. Border Patrol, Customs Service, and Immigration and Naturalization Service personnel working on the Canadian border. Title IV also allows the SECRETARY OF STATE to designate domestic terrorist organizations, defined as any organization that has ever used a weapon or dangerous device to cause substantial damage to property. The designation renders a group's non-citizen members inadmissible to the United States and makes payment of membership dues a deportable offense.

Within Title III, Section 411 permits immigrants to be found inadmissible to the United States for speaking in a way that undermines antiterrorism efforts. Section 412 allows the federal government to imprison ALIENS who are suspected of terrorism, for up to seven days before charging them with a crime or beginning deportation proceedings. The detention can go on indefinitely under certain circumstances. Section 416 allows the government to require schools to turn over information pertaining to foreign students for analysis and investigation.

Title V of the USA PATRIOT Act enhances the federal government's ability to offer rewards for information that is valuable to terrorism investigations. Title VI establishes and funds assistance programs for victims of terrorism, public-safety officers, and their families. This provision set up the September 11 Victim Compensation Fund of 2001 to pay the victims of the terrorist attacks and their families compensation. The Justice Department was authorized to appoint a SPECIAL MASTER, who would review claims and decide how much each victim or family would receive from the fund. Title VII expands the government's regional information-sharing system to help federal, state, and local law enforcement to respond more effectively to terrorist attacks.

Title VIII amends the U.S. criminal code to add material pertaining to terrorism, including sections on terrorism against mass transportation systems, the definition of domestic terrorism, the prohibition against harboring terrorists, and material support for terrorism. This title also eliminates the statute of limitations for many crimes involving terrorism. Title IX expresses Congress's intent for the CENTRAL INTELLIGENCE AGENCY to gather intelligence concerning potential terrorism. Finally, Title X contains many miscellaneous provisions, including the intent of Congress that "in the

quest to identify, locate, and bring to justice the perpetrators and sponsors of the terrorist attacks on the United States on September 11, 2001, the civil rights and civil liberties of all Americans . . . should be protected."

Since its enactment the law has aroused controversy over its surveillance and detention provisions. The September 11 fund has generated bitterness and legal action by some of the families of the terrorist victims. In April 2003, some members of Congress introduced legislation that sought to repeal the sunset provisions, thereby making the entire law permanent.

Civil libertarians continue to object to the surveillance powers given to the government. The act authorized federal officials to obtain WIRETAPPING orders that allow them to follow a suspect to any telephone the person uses. Prior law permitted wiretaps only on specified telephone lines. The act does allow persons to file civil lawsuits if the federal government discloses information gained through surveillance and wiretapping powers. The American Library Association has expressed concerns over provisions that require libraries to turn over the records of their patrons. Beyond supplying law enforcement with book information, libraries must share any requested information about a patron's Internet use on library computers.

Arab-American and Muslim leaders have objected to the immigration sections of the USA PATRIOT Act. The INS has detained hundreds of Middle Eastern immigrants for long periods of time without public acknowledgment. In addition, these leaders have complained that the use of the new surveillance powers has been targeted at their communities.

Kenneth R. Feinberg, the special master for the September 11 Victim Compensation Fund, has drawn criticism for the way he has awarded money. Because his rulings are not appealable to a court of law, these awards are final. In May 2003, a federal court upheld Feinberg's administration of the fund.

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CROSS-REFERENCES

September 11th Attacks; Terrorism.

## USAGE

*A reasonable and legal practice in a particular location, or among persons in a specific business or trade, that is either known to the individuals involved or is well established, general, and uniform to such an extent that a presumption may properly be made that the parties acted with reference to it in their transactions.*

The term *usage* refers to a uniform practice or course of conduct followed in certain lines of business or professions that is relied upon by the parties to a contractual transaction. A court will apply the usage of a business when it determines that doing so is necessary to resolve a contractual dispute. Ignoring usage may result in the misreading of a document and the intent of the parties who signed it.

The law has developed different forms of usage. *Local usage* refers to a practice or method of dealing regularly observed in a particular place. Under certain circumstances it may be considered by a court when interpreting a document. *General usage* is a practice that prevails generally throughout the country, or is followed generally by a given profession or trade, and is not local in its nature or observance.

A *trade usage* is the prevailing and accepted custom within a particular trade or industry and is not tied to a geographic location. The law assumes that merchants are aware of the usage of their trade. TRADE USAGE supplements, qualifies, and imparts particular meaning to the terms of an agreement for the purpose of their interpretation.

The term *custom and usage* is commonly used in COMMERCIAL LAW, but "custom" and "usage" can be distinguished. A *usage* is a repetition of acts whereas *custom* is the law or general rule that arises from such repetition. A usage may exist without a custom, but a custom cannot arise without a usage accompanying it or preceding it. Usage derives its authority from the assent of the parties to a transaction and is applicable only to consensual arrangements. Custom derives its authority from its adoption into the law and is binding regardless of any acts of assent by the parties. In modern law, however, the two principles are often merged into one by the courts.

## USC

*An abbreviation for U.S. Code.*

## USCA®

*An abbreviation for U.S. Code Annotated.*

## USCCAN®

*An abbreviation for* United States Code Congressional and Administrative News, *a source of new federal public laws that is published by West Group every two weeks when Congress is in session and once a month when Congress is not in session.*

USCCAN first appears in an advance sheet edition, which contains the full text of all public laws as well as some **LEGISLATIVE HISTORY** in the form of committee reports on the more significant enactments. In addition, it carries selected administrative regulations, executive documents, and various tables and indexes helpful in conducting research involving such legislation. At the end of each session of Congress, the pamphlet is bound to provide a permanent record of congressional laws.

## USDC

*An abbreviation for U.S. District Court.*

## USE

*The fact of being habitually employed in a certain manner. In real property law, a right held by an individual (called a* cestui que use*) to take the profits arising from a particular parcel of land that was owned and possessed by another individual.*

For example, a seller of goods might make an **IMPLIED WARRANTY** of fitness for a particular use, which signifies that an item or a product is fit to be used for a specific purpose, such as a tire meant for use in the snow.

The *cestui que use* received the benefits from the property even though title to such land was in another individual. This theory is no longer part of the U.S. legal system; however, the modern law of trusts evolved from the law relating to uses.

CROSS-REFERENCES

Product Liability; Sales Law.

## USE AND OCCUPATION

*A kind of action brought by a landlord against an individual who had occupancy of the landlord's land or premises under an express or implied agreement requiring payment, but not under a leasehold contract that would allow the landlord to initiate an action for rent.*

For example, property might be occupied under a lease that is rendered void because it does not comply with the **STATUTE OF FRAUDS**. In such a situation, the landlord could bring a use and occupation action for the value of the use of the property.

CROSS-REFERENCES

Landlord and Tenant.

## USE TAX

*A charge imposed on the use or possession of* **PERSONAL PROPERTY**.

Governments employ use taxes to accomplish two purposes. A use tax may be imposed to prevent someone from evading a sales tax by buying goods in a nontaxing state and shipping them into the state that imposes the sales tax. Use taxes are also used to help defray the cost of public services associated with particular types of personal property.

States and municipalities impose use taxes on purchases or rentals that are made outside the taxing jurisdiction but would have been taxable had they taken place within it. Such transactions escape the normal sales tax collection because retailers outside the state or municipality are not required to collect the sales tax. The use tax protects retailers located in the state or municipality because it removes the incentive for consumers to shop outside that locality in order to avoid paying the sales tax. For example, suppose a person buys a car from a dealer in a nearby state that does not impose a sales tax. The buyer must pay use tax on the purchase price when he returns to his state or city.

In addition, persons who order catalog merchandise from out-of-state companies that do not charge sales tax are obligated to pay the use tax themselves. Collecting the tax in this situation is difficult, however, because the government has no effective way of monitoring these sales.

The other purpose of a use tax is to help recoup the cost of public services directly related to the use of certain types of personal property. The most common use taxes are assessed on motor vehicle and boat licenses. User fees are also charged for docking privileges in airports or harbors.

The use tax on motor vehicles is generally allocated to the maintenance of roads and bridges and to the regulation and administration of motor vehicles. The federal government collected a use tax on motor vehicles during WORLD WAR II, but the tax was shifted to the states after the war. The use tax on vehicles and boats also serves as a method for identifying all vehicles and boats in the jurisdiction.

## USUFRUCT

*A* CIVIL LAW *term referring to the right of one individual to use and enjoy the property of another, provided its substance is neither impaired nor altered.*

For example, a *usufructuary right* would be the right to use water from a stream in order to generate electrical power. Such a right is distinguishable from a claim of legal ownership of the water itself.

## USURPATION

*The illegal encroachment or assumption of the use of authority, power, or property properly belonging to another; the interruption or disturbance of an individual in his or her right or possession.*

The term *usurpation* is also used in reference to the unlawful assumption or seizure of sovereign power, in derogation of the constitution and rights of the proper ruler.

## USURY

*The crime of charging higher interest on a loan than the law permits.*

State laws set the maximum amount of interest that can be charged for a loan of money. A lender that charges higher than the maximum amount of interest is guilty of the crime of usury. In addition, courts may modify contracts that contain usurious rates of interest by reducing the interest to the legal maximum.

The charging of excessive interest in exchange for a monetary loan has been considered reprehensible from the earliest times. Chinese and Hindu law prohibited it, while the Athenians scorned persons who charged more than a moderate rate of interest for a loan. The Romans at one time abolished the practice of charging interest. Although they later revived it, the rates were strictly regulated.

During the Middle Ages in western Europe, the Catholic Church censured usurers, and when they died, the Crown confiscated their lands and property. In England, until the thirteenth century charging any interest was defined as usury. As commerce and trade increased, however, the demand for credit grew, and usury was redefined to mean exorbitant interest rates. In 1545 the English Parliament set a legal maximum interest rate. Charging higher interest constituted usury.

The United States followed the English practice, as states passed laws that set maximum legal interest rates. Rate restrictions vary from state to state, and different limits are set for different kinds of loans. For example, higher interest rates are usually allowed on consumer loans than on home mortgages. Some states do not restrict the interest rates that corporations can be charged under the assumption that corporations have sufficient bargaining power and business sense to negotiate a fair rate independently.

Restrictions on legal interest rates apply to banks, consumer loan companies, and other businesses that extend credit. Loan agreements between private individuals are also governed by state usury laws. For example, if a person agrees to lend a friend $5,000, the interest rate cannot exceed the maximum set by the state usury statute. Persons who charge excess interest and then threaten EXTORTION are known as *loan sharks.* They may be prosecuted for usury and, if convicted, fined and possibly imprisoned. The persons who typically borrow from a loan shark are those who cannot qualify for a loan from a commercial lender. ORGANIZED CRIME has traditionally relied on loan sharking as a source of income.

The penalty for usury is ordinarily a fine, forfeiture of the interest, or both. In some cases involving CONSUMER CREDIT, courts may modify usurious contracts and allow the borrower to pay only the principal sum and legal interest. Courts have often concluded, for example, that the high interest rates charged by "rent-to-own" businesses for the rental of consumer goods, such as furniture and televisions, are usurious and force the consumer to pay an exorbitant price for the goods.

The UNIFORM CONSUMER CREDIT CODE (UCCC) was drafted to address many of these consumer credit problems. Though only nine states have adopted the code in its entirety, most states have included selected provisions from it in their consumer credit laws. The UCCC is designed to provide protection to consumers

# Rent-to-Own Contracts: Should They Be Subject to Usury Laws?

For more than thirty years, the legal status of rent-to-own (RTO) contracts has been the subject of debate. Consumer advocates decry the high cost of these contracts, which typically involve furniture, appliances, televisions, and other electronic goods. The RTO industry argues that it has been unfairly accused of consumer exploitation, when in fact it provides a needed service to individuals who either have poor credit or prefer to rent certain consumer goods. In most states RTO businesses must follow disclosure requirements when making RTO contracts, yet these businesses are allowed to charge rates that, if characterized as credit, would violate state usury laws.

The RTO industry, which serves close to 3 million customers a year and generates almost $4 billion in revenues annually, is composed of dealers who rent consumer goods with an option to buy. An RTO contract normally allows a customer to rent something for one week or one month at a time. At the end of the week or month, the customer can either terminate the agreement without any cost or obligation or renew the contract by making another advance rental payment. If the contract is renewed a prescribed number of times—typically, a period of eighteen months—and the customer meets the terms of the rental agreement, the store conveys ownership of the item to the customer.

Critics of RTO contracts contend that the cost of an eighteen-month contract greatly exceeds the value of the item purchased. If the contract was considered a credit sale rather than a lease, it would violate state usury laws. Usury laws are designed to prohibit excessive finance charges and to prevent creditors from gouging consumers, who are typically in a weaker bargaining position. Consumer advocates contend that RTO customers are mostly poor and uneducated and have poor credit histories. These customers spend a larger percentage of their disposable income on RTO contracts than more affluent consumers do using traditional credit arrangements. Consequently, these critics believe states should reclassify RTO contracts as installment sales rather than as leases.

Consumer advocates note that if RTO contracts were recognized as credit sales, the federal **CONSUMER CREDIT PROTECTION ACT**, also known as the **TRUTH IN LENDING ACT** (15 U.S.C.A. § 1601 et seq. [1968]), would apply. The act requires strict disclosures in **CONSUMER CREDIT** sales, as do state retail installment sales (RIS) laws. An RTO dealer would have to disclose the contract price of the consumer good, the total RTO price, the associated finance charge, and the annual percentage rate (APR). The RTO industry argues that it is not subject to the Truth in Lending Act because RTO contracts are not credit sales. Rather, they are leases that can be terminated at any time.

Consumer advocates have also argued that RTO contracts should be governed by the **UNIFORM CONSUMER CREDIT CODE** (UCCC), which regulates consumer credit transactions. The UCCC is a model act that has been adopted in some form by approximately one-third of the states. It applies to businesses who buy goods and services on credit. It attempts to simplify, clarify, and update legislation governing consumer credit and usury. The UCCC also sets interest rate ceilings to ensure that consumers are not overcharged for credit. The UCCC works in concert with the federal **CONSUMER CREDIT PROTECTION ACT** of 1968 (16 U.S.C.A. § 1601 et seq.), which mandates that consumers purchasing on credit be provided with full disclosure on the cost of the loan.

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CROSS-REFERENCES

Consumer Protection.

## UTI POSSIDETIS

*A term used in* **INTERNATIONAL LAW** *to indicate that the parties to a particular treaty are to retain possession of that which they forcibly seized during a war.*

A treaty ending a war may adopt the principle of *uti possidetis,* the principle of *status quo ante bellum* (Latin for "the state of things before the war"), or a combination of the two. Upon a default of any treaty stipulation, the doctrine of *uti possidetis* prevails.

## UTILITARIANISM

*In* **JURISPRUDENCE**, *a philosophy whose adherents believe that law must be made to conform to its most socially useful purpose. Although utilitarians differ as to the meaning of the word* useful, *most agree that a law's utility may be defined as its ability to increase happiness, wealth, or justice. Conversely, some utilitarians measure a law's usefulness by its ability to decrease unhappiness, poverty, or injustice.*

charges, and the applicable interest rate. In theory, such disclosures would allow a consumer to shop around for the best RTO deal.

More than forty states have adopted some type of RTO legislation. For example, Minnesota's Rental Purchase Agreement Act (RPAA) (Minn. Stat. § 325F.84 et seq. [1990]), provides a number of protections to consumers. It requires specific disclosures in the RTO contract, in advertising, and on in-store merchandise tags. The RPAA also provides restrictions and protections in the event of the customer's default, gives the consumer reinstatement rights, and limits delivery charges, security deposits, and collection fees.

The RTO industry rejects the idea that consumers are subjected to usurious interest rates when they enter into a contract. The industry says that an overwhelming majority of customers do not pursue the ownership option. Dealers point out that 75 percent of customers return the rented item within the first four months and that fewer than 25 percent rent long enough to own the item.

RTO supporters also challenge the stereotype of the typical RTO customer. A 1994 survey, sponsored by the Association of Progressive Rental Organizations (APRO), a national industry group, found that almost 60 percent of RTO customers earned between $24,000 and $75,000 annually. In addition, a 1996 APRO survey found that 45 percent of RTO customers had a high school education and almost 30 percent had some college education. The industry's customer base includes students, business executives on temporary assignment, military personnel, and families in transit. The RTO business contends that it provides products to consumers who have immediate needs for consumer household goods but who either do not want or cannot accept long-term obligations, as well as to customers who do not have access to traditional credit arrangements.

The RTO industry challenges the claim that it wishes to keep customers in the dark about the cost of RTO contracts. The industry, which sees potential for continued growth, is taking steps to protect customers and ensure that RTO dealers are ethical. The APRO notes that it has participated in the debate and drafting of RTO disclosure laws in forty-four states. The industry agrees that contracts should disclose basic information, including the cash price of the product, the amount of each rental payment, the number of payments necessary to acquire ownership, and the total cost of the product acquired. The RTO industry believes that once this information is disclosed, customers should have the freedom to make an RTO contract.

The industry does not agree that state usury laws should be applied to RTO agreements. RTO operators note that no one is compelled to enter into an agreement. In addition, the costs of doing business in the RTO market dictate the rental rates charged to customers. RTO businesses must provide full service, including repairs, loaners, and pickup and delivery. Finally, RTO dealers do not agree that an RTO agreement is a credit sales agreement. Instead, they see it as a no-obligation, no-debt agreement that gives the customer the option of ending the agreement at the end of the rental cycle.

The utilitarianism movement originated in Great Britain during the eighteenth and nineteenth centuries when philosophers JEREMY BENTHAM, JOHN AUSTIN, JOHN STUART MILL, and Henry Sidgwick began criticizing various aspects of the COMMON LAW. Bentham, the progenitor of the movement, criticized the law for being written in dense and unintelligible prose. He sought to cut through the thicket of legal verbiage by reducing law to what he thought were its most basic elements—pain and pleasure.

Bentham believed that all human behavior is motivated by a desire to maximize pleasure and avoid pain. Yet he observed that law is often written in vague terms of rights and obligations. For example, a law might say that a person has a right to take action under one set of circumstances but an obligation to refrain from action under different circumstances. Bentham thought that law could be simplified by translating the language of rights and obligations into a pain-pleasure calculation.

Utilitarians have tried to apply Bentham's hedonistic calculus to CRIMINAL LAW. They assert that punishment is a form of government-imposed pain. At the same time, utilitarians believe that criminals break the law only because they do not fully comprehend the confusing language of rights and obligations. Accordingly, utilitarians conclude that law must be stripped of such confusing terms and redrafted in language that equates socially undesirable conduct with pain and socially desirable conduct with pleasure.

Utilitarians measure the desirability of human conduct by the amount of happiness it generates in society. They maintain that the ultimate aim of any law should be to promote the greatest happiness for the greatest number of people. Utilitarians would permit conduct that produces more happiness in society than unhappiness and would proscribe conduct that results in more unhappiness than happiness. Some utilitarians envision a democratic society

where the happiness and unhappiness produced by a particular measure would be determined precisely by giving everyone the right to vote on the issue. Thus, those in power would know exactly how the citizenry felt about every issue.

Although the application of utilitarian principles may strengthen majority rule, unfettered democracy can lead to tyranny. Utilitarians are frequently criticized for sacrificing the interests of minorities to achieve majoritarian satisfaction. In a pure utilitarian form of government, a voting majority could pass laws to enslave minority groups as long as the institution of SLAVERY continued to satisfy a preponderance of the population. Concepts such as EQUAL PROTECTION, human dignity, and individual liberty would be recognized only to the extent that a majority of the population valued them.

Modern utilitarians have attempted to soften the harshness of their philosophy by expanding the definition of social utility. Law and economics is a school of modern utilitarianism that has achieved prominence in legal circles. Proponents of law and economics believe that all law should be based on a cost-benefit analysis in which judges and lawmakers seek to maximize societal wealth in the most efficient fashion. Here the term *wealth* possesses both pecuniary and nonpecuniary qualities. The nonpecuniary qualities of wealth may include the right to self-determination and other fundamental freedoms that society deems important, including FREEDOM OF SPEECH and religion. Under such an analysis, institutions like slavery that deny basic individual liberties would be declared illegal because they decrease society's overall nonpecuniary wealth.

Economic analysis of law has more practical applications as well. RICHARD A. POSNER, chief judge for the Seventh Circuit Court of Appeals from 1993 to 2000, is a pioneer in the law and economics movement. He advocates applying economic analysis of law to most legal disputes. For example, in NEGLIGENCE actions Posner believes that liability should be imposed only after a court weighs three factors: the pecuniary injury suffered by the plaintiff, the cost to the defendant in taking precautions against injurious behavior, and the probability that a particular injury could have been avoided by the defendant. This cost-benefit analysis is widely accepted and is applied in negligence actions by both state and federal courts. Thus, through economic analysis of law, utilitarianism and its permutations continue to influence legal thinking in the United States.

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CROSS-REFERENCES

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## UTTER

*To publish or offer; to send into circulation.*

The term *utter* is frequently used in reference to COMMERCIAL PAPER. To utter and publish an instrument is to declare, either directly or indirectly through words or action, that it is good. It constitutes a crime, for example, to utter a forged check.

## UXOR

*[*Latin, Wife.*] A woman who is legally married.*

The term *et uxor* (Latin for "and his wife"), frequently abbreviated to *et ux.,* is used in indexing conveyances, particularly in cases where a HUSBAND AND WIFE are joint grantors or grantees.

## VACATE

*To annul, set aside, or render void; to surrender possession or occupancy.*

The term *vacate* has two common usages in the law. With respect to real property, to vacate the premises means to give up possession of the property and leave the area totally devoid of contents. To vacate a court order or judgment means to cancel it or render it null and void.

A person may vacate property voluntarily or involuntarily through the issuance of an eviction order by a court. Rental and lease agreements usually contain a provision concerning when and how the tenant is to vacate the premises at the end of the lease period. Many landlords require renters to make damage deposits, which are refunded after the tenant vacates the property if the landlord determines that no serious damage has been done and that the renter has not left behind PERSONAL PROPERTY that must be disposed of by the landlord. Otherwise, the landlord may keep all or a portion of the deposit.

The other common legal usage of *vacate* refers to the canceling or rescinding of court judgments and orders. State and federal rules of CIVIL PROCEDURE give courts the authority to modify prior judgments. A judgment is the definitive act in a lawsuit that puts an end to the litigation by specifically granting or denying the relief requested by the parties. Once a judgment granting relief has been entered, the plaintiff may legally collect the damages awarded by the court.

A motion to vacate a judgment must be based on a substantial issue. Rule 60(b) of the Federal Rules of Civil Procedure permits a federal court to relieve a party from an adverse judgment on various grounds including FRAUD, mistake, newly discovered evidence, and satisfaction of the judgment.

Another common ground for seeking a motion to vacate is the failure to provide the person against whom the judgment is entered with sufficient notice of the action. If, for example, the plaintiff claims that after making a GOOD FAITH effort, he cannot locate the defendant to serve notice of the pending action, the court may permit service by publication in a newspaper. On the day of the hearing, if the defendant does not appear, the court may enter a default judgment in favor of the plaintiff. However, if the defendant discovers the judgment has been filed, she can make a motion to vacate. The defendant might argue that the plaintiff could have easily served the papers personally and given the defendant the opportunity to appear in court and argue the merits of the case.

Courts are generally reluctant to grant a motion to vacate a judgment, especially on the ground of newly discovered evidence. A court will not grant a motion to vacate where the complaining litigant failed to exercise due diligence in securing the evidence in sufficient time to offer it in the original lawsuit. Some jurisdictions do not allow any judgments to be vacated due to newly discovered evidence.

CROSS-REFERENCES

Landlord and Tenant.

## VAGRANCY

*The condition of an individual who is idle, has no visible means of support, and travels from place to place without working.*

At COMMON LAW the term *vagrant* referred to a person who was idle, refused to work although capable of doing so, and lived on the charity of others. Until the 1970s state vagrancy statutes were used by police to charge persons who were suspected of criminal activity, but whose actions had not gone far enough to constitute a criminal attempt. Court decisions, however, have struck down vagrancy laws as unconstitutionally vague. In addition, the term *vagrant* has been replaced by HOMELESS PERSON as a way of describing a person who is without means or a permanent home.

Traditionally, communities tended to regard vagrants with suspicion and view them either as beggars or as persons likely to commit crimes. In England vagrants were whipped, branded, conscripted into military service, or exiled to penal colonies. In colonial America vagrancy statutes were common. A person who wandered into a town and did not find work was told to leave the community or face criminal prosecution.

After the U.S. CIVIL WAR, the defeated Southern states enacted *Black Codes,* sets of laws that sought to maintain white control over the newly freed African American slaves. The concern that African Americans would leave their communities and deplete the labor supply led to the inclusion of vagrancy laws in these codes. Unemployed African Americans who had no permanent residence could be arrested and fined. Typically, the person could not pay the fine and was therefore either sent for a term of labor with the county or hired out to a private employer.

The abuse of vagrancy laws by the police throughout the United States was common. Such laws were vague and undefined, allowing police to arrest persons merely on the suspicion they were about to do something illegal. In 1972 the U.S. Supreme Court addressed this problem in *Papachristou v. Jacksonville,* 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110. The Court ruled that a Florida vagrancy statute was unconstitutional because it was too vague to be understood. The Court emphasized that members of the public cannot avoid engaging in criminal conduct, if prior to engaging in it, they cannot determine that the conduct is forbidden by law. The Court also concluded that the vagrancy law's vagueness lent itself to ARBITRARY enforcement: police, prosecutors, and juries could enforce the law more stringently against one person than against another, even though the two individuals' conduct was similar.

After *Papachristou* the validity of vagrancy statutes was put in doubt. Prosecutions for vagrancy must now be tied to observable acts, such as public begging. Prosecutions are rare, however, because local governments do not want to spend their financial resources incarcerating persons for such offenses.

CROSS-REFERENCES

Homeless Person; Void for Vagueness Doctrine.

*Most vagrancy laws have been struck down as unconstitutionally vague, and the term vagrant has been replaced by the term homeless person.*

AP/WIDE WORLD PHOTOS

## VAGUE

*Imprecise; uncertain; indefinite.*

The term *vague* is frequently used in reference to a statute written in language that is so indefinite or lacking in precision that an individual of ordinary intelligence is forced to guess at its meaning. Statutes that are vague are ordinarily void on that ground.

CROSS-REFERENCES

Void for Vagueness Doctrine.

## VALID

*Binding; possessing legal force or strength; legally sufficient.*

A valid contract, for example, is one that has been executed in compliance with all the requisite legal formalities and is binding upon, and enforceable by, the individuals who executed it.

## VALUABLE CONSIDERATION

*In the formation of a valid and binding contract, something of worth or value that is either a detriment incurred by the person making the promise or a benefit received by the other person.*

In contract law consideration is required as an inducement to enter into a contract that is enforceable in the courts. It is an essential element for the formation of a contract. What constitutes sufficient consideration, however, has been the subject of continuing legal debate. Contracts and courts generally use the term *valuable consideration* to signify consideration sufficient to sustain an enforceable agreement.

In general, consideration consists of a promise to perform a desired act or a promise to refrain from doing an act that one is legally entitled to do. Thus, a person who seeks to enforce a promise must have paid or obligated herself to pay money, delivered goods, expended time and labor, or forgone some other profitable activity or legal right. For example, in a contract for the sale of goods the money paid is the valuable consideration for the vendor, and the property sold is the consideration for the purchaser.

In early COMMON LAW nominal consideration was sufficient to establish a contract. The consideration could be as small as a peppercorn or a cent as long as it demonstrated that the parties intended to enter into an agreement. Eventually, the courts developed the requirement of valuable consideration, but what constitutes it has varied over time. Valuable consideration does not necessarily have to be equal in value to what is received, and it need not be translatable into dollars and cents. It is sufficient for the consideration to consist of a performance or a promise to perform that the promisor (the person making the promise) regards as having value. It is not essential that the person to whom the consideration moves should be benefited, provided the person from whom it moves is, in a legal sense, injured. The injury can consist of refusing to sue on a disputed claim or to exercise a legal right. The alteration in position is regarded as a detriment that forms consideration independent of the actual value of the right relinquished.

## VALUATION

*The process of determining the value or worth of an asset. There are several methods professionals use to perform a valuation, often including both objective and subjective criteria. Valuation is often used as a synonym for appraisal.*

## VALUE

*The estimated or appraised worth of any object or property, calculated in money.*

The word *value* has many meanings and may be used in different senses. Because value is usually a relative term, its true meaning must be determined by the context in which it appears.

Value sometimes expresses the inherent usefulness of an object and sometimes the power of purchasing other goods with it. The first is called *value in use,* the latter *value in exchange.* Value in use is the utility of an object in satisfying, directly or indirectly, the needs or desires of human beings. Value in exchange is the amount of commodities, commonly represented by money, for which a thing can be exchanged in an open market. This concept is usually referred to as market value.

Courts have frequently used the word *value* without any clear indication of whether it referred to value in use or market value. Generally, however, the courts and parties in civil actions are concerned with market value. Though courts may refer to salable value, actual value, fair value, reasonable value, and cash value, these terms are synonymous with market value.

Value is also employed in various phrases in business and commercial usage. The phrase actual cash value is used in insurance to signify the cost of purchasing new replacement property less normal depreciation, though it may also be determined by the current market value of similar property or by the cost of replacing or repairing the property. Cash surrender value is used in life insurance to refer to the amount that the insurer will pay the policyholder if the policy is canceled before the death of the insured.

Book value is the value at which the assets of a business are carried on the company's books. The book value of a fixed asset is arrived at by subtracting accumulated depreciation from the cost of the asset. Book value may also refer to the net worth of a business, which is calculated by subtracting liabilities from assets. *Liquidation value* is the value of a business or an asset when

it is sold other than in the ordinary course of business, as in the liquidation of a business.

In the STOCK MARKET, *par value* is the nominal value of stock; it is calculated by dividing the total stated capital stock by the number of shares authorized. *Stated value* is the value of no par stock established by the corporation as constituting the capital of the corporation.

CROSS-REFERENCES

Fair Market Value.

## ♦ VAN BUREN, MARTIN

Prominent political leader, U.S. senator, SECRETARY OF STATE, vice president, and eighth president of the United States, Martin Van Buren led the nation during its first major economic crisis. The New York native built a career based on machine politics—the control of local political power by a well-disciplined organization. Van Buren held top positions in his home state before entering national politics, where his instinct for party building helped create the DEMOCRATIC PARTY in the 1820s. Elected vice president in 1832 and president in 1836, he sought to protect federal monetary reserves during the depression that began shortly after he took office.

"LET THEM WORRY AND FRET AND INTRIGUE AT WASHINGTON. SIX WEEKS HENCE THEY WILL FIND THEMSELVES AS WISE AS THEY WERE WHEN THEY BEGAN."
—MARTIN VAN BUREN

Born in Kinderhook, New York, on December 5, 1782, Van Buren was the third of five children born to Dutch working-class parents. He began to study law at the early age of fourteen and gained admission to the New York bar four years later in 1803. He was elected to the New York legislature in 1812 and continued to be reelected until 1820. From 1816 until 1819, he also served as the state attorney general.

Van Buren's political views came directly from Jeffersonian Republicanism. Like THOMAS JEFFERSON, he believed in STATES' RIGHTS and opposed a strong federal government. During the early years of his career in New York, Van Buren controlled the so-called Albany Regency, a political machine that was very influential in state politics. Later, in the 1820s, he joined forces with ANDREW JACKSON and helped to forge the political alliances that would lead to the formation of the Democratic Party.

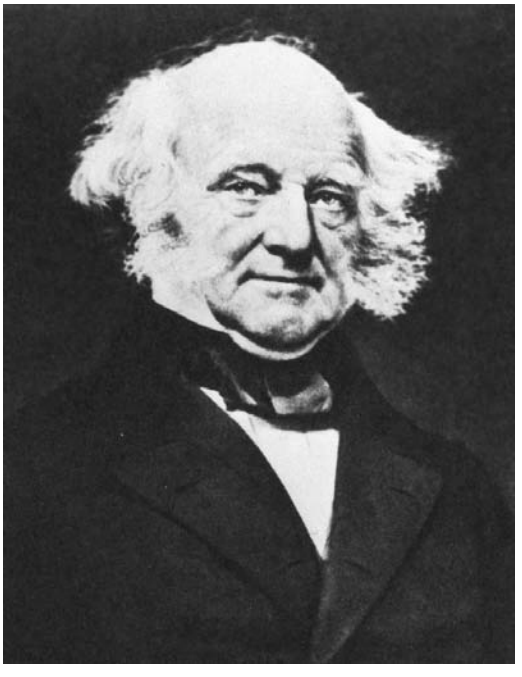

*Martin Van Buren.* LIBRARY OF CONGRESS

As in state politics, Van Buren enjoyed steady success at the national level. He won election to the U.S. Senate in 1821 and retained his senatorial seat until 1828 when he became governor of New York. He resigned the office a mere twelve weeks later, however, to become secretary of state under President Jackson. His support of Jackson through the president's turbulent first

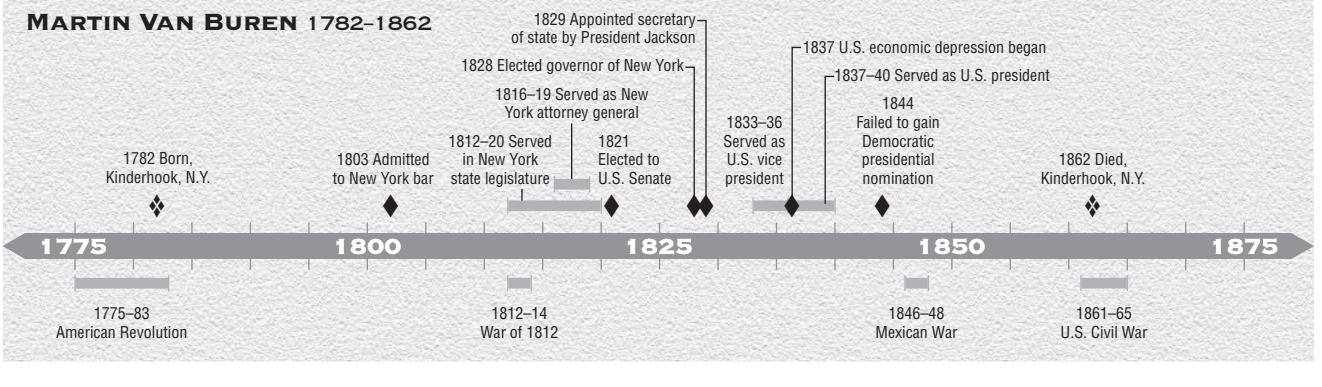

administration paid off: in 1832 Jackson chose Van Buren as his vice presidential running mate over the incumbent JOHN C. CALHOUN, and the two were elected.

Van Buren's own election as president in 1836 was precipitated by crisis. Under the Jackson administration, land speculation had run rampant nationwide. When Congress failed to intervene, banks issued great numbers of loans without backing them up with security. The speculation continued until Jackson ordered the government to accept only gold or silver as payment on land. The result was the so-called Panic of 1837, a devastating financial crash that led to the first large-scale economic depression in U.S. history. By 1840 Van Buren had convinced Congress to pass the Independent Treasury Bill. It provided for federally controlled vaults to store all federal monies; transactions were to be conducted in hard currency. The independent treasury protected federal deposits until 1841, when it was abolished. President JAMES K. POLK brought it back in 1846.

Van Buren sought reelection in 1840, running as the only presidential candidate without a vice presidential candidate in history. Defeated by WILLIAM HENRY HARRISON, he attempted to gain the Democratic nomination again in 1844 but was unsuccessful. His popularity had deteriorated both because of the depression and because of his positions on other domestic issues. He opposed the annexation of Texas, which he feared would precipitate a war with Mexico, and an expensive war against Seminole Indians in Florida. He tried once more to win the Democratic presidential nomination in 1848 but was defeated again. He died on July 24, 1862, in Kinderhook, New York.

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## ♦ VAN DEVANTER, WILLIS

As an associate justice of the U.S. Supreme Court from 1910 to 1937, Willis Van Devanter was considered the leading conservative justice of the era. Van Devanter's background in education, politics, and the law brought him to the bench, first as chief justice of the Wyoming Supreme Court and then as a U.S. circuit judge. In his twenty-six years on the U.S. Supreme Court, he consistently opposed the expansion of government power. His opposition was fiercest during the administration of President FRANKLIN D. ROOSEVELT, when he joined three other conservative justices of the Supreme Court in fighting Roosevelt's legislative program, the NEW DEAL. Their like-minded opinions, which earned them the nickname the "Four Horsemen," led to a sharp confrontation with the president.

Born on April 17, 1859, in Marion, Indiana, Van Devanter was the first of eight children born to Violetta Spencer and Isaac Van Devanter, a lawyer and abolitionist. He excelled in academics, graduating in 1878 from Indiana Asbury University (now DePauw University) with a near perfect record in history, math, Greek, and Latin. In 1881 he earned a bachelor of laws degree from the Cincinnati Law School and established a law practice in Indiana. He soon moved to Wyoming where he represented railroads, helped to amend the state's statutes in 1886, and served as city attorney for two years. In 1888 he was a representative at the territorial legislature and chaired the Judiciary Committee. Van Devanter also found time for hunting grizzly bears with the legendary Buffalo Bill (William F. Cody).

"WE ARE OF THE OPINION THAT THE POWER OF INQUIRY—WITH PROCESS TO ENFORCE IT—IS AN ESSENTIAL AND APPROPRIATE AUXILIARY TO THE LEGISLATIVE FUNCTION."
—WILLIS VAN DEVANTER

For the next two decades, Van Devanter's energies were divided among the judiciary, education, and REPUBLICAN PARTY politics. He presided as chief justice of the Wyoming Supreme Court from 1889 to 1890. From 1896 to 1900, he was an assistant U.S. attorney general to the INTERIOR DEPARTMENT, concurrently serving as a delegate to the Republican National Committee. He also taught law at Columbian College, now GEORGE WASHINGTON University. In 1903 President THEODORE ROOSEVELT appointed him to the Eighth Circuit Court of Appeals, and in 1910 President WILLIAM HOWARD TAFT nominated him to the Supreme Court.

On the Court, Van Devanter wrote few noteworthy opinions. His contributions came mainly in obscure legal areas that he had mastered while on the circuit court: land claims, WATER RIGHTS, and jurisdictional issues. Rather than writing opinions, Van Devanter preferred to assert his influence in discussions among the justices. He often voiced his belief that govern-

*Willis Van Devanter.*
BETTMANN/CORBIS

ment power should be limited. He took an especially narrow view of the powers that could be asserted under the U.S. Constitution's Commerce, Tax, and Due Process Clauses. From 1918 to 1923, he joined majority opinions that found federal CHILD LABOR LAWS and state MINIMUM WAGE legislation unconstitutional.

Ironically, Van Devanter's most significant opinion marked a rare departure from his ideology. In MCGRAIN V. DAUGHERTY, 273 U.S. 135, 47 S. Ct. 319, 71 L. Ed. 580 (1927), he asserted that Congress had broad powers to subpoena and conduct investigations. The opinion's impact was felt dramatically two decades later during congressional investigations of labor corruption and COMMUNISM.

In the 1930s, Van Devanter's desire to restrain government kept him on the Court. He had apparently decided to retire in 1932 but changed his mind because of what he regarded as the excesses of President Franklin Roosevelt. The president had embarked on the ambitious New Deal, a broad legislative response to the economic hardships of the Great Depression.

Sharing Van Devanter's opposition to these programs were three other conservative justices: JAMES C. MCREYNOLDS, GEORGE SUTHERLAND, and PIERCE BUTLER. Critics dubbed them the "Four Horsemen," after the four horsemen of the Apocalypse. In a string of decisions, they voted as a bloc to strike down key New Deal laws. Among these decisions was SCHECHTER POULTRY CORP. V. UNITED STATES, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935), which voided a key part of Roosevelt's plan for economic recovery and provoked the president into seeking a means to ensure that his legislation survived. Two years later, Roosevelt responded with an extraordinary attempt to expand the number of justices on the Court—his so-called court-packing plan. In the face of this challenge, the Court backed down and began upholding New Deal legislation.

Van Devanter resigned at the end of 1936. Although branded a reactionary during his tenure, in retirement he received accolades from his fellow justices, conservative and liberal alike. He died on February 8, 1941, in Washington, D.C.

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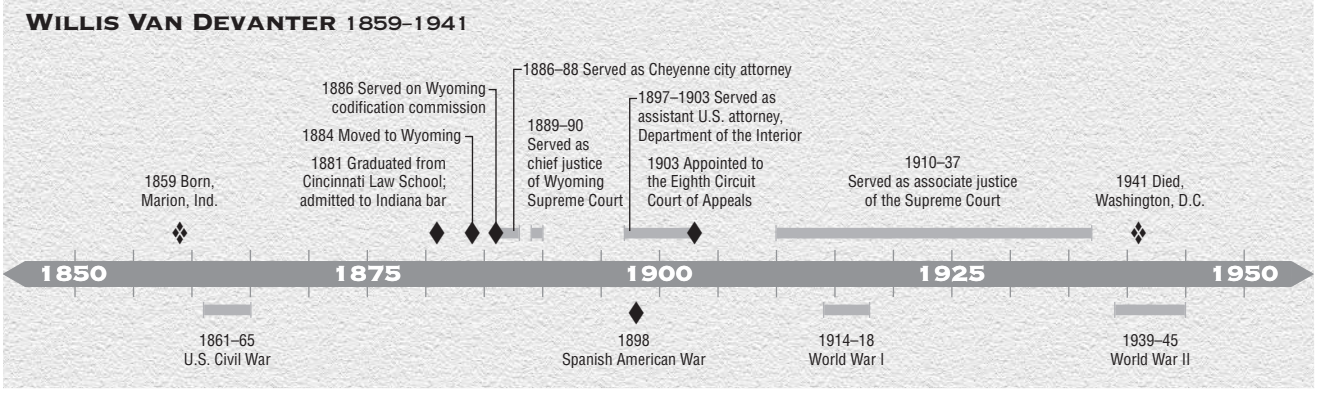

CROSS-REFERENCES

New Deal; Roosevelt, Franklin Delano, "FDR's Court Packing Plan" (Sidebar).

## VANDALISM

*The intentional and malicious destruction of or damage to the property of another.*

The intentional destruction of property is popularly referred to as vandalism. It includes behavior such as breaking windows, slashing tires, spray painting a wall with graffiti, and destroying a computer system through the use of a computer virus. Vandalism is a malicious act and may reflect personal ill will, although the perpetrators need not know their victim to commit vandalism. The recklessness of the act imputes both intent and malice.

Because the destruction of public and private property poses a threat to society, modern statutes make vandalism a crime. The penalties upon conviction may be a fine, a jail sentence, an order to pay for repairs or replacement, or all three. In addition, a person who commits vandalism may be sued in a civil tort action for damages so that the damaged property can be repaired or replaced.

Vandalism is a general term that may not actually appear in criminal statutes. Frequently, these statutes employ the terms *criminal mischief, malicious mischief,* or *malicious trespass* as opposed to vandalism. A group of individuals can be convicted of conspiring or acting concertedly to commit vandalism. Generally, the attempt to commit vandalism is an offense as well, but the penalties for attempted vandalism are not as severe as the penalties for a completed act. Penalties also depend on the value of the property destroyed or the cost of repairing it.

To obtain a conviction the prosecution must ordinarily prove that the accused damaged or destroyed some property, that the property did not belong to the accused, and that the accused acted willfully and with malice. In the absence of proof of damage, the defendant may be guilty of **TRESPASS**, but not vandalism. If there is no proof that the defendant intentionally damaged the property, the defendant cannot be convicted of the crime but can be held liable for monetary damages in a civil action.

Some state statutes impose more stringent penalties for the destruction of certain types of property. Such statutes might cover the desecration of a church or synagogue, the destruction of jail or prison property by inmates, and the intentional destruction of property belonging to a public utility.

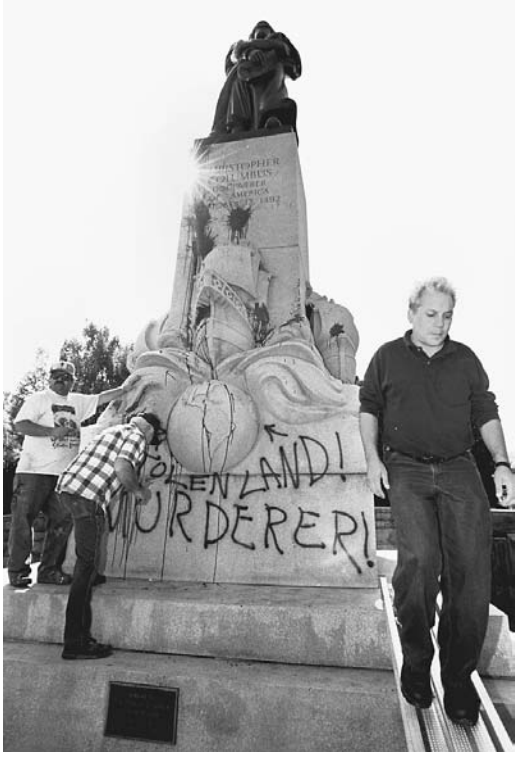


*Workers in Pittsburgh examine spray-painted vandalism on a statue of Christopher Columbus. Though political demonstrators may exercise their freedom of speech, doing so through the defacement of public property can lead to conviction.*

AP/WIDE WORLD PHOTOS

Destructive acts will not be excused merely because the defendants acted out of what they thought was a noble purpose. Political demonstrators may exercise their **FIRST AMENDMENT** rights of **FREEDOM OF SPEECH** and **FREEDOM OF ASSOCIATION AND ASSEMBLY**, but if they deface, for example, government property with spray-painted slogans, they can be convicted of vandalism.

The peak period for committing relatively minor property crimes is between the ages of fifteen and twenty-one. In the United States adolescent vandalism, including the wanton destruction of schools, causes millions of dollars of damage each year. Apprehending vandals is often difficult, and the costs of repairing the damage are passed on to taxpayers, private property owners, and insurance companies. Some states hold parents financially responsible for vandalism committed by their minor children, up to specified limits. These statutes are designed to encourage parental supervision and to shift part of the cost of vandalism from the public to the individuals who are best able to supervise the children who destroyed the property.

CROSS-REFERENCES

Juvenile Law.

## ♦ VANDERBILT, ARTHUR T.

Arthur T. Vanderbilt was chief justice of the New Jersey Supreme Court and a nationally renowned champion of judicial reform in the 1950s. Though he never became a U.S. Supreme Court justice, Vanderbilt's philosophy and personal energy paved the way for the modernization of state judicial systems. He used the New Jersey courts as his laboratory for judicial change.

Vanderbilt was born in Newark, New Jersey, on July 7, 1888. He graduated from Wesleyan University in 1910, then attended Columbia University School of Law in New York City. Upon graduation in 1913, he began private practice in Newark. Vanderbilt was notable for the longevity of his service in education and public office. In 1914, he began teaching as an adjunct professor at New York University School of Law, a position he held for 29 years. In 1921, he was appointed county counsel for New Jersey's Essex County where he served for 26 years. In 1934, Vanderbilt became a trustee for Wesleyan University; he remained on the board until his death.

Shortly after his graduation from law school, Vanderbilt became active in the REPUBLICAN PARTY as part of a group of "Clean-Government" reformers who sought change in the political apparatus that ran Essex County and New Jersey. The Clean Government movement strongly supported Frank Driscoll as the Republican candidate for governor. When Driscoll won the gubernatorial election in 1946, he kept his promise to Clean Government advocates to hold a constitutional convention and to seek judicial reform. A stroke prevented Vanderbilt from attending the 1947 constitutional convention, but he served as an advisor to the governor who followed through on many of the convention's recommendations. Chief among these was the replacement of New Jersey's outdated Court of Errors and Appeals with the New Jersey Supreme Court. In 1948, Governor Driscoll appointed Vanderbilt as chief justice of the new court.

Prior to the adoption of the 1947 Constitution, New Jersey's courts had functioned as separate units, each with its own rules, procedures, and case management system. As part of his duties as chief justice, Vanderbilt also functioned as the administrative head of all of the New Jersey courts. He immediately began the difficult process of creating a unified court system with standardized procedures and processes. One of the most egregious problems facing the new chief justice was the large number of cases that were backlogged on the dockets of the trial courts. Vanderbilt required the state's judges to increase their productivity by demanding that they submit weekly reports showing the number of cases and motions that had been resolved and listing those cases that were still not decided. Vanderbilt not only personally reviewed the reports, but had them published. While many judges resisted these changes, the case backlogs were eliminated by 1950 and New Jersey's courts were judged to be among the most efficient in the United States.

Besides facing battles inside the court system, Vanderbilt wrestled with the New Jersey Legislature over which body had control over judicial rule making. In a significant case, *Winberry v. Salisbury*, 74 A.2d 406 (N.J. 1950), Vanderbilt wrote a majority opinion in which the court interpreted the phrase "subject to law" to mean that the court, not the legislature, had the final word on rules it promulgated regarding

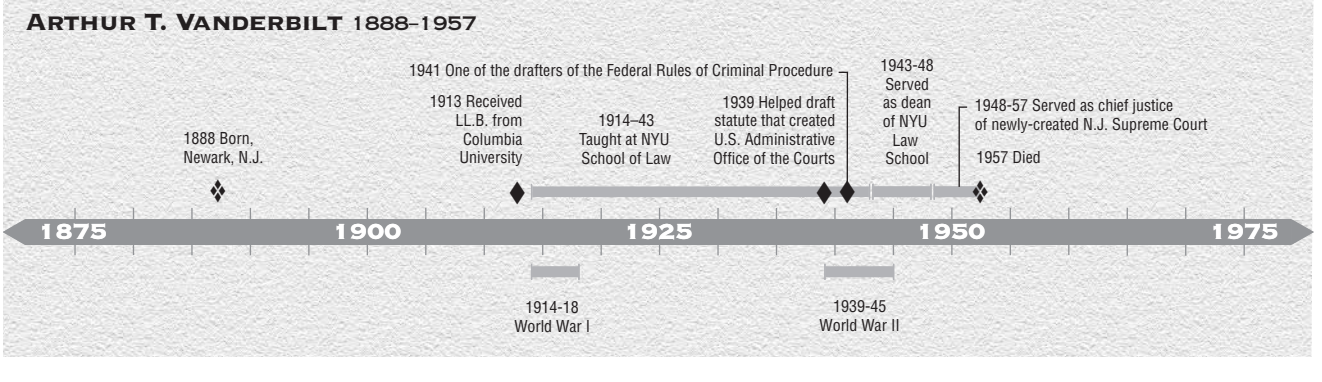

procedural matters. Despite opposition from one dissenting justice and from members of New Jersey's General Assembly, significant support from the press and members of the New Jersey bar helped Vanderbilt to prevail in the *Winberry* case and in other matters relating to judicial independence and court administration.

Vanderbilt gained a national reputation as a leading judicial reformer. In 1939, he helped to draft the statute that created the U.S. Administrative Office of the Courts, which oversees the federal court system. In 1941, he was one of the drafters of the Federal Rules of Criminal Procedure. In 1952, he helped to found the Institute for Judicial Administration at the New York University School of Law. Vanderbilt was a sought-after speaker and lecturer who received numerous awards and honorary degrees. He remained in the office of chief justice and continued to advocate for the improvement of judicial administration until his death on June 16, 1957.

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## VANZETTI, BARTOLOMEO

See SACCO AND VANZETTI TRIAL.

## VARIANCE

*The discrepancy between what a party to a lawsuit alleges will be proved in pleadings and what the party actually proves at trial.*

*In* ZONING *law, an official permit to use property in a manner that departs from the way in which other property in the same locality can be used.*

The term *variance* is used both in litigation and in zoning law. In both instances it has the general meaning of a difference or divergence.

A party to a civil lawsuit or a prosecutor in a criminal trial must prove the allegations set forth in a complaint, indictment, or information. If there is a substantial difference or discrepancy between the allegations and the proof offered in support, a *variance* exists. For example, if the crime of ROBBERY is alleged and the crime of BURGLARY is proved instead, the failure of proof on the robbery charge constitutes a variance that will lead to the dismissal of the case.

Most U.S. communities have zoning laws that control and direct the development of property within their borders according to its present and potential uses. Typically, a community is divided into zoning districts based on the type of use permitted: residential, commercial, and industrial. Additional restrictions may limit population density and building height within these districts. A *variance* is an exception to one or more of the zoning restrictions on a piece of property.

A variance is different from a nonconforming use, which permits existing structures and uses to continue when zoning is first instituted. Once a zoning plan has been established, a property owner who wishes to diverge from it must seek a variance from the municipal government. The variance will be granted when "unnecessary hardship" would result to the landowner if it were denied. Although other forms of administrative relief from zoning restrictions are available, such as rezoning the area, variances are most frequently used.

There are two types of variances: area variances and use variances. An area variance is usually not controversial because it is generally granted due to some odd configuration of the lot or some peculiar natural condition that prevents normal construction in compliance with zoning restrictions. For example, if the odd shape of a lot prevents a house from being set back the minimum number of feet from the street, the municipality will usually relax the requirement.

Use variances are more controversial because they attempt a change in the permitted use. For example, if a lot is zoned single-family residential, a person who wishes to build a multifamily dwelling must obtain a variance. Residents of an area will generally object to applications for variances that seek to change the character of their neighborhood. Although the municipality may heed these objections, it will likely grant the variance if it believes unnecessary hardship would result without the variance. If, however, the owner seeking a variance for a multifamily dwelling bought the property with notice of the current zoning restrictions, the variance will probably be denied. Applicants for a variance cannot argue hardship based on actions they commit that result in self-induced hardship.

If many use variances are sought in a particular area on the basis of unique or peculiar circumstances, it may be a sign that the entire neighborhood needs to be rezoned rather than forcing property owners to seek variances in a piecemeal fashion. Properly used, variances provide a remedy for hardships affecting a single lot or a relatively small area.

CROSS-REFERENCES

Land-Use Control; Setback.

## ♦ VAUGHN, GEORGE L.

George L. Vaughn was an African American lawyer and civic leader who became a prominent member of the DEMOCRATIC PARTY. Vaughn, who practiced in St. Louis, Missouri, is best remembered for representing J. D. Shelley in the landmark CIVIL RIGHTS case of *Shelley v. Kraemer,* 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), which struck down racially discriminatory real estate covenants.

Vaughn was born in Kentucky in 1885, the son of former slaves. He attended Lane College in Jackson, Tennessee, and went to law school at Walden University in Nashville, Tennessee. He served in the artillery as a first lieutenant in WORLD WAR I. After the war he moved to St. Louis, where he practiced law and, in 1919, helped to found the Citizen Liberty League, an organization that sought the election of more African Americans to public office. In 1936 Vaughn was appointed a St. Louis JUSTICE OF THE PEACE, and in 1941 he ran unsuccessfully for city alderman as a Democrat.

Vaughn became nationally known for his representation of J. D. Shelley. Shelley, an African American, was employed at a government-owned munitions factory and had saved enough money to make a down payment on a house. Using an African American real estate BROKER, he purchased a house in St. Louis and moved his family to the property in October 1945. An association of white homeowners was outraged at the sale of the house to an African American and served an eviction order on Shelley. An association of African American real estate brokers assisted Shelley by hiring Vaughn to fight the order.

The homeowners justified the eviction on the basis of a RESTRICTIVE COVENANT contained in the deed, which stated that the property could not be "occupied by any person not of the Caucasian race." Vaughn opposed the eviction and won at the trial court. However, the Missouri Supreme Court upheld the validity of the restrictive covenant and the eviction (*Kraemer v. Shelley,* 355 Mo. 814, 198 S.W.2d 679, 681 [1946]).

With the support of the African American real estate brokers, Vaughn successfully petitioned the U.S. Supreme Court to hear an appeal. At oral argument he called racially restrictive covenants "the Achilles heel" of U.S. democracy. The Supreme Court agreed in its 1948 decision, ruling that such covenants could not be enforced in state courts because they violated the FOURTEENTH AMENDMENT by infringing upon the right of a citizen to purchase and dispose of property.

That same year Vaughn played a prominent role in the Democratic National Convention in Philadelphia. As a Missouri delegate, Vaughn proposed a resolution that would bar the seating of the Mississippi delegation because of the white supremacy provisions contained in the Mississippi state constitution. His resolution fell just 115 votes short of prevailing.

Vaughn died in St. Louis in 1950.

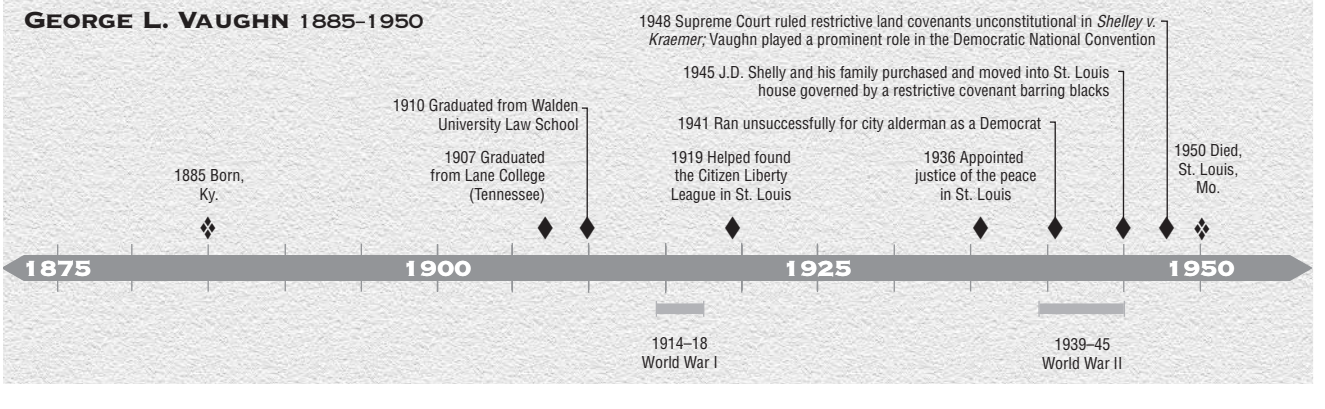

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## VEL NON

*[*Latin, Or not.*] A term used by the courts in reference to the existence or nonexistence of an issue for determination; for example: "We come to the merits vel non of this appeal," means "we come to the merits, or not, of this appeal," and refers to the possibility that the appeal backs merit.*

## VENDEE

*Buyer or purchaser; an individual to whom anything is transferred by a sale.*

The term *vendee* is ordinarily used in reference to a buyer of real property.

## VENDOR

*Seller; an individual who transfers property for sale; merchant; retail dealer; supplier.*

The term *vendor* is frequently used in reference to an individual who sells real property.

## VENDOR AND PURCHASER

*The legal relationship between the buyer and the seller of land during the interim period between the execution of the contract and the date of its consummation.*

The sale of real property is treated differently by the law than the sale of PERSONAL PROPERTY. The relationship between the seller and the buyer has traditionally been labeled that of vendor and purchaser. A contract to sell real property (for example, a house, a building, farmland, or a vacant lot) does not automatically mean the sale will be consummated. The vendor will be required to prove that she can convey a marketable title to the land.

A contract for the sale of real property is executed when the vendor and the purchaser sign an agreement in which the vendor promises to convey ownership of the property to the purchaser, who promises to pay an agreed sum. The contract is consummated when the vendor delivers a deed to the purchaser and the purchaser pays the vendor's price. Consummation of the contract is variously referred to as the closing of escrow, the date of closing, or simply the closing.

The vendor-purchaser relationship is based on the unique nature of land. Title to any particular parcel has always involved more complications than arise with the ownership of personal property. The status of the vendor's title is a matter of great concern to any prospective purchaser, but that title is often subject to deficiencies.

Most purchasers offer to buy land before they have made an investigation of the seller's title to it. To protect the purchaser in this situation, the law permits him to demand a marketable title from the vendor and to withdraw from a sales contract if the title turns out to be unmarketable. Therefore, every contract for the sale of land includes the implied requirement that the vendor's title be marketable, unless the contract specifically provides otherwise.

A marketable title is a title that the vendor does in fact have and that is not subject to encumbrances, which are interests in the property held by someone other than the vendor or purchaser. Unless an agreement indicates otherwise, the purchaser is entitled to receive an absolutely undivided interest in all the property he has contracted to buy. For example, if the vendor promises to convey forty acres in the sales agreement and the next day the purchaser discovers that the vendor has title to only twenty-five acres, the purchaser is not obligated to honor the contract because the vendor lacks marketable title to the land the vendor agreed to convey.

If the vendor's title is subject to an outstanding mortgage, the title may be unmarketable. The mere existence of an encumbrance does not necessarily cause the title to be unmarketable, however, if the parties have provided for it in their contract. For example, in the sale of a vendor's house that has an outstanding mortgage, the purchaser's money will first be applied to paying off the vendor's mortgage before the vendor receives any proceeds.

To avoid confusion and frustration of the parties' intentions, contracts of sale usually require an insurable title to the property as evidenced by a title insurance policy. The purchaser must accept the vendor's title, provided an insurance company indicates its willingness to insure the title without making exceptions to the coverage.

Because land has always been regarded as a unique asset, a prospective purchaser can usually enforce a sales agreement whether the vendor wants to proceed or not. This power has the effect of giving the purchaser an interest in the land

itself, as well as personal contract rights against the vendor. By executing the sales contract, the purchaser becomes the equitable owner of the land. The vendor retains legal title, but holds the title only as security for payment. This legal fiction is known as the doctrine of equitable conversion.

In some states the doctrine of equitable conversion shifts any loss or damage to the property to the purchaser before the closing. As the true owner of the property, the purchaser is required to bear the risk of loss during the contract period and cannot withdraw from the agreement. Thus, if a fire caused by neither party destroys the premises two weeks before the closing, the purchaser will still be obligated to complete the contract and pay the vendor's price.

Some courts reject this application of equitable conversion, holding that the contract fails if the vendor cannot deliver the premises in the original condition on the day of closing. This view treats the continued existence of undamaged property as an implied condition of the sales agreement. The purchaser is entitled to withdraw from the contract if the property is damaged prior to closing.

Several states have adopted the Uniform Vendor and Purchaser Risk Act, under which innocent losses occurring during the contract period are allocated to the vendor, unless the purchaser has taken possession prior to closing. The risk of loss is on the person in possession because that person is in the best position to take care of the property.

CROSS-REFERENCES

Sales Law; Title Search.

## VENIRE FACIAS

*[*Latin, Cause to come.*] A judicial order or writ addressed to the sheriff of a county where a legal action is to take place, commanding the sheriff to assemble a jury.*

A *venireman* is a member of a jury summoned by a writ of *venire facias.*

## VENIREMAN

*A member of a jury which has been summoned by a writ of venire facias.*

## VENUE

*A place, such as the territory from which residents are selected to serve as jurors.*

*A proper place, such as the correct court to hear a case because it has authority over events that have occurred within a certain geographical area.*

A basic principle of U.S. law is that a civil or criminal action will be decided by a court in the locality where the dispute or criminal offense occurred. This principle is expressed in the concept of *venue.* In accordance with this principle a civil action must be started where either the plaintiff or the defendant resides, where the CAUSE OF ACTION arose, or, if real property is at issue, where the real property is situated. In criminal cases proper venue is in the locality where the crime was committed or where a dead body was discovered.

State and federal venue statutes govern where a case will be tried. State venue statutes list a variety of factors that determine in which county and in which court a lawsuit should be brought, including where the defendant resides, where the defendant does business, where the plaintiff does business, or where the seat of government is located.

A plaintiff may bring his action in any of the places permitted by state law. Most commonly, states allow a lawsuit to be brought in the county where the defendant resides. Choosing the wrong place is not fatal to the plaintiff's action, however. Statutes usually provide that a judgment rendered by a state court is valid even if venue is improper. If a defendant believes the suit is being tried in the wrong venue, she usually must object at the outset of the case, or she will be presumed to have waived the right to object.

In criminal cases the defendant must be tried in the venue where the crime was committed or where the body of a victim was discovered. In extraordinary circumstances, however, a court may grant a change of venue. The request for a change of venue is usually made by the defendant, but it can be made by the prosecutor. The court itself may also initiate the transfer of venue.

Changes of venue are governed by statute, but the court has great discretion in applying the statutory grounds. In Alaska, for example, the law gives the court the ability to move a case from one place to another place within the judicial district or to a place in another judicial district. Reasons for a change of venue in Alaska include the belief that an impartial trial cannot be held or that the convenience of witnesses and

# Venue and the Oklahoma City Bombing Case

Trial judges are generally reluctant to grant a defendant's request for a change of venue in a criminal trial. A change of venue is inconvenient to the trial participants and is often financially costly. Nevertheless, when a judge believes that a defendant cannot receive a fair trial in the place where the crime was committed, he can order that the trial be moved to another location.

The attorneys for Timothy J. McVeigh and Terry L. Nichols, who were charged in federal court with the April 19, 1995 bombing of the federal office building in Oklahoma City, Oklahoma, that resulted in the deaths of 168 people, sought a change of venue from Oklahoma City. The defense attorneys argued that there was substantial prejudice against McVeigh and Nichols in Oklahoma City and the state of Oklahoma, making it impossible for them to receive a fair and impartial trial.

In an order issued on February 20, 1996, Judge Richard P. Matsch agreed. The news coverage of the events surrounding the bombing, its aftermath, and the arrest of McVeigh and Nichols had been extensive in Oklahoma. Matsch noted that the Oklahoma news media had "demonized" the defendants and run news stories suggesting that they had been associated with right-wing militia groups. Because the defendants had been charged with capital crimes, Matsch was concerned that Oklahoma jurors would not be able to set aside their prejudices and emotions to determine first whether the defendants were guilty or innocent and then, if found guilty, whether they deserved to be executed.

Therefore, Matsch ordered a change of venue to Denver, Colorado. Though he acknowledged that the victims of the bombing wished to attend the trials and that a change of venue would cause them hardship, Matsch concluded that the "interests of the victims in being able to attend this trial in Oklahoma are outweighed by the court's obligation to assure that the trial be conducted with fundamental fairness and with due regard for all constitutional requirements."

In June 1997 McVeigh was found guilty of bombing the federal building and was sentenced to death. Nichols's trial began in October 1997.

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**CROSS-REFERENCES**

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the ends of justice would be promoted by the change (Alaska Stat. § 22.10.040). The most common reason for a change of venue in criminal cases is PRETRIAL PUBLICITY that makes it unlikely that an impartial jury could be selected in the community where the crime occurred.

Different rules regulate venue in the federal courts. The federal court system is divided into judicial districts, which can cover an entire state or, in the case of populous states, only a portion of the state. The federal venue statute (28 U.S.C.A. § 1391) refers to these districts in the way state venue statutes refer to counties. Except when a special law applies to a particular type of case, proper venue is determined by the factor that allows the case to be brought in federal court.

If the court derives its authority because the plaintiffs and defendants are residents of different states (known as diversity jurisdiction), then the proper venue is the judicial district where all the plaintiffs or all the defendants reside or the district where the claim arose. In lawsuits where the federal court has jurisdiction because a question of federal law is involved (known as federal question jurisdiction), venue lies only in the district where all the defendants reside or where the claim arose.

Special statutes set different rules for ADMIRALTY, patent, and INTERPLEADER lawsuits and lawsuits in which the United States is a party. An alien can be sued in any district in the United States, but if the alien is a defendant along with

citizens, venue lies where all the citizens reside. A case transferred by removal from a state court to a federal court goes to the federal court in the district where the STATE ACTION was started.

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## VERBA

*[*Latin, Words.*] A term used in many legal maxims, including* verba sunt indices animi, *which means "words are the indicators of the mind or thought"; and* verba accipienda ut sortiantur effectum, *or "words are to be taken so that they may have some effect."*

## VERDICT

*The formal decision or finding made by a jury concerning the questions submitted to it during a trial. The jury reports the verdict to the court, which generally accepts it.*

The decision of a jury is called a verdict. A jury is charged with hearing the evidence presented by both sides in a trial, determining the facts of the case, applying the relevant law to the facts, and voting on a final verdict. There are different types of verdicts, and the votes required to render a verdict differ depending on whether the jury hears a criminal or civil case. Though most verdicts are upheld by the judge presiding at the trial, the judge has the discretion to set aside a verdict in certain circumstances.

A general verdict is the most common form of verdict. It is a comprehensive decision on an issue. In civil cases the jury makes a decision in favor of the plaintiff or the defendant, determining liability and the amount of money damages. In criminal cases the jury decides "guilty" or "not guilty" on the charge or charges against the defendant. In cases involving a major crime the verdict must be unanimous. In minor criminal cases, however, some states allow either a majority vote or a vote of 10 to 2. In civil cases many states have moved away from the unanimity requirement and now allow votes of 10 to 2.

A *special verdict* is sometimes used in civil cases where complex and technical QUESTIONS OF FACT are involved and the parties seek to assert greater control over the decision-making process. The judge gives the jury a series of specific, written, factual questions. Based upon the jury's answers, or findings of fact, the judge will determine the verdict. Special verdicts are used only infrequently because parties often have a difficult time agreeing on the precise set of questions.

U.S. law does not permit chance verdicts. A chance verdict is one that has been determined not by deliberation but by a form of chance, such as the flip of a coin or the drawing of lots. Although such verdicts were once acceptable, they are now unlawful.

A *directed verdict* is not made by a jury. It is a verdict ordered by the court after the evidence has been presented and the court finds it insufficient for a jury to return a verdict for the side with the BURDEN OF PROOF. A court may enter a directed verdict before the jury renders its verdict. If the court allows the jury to make a verdict but then disagrees with the jury's evaluation of the evidence, the court can decide the case by issuing an order. For example, under rule 29 of the Federal Rules of Criminal Procedure, a court can grant a judgment of acquittal to a defendant. In civil cases the court can issue a JUDGMENT NOTWITHSTANDING THE VERDICT.

## VERIFY

*To make certain, to substantiate, or to confirm by formal oath, affirmation, or* AFFIDAVIT.

The U.S. legal system relies on its participants to tell the truth. Before witnesses can give testimony at a trial or some other proceeding, they must swear or affirm that the testimony about to be given will be truthful. Apart from witnesses, when a particular PLEADING, statement, or other document is submitted to the court, the court requires that the person offering it *verify* its correctness, truth, or authenticity.

The verification takes the form of a written certification that is generally attached to the document in question. The most common form of certification is an *affidavit.* An affidavit is a written statement sworn to or affirmed before an officer authorized to administer an oath or affirmation, usually a NOTARY PUBLIC. The affidavit names the place of execution and certifies that the person making the affidavit states particular facts and that he appeared before the officer on a certain date and swore to and signed the statement.

A common verification is called an *affidavit of service.* The person swears or affirms that the attached legal document has been served (delivered) personally or by mail to the persons listed in the affidavit on a certain date. The affidavit of service verifies to the court that the document has, in fact, been sent to all parties who should receive it. Though this type of verification is a routine matter, it is essential to fairness and the DUE PROCESS OF LAW.

The need for verification is illustrated in CRIMINAL LAW. Law enforcement officers and others use affidavits to provide information to a magistrate to establish PROBABLE CAUSE for the issuance of an arrest warrant or a SEARCH WARRANT. The officer making the affidavit must set forth sufficient facts to satisfy the magistrate that an offense has been committed and that the person accused is the guilty party. If the officer falsely swears to the truthfulness of the affidavit's contents, a court may dismiss the charges. The officer, like anyone else who falsely verifies the truthfulness of a statement, may be charged with the crime of perjury.

The RULES OF EVIDENCE recognize the legitimacy of a *verified copy,* which is a copy of a document that is shown by independent evidence to be true. A verified copy will be allowed into evidence if successive witnesses trace the original into the hands of a witness who made or compared the copy.

## VERSUS

*[*Latin, Against.*] A designation used in the caption of a lawsuit to indicate the opposite positions taken by the parties.*

In the title of a lawsuit, the plaintiff's name appears first; the word *versus* follows; then the defendant's name appears, as in "A versus B." *Versus* is commonly abbreviated *vs.* or *v.*

## VERTICAL MERGER

*A merger between two business firms that have a buyer-seller relationship.*

Business mergers can take two forms: horizontal and vertical. In a *horizontal merger,* one firm acquires another firm that produces and sells an identical or similar product in the same geographic area. This type of merger eliminates competition between the two firms. In a *vertical merger,* one firm acquires either a customer or a supplier. Because horizontal mergers pose a direct threat to competition, they have been regulated more aggressively by the federal government than vertical mergers. Nevertheless, vertical mergers may, in some circumstances, be anticompetitive and violate federal ANTITRUST LAWS.

Firms vertically integrate for many reasons. Some of the most common are to reduce uncertainty over the availability or quality of supplies or the demand for output, to take advantage of available economies of INTEGRATION, to protect against monopolistic practices of either suppliers or buyers with which the firm must otherwise deal, and to reduce transactions costs such as sales taxes and marketing expenses. Through a vertical merger, the acquiring firm may lower its cost of production and distribution and make more productive use of its resources.

Vertical mergers are subject to the provisions of the CLAYTON ACT (15 U.S.C.A. § 12 et seq.) governing transactions that come within the ambit of antitrust acts. Vertical integration by merger does not reduce the total number of economic entities operating at one level of the market, but it may change patterns of industry behavior. Suppliers may lose a market for their goods, retail outlets may be deprived of supplies, and competitors may find that both supplies and outlets are blocked. Vertical mergers may also be anticompetitive because their entrenched market power may discourage new businesses from entering the market.

The U.S. Supreme Court has decided only three vertical merger cases under section 7 of the Clayton Act since 1950. In the first case, *United States v. E. I. du Pont de Nemours & Co.,* 353 U.S. 586, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957), the Court upset the general assumption that section 7 did not apply to vertical mergers. After finding that du Pont's acquisition of 23 percent of General Motors (GM) stock foreclosed sales to GM by other suppliers of automotive paints and fabric, the Court held that the vertical merger had an illegal anticompetitive effect.

The next vertical merger case to come before the Court, *Brown Shoe Co. v. United States,* 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962), remains the leading decision in this area of ANTITRUST LAW. The Court stated that the "primary vice of a vertical merger" is the foreclosure of competitors, which acts as a "clog on competition" and "deprive[s] . . . rivals of a fair opportunity to compete." The Court noted that market share would be an important, but sel-

dom decisive consideration. The Court identified other "economic and historical factors" that would determine the legality of the merger. The first and "most important such factor" was the nature and purpose of the arrangement. Another was the trend toward concentration in the industry.

In the only other vertical merger case decided by the Supreme Court, *Ford Motor Co. v. United States,* 405 U.S. 562, 92 S. Ct. 1142, 31 L. Ed. 2d 492 (1972), the Court condemned Ford's attempted acquisition of Autolite, a spark plug manufacturer, and emphasized the heightened barriers that the merger would pose to other companies that attempted to enter the market. The Court also emphasized that Ford's argument that the acquisition had made Autolite a more effective competitor was irrelevant.

CROSS-REFERENCES

Mergers and Acquisitions; Monopoly; Restraint of Trade; Unfair Competition.

## VEST

*To give an immediate, fixed right of present or future enjoyment.*

The term *vest* is significant in the law, because it means that a person has an absolute right to some present or future interest in something of value. When a right has *vested,* the person is legally entitled to what has been promised and may seek relief in court if the benefit is not given.

In U.S. PROPERTY LAW a *vested remainder* is a future interest held by an identifiable person (the remainderman), which, upon the happening of a certain event, will become the remainderman's. When property is given to one person for life and, at the person's death, the property is to go to another living person, this second person has a vested remainder in the property.

A *vested legacy* is an inheritance given in such terms that there is a fixed, irrevocable right to its payment. For example, a legacy contained in a will that states that the inheritance shall not be paid until the person reaches the age of twenty-one is a vested legacy, because it is given unconditionally and absolutely and therefore vests an immediate interest in the person receiving the legacy. Only the enjoyment of the legacy is deferred or postponed.

In contemporary U.S. law the term *vesting* refers to the right that an employee acquires to various employer-contributed benefits, such as a PENSION, after having been employed for a requisite number of years. The federal EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) of 1974 (29 U.S.C.A. § 1001 et seq.) governs the funding, vesting, administration, and termination of employee benefit plans. ERISA was enacted as a result of congressional dissatisfaction with private pension plans. Under some plans an employee's pension benefits did not vest before retirement or vested only after such a long period of time (as long as thirty years) that few employees ever became entitled to them. ERISA ensures that all pension benefits will vest within a reasonable time. Once pension benefits are vested, an employee has the right to them even if the employment relationship terminates before the employee retires.

In CONSTITUTIONAL LAW *vested rights* are those that are so completely and definitely settled in a person that they are not subject to defeat or cancellation by the act of any other private person. Once a person can prove to a court the validity of the vested rights, the court will recognize and protect these rights so as to prevent injustice.

## VETERANS AFFAIRS DEPARTMENT

The Department of Veterans Affairs (VA) operates programs to benefit veterans and members of their families. Benefits include compensation payments for disabilities or death related to military service, pensions, education, and rehabilitation. The VA also guarantees home loans, provides burial services for veterans, and operates a medical care program that includes nursing homes, clinics, and medical centers. Located in Washington, D.C., the VA in 2003 had 224,724 employees, a workforce second in size only to the DEFENSE DEPARTMENT. The department's projected budget for FY 2003 was 459.6 billion.

The Department of Veterans Affairs was established in 1989 as an executive department by the Department of Veterans Affairs Act (38 U.S.C.A. § 201 note). Its establishment came after more than 24 years of effort by members of Congress to elevate the department's predecessor, the Veterans Administration, to cabinet status. Proponents argued that promotion to cabinet level would increase the political accountability of the VA and improve the quality of its services. The Veterans Administration was established as an independent agency by

**Department of Veterans Affairs**

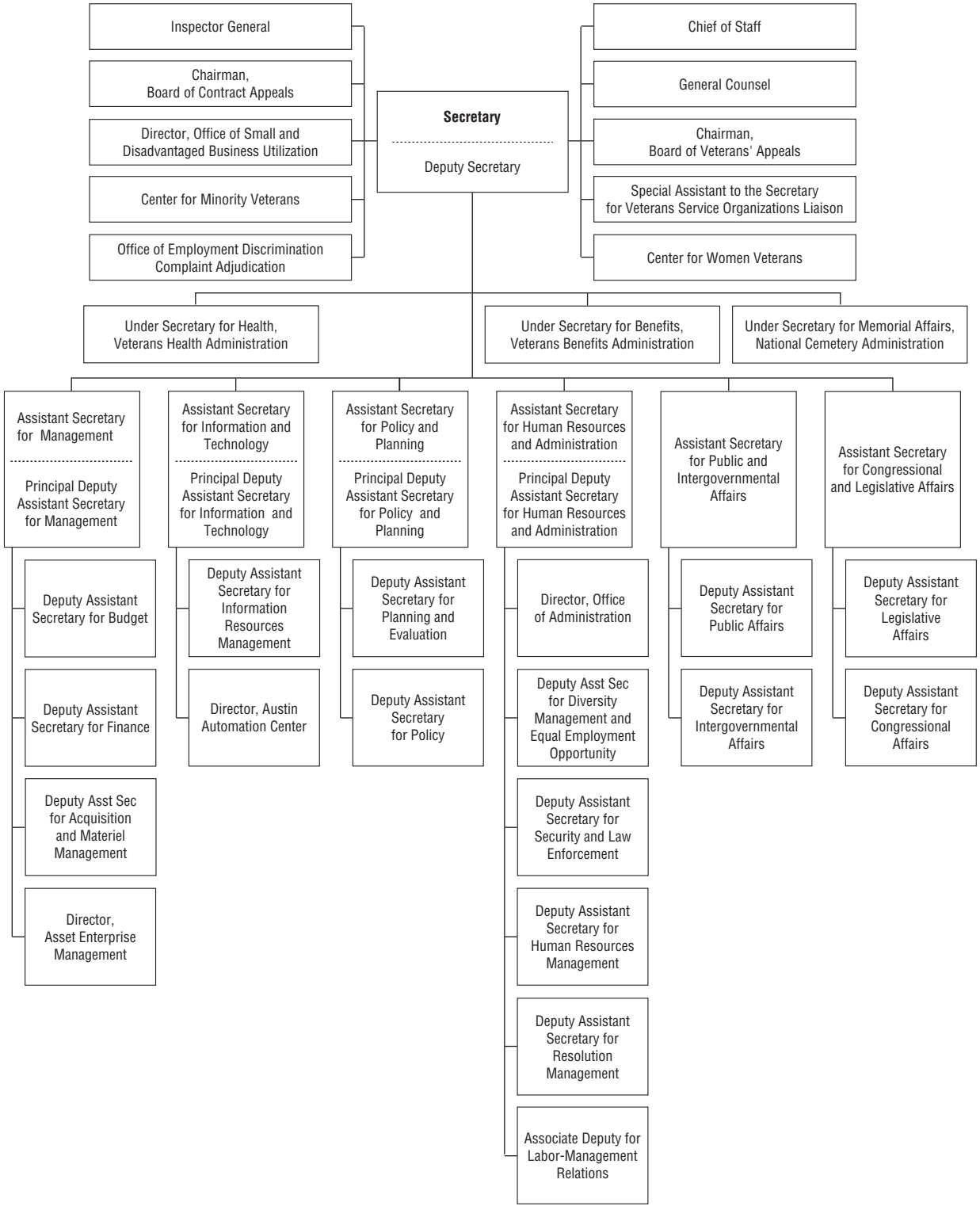

presidential EXECUTIVE ORDER No. 5398 of July 21, 1930, in accordance with the act of July 3, 1930 (46 Stat. 1016). This act authorized the president to consolidate and coordinate the U.S. Veterans Bureau, the Bureau of Pensions, and the National Home for Volunteer Soldiers.

The Department of Veterans Affairs consists of three organizations that administer veterans' programs: the Veterans Health Administration, the Veterans Benefits Administration, and the National Cemetery System. Each organization has field facilities and a central office. Each central office also includes separate offices that provide support to the organization's operations as well as to VA executives. Central office managers, including the inspector general and general counsel, report to the highest level of department management, which consists of the secretary of veterans affairs and the deputy secretary.

### Board of Veterans' Appeals

The Board of Veterans' Appeals (BVA) is responsible, on behalf of the secretary of veterans affairs, for entering the final appellate decisions in claims of entitlement to veterans' benefits. The board is also responsible for deciding matters concerning fees charged by attorneys and agents for representation of veterans before the VA. The mission of the board (contained in 38 U.S.C.A. §§ 7101–7109) is to conduct hearings, consider and dispose of appeals properly before the board in a timely manner, and issue quality decisions in compliance with the law. The board is headed by a chairperson who is appointed by the president and confirmed by the Senate. The chairperson is directly responsible to the secretary of veterans affairs. Members of the board are appointed by the secretary with the approval of the president and are under the administrative control and supervision of the chairperson. Each BVA decision is signed by a board member acting as an agent of the secretary. Final BVA decisions can be appealed to the U.S. COURT OF APPEALS FOR VETERANS CLAIMS.

### Board of Contract Appeals

The Board of Contract Appeals was established on March 1, 1979, pursuant to the Contract Disputes Act of 1978 (41 U.S.C.A. §§ 601–613). The board is a statutory, QUASI-JUDICIAL tribunal that hears and decides appeals from decisions of contracting officers on claims relating to contracts awarded by the VA or by any other agency when such agency or the administrator for federal procurement policy has designated the board to decide the appeal.

In August 1985 the board's jurisdiction was expanded to include applications for attorneys' fees and expenses under the Equal Access to Justice Act, as amended (5 U.S.C.A. § 504 note). Board decisions are final within the VA but may be appealed, either by the government or by the contractor, to the U.S. Court of Appeals for the Federal Circuit.

Additionally, the chairperson of the board, who is the senior official within the department, is responsible for promoting ALTERNATIVE DISPUTE RESOLUTION pursuant to the Administrative Dispute Resolution Act (5 U.S.C.A. § 581 note). Finally, the board is charged with resolving disputes between drug manufacturers and the secretary with regard to provisions of the Veterans Health Care Act of 1992 (38 U.S.C.A. § 101 note) dealing with pharmaceutical pricing agreements.

### Health Services

The Veterans Health Administration (formerly the Veterans Health Services and Research Administration) provides hospital, nursing home, and domiciliary care and outpatient medical and dental care to eligible veterans of military service in the armed forces. In 2002 the VA operated 163 hospitals (at least one in each of the 48 contiguous states, Puerto Rico, and the District of Columbia), more than 850 ambulatory care and community-based outpatient clinics, 137 nursing homes, and 73 comprehensive home-care programs, and provided health care to more than 4.5 million people. The administration also provides for similar care under VA auspices in non-VA hospitals and community nursing homes and for visits by veterans to non-VA physicians and dentists for outpatient treatment. Under the Civilian Health and Medical Program, dependents of certain veterans are provided with medical care supplied by non-VA institutions and physicians. The VA medical system serves as a backup to the Defense Department during national emergencies and as a federal support organization in times of major disaster.

The administration conducts both individual medical and HEALTHCARE delivery research projects and multi-hospital research programs. It assists in the education of physicians and den-

tists and in the training of many other health-care professionals through affiliations with educational institutions and organizations. These programs are all conducted as prescribed by the secretary of veterans affairs pursuant to 38 U.S.C.A. §§ 4101–4115 and other statutory authority and regulations.

### Veterans Benefits

The Veterans Benefits Administration (VBA), formerly the Department of Veterans Benefits, conducts an integrated program of veterans' benefits. It provides information, advice, and assistance to veterans, their dependents, beneficiaries, and representatives, and others applying for VA benefits. It also cooperates with the LABOR DEPARTMENT and other federal, state, and local agencies in developing employment opportunities for veterans and referrals for assistance in resolving socioeconomic, housing, and other related problems. In addition, the VBA provides information regarding veterans' benefits to various branches of the armed forces.

Programs are provided through VA regional offices, medical centers, visits to communities, and a special toll-free telephone service. The programs are available in all 50 states, the District of Columbia, and Puerto Rico.

### Compensation and Pension

The Compensation and Pension Service has responsibility for claims for disability compensation and pensions, automobile allowances and special adaptive equipment, claims for specially adapted housing, special clothing allowances, emergency officers' retirement pay, and eligibility determinations based on military service for other VA benefits and services or those of other government agencies. The service also processes survivors' claims for death compensation, dependency, and indemnity compensation, death pensions, burial and plot allowance claims, claims for accrued benefits, claims for adjusted compensation in death cases, and claims for reimbursement for headstones or markers.

### Education

The Education Service has responsibility for the Montgomery GI Bill—Active Duty and Selected Reserve, the Post Vietnam Era Veterans' Educational Assistance Program, the Survivors' and Dependents' Educational Assistance Program, and school approvals, compliance surveys, and work study.

**Civilian Veteran Population, by Period of Service, in 2000[a]**

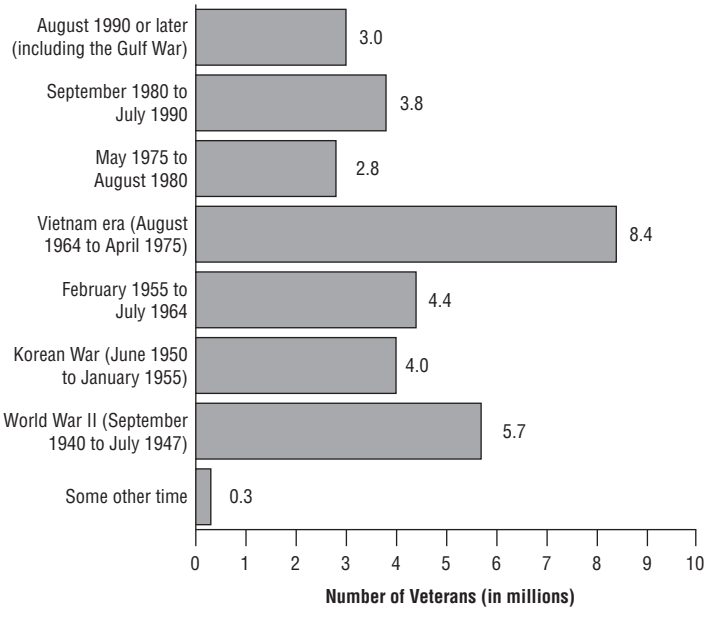


[a]Individuals may be included in more than one period of service.

SOURCE: U.S. Census Bureau, *Veterans 2000*.

### Vocational Rehabilitation

The Vocational Rehabilitation Service has responsibility for providing outreach, motivation, evaluation, counseling, training, employment, and other rehabilitation services to disabled veterans. The service also provides evaluation, counseling, and miscellaneous services to veterans and service persons and other VA education programs, as well as to sons, daughters, and spouses of totally and permanently disabled veterans and to surviving orphans, widows, or widowers of certain deceased veterans. Rehabilitation services are provided to certain disabled dependents.

### Loan Guaranty

The department has played a major part in the financing of homes since the end of WORLD WAR II. Loan guaranty operations include appraising properties to establish their value, supervising the construction of new residential properties, establishing the eligibility of veterans for the program, assessing the ability of a veteran to repay a loan and the associated credit risk, servicing and liquidating defaulted loans, and disposing of real estate acquired as the consequence of defaulted loans.

### Insurance

Life insurance operations are conducted for the benefit of service members and veterans and their beneficiaries. The day-to-day processing of all matters related to individual insurance accounts is handled by a regional office and insurance centers in Philadelphia, Pennsylvania, and St. Paul, Minnesota. These two centers provide the full range of functional activities necessary for a national life insurance program. Activities include the complete maintenance of individual accounts, underwriting functions, and life and death insurance claims awards, as well as other insurance-related transactions.

The agency is also responsible for the administration of the Veterans Mortgage Life Insurance Program for those disabled veterans who receive a VA grant for specially adapted housing. In addition, the agency is responsible for supervising the Servicemen's Group Life Insurance (SGLI) and Veterans Group Life Insurance (VGLI) Programs.

### Veterans Assistance

The Veterans Assistance Service provides information, advice, and assistance to veterans, their dependents, beneficiaries, representatives, and others applying for benefits administered by the Department of Veterans Affairs. In addition, the Veterans Assistance Service cooperates with the Department of Labor and other federal, state, and local agencies in developing employment opportunities for veterans and referrals for assistance in resolving socioeconomic, housing, and other related problems. The service is responsible for maintaining a benefits protection program (fiduciary activities) for minors and incompetent adult beneficiaries. It also provides field investigative services for other VA components.

The service ensures that schools and training institutions comply with VA directives. It also ensures compliance with Title VI of the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000d), Title IX of the Education Amendments of 1972 (20 U.S.C.A. § 1681), section 504 of the Rehabilitation Act of 1973 (29 U.S.C.A. § 794), and the AGE DISCRIMINATION Act of 1975, as amended (42 U.S.C.A. § 6101).

The service's programs are provided through VA regional offices, VA medical centers, itinerant visits to communities, and a special toll-free telephone service available in all 50 states, the District of Columbia, and Puerto Rico.

The Veterans Assistance Service also provides information on veterans' benefits to the various branches of the armed forces in the United States and abroad and to veterans residing in foreign countries through U.S. embassies and consular offices. The service also coordinates veterans' activities with foreign governments.

### National Cemetery System

The National Cemetery System (NCS) provides services to veterans, active duty personnel, reservists, and NATIONAL GUARD members with 20 years' qualifying service and their families by operating national CEMETERIES and furnishing headstones and markers for graves. The NCS provides presidential memorial certificates to the loved ones of honorably discharged, deceased service members, and veterans. The NCS also awards grants to aid states in developing, improving, and expanding veterans' cemeteries.

The National Cemetery area offices (located in Atlanta, Georgia; Philadelphia, Pennsylvania; and Denver, Colorado) provide direct support to the 114 national cemeteries located throughout the United States and Puerto Rico.

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#### CROSS-REFERENCES

GI Bill; U.S. Court of Appeals for Veterans Claims; Veterans' Rights.

## VETERANS OF FOREIGN WARS

The Veterans of Foreign Wars (VFW) is a U.S. organization comprised of men who have served overseas in the military during WORLD WAR I, WORLD WAR II, the KOREAN WAR, the VIETNAM WAR, and the Persian Gulf War. Veterans who served in expeditionary campaigns such as Grenada and Panama are also eligible to join. Female relatives of veterans and women who have served overseas in the armed forces are eligible to join the Ladies Auxiliary. In 2003 the VFW, with its Ladies Auxiliary, had about 2.7 million members in approximately 9,500 posts worldwide. The organization's national head-

quarters are located in Kansas City, Missouri, but it also has a large office in Washington, D.C.

The VFW was established in 1913, consolidating three organizations created by SPANISH-AMERICAN WAR veterans. From its inception, the VFW has sought to promote patriotism and national security. Its paramount mission, however, has been ensuring that needy and disabled veterans receive aid. Beginning in 1922, it has sold a paper flower called the "Buddy Poppy," to raise funds for national service programs and relief for needy veterans and their families. The VFW fought for military pensions after World War I, planned the establishment of the Veterans Administration (VA) in 1930, lobbied for the GI Bill of Rights after World War II, and helped develop the national cemetery system for veterans. The VFW has also contributed millions of dollars to cancer research since the 1950s.

The VFW National Legislative Service office in Washington, D.C., monitors legislation that affects veterans. It alerts the membership to key legislation and lobbies Congress and the EXECUTIVE BRANCH on veterans' issues. The office often assists congressional staffs in preparing legislation. In the early 2000s, the VFW legislative goals included a VA budget with sufficient funds to provide adequate veterans HEALTH CARE, vocational training and retraining for veterans, and employment opportunities for veterans.

The VFW has almost 16,000 trained service officers to assist veterans and their dependents in gaining federal or state entitlements. These service officers help with military discharge upgrades, records correction, education benefits, disability compensation, PENSION eligibility, and other types of veterans' issues. Field representatives conduct regular inspections of VA health care facilities, regional VA offices, and national CEMETERIES.

Historically, the VFW has promoted patriotism through its "Americanism Program." It provides materials and information and sponsors events and activities that are designed to stimulate interest in U.S. history, traditions, and institutions. The "Voice of Democracy" program is a national essay competition that annually provides more than $2.5 million in college scholarships and incentives.

In February 2003 the VFW issued a statement that charged the administration of President GEORGE W. BUSH with seriously underfunding the healthcare needs of the nation's veterans. The VFW stated that it had joined with the AMERICAN LEGION, the Disabled American Veterans, and other veteran and military organizations to seek mandatory or guaranteed funding to improve the funding provided by the VETERANS AFFAIRS DEPARTMENT (formerly the Veterans Administration).

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CROSS-REFERENCES

U.S. Court of Appeals for Veterans Claims; Veterans Affairs Department; Veterans' Rights.

## VETERANS' RIGHTS

*Legal rights and benefits extended to those who served on active duty in and have been honorably discharged from one of the U.S.* ARMED SERVICES.

According to data from the 2000 U.S. census, about 26.4 million civilians, or 12.7 percent of the civilian population, consisted of veterans of the armed forces. This number includes those who served on active duty for the duration of their military careers and those who served for only a short time on active duty, such as individuals who were called to serve in the Gulf War in 1991. Given that such a significant percentage of the population consists of veterans, the United States has extended a number of rights to and provides benefits for these servicemen.

The federal agency primarily responsible for administering the various programs for veterans is the VETERANS AFFAIRS DEPARTMENT (VA). A veteran's eligibility for the benefits administered by the VA depends upon a number of factors, such as whether the veteran served during wartime. A veteran must have received an honorable or general discharge in order to qualify for benefits, as a dishonorable or bad conduct discharge ordinarily precludes extension of benefits. However, veterans who are incarcerated or on PAROLE may still be eligible for some VA benefits.

### Health Care

Veterans are generally required to enroll with the VA in order to be eligible for HEALTH CARE benefits. Some veterans are exempted

from the enrollment requirement if they fall within certain categories, such as those who have a disability of 50 percent or more caused by service of duty and those who seek care only for a disability suffered as a result of service. Enrollment of other veterans depends upon the appropriations granted to the VA by Congress. The VA has established a priority list of those who apply to be enrolled in the health care benefits program. Priorities depend largely upon the severity of the disability and the financial need of the veteran. In order to determine whether a veteran is eligible for benefits due to financial need, the VA calculates the annual income and net worth of the veteran, and then compares this amount with the "means test," a financial threshold calculated on an annual basis. If the veteran's income and net worth fall below the means test, then the veteran may be eligible for health care benefits.

A wide range of health care benefits are available for qualified veterans, including nursing home care, domiciliary care, outpatient pharmacy services, outpatient dental treatment, alcohol and drug-dependence treatment, and funding to make home improvements necessary to accommodate a veteran's disability. Veterans who are seriously injured in the line of combat and who have suffered a major disability are generally eligible for a variety of additional benefits. On the other hand, veterans with disabilities that are not service-connected and veterans whose income and net worth are above the means test qualify for fewer programs and may be required to participate in a co-payment plan in order to qualify for VA assistance.

### Disability Compensation

Veterans who become disabled as a result of injury or disease incurred as a result of active military service may qualify for disability compensation. The amount of this monthly compensation depends upon the severity of the disability and the number of dependents of the veteran. The VA has also adopted rules for disability compensation that apply to veterans who have suffered through certain debilitating circumstances, such as those who have been prisoners of war for more than 30 days; those who were exposed to agent orange, herbicides, or radiation; and those who suffered chronic disabilities as a result of the Gulf War. Veterans who receive disability compensation receive their checks once per month.

The VA also provides vocational rehabilitation that allows qualifying disabled veterans to prepare for, locate, and maintain employment. In order to qualify for this plan, the disability must have been service-related, and the veteran must not have been dishonorably discharged. Services vary depending on the specific needs of the veteran.

### Pensions

The government may provide monetary support for veterans who became permanently and totally disabled and who have low incomes. In order to qualify, the veteran must have served at least 90 days in active military service and must have an income level lower than the standard set forth by the VA. Some veterans are automatically excluded from eligibility, such as those who have been dishonorably discharged from military service and those who suffered disabilities as a result of their own willful misconduct.

### Education and Vocational Training

Congress established a rather complex system to provide educational assistance to veterans. The Veterans' Educational Assistance Act of 1984 (Pub. L. No. 98-525, 98 Stat. 2553), better known as the Montgomery GI BILL, was enacted to provide a program that allows veterans to adjust to civilian life. Qualifying veterans generally fall within one of several categories, which are based primarily on the time period in which the veteran served in the armed forces. Veterans become ineligible for education assistance once ten years has passed from the time of discharge or release from active duty.

A wide array of training possibilities are available for veterans who qualify for educational assistance. The types of training include: (1) college or university courses that lead to an associate, a bachelor, or a graduate degree; (2) courses that lead to a diploma or certificate from a business, technical, or vocational school; (3) an apprenticeship or other on-the-job training program; (4) certain correspondence courses; (5) flight training under some circumstances; (6) state-approved certification programs for teachers; (7) courses deemed necessary for a veteran to gain admission to a college or graduate school; and (8) approved licensing and certification tests. Veterans may also qualify for a VA work study program.

Veterans who served in the reserve elements of the armed services may be eligible for educa-

tional assistance. In order to qualify, the reserve veteran must have agreed to a six-year obligation to serve in the Selected Reserve, in addition to other requirements. The rate of benefits is considerably less for reserve members than for veterans who served in active service.

### Home Loan Guarantees

The VA guarantees certain home loans for veterans, as well as individuals in active service, reservists, and surviving spouses. Under this program, the VA agrees to guarantee part of the total loan, which allows the veteran to obtain a mortgage at a competitive interest rate, sometimes without a down payment. A veteran is allowed to purchase a new home or condominium, or purchase a manufactured home or a manufactured home lot. Home loans may also be used to repair or improve an existing home, refinance an existing home loan, or make certain weatherization or energy-efficiency improvements. In order to qualify, the veteran must have a good credit rating, must make a sufficient income to pay mortgage payments, and agree to reside on the property. Other qualifications apply as well.

### Additional Benefits

Veterans may be entitled to a number of additional benefits offered by the VA, including life insurance, burial services, and survivor benefits. Veterans are requested to contact a local office of the VA to determine their potential eligibility. A variety of benefits are also provided by agencies other than the VA, including the DEFENSE DEPARTMENT, the AGRICULTURE DEPARTMENT, the SMALL BUSINESS ADMINISTRATION, and the HOUSING AND URBAN DEVELOPMENT DEPARTMENT.

### Appeals

A veteran or another claimant is entitled to file an appeal of a decision made by a regional office or medical center of the VA. Appeals may be filed for denials of a variety of benefits, including health care benefits, disability compensation, pensions, and educational benefits. A veteran who wishes to file an appeal must do so within one year of the VA's decision. The first body to hear an appeal is the Board of Veterans' Appeals, which is located in Washington, D.C. If the board refuses to grant benefits to the veteran, he or she may file an appeal with the U.S. COURT OF APPEALS FOR VETERANS CLAIMS. The appeals court does not conduct a new trial, but rather reviews the record of the Board of Veterans' Appeals. A decision of the Court of Appeals for Veterans Claims may be reviewed by the U.S. Court of Appeals for the Federal Circuit, and possibly by the U.S. Supreme Court.

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## VETO

*The refusal of an executive officer to assent to a bill that has been created and approved by the legislature, thereby depriving the bill of any legally binding effect.*

Article I, Section 7, of the U.S. Constitution states that "every bill" and "every order, resolution or vote to which the concurrence of the Senate and the House of Representatives may be necessary" must be presented to the president for approval. If the president disapproves of the legislation and declines to sign the bill, he issues a *veto,* returning the bill unsigned to Congress. Similar provisions in state constitutions give governors the same veto power, and municipal charters often give the mayor the right to veto legislation from the city council.

The veto power gives the executive a central role in the legislative process. By threatening a veto before legislation is passed, the executive can force the legislature to compromise and pass amendments it would otherwise find unacceptable. Though there is great power in the veto, most executives use it cautiously, as overuse can antagonize the legislature and create political risk for the executive.

Under the Constitution the president has ten days (not counting Sundays) in which to consider legislation presented for approval. The president has three options: sign the bill, making it law; veto the bill; or take no action on the bill during the ten-day period. A veto can be overridden by a two-thirds majority of both houses of Congress. If the president takes no action, the bill automatically becomes law after ten days. If Congress adjourns before the ten days have expired and the president has not signed the bill,

**Congressional Bills Vetoed, 1961 to 2001**

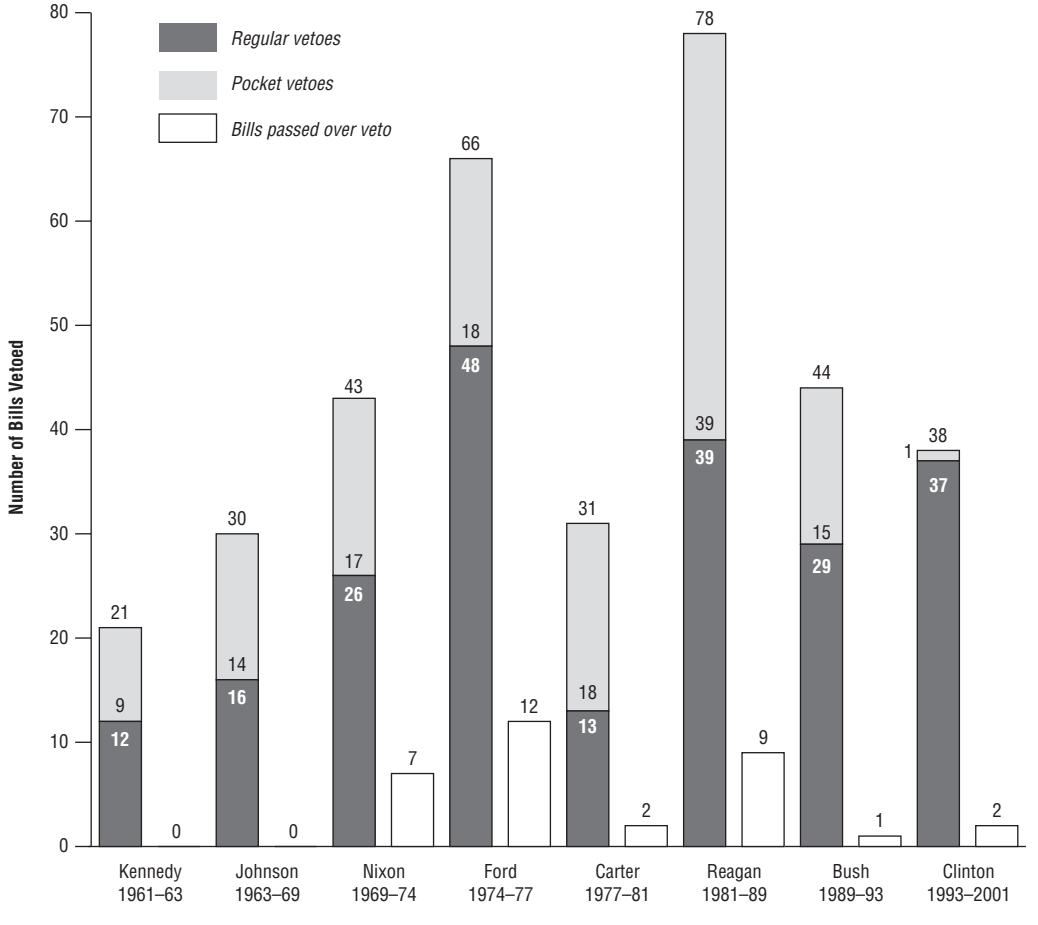


SOURCE: U.S. House of Representatives, Office of the Clerk web page.

however, the bill is said to have been subjected to a *pocket veto*. A pocket veto deprives Congress of the chance to override a formal veto. State governors have similar veto and pocket veto powers, and state legislatures usually are required to override vetoes by a two-thirds majority of both houses.

In the majority of states the governor also has the authority to select particular items from an appropriations bill and veto them individually. This authority, called the line-item veto, is popular because it allows the executive to cancel specific appropriations items from bills that are hundreds of pages long. The legislature can override the veto by a two-thirds majority vote.

In the 1980s and early 1990s, Presidents RONALD REAGAN and GEORGE H.W. BUSH called for a constitutional amendment that would provide the president with a line-item veto. After years of debate, Congress rejected the idea of enacting such an amendment and instead approved federal line-item veto authority in a 1996 statute known as the Line-Item Veto Act (2 U.S.C.A. §§ 691–692). The act gave the president the ability to cancel individual tax and spending measures included in federal legislation.

Members of Congress opposed to the act immediately filed a federal lawsuit, arguing that the act was unconstitutional. In *Raines v. Byrd*, 521 U.S. 811, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997), the Supreme Court concluded that the plaintiffs did not have standing to bring the action and dismissed the case. A key point in the ruling was that a plaintiff had to show an actual injury because of the law. The senators and representatives had argued that the constitutional SEPARA-

TION OF POWERS had been violated by the act but the Court found this was not an actual injury. Therefore, the Supreme Court had no jurisdiction.

Two groups of plaintiffs then filed suit, arguing that they had been injured. One group included the City of New York, two hospital associations, one hospital, and two unions that represented HEALTH CARE employees. They challenged a line-item veto President BILL CLINTON had made in the 1997 Balanced Budget Act. The other group was the Snake River Potato Growers, Inc., which consisted of approximately 30 potato growers located throughout Idaho. The collective opposed President Clinton's cancellation of a provision of the Taxpayer Relief Act of 1997. Both groups of plaintiffs argued that the line-item vetoes had deprived them of federal funds. The U.S. district court found that the parties had standing and that the act violated the Presentment Clause under Article I of the Constitution. The Supreme Court eventually resolved the matter in *Clinton v. City of New York*, 524 U.S. 417, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998).

The Court, in a 6–3 vote, agreed that the Line-Item Veto Act, which empowered the president to cancel individual portions of bills, violated the Presentment Clause. Under the Presentment Clause, after a bill has passed both Houses, but "before it become[s] a Law," it must either be approved (signed) or returned (vetoed) by the president. By canceling only parts of the legislation, President Clinton had, in effect, amended the laws. The Court concluded that there was no constitutional authorization for the president to amend legislation at his discretion.

A widely used means of congressional oversight has been the *legislative veto.* A legislative veto is a statutory device that subjects proposals and decisions of EXECUTIVE BRANCH administrative agencies to additional legislative consideration. The legislature may disapprove agency action by a committee, one-house, or concurrent resolution.

Since it was first used in the 1930s, the legislative veto has been the subject of controversy. The legislative veto circumvents traditional bill-passing procedures in that the legislative action is not presented to the executive for approval. This veto has been defended on the ground that it is not a legislative act. In *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983), the U.S. Supreme Court invalidated legislative veto provisions involving immigration and naturalization on the ground that these provisions violated the separation of powers between the legislative and executive branches. Despite *Chadha,* Congress has not systematically removed legislative veto provisions from federal statutes, and some states continue to use the legislative veto.

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CROSS-REFERENCES

Presidential Powers.

## VEXATIOUS LITIGATION

*A legal action or proceeding initiated maliciously and without* PROBABLE CAUSE *by an individual who is not acting in* GOOD FAITH *for the purpose of annoying or embarrassing an opponent.*

The U.S. legal system permits persons to file civil lawsuits to seek redress for injuries committed by a defendant. However, a legal action that is not likely to lead to any practical result is classified as *vexatious litigation.* Such litigation is regarded as frivolous and will result in the dismissal of the action by the court. A person who has been subjected to vexatious litigation may sue the plaintiff for MALICIOUS PROSECUTION, seeking damages for any costs and injuries associated with the original lawsuit.

Litigation is typically classified as vexatious when an attorney or a pro se litigant (a person representing himself without an attorney) repeatedly files groundless lawsuits and repeatedly loses. Under the COMMON LAW, the frequent incitement of lawsuits by an attorney constituted the crime of BARRATRY. In modern law, however, barratry is viewed as an archaic crime and is rarely enforced. Attorneys who encourage vexatious litigation are subject to discipline for violating rules of professional conduct and may be suspended from the PRACTICE OF LAW or disbarred.

Sometimes pro se litigants who have lost their initial lawsuits file new actions based on

the dispute contained in the original suit. Because the judgment of the original case is dispositive, a court will ultimately dismiss these new actions. To avoid the expenditure of court resources, as well as the costs associated with the defendant's defense of repeated frivolous claims, a court may issue an order forbidding the pro se litigant to file any new actions without permission of the court.

Vexatious litigation is a type of malicious prosecution that enables the defendant to file a tort action against the plaintiff. A plaintiff in a malicious prosecution must prove that a legal proceeding (or multiple proceedings) was instituted by the defendant, that the original proceeding was terminated in favor of the plaintiff, that there was no probable cause for the original proceeding, and that malice, or a primary purpose other than that of bringing the original action, motivated the defendant. A plaintiff in such an action may recover, for example, the expenses incurred in defending the original suit or suits, as well as resulting financial loss or injury. A plaintiff may also recover damages for mental suffering of a kind that would normally be expected to follow from the original action.

## VICARIOUS LIABILITY

*The* TORT *doctrine that imposes responsibility upon one person for the failure of another, with whom the person has a special relationship (such as* PARENT AND CHILD*, employer and employee, or owner of vehicle and driver), to exercise such care as a reasonably prudent person would use under similar circumstances.*

Vicarious liability is a legal doctrine that assigns liability for an injury to a person who did not cause the injury but who has a particular legal relationship to the person who did act negligently. It is also referred to as imputed NEGLIGENCE. Legal relationships that can lead to imputed negligence include the relationship between parent and child, HUSBAND AND WIFE, owner of a vehicle and driver, and employer and employee. Ordinarily the independent negligence of one person is not imputable to another person.

Other theories of liability that are premised on imputed negligence include the RESPONDEAT SUPERIOR doctrine and the family car doctrine.

The doctrine of respondeat superior (Latin for "let the master answer") is based on the employer-employee relationship. The doctrine makes the employer responsible for a lack of care on the part of an employee in relation to those to whom the employer owes a duty of care. For respondeat superior to apply, the employee's negligence must occur within the scope of her employment.

The employer is charged with legal responsibility for the negligence of the employee because the employee is held to be an agent of the employer. If a negligent act is committed by an employee acting within the general scope of her or his employment, the employer will be held liable for damages. For example, if the driver of a gasoline delivery truck runs a red light on the way to a gas station and strikes another car, causing injury, the gasoline delivery company will be responsible for the damages if the driver is found to be negligent. Because the company will automatically be found liable if the driver is negligent, respondeat superior is a form of STRICT LIABILITY.

Another common example of imputed negligence is attributing liability to the owner of a car, where the driver of the car committed a negligent act. This type of relationship has been labeled the family car doctrine. The doctrine is based on the assumption that the head of the household provides a car for the family's use and, therefore, the operator of the car acts as an agent of the owner. When, for example, a child drives a car, registered to a parent, for a family purpose, the parent is responsible for the negligent acts of the child at the wheel.

Liability can also be imputed to an owner of a car who lends it to a friend. Again, the driver of the car is acting as the agent of the owner. If the owner is injured by the driver's negligence and sues the driver, the owner can lose the lawsuit because the negligence of the driver can be imputed to the owner, thereby rendering him contributorily negligent. This concept is known as imputed contributory negligence.

CROSS-REFERENCES

Scope of Employment; Tort Law.

## VICE

*A fault, flaw, defect, or imperfection. Immoral conduct, practice, or habit.*

In CIVIL LAW, redhibitory vices are defects or flaws in the subject matter of a sale that entitle the buyer to return the item and recover the purchase price.

A vice crime is any type of immoral and illegal activity, such as prostitution, the sale of DRUGS AND NARCOTICS, and gambling.

## VICE CRIMES

*A generic legal term for offenses involving immorality, including prostitution, lewdness, lasciviousness, and* OBSCENITY.

## VICE PRESIDENT

The vice president of the United States occupies a high position in government, yet is given little responsibility under the U.S. Constitution. A person elected vice president presides over the Senate, but apart from that duty, he or she must rely upon the president to assign additional responsibilities. The Constitution requires that a vice president of the United States must be a native-born citizen, 35 years of age or older, who has resided in the United States for at least 14 years. The ELECTORAL COLLEGE chooses the vice president, who holds office for a term of four years.

Until 1804, under Article II, Section 2, Clause 3, of the Constitution, each member of the electoral college was permitted to vote for two persons. The person receiving the highest total became president, and the person receiving the second highest total became vice president. The ratification of the TWELFTH AMENDMENT to the Constitution, in 1804, changed this procedure by requiring each elector to vote for president and vice president on separate ballots instead of voting for two persons on a single ballot.

During the early years of the Republic, the vice president was limited to the only function set forth in the Constitution, that of president of the Senate. (As such, he or she occupies a largely ceremonial role, having no vote unless the senators are equally divided on a particular issue.) In 1841, however, JOHN TYLER became the first vice president to take over the presidency because of the death of the chief executive, in this case President WILLIAM HENRY HARRISON. Article II of the Constitution was silent on the matter of succession, so some political leaders suggested that Tyler serve as acting president. Tyler rejected this idea, and announced that he would assume the full powers and duties of the office, setting a precedent that would be followed by other vice presidents.

Presidential succession was clarified by the Twentieth and Twenty-fifth Amendments to the Constitution. Under the TWENTIETH AMENDMENT, if a president-elect dies before assuming office, the vice president elect becomes president. Under the TWENTY-FIFTH AMENDMENT, if the president is removed from office, dies, or resigns during his or her term of office, the vice president becomes president of the United States. Eight U.S. presidents have died in office, with the result that the vice president assumed the presidency. In 1974, Vice President GERALD R. FORD became president when RICHARD M. NIXON resigned in the face of IMPEACHMENT charges.

The Twenty-fifth Amendment also provides a method for the vice president to become acting president. If the president transmits a message to both houses of Congress stating that he or she cannot discharge the powers and duties of the office, the vice president becomes acting president. Until the president subsequently transmits a written declaration to the contrary, the vice president remains acting president.

In addition, the amendment deals with how to determine whether or not a president is unable to govern. In such a case the vice president and a majority of the cabinet may transmit to both houses of Congress a declaration that the president is unable to discharge the powers and duties of the office. If this occurs, the vice president must immediately assume the powers and duties of the office as acting president.

The president may resume his or her duties by notifying the president pro tempore of the Senate and the Speaker of the House of Representatives that the disability no longer exists. However, the vice president and the majority of the cabinet may send a declaration to Congress within four days disputing the assertion of the president that he or she is able to discharge the duties of the office. If this happens, Congress must vote by a two-thirds majority in both houses that the president is unable to serve. Otherwise, the president will reassume office.

The Twenty-Fifth Amendment has been invoked during only one brief period of time. In 1985, when President RONALD REAGAN underwent cancer surgery, he transferred power to Vice President GEORGE H. W. BUSH for a period of eight hours. Several commentators expected Bush to take charge under the amendment four years earlier, in 1981, when Reagan was shot by John Hinckley Jr. However, the president did not yield control even though later reports showed that he was in critical condition.

If a vice president dies in office or resigns, the Twenty-fifth Amendment authorizes the

*The official seal of the office of the vice president of the United States.*
BETTMANN/CORBIS

president to choose a new vice president, subject to confirmation by a majority vote of both houses of Congress. This situation occurred twice during the Nixon and Ford administrations. In 1973, President Nixon appointed Gerald R. Ford to replace Vice President Spiro T. Agnew, who resigned in the face of criminal BRIBERY charges. When Nixon resigned in August 1974 because of the WATERGATE scandal, Ford became president. Ford then appointed Nelson A. Rockefeller vice president.

The executive functions of the vice president include participation in all cabinet meetings and, by statute, membership in the NATIONAL SECURITY COUNCIL, the Domestic Council, and the BOARD OF REGENTS of the Smithsonian Institution. Although the vice president may take an active role in establishing policy in the EXECUTIVE BRANCH by serving on such committees and councils, the relative power of the vice president's office depends upon the duties delegated by the president.

In recent years, vice presidents such as AL GORE and Dick Cheney have played significant roles on both the domestic and international fronts. Gore, for example, was heavily involved in establishing environmental policy during President BILL CLINTON's administration. Likewise, Cheney—who served as secretary of defense under George H. W. Bush—has been highly influential in establishing the international agenda of President GEORGE W. BUSH.

The events that occurred during and after the SEPTEMBER 11, 2001, TERRORIST ATTACKS demonstrate the importance of the vice president's position. Immediately after the attacks began, SECRET SERVICE agents removed Vice President Cheney to a secret bunker beneath the White House. President Bush was in Florida when the attacks occurred, and Cheney maintained contact with him throughout the confusing morning. When reports indicated that terrorists were flying a hijacked plane toward Washington, Cheney reportedly ordered that the plane should be shot down by the military. Several passengers on the flight attacked the terrorists before military action was necessary, though the plane crashed in Pennsylvania and killed everyone on board.

In the days that followed the attacks, Cheney was moved to a number of secret locations in order to separate him from Bush. The fear was that terrorists would launch assassination attempts. Some commentators and news organizations later criticized the Bush administration for keeping Cheney in hiding, with CBS News noting, "Cheney is an integral part of the president's team and a comforting figure to Americans. Removing him from sight leads to speculation about his health or political status and is not helpful to the administration in selling its message that they have things under control."

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## VICTIM ASSISTANCE PROGRAM

*Government program that provides information and aid to persons who have suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime.*

All 50 states have government-funded entities that provide services to VICTIMS OF CRIME. In addition, the JUSTICE DEPARTMENT's Office for Victims of Crime (OVC), which was established in 1984 under the VICTIMS OF CRIME ACT, oversees many federal programs that benefit crime victims. These programs provide information to victims about their rights as well as emotional and financial support.

Victim assistance programs appeared for the first time in the early 1970s as part of the VICTIMS' RIGHTS movement. Victims complained that police and prosecutors did not keep them

informed about ongoing investigations and prosecutions. Most importantly, victims' rights advocates argued for the establishment of victim compensation funds. States began to enact victims' compensation statutes and, by 2003, all 50 states had such funds in place.

These laws authorized the creation of programs that pay victims compensation for certain losses associate with a criminal act. Compensation is generally provided for lost earnings, medical expenses, mental health counseling, and funeral expenses. However, these programs do not fully compensate victims because losses are capped at fixed amounts. In addition, victims must satisfy threshold requirements: (1) they must report the crime to law enforcement within a specific period of time (usually 30 days); (2) the crime must have occurred within the state that the claim is made; (3) a claim must be filed with the compensation program within a specific amount of time; (4) the victim must cooperate fully with the investigation and prosecution of the crime; and, (5) the victim cannot have been committing a crime or have been involved in any misconduct connected to the incident. Some states limit compensation benefits only to victims who have low incomes, while other compensation programs may only pay benefits to victims who are physically injured or to the families of victims who are killed.

Though some compensation funds are paid for with taxpayer money, most state programs are funded by fees and charges paid for by offenders. For example, some states require an offender to pay a set penalty fee, such as $50 for each felony charge. This creates a compensation pool, which encourages victims to sue when those victims would otherwise be discouraged at the prospect of trying to make a criminal pay a court judgment.

Apart from compensation programs, federal and state laws mandate that victims be kept informed about the criminal investigation and prosecution. Though police and prosecutors may contact victims, most jurisdictions have employees who serve as victim advocates. Victim advocates counsel victims and their families, update them about the criminal case, prepare victims to testify at trial, and help them apply to the compensation fund. In addition, they assist victims prepare impact statements that are either given orally or submitted in writing to the court before the defendant is sentenced.

Crime victims may also receive restitution directly from the defendant. Judges routinely order the person convicted of a crime to pay for any damage to the victim's property.

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CROSS-REFERENCES

Victims of Crime; Victims of Crime Act of 1984; Victims' Rights.

## VICTIMLESS CRIMES

*Crime where there is no apparent victim and no apparent pain or injury. This class of crime usually involves only consenting adults in activities such as* **PROSTITUTION, SODOMY,** *and* **GAMING** *where the acts are not public, no one is harmed, and no one complains of the activities. Some groups advocate legalizing victimless crimes by removing these acts from the law books. Other critics complain that there is no such thing as a victimless crime; whenever one of these crimes is committed but goes unpunished, individual mores, societal values, and the* **RULE OF LAW** *are undermined or compromised, rendering society itself the victim.*

## VICTIMS OF CRIME

Until the 1970s victims of crimes were often forgotten by the criminal justice system. As a result, victims sometimes came to believe that they had fewer rights than the criminals who had injured them. In addition, some victims became so alienated from the criminal justice process that prosecutors had difficulty persuading them to testify at trial. This environment began to change in the 1970s with the establishment of victim compensation funds. Not until the 1980s, however, did a national movement for "victims' rights" spark wholesale changes in the criminal justice system.

### Right to Sue

Victims have always had the right to sue for money damages a person who injures them dur-

## An Automated Victim Notification System

Crime victims commonly worry about the day when an inmate convicted in their case is released from custody. Women who have been stalked and victimized by boyfriends and former spouses fear that they will return again. Only rarely is the victim promptly notified of an inmate's release. In 1997 the state of Kentucky addressed this problem by introducing the first completely automated victim notification system.

The Kentucky system, called Victim Information and Notification Everyday (VINE)™, is a statewide system that seeks to help crime victims, especially those who have been subjected to **DOMESTIC VIOLENCE**. The VINE system keeps tabs on inmates in Kentucky's 17 state prisons and 83 county jails.

To obtain information, a person dials a toll-free number and supplies the prisoner's name or prison identification number. A computer then provides information as to where the prisoner is incarcerated, the telephone number and address of the jail or prison, the date of the inmate's next **PAROLE** hearing, and the date the sentence expires.

In addition, a person may confidentially register with the automated system and request to be notified when an inmate is released. Registered persons automatically receive a telephone call within ten minutes of an inmate's transfer or release, giving them time to take precautions.

**FURTHER READINGS**

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ing a criminal act. For most crime victims, however, this solution has generally not proved practical because victims frequently do not know who committed the crime against them and the criminals are not always apprehended. Even when a criminal is available to be sued, the victim may not have adequate funds to pay for a lawsuit, or the criminal may have no money to pay damages if the victim is successful.

### Victim Compensation Laws

During the 1970s many states enacted victim compensation statutes, which authorize payment of money from the public treasury to crime victims so that they are not forced to bear the full burden of the crime. Although compensation can be provided for lost earnings, medical expenses, and the replacement of missing property, the majority of plans do not replace every dollar lost.

Most compensation plans provide benefits only to victims who have low income or few resources, although some plans allow anyone who is an innocent victim or did not contribute to the cause of her injuries to receive benefits. Some plans pay benefits only to victims who are physically injured or to the families of victims who are killed.

An individual who wishes to apply for crime victim compensation must do so promptly after the injury. Ordinarily, this is done by filling out a form provided by the state official or victim compensation board responsible for administering the program. States generally will not consider applications filed later than a specified period after the crime.

As part of a victim compensation plan, a state may take any profit a criminal makes from the crime and hold it in trust to pay victims who successfully sue the criminal. This feature is designed to encourage victims who would ordinarily not sue because they are aware that most criminals cannot pay judgments. Under such a plan, any money paid to a convicted criminal for a book, story, or dramatization of the crime must be turned over to the state and the funds deposited into a special escrow account and held available to pay any victim who successfully sues the criminal. Forty-one states have adopted such laws, and the federal government established a similar process in the **VICTIMS OF CRIME ACT OF 1984** (18 U.S.C.A. §§ 3681–3682).

These statutes are known as "Son of Sam" laws after David Berkowitz, a New York serial killer who left a note signed "Son of Sam" at the scene of one of his crimes and was thereafter nicknamed Son of Sam by the New York press. The first Son of Sam law (N.Y. Exec. Law § 632-a [McKinney 1990]) was enacted by the New York state legislature in 1977 after it learned that Berkowitz was planning to sell his story of serial killing.

The U.S. Supreme Court struck down the New York law in *Simon and Schuster v. New York Victims Crime Board,* 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991). The Court held that the law was based on the content of a publication and therefore violated the FIRST AMENDMENT. New York quickly amended its law to apply to any economic benefit the criminal derived from the crime, not just the proceeds from the sale of the offender's story. This redefinition was intended to eliminate the unconstitutional regulation of expressive activity and reconceptualize the law as a regulation of economic proceeds from crime. Other states have modified their laws as well, but it remains to be seen if they will be found constitutional.

### Victims' Rights Laws

In the early 1980s, groups such as MOTHERS AGAINST DRUNK DRIVING (MADD), the National Coalition against Domestic Violence, and Parents of Murdered Children began calling for legislative recognition of VICTIMS' RIGHTS. Partly as a result of their efforts, in 1982 Congress enacted the Victim and Witness Protection Act (VWPA) (18 U.S.C.A. §§ 1512–1515, 3663–3664), which provides penalties for interfering with witnesses, victims, or informants and allows for restitution to victims of federal crimes. The VWPA has served as a model for many state victim protection laws, especially those providing for restitution to crime victims. The Victims of Crime Act also provided $150 million to support compensation and victim assistance programs.

Most states have adopted provisions in support of victims' rights. The majority have been enacted through legislation, but several take the form of state constitutional amendments. These laws require victims to be treated with dignity and fairness, and many require that the victim be kept informed of the status of the case and be notified when the criminal is released from prison. A key part of these initiatives deals with "victim impact statements." A victim impact statement is made by the victim or a member of the victim's family at the time of sentencing or during a PAROLE hearing. The speaker describes the impact the crime has had upon the victim and her family.

In *Booth v. Maryland,* 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), the U.S. Supreme Court forbade the use of victim impact statements in death penalty cases. The Court reasoned that the imposition of CAPITAL PUNISHMENT could be based on subjective feelings for the victim rather than objective criteria indicating the defendant's guilt. In *Payne v. Tennessee,* 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), however, the Court reversed itself and held that the EIGHTH AMENDMENT does not bar the jury from considering victim impact statements.

### Victim Advocates

In response to the growing support for victims' rights, the criminal justice system has created the position of victim advocate. Victim advocates first gained prominence during the women's and victims' rights movements of the 1970s and 1980s. Rape and domestic abuse counselors saw the need for advocates to support and guide victims through the ordeal of trial.

Victim advocates counsel victims and their families, keep them informed about the progress of an investigation, prepare them for trial, refer them to needed services, explain court proceedings, and act as a liaison with state and local agencies. By providing support to people who have been devastated by a crime, they free police officers and prosecutors from the task of dealing with distraught families and friends.

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Shield Laws; Stalking; Victim Assistance Program; Victims of Crime Act; Victims' Rights.

## VICTIMS OF CRIME ACT OF 1984

The Victims of Crime Act of 1984 (VOCA) was an attempt by the federal government to help the victims of criminal actions through means other than punishment of the criminal. It created a federal victims-compensation account funded by fines assessed in federal criminal convictions, and it established provisions to assist state programs that compensated the victims of crimes. The compensation system is still in existence, having distributed over $1 billion in funds since it began.

The statute, codified at 42 U.S.C.A. § 10601, was a direct result of a task force set up by the JUSTICE DEPARTMENT under the auspices of President RONALD REAGAN. Called the President's Task Force on Victims of Crime, the report issued by the task force in 1982 was harshly critical of existing victims-compensation programs. "In many states, program availability is not advertised for fear of depleting available resources or overtaxing a numerically inadequate staff. Victim claims might have to wait months until sufficient fines have been collected or until a new fiscal year begins and the budgetary fund is replenished," according to the report.

VOCA established the Crime Victim's Fund, which is supported by all fines that are collected from persons who have been convicted of offenses against the United States, except for fines that are collected through certain environmental statues and other fines that are specifically designated for certain accounts, such as the Postal Service Fund. The fund also includes special assessments collected for various federal crimes under 18 USC § 3613, the proceeds of forfeited appearance bonds, bail bonds, and collateral collected, any money ordered to be paid into the fund under section 3671(c)(2) of Title 18; and any gifts, bequests, or donations to the fund from private entities or individuals.

The first $10 million from the fund, plus an added amount depending on how much has been deposited in the fund for that fiscal year, goes to child-abuse prevention and treatment programs. After that, such sums as may be necessary are made available for the U.S. Attorneys' Offices and the FEDERAL BUREAU OF INVESTIGATION to improve services for the benefit of crime victims in the federal criminal justice system, and for a Victim Notification System.

Once those distributions have been made, the fund is distributed to victim-compensation programs in two different ways. One is to eligible victims-compensation programs. The law sets up a number criteria as to whether a program is eligible including: 1) whether it is a program operated by the state that offers compensation to victims and survivors of victims of criminal violence; 2) whether the program promotes victim cooperation with the reasonable requests of law enforcement authorities; 3) whether the state certifies that grants received under this section will not be used to supplant state funds that are otherwise available to provide crime-victim compensation; 4) whether the program makes compensation awards to victims who are nonresidents of the state on the basis of the same criteria that are used to make awards to victims who are residents of such state; 5) and whether the program provides compensation to victims of federal crimes occurring within the state on the same basis that such program provides compensation to victims of state crimes. The program also must not deny compensation to any victim because of that victim's familial relationship to the offender, or because of the sharing of a residence by the victim and the offender, nor may it provide compensation to any person who has been convicted of an offense under federal law with respect to any time period during which the person is delinquent in paying a fine, other monetary penalty, or restitution imposed for the offense.

The other way the fund provides compensation is to give the money directly to the governor of a state for the financial support of eligible crime-victim assistance programs. The governor must certify that priority for money from the fund will be given to eligible crime-victim assistance programs providing assistance to victims of sexual assault, spousal abuse, or CHILD ABUSE; and he must certify that funds will be made available for grants to programs that serve previously underserved populations of victims of violent crimes.

A small percentage of the fund is reserved for demonstration projects, program evaluation, compliance efforts, and training and technical assistance services to eligible crime-victim assistance programs. The fund also has recently expanded to apply to potential victims of TERRORISM and is authorized to set aside $50,000,000 from the amounts transferred to it in response to the SEPTEMBER 11, 2001, TERRORIST ATTACKS as an antiterrorism emergency reserve.

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CROSS-REFERENCES

Victim Assistance Program; Victims of Crime; Victims' Rights.

## VICTIMS' RIGHTS

*Generally, the rights of the victims of a criminal act, whether at trial or after conviction of the perpetrator.*

Victims' rights as a concept in American CRIMINAL LAW has had a patchy history. The prosecutorial-centered approach to criminal law developed in both the English and American COMMON LAW systems tended to marginalize the victim's position in the criminal process. Other than their testimony, there was no formal role for victims during the criminal trial, and little way for them to obtain compensation for the harms inflicted on them following the trial.

During the post-WORLD WAR II years, especially, American law seemed to be more interested in the rights of the criminally accused. This was evident after the Supreme Court's Miranda ruling (MIRANDA V. ARIZONA, 1966) and subsequent cases, which laid new boundaries for the constitutional rights of suspects. Even though many states were passing victims' compensation statutes at the same time, there were still concerns that the pendulum had swung too far in favor of criminal offenders.

In the 1970s, the phrase "victims' rights" began to be heard more and more as a rallying cry for those who felt that justice was not meted out equally to victims. Groups such as the NATIONAL ORGANIZATION FOR WOMEN (NOW), MOTHERS AGAINST DRUNK DRIVING (MADD), and various child advocacy groups raised the consciousness of the public regarding the treatment of victims by the criminal justice system. In response, the JUSTICE DEPARTMENT, under President RONALD REAGAN, set up the President's Task Force on VICTIMS OF CRIME. In 1982, the task force issued a report that was strongly critical of existing victims' rights programs. It particularly criticized existing victims' compensation programs, which were described as "inadequate" in terms of resources and difficult to utilize.

As a result of the findings, the federal government passed the Victim and Witness Protection Act of 1982 (18 U.S.C.), providing restitution for crime victims and allowing the use of "victim impact statements" at federal sentencing hearings. In 1984, Congress passed the VICTIM OF CRIME ACT (VOCA), an attempt by the federal government to establish help for crime victims on a nationwide scale. Among other things, the act created a federal victims' compensation account funded by fines assessed in federal criminal convictions. It also established funding to help state programs that compensate the victims of crime. The act has resulted in the distribution of over $1 billion in funds to victims of crime since it began. Another notable federal law that was enacted to help victims of crime was the VIOLENCE AGAINST WOMEN ACT OF 1994 (108 Stat. 1796, 1902). The act aided the victims of gender-based crimes by establishing new rights for those victims at trial and allotting funding to various organizations that assist those victims.

In the meantime, states began to pass their own victims' rights legislation, most of which established compensation programs for victims of crime. Some states went further, however, and passed victims' rights amendments to their state constitutions. These amendments, generally guaranteeing the right of the victim to be heard in criminal proceedings through the use of victim impact statements, have been enacted by a majority of the states. Their overall effect has been debated.

Nevertheless, at the federal level, a Victim's Rights Amendment to the U.S. Constitution was introduced in Congress in 1996, and again in 2000. This amendment is similar in scope as amendments at the state level. Among other things, it would provide that a victim has the right to be notified of hearings that involve the sentencing of the defendant, and to submit statements on all matters potentially affecting the custody of the accused or of a convicted offender. It would also require that the safety of victims be considered in defendant sentencing. Passage of this amendment would certainly mark the apogee of the victims' rights movement in America.

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CROSS-REFERENCES

Victim Assistance Program; Victims of Crime; Victims of Crime Act.

## VIDAL V. GIRARD'S EXECUTORS

*Vidal v. Girard's Executors* was an 1844 decision by the Supreme Court, 43 U.S. (2 How.) 127, 11 L.Ed. 205, that held that the city of Philadelphia, Pennsylvania, had power, pursuant to its charter, to accept and administer a CHARITABLE TRUST.

Stephen Girard was a native of France who emigrated to the American colonies shortly before the Declaration of Independence. Prior to 1783, he became a resident of the city of Philadelphia, where he died, a childless widower, in December 1831. In addition to some minor real estate holdings near Bordeaux, France, Girard owned real property in the United States that had cost him $1.7 million and PERSONAL PROPERTY worth approximately $5 million. On December 25, 1830, he executed a will making various bequests to his relatives and friends, to the city of New Orleans, and to specified charities. His will and two codicils were admitted to probate on December 31, 1831. His closest relatives were a brother and a niece, who sought to have a portion of his will set aside, and three other nieces, who were named defendants in the action. The lower court ruled in favor of the defendants, and the plaintiffs appealed to the Supreme Court.

The controversial clauses of Girard's will established a college for impoverished white male orphans between the ages of six and ten years. In addition to specifying the subject matter to be taught, the will barred clergymen of any denomination from holding any post within the college and from visiting the premises. Girard also bequeathed $500,000 to be invested and the income therefrom applied to the construction, lighting, and paving of a street in eastern Philadelphia, fronting the Delaware River, to be called "Delaware Avenue." He also gave $300,000 to the commonwealth of Pennsylvania to improve canal navigation. To implement these provisions, Girard bequeathed the residue and remainder of his real and personal property to the mayor, aldermen, and citizens of Philadelphia in trust.

The heirs of Girard instituted an action to have the devise of the residue of the real property to the mayor, aldermen, and citizens of Philadelphia in trust be declared void, on the theory that the recipients lacked the capacity to take lands by devise; or if they were deemed capable of taking by devise for their own benefit, they lacked capacity to take the lands in trust. The plaintiffs also asserted that because the beneficiaries of the charity for which the lands were devised in trust were ambiguous, indefinite, and vague, the will had not created a trust that could be executed or recognized at law or in EQUITY. The complaint sought the establishment of a RESULTING TRUST for the heirs, an accounting, and other relief.

This case contained three principal issues. The initial question focused on whether the corporation of the city of Philadelphia had the capacity to take the real and personal property for the construction and maintenance of a college pursuant to the trust established by the will. The second issue centered on whether the charitable purposes were valid and capable of being effectuated in accordance with the laws of Pennsylvania. The third issue involved the effect of the invalidation of the trust upon a finding that it violated Pennsylvania law, in terms of whether the property would fall into the residue of the estate and belong to the corporation of the city through the residuary clause of the will or belong, as a resulting trust, to the heirs of Girard.

With respect to the first issue, the Court held that where a corporation has the legal capacity to take real or personal property, it can accept it and administer it in trust to the same extent and in the same manner as a private person might execute a trust. The act of March 11, 1789, that incorporated the city of Philadelphia expressly conferred upon it the power to own and otherwise benefit from real and personal property. The Court noted that if the trust were inconsistent with the purposes for which the corporation was established, the trust itself would not be void, assuming that it was otherwise valid. Rather, a court, in the exercise of its equity jurisdiction, would simply order the substitution of a new trustee to execute the trust.

The Pennsylvania legislature passed the acts of March 24 and April 4, 1832, to implement particular improvements and execute certain trusts, pursuant to Girard's will. The Court acknowledged that this legislation was not a judicial decision entitled to the full force and effect of such but indicated that it was a legisla-

tive ratification of the competency of the corporation to take the property and implement the trusts. If the trusts were otherwise valid, the legislature could not challenge the competency of the corporation in this regard. In addition, neither the heirs nor any other private persons could contest the right of the corporation to take the property or to administer the trusts. This right was reserved solely for the state in its sovereign capacity.

The second issue involved a challenge of the trusts on the theory that because the Statute of Charitable Uses was not in effect in Pennsylvania, no charitable trust could be created. The Statute of Charitable Uses validated charitable trusts and such trusts that did not have an independent existence apart from that statute and its successors. As a result, if the statute had been expressly repealed or had been declared not a part of the COMMON LAW of a particular state, no charitable trust could be established in that state. The Court, however, rejected this theory and stated that charitable uses were known and upheld prior to the Statute of Charitable Uses; the statute merely acknowledged the existence of such uses and provided for their enforcement. The Court cited the then recent report of the Commissioners of Public Records in England, which contained a collection of early Chancery cases involving charitable trusts, to support this finding and to dispose of the plaintiffs' contention that the trust was void because the beneficiaries were too uncertain and indefinite for the bequest to have any legal effect. These early cases showed that charitable uses were valid at the common law and enforceable in Chancery pursuant to the general jurisdiction of the court. The Court of Chancery exercised such jurisdiction both prior to and subsequent to the enactment of the Statute of Charitable Uses. The cases also established that the Court of Chancery enforced charitable trusts created for the benefit of general and indefinite charities, as well as for specific charities. Chancery had also upheld trusts in cases where either no trustees were appointed or the trustees were not competent to execute the trust.

In terms of the second issue, the heirs also asserted that the trust that established the college for orphans was void because its terms violated the constitution, the common law, and the public policy of Pennsylvania. The purported violations consisted of (1) excluding all religious personnel of any sect from positions within the college or from visiting the premises and (2) limiting instruction to purely moral concepts of goodness, truth, and honor, thereby implicitly excluding all instruction in the Christian religion.

The Court ruled that Girard had adopted a position of neutrality with respect to the exclusion of all religious influence from the administration of the college. He had not explicitly impugned Christianity, which, in a qualified sense, was a part of the common law of Pennsylvania, or any other religion. Rather, he had merely wanted the students to remain free from sectarian controversy and wished them to study a curriculum that did not place inordinate emphasis on religious subjects. He did not proscribe members of the laity from teaching the general principles of Christianity or analyzing the Bible from a historical perspective. The Court concluded that Girard's provisions did not contravene the laws, the constitution, or the public policy of Pennsylvania.

The Court affirmed the ruling of the lower court upholding the trust and thereby deemed it unnecessary to examine the third issue in this case, which involved the question of to whom the property would belong if the trust were declared void.

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#### CROSS-REFERENCES

Chancery; Complaint; Corporations; Equity; Trustee.

## VIETNAM WAR

The Vietnam War was a 20-year conflict in Southeast Asia (1955–1975) between the government of South Vietnam and the Communist government of North Vietnam. The North Vietnamese sought the reunification of the two countries under its form of rule. The United States, determined to prevent Communist aggression, supported the government of South Vietnam and in the early 1960s became increasingly involved militarily in the conflict. By 1965 U.S. involvement had escalated, and U.S. armed forces had been introduced. Opposition to the war in the United States grew steadily, resulting in one of the most divisive periods in U.S. history. The United States ultimately withdrew its forces in 1973. Within two years the North Vietnamese defeated the South Vietnamese armed forces and took control of the country.

# Westmoreland v. Columbia Broadcasting System, Inc.

On January 23, 1982, CBS television broadcast a 90-minute documentary entitled *The Uncounted Enemy: A Vietnam Deception*. The program was produced by George Crile and based in large part on the reporting of Sam Adams, a Pentagon analyst who had acted as a CBS consultant for the program. Mike Wallace from *60 Minutes* was the narrator. He also conducted some of the interviews.

The documentary reported charges by a number of U.S. Army and **CENTRAL INTELLIGENCE AGENCY** (CIA) intelligence sources, who claimed that prior to the surprise North Vietnamese-Viet Cong led Tet Offensive in January 1968, the U.S. Military Assistance Command in Vietnam, also known as MACV, conspired to mislead President **LYNDON B. JOHNSON**, the American public, and the rest of the military about the enemy's actual strength. The witnesses interviewed for the documentary stated that MACV carried out this deception to make it appear that progress was being made in winning the war of attrition against enemy forces, that the war could be won, and that there was "some light at the end of the tunnel" in what was the longest war in U.S. history.

The documentary made clear that not only was MACV under the control and command of General William C. Westmoreland but that the conspiracy to understate enemy troop strength was carried out at least with Westmoreland's knowledge, **ACQUIESCENCE**, and tacit approval. The documentary then charged that the Tet Offensive might have been less surprising and demoralizing had MACV been providing accurate information. Since many historians and military experts consider the Tet Offensive to be the war's final turning point, the documentary suggested that Westmoreland played a significant role in the U.S. defeat in Vietnam.

In the preface to the broadcast, correspondent Mike Wallace stated: "The fact is that we Americans were misinformed about the nature and the size of the enemy we were facing, and tonight we're going to present evidence of what we have come to believe was a conscious effort—indeed, a conspiracy at the highest levels of American military intelligence—to suppress and alter critical intelligence of the enemy in the year leading up to the Tet Offensive."

Three days later, General Westmoreland held a press conference attended by former CIA special assistant George Carver, former senior CIA officials, a former ambassador to Vietnam, and some of the general's principal intelligence people during the war. Westmoreland and his supporters denounced the program as filled with lies, distortions, fraudulent statements that constituted a hoax on the public. Westmoreland and the others criticized the documentary on four grounds. They alleged that (1) one of the interviews had been rehearsed; (2) one of the witnesses was interviewed after being allowed to see the interviews of the other witnesses; (3) there was insufficient notice to General Westmoreland of the scope of his interview; and (4) certain answers were improperly spliced and edited.

CBS News decided to conduct an internal investigation, appointing senior editor Burton Benjamin to coordinate it. On July 7, 1982, Benjamin submitted his findings to Van Gordon Sauter, the president of CBS News. Eight days later Sauter issued a statement expressing regret that the documentary had failed to comply with certain journalistic standards ordinarily followed by CBS. However, Sauter emphasized that the program contained no falsehoods or distortions of the truth. In September, CBS offered to General Westmoreland 15 minutes of unedited airtime to respond to the documentary, which was to be followed by a 45 minute panel discussion about the criticisms and merits of the broadcast. The general declined the offer.

On September 13, 1982, Westmoreland filed a $120 million lawsuit against CBS, alleging that the Vietnam documentary had made 16 libelous statements against him. But statements that accused the general of having conspired to understate enemy troop strength constituted the centerpiece of the lawsuit. Although Westmoreland filed the lawsuit in his home state of South Carolina, CBS successfully moved the case to a federal district court in New York for trial. Westmoreland's suit was funded in part by the Capital Legal Foundation, a conservative think tank headed by Dan Burt, who also served as the general's lawyer. CBS was represented by the law firm of Cravath, Swaine, & Moore.

Discovery began immediately and continued for a year and a half. Hundreds of witnesses were interviewed and deposed throughout the country and the world. It was an exhaustive preparation for both sides. In the summer of 1984, the defense moved for **SUMMARY JUDGMENT**. Its memorandum of law ran just under 400 pages—not including volumes of exhibits. On September 24, 1984, Judge Pierre Leval denied the motion, concluding that the complaint contained several triable issues for the jury. Leval said it was the jury's province to determine whether certain statements of fact contained in the documentary were true, and, if proven to be false, whether they were made with "actual malice," the two lynchpins of any libel case involving a public figure.

The case came to trial on October 9, 1984, and concluded on February 17, 1985. Just as the case was about to go to the jury, the two sides settled their differences, each side claiming it had proven its major points. As part of the settlement, CBS agreed to issue the following written statement: "CBS respects General Westmoreland's long and faithful service to his country and never intended to assert, and does not believe, that General Westmoreland was unpatriotic or disloyal in performing his duties as he saw them." CBS then conducted a second internal investigation over the matter. This time it found that the program was "seriously flawed" and out of balance. It admitted that "conspiracy" had not been proven, friendly witnesses had been coddled, and those opposing the program's thesis were treated harshly. Despite these findings, Mike Wallace stood by the program.

Perhaps no other libel case in the twentieth century attained the celebrity of Westmoreland's libel suit. Born in Spartanburg County, South Carolina, and a 1936 graduate of West Point, General Westmoreland gained a reputation for superb staff work and sound battle leadership during **WORLD WAR II**, in which he participated in the North Africa, Sicily, and Normandy campaigns. He served as commander of U.S. forces in Vietnam from June of 1964 until June of 1968 and was the primary advocate for escalating U.S. troop involvement in South Vietnam during that period. He was *Time* magazine's Man of the Year for 1965.

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**CROSS-REFERENCES**

Libel and Slander.

### The War in Vietnam

During WORLD WAR II, the Viet Minh, a nationalist party seeking an end to French colonial rule of Vietnam, was organized. After the defeat of the Japanese and their withdrawal from what was then known as French Indochina, the Viet Minh, under the leadership of Ho Chi Minh, formally declared independence. France refused to recognize Vietnamese independence, and war broke out between the French and the Viet Minh. In 1954 the French withdrew after suffering a devastating defeat at the Battle of Dien Bien Phu.

After the French withdrawal, participants at an international conference in Geneva, Switzerland, divided Vietnam at the 17th parallel. The Viet Minh were given control of the north, which became known as North Vietnam, while the non-Communist southern half became South Vietnam. The South Vietnamese government was headed by Prime Minister Ngo Dinh Diem, who refused to allow free elections on reunification in 1956 as agreed by the Geneva Accords. Diem rightly feared that Ho Chi Minh and the Communists would win the election. The United States supported Diem's defiance, which led the North Vietnamese to seek unification through military force.

The Diem regime, which soon proved to be corrupt and ineffective, had difficulty fighting the Viet Cong, a South Vietnamese army of guerrilla soldiers who were trained and armed by the North Vietnamese. The Viet Cong became part of the National Liberation Front (NLF), a Communist-backed insurgent organization. In 1961 President JOHN F. KENNEDY began to send more U.S. military advisers to South Vietnam, and by the end of 1962, their number had risen from 900 to 11,000. Kennedy,

**Vietnam War Timeline**

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|---|---|
| 1954 | French Indochina War ends with French defeat at Dien Bien Phu. |
| 1955 | United States agrees to help train South Vietnamese army. |
| 1956 | President Eisenhower announces first U.S. advisers sent to Vietnam. |
| 1957 | North Vietnamese guerrilla (Vietcong) activity directed against South Vietnam begins. |
| 1959 | First U.S. military advisers killed in Vietcong attack. |
| 1961 | President Kennedy agrees to increase 685-member military advisory group and to arm and supply 20,000 South Vietnamese troops (June 16); first U.S. aircraft carrier arrives off Vietnam with armed helicopters to aid the South Vietnamese army. |
| 1962 | President Kennedy states that U.S. military advisers in Vietnam will return fire if fired pon. U.S. noncombat troops number 12,000 by year's end. |
| 1963 | South Vietnam president Ngo Dinh Diem assassinated (Nov. 2). |
| 1964 | North Vietnamese patrol boats attack U.S. destroyers in the Gulf of Tonkin. U.S. Congress passes resolution (Aug. 7) that President Johnson uses as basis for later U.S. troop buildup in Vietnam. United States announces massive aid increase to counter Hanoi's support of Vietcong (Dec. 11). |
| 1965 | First U.S. air attacks in North Vietnam begin (Feb. 24); first major deployment of U.S. ground troops (March 7–9). U.S. troops number 184,300 at year's end. |
| 1966 | Bombing of Hanoi begins (June 29). U.S. troops number 389,000 at year's end. |
| 1967 | U.S. troops number 480,000 at year's end. |
| 1968 | "Tet" offensive by North Vietnamese (Jan. 30 to Feb. 29); My Lai massacre by U.S. troops (March 16). Start of Paris peace talks. |
| 1969 | U.S. troop deployment reaches highest point of the war in April: 543,000. President Nixon begins U.S. troop withdrawal on May 14. |
| 1970 | U.S. and South Vietnamese forces cross Cambodian border to get at enemy bases (April 30). |
| 1971 | U.S. bombers strike massively in North Vietnam for alleged violations of 1968 bombing halt agreement (Dec. 26 to 30). U.S. troops number 140,000 at year's end. |
| 1972 | North Vietnamese launch bombing offensive across demilitarized zone (March 30). U.S. resumes bombing of Hanoi (April 15); U.S. announces mining of North Vietnam ports. Last U.S. combat troops leave (Aug. 11). |
| 1973 | Cease-fire accord signed (Jan. 27); last non-combat U.S. troops withdraw from Vietnam (March 29); last U.S. prisoners of war released (April 1). Some U.S. civilians remain. |
| 1975 | President Theu's government of South Vietnam surrenders to Communists April 30; United States abandons embassy. All U.S. civilians leave Vietnam. 140,000 South Vietnamese refugees flown to United States. |
| 1976 | Vietnam reunified; large-scale resettlement and reeducation programs started. |

SOURCE: Dupuy, R. Ernest and Trevor N. Dupuy, *Harper Encyclopedia of Military History*. New York Public Library's *Book of Chronologies*.

however, was dissatisfied with the Diem regime and allowed a military coup to occur on November 1, 1963. Diem was assassinated during the coup, but none of the lackluster military leaders who followed him was able to stop the Communists from gaining more ground.

Direct U.S. military involvement in Vietnam began in 1964. On August 2, 1964, President LYNDON B. JOHNSON announced that North Vietnamese ships had attacked U.S. naval vessels in the Gulf of Tonkin. Johnson asked Congress for the authority to employ any necessary course of action to safeguard U.S. troops. Based on what turned out to be inaccurate information supplied by the Johnson administration, Congress gave the president this authority in the TONKIN GULF RESOLUTION (78 Stat. 384).

Johnson used this resolution to justify military escalation in the absence of a congressional declaration of war. Following attacks on U.S. forces in February 1965, he authorized the bombing of North Vietnam. To continue the protection of the South Vietnamese government, Johnson increased the number of U.S. soldiers fighting in South Vietnam from 20,000 to 500,000 during the next three years.

U.S. military leaders had difficulty fighting a guerrilla army, yet repeatedly claimed that Viet Cong and North Vietnamese forces were losing the war. On January 30, 1968, the Viet Cong and the North Vietnamese made a surprise attack on 36 major cities and towns during the Tet (lunar new year) festival. Though U.S. troops repelled these attacks, the Tet offensive undermined the credibility of U.S. military leaders and of Johnson himself, who had claimed the war was close to being won. Antiwar sentiment in the United States grew after Tet as the public became skeptical about whether the war could be won and, if it could, how many years it would take to achieve victory.

The 1968 presidential campaign of Minnesota antiwar senator EUGENE MCCARTHY gained popularity after Tet. On March 31, 1968, Johnson announced that the United States would stop bombing North Vietnam above the 20th parallel and that he would not seek reelection to the presidency. Johnson ordered a total bombing halt in October, when North Vietnam agreed to begin preliminary peace talks in Paris. These discussions dragged on during the fall election campaign, which saw Republican RICHARD M. NIXON elected president.

Nixon sought to preserve the South Vietnamese government while withdrawing U.S. troops. He began a policy of "Vietnamization," which promised to gradually transfer all military operations to the South Vietnamese. During this process the United States would provide massive amounts of military aid. In 1969, when the number of U.S. military personnel in South Vietnam had reached 540,000, Nixon announced a modest troop withdrawal. During 1969 the Paris peace talks continued with the NLF, North Vietnamese, and South Vietnamese, but little progress was made.

In the spring of 1970, Nixon expanded the war as U.S. and South Vietnamese forces invaded Cambodia to destroy North Vietnamese military sanctuaries there. The Cambodian action created a firestorm on U.S. college and

university campuses, where antiwar protests led to the closing of many institutions for the remainder of the spring. Nevertheless, Nixon persevered with his policies. He authorized the bombing of Cambodia and Laos by B-52 bombers, destabilizing the Cambodian government and destroying large sections of both countries. By late 1970 the number of U.S. military personnel in South Vietnam had declined to 335,000. A year later the number had dropped to 160,000 military personnel.

In March 1972 the North Vietnamese invaded the northern section of South Vietnam and the central highlands. Nixon responded by ordering the mining of Haiphong and other North Vietnamese ports and large-scale bombing of North Vietnam. In the fall of 1972, a peace treaty appeared likely, but the talks broke off in mid-December. Nixon then ordered intense bombing of Hanoi and other North Vietnamese cities. The "Christmas bombing" lasted 11 days.

The peace talks then resumed, and on January 27, 1973, the parties agreed to a cease-fire the following day, the withdrawal of all U.S. forces, the release of all prisoners of war, and the creation of an international force to keep the peace. The South Vietnamese were to have the right to determine their own future, but North Vietnamese troops stationed in the south could remain. By the end of 1973, almost all U.S. military personnel had left South Vietnam.

The conflict in the south continued in 1974. The United States cut military aid to South Vietnam in August 1974, resulting in the demoralization of the South Vietnamese army. The North Vietnamese, sensing that the end was near, attacked a provincial capital 60 miles north of Saigon in December 1974. After the city of Phouc Binh fell in early January 1975, the North Vietnamese launched a full-scale offensive in the central highlands in March. The South Vietnamese army fell apart and a general panic ensued. On April 30 the South Vietnamese government surrendered. On July 2, 1976, the country was officially united as the Socialist Republic of Vietnam.

More than 47,000 U.S. military personnel were killed in action during the war and nearly 11,000 died of other causes. Approximately 200,000 South Vietnamese military personnel were killed, and 900,000 North Vietnamese and Viet Cong soldiers lost their lives. The civilian population was devastated by the war. An estimated 1 million North and South Vietnamese civilians were killed during the war. Large parts of the countryside were destroyed through bombing and the U.S. spraying of chemical defoliants such as agent orange.

*American soldiers exit a helicopter during Operation Oregon in the Vietnam War. More than 47,000 U.S. military personnel were killed in action during the war.*

U.S. DEPARTMENT OF DEFENSE

### The War and U.S. Law

The war provoked many legal and constitutional controversies in the United States. Though the U.S. Supreme Court refused to decide whether the war was constitutional, it did rule on several war-related issues. In *United States v. O'Brien,* 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), the Court upheld the conviction of David Paul O'Brien for violating a 1965 amendment to the Selective Service Act (50 U.S.C.A. App. § 451 et seq.) prohibiting any draft registrant from knowingly destroying or mutilating his draft card. The Court rejected O'Brien's contention that his burning of his draft card was SYMBOLIC SPEECH protected by the FIRST AMENDMENT. In TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), however, the Court ruled that high school students had the First Amendment right to wear black armbands to school to protest U.S. involvement in Vietnam.

In WELSH V. UNITED STATES, 398 U.S. 333, 90 S. Ct. 1792, 26 L. Ed. 2d 308 (1970), the Court held that a person could be exempted from compulsory military service based on purely moral or ethical beliefs against war.

One of the most significant Court decisions of the Vietnam War period involved the publica-

tion of the Pentagon Papers, a highly classified government report on the history of U.S. involvement in Vietnam. The Nixon administration sought to prevent the *New York Times* and the *Washington Post* from publishing excerpts from the study on the ground that publication would hurt national security interests. In **NEW YORK TIMES V. UNITED STATES**, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971), the Supreme Court, by a 6–3 vote, held that the government's efforts to block publication amounted to an unconstitutional **PRIOR RESTRAINT.**

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**CROSS-REFERENCES**

Cold War; Communism; Conscientious Objector; Kissinger, Henry; Prior Restraint.

## VIGILANTISM

*Taking the law into one's own hands and attempting to effect justice according to one's own understanding of right and wrong; action taken by a voluntary association of persons who organize themselves for the purpose of protecting a common interest, such as liberty, property, or personal security; action taken by an individual or group to protest existing law; action taken by an individual or group to enforce a higher law than that enacted by society's designated lawmaking institutions; private enforcement of legal norms in the absence of an established, reliable, and effective law enforcement body.*

The foundation of the American legal system rests on the **RULE OF LAW**, a concept embodied in the notion that the United States is a nation of laws and not of men. Under the rule of law, laws are thought to exist independent of, and separate from, human will. Even when the human element factors into legal decision making, the decision maker is expected to be constrained by the law in making his or her decision. In other words, police officers, judges, and juries should act according to the law and not according to their personal preferences or private agendas.

State and federal governments are given what amounts to a **MONOPOLY** over the use of force and violence to implement the law. Private citizens may use force and violence to defend their lives and their property, and in some instances the lives and property of others, but they must do so under the specific circumstances allowed by the law if they wish to avoid being prosecuted for a crime themselves. Private individuals may also make "citizen arrests," but the circumstances in which the law authorizes them to do so are very narrow. Citizens are often limited to making arrests for felonies committed in their presence. By taking law into their own hands, vigilantes flout the rule of law, effectively becoming lawmaker, police officer, judge, jury, and appellate court for the cause they are pursuing.

The history of vigilantism in the United States is as old as the country itself. In many ways, the history of the United States began with vigilantism. On December 16, 1773, American colonists, tired of British direct taxation, took part in what came to be known as the Boston Tea Party. As part of the resistance, they threw 342 chests of tea into Boston Harbor.

During the 1830s, so-called "vigilance committees" formed in the South to protect the institution of **SLAVERY** against encroachment by abolitionists, who were routinely assaulted, tarred and feathered, and otherwise terrorized by these committees with the **ACQUIESCENCE** of local law enforcement personnel. After slavery was abolished, southern vigilante groups, such as the **KU KLUX KLAN**, sought to continue white dominance over freed blacks by using **LYNCHING** and other forms of intimidation that were prohibited by law. During the second half of the twentieth century, African-American vigilantes wantonly destroyed symbols of white authority and property associated with white society in retaliation for the injuries and indignities caused by racial **SEGREGATION** and discrimination.

Vigilantism continues to metamorphose. Private watch groups patrol their neighborhoods to guard against criminal activity. Antiabortion extremists commit deadly attacks against family **HEALTH CARE** clinics and family health care workers, often in the name of reli-

gion. Environmental activists inflict economic losses on companies by obstructing lawful business activities that they think will cause harm to the air, water, or land. Every day people use force and violence to exact revenge against someone whom they believe has done them wrong. In each case, vigilantes take it upon themselves to enact justice, rather than enlist police officers, lawyers, judges, and the rest of the established legal machinery to do the job. And, in each case, vigilantes risk starting a cycle of violence and lawlessness in which the victims of vigilantism take the law into their own hands to exact payback.

The motivations underlying acts of vigilantism vary according to the individual vigilante. Some vigilantes seek to carry out personal agendas to protest existing law. Others seek to enforce existing law as they interpret, define, or understand it. Still others seek to implement or call attention to some kind of higher law that they feel overrules the norms established by society's designated lawmaking institutions. Since no state or federal jurisdiction offers any kind of "vigilante defense" to criminal prosecution, vigilantes must rely on the moral rectitude of their cause to justify their acts. Yet the morality of most acts of vigilantism is relative to whether one is the perpetrator or victim of vigilantism, as the targets of vigilantism rarely agree that the acts were justified.

The moral relativity associated with vigilantism is not as evident in less technological societies where vigilantism is simply equated with action taken by private residents to maintain security and order in the community, or to otherwise promote community welfare. For example, during much of the nineteenth century, local governments in the western United States were decentralized and loosely organized at best. As part of this often makeshift political order, certain individuals or groups of individuals took it upon themselves to provide summary justice for alleged victims of criminal activity. Some of the individuals accused of wrongdoing, and rounded up by this posse-style system of justice, were no doubt unhappy with the justice that was dispensed. However, these vigilante groups were prevalent in this particular region of the country, making them the norm and not the exception. As a result, such groups were typically more widely accepted than vigilante movements from other eras.

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## VILL

*In old* ENGLISH LAW, *a division of a hundred or wapentake; a town or a city.*

## ❖ VINSON, FREDERICK MOORE

As the thirteenth chief justice, Frederick Moore Vinson led the U.S. Supreme Court from 1946 to 1953. Vinson rose to the Court after a long career as a lawyer, district attorney, member of Congress, federal appellate judge, and secretary of the treasury. His nomination to the Supreme Court by President HARRY S. TRUMAN followed a dramatic controversy over filling the position, and Vinson inherited a sharply divided Court. His effectiveness as an administrator helped

"FREEDOM FROM DISCRIMINATION BY THE STATES IN THE ENJOYMENT OF PROPERTY RIGHTS WAS AMONG THE BASIC OBJECTIVES SOUGHT TO BE EFFECTUATED BY THE FRAMERS OF THE FOURTEENTH AMENDMENT."
—FREDERICK VINSON

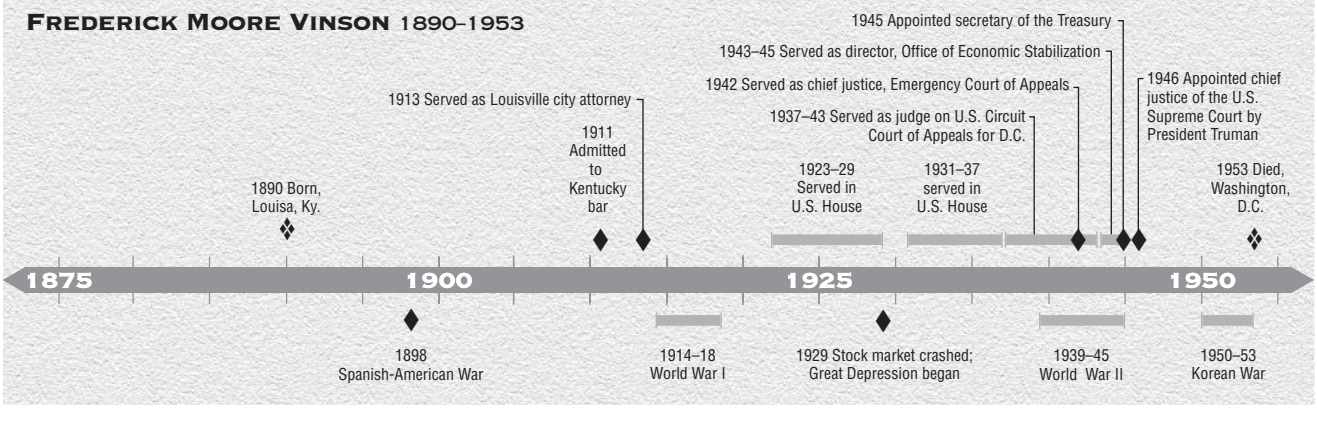

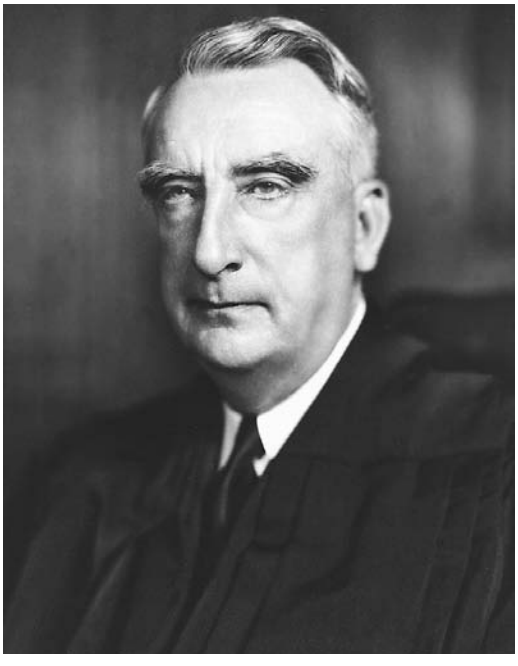

*Frederick M. Vinson.* PHOTOGRAPH BY HARRIS & EWING. COLLECTION OF U.S. SUPREME COURT

hold the justices together. Because he was generally disinterested in writing opinions, however, critics have judged his tenure harshly. Despite his liberal attitudes during his political career, he emerged as a predominantly conservative justice except for his support of CIVIL RIGHTS.

Born on January 22, 1890, in Louisa, Kentucky, Vinson was the son of a jailer. He graduated from Kentucky Normal College in 1908. In 1909 and 1911, he earned bachelor of arts and laws degrees from Center College in Danville, Kentucky, with the highest marks ever recorded at that school. Establishing his law practice in his hometown, he practiced law for two years before serving as city attorney in 1913 and as district attorney from 1921 to 1924.

In the mid-1920s, Vinson's visibility as a prosecutor led him into national politics. He represented Kentucky in the U.S. House of Representatives from 1923 to 1929 and again from 1931 to 1937. In his last four terms in Congress, he was a strong backer of President FRANKLIN D. ROOSEVELT's liberal economic recovery program, known popularly as the NEW DEAL.

The support engendered a long relationship between the two men. In 1937 Roosevelt appointed Vinson to the federal bench, and he served from 1937 to 1943 on the U.S. Court of Appeals for the District of Columbia. He became chief justice of the U.S. Emergency Court of Appeals in 1942 and the following year joined the Roosevelt administration as head of the Office of Economic Stabilization. A series of administrative positions culminated with Vinson's appointment as secretary of the treasury under President Truman in 1945.

In 1946 the death of Chief Justice HARLAN F. STONE set off a controversy over who should be his successor. The question for Truman was whether he should elevate an associate justice or select an outsider. Two associate justices—ROBERT H. JACKSON and HUGO L. BLACK—were known to want the job, and each threatened to resign if the other were nominated. To settle the conflict, Truman turned to Vinson, who had both the requisite experience and a calm temperament. Vinson's record of support for a strong federal government was also important to Truman.

During his seven years on the Court, Vinson more or less lived up to these hopes. His steady administration appears to have been effective during a tempestuous era on the Court. As a justice, however, he was less impressive. Vinson was rumored to have given the bulk of his opinion writing to his clerks. Moreover, his pragmatism showed no great philosophic appreciation of CONSTITUTIONAL LAW. He generally voted conservatively except when supporting decisions that upheld the discrimination claims of African Americans; this valuable support for civil rights would be taken further by his successor, EARL WARREN. At the same time, Vinson's anti-Communism fanned the flames of the COLD WAR. In *Dennis v. United States,* 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951), he upheld the convictions of American Communist party leaders.

Vinson's eagerness to bolster federal power can be seen in his most famous opinion, a dissent in YOUNGSTOWN SHEET AND TUBE CO. V. SAWYER, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952). During the KOREAN WAR, Truman temporarily seized control of most of the nation's steel mills in order to supply the military. The White House asserted that the seizure was necessary to prevent a national catastrophe, but the steel industry argued that the seizure was tantamount to lawmaking—a power held only by Congress. Although the majority in *Youngstown Sheet* held that the executive decision was unconstitutional, Vinson stated that Truman had acted "in full conformity with his duties under the Constitution."

Vinson died on September 8, 1953, while still serving on the Court. In retrospect, some

critics have regarded his tenure as a failure: his lack of vision and his apparent disinterest in writing his own opinions have provoked charges that he was among the few outright failures in Supreme Court history. On balance, his administrative skills seem to have outstripped his judicial ability; he managed a deeply divided Court with tact and diplomacy.

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## VIOLENCE AGAINST WOMEN ACT OF 1994

A sweeping response to the perception of increased violence against women in America, the Violence Against Women Act (VAWA) of 1994 was a broad-based law that created everything from funding of domestic-violence programs to new CIVIL RIGHTS remedies for women who were victims of gender-based attacks. The scope of the law made it somewhat controversial, and the U.S. Supreme Court ruled that at least one provision of the act was unconstitutional. But VAWA still managed to have a far-reaching effect on gender-based crime, and the reauthorization of the act in 2000 means that it will continue to have influence into the twenty-first century.

VAWA was first proposed in 1990, and support was subsequently strengthened by testimony before Congress of high numbers of crimes perpetrated against women every year, often by family members or boyfriends. The Clarence Thomas-Anita Hill confirmation battle (see SEXUAL HARASSMENT "Clarence Thomas and Anita Hill Hearings") and subsequent election of unprecedented numbers of women to the U.S. Congress in 1992 also helped to spur the act's passage. When the VAWA was voted on as part of an Omnibus Crime bill in 1994, the vote was overwhelmingly in favor of it in both houses.

VAWA can be divided into three separate areas where it attempts to combat violence against women. The first area, and probably the least controversial, was in the area of funding. VAWA provides $1.6 billion over six years for education, research, treatment of domestic and sex-crime victims, and the improvement of state criminal justice systems. It also distributed funds to increase safety for women on public transportation, for shelters, and for youth education programs. In addition, it provides funds for the training of judges and other court personnel in combating gender bias in the courts, and also authorizes funding to pay the cost of testing for sexually transmitted diseases for victims of SEXUAL ABUSE and to increase safety on college campuses. Finally, VAWA authorizes the provision of grants from the attorney general to local governments to improve the keeping of crime statistics, and allots money for the protection of battered immigrant women and children.

VAWA also increases criminal provisions for crimes based on gender (18 U.S.C. §§ 2261-2265) It prohibits interstate DOMESTIC VIOLENCE, making it a felony to cross state lines with the intent to injure, harass, or intimidate that person's spouse or intimate partner. It also allows "full faith and credit" for protective orders across state lines and prohibits the interstate violation of a state court's order of protection that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons whom the order covers. It allows the victim in a prosecution under VAWA the opportunity to be heard regarding the danger posed by the defendant during a pretrial detention hearing. Finally, VAWA provides for restitution to the victim, regardless of any other civil or criminal penalties the law provides, holding the perpetrator liable for the full amount of the victim's losses in the areas of medical services; physical and occupational therapy; necessary transportation, temporary housing, and child-care expenses; lost income; attorneys' fees, plus any costs incurred in obtaining a civil protection order; and "any other losses suffered by the victim as a proximate result of the offense."

The most controversial part of the VAWA was the provision giving gender-based victims of violence a CAUSE OF ACTION against their attackers. (42 USCA § 13981) "A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for the recovery of com-

pensatory and PUNITIVE DAMAGES, injunctive and declaratory relief, and such other relief as a court may deem appropriate," stated the pertinent part of the act. Congress determined that it had the right to enact this provision under the COMMERCE CLAUSE of the Constitution, which allows it to regulate interstate commerce, and under the Fourteenth Amendment's equal protection clause.

This civil rights remedy in the VAWA created by far the most commentary of any provision of the Act. In 2000, the U.S. Supreme Court in *U.S. v. Morrison,* 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658, 68 USLW 4351 (U.S. Va. 2000) struck down this provision of the Act. Chief Justice WILLIAM REHNQUIST, writing the opinion for the 5–4 court majority, stated "Congress's effort in (VAWA) to provide a federal civil remedy can be sustained neither under the Commerce Clause nor . . . the Fourteenth Amendment . . . under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States."

Despite this setback, in 2000 Congress passed a bill reauthorizing the VAWA for another five years, including more funding for domestic-violence programs and new measures against the trafficking of women and children into prostitution. This initiative ensures that despite the loss of the civil rights provision, VAWA will continue to affect the course of the nation's fight against gender-based violence.

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## VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994

Of all of the crime bills passed at the federal level in the history of the United States, the Violent Crime Control and Law Enforcement Act of 1994 was arguably the most far-reaching and comprehensive. Costing $30 billion, and taking up over 1,100 pages, the Violent Crime Control Act covered a mind-boggling variety of areas, ranging from an assault-weapons ban to money for midnight basketball programs. The net result was a bill whose effects the nation was feeling ten years later—a bill whose proponents gave it credit for the sharp drop in crime throughout the 1990s, and whose critics dismissed it as an unprecedented federal boondoggle.

### Background of the Violent Crime Control Act

The Violent Crime Control Act was passed amid a strong public concern about crime in the early 1990s. Polls had indicated that the American public placed crime at or near the top of the list when asked to name their civic concerns. A large rise in violent crime over a 30-year period—over 500 percent, according to one study, contributed to the public's desire to see something done about the crime rate.

Congress passed four omnibus federal crime bills between 1984 and 1990 in response to this crime wave. Nevertheless, crime continued to rise, and the public's perception was that the federal government was not doing enough to stop crime. However, conservatives and liberals disagreed on the best way to address problem of criminal violence.

Conservatives favored seeing violent criminals serve more of their sentences, and increased money for prison building. They also favored curbing the right of HABEAS CORPUS for death row inmates, and increasing the ability of police to process criminal suspects by reforming exclusionary rules. They also favored so-called THREE STRIKES LAWS, requiring long prison sentences for three-time felons.

Liberals wanted to see more money directed toward social programs that would help to prevent criminal behavior. They favored increased GUN CONTROL. They wanted to see a stop to racially discriminatory laws, and wanted to make sure that minorities were not treated unfairly by the criminal justice system.

The election of President BILL CLINTON in 1992, which for the first time since 1980 meant that the White House and the Congress would be controlled by the same party, increased the chances of meaningful crime legislation. Clinton, who was trying to push through a HEALTH CARE plan that was perceived as liberal, wanted an issue where he could take a conservative approach, and anti-crime legislation seemed like a promising area. In addition, both the Congress and the White House noted the 1993 off-year elections, which many candidates won using strong anti-crime themes.

The stage was set for a comprehensive anti-crime bill to pass. Despite the interest of both parties in passing the legislation, it still ended up having a difficult road. Among the problems were the attempts of some liberal representatives to introduce a "Racial Justice Act" which would have allowed death row inmates, at the state and federal level, to challenge their death sentences if statistics suggested that the race of either defendants or victims had affected past death-sentencing decisions in the jurisdiction where the crime was committed. This provision was strongly opposed by Republicans and other conservative Democrats and ended up being dropped from the final bill. A proposed assault weapons ban was also controversial.

Eventually, however, both the House and the Senate were able to pass a bill, and President Clinton signed it into law on Sept. 13, 1994.

### Provisions of the Violent Crime Control and Law Enforcement Act of 1994

The Violent Crime Control and Law Enforcement Act provided $30.2 billion over six years for crime control and related social programs—the most money ever allotted in a federal crime bill. State and local law enforcement would receive $10.8 billion of this; $9.9 billion was earmarked for prisons, and $6.9 billion was earmarked for crime prevention.

The largest portion of this funding went to community policing. The bill created an $8.8 billion program to add 100,000 police officers nationwide for police patrols. In addition, the bill allotted $2.6 billion for the FEDERAL BUREAU OF INVESTIGATION (FBI), Drug Enforcement Agency (DEA), Immigration and Naturalization Service (INS), and Border Patrol. $245 million was given to rural anti-crime efforts, and $150 million to help implement new laws requiring up to a five-day waiting period for handgun purchases

The act gave $1.6 billion to fight violence against women, including money to train and add police, prosecutors and judges; money for victims' services and advocates, and money for rape-education and community-prevention programs.

Perhaps because the bill was passed by a Democratic Congress and signed by a Democratic president, social programs were given a big priority. These programs included $567 million for after-school, weekend, and summer "safe haven" programs for youth; $243 million for in-school programs providing positive activities and alternatives to crime and drug abuse; and $377 million to be used for anti-gang programs, midnight sports leagues, boys and girls clubs, and other projects. There was also $1 billion for drug-court programs and substance-abuse treatment for non-violent offenders.

The most controversial provision of the act was non-monetary: the assault-weapons ban. It called for a 10-year ban on the manufacture, transfer, or possession of 19 semi-automatic assault weapons. Certain kinds of revolving-cylinder shotguns, semi-automatic rifles, semi-automatic pistols, and ammunition magazines were also banned. The act also outlawed the ownership of handguns by juveniles.

Less controversially, the bill established a three-strikes law that mandated life in prison for a third serious violent-felony conviction or a violent-felony conviction that follows a serious violent felony and a serious drug conviction under federal law. The crime bill also created 60 new federal crimes that call for the death penalty, including murder of federal judges; murder of federal law enforcement officers; murder of high-level members of the EXECUTIVE BRANCH; murder of a member of Congress; KIDNAPPING that results in death, and fatal violence committed in international airports.

Finally, on the subject of prisons, the bill allocated $9.9 billion, including $7.9 billion to build state prisons for violent offenders, and $1.8 billion to states for jailing criminal illegal immigrants.

### Effect of the Violent Crime Control and Law Enforcement Act of 1994

When President Clinton signed the Violent Crime Control Act, he called it the "toughest and smartest crime bill in our history." The bill also came under fierce criticism, though. The left objected to the extra spending, and the left lamented the bill's failure to address racial issues and the addition of the three-strikes law.

When the Republicans won control of Congress in 1995, there were threats of wholesale revisions to the law, but these threats were never carried out, and most of the provisions of the law were able to take effect. What the bill actually accomplished was debatable, although proponents, including the president, noted the precipitous drop in violent crime throughout the 1990s, and they gave the crime bill credit for at least some of this improvement.

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## VIRGINIA AND KENTUCKY RESOLVES

*Resolutions passed by the Virginia and Kentucky legislatures in 1798 and 1799 protesting the federal* ALIEN AND SEDITION ACTS *of 1798.*

The Virginia and Kentucky Resolves were expressions of opposition by the Jeffersonian Republicans against the Federalist-sponsored Alien and Sedition Acts of 1798. Besides opposing these particular measures, the legislative resolutions proposed a "compact" theory of the U.S. Constitution that contended that state legislatures possessed all powers not specifically granted to the federal government and gave the states the right to rule upon the constitutionality of federal legislation. The resolutions became the basis for nineteenth-century STATES' RIGHTS doctrines, which were employed by Southern states to defend the institution of SLAVERY.

The Alien and Sedition Acts were passed as internal security laws, restricting ALIENS and limiting FREEDOM OF THE PRESS, based on the assumption in 1798 that the United States might soon be at war with France. Though the acts were widely popular, THOMAS JEFFERSON (then vice president in the administration of JOHN ADAMS) and JAMES MADISON (one of the primary architects of the U.S. Constitution) opposed the measures. They expressed their opposition through the Virginia and Kentucky Resolves. Madison drafted the Virginia Resolves (December 21, 1798), and Jefferson wrote the Kentucky Resolves (November 10, 1798, and November 14, 1799), though their roles were not disclosed to the public for twenty-five years.

The resolves expressed the Republicans' theory of the limited nature of the grant of power to the federal government under the U.S. Constitution. This theory was buttressed by the TENTH AMENDMENT, which stipulates that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Because the Constitution did not give Congress the express power to provide for the expulsion of aliens who had committed no crimes and whose countries were not at war with the United States, the Republicans reasoned that the provisions of the Alien and Sedition Acts that provided for such deportation proceedings were unconstitutional. Likewise, Congress had not been given the express power to impose punishments for seditious libel, leading Republicans to conclude that these provisions were unconstitutional.

Jefferson and Madison asserted in the resolves that state legislatures had the right to determine whether the federal government was complying with the mandate of the Constitution. Under their compact theory of the Constitution, they argued that the grant of power to the federal government was in the nature of an authorization to act as an agent for the individual state legislatures. The resolves maintained that the individual state legislatures retained the ultimate sovereignty of the people. Therefore, state legislatures, as equal parties to the Constitution, had the right to determine whether the federal government was complying with the original agency directives, and they had the right to declare noncompliance. Jefferson and Madison also argued that the states had the right to be released from the compact (the Constitution) if compliance was not forthcoming, thereby suggesting that secession from the Union was legitimate.

Jefferson, in the second of the Kentucky Resolves, contended that the "sovereign and independent states" had the right to "interpose" themselves between their citizens and improper national legislative actions and to "nullify" acts of Congress they deemed unconstitutional. The Federalists strenuously objected to this theory, fearing that the federal government would be seriously weakened. The Federalists argued that only the federal courts could rule on the constitutionality of the Alien and Sedition Acts, which they said represented valid exercises of implied powers in time of national crisis. The acts, they argued, were authorized by Article I, Section 8, Clause 18, of the Constitution, which directs Congress "to make all Laws which shall be necessary and proper for carrying into Execution" the powers vested by the Constitution in the government of the United States. Because the federal government was vested with the power of conducting the national defense, the Federalists asserted, exercises of reasonable security measures, such as the Alien and Sedition Acts, were permissible.

No other state legislatures passed resolves in support of those of Virginia and Kentucky, including the legislatures of Republican-controlled states, in large part because of opposition to France, based on the XYZ AFFAIR, in which the French refused to recognize U.S. diplomats and demanded bribes before any such recognition would be forthcoming. In this political climate, state legislatures supported the Alien and Sedition Acts.

The acts expired or were repealed between 1800 and 1802, after Jefferson became president. Nevertheless, the theories of limited federal government and nullification remained popular during the early nineteenth century. New England states asserted nullification during the WAR OF 1812, and South Carolina asserted it in opposition to federal tariff legislation in 1832. South Carolina statesman and political theorist JOHN C. CALHOUN further developed Jefferson's theory, giving the states the right to dissolve their contractual relationship with the federal government rather than submit to policies they saw as destructive to their local self-interests. These ideas ultimately became the legal justification for the secession of Southern states from the Union in 1861.

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Kentucky Resolutions; "Virginia and Kentucky Resolves" (Appendix, Primary Document); XYZ Affair.

## VIRGINIA CONVENTIONS

The Virginia Conventions were a series of five meetings that were held after the Boston Tea Party in which representatives from the colonies gathered to decide the future relations between the colonies and England.

The first convention, which opened August 1, 1774, in Williamsburg, Virginia, was the result of a serious conflict with England that had occurred three months earlier. On May 26, the Virginia legislature, the House of Burgesses, had declared a day of prayer and fasting to acknowledge the plight of Bostonians after the English had closed the port of Boston as punishment for the Boston Tea Party. The royal governor of Virginia, Lord Dunmore, ordered the House of Burgesses to be closed to discourage any display of sympathy for the rebellious Bostonians. Angered by Lord Dunmore's actions, the Virginia burgesses issued a plan for a meeting of representatives from all the colonies.

In August, the colonists met in Williamsburg and chose Peyton Randolph as their presiding officer. The convention adopted several resolutions including one on the nonimportation of English merchandise and another that said that the colonists should refuse to export colonial goods to England unless the English agreed to come to terms with them. Thomas Jefferson's work *A Summary View of the Rights of British America,* which was introduced at this convention, was used as a guideline at future meetings.

The second convention met in Richmond, Virginia, for a one-week period in 1775, from March 20 to March 27. At this convention, PATRICK HENRY initiated a program for defensive action and presented his celebrated "Give me liberty or give me death" speech, which inspired the colonists to follow the cause.

The third meeting was held in Richmond on July 17, 1775. There the representatives denounced the actions that the royal governor had taken against Virginia, including disbanding the assembly and mobilizing troops. When the governor fled to the sanctuary of an English ship, the convention became the governing force of Virginia. The delegates enacted legislation and established a Committee of Safety to direct military activities.

Williamsburg was the site of the fourth convention, which was held in December 1775. With Edmund Pendleton as president, the delegates empowered the Committee of Safety to be the source of governmental authority in Virginia.

By May 6, 1776, the date of the final convention, the colonists were moving determinedly toward complete independence from England. In Williamsburg, the delegates declared their desire for freedom in a statement issued to their congressional representatives. Virginia initiated the action, and on June 12, the convention ratified the Virginia Bill of Rights. This bill of rights served as a model for similar documents in the other colonies. Virginia was the first state to have a new constitution, and Patrick Henry served as the first governor under the new government.

## VIRGINIA DECLARATION OF RIGHTS

*Statement of rights adopted by the colony of Virginia in 1776, which served as the model for the U.S. Constitution's* BILL OF RIGHTS.

The Virginia Declaration of Rights is an important document in U.S. constitutional history. Adopted by the Virginia Constitutional Convention on June 12, 1776, its sixteen sections enumerated specific civil liberties that government could not legitimately take away. The declaration was adopted during the last months of British colonial rule. THOMAS JEFFERSON used parts of it in the DECLARATION OF INDEPENDENCE, and it later served as a model for the Bill of Rights that was added to the U.S. Constitution.

In the spring of 1776 the Virginia Convention of Delegates convened in the colonial capitol of Williamsburg to decide the form of government Virginia should have and the rights its citizens should enjoy. The convention took place at a time when British attempts to tax and regulate the thirteen colonies had generated colonial resistance and a growing desire for political independence.

The Virginia Declaration of Rights was largely the product of GEORGE MASON, a plantation owner, real estate speculator, and neighbor of GEORGE WASHINGTON. A strong believer in human liberty and limited government, Mason crafted a document that guaranteed the citizens of Virginia, upon achieving independence from Great Britain, all the civil liberties they had lost under British rule.

In its opening sentence the declaration states that "all men are by nature equally free and independent, and have certain inherent rights" which they cannot surrender, "namely, the enjoyment of life, and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Jefferson's famous phrase "life, liberty, and the pursuit of happiness" in the Declaration of Independence was influenced by Mason and JOHN LOCKE, the English philosopher who first broached the idea of natural and inherent rights in the seventeenth century.

The declaration of rights enumerates specific civil liberties, including FREEDOM OF THE PRESS, the free exercise of religion, and the INJUNCTION that "no man be deprived of his liberty, except by the law of the land or the judgement of his peers." Other provisions include a prohibition against excessive bail or CRUEL AND UNUSUAL PUNISHMENTS, the requirements of evidence and good cause before obtaining a SEARCH WARRANT to enter a place, the right to trial by jury, and the need for a "well regulated militia" to be "under strict subordination" to the civilian government.

Many of these provisions were incorporated into the Bill of Rights. The Virginia Declaration of Rights was widely read and won an international reputation as an inspirational document.

CROSS-REFERENCES

"Virginia Declaration of Rights" (Appendix, Primary Document).

## VIRGINIA, UNITED STATES V.

In *United States v. Virginia,* 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996), the U.S. Supreme Court issued a landmark decision on sex-based discrimination when it ruled that Virginia Military Institute (VMI), a publicly funded military college, must give up its all-male enrollment policy and admit women. The decision, which also affected The Citadel, South Carolina's state-run, all-male, military school, was a decisive blow to state-sponsored discrimination. In so ruling, the Court rejected a proposal by Virginia that it establish a separate military program for women at a private college.

The case began in 1990 when a female high school student complained to the U.S. JUSTICE DEPARTMENT about the VMI male-only admission policy. Her application had been rejected without regard to her qualifications. The JUSTICE DEPARTMENT sued the Commonwealth of Virginia and VMI, arguing that discrimination on the basis of sex violated the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT.

The district court ruled in favor of VMI, grounding the decision on the need to preserve the "VMI experience," a physically and emotionally demanding military regimen that has remained unchanged since the early nineteenth century (*United States v. Virginia,* 766 F. Supp. 1407 [W.D. Va. 1991]). The court concluded that this "adversative" method of education could not work in a coeducational environment. The critical component of this method was the subjection of first-year students to the "rat line." First-year students are called "rats" because, as one expert testified, the rat is "probably the lowest animal on earth." During the first seven months of college, the rats are treated miserably.

Features of the rat line include "indoctrination, egalitarian treatment, rituals, minute regulation of individual behaviors, frequent punishment, and the use of privileges to support desired behaviors." Rats have no privacy. The tradition of constant supervision of cadets has led to stark, unaccommodating barracks without curtains, door locks, or other physical barriers that promote privacy.

The judge concluded that coeducation would prevent both men and women from undergoing the "VMI experience." The presence of women would "distract male students from their studies," while tending to "impair the *esprit de corps* and egalitarian atmosphere." The barracks would have to be modified to provide privacy, and the physical education requirements would have to be altered for women. If women were admitted, VMI would eventually drop the adversative model. Therefore, the judge ruled that VMI was "fully justified" in prohibiting women. The same-sex admission policy promoted diversity of educational opportunities because out of 15 state-funded COLLEGES AND UNIVERSITIES in Virginia, VMI alone had this policy. This diversity was a legitimate state objective that rebutted the claim of unequal protection of the law.

The Justice Department appealed the decision. The Fourth Circuit Court of Appeals vacated the decision and sent the case back to the district court (*United States v. Virginia,* 976 F.2d 890 [4th Cir. 1992]). In his majority opinion, Judge Paul Niemeyer accepted the district court's factual determinations that the VMI adversative model justified a single-sex admission policy and that critical elements of the model would be substantially changed if women were admitted. The appeals court also pointed out that all the parties acknowledged "the positive and unique aspects of the program."

The appeals court concluded, however, that the Commonwealth of Virginia had failed to "articulate an important objective which supports the provision of this unique educational opportunity to men only." Judge Niemeyer stated that the "decisive question" was why the state offered this educational opportunity only to men. The state was required to articulate an objective because of the type of constitutional review in this case. In lawsuits challenging SEX DISCRIMINATION by the government, the government must show that the sex-based classification is "substantially related to an important government objective."

The "unique benefit" offered by VMI did not answer the question of whether women could be denied admission under a policy of diversity. Judge Niemeyer found nothing in the record that explained why the Commonwealth of Virginia offered this unique benefit only to men. Though VMI had "adequately defended" its system, it had failed to identify or establish the existence of a government objective that justified its single-sex admission policy on the basis of educational diversity.

The appeals court remanded the case to the district court. Virginia then advanced a proposal to create a parallel program for women, called the Virginia Women's Institute for Leadership (VWIL). VWIL would be located at Mary Baldwin College, a private liberal arts college for women. VMI would remain all male. The district court accepted the plan (*United States v. Virginia,* 852 F. Supp. 471 [W.D. Va. 1994]). The Justice Department appealed again to the Fourth Circuit, but this time the appeals court upheld the remedial plan. The court concluded that Virginia's plan for single-gender options was a legitimate objective. It also found that VMI and VWIL would provide "substantively comparable" benefits (*United States v. Virginia,* 44 F.3d 1229 [4th Cir. 1995]).

The U.S. Supreme Court found no merit in the lower courts' justifications for maintaining the VMI male-only admission policy. Justice RUTH BADER GINSBURG, in her majority opinion, essentially agreed with the first decision of the court of appeals, which found no basis for the male-only policy. In her view, "[n]either the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women."

Ginsburg rejected Virginia's contention that single-sex education yields educational benefits important enough to justify the exclusion of women from VMI. The generalizations about the differences between men and women that were offered to justify the exclusion of women were suspect. According to Ginsburg, the generalizations were too broad and stereotypical, and the predictions that VMI stature would suffer if women were admitted were no more than self-fulfilling prophecies. The categorical exclusion of women from VMI denied EQUAL PROTECTION to women.

The categorical exclusion was unnecessary because the VMI adversative method of training could be modified without destroying the pro-

gram. In Ginsburg's view, "neither the goal of producing citizen-soldiers, VMI's *raison d'être,* nor VMI's implementing methodology is inherently unsuitable to women."

The Court was also unimpressed with the creation of the VWIL as a remedy for the constitutional violation of equal protection. Justice Ginsburg noted numerous deficiencies, pointing out that VWIL afforded women no opportunity to "experience the rigorous military training for which VMI is famed." VWIL did not propose to use the adversative method, nor would the student body, faculty, course offerings, or facilities match VMI's. Ginsburg called the VWIL a "pale shadow" of VMI that would lack substantial equality with the all male college.

Finally, the Court rejected the appeals court's "substantive comparability" test as PLAIN ERROR. The appellate court's "deferential analysis" did not accord with the "heightened scrutiny" test required when allegations of sex-based discrimination are made. Calling the VWIL remedy "substantially different and significantly unequal," Ginsburg noted that the court of appeals should have inquired as to whether the proposed remedy placed women who were denied the VMI advantage in the position they would have occupied in the absence of discrimination. The answer to this inquiry was clearly negative, thus invalidating the VWIL remedy. Ginsburg stated, "Women seeking and fit for a VMI-quality education cannot be offered anything less under the state's obligation to afford them genuinely equal protection."

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CROSS-REFERENCES

Sex Discrimination; Women's Rights.

## VIS

*[*Latin, Force or violence.*] A term employed in many legal phrases and maxims, such as* vis injuriosa, "*wrongful force.*"

## VISA

*An official endorsement on a passport or other document required to secure an alien's admission to a country.*

Under U.S. immigration law, an alien is any person who is not a citizen or national of the United States. Two types of visas exist: nonimmigrant and immigrant. The immigration laws delineate specific categories of persons who may be eligible for an immigrant visa, which generally allows a person to live in the United States permanently and perhaps eventually seek citizenship. Persons visiting the United States on a temporary basis to engage in an activity delineated under the nonimmigrant classifications of the federal immigration laws must generally possess a nonimmigrant visa. A visit under a nonimmigrant visa may be of very short duration or may validly last for years, depending on the classification of nonimmigrant visa used.

Immigrant visa classifications include family-sponsored immigrants, employment-based immigrants, diversity immigrants, and immediate relatives of U.S. citizens (8 U.S.C.A. § 1101(a)(15) et seq.). Immediate relatives are the children, spouse, and parents of a U.S. citizen. Only a specified number of visas may be issued in each of the first three categories each year. Demand often exceeds supply for these visas, creating a backlog. The immediate relative classification, along with certain other categories, is not subject to numerical limitation (8 U.S.C.A. § 1151).

A variety of nonimmigrant visa categories exist, including visitors coming to the United States for business or pleasure; ambassadors and certain diplomatic officers; a crew member on board a vessel or aircraft; certain kinds of workers; the fiancée or fiancé of a U.S. citizen; persons with "extraordinary ability in the sciences, arts, education, business, or athletics"; artists and entertainers; participants in approved international cultural exchange programs; and religious workers. Some nonimmigrant visa classifications permit family members or servants to accompany the principal alien.

Most immigrant visa categories require a U.S. citizen or entity to first file a visa petition on behalf of the alien. Once the visa petition is approved, the alien typically submits a visa application to the appropriate U.S. consulate. Immigrant visa applications may include a questionnaire, fingerprints, an oath and signature before the consular officer, photographs, and results of a medical examination. A visa applicant might also be required to provide police or prison records, military records, and a birth certificate. The alien has the burden to establish eligibility to receive the visa.

Documentation and other information needed for nonimmigrant visas vary with the type of visa sought but are generally less extensive than those required for an immigrant visa. A few categories require an approved visa petition; certain classifications require a medical exam. A nonimmigrant visa specifies the nonimmigrant classification, such as B-2 for a visitor for pleasure, and the length of time the visa is valid. Typically a nonimmigrant visa is evidenced by documentation placed in an alien's passport. On the other hand, an arriving immigrant usually surrenders the visa to the immigration officer at the port of entry, who notes the date, port of entry, identity of vessel or other means of transportation, and any other information that is required under federal regulations.

Possession of a valid visa does not ensure admission to the United States; an alien must still be admissible under all immigration laws at the time of arrival.

Following the SEPTEMBER 11, 2001, TERRORIST ATTACKS, officials within the federal government expressed concerns about the methods terrorists used to conduct their operations within the United States. As a result, Congress altered a number of provisions regarding visas under the USA PATRIOT ACT OF 2001, Pub. L. No. 107-56, 115 Stat. 272. The act includes restrictions on the issuance of student visas, and adds conditions designed to crack down on noncitizens who have overstayed the terms of their visas. The act also mandates improvements in the use of technology to identify persons who apply for U.S. visas. Congress further increased the ability of the federal government to issue and track visas within the United States by passing the Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543. The act allocated funds and personnel to develop systems and carry out policies to improve visa operations. Finally, the Immigration and Naturalizations (INS) Service was moved from the JUSTICE DEPARTMENT to the HOMELAND SECURITY DEPARTMENT because of concerns about the INS's ability to monitor those in the United States on visas who might have connections to terrorist organizations.

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CROSS-REFERENCES

Aliens.

## VISIBLE MEANS OF SUPPORT

*A term employed in* VAGRANCY *statutes to test whether an individual has any apparent ability to provide for himself or herself financially.*

A person who has no visible means of support and loiters in a public place might be arrested and prosecuted for vagrancy.

## VISITATION RIGHTS

*In a* DIVORCE *or custody action, permission granted by the court to a noncustodial parent to visit his or her child or children. Custody may also refer to visitation rights extended to grandparents.*

In a divorce where one parent is awarded sole custody of the child, the noncustodial parent is usually awarded visitation rights in the divorce decree. Visitation rights can be withheld if evidence is provided that proves it is in the best interest of the child not to see the parent. This usually occurs only where it has been shown that the parent is an excessive user of alcohol, a user of illegal narcotics, or is physically or verbally abusive. With the large number of divorced parents in the United States, grandparents have lobbied successfully for laws that give them rights to visit their grandchildren. However, the U.S. Supreme Court has voiced concerns about such laws and ruled one such statute unconstitutional in 2000.

Visitation rights may be determined by the agreement of the parties or by a court order. If the court concludes that the parents will be cooperative, it may not issue a detailed visitation schedule. This means that parents must amicably work out reasonable times and terms that work best for both parents and child. If parents are not cooperative, the courts encourage the drafting of a detailed schedule that leaves no doubt about the frequency of visitation, the days and times of pickup and return, and holiday and vacation schedules.

Courts generally consider the wishes of the child when reviewing custody and visitation issues. A child's wish may be granted but it will be dependent on the child's age and maturity level, as well as what the court concludes is in the child's best interests. Courts also take into con-

sideration the fact that the custodial parent may exert UNDUE INFLUENCE over the child's decision-making process and color the child's supposedly independent request. As children mature they may seek an order from the court changing custody and visitation arrangements.

A common problem in FAMILY LAW is when one parent uses visitation to spite the other parent. Examples include a custodial parent refusing visitation, not having the child available for the noncustodial parent at the appointed time for pickup, or a noncustodial parent not returning the child at the prescribed time. When a noncustodial parent encounters problems in exercising visitation rights, the parent may stop paying CHILD SUPPORT as a means of changing the custodial parent's behavior. However, the courts do not recognize this as a valid reason for withholding support, as visitation and support are separate and discrete issues. These circumstances, if persistent, sometimes lead the parents back into court for resolution of the problems.

"[JUS GENTIUM] IS WHAT NATURAL REASON HAS ESTABLISHED AMONG NATIONS."
—FRANCISCO DE VITORIA

When a substantial change in conduct or circumstances involving the parents occurs, the court may make permanent modifications in visitation rights. One of the parties must present clear evidence to the court of the change in conduct or circumstances. This evidence usually must be completely new to the court, as issues addressed in prior proceedings are generally not grounds for modification. Common grounds for permanent modifications include a persistent failure to follow the visitation schedule, repeated failure to return the child at the designated time, the teaching of immoral or illegal acts to the child, or the parent's conviction for a crime.

Visitation rights may also extend beyond parents. Every state has recognized grandparents' visitation rights in some form by amending visitation statutes. Several states limit visitation to cases where the parent is deceased, while others extend the right to cases of divorce, ANNULMENT, or separation. Such laws have come under attack by parents, who argue that giving grandparents visitation rights infringes on their right to raise their children as they see fit. The U.S. Supreme Court, in *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), held that the state of Washington's grandparent visitation statute violated the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT, as it interfered with the rights of parents to make decisions concerning the care, custody, and control of their children. The statute permitted "any person" at "any time" to petition a state family court for visitation rights whenever "visitation may serve the best interest of the child."

Most states hold that the ongoing family is not subject to enforced intrusion by grandparents, if both parents are fit and object. A majority of states also hold that any ADOPTION preempts visitation by the natural grandparents and that grandparents generally have no right to intervene in an adoption proceeding involving their grandchild.

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CROSS-REFERENCES

Child Custody; Children's Rights.

## VITIATE

*To impair or make void; to destroy or annul, either completely or partially, the force and effect of an act or instrument.*

Mutual mistake or FRAUD, for example, might vitiate a contract.

## ♦ VITORIA, FRANCISCO DE

Francisco de Vitoria was a Spanish theologian, teacher, and defender of the rights of the Native Americans who inhabited the newly discovered continents of North and South America.

Vitoria was born circa 1483 in Vitoria, Álava, Spain. He taught at the University of Valladolid from 1523 until 1526. In that year, he moved to Salamanca, Spain, where he taught theology for the next twenty years.

Vitoria's campaign for the rights of native peoples started in 1532, when he began a series of lectures on that subject. He incorporated the substance of these lectures into a treatise entitled *Relecciones De Indis et De iure belli* [*Readings on the Indians and on the Law of War*]. The work not only advocated the case for the Native Americans but also presented basic precepts on the law of nations.

In his fight for freedom for Native Americans, Vitoria asserted that they owned the terri-

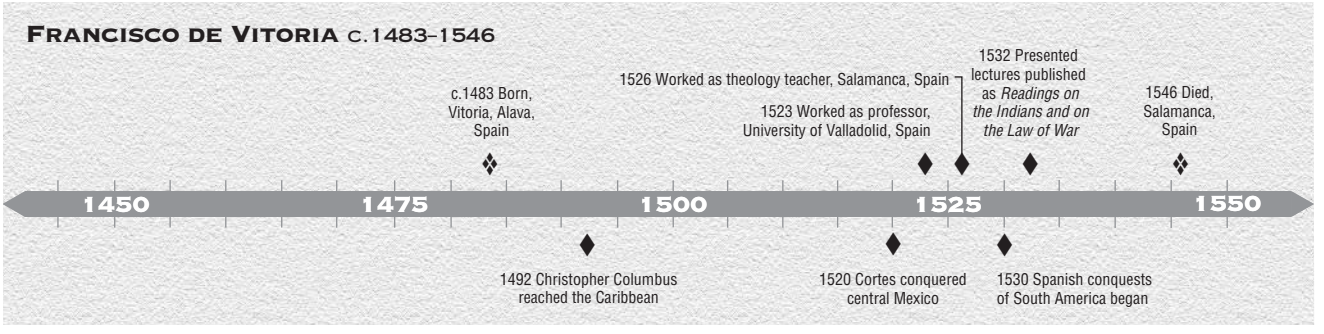


tories they inhabited and opposed their compulsory conversion to Christianity. He believed that the Spanish government should establish a ruling system that would benefit, not injure, the native people.

Vitoria believed that an ideal government would receive its authority from the people and would rely on the tenets of NATURAL LAW and reason to enact laws beneficial to all.

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CROSS-REFERENCES

Native American Rights.

## VIVA VOCE

*[*Latin, With the living voice; by word of mouth.*]* *Verbally; orally.*

When applied to the examination of witnesses, the term *viva voce* means oral testimony as opposed to testimony contained in depositions or affidavits.

*Viva voce* voting is voting by speech, as distinguished from voting by a written or printed ballot.

## VIZ.

*[*Latin, A contraction of the term *videlicet,* to wit, namely, or that is to say.*]* *A term used to highlight or make more specific something previously indicated only in general terms.*

## VOID

*That which is null and completely without legal force or binding effect.*

The term *void* has a precise meaning that has sometimes been confused with the more liberal term *voidable.* Something that is voidable may be avoided or declared void by one or more of the parties, but such an agreement is not void per se.

A void contract is not a contract at all because the parties are not, and cannot be, bound by its terms. Therefore, no action can be maintained for breach of a void contract, and it cannot be made valid by ratification. Because it is nugatory, a void contract need not be rescinded or otherwise declared invalid in a court of law.

A void marriage is one that is invalid from its inception. In contrast to a voidable marriage, the parties to a void marriage may not ratify the union by living together as HUSBAND AND WIFE. No DIVORCE or ANNULMENT is required. Nevertheless, parties frequently do seek, and are permitted to seek, such a decree in order to remove any doubt about the validity of the marriage. Unlike a voidable marriage, a void marriage can be challenged even after the death of one or both parties.

In most jurisdictions a bigamous marriage, one involving a person who has a living spouse from an undissolved prior marriage, is void from the outset. In addition, statutes typically prohibit marriage between an ancestor and descendant; between a brother and a sister (whether related by whole blood, half blood, or ADOPTION); and between an uncle and niece or aunt and nephew.

A judgment entered by a court is void if a court lacks jurisdiction over the parties or subject matter of a lawsuit. A void judgment may be entirely disregarded without a judicial declara-

tion that the judgment is void and differs from an erroneous, irregular, or voidable judgment. In practice, however, an attack on a void judgment is commonly used to make the judgment's flaw a matter of public record.

A law is considered void on its face if its meaning is so vague that persons of ordinary intelligence must guess at its meaning and may differ as to the statute's application (*Connally v. General Construction Co.,* 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 2d 322 [1926]). DUE PROCESS requires that citizens receive fair notice of what sort of conduct to avoid. For example, a Cincinnati, Ohio, city ordinance made it a criminal offense for three or more persons to assemble on a sidewalk and conduct themselves in a manner that was annoying to passersby. A conviction carried the possibility of a $50 fine and between one and thirty days imprisonment. The U.S. Supreme Court reversed the convictions of several persons found guilty of violating the ordinance after a demonstration and picketing (*Coates v. Cincinnati,* 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 [1971]). The Court ruled that the ordinance was unconstitutionally vague because it subjected citizens to an unascertainable standard. Stating that "conduct that annoys some people does not annoy others," the Court said that the ordinance left citizens to guess at the proper conduct required. The Court noted that the city could lawfully prohibit persons from blocking the sidewalks, littering, obstructing traffic, committing assaults, or engaging in other types of undesirable behavior through "ordinances directed with reasonable specificity toward the conduct to be prohibited."

CROSS-REFERENCES

Bigamy; Consanguinity; Void for Vagueness Doctrine.

## VOID FOR VAGUENESS DOCTRINE

*A doctrine derived from the* DUE PROCESS CLAUSES *of the* FIFTH *and* FOURTEENTH AMENDMENTS *to the U.S. Constitution that requires criminal laws to be drafted in language that is clear enough for the average person to comprehend.*

If a person of ordinary intelligence cannot determine what persons are regulated, what conduct is prohibited, or what punishment may be imposed under a particular law, then the law will be deemed unconstitutionally vague. The U.S. Supreme Court has said that no one may be required at peril of life, liberty, or property to speculate as to the meaning of a penal law. Everyone is entitled to know what the government commands or forbids.

The void for vagueness doctrine advances four underlying policies. First, the doctrine encourages the government to clearly distinguish conduct that is lawful from that which is unlawful. Under the Due Process Clauses, individuals must be given adequate notice of their legal obligations so they can govern their behavior accordingly. When individuals are left uncertain by the wording of an imprecise statute, the law becomes a standardless trap for the unwary.

For example, VAGRANCY is a crime that is frequently regulated by lawmakers despite difficulties that have been encountered in defining it. Vagrancy laws are often drafted in such a way as to encompass ordinarily innocent activity. In one case the Supreme Court struck down an ordinance that prohibited "loafing," "strolling," or "wandering around from place to place" because such activity comprises an innocuous part of nearly everyone's life (*Papachristou v. City of Jacksonville,* 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 [1972]). The Court concluded that the ordinance did not provide society with adequate warning as to what type of conduct might be subject to prosecution.

Second, the void for vagueness doctrine curbs the ARBITRARY and discriminatory enforcement of criminal statutes. Penal laws must be understood not only by those persons who are required to obey them but by those persons who are charged with the duty of enforcing them. Statutes that do not carefully outline detailed procedures by which police officers may perform an investigation, conduct a search, or make an arrest confer wide discretion upon each officer to act as he or she sees fit. Precisely worded statutes are intended to confine an officer's activities to the letter of the law.

Third, the void for vagueness doctrine discourages judges from attempting to apply sloppily worded laws. Like the rest of society, judges often labor without success when interpreting poorly worded legislation. In particular cases, courts may attempt to narrowly construe a vague statute so that it applies only to a finite set of circumstances. For example, some courts will permit prosecution under a vague law if the government can demonstrate that the defendant acted with a SPECIFIC INTENT to commit an offense, which means that the defendant must have acted wilfully, knowingly, or deliberately.

By reading a specific intent requirement into a vaguely worded law, courts attempt to insulate innocent behavior from criminal sanction.

However, such judicial constructions are not always possible. Ultimately, a confusing law that cannot be cured by a narrow judicial interpretation will not be submitted to a jury for consideration but will be struck down as an unconstitutional violation of the Due Process Clauses.

A fourth reason for the void for vagueness doctrine is to avoid encroachment on FIRST AMENDMENT freedoms, such as FREEDOM OF SPEECH and religion. Because vague laws cause uncertainty in the minds of average citizens, some citizens will inevitably decline to take risky behavior that might land them in jail. When the vague provisions of a state or federal statute deter citizens from engaging in certain political or religious discourse, courts will apply heightened scrutiny to ensure that protected expression is not suppressed. For example, a law that prohibits "sacrilegious" speech would simultaneously chill the freedoms of expression and religion in violation of the void for vagueness doctrine (*Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 [1952]).

Although courts scrutinize a vague law that touches on a fundamental freedom, in all other cases the void for vagueness doctrine does not typically require mathematical precision on the part of legislators. Laws that regulate the economy are scrutinized less closely than laws that regulate individual behavior, and laws that impose civil or administrative penalties may be drafted with less clarity than laws imposing criminal sanctions.

CROSS-REFERENCES

Chilling Effect Doctrine; Due Process of Law; Fifth Amendment; Fourteenth Amendment.

## VOIDABLE

*That which is not absolutely void, but may be avoided.*

In contracts, *voidable* is a term typically used with respect to a contract that is valid and binding unless avoided or declared void by a party to the contract who is legitimately exercising a power to avoid the contractual obligations.

A contract may be voidable on the grounds of FRAUD, mistake, MISREPRESENTATION, lack of capacity, duress, UNDUE INFLUENCE, or abuse of a fiduciary relationship. A contract that is based on one of these grounds is not automatically void but is voidable at the option of the party entitled to avoid it. For example, a person who was induced by fraud to enter into a contract may disclaim the contract by taking some positive action to disaffirm the contract. Or the victim of the fraud may ratify the contract by his or her conduct or by an express affirmation after acquiring full knowledge of the facts. Likewise, a contract between a minor and another party is generally viewed as voidable by the minor. The minor may legally decide to ratify the contract or disaffirm the contract.

A voidable marriage is a marriage that is valid when entered into and remains completely valid until a party obtains a court order nullifying the relationship. The parties may ratify a voidable marriage upon removal of the impediment preventing a lawful marriage, thus making the union valid. Living together as HUSBAND AND WIFE following the removal of the impediment typically constitutes a ratification. A voidable marriage can only be attacked by a direct action brought by one of the parties against the other and therefore cannot be attacked after the death of a spouse. It differs from a void marriage where no valid marital relationship ever existed.

Most jurisdictions hold that the marriage of a person under the statutory age of consent but over the age of seven is voidable rather than void. Such a marriage may be subject to attack through an ANNULMENT or may be ratified when the underage party reaches the age of consent. Some jurisdictions have determined that a marriage involving an incompetent party is void, but others hold that such a marriage is only voidable. A voidable marriage involving an incompetent party may be ratified during periods when the party is lucid or after she or he regains competency. Generally, a marriage procured or induced by certain types of fraud is viewed as voidable; voluntary COHABITATION following a disclosure of all pertinent facts ratifies the marriage. A marriage made without the voluntary consent of one of the parties is generally considered voidable. Moreover, a person who is so intoxicated at the time of marriage as to be incapable of understanding the nature of the marital contract lacks the capacity to consent, and such a marriage is voidable.

## VOIR DIRE

[Old French, To speak the truth.] *The preliminary examination of prospective jurors to deter-*

*mine their qualifications and suitability to serve on a jury, in order to ensure the selection of fair and impartial jury.*

Voir dire consists of oral questions asked of prospective jurors by the judge, the parties, or the attorneys, or some combination thereof. This oral questioning, often supplemented by a prior written questionnaire, is used to determine whether a potential juror is biased, knows any of the parties, counsel, or witnesses, or should otherwise be excluded from jury duty. Voir dire is a tool used to achieve the constitutional right to an impartial jury, but it is not a constitutional right in itself.

Typically, a number of prospective jurors are called to the jury box, given an oath, and then questioned as a group by counsel or the court. Local federal rules generally provide for questioning by the judge. Individual or sequestered voir dire is used in rare cases where extensive publicity may potentially damage a defendant's case; some jurisdictions mandate it in death penalty cases. A prospective juror must answer questions fully and truthfully but cannot be faulted for failing to disclose information that was not sought.

The purpose of voir dire is not to educate jurors but to enable the parties to select an impartial panel. Therefore, voir dire questions should test the capacity and competency of the jurors without intentionally or unintentionally planting prejudicial matter in their minds. Trial judges have wide latitude in setting the parameters of questioning, including the abilities to determine the materiality and propriety of the questions and to set the time allowed for voir dire.

A party may move for dismissal for cause to remove any potential juror shown to be connected to or biased in the case. A court may sustain counsel's request to strike a juror for cause, in which case the juror steps aside and another is called. Or a judge may overrule a challenge for cause if a suitable reason has not been sufficiently established. Challenges for cause are not limited in number.

Each side also exercises peremptory challenges to further shape the composition of the jury. Peremptory challenges are used to dismiss a prospective juror without the need to provide a reason for dismissal. Statutes or court rules typically set the number of peremptory challenges afforded to a party.

Voir dire also describes a court's preliminary examination of a prospective witness whose competency or qualifications have been challenged.

## VOLENTI NON FIT INJURIA

[Latin, To the consenting, no injury is done.] *In the law of* NEGLIGENCE*, the precept that denotes that a person who knows and comprehends the peril and voluntarily exposes himself or herself to it, although not negligent in doing so, is regarded as engaging in an* ASSUMPTION OF THE RISK *and is precluded from a recovery for an injury ensuing therefrom.*

CROSS-REFERENCES

Assumption of Risk.

## VOLSTEAD ACT

Volstead Act is the popular name for the National Prohibition Act (41 Stat. 305), a comprehensive statute that was enacted to enforce the EIGHTEENTH AMENDMENT to the U.S. Constitution and to prohibit the manufacture and sale of intoxicating liquors. The act was rendered inoperative by passage of the TWENTY-FIRST AMENDMENT, which repealed PROHIBITION.

## ♦ VOLSTEAD, ANDREW JOHN

Andrew John Volstead was a midwestern lawyer and ten-term U.S. representative from Minnesota who gained national prominence as the originator of the Volstead Act, officially the National Prohibition Act (41 Stat. 305). The Volstead Act was a comprehensive statute enacted to enforce the EIGHTEENTH AMENDMENT to the U.S. Constitution. It prohibited the manufacture, sale, or transportation of intoxicating liquor. The Volstead Act was later rendered inoperative by the passage of the TWENTY-FIRST AMENDMENT, which repealed Prohibition.

Volstead, a reluctant national symbol of Prohibition, was the product of modest, rural beginnings. His parents had been Norwegian farmers who earned their living by selling surplus produce in Oslo street markets until they immigrated to the United States in 1854, where they eventually settled on a farm near the town of Kenyon, in Goodhue County, Minnesota.

Volstead was born October 31, 1860, near Kenyon, Minnesota. After attending local public

schools, he went on to Saint Olaf College, in Northfield, Minnesota, and the Decorah Institute, in Decorah, Iowa. He graduated from Decorah in 1881. After graduation, he taught school in Iowa, and studied law with two Decorah attorneys. Volstead was admitted to the Iowa bar in 1883 and to the Minnesota bar one year later. He practiced law in Granite Falls, Minnesota.

In 1887, one year after his arrival, Volstead was named Yellow Medicine County attorney—a post he held for fourteen years. He was a member and president of the Granite Falls Board of Education, a Granite Falls city attorney, and a Granite Falls mayor. Volstead married Helen ("Nellie") Mary Osler Gilruth on August 6, 1894.

From his platform as mayor of Granite Falls, Volstead launched his first major political campaign in 1902. Running as a Republican, he sought to represent Minnesota's seventh congressional district in the U.S. House of Representatives. He was elected, and was returned to office nine times, serving for a total of almost twenty years.

Volstead sought to protect the interests of the small farmer in general—and western Minnesota wheat farmers in particular. He opposed legislation that favored big cities, big business, and big labor. He believed in competition, he hated monopolies, and he supported early legislative attempts to regulate the railroad industry. Though he had supported President WOODROW WILSON's WORLD WAR I policies, Volstead opposed many of the administration's domestic programs. He believed the Underwood Tariff Act of 1913 (19 U.S.C.A. §§ 128, 130, 131 [1982]) discriminated against the farmer, the Federal Reserve Act of 1913 (12 U.S.C.A. § 321 [1989]) benefited large city banks, and the CLAYTON ACT of 1914 (15 U.S.C.A. § 12 [1994]) exempted labor from federal laws.

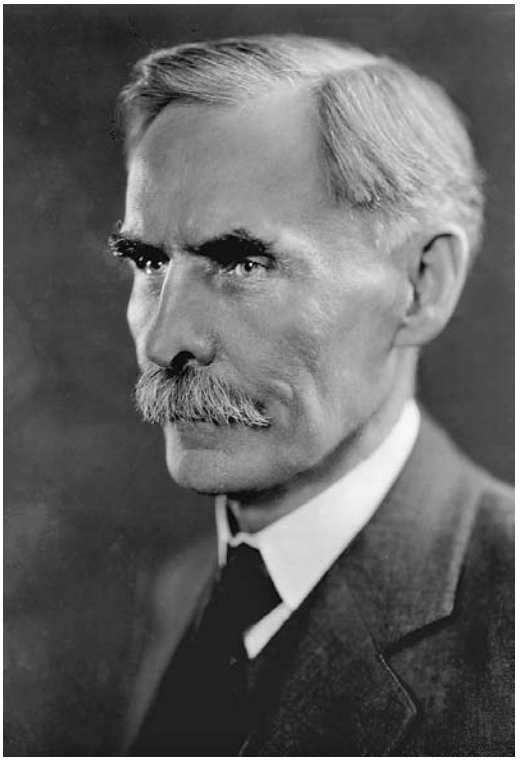

*Andrew J. Volstead.*
CORBIS

In spite of, or perhaps because of, his opposition to Wilson's domestic agenda, Volstead was admired and supported by his conservative rural constituents. He was also respected by his Washington, D.C. colleagues. Over the years, he earned a reputation as a hardworking public servant with a fine legal mind. Volstead joined the House Judiciary Committee in 1913. As a committee member, he frequently demonstrated his ability to frame successful bills and to move them through the legislative process.

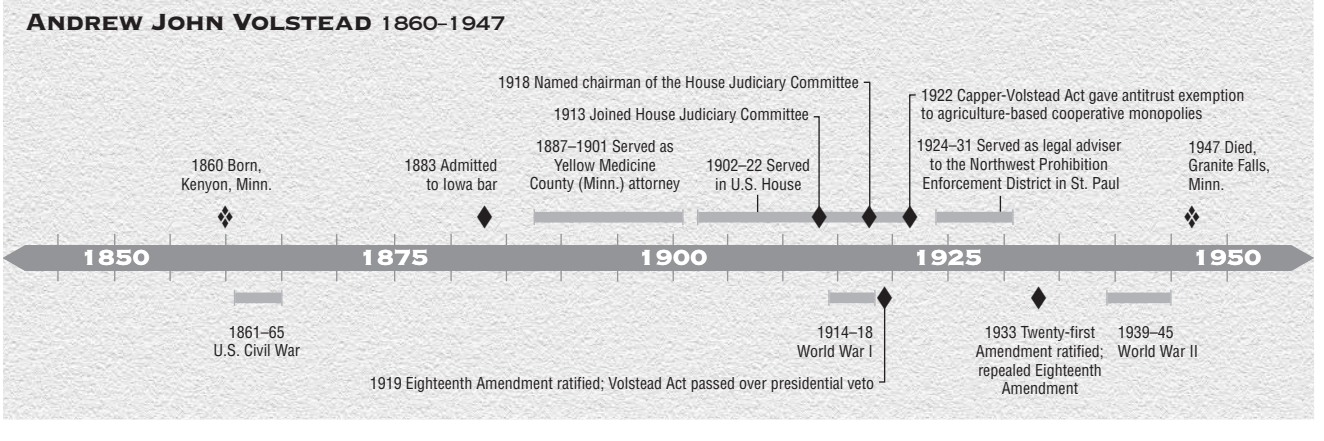

Volstead's professional skills were put to the test in 1918. Shortly after the passage of the Eighteenth Amendment, he was named chairman of the House Judiciary Committee. In this capacity, he was called upon to draft a new law to enforce Prohibition. Volstead's bill permitted the sale of alcohol for industrial, medicinal, and sacramental purposes. It outlawed any beverage containing more than one-half of one percent of alcohol; provided concurrent state and federal power to allow for the enforcement of stricter state laws; included a SEARCH AND SEIZURE clause; and provided for injunctions against, and the padlocking of, establishments selling alcoholic beverages. The bill was passed in 1919 over President Wilson's VETO.

"EVERY LAWYER IS FAMILIAR WITH THE . . . LARGE CORPORATE INTERESTS . . . THAT APPEAL TO OUR COURTS TO SET ASIDE THE WILL OF THE PEOPLE AS EXPRESSED BY OUR STATE LEGISLATURES. [T]HOSE WHO SEEK TO THWART THE WILL OF THE PEOPLE SHOULD NOT HAVE [THAT] ADVANTAGE."
—ANDREW J. VOLSTEAD

Although Volstead's bill was less drastic than an earlier measure drafted by Wayne B. Wheeler, of the Anti-Saloon League, and less strict than existing laws in Ohio and New York, it was not well received by those against Prohibition. Passage of the National Prohibition Act forced the quiet Minnesota congressman into the national spotlight, and made him a central figure in the country's ongoing debate between wet and dry factions.

It is somewhat ironic that Volstead became so closely associated with the Prohibition debate. He *was* a nondrinker who supported Prohibition, but he had never made a speech on the issue before his bill was passed. And, though he was proud of the act that came to carry his name, he expressed disappointment in later years that the Volstead Act got more attention than other legislative contributions that he deemed equally or more important.

In spite of his outstanding record of support for Minnesota farmers, Volstead's notoriety following the passage of the Volstead Act made him vulnerable in reelection bids. A coalition of Prohibition opponents was unable to defeat him in 1920, but two years later, Ole J. Kvale, a Lutheran minister, was elected to replace the ten-term congressman.

Volstead refused to profit from the Prohibition debate, and he turned down lucrative speaking engagements with some regularity. He did, however, continue to support the cause that had cost him reelection. From 1924 to 1931, he lived in St. Paul and served as the legal adviser to the Northwest Prohibition Enforcement District. The Volstead Act was repealed by the Twenty-first Amendment in 1933.

He died in Granite Falls at age eighty-seven, on January 20, 1947.

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## VOLUNTARY ACT

*A crime that is the product of conscious choice and independent will.*

No crime can be committed by bad thoughts alone. One basic premise of U.S. law is that every crime requires the commission of some act before a person may be held accountable to the justice system. A criminal act may take the form of affirmative conduct, such as the crime of murder, or it may take the form of an omission to act, such as the crime of withholding information from the police. However, in order for an act to be considered criminal, it must be voluntary.

To constitute a voluntary act for which a person may be held criminally liable, the act must result from the person's conscious choice. The choice need not be the product of thorough deliberation but may stem from an impulse, as long as the person is physically and mentally capable of exercising restraint and discretion consistent with the requirements of the law. A person who suddenly slips on a mountain trail and reaches out to grab the arm of a bystander to avoid falling has acted voluntarily because his mind has quickly grasped the situation and dictated a response.

Acts over which a person has no physical or mental control are not voluntary. A muscle reflex driven by the autonomic nervous system, such as a knee jerk, is not considered voluntary under the law. Acts committed during seizures, convulsions, hypnosis, or unconscious mental states also lack sufficient volition and judgment needed to impose criminal liability. For the same reasons, acts committed during episodes of sleepwalking are not considered voluntary.

On the other hand, acts that are not fully the result of independent will but are committed with extreme indifference to human life are usu-

ally treated as voluntary. A conscious person who points a loaded gun at another, for example, will typically be held liable for any harm that results from its accidental discharge because the act of brandishing a loaded gun is treated as a voluntary choice manifesting a recklessness toward the safety of others. Similarly, an intoxicated person who passes out behind the wheel of a car cannot escape liability for any criminal acts that ensue, because they followed from the voluntary acts of drinking and driving. Persons who have a history of seizures, fainting spells, or blackouts may be held responsible for criminal acts that result during such episodes if a court finds that reasonable precautions could have been taken to avoid the dangers created by these physical and mental conditions.

In the majority of criminal cases, the voluntary nature of a defendant's act is not at issue. Until something in evidence indicates to the contrary, a court may presume that a defendant has acted with the intent to carry out the bodily movements for which she is being prosecuted. The law expects every person to take responsibility for her own actions and anticipate the natural consequences that might reasonably follow from particular behavior. Medical testimony is commonly required to place a defendant's mental state into question and raise the defense of voluntariness before a judge or jury.

Involuntary criminal acts should be distinguished from acts that are the product of duress. Duress includes the use of force, or threat of force, to coerce another to commit a criminal act. Crimes committed under duress are considered voluntary because an individual's decision to succumb is normally based on a cost-benefit analysis in which he weighs the consequences of acting and refusing to act. Nonetheless, the law protects individuals who succumb to coercion by allowing them to assert the defense of duress. The defense of duress is based on the idea that the deterrent and retributive value of CRIMINAL LAW is not served by punishing individuals for behavior that is not the product of free and independent will.

CROSS-REFERENCES

Insanity Defense.

## VOTING

The right to vote is a fundamental element of the U.S. system of representative democracy. In this form of government, policy decisions are made by representatives chosen in periodic elections based on the principle of universal suffrage, which requires that all citizens (or at least all competent adults not guilty of serious crimes) be eligible to vote in elections. Democratic governments are premised on political equality. Although individuals are inherently unequal with respect to their talents and virtues, they are deemed equal in their essential worth and dignity as human beings. Each individual has an equal right to participate in politics under the law.

Though these principles of representative democracy and universal suffrage have been idealized throughout U.S. history, citizens often have needed to struggle to make these principles a reality. The Framers of the U.S. Constitution did not explicitly define qualifications for voting but delegated to the states the right to set voting requirements. At the time the Constitution was ratified, property qualifications for voting still existed, and the franchise was granted originally only to white men.

### The Growth of Enfranchisement

The movement toward universal suffrage can be traced to the advent of Jacksonian democracy in the 1830s. Property qualifications rapidly diminished for white voters by the beginning of the U.S. CIVIL WAR. The end of SLAVERY led, in 1870, to the adoption of the FIFTEENTH AMENDMENT, which theoretically granted the right to vote to African Americans. It was not until the 1960s, however, that this right became a reality.

The NINETEENTH AMENDMENT, ratified in 1920, removed gender as a qualification for voting. The TWENTY-FOURTH AMENDMENT, ratified in 1964, abolished POLL TAXES as prerequisites for voting in federal elections. Finally, the TWENTY-SIXTH AMENDMENT, ratified in 1971, lowered the voting age to 18. These constitutional amendments reveal the slow movement toward universal suffrage, but it would take court decisions as well as federal legislation to ensure that citizens were not denied their constitutional right to vote.

### Attempts at Disenfranchisement

For a hundred years the legislatures of southern and border states used a succession of different types of legislation to disenfranchise African Americans and the members of other minority groups. These laws were challenged in

## Rock the Vote and Motor Voter

The campaign to pass the National Voter Registration Act (NVRA) of 1993 (42 U.S.C.A. § 1973gg et seq.), popularly known as the "motor-voter" law, was led by the Motor Voter Coalition (<www.motorvoter.com>), an umbrella organization of nonpartisan groups. Some of the organizations that participated, such as the League of Women Voters and the National Association for the Advancement of Colored People (**NAACP**), had a long history of promoting voting rights. Many secretaries of state, the state officials who administer elections, also supported the NVRA.

The most publicity, however, was attracted by the Rock the Vote organization. Rock the Vote (<www.rockthevote.com>) is a non-partisan group based in Los Angeles, California, that is funded primarily by contributions from the popular music industry. Rock the Vote was established in 1990 to fight music **CENSORSHIP** and promote the **FIRST AMENDMENT** through the registration of voters between the ages of eighteen and twenty-four. Soon, however, Rock the Vote became a vocal supporter of the motor-voter bill, which simplifies voter registration and relaxes residency requirements.

Rock the Vote enlisted the help of many famous popular singers, rock bands, and rap artists to encourage the passage of the motor-voter bill. The rock group R.E.M. even included a postcard with one of its recordings that could be sent by a listener to Congress in support of the bill. President **BILL CLINTON**, who benefited from Rock the Vote's 1992 drive to register young voters, acknowledged the organization's efforts at the bill-signing ceremony on May 20, 1993.

court, leading to a steady stream of decisions that restricted the ability of legislatures to limit VOTING RIGHTS. Beginning in the 1960s, the federal government became actively involved in ending discriminatory voting practices. In addition, the federal government set new procedures for voter registration, which made it easier to register and vote.

Despite the passage of the Fifteenth Amendment in 1870, African Americans had difficulty exercising their right to vote. In some states, public officials ignored the Fifteenth Amendment, and in other areas, groups such as the KU KLUX KLAN used TERRORISM to prevent African Americans from voting. The U.S. Supreme Court struck down congressional attempts to enforce the Fifteenth Amendment in *United States v. Reese,* 92 U.S. (2 Otto) 214, 23 L. Ed. 563 (1875). The Court reversed itself in *Ex Parte Yarbrough,* 110 U.S. 651, 4 S. Ct. 152, 28 L. Ed. 274 (1884), yet in the 1880s Congress showed little interest in securing African American voting rights.

Southern and border states realized, however, that the federal government had the power to ensure the enfranchisement of African Americans. Therefore, these states sought ways of excluding African Americans from the political process; such methods appeared neutral but were employed solely against persons of color.

**Grandfather Clause** The most blatant official means of preventing African Americans from voting was the GRANDFATHER CLAUSE. First enacted by Mississippi in 1890, this method soon spread throughout the southern and border states. Typically these clauses required literacy tests for all voters whose ancestors had not been entitled to vote prior to 1866. This meant that African Americans were subject to literacy tests arbitrarily administered by white officials, whereas illiterate whites were exempted from this requirement because their ancestors could vote in 1866. In 1915, the Supreme Court struck down Oklahoma's grandfather clause in *Guinn v. United States,* 238 U.S. 347, 35 S. Ct. 926, 59 L. Ed. 1340.

**White Primary** After the grandfather clause was ruled unconstitutional, southern states adopted the WHITE PRIMARY as a way of excluding African Americans from voting in a meaningful way. The DEMOCRATIC PARTY, in many

states, adopted a rule excluding African Americans from party membership. The state legislatures worked in concert with the party, closing the party primaries to everyone except party members. Because nomination by the Democratic Party was tantamount to election in these essentially one-party states, African Americans were effectively disenfranchised. The Supreme Court, in *Smith v. Allwright,* 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944), struck down the white primary as a violation of the Fifteenth Amendment's prohibition against voting discrimination based on race.

**Literacy Tests** The end of grandfather clauses and white primaries led to the use of other exclusionary tactics. Many states relied on literacy tests that, despite superficial neutrality, were administered in a racially discriminatory manner. White people rarely had to take the test, even if their literacy was questionable. However, because the Constitution had left the determination of voting qualifications to the states and the literacy tests were on their face racially neutral, the Supreme Court refused to strike them down. Ultimately, Congress abolished literacy tests through the VOTING RIGHTS ACT OF 1965 (42 U.S.C.A. § 1973 et seq.).

**Poll Tax** Another less common means of preventing African Americans from voting was the poll tax. At the time the Constitution was adopted, poll taxes were used as a legitimate means of raising revenue. By the 1850s poll taxes had disappeared, but they were revived in the early twentieth century by states seeking to exclude African Americans from the political process. The tax generally amounted to $2 per election, an amount large enough to deter most persons of color, as well as poor whites, from voting.

On its face, the poll tax was racially neutral. The Supreme Court initially upheld the tax in *Breedlove v. Suttles,* 302 U.S. 277, 58 S. Ct. 205, 82 L. Ed. 252 (1937), but over time it became clear that it was being used in a racially discriminatory manner. The Twenty-fourth Amendment, ratified in 1963, abolished the use of the poll tax in federal elections. In 1966, the Supreme Court, in *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169, struck down the use of poll taxes in state and local elections, ruling that such taxes violated the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT.

## Voting Reforms

**Voting Rights Act of 1965** The passage of the Voting Rights Act of 1965 was a watershed event in U.S. history. For the first time the federal government undertook voting reforms that had traditionally been left to the states. The act prohibits the states and their political subdivisions from imposing voting qualifications or prerequisites to voting, or standards, practices, or procedures that deny or curtail the right of a U.S. citizen to vote because of race, color, or membership in a language minority group. The act was extended in 1970 and again in 1982, when its provisions were renewed for an additional 25 years.

Southern states challenged the legislation as a dangerous attack on STATES' RIGHTS, but the Supreme Court, in *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966), upheld the constitutionality of the act, despite the fact that the law was, in the words of Chief Justice EARL WARREN, "inventive."

The initial act covered the seven states in the South that had used poll taxes, literacy tests, and other devices to obstruct registration by African Americans. Under the law, a federal court can appoint federal examiners, who are authorized to place qualified persons on the list of eligible voters. The act waived accumulated poll taxes and abolished literacy tests and similar devices in those areas to which the statute applied.

In addition, the act (under Section 5) required the seven states to obtain "preclearance" from the JUSTICE DEPARTMENT or the U.S. District Court for the District of Columbia before making changes in the electoral system. The 1982 extension of the act revised this provision, extending it to all states. This means that a voter may challenge a voting practice or procedure on the ground that it is racially discriminatory either by intent or by effect.

**Motor Voter Laws** A state has the right to require bona fide residency as a prerequisite to the exercise of the right to vote in its elections. The courts have also upheld durational residency requirements (how long a person must have resided in the state) for voting. Beginning in the mid-1970s, however, many states began to abandon durational requirements, making it possible for a new resident to register to vote when he applies for a state driver's license. This "motor voter" statute was first enacted in Minnesota (Minn. Stat. Ann. § 201.161 [1992]) in

1992. By year's end, 27 states had some form of motor voter law. Congress eliminated durational residency requirements for voting with the passage of the National Voter Registration Act of 1993 (42 U.S.C.A. § 1973gg et seq.). The act allows anyone over the age of 18 to register to vote while obtaining a driver's license.

## Apportionment

Guaranteeing an individual the right to vote does not necessarily mean that the voters in a particular district have the same voting strength as voters in another district. Since the 1960s, however, the implementation of the concept of one person, one vote has meant that unreasonable disparities in voting strength have been eliminated. Nevertheless, racially discriminatory dilutions of voting strength have led the federal courts to become intimately involved in the drawing of election districts.

**One Person, One Vote** The Supreme Court, in REYNOLDS V. SIMS, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), established the principle of "one person, one vote" based on the EQUAL PROTECTION Clause of the Fourteenth Amendment. The decision resulted in almost every state's redrawing its legislative districts and in the shifting of power from rural to urban areas. All subsequent CONSTITUTIONAL LAW on APPORTIONMENT has relied on the principles established in *Reynolds.*

Until the *Reynolds* decision, most state legislatures gave more seats to sparsely populated rural areas than to heavily populated urban areas. Because rural legislators controlled the legislature and had a vested interest in perpetuating this apportionment scheme, legislative change had proved impossible. In *Reynolds* the Supreme Court concluded that to permit the minority to have power over the majority would be a violation of the Equal Protection Clause. The dilution of the weight of a person's vote because of where that person lives qualified as invidious discrimination, just as if the decision had been based on that person's race or financial status. Therefore, the Court required that "each citizen have an equally effective voice in the election of members of his state legislature."

**Racially Discriminatory Apportionment** The Voting Rights Act of 1965 gave the courts the right to review racially discriminatory election districts. The federal courts have struck down at-large elections, in which a number of officials are chosen to represent the district, as opposed to an arrangement under which each of the officials represents one smaller district or ward. Southern cities where whites were in the majority used the at-large election system to perpetuate all-white rule. Courts have required the creation of smaller wards or districts that give African Americans and other protected groups a reasonable opportunity to elect a person of color to city council.

**Racial Gerrymandering** The courts have also tackled the issue of racial gerrymandering, which is the intentional manipulation of legislative districts for political purposes. In these cases, districts have been drawn in bizarre shapes to include or exclude voters of a particular race.

In early cases white politicians gerrymandered districts to prevent African Americans from having any voting strength. In the 1990s, the debate moved to the legitimacy of creating, under the authority of the Voting Rights Act of 1965, unusually shaped congressional districts to ensure that they contained a majority of minority voters. The perceived hope was that minority unity would lead to the elections of persons of color. The Supreme Court, in SHAW V. HUNT, 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996), ruled that the redrawing of a North Carolina congressional district into a "bizarre-looking" shape in order to include a majority of African Americans could not be justified by the Voting Rights Act of 1965, because it violated the Equal Protection Clause of the Fourteenth Amendment. Justice SANDRA DAY O'CONNOR found it "unsettling how closely the North Carolina plan resembles the most egregious racial gerrymandering of the past." O'Connor agreed that prior cases had never made race-conscious redistricting "impermissible in all circumstances," yet agreed with the white plaintiffs that the redistricting was "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."

The Supreme Court continued its review of allegedly racially gerrymandered districts in *Abrams v. Johnson,* 521 U.S. 74, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997). The Court upheld a legislative redistricting plan that reduced from three to one the number of majority-black congressional districts in Georgia. The Court sup-

ported the district court's decision not to preserve three majority-black districts because the area's African American population was not sufficiently compact to sustain three, or even two, districts. According to the ruling, drawing multiple districts would have resulted in racial gerrymandering. The Court also ruled that the plan's creation of only one majority-black district would not violate the Voting Rights Act by causing retrogression in the political position of African American citizens. It noted that in the 1992 elections, held under the challenged plan, all three African American incumbents won reelection, two of whom while running against white candidates from majority-white districts. This confirmed for the Court that the plan was not discriminatory.

In *Reno v. Bossier Parish School Board,* 528 U.S. 320, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000), the Supreme Court effectively resolved the relationship between Sections 2 and 5 of the Voting Rights Act. Section 2 applies to all 50 states, while Section 5 applies to seven southern states (including Louisiana) that had used poll taxes, literacy tests, and other devices to obstruct registration by African Americans. The Court ruled that a redistricting plan may be precleared under Section 5, even if the proposed plan might seemingly violate Section 2. As a result, the Court reversed 25 years of federal policy by limiting the power of the Justice Department to block proposed redistricting changes for state and local elections.

African American citizens of Bossier Parish, Louisiana, objected to a redistricting plan drawn up by the Bossier Parish School Board, which had been precleared under Section 5 by the Justice Department. They argued that Section 2 barred the plan because it denied the creation of several majority-black districts. When it was supplied with evidence of possible discrimination and an alternative redistricting plan by the National Association for the Advancement of Colored People (NAACP), the Justice Department moved to block the original preclearance. The school board challenged the decision before the Supreme Court. The Supreme Court held that Section 5 was intended by Congress to prevent backsliding by states that had a history of past voter discrimination. As long as the new plan did not increase the degree of discrimination (which they felt it did not), it was not retrogressive, and therefore was entitled to Section 5 preclearance.

**National Voter Turnout in Presidential Elections, 1960 to 2000**

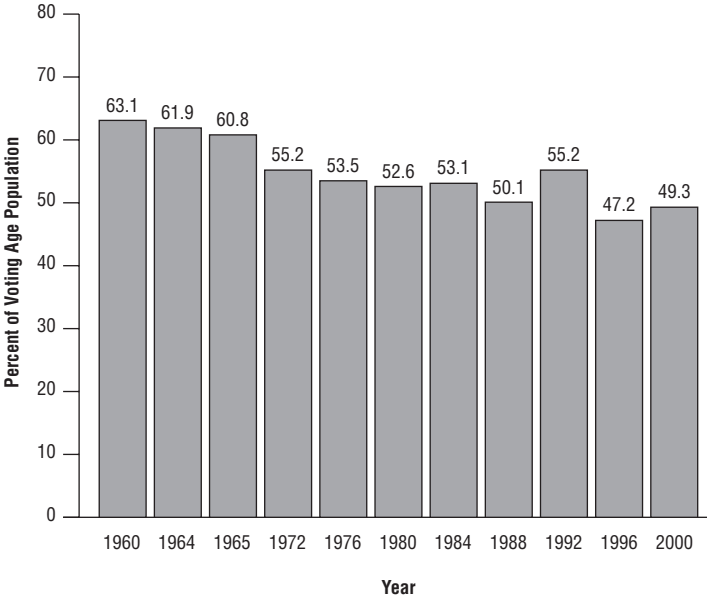


SOURCE: International Institute for Democracy and Electoral Assistance web page.

## Voting Procedures

The passage of the federal motor voter law eliminated restrictive voter registration requirements. A person may now register when applying for a state driver's license. In addition, a person may register at the polling place in his voting district by showing a state driver's license and having two witnesses vouch for him. Persons who are not able to vote at a polling place on election day may apply for an absentee ballot and vote ahead of time. These ballots are not opened until after the polls close on election day.

Since 1884, the United States has used the secret ballot. Originally paper ballots were used, but in many areas of the United States mechanical voting machines are employed. Voting systems are also in place in which a machine optically scans a paper ballot and tabulates the votes for each office. Enhanced technology has allowed quicker reporting of results and fewer arithmetical errors. Nevertheless, candidates may ask for a recount of the ballots, and in circumstances where the vote is very close or where FRAUD is alleged, each ballot is examined for accuracy and compliance with the law. The 2000 presidential election results in the state of

Florida provided a vivid lesson in the complications that can arise from poor ballot design.

Generally the results of each election race are reported to a local board, which certifies the result to the state's SECRETARY OF STATE. The secretary, in turn, reviews the results and issues an official certificate of election to the successful candidate.

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CROSS-REFERENCES

Absentee Voting; *Baker v. Carr*; Civil Rights; Equal Protection; Gerrymander; Independent Parties; Republican Party; "Voting Rights Act of 1965" (Appendix, Primary Document); Women's Rights.

*African Americans line up to cast their votes during 1966 elections in Alabama. Before the Voting Rights Act of 1965 was passed, very few African Americans in the South were allowed to vote.* FLIP SCHULKE/CORBIS

## VOTING RIGHTS ACT OF 1965

The Voting Rights Act of 1965 (42 U.S.C.A. § 1973 et seq.) prohibits the states and their political subdivisions from imposing voting qualifications or prerequisites to voting, or standards, practices, or procedures that deny or curtail the right of a U.S. citizen to vote because of race, color, or membership in a language minority group. A product of the CIVIL RIGHTS MOVEMENT of the 1960s, the Voting Rights Act has proven to be an effective, but controversial, piece of legislation. The act was extended in 1970 and again in 1982, when its provisions were renewed for an additional twenty-five years.

In the early 1960s very few African Americans in the South were allowed to vote. Southern states used literacy tests and physical and economic coercion to prevent African Americans from registering to vote. The state legal system supported these practices, leaving African Americans and other minority groups with few options to challenge voting discrimination. CIVIL RIGHTS leaders organized public protests and voter registration drives, but met intense resistance from local authorities.

A 1965 march to Selma, Alabama, by Dr. MARTIN LUTHER KING JR. and other civil rights supporters to demand voting rights led to police violence and the murder of several marchers. The Selma violence galvanized voting rights supporters in Congress. President LYNDON B. JOHNSON responded by introducing the Voting Rights Act, the toughest civil rights law in one hundred years. Congress enacted the measure five months later.

Congress based its authority to regulate voting practices on the FIFTEENTH AMENDMENT to the U.S. Constitution, which gives all citizens the right to vote regardless of race, color, or previous condition of servitude. The passage of the act ended the traditional practice of allowing states to handle all matters concerning voting and elections. The Voting Rights Act is premised on the active participation of the U.S. JUSTICE DEPARTMENT and the federal courts. Southern states challenged the legislation as a dangerous attack on STATES' RIGHTS, but the U.S. Supreme Court, in *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966), upheld the constitutionality of the act, despite the fact that the law was, in the words of Chief Justice EARL WARREN, "inventive."

The original act was directed at seven southern states—Alabama, Georgia, Louisiana, Mis-

sissippi, North Carolina, South Carolina, and Virginia—which had used POLL TAXES, literacy tests, and other devices to obstruct registration by African Americans.

Under the law, a federal court can appoint federal examiners, who are authorized to place qualified persons on the list of eligible voters. The act waived accumulated poll taxes and abolished literacy tests and similar devices in those areas to which the statute applied. It required that bilingual election materials be made available in areas where more than five percent of the citizens are members of a single-language minority.

The act also required the seven states to obtain "preclearance" from the Justice Department or the U.S. District Court for the District of Columbia before making changes in the electoral system. The state has the burden of proving that the proposed changes do not have the purpose or effect of "denying or abridging the right to vote on account of race or color." The Supreme Court has liberally construed this provision to require approval of even inconsequential alterations. As a result, relocation of polling sites, changes in ballot forms, reapportionment of election districts, municipal annexations, and revision of rules pertaining to the qualifications of candidates and the appointive or elective nature of the office fall within the ambit of federal supervision. If a modification of the election law, such as redistricting, has the purpose or effect of denying or curtailing the right to vote on the basis of race, it may be held to violate the Voting Rights Act. The 1982 extension of the act revised this provision, extending it to all states. This means that a voter may challenge a voting practice or procedure on the ground that it is racially discriminatory either by intent or by effect.

The most controversial issue for the courts has been whether voting districts can be redrawn to facilitate the election of racial minorities. The lower federal courts had approved such reapportionment plans, but the Supreme Court dealt a severe blow to these attempts in SHAW V. HUNT, 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996). In *Shaw* the Court ruled that the redrawing of a North Carolina congressional district into a "bizarre-looking" shape so as to include a majority of African Americans could not be justified by the Voting Rights Act, because it violated the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT.

The Voting Rights Act has proven effective in breaking down discriminatory barriers to voting. Enforcement of the act in the South resulted in substantially higher levels of voter registration among African Americans. Many politicians who formerly made overt appeals to white supremacy tempered their racist rhetoric to draw support from new black voters. In addition, many African Americans have been elected to public office in areas where whites had ruled exclusively.

FURTHER READINGS

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CROSS-REFERENCES

Civil Rights Movement; Gerrymander; Voting; "Voting Rights Act of 1965" (Appendix, Primary Document).

## VOTING TRUST

*A type of agreement by which two or more individuals who own corporate stock that carries* VOTING RIGHTS *transfer their shares to another party for voting purposes, so as to control corporate affairs.*

A voting trust is created by an agreement between a group of stockholders and the trustee to whom they transfer their voting rights or by a group of identical agreements between individual shareholders and a common trustee. Such agreements ordinarily provide that control of stock is given to the trustee for a term of years, for a time period contingent upon a certain event, or until the termination of the agreement. Voting trust agreements may provide that the stockholders can direct how the stock is to be voted.

## VOUCHEE

*Under a procedure in common law, a person from whom a defendant will seek indemnity if a plaintiff is successful in his or her action against the defendant.*

*A sample voting trust agreement*

**Voting Trust Agreement**

An agreement made this _____ day of _____, (year)___, between stockholders of _____ Corporation a Corporation organized under the laws of _____, whose names are hereunto subscribed and all other stockholders of the said company who shall join in and become parties to this agreement as hereinafter provided, all of which stockholders are hereinafter called subscribers, and, _____ who is hereinafter called the trustee(s):

Whereas, the subscribers are respectively owners of shares of common stock in the Corporation and the amounts set out opposite their signatures hereto;

And whereas, with a view to the safe and competent management of the Corporation, in the interest of all the stockholders thereof, the subscribers are desirous of creating a trust in the following manner;

Now, it is hereby agreed and declared as follows:

1. The subscribers shall forthwith endorse, assign, and deliver to the trustee(s) the certificates representing the shares of stock owned by them respectively, and shall do all things necessary for the transfer of their respective shares to the trustee(s) on the books of the Corporation.

2. Every other stockholder in the corporation may become a party to this agreement by signing it and assigning and delivering the certificate(s) of his or her shares to the trustee(s).

3. The trustee(s) shall hold the shares of stock transferred to them, under the terms and conditions hereinafter set forth.

4. The trustee(s) shall surrender to the proper officer of the Corporation the certificates of the subscribers, and shall receive for them new certificates issued to them as trustee(s) under this agreement.

5. The trustee(s) shall issue to each of the subscribers a trust certificate for the number of shares transferred by the subscriber to the trustees. Each trust certificate shall state that it is issued under this agreement, and shall set forth each subscriber's proportional interest in the trust. The trustee(s) shall keep a list of the shares of stock transferred to them, and shall keep a record of all trust certificates issued or transferred on their books, which records shall contain the names and addresses of the trust certificate holders and the number of shares represented by each trust certificate. Such list and record shall be open at all reasonable times to the inspection of the trust certificate holders.

6. It shall be the duty of the trustee(s), and they, or a majority of them, shall have the power to represent the holders of such trust certificates and the stock transferred to the trustee(s) as aforesaid, and vote upon such stock, as in the judgment of the trustee(s), or of a majority of them, may be for the best interest of the Corporation, in the election of directors and upon any and all matters and questions which may be brought before them, as fully as any stockholder might do.

7. The trustee(s) shall collect and receive all dividends that may accrue upon the shares of stock subject to this trust, and shall pay the same to the trust certificate holders in proportion to the number of shares respectively represented by their trust certificates.

8. The trustee(s) shall be entitled to be fully indemnified out of the dividends coming into their hands for all costs, changes, expenses, and other liabilities properly incurred by them in the exercise of any power conferred upon them by this agreement; and the subscribers hereby covenant with the trustee(s) that in the event of the monies and securities in their hands being insufficient for that purpose, the subscribers and each of them will, in proportion to the amounts of their respective shares and interests, indemnify the trustee(s) of and from all loss or damage which they may sustain or be put to, by reason of anything they may lawfully do in the execution of this trust.

9. In the event that the holder of any trust certificate shall desire to sell or pledge his or her beneficial interest in the shares of stock represented thereby, he or she shall first give to the trustee(s) notice in writing of such desire, and the trustee(s) shall have the right to purchase the trust certificates at the book value of the stock represented by such certificates at the time of such purchase. If the trustee(s) shall exercise such option to purchase, they shall hold the beneficial interest thereof for the benefit of all the remaining trust certificate holders who shall, upon days' notice given by the trustee(s) before exercising such option, contribute their respective proportionate share of the purchase money to be paid by the trustee(s). In the event that the trustee(s) shall not exercise such option to purchase the subscriber's interest, and only in that event, the holder of such trust certificate shall have the right to sell the same to such person and for such price as he or she sees fit.

10. In the event of any trustee dying, resigning, refusing, or becoming unable to act, the surviving or other trustee(s), if any, shall appoint a trustee or trustees to fill the vacancy or vacancies, and any person so appointed shall thereupon be vested with all the duties, powers, and authority of a trustee as if originally named herein.

11. This trust shall continue for _____ years from the date hereof, and shall then terminate, provided, however, that the beneficial owners of _____% of the shares of stock subject to this agreement may at any time terminate this trust by resolution adopted at a meeting of the trust certificate holders called by any one of them, upon notice of _____ days, stating the purpose of such meeting, in writing, mailed to the trust certificate holders at their respective addresses as they appear in the records of the trustee(s). Upon the termination of the trust, the trustee(s) shall, upon the surrender of the trust certificates by the respective holders thereof, assign and transfer to them the number of shares of stock thereby represented.

[continued]

**Voting Trust Agreement**

IN WITNESS WHEREOF, the individual parties hereto set their hands and seals, and the corporation has caused this agreement to be signed by its duly authorized officers.

ATTEST:

_____ _____ CORPORATION Secretary

_____

President

_____ _____

Shareholder Shareholder

Name of Trustee(s) _____

*A sample voting trust agreement (continued)*

## VOUCHER

*A receipt or release which provides evidence of payment or other discharge of a debt, often for purposes of reimbursement, or attests to the accuracy of the accounts.*

Government or corporate employees usually submit vouchers to their employers to recover living expenses they have paid while on business trips.

## VOUCHING-IN

*A procedural device used in common law by which a defendant notifies another, not presently a party to a lawsuit, that if a plaintiff is successful, the defendant will seek indemnity from that individual.*

The notice that an individual, the vouchee, receives as a result of vouching-in constitutes an offer for him or her to defend in the action against the defendant. If the vouchee refuses to do so, he or she will be bound in any later actions between the plaintiff and the defendant involving factual determinations necessary to the original judgment.

Although vouching-in has been largely replaced by third-party practice, called IMPLEADER, under Rule 14 of the Federal Rules of CIVIL PROCEDURE, it has not been abolished.

## WADSET

*In Scotland, the ancient term for a mortgage. A right by which lands or other property are pledged by their owner to a creditor in security for a debt, usually in the form of a mutual contract, in which one party sells the land and the other grants the right of reversion.*

## WAGE ASSIGNMENT

*The voluntary transfer in advance of a debtor's pay, generally in connection with a particular debt or judgment.*

A debtor may negotiate with a creditor a wage assignment plan in which a portion of the debtor's paycheck is transferred to the creditor by the employer. This voluntary agreement is in contrast to GARNISHMENT, in which a creditor obtains an order from the court to collect part of a debtor's wages from the employer. Both wage assignments and garnishment are governed by statutes in most states.

A wage assignment is similar to an ASSIGNMENT FOR BENEFIT OF CREDITORS, in which the debtor assigns PERSONAL PROPERTY to a trustee. Typically, the trustee sells the property and applies the proceeds to the debt. Any amount in excess of the debt is returned to the debtor.

Since the 1980s wage assignments have become an important method of making CHILD SUPPORT payments in the United States. In 1984 the federal government required all states to implement child support guidelines for WELFARE recipients. As time passed, those guidelines were implemented across the board in all cases involving child support. While a wage assignment has typically been viewed as a VOLUNTARY ACT by the assignee, courts now issue wage assignment orders directing employers to withhold child support payments and send the funds to a designated recipient such as a custodial parent, the court, or a state agency.

Although the paying parent may be a responsible individual who would never miss a payment, and the recipient parent may honestly report all payments received, the wage assignment eliminates potential conflict by using a neutral third party to implement the paying and reporting of payments. Employers generally do not impute bad character to an employee paying child support through a wage assignment, and the courts routinely issue orders without finding fault. Wage assignment orders are appropriate for salaried employees but do not work effectively for self-employed individuals or people in cash businesses.

A wage assignment may also be used when an employee obtains a loan from his employer and wants to repay the loan by having the employer withhold money from future paychecks. An employer who lends an employee a sum of money cannot take it out of the employee's next paycheck without a proper, written, notarized assignment from the employee. State statutes require that legal formalities be followed, or the withholding of

money can be considered an unlawful assignment of wages.

## WAGE EARNER'S PLAN

*A form of* BANKRUPTCY *under a former federal law whereby an individual retained her property and paid off a debt over a period of time, as determined by a court and subject to supervision by the court.*

Under Chapter Thirteen of the federal bankruptcy statutes (11 U.S.C.A. § 1301 et seq.), individuals who are unable to repay their debts when due may develop a plan for full or partial repayment. This procedure was formerly called a wage earner's plan because it was available only to persons who earned a regular wage. Changes in the statute now permit the owners of unincorporated small businesses to participate in this procedure, which is now known as either a Chapter Thirteen proceeding or a rehabilitation. A rehabilitation process enables the debtor to regain good credit and financial standing.

To qualify, an individual must have unsecured debts (those not backed by collateral to guarantee their repayment) of less than $100,000 and secured debts (backed by collateral) of less than $350,000. A debtor files a Chapter Thirteen petition listing all of his debts. Upon the filing, the debtor's creditors must suspend their efforts to collect or enforce their claims, pending the outcome of the proceeding.

The debtor has the exclusive right to propose a plan for repayment to the bankruptcy court. No matter how many creditors may exist, they cannot force a plan upon the debtor. A Chapter Thirteen petition might include a repayment plan that lasts five years and lists wage earnings and the sale of a portion of the debtor's property as sources for the repayment. The plan, which is overseen by a bankruptcy trustee, must treat all creditors who have comparable claims equally. The repayment plan may entail paying off only a portion of each debt, which is called a composition; receiving extra time to pay the debts, called an extension; or both.

The debtor's plan can be approved only by the court, unlike a Chapter Eleven reorganization plan, which requires both acceptance by the creditors and confirmation by the court. After the debtor has completed payments pursuant to the plan, she is discharged from liability. A Chapter Thirteen plan does not, however, relieve a debtor from liability for ALIMONY and CHILD SUPPORT, federal student loans, and taxes.

CROSS-REFERENCES

Composition with Creditors.

## WAGER OF BATTEL

*A type of trial by combat between accuser and accused that was introduced into England by William the Conqueror (King William I) and his Norman followers after the Norman Conquest of 1066.*

Wager of battel was founded on the belief that God would give victory to the party who was in the right. The kings maintained control over the practice, and it came to be reserved for cases affecting royal interests, such as serious criminal cases or disputes over land.

King William and his successors had distributed much land to their loyal supporters, but a century after the conquest it was impossible to produce witnesses who had seen the symbolic delivery of a clod of dirt or a twig representing title to the land. A party could, therefore, hire someone, a champion, to swear that the champion's father had told him on his deathbed that the party was the true owner of the land. The other party also produced a champion who swore just the opposite. The defendant's champion came forward and threw down his glove as a pledge. The plaintiff's champion accepted the challenge by picking up the glove, and the two waged battle or set a time to do so. The winner was held to have good title to the land. It was said that many monasteries, which owned vast tracts of land, had virtual stables of champions in waiting to settle disputes that might arise.

In the early twelfth century King Henry I specifically recognized the right to defend by battel, but the party accused might elect wager of battel or trial by jury. If he chose the wager of battel, he answered the charge before the court by saying that he would be tried by God; if he chose a trial by jury, his plea was that he would be tried by the country. The last demand for wager of battel occurred in 1818. The practice was abolished by statute during the reign of George III (1760–1820).

CROSS-REFERENCES

Feudalism.

## WAGER OF LAW

*A procedure for defending oneself that could be used in a trial before one of the ancient courts of England.*

A defendant who elected to "make his law" was permitted to make a statement before the tribunal, swear an oath that it was true, and present one or more individuals who swore that they believed he had told the truth under oath. This was the predominant form of defense in the feudal courts, and it persisted for a time in the common-law courts.

It had originated in Anglo-Saxon England in the ties of kinship that bound people together in the period before the year 1000, a time when each man was responsible for the acts of his blood relatives. Later, kinship gave way to a more tribal affiliation and a loyalty to the place of one's birth. When disputes more often than not led to violence, it seemed natural that neighbors would band together. They aligned themselves with a neighbor who was accused in court and swore that in good conscience they believed he was telling the truth. The number of oath-helpers required depended on the defendant's rank and the character of the lawsuit. Eventually it became standard practice to bring eleven neighbors into court to swear for the defendant. The oathhelpers were called compurgators, and the wager of law was called *compurgation.*

As the kings consolidated their power, suppressing violence and increasing the authority of the courts, the wager of law lost some of its ancient power and became a NUISANCE to litigants, who suspected that it frequently opened the door to false swearing. Different FORMS OF ACTION developed that did not permit the wager of law as a defense, and plaintiffs used them as much as possible. The procedure of wager of law had long since been obsolete when it was abolished during the reign of Henry IV (1399–1413).

CROSS-REFERENCES

Feudalism; Henry II of England.

## WAGNER ACT

The Wagner Act, also known as the National Labor Relations Act of 1935 (29 U.S.C.A. § 151 et seq.), is the most important piece of labor legislation enacted in U.S. history. It made the federal government the arbiter of employer-employee relations through the creation of the NATIONAL LABOR RELATIONS BOARD (NLRB) and recognized for the first time the right of workers to organize and bargain collectively with their employers. The act overturned decades of court decisions that asserted that LABOR UNIONS violated an employee's liberty of contract.

Senator ROBERT F. WAGNER, a Democrat from New York, introduced the legislation in 1935, when the United States was in the midst of the Great Depression. President FRANKLIN D. ROOSEVELT initially opposed the legislation out of fear that labor organizing might interfere with economic recovery, but gave his support when passage became inevitable.

Congress based its right to pass national labor-management legislation on the U.S. Constitution's COMMERCE CLAUSE. The act states that unequal bargaining power between employees and employers leads to economic instability, whereas the refusal of employers to recognize the right to bargain collectively leads to strikes. Because these disturbances impede the flow of interstate commerce, Congress may take steps to continue the free flow of commerce by encouraging COLLECTIVE BARGAINING and unionizing.

The Wagner Act established the rights of employees to organize, join, or aid labor unions and to participate in collective bargaining through their representatives. The act also authorized unions to take "concerted action" for these purposes. This meant that workers could lawfully strike and take other peaceful action as a way of placing pressure on an employer. This provision was coupled with another that prohibited employers from engaging in UNFAIR LABOR PRACTICES that interfere with the union rights of employees. Unfair labor practices include prohibiting employees from joining unions, firing employees because of their union membership, or establishing a company-dominated union. In addition to requiring employers to bargain collectively with the union duly selected by the employees, the act set up procedures for establishing appropriate bargaining units (homogeneous groups of employees) where employees can elect a bargaining agent (a representative for labor negotiations) by a secret ballot.

The act also created the NLRB, a federal ADMINISTRATIVE AGENCY, to administer and enforce its unfair labor practice and representation provisions. The NLRB hears cases involving unfair labor practices and makes decisions that the federal courts of appeals may review.

At the time of its enactment, some observers doubted that the Wagner Act would be found constitutional by the U.S. Supreme Court. The Court had struck down numerous NEW DEAL statutes on the basis that business and LABOR LAWS were matters that should be left to the marketplace or to state legislatures. In NLRB V. JONES & LAUGHLIN STEEL CORP., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937), however, the Court reversed course and held that the Wagner Act was constitutional.

The Wagner Act was one of the most dramatic legislative measures of the New Deal. Not only did the legislation indicate that the federal government was prepared to move against employers to enforce the rights of labor to unionize and to bargain collectively, but it imposed no reciprocal obligations on unions.

The law was amended by the TAFT-HARTLEY ACT of 1947, also known as the Labor Management Relations Act (29 U.S.C.A. § 141 et seq.), which balanced some of the advantages given to unions under the Wagner Act by imposing corresponding duties upon unions to deal fairly with management. The act was further modified by the LANDRUM-GRIFFIN ACT of 1959 (29 U.S.C.A. § 401 et seq.), which sought to end abuses of power by union officials in handling union funds and internal affairs.

FURTHER READINGS

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CROSS-REFERENCES

Labor Law; Labor Union.

## ♦ WAGNER, ROBERT FERDINAND

Robert Ferdinand Wagner served as a U.S. senator from New York from 1927 to 1949. Wagner was a strong believer in the social WELFARE state and sponsored many federal laws that have shaped U.S. law and society. In the 1930s he worked closely with President FRANKLIN D. ROOSEVELT and helped to implement much of Roosevelt's NEW DEAL agenda.

Wagner was born on June 8, 1877, in Nastätten, Germany. With his family he immigrated to the United States in 1885, settling in a New York City tenement neighborhood. He graduated from City College in New York in 1898 and studied law at New York Law School, where he earned his degree in 1900.

Wagner was admitted to the New York bar in 1900 and practiced law on his own for a short time. He then abandoned his law practice to enter DEMOCRATIC PARTY politics. Wagner worked his way up the party ladder and won a seat in the state legislature in 1904. In 1908 he was elected to the New York State Senate, where he soon established himself as a socially progressive leader, investigating industrial working conditions and introducing legislation that sought to use the power of government to improve the lives of blue-collar workers and the poor.

Wagner became a judge of the New York Supreme Court in 1919 but resigned in 1926 to run as the Democratic Party candidate for the U.S. Senate. He won the election and took office in 1927 during the heyday of the "Roaring Twenties." The U.S. economy was at its postwar zenith, and the REPUBLICAN PARTY controlled Congress. Wagner introduced legislation to help organized labor and the unemployed, but his proposals were unsuccessful.

Wagner's political fortunes changed dramatically with the Great Depression of the 1930s

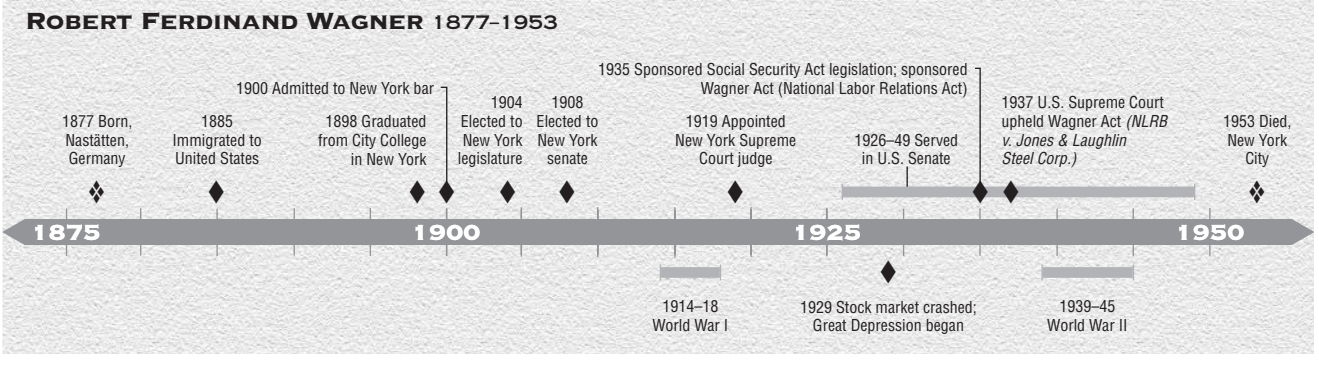

*Robert F. Wagner.* UPI/CORBIS-BETTMANN

and the election of President Roosevelt in 1932. Like Wagner, Roosevelt believed that the federal government needed to play a larger role in the activities of the national economy and in the lives of U.S. citizens. Wagner helped draft and sponsor the **NATIONAL INDUSTRIAL RECOVERY ACT** (NIRA) of 1933 (48 Stat. 195), which established the **NATIONAL RECOVERY ADMINISTRATION** to administer codes of fair practice within each industry. Under these codes, labor and management negotiated minimum wages, maximum hours, and fair trade practices for each industry. The Roosevelt administration sought to use these codes to stabilize production, raise prices, and protect labor and consumers. In **SCHECHTER POULTRY CORP. V. UNITED STATES**, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935), however, the U.S. Supreme Court invalidated the NIRA.

Wagner also sponsored the **SOCIAL SECURITY ACT** (42 U.S.C.A. § 301 et seq.), the bedrock of U.S. social welfare law. He is best remembered for the **WAGNER ACT**, also known as the National Labor Relations Act of 1935 (29 U.S.C.A. § 151 et seq.). The Wagner Act recognized for the first time the right of workers to organize unions and to collectively bargain with employers. The statute also established the **NATIONAL LABOR RELATIONS BOARD** to enforce labor-management relations in the United States.

Wagner sponsored numerous New Deal programs, including the Civilian Conservation Corps, the Federal Emergency Relief Administration, and the U.S. Housing Authority, which provided loans for low-cost public housing. When **WORLD WAR II** began, the country's attention shifted to international issues, and Wagner's social welfare agenda fell out of favor. He lobbied unsuccessfully for a **NATIONAL HEALTH CARE** system and for antilynching legislation.

Wagner resigned from the Senate for health reasons in 1949. He died on May 5, 1953, in New York City. In 1954 his son, Robert F. Wagner Jr., was elected mayor of New York City and served until 1965.

## WAIT-AND-SEE DOCTRINE

*A rule that permits consideration of events occurring subsequent to the inception of an instrument that pertains to the vesting of a future interest. If the specified contingency on which the creation of the interest depends actually occurs within the period of the* **RULE AGAINST PERPETUITIES**, *the interest is legally enforceable.*

Under the **COMMON LAW**, the Rule Against Perpetuities provides that no interest in property is valid unless it becomes fixed, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest. The period of gestation is included to cover cases of posthumous birth. A property interest vests when it is given to a person in being, and when the interest is not subject to a condition precedent. The courts developed the Rule Against Perpetuities during the seventeenth century in order to restrict a person's power to control the ownership and possession of his or her property after his or her death, and to ensure the transferability of property.

In order to mitigate the harshness of the Rule Against Perpetuities, some states have embodied the wait-and-see doctrine in statutes. The general concept of wait-and-see is that a perpetuity violation should occur only if an interest actually fails to vest within the perpetuity period. In contrast to the traditional view, which prescribes that the situation is examined as it exists when the interests are created, thereby invalidating the interests if a possibility exists that they will fail to vest in due time, one must wait and see whether, in fact, the possibility turns out to be an actuality.

"IT IS SIMPLY ABSURD TO SAY THAT AN INDIVIDUAL, ONE OF 10,000 WORKERS, IS ON AN EQUALITY WITH HIS EMPLOYER IN BARGAINING FOR HIS WAGES."
—ROBERT F. WAGNER

The wait-and-see doctrine is also deemed to be an extension of the SECOND LOOK DOCTRINE.

CROSS-REFERENCES

Estate.

## ♦ WAITE, MORRISON REMICK

Morrison Remick Waite served as chief justice of the U.S. Supreme Court from 1874 to 1888. Waite's rise to national prominence came unexpectedly. Although a distinguished lawyer in Ohio, he had never argued before the Supreme Court. Nevertheless, in 1871 he was asked to represent the United States in post–Civil War claims against Great Britain, and his success brought him widespread acclaim. On the strength of this reputation, President ULYSSES S. GRANT nominated Waite to lead the U.S. Supreme Court. His performance there, however, never won him the same praise. Waite's business decisions provoked the ire of powerful interests, and twentieth-century critics have condemned his limited view of CIVIL RIGHTS.

Born on November 29, 1816, in Lyme, Connecticut, Waite was the son of a successful attorney and jurist who was the state court's chief justice. Educated at Yale University, Waite graduated in 1837, studied law under his father, and then was admitted to the Ohio bar in 1839. Over the next decade, he split his time between legal practice and politics. He was elected to the Ohio legislature in 1849 as a member of the WHIG PARTY, and later helped to form the state's branch of the REPUBLICAN PARTY.

"FOR PROTECTION AGAINST ABUSERS BY LEGISLATURES THE PEOPLE MUST RESORT TO THE POLLS, NOT TO THE COURTS."
—MORRISON R. WAITE

By the late 1800s, Waite was quite successful. He had built two law firms and enjoyed prominence within Ohio. Yet because he had no significant national reputation, he was surprised when, in 1871, he was chosen for a task of national importance: representing the United States in its post–Civil War ARBITRATION with Great Britain, better known as the *Alabama* claims. The United States charged that Great Britain had aided the Confederacy by supplying warships during the U.S. CIVIL WAR, and it sought to recover damages at the 1871 Geneva Arbitration Council. Waite and his two colleagues succeeded spectacularly, winning a $15 million settlement. At home, they were showered with acclaim. Two years later, Waite added to his growing reputation by serving as president of the Ohio Constitutional Convention.

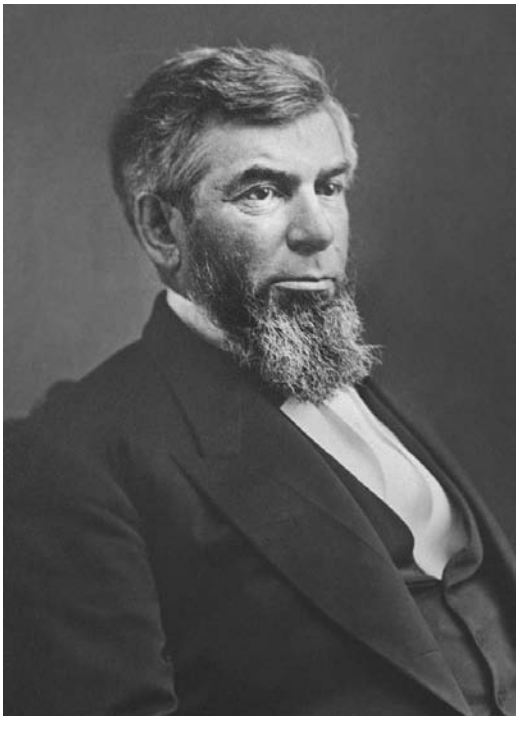

*Morrison R. Waite.* LIBRARY OF CONGRESS

Upon the sudden death of Chief Justice SALMON P. CHASE, President Grant looked unsuccessfully for a replacement before turning

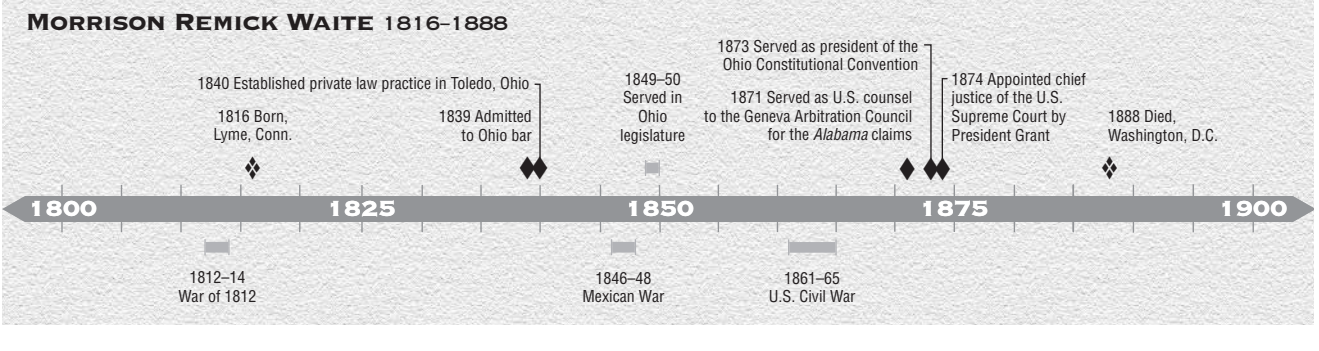

to Waite. Grant's administration had not fared well; choosing one of the heroes of the Geneva victory appeared fortuitous. Although Waite had no experience before the Supreme Court, he accepted the appointment and overcame long odds against success. His status as an outsider and the presence of a strong-minded group of associate justices did not deter him from administering the Court effectively.

In outlook, Waite was a supporter of STATES' RIGHTS. He usually favored state power to regulate business and determine civil rights. Yet both in his time and afterward, his decisions have drawn condemnation. In MUNN V. ILLINOIS, 94 U.S. 113, 24 L. Ed. 77 (1876), he upheld an Illinois law that imposed charges on the owners of grain elevators, asserting that such regulation was proper in areas "affected with a public interest." This position provoked fierce criticism from powerful business interests. Waite's reputation also suffered posthumously in the wake of the twentieth century's embrace of civil rights. His decision in *Minor v. Happersett,* 88 U.S. (21 Wall.) 162, 22 L. Ed. 627 (1874), allowed states to deny women the right to vote. Waite held that voting privileges were a right of U.S. citizenship and stated that the FOURTEENTH AMENDMENT to the U.S. Constitution did not confer additional PRIVILEGES AND IMMUNITIES upon citizens.

In *United States v. Cruikshank,* 92 U.S. 542, 23 L. Ed. 588 (1875), Waite set aside the convictions of white men who had taken part in the killing of more than one hundred black men in the 1873 Colfax Massacre, which followed a disputed election. Always concerned about the encroachment of federal power, Waite ruled that their indictment under federal law was faulty; such cases, he said, belonged in state courts. But state courts in the post–Civil War South were unlikely to prosecute such cases, and rather than leading to prosecutions, the decision only encouraged more bloodshed while dealing a blow to Congress's plan for Reconstruction in the South.

In appraising Waite's JURISPRUDENCE, twentieth-century critics have been harsh. They have criticized his narrow interpretation of the Fourteenth Amendment as a repudiation of the intent of the amendment's framers. In defense, some observers have noted his valuation of state power to regulate the economy. He died on March 23, 1888, in Washington, D.C.

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## WAIVE

*To intentionally or voluntarily relinquish a known right or engage in conduct warranting an inference that a right has been surrendered.*

For example, an individual is said to waive the right to bring a tort action when he or she renounces the remedy provided by law for such a wrong.

## WAIVER

*The voluntary surrender of a known right; conduct supporting an inference that a particular right has been relinquished.*

The term *waiver* is used in many legal contexts. A waiver is essentially a unilateral act of one person that results in the surrender of a legal right. The legal right may be constitutional, statutory, or contractual, but the key issue for a court reviewing a claim of waiver is whether the person voluntarily gave up the right. If voluntarily surrendered, it is considered an express waiver.

In CRIMINAL LAW the PRIVILEGE AGAINST SELF-INCRIMINATION is guaranteed by the FIFTH AMENDMENT to the U.S. Constitution. The Supreme Court, in MIRANDA V. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), held that the police must inform arrested persons that they need not answer questions and that they may have an attorney present during questioning. These requirements are known as the *Miranda* warning. A criminal defendant may waive the right to remain silent and make a confession, but the law enforcement officials must demonstrate to the court that the waiver was the product of a free and deliberate choice rather than a decision based on intimidation, coercion, or deception. They must also convince the court that the defendant was fully aware of the rights being abandoned and the consequences that would result from the ABANDONMENT. Based on the totality of these circumstances, a court may conclude that the defendant waived his *Miranda* rights.

A waiver may be shown by a person's actions. For example, a criminal defendant waives the privilege against self-incrimination merely by going on the witness stand. Such an action is called an implied waiver.

In insurance law waiver is used in numerous contexts. For example, under the doctrine of waiver, if the insurer has knowledge of facts that would bar its primary liability for a policy it has written but proceeds to treat the policy as being in force, it will not be allowed to plead such facts in court to avoid its primary liability.

A waiver of premium clause is a provision in an insurance policy that permits the waiver of premium payments upon the disability of the insured. Commonly such waivers take effect only after a certain time of disability.

Various waiver provisions are inserted into contracts. The parties may agree to surrender a substantive right granted by statute, such as a limitation on the amount of property that may be exempted from debt collection, or a procedural right that requires a certain number of days notice before an action can be taken.

CROSS-REFERENCES

Custodial Interrogation.

## WAIVING TIME

*The process whereby an individual permits a court to take longer than usual in trying him or her on a criminal charge.*

## ❖ WALD, PATRICIA MCGOWAN

In July 1999, UNITED NATIONS Secretary-General Kofi Annan appointed Judge Patricia M. Wald to serve on the International Criminal Tribunal for the Former Yugoslavia (ICTY). Wald, who had served as a judge on the U.S. Court of Appeals for the District of Columbia for 20 years and as vice president of the American Law Institute for ten years, had the necessary background and experience to tackle the difficult task of determining the guilt or innocence of those accused of crimes committed during the war between Serbians and Croatians in the early 1990s.

Born Patricia McGowan on September 16, 1928, and raised in the manufacturing town of Torrington, Connecticut, Wald spent her summers working in the brass mills. Through this experience, she became involved in her first cause—the protection of working class people. Later, after graduating first in her class from Connecticut College for Women, she decided she could better help people if she obtained a law degree. She enrolled in Yale University's Law School. At a time when female law students were rare, she was among fewer than a dozen other women in her class.

After graduating from Yale in 1951, Wald accepted a clerkship with Judge JEROME N. FRANK of the U.S. Court of Appeals for the Second Circuit. She was the first female clerk in the circuit court. In 1952, she married Robert Wald, a U.S. Navy reservist stationed in Norfolk, Virginia, and moved to Washington, D.C., to be closer to her new husband. Wald went to work as an associate attorney with the firm of Arnold, Fortas, and Porter. She took leave of the firm in 1953, however, when she was eight-months pregnant. While the firm told her that she could return when she was ready, she chose to stay home to care for her child.

Ten years and four more children later, Wald returned to the practice of law. She quickly

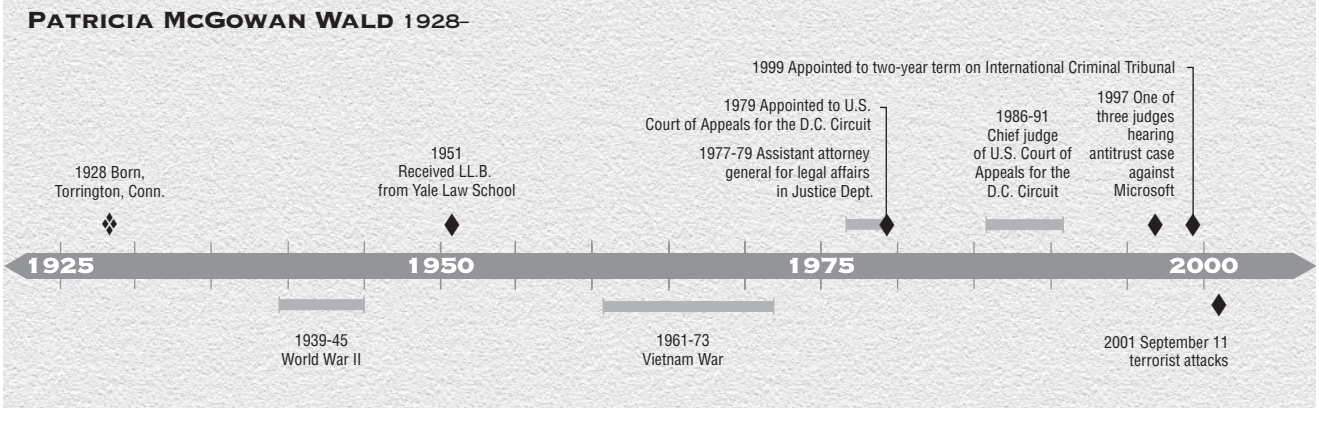

became involved in several research projects, including the Kerner Commission Report on the cause and prevention of violence, as well as the President's Commission on Crime in the District of Columbia. In 1963, Wald gave a presentation at the National Conference of Bail and Criminal Justice challenging the bail system of the time. She argued for additional factors to be considered in determining bail, apart from the mere ability of the accused to pay the amount set by the court. One factor Wald suggested was ties the accused had to the community. One year later, her ideas became a book, *Bail in the United States* (1964), and the bail system was reformed.

That same year, Wald became an attorney with the Justice Department's Office of Criminal Justice, but soon thereafter she left to join the innovative Neighborhood Legal Services Program in Washington, D.C. This position exposed her for the first time to litigation, which she would later say was helpful in making her a more understanding judge. In 1972, she became an attorney for the Mental Health Law Project where, between 1975 and 1977, she served as director.

In 1977, JIMMY CARTER took office as U.S. president and appointed Wald to the JUSTICE DEPARTMENT position of assistant attorney general for legal affairs. Only two years later, Wald made it to the top of President Carter's list again and was appointed to a judgeship on the U.S. Court of Appeals for the District of Columbia Circuit. She was the first woman to serve as a judge on a U.S. Court of Appeals. The D.C. Circuit is often referred to as the country's second-most important court—the SUPREME COURT OF THE UNITED STATES being the first—because it hears many issues of national importance due to its location in the nation's capital. Wald served as chief judge of the court between 1986 and 1991.

In 1997, Wald sat on a three-judge panel to hear part of the Justice Department's antitrust case against Microsoft. The panel was to review a lower court order that prohibited Microsoft from forcing computer makers to purchase the Microsoft Internet Explorer browser as a condition of buying Microsoft Windows, which was a necessary standard for most computers. Microsoft argued that the two products were integrated, therefore, they were not in violation of the order. The panel decided 2–1 in favor of Microsoft. Wald gave the dissenting opinion, arguing that the products were not integrated. Her opinion was later echoed by Judge Thomas Penfield Jackson, who ruled that Microsoft did indeed violate the ANTITRUST LAWS. By the end of her career on the court of appeals, Wald had authored more than 800 opinions.

In 1999, Judge Wald left the D.C. Circuit Court of Appeals to join the International Criminal Tribunal for the Former Yugoslavia. The tribunal was created by the United Nations in 1993 to judge those accused of crimes against humanity during the massacres in Croatia, Serbia, and Bosnia. This new position would entail her leaving behind her family and moving to The Hague, The Netherlands, in order to serve a two-year term on the bench. The position meant a great deal to Wald, however, because she had served for the past five years on the Executive Board of the American Bar Association's Central and Eastern European Law Initiative and had aided in the monitoring of elections and the creation of new constitutions in Eastern Europe.

The International Criminal Tribunal for the Former Yugoslavia is made up of 16 judges from various nations. The process is based on two legal systems: British COMMON LAW and European CIVIL LAW. There are two official languages: French and English. Wald faced a large and complex caseload, much of which involved such disturbing acts as murder, rape, and torture. In addition to presiding over trials, she sat in on a number of appeals including a reversal of the convictions of three Bosnian Croats due to a dearth of reliable evidence. In 2002, when Wald looked back on the work of the tribunal, she commented that despite the fact that there were several judges with diverse cultural backgrounds and languages, she generally was satisfied with the work that was accomplished during her two-year appointment.

In April 2002, because of her lifelong commitment to HUMAN RIGHTS, Judge Wald was honored by the International Human Rights Law Group. Wald continued her work as a human rights advocate into the 2000s, as a speaker and panelist, and serving on the steering committee of Human Rights Watch's Europe and Central Asia Division. She also is chair of the Open Society Justice Initiative, an international coalition that designs and implements legal initiatives to guarantee human rights in countries outside the United States.

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## ♦ WALLACE, GEORGE CORLEY

As the governor of Alabama and a presidential aspirant, George Corley Wallace did battle with the CIVIL RIGHTS MOVEMENT and defied federal efforts to desegregate schools in his state. His fight against school INTEGRATION pitted him against federal courts, troops, and the administration of President JOHN F. KENNEDY in a showdown over federal authority. Such stalwart convictions lionized Wallace in the hearts and minds of southerners and helped launch an increasingly successful national political career. While scoring victories in the 1972 Democratic presidential primaries, however, he was left partially paralyzed by gunshots from a would-be assassin—an incident that precipitated a political metamorphosis in Wallace. Though he failed to gain the presidency, he continued to serve the state of Alabama until 1987, when poor health forced him to leave the office after four terms and 17-and-a-half years.

"WE HAVEN'T BEEN AGAINST PEOPLE. WE'VE BEEN AGAINST BIG GOVERNMENT TRYING TO TAKE OVER AND WRITE A GUIDELINE FOR YOU AND TELL YOU HOW TO CROSS THE STREET, WHAT TO DO WITH YOUR UNION AND YOUR BUSINESS WHEN YOU KNOW HOW TO DO IT YOURSELF."
—GEORGE C. WALLACE

Wallace was born August 25, 1919, the first of four children of George Wallace Sr. and Mozelle Smith Wallace. Only a few hundred people lived in his birthplace, the small town of Clio, Alabama. His father weathered the Depression by leasing land to sharecroppers, although the family never had much money. Wallace was encouraged by his father in two areas: politics and boxing. At the age of 15, he became a page in the Alabama state legislature. A good student, athletic and popular, he finished high school as his senior class president. His punch served him well, too, and in 1936 and 1937, he won the Alabama Golden Gloves Championship.

In 1937, Wallace entered the University of Alabama, with only two shirts and the desire to have a career in politics. He took four jobs, finished his degree, and remained at the university to study law. He earned his law degree in 1942, and enlisted in the U.S. Army Air Corps for pilot training. Soon after, a near-fatal case of spinal meningitis ended his dreams of being a pilot, but in WORLD WAR II, he went to the Pacific as a flight engineer on a B-29 bomber called *The Sentimental Education.*

After the war, Wallace's political career quickly took off. His first appointment was as state assistant attorney general. Then, in 1946, at the age of 27, Wallace won election to the Alabama House of Representatives. He soon established a high profile, twice being voted an outstanding member of the house. Wallace sponsored a number of liberal bills. He supported legislation that provided SOCIAL SECURITY for county and municipal employees, created junior colleges and trade schools, and offered free tuition to the widows and children of men who had died at war.

Drawing on his name recognition as a legislator, Wallace ran for a judgeship in 1952, winning election to Alabama's Third Circuit Court.

In 1958, Wallace launched his first gubernatorial campaign. This election would be a turning point in his politics. Wallace's chief

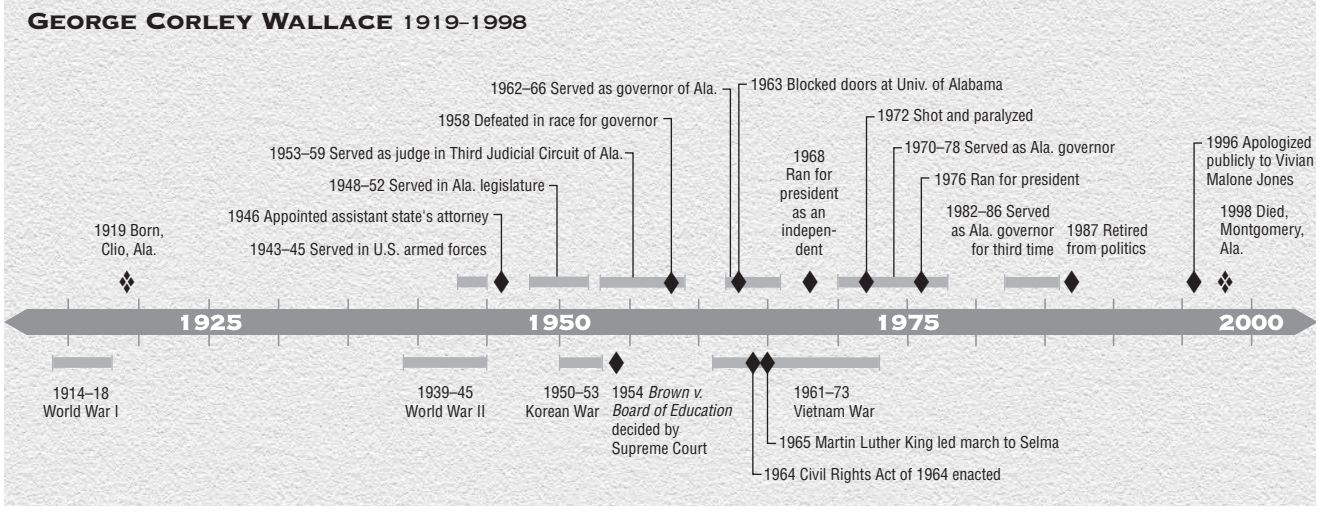

opponent in the Democratic primary was state attorney general John Patterson. Both candidates favored SEGREGATION, but Patterson's campaign had an edge: it was backed by the KU KLUX KLAN. When Wallace lost the election by nearly 65,000 votes, he vowed publicly never again to be "out-segged." After spending four years in private law practice with his brother Gerald, Wallace returned to politics in 1962 to run for governor again. This time, his opponent was former governor James Folsom. Wallace won the election and took office just as the CIVIL RIGHTS movement was gaining momentum.

Wallace and other segregationists were determined to keep the civil rights movement out of Alabama. When MARTIN LUTHER KING JR. and his fellow activists set out to integrate the city of Birmingham in 1963, violence met them repeatedly. Birmingham police officers unleashed water hoses, dogs, and clubs on the demonstrators and then Wallace dispatched the state troopers. Wearing steel helmets painted with Confederate flags, this force entered Birmingham with shotguns to crush the demonstration. Throughout the summer, while Ku Klux Klan members visited the governor's mansion to offer their services, there were bombings and shootings in Wallace's Alabama.

In the same year a federal judge ordered the University of Alabama to allow two black students to enroll. When Wallace vowed to prevent them from entering the university, U.S. attorney general ROBERT F. KENNEDY traveled to Alabama to warn him that the Kennedy administration would enforce the court's decree.

On June 11, 1963, Wallace, having advised citizens of Alabama to stay away from the university, stood at a podium before the school door. Attorney General Kennedy telephoned once more, only to be told that the governor was unavailable. As reporters, photographers, and police officers watched, Wallace held up his hand to prevent Vivian Malone and James Hood from entering. Then he holed himself up inside the school for four hours. Meanwhile, President Kennedy federalized the Alabama NATIONAL GUARD, which then moved in and forced Wallace to abandon his "schoolhouse stand" and admit the students.

In 1964, Wallace sought the Republican Party's presidential nomination. He did well in two early primaries, but the endorsement went to Senator BARRY M. GOLDWATER, of Arizona. Wallace ran again as an independent in 1968, with moderate success, and sought the Democratic nomination four years later. In this race, he swept aside challengers such as George S. McGovern, HUBERT H. HUMPHREY, and John V. Lindsay in the Florida primary. But he would not complete the race.

*George C. Wallace.*
LIBRARY OF CONGRESS

On May 15, 1972, moments after giving a speech at a Laurel, Maryland, shopping center, Wallace was shot five times. His would-be assassin, Arthur Bremer, was caught, convicted, and sentenced to 53 years in prison. The shooting left the governor paralyzed from the waist down. It also began a provocative transformation of identity.

Reelected as governor in 1974, and serving consecutive terms until his retirement in 1986, Wallace gradually retreated from his segregationist views, admitting that he may have been wrong all along. Poor health forced Wallace to forego running for a fifth term as governor in 1986, but he left a legacy far different from the one suggested by his first term in office. In contrast to the obstinate figure blocking the door to the University of Alabama, he had become a leader recognized for lasting contributions to both blacks and whites. Wallace appointed several African Americans to important state posts. He also helped to establish a statewide junior college system, increased state aid to black universities, increased support for inner cities, and improved industrial development.

Wallace's health continued to decline and for several years he suffered from Parkinson's disease.

Wallace died at the age of 79 on September 13, 1998, in Montgomery, Alabama. At the time of his death, many of his political appointees still held statewide office.

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School Desegregation.

## ❖ WALLACE, JOHN WILLIAM

John William Wallace served as reporter of decisions for the U.S. Supreme Court from 1863 to 1875. Wallace is noted for being the last reporter to privately publish decisions of the Court and for having his name on the spine of each volume. For example, the citation 87 U.S. (20 Wall.) 590 indicates that the decision is to be found on page 590 of volume 87 of *United States Reports* (the cumulative number of volumes, regardless of the reporter), which is volume 20 of those reports published by Wallace.

"I WAITED IN VAIN TO HEAR THE COMMERCIAL LAW OF MY OWN, FREE, GREAT, COMMERCIAL COUNTRY . . . BECAUSE NO MAN CAN SAY THAT SUCH A SYSTEM EXISTS."
—JOHN W. WALLACE

Wallace was born on February 17, 1815, in Philadelphia, Pennsylvania. The son of a distinguished Philadelphia lawyer, Wallace graduated from the University of Pennsylvania in 1833. He studied law in his father's office but decided to devote himself to being a law librarian. In 1841 Wallace became the librarian of the Law Association of Philadelphia. He assumed his first reporting task in 1849, when he published the first of three volumes of the opinions of the U.S. Court of Appeals for the Third Circuit.

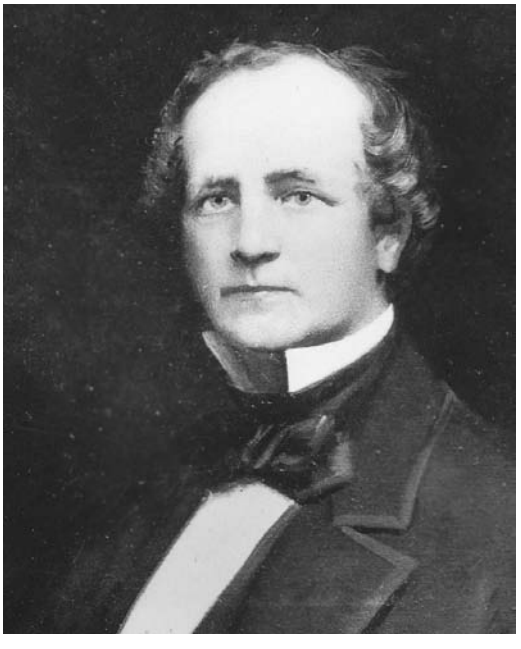

*John W. Wallace.* U.S. SUPREME COURT

During the 1840s and early 1850s Wallace concentrated on the scholarly examination of English law reports and reporters. In 1844 he published *The Reporters, Chronologically Arranged: with Occasional Remarks upon their Reporting Merits.* The work was warmly received for its scholarship and commentary and was republished frequently in the nineteenth century. Wallace also provided notes on U.S. cases included in a series of volumes known as the *British Crown Cases Reserved (1839–1853).*

In 1863 Wallace became the seventh reporter of decisions for the Supreme Court, replacing JEREMIAH S. BLACK. Between 1863 and 1875

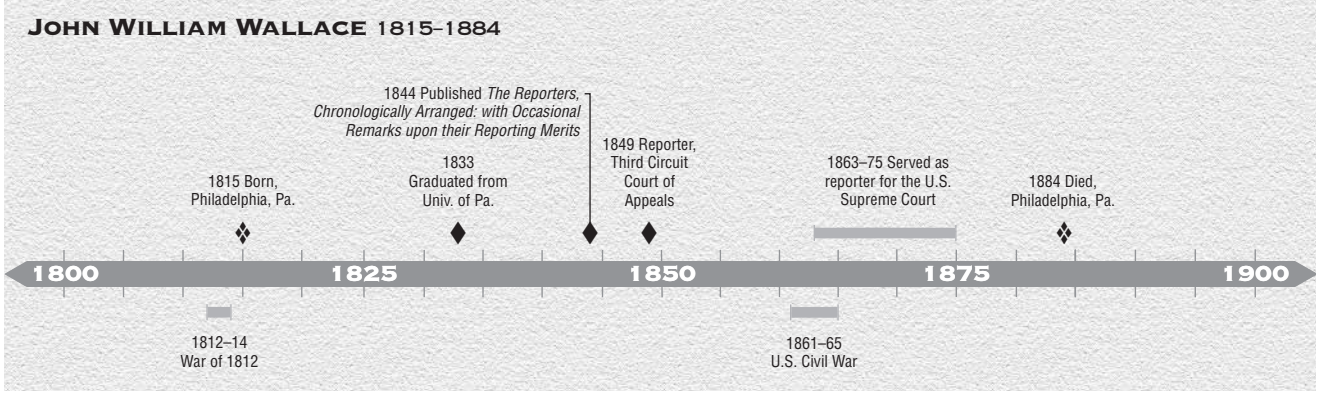

Wallace published twenty-three volumes of reports, which form volumes 68–90 of *United States Reports*. His volumes were praised for their accuracy and quality of editing.

Wallace resigned in 1875 after Congress appropriated $25,000 to be used for publishing Court decisions. After leaving his position, Wallace wrote many scholarly articles and became president of the Historical Society of Pennsylvania.

Wallace died on January 12, 1884, in Philadelphia.

## WALLACE V. JAFFREE

*Wallace v. Jaffree* enjoys the dubious distinction of being listed as one of the ten worst non-Supreme Court decisions in Bernard Schwartz's *A Book of Legal Lists*. The case involved a court challenge to the constitutionality of an Alabama statute authorizing a daily period of silence in Alabama's public schools for meditation or voluntary prayer.

The opinion from the U.S. District Court for the Southern District of Alabama was written by Chief Judge W. Brevard Hand. It came to the surprising conclusion that the Establishment Clause of the FIRST AMENDMENT to the U.S. Constitution prohibited only the *federal* government from establishing a state religion and that the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT did not make the prohibition binding on the *states*. Thus, reasoned Judge Hand, the federal Constitution presented no bar to Alabama's establishment of a state religion. Judge Hand found that "the relevant LEGISLATIVE HISTORY surrounding the adoption of both the First Amendment and of the Fourteenth Amendment, together with the plain language of those amendments, leaves no doubt that those amendments were not intended to forbid religious prayers in the schools which the states and their political subdivisions mandate." *Jaffree*, 554 F. Supp. at 1128.] In *Jaffree*, the district court thus openly rejected decades of settled Supreme Court precedents reaching the opposite conclusion.

Judge Hand's opinion was delivered on January 14, 1983. His remarkable conclusions were quickly appealed to the Eleventh Circuit, and the disappointed plaintiff, *Jaffree*, also made a simultaneous application for a stay to the U.S. Supreme Court. On February 11, 1983, Justice Powell granted *Jaffree*'s application for a stay of Judge Hand's opinion. Justice LEWIS F. POWELL stated that the district court was bound by the Supreme Court's previous decisions, which held that the Establishment Clause, as made applicable to the states by the Due Process Clause of the Fourteenth Amendment, does indeed prohibit a state from authorizing prayer in the public schools.

The appeal was argued before the Eleventh Circuit Court of Appeals, which reversed Judge Hand's opinion on May 12, 1983 (*Jaffree v. Wallace,* 705 F.2d 1526, 1536 [11th Cir. 1983]). The Eleventh Circuit Court of Appeals concluded that both Alabama Code sections in question, § 16-1-20.1 and § 16-1-20.2, were unconstitutional (*Jaffree*, 705 F.2d at 1535-36). The Eleventh Circuit also agreed with Justice Powell that the Supreme Court's Establishment Clause cases were clear and controlling on the facts as presented to Judge Hand.

In its opinion, the Court of Appeals for the Eleventh Circuit acknowledged the extensive scholarly debate over the interplay between the First and Fourteenth Amendments; however, the court made it clear that the U.S. Supreme Court had already considered and decided the historical implications surrounding the Establishment Clause and concluded that its present interpretation of the First and Fourteenth Amendments is consistent with the historical evidence. In explicit language, the Court of Appeals reiterated that the Supreme Court is the ultimate authority on the interpretation of the U.S. Constitution and laws; its interpretations may not be disregarded (*Jaffree*, 705 F.2d at 1532).

The state subsequently appealed the ruling of the Court of Appeals for the Eleventh Circuit. Eventually, *Wallace v. Jaffree* reached the U.S. Supreme Court. The Supreme Court refused to question the application of the Establishment Clause to the states. *Jaffree* presented the Supreme Court with an opportunity to reexamine the incorporation of the Establishment Clause, if the Court had seen any reason to do so. But not a single justice on the Supreme Court expressed any desire to reconsider the Supreme Court decisions which had consistently applied the Establishment Clause to the states. The justices refused to comment at length on the district court's remarkable conclusion that the federal Constitution imposes no obstacle to Alabama's establishment of a state religion. But the Court did find it appropriate to restate how firmly embedded in constitutional JURISPRUDENCE is the proposition that the states are

restrained from curtailing individual freedoms protected by the First Amendment.

Justice SANDRA DAY O'CONNOR wrote a concurring opinion, stating that the First and Fourteenth Amendment guarantees preclude the federal and state governments from making any law establishing a government-sponsored religion.

Three members of the Supreme Court dissented in *Jaffree*: Chief Justice WARREN BURGER, Justice BYRON R. WHITE, and Justice WILLIAM H. REHNQUIST. Chief Justice Burger and Justice White did not challenge the Court's previous decisions applying the Establishment Clause to the states, but Justice Rehnquist focused his dissent on what he believed is the proper reading of the Establishment Clause. Instead of the metaphorical "wall of separation" between church and state, he concluded that the Founders intended for the Establishment Clause to prevent the federal government from establishing a national church or preferring one religious denomination over another. His dissent did not suggest that he had any intention of reexamining the application of the First Amendment to the states. Rather, he accepted without comment the incorporation of the First Amendment and focused his comments on the proper scope of application for the Establishment Clause.

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Religion.

## WALNUT STREET PRISON

The Walnut Street Prison was a pioneering effort in prison reform. Originally built as a conventional jail just before the American Revolution, it was expanded in 1790 and hailed as a model of enlightened thinking about criminals. The prison, in fact, was known as a "penitentiary" (from the Latin word for remorse). It was designed to provide a severe environment that left inmates much time for reflection, but it was also designed to be cleaner and safer than past prisons. The Walnut Street Prison was one of the forerunners of an entire school of thought on prison construction and reform.

The prison was built on Walnut Street, in Philadelphia, as a city jail in 1773 to alleviate overcrowding in the existing city jail. Although designed by ROBERT SMITH, Pennsylvania's most prominent architect, the building was a typical U-shaped building, designed to hold groups of prisoners in large rooms. By and large the role of prisons was to incarcerate criminals. There was little regard for their physical well-being, nor were there any attempts to rehabilitate them. Prisons were overcrowded and dirty, and inmates attacked each other regularly. Those who served their sentences came out of prison probably more inclined toward a criminal life than they were before their incarceration.

It was the Quakers of Philadelphia who came up with the concept for what they called a penitentiary—a place where prisoners could reflect on their crime and become truly sorry for what they had done. The Quakers believed that through reflection and repentance, inmates would give up crime and leave prison rehabilitated. Shortly after the American Revolution, a group of Quakers formed the Philadelphia Society for Alleviating the Miseries of Public Prisons, whose goal was made clear in its name. (Later the group became known as the Pennsylvania Prison Society.) In the years after the Revolution this group worked to encourage prison reform, and its efforts finally paid off in 1790 when the Walnut Street Jail became the first state penitentiary in the country.

The main addition to the Walnut Street complex was a new cellblock called the "Penitentiary House." Built in the courtyard of the existing structure, it included a series of small cells designed to hold individual prisoners. The cells and the corridors connecting them were designed to prevent prisoners from communicating with each other. Windows were high up (the cells had nine-foot high ceilings) and grated and louvered to prevent prisoners from looking onto the street. Each cell had a mattress, a water tap, and a privy pipe. Inmates were confined to their cells for the duration of their confinement. The only person they saw was the guard and then only briefly once a day. They were sometimes allowed to read in their cells, but for the most part they sat in solitude. The Quakers saw this solitary confinement not as a punishment but as a time for reflection and remorse. That was the reason the inmates were not put to

work. Labor, said penitentiary proponents, would preoccupy the inmates and keep them from reflecting on their crimes.

The Walnut Street Prison became in part the model for what became known as the "Pennsylvania System" of prison design and philosophy. Other prisons built on the Pennsylvania model included a prison in Pittsburgh in 1821, the Eastern State Penitentiary (Cherry Hill) in eastern Philadelphia in 1836, and the Trenton State Prison in New Jersey the same year. The concepts of solitary confinement and repentance were key components of prison life at these institutions, although some Pennsylvania System prisons did introduce labor to the inmates. Visitors from overseas who were interested in prison reform visited Walnut Street, Eastern State, and similar prisons to see how they operated and to gain knowledge about prison reform strategies.

Meanwhile, in 1821 a prison was opened in the small upstate New York town of Auburn. That prison, which relied on individual cellblock architecture, required inmates to work 10 hours per day, six days per week. A number of prison reformers believed that by making the inmates work in an atmosphere free of corruption or criminal behavior, they would build new sets of values. The work would rehabilitate them because it would give them a sense of purpose, discipline, and order. This system became known as the "Auburn System," and it was followed in 1826 with the opening of Sing Sing prison on the banks of the Hudson River.

Soon it was clear that the Auburn system worked better at rehabilitating prisoners than the Pennsylvania system, and in the next century the Auburn system became the dominant one. Many prisons built to operate under the Pennsylvania System switched to the Auburn System. Vestiges of the Pennsylvania System exist in the philosophy of humane punishment, although no prison in the U.S. as of 2003 would place anyone in near-total isolation except in extreme circumstances.

As for Walnut Street, its success was short-lived despite the good intentions of the Quakers. The practical matter of housing prisoners became more pressing than the desire among prison officials to rehabilitate the inmates. Walnut Street became overcrowded and dirty, and there was no sign that isolated prisoners were being rehabilitated through solitude. By the 1830s the prison had outlived its usefulness, and it was closed in 1835. Later it was razed, and a library now stands on the site.

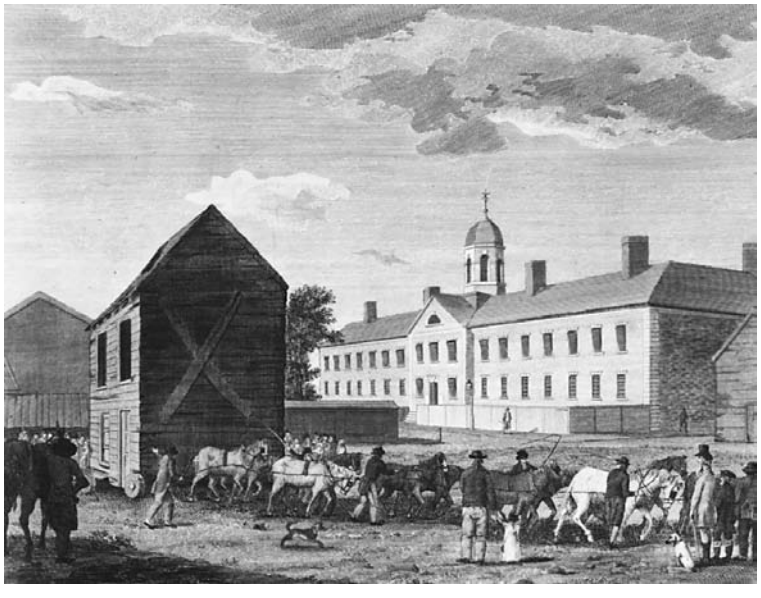

*In 1790, Philadelphia's Walnut Street Jail was expanded to alleviate overcrowding. The result was the first U.S. penitentiary, the Walnut Street Prison, shown in the background of this 1799 engraving by William Russell Birch.*

HULTON ARCHIVE/GETTY IMAGES

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## WANT

*The absence or deficiency of what is needed or desired.*

*Want of jurisdiction,* for example, is a lack of authority to exercise in a particular manner a power possessed by a tribunal or board.

## WANT OF CONSIDERATION

*A comprehensive term for all transactions or situations where no inducement to a contract was intended to pass between the parties thereto and, therefore, no legally enforceable contract is created.*

Want of consideration differs from failure of consideration, which refers to a situation wherein consideration was originally existing and valid but has since become valueless or ceased to exist.

## WANTON

*Grossly careless or negligent; reckless; malicious.*

The term *wanton* implies a reckless disregard for the consequences of one's behavior. A *wanton act* is one done in heedless disregard for the

life, limbs, health, safety, reputation, or property rights of another individual. Such an act is more than NEGLIGENCE or gross negligence; it is equivalent in its results to an act of willful misconduct. A *wanton injury* is one precipitated by a conscious and intentional wrongful act or by an omission of a known obligation with reckless indifference to potential harmful consequences.

## WAPENTAKE

*A local division of a shire or county in old* ENGLISH LAW*; the term used north of the Trent River for the territory called a hundred in other parts of England.*

The name *wapentake* is said to come from *weapon* and *take,* an indication that it referred to an area organized for military purposes.

## WAR

*Open and declared conflict between the armed forces of two or more states or nations.*

Article I, Section 8, Clause 11 of the U.S. Constitution gives Congress alone the power to declare war. In addition, Congress is given sole authority by the Constitution "To raise and support armies" and "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." The U.S. Constitution also spells out the military powers of the president of the United States: he or she serves as commander in chief of the U.S. armed forces. Throughout U.S. history, however, there have been conflicts between the two branches (legislative and executive) over who has the greatest military power. And, often, regardless of Constitutional right, the EXECUTIVE BRANCH holds forth.

### Executive Military Power

Such PRESIDENTIAL POWER is illustrated by President ABRAHAM LINCOLN's actions at the beginning of the Civil War. In the ten weeks between the fall of Fort Sumter and the convening of Congress in July 1861, Lincoln made war preparations based on his authority as commander in chief. He initiated the drafting of men for military service, approved of a Southern naval blockade, and suspended the writ of HABEAS CORPUS. Congress later ratified most of Lincoln's actions.

In the twentieth century several U.S. presidents have committed U.S. armed forces without a declaration of war. In 1903 and 1904, President THEODORE ROOSEVELT took military action in Panama and the Dominican Republic without consulting Congress. President WOODROW WILSON sent troops into Mexico without congressional approval. But, the most serious infractions began in 1951, when President HARRY S. TRUMAN ordered troops to Korea as part of a UNITED NATIONS "police action." This was followed, in the 1960s and 1970s, by the VIETNAM WAR, which Presidents LYNDON B. JOHNSON and RICHARD M. NIXON prosecuted without a congressional declaration.

In response, Congress passed the War Powers Resolution of 1973 (50 U.S.C.A. § 1541 et seq.), which restricts the president's power to mobilize the military during undeclared war. In a national emergency, the act allows the president to dispatch troops without consulting Congress. The president must, however, notify Congress within 48 hours, and the duration of time that troops can be committed in a foreign location is limited. The act also provides a VETO mechanism that allows Congress to force a recall of troops at any time.

The act has not prevented subsequent presidents from taking military action. For example, in 1990, without seeking approval from Congress, President GEORGE H. W. BUSH sent troops to Saudi Arabia in response to the Iraqi invasion of Kuwait. In 2002, with war with Iraq imminent, President GEORGE W. BUSH proposed a resolution that would allow him to declare war at a time of his own choosing, without having to first consult with Congress. Congress approved the authorization in 2002, and President Bush declared war on Iraq in March 2003.

### Status and Rights of Citizens

During a time of war, the U.S. government may properly compel the services of all its citizens and subjects. It can recall nationals who are abroad and subject them to penalty if they do not obey. The government can take steps it deems necessary for national security against enemy ALIENS. Enemy aliens residing in the United States at the outbreak of a declared war or who enter the United States during a war are properly subject to arrest, detention, internment, or deportation.

### Enemy Intercourse

The general rule is that, during a declared war, all intercourse, correspondence, and traffic between U.S. citizens and subjects of enemy

states that might be advantageous or provide comfort to the enemy are prohibited. For example, it is illegal to transmit money across enemy lines. In addition, a U.S. citizen cannot lawfully make a contract with a citizen of an enemy state while war exists, and any such contract is, therefore, void. The laws of war proscribe all trading with the enemy and all other commercial relations while a state of war exists.

### Requisition of Private Property

In times of war, Congress and the president, as commander in chief, have the power to requisition private property necessary for the war effort.

A military commander can seize or requisition a citizen's property for public use or to prevent it from falling into enemy hands. The commander can do this, however, only in situations involving imminent and impending danger or necessity. The services and production of a business organization, such as a shipping company, can properly be requisitioned.

An individual whose private property is requisitioned is entitled to fair compensation. However, the compensation does not have to be paid in advance or at the time the property is seized. When compensation is made, the owner is entitled to receive the reasonable value of the property. The market value of the requisitioned property is generally used as the measure of fair compensation.

### Martial Rule

Martial rule exists when military authorities exercise varying degrees of control over civilians in territory where, due to war or public commotion, the civil government is not able to maintain order and enforce the law.

### War Powers of the U.S. Government

The power of the federal government to conduct war extends to every matter and activity that has an effect on its conduct and progress. The war powers embrace every phase of national defense, including the mobilization and use of all resources of the nation and the protection of war materials. Most of these powers have not been used since WORLD WAR II, because the United States did not fight under a declaration of war while engaged in conflicts in Korea, Vietnam, and the Persian Gulf.

Congress has the authority to stimulate the production of the war equipment and supplies by all proper methods, including the payment of subsidies or the imposition of limits on profits.

Congress can control the food supply during war to ensure that military and civilian needs are met. Other materials may be rationed as well, including gasoline. Congress also can regulate and control prices as a wartime emergency measure to prevent inflation. Price controls are designated to stabilize economic conditions, prevent speculative and abnormal increases in prices, increase production, and ensure a sufficient supply of goods at fair prices. The federal government can also impose rent control on housing.

Civil liberties can also be curtailed during wartime. The government can censor news that affects national security, such as reports of troop movements. It is within the power of Congress to enact SEDITION laws that prohibit political speech that disrupts the war effort or gives AID AND COMFORT to the enemy.

During the early months of U.S. involvement in World War II, President FRANKLIN D. ROOSEVELT ordered the removal of people of Japanese ancestry from the West Coast. At the time the action was justified on national security grounds, because military commanders believed that California was vulnerable to Japanese spies and saboteurs. The U.S. Supreme Court, in KOREMATSU V. UNITED STATES, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944), upheld the removal. Thousands of Japanese Americans lost their property and businesses and were "relocated" to concentration camps for the duration of the war.

CROSS-REFERENCES

Armed Services; Arms Control and Disarmament; Japanese American Evacuation Cases; Korean War; Martial Law; Military Government; Military Law; Military Occupation; Militia; *Milligan, Ex parte*; Rules of War; Tonkin Gulf Resolution; World War I.

## WAR CRIMES

*Acts that violate the international laws, treaties, customs, and practices governing military conflict between belligerent states or parties.*

War crimes may be committed by a country's regular armed forces, such as its army, navy, or air force, or by irregular armed forces, such as guerrillas and insurgents. Soldiers may be punished for war crimes, as may military and political leaders, members of the judiciary,

industrialists, and civilians who are enlisted by a belligerent to contravene the RULES OF WAR.

However, isolated instances of TERRORISM and single acts of rebellion are rarely, if ever, treated as war crimes punishable under the international rules of warfare. Instead, they are ordinarily treated as criminal violations punishable under the domestic laws of the country in which they occur.

Most war crimes fall into one of three categories: crimes against peace, crimes against humanity, and traditional war crimes. Crimes against peace include the planning, commencement, and waging of aggressive war, or war in violation of international agreements. Aggressive war is broadly defined to include any hostile military act that disregards the territorial boundaries of another country, disrespects the political independence of another regime, or otherwise interferes with the sovereignty of an internationally recognized state. Wars fought in self-defense are not aggressive wars.

Following WORLD WAR II, for example, the Allies prosecuted a number of leading Nazi officials at the NUREMBERG TRIALS for crimes against peace. During the war, the Nazis had invaded and occupied a series of sovereign states, including France, Czechoslovakia, Poland, and Austria. Because those invasions were made in an effort to accumulate wealth, power, and territory for the Third Reich, Nazi officials could not claim to be acting in self-defense. Thus, those officials who participated in the planning, initiation, or execution of those invasions were guilty of crimes against peace.

Hermann Göring, chief of the Luftwaffe (the German Air Force), was one Nazi official who was convicted of crimes against peace at the Nuremberg trials. The international military tribunal presiding at Nuremberg, composed of judges selected from the four Allied powers (France, Great Britain, the Soviet Union, and the United States), found that Göring had helped plan and carry out the invasions of Poland and Austria and had ordered the destruction of Rotterdam, Holland, after the city had effectively surrendered.

Crimes against humanity include the deportation, enslavement, persecution, and extermination of certain peoples based on their race, religion, ethnic origin, or some other identifiable characteristic. This category of war crimes was created almost entirely from the catalog of atrocities committed by the Nazi regime in World War II. Although other regimes have since committed horrors of their own, the Nazis established the standard by which the wartime misconduct of all subsequent regimes is now measured.

As part of the Nazi blitzkrieg, the Germans constructed concentration camps around Europe where they gassed, tortured, and incinerated millions of Jews and other persons they deemed impure or subversive to the Aryan race. Millions of others who escaped this fate were deported to Nazi labor camps in occupied countries where they were compelled at gunpoint to work on behalf of the Third Reich. The Nazi leaders who were responsible for implementing this totalitarian system of terror were guilty of crimes against humanity.

Many Nazi leaders were prosecuted for crimes against humanity during the Nuremberg trials. For example, Ernst Kaltenbrunner, head of the Nazi security organization in charge of the gestapo (the German secret police), was convicted and sentenced to death based on evidence that he had authorized the extermination of Jews at concentration camps and ordered the CONSCRIPTION and deportation of civilians to foreign labor camps.

Traditional war crimes consist of those acts that violate the accepted customs, practices, and laws of warfare that have been followed by civilized nations for centuries. These rules of war prescribe the rights and obligations of belligerent states, prisoners of war, and occupying powers, as well as those of combatants and civilians. They also set restrictions on the types of weapons that belligerents may employ during combat. Soldiers, officers, and members of the high command can all be held responsible for violating the accepted customs and practices of war, regardless of whether they issue an order commanding an illegal act or simply follow such an order.

Soldiers, officers, and the high command can also be held responsible for failing to prevent war crimes. Military personnel in a position of authority have an obligation to instruct their subordinates on the customs and practices of war and a duty to supervise and oversee their conduct on the battlefield. A military commander who neglects this duty can be punished for any war crimes committed by his troops. Following World War II, for example, Japanese General Tomoyuki Yamashita was prosecuted

and sentenced to death by a U.S. military tribunal in the South Pacific for dereliction of duty in "failing to provide effective control" of his troops who had massacred, raped, and pillaged innocent noncombatant civilians and mistreated U.S. prisoners of war in the Philippines (Christenson 1991, 491).

For more than five centuries, the rules of war have been applied to military conflicts between countries. Until the last decade, many observers contended that the rules of war do not govern hostilities between combatants in civil wars that take place wholly within the territorial boundaries of a single state. However, during the 1990s, the UNITED NATIONS established two international military tribunals to investigate and prosecute war crimes that allegedly took place in the civil wars fought within Bosnia-Herzegovina and Rwanda.

The two tribunals indicted soldiers and other combatants in both countries for committing a litany of war crimes, including the torture of political and military enemies, the programmatic raping of women, and GENOCIDE. Although the litigants questioned the jurisdiction and authority of each tribunal, trials proceeded against certain defendants who had been captured. Thus, the theater in which war crimes can be committed and punished has expanded from international military conflicts to intranational civil wars.

In 1998, the United Nations established the INTERNATIONAL CRIMINAL COURT (ICC) with the signing of the Rome Treaty. The court, which came into force on July 1, 2002, is the first permanent international criminal tribunal. Many countries over the course of many years expressed the need for such a permanent court, but politics during the COLD WAR and other factors prevented its creation. The treaty, however, received widespread international support upon its signing. The ICC is empowered to hear three major types of cases, including genocide, crimes against humanity, and war crimes.

The United States originally signed the treaty on December 31, 2000, but did so with reservations. One claim was that the court could be used to prosecute troops based on the political motivations of other nations. The United States introduced an amendment to the treaty that would have given U.N. security council members the right to VETO certain prosecutions, but the amendment was rejected. Even when President BILL CLINTON signed the treaty, members of his cabinet and members of Congress expressed concerns about the court's powers. In May 2002, President GEORGE W. BUSH instructed the U.S. STATE DEPARTMENT to inform the secretary-general of the United Nations that the United States would not become a party to the treaty.

*Former president of Yugoslavia, Slobodan Milosevic, faced multiple war crimes charges—including genocide—before the United Nations war crimes tribunal in The Hague even though he refused to accept the validity of the court.*

AP/WIDE WORLD PHOTOS

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## WAR OF 1812

The War of 1812 between the United States and Great Britain was a conflict fought over the right of neutral countries to participate in foreign trade without the interference of other nations and the desire of many in the United States to end British occupation of Canada. The war, which lasted from 1812 to 1815, proved inconclusive, with both countries agreeing to revert to their prewar status as much as possible.

The U.S. declaration of war against Great Britain that President JAMES MADISON signed on June 18, 1812, culminated nearly a decade of antagonism between the nations. The British, who from 1802 to 1815 were involved in the

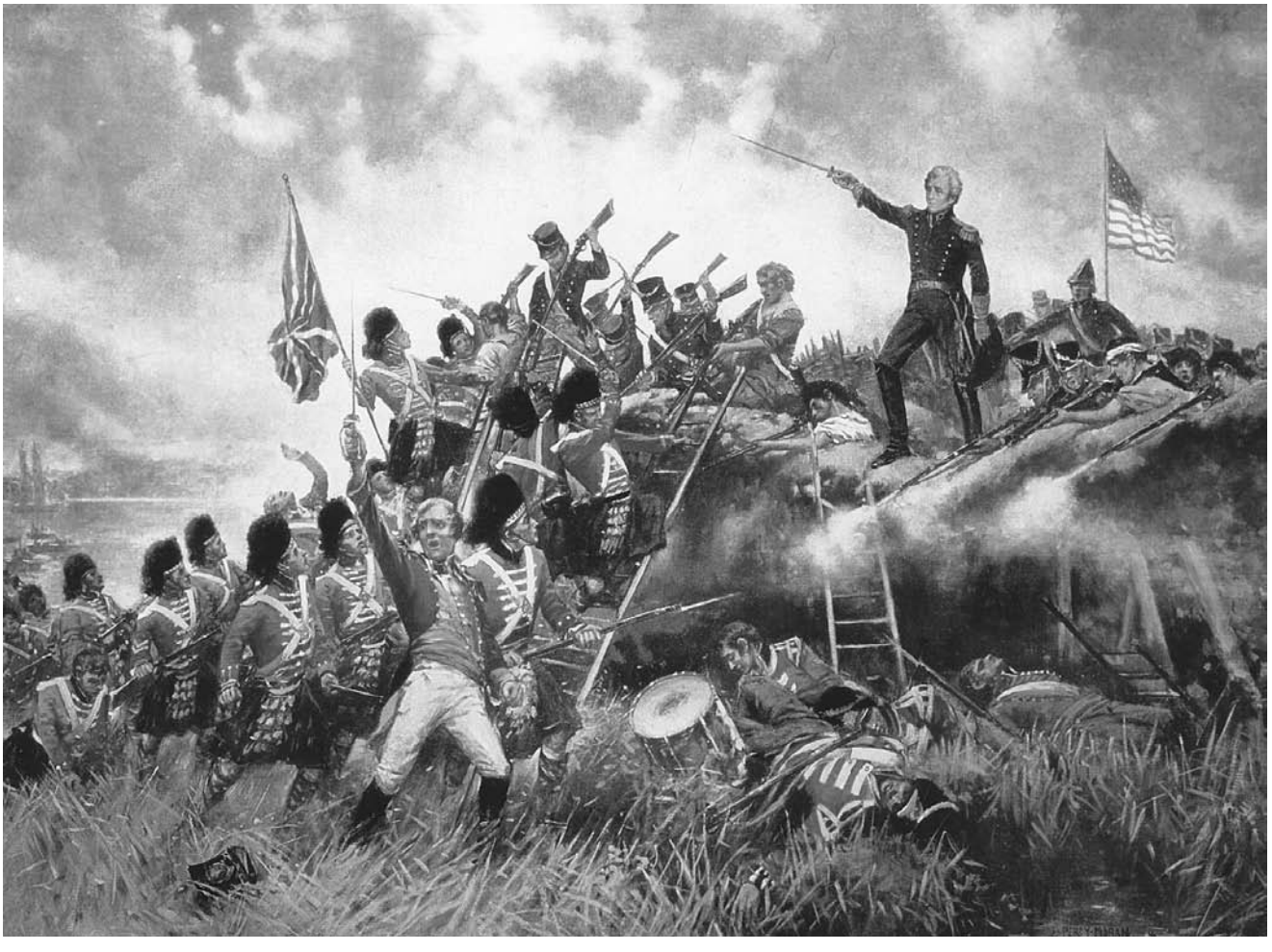

*The Battle of New Orleans was fought two weeks after the treaty ending the War of 1812 was signed. In the battle, General Andrew Jackson led American forces to victory over the British, enhancing his national reputation and paving the way for his presidency.*

LIBRARY OF CONGRESS

Napoleonic Wars with France, sought to prevent the United States, a neutral, from trading with France. Britain imposed a blockade on France and required that U.S. ships stop at British ports and pay duties on goods bound for France. In addition, outrage grew in the United States over the British practice of boarding U.S. ships on the high seas and impressing seamen (seizing them and forcing them to serve Great Britain) who the British claimed had deserted the Royal Navy. More than ten thousand U.S. seamen were impressed between 1802 and 1812.

In 1807 President **THOMAS JEFFERSON** succeeded in convincing Congress to pass the **EMBARGO ACT**, which prevented virtually all U.S. ships from sailing overseas. The economic consequences of this law were disastrous to the U.S. economy, forcing the act's repeal in 1809. In its place, Congress enacted the Non-Intercourse Act, which forbade trade only with Great Britain and France. A third law, passed in 1810, allowed trade with both nations but stipulated the revival of nonintercourse against whichever nation did not remove its trade restrictions. When France announced an end to its trade decrees, the United States banned trade with Great Britain.

Anger against Britain was also fueled by a group of expansionist congressmen, nicknamed the War Hawks, who wanted more land for settlement and military action against the British in Canada. British support of the American Indians on the frontier had led to Indian wars against U.S. settlers.

The war itself provided limited success for the United States. Though a U.S. naval squadron under the command of Oliver Hazard Perry captured the British fleet on Lake Erie in 1813, battles in northern New York and Ontario, Canada, proved inconclusive. After U.S. forces burned the city of York (now Toronto), Ontario, the British attacked Washington, D.C., on September 13 and 14, 1814. The British burned the U.S. Capitol and the White House.

Both sides realized the futility of the struggle and began treaty negotiations in 1813. Because of the military stalemate, neither side could extract concessions from the other. The United States and Great Britain agreed, in the Treaty of Ghent, to return to the prewar status quo. The treaty, which was signed on December 24, 1814, in Ghent, Belgium, was ratified by the U.S. Senate on February 16, 1815. However, the Battle of New Orleans was fought on January 8, 1815, before news of the treaty reached the two armies. General ANDREW JACKSON led his troops to a decisive victory over the British forces, providing the U.S. public with the illusion that the United States had won the war. The battle also enhanced Jackson's national reputation and helped pave the way for his presidency.

The frictions that had precipitated the war disappeared. The end of the Napoleonic Wars ended both the need for a British naval blockade and the impressing of U.S. seamen. Although the United States did not acquire Canada, American Indian opposition to expansion was weakened, and U.S. nationalism increased.

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## WAR OF INDEPENDENCE

The War of Independence, also known as the American Revolution and the Revolutionary War, was fought from 1775 to 1783 between Great Britain and the 13 British colonies in North America. The 1783 TREATY OF PARIS, which ended the war, gave the 13 colonies political independence and led to the formation of the United States of America.

The war had its roots in the growing economic power of the colonies and the limited political freedom granted by Great Britain to the colonists for managing their affairs. Acts of British Parliament in the 1760s that imposed taxes and import duties on the colonies increased these tensions.

The British victory in the French and Indian War, also known as the Seven Years' War (1756–63), removed France as a power in North America, yet the costs of the war were staggering for Great Britain. Faced with a large national debt, Parliament passed the Molasses Act and the Sugar Act in 1764, which imposed a duty on molasses and sugar imported by the colonies. The STAMP ACT of 1765 taxed papers such as legal documents, newspapers, and almanacs. The Quartering Act indirectly taxed the colonists by requiring them to house, feed, and supply British troops.

American colonists reacted angrily to these tax measures, believing that it was unfair of Great Britain to subject them to taxation when the colonies had no representation in Parliament. British leaders repealed the Stamp Act in 1766, but the following year Parliament passed the TOWNSHEND ACT, which imposed a series of new taxes on goods arriving at American ports. The new taxes were designed to pay the salaries of royal governors and other colonial appointees of Britain's King George III. The Townshend Act also restructured the customs service in the colonies, placing its headquarters in Boston.

The Townshend Act evoked more protests from the colonists. Groups such as the Sons of Liberty and the Daughters of Liberty organized protests against customs officials and boycotts of taxed goods. Merchants agreed not to sell imported goods.

British customs agents in Boston extorted money and seized American ships with little justification, leading to a riot in March 1770. The British troops, popularly known as redcoats because of their red uniforms, fired on the crowd, killing five people. The episode became known as the BOSTON MASSACRE.

Great Britain again reacted to economic pressure by removing most of the Townshend Act taxes. A notable exception was the tax on tea, which remained a symbol of Parliament's authority to tax colonists. In 1773 Britain tried to save the financially troubled British East India Company by passing the Tea Act, which lowered the tax on tea shipped by the company to the colonies, giving the company an edge over tea smugglers. The colonists responded by refusing to buy English tea and refusing to allow it to be unloaded from British ships. In Boston protesters dressed as American Indians dumped crates of tea into the water, and the event came to be known as the Boston Tea Party.

Parliament retaliated in 1774 by passing the Coercive Acts, which were labeled the "Intolerable Acts" by the colonists. These laws closed the port of Boston until the East India Company was repaid for the dumped tea, restricted the powers of the Massachusetts colonial legislature, and permitted British soldiers and officials accused of capital crimes to be tried in England

*The Battle of Lexington took place in April 1775 when British troops were sent to collect arms gathered by the patriot militia outside of Boston, Massachusetts.*

AP/WIDE WORLD PHOTOS

rather than in the hostile colony. In addition, Parliament appointed General Thomas Gage, commander of the British Army in North America, as the governor of Massachusetts. Gage was to enforce the Coercive Acts.

Representatives of 12 colonies and Canada met in September 1774 to consider what action to take against Parliament. The delegates to the First **CONTINENTAL CONGRESS** agreed that the colonies, and not Parliament, had the right to tax and make laws for the colonies. They called for a complete trade boycott against Britain until the Coercive Acts were repealed, but they acknowledged Parliament's right to regulate trade. The Congress did not call for independence from Great Britain.

The war began in 1775 when General Gage tried to break up a Massachusetts militia group and seize its ammunition and supplies. On the evening of April 18, 1775, Gage ordered his troops to seize munitions at Concord. Militia messengers, including silversmith Paul Revere, rode on horseback the 18 miles from Boston to Concord to warn the militia. Militia forces met the redcoats in Lexington, and they exchanged fire. The British killed eight men and proceeded to Concord, where they again encountered militia companies. The British retreated to Boston after 273 redcoats were killed in the battle. The militia followed, laying siege to the city for almost one year.

In early May 1775 colonial delegates met in Philadelphia for the Second Continental Congress. The New England militia was renamed the Continental Army, and **GEORGE WASHINGTON**, a Virginia plantation owner who had served in the French and Indian War, was named commander. The delegates also made the Congress the central government for "The United Colonies of America."

King George III replaced Gage with General William Howe. The king had become concerned over mounting British casualties that accompanied battles in Massachusetts, including the Battle of Bunker Hill. On August 23, 1775, the king declared the colonies to be in rebellion and subjected colonial ships to seizure.

American troops invaded Canada in August 1775, capturing Montreal in November. However, their efforts to take the city of Quebec failed, and the troops were forced to withdraw. During the winter of 1775–76, Washington positioned artillery around Boston. In March 1776 a massive artillery attack on the city led British troops and more than one thousand Loyalists (colonists who supported the British) to flee on ships to Nova Scotia, Canada.

In June 1776, as the British assembled reinforcements for an invasion, the Continental Congress debated a declaration of the colonies' independence from Britain. **THOMAS JEFFERSON** borrowed from the recently completed **VIRGINIA DECLARATION OF RIGHTS** in drafting the Declaration of Independence. The Virginia declaration, written by **GEORGE MASON**, stated that government derived from the people, that individuals were created equally free and independent, and that they had inalienable rights that the government could not legitimately deny them. On July 4, 1776, the Congress declared that the colonies were free and independent states, and it adopted the Declaration of Independence.

On June 29, 1776, Howe led an invasion force of 32,000 troops, including 18,000 German mercenaries (Hessian troops), that landed off Sandy Hook, New Jersey. The British attacked Washington's forces in New York on August 22, and by the end of the year Washington had abandoned New York City and had moved his troops into Pennsylvania. He made a successful surprise attack on Trenton, New Jersey, on December 25, 1776. On January 3, 1777, Washington's troops defeated the British at Princeton, New Jersey. The two victories were critical to maintaining colonial morale, and by the spring of 1777 more than 8000 new soldiers had joined the Continental Army.

The British implemented a plan in 1777 that sought to end the war that year by separating New England from the colonies in the south.

General John Burgoyne led British forces from Montreal toward Albany, New York. After securing a victory at Fort Ticonderoga on July 5, Burgoyne became overconfident. The Continental Army and local militia counterattacked, forcing Burgoyne to surrender his army after a battle at Saratoga, New York, on October 17.

To the south, Washington vainly tried to stop the British from taking Philadelphia, the home of the Continental Congress. His troops lost at the battle of Brandywine Creek, and Philadelphia fell to the British on September 26. The Congress moved to Baltimore, Maryland.

Despite the loss of Philadelphia and some discontent with Washington's leadership during the winter of 1777–78, American fortunes brightened in 1778. In February France signed a formal treaty of commerce and alliance with the American states. France sent a naval fleet along with military advisers and financial aid.

In June 1778 Washington attacked the British at Monmouth, New Jersey, but again was defeated. He then shifted his military strategy, keeping his troops encamped around British forces in Connecticut, New York, and New Jersey. Although American forces led by George Rogers Clark regained control of the Ohio River Valley, British troops had success in South Carolina in 1779. However, in 1780 American troops prevailed in the Battle of Kings Mountain and again in the Battle of Cowpens in 1781. The British attempt to control the southern colonies ended in a stalemate.

In 1781 Washington's troops, with the assistance of the French Navy, cut off British forces led by General Charles Cornwallis at Yorktown, Virginia. The Battle of Yorktown, in which British troops were outnumbered two to one, ended in a British surrender on October 19, 1781. This marked the end of major military actions in the War of Independence.

The defeat at Yorktown led to the resignation of the British prime minister and a desire by the new cabinet to begin peace negotiations, which commenced in Paris, France, in April 1782. The U.S. delegation included **BENJAMIN FRANKLIN**, **JOHN ADAMS**, and **JOHN JAY**. The negotiators concluded a preliminary treaty on November 30, 1782, and a final agreement was signed in September 1783 and ratified by the Continental Congress on January 14, 1784.

In the Treaty of Paris the British recognized the independence of the United States. The treaty established generous boundaries for the United States, with U.S. territory extending from the Atlantic Ocean to the Mississippi River in the west, and from the Great Lakes and Canada in the north to the thirty-first parallel in the south. The U.S. fishing fleet was guaranteed access to the fisheries off the coast of Newfoundland, Canada. Navigation of the Mississippi River was to be open to both the United States and Great Britain.

*Following the defeat of British forces at Yorktown, Virginia, on October 10, 1781, General Charles Cornwallis surrenders to General George Washington, marking the end of major military actions in the War of Independence.*

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

During the War of Independence, the Continental Congress struggled to formulate a constitution for the entity known as the United States of America. However, colonists were not interested in establishing a central government with broad powers because they feared replacing undemocratic British authority with a local version. Therefore, the **ARTICLES OF CONFEDERATION** that were drafted in 1777, but not ratified until 1781 by all the states, created only a national congress of limited authority. By the end of the war, Congress found itself receiving less cooperation from the individual states. The failure of the Articles of Confederation became apparent after the Treaty of Paris was ratified, leading to the Constitutional Convention in Philadelphia in 1787 where the Founding Fathers would write the U.S. Constitution.

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Boston Massacre Soldiers; Continental Congress; Declaration of Independence; Paine, Thomas; Washington, George. See also "Conflict and Revolution" section of Appendix.

## WAR ON TERRORISM

Terrorist acts and the threat of TERRORISM have occupied the various law enforcement agencies in the U.S. government for many years. The Anti-Terrorism and Effective Death Penalty Act of 1996, as amended by the USA PATRIOT ACT and codified at 18 U.S.C. section 2339B, makes it a crime punishable to up to 15 years in prison to provide material support or resources to any organization designated by the SECRETARY OF STATE as a foreign terrorist organization. Individuals suspected of acts of terrorism are arrested and tried under existing federal or state criminal laws. On September 11, 2001, 19 men hijacked four commercial airplanes. Two were deliberately crashed into the twin towers of the World Trade Center in New York City, one was deliberately crashed into the Pentagon in Washington, D.C., and the fourth crashed into a field in rural Pennsylvania, presumably on its way to a fourth symbolic target: the White House or the U.S. Capitol Building. Strong evidence suggested that a Saudi Arabian citizen living in Afghanistan, Osama bin Laden, was behind the attacks. As of 2003 bin Laden was the head of a terrorist organization known as al Qaeda (Arabic for "the base").

It would be difficult to overstate the magnitude of the simultaneous attacks and their psychological impact on the collective psyche of U.S. citizens. The SEPTEMBER 11TH ATTACKS instantly vaulted international terrorism and national security concerns to the top of the U.S. governmental agenda and propelled the United States headlong into a war against terrorism. According to the Federal Bureau of Investigation's "FBI Policy and Guidelines" (February 16, 1999) international terrorism is "the unlawful use of force or violence committed by a group or individual, who has some connection to a foreign power or whose activities transcend national boundaries, against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives." But international terrorism and the country's turn-of-the-century responses to it predated September 11, 2001. Four major incidents of international terrorism against U.S. interests since the mid-1990s involved bombings: the Khobar Tower in Dharan, Saudi Arabia; the U.S. embassy in Nairobi, Kenya; the U.S. embassy in Dar es Salaam, Tanzania; and the USS *Cole* in the port of Aden, Yemen. These attacks abroad made headlines around the world and commanded massive investigative efforts by the U.S. government.

On the evening of June 25, 1996, a couple of individuals parked a tanker truck in a parking lot adjacent to the Khobar Tower apartment buildings. These apartments housed U.S. military and civilian personnel. Sentries on duty saw the truck and realized the threat of a bomb and began evacuating the building. Unfortunately, the bomb was detonated before the building could be completely evacuated. As a consequence, 19 servicemen died and hundreds of others were wounded.

On August 7, 1998, a truck bomb detonated in the rear parking entrance to the U.S. embassy in Nairobi, Kenya. Twelve American diplomats and nearly 200 Kenyan citizens were killed. Ten Americans and 12 foreign service nationals were seriously injured, and 4,000 Kenyans were injured. Almost simultaneously, at the U.S. embassy at Dar es Salaam, Tanzania, a suicide bomber detonated another truck bomb located 35 feet from the embassy complex's outer wall. Eleven Tanzanians were killed and 85 people were injured, including two Americans. The terrorists who committed these acts were believed to be part of an international group headed by Osama bin Laden.

On October 12, 2000, a small boat exploded alongside the USS *Cole* while the *Cole* was preparing to refuel at an island in the port of Aden, Yemen. Seventeen American sailors were killed and nearly 40 were wounded in the attack; the ship sustained extensive damage.

These four separate acts of terrorism occurred during the two administrations of President BILL CLINTON. The Clinton administration defined its enemy narrowly: Osama bin Laden and his aides. Bin Laden was known to be living under the protection of the repressive Muslim regime known as the Taliban in Afghanistan. Although the Clinton administration adopted a hostile attitude toward the Taliban, it did not make Afghanistan or the Taliban government a target of its efforts to combat the bin Laden terrorism threat.

From 1998 to 2000, President Clinton pursued a policy of economic sanctions against the Taliban and sent numerous messages to the de facto government of Afghanistan demanding that it deliver bin Laden for trial in the United States. The Clinton administration quickly

became frustrated by the Taliban's lack of cooperation. Although the administration deliberately raised the specter of military confrontation, ultimately it chose to step back for a variety of reasons, not the least of which was the delicate negotiations between Israel and the Palestinians.

GEORGE W. BUSH was elected president and took office in January 2001. Just eight short months later came the devastating September 11th attacks. Bush's reaction was swift and decisive. When it became clear that bin Laden was the probable instigator of the attacks, Bush delivered an ultimatum to the Taliban to turn over bin Laden or face the might of the U.S. military. The Taliban again refused and Bush ordered the invasion of Afghanistan on October 7, 2001, phase one of his War on Terrorism.

Every U.S. president must produce a National Security Strategy document. President George W. Bush's policy has been called the "Bush Doctrine." This document is influenced by the thinking of its principal author, Bush's national security advisor, Condoleezza Rice. It resembles in some respects the MONROE DOCTRINE outlined in 1823 by President JAMES MONROE, which warned European powers against attempting to reestablish colonial authority in the Americas.

The Bush Doctrine contains six principles:

1. The fight against terrorism must continue until it is won.
2. Major responsibility for combating terrorism rests with those countries where terrorist organizations actually operate.
3. When intervention is required, the Bush Doctrine emphasizes action by coalitions of the willing and able.
4. It reaffirms the importance of deterrence as the best way to guarantee peace and respect for international rules of good behavior.
5. Military intervention is not the first choice for dissuading countries from backing terrorism with weapons of mass destruction, including chemical, biological, and nuclear weapons.
6. As a last resort, the Bush Doctrine reserves a first strike option.

The Bush Doctrine permits pre-emptive action against "hostile states" and terrorist groups alleged to be developing weapons of mass destruction. Furthermore, the Bush Doctrine asserts that the United States will never allow its military supremacy to be challenged in the way it was during the COLD WAR. The Bush Doctrine for conducting the war against terrorism was received with shock and dismay by many in Europe. The negative change in relations between the United States and its allies, particularly in Europe, marked this aspect of the war on terrorism.

During his 2003 State of the Union Address, the President Bush described advances in the war on terrorism and announced new initiatives. According to the president, the United States had disrupted terrorist networks, removed key leaders, and arrested more than 3,000 terrorist suspects around the world. The Bush administration had also created the HOMELAND SECURITY DEPARTMENT, intensified security at U.S. borders and ports of entry, and hired and deployed more than 50,000 federal screeners in airports. New initiatives included improving intelligence through the Terrorist Threat Integration Center and disarming Saddam Hussein.

Subsequent to the defeat of the Taliban in Afghanistan, the Bush administration focused its attention on what it perceived as grave threats coming from Iraq, which was ruled by the secretive dictator Saddam Hussein. The Clinton and Bush administrations both strongly suspected that Iraq, under the direction of Hussein, was producing and stockpiling weapons of mass destruction in violation of UNITED NATIONS Security Council resolutions, as well as the treaty Iraq signed in the wake of its defeat by U.S.-led coalition forces in the 1991 Gulf War. The Gulf War had expelled Iraq from its forcible invasion and occupation of neighboring Kuwait. The Bush administration increased its pressure on Iraq to disarm and reveal its outlawed weapons programs. Hussein met this pressure with a mixture of belligerence and shrewd diplomatic moves that garnered the Iraqi regime some international support.

The policies embedded in the Bush Doctrine helped set a course for U.S. conflict with Iraq. Bush's deep concern about Iraq's weapons of mass destruction possibly making their way into the hands of terrorist organizations such as bin Laden's al Qaeda prompted his increasingly bellicose posture toward Iraq. Bush ultimately offered an ultimatum to the Iraqi government to relinquish power and go into exile or face U.S. military action. Despite massive opposition at home and around the globe to the U.S. policy toward Iraq, the United States invaded Iraq on

March 20, 2003. In about three weeks, Saddam Hussein and his government were thrown out of power and Iraq was defeated. After Iraq's defeat and as of mid-2003, the U.S.-led search for weapons of mass destruction in Iraq had failed to reveal large caches of chemical or biological weapons.

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CROSS-REFERENCES

September 11th Attacks; Terrorism; USA PATRIOT Act of 2001.

## WAR POWERS RESOLUTION

See PRESIDENTIAL POWERS.

## WARD

*A person, especially an infant or incompetent, placed by the court in the care of a guardian.*

CROSS-REFERENCES

Guardian and Ward.

## ❖ WARD, NATHANIEL

Nathaniel Ward was a Puritan minister, attorney, and writer who compiled a code of statutes for colonial Massachusetts entitled *The Body of Liberties,* which was adopted by the colony in 1641. This code, which combined English COMMON LAW with Mosaic law (laws derived from the Old Testament of the Bible), was the first comprehensive set of laws enacted in New England.

Ward was born around 1578 in Haverhill, Suffolk, England. He graduated from Cambridge University in 1599 and then studied law at Lincoln's Inn in London. He practiced law for ten years and then decided to enter the ministry. Attracted to Puritan religious doctrine, Ward was dismissed from his ministry in 1633 and forced to leave England to avoid religious persecution. He arrived in Massachusetts in 1634 and became co-pastor of a church in Agawam. In 1636, however, he left the ministry and returned to the field of law.

Ward served on a committee charged with writing a code of laws for the Massachusetts Colony. In 1636 John Cotton, a Puritan minister, prepared a draft of a code, entitled *Moses His Judicials.* This code was a major departure from English common law, as it relied heavily upon Scripture. Cotton's code was not enacted into law, however, and another committee was formed in 1638 to prepare a second code.

In November 1639 Ward submitted his draft of a code to the General Court of the colony. His code, which became known as *The Body of Liberties,* was comprised of one hundred sections and used much of Cotton's earlier draft. The General Court enacted Ward's code in 1641. The code underwent several revisions, resulting in the production of the *Laws and Liberties Concerning the Inhabitants of Massachusetts* (1648), which served as the basis for civil and CRIMINAL LAW in the colony until the eighteenth century.

Ward's code was based on the Bible. Section 65 of the code states that "No custome or pre-

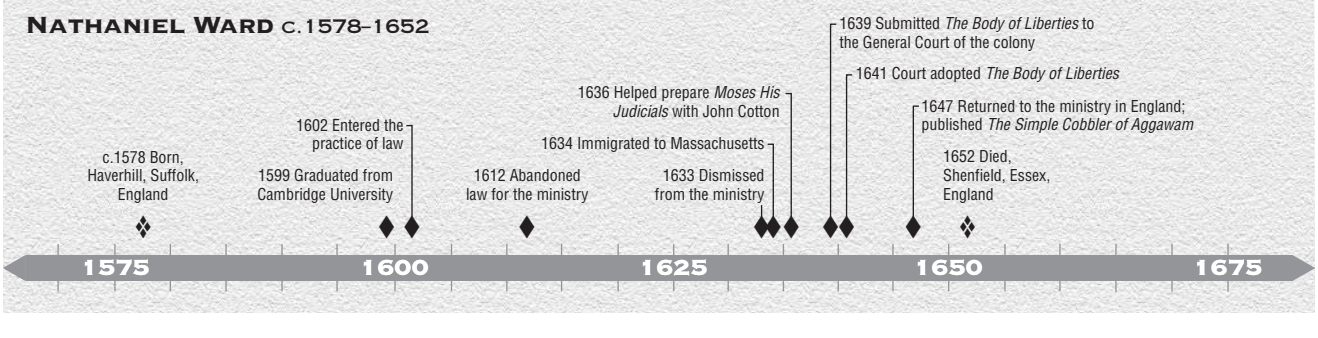

scription shall ever prevaile amongst us . . . that can be proved to bee morrallie sinfull by the word of God." At the same time, *The Body of Liberties* enumerated CIVIL RIGHTS and liberties and incorporated many of the principles of English common law. Other provisions guaranteed equal justice under law to every person within the jurisdiction and assured freedom from ARBITRARY arrest and imprisonment, DOUBLE JEOPARDY, cruel punishments, impressment, and torture. In a major departure from English common law, however, the code limited capital crimes to twelve specific offenses found in the Bible. At the time ENGLISH LAW recognized more than fifty capital crimes.

In 1647 Ward returned to his ministry in England, where he remained until his death. He published several books, including *The Simple Cobbler of Aggawam* (1647), which defended the status quo and attacked religious tolerance and modes of fashion. Ward died in October 1652 in Shenfield, Essex, England.

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## WAREHOUSE RECEIPT

*A written document given by a warehouseman for items received for storage in his or her warehouse, which serves as evidence of title to the stored goods.*

A number of warehouse receipts are negotiable instruments, and the law governing such receipts is embodied in Article 7 of the UNIFORM COMMERCIAL CODE.

The general rule is that warehouse receipts need not be in any particular form. They must, however, contain the following information: the location of the warehouse and the place where the goods are stored; the date when the receipt was issued; the consecutive number of the receipts; terms indicating whether the goods are to be delivered to the bearer of the receipt, to a particular individual, or to a particular individual on his or her order; the storage rate or handling charges; a statement describing the goods or the manner in which they are packed; the signature of the warehouseman or his or her agent; the amount of advance payment made, if any; and any other terms that do not impair the warehouseman's duty.

In situations where a warehouse receipt does not contain these provisions, the warehouseman can be held liable in damages to anyone who sustains financial injury because of the omission.

## WAREHOUSEMAN

*An individual who is regularly engaged in the business of receiving and storing goods of others in exchange for compensation or profit.*

The business of warehousemen can be either public or private in nature because they may store either goods belonging to the general public or those goods of certain individuals. Article 7 of the UNIFORM COMMERCIAL CODE sets forth the rights and liabilities of warehousemen.

## WARRANT

*A written order issued by a judicial officer or other authorized person commanding a law enforcement officer to perform some act incident to the administration of justice.*

Warrants are recognized in many different forms and for a variety of purposes in the law. Most commonly, police use warrants as the basis to arrest a suspect and to conduct a search of property for evidence of a crime. Warrants are also used to bring persons to court who have ignored a subpoena or a court appearance. In another context, warrants may be issued to collect taxes or to pay out money.

The FOURTH AMENDMENT to the U.S. Constitution states that "no Warrants shall issue, but upon PROBABLE CAUSE, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." There are three principal types of criminal warrants: arrest warrants, search warrants, and bench warrants.

An arrest warrant is a written order issued by a judge or other proper judicial officer, upon probable cause, directing a law enforcement officer to arrest a particular person. An arrest warrant is issued on the basis of a sworn complaint charging that the accused person has committed a crime. The arrest warrant must identify the person to be arrested by name or other unique characteristics and must describe the crime. When a warrant for arrest does not identify a person by name, it is sometimes called a "John Doe warrant" or a "no name warrant."

*A sample advance warehouse order form*

**Advance Warehouse Order Form**

GES CANADA Exposition Services Limited

**ADVANCE WAREHOUSE ORDER FORM**

3175 Airway Drive, Mississauga, Ontario L4V 1C2 Tel: (905) 405-4310 Fax: (905) 405-4343

SHOW **GTEC 2002**

**EXHIBITOR INFORMATION**

**BOOTH #:** _____

COMPANY _____

STREET _____

CITY _____

PROV/STATE_____ CODE _____

PHONE _____ FAX _____

CONTACT NAME _____

E-MAIL _____

**CREDIT CARD AUTHORIZATION**

☐ MASTERCARD ☐ VISA ☐ AMEX

☐☐☐☐ ☐☐☐☐ ☐☐☐☐ ☐☐☐☐

EXPIRY DATE_____/_____

_____
Cardholder Name

_____
Cardholder Signature

**CREDIT CARD AUTHORIZATION (ABOVE) MUST BE COMPLETED AS METHOD OF PAYMENT FOR THIS SERVICE.**

**Exhibitors choosing to ship to the ADVANCE WAREHOUSE will receive the following special services:**

- STORAGE UP TO 30 DAYS IN THE ADVANCE WAREHOUSE
- DELIVERY OF SHIPMENT FROM ADVANCE WAREHOUSE TO LOADING DOCK AT SHOW SITE
- FIRST PRIORITY UNLOADING STATUS AT SHOW SITE

**ADVANCE SHIPMENTS TO WAREHOUSE RECEIVED BETWEEN SEPTEMBER 1 -SEPTEMBER 30, 2002:**

- ESTIMATED WEIGHT OF SHIPMENT(S) - Rounded Up to the nearest 100 lbs. = ☐
- Rate of $46.80 Per 100 lbs. (300 lb. Minimum)

**ADVANCE SHIPMENTS TO WAREHOUSE RECEIVED AFTER SEPTEMBER 30, 2002:**

- ESTIMATED WEIGHT OF SHIPMENT(S) - Rounded Up to the nearest 100 lbs. = ☐
- Rate of $52.00 per 100 lbs. (300 lb. Minimum)

**ADDITIONAL CHARGES MAY INCLUDE**

- **SPECIAL HANDLING** - Shipments of loose, padded or uncrated material, or double-stacked shipments will be subject to a 30% surcharge.
- **OVERTIME CHARGES** - Shipments received at the ADVANCE WAREHOUSE between 4:30pm and 8:00am Monday through Friday, all day Saturday, Sunday and holidays will be subject to a 25% surcharge.

**PLEASE COMPLETE THE FOLLOWING**

**Date shipment is scheduled to arrive at the ADVANCE WAREHOUSE** _____

**Carrier Name:** _____ **Number of Pieces** _____ **Total Weight** _____

**Terms & Conditions**

- Collect shipments will not be accepted.
- GES CANADA is not responsible for concealed damage, damage to loose or inadequately packed shipments or loss of merchandise after delivery to booth.
- It is the exhibitor's responsibility to secure and maintain loss & damage insurance coverage for their exhibit properties.
- All claims or discrepancies must be settled at the GES CANADA Service Centre prior to show closing.
- GES CANADA is not responsible for exhibit materials left in GEM rental exhibits or counter storage units

| | |
|---|---|
| **SUBTOTAL** | |
| **7% GST** | |
| **8% PST** | |
| **TOTAL** | |

GST #R104060264

**I have read and understand the Terms & Conditions of my agreement with GES CANADA.**

_____ SIGNATURE

_____ DATE

04/02

A SEARCH WARRANT is an order in writing, issued by a judge or judicial officer, commanding a law enforcement officer to search a specified person or premises for specified property and to bring it before the judicial authority named in the warrant. Before issuing the search warrant, the judicial officer must determine whether there is probable cause to search based on the information supplied in an AFFIDAVIT by a law enforcement officer or other person. Generally the types of property for which a search warrant may be issued, as specified in statutes or rules of court, are weapons, contraband, fruits of crimes, instrumentalities of crimes (for example, a mask used in a ROBBERY), and other evidence of crime.

A bench warrant is initiated by and issued from the bench or court directing a law enforcement officer to bring a specified person before the court. A bench warrant is used, among other purposes, when a person has failed to appear in response to a subpoena, summons, or citation. It is also used when an accused person needs to be transferred from jail to court for trial, and when a person's failure to obey a court order puts her or him in CONTEMPT of court. A bench warrant is sometimes called a "capias" or an "alias warrant."

Warrants may be used for financial transactions. For example, a private individual may draw up a warrant authorizing another person to pay out or deliver a sum of money or something else of value.

A warrant may be issued to a collector of taxes, empowering him or her to collect taxes as itemized on the assessment role and to enforce the assessments by tax sales where necessary.

## WARRANT OF ATTORNEY

*A written authorization that allows an attorney named in it to appear in court and admit the liability of the person giving the warrant in an action to collect a debt.*

This writing is usually given to help ensure that the person signing it will pay the amount that he or she would be obliged to pay if a judgment were entered against him or her. It usually contains an agreement that no action will be started against the signer if the obligation described in the paper is satisfied. Essentially the warrant of attorney is a cognovit note that permits a confession of judgment (a shortcut to obtaining a judgment against a debtor that is now illegal in most states).

## WARRANTY

*An assurance, promise, or guaranty by one party that a particular statement of fact is true and may be relied upon by the other party.*

Warranties are used in a variety of commercial situations. In many instances a business may voluntarily make a warranty. In other situations the law implies a warranty where no express warranty was made. Most warranties are made with respect to real estate, insurance, and sales and leases of goods and services.

### Real Estate

When land, houses, apartments, and other forms of real estate are sold or leased, the real estate usually comes with at least one warranty. In a sale of realty, the seller usually includes a warranty regarding the title to the property. In some cases the title may have a cloud on it. This means that some party other than the seller has a claim to the property. Such claims may be made by a bank, a JUDGMENT DEBTOR, a construction company, or any other party that has obtained a lien against the property. If the seller thinks that the title is clouded, the seller may offer a quitclaim deed. This type of deed contains no promises as to the title and releases the seller from any liability to the buyer if a lien holder later makes a claim to the property.

In other real estate transactions, the seller may warrant that the title is clear. In this situation the seller gives the buyer a general warranty deed. This kind of deed warrants that the title is clear and that the seller will be liable for any defects in the title that existed at the time of the sale.

Other types of warranties related to real estate titles include special warranty deeds and covenants of further assurances. A special warranty deed warrants only that no party made a claim to the property during the seller's ownership. Under a special warranty deed, the seller is not liable for any defects in the title attributable to her predecessors. A seller may add to a deed a COVENANT of further assurances, which promises that the seller will take any steps necessary to satisfy any claims to the property.

Sellers and buyers of real estate may negotiate warranties regarding the title to the property. They also may negotiate additional warranties regarding the property, such as warranties on plumbing or electricity or any other matter of special concern.

If the seller of real estate is the same party who constructed a building on the property, a

warranty of habitability may be automatically included in a sale of the property. A warranty of habitability in the context of a sale of real property is a promise that the dwelling complies with local BUILDING CODES, was built in a professional manner, and is suitable for human habitation.

Warranties also accompany leases of real property. All states, through either statutes or court decisions, require landlords to observe the warranty of habitability in leases of residential property. In this context the warranty of habitability is a promise that the premises comply with all relevant building codes and that they will be properly maintained and will be fit for habitation throughout the period of the tenancy. Specifically, the landlord promises to make necessary repairs in a prompt and reasonable fashion and to provide such basic services as water, heat, and electricity. If a landlord breaches the IMPLIED WARRANTY of habitability, the tenant may withhold rent and sue for any financial losses resulting from the breach.

### Insurance

A warranty in an insurance policy is a promise by the insured party that statements affecting the validity of the contract are true. Most insurance contracts require the insured to make certain warranties. For example, to obtain a HEALTH INSURANCE policy, an insured party may have to warrant that he does not suffer from a terminal disease. If a warranty made by an insured party turns out to be untrue, the insurer may cancel the policy and refuse to cover claims.

Not all misstatements made by an insured party give the insurer the right to cancel a policy or refuse a claim. Only misrepresentations on conditions and warranties in the contract give an insurer such rights. To qualify as a condition or warranty, the statement must be expressly included in the contract, and the provision must clearly show that the parties intended that the rights of the insured and insurer would depend on the truth of the statement.

Warranties in insurance contracts can be divided into two types: affirmative or promissory. An affirmative warranty is a statement regarding a fact at the time the contract was made. A promissory warranty is a statement about future facts or about facts that will continue to be true throughout the term of the policy. An untruthful affirmative warranty makes an insurance contract void at its inception. If a promissory warranty becomes true, the insurer may cancel coverage at such time as the warranty becomes untrue. For example, if an insured party warrants that property to be covered by a fire insurance policy will never be used for the mixing of explosives, the insurer may cancel the policy if the insured party decides to start mixing explosives on the property. Warranty provisions should contain language indicating whether they are affirmative or promissory.

Many states have created laws that protect insureds from cancellations due to misrepresented warranties. Courts tend to favor insureds by classifying indefinite warranties as affirmative. Many state legislatures have created laws providing that no misrepresented warranty should cancel an insurance contract if the MISREPRESENTATION was not fraudulent and did not increase the risks covered by the policy.

### Sales and Leases of Goods

Every contract for the sale or lease of goods contains a warranty that the seller or lessor actually owns the property. Courts hold that this warranty is implied if it is not included in the contract, and a seller or lessor cannot disclaim it.

The two basic types of sales warranties are express warranties and implied warranties. Express warranties are specific promises made by the seller and include oral representations, written representations, descriptions of the goods or services, representations in samples and models, and proof of prior quality of the goods or services. Puffing, or the seller's exaggerated opinion of quality, does not constitute a warranty. For example, if a car salesperson says, "This car will last you a lifetime," a court would likely consider such a statement puffing and not an express warranty.

Implied warranties are warranties that courts assume are implied in sales made by merchants. A merchant is a person who is in the business of selling the good or service being sold in the contract. All sales contracts made by merchants contain an implied warranty of merchantability. This is a promise that the goods, as they are described in the contract, pass without objection in the merchant's trade, are fit for the ordinary purpose for which they are normally used, are adequately contained, packaged, and labeled, and conform to any promises or affirmations of fact made on the container or label. If the goods are fungible, or easily replaced or

substituted, such as grain or oil, the replacement goods must be of fair and average quality, fit for their ordinary purposes, and similar to previous goods delivered in the same contract or previous similar contracts.

In some situations a sales contract may include an implied warranty of fitness for a particular purpose. This kind of warranty is a promise that the goods are useful for a special function. Courts infer this warranty is implied when the seller has reason to know of a particular purpose for which the goods are required and also knows that the buyer is relying on the seller's skill and knowledge in choosing the goods. The buyer does not need to specifically inform the seller that the goods are for a particular purpose; it is enough that a reasonable seller would be aware of the purpose.

For example, assume that a farmer, intending to plant no-till soybeans, approaches a seller to buy herbicide. Assume further that the buyer requests a particular herbicide mix but the seller suggests a less expensive mix. If the chemicals fail to kill crabgrass and the farmer has a low yield of soybeans, the farmer could sue the seller for breach of the warranty of fitness for a particular purpose because the seller knew what the farmer required.

In some cases an implied warranty may be lost or waived. If a seller issues a disclaimer—for example, states that the goods are as is—and the buyer examines or refuses to examine the goods, the buyer may lose any implied warranties. One important caveat is that courts will not find that an implied warranty has been waived if, under the circumstances of the sale, it is unreasonable to expect that the buyer would have understood that there were no warranties under the circumstances of the transaction.

A seller may disclaim the warranty of merchantability either orally or in writing, but a seller cannot orally disclaim a warranty of fitness for a particular purpose. A disclaimer of the warranty of fitness for a particular purpose must be in writing, and the disclaimer must be conspicuous to the buyer. Express warranties made by a seller may not be disclaimed. However, if a disclaimer and an express warranty can be construed as consistent, a court may uphold the disclaimer.

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CROSS-REFERENCES

Cloud on Title; Consumer Protection; Landlord and Tenant; Merchantable; Product Liability; Sales Law.

## WARRANTY DEED

*An instrument that transfers real property from one person to another and in which the grantor promises that title is good and clear of any claims.*

A deed is a written instrument that transfers the title of property from one person to another. Although many types of deeds exist, title is usually transferred by a warranty deed. A warranty deed provides the greatest protection to the purchaser because the grantor (seller) pledges or warrants that she legally owns the property and that there are no outstanding liens, mortgages, or other encumbrances against it. A warranty deed is also a guarantee of title, which means that the seller may be held liable for damages if the grantee (buyer) discovers the title is defective.

There are two types of warranty deeds: general and special. A general warranty deed not only conveys to the grantee all of the grantor's interest in and title to the property but also guarantees that if the title is defective or has a "cloud" on it, such as a mortgage claim, tax lien, title claim, judgment, or mechanic's lien, the grantee may hold the grantor liable.

A special warranty deed conveys the grantor's title to the grantee and promises to protect the grantee against title defects or claims asserted by the grantor and any persons whose right to assert a claim against the title arose during the period in which the grantor held title to the property. In a special warranty deed, the grantor guarantees to the grantee that the grantor has done nothing during the time he held title to the property that might in the future impair the grantee's title.

A warranty deed should contain an accurate description of the property being conveyed, be signed and witnessed according to the laws of the state where the property is located, and be delivered to the purchaser at closing. The deed should be recorded by the buyers of the property at the public records office, which is usually

located in the county courthouse. Recording a deed gives "notice to the world" that a particular piece of property has been sold. Though the grantor guarantees good title in a warranty deed, the deed is no substitute for title insurance because a warranty from a grantor who later dies or goes bankrupt may have little value.

CROSS-REFERENCES

Cloud on Title; Property Law; Recording of Land Titles; Registration of Land Titles; Title Search.

## ♦ WARREN, CHARLES

Charles Warren, a prominent lawyer and legal historian, is best known for his three-volume study, *The Supreme Court in U.S. History,* which won the Pulitzer Prize in 1923.

Warren was born on March 9, 1868, in Boston, Massachusetts. He attended Harvard College, receiving his A.B. in 1889. He then attended Harvard Law School, graduating in 1892. He was admitted to the bar that same year, and began to practice law in Boston.

Warren's foray into state politics began in 1893, when he became Governor William Eustis Russell's private secretary. The following year, in 1894, and again in 1895, Warren unsuccessfully ran for the state senate. During this period, he cofounded the Immigration Restriction League along with fellow Harvard graduates Robert DeCourcy Ward and Prescott Farnsworth Hall. The league, which was started in Boston but quickly spread to industrial centers around the United States, was seen as a response to the perceived threat to the American way of life by the growing numbers of immigrants from various European countries including Ireland, Italy, and Germany. The primary purpose of the league was to lobby for restriction of the number of immigrants permitted to enter the United States. The league remained active for approximately two decades before Hall died and the organization disbanded.

When Russell left the governorship in 1894, Warren became an associate in Russell's law practice until 1896. He then became a senior attorney in the Boston firm of Warren & Perry, where he practiced from 1897 to 1914. In 1905, Warren received a key appointment, when he became chair of the Massachusetts State Civil Service Commission. He served in that capacity until 1911. From there, he moved on to the national political scene.

Warren's work on the commission drew attention from President WOODROW WILSON, who, in 1914, appointed the progressive Democrat from Massachusetts assistant attorney general of the United States. Warren served from 1914 until 1918—the WORLD WAR I years. During this time, he developed expertise in the areas of governmental neutrality and INTERNATIONAL LAW. He also argued or wrote briefs on 39 cases that were heard by the U.S. Supreme Court.

Following the war, Warren remained in Washington, D.C., where he served as a SPECIAL MASTER for the Supreme Court on several original jurisdiction cases involving state boundary lines and WATER RIGHTS. He also practiced law and lectured at numerous colleges and law schools throughout the country. He became a prolific writer, authoring essays, law journal articles, and nonlegal works, including short stories. In addition, Warren wrote several influential books on law and LEGAL HISTORY. One of them, *The History of the American Bar, Colonial and Federal, to 1860,* published in 1911, traced the development of courts and the legal profession in the American colonies in Part One. Part Two looked at the growth of the bar from the begin-

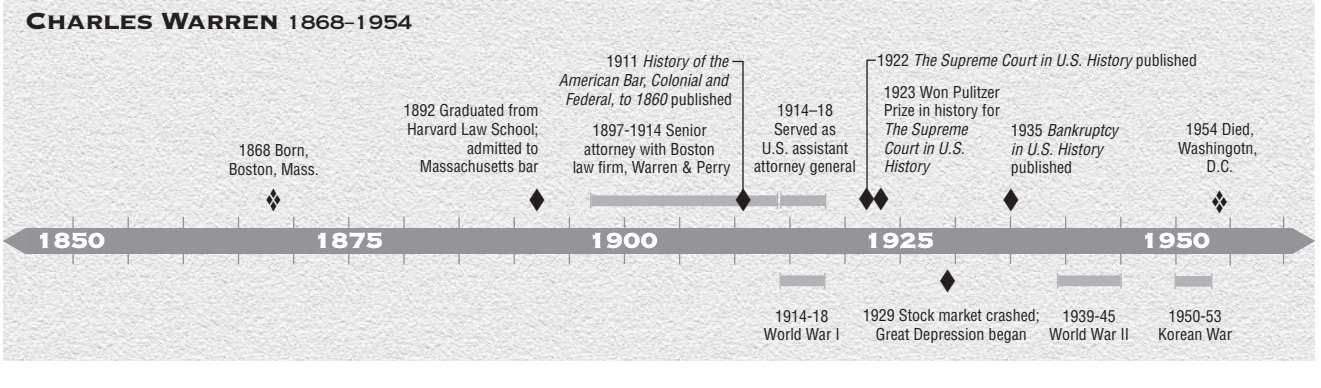

ning of the U.S. Supreme Court to the start of the Civil War.

Warren's reputation as a legal scholar was cemented in 1922, when he published a three-volume set called *The Supreme Court in U.S. History*, an analysis of each term of the Supreme Court and its most significant decisions between 1789 and 1918. Warren included contemporaneous writings with the cases so that readers could understand how the Court's decisions were viewed at the time they were issued. A monumental work that was still in print in the 2000s, Warren's opus was awarded the Pulitzer Prize for history in 1923.

Because of his expertise, Warren frequently was consulted by the U.S. government during the 1930s. For example, the STATE DEPARTMENT sought out his advice on neutrality issues. Warren also continued to publish. In 1935, he released *Bankruptcy in U. S. History.* Drawing on a series of lectures he had delivered at Northwestern University Law School, Warren's book was an historical and constitutional analysis of the topic of BANKRUPTCY from 1793 to 1935 at both the state and federal level.

During WORLD WAR II, Warren again was at the fore of international politics. Warren retired from public service in the late 1940s. He died in Washington, D.C., on August 16, 1954.

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## WARREN COMMISSION

The assassination of President JOHN F. KENNEDY in Dallas, Texas, on November 22, 1963, was a shocking event that immediately raised questions about the circumstances surrounding the death of the president. Those questions increased when the alleged assassin, Lee Harvey Oswald, was murdered while in the custody of Dallas police on November 25 by JACK RUBY, a Dallas nightclub owner.

President LYNDON B. JOHNSON moved quickly to reassure the nation that a thorough inquiry would take place by creating a commission of distinguished public servants to investigate the evidence. On November 29, 1963, Johnson appointed EARL WARREN, chief justice of the U.S. Supreme Court, to head the commission, which became known as the Warren Commission. Its 1964 report, which sought to put to rest many issues, proved controversial, provoking charges of a whitewash. The facts surrounding the Kennedy assassination remain the subject of debate.

*A bipartisan commission was assembled to investigate the assassination of President Kennedy. The Warren Commission included (l-r) Rep. Gerald R. Ford, Rep. Hale Boggs, Sen. Richard Russel, Chief Justice Earl Warren, Sen. John Sherman Cooper, John J. McCloy, Allen W. Dulles, and J. Lee Rankin.*

AP/WIDE WORLD PHOTOS

Chief Justice Warren, fearing that his service disrupted the traditional SEPARATION OF POWERS, reluctantly agreed to serve as director of the commission. The other members of the commission were Senators Richard B. Russell of Georgia and JOHN SHERMAN Cooper of Kentucky; two members of the House of Representatives, Hale Boggs of Louisiana and GERALD R. FORD of Michigan; Allen W. Dulles, former head of the CENTRAL INTELLIGENCE AGENCY; John J. McCloy, former head of the WORLD BANK; and James Lee Rankin, former U.S. SOLICITOR GENERAL, who was appointed general counsel for the commission.

The Warren Commission began its investigations on December 3, 1963. The commission used accounts and statements provided by the Dallas police force, the SECRET SERVICE, the FEDERAL BUREAU OF INVESTIGATION, the military, and government and congressional commissions. Over the course of ten months, the commission took testimony from 552 witnesses.

The commission published its conclusions, popularly known as the *Warren Report,* in September 1964. According to the commission, Oswald acted alone in the assassination. The commission characterized Oswald as a resentful, belligerent man who hated authority. The commission endorsed the "single bullet theory,"

which concluded that only one bullet, rather than two, struck President Kennedy and Texas governor John Connally, who was sitting directly in front of the president in the open convertible. This was important because it appeared unlikely that Oswald could have fired his rifle twice in succession quickly enough to strike the two men. It found no connection between Oswald's Communist affiliation, his time living in the Soviet Union, and the murder, nor between Oswald and his murderer, Jack Ruby. The commission also found no evidence that Ruby was part of a conspiracy. It criticized the security measures taken to protect Kennedy and recommended that more effective measures be taken in the future.

Although the conclusions of the commission were well received at first, public skepticism soon grew about the findings. In 1966 two influential books were published that challenged the methods and conclusions of the commission. Both *Inquest* by Edward Jay Epstein and *Rush to Judgment* by Mark Lane declared that the commission had not investigated deeply enough to produce conclusive results. In that same year, Jim Garrison, a New Orleans district attorney, stunned the public with his revelations of a conspiracy and his accusations against prominent businessman Clay Shaw. Shaw was tried on conspiracy charges but was acquitted in 1969.

Since the release of the Warren Commission report, thousands of articles and books have been published promoting various theories surrounding the assassination. A 1979 special committee of the House of Representatives reexamined the evidence and concluded that Kennedy "was probably assassinated as a result of a conspiracy."

Allegations that federal agencies withheld assassination evidence led Congress to enact the President John F. Kennedy Assassination Records Collection Act of 1992 (44 U.S.C.A. § 2107). The act created the Assassination Records Review Board, an independent federal agency that oversees the identification and release of records related to the assassination of President Kennedy. The act granted the review board the mandate and the authority to identify, secure, and make available, through the National Archives and Records Administration, records related to Kennedy's assassination. Creation of the review board has allowed the release of thousands of previously secret government documents and files.

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## WARREN COURT

From 1953 to 1969, EARL WARREN presided as chief justice of the U.S. Supreme Court. Under Warren's leadership, the Court actively used JUDICIAL REVIEW to strictly scrutinize and overturn state and federal statutes, to apply many provisions of the BILL OF RIGHTS to the states, and to provide opportunities for those groups in society that had been excluded from the political process. During Warren's tenure, the Court became increasingly liberal and activist, drawing the fire of political and judicial conservatives who believed that the Warren Court had overstepped its constitutional role and had become a legislative body. The Warren Court itself became a catalyst for change, initiating reforms rather than responding to pressures applied by other branches of government.

The Warren Court was committed to the promotion of a libertarian and egalitarian society. The Court used the STRICT SCRUTINY test of constitutional review to strike down legislation that directly abridged the exercise of fundamental rights or narrowed the number of people who might exercise them and to invalidate legislation that discriminated on the basis of race, religion, and other suspect classifications. Under strict scrutiny, the government has the burden of proving that a compelling state interest exists for the legislation and that the law was narrowly tailored to minimize the restriction on the fundamental right. This burden proved difficult to meet during the Warren Court years, turning the federal courts into institutions that protected the interests of politically unpopular individuals and members of relatively powerless minority groups who had been victimized by pervasive historical, political, economic, and social discrimination.

### Racial Discrimination

The first major decision of the Warren Court is arguably its most important. In BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the Court

overruled the 1896 Supreme Court decision of PLESSY V. FERGUSON, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, which had allowed racially segregated facilities on trains and by implication in public schools. The Court made clear that state-sponsored racial SEGREGATION of public schools was inherently unequal and that it violated the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT.

The *Brown* decision helped trigger the modern CIVIL RIGHTS MOVEMENT. During the 1960s the Warren Court upheld federal civil right legislation, including the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000a et seq.) and the VOTING RIGHTS ACT OF 1965 (42 U.S.C.A. § 1973 et seq.). The Court struck down state laws that were racially discriminatory, including statutes that forbade racially mixed marriages. The Court applied the THIRTEENTH AMENDMENT, which abolished SLAVERY, to outlaw all discrimination in the sale and rental of property and in the making of contracts.

### Voting and Reapportionment

Apart from upholding the Voting Rights Act of 1965, the Warren Court removed impediments to voting by striking down state poll tax and property qualifications, unreasonable residency requirements, and obstacles to putting third political parties on the ballot.

The Court also changed the makeup of state legislatures by reversing precedent and agreeing to hear legislative reapportionment cases. In REYNOLDS V. SIMS, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), Warren wrote the opinion that has come to be known as the one person, one vote decision. *Reynolds* and a series of cases that followed forced state legislatures to be apportioned equally on the basis of population rather than geographic areas. Reapportionment based on population resulted in a shift of political power away from sparsely populated rural areas to metropolitan areas.

### Criminal Procedure

The Warren Court aroused bitter controversy with its decisions in CRIMINAL PROCEDURE. The Court sought to provide equal justice by providing criminal defendants with an attorney in felony cases if they could not afford one (GIDEON V. WAINWRIGHT, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 [1963]). It also ruled that indigent defendants could not be denied the opportunity to appeal their cases or to participate fully in post-conviction proceedings because of a lack of funds to obtain the necessary transcripts or to hire counsel.

The decision in MIRANDA V. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), proved to be the Warren Court's most controversial criminal procedure case. The Court required what has come to be known as the *Miranda* warning: police must inform arrested persons that they need not answer questions and that they may have an attorney present during questioning.

In addition, the Court used the Fourteenth Amendment to incorporate federal constitutional rights, thus making them applicable to the states. Using this process, the Court applied the EXCLUSIONARY RULE to the states. This meant that evidence seized in violation of the FOURTH AMENDMENT could not be used in a criminal prosecution. The Warren Court also applied to the states the federal constitutional right against CRUEL AND UNUSUAL PUNISHMENT in the EIGHTH AMENDMENT, the RIGHT TO COUNSEL in the SIXTH AMENDMENT, the right against compelled SELF-INCRIMINATION in the FIFTH AMENDMENT, and the rights to confront witnesses and to a jury trial in all criminal cases, which are guaranteed by the Sixth Amendment. These decisions radically changed the criminal justice system and generated criticism that the Court had gone too far in protecting the accused.

### First Amendment

The Warren Court sought to protect FIRST AMENDMENT rights. It invalidated the Georgia House of Representatives' exclusion of one of its members because of his antiwar and antidraft statements. The Court also attacked vagueness and overbreadth in compulsory LOYALTY OATHS and ruled against the compulsory disclosure of organization memberships. It moved to invalidate attempts in southern states to inhibit the functioning of the National Association for the Advancement of Colored People (NAACP), to make public the identities of the organization's members, and to deny its members opportunities for public employment.

During the 1960s, the Court upheld the legitimacy of demonstrations at state capitols and in the streets and sit-ins at segregated lunch counters. It also upheld the right of individuals to picket in a privately owned shopping center and the right of high school students to express

their opposition to the VIETNAM WAR by wearing black armbands to school.

The Warren Court also changed state slander and LIBEL laws that stifled open discussion of controversial issues. It held that persons who are public officials or public figures cannot recover damages in a DEFAMATION action unless they prove that a false statement was made with "actual malice" (with knowledge that it was false or with reckless disregard of whether it was false).

The Court also reviewed many freedom of religion cases, provoking controversy over its interpretation of the Establishment Clause of the First Amendment. The Warren Court struck down Bible reading and the reciting of state-written prayers in public schools, even those religious acts done on a voluntary basis. The Court did, however, uphold, with qualifications, state aid to children attending religious schools. As to the First Amendment's Free Exercise Clause, the Court sought to protect the rights of religious dissenters and nonconformists when it struck down a Maryland constitutional provision requiring the declaration of a belief in God as a prerequisite to holding public office. It also held that an individual need not believe in a supreme being to be eligible for CONSCIENTIOUS OBJECTOR status.

### Right to Privacy

One of the most significant rulings of the Warren Court was its recognition of the constitutional right of privacy. In GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), the Court struck down a Connecticut statute that prohibited the dissemination of BIRTH CONTROL information. In declaring the right of privacy, the Court laid the groundwork for the post–Warren Court decision in ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), which gave women the right to have an ABORTION.

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Apportionment; *Baker v. Carr*; Custodial Interrogation; Equal Protection; Incorporation Doctrine; Libel and Slander; *Mapp v. Ohio*; *New York Times Co. v. Sullivan*; Overbreadth Doctrine; School Desegregation; Symbolic Speech; Void for Vagueness Doctrine.

## ❖ WARREN, EARL

Earl Warren served as the fourteenth chief justice of the U.S. Supreme Court from 1953 to 1969. A former prosecutor, state attorney general, and governor of California, Warren previously had not served as a judge. In spite of his lack of judicial experience, Warren led a constitutional revolution that reshaped U.S. law and society and granted the lower federal courts wide latitude in enforcing individual constitutional rights. Although criticized by conservatives for his judicial activism, Warren has also been hailed as one of the greatest chief justices in U.S. history.

Warren was born on March 19, 1891, in Los Angeles, California, but moved with his family to Bakersfield, California, as a young boy. The son of a railroad worker, Warren worked summers on railroad crews as a young man to earn money to attend college. He earned a bachelor's degree and a law degree from the University of California at Berkeley and was admitted to the California bar in 1914. After a brief period of service in the Army during WORLD WAR I, Warren returned to northern California where he practiced law for a short time in San Francisco.

Warren joined the Alameda County district attorney's office in 1920 and in 1925 was elected district attorney. Reelected two times, Warren established a reputation as a tough but fair prosecutor. A liberal Republican, he was elected California attorney general in 1938. Though he helped modernize the office during his term as attorney general, Warren's record was tarnished by his actions during the early months of U.S. involvement in WORLD WAR II.

In 1942 Warren was a key leader in demanding the removal of people of Japanese ancestry from the West Coast. At the time, Warren and others justified the removal of Japanese Americans on national security grounds, believing that California was vulnerable to Japanese spies and saboteurs. The U.S. Supreme Court, in KORE-

MATSU V. UNITED STATES, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944), upheld the removal. Thousands of Japanese Americans lost their property and businesses and were "relocated" to concentration camps for the duration of the war. Warren defended his actions throughout his public career, but in retirement he admitted the relocation was a mistake based on hysteria and unsubstantiated fears.

Warren was elected governor of California in 1942 and proved a popular political leader. He was reelected with Republican and DEMOCRATIC PARTY support in 1946 and 1950. Warren's only political defeat came in 1948, when he was the Republican vice-presidential candidate on the ticket headed by THOMAS E. DEWEY that lost to President HARRY S. TRUMAN. In 1952 he played a key role in securing the Republican presidential nomination for DWIGHT D. EISENHOWER, who in return promised Warren an appointment to the Supreme Court when a vacancy occurred.

When Chief Justice FRED M. VINSON died unexpectedly in September 1953, Eisenhower appointed Warren as his successor. In his first term as chief justice, Warren confronted the issue of state-mandated racial SEGREGATION in public schools. The case, which the Court had heard the previous year but was unable to decide, came back for reargument. In May 1954 Warren wrote the opinion for a unanimous Court in BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). *Brown* overruled the 1896 Supreme Court decision of PLESSY V. FERGUSON, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, which had allowed racially segregated facilities on trains and by implication in public schools. Writing that "separate educational facilities are inherently unequal," Warren held that racial segregation in Kansas denied African Americans EQUAL PROTECTION of the laws.

*Earl Warren.*
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*Brown* unleashed a torrent of controversy and protest in the South and immediately established Warren's image as a liberal. Throughout the South, billboards appeared that read "Impeach Earl Warren." Nevertheless, in 1955 the Court ordered Kansas and other states with segregated schools to move with "all deliberate speed" to dismantle their dual school systems. The modern CIVIL RIGHTS MOVEMENT was founded in this decision, which radically altered the traditional legal position on RACIAL DISCRIMINATION. When comprehensive federal

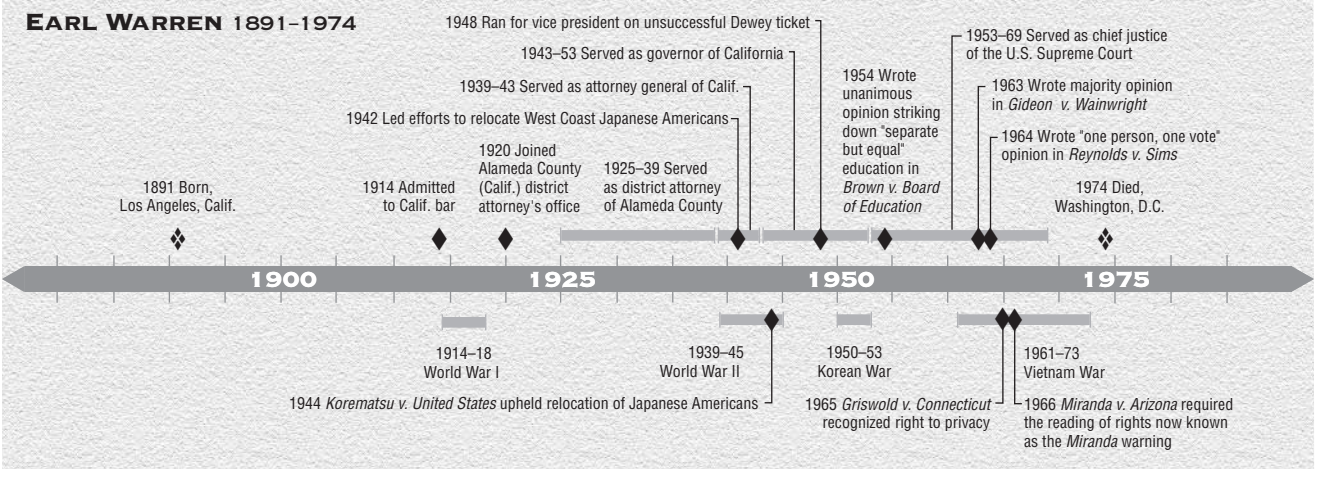

"In civilized life, law floats in a sea of ethics. Each is indispensable to civilization. Without law, we should be at the mercy of the least scrupulous; without ethics, law could not exist."
—Earl Warren

CIVIL RIGHTS legislation was enacted in the 1960s, the WARREN COURT easily upheld the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000a et seq.) and the VOTING RIGHTS ACT OF 1965 (42 U.S.C.A. § 1973 et seq.).

The Warren Court was marked by its STRICT SCRUTINY of legislation that directly abridged the exercise of fundamental rights or narrowed the number of people who might exercise them, and of legislation that discriminated against various suspect classes. The strict scrutiny standard of review shifted to the government the burden of proving a compelling STATE INTEREST that could justify discriminatory legislation. On most occasions the government could not meet this burden. In addition, the Court "read into" the FOURTEENTH AMENDMENT, applicable to the states, most of the provisions of the BILL OF RIGHTS, which until then had been applicable only to the federal government.

Warren himself believed that his most important contribution to the law came in the area of legislative reapportionment. Most state legislatures had not apportioned their seats since the early 1900s. The allocation of seats was based on geographic areas and favored rural districts with small populations over growing urban and suburban areas. Political change was almost impossible because rural-dominated legislatures prevented reapportionment. Until the 1960s the Supreme Court had refused to intervene, concluding that cases challenging APPORTIONMENT were POLITICAL QUESTIONS beyond the Court's jurisdiction.

In BAKER V. CARR, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), the Court held that it did have jurisdiction, and two years later, in REYNOLDS V. SIMS, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), Warren wrote the opinion that has come to be known as the one person, one vote decision. *Reynolds* and a series of cases that followed forced state legislatures to be apportioned equally on the basis of population rather than geographic areas. Warren noted that "citizens, not history or economic interests cast votes," and that "legislators represent people, not acres or trees." Reapportionment based on population resulted in a shift of political power away from sparsely populated rural areas to metropolitan areas.

Warren also reshaped U.S. CRIMINAL PROCEDURE, in the process drawing protest from law enforcement officials and those citizens who believed the Court was tipping the balance in favor of criminals. Many cases of this era limited police SEARCHES AND SEIZURES and the use of confessions and extended the RIGHT TO COUNSEL to poor persons accused of felonies.

In GIDEON V. WAINWRIGHT, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), the Court held that the SIXTH AMENDMENT right to legal counsel encompassed state as well as federal criminal proceedings. Therefore, the state was required to appoint an attorney to represent an indigent person charged with a crime. In MIRANDA V. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Court required what has come to be known as the *Miranda* warning: the police must inform arrested persons that they need not answer questions and that they may have an attorney present during questioning. Warren sought to ensure that suspects who are not sophisticated in law or who are not able to afford ready counsel are not disadvantaged. Nevertheless, rising crime convinced many citizens that the Court gave away too much of the government's authority in *Miranda.*

The Warren Court also recognized the constitutional right of privacy in GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). *Griswold* struck down a Connecticut statute that prohibited the dissemination of BIRTH CONTROL information. In declaring the right of privacy, the Court laid the groundwork for the post–Warren Court decision in ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), which gave women the right to have an ABORTION.

In 1963 President LYNDON B. JOHNSON persuaded Warren to head a commission investigating the assassination of President JOHN F. KENNEDY. Warren reluctantly agreed to the request but was uncomfortable participating in this extrajudicial activity. The 1964 WARREN COMMISSION report has remained controversial. Critics have attacked its conclusions that Lee Harvey Oswald was the lone assassin and that there was no conspiracy to kill the president.

Warren informed President Johnson in June 1968 of his intent to retire but left the date of his resignation open. When Republicans blocked Johnson's nomination of Justice ABE FORTAS in the fall of 1968, Warren agreed to serve until the next president took office in 1969, leaving the bench in July 1969. President RICHARD M. NIXON appointed WARREN E. BURGER as Warren's successor.

Many commentators have praised Warren's tenure as chief justice, but critics have charged that his judicial activism was outside the proper role of the Court and that many of the decisions were based on his personal values rather than the Constitution or other legal sources. Both Chief Justice Burger and his successor, Chief Justice WILLIAM H. REHNQUIST, have eschewed Warren's approach, applying more conservative principles.

Warren died on July 9, 1974, in Washington, D.C.

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CROSS-REFERENCES

Japanese American Evacuation Cases; Judicial Review; School Desegregation; Warren Court.

## WASH SALE

*The buying and selling of the same or a similar asset within a short period of time.*

*A fictitious type of arrangement whereby a* BROKER*, upon receiving an order from one individual to purchase and an order from another individual to sell a certain amount of a particular stock or commodity, transfers it from one principal to the other and retains the difference in value.*

For the purposes of INCOME TAX, losses on a wash sale of stock may not be recognized as capital losses if stock of equal value is obtained within thirty days prior or subsequent to the date of sale.

Various stock exchanges disallow this practice because the orders to buy and sell should be executed separately to the advantage of each of the broker's clients.

## ♦ WASHINGTON, BOOKER TALIAFERRO

Booker Taliaferro Washington was born into SLAVERY, but grew up to become one of the nation's most prominent leaders and educators. While various groups both supported and opposed his views, no one denied that Washington's accomplishments were notable. He remained, until his death, an influential proponent of race relations and African American self-sufficiency.

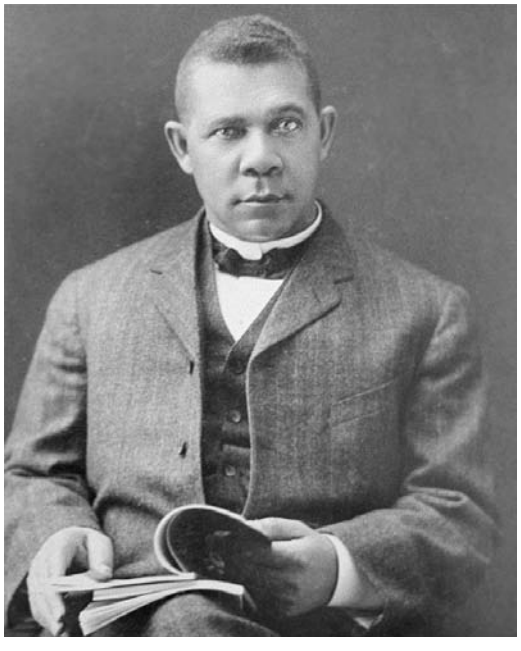

*Booker T. Washington.*
LIBRARY OF CONGRESS

"I HAVE LEARNED THAT SUCCESS IS TO BE MEASURED NOT SO MUCH BY THE POSITION THAT ONE HAS REACHED IN LIFE AS BY THE OBSTACLES WHICH HE HAS OVERCOME WHILE TRYING TO SUCCEED."
—BOOKER T. WASHINGTON

Booker Taliaferro was born on April 5, 1856, in Franklin County, Virginia. His mother was a slave; his father a white man whose identity remains unknown. When Booker was a child, his mother married a slave named Washington Ferguson. Booker took his stepfather's first name and became known as Booker T. Washington. After the U.S. CIVIL WAR ended, Washington and his family moved to Malden, West Virginia. At age nine, Washington began work in the local salt mines. He then labored as a coal miner before going to work as a houseboy for the wife of Lewis Ruffner, the mine owner, while attending a poorly equipped school that could only give him the bare rudiments of an education.

Possessed of a quick and lively intelligence, Washington was fascinated by the books he saw at the Ruffners' house and, with Mrs. Ruffner's encouragement, became determined to get a higher education. When Washington was 16, he made a long trek on foot to attend the Hampton Agricultural Institute in Virginia. The institute had been founded in 1868 by Samuel Armstrong, a former Union Army general who had led African-American troops during the Civil War. Armstrong believed strongly that freed slaves must be educated but also must learn to provide for themselves by receiving training in manual skills. An ardent proponent of the virtues of good hygiene and strong morals as well as self-discipline, Armstrong became a mentor to Washington.

Washington graduated from Hampton Institute in 1875 and returned to Malden where he worked as a teacher. Washington later taught at Hampton. When a new school, the Tuskegee Negro Normal Institute, was opened in Alabama on July 4, 1881, Washington, on Armstrong's recommendation, was placed in charge of it. Following the Hampton Institute model, Tuskegee Institute had an academic regimen but placed an emphasis on learning such practical trades as farming, carpentry, brickmaking, shoemaking, and printing.

Washington traveled the country to raise funds for his school, speaking to both whites and African Americans. His speeches eventually began to earn him a national reputation. In 1895, Washington spoke at the opening of the Cotton States Exposition in Atlanta, Georgia. In that speech Washington emphasized the need for African Americans to become economically self-sufficient before pressing for political rights. Washington's speech, called the "Atlanta Compromise," was well-received by numerous politicians and white citizens in the South who were proponents of JIM CROW LAWS, legislation which mandated SEGREGATION and political disenfranchisement.

Washington's conservative views were denounced by W. E. B. DuBois and other African American, as well as white, leaders who felt that CIVIL RIGHTS could not be compromised and that Washington's emphasis on a vocational education was an affront to those who wished to become professionals. Opposition to Washington's views helped to create the Niagara Movement, which was started in 1905 and served as the forerunner of the National Association for the Advancement of Colored People (NAACP), established in 1909.

Undaunted by criticism from both liberals and conservatives, Washington continued to write, lecture, and disseminate his personal philosophy of non-agitation. In addition, his influence expanded. He served as advisor to Presidents THEODORE ROOSEVELT and WILLIAM HOWARD TAFT, on the subject of political appointments of African Americans and issues concerning race relations. He also was instrumental in securing funds for African-American institutions from such millionaire industrial leaders as Andrew Carnegie and John D. Rockefeller.

When Washington died in New York City on November 14, 1915, Tuskegee Institute had more than 1,500 students enrolled, and approximately two hundred faculty members. Its endowment was larger than that of any other African American institution. Washington was able to add a considerable amount to Tuskegee funds through the sale of his popular and groundbreaking autobiography, *Up From Slavery,* which was published in 1901.

Booker T. Washington was both praised and reviled for practicing the "politics of accommodation." To some he was a hero who advocated for moral development and economic self-reliance for African Americans who had to forge a life after being freed from the bonds of slavery. To others he was supportive of segregation and a compatriot of whites who attempted to suppress equal rights for African Americans. Regardless of these views, Washington was a pivotal figure in American race relations after the Civil War.

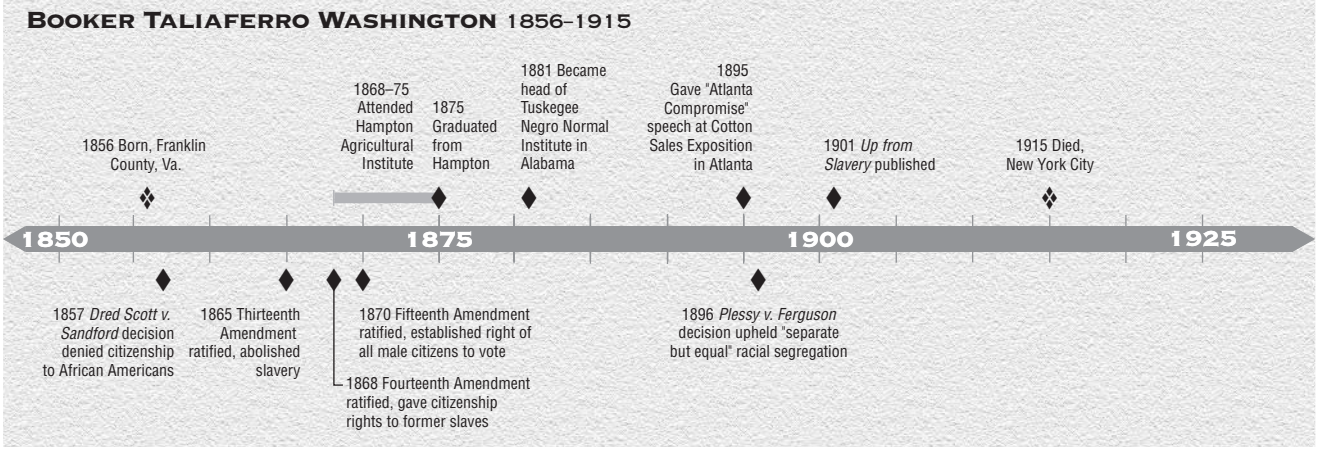

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## ♦ WASHINGTON, BUSHROD

Bushrod Washington served on the U.S. Supreme Court as an associate justice from 1798 to 1829. A strong Federalist and able jurist, Washington was tolerant and well-liked by other members of the bar. His reputation, though respectable, might shine more brightly today if it was not overshadowed by that of his contemporary and friend, Chief Justice JOHN MARSHALL. Washington concurred with Marshall's opinions so often that jokes were made about them being one justice. Although he wrote a handful of significant opinions on contract law, Washington is remembered primarily as a stalwart supporter of the chief justice.

Born on June 5, 1762, in Westmoreland County, Virginia, Washington enjoyed the benefits of an aristocratic life. He was a nephew of GEORGE WASHINGTON, the nation's first president, and the two were close. He inherited the president's estate at Mount Vernon. Tutored at home in his childhood, Washington later attended the College of William and Mary, graduating in 1778. He studied law privately until 1781 and then served in the Revolutionary War. In 1784 he was admitted to the Virginia bar.

Washington first practiced law in Alexandria, Virginia, where he also became involved in politics. In these early years of the young lawyer's life, he specialized in chancery cases—typical lawsuits under the now-antiquated system of EQUITY law. Yet he had an eager mind and kept expanding the range of his experience. He became a keen supporter of FEDERALISM, embracing its belief in strong federal government, and in 1787 won election to the Virginia House of Delegates. In 1788, as the nation was preparing to ratify the Constitution, he served as a delegate to Virginia's ratifying convention. By the late 1790s, Washington had established his own practice in Richmond, trained numerous lawyers, and written two enormous volumes of reports on cases as a recorder for the state's court of appeals. His legal and political experience prompted President JOHN ADAMS to appoint him to the Supreme Court in 1798.

On the Court, Washington almost always followed the lead of Chief Justice Marshall. The two had been friends since their student days and shared political sympathies. Marshall, widely viewed as the greatest leader of the Court

*Bushrod Washington.*
ETCHING BY ALBERT ROSENTHAL. THE GRANGER COLLECTION, NEW YORK

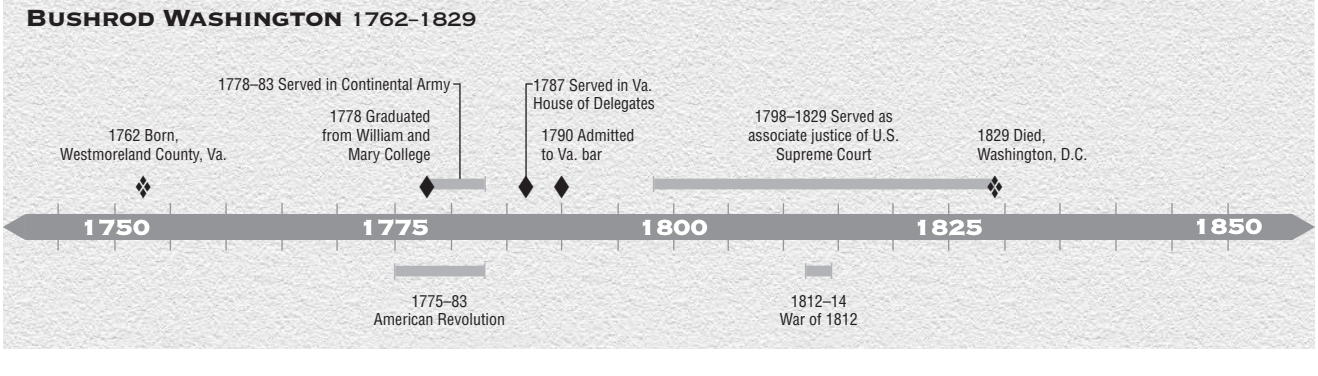

in history, was also an ardent judicial Federalist. Only three times did Washington vote differently from Marshall, and only once did he attach a concurring opinion to the chief justice's opinion. This was in DARTMOUTH COLLEGE V. WOODWARD, 17 U.S. (4 Wheat.) 518, 4 L. Ed. 629 (1819), a landmark case that upheld the inviolability of contracts. Washington's cautious concurrence sought to limit the implications of the decision.

If the two men differed philosophically, it was only by degree. Washington wished to avoid conflicts with STATES' RIGHTS whenever possible. He dissented only twice during thirty-one years on the Court. In fact, as a trusted supporter of the chief justice during the early tumultuous years of Marshall's tenure, he even went so far as to discourage his colleagues from writing dissents when ordinary issues were involved.

"IT IS BUT A DECENT RESPECT DUE TO THE WISDOM, THE INTEGRITY, AND THE PATRIOTISM OF THE LEGISLATIVE BODY, BY WHICH ANY LAW IS PASSED, TO PRESUME IN FAVOR OF ITS VALIDITY, UNTIL ITS VIOLATION OF THE CONSTITUTION IS PROVED BEYOND ALL REASONABLE DOUBT."
—BUSHROD WASHINGTON

Washington also made independent contributions to the Court. He wrote the first part of the decision in *Ogden v. Saunders,* 25 U.S. (12 Wheat.) 213, 6 L. Ed. 606 (1827), which stated that any law passed before the execution of a contract is a valid part of that contract. He was noted for his fairness while "circuit riding"—traveling and performing the duties of a circuit judge, a routine though difficult task for Supreme Court justices in the early nineteenth century.

Washington died in Philadelphia on November 26, 1829.

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## ♦ WASHINGTON, GEORGE

George Washington was a U.S. military leader, statesperson, and the first president of the United States from 1789 to 1797. A leader of mythic proportion in U.S. history, Washington's leadership from the American Revolution (WAR OF INDEPENDENCE) to the end of his presidential administrations proved crucial to winning independence from Great Britain and establishing a national union of states based on the U.S. Constitution.

Washington was born on February 22, 1732, in Westmoreland County, Virginia. Born into the colonial aristocracy, Washington attended local schools and supplemented his formal education by reading widely. As a young man he became a surveyor, and in 1749 he was appointed county surveyor for Culpeper County, Virginia. In 1752, at the age of twenty, Washington inherited the family estate at Mount Vernon and embarked on a military career.

During the French and Indian War, Washington gained his first military experience. The war was fought to determine whether France or Great Britain would rule North America. In 1753 Washington requested and received the assignment of delivering an ultimatum to the French, ordering them to retreat from the Ohio Valley. The French refused, and Washington led troops against them. Although Washington won an initial victory in 1754, the French counterattacked in force and Washington had to surrender his camp at Fort Necessity, Pennsylvania. He resigned his commission, but in May 1755 Washington became an unpaid volunteer, serving as aide-de-camp to the British general Edward Braddock. Braddock was ambushed and killed later that year near Fort Duquesne, and Washington himself narrowly escaped. In August 1755 Washington was promoted to colonel and given command of the Virginia militia, which defended the western frontier of the colony. During the remainder of the war, Washington successfully protected the frontier.

In 1759 Washington returned to Mount Vernon, where he married Martha Custes, a young widow with a large estate. The marriage made Washington one of the wealthiest men in Virginia. He was elected to the Virginia House of Burgesses in 1759, serving until 1774. During this period, colonial anger at British taxation and control began to steadily build. Great Britain believed that the taxes were justified to help repay the war debt and recognize British efforts to successfully remove France from North America. Washington, like many other colonial leaders, joined the protest against British interference and in 1774 endorsed the Fairfax Resolves, which called for a stringent boycott of British imports. In 1774 and 1775 he attended the first and second CONTINENTAL CONGRESSES as a delegate from Virginia.

In 1775, as the Revolutionary War was imminent, the Congress appointed Washington commander in chief of the American forces, which were known as the Continental Army. It was hoped that Washington's appointment would promote unity between Virginia and New England.

Washington's years as commander in chief were a mix of defeats and victories. In March 1776 he successfully forced the British out of Boston, but in August the British defeated his forces at New York City. Washington then sought safety in New Jersey and emerged victorious again with his surprise attack on Trenton on December 25, 1776. On January 3, 1777, Washington's troops defeated the British at Princeton, New Jersey. The two victories were critical to maintaining colonial morale, and by the spring of 1777, more than eight thousand new soldiers had joined the Continental Army.

The tide turned, however, in September 1777, when Washington unsuccessfully tried to stop British forces from advancing on Philadelphia at the battle of Brandywine Creek. After the British occupied Philadelphia, Washington made a futile attack at nearby Germantown. During the winter of 1777 and 1778, Washington's troops stayed at Valley Forge, west of Philadelphia. The conditions were adverse, requiring all of Washington's leadership skills to hold his army together. During the winter his actions aroused dissent in Congress, and his critics sought to have General Horatio Gates replace Washington as commander in chief. Several congressmen and military officers backed Gates, but the public rallied behind Washington.

In June 1778, Washington attacked the British at Monmouth, New Jersey, but again was defeated. He then shifted his military strategy, keeping his troops encamped around British forces in Connecticut, New York, and New Jersey. In 1781 Washington defeated General Charles Cornwallis at the Battle of Yorktown in Virginia. The surrender of Cornwallis marked the end of major military actions in the Revolutionary War. The signing of the **TREATY OF PARIS** in 1783 officially ended the conflict, with Great Britain recognizing the independence of the thirteen colonies and the geographic boundaries of the new nation.

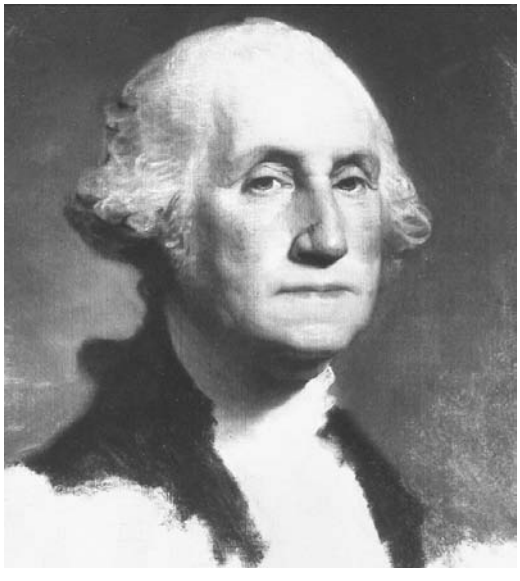

*George Washington.*
LIBRARY OF CONGRESS

After the war Washington returned to Mount Vernon, but he was soon drawn back into politics. The **ARTICLES OF CONFEDERATION** proved ineffective for governing the national affairs of the thirteen states. **SHAYS'S REBELLION**, named after its leader Daniel Shays, was an armed insurrection in Massachusetts in 1787 and 1788 that convinced U.S. political leaders that a strong national government was needed. Washington agreed and consented to serve as president at the Constitutional Convention of 1787 in Philadelphia. Though he played no part in the drafting of the Constitution and did not participate in behind-the-scenes political dis-

"LIBERTY, WHEN IT BEGINS TO TAKE ROOT, IS A PLANT OF RAPID GROWTH."
—GEORGE WASHINGTON

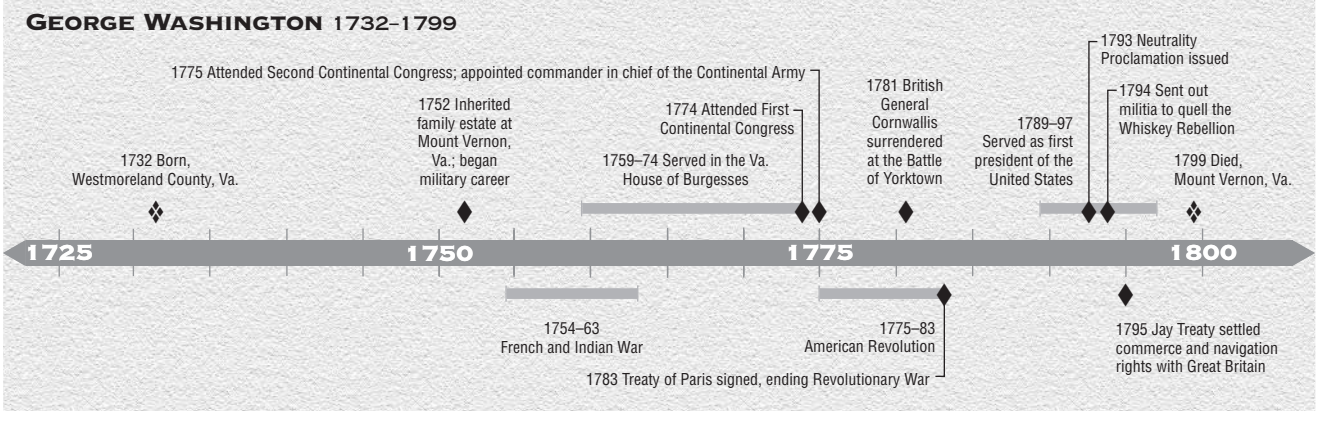

cussions, Washington's presence lent legitimacy to the effort to craft a new government.

As the leading national figure, Washington was the logical choice to become the first president of the United States. His election in 1788 helped shape the EXECUTIVE BRANCH of federal government. Washington decided to surround himself with a group of national leaders as his advisors and administrators. Though the presidential cabinet is not discussed in the Constitution, Washington's use of it made it a traditional part of a president's administration.

The first cabinet included THOMAS JEFFERSON as secretary of state and ALEXANDER HAMILTON as secretary of the treasury. Washington was sympathetic to Hamilton's belief that a strong national government was needed, including the establishment of a national bank. In contrast, Jefferson believed that the states should continue to be dominant, with the national government confined to the enumerated powers contained in the Constitution. The conflict between Hamilton and Jefferson dominated Washington's administration.

Jefferson supported the French Revolution, whereas Hamilton favored British efforts to organize a coalition to topple the new regime through warfare. As events unfolded, Washington announced in the Neutrality Proclamation of 1793 that the United States favored neutrality in the war between France and the British coalition. U.S. neutrality clearly favored the British. When the French emissary Edmond-Charles Genet tried to recruit U.S. soldiers to serve as volunteers for the French cause, Washington had Genet recalled and repudiated the 1778 treaty with France. Jefferson opposed Washington's actions and resigned as secretary of state, causing a rift in the REPUBLICAN PARTY and precipitating the formation of the FEDERALIST PARTY, with Hamilton as its leader.

Reelected in 1792, Washington faced domestic problems in 1794 with the WHISKEY REBELLION in Pennsylvania. Organized as a protest against a federal liquor tax, the Pennsylvania uprising was quelled when Washington ordered the militia to maintain peace.

In 1795 Washington faced opposition to the Jay Treaty with Great Britain, which JOHN JAY had negotiated to settle commerce and navigation rights. One section of the treaty permitted the British to search U.S. ships. The treaty was adopted because of Washington's popularity, but both the president and the treaty were severely criticized.

Washington did not seek reelection in 1796. In his celebrated "Farewell Address," he advised against "entangling alliances" with European nations. He returned to Mount Vernon, where he spent the rest of his years managing his estate.

Washington died on December 14, 1799, at Mount Vernon.

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"Farewell Address" (Appendix, Primary Document); War of Independence.

## WASHINGTON V. GLUCKSBERG

In *Washington v. Glucksberg,* 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997), the U.S. Supreme Court was asked to review the constitutionality of a Washington state statute prohibiting physician-assisted suicide. By upholding the statute and denying mentally competent, terminally ill patients a constitutional right to hasten their death through lethal doses of self-administered, doctor-prescribed medication, the Supreme Court returned this controversial issue to the states where it continues to be debated among residents, legislators, and judges. In handing down its decision, the Court was careful to point out that it was not foreclosing reconsideration of the issue at some later time.

The case arose in January 1994 when four Washington physicians, three gravely ill patients, and a nonprofit organization that counsels people considering doctor-assisted suicide filed a lawsuit in the U.S. District Court for the Western District of Washington. The lawsuit challenged the constitutionality of Washington Revised Code Section 9A.36.060, which makes it a crime to knowingly assist, aid, or cause the suicide of another person. The district court ruled the statute unconstitutional on the ground that it violated the liberty interest protected by the DUE PROCESS CLAUSE of the FIFTH and FOURTEENTH AMENDMENTS to the U.S. Constitution (*Com-*

*passion in Dying v. Washington,* 850 F. Supp. 1454).

The case was then appealed to the U.S. Court of Appeals for the Ninth Circuit, where a panel of judges reversed the district court's ruling and reinstated the Washington statute. In a 2–1 decision, the court of appeals emphasized that no right to assisted suicide has ever been recognized by a court of final jurisdiction anywhere in the United States (*Compassion in Dying v. Washington,* 49 F.3d 586 (1995). Agreeing to rehear the case en banc (before 11 judges on the ninth circuit), the court of appeals reversed the panel's decision and affirmed the district court's ruling, which had invalidated the Washington statute (*Compassion in Dying v. Washington,* 79 F.3d 790 [1996]. In an 8–3 decision, the appellate court said that "the Constitution encompasses a DUE PROCESS liberty interest in controlling the time and manner of one's death," including the liberty interest of certain patients to hasten their deaths by taking deadly amounts of medication prescribed by their physicians.

When the case reached the Supreme Court, Chief Justice WILLIAM H. REHNQUIST cast the issue in a slightly different light. In an opinion joined by Justices SANDRA DAY O'CONNOR, ANTONIN SCALIA, ANTHONY M. KENNEDY, and CLARENCE THOMAS, Rehnquist said that the case turned on whether the Due Process Clause protects the right to commit suicide with another's assistance. According to the Court, three reasons supported its decision to reject such a constitutional claim.

First, the Court observed that suicide and assisted suicide have been disapproved by Anglo-Saxon law for more than seven hundred years. From thirteenth-century England through nineteenth-century America, the Court said, the COMMON LAW has consistently authorized the punishment of those who have attempted to kill themselves or assisted others in doing so. Second, the Court pointed to the overwhelming majority of states that currently prohibit physician-assisted suicide. Only Oregon expressly allows doctors to help their patients hasten their demise through lethal doses of prescribed medication, and the law that allows this practice is constantly being challenged in court. Third, the Court found that the history of the Due Process Clause does not support the asserted right to assisted suicide.

Although the Due Process Clause protects certain fundamental rights, the Court wrote, the asserted right to physician-assisted suicide does not rise to this level of importance. Before a right may be deemed fundamental in nature, it must be deeply rooted in the nation's LEGAL HISTORY. Because the Court found the asserted right to physician-assisted suicide to be contrary to U.S. history, tradition, and practice, it concluded that it was not a fundamental right. This conclusion meant that the Court would not apply the STRICT SCRUTINY standard of JUDICIAL REVIEW that is required when a piece of legislation affects a highly valued liberty or freedom.

Instead, the Court applied a minimal standard of judicial scrutiny. Known as the rational relationship test, this standard of judicial scrutiny requires courts to uphold laws that are reasonably related to some legitimate government interest. In this case the Court said that the state of Washington had a legitimate interest in preserving life, preventing suicide, protecting the integrity and ethics of the medical profession, and safeguarding vulnerable members of society, such as the poor, elderly, and disabled, from friends and relatives who see physician-assisted suicide as a way to end the heartache and burden that often accompany the protracted illness of a loved one.

On the same day that the Court released its decision in *Glucksberg,* it announced its decision in a companion case, *Vacco v. Quill,* 521 U.S. 793, 117 S. Ct. 2293, 138 L. Ed. 2d 834 (1997). *Vacco* differed from *Glucksberg* in that the plaintiffs in *Vacco* (three doctors and three terminally ill patients) challenged a New York law prohibiting physician-assisted suicide on the ground that it violated the EQUAL PROTECTION CLAUSE of the Fourteenth Amendment to the U.S. Constitution. New York Penal Law Section 125.15 makes it a crime to intentionally help another person commit suicide. However, pursuant to the Supreme Court's decision in *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990), New York permits competent adult patients to terminate life-sustaining treatment, such as artificial hydration, nutrition, and respiration.

The Equal Protection Clause requires the government to provide equal treatment to all similarly situated people. The Fourteenth Amendment prohibits the government from denying legal rights to one group of persons when those same rights are afforded to another group confronted by indistinguishable circum-

stances. The plaintiffs argued that the withdrawal of life-sustaining treatment is tantamount to suicide, because by definition its withdrawal typically ends life by ceasing to sustain it. The plaintiffs in *Vacco* contended that, in allowing some patients to hasten their death by terminating life-sustaining measures but not allowing other patients to hasten their deaths by taking lethal doses of prescribed medication, New York had denied patients equal protection of the laws.

The Supreme Court disagreed. A fundamental distinction exists between letting a patient die and killing her, Chief Justice Rehnquist wrote in the majority opinion that was again joined by Justices O'Connor, Scalia, Kennedy, and Thomas. In one instance, the patient is allowed to die by natural causes when life-sustaining treatment is withdrawn. The patient's cause of death in that instance, the Court said, is the underlying illness. In the other instance, the Court continued, death is intentionally inflicted by the joint effort of doctor and patient. The cause of death in that instance, the Court emphasized, is not the underlying illness, but human action.

The Court also pointed out that the *Cruzan* decision was based on the ancient common-law tradition of protecting patients from unwanted medical treatment. Under the common law, it is considered a BATTERY (an intentional TORT that makes any unwanted touching actionable) for a physician to force a competent adult to undergo life-sustaining treatment over a clearly voiced objection. Based in part on this common-law tradition, the Court in *Cruzan* recognized a limited constitutional right of a competent, adult patient to disconnect hydration, nutrition, and respiration equipment, even if exercising this right would necessarily result in the patient's death. However, the Court in *Vacco* noted that a right to physician-assisted suicide has never been approved by the common law but has been historically discouraged by both common-law and statutory schemes throughout the United States. Thus, the Court concluded that physician-assisted suicide is not substantially similar to refusing medical treatment and that the legal systems of New York and other states may treat each practice differently without running afoul of the Equal Protection Clause.

Although the decisions in *Glucksberg* and *Vacco* were both unanimous, a number of justices wrote concurring opinions that were applicable to both cases. In a concurring opinion by Justice O'Connor, which was joined by Justice RUTH BADER GINSBURG, O'Connor stressed that the states remain free to establish a right to physician-assisted suicide or to otherwise strike a proper balance between the interests of terminally ill patients and the interests of society. State legislatures, O'Connor suggested, are a more appropriate forum for making such difficult decisions because their members are accountable to the electorate at the ballot box. By contrast, the federal judiciary is often insulated from public opinion because their members are appointed to the bench for life. Relying on several studies undertaken by the states to evaluate the problem of physician-assisted suicide, O'Connor said that the right to die must first be grappled with at the local level before entangling federal courts in the controversy.

Justice JOHN PAUL STEVENS's concurring opinion also underscored the need for further national debate on the propriety of physician-assisted suicide, but in a different vein. Although the states' interests may have been adequately served in *Glucksberg* and *Vacco,* Stevens cautioned, the Court's holding in these two cases does not foreclose the possibility that other circumstances might arise in which such statutes would infringe on a constitutionally protected area. There will be times, Stevens wrote, when a patient's interests in hastening his death will outweigh the state's countervailing interests in preserving his life. Although Stevens did not speculate about the circumstances in which a patient might successfully assert a right-to-die claim, Justice STEPHEN BREYER took the opportunity to do so in his concurring opinion.

Breyer suggested that the right to die should be renamed "the right-to-die with dignity." Once recognized by the Court, Breyer said, the right to die with dignity would include a competent patient's right to control the manner of her death, the quality and degree of professional care and intervention, and the amount of physical pain and suffering. According to Breyer, a statute that would prevent patients from obtaining access to certain palliative care aimed at reducing pain and suffering might infringe on the right to die with dignity. Competent, terminally ill adult patients, Breyer intimated, may enjoy a constitutional right to prescription medication that will minimize the agony that often tortures the final days of their existence.

Justice DAVID H. SOUTER articulated a different method of analysis for evaluating right-to-die cases. Souter argued that the so-called right to die is a species of SUBSTANTIVE DUE PROCESS. Substantive due process, Souter reminded the Court, is a doctrine under which a judge evaluates the substantive merits of a statute, as opposed to the procedure by which it is implemented or administered. Under the rubric of substantive due process, the Court has recognized an individual's interest in dignity, autonomy, and privacy, among other things, over the course of the last century. The right to refuse unwanted medical treatment recognized by the Court in *Cruzan,* for example, was designed in part to serve these three interests.

Souter contended that the doctrine of substantive due process protects individuals from "arbitrary impositions" and "purposeless restraints" created by the government. Souter advocated viewing substantive due process claims on a continuum of liberty in which the level of judicial scrutiny would increase in direct proportion to the level of government restraint or imposition. First enunciated by Justice JOHN MARSHALL HARLAN in his dissenting opinion in *Poe v. Ullman,* 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961), this approach to substantive due process would require courts to carefully balance the competing interests presented by the litigants in each right-to-die case.

Souter contrasted this simpler approach with the more complicated analysis presently employed by the Court, an analysis that involves multiple tiers of judicial scrutiny, ranging from strict to minimal scrutiny, different categories of constitutional rights, ranging from fundamental to non-fundamental rights, and different classes of protected status into which a plaintiff may fall, ranging from suspect to non-suspect classes. A BALANCING approach like the one articulated in *Poe,* Souter maintained, would allow for the gradual evolution of a constitutional right to die, instead of the complicated all-or-nothing approach that the Court has effectively adopted.

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CROSS-REFERENCES

Death and Dying; Euthanasia; Living Will; *Quinlan, In re.*

## WASTE

*Harmful or destructive use of real property by one in rightful possession of the property.*

Waste is an unreasonable or improper use of land by an individual in rightful possession of the land. A party with an interest in a parcel of land may file a civil action based on waste committed by an individual who also has an interest in the land. Such disputes may arise between life tenants and remainderpersons and landlords and tenants. The lawsuit may seek an INJUNCTION to stop the waste, damages for the waste, or both. Actions based on waste ordinarily arise when an owner of land takes exception to the manner in which the possessor or tenant is using the land.

The four common types of waste are voluntary, permissive, ameliorating, and equitable waste. Voluntary waste is the willful destruction or carrying away of something attached to the property. In an action for voluntary waste, the plaintiff must show that the waste was caused by an affirmative act of the tenant. Such waste might occur if a life tenant (a person who possesses the land for his lifetime, after which a remainderperson takes possession) chops down all the trees on the occupied land and sells them as lumber.

Voluntary waste will also occur, for example, if the tenant of an apartment removes kitchen appliances that are attached to the apartment floors and walls. More commonly, the tenant breaks a window, damages walls or woodwork, or otherwise damages the apartment. Landlords typically protect against this type of voluntary waste by requiring a damage or security deposit from the tenant at the commencement of the lease. When the tenant vacates the apartment, the landlord inspects for waste. If the apartment has been damaged, the landlord will use part or all of the deposit for repairs. If the damage exceeds the deposit, however, the landlord may

file an action seeking damages for the repairs not covered by the deposit.

Permissive waste is an injury caused by an omission, rather than an affirmative act, on the part of the tenant. This type of waste might occur, for example, if a tenant permits a house to fall into disrepair by not making reasonable maintenance repairs.

Ameliorating waste is an alteration in the physical characteristics of the premises by an unauthorized act of the tenant that increases the value of the property. For example, a tenant might make improvements that increase the value of the property, such as remodeling a bathroom. Generally, a tenant is not held liable if she commits this type of waste.

Equitable waste is a harm to the reversionary interest in land that is inconsistent with fruitful use. This CAUSE OF ACTION is recognized only by courts of EQUITY and is not regarded as legal waste in courts of law. For example, if the life tenant begins to cut down immature trees, the remainderperson, who will someday take possession of the property, may file an action in equity seeking an injunction to stop the cutting. The remainderperson would argue that the cutting imperils the productive use of the land in the future, because the value of the land after the immature trees have been cut would be decreased.

In an action for waste, a plaintiff commonly will seek damages for acts that have already occurred and request an injunction against future acts. A court will order an injunction if it finds that irreparable harm will occur and that the legal remedy would be inadequate, unless otherwise provided by statute. Certain laws provide for temporary relief if acts of waste are either threatened or committed.

The ordinary measure of damages for waste is the diminution in value of the property to the nonpossessor as a result of the acts of the possessor. This is frequently difficult to measure, particularly in situations where a significant period of time will elapse before the plaintiff is entitled to actual possession.

CROSS-REFERENCES

Landlord and Tenant; Life Estate.

## WATER POLLUTION

Without healthy water for drinking, cooking, fishing, and farming, the human race would perish. Clean water is also necessary for recreational interests such as swimming, boating, and water skiing. Yet, when Congress began assessing national water quality during the early 1970s, it found that much of the country's groundwater and surface water was contaminated or severely compromised. Studies revealed that the nation's three primary sources of water pollution—industry, agriculture, and municipalities—had been regularly discharging harmful materials into water supplies throughout the country over a number of years.

These harmful materials included organic wastes, sediments, minerals, nutrients, thermal pollutants, toxic chemicals, and other hazardous substances. Organic wastes are produced by animals and humans, and include such things as fecal matter, crop debris, yard clippings, food wastes, rubber, plastic, wood, and disposable diapers. Such wastes require oxygen to decompose. When they are dumped into streams and lakes and begin to break down, they can deprive aquatic life of the oxygen it needs to survive.

Sediments may be deposited into lakes and streams through soil erosion caused by the clearing, excavating, grading, transporting, and filling of land. Minerals, such as iron, copper, chromium, platinum, nickel, zinc, and tin, can be discharged into streams and lakes as a result of various mining activities. Excessive levels of sediments and minerals in water can inhibit the penetration of sunlight, which reduces the production of photosynthetic organisms.

Nutrients, like phosphorus and nitrogen, support the growth of algae and other plants forming the lower levels of the food chain. However, excessive levels of nutrients from sources such as fertilizer can cause eutrophication, which is the overgrowth of aquatic vegetation. This overgrowth clouds the water and smothers some plants. Over time, excessive nutrient levels can accelerate the natural process by which bodies of water evolve into dry land.

Thermal pollution results from the release of heated water into lakes and streams. Most thermal pollution is generated by power plant cooling systems. Power plants use water to cool their reactors and turbines, and discharge it into lakes and tributaries after it has become heated. Higher water temperatures accelerate biological and chemical processes in rivers and streams, reducing the water's ability to retain dissolved oxygen. This can hasten the growth of algae and disrupt the reproduction of fish.

Toxic chemicals and other hazardous materials present the most imminent threat to water quality. The ENVIRONMENTAL PROTECTION AGENCY (EPA) has identified 582 highly toxic chemicals, which are produced, manufactured, and stored in locations across the United States. Some chemical plants incinerate toxic waste, which produces dangerous by-products like furans and chlorinated dioxins, two of the most deadly carcinogens known to the human race. Other hazardous materials are produced or stored by households (motor oil, antifreeze, paints, and pesticides), dry cleaners (chlorinated solvents), farms (insecticides, fungicides, rodenticides, and herbicides), and gas stations and airports (fuel).

Water pollution regulation consists of a labyrinth of state and federal statutes, administrative rules, and common-law principles.

### Statutory Law

Federal statutory regulation of water pollution has been governed primarily by three pieces of legislation: the Refuse Act, the Federal Water Pollution Control Act, and the Clean Water Act. The Rivers and Harbors Appropriations Act of 1899, 33 U.S.C.A. § 401 et seq., commonly known as the Refuse Act, was the first major piece of federal legislation regulating water pollution. The Refuse Act set effluent standards for the discharge of pollutants into bodies of water. An effluent standard limits the amount of pollutant that can be released from a specific point or source, such as a smokestack or sewage pipe. The Refuse Act flatly prohibited pollution discharged from ship and shore installations.

The Refuse Act was followed by the Federal Water Pollution Control Act of 1948 (FWPCA), 33 U.S.C.A. § 1251 et seq. Instead of focusing on sources of pollution through effluent standards, the FWPCA created water quality standards, which prescribed the levels of pollutants permitted in a given body of water. Where the Refuse Act concentrated on deterring specific types of polluters, the FWPCA concentrated on reducing specific types of pollution.

Since 1972, federal regulation of water pollution has been primarily governed by the Clean Water Act (CWA) 33 U.S.C.A. § 1251 et seq., which overhauled FWCPA. The CWA forbids any person to discharge pollutants into U.S. waters unless the discharge conforms with certain provisions of the act. Among those provisions are several that call upon the EPA to promulgate effluent standards for particular categories of water polluters.

To implement these standards, the CWA requires each polluter to obtain a discharge permit issued by the EPA through the National Pollutant Discharge Elimination System (NPDES). Although the EPA closely monitors water pollution dischargers through the NPDES, primary responsibility for enforcement of the CWA rests with the states. Most states have also drafted permit systems similar to the NPDES. These systems are designed to protect local supplies of groundwater, surface water, and drinking water. Persons who violate either the federal or state permit system face civil fines, criminal penalties, and suspension of their discharge privileges.

The CWA also relies on modern technology to curb water pollution. It requires many polluters to implement the best practicable control technology, the best available technology economically achievable, or the best practicable waste treatment technology. The development of such technology for nontoxic polluters is based on a cost-benefit analysis in which the feasibility and expense of the technology is balanced against the expected benefits to the environment.

The CWA was amended in 1977 to address the nation's increasing concern about toxic pollutants. Pursuant to the 1977 amendments, the EPA increased the number of pollutants it deemed toxic from nine to 65, and set effluent limitations for the 21 industries that discharge them. These limitations are based on measures of the danger these pollutants pose to the public health rather than on cost-benefit analyses.

Many states have enacted their own water pollution legislation regulating the discharge of toxic and other pollutants into their streams and lakes.

The mining industry presents persistent water pollution problems for state and federal governments. It has polluted over a thousand miles of streams in Appalachia with acid drainage. In response, the affected state governments now require strip miners to obtain licenses before commencing activity. Many states also require miners to post bonds in an amount sufficient to repair potential damage to surrounding lakes and streams. Similarly, the federal government, under the Mineral Leasing Act, 30 U.S.C.A. § 201 et seq., requires each mining applicant to "submit a plan of construction,

*Toxic chemicals and other hazardous materials present the greatest threat to water quality. In June 1997, warning signs were posted around Silver Lake in Pittsfield, Massachusetts, when the lake was found to contain dangerous levels of PCBs.*

AP/WIDE WORLD PHOTOS

operation and rehabilitation" for the affected area, that takes into account the need for "restoration, revegetation and curtailment of erosion."

The commercial timber industry also presents persistent water pollution problems. Tree harvesting, yarding (the collection of felled trees), and road building can all deposit soil sediments into watercourses, thereby reducing the water quality for aquatic life. State governments have offered similar responses to these problems. For instance, clear-cutting (the removal of substantially all the trees from a given area) has been prohibited by most states. Other states have created buffer zones around particularly vulnerable watercourses, and banned unusually harmful activities in certain areas. Enforcement of these water pollution measures has been frustrated by vaguely worded legislation and a scarcity of inspectors in several states.

### Common Law

State and federal water pollution statutes provide one avenue of legal recourse for those harmed by water pollution. The common-law doctrines of NUISANCE, TRESPASS, NEGLIGENCE, STRICT LIABILITY, and riparian ownership provide alternative remedies.

Nuisances can be public or private. Private nuisances interfere with the rights and interests of private citizens, whereas public nuisances interfere with the common rights and interests of the people at large. Both types of nuisance must result from the "unreasonable" activities of a polluter, and inflict "substantial" harm on neighboring landowners. An injury that is minor or inconsequential will not result in liability under common-law nuisance. For example, dumping trace amounts of fertilizer into a stream abutting neighboring property will not amount to a public or private nuisance.

The oil and agricultural industries are frequently involved in state nuisance actions. Oil companies often run afoul of nuisance principles for improperly storing, transporting, and disposing of hazardous materials. Farmers represent a unique class of persons who fall prey to water pollution nuisances almost as often as they create them. Their abundant use of fungicides, herbicides, insecticides, and rodenticides makes them frequent creators of nuisances, and their use of streams, rivers, and groundwater for irrigation systems makes them frequent victims.

Nuisance actions deal primarily with continuing or repetitive injuries. Trespass actions provide relief even when an injury results from a single event. A polluter who spills oil, dumps chemicals, or otherwise contaminates a neighboring water supply on one occasion might avoid liability under nuisance law but not under the law of trespass. Trespass does not require proof of a substantial injury. However, only nominal damages will be awarded to a landowner whose water supply suffers little harm from the trespass of a polluter.

Trespass requires proof that a polluter intentionally or knowingly contaminated a particular course of water. Yet, water contamination often results from unintentional behavior, such as industrial accidents. In such instances, the polluter may be liable under common-law principles of negligence. Negligence occurs when a polluter fails to exercise the degree of care that would be reasonable under the circumstances. Thus, a landowner whose water supply was inadvertently contaminated might bring a successful lawsuit against the polluter for common-law negligence where a lawsuit for nuisance or trespass would fail.

Even when a polluter exercises the utmost diligence to prevent water contamination, an injured landowner may still have recourse under the doctrine of strict liability. Under this doctrine, polluters who engage in "abnormally dangerous" activities are held responsible for any water contamination that results. Courts consider six factors when determining whether a particular activity is abnormally dangerous: the probability that the activity will cause harm to another, the likelihood that the harm will be great, the ability to eliminate the risk by exercising reasonable care, the extent to which the

activity is uncommon or unusual, the activity's appropriateness for a particular location, and the activity's value or danger to the community.

The doctrine of strict liability arose out of a national conflict between competing values during the industrial revolution. This conflict pitted those who believed it was necessary to create an environment that promoted commerce against those who believed it was necessary to preserve a healthy and clean environment. For many years, courts were reluctant to impose strict liability on U.S. businesses, out of concern over retarding industrial growth.

Since the early 1970s, courts have placed greater emphasis on preserving a healthy and clean environment. In *Cities Service Co. v. State,* 312 So. 2d 799 (Fla. App. 1975), the court explained that "though many hazardous activities . . . are socially desirable, it now seems reasonable that they pay their own way." *Cities Service* involved a situation in which a dam burst during a phosphate mining operation, releasing a billion gallons of phosphate slime into adjacent waterways, where fish and other aquatic life were killed. The court concluded that this mining activity was abnormally dangerous.

Some activities inherently create abnormally dangerous risks to abutting waterways. In such cases, courts do not employ a BALANCING test to determine whether an activity is abnormally dangerous. Instead, they consider these activities to be dangerous in and of themselves. The transportation and storage of high explosives and the operation of oil and gas wells are activities courts have held to create inherent risks of abnormally dangerous proportions.

The doctrine of riparian ownership forms the final prong of common-law recovery. A riparian proprietor is the owner of land abutting a stream of water, and has the right to divert the water for any useful purpose. Some courts define the term *useful purpose* broadly to include almost any purpose whatsoever, whereas other courts define it more narrowly to include only purposes that are reasonable or profitable.

In any event, downstream riparian proprietors are often placed at a disadvantage because the law protects upstream owners' initial use of the water. For example, an upstream proprietor may construct a dam to appropriate a reasonable amount of water without compensating a downstream proprietor. However, cases involving thermal pollution provide an exception to this rule. For example, downstream owners who use river water to make ice can seek injunctive relief to prevent upstream owners from engaging in any activities that raise the water temperature by even one degree Fahrenheit.

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Environmental Law; Fish and Fishing; Law of the Sea; Mine and Mineral Law; Pollution; Riparian Rights; Solid Wastes, Hazardous Substances, and Toxic Pollutants; Tort Law; Water Rights.

## WATER RIGHTS

*A group of rights designed to protect the use and enjoyment of water that travels in streams, rivers, lakes, and ponds, gathers on the surface of the earth, or collects underground.*

Water rights generally emerge from a person's ownership of the land bordering the banks of a watercourse or from a person's actual use of a watercourse. Water rights are conferred and regulated by judge-made COMMON LAW, state and federal legislative bodies, and other government departments. Water rights can also be created by contract, as when one person transfers his water rights to another.

In the eighteenth century, regulation of water was primarily governed by custom and practice. As the U.S. population expanded over the next two centuries, however, and the use of water for agrarian and domestic purposes increased, water became viewed as a finite and frequently scarce resource. As a result, laws were passed to establish guidelines for the fair distribution of this resource. Courts began developing common-law doctrines to accommodate landowners who asserted competing claims over a body of water. These doctrines govern three

areas: riparian rights, surface water rights, and underground water rights.

An owner or possessor of land that abuts a natural stream, river, pond, or lake is called a riparian owner or proprietor. The law gives riparian owners certain rights to water that are incident to possession of the adjacent land. Depending on the jurisdiction in which a watercourse is located, riparian rights generally fall into one of three categories.

First, riparian owners may be entitled to the "natural flow" of a watercourse. Under the natural flow doctrine, riparian owners have a right to enjoy the natural condition of a watercourse, undiminished in quantity or quality by other riparian owners. Every riparian owner enjoys this right to the same extent and degree, and each such owner maintains a qualified right to use the water for domestic purposes, such as drinking and bathing.

However, this qualified right does not entitle riparian owners to transport water away from the land abutting the watercourse. Nor does it permit riparian owners to use the water for most irrigation projects or commercial enterprises. Sprinkling gardens and watering animals are normally considered permissible uses under the natural flow doctrine of riparian rights.

Second, riparian owners may be entitled to the "reasonable use" of a watercourse. States that recognize the reasonable use doctrine found the natural flow doctrine too restrictive. During the industrial revolution of the nineteenth century, some U.S. courts applied the natural flow doctrine to prohibit riparian owners from detaining or diverting a watercourse for commercial development, such as manufacturing and milling, because such development impermissibly altered the water's original condition.

In replacing the natural flow doctrine, a majority of jurisdictions in the United States now permit riparian owners to make any reasonable use of water that does not unduly interfere with the competing rights and interests of other riparian owners. Unlike the natural flow doctrine, which seeks to preserve water in its original condition, the reasonable use doctrine facilitates domestic and commercial endeavors that are carried out in a productive and reasonable manner.

When two riparian owners assert competing claims over the exercise of certain water rights, courts applying the reasonable use doctrine generally attempt to measure the economic value of the water rights to each owner. Courts also try to evaluate the prospective value to society that would result from a riparian owner's proposed use, as well as its probable costs. No single factor is decisive in a court's analysis.

Third, riparian owners may be entitled to the "prior appropriation" of a watercourse. Where the reasonable use doctrine requires courts to balance the competing interests of riparian owners, the doctrine of prior appropriation initially grants a superior legal right to the first riparian owner who makes a beneficial use of a watercourse. The prior appropriation doctrine is applied in most arid western states, including Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming and requires the riparian owner to demonstrate that she is using the water in an economically efficient manner. Consequently, the rights of a riparian owner under the prior appropriation doctrine are always subject to the rights of other riparian owners who can demonstrate a more economically efficient use.

Under any of the three doctrines, the interests of riparian owners are limited by the constitutional authority of the state and federal governments. The COMMERCE CLAUSE of the U.S. Constitution gives Congress the power to regulate NAVIGABLE WATERS, a power that Congress has exercised in a variety of ways, including the construction of dams. In those instances where Congress does not exercise its power under the Commerce Clause, states retain authority under their own constitutions to regulate waterways for the public good.

However, the EMINENT DOMAIN CLAUSE of the FIFTH AMENDMENT to the U.S. Constitution limits the power of state and federal governments to impinge on the riparian rights of landowners by prohibiting the enactment of any laws or regulations that amount to a "taking" of private property. Laws and regulations that completely deprive a riparian owner of legally cognizable water rights constitute an illegal governmental taking of private property for Fifth Amendment purposes. The Fifth Amendment requires the government to pay the victims of takings an amount equal to the fair market value of the water rights.

Some litigation arises not from the manner in which neighboring owners appropriate water but from the manner in which they get rid of it. The disposal of surface waters, which consist of

drainage from rain, springs, and melting snow, is typically the source of such litigation. This type of water gathers on the surface of the earth but never joins a stream, lake, or other well-defined body of water.

Litigation arises when one owner drains excess surface water onto neighboring property. Individuals who own elevated property may precipitate a dispute by accelerating the force or quantity of surface water running downhill, and individuals who own property on a lower level may rankle their neighbors by backing up surface water through damming and filling. Courts are split on how to resolve such disputes.

Some courts apply the common-law rule that allows landowners to use any method of surface water removal they choose without liability for flooding that may result to nearby property. Application of this rule generally rewards assertive and clever landowners and does not discourage neighbors from engaging in petty or vindictive squabbles over surface water removal.

Other courts apply the civil-law rule, which stems from Louisiana, a civil-law jurisdiction. This rule imposes STRICT LIABILITY for any damage caused by a landowner who interrupts or alters the natural flow of water. The civil-law rule encourages neighbors to let nature take its course and live with the consequences that may follow from excessive accumulation of standing surface water.

Over the last quarter century many courts have begun applying the reasonable use rule to surface water disputes. This rule enables landowners to make reasonable alterations to their land for drainage purposes as long as the alteration does not unduly interfere with a neighbor's right to do the same. In applying this rule, courts balance the neighbors' competing needs, the feasibility of more appropriate methods of drainage, and the comparative severity of injuries.

Surface water that seeps underground can also create conditions ripe for litigation. Sand, sod, gravel, and even rock are permeable substances in which natural springs may form and moisture can collect. Underground reservoirs can be tapped by artificial wells that are used in conjunction by commercial, municipal, and private parties. When an underground water supply is appreciably depleted by one party, other parties with an interest in the well may sue for damages.

As with surface water and riparian rights, three theories of underground water rights have evolved. The first theory, known as the absolute ownership theory, derives from ENGLISH LAW and affords landowners the right to withdraw as much underground water as they wish, for whatever purpose, requiring their neighbors to fend for themselves. Under the second theory, known as the American rule, landowners may withdraw as much underground water as they like as long as it is not done for a malicious purpose or in a wasteful manner. This theory is now applied in a majority of jurisdictions in the United States.

California has developed a third theory of underground water rights, known as the correlative theory. The correlative theory provides each landowner with an equal right to use underground water for a beneficial purpose. But landowners are not given the prerogative to seriously deplete a neighbor's water supply. In the event of water shortage, courts may apportion an underground supply among landowners. Many states facing acute or chronic shortages have adopted the correlative theory of underground water rights.

Water rights can also be affected by the natural avulsion or accretion of lands underlying or bordering a watercourse. Avulsions are marked by a sudden and violent change to the bed or course of a stream or river, causing a measurable loss or addition to land. Accretions are marked by the natural erosion of soil on one side of a watercourse and the gradual addition of soil to the other side. The extended shoreline made by sedimentary deposits is called an alluvion. Water rights are not altered by avulsions. However, any accretions of soil enure to the benefit of the landowner whose holdings have increased by the alluvion addition.

Although water covers more than two-thirds of the earth's surface, U.S. law treats water as a limited resource that is in great demand. The manner in which this demand is satisfied varies according to the jurisdiction in which a water supply is located. In some jurisdictions the most productive use is rewarded, whereas in other jurisdictions the first use is protected. Several jurisdictions are dissatisfied with both approaches and allow a water supply to be reasonably appropriated by all interested parties. Each approach has its weaknesses, and jurisdictions will continue experimenting with established legal doctrines to better accommodate the supply and demand of water rights.

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CROSS-REFERENCES

Environmental Law; Land-Use Control; Law of the Sea; Pollution; Solid Wastes, Hazardous Substances, and Toxic Pollutants; Water Pollution.

## WATERGATE

Watergate is the name given to the scandals involving President **RICHARD M. NIXON**, members of his administration, and operatives working for Nixon's 1972 reelection organization. The name comes from the Watergate apartment and hotel complex in Washington, D.C., which in 1972 was the location of the Democratic National Committee (DNC). On June 17, 1972, several burglars were caught breaking in to DNC headquarters. The break-in and the subsequent cover-up by Nixon and his aides culminated two years later in the president's resignation. Nixon's departure on August 9, 1974, prevented his **IMPEACHMENT** by the Senate. President **GERALD R. FORD**'s pardon of Nixon one month later prevented any criminal charges from being filed against the former president.

It has never been disclosed what the burglars who broke into DNC headquarters were seeking, but they were acting on orders from Nixon's first attorney general, **JOHN N. MITCHELL**, who was heading Nixon's reelection campaign, and several other high officials in the campaign staff and the White House. Though Nixon may not have known in advance about the break-in, by June 23, 1972, six days later, he had begun to participate in the cover-up. On that date he ordered the **CENTRAL INTELLIGENCE AGENCY** (CIA) to direct the **FEDERAL BUREAU OF INVESTIGATION** (FBI) to stop investigating the burglary, on the pretense that an investigation would endanger national security. This particular plan failed, but Nixon and his aides contained the damage during the fall presidential campaign. Nixon won a landslide victory over Democratic Senator George S. McGovern of South Dakota in November 1972.

During the first two months of 1973, Watergate receded from the public eye. However, on March 23, 1973, Judge John J. Sirica of the U.S. District Court for the District of Columbia imposed harsh sentences on the Watergate burglars. Sirica, who had presided at the trial, was convinced that the burglars were acting at the direction of others not yet revealed. He told the burglars that he would reduce their sentences if they cooperated with the investigation then being conducted by the U.S. Senate. He also released a letter from convicted burglar James W. McCord Jr., who said that pressure had been applied to convince the burglars not to reveal all that they knew, that administration officials had committed perjury, and that higher-ups were involved.

A federal **GRAND JURY** soon began to receive information from campaign insiders about campaign and White House involvement in the cover-up. In addition, the continuing investigative work of *Washington Post* reporters Carl Bernstein and Bob Woodward provided more details about the inner workings of Nixon's 1972 campaign and its connections with the White House. Finally, the Senate investigating committee headed by Senator **SAM J. ERVIN JR.** began to call Nixon aides to testify before it.

Nixon, who initially called the break-in "a third rate burglary," sought to have his chief aides—John D. Ehrlichman and H. R. ("Bob") Haldeman—"stonewall" prosecutors. The three men attempted to make John Mitchell the scapegoat, but public pressure forced Nixon to accept the resignations of Ehrlichman, Haldeman, White House counsel John W. Dean III, and Attorney General **RICHARD G. KLEINDIENST** on April 30, 1973.

Nixon appointed **ELLIOT L. RICHARDSON** attorney general to succeed Kleindienst, who had been accused of political improprieties. Richardson appointed Harvard law professor **ARCHIBALD COX** as special Watergate prosecutor

to investigate whether federal laws had been broken in connection with the break-in and the attempted cover-up. Richardson assured Cox, who was a personal friend, that he would have complete independence in his work.

At the Senate hearings, Dean and others disclosed the "dirty tricks" used by Nixon's political operatives and the cover-up activities after the break-in. However, in July 1973 the Watergate investigation changed course when Alexander Butterfield, a Haldeman aide, disclosed that Nixon had secretly taped all conversations in the Oval Office. Cox immediately subpoenaed the tapes of the conversations. When Nixon refused to honor the subpoena, Judge Sirica ordered Nixon to turn over the tapes. After the federal court of appeals upheld the order, Nixon offered to provide Cox with written summaries of the conversations in return for an agreement that Cox would not seek the release of any more presidential documents.

Cox refused the proposal. On Saturday, October 20, Nixon ordered Richardson to fire Cox. Richardson and his deputy attorney general, William D. Ruckelshaus, resigned rather than carry out the order. Cox was fired that night by solicitor general **ROBERT H. BORK**. The two resignations and the firing of Cox became known as the Saturday Night Massacre. The national outrage at Nixon's actions forced him to appoint a new prosecutor, **LEON JAWORSKI**. Jaworski immediately renewed the request for the tapes.

Although Nixon released edited transcripts of some of the subpoenaed conversations, he refused to turn over the unedited tapes on the grounds of **EXECUTIVE PRIVILEGE**. When the district court denied Nixon's motion to quash the subpoena, he appealed, and the case was quickly brought to the Supreme Court.

Nixon contended that the doctrine of executive privilege gave him the right to withhold documents from Congress and the courts. In **UNITED STATES V. NIXON**, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), the Supreme Court recognized the legitimacy of the doctrine of executive privilege but held that it could not prevent the disclosure of materials needed for a criminal prosecution. The Court ordered the judge to review the subpoenaed tapes in private to determine which portions should be released to prosecutors. This confidential review would prevent sensitive but irrelevant information from being disclosed. Nonetheless, the Court directed Nixon to turn over the tapes.

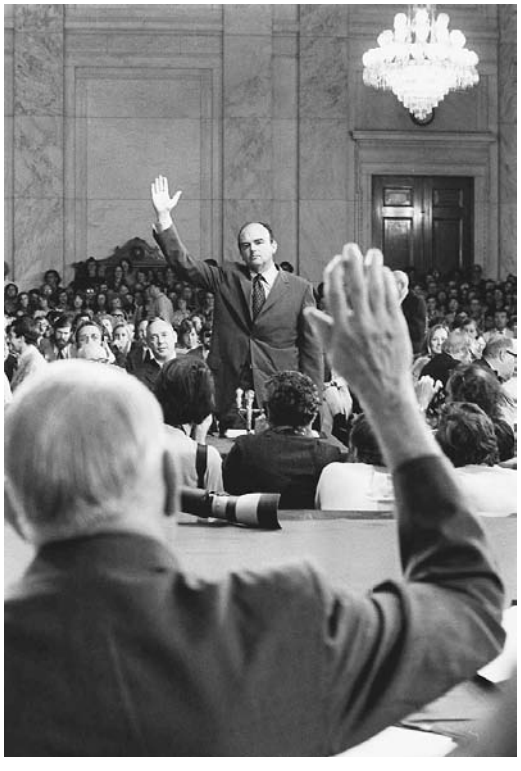

*John D. Ehrlichman, a former chief aide to President Richard Nixon, testifies before the Senate Watergate Committee in July 1973. He later spent 18 months in prison for his role in the Watergate conspiracy.*

AP/WIDE WORLD PHOTOS

The decision was handed down on July 24, 1974, at the same time the House Judiciary Committee was nearing completion of its impeachment hearings. Despite more than a year of damaging disclosures, many congressional Republicans remained loyal to the president, arguing that he had committed no criminal offenses that would make him liable for impeachment. Nevertheless, the committee voted three **ARTICLES OF IMPEACHMENT** against Nixon: for obstructing justice in the Watergate investigation, for exceeding **PRESIDENTIAL POWER** in waging a secret war in Cambodia without congressional approval, and for failing to cooperate with Congress in its attempt to gather evidence against him.

Nixon complied with the Supreme Court decision and turned over the tapes. When prosecutors discovered the June 23, 1972, conversation in which Nixon directed the CIA to halt the FBI investigation, they knew they had the "smoking gun" that tied Nixon to the cover-up. On August 6, 1974, Republican congressional leaders were informed about the contents of this tape. Nixon's political support vanished.

Faced with an impeachment trial, Nixon announced his resignation on August 8, 1974, and left office the next day. Though President

Ford pardoned Nixon, most of the other participants in Watergate were convicted for their crimes. Mitchell, Haldeman, and Ehrlichman, among others, spent time in prison.

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Executive Privilege; Ford, Gerald Rudolph; Impeachment; Pardon.

"WE'RE NOT SAYING ABORTION IS RIGHT OR WRONG OR PREACHING A MORAL CAUSE, BECAUSE THAT IS A VERY PERSONAL DECISION. WHAT WE ARE SAYING IS THAT THE GOVERNMENT HAS NO RIGHT TELLING WOMEN WHAT TO DO WITH THEIR LIVES."
—FAYE WATTLETON

## ♦ WATTLETON, ALYCE FAYE

From 1978 to 1992, Alyce Faye Wattleton held the stage as an articulate defender of reproductive rights for U.S. women. As president of the Planned Parenthood Federation of America, Wattleton was a national spokesperson for reproductive freedom and a lightning rod in the highly charged debate over ABORTION. Wattleton was the first woman and the first African American to head Planned Parenthood, the oldest voluntary family planning organization in the United States. During her 14-year tenure, she took an unequivocal stand on abortion rights and fought for improved reproductive HEALTH CARE for women with low incomes. Wattleton was known for her tremendous poise during confrontations with abortion foes and for her intelligent television interviews. As U.S. courts and lawmakers chipped away at abortion rights, Wattleton held fast to her conviction that women, not governments, had the right to control their reproductive destiny.

Born in St. Louis, Missouri on July 8, 1943, Wattleton was the only child of George Wattleton, a factory employee, and Ozie Garret Wattleton, a seamstress and a Fundamentalist minister in the Church of God. Wattleton credits her parents for developing in her a strong social conscience and a will to succeed. She excelled in school and was only 16 years old when she enrolled in Ohio State University. After graduating from Ohio State in 1964 with a nursing degree, Wattleton taught at Miami Valley Hospital School, in Dayton. She left that position in 1966 to begin work on a master's degree in maternal and infant health care, at New York's Columbia University.

While at Columbia on a full scholarship, Wattleton trained as a midwife in New York City's Harlem Hospital. In the 1960s, abortion was prohibited by law in most states. At Harlem Hospital, Wattleton saw firsthand the appalling medical consequences of illegal abortions. She witnessed the blood poisoning, torn uteruses, and painful deaths of desperate women who tried to induce abortions with chemicals or sharp instruments. These grim cases influenced Wattleton's decision to join Planned Parenthood and to support reproductive freedom. To Wattleton, the issue was one of self-determination and basic HUMAN RIGHTS for women.

After earning her master's degree in 1967, Wattleton became assistant director of the Montgomery County Combined Public Health District, in Dayton. As a public health nurse, she helped increase the prenatal health care services in the area. In 1970, Wattleton became executive director of a Planned Parenthood affiliate in Dayton. She married social worker and musician Franklin Gordon in 1971, and had a daughter, Felicia Gordon, in 1976. Wattleton and Gordon were divorced in 1981.

Wattleton's work ethic and her successful outreach and fund-raising efforts in Dayton led to her appointment in 1978 as president of the national Planned Parenthood organization. At age 34, Wattleton became the youngest person ever to head the huge family planning enterprise. (By the time Wattleton resigned in the early 1990s, Planned Parenthood would have nine hundred U.S. affiliates and an annual budget of $380 million.) Wattleton assumed leadership at a time when donating funds to Planned Parenthood was neither controversial nor a political act. Once Wattleton began to lobby for abortion rights, Planned Parenthood's reputation and perceived mission changed dramatically.

Although Planned Parenthood became synonymous with abortion, Wattleton pointed out that only a relatively small part of its operation was involved in terminating pregnancies. Only one-third of its U.S. clinics even performed abortions. BIRTH CONTROL, gynecologic exams,

and prenatal care were the services most commonly provided. Whereas 130,000 abortions were performed at Planned Parenthood clinics in 1990 (when 1.5 million abortions were performed nationwide), 3 million women received pregnancy tests, contraceptives, and prenatal exams from Planned Parenthood during the same year.

Wattleton placed Planned Parenthood squarely in the pro-choice camp because she was concerned about the erosion of **ROE V. WADE**, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), a landmark U.S. Supreme Court case guaranteeing a woman's right to choose an abortion. When President **RONALD REAGAN** took office in 1982, he aligned his administration with the antiabortion faction. During his two terms in office, federal funds for family planning clinics under title X of the **PUBLIC HEALTH SERVICE** Act (42 U.S.C.A. § 300–300a-41 [1970]) were cut significantly. Also, the **JUSTICE DEPARTMENT** attempted to prevent federally funded clinics from even mentioning abortion as a medical option (42 C.F.R. 59.8). Its so-called **GAG RULE** was denounced by Wattleton as a violation of free speech and an unfair restriction on poor women. The controversial regulation was enjoined by federal courts and ultimately struck down by a U.S. district court in 1992 (*National Family Planning & Reproductive Health Ass'n v. Sullivan,* 979 F.2d 227 [1992]).

Perhaps the most discouraging blow to Wattleton and the pro-choice movement was the U.S. Supreme Court's decision in **WEBSTER V. REPRODUCTIVE HEALTH SERVICES**, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989). In *Webster* the High Court ruled that individual state legislatures had the power to regulate abortion. As a result, an increase in state laws limiting access to abortion was likely.

*Faye Wattleton.*
AP/WIDE WORLD PHOTOS

Wattleton supported the introduction into the United States of RU486, an abortion-inducing drug not yet approved by the federal government. She also backed a reproductive rights amendment to the U.S. Constitution. Although Wattleton was a staunch abortion rights advocate, she was equally emphatic about the need to prevent unwanted pregnancies in the first place. She campaigned for the establishment of comprehensive health education programs in the schools and the community.

Because of her high profile and pro-choice position, Wattleton received several death threats while head of Planned Parenthood. Dur-

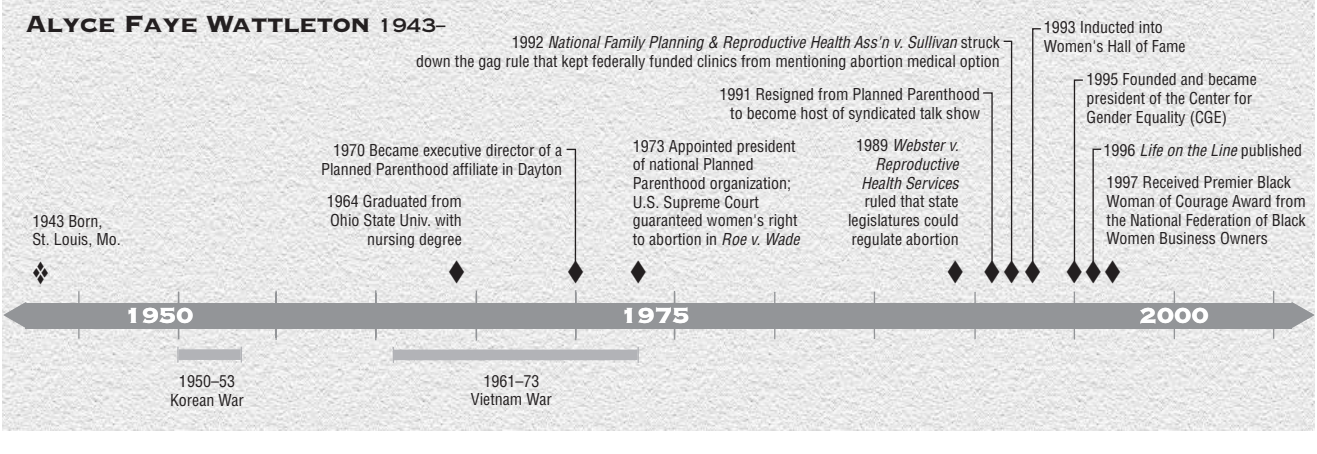

ing her tenure, several U.S. affiliates were bombed, picketed, and besieged by anti-choice groups.

In 1992, Wattleton resigned from Planned Parenthood to become host of a syndicated talk show in Chicago. She left behind a strengthened organization with a defined course of action, and a powerful example of living one's life according to principles. In 1995, Wattleton helped cofound the Center for Gender Equality, a research and education organization that advocates for the equality of women. In addition to sitting on the board of directors of a number of national corporations and nonprofit organizations, Wattleton became a trustee of Columbia University in April 2002.

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Reproduction.

"A CORPORATION . . . SEEMS TO US TO BE A PERSON, THOUGH AN ARTIFICIAL ONE, INHABITING AND BELONGING TO THAT STATE [OF INCORPORATION], AND THEREFORE ENTITLED, FOR THE PURPOSE OF SUING AND BEING SUED, TO BE DEEMED A CITIZEN OF THAT STATE."
—JAMES MOORE WAYNE

## WATTS, THOMAS HILL

See CONFEDERATE ATTORNEYS GENERAL.

## ❖ WAYNE, JAMES MOORE

As an associate justice, James Moore Wayne served on the U.S. Supreme Court from 1835 to 1867. Wayne rose to prominence in his native Georgia in the early 1800s, establishing himself as a local politician with cosmopolitan views. Nominated to the Court by President ANDREW JACKSON, he shared the president's strong federalist views, and Wayne often took an expansive view of federal power in his opinions. His FEDERALISM was put to the test, however, because of his support of SLAVERY. Loyal in his support for the Union during the U.S. CIVIL WAR, he paid a dear price in the south for choosing to remain on the Court even as other southern judges quit the federal bench.

*James M. Wayne.* ARCHIVE PHOTOS, INC.

Born in Savannah, Georgia, in 1790, Wayne was the son of aristocratic parents. In his teens, he chose to leave Georgia in order to attend Princeton University. He graduated in 1808, and two years later returned home to establish a law practice. After brief service as a captain in the WAR OF 1812, he set out on an intermittent political career. From 1815 to 1816, he served in the Georgia House of Representatives and was then

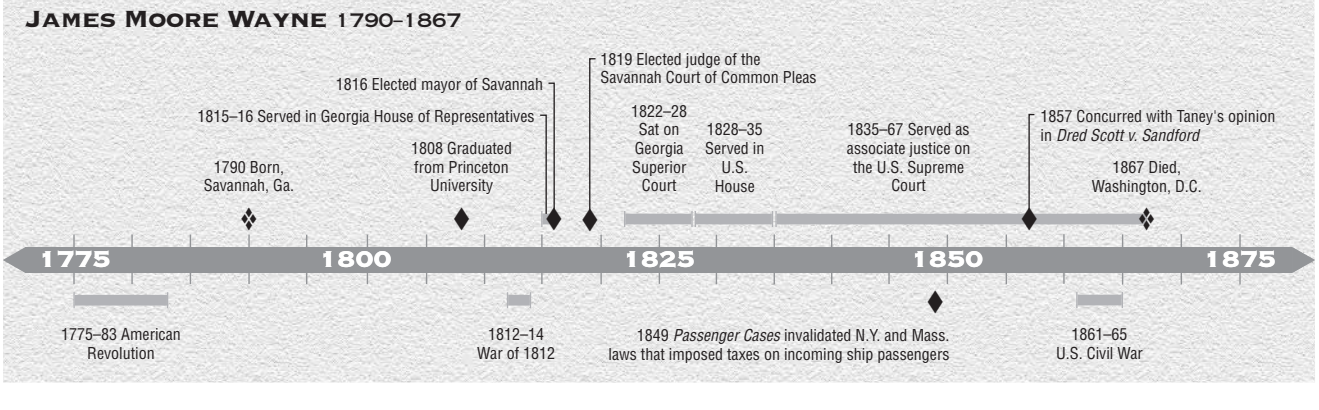

elected mayor of Savannah. His local political career soon gave way to a judicial one. In 1819 he was elected judge of the Savannah Court of Common Pleas, and in 1822 he became a judge of the superior court.

In 1828, Wayne's interest in national affairs took him to Washington. Winning election to the U.S. House of Representatives, he became a strong supporter of Andrew Jackson over the course of three terms in office. In 1834, when President Jackson needed a southerner to fill the vacancy left by the death of Associate Justice WILLIAM JOHNSON, Jackson nominated Wayne.

On the Court Wayne's federalism expressed itself repeatedly. His specialty was ADMIRALTY law—the law of the seas—which was of great significance during the era. Admiralty issues were often volatile because they involved one of the sharpest constitutional conflicts of the day, the power of Congress to regulate interstate commerce relative to state POLICE POWERS. The cases heard by the Court during Wayne's tenure involved taxation, licensing, and slavery, and the Court was often divided due to its inability to agree upon the extent of power vested in the Constitution's COMMERCE CLAUSE. Wayne generally voted in favor of the federal government's interests. In the so-called *Passenger Cases* of 1849, when the Court invalidated New York and Massachusetts laws that imposed taxes on incoming ship passengers, Wayne wrote in his concurring opinion that Congress had exclusive control over interstate commerce.

Politically, the dividing point in Wayne's federalism was the very issue that split the nation into Civil War—slavery. As a slave owner, he struggled to find justification for preserving the institution even as the federal government opposed it. He believed that Congress had no power to interfere with slavery under the DUE PROCESS CLAUSE of the FIFTH AMENDMENT, and thus concurred in Chief Justice Roger Brooke Taney's opinion in DRED SCOTT V. SANDFORD, 60 U.S. 393, 19 How. 393, 15 L. Ed. 691 (1857), which upheld the legality of slavery. The decision fueled animosities which led to the Civil War.

Southerners detested Wayne's decision to remain on the Court during the war. Yet even as he was denounced as a traitor and his property in Georgia was seized, he supported the cause of union. He remained on the bench until his death on July 7, 1867.

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## WEAPONS

*A comprehensive term for all instruments of offensive or defensive combat, including items used in injuring a person.*

The term *weapons* includes numerous items that can cause death or injury, including firearms, explosives, chemicals, and nuclear material. Because weapons pose a danger to the safety and well-being of individuals and communities, federal, state, and local statutes regulate the possession and use of weapons.

A dangerous or deadly weapon is one that is likely to cause death or great bodily harm. A handgun, a hand grenade, or a long knife are examples of deadly weapons. A weapon capable of causing death is, however, not necessarily a weapon likely to produce death. For example, an ordinary penknife is capable of causing death, but it is not considered a deadly weapon.

The regulation of firearms in the United States has proved controversial. Opponents of GUN CONTROL argue that the SECOND AMENDMENT to the U.S. Constitution makes the right to bear arms an inherent and inalienable right. Nevertheless, federal and state laws regulate who may own firearms and impose other conditions on their use. The passage in 1993 of the Brady Handgun Violence Prevention Act (18 U.S.C.A. § 921 et seq.) was the first major federal gun control law. The Brady Act bars felons and selected others from buying handguns, establishes a five-day waiting period for purchase, requires the local police to run background checks on handgun buyers, and mandates the development of a federal computer database for instant background checks.

The 1994 federal crime bill addressed deadly weapons used by criminals. The law (108 Stat. 1796) banned nineteen assault-type firearms and other firearms with similar characteristics. It limited the magazine capacity of guns and rifles to ten rounds, but exempted firearms, guns, and magazines that were legally owned when the law went into effect.

The deadliness of chemical explosives was demonstrated by the April 1995 bombing of the

federal courthouse in Oklahoma City, Oklahoma. In response, Congress passed the 1996 Anti-Terrorism and Effective Death Penalty Act. (P.L. 104-132). The act increases the penalties for conspiracies involving explosives and for the possession of nuclear materials, criminalizes the use of chemical weapons, and requires plastic explosives to contain "tagging" elements in the explosive materials for detection and identification purposes.

Unless proscribed by statute, possessing or carrying a weapon is not a crime, nor does it constitute a breach of the peace. However, most states make it a crime to carry a prohibited or concealed weapon. The term *concealed* means hidden, screened, or covered. The usual test for determining whether a weapon is concealed is whether the weapon is hidden from the general view of individuals who are in full view of the accused and close enough to see the weapon if it were not hidden. If the surface of a weapon is covered, the fact that its outline is distinguishable and recognizable as a weapon does not prevent it from being illegally concealed. In addition, most states have enacted laws mandating longer prison terms if a firearm was used in the commission of the crime.

Law enforcement officers who must carry weapons in order to perform their official duties ordinarily are exempted from statutes governing weapons. Private citizens may apply to the local police department for a permit to carry a firearm. Permits are generally granted if the person carries large sums of money or valuables in his or her business, or can demonstrate a particular need for personal protection.

CROSS-REFERENCES

Deadly Force; Self-Defense.

"[THE] MODERN JUDGE IS A VENDING MACHINE INTO WHICH THE PLEADINGS ARE INSERTED TOGETHER WITH THE FEE AND WHICH THEN DISGORGES THE JUDGMENT TOGETHER WITH THE REASONS MECHANICALLY DERIVED FROM THE CODE."
—MAX WEBER

## ♦ WEBER, MAX

Max Weber was a German sociologist and political economist who is best known for his theory of the development of Western capitalism that is based on the "Protestant Ethic." In addition, Weber wrote widely on law and religion, including groundbreaking work on the importance of bureaucracy in modern society. He also worked to establish the discipline of sociology based on an objective scholarship.

Weber was born on April 21, 1864, in Erfurt, Germany, into a wealthy manufacturing family. He studied at the Universities of Heidelberg and Berlin and joined the faculty at Heidelberg in 1896. A prolific writer and scholar, Weber resigned his professorship in 1907 after coming into an inheritance that made him financially independent, allowing him to devote all his energies to scholarship.

Weber's most famous work, *The Protestant Ethic and the Spirit of Capitalism* (1904–1905), introduced the concept of the "Protestant Ethic." Weber theorized that certain Protestant religious beliefs promoted the growth of capitalism. He claimed a relationship existed between success in capitalist ventures and Protestant (in particular, Calvinist and Puritan sects) theology. The Calvinist doctrine of predestination posited that individuals could never know if they were to receive God's salvation. This doctrine bred psychological insecurity in John Calvin's followers, who eventually looked for signs that might indicate they were in God's grace. From this search for signs developed the Protestant Ethic, which called for unceasing commitment to work and ascetic abstinence from any enjoyment of the profit realized from such labors. The result, Weber argued, was the

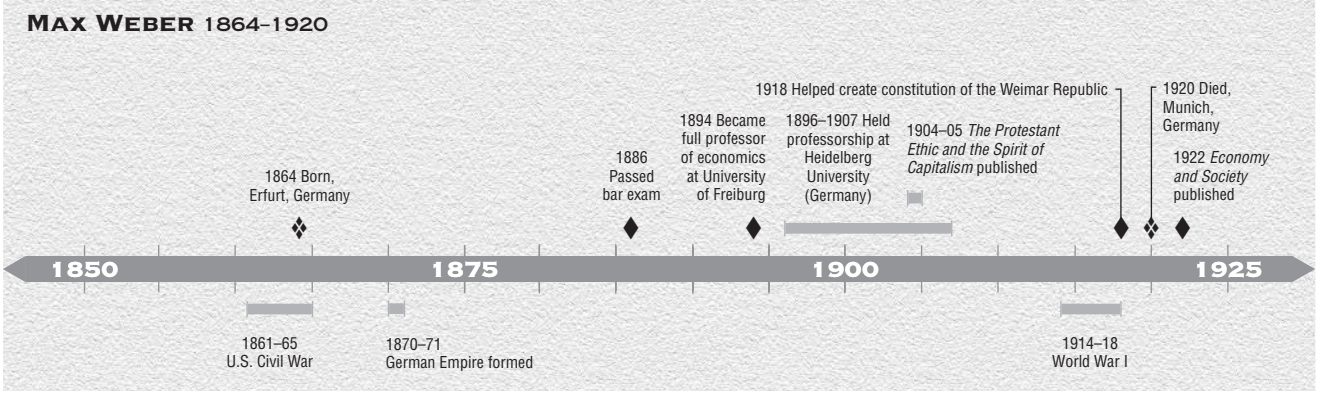

*Max Weber.* ARCHIVE PHOTOS, INC.

rapid accumulation of capital that fueled the rise of Western capitalism.

Weber also analyzed how politics, government, and law have developed in Western and non-Western cultures. He proposed the idea of the charismatic leader, who exhibited both religious and political authority. Weber was more interested, however, in the development of modern government and the growth of bureaucracy. Bureaucracy is a method of organization based on specialization of duties, action according to rules, and a stable order of authority. For Weber, bureaucracy was an expression of "rationality," which in his terminology meant the use of rules and procedures to determine outcomes rather than sentiment, tradition, or rules of thumb.

Weber's sociological theories had a great impact on twentieth century sociology. He developed the notion of "ideal types," which were examples of situations in history that could be used as reference points to compare and contrast different societies. This approach analyzes the basic elements of social institutions and examines how these elements relate to one another.

Weber died on June 14, 1920, in Munich, Germany.

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## ◆ WEBSTER, DANIEL

Daniel Webster was a nineteenth-century lawyer, representative, senator, SECRETARY OF STATE, and one of the great orators in U.S. history. A man of prodigious talent and great political ambition, Webster reversed himself on issues involving the economy and SLAVERY in hopes of becoming president. As the greatest constitutional lawyer of his day, he helped shape the nationalist JURISPRUDENCE favored by Chief Justice JOHN MARSHALL.

Webster was born on January 18, 1782, in Salisbury, New Hampshire. He entered Dartmouth College when he was fifteen and graduated in 1801. He then studied law with an attorney in Boston before becoming a member of the New Hampshire bar in 1805. Webster moved to Portsmouth, New Hampshire in 1807 and quickly developed a legal association with the shipowners and merchants of the city. Webster became the spokesperson for the Portsmouth business community, who opposed the Jefferson administration's trade restrictions with Great Britain and France. His vehement denunciations of the trade embargo and the WAR OF 1812 against Great Britain led to his election to the U.S. House of Representatives in 1812. He aligned himself with the pro-British FEDERALIST PARTY and endorsed a strong national government.

"GOD GRANT LIBERTY ONLY TO THOSE WHO LOVE IT, AND ARE ALWAYS READY TO GUARD AND DEFEND IT."
—DANIEL WEBSTER

Webster left Congress in 1817 and relocated to Boston where he emerged as an eminent attorney, specializing in CONSTITUTIONAL LAW. His reputation increased when he became involved in three landmark cases. In the first, TRUSTEES OF DARTMOUTH COLLEGE V. WOODWARD, 17 U.S. (4 Wheat.) 518, 4 L. Ed. 629 (1819), Webster successfully defended his former college against the state of New Hampshire's attempt to disregard the corporate charter of the school and make it a public institution. The Court, with Chief Justice Marshall writing the opinion, ruled that a corporate charter was a contract that could not be impaired.

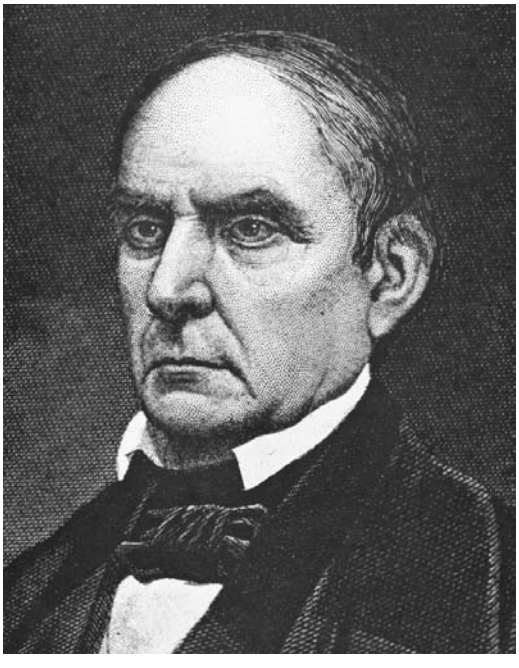

*Daniel Webster.*
LIBRARY OF CONGRESS

In that same year, Webster argued for the validity of the BANK OF THE UNITED STATES and against the right of a state to tax a federal institution in MCCULLOCH V. MARYLAND, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579. Again, Chief Justice Marshall agreed with Webster's nationalist philosophy, finding that the NECESSARY AND PROPER CLAUSE provided the basis for Congress's creation of a national bank and that "the government of the Union, though limited in its power, is supreme within its sphere of action."

Five years later, in GIBBONS V. OGDEN, 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824), Webster argued against navigation monopolies granted by the state of New York to private individuals. Chief Justice Marshall and the Court sided with Webster, holding that the Constitution's COMMERCE CLAUSE empowered Congress to regulate interstate commerce, establishing a precedent that had far-reaching effects in the economic expansion of the nineteenth century.

With these accomplishments to his credit, Webster returned to the U.S. House of Representatives in 1822, where he represented Massachusetts for the next five years. In the House he chaired the Judiciary Committee and opposed the 1824 tariff, believing that it would injure the merchant class. Following his election to the U.S. Senate in 1826, however, Webster made one of his famous reversals and embraced the need for a tariff. He endorsed the tariff of 1828.

Webster's skills as an orator were renowned. Oral arguments before the Supreme Court could last several days, requiring attorneys to have both mental and physical stamina. Webster excelled in oral argument but he was also famous for his public addresses. In 1826 he delivered addresses on the deaths of JOHN ADAMS and THOMAS JEFFERSON. In 1830 he debated Senator Robert Y. Hayne of South Carolina, who favored a coalition between Western and Southern states to benefit both areas in tariffs and land prices. Webster opposed this sectionalism and denounced the doctrine of nullification, which upheld the right of a state to declare a federal law invalid within its boundaries. Webster's phrase "Liberty and Union, now and forever, one and inseparable!" came from the Hayne debate and helped cement his popularity in the North.

In 1836 Webster abandoned the Federalist Party and helped form the WHIG PARTY, made up of groups opposed to President ANDREW JACKSON and the Democrats. He was considered for the Whig presidential nomination in 1836 but was defeated. In 1841 President WILLIAM HENRY HARRISON appointed Webster secretary of state. When

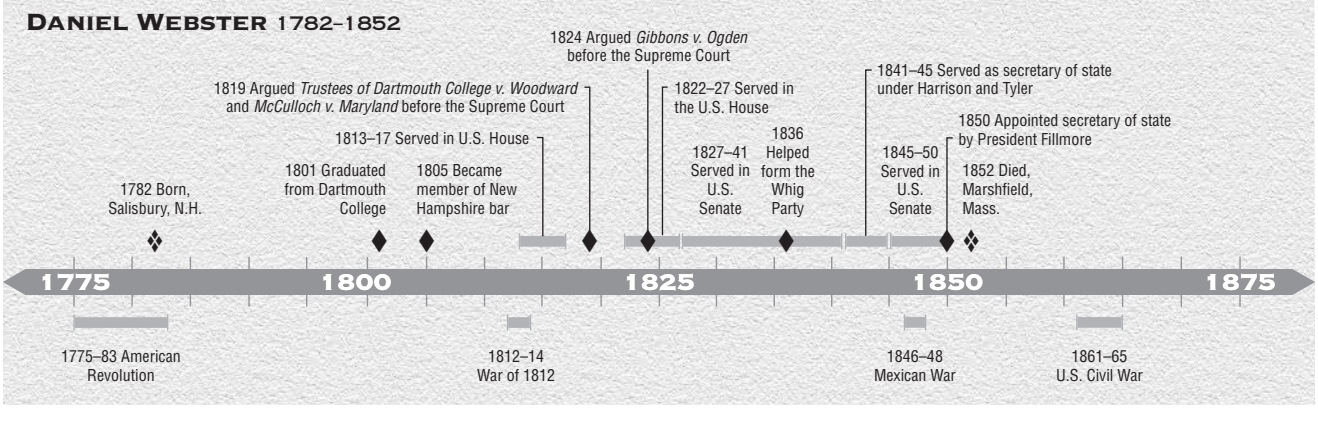

Harrison died shortly after taking office, President JOHN TYLER asked Webster to remain at his post.

The Tyler administration was a troubled one, largely because Tyler was a Democrat with a cabinet of Whigs. His decision to reject a Whig measure establishing a new national bank caused a revolt in his cabinet, with most members resigning in protest. Webster alone remained to aid Tyler, motivated by the possibility of becoming his vice-presidential running mate in 1844. However, Tyler was not renominated. As secretary of state, Webster did negotiate the Webster-Ashburton Treaty, which established the boundary line for Maine.

Webster returned to the Senate in 1845, with his salary supplemented by a fund raised by Boston and New York businessmen. Critics charged that he had surrendered his political independence to manufacturing interests. As a senator he opposed the Mexican War and the acquisition of Texas. He opposed slavery but feared civil war. Because of this fear Webster supported the COMPROMISE OF 1850. This act admitted California into the Union as a free state, gave the Utah and New Mexico territories the right to determine the slavery issue for themselves at the time of their admission to the Union, outlawed the slave trade in the District of Columbia, and gave the federal government the right to return fugitive slaves under the FUGITIVE SLAVE ACT (9 Stat. 462).

In 1850 President MILLARD FILLMORE appointed Webster secretary of state. He used his influence to enforce the Compromise of 1850, especially the Fugitive Slave Act. Though the act was unpopular in the North, Webster sought to demonstrate to Southern politicians his determination to uphold the law. Aside from promoting national unity, Webster dreamed of a "Union" party that would help make him president in 1852. However, Webster died on October 24, 1852, at his farm in Marshfield, Massachusetts.

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## WEBSTER V. REPRODUCTIVE HEALTH SERVICES

In *Webster v. Reproductive Health Services,* 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989), the United States Supreme Court reviewed the constitutionality of several Missouri statutes restricting access to ABORTION services and counseling. *Webster* is significant because it narrowed the Supreme Court's holding in the landmark case ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), by modifying the trimester analysis under which the constitutionality of abortion regulations had been evaluated during the intervening 16 years.

The case arose in 1986 when seven Missouri statutes regulating abortion were challenged in a CLASS ACTION filed in the U.S. District Court for the Western District of Missouri. The class action was brought on behalf of all HEALTHCARE professionals who were providing abortion services in the state of Missouri and on behalf of all pregnant women who were seeking access to those services. The federal district court declared all seven statutes unconstitutional, and the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's decision. The Missouri attorney general appealed the case to the U.S. Supreme Court.

*Webster* splintered the nine Supreme Court justices. Chief Justice WILLIAM REHNQUIST wrote the Court's plurality opinion, joined by Justices BYRON WHITE and ANTHONY KENNEDY. Justices SANDRA DAY O'CONNOR and ANTONIN SCALIA wrote separate concurring opinions. Justices HARRY BLACKMUN and JOHN PAUL STEVENS wrote separate dissenting opinions, with Justices WILLIAM BRENNAN and THURGOOD MARSHALL joining Blackmun's dissent.

The plurality opinion was separated into three parts. First, the Court upheld the constitutionality of Missouri Revised Statutes section 1.205.1, which provided that the "life of each human being begins at conception" and that all "unborn children have protectable interests in life, health, and well-being." The plaintiffs had argued that this provision was inconsistent with previous cases in which the Court had prohibited states from adopting a single theory regarding when life begins. The Supreme Court disagreed with this argument, concluding that this statutory language had no operative legal effect because it was contained in a legislative preamble. Thus, this particular Missouri statute raised no constitutional issue for the Court to decide.

Second, the Court upheld the constitutionality of Missouri Revised Statutes section 188.20, which prohibited abortions at public

hospitals or on other property owned by the state. The plaintiffs had asserted that the Constitution guarantees every woman access to public facilities for the purpose of obtaining an abortion. The Court took exception to this argument, observing that "[n]othing in the Constitution requires states to enter or remain in the business of performing abortions." Instead, the Court said, states may take affirmative steps to encourage childbirth over abortion, which is exactly what the state of Missouri did in this case. Although the statute in question prevented women from seeking abortion services at public facilities, the Court noted that pregnant women in Missouri could still obtain abortion services from private healthcare providers.

Third, the Court upheld the constitutionality of Missouri Revised Statutes section 188.029, which required physicians to perform certain medical tests when there was reason to believe a fetus had reached at least 20 weeks of gestational age. These tests, which included assessments of fetal weight and lung maturity, were designed to determine the viability of an unborn child. Because this statute created a presumption of viability at 20 weeks, the plaintiffs contended that it violated the trimester framework established by *Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

In *Roe* the Supreme Court ruled that states have no legitimate interest in regulating abortion during the first trimester of pregnancy, and that the decision to terminate a pregnancy during this period rests solely with the pregnant woman and her attending physician. During the second trimester, the Court said in *Roe,* states may pass abortion regulations that are reasonably related to preserving the mother's health. During the third trimester, *Roe* held that states may ban abortion altogether, unless requiring childbirth would endanger the life of the mother. The *Roe* decision was based on the premise that states have a compelling interest in protecting fetal life that is triggered by the onset of the third trimester, at which point fetuses typically become viable outside the womb.

In *Webster* the Supreme Court acknowledged that the Missouri statute clashed with the *Roe* trimester analysis by compelling doctors to perform viability examinations during the second trimester of pregnancy, even though such tests were intended to protect the life of a fetus and were unrelated to preserving maternal health. However, the rigid trimester formula created by *Roe,* the Court pointed out, failed to take into account that some fetuses reach viability before the twenty-fifth week of pregnancy. The Court also queried why a state's interest in protecting fetal life should be cognizable only after the second trimester. States have an important interest in protecting fetal life throughout pregnancy, the Court posited.

The Court then held that the Missouri statute requiring viability examinations during the second trimester was reasonably related to this important governmental interest. The Court emphasized that its holding in *Webster* would leave undisturbed the fundamental holding of *Roe.* The Court reiterated that pregnant women still enjoy a legal right to abortion that is protected by the DUE PROCESS CLAUSES of the FIFTH AMENDMENT and FOURTEENTH AMENDMENT to the U.S. Constitution. At the same time, the Court said that its decision in *Webster* had modified the *Roe* trimester analysis by permitting states to regulate abortions prior to the twenty-fifth week of pregnancy.

In his concurring opinion, Justice Scalia expressed regret that the Court had not taken this opportunity to completely overrule *Roe.* The legality of abortion, Scalia argued, is a political issue that should be decided by state legislatures, whose members are democratically elected to office, and not by federal courts, whose members are appointed to the bench for life. In her concurring opinion, Justice O'Connor urged a more moderate approach. Prior to the point in which a fetus reaches viability, O'Connor advocated, states should be allowed to pass any abortion regulations that do not "unduly burden" a women's right to terminate her pregnancy. According to O'Connor, the severity of a particular regulatory burden would be evaluated on a case-by-case basis. This "undue burden" analysis was eventually adopted by the Supreme Court in *Planned Parenthood v. Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

Of the two dissenting opinions, Blackmun's was the more vigorous. As the author of the *Roe* opinion, Blackmun chastised the Court for permitting Missouri to regulate abortion during the second trimester of pregnancy in contravention of established precedent, and characterized the Court's opinion as an invitation to enact draconian abortion regulations. The plurality opinion conceded that the Court's holding in *Webster* would enable states to regulate abortion earlier

in a pregnancy but reminded the dissenting justices that the decision on how early would partially rest with the American people and their elected representatives.

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CROSS-REFERENCES

Fetal Rights; Precedent; Privacy; Substantive Due Process.

*Sarah R. Weddington.*
ARCHIVE PHOTOS, INC.

## ♦ WEDDINGTON, SARAH RAGLE

Sarah Ragle Weddington is a Texas lawyer, teacher, author, and public speaker who is best known as the lawyer who took the case on ABORTION rights, ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), to the U. S. Supreme Court and prevailed. Since *Roe,* Weddington has been a vigorous defender of the decision. During the administration of President JIMMY CARTER, Weddington served in a series of key posts that involved WOMEN'S RIGHTS.

Weddington was born on February 5, 1945 in Abilene, Texas. She earned a bachelor's degree from McMurray College in 1965 and a law degree from the University of Texas at Austin in 1967. She was admitted to the Texas bar in 1967.

Following her ADMISSION TO THE BAR, Weddington opened a law practice in Austin. Soon after, she was approached by a group of women who needed free legal research concerning their inability to secure legal abortions in Texas. Weddington began a CLASS ACTION lawsuit and named as her plaintiff "Jane Roe," a fictitious name for a woman who was pregnant and wished to terminate her pregnancy.

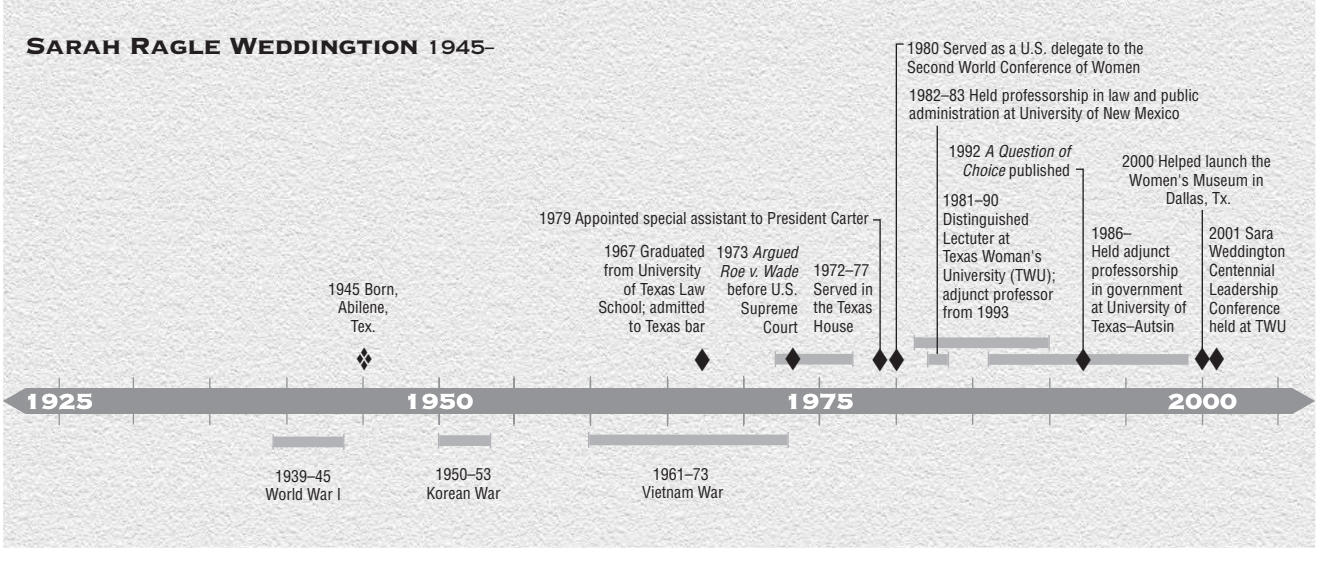

The case eventually reached the U.S. Supreme Court, where, at age 27, Weddington presented her oral argument that a woman's right to choose was based on the constitutional right to privacy. In a controversial opinion written by HARRY A. BLACKMUN, the Court agreed with Weddington, striking down state laws that made abortions illegal. *Roe* was a landmark case and made Weddington a national figure. The decision, however, also galvanized opposition to abortion, setting off a contentious national debate that continued into the 2000s.

Weddington served in the Texas House of Representatives from 1972 to 1977. She also continued to practice law in Texas until 1977, when she was appointed general counsel to the U.S. AGRICULTURE DEPARTMENT in Washington, D.C. In 1979, President Carter made Weddington a special presidential assistant. In this post, she chaired an intergovernmental task force of 15 agencies and made economic issues and the EQUAL RIGHTS AMENDMENT her priorities. In 1980, Weddington was a U.S. delegate to the second World Conference of Women in Copenhagen, Denmark.

"LIFE IS AN ONGOING PROCESS. IT IS ALMOST IMPOSSIBLE TO DEFINE A POINT AT WHICH LIFE BEGINS OR PERHAPS EVEN AT WHICH LIFE ENDS."
—SARAH RAGLE WEDDINGTON

Weddington continued to be an ardent defender of abortion rights in the 1990s, and often debated those who attempted to overturn *Roe.* In 1992, she published *A Question of Choice,* which articulated her position on abortion rights and other gender issues. Weddington also served as an adjunct professor at the University of Texas at Austin where she taught classes on Gender-Based Discrimination and Leadership in American. In addition, she continued to write and serve as a legal and political commentator. After a bout with breast cancer in 2001, Weddington resumed a vigorous round of activities, including teaching, lecturing, and writing.

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## WEIGHT OF EVIDENCE

*Measure of credible proof on one side of a dispute as compared with the credible proof on the other, particularly the* PROBATIVE *evidence considered by a judge or jury during a trial.*

The trier of fact in a civil or criminal trial, whether a judge or a jury, must review the evidence presented, evaluate it, and determine if it meets the standard of proof. If it meets this standard, the trier of fact must return a verdict in favor of the plaintiff in a civil suit and must convict a defendant in a criminal trial. If the evidence does not meet the standard of proof, the trier of fact must find for the defendant in a civil or criminal case. These decisions are based on the concept of the "weight of evidence."

The weight of evidence is based on the believability or persuasiveness of evidence. The probative value (tending to convince a person of the truth of some proposition) of evidence does not necessarily turn on the number of witnesses called, but rather the persuasiveness of their testimony. For example, a witness may give uncorroborated but apparently honest and sincere testimony that commands belief, even though several witnesses of apparent respectability may contradict her. The question for the jury is not which side has more witnesses, but what testimony they believe.

Particular evidence has different weight in inducing belief with respect to the facts and circumstances to be proved. Evidence that is indefinite, vague, or improbable will be given less weight than evidence that is direct and unrefuted. For example, a criminal defendant's testimony that he had never been at the scene of a crime would be given little weight if his fingerprints were found at the crime scene and witnesses testify they saw him at the scene. Similarly, evidence given by a witness who testifies from personal observation is of greater weight than evidence offered by a witness who is testifying from general knowledge alone.

In a civil trial, the plaintiff's BURDEN OF PROOF is the PREPONDERANCE OF THE EVIDENCE standard, which means that the plaintiff must convince the trier of fact that the evidence in support of his case outweighs the evidence offered by the defendant to oppose it. In contrast, criminal trials require that the weight of evidence proving a defendant's guilt must be BEYOND A REASONABLE DOUBT.

In a number of jurisdictions, judges are prohibited from instructing juries on the weight to be given to evidence. In other states, the judge is permitted to give a balanced and fair assessment of the weight she believes should be ascribed to the evidence. All jurisdictions prohibit the judge from instructing the jury on what weight is to be given to the testimony of any witness or class of witnesses. The judge may not state that any particular piece of admissible evidence is or is not entitled to receive weight or consideration from the jury. The judge is also forbidden either to aid a jury or to infringe upon its role in weighing the evidence or in deciding upon the facts. In addition, the judge, in giving her instructions to the jury, has no right to prescribe the order and manner in which the evidence should be examined and weighed by the jury, or to tell the jurors how they shall consider any evidence that has been received by the court.

CROSS-REFERENCES

Preponderance of Evidence.

## WEIGHTS AND MEASURES

*A comprehensive legal term for uniform standards ascribed to the quantity, capacity, volume, or dimensions of anything.*

The regulation of weights and measures is necessary for science, industry, and commerce. The importance of establishing uniform national standards was demonstrated by the drafters of the U.S. Constitution, who gave Congress in Article 1, Section 8, the power to "fix the Standard of Weights and Measures." During the nineteenth century, the Office of Standard Weights and Measures regulated measurements. In 1901 it became the National Bureau of Standards, and in 1988 it was renamed the National Institute of Standards and Technology.

The states may also regulate weights and measures, provided their regulations are not in opposition to any act of Congress. Legislation that adopts and mandates the use of uniform system of weights and measures is a valid exercise of the **POLICE POWER**, and such laws are constitutional. In the early twentieth century the National Bureau of Standards coordinated standards among states and held annual conferences at which a model state law of weights and measures was updated. This effort has resulted in almost complete uniformity of state laws.

Though U.S. currency was settled in a decimal form, Congress has retained the English weights and measures systems. France adopted the metric system in the 1790s, starting an international movement to make the system a universal standard, replacing national and regional variants that made scientific and commercial communication difficult.

**THOMAS JEFFERSON** was an early advocate of the metric system and in an 1821 report to Congress, Secretary of State **JOHN QUINCY ADAMS** urged its acceptance. However, Congress steadfastly refused.

Despite hostility to making the metric system the official U.S. system of weights and measures, its use was authorized in 1866. The United States also became a signatory to the Metric Convention of 1875, and received copies of the International Prototype Meter and the International Prototype Kilogram in 1890. In 1893 the Office of Weights and Measures announced that the prototype meter and kilogram would be recognized as fundamental standards from which customary units, the yard and the pound, would be derived.

The metric system has been adopted by many segments of U.S. commerce and industry, as well as by virtually all of the medical and scientific professions. The international acceptance of the metric system led Congress in 1968 to authorize a study to determine whether the United States should convert. Though the resulting 1971 report recommended shifting to the metric system over a ten-year period, Congress declined to pass appropriate legislation.

*The weight of evidence is based on the credibility and persuasiveness of evidence. A witness in the trial of a man accused of firebombing a New York subway car in 1994 offered testimony based on her personal observation of the defendant shortly before the attack.*

AP/WIDE WORLD PHOTOS

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## ♦ WEINSTEIN, JACK BERTRAND

For more than a quarter of a century, Jack Bertrand Weinstein has championed the fight for an independent judiciary. As a federal district judge—and later chief judge—for the Eastern District of New York, he has written, lectured, and testified about the importance of fostering strong, free-thinking jurists in the U.S. courts. As a young judge, he exerted his independence by eschewing the traditional black robe in the courtroom (except for ceremonial occasions), and as a senior judge he continued to go his own way by refusing to hear drug cases because he disagreed with federal sentencing guidelines.

Weinstein's independence has also manifested itself in his innovative approach to the organization and disposition of mass TORT cases (large-scale personal injury litigation); he has been a central figure in mass tort litigation related to subjects such as the chemical known as "Agent Orange" and silicone breast implants. Weinstein has written that judges must not isolate themselves from society if they are to make informed decisions. His commitment to that philosophy has been reinforced by the variety of his own life experiences.

Weinstein was born on August 10, 1921, in Wichita, Kansas. Though born in Kansas, Weinstein was raised in the Williamsburg and Bensonhurst communities near Brooklyn, New York. His father, Harry Louis Weinstein, was a salesman; his mother, the former Bessie Helen Brodach, was an amateur actress. As a toddler, Weinstein accompanied his mother to auditions, and by age eight, he too was performing on stage. During the Depression, he brought home $25 a week to supplement the family income. He carried an Actor's Equity card for years. After high school, Weinstein put himself through Brooklyn College by working on the docks in New York Harbor. He received his bachelor of arts degree in 1943, but not before his college education had been interrupted by service in WORLD WAR II. Weinstein, who later described himself as a "submariner," was a lieutenant in the U.S. Navy and Navy Reserve from 1942 to 1946.

On October 10, 1946, Weinstein married Evelyn Horowitz. When he entered the law school at Columbia University the following year, the first of his three sons had already been born. His wife worked nights as a social worker to support the family, while Weinstein took care of the new baby and attended classes. He received his bachelor of laws degree from Columbia Law School in 1948 and was admitted to the New York bar in 1949.

After graduation, Weinstein clerked for New York Court of Appeals Judge Stanley H. Fuld. Two years later, in 1950, he partnered with William Rosenfeld to open a New York City law firm. His specialty was litigation. The partnership ended in 1952 when Weinstein returned to Columbia Law School as an associate professor of law.

For the next 15 years, Weinstein forged multiple and overlapping careers as a teacher, lawyer, and public servant. From 1952 to 1954, he was special counsel for the New York Joint Legislative Committee on Motor Vehicle Problems; counsel to New York State Senator Seymour Halpern; research assistant at the New York State Senate, and a volunteer at the Legal Aid Society of New York.

Beginning in 1954, Weinstein spent four years as a consultant to, and reporter for, the New York Temporary Commission on Courts. He made a name for himself by heading a panel that rewrote the rules governing how civil cases are practiced in New York courts; he was soon recognized as a leading U.S. authority on the rules of CIVIL PROCEDURE. In large part due to his work in this area, he was made a full professor of law at Columbia in 1956.

The demand for Weinstein's expertise grew along with his reputation. While maintaining a full schedule of classes at Columbia, he served as advisor to, or member of, numerous academic, civil, judicial, legal, legislative, and government groups from 1957 to 1962.

He also became more active in political circles. From 1963 to 1965, Weinstein served as county attorney for Nassau County, New York. He also served as counsel to a number of New York state legislative committees. In 1966, he was named commissioner of the Temporary New York State Commission on Reform and Simplification of the Constitution, and he was an advisor to the New York State Constitutional Convention the following year.

Weinstein began writing and publishing in the late 1950s. Some of his early works include *Cases and Materials on Evidence* (with Morgan and Maguire, 1957); *Elements of Civil Procedure* (with Rosenberg, 1962); *Essays on the New York*

*Constitution* (1966); *A New York Constitution Meeting Today's Needs and Tomorrow's Challenges* (1967); and *Manual of New York Civil Procedure* (with Korn and Miller, 1967).

When a federal district court vacancy occurred in early 1967, Weinstein's national prominence as an educator, author, and public servant made him a logical choice for the position. He was appointed U.S. district judge for the Eastern District of New York on April 15, 1967, by President LYNDON B. JOHNSON. He entered duty on May 1, 1967.

From the beginning, Weinstein was an independent and innovative jurist. He wore a business suit to court rather than the traditional black robe, and he could often be found sitting at a courtroom conference table *with* the parties in a dispute, rather than presiding from the bench. He believed that judicial trappings only served to distance and separate the public from a system that should be accessible to everyone.

His style and his determination to make the system open and flexible enough to address the real problems of real people sometimes left him open to attack—and reversal. Sheila L. Birnbaum, an attorney who frequently appeared in his court, said, "He often reached what he believed to be the right result and then reached to expand the law to get there." This tendency earned him the nickname "Reversible Jack."

As a judge, he maintained his ties to academia. He was an adjunct professor of law at Columbia from the time of his appointment to the bench in 1967 until 1995. He served in a similar capacity at Brooklyn Law School. Over the years, he has been a visiting professor of law at George Washington University, Georgetown University, Harvard University, New York University, the University of Colorado, and the University of Texas. He also has been a frequent lecturer on other legal campuses around the United States and the world. Similarly, Weinstein continued to publish in his field of expertise while on the bench. His seven-volume *Weinstein's Evidence,* and *Weinstein's Evidence Manual,* both written with Professor Margaret Berger, were first published in 1975.

In 1981, Weinstein became chief judge of the district court, and he began to make his mark in the area of complex mass tort litigation. From 1983 to 1986, Weinstein worked with chemical manufacturers and VIETNAM WAR veterans to settle the thousands of Agent Orange cases clogging the courts. Within months of taking over the five-year-old dispute, Weinstein pressured chemical manufacturers and plaintiffs' lawyers to establish a $180 million fund for veterans taking part in the CLASS ACTION.

As chief judge, Weinstein continued to be a watchdog for those in society most vulnerable to exploitation. For example, in 1984, he ordered the federal government to rewrite MEDICARE forms, making them more understandable to average SENIOR CITIZENS.

Weinstein took senior (or semiretired) status in 1988. Exercising his right as a senior judge to choose the cases he would hear, he decided that he would concentrate on complex cases and

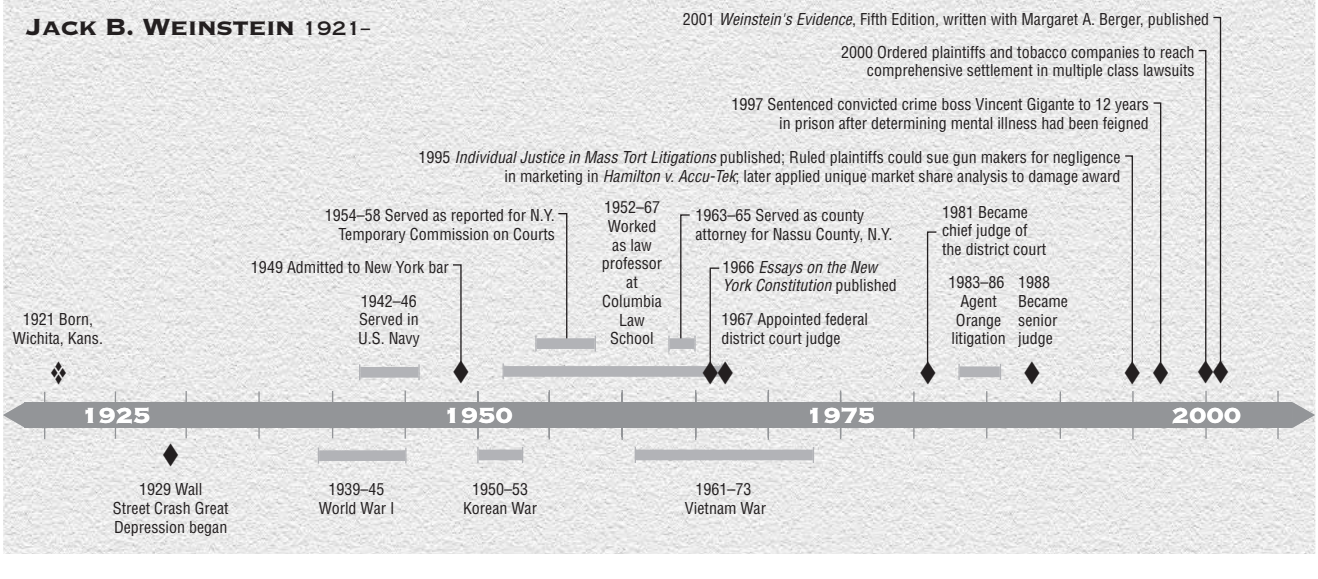

would not hear routine matters—including drug cases. Weinstein does not agree with federal sentencing guidelines for drug offenses. He has written that the strict sentences imposed in drug cases often do not fit the crime, impose exceptional hardship on families and dependent children, and have not proven to be an appropriate or effective deterrent.

In one of his first cases as a senior judge, Weinstein overturned a jury verdict against the Long Island Lighting Company (LILCO), allowing the utility to settle a long and nasty dispute with customers over the construction of a NUCLEAR POWER plant. Weinstein's ruling led to an agreement between LILCO and its customers—and a cut in utility rates.

In 1990, Weinstein was asked to tackle the backlog of asbestos-injury cases in the nation's courts. Weinstein and nine other judges developed a plan to consolidate the cases into three groups (or classes) for trial. Though initially rejected by the U.S. Court of Appeals for the Sixth Circuit, a judicial panel on MULTIDISTRICT LITIGATION finally agreed, in 1991, to consolidate all pending asbestos cases in the Eastern District of Pennsylvania (*In re Asbestos Products Liability Litigation,* 771 F. Supp. 415). The following year Weinstein helped to consolidate cases involving the anti-miscarriage drug DES. And later in 1992, he recommended the consolidation of more than 40 suits involving repetitive-stress injury.

Through his work, Weinstein developed a philosophy for handling mass tort cases: obtain scientific and medical information as early in the process as possible, consolidate cases for ease of administration, and cooperate with the state courts. Although consolidation of mass tort cases provides for convenience and economy of effort, Weinstein admits that the system is not perfect and that reform is necessary. In September 1992 he told the *Wall Street Journal* that many people caught up in mass tort cases feel "alienated and dehumanized" and that the present system does not always meet their individual needs.

Weinstein continues to serve as senior judge in the Eastern District of New York. He also continues to serve the people and the profession by his active involvement in many legal service organizations, including the American Academy of Arts and Sciences, American Judicature Society, American Law Institute, American Association of University Professors, AMERICAN BAR ASSOCIATION, Institute for Judicial Administration, International Association of Jewish Lawyers and Jurists, National Legal Aid and Defender Association, Society of American Law Teachers, and International Society of Public Teachers of Law.

In the late 1990s and early 2000s Weinstein continued to hear cases of major import. For example, in early 2003 Weinstein presided over a class action lawsuit filed by the NAACP against 80 gun manufacturers (*NAACP v. American Arms Inc.*). The NAACP sought an INJUNCTION that would impose certain restrictions on the sale of firearms, contending that gun manufacturers are negligent in making firearms readily available to criminals. As a result, a high number of African Americans and minorities fall victim to injury and death. In July 2003, Weinstein dismissed the case in a 175-page decision. He stated that NAACP lawyers had supplied sufficient evidence to prove that gun manufacturers are guilty of "careless practices," but they had failed to prove that minorities are uniquely harmed by such practices.

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## ♦ WEIS, JOSEPH FRANCIS, JR.

In March 1989, senior federal appeals court judge Joseph Francis Weis Jr. was handed the awesome task of chairing a congressional committee to examine issues and problems facing U.S. courts and to develop a long-range plan for the future of the federal judiciary. Though segments of the U.S. court system had been examined and fine-tuned throughout U.S. history, the formation of the Federal Courts Study Committee in 1989 marked the first time in almost one hundred years that any entity was granted such broad and sweeping authority to review the sys-

tem and propose changes to it. Professor Daniel J. Meador, of the University of Virginia School of Law, called the mandate a "once-in-a-century undertaking." The only analogous review of the federal courts took place in the 1890s and resulted in the creation of the federal courts of appeals.

Under Weis's leadership, the Federal Courts Study Committee took just 15 months to produce a monumental report containing one hundred specific recommendations for U.S. court reform. Many of the committee's recommendations were adopted immediately, and others were expected to influence court reform well into the twenty-first century.

Congress chose the right person to chair the historic committee. Weis's natural abilities as a leader and a consensus builder have been evident throughout his life. Born March 12, 1923, in Pittsburgh, Pennsylvania, Weis was the first of four sons in the family of Joseph Francis Weis and Mary Flaherty Weis. He graduated from local schools and set out to follow a path inspired by his father, a prominent trial attorney.

Weis entered Duquesne University in 1941 with the intention of attending law school immediately after graduation. His plans, however, were interrupted by WORLD WAR II. In 1943, Weis left college to enlist. He fought in France with the Third Army's Fourth Armored Division, and was wounded twice during his tour of duty. Weis returned home with a Bronze Star and a Purple Heart. He continued to serve in the Army Reserve long after he returned to college. Weis retired with the rank of captain in 1948.

Weis received a bachelor of arts degree from Duquesne University in 1947 and a doctor of jurisprudence degree from the University of Pittsburgh Law School in 1950. While in law school, he developed an interest in scholarly writing as editor of the law review.

Admitted to the Pennsylvania bar in 1950, Weis joined three former classmates to establish the law firm of Sheriff, Lindsay, Weis, and McGinnis. Two years later he realized a lifelong dream when he partnered with his father in the firm of Weis and Weis. Weis's three younger brothers joined the firm as they completed their studies, creating a thriving family enterprise.

A skillful trial attorney like his father, Weis was active in the Academy of Trial Lawyers of Allegheny County from 1960 to 1968, serving as president from 1966 to 1967. He became a recognized expert on trial procedures and was a frequent lecturer on the subject.

His expertise led to an appointment as judge of the Court of Common Pleas of Allegheny County in 1968. In May 1970 Weis was appointed to the U.S. District Court for the Western District of Pennsylvania. In February 1973 President RICHARD M. NIXON appointed him to the U.S. Court of Appeals for the Third Circuit.

Early in his career on the federal bench, Weis showcased his expertise on INTERNATIONAL LAW when he authored the opinion in *Mannington Mills v. Congoleum Corp.,* 595 F.2d 1287 (3d Cir. 1979). This oft-cited opinion made him a sought-after member of many international legal forums.

Weis also authored a number of important opinions in the field of legal and judicial ethics. One of these was the dissenting opinion in *Garden State Bar Ass'n v. Middlesex County Ethics Committee,* 651 F.2d 154 (3d Cir. 1981), which

"SENTENCES ARE INEVITABLY ONLY APPROXIMATIONS AND [LEGISLATIVE] EFFORTS TO MAKE THEM SCIENTIFICALLY PRECISE ARE DOOMED TO FAILURE."
—JOSEPH FRANCIS WEIS JR.

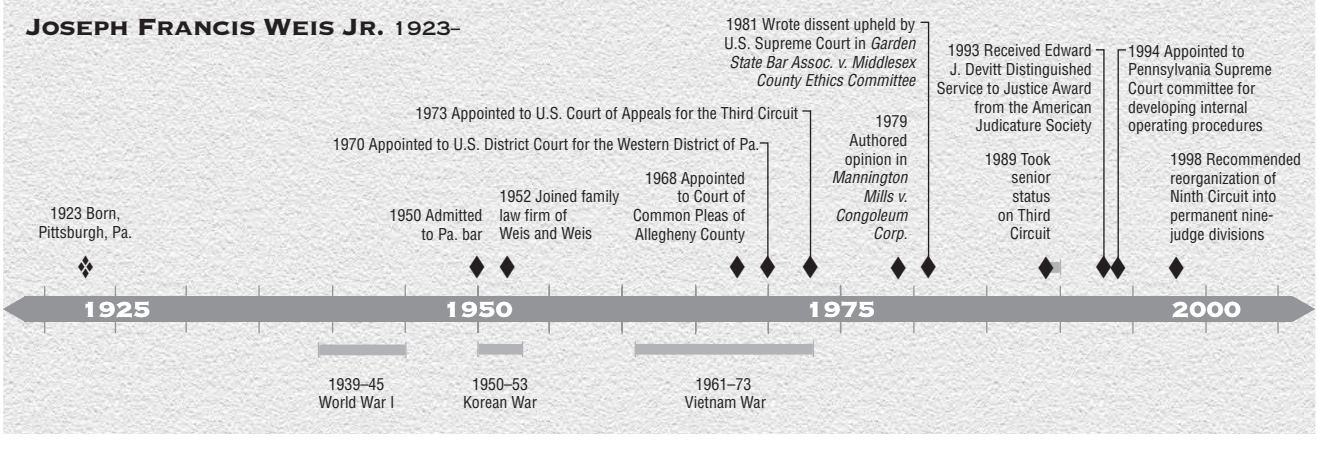

was later reversed by the U.S. Supreme Court (*Middlesex County Ethics Committee v. Garden State Bar Ass'n,* 457 U.S. 423, 102 S. Ct. 2515, 73 L. Ed. 2d 116 [1982]). Another was the majority opinion in *Stretton v. Disciplinary Board,* 944 F.2d 137 (3d Cir. 1991), which reversed a lower court's ruling that struck down a Pennsylvania judicial ethics rule barring judicial candidates from telling voters about their legal and political views.

It was, however, in the areas of technology, courtroom design, structure, rules, and administration that Weis truly distinguished himself. In the Third Circuit he chaired committees experimenting with videoconference arguments and videotape trial proceedings. For the JUDICIAL CONFERENCE OF THE UNITED STATES, Weis was chairman of the Standing Committee on Rules of Practice and Procedure, member of the Committee on Administration of the Bankruptcy System, member of the Subcommittee on Judicial Improvements, and chairman of the Supreme Court Advisory Committee on Civil Rules. For the AMERICAN BAR ASSOCIATION, he served on the Committee on Technology and the Courts and the Committee on Design of Court Rooms and Court Facilities.

In 1989, after 16 years on the federal bench and hundreds of hours of committee service, Weis announced that he would take senior (or semiretired) status and begin winding down his judicial career. His timing could not have been worse. At the time of his announcement, he did not know that Chief Justice WILLIAM H. REHNQUIST was about to tap him for the most demanding and significant task of his judicial career.

For years Congress had considered various bills to study mounting procedural and workload problems in the U.S. courts. In the fall of 1988 Congress finally created the Federal Courts Study Committee (Pub. L. No. 100-702, 102 Stat. 4644 [1988] [codified at 28 U.S.C.A. § 331]). Unlike previous committees that were conceived to examine parts of the court system, the Federal Courts Study Committee was charged with examining issues and problems facing the entire court system in the United States—and with developing the first ever long-range plan for addressing the issues and correcting the problems. Chief Justice Rehnquist appointed 15 committee members, including federal and state judges, members of Congress, private attorneys, a state public defender, and a JUSTICE DEPARTMENT official. He named Weis to chair the committee.

Weis assumed the leadership role with his characteristic sense of duty. For the first three months following his appointment, Weis and his committee conducted a thorough survey of the federal judiciary to help focus the issues and problems. They also solicited input from citizens' groups, bar associations, research groups, law school deans and other academics, chief probation officers, pretrial services chiefs, and federal public defenders.

By December 1989, they had drafted a preliminary report that clearly focused on the overriding problem and made a number of recommendations for addressing it. Workload was cited as the biggest barrier to efficiency and equal justice. Between 1958 and 1988, the number of cases filed in the district courts had tripled, and the number of appeals filed in the circuits had increased more than tenfold. Public hearings on the preliminary report were held in nine U.S. cities beginning in January 1990.

The final report was presented to the president of the United States, the chief justice of the U.S. Supreme Court, Congress, the Conference of State Chief Justices, and the State Justice Institute in the spring of 1990. It outlined one hundred substantive changes in the areas of court administration and operation, designed to reduce the workload and enhance the quality of U.S. justice. Among the recommendations: redirect narcotics cases to state courts, narrow the jurisdiction of federal courts, create a tier of specialized courts (a disability claims court and special bankruptcy appeals panels), and encourage ALTERNATIVE DISPUTE RESOLUTION in civil cases. Sixteen procedural and noncontroversial recommendations were introduced and passed during the following congressional session.

On April 26, 1993, Weis was awarded the Devitt Distinguished Service to Justice Award, which is administered by the American Judicature Society. This award is named for Edward J. Devitt, a former chief U.S. district judge for Minnesota. It acknowledges the dedication and contributions to justice made by all federal judges, by recognizing the specific achievements of one judge who has contributed significantly to the profession. Weis was honored for his work on the Federal Courts Study Committee and a lifetime achievement in the area of court reform.

In the late 1990s and into the 2000s, Weis continued to be involved in judicial reform. In

1999, he gave testimony to the Commission on Structural Alternatives for the Federal Courts of Appeals in which he proposed that the United States should have a unified federal appellate system with one U. S. Court of Appeals that would cover the entire country. In June of 2001, Weis became involved in controversy just days before the execution of Oklahoma City bomber Timothy McVeigh. A federal judge issued an order that would permit videotaping of McVeigh's execution for an unrelated case attempting to allege that CAPITAL PUNISHMENT is CRUEL AND UNUSUAL PUNISHMENT. On June 8, 2001, Weis issued a stay of the judge's ruling pending further consideration by a panel of three circuit court judges in Philadelphia. The panel overturned the federal judge's order and McVeigh was executed on June 11, 2001.

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## ❖ WELCH, JOSEPH NYE

Joseph Nye Welch represented the U.S. Army in the Army-McCarthy hearings held in the U.S. Senate in April through June 1954.

Welch was born in Primghar, Iowa, on October 22, 1890, the youngest of seven children born in a poor farm family. Welch's mother encouraged him to succeed in school. He was intrigued by the law even as a boy and enjoyed watching trials whenever he could. After clerking for two years in a real estate office, he entered Grinnell College in Iowa and graduated Phi Beta Kappa in 1914. Welch then entered Harvard Law School with a $600 scholarship and earned his bachelor of laws degree in 1917.

Welch attended Army Officer Candidate School when the U.S. entered WORLD WAR I, but the war ended before he received his commission as a second lieutenant. He served briefly in the legal division of the U.S. Shipping Board. Welch joined the Boston law firm of Hale and Dorr in 1919 and became a partner in 1923 and a senior partner in 1936. He practiced CIVIL LAW, particularly in the areas of antitrust, LIBEL, estates, wills, and tax litigation, and he oversaw the firm's trial department.

Welch is known for serving as special counsel to the Department of the Army in Senate hearings involving Wisconsin Senator JOSEPH R. MCCARTHY. Welch served without compensation for the job. The hearings were held before the Senate's Special Subcommittee on Investigations of the Government Operations Committee, chaired by McCarthy. Televised to millions of Americans, the hearings showed political theater of a kind never seen before.

The issues in the hearings were a mass of attacks, innuendo, and counterattacks involving Senator McCarthy and Secretary of the Army Robert T. Stevens. McCarthy, widely known for his forceful attempts to ferret out suspected or imagined subversives in the government, had made repeated demands in late 1953 for access to confidential Army files on loyalty and security because he alleged that the Army had employed subversives. In addition, McCarthy was agitated

"UNTIL THIS MOMENT, SENATOR [MCCARTHY], I THINK I NEVER REALLY GAUGED YOUR CRUELTY OR YOUR RECKLESSNESS. . . HAVE YOU NO SENSE OF DECENCY, SIR, AT LONG LAST? HAVE YOU LEFT NO SENSE OF DECENCY?"
—JOSEPH NYE WELCH

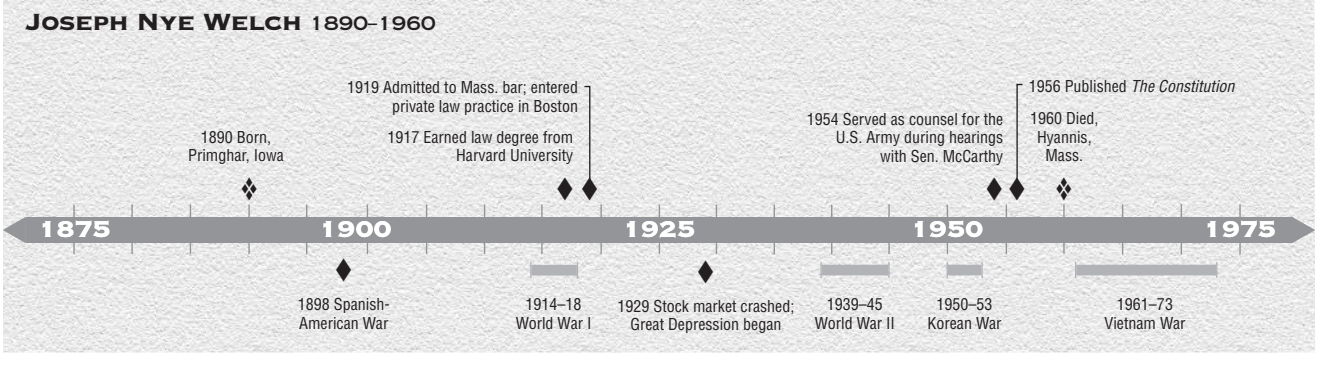

over the case of an Army dentist, Irving Peress. Peress, a member of the left-wing American Labor party, had been promoted to major in late 1953 according to provisions automatically applicable to drafted doctors. Soon thereafter, he was ordered discharged when the military learned that he had declined to answer questions regarding his political beliefs. McCarthy learned about the case before the discharge and summoned Peress to speak before the subcommittee. Peress invoked the FIFTH AMENDMENT when asked about his political views, and McCarthy demanded that he be court-martialed.

While McCarthy was pressuring the Army, the press uncovered a story regarding an unpaid, sometime consultant to the subcommittee, G. David Schine. Schine, a friend of the subcommittee's chief counsel ROY COHN, had been called by the draft board in July 1953. Cohn and McCarthy purportedly tried unsuccessfully to arrange a commission for Schine in the Army, Navy, or Air Force. McCarthy and Cohn were also charged with improperly pressuring the Army to promote Schine. In response, McCarthy claimed that the Army was holding Schine "hostage" to blackmail McCarthy into stopping his investigation.

In stark contrast to the domineering, goading, and downright bullying demeanor of McCarthy, Welch appeared calm, genteel, and well prepared in the hearing room. He managed to inject a bit of humor into the proceedings on more than one occasion. When Welch questioned a witness about how he had come into possession of a photograph, he asked the witness if he thought it came from a pixie. Senator McCarthy interrupted to ask for the definition of a pixie. Welch replied, "I should say, Mr. Senator, that a pixie is a close relative of a fairy. Shall I proceed, sir? Have I enlightened you?"

The thirty-six days of hearings resolved little, and legal issues remained muddled. The dramatic climax came on June 9, 1954, when McCarthy attacked Frederick G. Fisher Jr., a member of Welch's Boston firm, for supposed Communist leanings. During law school at Harvard, Fisher had belonged to the National Lawyer's Guild, an organization with purported Communist ties. At the time of the hearings, Fisher was a Republican (as was McCarthy) and a respected lawyer. Welch responded, "Little did I dream you could be so reckless and so cruel as to do an injury to that lad. . . . I like to think that I am a gentleman, but your forgiveness will have to come from someone other than me." When McCarthy persisted in his diatribe, Welch cut him off, exhorting him to exhibit a sense of decency. Welch then left the hearing room, as the spectators broke into loud applause.

Though the outcome of the investigation was inconclusive, McCarthy's conduct during the widely publicized hearings eventually cost him support from moderates who had long tolerated him. Later that year, the Senate took a rare step and voted to censure McCarthy for his unbecoming conduct.

Welch was a family man who preferred a quiet life, but he did not return to obscurity after the hearings. His courtroom persona captured the nation's interest, and in 1956 he became the narrator of a highly praised television series on the constitutional history of the United States. He also wrote a book, *The Constitution,* to accompany the series. He took on other roles, culminating in his portrayal of a judge in the 1959 movie *Anatomy of a Murder.* Reviews of the film praised his performance.

Welch was married in 1917 and had two sons. His wife died in 1956, and he remarried the next year. He died on October 6, 1960, in Hyannis, Massachusetts.

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Communism.

## WELFARE

*Government benefits distributed to impoverished persons to enable them to maintain a minimum standard of well-being.*

Providing welfare benefits has been controversial throughout U.S. history. Since the colonial period, government welfare policy has reflected the belief that the indigent are responsible for their poverty, leading to the principle that governmental benefits are a privilege and not a right. Until the Great Depression of the 1930s, state and local governments bore some responsibility for providing assistance to the poor. Generally, such assistance was minimal at best, with church and volunteer agencies providing the bulk of any aid.

The NEW DEAL policies of President FRANKLIN D. ROOSEVELT included new federal

initiatives to help those in poverty. With millions of people unemployed during the 1930s economic depression, welfare assistance was beyond the financial resources of the states. Therefore, the federal government provided funds either directly to recipients or to the states for maintaining a minimum standard of living.

Following the 1930s, federal programs were established that provided additional welfare benefits, including medical care (MEDICAID), public housing, food stamps, and Supplemental Security Income (SSI). By the 1960s, however, criticism began to grow that these programs had created a "culture of dependency," which discouraged people from leaving the welfare rolls and finding employment. Defenders of public welfare benefits acknowledged that the system was imperfect, noting the financial disincentives associated with taking a low-paying job and losing the array of benefits, especially medical care. They also pointed out that millions of children are the prime beneficiaries of welfare assistance, and that removing adults from welfare affects these children.

During the 1980s and 1990s, criticism of public welfare escalated dramatically. Some states began to experiment with programs that required welfare recipients to find work within a specified period of time, after which welfare benefits would cease. Since job training and CHILD CARE are important components of such programs, proponents acknowledged that "workfare" programs save little money in the short term. They contended, however, that workfare would reduce welfare costs and move people away from government dependency over the long term.

These state efforts paved the way for radical changes in federal welfare law. On August 22, 1996, President BILL CLINTON, a Democrat, signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (popularly known as the Welfare Reform Act), a bill passed by the Republican-controlled Congress. The act eliminated some federal welfare programs, placed permanent ceilings on the amount of federal funding for welfare, and gave each state a block grant of money to help run its own welfare programs. The law also directs each state legislature to come up with a new welfare plan that meets new federal criteria. Under the 1996 law, federal funds can be used to provide a total of only five years of aid in a lifetime to a family.

**Number of Welfare Recipients and Percent of U.S. Population, 1960 to June 2000**

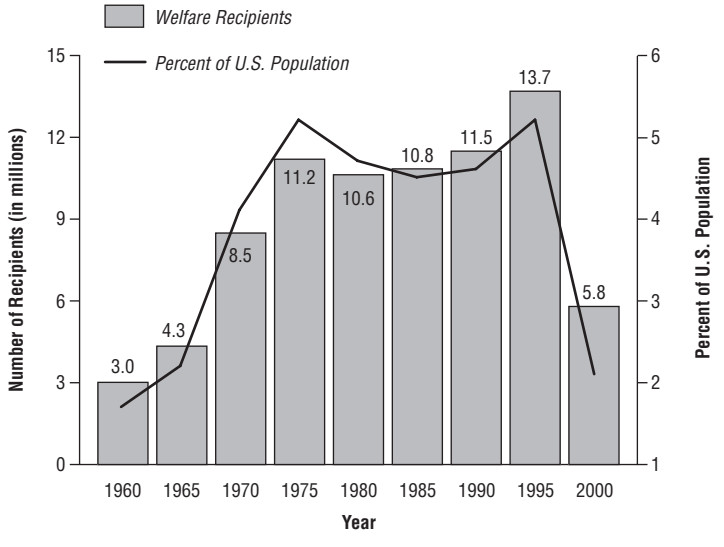


SOURCE: U.S. Department of Health and Human Services, Administration for Children and Families web page.

In the early 2000s, Congress continued to debate the reauthorization of the 1996 law. Proponents of the law pronounced the reform effort a great success. States had met the requirement of halving their welfare rolls by 2002. In addition, many former welfare recipients had entered the workforce and child poverty had been reduced for the first time since the early 1970s. However, some commentators attributed much of the success to the strong economy of the late 1990s that produced jobs for those coming off welfare. They also noted that welfare recipients were employed in mostly low-wage jobs. Moreover, as the economy took a nosedive in 2001 and 2002, unemployment rose. By the end of 2002, welfare caseloads had increased in 26 states.

In 2003, President GEORGE W. BUSH proposed major changes to the reauthorized welfare reform law. Under his proposals, welfare recipients would have to work 40 hours per week at a job or in a program designed to help the recipient achieve independence. This initiative, coupled with a Medicaid proposal that would give block grants to the states for managing HEALTH CARE services for indigent persons, faced an uncertain fate in Congress.

# A Brief History of Welfare Reform

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 110 Stat. 2105, popularly known as the Welfare Reform Act, is the most significant piece of welfare legislation since the **NEW DEAL** administration of **FRANKLIN D. ROOSEVELT**. The 1996 act was the culmination of a 30-year debate over the effectiveness of government welfare programs and the proper role of government assistance. The act's goals of moving people off the welfare rolls, limiting the amount of time on public assistance, and mandating that welfare recipients' work were based on the idea of personal responsibility. For conservatives, the law delivered a blow to the modern liberal welfare state. For liberals, the act raised as many questions as it answered. It was unclear how states would provide training to welfare recipients that would allow them to find employment paying a living wage. More ominously, what would happen to children when families lost their welfare benefits permanently?

The history of welfare reform reveals that the question of personal responsibility versus assistance to those in need has been a constant in the debate over welfare. Dissatisfaction with welfare began during the 1950s. Critics began to assert that the federal Aid to Families with Dependent Children (AFDC) program had made welfare a way of life, rather than simply short-term assistance, for many in the program. With this perception, a backlash set in.

In the 1950s and early 1960s, welfare reform was limited to various states' attempts to impose residency requirements on welfare applicants and remove illegitimate children from the welfare rolls. Many states also passed so-called "man in the house" rules, which cut off benefits when a man lived in the home. By the late 1960s, such laws had been struck down on the ground that the **EQUAL PROTECTION CLAUSE** of the **FOURTEENTH AMENDMENT** requires the government to treat all persons in similar situations equally.

During the 1960s President **LYNDON B. JOHNSON**'s administration declared an ostensible "war on poverty" with its **GREAT SOCIETY** programs: Head Start, the Job Corps, food stamps, and **MEDICAID** funded education, job training, direct food assistance, and direct medical assistance. Although the poverty rate declined in the 1960s, more than 4 million new recipients signed up for welfare.

With the election of President **RICHARD M. NIXON** in 1968, the conservative backlash against liberal policies began to take hold. Nixon was the first president since Roosevelt to offer major national welfare legislation. His 1969 Family Assistance Plan, however, pleased neither liberals nor conservatives. Nixon proposed giving needy families with children $1,600 annually; as a work incentive, they would be allowed to keep any earned income up to approximately $4,000. More important, all welfare recipients except mothers with children under the age of three would be required to work. Liberals rejected the plan because they believed that the support levels were too low and that the work requirement was punitive. Conservatives were unimpressed by Nixon's goal of reducing the welfare bureaucracy through a program that appeared to expand public assistance. The program died in Congress in 1972.

Instead of reform, welfare programs underwent major expansions during the Nixon administration. States were required to provide food stamps, and Supplemental Security Income (SSI) consolidated aid for aged, blind, and **DISABLED PERSONS**. The Earned Income Credit provided the working poor with direct cash assistance in the form of tax credits. As spending grew, so did the welfare rolls.

During the 1970s advocates of welfare reform promoted the theory of "workfare." The idea initially referred to working off welfare payments through

### Federal Social Security Programs

Until the 1996 Welfare Reform Act, the federal government financed the three major welfare programs in the United States under the **SOCIAL SECURITY ACT** of 1935 (42 U.S.C.A. § 301 et seq.): Supplemental Security Income (SSI), Medicaid, and Aid to Families with Dependent Children (AFDC). The 1996 law abolished the AFDC program. These types of assistance are in addition to the benefits available to the aged, disabled, and unemployed workers and their dependents. They are distributed to people who demonstrate financial need.

**Supplemental Security Income** Indigent persons who are aged or disabled receive monthly checks through the SSI program to help provide them with a minimum standard of living. In 1974, SSI assumed the responsibility for three separate plans previously administered by the states for these recipients. Funds are taken from the U.S. Treasury to provide monthly benefits at a standard nationwide rate. Where state funds already supply such benefits, they supplement the amount provided by the federal government.

The creation of the SSI program meant that applicants had to meet the same standards of

public service jobs, but it developed into the concept of using training and education to help recipients gain independence. By the 1980s workfare had emerged as the future of welfare reform.

President **RONALD REAGAN** came into office in 1981 as a harsh critic of welfare. During his first term, he helped secure deep cuts in AFDC spending, including the reduction of benefits to working recipients of public assistance. In addition, the states were given the option of requiring the majority of recipients to participate in workfare programs.

During the 1980s the welfare system was subjected to many critical attacks, most notably in sociologist Charles Murray's book *Losing Ground: American Social Policy, 1950–1980* (1984). Murray argued that welfare hurt the poor by making them less well off and discouraging them from working. The system effectively trapped single-parent families in a cycle of welfare dependency, creating more, rather than less, poverty. Murray proposed abolishing federal welfare and replacing it with short-term local programs. Though many criticized Murray's data and conclusions, most agreed that welfare produced disincentives to work.

During the 1980s 40 states set up so-called welfare-to-work programs that provided education and training. The federal Family Support Act of 1988 (23 U.S.C.A. § 125) adopted this approach, directing all states to phase in comprehensive welfare-to-work programs by 1990. Each state was to implement education, job training, and job placement programs for welfare recipients. Nevertheless, the initiative proved unsuccessful because the states lacked the money needed for federal matching funds. By 1993 only one in five eligible recipients was enrolled in a training program.

Thus, the stage was set for the 1996 welfare reform legislation. It did much of what Murray had advocated: it made personal responsibility and work central to the welfare agenda, and it shifted welfare to the states. State governments were given fixed blocks of money known as Temporary Assistance to Needy Families (TANF), which they could use as they saw fit, as long as they imposed work requirements and limited a family's stay on welfare to five years. By placing ceilings on the amount of money states receive for welfare, the 1996 act announced that public welfare programs would shrink rather than grow over time.

This 1996 welfare reform law, known as the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), was considered revolutionary by many experts. With a strong economy and an unemployment rate that by the late 1990s was down to only 4 percent, states were more confident about making welfare reform work. By 2000, the economy began to slow down, and the September 11, 2001 attacks in New York and Washington further slowed economic growth. States that had once been flush with cash now faced deficits, some of them substantial. Meanwhile, the federal government's TANF funding was scheduled to end on October 1, 2002.

On May 16, 2002, the House passed the Personal Responsibility, Work, and Family Promotion Act of 2002 (H.R. 4737) by a vote of 229 to 197. This bill would reauthorize TANF funding for an additional five years. It would also increase the minimum work requirement for recipients by 5 percent per year, so that states would have 70 percent of TANF families working or engaged in other job-preparation activities for 40 hours per week by fiscal year 2007. It would continue to fund childcare through a block grant, and it would also work to strengthen **CHILD SUPPORT** laws to increase money available to mothers and children. It would also provide up to $300 million each year for programs that encourage healthy and stable marriages, such as premarital education and counseling programs.

The Senate did approve the Work, Opportunity, and Responsibility Act (WORK). Among the differences between WORK and H.R. 4737, WORK provides $5.5 billion more in childcare funding and reduces the required workweek to 30 hours instead of 40. The Senate did not act on this legislation, and in September the House and the Senate passed continuing resolutions to extend TANF funding through March 31, 2003. The Senate was expected to take up the issue again in the spring of 2003.

eligibility in every state. For example, applicants must prove they are residents and citizens of the United States. The 1996 Welfare Reform Act cut billions of dollars of aid for legal **ALIENS**, and completely excluded legal aliens from receiving SSI benefits. No new noncitizens could be added to the program after the date of enactment, and all legal aliens who were receiving SSI benefits will eventually be removed from the rolls, unless they meet one of the law's exceptions. A recipient will not receive benefits for any full month that he is not living within the 50 states or the District of Columbia. Inmates in a public institution cannot collect SSI unless they reside in a community-run group home with a maximum of 16 residents.

The passage of the Contract with America Advancement Act of 1996 (P.L. 104-221) made a significant change in the basic philosophy of the SSI program. Beginning on the date of enactment (March 29, 1996), new applicants for SSI disability benefits are not eligible for benefits if drug addiction or alcoholism is a material factor in their disability. Unless they can qualify on some other medical basis, they cannot receive disability benefits. Previously, if a person had a

medical condition that prevented them from working, he was considered disabled for SSI purposes, regardless of the cause of the disability.

All persons who are otherwise qualified must show that their incomes are below the levels prescribed by federal law and that they have no assets that can be used for their support. Various rules regulate the calculation of an applicant's income. A person need not be totally devoid of assets in order to receive benefits. A home, for example, does not count as an asset, and the government does not impose liens (charges against property to secure the payment of a debt) against the homes of recipients of SSI benefits.

**Medicaid** The largest government welfare program that provides benefits other than money for indigent persons is Medicaid. Medicaid was enacted in 1965 as an amendment to the Social Security Act of 1935, (Title XIX, 42 U.S.C.A. 1396). A state receives federal money if it furnishes additional financing and administers a medical program for the poor that satisfies federal standards. A state can supplement federal benefits with its own funds. Medicaid is designed to make private medical care available to impoverished people. As long as their procedures are reasonable, states can establish their own methods of determining a Medicaid applicant's income and resources and whether the applicant qualifies for aid.

Prior to the abolition of the AFDC program in the 1996 reform law, children and parents who received AFDC automatically qualified for Medicaid. The 1996 law provides Medicaid coverage to all families that meet their state's July 1996 AFDC income and asset standards. When a family becomes ineligible for Medicaid coverage due to increased earnings or CHILD SUPPORT income, it becomes eligible for transitional Medicaid, regardless of whether the family received assistance under the block grant program that has replaced AFDC.

As with SSI and other programs, however, the 1996 law denies Medicaid eligibility to most legal immigrants. Except for REFUGEES, those who have claimed political ASYLUM, and a few other categories, immigrants entering the United States are ineligible for Medicaid for five years, with states having the option of extending this ban for a longer period. Immigrants who had been receiving Medicaid as a result of receiving SSI are not eligible for Medicaid once their SSI benefits are cut off.

Medicaid furnishes at least five general categories of treatment, including inpatient hospital service, outpatient hospital services, laboratory and x-ray services, skilled nursing home services, and physicians' services. Generally each of these services is available to treat conditions that cause acute suffering, endanger life, result in illness or infirmity, interfere with the capacity for normal activity, or present a significant handicap. In addition, all states provide eye and dental care and prescription drugs. Almost all states provide physical therapy, hospice care, and rehabilitative services.

Medicaid is a "vendor" plan because payment is made directly to the vendor (the person or entity which provides the services) rather than to the patient. Only approved nursing homes, physicians, and other providers of medical care are entitled to receive Medicaid payments for their services. Since the early 1970s, rising medical costs have placed financial pressures on the Medicaid program. Consequently, health care providers are not fully reimbursed for the services they provide to Medicaid patients. When Medicaid began, persons who were eligible had the right to select their own doctors, hospitals, or other medical facilities. Because of skyrocketing medical expenditures, almost all states have received waivers from the federal government concerning the choice of physician.

**Aid to Families with Dependent Children** Prior to 1996, the most controversial component of the welfare system was the AFDC program. AFDC was established by Congress to ensure the welfare and protection of needy dependent children by providing them, and a custodial relative, with basic necessities within the framework of the family relationship. It was abolished in the 1996 welfare reform act, replaced by block grants to the states to fund welfare under new sets of rules and requirements. The block grant, which is titled the Temporary Assistance to Needy Families (TANF) block grant, converts AFDC to fixed funding. Under TANF, states receive a fixed level of resources for income support and work programs based on what they spent on these programs in 1994, without regard to subsequent changes in the level of need in a state.

Every state was required to establish an AFDC system within broad federal guidelines, with the federal government providing funds for the state programs. The state plan had to be

applied uniformly throughout the state, with the state providing some funding itself and designating one state agency to administer the program. Even though the 1996 law eliminated AFDC, many of the general categories and definitions contained in state-AFDC statutes and regulations remained relevant in new state welfare program laws for determining eligibility.

A child is classified "dependent" if he has no parental support or care because of the death of a parent, the ABANDONMENT by a parent, or the physical or mental incapacity of a parent to fulfill the responsibilities to a child. Once a child qualifies as dependent under these standards, the state agency will decide whether the child is "needy." Each state establishes a minimum income level of subsistence. If the income of a child and the members of his family are below this level, these individuals are deemed needy. All sources of income actually received by the family are considered, as well as the value of all the family's assets.

Under the old AFDC system, each state fashioned exemptions depending upon the circumstances of the case. For example, a state might allow a portion of SOCIAL SECURITY benefits received because of the death of a parent to be saved for the child's future education.

Once the state agency determines the income of members of a family and decides whether their assets are sufficient to meet their needs, it compares their income to the standard of need applied in that state. The standard of need is based on the number of family members, sometimes up to a specific maximum. Under the old law, if the family's income was inadequate to provide what the state considered a minimum amount for the family's needs, AFDC benefits were issued. Under the 1996 law, there is no explicit requirement that the families get cash aid, making it possible for the states to provide vouchers or services rather than cash help. The law specifically eliminates the promise of help and eliminates individual entitlement to aid under federal law. In addition, if a state runs out of block grant funds for the year, and does not provide state funds, it can place new applicants on waiting lists. Under the old law, states received federal funds on an open-ended, entitlement basis.

The 1996 law placed a yearly limit of $16.4 billion nationally on federal welfare spending that replaced AFDC and several other programs, with no provision to raise the limit in the future. Within this financial framework, the states have greater autonomy in determining how to spend the funds on welfare. However, the 1996 law imposed several important changes in national welfare policy.

The 1996 law mandated that states increase the number of persons on welfare who work. It included a directive that by 2002, a minimum of half the families receiving public assistance must have an adult working a minimum of 30 hours per week. If states do not meet these requirements, they can be penalized by losing a percentage of their TANF block grants. Adults cannot be penalized for failure to meet work requirements if their failure is based on the inability to find or afford child care for a child under the age of six. Otherwise, if an adult recipient refuses to participate in a work program, states must reduce the family's assistance by a pro rata amount. States, however, have the option of increasing this penalty, including the termination of assistance to the entire family. Adults can also lose Medicaid as well as cash aid.

One of the criticisms of the AFDC program was that it allowed teenage mothers to set up independent living arrangements and receive AFDC. The 1996 law directs that minor parents can only receive TANF block grant funds if they are living at home or in another adult-supervised setting. They must attend high school or an alternative educational or training program as soon as their child is at least 12 weeks old.

The most radical change in abolishing AFDC and moving to the TANF block grants was the limitation on families receiving TANF funds. Federal funds can only be used to provide a total of five years of aid in a lifetime to a family. The law provides that states may give hardship exemptions of up to 20 percent of their average monthly caseload. However, the law also permits states to set limits shorter than five years.

A state welfare assistance plan must set forth objective criteria for the delivery of benefits and for fair and equitable treatment, as well as how the state will provide opportunities for recipients to appeal decisions against them. While the law and regulations governing AFDC were explicit regarding appeal rights, the 1996 law is more general in this area, leaving each state to devise DUE PROCESS protections in state law.

### Food and Food Stamps

The federal government provides food to those in need through several types of programs, including nutrition programs, and, most importantly, the Food Stamp program.

The federal government sponsors special nutrition plans to promote child welfare. Such programs, including the Child and Adult Care Food Program (CACFP), provide federal grants of money and food to nonprofit elementary and secondary schools and to child-care institutions so that they can serve milk, well-balanced meals, and snacks to the children. Additional money is provided so that free or reduced-price food and milk can be given to children of needy families. These programs provide lunch and breakfast to children in public and private nonprofit schools. Pregnant and nursing mothers and their children up to age four who live in areas that have large numbers of people who are considered nutritional risks are eligible for a special program that supplies food supplements.

The Food Stamp program, as provided by the Federal Food Stamp Act of 1964, is the most significant food plan in the United States. Needy individuals or households obtain food stamps (or official coupons) that can be exchanged like money at authorized stores. Some states create electronic banking accounts that allow a person to purchase food using an electronic bank card. The person's account is debited the amount of the cash value of the stamps when he purchases food at a store.

The federal government pays for the amount of the benefit received, and the states pay the costs of determining eligibility and distributing the stamps. The value of the food stamp allotment that state agencies are authorized to issue is based on the "thrifty food plan," a low-cost food budget, reduced by an amount equal to 30 per cent of the household income. Prior to 1996, poor families with children that spent more than 50 per cent of their income for housing would have had their excess shelter costs included in calculating the amount of food stamps received. The 1996 law placed a maximum amount for the food stamp deduction for shelter costs.

### Public Housing

Since the late 1930s, the federal government has provided funds to build public housing for the poor. Almost all programs rely on local public housing agencies created by state law or by a local government unit authorized by the state. Contracts between the HOUSING AND URBAN DEVELOPMENT DEPARTMENT and the local agency provide the means for the transfer of the federal funds.

Applicants for public housing must meet income requirements. So as not to penalize people for improving their financial condition, tenants usually can continue to live in public housing after they surpass the income level that admitted them to the project. As the tenant's income increases, he or she might be charged a higher rent so that the rent can be kept lower for other tenants with greater need. Federal law limits the percentage of a tenant's income that can be charged for rent in low-income housing projects.

### Welfare Rights

With the development of the welfare system, the courts have been called on to resolve disputes involving welfare recipients and government agencies. The most important case concerning the scope of welfare rights is *Dandridge v. Williams,* 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970). In *Dandridge,* a California law set an upper limit on the amount of welfare benefits that a family could receive, preventing larger families from receiving the same amount per person as smaller families. Large-family recipients charged that the law violated the Social Security Act of 1935 and the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT.

The Court ruled that the California law did not violate either. It stated that the act does not prohibit a state from "providing the largest families with somewhat less than their ascertained per capita standard of need," given the finite amount of resources a state has available. The Court also contended that states might reasonably theorize that large families are able take advantage of other types of assistance unavailable to smaller households. The Court ruled that the law did not violate the Equal Protection Clause because it was free from "invidious discrimination," and it reasonably worked to further the state's interest of "encouraging employment and in maintaining an equitable balance between welfare families and the families of the working poor."

An equally compelling welfare case was heard in the late 1990s. The Supreme Court, in *Saenz v. Roe*, 526 U.S. 489, 119 S.Ct. 1518, 143

L.Ed.2d 689 (1999), struck down a California law that limited new residents to the amount of welfare benefits they would have received in the state of their prior residence. The law was enacted in an attempt to discourage individuals from moving into the state in order to gain higher welfare benefits. California officials estimated that, each year, more than 50,000 people applying for benefits had lived in another state during the previous 12 months. Many of these individuals came from states that had much lower benefit levels. For example, a family of four who arrived from Mississippi would have received $144 in that state. In comparison, but for the one-year residency limitation, they would receive $673 in California.

In a previous case (*Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 [1969]), the Court had struck down the laws of three states that denied all welfare benefits to persons who had resided in their states less than one year. In that case the Court ruled that it was "constitutionally impermissible" for a state to enact durational residency requirements that sought to inhibit the migration of needy persons into the state. These laws restricted a person's right to travel, which is protected under the Fourteenth Amendment. California argued that its law had not been enacted for the purpose of inhibiting the migration of poor people and that it merely reduced the level of benefits rather denying benefits.

The Supreme Court disagreed. It ruled that persons have a right to travel from state to state and that once a person decides to reside in a state he or she must be treated like all other citizens of that state. The Court concluded that "the state's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens." Citizens, regardless of their incomes, have the right to choose to be citizens of the state in which they reside. The states, however, "do not have any right to select their citizens."

In an attempt to discourage welfare recipients from litigating the 1996 welfare reform law, Congress prohibited legal aid groups that receive federal money from taking such cases. The Supreme Court, in *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001), overturned this restriction as unconstitutional. The Court concluded that once Congress appropriated funds for providing legal assistance to private citizens, FIRST AMENDMENT rights were implicated. A federally-funded legal aid attorney "speaks on behalf of a private, indigent client in a welfare benefits claim, while the Government's message is delivered by the attorney defending the benefits decision." Therefore, the attorney's advice to the client and advocacy to the court was private speech that could not be restricted by the government.

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CROSS-REFERENCES

Health Care Law; Health Insurance; Homeless Person; Old-Age, Survivors, and Disability Insurance.

"ETERNAL VIGILANCE IS THE PRICE OF LIBERTY, AND IT DOES SEEM THAT NOTWITHSTANDING ALL THOSE SOCIAL AGENCIES AND ACTIVITIES THERE IS NOT VIGILANCE, WHICH SHOULD BE EXERCISED IN THE PRESERVATION OF OUR RIGHTS."
—IDA B. WELLS-BARNETT

## ♦ WELLS-BARNETT, IDA BELL

Ida Bell Wells-Barnett was a prominent and often controversial African–American reformer who spoke out against racial oppression in the United States at the turn of the twentieth century. The daughter of slaves, Wells-Barnett conducted a self-described crusade for justice to protest the savage LYNCHINGS of hundreds of African Americans in the South. Her impassioned antilynching lectures and publications had an enormous effect on public opinion in the United States and Great Britain. Outspoken and self-confident, Wells-Barnett was viewed with hostility by many whites and rebuffed by several African–American leaders who resented her frequent criticism of their efforts. Yet, even her detractors conceded that Wells-Barnett's unshakable commitment to the social, political, and economic advancement of African Americans propelled the struggle for CIVIL RIGHTS.

Born July 16, 1862, in Holly Springs, Mississippi, Wells-Barnett was the oldest of eight children of James Wells and Elizabeth Warrenton Wells. After the Civil War, her father was a carpenter and a leader in local Reconstruction activities. Wells-Barnett attended Shaw University (later renamed Rust College), an African American school for all grade levels established in Holly Springs in 1866 by Freedmen's Aid, a church-sponsored effort to educate former

*Ida B. Wells-Barnett.*
BETTMANN/CORBIS

slaves. The northern Methodist missionaries who taught at the school considered Wells-Barnett an exemplary student.

When Wells-Barnett was sixteen years old, her parents and youngest brother died in a yellow fever epidemic. Wells-Barnett insisted on raising her surviving siblings while teaching school in a rural district. By 1883, her brothers were old enough to begin work as carpenters, so Wells-Barnett and her sisters moved to Memphis, to live with an aunt. Wells-Barnett attended classes at Fisk University and taught school in Memphis until 1891, when she was fired from her job for criticizing the segregationist policies of the Memphis School Board. Angry articles by Wells-Barnett in the small newspaper *Free Speech and Headlight* denounced the limited educational opportunities for African Americans in "separate-but-equal" Memphis schools. Writing under the pen name Iola, Wells-Barnett discovered her talent for journalism and her calling as a social activist.

Wells-Barnett became co-owner and editor of *Free Speech* and a vocal opponent of JIM CROW LAWS in the South. In one *Free Speech* article, she described her own frustrating 1884 lawsuit against the Chesapeake, Ohio, & Southwestern Railroad. The dispute began when Wells-Barnett boarded a train in Memphis en route to Woodstock, Tennessee. After taking her usual seat in the "ladies car," which was a first-class coach, she and the other African–American women in that car were told by the conductor to move to the smoking car, which was not first-class. By Tennessee law, African Americans were to be assigned separate and equal accommodations on public transportation.

When Wells-Barnett refused to sit in the smoking car, she was forced off the train. Later, she sued the railroad and won $500 in damages from a lower state court. Her triumph was short-lived, however, because the award was overturned in 1887 by the Supreme Court of Tennessee, which determined that a smoking car could indeed serve as a first-class accommodation for African Americans (*Chesapeake, Ohio, & Southwestern Railroad Co. v. Wells,* 85 Tenn. (1 Pickle) 613, 4 S.W. 5 [1887]). The Tennessee high court suggested that Wells-Barnett's real motive in refusing to sit in the smoking car was to harass the railroad and to lay the groundwork

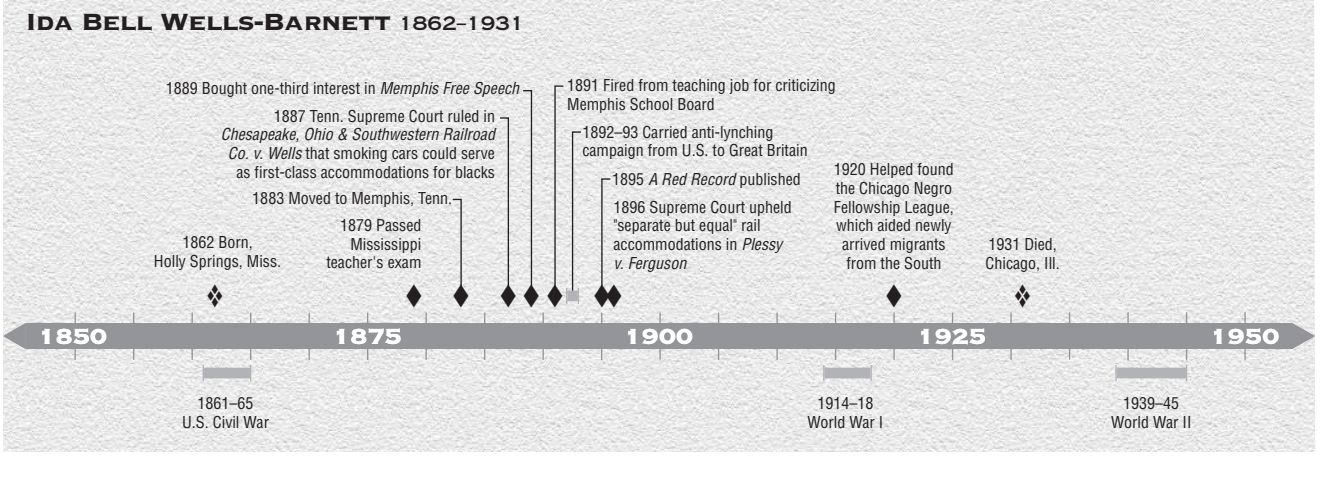

for a profitable lawsuit. The court chastised Wells-Barnett for failing to try in GOOD FAITH to secure a comfortable seat. The stark injustice of the court's reversal fueled Wells-Barnett's determination to speak out against the mistreatment of African Americans.

For Wells-Barnett, the pivotal event in her activist career was the LYNCHING in 1892 of her friends Calvin McDowell, Thomas Moss, and Henry Stewart, three African–American merchants from Memphis. The men owned the People's Grocery, a thriving operation that had cut into the profits of its white competitors. When a mob of white men was deputized to arrest the three merchants on trumped-up criminal charges, violence erupted, and the innocent African Americans were hanged.

Wells-Barnett was outraged. She wrote a scathing editorial in *Free Speech,* denouncing not only the murder of her friends but also the offensive, widely accepted rationale for most lynchings. Wells-Barnett observed that contrary to southern myth, lynchings were rarely if ever spontaneous group acts in retaliation for sexual misconduct by African–American men. A lynch mob was actually a barbaric mechanism for maintaining power among whites and for denying African Americans their civil rights. Protecting the reputation of southern white women was a smoke screen. Wells-Barnett also asserted that any sexual liaisons between African–American men and white women were consensual, an observation that enraged much of the conservative white population.

After the editorial was published, an angry throng of white men stormed the *Free Speech* office and destroyed Wells-Barnett's printing press. Wells-Barnett was in Philadelphia at the time.

These episodes of mob rule, so contrary to the democratic ideal, led Wells-Barnett to launch an antilynching campaign. Wells-Barnett relied not only on righteous indignation but on shocking national statistics to make her case against lynching. In articles and speeches, she quoted a grim fact: in 1894, 132 legal executions were carried out in the United States, and 197 lynchings occurred. African Americans were receiving the death penalty from self-appointed white citizens without the benefit of criminal investigations, formal charges, LEGAL REPRESENTATION, or trials. Wells-Barnett's findings were published in 1895 in a detailed book entitled *A Red Record: Tabulated Statistics and Alleged Causes of Lynchings in the United States, 1892–1893–1894.*

In 1893, Wells-Barnett carried her antilynching campaign to Great Britain in the hope of exerting international pressure on U.S. legislators to enact antilynching laws. She was well received in Great Britain and spoke to large crowds. While in Europe, she was a guest at several women's civic clubs and was impressed with their worthwhile, community-minded activities. Wells-Barnett exported the idea to the United States, where African–American women's clubs flourished.

In 1895, Wells-Barnett married Ferdinand L. Barnett, the first African–American state's attorney in Illinois. After the marriage, Wells-Barnett curtailed her international speaking but continued to write in national publications. The couple lived in Chicago and had four children. Wells-Barnett worked hard to improve conditions for African Americans in Chicago by serving as a social worker and community organizer.

Wells-Barnett was well-known throughout the United States, yet the political power she craved eluded her. Although she was involved in the formation of the National Association for the Advancement of Colored People, she alienated many of her African–American colleagues with her sharp tongue and unbending manner. Also, she was an unreserved critic of the accommodationist position favored by BOOKER T. WASHINGTON, the founder of Tuskegee Institute and the most influential African–American leader at the time. Wells-Barnett favored a militant approach to achieving racial equality and was not welcome in the Washington camp. Other women such as Mary McLeod Bethune eventually eclipsed Wells-Barnett in influence. A combination of politics and personal animosity prevented Wells-Barnett from achieving the level of African–American leadership she sought.

Although Wells-Barnett felt stymied near the end of her career, she earned an honored and lasting place in history as one of the first African American civil rights activists. Daughter Alfreda M. Barnett Duster wrote that Wells-Barnett "fought a lonely and almost single-handed fight, with the single-mindedness of a crusader, long before men or women of any race entered the arena" (Wells 1970, xxxii).

Wells-Barnett died in Chicago on March 25, 1931, at the age of sixty-eight. In 1950 the city of Chicago named her one of the twenty-five most outstanding women in its history.

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## WELSH V. UNITED STATES

A 1970 U.S. Supreme Court decision, *Welsh v. United States,* 398 U.S. 333, 90 S. Ct. 1792, 26 L. Ed. 2d 308, held that a person could be exempted from compulsory military service based solely on moral or ethical beliefs against war.

The VIETNAM WAR was an unpopular conflict that depended on the military draft to maintain adequate numbers of persons in the ARMED SERVICES. A man who was selected for compulsory military service could be excused if he signed a statement in the SELECTIVE SERVICE form that provided: "I am, by reason of my religious training and belief, conscientiously opposed to participation in war of any form." In *Welsh,* the Supreme Court ruled that a person did not have to profess a religious belief to qualify for CONSCIENTIOUS OBJECTOR status. Under *Welsh,* a person's strongly held moral or ethical beliefs can provide an adequate basis for exemption from military service.

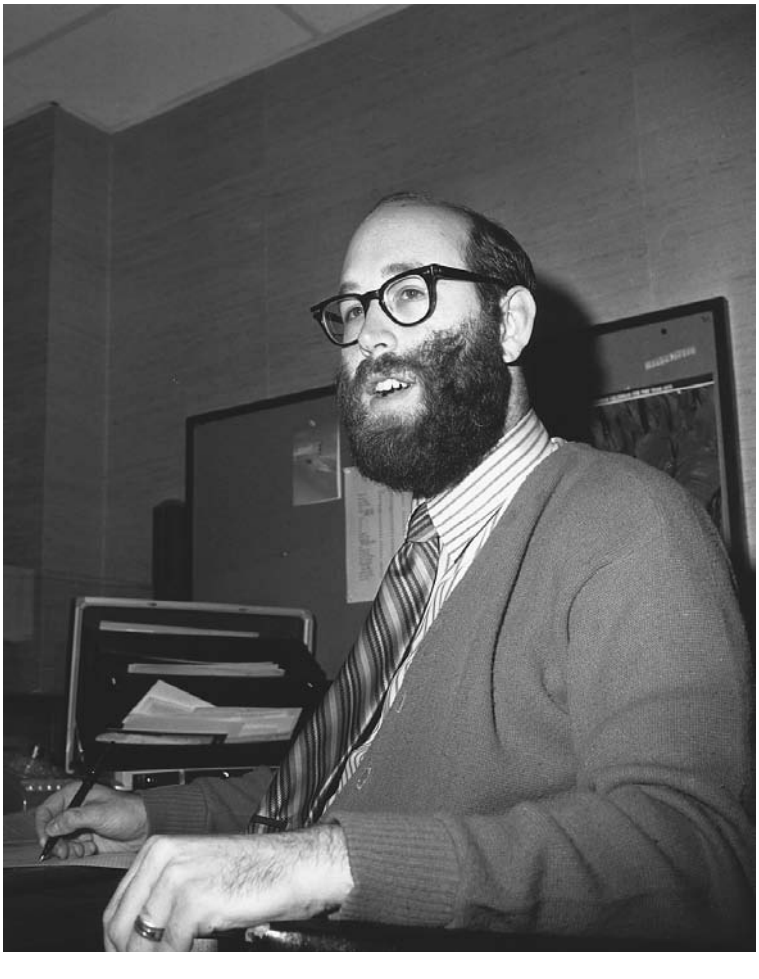

*Elliot A. Welsh II speaks to reporters on June 15, 1970, shortly after learning of the U.S. Supreme Court ruling in his favor that a person could be exempted from military service based solely on moral or ethical beliefs against war.*

AP/WIDE WORLD PHOTOS

In 1966 Elliot A. Welsh II was convicted for refusing to submit to induction into the armed forces in violation of federal law, and was sentenced to imprisonment for three years. Welsh had signed the conscientious objection statement after crossing out "my religious training and." He believed that killing in war is unethical and immoral, and the sincerity of his beliefs was not questioned. However, his conscientious-objector claim was denied because it was not predicated upon a belief in a "Supreme Being," which was a statutory requirement for an exemption at that time.

Welsh appealed his conviction to the U.S. Supreme Court. The Court ruled that a draft registrant's conscientious objection to all war must be derived from his moral, ethical, or religious convictions about what is right and wrong and that it had to be maintained with the intensity of more conventional religious beliefs. If a draft registrant's beliefs represent an analogue to worship of God—if they serve as a religion in the person's life—then the draft registrant is entitled to a religious conscientious objector exemption, just as someone whose conscientious opposition to war stems from orthodox religious beliefs.

The government argued that Welsh's convictions were predominantly philosophical, sociological, or personal in nature and therefore were within the statutory exclusion for conscientious objector status. The Court rejected this argument, ruling that this provision should not be construed to exclude those who are opinionated about domestic and international affairs or those whose conscientious objection to participation in all wars is based upon public policy considerations. It concluded that only those persons whose beliefs are not fervently held or whose objections to war are based on considerations of expediency or pragmatism could be excluded from conscientious objector status.

In this case, the Court held that Welsh's beliefs met its test and therefore he was entitled to conscientious objector status and a reversal of his conviction.

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Conscientious Objector.

## ♦ WESLEY, CARTER WALKER

Carter Walker Wesley was a prominent African American attorney and newspaper publisher who fought a long legal battle with the state of Texas and the Texas DEMOCRATIC PARTY to end the racially discriminatory WHITE PRIMARY. Wesley, a member of the National Association for the Advancement of Colored People (NAACP), also sought to unite African American newspaper owners through the National Negro Publishers Association.

Wesley was born in 1892 in Houston, Texas. He received a bachelor's degree from Fisk University in Nashville, Tennessee, in 1917 and a law degree from Northwestern University in 1922. He practiced law in Muskogee, Oklahoma, with John Atkins, but the pair moved to Houston in 1927 to engage in additional business opportunities, including a real estate firm, an insurance company, and a newspaper, the *Houston Informer.* James M. Nabrit Jr., also a Northwestern Law School graduate, joined them to form the law firm of Nabrit, Atkins, and Wesley.

Wesley usually concentrated on his business ventures and let Nabrit handle most of the legal work. However, because Wesley was committed to ending RACIAL DISCRIMINATION, he personally handled important cases involving the CIVIL RIGHTS of African Americans. He and Nabrit took the case of Dr. A. L. Nixon of El Paso, Texas, who had been prevented from voting in the Democratic primary election because he was black. Nixon had earlier challenged a state law that permitted the Democratic Party to exclude African Americans from the primary. In *Nixon v. Herndon,* 273 U.S. 536, 47 S. Ct. 446, 71 L. Ed. 759 (1927), the U.S. Supreme Court ruled that the state could not formally endorse the white primary.

Texas responded, however, by basing the white primary solely on a resolution adopted by the state Democratic Party. Texas claimed that it had no role in the primary and therefore the Fourteenth Amendment's Equal Protection Clause did not apply. Wesley and Nabrit challenged this theory, but in *Grovey v. Townsend,* 295 U.S. 45, 55 S. Ct. 622, 792 L. Ed. 1292 (1932), the Court upheld the Texas white primary. Undaunted, Wesley continued to press for an end to the white primary. Finally, in *Smith v. Allwright,* 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944), the Court overruled the *Grovey* decision and struck down the Texas white primary as a violation of the Fifteenth Amendment's prohibition against voting discrimination based on race.

Wesley remained a staunch supporter of the NAACP and civil rights but shifted his emphasis to publishing. He formed the National Negro Publishers Association (now called the National Newspaper Publishers Association) in 1941, which became a means of communication for African American publishers throughout the United States. Wesley eventually became publisher and editor of a chain of affiliated newspapers in Texas, Louisiana, Alabama, and California.

Wesley died in Houston in 1969.

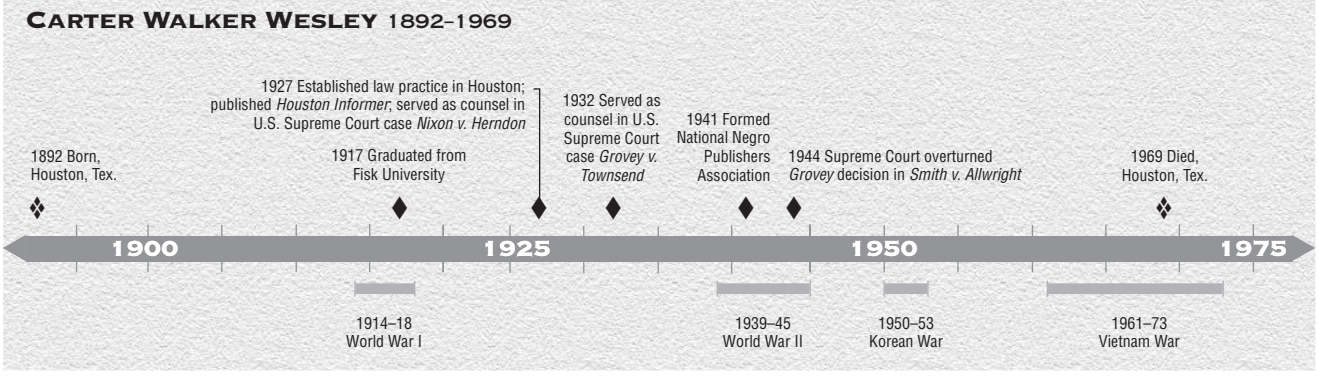

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## WEST COAST HOTEL CO. V. PARRISH

The Supreme Court's decision in *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937), marked the end of an era in U.S. constitutional JURISPRUDENCE. The Court in *Parrish* repudiated SUBSTANTIVE DUE PROCESS and the "freedom of contract" doctrine that prior courts had used to invalidate state laws that regulated business and labor. By reversing precedent, the Court sent a signal to Congress and state legislatures that it would exercise judicial restraint and not stand in the way of legislation that had a legitimate government purpose.

In the case the West Coast Hotel Company challenged the constitutionality of the state of Washington's MINIMUM WAGE law for women. Elsie Parrish, a hotel chambermaid, had filed a lawsuit seeking to recover the difference between the wages paid her and the minimum wage prescribed by law. The hotel company argued that the wage law violated the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT. The Washington Supreme Court upheld the law, and the company appealed to the U.S. Supreme Court.

Many observers believed that the Court would strike down the law because of its decision in *Adkins v. Children's Hospital,* 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923), which invalidated a minimum wage law for women and children. The Court in *Adkins* had reiterated that the Due Process Clause of the Fourteenth Amendment barred states from interfering with the freedom of employees to negotiate the terms of their employment with their employers. This doctrine of substantive due process was used to limit the substance of government regulations and other activities that affected "life, liberty, and property." Substantive due process was the basis for the freedom of contract doctrine that the Court had used to strike down state laws that regulated hours and work conditions, as well as wages.

However, in *Parrish* the Court, on a 5–4 vote, rejected the freedom of contract doctrine. Chief Justice CHARLES EVANS HUGHES noted that the Constitution does not refer to freedom of contract. Rather, it proscribes deprivation of liberty without DUE PROCESS OF LAW. Hughes pointed out that freedom is not absolute. Moreover, "the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people." Thus, constitutional liberty is "necessarily subject to restraints of due process" as long as government regulation is reasonable and furthers the interests of the community. He branded the *Adkins* decision as "a departure from the true application of the principles governing the regulation by the state of the relation of employer and employed."

The decision was made at the height of the Great Depression. Hughes took JUDICIAL NOTICE of "the unparalleled demands for relief" arising out of the economic hard times. He concluded that the state of Washington was free to correct the abusive practices of "unconscionable employers" who disregard the public interest.

*Parrish* marked the end of an era in U.S. CONSTITUTIONAL LAW. Substantive due process as a limitation on government power in the field of economic regulation became a dead letter.

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CROSS-REFERENCES

*Lochner v. New York*; New Deal.

## WEST LEGAL DIRECTORY

The West Legal Directory™ (WLD) is a searchable on-line directory of law firms, judges, and attorneys in the United States, Puerto Rico, the Virgin Islands, Canada, and Europe. WLD is not available in print. It is available on WESTLAW®, West CD-ROM Libraries™, and at FindLaw (<www.findlaw.com>), the most popular legal portal and research site on the INTERNET. (FindLaw was purchased by Thomson West in 2001.) WLD contains information regarding private, government, and corporate offices and attorneys, as well as profiles of courts, judges, and law school professors. Law student resumés are accessible to potential employers, but not to other law students or professors.

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WLD updates its profiles daily on WESTLAW and FindLaw, and quarterly on CD-ROM. WLD information may be searched in the WLD database, or in component databases. Component databases, such as WLD-MN, WLD-TAX, and WLD-JUDGE, allow users to narrow their search to legal directories designed for particular geographic locations, practice areas, or professional titles. WLD may be searched using the Terms and Connectors search method or fill-in-the-blank templates. In addition, FindLaw's web interface allows users to employ simple and advanced search methods.

CROSS-REFERENCES

Computer-Assisted Legal Research; Westlaw®.

## WEST SAXON LAGE

*The laws of the West Saxons, who lived in the southern and western counties of England, from Kent to Devonshire, during the Anglo-Saxon period.*

Before the Norman Conquest in 1066, the Anglo-Saxon rulers of England employed a set of laws to govern their kingdom. The collection of laws, called the West Saxon lage, helped support the structure of early English society.

Ine, the Anglo-Saxon king of the West Saxons, or Wessex, ruled from 688 to 726. He was a powerful ruler and the first West Saxon king to issue a code of laws. Alfred the Great, king of Wessex from 871 to 899, promulgated a code of laws based on Ine's work as well as the Book of Exodus and the codes of Aethelberht of Kent (560–616) and Offa of Mercia (757–796). Ine's code, which concerned itself with judicial procedures and the listing of punishments to be inflicted for various offenses, was preserved by Alfred as an appendix to his code. Though Alfred's laws avoided unnecessary changes in custom, his code limited the practice of the blood feud and imposed heavy penalties for breach of oath or pledge.

The West Saxon lage is believed to have evolved from Ine's and Alfred's codes. The legal scholar SIR WILLIAM BLACKSTONE concluded that the lage was the municipal law for much of England before the Norman Conquest.

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WESTLAW has more than 40 specialized databases that group legal materials by area of practice, including INTERNATIONAL LAW, immigration, health and medicine, ENVIRONMENTAL LAW, SECURITIES, BANKRUPTCY, banking, CIVIL RIGHTS, insurance, energy, entertainment, labor, education, and INTELLECTUAL PROPERTY. Secondary legal materials, such as law reviews, scholarly commentaries, and academic treatises,

are also available on WESTLAW. All materials accessed on WESTLAW can be printed offline, downloaded to a floppy disc, or transmitted to a fax or electronic mail destination.

There are two principal methods of searching individual and combination databases, Natural Language and Terms and Connectors. Natural Language, known to WESTLAW subscribers as WIN® (WESTLAW is Natural™), allows users to search WESTLAW with sentences written in plain English. Terms and Connectors, also known as Boolean logic, is a search method that permits users to specify which terms will appear in retrieved documents, and their proximity to each other. Suppose an attorney is asked to research whether her client committed the intentional TORT of assault, even though there was no physical contact between the plaintiff and defendant. An effective Natural Language search might be as simple as the following:

> "Does the intentional tort of assault require physical contact between the plaintiff and defendant?

On the other hand, an effective Terms and Connectors search would require greater specificity such as the following:

> "intentional tort" /p physical /3 contact /s assault.

Words in quotation marks are treated as phrases in Terms and Connectors searching and must appear in the retrieved documents exactly as they appear in quotation marks. Terms on each side of a */p* must appear in the same paragraph; terms on each side of a */s* must appear in the same sentence; and terms on each side of a numeric connector such as */3* must appear a designated number of terms apart. The sample Terms and Connectors search tells WESTLAW to retrieve documents in which the phrase "intentional tort" appears in the same paragraph as the term "physical," which itself must appear within three terms of "contact," which, in turn, must appear in the same sentence as "assault." The sample Natural Language search tells WESTLAW to perform a statistical analysis of the search terms for the purpose of retrieving documents in which the least common terms appear the greatest number of times.

Introduced in 1975, WESTLAW was designed to supplement traditional methods of manual legal research. In this regard, WESTLAW, along with its chief competitor, LEXIS-NEXIS, has made legal research easier, faster, more accurate, and more up-to-date. Although WESTLAW continues to add hundreds of new databases each year, traditional legal research has not been entirely replaced. Many legal materials remain accessible only at law libraries. Comprehensive coverage of other legal materials is not always provided online. For example, WESTLAW coverage of the *United States Code Annotated*® begins in 1989, though the print version of the U.S.C.A. was first published in 1927.

WESTLAW subscription packages can be expensive, and as a result, not all lawyers subscribe. However, by 2003 attorneys could access WESTLAW through their Internet browser software and use a credit card to purchase WESTLAW access as needed. The development of the browser interface has been extremely popular, dispensing with the installation of special WESTLAW software that had to be installed on a computer before establishing a connection with the mainframe. This arrangement has also streamlined training on how to access WESTLAW, as the user has experience using the browser. In addition, WESTLAW has added cite-checking software that ensures the accuracy of cited decisions.

**CROSS-REFERENCES**

Computer-Assisted Legal Research; Law Review; Legal Publishing.

## WESTMINSTER, FIRST STATUTE OF

The First Statute of Westminster was enacted by a parliament meeting at Westminster, England, during the reign of King Edward I to enforce some of the provisions of MAGNA CHARTA and to liberalize the law of England. The statute was more like a code, containing fifty-one chapters that dealt with many facets of English CIVIL LAW and CRIMINAL LAW.

The statute was the first effort by Edward I to consolidate and reform ENGLISH LAW and procedure. Among its many provisions, the act extended protection of church property from acts of violence and spoliation by the king and nobility and provided for freedom of popular elections for the offices of sheriff, CORONER, and conservator of the peace.

The statute also contained a declaration to enforce the enactment of Magna Charta, the charter granted by King John to the barons at Runnymede on June 15, 1215. Magna Charta regulated the administration of justice, defined the jurisdictions of church and state, limited taxation, and secured the personal liberty of the

subjects and their rights of property. The statute prohibited excessive fines, which might operate as perpetual imprisonment. It also regulated the levying of tolls, which were imposed arbitrarily by the barons and by cities and boroughs, and restrained the powers of the officers of the king.

The statute amended the criminal law by making rape a serious crime, but not a capital one. The law also defined *peine forte et dure,* a "strong and hard punishment" that was inflicted upon those who were accused of a felony and stood silent, refusing to plead either guilty or not guilty. The statute permitted a person to be imprisoned and starved until submission. An individual who chose to stand mute under the threat of *peine forte et dure* often did so to ensure that his family would inherit his goods and estates. If he entered a plea and was later tried and convicted, his goods would pass to the crown.

The statute also introduced simpler and more expeditious procedures for civil and criminal matters.

## WESTMINSTER, SECOND STATUTE OF

In 1285 King Edward I summoned the great lords and councillors of England to a parliament in Westminster to consider changes in how land could be conveyed. The result was the enactment of the Second Statute of Westminster, which is sometimes referred to as the Statute de Donis Conditionalibus (Latin, "concerning conditional gifts"). It converted estates in fee simple conditional into estates in fee entail and rendered them inalienable, thereby strengthening the power of the nobility.

Under FEUDALISM in England, the crown and nobility controlled all of the land. The nobility sought to restrain the transfer of real property and to ensure that property would stay within family lines.

The Second Statute of Westminster addressed this issue by changing PROPERTY LAW. At COMMON LAW, an estate in fee simple conditional was a title to land limited to some particular heirs, exclusive of others. Under fee simple conditional, relatives other than a person's children could inherit the person's estate. The statute changed this by converting such an estate into a fee entail, which restricted ownership of land to a particular family line. Thus, an estate in land descended to a person's children and through them to the person's grandchildren in a direct line. However, upon the death of the first owner of the estate who did not have living children, the land would revert to the original grantor's line, which meant that the land would revert to the local lord or to the crown.

CROSS-REFERENCES

Fee Tail.

## WESTMINSTER HALL

Westminster Hall was the home of English superior courts until they were moved to the Strand in the early 1880s. Construction of the hall began in 1097; the hall is 240 feet long, 67½ feet wide, and 90 feet high. In addition to holding regular court sessions, the hall was the focal point of medieval political life.

Many famous trials were held in the hall. Sir Thomas More (1478–1535), lord chancellor for Henry VIII (1491–1547), was sentenced to death for refusing to recognize royal supremacy over the church. Charles I (1600–49) was sentenced to death for TREASON, and Warren Hastings (1732–1818) was impeached for his handling of the East India Company.

Westminster Hall contained the King's Bench, the Court of Chancery, and the Court of Common Pleas. Until the eighteenth century, it had no partitions or screens to divide the courts from the open hall.

The hall was part of Westminster Palace, which, except for the hall and St. Stephen's Chapel, was destroyed by fire in 1834. The houses of Parliament were constructed next to the hall between 1840 and 1860.

## WHALING

*The hunting of whales for food, oil, or both.*

The hunting of whales by Eskimos and Native Americans began around 100 A.D. in North America. In Europe the systematic hunting of whales began during the Middle Ages and greatly expanded in the seventeenth century. Whaling was driven by the desire to procure whale oil and sperm oil. Whale oil comes from baleen whales and is an edible product that was used in the making of margarine and cooking oil. Sperm oil, which comes from sperm whales, was used for illuminating lamps, as an industrial lubricant, and as a component of soaps, cosmetics, and perfumes.

During the nineteenth century, the U.S. whaling fleet dominated the world industry.

Most of the seven hundred U.S. ships sailed out of New Bedford and Nantucket, Massachusetts. However, the industry went into a steep decline with the discovery and exploitation of petroleum during the late nineteenth century. Though new uses for sperm oil were developed, the U.S. fleet gradually disappeared.

In the early twentieth century, concerns were raised about the dwindling whale population. An international movement to regulate the hunting of whales met resistance from Scandinavian countries and Japan, but in 1931 the LEAGUE OF NATIONS convened a Convention for the Regulation of Whaling. It proved unsuccessful because several important whaling states refused to participate.

Annual international whaling conferences led to the International Convention for the Regulation of Whaling in 1946, which established the International Whaling Commission (IWC). The IWC was charged with the conservation of whale stocks. It limited the annual Antarctic kill and created closed areas and hunting seasons throughout the world. Despite these initiatives and others over the years, the whale population edged closer to extinction, and the IWC agreed in 1982 to prohibit commercial whaling beginning in 1986. Commercial whaling has continued, however, often under the fiction of capturing specimens for scientific research.

In 1990 a scientific study was begun to determine if the whaling MORATORIUM should be lifted. Though the study indicated that whale populations were growing, in 1993 the United States refused to agree to a resumption of commercial whaling, and the IWC agreed. The United States warned that if a country (primarily Japan, Norway, or Iceland) ignored the IWC conservation program and resumed commercial whaling without IWC approval, that country's actions would be reviewed, and sanctions would be considered where appropriate.

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CROSS-REFERENCES

Environmental Law; Fish and Fishing.

## WHARVES

*Structures erected on the margin of* NAVIGABLE WATERS *where vessels can stop to load and unload cargo.*

Cities located on lakes, rivers, and oceans usually have at least one wharf, where ships can deliver and pick up passengers and load and unload various types of goods. The law regarding wharves deals with access to wharves, rates that may be charged, and liability issues surrounding the use of these facilities.

There are public and private wharves. Public wharves, which can be used with or without paying a fee, ordinarily belong to a government organization, such as a city or town. Private wharves are owned or leased by individuals for their own private use. Such a wharf may be opened to the public in exchange for a one-time payment or a rental fee. If the public is allowed to use the private wharf, it becomes a quasi-public facility that is open to all who are able to pay the charges. Whether a particular wharf is public or private depends mainly on its use, rather than on its ownership.

There are several terms peculiar to wharves. *Wharfage* in its most general sense refers to the use of a wharf in the usual course of navigation for such practices as loading and unloading goods and passengers. In a more restricted sense, the term *wharfage* refers to a charge or rent for the use of the wharf. A *wharfinger* is an individual who maintains a wharf for the purposes of receiving goods for hire. The term *dock* refers to an enclosure for the reception of vessels as well as a place where ships are built and repaired. It can include bulkheads, piers, slips, a waterway, wharves, and the space between wharves.

### Government Regulation

Though the federal government has reserved the right to control and regulate the use of wharves, the jurisdiction and control of these facilities is generally in the hands of the states where the wharves are located. Government supervision is ordinarily exercised through statutes that give stipulated powers to local boards and commissions. Such powers include the power to supervise and regulate wharf construction, use, and maintenance, the depth of waters surrounding wharves, and their lighting and policing.

### Wharfage Rates

Local laws may govern wharfage rates for the use of public wharves. The rates may be fixed to benefit and increase commerce in the port, but the rates must be reasonable.

A user will be subject to a charge, even for limited periods of time. Such charges may be graduated on the basis of the gross tonnage of the vessel using the wharf. When the costs for the use of private wharves are not regulated, the parties may freely bargain for compensation, and there is no requirement of reasonableness.

### Liability

The proprietors of wharves have the legal obligation to provide a safe berth and must use reasonable care to keep the dock in a reasonably safe condition for use by vessels invited to enter it. The owner of the dock must exercise reasonable diligence to discover the existence of defects, obstructions, and other hazards that would make the wharf unsafe to vessels. The owner is liable for harm incurred by a vessel that results from the owner's failure to meet this duty. Wharf proprietors have been found liable for injuries to vessels resulting from an uneven ocean bottom or from submerged obstructions, such as rock, cinders, or a sunken ship.

A vessel must be furnished with ordinary mooring devices. The wharf owner owes a duty of reasonable care in maintaining the fastenings for a vessel, including the duty of inspecting the line securing the vessel. NEGLIGENCE by the wharf owner in failing to properly moor the vessel will result in liability for injuries to the vessel and its crew. However, if an employee of the ship supervises the mooring, the responsibility shifts to the owners of the ship.

### Injuries to Wharves

The proprietor of a wharf has a right to use and enjoy the property undisturbed by the negligent conduct of others. A wharf proprietor can recover damages for injury to the wharf that results from the negligent operation of a vessel.

CROSS-REFERENCES

Shipping Law.

## ♦ WHEATON, HENRY

Henry Wheaton served as the reporter of decisions for the U.S. Supreme Court and later became a diplomat and a scholar of INTERNATIONAL LAW. Wheaton is recognized for establishing a high level of accuracy, timeliness, and scholarship for Supreme Court reporters. A dispute with his successor, however, lead to a landmark case that had a profound effect on U.S. COPYRIGHT law and public information.

Wheaton was born on November 27, 1785, in Providence, Rhode Island. He graduated from Rhode Island College (today known as Brown University) and then studied law in France in 1802. Upon his return that year he established a law practice in Providence.

Wheaton became a friend and colleague of U.S. Supreme Court Justice JOSEPH STORY, who shared Wheaton's passion for legal scholarship. In 1816 Story persuaded Wheaton to move to Washington, D.C., and take the position of reporter of decisions for the Court. Wheaton agreed, becoming the first paid reporter recognized by law.

Wheaton attended court sessions, accurately reported oral arguments and the written decisions of the Court, collected the decisions, and then published them within one year. Wheaton became the first reporter to supply annotations with the Court's decisions, sometimes anonymously assisted by Story. In 1820 Wheaton consolidated prior Court decisions into *A Digest of the*

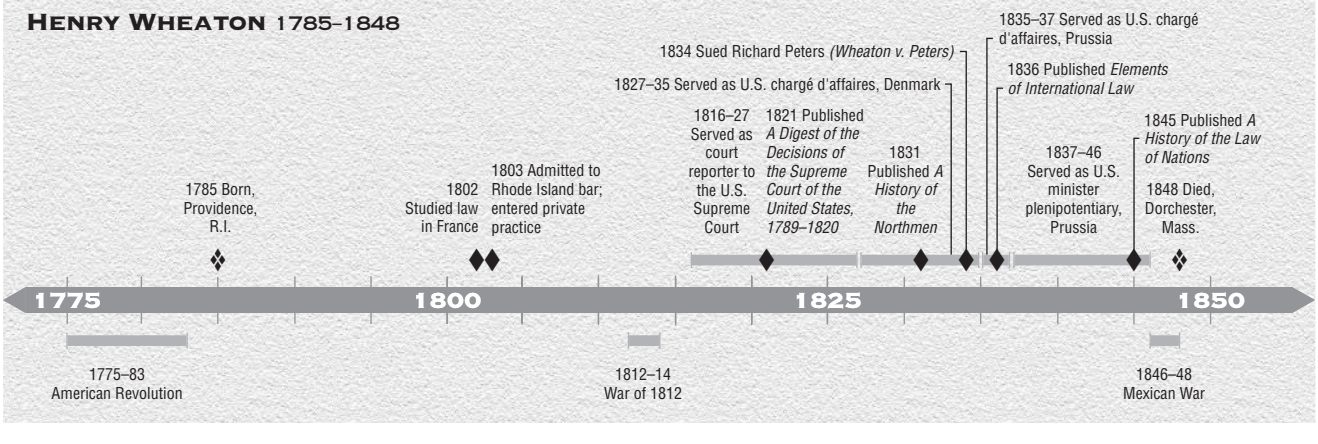

*Henry Wheaton.*
U.S. SUPREME COURT

*Decisions of the Supreme Court of the United States, 1789 to 1820.*

In 1827 Wheaton left the reporter position and entered the U.S. foreign service. He served as chargé d'affaires (a diplomatic representative below ambassador) in Denmark from 1827 to 1835. He became adept at treaty negotiations and was made chargé d'affaires to the Prussian court in 1835. In 1837 he was appointed minister plenipotentiary and served in that position until 1846.

Wheaton was a noted writer and legal scholar. He published *A History of the Northmen* in 1831, in which he argued that Scandinavian explorers had landed on the North American continent several centuries before the expedition of CHRISTOPHER COLUMBUS. Wheaton also published *Elements of International Law* (1836) and *A History of the Law of Nations* (1845).

Wheaton became embroiled in a legal dispute with Richard Peters Jr., his successor as Supreme Court reporter, over Peters's use of Wheaton's published case decisions. Wheaton lost the right to control the copyright of decisions that he had reported, in the process giving the Supreme Court the opportunity to clarify the boundaries between COMMON LAW and statutory copyright.

Wheaton died on March 11, 1848, in Dorchester, Massachusetts.

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*Wheaton v. Peters.*

## WHEATON V. PETERS

The 1834 decision by the U.S. Supreme Court, *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 8 L. Ed. 1055, delineated the differences between rights in a COPYRIGHT at COMMON LAW and in federal statutory law.

*Wheaton* was the first significant copyright decision by the Supreme Court. A copyright grants the creator of an artistic or creative work a limited MONOPOLY in its use, based on the public policy that such a monopoly encourages creativity and invention. In *Wheaton,* the Court established the basic foundation of U.S. copyright law, holding that the statutory requirements for securing a copyright must be strictly followed and that copyright exists primarily for the benefit of society and not the creator.

The case centered on whether Supreme Court decisions, which were public documents, could be copyrighted. HENRY WHEATON, the official reporter of decisions for the Court between 1816 and 1827, sued Richard Peters Jr., his successor, for violating the copyright Wheaton obtained for his twelve volumes of Supreme Court decisions, entitled *Wheaton's Reports.* Peters had published and sold a book called *Condensed Reports of Cases in the Supreme Court of the United States,* which contained every Court decision from its inception to 1827, when *Peters's Report* began publication. Wheaton charged that the *Condensed Reports* contained all the reports of cases in the first volume of *Wheaton's Reports* without any significant abbreviation or alteration and that the publication and sale of this work infringed on his copyright. Wheaton sought an INJUNCTION to stop the sale of the work.

Peters denied that the publication infringed any copyright Wheaton claimed to possess. In addition, Peters asserted that Wheaton did not have a valid copyright because he failed to satisfy all the federal statutory requirements that were essential for the creation of copyright. The trial court agreed with Peters and dismissed the lawsuit. Wheaton then appealed to the Supreme Court.

The Court affirmed the lower court decision and made three rulings that defined copyright law in the United States. First, the Court rejected Wheaton's contention that he possessed a perpetual copyright in his *Reports* under the common law of Pennsylvania. Though Wheaton may have complied with Pennsylvania procedures on securing a copyright, the Court held that the common law of Pennsylvania did not address the issue of copyrights and therefore the state could not grant any protection to LITERARY PROPERTY.

The Court also rejected Wheaton's argument that he had complied with the applicable provisions of the federal copyright law and therefore was entitled to copyright protection. The 1802 copyright law required a series of steps to secure a copyright: a book was to be deposited with the clerk of the appropriate district court, the record made by the clerk was to be inserted in the first or second page, public notice was to be given in the newspapers, and within six months after publication a copy of the book was to be deposited in the STATE DEPARTMENT.

During the trial, there was uncertainty about whether Wheaton gave public notice and deposited the book in the State Department. Wheaton asserted that he had completed the first two acts, which were sufficient to perfect his copyright. The Supreme Court, however, disagreed. It stated that the significance and wisdom of a law is a matter for the legislature, and not the Court, to determine. Therefore, all four steps were required to perfect title.

Finally, the Court held that no reporter could have any copyright in the written opinions issued by the Court and that the Court could not grant such a right to any reporter. This holding was essential to the free flow of public information, for if Wheaton could control through copyright the distribution of court decisions, then other private actors could copyright and publish other public information, such as congressional debates or statutes, and restrict its dissemination.

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## WHEREAS

*On the contrary, although, when in fact. An introductory statement of a formal document.*

The term *whereas* is used two ways in the law. It is derived from Middle English and can mean "on the contrary," as in the sentence, The orange juice can label said "fresh squeezed," whereas the contents were made from orange juice concentrate.

In the law the term *whereas* also is used as the introductory word to a recital in a formal document. A recital contains words of introduction to a contract, statute, proclamation, or other writing. In a contract a whereas clause is an introductory statement that means "considering that" or "that being the case." The clause explains the reasons for the execution of the contract and, in some cases, describes its purpose. The whereas clause may properly be used in interpreting the contract. However, it is not an essential component for its operative provisions.

Court orders typically use whereas clauses before the clause or clauses containing the directions of the court. For example, a court might declare that "whereas the plaintiff made a motion to compel the production of certain documents, and whereas the court has held a hearing on the motion and is fully advised on the matter, now therefore it is hereby ordered that the motion to compel the production of the documents requested is hereby denied."

When *whereas* is placed at the beginning of a legislative bill, it means "because" and is followed by an explanation for the enactment of the legislation.

Finally, *whereas* is often used in official proclamations to project the solemnity of the occasion.

The term has been criticized as an overused legal formalism that clutters contracts and other legal documents. Legal formalism means the special usages of the language of law, many of which are archaic and which are flourishes of a style long dead.

## WHEREBY

*By or through which; by the help of which; in accordance with which.*

For example, in the promissory note clause "whereby he promised and agreed for value received to pay," the term *whereby* is equivalent to the phrase *and by it.*

## WHEREFORE

*For which reason.*

The term *wherefore* is frequently used in an averment (a positive statement of fact set out in the pleadings that must be filed with a court by the parties to a legal action)—for example, "wherefore the defendant says that such contract was and is void."

## WHIG PARTY

*Whig Party* was a name applied to political parties in England, Scotland, and America. Whig is a short form of the word *whiggamore*, a Scottish word once used to describe people from western Scotland who opposed King Charles I of England in 1648.

In the late 1600s, Scottish and English opponents of the growing power of royalty were called Whigs. The Whigs maintained a strong position in English politics until the 1850s, when the Whig progressives adopted the term Liberal. In the American colonies, the Whigs were those people who resented British control, favored independence from Britain, and supported the Revolutionary War. The term was first used in the colonies around 1768. The term *Whig* fell into disuse after the colonies won their independence.

*The Whig Party nominated General Zachary Taylor and Millard Fillmore as candidates for president and vice president in the 1848 election.*

LITHOGRAPH WITH WATERCOLOR BY NATHANIEL CURRIER. LIBRARY OF CONGRESS

However, political opponents of Democratic President ANDREW JACKSON revived the term in the 1830s. After Jackson soundly defeated a field of challengers representing an array of political parties in 1832, many of these challengers began coordinating their efforts under the Whig Party name. The Whig Party included former National Republicans, conservative factions of the DEMOCRATIC-REPUBLICAN PARTY, and some former members of the Anti-Masonic Party. By 1834 the Whigs were promoting their party as an alternative to the policies of "King Andrew" Jackson, whose administration they compared to the unpopular reigns of English Kings James II (1633–1701) and George III (1760–1820).

Often united by little more than their distaste for Jackson's administration and their desire to oust the DEMOCRATIC PARTY from the White House, the Whigs struggled to define their platform. Whigs generally criticized the growth of executive power, a development they associated with Jackson's use of civil-service patronage, also known as the "spoils system," by which government officials were replaced solely on partisan grounds instead of merit. Many Whigs who came from an evangelical Protestant background encouraged a variety of moral reforms, condemning Jackson's sometimes brutal and ARBITRARY treatment of Native American Tribes and militant quest for territorial expansion.

The Whig Party nominated four unsuccessful candidates for president in the election of 1836, WILLIAM HENRY HARRISON from Ohio, DANIEL WEBSTER from Massachusetts, Hugh Lawson White from Tennessee, and Willie Person Mangum from North Carolina. Democrat MARTIN VAN BUREN won the election with 58 percent of the vote, while Harrison received 25 percent, White received 8.9 percent, Webster 4.7 percent, and Mangum 3.7 percent.

The Whigs simplified and consolidated their ticket in 1840, again offering Harrison for president and JOHN TYLER for vice president. The Whigs triumphed, but Harrison died after one month in office, and Vice President Tyler, who

had once been a Jacksonian Democrat, acceded to the presidency. Tyler embittered the Whigs by vetoing congressional bills that sought to restore the BANK OF THE UNITED STATES, abolished by Jackson, and by opposing their plan to redistribute the proceeds from the sale of public lands. Most of Tyler's cabinet immediately resigned in protest, and his membership in the party was withdrawn.

In 1844 the Whig Party nominated HENRY CLAY from Kentucky for president. In the ensuing campaign Clay refused to take a definite stand on the Texas annexation issue. This choice provoked northern abolitionists, who opposed the admission of Texas to the Union as a slave state, to support the little-known Liberty Party candidates, James Gillespie and Thomas Morris. The Whig split ensured victory for the Democratic candidate, JAMES K. POLK.

Once the Mexican War (1846–1848) had been declared, controversy over allowing or forbidding slavery in the territories acquired during the war further splintered the party. Antislavery Whigs from Massachusetts, known as Conscience Whigs, opposed the so-called Cotton Whigs in the pro-slavery southern states.

Despite the division, the Whig Party, with the popular general ZACHARY TAYLOR as its candidate, was successful in the presidential election of 1848. The divisions resurfaced, however, when Taylor declared his opposition to Clay's proposal to end the deadlock over the admission of California to statehood. Before the stalemate could be resolved, Taylor died. His successor, MILLARD FILLMORE, helped push Clay's compromise through Congress in 1850.

The COMPROMISE OF 1850 (a series of laws passed by Congress to settle the issues arising from the deepening section conflict over slavery) only served to intensify the divisions within the party. Southerners and conservative northerners who supported the compromise refused to cooperate with the northerners who opposed it. Consequently, the election of 1852 resulted in the overwhelming defeat of the Whig candidate, General Winfield Scott. Many supporters of the compromise subsequently began leaving the party.

Southern Whig support for the KANSAS-NEBRASKA ACT of 1854 (a law that created the territories of Kansas and Nebraska and gave both territories the power to resolve the issue of slavery for themselves) convinced most northern Whigs to abandon the party, and by the end of that year the party had essentially disbanded. Many voters who abandoned the Whig Party initially joined the so-called KNOW-NOTHING PARTY. Most northern Whigs, however, eventually joined the newly formed REPUBLICAN PARTY. In the South, most of the Whigs were soon absorbed by the Democratic Party. In 1856, a small Whig convention backed Millard Fillmore, the unsuccessful Know-Nothing candidate for the presidency.

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## WHISKEY REBELLION

In 1794 thousands of farmers in western Pennsylvania took up arms in opposition to the enforcement of a federal law calling for the imposition of an excise tax on distilled spirits. Known as the "Whiskey Rebellion," this insurrection represented the largest organized resistance against federal authority between the American Revolution and the Civil War. A number of the whiskey rebels were prosecuted for TREASON in what were the first such legal proceedings in the United States.

Congress established the excise tax in 1791 to help reduce the $54 million national debt. The tax was loathed across the country. For a small group of farmers west of the Allegheny Mountains, the federal excise tax was singularly detestable. Bartering was the chief means of exchange in this frontier economy, and distilled spirits were the most commonly traded commodity. Cash was a disfavored currency in western Pennsylvania during the late eighteenth century, but whiskey, especially Monongahela Rye, was as valuable as gold. Whiskey was considered an all-purpose liquor, with locals using it for cooking and medicine, and drinking it at social occasions, among other uses.

By modern standards the excise tax of 1791 does not seem oppressive. Distillers were taxed based on the size of their stills. Stills with the capacity to annually produce at least 400 gallons of whiskey were taxed between 7 and 18 cents a gallon, depending on the proof of the liquor. Distillers who made stronger whiskey paid a higher tax. Smaller stills were taxed at a rate of 10 cents for every month a still was in operation, or 7 cents for every gallon produced, whichever was lower. Based on these rates, the average distiller was required to pay only a few dollars in

liquor tax each year. But even an annual tax of $5 would have consumed a large percentage of the disposable income earned by farmers in the barter-based economy of western Pennsylvania.

The rebellion began in Pittsburgh during October of 1791 when a group of disguised farmers snatched a federal tax collector from his bed, and marched him five miles to a blacksmith shop where they stripped him of his clothes, and burned him with a poker. Over the next three years dozens of tax collectors were beaten, shot at, tarred and feathered, and otherwise terrorized, intimidated, and humiliated. The home and plantation of John Neville, the chief tax collector for southwestern Pennsylvania, were burned to the ground.

By 1794 the excise tax lay largely uncollected in western Pennsylvania. The national debt was rising, and respect for federal authority was waning. Rebel forces had swelled to 5,000. In October President GEORGE WASHINGTON dispatched 15,000 troops to quell the resistance. Led by ALEXANDER HAMILTON, Washington's SECRETARY OF STATE, the federal troops met little opposition. Within a month, most of the rebels had dispersed, disavowed their cause, or left the state. Keeping a few soldiers in western Pennsylvania to maintain order, the federal army departed for Philadelphia, having arrested more than 150 people suspected of criminal activity.

In May of 1795 the Circuit Court for the Federal District of Pennsylvania indicted thirty-five defendants for an assortment of crimes associated with the Whiskey Rebellion. One of the defendants died before trial began, one defendant was released because of mistaken identity, and nine others were charged with minor federal offenses. Twenty-four rebels were charged with serious federal offenses, including high treason. Two men, JOHN MITCHELL and Philip Vigol, were found guilty of treason, and sentenced to hang. Seventeen defendants were convicted of lesser crimes, and sentenced to prison terms of various lengths. Upon learning that none of the convicted rebels were principally responsible for instigating the armed resistance, Washington pardoned each of them.

By extinguishing the Whiskey Rebellion, the U.S. government withstood a formidable challenge to its sovereignty. Preceded by SHAYS'S REBELLION in 1786, and followed by FRIES'S REBELLION in 1799, the Whiskey Rebellion is distinguished by its size. While all three rebellions were motivated by their opposition to burdensome taxes, neither Daniel Shays nor John Fries ever gathered more than a few hundred supporters at any one time. On at least one occasion, as many as 15,000 men and women marched on Pittsburgh in armed opposition to the federal excise tax on whiskey.

The Whiskey Rebellion also occupies a distinguished place in American JURISPRUDENCE. Serving as the backdrop to the first treason trials in the United States, the Whiskey Rebellion helped delineate the parameters of this constitutional crime. Article III, Section 3 of the U.S. Constitution defines treason as "levying War" against the United States. During the trials of the two men convicted of treason, Circuit Court Judge WILLIAM PATERSON instructed the jury that "levying war" includes armed opposition to

*A government inspector is tarred and feathered during the Whiskey Rebellion, which took place in western Pennsylvania in 1794.*

BETTMANN/CORBIS

the enforcement of a federal law. This interpretation of the Treason Clause was later applied during the trial of John Fries, and remains valid today.

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## WHISTLEBLOWING

*The disclosure by a person, usually an employee in a government agency or private enterprise, to the public or to those in authority, of mismanagement, corruption, illegality, or some other wrongdoing.*

Since the 1960s, the public value of *whistleblowing* has been increasingly recognized. For example, federal and state statutes and regulations have been enacted to protect *whistleblowers* from various forms of retaliation. Even without a statute, numerous decisions encourage and protect whistleblowing on grounds of public policy. In addition, the federal False Claims Act (31 U.S.C.A. § 3729) will reward a whistleblower who brings a lawsuit against a company that makes a false claim or commits FRAUD against the government.

Persons who act as whistleblowers are often the subject of retaliation by their employers. Typically the employer will discharge the whistleblower, who is often an at-will employee. An at-will employee is a person without a specific term of employment. The employee may quit at any time and the employer has the right to fire the employee without having to cite a reason. However, courts and legislatures have created exceptions for whistleblowers who are at-will employees.

Whistleblowing statutes protect from discharge or discrimination an employee who has initiated an investigation of an employer's activities or who has otherwise cooperated with a regulatory agency in carrying out an inquiry or the enforcement of regulations. Federal whistleblower legislation includes a statute protecting all government employees, 5 U.S.C.A. §§ 2302(b)(8), 2302(b)(9). In the federal civil service, the government is prohibited from taking, or threatening to take, any personnel action against an employee because the employee disclosed information that he or she reasonably believed showed a violation of law, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public safety or health. In order to prevail on a claim, a federal employee must show that a protected disclosure was made, that the accused official knew of the disclosure, that retaliation resulted, and that there was a genuine connection between the retaliation and the employee's action.

Many states have enacted whistleblower statutes, but these statutes vary widely in coverage. Some statutes apply only to public employees, some apply to both public and private employees, and others apply to public employees and employees of public contractors.

Some statutes cover a broad array of circumstances, such as those that apply to federal employees that prohibit employers from dismissing workers in REPRISAL for disclosing information about, or seeking a remedy for, a violation of law, gross mismanagement, gross waste of funds, abuse of authority, or a specific danger to public safety and health. Other statutes are narrow in scope, such as one that limits the protection of public and private employees to retaliation for reporting possible violations of local, state, or federal environmental statutes. A whistleblower statute may also limit protection to discussions of agency operations with members of the legislature or to disclosure of information to legislative committees or courts.

In whistleblower cases, states follow their general rules for determining whether a public policy CAUSE OF ACTION exists in favor of the employee. Therefore, in states in which WRONGFUL DISCHARGE actions must have a statutory (legal) basis, the case will be dismissed if the employer did not violate a statutorily enacted public policy. In many cases, the courts have refused to recognize a whistleblower's claim because no clearly mandated statutory policy has been identified. In addition, employees who blow the whistle on matters that affect only private interests (e.g., complaints about internal corporate policies) will generally be unsuccessful in maintaining a cause of action for discharge in violation of public policy.

Under the federal False Claims Act, any person with knowledge of false claims or fraud against the government may bring a lawsuit in his own name and in the name of the United States. As long as the information is not publicly disclosed and the government has not already sued the defendant for the fraud, the whistleblower, who is called a relator in this action, may bring a False Claims Act case.

The relator files the case in federal court under seal (in secret), and gives a copy to the government. The government then has 60 days to review the case and decide whether it has merit. If the government decides to join the case, the case is unsealed, a copy is served on the defendant, and the government and the relator work together in the case as co-plaintiffs. If the government declines to join the suit, the relator may proceed alone. In a successful False Claims Act case the relator will receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.

In the early 1990s, commentators were claiming that men were more likely than women to blow the whistle on improper conduct. Some analysts suggested the reason for this perception was that men seem to seek financial gain for whistleblowing. During the early 2000s, however, a number of women became involved in high profile acts of whistleblowing—for reasons other than fame and fortune.

In 2001, Sherron Watkins, a vice president at Enron Corporation, informed the company's board that Enron's accounting practices were improper. Enron later suffered a major collapse—largely as a result of its accounting practices—that led to the company's **BANKRUPTCY** and to the indictment of the company's auditor and chief financial officer. The following year, Cynthia Cooper, an auditor with WorldCom, told the company's board that WorldCom had covered up major losses of $3.8 billion through false bookkeeping. Like Enron, the accounting failures led to WorldCom's bankruptcy. During the same year, Coleen Rowley, an FBI staff attorney for more than 20 years, sent a letter to FBI director **ROBERT MUELLER**, indicating that the FBI's national headquarters had mishandled an investigation of Zacarias Moussaoui, who was later believed to be a co-conspirator in the September 11, 2001, terrorist attacks. Rowley later spoke before the intelligence committees of the House of Representatives and the Senate about her accusations.

*Time* magazine dubbed 2002 the "Year of the Whistleblower," and named Watkins, Cooper, and Rowley as its "Persons of the Year." Their stories fueled the observation that women are more likely to become whistleblowers not for the potential for fame and financial gain, but out of a sense of duty. Although Watkins, Cooper, and Rowley were each subjected to rather harsh treatment by their respective employers following their disclosures, they became national celebrities by "speaking up when no one else would."

*FBI agent Coleen Rowley blew the whistle on the agency accusing bureau headquarters of mishandling an investigation of Zacarias Moussaoui, a man believed to have conspired with hijackers in the September 11, 2001, terrorist attacks.*

AP/WIDE WORLD PHOTOS

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**CROSS-REFERENCES**

Employment at Will; Employment Law.

## ♦ WHITE, BYRON RAYMOND

Byron Raymond White sat on the U.S. Supreme Court as an associate justice from 1962 to 1993. White had an eclectic career. He was a college and pro football star during the 1930s and 1940s and an assistant attorney general under **ROBERT F. KENNEDY** from 1960 until 1962, the year his friend President **JOHN F. KENNEDY** appointed him to the Supreme Court. As a justice, White charted a pragmatic and low-key course on the bench: he enunciated no single judicial philosophy, although judicial restraint sometimes appeared as a feature of his reasoning. For part of his career, he was seen as a moderate. Toward the end, however, he voted conservatively on

social issues such as ABORTION, AFFIRMATIVE ACTION, and GAY AND LESBIAN RIGHTS.

Born on June 8, 1917, in Fort Collins, Colorado, White was the son of working class parents. As a youth, he picked beets in the poor community, but he excelled in athletics and scholastics. He attended the University of Colorado on an academic scholarship and, in 1937, became the premier running back in college football. So accomplished was "Whizzer" White on the gridiron that when he threatened not to play in the Cotton Bowl—because it would interfere with his studying—the state's governor intervened in order to convince him to play. He graduated in 1938 as class valedictorian.

White's journey to the bench was not direct. In 1939, he accepted a Rhodes Scholarship to study at Oxford University in England, where he became a lifelong friend of John F. Kennedy. He subsequently played in the National Football League and led the league in rushing while also studying law at Yale University, where he graduated with high honors in 1946. During WORLD WAR II White joined the U.S. Navy and served in the Pacific. After the war, he clerked for Chief Justice FRED M. VINSON from 1946 to 1947.

For the next 13 years, White practiced law in Denver, Colorado. His organizational support for the presidential candidacy of John F. Kennedy led to his being appointed second in charge of the JUSTICE DEPARTMENT in 1960. After two years of selecting judges and helping steer the department's support of the CIVIL RIGHTS MOVEMENT, White was nominated to the Supreme Court to fill the vacancy created by the resignation of Justice CHARLES WHITTAKER.

White's tenure on the Court was marked by judicial pragmatism and unpredictability. Defying expectations that he would be a centrist,

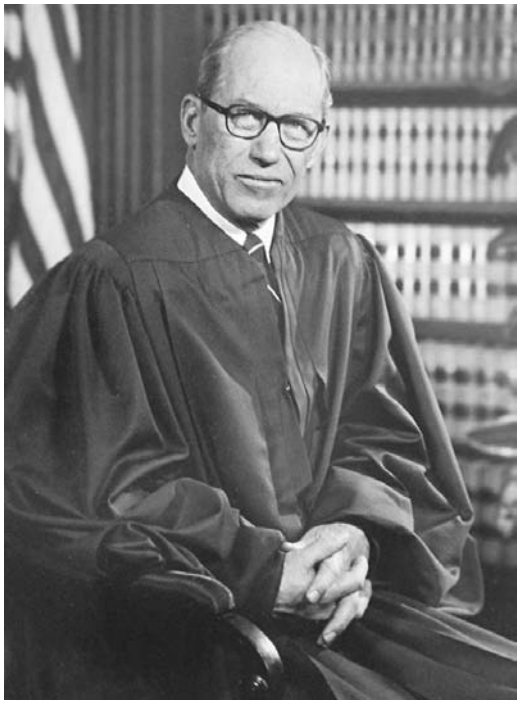

*Byron R. White.*
LIBRARY OF CONGRESS

White swayed between liberal and conservative positions. He consistently supported the constitutionality of CIVIL RIGHTS reforms during the mid-1960s in cases dealing with VOTING RIGHTS. Thirty years later, he continued to take a firm stance on the issue of SCHOOL DESEGREGATION: in 1992 he wrote the majority opinion in *U.S. v. Fordice,* 505 U.S. 717, 112 S. Ct. 2727, 120 L. Ed. 2d 575 (1992), which ordered Mississippi to take additional steps to desegregate its state colleges.

White's tendency to vote conservatively also became apparent early in his tenure on the Court. In 1966, he dissented from the Court's decision in MIRANDA V. ARIZONA, 384 U.S. 436,

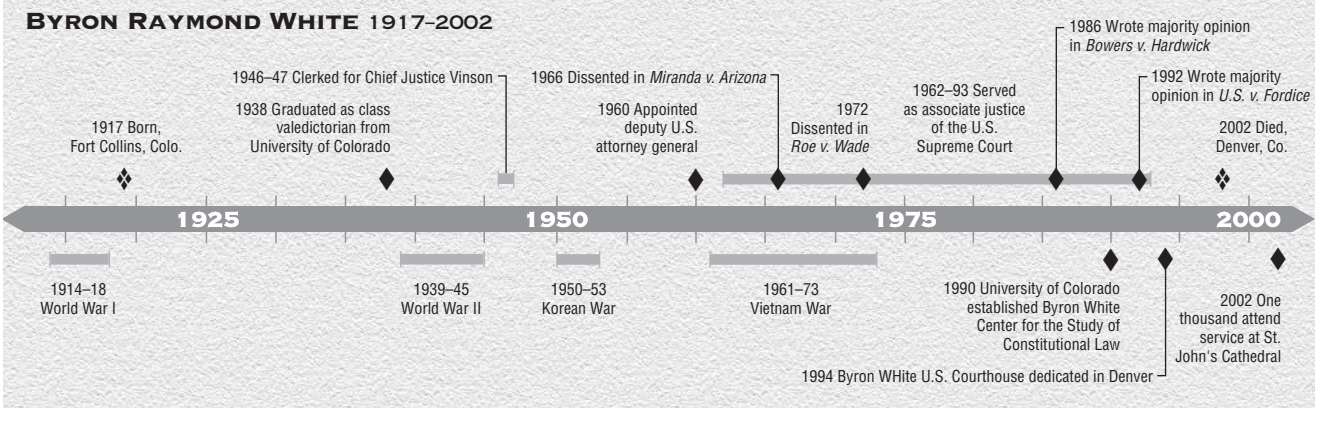

86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), which established the so-called Miranda Rule requiring police officers to read arrested persons their constitutional rights. Believing that it would only weaken the ability of the police to do their job, White called the decision "a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty and to increase the number of trials."

This conservatism was grounded in pragmatism. In 1972, White was one of two justices dissenting from the majority decision that established a woman's right to abortion (**ROE V. WADE**, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 [1973]). His four-page dissent avoided the moral issues involved and attacked the majority's reading of the Constitution: they had exceeded the Court's power. He could find no constitutional basis for "valu[ing] the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries." Similarly, his 1986 majority opinion in *Bowers v. Hardwick,* 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986) dispassionately held that a Georgia statute criminalizing sodomy—oral and anal sex—did not violate the constitutional rights of homosexuals. He simply found no "fundamental right to engage in homosexual sodomy" and refused to find a new right in the constitution's **DUE PROCESS CLAUSE**. Doing so, he wrote, would make the Court vulnerable to criticisms of judicial activism.

"THE COURT IS MOST VULNERABLE AND COMES NEAREST TO ILLEGITIMACY WHEN IT DEALS WITH JUDGE-MADE CONSTITUTIONAL LAW HAVING LITTLE OR NO COGNIZABLE ROOTS IN THE LANGUAGE OR DESIGN OF THE CONSTITUTION."
—BYRON R. WHITE

In the 1980s and 1990s, White's liberal tendencies were all but exhausted. He frequently sided with the conservative voting bloc on the Court. In case after case, he joined the conservative majority in opposing abortion rights, curtailing affirmative action programs, restricting federal civil rights laws, and allowing the use of illegally-acquired police evidence in court. As was his wont, he uniquely refused to read his opinions from the bench and, instead, merely indicated whether the Court upheld or reversed the decisions of lower courts.

After retiring from the Supreme Court in 1993, White continued working in the legal arena. He occasionally served as an appellate court judge and he was chairman of the Commission on Structural Alternatives for the Federal Court of Appeals from 1997 to 1999. White died on April 15, 2002, in Denver, Colorado, at the age of 84.

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## WHITE-COLLAR CRIME

*Financial, economic, or corporate crime, usually involving* **FRAUD** *and theft, that is often carried out by sophisticated means. The result is usually economic loss for businesses, investors, and those affected by the actions of the perpetrator.*

White-collar crime is a broad term that encompasses many types of nonviolent criminal offenses involving fraud and illegal financial transactions. White-collar crimes include bank fraud, **BRIBERY**, blackmail, counterfeiting, **EMBEZZLEMENT**, forgery, insider trading, **MONEY LAUNDERING**, **TAX EVASION**, and antitrust violations. Though white-collar crime is a major problem, it is difficult to document the extent of these crimes because the Federal Bureau of Investigation's (FBI) crime statistics collect information on only three categories: fraud, counterfeiting and forgery, and embezzlement. All other white-collar crimes are listed in an "other" category. Nevertheless, law enforcement officials agree that white-collar crime is a major problem.

Sociologist Edwin H. Sutherland coined the term in a speech to the American Sociological Association in 1939, and published the book *White-Collar Crime* ten years later. Sutherland argued that there were significant differences between crimes such as **ROBBERY**, **BURGLARY**, and murder, which he classed as "blue-collar crime," and white-collar crime. Perpetrators of blue-collar crimes were typically street criminals. Their crimes had no link to their occupations and they were typically poor. In contrast, individuals of higher economic and social status committed white-collar crimes and their crimes were linked to their socially respected professions. In addition, Sutherland noted that very few white-collar criminals occupied prison cells. Sutherland argued that white-collar criminals inflicted more harm on U.S. society than burglars and robbers, however, the justice system treated white-collar offenders with more lenience and with less consistency than street criminals.

White-collar fraud did not begin in the late twentieth century. Embezzlers, counterfeiters, stock swindlers, and con men have practiced their crimes for hundreds of years. Political corruption thrived during the nineteenth century and, for example, tarnished the administration of President ULYSSES S. GRANT. The TEAPOT DOME SCANDAL of the mid-1920s did the same for President Warren G. Harding's administration. Overall, however, there was a lack of interest in the United States in punishing fraudulent business behavior.

The STOCK MARKET crash of 1929 and the subsequent Great Depression of the 1930s began to change public and political attitudes toward white-collar crime. These types of activities also began to draw more attention thanks in part to advances in the modern media. The 1930s saw the enactment of federal laws that regulated the banking and SECURITIES industries. The SECURITIES AND EXCHANGE COMMISSION was established in 1934 to protect investors from illegal stock manipulation, insider trading, and other white-collar offenses perpetrated by stockbrokers. Though the SEC has not always succeeded in policing these white-collar crimes, numerous brokers and dealmakers have been prosecuted over the years.

Over the years, numerous regulations covering other areas of business have been enacted by both state and federal government. With more laws on the books violations have led to more prosecutions. The hallmark of many white-collar crimes, however, is sophistication. Perpetrators have specialized knowledge that allows them to commit complex transactions that are often difficult to identify. Law enforcement authorities rarely catch white-collar criminals at the very onset of their activities. The collapse of a business institution may reveal signs of financial irregularities that took place over many years. In addition, the use of computers and electronic financial transactions has complicated the detection and prosecution of white-collar crimes. Though law enforcement may be able to reconstruct electronic records and chains of events, the process is laborious and costly.

ORGANIZED CRIME has also added white-collar offenses to its repertoire of illegal activities. The federal government passed the Racketeer Influenced and Corrupt Organization (RICO) Act (18 U.S.C.A. § 1961 et seq.), in 1970 to address these types of crimes. RICO is specifically designed to punish criminal activity by business enterprises controlled by organized crime. RACKETEERING includes a number of discrete criminal offenses, including gambling, bribery, EXTORTION, BANKRUPTCY fraud, MAIL FRAUD, securities fraud, prostitution, narcotics trafficking, loan sharking, and murder. The punishment for violating RICO's criminal provisions is extremely harsh. If convicted, a defendant is fined and sentenced to not more than 20 years in prison for each RICO violation. Moreover, the defendant must forfeit any interest, claim against, or property or contractual right over the criminal enterprise, as well as any property that constitutes the racketeering activity or was derived from the racketeering activity. Finally, RICO contains civil provisions that allow a party injured by a RICO defendant to recover damages from the defendant in civil court.

During the late 1990s, a number of corporations manipulated financial information and made improper financial transactions. Accounting firms helped conceal the illegal nature of these actions, which undermined investor confidence in the stock market and corporate governance in general. The corporate scandals that emerged in 2001 involved Enron, WorldCom, and the accounting firm of Arthur Andersen and were of national importance. Congress responded to these elaborate white-collar crimes by enacting the Public Company Accounting Reform and Investor Protection Act, also known as the SARBANES-OXLEY ACT (Pub.L. 107-204, 116 Stat. 745, [2002]) The act increased penalties for the white-collar crimes of mail fraud and wire fraud from a maximum of five years to 20 years in prison. It also directed the UNITED STATES SENTENCING COMMISSION to review and amend its sentencing guidelines regarding white-collar crimes. In addition, the law makes it a crime for corporate officers to falsify financial reports. A conviction could result in a $5 million fine and 10 years in prison. Most importantly, the act created a new crime of securities fraud. A person convicted of this white-collar crime could be sentenced to 25 years in prison.

The Sarbanes-Oxley Act, apart from its substantive provisions, expressed a new recognition of the seriousness of white-collar crime.

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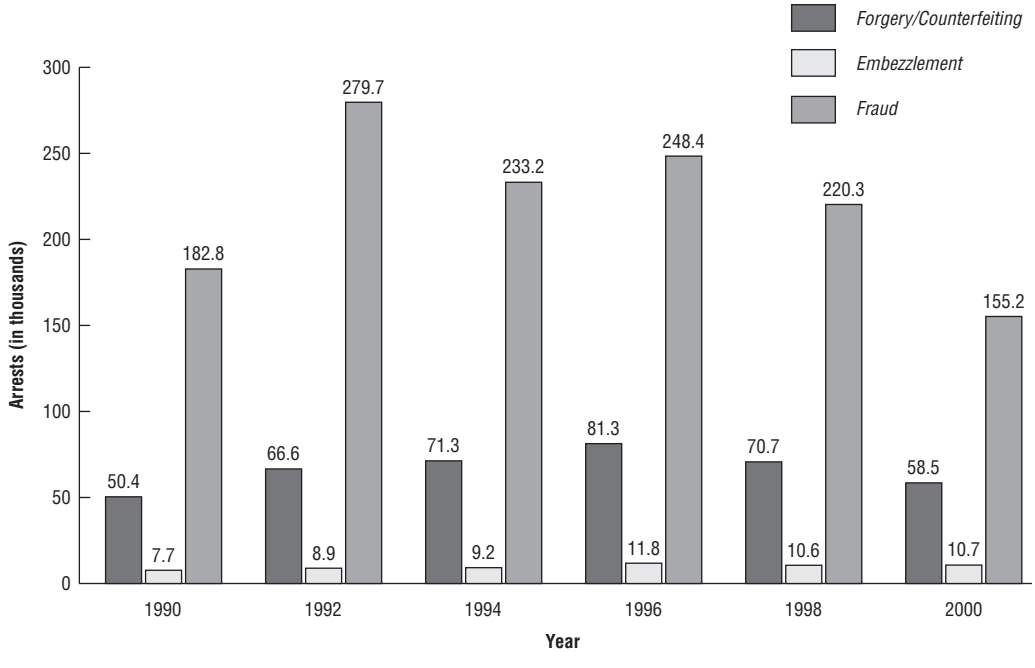


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Corporate Fraud; Corporations; Embezzlement; Money Laundering; Tax Evasion.

"THE ONLY PURPOSE WHICH AN ELABORATE DISSENT CAN ACCOMPLISH, IF ANY, IS TO WEAKEN THE EFFECT OF THE OPINION OF THE MAJORITY, AND THUS ENGENDER WANT OF CONFIDENCE IN THE CONCLUSIONS OF COURTS OF LAST RESORT."
—EDWARD DOUGLASS WHITE

## ♦ WHITE, EDWARD DOUGLASS

In his three decades as a lawmaker and justice, Edward Douglass White left a powerful and sometimes controversial mark on American law. White's career spanned from the end of the nineteenth century to the early years of the twentieth. From 1891 to 1894, he served as a U.S. Senator from his home state of Louisiana, distinguishing himself by almost single-minded devotion to the state's farming interests. His appointment to the U.S. Supreme Court came in 1894, but White delayed joining the Court until finishing political battles in the Senate. In 1910 he became the first associate justice to be made chief justice, a position he held until his death in 1921. White's legacy includes his contribution to antitrust JURISPRUDENCE, which long shaped how the Court viewed the area of law concerned with unfair business competition.

Born on November 3, 1845, in Lafourche Parish, Louisiana, White was the son of wealthy sugar farmers. Educated in Jesuit schools during his youth, he later attended Georgetown College. From 1861 to 1863 he fought in the U.S. CIVIL WAR on the side of the Confederacy and was captured and imprisoned by Union forces. Private legal study followed the war, and after being admitted to the Louisiana bar in 1868, he established a private practice.

The origin of White's political and judicial careers reflected the spoils systems of late nineteenth century politics. In the 1870s White served as a lieutenant to Louisiana Governor Francis T. Nicholls. Nicholls appointed him to the state supreme court in 1878, a post which lasted only until the governor's electoral defeat in 1880. But after the governor battled back into office in 1888, he appointed White to a newly vacant seat in the U.S. Senate. Serving in office from 1891 to 1894, Senator White understood how to serve the system that had created him:

he used the position almost entirely to advance the interests of his state's sugar growers.

In 1894 President GROVER CLEVELAND nominated White to the U.S. Supreme Court. For several weeks White, who still had the state's sugar interests on his mind, could not be persuaded to leave the Senate. He remained there to ensure passage of the Wilson-Gorman Tariff Act, a protectionist bill that served the interests of domestic sugar producers. A year later, White eagerly voted to uphold his favorite provisions of the Wilson-Gorman Tariff Act, but a majority of justices struck down those provisions in POLLOCK V. FARMER'S LOAN AND TRUST CO., 157 U.S. 429, 15 S. Ct. 673, 39 L. Ed. 759 (1895).

White's major contribution came in the area of ANTITRUST LAW. In the late nineteenth century, the issue of regulating business competition was a paramount issue before lawmakers and the courts. Congress passed the SHERMAN ANTI-TRUST ACT in 1890 (15 U.S.C.A. § 1 et seq.) in order to combat the unfair constraint of trade that was rampant in the nation's biggest markets. Section 1 of the Sherman Act prohibits every contract, combination, or conspiracy to restrain trade. White found this provision contrary to his probusiness sentiments. He argued for reading the act objectively: constraints upon trade should be declared illegal only when they are unreasonable.

In 1911, a year after his elevation to chief justice, White persuaded a majority of the Court to accept his view. It was contained in his most important opinion as a justice, *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911). This landmark decision affected the course of anti-trust jurisprudence by introducing the so-called rule of reason. According to White, the Sherman Act only prohibits unreasonable restraints of trade that hurt the "public interest."

*Edward Douglass White.*
LIBRARY OF CONGRESS

White's application of the rule of reason gave the Supreme Court more power to interpret the Sherman Act, and the approach dominated its decisions for the next two decades. Much like the earlier phases of his career, White's tenure as chief justice was marked by his changing constitutional views, and his strong belief in judicial power. He died on May 19, 1921 in Washington, D.C.

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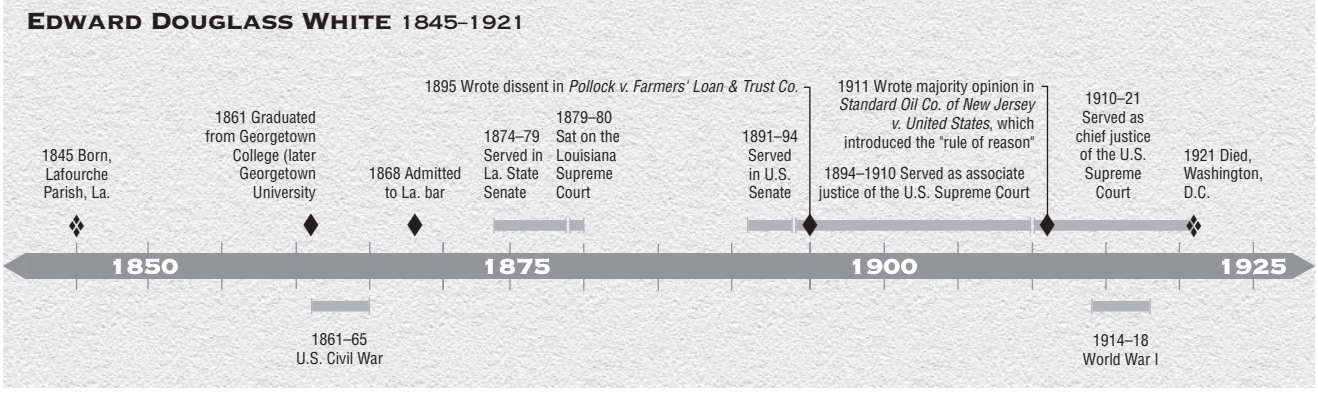

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## WHITE PRIMARY

*A legal device once employed by some Southern states to prevent African Americans from exercising their right to vote in a meaningful way.*

In the 1920s Southern states began using the *white primary* as a way of limiting the ability of African Americans to play a part in the political process. The white primary was an effective device because of the virtual one-party political system in the South that existed until the late 1960s. In all but a few areas nomination by the DEMOCRATIC PARTY was tantamount to election, with Republicans often not bothering to run in the general elections.

In order to keep African Americans out of the political process, the Democratic party in many states adopted a rule excluding them from party membership. The state legislatures worked in concert with the party, closing the primaries to everyone except party members. The Supreme Court had ruled in 1921, in *Newberry v. United States,* 256 U.S. 232, 41 S. Ct. 469, 65 L. Ed. 913, that political parties were private organizations and not part of the government election apparatus. Therefore, by means of the white primary device, African Americans were disenfranchised without official STATE ACTION that would have triggered JUDICIAL REVIEW under the Fourteenth Amendment's Equal Protection Clause.

Beginning in the late 1920s the Supreme Court reviewed a series of cases involving the white primary. In *Nixon v. Herndon,* 273 U.S. 536, 47 S. Ct. 446, 71 L. Ed. 759 (1927), the Court ruled that the state could not formally endorse the white primary, but in *Grovey v. Townsend,* 295 U.S. 45, 55 S. Ct. 622, 79 L. Ed. 1292 (1935), it upheld a Texas white primary that was based solely on a resolution adopted by the state Democratic party.

In *United States v. Classic,* 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941), the Court ruled that the federal government could regulate party primaries to prevent voter FRAUD. In recognizing that primaries were part of a state's electoral scheme, it overruled the *Newberry* precedent and weakened the *Grovey v. Townsend* holding. Finally, in *Smith v. Allwright,* 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944), the Court overruled the *Grovey* decision and struck down the white primary as a violation of the Fifteenth Amendment's prohibition against voting discrimination based on race.

Following *Smith v. Allwright,* Texas Democrats established a private association from which African Americans were excluded. The members of the association held "preprimary" elections to select candidates for the Democratic primaries. The Supreme Court declared in *Terry v. Adams,* 345 U.S. 461, 73 S. Ct. 809, 97 L. Ed. 1152 (1953), that the preprimary device was unconstitutional, as it made the primary and general elections "perfunctory ratifiers" of the decisions made during the preprimary process.

CROSS-REFERENCES

Civil Rights; Civil Rights Movement; Elections; Voting.

## WHITE SUPREMACY GROUPS

*Organizations that believe the Caucasian race is superior to all other races and therefore seek either to separate the races in the United States or to remove all non-Caucasians from the nation.*

*White supremacy* is an umbrella label applied to the beliefs of a number of groups of activists in the United States. Although the beliefs of the various groups differ in some particulars, they share a desire to preserve what they call the "genetic purity" of the Caucasian race. Among the better-known white supremacist organizations are the KU KLUX KLAN, the Aryan Nations and its offshoot the Order, the White Patriot Party, and the White American Resistance movement. These groups also are anti-Semitic, as they classify Jews as non-Caucasian. Some members of white supremacy groups have committed violent acts against nonwhites and those whites who are opposed to their beliefs.

The Ku Klux Klan has been the most enduring white supremacy group. It was established after the Civil War and became a white underground resistance group to Reconstruction in the South. Klan members used violence and intimidation against newly enfranchised African Americans as a way of restoring white supremacy in the states of the former confederacy. Dressed in white robes and sheets to disguise themselves, Klan members burned property and whipped, assaulted, and sometimes murdered African Americans and their white supporters in nighttime raids. These violent acts led Congress to pass the Force Act in 1870 and the KU KLUX KLAN ACT in 1871, meas-

ures that authorized the president to suspend the writ of HABEAS CORPUS, suppress disturbances by force, and impose heavy penalties upon terrorist organizations. By the end of the 1870s, the Klan had virtually disappeared.

The Klan reemerged in 1915, adding new enemies to its list. The revitalized organization drew upon anti-immigrant, anti-Catholic, anti-Semitic, and anti-Communist prejudices, believing that the ethnic character of U.S. society was changing and that white Protestants were losing their dominant position. The reinvigorated Klan extended its reach outside the South and into the Midwest, drawing most of its members from small towns. By the late 1920s, Klan membership exceeded four million nationally. Klan members participated in marches, parades, and nighttime cross burnings. Klan membership dropped dramatically, however, during the Great Depression of the 1930s and the national organization was virtually disbanded in 1944.

The CIVIL RIGHTS MOVEMENT of the 1960s ignited interest in the Klan in the South. Klan members terrorized CIVIL RIGHTS workers, with many instances of bombings, beatings, and shootings. The Klan was ultimately unsuccessful in preventing the expansion of civil rights for African Americans and membership declined again. However, there was a resurgence of Klan activity in the late 1970s and early 1980s, with most groups located in southern towns and cities. Since 1981, the SOUTHERN POVERTY LAW CENTER, located in Montgomery, Alabama, has monitored Klan activity through an effort called "Klanwatch." It issues a quarterly report that identifies Klan leaders, locations, and activities.

Neo-Nazi groups, which base their beliefs on Adolf Hitler's Nazi ideology, have been active since the 1960s. The American Nazi Party conducted many demonstrations during the 1960s and 1970s. In the 1980s and 1990s other groups arose that espouse similar racist and anti-Semitic beliefs, most prominently the group Aryan Nations, also known as the Church of Jesus Christ Christian. The *religion* of the Aryan Nations is the Christian Kingdom Identity Movement, whose adherents believe that white Europeans are the chosen people of the Bible, that Jews are the offspring of Satan, and that all others are fit only for SLAVERY.

The rise of VANDALISM and violent crimes by persons associated with white supremacy groups led states to enact HATE CRIME statutes.

*Members of the Aryan National Alliance stage a parade through the streets of Coeur d'Alene, Idaho, in October 2000. White supremacists use the freedom of speech to express their views.*
AP/WIDE WORLD PHOTOS

These laws provide additional penalties if a jury finds a defendant intentionally selected a victim based on race, religion, color, national origin, or sexual orientation. In addition, federal civil rights statutes that derive from the original 1870s anti-Klan laws have been used to prosecute members of white supremacy groups for their ideologically based criminal acts.

In the 1990s white supremacy groups became linked to right-wing militia organizations. These militia groups, while espousing anti-government violence, often share a belief in white supremacy.

Many white supremacists maintain low profiles, seeking to champion their beliefs through support of their racist organizations. Others, however, are well known to the public by their repeated appearances in the media. Such is the case with Matt Hale, a native of East Peoria, Illinois. As early as 1990, his beliefs in white supremacy were featured in an article in the *Chicago Sun-Times* when he was a freshman at Bradley University. Throughout his early adulthood, he was arrested on a number of occasions for engaging in altercations while he was trying to spread leaflets regarding his beliefs.

Hale later formed the World Church of the Creator, which deems such racial and ethnic groups as blacks and Jews as "mud races." The organization became known as one of the most violent hate groups in the United States, though Hale himself was never charged with a violent crime. At about the same time that he became the leader of the group, Hale entered law school at Southern Illinois University in Carbondale.

He graduated in 1998 and passed the Illinois bar examination. However, the Illinois Supreme Court's Board of ADMISSION TO THE BAR denied his application to become a member of the Illinois bar, citing Hale's "gross deficiency in moral character." Three years later, Hale's application to become a member of the Montana bar was similarly denied.

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CROSS-REFERENCES

Jim Crow Laws; Second Amendment; Militia; Terrorism.

## WHITEACRE

*A fictitious designation used by legal writers to describe a parcel of land.*

Whiteacre is frequently used with Blackacre, another fictitious designation, in order to distinguish one piece of land from another.

## ♦ WHITEMAN, MARJORIE MILLACE

Marjorie Millace Whiteman was a scholar and expert in INTERNATIONAL LAW who served in the U.S. STATE DEPARTMENT from 1929 to 1970. She participated in the drafting of the United Nations Charter and the 1948 UNIVERSAL DECLARATION OF HUMAN RIGHTS, and as a scholar published a fifteen-volume *Digest of International Law* between 1963 and 1972.

Whiteman was born on November 30, 1898, in Liberty Center, Ohio. She graduated from Ohio Wesleyan University in 1920 and received LL.B. and J.S.D. degrees from Yale Law School in 1927 and 1928, respectively. At Yale, Whiteman studied with Edwin M. Borchard, a leading international law scholar. After law school, Whiteman served as a research associate with the Columbia University Research Commission on Latin America. She joined the State Department in 1929 as special assistant to the department's legal advisor Green H. Hackworth, a position she held until Hackworth's election to the INTERNATIONAL COURT OF JUSTICE in 1946.

In the State Department Whiteman became a specialist in international organizations. In 1945 she helped draft the United Nations Charter and the 1948 Universal Declaration of Human Rights. She served as legal counsel to ELEANOR ROOSEVELT when Roosevelt represented the United States on the United Nations Commission on Human Rights.

Whiteman had a strong interest in, and knowledge of, inter-American affairs. She played a major role in many Pan-American conferences and proposed the idea of consultation for the inter-American system. In 1948 she took part in the conference at Bogotá, Colombia, which drafted the charter of the Organization of American States.

When the State Department was reorganized in 1949, Whiteman was named the first assistant legal advisor for American republic affairs, which involved relationships with Central and South America. In 1965 Whiteman became the first counselor for international law in the Office of Legal Advisor (an office in the State Department that advises the SECRETARY OF STATE on

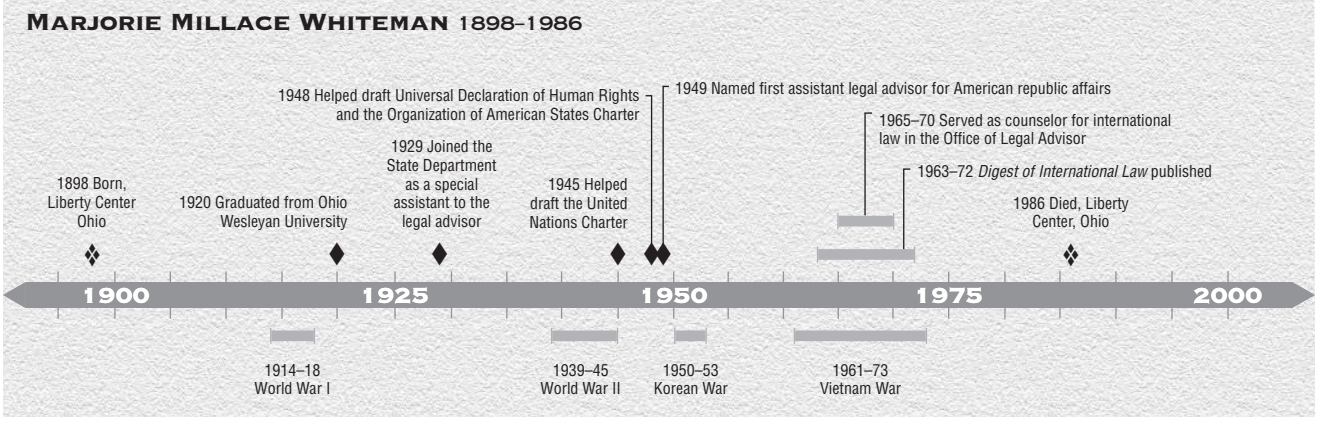

all matters of international law arising in the conduct of U.S. foreign relations), a position she held until her retirement in 1970.

Despite her activities in the State Department, Whiteman found time for scholarly work in international law. She was a major contributor to Hackworth's eight-volume *Digest of International Law* (1937–1943), and established herself as a world expert with the publication of her *Digest of International Law.*

Whiteman died on July 6, 1986, in Liberty Center, Ohio.

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CROSS-REFERENCES

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## WHITEWATER

Whitewater is the name given to the scandal involving President BILL CLINTON, First Lady HILLARY RODHAM CLINTON, members of the Clinton administration, and private individuals and public officials in Arkansas. Though the alleged wrongdoing took place before Clinton was elected president in 1992, investigations by an INDEPENDENT COUNSEL continued into Clinton's second term of office. As with President RICHARD M. NIXON'S WATERGATE scandal, the focus of the independent counsel's investigation shifted from the underlying event to the question of whether the president and members of his administration participated in a cover up. The role of Hillary Clinton in these events also became a target of investigators. As in Watergate, the Whitewater scandal quickly became politicized. Democrats accused Republicans in Congress as well as the Republican independent counsel of conducting a political witch hunt.

Whitewater is the name of a failed resort development on the White River in the Ozark Mountain region of Arkansas. In 1978 Bill Clinton, then Arkansas attorney general, and Hillary Clinton joined a partnership with James and Susan McDougal to form Whitewater Development Corporation, a real estate development firm that built vacation homes near the White River. When Clinton was elected governor that year, he appointed James McDougal his top aide.

In 1980 Clinton lost his re-election race. McDougal bought the Madison Bank and Trust in 1980 and in 1982 purchased a small savings and loan company and renamed it Madison Guaranty. In 1982 Clinton was again elected governor.

By 1984 Madison Guaranty Savings and Loan was in financial trouble, with federal regulators questioning its lending practices and its financial stability. Under Arkansas law, the state's SECURITIES commission could have closed Madison Guaranty. However, in January 1985, Clinton appointed Beverly B. Schaffer to head the commission. She approved two stock sale plans to raise money to keep Madison Guaranty solvent. Madison had retained the Rose Law Firm of Little Rock to help it secure approval of its stock sale applications. Hillary Clinton, the wife of the governor, worked as an attorney at Rose and was also a partner of McDougal in the Whitewater development. In addition, McDougal held a fund-raising event for governor Clinton in 1985 to help pay off a Clinton campaign debt. Investigators later determined some of the money was improperly withdrawn from depositor funds.

Despite the stock sales, the bank failed to raise enough capital, and by 1986, the Resolution Trust Corporation (RTC), the federal agency responsible for handling savings and loan failures, took over the bankrupt thrift. McDougal was charged with bank FRAUD. Four years later, McDougal was acquitted of the charge, based on an INSANITY DEFENSE. Meanwhile, the Whitewater development proved a financial disappointment, providing the Clintons with losses rather than profits. The Clintons sold their interest in the Whitewater corporation before Bill Clinton was sworn in as president in 1993.

The Whitewater scandal is grounded in these events of the 1970s and 1980s. It appeared that McDougal had been helped by his business partner Hillary Clinton, the wife of the governor. She had appointed the securities commissioner who allowed the failing thrift institution to stay open. By the time Bill Clinton was running for president in 1992, the national news media was investigating whether favors had been granted and conflicts of interest had been overlooked in apparent disregard for Arkansas state law.

The news media and members of Congress pursued Whitewater during the first months of Clinton's presidency. The July 1993 suicide of Deputy White House Counsel Vincent Foster heightened interest in Whitewater, as Foster had several links to it. Foster had worked at the Rose

Law Firm with Hillary Clinton, had handled the sale of the Clintons' interest in Whitewater, and had talked to an attorney who had previously prepared a report for the Clintons on the investment just hours before his suicide. Finally, after Foster's death, White House staff removed Whitewater files from Foster's office. Critics suspected that the removal of files was part of a White House cover up, while others speculated that Foster had been murdered to prevent the disclosure of damaging information.

In October 1993, the RTC asked the JUSTICE DEPARTMENT to investigate whether Madison's funds had been illegally siphoned into the Whitewater corporation and whether Madison illegally gave money in 1985 to pay off Clinton's campaign debt. Though President Clinton steadfastly denied any wrongdoing by himself or the first lady, Attorney General JANET RENO came under intense pressure to appoint an independent counsel. She at first refused, noting that the independent counsel law had expired in 1992 (5 U.S.C.A. § 1211). Any counsel appointed by her would appear to be politically tainted.

Nevertheless, in January 1994, Reno appointed Robert B. Fiske Jr., a former U.S. attorney and Wall Street lawyer, special prosecutor to investigate the Clintons' involvement in Whitewater and any potential links between Foster's suicide and his intimate knowledge of the Whitewater scandal.

Fiske surprised the Clinton administration in March 1994 by serving subpoenas on White House and TREASURY DEPARTMENT officials. The investigation had shifted from one solely concerned with past deeds in Arkansas, to one that included current official behavior. Fiske discovered that senior Treasury Department officials, who oversee the work of the RTC, had discussed the Madison Guaranty probe with White House counsel Bernard Nussbaum and other aides. This appeared improper, as it is highly unusual for regulatory agencies to discuss their probes with the parties they are investigating. As a result, the Treasury Department officials resigned.

Despite this embarrassment, the Clinton administration was pleased with Fiske's first report, issued in June 1994. He concluded that Foster's suicide had nothing to do with Whitewater and that the Treasury Department and White House meetings were not illegal. Fiske's report recommended that no criminal charges be filed and generally supported the administration's position on Whitewater.

During the summer of 1995, Senate and House committees held hearings on Whitewater. The hearings were mostly concerned with the propriety of the Treasury-White House meetings. The committee reports that followed cleared administration officials of any wrongdoing.

The course of the special counsel's investigation changed dramatically in August 1994. In July Congress had enacted the Independent Counsel Act (28 U.S.C.A. §§ 591-599), which meant that a three-judge panel of the U.S. court of appeals had to appoint an independent counsel for Whitewater. Attorney General Reno sought to have Fiske appointed, but the three-judge panel refused, citing a possible conflict of interest because he had been appointed by Reno, a member of the Clinton administration. Instead, the panel appointed KENNETH W. STARR, a GEORGE H.W. BUSH administration solicitor general, a former federal appeals court judge, and a conservative Republican. Starr reopened all aspects of the investigation and reissued a subpoena for the Rose law firm billing records of Hillary Clinton. The first lady informed Starr that the records could not be located. In April 1995, Starr interviewed the Clintons privately.

In January 1996 Hillary Clinton's billing records were found on a table in the White House residence book room after two years of searching. An aide claimed she had found them in August 1995 but did not realize their significance until coming across them again. The discovery of the records was met with skepticism, with Starr subpoenaing Hillary Clinton in a criminal probe to determine if the records were intentionally withheld. The first lady testified before a GRAND JURY about the billing records.

Meanwhile, a Senate Special Whitewater Committee, chaired by New York Senator Alfonse D'Amato, conducted hearings in the last half of 1995, examining Whitewater and Foster's suicide, and the actions of White House staff. In June 1996, the committee divided along party lines in making its final report. Republican senators concluded that White House officials abused their power by trying to monitor and derail investigations of the Clintons and that Hillary Clinton may have obstructed justice by concealing the Rose law firm billing records. Democratic senators dissented, finding no evidence to support the Republican allegations.

In 1996 President Clinton testified on videotape in two Arkansas criminal trials brought by Starr's prosecution team that concerned bank fraud. In the first trial James and Susan McDougal and Arkansas governor Jim Guy Tucker were convicted of fraud and conspiracy in connection with questionable loans made through Madison Guaranty. In the second case bankers Herby Branscom Jr. and Robert Hill were acquitted of illegally using bank funds to reimburse themselves for political contributions, including contributions to Clinton's gubernatorial and presidential campaigns.

Starr continued to investigate Hillary Clinton's role in the Rose law firm's work for Madison Guaranty and the missing billing records. She had stated several times she had done little work on Madison, but at least one associate in the firm disputed her accounts. In 1997 Starr subpoenaed the notes of government attorneys who had met with the first lady prior to her grand jury testimony. The White House refused to comply with the subpoena, arguing that disclosure would violate the confidentiality of the attorney-client relationship. Starr took the matter to court and won court approval to enforce the subpoena from the Eighth Circuit Court of Appeals. *In re Grand Jury Subpoenas Duces Tecum,* 78 F.3d 1307 (1996). The appeals court agreed with Starr, ruling that the government attorneys were not the first lady's private counsel, but rather administration officials. Therefore, there was no attorney-client relationship and the notes were ordered surrendered. When the Supreme Court refused to hear an appeal from the Clinton Administration on this issue, the notes were given to Starr.

In 1997 Democrats and the Clinton administration escalated their criticisms of Starr and his investigation, arguing that Starr's conservative Republican affiliation had tainted the objectivity of the probe. Starr's credibility was hurt by his announcement in February 1997 that he would leave his position to become dean of the Pepperdine College law school and the head of a new public policy school. The new school was funded by a conservative Republican with ties to persons who had asserted a White House conspiracy concerning the death of Foster and subsequent events. Starr, who was criticized for leaving an unfinished investigation, reversed his decision, announcing he would not take the Pepperdine positions until the probe was concluded. Even Senator D'Amato was critical of this reversal, concluding that Starr's indecision about staying hurt his credibility. In June, news reports circulated claiming Starr's team had been questioning Arkansas state troopers about whether President Clinton had engaged in extramarital affairs while governor. Questions arose as to whether the original investigation had gotten too far off track. That same month, the GENERAL ACCOUNTING OFFICE reported that as of March 1997 Starr had spent more than $25 million on his investigations. The only major event in Whitewater for the rest of 1997 was a ruling from Starr's office in July that Vincent Foster's death was definitely a suicide. The Whitewater investigation continued, but with no new revelations public interest declined.

Public interest in scandal and the Clintons was revived in 1998, but not the way anyone had planned. Pentagon employee Linda Tripp approached Starr with allegations that President Clinton had had an affair with White House intern Monica Lewinsky. Tripp also alleged that Clinton had told Lewinsky to deny the affair if she was questioned by lawyers for Paula Jones as part of her pending lawsuit against Clinton. Tripp produced audiotapes of her secretly recorded conversations with Lewinsky, which corroborated her story.

Starr received permission to expand the scope of his investigation, to determine whether Clinton had in fact asked Lewinsky to lie under oath. The Lewinsky scandal made headlines for much of 1998, culminating with the president's IMPEACHMENT trial in the late fall.

Starr had not forgotten Whitewater, however. In February 1998, both James McDougal and former Arkansas governor Jim Guy Tucker agreed to cooperate with the Whitewater investigation. McDougal's cooperation was particularly welcome, but he died in March 1998.

On April 23, 1998, prosecutors called Susan McDougal before a grand jury. Two years earlier, in September 1996, after her conviction for fraud, she was granted IMMUNITY from additional charges in return for her testimony against President Clinton. She refused to cooperate, claiming that she did not trust Starr and his investigators. U.S. District Court Judge SUSAN WEBBER WRIGHT held McDougal in civil CONTEMPT and sentenced her to 18 months in prison. At her April 1998 appearance, she once again refused to answer questions. She said that she was convinced the Starr investigators were determined to convict President Clinton at any

cost, and she added that she would only answer questions before the grand jury if Starr and his team resigned and were replaced with what she felt was truly independent counsel. On May 4, 1998, Starr indicted McDougal for criminal contempt and OBSTRUCTION OF JUSTICE. The case was tried in a U.S. District Court in Little Rock.

At trial, McDougal testified that Starr and his prosecutors had tried to pressure her into lying about having an affair with President Clinton. She claimed that she was threatened with an EMBEZZLEMENT charge and a possible INCOME TAX investigation unless she agreed to cooperate. After months of testimony, the federal grand jury acquitted McDougal on the contempt charge and deadlocked on two counts of obstruction of justice. The judge, George Howard Jr., declared a mistrial on the deadlocked charges. In May 1999, Starr said that he would not seek to retry McDougal on those charges.

In June 1999, Webster Hubbell, another Clinton friend and Whitewater partner, agreed to admit to one of 15 charges against him. In return, the other charges were dropped and he received PROBATION. Hubbell made a point of insisting that Hillary Clinton had committed no crime associated with her Whitewater dealings.

Meanwhile, Starr was going through his own legal difficulties. In February 1999, the White House had filed a criminal complaint against the Office of the Independent Counsel for leaking information to the news media. An article that appeared in the January 31, 1999, issue of *The New York Times* stated that Starr was considering whether to indict President Clinton for perjury and obstruction of justice. Moreover, Starr had decided that he had the authority to make the indictments. Starr's spokesman, attorney Charles Bakaly III, told the press, "We will not discuss the plans of this office or the plans of the grand jury in any way."

The White House charged that Bakaly had actually discussed so much that he was in violation of Federal Rule of Criminal Procedure 6(e). That rule limits the amount of information attorneys can divulge about grand jury cases.

Bakaly denied that Starr's office had provided any information to the *Times*. Starr, meanwhile, decided to conduct an internal investigation, assisted by the FEDERAL BUREAU OF INVESTIGATION. In March 1999, Starr forced Bakaly to resign, and the case was referred to the U.S. Justice Department for criminal investigation and possible prosecution.

The District Court issued a preliminary ruling in July that the newspaper article did appear to have information in it that violated Rule 6(e). The court ordered Bakaly and Starr's office to show why they should not be held in civil contempt. Starr's office countered on appeal that the district court had misinterpreted the rule. In September, a three-judge Appellate Court panel of the U.S. Court of Appeals agreed and overturned the lower court. *In re Sealed Case No. 99-3091 (Office of Independent Counsel Contempt Proceeding)*.

As for Bakaly, who still faced his own contempt charges, his case was brought before the U.S. District Court in July 2000. Prosecutors argued that Bakaly had lied about the information he gave to the newspaper, but the defense argued that he had merely provided standard information that gave away no confidential information. The judge, Norma Holloway Johnson, agreed with the defense, and Bakaly was acquitted on all counts on October 6, 2000.

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## ♦ WHITTAKER, CHARLES EVANS

Charles Evans Whittaker served as an associate justice on the U.S. Supreme Court from 1957 to 1962. The Missouri-born Whittaker practiced law for thirty years before being appointed to the federal bench in 1954. He served on the U.S. District Court in Missouri until 1957, when President DWIGHT D. EISENHOWER nominated

him for a position on the Supreme Court. His appointment and service have been the subjects of caustic commentary, for Whittaker was not cut out for the duties of the higher court: he served only five years before retiring in a state of physical exhaustion.

Born on February 22, 1901, in Troy, Kansas, Whittaker was the son of farmers. As a teenager, he knew that he wanted to be a lawyer: the ambitious high school student enrolled in law school during his senior year. Graduating in 1923 from the University of Kansas City Law School, where he was recognized for his talents as an orator, he passed the state bar and immediately began practicing for the law firm of Watson, Gage, & Ess. He litigated cases for the same Missouri firm for three decades.

Unlike countless other lawyers who used political careers to gain entry to the judiciary, Whittaker was plucked from relative obscurity. In fact, he generally avoided politics. He had a modest reputation in his home state for his work in corporate law and on the state bar, and this reputation attracted the attention of U.S. Attorney General **HERBERT BROWNELL**, who selected him for the U.S. District Court in Missouri. Whittaker presided as a judge on the court from 1954 to 1956.

During this period, Whittaker displayed a lack of appreciation for certain constitutional rights. In 1955 he heard *Davis v. University of Kansas City*, 129 F. Supp. 716 (W.D. Mo. 1955), a lawsuit brought by a professor claiming he had been unfairly dismissed from the University of Kansas City for refusing to tell a Senate subcommittee whether or not he was a Communist. Such cases were typical in the **COLD WAR** era, as was Whittaker's dismissal of the claim. But the judge's outburst from the bench was not: he announced that the public should not tolerate teachers who belong to a "declared conspiracy by a godless group to overthrow our government." Although ostensibly recognizing the professor's **FIFTH AMENDMENT** right not to incriminate himself, Whittaker, in effect, believed that he was bound to answer.

*Charles Evans Whittaker.*
AP/WIDE WORLD PHOTOS

In 1957 President Eisenhower appointed Whittaker to the Supreme Court to replace the outgoing Justice **STANLEY REED**. Whittaker became the first judge from the Western District to be elevated to the Court. Generally, he voted conservatively. He wrote no significant opinions, and, indeed, had little discernible judicial philosophy. In 1959 his appointment came under attack from the attorney (and eventual Chief Justice) **WILLIAM REHNQUIST** who wrote a scathing article attacking the U.S. Senate for not adequately considering Whittaker's nomination. In the *Harvard Law Review* Rehnquist noted dryly that the Senate hearings had revealed detailed information about the young Whittaker's life and education, but discussed nothing

"PRIVATE-PROPERTY RIGHTS ARE THE SOIL IN WHICH OUR CONCEPT OF HUMAN RIGHTS GROWS AND MATURES. AS LONG AS PRIVATE-PROPERTY RIGHTS ARE SECURE, HUMAN RIGHTS WILL BE RESPECTED AND WILL ENDURE AND EVOLVE."
—CHARLES EVANS WHITTAKER

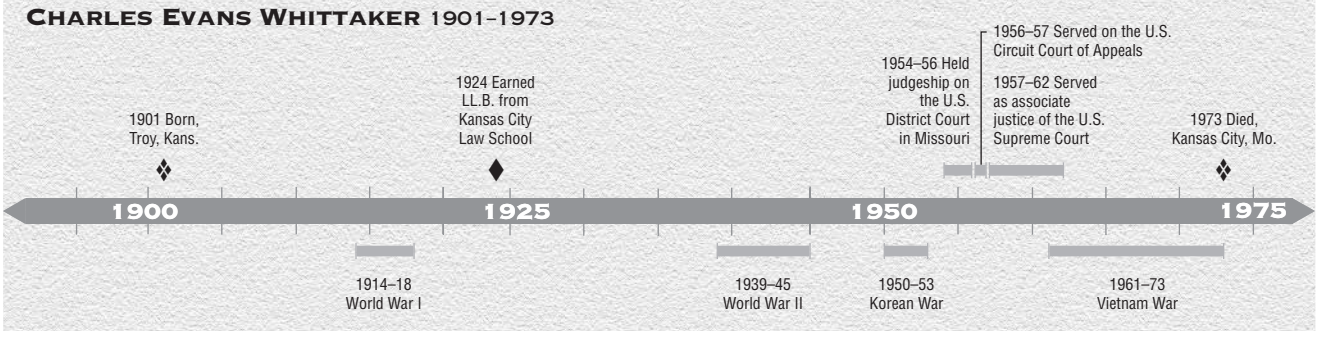

about his views on DUE PROCESS and EQUAL PROTECTION.

In any event, Whittaker's views quickly did not matter. He found the work of the Supreme Court overly taxing, and, by 1962, suffering from exhaustion, he accepted his physician's advice that he retire. Some distinction was made as to his *retiring* rather than *resigning* and, as a result, he was allowed to continue to take part in Supreme Court ceremonies. No invalid, however, he later returned to legal practice, a move that set him apart from other modern justices. He died on November 26, 1973, in Kansas City, Missouri.

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## WICKERSHAM COMMISSION

The Wickersham Commission is the popular name for the National Commission on Law Observance and Enforcement, which was appointed by President HERBERT HOOVER in 1929. The commission, which derived its name from its chairperson, former attorney general GEORGE W. WICKERSHAM, conducted the first comprehensive national study of crime and law enforcement in U.S. history. Its findings, which were published in fourteen volumes in 1931 and 1932, covered every aspect of the criminal justice system, including the causes of crime, police and prosecutorial procedures, and the importance of PROBATION and PAROLE.

Hoover established the commission to address several important issues. With the passage of the EIGHTEENTH AMENDMENT, PROHIBITION had begun in 1920, making the manufacture or sale of alcoholic beverages illegal. By 1929 illegal sale of alcohol by ORGANIZED CRIME had become a national problem. In addition, gangland murders in Chicago in the late 1920s raised concerns about crime. Hoover appointed the commission to address the issue of crime in general, but he also sought a way to resolve the debate over continuing Prohibition.

The commission included many distinguished national leaders and academics, including Harvard law professor ROSCOE POUND. The commissioners hired a research staff to interview police, prosecutors, defense attorneys, judges, social workers, probation officers, prison administrators, and others involved in the criminal justice system. The commission's wide-ranging investigation was influenced by the comprehensive crime surveys conducted by the states of Missouri and Illinois in the 1920s. Some members of the commission had participated in those studies.

The publication of the commission's findings in 1931 and 1932 was obscured by the hard times brought on by the Great Depression. Nevertheless, the volume entitled *Lawlessness in Law Enforcement* shocked the nation. This volume constituted an indictment of the POLICE MISCONDUCT the commission had found throughout the country. The report described the widespread use of the "third degree"—the willful infliction of pain and suffering on criminal suspects—and other types of police brutality. In addition, it revealed corruption in many cities' criminal justice systems and documented instances of BRIBERY, ENTRAPMENT, coercion of witnesses, fabrication of evidence, and illegal WIRETAPPING.

The report on *Lawlessness in Law Enforcement* led to police reform efforts in many municipalities. These efforts were reinforced by volume fourteen, *The Police,* which called for professional police departments, staffed by more highly qualified police officers and insulated from political pressures.

Other reports included *Prosecution,* which described the rise of PLEA BARGAINING and the decline of the jury trial, *Criminal Statistics, Crime and the Foreign Born, The Cost of Crime, Penal Institutions, Probation and Parole,* and *The Causes of Crime.* The latter volume concluded that sociological factors had a direct effect on criminal activity.

The commission's report on *The Enforcement of the Prohibition Laws of the United States* was a forthright examination of the failure by federal, state, and local police to enforce Prohibition. The report documented the inadequacy of federal law enforcement and described the political, economic, geographical, and human difficulties in preventing the manufacture and sale of intoxicating liquor. Despite evidence of POLICE CORRUPTION and the rise of organized crime, the commission recommended that the Eighteenth Amendment not be repealed.

Instead, it urged all levels of government to spend more money and effort on enforcing the Prohibition laws. The commission's recommendations on Prohibition were ignored. In 1933 Congress passed an amendment repealing Prohibition, and state ratification conventions quickly endorsed the amendment. Ratification of the TWENTY-FIRST AMENDMENT, bringing Prohibition's demise, came on December 5, 1933.

CROSS-REFERENCES

Prohibition.

## ♦ WICKERSHAM, GEORGE WOODWARD

As U.S. attorney general from 1909 to 1913, George Woodward Wickersham was an aggressive enforcer of federal ANTITRUST LAWS. Late in his career, he headed a commission that conducted the first comprehensive national investigation of the U.S. criminal justice system.

Wickersham was born on September 19, 1858, in Pittsburgh, Pennsylvania. He attended Lehigh University from 1873 to 1875 and received a bachelor of laws degree from the University of Pennsylvania in 1880. Before he graduated, he was admitted to the Pennsylvania bar. He practiced for two years in Philadelphia before moving to New York City where he joined the established law firm of Strong and Cadwalader. Wickersham became a partner in the firm four years later.

President WILLIAM HOWARD TAFT appointed Wickersham attorney general in March 1909. Wickersham helped draft the SIXTEENTH AMENDMENT to the U.S. Constitution, adopted in 1913, that authorized Congress to levy an INCOME TAX. He concentrated his efforts on prosecuting monopolistic corporations for antitrust violations under the Sherman Act (15 U.S.C.A. § 1 et seq. [1890]). In *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911), and other important antitrust cases, he participated in the oral arguments before the U.S. Supreme Court.

Wickersham also became the first attorney general to use consent decrees, which allow defendants to agree to negotiated settlements, without resort to court trials. Nineteen of forty-seven suits begun by Wickersham ended in such decrees.

After leaving office in 1913, Wickersham returned to his law practice. In 1915 he attended the New York Constitutional Convention and chaired its Judiciary Committee. After the U.S. entry into WORLD WAR I, President WOODROW WILSON appointed Wickersham to the War Trade Board.

Wickersham is best remembered, however, for heading the National Commission of Law Observance and Law Enforcement, which came to be known as the WICKERSHAM COMMISSION. President HERBERT HOOVER named the commission to investigate the rise in crime and to determine whether, given the level of gangland violence, repeal of PROHIBITION was needed.

The commission, which included ROSCOE POUND, the noted legal scholar and court reformer, could not agree on the Prohibition issue, but its fourteen-volume report revealed disturbing features in the U.S. criminal justice system. It brought to public attention the use of "third-degree" interrogation methods against criminal suspects and the need for more professional police forces. In addition, it condemned the existing prison system and advocated the use

"WE EXPECT LEGISLATION TO CONFORM TO PUBLIC OPINION, NOT PUBLIC OPINION TO YIELD TO LEGISLATION."
—GEORGE W. WICKERSHAM

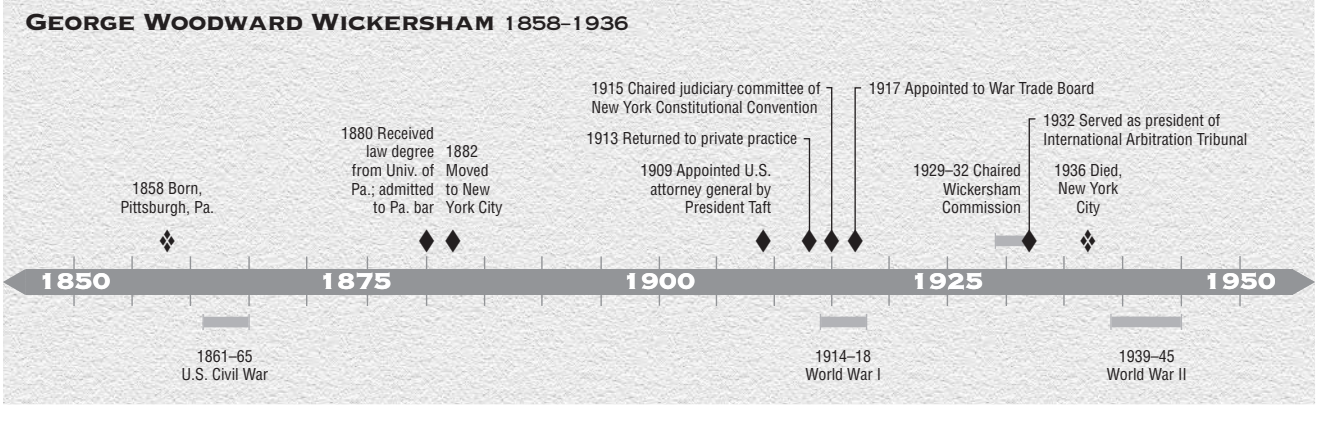

of PROBATION and PAROLE as humane solutions to crime.

Wickersham completed his public service in 1932 as president of the International ARBITRATION Tribunal under the Young Plan, which in 1929 had negotiated the reparations to be paid by Germany for World War I.

Wickersham died on January 25, 1936, in New York City.

CROSS-REFERENCES

Prohibition.

## WIFE

See HUSBAND AND WIFE.

## ❖ WIGMORE, JOHN HENRY

John Henry Wigmore ranks as one of the most important legal scholars in U.S. history. A law professor and later dean of Northwestern University Law School from 1901 to 1929, Wigmore was a prolific writer in many areas of the law. He is renowned for his ten-volume *Treatise on the Anglo-American System of Evidence in Trials at Common Law*—usually referred to as *Wigmore on Evidence*—originally released in four volumes (1904–1905) but expanded to ten volumes by the third edition (1940). Legal scholars consider this treatise one of the greatest books on law ever written.

"SOME DAY, IT MAY BE HOPED, THE METHOD OF RATIONALIZATION WILL BE RECOGNIZED IN SYSTEMATIC TREATMENT OF ALL LEGAL IDEAS, AND NOT MERELY OF THE FUNDAMENTAL INSTITUTIONS."
—JOHN HENRY WIGMORE

Wigmore was born on March 4, 1863, in San Francisco, California. He graduated from Harvard University in 1883 and entered Harvard Law School in 1884. While attending law school, he helped to found the *Harvard Law Review,* which was to become a pre-eminent legal journal. After graduating in 1887, Wigmore was admitted to the Massachusetts bar and entered private practice in Boston. He supplemented his income by doing research and writing for Chief Justice CHARLES DOE of the New Hampshire Supreme Court.

*John Henry Wigmore.* AP/WIDE WORLD PHOTOS

In 1889, Wigmore moved to Tokyo to accept the post of chief professor of Anglo-American law at Keio University. In addition to his teaching duties, Wigmore wrote extensively and researched Japanese LEGAL HISTORY. Extremely adept at languages, he became fascinated by the field of comparative law and pursued this interest throughout his life.

Wigmore returned to the United States in 1892 and accepted a teaching position with

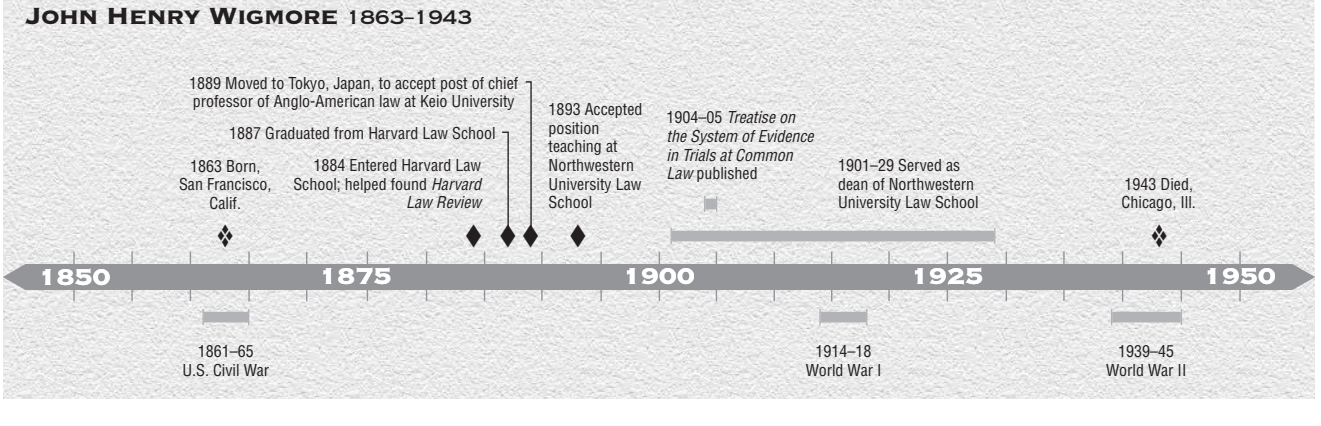

Northwestern University Law School in 1893. He taught a variety of courses, including evidence, TORTS, and INTERNATIONAL LAW. In 1901, he accepted the position of dean, a post he held until his mandatory retirement in 1929. As dean, Wigmore raised money to build the Albert Gary Library, one of the finest university law libraries in the United States, as well as a new law school building. He recruited some of the leading legal scholars of his day and made Northwestern one of the most prominent U.S. law schools.

Wigmore's output as a writer was astounding. He produced 46 original volumes of legal scholarship, 38 edited volumes, and more than 800 articles, pamphlets, and reviews. Much of Wigmore's writing was not of timeless quality, but his treatise on evidence is recognized as a classic because of the scope of its coverage and the insightful explanations of doctrine drawn from the most advanced U.S. JURISPRUDENCE.

Wigmore died April 20, 1943, in Chicago.

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## WILDCAT STRIKE

*An employee work stoppage that is not authorized by the* LABOR UNION *to which the employees belong.*

When employees join a union, they give the union the right to collectively bargain with their employers concerning the terms and conditions of work. Since the passage in 1932 of the NORRIS-LAGUARDIA ACT (29 U.S.C.A. § 101 et seq.), employees have had the right to strike for the purpose of demanding concessions from their employers. When employees go on strike without union authorization, however, their action is called a *wildcat strike.* Federal courts have held that wildcat strikes are illegal under the WAGNER ACT (National Labor Relations Act of 1935 [29 U.S.C.A. § 151 et seq.]), and employees may be discharged by their employers for participating in wildcat strikes.

A wildcat strike brings into conflict sections 7 and 9(a) of the Wagner Act. Section 7 protects employees who bargain collectively and engage in other concerted activities for the purpose of COLLECTIVE BARGAINING. Section 9(a) states that representatives chosen for the purpose of collective bargaining shall be the exclusive representatives of all the employees in that bargaining unit. Because wildcat strikers engage in concerted activity without the authorization of their union, they appear to be both protected because of section 7 and unprotected because of section 9(a). The critical issue is whether the wildcat strikers should be protected to the same extent as strikers authorized by the union, or whether their activity is unprotected because of the exclusivity principle behind section 9(a).

The Supreme Court ruled in *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50, 95 S. Ct. 977, 43 L. Ed. 2d 12 (1975) that when wildcat strikers bargain separately, they are not protected by the Wagner Act. Most lower courts have applied *Emporium Capwell* broadly, holding that all wildcat strikers are unprotected. Therefore, even when wildcat strikers have not attempted to bargain separately, the majority rule is that the strike is unprotected activity.

Ordinarily a wildcat strike constitutes a violation of an existing collective bargaining contract, so the strikes are not protected unless the whole union joins them and ratifies the protest. The union may, however, discipline its members for participating in a wildcat strike and impose fines.

CROSS-REFERENCES

Labor Law; Wagner Act.

"ALL AUTHORITY IS QUITE DEGRADING."
—OSCAR WILDE

## ♦ WILDE, OSCAR

Oscar Wilde was a nineteenth-century Irish poet, novelist, and playwright who mocked social conventions and outraged English society with his unconventional ideas and behavior. Wilde's relevance to the law is based on his 1895 criminal trial, in which he was convicted of committing homosexual acts and was sentenced to two years in prison. Historians of law and sexuality regard the trial as a pivotal event, as it demonstrated that the legal system could be used to punish gays and lesbians.

Wilde was born in Dublin, Ireland, probably on October 16, 1854, although some sources say October 15 or 1856. He was a talented writer who achieved prominence—despite mixed literary criticism—with his first effort, *Poems,* in

*Oscar Wilde.*
LIBRARY OF CONGRESS

1881. Many of his subsequent works are considered classics, including the novel *The Picture of Dorian Gray* (1891), and the plays *Lady Windermere's Fan* (first produced, 1892) and *The Importance of Being Earnest* (first produced, 1895).

As one of England's most flamboyant and sought-after socialites, Wilde nevertheless led an ordinary life in many respects. He married Constance Lloyd in 1884 and fathered two sons. In 1895, however, rumors of Wilde's homosexuality began to circulate, culminating in a scandalous LIBEL trial.

The Marquess of Queensberry, whose name is associated with the accepted standards of boxing regulations, started the controversy by publicizing Wilde's sexual preferences. The marquess had discovered that his son, Alfred Douglas, had a relationship with Wilde, and he was determined to sever the ties. In February 1895, the marquess publicly accused Wilde of being a homosexual. ENGLISH LAW made homosexual relations a criminal offense.

Wilde professed innocence and took the marquess to court for criminal libel. At trial, the marquess's lawyer produced letters written by Wilde to Alfred Douglas, and their affectionate terminology was damaging to Wilde's case. As witnesses revealed Wilde's affiliations with male prostitutes and other men, Wilde considered retracting his accusation. The jury found the marquess not guilty, thus lending some credibility to his accusation against Wilde.

Soon after the conclusion of the trial, Wilde was arrested with a young man, accused of homosexual activities, and put on trial. At the trial, more information about his sexual activities emerged. The prosecution also introduced a poem by Alfred Douglas and questioned Wilde about several loving references to him.

Wilde's lawyers denounced the witnesses as characters of ill repute and pointed out conflicting facts in their testimonies. The trial ended in a hung jury, but Wilde was retried in May 1895. That time, Wilde was found guilty and sentenced to two years in prison. He was released from Reading Gaol (pronounced "JAIL") in May 1897 and moved to Europe, where he assumed the name Sebastian Melmoth. During his exile, he wrote "The Ballad of Reading Gaol," a long poem decrying the cruelty of British prison conditions, especially affecting child inmates. He also wrote letters to English newspapers to sway public opinion during consideration of new legislation. Most notably, on a personal and literary level, Wilde composed a letter to Douglas that

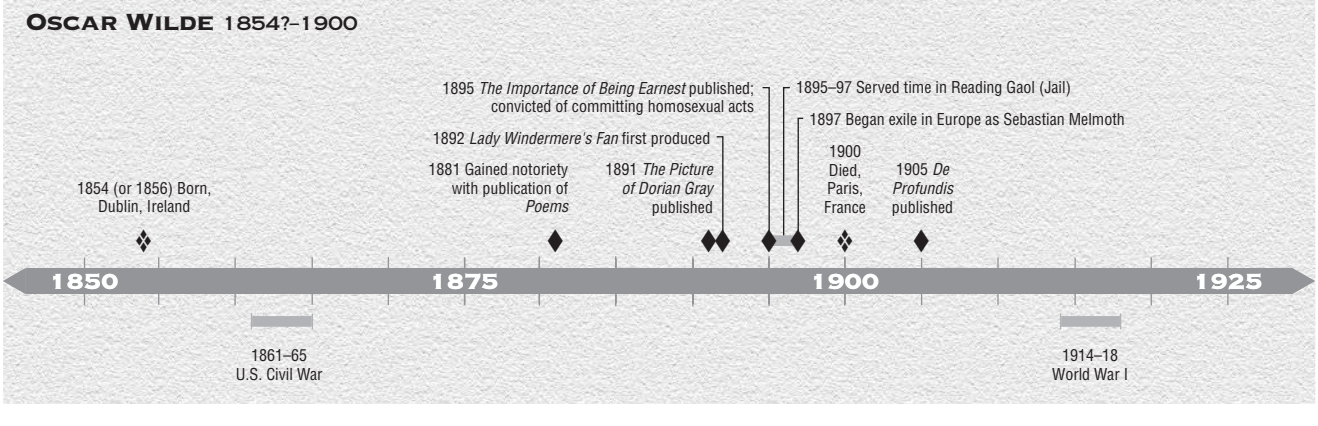

was filled with recriminations against the younger man, which was published posthumously in edited form as *De Profundis* in 1905. Wilde died on November 30, 1900, in Paris.

In 2001, the transcript of Wilde's 1895 libel trial—which was thought not to exist—was donated anonymously to the British Library. Two-and-a-half years later, the library hosted a live reading with prominent British actors. The original documents, in stenographic shorthand, contain the entirety of the trial's proceedings, a marked improvement over the abbreviated, personal, and unofficial accounts.

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## ♦ WILKINS, ROY OTTOWAY

Roy Wilkins was a prominent U.S. **CIVIL RIGHTS** leader who served as the executive secretary of the National Association for the Advancement of Colored People (**NAACP**) from 1955 to 1977. Wilkins guided the NAACP during a time when momentous changes improved the civil rights of African-Americans and other racial minorities. Criticized as too conservative and unwilling to shift the NAACP's focus from legal challenges and political **LOBBYING** to the nonviolent direct-action tactics of Dr. **MARTIN LUTHER KING JR.** and black power groups, Wilkins worked with Congress and Presidents **JOHN F. KENNEDY** and **LYNDON B. JOHNSON** to secure legislation that changed the status quo on racial inequality.

Roy Ottoway Wilkins was born August 30, 1901, in St. Louis, Missouri. He was abandoned by his father shortly after his mother died and was taken in by an uncle who lived in Duluth, Minnesota. Wilkins later moved to St. Paul and graduated from the University of Minnesota. In 1923, he went to work as a journalist for the *Kansas City Call,* a newspaper published by and for the African-American community in Kansas City, Missouri. He soon became managing editor of the paper.

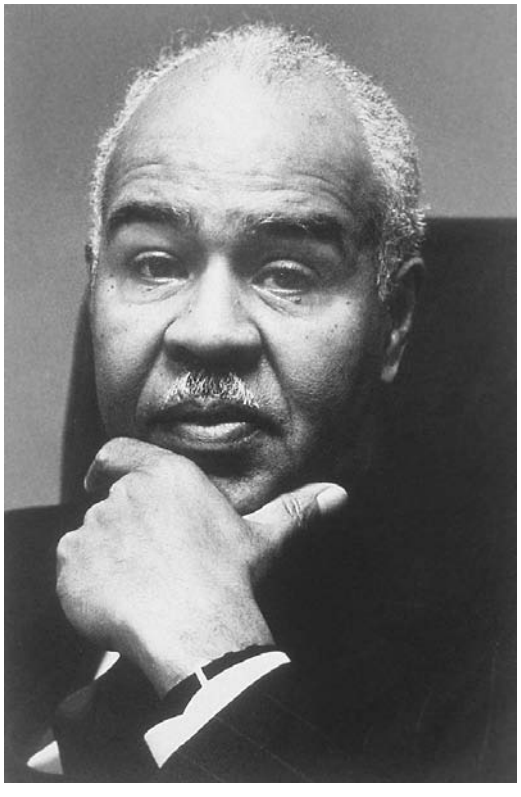

*Roy Wilkins.*
PHOTOGRAPH BY BILL SPARROW. ENCORE MAGAZINE

In 1931, Wilkins was appointed assistant executive secretary of the NAACP, the largest civil rights organization in the United States. His first major campaign was a telegram- and letter-writing protest against comedian Will Rogers, who had used the word "nigger" four times in his premier broadcast over the NBC radio network. As a result, Rogers switched to the less offensive term "darky."

From 1934 to 1949, Wilkins edited *The Crisis,* the official magazine of the NAACP. During that period, Wilkins was a trusted adviser and protégé of executive secretary Walter White. The NAACP's strategy for improved civil rights for African-Americans began during the 1920s with a series of lawsuits that contested both the separate-but-equal doctrine of racial **SEGREGATION** and the denial of **VOTING RIGHTS** based on race. Led by gifted attorneys that included future U.S. Supreme Court Justice **THURGOOD MARSHALL**, the NAACP made steady progress during the 1930s and 1940s. The campaign to end school segregation reached its climax in 1954 with the landmark case of **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873. Wilkins played a major role in preparing the case for trial and appeal. The decision itself did not eliminate racially segregated

"AT FIRST COLOR DOESN'T MEAN VERY MUCH TO LITTLE CHILDREN, BLACK OR WHITE. ONLY AS THEY GROW OLDER AND ABSORB POISONS FROM ADULTS DOES COLOR BEGIN TO BLIND THEM."
—ROY WILKINS

schools, but it did remove the legal justification for the discriminatory practice.

Wilkins was named executive secretary of the NAACP in 1955, following the death of White. The association proceeded to extend the gains of *Brown* through more lawsuits, both in the South and, during the 1960s and 1970s, in the North. Until the late 1950s, the NAACP was regarded as a militant organization, uncompromising in its commitment to racial equality. With the birth of the modern CIVIL RIGHTS MOVEMENT, led by Martin Luther King Jr., the NAACP appeared to be more conservative. Where Wilkins and the NAACP leadership believed in using the legislative and judicial process to achieve racial equality, King and his followers favored civil disobedience and other forms of nonviolent direct action.

Although Wilkins and the NAACP leadership were uncomfortable with this approach, Wilkins sought to form alliances with the new leaders. He helped to organize the March on Washington in 1963, which catapulted King to national attention. The NAACP supported many of the sit-ins and marches of the period, but it rarely initiated them. Wilkins preferred to concentrate on the political process.

Wilkins played a major role in the passage of the CIVIL RIGHTS ACT 1964 (42 U.S.C.A. § 2000a et seq.), the VOTING RIGHTS ACT OF 1965 (42 U.S.C.A. § 1973 et seq.), and the FAIR HOUSING ACT OF 1968 (42 U.S.C.A. § 3601 et seq.). He worked with President Johnson and key senators and representatives on these measures.

Militant leaders of the rising BLACK POWER MOVEMENT during the late 1960s charged that Wilkins and the NAACP were not radical enough. Wilkins rejected black separatism, seeking instead an integrated, color-blind society. With a plainspoken and laconic demeanor, Wilkins refused to indulge in emotional rhetoric, concentrating instead on making reasoned arguments for racial equality.

In 1977, Wilkins ended his service as executive secretary of the NAACP and was succeeded by BENJAMIN L. HOOKS. Wilkins died from kidney failure on September 8, 1981, in New York City.

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## WILL

*A document in which a person specifies the method to be applied in the management and distribution of his estate after his death.*

A will is the legal instrument that permits a person, the testator, to make decisions on how his estate will be managed and distributed after his death. At COMMON LAW, an instrument disposing of PERSONAL PROPERTY was called a "testament," whereas a will disposed of real property. Over time the distinction has disappeared so that a will, sometimes called a "last will and testament," disposes of both real and personal property.

If a person does not leave a will, or the will is declared invalid, the person will have died intestate, resulting in the distribution of the estate according to the laws of DESCENT AND DISTRIBUTION of the state in which the person resided.

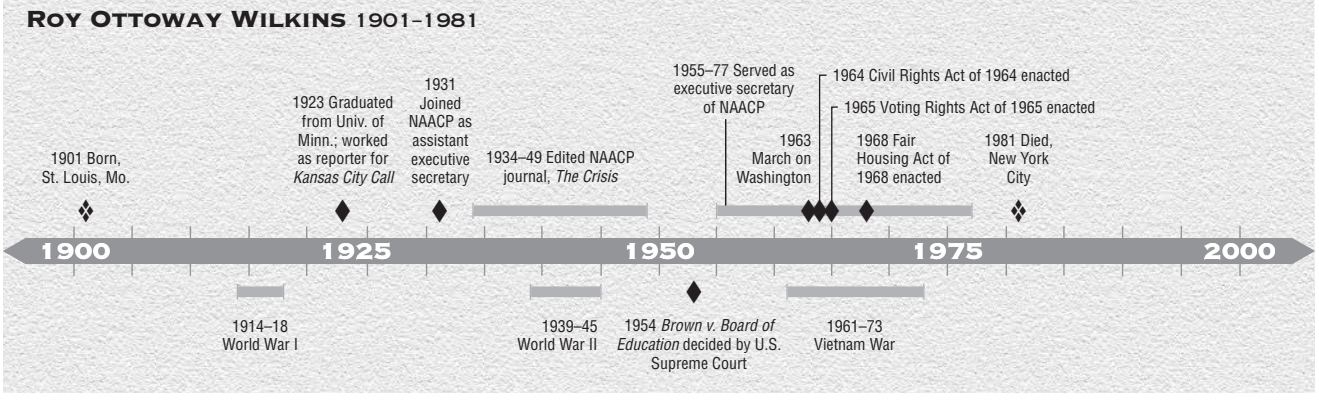

## Howard Hughes and the Mormon Will

When billionaire recluse Howard Hughes died in 1976, it appeared that he had not left a will. Attorneys and executives of Hughes's corporations began an intensive search to find a will, while speculation grew that Hughes might have left a holographic (handwritten) will. One attorney publicly stated that Hughes had asked him about the legality of a holographic will.

Soon after the attorney made the statement, a holographic will allegedly written by Hughes appeared on a desk in the Salt Lake City headquarters of the Church of Jesus Christ of Latter-day Saints, more commonly known as the **MORMON CHURCH**. After a preliminary review, a document examiner concluded that the will might have been written by Hughes. The Mormon Church then filed the will in the county court in Las Vegas, Nevada, where Hughes's estate was being settled.

The will, which became known as the Mormon Will, drew national attention for a provision that gave one-sixteenth of the estate, valued at $156 million, to Melvin Dummar, the owner of a small gas station in Willard, Utah. Dummar told reporters that in 1975 he had picked up a man who claimed to be Howard Hughes and had dropped him off in Las Vegas.

Though Dummar first said he had no prior knowledge of the will or how it appeared at the church headquarters, he later claimed that a man drove to his service station and gave him the will with instructions to deliver it to Salt Lake City. Dummar said he had destroyed the instructions.

Investigators discovered that Dummar had checked out a library copy of a book called *The Hoax,* which recounted the story of Clifford Irving's forgery of an "autobiography" of Hughes. The book contained examples of Hughes's handwriting. Document examiners demonstrated that Hughes's handwriting had changed before the time the Mormon Will supposedly was written. In addition, the examiners concluded that the will was a crude forgery. Nevertheless, it took a seven-month trial and millions of dollars from the Hughes estate to prove that the will was a fake. In the end, the court ruled that the will was a forgery.

No valid will was ever found. Dummar's story later became the subject of the 1980 motion picture *Melvin and Howard.*

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Because of the importance of a will, the law requires it to have certain elements to be valid. Apart from these elements, a will may be ruled invalid if the testator made the will as the result of UNDUE INFLUENCE, FRAUD, or mistake.

A will serves a variety of important purposes. It enables a person to select his heirs rather than allowing the state laws of descent and distribution to choose the heirs, who, although blood relatives, might be people the testator dislikes or with whom he is unacquainted. A will allows a person to decide which individual could best serve as the executor of his estate, distributing the property fairly to the beneficiaries while protecting their interests, rather than allowing a court to appoint a stranger to serve as administrator. A will safeguards a person's right to select an individual to serve as guardian to raise his young children in the event of his death.

The right to dispose of property by a will is controlled completely by statute. Since the 1970s, many states have adopted all or parts of the UNIFORM PROBATE CODE, which attempts to simplify the laws concerning wills and estates. When a person dies, the law of his domicile (permanent residence) will control the method of distribution of his personal property, such as money, stock, or automobiles. The real property, such as farm or vacant land, will pass to the intended heirs according to the law of the state in which the property is located. Though a testa-

tor may exercise much control over the distribution of property, state laws protect spouses and children by providing ways of guaranteeing that a spouse will receive a minimum amount of property, regardless of the provisions of the will.

### Requirements of a Will

A valid will cannot exist unless three essential elements are present. First, there must be a competent testator. Second, the document purporting to be a will must meet the execution requirements of statutes, often called the Statute of Wills, designed to ensure that the document is not a fraud but is the honest expression of the testator's intention. Third, it must be clear that the testator intended the document to have the legal effect of a will.

If a will does not satisfy these requirements, any person who would have a financial interest in the estate under the laws of descent and distribution can start an action in the probate court to challenge the validity of the will. The persons who inherit under the will are proponents of the will and defend it against such an attack. This proceeding is known as a will contest. If the people who oppose the admission of the will to probate are successful, the testator's estate will be distributed according to the laws of descent and distribution or the provisions of an earlier will, depending on the facts of the case.

**Competent Testator** A competent testator is a person who is of sound mind and requisite age at the time that he makes the will, not at the date of his death when it takes effect. Anyone over a minimum age, usually 18, is legally capable of making a will as long as he is competent. A person under the minimum age dies intestate (regardless of efforts to make a will), and his property will be distributed according to the laws of descent and distribution.

An individual has testamentary capacity (sound mind) if he is able to understand the nature and extent of his property, the natural objects of his bounty (to whom he would like to leave the estate), and the nature of the testamentary act (the distribution of his property when he dies). He must also understand how these elements are related so that he can express the method of disposition of property.

A testator is considered mentally incompetent (incapable of making a will) if he has a recognized type of mental deficiency, such as a severe mental illness. Mere eccentricities, such as the refusal to bathe, are not considered insane delusions, nor are mistaken beliefs or prejudices about family members. A person who uses drugs or alcohol can validly execute a will as long as he is not under the influence of drugs or intoxicated at the time he makes the will. Illiteracy, old age, or severe physical illness do not automatically deprive a person of a testamentary capacity, but they are factors to be considered along with the particular facts of the case.

### Execution of Wills

Every state has statutes prescribing the formalities to be observed in making a valid will. The requirements relate to the writing, signing, witnessing, or attestation of the will in addition to its publication. These legislative safeguards prevent tentative, doubtful, or coerced expressions of desire from controlling the manner in which a person's estate is distributed.

**Writing** Wills usually must be in writing but can be in any language and inscribed with any material or device on any substance that results in a permanent record. Generally, most wills are printed on paper to satisfy this requirement. Many states do not recognize as valid a will that is handwritten and signed by the testator. In states that do accept such a will, called a holographic will, it usually must observe the formalities of execution unless exempted by statute. Some jurisdictions also require that such wills be dated by the testator's hand.

**Signature** A will must be signed by the testator. Any mark, such as an *X,* a zero, a check mark, or a name intended by a competent testator to be his signature to authenticate the will, is a valid signing. Some states permit another person to sign a will for a testator at the testator's direction or request or with his consent.

Many state statutes require that the testator's signature be at the end of the will. If it is not, the entire will may be invalidated in those states, and the testator's property will pass according to the laws of descent and distribution. The testator should sign the will before the witnesses sign, but the reverse order is usually permissible if all sign as part of a single transaction.

**Witnesses** Statutes require a certain number of witnesses to a will. Most require two, although others mandate three. The witnesses sign the will and must be able to attest (certify) that the testator was competent at the time he made the will.

*A sample will*

**Last Will**

LAST WILL OF _____ [name of testator]

I, _____ [name of testator], a resident of _____, [State], being of sound and disposing mind and memory and _____ [over the age of eighteen (18) years or lawfully married or having been lawfully married or a member of the armed forces of the United States or a member of an auxiliary of the armed forces of the United States or a member of the maritime service of the United States], and not being actuated by any duress, menace, fraud, mistake, or undue influence, do make, publish, and declare this to be my last Will, hereby expressly revoking all Wills and Codicils previously made by me.

I. EXECUTOR: I appoint _____ as Executor of this my Last Will and Testament and provide if this Executor is unable or unwilling to serve then I appoint _____ as alternate Executor. My Executor shall be authorized to carry out all provisions of this Will and pay my just debts, obligations and funeral expenses. I further provide my Executor shall not be required to post surety bond in this or any other jurisdiction, and direct that no expert appraisal be made of my estate unless required by law.

II. GUARDIAN: In the event I shall die as the sole parent of minor children, then I appoint _____ Guardian of said minor children. If this named Guardian is unable or unwilling to serve, then I appoint _____ alternate.

III. MARITAL STATUS: I declare that I am married to _____ [name of spouse ] and that all references in this Will to my _____ [Husband or wife] are references to _____ [him or her].

IV. SIMULTANEOUS DEATH OF SPOUSE: In the event that my _____ [wife or husband] shall die simultaneously with me or there is no direct evidence to establish that my _____ [wife or husband] and I died other than simultaneously, I direct that I shall be deemed to have predeceased my _____ [wife or husband], notwithstanding any provision of law to the contrary, and that the provisions of my Will shall be construed on such presumption.

V. SIMULTANEOUS DEATH OF BENEFICIARY: If any beneficiary of this Will, including any beneficiary of any trust established by this Will, other than my _____ [wife or husband], shall die _____ within 60 days of my death or prior to the distribution of my estate, I hereby declare that I shall be deemed to have survived such person.

VI. BEQUESTS:

IN WITNESS WHEREOF, I, _____ [name of testator ], hereby set my hand to this last Will, on each page of which I have placed my initials, on this _____ day of _____, at _____, [State].

_____ [signature ]

_____ [typed name of testator ]

The foregoing instrument [, consisting of _____ pages, including this page,] was signed in our presence by _____ [name of testator ] and declared by _____ [him or her] to be _____ [his or her] last Will. We, at the request and in the presence of _____ [him or her] and in the presence of each other, have subscribed our names below as witnesses on this _____ day of _____.

_____ [Signature of Witness #1]
_____ [Typed name of Witness #1]
_____ [Address of Witness #1]

_____ [Signature of Witness #2]
_____ [Typed name of Witness #2]
_____ [Address of Witness #2]

_____ [Signature of Witness #3]
_____ [Typed name of Witness #3]
_____ [Address of Witness #3]

Though there are no formal qualifications for a witness, it is important that a witness not have a financial interest in the will. If a witness has an interest, his testimony about the circumstances will be suspect because he will profit by its admission to probate. In most states such witnesses must either "purge" their interest under the will (forfeit their rights under the will) or be barred from testifying, thereby defeating the testator's testamentary plan. If, however, the witness also would inherit under the laws of descent and distribution should the will be invalidated, he will forfeit only the interest in excess of the amount he would receive if the will were voided.

**Acknowledgment** A testator is usually required to publish the will—that is, to declare to the witnesses that the instrument is his will. This declaration is called an ACKNOWLEDGMENT. No state requires, however, that the witnesses know the contents of the will.

Although some states require a testator to sign the will in the presence of witnesses, the majority require only an acknowledgment of the signature. If a testator shows the signature on a will that he has already signed to a witness and acknowledges that it is his signature, the will is thereby acknowledged.

**Attestation** An attestation clause is a certificate signed by the witnesses to a will reciting performance of the formalities of execution that the witnesses observed. It usually is not required for a will to be valid, but in some states it is evidence that the statements made in the attestation are true.

### Testator's Intent

For a will to be admitted to probate, it must be clear that the testator acted freely in expressing his testamentary intention. A will executed as a result of undue influence, fraud, or mistake can be declared completely or partially void in a probate proceeding.

**Undue Influence** Undue influence is pressure that takes away a person's free will to make decisions, substituting the will of the influencer. A court will find undue influence if the testator was capable of being influenced, improper influence was exerted on the testator, and the testamentary provisions reflect the effect of such influence. Mere advice, persuasion, affection, or kindness does not alone constitute undue influence.

Questions of undue influence typically arise when a will deals unjustly with persons believed to be the natural objects of the testator's bounty. However, undue influence is not established by inequality of the provisions of the will, because this would interfere with the testator's ability to dispose of the property as he pleases. Examples of undue influence include threats of violence or criminal prosecution of the testator, or the threat to abandon a sick testator.

**Fraud** Fraud differs from undue influence in that the former involves MISREPRESENTATION of essential facts to another to persuade him to make and sign a will that will benefit the person who misrepresents the facts. The testator still acts freely in making and signing the will.

The two types of fraud are fraud in the execution and fraud in the inducement. When a person is deceived by another as to the character or contents of the document he is signing, he is the victim of fraud in the execution. Fraud in the execution includes a situation where the contents of the will are knowingly misrepresented to the testator by someone who will benefit from the misrepresentation.

Fraud in the inducement occurs when a person knowingly makes a will but its terms are based on material misrepresentations of facts made to the testator by someone who will ultimately benefit.

Persons deprived of benefiting under a will because of fraud or undue influence can obtain relief only by contesting the will. If a court finds fraud or undue influence, it may prevent the wrongdoer from receiving any benefit from the will and may distribute the property to those who contested the will.

**Mistake** When a testator intended to execute his will but by mistake signed the wrong document, that document will not be enforced. Such mistakes often occur when a HUSBAND AND WIFE draft mutual wills. The document that bears the testator's signature does not represent his testamentary intent, and therefore his property cannot be distributed according to its terms.

### Special Types of Wills

Some states have statutes that recognize certain kinds of wills that are executed with less formality than ordinary wills, but only when the wills are made under circumstances that reduce the possibility of fraud.

**Holographic Wills** A holographic will is completely written and signed in the handwrit-

ing of the testator, such as a letter that specifically discusses his intended distribution of the estate after his death. Many states do not recognize the validity of holographic wills, and those that do require that the formalities of execution be followed.

**Nuncupative Wills** A nuncupative will is an oral will. Most states do not recognize the validity of such wills because of the greater likelihood of fraud, but those that do impose certain requirements. The will must be made during the testator's last sickness or in expectation of imminent death. The testator must indicate to the witnesses that he wants them to witness his oral will. Such a will can dispose of only personal, not real, property.

**Soldiers' and Sailors' Wills** Several states have laws that relax the execution requirements for wills made by soldiers and sailors while on active military duty or at sea. In these situations a testator's oral or handwritten will is capable of passing personal property. Where such wills are recognized, statutes often stipulate that they are valid for only a certain period of time after the testator has left the service. In other instances, however, the will remains valid.

## Revocation of a Will

A will is ambulatory, which means that a competent testator may change or revoke it at any time before his death. Revocation of a will occurs when a person who has made a will takes some action to indicate that he no longer wants its provisions to be binding and the law abides by his decision.

For revocation to be effective, the intent of the testator, whether express or implied, must be clear, and an act of revocation consistent with this intent must occur. Persons who wish to revoke a will may use a codicil, which is a document that changes, revokes, or amends part or all of a validly executed will. When a person executes a codicil that revokes some provisions of a previous will, the courts will recognize this as a valid revocation. Likewise, a new will that completely revokes an earlier will indicates the testator's intent to revoke the will.

Statements made by a person at or near the time that he intentionally destroys his will by burning, mutilating, or tearing it clearly demonstrate his intent to revoke.

Sometimes revocation occurs by operation of law, as in the case of a marriage, DIVORCE, birth of a child, or the sale of property devised in the will, which automatically changes the legal duties of the testator. Many states provide that when a testator and spouse have been divorced but the testator's will has not been revised since the change in marital status, any disposition to the former spouse is revoked.

## Protection of the Family

The desire of society to protect the spouse and children of a decedent is a major reason both for allowing testamentary disposition of property and for placing limitations upon the freedom of testators.

**Surviving Spouse** Three statutory approaches have developed to protect the surviving spouse against disinheritance: DOWER or curtesy, the elective share, and COMMUNITY PROPERTY.

*Dower or curtesy* At common law, a wife was entitled to dower, a life interest in one-third of the land owned by her husband during the marriage. Curtesy was the right of a husband to a life interest in all of his wife's lands. Most states have abolished common-law dower and curtesy and have enacted laws that treat husband and wife identically. Some statutes subject dower and curtesy to payment of debts, and others extend rights to personal property as well as land. Some states allow dower or curtesy in addition to testamentary provisions, though in other states dower and curtesy are in lieu of testamentary provisions.

*Elective share* Although a testator can dispose of his property as he wishes, the law recognizes that the surviving spouse, who has usually contributed to the accumulation of property during the marriage, is entitled to a share in the property. Otherwise, that spouse might ultimately become dependent on the state. For this reason, the elective share was created by statute in states that do not have community property.

Most states have statutes allowing a surviving spouse to elect either a statutory share (usually one-third of the estate if children survive, one-half otherwise), which is the share that the spouse would have received if the decedent had died intestate, or the provision made in the spouse's will. As a general rule, surviving spouses are prohibited from taking their elective share if they unjustly engaged in desertion or committed bigamy.

A spouse can usually waive, release, or contract away his statutory rights to an elective

share or to dower or curtesy by either an antenuptial (also called prenuptial) or postnuptial agreement, if it is fair and made with knowledge of all relevant facts. Such agreements must be in writing.

***Community property*** A community property system generally treats the husband and wife as co-owners of property acquired by either of them during the marriage. On the death of one, the survivor is entitled to one-half the property, and the remainder passes according to the will of the decedent.

**Children** Generally parents can completely disinherit their children. A court will uphold such provisions if the testator specifically mentions in the will that he is intentionally disinheriting certain named children. Many states, however, have pretermitted heir provisions, which give children born or adopted after the execution of the will and not mentioned in it an intestate share, unless the omission appears to be intentional.

### Other Limitations on Will Provisions

The law has made other exceptions to the general rule that a testator has the unqualified right to dispose of his estate in any way that he sees fit.

**Charitable Gifts** Many state statutes protect a testator's family from disinheritance by limiting the testator's power to make charitable gifts. Such limitations are usually operative only where close relatives, such as children, grandchildren, parents, and spouse, survive.

Charitable gifts are limited in certain ways. For example, the amount of the gift can be limited to a certain proportion of the estate, usually 50 percent. Some states prohibit deathbed gifts to charity by invalidating gifts that a testator makes within a specified period before death.

**Ademption and Abatement** ADEMPTION is where a person makes a declaration in his will to leave some property to another and then reneges on the declaration, either by changing the property or removing it from the estate. Abatement is the process of determining the order in which property in the estate will be applied to the payment of debts, taxes, and expenses.

The gifts that a person is to receive under a will are usually classified according to their nature for purposes of ademption and abatement. A specific bequest is a gift of a particular identifiable item of personal property, such as an antique violin, whereas a specific devise is an identifiable gift of real property, such as a specifically designated farm.

A demonstrative bequest is a gift of a certain amount of property—$2,000, for example—out of a certain fund or identifiable source of property, such as a savings account at a particular bank.

A general bequest is a gift of property payable from the general assets of the testator's estate, such as a gift of $5,000.

A residuary gift is a gift of the remaining portion of the estate after the satisfaction of other dispositions.

When specific devises and bequests are no longer in the estate or have been substantially changed in character at the time of the testator's death, this is called ademption by extinction, and it occurs irrespective of the testator's intent. If a testator specifically provides in his will that the beneficiary will receive his gold watch, but the watch is stolen prior to his death, the gift adeems and the beneficiary is not entitled to anything, including any insurance payments made to the estate as reimbursement for the loss of the watch.

Ademption by satisfaction occurs when the testator, during his lifetime, gives to his intended beneficiary all or part of a gift that he had intended to give the beneficiary in her will. The intention of the testator is an essential element. Ademption by satisfaction applies to general as well as specific legacies. If the subject matter of a gift made during the lifetime of a testator is the same as that specified in a testamentary provision, it is presumed that the gift is in lieu of the testamentary gift where there is a parent-child or grandparent-parent relationship.

In the abatement process, the intention of the testator, if expressed in the will, governs the order in which property will abate to pay taxes, debts, and expenses. Where the will is silent, the following order is usually applied: residuary gifts, general bequests, demonstrative bequests, and specific bequests and devises.

#### FURTHER READINGS

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#### CROSS-REFERENCES

Estate and Gift Taxes; Executors and Administrators; Husband and Wife; Illegitimacy; Living Will; Parent and Child; Postmarital Agreement; Premarital Agreement; Trust.

## ♦ WILL, HUBERT LOUIS

Hubert Louis Will was appointed U.S. district judge for the Northern District of Illinois on October 27, 1961, by President JOHN F. KENNEDY. Like Kennedy, Will has been called an idealist and a pragmatist. His challenge to other federal judges is famous: produce the highest quality justice in the shortest time and at the lowest cost, consistent with that quality. To meet his own challenge, Will developed innovative case-management techniques over the years—and he willingly shared them, through judicial seminars, with many of the nation's leading jurists.

Will was among the first to use pretrial scheduling conferences, pretrial orders, and standardized pretrial order forms to organize and supervise the course of a trial from the outset. His aversion to lengthy and costly trials caused him to be, at times, an outspoken critic of the U.S. trial lawyers. He was a longtime crusader for higher professional standards and better practice skills within the trial bar. Lawyers seldom took issue with Will's position on the issue. He was a respected trial lawyer for almost 20 years before coming to the federal bench.

Will was born April 23, 1914, in Milwaukee. As a law student at the University of Chicago he was among a select group of students chosen to meet with attorney CLARENCE DARROW for informal Sunday afternoon discussions on legal topics. One of Darrow's favorites was VOIR DIRE, which is the preliminary examination of prospective jurors or witnesses to inquire into their competence. As a judge, Will enjoyed the dynamics of the jury selection process.

In 1937 Will earned a doctor of jurisprudence degree from the University of Chicago. That same year, he accepted a position with the general counsel's staff of the U.S. SECURITIES AND EXCHANGE COMMISSION. In 1939, he went to work as special secretary to U.S. senator ROBERT F. WAGNER, of New York. During his tenure as special secretary, Will also served as clerk of the Senate Committee on Banking and Currency. In 1940 Will joined the Tax Division of the JUSTICE DEPARTMENT as a special assistant to the U.S. attorney general. It was in the Tax Division that Will got his first real courtroom experience. There, he briefed and argued cases in the U.S. Court of Claims and various district courts. He also tried cases in all the circuit courts of appeals and the U.S. Supreme Court.

Later, Will served as general counsel for the Office of Price Administration and as tax counsel to the U.S. alien property custodian. By 1943, he was active in the military as a member of the Office of Strategic Services. He later served as acting chief of the Counter Espionage Branch in the European theater of operations. Before WORLD WAR II ended, he earned a promotion to captain and a citation for bravery. Thereafter he remained active in veterans' affairs.

At the close of the war, Will and his wife and four children returned to Chicago, where he joined the law firm of Pope and Ballard. A year later, he became a partner in the firm of Nelson, Boodell, and Will. From 1946 to 1961, Will made his name as a tough—and winning—trial attorney. As a consequence of his work and reputation, Will was well known in Chicago circles of the DEMOCRATIC PARTY. His name was soon added to a short list of possible appointees to the federal bench. In October 1961, President Kennedy named Will U.S. district judge for the

"JUDGES FOR CENTURIES HAVE THOUGHT THAT THEY WERE JUST SUPPOSED TO BE SKILLED REFEREES WHO WOULD STEP INTO THE RING WHEN THE LAWYER COMBATANTS SAID THEY WERE READY TO FIGHT."
—HUBERT LOUIS WILL

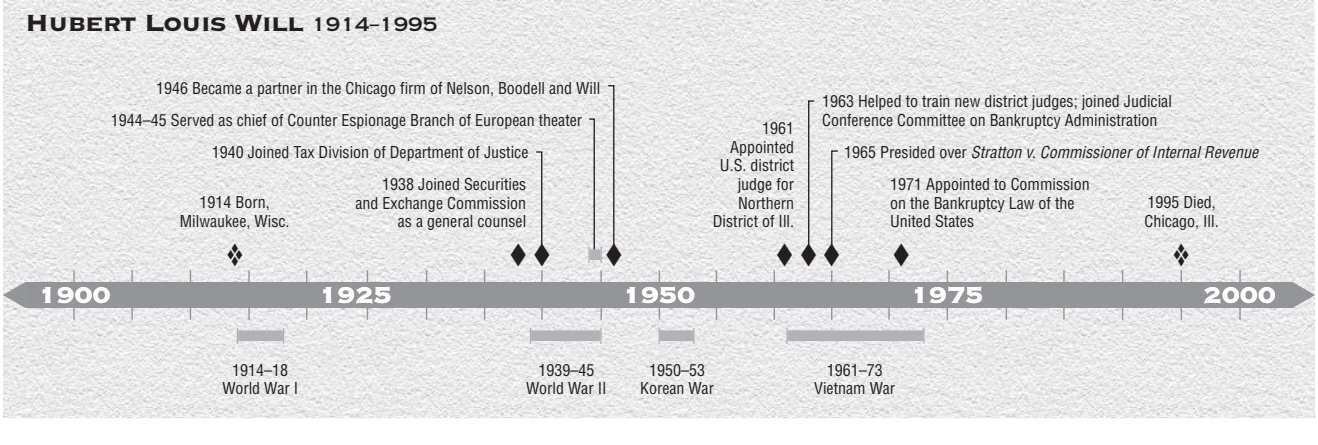

Northern District of Illinois. In 1965 Will called on his tax litigation background when he presided over the trial and acquittal of former Illinois governor William G. Stratton on charges of TAX EVASION (*Stratton v. Commissioner of Internal Revenue,* 54 T.C. 255 [T.C. 1970]).

As a new judge, Will faced a staggering number of cases, and he was often frustrated when valuable courtroom time was devoted to issues he would not have bothered to handle as an attorney. Recognizing the need to better manage the volume and disposition of his cases, Will turned to colleagues for advice and assistance. Seasoned federal judges had practical suggestions for the newest among them, but no forum for sharing that expertise. To address this problem, Will was asked to join senior judges on a planning committee charged with developing training seminars for new district judges. His contribution and insight proved valuable. By 1963, Will was part of a permanent faculty responsible for training new judges. He remained on the faculty for the next 25 years.

Throughout the 1960s, Will experimented with methods to improve court procedures. The first standard forms for prisoners' HABEAS CORPUS petitions and CIVIL RIGHTS complaints were drafted in his chambers. Will acknowledged that the forms were a simple solution but saw them as essential to sorting valid prisoner pleas from those that were "recreation for people with time on their hands."

In the area of civil litigation, Will was a vocal advocate of bifurcated trials, or trials in which certain issues are considered separately, for example, guilt and punishment, liability and damages. He was among the first to use pretrial scheduling conferences, pretrial orders, and standardized pretrial order forms to control the course of a trial from the outset. An amendment to rule 16 of the Federal Rules of Civil Procedure covering pretrial scheduling conferences is often called the Will rule. He was also known for the 20 questions rule, which limits the number of interrogatories without court approval, and the straight face test, cautioning attorneys against taking a "position on any issue in any case that he or she cannot take with a straight face."

Throughout the 1960s, Will traveled to other districts to demonstrate case management techniques. His most famous bit of grandstanding took place when he set out to prove that the use of individual calendaring systems could improve judicial efficiency and clear courtroom backlogs. While carrying a full caseload in the Northern District of Illinois, Will served for just three days a month on the district court in Philadelphia, where he disposed of more than 100 cases in under ten months.

In addition to experimenting with general courtroom efficiency, Will gave special attention to the administration of BANKRUPTCY cases in the federal system. He joined the Judicial Conference Committee on Bankruptcy Administration in 1963. In the decade that followed, he developed criteria for adding bankruptcy judgeships, proposed limits on bankruptcy administration costs, and revised bankruptcy rules in his own jurisdiction. In recognition of his expertise, Will was appointed to the Commission on the Bankruptcy Law of the United States in 1971 by Chief Justice WARREN E. BURGER. Many of the commission's recommendations became the law of the land.

Starting in the mid-1970s, Will served the Courts of Appeals for the Second, Fifth, Seventh, District of Columbia, and Federal Circuits. He also took temporary assignments in the district courts of Milwaukee and Madison, Wisconsin; South Bend, Indiana; Phoenix, Arizona; and Springfield, Illinois. Will assumed senior status with the District Court for the Northern District of Illinois in 1979. He died from cancer on December 9, 1995, in Oconomowoc, Wisconsin.

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## WILLFUL

*Intentional; not accidental; voluntary; designed.*

There is no precise definition of the term *willful* because its meaning largely depends on the context in which it appears. It generally signifies a sense of the intentional as opposed to the inadvertent, the deliberate as opposed to the unplanned, and the voluntary as opposed to the compelled. After centuries of court cases, it has

no single meaning, whether as an adjective (*willful*) or an adverb (*willfully*).

Statutes and case law have adapted the term *willful* to the particular circumstances of action and inaction peculiar to specific areas of the law, including TORT LAW, CRIMINAL LAW, WORKERS' COMPENSATION, and UNEMPLOYMENT COMPENSATION. A willful violation, for example, may mean a deliberate intent to violate the law, an intent to perform an act that the law forbids, an intent to refrain from performing an act that the law requires, an indifference to whether or not action or inaction violates the law, or some other variant.

In criminal-law statutes, *willfully* ordinarily means with a bad purpose or criminal intent, particularly if the proscribed act is mala in se (an evil in itself, intrinsically wrong) or involves moral turpitude. For example, willful murder is the unlawful killing of another individual without any excuse or MITIGATING CIRCUMSTANCES. If the forbidden act is not wrong in itself, such as driving over the speed limit, *willfully* is used to mean intentionally, purposefully, or knowingly.

Under workers' compensation acts, willful misconduct by an employee means that he intentionally performed an act with the knowledge that it was likely to result in serious injuries or with reckless disregard of its probable consequences. A finding of "willful misconduct" prevents the employee from being awarded compensation for his injuries.

Under unemployment compensation laws, an employee who is fired on willful misconduct grounds is not entitled to recover unemployment compensation benefits. Common examples of such willful misconduct include excessive absenteeism, habitual lateness, deliberate violations of an employer's rules and regulations, reporting for work in an intoxicated condition, and drinking alcoholic beverages while on the job.

## WILLIAMS ACT

The Williams Act of 1968 amended the Securities and Exchange Act of 1934 (15 U.S.C.A. § 78a et seq.) to require mandatory disclosure of information regarding cash tender offers. When an individual, group, or corporation seeks to acquire control of another corporation, it may make a tender offer. A tender offer is a proposal to buy shares of stock from the stockholders for cash or some type of corporate security of the acquiring company. Since the mid-1960s, cash tender offers for corporate takeovers have become favored over the traditional alternative, the proxy campaign. A proxy campaign is an attempt to obtain the votes of enough shareholders to gain control of the corporation's board of directors.

Because of abuses with cash tender offers, Congress passed the Williams Act in 1968, whose purpose is to require full and fair disclosure for the benefit of stockholders, while at the same time providing the offeror and management equal opportunity to fairly present their cases.

The act requires any person who makes a cash tender offer (which is usually 15 to 20 percent in excess of the current market price) for a corporation that is required to be registered under federal law to disclose to the federal SECURITIES AND EXCHANGE COMMISSION (SEC) the source of the funds used in the offer, the purpose for which the offer is made, the plans the purchaser might have if successful, and any contracts or understandings concerning the target corporation.

Filing and public disclosures with the SEC are also required of anyone who acquires more than 5 percent of the outstanding shares of any class of a corporation subject to federal registration requirements. Copies of these disclosure statements must also be sent to each national securities exchange where the securities are traded, making the information available to shareholders and investors.

The law also imposes miscellaneous substantive restrictions on the mechanics of a cash tender offer, and it imposes a broad prohibition against the use of false, misleading, or incomplete statements in connection with a tender offer. The Williams Act gives the SEC the authority to institute enforcement lawsuits.

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Mergers and Acquisitions; Securities and Exchange Commission.

## ♦ WILLIAMS, FRANKLIN HALL

Franklin H. Williams was a lawyer, government administrator, and ambassador who played an important role in the modern CIVIL RIGHTS MOVEMENT. As an attorney with the National Association for the Advancement of Colored People (NAACP), Williams worked to desegregate public schools, public housing, and workplaces.

Franklin Hall Williams was born on October 22, 1917, in Flushing, New York. He graduated from Lincoln University in Pennsylvania in 1941 and served in a racially segregated unit of the U.S. Army during WORLD WAR II. He graduated from Fordham University School of Law in 1945.

After receiving his law degree, Williams accepted a position with the NAACP. From 1945 to 1950, Williams was an assistant special counsel for the NAACP LEGAL DEFENSE AND EDUCATIONAL FUND and a special assistant to THURGOOD MARSHALL, the head of the fund who later became an associate justice of the U.S. Supreme Court. Williams worked with Marshall during the NAACP's efforts to desegregate public education, which were significantly aided by the 1954 U.S. Supreme Court decision in BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS, 347 U.S. 483. *Brown* overruled the 1896 decision of PLESSY V. FERGUSON, 163 U.S. 537, which had allowed racially segregated facilities on trains and, by implication, in public schools.

"THE MASS MEDIA CONSTANTLY TAUNT THE GHETTO WITH THE AFFLUENCE OF MODERN SOCIETY."
—FRANKLIN H. WILLIAMS

In 1950, Williams became the NAACP's regional director of the western states. Under his leadership, the office pushed for legislation on minority employment, open housing, and other CIVIL RIGHTS issues. In 1959, Williams left the organization to become an assistant attorney general of California, where he was instrumental in setting up the state's constitutional rights section.

In 1961, Williams became special assistant to Sargent Shriver, who helped to establish the Peace Corps. In 1963, Williams served as director of the African regional division. In the same year, Williams became the first African-American to serve as U.S. representative to the United Nations Economic and Social Council.

In 1965, President LYNDON B. JOHNSON appointed Williams to be the U.S. ambassador to Ghana. Williams held the post until 1968 and is credited with improving what had been strained relations between the U.S. and Ghana.

Williams returned to New York City after leaving his diplomatic post. He headed the Urban Center at Columbia University and served as vice chairperson of the New York Board of Higher Education. In 1987, Williams chaired the New York State Judicial Commission on Minorities, which examined the treatment of minorities in the state's courts.

Williams also served as president of the Phelps-Stokes Fund from 1970 to 1990. This foundation was established in 1911 to improve educational opportunities for African-Americans, Native Americans, and Africans. One of Williams's first moves as president was to persuade the foundation's board to divest itself of holdings in corporations that did business in South Africa, which at that time was governed by a white minority employing the racially segregated practices of apartheid. Williams's divestiture action was later adopted by other foundations and institutions.

Williams died on May 20, 1990, in New York City.

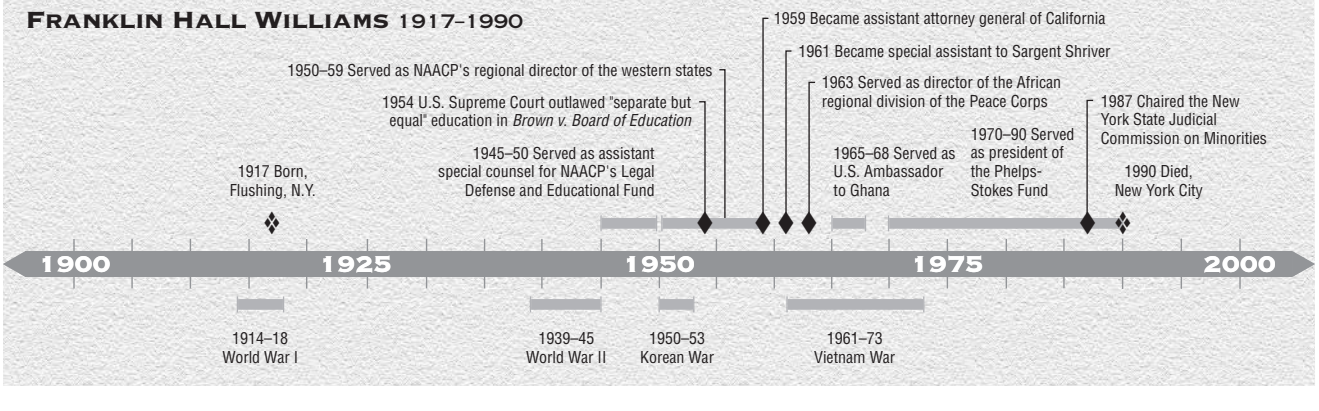

## ♦ WILLIAMS, GEORGE HENRY

George Henry Williams served as U.S. attorney general from 1871 to 1875. A state and territorial judge, as well as a U.S. senator, Williams was nominated to be chief justice of the United States by President ULYSSES S. GRANT in 1873, but he was never confirmed.

According to the JUSTICE DEPARTMENT's publication, *Attorneys General of the United States,* Williams was born on March 23, 1823 (some sources cite March 22 or March 26), in New Lebanon, New York. He received an academic education, studied law, and was admitted to the New York bar in 1844. Williams moved to Fort Madison, Iowa, and established a law practice, but in 1847 he was elected as a state district judge. In 1853 he moved west again, becoming chief justice of Oregon Territory, remaining on the bench until 1857.

In 1865 Williams was elected to represent Oregon in the U.S. Senate. He aligned himself with the Radical Republicans, who opposed President ANDREW JOHNSON's programs for the South during RECONSTRUCTION following the end of the U.S. CIVIL WAR. The animosity between Congress and Johnson led to ARTICLES OF IMPEACHMENT against Johnson. Williams supported the IMPEACHMENT of Johnson, but the Senate attempt to convict Johnson failed by one vote.

After Williams lost his Senate seat, President Grant appointed Williams attorney general in 1871. His term as attorney general was unremarkable, but his reputation was damaged by the events surrounding his failed nomination as chief justice in 1873. There were allegations that Williams had participated in fraudulent activities involving voting in Oregon, but the organized bar on the East Coast also feared that as a frontier lawyer from Oregon, Williams was ill-prepared to preside over a Court that decided many complex commercial cases. A man of little formal education, Williams appeared too undistinguished to serve on the Court. It is likely, however, that the many political scandals involving corruption in the Grant administration unfairly tarnished Williams's nomination.

When it became clear that his nomination was doomed, Williams asked President Grant to withdraw his name from consideration. He continued as attorney general for two more years, resigning in 1875. Williams abandoned national politics after his resignation and returned to Oregon, where he practiced law for many years in Portland. His last public position was as mayor of Portland from 1902 to 1905. He died on April 4, 1910, in Portland, Oregon.

"I BELIEVE I HAVE LIVED LONGER AND HAPPIER THAN IF I HAD BEEN RAISED TO [THE] EXALTED OFFICE [OF CHIEF JUSTICE]."
—GEORGE HENRY WILLIAMS

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## ♦ WILLISTON, SAMUEL

Samuel Williston was a noted law professor and the primary authority on contract law in the United States during the early twentieth century. A professor of law at Harvard Law School from 1890 to 1938, his works *The Law Governing Sales of Goods at Common Law and Under the Uniform Sales Act* (1909) and *The Law on Contracts* (1920) are recognized as leading treatises.

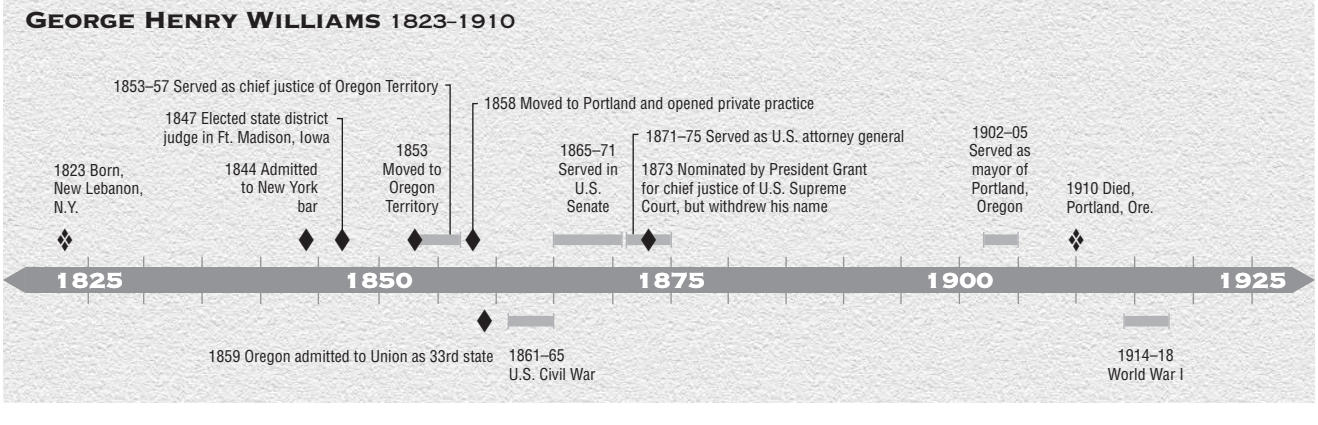

Williston was born on September 24, 1861, in Cambridge, Massachusetts. He earned a bachelors degree from Harvard University in 1882 and then worked for three years to earn the money needed to attend Harvard Law School. In 1888, Williston graduated from law school and established successful law practices in Boston and Cambridge.

In 1890, Williston accepted a professorship at Harvard Law School. As an assistant professor, Williston turned down many promising career opportunities, including offers of deanships at three other law schools and a position as reporter to the Massachusetts Supreme Court, which might have led to a judicial appointment on the state's highest court.

During his career at Harvard, Williston aligned himself with legal formalism, which in the early twentieth century dominated legal thought in the United States. Legal formalism views the law as a body of scientific rules from which legal decisions may be readily deduced. Existing rules are elevated into the category of self-evident truths. In practice, this meant that the law was unconcerned with social and economic forces.

"THE MODERN LAW RIGHTLY CONSTRUES BOTH ACTS AND WORDS AS HAVING THE MEANING WHICH A REASONABLE PERSON PRESENT WOULD PUT UPON THEM IN VIEW OF THE SURROUNDING CIRCUMSTANCES."
—SAMUEL WILLISTON

The desire for form and structure permeates Williston's writings. According to Williston, the law must be stated as simply as possible, and it must be certain. If the law is simple and certain, he argued, parties can use it to resolve their disputes without litigation, as a sign of a sound legal system. Therefore, Williston believed, the ideal course for the law was the construction of broad, general rules.

Williston was able to apply his legal philosophy to the American Law Institute's *Restatement of Contracts*. The purpose of the *Restatement* was to set forth the basic principles of contract law by means of a coherent series of "black letter" principles, drafted with precision, that were consistent with the best traditions of the COMMON LAW, rooted in precedent, yet flexible enough to accommodate growth and development in the law. Williston explained each principle with commentary and concrete examples of its application.

Williston died on February 18, 1963, in Cambridge, Massachusetts.

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## ♦ WILMOT, DAVID

David Wilmot was a lawyer, judge, U.S. senator, and member of the U.S. House of Representatives. From 1845 to 1851 the Pennsylvania Democrat served in the House where he drew national attention for his 1846 proposal. The WILMOT PROVISO banned the expansion of SLAVERY into the territories newly acquired from Mexico. Wilmot's disenchantment with slavery and the DEMOCRATIC PARTY's support of it eventually led him to help form the REPUBLICAN PARTY.

Wilmot was born on January 20, 1814, in Bethany, Pennsylvania. He studied the law with an attorney and became a member of the Pennsylvania bar in 1834. He established a law practice in Towanda and was soon recognized as an able lawyer.

However, politics drew Wilmot's interest. He became active in the Democratic Party and in 1845 he was elected to the U.S. House of Representatives. Wilmot strongly supported President

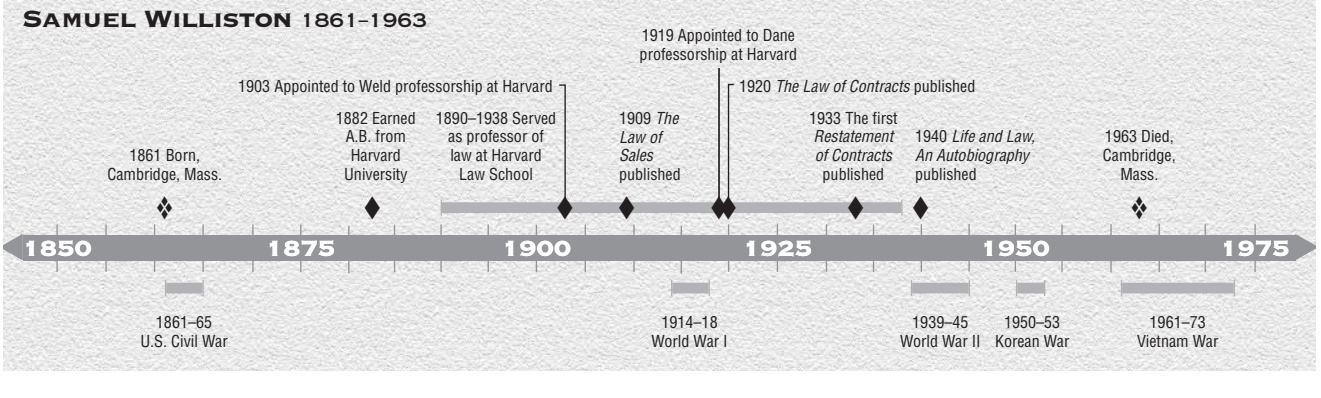

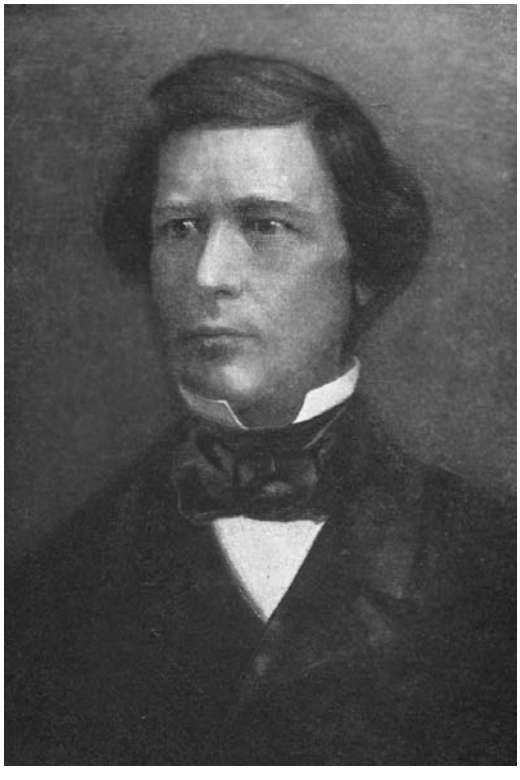

*David Wilmot.* ARCHIVE PHOTOS, INC.

JAMES K. POLK and the Mexican War that began in 1845. When President Polk requested a congressional appropriation of $2 million to purchase land from Mexico, however, Wilmot vehemently objected to suggestions that slavery could be established in the newly acquired areas. He introduced the Wilmot Proviso to ban the spread of slavery but could not secure passage by both houses of Congress.

Wilmot left Congress in 1851, disenchanted with the COMPROMISE OF 1850, which admitted California into the Union as a free state but gave the Utah and New Mexico territories the right to determine the slavery issue for themselves at the time of their admission to the Union. Most disturbing to Wilmot were the new powers given to the federal government to enforce the FUGITIVE SLAVE ACT (9 Stat. 462).

Wilmot served as a Pennsylvania state judge from 1851 to 1861. In 1854 he, along with disaffected members of the Democratic and Whig parties, helped form the Republican Party. The Republican Party was antislavery and adopted the Wilmot Proviso language as part of its platform. Wilmot became a prominent member of the party and was elected to the U.S. Senate where he served the 1861–63 term.

A strong defender of the Union, Wilmot supported President ABRAHAM LINCOLN in the early years of the U.S. CIVIL WAR. Lincoln appointed Wilmot a judge of the U.S. Court of Claims in 1863, a post he served until 1868.

Wilmot died on March 16, 1868, in Towanda, Pennsylvania.

"DEMOCRACY IS A PRINCIPLE OF ETERNAL JUSTICE."
—DAVID WILMOT

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CROSS-REFERENCES

Compromise of 1850; Republican Party; "Wilmot Proviso" (Appendix, Primary Document).

## WILMOT PROVISO

The 1846 Wilmot Proviso was a bold attempt by opponents of slavery to prevent its introduction in the territories purchased from Mexico following the Mexican War. Named after its sponsor, Democratic representative DAVID WILMOT of Pennsylvania, the proviso never passed both houses of Congress, but it did ignite an intense national

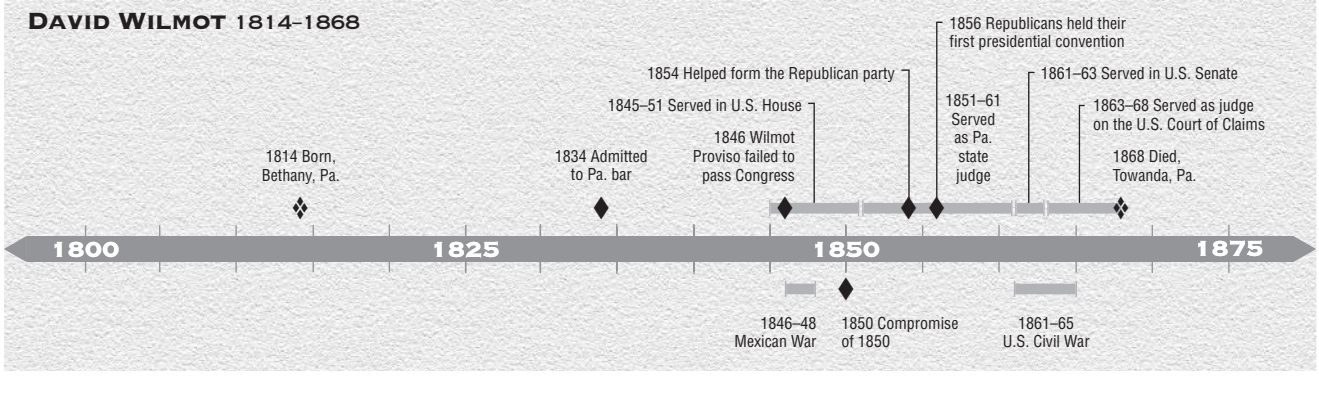

debate over slavery that led to the creation of the antislavery REPUBLICAN PARTY in 1854.

The Mexican War of 1845–1846 was fueled, in part, by the desire of the United States to annex Texas. President JAMES POLK asked Congress in August 1846 for $2 million to help him negotiate peace and settle the boundary with Mexico. Polk sought the acquisition of Texas and other Mexican territories. Wilmot quickly offered his proposal, known as the Wilmot Proviso, which he attached to President Polk's funding measure. The proviso would have prohibited slavery in the new territories acquired from Mexico, including California.

The proviso injected the controversial slavery issue into the funding debate, but the House approved the bill and sent it to the Senate for action. The Senate, however, adjourned before discussing the issue.

When the next Congress convened, a new appropriations bill for $3 million was presented, but the Wilmot Proviso was again attached to the measure. The House passed the bill and the Senate was forced to consider the proposal. Under the leadership of Senator JOHN C. CALHOUN of South Carolina and other proslavery senators, the Senate refused to accept the Wilmot amendment, approving the funds for negotiations without the proviso.

For several years, the Wilmot Proviso was offered as an amendment to many bills, but it was never approved by the Senate. However, the repeated introduction of the proviso kept the issue of slavery before the Congress and the nation. The COMPROMISE OF 1850, which admitted California as a free state but left the issue of slavery up to the citizens of New Mexico and Utah, created dissension within the Democratic and Whig parties. The strengthening of federal enforcement of the FUGITIVE SLAVE ACT (9 Stat. 462) angered many northerners and led to growing sectional conflict.

The creation of the Republican Party in 1854 was based on an antislavery platform that endorsed the Wilmot Proviso. The prohibition of slavery in any new territories became a party tenet, with Wilmot himself emerging as Republican Party leader. The Wilmot Proviso, while unsuccessful as a congressional amendment, proved to be a battle cry for opponents of slavery.

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#### CROSS-REFERENCES

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## ♦ WILSON, JAMES

Lawyer, author, theorist, and justice, James Wilson helped write the U.S. Constitution and served as one of the first justices of the U.S. Supreme Court. Wilson emigrated from Scotland in the mid 1760s, studied law, and quickly gained prominence and success in Philadelphia. As a Federalist, Wilson believed in strong central government. This theme pervaded the pamphlets he wrote in the 1770s and 1780s. These

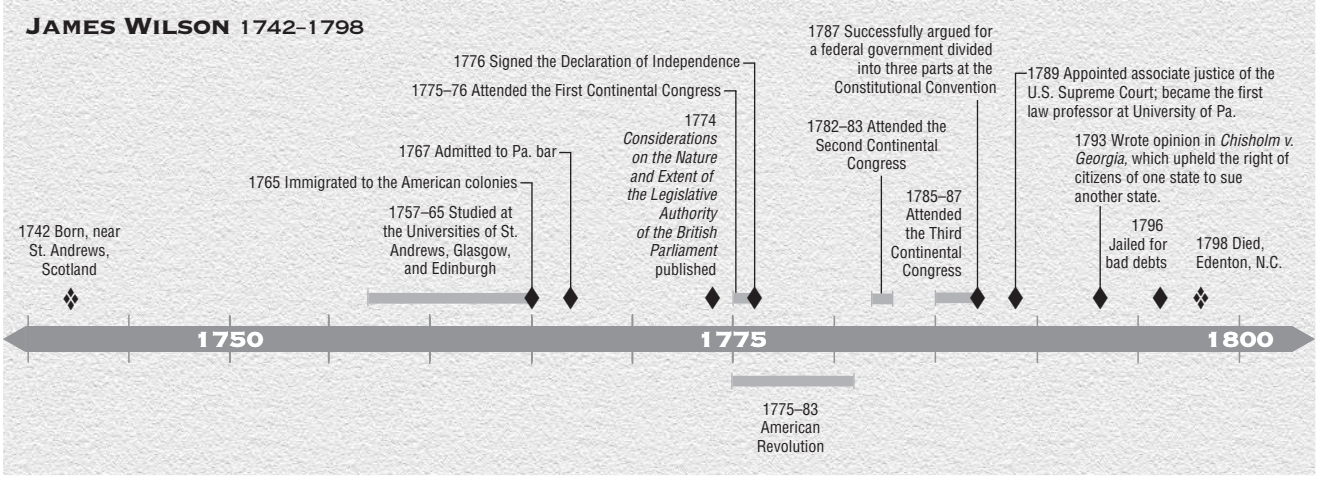

highly influential tracts won him a national reputation. In 1787, he was a leading participant at the Constitutional Convention where the U.S. Constitution was written. Wilson served on the Supreme Court from 1789 to 1798, but the latter years of his life ended in disgrace.

Born on September 14, 1742, near St. Andrews, Scotland, Wilson came from a rural working class background. His quick intelligence took him far from his roots, however. He attended the University of St. Andrews from 1757 to 1759, the University of Glasgow from 1759 to 1763, and the University of Edinburgh from 1763 to 1765. At the age of twenty-three, he set out to make his fortune by emigrating to the American colonies, where he promptly began studying law under one of America's best lawyers, JOHN DICKINSON. Two years later, in 1767, he was admitted to the Pennsylvania bar.

Over the next two decades, Wilson wrote political pamphlets that brought him national attention and launched his public career. In 1774 he argued that the American colonies should be free from the rule of British lawmakers in his widely read *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament.* His writing soon led to involvement in the planning for American independence. He represented Pennsylvania at the CONTINENTAL CONGRESS from 1775 to 1776, and 1782 to 1783, and signed the Declaration of Independence in 1776.

Wilson's most important role came at the Constitutional Convention in 1787, where he argued on behalf of key features of the Constitution such as the SEPARATION OF POWERS, which divided federal government into three parts, and the sovereignty of the people. A year later he helped persuade Pennsylvania to adopt the Constitution.

In 1789 President GEORGE WASHINGTON considered Wilson for the position of chief justice of the U.S. Supreme Court, a post Wilson desired but never attained. He became an associate justice, and, in the same year, was made the first law professor of the University of Pennsylvania. The few short opinions he wrote for the Court embodied his strong FEDERALISM. His most famous opinion was CHISHOLM V. GEORGIA, 2 U.S. (2 Dall.) 419, 1 L. Ed. 440 (1793), which upheld the right of citizens of one state to sue another state.

Despite the accomplishments of his early life, Wilson remained a minor figure on the Court. As a result of bad investments he became heavily in debt in the 1790s and was jailed twice before fleeing his creditors. He died on August 21, 1798, in Edenton, North Carolina.

*James Wilson.*
LIBRARY OF CONGRESS

"LAWS MAY BE UNJUST . . . MAY BE DANGEROUS, MAY BE DESTRUCTIVE; AND YET NOT BE UNCONSTITUTIONAL."
—JAMES WILSON

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## ❖ WILSON, JAMES QUINN

James Q. Wilson is a significant American thinker and writer whose views on CRIMINOLOGY, economics, politics, and culture have found both acceptance and criticism since the 1970s. Wilson is particularly known for advancing the "broken window" theory of crime deterrence. Wilson's 1982 thesis was simple: if people see a broken factory or office window that is left

"WITHOUT RELIGIOUS FREEDOM, MODERN GOVERNMENT IS IMPOSSIBLE."
—JAMES Q. WILSON

unrepaired, they will conclude that no one is looking after the property. Soon all the windows will be broken, signaling the breakdown of law and order in that neighborhood. Wilson's theory held that neighborhoods could prevent the growth of crime if they quickly took steps such as replacing broken windows, removing graffiti, keeping streets and buildings in good repair, and making arrests for petty crimes and misdemeanors such as littering and evading fares for public transportation. Numerous U.S. cities embraced Wilson's theory. The most notable response was that of New York City in the 1990s when Mayor Rudolph Giuliani and Police Commissioner William Bratton used this approach to successfully reduce crime and improve the perception of New York City as a safe place to visit.

James Quinn Wilson was born May 27, 1931, in Long Beach, California. Wilson did not plan on attending college until his high school English teacher told him that he could attend the University of Redlands on a scholarship. In 1952 Wilson graduated with a bachelor's degree in political science. Wilson enlisted in the navy during the KOREAN WAR and served three years. He then attended graduate school at the University of Chicago where he received a Ph.D. in 1959.

Wilson taught government at Harvard University from 1961 until 1987. He then taught management and public policy at UCLA from 1985 to 1997. In the early 2000s Wilson was the Ronald Reagan Professor of Public Policy at Pepperdine University's School of Public Policy.

Wilson has served on a number of national commissions related to public policy. In 1966 he was chair of the White House Task Force on Crime. He also served as chair of the National Advisory Commission on Drug Abuse Prevention in 1972–1973 and was a member of the attorney general's Task Force on Violent Crime in 1981. From 1985 to 1990 he was a member of the President's Foreign Intelligence Advisory Board. Wilson served on the board of directors for the Police Foundation from 1971 to 1973.

In addition to serving on the board of directors of a number of major U.S. corporations, Wilson served as chair of the council of academic advisors for the American Enterprise Institute. He was elected a member of the American Academy of Arts and Sciences and was made a fellow of the American Philosophical Society. In 1990 Wilson received the James Madison Award for distinguished scholarship from the American Political Science Association (APSA). He served as president of the APSA from 1991 to 1992.

Wilson has authored more than a dozen books dealing with the topics of crime, government, urban problems, and aspects of American culture. One of Wilson's most seminal works was *Thinking about Crime*, published in 1975. In this book Wilson, a strong conservative, rejected the rehabilitation model of punishment that held that offenders are subject to rehabilitative efforts and that money spent on social programs helps reduce crime. Wilson wrote that offenders could not be helped by social programs because they have made a rational choice to commit crimes. Wilson argued in favor of the deterrence model that held that incarceration and other government-imposed sanctions are the best methods of deterring would-be offenders.

Wilson's arguments in favor of the deterrence model of crime and punishment gained support throughout the 1980s and 1990s. During this period a number of states as well as the federal government replaced indeterminate sen-

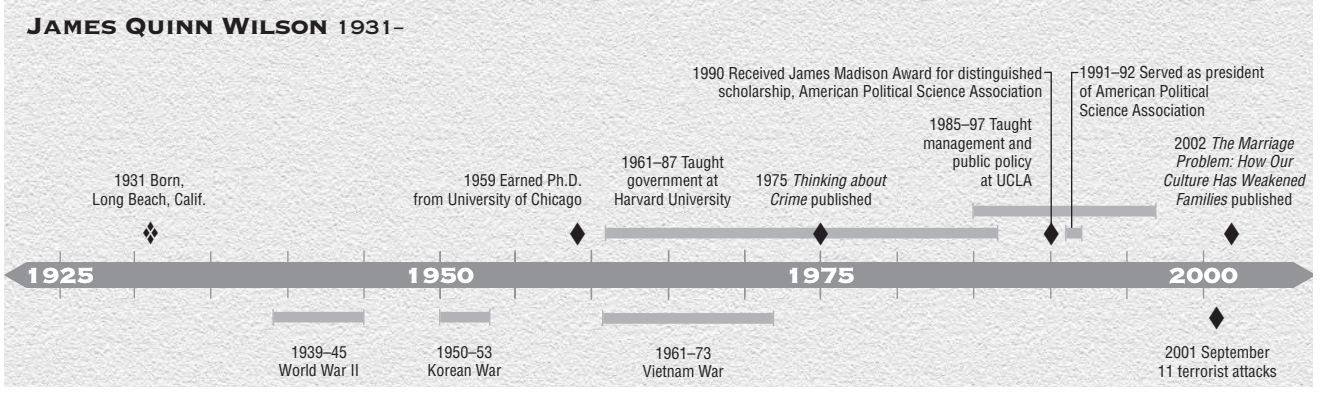

tencing policies that gave judges and PAROLE boards wide latitude to determine how long an offender should be incarcerated, with sentencing guidelines that mandated particular sentence lengths with little discretion left to the judges. These policy changes met with great favor from governmental officials and members of the public who advocated increased law and order. HUMAN RIGHTS advocates and others have criticized the results of the deterrence model as infringing on civil liberties. Some members of the judiciary have protested severe penalties for what they see as minor offenses. Nevertheless, Wilson has been steadfast in defending his theory. As crime rates fell in the 1990s, he argued that deterrence worked. In a 1998 *U.S. News and World Report* article Wilson stated, "Putting people in prison is the single most important thing we've done."

Wilson continued to stir controversy in 2002 with the publication of his book, *The Marriage Problem: How Our Culture Has Weakened Families,* in which he argued that COHABITATION and DIVORCE have led to increases in school dropouts, teenage pregnancies, and criminal activity.

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CROSS-REFERENCES

Crimes; Rehabilitation; Sentencing.

## ♦ WILSON, THOMAS WOODROW

Educator, political reformer, and the 28th president of the United States, Woodrow Wilson significantly affected domestic and international affairs during his two terms in office. Wilson made advances in education while he was the president of Princeton University in the early 1900s, before entering politics as the governor of New Jersey in 1910. He was elected president first in 1912 and again in 1916. He emerged from the tragedy of WORLD WAR I as an international leader who campaigned widely for the creation of the LEAGUE OF NATIONS—the postwar international organization that was the forerunner of the UNITED NATIONS. But political battles with a reluctant Congress ultimately dashed his hopes of U.S. participation in the League.

*Woodrow Wilson.*
LIBRARY OF CONGRESS

"AMERICA WAS SET UP AND OPENED HER DOORS, IN ORDER THAT ALL MANKIND MIGHT COME AND FIND WHAT IT WAS TO RELEASE THEIR ENERGIES IN A WAY THAT WOULD BRING THEM COMFORT AND HAPPINESS AND PEACE OF MIND."
—WOODROW WILSON

Born on December 28, 1856, in Staunton, Virginia, Thomas Woodrow Wilson was the third of four children of devoutly religious parents, Janet Woodrow Wilson and Joseph Ruggles Wilson. The U.S. CIVIL WAR prevented him from beginning school until the age of nine, but the intellectual atmosphere fostered largely by his father, a Presbyterian minister, helped him to excel. After graduation from Princeton University in 1879, he studied law at the University of Virginia and became a member of the bar in 1882. He established a law practice in Atlanta, Georgia, but later returned to school to study political science at Johns Hopkins University, earning his doctorate in 1886.

Professionally, Wilson worked in the area of education before entering politics. Between 1885 and 1892, he taught history and political economy first at Bryn Mawr College, then at Wesleyan University, and finally at Princeton. As president of Princeton from 1902 to 1910, he became known as an educational reformer. His improvements to teaching were welcomed until he set out on a bold plan to reform the social structure of the school by eliminating class distinctions, an effort that was severely criticized.

Elected governor of New Jersey in 1910, Wilson pursued reform policies that won greater approval: he improved worker's compensation and the school system while also providing for better control of PUBLIC UTILITIES.

In 1912, the strength of Wilson's accomplishments at Princeton and as governor helped to take him to the White House. Running as a Democrat, he also benefited from a rift in the REPUBLICAN PARTY that split votes between THEODORE ROOSEVELT and WILLIAM HOWARD TAFT.

Wilson called his domestic program the New Freedom. It consisted of far-ranging economic and labor reforms. In a dramatic return to an old tradition, he addressed Congress personally, asking for passage of the legislation, and Congress largely complied. In 1913, the Underwood Tariff Act instituted the INCOME TAX but decreased the tariff on certain imports. The Federal Reserve Act of 1913 (38 Stat. 251), which reorganized the national banking system, is regarded as the most important banking reform in history. It gave the federal government control over the FEDERAL RESERVE BOARD while also providing agricultural credits to farmers.

The extent of Wilson's idealism can be seen in other significant reforms. In 1914, the FEDERAL TRADE COMMISSION was established to discourage business corruption, and the CLAYTON ANTITRUST ACT (15 U.S.C.A. § 12 et seq.) was passed in order to restrict businesses from monopolizing—unfairly dominating—individual markets. Three constitutional amendments were ratified during the Wilson administration: the provision for the direct election of U.S. senators in 1913 (SEVENTEENTH AMENDMENT); the PROHIBITION of the manufacture, sale, and transportation of liquor in 1917 (EIGHTEENTH AMENDMENT); and the granting of the right to vote to women in 1920 (NINETEENTH AMENDMENT).

Wilson's foreign-affairs policies encountered serious difficulties. In Mexico, which was in the throes of upheaval, the arrest of U.S. military personnel precipitated a U.S. invasion. U.S. troops also retaliated when Mexican revolutionary Francisco "Pancho" Villa invaded New Mexico. Wilson ordered troops to pursue him into Mexico. Relations between the two nations remained tense throughout the Wilson administration.

World War I and its aftermath tested Wilson. The United States was neutral at the onset of war in 1914. Despite the entreaties of allies, it did not enter the war until nearly two years after Germany had begun attacking ships with submarines. (Germany sank the English ship *Lusitania* on May 7, 1915, killing more than 100 U.S. passengers.) More German attacks on ships carrying U.S. passengers forced Wilson's hand. In 1917, his war speech included the celebrated phrase, "the world must be made safe for democracy." As the defeat of Germany became imminent in 1918, Wilson put forth his Fourteen Points, a post-war program that he hoped would establish a lasting peace.

Besides economic, political, and geographic proposals, Wilson's plan proposed the creation of an international peacekeeping body to be called the League of Nations. Traveling to Europe in 1918 for the signing of a peace treaty at Versailles, France, Wilson was praised. This acclaim was not heard at home, where domestic criticism of his proposed League of Nations forced him to make concessions. He traveled widely across the nation campaigning on behalf of his plan. Ultimately, however, opposition in the U.S. Senate, based on the conviction that the United States should stay out of European

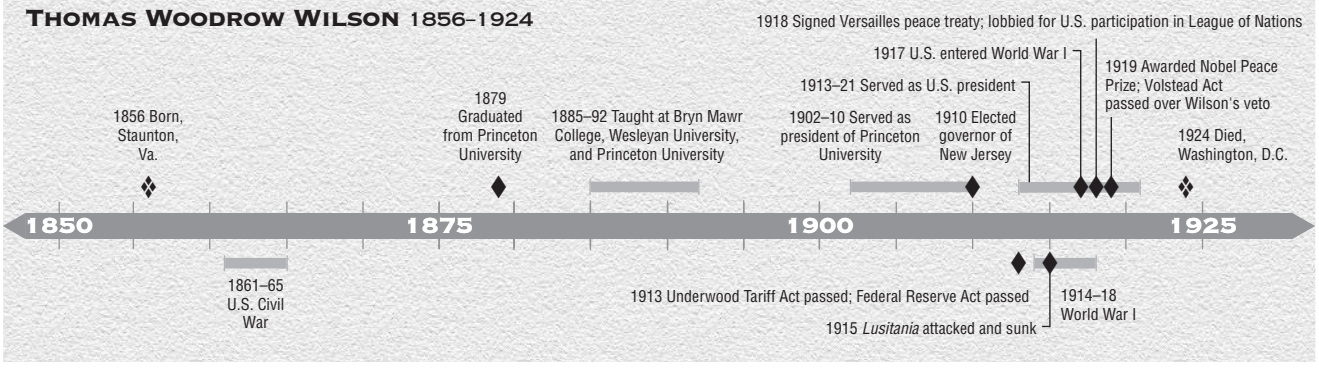

affairs, scuttled plans for U.S. participation in the League. Wilson also suffered personally at this time. A stroke in 1919 rendered him an invalid for the rest of his life.

History has sometimes judged Wilson to be too much of an idealist, particularly in foreign affairs. The disastrous Versailles Treaty, in particular, sowed the seeds of a second world war. Yet his leadership during the war was inspirational, and his plan for international participation after the war was largely achieved in later decades under the aegis of the United Nations. For these accomplishments, Wilson was awarded the 1919 Nobel Peace Prize. He died on February 3, 1924, in Washington, D.C.

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**CROSS-REFERENCES**

"Fourteen Points Speech" (Appendix, Primary Document); League of Nations; Treaty of Versailles.

## WIND UP

*The last phase in the dissolution of a partnership or corporation, in which accounts are settled and assets are liquidated so that they may be distributed and the business may be terminated.*

The dissolution of a corporation or a partnership culminates in the wind up of all legal and financial affairs of the business. State statutes govern the dissolution process for both types of business organizations, based on the need to insure that creditors, stockholders, and other interested parties receive a fair accounting of the liquidation and distribution of the business assets.

When a corporation announces that it will dissolve and end its legal existence, it is only the beginning of the end. Dissolution marks the end of business as usual, but corporate existence continues for the limited purpose of paying, settling, and collecting debts. Once this is done, the corporation may wind up and distribute the remaining assets.

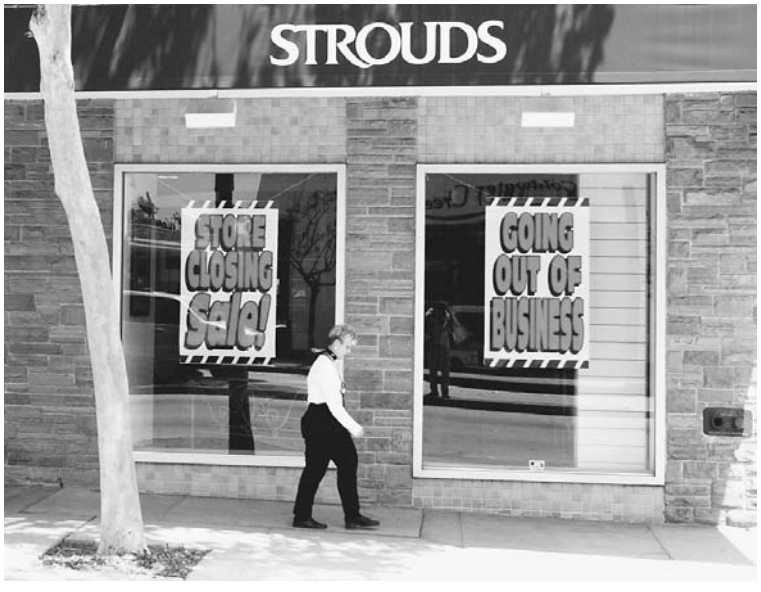


*Winding up a business involves selling off all of the business's assets. Going out of business sales typically involve steep discounts to move merchandise quickly.*

AP/WIDE WORLD PHOTOS

A general partnership will dissolve when a change occurs in the relation of the partners caused by any partner ceasing to be associated in the carrying on of the business. In the absence of a contrary agreement by the partners, a dissolution involves reducing the partnership assets to cash, paying creditors, and distributing to partners the value of their respective interests, as well as the performance of existing contracts. Once this phase is completed, the partnership may wind up by distributing assets. Once the wind up has occurred, the termination of the partnership is complete.

A partnership contract that is silent as to the procedures for wind up and liquidation must defer to the provisions of the Uniform Partnership Act (UPA), which has been adopted by virtually all of the states. The same rules of winding up and liquidation apply to all partnerships, regardless of their nature or business. Section 37 of the UPA provides that unless otherwise agreed, the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving solvent partner have the right to wind up the partnership affairs, provided, however, that any partner, his legal representative, or his assignee may obtain, for good cause, winding up by a court.

## WINSHIP, IN RE

In the case *In re Winship,* 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), the U.S. Supreme Court ruled that the DUE PROCESS CLAUSE of

the FOURTEENTH AMENDMENT to the U.S. Constitution requires proof BEYOND A REASONABLE DOUBT before a juvenile may be adjudicated delinquent for an act that would constitute a crime were the child an adult. *Winship* expanded the constitutional protections afforded by IN RE GAULT, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), in which the Supreme Court ruled that minors accused of delinquent acts must receive notice of any charges pending against them, and be given a reasonable opportunity to defend themselves during a fair hearing in which they enjoy the RIGHT TO COUNSEL, the right not to incriminate themselves, and the right to confront and cross-examine adverse witnesses.

Twelve-year-old Samuel Winship was charged under the New York Family Court Act (NYFCA) with stealing $112 from a woman's pocketbook, an act that would have constituted the crime of LARCENY if Winship had been an adult. At the conclusion of the proceedings against Winship, the family court judge made a finding of delinquency by a PREPONDERANCE OF THE EVIDENCE, the standard of proof set forth in section 744(b) of the NYFCA. The judge acknowledged on the record that the state had not proven its case beyond a reasonable doubt. As a consequence for his transgression, Winship was placed in a juvenile training facility for a minimum period of eighteen months.

Winship appealed the adjudication of delinquency to the New York Supreme Court (an intermediate court of appeals in New York), where he challenged the constitutionality of the NYFCA. Winship claimed that he was denied due process because the NYFCA required the family court to apply a quantum of proof less stringent than beyond a reasonable doubt. After the court rejected this challenge, Winship appealed the case to the New York Court of Appeals (the highest court in the state of New York), which affirmed the decisions of both lower courts. *In the Matter of Samuel W. v. Family Court,* 24 N.Y.2d 196, 247 N.E.2d 253, 299 N.Y.S.2d 414 (1969).

The court of appeals relied on the traditional distinction between juvenile and criminal proceedings in explaining its decision to affirm the lower court. State intervention in delinquency matters is traditionally justified under the doctrine of PARENS PATRIAE, a paternalistic theory of juvenile justice in which the government seeks to protect the welfare of minors by providing wayward youth with medical help, counseling, discipline, and other assistance deemed necessary by a court or by social services.

In contrast to the remedial and rehabilitative nature of many juvenile dispositions, criminal sanctions are intended to serve four different purposes: punishment, retribution, deterrence, and confinement. While most criminal proceedings are open to the public, nearly all juvenile proceedings are conducted in private under strict orders of confidentiality. Because adult criminal defendants generally have more at stake than minors accused of delinquency, criminal proceedings involving adults are designed to be more adversarial in nature. Conversely, juvenile proceedings are administered with greater flexibility to meet the needs of each delinquent child.

Based on these distinctions, the court of appeals concluded that the remedial goals of juvenile justice are better served when the guilt or innocence of a minor is determined by a preponderance of the evidence. Application of the reasonable doubt standard in delinquency proceedings, the court of appeals reasoned, would result in a greater number of acquittals. More troubled children would return home without aid from juvenile justice programs, the court surmised, and delinquency problems would exacerbate.

In reversing the New York Court of Appeals, the U.S. Supreme Court emphasized two points. First, the Court underscored the importance of the reasonable doubt standard. Proof beyond a reasonable doubt, the Court said, is a standard deeply rooted in the nation's history, and forms an integral part of the fundamental freedoms protected by the Due Process Clause. The Court noted that since colonial times every person accused of wrongdoing in America has been entitled to a PRESUMPTION OF INNOCENCE until proven guilty beyond a reasonable doubt by the government.

Second, the Court indicated that this standard of proof is not necessarily limited to criminal cases, but may apply in other proceedings in which an accused faces a potential deprivation of life, liberty, or property. Winship faced confinement in a juvenile training facility for a period of up to six years because his detention order was subject to annual extension by the family court until his eighteenth birthday. Ordinarily, the Supreme Court observed, the law reserves such lengthy periods of confinement for adult felony offenders. But when juvenile defendants are exposed to adult-like penal sanctions,

the Court held, they must be protected by the same procedural safeguards as adult criminal defendants, including the right to be presumed innocent until proven guilty beyond a reasonable doubt.

Despite the sweeping language of In re Winship and *In re Gault,* juveniles are not always afforded the same protections as adults under the Due Process Clause. For example, in *McKeiver v. Pennsylvania,* 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971), the Supreme Court ruled that there is no constitutional right to jury trial in juvenile proceedings. So long as the judge presiding over a juvenile matter is fair and impartial, the Supreme Court said, due process has been provided.

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CROSS-REFERENCES

Due Process of Law; Juvenile Law; Preponderance of Evidence.

## WIRETAPPING

*A form of electronic eavesdropping accomplished by seizing or overhearing communications by means of a concealed recording or listening device connected to the transmission line.*

Wiretapping is a particular form of ELECTRONIC SURVEILLANCE that monitors telephonic and telegraphic communication. The introduction of such surveillance raised fundamental issues concerning personal privacy. Since the late 1960s, law enforcement officials have been required to obtain a SEARCH WARRANT before placing a wiretap on a criminal suspect. Under the Federal Communications Act of 1934 (47 U.S.C.A. 151 et seq.), private citizens are prohibited from intercepting any communication and divulging its contents.

Police departments began tapping phone lines in the 1890s. The placing of a wiretap is relatively easy. A suspect's telephone line is identified at the phone company's switching station and a line, or "tap," is run off the line to a listening device. The telephone conversations may also be recorded.

The U.S. Supreme Court, in the 1928 case of OLMSTEAD V. UNITED STATES, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944, held that the tapping of a telephone line did not violate the Fourth Amendment's prohibition against unlawful SEARCHES AND SEIZURES, so long as the police had not trespassed on the property of the person whose line was tapped. Justice LOUIS D. BRANDEIS argued in a dissenting opinion that the Court had employed an outdated mechanical and spatial approach to the FOURTH AMENDMENT and failed to consider the interests in privacy that the amendment was designed to protect.

For almost 40 years the Supreme Court maintained that wiretapping was permissible in the absence of a TRESPASS. When police did trespass in federal investigations, the evidence was excluded in federal court. The Supreme Court reversed course in 1967, with its decision in *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576. The Court abandoned the *Olmstead* approach of territorial trespass and adopted one based on the reasonable expectation of privacy of the victim of the wiretapping. Where an individual has an expectation of privacy, the government is required to obtain a warrant for wiretapping.

Congress responded by enacting provisions in the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.A. § 2510 et seq.) that established procedures for wiretapping. All wiretaps were banned except those approved by a court. Wiretaps were legally permissible for a designated list of offenses, if a court approved. A wiretap may last a maximum of 30 days and notice must be provided to the subject of the search within 90 days of any application or a successful interception. In 1986, Congress extended wiretapping protection to electronic mail in the Electronic Communications Privacy Act (ECPA), 8 U.S.C.A. § 2701 et seq. The law, also known as the Wiretap Act, makes it illegal to tap into private E-MAIL.

With the emergence of the INTERNET in the 1990s as a popular communications vehicle, law enforcement agencies concluded that it was necessary to conduct surveillance of E-mail, chat rooms, and Web pages in order to monitor illegal activities, such as the distribution of CHILD

**Authorized Intercepts of Communication in 2002**

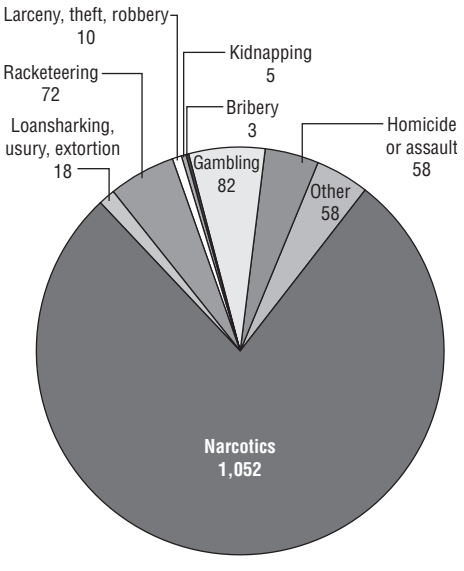


SOURCE: Administrative Office of the United States Courts, *Wiretap Report*, 2002.

PORNOGRAPHY and terrorist activities. In 2000, the FEDERAL BUREAU OF INVESTIGATION (FBI) announced the launch of an Internet diagnostic tool called "Carnivore." Carnivore can monitor E-mail writers on-line or record the contents of messages. It performs these tasks by capturing "packets" of information that may be lawfully intercepted. Groups that safeguard civil liberties expressed alarm at the loss of privacy posed by such potentially invasive technology.

Following the SEPTEMBER 11, 2001, TERRORIST ATTACKS, Congress broadened wiretapping rules for monitoring suspected terrorists and perpetrators of computer FRAUD and abuse through the USA PATRIOT ACT, Pub. L. No. 107-56, 115 Stat. 272 (2001). For example, the act expanded the use of traditional pen registers (a device to capture outgoing phone numbers from a specific line) and "trap and trace" devices (that capture the telephone numbers of incoming callers) to include both telephone and Internet communications as long as they exclude message content. These devices can be used without having to show that the telephone being monitored was used in communications with someone involved in TERRORISM or intelligence activities that may violate criminal laws.

In addition, the act broadened the provisions of the 1986 Wiretap Act that involve roving wiretaps. Roving wiretaps authorize law enforcement agents to monitor any telephone a suspect might use. Again, agents do not have to prove that the suspect is actually using the line. This means that if a suspect enters the private home of another person, the homeowner's telephone line can be tapped. The act does allow persons to file civil lawsuits if the federal government discloses information gained through surveillance and wiretapping powers.

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Pen Register; Search and Seizure; Telecommunications.

## ❖ WIRT, WILLIAM

William Wirt served as U.S. attorney general from 1817 to 1829, the longest tenure in U.S. history. Wirt is recognized as one of the most important holders of that office, as he increased its prestige, established administrative record keeping, and defined the functions and authority of the attorney general that have remained unchanged.

Wirt was born on November 8, 1772, in Bladensburg, Maryland. He was educated at private schools and for a time worked as a private tutor. Wirt studied law and became a member of the Virginia bar in 1792. Though he established a private practice and showed remarkable talent as a lawyer, he was drawn into Virginia politics. He served as clerk of the Virginia House of Delegates in 1800 and in 1802 was chancellor of the eastern district of Virginia. Wirt's political involvement led to friendships with several prominent Virginians, including THOMAS JEFFERSON, JAMES MADISON, and JAMES MONROE.

In 1807 President Jefferson appointed Wirt prosecuting attorney in the TREASON trial of AARON BURR. Though Burr was acquitted of all charges, Wirt had entered the national political arena. He continued to practice law, but he was also a Latin scholar and an author. In 1817 he published *Sketches of the Life and Character of Patrick Henry.*

In that same year President Monroe appointed Wirt attorney general. When Wirt entered his office for the first time he discovered that none of his eleven predecessors had left any books or records to document what they had done. Appalled at this lack of institutional memory, Wirt announced that he would keep a regular record of every official opinion he rendered for the use of his successors. This collection became known as the *Official Opinions of the Attorney General,* which has been maintained by every succeeding attorney general.

Wirt's most important contribution as attorney general was to define what activities his office could lawfully engage in and what advice it could give. Until Wirt's administration, the attorney general had routinely advised Congress and had advised EXECUTIVE BRANCH department heads in matters of policy. After reviewing the JUDICIARY ACT OF 1789, Wirt noted that the attorney general had no authority to advise Congress, and that the advice the attorney general could give to the president and department heads must be confined to matters of law. Therefore, Wirt ceased issuing opinions to Congress and only gave legal advice, policies that his successors have, with few deviations, honored.

During his long service, Wirt argued numerous cases before the U.S. Supreme Court, including the landmark cases of MCCULLOCH V. MARYLAND, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819) and GIBBONS V. OGDEN, 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824). In *McCulloch* the Court affirmed the power of Congress to charter a national bank and denied states the right to tax a federal instrumentality. In *Gibbons* the court upheld the right of the federal government to control matters of interstate commerce. The case involved the authority of a state to grant private individuals monopolies to operate steamboats in NAVIGABLE WATERS over which the federal government had authority. The Court held that the U.S. Constitution's COMMERCE CLAUSE empowered Congress to regulate interstate commerce, establishing a precedent that had far-reaching effects in the economic expansion of the nineteenth century.

*William Wirt.*
LIBRARY OF CONGRESS

Wirt served in both Monroe administrations and in the administration of President JOHN

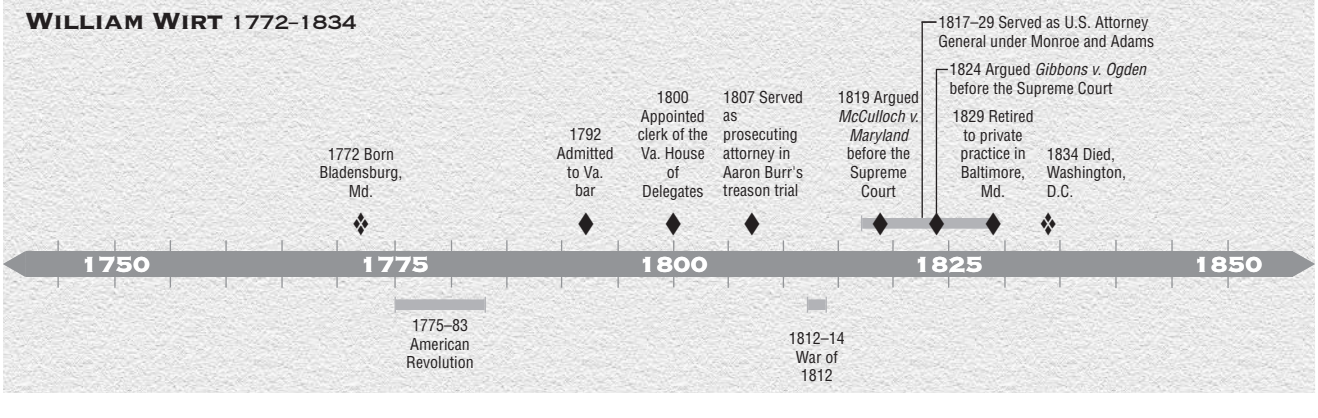

QUINCY ADAMS. He left office in 1829 and moved to Baltimore, where he practiced law. He died on February 18, 1834, in Washington, D.C.

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## ♦ WISDOM, JOHN MINOR

John Minor Wisdom, a judge of the U.S. Court of Appeals for the Fifth Circuit, was one of the most influential jurists of the CIVIL RIGHTS era. He was prominent among southern judges who endured political pressures and physical threats for enforcing BROWN V. BOARD OF EDUCATION and for making other rulings that advanced the fight for equality under the law. (*Brown v. Board of Education of Topeka, Kansas,* 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 [1954], was the landmark U.S. Supreme Court case that held racial SEGREGATION in public education to be against the law.)

Wisdom and his prominent colleagues on the Fifth Circuit court (Judges John R. Brown of Houston, Texas, Richard T. Rives of Montgomery, Alabama, and ELBERT PARR TUTTLE of Atlanta, Georgia) were known derisively as "The Four" by those who disapproved of their work. Under their gavels, JIM CROW LAWS were declared unconstitutional, African Americans were granted VOTING RIGHTS, RACIAL DISCRIMINATION in jury selection was curbed, and state COLLEGES AND UNIVERSITIES were desegregated. Though proud of his work, Wisdom was quick to point out that he was just one of many judges responsible for advancing the fight for civil rights in the old South. And in many ways, he was an unlikely individual to figure so prominently in the cause.

Born in New Orleans, Louisiana, on May 17, 1905, Wisdom was a product of the old South, and he grew up accustomed to the privileges and prejudices of the white aristocracy. His father, Mortimer Norton Wisdom, had been a pallbearer for General Robert E. Lee. His mother, Adelaide Labatt Wisdom, limited her son's youthful associations to people of his own social class and standing. It was not until Wisdom enrolled at Virginia's Washington and Lee University in 1921 that he was exposed to a more diverse cross section of the population and began to develop a broader view of the world. He received his bachelor of arts degree in 1925.

Wisdom entered the law school at Tulane University in 1925. He completed his studies in the spring of 1929 and was admitted to the Louisiana bar the same year. After law school, he joined several classmates to establish a New Orleans law practice. The firm of Wisdom, Stone, Pigman, and Benjamin endured in one variation or another for 30 years.

Wisdom established another enduring union on October 24, 1931, when he married Bonnie Stewart Mathews. They had three children.

By the late 1930s, Wisdom was combining careers in law and education. He was named adjunct professor of law at Tulane University law school in 1938 (a position he held until 1957). It was during this period that Wisdom began to see the importance of providing equal educational opportunities to all members of society.

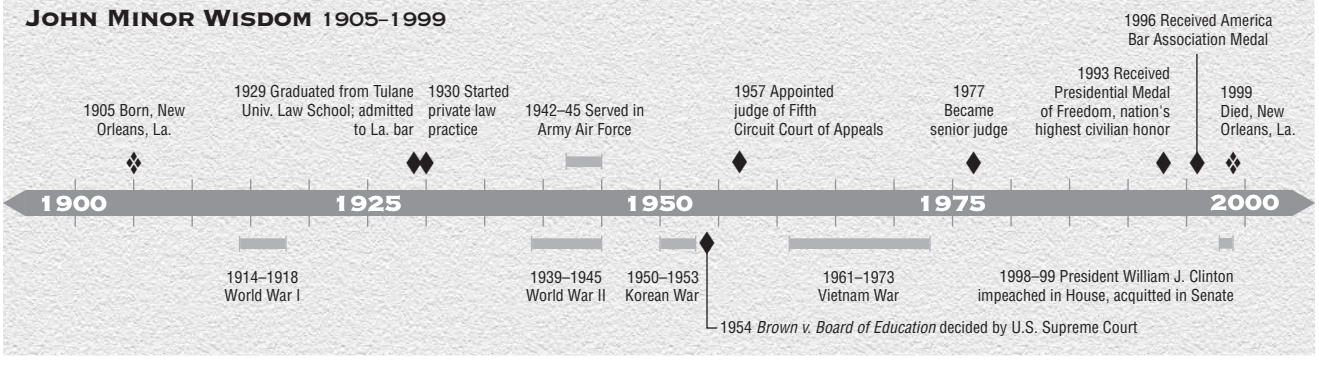

His views were affirmed during the WORLD WAR II years when he worked closely, for the first time, with poor and undereducated southern whites and blacks. Wisdom served in the U.S. Army Air Force from 1942 to 1946. Before the war's end, he had attained the rank of lieutenant colonel and been awarded the Legion of Merit.

After World War II, Wisdom returned to Louisiana and the practice of law. He also entered the political arena. By 1952 he was a member of the Republican National Committee for Louisiana and was sometimes called the man who made DWIGHT D. EISENHOWER president of the United States. At the 1952 Republican National Convention in Chicago, Wisdom led a fight to have Louisiana's Eisenhower delegates seated in place of those committed to Ohio Senator Robert A. Taft. Wisdom's success was the turning point in Eisenhower's bid for the nomination.

In 1954, Eisenhower named Wisdom to the President's Commission on Anti-Discrimination in Government Contracts. His work on the commission earned him national respect, and in 1957 he was appointed, again by Eisenhower, to the U.S. Court of Appeals for the Fifth Circuit. Wisdom served the court and the nation for more than 30 years, as a judge from 1957 to 1977, and then as a senior judge. Wisdom assumed senior, or semi-retired, status on January 15, 1977.

In his years on the bench Wisdom participated in deciding almost five thousand cases, signed one thousand published majority opinions, and wrote nearly as many unnumbered per curiams and unpublished opinions. Colleagues stated that his place in history was assured by his unique ability to clearly express the court's opinions. Many of Wisdom's opinions defined civil rights law in the United States. In *Meredith v. Fair,* 298 F.2d 696 (1962), Wisdom desegregated the University of Mississippi. In *United States v. Louisiana,* 225 F. Supp. 353 (E.D. La. 1963), he affirmed the duty of federal courts to protect federally guaranteed rights and eloquently discussed the DISFRANCHISEMENT of African Americans in Louisiana. And, in *Dombrowski v. Pfister,* 227 F. Supp. 556 (E.D. La. 1964), *rev'd,* 380 U.S. 479 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965), the U.S. Supreme Court upheld his powerful dissent and enjoined the state of Louisiana from using legislative and judicial processes to harass civil rights leaders with unwarranted prosecution.

History and the law have accorded landmark status to at least two of Wisdom's cases. In *United States v. Jefferson County Board of Education,* 372 F.2d 836; 380 F.2d 385 (en banc); *cert. denied,* 389 U.S. 840 (1967), he used AFFIRMATIVE ACTION to desegregate schools "lock, stock, and barrel." And, in *Local 189, United Papermakers and Paperworkers v. United States,* 416 F.2d 980 (1969), *cert. denied,* 397 U.S. 919 (1976), he used a "rightful place" theory to prohibit the awarding of jobs based on a racially discriminatory seniority system.

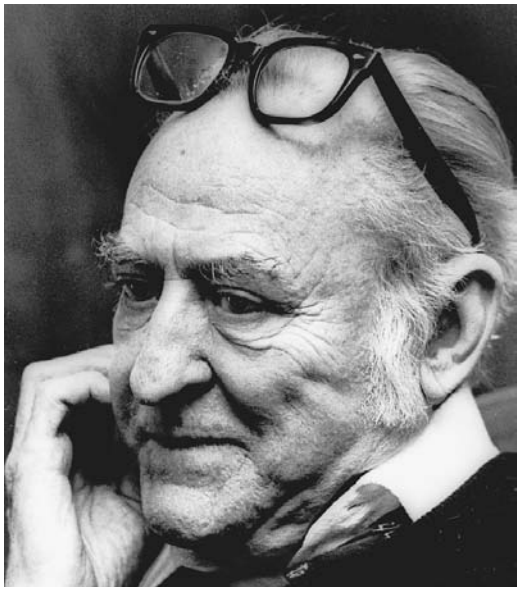

*John Minor Wisdom.*
AP/WIDE WORLD PHOTOS

Wisdom's expertise went beyond civil rights. He wrote landmark opinions in the fields of ADMIRALTY, antitrust, evidence, and LABOR LAW. He also wrote the majority opinion in the first appellate case to hold a manufacturer of insulation material liable for failing to warn workers of the dangers associated with asbestos (*Borel v. Fibreboard Products Corp.,* 493 F.2d 1076 [1973], *cert. denied,* 439 U.S. 1129).

In 1993, Wisdom was awarded the Presidential Medal of Freedom, the nation's highest civilian award, by President BILL CLINTON. In 1996, he received the AMERICAN BAR ASSOCIATION Medal, the highest honor awarded by the American Bar Association (ABA). Wisdom continued to sit on the Fifth Circuit until his death two days short of his 94th birthday on May 15, 1999, in New Orleans, Louisiana.

"TO AVOID CONFLICT WITH THE EQUAL PROTECTION CLAUSE, A CLASSIFICATION THAT DENIES A BENEFIT, CAUSES HARM, OR IMPOSES A BURDEN MUST NOT BE BASED ON RACE. IN THAT SENSE, THE CONSTITUTION IS COLOR BLIND. BUT THE CONSTITUTION IS COLOR CONSCIOUS TO PREVENT DISCRIMINATION BEING PERPETUATED AND TO UNDO THE EFFECTS OF PAST DISCRIMINATION. THE CRITERION IS THE RELEVANCY OF COLOR TO A LEGITIMATE GOVERNMENTAL PURPOSE."
—JOHN MINOR WISDOM

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## WITAN

*An Anglo-Saxon term that meant wise men, persons learned in the law; in particular, the king's advisers or members of his council.*

In England, between the sixth and tenth centuries, a person who advised an Anglo-Saxon king was called a *witan,* or wise man. A witan's basic duty was to respond when the king asked for advice on specific issues. A witan gave his advice in the Witenagemote, or assembly of wise men. This assembly was the forerunner of the English Parliament.

The Witenagemote was the great council of the Anglo-Saxons in England, comprising the aristocrats of the kingdom, along with bishops and other high ecclesiastical leaders. This council advised and aided the king in the general administration of government. The Witenagemote attested to the king's grants of land to churches or laypersons and consented to his proclamation of new laws or new statements of ancient customs. The council also assisted the king in dealing with rebels and persons suspected of disloyalty. The king determined both the composition of the council and its meeting times.

The Witenagemote generally met in the open air in or near some city or town. Members were notified by public notice or particular summons issued by the king's select council. When the throne was vacant, the body also met without notice to elect a new king.

After the Norman Conquest in 1066, the council was called the *commune concillium,* or common council of the realm. This was transformed into the Curia Regis, or King's Council, and by the late thirteenth century, it was called Parliament. The character of the institution also changed during this period. It became a court of last resort, especially for determining disputes between the king and his nobles and, ultimately, from all inferior tribunals.

CROSS-REFERENCES

English Law.

*In* Witherspoon v. Illinois, *the death sentence of William Witherspoon was reversed although his conviction stood. The Court ruled that the death sentence cannot be imposed by a jury that excluded people with conscientious scruples against capital punishment.*

AP/WIDE WORLD PHOTOS

## WITHERSPOON V. ILLINOIS

In the 1960s and 1970s, the U.S. Supreme Court reviewed many issues surrounding the constitutionality of CAPITAL PUNISHMENT. In *Witherspoon v. Illinois,* 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 776 (1968), the Court examined the practice of authorizing prosecutors in death penalty cases to exclude from the jury persons who were opposed to capital punishment. The Court held that states could not exclude persons who had "conscientious scruples" or who were generally against capital punishment.

In 1960 an Illinois jury convicted William C. Witherspoon of murder and sentenced him to death. Witherspoon challenged the constitutionality of both his conviction and his death sentence. His appeal was based on an Illinois statute that provided that in murder trials a prospective juror could be challenged for cause and removed from the jury panel if, upon examination, the prospective juror declared that she was opposed to, or had conscientious scruples against, capital punishment. Using this statute, the prosecution in Witherspoon's case removed almost half the prospective jurors during jury selection.

Witherspoon argued that the law unfairly deprived him of his right to a fair trial under the SIXTH and FOURTEENTH AMENDMENTS because the state had allowed to be seated only jurors who were in favor of capital punishment. After

the Illinois courts rejected his appeals, the U.S. Supreme Court agreed to decide whether a state could constitutionally inflict the death penalty pursuant to the verdict of a jury composed in this manner.

The Court reversed the state courts and agreed that the Illinois statute was unconstitutional. Justice POTTER STEWART, in his majority opinion, held that it cannot be assumed that a juror who describes himself as having conscientious principles against imposition of the death penalty or against its imposition in an appropriate case thereby states that he would never vote in favor of the death penalty or would not consider doing so in the case at hand. Unless the juror asserts unequivocally that he would automatically vote against the death penalty, irrespective of what the trial might reveal, it cannot be assumed that this is the juror's position.

Stewart said that the determination of whether to sentence a defendant to life imprisonment or capital punishment cannot be made by a panel intentionally structured to inflict the death penalty. In such a situation, the state crosses the boundary of neutrality. The Court declared that the maximum that can be required of jurors in a capital case is that they be amenable to considering all penalties provided by state law and not be irrevocably committed before trial to voting against the death penalty irrespective of the facts and circumstances that the proceeding might disclose.

The *Witherspoon* decision forced states to rewrite their laws concerning jury selection in capital punishment cases. A general opposition to capital punishment is an insufficient ground for challenging a prospective juror. The prosecutor must probe to determine whether the person's beliefs would deter her from reaching an impartial verdict as to the defendant's guilt, or whether the person would never vote to impose the death penalty. If a person's views on capital punishment would affect her determination of the case, the person may properly be removed from the jury.

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## WITHHOLDING TAX

*The amount legally deducted from an employee's wages or salary by the employer, who uses it to prepay the charges imposed by the government on the employee's yearly earnings.*

The federal INCOME TAX system is a "pay-as-you-go" system that requires wage earners to pay federal tax as they earn income. The federal government enforces this system through a withholding tax on wages and salary income. A taxpayer who does not have enough tax withheld may be subject to penalties for underpayment.

In 1942 the federal government instituted a one-time withholding tax as a revenue-raising device during WORLD WAR II. Withholding taxes are now a permanent method of collecting income taxes at the state and federal levels. Each pay period an employer is required to withhold tax from each employee's gross salary and send it to the INTERNAL REVENUE SERVICE (IRS) and to the state revenue collection agency, if the state has an income tax.

When a person is hired for a salaried job, the new employee must complete a federal W-4 form, which authorizes the employer to retain a certain amount of the employee's earnings to be forwarded to the government to satisfy the employee's federal income tax liability. The W-4 consists of a certificate showing the withholding allowances claimed by the employee and a worksheet in the form of an abbreviated tax return. The employee estimates her income, deductions, credits, and exemptions to determine how many withholding allowances to claim. The more allowances claimed, the less tax is taken out each pay period. The goal is to have the withheld taxes equal the yearly tax liability.

Taxpayers who underestimate the withholding tax needed to satisfy their tax liability may have to pay a penalty for underpayment. The IRS encourages taxpayers to review their financial situation periodically and file amended W-4 forms.

Backup withholding is a way of assuring that tax is paid on dividend and interest income. If a

taxpayer does not provide his SOCIAL SECURITY number to the payer of dividend or interest income, such as a bank, the institution must withhold a "backup" of 31 percent of each payment until the taxpayer provides the number.

## WITHIN THE STATUTE

*Encompassed by, or included under, the provisions and scope of a particular law.*

In the U.S. legal system, a person who is charged with violating a statute must have committed actions that are specifically addressed in the law. When a person's actions comport with the language of the law, the actions are said to be "within the statute."

Troublesome questions arise, however, when a statute is too general or not specific enough in providing information on the proscribed acts. For example, VAGRANCY laws were used to arrest and detain persons the police believed had or were about to commit crimes. A person could be arrested for having no permanent address or for moving "aimlessly" through the streets. In *Papachristou v. Jacksonville,* 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972), however, the U.S. Supreme Court ruled that a Florida vagrancy statute was unconstitutional because it was too vague to be understood. The Court emphasized that a person cannot avoid engaging in criminal conduct, if prior to engaging in it, he cannot determine that the conduct is forbidden by law.

In CRIMINAL LAW, the courts apply the rule of lenity to deal with ambiguities in criminal statutes. The general rule is that an AMBIGUITY in a criminal statute should be resolved in favor of the defendant. Therefore, a court will choose the more lenient interpretation in determining the punishment.

CROSS-REFERENCES

Void for Vagueness Doctrine.

## WITHOUT DAY

*A term used to describe a final ending or adjournment of a session of a legislature or a court; the English translation of the Latin phrase* sine die.

When a state legislature or Congress makes a final adjournment of a legislative session, the presiding officer typically ends the session by announcing to the body that "the house (or senate) stands adjourned, sine die." The use of the phrase sine die, or its English equivalent, without day, is more than a legal formality carried over from the COMMON LAW. The use of *without day* signifies finality and triggers constitutional requirements that the governor or president must meet if he wishes to sign legislation that has been passed in the last days of a legislative session.

For example, the president of the United States has ten days to sign or VETO a bill. If Congress adjourns without day before the ten days have expired, however, and the president has not signed the bill, it is said to have been subjected to a *pocket veto.* A pocket veto deprives Congress of the chance to override a formal veto. State governors have similar pocket veto powers.

In addition, once a legislature makes a final adjournment, it generally cannot call itself back into special session. In this situation the governor or president is authorized to call a special session of the legislature. The legislature, however, retains the right to adjourn the special session. If a legislature merely recesses for a holiday or vacation break, it may reconvene at its discretion.

In the modern legal system, without day has little importance as a legal formality. At one time it meant the final dismissal of a case. The Latin phrase *Quod eat sine die* ("that he go without day") was the old form of a judgment for the defendant; it had the effect of discharging the defendant from any further appearances in court.

## WITHOUT PREJUDICE

*Without any loss or waiver of rights or privileges.*

When a lawsuit is dismissed, the court may enter a judgment against the plaintiff with or without prejudice. When a lawsuit is dismissed *without prejudice,* it signifies that none of the rights or privileges of the individual involved are considered to be lost or waived. The same holds true when an admission is made or when a motion is denied without prejudice.

The inclusion of the term *without prejudice* in a judgment of dismissal ordinarily indicates the absence of a decision on the merits and leaves the parties free to litigate the matter in a subsequent action, as though the dismissed action had not been started. Therefore, a dismissal without prejudice makes it unnecessary for the court in which the subsequent action is brought to determine whether that action is based on the same cause as the original action,

or whether the identical parties are involved in the two actions.

The purpose and effect of the words *without prejudice* in a judgment, order, or decree dismissing a suit are to prohibit the defendant from using the doctrine of RES JUDICATA in any later action by the same plaintiff on the subject matter. The doctrine of res judicata (from the Latin, "a thing decided") is based on the importance of finality in the law. If a court decides a case, the subject of that case is firmly and finally decided between the persons involved in the suit, so no new lawsuit on the same subject may be brought by the persons involved. Therefore, the words *without prejudice* protect the plaintiff from a defendant's res judicata defense.

A court may also enter judgment *with prejudice,* however. This signifies that the court has made an adjudication on the merits of the case and a final disposition, barring the plaintiff from bringing a new lawsuit based on the same subject. If a new lawsuit is brought, a defendant can properly invoke res judicata as a defense, because a court will not relitigate a matter that has been fully heard before. Often a court will enter a judgment with prejudice if the plaintiff has shown bad faith, misled the court, or persisted in filing frivolous lawsuits.

## WITHOUT RECOURSE

*A phrase used by an endorser (a signer other than the original maker) of a negotiable instrument (for example, a check or promissory note) to mean that if payment of the instrument is refused, the endorser will not be responsible.*

An individual who endorses a check or promissory note using the phrase *without recourse* specifically declines to accept any responsibility for payment. By using this phrase, the endorser does not assume any responsibility by virtue of the endorsement alone and, in effect, becomes merely the assignor of the title to the paper.

A without recourse endorsement is governed by the laws of COMMERCIAL PAPER, which have been codified in Article 3 of the UNIFORM COMMERCIAL CODE (UCC). The UCC has been adopted wholly or in part by every state, establishing uniform rights of endorsers under UCC § 3-414(1).

A without recourse endorsement is a qualified endorsement and will be honored by the courts if certain requirements are met. Any words other than "without recourse" should clearly be of similar meaning. Because the payee's name is on the back of the note, he is presumed to be an unqualified endorser unless there are words that express a different intention. The denial of recourse against a prior endorser must be found in express words. An implied qualification, based on the circumstances surrounding the endorsement to a third party, will not be recognized by the courts. An assignment of a note is generally regarded as constituting an endorsement, and the mere fact that an instrument is assigned by express statement on the back does not make the signer a qualified endorser.

The qualification without recourse, or its equivalent, is limited to the immediate endorsement to which it applies. It may precede or follow the name of the endorser, but its proximity to the name should be such as to give a subsequent purchaser reasonable notice of the endorsement to which it applies.

A person might agree to accept a check without recourse if the person believes she could collect the money in question. Often the purchaser of such a note will acquire it at a substantial discount from the face value of the note, in recognition that the purchaser can only seek to collect the money from the original maker of note.

An example of a without recourse note is a personal check written by A, the maker, to B, the payee. B, in turn pays off a debt to C by endorsing the check and adding the without recourse phrase. If A's bank refuses to pay C the check amount because A has insufficient funds in his checking account, C cannot demand payment from B. C will have to attempt to collect the money from A.

## WITNESSES

*Individuals who provide evidence in legal proceedings before a tribunal. Persons who give testimony under oath in court, concerning what they have seen, heard, or otherwise observed.*

Legal proceedings, especially trials, depend on witnesses to present factual evidence to the fact finder, which may be a judge or a jury. Typically each party in a dispute has its own set of witnesses. All witnesses, however, must submit to cross-examination, which means being questioned by the opposing party.

### Attendance

Individuals who are called as witnesses have a public obligation to attend the court or legislative

tribunal to which they are summoned and to give testimony. Constitutional and statutory provisions provide that the parties to a civil lawsuit have a right to compel essential witnesses to appear. This is done through the service of legal process called a subpoena, which is issued by the court. The state is also entitled to compulsory process in any proceeding in which it has an interest, either civil or criminal. An individual accused of a crime has the right to compulsory process in order to obtain witnesses on his behalf. However, the right to compel witnesses does not ensure the actual attendance of the witnesses.

An individual who receives a subpoena is bound to obey it and appear in court. Once a witness appears in court, he may be forced to attend court until dismissed by the court or by the party who summoned him. A person who fails to appear and testify subject to a subpoena can be punished for CONTEMPT. In addition, the failure to appear may result in the potential witness being liable to the individual who summoned him for any damages that result from his nonappearance. Damages that result from a postponement of the trial because of the failure of a witness to attend can also be assessed. However, if it is determined that the testimony of the defaulting witness was not crucial, the individual who summoned the witness has no right to recover damages.

A witness who is not able to appear at trial may give testimony beforehand and have it recorded on videotape. The witness is examined and cross-examined by the parties and the tape is then shown at trial.

In a criminal trial, a witness whose testimony is crucial to either the defense or prosecution is called a material witness. In most states, a material witness may be required to post a bond guaranteeing his appearance. In cases where a bond cannot be issued, a material witness may be confined by the police until he testifies.

### Right to Compensation

Compensation for witnesses is governed by statute and is not designed to reward them for testifying. Its purpose is merely to pay their expenses while they are away from home or work. A witness must be in attendance in the court to be entitled to compensation, even in cases where he is not called upon to testify or proves to be incompetent to serve as a witness.

Witnesses who are subpoenaed are usually entitled to travel expenses. Compensation for voluntary attendance depends upon state law. Some statutes provide that a witness who attends voluntarily without being subpoenaed is entitled to a daily allowance and mileage, while other state laws provide only a daily allowance, or no compensation at all.

### Competency

The general rule is that a person is competent to testify if he is able to perceive, remember, and communicate, and believes that he is morally obligated to tell the truth. Legislatures have the authority to set a standard of competency for witnesses in all cases. In the case of young children, the court must assess whether the child is competent to testify.

### Expert Witnesses

An expert witness is a person who, by reason of education or specialized experience, is allowed to testify at a trial not just about the facts of the case but also about the professional conclusions he draws from the facts. Medical, scientific, and technical experts are commonly used, but other types of experts can be used. For example, in an employment discrimination case, an economist might serve as an expert witness, providing professional testimony about discriminatory wage patterns in the affected industry. Experts witnesses generally charge a fee for their services.

### Relationship to a Party

Generally a witness is not disqualified merely because he is related to one of the parties by blood or marriage. Such a relationship only affects the credibility, not the competency, of the witness.

At COMMON LAW, husbands and wives were considered to be incompetent as witnesses for or against each other in civil or criminal proceedings. This consideration was based on the legal presumption that the testifying spouse was too strongly interested in the outcome of the proceedings to testify truthfully. Most states have modified the common law rule so that either spouse can testify for or against the other in civil cases. In criminal cases, one spouse can ordinarily offer testimony in favor of the other. A spouse can voluntarily testify against the other in federal prosecutions. In addition, a spouse who is a victim of the other spouse's criminal act may testify.

### Privileged Communications

As a matter of public policy, certain relationships are held to be confidential and certain

communications are privileged against disclosure by a witness. A witness cannot refuse to testify about a matter disclosed in a private conversation in confidence and in reliance upon the witness's promise of secrecy unless the law recognizes it as a confidential communication. Certain communications arising between an attorney and client, a HUSBAND AND WIFE, priest and penintent, and a physician and patient are privileged against disclosure by a witness.

An individual who refuses to either provide testimony or to answer proper questions when examined before a court is liable for contempt. A mere evasive or noncommittal answer does not, however, constitute a refusal to answer that is punishable by contempt, at least when the court does not direct the witness to be more specific in his answers. A witness cannot be penalized for refusing to answer questions when the answers would violate his PRIVILEGE AGAINST SELF-INCRIMINATION under the FIFTH AMENDMENT to the U.S. Constitution.

### Credibility

A credible witness is an individual whose statements are reasonable and believable. Courts are reluctant to impute perjury (lying under oath) to an apparently credible witness because a witness is, in general, presumed to speak the truth.

Anything that may shed light on the accuracy, truthfulness, and sincerity of a witness can be brought out by the parties in a case. In particular, a party has the right in either a civil or criminal case to introduce evidence attacking the credibility of a witness for his adversary. The term *to impeach a witness* means to question the individual's truthfulness by offering evidence that tends to show that the witness should not be believed. In addition, a party has the right to confront witnesses and to cross-examine witnesses who testify in a criminal case. Ultimately, however, the fact finder must decide how much credit should be given to a witness's testimony.

CROSS-REFERENCES

Attorney-Client Privilege; Hearsay; Husband and Wife; Marital Communications Privilege; Privileged Communication; Scientific Evidence; Sexual Abuse "Child Testimony in Day Care Center Sexual Abuse Cases" (In Focus); Shield Laws.

## ❖ WOLCOTT, ALEXANDER

President James Madison's appointment of Alexander Wolcott to the U.S. Supreme Court was a tribute to Wolcott's political loyalty, not his legal acumen. Nominated by Madison on February 4, 1811, Wolcott was a well-connected Republican whom Federalists and most historians regarded as unqualified for the High Court. Unable to win support even among fellow Republicans, Wolcott saw his confirmation rejected by the U.S. Senate, 24–9.

Wolcott was born in Windsor, Connecticut, on September 15, 1758, to Dr. Alexander Wolcott and Mary Richards Wolcott. After attending Yale College, he studied law and eventually practiced in Massachusetts and Connecticut. Wolcott married Frances Burbank in 1785 and settled in Middletown, Connecticut, where he became a port customs collector and an influential Republican.

Wolcott was appointed to the U.S. Supreme Court in 1811 to fill a vacancy left by the death of Associate Justice WILLIAM CUSHING. He was not Madison's first choice. Before Wolcott, Madison had nominated former U.S. attorney general LEVI LINCOLN. Lincoln refused the honor, even after winning confirmation by the U.S. Senate. Madison then turned to Wolcott, primarily for political reasons. Although Wolcott was a recognized leader among Republi-

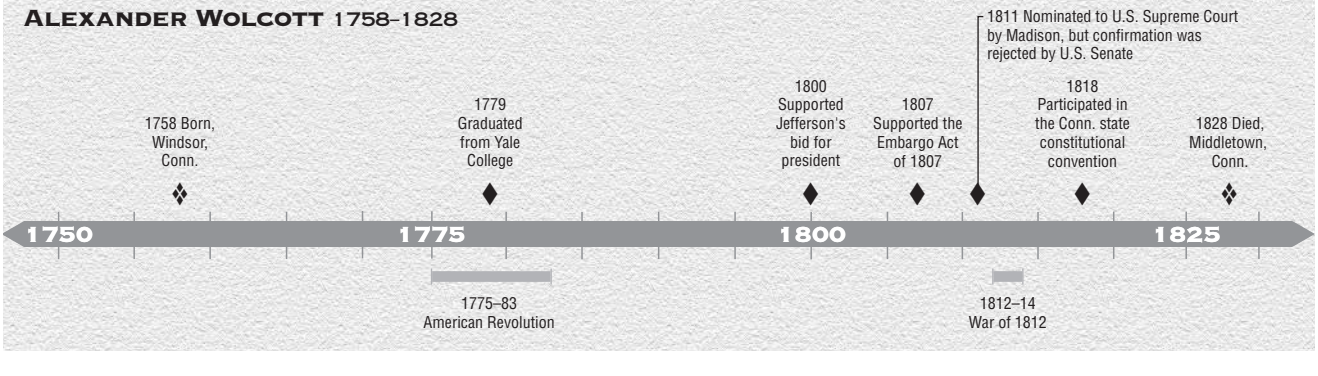

cans, few people believed he had the professional ability to serve on the U.S. Supreme Court. Lincoln supported Wolcott, but Federalists condemned his appointment, calling Wolcott depraved and his nomination abominable.

Opposition to the Connecticut customs official was unusually strong because of his public support of the EMBARGO ACT of 1807. The act, signed by President THOMAS JEFFERSON, prevented goods from England, France, and other countries from entering U.S. ports. The law was extremely unpopular with U.S. merchants and farmers, whose profits were diminished by the reduced trade. Wolcott's endorsement of the embargo, as well as his undeniable lack of judicial talent, doomed his nomination.

After Wolcott's rejection by the U.S. Senate, Madison appointed JOHN QUINCY ADAMS to serve on the Court. Adams, later the nation's sixth president, also turned down the seat, despite a unanimous Senate confirmation. The position eventually went to JOSEPH STORY, of Massachusetts, who at age 32 became the youngest person in U.S. history to sit on the high court.

After the confirmation defeat, Wolcott continued his political career, participating in the Connecticut state constitutional convention of 1818. At the convention, Wolcott sparked debate by supporting the expulsion of any judge who declared a legislative act unconstitutional. He also favored limitations on JUDICIAL REVIEW, the U.S. Supreme Court's power to interpret laws.

Wolcott died in Middletown, Connecticut, on June 26, 1828.

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## WOMEN'S RIGHTS

*The effort to secure equal rights for women and to remove gender discrimination from laws, institutions, and behavioral patterns.*

The women's rights movement began in the nineteenth century with the demand by some women reformers for the right to vote, known as suffrage, and for the same legal rights as men. Though the vote was secured for women by the NINETEENTH AMENDMENT to the U.S. Constitution in 1920, most of the gains women have made in achieving legal equality and ending gender discrimination have come since the 1960s. CIVIL RIGHTS legislation of that era was primarily focused on ensuring that African Americans and other racial minorities secured EQUAL PROTECTION of the laws. However, the inclusion of sex as a protected category under the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000e et seq.) gave women a powerful legal tool to end SEX DISCRIMINATION and to erase cultural stereotypes about females.

The modern women's rights movement began in the 1960s and gained momentum with the development of the scholarly field of FEMINIST JURISPRUDENCE in the 1970s. The quest for women's rights has led to legal challenges in the areas of employment, domestic relations, reproductive rights, education, and CRIMINAL LAW. Although the women's rights movement failed to secure ratification of the EQUAL RIGHTS AMENDMENT (ERA), the courts have generally been receptive to claims that demand recognition of rights under the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT.

### Nineteenth Century Women's Rights Movement

The effort to secure women's rights began at a convention in Seneca Falls, New York, in 1848. A group of women and men drafted and approved the Declaration of Sentiments, an impassioned demand for equal rights for women, including the right to vote. The declaration was modeled after the language and structure of the Declaration of Independence of 1776. Many of those gathered at Seneca Falls, including early women's rights leaders SUSAN B. ANTHONY and ELIZABETH CADY STANTON, had been active in the abolitionist movement, seeking an end to SLAVERY. However, these women realized that they were second-class citizens, unable to vote and possessing few legal rights, especially if they were married. Some leaders, like LUCY STONE, saw parallels between women and slaves: both were expected to be passive, cooperative, and obedient. In addition, the legal status of both slaves and women was unequal to that of white men.

After the Civil War ended in 1865, many of these reformers fully committed their energies to gaining women's suffrage. Stanton and Anthony established the National Woman Suffrage Association (NWSA) that sought an amendment to the U.S. Constitution similar to

# The Campaign to Defeat the ERA

After a fifty-year struggle, in March 1972 Congress approved the **EQUAL RIGHTS AMENDMENT** (ERA), a move that appeared to pave the way for the quick and easy adoption of the amendment by the states. Under the Constitution, thirty-eight states are required for ratification, and within a year of congressional approval, thirty states had ratified the amendment. At this point, however, a concerted opposition campaign stopped the momentum for the ERA dead in its tracks.

The most intense opposition to the ERA came from conservative religious and political organizations, including the right-wing John Birch Society and STOP ERA, a group led by conservative firebrand Phyllis S. Schlafly. Supporters of the ERA had cast it as mainly a tool to improve the economic position of women. Opponents, however, saw the amendment as a means of undermining traditional cultural values, especially those concerned with the family and the role of women in U.S. society. The U.S. Supreme Court's decision legalizing **ABORTION**, **ROE V. WADE**, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), also affected the ratification struggle, as the emerging right-to-life movement saw the ERA as an additional legal basis for a woman's right to an abortion.

During the 1970s and early 1980s, fierce **LOBBYING** took place in state legislatures that were considering the ERA. Opponents pointed out that during the U.S. Senate debate on the ERA, a host of amendments that would have restricted the reach of the amendment were defeated. These included prohibitions against drafting women into the military and allowing women to serve in combat. The defeat of other amendments to the ERA led opponents to claim that women would lose the right to **CHILD SUPPORT** and certain special privileges and exemptions based in state and federal law. Opponents also warned that the passage of the ERA would lead to unisex public toilet facilities and the **ABOLITION** of traditionally gender-based segregated facilities. Finally, many opponents saw the ERA as a means to remove criminal laws dealing with homosexual acts.

Although the deadline for ratification was extended for thirty months, ERA supporters were never able to gain the additional states needed for ratification.

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the FIFTEENTH AMENDMENT, which gave nonwhite men the right to vote. In 1872, Anthony was prosecuted for attempting to vote in the presidential election. Stone, on the other hand, helped form the American Woman Suffrage Association (AWSA). AWSA worked for women's suffrage on a state by state basis, seeking amendments to state constitutions.

The U.S. Supreme Court was hostile to women's suffrage. In *Minor v. Happersett*, 88 U.S. 162, 22 L. Ed. 627 (1875), the Court rejected an attempt by a woman to cast a ballot in a Missouri election. The Court stated that the "Constitution of the United States does not confer the right of suffrage upon any one." In addition, the Court said, "Women were excluded from suffrage in nearly all the States by the express provision of their constitutions and laws." In essence, the Court relied on past exclusions to justify current exclusions, concluding that because women had never been allowed to vote, they could continue to be excluded.

The attitude of the Court in *Minor* was foreshadowed three years earlier in the concurring opinion of Justice JOSEPH P. BRADLEY in *Bradwell v. Illinois*, 83 U.S. 130, 21 L. Ed. 442 (1872). Bradley supported the Illinois Supreme Court's denial of Myra Bradwell's application to practice law in the state. Bradley articulated the widely held view that the "natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." He further concluded that the "paramount destiny and mission of

woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

By the late nineteenth century, LOBBYING of state legislatures by AWSA and other suffrage supporters began to bear fruit. A few states changed their statutes to permit female suffrage. By 1912, nine states had extended the franchise to include women. In 1918, President WOODROW WILSON endorsed women's suffrage, and Congress soon adopted a constitutional amendment granting women the right to vote and submitting the amendment to the states for ratification. In 1920, the Nineteenth Amendment was added to the Constitution, immediately doubling the potential electorate.

### Domestic Relations in the Nineteenth Century

The legal inequality that Lucy Stone and other women's rights leaders argued against was evident in the relationship of HUSBAND AND WIFE. Under English COMMON LAW, which was adopted by the states after independence, the identity of the wife was merged into that of the husband; he was a legal person but she was not. Upon marriage, he received all her PERSONAL PROPERTY, and managed all property owned by her. In return, the husband was obliged to support his wife and children. A married woman, therefore, could not sign a contract without the signature of her husband.

In a society that had no government WELFARE system, a wife's property could be squandered by a profligate or drunken husband, leaving her without financial means if the husband died or abandoned her. By the 1850s, women's rights supporters convinced many state legislatures to pass Married Women's Separate Property Acts. These acts gave women the legal right to retain ownership and control of property they brought to the marriage.

Women also secured the right to have custody of their children after a DIVORCE. Traditionally, fathers retained custody of their children. This tradition weakened in the nineteenth century, as judges fashioned two doctrines governing CHILD CUSTODY. The "best-interest-of-the-child" doctrine balanced the new right of the mother to have custody of the child against the assessment of the needs of the child. The "tender years" doctrine arose after the Civil War, giving mothers a presumptive right to their young children.

### Reproductive Rights in the Nineteenth Century

The fertility rate of white women declined steadily during the nineteenth century. In part this was the result of using BIRTH CONTROL and ABORTION to control family size. By the 1870s, a woman's right to make decisions about reproduction was restricted by federal and state laws. The most famous was the federal COMSTOCK LAW OF 1873, which criminalized the transmission and receipt of "obscene," "lewd," or "lascivious" publications through the U.S. mail. The law specified that materials designed, adapted, or intended "for preventing conception or producing abortion" were included in the list of banned items. Some states passed laws banning the use of contraceptives.

A woman's opportunity to have an abortion was outlawed by the states during the latter part of the nineteenth century. ABORTIONS, which increased markedly in the 1850s and 1860s, especially among middle-class white women, had been legal until the fetus "quickened," or moved inside the uterus. The AMERICAN MEDICAL ASSOCIATION (AMA) and religious groups led the successful move to have state legislatures impose criminal penalties on persons performing abortions. In some states, women who had abortions could also be held criminally liable.

### The Modern Women's Rights Movement

For many decades of the twentieth century, supporters of women's rights had little success in legislatures or in the courts. Gender inequality meant that women could legally be discriminated against in employment, education, and other important areas of everyday life. The CIVIL RIGHTS MOVEMENT of the 1960s drew the support of many college-educated women, much like the women who supported the abolitionist cause a little more than a hundred years before. Like their predecessors, these civil rights workers realized that discrimination based on race existed side by side with discrimination based on gender. The result was the birth of the modern feminist movement and the quest for women's rights.

### Legislation

Title VII of the Civil Rights Act of 1964 was a major step forward for women's rights. Title VII prohibits employment discrimination based on sex, giving women the ability to challenge the actions of employers or potential employers.

The Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C.A. § 2000e(k), prohibits discrimination against employees on the basis of pregnancy and childbirth with respect to employment and benefits. The Equal Credit Opportunity Act, 15 U.S.C.A. § 1691, prohibits discrimination in the extension of credit on the basis of sex or marital status. Title IX of the Education Amendments of 1972, 20 U.S.C.A. §§ 1681–1686, prohibits sex discrimination in educational institutions receiving federal financial assistance, and covers exclusion on the basis of sex from noncontact team sports. Title IX revolutionized women's collegiate athletics, forcing COLLEGES AND UNIVERSITIES to fund women's athletics at a level comparable to men's athletics.

### The Equal Rights Amendment

The Equal Rights Amendment was the central goal of the women's rights movement in the 1970s. Congress passed the ERA and sent it to the states for ratification on March 22, 1972. The operative language of the ERA stated, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." The effect of the amendment would have been limited to the actions of any government or government official, acting in his official capacity. In addition to its symbolic effect, the ERA would have shifted the BURDEN OF PROOF in litigation alleging discrimination from the person making the complaint to the public officials who were denying that the discrimination had occurred. Such an effect would have been significant, because the party with the responsibility for carrying the burden of proof must do so successfully or else lose the litigation.

Congress initially required the ERA to be ratified by three-fourths of the states (38 states) seven years from the time Congress sent the amendment to the states. By 1978, 35 of the 38 states had ratified the amendment. Proponents of the ERA secured an extension of the ratification deadline to June 30, 1982. A determined effort by conservative groups opposed to the ERA prevented any additional states from ratifying the amendment by the 1982 deadline. However, some states have amended their constitutions to include an equal rights amendment.

### Intermediate Judicial Scrutiny

Without the Equal Rights Amendment, women's rights supporters faced a more difficult task in convincing the courts to set aside state laws and policies that perpetuated inequality and sex discrimination. The main constitutional tool for litigating women's rights cases has been the Equal Protection Clause of the Fourteenth Amendment. A key issue in equal protection analysis by the courts is what standard of judicial scrutiny to apply to the challenged legislation. Since the 1970s, the Supreme Court has applied "heightened" or "intermediate" judicial scrutiny to cases involving matters of discrimination based on sex.

In 1971, the Supreme Court, in *Reed v. Reed,* 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225, extended the application of the Equal Protection Clause of the Fourteenth Amendment to gender-based discrimination. Women's rights supporters sought to have the Court include sex as a "suspect classification." The SUSPECT CLASSIFICATION doctrine holds that laws classifying people according to race, ethnicity, and religion are inherently suspect and are subject to the STRICT SCRUTINY test of JUDICIAL REVIEW. Strict scrutiny forces the state to provide a compelling state interest for the challenged law and demonstrate that the law has been narrowly tailored to achieve its purpose. If a suspect classification is not involved, the Court will apply the RATIONAL BASIS TEST, which requires the state to provide any reasonable ground for the legislation. Under strict scrutiny, the government has a difficult burden to meet, while under rational basis, most laws will be upheld.

The Supreme Court has refused to make sex a suspect classification, but it did not impose the rational basis test on matters involving sex discrimination. Instead, the Court developed the intermediate or heightened scrutiny test. As articulated in *Craig v. Boren,* 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), "classifications by gender must serve *important* governmental objectives and must *be substantially related* to achievement of those objectives." Thus, intermediate scrutiny lies between strict scrutiny and rational basis.

The Supreme Court has sustained numerous challenges to gender-based discrimination, thereby mandating equal rights under the law. It has established the right of equality in laws dealing with survivors' benefits (*Weinberger v. Wiesenfeld,* 420 U.S. 636, 95 S. Ct. 1225, 43 L. Ed. 2d 514 [1975]), ALIMONY (*Orr v. Orr,* 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 [1979]), sex-based mortality tables (*City of Los Angeles*

*Department of Water and Power v. Manhart,* 435 U.S. 702, 98 S. Ct. 1370, 55 L. Ed. 2d 267 [1978]), and pensions (*Arizona Governing Committee v. Norris,* 463 U.S. 1073, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 [1983]).

Nevertheless, the Court has upheld laws that apply sex-based distinctions. In *Michael M. v. Superior Court,* 450 U.S. 464, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981), the Court upheld a STATUTORY RAPE law that set different ages of consent for females and males. The Court also upheld, in ROSTKER V. GOLDBERG, 453 U.S. 57, 101 S. Ct. 2646, 69 L. Ed. 2d 478 (1981), the Military Selective Service Act (50 U.S.C.A. App. § 451 et seq.), passed by Congress in 1980, though only men are required to register.

The Court has granted women equal rights to attend publicly funded colleges and universities that have traditionally enrolled only men. In UNITED STATES V. VIRGINIA, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996), the Court ruled that the Virginia Military Institute (VMI), a publicly funded military college, must end its all-male enrollment policy and admit women. According to the Court, the all-male policy violated the Equal Protection Clause of the Fourteenth Amendment.

### Reproductive Rights

The reproductive rights of women were recognized by the Supreme Court in the 1960s and 1970s, overturning one hundred years of legislation that restricted birth control and banned legal abortions. In the 1980s and 1990s, however, the Court retreated, allowing states to place restrictions on abortion.

In GRISWOLD V. STATE OF CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), the Court struck down a Connecticut law that made the sale and possession of birth control devices to married couples a misdemeanor. The law also prohibited anyone from assisting, abetting, or counseling another in the use of birth control devices. In *Griswold,* the Court announced that the Constitution contained a general, independent right of privacy.

Seven years later, in *Eisenstadt v. Baird,* 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972), the Court struck down a Massachusetts law that banned the distribution of birth control devices. In this case, the Court established that the right of privacy is an individual right, not a right enjoyed only by married couples.

These two cases paved the way for ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), which struck down a Texas law that banned abortions. Writing for the majority, Justice HARRY A. BLACKMUN concluded that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." More importantly, he stated that the right of privacy is a fundamental right. This meant that the state of Texas had to meet the strict scrutiny test of constitutional review. The Court held that Texas' interest in preventing abortion did not become compelling until that point in pregnancy when the fetus becomes "viable" (capable of "meaningful life outside the mother's womb"). Beyond the point of viability, the Court held that the state may prohibit abortion, except in cases where it is necessary to preserve the life or health of the mother.

The *Roe* decision provided women with the right to continue or terminate a pregnancy, at least up to the point of viability. However, by the 1980s, a more conservative Supreme Court began upholding state laws that placed restrictions on this right. In WEBSTER V. REPRODUCTIVE HEALTH SERVICES, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989), the Court upheld a Missouri law that forbids state employees from performing or assisting in abortions, or counseling women to have abortions. It also prohibited the use of state facilities for these purposes and required all doctors who would perform abortions to conduct viability tests on fetuses at or beyond 20 weeks' gestation. Though it appeared that the Court might overturn *Roe* in *Planned Parenthood v. Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), it reaffirmed the essential holding of *Roe* that the constitutional right of privacy is broad enough to include a woman's decision to terminate her pregnancy.

### Domestic Violence

The right of women to be free from DOMESTIC VIOLENCE has drawn increasing concern and support since the 1970s. As a result, the issue of spousal abuse, in which most of the victims are women, has led to changes in state and federal law. For example, many states have repealed laws that prevented a wife from filing a marital rape charge against her husband.

In addition, most court systems have attempted to be more consistent in enforcing and prosecuting these toughened domestic violence laws. For example, a spouse who has been

attacked or harassed by a marital partner may obtain an order for protection, which prohibits the aggressor from contacting the victim. The federal VIOLENCE AGAINST WOMEN ACT (VWA), passed in 1994 (108 Stat. 1796, 1902), sought to ensure that orders for protection are given FULL FAITH AND CREDIT in every state, not just in the state where the order was made. Persons who commit domestic abuse are banned from possessing a firearm and anyone facing a RESTRAINING ORDER for domestic abuse is prohibited from possessing a firearm. In addition, the law established a federal CAUSE OF ACTION for gender-motivated violence, which means that victims of gender-motivated violence were allowed to bring a civil suit for damages or equitable relief in federal or state court.

However, the Supreme Court, in *Brzonkala v Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), struck down this section of the act (42 USC section 13981). The Court held that Congress did not have the authority to enact the section under either the COMMERCE CLAUSE or the Fourteenth Amendment, which had been identified by Congress as the sources for its authority. The VWA provision had nothing to do with interstate commerce or any type of economic enterprise. In addition, the Fourteenth Amendment could not sustain this section of the VWA because the amendment only applies to the actions of state governments, not private persons. The Court concluded that the suppression of violent crime and the "vindication of its victims" had, in its view, always been the responsibility of state governments.

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## ♦ WOODBURY, LEVI

Levi Woodbury served on the U.S. Supreme Court as an associate justice from 1845 to 1851. Woodbury's career encompassed a range of positions in state and federal government. By the time of his nomination by President JAMES K. POLK, he had served as a state judge, governor, U.S. senator, and secretary of both the U.S. Navy and Treasury. A lifelong advocate of STATES' RIGHTS, this position guided him throughout his brief tenure on the Court. He rarely stood out except in the occasional instance when he dissented. A proponent of SLAVERY, he worried about the Court's potential for exacerbating national tensions over the volatile issue.

Woodbury was born on December 22, 1789, in Francestown, New Hampshire. He graduated from Dartmouth College in 1809 and then studied at the LITCHFIELD LAW SCHOOL. After his admission to the New Hampshire bar in 1812, he began practicing law while gradually preparing himself for politics. In 1816, he served as clerk of the state senate, and in 1817 he entered the judiciary as associate justice of the New Hampshire Superior Court.

"I CARRY WITH ME, AS A CONTROLLING PRINCIPLE, THE PROPOSITION THAT STATE POWERS, STATE RIGHTS, AND STATE DECISIONS ARE TO BE UPHELD WHEN THE OBJECTION TO THEM IS NOT CLEAR."
—LEVI WOODBURY

Woodbury was passionate about states' rights, the cause of the Jeffersonian Republicans. His marriage in 1819 to Elizabeth Clapp, the daughter of a wealthy merchant, helped to advance his aspirations, and in 1823 he won election as governor of New Hampshire. In 1825, he became speaker of the state House of Representatives and then served two terms as a U.S. senator, from 1825 to 1831 and from 1841 to 1845. During the interim, he served twice in the cabinet of President ANDREW JACKSON: first as U.S. secretary of the Navy (1831–1834) and then as U.S. secretary of the Treasury (1834–1841), a position he also held for the first four years of Martin Van Buren's administration.

In 1845, Polk chose Woodbury to fill the vacancy left by the death of Justice JOSEPH STORY. The Court was led by Chief Justice ROGER BROOKE TANEY, whom Woodbury often joined in decisions. Notably, he generally agreed with the majority on the Taney Court in its reading of the U.S. Constitution's Contract Clause (Article I, Section 10, Clause 1). The Contract Clause, which bars the states from passing laws that impair the obligations of contracts, was an important subject of constitutional interpretation during the era, and the Court invoked it in

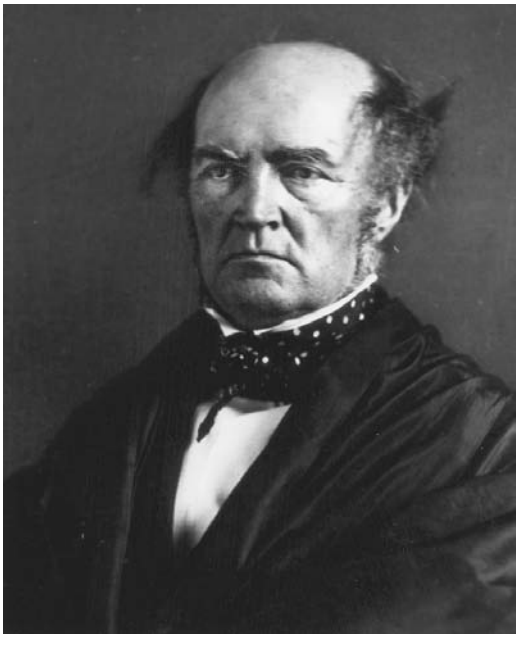

*Levi Woodbury.*
ARCHIVE PHOTOS, INC.

order to limit the power of states to regulate business and economic matters.

Woodbury left no landmark opinions. However, he occasionally dissented when he thought the Court was trampling the rights of states: He dissented from the Court's decisions to extend the boundaries of federal jurisdiction over national waters and, in the so-called *Passenger Cases* of 1849, to strike down state laws that provided for taxing immigrants upon their arrival.

Woodbury died on September 4, 1851, in Portsmouth, New Hampshire.

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## WOODS AND FORESTS

*A comprehensive term for a large collection of trees in their natural setting and the property on which they stand.*

State and federal laws govern the harvesting, reforestation, and other uses of woods and forests. The federal government maintains a system of national forests under the direction of the Forest Service, and most states also have forested land set aside as reserves.

### State Regulation

A state may properly compel and encourage private owners to participate in programs for the reforestation of land. It can mandate that private property owners who are engaged in commercial lumbering operations provide for reforesting by leaving a certain number of trees for reseeding purposes, or by restocking the area with seedlings. The property owner's logging permit can be granted with the condition that he participate in the reforestation program.

A state can also give its forestry department the authority to arrange for the planting of roadside trees and to regulate the cutting and trimming of trees along the highways. In addition, various state statutes have been enacted to provide for the nurture and protection of shade and ornamental trees on public streets and highways. These statutes are based on a state's POLICE POWER, which is to be used to promote the GENERAL WELFARE of its citizens.

State laws require precautions to be taken against forest fires. The state can prevent property owners from setting fires during the summer without permission, or it can authorize a state forester to determine whether an owner of forest land has provided sufficient protection against fire. During drought periods, when the fire danger is increased, the public

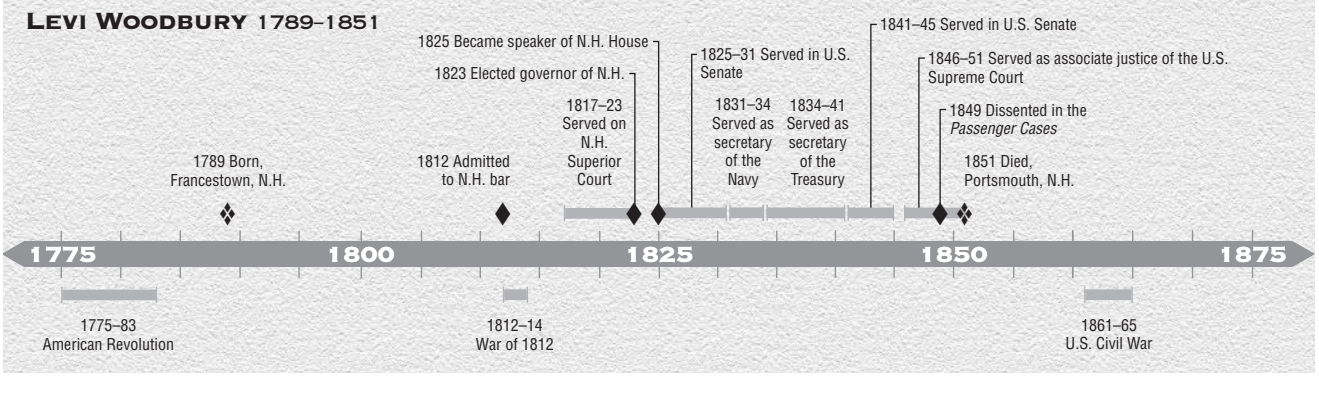

may be prohibited from entering forests and woodlands.

### National and State Forests

Since the early twentieth century it has been federal policy to reserve federally owned wooded areas as national forests. The goal is to improve and protect these areas so they can provide timber to be used by the public. Congress has the authority to provide for the development and maintenance of national forests and to acquire land for such purposes. Federal laws and regulations concerning national forests and their protection are paramount and PREEMPT conflicting state laws. The Forest Service, which is a branch of the AGRICULTURE DEPARTMENT, manages and regulates national forests and grasslands.

When a national forest is created, the reserved land is no longer subject to use for private purposes, except according to applicable statutes and regulations. The Forest Service can, therefore, issue permits for the occupancy of and the cutting of timber within national forests.

The granting of logging rights to private companies has proved controversial since the mid-1960s, when the practice of clearcutting was introduced. Clearcutting is a method of harvesting and regenerating timber in which all trees are cleared from a site and a new, even-aged stand of timber is grown. Many conservation and citizen groups object to clearcutting in the national forests, citing soil and water degradation, unsightly landscapes, over-harvesting, destruction of diversity of plants and animals, and other damages and abuses. Clearcutting accounted for sixty-three percent of the national forest area harvested between 1984 and 1994. Beginning in 1992, however, the Forest Service modified its policies to reduce clearcutting.

A portion of the proceeds from the use of national forests is given to the state in which the forest is located. The funds are to be spent for the benefit of public schools and roads in the counties that encompass the forest.

Generally a state can create forest reserves when they are reasonably necessary to promote the public WELFARE. A state can also levy taxes for the support of such forests.

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Environmental Law.

## ♦ WOODS, WILLIAM BURNHAM

William Burnham Woods served on the U.S. Supreme Court as an associate justice from 1881 to 1887. Woods's legal career led him into politics in his native Ohio, where he was a mayor and a member of the Ohio General Assembly before the U.S. CIVIL WAR. In the war, he fought on the side of the Union as a commander, and afterward he moved to Alabama where he began a judicial career in the late 1860s. President RUTHERFORD B. HAYES appointed Woods to the U.S. Supreme Court, where his conservative philosophy generally favored STATES' RIGHTS over federal power.

Born on August 3, 1824, in Newark, Ohio, Woods was the son of a farmer. He attended Western Reserve College, graduated from Yale University in 1845, and was admitted to the Ohio bar in 1847. Over the next fourteen years, he practiced law while involving himself in the state's DEMOCRATIC PARTY. He mounted a successful campaign for the mayoralty of Newark in 1856, and twice won election to the Ohio General Assembly where he served from 1857 to 1861.

When the Civil War began, Woods volunteered for an Ohio regiment. He fought for the Union in several battles, including Shiloh and Vicksburg, and gradually rose through the ranks. By the time the war was drawing to a close, he was a commander under General William T. Sherman. Woods led Sherman's troops in the brutal march to the sea in Georgia that destroyed all the cities and towns between Atlanta and Savannah.

After the war, Woods changed his life. He left Ohio and moved to Alabama, became a Republican, and commenced a judicial career. In 1868 he served as chancellor of the state's Middle Chancery Division of Alabama, which made him the presiding judge of the state's EQUITY courts, the now-antiquated system of justice that dealt with common claims. He held the position until 1880, when his reputation prompted President ULYSSES S. GRANT to appoint him a U.S. district judge in the Fifth Circuit. Woods's judicial conservatism began to develop during this period; however, he still took a somewhat tolerant view of federal power, especially with regard to the government's power to protect CIVIL RIGHTS.

In 1881 President Hayes nominated Woods to the U.S. Supreme Court. Once in the Court's

"THE RIGHTS . . . ENUMERATED IN THE FIRST EIGHT . . . AMENDMENT[S] OF THE CONSTITUTION OF THE UNITED STATES ARE [IPSO FACTO] FUNDAMENTAL PRIVILEGES OF THE CITIZENS OF THE UNITED STATES . . . AND THE STATES ARE INHIBITED FROM IMPAIRING OR ABRIDGING THEM."
—WILLIAM B. WOODS

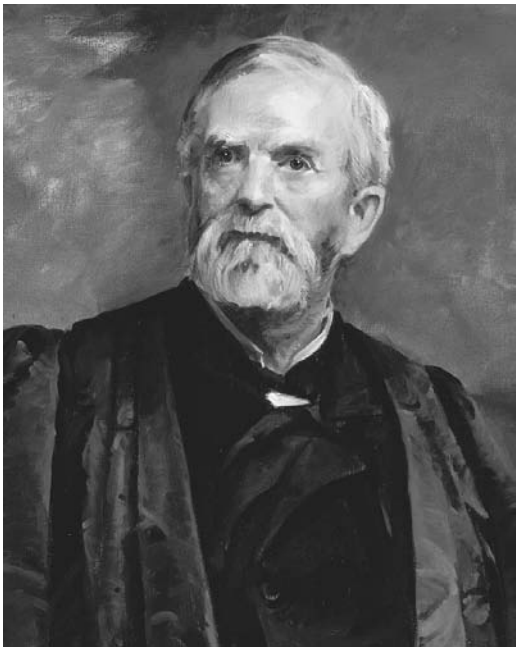

*William B. Woods.*
ETCHING BY MAX ROSENTHAL. THE GRANGER COLLECTION, NEW YORK

conservative majority, his judicial priorities changed. Following the Civil War, Congress had enacted new civil rights laws aimed at ending RACIAL DISCRIMINATION; equally important to this end was the ratification of the FOURTEENTH AMENDMENT to the U.S. Constitution in 1868. But the Supreme Court soon undermined these efforts. In 1883 it struck down provisions of the CIVIL RIGHTS ACT of 1875; Woods joined in the 8 to 1 majority in the so-called CIVIL RIGHTS CASES, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835.

Woods's intolerance for federal reform efforts marked his last years on the Court. Like the majority of the justices, he took a narrow view of the Fourteenth Amendment. He wrote the majority opinion in *United States v. Harris,* 106 U.S. 629, 1 S. Ct. 601, 16 Otto 629, 27 L. Ed. 290 (1883), which held unconstitutional a federal law protecting African Americans from the terrorist KU KLUX KLAN organization. Woods stated that such powers properly belonged to states rather than the federal government. He died on May 14, 1887, in Washington D.C.

## WORDS AND PHRASES®

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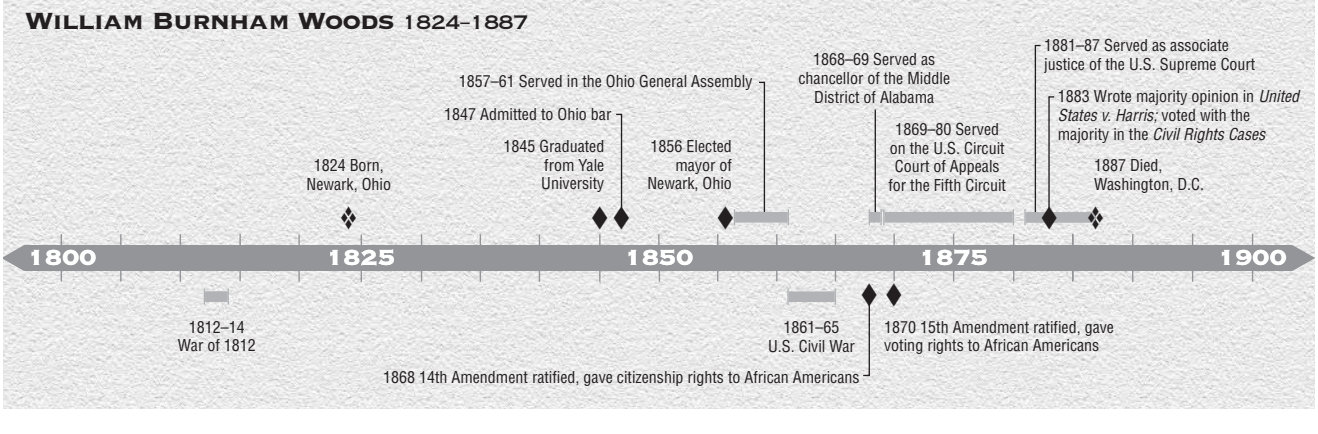

## WORDS OF ART

*The vocabulary or terminology of a particular art, science, or profession, particularly those expressions that are peculiar to it.*

Though a society may share a common language, there are many specialized uses of words based on human activities. An examination of any profession, for example, will yield many expressions that are idiomatic or peculiar to it. For the person working within the profession, these become words of art, which usually convey a meaning much different from the normal use of these words, or which may be completely baffling to an outsider.

Because the law is based on the expression of language, it contains thousands of words of art. Many persons working outside the legal profession would recognize that "taking the Fifth" means that a person is asserting his or her protection against SELF-INCRIMINATION under the FIFTH AMENDMENT to the U.S. Constitution. However, very few persons would understand that an *appellant* is the party bringing an appeal, while a *respondent* is the party against whom the appeal is taken. *Appellant* and *respondent* are words of art.

CROSS-REFERENCES

Term of Art.

## WORDS OF LIMITATION

*The words in a deed or will that indicate what type of estate or rights the person being given land receives.*

Words of limitation are used to indicate the duration or terms of the conveyance of real property. There are many types of limitations that can be expressed in a deed or a will. For example, a grantor might make a deed that conveys a parcel of land "to A until B marries." A's estate is restricted by these words of limitation, since A is given the land for only a specified length of time (the time before B marries).

A grantor may also place restrictions on who may receive property by employing words of limitation. For example, a grantor might convey property "to A and the heirs of her body." The words *heirs of her body* limit the persons who can inherit the property and are, therefore, recognized as words of limitation.

## WORDS OF PURCHASE

*Language used in connection with a transfer of real property that identifies the grantees or designees who take the interest being conveyed by deed or will.*

The term *words of purchase* is a technical conveyancing expression, a TERM OF ART in real PROPERTY LAW that has nothing to do with the ordinary meanings of the word *purchase.*

The word *purchase* in the expression means that real property is being transferred by deed or will, not inherited through the laws of DESCENT AND DISTRIBUTION. Whether the property is bought or given away, if the transfer is by deed or will, it is a purchase in this usage.

The act or process of acquiring real property by deed or will is called taking by purchase, even though it was a gift. The person who acquires real property by deed or will is called a purchaser, even though this person may have paid nothing.

Words of purchase are the words in a deed or will that tell who takes an interest in real property. The expression is contrasted with words of limitation, which are words in a deed or will that tell how long that interest will last. For example, in a deed to Whiteacre "To A for life," *To A* are words of purchase, *for life* are words of limitation.

## WORK PRODUCT RULE

*A legal doctrine that provides that certain materials prepared by an attorney who is acting on behalf of his or her client during preparation for litigation are privileged from discovery by the attorney for the opposition party.*

Under rules of civil and CRIMINAL PROCEDURE, as well as some statutes, parties to a civil lawsuit or a criminal prosecution must provide each other with information about the pending litigation. If a party will not disclose information during the discovery process, a court may issue an order compelling the production of evidence.

The work product rule is an exception to the concept of sharing information. This rule is based on the attorney-client relationship, which includes maintaining the confidentiality of information given by the client. The general rule is that legal research, records, correspondence, reports, or memoranda are attorney work product to the extent that they contain the opinions, theories, strategies, mental impressions, or conclusions of the client, the attorney, or persons participating in the case with the attorney, such as a jury consultant.

The U.S. Supreme Court, in *Hickman v. Taylor,* 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947), upheld the legitimacy of the work product rule contained in the Federal Rules of Civil Procedure. Since the *Hickman* decision, there have been numerous cases in federal and state courts involving disputes over what constitutes non-discoverable work product.

For example, in *Bondy v. Brophy,* 124 F.R.D. 517 (D. Mass. 1989), the federal district court ruled that the work product rule applied to information obtained by an investigator hired by the attorney for Edna Bondy, the administrator of a probate estate, to look into decedent John Harrington's property transfers. Bondy sued Carolyn Brophy regarding one of the transfers, and Brophy sought to obtain information from the investigator, including identities of persons investigated, identities of persons contacted, and copies of any and all written reports. She argued that the work product rule only applied to information gathered for a trial or litigation and that at the time of the investigation, no litigation was contemplated. The court rejected her argument, finding that the information collected was not in the ordinary course of business, nor was it typical for the administrator of an estate to hire an investigator to look into property transfers of a decedent. The only reasonable inference is that the investigator was hired because Bondy had questions about these transfers and was considering appropriate legal action if the inquiry turned up evidence of questionable conduct. Moreover, the investigator was hired by Bondy's lawyer. Under these circumstances, the investigator's report and the names of persons he contacted enjoyed qualified protection under the work product rule.

**CROSS-REFERENCES**

Attorney-Client Privilege.

## WORKERS' COMPENSATION

*A system whereby an employer must pay, or provide insurance to pay, the lost wages and medical expenses of an employee who is injured on the job.*

Workers' compensation law is governed by statutes in every state. Specific laws vary with each jurisdiction, but key features are consistent. An employee is automatically entitled to receive certain benefits when she suffers an occupational disease or accidental personal injury arising out of and in the course of employment. Such benefits may include cash or wage-loss benefits, medical and career rehabilitation benefits, and in the case of accidental death of an employee, benefits to dependents. The NEGLIGENCE and fault of either the employer or the employee usually are immaterial. Independent contractors are not entitled to workers' compensation benefits, and in some states domestic workers and agricultural workers are excluded or only partially covered.

It is the goal of workers' compensation to return the injured employee quickly and economically to the status of productive worker without unduly harming the employer's business. A worker whose injury is covered by the workers' compensation statute loses the common-law right to sue the employer for that injury, but injured workers may still sue third parties whose negligence contributed to the work injury. For example, a truck driver injured in a rear-end collision by an unemployed third party would be entitled to collect workers' compensation and also to sue the third party for negligence. In such cases a plaintiff who recovers money from a third-party lawsuit must first repay the employer or insurer that paid workers' compensation benefits. The plaintiff may keep any remaining money. Many jurisdictions permit the employer or its insurer to sue negligent third parties on the employee's behalf to recover funds paid as workers' compensation benefits.

In most states parties to workers' compensation disputes resolve them in an administrative, rather than judicial, tribunal. Courts usually relax the standard rules of procedure, evidence, and conflict of laws to allow for expediency and simplicity in keeping with the goal of getting an injured worker the benefits necessary to return to work.

Workers' compensation statutes require most employers to purchase private or state-funded insurance, or to self-insure, to make certain that injured workers receive proper benefits. The cost of insurance is reflected in the cost of goods or services produced by the employer; thus the cost of workers' compensation liability is passed ultimately to consumers.

Workers' compensation law is somewhat unique in that negligent acts of either the employer or the injured employee generally are irrelevant to the determination of compensability. Victims of injuries not related to work in most cases must prove the negligence of another party before recovering money in a lawsuit. Conversely, a defendant in a personal injury law-

suit may avoid or mitigate liability to a plaintiff whose own negligence caused or contributed to the personal injury. Yet workers' compensation is a no-fault law, and an employee's negligence or an employer's lack of negligence is usually not a factor.

The underlying social philosophy of this no-fault system is evident when one considers what would happen without workers' compensation. For example, assume a responsible employer encourages a safe workplace and implements a rule requiring workers to obtain the assistance of a coworker before climbing a tall ladder to a storage area. One employee, hurrying to get her work done for the day, ignores this rule and climbs the ladder without assistance. When she reaches the top of the ladder, it shifts and she falls, injuring her spine and paralyzing her legs.

Society could choose to treat this injured worker in one of three basic ways. It could refuse to render any aid, instead forcing the injured worker to seek help from friends or family. If the worker was without ties to persons both willing and able to assist, this plan would leave her destitute. A second option would be to give her government aid, or WELFARE, such as MEDICAID or food stamps. This alternative would be less speculative but still not ideal because it would force local taxpayers to pay for the worker's benefits regardless of whether they had any connection to the injury.

The third solution is the workers' compensation system. This system preserves the injured worker's dignity and well-being by providing an income and medical care and keeping her off welfare. The system passes the cost of compensating injured workers to consumers of products that, through their manufacture, cause the workers to get injured. Thus the social philosophy underlying workers' compensation is the efficient and dignified provision of financial and medical benefits to those injured on the job and the allocation of the expense to an appropriate source: the consumer.

Workers' compensation is also distinguishable from other personal injury laws where negligence is a factor because although the employer is liable for paying injured workers' benefits, the purpose of workers' compensation is not to punish or hurt the employer. For this reason, an integral component of workers' compensation is the requirement that employers purchase workers' compensation insurance, or provide a self-insured fund, to pay the benefits. This way, the employer can pass along the cost of insurance to the purchasers of the employer's product.

### History

Workers' compensation laws in the United States developed during the early 1900s as a result of the industrial age and growing numbers of industrial injuries. Before these laws were developed, workers injured on the job often found themselves without remedy against their employer or their fellow workers.

The law of VICARIOUS LIABILITY developed in England in approximately 1700 to make the master, or employer, liable for the acts of the servant, or employee. In 1837, however, the English case *Priestly v. Fowler,* 3 M. & W. 1, 150 Reprint 1030, created the fellow servant exception to the general rule of a master's vicarious liability; no longer would the master be held liable for an employee's negligence in causing injury to a coworker.

After *Priestly,* courts in the 1800s continued to develop employer defenses to liability for injured workers. One such defense, ASSUMPTION OF THE RISK, allowed employers to escape liability with the questionable logic that employees could avoid or decline dangerous work duties. Another defense, contributory negligence, allowed employers to escape liability, notwithstanding the employer's negligence, where the employee was also negligent. Therefore, during a century of burgeoning industry and its inherent risk of work-related accidents, workers faced nonexistent or inadequate remedies for their injuries.

At the end of the nineteenth century, state lawmakers recognized the problem and began studying the compensation system developed in Germany in 1884. Rooted largely in its socialistic tradition, Germany's compensation system mandated that employers and employees share in the cost of paying benefits to workers disabled by sickness, accident, or old age. Britain followed suit in 1897 with the British Compensation Act, which later became the model for many state workers' compensation laws in the United States.

In 1910, representatives of various state commissions met at a conference in Chicago and drafted the Uniform Workmen's Compensation Law. Although not overwhelmingly adopted, this uniform law became the blueprint for state workers' compensation statutes. All but

eight states had adopted a workers' compensation law by 1920, and, in 1963, Hawaii became the last state to do so.

### Accident and Injury

Workers' compensation benefits are most commonly provided to workers who are injured by a specific accident on the job, such as the worker who trips and falls down the employer's staircase, or the worker who gets a hand caught in factory machinery. But a compensable accidental injury might also include an occupational disease, such as lung disease that resulted from an employee's exposure to asbestos in the workplace. Cumulative trauma associated with work duties, such as carpal tunnel syndrome caused by repetitive keyboard work, also can be compensable.

Jurisdictions differ as to whether work-related mental illness is compensable. In the majority of states, mental illness caused by work, such as stress, anxiety, or depression, is not compensable. A common exception to this rule exists when a specific accident or injury at work leads to mental illness. For example, an employee who suffers from panic attacks upon hearing the phone ring at work generally will not be entitled to workers' compensation benefits. But an employee who witnesses a vicious ASSAULT AND BATTERY at work, and who then develops anxiety and panic attacks as a result, would be entitled to compensation in most jurisdictions.

### Requirements for Benefits

An injured worker is entitled to workers' compensation benefits only if the injury arose out of and in the course of employment. The first part of this requirement, "arising out of employment," ensures that there is a causal connection between the work and the injury. Usually the employee has the burden of proving that the injury was caused by exposure to an increased risk from employment.

In determining whether an injury is compensable, it is helpful to categorize the risk causing the injury in one of three ways. First, there is the risk that is associated distinctly with the employment. An example would be a house painter injured in a fall from a scaffold; the house painter would not have been on the scaffold but for his employment. This type of injury is always compensable as arising out of employment.

The second category of risk is risk that is personal to the claimant. An example is a worker who develops lung cancer due to years of smoking. Assuming this cancer was not caused by carcinogens in the workplace and would have developed notwithstanding employment, the disease would be considered personal and not arising out of employment. Injuries from purely personal risks are never compensable.

The third category of risk, neutral risk, is the most problematic in determining the compensability of a work injury. Neutral risks are neither distinct to the employment nor distinctly personal. Examples would include a teacher shot in a drive-by shooting while standing in his classroom; an auto mechanic bitten by a stray dog while dumping oil into an outdoor receptacle; and an executive struck by lightning when walking to his car after a meeting.

Whether an injury resulting from a neutral risk is compensable is difficult to predict and often depends on the jurisdiction of the tribunal, the nature of the injury, and the precise facts surrounding the accident. For example, injuries caused by lightning are usually compensable if the claimant can show that the work conditions increased the risk of being struck. An employee struck while working atop a metal electric pole likely would receive workers' compensation benefits for a lightning injury or death, whereas an employee struck while walking to her car after her work shift would have a more difficult time collecting benefits. In *Reich v. A. Reich & Sons Gardens, Inc.,* 485 S.W. 2d 133 (Mo. Ct. App. 1972), the employee was killed by lightning while standing next to several vehicles in a wheat field. The court deemed the death compensable, citing testimony that the employee's risk of being hit by lightning was greater than that of other people in the vicinity, who were sheltered in cars and buildings and were not standing in an open field.

Using the same logic, injuries from sunstroke, freezing, and other effects of heat and cold exposure arise out of the course of employment if the employee can show that such exposure was greater than that to which the general public was exposed. Workers who contract contagious diseases at work will receive benefits upon a showing that the workplace offered an increased risk of exposure.

Another type of neutral-risk injury is an assault. Most courts will deem an assault as arising out of the course of employment if the nature or setting of the work increased the risk of assault or if a quarrel that led to the assault

originated at work. In *Bryan v. Best Western/Coachman's Inn,* 885 S.W.2d 28 (Ark. 1994), the claimant worked as a security guard at a motel. The claimant and the motel night clerk were involved in a personal dispute, which led to a fight between the claimant and the night clerk's boyfriend, injuring the claimant. The court held that even though the dispute was personal and not related to work, the claimant, because of his job, faced an increased risk of assault. His injuries therefore were compensable.

Even idiopathic injuries, or injuries resulting from risks personal to the employee as opposed to risks associated with the job, may be compensable if the job contributes to the risk or aggravates the injury. An employee who misses breakfast and suffers a fainting spell ordinarily will not be entitled to workers' compensation, because the fainting spell does not arise out of employment. But if the same worker faints and in so doing hits her head on her desk and fractures her skull, her injury will be compensable. In *Silverman v. Roth,* 9 A.D. 2d 591, 189 N.Y.S.2d 311 (1959), the employee died of heart failure after suffering a heart attack and falling from a ladder. The precise sequence of events was impossible to determine. Nevertheless, the court awarded benefits, citing evidence that even if the heart attack occurred before the fall from the ladder, the heart condition would have been aggravated by the shock of the fall, and thus the fall from the ladder was a contributing factor in the employee's death.

In addition to the requirement that an injury arise out of employment, the employee seeking workers' compensation also must show that the injury arose "in the course of employment." To arise in the course of employment, the injury must take place within the employment period, in a location where it is reasonable for the employee to be, and while the employee is fulfilling work duties. This does not mean that the employee must actually be doing his job, or doing it within the precise work hours, when the injury occurs for it to be compensable. Distinguishing between injuries that do or do not arise out of the course of employment is often a difficult and confusing task.

One common issue arises when an employee is injured going to or from work. Clearly, employment necessitates that an employee travel to work and home again. Yet it is not the purpose of workers' compensation to protect the employee from the risk of travel. Courts have, through the years, reached a compromise: an employee with fixed hours and work locale going to or coming from work generally is covered by workers' compensation if the injury occurs on the employer's premises.

This rule can lead to rather harsh results, as in *Heim v. Longview Fibre Co.,* 41 Wash. App. 745, 707 P.2d 689 (1985). There, the claimant was driving his motorcycle through the usual exit from his employer's premises when a coworker turning into the premises hit the claimant, killing him. The precise location of the crash was fewer than five feet from the employer's property, on a public access road to the plant used by company personnel. Nevertheless, the court held that the injury did not arise in the course of employment and denied death benefits. Employees injured off work premises may still recover damages in TORT against any persons whose negligence caused them harm.

Some courts, recognizing the harshness of the premises rule, have attempted to extend the premises rule to include injuries that occur within a reasonable distance of the employer's premises. And most courts recognize the compensability of an injury that occurs off the employer's premises when an employee is going to or coming from work, where the trip itself is a substantial part of the employee's service to the employer. In *Urban v. Industrial Commission,* 34 Ill. 2d 159, 214 N.E.2d 737 (Ill. App. Ct. 1966), the employee, a traveling salesperson, was killed in a car accident while driving in the direction of his home, although the evidence was not clear that he was actually returning home. The court ruled the death to be compensable.

## Benefits

Workers' compensation provides two general categories of benefits to injured workers: indemnity benefits and medical benefits. Indemnity benefits compensate for the worker's loss of income or earning capacity resulting from the work-related injury. Depending on the employee's medical status and ability to work following the injury, she may be entitled to different types of indemnity benefits. A worker whose injury is only temporary and does not preclude her ability to work her normal job duties and hours typically will not receive indemnity benefits because her injury has no effect on her ability to earn a living. A worker whose injury temporarily causes him to miss time from work will be entitled to payment of all

or a portion of his lost wages, known as temporary partial disability benefits. A worker whose injury temporarily renders him unable to work at all may receive temporary total disability, which is usually a portion of the worker's average wage. A worker who is able to work at least part time but who has a work-related permanent disability may be entitled to permanent partial disability benefits. The formula for permanent partial disability benefits varies from jurisdiction to jurisdiction but usually considers the employee's average weekly wage combined with the degree of permanent disability. Finally, a worker who is permanently disabled from working at all may be entitled to permanent total disability benefits.

A frequently disputed issue between an employer and an injured employee is the degree that the employee's injury restricts her from returning to suitable employment, mitigating the need for indemnity benefits. Some state statutes permit or require the employer to provide an injured employee with vocational rehabilitation, job search assistance, or job retraining if the injury would otherwise prevent the employee from returning to gainful work.

In the case of a compensable work-related death, the decedent's spouse, dependent children, or both spouse and children may be entitled to dependency benefits. Most jurisdictions pay death benefits to a spouse until the spouse dies or remarries, and to children until they reach age 18. Other jurisdictions place limits on benefit amount or duration.

Employees injured on the job also may receive reasonable and necessary medical benefits that are related to the work injury. Such benefits are compensable if they serve to cure the injury, or, if the injury is incurable, relieve its effects. These benefits may include medical treatments such as sutures, casts, or surgery; psychiatric or psychological treatments; hospital, nursing, and physical therapy treatments; chiropractic or podiatric treatments; prescription medications; supplies such as wheelchairs or wrist braces; orthopedic mattresses; or attendant care services. Most workers' compensation statutes also provide for the reimbursement of the employee's travel expenses incurred in obtaining medical services.

### The System Today

Workers' compensation has been criticized as an expensive component of doing business and a system made more expensive by undetected FRAUD. What was intended to provide the employer and the injured worker with an amicable and humane resolution of a work injury often results in contentious disputes and costly litigation. Some employees feign injury to receive wage-loss benefits, and some employers balk at providing benefits to legitimately injured workers for fear that insurance premiums will rise. But the system has been effective in keeping injured employees employed and promoting the importance of a safe workplace.

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#### CROSS-REFERENCES

Employment Law; Labor Law; Master and Servant.

## WORLD BANK

The International Bank for Reconstruction and Development, commonly referred to as the World Bank, is an international financial institution whose purposes include assisting the development of its member nations' territories, promoting and supplementing private foreign investment, and promoting long-range balanced growth in international trade.

The World Bank was established in July 1944 at the United Nations Monetary and Financial Conference in Bretton Woods, New Hampshire. It opened for business in June 1946 and helped in the reconstruction of nations devastated by WORLD WAR II. Since the 1960s the World Bank has shifted its focus from the advanced industrialized nations to developing third-world countries.

The World Bank consists of a number of separate institutions. The three major institutions are the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), and the International Finance Corporation (IFC). The IBRD, the bank's most important component, lends funds directly, guarantees loans made by others, or participates in these loans. The IDA, which was established in 1960, lends to low-income countries on more favorable terms, charging a small service fee but no interest. It gets its funds from more affluent member countries. The IFC, established in 1956, provides loans to private business in developing countries.

Twenty-nine nations joined the World Bank in 1945. By 1996 the bank had 180 members. The bank is governed by an executive board and a managing director. Voting in the bank is weighted according to the initial contributions to the bank's capital, which historically has given the U.S. government a dominant voice in the bank's affairs.

In 1996 almost one-third of the bank's loans went to the world's poorest countries. However, the bank has moved away from financing large-scale infrastructure projects, such as roads, railways, and power facilities. Since the 1970s, the bank has provided an increasing number of loans to developing countries for agricultural, educational, and population programs. The goals of these loan programs have been to raise the standard of living and to increase self-sufficiency.

The World Bank also offers advisory services to countries seeking to reform their banking and finance systems. It has also launched InfoDev, an initiative to secure resources from corporations, foundations, and governments to promote reform and investment in the developing world through improved access to information technology.

In the late 1990s several coalitions of organizations and individuals formed Jubilee 2000 to campaign for *debt-forgiveness* for poor countries that found themselves unable to pay back the bank's loans. The World Bank and the INTERNATIONAL MONETARY FUND responded by establishing the Heavily Indebted Poor Countries Initiative (HIPC) that sought to provide relief for the world's most heavily indebted countries. In April 2000 World Bank President James D. Wolfensohn stated that he welcomed Jubilee 2000 and continuing public involvement for their contributions toward getting creditor countries to support the HIPC.

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CROSS-REFERENCES

International Monetary Fund.

## WORLD COURT

See INTERNATIONAL COURT OF JUSTICE.

## WORLD WAR I

World War I was an international conflict primarily involving European nations that was fought between 1914 and 1918. The United States did not enter the conflict until April 1917, but its entry was the decisive event of the war, enabling the Allies (Great Britain, France, Italy, and Russia) to defeat the Central Powers (Germany, Austria-Hungary, Turkey, and Bulgaria). The leadership of President WOODROW WILSON led to both the conclusion of hostilities and the creation of the LEAGUE OF NATIONS, an international organization dedicated to resolving disputes without war.

The war began on July 28, 1914, when Austria-Hungary declared war on Serbia. During the late nineteenth century, European nations had negotiated military alliances with each other that called for mutual protection. The Austria-Hungary declaration of war triggered these alliance commitments, leading to the widening of the war between the Allies and Central Powers.

During the next four years, the war was fought primarily on three fronts and on the Atlantic Ocean. The western front was in France, where Germany was opposed by France, Great Britain, and eventually the United States. The eastern front was in Russia, where Germany and Austria-Hungary opposed Russia. The southern front was in Serbia and involved Austria-Hungary and Serbia.

In August 1914 Germany invaded Belgium and then moved into France. German forces were unable to achieve a decisive victory, how-

ever, and the war soon became a conflict of fixed battle lines. French, British, and German soldiers lived and fought in trenches, periodically making assaults on the enemy by entering the "no man's land" between the two sets of trenches. The use of machine guns, tanks, gas warfare, and artillery in these confined battlefields generated unprecedented human carnage on the western front.

Though Germany had more success on the eastern front, neither side had sufficient economic and military strength to achieve victory. In 1916 and early 1917, Wilson sought to bring about negotiations between the Allies and Central Powers that would lead, in his words, to "peace without victory." Wilson's efforts at first appeared promising, but German military successes convinced the Central Powers that they could win the war.

Germany's use of submarine warfare proved to be the key element in provoking the United States' entry into the war. In 1915 a German submarine had torpedoed without warning the British passenger steamship *Lusitania* off the southern coast of Ireland. Nearly 1,200 persons died, including 128 U.S. citizens. Popular feeling in the United States against Germany was intense, leading to calls for declaring war on Germany. Wilson, however, sought a diplomatic solution. Though Germany rebuked his call for assuming responsibility for the tragedy, it did not sink any more passenger liners without warning.

*American soldiers man a trench in France in 1917. The entry of the United States in World War I tipped the scales in favor of the Allies, and they soon won the war against the Central Powers.*

AP/WIDE WORLD PHOTOS

Wilson abandoned his peacemaking efforts when Germany announced that unrestricted submarine warfare would begin on February 1, 1917. This meant that U.S. merchant ships were in peril, despite the fact that the United States was a neutral in the war. Wilson broke diplomatic relations with Germany on February 3 and asked Congress later that month for authority to arm merchant ships and take other protective measures. In mid-March German submarines sank three U.S. merchant ships, with heavy loss of life. Wilson called a special session of Congress for April 2 and asked for a declaration of war on Germany. Congress obliged, and on April 6, 1917, Wilson signed the declaration.

The United States immediately moved to raise a large military force by instituting a military draft. It took months, however, to raise, train, and dispatch troops to Europe. The first 85,000 members of the American Expeditionary Force (AEF), under the command of General John J. Pershing, arrived in France in June 1917. By the end of the war in November 1918, there were 2 million soldiers in the AEF.

Germany realized that U.S. war production and financial strength reduced Germany's chances of victory. In March 1918 Germany launched its last great offensive on the western front. U.S. troops saw their first extended action in the Battle of the Marne, halting the German advance on June 4. During the second Battle of the Marne, U.S. and French troops again stopped the German advance and successfully counterattacked. The Allies began pushing back the German army all along the western front, signaling the beginning of the end of German resistance.

Wilson renewed his peace efforts by proposing a framework for negotiations. On January 8, 1918, he delivered an address to Congress that named Fourteen Points to be used as the guide for a peace settlement. The fourteenth point called for a general association of nations that would guarantee political independence and territorial integrity for all countries. In October 1918 Germany asked Wilson to arrange a general ARMISTICE based on the Fourteen Points and the immediate start of peace negotiations. Germany finally capitulated and signed an armistice on November 11, 1918.

The 1919 TREATY OF VERSAILLES ended World War I and imposed disarmament, reparations, and territorial changes on Germany. The treaty also established the League of Nations, an

international organization dedicated to resolving world conflicts peacefully. Wilson, however, was unable to convince the U.S. Senate to ratify the treaty, because it was opposed to U.S. membership in the League of Nations.

World War I also saw the 1917 Bolshevik revolution in Russia. The specter of a worldwide Communist movement generated fears in the United States that socialists, anarchists, and Communists were undermining democratic institutions. During the war, socialist opponents of the war were convicted of SEDITION and imprisoned. In 1920 the federal government rounded up 6,000 ALIENS who it considered to be politically subversive. These "Palmer Raids," named after Attorney General A. MITCHELL PALMER, violated basic civil liberties. Agents entered and searched homes without warrants, held persons without specific charges for long periods of time, and denied them legal counsel. Hundreds of aliens were deported.

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CROSS-REFERENCES

Communism; "Fourteen Points" (Appendix, Primary Document); Socialism.

## WORLD WAR II

World War II began in 1939 as a conflict between Germany and the combined forces of France and Great Britain and eventually included most of the nations of the world before it ended in August 1945. It caused the greatest loss of life and material destruction of any war in history, killing 25 million military personnel and 30 million civilians. By the end of the war, the United States had become the most powerful nation in the world, the possessor and user of atomic weapons. The war also increased the power of the Soviet Union, which gained control of Eastern Europe and part of Germany.

World War II was caused in large part by the rise of totalitarian regimes in Germany and Italy and by the domination of the military in Japan. In Germany, ADOLF HITLER, head of the National Socialist or Nazi party, became chancellor in 1933. Within a short time, he had assumed dictatorial rule. Hitler broke the Versailles Treaty, which had ended WORLD WAR I and disarmed Germany, and proceeded with a massive buildup of the German armed forces. Hitler believed that the German people were a master race that needed more territory. His first aim was to reunite all Germans living under foreign governments. In 1936 he reclaimed the Rhineland from French control and in 1938 annexed Austria to Germany. That same year he took over the German areas of Czechoslovakia and in 1939 annexed all of that country.

Though France and Great Britain had acquiesced to Germany's actions, they soon realized that Hitler had greater ambitions. When Germany invaded Poland on September 1, 1939, Great Britain and France declared war on Germany. With the invasion of Poland, World War II began. Poland was quickly defeated, and for a period of time a "phony war" ensued, with neither side making any military moves. This situation changed in the spring of 1940, when Germany invaded Holland, Belgium, and France. Again, German military forces overwhelmed their opponents, leaving Great Britain the only outpost against Germany.

During the 1930s the United States government had avoided involvement in European affairs. This traditional policy of "isolationism" became more problematic after the war began in 1939. President FRANKLIN D. ROOSEVELT moved away from an isolationist foreign policy and sought to assist Great Britain and France, while keeping the United States a neutral party to the conflict. This strategy led to the repeal of the arms embargo in the Neutrality Act of 1939 (22 U.S.C.A. § 441), allowing the sale of military equipment to Great Britain and France.

After the fall of France to Germany in 1940, Roosevelt became even more determined to assist Great Britain. He persuaded Congress to pass the LEND-LEASE ACT of 1941 (55 Stat. 31). Lend-Lease provided munitions, food, machinery, and services to Great Britain and other Allies without immediate cost.

U.S. interests in the Pacific were threatened by the rise of Japanese militarism in the 1930s. The Japanese invasion of Manchuria in 1931 signaled a new direction for Japan. Its military leaders, who dominated the government, sought to conquer large parts of Asia. In 1936 and 1937 Japan signed treaties with Germany and Italy (headed by dictator BENITO MUSSOLINI), creating what was called the Axis powers.

*On December 7, 1941, the Japanese launched an attack on the U.S. naval base at Pearl Harbor, killing well over 2,000 Americans and causing great damage to many of the ships anchored there, including the sinking of the battleship USS* Arizona.

AP/WIDE WORLD PHOTOS

In 1937 Japan began an undeclared war against China. When Japan occupied Indochina in 1940, the United States stopped exporting gasoline, iron, steel, and rubber to Japan and froze all Japanese assets in the United States. In the fall of 1941, the extremist Japanese general Hideki Tōjō became leader of the cabinet. His cabinet began planning a war with the United States, as Japan realized it could not attain its imperial goals without defeating the United States.

The devastating Japanese attack on the U.S. naval base at Pearl Harbor, Hawaii, on December 7, 1941, resulted in a U.S. declaration of war on Japan the following day. Germany and Italy, as part of the Axis powers alliance, then declared war on the United States.

The attack on the United States led to severe consequences for Japanese Americans. On February 19, 1942, President Roosevelt issued EXECUTIVE ORDER No. 9,066, directing the forced relocation of all 112,000 Japanese Americans living on the West Coast (70,000 of them U.S. citizens) to detention camps in such places as Jerome, Arkansas, and Heart Lake, Wyoming. Roosevelt issued the order after military leaders, worried about a Japanese invasion, argued that national security required such drastic action.

The U.S. Supreme Court upheld the forced relocation in KOREMATSU V. UNITED STATES, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944). Justice HUGO L. BLACK noted that curtailing the rights of a single racial group is constitutionally suspect but that in this case military necessity justified the exclusion of Japanese Americans from the West Coast. In retrospect, historians have characterized the removal and detention as the most drastic invasion of individual CIVIL RIGHTS by the government in U.S. history.

The United States joined Great Britain and the Soviet Union in an alliance against Germany, Italy, and Japan. The Allies determined that priority would be given to defeating Germany and Italy. The Soviet Union, under the leadership of JOSEPH STALIN, had signed a nonaggression pact with Germany in 1939, just days before Germany's invasion of Poland. In June 1941 Hitler renounced the agreement and invaded the Soviet Union. The Russian front proved to be the bloodiest of the war, killing millions of civilians and millions of soldiers.

The Allies stemmed Axis advances in 1942. On the Russian front, the Soviet troops won a decisive victory at the Battle of Stalingrad. Following this battle, Soviet forces began the slow process of pushing the German army back toward its border. The U.S. Army achieved success in routing German forces from North Africa in 1942, paving the way for the invasion of Sicily and Italy in 1943.

On June 6, 1944 ("D-Day"), the Allies mounted an amphibious landing on France's Normandy coast. The D-Day invasion surprised the German military commanders, who did not expect an invasion at this location. In a short time, U.S. and British forces were able to break out of the coastal areas and move into France. U.S. forces liberated Paris on August 25.

Germany could not succeed in fighting a two-front war. By early 1945 it was clear that an Allied victory was inevitable. On April 30, 1945, with the Russian army entering Berlin, Hitler committed suicide. On May 7 Germany unconditionally surrendered.

The war in the Pacific was primarily a conflict between Japanese and U.S. forces. The U.S. Navy inflicted substantial damage to the Japanese fleet at the Battle of Midway in June 1942. Following Midway, the U.S. forces began invading Japanese-held islands in the South Pacific. This endeavor was a slow and costly process because Japanese soldiers were taught to fight to the death. However, the process proved successful. From 1942 to 1945, U.S. forces invaded numerous islands, the last being Okinawa, which is close to the Japanese mainland. Despite fierce resistance, the U.S. forces prevailed.

In 1945 the U.S. military prepared for the invasion of Japan. Though a Japanese defeat appeared inevitable, an invasion would result in heavy U.S. casualties. President HARRY S. TRUMAN, who had become president in April 1945 after the death of President Roosevelt, approved the dropping of atomic bombs on two Japanese cities. On August 6 the United States dropped the atomic bomb on the city of Hiroshima, destroying it and killing about 100,000 civilians in the first ten seconds; three days later the United States dropped a second atomic bomb, this time on the city of Nagasaki. Japan opened peace negotiations on August 10 and surrendered on September 2.

Wartime conferences among Roosevelt, Stalin, and British prime minister Winston Churchill led to the creation of the UNITED NATIONS in 1945. At the Yalta Conference in 1945, the leaders agreed to divide Germany, as well as the city of Berlin, into four zones of occupation, controlled by forces from the three countries and France. Germany was to have its industrial base rebuilt, but its armaments industries were to be abolished or confiscated. The leaders also approved the creation of an international court to try German leaders as war criminals, setting the stage for the NUREMBERG TRIALS. The Soviet army's occupation of Eastern Europe soon gave way to the creation of Communist governments under the influence of the Soviet Union.

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Communism; Hirohito; Hitler, Adolf; Japanese American Evacuation Cases; Nuremberg Trials; Tokyo Trial; United Nations; War Crimes; Yalta Agreement.

## WORTHIER TITLE DOCTRINE

*A* COMMON LAW *rule that provides that a conveyance of real property by a grantor to another person for life with a limitation to the grantor's heirs creates a reversion in the grantor by which his or her heirs acquire the property only upon the death of the grantor, not upon the death of the person who has been granted the property for life.*

The worthier title doctrine comes from English feudal real PROPERTY LAW and is based on the presumption that a title by descent (land inherited by an heir) is worthier (better) than a title by conveyance (purchase.) If a grantor or a testator attempts to convey a future interest in land to the grantor's heirs, the heirs would be getting by conveyance what they would otherwise take by descent, making the conveyance void.

For example, A deeds Blackacre to B for life, and then to the heirs of A. The effect of the doctrine is that A has a reversion (a future interest remaining with A in the property), while B has a life estate. The words *to the heirs of A* are words of limitation, which are required under the worthier title doctrine. If the heirs acquire the property at all, it is only after the death of the owner. If the heirs had a remainder interest in the property, they would acquire it after the death of B, the grantee with the life estate, regardless of whether A, the grantor, was alive or dead. The deed or will would have to contain language such as "to B for life and to C, D, E, (the heirs) in fee."

The worthier title doctrine has been abolished in many states by the UNIFORM PROBATE CODE, § 2-710. Where the doctrine has been abolished, language in a governing instrument describing the beneficiaries of a disposition as the transferor's *heirs, heirs at law, next of kin, distributees, relatives,* or *family,* or language of similar import, does not create a reversionary interest in the transferor. In effect, the reversion interest is eliminated and the heirs receive their unrestricted remainder interest in the property.

## ♦ WRIGHT, JAMES SKELLY

James Skelly Wright served as a federal district judge in Louisiana from 1949 to 1962 and as a federal court of appeals judge in Washington, D.C., from 1962 to 1986. From 1978 to 1981, he was the chief judge of the D.C. Circuit Court. Wright distinguished himself as a district judge during the 1950s when he forced the desegrega-

"THERE ARE SOCIAL AND POLITICAL PROBLEMS WHICH AT TIMES SEEM TO DEFY RESOLUTION [IN THE POLITICAL ARENA]. IN SUCH SITUATIONS . . . THE JUDICIARY MUST BEAR A HAND AND ACCEPT ITS RESPONSIBILITY TO ASSIST IN THE SOLUTION WHERE CONSTITUTIONAL RIGHTS HANG IN THE BALANCE."
—J. SKELLY WRIGHT

tion of the New Orleans, Louisiana, public schools and the city's public transportation system. Wright continued this course on the federal appeals court when he ordered sweeping changes in the discriminatory policies of the District of Columbia's school system.

Wright was born on January 14, 1911, in New Orleans. He graduated from Loyola University in New Orleans in 1931 and earned a law degree from Loyola Law School in 1934. Unable to find legal work during the Great Depression, Wright taught high school and lectured in history at Loyola until 1937, when he became an assistant U.S. attorney in New Orleans. During **WORLD WAR II**, he served in the U.S. Coast Guard as the legal aide to an admiral at the U.S. Embassy in London.

After the war, Wright briefly practiced law in Washington, D.C., before moving back to New Orleans. In 1948, President **HARRY S. TRUMAN** named him U.S. attorney in New Orleans and a year later appointed him to the federal district court in New Orleans.

Wright's 13 years on the district bench were controversial. In the wake of the U.S. Supreme Court's decision in **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), which outlawed state-sponsored racial **SEGREGATION** of public schools, Wright granted the NAACP's request to desegregate the New Orleans public schools. His decision in *Bush v. Orleans Parish School Bd.,* 138 F. Supp. 337 (1956), was met with resistance by virtually every public official in Louisiana. By the time Wright assumed the appellate bench in 1962, he had issued 41 rulings and had injunctions in force against the governor, the attorney general, the superintendent of education, the state police, the **NATIONAL GUARD**, all district attorneys, all sheriffs, all mayors, all police chiefs, and the state legislature.

In 1962, President **JOHN F. KENNEDY** wished to appoint Wright to the U.S. Court of Appeals for the Fifth Circuit, which is based in New Orleans. Vehement opposition from Southern senators dissuaded Kennedy from going forward with the nomination. Instead, he appointed Wright to the U.S. Court of Appeals for the District of Columbia Circuit.

As an appellate judge, Wright continued his career of judicial activism. He took major steps toward eliminating discrimination against poor African-Americans in the district's public schools. To that end, he ordered sweeping changes in the schools. In *Hobson v. Hansen,* 269 F. Supp. 401 (D.D.C. 1967), he eliminated the "tracking" system, which attempted to place schoolchildren according to mental ability in hopes of stimulating bright children and helping slower ones. However, that system often resulted in placement along racial lines, with most African-Americans being placed in lower tracks, and whites being placed in upper tracks. In other cases, Wright broadened the concept of illegal discrimination to include "de facto" discrimination (where segregation exists mainly because of social and economic patterns).

Wright also issued rulings that advanced **CONSUMER PROTECTION**. He ruled in favor of the rights of slum tenants to withhold rent for dilapidated and rat-infested dwellings (*Jarvins v. First National Realty Corp.,* 428 F.2d 1071 [D.C. Cir. 1970]), and provided remedies for poor consumers who had signed "unconscionable" contracts, which contained excessive rates of interest and threatened them with repossession

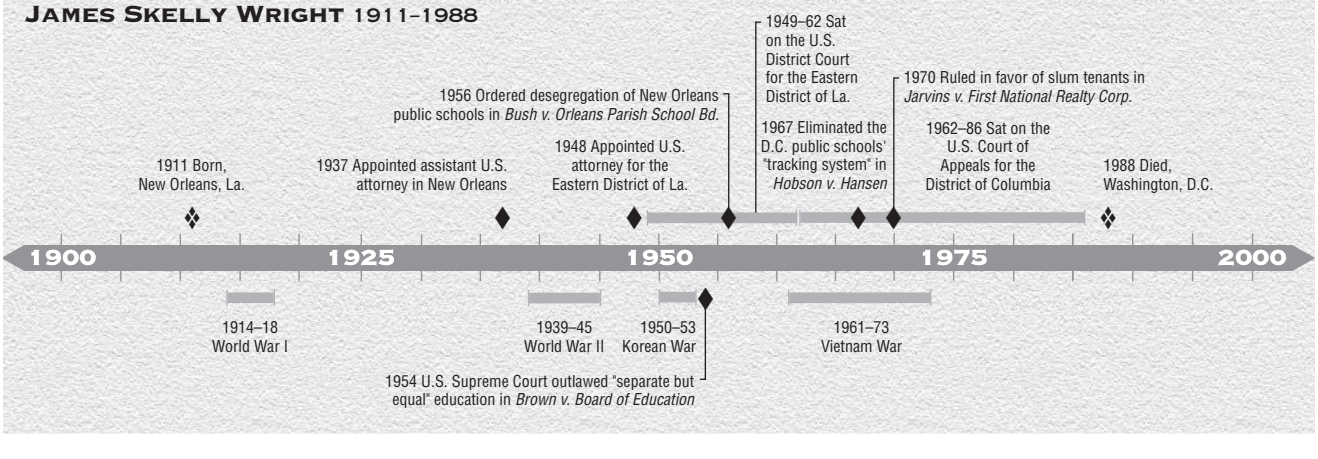

of goods if they failed to make payments. (*Williams v. Walker-Thomas Furniture Co.,* 350 F.2d 445 [D.C. Cir. 1965]).

Throughout his years on the bench, Wright espoused what he once described as a JURISPRUDENCE of "goodness," which he said was inspired by the work of U.S. Supreme Court Chief Justice EARL WARREN. In this jurisprudence, what was "fair" was often more important than what had been held in previous cases.

Wright assumed senior status in 1986 and died on August 6, 1988, in Washington, D.C.

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School Desegregation.

## WRIT

*An order issued by a court requiring that something be done or giving authority to do a specified act.*

The development of English COMMON LAW relied on the courts to issue writs that allowed persons to proceed with a legal action. Over time the courts also used writs to direct other courts, sheriffs, and attorneys to perform certain actions. In modern law, courts primarily use writs to grant extraordinary relief, to grant the right of appeal, or to grant the sheriff authority to seize property. Most other common-law writs were discarded in U.S. law, as the courts moved to simpler and more general methods of starting civil actions.

U.S. courts commonly use several extraordinary writs, which are issued only when the courts believe that usual remedies have failed. The writ of HABEAS CORPUS, sometimes called the "great writ," is probably the best-known example of a writ. A writ of habeas corpus is a legal document ordering anyone who is officially holding the petitioner (the person requesting the writ) to bring him into court to determine whether the detention is unlawful. A federal court can hear an application for a writ of habeas corpus by a state prisoner who is being held in custody, allegedly in violation of the U.S. Constitution or the laws of the United States.

The writ of MANDAMUS is an extraordinary writ that directs a public official or government department to take an action. It may be sent to the EXECUTIVE BRANCH, the legislative branch, or a lower court. The famous case of MARBURY V. MADISON, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), which established the right of JUDICIAL REVIEW of congressional statutes, was an action for a writ of mandamus. William Marbury asked the court to issue the writ to Secretary of State JAMES MADISON, commanding him to deliver his judicial commission. The Court, however, refused to issue the writ of mandamus.

The writ of prohibition is another extraordinary writ and is the opposite of a writ of mandamus, because it commands a government official *not* to take a specified action. The most common use of the writ is by an appellate court to a lower court, commanding the lower court to refrain from a proposed action. For example, a trial court might grant a request by the news media to release information from a court file. A defendant who objects to the release could petition for a writ of prohibition from the court of appeals. If the appellate court issues the writ, the trial court may not release the information.

The writ of certiorari is an extraordinary writ issued by an appellate court that is used by that court when it has discretion on whether to hear an appeal from a lower court. If the writ is denied, the lower court decision remains unchanged. The U.S. Supreme Court has used the petition and writ of certiorari to control its caseload since 1925.

The extraordinary writ of QUO WARRANTO starts a proceeding in which the state challenges the legality of the use of an office, franchise, charter, or other right that can be held or used under authority of the state. For example, a writ of quo warranto would be used to remove a person who illegally holds public office, or to nullify an illegal amendment to a municipal charter.

A writ of attachment is a court order used to force obedience to another order or a judgment of the court. It was originally used to order a sheriff or law enforcement officer to take a disobedient party into custody and to bring her

before the court to answer for the CONTEMPT. In modern law, a writ of attachment orders seizure of the defendant's property rather than the defendant's person to secure the satisfaction of a judgment that has not yet been secured. Modern law limits the scope and effect of attachment procedures to safeguard the defendant's rights to liberty and DUE PROCESS OF LAW.

A writ of execution may be issued after a plaintiff wins a judgment in a civil case and is awarded damages. The writ directs the sheriff to take the property of the defendant in satisfaction of the court-imposed debt.

A writ of entry is an instrument used in an action brought to recover land wrongfully withheld from the true owner or tenant entitled to possession and use of the land. It establishes who is entitled to possession of a parcel of land but does not settle the issue of who is the true owner. The central inquiry is which of the two individuals has the superior right of possession and use of the land at the time of the action.

To determine the priority of the rights of the parties fighting over land, the court must consider how and when each individual acquired ownership or possession. In general, modern laws permit the recovery of monetary damages for rent or abuse of property, as well as recovery of possession of the land. The individual who has been in possession of the land may be compensated for any improvements he has made in the property.

The writ of entry is used in only a few states to recover the possession of land. It has been replaced by the action to recover possession of real property.

A writ of error is an order issued from an appellate court directed to the judge of a lower court, mandating the judge to release the trial record of an action in which the judge has entered a final judgment. The appellate court issues the writ so that it may review the case and either reverse, correct, or affirm the lower-court decision. Most states have replaced the writ of error with a simpler appellate document, usually called the notice of appeal.

CROSS-REFERENCES

Prohibition, Writ of.

## WRITS OF ASSISTANCE CASE

The *Writs of Assistance* case involved a legal dispute during 1761 in which 63 Boston merchants petitioned the Massachusetts Superior Court to challenge the legality of a particular type of SEARCH WARRANT called a writ of assistance. Also known as *Paxton's Case,* the *Writs of Assistance* case contributed to the Founding Fathers' original understanding of SEARCH AND SEIZURE law, planted the seeds of JUDICIAL REVIEW in the United States, and helped shape the U.S. concept of NATURAL LAW.

Parliament created the writ of assistance during the seventeenth century. Once issued, the writ authorized government officials to look for contraband in private homes and businesses. Normally, the writ placed no limitations on the time, place, or manner of a given search. In the eighteenth century, customs officials in America used the writ to investigate colonial merchants who were suspected of SMUGGLING goods into the country. The writ generally commanded all constables, peace officers, and nearby subjects to help customs officials carry out a search.

The *Writs of Assistance* case arose when James Paxton, a Massachusetts customs official, applied to the superior court for a writ of assistance. JAMES OTIS JR., advocate general for the colony of Massachusetts, resigned his post to represent the merchants who opposed the writ. Appearing before Chief Justice Thomas Hutchinson, Otis and his co-counsel, Oxenbridge Thacher, made four arguments against the legality of the writ.

First, Thacher challenged the authority of the Massachusetts Superior Court to issue the writ. Thacher conceded that Parliament had passed a law in 1662 granting the English Court of Exchequer the power to issue the writ in Great Britain and passed a second law in 1696 enabling customs officials to apply for the writ in America. However, Thacher argued that neither law specified which courts in America could issue the writ. Thus, Thacher said that the Massachusetts Superior Court was never expressly delegated authority to issue the writ.

Second, Otis challenged the procedure by which the writs were issued. Otis argued that bare suspicion should not be enough to support an application for the writ. Otis maintained that no writ should be issued unless the official making the application is first placed under oath and made to disclose the evidence on which the application is based. Otis also suggested that every writ application should be carefully reviewed by an impartial third party and not the judges who had been appointed to the Massa-

chusetts Superior Court. Those judges, Otis charged, were predisposed in favor of granting the writ.

Third, Otis challenged the writ applications for lack of specificity. A lawful writ application, Otis asserted, must identify the person, place, or thing to be searched. Under ENGLISH LAW, customs officials were authorized to search for contraband in any house, shop, cellar, warehouse, room, or other place where uncustomed goods might be hidden. If colonial residents resisted, customs officials were authorized to break open doors, chests, trunks, and other packages that might lead to incriminating evidence. Because the duration of the writ was perpetual and could be executed at any time of the day or night, Otis said, the law failed to respect the sanctity of a person's home and private life.

Fourth, Otis challenged Parliament's autocratic authority. Parliament has no power to pass legislation, Otis claimed, that is against fundamental principles of law. When Parliament enacts legislation that contravenes fundamental principles of reason and EQUITY, such legislation must be struck down by the courts. Otis contended that Parliament was not above the law and that any parliamentary act against the constitution was void.

In response to these arguments, lawyers for the government asserted that the Massachusetts Superior Court possessed no discretion to deny Paxton's application for the writ. Parliament had granted the English Court of Exchequer the power to issue the writ in Great Britain and authorized customs officials to apply for the writ in America. Parliament also gave the Massachusetts Superior Court the same powers as the English Court of Exchequer. Because the Court of Exchequer had been lawfully issuing the writ for years in Great Britain, lawyers for the government argued, the Massachusetts Superior Court enjoyed the same legal authority.

Chief Justice Hutchinson and his colleagues agreed with the lawyers for the government. They unanimously voted to grant Paxton's application in this particular case and affirmed the legality of the writ across Massachusetts. Although Otis, Thacher, and their clients lost the case, they transformed the writ into a rallying cry of the American Revolution. Colonial opposition to the writ quickly evolved from civil disobedience to armed resistance. By 1769 many colonial courts had grown reluctant to issue the writ. This series of events prompted JOHN ADAMS to exclaim that the *Writs of Assistance* case gave birth to the "Child Independence!"

In addition to fueling the revolutionary spirit in the colonies, the *Writs of Assistance* case presented the first formidable challenge to general search warrants in the colonies. Otis thought that more restrictions should be placed on the government's authority to intrude upon places ordinarily kept private by homeowners and business proprietors. In America, Otis argued, the law should require that all searches be conducted pursuant to a lawful warrant that is obtained by an official who is placed under oath before a neutral third party and compelled to disclose the precise nature of any incriminating evidence. Any warrant that might be issued should fully describe the person or premises to be searched. The FOURTH AMENDMENT to the U.S. Constitution established these principles as a permanent part of U.S. CRIMINAL PROCEDURE.

The *Writs of Assistance* case also planted the seeds of judicial review in the United States. Judicial review is the power of the judiciary to invalidate legislative acts that violate a constitutional provision or principle. The English system of government did not recognize judicial review during the eighteenth century. Neither a common-law court nor the crown possessed the power to overturn a law duly enacted by Parliament. In the United States, Otis suggested in the *Writs of Assistance* case, legislative acts that contravene the Constitution must be struck down by courts of law.

Finally, the *Writs of Assistance* case helped shape the form of natural law in the United States. Some people believe in natural law, a body of unwritten principles derived from religion, morality, and secular philosophy. In certain instances natural law is said to transcend the written rules and regulations that are enacted by government. During the *Writs of Assistance* case, Otis argued that the written laws of Parliament are limited by unwritten principles of reason and equity. The "constitution" to which Otis referred was itself an unwritten body of English common-law principles. (The United States Constitution was not ratified until 1787.)

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CROSS-REFERENCES

Contraband; Fourth Amendment; Judicial Review; Search Warrant; Warrant.

## WRONG

*A violation, by one individual, of another individual's legal rights.*

The idea of rights suggests the opposite idea of wrongs, for every right is capable of being violated. For example, a right to receive payment for goods sold implies a wrong on the part of the person who owes, but does not make payment. In the most general point of view, the law is intended to establish and maintain rights, yet in its everyday application, the law must deal with rights and wrongs. The law first fixes the character and definition of rights, and then seeks to secure these rights by defining wrongs and devising the means to prevent these wrongs or provide for their redress.

The CRIMINAL LAW is charged with preventing and punishing public wrongs. Public wrongs are violations of public rights and duties that affect the whole community.

A private wrong, also called a civil wrong, is a violation of public or private rights that injures an individual and consequently is subject to civil redress or compensation. A civil wrong that is not based on breach of contract is a TORT. Torts include assault, BATTERY, LIBEL, slander, intentional infliction of mental distress, and damage to property. The same act or omission that makes a tort may also be a breach of contract, but it is the NEGLIGENCE, not the breaking of the contract, that is the tort. For example, if a lawyer is negligent in representing his client, the lawyer may be sued both for MALPRACTICE, which is a tort, and for breach of the attorney-client contract.

The word *wrongful* is attached to numerous types of injurious conduct. For example, *wrongful death* is a type of lawsuit brought on behalf of a deceased person's beneficiaries that alleges that the death was attributable to the willful or negligent conduct of another. However, even in these special contexts, the words *wrong, wrongful,* and *wrongfully* do not sharply delineate the exact nature of the wrongness. Their presence merely signifies that something bad has occurred.

## WRONGFUL BIRTH

*A* MEDICAL MALPRACTICE *claim brought by the parents of a child born with birth defects, alleging that negligent treatment or advice deprived them of the opportunity to avoid conception or terminate the pregnancy.*

A wrongful birth action is conceptually similar to a WRONGFUL LIFE action. In a wrongful birth action, parents seek damages for a child born with birth defects. The claim for damages is based on the cost to parents of raising an unexpectedly defective child. In a wrongful life action, the child seeks damages for being born with a birth defect rather than not being born.

A wrongful birth action was first recognized in *Jacobs v. Theimer,* 519 S.W.2d 846 (Tex. 1975). The case involved an action by the parents of a child born with defects caused by the mother contracting rubella in her first month of pregnancy. The claim was that the defendant was negligent in failing to diagnose the rubella in the mother. The Texas Supreme Court allowed damages, but only for expenses reasonably necessary for the care and treatment of the child's impairment. The parents were not awarded any noneconomic damages such as damages for pain and suffering.

Most wrongful birth suits had little chance of succeeding before the decriminalization of ABORTION by the U.S. Supreme Court in ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), since the parents of a child with birth defects could not argue that they would have had an abortion had they known of the defect. In addition, some courts were reluctant to award damages, ruling that it was impossible to weigh the economic and emotional costs of raising an impaired child against the intangible joys of parenthood.

Since the mid-1970s, however, more than twenty states have recognized wrongful birth actions that enable parents to collect some or all of their CHILD CARE expenses if they can prove NEGLIGENCE. With improved genetic testing, medical providers can routinely determine early in pregnancy the presence of certain birth defects in the fetus. This imposes on medical providers the duty to order the correct tests and to properly diagnose the results.

CROSS-REFERENCES

Tort Law; Wrongful Pregnancy.

## WRONGFUL DEATH

*The taking of the life of an individual resulting from the willful or negligent act of another person or persons.*

If a person is killed because of the wrongful conduct of a person or persons, the decedent's heirs and other beneficiaries may file a wrongful death action against those responsible for the decedent's death. This area of TORT LAW is governed by statute. Wrongful death statutes vary from state to state, but in general they define who may sue for wrongful death and what, if any, limits may be applied to an award of damages.

Originally, wrongful death statutes were created to provide financial support for widows and orphans and to motivate people to exercise care to prevent injuries. A wrongful death action is separate and apart from criminal charges, and neither proceeding affects nor controls the other. This means that a defendant acquitted of murder may be sued in a civil action by the victim's family for wrongful death.

An action for wrongful death may be brought for either an intentional or unintentional act that causes an injury that results in death. A blow to the head during an altercation that later results in death is an injury that is intentionally caused. The driver of an automobile who unintentionally causes the death of another in an accident may be held liable for NEGLIGENCE. An individual who, in violation of local law, neglects to enclose a swimming pool in his yard can be held liable for the omission or failure to act if a child is attracted to the pool and subsequently drowns.

Wrongful death statutes do not apply to an unborn fetus, as an individual does not have a distinct legal status until he is born alive. If an infant is born alive and later dies as a result of an injury that occurred prior to birth, an action may be brought for wrongful death.

### Who May Sue

The individuals entitled to sue for wrongful death are enumerated in each state statute. Many statutes provide for recovery by a surviving spouse, next of kin, or children. Some states permit a surviving spouse to bring an action even in the event of a separation, but not if the surviving spouse was guilty of desertion or failure to provide support.

Ordinarily, children may bring suit for the wrongful death of their parents, and parents may sue for the wrongful death of their children. In some states, only minor children are allowed to sue for the death of a parent. Similarly, some state statutes preclude a parent from recovery for the death of an adult child who is financially independent or married.

### Immunity from Suit

In the absence of a legal exception, the surviving beneficiaries may sue any person who caused the injuries that precipitated the death.

A traditional exception to this rule has been applied to family members. This doctrine is known as *family immunity* and means that an individual is protected from suit by any member of his family. This rule was intended to promote family harmony and to prevent family members from conspiring to defraud an insurance company. However, its strict application prevented children from legitimately collecting insurance money. Therefore, many states have discarded the strict rule of family immunity. Some limitations have been retained, such as allowing an adult child to sue a parent but not allowing a minor child to do so.

Wrongful death actions filed against state or local government will be allowed to go forward only if the state has waived its SOVEREIGN IMMUNITY, a doctrine that bars lawsuits against the government. Since the 1960s a majority of states have relinquished the right to claim sovereign immunity in many instances. Therefore, if a child drowns in a municipal swimming pool, the parents may be able to sue the city for wrongful death based on negligence.

In states that allow wrongful death actions to be brought against government, there is generally a strict notice requirement. The plaintiff must promptly notify the government that a lawsuit is contemplated in order to give the government an opportunity to estimate the potential losses to its budget. The time period for filing a notice may be as short as 30, 60, or 90 days. Failure to file a notice of claim precludes the possibility of a lawsuit.

In one of the most widely followed wrongful death suits involving a governmental entity, a federal judge in Texas allowed a suit to be brought against the federal government by family members of the Branch Davidians, a religious

*A sample demand letter in a case seeking recovery for wrongful death*

**Demand Letter: Wrongful Death Case**

_____ [Date]

_____

[Name and address of attorney or unrepresented party]

Re: _____ [Case name]

Dear _____ [name of, e.g., attorney for defendant]:

This will confirm your recent telephone conversation with my associate in which you stated that the total insurance coverage applicable to this case amounts to only $100,000.

On the basis of this statement, we have conferred with our clients and have obtained their authority to accept the sum of $100,000 in full settlement of their claim against your insureds for the wrongful death of our clients' son, Jeff Smith. This offer is conditioned, however, on your (1) providing this office with proof of the limits of the applicable insurance policy or policies and (2) payment of the policy limits within 15 days from the date of this letter.

As you know, this is an open-and-shut case of liability against your insureds. Joe Jones negligently and recklessly drove his vehicle over the center line of Highway 1 in Marin County, colliding head-on with the automobile driven by Jeff Smith. Joe Jones was cited by the California Highway Patrol for violation of Vehicle Code section 21460(a) and was charged with vehicular manslaughter in the death of Jeff Smith.

It is also obvious that this case is worth well over the stated policy limits of $100,000. At the time of his death, Jeff Smith was a healthy, 25-year-old serviceman stationed at Fort Honor, enjoyed an extremely close and loving relationship with his parents, and remained in constant contact with them while he was in the army.

The tragic nature of this case is compounded by the fact that the Smiths lost another son in an accident shortly before Jeff's death and by the fact that Jeff's father, Jim, suffered a massive heart attack immediately after learning of Jeff's death. Jim is now permanently disabled and totally dependent on his surviving children for support. Given the close bond between Jeff and his father, there is no question that Jeff would have contributed substantially to his father's support for the balance of his life. Both parents have now been deprived of the support as well as the love, care, comfort, affection, society, and protection that Jeff would have provided them had he survived.

The jury verdict potential in this case is further evident from a review of recent California verdicts involving the wrongful death of a child. As a matter of fact, our office recently obtained a jury verdict of $800,000 in the case of Doe v Roe (Fresno County Superior Court) for the wrongful death of a four-year-old child. Certainly the death of a 25-year-old son would yield a verdict far above that figure, particularly in view of the factors discussed above.

As previously mentioned, this offer to settle within the applicable policy limits will remain open for 15 days from the date of this letter. If it has not been accepted by that time, this demand will be withdrawn, and we will proceed to trial.

If you do not fully comply with this demand, we will have to conclude that the insurance company is acting in bad faith and proceed accordingly. After we receive a jury verdict over $100,000, we will seek an assignment from the insureds and proceed against the carrier for its bad faith and outrageous conduct in the negotiations pertaining to this case. I need not remind you of the numerous decisions in which an insurance company has been held liable for the full amount of the jury verdict when the company chose to subject its insureds to personal liability instead of settling the case for the limits of the insurance policy. See, e.g., Johansen v California State Auto. Ins. Inter-Ins. Bureau (1975) 15 C3d 9; Gruenberg v Aetna Ins. Co. (1973) 9 C3d 666; Richardson v Employers Liab. & Ins. Co. (1972) 25 CA3d 333; Fletcher v Western Nat'l Life Ins. Co. (1970) 10 CA3d 376; and Crisci v Security Ins. Co. (1967) 66 C2d 425.

Please feel free to call this office if you have any questions or need any additional information on this matter.

Thank you for your cooperation.

Very truly yours,

_____ [Signature of, e.g., attorney for plaintiff]

_____ [Typed name]

sect based near Waco, Texas. About one hundred plaintiffs sought $675 million in damages from the federal government, alleging that the government used excessive force in a standoff with the group at its compound. The standoff ended on April 19, 1993, when the sect's compound, which was believed to contain a hoard of weapons, burst into flames, killing everyone inside. Included among the deceased were leader David Koresh and 17 children. The judge, Walter Smith, later found that the federal government bore no responsibility for the incident and was not liable.

### The Defendant's Responsibility

In order to sue for wrongful death, it must be proven that the acts or omissions of the defendant were the proximate cause of the decedent's injuries and death. This means that the defendant's wrongful conduct must have created a natural, direct series of events that led to the injury.

### Damages

The law of each state governs the amount of damages recoverable by statutory beneficiaries. COMPENSATORY DAMAGES, which are intended to make restitution for the amount of money lost, are the most common damages awarded in wrongful death actions. Plaintiffs who prevail in a wrongful death lawsuit may recover medical and funeral expenses in addition to the amount of economic support they could have received if the decedent had lived and, in some instances, a sum of money to compensate for grief or loss of services or companionship.

Determining the amount of damages in a wrongful death action requires the taking into account of many variables. To compute compensation, the salary that the decedent could have earned may be multiplied by the number of years he most likely would have lived and can be adjusted for various factors, including inflation. Standard actuarial tables serve as guides for the life expectancy of particular groups identified by age or gender. The decedent's mental and physical health, along with the nature of his work, may also be taken into consideration by a jury.

Damages cannot always be calculated on the basis of potential earnings because not everyone is employed. Courts have set minimum yearly dollar amounts for the worth of an individual's housekeeping and for CHILD CARE services.

PUNITIVE DAMAGES may be awarded in a wrongful death case if the defendant's actions were particularly reckless or heinous. Punitive damages are a means of punishing the defendant for his action and are awarded at the discretion of the jury. Any damages recovered are distributed among the survivors subject to the statutes of each state. Courts frequently divide an award based on the extent of each beneficiary's loss.

In 1997, in the wrongful death action brought against O. J. SIMPSON by the families of Ron Goldman and Nicole Brown Simpson, the former football star was required to pay a total of $33.5 million in punitive and compensatory damages. Although he was acquitted in 1995 of murdering his ex-wife and Goldman, a Superior Court jury in Santa Monica, California, found him liable for their deaths. As a result, Nicole Brown Simpson's estate received an award of $12.5 million, while Goldman's estate received $13.475 million and Sharon Rufo, Goldman's mother, received $7.525 million. Simpson retained custody of his two children with Nicole; the children were beneficiaries of her estate.

### Limitations on Recovery of Damages

Some states limit the amount of money that can be recovered in a wrongful death action. For example, many state and local governments that waive sovereign immunity set a maximum amount of damages that can be recovered for a wrongful death. However, a number of states do not limit the amount of damages for wrongful death.

International treaties limit the amount recoverable for the death of passengers on international airlines. WORKERS' COMPENSATION laws, which exist in some form in every state, place limits upon an employer's liability. Employers must carry insurance for their employees that compensates workers based on a legal schedule for each type of injury or for death. In return for carrying such insurance, employers are immune from negligence suits. The result is that the amount workers can recover is limited, but recovery is guaranteed for injury or death sustained in the course of employment.

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## WRONGFUL DISCHARGE

*An at-will employee's* CAUSE OF ACTION *against his former employer, alleging that his discharge was in violation of state or federal antidiscrimination statutes, public policy, an implied contract, or an implied* COVENANT *of* GOOD FAITH *and fair dealing.*

At COMMON LAW, an employment contract of indefinite duration can be terminated by either party at any time for any reason. The United States is the only major industrial power that maintains a general employment-at-will rule. Since the 1950s, however, many courts have allowed discharged at-will employees to bring suits alleging wrongful discharge from employment.

An at-will employee may allege that her discharge is based on illegal discrimination. The CIVIL RIGHTS ACT OF 1964, 42 U.S.C.A. § 2000e et seq., contains broad prohibitions against discrimination in employment based on race, color, religion, national origin, or sex. Discrimination against persons forty years old and over is banned by the Age Discrimination in Employment Act, 29 U.S.C.A. § 621 et seq. (1967). In addition, an at-will employee may use state antidiscrimination statutes to contest a discharge.

A majority of states allow an at-will employee to proceed with a wrongful discharge action that is based on public policy. This means that an employer cannot legally discharge an employee if the employee refused the employer's request to violate a specific federal or state statute, or a professional code of ethics. In addition, it is against public policy to discharge an employee who exercises a statutory right, such as the right to apply for worker's compensation benefits for an on-the-job injury. An employee is also protected if his WHISTLEBLOWING activity or other conduct exposing the employer's wrongdoing resulted in a retaliatory discharge.

Employees may sue for wrongful discharge in almost half of the states on the basis of an express or implied promise by the employer, which constitutes a unilateral contract. In a unilateral contract, one party makes a promise and receives performance from the other party. Typically, this type of wrongful discharge action will be based on a statement by the employer that expressly or implicitly promises employees a degree of job security. Ordinarily, such statements are found in employee handbooks or in policy statements given to employees when they are hired.

Some courts have interpreted such statements as unilateral contracts in which the employer promises not to discharge the employees except for JUST CAUSE and in accordance with certain procedures. The difficulty with suits based on the employer's promise from the employee's perspective is that the employer may eliminate the possibility of a suit by issuing a policy statement that expressly disclaims any right to continuing employment.

Some at-will employees have based their suits on an implied covenant (promise) of good faith and fair dealing. The discharged employee typically contends that the employer has indicated in various ways that the employee has job security and will be treated fairly. For example, long-time employees who have consistently received favorable evaluations might claim that their length of service and positive performance reviews were signs that their jobs would be secure as long as they performed satisfactorily. However, few jurisdictions have recognized any good-faith-and-fair-dealing exceptions to the employment at-will practice.

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### CROSS-REFERENCES

Employment Law.

## WRONGFUL LIFE

*A type of* MEDICAL MALPRACTICE *claim brought on behalf of a child born with birth defects, alleging that the child would not have been born but for negligent advice to, or treatment of, the parents.*

Since the early 1970s, TORT actions for wrongful life have been filed in U.S. courts. In a typical wrongful life action, the parents of a child born with birth defects sue on behalf of the child. Generally, the parents sue their doctor or a medical testing company for NEGLIGENCE, claiming that the failure to diagnose an illness in the mother—for example, rubella in the early stages of pregnancy—prevented the opportunity for the mother to have an ABORTION. As a result, the child is born with impaired health.

Essentially, the child alleges that because of the defect, he would have been better off not being born at all. To bring a wrongful life action, the defect must be one that could only have been averted by preventing the birth of the child; otherwise the child would bring an ordinary negligence action. Other types of defects that can be diagnosed early in pregnancy include Tay-Sachs disease, sickle cell anemia, neurofibromatosis, and Down's syndrome.

Only a small number of states permit wrongful life actions. The many courts that have rejected wrongful life claims have cited two general reasons. First, the courts are reluctant to hold that a plaintiff can recover damages for being alive when the law and civilization in general have placed a high value on the presence of human life, not on its absence. Second, the basic rule of tort compensation is that the plaintiff is to be put in the position that she would have been in if the defendant had not been negligent. This is impossible in wrongful life actions because the contention is not that in the absence of negligence by the defendant, the plaintiff would have had a healthy, unimpaired life, but rather that if the defendant had not been negligent, the plaintiff would not have been born.

The computation of damages in a wrongful life action is based on the claim that the value of the life of the disabled child is less than the value of never having been born. The California Supreme Court, in *Turpin v. Sortini,* 31 Cal.3d 220, 182 Cal. Rptr. 337, 643 P.2d 954 (1982), stated that the wrongful life action is another form of a medical MALPRACTICE action, and that recovery should not be allowed for pain and suffering and other general damages, but rather only for those extraordinary medical and other expenses incurred during the child's lifetime.

FURTHER READINGS

*Prenatal Injuries and Wrongful Life: Practice Guide.* 1993. Rochester, N.Y.: Lawyers Cooperative.

CROSS-REFERENCES

Wrongful Birth; Wrongful Pregnancy.

## WRONGFUL PREGNANCY

*A claim by parents for damages arising from the negligent performance of a sterilization procedure or* ABORTION*, and the subsequent birth of a child.*

In wrongful pregnancy cases (also known as wrongful conception), parents file a NEGLIGENCE action against the medical provider for failing to perform a sterilization or abortion correctly, which results in the birth of a healthy but unwanted child. Wrongful pregnancy cases are different from *wrongful birth* cases. In WRONGFUL BIRTH actions, the provider is charged with negligence in failing to diagnose a birth defect, which would have allowed the mother to have an abortion instead of giving birth to a child with birth defects.

Parents in wrongful pregnancy actions may be able to sue for damages on the basis of the cost of the unsuccessful procedure and any pain or suffering associated with the sterilization or abortion. The parents may also recover damages for the medical expenses, pain, and suffering attributable to the pregnancy, the mother's lost wages due to the pregnancy, the husband's loss of consortium during the pregnancy, and the economic and emotional costs of rearing the child to maturity. Of these, the claims for the costs of rearing the child have presented the most difficulty for the courts.

Some courts have taken the position that the costs of raising a child are not recoverable damages. Another objection that has been raised is that allowing damages for the cost of rearing a healthy child requires the parents to deny the worth of the child, which may cause considerable emotional harm to the child when he eventually learns of the lawsuit. However, the plaintiffs may still be able to recover damages for the costs of the pregnancy and the birth if they can prove negligence.

Other courts have allowed recovery for the expenses of rearing the child, but insist that they be offset by the benefits of having a normal, healthy child.

CROSS-REFERENCES

Tort Law; Wrongful Life.

## ♦ WYATT, WALTER

Walter Wyatt served as reporter of decisions of the U.S. Supreme Court from 1946 to 1963. Prior to becoming reporter, Wyatt spent almost thirty years working for the FEDERAL RESERVE BOARD as an attorney. Wyatt's tenure was marked by a series of important decisions, including BROWN V. BOARD OF EDUCATION, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), which struck down state-sponsored, racially segregated schools.

*Walter Wyatt.*
U.S. SUPREME COURT

Wyatt was born on July 20, 1893, in Savannah, Georgia. He attended the University of Virginia Law School and served as editor in chief of the *Virginia Law Review,* graduating in 1917. During WORLD WAR I, he was a member of the Legal Advisory Board of the Selective Service.

In 1922 Wyatt took a position as law clerk with the Federal Reserve Board in Washington, D.C. He rose from assistant to counsel to general counsel of the Board of Governors of the Federal Reserve System. From 1936 to 1946, Wyatt also served as general counsel to the federal Open Market Commission.

The Supreme Court appointed Wyatt its reporter in 1946. Because the position had been vacant for more than two years, Wyatt edited volumes 322 to 325 of the *United States Reports,* which had been previously published without editorial review. During his seventeen years as reporter, Wyatt edited or coedited 123 volumes of decisions, writing a syllabus for each opinion that highlights the important points of each case.

Wyatt also published numerous works on banking law throughout his career.

Wyatt retired from his position in 1963. He died in Washington, D.C., on February 26, 1978.

## WYGANT V. JACKSON BOARD OF EDUCATION

The U.S. Supreme Court has held that an employer can grant preferential treatment to racial minorities under a private, voluntary AFFIRMATIVE ACTION program. Affirmative action is a concerted effort by an employer to rectify past discrimination against specific classes of individuals by giving temporary preferential treatment to the hiring and promoting of individuals from these classes until such time as true equal opportunity is achieved. The use of affirmative action is based on Title VII of the CIVIL RIGHTS ACT OF 1964 (42 U.S.C.A. § 2000e et seq.). It has proved controversial, with many white persons claiming affirmative action is in fact "reverse discrimination."

The case of *Wygant v. Jackson Board of Education,* 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986), involved minority preferences in teacher layoffs. In the face of a budget crisis, the Jackson, Mississippi, Board of Education was forced to cut teaching positions. Under the terms of the contract with the teachers' union, the board laid off more senior white teachers in order to retain less senior minority teachers. The white teachers who were laid off fought the decision, arguing that the minority preference plan

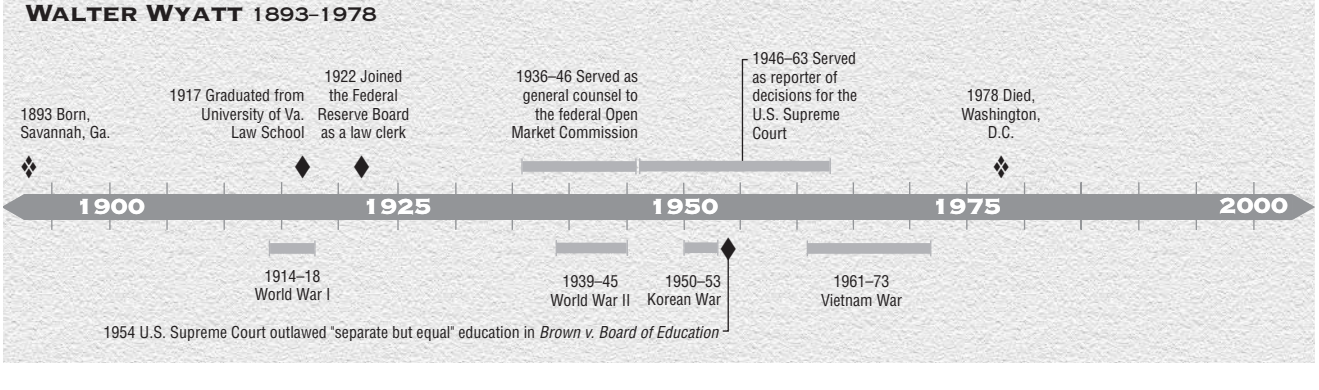

unfairly discriminated against them on the basis of race, thus violating Title VII and the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT to the U.S. Constitution.

Though there was no majority opinion, the Supreme Court agreed that the school board had violated the Constitution. Writing for a plurality, Justice LEWIS F. POWELL found that race-based preferences must be subjected to the STRICT SCRUTINY standard of equal protection review. Strict scrutiny reverses the ordinary presumption of constitutionality, with the government carrying the BURDEN OF PROOF that its challenged policy is constitutional. To withstand strict scrutiny, the government must show that its policy is necessary to achieve a compelling state interest. If this is proved, the state must then demonstrate that the legislation is narrowly tailored to achieve the intended result. Strict scrutiny is far more stringent than the traditional RATIONAL BASIS TEST, which only requires the government to offer a reasonable ground for the legislation.

Applying strict scrutiny, the plurality concluded that the school board had no compelling interest in remedying "societal discrimination" and suggested that prior institutional discrimination supplied the only permissible justification for "race-based remedies." However, even if the school board had discriminated in the past, "the burden that a preferential-layoffs scheme imposes on innocent parties" would be too great to be constitutionally acceptable. Powell noted that while minority hiring goals "impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." That burden was too intrusive and therefore failed the strict scrutiny requirement that a race-based remedy be narrowly tailored to achieve its ends.

The *Wygant* decision imposed a higher burden on government to justify affirmative action programs, especially when white employees are laid off in order to retain minority employees. The Court left open, however, the possibility that it would find other governmental interests to be sufficiently important or compelling to sustain the use of affirmative action policies.

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CROSS-REFERENCES

Civil Rights; Employment Law; Equal Employment Opportunity Commission; *United Steelworkers v. Weber*.

## ♦ WYTHE, GEORGE

George Wythe was an attorney, judge, signer of the Declaration of Independence, and first professor of law in the United States. A mentor to THOMAS JEFFERSON, Wythe educated a number of men who went on to achieve prominence in law and politics.

"THERE IS NO COUNTRY IN THE WORLD . . . SUCH AS THE UNITED STATES ITSELF—IN WHICH CAPITAL, MANAGEMENT, LABOR AND RESOURCES MAY BE JOINED TOGETHER FOR MORE PRODUCTION, TO THE MUTUAL ADVANTAGE OF ALL CONCERNED."
—GEORGE WYTHE

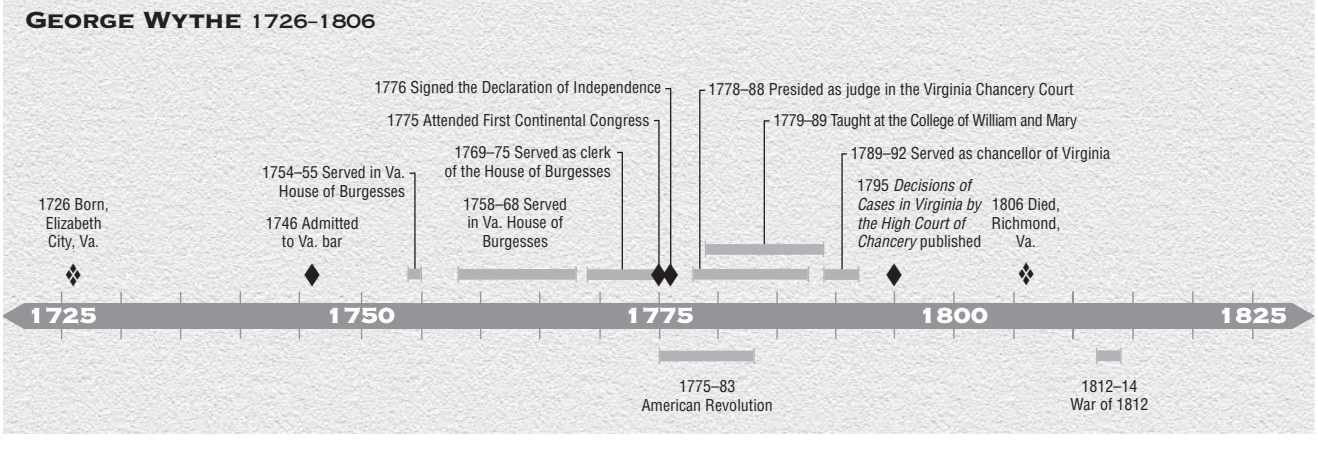

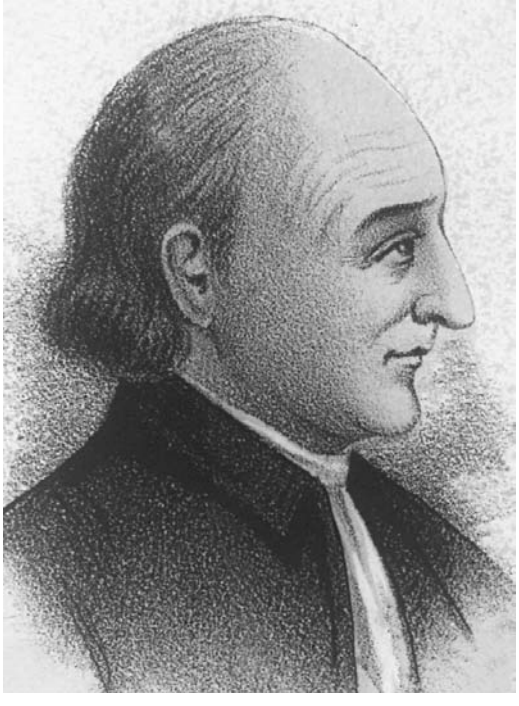

*George Wythe.*
LIBRARY OF CONGRESS

Wythe was born in 1726 in Elizabeth City, Virginia. After his admission to the Virginia bar in 1746, Wythe settled in Williamsburg, then the seat of government in the colony. He became active in politics, serving as a member of the House of Burgesses from 1754 to 1755 and from 1758 to 1768. He later served as clerk of the house from 1769 to 1775. An ardent supporter of independence, Wythe drafted a fiery motion opposing the STAMP ACT of 1764. However, the house was compelled to rewrite the motion and adopt a softer tone. Wythe attended the CONTINENTAL CONGRESS in 1775 and 1776 and signed the DECLARATION OF INDEPENDENCE.

During these years of politics and revolution, Wythe maintained a successful law practice. Many students sought his counsel, including Jefferson, who studied law with Wythe in the 1760s and viewed him as his mentor. As Jefferson rose in stature and power, Wythe became part of his circle. In 1776 Wythe, Jefferson, GEORGE MASON, and Edmund Pendleton revised the Virginia Code.

Jefferson used his influence to have Wythe appointed the first law professor in the United States. Wythe taught at the College of William and Mary from 1779 to 1789. One of his first students was JOHN MARSHALL, later chief justice of the United States. While teaching, Wythe also pursued a judicial career and presided as a judge in the Virginia Chancery Court from 1778 to 1788. In 1789 he was appointed chancellor of Virginia, which required him to move to Richmond. Wythe established a private law school there and had as one of his pupils the future U.S. senator from Kentucky, HENRY CLAY. Wythe resigned as chancellor in 1792. He published a selection of his court decisions in *Decisions of Cases in Virginia by the High Court of Chancery* in 1795.

Wythe died on June 8, 1806, in Richmond, Virginia, of poisoning. His grandnephew and heir, George Wythe Sweeney, was acquitted of the murder. At trial the only witness was an African American, who was disqualified from testifying under the laws of Virginia.

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## "X" AS A SIGNATURE

"X" as a signature refers to a cross that is printed in lieu of an individual's signature. A signature is required to authenticate wills, deeds, and certain commercial instruments. Typically, individuals sign their full names when executing legal documents. Sometimes, however, individuals use only their initials or other identifying mark. For illiterate, incompetent, or disabled people, this mark is often the letter X. Documents signed with an X sometimes raise questions as to their validity and enforceability.

For example, wills must be signed by the testator in order to be valid and enforceable. A testator's signature may take the form of his full name, nickname, initials, or other identifying mark, including a thumbprint or blood splotch. In many jurisdictions testators may authenticate their last will and testament with the letter X. Before an X may be treated as a binding signature during a proceeding to contest a will, courts commonly require the testimony of two people who witnessed the signature. The witnesses may also be questioned by the court to determine if the testator declared her intention of completing the will by signing it in this fashion. In other states the law requires courts to invalidate wills that are signed with an X unless the testator was physically or mentally incapable of signing her full name. Similar rules are applied by courts when evaluating the enforceability of real estate deeds that are signed with an X.

Signatures also form the legal basis of negotiable instruments. Section 3-401(2) of the UNIFORM COMMERCIAL CODE (UCC) provides that "[n]o person is liable on an instrument unless his signature appears thereon." The UCC defines the term *signature* as any name, TRADE NAME, assumed name, word, or other identifying mark used in lieu of a signature (§ 3-401(2)). The term *signed* is defined by the UCC as any symbol executed or adopted by a party with the "present intention of authenticating a writing" (§ 1-201(39)). Thus, commercial instruments, such as checks and promissory notes, may be signed by affixing any symbol that an individual intends to represent his signature. Consequently, courts will enforce commercial contracts signed with an X without regard to an individual's mental or physical ability to sign her full name, though mental or physical incapacity may be relevant if a particular contract is alleged to be the product of overreaching, UNDUE INFLUENCE, or coercion.

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## X, MALCOLM

See MALCOLM X.

## X RATING

*A classification devised by the Motion Picture Association of America (MPAA) and the National Association of Theater Owners (NATO) in 1968*

*to designate certain films containing excessive violence or explicit sexuality. It was replaced in 1990 by the NC-17 rating (no one 17 and under admitted).*

Since the 1920s the U.S. movie industry has practiced self-regulation to forestall government CENSORSHIP. In 1968 MPAA and NATO adopted a MOVIE RATING system that is based on age classification. Any film produced or distributed by members of MPAA must receive a rating from a Ratings Board, which is part of its Classification and Rating Administration. There are five rating classifications: G (suitable for all ages), PG (parental guidance suggested), PG-13 (may not be suitable for children under age 13), R (restricted, children younger than age 17 must be accompanied by a parent or guardian), and, until 1990, X (no one under age 17 admitted.) In 1990 the X rating was changed to NC-17.

The distinction between the R and the X rating was based on the overall sexual or violent content of a movie. A movie was given an R rating if it contained adult themes, nudity, sex, and profanity. A movie given an X rating contained an accumulation of brutal or sexually connotative language or explicit sex, or excessive and sadistic violence.

Over time very few MPAA-produced movies were given an X rating. If an X rating was awarded, a producer would usually reedit the film to qualify for an R rating. This reediting was done because theater owners generally refused to book X-rated movies, thereby reducing the size of the potential audience. In the 1970s the X rating concept was used by the producers and exhibitors of pornographic movies as a promotional device. Though these films were not MPAA productions and the producers could not submit their films for review, the X rating was not trademarked by MPAA. This meant that pornographic films could be advertised as X-rated or XXX-rated, which suggested that MPAA's X rating was a code for hardcore PORNOGRAPHY.

*Movies may be advertised as rated XXX in order to attract customers, but this is not a rating from the Motion Picture Association of America, which only rates movies produced by its members.*

JAMES LEYNSE/CORBIS

Because of this problem, the X rating was changed in 1990 to NC-17. MPAA sought to reaffirm the ORIGINAL INTENT of the 1968 ratings design, in which the "adults-only" category explicitly describes a movie that most parents would not want their children to see. Despite the attempt to remove the taint of pornography from the adults-only category, the NC-17 rating, like the X rating before it, is avoided by motion picture companies. Theater owners remain opposed to exhibiting films that substantially restrict the size of the potential audience, many of whom are seventeen years old or younger.

FURTHER READINGS

Classification and Rating Administration Website. 2000. "Everything You Always Wanted to Know About the Movie Rating System." Available online at <www.filmratings.com/questions.htm> (accessed December 1, 2003).

CROSS-REFERENCES

Entertainment Law; Movie Rating; Theaters and Shows.

## XYY CHROMOSOMAL ABNORMALITY DEFENSE

*A legal theory that holds that a defendant's XYY chromosomal abnormality is a condition that should relieve him or her of legal responsibility for his or her criminal act.*

Criminologists have examined many theories as to why a person becomes a criminal. Since the nineteenth century, biological theories have been proposed that seek to link criminal behavior with innate characteristics, yet these theories have been strongly challenged by the scientific community. With the development of modern genetics, scientists have noted abnormalities in the chromosomal structure of some people.

A chromosome is the threadlike part of the cell that carries hereditary information in the form of genes. The normal human genetic complement consists of 23 pairs of chromosomes. One of these pairs determines sex. Women have two X chromosomes and men usually have an X and a Y chromosome. However, in 1 in 500 to 1,000 live male births, an individual has an extra

Y chromosome. This XYY abnormality is often characterized by tallness and severe acne and sometimes by skeletal malformations and mental deficiency.

With the discovery of the XYY abnormality in 1961, some social scientists proposed a link between the abnormality and aggressive and impulsive behavior. This "supermale" syndrome seemed confirmed when studies of prison populations showed the presence of the abnormality to be significantly higher than in the general population.

Armed with these studies, defense attorneys sought to use the XYY chromosomal abnormality as a criminal defense theory. However, the defense has never been successfully used in the United States. Though the abnormality can be easily diagnosed using a blood test, the courts have rejected the defense because of the lack of conclusiveness of SCIENTIFIC EVIDENCE regarding the theory of criminality.

The legal community's misgivings have been confirmed by subsequent studies of the general population, especially those in which affected individuals were observed from early childhood over a long period of time. These studies have cast serious doubt on the validity of linking the chromosomal anomaly directly to behavioral abnormalities. Numerous XYY individuals live normal lives as law-abiding citizens.

## XYZ AFFAIR

The XYZ Affair was a diplomatic incident that almost led to war between the United States and France. The scandal inflamed U.S. public opinion and led to the passage of the ALIEN AND SEDITION ACTS of 1798 (1 Stat. 570, 596). Though the affair caused an unofficial naval war, the two countries were able to negotiate their differences and end their conflict in 1800.

The affair took place during one of the Napoleonic wars between France and Great Britain. The French regarded the United States as a hostile nation, particularly after the signing of Jay's Treaty in 1794. This treaty settled some of the problems that continued to cause friction between the United States and Great Britain after the peace treaty of 1783 that granted the colonies independence. Consequently, President JOHN ADAMS appointed Charles Pinckney minister to France in 1796 in an attempt to ease French-U.S. relations.

After Charles Talleyrand, the French foreign minister, refused to recognize Pinckney, Adams appointed a commission to France, consisting of Pinckney, JOHN MARSHALL, and Elbridge Gerry. Before official negotiations on a treaty to establish peaceful relations and normalize trade could occur, Talleyrand sent three French agents to meet with the commission members. The agents suggested that Talleyrand would agree to the treaty if he received from the United States a $250,000 bribe and France received a $10 million loan. The commission refused, with Pinckney quoted as saying, "No! No! Not a sixpence!"

Outraged, the commission sent a report to Adams, who inserted the letters X, Y, and Z in place of the agents' names and forwarded the report to Congress. Congress and the public were angered at the attempted blackmail. An undeclared naval war took place between the two nations between 1798 and 1800. Anticipating a declared war with France, Congress enacted the Alien and Sedition Acts. These internal security laws were aimed at French and Irish immigrants, who were thought to be supportive of France. The acts lengthened the period of naturalization for ALIENS, authorized the president to expel any alien considered dangerous, permitted the detention of subjects of an enemy nation, and limited FREEDOM OF THE PRESS.

Talleyrand, unwilling to risk a declared war with the United States, sought an end to the dispute. The next U.S. delegation sent to France was treated with appropriate respect, and the Treaty of Morfontaine, which restored normal relations between France and the United States, was signed in 1800.

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## YALTA AGREEMENT

British prime minister Winston Churchill, U.S. president FRANKLIN D. ROOSEVELT, and Soviet premier JOSEPH STALIN met from February 4 to 11, 1945, at Yalta, in the Crimea. The conference—the last attended by all three of these leaders—produced an agreement concerning the prosecution of the war against Japan, the occupation of Germany, the structure of the UNITED NATIONS, and the post–WORLD WAR II fate of Poland, Czechoslovakia, Hungary, Romania, and Bulgaria. The Yalta agreement proved to be controversial, as many in the United States criticized Roosevelt for abandoning Eastern Europe to the Communists.

Roosevelt came to Yalta seeking early Soviet participation in the war against Japan. Fearing that Japan would not surrender easily, Roosevelt promised Stalin the return of territories lost following the Russo-Japanese War of 1905. Stalin agreed to declare war on Japan, but only ninety days after the surrender of Germany. With the surrender of Japan in August 1945, which followed the dropping of nuclear bombs by the United States on the cities of Hiroshima and Nagasaki, the Soviet Union obtained the promised territories after expending minimal military effort.

Roosevelt also sought Stalin's approval of the U.N. Charter, which had already been drafted. Stalin had previously insisted that each of the sixteen Soviet republics be represented and that the permanent members of the Security Council retain a permanent VETO on all issues, not just those involving sanctions or threats to peace. Roosevelt and Churchill objected to this proposal, and at Yalta, Stalin agreed to three seats for the Soviet Union in the General Assembly and a limited veto.

The postwar status of Germany was also settled at Yalta. Germany was to be divided into four zones of occupation by the three countries and France, as was the city of Berlin. Germany was to have its industrial base rebuilt but its armaments industries were to be abolished or confiscated. The leaders also approved the creation of an international court to try German leaders as war criminals, setting the stage for the NUREMBERG TRIALS.

The most troublesome issue was the fate of the Eastern European countries that Germany had conquered during the war. The Soviet army occupied most of the territory, making it difficult for Churchill and Roosevelt to bargain with Stalin on this point. It was agreed that interim governments in these countries would give way to democratically elected regimes as soon as practicable. On Poland, Churchill and Roosevelt abandoned the London-based Polish government-in-exile, agreeing that members of this group must work with the Soviet-dominated group with headquarters in Lublin, Poland.

In the aftermath of World War II the results envisioned in the Yalta agreement on Eastern Europe proved illusory. Communist regimes were established by the Soviet Union, accompa-

*(L-r) British Prime Minister Winston Churchill, U.S. President Franklin D. Roosevelt, and Soviet Premier Joseph Stalin meet in Yalta, in the Crimea, in February 1945.*

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nied by the destruction of democratic political groups. The legacy of Yalta continued until the collapse of COMMUNISM and the emergence of democracy in the late 1980s and early 1990s.

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World War II.

## YEAR BOOKS

*Books of legal cases, or reporters, published annually in England from the thirteenth to the sixteenth century.*

The development of English COMMON LAW was based on the law of the case. Lawyers and courts relied on previous court decisions that involved similar issues of law and fact. The law of the case could not take hold, however, until cases were recorded, reported, and eventually published. The English Year Books, which were created in about 1290, are the first example of a reporting system. Though they were informal and often contained running commentary about the judges' personalities and the lawyers' quips, the Year Books were referred to increasingly by judges and lawyers.

During the reign of King Edward I (1272-1307) legal materials began to be collected into separate books for each year. During this early period the Year Books were extremely informal. They contained accounts by anonymous scribes and law students of courtroom proceedings and arguments that helped explain the judicial decision. The quality of the reports varied according to the abilities of the note takers. Despite these shortcomings, the reports conveyed basic procedural information to lawyers and students, but they stated few RULES OF LAW.

English LEGAL PUBLISHING began in 1481 with the printing of the Year Book. Until that time Year Books had been prepared and circulated in handwritten copies. It was during this period that the Year Books became more professional and uniform. They were published at the expense of the Crown, but they were not official reports of cases. The printed versions were arranged by year, but it sometimes took two or three years after a case had been decided for it to be reported.

The compilation of Year Books ceased in 1535 during the reign of King Henry VIII, for reasons that remain unclear. Thereafter court reports were issued in a different form by named reporters.

Since the late nineteenth century, modern critical editions of the Year Books have been prepared by the SELDEN SOCIETY. Legal historians have found the Year Books a rich source of information about law and life in medieval England.

## YELLOW DOG CONTRACT

*An employment agreement whereby a worker promises not to join a* LABOR UNION *or promises to resign from a union if he or she is already a member.*

Until the 1930s, employers were able to use a variety of measures to prevent employees from joining labor unions. One of the most effective was the yellow dog contract, which frequently forced employees to either sign an agreement not to join a union or be fired. Courts upheld the legality of yellow dog contracts and frequently struck down state laws that sought to outlaw them. The enactment of the WAGNER ACT in 1935 (29 U.S.C.A. § 151 et seq.) finally put an end to these types of agreements.

The U.S. Supreme Court's hostility to efforts by government to outlaw the yellow dog contract was rooted in the concept of "liberty of contract." Near the end of the nineteenth century, the Court used the DUE PROCESS provi-

sions of the Fifth and Fourteenth Amendments to the U.S. Constitution to strike down federal and state laws regulating business. These amendments provide that no government was to "deprive any person of life, liberty, or property, without due process of law." The Court interpreted this prohibition to include the negotiating of terms of employment between an employer and an employee.

Therefore, in *Adair v. United States,* 208 U.S. 161, 28 S. Ct. 277, 52 L. Ed. 436 (1908), the Court struck down a federal law that protected union members by prohibiting yellow dog contracts and the discharge or blacklisting of employees for union activities. In his majority opinion Justice JOHN HARLAN presumed that there was equal bargaining power between an employer and an employee, and that the law was an unreasonable intrusion on personal liberty and property rights, as guaranteed by the FIFTH AMENDMENT.

When Kansas enacted a law prohibiting yellow dog contracts, the Court declared the law unconstitutional under the FOURTEENTH AMENDMENT as an infringement of freedom of contract. *Coppage v. Kansas,* 236 U.S. 1, 35 S. Ct. 240, 59 L. Ed. 441 (1915).

The Wagner Act of 1935 gave employees the right to join unions and to bargain collectively with their employers. Congress outlawed the yellow dog contract and other UNFAIR LABOR PRACTICES on the part of employers, finding that these practices were contrary to public policy. Existing yellow dog contracts were declared unenforceable by the courts. The Supreme Court's upholding of the constitutionality of the Wagner Act in NLRB V. JONES & LAUGHLIN STEEL CORP., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937), meant the end of the yellow dog contract.

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Labor Law; Substantive Due Process.

## YICK WO V. HOPKINS

An 1896 U.S. Supreme Court decision, *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886), held that the unequal application of a law violates the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT to the U.S. Constitution.

A law that is racially neutral on its face may be deliberately administered in a discriminatory way, or it may have been enacted in order to disadvantage a racial minority. In *Yick Wo v. Hopkins,* the Supreme Court stated for the first time that a state or municipal law that appears to be fair on its face will be declared unconstitutional under the Fourteenth Amendment because of its discriminatory purpose.

Yick Wo, a native and subject of China, was convicted and imprisoned for violating an ordinance of the city of San Francisco, California, which made it unlawful to maintain a laundry "without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." The 1880 ordinance was neutral on its face, but its purpose and its administration appeared suspect to Yick Wo and other Chinese. Most laundries in San Francisco were owned by Chinese and were constructed out of wood. The few laundries owned by whites were located in brick buildings. At the time the ordinance was passed, Chinese immigration had brought around 75,000 Chinese to California, half of whom lived in San Francisco. The white population became increasingly anti-Chinese and sought ways to control the Chinese population.

In 1885 the San Francisco Board of Supervisors denied Yick Wo and two hundred other Chinese laundry owners their licenses, even though their establishments had previously passed city inspections. After he was denied his license, Yick Wo continued to operate his business. He was eventually arrested and jailed for ten days for violating the ordinance. More than one hundred and fifty other Chinese laundry owners were also arrested for violating the ordinance.

On appeal to the U.S. Supreme Court, Yick Wo argued that the ordinance violated the Fourteenth Amendment, as the law denied him equal protection of the laws. He pointed out that only one-quarter of the laundries could operate under the ordinance, with 73 owned by non-Chinese and only one owned by a Chinese. San Francisco contended the ordinance was a valid exercise of the POLICE POWERS granted by the U.S. Constitution to cities and states.

Justice STANLEY MATTHEWS, writing for a unanimous court, struck down the ordinance. Matthews looked past the neutral language to

strike down the ordinance as a violation of the Fourteenth Amendment's Equal Protection Clause. He found that the division between wood and brick buildings was an "arbitrary line." Moreover, whatever the intent of the law may have been, the administration of the ordinance was carried out "with a mind so unequal and oppressive as to amount to a practical denial by the state" of equal protection of the laws.

Matthews held that:

> Though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

Because the unequal application of the ordinance furthered "unjust and illegal discrimination," the Court ruled that the ordinance was unconstitutional under the Fourteenth Amendment.

*Yick Wo* has become a central part of CIVIL RIGHTS jurisprudence. If a law has a discriminatory purpose or is administered unequally, courts will apply the Fourteenth Amendment and strike down the law. *Yick Wo* is also the source of modern civil rights DISPARATE IMPACT cases, in which discrimination is established by statistical inequality rather than through proof of intentional discrimination.

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## YIELD

*Current return from an investment or expenditure as a percentage of the price of investment or expenditure.*

The term *yield* is the proportionate rate that income from an investment bears to the total cost of the investment. For example, a ten dollar profit on a one hundred dollar investment represents a 10 percent yield. Thus, a yield for stock dividends or bond interest paid will be expressed as a percentage of the current price. A yield can also refer to the bond coupon or stock dividend rate divided by the purchase price.

There are several specific types of yields. On bonds, a current yield is the annual interest paid divided by the current market price of the bond. As interest rates fall, the market price of the bond rises; as they rise, bond prices fall. The current yield reflects the actual rate of return on a bond. For example, a 9.5 percent bond with a face value of $1,000 yields $95 per year. If this bond is purchased in the secondary bond market for $1,100, the interest will still be $95 a year, but the current yield will be reduced to 8.6 percent because the new owner paid more for the bond.

A nominal yield is the annual income received from a fixed-income security divided by the face value of the security. It is stated as a percentage figure. For example, if a security with a face value of $5,000 generated $500 in income, the nominal yield would be 10 percent.

On bonds, a yield to maturity is a complex calculation that reflects the overall rate of return an investor would receive from a bond if the bond is held to maturity and the interest payments are reinvested at the same rate. It takes into account the purchase price, the coupon yield, the time to maturity, and the time between interest payments.

A net yield is the rate of return on an investment after deducting all costs, losses, and charges for investment. A dividend yield is the current annual dividend divided by the market price per share of stock. A yield spread refers to differences in yields between various issues of SECURITIES.

## YORK-ANTWERP RULES

*A group of directives relating to uniform bills of lading and governing the settlement of maritime losses among the several interests, including ship and cargo owners.*

Maritime law includes international agreements, national laws on shipping, and private agreements voluntarily adhered to by the parties involved in shipping contracts. The York-Antwerp Rules of General Average are the best known example of such private agreements, as they establish the rights and obligations of the parties when cargo must be jettisoned from a ship.

Under the law of general average, if cargo is jettisoned in a successful effort to refloat a grounded vessel, the owners of the vessel and the cargo saved are required to absorb a proportionate share of the loss, in order to compensate the owner of the cargo that has been singled out for sacrifice. All participants in the maritime ven-

ture contribute to offset the losses incurred. The law of general average became an early form of marine insurance.

The York-Antwerp Rules were first promulgated in 1890 and have been amended several times, most recently in 1994. They are the result of conferences of representatives of mercantile interests from many countries. The rules provide uniform guidelines on the law of general average that are included in private shipping agreements and depend upon their voluntary acceptance by the maritime community. These international rules ensure uniformity and determine the rights and obligations of the parties.

The rules are incorporated by reference into most bills of lading (documents given by a shipping company that list the goods accepted for transport and sometimes list the terms of the shipping agreement), contracts of affreightment (a contract with a ship owner to hire the ship, or part of it, for the carriage of goods), and marine insurance policies.

The York-Antwerp Rules attempt to cover many types of expenses associated with an imperiled ship. For example, the rules provide for recovery by the ship owner of the costs of repair, loading and unloading cargo, and maintaining the crew, if these expenses are necessary for the safe completion of the voyage. Claims are generally made against the insurer of the cargo and the ship owner's insurance underwriters.

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## ♦ YOUNG, OWEN D.

Owen D. Young was a prominent corporate lawyer and businessperson who played a major part in negotiating German reparations following WORLD WAR I. His 1929 proposal to restructure reparations, called the Young Plan, was an attempt to relieve financial pressure on Germany and end active oversight of its economy by the United States, Great Britain, and France.

Young was born on October 27, 1874, in Van Hornesville, New York. He graduated from St. Lawrence University in 1894 and earned a law degree from Boston University in 1896. He later completed a doctorate in Hebrew literature in 1923 from St. Lawrence.

Young practiced law in Boston from 1896 until 1913, when he moved to New York City where he served as general counsel for the General Electric Company. He was chairperson of the board of directors from 1922 to 1939 and again from 1942 to 1944. Young also organized Radio Corporation of America (RCA) in 1919 and was its honorary chairperson from its inception until 1929.

In 1924 Young and Charles G. Dawes represented the United States at the post-World War I reparations conference. The TREATY OF VERSAILLES had mandated that a Reparations Commission be formed to determine how much Germany was to pay the Allies for war destruction and to set the terms of payment. The German government complained that the payment schedule was unrealistic. In response, the U.S.

"MANAGERS [ARE] NO LONGER ATTORNEYS FOR STOCKHOLDERS, THEY [ARE] BECOMING TRUSTEES OF AN INSTITUTION."
—OWEN D. YOUNG

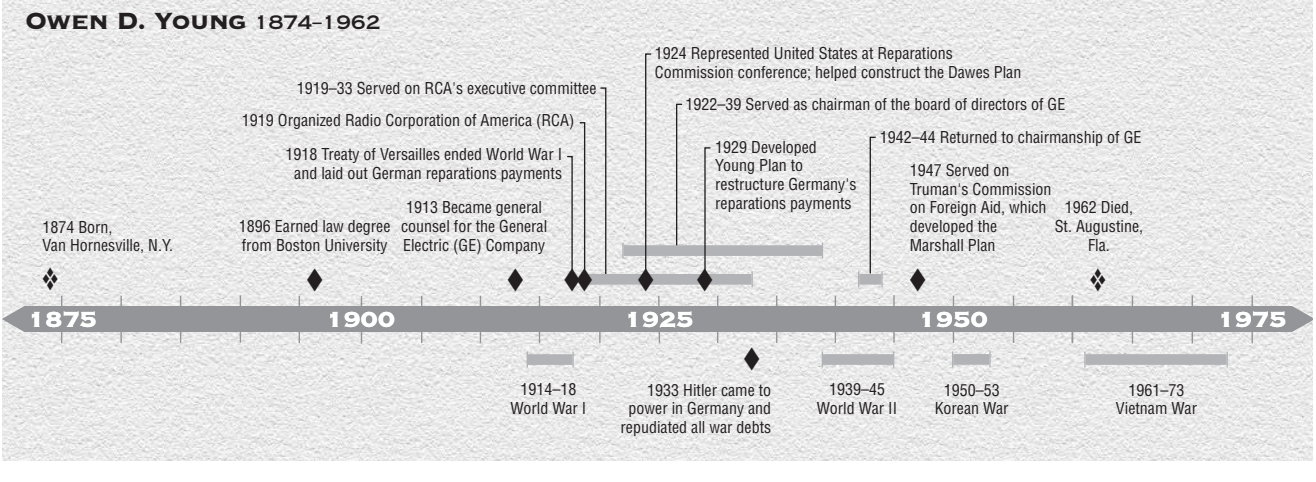

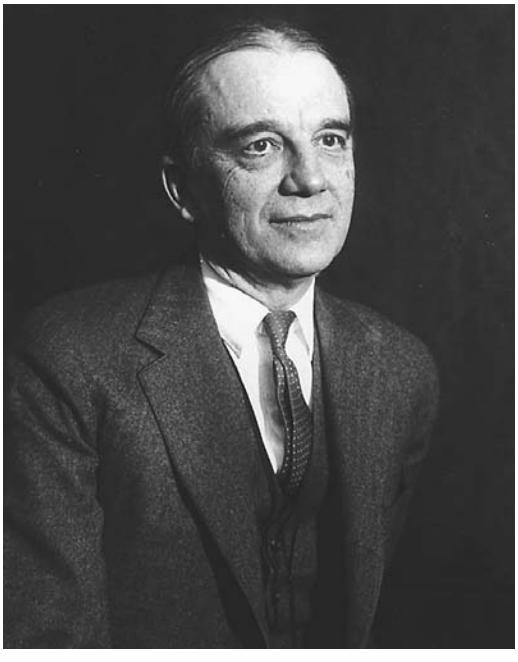

*Owen D. Young.*
CORBIS-BETTMANN/UPI

representatives helped formulate the Dawes Plan under which Germany was to make billions of dollars of reparations stretching over a period of years.

The German economy prospered from 1924 to 1929 but it still could not make its annual reparations payment. The Reparations Commission, seeking to resolve the issue, appointed Young in 1929 to head a committee to develop a workable reparations plan. Young played a major role in creating the proposal, which reduced German reparations to approximately $26 billion, one-third the amount originally assessed in 1921. Payments were spread out over 58 years, ending in 1988, and were to be made to the new Bank for International Settlements. The Young plan also called for the dissolution of the Reparations Commission and an end to Allied occupation of the Rhineland. The German government quickly agreed to these terms.

Despite the more favorable terms, right-wing German opposition leaders campaigned against the Young Plan, seeing it as another attempt to humiliate Germany. ADOLF HITLER and his Nazi party demanded the government repudiate the war debt and the war-guilt clause of Versailles upon which the debt was based. Nevertheless, the plan was approved by the German Reichstag. When Hitler came to power in 1933, however, he refused to recognize the plan and repudiated all war debts, making the Young Plan a dead letter.

Young died on July 11, 1962, in St. Augustine, Florida.

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## YOUNGSTOWN SHEET & TUBE CO. V. SAWYER

In *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952), the Supreme Court reviewed the constitutionality of an EXECUTIVE ORDER directing the secretary of commerce to seize possession of the nation's steel mills during a labor dispute and keep them operating while hostilities continued in the KOREAN WAR. Also known as the Steel Seizure Case, *Youngstown Sheet & Tube* stands for the proposition that the EXECUTIVE BRANCH has no constitutional authority to seize possession of private property, even if it is for public use during times of national emergency because such authority is vested in the lawmaking powers of Congress.

The case arose from a labor dispute between American steel companies and their employees over the terms of a collective bargaining agreement that was under negotiation in 1951. Employees wanted higher wages, but management protested that such increases could only be met through drastic price hikes. President HARRY S. TRUMAN opposed further price hikes because the economy was already suffering from inflation. However, Truman feared that any disruption in domestic steel production would impede the American war effort in Korea, which was entering its second year, and thus imperil the safety of U.S. military troops.

When negotiations between labor and management reached an impasse, the employees' representative, United Steelworkers of America, C.I.O., announced its intention to commence a nationwide strike on April 12, 1952, at 12:01 A.M. A few hours before the strike was to begin, Truman issued Executive Order 10340, which commanded the secretary of commerce, Charles Sawyer, to seize most of the nation's steel mills and keep them running.

In carrying out this order, the secretary directed the presidents of the seized steel companies to serve as operating managers for the U.S. government. Until directed otherwise, each president was to operate his plant in accordance with the rules and regulations prescribed by the secretary. While obeying these orders under protest, the steel companies filed a lawsuit in U.S. District Court for the District of Columbia, seeking declaratory relief to invalidate the executive order and injunctive relief to restrain its enforcement.

On April 30, 1952, the district court issued a preliminary injunction immediately restraining the secretary of commerce from continuing the seizure and possession of the steel mills. On that same day, the U.S. Court of Appeals for the District of Columbia stayed the district court's order on the grounds that resolution of such an issue is more appropriate for the U.S. Supreme Court. Granting certiorari three days later, the Supreme Court decided the case on June 12, 1952.

In a 6–3 decision, the Supreme Court invalidated the executive order and affirmed the district court's judgment. Justice **HUGO BLACK** delivered the opinion of the Court. Truman's power to issue the order, the Court said, derives, if at all, from an act of Congress or from the U.S. Constitution. There are no other sources for **PRESIDENTIAL POWER**, the Court wrote.

The Court found that Truman had not acted pursuant to congressional authority. Prior to issuing the order, Truman had given Congress formal notice of the impending seizure. However, neither house responded. The Court also observed that Congress had considered amending the Labor-Management Relations Act of 1947, 61 Stat. 136, popularly known as the **TAFT-HARTLEY ACT**, to include a provision authorizing the seizure of steel mills in times of national crisis. Yet Congress rejected the idea. No other federal statutory authority existed, the Court stressed, from which presidential power to seize a private business could be fairly implied.

The Court next turned to the president's constitutional powers. Article II of the Constitution delegates certain enumerated powers to the executive branch. Unlike Article I, which gives Congress a broad grant of authority to make all laws that are "necessary and proper" in exercising its legislative function, Article II limits the authority of the executive branch to narrowly specified powers.

Consistent with Article II, the Court said, a president may recommend the enactment of a particular bill, **VETO** objectionable legislation, and "faithfully execute" laws that have been passed by both houses of Congress. As commander in chief, the president of the United States is vested with ultimate responsibility for the nation's armed forces. However, the Court emphasized, the office of the president has no constitutional authority outside the language contained within the four corners of the Constitution.

Lawyers for the executive branch had argued that the presidency carries with it certain inherent powers that may be reasonably inferred from the express provisions of the Constitution. During times of national emergency, the government's lawyers argued, the president may exercise these inherent powers without violating the Constitution. Since wartime is traditionally considered a time of national emergency, the president's seizure of the steel mills represented a legitimate exercise of his inherent powers.

The Supreme Court disagreed with these arguments. Conceding that a strike could threaten national security by curtailing the production of armaments, the Court said that the commander in chief's authority to prosecute a foreign war does not empower him to seize private property in an effort to resolve a domestic labor dispute. "This is a job for the Nation's lawmakers," Justice Black wrote, "not for its military authorities." Black reminded the executive branch that only Congress can authorize the taking of private property for public use under the **EMINENT DOMAIN CLAUSE** of the **FIFTH AMENDMENT** to the U.S. Constitution.

Justices **FELIX FRANKFURTER**, **WILLIAM O. DOUGLAS**, **HAROLD BURTON**, **TOM CLARK**, and **ROBERT JACKSON** each wrote a concurring opinion. Frankfurter suggested that the powers expressly enumerated in Article II may be supplemented by long-standing executive practice, though he said there was no historical precedent for Truman's action in this case. With the exception of Jackson, the other concurring justices elaborated on points made by Justice Black in the Court's opinion.

Jackson's concurring opinion has garnered much attention from constitutional scholars and is the most frequently cited opinion in *Youngstown Sheet & Tube.* Jackson articulated an overarching theory of federal executive power in the United States. According to Jackson, there are three tiers of presidential authority. When a

president acts in conjunction with Congress, Jackson wrote, executive power is at its zenith because the president may rely on his own authority plus that of the legislative branch. When a president acts contrary to congressional will, executive power is at its nadir because the president must rely solely on his expressly delegated authority minus that of the legislative branch. And when a president acts in an area where Congress has been silent, executive power is uncertain and may fluctuate depending on the circumstances.

Justice FRED VINSON dissented, joined by Justices STANLEY REED and SHERMAN MINTON. The dissent underscored the importance of steel production to the military effort in Korea. During the two years of hostilities in Southeast Asia, the dissent noted, Congress directed the president to secure the nation's defenses, sometimes doing so in a very general and open-ended manner. Thus, the dissent argued, Truman had received some authority from Congress to take action in the name of national defense and the public interest.

The dissent also relied on history, pointing out that JAMES MADISON advocated instilling the executive branch with initiative and vigor. President ABRAHAM LINCOLN, the dissent continued, showed initiative during the Civil War by ordering the seizure of all rail and telegraph lines leading to Washington, D.C., even though he lacked congressional approval. In this light, the dissent concluded, Truman's seizure of the steel mills was supported by historical precedent.

*Youngstown Sheet & Tube* is considered a seminal case regarding the SEPARATION OF POWERS among the coordinate branches of the federal government. The U.S. Constitution separates the powers of the federal government among the executive, legislative, and judicial branches. The constitutional authority of each branch is limited by the express language of the Constitution and by the powers delegated to the coordinate branches.

Article I gives Congress the power to make the law. Article II gives the president the power to execute or implement the law, while Article III gives the federal judiciary the power to interpret and apply the law. The popular notion of "checks and balances" rests upon this conception of the separation of powers.

Despite the clear separation of constitutional powers, presidents, members of Congress, judges, and laypeople have debated whether the executive branch is vested with additional inherent or implied powers. On one side of the debate are those who believe the presidency enjoys a residue of autocratic power. According to these individuals, such power may be exercised by the president in times of national emergency and is limited only by the president's good judgment. On the other side of the debate are those who believe the executive branch may not exercise any power that is not explicitly granted by the federal Constitution or federal statute.

*Youngstown Sheet & Tube* went a long way toward settling this debate. Occasionally presidents still assert claims of EXECUTIVE PRIVILEGE and executive IMMUNITY. In some instances federal courts recognize such claims, but oftentimes they do not. President RICHARD M. NIXON unsuccessfully attempted to insulate tape recordings made at the White House during the WATERGATE political scandal from a federal investigation, a notable example of a failed assertion of executive immunity (UNITED STATES V. NIXON, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 [1974]). In many such cases, *Youngstown Sheet & Tube* has provided the backdrop for judicial analysis of executive authority under CONSTITUTIONAL LAW.

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CROSS-REFERENCES

Executive Order; Preliminary Injunction; Strike.

## ZENGER, JOHN PETER

In August of 1735 John Peter Zenger, a printer for the *New York Weekly Journal,* was prosecuted for seditious libel. Although Zenger may have been technically guilty of the crime as it was then defined by ENGLISH LAW, a jury made up of twelve Americans acquitted the defendant in one of the earliest acts of colonial resistance to British authority during the eighteenth century.

Zenger printed the allegedly seditious articles following a legal dispute between two public officials, William Cosby and Rip Van Dam. Cosby was appointed governor of New York in 1731, but did not officially take office until 1732. During the interim, Van Dam, the current governor, continued to discharge his official responsibilities, and collect a salary. Cosby, believing that he was entitled to the salary collected by Van Dam during this period, sued the lame duck governor for restitution. When the New York Supreme Court decided in favor of Van Dam, Cosby removed Chief Justice Lewis Morris and replaced him with James DeLancey, a judge who was friendlier to the new governor.

On November 1, 1733, the first issue of the *New York Weekly Journal* appeared. The *Journal* was financially supported by Morris, edited by Van Dam's attorney, and printed by Zenger, a German immigrant with little education. In a series of articles, the *Journal* accused Cosby of conspiring to persecute the inhabitants of New York and tainting their judicial system. Since Cosby had altered the composition of the state supreme court by replacing a political adversary with a political ally, the articles printed in the *Journal* possessed a kernel of truth.

In January of 1734 Cosby attempted to imprison Zenger for seditious LIBEL, but DeLancey failed to convince a GRAND JURY to indict him. Ten months later a second grand jury declined to indict Zenger, prompting the governor's council to command the destruction of all offensive *Journal* articles. When a third grand jury refused to issue an indictment against Zenger, Cosby ordered his attorney general to charge Zenger with seditious libel by "information," an alternative legal procedure by which criminal proceedings may be instituted against a defendant.

The information accused Zenger of having printed several false, scandalous, and defamatory articles that tended to bring the governor into disrepute. The case was tried before the New York Supreme Court and Chief Justice DeLancey. Zenger's lawyers, Alexander and WILLIAM SMITH, challenged the jurisdiction of the court to hear the dispute, and questioned DeLancey's impartiality. In response, DeLancey disbarred both attorneys. Subsequently, Andrew Hamilton, one of the most noted advocates in the colonies, agreed to represent Zenger for the trial's duration.

The nub of Hamilton's defense rested upon the veracity of the articles printed in the *Journal.* Acknowledging that truth was not a defense to seditious libel under the COMMON LAW of England, Hamilton suggested that Americans

enjoyed greater freedom than citizens of Great Britain, including the right to print truthful criticisms of the government and its officials. A published allegation of official misconduct, Hamilton argued, does not amount to libel unless proven false by the government.

DeLancey instructed the jurors to consider only the factual question of whether Zenger had printed or published the articles in issue. The court said it would decide the legal question of whether they were libelous. However, Hamilton had earlier intimated that the jurors enjoyed the prerogative to ignore the judge's instructions, and render a verdict according to their collective conscience and the interests of justice. Contemporary observers reported that the jurors took only a "small time" before returning a verdict of "not guilty."

Zenger's trial served as a fountainhead for two different principles of American law. First, the Zenger trial represents the first case in America in which truth was asserted as a defense to an action for libel. Although Americans were denied this defense under the common law of many jurisdictions during the two centuries that followed the Zenger trial, truth is now a constitutionally protected defense under the **FIRST AMENDMENT**. In **NEW YORK TIMES CO. V. SULLIVAN**, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), the U.S. Supreme Court cited the Zenger trial as one of the building blocks in this area of libel law.

Second, the Zenger trial represents one of the first cases in which **JURY NULLIFICATION** was exercised in America. During the 1990s state and federal courts continue to recognize the right of juries to disregard the law and acquit certain defendants in order to prevent oppression by the government or to otherwise promote the interests of justice. This prerogative, which stems from the jury's role as the conscience of the community, is not formally acknowledged in a number of jurisdictions. However, in those jurisdictions that do recognize it, at least one court has pointed out that "[t]he roots of jury nullification in this country reach back to 1735 and the prosecution of Peter Zenger for seditious libel" *U.S. v. Datcher,* 830 F.Supp. 411 (M.D. Tenn. 1993).

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**CROSS-REFERENCES**

Libel and Slander; Sedition.

## ZERO BRACKET AMOUNT

*A lump-sum allowance of income that a taxpayer could receive without imposition of any federal* **INCOME TAX** *because it was considered equivalent to the standard amount of deductions usually taken by an average taxpayer. It was replaced by the standard deduction in the* **TAX REFORM ACT** *of 1986. 100 Stat. 2085, 26 U.S.C.A. §§ 47, 1042.*

The zero-bracket amount was so named because a zero rate of taxation was applied to it. Its financial value was determined by the filing status of the taxpayer. If a taxpayer had more deductions that qualified as itemized deductions than the zero-bracket amount, she could itemize deductions, but the itemized deductions were reduced by the zero bracket amount. That figure was subtracted from the taxpayer's adjusted gross income to find her taxable income, upon which the income tax liability was computed.

Congress eliminated the zero-bracket amount in the Tax Reform Act of 1986, replacing it with the standard deduction. The standard deduction is a specific dollar amount that can be deducted from income by those taxpayers who do not itemize their deductions because their deductions do not exceed the standard deduction assigned to them. The base amount of the standard deduction depends on the taxpayer's filing status (single, married filing jointly, married filing separately, head of household, or qualifying widow or widower).

## ZERO TOLERANCE

*The policy of applying laws or penalties to even minor infringements of a code in order to reinforce its overall importance and enhance deterrence.*

Since the 1980s the phrase zero tolerance has signified a philosophy toward illegal conduct that favors strict imposition of penalties regardless of the individual circumstances of each case. Zero tolerance policies deal primarily with drugs and weapons and have been implemented by most school districts in the United States. Two federal laws have driven zero tolerance but state legislatures have also been willing to mandate similar policies. Supporters of zero tolerance policies contend that they promote the

safety and well-being of school children and send a powerful message of deterrence. In addition, supporters believe strict adherence to these polices ensures that school officials do not treat individual children differently. Critics of zero tolerance believe that inflexible discipline policies produce harmful results. Moreover, school administrators have failed to use common sense in applying zero tolerance, leading to the expulsion of children for bringing to school such items as an aspirin or a plastic knife.

The term *zero tolerance* was first employed by President RONALD REAGAN's administration when it launched its War on Drugs initiative in the early 1980s. Some school districts embraced the initiative in an attempt to eradicate drug possession and drug use on school property. The policy became law, however, when Congress passed the Drug-Free Schools and Campuses Act of 1989 (Pub.L. 101-226, December 12, 1989, 103 Stat. 1928). The act banned the unlawful use, possession, or distribution of drugs and alcohol by students and employees on school grounds and college campuses. It required educational agencies and institutions of higher learning to establish disciplinary sanctions for violations or risk losing federal aid. As a result, the majority of schools and colleges immediately began to adopt zero tolerance polices to safeguard their federal funding.

Congress legislated zero tolerance polices toward weapons on school grounds when it passed the Gun-Free Schools Act of 1994 (Pub. L. 103-382, Title I, § 101, October 20, 1994, 198 Stat. 3907). According to the act, every state had to pass a law requiring educational agencies to expel from school, for not less than one year, any student found in possession of a gun. Students with disabilities under either the Individuals with Disabilities Act (IDEA) (Pub.L. 91-230, Title VI, April 13, 1970, 84 Stat. 175 to 188) or Section 504 of the Rehabilitation Act (Pub.L. 93-112, September 26, 1973, 87 Stat. 355) could be expelled for only 45 days. Despite these strict provisions, the act permitted school superintendents to modify the expulsion requirement on a case-by-case basis.

This federal law was the catalyst for school zero tolerance policies that soon went beyond drugs and weapons to include hate speech, harassment, fighting, and dress codes. School principals, who must administer zero tolerance policies, began to suspend and expel students for seemingly trivial offenses. Students have been suspended or expelled for a host of relatively minor incidents, including possession of nail files, paper clips, organic cough drops, a model rocket, a five-inch plastic ax as part of a Halloween costume, an inhaler for asthma, and a kitchen knife in a lunch box to cut chicken. Outraged parents of children disciplined by zero tolerance policies protested to school boards, publicized their cases with the news media, and sometimes filed lawsuits in court seeking the overturning of the discipline. Courts generally have rejected such lawsuits, concluding that school administrators must have the ability to exercise their judgment in maintaining school safety.

One study, however, issued by the Advancement Project in 2000, suggested that zero tolerance, while supposedly a neutral policy, was applied disproportionately to students of color. Such concerns led the AMERICAN BAR ASSOCIATION (ABA) in 2001 to pass a resolution opposing, in principle, zero tolerance policies that (1) have a discriminatory effect, or (2) set forth mandatory punishment without regard to the circumstances or nature of the offense, or the student's history. The ABA concluded that such "one-size-fits-all" policies violate students' DUE PROCESS rights. Although the organization urged schools to maintain strong prevention policies, it also wanted to ensure that students' rights were protected when they were disciplined.

Despite the backlash, zero tolerance has remained a central part of school administration. In particular, zero tolerance for weapons has been a top priority due, in part, to a string of school shootings, which culminated in the 1999 tragedy at Columbine High School in Colorado. Some school administrators have turned to zero tolerance policies because they need to respond swiftly and decisively in order to maintain control and discipline. They contend that such polices can be communicated clearly and forcefully to students so they understand that discipline will be immediate and predictable. Finally, another reason for school administrators to embrace zero tolerance policies is legal liability. A school that does not enforce a zero tolerance policy risks a civil lawsuit by victims of school violence.

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CROSS-REFERENCES

Schools and School Districts; Three Strikes Laws.

## ZONING

*The separation or division of a municipality into districts, the regulation of buildings and structures in such districts in accordance with their construction and the nature and extent of their use, and the dedication of such districts to particular uses designed to serve the* GENERAL WELFARE.

Zoning, the regulation of the use of real property by local government, restricts a particular territory to residential, commercial, industrial, or other uses. The local governing body considers the character of the property as well as its fitness for particular uses. It must enact the regulations in accordance with a well-considered and comprehensive plan intended to avoid ARBITRARY exercise of government power. A comprehensive plan is a general design to control the use of properties in the entire municipality, or at least in a large portion of it. Individual pieces of property should not be singled out for special treatment. For example, one or two lots may not be placed in a separate zone and subjected to restrictions that do not apply to similar adjoining lands.

Zoning ordinances divide a town, city, village, or county into separate residential, commercial, and industrial districts, thereby preserving the desirable characteristics of each type of setting. These laws generally limit dimensions in each zone. Many regulations require certain building features and limit the number and location of parking and loading areas and the use of signs. Other regulations provide space for schools, parks, or other public facilities.

Zoning helps city planners bring about orderly growth and change. It controls population density and helps create attractive, healthful residential areas. In addition, zoning helps assure property owners and residents that the characteristics of nearby areas will remain stable.

In some states a municipality has the right to be heard on proposed zoning in an adjoining community. Courts have upheld this so-called extraterritorial zoning as an exercise of the POLICE POWER of the state, with the goal of serving the general welfare of both communities and creating harmony among the uses of a given area, without regard to political boundaries.

Following the lead of New York City, which passed the first major zoning ordinance in 1916, most urban communities throughout the country have enacted zoning regulations.

Zoning is not merely the division of a city into districts and the regulation of the structural and architectural designs of buildings within each district. It also requires consideration of future growth and development, adequacy of drainage and storm sewers, public streets, pedestrian walkways, density of population, and many other factors that are within legislative competence.

BUILDING CODES, which govern the safety and structure of buildings, do not contradict zoning ordinances, but exist side by side with them. Both rest on the police power: zoning stabilizes the use of property, and building codes ensure the safety and structure of buildings. Zoning is intended to have a relative permanency, whereas building codes are much more flexible because they must keep abreast of new materials and other technological advances.

Municipalities have power to zone property only if a state grants it by statute or it is derived from constitutional provisions. Zoning ordinances must be reasonable because by their nature they restrain the use of property that the owners could otherwise use as they chose. The landowner cannot complain as long as the power to zone is used in the public interest and for the general welfare of the community impartially and without compensation.

The regulations must meet the demands of the constitutional prohibition against taking private property for public use without just compensation as mandated by the Fifth and Fourteenth Amendments to the U.S. Constitution as well as by the constitutions of the states. The U.S. Supreme Court decided three cases that have had considerable impact in this area: *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), *Lujan v. National Wildlife Federation,* 497 U.S. 871, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990), and *Dolan v. City of Tigard,* 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). The decisions made it more difficult for municipalities to require that

land developers give up part of their property for public purposes, such as access to lake shores, sidewalks, access roads, and parks. If the government needs the land, it must compensate the owner by exercising its power of EMINENT DOMAIN and condemning the property.

Courts have held that a zoning regulation is legal or valid if it is reasonable and not arbitrary and bears a reasonable and substantial relation to the public health, safety, comfort, morals, and general welfare and if the means employed are reasonably necessary for the accomplishment of its purpose. An ordinance is invalid if its enforcement will preclude use of the property for any purpose to which it is reasonably adapted. In determining whether a regulation is reasonable, no single factor is controlling. Those factors normally considered are need for the adoption, the purpose, location, size, and physical characteristics of the land, and the character of the neighborhood. Also considered are the effect on the value of property, the amount by which property values are decreased, the notion of the general welfare (that is, what is best for the community at large), and the density, population, and aesthetics of the area. Traffic, use of nearby land, and length of time the property has been vacant are also relevant.

An ordinance that is reasonable when enacted may prove to be unreasonable, and hence may be set aside by a court, if circumstances have changed. Zoning regulations must promote the good of all the people in the community rather than further the desires of a particular group, and the power cannot be invoked to further private interests that conflict with the rights of the public. Restrictions based solely on race or occupancy of property within certain districts are invalid. A classification that discriminates against a racial or religious group can only be upheld if the state demonstrates an overwhelming interest that can be served no other way. The regulation must be clear and specific. It must describe districts with certainty, and if maps are necessary, it should include references to them. The standards governing conduct of the administrator must be clear. The fact that regulations have not been enforced does not prevent their enforcement. Only persons whose rights are injured by regulations may attack them. An invalid enactment is without effect and confers no rights and imposes no duties.

Regulations must be in accordance with a comprehensive plan, which may be separate or part of the zoning regulation. Spot zoning of individual parcels of property in a manner different from that of surrounding property, primarily for the private interests of the owner of the property so zoned, may be improper but not illegal in all cases. Spot zoning disregards the requirement that zoning be in accordance with a comprehensive plan. It may be valid if there is a reasonable basis for distinguishing the parcel from surrounding parcels.

Zoning regulations may validly prescribe a type of building, location of utility lines, restrictions on accessory buildings or structures, and preservation of historical areas and buildings. General rules of construction apply to restrictions affecting architectural and structural design of buildings and open spaces. Such rules apply to building setbacks from the streets and other boundaries, size and height of buildings, number of rooms, floor space or area and cubic feet, and minimum cost of buildings. They also apply to frontage of lots, minimum lot area, front, rear, and side yards, off-street parking, the number of buildings on a lot, and the number of dwelling units in a certain area. Regulations may restrict areas to single-family homes or to multifamily dwellings or townhouses. An ordinance may permit the construction of a building intended for nonresidential use, such as a school, church, hospital, or charitable institution, in a residential district.

Municipalities have gained some flexibility in their regulations by authorizing special use permits in certain districts. This gives them the power to impose restrictions and requirements that might not otherwise be possible under the strict classification of the district.

It is also possible to create a unit development in an entire district or a large part of one, with plans and restrictions governing the entire project. This arrangement may mix some commercial and residential uses and "clustering" of certain properties, leaving room for green spaces and parkways.

A municipality may use broad discretion to fix the location and boundaries of business, commercial, and industrial districts and has the power to review and periodically update zoning regulations. This should be done whenever growth and progress require. Failure or refusal to make a change in regulations when they are clearly appropriate in view of development may be regarded as unreasonable, arbitrary conduct. Only the legislative body empowered to enact

zoning regulations has the power to amend them. This must be done with the same formality, including required notices and hearings, as the original enactment. Neither the courts nor boards of zoning appeals should undertake such amendment, regardless of how archaic the regulations may be.

Zoning ordinances may permit or prohibit certain uses and may create whole districts devoted only to residence, commerce, or industry. When a structure's use does not conform to a zoning ordinance but the structure existed before the adoption or amendment of the ordinance, the structure has nonconforming use status, sometimes called legal nonconforming use. A vested legal nonconforming use is safeguarded by the Constitution unless it is abandoned or terminated. It is a property right that cannot be taken away without just compensation. However, the nonconforming use structure may not be expanded, its use may not be changed, and, under many laws, if it is destroyed by fire or other cause, it may not be rebuilt.

Zoning regulations are subject to interpretation by the courts where their meaning is unclear. Because such laws are in derogation of the COMMON LAW, they are to be construed strictly, but they should receive a reasonable and fair construction in the light of the public good they propose to serve.

Boards of zoning appeals are created by statutes. They are QUASI-JUDICIAL bodies because they conduct hearings with sworn testimony by witnesses and a transcript is made, which courts may review. Municipalities generally require permits for building or remodeling and certificates of occupancy after inspection discloses conformity with applicable codes. An owner without legal training who contests a zoning requirement would be ill-advised to try to argue his case alone because the members of the board, the municipal attorney, and the planning official have long experience, knowledge of the law, and a built-in tendency to favor their interpretations of the ordinances.

Where full compliance with the strict letter of the ordinance works a hardship on the owner, the board of appeals or governing body may grant a variance, which is toleration of a slight violation of the ordinance. The owner, however, may not create her own hardship by willfully violating the law.

Zoning regulations may be enforced by MANDAMUS, an action that results in a judgment of a court compelling the appropriate public officers to carry out their duty; by INJUNCTION, which results in a court order forbidding the use or structure that is in violation; and by civil FORFEITURE actions or criminal prosecutions. Adjoining owners or citizens at large may have standing to enforce the ordinances where the municipal officers fail to do so. Some ordinances provide for a certain sum to be paid to the municipality for each day of violation. Some courts enforce these penalties strictly, whereas others are more lenient, as long as compliance with the ordinances is achieved in a reasonable time.

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### CROSS-REFERENCES

Adjoining Landowners; Condemnation; Fifth Amendment; Landmark; Land-Use Control; Municipal Corporation; Theaters and Shows.

# Abbreviations

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|---|---|
| A. | Atlantic Reporter |
| A. 2d | Atlantic Reporter, Second Series |
| AA | Alcoholics Anonymous |
| AAA | American Arbitration Association; Agricultural Adjustment Act of 1933 |
| AALS | Association of American Law Schools |
| AAPRP | All African People's Revolutionary Party |
| AARP | American Association of Retired Persons |
| AAS | American Anti-Slavery Society |
| ABA | American Bar Association; Architectural Barriers Act of 1968; American Bankers Association |
| ABC | American Broadcasting Companies, Inc. (formerly American Broadcasting Corporation) |
| ABM | Antiballistic missile |
| ABM Treaty | Anti-Ballistic Missile Treaty of 1972 |
| ABVP | Anti-Biased Violence Project |
| A/C | Account |
| A.C. | Appeal cases |
| ACAA | Air Carrier Access Act |
| ACCA | Armed Career Criminal Act of 1984 |
| ACF | Administration for Children and Families |
| ACLU | American Civil Liberties Union |
| ACRS | Accelerated Cost Recovery System |
| ACS | Agricultural Cooperative Service |
| ACT | American College Test |
| Act'g Legal Adv. | Acting Legal Advisor |
| ACUS | Administrative Conference of the United States |
| ACYF | Administration on Children, Youth, and Families |
| A.D. 2d | Appellate Division, Second Series, N.Y. |
| ADA | Americans with Disabilities Act of 1990 |
| ADAMHA | Alcohol, Drug Abuse, and Mental Health Administration |
| ADC | Aid to Dependent Children |
| ADD | Administration on Developmental Disabilities |
| ADEA | Age Discrimination in Employment Act of 1967 |
| ADL | Anti-Defamation League |
| ADR | Alternative dispute resolution |
| AEC | Atomic Energy Commission |
| AECB | Arms Export Control Board |
| AEDPA | Antiterrorism and Effective Death Penalty Act |
| A.E.R. | All England Law Reports |
| AFA | American Family Association; Alabama Freethought Association |
| AFB | American Farm Bureau |
| AFBF | American Farm Bureau Federation |
| AFDC | Aid to Families with Dependent Children |
| aff'd per cur. | Affirmed by the court |
| AFIS | Automated fingerprint identification system |
| AFL | American Federation of Labor |

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| AFL-CIO | American Federation of Labor and Congress of Industrial Organizations |
| AFRes | Air Force Reserve |
| AFSC | American Friends Service Committee |
| AFSCME | American Federation of State, County, and Municipal Employees |
| AGRICOLA | Agricultural Online Access |
| AIA | Association of Insurance Attorneys |
| AIB | American Institute for Banking |
| AID | Artificial insemination using a third-party donor's sperm; Agency for International Development |
| AIDS | Acquired immune deficiency syndrome |
| AIH | Artificial insemination using the husband's sperm |
| AIM | American Indian Movement |
| AIPAC | American Israel Public Affairs Committee |
| AIUSA | Amnesty International, U.S.A. Affiliate |
| AJS | American Judicature Society |
| ALA | American Library Association |
| Alcoa | Aluminum Company of America |
| ALEC | American Legislative Exchange Council |
| ALF | Animal Liberation Front |
| ALI | American Law Institute |
| ALJ | Administrative law judge |
| All E.R. | All England Law Reports |
| ALO | Agency Liaison |
| A.L.R. | American Law Reports |
| ALY | *American Law Yearbook* |
| AMA | American Medical Association |
| AMAA | Agricultural Marketing Agreement Act |
| Am. Dec. | American Decisions |
| amdt. | Amendment |
| Amer. St. Papers, For. Rels. | American State Papers, Legislative and Executive Documents of the Congress of the U.S., Class I, Foreign Relations, 1832–1859 |
| AMS | Agricultural Marketing Service |
| AMVETS | American Veterans (of World War II) |
| ANA | Administration for Native Americans |
| Ann. Dig. | Annual Digest of Public International Law Cases |
| ANPA | American Newspaper Publishers Association |
| ANSCA | Alaska Native Claims Act |
| ANZUS | Australia-New Zealand-United States Security Treaty Organization |
| AOA | Administration on Aging |
| AOE | Arizonans for Official English |
| AOL | America Online |
| AP | Associated Press |
| APA | Administrative Procedure Act of 1946 |
| APHIS | Animal and Plant Health Inspection Service |
| App. Div. | Appellate Division Reports, N.Y. Supreme Court |
| Arb. Trib., U.S.-British | Arbitration Tribunal, Claim Convention of 1853, United States and Great Britain Convention of 1853 |
| Ardcor | American Roller Die Corporation |
| ARPA | Advanced Research Projects Agency |
| ARPANET | Advanced Research Projects Agency Network |
| ARS | Advanced Record System |
| Art. | Article |
| ARU | American Railway Union |
| ASCME | American Federation of State, County, and Municipal Employees |
| ASCS | Agriculture Stabilization and Conservation Service |
| ASM | Available Seatmile |
| ASPCA | American Society for the Prevention of Cruelty to Animals |
| Asst. Att. Gen. | Assistant Attorney General |
| AT&T | American Telephone and Telegraph |
| ATFD | Alcohol, Tobacco and Firearms Division |
| ATLA | Association of Trial Lawyers of America |
| ATO | Alpha Tau Omega |
| ATTD | Alcohol and Tobacco Tax Division |
| ATU | Alcohol Tax Unit |
| AUAM | American Union against Militarism |
| AUM | Animal Unit Month |
| AZT | Azidothymidine |

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|---|---|
| BAC | Blood alcohol concentration |
| BALSA | Black-American Law Student Association |
| BATF | Bureau of Alcohol, Tobacco and Firearms |
| BBS | Bulletin Board System |
| BCCI | Bank of Credit and Commerce International |
| BEA | Bureau of Economic Analysis |
| Bell's Cr. C. | Bell's English Crown Cases |
| Bevans | United States Treaties, etc. *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled under the direction of Charles I. Bevans, 1968–76) |
| BFOQ | Bona fide occupational qualification |
| BI | Bureau of Investigation |
| BIA | Bureau of Indian Affairs; Board of Immigration Appeals |
| BID | Business improvement district |
| BJS | Bureau of Justice Statistics |
| Black. | Black's United States Supreme Court Reports |
| Blatchf. | Blatchford's United States Circuit Court Reports |
| BLM | Bureau of Land Management |
| BLS | Bureau of Labor Statistics |
| BMD | Ballistic missile defense |
| BNA | Bureau of National Affairs |
| BOCA | Building Officials and Code Administrators International |
| BOP | Bureau of Prisons |
| BPP | Black Panther Party for Self-defense |
| Brit. and For. | British and Foreign State Papers |
| BSA | Boy Scouts of America |
| BTP | Beta Theta Pi |
| Burr. | James Burrows, *Report of Cases Argued and Determined in the Court of King's Bench during the Time of Lord Mansfield* (1766–1780) |
| BVA | Board of Veterans Appeals |
| c. | Chapter |
| $C^3I$ | Command, Control, Communications, and Intelligence |
| C.A. | Court of Appeals |
| CAA | Clean Air Act |
| CAB | Civil Aeronautics Board; Corporation for American Banking |
| CAFE | Corporate average fuel economy |
| Cal. 2d | California Reports, Second Series |
| Cal. 3d | California Reports, Third Series |
| CALR | Computer-assisted legal research |
| Cal. Rptr. | California Reporter |
| CAP | Common Agricultural Policy |
| CARA | Classification and Ratings Administration |
| CATV | Community antenna television |
| CBO | Congressional Budget Office |
| CBS | Columbia Broadcasting System |
| CBOEC | Chicago Board of Election Commissioners |
| CCC | Commodity Credit Corporation |
| CCDBG | Child Care and Development Block Grant of 1990 |
| C.C.D. Pa. | Circuit Court Decisions, Pennsylvania |
| C.C.D. Va. | Circuit Court Decisions, Virginia |
| CCEA | Cabinet Council on Economic Affairs |
| CCP | Chinese Communist Party |
| CCR | Center for Constitutional Rights |
| C.C.R.I. | Circuit Court, Rhode Island |
| CD | Certificate of deposit; compact disc |
| CDA | Communications Decency Act |
| CDBG | Community Development Block Grant Program |
| CDC | Centers for Disease Control and Prevention; Community Development Corporation |
| CDF | Children's Defense Fund |
| CDL | Citizens for Decency through Law |
| CD-ROM | Compact disc read-only memory |
| CDS | Community Dispute Services |
| CDW | Collision damage waiver |
| CENTO | Central Treaty Organization |
| CEO | Chief executive officer |
| CEQ | Council on Environmental Quality |

| | |
|---|---|
| CERCLA | Comprehensive Environmental Response, Compensation, and Liability Act of 1980 |
| cert. | *Certiorari* |
| CETA | Comprehensive Employment and Training Act |
| C & F | Cost and freight |
| CFC | Chlorofluorocarbon |
| CFE Treaty | Conventional Forces in Europe Treaty of 1990 |
| C.F. & I. | Cost, freight, and insurance |
| C.F.R | Code of Federal Regulations |
| CFNP | Community Food and Nutrition Program |
| CFTA | Canadian Free Trade Agreement |
| CFTC | Commodity Futures Trading Commission |
| Ch. | Chancery Division, English Law Reports |
| CHAMPVA | Civilian Health and Medical Program at the Veterans Administration |
| CHEP | Cuban/Haitian Entrant Program |
| CHINS | Children in need of supervision |
| CHIPS | Child in need of protective services |
| Ch.N.Y. | Chancery Reports, New York |
| Chr. Rob. | Christopher Robinson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (1801–1808) |
| CIA | Central Intelligence Agency |
| CID | Commercial Item Descriptions |
| C.I.F. | Cost, insurance, and freight |
| CINCNORAD | Commander in Chief, North American Air Defense Command |
| C.I.O. | Congress of Industrial Organizations |
| CIPE | Center for International Private Enterprise |
| C.J. | Chief justice |
| CJIS | Criminal Justice Information Services |
| C.J.S. | Corpus Juris Secundum |
| Claims Arb. under Spec. Conv., Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| CLASP | Center for Law and Social Policy |
| CLE | Center for Law and Education; Continuing Legal Education |
| CLEO | Council on Legal Education Opportunity; Chief Law Enforcement Officer |
| CLP | Communist Labor Party of America |
| CLS | Christian Legal Society; critical legal studies (movement); Critical Legal Studies (membership organization) |
| C.M.A. | Court of Military Appeals |
| CMEA | Council for Mutual Economic Assistance |
| CMHS | Center for Mental Health Services |
| C.M.R. | Court of Military Review |
| CNN | Cable News Network |
| CNO | Chief of Naval Operations |
| CNOL | Consolidated net operating loss |
| CNR | Chicago and Northwestern Railway |
| CO | Conscientious Objector |
| C.O.D. | Cash on delivery |
| COGP | Commission on Government Procurement |
| COINTELPRO | Counterintelligence Program |
| Coke Rep. | Coke's English King's Bench Reports |
| COLA | Cost-of-living adjustment |
| COMCEN | Federal Communications Center |
| Comp. | Compilation |
| Conn. | Connecticut Reports |
| CONTU | National Commission on New Technological Uses of Copyrighted Works |
| Conv. | Convention |
| COPA | Child Online Protection Act (1998) |
| COPS | Community Oriented Policing Services |
| Corbin | Arthur L. Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (1950) |
| CORE | Congress on Racial Equality |
| Cox's Crim. Cases | Cox's Criminal Cases (England) |
| COYOTE | Call Off Your Old Tired Ethics |

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| CPA | Certified public accountant |
| CPB | Corporation for Public Broadcasting, the |
| CPI | Consumer Price Index |
| CPPA | Child Pornography Prevention Act |
| CPSC | Consumer Product Safety Commission |
| Cranch | Cranch's United States Supreme Court Reports |
| CRF | Constitutional Rights Foundation |
| CRR | Center for Constitutional Rights |
| CRS | Congressional Research Service; Community Relations Service |
| CRT | Critical race theory |
| CSA | Community Services Administration |
| CSAP | Center for Substance Abuse Prevention |
| CSAT | Center for Substance Abuse Treatment |
| CSC | Civil Service Commission |
| CSCE | Conference on Security and Cooperation in Europe |
| CSG | Council of State Governments |
| CSO | Community Service Organization |
| CSP | Center for the Study of the Presidency |
| C-SPAN | Cable-Satellite Public Affairs Network |
| CSRS | Cooperative State Research Service |
| CSWPL | Center on Social Welfare Policy and Law |
| CTA | *Cum testamento annexo* (with the will attached) |
| Ct. Ap. D.C. | Court of Appeals, District of Columbia |
| Ct. App. No. Ireland | Court of Appeals, Northern Ireland |
| Ct. Cl. | Court of Claims, United States |
| Ct. Crim. Apps. | Court of Criminal Appeals (England) |
| CTI | Consolidated taxable income |
| Ct. of Sess., Scot. | Court of Sessions, Scotland |
| CU | Credit union |
| CUNY | City University of New York |
| Cush. | Cushing's Massachusetts Reports |
| CWA | Civil Works Administration; Clean Water Act |
| DACORB | Department of the Army Conscientious Objector Review Board |
| Dall. | Dallas's Pennsylvania and United States Reports |
| DAR | Daughters of the American Revolution |
| DARPA | Defense Advanced Research Projects Agency |
| DAVA | Defense Audiovisual Agency |
| D.C. | United States District Court; District of Columbia |
| D.C. Del. | United States District Court, Delaware |
| D.C. Mass. | United States District Court, Massachusetts |
| D.C. Md. | United States District Court, Maryland |
| D.C.N.D.Cal. | United States District Court, Northern District, California |
| D.C.N.Y. | United States District Court, New York |
| D.C.Pa. | United States District Court, Pennsylvania |
| DCS | Deputy Chiefs of Staff |
| DCZ | District of the Canal Zone |
| DDT | Dichlorodiphenyltricloro-ethane |
| DEA | Drug Enforcement Administration |
| Decl. Lond. | Declaration of London, February 26, 1909 |
| Dev. & B. | Devereux & Battle's North Carolina Reports |
| DFL | Minnesota Democratic-Farmer-Labor |
| DFTA | Department for the Aging |
| Dig. U.S. Practice in Intl. Law | Digest of U.S. Practice in International Law |
| Dist. Ct. | D.C. United States District Court, District of Columbia |
| D.L.R. | Dominion Law Reports (Canada) |
| DMCA | Digital Millennium Copyright Act |
| DNA | Deoxyribonucleic acid |
| Dnase | Deoxyribonuclease |
| DNC | Democratic National Committee |
| DOC | Department of Commerce |
| DOD | Department of Defense |
| DODEA | Department of Defense Education Activity |
| Dodson | Dodson's Reports, English Admiralty Courts |
| DOE | Department of Energy |

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| DOER | Department of Employee Relations |
| DOJ | Department of Justice |
| DOL | Department of Labor |
| DOMA | Defense of Marriage Act of 1996 |
| DOS | Disk operating system |
| DOT | Department of Transportation |
| DPT | Diphtheria, pertussis, and tetanus |
| DRI | Defense Research Institute |
| DSAA | Defense Security Assistance Agency |
| DUI | Driving under the influence; driving under intoxication |
| DVD | Digital versatile disc |
| DWI | Driving while intoxicated |
| EAHCA | Education for All Handicapped Children Act of 1975 |
| EBT | Examination before trial |
| E.coli | Escherichia coli |
| ECPA | Electronic Communications Privacy Act of 1986 |
| ECSC | Treaty of the European Coal and Steel Community |
| EDA | Economic Development Administration |
| EDF | Environmental Defense Fund |
| E.D.N.Y. | Eastern District, New York |
| EDP | Electronic data processing |
| E.D. Pa. | Eastern-District, Pennsylvania |
| EDSC | Eastern District, South Carolina |
| EDT | Eastern daylight time |
| E.D. Va. | Eastern District, Virginia |
| EEC | European Economic Community; European Economic Community Treaty |
| EEOC | Equal Employment Opportunity Commission |
| EFF | Electronic Frontier Foundation |
| EFT | Electronic funds transfer |
| Eliz. | Queen Elizabeth (Great Britain) |
| Em. App. | Temporary Emergency Court of Appeals |
| ENE | Early neutral evaluation |
| Eng. Rep. | English Reports |
| EOP | Executive Office of the President |
| EPA | Environmental Protection Agency; Equal Pay Act of 1963 |
| ERA | Equal Rights Amendment |
| ERDC | Energy Research and Development Commission |
| ERISA | Employee Retirement Income Security Act of 1974 |
| ERS | Economic Research Service |
| ERTA | Economic Recovery Tax Act of 1981 |
| ESA | Endangered Species Act of 1973 |
| ESF | Emergency support function; Economic Support Fund |
| ESRD | End-Stage Renal Disease Program |
| ETA | Employment and Training Administration |
| ETS | Environmental tobacco smoke |
| et seq. | *Et sequentes* or *et sequentia* ("and the following") |
| EU | European Union |
| Euratom | European Atomic Energy Community |
| Eur. Ct. H.R. | European Court of Human Rights |
| Ex. | English Exchequer Reports, Welsby, Hurlstone & Gordon |
| Exch. | Exchequer Reports (Welsby, Hurlstone & Gordon) |
| Ex Com | Executive Committee of the National Security Council |
| Eximbank | Export-Import Bank of the United States |
| F. | Federal Reporter |
| F. 2d | Federal Reporter, Second Series |
| FAA | Federal Aviation Administration; Federal Arbitration Act |
| FAAA | Federal Alcohol Administration Act |
| FACE | Freedom of Access to Clinic Entrances Act of 1994 |
| FACT | Feminist Anti-Censorship Task Force |
| FAIRA | Federal Agriculture Improvement and Reform Act of 1996 |
| FAMLA | Family and Medical Leave Act of 1993 |
| Fannie Mae | Federal National Mortgage Association |
| FAO | Food and Agriculture Organization of the United Nations |
| FAR | Federal Acquisition Regulations |

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| FAS | Foreign Agricultural Service |
| FBA | Federal Bar Association |
| FBI | Federal Bureau of Investigation |
| FCA | Farm Credit Administration |
| F. Cas. | Federal Cases |
| FCC | Federal Communications Commission |
| FCIA | Foreign Credit Insurance Association |
| FCIC | Federal Crop Insurance Corporation |
| FCLAA | Federal Cigarette Labeling and Advertising Act |
| FCRA | Fair Credit Reporting Act |
| FCU | Federal credit unions |
| FCUA | Federal Credit Union Act |
| FCZ | Fishery Conservation Zone |
| FDA | Food and Drug Administration |
| FDIC | Federal Deposit Insurance Corporation |
| FDPC | Federal Data Processing Center |
| FEC | Federal Election Commission |
| FECA | Federal Election Campaign Act of 1971 |
| Fed. Cas. | Federal Cases |
| FEHA | Fair Employment and Housing Act |
| FEHBA | Federal Employees Health Benefit Act |
| FEMA | Federal Emergency Management Agency |
| FERC | Federal Energy Regulatory Commission |
| FFB | Federal Financing Bank |
| FFDC | Federal Food, Drug, and Cosmetics Act |
| FGIS | Federal Grain Inspection Service |
| FHA | Federal Housing Administration |
| FHAA | Fair Housing Amendments Act of 1998 |
| FHWA | Federal Highway Administration |
| FIA | Federal Insurance Administration |
| FIC | Federal Information Centers; Federation of Insurance Counsel |
| FICA | Federal Insurance Contributions Act |
| FIFRA | Federal Insecticide, Fungicide, and Rodenticide Act |
| FIP | Forestry Incentives Program |
| FIRREA | Financial Institutions Reform, Recovery, and Enforcement Act of 1989 |
| FISA | Foreign Intelligence Surveillance Act of 1978 |
| FISC | Foreign Intelligence Surveillance Court of Review |
| FJC | Federal Judicial Center |
| FLSA | Fair Labor Standards Act |
| FMC | Federal Maritime Commission |
| FMCS | Federal Mediation and Conciliation Service |
| FmHA | Farmers Home Administration |
| FMLA | Family and Medical Leave Act of 1993 |
| FNMA | Federal National Mortgage Association, ''Fannie Mae'' |
| F.O.B. | Free on board |
| FOIA | Freedom of Information Act |
| FOMC | Federal Open Market Committee |
| FPA | Federal Power Act of 1935 |
| FPC | Federal Power Commission |
| FPMR | Federal Property Management Regulations |
| FPRS | Federal Property Resources Service |
| FR | Federal Register |
| FRA | Federal Railroad Administration |
| FRB | Federal Reserve Board |
| FRC | Federal Radio Commission |
| F.R.D. | Federal Rules Decisions |
| FSA | Family Support Act |
| FSB | Federal'naya Sluzhba Bezopasnosti (the Federal Security Service of Russia) |
| FSLIC | Federal Savings and Loan Insurance Corporation |
| FSQS | Food Safety and Quality Service |
| FSS | Federal Supply Service |
| F. Supp. | Federal Supplement |
| FTA | U.S.-Canada Free Trade Agreement of 1988 |
| FTC | Federal Trade Commission |
| FTCA | Federal Tort Claims Act |
| FTS | Federal Telecommunications System |
| FTS2000 | Federal Telecommunications System 2000 |
| FUCA | Federal Unemployment Compensation Act of 1988 |

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| FUTA | Federal Unemployment Tax Act |
| FWPCA | Federal Water Pollution Control Act of 1948 |
| FWS | Fish and Wildlife Service |
| GAL | Guardian ad litem |
| GAO | General Accounting Office; Governmental Affairs Office |
| GAOR | General Assembly Official Records, United Nations |
| GAAP | Generally accepted accounting principles |
| GA Res. | General Assembly Resolution (United Nations) |
| GATT | General Agreement on Tariffs and Trade |
| GCA | Gun Control Act |
| Gen. Cls. Comm. | General Claims Commission, United States and Panama; General Claims United States and Mexico |
| Geo. II | King George II (Great Britain) |
| Geo. III | King George III (Great Britain) |
| GHB | Gamma-hydroxybutrate |
| GI | Government Issue |
| GID | General Intelligence Division |
| GM | General Motors |
| GNMA | Government National Mortgage Association, "Ginnie Mae' |
| GNP | Gross national product |
| GOP | Grand Old Party (Republican Party) |
| GOPAC | Grand Old Party Action Committee |
| GPA | Office of Governmental and Public Affairs |
| GPO | Government Printing Office |
| GRAS | Generally recognized as safe |
| Gr. Br., Crim. Ct. App. | Great Britain, Court of Criminal Appeals |
| GRNL | Gay Rights-National Lobby |
| GSA | General Services Administration |
| Hackworth | Green Haywood Hackworth, *Digest of International Law* (1940–1944) |
| Hay and Marriott | Great Britain. High Court of Admiralty, *Decisions in the High Court of Admiralty during the Time of Sir George Hay and of Sir James Marriott, Late Judges of That Court* (1801) |
| HBO | Home Box Office |
| HCFA | Health Care Financing Administration |
| H.Ct. | High Court |
| HDS | Office of Human Development Services |
| Hen. & M. | Hening & Munford's Virginia Reports |
| HEW | Department of Health, Education, and Welfare |
| HFCA | Health Care Financing Administration |
| HGI | Handgun Control, Incorporated |
| HHS | Department of Health and Human Services |
| Hill | Hill's New York Reports |
| HIRE | Help through Industry Retraining and Employment |
| HIV | Human immunodeficiency virus |
| H.L. | House of Lords Cases (England) |
| H. Lords | House of Lords (England) |
| HMO | Health Maintenance Organization |
| HNIS | Human Nutrition Information Service |
| Hong Kong L.R. | Hong Kong Law Reports |
| How. | Howard's United States Supreme Court Reports |
| How. St. Trials | Howell's English State Trials |
| HUAC | House Un-American Activities Committee |
| HUD | Department of Housing and Urban Development |
| Hudson, Internatl. Legis. | Manley Ottmer Hudson, ed., *International Legislation: A Collection of the Texts of Multipartite International Instruments of General Interest Beginning with the Covenant of the League of Nations* (1931) |
| Hudson, World Court Reps. | Manley Ottmer Hudson, ea., *World Court Reports* (1934– ) |
| Hun | Hun's New York Supreme Court Reports |
| Hunt's Rept. | Bert L. Hunt, *Report of the American and Panamanian General Claims Arbitration* (1934) |
| IAEA | International Atomic Energy Agency |
| IALL | International Association of Law Libraries |

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| IBA | International Bar Association |
| IBM | International Business Machines |
| ICA | Interstate Commerce Act |
| ICBM | Intercontinental ballistic missile |
| ICC | Interstate Commerce Commission; International Criminal Court |
| ICJ | International Court of Justice |
| ICM | Institute for Court Management |
| IDEA | Individuals with Disabilities Education Act of 1975 |
| IDOP | International Dolphin Conservation Program |
| IEP | Individualized educational program |
| IFC | International Finance Corporation |
| IGRA | Indian Gaming Regulatory Act of 1988 |
| IJA | Institute of Judicial Administration |
| IJC | International Joint Commission |
| ILC | International Law Commission |
| ILD | International Labor Defense |
| Ill. Dec. | Illinois Decisions |
| ILO | International Labor Organization |
| IMF | International Monetary Fund |
| INA | Immigration and Nationality Act |
| IND | Investigational new drug |
| INF Treaty | Intermediate-Range Nuclear Forces Treaty of 1987 |
| INS | Immigration and Naturalization Service |
| INTELSAT | International Telecommunications Satellite Organization |
| Interpol | International Criminal Police Organization |
| Int'l. Law Reps. | International Law Reports |
| Intl. Legal Mats. | International Legal Materials |
| IOC | International Olympic Committee |
| IPDC | International Program for the Development of Communication |
| IPO | Intellectual Property Owners |
| IPP | Independent power producer |
| IQ | Intelligence quotient |
| I.R. | Irish Reports |
| IRA | Individual retirement account; Irish Republican Army |
| IRC | Internal Revenue Code |
| IRCA | Immigration Reform and Control Act of 1986 |
| IRS | Internal Revenue Service |
| ISO | Independent service organization |
| ISP | Internet service provider |
| ISSN | International Standard Serial Numbers |
| ITA | International Trade Administration |
| ITI | Information Technology Integration |
| ITO | International Trade Organization |
| ITS | Information Technology Service |
| ITT | International Telephone and Telegraph Corporation |
| ITU | International Telecommunication Union |
| IUD | Intrauterine device |
| IWC | International Whaling Commission |
| IWW | Industrial Workers of the World |
| JAGC | Judge Advocate General's Corps |
| JCS | Joint Chiefs of Staff |
| JDL | Jewish Defense League |
| JNOV | Judgment *non obstante veredicto* ("judgment nothing to recommend it" or "judgment notwithstanding the verdict") |
| JOBS | Jobs Opportunity and Basic Skills |
| John. Ch. | Johnson's New York Chancery Reports |
| Johns. | Johnson's Reports (New York) |
| JP | Justice of the peace |
| K.B. | King's Bench Reports (England) |
| KFC | Kentucky Fried Chicken |
| KGB | Komitet Gosudarstvennoi Bezopasnosti (the State Security Committee for countries in the former Soviet Union) |
| KKK | Ku Klux Klan |
| KMT | Kuomintang (Chinese, "national people's party") |
| LAD | Law Against Discrimination |

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| LAPD | Los Angeles Police Department |
| LC | Library of Congress |
| LCHA | Longshoremen's and Harbor Workers Compensation Act of 1927 |
| LD50 | Lethal dose 50 |
| LDEF | Legal Defense and Education Fund (NOW) |
| LDF | Legal Defense Fund, Legal Defense and Educational Fund of the NAACP |
| LEAA | Law Enforcement Assistance Administration |
| L.Ed. | Lawyers' Edition Supreme Court Reports |
| LI | Letter of interpretation |
| LLC | Limited Liability Company |
| LLP | Limited Liability Partnership |
| LMSA | Labor-Management Services Administration |
| LNTS | League of Nations Treaty Series |
| Lofft's Rep. | Lofft's English King's Bench Reports |
| L.R. | Law Reports (English) |
| LSAC | Law School Admission Council |
| LSAS | Law School Admission Service |
| LSAT | Law School Aptitude Test |
| LSC | Legal Services Corporation; Legal Services for Children |
| LSD | Lysergic acid diethylamide |
| LSDAS | Law School Data Assembly Service |
| LTBT | Limited Test Ban Treaty |
| LTC | Long Term Care |
| MAD | Mutual assured destruction |
| MADD | Mothers against Drunk Driving |
| MALDEF | Mexican American Legal Defense and Educational Fund |
| Malloy | William M. Malloy, ed., *Treaties, Conventions International Acts, Protocols, and Agreements between the United States of America and Other Powers* (1910–1938) |
| Martens | Georg Friedrich von Martens, ea., *Noveau recueil général de traités et autres actes relatifs aux rapports de droit international* (Series I, 20 vols. [1843–1875]; Series II, 35 vols. [1876–1908]; Series III [1909– ]) |
| Mass. | Massachusetts Reports |
| MCC | Metropolitan Correctional Center |
| MCCA | Medicare Catastrophic Coverage Act of 1988 |
| MCH | Maternal and Child Health Bureau |
| MCRA | Medical Care Recovery Act of 1962 |
| MDA | Medical Devices Amendments of 1976 |
| Md. App. | Maryland, Appeal Cases |
| M.D. Ga. | Middle District, Georgia |
| Mercy | Movement Ensuring the Right to Choose for Yourself |
| Metc. | Metcalf's Massachusetts Reports |
| MFDP | Mississippi Freedom Democratic party |
| MGT | Management |
| MHSS | Military Health Services System |
| Miller | David Hunter Miller, ea., *Treaties and Other International Acts of the United States of America* (1931–1948) |
| Minn. | Minnesota Reports |
| MINS | Minors in need of supervision |
| MIRV | Multiple independently targetable reentry vehicle |
| MIRVed ICBM | Multiple independently targetable reentry vehicled intercontinental ballistic missile |
| Misc. | Miscellaneous Reports, New York |
| Mixed Claims Comm., Report of Decs | Mixed Claims Commission, United States and Germany, Report of Decisions |
| M.J. | Military Justice Reporter |
| MLAP | Migrant Legal Action Program |
| MLB | Major League Baseball |
| MLDP | Mississippi Loyalist Democratic Party |
| MMI | Moslem Mosque, Incorporated |
| MMPA | Marine Mammal Protection Act of 1972 |
| Mo. | Missouri Reports |
| MOD | Masters of Deception |
| Mod. | Modern Reports, English King's Bench, etc. |

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| Moore, Dig. Intl. Law | John Bassett Moore, *A Digest of International Law,* 8 vols. (1906) |
| Moore, Intl. Arbs. | John Bassett Moore, *History and Digest of the International Arbitrations to Which United States Has Been a Party,* 6 vols. (1898) |
| Morison | William Maxwell Morison, *The Scots Revised Report: Morison's Dictionary of Decisions* (1908–09) |
| M.P. | Member of Parliament |
| MP3 | MPEG Audio Layer 3 |
| MPAA | Motion Picture Association of America |
| MPAS | Michigan Protection and Advocacy Service |
| MPEG | Motion Picture Experts Group |
| mpg | Miles per gallon |
| MPPDA | Motion Picture Producers and Distributors of America |
| MPRSA | Marine Protection, Research, and Sanctuaries Act of 1972 |
| M.R. | Master of the Rolls |
| MS-DOS | Microsoft Disk Operating System |
| MSHA | Mine Safety and Health Administration |
| MSPB | Merit Systems Protection Board |
| MSSA | Military Selective Service Act |
| N/A | Not Available |
| NAACP | National Association for the Advancement of Colored People |
| NAAQS | National Ambient Air Quality Standards |
| NAB | National Association of Broadcasters |
| NABSW | National Association of Black Social Workers |
| NACDL | National Association of Criminal Defense Lawyers |
| NAFTA | North American Free Trade Agreement of 1993 |
| NAGHSR | National Association of Governors' Highway Safety Representatives |
| NALA | National Association of Legal Assistants |
| NAM | National Association of Manufacturers |
| NAR | National Association of Realtors |
| NARAL | National Abortion and Reproductive Rights Action League |
| NARF | Native American Rights Fund |
| NARS | National Archives and Record Service |
| NASA | National Aeronautics and Space Administration |
| NASD | National Association of Securities Dealers |
| NATO | North Atlantic Treaty Organization |
| NAVINFO | Navy Information Offices |
| NAWSA | National American Woman's Suffrage Association |
| NBA | National Bar Association; National Basketball Association |
| NBC | National Broadcasting Company |
| NBLSA | National Black Law Student Association |
| NBS | National Bureau of Standards |
| NCA | Noise Control Act; National Command Authorities |
| NCAA | National Collegiate Athletic Association |
| NCAC | National Coalition against Censorship |
| NCCB | National Consumer Cooperative Bank |
| NCE | Northwest Community Exchange |
| NCF | National Chamber Foundation |
| NCIP | National Crime Insurance Program |
| NCJA | National Criminal Justice Association |
| NCLB | National Civil Liberties Bureau |
| NCP | National contingency plan |
| NCSC | National Center for State Courts |
| NCUA | National Credit Union Administration |
| NDA | New drug application |
| N.D. Ill. | Northern District, Illinois |
| NDU | National Defense University |
| N.D. Wash. | Northern District, Washington |
| N.E. | North Eastern Reporter |
| N.E. 2d | North Eastern Reporter, Second Series |
| NEA | National Endowment for the Arts; National Education Association |

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| NEH | National Endowment for the Humanities |
| NEPA | National Environmental Protection Act; National Endowment Policy Act |
| NET Act | No Electronic Theft Act |
| NFIB | National Federation of Independent Businesses |
| NFIP | National Flood Insurance Program |
| NFL | National Football League |
| NFPA | National Federation of Paralegal Associations |
| NGLTF | National Gay and Lesbian Task Force |
| NHL | National Hockey League |
| NHRA | Nursing Home Reform Act of 1987 |
| NHTSA | National Highway Traffic Safety Administration |
| Nielsen's Rept. | Frederick Kenelm Nielsen, *American and British Claims Arbitration under the Special Agreement Concluded between the United States and Great Britain, August 18, 1910* (1926) |
| NIEO | New International Economic Order |
| NIGC | National Indian Gaming Commission |
| NIH | National Institutes of Health |
| NIJ | National Institute of Justice |
| NIRA | National Industrial Recovery Act of 1933; National Industrial Recovery Administration |
| NIST | National Institute of Standards and Technology |
| N.J. | New Jersey Reports |
| N.J. Super. | New Jersey Superior Court Reports |
| NLEA | Nutrition Labeling and Education Act of 1990 |
| NLRA | National Labor Relations Act |
| NLRB | National Labor Relations Board |
| NMFS | National Marine Fisheries Service |
| No. | Number |
| NOAA | National Oceanic and Atmospheric Administration |
| NOC | National Olympic Committee |
| NOI | Nation of Islam |
| NOL | Net operating loss |
| NORML | National Organization for the Reform of Marijuana Laws |
| NOW | National Organization for Women |
| NOW LDEF | National Organization for Women Legal Defense and Education Fund |
| NOW/PAC | National Organization for Women Political Action Committee |
| NPDES | National Pollutant Discharge Elimination System |
| NPL | National priorities list |
| NPR | National Public Radio |
| NPT | Nuclear Non-Proliferation Treaty of 1970 |
| NRA | National Rifle Association; National Recovery Act |
| NRC | Nuclear Regulatory Commission |
| NRLC | National Right to Life Committee |
| NRTA | National Retired Teachers Association |
| NSA | National Security Agency |
| NSC | National Security Council |
| NSCLC | National Senior Citizens Law Center |
| NSF | National Science Foundation |
| NSFNET | National Science Foundation Network |
| NSI | Network Solutions, Inc. |
| NTIA | National Telecommunications and Information Administration |
| NTID | National Technical Institute for the Deaf |
| NTIS | National Technical Information Service |
| NTS | Naval Telecommunications System |
| NTSB | National Transportation Safety Board |
| NVRA | National Voter Registration Act |
| N.W. | North Western Reporter |
| N.W. 2d | North Western Reporter, Second Series |
| NWSA | National Woman Suffrage Association |
| N.Y. | New York Court of Appeals Reports |
| N.Y. 2d | New York Court of Appeals Reports, Second Series |
| N.Y.S. | New York Supplement Reporter |

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| N.Y.S. 2d | New York Supplement Reporter, Second Series |
| NYSE | New York Stock Exchange |
| NYSLA | New York State Liquor Authority |
| N.Y. Sup. | New York Supreme Court Reports |
| NYU | New York University |
| OAAU | Organization of Afro American Unity |
| OAP | Office of Administrative Procedure |
| OAS | Organization of American States |
| OASDI | Old-age, Survivors, and Disability Insurance Benefits |
| OASHDS | Office of the Assistant Secretary for Human Development Services |
| OCC | Office of Comptroller of the Currency |
| OCED | Office of Comprehensive Employment Development |
| OCHAMPUS | Office of Civilian Health and Medical Program of the Uniformed Services |
| OCSE | Office of Child Support Enforcement |
| OEA | Organización de los Estados Americanos |
| OEM | Original Equipment Manufacturer |
| OFCCP | Office of Federal Contract Compliance Programs |
| OFPP | Office of Federal Procurement Policy |
| OIC | Office of the Independent Counsel |
| OICD | Office of International Cooperation and Development |
| OIG | Office of the Inspector General |
| OJARS | Office of Justice Assistance, Research, and Statistics |
| OMB | Office of Management and Budget |
| OMPC | Office of Management, Planning, and Communications |
| ONP | Office of National Programs |
| OPD | Office of Policy Development |
| OPEC | Organization of Petroleum Exporting Countries |
| OPIC | Overseas Private Investment Corporation |
| Ops. Atts. Gen. | Opinions of the Attorneys-General of the United States |
| Ops. Comms. | Opinions of the Commissioners |
| OPSP | Office of Product Standards Policy |
| O.R. | Ontario Reports |
| OR | Official Records |
| OSHA | Occupational Safety and Health Act |
| OSHRC | Occupational Safety and Health Review Commission |
| OSM | Office of Surface Mining |
| OSS | Office of Strategic Services |
| OST | Office of the Secretary |
| OT | Office of Transportation |
| OTA | Office of Technology Assessment |
| OTC | Over-the-counter |
| OTS | Office of Thrift Supervisors |
| OUI | Operating under the influence |
| OVCI | Offshore Voluntary Compliance Initiative |
| OWBPA | Older Workers Benefit Protection Act |
| OWRT | Office of Water Research and Technology |
| P. | Pacific Reporter |
| P. 2d | Pacific Reporter, Second Series |
| PAC | Political action committee |
| Pa. Oyer and Terminer | Pennsylvania Oyer and Terminer Reports |
| PATCO | Professional Air Traffic Controllers Organization |
| PBGC | Pension Benefit Guaranty Corporation |
| PBS | Public Broadcasting Service; Public Buildings Service |
| P.C. | Privy Council (English Law Reports) |
| PC | Personal computer; politically correct |
| PCBs | Polychlorinated biphenyls |
| PCIJ | Permanent Court of International Justice |
| | Series A-Judgments and Orders (1922–30) |
| | Series B-Advisory Opinions (1922–30) |
| | Series A/B-Judgments, Orders, and Advisory Opinions (1931–40) |

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| PCIJ (cont'd.) | Series C-Pleadings, Oral Statements, and Documents relating to Judgments and Advisory Opinions (1923–42) |
| | Series D-Acts and Documents concerning the Organization of the World Court (1922 –47) |
| | Series E-Annual Reports (1925–45) |
| PCP | Phencyclidine |
| P.D. | Probate Division, English Law Reports (1876–1890) |
| PDA | Pregnancy Discrimination Act of 1978 |
| PD & R | Policy Development and Research |
| Pepco | Potomac Electric Power Company |
| Perm. Ct. of Arb. | Permanent Court of Arbitration |
| PES | Post-Enumeration Survey |
| Pet. | Peters' United States Supreme Court Reports |
| PETA | People for the Ethical Treatment of Animals |
| PGA | Professional Golfers Association |
| PGM | Program |
| PHA | Public Housing Agency |
| Phila. Ct. of Oyer and Terminer | Philadelphia Court of Oyer and Terminer |
| PhRMA | Pharmaceutical Research and Manufacturers of America |
| PHS | Public Health Service |
| PIC | Private Industry Council |
| PICJ | Permanent International Court of Justice |
| Pick. | Pickering's Massachusetts Reports |
| PIK | Payment in Kind |
| PINS | Persons in need of supervision |
| PIRG | Public Interest Research Group |
| P.L. | Public Laws |
| PLAN | Pro-Life Action Network |
| PLC | Plaintiffs' Legal Committee |
| PLE | Product liability expenses |
| PLI | Practicing Law Institute |
| PLL | Product liability loss |
| PLLP | Professional Limited Liability Partnership |
| PLO | Palestine Liberation Organization |
| PLRA | Prison Litigation Reform Act of 1995 |
| PNET | Peaceful Nuclear Explosions Treaty |
| PONY | Prostitutes of New York |
| POW-MIA | Prisoner of war-missing in action |
| Pratt | Frederic Thomas Pratt, *Law of Contraband of War, with a Selection of Cases from Papers of the Right Honourable Sir George Lee* (1856) |
| PRIDE | Prostitution to Independence, Dignity, and Equality |
| Proc. | Proceedings |
| PRP | Potentially responsible party |
| PSRO | Professional Standards Review Organization |
| PTO | Patents and Trademark Office |
| PURPA | Public Utilities Regulatory Policies Act |
| PUSH | People United to Serve Humanity |
| PUSH-Excel | PUSH for Excellence |
| PWA | Public Works Administration |
| PWSA | Ports and Waterways Safety Act of 1972 |
| Q.B. | Queen's Bench (England) |
| QTIP | Qualified Terminable Interest Property |
| Ralston's Rept. | Jackson Harvey Ralston, ed., *Venezuelan Arbitrations of 1903* (1904) |
| RC | Regional Commissioner |
| RCRA | Resource Conservation and Recovery Act |
| RCWP | Rural Clean Water Program |
| RDA | Rural Development Administration |
| REA | Rural Electrification Administration |
| Rec. des Decs. des Trib. Arb. Mixtes | G. Gidel, ed., *Recueil des décisions des tribunaux arbitraux mixtes, institués par les traités de paix* (1922–30) |
| Redmond | Vol. 3 of Charles I. Bevans, *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled by C. F. Redmond) (1969) |
| RESPA | Real Estate Settlement Procedure Act of 1974 |
| RFC | Reconstruction Finance Corporation |

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| RFRA | Religious Freedom Restoration Act of 1993 |
| RIAA | Recording Industry Association of America |
| RICO | Racketeer Influenced and Corrupt Organizations |
| RLUIPA | Religious Land Use and Institutionalized Persons Act |
| RNC | Republican National Committee |
| Roscoe | Edward Stanley Roscoe, ed., *Reports of Prize Cases Determined in the High Court Admiralty before the Lords Commissioners of Appeals in Prize Causes and before the judicial Committee of the Privy Council from 1745 to 1859* (1905) |
| ROTC | Reserve Officers' Training Corps |
| RPP | Representative Payee Program |
| R.S. | Revised Statutes |
| RTC | Resolution Trust Corp. |
| RUDs | Reservations, understandings, and declarations |
| Ryan White CARE Act | Ryan White Comprehensive AIDS Research Emergency Act of 1990 |
| SAC | Strategic Air Command |
| SACB | Subversive Activities Control Board |
| SADD | Students against Drunk Driving |
| SAF | Student Activities Fund |
| SAIF | Savings Association Insurance Fund |
| SALT | Strategic Arms Limitation Talks |
| SALT I | Strategic Arms Limitation Talks of 1969–72 |
| SAMHSA | Substance Abuse and Mental Health Services Administration |
| Sandf. | Sandford's New York Superior Court Reports |
| S and L | Savings and loan |
| SARA | Superfund Amendment and Reauthorization Act |
| SAT | Scholastic Aptitude Test |
| Sawy. | Sawyer's United States Circuit Court Reports |
| SBA | Small Business Administration |
| SBI | Small Business Institute |
| SCCC | South Central Correctional Center |
| SCLC | Southern Christian Leadership Conference |
| Scott's Repts. | James Brown Scott, ed., *The Hague Court Reports,* 2 vols. (1916–32) |
| SCS | Soil Conservation Service; Social Conservative Service |
| SCSEP | Senior Community Service Employment Program |
| S.Ct. | Supreme Court Reporter |
| S.D. Cal. | Southern District, California |
| S.D. Fla. | Southern District, Florida |
| S.D. Ga. | Southern District, Georgia |
| SDI | Strategic Defense Initiative |
| S.D. Me. | Southern District, Maine |
| S.D.N.Y. | Southern District, New York |
| SDS | Students for a Democratic Society |
| S.E. | South Eastern Reporter |
| S.E. 2d | South Eastern Reporter, Second Series |
| SEA | Science and Education Administration |
| SEATO | Southeast Asia Treaty Organization |
| SEC | Securities and Exchange Commission |
| Sec. | Section |
| SEEK | Search for Elevation, Education and Knowledge |
| SEOO | State Economic Opportunity Office |
| SEP | Simplified employee pension plan |
| Ser. | Series |
| Sess. | Session |
| SGLI | Servicemen's Group Life Insurance |
| SIP | State implementation plan |
| SLA | Symbionese Liberation Army |
| SLAPPs | Strategic Lawsuits Against Public Participation |
| SLBM | Submarine-launched ballistic missile |
| SNCC | Student Nonviolent Coordinating Committee |
| So. | Southern Reporter |
| So. 2d | Southern Reporter, Second Series |
| SPA | Software Publisher's Association |
| Spec. Sess. | Special Session |
| SPLC | Southern Poverty Law Center |
| SRA | Sentencing Reform Act of 1984 |

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| SS | *Schutzstaffel* (German, "Protection Echelon") |
| SSA | Social Security Administration |
| SSI | Supplemental Security Income |
| START I | Strategic Arms Reduction Treaty of 1991 |
| START II | Strategic Arms Reduction Treaty of 1993 |
| Stat. | United States Statutes at Large |
| STS | Space Transportation Systems |
| St. Tr. | State Trials, English |
| STURAA | Surface Transportation and Uniform Relocation Assistance Act of 1987 |
| Sup. Ct. of Justice, Mexico | Supreme Court of Justice, Mexico |
| Supp. | Supplement |
| S.W. | South Western Reporter |
| S.W. 2d | South Western Reporter, Second Series |
| SWAPO | South-West Africa People's Organization |
| SWAT | Special Weapons and Tactics |
| SWP | Socialist Workers Party |
| TDP | Trade and Development Program |
| Tex. Sup. | Texas Supreme Court Reports |
| THAAD | Theater High-Altitude Area Defense System |
| THC | Tetrahydrocannabinol |
| TI | Tobacco Institute |
| TIA | Trust Indenture Act of 1939 |
| TIAS | Treaties and Other International Acts Series (United States) |
| TNT | Trinitrotoluene |
| TOP | Targeted Outreach Program |
| TPUS | Transportation and Public Utilities Service |
| TQM | Total Quality Management |
| Tripartite Claims Comm., Decs. and Ops. | Tripartite Claims Commission (United States, Austria, and Hungary), Decisions and Opinions |
| TRI-TAC | Joint Tactical Communications |
| TRO | Temporary restraining order |
| TS | Treaty Series, United States |
| TSCA | Toxic Substance Control Act |
| TSDs | Transporters, storers, and disposers |
| TSU | Texas Southern University |
| TTBT | Threshold Test Ban Treaty |
| TV | Television |
| TVA | Tennessee Valley Authority |
| TWA | Trans World Airlines |
| UAW | United Auto Workers; United Automobile, Aerospace, and Agricultural Implements Workers of America |
| U.C.C. | Uniform Commercial Code; Universal Copyright Convention |
| U.C.C.C. | Uniform Consumer Credit Code |
| UCCJA | Uniform Child Custody Jurisdiction Act |
| UCMJ | Uniform Code of Military Justice |
| UCPP | Urban Crime Prevention Program |
| UCS | United Counseling Service |
| UDC | United Daughters of the Confederacy |
| UFW | United Farm Workers |
| UHF | Ultrahigh frequency |
| UIFSA | Uniform Interstate Family Support Act |
| UIS | Unemployment Insurance Service |
| UMDA | Uniform Marriage and Divorce Act |
| UMTA | Urban Mass Transportation Administration |
| U.N. | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCTAD | United Nations Conference on Trade and Development |
| UN Doc. | United Nations Documents |
| UNDP | United Nations Development Program |
| UNEF | United Nations Emergency Force |
| UNESCO | United Nations Educational, Scientific, and Cultural Organization |
| UNICEF | United Nations Children's Fund (formerly United Nations International Children's Emergency Fund) |
| UNIDO | United Nations Industrial and Development Organization |
| Unif. L. Ann. | Uniform Laws Annotated |
| UN Repts. Intl. Arb. Awards | United Nations Reports of International Arbitral Awards |

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| UNTS | United Nations Treaty Series |
| UPI | United Press International |
| URESA | Uniform Reciprocal Enforcement of Support Act |
| U.S. | United States Reports |
| U.S.A. | United States of America |
| USAF | United States Air Force |
| USA PATRIOT Act | Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act |
| U.S. App. D.C. | United States Court of Appeals for the District of Columbia |
| U.S.C. | United States Code; University of Southern California |
| U.S.C.A. | United States Code Annotated |
| U.S.C.C.A.N. | United States Code Congressional and Administrative News |
| USCMA | United States Court of Military Appeals |
| USDA | U.S. Department of Agriculture |
| USES | United States Employment Service |
| USF | U.S. Forestry Service |
| USFA | United States Fire Administration |
| USGA | United States Golf Association |
| USICA | International Communication Agency, United States |
| USMS | U.S. Marshals Service |
| USOC | U.S. Olympic Committee |
| USSC | U.S. Sentencing Commission |
| USSG | United States Sentencing Guidelines |
| U.S.S.R. | Union of Soviet Socialist Republics |
| UST | United States Treaties |
| USTS | United States Travel Service |
| v. | *Versus* |
| VA | Veterans Administration |
| VAR | Veterans Affairs and Rehabilitation Commission |
| VAWA | Violence against Women Act |
| VFW | Veterans of Foreign Wars |
| VGLI | Veterans Group Life Insurance |
| Vict. | Queen Victoria (Great Britain) |
| VIN | Vehicle identification number |
| VISTA | Volunteers in Service to America |
| VJRA | Veterans Judicial Review Act of 1988 |
| V.L.A. | Volunteer Lawyers for the Arts |
| VMI | Virginia Military Institute |
| VMLI | Veterans Mortgage Life Insurance |
| VOCAL | Victims of Child Abuse Laws |
| VRA | Voting Rights Act |
| WAC | Women's Army Corps |
| Wall. | Wallace's United States Supreme Court Reports |
| Wash. 2d | Washington Reports, Second Series |
| WAVES | Women Accepted for Volunteer Service |
| WCTU | Women's Christian Temperance Union |
| W.D. Wash. | Western District, Washington |
| W.D. Wis. | Western District, Wisconsin |
| WEAL | *West's Encyclopedia of American Law,* Women's Equity Action League |
| Wend. | Wendell's New York Reports |
| WFSE | Washington Federation of State Employees |
| Wheat. | Wheaton's United States Supreme Court Reports |
| Wheel. Cr. Cases | Wheeler's New York Criminal Cases |
| WHISPER | Women Hurt in Systems of Prostitution Engaged in Revolt |
| Whiteman | Marjorie Millace Whiteman, *Digest of International Law,* 15 vols. (1963–73) |
| WHO | World Health Organization |
| WIC | Women, Infants, and Children program |
| Will. and Mar. | King William and Queen Mary (Great Britain) |
| WIN | WESTLAW Is Natural; Whip Inflation Now; Work Incentive Program |
| WIPO | World Intellectual Property Organization |
| WIU | Workers' Industrial Union |
| W.L.R. | Weekly Law Reports, England |
| WPA | Works Progress Administration |
| WPPDA | Welfare and Pension Plans Disclosure Act |

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| WTO | World Trade Organization |
| WWI | World War I |
| WWII | World War II |
| Yates Sel. Cas. | Yates's New York Select Cases |
| YMCA | Young Men's Christian Association |
| YWCA | Young Women's Christian Association |

# WEST'S ENCYCLOPEDIA *of* AMERICAN LAW

2ND EDITION

# How to Use This Book

❚1❚ Article Title

❚2❚ Definition in italics with Latin translation provided

❚3❚ First-level subhead

❚4❚ Timeline for subject of biography, including general historical events and life events

❚5❚ Sidebar expands upon an issue addressed briefly in the article

❚6❚ Quotation from subject of biography

❚7❚ Biography of contributor to American law

❚8❚ Internal cross-reference to entry within WEAL

❚9❚ In Focus article examines a controversial or complex aspect of the article topic

❚10❚ Cross-references at end of article

❚11❚ Full cite for case

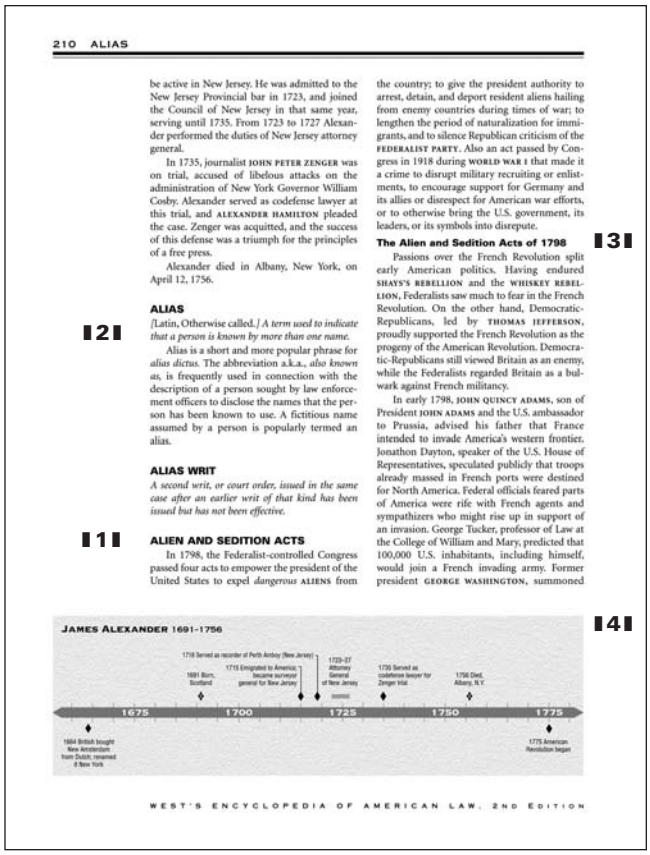



be active in New Jersey. He was admitted to the New Jersey Provincial bar in 1723, and joined the Council of New Jersey in that same year, serving until 1735. From 1723 to 1727 Alexander performed the duties of New Jersey attorney general.

In 1735, journalist JOHN PETER ZENGER was on trial, accused of libelous attacks on the administration of New York Governor William Cosby. Alexander served as codefense lawyer at this trial, and ALEXANDER HAMILTON pleaded the case. Zenger was acquitted, and the success of this defense was a triumph for the principles of a free press.

Alexander died in Albany, New York, on April 12, 1756.

**ALIAS**

❚2❚ *[Latin, Otherwise called.] A term used to indicate that a person is known by more than one name.*

Alias is a short and more popular phrase for *alias dictus.* The abbreviation a.k.a., *also known as,* is frequently used in connection with the description of a person sought by law enforcement officers to disclose the names that the person has been known to use. A fictitious name assumed by a person is popularly termed an alias.

**ALIAS WRIT**

*A second writ, or court order, issued in the same case after an earlier writ of that kind has been issued but has not been effective.*

❚1❚ **ALIEN AND SEDITION ACTS**

In 1798, the Federalist-controlled Congress passed four acts to empower the president of the United States to expel *dangerous* ALIENS from the country; to give the president authority to arrest, detain, and deport resident aliens hailing from enemy countries during times of war; to lengthen the period of naturalization for immigrants, and to silence Republican criticism of the FEDERALIST PARTY. Also an act passed by Congress in 1918 during WORLD WAR I that made it a crime to disrupt military recruiting or enlistments, to encourage support for Germany and its allies or disrespect for American war efforts, or to otherwise bring the U.S. government, its leaders, or its symbols into disrepute.

❚3❚ **The Alien and Sedition Acts of 1798**

Passions over the French Revolution split early American politics. Having endured SHAYS'S REBELLION and the WHISKEY REBELLION, Federalists saw much to fear in the French Revolution. On the other hand, Democratic-Republicans, led by THOMAS JEFFERSON, proudly supported the French Revolution as the progeny of the American Revolution. Democratic-Republicans still viewed Britain as an enemy, while the Federalists regarded Britain as a bulwark against French militancy.

In early 1798, JOHN QUINCY ADAMS, son of President JOHN ADAMS and the U.S. ambassador to Prussia, advised his father that France intended to invade America's western frontier. Jonathon Dayton, speaker of the U.S. House of Representatives, speculated publicly that troops already massed in French ports were destined for North America. Federal officials feared parts of America were rife with French agents and sympathizers who might rise up in support of an invasion. George Tucker, professor of Law at the College of William and Mary, predicted that 100,000 U.S. inhabitants, including himself, would join a French invading army. Former president GEORGE WASHINGTON, summoned

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## The First Payments of Social Security

After the enactment of the Social Security Act of 1935 (42 U.S.C.A. § 301 et seq.) and the creation of the Social Security Administration (SSA), the federal government had a short time to establish the program before beginning to pay benefits. Monthly benefits were to begin in 1940. The period from 1937 to 1940 was to be used both to build up the trust funds and to provide a minimum period for participation for persons to qualify for monthly benefits.

From 1937 until 1940, however, Social Security paid benefits in the form of a single, lump-sum payment. The purpose of these one-time payments was to provide some compensation to people who contributed to the program but would not participate long enough to be vested for monthly benefits.

The first applicant for a lump-sum benefit was Ernest Ackerman, a Cleveland motorman who retired one day after the Social Security Program began. During his one day of participation in the program, five cents was withheld from Ackerman's pay for Social Security, and upon retiring, he received a lump-sum payment of seventeen cents.

Payments of monthly benefits began in January 1940. On January 31, 1940, the first monthly retirement check was issued to Ida May Fuller of Ludlow, Vermont, in the amount of $22.54. Fuller died in January 1975 at the age of one hundred. During her thirty-five years as a beneficiary, she received more than $20,000 in benefits.

tions to Social Security. There is no financial need requirement to be satisfied. Once a worker qualifies for protection, his family is also entitled to protection. The entire program is geared toward helping families as a matter of social policy.

Two large funds of money are held in trust to pay benefits earned by people under OASDI: the Old Age and Survivors Trust Fund and the Disability Insurance Trust Fund. As workers and employers make payroll contributions to these funds, money is paid out in benefits to people currently qualified to receive monthly checks.

The OASDI program is funded by payroll taxes levied on employees and their employers and on the self-employed. The tax is imposed upon the employee's taxable income, up to a maximum taxable amount, with the employer contributing an equal amount. The self-employed person contributes twice the amount levied on an employee. In 2003 the rate was 6.2 percent, levied on earned income up to a maximum of $87,000.

**Old Age Benefits** A person becomes eligible for Social Security old age benefits by working a minimum number of calendar quarters. The number of quarters required for full insurance increases with the worker's age. Forty quarters is the maximum requirement. The individual is credited for income up to the maximum amount of money covered by Social Security for those years. This amount is adjusted to reflect the impact of inflation on normal earnings and ensure that a worker who pays increasing Social Security contributions during his or her work life will receive retirement benefits that keep pace with inflation.

Persons born before 1950 can retire at age 65 with full benefits based on their average income during their working years. For those born between 1950 and 1960, the retirement age for full benefits has increased to age 66. Persons born in 1960 or later will not receive full retirement benefits until age 67. Any person, however, may retire at age 62 and receive less than full benefits. At age 65, a worker's spouse who has not contributed to Social Security receives 50 percent of the amount paid to the worker.

Since 1975 Social Security benefits have increased annually to offset the corrosive effects of inflation on fixed incomes. These increases, known as cost of living allowances (COLAs), are based on the annual increase in consumer prices. Allowing benefits to increase automatically ended the need for special acts of Congress, but it has also steadily increased the cost of the Social Security Program.

have the same inheritance rights as other children. The ruling was believed to be the first on the controversial issue by any state supreme court.

Also in January 2002, Marshall addressed the Massachusetts Bar Association Conference, where she called for "a revolution in the administration of justice" stating that the court system needed to improve its management system as well as its staffing and budget controls. In March 2002, her discussion of the court system's problems were amplified in a 52-page report that was published by a blue-ribbon panel appointed by Marshall.

FURTHER READINGS

Teicher, Stacy A. 2000." A Subtle Revolution as Women Lead the Bench." *Christian Science Monitor* (January 5).

Lavoie, Denise. 2002. "Court Rules on Posthumous Conception." *Associated Press* (January 2)

**16**

*THE GOVERNMENT [THAT THE FRAMERS OF THE CONSTITUTION] DEVISED REQUIRED SEVERAL AMENDMENTS, A CIVIL WAR, AND MOMENTOUS SOCIAL TRANSFORMATION TO ATTAIN THE SYSTEM OF CONSTITUTIONAL GOVERNMENT, AND ITS RESPECT FOR THE INDIVIDUAL FREEDOMS AND HUMAN RIGHTS, THAT WE HOLD AS FUNDAMENTAL TODAY.*
*THURGOOD MARSHALL*

## MARSHALL PLAN

After **WORLD WAR II**, Europe was devastated and urgently needed an organized plan for reconstruction and economic and technical aid. The Marshall Plan was initiated in 1947 to meet this need.

The originator of the plan, U.S. Secretary of State George C. Marshall, introduced it in a speech at Harvard University on June 5, 1947. He pointed out two basic reasons for providing aid to Europe: the United States sought the reestablishment of the European countries as independent nations capable of conducting valuable trade with the United States; and the threat of a Communist takeover was more prevalent in countries that were suffering economic depression.

In 1947 a preliminary conference to discuss the terms of the program convened in Paris. The Soviet Union was invited to attend but subsequently withdrew from the program, as did other Soviet countries.

Sixteen European countries eventually participated, and, in July 1947, the Committee for European Economic Cooperation was established to allow representatives from member countries to draft a report that listed their requirements for food, supplies, and technical assistance for a four-year period.

The Committee for European Economic Cooperation subsequently became the Organization of European Economic Cooperation, an expanded and permanent organization that was responsible for submitting petitions for aid. In 1948, Congress passed the Economic Cooperation Act (62 Stat. 137), establishing funds for the Marshall Plan to be administered under the Economic Cooperation Administration, which was directed by Paul G. Hoffman.

Between 1948 and 1952, the sixteen-member countries received more than $13 billion dollars in aid under the Marshall Plan. The plan was generally regarded as a success that led to industrial and agricultural production, while stifling the Communist movement. The plan was not without its critics, however, and many Europeans believed the **COLD WAR** hostilities between the Soviet nations and the free world were aggravated by it.

**17**

## ◊ MARSHALL, THURGOOD

Thurgood Marshall, the first African American to serve on the U.S. Supreme Court, saw law as a catalyst for social change. For nearly 60 years, as both a lawyer and a jurist, Marshall worked to dismantle the system of **SEGREGATION** and improve the legal and social position of minorities.

Marshall was born July 2, 1908, in Baltimore, the son of a Pullman porter and a schoolteacher. He was a graduate of Lincoln University, a small, all-black college in Pennsylvania, and Howard University Law School in Washington, D.C. At Howard, Marshall excelled under the guidance of Vice Dean **CHARLES HAMILTON HOUSTON**, the first African American to win a case before the U.S. Supreme Court. Houston encouraged his students to become not just lawyers but "social engineers" who could use the legal system to improve society. Marshall graduated first in his law class in 1933.

Marshall's attendance at predominantly black Howard University illustrates the barriers faced by African Americans during the early twentieth century. Although Marshall wished to attend law school at the University of Maryland (a public institution in his home town of Baltimore), he was prohibited by law from doing so because of his race. This injustice helped set Marshall on a course of opposing all forms of official segregation that denied equal opportunities to African Americans.

After law school, Marshall set up a practice in Baltimore, representing indigent clients in civil rights cases. In 1936, his mentor Houston offered him a position with the National Association for the Advancement of Colored People (**NAACP**),





and in 1940, Marshall became director of the **NAACP LEGAL DEFENSE AND EDUCATIONAL FUND**, a position he held until 1961. Determined to eliminate segregation, Marshall coordinated a nationwide campaign to integrate higher education. He filed several successful lawsuits against public graduate and professional schools that refused to accept African-American students. These suits paved the way for similar cases at the high school and elementary school levels. Marshall also journeyed throughout the deep South, traveling fifty thousand miles a year to fight **JIM CROW LAWS** (a series of laws that provided for racial segregation in the South) and to represent criminal defendants.

Marshall argued 32 cases before the U.S. Supreme Court and won 29 of them. No doubt his most famous and far-reaching triumph before the High Court was **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). In that case, the father of African-American student Linda Brown sued the school board of Topeka, Kansas, over its segregation policy. Brown was required by law to attend an all African-American school several blocks from her home even though an all white public school was located in her own neighborhood. Under Kansas law, cities of more than 15,000 people, such as Topeka, could choose to operate segregated schools. Marshall argued that these segregated schools, defended by officials as "separate but equal," were unconstitutional.

**18**

The **SEPARATE-BUT-EQUAL** doctrine originated in **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), a case allowing segregated public accommodations for whites

*Thurgood Marshall.*
LIBRARY OF CONGRESS

and blacks. In a plainspoken argument, Marshall dismissed as fallacy the notion that segregated schools offered the same educational experiences to black and white students. Sociological and psychological studies demonstrated that black children were in fact harmed by the policy of school segregation. The students' self-esteem was damaged and their future diminished when they were forced to accept inadequate facilities, equipment, and educational opportunities. Marshall argued that the only purpose segregation served was to perpetuate the myth of African-Americans' inferiority. A unanimous Court agreed and struck down the separate-but-equal doctrine, a

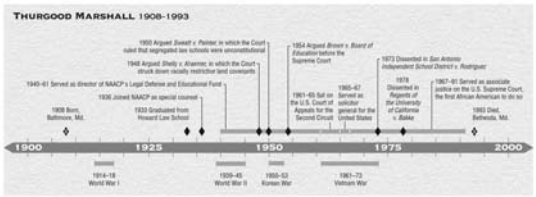






# THE FUTURE OF SOCIAL SECURITY

**19**

The payment of **OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE** (OASDI) benefits has been a cornerstone of U.S. social welfare policy since the establishment of the **SOCIAL SECURITY ADMINISTRATION** in 1935. At the same time, the long-term financial stability of OASDI has been a constant worry. In the early years of the twenty-first century, concerns about Social Security mounted as policy makers assessed the impact of the retirement of the "Baby Boom" generation. Many younger people raised the issue of "generation equity." They express doubt that Social Security benefits will be available when they retire, and anger that they will be forced to pay, through payroll taxes, for the baby boomers' retirement benefits.

Reform of the Social Security system has always been a political hot potato. Retirees and those approaching retirement form a strong **LOBBYING** force, and they zealously protect their benefits. Employers and employees are equally vocal in their opposition to higher payroll taxes to fund OASDI. Thus, changes in Social Security required bipartisan support, which materialized in the face of an impending Social Security crisis. The 1982–83 National Commission on Social Security Reform successfully secured from Congress the short-term financing of OASDI. As a result, Congress passed a series of laws meant to accumulate surpluses as a hedge against future burdens. The Social Security surplus is the amount by which revenue from the federal payroll tax exceeds the amount of Social Security benefits paid out.

IN FOCUS

Shortly after these new laws went into effect, Social Security began running a surplus. Surplus Social Security revenue can be used to fund other government programs and to help retire the national debt. During the favorable economic climate of the late 1990s, Congress began to use the surplus to pay down the federal debt, hoping to better position the government to meet its obligations to future retirees. And, in 2000, the federal government generated enough revenue so that the entire Social Security surplus was available for paying off debt.

The state of Social Security became a major campaign issue in the 2000 elections, with both Republicans and Democrats attempting to appear as though they were guardians of Social Security assets. Candidates from both parties promised to create a "lockbox," meaning that the Social Security surplus would be spent entirely on debt retirement. With the advent of fiscally lean years in the early 2000s, the lockbox approach was largely disregarded by politicians who advanced other ideas about what to do with Social Security surpluses. These ideas included using the surplus to help offset decreases in revenues brought about by tax cuts and using the surplus to fund new or expanded spending initiatives.

Analysts argue that the real issue often is clouded. It is not how to spend the surplus now, but how to maintain the long-term solvency of the Social Security trust fund. Planners estimate that the income from the trust fund will exceed expenses each year until 2020. The trust fund balances will then start to decline as investments are redeemed to meet the increased expenses from a swelling retired workforce. Although it is estimated that 75 percent of the costs would continue to be met from current payroll and income taxes, in the absence of any changes, full benefits could not be paid beginning in 2030.

In its 1996 report, the Social Security Administration's Advisory Council looked at various long-term financing options for OASDI. The council could not reach consensus on a specific long-term plan, but it did suggest several types of financing that represent a marked departure from previous efforts to fund Social Security. The council noted that past efforts have generally featured cutting benefits and raising tax rates on a "pay-as-you-go" basis. The council agreed that this approach must be changed and offered three ways of restoring financial solvency.

One approach, called Maintenance of Benefits (MB), calls for an increase in income taxes on OASDI benefits, a redirection of some revenue from other trust funds, and, most importantly, the adoption of a plan allowing the federal government to invest a portion of the trust fund assets directly in common stocks. Rates of returns on stocks have historically exceeded those on federal government bonds, where all Social Security

A person who continues to work past the retirement age may lose some benefits because Social Security is designed to replace lost earnings. If earnings from employment do not exceed the amount specified by law, the person receives the full benefits. If earnings are greater than that amount, one dollar of benefit is withheld for every two dollars in wages earned above the exempt amount. Once a person reaches age 70, however, he does not have to report earnings to the SSA, and the benefit is not reduced.

**Survivors' Benefits** Survivors' benefits are paid to family members when a worker dies. Survivors can receive benefits if the deceased worker was employed and contributed to Social





momentous victory for Marshall, affecting public schools in twenty-one states.

Marshall was appointed to the U.S. Court of Appeals for the Second Circuit in 1961, and served there until 1965 when he was named **SOLICITOR GENERAL** for the United States. He was appointed to the U.S. Supreme Court in 1967 by President **LYNDON B. JOHNSON** and served as an associate justice for 24 years.

While on the Court, Marshall was known more for his impassioned dissents than for his majority opinions. In particular, as a staunch opponent of **CAPITAL PUNISHMENT**, he regularly voiced his disagreement with the majority in death penalty cases. He was also a firm backer of **AFFIRMATIVE ACTION** and contributed one of his most famous dissents in **REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE**, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In that case, Marshall criticized the high court's ruling that a public medical school's policy of reserving 16 of 100 spots for minority students was unconstitutional. Marshall also dissented in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), disagreeing with the majority view that a Texas property tax system used to fund public education was acceptable, even though it allowed wealthier districts to provide a better school system for students in those districts than less wealthy districts could provide. Marshall objected strongly to the property tax arrangement, claiming that it deprived poor children of an equal education.

Marshall wrote the majority opinion in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968), in which the Court declared that a shopping center was a public forum from which picketers could not be barred by private owners.

Marshall retired from the Court in 1991, but continued his criticism of government policies that were detrimental to African Americans or other disenfranchised groups.

Marshall died on January 24, 1993, in Bethesda, Maryland. Upon Marshall's death, nearly 20,000 mourners filed by his casket during the 12 hours it lay in state in the Great Hall of the U.S. Supreme Court.

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CROSS-REFERENCES

**10**

*Civil Rights Movement; Integration; School Desegregation.*

## MARTIAL LAW

*The exercise of government and control by military authorities over the civilian population of a designated territory.*

**11**

Martial law is an extreme and rare measure used to control society during war or periods of civil unrest or chaos. According to the Supreme Court, the term *martial law* carries no precise meaning (*Duncan v. Kahanamoku*, 327 U.S. 304, 66 S. Ct. 606, 90 L. Ed. 688 [1946]). However, most declarations of martial law have some common features. Generally, the institution of martial law contemplates some use of military force. To a varying extent, depending on the martial law order, government military personnel have the authority to make and enforce civil and criminal laws. Certain civil liberties may be suspended, such as the right to be free from unreasonable **SEARCHES AND SEIZURES**, **FREEDOM OF ASSOCIATION**, and freedom of movement. And the writ of **HABEAS CORPUS** may be suspended (this writ allows persons who are unlawfully imprisoned to gain freedom through a court proceeding).

In the United States, martial law has been instituted on the national level only once, during the Civil War, and on a regional level only once, during **WORLD WAR II**. Otherwise, it has been limited to the states. Uprisings, political protests, labor strikes, and riots have, at various times, caused several state governors to declare some measure of martial law.

Martial law on the national level may be declared by Congress or the president. Under

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2ND EDITION

VOLUME 11

MILESTONES IN THE LAW

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# PREFACE

The U.S. legal system is admired around the world for the freedoms it allows the individual and the fairness with which it attempts to treat all persons. On the surface, it may seem simple, yet those who have delved into it know that this sytem of federal and state constitutions, statutes, regulations, and common-law decisions is elaborate and complex. It derives from the English common law, but includes principles older than England, along with some principles from other lands. The U.S. legal system, like many others, has a language all its own, but too often it is an unfamiliar language: many concepts are still phrased in Latin. The second edition of *West's Encyclopedia of American Law (WEAL)* explains legal terms and concepts in everyday language, however. It covers a wide variety of persons, entities, and events that have shaped the U.S. legal system and influenced public perceptions of it.

## MAIN FEATURES OF THIS SET

### Entries

This encyclopedia contains nearly 5,000 entries devoted to terms, concepts, events, movements, cases, and persons significant to U.S. law. Entries on legal terms contain a definition of the term, followed by explanatory text if necessary. Entries are arranged alphabetically in standard encyclopedia format for ease of use. A wide variety of additional features, listed later in this preface, provide interesting background and supplemental information.

**Definitions** Every entry on a legal term is followed by a definition, which appears at the beginning of the entry and is italicized. The Dictionary and Indexes volume includes a glossary containing all the definitions from *WEAL*.

**Further Readings** To facilitate further research, a list of Further Readings is included at the end of a majority of the main entries.

**Cross-References** *WEAL* provides two types of cross-references, within and following entries. Within the entries, terms are set in small capital letters—for example, LIEN—to indicate that they have their own entry in the encyclopedia. At the end of the entries, related entries the reader may wish to explore are listed alphabetically by title.

Blind cross-reference entries are also included to direct the user to other entries throughout the set.

### In Focus Essays

In Focus essays accompany related entries and provide additional facts, details, and arguments on particularly interesting, important, or controversial issues raised by those entries. The subjects covered include hotly contested issues, such as abortion, capital punishment, and gay rights; detailed processes, such as the Food and Drug Administration's approval process for new drugs; and important historical or social issues, such as debates over the formation of the U.S. Constitution.

### Sidebars

Sidebars provide brief highlights of some interesting facet of accompanying entries. They complement regular entries and In Focus essays by adding informative details. Sidebar topics include the Million Man March and the branches of the U.S. armed services. Sidebars appear at the top of a text page and are set in a box.

### Biographies

*WEAL* profiles a wide variety of interesting and influential people—including lawyers, judges, government and civic leaders, and historical and modern figures—who have played a part in creating or shaping U.S. law. Each biography includes a timeline, which shows important moments in the subject's life as well as important historical events of the period. Biographies appear alphabetically by the subject's last name.

## ADDITIONAL FEATURES OF THIS SET

**Enhancements** Throughout *WEAL*, readers will find a broad array of photographs, charts, graphs, manuscripts, legal forms, and other visual aids enhancing the ideas presented in the text.

**Indexes** *WEAL* features a cases index and a cumulative general index in a separate volume.

### Appendixes

Three appendix volumes are included with *WEAL*, containing hundreds of pages of documents, laws, manuscripts, and forms fundamental to and characteristic of U.S. law.

### Milestone Cases in the Law

A special Appendix volume entitled Milestones in the Law, allows readers to take a close look at landmark cases in U.S. law. Readers can explore the reasoning of the judges and the arguments of the attorneys that produced major decisions on important legal and social issues. Included in each Milestone are the opinions of the lower courts; the briefs presented by the parties to the U.S. Supreme Court; and the decision of the Supreme Court, including the majority opinion and all concurring and dissenting opinions for each case.

### Primary Documents

There is also an Appendix volume containing more than 60 primary documents, such as the English Bill of Rights, Martin Luther King Jr.'s Letter from Brimingham Jail, and several presidential speeches.

### Citations

Wherever possible, *WEAL* entries include citations for cases and statutes mentioned in the text. These allow readers wishing to do additional research to find the opinions and statutes cited. Two sample citations, with explanations of common citation terms, can be seen below and opposite.

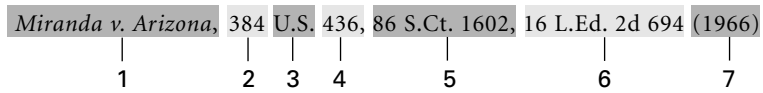


1. *Case title.* The title of the case is set in italics and indicates the names of the parties. The suit in this sample citation was between Ernesto A. Miranda and the state of Arizona.
2. *Reporter volume number.* The number preceding the reporter name indicates the reporter volume containing the case. (The volume number appears on the spine of the reporter, along with the reporter name.)
3. *Reporter name.* The reporter name is abbreviated. The suit in the sample citation is from the reporter, or series of books, called *U.S. Reports,* which contains cases from the U.S. Supreme Court. (Numerous reporters publish cases from the federal and state courts.)
4. *Reporter page.* The number following the reporter name indicates the reporter page on which the case begins.
5. *Additional reporter citation.* Many cases may be found in more than one reporter. The suit in the sample citation also appears in volume 86 of the *Supreme Court Reporter,* beginning on page 1602.
6. *Additional reporter citation.* The suit in the sample citation is also reported in volume 16 of the *Lawyer's Edition,* second series, beginning on page 694.
7. *Year of decision.* The year the court issued its decision in the case appears in parentheses at the end of the cite.

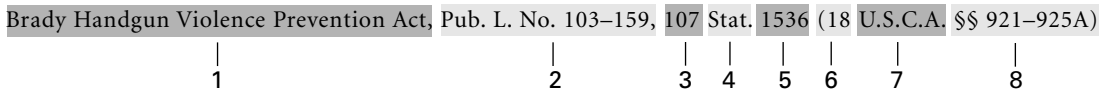


1. *Statute title.*
2. *Public law number.* In the sample citation, the number 103 indicates that this law was passed by the 103d Congress, and the number 159 indicates that it was the 159th law passed by that Congress.
3. *Reporter volume number.* The number preceding the reporter name indicates the reporter volume containing the statute.
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6. *Title number.* Federal laws are divided into major sections with specific titles. The number preceding a reference to the *U.S. Code Annotated* is the title number. title 18 of the U.S. Code is Crimes and Criminal Procedure.
7. *Additional reporter.* The statute in the sample citation may also be found in the *U.S. Code Annotated*.
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# Brown v. Board of Education of Topeka, Kansas

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## HOW TO USE MILESTONES IN THE LAW

In the materials that follow, the reader is invited to review the judicial opinions and the briefs of the parties in this milestone in U.S. law. As you read this section, you may wish to consider the following questions:

- How did the appellant's description of the issues before the Court, or questions presented, differ from the appellee's description?
- How did the parties differ in describing the history relevant to this case?
- What aspects of the conflict presented in *Brown* make it difficult for a court (as opposed to a legislature) to resolve?
- Why might *Brown* apply, or not apply, to discrimination based on a criterion other than race?

## THIS CASE IN HISTORY

*Brown versus Board of Education of Topeka, Kansas, or Brown* as it is commonly known, is one of the most significant civil rights decisions of the twentieth century. With this decision, the Supreme Court declared that the practice of segregating children into separate schools based on race was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *Brown* overruled the Court's prior decision in *Plessy v. Ferguson*, which had upheld segregation of the races so long as the facilities provided to each race were separate but equal. As a number of opinions* and briefs* in *Brown* demonstrate, the Court struggled with the issues presented in the case. The Court even took the extraordinary step of asking the parties for additional argument—twice—on the power and the ability of the Court to resolve the issues before it. Even today, the existence of schools with disproportionate numbers of students of one race or another continues to pose difficulties for courts and legislatures under *Brown.*

*The Supreme Court granted review to several similar cases from different states, which it consolidated with the *Brown* case for review. In the interest of space, the district court opinions from the other states' cases are omitted here. Also omitted are the opinion of the Supreme Court consolidating the cases and the briefs of the state of Kansas, which was asked by the Court to present its position on the issues.

# Brown v. Board of Education of Topeka

U.S. DISTRICT COURT, AUGUST 1951

**CITES AS 98 F.SUPP. 707**

**BROWN ET AL. V. BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS ET AL.**
**CIV. NO. T-316.**
**AUG. 3, 1951.**

United States District Court,
D. Kansas.
Aug. 3, 1951.

Action by Oliver Brown and others against the Board of Education of Topeka, Shawnee County, Kansas, and others for a judgment declaring unconstitutional a state statute authorizing cities of the first class to maintain separate schools for white and colored children in the grades below high school and to enjoin enforcement of the statute. The United States District Court, Huxman, Circuit Judge, held that the statute. The United States District Court, Huxman, Circuit Judge, held that the statute and the maintenance thereunder of a segregated system of schools for the first six grades do not violate constitutional guarantee of due process of law in absence of discrimination in the maintenance of the segregated schools.

Judgment for defendants.

Where physical facilities, curricula, courses of study, qualifications and quality of teachers and other educational facilities provided in separate elementary schools for colored and white children were comparable, there was no willful, intentional or substantial discrimination in such respects between colored and white schools, though absolute equality in such respects was impossible of attainment and colored children were required to travel much greater distances to school than white children, were transported to and from school free of charge. G.S.1949, 72–1724; U.S.C.A.Const. Amend. 14.

State statute authorizing cities of the first class to maintain separate schools for white and colored children in the grades below high school and the maintenance thereunder of a segregated system of elementary schools does not violate the constitutional guarantee of due process of law, in absence of discrimination between colored and white schools in the matter of physical facilities, curricula, courses of study, qualifications and quality of teachers, and other educational facilities. G.S.1949, 72–1724; U.S.C.A. Const. Amend. 14.

John Scott and Charles Scott, Topeka, Kan., Robert L. Carter, New York City, Jack Greenberg, New York City, and Charles Bledsoe, Topeka, Kan., for plaintiffs.

George Brewster and Lester Goodell, Topeka, Kan., for defendants.

Before HUXMAN, Circuit Judge, MELOTT, Chief Judge, and HILL, District Judge.

HUXMAN, Circuit Judge.

Chapter 72–1724 of the General Statutes of Kansas, 1949, relating to public schools in cities of the first class, so far as material, authorizes such cities to organize and maintain separate schools for the education maintain separate schools for the education of white and colored children in the grades below the high school grades. Pursuant to this authority, the City of Topeka, Kansas, a city of the first class, has established and maintains a segregated system of schools for the first six grades. It has established and maintains in the Topeka School District eighteen schools for colored students.

The adult plaintiffs instituted this action for themselves, their minor children plaintiffs, and all other persons similarly situated for an interlocutory injunction, a permanent injunction, restraining the enforcement, operation and execution of the state statute and the segregation instituted thereunder by the school authorities of the City of Topeka and for a declaratory judgment declaring unconstitutional the state statute and the segregation set up thereunder by the school authorities of the City of Topeka.

As against the school district of Topeka they contend that the opportunities provided for the infant plaintiffs in the separate all Negro schools are inferior to those provided white children in the all white schools; that the respects in which these opportunities are inferior include the physical facilities, curricula, teaching resources, student personnel services as well as all other services. As against both the state and the school district, they contend that apart from all other factors segregation in itself constitutes an inferiority in educational opportunities offered to Negroes and that all of this is in violation of due process guaranteed them by the Fourteenth

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Amendment to the United States Constitution. In their answer both the state and the school district defend the constitutionality of the state law and in addition the school district defends the segregation in its schools instituted thereunder.

[1] We have found as fact that the physical, facilities, the curricula, courses of study, qualification of and quality of teachers, as well as other educational facilities in the two sets of schools are comparable. It is obvious that absolute equality of physical facilities is impossible of attainment in buildings that are erected at different times. So also absolute equality of subjects taught is impossible of maintenance when teachers are permitted to select books of their own choosing to use in teaching in addition to the prescribed courses of study. It is without dispute that the prescribed courses of study are identical in all of the Topeka schools and that there is no discrimination in this respect. It is also clear in the record that the educational qualifications of the teachers in the colored schools are equal to those in the white schools and that in all other respects the educational facilities and services are comparable. It is obvious from the fact that there are only four colored schools as against eighteen white schools as against eighteen white schools in the Topeka School District, that colored children in many instances are required to travel much greater distances than they would be required to travel could they attend a white school, and are required to travel much greater distances than white children are required to travel. The evidence, however, establishes that the school district transports colored children to and from school free of charge. No such service is furnished to white children. We conclude that in the maintenance and operation of the schools there is no willful, intentional or substantial discrimination in the matters referred to above between the colored and white schools. In fact, while plaintiffs' attorneys have not abandoned this contention, they did not give it great emphasis in their presentation before the court. They relied primarily upon the contention that segregation in and of itself without more violates their rights guaranteed by the Fourteenth Amendment.

This contention poses a question not free from difficulty. As a subordinate court in the federal judicial system, we seek the answer to this constitutional question in the decisions of the Supreme Court when it has spoken on the subject and do not substitute our own views for the declared law by the Supreme Court. The difficult question as always is to analyze the decisions and seek to ascertain the trend as revealed by the later decisions.

There are a great number of cases, both federal and state, that have dealt with the many phases of segregation. Since the question involves a construction and interpretation of the federal Constitution and the pronouncements of the Supreme Court. we will consider only those cases by the Supreme Court with respect to segregation in the schools. In the early case of *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138. 1140, 41 L.Ed. 256, the Supreme Court said: "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white an colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."

It is true as contended by plaintiffs that the Plessy case involved transportation and that the above quoted statement relating to schools was not essential to the decision of the question before the court and was therefore somewhat in the nature of dicta. But that the statement is considered more than dicta is evidenced by the treatment accorded it by those seeking to strike down segregation as well as by statements in subsequent decisions of the Supreme Court. On numerous occasions the Supreme Court has been asked to overrule the Plessy case. This is the Supreme Court has refused to do, on the sole ground that a decision of the question was not necessary to a disposal of the controversy presented. In the late case of *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 851, 94 L.Ed. 1114, the Supreme Court again refused to review the Plessy case. The Court said: "Nor need we reach

petitioner's contention that *Plessy v. Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation."

*Gong Lum v. Rice*, 275 U.S. 78, 48 S.Ct. 91, 93, 72 L.Ed. 172, was a grade school segregation case. It involved the segregation law of Mississippi. Gong Lum was a Chinese child and, because of color, was required to attend the separate schools provided for colored children. The opinion of the court assumes that the educational facilities in the colored schools were adequate and equal to those of the white schools. Thus the court said: "The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow, or black." In addition to numerous state decisions on the subject, the Supreme Court in support of its conclusions cited *Plessy v. Ferguson, supra*. The Court also pointed out that the question was the same no matter what the color of the class that was required to attend separate schools. Thus the Court said: "Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils; but we cannot think that the question is any different, or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races." The court held that the question of segregation was within the discretion of the state in regulating it public schools and did not conflict with the Fourteenth Amendment.

It is vigorously argued and not without some basis therefore that the later decisions of the Supreme Court in *McLaurin v. Oklahoma*, 339 U.S. 637, 70 S.Ct. 851, 84 L.Ed. 1149, and *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114, show a trend away from the Plessy and Lum cases. *McLaurin v. Oklahoma* arose under the segregation laws of Oklahoma. McLaurin, a colored student, applied for admission to the University of Oklahoma in order to pursue studies leading to a doctorate degree in education. He was denied admission solely because he was a Negro. After litigation in the courts, which need not be reviewed herein, the legislature amended the statute permitting the admissions of colored students to institutions of higher learning attended by white students, but providing that such instruction should be given on a segregated basis; that the instruction be given in separate class rooms or at separate times. In compliance with this statute McLaurin was admitted to the university but was required to sit at a separate desk in the ante room adjoining the class room; to sit at a designated desk on the mezzanine floor of the library and to sit at a designated table and eat at a different time from the other students in the school cafeteria. These restrictions were held to violate his rights under the federal Constitution. The Supreme Court held that such treatment handicapped the student in his pursuit of effective graduate instruction.[1]

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In *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 850, 94 L.Ed. 1114, petitioner, a colored student, filed an application for admission to the University of Texas Law School. His application was rejected solely on the ground that he was a Negro. In its opinion the Supreme Court stressed the educational benefits from commingling with white students. The court concluded by stating: "we cannot conclude that the education offered petitioner [in a separate school] is substantially equal to that which he would receive if admitted to the University of Texas Law School." If segregation within a school as in the McLaurin case is a denial of due process, it is difficult to see why segregation in separate schools would not result in the same denial. Or if the denial of the right to commingle with the majority group in higher institutions of learning as in the Sweatt case and gain the educational advantages resulting therefrom, is lack of due

[1] The court said: "Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained.

"It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. * * * having been admitted to a state-supported graduate school, (he), must receive the same treatment at the hands of the state as students of other races." [339 U.S. 637, 70 S.Ct. 853.]

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process, it is difficult to see why such denial would not result in the same lack of due process if practiced in the lower grade.

It must however be remembered that in both of these cases the Supreme Court made it clear that it was confining itself to answering the one specific question, namely: "To what extent does the Equal Protection Clause * * * limit the power of a state to distinguish between students of different races in professional and graduate education in a state university?", and that the Supreme Court refused to review the Plessy case because that question was not essential to a decision of the controversy in the case.

[2] We are accordingly of the view that the Plessy and Lum cases, *supra*, have not been overruled and that they still presently are authority for the maintenance of a segregated school system in the lower grades.

The prayer for relief will be denied and judgment will be entered for defendants for costs.

# In the Supreme Court of the United States October Term, 1952

NO. 8
OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, ET AL., APPELLANTS,
V.
BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

## BRIEF FOR APPELLANTS

WILLIAM T. COLEMAN JR.,
GEORGE E. C. HAYES,
GEORGE M. JOHNSON,
WILLIAM R. MING JR.,
CONSTANCE BAKER MOTLEY,
JAMES M. NABRIT JR.,
FRANK D. REEVES,
JOHN SCOTT,
JACK B. WEINSTEIN, *of Counsel.*
ROBERT L. CARTER,
THURGOOD MARSHALL,
SPOTTSWOOD W. ROBINSON III,
CHARLES S. SCOTT,
*Counsel for Appellants.*

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### OPINION BELOW

The opinion of the statutory three-judge-District Court for the District of Kansas (R. 238-244) is reported at 98 F. Supp. 797.

### JURISDICTION

The judgment of the court below was entered on August 3, 1951 (R. 247). On October 1, 1951, appellants filed a petition for appeal (R. 248), and an order allowing the appeal was entered (R. 250). Probable jurisdiction was noted on June 9, 1952 (R. 254). Jurisdiction of this Court rests on Title 28, United States Code, §§ 1253 and 2201(b).

### QUESTIONS PRESENTED

1. Whether the State of Kansas has power to enforce a state statute pursuant to which racially segregated public elementary schools are maintained.
2. Whether the finding of the court below—that racial segregation in public elementary schools has the detrimental effect of retarding the mental and educational development of colored children and connotes governmental acceptance of the conception of racial inferiority—compels the conclusion that appellants here are deprived of their rights to share equally in educational opportunities in violation of the equal protection clause of the Fourteenth Amendment.

### THE LAW OF KANSAS AND THE STATUTE INVOLVED

All boards of education, superintendents of schools and school districts in the state are prohibited from using race as a factor in affording educational opportunities in the public schools within their respective jurisdictions unless expressly empowered to do so by statute. *Knox* v. *Board of Education,* 54 K. 152, 25 P. 616 (1891); *Cartwright* v. *Board of Education,* 73 K. 32, 84 P. 382 (1906); *Rowles* v. *Board of Education,* 76 K. 361, 91 P. 88 (1907); *Woolridge, et al.* v. *Board of Education,* 98 K. 397, 157 P. 1184 (1916); *Thurman-Watts* v. *Board of Education,* 115 K. 328, 222 P. 123 (1924); *Webb* v. *School District,* 167 K. 395, 206 P. 2d 1066 (1949).

Segregated elementary schools in cities of the first class are maintained solely pursuant to authority of Chapter 72-1724 of the General Statutes of Kansas, 1949, which reads as follows:

> "Powers of board; separate schools for white and colored children; manual training. The

board of education shall have power to elect their own officers, make all necessary rules for the government of the schools of such city under its charge and control and of the board, subject to the provisions of this act and the laws of this state; to organize and maintain separate schools for the education of white and colored children, including the high schools in Kansas City, Kans.; no discrimination on account of color shall be made in high schools except as provided herein; to exercise the sole control over the public schools and school property of such city; and shall have the power to establish a high school or high schools in connection with manual training and instruction or otherwise, and to maintain the same as a part of the public-school system of said city. (G. S. 1868, Ch. 18, § 75; L. 1879, Ch. 81, § 1; L. 1905, Ch. 414, § 1; Feb. 28; R. S. 1923, § 72-1724.)"

## STATEMENT OF THE CASE

Appellants are of Negro origin and are citizens of the United States and of the State of Kansas (R. 3-4). Infant appellants are children eligible to attend and are now attending elementary schools in Topeka, Kansas, a city of the first class within the meaning of Chapter 72-1724, General Statutes of Kansas, 1949, hereinafter referred to as the statute. Adult appellants are parents of minor appellants and are required by law to send their respective children to public schools designated by appellees (R. 3-4). Appellees are state officers empowered by state law to maintain and operate the public schools of Topeka, Kansas.

For elementary school purposes, the City of Topeka is divided into 18 geographical divisions designated as territories (R. 24). In each of these territories one elementary school services white children exclusively (R. 24). In addition, four schools are maintained for the use of Negro children exclusively (R. 11, 12). These racial distinctions are enforced pursuant to the statute. In accordance with the terms of the statute there is no segregation of Negro and white children in junior and senior high schools (R. 12).

On March 22, 1951, appellants instituted the instant action seeking to restrain the enforcement, operation and execution of the statute on the ground that it deprived them of equal educational opportunities within the meaning of the Fourteenth Amendment (R. 2-7). In their answer, appellees admitted that they acted pursuant to the statute, and that infant appellants were not eligible to attend any of the 18 white elementary schools solely because of their race and color (R. 12). The Attorney General of the State of Kansas filed a separate answer for the specific purpose of defending the constitutional validity of the statute in question (R. 14).

Thereupon, the court below was convened in accordance with Title 28, United States Code, § 2284. On June 25–26, a trial on the merits took place (R. 63 *et seq.*). On August 3, 1951, the court below filed its opinion (R. 238-244), its findings of fact (R. 244-246), and conclusions of law (R. 246-247), and entered a final judgment and decree in appellees' favor denying the injunctive relief sought (R. 247).

## SPECIFICATIONS OF ERROR

The District Court erred:

1. In refusing to grant appellants' application for a permanent injunction to restrain appellees from acting pursuant to the statute under which they are maintaining separate public elementary schools for Negro children solely because of their race and color.
2. In refusing to hold that the State of Kansas is without authority to promulgate the statute because it enforces a classification based upon race and color which is violative of the Constitution of the United States.
3. In refusing to enter judgment in favor of appellants after finding that enforced attendance at racially segregated elementary schools was detrimental and deprived them of educational opportunities equal to those available to white children.

## SUMMARY OF ARGUMENT

The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone. The State of Kansas has no power thereunder to use race as a factor in affording educational opportunities to its citizens.

Racial segregation in public schools reduces the benefits of public education to one group solely on the basis of race and color and is a constitutionally proscribed distinction. Even assuming that the segregated schools attended by appellants are not inferior to other elementary schools in Topeka with respect to physical facilities, instruction and courses of study, unconstitutional inequality inheres in the retardation of intellectual development and distortion of personality which Negro children suffer as a result of

enforced isolation in school from the general public school population. Such injury and inequality are established as facts on this appeal by the uncontested findings of the District Court.

The District Court reasoned that it could not rectify the inequality that it had found because of this Court's decisions in *Plessy* v. *Ferguson,* 163 U.S. 537 and *Gong Lum* v. *Rice,* 275 U.S. 78. This Court has already decided that the *Plessy* case is not in point. Reliance upon *Gong Lum* v. *Rice* is mistaken since the basic assumption of that case is the existence of equality while no such assumption can be made here in the face of the established facts. Moreover, more recent decisions of this Court, most notably *Sweatt* v. *Painter,* 339 U.S. 629 and *McLaurin* v. *Board of Regents,* 339 U.S. 637, clearly show that such hurtful consequences of segregated schools as appear here constitute a denial of equal educational opportunities in violation of the Fourteenth Amendment. Therefore, the court below erred in denying the relief prayed by appellants.

## ARGUMENT

**I. The State of Kansas in affording opportunities for elementary education to its citizens has no power under the Constitution of the United States to impose racial restrictions and distinctions** While the State of Kansas has undoubted power to confer benefits or impose disabilities upon selected groups of citizens in the normal execution of governmental functions, it must conform to constitutional standards in the exercise of this authority. These standards may be generally characterized as a requirement that the state's action be reasonable. Reasonableness in a constitutional sense is determined by examining the action of the state to discover whether the distinctions or restrictions in issue are in fact based upon real differences pertinent to a lawful legislative objective. *Bain Peanut Co.* v. *Pinson,* 282 U.S. 499; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61; *Asbury Hospital* v. *Cass County,* 326 U.S. 207; *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 U.S. 580; *Dominion Hotel* v. *Arizona,* 249 U.S. 265.

When the distinctions imposed are based upon race and color alone, the state's action is patently the epitome of that arbitrariness and capriciousness constitutionally impermissive under our system of government. *Yick Wo* v. *Hopkins,* 118 U.S. 356; *Skinner* v. *Oklahoma,* 316 U.S. 535. A racial criterion is a constitutional irrelevance, *Edwards* v. *California,* 314 U.S. 160, 184, and is not saved from condemnation even though dictated by a sincere desire to avoid the possibility of violence or race friction. *Buchanan* v. *Warley,* 245 U.S. 60; *Morgan* v. *Virginia,* 328 U.S. 373. Only because it was a war measure designed to cope with a grave national emergency was the federal government permitted to level restrictions against persons of enemy descent. *Hirabayashi* v. *United States,* 320 U.S. 81; *Oyama* v. *California,* 332 U.S. 633. This action, "odious," *Hirabayashi* v. *United States, supra,* at page 100, and "suspect," *Korematsu* v. *United States,* 323 U.S. 214, 216, even in times of national peril, must cease as soon as that peril is past. *Ex Parte Endo,* 323 U.S. 283.

This Court has found violation of the equal protection clause in racial distinctions and restrictions imposed by the states in selection for jury service, *Shepherd* v. *Florida,* 341 U.S. 50; ownership and occupancy of real property, *Shelley* v. *Kramer,* 334 U.S. 1; *Buchanan* v. *Warley, supra;* gainful employment, *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410; voting, *Nixon* v. *Condon,* 286 U.S. 73; and graduate and professional education. *McLaurin* v. *Board of Regents, supra; Sweatt* v. *Painter, supra.* The commerce clause in proscribing the imposition of racial distinctions and restrictions in the field of interstate travel is a further limitation of state power in this regard. *Morgan* v. *Virginia,* 328 U.S. 373.

Since 1940, in an unbroken line of decisions, this Court has clearly enunciated the doctrine that the state may not validly impose distinctions and restrictions among its citizens based upon race or color alone in each field of governmental activity where question has been raised. *Smith* v. *Allwright,* 321 U.S. 649; *Sipuel* v. *Board of Education,* 332 U.S. 631; *Sweatt* v. *Painter, supra; Pierre* v. *Louisiana,* 306 U.S. 354; *Hill* v. *Texas,* 316 U.S. 400; *Morgan* v. *Virginia, supra; McLaurin* v. *Board of Regents, supra; Oyama* v. *California, supra; Takahashi* v. *Fish and Game Commission, supra; Shelley* v. *Kraemer, supra; Shepherd* v. *Florida, supra; Cassell* v. *Texas,* 339 U.S. 282. On the other hand, when the state has sought to protect its citizenry against racial discrimination and prejudice, its action has been consistently upheld, *Railway Mail Association* v. *Corsi,* 326 U.S. 88, even though taken in the field of foreign commerce. *Bob-Lo Excursion Co.* v. *Michigan,* 333 U.S. 28.

It follows, therefore, that under this doctrine, the State of Kansas which by statutory sanctions

seeks to subject appellants, in their pursuit of elementary education, to distinctions based upon race or color alone, is here attempting to exceed the constitutional limits to its authority. For that racial distinction which has been held arbitrary in so many other areas of governmental activity is no more appropriate and can be no more reasonable in public education.

**II. The court below, having found that appellants were denied equal educational opportunities by virtue of the segregated school system, erred in denying the relief prayed** The court below made the following finding of fact:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system."

This finding is based upon uncontradicted testimony that conclusively demonstrates that racial segregation injures infant appellants in denying them the opportunity available to all other racial groups to learn to live, work and cooperate with children representative of approximately 90% of the population of the society in which they live (R. 216); to develop citizenship skills; and to adjust themselves personally and socially in a setting comprising a cross-section of the dominant population (R. 132). The testimony further developed the fact that the enforcement of segregation under law denies to the Negro status, power and privilege (R. 176); interferes with his motivation for learning (R. 171); and instills in him a feeling of inferiority (R. 169) resulting in a personal insecurity, confusion and frustration that condemns him to an ineffective role as a citizen and member of society (R. 165). Moreover, it was demonstrated that racial segregation is supported by the myth of the Negro's inferiority (R. 177), and where, as here, the state enforces segregation, the community at large is supported in or converted to the belief that this myth has substance in fact (R. 156, 169, 177). It was testified that because of the peculiar educational system in Kansas that requires segregation only in the lower grades, there is an additional injury in that segregation occurring at an early age is greater in its impact and more permanent in its effects (R. 172) even though there is a change to integrated schools at the upper levels.

That these conclusions are the consensus of social scientists is evidenced by the appendix filed herewith. Indeed, the findings of the court that segregation constitutes discrimination are supported on the face of the statute itself where it states that: " * * * no discrimination on account of color shall be made in high schools *except as provided herein* * * * " (emphasis supplied).

Under the Fourteenth Amendment equality of educational opportunities necessitates an evaluation of all factors affecting the educational process. *Sweatt* v. *Painter, supra; McLaurin* v. *Board of Regents, supra.* Applying this yardstick, any restrictions or distinction based upon race or color that places the Negro at a disadvantage in relation to other racial groups in his pursuit of educational opportunities is violative of the equal protection clause.

In the instant case, the court found as a fact that appellants were placed at such a disadvantage and were denied educational opportunities equal to those available to white students. It necessarily follows, therefore, that the court should have concluded as a matter of law that appellants were deprived of their right to equal educational opportunities in violation of the equal protection clause of the Fourteenth Amendment.

Under the mistaken notion that *Plessy* v. *Ferguson* and *Gong Lum* v. *Rice* were controlling with respect to the validity of racial distinctions in elementary education, the trial court refused to conclude that appellants were here denied equal educational opportunities in violation of their constitutional rights. Thus, notwithstanding that it had found inequality in educational opportunity as a fact, the court concluded as a matter of law that such inequality did not constitute a denial of constitutional rights, saying:

> "*Plessy* v. *Ferguson,* 163 U.S. 537, and *Gong Lum* v. *Rice,* 275 U.S. 78, uphold the constitutionality of a legally segregated school system in the lower grades and no denial of due process results from the maintenance of such a segregated system of schools absent discrimination in the maintenance of the segregated schools. We conclude that the above-cited cases have not been overruled by the later case of *McLaurin* v. *Oklahoma,* 339 U.S. 637, and *Sweatt* v. *Painter,* 339 U.S. 629."

*Plessy* v. *Ferguson* is not applicable. Whatever doubts may once have existed in this respect were removed by this Court in *Sweatt* v. *Painter, supra,* at page 635, 636.

*Gong Lum* v. *Rice* is irrelevant to the issues in this case. There, a child of Chinese parentage was denied admission to a school maintained exclusively for white children and was ordered to attend a school for Negro children. The power of the state to make racial distinctions in its school system was not in issue. Petitioner contended that she had a constitutional right to go to school with white children, and that in being compelled to attend school with Negroes, the state had deprived her of the equal protection of the laws.

Further, there was no showing that her educational opportunities had been diminished as a result of the state's compulsion, and it was assumed by the Court that equality in fact existed. There the petitioner was not inveighing against the system, but that its application resulted in her classification as a Negro rather than as a white person, and indeed by so much conceded the propriety of the system itself. Were this not true, this Court would not have found basis for holding that the issue raised was one "which has been many times decided to be within the constitutional power of the state" and, therefore, did not "call for very full argument and consideration."

In short, she raised no issue with respect to the state's power to enforce racial classifications, as do appellants here. Rather, her objection went only to her treatment under the classification. This case, therefore, cannot be pointed to as a controlling precedent covering the instant case in which the constitutionality of the system itself is the basis for attack and in which it is shown the inequality in fact exists.

In any event the assumptions in the *Gong Lum* case have since been rejected by this Court. In the *Gong Lum* case, without "full argument and consideration," the Court assumed the state had power to make racial distinctions in its public schools without violating the equal protection clause of the Fourteenth Amendment and assumed the state and lower federal court cases cited in support of this assumed state power had been correctly decided. Language in *Plessy* v. *Ferguson* was cited in support of these assumptions. These assumptions upon full argument and consideration were rejected in the *McLaurin* and *Sweatt* cases in relation to racial distinctions in state graduate and professional education. And, according to those cases, *Plessy* v. *Ferguson* is not controlling for the purpose of determining the state's power to enforce racial segregation in public schools.

Thus, the very basis of the decision in the *Gong Lum* case has been destroyed. We submit, therefore, that this Court has considered the basic issue involved here only in those cases dealing with racial distinctions in education at the graduate and professional levels. *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337; *Sipuel* v. *Board of Education, supra; Fisher* v. *Hurst,* 333 U.S. 147; *Sweatt* v. *Painter, supra; McLaurin* v. *Board of Regents, supra.*

In the *McLaurin* and *Sweatt* cases, this Court measured the effect of racial restrictions upon the educational development of the individual affected, and took into account the community's actual evaluation of the schools involved. In the instant case, the court below found as a fact that racial segregation in elementary education denoted the inferiority of Negro children and retarded their educational and mental development. Thus the same factors which led to the result reached in the *McLaurin* and *Sweatt* cases are present. Their underlying principles, based upon sound analyses, control the instant case.

## CONCLUSION

In light of the foregoing, we respectfully submit that appellants have been denied their rights to equal educational opportunities within the meaning of the Fourteenth Amendment and that the judgment of the court below should be reversed.

WILLIAM T. COLEMAN JR.,
JACK GREENBERG,
GEORGE E. C. HAYES,
GEORGE M. JOHNSON,
WILLIAM R. MING JR.,
CONSTANCE BAKER MOTLEY,
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THURGOOD MARSHALL,
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CHARLES S. SCOTT,
*Counsel for Appellants.*

U.S. SUPREME COURT, OCTOBER 1952

APPENDIX TO APPELLANTS' BRIEFS

**IN THE SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1952**

NO. 8
OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, ET AL., APPELLANTS,
VS.
BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL., APPELLEE

NO. 101
HARRY BRIGGS, JR., ET AL., APPELLANTS,
VS.
R. W. ELLIOTT, CHAIRMAN, J. D. CARSON, ET AL., MEMBERS OF BOARD OF TRUSTEES OF SCHOOL DISTRICT NO. 22, CLARENDON COUNTY, S.C., ET AL., APPELLEE

NO. 191
DOROTHY E. DAVIS, BERTHA M. DAVIS AND INEZ D. DAVIS, ETC., ET AL., APPELLANTS,
VS.
COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL., APPELLEE

## APPENDIX TO APPELLANTS' BRIEFS

## THE EFFECTS OF SEGREGATION AND THE CONSEQUENCES OF DESEGREGATION: A SOCIAL SCIENCE STATEMENT

### STATEMENT OF COUNSEL

The following statement was drafted and signed by some of the foremost authorities in sociology, anthropology, psychology and psychiatry who have worked in the area of American race relations. It represents a consensus of social scientists with respect to the issue presented in these appeals. As a summary of the best available scientific evidence relative to the effects of racial segregation on the individual, we file it herewith as an appendix to our briefs.

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### I

The problem of the segregation of racial and ethnic groups constitutes one of the major problems facing the American people today. It seems desirable, therefore, to summarize the contributions which contemporary social science can make toward its resolution. There are, of course, moral and legal issues involved with respect to which the signers of the present statement cannot speak with any special authority and which must be taken into account in the solution of the problem. There are, however, also factual issues involved with respect to which certain conclusions seem to be justified on the basis of the available scientific evidence. It is with these issues only that this paper is concerned. Some of the issues have to do with the consequences of segregation, some with the problems of changing from segregated to unsegregated practices. These two groups of issues will be dealt with in separate sections below. It is necessary, first, however, to define and delimit the problem to be discussed.

#### Definitions

For purposes of the present statement, *segregation* refers to that restriction of opportunities for different types of associations between the members of one racial, religious, national or geographic origin, or linguistic group and those of other groups, which results from or is supported by the action of any official body or agency representing some branch of government. We are not here concerned with such segregation as arises from the free movements of individuals which are neither enforced nor supported by official bodies, nor with the segregation of criminals or of individuals with communicable diseases which aims at protecting society from those who might harm it.

Where the action takes place in a social milieu in which the groups involved do not enjoy equal social status, the group that is of lesser social status will be referred to as the *segregated* group.

In dealing with the question of the effects of segregation, it must be recognized that these effects do not take place in a vacuum, but in a social context. The segregation of Negroes and of other groups in the United States takes place in a social milieu in which "race" prejudice and discrimination exist. It is questionable in the view of some students of the problem whether it is possible to have segregation without substantial discrimination. Myrdal[1] states: "Segregation * * * is

[1] Myrdal, G., *An American Dilemma,* 1944.

financially possible and, indeed, a device of economy only as it is combined with substantial discrimination" (p. 629). The imbeddedness of segregation in such a context makes it difficult to disentangle the effects of segregation *per se* from the effects of the context. Similarly, it is difficult to disentangle the effects of segregation from the effects of a pattern of social disorganization commonly associated with it and reflected in high disease and mortality rates, crime and delinquency, poor housing, disrupted family life and general substandard living conditions. We shall, however, return to this problem after consideration of the observable effects of the total social complex in which segregation is a major component.

## II

At the recent Mid-century White House Conference on Children and Youth, a fact-finding report on the effects of prejudice, discrimination and segregation on the personality development of children was prepared as a basis for some of the deliberations.[2] This report brought together the available social science and psychological studies which were related to the problem of how racial and religious prejudices influenced the development of a healthy personality. It highlighted the fact that segregation, prejudices and discriminations, and their social concomitants potentially damage the personality of all children—the children of the majority group in a somewhat different way than the more obviously damaged children of the minority group.

The report indicates that as minority group children learn the inferior status to which they are assigned—as they observe the fact that they are almost always segregated and kept apart from others who are treated with more respect by the society as a whole—they often react with feelings of inferiority and a sense of personal humiliation. Many of them become confused about their own personal worth. On the one hand, like all other human beings they require a sense of personal dignity; on the other hand, almost nowhere in the larger society do they find their own dignity as human beings respected by others. Under these conditions, the minority group child is thrown into a conflict with regard to his feelings about himself and his group. He wonders whether his group and he himself are worthy of no more respect than they receive. This conflict and confusion leads to self-hatred and rejection of his own group.

The report goes on to point out that these children must find ways with which to cope with this conflict. Not every child, of course, reacts with the same patterns of behavior. The particular pattern depends upon many interrelated factors, among which are: the stability and quality of his family relations; the social and economic class to which he belongs; the cultural and educational background of his parents; the particular minority group to which he belongs; his personal characteristics, intelligence, special talents, and personality pattern.

Some children, usually of the lower socio-economic classes, may react by overt aggressions and hostility directed toward their own group or members of the dominant group.[3] Anti-social and delinquent behavior may often be interpreted as reactions to these racial frustrations. These reactions are self-destructive in that the larger society not only punishes those who commit them, but often interprets such aggressive and anti-social behavior as justification for continuing prejudice and segregation.

Middle class and upper class minority group children are likely to react to their racial frustrations and conflicts by withdrawal and submissive behavior. Or, they may react with compensatory and rigid conformity to the prevailing middle class values and standards and an aggressive determination to succeed in these terms in spite of the handicap of their minority status.

The report indicates that minority group children of all social and economic classes often react with a generally defeatist attitude and a lowering of personal ambitions. This, for example, is reflected in a lowering of pupil morale and a depression of the educational aspiration level among minority group children in segregated schools. In producing such effects, segregated schools impair the ability of the child to profit from the educational opportunities provided him.

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[2] Clark, K. B., *Effect of Prejudice and Discrimination on Personality Development,* Fact Finding Report Mid-century White House Conference on Children and Youth, Children's Bureau, Federal Security Agency, 1950 (mimeographed).

[3] Brenman, M., The Relationship Between Minority Group Identification in a Group of Urban Middle Class Negro Girls, *J. Soc. Psychol.,* 1940, 11, 171-197; Brenman, M., Minority Group Membership and Religious, Psychosexual and Social Patterns in a Group of Middle-Class Negro Girls, *J. Soc. Psychol,* 1940, 12, 179-196; Brenman, M., Urban Lower-Class Negro Girls, *Psychiatry,* 1943, 6, 307-324; Davis, A., The Socialization of the American Negro Child and Adolescent, *J. Negro Educ.,* 1939, 8, 264-275.

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Many minority group children of all classes also tend to be hypersensitive and anxious about their relations with the larger society. They tend to see hostility and rejection even in those areas where these might not actually exist.

The report concludes that while the range of individual differences among members of a rejected minority group is as wide as among other peoples, the evidence suggests that all of these children are unnecessarily encumbered in some ways by segregation and its concomitants.

With reference to the impact of segregation and its concomitants on children of the majority group, the report indicates that the effects are somewhat more obscure. Those children who learn the prejudices of our society are also being taught to gain personal status in an unrealistic and non-adaptive way. When comparing themselves to members of the minority group, they are not required to evaluate themselves in terms of the more basic standards of actual personal ability and achievement. The culture permits and, at times, encourages them to direct their feelings of hostility and aggression against whole groups of people the members of which are perceived as weaker than themselves. They often develop patterns of guilt feelings, rationalizations and other mechanisms which they must use in an attempt to protect themselves from recognizing the essential injustice of their unrealistic fears and hatreds of minority groups.[4]

The report indicates further that confusion, conflict, moral cynicism, and disrespect for authority may arise in majority group children as a consequence of being taught the moral, religious and democratic principles of the brotherhood of man and the importance of justice and fair play by the same persons and institutions who, in their support of racial segregation and related practices, seem to be acting in a prejudiced and discriminatory manner. Some individuals may attempt to resolve this conflict by intensifying their hostility toward the minority group. Others may react by guilt feelings which are not necessarily reflected in more humane attitudes toward the minority group. Still others react by developing an unwholesome, rigid, and uncritical idealization of all authority figures—their parents, strong political and economic leaders. As described in *The Authoritarian Personality,*[5] they despise the weak, while they obsequiously and unquestioningly conform to the demands of the strong whom they also, paradoxically, subconsciously hate.

With respect to the setting in which these difficulties develop, the report emphasized the role of the home, the school, and other social institutions. Studies[6] have shown that from the earliest school years children are not only aware of the status differences among different groups in the society but begin to react with the patterns described above.

Conclusions similar to those reached by the Mid-century White House Conference Report have been stated by other social scientists who have concerned themselves with this problem. The following are some examples of these conclusions:

Segregation imposes upon individuals a distorted sense of social reality.[7]

Segregation leads to a blockage in the communications and interaction between the two groups. Such blockages tend to increase mutual suspicion, distrust and hostility.[8]

Segregation not only perpetuates rigid stereotypes and reinforces negative attitudes toward members of the other group, but also leads to the development of a social climate within which violent outbreaks of racial tensions are likely to occur.[9]

We return now to the question, deferred earlier, of what it is about the total society complex of which segregation is one feature that produces the effects described above—or, more precisely, to the question of whether we can justifiably conclude that, as only one feature of a

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[4] Adorno, T. W.; Frenkel-Brunswik, E.; Levinson, D. J.; Sanford, R. N., *The Authoritarian Personality,* 1951.

[5] Adorno, T. W.; Frenkel-Brunswik, E.; Levinson, D. J.; Sanford, R. N., *The Authoritarian Personality,* 1951.

[6] Clark, K. B. & Clark, M. P., Emotional Factors in Racial Identification and Preference in Negro Children, *J. Negro Educ.,* 1950, 19, 341-350; Clark, K. B. & Clark, M. P., Racial Identification and Preference in Negro Children, *Readings in Social Psychology,* Ed. by Newcomb & Hartley, 1947; Radke, M.; Trager, H.; Davis, H., Social Perceptions and Attitudes of Children, *Genetic Psychol. Monog.,* 1949, 40, 327-447; Radke, M.; Trager, H.; Children's Perceptions of the Social Role of Negroes and Whites, *J. Psychol.,* 1950, 29, 3-33.

[7] Reid, Ira, What Segregated Areas Mean; Brameld, T., Educational Cost, *Discrimination and National Welfare,* Ed. by MacIver, R. M., 1949.

[8] Frazier, E., *The Negro in the United States,* 1949; Krech, D. & Crutchfield, R. S., *Theory and Problems of Social Psychology,* 1948; Newcomb, T., *Social Psychology,* 1950.

[9] Lee, A. McClung and Humphrey, N. D., *Race Riot,* 1943.

complex social setting, segregation is in fact a significantly contributing factor to these effects.

To answer this question, it is necessary to bring to bear the general fund of psychological and sociological knowledge concerning the role of various environmental influences in producing feelings of inferiority, confusions in personal roles, various types of basic personality structures and the various forms of personal and social disorganization.

On the basis of this general fund of knowledge, it seems likely that feelings of inferiority and doubts about personal worth are attributable to living in an underprivileged environment only insofar as the latter is itself perceived as an indicator of low social status and as a symbol of inferiority. In other words, one of the important determinants in producing such feelings is the awareness of social status difference. While there are many other factors that serve as reminders of the differences in social status, there can be little doubt that the fact of enforced segregation is a major factor.[10]

This seems to be true for the following reasons among others: (1) because enforced segregation results from the decision of the majority group without the consent of the segregated and is commonly so perceived; and (2) because historically segregation patterns in the United States were developed on the assumption of the inferiority of the segregated.

In addition, enforced segregation gives official recognition and sanction to these other factors of the social complex, and thereby enhances the effects of the latter in creating the awareness of social status differences and feelings of inferiority.[11] The child who, for example, is compelled to attend a segregated school may be able to cope with ordinary expressions of prejudice by regarding the prejudiced person as evil or misguided; but he cannot readily cope with symbols of authority, the full force of the authority of the State—the school or the school board, in this instance—in the same manner. Given both the ordinary expression of prejudice and the school's policy of segregation, the former takes on greater force and seemingly becomes an official expression of the latter.

Not all of the psychological traits which are commonly observed in the social complex under discussion can be related so directly to the awareness of status differences—which in turn is, as we have already noted, materially contributed to by the practices of segregation. Thus, the low level of aspiration and defeatism so commonly observed in segregated groups is undoubtedly related to the level of self-evaluation; but it is also, in some measure, related among other things to one's expectations with regard to opportunities for achievement and, having achieved, to the opportunities for making use of these achievements. Similarly, the hypersensitivity and anxiety displayed by many minority group children about their relations with the larger society probably reflects their awareness of status differences; but it may also be influenced by the relative absence of opportunities for equal status contact which would provide correctives for prevailing unrealistic stereotypes.

The preceding view is consistent with the opinion stated by a large majority (90%) of social scientists who replied to a questionnaire concerning the probable effects of enforced segregation under conditions of equal facilities. This opinion was that, regardless of the facilities which are provided, enforced segregation is psychologically detrimental to the members of the segregated group.[12]

Similar considerations apply to the question of what features of the social complex of which segregation is a part contribute to the development of the traits which have been observed in majority group members. Some of these are probably quite closely related to the awareness of status differences, to which, as has already been pointed out, segregation makes a material contribution. Others have a more complicated relationship to the total social setting. Thus, the acquisition of an unrealistic basis for self-evaluation as a consequence of majority group membership probably reflects fairly closely the awareness of status differences. On the other hand, unrealistic fears and hatreds of minority groups, as in the case of the converse phenomenon among minority group members, are probably significantly influenced as well by the lack of opportunities for equal status contact.

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[10] Frazier, E., *The Negro in the United States,* 1949; Myrdal, G., *An American Dilemma,* 1944.

[11] Reid, Ira, What Segregated Areas Mean, *Discrimination and National Welfare,* Ed. by MacIver, R. M., 1949.

[12] Deutscher, M. and Chein, I., The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, *J. Psychol.,* 1948, 26, 259-287.

With reference to the probable effects of segregation under conditions of equal facilities on majority group members, many of the social scientists who responded to the poll in the survey cited above felt that the evidence is less convincing than with regard to the probable effects of such segregation on minority group members, and the effects are possibly less widespread. Nonetheless, more than 80% stated it as their opinion that the effects of such segregation are psychologically detrimental to the majority group members.[13]

It may be noted that many of these social scientists supported their opinions on the effects of segregation on both majority and minority groups by reference to one or another or to several of the following four lines of published and unpublished evidence.[14] First, studies of children throw light on the relative priority of the awareness of status differentials and related factors as compared to the awareness of differences in facilities. On this basis, it is possible to infer some of the consequences of segregation as distinct from the influence of inequalities of facilities. Second, clinical studies and depth interviews throw light on the genetic sources and causal sequences of various patterns of psychological reaction; and, again, certain inferences are possible with respect to the effects of segregation *per se.* Third, there actually are some relevant but relatively rare instances of segregation with equal or even superior facilities, as in the cases of certain Indian reservations. Fourth, since there are inequalities of facilities in racially and ethnically homogeneous groups, it is possible to infer the kinds of effects attributable to such inequalities in the absence of effects of segregation and, by a kind of subtraction to estimate the effects of segregation *per se* in situations where one finds both segregation and unequal facilities.

## III

Segregation is at present a social reality. Questions may be raised, therefore, as to what are the likely consequences of desegregation.

One such question asks whether the inclusion of an intellectually inferior group may jeopardize the education of the more intelligent group by lowering educational standards or damage the less intelligent group by placing it in a situation where it is at a marked competitive disadvantage. Behind this question is the assumption, which is examined below, that the presently segregated groups actually are inferior intellectually.

The available scientific evidence indicates that much, perhaps all, of the observable differences among various racial and national groups may be adequately explained in terms of environmental differences.[15] It has been found, for instance, that the differences between the average intelligence test scores of Negro and white children decrease, and the overlap of the distributions increases, proportionately to the number of years that the Negro children have lived in the North.[16] Related studies have shown that this change cannot be explained by the hypothesis of selective migration.[17] It seems clear, therefore, that fears based on the assumption of innate racial differences in intelligence are not well founded.

It may also be noted in passing that the argument regarding the intellectual inferiority of one group as compared to another is, as applied to schools, essentially an argument for homogeneous groupings of children by intelligence rather than by race. Since even those who believe that there are innate differences between Negroes and whites in America in average intelligence grant that considerable overlap between the two groups exists, it would follow that it may be expedient to group together the superior whites and Negroes, the average whites and Negroes, and so on. Actually, many educators have come to doubt the wisdom of class groupings made homogeneous solely on the basis of intelligence.[18] Those who are opposed to such homogeneous grouping believe that this type of segregation, too, appears to create generalized

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[13] Deutscher, M. and Chein, I., The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, *J. Psychol.,* 1948, 26, 259-287.

[14] Chein, I., What Are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, *International J. Opinion and Attitude Res.,* 1949, 2, 229-234.

[15] Klineberg, O., *Characteristics of American Negro,* 1945; Klineberg, O., *Race Differences,* 1936.

[16] Klineberg, O., *Negro Intelligence and Selective Migration,* 1935.

[17] Klineberg, O., *Negro Intelligence and Selective Migration,* 1935.

[18] Brooks, J. J., Interage Grouping on Trial-Continuous Learning, *Bulletin #87, Association for Childhood Education,* 1951; Lane, R. H., Teacher in Modern Elementary School, 1941; Educational Policies Commission of the National Education Association and the American Association of School Administration Report in *Education For All Americans,* published by the N. E. A. 1948.

feelings of inferiority in the child who attends a below average class, leads to undesirable emotional consequences in the education of the gifted child, and reduces learning opportunities which result from the interaction of individuals with varied gifts.

A second problem that comes up in an evaluation of the possible consequences of desegregation involves the question of whether segregation prevents or stimulates interracial tension and conflict and the corollary question of whether desegregation has one or the other effect.

The most direct evidence available on this problem comes from observations and systematic study of instances in which desegregation has occurred. Comprehensive reviews of such instances[19] clearly establish the fact that desegregation has been carried out successfully in a variety of situations although outbreaks of violence had been commonly predicted. Extensive desegregation has taken place without major incidents in the armed services in both Northern and Southern installations and involving officers and enlisted men from all parts of the country, including the South.[20] Similar changes have been noted in housing[21] and industry.[22] During the last war, many factories both in the North and South hired Negroes on a non-segregated, non-discriminatory basis. While a few strikes occurred, refusal by management and unions to yield quelled all strikes within a few days.[23]

Relevant to this general problem is a comprehensive study of urban race riots which found that race riots occurred in segregated neighborhoods, whereas there was no violence in sections of the city where the two races lived, worked and attended school together.[24]

Under certain circumstances desegregation not only proceeds without major difficulties, but has been observed to lead to the emergence of more favorable attitudes and friendlier relations between races. Relevant studies may be cited with respect to housing,[25] employment,[26] the armed services[27] and merchant marine,[28] recreation agency,[29] and general community life.[30]

Much depends, however, on the circumstances under which members of previously segregated groups first come in contact with others in unsegregated situations. Available evidence suggests, first, that there is less likelihood of unfriendly relations when the change is simultaneously introduced into all units of a social institution to which it is applicable—*e.g.,* all of the schools in a school system or all of the shops in a given factory.[31] When factories introduced Negroes in only some shops but not in others the prejudiced workers tended to classify the desegregated shops as inferior, "Negro work." Such objections were not raised when complete integration was introduced.

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[19] Delano, W., Grade School Segregation: The Latest Attack on Racial Discrimination, *Yale Law Journal,* 1952, 61, 5, 730-744; Rose, A., The Influence of Legislation on Prejudice; Chapter 53 in *Race Prejudice and Discrimination,* Ed. by Rose, A., 1951; Rose, A., *Studies in Reduction of Prejudice,* Amer. Council on Race Relations, 1948.

[20] Kenworthy, E. W., The Case Against Army Segregation, *Annals of the American Academy of Political and Social Science,* 1951, 275, 27-33; Nelson, Lt. D. D., *The Integration of the Negro in the U.S. Navy,* 1951; Opinions About Negro Infantry Platoons in White Companies in Several Divisions, *Information and Education Division, U.S. War Department, Report No. B-157,* 1945.

[21] Conover, R. D., *Race Relations at Codornices Village, Berkeley-Albany, California: A Report of the Attempt to Break Down the Segregated Pattern on A Directly Managed Housing Project,* Housing and Home Finance Agency, Public Housing Administration, Region I, December 1947 (mimeographed); Deutsch, M. and Collins, M. E., *Interracial Housing, A Psychological Study of A Social Experiment,* 1951; Rutledge, E., *Integration of Racial Minorities in Public Housing Projects: A Guide for Local Housing Authorities on How to Do It,* Public Housing Administration, New York Field Office (mimeographed).

[22] Minard, R. D., The Pattern of Race Relationships in the Pocahontas Coal Field, *J. Social Issues,* 1952, 8, 29-44; Southall, S. E., *Industry's Unfinished Business,* 1951; Weaver, G. L-P, *Negro Labor, A National Problem,* 1941.

[23] Southall, S. E., *Industry's Unfinished Business,* 1951; Weaver, G. L-P, *Negro Labor, A National Problem,* 1941.

[24] Lee, A. McClung and Humphrey, N. D., *Race Riot,* 1943; Lee, A. McClung, Race Riots Aren't Necessary, *Public Affairs Pamphlet,* 1945.

[25] Deutsch, M. and Collins, M. E., *Interracial Housing, A Psychological Study of A Social Experiment,* 1951; Merton, R. K.; West, P. S.; Jahoda, M., *Social Fictions and Social Facts: The Dynamics of Race Relations in Hilltown,* Bureau of Applied Social Research Columbia, Univ., 1949 (mimeographed); Rutledge, E., *Integration of Racial Minorities in Public Housing Projects; A Guide for Local Housing Authorities on How To Do It,* Public Housing Administration, New York Field Office (mimeographed); Wilner, D. M.; Walkley, R. P.; and Cook, S. W., Intergroup Contact and Ethnic Attitudes in Public Housing Projects, *J. Social Issues,* 1952, 8, 45-69.

[26] Harding, J., and Hogrefe, R., Attitudes of White Department Store Employees Toward Negro Co-workers, *J. Social Issues,* 1952, 8, 19-28; Southall, S. E., *Industry's Unfinished Business,* 1951; Weaver, G. L-P., *Negro Labor, A National Problem,* 1941.

[27] Kenworthy, E. W., The Case Against Army Segregation,

The available evidence also suggests the importance of consistent and firm enforcement of the new policy by those in authority.[32] It indicates also the importance of such factors as: the absence of competition for a limited number of facilities or benefits;[33] the possibility of contacts which permit individuals to learn about one another as individuals;[34] and the possibility of equivalence of positions and functions among all of the participants within the unsegregated situation.[35] These conditions can generally be satisfied in a number of situations, as in the armed services, public housing developments, and public schools.

## IV

The problem with which we have here attempted to deal is admittedly on the frontiers of scientific knowledge. Inevitably, there must be some differences of opinion among us concerning the conclusiveness of certain items of evidence, and concerning the particular choice of words and placement of emphasis in the preceding statement. We are nonetheless in agreement that this statement is substantially correct and justified by the evidence, and the differences among us, if any, are of a relatively minor order and would not materially influence the preceding conclusions.

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[28] Brophy, I. N., The Luxury of Anti-Negro Prejudice, *Public Opinion Quarterly,* 1946, 9, 456-466 (Integration in Merchant Marine); Watson, G., *Action for Unity,* 1947.

[29] Williams, D. H., *The Effects of an Interracial Project Upon the Attitudes of Negro and White Girls Within the Young Women's Christian Association,* Unpublished M. A. thesis, Columbia University, 1934.

[30] Dean, J. P., *Situational Factors in Intergroup Relations: A Research Progress Report.* Paper Presented to American Sociological Society, 12/28/49 (mimeographed); Irish, D. P., Reactions of Residents of Boulder, Colorado, to the Introduction of Japanese Into the Community, *J. Social Issues,* 1952, 8, 10-17.

[31] Minard, R. D., The Pattern of Race Relationships in the Pocahontas Coal Field, *J. Social Issues,* 1952, 8, 29-44; Rutledge, E., *Integration of Racial Minorities in Public Housing Projects; A Guide for Local Housing Authorities on How to Do It,* Public Housing Administration, New York Field Office (mimeographed).

[32] Deutsch, M. and Collins, M. E., *Interracial Housing, A Psychological Study of A Social Experiment,* 1951; Feldman, H., The Technique of Introducing Negroes Into the Plant, *Personnel,* 1942, 19, 461-466; Rutledge, E., *Integration of Racial Minorities in Public Housing Projects; A Guide for Local Housing Authorities on How to Do It,* Public Housing Administration, New York Field Office (mimeographed); Southall, S. E., *Industry's Unfinished Business,* 1951; Watson, G., *Action for Unity,* 1947.

[33] Lee, A. McClung and Humphrey, N. D., *Race Riot,* 1943; Williams, R., Jr., *The Reduction of Intergroup Tensions,* Social Science Research Council, New York, 1947; Windner, A. E., *White Attitudes Towards Negro-White Interaction In An Area of Changing Racial Composition.* Paper Delivered at the Sixtieth Annual Meeting of the American Psychological Association, Washington, September 1952.

[34] Wilner, D. M.; Walkley, R. P.; and Cook, S. W., Intergroup Contact and Ethnic Attitudes in Public Housing Projects, *J. Social Issues,* 1952, 8, 45-69.

[35] 35. Allport, G. W., and Kramer, B., Some Roots of Prejudice, *J. Psychol.,* 1946, 22, 9-39; Watson, J., Some Social and Psychological Situations Related to Change in Attitude, *Human Relations,* 1950, 3, 1.

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U.S. SUPREME COURT, OCTOBER 1952

BRIEF FOR APPELLEES

# In the Supreme Court of the United States October Term, 1952

OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, ET AL., APPELLANTS,
VS.
BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

## BRIEF FOR APPELLEES

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### I. PRELIMINARY STATEMENT

The issue presented by this case is whether the Fourteenth Amendment to the Constitution of the United States is violated by a statute which permits boards of education in designated cities to maintain separate elementary school facilities for the education of white and colored children.

At the outset, counsel for the appellees desire to state that by appearing herein they do not propose to advocate the policy of segregation of any racial group within the public school system. We contend only that policy determinations are matters within the exclusive province of the legislature. We do not express an opinion as to whether the practice of having separate schools of equal facility for the white and colored races is economically expedient or sociologically desirable, or whether it is consistent with sound ethical or religious theory. We do not understand that these extra-legal questions are now before the Court. The only proposition that we desire to urge is that the Kansas statute which permits racial segregation in elementary public schools in certain cities of the state does not violate the Fourteenth Amendment to the Constitution of the United States as that amendment has been interpreted and applied by this Court.

### II. OPINION BELOW

The opinion of the three-judge District Court below: (R-238-244) is reported at 98 Fed. Supp. 797.

### III. JURISDICTION

The judgment of the court below was entered on August 3, 1951 (R. 247). On October 1, 1951, appellants filed a petition for appeal (R. 248), and an order allowing the appeal was entered (R. 251). Probable jurisdiction was noted on June 9, 1952 (R. 254). Jurisdiction of this Court rests on Title 28 U. S. C. Sec. 1253 and 2201 (b).

### IV. QUESTIONS PRESENTED

**1.** Does a statute which permits but does not require cities of more than 15,000 population to maintain separate school facilities for colored and white students, violate the Fourteenth

Amendment to the Constitution of the United States in a situation where a court has specifically found that there is no discrimination or distinction in physical facilities, educational qualifications of teachers, curricula or transportation facilities?

**2.** Is a general finding of the trial court that segregation is detrimental to colored children and deprives them of some benefits they would receive in a racial integrated school sufficient to entitle the individual colored plaintiffs to an injunction prohibiting the maintenance of an existing system of segregated schools, and to require reversal of a judgment denying such relief?

### V. THE STATUTE

The statute under attack in the present litigation is section 72-1724, General Statutes of Kansas of 1949, which is quoted hereafter:

> "*Powers of board; separate schools for white and colored children; manual training.* The board of education shall have power to elect their own officers, make all necessary rules for the government of the schools of such city under its charge and control and of the board, subject to the provisions of this act and the laws of this state; to organize and maintain separate schools for the education of white and colored children, including the high schools in Kansas City, Kansas; no discrimination on account of color shall be made in high schools, except as provided herein; to exercise the sole control over the public schools and school property of such city; and shall have the power to establish a high school or high schools in connection with manual training and instruction or otherwise, and to maintain the same as a part of the public school system of said city."

### VI. STATEMENT OF THE CASE

The appellants here, who are plaintiffs below, are Negro citizens of the United States and the State of Kansas, who reside in Topeka, Shawnee County, Kansas. The infant plaintiffs are children of common school age. The defendants below and appellees herein are the duly constituted governing body and certain administrative officers of the public school system of Topeka, Kansas. The State of Kansas has intervened in the District Court to defend the constitutionality of the state statute under attack.

Acting pursuant to the authority conferred by G. S. 1949, 72-1724, *supra,* the appellee, Board of Education, many years ago created within the city of Topeka, which is one school district, eighteen school areas, and now maintains in each of said areas a kindergarten and elementary school for white children only. (R. 24.) At the same time the present Board of Education of Topeka and prior boards of education, acting under same statutory authority, have established and operated in said city four elementary schools in the same grades for Negro children. Negro children may attend any one of said elementary schools that they or their parents may select. It was stipulated in the Court below that the Negro schools are located in neighborhoods in which the population is predominantly Negro. (R. 31.) The stipulation also indicates that at the time the action was brought, the enrollment in the eighteen white schools was 6,019, as compared to 658 students enrolled in the four Negro schools. (R. 37.)

The administration of the entire Topeka school system is under the Board of Education, and the same administrative regulations govern both the white and Negro schools. The Court found specifically that there is no material difference in the physical facilities in colored and white schools; that the educational qualifications of the teachers and the quality of instruction in the colored schools are not inferior to, but are comparable with those in the white schools; and that the courses of study followed in the two groups of schools are identical, being that prescribed by state law. (R. 245.) Also, it was found that colored students are furnished transportation to the segregated schools without cost to the children or their parents. No such transportation is furnished to the white children in the segregated schools. (R. 246.)

### VII. SUMMARY OF ARGUMENT

**1.** The Kansas statute which permits cities of the first class to maintain separate grade school facilities for colored and white students does not *per se* violate the Fourteenth Amendment to the Constitution of the United States.

The Court below found facilities provided for Negro children in the city of Topeka to be substantially equal to those furnished to white children. The appellants, in their specifications of error and in their brief, do not object to that finding. Under those circumstances and under authority of the decisions of the Supreme Court of the United States, the inferior federal courts, and the courts of last resort in numerous state jurisdictions, and particularly the decisions of the Kansas Supreme Court, the appellants here-

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in are not denied equal protection of the laws by virtue of their being required to attend schools separate from those which white children are required to attend.

The decision of the court below should be affirmed.

**2.** Irrespective of the question of the constitutionality of the Kansas statute, the trial court's findings of fact are insufficient to establish appellants' right to injunctive relief and to require reversal of the judgment below. The only finding of fact relied upon by appellants is Finding of Fact No. VIII. That finding is couched in general language and in effect simply shows that segregation in the public schools has a detrimental effect upon colored children and a tendency to retain or retard their educational and mental development and to deprive them of some of the benefits they would receive in a racially integrated school system. The finding does not specifically show that any of the appellants have actually and personally suffered by reason of segregation in the public schools of Topeka nor that the mental development of any of the appellants in this case has been retarded; and the finding does not even purport to show discrimination against the appellants and in favor of any other students in the Topeka school system. It no where discusses the effect of segregation upon children of any race other than colored children. Therefore, the District Court's Finding of Fact No. VIII fails to show either that the appellants have suffered any personal harm, or that they are being deprived of benefits or subjected to detriments which do not equally apply to other students in the Topeka school system. Thus, the appellants have failed to secure findings of fact sufficient to entitle them to injunctive relief or to a reversal of the judgment below.

### VIII. ARGUMENT

**1. Does a statute which permits but does not require cities of more than 15,000 population to maintain separate school facilities for colored and white students violate the Fourteenth Amendment to the Constitution of the United States in a situation where a court has specifically found that there is no discrimination or distinction in physical facilities, educational qualifications of teachers, curricula or transportation facilities?**

Appellees contend that only a negative answer to this question is possible.

**Background of segregation in Kansas** A meaningful examination of any statute must necessarily be made in the light of its context. In *Plessy v. Ferguson,* 163 U.S. 357, the Court comments:

> "So far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question of whether the statute … is a reasonable regulation, and with respect to this, there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."

Therefore, we deem it proper to pause briefly to examine the origins and attitudes of the people of the State of Kansas.

The birth of the State of Kansas was an incident of the intersectional struggle that culminated in the war between the states. Located midway between the north and the south, the territory of Kansas was coveted by both the proslavery and free-state elements. The Kansas-Nebraska Act which announced the principle of "squatter sovereignty" formally opened the territory for settlement and resulted in migration of large numbers of people from both the north and the south. In these early settlers were reflected the diverse attitudes and cultures of the regions from which they came. While the free-state elements from the north gained political ascendency, there remained in Kansas people who, in good faith, believed that the welfare of both the colored and the white races required that they live apart from one another. Migration following the war between the states followed the same pattern. While the greatest number came from Illinois, Ohio, Indiana and other northern states, a considerable segment of the population had its origin in Kentucky, Tennessee and Missouri. (Clark & Roberts, People of Kansas, 1936, p. 18.)

The early legislatures were faced with the task of reconciling the divergent attitudes of the settlers from such varied cultural backgrounds.

The Wyandotte Constitution, under which the State of Kansas was admitted to the Union, provided for a system of public education specifically requiring the legislature to "encour-

age the promotion of intellectual, moral, scientific and agricultural improvement, by establishing a uniform system of common schools and schools of a higher grade, embracing normal, preparatory, collegiate and university departments." (Const., Art. 6, Sec. 1.) It is significant that an effort was made in the Wyandotte convention to obtain a constitutional requirement for the separate education of Negro children. The proposal was defeated, not because of objection to the intrinsic policy of segregation, but because the dominant faction in the constitutional convention believed that the power to govern the public schools and to classify students therein should rest with the legislature. At no time was doubt expressed that the constitutional provision adopted at Wyandotte would preclude classification of students on the basis of color (Wyandotte Constitutional Convention, Proceedings and Debates, 1859, pp. 171 to 174).

As early as 1862 the power to classify students was exercised by the enactment of section 18, article 4, chapter 46, Compiled Laws of 1862, applying to cities of not less than 7,000 inhabitants. That statute provided:

> "The city council of any city under this act shall make provisions for the appropriation of all taxes for school purposes collected from black or mulatto persons, so that the children of such persons shall receive the benefit of all moneys collected by taxation for school purposes from such persons, in schools separate and apart from the schools hereby authorized for the children of white persons."

Chapter 18, Laws of 1868, entitled "An Act to Incorporate Cities of the First Class" authorized the organization and maintenance of separate schools for the education of white and colored children in cities of over 15,000 population. In 1876 the laws of the state pertaining to the common schools were codified and embodied in one comprehensive statute. (Chapter 122.) Article X of this chapter related to the public schools and cities of the first class, and provided that all cities of more than 15,000 inhabitants shall be governed thereby. The provision of the law of 1868 authorizing the maintenance of separate schools for white and colored children was omitted from that section and was thus deemed to have been repealed by implication. However, in 1879 a statute was passed (Laws of 1879, Chapter 81) amending the law relating to cities of the first class and specifically authorizing the boards of education therein to organize and maintain separate elementary schools for the education of white and colored children. The section was again amended by Laws of 1905, Chapter 414, and now appears without further change in G. S. 1949, 72-1724, quoted above.

Two features of the Kansas statute should be emphasized. In the first place, we invite the court's attention to the fact that the statute is permissive only and does not, as may be inferred from appellants' brief, require any board of education to maintain separate schools for colored children.

In the second place, it is again pointed out that the statute applies only to cities of the first class. Cities of the first class in Kansas include those cities having a population of more than 15,000 persons. Presently there are 12 cities in the state so classified. The special provision affecting only these communities may be accounted for by reference to the fact that the Negro population of Kansas is largely urban. According to the 1950 census, less than four percent of the total population of Kansas belongs to the Negro race. However, more than ninety percent of this colored population lives in cities classified as urban. Sixty percent of the total colored population live in the three largest cities of Kansas City, Wichita and Topeka, and at least thirty-five percent of this total live in Kansas City alone. Thus, in enacting a school segregation statute applicable only to cities of the first class the Kansas legislature has simply recognized that there are situations where Negroes live in sufficient numbers to create special school problems and has sought to provide a law sufficiently elastic to enable Boards of Education in such communities to handle such problems as they may, in the exercise of their discretion and best judgment, deem most advantageous to their local school system under their local conditions.

**The Kansas decisions** The Supreme Court of Kansas has uniformly held that the governing bodies of school districts in the state may maintain separate schools for colored children only when expressly authorized by statute. *Board of Education v. Tinnon,* 26 Kan. 1 (1881); *Knox v. Board of Education,* 45 Kan. 152, 25 Pac. 616 (1891); *Cartwright v. Board of Education,* 73 Kan. 302, 84 Pac. 382 (1906); *Rowles v. Board of Education,* 76 Kan. 361, 91 Pac. 88 (1907); *Woolridge, et al., v. Board of Education,* 98 Kan. 397, 157 Pac. 1184 (1916); *Thurman-Watts v. Board of Education,* 115 Kan. 328, 22 Pac. 123

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(1924); *Webb v. School District,* 167 Kan. 395, 206 Pac. 2d 1066 (1949).

The rationale of each of these cases is expressed in *Thurman-Watts v. Board of Education,* supra, as follows:

> "The power and duty of the school board are derived exclusively from the statutes. The school board has no greater power than is conferred on it by the statutes."

It is significant that in each of the cases cited above, the court expressly recognized or conceded that the legislature has power to classify students in the public schools on the basis of color. Illustrative of this attitude is the following statement from *Board of Education v. Tinnon,* supra, appearing on p. 16 of the reported decision:

> "For the purpose of this case we shall assume that the legislature has the power to authorize the board of education of any city or the officers of any school district to establish separate schools for the education of white and colored children, and to exclude the colored children from the white schools notwithstanding the Fourteenth Amendment to the Constitution of the United States;"

In each of the subsequent cases where the power to segregate was denied by reason of the absence of statutory authority, the court specifically recognized that the legislature had such authority to confer. (See cases above cited.)

The question of the constitutionality of a statute, antecedent to but substantially like the one here under attack, was squarely presented to the Supreme Court of Kansas in the case of *Reynolds v. Board of Education,* 66 Kan. 672, 72 Pac. 274. That was a proceeding in the nature of mandamus brought against the board of education of the city of Topeka by a colored resident. In the action he sought to compel the board of education to admit his child to a school maintained for white children only. In an exhaustive opinion the court found that the statute which permitted the policy of racial segregation to be valid and not in violation of the Fourteenth Amendment to the Constitution of the United States. The court relied specifically on the decision of the Supreme Court of the United States in the case of *Plessy v. Ferguson,* supra, and held that where facilities are equal, the mere fact of separation of races within a school system does not constitute a violation of the Fourteenth Amendment to the Constitution of the United States.

Quoting with approval from the New York case of *People, ex rel., Cisco v. School Board,* 161 N. Y. 598, 56 N. E. 81, 48 L. R. A. 115, the Court said:

> "The most that the constitution requires the legislature to do is to furnish a system of common schools where each and every child may be educated; not that all must be educated in any one school, but that it shall provide or furnish a school or schools where each and all may have the advantages guaranteed by that instrument. If the legislature determined that it was wise for one class of pupils to be educated by themselves, there is nothing in the constitution to deprive it of the right to so provide. It was the facilities for and the advantages of an education that it was required to furnish to all the children, and not that it should provide for them any particular class of associates while such education was being obtained."

And the court found merit in the quoted portion of the decision in the Massachusetts case of *Roberts v. City of Boston,* 5 Cush. 198:

> "It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compeling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under thier superintendence, and we cannot say, that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment."

Consistent with its finding that the statute did not violate the equal protection guarantee of the Fourteenth Amendment, the Court said on page 689: "The design of the common-school system of this state is to instruct the citizen, and where for this purpose they have placed within his reach equal means of acquiring an education with other persons, they have discharged their duty to him, and he has received all that he is entitled to ask of the government with respect to such privileges."

Finally on page 292 the court holds:

> "The act of the legislature of 1879 providing for the education of white and colored children in separate schools in cities of the first

> class except in the high school is, therefore, in all respects constitutional and valid."

At the same time the Kansas court has always insisted that facilities must be equal for all groups. Particularly significant is the case of *Williams v. Parsons,* 79 Kan. 202, decided in 1908. There objection was made that the school provided for colored children was located in such close proximity to the railroad tracks that such location produced an undue hazard to the children attending the school. The court stated, at page 209:

> "Having power to maintain separate schools in cities of the first class, the duty rests upon the board of education therein to give equal educational facilities to both white and colored children in such schools. This requirement must have a practical interpretation so that it may be reasonably applied to varying circumstances. . . . Where the location of a school is such as to substantially deprive some of the children of the district of any educational facilities, it is manifest that this equality is not maintained and the refusal to furnish such privileges, where it is practicable to do so, is an abuse of discretion for which the courts will afford a remedy."

A later expression of the Supreme Court of Kansas is found in *Graham v. Board of Education,* 153 Kan. 840, decided in 1941. There the court said on page 842:

> "The authorities are clear that separate schools may be maintained for the white and colored races if the educational facilities provided for each are equal, unless such separation is in contravention of a specific state law."

Again on p. 846 the court comments with reference to the rule expressed in *Reynolds v. Board of Education,* supra:

> "The defendants cite the case of *Reynolds v. Board of Education,* 66 Kan. 672, 72 Pac. 274. The rules of law set out in that case are sound and are applied in this case."

These cases demonstrate that the Supreme Court of Kansas has never doubted that G. S. 1949, 72-1724, and its antecedent statutes is without the scope of the prohibitions imposed on the legislature by the Fourteenth Amendment to the Constitution of the United States.

**The controlling principles** The position taken by the Supreme Court of Kansas in the cases cited, *supra,* is sustained by the weight of the decisions of this Court in *Plessy v. Ferguson,* supra, and *Gong Lum v. Rice,* 275 U.S. 78; and in numerous decisions of the inferior federal courts and the appellate courts in other states.

Appellants suggest that the Plessy case is not applicable to the situation before us. Admittedly, the question presented in the Plessy case arose out of segregation of white and colored races in railroad cars and not segregation in the public schools. However, the decision of the Court rises above the specific facts in issue and announces a doctrine applicable to any social situation wherein the two races are brought into contact. In commenting upon the purpose and the limitations of the Fourteenth Amendment the Court makes the following statement:

> "The object of the Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced." (p. 554.)

Certainly this language refutes appellants' contention that the Plessy case has no application to these facts.

Appellants further state that *Gong Lum v. Rice* "is irrelevant to the issues in this case." This statement appears to justify a brief examination of the facts in the Gong case. Those facts may be summarized as follows:

The Constitution and statutes of the State of Mississippi provided for two school systems in each county. One system was for "white" children and the other system for "colored" children. Plaintiff sought to have his child who was a citizen of Chinese extraction admitted to the school maintained for white students in the county where she lived. She was refused admission by the school authorities. The Supreme Court of the United States unanimously affirmed the decision

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of the Supreme Court of Mississippi, refusing to grant a Writ of Mandamus to compel the school authorities to admit the Chinese-American citizen to the white school.

The opinion by Chief Justice Taft includes the following statement (pp. 85–86): "The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black. Were this a new question it would call for very full argument and consideration but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution."

To support this proposition the Court cites sixteen cases decided by federal courts and state courts of last resort, including *Plessy v. Ferguson,* supra.

We do not believe that appellants suggest that the rights of the Negro citizens differ from the rights of the Mongolian citizen, Martha Lum. If such an idea is advanced herein, this Court should have no more difficulty in disposing of that contention than it did of that phase of the Gong case where it seemed to be contended that a yellow child had different rights than a Negro child. The Court simply held that children of all races have equal rights but that those rights are not infringed upon when the state provides that the different races shall be educated in separate schools of equal facility.

Appellants further contend that whatever force the Plessy and Gong-Lum cases may have had has been overcome by the recent decisions of *Sweatt v. Painter,* 339 U.S. 629, and *McLaurin v. Oklahoma,* 339 U.S. 637. Appellees concede that if there has been any change in the attitude of this Court as to the constitutionality of the separate but equal doctrines as it affects segregation, it must be found in these two cases. Thus, we have examined them carefully. But we find no statement therein that would cause us to believe the Court intended to reverse or modify its earlier decisions. In the Sweatt case, the Court held that a Negro prospective law student could not be denied admission to the renowned University of Texas Law School—"one of the nation's ranking law schools" (p. 663), and be compelled to accept instruction in a new school of perhaps questionable worth, inferior as to faculty, plant and student body. The McLaurin case only found that a Negro graduate student, who had successfully compelled his admission to the University of Oklahoma to do graduate work in education, was still being denied equal rights when he was segregated inside the university as to his seat in class, in the library and in the dining hall. Unquestionably, these cases sustain the position that equal facilities must be provided. However, that point is not at issue in this case.

We think the Sweatt case has no greater significance than the following expression of the Court's attitude indicates:

> "This case and *McLaurin v. Oklahoma State Regents* … present different aspects of this general question: To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university? Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the court." (p. 631.)

Squarely in point is the following statement:

> "We cannot, therefore, agree with respondents that the doctrine of *Plessy v. Ferguson,* 1896, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, requires affirmance of the judgment below. Nor need we reach the petitioner's contention that *Plessy v. Ferguson* should be re-examined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation. See, *supra,* pg. 631." (pp. 635–636.)

And in the McLaurin case the significance of the special situation is noted by the Court:

> "Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained.
>
> "It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his

> fellow students. This we think is irrelevant. There is a vast difference—a constitutional difference between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar … Appellant having been admitted to a state-supported graduate school, he must receive the same treatment at the hands of the state as students of other races." (pp. 641, 642.)

In the Sweatt and McLaurin cases the Court specifically refused to consider the issue of constitutionality of racial separation in schools of equal facility in view of contemporary knowledge and held only that where the State did not furnish equal facilities for one race, the students of that race were being denied equal protection of the laws. Appellees contend that this refusal by the Court to review the Plessy and Gong-Lum doctrines in its later decisions can only be interpreted to support the view that those cases still stand as expressions of the rule established by the Supreme Court upon the question of racial segregation within the public schools.

Notable among decisions since the Sweatt and McLaurin cases are *Carr v. Corning,* 182 F. 2d 14; *Briggs v. Elliott,* 98 F. Supp. 529; and *Davis v. County School Board,* 103 F. Supp. 337, the latter two cases now pending before this Court on appeal. *Carr v. Corning* involved the public school system of the District of Columbia. There the Court noted a fact that we deem most significant with respect to the original meaning and intent of the Fourteenth Amendment. It was pointed out that in the same year that Congress proposed the amendment, federal legislation was enacted providing for segregation of the races in the public schools in the District of Columbia.

> "We are not unmindful of the debates which occurred in Congress relative to the Civil Rights Act of April 9, 1866, the Fourteenth Amendment, and the Civil Rights Act of March 1, 1875. But the actions of Congress, the discussion in the Civil Rights Cases, and the fact that in 1862, 1864, 1866 and 1874 Congress, as we shall point out in a moment, enacted legislation which specifically provided for separation of the races in the schools of the District of Columbia, conclusively support our view of the Amendment and its effect." (p. 17.)

Here we note the parallel situation in the State of Kansas. There the State, through its Legislature, ratified the Fourteenth Amendment in 1867, and only one year later legislation providing for separation of the races in the public schools of first class cities was enacted. (L. 1868, ch. 18.)

An examination of all the cases in American jurisdictions supporting the appellants' position would become repetitious and tedious. Thus, we refrain from an exhaustive survey. We believe the comment of Circuit Judge Parker in *Briggs v. Elliott,* supra, aptly summarizes the law and its justification:

> "One of the great virtues of our constitutional system is that, while the federal government protects the fundamental rights of the individual, it leaves to the several states the solution of local problems. In a country with a great expanse of territory with peoples of widely differing customs and ideas, local self government in local matters is essential to the peace and happiness of the people in the several communities as well as to the strength and unity of the country as a whole. It is universally held, therefore, that each state shall determine for itself, subject to the observance of the fundamental rights and liberties guaranteed by the federal Constitution, how it shall exercise the police power, *i.e.,* the power to legislate with respect to the safety, morals, health and general welfare. And in no field is this right of the several states more clearly recognized than in that of public education." (p. 532.)

Justice Holmes has expressed the following view:

> "I must add one general consideration. There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect. (Holmes, J., dissenting opinion, *Truax v. Corrigan,* 257 U.S. 312, p. 344, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375.)"

It is undoubtedly true that the separate but equal doctrine is susceptible of abuse. In many instances it has resulted in a separate and unequal rule in practice. However, it is the impossibility of equality under such a doctrine, and not the difficulty of administering and applying the same with equality, that would make such a doctrine unconstitutional *per se.* The situation in Topeka is one where substantial equality has been reached. Such was the finding of the Court below (R. 245) and such is appar-

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ently conceded by the appellants (Appellants' Brief, p. 5). These facts, under authority of decisions heretofore reviewed, compel an inescapable conclusion: Neither the statute of Kansas nor the action of the appellee, Board of Education, offends the Fourteenth Amendment to the Federal Constitution.

**The prospect** At the outset we suggested that the Kansas statute is permissive and that any Board of Education included in the statute may adopt a policy consistent with local conditions and local attitudes. We believe it is significant that under this statute by a process of evolution the people in Kansas communities are arriving at their own solutions to this problem. Under the statute 12 cities are authorized to maintain separate schools for colored students. The files of the State Superintendent of Public Instruction indicate that at the present time, only nine cities exercise the power conferred by statute. Wichita, the largest city in the state, has abandoned segregation only recently. The city of Pittsburg abandoned the policy of segregation only two years ago. Lawrence, seat of the state university, is now in the process of ending the operation of segregated schools.

This account of events not in the record is related to illustrate the wisdom which underlies the Kansas statute. Only those cities where local conditions produce special problems making segregation desirable need adopt the expedient of segregation. In the orderly progress of the community, these special problems are either solved or vanish, and when the need for segregation disappears, its practice may be discontinued. This was the method provided by the legislature of the State of Kansas to achieve the goal of an integrated school system where segregation is not needed. We respectfully suggest to the court that this evolutionary process permitting an autonomous solution in the community is consistent with the purpose and intent of the Fourteenth Amendment.

**2. The District Court's finding of Fact No. VIII is insufficient to establish appellants' right to injunctive relief and to require reversal of the judgment below**

**A. Counsel for Appellants have overstated their case.** Appellant has raised and preserved this issue by its third Assignment of Error, to wit:

> "The District Court erred:
>
> "… … … . .
>
> "3. In refusing to enter judgment in favor of plaintiffs, after the court found that plaintiffs suffered serious harm and detriment in being required to attend segregated elementary schools in the City of Topeka, and were deprived thereby of benefits they would have received in a racially integrated school system." (R. 250.)

And by adopting its Assignment of Errors in its Statement of Points to Be Relied Upon (R. 253).

The District Court's Findings of Fact and Conclusions of Law appear at pp. 244 to 247 of the Transcript of the Record.

There is no Finding of Fact which literally and specifically corresponds to the finding mentioned in Appellants' third Assignment of Error.

At page 2 of the Brief for Appellants under the heading *Questions Presented,* appellants state the second issue, as follows:

> "Whether the finding of the court below—that racial segregation in public elementary schools has the detrimental effect of retarding the mental and educational development of colored children and connotes governmental acceptance of the conception of racial inferiority—compels the conclusion that appellants here are deprived of their rights to share equally in educational opportunities in violation of the equal protection clause of the Fourteenth Amendment."

There is no Finding of Fact which literally and specifically corresponds to the finding mentioned in appellants' statement of the second issue.

At page 10 of the Brief for Appellant, counsel state:

> "Applying this yardstick, any restrictions or distinction based upon race or color that places the Negro at a disadvantage in relation to other racial groups in his pursuit of educational opportunities is violative of the equal protection clause.
>
> "In the instant case, the court found as a fact that appellants were placed at such a disadvantage and were denied educational opportunities equal to those available to white students.
>
> "… … … … … . .
>
> "Thus, notwithstanding that it had found inequality in educational opportunity as a fact, the court concluded as a matter of law that such inequality did not constitute a denial of constitutional rights, saying: …"

There is no such finding of fact in the Record in this case.

With all respect due to able counsel for appellants we believe that in their zeal for their cause, they have overstated their case. The only existing Finding of Fact which is relied upon by appellants and the only one quoted in their brief is the District Court's Finding of Fact No. VIII, which we quote accurately:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retain the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial integrated school system."

We call attention to the fact that the foregoing Finding is couched only in broad and general language; it makes no specific or particular reference to any of the appellants, nor to the grade schools in Topeka, nor to racial groups other than Negroes, nor to inequality of educational opportunities between Negroes and other racial groups. The substance of the finding can be summarized in the following statement: "Generally speaking, segregation is detrimental to colored children, and deprives them of some benefits they would receive in a racial integrated school system."

The Finding of Fact No. VIII cannot be stretched, as counsel for appellants apparently would like to stretch it, into a finding that the appellants in this case have "suffered serious harm in being required to attend segregated elementary schools in Topeka" and that "appellants were placed at such a disadvantage (in relation to other racial groups in [their] pursuit of educational opportunities) and were denied educational opportunities equal to those available to white students."

**"B. Elements necessary to entitle appellants to injunctive relief and to a reversal of the judgment in this case.** To establish appellants' right to injunctive relief and to reversal of the judgment in this case, the Findings of Fact No. VIII would have to show:

> (1) That the appellants have actually suffered personal harm as the result of attending segregated schools in Topeka; and,
>
> (2) Either that appellants are being deprived of benefits which other students in the Topeka school system enjoy, or that appellants are being subjected to detriments to which other students in the Topeka school system are not being subjected, by reason of maintenance of a segregated school system.

The mere showing that appellants may be members of a class which is being discriminated against by reason of a statute is not sufficient to entitle them to injunctive relief, unless appellants can also show that they personally are suffering harm. The Fourteenth Amendment protects only personal and individual rights.

The mere showing that appellants can show that they are being deprived of benefits they would receive under a different system of schools is not sufficient to show that they are being deprived of equal protection of the law, unless appellants can also show that under the existing segregate school system there are others who are not deprived of such benefits.

And finally, the mere showing that segregation is detrimental to appellants is not sufficient to show that they are being deprived of equal protection of the laws, unless they also show that segregation is not similarly detrimental to others in the Topeka school system.

*McCabe v. A. T. & S. F. Ry. Co.,* 235 U.S. 151, 59 Law Ed. 149:

> "There is, however, an insuperable obstacle to the granting of the relief sought by this bill. It was filed, as we have seen, by five persons against five railroad corporations to restrain them from complying with the state statute. The suit had been brought before the law went into effect, and this amended bill was filed very shortly after. It contains some general allegations as to discriminations in the supply of facilities and as to the hardships which will ensue. It states that there will be 'A multiplicity of suits,' there being at least 'fifty thousand persons of the Negro race in the state of Oklahoma' who will be injured and deprived of their civil rights. But we are dealing here with the case of the complainants, and nothing is shown to entitle them to an injunction. It is an elementary principle that, in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because someone else may be

> hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention." (p. 162.)

*Turpin v. Lemon,* 187 U.S. 51, 47 Law Ed. 70:

> "This is an effort to test the constitutionality of the law, without showing that the plaintiff had been injured by its application, and, in this particular, the case falls without ruling in *Tyler v. Registration Court Judges,* 179 U.S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206, wherein we held that the plaintiff was bound to show he had personally suffered an injury before he could institute a bill for relief. In short, the case made by the plaintiff is purely academic." (pp. 60, 61.)

*Thomas Cusack Co. v. Chicago,* 242 U.S. 526, 61 Law Ed. 472:

> "He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property." (p. 530.)

*Mallinckrodt Chemical Works v. Missouri ex rel. Jones,* 238 U.S. 41, 59 L. ed. 1192:

> "As has been often pointed out, one who seeks to set aside a state statute as repugnant to the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him." (p. 54.)

**C. Finding of Fact No. VIII fails to disclose that any of the appellants have been actually and personally harmed by segregation in the Topeka Schools.** Finding of Fact No. VIII makes no specific reference to the individual appellants. It expresses only in broad generalities the effect of segregation in the public schools upon colored children as a class. There is no specific finding that segregation has had a personal detrimental effect upon any of the appellants. There is no specific finding that any of the appellants personally has interpreted segregation as denoting inferiority of the Negro group, or that the motivation to learn of any of the appellants has been affected by a sense of inferiority. There is no finding that the educational and mental development of any of the appellants has actually been retained or retarded by reason of segregation in the Topeka schools. In short there is no finding that any of the appellants individually and actually has been harmed by segregation in the Topeka school system.

**D. Finding of Fact No. VIII fails to disclose that appellants are being deprived of equal protection of the laws, or that they are being discriminated against by segregation in the Topeka Schools.** Denial of equal protection of the laws, or discrimination, logically and necessarily involves at least two persons who are being treated differently. Denial of equal protection must mean denial of protection or opportunity equal to that afforded to someone else. There can be no such thing as "unilateral discrimination."

Since the Finding of Fact No. VIII is limited solely to a statement of the effect of segregation on colored children as a group, and nowhere mentions the effect of segregation upon any other race or group, it cannot reasonably or logically show discrimination or a denial of equal protection of the laws.

Nowhere in the finding has the court disclosed any facts upon which it can be claimed to show discrimination in favor of white children over colored in segregated schools.

It is idle on this appeal to speculate upon what the trial court might have found had it been requested to make additional findings. No request for additional findings was made in the trial court. We therefore refrain from speculating as to whether the court would also have found that segregation was detrimental to white children and impaired their educational and mental development.

**E. The District Court did not intend nor consider its Finding of Fact No. VIII to be a finding of discrimination against appellants.** The last sentence in Finding of Fact No. VIII summarizes the entire finding. We quote:

> "Segregation with the sanction of law, therefore, has a tendency to retain the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial integrated school system."

We believe the court intended the finding to mean simply that colored children would be better off in integrated schools than they are in segregated schools. Conceding that that is the meaning of the finding, it does not amount to a finding of actual discrimination against colored children and in favor of white children upon the facts in this case. White children are not permitted to attend integrated schools in Topeka. The mere fact, if it be a fact, that the Topeka school

system could be improved so far as education of colored children is concerned, does not prove discrimination against them.

In the opinion of the District Court (R. 238 to 244), 98 F. Supp. 797, no mention is made of Finding of Fact No. VIII. It is clear the District Court did not consider or intend to attach to that finding the same significance which appellants seek to place upon it.

We do not question that if the Finding of Fact No. VIII means everything appellants claim it means, they would be entitled to an injunction and reversal of the judgment, if this court should overrule the "separate but equal doctrine." However, it is clear that the District Court did not intend or consider the finding to mean all the things appellants claim for it. As stated in the Decree of the District Court:

> "The Court has heretofore filed its Findings of Fact and Conclusions of Law together with an opinion and has held as a matter of law that the plaintiffs have failed to prove they are entitled to the relief demanded."

## IX. CONCLUSION

In view of the authorities heretofore cited, appellees respectfully submit that the judgment of the court below should be affirmed.

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U.S. SUPREME COURT, OCTOBER 1953

MEMORANDUM DECISION

# U.S. Supreme Court, October 1953 Brown v. Board of Education of Topeka

I

**Oliver Brown, Mrs. Richard Lawton, Mrs. Sadie Emmanuel, et al., appellants, v. Board of Education of Topeka, Shawnee County, Kansas, et al. No. 8, 345 U.S. 972.**

Former decision, 72 S.Ct. 1070; 344 U.S. 1, 73 S.Ct. 1; 344 U.S. 141, 73 S.Ct. 124.

Facts and opinion, 98 F.Supp. 797.

June 8, 1953. Case ordered restored to the docket and is assigned for reargument on Monday, October 12, next. In their briefs and on oral argument counsel are requested to discuss particularly the following questions insofar as they are relevant to the respective cases:

"I. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?

"2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment

"(a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or

"(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

"3. On the assumption that the answers to questions 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

"(a) should this Court formulate detailed decrees in this case;

"(b) if so what specific issues should the decrees reach;

"(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decree;

"(d) should this Court remand to the courts of first instance with directions to frame decrees in this case and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

"The Attorney General of the United States in invited to take part in the oral argument and to file an additional brief if he so desires."

U.S. SUPREME COURT, OCTOBER 1953

BRIEF FOR THE APPELLANTS AND RESPONDENTS ON REARGUMENT

# The Supreme Court of the United States October Term, 1953

NO. 1
OLIVER BROWN, ET AL., APPELLANTS,
VS.
BOARD OF EDUCATION OF TOPEKA, ET AL., APPELLEES.

NO. 2
HARRY BRIGGS, JR., ET AL., APPELLANTS.
VS.
R. W. ELLIOTT, ET AL., APPELLEES.

NO. 4
DOROTHY E. DAVIS, ET AL., APPELLANTS,
VS.
COUNTY SCHOOL BOARD OF PRINCE EDWARDS COUNTY, APPELLEES.

NO. 10
FRANCIS B. GEBHART, ET AL., PETITIONERS,
VS.
ETHEL LOUISE BELTON, ET AL., RESPONDENTS.

## APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, THE EASTERN DISTRICT OF SOUTH CAROLINA AND THE EASTERN DISTRICT OF VIRGINIA, AND ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE, RESPECTIVELY

## BRIEF FOR APPELLANTS IN NOS. 1, 2 AND 4 AND FOR RESPONDENTS IN NO. 10 ON REARGUMENT

CHARLES L. BLACK JR.,
ELWOOD H. CHISOLM,
WILLIAM T. COLEMAN JR.
CHARLES T. DUNCAN,
GEORGE E. C. HAYES,
WILLIAM R. MING JR.,
CONSTANCE BAKER MOTLEY,
JAMES M. NABRIT JR.,
DAVID E. PINSKY,
FRANK E. REEVES,
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HAROLD BOULWARE,
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OLIVER W. HILL,
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CHARLES S. SCOTT, *Attorneys for Appellants in Nos. 1, 2, 4 and for Respondents in No. 10.*

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Specification of Errors

**No. 10**

Opinion Below
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Argument
Part One

**I.** Normal exercise of the judicial function calls for a declaration that the state is without power to enforce distinctions based upon race or color in affording educational opportunities in the public schools

**II.** The statutory and constitutional provisions involved in these cases cannot be validated under separate but equal concept

**A.** Racial segregation cannot be squared with the rationale of the early cases interpreting the reach of the Fourteenth Amendment

**B.** The first time the question came before the Court, racial segregation in transportation was specifically disapproved

**U.S. SUPREME COURT, OCTOBER 1953**

BRIEF FOR THE APPELLANTS AND RESPONDENTS ON REARGUMENT

**C.** The separate but equal doctrine marked an unwarranted departure from the main stream of constitutional development and permits the frustration of the very purposes of the Fourteenth Amendment as defined by this Court

**D.** The separate but equal doctrine was conceived in error

1. The dissenting opinion of Justice Harlan in *Plessy v. Ferguson*
2. Custom, usage and tradition rooted in the slave tradition cannot be the constitutional yardstick for measuring state action under the Fourteenth Amendment
3. Preservation of public peace cannot justify deprivation of constitutional rights
4. The separate but equal doctrine deprives Negroes of that protection which the Fourteenth Amendment accords under the general classification test

**E.** The separate but equal doctrine has not received unqualified approval in this Court

**F.** The necessary consequence of the Sweatt and McLaurin decisions is repudiation of the separate but equal doctrine

**III.** Viewed in the light of history the separate but equal doctrine has been an instrumentality of defiant nullification of the Fourteenth Amendment

**A.** The status of the Negro, slave and free, prior to the Civil War

**B.** The post war struggle

**C.** The Compromise of 1877 and the abandonment of Reconstruction

**D.** Consequences of the 1877 Compromise

**E.** Nullification of the rights guaranteed by the Fourteenth Amendment and the reestablishment of the Negro's pre–Civil War inferior status fully realized

Conclusion to Part I

Part Two

**I.** The Fourteenth Amendment was intended to destroy all caste and color legislation in the United States, including racial segregation

**A.** The era prior to the Civil War was marked by determined efforts to secure recognition of the principle of complete and real equality for all men within the existing constitutional framework of our government

Equality under law

**B.** The movement for complete equality reached its successful culmination in the Civil War and the Fourteenth Amendment

**C.** The principle of absolute and complete equality began to be translated into federal law as early as 1862

**D.** From the beginning the thirty-ninth Congress was determined to eliminate race distinctions from American law

The framers of the Fourteenth Amendment

**E.** The Fourteenth Amendment was intended to write into the organic law of the United States the principle of absolute and complete equality in broad constitutional language

**F.** The Republican majority in the 39th Congress was determined to prevent future Congresses from diminishing federal protection of these rights

**G.** Congress understood that while the Fourteenth Amendment would give authority to Congress to enforce its provisions, the amendment in and of itself would invalidate all class legislation by the states

Congress intended to destroy all class distinction in law

**H.** The treatment of public education or segregation in public schools during the 39th Congress must be considered in the light of the status of public education at that time

**I.** During the congressional debates on proposed legislation which culminated in the Civil Rights Act of 1875 veterans of the thirty-ninth Congress adhered to their conviction that the Fourteenth Amendment had proscribed segregation in public schools

**II.** There is convincing evidence that the State Legislatures and conventions which ratified the Fourteenth Amendment contemplated and understood that it prohibited State legislation which would require racial segregation in public schools

**A.** The eleven states seeking readmission understood that the Fourteenth Amendment stripped them of power to maintain segregated schools

Arkansas

North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida

Texas

Virginia

Mississippi

Tennessee

**B.** The majority of the twenty-two Union States ratifying the 14th Amendment understood that it forbade compulsory segregation in public schools

West Virginia and Missouri
The New England States
The Middle Atlantic States
The Western Reserve States
The Western States

**C.** The non-ratifying states understood that the Fourteenth Amendment forbade enforced segregation in public schools
Maryland
Kentucky
California

Conclusion to Part II

Part Three

1. This Court should declare invalid the constitutional and statutory provisions here involved requiring segregation in public schools. After careful consideration of all of the factors involved in transition from segregated school systems to unsegregated school systems, appellants know of no reasons or considerations which would warrant postponement of the enforcement of appellants' rights by this Court in the exercise of its equity powers
   **A.** The Fourteenth Amendment requires that a decree be entered directing that appellants be admitted forthwith to public schools without distinction as to race or color
   **B.** There is no equitable justification for postponement of appellants' enjoyment of their rights
   **C.** Appellants are unable, in good faith, to suggest terms for a decree which will secure effective gradual adjustment because no such decree will protect appellants' rights

Conclusion

Supplement



## EXPLANATORY STATEMENT

One brief is being filed in these four cases. They fundamentally involve the same questions and issues. As an aid to the Court, we are restating below a full history of each case.

### NO. 1

#### Opinion below

The opinion of the statutory three-judge District Court for the District of Kansas (R. 238–244) is reported at 98 F. Supp. 797.

#### Jurisdiction

The judgment of the court below was entered on August 3, 1951 (R. 247). On October 1, 1951, appellants filed a petition for appeal (R. 248), and an order allowing the appeal was entered (R. 250). Probable jurisdiction was noted on June 9, 1952 (R. 254). Jurisdiction of this Court rests on Title 28, United States Code, §§ 1253 and 2101(b).

#### Statement of the case

Appellants are Negro students eligible to attend and attending elementary schools in Topeka, Kansas, and their parents (R. 3–4). Appellees are state officers empowered to maintain and operate the public schools of Topeka, Kansas (R. 4–5). On March 22, 1951, appellants commenced this class action against appellees to restrain them from enforcing and executing that part of Chapter 72–1724, General Statutes of Kansas, 1949, which permitted racial segregation in public elementary schools, on the ground that it violated the Fourteenth Amendment by depriving the infant appellants of equal educational opportunities (R. 2–7), and for a judgment declaring that the practice of appellees under said statute of maintaining and operating racially segregated elementary schools is in violation of the Fourteenth Amendment.

Appellees admitted in their answer that they acted pursuant to the statute and that, solely because of their color, the infant appellants were not eligible to attend any of the elementary schools maintained exclusively for white students (R. 12). The Attorney General of the State of Kansas filed a separate answer specifically to defend the constitutional validity of the statute (R. 14).

The court below was convened in accordance with Title 28, United States Code, § 2284, and, on June 25–26, a trial on the merits was held (R. 63 *et seq.*). On August 3, 1951, the court below filed its opinion (R. 238–244), findings of fact (R. 244–246) and conclusions of law (R. 246–247) and entered a final judgment denying the injunctive relief sought (R. 247).

#### Specification of errors

The court below erred:

1. In refusing to grant appellants' application for a permanent injunction to restrain appellees from acting pursuant to the statute under which they are maintaining separate

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public elementary schools for Negro children, solely because of their race and color.

2. In refusing to hold that the State of Kansas is without authority to promulgate the statute because it enforces a classification based upon race and color which is violative of the Constitution of the United States.
3. In refusing to enter judgment in favor of appellants after finding that enforced attendance at racially segregated elementary schools was detrimental and deprived them of educational opportunities equal to those available to white children.

## NO. 2

### Opinions below

The majority and dissenting opinions of the statutory three-judge District Court for the Eastern District of South Carolina on the first hearing (R. 176–209) are reported in 98 F. Supp. 529–548. The opinion on the second hearing (R. 301–306) is reported in 103 F. Supp. 920–923.

### Jurisdiction

The judgment of the court below was entered on March 13, 1952 (R. 306). A petition for appeal was filed below and allowed on May 10, 1952 (R. 309). Probable jurisdiction was noted on June 9, 1952 (R. 316). Jurisdiction of this Court rests on Title 28, United States Code, §§ 1253 and 2101(b).

### Statement of the case

Appellants are Negro children who reside in and are eligible to attend the public schools of School District No. 22, Clarendon County, South Carolina, and their respective parents and guardians (R. 4–5). Appellees are the public school officials of said district who, as officers of the state, maintain and operate the public schools of that district (R. 5–6). On December 22, 1950, appellants commenced this class action against appellees to enjoin enforcement of Article XI, Section 7, of the Constitution of South Carolina and Section 5377 of the Code of Laws of South Carolina of 1942, which require the segregation of races in public schools, on the ground that they deny to appellants the equal protection of the laws secured by the Fourteenth Amendment, and for a judgment declaring that said laws violate the Fourteenth Amendment and are invalid (R. 2–11).

Appellees in their answer admitted adherence to the said constitutional and statutory provisions requiring racial segregation in public schools and asserted that such provisions were a reasonable exercise of the police powers of the state and, therefore, were valid (R. 13–17).

A three-judge District Court was convened, pursuant to Title 28, United States Code, §§ 2284, and on July 25, 1951, a trial on the merits was held (R. 30 *et seq.*). On June 23, 1951, the court below filed its opinion (R. 176) and entered a final decree (R. 209): (1) upholding the constitutional validity of the contested state constitutional and statutory provisions; (2) denying the injunctive relief which was sought; (3) requiring appellees to furnish to appellants educational facilities equal to those furnished to white students; and (4) requiring appellees within six months to file a report of action taken toward that end.

An appeal from this judgment was allowed by this Court on July 20, 1951. The report required by the decree of the court below was filed on December 21, 1951, and subsequently forwarded to this Court. On January 28, 1952, this Court vacated the judgment of the court below and remanded the case for the purpose of obtaining the views of the court below on the additional facts in the record and to give it the opportunity to take such action as it might deem appropriate in light of the report. 342 U.S. 350. Mr. Justice Black and Mr. Justice Douglas dissented on the ground that the additional facts in the report were "wholly irrelevant to the constitutional questions presented by the appeal to this Court." 342 U.S. 350.

Pursuant to the mandate of this Court, a second trial was held in the court below on March 3, 1953 (R. 271), at which time the appellees filed an additional report showing progress made since the filing of the original report (R. 273). On March 13, 1952, the court below filed its opinion (R. 301) and entered a final decree (R. 306) again upholding the validity of the contested constitutional and statutory provisions, denying the injunctive relief requested and requiring appellees to afford to appellants educational facilities equal to those afforded to white students.

### Specification of errors

The court below erred:

1. In refusing to enjoin the enforcement of the laws of South Carolina requiring racial segregation in the public schools of Clarendon County on the ground that these laws violate rights secured under the equal protection clause of the Fourteenth Amendment.
2. In refusing to grant to appellants immediate and effective relief against the unconstitutional practice of excluding appellants from an opportunity to share the public school facilities of Clarendon County on an equal basis with other students without regard to race or color.
3. In predicating its decision on the doctrine of *Plessy v. Ferguson* and in disregarding the rationale of *Sweatt v. Painter* and *McLaurin v. Board of Regents.*

## NO. 4

### Opinion below

The opinion of the statutory three-judge District Court for the Eastern District of Virginia (R. 617–623) is reported at 103 F. Supp. 337–341.

### Jurisdiction

The judgment of the court below was entered on March 7, 1952 (R. 623). A petition for appeal was filed below and allowed on May 5, 1952 (R. 625, 630, 683). Probable jurisdiction was noted on October 8, 1952. ___U.S. ___, 97 L. ed. (Advance p. 27). Jurisdiction of this Court rests on Title 28, United States Code, §§ 1253 and 2101(b).

### Statement of the case

Appellants, high school students residing in Prince Edward County, Virginia, and their parents and guardians, brought a class action against appellees, the County School Board and the Division Superintendent of Schools on May 23, 1951. The complaint (R. 5–30) alleged that said appellees maintained separate public secondary schools for Negro and white children pursuant to Article IX, Section 140 of the Constitution of Virginia, and Title 22, Chapter 12, Article 1, section 22–221, of the Code of Virginia of 1950; that the Negro school was inferior and unequal to the white schools; and that it was impossible for the infant appellants to secure educational opportunities or facilities equal to those afforded white children similarly situated as long as said appellees enforce said laws or pursued a policy of racial segregation. It sought a judgment declaratory of the invalidity of said laws as a denial of rights secured by the due process and equal protection clauses of the Fourteenth Amendment, and an injunction restraining said appellees from enforcing said laws and from making any distinction based on race or color among children attending the secondary schools of the County.

Appellees admitted maintenance of said schools, enforcement of said laws, and inequalities as to physical plant and equipment, but denied that the segregation violated the Constitution (R. 32–36). Appellee, the Commonwealth of Virginia, intervened (R. 37) and made the same admissions and defense (R. 37–39).

On March 7, 1952, a three-judge District Court found the Negro school inferior in plant, facilities, curricula and means of transportation (R. 622–623) and ordered appellees forthwith to provide "substantially" equal curricula and transportation facilities and to "proceed with all reasonable diligence and dispatch to remove" the existing inequality "by building, furnishing and providing a high school building and facilities for Negro students" (R. 624). It refused to enjoin enforcement of the constitutional and statutory segregation provisions on the grounds: (1) that appellants' evidence as to the effects of educational segregation did not overbalance appellees', and that it accepted as "apt and able precedent" *Briggs v. Elliott,* 98 F. Supp. 529 (E. D. S. C. 1951) and *Carr v. Corning,* 182 F. 2d 14 (C. A. D. C. 1950) which "refused to decree that segregation be abolished incontinently" (R. 619); (2) that nullification of the segregation provisions was unwarranted in view of evidence that racial segregation was not based on prejudice or caprice but, rather, was "one of the ways of life in Virginia" (R. 620); (3) that segregation has begotten greater opportunities for the Negro (R. 621); (4) that elimination of segregation would lessen interest in and financial support of public schools (R. 621); and (5) that, finding "no hurt or harm to either race," it was not for the court "to adjudge the policy as right or wrong" (R. 621–622).

### Specification of errors

The court below erred:

1. In refusing to enjoin the enforcement of Article IX, Section 140 of the Constitution of Virginia, and Title 22, Chapter 12, Article 1,

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Section 22–221, of the Code of Virginia of 1950, upon the grounds that these laws violate rights secured by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

2. In refusing to forthwith restrain appellees from using race as a factor in determining the assignment of public secondary educational facilities in Prince Edward County, Virginia, after it had found that appellants are denied equality of buildings, facilities, curricula and means of transportation in violation of the due process and equal protection clauses of the Fourteenth Amendment.
3. In refusing to hold that appellants are entitled to equality in all aspects of the public secondary educational process, in addition to equality in physical facilities and curricula.
4. In issuing a decree ordering appellees to equalize secondary school facilities in the County where such decree cannot be effectively enforced without involving the court in the daily operation and supervision of schools.

## NO. 10

### Opinions below

The opinion of the Chancellor of the State of Delaware (A. 338) is reported at 87 A. (2d) 862. The opinion of the Supreme Court of Delaware (R. 37) is reported at 91 A. (2d) 137.*

### Jurisdiction

The judgment of the court below was entered on August 28, 1952 (R. 37). On November 13, 1952 petition for writ of certiorari was filed herein. On November 20, 1952, respondents waived the filing of a brief in opposition to the petition for writ of certiorari and moved that, if certiorari were granted, the argument be advanced and heard immediately following argument in Nos. 8, 101 and 191. On November 24, 1952, the petition for writ of certiorari and motion to advance were granted. ___U.S. ___; 97 L. ed. (Advance, p. 124). Jurisdiction of this Court rests upon Title 28, United States Code, § 1257(3).

### Statement of the case

No. 10 arises from two separate class actions filed in the Court of Chancery of the State of Delaware by Negro school children and their guardians seeking admittance of the children to two public schools maintained by petitioners exclusively for white children in New Castle County, Delaware. In the courts below, plaintiffs prevailed, and they and members of their class are now attending the schools to which they sought admission, an application for stay of final order having been denied. (Brief of Respondents, No. 448, October Term, 1952, pp. 25–27). Thus, in this case, unlike the other school segregation cases now under consideration, plaintiffs are respondents in this Court. Nevertheless, they file their brief at this time along with appellants in Numbers 1, 2 and 4, because, on the fundamental issues, they take the same position as do those appellants, and because they believe that by so filing they will facilitate the Court's consideration of the matters at bar.

The complaint (A 3–13) in one of the two cases from which No. 10 arises, alleged that respondents residing in the Claymont Special School District were refused admittance to the Claymont High School maintained by petitioner-members of the State Board of Education and members of the Board of Education of the Claymont Special School District solely because of respondents' color. Because of this, these respondents were compelled to attend Howard High School (RA 47), a public school for Negroes only, in Wilmington, Delaware. Howard High School is operated and controlled by the Corporate Board of Public Education in Wilmington, not a party to this case (A 314–15, 352; R 57, RA 203). The second complaint (A 14–30) out of which No. 448 arises alleged that respondent was excluded from Hockessin School No. 29, a public elementary school maintained for white children only, by petitioner-members of the State Board of Education and petitioner-members of the Board of School Trustees of Hockessin School No. 29.

* The record in this case consists of five separate parts: appendix to petitioners' brief in the court below, the supplement thereto, appendix to respondents' brief in the court below, the supplement thereto, and the record of proceedings in the Supreme Court of Delaware. These will be referred to in respondents' brief as follows:

Appendix to petitioners' brief below will be indicated by A; the supplement to the petitioners' appendix below will be referred to as SA; respondents' appendix below will be referred to as RA; the supplement to respondents' appendix below will be referred to as RSA; the record of proceedings in the Supreme Court of Delaware will be referred to as R.

Respondent and the class she represented at the time of the complaint, attended Hockessin School No. 107, maintained solely for Negroes by the State Board of Education. Respondents in both complaints asserted that the aforesaid state-imposed racial segregation required by Par. 2631, Revised Code of Delaware, 1935, and Article X, Section 1 of the Constitution of Delaware: (1) compelled them to attend schools substantially inferior to those for white children to which admittance was sought; and (2) injured their mental health, impeded their mental and personality development and made inferior their educational opportunity as compared with that offered by the state to white children similarly situated. Such treatment, respondents asserted, is prohibited by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Petitioners' answers (A 31–33, A 34–37) defended the exclusion: (1) upon mandatory constitutional and statutory provisions of the State of Delaware which require separate public schools for white and colored children; and (2) upon the fact that the educational opportunities offered respondents were equal to those offered white children similarly situated.

The two cases were consolidated and tried before the Chancellor. In an opinion (A 348–356; 87 A. (2d) 862) filed on April 1, 1952, the Chancellor found as a fact that in "our Delaware society" segregation in education practiced by petitioners "itself results in Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated." However, the Chancellor denied respondents' prayers for a judgment on this ground and refused to declare that the Delaware constitutional and statutory provisions violated respondents' right to equal protection. But the Chancellor did award respondents the relief which they requested because other inequalities were found to exist. These included, in the high school, teacher training, pupil-teacher ratio, extra-curricular activities, physical plant and esthetic considerations, and time and distance involved in travel. As to the elementary schools in question, the court found the Negro facilities inferior in building and site, esthetic considerations, teacher preparation and transportation facilities. A more detailed exposition of the facts upon which these findings were based is set forth in respondents' Brief in No. 448, October Term, 1952, pp. 27–44.

The Chancellor, as stated above, ordered that respondents be granted immediate relief in the only way that it was then available, that is, by admission to the superior facilities. On August 28, 1952, the Supreme Court of Delaware affirmed. 91 A. (2d) 137. Its findings on some of the facts were somewhat different than the Chancellor's but, on the whole, it agreed with him. Upholding the Chancellor's determination that the requested relief could not be granted because of the harmful psychological effect of racial segregation, it did not otherwise review his factual findings in this regard. Denying petitioners' plea for time to equalize the facilities in question, the Supreme Court held that in the high school case: (1) a decree ordering petitioners to equalize the facilities in question could have no effect on the legal entity having control of the Wilmington public schools which was not a party to the cause; and (2) that the court did not see how it could supervise and control the expenditure of state funds in a matter committed to the administrative discretion of school authorities. Finally, the court held that it could not issue a decree which would, in effect, deny to plaintiffs what it had held they rightfully deserved. As to the elementary school, the court also noted that defendants had not assumed the burden of showing to what extent remedial legislation had improved or could improve conditions in the future. Alluding to its antecedent discussion of the question of relief for high school respondents, it affirmed the Chancellor's finding on this issue also.

Stay of the order was denied by the Chancellor and by the Supreme Court of Delaware (Brief of Respondents, No. 448, October Term, 1952, pp. 25–27) and respondents and members of their class are now enjoying their second year of equal educational opportunities under the decree.

#### This court's order

These four cases were argued and submitted to the Court on December 9–11, 1952. Thereafter, on June 8, 1953, this Court entered its order for reargument, as follows, ___U.S. ___; 97 L. ed. (Advance p. 956):

> "Each of these cases is ordered restored to the docket and is assigned for reargument on Monday, October 12, next. In their briefs and on oral argument counsel are requested to

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discuss particularly the following questions insofar as they are relevant to the respective cases:

"1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?

"2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment

"(a) that future Congresses might, in the exercise of their power under Sec. 5 of the Amendment, abolish such segregation, or

"(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

"3. On the assumption that the answers to questions 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

"(a) should this Court formulate detailed decrees in these cases;

"(b) if so what specific issues should the decrees reach;

"(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

"The Attorney General of the United States is invited to take part in the oral argument and to file an additional brief if he so desires."

On August 4, 1953, upon motion of the Attorney General of the United States and without objection by the parties, this Court entered its order postponing the date assigned for reargument of these cases until December 7, 1953.

## SUMMARY OF ARGUMENT

These cases consolidated for argument before this Court present in different factual contexts essentially the same ultimate legal questions.

The substantive question common to all is whether a state can, consistently with the Constitution, exclude children, solely on the ground that they are Negroes, from public schools which otherwise they would be qualified to attend. It is the thesis of this brief, submitted on behalf of the excluded children, that the answer to the question is in the negative: the Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race. Both the legal precedents and the judicial theories, discussed in Part I hereof, and the evidence concerning the intent of the framers of the Fourteenth Amendment and the understanding of the Congress and the ratifying states, developed in Part II hereof, support this proposition.

Denying this thesis, the school authorities, relying in part on language originating in this Court's opinion in *Plessy v. Ferguson,* 163 U.S. 537, urge that exclusion of Negroes, *qua* Negroes, from designated public schools is permissible when the excluded children are afforded admittance to other schools especially reserved for Negroes, *qua* Negroes, if such schools are equal.

The procedural question common to all the cases is the role to be played, and the time-table to be followed, by this Court and the lower courts in directing an end to the challenged

exclusion, in the event that this Court determines, with respect to the substantive question, that exclusion of Negroes, *qua* Negroes, from public schools contravenes the Constitution.

The importance to our American democracy of the substantive question can hardly be overstated. The question is whether a nation founded on the proposition that "all men are created equal" is honoring its commitments to grant "due process of law" and "the equal protection of the laws" to all within its borders when it, or one of its constituent states, confers or denies benefits on the basis of color or race.

1. Distinctions drawn by state authorities on the basis of color or race violate the Fourteenth Amendment. *Shelley v. Kraemer,* 334 U.S. 1; *Buchanan v. Warley,* 245 U.S. 60. This has been held to be true even as to the conduct of public educational institutions. *Sweatt v. Painter,* 339 U.S. 629; *McLaurin v. Oklahoma State Regents,* 339 U.S. 637. Whatever other purposes the Fourteenth Amendment may have had, it is indisputable that its primary purpose was to complete the emancipation provided by the Thirteenth Amendment by ensuring to the Negro equality before the law. The *Slaughter-House Cases,* 16 Wall. 36; *Strauder v. West Virginia,* 100 U.S. 303.

2. Even if the Fourteenth Amendment did not *per se* invalidate racial distinctions as a matter of law, the racial segregation challenged in the instant cases would run afoul of the conventional test established for application of the equal protection clause because the racial classifications here have no reasonable relation to any valid legislative purpose. See *Quaker City Cab Co. v. Pennsylvania,* 277 U.S. 389; *Truax v. Raich,* 239 U.S. 33; *Smith v. Cahoon,* 283 U.S. 553; *Mayflower Farms v. Ten Eyck,* 297 U.S. 266; *Skinner v. Oklahoma,* 316 U.S. 535. See also *Tunstall v. Brotherhood of Locomotive Firemen,* 323 U.S. 192; *Steele v. Louisville & Nashville R. R. Co.,* 323 U.S. 192.

3. Appraisal of the facts requires rejection of the contention of the school authorities. The educational detriment involved in racially constricting a student's associations has already been recognized by this Court. *Sweatt v. Painter,* 339 U.S. 629; *McLaurin v. Oklahoma State Regents,* 339 U.S. 637.

4. The argument that the requirements of the Fourteenth Amendment are met by providing alternative schools rests, finally, on reiteration of the separate but equal doctrine enunciated in *Plessy v. Ferguson.*

Were these ordinary cases, it might be enough to say that the *Plessy* case can be distinguished—that it involved only segregation in transportation. But these are not ordinary cases, and in deference to their importance it seems more fitting to meet the *Plessy* doctrine head-on and to declare that doctrine erroneous.

Candor requires recognition that the plain purpose and effect of segregated education is to perpetuate an inferior status for Negroes which is America's sorry heritage from slavery. But the primary purpose of the Fourteenth Amendment was to deprive the states of *all* power to perpetuate such a caste system.

5. The first and second of the five questions propounded by this Court requested enlightment as to whether the Congress which submitted, and the state legislatures and conventions which ratified, the Fourteenth Amendment contemplated or understood that it would prohibit segregation in public schools, either of its own force or through subsequent legislative or judicial action. The evidence, both in Congress and in the legislatures of the ratifying states, reflects the substantial intent of the Amendment's proponents and the substantial understanding of its opponents that the Fourteenth Amendment would, of its own force, proscribe all forms of state-imposed racial distinctions, thus necessarily including all racial segregation in public education.

The Fourteenth Amendment was actually the culmination of the determined efforts of the Radical Republican majority in Congress to incorporate into our fundamental law the well-defined equalitarian principle of complete equality for all without regard to race or color. The debates in the 39th Congress and succeeding Congresses clearly reveal the intention that the Fourteenth Amendment would work a revolutionary change in our state-federal relationship by denying to the states the power to distinguish on the basis of race.

The Civil Rights Bill of 1866, as originally proposed, possessed scope sufficiently broad in the opinion of many Congressmen to entirely destroy all state legislation based on race. A great majority of the Republican Radicals—who later formulated the Fourteenth Amendment—understood and intended that the Bill would prohibit segregated schools. Opponents of the measure shared this understanding. The scope

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of this legislation was narrowed because it was known that the Fourteenth Amendment was in process of preparation and would itself have scope exceeding that of the original draft of the Civil Rights Bill.

6. The evidence makes clear that it was the intent of the proponents of the Fourteenth Amendment, and the substantial understanding of its opponents, that it would, of its own force, prohibit all state action predicated upon race or color. The intention of the framers with respect to any specific example of caste state action—in the instant cases, segregated education—cannot be determined solely on the basis of a tabulation of contemporaneous statements mentioning the specific practice. The framers were formulating a constitutional provision setting broad standards for determination of the relationship of the state to the individual. In the nature of things they could not list all the specific categories of existing and prospective state activity which were to come within the constitutional prohibitions. The broad general purpose of the Amendment—obliteration of race and color distinctions—is clearly established by the evidence. So far as there was consideration of the Amendment's impact upon the undeveloped educational systems then existing, both proponents and opponents of the Amendment understood that it would proscribe all racial segregation in public education.

7. While the Amendment conferred upon Congress the power to enforce its prohibitions, members of the 39th Congress and those of subsequent Congresses made it clear that the framers understood and intended that the Fourteenth Amendment was self-executing and particularly pointed out that the federal judiciary had authority to enforce its prohibitions without Congressional implementation.

8. The evidence as to the understanding of the states is equally convincing. Each of the eleven states that had seceded from the Union ratified the Amendment, and concurrently eliminated racial distinctions from its laws, and adopted a constitution free of requirement or specific authorization of segregated schools. Many rejected proposals for segregated schools, and none enacted a school segregation law until after readmission. The significance of these facts is manifest from the consideration that ten of these states, which were required, as a condition of readmission, to ratify the Amendment and to modify their constitutions and laws in conformity therewith, considered that the Amendment required them to remove all racial distinctions from their existing and prospective laws, including those pertaining to public education.

Twenty-two of the twenty-six Union states also ratified the Amendment. Although unfettered by congressional surveillance, the overwhelming majority of the Union states acted with an understanding that it prohibited racially segregated schools and necessitated conformity of their school laws to secure consistency with that understanding.

9. In short, the historical evidence fully sustains this Court's conclusion in the *Slaughter House Cases,* 16 Wall. 61, 81, that the Fourteenth Amendment was designed to take from the states all power to enforce caste or class distinctions.

10. The Court in its fourth and fifth questions assumes that segregation is declared unconstitutional and inquires as to whether relief should be granted immediately or gradually. Appellants, recognizing the possibility of delay of a purely administrative character, do not ask for the impossible. No cogent reasons justifying further exercise of equitable discretion, however, have as yet been produced.

It has been indirectly suggested in the briefs and oral argument of appellees that some such reasons exist. Two plans were suggested by the United States in its Brief as *Amicus Curiae.* We have analyzed each of these plans as well as appellees' briefs and oral argument and find nothing there of sufficient merit on which this Court, in the exercise of its equity power, could predicate a decree permitting an effective gradual adjustment from segregated to non-segregated school systems. Nor have we been able to find any other reasons or plans sufficient to warrant the exercise of such equitable discretion in these cases. Therefore, in the present posture of these cases, appellants are unable to suggest any compelling reasons for this Court to postpone relief.

## ARGUMENT

### PART ONE

The question of judicial power to abolish segregated schools is basic to the issues involved in these cases and for that reason we have undertaken to analyze it at the outset before dealing with the other matters raised by the Court,

although formally this means that the first section of this brief comprehends Question No. 3:

> On the assumption that the answers to question 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

### I. NORMAL EXERCISE OF THE JUDICIAL FUNCTION CALLS FOR A DECLARATION THAT THE STATE IS WITHOUT POWER TO ENFORCE DISTINCTIONS BASED UPON RACE OR COLOR IN AFFORDING EDUCATIONAL OPPORTUNITIES IN THE PUBLIC SCHOOLS

This Court in a long line of decisions has made it plain that the Fourteenth Amendment prohibits a state from making racial distinctions in the exercise of governmental power. Time and again this Court has held that if a state's power has been exercised in such a way as to deprive a Negro of a right which he would have freely enjoyed if he had been white, then that state's action violated the Fourteenth Amendment.

In *Shelley v. Kraemer,* 334 U.S. 1, for example, an unanimous Court held that States of Missouri and Michigan had violated the 14th Amendment when their courts ruled that a Negro could not own real property whose ownership it was admitted the state law would have protected him in, had he been white. This, despite the fact that the state court was doing no more than enforcing a private agreement running with the land. The sole basis for the decision, then, was that the Fourteenth Amendment compels the states to be color blind in exercising their power and authority.

*Buchanan v. Warley,* 245 U.S. 60, was an earlier decision to the same effect. There, this Court invalidated a Louisville, Kentucky ordinance which required racial residential segregation. Though it applied to Negro and white alike, the Court rightly recognized that the ordinance was an exercise of the state's power based on race and race alone. This, the Court ruled, was a violation of the Fourteenth Amendment. To the same effect is *Barrows v. Jackson,* 346 U.S. 249, 97 (L. Ed. Advance p. 261). And see *Oyama v. California,* 332 U.S. 633.

This Court has applied the same rigorous requirement to the exercise of the state's power in providing public education. Beginning with *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337, this Court has uniformly ruled that the Fourteenth Amendment prohibits a state from using race or color as the determinant of the quantum, quality or type of education and the place at which education is to be afforded. Most recently, this Court in *McLaurin v. Oklahoma State Regents,* 339 U.S. 637, held that rules which made distinctions among students in the same school solely on the basis of color were forbidden by the Fourteenth Amendment. Thus, this Court has made it plain that no state may use color or race as the axis upon which the state's power turns, and the conduct of the public education system has not been excepted from this ban.

This judicial recognition that race is an irrational basis for governmental action under our Constitution has been manifested in many decisions and opinions of this Court. In *Yick Wo v. Hopkins,* 118 U.S. 356, this Court struck down local administrative action which differentiated between whites and Chinese. In *Hirabayashi v. United States,* 320 U.S. 81, 100, Chief Justice Stone, in a majority opinion, characterized racial distinctions as "odious to a free people." In *Korematsu v. United States,* 323 U.S. 214, 216, the Court viewed racial restrictions as "immediately suspect." Mr. Justice Jackson, concurring in *Edwards v. California,* 314 U.S. 180, 185, referred to race and color as "constitutionally an irrelevance." Mr. Justice Douglas, dissenting in *South v. Peters,* 339 U.S. 276, 278, considered discriminations based upon race, creed, or color "beyond the pale." In an unanimous opinion in *Henderson v. United States,* 339 U.S. 816, 825, the Court, while not reaching the constitutional question raised, described signs, partitions and curtains segregating Negroes in railroad dining cars as emphasizing "the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility." Every member of the present Court has from time to time subscribed to this view of race as an irrational premise for government action.

The restrictions placed upon persons of Japanese origin on the West Coast during World War II were sustained in *Hirabayashi v. United States, supra,* and in *Korematsu v. United States, supra,* as emergency war measures taken by the national government in a dire national peril of the gravest nature. The military decision was upheld as within an implied war power, and the Court was unwilling to interfere with measures considered necessary to the safety of the nation

by those primarily responsible for its security. Yet, in upholding these orders, the Court made some of the most sweeping condemnations of governmentally imposed racial and color distinctions ever announced by our judiciary. And while departure from accepted standards of governmental conduct was sustained in order to remove persons of Japanese origin from areas where sabotage and espionage might have worked havoc with the national war effort, once this removal was accomplished and individual loyalty determined, further restrictions based upon race or color could no longer be countenanced. *Ex Parte Endo,* 323 U.S. 283.

*Tunstall v. Brotherhood of Locomotive Firemen & Enginemen,* 323 U.S. 210, and *Steele v. Louisville & Nashville R. R. Co.,* 323 U.S. 192, while not deciding the constitutional question, left no doubt that the Fifth Amendment had stripped the national government of power to enforce the racial discrimination assailed.

These decisions serve to underscore the constitutional prohibition against Congressional action grounded upon color except in so far as it may have temporary justification to meet an overwhelming national emergency such as that which led to decisions in the *Hirabayashi* and *Korematsu* cases.

The power of states is even more rigidly circumscribed. For there is grave doubt that their acts can be sustained under the exception made in the *Hirabayashi* and *Korematsu* cases with respect to the national government. See *Oyama v. California,* 332 U.S. 633. The Fourteenth Amendment has been defined as a broad prohibition against state enforcement of differentiations and discrimination based upon race or color. State action restricting the right of Negroes to vote has been struck down as a violation of the Fourteenth Amendment. *Nixon v. Condon,* 286 U.S. 73. Similarly, the Court has refused to sanction the systematic exclusion of Negroes from the petit or grand jury, *Hill v. Texas,* 316 U.S. 400; *Pierre v. Louisiana,* 306 U.S. 354; their representation on juries on a token or proportional basis, *Cassell v. Texas,* 339 U.S. 282; *Shepherd v. Florida,* 341 U.S. 50; or any method in the selection of juries susceptible of racial discrimination in practice. *Avery v. Georgia,* 345 U.S. 559.

Legislation depriving persons of particular races of an opportunity to pursue a gainful occupation has been held a denial of equal protection. *Truax v. Raich,* 239 U.S. 33; *Takahashi v. Fish and Games Commission,* 334 U.S. 410. It is now well settled that a state may not make racial differences among its employees the basis for salary differentiations. *Alston v. School Board,* 112 F. 2d 992 (CA 4th 1940), *cert. denied,* 311 U.S. 693.

Indeed, abhorrence of race as a premise for governmental action pervades a wide realm of judicial opinion dealing with other constitutional provisions. Sweeping decisions have enforced the right of Negroes to make effective use of the electoral process consistent with the requirements of the Fifteenth Amendment. *Guinn v. United States,* 238 U.S. 347; *Lane v. Wilson,* 307 U.S. 268; *Smith v. Allwright,* 321 U.S. 649; *Terry v. Adams,* 345 U.S. 461.

It should be added parenthetically that these decisions are not mere *pro forma* applications of the self-evident requirements of the Fifteenth Amendment. On the contrary, the concept of state action has been utilized in a dynamic and expanding fashion as the Court has sought to reach any method or subterfuge with which the state has attempted to avoid its obligation under that constitutional amendment. *Smith v. Allwright, supra; Terry v. Adams, supra.* See *Rice v. Elmore,* 165 F. 2d 387 (CA 4th 1947), *cert. denied,* 333 U.S. 875 and *Baskin v. Brown,* 174 F. 2d 391 (CA 4th 1949), cases holding state nonaction violative of the Fifteenth Amendment the principle of which was expressly approved in *Terry v. Adams.*

State laws requiring racial segregation in interstate commerce have been declared an invalid invasion of commerce power reserved to the Congress. *Morgan v. Virginia,* 328 U.S. 373. But where a state sought to enforce against a carrier engaged in foreign commerce its local nonsegregation policy, the state law was upheld. The Court considered it inconceivable that the Congress in the exercise of its plenary power over commerce would take any action in conflict with the local nondiscriminatory regulations imposed. *Bob-Lo Excursion Co. v. Michigan,* 333 U.S. 28. These two cases considered together strikingly exemplify this Court's position that fundamental national policy is offended by a requirement of segregation, but implemented by its prohibition.

The contention by a labor union that a state civil rights law which prohibited racial discrimination in union membership offended the

Fourteenth Amendment was dismissed because such a position "would be a distortion of the policy manifested in that amendment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race and color." *Railway Mail Association v. Corsi,* 326 U.S. 88, 94.

Thus, the Court has all but universally made short shrift of attempts to use governmental power to enforce racial distinctions. Yet, where such power has prohibited racial discrimination, it has been sustained even where it has been urged that the state is acting in derogation of other constitutional rights or protected interests.

At the graduate and professional school level, closest to the cases here, racial distinctions as applied have been struck down. *McLaurin v. Oklahoma State Regents,* 339 U.S. 637; *Sweatt v. Painter,* 339 U.S. 629. In those cases the educational process was viewed as a totality. The faculty of the school, the prestige of the institution, the fact that segregation deprived the Negro applicant of the benefits which he might secure in attending school with representatives of the state's dominant racial majority, the value judgment of the community with respect to the segregated school, and the impact of segregation on the individual were among the factors considered by the Court in determining that equal educational opportunities were not available. Those cases, we submit, control disposition of the cases here.

Since segregation was found to impair and inhibit an adult's ability to study in the *McLaurin* case, it seems clear that such segregation has even more far reaching adverse consequences on the mental development of the children involved here.

Sweatt's isolation from the dominant racial majority in a segregated law school was held to deprive him of an effective opportunity to learn the law. The basic function of the public school is to instruct each succeeding generation in the fundamental traditions of our democracy. The child can best come to believe in and respect these traditions by learning them in a setting in which they are in practical operation. But to be taught that our society is founded upon a concept of equality in a public school from which those racial groups are excluded which hold preeminence in every field in his community makes it all but impossible for such teachings to take root. Segregation here is detrimental to the Negro child in his effort to develop into a useful and productive citizen in a democracy.

The *Sweatt* and *McLaurin* cases teach that the Court will consider the educational process in its entirety, including, apart from the measurable physical facilities, whatever factors have been shown to have educational significance. This rule cannot be peculiar to any level of public education. Public elementary and high school education is no less a governmental function than graduate and professional education in state institutions. Moreover, just as Sweatt and McLaurin were denied certain benefits characteristic of graduate and professional education, it is apparent from the records of these cases that Negroes are denied educational benefits which the state itself asserts are the fundamental objectives of public elementary and high school education.

South Carolina, like the other states in this country, has accepted the obligation of furnishing the extensive benefits of public education. Article XI, section 5, of the Constitution of South Carolina, declares: "The General Assembly shall provide for a liberal system of free public schools for all children between the ages of six and twenty-one years." Some 410 pages of the Code of Laws of South Carolina deal with "education." Title 31, Chapters 122–23, S. C. Code, pp. 387–795 (1935). Provision is made for the entire state-supported system of public schools, its administration and organization, from the kindergarten through the university. Pupils and teachers, school buildings, minimum standards of school construction, and specifications requiring certain general courses of instruction are dealt with in detail. In addition to requiring that the three "R's" must be taught, the law compels instruction in "morals and good behaviour" and in the "principles" and "essentials of the United States Constitution, including the study of and devotion to American institutions." Title 31, Chapter 122, sections 5321, 5323, 5325, S. C. Code (1935). The other states involved here are attempting to promote the same objectives.

These states thus recognize the accepted broad purposes of general public education in a democratic society. There is no question that furnishing public education is now an accepted governmental function. There are compelling reasons for a democratic government's assuming the burden of educating its children, of

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increasing its citizens' usefulness, efficiency and ability to govern.

In a democracy citizens from every group, no matter what their social or economic status or their religious or ethnic origins, are expected to participate widely in the making of important public decisions. The public school, even more than the family, the church, business institutions, political and social groups and other institutions, has become an effective agency for giving to all people that broad background of attitudes and skills required to enable them to function effectively as participants in a democracy. Thus, "education" comprehends the entire process of developing and training the mental, physical and moral powers and capabilities of human beings. See *Weyl v. Comm. of Int. Rev.,* 48 F. 2d 811, 812 (CA 2d 1931); *Jones v. Better Business Bureau,* 123 F. 2d 767, 769 (CA 10th 1941).

The records in instant cases emphasize the extent to which the state has deprived Negroes of these fundamental educational benefits by separating them from the rest of the school population. In the case of *Briggs v. Elliott* (No. 101), expert witnesses testified that compulsory racial segregation in elementary and high schools inflicts considerable personal injury on the Negro pupils which endures as long as these students remain in the segregated school. These witnesses testified that compulsory racial segregation in the public schools of South Carolina injures the Negro students by: (1) impairing their ability to learn (R. 140, 161); (2) deterring the development of their personalities (R. 86, 89); (3) depriving them of equal status in the school community (R. 89, 141, 145); (4) destroying their self-respect (R. 140, 148); (5) denying them full opportunity for democratic social development (R. 98, 99, 103); (6) subjecting them to the prejudices of others (R. 133) and stamping them with a badge of inferiority (R. 148).

Similar testimony was introduced in each of the other three cases here involved, and that testimony was undisputed in the case of *Briggs v. Elliott* (No. 101); *Brown v. Board of Education of Topeka, et al.* (No. 8); *Gebhart v. Belton* (No. 448). In *Davis v. County School Board* (No. 191), while witnesses for the appellees disputed portions of the testimony of appellants' expert witnesses, four of appellees' witnesses admitted that racial segregation has harmful effects and another recognized that such segregation could be injurious.

In the *Gebhart* case (No. 448) the Chancellor filed an opinion in which he set forth a finding of fact, based on the undisputed oral testimony of experts in education, sociology, psychology, psychiatry and anthropology (A. 340–341) that in "our Delaware society," segregation in education practiced by petitioners as agents of the state "itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated."

And the court below in the *Brown* case (No. 8) made the following Finding of Fact (R. 245–246):

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system."

The testimony of the expert witnesses in the cases now under consideration, the Opinion of the Chancellor in the Delaware case and the Finding of Fact by the lower court in the Kansas case are amply supported by scientific studies of recognized experts. A compilation of these materials was assembled and filed as an Appendix to the briefs in these cases on the first hearing. The observation of Mr. Justice Jackson in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 636 that public school children, being educated for citizenship, must be scrupulously protected in their constitutional rights, "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes," while made in somewhat different context, appropriately describes the high public interest which these cases involve.

In sum, the statutes and constitutional provisions assailed in these cases must fall because they are contrary to this Court's basic premise that, as a matter of law, race is not an allowable basis of differentiation in governmental action; they are inconsistent with the broad prohibition of the Fifth and Fourteenth Amendments as defined by this Court; they are clearly within that category of

racism in state action specifically prohibited by the *McLaurin* and *Sweatt* decisions.

## II. THE STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN THESE CASES CANNOT BE VALIDATED UNDER ANY SEPARATE BUT EQUAL CONCEPT

The basic principles referred to in Point I above, we submit, control these cases, and except for the mistaken belief that the doctrine of *Plessy v. Ferguson,* 163 U.S. 537, is a correct expression of the meaning of the Fourteenth Amendment, these cases would present no difficult problem.

This Court announced the separate but equal doctrine in a transportation case, and proponents of segregation have relied upon it repeatedly as a justification for racial segregation as if "separate but equal" had become *in haec verba* an amendment to the Fourteenth Amendment, itself. Under that anomalous doctrine, it is said that racial differentiations in the enjoyment of rights protected by the Fourteenth Amendment are permitted as long as the segregated facilities provided for Negroes are substantially equal to those provided for other racial groups. In each case in this Court where a state scheme of racism has been deemed susceptible of rationalization under the separate but equal formula, it has been urged as a defense.

A careful reading of the cases, however, reveals that this doctrine has received only very limited and restricted application in the actual decisions of this Court, and even that support has been eroded by more recent decisions. See particularly *McLaurin v. Oklahoma State Regents; Sweatt v. Painter.* Whatever appeal the separate but equal doctrine might have had, it stands mirrored today as the faulty conception of an era dominated by provincialism, by intense emotionalism in race relations caused by local and temporary conditions and by the preaching of a doctrine of racial superiority that contradicted the basic concept upon which our society was founded. Twentieth-century America, fighting racism at home and abroad, has rejected the race views of *Plessy v. Ferguson* because we have come to the realization that such views obviously tend to preserve not the strength but the weaknesses of our heritage.

### A. Racial segregation cannot be squared with the rationale of the early cases interpreting the reach of the Fourteenth Amendment

In the *Slaughter House Cases,* 16 Wall. 36—the first case decided under the Fourteenth Amendment—the Court, drawing on its knowledge of an almost contemporaneous event, recognized that the Fourteenth Amendment secured to Negroes full citizenship rights and prohibited any state action discriminating against them as a class on account of their race. Thus, addressing itself to the intent of the Thirteenth, Fourteenth and Fifteenth Amendments, the Court said at pages 71 and 72:

> "We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the 15th Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth."

The real purpose of the equal protection clause was discussed in these terms at page 81:

> "In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. *The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.*" (Emphasis supplied.)

So convinced was the Court that the overriding purpose of the Fourteenth Amendment was to protect the Negro against discrimination that it declared further at page 81:

> "We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency,

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that a strong case would be necessary for its application to any other."

In *Strauder v. West Virginia,* 100 U.S. 303, the Court, on page 306, viewed the Fourteenth Amendment in the same light and stated that its enactment was aimed to secure for the Negro all the civil rights enjoyed by white persons:

> "It was in view of these considerations the 14th Amendment was framed and adopted. *It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons,* and to give to that race the protection of the General Government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but *it denied to any State the power to withhold from them the equal protection of the laws,* and authorized Congress to enforce its provisions by appropriate legislation." (Emphasis supplied).

Clearly recognizing the need to construe the Amendment liberally in order to protect the Negro, the Court noted at page 307:

> "If this is the spirit and meaning of the Amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside)."

It was explicitly stated at pages 307, 308 that the Amendment prevented laws from distinguishing between colored and white persons:

> "What is this but declaring *that the law in the States shall be the same for the black as for the white;* that all persons, whether colored or white, shall stand equal before the laws of the States and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctly as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." (Emphasis supplied).

Any distinction based upon race was understood as constituting a badge of inferiority, at page 308:

> "The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."

There was no doubt that this new constitutional provision had changed the relationship between the federal government and the states so that the federal courts could and should now protect these new rights. At page 309 the Court said:

> "The framers of the constitutional Amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was, doubtless, a motive that led to the Amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that, through prejudice, they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the National Government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the Amendment would have been unnecessary, and it might have been left to the States to extend equality of protection."

That law must not distinguish between colored and white persons was the thesis of all the early cases. *United States v. Cruikshank,* 92 U.S. 542, 554, 555; *Virginia v. Rives,* 100 U.S. 313; *Ex Parte Virginia,* 100 U.S. 339; *Neal v. Delaware,* 103 U.S. 370, 386; *Bush v. Kentucky,* 107 U.S. 110; *Civil Rights Cases,* 109 U.S. 3, 36, 43. As early as *Yick Wo v. Hopkins,* 118 U.S. 356, it became settled doctrine that the Fourteenth Amendment was a broad prohibition against state enforcement of racial differentiations or discrimination—a prohibition totally at war with any separate but equal notion. There can be no doubt, we submit, that, had the state regulation approved in *Plessy v. Ferguson* been before the Court that rendered the initial interpretations of the Fourteenth Amendment, the regulation

would have been held a violation of the Federal Constitution.

**B. The first time the question came before the Court, racial segregation in transportation was specifically disapproved**

In *Railroad Co. v. Brown,* 17 Wall. 445, the first case involving the validity of segregation to reach this Court after the adoption of the Fourteenth Amendment, segregation was struck down as an unlawful discrimination. While the Fourteenth Amendment was not before the Court, the decision in the *Brown* case was in line with the spirit of the new status that the Negro had gained under the Thirteenth, Fourteenth and Fifteenth Amendments.

The problem before the Court concerned the validity of the carrier's rules and regulations that sought to segregate its passengers because of race. The pertinent facts are described by the Court as follows at page 451:

> "In the enforcement of this regulation, the defendant in error, a person of color, having entered a car appropriated to white ladies, was requested to leave it and take a seat in another car used for colored persons. This she refused to do, and this refusal resulted in her ejectment by force and with insult from the car she had first entered."

The Court characterized the railroad's defense that its practice of providing separate accommodations for Negroes was valid, as an ingenious attempt at evasion, at page 452:

> "The plaintiff in error contends that it has literally obeyed the direction, because it has never excluded this class of persons from the cars, but on the contrary, has always provided accommodations for them.
>
> "This is an ingenious attempt to evade a compliance with the obvious meaning of the requirement. It is true the words taken literally might bear the interpretation put upon them by the plaintiff in error, but evidently Congress did not use them in any such limited sense. There was no occasion, in legislating for a railroad corporation, to annex a condition to a grant of power, that the company should allow colored persons to ride in its cars. This right had never been refused, nor could there have been in the mind of anyone an apprehension that such a state of things would ever occur, for self-interest would clearly induce the carrier—South as well as North—to transport, if paid for it, all persons whether white or black, who should desire transportation."

The Court stressed with particularity the fact that the discrimination prohibited was discrimination in the use of the cars, at pages 452–453:

> "It was the discrimination in the use of the cars on account of color, where slavery obtained, which was the subject of discussion at the time, and not the fact that the colored race could not ride in the cars at all. Congress, in the belief that this discrimination was unjust, acted. It told this company, in substance, that it could extend its road in the District as desired, but that this discrimination must cease, and the colored and white race, in the use of the cars, be placed on an equality. This condition it had the right to impose, and in the temper of Congress at the time, it is manifest the grant could not have been made without it."

The regulation that was struck down in the *Brown* case sought to accomplish exactly what was achieved under a state statute upheld subsequently in *Plessy v. Ferguson*—the segregation of Negro and white passengers. It is clear, therefore, that in this earlier decision the Court considered segregation *per se* discrimination and a denial of equality.

**C. The separate but equal doctrine marked an unwarranted departure from the main stream of constitutional development and permits the frustration of the very purposes of the Fourteenth Amendment as defined by this Court**

In *Plessy v. Ferguson,* this Court for the first time gave approval to state imposed racial distinctions as consistent with the purposes and meaning of the Fourteenth Amendment. The Court described the aims and purposes of the Fourteenth Amendment in the same manner as had the earlier cases, at page 543:

> "… its main purpose was to establish the citizenship of the negro; to give definitions of citizenship of the United States and of the states, and to protect from the hostile legislation of the states the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the states."

But these defined aims and purposes were now considered consistent with the imposition of legal distinctions based upon race. The Court said at 544, 551–552:

> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to

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> abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.
>
> * * *
>
> Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."

And reasonableness of the regulation was found in established social usage, custom and tradition, at page 550:

> "So far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."

In *Plessy,* through distortion of the concept of "social" rights as distinguished from "civil" rights, the right to civil equality as one of the purposes of the Fourteenth Amendment was given a restricted meaning wholly at variance with that of the earlier cases and the intent of the framers as defined by this Court. Indeed, civil rights, as defined by that Court, seem merely to encompass those rights attendant upon use of the legal process and protection against complete exclusion pursuant to state mandate. Race for the first time since the adoption of the Fourteenth Amendment was sanctioned as a constitutionally valid basis for state action, and reasonableness for the racial distinctions approved was found in the social customs, usages and traditions of a people only thirty-one years removed from a slave society.

Under this rationale the Court sought to square its approval of racial segregation with the *Slaughter House Cases, Strauder v. West Virginia* and the other precedents. It is clear, however, that the early cases interpreted the Fourteenth Amendment as encompassing that same category of rights which were involved in *Plessy v. West Virginia*—the right to be free of a racial differentiation imposed by the state in the exercise of any civil right. And the Court's attempt to distinguish *Railroad Co. v. Brown,* as a case of exclusion, was the very argument that has been specifically rejected in the *Brown* case as a sophisticated effort to avoid the obvious implications of the Congressional requirement. Thus, the separate but equal doctrine is a rejection of the precedents and constitutes a break in the development of constitutional law under which the Fourteenth Amendment has been interpreted as a fundamental interdiction against state imposed differentiations and discriminations based upon color.

#### D. The separate but equal doctrine was conceived in error

The separate but equal doctrine of *Plessy v. Ferguson,* we submit, has aided and supported efforts to nullify the Fourteenth Amendment's undoubted purpose—equal status for Negroes—as defined again and again by this Court. The fallacious and pernicious implications of the doctrine were evident to Justice Harlan and are set out in his dissenting opinion. It is clear today that the fact that racial segregation accords with custom and usage or is considered needful for the preservation of public peace and good order does not suffice to give constitutional validity to the state's action. What the doctrine has in fact accomplished is to deprive Negroes of the protection of the approved test of reasonable classifications which is available to everyone else who challenges legislative categories or distinctions of whatever kind.

**1. The dissenting opinion of Justice Harlan in *Plessy v. Ferguson*.** Justice Harlan recognized and set down for history the purpose of segregation and the implications of the separate but equal doctrine and evidenced prophetic insight concerning the inevitable consequences of the Court's approval of racial segregation. He said at page 557: "The thing to accomplish was, under the guise of giving equal accommodations for whites and blacks to compel the latter to keep to themselves while traveling in railroad passenger coaches."

He realized at page 560, moreover, that the approved regulations supported the inferior caste thesis of *Scott v. Sandford,* 19 How. 393, supposedly eradicated by the Civil War Amendments: "But it seems that we have yet, in some of the states, a dominant race, a superior

class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, on the basis of race." And at page 562: "We boast of the freedom enjoyed by our people above all other people. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law."

While the majority opinion sought to rationalize its holding on the basis of the state's judgment that separation of races was conducive to public peace and order, Justice Harlan knew all too well that the seeds for continuing racial animosities had been planted. He said at pages 560–561:

> "The sure guaranty of peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of equality before the law of all citizens of the United States without regard to race. State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible and to keep alive a conflict of races, the continuance of which must do harm to all concerned."

"Our Constitution," said Justice Harlan at 559, "is color-blind, and neither knows nor tolerates classes among citizens." It is the dissenting opinion of Justice Harlan, rather than the majority opinion in *Plessy v. Ferguson,* that is in keeping with the scope and meaning of the Fourteenth Amendment as consistently defined by this Court both before and after *Plessy v. Ferguson.*

**2. Custom, usage and tradition rooted in the slave tradition cannot be the constitutional yardstick for measuring state action under the Fourteenth Amendment.** The analysis by Justice Harlan of the bases for the majority opinion in *Plessy v. Ferguson* was adopted by this Court in *Chiles v. Chesapeake & Ohio Railroad Company,* 218 U.S. 71, 77, 78. There this Court cited *Plessy v. Ferguson* as authority for sustaining the validity of legislative distinctions based upon race and color alone.

The importance of this case is its clear recognition and understanding that in *Plessy v. Ferguson* this Court approved the enforcement of racial distinctions as reasonable because they are in accordance with established social usage, custom and tradition. The Court said at pages 77, 78:

> "It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, 'the established usages, customs and traditions of the people,' and the 'promotion of their comfort and the preservation of the public peace and good order,' this must also be the test of reasonableness of the regulations of a carrier, made for like purposes and to secure like results."

But the very purpose of the Thirteenth, Fourteenth and Fifteenth Amendments was to effectuate a complete break with governmental action based on the established usages, customs and traditions of the slave era, to revolutionize the legal relationship between Negroes and whites, to destroy the inferior status of the Negro and to place him upon a plane of complete equality with the white man. As we will demonstrate, post Civil War reestablishment of ante-bellum custom and usage, climaxed by the decision in *Plessy v. Ferguson,* reflected a constant effort to return the Negro to his pre-Thirteenth, Fourteenth Amendment inferior status. When the Court employed the old usages, customs and traditions as the basis for determining the reasonableness of segregation statutes designed to resubjugate the Negro to an inferior status, it nullified the acknowledged intention of the framers of the Amendment, and made a travesty of the equal protection clause of the Fourteenth Amendment.

Here, again, the *Plessy v. Ferguson* decision is out of line with the modern holdings of this Court, for in a variety of cases involving the rights of Negroes it has constantly refused to regard custom and usage, however widespread, as determinative of reasonableness. This was true in *Smith v. Allwright,* of a deeply entrenched custom and usage of excluding Negroes from voting in the primaries. It was true in *Shelley v. Kraemer,* of a long standing custom excluding Negroes from the use and ownership of real property on the basis of race. In *Henderson v. United States,* a discriminatory practice of many years was held to violate the Interstate Commerce Act. In the *Sweatt* and *McLaurin* decisions, the Court broke a southern tradition of state-enforced racial distinctions in graduate and professional education—a custom almost as old as graduate and professional education, itself.

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In each instance the custom and usage had persisted for generations and its durability was cited as grounds for its validity. If this were the only test, ours indeed would become a stagnant society. Even if there be some situations in which custom, usage and tradition may be considered in testing the reasonableness of governmental action, customs, traditions and usages rooted in slavery cannot be worthy of the constitutional sanction of this Court.

**3. Preservation of public peace cannot justify deprivation of constitutional rights.** The fallacy underlying *Plessy v. Ferguson* of justifying racially-discriminatory statutes as essential to the public peace and good order has been completely exposed by Frederick W. Lehmann, a former Solicitor General of the United States, and Wells H. Blodgett in their Brief as *amici curiae* in *Buchanan v. Warley,* 245 U.S. 60. Their statements warrant repetition here:

> "The implication of the title of the ordinance is, that unless the white and colored people live in separate blocks, ill feeling will be engendered between them and conflicts will result and so it is assumed that a segregation of the races is necessary for the preservation of the public peace and the promotion of the general welfare. There is evidence in the record that prior to the enactment of the ordinance there were instances of colored people moving into white blocks and efforts by the white people to drive them out by violence. So to preserve the peace, the ordinance was enacted not to repress the lawless violence, but to give the sanction of the law to the motives which inspired it and to make the purpose of it lawful.
>
> "The population of Louisville numbers two hundred and fifty thousand, of whom about one-fifth are colored. The ordinance, almost upon its face, and clearly by the evidence submitted and the arguments offered in support of it is a discriminating enactment by the dominant majority against a minority who are held to be an inferior people. It cannot be justified by the recitals of the title, even if they are true. Many things may rouse a man's prejudice or stir him to anger, but he is not always to be humored in his wrath. The question may arise, 'Dost thou well to be angry?'" (*Brief Amici Curiae,* pp. 2 and 3).

Accepting this view, the Court in *Buchanan v. Warley* rejected the argument that a state could deny constitutional rights with impunity in its efforts to maintain the public peace:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution" (245 U.S. 60, 81).

Accord, *Morgan v. Virginia, supra; Monk v. City of Birmingham,* 185 F. 2d 859 (CA 5th 1950), *cert. denied,* 341 U.S. 940.

Thus, the bases upon which the separate but equal doctrine was approved in the *Plessy v. Ferguson* case have all been uprooted by subsequent decisions of this Court. All that remains is the naked doctrine itself, unsupported by reason, contrary to the intent of the framers, and out of tune with present notions of constitutional rights. Repudiation of the doctrine itself, we submit, is long overdue.

**4. The separate but equal doctrine deprives Negroes of that protection which the Fourteenth Amendment accords under the general classification test.** One of the ironies of the separate but equal doctrine of *Plessy v. Ferguson* is that under it, the Fourteenth Amendment, the primary purpose of which was the protection of Negroes, is construed as encompassing a narrower area of protection for Negroes than for other persons under the general classification test.

Early in its history, the Fourteenth Amendment was construed as reaching not only state action based upon race and color, but also as prohibiting all unreasonable classifications and distinctions even though not racial in character. *Barbier v. Connolly,* 113 U.S. 27, seems to be the earliest case to adopt this concept of the Amendment. There the Court said on page 31:

> "The Fourteenth Amendment … undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights."

Accord: *Minneapolis & St. Louis Ry. Co. v. Beckwith,* 129 U.S. 26, 28, 29; *Bell's Gap R. R. Co. v. Pennsylvania,* 134 U.S. 232, 237; *McPherson v. Blacker,* 146 U.S. 1, 39; *Yesler v. Board of Harbor Line Commissioners,* 146 U.S. 646, 655; *Giozza v. Tiernan,* 148 U.S. 657, 662; *Marchant v. Pennsylvania R. Co.,* 153 U.S. 380, 390; *Moore v. Missouri,* 159 U.S. 673, 678.

In effectuating the protection afforded by this secondary purpose, the Court has required the classification or distinction used be based upon some real or substantial difference pertinent to a valid legislative objective. *E.g., Quaker City Cab Co. v. Pennsylvania,* 277 U.S. 389; *Truax v. Raich,* 239 U.S. 33; *Smith v. Cahoon,* 283 U.S. 553; *Mayflower Farms v. Ten Eyck,* 297 U.S. 266; *Skinner v. Oklahoma,* 316 U.S. 535. See also *Cities Service Gas Co. v. Peerless Oil & Gas Co.,* 340 U.S. 179, 186.

Justice Holmes in *Nixon v. Herndon,* 273 U.S. 536, 541, recognized and restated a long established and well settled judicial proposition when he described the Fourteenth Amendment's prohibition against unreasonable legislative classification as less rigidly proscriptive of state action than the Amendment's prohibition of color differentiation. There he concluded:

> "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."

But the separate but equal doctrine substitutes race for reasonableness as the constitutional test of classification. We submit, it would be a distortion of the purposes and intendment of the Fourteenth Amendment to deny to those persons for whose benefit that provision was primarily intended the same measure of protection afforded by a rule of construction evolved to reach the Amendment's subsidiary and secondary objectives. We urge this Court to examine the segregation statutes in these cases to determine whether the statutes seek to serve a permissible legislative objective; and, if any permissible objective is found, whether color differentiation has pertinence to it. So examined, the constitutional provisions and statutes involved here disclose unmistakably their constitutional infirmity.

#### E. The separate but equal doctrine has not received unqualified approval in this Court

Even while the separate but equal doctrine was evolving, this Court imposed limitations upon its applications. In *Buchanan v. Warley,* the Court, after reviewing the limited acceptance which the doctrine had received, concluded that its extension to approve state enforced segregation in housing was not permissible.

Ten years later in *Gong Lum v. Rice,* 275 U.S. 78, 85, 86, without any intervening development in the doctrine in this Court, sweeping language was used which gave the erroneous impression that this Court already had extended the application of the doctrine to the field of education. And in *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337, the doctrine is mentioned in passing as if its application to public education were well established. But, what Justice Day was careful to point out in *Buchanan v. Warley,* was true then and is true now—the separate but equal doctrine has never been extended by this Court beyond the field of transportation in any case where such extension was contested.

While the doctrine itself has not been specifically repudiated as a valid constitutional yardstick in the field of public education, in cases in which this Court has had to determine whether the state had performed its constitutional obligation to provide equal education opportunities—the question presented here—the separate but equal doctrine has never been used by this Court to sustain the validity of the state's separate school laws. *Missouri ex rel. Gaines v. Canada; Sipuel v. Board of Regents,* 332 U.S. 631; *Sweatt v. Painter; McLaurin v. Oklahoma State Regents.*

Earlier educational cases, not concerned with equality, did not apply the doctrine. In *Cumming v. County Board of Education,* 175 U.S. 528, the question was explicitly beyond the scope of the decision rendered. In *Berea College v. Kentucky,* 211 U.S. 45, the question was reserved. In *Gong Lum v. Rice,* the separate but equal doctrine was not put in issue. Instead of challenging the validity of the Mississippi school segregation laws, the Chinese child merely objected to being classified as a Negro for public school purposes.

Even in the field of transportation, subsequent decisions have sapped the doctrine of vitality. *Henderson v. United States,* in effect overruled *Chiles v. Chesapeake & Ohio Railway Co.,* 218 U.S. 71. See *Chance v. Lambeth,* 186 F. 2d 879 (CA 4th 1951), *cert. denied,* 341 U.S. 91. *Morgan v. Virginia,* places persons traveling in interstate commerce beyond the thrust of state segregation statutes. Thus, the reach of the separate but equal doctrine approved in the *Plessy* case has now been so severely restricted and narrowed in scope that, it may be appropriately said of *Plessy v. Ferguson* as it was said of *Crowell v. Benson,* 285 U.S. 22, "one had supposed that the doctrine had earned a deserved repose." *Estep v. United States,* 327 U.S. 114, 142 (concurring opinion).

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**F. The necessary consequence of the Sweatt and McLaurin decisions is repudiation of the separate but equal doctrine**

While *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents* were not in terms rejections of the separate but equal doctrine, their application in effect destroyed the practice of segregation with respect to state graduate and professional schools. *Wilson v. Board of Supervisors,* 92 F. Supp. 986 (E. D. La. 1950), *aff'd,* 340 U.S. 909; *Gray v. Board of Trustees of University of Tennessee,* 342 U.S. 517; *McKissick v. Carmichael,* 187 F. 2d 949 (CA 4th 1951), *cert. denied,* 341 U.S. 951; *Swanson v. University of Virginia,* Civil Action #30 (W. D. Va. 1950) unreported; *Payne v. Board of Supervisors,* Civil Action #894 (E. D. La. 1952) unreported; *Foister v. Board of Supervisors,* Civil Action #937 (E. D. La. 1952) unreported; *Mitchell v. Board of Regents of University of Maryland,* Docket #16, Folio 126 (Baltimore City Court 1950) unreported.[1]

In the *Sweatt* case, the Court stated that, with members of the state's dominant racial groups excluded from the segregated law school which the state sought to require Sweatt to attend, "we cannot conclude that the education offered petitioner is substantially equal to that he would receive if admitted to the University of Texas." If this consideration is one of the controlling factors in determining substantial equality at the law school level, it is impossible for any segregated law school to be an equal law school. And pursuant to that decision one of the oldest and best state-supported segregated law schools in the country was found unequal and Negro applicants were ordered admitted to the University of North Carolina. *McKissick v. Carmichael.* Thus, substantial equality in professional education is "substantially equal" only if there is no racial segregation.

In the *McLaurin* case, the racial distinctions imposed in an effort to comply with the state's segregation laws were held to impair and inhibit ability to study, to exchange views with other students and, in general, to learn one's profession. The state, therefore, was required to remove all restrictions and to treat McLaurin the same way as other students are treated. Consequently these decisions are a repudiation of the separate but equal doctrine.

## III. VIEWED IN THE LIGHT OF HISTORY THE SEPARATE BUT EQUAL DOCTRINE HAS BEEN AN INSTRUMENTALITY OF DEFIANT NULLIFICATION OF THE FOURTEENTH AMENDMENT

The history of segregation laws reveals that their main purpose was to organize the community upon the basis of a superior white and an inferior Negro caste. These laws were conceived in a belief in the inherent inferiority of Negroes, a concept taken from slavery. Inevitably, segregation in its operation and effect has meant inequality consistent only with the belief that the people segregated are inferior and not worthy, or capable, of enjoying the facilities set apart for the dominant group.

Segregation originated as a part of an effort to build a social order in which the Negro would be placed in a status as close as possible to that he had held before the Civil War. The separate but equal doctrine furnished a base from which those who sought to nullify the Thirteenth, Fourteenth and Fifteenth Amendments were permitted to operate in relative security. While this must have been apparent at the end of the last century, the doctrine has become beclouded with so much fiction that it becomes important to consider the matter in historical context to restore a proper view of its meaning and import.

**A. The status of the Negro, slave and free, prior to the Civil War**

One of the basic assumptions of the slave system was the Negro's inherent inferiority.[2] As the invention of the cotton gin rendered slavery essential to the maintenance of the plantation economy in the South, a body of pseudo-scientific thought developed in passionate defense of slavery, premised on the Negro's

[1] Negroes are now attending state graduate and professional schools in West Virginia, Maryland, Arkansas, Delaware, Oklahoma, Kentucky, Texas, Missouri, North Carolina, Virginia, and Louisiana. See (Editorial Comment), THE COURTS AND RACIAL INTEGRATION IN EDUCATION, 21 J. NEG. EDUC. 3 (1952).

Negroes are also now attending private universities and colleges in Missouri, Georgia, Kentucky, Louisiana, Texas, Maryland, West Virginia, North Carolina, District of Columbia, and Virginia. See THE COURTS AND RACIAL INTEGRATION IN EDUCATION, 21 J. NEG. EDUC. 3 (1952): SOME PROGRESS IN ELIMINATION OF DISCRIMINATION IN HIGHER EDUCATION IN THE UNITED STATES, 19 J. NEG. EDUC. 4–5 (1950); LEE AND KRAMER, RACIAL INCLUSION IN CHURCH-RELATED COLLEGES IN THE SOUTH, 22 J. NEG. EDUC. 22 (1953); A NEW TREND IN PRIVATE COLLEGES, 6 NEW SOUTH 1 (1951).

[2] For an illuminating discussion of these assumptions, see JOHNSON, THE IDEOLOGY OF WHITE SUPREMACY, 1876–1910, IN ESSAYS IN SOUTHERN HISTORY PRESENTED TO JOSEPH GREGOIRE DEROULHAC HAMILTON, GREEN ED., 124–156 (1949).

unfitness for freedom and equality.[3] Thus, the Negro's inferiority with respect to brain capacity, lung activity and countless other physiological attributes was purportedly established by some of the South's most respected scientists.[4] In all relationships between the two races the Negro's place was that of an inferior, for it was claimed that any other relationship status would automatically degrade the white man.[5]

This concept of the Negro as an inferior fit only for slavery was complicated by the presence of several hundred thousand Negroes, who although not slaves, could not be described as free men.[6] In order that they would not constitute a threat to the slave regime, free Negroes were denied the full rights and privileges of citizens. They enjoyed no equality in the courts, their right to assemble was denied, their movements were proscribed, and education was withheld.[7] Their plight, in consequence of these proscriptions, invited the unfavorable comparison of them with slaves and confirmed the views of many that Negroes could not profit by freedom. They were regarded by the white society as the "very drones and pests of society," pariahs of the land, and an incubus on the body politic.[8] Even this Court, in *Scott v. Sandford,* recognized this substantial body of opinion to the effect that free Negroes had no rights that a white man was bound to respect.

The few privileges that free Negroes enjoyed were being constantly whittled away in the early nineteenth century. By 1836, free Negroes were denied the ballot in every southern state and in many states outside the South.[9] In some states, they were denied residence on penalty of enslavement; and in some, they were banned from the mechanical trades because of the economic pressure upon the white artisans.[10] Before the outbreak of the Civil War, the movement to reenslave free Negroes was under way in several states in the South.[11]

This ante-bellum view of the inferiority of the Negro persisted after the Civil War among those who already regarded the newly freed slaves as simply augmenting the group of free Negroes who had been regarded as "the most ignorant … vicious, impoverished, and degraded population of this country."[12]

### B. The post war struggle

The slave system had supported and sustained a plantation economy under which 1,000 families received approximately $50,000,000 a year with the remaining 600,000 families receiving about $60,000,000 per annum. The perfection of that economy meant the ruthless destruction of the small independent white farmer who was either bought out or driven back to the poorer lands—the slaveholders controlled the destiny of both the slave and the poor whites.[13] Slaves were not only farmers and unskilled laborers but were trained by their masters as skilled artisans. Thus, slave labor was in formidable competition with white labor at every level, and the latter was the

[3] JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH 243 (1935); JOHNSON, THE NEGRO IN AMERICAN CIVILIZATION 5–15 (1930).

[4] See VAN EVRIE, NEGROES AND NEGRO SLAVERY 120 ff, 122 ff, 214 ff (1861); CARTWRIGHT, DISEASES AND PECULIARITIES OF THE NEGRO RACE, 2 DEBOW, THE INDUSTRIAL RESOURCES, ETC., OF THE SOUTHERN AND WESTERN STATES 315–329 (1852); NOTT, TWO LECTURES ON THE NATURAL HISTORY OF THE CAUCASIAN AND NEGRO RACES (1866); VAN EVRIE, NEGROES AND NEGRO "SLAVERY"; THE FIRST AN INFERIOR RACE—THE LATTER ITS NORMAL CONDITION (1853); VAN EVRIE, SUBGENATION: THE THEORY OF THE NORMAL RELATION OF THE RACES (1864); CARTWRIGHT, DISEASES AND PECULIARITIES OF THE NEGRO RACES, 9 DEBOW'S REVIEW 64–69 (1851); CARTWRIGHT, ESSAYS, BEING INDUCTIONS DRAWN FROM THE BACONIAN PHILOSOPHY PROVING THE TRUTH OF THE BIBLE AND THE JUSTICE AND BENEVOLENCE OF THE DECREE DOOMING CANAAN TO BE A SERVANT OF SERVANTS (1843).

[5] JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH 242 ff (1935); THE PRO-SLAVERY ARGUMENT, especially HARPER'S MEMOIR ON SLAVERY, pp. 26–98; and SIMMS, THE MORALS OF SLAVERY, pp. 175–275 (1835); JOHNSON, THE IDEOLOGY OF WHITE SUPREMACY, *op. cit. supra,* n. 2 at 135.

[6] See FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF AMERICAN NEGROES 213–238 (1947).

[7] FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA, 1790–1860 59–120 (1943).

[8] DEW, REVIEW OF THE DEBATES IN THE VIRGINIA LEGISLATURE OF 1831–1832, THE PRO-SLAVERY ARGUMENT, 422 ff (1853); JENKINS, *op. cit. supra,* n. 5, 246.

[9] WEEKS, HISTORY OF NEGRO SUFFRAGE IN THE SOUTH, 9 POL. SCI. Q. 671–703 (1894); PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 87 ff (1918); SHUGG, NEGRO VOTING IN THE ANTE-BELLUM SOUTH, 21 J. NEG. HIST. 357–364 (1936).

[10] VA. HOUSE J. 84 (1831–1832); VA. LAWS 1831. p. 107; CHANNING, HISTORY OF THE UNITED STATES 136–137 (1921); GREENE and WOODSON, THE NEGRO WAGE EARNER 15 ff (1930).

[11] FRANKLIN, THE ENSLAVEMENT OF FREE-NEGROES IN NORTH CAROLINA, 29 J. NEG. HIST. 401–428 (1944).

[12] See JENKINS, *op. cit. supra,* n. 5, 246.

[13] WESTON, THE PROGRESS OF SLAVERY (1859); HELPER, THE IMPENDING CRISIS OF THE SOUTH (1863); JOHNSON, THE NEGRO IN AMERICAN CIVILIZATION, *op. cit. supra,* n. 2; PHILLIPS, AMERICAN NEGRO SLAVERY, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY-PLANTATION AND FRONTIER DOCUMENTS (1910–11).

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more expendable for it did not represent property and investment. Only a few white supervisory persons were needed to insure the successful operation of the plantation system.

After the Civil War, the independent white farmer entered into cotton cultivation and took over the lands of the now impracticable large plantations. Within a few years the independent farmer was engaged in 40% of the cotton cultivation, and by 1910 this percentage had risen to 67%.[14] To the poor white Southerner the new Negro, as a skilled farmer and artisan in a free competitive economy, loomed as an even greater economic menace than he had been under the slave system. They became firm advocates of the Negro's subjugation to insure their own economic well being.[15]

The plantation aristocracy sought to regain their economic and political pre-eminence by rebuilding the prewar social structure on the philosophy of the Negro's inferiority. This group found that they could build a new economic structure based upon a depressed labor market of poor whites and Negroes. Thus, to the aristocracy, too, the Negro's subjugation was an economic advantage.

The mutual concern of these two groups of white Southerners for the subjugation of the Negro gave them a common basis for unity in irreconcilable resistance to the revolutionary change in the Negro's status which the Civil War Amendments were designed to effect. Their attitude towards the Fourteenth Amendment is best described by a Mississippi editor who said that the southern states were not prepared "to become parties to their own degradation."[16] There were white southerners, however, as there always had been, who sought to build a society which would respect and dignify the rights of the Freedmen. But this group was in the minority and southern sentiment in bitter opposition to Negro equality prevailed. Accordingly, as a temporary expedient, even as an army of occupation has been necessary recently in Germany and Japan to prevent lawlessness by irreconcilables and the recrudescense of totalitarianism, so Union forces were needed during Reconstruction to maintain order and to make possible the development of a more democratic way of life in the states recently in rebellion.

The Thirteenth, Fourteenth and Fifteenth Amendments and the Reconstruction effort, implemented by those in the South who were coming to accept the new concept of the Negro as a free man on full terms of equality, could have led to a society free of racism. The possibility of the extensive establishment and expansion of mixed schools was real at this stage. It was discussed in every southern state, and in most states serious consideration was given to the proposal to establish them.[17]

### C. The Compromise of 1877 and the abandonment of Reconstruction

The return to power of the southern irreconcilables was finally made possible by rapprochement between northern and southern economic interests culminating in the compromise of 1877. In the North, control of the Republican Party passed to those who believed that the protection and expansion of their eco-

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[14] VANCE, HUMAN FACTORS IN COTTON CULTIVATION (1926); SIMKINS, THE TILLMAN MOVEMENT IN SOUTH CAROLINA (1926).

[15] For discussion of this whole development see JOHNSON, THE NEGRO IN AMERICAN CIVILIZATION (1930).

[16] COULTER, THE SOUTH DURING RECONSTRUCTION 434 (1947).

[17] KNIGHT, PUBLIC EDUCATION IN THE SOUTH 320 (1922). See also Part II *infra,* at pages 142–157.

There were interracial colleges, academies, and tributary grammar schools in the South established and maintained largely by philanthropic societies and individuals from the North. Although they were predominantly Negro institutions, in the Reconstruction period and later, institutions such as Fisk University in Nashville, Tennessee, and Talladega College in Alabama usually had some white students. In the last quarter of the nineteenth century most of the teachers in these institutions were white. For accounts of co-racial education at Joppa Institute and Nat School in Alabama, Piedmont College in Georgia, Saluda Institute in North Carolina and in other southern schools, see BROWNLEE, NEW DAY ASCENDING 98–110 (1946).

The effect of these institutions in keeping alive the possibility of Negroes and whites living and learning together on the basis of complete equality was pointed out by one of the South's most distinguished men of letters, George W. Cable. "In these institutions," he said:

> "… there is a complete ignoring of those race distinctions in the enjoyment of common public rights so religiously enforced on every side beyond their borders; and yet none of those unnamable disasters have come to or from them which the advocates of these onerous public distinctions and separations predict and dread. On scores of Southern hilltops these schools stand out almost totally without companions or competitors in their peculiar field, so many refutations, visible and complete, of the idea that any interest requires the colored American citizen to be limited in any of the civil rights that would be his without question if the same man were white." Cable, The Negro Question 19 (1890).

nomic power could best be served by political conciliation of the southern irreconcilables, rather than by unswerving insistence upon human equality and the rights guaranteed by the post war Amendments. In the 1870's those forces that held fast to the notion of the Negro's preordained inferiority returned to power in state after state, and it is significant that one of the first measures adopted was to require segregated schools on a permanent basis in disregard of the Fourteenth Amendment.[18]

In 1877, out of the exigencies of a close and contested election, came a bargain between the Republican Party and the southern leaders of the Democratic Party which assured President Hayes' election, led to the withdrawal of federal troops from the non-redeemed states and left the South free to solve the Negro problem without apparent fear of federal intervention. This agreement preserved the pragmatic and material ends of Reconstruction at the expense of the enforcement of not only the Fourteenth Amend-ment but the Fifteenth Amendment as well.[19] For it brought in its wake peonage and disfranchisement as well as segregation and other denials of equal protection. Although there is grave danger in oversimplification of the complexities of history, on reflection it seems clear that more profoundly than constitutional amendments and wordy statutes, the Compro-mise of 1877 shaped the future of four million freedmen and their progeny for generations to come. For the road to freedom and equality, which had seemed sure and open in 1868, was now to be securely blocked and barred by a maze of restrictions and limitations proclaimed as essential to a way of life.

### D. Consequences of the 1877 Compromise

Once the South was left to its own devices, the militant irreconcilables quickly seized or consolidated power. Laws and practices de-signed to achieve rigid segregation and the disfranchisement of the Negro came on in increasing numbers and harshness.

The policy of the southern states was to destroy the political power of the Negro so that he could never seriously challenge the order that was being established. By the poll tax, the Grandfather Clause, the white primary, gerrymandering, the complicated election procedures, and by unabated intimidation and threats of violence, the Negro was stripped of effective political participation.[20]

The final blow to the political respectability of the Negro came with disfranchisement in the final decade of the Nineteenth Century and the early years of the present century when the discriminatory provisions were written into the state constitutions.[21] That problem the Court dealt with during the next forty years from *Guinn v. United States,* 238 U.S. 347 to *Terry v. Adams,* 345 U.S. 461.

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[18] Georgia, where the reconstruction government was especially short-lived, passed a law in 1870 making it mandatory for district school officials to "make all necessary arrangements for the instruction of the white and colored youth … in separate schools. They shall provide the same facilities for each … but the children of the white and colored races shall not be taught together in any sub-district of the state." Ga. Laws 1870, p. 56. As soon as they were redeemed, the other southern states enacted similar legislation providing for segregated schools and gradually the states incorporated the provision into their constitutions. See, for example, Ark. Laws 1873, p. 423; THE JOURNAL OF THE TEXAS CONSTITUTIONAL CONVENTION 1875, pp. 608–616; Miss. Laws 1878, p. 103; STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 170–176 (1908). When South Carolina and Louisiana conservatives secured control of their governments in 1877, they immediately repealed the laws providing for mixed schools and established separate institutions for white and colored youth.

[19] The explanation for this reversal of national policy in 1877 and the abandonment of an experiment that had enlisted national support and deeply aroused the emotions and hopes has been sought in many quarters. The most commonly accepted and often repeated story is that authorized spokesmen of Hayes met representatives of the Southern Democrats at the Wormley House in Washington in late February, 1877, and promised the withdrawal of troops and abandonment of the Negro in return for the support of southern Congressmen for Hayes against the Democratic candidate Samuel J. Tilden in the contested Presidential election. Recent investigation has demonstrated that the so-called "Wormley House Bargain", though offered by southern participants as the explanation, is not the full relevation of the complex and elaborate maneuvering which finally led to the agreement. See WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (1951) for an elaborate and detailed explanation of the compromise agreement.

[20] In 1890, Judge J. Chrisman of Mississippi could say that there had not been a full vote and a fair count in his state since 1875, that they had preserved the ascendancy of the whites by revolutionary methods. In plain words, he continued, "We have been stuffing the ballot boxes, committing perjury and here and there in the State carrying the elections by fraud and violence until the whole machinery for election was about to rot down." Quoted in WOODWARD, ORIGINS OF THE NEW SOUTH 58 (1951).

[21] KEY, SOUTHERN POLITICS IN STATE AND NATION 539–550 (1949); WOODWARD, ORIGINS OF THE NEW SOUTH 205, 263 (1951).

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A movement to repeal the Fourteenth and Fifteenth Amendments shows the extremity to which the irreconcilables were willing to go to make certain that the Negro remained in an inferior position. At the Mississippi Constitutional Convention of 1890, a special committee studied the matter and concluded that "the white people only are capable of conducting and maintaining the government" and that the Negro race, "even if its people were educated, being wholly unequal to such responsibility," should be excluded from the franchise. It, therefore, resolved that the "true and only efficient remedy for the great and important difficulties" that would ensue from Negro participation lay in the "repeal of the Fifteenth Amendment … whereby such restrictions and limitations may be put upon Negro suffrage as may be necessary and proper for the maintenance of good and stable government … "[22]

A delegate to the Virginia Constitutional Convention of 1901–1902 submitted a resolution calling for a repeal of the Fifteenth Amend-ment because it is wrong, "in that it proceeds on the theory that the two races are equally competent of free government."[23] Senator Edward Carmack of Tennessee gave notice in 1903 that he would bring in a bill to repeal the Amendments.[24] The movement, though unsuccessful, clearly illustrates the temper of the white South.

Having consigned the Negro to a permanently inferior caste status, racist spokesmen, with unabashed boldness, set forth views regarding the Negro's unassimilability and uneducability even more pernicious than those held by the old South. Ben Tillman, the leader of South Carolina, declared that a Negro should not have the same treatment as a white man, "for the simple reason that God Almighty made him colored and did not make him white." He lamented the end of slavery which reversed the process of improving the Negro and "inoculated him with the virus of equality."[25] These views were expressed many times in the disfranchising conventions toward the end of the century.[26] Nor were the politicians alone in uttering such views about the Negro. Drawing on the theory of evolution as expressed by Darwin and the theory of progress developed by Spencer, persons of scholarly pretension speeded the work of justifying an inferior status for the Negro.[27] Alfred H. Stone, having the reputation of a widely respected scholar in Mississippi, declared that the "Negro was an inferior type of man with predominantly African customs and character traits whom no amount of education or improvement of environmental conditions could ever elevate to as high a scale in the human species as the white man." As late as 1910, E. H. Randle in his *Characteristics of the Southern Negro* declared that "the first important thing to remember in judging the Negro was that his mental capacity was inferior to that of the white man."[28]

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[22] JOURNAL OF THE MISSISSIPPI CONSTITUTIONAL CONVENTION, 1890, 303–304. Tillman, Vardaman, and other Southern leaders frequently called for the repeal of the Amendments. Tillman believed "that such a formal declaration of surrender in the struggle to give the Negro political and civil equality would confirm the black man in his inferior position and pave the way for greater harmony between the races." SIMKINS, PITCHFORK BEN TILLMAN 395 (1944). Vardaman called for repeal as a recognition that the Negro "was physically, mentally, morally, racially, and eternally inferior to the white man." See KIRWAN, REVOLT OF THE REDNECKS (1951).

[23] JOURNAL OF THE VIRGINIA CONSTITUTIONAL CONVENTION, 1901–1902, pp. 47–48.

[24] JOHNSON, THE IDEOLOGY OF WHITE SUPREMACY, *op. cit. supra,* n. 2, 136 ff.

[25] SIMKINS, PITCHFORK BEN TILLMAN 395, 399 (1944). Tillman's Mississippi counterpart, J. K. Vardaman, was equally vigorous in denouncing the Negro. He described the Negro as an "industrial stumbling block, a political ulcer, a social scab, 'a lazy, lying, lustful animal which no conceivable amount of training can transform into a tolerable citizen.' " Quoted in KIRWAN, *op. cit. supra,* n. 22, at 146.

[26] See, for example, Alabama Constitutional Convention, 1901, Official Proceedings, Vol. I, p. 12, Vol. II, pp. 2710–2711, 2713, 2719, 2782, 2785–2786, 2793; Journal of the South Carolina Convention, 1895, pp. 443–472; Journal of the Mississippi Constitutional Convention, 1890, pp. 10, 303, 701–702; Journal of the Louisiana Constitutional Convention, 1898, pp. 9–10.

[27] See ROWLAND, A MISSISSIPPI VIEW OF RELATIONS IN THE SOUTH, A Paper (1903); HERBERT, et al., WHY THE SOLID SOUTH? OR RECONSTRUCTION AND ITS RESULTS (1890); BRUCE, THE PLANTATION NEGRO AS A FREEMAN: OBSERVATIONS ON HIS CHARACTER, CONDITION AND PROSPECTS IN VIRGINIA (1889); STONE, STUDIES IN THE AMERICAN RACE PROBLEM (1908); CARROLL, THE NEGRO A BEAST (1908); CARROLL, THE TEMPTER OF EVE, OR THE CRIMINALITY OF MAN'S SOCIAL, POLITICAL, AND RELIGIOUS EQUALITY WITH THE NEGRO, AND THE AMALGAMATION TO WHICH THESE CRIMES INEVITABLY LEAD 286 ff (1902); PAGE, THE NEGRO: THE SOUTHERNER'S PROBLEM 126 ff (1904); RANDLE, CHARACTERISTICS OF THE SOUTHERN NEGRO 51 ff (1910).

[28] Quoted in JOHNSON, IDEOLOGY OF WHITE SUPREMACY, op. cit., *supra,* n. 2, p. 151. That the South was not alone in these views is clearly shown by Logan's study of the Northern press between 1877 and 1901. See LOGAN, THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR 1877–1901, cc. 9–10 (unpub. ms., to be pub. early in 1954 by the Dial Press).

Such was the real philosophy behind the late 19th Century segregation laws—an essential part of the whole racist complex. Controlling economic and political interests in the South were convinced that the Negro's subjugation was essential to their survival, and the Court in *Plessy v. Ferguson* had ruled that such subjugation through public authority was sanctioned by the Constitution. This is the overriding vice of *Plessy v. Ferguson.* For without the sanction of *Plessy v. Ferguson,* archaic and provincial notions of racial superiority could not have injured and disfigured an entire region for so long a time. The full force and effect of the protection afforded by the Fourteenth Amendment was effectively blunted by the vigorous efforts of the proponents of the concept that the Negro was inferior. This nullification was effectuated in all aspects of Negro life in the South, particularly in the field of education, by the exercise of state power.

As the invention of the cotton gin stilled the voices of Southern Abolitionists, *Plessy v. Ferguson* chilled the development in the South of opinion conducive to the acceptance of Negroes on the basis of equality because those of the white South desiring to afford Negroes the equalitarian status which the Civil War Amendments had hoped to achieve were barred by state law from acting in accordance with their beliefs. In this connection, it is significant that the Populist movement flourished for a short period during the 1890's and threatened to take over political control of the South through a coalition of the poor Negro and poor white farmers.[29] This movement was completely smashed and since *Plessy v. Ferguson* no similar phenomenon has taken hold.

Without the "constitutional" sanction which *Plessy v. Ferguson* affords, racial segregation could not have become entrenched in the South, and individuals and local communities would have been free to maintain public school systems in conformity with the underlying purposes of the Fourteenth Amendment by providing education without racial distinctions. The doctrine of *Plessy v. Ferguson* was essential to the successful maintenance of a racial caste system in the United States. Efforts toward the elimination of race discrimination are jeopardized as long as the separate but equal doctrine endures. But for this doctrine we could more confidently assert that ours is a democratic society based upon a belief in individual equality.

**E. Nullification of the rights guaranteed by the Fourteenth Amendment and the reestablishment of the Negro's pre–Civil War inferior status fully realized**

Before the end of the century, even without repeal of the Fourteenth and Fifteenth Amendments, those forces committed to a perpetuation of the slave concept of the Negro had realized their goal. They had defied the federal government, threatened the white defenders of equal rights, had used intimidation and violence against the Negro and had effectively smashed a political movement designed to unite the Negro and the poor whites. Provisions requiring segregated schools were written into state constitutions and statutes. Negroes had been driven from participation in political affairs, and a veritable maze of Jim Crow laws had been erected to "keep the Negro in his place" (of inferiority), all with impunity. There was no longer any need to pretend either that Negroes were getting an education equal to the whites or were entitled to it.

In the Constitutional Convention of Virginia, 1901–1902, Senator Carter Glass, in explaining a resolution requiring that state funds be used to maintain primary schools for four months before being used for establishment of higher grades, explained that "white people of the black sections of Virginia should be permitted to tax themselves, and after a certain point had been passed which would safeguard the poorer classes of those communities, divert that fund to the exclusive use of white children. . . ."[30]

Senator Vardaman thought it was folly to make such pretenses. In Mississippi there were too many people to educate and not enough money to go around, he felt. The state, he insisted, should not spend as much on the education of Negroes as it was doing. "There is no use multiplying words about it," he said in 1899, "the negro will not be permitted to rise above the sta-

[29] See CARLETON, THE CONSERVATIVE SOUTH—A POLITICAL MYTH, 22 Va. Q. Rev. 179–192 (1946); LEWINSON, RACE, CLASS AND PARTY (1932); MOON, THE BALANCE OF POWER—THE NEGRO VOTE, c. 4 (1948).

[30] REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, State of Virginia, Richmond, June 12, 1901–June 26, 1902, p. 1677 (1906).

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tion he now fills." Money spent on his education was, therefore, a "positive unkindness" to him. "It simply renders him unfit for the work which the white man has prescribed and which he will be forced to perform."[31] Vardaman's scholarly compatriot, Dunbar Rowland, seconded these views in 1902, when he said that "thoughtful men in the South were beginning to lose faith in the power of education which had been heretofore given to uplift the negro," and to complain of the burden thus placed upon the people of the South in their poverty.[32]

The views of Tillman, Vardaman, Stone, Rowland, Glass and others were largely a justification for what had been done by the time they uttered them. The South had succeeded in setting up the machinery by which it was hoped to retain the Negro in an inferior status. Through separate, inferior schools, through an elaborate system of humiliating Jim Crow, and through effective disfranchisement of the Negro, the exclusive enjoyment of first-class citizenship had now become the sole possession of white persons.

And, finally, the Negro was effectively restored to an inferior position through laws and through practices, now dignified as "custom and tradition." Moreover, this relationship—of an inferior Negro and superior white status—established through laws, practice, custom and tradition, was even more rigidly enforced than in the ante-bellum era. As one historian has aptly stated:

> "Whether by state law or local law, or by the more pervasive coercion of sovereign white opinion, 'the Negro's place' was gradually defined—in the courts, schools, and libraries, in parks, theaters, hotels, and residential districts, in hospitals, insane asylums—everywhere including on sidewalks and in cemeteries. When complete, the new codes of White Supremacy were vastly more complex than the antebellum slave codes or the Black Codes of 1865–1866, and, if anything, they were stronger and more rigidly enforced."[33]

This is the historic background against which the validity of the separate but equal doctrine must be tested. History reveals it as a part of an overriding purpose to defeat the aims of the Thirteenth, Fourteenth and Fifteenth Amendments. Segregation was designed to insure inequality—to discriminate on account of race and color—and the separate but equal doctrine accommodated the Constitution to that purpose. Separate but equal is a legal fiction. There never was and never will be any separate equality. Our Constitution cannot be used to sustain ideologies and practices which we as a people abhor.

That the Constitution is color blind is our dedicated belief. We submit that this Court cannot sustain these school segregation laws under any separate but equal concept unless it is willing to accept as truths the racist notions of the perpetuators of segregation and to repeat the tragic error of the Plessy court supporting those who would nullify the Fourteenth Amendment and the basic tenet of our way of life which it incorporates. We respectfully suggest that it is the obligation of this Court to correct that error by holding that these laws and constitutional provisions which seek to condition educational opportunities on the basis of race and color are historic aberrations and are inconsistent with the federal Constitution and cannot stand. The separate but equal doctrine of *Plessy v. Ferguson* should now be overruled.

### CONCLUSION TO PART ONE

In short, our answer to Question No. 3 proposed by the Court is that it is within the judicial power, whatever the evidence concerning Questions 2(a) and (b) may disclose, to hold that segregated schools violate the Fourteenth Amendment, and for the reasons herein above stated that such power should now be exercised.

WHEREFORE, it is respectfully submitted that constitutional provisions and statutes involved in these cases are invalid and should be struck down.

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[31] KIRWAN, *op. cit. supra,* n. 22, at 145–146.

[32] JOHNSON, IDEOLOGY OF WHITE SUPREMACY, *op. cit. supra,* n. 2, at 153. That this pattern is not an antiquated doctrine but a modern view may be seen in the current expenditure per pupil in average daily attendance 1949–1950: In Alabama, $130.09 was spent for whites against $92.69 for Negroes; in Arkansas $123.60 for whites and $73.03 for Negroes; in Florida $196.42 for whites, $136.71 for Negroes; in Georgia, $145.15 for whites and $79.73 for Negroes; in Maryland, $217.41 for whites and $198.76 for Negroes; in Mississippi, $122.93 for whites and $32.55 for Negroes; in North Carolina, $148.21 for whites and $122.90 for Negroes; in South Carolina, $154.62 for whites and $79.82 for Negroes; in the District of Columbia, $289.68 for whites and $220.74 for Negroes. BLOSE AND JARACZ, BIENNIAL SURVEY OF EDUCATION IN THE UNITED STATES, 1948–50, TABLE 43, "STATISTICS OF STATE SCHOOL SYSTEMS, 1949–50" (1952).

[33] WOODWARD, ORIGINS OF THE NEW SOUTH 212 (1951).

## PART TWO

This portion of the brief is directed to questions one and two propounded by the Court:

> "1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
>
> 2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
>
> (a) that future Congresses might, in the exercise of their power under Sec. 5 of the Amendment, abolish such segregation, or
>
> (b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?"

## I. THE FOURTEENTH AMENDMENT WAS INTENDED TO DESTROY ALL CASTE AND COLOR LEGISLATION IN THE UNITED STATES, INCLUDING RACIAL SEGREGATION

Research by political scientists and historians, specialists on the period between 1820 and 1900, and other experts in the field, as well as independent research by attorneys in these cases, convinces us that: (1) there is ample evidence that the Congress which submitted and the states which ratified the Fourteenth Amendment contemplated and understood that the Amendment would deprive the states of the power to impose any racial distinctions in determining when, where, and how its citizens would enjoy the various civil rights afforded by the states; (2) in so far as views of undeveloped public education in the 1860's can be applied to universal compulsory education in the 1950's, the right to public school education was one of the civil rights with respect to which the states were deprived of the power to impose racial distinctions; (3) while the framers of the Fourteenth Amendment clearly intended that Congress should have the power to enforce the provisions of the Amendment, they also clearly intended that the Amendment would be prohibitory on the states without Congressional action.

The historic background of the Fourteenth Amendment and the legislative history of its adoption show clearly that the framers intended that the Amendment would deprive the states of power to make any racial distinction in the enjoyment of civil rights. It is also clear that the statutes involved in these cases impose racial distinctions which the framers of the Amendment and others concerned with its adoption understood to be beyond the power of a state to enforce.

The framers of the Fourteenth Amendment were men who came to the 39th Congress with a well defined background of Abolitionist doctrine dedicated to the equalitarian principles of real and complete equality for all men. Congressional debates during this period must be read with an understanding of this background along with the actual legal and political status of the Negro at the end of the Civil War. This background gives an understanding of the determination of the framers of the Fourteenth Amendment to change the inferior legal and political status of Negroes and to give them the full protection of the Federal Government in the enjoyment of complete and real equality in all civil rights.[34]

### A. The era prior to the Civil War was marked by determined efforts to secure recognition of the principle of complete and real equality for all men within the existing constitutional framework of our government

The men who wrote the Fourteenth Amendment were themselves products of a gigantic antislavery crusade which, in turn, was an expression of the great humanitarian reform movement of the Age of Enlightenment. This philosophy upon which the Abolitionists had taken their stand had been adequately summed up in Jefferson's basic proposition "that all men are created equal" and "are endowed by their Creator with certain unalienable Rights." To this philosophy they adhered with an almost fanatic devotion and an unswerving determination to obliterate any obstructions which stood in the way of its fulfillment. In their drive toward this goal, it may be that they thrust aside some then accepted notions of law and, indeed, that they attempted to give to the Declaration of Independence a substance which might have sur-

[34] TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 185, 186 (1951).

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prised its draftsmen. No matter, the crucial point is that their revolutionary drive was successful and that it was climaxed in the Amendment here under discussion.

The first Section of the Fourteenth Amendment is the legal capstone of the revolutionary drive of the Abolitionists to reach the goal of true equality. It was in this spirit that they wrote the Fourteenth Amendment and it is in the light of this revolutionary idealism that the questions propounded by this Court can best be answered.

In the beginning, the basic and immediate concern of the Abolitionists was necessarily slavery itself. The total question of removing all other discriminatory relationships after the abolition of slavery was at first a matter for the future. As a consequence, the philosophy of equality was in a state of continuous development from 1830 through the time of the passage of the Fourteenth Amendment. However, the ultimate objective was always clearly in mind—absolute and complete equality for all Americans.

During the pre–Civil War decades, the antislavery movement here and there began to develop special meaning and significance in the legal concept of "privileges and immunities," the concept of "due process" and the most important concept of all for these cases, "equal protection of the laws." In the immediately succeeding sections, we shall show how the development of these ideas culminated in a firm intention to obliterate all class distinction as a part of the destruction of a caste society in America.

The development of each of these conceptions was often ragged and uneven with much overlapping: what was "equal protection" to one was "due process" or "privilege and immunity" to another. However, regardless of the phrase used, the basic tenet of all was the uniform belief that Negroes were citizens and, as citizens, freedom from discrimination was their right. To them "discrimination" included all forms of racial distinctions.

**Equality under law** One tool developed to secure full standing for Negroes was the concept of equal protection of the laws. It was one thing, and a very important one, to declare as a political abstraction that "all men are created equal," and quite another to attach concrete rights to this state of equality. The Declaration of Independence did the former. The latter was Charles Sumner's outstanding contribution to American law.

The great abstraction of the Declaration of Independence was the central rallying point for the Abolitionists. When slavery was the evil to be attacked, no more was needed. But as some of the New England states became progressively more committed to abolition, the focus of interest shifted from slavery itself to the status and rights of the free Negro. In the Massachusetts legislature in the 1840's, Henry Wilson, manufacturer, Abolitionist, and later United States Senator and Vice President, led the fight against discrimination, with "equality" as his rallying cry.[35] One Wilson measure adopted by the Massachusetts Legislature in 1845 gave the right to recover damages to any person "unlawfully excluded" from the Massachusetts public schools.[36]

Boston thereafter established a segregated school for Negro children, the legality of which was challenged in *Roberts v. City of Boston,* 5 Cush. (Mass.) 198 (1849). Charles Sumner, who later was to play such an important role in the Congress that formulated the Fourteenth Amendment, was counsel for Roberts. His oral argument, which the Abolitionists widely circulated, is one of the landmarks in the crystallization of the equalitarian concept.

This case was technically an action for damages under the Wilson Act. However, Sumner attacked segregation in public schools on the broader ground that segregation violated the Massachusetts Constitution which provided: "All men are created free and equal," and it was from this base that he launched his attack.

> "Of Equality I shall speak, not as a sentiment, but as a principle. . . .*** Thus it is with all moral and political ideas. First appearing as a sentiment, they awake a noble impulse, filling the soul with generous sympathy, and encouraging to congenital effort. Slowly recognized, they finally pass into a formula, to be acted upon, to be applied, to be defended in the concerns of life, as principles."[37]

"Equality before the law"[38] was the formula he employed. He traced the equalitarian theory from the eighteenth century French philoso-

[35] For an account of Wilson's struggles against anti-miscegenation laws, against jim-crow transportation and jim-crow education, see NASON, LIFE OF HENRY WILSON 48 *et seq.* (1876).

[36] Massachusetts Act 1845, § 214.

[37] 2 WORKS OF CHARLES SUMNER 330, 335–336 (1875). The entire argument is reprinted at 327 *et seq.*

[38] *Id.* at 327, 330–331.

phers through the French Revolution into the language of the French Revolutionary Constitution of 1791,[39] the Constitution of February 1793,[40] the Constitution of June 1793[41] and the Charter of Louis Phillipe.[42] Equality before the law, i.e., equality of rights, was the real meaning of the Massachusetts constitutional provision. Before it "all … distinctions disappear":

> "He may be poor, weak, humble, or black—he may be Caucasian, Jewish, Indian or Ethiopian race—he may be of French, German, English or Irish extraction; but before the Constitution of Massachusetts all these distinctions disappear. He is not poor, weak, humble, or black; nor is he French, German, English or Irish; he is a MAN, the equal of all his fellowmen."[43]

Hence, he urged, separate schools are illegal.

The Massachusetts court rejected Sumner's argument and refused to grant relief. Subsequent thereto, in 1853, the Legislature of Massachusetts, after careful consideration of the problem involving hearings and reports, amended the Wilson statute by providing, among other things, that in determining the qualifications of school children in public schools in Massachusetts "no distinction was to be made on account of the race, color or religious opinions of the appellant or scholar."[44]

The Committee on Education of the House of Representatives in its report recommending adoption of this bill carefully considered the arguments for and against the measure and concluded:

> "Your committee believe, in the words of another, that 'The only security we can have for a healthy and efficient system of public instruction rests in the deep interest and vigilant care with which the more intelligent watch over the welfare of the schools. This only will secure competent teachers, indefatigable exertion, and a high standard of excellence; and where the colored children are mingled up with the mass of their more favored fellows, they will partake of the advantages of this watchful oversight. Shut out and separated, they are sure to be neglected and to experience all the evils of an isolated and despised class. One of the great merits of our system of public instruction is the fusion of all classes which it produces. From a childhood which shares the same bench and sports there can hardly arise a manhood of aristocratic prejudice or separate castes and classes. Our common-school system suits our institutions, promotes the feeling of brotherhood, and the habit of republican equality. To debar the colored race from these advantages, even if we still secured to them equal educational results, is a sore injustice and wrong, and is taking the surest means of perpetuating a prejudice that should be depreciated and discountenanced by all intelligent and Christian men."[45]

Thus, the argument and theories advanced by Sumner, although rejected by the Supreme Court of Massachusetts, finally became incorporated into the law of the State of Massachusetts. More important, however, is the fact that the argument of Sumner was widely distributed throughout the country during the period immediately preceding the consideration of the Fourteenth Amendment.[46] As a consequence it became a fundamental article of faith among the Radical Republicans that from a constitutional standpoint racial segregation was incompatible with constitutional guarantees of equal protection.[47]

The analysis of the available materials covering the period from 1830 to 1860, while important to this point, is too voluminous to be included in the argument at this point. We have, therefore, placed this analysis in a supplement at the end of the brief. The analysis of these materials compels the following historical conclusions:

**1.** To the Abolitionists, equality was an absolute—not a relative—concept which comprehended that no legal recognition be given to racial distinctions of any kind. The notion that any state could require racial segregation was totally incompatible with this doctrine.

**2.** The phrases—"privileges and immunities," "equal protection," and "due process"—that were to appear in the Amendment had

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[39] "Men are born and continue free and *equal in their rights.*" *Id.* at 337.

[40] "The law ought to be equal for all." *Id.* at 338.

[41] "All men are equal by nature *and before the law.*" *Id.* at 339.

[42] "Frenchmen are *equal before the law… .*" *Ibid.*

[43] *Id.* at 341–342.

[44] General Laws of Mass. c. 256. § 1 (1855).

[45] Report of Committee on Education to House of Representatives, Commonwealth of Massachusetts, March 17, 1855.

[46] Among those active in distributing the argument was SALMON P. CHASE. DIARY AND CORRESPONDENCE OF SALMON P. CHASE, Chase to Sumner, Dec. 14, 1849, in 2 Ann. Rep. Am. Hist. Ass'n. 188 (1902).

[47] See, for example, Sumner resolution offered Congress on December 4, 1865 which called for "The organization of an educational system for the equal benefit of all without distinction of color or race." Cong. Globe, 39th Cong., 1st Sess. 2 (1865–1866).

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come to have a specific significance to opponents of slavery in the United States. Proponents of slavery knew and understood what that significance was, even as they disagreed with these theories. Members of the Congress that proposed the Amendment, shared this knowledge.

**3.** These radical Abolitionists, who had been in the minority prior to the Civil War, gained control of the Republican party in Congress during the course of the war and thus emerged in a dominant position in the Congress which was to write the Fourteenth Amendment. Ten of the members of the Joint Committee of Fifteen were men who had definite antislavery backgrounds and two others had likewise opposed slavery.

**4.** When the Joint Committee of Fifteen translated into constitutional provisions the equalitarian concepts held and widely bruited about in the struggle against slavery, it used the traditional phrases that had all become freighted with equalitarian meaning in its widest sense: "equal protection," "privileges and immunities" and "due process."

In these respects history buttresses and gives particular content to the recent admonition of this Court that "[w]hatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race and color." *Shelley v. Kraemer,* 334 U.S. 1, 23.

Despite the high principles and dedication of the leaders of the Abolitionist movement, their program ran into repeated roadblocks from both individual groups and state machinery. The movement was not only blocked in so far as the abolition of slavery itself was concerned, but was met by an ever increasing tendency on the part of all the southern states and some northern states to gradually cut down on the rights of free Negroes and to bring their status nearer and nearer to that of slaves. This countermovement culminated in the decision of the Supreme Court in the *Dred Scott* case (*Scott v. Sandford,* 19 How. 393) that no person of the "African race, whether free or not" could enjoy, under the Constitution of the United States, any right or protection whatsoever. All Negroes were thereby left, by the principles of that case, to the absolute, unrestrained power of the several states.

**B. The movement for complete equality reached its successful culmination in the Civil War and the Fourteenth Amendment**

The onset of the Civil War marked the turning point of the Abolitionists' drive to achieve absolute equality for all Americans. The first great success came on January 1, 1863, when President Lincoln's Emancipation Proclamation freed all slaves in those areas in insurrection against the United States. Obviously this was far from a complete victory. The doctrines enunciated by Chief Justice Taney in the *Dred Scott* case were still unqualified and remained as a part of the "constitutional law" of the time.

In February, 1865, the Abolitionist-dominated 38th Congress adopted and submitted to the states what was to become the Thirteenth Amendment to the Constitution. However, the Radical Republicans in Congress were intensely aware that the abolition of slavery constituted only a partial attainment of their goal of complete political and legal equality for Negroes. They had already determined as early as the spring and summer of 1862 to strike at the objective of federal statutory and constitutional guarantees for Negro equality. As yet, however, their thinking had not succeeded in distilling clearly a series of specifically defined legal and political objectives which they proposed to write into federal law and Constitution.

It should be observed in passing that their reason for this obviously was not necessarily pure Abolitionist idealism. They were in part motivated by hard practical considerations of Republican Party ascendency, and the fear that a restored South, in which Negroes were not given complete legal and political equality, would fall into the hands of a pre-war conservative white political leadership which would threaten the national political control of the Radical Republicans themselves. Thus their idealistic, social philosophy and their hard practical considerations of party interest dovetailed very nicely.[48]

It was to require the events of 1865–66, most notably the attempt to restore political rule in the South and the attempt to impose an inferior non-citizenship status upon the Negro in the restored southern states, to make clear to the Radical Republicans their new constitutional

[48] tenBroek, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 117–119 (1951).

objectives and the means they would seek to obtain it.

**C. The principle of absolute and complete equality began to be translated into federal law as early as 1862**

In 1862 Congress addressed itself to an immediate problem over which it had authority. In debating the bill which was to abolish slavery in the District of Columbia, Representative Bingham said: "The great privilege and immunity of an American citizen to be respected everywhere in this land, and especially in this District, is that they shall not be deprived of life, liberty, or property without due process of law."[49] Representative Fessenden concluded: "If I do not mistake, it is quite apparent that when this bill shall be put on its final passage it will proclaim liberty to the slaves within this District. These men—for God created them men, though man has used them as goods and chattels—slaves—these men and women and children will, when the President of the United States signs this bill, be translated … [to a] condition in which they are invested with the rights of freemen, upon which none can trespass with impunity; since over the person of the free black as well as the free white man there is thrown the broad shield of the nation's majesty."[50] The bill was enacted into law.[51]

Simultaneously Congress discontinued the application of the Black Codes of Maryland and Virginia to the District of Columbia.[52]

Between the time of the Emancipation Proclamation in 1863 and the formulation of the Fourteenth Amendment, Congress took several forward steps to secure complete equality for the class so recently freed. These steps came in the form of particular solutions to particular problems. To this Congress (38th), the most immediate problem was one which fell under their glance daily, the problem of transportation in the District of Columbia. Congressional treatment of this problem is of significance because it reveals the early determination of the Radical Republicans to prohibit racial segregation.

In 1863, Congress amended the charter of the Alexandria and Washington Railroad to eliminate the practice of putting white and Negro passengers in separate parts of the street cars.[53] When, in 1864, the Washington and Georgetown street car company attempted to put colored passengers in cars separate from those of the white passengers, Senator Sumner denounced the practice in the Senate and set forth on his crusade to prohibit all racial distinctions by first eliminating street car segregation in the District.[54] In 1865, he carried to passage a law applicable to all District carriers that "no person shall be excluded from any car on account of color."[55]

The debate on the street car bill covered the entire issue of segregation in transportation. Those who supported prohibition of segregation did so on the ground that any such separation was a denial of equality itself. Senator Wilson denounced the "Jim Crow car," declaring it to be "in defiance of decency."[56] Senator Sumner persuaded his brethren to accept the Massachusetts view, saying that in Massachusetts, "the rights of every colored person are placed on an equality with those of white persons. They have the same right with white persons to ride in every public conveyance in the Commonwealth."[57] Thus, when Congress in 1866 framed the Fourteenth Amendment, it did so against a background of Congressional determination that segregation in transportation was unequal, unjust, and was "in defiance of decency."

**D. From the beginning the thirty-ninth Congress was determined to eliminate race distinctions from American law**

The 39th Congress which was to propose the Fourteenth Amendment convened in December 1865 with the realization that, although slavery had been abolished, the overall objective, the complete legal and political equality for all men had not been realized. This was dramatically emphasized by the infamous Black Codes being enacted throughout the southern states. These Black Codes had the single purpose of providing additional legislative sanction to maintain the inferior status for all Negroes which had been judicially decreed in the opinion in the case of *Scott* v. *Sandford,* 19 How. 393.

The Black Codes, while they grudgingly admitted that Negroes were no longer slaves, nonetheless used the states' power to impose and

[49] Cong. Globe, 37th Cong., 2d Sess. 1639 (1862).
[50] *Id.* at 1642.
[51] 12 Stat. 376 (1862).
[52] 12 Stat. 407 (1862).
[53] 12 Stat. 805 (1863).
[54] Cong. Globe, 38th Cong., 1st Sess. 553, 817 (1864).
[55] 13 Stat. 536, 537 (1865).
[56] Cong. Globe, 38th Cong., 1st Sess. 3132, 3133 (1864).
[57] *Id.* at 1158.

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maintain essentially the same inferior, servile position which Negroes had occupied prior to the abolition of slavery. These codes thus followed the legal pattern of the ante-bellum slave codes. Like their slavery forerunners, these codes compelled Negroes to work for arbitrarily limited pay; restricted their mobility; forbade them, among other things, to carry firearms; forbade their testimony in a court against any white man; and highly significant here, contained innumerable provisions for segregation on carriers and in public places. In at least three states these codes prohibited Negroes from attending the public schools provided for white children.[58]

It was this inferior caste position which the Radical Republicans in Congress were determined to destroy. They were equally determined that by federal statutory or constitutional means, or both, Congress would not only invalidate the existing Black Codes but would proscribe any and all future attempts to enforce governmentally-imposed caste distinctions.

Congress was well aware of the fact that to take this step involved a veritable revolution in federal-state relations. A number of Senators and Representatives in the 39th Congress, by speech and resolution, made it eminently clear that they aimed at nothing less than the total destruction of all hierarchy, oligarchy and class rule in the southern states. One of the more notable resolutions of this kind was that of Senator Charles Sumner, introduced on December 4, 1865, at the opening of the session. This resolution asserted that no state formerly declared to be in rebellion was to be allowed to resume its relation to the Union until "the complete reestablishment of loyalty … " and:

> "The complete suppression of all oligarchical pretensions, and the complete enfranchisement of all citizens, so that there shall be no denial of rights on account of color or race; but justice shall be impartial, and all shall be equal before the law."

Another requirement of Sumner's resolution called for:

> "The organization of an educational system for the equal benefit of all without distinction of color or race."[59]

Sumner thus recognized the close relationship between the destruction of the southern ruling class and the elimination of segregation in the educational system.

Representative Jehu Baker of Illinois introduced a similar resolution in the House of Representatives, which read in part as follows:

> "Whereas class rule and aristocratic principles of government have burdened well nigh all Europe with enormous public debts and standing armies, which press as a grievous incubus on the people, absorbing their substance, impeding their culture, and impairing their happiness; and whereas the class rule and aristocratic element of slaveholding which found a place in our Republic has proved itself, in like manner, hurtful to our people … Therefore,
>
> "*Resolved,* (as the sense of this House,) That once for all we should have done with class rule and aristocracy as a privileged power before the law in this nation, no matter where or in what form they may appear; and that, in restoring the normal relations of the States lately in rebellion, it is the high and sacred duty of the Representatives of the people to proceed upon the true, as distinguished from the false, democratic principle, and to realize and secure the largest attainable liberty to the whole people of the Republic, irrespective of class or race."[60]

There were numerous other resolutions and speeches expressing similar sentiments. All of the resolutions were referred to the Joint Committee on Reconstruction and are a part of the background of that committee's work in the framing of the Fourteenth Amendment.

These expressions of principle were started toward statutory fruition by Senator Trumbull's Bill to enlarge the powers of the Freedmen's Bureau. The debates which followed the introduction of his Senate Bill No. 60 are of particular interest because they make it clear that a large number of the Radical Republicans regarded the destruction of segregation in the school districts of the southern states as a highly desirable legislative objective. What followed amounted to a forthright assault on the idea that there could be racial segregation in the public schools.

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[58] See the summary in Senator Wilson's speech before Congress, Cong. Globe, 39th Cong., 1st Sess. 39–40, 589 (1866); 1 FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 273–312 (1906); MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES DURING THE PERIOD OF RECONSTRUCTION 29–44 (1880).

[59] Cong. Globe, 39th Cong., 1st Sess. 2 (1865–1866).

[60] Cong. Globe, 39th Cong. 1st Sess. 69 (1865–1866).

Representative Hubbard of Connecticut expressed the broad pattern of thinking of which this bill was a part:

> "The words, caste, race, color, ever unknown to the Constitution, … are still potent for evil on the lips of men whose minds are swayed by prejudice or blinded by passion, and the freedmen need the protection of this bill.
>
> "The era is dawning when it will be a reproach to talk in scorn about the distinctions of race or color. Our country is, and must be, cosmopolitan.…
>
> "It is in vain that we talk about race, caste, or color. . . ."[61]

Likewise, Representative Rousseau of Kentucky stated:

> "… Here are four school-houses taken possession of, and unless they mix up white children with black, the white children can have no chance in these schools for instruction. And so it is wherever this Freedmen's Bureau operates."[62]

Representative Dawson of Pennsylvania recognized that the supporters of the bill:

> "… hold that the white and black race are equal. . . . Their children are to attend the same schools with white children, and to sit side by side with them. . . ."[63]

Of more importance was S.61 "A Bill to Protect All Persons in the United States in Their Civil Rights and Furnish the Means of Vindication." This bill, though introduced through Senator Trumbull in his capacity as Chairman of the Judiciary Committee, was in fact a measure sponsored by the entire Radical Republican majority.

The bill forbade any "discrimination in civil rights or immunities" among "the people of the United States on account of race, color, or previous condition of slavery." It provided that all persons should have "full and equal benefits of all laws" for the security of their persons and their property.

In a lengthy speech, Senator Trumbull defended the wisdom and constitutionality of this bill in detail. The Thirteenth Amendment, he argued, made the bill both constitutional and necessary.

> "Then, sir, I take it that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited."[64]

Senator Trumbull's argument precipitated a lengthy debate on the constitutional issues. Opponents of the measure, conceding that Congress had the power under the Thirteenth Amendment to assure freedom of Negroes, denied that Congress had the power to endow Negroes with citizenship and civil rights. To sustain their position they pointed to the fact that Negroes who were freed prior to the Emancipation Proclamation were not treated as citizens and under the authority of the *Dred Scott* case could not be citizens.[65]

In reply, Trumbull advanced the additional constitutional argument that, once slavery was abolished, the naturalization clause of the Constitution provided Congress with the power to endow Negroes with the citizenship the *Dred Scott* case had held they could not otherwise enjoy. Trumbull thus adopted the position of Chief Justice Taney in the *Dred Scott* case that the power to confer citizenship was vested in the federal, not the state government.

Another major area of controversy with respect to the bill was as to its scope. Time and again the Democrats and the more conservative Republicans in the Senate asserted that the bill would invalidate every state law which provided for racial segregation, or provided a different rule for persons of different races.[66] For example, there was the charge of Senator Cowan, a Republican of Pennsylvania, who said:

> "Now, as I understand the meaning … of this bill, it is that there shall be no discrimination made between the inhabitants of the several States of this Union, none in any way. In Pennsylvania, for the greater convenience of the people, and for the greater convenience, I may say, of both classes of the people, in certain districts the Legislature has provided schools for colored children, has discriminated as between the two classes of children. We put the African children in this school-house and the white children over in that school-house, and educate them there as we best can. Is this amendment to the Constitution of the United States abolishing slavery to break up that system which Pennsylvania has adopted for the education of her white and colored

[61] *Id.* at 630.
[62] *Id.* at App. 71.
[63] *Id.* at 541.
[64] *Id.* at 474.
[65] See statements of Senators Van Winkle of West Virginia and Saulsbury of Delaware. *Id.* at 475 ff.
[66] *Id.* at 500 ff.

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> children? Are the school directors who carry out that law and who make this distinction between these classes of children to be punished for a violation of this statute of the United States? To me it is monstrous."[67]

Senator Howard in reply gave the Conservatives no comfort:

> "I do not understand the bill which is now before us to contemplate anything else but this, that in respect to all civil rights … there is to be hereafter no distinction between the white race and the black race. It is to secure to these men whom we have made free the ordinary rights of a freeman and nothing else. . . . There is no invasion of the legitimate rights of the States."[68]

But, perhaps the best answer of all to these assertions of the sweeping character of the bill was given by Senator Morrill of Vermont, a member of the Joint Committee of Fifteen:

> "The Senator from Kentucky tells us that the proposition [federal guarantee of civil rights] is revolutionary, … I admit that this species of legislation is absolutely revolutionary. But are we not in the midst of revolution? Is the Senator from Kentucky utterly oblivious to the grant results of four years of war?"[69]

It is highly significant that Senator Morrill was not only a member of the Joint Committee of Fifteen, even then engaged in drafting the Fourteenth Amendment, but that he later was to insist that the Fourteenth Amendment prohibited separate but equal provisions in state school legislation.

After two full days of debate, the Senate passed the Trumbull bill by a vote of 33 to 12.

The only rational inference to be drawn from the legislative history of the Trumbull bill in the Senate is that the great majority of that body was determined to bar the states from using their power to impose or maintain racial distinctions. The same majority was of the opinion that the federal government had constitutional authority so to delimit such action by the state.

In the House, the Conservatives pointed out forcefully that the text of the bill presented would destroy all limitations on federal power over state legislation and would likewise destroy all state legislative and judicial provisions making distinctions against Negroes. Representative Rogers observed:

> "In the State of Pennsylvania there is a discrimination made between the schools for white children and the schools for black. The laws there provide that certain schools shall be set apart for black persons, and certain schools shall be set apart for white persons. Now, if this Congress has a right, by such a bill as this, to enter the sovereign domain of a State … then, by parity of reasoning, it has a right to enter the domain of that State and inflict upon the people there, without their consent, the right of the negro to enjoy the elective franchise. . . ."[70]

In a somewhat disingenuous attempt to deal with the argument of the Conservatives, Representative Wilson of Iowa, chairman of the House Judiciary Committee, argued vaguely that the bill would not have the effect of destroying all legislation discriminating on the basis of race.[71] Nevertheless Wilson broadly defined the term civil rights as used in the bill as being "the natural rights of man." Moreover, he observed that "immunities" secured "to citizens of the United States equality in the exemptions of the law."[72]

At this point, Representative Bingham of Ohio, who had become converted to the Conservatives' constitutional power argument, made a notable address to the House. While admitting that perhaps Congress was at that time without constitutional authority to enact so sweeping a bill, he said it was nevertheless true that the bill as it stood was as sweeping as was charged by the Conservatives.

Representative Bingham then made it preeminently clear that he entirely approved of the sweeping objectives of the bill as it came from the Senate. His willingness to accept any modification of the bill was *solely* on the grounds of an overwhelming present constitutional objection which he himself was even then in the process of curing with a proposal for a constitutional amendment. He said:

> "If civil rights has this extent, what, then, is proposed by the provision of the first section? Simply to strike down by congressional enactment every State constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen. I might say here, without the least fear of contradiction, that there is scarcely a State in this Union which does not, by its Constitution or by its statute laws, make some discrimination on

[67] *Id.* at 500.
[68] *Id.* at 504.
[69] *Id.* at 570.
[70] *Id.* at 1121.
[71] *Id.* at 1117.
[72] *Ibid.*

> account of race or color between citizens of the United States in respect of civil rights."[73]

Bingham then insisted that he believed that all discriminatory legislation should be wiped out by amending the Constitution.

> "The law in every State should be just; it should be no respecter of persons. It is otherwise now, and it has been otherwise for many years in many of the States of the Union. I should remedy that not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future."[74]

Bingham's prestige as a leader of the Radical Republican majority obliged Wilson to accept the Ohioan's interpretation. Consequently, the bill was returned to the Judiciary Committee and amended to eliminate the sweeping phrase "there shall be no discrimination in civil rights and immunities." Wilson no doubt comforted himself with the fact that even as amended the language of the bill was still revolutionary. At any rate, the Conservatives were still convinced that the bill invalidated state racial segregation laws. With considerable force, they argued that the phrase "the inhabitants of every state" … shall have the rights to full and equal benefits of all laws and proceedings for the "security of persons and property … " was properly to be broadly interpreted. In fact, Senator Davis of Kentucky had this to say:

> "… [T]his measure proscribes all discriminations against negroes in favor of white persons that may be made anywhere in the United States by any 'ordinance, regulation, or custom,' as well as by 'law or statute.' …
>
> But there are civil rights, immunities, and privileges 'which ordinances, regulations, and customs' confer upon white persons everywhere in the United States, and withhold from negroes. On ships and steamboats the most comfortable and handsomely furnished cabins and state-rooms, the first tables, and other privileges; in public hotels the most luxuriously appointed parlors, chambers, and saloons, the most sumptuous tables, and baths; in churches not only the most softly cushioned pews, but the most eligible sections of the edifices; on railroads, national, local, and street, not only seats, but whole cars, are assigned to white persons to the exclusion of negroes and mulattoes. All these discriminations in the entire society of the United States are established by ordinances, regulations, and customs. This bill proposes to break down and sweep them all away and to consummate their destruction, and bring the two races upon the same great plane of perfect equality, declares all persons who enforce those distinctions to be criminals against the United States, and subjects them to punishment by fine and imprisonment. . . ."[75]

Significantly, there was no attempt to reply to this interpretation of the amended bill.

The bill in its amended form was adopted by Congress and vetoed by President Johnson.

Representative Lawrence, who spoke in favor of overriding President Johnson's veto said:

> "This section does not limit the enjoyment of privileges to such as may be accorded only to citizens of 'some class,' or 'some race,' or 'of the least favored class,' or 'of the most favored class,' or of a particular complexion, for these distinctions were never contemplated or recognized as possible in fundamental civil rights, which are alike necessary and important to all citizens, and to make inequalities in which is rank injustice."[76]

He also said:

> "… distinctions created by nature of sex, age, insanity, etc., are recognized as modifying conditions and privileges, but mere race or color, as among citizens never can [be]."[77]

Numerous newspapers also thought the bill destroyed all segregation in schools, theatres, churches, public vehicles and the like.[78] Flack said of the bill:

> "Many [Congressmen] believed that the negro would be entitled to sit on juries, to attend the same schools, etc., since, if the States undertook to legislate on those matters, it might be claimed that he was denied the equal rights and privileges accorded to white men. It does not appear that all of these contentions were specifically contradicted.
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> * * *
>
> It would seem reasonable to suppose that if the bill should prove to be constitutional that

[73] *Id.* at 1291.
[74] *Id.* at 1294.
[75] *Id.* at App. 183.
[76] *Id.* at 1836.
[77] *Id.* at 1835.
[78] New York Herald, March 29 and April 10, 1866: Commercial March 30, 1866; National Intelligencer, April 16, 1866 and May 16, 1866. There were a number of suits against local segregation laws banning Negroes from theatres, omnibuses, etc., McPherson's Scrap Book, The Civil Rights Bill, pp. 110 ff. None of these suits appear to have involved school segregation laws.

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these rights could not be legally denied them."[79]

* * *

"… many of the leading papers of the country, including some of the principal Republican papers, regarded the Civil Rights Bill as a limitation of the powers of the States, and as a step towards centralization, in that it interfered with the regulation of local affairs which had hitherto been regulated by state and local authorities or by custom. This opinion was held in the North as well as in the South. There also seems to have been a general impression among the press that negroes would, by the provisions of the bill, be admitted, on the same terms and conditions as the white people, to schools, theaters, hotels, churches, railway cars, steamboats, etc."[80]

* * *

"What the papers gave as their opinion must necessarily have been the opinion of large numbers of people. There is much evidence to substantiate this conclusion, for almost immediately after the passage of the bill over the President's veto, efforts were made by the negroes to secure these rights."[81]

The following generalizations are pertinent to the relationship of the Civil Rights Act (S. 61 as amended) to the problem of segregation in schools and the Fourteenth Amendment:

1. As originally drafted, the Act contained a phrase "there shall be no discrimination in civil rights and immunities among the inhabitants of any state …" This was so broad in scope that most Senators and Representatives believed that it would have the effect of destroying entirely all state legislation which distinguished or classified in any manner on the basis of race. School segregation laws, statutes establishing unequal penalties in criminal codes, laws banning Negroes from juries, all alike would have become invalid as against the federal statute.
2. A great majority of the Republicans—the men who formulated the Fourteenth Amendment—had no objection to a bill which went this far. Men like Rogers, Kerr and Cowan objected to the bill on the ground that it would end all caste legislation, including segregated schools, and this was the view of the Senate. None of the bill's supporters in the House, except Wilson, denied that the bill had that effect.
3. The Bingham amendment was finally adopted in the House which struck out the "no discrimination" clause, simply because a majority of the members of the House believed that so sweeping a measure could not be justified under the Constitution as it stood. They accepted Bingham's argument that the proper remedy for removing racial distinctions and classifications in the states was a new amendment to the Constitution.
4. The logic of the Bingham constitutional objections aside, the persuasiveness of his technical objection to the Trumbull bill was immeasurably enhanced by the fact that several days before his motion to amend the Civil Rights Bill, Bingham had in fact proposed to the House, on behalf of the Joint Committee, a constitutional amendment by the terms of which his constitutional objections to the Trumbull bill were obviated. That measure, H. R. 63, with some significant changes intended to underscore the prohibition on state governmental action with the addition of the citizenship clause became the Fourteenth Amendment.[82]
5. The law as finally enacted enumerated certain rights which Trumbull and other Radicals had felt were inseparably connected with the status of freedom. However, there is no evidence that even after the modification of the bill, the enumeration in the bill was considered to exclude rights not mentioned. Kerr, Rogers, Cowan, Grimes and other conservatives still insisted that the bill, even in its final form, banned segregation laws. The phrase "the inhabitants of every race … shall have the right … to full and equal benefit of all laws and proceedings for the security of persons and property" still stood in the bill and was susceptible of broad interpretation.
6. Finally, it may be observed that a majority of both Houses of Congress were ready to go beyond the provisions of the Civil Rights

[79] FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 40 (1908).
[80] *Id.* at 45.
[81] *Ibid.*
[82] "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)." THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 61 (Kendrick ed. 1914).

Act. Congressmen as diverse in their views as John A. Bingham and Henry J. Raymond, a moderate Republican and editor of the *New York Times*, united in proposing a constitutional amendment which would remove doubts as to the ability of Congress to destroy all state legislation discriminating and segregating on the basis of race. The forthcoming amendment, at all odds, was to set at rest all doubts as to the power of Congress to abolish all state laws making any racial distinctions or classifications.

**The framers of the Fourteenth Amendment** While Congress was engaged in the passage of the Civil Rights Act, a powerful congressional committee was even then wrestling with the problem of drafting a constitutional amendment which they hoped would definitely destroy all class and caste legislation in the United States. This committee was the now famous Joint Committee of Fifteen, which the two houses of Congress had established by Joint Resolution in December, 1865, to "inquire into the conditions of the states which formed the so-called Confederate States of America and report whether any or all of them were entitled to representation in Congress." It is extremely important for the purpose of this brief to observe that the Joint Committee of Fifteen was altogether under the domination of a group of Radical Republicans who were products of the great Abolitionist tradition, the equalitarianism which has been set forth earlier in this brief.

Section 1 of the Fourteenth Amendment, and particularly the equal protection clause, is peculiarly the product of this group, plus Senators Sumner, Wilson and Trumbull.[83]

Co-chairmen of the Committee were Representative Thaddeus Stevens of Pennsylvania and Senator William P. Fessenden of Maine.

Stevens was virtually dictator of the House. It was his dedicated belief that the Negro must be immediately elevated to a position of unconditional, legal, economic, political and social equality; and to this end he was determined to destroy every legal and political barrier that stood in the way of his goal.[84] Obviously, any constitutional amendment affecting the Negro would very heavily reflect his point of view.

Stevens believed that the law could not permit any distinctions between men because of their race. It was his understanding of the first section of the Fourteenth Amendment that: "… where any State makes a distinction in the same law between different classes of individuals, Congress shall have power to correct such discrimination and inequality …"[85] He believed that it was up to Congress to repudiate "… the whole doctrine of the legal superiority of families or races,"[85a] and that under the Amendment, "… no distinction would be tolerated in this purified Republic but what arose from merit and conduct."[86]

Senator Fessenden undoubtedly held moderate views on the Reconstruction and, these views probably accounted for his selection as Co-chairman of the Joint Committee. Although Fessenden hoped that the Republican Party would work successfully with President Johnson, he broke with Johnson on the Civil Rights Act, which he supported with conviction. He was a staunch champion of the Fourteenth Amendment. Fessenden believed that all distinctions in civil rights based upon race must be swept away, and he was in favor of excluding the southern states from any representation in Congress until this end was assured.[87]

His son reports that the essence of his views was "all civil and political distinctions on account of race or color [would] be inoperative and void. . . ."[88]

Senator James W. Grimes, Republican of Iowa, was a Moderate and a close friend of Fessenden.[89] While he was governor of Iowa, prior to his election to the Senate the state constitution was revised to provide schools free and

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[83] KELLY AND HARBISON, THE AMERICAN CONSTITUTION, ITS ORIGIN AND DEVELOPMENT 460–463 (1948); BOUDIN, TRUTH AND FICTION ABOUT THE FOURTEENTH AMENDMENT, 16 N. Y. U. L. Q. REV. 19 (1938); FRANK AND MUNRO, THE ORIGINAL UNDERSTANDING OF "EQUAL PROTECTION OF THE LAWS," 50 COL. L. REV. 131, 141 (1950).

[84] See for example, Stevens' speech attacking the "doctrine of the legal superiority of families or races" and denouncing the idea that "this is a white man's government." Cong. Globe, 39th Cong., 1st Sess. 75 (1865). "Sir," he said on this occasion, "this doctrine of a white man's Government is as atrocious as the infamous sentiment that damned the late Chief Justice to everlasting fame; and, I fear, to everlasting fire." See also similar observations on Stevens in BOWERS, THE TRAGIC ERA (1929) and WOODBURN, THE LIFE OF THADDEUS STEVENS (1913).

[85] Cong. Globe, 39th Cong., 1st Sess. 1063 (1866).

[85a] *Id.* at 74.

[86] *Id.* at 3148.

[87] KENDRICK, *op. cit. supra* n. 82, at 172–177; 6 DICTIONARY OF AMERICAN BIOGRAPHY 349–350 (1931).

[88] 2 FESSENDEN, LIFE AND PUBLIC SERVICES OF WILLIAM PITT FESSENDEN 36 (1931).

[89] KENDRICK, *op. cit. supra* n. 82, at 190–191.

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open to all children.[90] He insisted upon free schools open to all,[91] and Lewellen, who analyzed Grimes' political ideas, concluded that—

> "Special legislation, whether for individual or class, was opposed by Grimes as contrary 'to the true theory of a Republican government' and as the 'source of great corruption.' Although he sympathized with the newly freed Negroes after the Civil War, he opposed any attempt to make them wards of the Federal government. They had been made citizens and had been given the right to vote; there was no reason in the world why a law should be passed 'applicable to colored people' and not to white people. While his ideas on the Negro question were colored by his radical opinions on the slavery question his opposition to race legislation would probably have been practically as firm upon any other subject."[92]

Senator Ira Harris of New York, one of the least vocal members of the Committee of Fifteen, was a close friend of Charles Sumner,[93] and "acted with the radicals in all matters pertaining to reconstruction."[94] His explicit views on segregation are unascertained.[95] He was, however, so closely allied to the insiders on the Committee who considered race and color an indefensible basis for making legal distinctions,[96] that it is safe to conclude that he espoused, or at least acquiesced in, this viewpoint.

Senator George H. Williams, an Oregon Republican and former Douglas Democrat, claimed authorship of the First Reconstruction Act of 1867, originally called the Military Reconstruction Bill, which he introduced in the Senate on February 4, 1867.[97] In commenting upon this bill he said:

> "I will say that in preparing this bill, I had no desire to oppress or injure the people of the South, but my sole purpose was to provide a system by which all classes would be protected in life, liberty, and property …"[98]

His views on segregation are also unascertained.[99] It should be noted, however, that there is no record of his ever lending his voice or his votes to any law providing segregation based upon race or color.

Senator Jacob H. Howard of Michigan was clearly in the vanguard of that group which worked to secure full equality for Negroes.[100] He was clear and definite in his interpretation of the Civil Rights Act of 1866 and the Fourteenth Amendment. He said after the passage of the former that "in respect of all civil rights, there is to be hereafter no distinction between the white race and the black race."[101] In explaining the intention of the Joint Committee during discussion of the joint resolution to propose what was to become the Fourteenth Amendment, he said:

> "He desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power of such gentlemen as [Senator Doolittle of Wisconsin] who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters."[102]

In another speech, while acting for Senator Fessenden as floor leader for the Amendment, Howard interpreted Section 1 as follows:

> "The last two clauses of first section … disable a state from depriving … any person … of life, liberty or property without due process of law, or from denying to him the equal protection of the laws of the state. This abolishes all class legislation and does away with the injustice of subjecting one caste of persons to a code not applicable to another … Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States …[103]

The evidence conclusively establishes that Howard's interpretation of the equal protection clause precluded any use whatever of color as a basis for legal distinctions.[104]

Senator Reverdy Johnson, Democrat of Maryland, was attorney for the defense in *Dred*

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[90] DICTIONARY OF AMERICAN BIOGRAPHY 632 (1931).
[91] *Ibid.;* SALTER, LIFE OF JAMES W. GRIMES, c. 3 (1876).
[92] LEWELLEN, POLITICAL IDEAS OF JAMES W. GRIMES 42 IOWA HIST. & POL. 339, 347 (1944).
[93] 8 DICTIONARY OF AMERICAN BIOGRAPHY 310 (1932).
[94] KENDRICK, *op. cit. supra* n. 82, at 195.
[95] FRANK AND MUNRO, THE ORIGINAL UNDERSTANDING OF EQUAL PROTECTION OF THE LAWS, 50 COL. L. REV. 131, 142 (1950).
[96] *Ibid.*
[97] KENDRICK, *op. cit. supra* n. 82, at 191; Williams, *Six Years in the United States Senate, Daily Oregonian,* Dec. 3, 10, 1905.
[98] CHRISTENSEN, THE GRAND OLD MAN OF OREGON: THE LIFE OF GEORGE H. WILLIAMS 26 (1939).
[99] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.
[100] KENDRICK, *op. cit. supra* n. 82, at 192.
[101] FRANK AND MUNRO, *op. cit. supra* n. 83, at 140.
[102] Cong. Globe, 39th Cong., 1st Sess. 2896 (1866).
[103] *Id.* at 2766.
[104] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.

*Scott* v. *Sandford.*[105] George I. Curtis, one of Scott's attorneys, credited Johnson with being the major influence in shaping the decision.[106] Where segregation was concerned, Johnson was not entirely consistent or predictable.

In 1864 he supported the motion of Senator Charles Sumner that the Washington Railroad end the exclusion of persons of color.[107] During the debate upon Sumner's motion, Johnson said:

> "It may be convenient, because it meets with the public wish or with the public taste of both classes, the white and the black, that there should be cars in which the white men and ladies are to travel, designated for that purpose, and cars in which the black men and black women are to travel, designated for that purpose. But that is a matter to be decided as between these two classes. There is no more right to exclude a black man from a car designated for the transportation of white persons than there is a right to refuse to transport in a car designated for black persons white men; and I do not suppose that anybody will contend … that there exists any power in the company to exclude white men from a car because the company have appropriated that car for the general transportation of black passengers.[108]

Two years later, Johnson said:

> "… as slavery has been abolished in the several States, those who were before slaves are now citizens of the United States, standing … upon the same condition, therefore, with the white citizens. If there is an authority in the Constitution to provide for the black citizen, it cannot be because he is black; it must be because he is a citizen; and that reason [is] equally applicable to the white man as to the black man. . . ."[109]

Thus it appears that he understood that the granting of citizenship rights to Negroes meant that racial distinctions could no longer be imposed by law.

Representative John A. Bingham of Ohio, a member of the committee who has been described as the "Madison of the first section of the Fourteenth Amendment"[110] and undoubtedly its author, was a strong and fervent Abolitionist, classified with those whose views of equal protection "precluded any use whatsoever of color as a basis of legal distinctions."[111]

While the Fourteenth Amendment was pending, Representative Bingham took the view that state constitutions which barred segregated schools were "in accordance with the spirit and letter of the Constitution of the United States … [if] the utterance of Jefferson ever meant anything … it meant precisely that when he declared for equal and exact justice. . . ."[112]

Representative George Boutwell of Massachusetts, was a hard, practical politician rather than an idealist. He was however, no less extreme in his demands for Negro civil rights and Negro suffrage than men like Stevens and Sumner. Indicative of his views is his vote on May 22, 1874 against the Sargent amendment to the Civil Rights Act of 1875, which would have permitted separate but equal schools.[113] During Reconstruction Alabama was "flooded with the radical speeches of Morton and Boutwell in favor of mixed schools."[114] He was among those whose interpretation of "equal protection" would not admit color as a basis for legal distinctions.[115]

Representative Roscoe Conkling, a New York Republican, was thought to have taken his views on Reconstruction from Stevens.[116] He was called by some a protege of Stevens; at any rate, they worked as partners on much reconstruction legislation.[117] In 1868, when the readmission of Arkansas was being discussed, he voted against the Henderson Amendment to the bill which would have permitted the state to establish segregated schools.[118] In 1872 he favored the supplementary civil rights bill and voted against the Thurman amendment which would have struck

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[105] 19 How. 393.

[106] 10 DICTIONARY OF AMERICAN BIOGRAPHY 113 (1933).

[107] WILSON, HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA 507 (1877).

[108] Cong. Globe, 38th Cong., 1st Sess. 1156 (1864).

[109] Cong. Globe, 39th Cong., 1st Sess. 372–374 (1865–1866).

[110] Dissent of Mr. Justice Black in Adamson v. California, 332 U.S. 46, 74.

[111] "FRANK AND MUNRO, THE ORIGINAL UNDERSTANDING OF EQUAL PROTECTION OF THE LAWS, 50 COL. L. REV. at 151. See GRAHAM, THE "CONSPIRACY THEORY" OF THE FOURTEENTH AMENDMENT, 47 YALE L. J. 371, 400–401 (1938); GRAHAM, THE EARLY ANTISLAVERY BACKGROUNDS OF THE FOURTEENTH AMENDMENT, 1950 WIS. L. REV. 479 at 492; Cong. Globe, 39th Cong., 1st Sess. 1291, 1293, 2461–2462 (1866). For other sketches of Bingham see 2 DICTIONARY OF AMERICAN BIOGRAPHY 278 (1929) and KENDRICK, *op. cit. supra* n. 82 at 183.

[112] Cong. Globe, 40th Cong., 1st Sess. 2462 (1868).

[113] 2 Cong. Rec. 4167 (1874).

[114] BOWERS, THE TRAGIC ERA 427 (1929).

[115] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.

[116] KENDRICK, *op. cit. supra* n. 82, at 186.

[117] CHIDSEY, THE GENTLEMAN FROM NEW YORK 34–35 (1935).

[118] Cong. Globe, 40th Cong., 2nd Sess. 2748 (1868).

out a clause permitting colored persons to enter "any place of public amusement or entertainment."[119] He was in the Senate majority which on May 22, 1874, voted down the Sargent amendment to the Civil Rights Bill, an amendment which would have permitted separate but equal schools.[120] Conkling must be classified as one of those who agreed to no legal classifications or distinctions based upon color.[121]

Representative Henry T. Blow, a Missouri Republican, first supported the views of Thaddeus Stevens in the Joint Committee and then in the second session gave his support to Bingham.[122] In either case, he acted with those who favored a broad and sweeping denial of the right of the states to make legal classifications on the basis of race or color. Blow came to Congress with a strong antislavery background and took the position that color discrimination could not be defended, as a matter of course.[123]

Representative Justin S. Morrill of Vermont is characterized as "an extreme radical," one "regularly on the side of radicalism." It is said of him that "the only part taken by him in Reconstruction was to attend the meetings of the Committee and cast his vote."[124] However, he was among those voting against the "white" clause in the Nebraska constitution when the bill to admit that state to the union was under consideration.[125] He voted against the Henderson amendment to permit segregated schools in the bill to readmit Arkansas.[126] He voted against the Sargent Amendment to allow separate but equal schools, during the debates on the bill that became the Civil Rights Act of 1875.[127] Morrill thus belongs in the group of those who did not consider color a reasonable ground for legal distinctions.[128]

Representative Elihu Washburne of Illinois was a staunch member of the House Radical bloc, and a pronounced enemy of the more moderate Reconstruction policies of President Johnson. He supported both the Civil Rights Act and the Fourteenth Amendment and his remarks make it clear that he favored a revolution in the southern social order.[129]

The two Democratic members of the Joint Committee from the House were both enemies of the Civil Rights Act and the Fourteenth Amendment. Representative Henry Grider of Kentucky was without influence in the drafting of the Fourteenth Amendment by the Joint Committee.[130] However, remarks of Representative Andrew Jackson Rogers of New Jersey, in opposition to these measures, are significant indication of contemporary understanding of their reach and thrust. Thus, in speaking of the Civil Rights Bill, Rogers said:

> "In the State of Pennsylvania there is a discrimination made between the schools for white children and the schools for black. The laws there provide that certain schools shall be set apart for black persons, and certain schools shall be set apart for white persons. Now, if this Congress has a right, by such a bill as this, to enter the sovereign domain of a State and interfere with these statutes … , then … it has a right to … , inflict upon the people … the right of the negro to [vote]… ."[131]

Similarly, in speaking of the proposed Section 1 of the Fourteenth Amendment on February 26, 1866, he said:

> "… Under this amendment, Congress would have power to compel the State to provide for white children and black children to attend the same school, upon the principle that all the people … shall have equal protection in all the rights of life, liberty, and property, and all the privileges and immunities of citizens. . . ."[132]

Again, in denouncing the Amendment, he declared:

> "This section of the joint resolution is no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill. . . ."
>
> "… I hold [the amendment] will prevent any State from refusing to allow anything to anybody."[133]

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[119] CONKLING, LIFE AND LETTERS OF ROSCOE CONKLING 432 (1869).
[120] 2 Cong. Rec. 4167 (1874).
[121] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.
[122] KENDRICK, *op. cit. supra* n. 82, at 194.
[123] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.
[124] KENDRICK, *op. cit. supra* n. 82, at 140, 193.
[125] CONG. Globe, 39th Cong., 1st Sess. 4275–4276 (1866).
[126] Cong. Globe, 40th Cong., 2nd Sess. 2748 (1868).
[127] 2 Cong. Rec. 4167 (1874).
[128] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.
[129] 19 DICTIONARY OF AMERICAN BIOGRAPHY 504 (1936);, *op. cit. supra* n. 82, at 194.
[130] KENDRICK, *op. cit. supra* n. 82, at 196. Grider is not even listed in the DICTIONARY OF AMERICAN BIOGRAPHY. He died before the second session of the 39th Congress. KENDRICK, *op. cit. supra* n. 82, at 197.
[131] Cong. Globe., 39th Cong., 1st Sess. 1121 (1866).
[132] *Id.* at App. 134 (1866).
[133] *Id.* at 2538.

**E. The Fourteenth Amendment was intended to write into the organic law of the United States the principle of absolute and complete equality in broad constitutional language**

While the Civil Rights Act of 1866 was moving through the two Houses of Congress, the Joint Committee of Fifteen was engaged in the task of drafting a constitutional amendment as a part of a program for the "readmission" of the southern states to the Union. When the Committee began its meetings in January 1866, several of its members introduced proposals for constitutional amendments guaranteeing civil rights to the freedmen. After a series of drafting experiments, Representative Bingham on February 3 proposed the following:

> "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)."[134]

The Joint Committee found this proposal satisfactory and accordingly on February 13th introduced it in the House as H. R. 63.[135]

By now the dedicated purpose of the Radical Republicans based in part upon the ante-war equalitarian principles as opposed to caste and class legislation had to be crystallized in a Fourteenth Amendment. Necessarily, the drafters of this amendment and those who participated in the debates on the amendment recognized that constitutional amendments are properly worded in the broadest and most comprehensive language possible.

It must be borne in mind that Representative Bingham, and those who supported his position on the amendment to the Civil Rights Bill of 1866, had already demonstrated that the constitutional amendment under consideration would be at least as comprehensive in its scope and effect as the original sweeping language of the Trumbull Civil Rights Bill *before* it was amended in the House, and that it would be far broader than the scope of the bill as finally enacted into law. On this point, Bingham repeatedly made his intentions clear, both in his discussion on the power limitations on the Civil Rights Bill itself and in his defense of his early drafts of the proposed constitutional amendment.

Representative Rogers immediately attacked the proposed constitutional amendment (H. R. 63) as "more dangerous to the liberties of the people and the foundations of the government" than any proposal for amending the Constitution heretofore advanced. This amendment, he said, would destroy all state legislation distinguishing Negroes on the basis of race. Laws against racial intermarriage, laws applying special punishments to Negroes for certain crimes, and laws imposing segregation, including school segregation laws, alike would become unconstitutional. He said:

> "Who gave the Senate the constitutional power to pass that bill guarantying equal rights to all, if it is necessary to amend the organic law in the manner proposed by this joint resolution? … It provides that all persons in the several States shall have equal protection in the right of life, liberty, and property. Now, it is claimed by gentlemen upon the other side of the House that Negroes are citizens of the United States. Suppose that in the State of New Jersey Negroes are citizens, as they are claimed to be by the other side of the House, and they change their residence to the State of South Carolina, if this amendment be passed Congress can pass under it a law compelling South Carolina to grant to Negroes every right accorded to white people there; and as white men there have the right to marry white women, Negroes, under this amendment, would be entitled to the same right; and thus miscegenation and mixture of the races could be authorized in any State, as all citizens under this amendment are entitled to the same privileges and immunities, and the same protection in life, liberty, and property.
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> * * *
>
> "In the State of Pennsylvania there are laws which make a distinction with regard to the schooling of white children and the schooling of black children. It is provided that certain schools shall be designated and set apart for white children, and certain other schools designated and set apart for black children. Under this amendment, Congress would have power to compel the State to provide for white children and black children to attend the same school, upon the principle that all the people … shall have equal protection in all the rights of life, liberty, and property, and

[134] This proposal with some changes was destined to become eventually the second portion of Section 1 of the Fourteenth Amendment. KENDRICK, *op. cit. supra* n. 82, at 61.

[135] Globe, 39th Cong., 1st Sess. 813 (1865–1866).

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> all the privileges and immunities of citizens in the several States."[136]

Representative Bingham, who was contemporaneously amending the original Trumbull Civil Rights Bill because its broad anti-discrimination provisions lacked constitutional foundation, naturally did not dispute Representative Rogers' appraisal of the wide scope of H. R. 63. On the contrary, Representative Bingham two days later indicated his concurrence in that appraisal in the course of a colloquy with Representative Hale.

Representative Hale inquired of Representative Bingham whether his proposed constitutional amendment did not "confer upon Congress a general power of legislation for the purpose of securing to all persons in the several states protection of life, liberty and property, subject only to the qualification that the protection shall be equal." And Representative Bingham replied, "I believe it does …"

In order to nail down the precise source of the proposed grant of power, Representative Hale then asked Representative Bingham to "point me to that clause or part … which contains the doctrine he here announces?" To which the answer was, "The words 'equal protection,' contain it, and nothing else."[137]

The House at the end of February was preoccupied with debating Reconstruction generally as well as the Civil Rights Bill, and it showed itself in no hurry to take up Bingham's proposal, especially since it was obvious that a more comprehensive measure would soon be forthcoming from the Joint Committee. Following the debate on February 28, the House postponed further consideration of the proposed amendment until mid-April.[138] In fact, "H. R. 63" was not to be heard from in that form again. Yet its protective scope presently passed into the more extensive proposal which the Joint Committee brought forward at the end of April and which became, after some changes, the amendment which Congress finally submitted to the states.

During most of March and April, the Joint Committee paid little attention to the question of civil rights. It was concerned, for a time, with the question of the admission of Tennessee; then, for a time, it appears to have been inactive. Not until late April did it resume sessions looking forward to the drafting of a comprehensive constitutional amendment on Reconstruction. On April 21, Stevens offered to the committee a draft of a proposed constitutional amendment, covering civil rights, representation, Negro suffrage and the repudiation of the "rebel" debt.

This proposal became the frame upon which the Fourteenth Amendment was constructed. Most significant from our point of view was section 1:

> "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude."[139]

Section 2 provided that on and after July 4, 1876, no discrimination should be made between persons in the rights of suffrage on account of race, color, or previous condition of servitude. Section 3 provided that until that time, no class of persons against whom a state imposed suffrage discrimination because of race, color or previous condition of servitude should be included in the state's basis of representation. Section 4 invalidated the "rebel" debt. Section 5, which passed substantially intact into the Fourteenth Amendment, provided that Congress was to have the power to enforce the provisions of the amendment by appropriate legislation.[140]

Section 1 was to pass through several critical changes in the next few days. Almost at once, Senator Bingham moved to have the following provision added to section 1:

> "… nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation."[141]

It will be noticed that Bingham's suggestion had within it the substance of the equal protection clause of the Fourteenth Amendment. After some discussion, the committee voted this suggestion down, seven to five.

Other changes followed. After some further discussion, Bingham moved that the following be added as a new section of the amendment:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor

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[136] Cong. Globe, 39th Cong., 1st Sess., App. 134 (1865–1866).
[137] *Id.* at 1094.
[138] *Id.* at 1095.
[139] KENDRICK, *op. cit. supra* n. 82, at 83.
[140] *Ibid.*
[141] *Id.* at 85.

> deny to any person within its jurisdiction the equal protection of the laws."[142]

This was substantially Bingham's earlier amendment, submitted to Congress in February as H. R. 63 with the addition of the equal protection clause. One significant difference lay in the fact that Bingham's new section did not confer power upon Congress to legislate; instead, it made privileges and immunities, due process and equal protection constitutional guarantees against state interference.

### F. The Republican majority in the 39th Congress was determined to prevent future Congresses from diminishing federal protection of these rights

There were two rather obvious reasons for Senator Bingham's last two amendments. First, a number of committee members had earlier expressed some concern over the phraseology of H. R. 63 because it allowed Congress to refuse to enforce the guarantees if it saw fit. The Radical Republicans were openly fearful lest later and more conservative Congresses destroy their work.[143] But direct constitutional guarantees would be beyond the power of Congress to impair or destroy. Second, Bingham was acting with the knowledge that section 5 of the proposed amendment already granted Congress full power to legislate to enforce the guarantees of the amendment. In other words, the Radical Republicans had no thought of stripping Congress of the power to enforce the amendment by adequate legislation. They put the guarantees themselves beyond the reach of a hostile Congress.[144]

The Committee at once adopted Representative Bingham's suggested addition by a vote of ten to two.[145] Four days later, however, on April 25, the Committee on Williams' motion, struck out Bingham's latest suggested revision, only Stevens, Bingham, Morrill, Rogers and Blow voting to retain it.[146] On April 28, in the final stages of committee discussion, Bingham moved to strike out section 1, reading "no discrimination shall be made …" and insert his proposal of April 21 in its place. Although the Committee had voted only three days earlier to kill Bingham's proposal entirely, it now passed his new motion.[147] Thus, Bingham's proposal ultimately became section 1 of the amendment which the Committee now submitted to Congress. As such, and with the addition of the citizenship clause adopted from the Civil Rights Act of 1866, it was to pass into the Fourteenth Amendment as finally accepted by Congress.

On April 30, Representative Stevens introduced the text of the Committee's proposed amendment in the House of Representatives. As presented, the amendment differed in two particulars from the Fourteenth Amendment as finally adopted: the first section as yet did not contain the citizenship clause; and the third section carried a clause for the complete disfranchisement of Confederate supporters until 1870. An accompanying resolution proposed to make successful ratification of the amendment, together with ratification by the several southern states, a condition precedent to the readmission of the southern states to representation in Congress.[148]

On May 8, Stevens opened debate in the House on the proposed amendment. In a sharp speech he emphasized the legislative power of Congress under the proposed amendment:

> "I can hardly believe that any person can be found who will not admit that every one of these provisions [in the first section] is just. They are all asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime, shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man."[149]

The amendment, he added, was made necessary by the "oppressive codes" which had become law in the southern states. "Unless the Constitution should restrain them, those States will all, I fear, keep up this discrimination and crush to death the hated freedmen."[150]

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[142] *Id.* at 87.

[143] See speeches of Representatives Garfield, Broomall, Eldridge, and Stevens and Senator Howard, Cong. Globe, 39th Cong., 1st Sess. 2459, 2462, 2498, 2506, 2896 (1865–1866).

[144] See for example Stevens's explanations on the reasons for reenforcing the Civil Rights Act by constitutional guarantees. *Id.* at 2459.

[145] KENDRICK, *op. cit. supra* n. 82, at 87.

[146] *Id.* at 98.

[147] *Id.* at 106.

[148] Cong. Globe, 39th Cong., 1st Sess. 2459 (1866).

[149] *Ibid.* (italics in original).

[150] *Ibid.*

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Finally, he stated that the purpose of section 1 was to place the Civil Rights Act beyond the reach of a hostile Congress:

> "Some answer, 'Your civil rights bill secures the same things.' That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed … This amendment once adopted cannot be annulled without two-thirds of Congress. That they will hardly get."[151]

There was general agreement among subsequent speakers that one of the purposes of section 1 of the amendment was to reinforce the Civil Rights Act. Enemies of the proposed amendment charged that Radical Republicans, having forced through what was an unconstitutional statute, were now attempting to clear up the constitutional issue by writing the statute into the supreme law.[152]

The Radical Republicans refused to admit that they were attempting to cover up the passage of an unconstitutional statute. Instead, they insisted that one of the purposes of the present proposed amendment was to place the guarantees of the Civil Rights Act beyond attack by future Congresses unfriendly to the rights of the freedman. "The Civil Rights Bill is now part of the law of this land," said Representative James A. Garfield of Ohio in defending the amendment. "But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when that gentleman's party comes into power … For this reason, and not because I believe the civil rights bill to be unconstitutional, I am glad to see that first section here."[153] Representative John Broomall of Ohio, making the same point, said, "If we are already safe with the civil rights bill, it will do no harm to become the more effectually so, and to prevent a mere majority from repealing the law and thus thwarting the will of the loyal people." Broomall pointed out, also, that no less a friend of the Negro than Representative John A. Bingham, had entertained grave doubts as to the constitutionality of the measure, and thought a constitutional amendment necessary. He disagreed, Broomall said, with Bingham's doubts, but he was not so sure of himself that he felt justified "in refusing to place the power to enact the law unmistakably in the Constitution."[154]

Probably other moderate Republicans agreed with Representative Henry J. Raymond of New York who had voted against the Civil Rights bill because he "regarded it as very doubtful, to say the least, whether Congress, under the existing Constitution had any power to enact such a law. . . ." But he nonetheless had heartily favored the principles and objectives of the bill, and because he still favored "securing an equality of rights to all citizens" he would vote "very cheerfully" for the present amendment.[155]

There was little discussion during the debate in the House of the scope of the civil rights which would be protected by the proposed amendment, apparently because both sides realized that debate on the original Civil Rights Bill had exhausted the issue. The indefatigable Rogers, fighting to the last against any attempt to guarantee rights for the Negro, repeatedly reminded Congress that the amendment would sweep the entire range of civil rights under the protection of the Federal Government and so work a revolution in the constitutional system.[156]

Although it was not necessary to answer Rogers, Bingham reminded Congress:

> "The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to

[151] *Ibid.*

[152] Representative William Finck of Ohio asserted, for example, that "all I have to say about this section is, that if it is necessary to adopt it … then the civil rights bill, which the President vetoed, was passed without authority and was clearly unconstitutional." *Id.* at 2461. Representative Benjamin Boyer of Pennsylvania, another enemy of the amendment, after observing that "the first section embodies the principles of the civil rights bill," twitted the Republicans for seeking to rectify their own constitutional error and attacked the present amendment as "objectionable, also, in its phraseology, being open to ambiguity and admitting the conflicting constructions." *Id.* at 2467. Representative Charles Eldridge of Wisconsin asked ironically, "What necessity is there, then, for this amendment if that bill was constitutional at the time of its passage?" *Id.* at 2506.

[153] *Id.* at 2462.

[154] *Id.* at 2498.

[155] *Id.* at 2502.

[156] *Id.* at 2537.

do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.

Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy."[157]

**G. Congress understood that while the Fourteenth Amendment would give authority to Congress to enforce its provisions, the amendment in and of itself would invalidate all class legislation by the states**

On May 10, the House passed the amendment without modification by a vote of 128 to 37. The measure then went to the Senate.[158]

On the same day, Senator Howard opened the debate in the Senate. Speaking for the Joint Committee because of Senator Fessenden's illness, Howard gave a broad interpretation of the first section of the proposed amendment. He emphasized the scope of legislative power which Congress would possess in the enforcement of the Amendment.

"How will it be done under the present amendment? As I have remarked, they are not [at present] powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power be given to Congress to that end. This is done by the fifth section of this amendment which declares that 'the Congress shall have power to enforce by appropriate legislation the provisions of this article.' Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution."[159]

Senator Howard's interpretation of the legislative power of Congress under the proposed amendment makes it obvious that the Joint Committee, in separating the guarantees of civil rights from the congressional power to legislate thereon, had not at all intended to weaken the legislative capacity of Congress to enforce the rights conferred by the amendment. The guarantees, however, no longer depended upon congressional fiat alone for their effectiveness as they had in Bingham's proposed civil rights amendment of January (H. R. 63). But in Howard's view and that of the Committee, this meant merely that future Congresses could not destroy the rights conferred.

Senator Howard then passed to an equally expansive interpretation of the due process and equal protection clauses of the amendment:

"The last two clauses of the first section of the amendment disabled a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law or from denying to him the equal protection of the laws of the State. *This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.* It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man."[160] (Italics added.)

The only class of rights, Howard added, which were not conferred by the first section of the amendment was "the right of suffrage." Howard concluded this analysis by asserting that the entire first section, taken in conjunction with the legislative power of Congress conferred in section five, was of epoch-making importance:

"I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by the States, forever disable everyone of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government."[161]

[157] *Id.* at 2542.
[158] *Id.* at 2545.
[159] *Id.* at 2766.
[160] *Id.* at 2766.
[161] *Id.* at 2766.

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Thus, Senator Howard understood that due process and equal protection would sweep away entirely "all class legislation" in the states. By implication, he subscribed to a "substantive interpretation" of due process of law, thus making due process a limitation upon state governments to subvert civil liberties.

No Senator thereafter challenged these sweeping claims for the efficacy of the civil rights portion of Section 1. Howard's allies subscribed enthusiastically to his interpretation. Senator Luke Poland of Vermont, a staunch Radical Republican, regarded the amendment as necessary to set to rest all questions of congressional competence in enacting the civil rights bill:

> "Congress has already shown its desire and intention to uproot and destroy all such partial State legislation in the passage of what is called the civil rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States. . . ."[162]

Certainly the Conservatives in the Senate agreed altogether with Senator Howard and the other Senate Republicans about the sweeping impact which the prospective amendment would have upon state caste legislation. Senator Thomas Hendricks of Indiana, in condemning the legislative power to enforce the amendment which Congress would acquire from the operation of section 5, said that these words had

> "… such force and scope of meaning as that Congress might invade the jurisdiction of the States, rob them of their reserved rights, and crown the Federal Government with absolute and despotic power. As construed this provision is most dangerous."[163]

The prospective amendment moved forward rapidly in the Senate, with comparatively little debate. The Radical Republicans were confident of their objectives. The conservative Republicans and Democrats despaired of arresting the tide of events. One significant change occurred on May 30 when Howard brought forward the citizenship clause of the Civil Rights Act and successfully moved it as an amendment to section 1. Few Republicans doubted that Congress already had the power to legislate upon the question of citizenship. However, the new provision cleared up a serious hiatus in the original Constitution by settling in unequivocal fashion the definition of national and state citizenship. Needless to say, the new provision, like its predecessor in the Civil Rights Act, specifically endowed Negroes with citizenship and reversed the dictum of the *Dred Scott* case that no Negro could be a citizen of the United States.

The Radical Republicans were well aware that by endowing the Negro with citizenship, they strengthened his claim to the entire scope of civil rights. Bingham had mentioned as much in debate in the House, while Representative Raymond of New York had added that once the Negro became a citizen, it would not be possible in a republican government to deny him any right or to impose upon him any restriction, even including that of suffrage. The force of this stratagem did not escape the Conservatives in the Senate. Senator Garrett Davis of Kentucky had this to say of the citizenship provision of the amendment:

> "The real and only object of the first provision of this section, which the Senate has added to it, is to make Negroes citizens, to prop the civil rights bill, and give them a more plausible, if not a valid, claim to its provisions, and to press them forward to a full community of civil and political rights with the white race, for which its authors are struggling and mean to continue to struggle."[164]

The Senate passed the amendment in June, 33 to 11. Congress formally proposed the amendment on June 13 and it was submitted to the states.

**Congress intended to destroy all class distinctions in law** What, then, may one conclude concerning the intent of Congress with regard to segregation in the framing of the amendment?

Both Senator Howard and Representative Stevens made it definitely clear that the scope of the rights guaranteed by the amendment was much greater than that embraced in the Civil Rights Act.

It is evident that the members of the Joint Committee intended to place all civil rights within the protection of the Federal Government and to deny the states any power to interfere with those rights on the basis of color. The scope of the concept of liberties entertained by the

[162] *Id.* at 2961.
[163] *Id.* at 2940.
[164] *Id.* at App. 240.

Committee was very broad. The breadth of this concept was recognized by this Court in all of its decisions up to *Plessy v. Ferguson.*

In adopting the Civil Rights Act of 1866, Congress had enumerated the rights protected. This was done because Bingham and others doubted that Congress had the power to take all civil liberties under federal protection. Unrestricted by this consideration in drafting a constitutional provision, Congress used broad comprehensive language to define the standards necessary to guarantee complete federal protection. This was promptly recognized by this Court in one of the earliest decisions construing the Amendment when it was held: "The 14th Amendment makes no effort to enumerate the rights it designs to protect. It speaks in general terms, and those are as comprehensive as possible." *Strauder v. West Virginia,* 100 U.S. 303, 310.

Did Congress specifically intend to ban state laws imposing segregation by race? And more specifically, did it intend to prohibit segregation in school systems, even where a state provided a separate but equal system for Negroes? To begin with it must be recognized that the "separate but equal" doctrine was yet to be born. The whole tenor of the dominant argument in Congress was at odds with any governmentally enforced racial segregation as a constitutionally permissible state practice.

Senator Howard, among others, asserted categorically that the effect of the due process and equal protection clauses of the Fourteenth Amendment would be to sweep away entirely all caste legislation in the United States. Certainly a number of Conservatives, notably Representative Rogers of New Jersey, a member of the Joint Committee and Senator Davis of Kentucky, were convinced that the effect of the amendment would be to prohibit entirely all laws classifying or segregating on the basis of race. They believed, and stated, that school laws providing separate systems for whites and Negroes of the kind which existed in Pennsylvania, Ohio and in several of the Johnson–Reconstructed southern states would be made illegal by the amendment.

It is notable that while there were some assurances extended by Radical Republicans to the Moderates and Conservatives as to the scope of the Civil Rights Act of 1866 in this regard, there were no such assurances in the debates on the Fourteenth Amendment.

The Republican majority realized full well that it could not envisage all possible future applications of the amendment to protect civil rights. By separating section 1 of the amendment, which provides an absolute federal constitutional guarantee for those rights, from section 5, which endows Congress with legislative capacity to protect such rights, the framers of the amendment assured continued protection of these rights, by making it possible to win enforcement of them in the courts and eliminated the power of Congress alone to diminish them.

**H. The treatment of public education or segregation in public schools during the 39th Congress must be considered in the light of the status of public education at that time**

Although today, compulsory free public education is universally regarded as a basic, appropriate governmental function, there was no such unanimity existing at the time the Fourteenth Amendment was adopted. Arrayed against those who then visualized education as vital to effective government, there were many who still regarded education as a purely private function.

While it has already been shown that the conception of equal protection of the laws and due process of law, developed by the Abolitionists before the Civil War, was so broad that it would necessarily cover such educational segregation as is now before this Court, compulsory public education at that time was the exception rather than the rule. The conception of universal compulsory free education was not established throughout the states in 1866. The struggle for such education went on through most of the 19th century and, even where accepted in principle in some of the states, it sometimes was not fully put into practice.

Prior to the first quarter of the nineteenth century childhood education was considered an individual private responsibility.[165] The period 1830–1860 was one of marked educational advancement. It has commonly been termed as the era of the Common School Revival, a movement to extend and improve facilities for general education. This movement flourished in New England under the leadership of Horace Mann, Henry Barnard and others. There was a definite tendency throughout the country to shift from

[165] CUBBERLY, A BRIEF HISTORY OF EDUCATION, cc. XXV–XXVI (1920).

private to public support of education and this trend extended to normal schools and facilities for secondary and higher education. Many states, urged on by educational leaders, publicists and statesmen, began making legislative provisions for public education.

On the other hand, these gains have been commonly exaggerated and in some respects misinterpreted. The laws were by no means always carried into effect and the recommendations of the reformers were, in most instances, accepted with great hesitancy.[166] Another authority after appraising public education during the period just prior to the Civil War made the following generalizations:

> "Practically all the states were making substantial progress in the development of systems of public education. (2) At the close of the period no single state can be said to have been providing any large percentage of its children and youth with schools well-supported and well-taught. (3) The facilities for secondary education were by no means as extensive as has commonly been reported. (4) Regional differences in educational development have been exaggerated; and (5) where sectional differences in school support and attendance did exist they appear to have been due more to differentials in urban and rural development than to differences in social attitudes and philosophies."[167]

In general, it should be noted that in New England and in New York the main problem during this period was to improve the educational systems which had already been established and to secure additional support for them. In the Middle Atlantic states the major problem was to establish systems of public schools and to provide effective public education. In the West, the prevailing political and social philosophy required that at least some degree of education be provided to as large an element of the population as possible.

Public education was much slower in getting under way in the South. In most of the southern states, despite some promising beginnings, an educational system was not created until after the close of the Civil War. One historian concluded:

> "… although the 'common school awakening' which took place in the Northern States after Horace Mann began his work in Massachusetts (1837) was felt in some of the Southern States as well, and although some very commendable beginnings had been made in a few of these States before 1860, the establishment of state educational systems in the South was in reality the work of the period following the close of the Civil War. The coming of this conflict, evident for a decade before the storm broke, tended to postpone further educational development."[168]

Public education in the South made progress only after it became acceptable as being compatible with its ideal of a white aristocracy.[169]

Among the factors responsible for this condition were the aristocratic attitude which held that it was not necessary to educate the masses, the reluctance of the people to tax themselves for educational purposes, the marked individualism of the people, born of isolation, and the imperfect state of social and political institutions. Most southerners saw little or no relation between education and life. Consequently, the view prevailed that those who could afford education could indulge themselves in securing it and those who could not afford it lost little, if anything. This southern attitude was aptly summed up fifteen years after the close of the war by the statement of Virginia's Governor F. W. M. Holliday that public schools were "a luxury … to be paid for like any other luxury, by the people who wish their benefits."[170] Education in the South was not so much a process of individual and community improvement as it was an experience that carried with it a presumption of social equality for those who shared it, a view hardly compatible with any notion of universal education which included persons of diverse social and ethnic backgrounds.

Between 1840 and 1860, public education began to advance in the South but its benefits were denied Negroes. It is significant that racist and other types of intolerant legislation increased markedly during this period. While education could be extended to all whites who, for political purposes, belonged to one big happy family, there was nothing in such a conception that suggested that Negroes should be included.[171] The editor of the authoritative antebellum organ of southern opinion, *DeBow's*

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[166] EDWARDS AND RICHEY, THE SCHOOL IN THE SOCIAL ORDER 421 (1947).

[167] *Id.* at 423.

[168] CUBBERLY, PUBLIC EDUCATION IN THE UNITED STATES 251 (1919).

[169] EDWARDS AND RICHEY, *op. cit. supra* n. 166, at 434.

[170] Quoted in WOODWARD, ORIGINS OF THE NEW SOUTH 61 (1951).

[171] DEBOW, THE INTEREST IN SLAVERY OF THE SOUTHERN NON-SLAVEHOLDER 3–12 (1860).

*Review,* summed up the matter of education for Negroes during slavery as follows: "Under the institution of slavery we used to teach them everything nearly except to read."[172]

The framers of the Fourteenth Amendment were familiar with public education, therefore, only as a developing concept. We have already demonstrated that they were determined to eliminate all governmentally imposed racial distinctions—sophisticated as well as simple minded—and expressed their views in the broadest and most conclusive terms. The intentions they expressed were definitely broad enough to proscribe state imposed racial distinctions in public education as they knew it, and the language which they used in the Fourteenth Amendment was broad enough to forever bar racial distinctions in whatever public educational system the states might later develop.

Furthermore, the framers intended that Congress would have the power under section 5 to provide additional sanctions, civil and criminal, against persons who attempted to enforce states statutes made invalid by section 1 of the Amendment. As stated above, Representative Bingham purposely revised an earlier draft of the Amendment so that the prohibitions of section 1 would be self-executing against state statutes repugnant thereto and would be beyond the threat of hostile Congressional action seeking to repeal civil rights legislation. In other words, the judicial power to enforce the prohibitory effect of section 1 was not made dependent upon Congressional action.

Thus, the exercise of this Court's judicial power does not await precise Congressional legislation. This Court has repeatedly declared invalid state statutes which conflicted with section 1 of the Fourteenth Amendment, even though Congress had not acted.[173] For example, there is no federal statute to the effect that a state which permits released time for religious instructions is acting in a way prohibited by the Fourteenth Amendment. This Court, nevertheless, held that such state action conflicted with section 1 of the Fourteenth Amendment and directed the trial court to enjoin the continuance of the proscribed state action. *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203.

Similarly, this Court has acted to redress violations of constitutional rights, even in the absence of specific Congressional statute, in a long series of cases involving the rights of freedom of expression and freedom of worship under the Fourteenth Amendment. See *e.g., De Jonge v. Oregon,* 299 U.S. 353. And this Court has often vindicated the constitutional rights of members of minority groups in the area of public education in the absence of any Congressional statute. *Sweatt v. Painter, supra.*

Indeed, this rule has been applied in all areas in which the prohibitory effect of section 1 has been employed by the Court. *E.g., Miller v. Schoene,* 276 U.S. 272; *McCardle v. Indianapolis Water Co.,* 272 U.S. 400. To now hold Congressional action a condition precedent to judicial action would be to stultify the provisions in the Federal Constitution protecting the rights of minorities. In effect, this Court would be holding that action by a state against an unpopular minority which the Constitution prohibits cannot be judicially restrained unless the unpopular minority convinces a large majority (the whole country as represented in Congress) that a forum in which to ask relief should be provided for the precise protection they seek.

### I. During the congressional debates on proposed legislation which culminated in the Civil Rights Act of 1875 veterans of the thirty-ninth Congress adhered to their conviction that the Fourteenth Amendment had proscribed segregation in public schools

At various times during the 1870's, Congress considered bills for implementing the Fourteenth Amendment as well as the Civil Rights Act of 1866. Debate on these measures was on occasion extremely significant, since it gave members of Congress an opportunity to express themselves as to the meaning and scope of the Amendment. These observations were the more significant in that perhaps two-fifths of the members of both Houses in the early seventies were veterans of the Thirty-ninth Congress

[172] REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess., Pt. IV, 135 (1866).

[173] Of course, Title 8 provides a remedy in law or equity against any person acting under color of State law who deprives anyone within the jurisdiction of the United States of rights secured by the Federal Constitution or laws. It provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 8 U.S.C. § 43.

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which had formulated the Amendment. Moreover, the impact of the Amendment upon segregated schools had by this time moved into the public consciousness so that Congressmen now had an opportunity to say specifically what they thought about the validity under the Amendment of state statutes imposing segregation upon public school systems.

The second session of the Forty-second Congress, which convened in December, 1871, soon found itself involved in a fairly extended discussion of the effect of the Fourteenth Amendment upon racial segregation, particularly in school systems. Early in the session the Senate took under consideration an amnesty bill to restore the political rights of ex-Confederate officials in accordance with the provisions of section 3 of the Amendment. On December 20, Senator Sumner of Massachusetts, now a veteran champion of the rights of the Negro, moved the following as an amendment to the measure under consideration:

> "Section—That all citizens of the United States, without distinction of race, color, or previous condition of servitude, are entitled to the equal and impartial enjoyment of any accommodation, advantage, facility, or privilege furnished by common carriers, whether on land or water; by inn-keepers; by licensed owners, managers, or lessees of theaters or other places of public amusement; by trustees, commissioners, superintendents, teachers, or other officers of common schools and other public institutions of learning, the same being supported or authorized by law … and this right shall not be denied or abridged on any pretense of race, color, or previous condition of servitude."[174]

Here was a provision, which if adopted would commit Congress to the proposition that under the Fourteenth Amendment it could do away entirely with state school statutes providing for segregated school systems. Sumner attacked school segregation at length. The public school, he asserted, "must be open to all or its designation is a misnomer and a mockery. It is not a school for whites or a school for blacks, but a school for all; in other words a common school for all." Segregation he called an "odius discrimination" and an "ill-disguised violation of the principle of Equality."[175]

In the debate that followed, it was apparent that a large majority of the Republicans in the Senate were convinced that Congress quite appropriately might enact such legislation in accordance with section 5 of the Fourteenth Amendment.

Senator Carpenter of Wisconsin, one of the best constitutional lawyers in the Upper House, was doubtful of the constitutionality of Sumner's measure insofar as it applied to churches. But he had no doubt on the authority of Congress to guarantee the right of all persons, regardless of race or color, to attend public schools, to use transportation facilities, and the like, and he offered a resolution of his own to this end.[176] Even the conservative Kentuckian Garrett Davis admitted that there was no question of congressional competence under the Amendment to guarantee these rights as against state action, though he challenged the validity of any statute protecting rights against private discrimination.[177] And Senator Stevenson of Kentucky, another strong enemy of mixed schools, confined his attack to discussion of the evil involved in an attempt to "coerce social equality between the races in public schools, in hotels, in theatres. . . ."; he spoke not at all of constitutional objections.[178]

The real objection to Sumner's measure, however, was not the constitutionality of the measure itself, but the incongruity of its attachment as a rider to an amnesty bill, which required a two-thirds majority of both Houses of Congress. Nonetheless, the Senate, after extended debate, adopted Sumner's amendment, including the provision banning segregated schools, by a vote of 28–28, the ballot of the Vice President breaking the tie.[179] The amnesty measure itself later failed to obtain the necessary two-thirds majority of the Senate.

The impressive Senate support in favor of a bill which would have banned segregation in state school systems alarmed Conservatives in both Houses, who now began to advance, very deliberately, the idea that "separate but equal" facilities would be constitutional under the limitations of the equal protection clause of the Fourteenth Amendment. In the House, a few days after the defeat of the amnesty bill, Representative Frank Hereford of West Virginia

[174] Cong. Globe, 42nd Cong., 2nd Sess. 244 (1871).
[175] *Id.* at 383–384.
[176] *Id.* at 760.
[177] *Id.* at 764.
[178] *Id.* at 913.
[179] *Id.* at 919. The Senate vote on the amnesty bill was 33 to 19 in favor of the measure. *Id.* at 929.

offered the following resolution as an expression of conservative sentiment:

> "*Be it resolved,* That it would be contrary to the Constitution and a tyrannical usurpation of power for Congress to force mixed schools upon the States, and equally unconstitutional and tyrannical for Congress to pass any law interfering with churches, public carriers, or inn-keepers, such subjects of legislation belonging of right to the States respectively."

There was no debate on the Hereford resolution, which was put to an immediate vote and defeated, 85 to 61, 94 not voting.[180]

Later in the session, there was still further debate in the Senate concerning segregated schools. With a second amnesty bill up for consideration, Sumner on May 8 again moved an amendment providing:

> "That no citizen of the United States shall, by reason of race, color, or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility, or privilege furnished by inn-keepers; by common carriers … or … by trustees, commissioners, superintendents, teachers, and other officers of common schools and other public institutions of learning, the same being supported by moneys derived from general taxation, or authorized by law… ."[181]

This proposal led to sharp debate and decided differences of opinion among the Republican majority. Senator Trumbull of Illinois, who was the author of the Civil Rights Act of 1866 and who had become decidedly more conservative in his political outlook since the early Reconstruction era, now insisted that the right to attend public schools was in any event not a civil right, so that Congress could not legislate on the subject under the Fourteenth Amendment. But Senator George Edmunds of Vermont, already known as a distinguished constitutional lawyer and who had entered the Senate in 1866 in time to participate in the debates on the Fourteenth Amendment, dissented sharply, insisting that the right to attend tax-supported public schools was a civil right and therefore subject to regulation by Congress.[182] Senator Morton taking the same view, insisted that "if the right to participate in these schools is to be governed by color, I say that it is a fraud upon those who pay the taxes." And he added that where there are public schools supported by common taxation upon everybody, white and black, then there is a civil right that there shall be equal participation in those schools.

Observing that the Ohio Supreme Court had but lately held constitutional a state statute providing for segregation in public schools, he argued that Congress was entirely competent under the Fourteenth Amendment to prohibit segregated schools.

Senator Arthur Boreman of West Virginia also took it as a matter of course that Congress had the power under the amendment to prohibit separate but equal facilities in school systems; he thought that Congress ought not to force the issue at present:

> "The time will come when … these distinctions will pass away in all the States, when school laws will be passed without this question appearing upon the face of those laws; but it is not so now, and for the present I am willing to allow the laws of the State to remain as they are where they provide schools for both classes."[183]

At the close of the debate, the proponents of segregated school systems tried unsuccessfully to modify the Sumner measure to eliminate the requirement for mixed school systems. Senator Orris Ferry of Connecticut first moved to strike out entirely the provisions of the Sumner amendment which related to public school systems. This motion the Senate defeated 26 to 25.[184] Senator Francis P. Blair of Missouri then offered another amendment to allow "local option" elections within the states on the question of mixed versus segregated schools. Sumner, Edmunds and Howe all strongly condemned this proposal, which the border and southern Senators as strongly commended. The Blair amendment in turn met defeat, 23 to 30.[185] Finally, an amendment to strike out the first five sections of the Sumner measure, thereby completely destroying its effect, was defeated 29 to 29, with the Vice President casting a deciding negative vote.[186] The Senate then formally adopted the Sumner amendment to the amnesty bill, 28 to 28, with the Vice President voting in the affirmative.[187]

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[180] *Id.* at 1582.
[181] *Id.* at 3181.
[182] *Id.* at 3190.
[183] *Id.* at 3195.
[184] *Id.* at 3256, 3258.
[185] *Id.* at 3262.
[186] *Id.* at 3264–3265.
[187] *Id.* at 3268. The amnesty bill itself subsequently received a favorable vote of 32 to 22, thereby failing to receive the necessary two-thirds majority. *Id.* at 3270.

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The conclusion seems inescapable that as of 1872 a substantial majority of the Republican Senators and perhaps half of the Senate at large believed that the prohibitions of the Fourteenth Amendment extended to segregated schools.

The authority of the judiciary to act in this field was specifically recognized and not disputed.[188] A significant number of the Senators in question, among them Edmunds, Howe, Sumner, Conkling, and Morrill, had been in Congress during the debates on the adoption of the Amendment, while Conkling and Morrill had been members of the Joint Committee. And Vice President Henry Wilson, who several times cast a deciding vote in favor of prohibiting segregated schools not only had been in Congress during the debates on the Amendment but had also authored one of the early civil rights bills of the Thirty-ninth Congress.

The first session of the Forty-third Congress, which opened in December, 1873, saw extended discussion of the issue of segregated schools in both Houses. On December 18, Representative Benjamin F. Butler of Massachusetts, chairman of the House Judiciary Committee and long one of the most outspoken leaders of the Radical faction of the Republican party, introduced the following measure from his committee:

> "… whoever, being a corporation or natural person and owner, or in charge of any public inn, or of any place of public amusement or entertainment for which a license from any legal authority is required, or of any line of stage-coaches, railroad, or other means of public carriage of passengers or freight, or of any cemetery or other benevolent institution, or any public school supported in whole or in part at public expense or by endowment for public use, shall make any distinction as to admission or accommodation therein of any citizen of the United States because of race, color, or previous condition of servitude, shall, on conviction thereof, be fined not less than $100 nor more than $5000 for each offense. . . ."[189]

This measure inspired a somewhat bitter two-day debate early in January, 1874, during which the power of Congress to prohibit segregated schools received more attention than any other single issue involved. The most extended defense of the constitutionality of Butler's measure was made by Representative William Lawrence of Ohio, who began with the flat assertion that "Congress has the constitutional power to pass this bill." Denying that civil rights were any longer in the exclusive care of the states, he asserted that since the passage of the Fourteenth Amendment, "if a state permits any inequality in rights to be created or meted out by citizens or corporations enjoying its protection, it denied the equal protection of laws." He then launched into an extended historical analysis of the debates in the Thirty-ninth Congress before and during the passage of the Amendment. He recalled Bingham's statement in opposition to the original extreme language of the Civil Rights bill, in which the Ohioan had said that the proper remedy for state violation of civil rights was to be achieved not by an "arbitrary assumption of power," but "by amending the Constitution of the United States expressly prohibiting the States from any such abuse of power in the future." He quoted Stevens' and Howard's speeches introducing the Amendment in Congress to show the broad purpose which they had represented to be the objectives of the Joint Committee. In some irony, he quoted various conservatives in the House, among them Finck, Boyer and Shanklin, who had asserted again and again that the Amendment would place all civil rights within the protective custody of the federal government.[190] Lawrence's speech was the more impressive in that he was a veteran of the Thirty-ninth Congress who had actively supported both the Civil Rights Act and the passage of the Fourteenth Amendment. Moreover, he was held in great respect in Congress as an able jurist and constitutional lawyer.[191]

The most extended argument in opposition to Lawrence was advanced by Representative Roger Q. Mills of Texas, who presented the contention that civil rights, in spite of the Fourteenth Amendment, were still entrusted entirely to the care of the states. Congress, he thought, had no right to touch the public school system of the several states. "The States," he said, "have … [an] unquestioned right … to establish universities, colleges, academies, and common schools, and govern them according to their own pleasure." He relied upon the narrow interpretation of the "privileges or immunities" clause of the Fourteenth Amendment recently

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[188] *Id.* at 3192.

[189] 2 CONG. REC. 318 (1873–1874).

[190] *Id.* at 412 ff.

[191] 11 DICTIONARY, *op. cit. supra* n. 129, at 52. He was later the author of the statute creating the Department of Justice.

advanced by the Supreme Court in the *Slaughter House Cases* as a new argument in support of his contention. And he finished with the warning, not entirely unheard in the twentieth century, that if Congress passed any such measure as the Butler bill, "the Legislatures of every State where the white people have control will repeal the common-school laws."[192] At the end of debate, Butler's bill was recommitted on the motion of its sponsor, and was not heard of again during the session.

More significant events were occurring in the Senate. On December 2, Sumner had once more presented his now well-known civil rights measure, this time as an independent Senate bill instead of a proposed amendment to an amnesty resolution.[193] This bill finally came up for debate in late April and May, although Sumner himself had died in March. Conkling of New York, Boutwell of Massachusetts, Howe of Wisconsin, Edmunds of Vermont, and Frelinghuysen of New Jersey all gave it very effective support in debate.[194]

In a strong speech, Senator Frelinghuysen pointed out that a variety of conflicting state decisions had introduced some confusion into the question of whether or not state statutes setting up segregated school systems were constitutional under the Amendment. The present measure, he thought, would destroy "injurious agitation" on that subject. There could be no question of the constitutional power of Congress to enact the bill; the "privileges or immunities" and "the equal protection" clauses, in particular, were especially germane to congressional power. And he pointed out that if the present bill became law, it would still be possible to pursue an informal voluntary segregation by the consent of both parents and school boards, where for a time that seemed advisable. But he added that segregated school systems established by law were in complete violation of the whole spirit of the Amendment; separate schools for colored people were inevitably inferior to those for whites. "Sir," he said in conclusion, "if we did not intend to make the colored race full citizens … we should have left them slaves."[195]

Senator Edmunds used both constitutional and pragmatic arguments in support of the bill. "What the Constitution authorizes us to do is to enforce equality," he said, "and … not half-equality, for there is no such thing as half-equality. It is entire equality or none at all." And segregated schools imposed inequality on Negroes. He quoted figures from Georgia school statistics, to demonstrate that although forty-three percent of the children in that state were colored, there were nonetheless only 356 schools for colored children as against 1379 for whites. In the light of this kind of evidence, he thought, the duty of Congress was clear.[196]

Senator Boutwell declared that "opening the public schools of this country to every class and condition of people without distinction of race and color, is security … that … the rising … generations will advance to manhood with the fixed purpose of maintaining these principles [of the Republic]." Like Edmunds, he argued that segregation made either adequate or equal facilities impossible; there was not enough money in the South to support two school systems.[197]

Senator Howe asserted that "… I am of the opinion that the authority of Congress to issue these commands, to enact this bill into law, is as clear, as indisputable as its authority to lay taxes or do any other one thing referred to in the Constitution." Like Frelinghuysen he thought that voluntary segregation might exist in some places for a time without violating the amendment. "Open two school houses wherever you please;" he said, and "furnish in them equal accommodations and equal instruction, and the whites will for a time go by themselves, and the colored children will go by themselves for the same reason, because each will feel more at home by themselves than at present either can feel with the other. . . ." But legally segregated schools, he thought would not in fact be equal, and it was the duty of Congress to prohibit them.[198]

Senator Pease of Mississippi shortly before the bill was passed speaking in favor of the bill said in unequivocal terms:

> "The main objection that has been brought forward by the opponents of this bill is the objection growing out of mixed schools. . . . There has been a great revolution in public sentiment in the South during the last three

[192] 2 Cong. Rec. 383 ff. (1873–1874).

[193] *Id.* at 2.

[194] Boutwell and Conkling, it will be recalled, had both served as members of the Joint Committee.

[195] *Id.* at 3451–3455.

[196] *Id.* at 4173.

[197] *Id.* at 4116.

[198] *Id.* at 4151.

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> or four years, and I believe that to-day a majority of the southern people are in favor of supporting, maintaining, and fostering a system of common education … I believe that the people of the South so fully recognize this, that if this measure shall become a law, there is not a State south of Mason and Dixon's line that will abolish its school system. . . .
>
> "…:" I say that whenever a State shall legislate that the races shall be separated, and that legislation is based upon color or race, there is a distinction made; it is a distinction the intent of which is to foster a concomitant of slavery and to degrade him. The colored man understands and appreciates his former condition; and when laws are passed that say that 'because you are a black man you shall have a separate school,' he looks upon that, and justly, as tending to degrade him. There is no equality in that.
>
> "… because when this question is settled I want every college and every institution of learning in this broad land to be open to every citizen, that there shall be no discrimination."[199]

The opponents of the Sumner bill meantime had become aware of the epoch-making significance of the Supreme Court's decision in the *Slaughter House Cases,* and they leaned very heavily upon Justice Miller's opinion during the debate. Thurman of Ohio analysed the *Slaughter House Cases* at length to prove his former contention that the main body of civil rights was still in the custody of the states and that the present bill was unconstitutional."[200] Senator Henry Cooper of Tennessee, after citing Justice Miller's opinion to make the same constitutional point, asked the Republican majority, "… what good are you to accomplish thus by forcing the mixture of the races in schools?"[201] And Senator Saulsbury of Delaware, who, in 1866 had insisted that if Congress enacted the Fourteenth Amendment it would work an entire revolution in state-federal relations, now argued flatly that the Sumner bill was unconstitutional under Justice Miller's interpretation of the limited scope of the "privileges or immunities" clause of the Amendment.[202]

However, the Senate majority remained firm in its intention to pass the bill with the ban on segregated schools. At the close of debate, Senator Aaron Sargent of California presented an amendment that "nothing herein contained shall be construed to prohibit any State or school district from providing separate schools for persons of different sex or color, where such separate schools are equal in all respects to others of the same grade established by such authority, and supported by an equal *pro rata* expenditure of school funds." This amendment the Senate promptly defeated, 21 to 26.[203] Senator McCreery then moved an amendment providing that "nothing herein contained shall be so construed as to apply to schools already established." This, too, met defeat, mustering but eleven "ayes" in its support.[204] Immediately after this, the Senate, on May 22, passed the Sumner bill, by a vote of 29 to 16, and sent it to the House.[205]

Again the conclusion with respect to congressional intent as regards segregated schools seems fairly clear: a majority of the Senate in the Forty-third Congress, under control of leaders, a number of whom had supported the passage of the Fourteenth Amendment eight years earlier, thought Congress had the constitutional power to ban segregated schools and that it would be good national policy to do so.[206]

Congress adjourned before the House could take action on the Sumner bill, so that the measure carried over to the second session of the Congress, beginning in December, 1874. And now occurred a curious anticlimax with respect to the prohibition of segregated schools; Congress speedily enacted what virtually amounted to the Sumner bill of 1874 into law, but with the provision banning segregated schools eliminated from the bill.

The critical action occurred in the House of Representatives, where Butler on December 16 introduced what amounted to a somewhat modified draft of the measure passed by the Senate the previous spring. The constitutional debates produced little that was new. It was apparent that Congress by virtue of Section 5 had the constitutional power to take all civil liberties under its protection. Representative

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[199] *Id.* at 4153–4154.
[200] *Id.* at 4089.
[201] *Id.* at 4154.
[202] *Id.* at 4159.
[203] *Id.* at 4167.
[204] *Id.* at 4171.
[205] *Id.* at 4176.
[206] Flack long ago reached a similar conclusion, that the great majority in Congress who voted for Sumner's bill "fully believed they had the power to pass it." "Of all the evidence," he said, "only a very minor part of it against this conclusion." FLACK, *op. cit. supra* n. 79, at 271.

Robert Hale of New York, a veteran of the Thirty-ninth Congress, twitted Finck of Ohio for his fallible memory in forgetting so conveniently that in 1866, he had solemnly warned that the impending amendment would place all civil rights under federal protection.[207]

Whatever may be said about the quantum or quality of Congressional debates on one side or the other no one can deny that the 39th Congress opened with a determination on the part of the Radical Republican majority to deprive the states of all power to maintain racial distinctions in governmental functions. No one can gainsay that this determination permeated the 39th Congress and continued through the passage adoption of the Fourteenth Amendment. The debates and all of the related materials show conclusively that the Fourteenth Amendment effectively gave constitutional sanction to the principle that states are thereby deprived of all power to enforce racial distinctions in governmental functions including public schools.

## II. THERE IS CONVINCING EVIDENCE THAT THE STATE LEGISLATURES AND CONVENTIONS WHICH RATIFIED THE FOURTEENTH AMENDMENT CONTEMPLATED AND UNDERSTOOD THAT IT PROHIBITED STATE LEGISLATION WHICH WOULD REQUIRE RACIAL SEGREGATION IN PUBLIC SCHOOLS

The Fourteenth Amendment was submitted to the states for consideration on June 16, 1866. 14 Stat. 358. It was deliberated by thirty-seven states and ratified by thirty-three.[208] We urge that the evidence with respect to the states' understanding indicates that three-fourths of the states understood and contemplated the Amendment to forbid legislation compelling the assignment of white and Negro youth to separate schools.

The evidence which compels this conclusion is adduced from governors' messages, reports of the legislative committees on federal relations and entries in the journals of the legislatures. At that time, the legislatures, almost without exception, kept no verbatim record of debates and speeches; and the journals merely noted motions and votes. There are, however, newspaper summaries of some speeches and proceedings. But much of the evidence from these sources is inadequate.

More significant is the modifications which the states made in their schools' laws. For if it was understood in the legislatures, which considered the proposed Amendment, that ratification would perforce forbid compulsory segregated schools, it seems certain that the legislatures would have apprehended its effect upon the state's constitutional or statutory provisions for public schools. If, for example, a state required or authorized segregated schools under existing law, presumably the legislature would not knowingly adopt the Amendment without giving some thought to its implications. After adoption, it would be expected that measures would be taken to conform the school laws to the new constitutional mandate. If, however, a state's school laws and practices already conformed to the understanding that the Fourteenth Amendment forbade segregated schools, it is probable that its legislature would not have objected to the Amendment on this question and would afterwards either retain or reinforce its school laws. On the other hand, if there was an authorization or requirement of segregation in a state's school laws, and, after ratification, the legislature took no action to end this disparity, undoubtedly it would appear that this state did not understand the Amendment to have the effect which Appellants urge. Yet, if a state under these same conditions had rejected the Amendment, it would suggest that the Amendment's impact upon the school segregation law was a controlling factor. We submit, the new constitutional and statutory provisions enacted with respect to public schools during the critical period, i.e., from 1866, the year the Amendment was submitted, until several years following adoption, constitute strong evidence on the question of the understanding of the Amendment in the state legislatures.

Then, too, we note that the Fourteenth Amendment was designed particularly as a limitation upon the late Confederate States.

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[207] 3 Cong. Rec. 979, 980 (1875).

[208] The ratifying states included twenty free or non-slaveholding states (Connecticut, New Hampshire, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, Kansas, Maine, Nevada, Indiana, Minnesota, Rhode Island, Wisconsin, Pennsylvania, Michigan, Massachusetts, Nebraska and Iowa), two former slave-holding but loyal states (West Virginia and Missouri), and the eleven former slaveholding states which had seceded (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia). Delaware, Kentucky and Maryland, three former slave-holding but non-seceding states, expressly rejected the Amendment. California, probably because the control of its legislature differed in each house, was unable to take any definitive action.

*Slaughter House Cases,* 16 Wall. 36. Each of them, except Tennessee, was required to endorse the Amendment and the price of readmission also required each to demonstrate that it "modified its constitution and laws in conformity therewith." 14 Stat. 428 (Act of March 2, 1867). In this connection, Representative Boutwell significantly declared:[209]

> "We are engaged in the great work of reconstructing this Government, and I suppose if we are committed to anything, it is this: that in the ten States not now represented there shall hereafter be no distinction on account of race or color."

These new constitutions, and the proposals and debates of the conventions which framed them, then are of utmost significance. Certainly, they had to measure up to the requirements of the Fourteenth Amendment and, therefore, their educational provisions apparently reflect the understanding of the draftsmen as to the Amendment's effect upon compulsory public school segregation. Similarly, since the constitutions of these states, were subject to the scrutiny of Congress, an additional insight into the understanding of Congress is provided. For it would hardly be possible to maintain that Congress contemplated the Fourteenth Amendment as a prohibition on compulsory segregated schools if it had approved a constitution having a provision inconsistent with this proposition.

We now turn to the legislative history of the Fourteenth Amendment in the states. The proceedings in the several states shall be taken up in turn. Because of the geographic origin of certain of the instant cases and the significance of the contemporary understanding and contemplation of the effect of the Amendment upon Southern institutions, we will first treat the evidence from the states whose readmission to the Union was conditioned upon their conformity with the Amendment.

### A. The eleven states seeking readmission understood that the Fourteenth Amendment stripped them of power to maintain segregated schools

Subsequent to the proclamation of the Thirteenth Amendment the South sought to define the relations between the new freedmen and white men in a manner which retained most of the taint of the former master-slave relationship. The ante-bellum constitutions remained inviolate although prohibitions against slavery were added. Laws were passed which restricted Negroes in their freedom of movement, employment, and opportunities for learning. *Slaughter House Cases,* 16 Wall. 36, 71–72; *Strauder* v. *West Virginia,* 100 U.S. 303, 306–307. In Arkansas[210] and Florida,[211] the so-called Black Codes required separate schools for the children of the two races.

After March 2, 1867, the date of the First Reconstruction Act, 14 Stat. 428, the South was obliged to redefine the status of the freedmen in conformity with their understanding of the Fourteenth Amendment. New constitutions were adopted which without exception were free of any requirement or specific authorization of segregated schools. It is also significant that in almost all of these constitutional conventions and legislatures, the issue of segregated schools was specifically raised and rejected. And no law compelling segregated schools was enacted in any state until after it had been readmitted.

**Arkansas** The first of these states to be readmitted was Arkansas. 15 Stat. 72 (Act of June 22, 1868). The constitution which it submitted to Congress had not one reference to race; the education article merely obligated the general assembly to "establish and maintain a system of free schools for all persons" of school age.[212] It is reported that this article was adopted to nullify the segregated school law passed by the legislature earlier in 1867.[213] Its adoption had been generally opposed in the Convention on the ground that it would "establish schools in which there would be 'indiscriminate social intercourse between whites and blacks.'"[214] The electorate was warned that this constitution would "force children into mixed schools."[215] But the new constitution was adopted and proclaimed law on April 1, 1868.[216]

The general assembly convened on April 3, and ratified the Fourteenth Amendment on April 6, 1868.[217] It then proceeded to repeal the former school statute and a new school law was proposed

[209] Cong. Globe, 39th Cong., 2nd Sess. 472 (1867).
[210] Ark. Acts 1866–67 p. 100.
[211] Cong. Globe, 39th Cong., 1st Sess. 217 (1866).
[212] ARK. CONST. 1868, Art. IX, § 1.
[213] STAPLES, RECONSTRUCTION IN ARKANSAS 28 (1923).
[214] *Id.* at 247.
[215] Daily Arkansas Gazette, March 19, 1868; *Id.,* March 15, 1868.
[216] *Id.,* April 2, 1868.
[217] Ark. Sen. J., 17th Sess. 19–21 (1869).

whereby taxes were to be assessed to support a system of common schools for the education of all children. This law was interpreted as establishing "a system of schools where the two races are blended together."[218] And it was attacked because it granted white parents "no option to their children … but to send them to the negro schools … unless, as is now rarely the case, they are able to give their children education in other schools."[219]

These provisions for public schools were included in the legislative record which Arkansas submitted to the scrutiny of Congress. Whereupon, Arkansas was re-admitted on June 22, 1868. 15 Stat. 72. One month later, but after readmission, the legislature amended the public school statute and directed the Board of Education to "make the necessary provisions for establishing separate schools for white and colored children and youths. . . ."[220]

**North Carolina, South Carolina, Louisiana, Georgia, Alabama and Florida** The North Carolina, South Carolina, Louisiana, Georgia, Alabama and Florida modifications in their constitutions and laws were approved by Congress in the Omnibus Act of June 25, 1868 and Congress authorized readmittance effective on the date each ratified the Amendment. 15 Stat. 73. The constitution which Florida offered for congressional review imposed a specific duty on the state to provide "for the education of all children residing within its borders without distinction or preference."[221] The legislature ratified the Amendment on June 9, 1868 and when it next convened passed a law to maintain "a uniform system of instruction, free to all youth of six to twenty-one years."[222] It is agreed that this law was not designed to foster segregated schools and by its operation "mixed schools" were authorized or required.[223]

Several years later the Florida Legislature passed a sweeping law which forbade any racial distinction in the full and equal enjoyment of public schools, conveyances, accommodations and amusements.[224] The first compulsory school segregation provision did not appear until over twenty years after readmission.[225]

In the North Carolina Constitution of 1868, the education article called for the general assembly to maintain "a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and sixteen."[226] Furthermore, the general assembly was "empowered to enact that every child of sufficient mental and physical ability, shall attend the public schools" unless otherwise educated.[227] It is reported that the Constitutional Convention refused by a vote of 86 to 11 to adopt a section which provided that "The General Assembly shall provide separate and distinct schools for the black children of the state, from those provided for white children."[228] The adopted article also survived amendments which would have permitted separate schools "for any class of the population" providing each class shared equally in the school fund.[229] Some proponents of the education article said that it did not force racial commingling but they frankly admitted that it did not prevent it and contended that separate schools, if established, should only develop out of the mutual agreement of parents rather than through legislation.[230] Available contemporary comment upon the education article of the 1868 constitution uniformly agreed that it either authorized or required mixed schools.[231]

The 1868 Constitution, with this education article, was submitted to Congress and treated as being in conformity with the Amendment. North Carolina's readmission was thus assured contingent upon its ratification of the Fourteenth Amendment.

The state legislature convened on July 1, 1868 and ratified the Amendment on July 4th.[232]

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[218] *Ibid.*

[219] Daily Arkansas Gazette, April 10, 1868.

[220] Act of July 23, 1868 as amended by Ark. Acts 1873, p. 42. See Ark. Dig. Stats., c. 120 § 5513 (1874).

[221] FLA. CONST. 1868, Art. VIII § 1.

[222] Fla. Laws 1869, Act of Jan. 30, 1869.

[223] KNIGHT, PUBLIC EDUCATION IN THE SOUTH 306 (1922) EATON, "SPECIAL REPORT TO THE UNITED STATES COMMISSION OF EDUCATION", REP. U.S. COMMR. EDUC. TO SECY. INT. (1871).

[224] Fla. Laws 1873, c. 1947.

[225] FLA. CONST. 1885, Art. XII § 2.

[226] N. C. CONST. 1868, Art. IX § 2.

[227] *Id.,* § 17.

[228] Motion of Mr. Durham reported in KNIGHT, INFLUENCE OF RECONSTRUCTION ON EDUCATION 22 (1913).

[229] Motions of Messrs. Graham and Tourgee reported in *Id.* at 22.

[230] NOBLE, A HISTORY OF PUBLIC SCHOOLS IN NORTH CAROLINA 340–41 (1930).

[231] Wilmington Morning Star, March 27, 1868; >*id.,* March 28, 1868, p. 2; Charlotte Western Democrat, March 24, 1868; *id.,* April 17, 1868, p. 2; Greensboro Times, April 2, 1868, p. 3; *id.,* April 16, 1868, p. 1; Fayetteville News, April 14, 1868, p. 2; *id.,* June 2, 1868, p. 1.

[232] N. C. Laws 1867, ch. CLXXXIV, Sec. 50.

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Three days later the lower house adopted a resolution providing for the establishment of separate schools, but it failed to win support in the upper house which successfully carried a resolution instructing the Board of Education to prepare a code for the maintenance of the system of free public schools contemplated in the constitution.[233] Significantly, this measure made no reference to race. It was enrolled on July 28, 1868.[234]

At the next regular session after readmission, the legislature passed a school law which required separate schools.[235] However doubtful the validity of this law was to some as late as 1870,[236] the state constitution as amended in 1872, settled the issue by specifically requiring racial separation in education.[237]

South Carolina and Louisiana both ratified the Amendment on July 9, 1868 and were readmitted as of that date pursuant to the Omnibus Act. 15 Stat. 73. The educational articles in their 1868 constitutions were of the same cloth. The Louisiana article flatly said: "There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana."[238] South Carolina's constitution provided that: "All the public schools, colleges and universities of this State, supported in whole or in part by the public school fund, shall be free and open to all the children and youths of the State, without regard to race or color."[239] In addition to this, the South Carolina Constitution required the legislature to pass a compulsory school law after it organized facilities for the education of all children.[240] The 1868 constitutions of both states also declared that all citizens, without regard to race or color, were entitled to equal civil and political rights.[241]

The proponents of the education articles in the Louisiana and South Carolina conventions defended the provisions prohibiting segregation by force of law in public schools as an incident of equal justice or equal benefits in return for equal burdens; and they overwhelmingly considered compulsory segregation to be a hostile distinction based on race and previous condition.[242] The chairman of the Education Committee of the South Carolina Convention, defending the proposed education article, explained:[243]

> "The whole measure of Reconstruction is antagonistic to the wishes of the people of the State, and this section is a legitimate portion of that scheme. It secures to every man in this State full political and civil equality, and I hope members will not commit so suicidal an act as to oppose the adoption of this section."

Continuing, he explained:[244]

> "*We only compel parents to send their children to some school, not that they shall send them with the colored children; we simply give those colored children who desire to go to white schools, the privilege to do so.*" (Emphasis supplied.)

After the Louisiana and South Carolina constitutions were approved by Congress, the South Carolina Legislature, in a special session, ratified the Amendment and temporarily organized the school system in conformity with the education article, despite Governor Scott's plea for a law which would require racial separation in schools as a preventive against "educational miscegenation."[245] At the next regular session, the school system was permanently organized, and a law was passed forbidding officials of the state university to "make any distinction in the admission of students or management of the university on account of race, color or creed."[246]

The Louisiana legislature acted with similar celerity and consistency. It assembled on June 29, 1868, ratified the Amendment on July 9, 1868 and enacted laws conforming to the constitutional mandate against segregated schools.[247] At its next session, it supplemented the school laws by imposing penal and civil sanctions against any teacher refusing to accept a pupil of either race.[248] Subsequent laws forbade racial

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[233] NOBLE, *op. cit. supra* n. 230, at 297, 299.

[234] See List of Public Acts and Resolutions Passed by the General Assembly of North Carolina, Spec. Sess. of July, 1868.

[235] N. C. Laws 1868–69, c. CLXXXIV, § 50.

[236] NOBLE, *op. cit. supra* n. 230, at 325.

[237] Art. IX, § 2.

[238] LA. CONST. 1868, Title VII, Art. 135.

[239] S. C. CONST. 1868, Art. XX § 10.

[240] *Id.,* § 4.

[241] *Id.,* Art. I, § 7; LA. CONST. 1868, Title I, Art 2.

[242] Proceedings of the South Carolina Constitutional Convention of 1868, Held at Charleston, S. C., Beginning January 14th and Ending March 17th, 1868, pp. 654–900 (1868); Official Journal of the Proceedings for Framing a Constitution for Louisiana, 1867–1868, *passim* (1868).

[243] Proceedings, *op. cit. supra* n. 242, at 899.

[244] *Id.* at 690.

[245] S. C. House J., Spec. Sess., p. 51 *et seq.* (1868). See Charleston Daily News, July 10, 1868.

[246] S. C. Acts 1868–69, pp. 203–204.

[247] DABNEY, UNIVERSAL EDUCATION IN THE SOUTH 370 (1936).

[248] FAY, "THE HISTORY OF EDUCATION IN LOUISIANA", 1 U.S. Bu. Educ. Cir. No. 1, p. 101 (1898).

distinctions at a state institution for the instruction of the blind, prohibited racial separation on common carriers, and provided that there should be no racial discrimination in admission, management and discipline at an agricultural and mechanical college.[249]

More than a quarter-century elapsed before South Carolina and Louisiana in 1895 and 1898, respectively, changed these laws to require racial segregation in public education.[250]

The Alabama Constitutional Convention assembled on November 4, 1867, but the education article was not adopted until December 5th, the final day of the session. What emerged was borrowed directly from the Iowa Constitution of 1857, in most particulars, plus the language of a statute passed by the 1865–66 Iowa legislature to specifically bar segregation in schools.[251] This anti-segregation article survived two attempts to introduce provisos specifically requiring the establishment of separate schools.[252]

Congress found that Alabama had conformed its constitution with the Amendment and considered the state qualified for readmission as soon as it ratified the Fourteenth Amendment. On July 13th, 1868, the General Assembly fulfilled the final requirement. Thereafter, on August 11th, the State Board of Education, acting under the legislative powers conferred upon it in the constitution, passed a regulation which made it unlawful "to unite in one school both colored and white children, unless it be by the unanimous consent of the parents and guardians of such children … "[253] But the significant point again is that this was done only after readmission.

Georgia, like most of the South, had no public school system prior to Reconstruction. In fact, no reference to public schools appears in either the ante-bellum Georgia Constitution or the Constitution of 1865 which was substantially a reenactment of the former.[254]

The Constitutional Convention of 1867–68, however, rewrote the basic state document and the committee on education reported a proposal to establish a thorough system of public education "without partiality or distinction."[255] During the drafting and consideration of the proposed education article, several efforts to include provisions requiring segregated schools were defeated.[256] The Convention adopted an article which directed the General Assembly to "provide a thorough system of general education to be forever free to all children of the State. . . ."[257]

After this constitution was approved by Congress, the legislature ratified the Fourteenth Amendment on July 21, 1868 and Georgia apparently qualified for readmission. But the General Assembly forcibly expelled its Negro complement at this session on the ground that their color made them ineligible to hold office. This action prompted Congress to refuse to seat the Georgia congressional delegation.[258] The General Assembly then reconvened on January 10, 1870, re-seated its Negro members, ratified the Fourteenth Amendment again, and expunged the word "white" from all state laws.[259] The conduct of this legislature satisfied Congress and Georgia was readmitted to the Union on July 15, 1870. 16 Stat. 363.

Three months later, on October 13, 1870, the state legislature passed a public school act which in section 32 established a system of segregated schools.[260] The state constitution was amended in 1877 and validated this legislation by an express requirement for racial separation in public schools.[261]

**Texas** In Texas a Constitutional Convention met in June 1868 to frame the constitution under which it was subsequently readmitted. Drafted to secure the approval of Congress,[262] it required

[249] La. Acts 1869, p. 37; La. Laws 1871, pp. 208–10; La. Laws 1875, pp. 50–52.

[250] S. C. CONST. 1895, Art. XI § 7; LA. CONST. 1898, Art. 248.

[251] Compare ALA. CONST. 1867, Art. XI with IOWA CONST. 1857, Art. IX and Iowa Laws 1865–66, p. 158.

[252] Official Journal of the Constitutional Convention of the State of Alabama 1867–68, pp. 237, 242 (1869).

[253] Ala. Laws 1868, App., Acts Ala. Bd. of Educ. It would appear that had this law been tested, application of the rule applicable to borrowed statutes would have invalidated it inasmuch as a similar statute in Iowa had been struck down on the basis of a less stringent constitutional provision. Clark v. Board of School Directors, 24 Iowa 266 (1868).

[254] 2 Thorpe, Federal and State Constitutions 765 *et seq.* (1909).

[255] Journal of the Constitutional Convention of Georgia, 1867–68, p. 151 (1868).

[256] *Id.,* at 69, 151, 479, 558. See ORR, HISTORY OF EDUCATION IN GEORGIA 187 (1950).

[257] GA. CONST. 1868, Art. VI.

[258] ORR, *op. cit. supra* n. 256, at 195–196.

[259] Ga. Sen. J. Pt. II, p. 289 (1870); Ga. House J. pp. 307, 1065 (1870).

[260] Ga. Laws 1870, p. 57.

[261] GA. CONST. 1877, Art. VIII § 1.

[262] TEX. CONST. 1871, Art. I § 1.

the legislature to maintain "a system of public free schools, for the gratuitous instruction of all the inhabitants of this State of school age."[263] This constitution was accepted at the elections in 1869, and the legislature, without discussion, ratified the three Civil War Amendments on February 18, 1870.[264] Texas was readmitted on March 30, 1870, 16 Stat. 80, and the legislature drafted a public school law which provided that local boards of education, "when in their opinion the harmony and success of the schools require it, … *may* make any separation of the students or schools necessary to secure success in operation . . . ."[265] Contemporary opinion was that this grant of discretion to school boards was a restrained effort to achieve racial separation without offending Congress and that the Fourteenth Amendment forbade the requirement of separate schools although it did not compel mixed schools.[266] It was not until 1876, when Texas adopted a new constitution, that racial separation in schools was expressly required by law.[267]

**Virginia** Virginia submitted to Congress a constitution which contained no reference to race or racial separation in public schools.[268] In the Constitutional Convention, the issue of segregation was introduced when the report of the committee on education was being considered. First, an amendment was proposed to provide "that in no case shall white and colored children be taught in the same school."[269] This amendment was defeated.[270] Subsequently, a proposal to add an independent section providing for the establishment of segregated schools met a like fate.[271] A provision was also submitted to require that public schools be open to all classes without distinction and that the legislature be denied the power to make any law which would admit of any invidious distinctions.[272] This proposal and a substitute to the same effect were also defeated.[273] Opponents of the proposals to prohibit segregated schools explained the failure of passage, not on the grounds of fundamental objection, but because it was feared that the adoption of such an article in the constitution would doom its chance of ratification.[274] Thus, an article merely directing the general assembly to provide for a uniform system of public free schools was adopted "rather than risk having the Congress or Union Leagues force an obnoxious law on them."[275]

After the election of 1869, at which the constitution was adopted, the General Assembly convened and ratified the Fourteenth Amendment on October 8, 1869. This session passed no school laws and the establishment of the public school system was deferred until after readmission. Full statehood status was regained on January 26, 1870. 16 Stat. 62. Six months later, on June 11th, the General Assembly established a "uniform system of schools" in which separate schools were required.[276] A specific constitutional mandate for segregated[277] schools, however, did not appear until 1902.

**Mississippi** Mississippi followed the general pattern of the former seceded states. The Constitutional Convention of 1868, adopted an education article which made no mention of race or racial separation.[278] At least two unsuccessful attempts were also made in the Convention to require segregated schools.[279]

While the convention journal does not specifically indicate that the Fourteenth Amendment was raised as an objection to segregated schools, the convention had passed a resolution which declared that:

> "… the paramount political object … is the restoration or reconstruction of our government upon a truly loyal and national basis, or a basis which will secure liberty and equality before the law, to all men, regardless of race, color or previous conditions."[280]

The convention also framed a Bill of Rights which required all public conveyances to accord

[263] *Id.* Art. IX §§ 1–4.
[264] Daily State Journal, February 20, 1870.
[265] 6 Tex. Laws 1866–71, p. 288. (Emphasis added.)
[266] Flake's Daily Bulletin, March 3, 1870; *Id.* March 13, 1870.
[267] TEX. CONST. 1876, Art. VII § 7; 8 TEX. Laws 1873–79 CXX § 54.
[268] VA. CONST. 1868, Art. VIII § 3.
[269] JOURNAL OF THE VIRGINIA CONSTITUTIONAL CON-VENTION, 1867–68, p. 299 (1868).
[270] *Id.* at 300: Richmond Enquirer, March 31, 1868.
[271] Journal, *op cit. supra* n. 269, at 301.
[272] *Id.,* at 333.
[273] *Id.,* at 335–40.
[274] ADDRESS OF THE CONSERVATIVE MEMBERS OF THE LATE STATE CONVENTION TO THE VOTERS OF VIRGINIA (1868).
[275] DABNEY, UNIVERSAL EDUCATION IN THE SOUTH 143–44 (1936).
[276] Va. Acts 1869–70, c. 259 § 47, p. 402.
[277] VA. CONST. 1902, Art. IX § 140.
[278] MISS. CONST. 1868, Art. VIII.
[279] JOURNAL OF THE MISSISSIPPI CONSTITUTIONAL CONVENTION OF 1868, pp. 316–18, 479–80 (1868).
[280] *Id.* at 123.

all persons the same rights,[281] and it refused to adopt an article forbidding intermarriage.[282]

The next legislature convened in January, 1870, ratified the Fourteenth and Fifteenth Amendments, repealed all laws relative to Negroes in the Code of 1857, as amended by the Black Code of 1865, and indicated that it intended to remove all laws "which in any manner recognize any natural difference or distinction between citizens and inhabitants of the state."[283]

The Constitution and actions of the legislature proved acceptable to Congress, and Mississippi was restored to the Union on February 23, 1870. 16 Stat. 77. It was not until 1878 that Mississippi passed a law requiring segregated schools;[284] and it was still later when the Constitution was altered to reiterate this requirement.[285]

**Tennessee** Tennessee, although a member state in the late Confederacy, was not subjected to the requirements of the First Reconstruction Act, inasmuch as it had promptly ratified the Fourteenth Amendment and had been readmitted prior to the passage of that Act. Nevertheless, this state likewise reentered the Union with compulsory racial segregation absent from its constitution and statutory provisions on public schools. Readmission was under the Constitution of 1834, inasmuch as the Constitutional Convention of 1865 merely amended it to abrogate slavery and authorize the general assembly to determine the qualifications of the exercise of the elective franchise.[286] The education article in this constitution merely required the legislature to encourage and support common schools "for the benefit of all the people" in the state.[287] The first law providing for tax supported schools, on its face, also made no racial distinction.[288] The next law, however, prohibited compulsory integrated schools.[289] Contemporary federal authorities noted that ante-bellum practice apparently had restricted the benefits of the school system to white children; but approved these provisions because, in sum, they provided a sufficient guarantee for the support and enjoyment of common schools for the equal benefit of all the people without distinction on the basis of race or color.[290]

The Governor convened the legislature in special session on July 4, 1866 to consider the Fourteenth Amendment. In urging its adoption, he summarized Section 1, and said that its practical effect was to protect the civil rights of Negroes and to "prevent unjust and oppressive discrimination" in the exercise of these citizenship rights.[291] A joint resolution to ratify was introduced in the upper house; and a resolution to amend it with a proviso that the proposed Amendment should not be construed to confer upon a person of color rights to vote, to hold office, to sit on juries or to intermarry with whites or to "prevent any state from enacting and enforcing such laws" was voted down.[292] Then the Senate approved the joint resolution and the House concurred.[293]

After ratification, a group in the lower house formally protested its confirmation of the Amendment on the ground that it invaded state rights "and obliterates all distinctions in regard to races, except Indians not taxed."[294] A similar protest was filed in the upper house.[295] Such of the debates as were reported in the press indicate that the legislators understood the Amendment to force absolute equality[296] and that under the inhibitions of Section 1 "distinctions in schools cannot be made, and the same privileges the one has cannot be denied the other. . . ."[297]

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[281] *Id.* at 47; MISS. CONST. 1868, Art. I, § 24.

[282] JOURNAL OF THE MISSISSIPPI CONSTITUTIONAL CONVENTION OF 1868, pp. 199, 212 (1868).

[283] GARNER, RECONSTRUCTION IN MISSISSIPPI 285 (1901).

[284] Miss. Laws 1878, p. 103.

[285] MISS. CONST. 1890, Art. IX, § 2.

[286] TENN. CONST. 1834 as amended by §§ 1 and 9 of "Schedule" ratified February 22, 1865. In conformity with the Schedule's directive the legislature enacted that Negroes could exercise and pursue all types of employment and business under the laws applicable to white persons, Tenn. Acts. 1865–66, c. 15; that Negroes were competent witnesses, *Id.,* c. 18; and that persons of color henceforth had the same rights in courts, contracts and property as white persons except that Negroes could not serve on juries and that this act "shall not be construed as to require the education of white and colored children in the same school." *Id.,* c. 40, § 4.

[287] TENN. CONST. 1834, Art. XI § 10.

[288] Tenn. Acts. 1853–54, c. 81.

[289] Tenn. Acts. 1865–66, c. 40, § 4.

[290] Rep. U.S. Commr. Educ. 1867–68, 101 (18 ).

[291] Tenn. House J., Called Sess. 3, 26–27 (1866); Tenn. Sen. Called Sess. 8 (1866).

[292] Tenn. Sen. J., Called Sess. 26 (1866).

[293] *Id.* at p. 24; Tenn. House J., Called Sess. 24 (1866).

[294] Tenn. House J., Called Sess. 38 (1866).

[295] Tenn. Sen. J., Called Sess. 41–42 (1866).

[296] Nashville Dispatch, July 12, 1866.

[297] *Id.,* July 25, 1866.

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Tennessee was readmitted July 24, 1866. 15 Stat. 708–711. After readmission, a school law was passed on March 5, 1867 whereby boards of education were "authorized and required to establish … special schools for colored children, when the whole number by enumeration exceeds twenty-five."[298] It also provided for the discontinuance of these separate schools when the enrollment fell below fifteen. The law, however, did not forbid non-segregated schools. But it was repealed in 1869 and replaced with a requirement that racial separation in schools be observed without exception.[299] Finally, the constitution was amended in 1870 to secure the same result.[300]

In summary, therefore, as to these eleven states the evidence clearly reveals that the Fourteenth Amendment was understood as prohibiting color distinctions in public schools.

**B. The majority of the twenty-two union states ratifying the 14th Amendment understood that it forbade compulsory segregation in public schools.**

Other than the states already treated, twenty-six Union States considered the Amendment. Twenty-two of them ratified it. The evidence adduced here is of a somewhat less uniform character than that from the states which formed the late Confederacy for the simple reason that the legislatures in the North were unfettered by any congressional surveillance, and they did not experience the imperative necessity of re-examining their constitutions and laws at the time the proposed Fourteenth Amendment was considered by them. Thus, it is to be expected that some of these legislatures deferred attuning their school laws with the keynote of the Amendment until several years after it had become the law of the land. In other states, the legislatures adjusted their school laws almost simultaneously with their ratification of the Amendment. Still others, because existing laws and practices conformed with their basic understanding with respect to the impact of the Amendment, were not required to act. In the end, nevertheless, we submit that the overwhelming majority of the Union States ratified or did not ratify the Fourteenth Amendment with an understanding or contemplation that it commanded them to refrain from compelling segregated schools and obliged them to conform their school laws to assure consistency with such an understanding.

**West Virginia and Missouri** West Virginia, a state created during the Civil War when forty western counties refused to follow Virginia down the road to secession, and Missouri, a former slaveholding state comprised the small minority of states which ratified the Fourteenth Amendment and perpetuated laws requiring segregated schools without any subsequent enactment consistent with a discernment that such laws and the Amendment were incompatible.

Both states required separate schools for the two races prior to the submission of the Amendment.[301] These laws were continued after the Amendment was proclaimed as ratified;[302] and both states subsequently strengthened the requirement of separate schools in the 1870's by amending their constitutions to specifically proscribe racial integration in public schools.[303]

**The New England States** Segregated schools also existed in some of the strongly abolitionist New England states prior to their consideration and ratification of the Amendment. But their reaction to the prohibitions of Section 1 was directly contrary to the course taken in West Virginia and Missouri.

In Connecticut, prior to the adoption of the Amendment, racial segregation was not required by state law but segregated schools were required in some cities and communities, e.g., in Hartford pursuant to an ordinance enacted in 1867 and in New Haven by administrative regulation.[304] On August 1, 1868, four days after the Amendment was proclaimed, however, the legislature expressly forbade separate schools.[305] Interestingly, during the course of debate on this bill, amendments which would have required segregation or permitted separate "equal" schools were introduced and rejected.[306]

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[298] Tenn. Laws 1867, c. 27, § 17.
[299] Tenn. Laws 1870, c. 33, § 4.
[300] TENN. CONST. 1870, Art. XI, § 12.
[301] W. Va. Laws 1865, p. 54; Mo. Laws 1864, p. 126.
[302] W. Va. Laws 1867, c. 98; W. Va. Laws 1871, p. 206; Mo. Laws 1868, p. 170; Mo. Laws 1869, p. 86.
[303] W. VA. CONST. 1872, Art. XII, § 8; MO. CONST. 1875, Art. IX.
[304] MORSE, THE DEVELOPMENT OF FREE SCHOOLS IN THE UNITED STATES AS ILLUSTRATED BY CONNECTICUT AND MICHIGAN 127, 144, 192 (1918); WARNER, NEW HAVEN NEGROES 34, 71–72 (1940).
[305] Conn. Acts 1866–68, p. 206. See Conn. House J. 410 (1866); Conn. Sen. J. 374 (1866).
[306] Conn. Sen. J. 247–48 (1868); Conn. House J. 595 (1868). See New Haven Evening Register, June 17, 1868.

Similarly, racial separation in schools was never required by the constitution or laws of Rhode Island, but segregated schools existed at least in Providence, Newport and Bristol.[307] Here, too, the same legislature which ratified the Amendment enacted a law prohibiting racial segregation in public schools.[308]

In Maine, there was no racial separation in public schools prior to the adoption of the Amendment.[309] However, the leading supporter of ratification extolled in the broadest terms its equality provisions and indicated that the proponents expected it to compel in the other states the same equality in civil and political rights as existed in Maine, itself.[310]

Massachusetts too, had already made unlawful any racial segregation in schools prior to the submission of the Amendment.[311] Thus, since Massachusetts had already considered state required racial segregation completely inconsistent with a system of laws and government which treats all persons alike irrespective of color,[312] there was no subsequent legislative action interpretative of the impact of the Amendment on segregation.

The deliberations of the legislature on the proposed Amendment opened with its reference to the body by the governor. He recommended ratification and his speech indicates that he understood Section 1 of the Amendment to be a reinforcement of the Civil Rights Act of 1866 and observed: "Whatever reasons existed at the time for the enactment of that bill, apply to the incorporation of its provisions into the state law."[313] Surprisingly, strong opposition to ratification developed. A majority of the joint committee recommended rejection on the ground that the proposed Amendment neither specifically guaranteed Negro suffrage nor added anything to what was already in the constitution "possibly excepting the last clause" of Section 1. Of this, is concluded:[314]

> "The denial by any state to any person within its jurisdiction, of the equal protection of the laws, would be a flagrant perversion of the guarantees of personal rights. . . . [But] such denial would be equally possible and probable hereafter, in spite of an indefinite reiteration of these guarantees by new amendments."

The minority reported that:[315]

> "Without entering into any argument upon the merits of the amendment, they would express the opinion that its ratification is extremely important in the present condition of national affairs."

When these reports were presented in the lower house of the legislature, a motion was passed to substitute the minority report.[316] Suffrage had claimed much of the strident debate on the motion. But a speech of one of the last members to speak for the motion was reported as follows:[317]

> "To the first article of this amendment, there had been no objection brought by those who favored rejection. . . . The speaker felt that this was a most important article; by it the question of equal rights was taken from the supreme courts of the States and given to the Supreme Court of the United States for decision; the adoption of the article was the greatest movement that the country had made toward centralization, and was a serious and most important step. This was taken solely for the reason of obtaining protection for the colored people of the South; the white men who do not need this article and do not

[307] BARTLETT, FROM SLAVE TO CITIZEN, c. 6 *passim.* (unpub. ms., pub. expected in Dec. 1953). See Ammons v. School Dist. No. 5, 7 R. I. 596 (1864).

[308] R. I. LAWS 1866, c. 609. The Committee on Education recommended passage of this act, saying: "The great events of the time are, also, all in favor of the elevation of the colored man. They are all tending to merge the distinctions of race and of class in the common brotherhood of humanity. They have already declared the Negro and the white man to be equal before the law; and the privileges here asked for by these petitioners, are simply a necessary result of this recognized equality." It went on to say, "We have no right to withhold it from him in any case," and asked, "With what consistency can we demand that these colored people shall be equal before the law in other states or the territories, while we, ourselves, deprive them of one of their most important civil rights?" Report of Committee on Education, Pub. Doc. No. 4 (1896).

[309] See CHADBOURNE, A HISTORY OF EDUCATION IN MAINE (1936).

[310] Speech of Senator Crosby in the Maine Senate, January 16, 1867, reported in Kennebec Journal, January 22, 1867, p. 1.

[311] Mass. Acts & Res. 1854–1855, p. 650; Mass. Acts & Res. 1864–1865, pp. 674–75.

[312] This was precisely the fundamental proposition underlying the enactment of the Act of 1855 prohibiting racial segregation in public schools. Report of the Committee on Education, Mass. House Doc. No. 167, March 17, 1855.

[313] Mass. Acts and Res. 1867, pp. 789, 820; Boston Daily Advertiser, January 5, 1867, Sat. Supp.

[314] Mass. House Doc. 149, pp. 23–24 (1867).

[315] *Id.,* at 25.

[316] Boston Daily Advertiser, March 13, 1867, p. 2; *Ibid.,* March 14, 1867, p. 1.

[317] *Id.,* March 14, 1867, p. 1 (Speech of Richard Henry Dana, Jr.).

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like it, sacrifice some of their rights for the purpose of aiding the blacks."

The upper house considered the motion several days later, re-echoed the theme of the speeches previously made in the lower house, and voted for ratification.[318]

The New Hampshire legislature took up the proposed Amendment in June of 1866. The governor's message urged ratification but its brief comment was not revealing.[319] The majority report of the house committee with respect to the Amendment merely offered a resolution to modify.[320] But the minority reported a number of reasons for rejection which, *inter alia,* criticized section 1 on the grounds of ambiguity and furthermore:[321]

> "Because said amendment is a dangerous infringement upon the rights and independence of all the states, north as well as south, assuming as it does, control their legislation in matters purely local in their character, and impose disabilities upon them for regulating, in their own way [such matters]."

The same set of objections was presented by a minority of the special committee of the upper house.[322] Both chambers voted for ratification, however, within a month after the Amendment was offered to the state.[323]

Laws governing public schools in New Hampshire appear to have never been qualified on the basis of race or color at any time after its organic law obligated the legislature to stimulate public education.[324] Similarly, Vermont seems to have no history of segregated schools. Neither did its laws sanction such a policy.[325] When the legislature convened in 1866, the Governor's opening message discussed the proposed Fourteenth Amendment at some length. He urged that it be ratified to secure "equal rights and impartial liberty," otherwise a small number of whites in the South and the entire colored race would be left unprotected. In concluding, he said Vermont welcomed "such a reorganization of the rebellious communities, as would have given the people, white and black, the equal civil and political rights secured to the people of the State, by our Bill of Rights and Constitution, and under which peace, order, civilization, *education,* contentment, Christianity and liberty have shed their benign and blessed influence alike upon every home and household in our beloved Commonwealth."[326] Thereupon, both houses routinely voted for ratification.[327]

**The Middle Atlantic States** Three Mid-Atlantic States, New York, New Jersey and Pennsylvania ratified the Amendment. The Pennsylvania evidence is in some detail because it was one of the few states to preserve the full discussions and debates of its legislature. Furthermore, its statutes, previous to the adoption of the Amendment, authorized segregation in schools;[328] and public carriers had regulations which excluded or segregated Negroes. See *West Chester & Phila. R. Co. v. Miles,* 5 Smith (55 Pa.) 209 (1867).

On January 2, 1867, the Governor transmitted the Fourteenth Amendment to the Legislature. He called for its adoption primarily upon political grounds but strenuously urged that every citizen of the United States had certain rights that no state had a right to abridge and the proposed Amendment asserted "these vital principles in an authoritative manner, and this is done in the first clause of the proposed amendments [sic]."[329]

The resolution recommending ratification was introduced in the Pennsylvania Senate by its floor leader. He urged that one of the reasons why it had to be adopted was because Mississippi had enacted a law requiring segregation on railroads and the Amendment was necessary to overcome all state legislation of this character.[330] In summary of his concept of the purpose of section 1, he said:

> "The South must be fenced in by a system of positive, strong, just legislation. The lack of this has wrought her present ruin; her future renovation can come only through pure and equitable law; law restraining the vicious and protecting the innocent, making all castes

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[318] Mass. Acts and Res. 1867, p. 787; Mass. Leg. Doc. Sen. Doc. No. 25 (1867); Boston Daily Advertiser, March 21, 1867, p. 1.
[319] N. H. House J. 137 (1866).
[320] *Ibid.,* p. 174.
[321] *Id.* at 176.
[322] N. H. Sen. J. 70 (1866).
[323] *Id.* at 94, N. H. House J. 231–33 (1866).
[324] N. H. CONST. 1792, § LXXXIII.
[325] VT. CONST. 1777, c. II, § XXXIX; VT. CONST. 1786, c. II, § XXXVIII; VT. CONST. 1793, c. II, § 41. See Report of the Indiana Department of Public Instruction 23–28 (1867–68).
[326] Vt. Sen. J. 28 (1866); Vt. House J. 33 (1866). (Emphasis added.)
[327] Vt. House J. 139 (1866); Vt. Sen. J. 75 (1866).
[328] Act of May 8, 1854, Pa. L. 617 § 24.
[329] Pa. Sen. J. 16 (1867).
[330] 2 Pa. Leg. Rec., app., p. III (1867).

> and colors equal before its solemn bar, that, sir, is the *sine qua non*. . . ."

The pith of the speeches of both the proponents and opponents of ratification are as follows:

Senator Bingham, a leading supporter of the resolution, noted that "it has been only a question of time how soon all legal distinctions will be wiped out."[331]

Another announced, "I shall vote for it with satisfaction for my own conscience and gratitude to Congress for squarely meeting the universal demand of the loyal states to destroy all legal caste within our borders."[332]

The leading opponent of ratification interpreted the Amendment as follows:[333]

> "By the first section it is intended to destroy every distinction founded upon a difference in the caste, nationality, race or color of persons … which has found its way into the laws of the Federal or State Governments which regulate the civil relations or rights of the people. No law shall be made or executed which does not secure equal rights to all. *In all matters of civil legislation and administration there shall be perfect equality in the advantages and securities guaranteed by each state to everyone here declared a citizen, without distinction of race or color,* every one being equally entitled to demand from the state and state authorities full security in the enjoyment of such advantages and securities." (Emphasis supplied).

The legislature ratified the Amendment on January 17, 1867.[334]

About two weeks later, on February 5th, a bill was introduced making it unlawful for public conveyances to exclude or segregate Negroes.[335] In introducing this bill, its sponsor announced that the doctrine of equality before the law required the passage of this bill. Both he and another supporter of the bill pointed out that these practices were pursuant to carrier regulations and policies and had to be eradicated by legislative action. It was also pointed out that the bill did not effect social equality because that is regulated solely by the personal tastes of each individual.[336] The bill was overwhelmingly enacted into law the following month.[337]

The school law authorizing separate schools was not specifically repealed until 1881 when the legislature made it unlawful for any school official to make any distinction on account of race or color in students attending or seeking to attend any public school.[338]

It appears, however, that when the state constitution was amended in 1873, the 1854 school law was viewed as having been brought into conformity with the adoption of a provision for a school system "wherein all children of this Commonwealth above the age of six years shall be educated. . . ."[339] The Secretary of State, official reporter of the Convention, states particular attention was paid to "that part which confers authority on the subject of education." And he noted that the new article was formulated to conform with the policy of protest against all racial discrimination and, specifically, to remove the "equivocal and invidious provision."[340] These purposes are further borne out when the sponsor of the 1881 bill stated:[341]

> "In proposing the repeal of the act of 1854, which in terms would be prohibited by the present State and Federal Constitutions, it seems a matter of surprise that an act so directly in conflict with the Fourteenth and Fifteenth Amendments of the Constitution of the United States should have been permitted to have remained in the statute book until this time."

New Jersey, as early as 1844, enacted general legislation for the establishment and support of a public school system "for the equal benefit of all persons. . . ."[342] In 1850, special legislation was enacted which enabled Morris Township to establish a separate colored school district if the local town meeting voted to do so.[343] The state superintendent of schools construed this act and concluded that it in combination with the earlier law of 1844 permitted any local school system to maintain separate schools provided both schools offered the same advantages and no child was excluded.[344]

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[331] *Id.* at XVI.

[332] *Id.* at XXII (speech of Senator Taylor).

[333] *Id.* at XLI (speech of Mr. Jenks).

[334] Pa. Laws 1867, 1334.

[335] 2 Pa. Leg. Rec., app. p. LXXXIV (1867).

[336] Id. at pp. LXXXIV *et seq.* (Remarks of Senators Lowery and Brown.)

[337] Act of March 22, 1867, Pa. Laws 1867, pp. 38–39.

[338] Act of June 8, 1881, Pa. L. 76, § 1, Pa. Laws 1881, p. 76.

[339] PA. CONST. 1873, Art. X, § 1.

[340] JORDAN, OFFICIAL CONVENTION MANUAL 44 (1874).

[341] Pa. Sen. J. (entry dated May 26, 1881).

[342] N. J. CONST. 1844, Art. IV § 7(6); N. J. REV. STATS., c. 3 (1847).

[343] N. J. Laws 1850, pp. 63–64.

[344] ANNUAL REPORT OF THE STATE SUPERINTENDENT OF SCHOOLS 41–42, (1868).

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The New Jersey Legislature convened in a special session and hastily ratified the Amendment on September 11, 1866.[345] The dispatch with which this was done was made a focal issue in the following elections. The Republicans broadly defended the Amendment as "forbidding class legislation, or the subjecting of one class of people to burdens that are not equally laid upon all."[346] The Democrats more specifically contended that their candidates opposed the Amendment because they were "against Negro suffrage and the attempt to mix negroes with workingmen's children in public schools."[347] When the Republicans captured the governorship and elected a radical congressional delegation, the Democrats captured the state legislature and immediately proceeded to rescind New Jersey's ratification.[348]

When the Republicans recaptured control of the legislature in 1870 the school law was amended to require "a thorough and effective system of public schools for the instruction of all children. . . ."[349] And this was later reinforced by an enactment which made it unlawful to exclude any child from any public school on account of color.[350] As a result of this law, separate schools soon disappeared except in a few counties where Negro citizens generally accepted them. When Negroes chose not to accept these segregated schools the school authorities were required to admit them to the white schools pursuant to the prohibition of the 1881 school law.[351]

New York, like the other Middle-Atlantic states, had ante-bellum constitutions which merely authorized the legislature to establish a common school fund.[352] There was never any general legislation on the subject of racial separation in schools sharing in the common school fund. The legislature, however, granted charters to Brooklyn, Canandaigua, Buffalo and Albany which permitted these cities to maintain segregated schools as early as 1850.[353] The Common School Act of 1864 was in the same vein. It only permitted school boards in certain political subdivisions to establish and maintain segregated schools "when the inhabitants of any school district shall so determine, by resolution at any annual meeting called for that purpose, establish a separate school or separate schools for the instruction of such colored children. . . ."[354] Communities exercising the option under this law comprised the exception rather than the rule.[355]

Shortly after New York ratified the Amendment,[356] a constitutional convention was held and it adopted a new constitution which provided for free instruction of all persons of school age.[357] The convention approved a committee report which contained a ringing declaration that Negroes should have full equality in the enjoyment of all civil and political rights and privileges.[358]

Subsequently, in 1873, the legislature passed an "Act to Provide for the Protection of Citizens in Their Civil and Public Rights."[359] The Act

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[345] N. J. Sen. J., Extra Sess., 1866, p. 14; MINUTES OF THE ASSEMBLY, Extra Sess., 1866, p. 8.

[346] Newark Daily Advertiser, October 25, 1866; Trenton State Gazette, November 3, 1866.

[347] Trenton Daily True American, November 3, 1866.

[348] N. J. Sen. J. 198, 249, 356 (1868); Minutes of the Assembly; 309, 743 (1868). See KNAPP, NEW JERSEY POLITICS DURING THE PERIOD OF CIVIL WAR AND RECONSTRUCTION 167 (1924).

[349] N. J. Laws 1874, p. 135.

[350] N. J. Laws 1881, p. 186.

[351] See Pierce v. Union Dist. School Trustees, 17 Vroom (46 N. J. L.) 76 (1884).

[352] N. Y. CONST. 1821, Art. VII; N. Y. CONST. 1846, Art. IX.

[353] N. Y. Laws 1850, c. 143; N. Y. Laws 1852, c. 291. See Dallas v. Fosdick, 50 How. Prac. 249 (1869); People v. Easton, 13 Abb. Prac. N. S. 159 (1872).

[354] N. Y. Laws 1864, c. 555.

[355] ANNUAL REPORT OF THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION 131, 159, 163, 166, 170, 233, 323 (1866).

[356] N. Y. Sen. J. 33 (1867); N. Y. Ass. J. 77 (1867). The Governor's message upon transmission of the Amendment leaves little doubt that he considered it as a "moderate proposition" containing "just the conditions for safety and justice indispensable to a permanent settlement." N. Y. Sen. J. 6 (1867); N. Y. Ass. J. 13 (1867).

[357] N. Y. CONST. 1868, Art. IX. See PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 1867–68 (1868).

[358] "First. Strike out all discriminations based on color. Slavery, the vital source and only plausible ground of such invidious discrimination, being dead, not only in this State, but throughout the Union, as it is soon to be, we trust, throughout this hemisphere, we can imagine no tolerable excuse for perpetuating the existing proscription. Whites and blacks are required to render like obedience to our laws, and are punished in like measure for their violation. Whites and blacks are indiscriminately drafted and held to service to fill our State's quotas in a war whereby the Republic was saved from disruption. We trust that we are henceforth to deal with men according to their conduct, without regard to their color. If so, the fact should be embodied in the Const." DOCUMENTS OF THE CONVENTION OF THE STATE OF NEW YORK, 1867–68, Doc. No. 15 (1868).

[359] N. Y. Laws 1873, c. 186 § 1.

made it unlawful for any person to exclude any other person on the ground of race or color from the equal enjoyment of any place of public accommodation, place of public amusement, public conveyance, "*common schools and public instruction* [sic] of learning. . . ." (emphasis supplied). It also annulled the use of the word "white" or any other discriminatory term in all existing laws, statutes, ordinances and regulations.[360] The New York Court of Appeals did not give vitality to this act in the case of *People ex rel. King v. Gallagher,* 92 N.Y. 438 (1883). But cf. *Railway Mail Association v. Corsi,* 326 U.S. 88.

**The Western Reserve States** The five states in the Western Reserve all ratified the Fourteenth Amendment. Each of them had rather well established public school systems prior to the Civil War. In Ohio, the first public school legislation expressly denied Negroes the benefit of free schools.[361] Twenty years later, in 1847, this act was amended to permit the maintenance of separate schools for colored children if the residents of a school district objected to their admission into the white schools.[362] At its next session, the legislature repealed the provision in an earlier law that had prohibited the application of taxes paid by white residents toward the support of colored schools.[363] And in 1853 the school law was revised to require the allocation of public school funds in proportion to the number of children of school age regardless of color.[364]

Separate schools, however, were still maintained except in Cleveland, Oberlin and other northern cities despite the general feeling that this act had relaxed the stringent restrictions of the antecedent laws. Furthermore, the State Supreme Court held this law not to entitle colored children, as of right, to admission into white schools. *Van Camp v. Board of Education,* 9 Ohio St. 406 (1859).

After ratification of the Amendment,[365] the legislature did not immediately modify the schools laws. In fact, it did nothing until after the Ohio Supreme Court upheld compulsory segregated schools in *State ex rel. Garnes v. McCann,* 21 Ohio St. 198 (1872). Then the legislature enacted a statute which permitted rather than required segregated schools.[366] Later, it denied local school authorities the power to exercise their discretion in the premises.[367] By this act, all public schools were opened to all children without distinction on account of race or color. *State v. Board of Education,* 2 Ohio Cir. Ct. Rep. 557 (1887).

Indiana's pre-Fourteenth Amendment school law provided for the support of public schools but exempted "all Negroes and mulattoes" from the assessment.[368] This law was interpreted as excluding colored children from public schools wherever the parents of white children objected. *Lewis v. Henley,* 2 Ind. 332 (1850).

On January 11, 1867, Governor Morton submitted the Fourteenth Amendment to the legislature. His message urged ratification but suggested that schools should be provided for Negroes and that they be educated in separate schools to relieve any friction which could arise if they were required to be admitted to white schools.[369] A resolution to ratify the Amendment was introduced on the same day and referred to a joint committee. Five days later the resolution was reported out favorably with a recommendation of prompt ratification.[370] A minority report was made which objected to the Amendment primarily because it conferred civil and political equality upon Negroes, including the same rights that were then enjoyed by the white race.[371]

The resolution was adopted on the same day in the Senate.[372] No speeches were made in support of the resolution in this chamber but two senators spoke at length against it.[373] In the House, the main contention of the opponents was that the Amendment would impose Negro equality,[374] seat Negroes on juries, grant them suffrage and admit them into the white

[360] *Id.,* § 3.
[361] Ohio Laws 1828–29, p. 73.
[362] Ohio Laws 1847–48, pp. 81–83.
[363] Ohio Laws 1848–49, pp. 17–18.
[364] Ohio Laws 1852, p. 441.
[365] Ohio Sen. J. 9 (1867); Ohio House J. 13 (1867). The Amendment was ratified within two days of its submission to the legislature by the Governor. He observed that the Amendment had four provisions; the first of which was "the grant of power to the National Government to protect the citizens of the whole country … should any state attempt to oppress classes or individuals, or deprive them of equal protection of the laws …" Ohio Exec. Doc., Part I, 282 (1867).
[366] Ohio Laws 1878, p. 513.
[367] Ohio Laws 1887, p. 34.
[368] Ind. Rev. Stats. 314 (1843).
[369] Ind. Doc. J., Part I, p. 21 (1867).
[370] Ind. House J. 101 (1867).
[371] *Id.* at 102.
[372] Ind. Sen. J. 79 (1867).
[373] Brevier, Legislative Reports 44–45 (1867).
[374] *Id.* at 79.

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schools.[375] The proponents only denied that the Amendment conferred suffrage.[376] And the lower chamber adopted the resolution on January 23, 1867.[377]

Two years after ratification of the Fourteenth Amendment, the legislature revised its law to require the organization of separate schools.[378] The act also authorized the maintenance of non-segregated schools in areas where there were insufficient Negro children residing within a reasonable distance to justify a separate school. In 1874, the compulsory segregation section of this law was declared valid in the case of *Cory v. Carter,* 48 Ind. 327 (1874).

The legislature, however, revised the school laws at its next session to permit (*not require*) segregated schools.[379] The revised law, furthermore, required that colored children be admitted to the regular schools if a separate school was not maintained. This provision was applied in sustaining mixed schools in *State v. Grubbs,* 85 Ind. 213 (1883).

Illinois statutes never specifically required separate schools. But the ante-bellum school statute provided that school districts with Negro populations should allow these residents a portion of the school fund equal to the amount of taxes collected from them.[380] As construed by the state superintendent of schools, this law was applied to require segregated schools.[381]

The Illinois legislature received the governor's message endorsing ratification of the Fourteenth Amendment on January 7, 1867. Both chambers then ratified it on the same day with virtually no discussion or debate.[382] About one year later, in December 1869, Illinois called a constitutional convention. It adopted the present organic law which provides for a free public school system for the education of "all children."[383] This provision stems from a resolution in which the convention directed the Education Committee to submit an article which would call for the establishment of a public school system for the education of every "susceptible child—without regard to color or previous condition."[384] Furthermore, the convention rejected two resolutions which would have directed the establishment of a compulsory segregated school system.[385]

Of all the states of the Western Reserve, Michigan was most deeply affected by the tide of abolitionism which swept this section during the pre-war years. By its Constitution of 1850 the word "white" was eliminated from the section establishing voting qualifications[386] and slavery was declared intolerable.[387] Neither this constitution nor the general law of the state recognized any racial distinctions in the enjoyment of public education. But as early as 1842 and as late as 1866, special statutes were passed granting school boards in certain of the larger cities discretionary power to regulate the apportionment of school funds and distribution of pupils among the several schools under their jurisdiction. Pursuant to this authority some school boards, e.g., in Detroit and Jackson, established separate schools.[388]

The Amendment was submitted to the legislature on January 6, 1867. On January 12th, a resolution was adopted in the Senate instructing the Committee on Public Instruction to report out a bill "to prevent the exclusion of children from the primary or graded or other public schools of this state on account of race or color." And four days later the general school law was amended to provide that "all residents of any district shall have an equal right to attend any school therein. . . ."[389] The Fourteenth Amendment was subsequently ratified on February 16, 1867.[390]

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[375] *Id.* at 80, 88–89, 90.
[376] *Id.* at 90.
[377] Ind. House J. 184 (1867).
[378] Ind. Laws 1869, p. 41.
[379] Ind. Laws 1877, p. 124.
[380] Ill. Stats. 1858, p. 460.
[381] SIXTH BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ILLINOIS, 1865–66, pp. 27–29; 2 REPORTS MADE TO THE GENERAL ASSEMBLY AT ITS TWENTY-FIFTH SESSION, pp. 35–37.
[382] Ill. House J. 40, 154 (1867); Ill. Sen. J. 40, 76 (1867).
[383] ILL. CONST. 1870, Art. VIII, § 1.
[384] JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS, Convened at Springfield, December 13, 1869, p. 234.
[385] *Id.* at 429–431, 860–861.
[386] Compare MICH. CONST. 1850, Art. VII, § 1 with MICH. CONST. 1835, Art. II, § 1.
[387] Art. XVIII, § 11.
[388] See People ex rel. Workman v. Board of Education of Detroit, 18 Mich. 400 (1869) for reference to these special statutes and notice of separate schools in these two cities. Since the decision in this case, there have been no segregated schools maintained by state authorities.
[389] 1 Mich. Laws 42 (1867); Mich. Acts 1867, Act 34 § 28.
[390] The journals of the Michigan legislature indicate that both houses promptly ratified the Amendment without reference to a committee. Mich. Sen. J. 125, 162 (1867); Mich. House J. 181 (1867).

The legislative record of Michigan during the next several years is replete with more blows against segregation and other distinctions based on race or color. In 1869, insurance companies were prohibited from making any distinction between white and Negro insureds.[391] The ban against interracial marriages was removed in 1883.[392] Then in 1885, the civil rights law was enacted prohibiting racial separation on public conveyances, in places of public accommodation, recreation, and amusement.[393]

Wisconsin, since 1848, provided for a public school system free to all children.[394] Moreover, during the crucial years, its Negro population was insignificant—less than two-tenths of one percent.[395] Thus, it seems obvious why segregation in schools or elsewhere never merited the attention of the legislature at the time of its ratification of the Amendment or thereafter.[396]

The Wisconsin legislature met on January 3, 1867 and was addressed by the Governor. His speech suggests that in his thinking the Fourteenth Amendment which he asked them to ratify was designed to apply solely to the South and required that "they must assent to the proposed amendment with all of its guarantees, securing to all men equality before the law. . . ."[397] A joint resolution was introduced to ratify the Amendment and referred to a committee of three, two of whom reported a recommendation to adopt. The report filed by the minority member condemned the Amendment at some length. "The apparent object," to him, was to allow Congress to enfranchise Negroes, legislate generally on civil rights, "give to the federal government the supervision of all the social and domestic relations of the citizen of the state and to subordinate state governments to federal power."[398]

It appears that this understanding of the Amendment was not disputed. Rather, one supporter of the Amendment is reported as stating: "If the states refuse to legislate as to give all men equal civil rights and equal protection before the laws, then, sir, there should be supervisory power to make them do that, and a consolidation of that kind will be a benefit instead of an injury."[399] And, another answered:[400]

> "We therefore need such a provision in the Constitution so that if the South discriminates against the blacks the United States courts can protect them. I know it is objected that this is an enlargement of the power of the United States Supreme Court. But it is a power given on the side of liberty—power to protect and not power to oppress. For the appeal will come up to this court from the aggrieved individual against the aggressing state. . . ."

**The Western States** Of the states west of the Mississippi which ratified the Amendment, Nebraska is quite significant because it was admitted to the Union during the life of the 39th Congress and conditions were imposed upon its admission which demonstrate that the Congress which prepared the Amendment intended to eradicate all distinctions based upon race. Nebraska won statehood without having ratified the Amendment. But the enabling Act provided that "this act shall take effect with the fundamental and perpetual condition that there shall be no abridgement or denial of the exercise of the elective franchise, *or any other right,* to any person by reason of race or color. . . ." Act of February 9, 1867, ch. 9, sec. 3, 14 Stat. 377 (emphasis supplied). The Act, furthermore, required Nebraska to publicly proclaim this fundamental condition "as a part of the organization of this state."

While the enabling Act was still being considered by Congress, the territorial legislature forthwith passed a "Bill to remove all distinctions on account of race or color in our public schools"[401] since the existing school law restricting the enumeration of pupils to white

[391] Mich. Acts 1869, Act 77 § 32. See Mich. Comp. Laws § 7220 (1897).

[392] Mich. Acts 1883, Act 23, p. 16.

[393] Mich. Acts 1885, Act 130 § 1. See Mich. Comp. Laws § 11759 (1897).

[394] WIS. CONST. 1848, Art. X, § 3; WIS. REV. STATS. Title VII (1849).

[395] LEGAL STATUS OF THE COLORED POPULATION IN RESPECT TO SCHOOLS AND EDUCATION, SPECIAL REPORT OF THE COMMISSIONER OF EDUCATION, 400 (1871).

[396] Wis. Sen. J. 119, 149 (1867); Wis. Ass. J. 224–226, 393 (1867). The entire series of Journals covering the War and Reconstruction years shows but a single reference to color in connection with education. This was a proposal to amend an 1863 bill so as to limit certain educational privileges to children of "white parentage." The amendment failed and the matter was never revived. Wis. Ass. J. 618 (1863).

[397] Wis. Sen. J. 32 (1867); Wis. House J. 33 (1867).

[398] *Id.* at 96, 98 *et seq.* (Report filed by Sen. Garrett T. Thorne).

[399] Wisconsin State Journal, Feb. 7, 1867 (Reporting speech of Assemblyman C. B. Thomas).

[400] Daily Wisconsin Union, Feb. 7, 1867 (Reporting speech of Assemblyman H. C. Hobart).

[401] Neb. House J., 12th Terr. Sess. 99, 105 (1867). See Omaha Weekly Republican, January 25, 1867, p. 2; *Id.,* February 8, 1867.

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youths[402] had heretofore been administratively construed to exclude colored children from the public schools. This bill failed to enter the statute books for lack of gubernatorial endorsement.[403]

The same session of the legislature by an appropriate resolution recognized the enabling Act's "fundamental condition" on February 20, 1867 and on March 1st Nebraska was proclaimed the 37th state. Two months later, a special session of the legislature was called to ratify the Amendment and to enact legislation to "render Nebraska second to no other state in the facilities offered to all her children, irrespective of sex or condition. . . ."[404] The Amendment was ratified in June 1867,[405] and the school law was amended to require the enumeration of "all the children" in the school census.[406] The new school law did not in specific language prohibit segregation, but colored children entered the public schools on a non-segregated basis at the next school term in September, 1867.[407]

Another school law was enacted in 1869 which provided an increase in the taxes for the support of public schools "affording the advantages of a free education to all youth;"[408] and thereafter no school law has contained any language describing the system of public schools operated by the state.

Prior to its ratification of the Amendment, Kansas, a loyal border state, had adopted a policy of permissive segregation whereby boards of education were authorized, but not required, to establish separate schools.[409] The legislature ratified the Amendment on January 16, 1867,[410] and changed the school law on February 26th by an act which made it illegal for "any" school board to refuse to admit "any" child.[411] In 1868, it reenacted the earlier permissive school segregation law.[412] Subsequently, an 1876 revision of the school laws omitted any authorization for segregation in cities of the first class and specifically forbade segregated schools in cities of the second class.[413] The same session also passed a civil rights act which is still the law and proscribes any distinction on account of race or color in "any state university, college, or other school of public instruction" or in any licensed place of public accommodation or amusement, or on any means of public carriage.[414] In 1879, the legislature reenacted the law permitting racial separation in schools but limited it to cities of the first class.[415]

Minnesota ratified the Fourteenth Amendment on January 16, 1867.[416] Its legislature was not obliged to contemplate whether the Amendment nullified segregated schools because such practices had been made a penal offense in 1864.[417] However, in submitting the Amendment to the legislature, the governor urged that its adoption was necessary because of the failure of the former seceding states "to reorganize their civil government on the basis of equal … rights, without distinction of color. . . ."[418] In 1873, the legislature rephrased the school law so as to specifically prohibit segregated schools.[419]

In Nevada, the school law in existence prior to its consideration of the Amendment excluded Negroes from public schools and prescribed a penalty against any school which opened its doors to such persons.[420] However, the statute provided that school authorities might, if they deemed it advisable, establish a separate school for colored children and maintain it out of the

[402] Neb. Comp. Laws 1855–65, pp. 92, 234, 560, 642 (1886).
[403] MESSAGES AND PROCLAMATIONS OF THE GOVERNORS OF NEBRASKA. COLLECTED IN PUBLICATIONS OF THE NEBRASKA STATE HISTORICAL SOCIETY, 249 (1942).
[404] *Id.* at 274.
[405] Neb. House J. 148 (1867); Neb. Sen. J. 174 (1867).
[406] 2 Neb. Comp. Laws 1866–77, p. 351 (1887).
[407] See Nebraska City News, August 26, 1867, p. 3; *Id.,* September 4, 1867, p. 3.
[408] 2 Neb. Comp. Laws 1866–77, pp. 451, 453 (1887).
[409] Kan. Laws 1862, c. 46, Art. 4 §§ 3, 18; Kan. Laws 1864, c. 67, § 4; Kan. Laws 1865, c. 46, § 1.
[410] The Amendment was ratified without reference to a committee within three days after it was submitted to the legislature. Kan. Sen. J. 43, 76, 128 (1867); Kan. House J. 62, 79 (1867).
[411] Kan. Laws 1867, c. 125, § 1; KAN. GEN. STATS., c. 92, § 1 (1868). The punitive feature of this statute directed county superintendents to withhold school funds from any offending schools.
[412] Kan. Gen. Stats., c. 18, Art. V § 75, c. 19, Art. V § 57 (1868).
[413] Kan. Laws 1876, 238.
[414] Kan. Laws 1874, c. 49, § 1. See KAN. REV. STATS. § 21–2424 (1935).
[415] Kan. Laws 1879, c. 81, § 1. This is the current law in Kansas. KAN. REV. STATS. § 27–1724 (1935).
[416] The governor laid the proposed Amendment before the legislature with the observation that it would secure equal civil rights to all citizens and both houses voted at once to ratify the Amendment without further reference. Minn. Exec. Doc. 26 (1866); Minn. House J. 26 (1866); Minn. Sen. J. 22, 23 (1866).
[417] Minn. Laws 1864, c. 4, § 1, amending Minn. Laws 1862, c. 1, § 33.
[418] Minn. Exec. Docs. 25 (1866).
[419] Minn. Stats., ch. 15 § 74 (1873).
[420] Nev. Laws 1864–65, p. 426.

general school fund. While the legislature took no affirmative action after it ratified the Amendment on January 22, 1867,[421] it similarly remained inactive after the decision in *State* v. *Duffy,* 7 Nev. 342 (1872), which vitiated the first section of the school law. There is no subsequent reference to the subject of separate schools in the statute books and the segregatory statute itself was dropped from subsequent compilations of laws.[422]

The Oregon evidence is singularly meager. There were no laws requiring or permitting racial separation in schools either prior or subsequent to ratification of the Amendment on September 9, 1866. What the ratifying legislature understood as to the force of the Amendment and the significance of the abortive attempt to withdraw its ratification in 1868 on this subject is unavailable from the bare notations contained in the legislative journals.[423] The contemporary newspapers are also barren of information on this point.[424] What evidence there is, indicates that separate schools did exist at least in Portland as late as 1867 and that they were discontinued in 1871.[425]

Almost two years after the Amendment was submitted to the states, Iowa ratified on April 3, 1868.[426] Neither the state constitution nor laws required or in any manner authorized racial separation in schools at that time.[427] Instances of exclusion and segregation were being quickly remedied without recourse to the courts.[428] Where the courts were called upon, local practices of segregation in schools were never sustained as lawful. *Clark v. School Directors,* 24 Iowa 266 (1868); *Smith v. Directors of Independent Schools Dist.,* 40 Iowa 518 (1875); *Dove v. Independent School Dist.,* 41 Iowa 689 (1875). The state supreme court also forbade segregation by a common carrier in its dining facilities, predicating its decision squarely upon the Fourteenth Amendment. *Coger v. N. W. Union Packet Co.,* 37 Iowa 145 (1873).

In sum, the legislatures in all of the Union States which ratified the Fourteenth Amendment, except three, understood and contemplated that the Amendment proscribed State laws compelling segregation in public schools.

### C. The non-ratifying states understood that the Fourteenth Amendment forbade enforced segregation in public schools

Four states did not ratify the Amendment, three specifically withholding endorsement and the other being unable to arrive at any definitive position. Delaware, in the anomalous position of a former slave state which sided with the Union, rejected it on February 7, 1867 with a resolution which declared that "this General Assembly believes the adoption of the said proposed amendment to the Constitution would have a tendency to destroy the rights of the States in their Sovereign capacity as states, would be an attempt to establish an equality not sanctioned by the laws of nature or God. . . ."[429] Again, in 1873, the state legislators denounced

> "… all other measures intended or calculated to equalize or amalgamate the Negro race with the white race, politically or socially, and especially do they proclaim unceasing opposition to making Negroes eligible to public office, to sit on juries, and to their admission into public schools where white children attend, and to the admission on terms of equality with white people in the churches, public conveyances, places of amusement or hotels, and to any measure designed or hav-

[421] The governor presented the Amendment to the legislature with an admonition that they were expected to ratify it and the ratification was accomplished three days later. The journals indicate virtually no opposition or advocacy of the Amendment. Nev. Sen. J. 9, 47 (1867); Nev. Ass. J. 25 (1867).

[422] See Nev. Comp. Laws (1929).

[423] Ore. Sen. J. 25, 34–36 (1866); *Id.,* at 271–272 (1868); Ore. House J. 273 (1868); Ore. Laws 1868, 114; *Id.,* "Joint Resolutions and Memorials" 13.

[424] The Oregonian, the state's leading newspaper, purportedly carried all the legislative happenings in full. See The Oregonian, September 14, 1866. None of its 1866 issues indicate more than that the legislature considered the Amendment dealt with "equality" and that the primary controversy was with respect to suffrage. *Ibid.,* September 21, 1866.

[425] See REYNOLDS, PORTLAND PUBLIC SCHOOLS, 1875, 33 ORE. HIST. Q. 344 (1932); W. P. A. ADULT EDUCATION PROJECT, HISTORY OF EDUCATION IN PORTLAND 34 (1937).

[426] Ratification was almost perfunctorily effected. Iowa Sen. J. 265 (1868) Iowa House J. 132 (1868).

[427] ;s427 IOWA CONST. 1857, Art. IX. § 12; Iowa Laws 1866, p. 158, reinforcing the Acts of 1860 and 1862 which required the instruction of all children without regard to race. SCHAFFTER, THE IOWA CIVIL RIGHTS ACT, 14 Iowa L. Rev. 63, 64–65 (1928).

[428] Dubuque Weekly Herald, January 30, 1867, p. 2; Des Moines Iowa State Register, January 29, 1868, p. 1; *Id.,* February 19, 1868, p. 1.

[429] 13 Del. Laws 256. See Del. Sen. J. 76 (1867); Del. House J. 88 (1867) for speech of Governor Saulsbury recommending rejection on the ground that it was a flagrant invasion of state rights.

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ing the effect to promote the equality of the Negro with the white man in any of the relations of life, or which may possibly conduce to such result."[430]

Then, shortly thereafter, the General Assembly in a series of discriminatory statutes demonstrated that it fully understood that equality before the law demanded non-segregation. It passed laws permitting segregation in schools,[431] places of public accommodation, places of public amusement and on public carriers.[432] Delaware, however, deferred sanctioning compulsory racial separation in public schools until after this Court handed down the *Plessy* decision.[433]

**Maryland** Maryland was also a loyal former slave-holding state. It rejected the Amendment on March 23, 1867.[434] The establishment of universal free public education here coincided with the Reconstruction Period. Although Maryland has always maintained a dual school system, it has never enacted a law specifically forbidding racial integration in its public schools. Rather, separate and parallel provisions were made for the education of white and colored children.[435]

**Kentucky** The third of the states which rejected the Amendment was Kentucky, a state with a slaveholding background and generally sympathetic with the South with regard to the status of Negroes although it did not secede. It was the first to refuse ratification: its rejection was enrolled on January 10, 1867.[436] While Negroes were denied or severely limited in the enjoyment of many citizenship rights at that time, including exclusion from juries,[437] the legislature was silent on the specific question of compulsory segregated schools.[438] Like its Maryland brothers, it passed two discrete series of laws, one for the benefit of white children and the other for colored children. But no definite compulsory education statute was enacted until 1904[439] although the constitution had been previously amended so as to support such legislation.[440]

**California** California was the only state whose legislature considered the Amendment and yet did not reach an official stand on the matter.[441] Before the Fourteenth Amendment was proclaimed the law of the land, the legislature in 1866, relaxed the pattern of compulsory segregation when the school law was revised to permit Negro children to enter "white" schools, provided a majority of the white parents did not object.[442] This provision survived changes made in the school laws in 1870 and 1872; and, in 1874, a bill to eliminate segregated schools led to the adoption of a law which required the admission of colored children "into schools for white children" if separate schools were not provided.[443] Later in this same year the state supreme court upheld segregated schools despite the petitioner's claim that this practice violated the Amendment. *Ward v. Flood,* 48 Cal. 36 (1874). The legislature then revised the school laws and eliminated the provisions which had been held to require separate schools for Negro children.[444]

The evidence from the non-ratifying states also indicates that their legislatures understood or contemplated that the Fourteenth Amendment forbade legislation which enforced the separation of white and colored children in public schools.

### CONCLUSIONS OF PART II

There is, therefore, considerable evidence and, we submit, conclusive evidence that the Congress which submitted and the state legisla-

[430] Del. Laws 1871–73, pp. 686–87.
[431] DEL. REV. STATS. c. 42 § 12 (1874); Del. Laws 1875, pp. 82–83; Del. Laws 1881, c. 362.
[432] Del. Laws 1875–77, c. 194.
[433] DEL. CONST. 1897, Art. X, § 2.
[434] Md. Sen. J. 808 (1867); Md. House J. 1141 (1867).
[435] Md. Laws 1865, c. 160, tit. i–iv; Md. Rev. Code §§ 47, 60, 119 (1861–67 Supp.); Md. Laws 1868, c. 407; Md. Laws 1870, c. 311; Md. Laws 1872, c. 377; Md. Rev. Code, tit. xvii §§ 95, 98 (1878).
[436] Ky. House J. 60 (1867); Ky. Sen. J. 63 (1867).
[437] Ky. Laws 1865–66, pp. 38–39, 49–50, 68–69.
[438] Ky. Laws 1869, c. 1634; 1 Ky. Laws 1869–70, pp. 113–127; Ky. Laws 1871–72, ch. 112; KY. STATS., c. 18 (1873); KY. GEN. STATS., c. 18, pp. 371 *et seq.* (1881).
[439] Ky. Laws 1904, pp. 181–82.
[440] KY. CONST. 1891, § 187.
[441] The Committee on Federal Relations in the Assembly and Senate, respectively, recommended rejection and ratification of the Amendment and no further action was taken. Cal. Ass. J., 17th Sess., p. 611 (1867–68); Cal. Sen. J., 17th Sess., p. 676 (1867–68), p. 676. See FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 207 (1908).
[442] Cal. Stats. 1866, p. 363. Pursuant to this statute a number of "white" schools admitted colored children without untoward incident. CLOUD, EDUCATION IN CALIFORNIA 44 (1952).
[443] Cal. Stats. 1873–74, p. 97.
[444] Cal. Stats. 1880, p. 48. See Wysinger v. Crookshank, 82 Cal. 588 (1890). The laws segregating Chinese children remained on the books probably because it was the general impression that only discriminatory laws aimed at Negroes were forbidden by the Fourteenth Amendment. Debates of the California Constitutional Convention of 1873, pp. 631, 642, 649 (1880).

tures and conventions which considered the Fourteenth Amendment contemplated and understood that it would proscribe all racial distinctions in law including segregation in public schools. A part of this evidence consists of the political, social and legal theories which formed the background of the men who framed the Fourteenth Amendment and the Radical Republican majority in Congress at that time.

Congressional debates following the Civil War must be read and understood in the light of the equalitarian principles of absolute and complete equality for all Americans as exemplified throughout the Abolitionist movement prior to the Civil War.

Many of the members of Congress, in debating the bill which became the Civil Rights Act of 1875, made it clear in no uncertain terms that it was generally understood in the 39th Congress that the Fourteenth Amendment was intended to prohibit all racial distinctions, including segregation in public school systems.

Running throughout the 39th Congress was a determination of the Radical Republican majority to transform these equalitarian principles into federal statutory and constitutional law. They realized that these high principles could not be achieved without effective federal legislation. The infamous Black Codes were demonstrative proof that the southern states were determined to prevent the newly freed Negroes from escaping from an inferior status even after the Thirteenth Amendment. The Radical Republican majority realized that in the status of American law at that time, the only way to achieve fulfillment of their determination to remove caste and racial distinctions from our law would be for them to effect a revolutionary change in the federal-state relationship.

After many drafting experiments, the Committee of Fifteen introduced in Congress the proposed amendment to the Constitution which was to become the Fourteenth Amendment. The broad and comprehensive scope of the bill was clearly set forth by Senator Howard, Chairman of the Judiciary Committee. An appraisal of the Congressional debates during the period the Fourteenth Amendment was being considered show conclusively that in so far as section 1 was concerned, there could be no doubt that it was intended to not only destroy the validity of the existing Black Codes, but also to deprive the states of power to enact any future legislation which would be based upon *class* or *caste* distinctions. It is likewise clear that the Fourteenth Amendment was intended to be even more comprehensive than the scope of the original bill which, subsequently weakened by amendment, became the Civil Rights Act of 1866.

Throughout the debates in the 39th Congress and subsequent Congresses, the framers of the Amendment, the Radical Republican majority in Congress, over and over again, made it clear that: (1) future Congresses might in the exercise of their power under section 5 take whatever action they might deem necessary to enforce the Amendment; (2) that one of the purposes of the Amendment was to take away from future Congresses the power to diminish the rights intended to be protected by the Amendment; and (3) they at all times made it clear that the Amendment was meant to be self-executing and that the judiciary would have the authority to enforce the provisions of the Amendment without further implementation by Congress. All of the decisions of this Court, without exception, have recognized this principle.

Other Congressional debates, including those on the readmission of certain states, the amnesty bills and other legislation give further evidence of the intent of Congress in regard to the broad scope of the Fourteenth Amendment. The debates in Congress on legislation which was later to become the Civil Rights Act of 1875 made it clear that efforts of states to set up segregated school systems violated the Fourteenth Amendment. These debates were more specific on the question of segregation in public education because some states were already beginning to violate the Fourteenth Amendment by setting up segregated systems.

A study of the statements and actions of those responsible for state ratification of the Amendment remove any doubt as to their understanding that the Fourteenth Amendment was intended to prohibit state imposed racial segregation in public schools.

After addressing ourselves to questions 1 and 2 propounded by this Court, we find that the evidence not only supports but also compels the conclusions reached in Part One hereof. Wherefore, we respectfully submit, this Court should decide that the constitutional provisions and statutes involved in these cases are in violation of the Fourteenth Amendment and therefore unconstitutional.

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## PART THREE

This portion is directed to questions four and five of the Court's Order:

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,
   (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
   (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?
5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),
   (a) should this Court formulate detailed decrees in these cases;
   (b) if so what specific issues should the decrees reach;
   (c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;
   (d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

### I. THIS COURT SHOULD DECLARE INVALID THE CONSTITUTIONAL AND STATUTORY PROVISIONS HERE INVOLVED REQUIRING SEGREGATION IN PUBLIC SCHOOLS. AFTER CAREFUL CONSIDERATION OF ALL OF THE FACTORS INVOLVED IN TRANSITION FROM SEGREGATED SCHOOL SYSTEMS TO UNSEGREGATED SCHOOL SYSTEMS, APPELLANTS KNOW OF NO REASONS OR CONSIDERATIONS WHICH WOULD WARRANT POSTPONEMENT OF THE ENFORCEMENT OF APPELLANTS' RIGHTS BY THIS COURT IN THE EXERCISE OF ITS EQUITY POWERS.

The questions raised involve consideration of the propriety of postponing relief in these cases, should the Court declare segregation in public schools impermissible under the Constitution. The basic difficulty presented is in the correlation between a grant of effective relief and temporary postponement. After carefully addressing ourselves to the problem, we find that difficulty insurmountable.

#### A. The Fourteenth Amendment requires that a decree be entered directing that appellants be admitted forthwith to public schools without distinction as to race or color

"It is fundamental that these cases concern rights which are personal and present." *Sweatt v. Painter,* 339 U.S. 629, 635; see also *Sipuel v. Board of Regents,* 332 U.S. 631, 633. These rights are personal because each appellant[445] is asserting his individual constitutional right to grow up in our democratic society without the impress of state-imposed racial segregation in the public schools. They are present because they will be irretrievably lost if their enjoyment is put off. The rights of the adult students in the *Sipuel, Sweatt,* and *McLaurin* cases required, this Court held, vindication forthwith. *A fortiori,* this is true of the rights of children to a public education that they must obtain, if at all while they are children. It follows that appellants are entitled to be admitted forthwith to public schools without distinction as to race and color.

#### B. There is no equitable justification for postponement of appellants' enjoyment of their rights

Even if the Court should decide that enforcement of individual and personal constitutional rights may be postponed, consideration of the relevant factors discloses no equitable basis for delaying enforcement of appellants' rights.

Appellants have no desire to set precise bounds to the reserve discretion of equity. They concede that, as a court of chancery, this Court has power in a proper case to mold its relief to individual circumstances in ways and to an extent which it is now unnecessary to define with entire precision. But the rights established by these appellants are far outside the classes as to which, whether for denial or delay, a "balance of convenience" has been or ought to be struck.

These infant appellants are asserting the most important secular claims that can be put

[445] As used herein "appellant" includes the respondents in No. 10.

forward by children, the claim to their full measure of the chance to learn and grow, and the inseparably connected but even more important claim to be treated as entire citizens of the society into which they have been born. We have discovered no case in which such rights, once established, have been postponed by a cautious calculation of conveniences. The nuisance cases, the sewage cases, the cases of the overhanging cornices, need not be distinguished. They distinguish themselves.

The Fourteenth Amendment can hardly have been intended for enforcement at a pace geared down to the mores of the very states whose action it was designed to limit. The balance between the customs of the states and the personal rights of these appellants has been struck by that Amendment. "[A] court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable jurisdiction." *Youngstown Co. v. Sawyer,* 343 U.S. 579, 610 (concurring opinion).

Affirming the decree of one of the few judges still carrying the traditional title and power of Chancellor, the highest Court of Delaware epitomized equity in one of the cases now before this bar when it declared in *Gebhart v. Belton,* 91 A. 2d 137, 149 that

> "To require the plaintiffs to wait another year under present conditions would be in effect partially to deny them that to which we have held they are entitled."

Appellants, in the main, are obliged to speculate as to factors which might be urged to justify postponement of the enforcement of their rights. Hitherto, appellees have offered no justification for any such postponement. Instead they have sought to maintain a position which is, essentially, that a state may continue governmentally enforced racism so long as the state government wills it.

In deciding whether sufficient reason exists for postponing the enjoyment of appellants' rights, this Court is not resolving an issue which depends upon a mere preponderance of the evidence. It needs no citation of authority to establish that the defendant in equity who asks the chancellor to go slow in upholding the vital rights of children accruing to them under the Constitution, must make out an affirmative case of crushing conviction to sustain his plea for delay.

The problem of effective gradual adjustment cannot fairly arise in three of the five cases consolidated for argument. In the Kansas case, there was a frank concession on oral argument that elimination of segregation would not have serious consequences. In Delaware, court-compelled desegregation in this very case has already been accomplished. The case from the District of Columbia is here on a dismissal of the complaint on motion. In the oral argument the counsel for respondents implied that he foresaw no difficulties in enforcing a decree which would abolish segregation. Surely it would be curious as well as a gratuitous assumption that such a change cannot be expeditiously handled in this nation's capital. Cf. *District of Columbia v. John R. Thompson Co.,* 346 U.S. 100.

We can, however, put out of the case what is not in dispute. We concede that there may well be delays of a purely administrative nature involved in bringing about desegregation. Any injunction requires time for compliance and we do not ask the impossible. We strongly urge, however, that no reason has been suggested and none has been discovered by us that would warrant denying appellants their full rights beyond the beginning of the next school year.

But we do not understand that the "effective gradual adjustment" mentioned in this Court's fourth and fifth questions referred to such conceded necessities. We proceed then, to consider possible grounds that might be put forth as reasons for added delay, or for the postponement of relief to appellants.

It has been suggested that desegregation may bring about unemployment for Negro teachers. (Appellees' Brief in *Davis v. County School Board,* p. 31; *Transcript of Argument* in the same case, p. 71) If this is more than a remote possibility, it undoubtedly can be offset by good faith efforts on the part of the responsible school boards.[446] On the other hand, if appellees' suggestion is based upon an unexpressed intention of discriminating against Negro teachers by wholesale firings, it is not even worthy of notice in a court of equity.

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[446] In view of the nationwide shortage of teachers, it is doubtful that any unemployment would be more than transitory. See *e.g.,* New York Times, August 19, 1953, 31:8 (S. M. Bouthardt puts elementary teachers shortage at 116,000); August 24, 1953, 21:1 (Comm. Thurston and NEA on shortage); 22 J. Neg. Ed. 95 (1953).

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It has been bruited about that certain of the states involved in this litigation will cease to support and perhaps even abolish their public school systems, if segregation is outlawed. (*Davis v. County School Board, Transcript of Argument,* pp. 69–70; *Gebhart v. Belton, Transcript of Argument,* p. 17; *Briggs v. Eliott, Record on Appeal,* p. 113.) We submit that such action is not permissible. *Cf. Rice v. Elmore,* 165 F. 2d 387 (CA 4th 1947), *cert. denied,* 333 U.S. 875. Any such reckless threats cannot be relevant to a consideration of effective "gradual adjustment"; they are based upon opposition to desegregation in any way, at any time.

Finally, there are hints and forebodings of trouble to come, ranging from hostility and deteriorated relations to actual violence. (Appellees' brief in *Briggs v. Eliott,* p. 267; Appellees' brief in *Davis v. County School Board,* p. 17.) Obviously this Court will not be deterred by threats of unlawful action. *Buchanan v. Warley,* 245 U.S. 60, 81.

Moreover, there are powerful reasons to confirm the belief that immediate desegregation will not have the untoward consequences anticipated. The states in question are inhabited in the main by law-abiding people who up to now have relied upon what they believe—erroneously, as we have demonstrated—to be the law. It cannot be presumed that they will not obey the law as expounded by this Court. Such evidence as there is lends no support to defendants' forebodings. Note, *Grade School Segregation: The Latest Attack on Racial Discrimination,* 61 Yale L. J. 730, 739, 743 (1952).

A higher public interest than any yet urged by appellees is the need for the enforcement of constitutional rights fought for and won about a century ago. Public interest requires that racial distinctions proscribed by our Constitution be given the fullest protection. Survival of our country in the present international situation is inevitably tied to resolution of this domestic issue.

The greatest strength of our democracy grows out of its people working together as equals. Our public schools are "[d]esigned to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people. . . ." Mr. Justice Frankfurter, concurring in *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 206, 216–217.

**C. Appellants are unable, in good faith, to suggest terms for a decree which will secure effective gradual adjustment because no such decree will protect appellants' rights**

Question 5 assumes that the Court, having decided that segregation in public schools violates the Fourteenth Amendment, will, nevertheless, in the exercise of its equity powers, permit an effective gradual adjustment from segregated schools to systems not operated on the basis of color distinctions. This necessarily assumes further that reasons might be produced to justify consideration of postponement of the enforcement of the present and personal rights here involved. As we have pointed out immediately hereinbefore we are unable to identify any such reason.

Appellants obviously are aware of the existence of segregated school systems throughout the South similar to those presently before this Court. Similarly, appellants realize that the thrust of decisions in these cases may appear to present complex problems of adjustment because segregated schools have existed for nearly a century in many areas of this country. Generalizations, however, as to the scope and character of the complexities which might arise from immediate enforcement of appellants' rights would be unwarranted. This is demonstrated in part by the fact that even in the five cases joined for hearing, there appears to be no uniformity in the extent of the task of adjustment from segregated to nonsegregated schools.

Necessarily, consideration of the specific issues which decrees should reach on the basis of the assumptions of Question 5 likewise requires the assumption that reasons will be adduced to warrant consideration of postponement of enforcement of appellants' rights.[447]

[447] It follows that there is no need for this Court to appoint a Master. Since repeal in 1948 of the 1805 statute, 28 U.S.C., § 863 (1946), forbidding the introduction of new evidence at an appellate level, there would appear to be no reason why such master could not be appointed. Certainly respected authorities have recommended the practice of appellate courts' taking evidence. See 1 WIGMORE, EVIDENCE 41 (3d ed., 1940); POUND, APPELLATE PROCEDURE IN CIVIL CASES pp. 303, 387 (1941); Note, 56 HARV. L. REV. 1313 (1943), and in other times and jurisdictions it has been respected practice. See SMITH, APPEALS OF THE PRIVY COUNCIL FROM AMERICAN PLANTATIONS 310 (1950); Rules of the Supreme Court of Judicature, Order 58, Rules 1, 2; cf. New Mexico, Stat. 1949, c. 168, § 19. However, taking of evidence by a Master is undoubtedly a departure from normal practice on appeal and it may result in loss of time to the prejudice of plaintiffs' rights.

Though no cogent reasons were offered to support them, two suggestions of methods of postponement of relief to appellants were made to this Court in the original brief for the United States. The first of these was "integration on a grade basis," i.e., to integrate the first grades immediately, and to continue such integration until completed as to all grades in the elementary schools (Brief, pp. 30–31). The second was integration "on a school-by school" basis (Brief, p. 31).

The first suggestion is intolerable. It would mean the flat denial of the right of every appellant in these cases. The second plan is likewise impossible to defend because it would mean the deliberate denial of the rights of many of the plaintiffs. If desegregation is possible in some schools in a district, why not in all? Must some appellants' rights be denied altogether so that others may be more conveniently protected?

Whether any given plan for gradual adjustment would be effective would depend on the showing of reasons valid in equity for postponement of enforcement of appellants' rights. In accordance with instructions of this Court we have addressed ourselves to all of the plans for gradual adjustment which we have been able to find. None would be effective. We recognize that the appellees, as school officials and state officers, might offer reasons for seeking postponement of the effect of decrees in these cases. Therefore, we submit, affirmative answers to questions 4(b) and 5 can come only from appellees since they alone can adduce reasons for postponement of enforcement of appellants' rights.

In the absence of any such reasons the only specific issue which appellants can recommend to the Court that the decrees should reach is the substantive one presented here, namely, that appellees should be required in the future to discharge their obligations as state officers without drawing distinctions based on race and color. Once this is done not only the local communities involved in these several cases, but communities throughout the South, would be left free to work out individual plans for conforming to the then established precedent free from the statutory requirement of rigid racial segregation.

In the very nature of the judicial process once a right is judicially declared proposals for postponement of the remedy must originate with the party desiring that postponement.

We submit that it would be customary procedure for the appellees to first produce whatever reasons they might urge to justify postponement of relief. Appellants then would be in a position to advise the Court of their views with respect to the matter.

## CONCLUSION

Under the applicable decisions of this Court the state constitutional and statutory provisions herein involved are clearly unconstitutional. Moreover, the historical evidence surrounding the adoption, submission and ratification of the Fourteenth Amendment compels the conclusion that it was the intent, understanding and contemplation that the Amendment proscribed all state imposed racial restrictions. The Negro children in these cases are arbitrarily excluded from state public schools set apart for the dominant white groups. Such a practice can only be continued on a theory that Negroes, *qua* Negroes, are inferior to all other Americans. The constitutional and statutory provisions herein challenged cannot be upheld without a clear determination that Negroes are inferior and, therefore, must be segregated from other human beings. Certainly, such a ruling would destroy the intent and purpose of the Fourteenth Amendment and the very equalitarian basis of our Government.

WHEREFORE, it is respectfully submitted that the judgments in cases No. 1, 2 and 4 should be reversed and the judgment in No. 10 should be affirmed on the grounds that the constitutional and statutory provisions involved in each of the cases violate the Fourteenth Amendment.

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## SUPPLEMENT

## AN ANALYSIS OF THE POLITICAL, SOCIAL, AND LEGAL THEORIES UNDERLYING THE FOURTEENTH AMENDMENT

The first Section of the Fourteenth Amendment did not spring full blown from the brow of any individual proponent. Primitive natural rights theories and earlier constitutional forms were the origins of its equal protection-due process-privileges and immunities trilogy. The occasion for the metamorphosis of moral premises to full-fledged constitutional status was the attack on the American system of slavery. During the long antislavery crusade, the trilogy became a form of shorthand for, and the spearhead of, the whole of the argument against distinctions and caste based on race.

Section One of the Fourteenth Amendment thus marks the "constitutionalization" of an ethico-moral argument. The really decisive shifts occurred before the Civil War, and the synthesis was made, not by lawyers or judges, but by laymen. Doctrines originally worked out and propagated by a dissident minority became, by 1866, the dominant constitutional theory of the country.

In both language and form, Section One was the distillation of basic constitutional and legal theories long understood and voiced by leaders in a Congress upon which history had cast both the opportunity and the obligation to amend the Constitution to regulate relationships profoundly altered by the abolition of slavery.[448] None can doubt that the thrust of the Amendment was equalitarian and that it was adopted to wipe out the racial inequalities that were the legacies of that system. But beyond this, the majestic generalities of the Section can be seen to have evolved naturally and logically in the minds of the antislavery generation.[449]

At the outset we point out that we do not set forth the arguments of pamphleteers, or even of lawyers or congressmen, to justify the validity of their constitutional theories. We do not say that these theories were universally held, or deny that they were vigorously challenged. Nor do we urge that the pre–Civil War Constitution contained the sweeping guarantees that the Abolitionists claimed for Negroes. These are beside our present point. What we do undertake in this section is illumination of the constitutional language—the moral and ethical opinions that were the matrix of the Amendment, the development under terrific counter-pressures of the principal texts and forms, the meaning of "equal protection" and "due process" as understood and contemplated by those who wrote those phrases into the Amendment.

### 1. The declaration of the "Self-Evident Truths"

The roots of our American equalitarian ideal extend deep into the history of the western world. Philosophers of the seventeenth and eighteenth centuries produced an intellectual climate in which the equality of man was a central concept. Their beliefs rested upon the basic proposition that all men were endowed with certain natural rights, some of which were surrendered under the so-called "social contract." The state, in return, guaranteed individual rights, and owed protection equally to all men. Thus, governments existed, not to give, but to protect rights; and allegiance and protection were reciprocal. For his allegiance, the citizen was guaranteed his rights and the equal protection of the law.[450]

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[448] Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment,* 1950 WIS. L. REV. 479–507, 610–661, hereinafter cited *Early Antislavery Backgrounds.*

[449] Basic monographs and articles on the Fourteenth Amendment and its major clauses are: 2 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES cc. 31–32 (1953); FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); THE JOURNALS OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (Kendrick ed. 1914); TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951) hereinafter cited ANTISLAVERY ORIGINS; WARSOFF, EQUALITY AND THE LAW (1938); Boudin, *Truth and Fiction About the Fourteenth Amendment,* 16 N. Y. U. L. Q. REV. 19 (1938); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding,* 2 STAN. L. REV. 5 (1949); Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COL. L. REV. 131 (1950); Graham, *The "Conspiracy Theory" of the Fourteenth Amendment,* 47 YALE L. J. 371, 48 YALE L. J. 171 (1938); McLaughlin, *The Court, The Corporation, and Conkling,* 46 AM. HIST. REV. 45 (1940).

[450] LOCKE, SECOND TREATISE ON GOVERNMENT c. 2 (1698). (1926); SMITH, AMERICAN PHILOSOPHY OF EQUALITY (1927); WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW (1931); Corwin, *The "Higher Law" Background of American*

This doctrine was the core of the first great statement of American principles. To Jefferson and the other draftsmen of the Declaration of Independence, it was "self-evident" that "all men are created equal," and "are endowed by their Creator with certain unalienable Rights," among which are "Life, Liberty and the pursuit of Happiness," and that "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."[451]

Abhorrence of arbitrariness—the central element of due process—and the ideal of a general and equal law—the core of equal protection—both were implicit in the Lockean-Jeffersonian premises. Slavery—with its theories of racial damnation, racial inferiority, and racial discrimination—was inherently repugnant to the American creed and the Christian ethic. This fact was being rapidly and increasingly sensed. As men sensed it, they had to fit it into the only political theory they knew: Governments existed, not to give, but to *protect* human rights; allegiance and protection were reciprocal—i.e., *ought to be reciprocal;* rights and duties were correlative—i.e., *had to be correlative* if Americans ever were to live with their consciences and to justify their declared political faith.

Long before the Revolution, Quakers and Puritans attacked slavery as a violation of the social compact and Christian ethic.[452] After 1776, Jefferson's "self-evident truths" put a cutting edge on all such pleas—made them the broadswords in every attack. Idealists demanded that America live up to her Declaration. "All men" must mean all men. "Unalienable Rights … of Life, Liberty and the pursuit of Happiness" must be given its full human, not merely a restricted racial, application. Race and color were arbitrary, insubstantial bases for accord or denial of natural, human rights. Sensitive leaders soon found themselves confronted with what Gunnar Myrdal treated recently as *An American Dilemma.*[453] Having pledged their "Lives … Fortunes, and sacred Honor" to the causes of liberty and freedom, either Americans endeavored to live up to their creed or stultified themselves before the world.

After the Revolution, the "self-evident truths" and the provisions of the state Bills of Rights were employed as weapons against slavery and against racial distinctions.[454] Down through the Civil War, moreover, the "self-evident truths" constituted precisely what Jefferson declared them to be—political axioms—except in the South after the invention of the cotton gin.[455] They were on every tongue as rhetorical shorthand, and were popularly regarded as the marrow of the Constitution itself. In justifying one revolution, Jefferson no less than Locke had laid the groundwork for another. The dominating premise that governments were instituted for protection and

*Constitutional Law,* 42 HARV. L. REV. 149, 365 (1928); Graham, *Early Antislavery Backgrounds, supra* note 1, at 610–611; Hamilton. *Property According to Locke,* 41 YALE L. J. 864 (1932).

[451] It is interesting to note in this context that Jefferson's original draft of the Declaration, accepted by Franklin and Adams, the other members of the sub-committee responsible for the drafting, contained severe strictures on the King because of the slave trade. See BECKER, *op. cit. supra* note 3, at 212–213.

[452] German Quakers of Pennsylvania had argued as early as 1688, "Though they are black, we cannot conceive there is more liberty to have them slaves [than] … to have other white ones… . We should do to all men like as we will be done ourselves, making no difference of what descent or colour they are… . Here is liberty of conscience, which is right and reasonable; here ought to be likewise liberty of body… ." MOORE, NOTES ON THE HISTORY OF SLAVERY IN MASSACHUSETTS 75 (1866). In 1700, in his antislavery tract, THE SELLING OF JOSEPH, the great Puritan elder, Judge Samuel Sewall, declared, "All men, as they are … Sons of Adam, are co-heirs, and have equal Right unto Liberty." *Id.* at 83–87. See also Graham, *Early Antislavery Backgrounds, supra* note 1, at 614–615.

[453] 2 vols. (1944).

[454] In 1783, Chief Justice Cushing, pointing to the "All men are born free and equal" clause of the Massachusetts Bill of Rights, declared that "… slavery is inconsistent with our conduct and Constitution, and there can be no such thing as perpetual servitude of a rational creature." MOORE, *op. cit. supra* note 5, at 209–221. Four years later, Congress passed the Northwest Ordinance outlawing slavery in the territories. 2 THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 957–962 (1909). Vermont effected abolition by constitutional clause; other northern states by prospective legislative action. Graham, *Early Antislavery Backgrounds, supra* note 1, at 617.

[455] While early southern leaders in Virginia accepted Jeffersonian concepts of natural rights, contract, and equality, later leaders and theorists defended the slave society on the basis of Greek concepts. Man had no rights save those created by the state. Men were inherently unequal, and the end of the state was not equality but justice. Each man would have status in accordance with his ability. Such theorists posited the inherent inferiority of the Negro. Their theory was broad enough to justify slavery for any man, irrespective of race or color. See THE PRO-SLAVERY ARGUMENT, AS MAINTAINED BY THE MOST DISTINGUISHED WRITERS OF THE SOUTHERN STATES (1853). See also 1 THE WORKS OF JOHN C. CALHOUN 393–394, 6 *id.* at 182–183 (Crallé ed. 1854–1855);

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that they derived their just powers from the consent of the governed had begun to make slavery, and with it race distinctions, untenable. What slowly took shape was an ethical interpretation of American origins and destiny.

**2. The moral suasion campaign and its rejection**

The Age of Enlightenment of the seventeenth and eighteenth centuries gave birth to a world-wide antislavery movement. A wave of humanitarianism, embracing quests for abolition of slavery, suffrage for women, and penal, land, and other reforms, swept across the United States of the early nineteenth century. Because of its dramatic qualities, the American anti-slavery movement assumed even larger proportions and eventually overshadowed the other phases.[456] Like them, it was based fundamentally on Judeo-Christian ethic and was formulated in terms of equalitarianism and natural rights.

The early antislavery movement was a campaign of moral suasion. Rational men appealed to other rational men to square precept with practice. Proponents of equality, who were by that definition opponents of slavery, sought to persuade slaveholders of the error of enslaving other men, i.e., of denying equality to those held as slaves. That campaign bore early fruit in Virginia, in the uplands of the Carolinas, and even in the deeper South. The appeal to the South ultimately broke on the hard rock of economic self-interest after invention of the cotton gin. Geography and migrations tended further to sectionalize the institution. Quakers and Scotch-Irish yeomen from Virginia and the Carolinas, unable to arrest spread of a labor system they detested, and others from the deeper South, fled *en masse,* settling generally in Ohio and Indiana. There they were joined by staunch Puritan and Calvinist stocks from New York and New England. Thus, the antislavery movement became sectionalized with important centers in Ohio, western New York, and Pennsylvania.

Spearheading the movement was the American Anti-Slavery Society, founded in 1833 and headed by the wealthy Tappan brothers. Recruited and led by Theodore Weld,[457] a brilliant orator and organizer, and by his co-leader, James G. Birney,[458] a converted Alabama slaveholder and lawyer, whole communities were abolitionized in the years 1835–1837. Appeals were aimed at influential leaders; lawyers in particular were sought out and recruited by the score.

This appeal was an ethico-moral-religious-natural rights argument. It was addressed by the revivalists to their countrymen as patriots, Christians, and "free moral agents." "The law of nature *clearly teaches the natural* republican equality of all mankind. *Nature* revolts at human slavery. . . . The Law of God renders all Natural Rights inalienable. . . . Governments and laws are established, not to give, but to protect … rights."[459] Negroes, they continued, were "not naturally inferior." They simply had been degraded by slavery. They were persons, endowed by God with all the attributes of personality. Their enslavement could no more be justified than could chattelization of men with red hair. Slavery rested on a capricious, discredited classification.[460] It simply was institutionalized false imprisonment. White men were protected against enslavement and against false imprisonment.

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SPAIN, THE POLITICAL THEORY OF JOHN C. CALHOUN c. 8 (1951).

[456] NYE, FETTERED FREEDOM 2, 10–11, 217–218, and *passim* (1949).

[457] See THOMAS, THEODORE WELD (1950); LETTERS OF THEODORE DWIGHT WELD, ANGELINA GRIMKE WELD AND SARAH GRIMKE, 1822–1844, 2 vols. (Barnes and Dumond ed. 1934) cited hereinafter as WELD-GRIMKE LETTERS.1830–1844 (1933). Weld was a tireless speaker and pamphleteer who turned out documents that became guide posts in the antislavery movement: SLAVERY AS IT IS (1839); THE POWER OF CONGRESS OVER THE DISTRICT OF COLUMBIA (1838); THE BIBLE AGAINST SLAVERY (1837). Such persons as William Jay, John Quincy Adams and Senator Robert C. Winthrop relied on Weld for legal research. See 2 WELD-GRIMKE LETTERS 748, 956–958. The evangelical character of the antislavery movement helps account for the flood of arguments that poured from it. It was even organized on an analogy drawn from early Christian evangelists with its Seventy and its Council of Twelve.

[458] See BIRNEY, JAMES G. BIRNEY AND HIS TIMES (1890); LETTERS OF JAMES G. BIRNEY, 1831–1857, 2 vols. (Dumond ed. 1938), referred to hereinafter as BIRNEY LETTERS.

[459] OLCOTT, TWO LECTURES ON THE SUBJECT OF SLAVERY AND ABOLITION 24–29 (1838).

[460] The idea that race and color were arbitrary, capricious standards on which to base denial of human rights was implicit in all antislavery attacks on discrimination and prejudice. Yet it was when the constitutional-legal attack began to reinforce the religious one that such arguments became explicit, and the concept of an arbitrary classification developed. Lawyers like Ellsworth, Goddard, Birney (Philanthropist, Dec. 9, 1836, p. 3, cols. 4–5), Gerrit Smith (see AMERICAN ANTI-SLAVERY SOCIETY, 3 ANNUAL REPORTS 16–17 (1836)) and Salmon P. Chase ( SPEECH … IN THE CASE OF THE COLORED WOMAN, MATILDA … 32 (1837)) helped to formulate the concept and linked it with the principles of equality, affirmative protection, and national citizenship.

"What abolitionists demand as naked justice is that the benefit and protection of these just laws be extended to all human beings alike … without regard to color or any other physical peculiarities."[461]

Racial discrimination, in short, was repugnant both as a breach of equality and as a breach of protection. Because it was a breach of protection, it also was a breach of equality; and because it was a breach of equality, it was thereby an even greater breach of protection. This was the outcome of Americans' triple-barreled major premise which posited the purpose of *all* government to be the protection of inalienable rights bestowed upon *all* men by their Creator. Once that compound premise was granted—and in the generations since 1776 virtually all Americans outside the South had *spoken* as if they granted it—the abolitionists' conclusions were unassailable. The heart of it was that these basic ideals of liberty, equality, and protection were deemed to be paramount by reason of their place in the Declaration and determinative by reason of the place of the Declaration in American life and history.

The issue had to be resolved within the framework of the constitutional system. Appeals to ethico-moral concepts and to natural rights were good enough to argue as to what ought to be. Reality was something else again. Constitutional reality was that the status of inhabitants of the United States, white or Negro, was fixed by the Constitution. Social reality was that the great mass of Negroes were slaves.

Inevitably, then, the first skirmishes as to the rights claimed for Negroes had to be fought out in the case of free Negroes.[462] The targets here were northern black laws—the laws in Ohio and Connecticut; the techniques were persuasion, conversion, and demonstration. It was in the course of this campaign that what presently became the constitutional trinity of the antislavery movement received its decisive synthesis.

The first comprehensive crystallization of antislavery constitutional theory occurred in 1834 in the arguments of W. W. Ellsworth and Calvin Goddard, two of the outstanding lawyers and statesmen of Connecticut, on the appeal[463] of the conviction of Prudence Crandall for violation of an ordinance forbidding the education of non-resident colored persons without the consent of the civil authorities.[464] They reveal this theory as based on broad natural rights premises and on an ethical interpretation of American origins and history. Four ideals were central and interrelated: the ideal of human equality, the ideal of a general and equal law, the ideal of reciprocal protection and allegiance, and the ideal of reason and substantiality as the true bases for the necessary discriminations and classifications by government. Race as a standard breached every one of these ideals, as did color. What was attacked was denial of human equality and denial of protection of the laws—denials inherent in any racial discrimination backed by public authority. Slavery was the arch evil in this respect, and the primary one, both because of the magnitude of its denials and deprivations and abridgments, and because these necessarily established a whole pattern of discrimination based upon race and color alone. It was this pattern of public discrimination that was combatted no less than slavery. It had to be combatted because it was deemed a part of slavery.

Although neither slavery nor segregated schools was the issue in the case, the Ellsworth-Goddard argument is one of the classic statements of the social and ethical case for equality of opportunity irrespective of race. It gave immense impetus to the emerging concept of American nationality and citizenship. Fully reported and widely circulated as a tract, it soon became one of the fountainheads of antislavery constitutional theory. It figured prominently in Abolitionist writings throughout the 'thirties. In the spring of 1835, Judge William Jay, Abolitionist son of the first Chief Justice and one of the founders and vice-presidents of the American Anti-Slavery

[461] OLCOTT, *op. cit. supra* note 12, at 44.

[462] For characteristic references to plans for bettering the lot of the free Negro, see 1 WELD-GRIMKE LETTERS, *op. cit. supra* note 10, at 132–135, 262; AMERICAN ANTI-SLAVERY SOCIETY, 4 ANNUAL REPORTS 32–35, 105–111 (1837). 5 ANNUAL REPORTS 127 (1838). For evidence of how large the condition of the free Negroes, and plans for their betterment, figured in the early A. A. S. S. strategy, see *The Condition of Free People of Color in the United States,* The Anti-slavery Examiner #13a (1839), apparently written by Judge William Jay, reprinted in his MISCELLANEOUS WORKS 371–395 (1853).

[463] Crandall v. State, 10 Conn. 339 (1834).

[464] REPORT OF THE ARGUMENTS OF COUNSEL IN THE CASE OF PRUDENCE CRANDALL, PLFF. IN ERROR, VS. STATE OF CONNECTICUT, BEFORE THE SUPREME COURT OF ERRORS, AT THEIR SESSION AT BROOKLYN, JULY TERM, 1834. The arguments are printed in condensed form in the official report, Crandall v. State, *supra* note 16, at 349–353 (1834).34–51 (1853); STIENER, HISTORY OF SLAVERY IN CONN. 45–52 (1893); VON HOLST, CONSTITUTIONAL HISTORY 1828–1846 98, 99 (1881); McCarron, *Trial of Prudence Crandall,* 12 CONN. MAG. 225–232 (1908); NYE, *op. cit. supra* note 9, at 83.

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Society, devoted fifteen pages of his *Inquiry into the Character and Tendency of the Colonization and Anti-Slavery Societies*[465] to a slashing attack on the trial court's decision.

The due process element of our modern trilogy was introduced in the course of a determined attack made in 1835 by the Weld-Birney group upon Ohio's black laws. Enacted in 1807, these laws embodied prohibitions against Negro immigration, employment, education, and testimony. A report[466] prepared at Weld's direction by a committee of the newly formed Ohio Anti-Slavery Society appealed to the American and Christian conscience. Notwithstanding the affirmative duty of all government to "promote the happiness and secure the rights and liberties of man," and despite the fact that American government was predicated on the "broad and universal principle of equal and unalienable rights," these statutes had singled out a "weak and defenseless class of citizens—a class convicted of no crime—no natural inferiority," and had invidiously demanded their exclusion from "the rights and privileges of citizenship." This, it was argued, the Constitution forbade. "Our Constitution does not say, *All men* of a *certain color* are entitled to certain rights, and are born free and independent. . . . The expression is unlimited. . . . *All* men are so born, and have the *unalienable* rights of life and liberty—the pursuit of happiness, and the acquisition and possession of wealth."

These were the doctrinal cornerstones.[467] They were the heart of the ethico-moral-historical-natural rights argument which the American Anti-Slavery Society broadcast in the mid- and late-'thirties. They were broadcast particularly throughout Ohio, western New York and Pennsylvania, Rhode Island, and Massachusetts.[468] Weld was the director and master strategist; Birney, the forensic quartermaster and attorney general. The "Twelve" and the "Seventy" were the chosen instruments. These were the two dedicated hand-picked groups of trained teachers, ministers, divinity students, self-named after the early Christian Apostles. Their revivals converted thousands before funds ran out and southern antagonism crippled the movement. Numerous anti-slavery newspapers and coordinated pamphlet and petition campaigns were reinforcing media.

The trouble, of course, was that northerners were still largely indifferent to or unreached by this program, while the South rejected it almost without a hearing. Coincidence played a great part here. Alarmed lest educated Negroes foment slave insurrections, the South further tightened its controls.[469] Fortuitously, the Vesey and Turner uprisings had seemed to offer frightening confirmation of fears in this regard. Meanwhile, cotton profits and politics had begun to rationalize slavery as "a positive good." The insidious belief spread that the South must insulate herself, safeguard her "peculiar institu-

[465] Reprinted in JAY, MISCELLANEOUS WRITINGS ON SLAVERY 36 (1853).

[466] PROCEEDINGS OF THE OHIO ANTI-SLAVERY CONVENTION HELD AT PUTNAM 17–36 (April 22–24, 1835).

[467] It is not implied that these arguments were without ante-cedents. Earlier (1819–21) in the controversy over Missouri's admission, the provision in its Constitution prohibiting immigration of free Negroes prompted anti-slavery arguments based on the republican form of government and comity clauses. See BURGESS, THE MIDDLE PERIOD, 1817–58 c. 4 (1897); MCLAUGHLIN, CONSTITUTIONAL HISTORY OF THE UNITED STATES c. 29 (1935); WILSON, RISE AND FALL OF THE SLAVE POWER cc. 11–12 (1872), especially at 154. Later, the Horton episode, and the protracted controversy over southern seamen's laws whereunder northern and British free Negro seamen were confined to quarters or jailed while in southern ports, gave further impetus to theories of *national* or *American* citizenship. The former was a *cause cél;agebre* of 1826–1827 involving a statute of the District of Columbia which authorized sale for jail fees of *suspected* fugitive slaves. Horton, a free Negro of New York, who had been arrested and threatened with sale, was saved by timely aid of Abolitionist friends who capitalized the incident. See JAY, MISCELLANEOUS WRITINGS ON SLAVERY 48, 238–242 (1853); TUCKERMAN, WILLIAM JAY AND THE CONSTITUTIONAL MOVEMENT FOR ABOLITION OF SLAVERY 31–33 (1893); 3 CONG. DEB. 555 (1826). Regarding the seamen's controversy, see Hamer, *Great Britain, the United States and the Negro Seamen Acts, 1822–1848,* 1 J. OF SO. HIST. 1–28 (1935); H. R. REP. NO. 80, 27th Cong., 3rd Sess. (1843). Later, in 1844, the Hoar incident occurred, in which Judge Samuel Hoar of Massachusetts, proceeding to Charleston to defend imprisoned Negro seamen, was expelled from South Carolina by legislative resolution. See Hamer, *supra,* and the elaborate documentation in STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 237–238 (Ames ed. 1904). The Hoar expulsion and the numerous laws, both North and South, excluding free Negroes and mulattoes, were cited repeatedly in the debates of the 'fifties and in 1866. See, for example, CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (Remarks of Sen. Trumbull).

[468] See especially BARNES, *op. cit. supra* note 10, cc. 2, 3, 4, and WELD-GRIMKE LETTERS and BIRNEY LETTERS, *op. cit. supra* notes 10, 11.

[469] See EATON, FREEDOM OF THOUGHT IN THE OLD SOUTH c. 5 (1940) and statutes there cited; SYDNOR, DEVELOPMENT OF SOUTHERN SECTIONALISM 1819–1848 (1948).

tions," and remove them even from discussion and criticism.[470] In the Pinckney Report of 1836,[471] pro-slave theorists sought to implement these convictions. To reinforce Calhoun's defensive doctrines of concurrent majority and state interposition, and in a determined attempt to protect slavery in the Federal District from possible interference or abolition by Congress under its sweeping powers over the District and territories, Pinckney and his colleagues in the House employed the due process clause of the Fifth Amendment and "the principles of natural justice and of the social compact."[472]

### 3. The political action campaign

**A. Systemization** Thus, the antislavery campaign was set back, its piecemeal conversion and demonstration program was frustrated at the outset by barriers that held slavery to be a positive good—untouchable even where Congress had full powers over it. Antislavery men were denied the use of the mails. Their anti-slavery petitions were throttled by Congressional "gags." They were forced to defend even their own rights to speak and write and proselytize. In consequence, the antislavery leaders had to reorient their whole movement and strategy.[473]

This reorientation, greatly accelerated by the Pinckney Report, was marked by rapid "constitutionalization" of the higher law argument. There was a shift from an overwhelming faith in moral suasion to a reluctant resort to political action, from efforts to convince Americans of the expediency and justice of freeing their slaves, to a search for constitutional power to free them.[474]

These tendencies may be traced today in the pages of the *Weld-Grimke* and *Birney Letters,* in a vast pamphlet literature, in annual reports of the state and national societies,[475] but most satisfactorily in the columns of Birney's *Philanthropist.*[476] Calhoun and "positive good" theorists had fashioned a constitutional system that promised absolute protection for slavery and ignored the constitutional reference to slaves as "persons," referring to them whenever possible as "property." These theorists also employed the "compact" and "compromises" of 1787 as a device that removed slavery from the reach not merely of state and federal legislatures but from adverse discussion and criticism.

Birney and his colleagues now formulated a countersystem, one which exalted liberty and exploited the founding fathers' use of "persons." Denying all limiting force to the "compact" or "compromises," this group hailed the spirit of the Declaration, of the Constitution, and American institutions generally. They seized on the leading provisions of the state and federal bills of rights as affirmative guarantees of the freedom of the slaves.[477]

In his earlier writings,[478] Birney's ethical interpretation of American origins and history was essentially that of the *Crandall* argument and the Ohio Anti-Slavery Society reports. The natural rights creed of the Declaration, the universality of guarantees of the state bills of rights, the Signers' and the Fathers' known aversion toslavery, the "color blindness" of the Articles of Confederation, the outright prohibition of slavery in the territories by the Northwest Ordinance,

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[470] See JENKINS, PROSLAVERY THOUGHT IN THE OLD SOUTH (1935); and the histories of Eaton and Sydnor, *op. cit. supra* note 22; and WILTSIE, JOHN C. CALHOUN, NULLIFIER, 1828–1839 c. 20, esp. 283–286 (1949); *cf.* Corwin, *National Power and State Interposition, 1787–1861,* 10 MICH. L. REV. 535 (1912).

[471] H. R. REP. NO. 691, 24th Cong., 1st Sess. (1836).

[472] *Id.* at 14.

[473] DUMOND, THE ANTISLAVERY ORIGINS OF THE CIVIL WAR (1938); NYE, *op. cit. supra* note 9.

[474] DUMOND, *op. cit. supra* note 26, especially cc. 5–6; T. C. SMITH, THE LIBERTY AND FREE SOIL PARTIES IN THE NORTHWEST (1897); NYE, *op. cit. supra* note 9. *Cf.* CRAVEN, THE COMING OF THE CIVIL WAR (1943); NEVINS, ORDEAL OF THE UNION (1947).

[475] Read straight through, the six ANNUAL PROC. AND REP. OF AMERICAN ANTISLAVERY SOCIETY (1833–1839) and the five ANNIVERSARY PROC. OF THE OHIO ANTISLAVERY SOCIETY (1836–1840) reveal the shift from confident evangelism to determined self-defense and political action. Not until after the Pinckney Report (*supra* note 24), the "Gags" denying antislavery petitions, and the refusal of the South to countenance discussion of the issue, does one find serious interest in political movements and tactics. The THIRD ANNUAL REPORT OF THE A. A. S. S. (May 10, 1836) signed by Elizur Wright is thus the turning point and a catalog of the factors that had reoriented opinion. By the SIXTH ANNUAL REPORT OF THE A. A. S. S. (1839), the "imperative necessity of political action" caused Wright to devote much of his space to convincing the still hesitant and divided membership.

[476] Birney's career as an editor can be followed in the BIRNEY LETTERS, *op. cit. supra* note 11 (see index entries "Philanthropist"), and in his pamphlet NARRATIVE OF THE LATE RIOTOUS PROCEEDINGS AGAINST THE LIBERTY OF THE PRESS IN CINCINNATI (1836).

[477] Sometimes Abolitionists, in desperation, appealed to a higher law beyond the Constitution, but this was not a consistent argument or one possible within the legal framework.

[478] BIRNEY LETTERS, *op. cit. supra* note 11. For a fuller and documented summary, see Graham, *Early Antislavery Backgrounds, supra* note 1, at 638–650.

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and above all, the silence, the euphemisms, the circumlocutions of the Constitution—these were the recurrent and expanding points. Not merely slavery, but *all public race discrimination* was ethically and morally wrong. It was so because it was a denial of the rights and protections that governments were established to secure.

After the Pinckney Report, however, and especially after the growing mob action against Abolitionists began to make it clear that state bills of rights were not self-executing but rested on local enforcement, Birney reexamined his position. Everywhere there was this anomaly: the great natural and fundamental rights of conscience, inquiry and communication, secured *on paper* in every constitution, nevertheless were denied and abridged daily for want of sanctions. All men by nature "possessed" these indispensable rights; all constitutions "declared" and "secured" them. It was the bounden duty of all governments "created for the purposes of protection" to safeguard and enforce them. Yet the hard fact was that state and local governments were flagrantly, increasingly derelict. Nothing, southerners argued, could be done about it.

Challenged in this manner, Birney and his aides shifted their ground. They advanced from the old position that the Federal Constitution was neutral—"or at least not pro-slavery"—to the stand that the document was antislavery. Constitutionalization of the natural rights argument proceeded at a much more rapid pace. No longer was the fight waged merely defensively in behalf of the right to proselytize, or counterdefensively to support sweeping Federal powers over the District and territories; more and more the antislavery forces took the offensive against slavery itself.[479]

Thus, by December 1836, the Abolitionists' argument was recrystallizing around three major propositions:

*First,* the great natural and fundamental rights of life, liberty, and property, long deemed inherent and inalienable, were now held to be secured by *both* state and national constitutions.

*Second,* notwithstanding this double security, and in disregard of the obligation of governments to extend protection in return for allegiance, these rights were being violated with impunity both on national soil and in the states, (a) by the fact of slavery itself, (b) by mob action directed against those working for abolition, (c) by flagrant discriminations against free Negroes and mulattoes.

*Third,* race and color—"grades and shades"—whenever and wherever employed as criteria and determinants of fundamental rights, violated both the letter and spirit of American institutions; race *per se* was not only an ignoble standard; it was an irrational and unsubstantial one.

The problems of implementing this theory, Birney worked out in several series of articles during 1837. Rescrutinizing the document, he began to make the same rigorous use of the Federal Bill of Rights that previously he and others had made of Ohio's. Ultimately, he focused on the due process clause employed in Pinckney's Report:[480] "The Constitution contains provisions which, if literally carried out, would extinguish the entire system of slavery. It guarantees to every state in the union a republican form of government, Art. IV, Sec. 4th. A majority of the people of South Carolina are slaves; can she be said properly to have a republican form of government? It says, that 'the right of the people to be secure in their *persons,* houses, papers and effects … against unreasonable searches and *seizures,* shall not be violated.' Slaves, Sir, are men, constitute a portion of the people: Is that no 'unreasonable seizure,' by which the man is deprived of all his earnings [effects?]—by which in fact he is robbed of his own person? Is the perpetual privation of liberty 'no unreasonable seizure'? Suppose this provision of the Constitution were literally and universally enforced; how long would it be before there would not be a single *slave* to mar the prospect of American liberty? Again, '*no* person shall be held to answer for a capital or otherwise infamous crime unless on the presentment or indictment of a grand jury, except in cases arising in the land or naval forces, [sic] nor shall any person be compelled in any case to witness against himself; nor be deprived of life, liberty or property without due process of law.' Art. V Amendments.

> "Are slaves ever honored with indictment by a grand jury? Are they never compelled 'to wit-

[479] See Graham, *Early Antislavery Backgrounds, supra* note 1, at 650–653.

[480] Philanthropist, Jan. 13, 1837, p. 2. Birney continued his "Reply to Judge L" in the Jan. 20 and 27, 1837 numbers, and in the former demonstrated his forensic powers by brilliant caricature of the South's efforts to suppress discussion of slavery.

> ness against themselves'? never tortured until they lie against their own lives? never deprived of life without 'due process of law'? By what 'due process of law' is it, that two millions of 'persons' are deprived every year of the millions of dollars produced by their labor? By what due process of law is it that 56,000 'persons,' the annual increase of the slave population, are annually deprived of their 'liberty'? Such questions may seem impertinent, to Mr. L., but when he shall feel that the slave is a 'person,' in very deed, and has rights, as inalienable as his own, he will acknowledge their propriety. Again 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury … and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of Counsel for his defense.' Art. VI of the Amendments. Take all the above provisions in connection with that clause under Art. VI, which declares that 'This Constitution and the laws of the United States which shall be made in pursuance thereof' etc., 'shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding'—and then carry them out to their full extent, and how long would it be ere slavery would be utterly prostrated? I do not say they were inserted with a specific view toward this end, but I do say, that so long as they shall stand, the Constitution of these U[nited] States will be a perpetual rebuke to the selfishness and injustice of the whole policy of the slaveholder. The provisions embody principles which are at entire enmity with the spirit and practice of slavery. How an instrument, containing such principles, can be tortured to express a *sanction* to slavery, I am yet to learn."[481]

Reassimilation of the old theory into the Bill of Rights now proceeded rapidly.[482] The various clauses restraining the powers of Congress began to be popularly regarded as *sources* of Congressional power. The initial premise in this regard was that the provisions of the Bill of Rights were not *rights,* they were *guarantees,* and guarantees customarily presumed the intent and capacity, as well as the duty, to make them good.[483] An open letter[484] to his Congressman from an unnamed Abolitionist in Batavia[485] reveals the hold and spread and reach of these ideas:

> "The very Constitution of the United States is attempted to be distorted and made an ally of domestic slavery. That Constitution was established, not by the *citizens* or *voters,* but by '*the people*' of the United States to secure the blessings of *liberty* and establish *justice.* The Union … was formed for the same great purposes, … yet we have been told that petitioning for *liberty* endangers this Union, that the partnership will be dissolved by extending to all the very right it was intended to secure.

"Slavery in the District of Columbia violates the most important and sacred principles of the Constitution… . I speak not of the mere *letter,* but of the *principles* …—of the *rights* it guarantees, of the *form,* in which the guarantee is expressed. The 5th Amendment declares 'no person shall be deprived of life, *liberty* or property without due process of law.' This petition informs you free men in the District … have been first imprisoned, and then sold for their jail fees. [Suppose, he continued, this had happened to American seamen in a foreign port.] Would not Congress upon petition enquire into the fact and redress the wrong if it existed? Would not you, Sir, be one of the foremost in repelling the insult to our seamen and punishing the aggressor? Would you not consider it your *duty*—your *official* duty to do so? And yet you have no power to discriminate in the object of your protection—a colored sailor is entitled to the *protection* of his country's laws, and Constitution, and flag, and honor, as well as a white one,—he is as much entitled to that protection in Washington city beneath the flag of his country and while he reposes under the tower of the Capitol as he is at *Qualla Balloo* or Halifax, or anywhere on the face of the earth. And all should be protected with equal and exact justice, whether sailors or laborers—citizens or soldiers: if so, you are bound to enquire into the alleged abuses, and if they exist to redress them."

Thus, by October, 1837, the date of Birney's retirement as editor of the Philanthropist, the motivating premise of Abolitionism already was

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[481] *Ibid.*

[482] Resolutions and petitions still were the chief media in evolving this system of constitutional shorthand. Similarity of the revivalists' lectures from place to place, their widespread circulation of the Philanthropist and printed tracts, Birney's own speaking tours, all contributed to resulting stereotypes.

[483] For a striking statement of this theory in 1866 see CONG. GLOBE, 39th Cong., 1st Sess. 1270 (Rep. Thayer, later a distinguished Philadelphia judge).

[484] Graham, *Early Antislavery Backgrounds, supra* note 1, at 655.

[485] Perhaps John Joliffe, a local antislavery lawyer, who was a close friend of Birney. See Graham, *Early Antislavery Backgrounds, supra* note 1, at 655, n. 256.

coming to be this: Americans' basic civil rights were truly national, but in practice their basic civil liberty was not. By acts in support and in toleration of slavery and by failure to protect the friends of the enslaved race, the states and the federal government all abridged, and all allowed to be abridged, the dearest privileges and immunities of citizenship. Humanitarianism had attempted to soften race prejudice and meet this challenge squarely but had been frustrated. Failure left no alternative but political action and the instinctive answer that government had the power to do what the governed had the job to do. The answer to denied power and to defective power was the concept of an inherent power derived from the standing duty to protect. The gist of it was that because allegiance and protection were reciprocal—i.e., ought to be reciprocal—because the government protected its citizens abroad without discrimination, and because the text of the Federal Bill of Rights gave no warrant for discrimination, Congress was duty bound *not* to discriminate. It must do "equal and exact justice" irrespective of race. It had no other choice. It lacked power to discriminate between those persons who were equally entitled to protection. It was duty bound also to remove such discrimination as existed. Implicitly, and morally, these same obligations rested on the states; yet respect for the constitutional division of power here introduced conflict. Few were yet ready for the extreme proposition that Congress might *constitutionally* abolish slavery *in the states.* The original form, as shown by the Batavian communication, was more often that Congress was duty bound to hear petitions to abolish slavery, or that slavery had been abolished in federal territory by the force of the Preamble and Declaration. Because the great natural rights were now also national constitutional rights, they began to generate and carry with them—*even into the states*—the power for their enforcement.

**B. Popularization**

Four routes and media of political action "constitutionalizing" the anti-slavery argument are to be noted.

First were the countless petitions, resolutions, declarations, letters, editorials, speeches, and sermons broadcast by the original anti-slavery proponents and converts—uniformly men and women of influence and position whose idealism was extraordinary and undoubted. One has to read only the *Weld-Grimke* and the *Birney*[486] *Letters,* or the monographs of Barnes,[487] Dumond[488] and Nye[489]—and Nevins's great history[490]—to realize the appeal of these peoples' character and of their example and argument. Moreover, many of them were southerners, and of the proudest type who practiced what they preached—Birney alone freeing slaves to the value of thousands of dollars,[491] and the Grimke sisters doing likewise with those they inherited. Every antislavery society was a band of disciples, workers, petitioners, writers, and "free moral agents" committed to the spread of doctrine that had immense intrinsic appeal.

In consequence, simply as an incident of the intense revival campaigns, the equal protection–due process–privileges and immunities theory became the core of thousands of abolitionist petitions, resolutions, and lectures. Now one, now another of the elements was accented, depending on the need and circumstances, but in an astonishing number of cases two or three parts of the trilogy were used. The whole thus became, even before 1840, a form of popular constitutional shorthand.

After that date even stronger forces enter the picture. First, were the compilers and synthesizers—pamphleteers and journalists like Tiffany[492] and Goodell[493] and Mellen[494] who wrote the articles and treatises on the "Unconstitutionality of Slavery" which Dr.

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[486] The legal and constitutional argument in the BIRNEY LETTERS is remarkable both in range and interest. Note especially the due process arguments at 293, 647, 805–806, 835; the declaration that colored people are "citizens" at 815, and "persons" at 658 and 835; the exceptionally strong references to "natural equality of men" at 272; the composite synthesis of all these elements in the Declaration of 1848 drafted by William Goodell at 1048–1057; the various references to major law cases at 386–387 (Nancy Jackson v. Bulloch, 12 Conn. 38 (1837)), at page 658, 667–670 (Birney's arguments in The Creole, 2 Moore, Digest of International Law 358–361 (1906), for which Weld did much of the research), at 758 (Jones v. Van Zandt, 46 U.S. 215 (1846) in which Salmon P. Chase was of counsel). By contrast, the legal argument in the WELD-GRIMKE LETTERS is more limited, but see page 798 for the letter of Ebenezer Chaplin, an Athol, Massachusetts physician, to Weld, dated October 1, 1839, urging greater emphasis on the unconstitutionality of slavery and less on its cruelties, and specifically mentioning the Declaration of Independence, the common law, the Ordinance of 1787, the Preamble, and the due process clause of the Fifth Amendment.

[487] *Op. cit. supra* note 10.

[488] *Op. cit. supra* note 26.

[489] *Op. cit. supra* note 9.

[490] THE ORDEAL OF THE UNION, 2 vols. (1947).

tenBroek analyzes so well.[495] Others annotated copies of *Our National Charters*[496] setting down after each clause or phrase of the Constitution and the Declaration (much as Birney had done in his early articles) antislavery arguments and doctrines gleaned "both from reason and authority." Such materials, broadcast by the thousand, reprinted, condensed and paraphrased, were themselves powerful disseminators.

It was the minority party platform that gave antislavery theory its most concise, effective statement. Drafted generally by Salmon P. Chase or Joshua R. Giddings, these documents, first of the Liberty and Free Soil parties in the 'forties, then of the Free Democracy and Republican parties in the 'fifties, and in 1860, all made use, in slightly varying combination, of the cardinal articles of faith: human equality, protection, and equal protection from the Declaration, and due process both as a restraint and a source of congressional power. Such consistent repetition testifies both to the nature and extent of previous distillations and to the power and significance of current ones:

**1.** Liberty Party Platform (adopted in 1843 for the 1844 campaign):

> "*Resolved,* That the fundamental truth of the Declaration of Independence, that all men are endowed by their Creator with certain unalienable rights, among which are life, liberty, and the pursuit of happiness, was made the fundamental law of our national government by that amendment of the Constitution which declares that no person shall be deprived of life, liberty, or property without due process of law."[497]

**2.** Free Soil Party Platform, 1848:

> "*Resolved,* That our fathers ordained the Constitution of the United States in order, among other great national objects, to establish justice, promote the general welfare, and secure the blessings of liberty, but expressly denied to the federal government, which they created, all constitutional power to deprive any person of life, liberty, or property without due legal process.
>
> "*Resolved,* that, in the judgment of this convention, Congress has no more power to make a slave than to make a king; no more power to institute or establish slavery than to institute or establish a monarchy. No such power can be found among those specifically conferred by the Constitution, or derived by any just implication from them."[498]

**3.** Free Democracy Platform, 1852:

> "1. That governments deriving their just powers from the consent of the governed are instituted among men to secure to all those unalienable rights of life, liberty, and the pursuit of happiness with which they are endowed by their Creator, and of which none can be deprived by valid legislation, except for crime.
>
> "4. That the Constitution of the United States, ordained to form a more perfect Union, to establish justice, and secure the blessings of liberty, expressly denies to the general government all power to deprive any person of life, liberty, or property without due process of law; and, therefore, the government, having no more power to make a slave than to make a king, and no more power to establish slavery than to establish a monarchy, should at once proceed to relieve itself from all responsibility for the existence of slavery wherever it possesses constitutional power to legislate for its extinction."[499]

**4.** Republican Party Platform, 1856:

> "*Resolved,* That with our republican fathers we hold it be a self-evident truth, that all men are endowed with the unalienable rights to life, liberty, and the pursuit of happiness, and that the primary object and ulterior designs of our federal government were to secure these rights to all persons within its exclusive jurisdiction; that, as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty to maintain this

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[491] 1 BIRNEY LETTERS, *op. cit. supra* note 11, at 52, 494, 498, 500–501.

[492] TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY (1849).

[493] GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW IN ITS BEARING UPON AMERICAN SLAVERY (1844).

[494] MELLEN, AN ARGUMENT ON THE UNCONSTITUTIONALITY OF SLAVERY … (1841).

[495] tenBROEK, ANTISLAVERY ORIGINS, *op. cit. supra* note 2, c. 3 and pp. 86–91.

[496] (Goodell ed. 1863).

[497] The full platform is in STANWOOD, HISTORY OF THE PRESIDENCY 216–220 (1904). In addition to the plank quoted, it contains numerous references to "equality of the rights among men," "the principle of equal rights with all its practical consequences and applications," the "higher law" and "moral law," and the sacredness of rights of speech, press and petition.

[498] *Id.* at 240. This platform was drafted by Salmon P. Chase. See SMITH, THE LIBERTY AND FREE SOIL PARTIES IN THE NORTHWEST 140 (1897).

[499] STANWOOD,*op. cit. supra* note 50, 253–254. This platform was drafted by Salmon P. Chase (see WARDEN, LIFE OF CHASE 338 (1874)) and Joshua R. Giddings (see SMITH, *op. cit. supra* note 51, 247–248).

provision of the Constitution against all attempts to violate it for the purpose of establishing slavery in any Territory of the United States, by positive legislation prohibiting its existence or extension therein; that we deny the authority of Congress, of a territorial legislature, of any individual or association of individuals, to give legal existence to slavery in any Territory of the United States, while the present Constitution shall be maintained."[500]

**5.** Republican Party Platform, 1860:

"8. That the normal condition of all the territory of the United States is that of freedom; that as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty, by legislation whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any individual, to give legal existence to slavery in any Territory of the United States.

"14. That the Republican party is opposed to any change in our naturalization laws, or any state legislation by which the rights of citizenship hitherto accorded to immigrants from foreign lands shall be abridged or impaired; and in favor of giving a full and efficient protection to the rights of all classes of citizens, whether native or naturalized, both at home and abroad."[501]

True, these were party platforms, but these were the platforms of parties to which leaders in the Congress that would frame the Fourteenth Amendment had given their allegiance.[502]

Many Congressmen whose names later loomed large in the formulation of and debates on the Thirteenth and Fourteenth Amendments and the Civil Rights Acts were men of antislavery backgrounds[503] which, it will be recalled, had sought out community leaders, particularly lawyers.[504] Even in the 'forties, antislavery Whigs, Liberty Party-Free Soilers, and later, members of the Free Democracy, converted by the Weld-Birney group, began to enter Congressmen like Joshua R. Giddings,[505] E. S. Hamlin,[506] the Wade brothers,[507] Horace Mann,[508] Philomen Bliss,[509] A. P. Granger,[510] Thaddeus Stevens,[511] Gerrit Smith,[512] William Lawrence,[513] James M. Ashley[514] (who introduced the Thirteenth Amendment in the House), Samuel Galloway[515] (a former member of the "Seventy") and John A. Bingham.[516] All were either associates, converts, or disciples of the Weld-Birney group; and after 1854, all were Republicans.

In addition to the western group of antislavery leaders, there was an equally strong and determined group with its focus in New England. From this group emerged Charles Sumner, Wendell Phillips, and Henry Wilson. Sumner later became one of the most intransigent leaders of the Republican party during and

[500] STANWOOD, *op. cit. supra* note 50, at 271. This platform was drafted by Joshua R. Giddings. JULIAN, THE LIFE OF JOSHUA R. GIDDINGS 335–336 (1892).

[501] STANWOOD, *op. cit. supra* note 50, at 293.

[502] See *infra* pp. 27–36, and notes 56–69.

[503] Among them the following members of the Joint Committee on Reconstruction: George H. Williams, Oregon; Henry W. Grimes, Iowa; William Pitt Fessenden, Maine; Henry T. Blow, Missouri; John A. Bingham, Ohio; George S. Boutwell, Massachusetts; Justin S. Morrill, Vermont; Roscoe Conkling, New York; Elihu B. Washburne, Illinois; and Thaddeus Stevens, Pennsylvania. Two others, Jacob M. Howard of Michigan and Ira Harris of New York, invariably voted with the so-called Radicals. See KENDRICK *op. cit. supra* note 2, at 155–195.

[504] Among Weld's converts were Reps. Edward Wade, and Philemon Bliss, and John H. Paine, Liberty Party leader. See 1 WELD-GRIMKE LETTERS, *op. cit. supra* note 10, at 236–240.

[505] 1795–1864; represented Ohio's Ashtabula and Jefferson Counties (Western Reserve) in House, 25th–34th Congresses, 1838–1859; with John Quincy Adams one of the original antislavery leaders in the House. 7 DICT. AM. BIOG. 260 (1931).

[506] 1808–1894; represented Lorain County district in 28th Cong. 1844–45; one of the political lieutenants of Salmon P. Chase in the 'fifties. See 2 BIRNEY LETTERS, *op. cit. supra* note 11, at 1025.

[507] Edward Wade, 1803–1862, elected as a Free Soiler from Cleveland, 1853–55, and as a Republican, 1855–61 Ben Wade, 1800–1878, law partner of Giddings, and Radical Senator, 1851–1869. See 2 BIRNEY LETTERS, *op. cit. supra* note 11, at 710. 19 DICT. AM. BIOG. 303 (1936).

[508] 1796–1859; one of the organizers of the American public school system; elected as a Whig to succeed J. Q. Adams, Mass. district; reelected as Free Soiler, served 1848–53; President, Antioch College, 1852–59. 12 DICT. AM. BIOG. 240 (1933).

[509] 1813–1889; Ohio Circuit Judge, 1848–51; elected as a Republican from Elyria-Oberlin district, Ohio, served 1855–59; Chief Justice of Dakota Territory, 1861; Assoc. Justice Missouri Supreme Court, 1868–72; Dean of Univ. of Missouri Law School, 1872–1889. 2 DICT. AM. BIOG. 374 (1929).

[510] 1789–1866; antislavery Whig from Syracuse, N.Y.; served 1855–59. BIOG. DIR. AM. CONG., H. R. DOC. NO. 607, 81st Cong., 2d Sess. 1229 (1950).

[511] 1792–1868; elected as a Whig from Lancaster, Pa. district, 1849–53; as a Republican, 1859–68; Radical Republican leader in the House. 17 DICT. AM. BIOG. 620 (1935).

[512] 1797–1874; elected from Peterboro, N.Y. district, one of

after the Civil War.[517] Wilson was also in Congress during the Reconstruction period; and became Vice-President and voted with the Radicals on important tie votes.[518] Other New Englanders who served in Congress, and were members of the Joint Committee on Reconstruction, include William Pitt Fessenden of Maine, Justin Morrill of Vermont, and George S. Boutwell of Massachusetts.[519]

Because Bingham is known to have drafted Sections One and Five of the Fourteenth Amendment, his speeches are of special interest. From 1855–63 and from 1865–73, he represented the Twenty-first Ohio District, which included the Cadiz-Mt. Pleasant Quaker settlements, antislavery strongholds. Furthermore, as a youth he had attended Franklin College at New Athens in 1837–38. At that date Franklin was second only to Oberlin as an antislavery stronghold;[520] the Weld-Birney crusade was at its height. Indeed, in Birney's Philanthropist, 1836–37, we find various anti-slavery petitions and resolutions from the Cadiz and Mt. Pleasant societies.[521] These are couched in the very phraseology for which Bingham in 1856–66 manifested his decisive preference.

Four of Bingham's speeches are of particular significance:

**I.** In his maiden speech in the House, March 6, 1856, attacking laws recently passed by the Kansas pro-slavery legislature which declared it a felony even to agitate against slavery, Bingham argued:

> "These infamous statutes … [contravene] the Constitution of the United States. . . . [A]ny territorial enactment which makes it a felony for a citizen of the United States, within the territory of the United States 'to know, to argue and to utter freely,' according to conscience is absolutely void. . . . [A] felony to utter there, in the hearing of a slave, upon American soil, beneath the American flag … the words of the Declaration 'All men are born free and equal, and endowed by their Creator with the inalienable rights of life and liberty;' … [A] felony to utter … those other words. . . . 'We, the people of the United States, in order to establish justice,' the attribute of God, and 'to secure liberty,' the imperishable right of man, do 'ordain this Constitution'. . . . It is *too late* to make it a felony to utter the self-evident truth that life and liberty belong of right to every man. . . . This pretended legislation … violates the Constitution in this—that it abridges the freedom of speech and of the press, and deprives persons of liberty without due process of law, or any process but that of brute force, while the Constitution provides that Congress shall make no law abridging the freedom of speech or of the press; and it expressly prescribes that 'no person shall be deprived of life, liberty, or property without due process of law."[522]

**II.** On January 13, 1857, Bingham spoke in support of Congress' power over slavery in the territory and attacked President Buchanan's recent defense of the Kansas-Nebraska Act of 1854 repealing the Missouri Compromise. After a long analysis of the provisions of the Federal Bill of Rights, of the Northwest Ordinance, the enabling acts and constitutions of the states carved from the Ohio Territory—emphasizing especially the Federal due process clause and the "all men are born equally free and independent" clauses of the state constitution, he said:

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the regions converted by Weld; served 1853–1854, resigned. 17 DICT. AM. BIOG. 270 (1935).

[513] 1819–1899; grad. Franklin College, New Athens, Ohio, 1838; Cincinnati Law School, 1840; Supreme Court Reporter, 1851; Judge, 1857–64; elected as a Republican, served 1865–71, 1873–77. 11 >DICT. AM. BIOG. 52 (1933).

[514] 1824–1896; elected as a Republican from Scioto County, 1859–69. See 1 WELD-GRIMKE LETTERS, *op. cit. supra* note 10, at 333. 1 DICT. AM. BIOG. 389 (1928).

[515] 1811–1872, elected as a Republican from Columbus, 1855–57. See WELD-GRIMKE LETTERS, *op. cit. supra* note 10, at 228.

[516] For eight terms (1855–63, 1865–73) Bingham represented the 21st Ohio District, composed of Harrison, Jefferson, Carroll and Columbiana Counties, including the Quaker settlements along Short Creek and the Ohio. See 3 BRENNAN, BIOGRAPHICAL ENCYCLOPEDIA … OF OHIO 691 (1884).

[517] 18 DICT. AM. BIOG. 208 (1936).

[518] 20 DICT. AM. BIOG. 322 (1936).

[519] Fessenden was the son of General Samuel Fessenden, the leading Abolitionist of Maine, who was one of the national vice-presidents of the American Anti-Slavery Society, 6 DICT. AM. BIOG. 348 (1931); on Morrill, see 13 DICT. AM. BIOG. 198 (1934); on Boutwell, see 2 DICT. AM. BIOG. 489 (1929).

[520] See Graham, *Early Antislavery Backgrounds, op. cit. supra* note 1, at 624, n. 150.

[521] For an example see Philanthropist, Mar. 10, 1837, p. 3, col. 4.

[522] CONG. GLOBE, 34th Cong., 1st Sess. app. 124 (1856). Three other antislavery Republicans representing constituencies converted in the Weld-Birney crusade also used all the old rhetoric and theory including due process: Rep. Granger (N.Y.) *id.* at 295–296; Reps. Edward Wade (*id.* at 1076–1081) and Philemon Bliss (*id.* at 553–557), both Ohioans and among Weld's early converts. See also the speech of Rep. Schuyler Colfax (Ind.), *id.* at 644.

**U.S. SUPREME COURT, OCTOBER 1953**

BRIEF FOR THE APPELLANTS AND RESPONDENTS ON REARGUMENT

> "The Constitution is based upon EQUALITY of the human race. . . . A State formed under the Constitution and pursuant to its spirit, must rest upon this great principle of EQUALITY. Its primal object must be to protect each human being within its jurisdiction in the free and full enjoyment of his natural rights. . . .
>
> "It must be apparent that the absolute equality of all, and the equal protection of each, are principles of our Constitution, which ought to be observed and enforced in the organization and admission of new States. The Constitution provides … that *no person* shall be deprived of life, liberty, or property, without due process of law. It makes no distinction either on account of complexion or birth—it secures these rights to all persons within its exclusive jurisdiction. This is equality. It protects not only life and liberty, but also property, the product of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life."[523]

**III.** On January 25, 1858, attacking "The Lecompton Conspiracy"—the proposed pro-slave constitution of Kansas declaring that only "All *freemen,* when they form a compact, are equal in rights,"—and absolutely barring free Negroes from the state, Bingham declared:

> "The [Federal] Constitution … declares upon its face that no person, whether white or black, shall be deprived of life, liberty, or property, but by due process of law; and that it was ordained by the people to establish justice! … [By sanctioning these provisions] we are asked to say, that the self-evident truth of the Declaration, 'that ALL MEN ARE CREATED EQUAL' is a self-evident lie. . . . We are to say … to certain human beings in the Territory of Kansas, though you were born in this Territory, and born of free parents, though you are human beings, and no chattel, yet you are not free to live here …; you must be disseized of your freehold liberties and privileges, without the judgment of your peers and without the protection of law. Though born here, you shall not, under any circumstances, be permitted to live here."[524]

**IV.** On February 11, 1859, Bingham attacked the admission of Oregon because its constitution forbade immigration of free Negroes and contained other discriminations against them:

> "[T]his constitution … is repugnant to the Federal Constitution, and violative of the *rights of citizens of the United States. . . .*
>
> "Who *are citizens of the United States?* They are those, and those only, who owe allegiance to the Government of the United States; not the base allegiance imposed upon the Saxon by the Conqueror …; but the allegiance which requires the citizen not only to obey, but to support and defend, if need be with his life, the Constitution of his country. All free persons born and domiciled within the jurisdiction of the United States; all aliens by act of naturalization, under the laws of the United States."

"The people of the several States," who according to the Constitution are to choose the representatives in Congress, and to whom political powers were reserved by the Tenth Amendment, were to Bingham "the same community, or body politic, called by the Preamble … 'the people of the United States'." Moreover, certain "distinctive political rights"—for example the right to choose representatives and officers of the United States, to hold such offices, etc.—were conferred only on "citizens of the United States."

> "… I invite attention to the significant fact that natural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this Constitution guaranteed by the broad and comprehensive word 'person,' as contradistinguished from the limited term citizen—as in the fifth article of amendments, guarding those *sacred rights* which *are* as *universal and indestructible* as the human race, that 'no person shall be deprived of life, liberty, or property, but by due process of law, nor shall private property be taken without just compensation.' And this guarantee *applies* to all citizens within the United States."

Against infringement of "these wise and beneficent guarantees of political rights to the citizens of the United States as such, and of natural rights to all persons, whether citizens or strangers," stood the supremacy clause.

> "There, sir, is the limitation upon State sovereignty—simple, clear, and strong. No State may *rightfully,* by Constitution or statute law, impair any of these guarantied rights, either political or natural. They may not *rightfully or lawfully* declare that the strong citizens may deprive the weak citizens of their rights, natural or political. . . .
>
> "… This provision [excluding free Negroes and mulattoes] seems to me … injustice and

[523] CONG. GLOBE, 34th Cong., 3rd Sess. app. 135–140 (1857).
[524] CONG. GLOBE, 35th Cong., 1st Sess. 402 (1858).

oppression incarnate. This provision, sir, excludes from the State of Oregon eight hundred thousand of the native-born citizens of the other States, who are, therefore, *citizens of the United States.* I grant you that a State may restrict the exercise of the elective franchise to certain classes of citizens of the United States, to the exclusion of others; but I deny that any State may exclude a law abiding citizen of the United States from coming within its territory, or abiding therein, or acquiring and enjoying property therein, or from the enjoyment therein of the 'privileges and immunities' of *a citizen of the United States.* What says the Constitution:

" 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. Art. 4, Section 2.'

"Here is no qualification. . . . The citizens of each State, all the citizens of each State, *being citizens of the United States,* shall be entitled to 'all privileges and immunities of citizens of the several States.' Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State authority or State legislation; but to 'all privileges and immunities' of citizens of the United States in the several States. *There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is 'the privileges and immunities of citizens of the* United States …' that it guaranties. . . .

"…[S]ir, I maintain that the persons thus excluded from the State by this section of the Oregon Constitution, are citizens by birth of the several States, and therefore *are citizens of the United States,* and as such are entitled to all the privileges and immunities of citizens of the United States, amongst which *are* the rights of life and liberty and property, and their due protection in the enjoyment thereof by law; . . . .

"Who, sir, are citizens of the United States? First, all free persons born and domiciled within the United States—not all free white persons, but all free persons. You will search in vain, in the Constitution of the United States, for that word *white;* it is not there. You will look in vain for it in that first form of national Government—the Articles of Confederation; it is not there. The omission of this word—this phrase of caste—from our national charter, was not accidental, but intentional. . . .

"… This Government rests upon the absolute equality of natural rights amongst men. . . .

"… Who … will be bold enough to deny that all persons are equally entitled to the enjoyment of the rights of life and liberty and property; and that no one should be deprived of life or liberty, but as punishment for crime; nor of his property, against his consent and without due compensation? …

"*The equality of all* to the right to live; *to the right to know;* to argue and to utter, according to conscience; to work and enjoy the product of their toil, is the rock on which that Constitution rests—. . . . The charm of that Constitution lies in the great democratic idea which it embodies, that *all men, before the law, are equal in respect of those rights of person which God gives* and *no man or State may rightfully take away,* except as a forfeiture for crime. Before your Constitution, sir, *as it is,* as I trust it ever will be, all men are sacred, whether white or black. . . ."[525]

Several points must here be emphasized. It will be noted that Bingham disavows the color line as a basis for citizenship of the United States; that he regards Milton's rights of communication and conscience, including the *right to know,* to *education,* as one of the great fundamental natural "rights of person which God gives and no man or *state* may *rightfully* take away," and which hence are "embodied" also within, and secured by, "the great democratic idea that all men before the law are equal." In short, the concept and guarantee of the equal protection of the laws is already "embodied" in the Federal Constitution as of 1859; this same concept, moreover, embraces "*the equality of all … to the right to know*"; and above all, there is no color line in the Constitution, even of 1859.

### Conclusions

From this consideration of the historical background against which the Fourteenth Amendment was written, submitted by Congress, and ratified by the requisite number of states, these important facts develop:

**1.** To the opponents of slavery, equality was an absolute, not a relative, concept which comprehended that no legal recognition be given to racial distinctions of any kind. Their theories were formulated with reference to the free Negro as well as to slavery—that great reservoir of prejudice and evil that fed the whole system of racial distinctions and caste. The notion that any state could impose such distinctions was totally incompatible with antislavery doctrine.

[525] CONG. GLOBE, 35th Cong., 2nd Sess. 981–985 (1859) (emphasis added throughout).

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BRIEF FOR THE APPELLANTS AND RESPONDENTS ON REARGUMENT

**2** These proponents of absolute equalitarianism emerged victorious in the Civil War and controlled the Congress that wrote the Fourteenth Amendment. Ten of the fifteen members of the Joint Committee on Reconstruction were men who had antislavery backgrounds.

**3** The phrases—"privileges and immunities," "equal protection," and "due process"—that were to appear in the Amendment had come to have specific significance to opponents of slavery. Proponents of slavery, even as they disagreed, knew and understood what that significance was. Members of the Congress that formulated and submitted the Amendment shared that knowledge and understanding. When they translated the antislavery concepts into constitutional provisions, they employed these by now traditional phrases that had become freighted with equalitarian meaning in its widest sense.

U.S. SUPREME COURT, OCTOBER 1953

BRIEF FOR THE BD. OF EDUC., TOPEKA, KS, ON QUESTIONS PROPOUNDED BY THE COURT

# In the Supreme Court of the United States October Term, 1953

## No. 1

OLIVER BROWN, ET AL., APPELLANTS
VS.
BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL., APPELLEES

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS**

**BRIEF FOR THE BOARD OF EDUCATION, TOPEKA, KANSAS, ON QUESTIONS PROPOUNDED BY THE COURT**

PETER F. CALDWELL, Counsel for the Board of Education of Topeka, Kansas, 512 Capitol Federal Building, Topeka, Kansas.

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### I. STATEMENT

This brief is filed in response to the order of the Court, entered June 8, 1953, propounding five questions on which briefs were requested. Since the date of that order the Topeka Board of Education on September 3, 1953, duly adopted the following resolution:

> "Be it resolved that it is the policy of the Topeka Board of Education to terminate maintenance of segregation in the elementary schools as rapidly as is practicable.";

and on September 8, 1953, it passed a motion, "… that segregation be terminate in the Southwest and Randolph Schools this year …". Prior to the adoption of said resolution the Board of Education maintained twenty separate elementary schools for white children, each of which schools was attended by white children residing within a limited geographic area or boundaries near the school, and it also maintained four separate schools for negro children with large area or district boundaries. Negro students living some distance from school were furnished transportation to and from school if they requested it.

Since September 8, 1953, negro children living within the area boundaries of the Southwest School and the Randolph School are assigned to and are attending those schools along with and equally with white children. The Board is still maintaining the four separate negro schools and eighteen separate white schools.

By reason of its having resolved to terminate segregation in the elementary schools of Topeka "as rapidly as is practicable," the Topeka Board of Education no longer has an actual interest in the controversy over the constitutionality of segregation in such schools, and it therefore prefers to refrain from arguing and briefing Questions 1, 2, and 3 as propounded by the Court, which are directed to the constitutional questions involved.

The Board of Education of Topeka is, however, actually and directly interested in Questions 4 and 5 as propounded by the Court. Briefly summarized, we contend;

> *First,* That termination of segregation in the elementary schools of Topeka will involve difficult and far reaching administrative decisions, affecting nearly all school children, nearly all teachers, and nearly all school buildings, so that to attempt to accomplish it in a hurried or summary manner will be both impossible and impractical.
>
> *Second,* The public interest, including the interest of negro children in Topeka, equity, and practical considerations require that termination of segregation in the elementary schools of Topeka shall be permitted to be accomplished in a gradual and orderly manner.

### II. QUESTION 4(A) SHOULD BE ANSWERED IN THE NEGATIVE: AND QUESTION 4(B) IN THE AFFIRMATIVE

Both Questions 4(a) and 4(b) contemplate the possibility that this Court might issue a broad, general order requiring abolition of segregation in the elementary schools of Topeka, rather than a limited order relating to the rights of the few particular negro children who are parties to this suit.

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Such a general order would necessitate almost a complete readjustment of the elementary school system as now maintained in Topeka, so far as fixing attendance areas and boundaries for all the elementary school buildings in Topeka; it would require the transfer of many white and negro children from the schools they now attend to other buildings, as well as the transfer and assignment of many teachers to serve the resulting new classes in the various buildings.

Many of the grade schools now used for white children in the city are already full, and some are badly overcrowded. A school building program has been carried on and is being carried on now. The Southwest School was completed and opened in 1952; two other new schools are under construction now, and the Board is deciding on new sites for still two more schools to be constructed as quickly as possible. All five of these new buildings are, or will be, in areas where there have been new housing projects, and where the school population is now and probably will remain predominantly white children. These schools will probably not serve many negro children even when segregation is finally abolished.

The majority of the negro school population resides in a few scattered areas throughout the older parts of the city, and is not evenly distributed throughout the entire city. Many negro children live nearest to white schools which are already overcrowded. To transfer and admit these negro children to the schools nearest their residences will require either that many white children now attending such schools will have to be transferred to other schools, or that annexes will have to be provided. In short we have little doubt that the area boundaries of the existing white and negro schools will have to be redefined. This will necessarily require reassigning students, both white and negro, to schools which they do not now attend, and this in turn will require changing the classes to fit the new children in, and may involve transferring teachers from building to building as well.

It is the plan of the Board of Education of Topeka to make the transition from segregated to integrated elementary schools gradually and in an orderly manner on a school by school basis, but as rapidly as is practically possible. Such changes will be made at convenient times between semesters, and in such a manner that the administrative decisions and changes can be conveniently and efficiently handled without interrupting the continuity of the regular school program. The Board has discussed its policy and plans in open, public meetings attended by members of both white and negro races. It has invited and secured cooperation and suggestions, and the public generally in the community is assisting the Board in achieving its objective of terminating segregation "as rapidly as is practicable."

If this Court should enter an order to abolish segregation in the public schools of Topeka "forthwith," as suggested in Question 4(a), the Topeka Board would, of course, do its best to comply with the order. We believe, however, that it would probably require that the regular classes be suspended, while the many administrative changes and adjustments are being made, and while the necessary transfers of and reassignment of students and teachers are being made. Important decisions would have to be hurriedly made, without time for careful investigation of the facts nor for careful thought and reflection. Most decisions would have to be made on a temporary or an emergency basis. We believe the attendant confusion and interruption of the regular school program would be against the public interest, and would be damaging to the children, both negro and white alike.

We respectfully urge that in making and issuing its decree this Court has equitable power and discretion to shape the decree and to control its execution in such a manner as to protect the public interest:

*United States v. Morgan,* 307 U.S. 183, 81 L. Ed. 1211, 59 S. Ct. 795:

> "It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved." (p. 1219, L. Ed.)

*Virginia Ry. Co. v. System Federation No.* 40, 300 U.S. 515, 81 L. Ed. 789, 52 S. Ct. 512:

> "6. The extent to which equity will go to give relief where there is no adequate remedy at law is not a matter of fixed rule, but rests rather in the sound discretion of the court.
>
> "7. Courts of equity may, and frequently do, go much further to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." (Syll. 6. and 7.)

*Securities Exch. Comm. v. U. S. R. and Imp. Co.,* 310 U.S. 434, 84 L. Ed. 1293, 60 S. Ct. 1044:

> "7. A court of equity has discretion, in the exercise of jurisdiction committed to it, to grant or deny relief upon performance of conditions which will safeguard the public interest." (Syll. 7.)

Because the Board of Education believes that a "forthwith" order to abolish segregation in the Topeka school system would seriously damage and interrupt the operation and administration of the schools and would be plainly against public interest, and because it believes that an order to abolish segregation, in the public interest, should permit "an effective gradual adjustment"; we respectfully submit that Question 4(a) propounded by the Court should be answered in the negative, and that Question 4(b) should be answered in the affirmative.

### III. QUESTIONS 5(A), (B) AND (C) SHOULD BE ANSWERED IN THE NEGATIVE

If segregation in the public schools of Topeka is to be abolished by decree of the Court permitting an "effective gradual adjustment" as suggested in Question 4(b), then the Board of Education should be permitted to manage the readjustment, subject only to the usual and normal jurisdiction always retained by a court of equity for the enforcement of its decree or judgment.

We have heretofore pointed out the many intricate administrative decisions which will be involved in the transition to an integrated system of grade schools in Topeka. These are the problems and decisions which the Board of Education is organized to handle. Clearly there will be considerable administrative expense involved in making the adjustment. In Kansas the Board of Education is required to comply with cash basis and budget laws in connection with such expenditures, and taxes must be levied for such expenses within the levy limitation laws. Thus the necessary adjustments for a transition from segregated to integrated schools will affect nearly all the other administrative actions of the Board of Education. For this Court or a special master to undertake to control the necessary readjustments or to draw detailed orders and decrees will involve them in the control and direction of the administration of the entire school program either directly or indirectly.

We believe such detailed control by this Court or a special master is unnecessary and undesirable. We therefore submit that Questions 5(a), (b) and (c) should be answered in the negative.

### IV. QUESTION 5(D) SHOULD ALSO BE ANSWERED IN THE NEGATIVE

If this Court should enter an order or decree as suggested in Question 4(b), there is no need for a more specific or detailed decree in this case.

The Board of Education of Topeka has already on its own initiative resolved to terminate segregation in the elementary schools "as rapidly as is practicable" and has already taken its first step toward that end by providing for an integrated system in two schools which were formerly used only for white children. Certainly at this time there is no need for a more detailed decree than the decree suggested in Question 4(b). The District Court will always have jurisdiction to enforce the decree. If the need for a more specific decree should arise in the future, the District Court will have ample power to make such a decree under its general power to enforce the judgment and decree of the court.

We respectfully submit that Question 5(d) should be answered in the negative.

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U.S. SUPREME COURT, MAY 1954

# Brown v. Board of Education of Topeka

BROWN ET AL.
V.
BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KAN., ET AL.

BRIGGS ET AL. V. ELLIOTT ET AL.

DAVIS ET AL. V. COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VA., ET AL.

GEBHART ET AL. V. BELTON ET AL.

Nos. 1, 2, 4, 10.

Reargued Dec. 7, 8, 9, 1953.
Decided May 17, 1954.

**347 U.S. 483**

Class action originating in the four states of Kansas, South Carolina, Virginia, and Delaware, by which minor Negro plaintiffs sought to obtain admission to public schools on a nonsegregated basis. On direct appeals by plaintiffs form adverse decisions in the United States District Courts, District of Kansas, 98 F.Supp. 797, Eastern District of South Carolina, 103 F.Supp. 337, and on grant of certiorari after decision favorable to plaintiffs in the Supreme Court of Delaware, 91 A.2d 137, the United States Supreme Court, Mr. Chief Justice Warren, held that segregation of children in public schools solely on the basis race, even though the physical facilities and other tangible factors may be equal, deprives the children of the minority group of equal educational opportunities, in contravention of the Equal Protection Clause of the Fourteenth Amendment.

Cases ordered restored to docket for further argument regarding formulation of decrees.

In resolving question whether segregation of races in public schools constituted a denial of equal protection of the laws, even though the tangible facilities provided might be equal, court would consider public education in light of its full development and present status throughout the nation, and not in light of conditions prevailing at time of adoption of the amendment. U.S.C.A.Const. Amend. 14.

The opportunity of an education, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. U.S.C.A.Const. Amend. 14.

The segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprives the children of minority group of equal educational opportunities, and amounts to a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution. U.S.C.A.Const. Amend. 14.

The doctrine of "separate but equal" has no place in the field of public education, since separate educational facilities are inherently unequal. U.S.C.A.Const. Amend. 14.

In view of fact that actions raising question of constitutional validity of segregation of races in public schools were class actions, and because of the wide applicability of decisions holding that segregation was denial of equal protection of laws, and the great variety of local conditions, the formation of decrees presented problems of considerable complexity, requiring that cases be restored to the docket so that court might have full assistance of parties in formulating appropriate decrees. U.S.C.A.Const. Amend. 14.

*No. 1:*

Mr. Robert L. Carter, New York City, for appellants Brown and others.

Mr. Paul E. Wilson, Topeka, Kan., for appellees Board of Education of Topeka and others.

*Nos. 2, 4:*

Messrs. Spottswood Robinson III, Thurgood Marshall, New York City for appellants Briggs and Davis and others.

Messrs. John W. Davis, T. Justin Moore, J. Lindsay Almond Jr., Richmond, Va., for appellees Elliott and County School Board of Prince Edward County and others.

Asst. Atty. Gen. J. Lee Rankin for United States amicus curiae by special leave of Court.

*No. 10:*

Mr. H. Albert Young, Wilmington, Del., for petitioners Gerbhart et al.

Mr. Jack Greenberg, Thurgood Marshall, New York City, for respondents Belton et al.

U.S. SUPREME COURT, MAY 1954

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

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.[1]

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction.[2] Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.[3]

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect.

[1] In the Kansas case, *Brown v. Board of Education*, the plaintiffs are Negro children of elementary school age residing in Topeka. They brought this action in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students. Kan.Gen.Stat1949, § 72–1724. Pursuant to the authority, the Topeka Board of Education elected to establish segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, 28 U.S.C.A. §§ 2281, 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F.Supp. 797. The case is here on direct appeal under 28 U.S.C.A. § 1253.

In the South Carolina case, *Briggs v. Elliott*, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S.C.Const. Art. XI, § 7; S.C. Code 1942 § 5377. The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, 28 U.S.C.A.§§ 2281, 2284, denied the requested relief. The court found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 98 F.Supp. 529. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's reviews on a report filed by the defendants concerning the progress made in the equalization program. 342 U.S. 350, 72 S.Ct. 327, 96 L.Ed. 392. On remand, the District Court found that substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well. 103 F.Supp. 920. The case is again here in direct appeal under 28 U.S.C. § 1253, 28 U.S.C.A. § 1253.

In the Virginia case, *Davis v. County School Board*, the plaintiffs are Negro children of high school age residing Prince Edward County. They brought this action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Va.Const. § 140; Va.Code 1950, § 22–221, The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, 28 U.S.C.A. §§ 2281, 2284, denied the requested relief. The court found the

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What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time.[4] In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by the law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Four-teenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.[5] The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson, supra*, involving not education but transportation.[6] American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education.[7] In *Cumming v. Board of Education of Richmond County*, 175 U.S. 528, 20 S.Ct. 197, 44 L.Ed. 262, and *Gong Lum v. Rice*, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172, the validity of the doctrine itself was not challenged.[8] In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students were denied to Negro Students of the same educational qualifications. *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208; *Sipuel v. Board of Regents of University of Oklahoma*, 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247; *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848,

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Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forwith to provide substantially equal curricula and transportation and to "proceed with all reasonable diligence and dispatch to remove" the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 103 F.Supp. 337. The case is here on direct appeal under 28 U.S.C. § 1253.

In the Delaware case, *Gebhart v. Belton*, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Del.Const. Art. X, § 2; Del.Rev.Code, 1935, § 2631, 14 Del.C. § 141. The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved in travel. Del.Ch., 87 A.2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (see note 10, *infra*), but did not rest his decision on that ground. 87 A.2d at page 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools and had been accomplished. 91 A.2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U.S, 891, 73 S.Ct. 213, 97 L.Ed. 689. The plaintiffs, who were successful below, did not submit a cross-petition.

[2] 344 U.S. 1, 73 S.Ct. 1, 97 L.Ed. 3, Id., 344 U.S. 141, 73 S.Ct. 124, 97 L.Ed. 152, *Gebhart v. Belton*, 344 U.S. 891, 73 S.Ct. 213, 97 L.Ed. 689.

[3] 345 U.S. 972, 73 S.Ct. 1118, 97 L.Ed. 1388. The Attorney General of the United States participated both Terms as *amicus curiae*. 3. 345 U.S. 972, 73 S.Ct. 1118, 97 L.Ed. 1388. The Attorney General of the United States participated both Terms as *amicus curiae*.

[4] For a general study of the development of public education prior to the Amendment, see Butts and Cremin, *A History of Education in American Culture* (1953), Pts. I, II; Cubberley, *Public Education in the United States* (1934 ed.), cc. II-XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Crimin, *supra*, at 269–275; Cubberley, *supra*, at 288–339, 408–431; Knight, *Public Education in the South* (1922), ecc. VIII, IX. See also H. Ex. Doc. No. 315, 41st Cong., 2d Sees. (1871).

94 L.Ed. 1114; *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v, Painter*, supra, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors.[9] Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

[1] In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

[2] Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

[3] We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt v. Painter*, supra [339 U.S. 629, 70 S.Ct. 850], in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court

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Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South and did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (e.g., the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, *supra*, at 408–424. In the country as a whole, but particularly in the South, the War virtually stopped all progress in public education. Id., at 427–428. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, *A History of Freedom of Teaching in American Schools* (1941), 112–132, 175–195. Compulsory school attendance laws were not generally adopted until after the ratification of the fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, *supra*, at 563–565.

[5] *In re Slaughter-House Cases*, 1873, 16 Wall. 36, 67–72, 21 L.Ed. 394; *Strauder v. West Virginia*, 1880, 100 U.S. 303, 307–308, 25 L.Ed. 664.

> "It ordains that no State shall deprive any person of life, liberty, or property. without due process of deny, to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from un-friendly legislation against them distinctively as colored,—exemption from legal discrimination, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." See also *State of Virginia v. Rives*, 1879, 100 U.S. 313, 318, 25 L.Ed. 667; *Ex parte Virginia*, 1879, 100 U.S. 339, 344–345, 25 L.Ed. 676.

The doctrine apparently originated in *Roberts v. City of Boston*, 1850, 5 Cush. 198, 59 Mass. 198, 206, upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. Mass. Acts 1855, c. 256. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

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relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents*, supra [339 U.S. 67, 70 S.Ct. 853], the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: "* * * his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs.

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."[10]

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.[11] Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

[4] We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.[12]

[5] Because these are class actions, because of the wide applicability of third decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of

[7] See also *Berea College v. Kentucky*, 1908, 211 U.S 45, 29 S.Ct. 33, 53 L.Ed. 81.

[8] In the Cumming case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the Gong Lum case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

[9] In the Kansas case, the court below found substantial equality as to all such factors. 98 F.Supp. 797, 798. In the South Carolina case, the court below found that the defendants were proceeding "promptly and in good faith to comply with the court's decree." 103 F.Supp, 920, 921. In the Virginia case, the court below noted that the equalization program was already "afoot and progressing," 103 F.Supp. 337, 341; since then, we have been advised, in the Virginia Attorney General's brief on reargument, that the program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way. 91 A.2d 137, 139.

[10] A similar finding was made in the Delaware case: "I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated." 87 A.2d 862, 865.

[11] K. B. Clark, "Effect of Prejudice and Discrimination on Personality Development" (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, *Personality in the Making* (1952), c. VI; Deutscher and Chein, "The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion," 26 J.Psychol. 259 (1948); Chein, "What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?," 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, "Educational Costs," in *Discrimination and National Welfare* (MacIver, ed., 1949), 674–681. And see generally Myrdal, *An American Dilemma* (1944).

[12] See *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, concerning the Due Process Clause of the Fifth Amendment.

[13] "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term.[13] The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as *amici curiae* upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.[14]

It is so ordered.

"5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

"(*a*) should this Court formulate detailed decrees in these cases;

"(*b*) if so, what specific issues should the decrees reach;

"(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more, detailed decrees?"

[14] See Rule 42, Revised Rules of this Court, effective July 1, 1954, 28 U.S.C.A.

U.S. SUPREME COURT, OCTOBER 1954

BRIEF FOR APPELLANTS AND RESPONDENTS ON FURTHER REARGUMENT

# In The Supreme Court of the United States October Term, 1954

NO. 1

OLIVER BROWN, ET AL., APPELLANTS,
VS.
BOARD OF EDUCATION OF TOPEKA, ET AL.,
APPELLEES.

NO. 2

HARRY BRIGGS, JR. ET AL., APPELLANTS,
VS.
R. W. ELLIOTT, ET AL., APPELLEES.

NO. 3

DOROTHY E. DAVIS, ET AL., APPELLANTS,
VS.
COUNTY SCHOOL BOARD OF PRINCE
EDWARD COUNTY, VIRGINIA, ET AL., APPELLEES.

NO. 5

FRANCIS B. GEBHART, ET AL., PETITIONERS,
VS.
ETHEL LOUISE BELTON, ET AL., RESPONDENTS.

## APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE DISTRICT OF KANSAS, THE EASTERN DISTRICT OF SOUTH CAROLINA AND THE EASTERN DISTRICT OF VIRGINIA, AND ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE, RESPECTIVELY

## BRIEF FOR APPELLANTS IN NOS. 1, 2 AND 3 AND FOR RESPONDENTS IN NO. 5 ON FURTHER REARGUMENT

CHARLES L. BLACK JR.,
ELWOOD H. CHISOLM,
WILLIAM T. COLEMAN JR.,
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## PRELIMINARY STATEMENT

On May 17, 1954, this Court disposed of the basic constitutional question presented in these cases by deciding that racial segregation in public education is unconstitutional. The Court said, however, that the formulation of decrees was made difficult "because these are class actions, because of the wide applicability of this decision and because of the great variety of local conditions. . . ." The cases were restored to the docket, and the parties were requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument last Term.

## QUESTIONS INVOLVED

Questions 4 and 5, left undecided and now the subject of discussion in this brief, follow:

**4.** Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

*(a)* would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

*(b)* may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

**5.** On the assumption on which question 4*(a)* and *(b)* are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 *(b)*

*(a)* should this Court formulate detailed decrees in these cases;

*(b)* if so, what specific issues should the decrees reach;

*(c)* should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

*(d)* should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

## DEVELOPMENTS IN THESE CASES SINCE THE LAST ARGUMENT

### The Kansas case

On September 3, 1953, the Topeka School Board adopted the following resolution:

> Be it resolved that it is the policy of the Topeka Board of Education to terminate the maintenance of segregation in the elementary schools as rapidly as is practicable.

On September 8, 1953, appellees ordered segregation terminated in two of the nineteen school districts in Topeka. In September, 1954, segregation was completely terminated in ten other school districts and partially in two.

There is now a total school enrollment of approximately 8,500 children of elementary school age attending 23 elementary schools. Of the 8,500 children enrolled, approximately 700 Negro children are in four elementary schools for Negroes. There are 123 Negro children now attending schools on a non-segregated basis pursuant to appellees' implementation of its policy of removing segregation from the public school system. The blunt truth is that 85% of the Negro children in Topeka's elementary schools are still being denied the constitutional rights for which appellants sought redress in their original action.

While Topeka has been effectuating its plan, several other cities of the first class have undertaken the abolition of segregated schools. Lawrence and Pittsburg have completely desegregated. Kansas City, Abilene, Leavenworth and Parsons have ordered partial desegregation. Wichita and Salina have revised their school regulations to permit Negro children to attend schools nearest their homes. Only Coffeeville and Fort Scott have not taken any affirmative action whatsoever.

### The Delaware case

By order of the Court of Chancery, affirmed by the Supreme Court of Delaware, the named plaintiffs were immediately admitted to the schools to which they applied. These plaintiffs and other members of the class are in their third year of uninterrupted attendance in the two Delaware schools named in the order. That attendance has been marked by no untoward incident. The order, however, did not result in elimination of separate schools for Negroes in the two school districts involved, in each of

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which one segregated elementary school is yet maintained by petitioners.

The State Board of Education has statutory authority to "exercise general control and supervision over the public schools of the State, including … the determination of the educational policies of the State and the seeking in every way to direct and develop public sentiment in support of public education." DELAWARE CODE, Title 14, Section 121 (1953). Accordingly, the State Board of Education, on June 11, 1954, adopted a statement of "Policies Regarding Desegregation of Schools of the State" and announced "a general policy" that it "intends to carry out the mandates of the United States Supreme Court decision as expeditiously as possible." It further requested that "the school authorities together with interested citizen groups throughout the State should take immediate steps to hold discussions for the purpose of (1) formulating plans for desegregation in their respective districts and (2) presenting said plans to the State Board of Education for review."

On August 19, 1954, the State Board of Education requested "that *all schools,* maintaining four or more teachers, present a *tentative plan* for desegregation in their area on or before *October 1, 1954.*"

The desegregation plans of the Claymont Board of Education, whose members are petitioners here, providing for the complete termination of segregation, were approved by the State Board of Education on August 26, 1954. These plans have been partially put into operation.

No plan ending segregation in the Hockessin schools, the other Delaware area in the litigation here, has yet been formulated.

Delaware statutes provide for two types of public school districts, exclusive of the public school system in Wilmington which is practically autonomous. One type is commonly known as the State Board District. As to it, the statute provides that the "Board of School Trustees shall be the representative in the District of the State Board of Education." DELAWARE CODE, Title 14, Section 702 (1953). There are 98 such units. The other type is the Special School District, concerning which the statute provides that "There shall be a Board of Education which shall be responsible for the general administration and supervision of the free public schools and educational interests of the District." DELAWARE CODE, Title 14, Section 902 (1953). There are fifteen Special School Districts.

Desegregation in the school districts of Delaware is illustrated by the table below:

State Board Districts

| | Partial Desegregation | Complete Desegregation | No Desegregation | Total |
|---|---|---|---|---|
| New Castle County | 4 | 1 | 26 | 31 |
| Kent County | 0 | 0 | 24 | 24 |
| Sussex County | 0 | 0 | 43 | 43 |
| | | | | 98 |

Special School Districts

| | Partial Desegregation | Complete Desegregation | No Desegregation | Total |
|---|---|---|---|---|
| New Castle County | 3 | 1 | 1 | 5 |
| Kent County | 1 | 0 | 3 | 4 |
| Sussex County* | 0 | 0 | 6 | 6 |
| | | | | 15 |

Wilmington, which is in New Castle County and contains 34% of the population of the State, in June desegregated all elementary and secondary schools for the 1954 summer session. It has also completely desegregated its night school sessions. Beginning in September, 1954, desegregation of all elementary schools was effectuated, with some integration of teachers.

The school districts involved in this litigation also are in New Castle County, which has 68% of the State's population. Desegregation in varying degrees has started in every major school district in this county, except one.

The State Board of Education has made specific requests to 58 of the 113 school districts in the State to submit such plans. Another six districts have stated that any kind of plan they may have would be more or less nullified by overcrowded classroom conditions. Fourteen others have indicated that they desire to await the mandate of this Court. The remaining districts have not responded to the State Board.

In summary, school districts in areas comprising more than 50% of the population of Delaware have undertaken some desegregation of the public schools. Many school districts in semi-urban and rural areas have undertaken no step. The ultimate responsibility for effectuating desegregation throughout Delaware rests with

petitioners here, members of the State Board of Education.

**The South Carolina case**

Since May 17, 1954, South Carolina's fifteen-man legislative "Segregation Study Committee" was reorganized and has conferred with the Governor, State education officials, other legislators and spokesmen from various civic and teacher organizations. All of their meetings have been closed to the public. The Committee also visited Louisiana and Mississippi "to observe what was being done in those states to preserve segregated schools."

On July 28, the committee issued an interim report which recommended that public schools be operated during the coming year "in keeping with previously established policy." The committee construed its assignment as being the formulation of courses of action whereby the State could continue public education "without unfortunate disruption by outside forces and influences which have no knowledge of recent progress and no understanding of the problems of the present and future. . . ." Moreover, the report stated that the committee also recognized "the need for a system in keeping with public opinion and established traditions and living patterns."

The State Attorney General insisted that this Court should not undertake to direct further action even by the school district involved and announced that he considered the Clarendon County case "purely a local matter as far as the parties to the suit are concerned."

In Rock Hill (population 25,000 with 20% Negroes) a Catholic grade school voluntarily desegregated. Opening day enrollment was 29 white students and five Negroes. There has been no report of overt action against this development; but the parents of some of the children have been remonstrated with by neighbors and workers.[1]

A newspaper report[1a] of a public speech of E. B. McCord, one of the appellees herein, superintendent of education for Clarendon County, states in part:

> There will be no mixed schools in Clarendon County as long as there is any possible way for present leadership to prevent them.
>
> So declared L. B. McCord of Manning, Clarendon County superintendent of education, in an address before the Lions Club here Monday night.
>
> Decrying the fact that "Our churches seem to be letting their zeal run away in leading the way," he denounced de-segregation as contrary to the Scriptures and to good sense.

**The Virginia case**

On May 27, 1954, the State Board of Education advised city and county school boards to continue segregation during the present school year.

On August 28, the Governor named a thirty-two-man, all-white legislative commission to study the problems raised by the Court's ruling and to prepare a report and recommendations to the legislature and to him. The Governor then announced:

> … I am inviting the commission to ascertain, through public hearings and such other means as appear appropriate, the wishes of the people of Virginia; to give careful study to plans or legislation or both, that should be considered for adoption in Virginia after the final decree of the Court is entered, and to offer such other recommendations as it may deem proper as a result of the decision of the Supreme Court affecting the public schools.[2]

At its first meeting the commission adopted a rule that:

> All meetings of the commission shall be executive and its deliberations confidential, except when the meeting consists of a public hearing or it is otherwise expressly decided by the commission.[3]

By October, the local school boards or boards of supervisors of approximately 25 of the state's 98 counties had adopted and forwarded

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* Partial desegregation, that is, on the high school level, was instituted by the Milford Board of Education, in Sussex County. This action was later revoked and a test of the revocation is now pending in the Delaware courts. See Simmons v. Steiner, 108 A. 2d 173 (Del. Ct. Chanc. 1954). In that case the Vice-Chancellor found the Negro plaintiffs' rights to remain as students in Milford High School "clear and convincing" and restrained the Board of Education from excluding them. However, the Supreme Court of Delaware temporarily stayed the injunction to give that court sufficient time to examine "serious questions of law." Argument has been scheduled for December 13, 1954. Steiner v. Simmons (Del Sup. Ct. No. 27, 1954).

[1] Southern School News, Sept. 3, 1954, p. 12, col. 3–4.

[1a] Charleston News and Courier, August 4, 1954.

[2] Southern School News, Sept. 3, 1954, p. 13, col. 5.

[3] Southern School News, Oct. 1, 1954, p. 14, col. 2–3.

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to the Governor resolutions urging the continuation of segregated schools.

In May, 1954, the Richmond Diocese of the Roman Catholic Church, which includes all but 6 of Virginia's counties, announced that during the Fall of 1954, Negroes would for the first time be admitted to previously all-white Catholic parochial schools where there was no separate parochial school for Negroes. Approximately 40 Negro pupils of a total of 3,527 are enrolled in four high and six elementary parochial schools formerly attended only by white pupils. The Superintendent of the Richmond Diocese states that integration in these schools "has worked out magnificently, without a ripple of discontent, . . . ."[4]

## ARGUMENT

**I. Answering Question 4: Only a decree requiring desegregation as quickly as prerequisite administrative and mechanical procedures can be completed will discharge judicial responsibility for the vindication of the constitutional rights of which appellants are being deprived** In the normal course of judicial procedure, this Court's decision that racial segregation in public education is unconstitutional would be effectuated by decrees forthwith enjoining the continuation of that segregation. Indeed, in *Sipuel* v. *Board of Regents,* 332 U.S. 631, when effort was made to secure postponement of the enforcement of similar rights, this Court not only refused to delay action but accelerated the granting of relief by ordering its mandate to issue forthwith.

In practical effect, such disposition of this litigation would require immediate initiation of the administrative procedures prerequisite to desegregation, to be followed by the admission of the complaining children and others similarly situated to unsegregated schools at the beginning of the next academic term. This means that appellees will have had from May 17, 1954, to September, 1955, to complete whatever adjustments may be necessary.

If appellees desire any postponement of relief beyond that date, the affirmative burden must be on them to state explicitly what they propose and to establish that the requested postponement has judicially cognizable advantages greater than those inherent in the prompt vindication of appellants' adjudicated constitutional rights. Moreover, when appellees seek to postpone the enjoyment of rights which are personal and present, *Sweatt* v. *Painter,* 339 U.S. 629; *Sipuel* v. *Board of Regents,* 332 U.S. 631, that burden is particularly heavy. When the rights of school children are involved the burden is even greater. Each day relief is postponed is to the appellants* a day of serious and irreparable injury; for this Court has announced that segregation of Negroes in the public schools "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . ." And, time is of the essence because the period of public school attendance is short.

**A. Aggrieved parties showing denial of constitutional rights in analogous situations have received immediate relief despite arguments for delay more persuasive than any available here.** Where a substantial constitutional right would be impaired by delay, this Court has refused to postpone injunctive relief even in the face of the gravest of public considerations suggested as justification therefor. In *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, this Court upheld the issuance of preliminary injunctions restraining the Government's continued possession of steel mills seized under Presidential order intended to avoid a work stoppage that would imperil the national de-fense during the Korean conflict. The Govern-ment argued that even though the seizure might be unconstitutional, the public interest in uninterrupted production of essential war materials was superior to the owners' rights to the immediate return of their properties. It is significant that in the seven opinions filed no Justice saw any merit in this position. If equity could not appropriately exercise its broad discretion to withhold the immediate grant of relief in the *Youngstown* case, such a postponement must certainly be inappropriate in these cases where no comparable overriding consideration can be suggested.

Similarly in Ex parte *Endo,* 323 U.S. 283, this Court rejected the Government's argument that hardship and disorder resulting from racial prejudice could justify delay in releasing the petitioner. There, the argument made by the Government to justify other than immediate

[4] *Id.* at p. 14, col. 5.

[24] *As used in this Brief, "appellants" include the respondents in No. 5.

relief was summarized in the Court's opinion as follows (pp. 296–297):

> It is argued that such a planned and orderly relocation was essential to the success of the evacuation program; that but for such supervision there might have been a dangerously disorderly migration of unwanted people to unprepared communities; that unsupervised evacuation might have resulted in hardship and disorder; that the success of the evacuation program was thought to require the knowledge that the Federal government was maintaining control over the evacuated population except as the release of individuals could be effected consistently with their own peace and well-being and that of the nation; that although community hostility towards the evacuees has diminished, it has not disappeared and the continuing control of the Authority over the relocation process is essential to the success of the evacuation program. It is argued that supervised relocation, as the chosen method of terminating the evacuation, is the final step in the entire process and is a consequence of the first step taken. It is conceded that appellant's detention pending compliance with the leave regulations is not directly connected with the prevention of espionage and sabotage at the present time. But it is argued that Executive Order No. 9102 confers power to make regulations necessary and proper for controlling situations created by the exercise of the powers expressly conferred for protection against espionage and sabotage. The leave regulations are said to fall within that category.

In a unanimous decision, with the Court's opinion by Mr. Justice Douglas and two concurring opinions, the Court held that the petitioner must be given her unconditional liberty because the detention was not permissible by either statutory or administrative authorization. Viewing the petitioner's right as being in that "sensitive area of rights specifically guaranteed by the Constitution" (p. 299), the Court rejected the Government's contention that a continuation of its unlawful course of conduct was necessary to avoid the harmful consequences which otherwise would follow.

It is true that in the *Endo* case the contention rejected was that an executive order (which on its face did not authorize the petitioner's detention) ought to be extended by "construction" so as to entitle the Relocation Authority to delay the release of the petitioner until it felt that social conditions made it convenient and prudent to do so. In this case, the suggestion is that this Court, in the exercise of its equity powers, ought to withhold appellants' constitutional rights on closely similar grounds. But this is not a decisive distinction. If, as the *Endo* case held, the enjoyment of a constitutional right may not be deferred by a process of forced construction on the basis of factors closely similar to the ones at work in the instant case, then certainly this Court ought not to find in its equitable discretion a mandate or empowerment to obtain the same result.

In the *Endo* case, the national interest in time of war was present. In these cases, no such interest exists. Thus, there is even less basis for delaying the immediate enjoyment of appellants' rights.

Counsel have discovered no case wherein this Court has found a violation of a present constitutional right but has postponed relief on the representation by governmental officials that local mores and customs justify delay which might produce a more orderly transition.

It would be paradoxical indeed if, in the instant cases, it were decided for the first time that constitutional rights may be postponed because of anticipation of difficulties arising out of local feelings. These cases are brought to vindicate rights which, as a matter of common knowledge and legal experience, need, above all others, protection against local attitudes and patterns of behavior.[5] They are brought, specifically, to uphold rights under the Fourteenth Amendment which are not to be qualified, substantively or remedially, by reference to local mores. On the contrary, the Fourteenth Amendment, on its face and as a matter of history, was designed for the very purpose of affording protection against local mores and customs, and Congress has implemented that design by providing redress against aggression under color of state laws, customs and usages. 28 U.S.C. § 1343; 42 U.S.C. § 1983.

Surely, appellants' rights are not to be enforced at a pace geared down to the very customs which the Fourteenth Amendment and implementing federal laws were designed to combat.

Cases in which delays in enforcement of rights have been granted involve totally dissimilar considerations. Such cases generally deal

[5] In the instant cases, dark and uncertain prophecies as to anticipated community reactions to school desegregation are speculative at best.

with the abatement of nuisances, e.g., *New Jersey* v. *New York,* 283 U.S. 473; *Wisconsin* v. *Illinois,* 278 U.S. 367; *Arizona Copper Co.* v. *Gillespie,* 230 U.S. 46; *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230; or with violations of the anti-trust laws, e.g., *Schine Chain Theaters* v. *United States,* 334 U.S. 110; *United States* v. *National Lead Co.,* 332 U.S. 319; *United States* v. *Crescent Amusement Co.,* 323 U.S. 173; *Hartford-Empire Co.* v. *United States,* 323 U.S. 386; *United States* v. *American Tobacco Co.,* 221 U.S. 106; *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1.

These cases are readily distinguishable, and are not precedents for the postponement of relief here. In the nuisance cases, the Court allowed the offending parties time to comply because the granting of immediate relief would have caused great injury to the public or to the defendants with comparatively slight benefit to the plaintiffs. In the instant cases, a continuation of the unconstitutional practice is as injurious to the welfare of our government as it is to the individual appellants.

In the anti-trust cases, delay could be granted without violence to individual rights simply because there were no individual rights on the plaintiff's side. The suits were brought by the Government and the only interest which could have been prejudiced by the delays granted is the diffuse public interest in free competition. The delays granted in anti-trust cases rarely, if ever, permit the continuance of active wrongful conduct, but merely give time for dissolution and dissipation of the effects of past misconduct. Obviously, these cases have nothing to do with ours.

It should be remembered that the rights involved in these cases are not only of importance to appellants and the class they represent, but are among the most important in our society. As this Court said on May 17th:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Neither the nuisance cases nor the anti-trust cases afford any support for delay in these cases. On the contrary, in cases more nearly analogous to the instant cases, this Court has held that the executive branch of the government could not justify the detention of wrongfully seized private property on the basis of a national economic crisis in the midst of the Korean conflict. Nor could the War Relocation Authority wrongfully detain a loyal American because of racial tension or threats of disorder. It follows that in these cases this Court should apply similar limitations to the judiciary in the exercise of its equity power when a request is made that it delay enjoyment of personal rights on grounds of alleged expediency.

**B. Empirical data negate unsupported speculations that a gradual decree would bring about a more effective adjustment.** Obviously, we are not aware of what appellees will advance on further argument as reasons for postponing the enforcement of the rights here involved. Therefore, the only way we can discuss Question 4(b) is by conjecture in so far as reasons for postponement are concerned.

There is no basis for the assumption that gradual as opposed to immediate desegregation is the better, smoother or more "effective" mode of transition. On the contrary, there is an impressive body of evidence which supports the position that gradualism, far from facilitating the process, may actually make it more difficult; that, in fact, the problems of transition will be a good deal less complicated than might be forecast by appellees. Our submission is that this, like many wrongs, can be easiest and best undone, not by "tapering off" but by forthright action.

There is now substantial documented experience with desegregation in this country, in schools and elsewhere.[6] On the basis of this experience, it is possible to estimate with some accuracy the chances of various types of "gradual" plans for success in minimizing trouble during the period of transition.

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[6] See ASHMORE, THE NEGRO AND THE SCHOOLS (1954); CLARK, DESEGREGATION: AN APPRAISAL OF THE EVIDENCE, 9 J. SOCIAL ISSUES 1–77 (1953); NEXT STEPS IN RACIAL DESEGREGATION IN EDUCATION, 23 J. NEGRO ED. 201–399 (1954).(1950).

Some plans have been tried involving a set "deadline" without the specification of intervening steps to be taken. Where such plans have been tried, the tendency seems to have been to regard the deadline as the time when action is to be initiated rather than the time at which desegregation is to be accomplished. Since there exists no body of knowledge that is even helpful in selecting an optimum time at the end of which the situation may be expected to be better, the deadline date is necessarily arbitrary and hence may be needlessly remote.[7]

A species of the "deadline" type of plan attempts to prepare the public, through churches, radio and other agencies, for the impending change. It is altogether conjectural how successful such attempts might be in actually effecting change in attitude. The underlying assumption—that change in attitude must precede change in action—is itself at best a highly questionable one. There is a considerable body of evidence to indicate that attitudemay itself be influenced by situation[8] and that, where the situation demands that an individual act as if he were not prejudiced, he will so act, despite the continuance, at least temporarily, of the prejudice.[9] We submit that this Court can itself contribute to an effective and decisive change in attitude by insistence that the present unlawful situation be changed forthwith.

As to any sort of "deadline" plan, even assuming that community leaders make every effort to build community support for desegregation, experience shows that other forces in the community will use the time allowed to firm up and build opposition.[10] At least in South Carolina and Virginia, as well as in some other states affected by this decision, statements and action of governmental officials since May 17th demonstrate that they will not use the time allowed to build up community support for desegregation.[11] Church groups and others in the South who are seeking to win community acceptance for the Court's May 17th decision cannot be effective without the support of a forthwith decree from this Court.

Besides the "deadline" plans, various "piecemeal" schemes have been suggested and tried. These seem to be inspired by the assumption that it is always easier and better to do something slowly and a little at a time than to do it all at once. As might be expected, it has appeared that the resistance of some people affected by such schemes is increased since they feel arbitrarily selected as experimental animals. Other members in the community observe this reaction and in turn their anxieties are sharpened.[12]

Piecemeal desegregation of schools, on a class-by-class basis, tends to arouse feelings of the same kind[13] and these feelings are heightened by the intra-familial and intra-school dif-

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[7] ASHMORE, *op. cit. supra* note 6, at 70, 71, 79, 80; CLARK, *op. cit. supra* note 6, at 36, 45.

[8] CLARK, *op. cit. supra* note 6, at 69–76.

[9] KUTNER, WILKINS and YARROW, VERBAL ATTITUDES AND OVERT BEHAVIOR INVOLVING RACIAL PREJUDICE, 47 J. ABNORMAL AND SOCIAL PSYCH. 649–652 (1952); LA PIERE, ATTITUDES VS. ACTION, 13 SOCIAL FORCES 230–237 (1934); SAENGER and GILBERT, CUSTOMER REACTIONS TO THE INTEGRATION OF NEGRO SALES PERSONNEL, 4 INT. J. OPINION AND ATTITUDES RESEARCH 57–76 (1950); DEUTSCH and COLLINS, INTERRACIAL HOUSING, A PSYCHOLOGICAL STUDY OF A SOCIAL EXPERIMENT (1951); CHEIN, DEUTSCH, HYMAN and JAHODA, CONSISTENCY AND INCONSISTENCY IN INTERGROUP RELATIONS, 5 J. SOCIAL ISSUES 1–63 (1949). ASHMORE, *op. cit. supra* note 6, at 42; New York Times, "Mixed Schools Set in 'Border' States", August 29, 1954, p. 88, col. 1–4; New York Times, "New Mexico Town Quietly Ends Pupil Segregation Despite a Cleric", August 31, 1954, p. 1, col. 3–4; ROSE, YOU CAN'T LEGISLATE AGAINST PREJUDICE—OR CAN YOU?, 9 COMMON GROUND 61–67 (1949), reprinted in RACE PREJUDICE AND DISCRIMINATION, (Rose ed. 1951); NICHOLS, BREAKTHROUGH ON THE COLOR FRONT (1954); MERTON, WEST and JAHODA, SOCIAL FICTIONS AND SOCIAL FACTS: THE DYNAMICS OF RACE RELATIONS IN HILLTOWN, COLUMBIA UNIVERSITY BUREAU OF APPLIED SOCIAL RESEARCH (mimeographed); MERTON, WEST, JAHODA and SELDEN, SOCIAL POLICY AND SOCIAL RESEARCH IN HOUSING, 7 J. SOCIAL ISSUES, 132–140 (1951); MERTON, THE SOCIAL PSYCHOLOGY OF HOUSING (1948). South as well as North, people's actions and attitudes were changed not in advance of but after the admission of Negroes into organized baseball. See CLEMENT, RACIAL INTEGRATION IN THE FIELD OF SPORTS, 23 J. NEGRO ED. 226–228 (1954). Objections to desegregation have generally been found to be greater before than after its accomplishment. CLARK, *op. cit. supra* note 6, *passim;* CONFERENCE REPORT, ARIZONA COUNCIL FOR CIVIC UNITY CONFERENCE ON SCHOOL SEGREGATION (Phoenix, Arizona, June 2, 1951).

[10] CLARK, *op. cit. supra* note 6, at 43, 44; BROGAN, THE EMERSON SCHOOL—COMMUNITY PROBLEM, GARY, INDIANA, BUREAU OF INTERCULTURAL EDUCATION REPORT (October 1947, mimeographed); TIPTON, COMMUNITY IN CRISIS 15–76 (1953).

[11] For the latest example of this, see New York Times, "7 of South's Governors Warn of 'Dissensions' in Curb on Bias—Avow Right of States to Control Public School Procedures—Six at Meeting Refrain from Signing Statement", November 14, 1954, p. 58, col. 4–5.

[12] TIPTON, *op. cit. supra* note 11, at 42, 47, 57, 71; CLARK, SOME PRINCIPLES RELATED TO THE PROBLEM OF DESEGREGATION, 23 J. NEGRO ED. 343 (1954); CULVER, RACIAL DESEGREGATION IN EDUCATION IN INDIANA, 23 J. NEGRO ED. 300 (1954).

[13] ASHMORE, *op. cit. supra* note 6, at 79, 80; CLARK,

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ferences thus created.[14] It would be hard to imagine any means better calculated to increase tension in regard to desegregation than to so arrange matters so that some children in a family were attending segregated and others unsegregated classes. Hardly more promising of harmony is the prospect of a school which is segregated in the upper parts and mixed in the lower.

When one looks at various "gradual" processes, the fact is that there is no convincing evidence which supports the theory that "gradual" desegregation is more "effective."[15] On the contrary, there is considerable evidence that the forthright way is a most effective way.[16]

The progress of desegregation in the Topeka schools is an example of gradualism based upon conjecture, fears and speculation regarding community opposition which might delay completion of desegregation forever. The desegregation plan adopted by the Topeka school authorities called for school desegregation first in the better residential areas of the city and desegregation followed in those areas where the smallest number of Negro children lived. There is little excuse for the school board's not having already completed desegregation. Apparently either the fact that the school board, in order to complete the transition, may have to utilize one or more of the former schools for Negroes and assign white children to them or the fact that it must now reassign some 700 Negro children to approximately seven former all-white schools, seems to present difficulties to appellees. One must remember that in Topeka there has been complete integration above the sixth grade for many years. The schools already desegregated have reported no difficulties. There can hardly be any basic resistance to nonsegregated schools in the habits or customs of the city's populace. The elimination of the remnants of segregation throughout the city's school system should be a simple matter.

No special public preparations involving teachers, parents, students or the general public were made, nor were they necessary in advance of either the first or second step in the implementation of the Board's decision to desegregate the school system. Indeed, the Board of Education adopted the second step in January, 1954, and the only reports of what was involved were those published in the newspapers. Negro parents living in these territories were not notified by appellees regarding the change, but transferred their children to the schools in question on the basis of information provided in the newspapers. As far as the teachers in those schools were concerned, they were merely informed in the Spring of 1954 that their particular schools would be integrated in September. Thus, delay here cannot be based upon need for public orientation.

It should be pointed out that of the 23 public elementary schools, there exists potential space for some additional 83 classrooms of which 16 such potential classrooms are in the four schools to which the majority of the Negroes are now assigned. No claim can be made that the school system is overcrowded and unable to absorb the Negro and white children under a reorganization plan. There is no discernable reason why all of the elementary schools of Topeka have not been desegregated.

As is pointed out in the Brief for Petitioners on Further Reargument in *Bolling* v. *Sharpe* (No. 4, October Term, 1954) the gradualist approach adopted by the Board of Education in Washington, D.C., produced confusion, hard-

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DESEGREGATION: AN APPRAISAL OF THE EVIDENCE, *op. cit. supra* note 6, at 36, 45.

[14] CLARK, EFFECTS OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENTS, MID-CENTURY WHITE HOUSE CONFERENCE ON CHILDREN AND YOUTH (mimeographed, 1950).

[15] ASHMORE, *op. cit. supra* note 6, at 80:

> Proponents of the gradual approach argue that it minimizes public resistance to integration. But some school officials who have experienced it believe the reverse is true. A markedly gradual program, they contend, particularly one which involves the continued maintenance of some separate schools, invites opposition and allows time for it to be organized. Whatever the merit of this argument, the case histories clearly indicate a tendency for local political pressure to be applied by both sides when the question of integration is raised, and when policies remain unsettled for a protracted period the pressures mount. One school board member in Arizona privately expressed the wish that the state had gone all the way and made integration mandatory instead of optional— thus giving the board something to point to as justification for its action.

[16] CLARK, *op. cit. supra* note 6, at 46, 47; WRIGHT, RACIAL INTEGRATION IN THE PUBLIC SCHOOLS OF NEW JERSEY, 23 J. NEGRO ED. 283 (1954); KNOX, RACIAL INTEGRATION IN THE SCHOOLS OF ARIZONA, NEW MEXICO, AND KANSAS, 23 J. NEGRO ED. 291, 293 (1954); CULVER, RACIAL DESEGREGATION IN EDUCATION IN INDIANA, 23 J. NEGRO ED. 296, 300–302 (1954).

ship and unnecessary delay. Indeed, the operation of the "Corning Plan" has produced manifold problems in school administration which could have been avoided if the transition had been immediate. The argument that delay is more sound educationally has been shown to be without basis in fact in the operation of the District of Columbia plan—so conclusively, in fact, that the time schedule has been accelerated. The experience in the District argues for immediate action.

To suggest that this Court may properly mold its relief so as to serve whatever theories as to educational policy may be in vogue is to confuse its function with that of a school board, and to confuse the clear-cut constitutional issue in these cases with the situation in which a school board might find itself if it were unbound by constitutional requirements and were addressing itself to the policy problem of effecting desegregation in what seems to it the most desirable way. But even if a judgment as to the abstract desirability of gradualism could be supported by evidence, it is outside the province of this Court to balance the merely desirable against the adjudicated constitutional rights of appellants. The Constitution has prescribed the educational policy applicable to the issue tendered in this case, and this Court has no power, under the guise of a "gradual" decree, to select another.

We submit that there are various necessary administrative factors which would make "immediate" relief as of tomorrow physically impossible. These include such factors as need for redistricting and the redistribution of teachers and pupils. Under the circumstances of this case, the Court's mandate will probably come down in the middle or near the close of the 1954 school term, and the decrees of the courts of first instance could not be put into effect until September, 1955. Appellees would, therefore, have had from May 17, 1954, to September, 1955, to make necessary administrative changes.

**II. Answering Question 5: If this court should decide to permit an "effective gradual adjustment" from segregated school systems to systems not based on color distinctions, it should not formulate detailed decrees but should remand these cases to the courts of first instance with specific directions to complete desegregation by a day certain** In answering Question 5, we are required to assume that this Court "will exercise its equity powers to permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions" thereby refusing to hold that appellants were entitled to decrees providing that, "within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice." While we feel most strongly that this Court will not subordinate appellants' constitutional rights to immediate relief to any plan for an "effective gradual adjustment," we must nevertheless assume the contrary for the purpose of answering Question 5.[17]

Question 5 assumes that there should be an "effective gradual adjustment" to a system of desegregated education. We have certain difficulties with this formulation. We have already demonstrated that there is no reason to believe that any form of gradualism will be more effective than forthwith compliance. If, however, this Court determines upon a gradual decree, we then urge that, as a minimum, certain safeguards must be embodied in that "gradual" decree in order to render it as nearly "effective" as any decree can be which continues the injury being suffered by these appellants as a consequence of the unconstitutional practice here complained of.

Appellants assume that "the great variety of local conditions," to which the Court referred in its May 17th opinion, embraces only such educationally relevant factors as variations in administrative organization, physical facilities, school population and pupil redistribution, and does not include such judicially non-cognizable factors as need for community preparation, Ex Parte *Endo,* 323 U.S. 283, and threats of racial hostility and violence, *Buchanan* v. *Warley,* 245

[17] "5. On the assumption on which question 4*(a)* and *(b)* are based, and assuming further that this Court will exercise its equity powers to the end described in question 4*(b)*.

"*(a)* should this Court formulate detailed decrees in these cases;

"*(b)* if so, what specific issues should the decrees reach;

"*(c)* should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"*(d)* should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

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U.S. 60; *Monk* v. *City of Birmingham,* 185 F. 2d 859 (C. A. 5th 1950), *cert. denied,* 341 U.S. 940.

Further we assume that the word "effective" might be so construed that a plan contemplating desegregation after the lapse of many years could be called an "effective gradual adjustment." For, whenever the change is in fact made, it results in a desegregated system. We do not understand that this type of adjustment would be "effective" within the meaning of Question 5 nor do we undertake to answer it in this framework. Rather, we assume that under any circumstances, the question encompasses due consideration for the constitutional rights of each of these appellants and those presently in the class they represent to be free from enforced racial segregation in public education.

Ordinarily, the problem—the elimination of race as the criterion of admission to public schools—by its very nature would require only general dispositive directions by this Court. Even if the Court decides that the adjustment to non-segregated systems is to be gradual, no elaborate decree structure is essential at this stage of the proceedings. In neither event would appellants now ask this Court, or any other court, to direct or supervise the details of operation of the local school systems. In either event, we would seek effective provisions assuring their operation—forthwith in the one instance and eventually in the other—in conformity with the Constitution.

These considerations suggest appellants' answers to Question 5. Briefly stated, this Court should not formulate detailed decrees in these cases. It should not appoint a special master to hear evidence with a view to recommending specific terms for such decrees. It should remand these cases to the courts of first instance with directions to frame decrees incorporating certain provisions, hereinafter discussed, that appellants believe are calculated to make them as nearly effective as any gradual desegregation decree can be. The courts of first instance need only follow normal procedures in arriving at such additional provisions for such decrees as circumstances may warrant.

**Declaratory provisions** This Court should reiterate in the clearest possible language that segregation in public education is a denial of the equal protection of the laws. It should order that the decrees include a recital that constitutional and statutory provisions, and administrative and judicial pronouncements, requiring or sanctioning segregated education afford no basis for the continued maintenance of segregation in public schools.

The important legal consequence of such declaratory provisions would be to obviate the real or imagined dilemma of some school officials who contend that, pending the issuance of injunctions against the continuation of segregated education in their own systems, they are entitled or even obliged to carry out state policies the invalidity of which this Court has already declared. The dilemma is well illustrated by the case of *Steiner* v. *Simmons* (Del. Sup. Ct. No. 27, 1954), pending in the Delaware Supreme Court, wherein plaintiffs are suing for readmission to Milford's high school from which, on September 30, 1954, they were expelled because they are Negroes. The Vice Chancellor granted the requested mandatory injunction, finding that plaintiffs had a constitutional right to readmission to school. The Delaware Supreme Court, however, granted a stay pending determination of the appeal on the basis of its preliminary conclusion that "there are serious questions of law touching the existence of that legal right."[18]

This Court's decision of May 17th put state authorities on notice that thereafter they could not with impunity abrogate the constitutional rights of American children not to be segregated in public schools on the basis of race. This type of recital in the decree should foreclose further

[18] Cf. Burr v. Bd. of School Commrs. of Baltimore, Superior Court of Baltimore City, Oct. 5, 1954 (unreported), in which case Judge James K. Cullen stated in part: In the instant case this Court is asked to issue a writ of mandamus requiring these defendants, the School Board, to continue with its policy of segregation. This Court finds the Board of School Commissioners have exercised their discretion legally and in accordance with a final and enforceable holding and decision of the Supreme Court. Those cases were undoubtedly argued before the Supreme Court fully, and the views of every division of thought of our citizenry was undoubtedly presented to the Court; but the Court has spoken. Whether the individual agrees or disagrees with the finding, he is bound thereby so long as it remains the law of the land. The Court realizes the change and the difficulty some may have accepting the reality or the inevitable from the standpoint of enforcement. We live in a country where our rights and liberties have been protected under a system of laws which has withstood the test of time. We must allow ourselves to be governed by those laws, realizing there are many differences among our people. Respect for the law is of paramount importance. The law must be accepted. We must all be forced to abide by it. We can gain nothing by demonstrations of violence except sorrow and possible destructions.

misunderstanding, real or pretended, of the principle of law that continuation of racial segregation in public education is in direct violation of the Constitution—state constitutions, statutes, custom or usage requiring such segregation to the contrary notwithstanding.

**Time provisions** We do not know what considerations may be presented by appellees to warrant gradualism. But whatever these considerations may be, appellants submit that any school plan embracing gradualism must safeguard against the gradual adjustment becoming an interminable one. Therefore, appellants respectfully urge that this Court's opinion and mandate also contain specific directions that any decree to be entered by a district court shall specify (1) that the process of desegregation be commenced immediately, (2) that appellees be required to file periodic reports to the courts of first instance, and (3) an outer time limit by which desegregation must be completed.

Even cases involving gradual decrees have required some amount of immediate compliance by the party under an obligation to remedy his wrongs to the extent physically possible.[19] In *Wisconsin* v. *Illinois,* 281 U.S. 179, the Court said:

> It already has been decided that the defendants are doing a wrong to the complainants, and that they must stop it. They must find out a way at their peril. We have only to consider what is possible if the state of Illinois devotes all its powers to dealing with an exigency to the magnitude of which it seems not yet to have fully awaked. It can base no defenses upon difficulties that it has itself created. If its Constitution stands in the way of prompt action, it must amend it or yield to an authority that is paramount to the state (p. 197).

* * *

> 1. On and after July 1, 1930,[20] the defendants, the state of Illinois and the sanitary district of Chicago are enjoined from diverting any of the waters of the Great Lakes–St. Lawrence system or watershed through the Chicago drainage canal and its auxiliary channels or otherwise in excess of an annual average of 6,500 c.f.s. in addition to domestic pumpage (p. 201).

Considering the normal time consumed before the issuance of the mandate of this Court and the time for submission and preparation of decrees by the courts of first instance, decrees in these cases will not issue until after February, 1955—after the normal mid-term in most school systems. Thus, the school boards would have until September, 1955—sixteen months after the May 17th opinions—to change to a system not based on color distinctions. This time could very well be considered as necessarily incidental to any decision by this Court requiring "forthwith" decrees by the courts of first instance.

Whatever the reasons for gradualism, there is no reason to believe that the process of transition would be more effective if further extended. Certainly, to indulge school authorities until September 1, 1956, to achieve desegregation would be generous in the extreme. Therefore, we submit that if the Court decides to grant further time, then the Court should direct that all decrees specify September, 1956, as the outside date by which desegregation must be accomplished. This would afford more than a year, in excess of the time necessary for administrative changes, to review and modify decisions in the light of lessons learned as these decisions are put into effect.

We submit that the decrees should contain no provision for extension of the fixed limit, whatever date may be fixed. Such a provision would be merely an invitation to procrastinate.[21]

We further urge this Court to make it plain that the time for completion of the desegregation program will not depend upon the success or failure of interim activities. The decrees in the instant cases should accordingly provide that in the event the school authorities should for any reason fail to comply with the time limitation of the decree, Negro children should then be immediately admitted to the schools to which they apply.[22]

All states requiring segregated public education were by the May 17th decision of this Court

[19] See Wisconsin v. Illinois, 281 U.S. 179; Arizona Copper Co. v. Gillespie, 230 U.S. 46; Georgia v. Tennessee Copper Co., 206 U.S. 230; Westinghouse Air Brake Co. v. Great Northern Ry. Co., 86 Fed. 132 (C. C. S. D. N. Y. 1898).

[20] This opinion was rendered April 30, 1930.

[21] ASHMORE, THE NEGRO AND THE SCHOOLS 70–71 (1954); CULVER, RACIAL DESEGREGATION IN EDUCATION IN INDIANA, 23 J. NEGRO ED. 296–302 (1954).

[22] See United States v. American Tobacco Co., 221 U.S. 106, where this Court directed the allowance of a period of six months, with leave to grant an additional sixty days if necessary, for activities dissolving an illegal monopoly and recreating out of its components a new situation in harmony with the law, but further directed that if within this period a legally harmonious condition was not brought about, the lower court should give effect to the requirements of the Sherman Act.

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put upon notice that segregated systems of public education are unconstitutional. A decision granting appellees time for gradual adjustment should be so framed that no other state maintaining such a system is lulled into a period of inaction and induced to merely await suit on the assumption that it will then be granted the same period of time after such suit is instituted.

## CONCLUSION

Much of the opposition to forthwith desegregation does not truly rest on any theory that it is better to accomplish it gradually. In considerable part, if indeed not in the main, such opposition stems from a desire that desegregation not be undertaken at all. In consideration of the type of relief to be granted in any case, due consideration must be given to the character of the right to be protected. Appellants here seek effective protection for adjudicated constitutional rights which are personal and present. Consideration of a plea for delay in enforcement of such rights must be preceded by a showing of clear legal precedent therefor and some public necessity of a gravity never as yet demonstrated.

There are no applicable legal precedents justifying a plea for delay. As a matter of fact, relevant legal precedents preclude a valid plea for delay. And, an analysis of the non-legal materials relevant to the issue whether or not relief should be delayed in these cases shows that the process of gradual desegregation is at best no more effective than immediate desegregation.

WHEREFORE, we respectfully submit that this Court should direct the issuance of decrees in each of these cases requiring desegregation by no later than September of 1955.

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U.S. SUPREME COURT, OCTOBER 1954

SUPPLEMENTAL BRIEF FOR THE BD. OF EDUC., TOPEKA, KS, ON QUESTIONS PROPOUNDED BY THE COURT

# In the Supreme Court of the United States

## No. 1, October Term, 1954

OLIVER BROWN, ET AL., APPELLANTS
VS.
BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS ET AL., APPELLEES

### APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

### SUPPLEMENTAL BRIEF FOR THE BOARD OF EDUCATION, TOPEKA, KANSAS, ON QUESTIONS 4 AND 5 PROPOUNDED BY THE COURT

PETER F. CALDWELL,
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This supplemental brief is filed in response to the order of this Court directing and requesting further briefs and argument on questions 4 and 5 heretofore propounded by the Court.

In its brief, heretofore filed herein in December, 1953, The Board of Education of Topeka urged that in the event segregation in its elementary schools were held to be unconstitutional, this case should simply be remanded to the lower court with instructions to reverse its judgment and to enter a decree requiring that segregation be terminated "as rapidly as is practicable" by the defendant Board of Education. It was suggested that by such a decree the lower court could retain jurisdiction for enforcement of the decree, and that if a need for a more specific decree should arise in the future, the lower court would have power to amplify its decree under the general power of an equity court to enforce its decree.

As was pointed out in its brief filed in December, 1953, The Board of Education of Topeka in September, 1953, adopted a resolution to terminate segregation in its elementary schools "as rapidly as is practicable"; and on September 8, 1953, terminated segregation at two of its elementary schools, to wit: Southwest and Randolph Schools.

Since that time, the Board of Education of Topeka has already taken its second far-reaching step or stride toward termination of segregation by adopting the recommendations of its superintendent of schools as set out in the following report which was made on January 20, 1954, and was approved and adopted by the Board of Education on the same date:

#### SECOND STEP IN TERMINATION OF SEGREGATION IN TOPEKA ELEMENTARY SCHOOLS

**I.** In implementation of the Board's policy to terminate segregation in elementary schools as soon as practicable, I propose that the second step be taken at the opening of school in September, 1954. The step should be acted upon by the Board at this time in order to enable everybody concerned to make necessary plans for next year.

**II.** In the second step, I propose that segregation be terminated in the following school districts and that transportation not be provided for Negro children who are affected, but that such child be given the privilege of attending the nearest Negro School if his parents want him to do so. (All pupil accounting is based on the number belonging on October 16, 1953.)

| | Negro Children to Integrated Schools | Negro Children to Come from Following Schools | | | |
|---|---|---|---|---|---|
| | | McKinley | Buchanan | Monroe | Washington |
| 1. Central Park | 21 | | 16 | 5 | |
| 2. Clay | 13 | | 12 | 1 | |
| 3. Crestview | 0 | | | | |
| 4. Gage | 1 | | | | |
| 5. Grant (Limited)* | 3 | 3 | 1 | | |
| 6. Oakland | 0 | | | | |
| 7. Polk (Limited)** | 3 | | | 3 | |
| 8. Potwin | 0 | | | | |
| 9. Quincy | 34 | 34 | | | |
| 10. Quinton Heights | 10 | | 5 | 5 | |

*The limitation suggested at Grant is that three Negro children isolated in the extreme northern part of Grant School district be permitted to attend Grant, while the remainder of the Negro children continue at McKinley.

**The limitation suggested at Polk School is as follows: Several Negro children in this district live very close to Buchanan School. They should continue at this school. There would not be room for them at Polk and there is plenty of room at Buchanan. However, there are three Negro children now attending Monroe School but residing in the Polk district. I suggest that they be allowed to attend Polk School.

**U.S. SUPREME COURT, OCTOBER 1954**

SUPPLEMENTAL BRIEF FOR THE BD. OF EDUC., TOPEKA, KS, ON QUESTIONS PROPOUNDED BY THE COURT

| | | Negro Children to Integrated Schools | Negro Children to Come from Following Schools | | | |
|---|---|---|---|---|---|---|
| | | | McKinley | Buchanan | Monroe | Washington |
| 11. | State Street | 21 | | | 9 | 12 |
| 12. | Sumner | 7 | 1 | 5 | 1 | |
| | | 113 | 38 | 39 | 24 | 12 |
| | Randolph | 2 | | | | |
| | Southwest | 8 | | | | |
| | | 123 | | | | |

**III.** The effects of taking this step would be as follows:

1. It would reduce the enrollments of Negro Schools as indicated.

| | From | To |
|---|---|---|
| McKinley | 127 | 89 |
| Buchanan | 160 | 121 |
| Monroe | 245 | 221 |
| Washington | 292 | 280 |
| | 824 | 711 |

2. It would place 123 Negro children in integrated schools.
3. It would leave, in addition to the four schools for Negro children, 12 schools integrated, 2 schools (Grant and Polk) on a basis of partial integration, and 5 schools continuing on a segregated basis (Lafayette, Lincoln, Lowman Hill, Parkdale and Van Buren.)

Thus, by announcing the changes in the spring of 1954, all parties affected had ample opportunity to adjust themselves to the changes before they became effective the following September.

Segregation has been completely terminated in 12 elementary school districts, and partially terminated in two others; and, as of September, 1954, there will remain only four Negro schools and five white schools in which segregation is being continued.

The Board of Education has requested the superintendent, and he plans, to make recommendations for the third step toward termination of segregation early in 1955 to become effective in September, 1955. In the meantime, of course, he will have had an opportunity to observe the results and the operation of the second step which became effective in September, 1954. Thus before taking the third step, the board of education will have the benefit of its experiences with the first and second steps.

It is gratifying to be able to report to the Court that The Board of Education has been carrying out its policy of termination of segregation "as rapidly as is practicable" with full public cooperation and acceptance by both white and Negro pupils, teachers and parents.

The administrative problems, which were discussed in the brief filed in December, 1953, are the chief problems with which The Board of Education is confronted; but with practical experience, they are being satisfactorily solved. Their solution, however, cannot be effected "forthwith," but require time for a gradual adjustment.

It is respectfully submitted that The Board of Education of Topeka is in good faith carrying out its adopted policy to terminate segregation "as rapidly as is practicable," and that there is no need at this time for the appointment of a special master or for the Court to undertake to formulate specific decrees directing the particular steps to be taken to terminate segregation in the schools of Topeka.

Respectfully submitted,
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# In the Supreme Court of the United States October Term, 1954

NO. 1

OLIVER BROWN, ET AL., APPELLANTS,
VS.
BOARD OF EDUCATION OF TOPEKA, ET AL., APPELLEES.

NO. 2

HARRY BRIGGS, JR., ET AL., APPELLANTS,
VS.
R. W. ELLIOTT, ET AL., APPELLEES.

NO. 3

DOROTHY E. DAVIS, ET AL., APPELLANTS,
VS.
COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL., APPELLEES.

NO. 5

FRANCIS B. GEBHART, ET AL., PETITIONERS,
VS.
ETHEL LOUISE BELTON, ET AL., RESPONDENTS.

## APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE DISTRICT OF KANSAS, THE EASTERN DISTRICT OF SOUTH CAROLINA AND THE EASTERN DISTRICT OF VIRGINIA, AND ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE, RESPECTIVELY

## REPLY BRIEF FOR APPELLANTS IN NOS. 1, 2 AND 3 AND FOR RESPONDENTS IN NO. 5 ON FURTHER REARGUMENT

CHARLES L. BLACK JR.,
ELWOOD H. CHISOLM,
WILLIAM T. COLEMAN JR.,
CHARLES T. DUNCAN,
GEORGE E. C. HAYES,
LOREN MILLER,
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The briefs filed on this reargument by appellees and *amici curiae* (with the exception of those in Nos. 1 and 5, and the brief filed on behalf of the Attorney General of The United States) are similar in substance despite some differences in details. Our reply to them can, therefore, be made in one joint brief.

### ARGUMENT

**Briefs filed by appellees and state Attorneys General do not offer any affirmative plan for desegregation but are merely restatements of arguments in favor of interminable continuation of racial segregation** In our Brief on Further Reargument, we stated:[1]

[1] Brief for Appellants in Nos. 1, 2 and 3 and for Respondents in No. 5 on Further Reargument, 1954 Term, p. 31.

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REPLY BRIEF FOR APPELLANTS AND RESPONDENTS ON FURTHER REARGUMENT

> Much of the opposition to forthwith desegregation does not truly rest on any theory that it is better to accomplish it gradually. In considerable part, if indeed not in the main, such opposition stems from a desire that desegregation not be undertaken at all.

Similarly, the briefs filed at this time, both by appellees and state attorneys general seem to be directed against ending racial segregation in our time, rather than toward desegregation within a reasonable time. First, these briefs do not in fact offer any affirmative plan or elements of such a plan for accomplishing the task of desegregation. Secondly, and equally significant, the main reasons now proffered in support of indefinite delay are identical with arguments previously advanced for denying relief on the merits.

This Court has decided that racial segregation is unconstitutional—that it is a practice, moreover, which has such effects on its victims that it can only be described as abhorrent. Yet, in answering questions 4 and 5, propounded by the Court, the States do not even get around to what must, in the light of that decision, be the main problem underlying those questions: How can this practice be most expeditiously done away with? Reasons for delay, which would seem to occupy at best a subsidiary position, are the sole preoccupation of state counsel, and the affirmative problem gets virtually no attention.[2]

The brief of the Attorney General of Florida does contain a Point entitled "Specific Suggestions to the Court in Formulating a Decree."[3] But, the effect of the suggested plan[4] would be to subject the constitutional rights of Negro children to denial on the basis of such a variety of intangible factors that the plan itself cannot be seriously regarded as one for implementing the May 17th decision.

Each individual Negro child must, under the Florida plan, petition a court of the first instance for admission to an unsegregated school, after exhausting his administrative remedies. It is up to him to establish to that court's satisfaction that there exists no "reasonable grounds" for delay in his admission. "Reasonable grounds" include lack of a reasonable time to amend the state school laws, good faith efforts of the school board in promoting citizens' educational committees, administrative problems, and "evidence of … a strong degree of *sincere* opposition and sustained hostility" [emphasis supplied] giving the school board ground to believe that admission of the applicant would "… create emotional responses among the children which would seriously interfere with their education." In other words, the applicant's right is to be postponed until everything seems entirely propitious for granting it. It is submitted that this is not a plan for granting rights, but a plan for denying them just as long as can possibly be done without a direct overruling of the May 17th decision.

Lest there be any doubt about this, the final criterion for admission to unsegregated schooling should be quoted:[5]

> (6) Evidence that the petitioner's application was made in good faith and not for *capricious* reasons. Such evidence should demonstrate:
>
> (a) That the petitioner personally feels that he would be handicapped in his education, either because of lack of school plant facilities or psychological or sociological reasons if his application for admission is denied.
>
> (b) That the petitioner is not motivated in his application solely by a desire for the advancement of a racial group on economic, social or political grounds, as distinguished from his personal legal right to equality in public school education as guaranteed by the 14th Amendment. This distinction should be carefully drawn [emphasis supplied].

Where the devisers of a plan are disposed to characterize opposition to desegregation as "sincere" and reasons for desiring admission as "capricious," we cannot be surprised at a rather peculiar procedural consequence of the dispensation they set up. The "petitioner," if he is to make timely application, exhaust his administrative remedies, and allow time for appeal, will have to draw this fine distinction at about four years of age, if he is to start the first grade in a desegregated school. Out of the mouths of babes and sucklings will have to come a wisdom in self-analysis which surely has never in the history of this country been required of any applicant for relief from the denial of a personal constitu-

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[2] It is true that Delaware and Kansas catalogue the progress they have made thus far in accomplishing integration. But both states plead for delay without offering any valid reasons therefor.

[3] Brief of the Attorney General of the State of Florida as *amicus curiae,* pp. 57–65. Hereinafter, citations to briefs of appellees and *amici curiae* will be abbreviated. See, e.g., fn. 5, *infra.*

[4] Set out commencing at p. 61 of the Florida Brief.

[5] Florida Brief, p. 63.

tional right. The Florida Brief is no real exception to the statement that none of the States has offered any plan for actually implementing the decision of this Court.

The quality and thrust of the reasons now advanced for delay may best be evaluated by noting that (except for those that deal with purely administrative matters obviously requiring little time for solution) they are arguments which were advanced at an earlier stage in this litigation as grounds for denying relief on the merits, and now, under slightly altered guise, they walk again after their supposed laying to rest on May 17. Thus, the impossibility of procuring community acceptance of desegregation, urged earlier as a ground for decision on the merits,[6] now turns up as an argument for indefinite postponement[7] with no convincing reasons given for supposing that community attitudes will change within the segregated pattern.

The prediction that white parents will withdraw their children from public schools is repeated,[8] with the implied hope, no doubt, that at some remote date they will have attained a state of mind that will result in their leaving their children in school. "Racial tensions" are again predicted.[9] Negro teachers may lose their jobs.[10] Violence is warned of.[11] The people and the legislature will abolish the school system or decline to appropriate money for its support.[12]

All these are serious matters, but we have elsewhere shown solid reason for believing that those dire predictions, one and all, are unreliable. There is no reason for supposing that delay can minimize whatever unpleasant consequences might follow from the eradication of this great evil. Here, however, the point is that, where these arguments are resuscitated as grounds for delay, the inference is that their sponsors favor delay as long as present conditions prevail—that, in other words, they now want to delay desegregation just as long as the conditions exist which they formerly regarded as sufficient grounds for imposing segregation as a matter of legal right. The distinction is too fine to make such practical difference, either to the Negro child who is growing up or to this Court.

That it is opposition to the principle of the May 17th decision that animates these briefs is made clear by noting that the equality of schools, *Plessy* style, is now being urged as a ground for delay.[13] Nothing could make it clearer, moreover, that many responsible officials, taking a realistic view, will not regard the "separate but equal" doctrine as abolished until this Court orders its abandonment in practice. Most significant here is the *amicus curiae* brief of the Attorney General of Texas which, after making a straight-out *Plessy* argument, continues with the statement: "However, if the occasion arises whereby we are compelled to abolish segregation in Texas, it should be a gradual adjustment in view of the complexities of the problem" (p. 4).

**Opinion polls are immaterial to the issues herein and do not afford any basis to support an argument that a gradual adjustment would be more effective** Several of the briefs filed herein refer to polls of public opinion in their respective States in support of arguments to postpone desegregation indefinitely.[14] These polls appear to have been made for the purpose of sampling opinions of various groups within the State as to whether they approved of the May 17th decision and whether they thought it could be enforced immediately without friction.

The information as to racial hostility obtained from these polls is indecisive of the issues before this Court. In *Buchanan* v. *Warley,* 245 U.S. 60, 80, this Court stated:

> That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution

[6] South Carolina Brief (1952) p. 27. Cf. *Id.* at p. 35; Virginia Brief (1952) pp. 24–25.

[7] Virginia Brief (1954) p. 13; Delaware Brief (1954) pp. 16, 25; Florida Brief (1954) p. 201 ff.; Texas Brief (1954) pp. 16–17; North Carolina Brief (1954) pp. 7–8.

[8] *Compare* Florida Brief (1954) pp. 26–27 and North Carolina Brief (1954) pp. 36–37 *with* Virginia Brief (1952) p. 30.

[9] *Compare* Florida Brief (1954) p. 95 *with* Virginia Brief (1952) p. 27.

[10] *Compare* Florida Brief (1954) pp. 31–32; North Carolina Brief (1954) pp. 24–25; and Texas Brief (1954) pp. 10–11, *with* Virginia Brief (1952) p. 31.

[11] *Compare* North Carolina Brief (1954) p. 37 and Florida Brief (1954) p. 25 *with* South Carolina Brief (1952) p. 27.

[12] *Compare* North Carolina Brief (1954) p. 36; Virginia Brief (1954) p. 15; and Arkansas Brief (1954) pp. 7–8 *with* South Carolina Brief (1952) p. 27.

[13] *Compare* North Carolina Brief (1954) pp. 25–35, 43; Texas Brief (1954) pp. 2–4; and Maryland Brief (1954) p. 10 *with* Virginia Brief (1952) pp. 18–19 and South Carolina Brief (1952) pp. 8–9.

[14] Texas Brief, pp. 16–17; Virginia Brief pp. 13–14; North Carolina Brief pp. 7–9; Florida Brief pp. 23–24, 105 ff: Delaware Brief p. 12.

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cannot be promoted by depriving citizens of their constitutional rights and privileges.

We believe the same answer should be given to any suggestion that the enforcement of constitutional rights be deferred to a time when it will have uniform public acceptance.

Even if relevant, results of polls are often not conclusive. For example, the Florida survey polled eleven "leadership" groups. These groups give evidence of a very high degree of "willingness" to comply. Although peace officers are greatly opposed to desegregation (Table 3, p. 138), only two of the eleven groups would not positively comply, and in those cases there is a very even division (Table 4, p. 139). Overall, six of the eleven groups are not opposed to the decision (Table 3, p. 138); 84.5% of white principals and supervisors who, would be charged with the duty of implementation, would comply (Table 4, p. 139). A majority of all groups expect neither mob violence nor "serious violence" (Table 5, p. 140).

Moreover, such polls are not a valid index of how the individuals questioned will in fact act in the event of desegregation. Modern psychological research shows that, especially in the case of broad public issues, many persons simply "do not follow through even on actions which they say they personally will take in support of an opinion."[15]

The Attorney General of Texas sets out in his brief in these cases a survey by the "Texas Poll" showing 71% disapproval of the May 17th decision and 65% approval of continued segregation notwithstanding this Court's decision. It is interesting to note that in *Sweatt* v. *Painter,* 339 U.S. 629, respondents included in their brief a survey made by the same "Texas Poll" showing that 76% of all Texans were "against Negroes and whites going to the same universities." However, this Court ordered Sweatt admitted to the University of Texas. He and other Negroes attended the University.[16] Since then Negroes have been admitted to and are attending this and other public universities in twelve southern States.[16a]

Finally, there is nothing to indicate that an extended delay in ordering the elimination of all segregation will improve public attitudes or eliminate the objections presently interposed. Clearly the polls are irrelevant and should be so treated by this Court.

**The wide applicability of the decision in these cases should not affect the relief to which appellants are entitled** Effort is made throughout the briefs for appellees and the several attorneys general to balance the personal and present rights here involved against the large number of children of both races now attending public school on a segregated basis. This argument is made for a twofold purpose: to escape the uniformity of decisions of this Court on the personal character of the rights involved and, secondly, to destroy the present character of the right involved.

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[15] BUCHANAN, KRUGMAN AND VAN WAGENEN, AN INTERNATIONAL POLICE FORCE AND PUBLIC OPINION 13 (1954). For other studies dealing with the discrepancy between verbal statements and actions, see Link and Freiberg, "THE PROBLEM OF VALIDITY VS. RELIABILITY IN PUBLIC OPINION POLLS," 6 PUBLIC OPINION QUARTERLY 87–98, esp. 91–92 (1942); JENKINS AND CORBIN, "DEPENDABILITY OF PSYCHOLOGICAL BRAND BAROMETERS II, THE PROBLEM OF VALIDITY," 22 JOURNAL OF APPLIED PSYCHOLOGY, 252–260 (1938); HYMAN, "DO THEY TELL THE TRUTH?," 8 PUBLIC OPINION QUARTERLY 557–559 (1944); SOCIAL SCIENCE RESEARCH COUNCIL, COMMITTEE ON ANALYSIS OF PRE–ELECTION POLLS AND FORECASTS 302–303 (1949); LA PIERE, "ATTITUDES VS. ACTIONS," 13 SOCIAL FORCES 230–237 (1934); DOOB, PUBLIC OPINION AND PROPAGANDA 151 (1948); HARTLEY AND HARTLEY, FUNDAMENTALS OF SOCIAL PSYCHOLOGY 657 (1952). See also *Irvin* v. *State,* 66 So. 2d 288, 290–292, *cert. denied* 346 U.S. 927, *reh. denied* 347 U.S. 914.

[16] It is also significant that many municipal junior colleges in Texas have also desegregated their student bodies. See SOUTHERN SCHOOL NEWS, October 1, 1954, p. 13, c. 5.

[16a] JOHNSON, "PUBLIC HIGHER EDUCATION IN THE SOUTH," 23 JOURNAL OF NEGRO EDUCATION 317 (1954), especially at 328 where Dr. Johnson, University of North Carolina Sociologist, concludes:

> The transition from complete segregation to some degree of integration of Negroes into the publicly-supported institutions of higher learning in the South has already been accomplished in all except five of the Southern states, and most of this change has occurred in the brief period, 1948–1953. Despite numerous predictions of violence, this transition has been accomplished without a single serious incident of interracial friction. We put to one side as obviously immaterial the mere technical character of these suits as class actions under Rule 23(a)(3). Obviously, the mere joinder of plaintiffs in a spurious class suit for reasons of convenience cannot have any effect on the nature of the rights asserted or on the availability of normal relief remedy. Whether a suit is or is not a class action tells us little, in this field of law, as to the magnitude of the interests involved; *Sweatt* v. *Painter* was an individual mandamus suit, but the effect of that decision spread throughout the segregating states.

Of course, the decision of this Court in the instant cases will have wide effect involving public school systems of many states and many public school children. The mere fact of numbers involved is not sufficient to delay enforcement of rights of the type here involved.[17]

On the face of it, their position is both ill-taken and self-defeating. That it is ill-taken becomes clear when the suggestion itself is clearly stated; obviously, there is nothing in mere numerousness as such which has any tendency whatever to create or destroy rights to efficacious legal relief. Behind every numeral is a Negro child, suffering the effects spoken of by the Court on May 17. It is a manifest inconsequence to say that the rights or remedial needs of each child are diminished merely because others are in the same position. That this argument is self-defeating emerges when it is considered that its tendency is simply to establish that we have to do with an evil affecting a great many people; presumably, the abolition of a widespread evil is even more urgent than dealing with isolated cases of wrongdoing.

This Court has consistently treated the personal rights of litigants on a personal basis. Every leading case involving discrimination against Negroes has necessarily and demonstrably involved large numbers of people; yet this Court has given present relief on a personal basis to those who showed themselves entitled to it, without any hint of the possibility that the rights of citizenship are diminished because many people are being denied them. The *Sweatt, Sipuel* and *McLaurin* cases and *Smith* v. *Allwright,* all, as was well known to this Court and to the country, involved not merely the individuals or class-plaintiffs or geographical subdivision actually before the Court, but also the whole framework of law school, graduate school or primary election segregation. All major constitutional cases involve large numbers of people. Yet there is not a hint, in words or in action, in any past case, to the effect that the wide applicability of a decision was considered material to the right to relief. It is unthinkable that this Court would apply any such doctrine to limit the enjoyment of constitutional rights in general; there is no reason for its making a special and anomalous exception of the case at bar.

Actually, to point to the vast numbers of people whose lives will be affected by the relief granted here is only a diffuse way of raising all the questions as to the consequences of immediate desegregation. We have dealt with these questions elsewhere. The suggestion that mere numerousness makes a difference adds nothing new, but merely serves to confuse the issues by diverting attention from the extremely personal plight of each child, and from his need for present relief.

**Average differences in student groups have no relevance to the individual rights of pupils: individual differences can be handled administratively without reference to race** Having attempted to subordinate appellants' personal and present constitutional rights to an alleged overriding consideration of the large numbers of people involved, these briefs for appellees then seek to further limit the individual rights of Negro students by broad characterizations of group intelligence, group morality and health.[18] Specifically, it is pointed out that statistics show that *on the average* Negro children in segregated schools score lower on achievement tests and are *in general* more retarded culturally than white children. This data, contrary to the conclusions advanced thereupon, merely underscores and further documents the finding quoted in this Court's opinion:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

We have come too far not to realize that educability and absorption and adoption of cultural values has nothing to do with race. What is achieved educationally and culturally, we now

[18] North Carolina Brief, pp. 39–41; Florida Brief, pp. 19–21, 189.

[19] KLINEBERG, RACE DIFFERENCES: THE PRESENT POSITION OF THE PROBLEM, 2 INTERNATIONAL SOCIAL SCIENCE BULLETIN 460 (1950); MONTAGUE, STATEMENT ON RACE, THE UNESCO STATEMENT BY EXPERTS ON RACE PROBLEMS 14–15 (1951); MONTAGUE, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE 286 (1952); KIRKPATRICK, PHILOSOPHY OF EDUCATION 399–433 (1951). See KLINEBERG, RACE AND PSYCHOLOGY, UNESCO (1951); ALLPORT, THE NATURE OF PREJUDICE (1954); COMAS, RACIAL MYTHS, UNESCO (1951).

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know to be largely the result of opportunity and environment.[19] That the Negro is so disadvantaged educationally and culturally in the states where segregation is required is the strongest argument against its continuation for any period of time. Yet those who use this argument as a basis for interminable delay in the elimination of segregation in reality are seeking to utilize the product of their own wrongdoing as a justification for continued malfeasance.

Our public school systems have grown and improved as an American institution. And in every community it is obvious that children of all levels of culture, educability, and achievement must be accounted for within the same system. In some school systems the exceptional children are separated from the rest of the children. In others there are special classes for retarded children, for slow readers and for the physically handicapped. But these factors have no relation to race. These are administrative problems with respect to conduct of the public school.

In the past, large city school systems, North and South, have had the problem of absorbing children from rural areas where the public schools and cultural backgrounds were below the city standards. On many occasions these migrations have been very sudden and in proportionately very large numbers. This problem has always been solved as an administrative detail. It has never been either insurmountable nor has it been used as an excuse to force the rural children to attend sub-standard schools. Similarly, large cities have met without difficulty the influx of immigrants from foreign countries.

Cultural and health standards have always been maintained in public schools and there could be no objection to the continuation of such standards without regard to race. All social scientists seem to be in agreement that race and color have no connection whatsoever with a student's ability to be educated. Achievement and cultural deficiencies are nonracial in character, also. Hence these factors in no wise relate to questions posed as to whether desegregation should take place immediately or over an extended period.

Perhaps the main reasons for rejecting appellees' argument are that the conditions they complain of can never be remedied as long as segregation in public schools is continued and these so-called problems, *i.e.,* average on achievement tests, health, etc., are administrative problems which can be solved by recognized administrative regulations made to fit the problems without regard to pigmentation of the skin. It is significant that appellees and the Attorneys-General who advance these arguments do not give any hope to anyone that the continuation of segregated public education will ever remove these problems which are the product of this segregation.

On the other hand, appellants have shown in their Brief on Further Reargument that on the basis of substantial documented experience: "There is no basis for the assumption that gradual as opposed to immediate desegregation is the better, smoother or more 'effective' mode of transition. On the contrary, there is an impressive body of evidence which supports the position that gradualism, far from facilitating the process, may actually make it more difficult; that, in fact, the problems of transition will be a good deal less complicated than might be forecast by appellees. Our submission is that this, like many wrongs, can be easiest and best undone, not by 'tapering off' but by forthright action" (p. 31).

**Official reactions in states affected by the May 17th decision make it plain that delay will detract from rather than contribute to the "effectiveness" of the transition to desegregated schools** Events occurring in the states affected by the decision of May 17, 1954, do not support the suggestions of appellees and *amici curiae* that further (and limitless) postponement of relief to Negro children will assure an "effective" adjustment from segregated to non-segregated school systems. In terms of legislative, executive or administrative reaction, the southern and border states may now be grouped in three loose categories:

(**1**) Those which have not waited for further directions from the Court, but have undertaken desegregation in varied measure during the current school year. Typical of the states falling in this category are Delaware,[20] Kansas,[21] Missouri,[22]

[20] Brief for Appellants in Nos. 1, 2 and 3 and for Respondents in No. 5 on Further Reargument, pp. 4–7; Brief for Petitioners on the Mandate in No. 5, pp. 10–12.

[21] Brief for Appellants in Nos. 1, 2 and 3 and for Respondents in No. 5 on Further Reargument, pp. 3–4; Supplemental Brief for the State of Kansas on Questions 4 and 5 Propounded by the Court, pp. 13–22; Supplemental Brief for the Board of Education, Topeka, Kansas on Questions 4 and 5 Propounded by the Court, pp. 2–4.

[22] SOUTHERN SCHOOL NEWS, September 3, 1954, p. 9, c. 2–5; *Id.,* October 1, 1954, p. 10, c. 1–5; *Id.,* November 4, 1954, p. 12, c. 1–5; *Id.,* December 1, 1954, p. 10, c. 1–5; *Id.,* January 6, 1955, p. 11, c. 1; *Id.,* February 3, 1955, p. 15, c. 1–5.

and West Virginia.[23] Although not a state, the District of Columbia would fall within this group.

(**2**) Those which have decided to await a decision on the question of relief but have indicated an intention to obey the Court's directions. Kentucky,[24] Oklahoma,[25] and Tennessee[26] are among the states in this category.

(**3**) Those which have indicated an intention to circumvent the decision of this Court or interminably delay the enjoyment by Negro children of their constitutionally protected rights not to be segregated in public schools. Included in this category are states like South Carolina[27] and Mississippi,[28] which have enacted legislation designed to nullify any decision of this Court in these cases, and states like Virginia[29] and Florida,[30] where either the governors or special legislative committees studying the problem have recommended that "every legal means" be used to preserve segregated school systems.[31]

Against this background of state reaction to the decision of May 17, 1954, it is clear that postponement of relief will serve no purpose. The states in the first category have already begun to implement this Court's decision and any delay as to them may imperil the progress already made.[32] The states in the second category have indicated a willingness to do whatever this Court directs and there is certainly no reason for delay as to them. The probable effect of delay, as to states in the third category, must be evaluated in the light of their declared intentions; we are justified in assuming that it would have no affirmative effect, but would merely provide additional time to devise and put into practice schemes expressly designed to thwart this Court's decision.

## CONCLUSION

Appellants recognize that the problems confronting this Court, as it turns to the implementation of its decision in these cases, are of primary magnitude. Their high seriousness is enhanced by the fact that sovereign states are in effect, though not formally, at the bar and that the evil to which the Court's decree must be directed is no transitory wrong but is of the essence of the social structure of a great section of our nation.

Yet, it should be borne in mind that the very magnitude of these problems exists because of the assumption, tacitly indulged up to now, that the Constitution is not to be applied in its full force and scope to all sections of this country alike, but rather that its guarantees are to be enjoyed, in one part of our nation, only as molded and modified by the desire and customs of the dominant component of the sectional population. Such a view, however expressed, ignores the minimum requirement for a truly national constitution. It ignores also a vast part of the reality of the sectional interest involved, for that interest must be composed of the legitimate aspirations of Negroes as well as whites. It certainly ignores the repercussions which any reluctance to forthrightly enforce appellants' rights would have on this nation's international relations. Every day of delay means that this country is failing to develop its full strength.

The time has come to end the division of one nation into those sections where the Constitution is and those where it is not fully respected. Only by forthright action can the country set on the road to a uniform amenability to its Constitution. Finally, the right asserted by these appellants is not the only one at stake. The fate of other great constitutional freedoms,

---

[23] SOUTHERN SCHOOL NEWS, October 1, p. 14, c. 1, 5; *Id.,* January 6, 1955, p. 2, c. 4–5.

[24] SOUTHERN SCHOOL NEWS, September 3, 1954, p. 7, c. 3; *Id.,* November 4, 1954, p. 16, c. 1; *Id.,* December 1, 1954, p. 9, c. 1, 3.

[25] SOUTHERN SCHOOL NEWS, February 3, 1955, p. 10, c. 1–2; *Id.,* March 3, 1955, p. 16, c. 1; THE NEW YORK TIMES, April 6, 1955, p. 20, c. 5.

[26] SOUTHERN SCHOOL NEWS, October 1, 1954, p. 11, c. 1; *Id.,* December 1, 1954, p. 12, c. 4; NEW YORK POST, March 16, 1955, p. 58, c. 4.

[27] SOUTHERN SCHOOL NEWS, September 3, 1954, p. 12, c. 1–2; *Id.,* February 3, 1955, p. 3, c. 2–4, *Id.,* March 3, 1955, p. 14, c. 1–3.

[28] SOUTHERN SCHOOL NEWS, September 3, 1954, p. 8, c. 3; *Id.,* October 1, 1954, p. 9, c. 4–5; *Id.,* November 4, 1954, p. 11, c. 4–5; *Id.,* January 6, 1955, p. 10, c. 1–2; THE NEW YORK TIMES, April 6, 1955, p. 20, c. 5.

[29] SOUTHERN SCHOOL NEWS, February 3, 1955, p. 10, c. 4.

[30] SOUTHERN SCHOOL NEWS, January 6, 1955, p. 6, c. 2.

[31] Indeed, Governor Marvin B. Griffin of Georgia has asserted: "However, if this court is so unrealistic as to attempt to enforce this unthinkable evil upon us, I serve notice now that we shall resist it with all the resources at our disposal and we shall never submit to the proposition of mixing the races in the classrooms of our schools."

[32] See, *e.g., Steiner* v. *Simmons,* 111 A. 2d 574 (Del. 1955), rev'g. 108 A. 2d 173 (Del. 1954). There the Supreme Court reversed a chancery court determination that forthwith desegregation was proper under the decision of this Court of May 17, 1954.

U.S. SUPREME COURT, OCTOBER 1954

REPLY BRIEF FOR APPELLANTS AND RESPONDENTS ON FURTHER REARGUMENT

whether secured by the Fourteenth Amendment or by other provisions, is inevitably bound up in the resolution to be made in these cases. For delay in enforcement of these rights invites the insidious prospect that a moratorium may equally be placed on the enjoyment of other constitutional rights.

In disposing of the great issues before it, this Court should do no less than order the abolition of racial segregation in public education by a day certain, as heretofore set forth in Appellants' Brief on Further Reargument.

Respectively submitted,

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U.S. SUPREME COURT, 1955

# In the Supreme Court of the United States

**CITE AS 75 S.CT. 753**

OLIVER BROWN, ET AL., APPELLANTS,
V.
BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

HARRY BRIGGS, JR., ET AL., APPELLANTS,
V.
R. W. ELLIOTT, ET AL.

DOROTHY E. DAVIS, ET AL., APPELLANTS,
V.
COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET. AL.

SPOTTSWOOD THOMAS BOLLING, ET AL., PETITIONERS,
V.
C. MELVIN SHARPE, ET AL.

FRANCIS B. GEBHART, ET AL., PETITIONERS,
V.
ETHEL LOUISE BELTON, ET AL.

NOS. 1–5.

Argued April 11, 12, 13, and 14, 1955.
Decided May 31. 1955.

**349 U.S. 294**

Class actions by which minor plaintiffs sought to obtain admission to public schools on a nonsegregated basis. On direct appeals by plaintiffs from adverse decisions in United States District Courts, District of Kansas, 98 F.Supp. 797, Eastern District of South Carolina, 103 F.Supp. 920, and Eastern District of Virginia, 103 F.Supp. 337, on certiorari before judgment on appeal to the United States Court of Appeals for the District of Columbia from adverse decision in the United States District Court for the District of Columbia, and on certiorari from decision favorable to plaintiffs in the Supreme Court of Delaware, 91 A.2d 137, the Supreme Court, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, and 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884, held that racial discrimination in public education was unconstitutional and restored cases to docket for further argument regarding formulation of decrees. On further argument, the Supreme Court, Mr. Chief Justice Warren, held that in proceedings to implement Supreme Court's determination, inferior courts might consider problems related to administration, arising from physical condition of school plant, school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve system of determining admission to public schools on a nonracial basis, and revision of local laws and regulations, and might consider adequacy of any plan school authorities might propose to meet these problems and to effectuate a transition to racially nondiscriminatory school systems.

Judgments, except that in case No. 5, reversed and cases remanded with directions; judgment in case No. 5 affirmed and case remanded with directions.

All provisions of federal, state, or local law requiring or permitting racial discrimination in public education must yield to principle that such discrimination is unconstitutional. U.S.C.A. Const. Amend.

School authorities have primary responsibility for elucidating, assessing, and solving problems arising from fact that racial discrimination in public education is unconstitutional.

Question whether school authorities' actions constitute good faith implementation of principle that racial discrimination in public education is unconstitutional could best be appraised by courts which originally heard cases raising questions of constitutionality of such discrimination, and it was appropriate to remand cases to such courts. 28 U.S.C.A.§§ 2281, 2284.

Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.

Courts of equity, in implementing Supreme Court's determination that racial discrimination in public education is unconstitutional, may properly take into account the public interest in elimination, in a systematic and effective manner, of obstacles to transition to school systems operated in accordance with constitutional principles, but constitutional principles cannot be allowed to yield because of disagreement with them.

U.S. SUPREME COURT, 1955

On remand from Supreme Court after determination in several cases that racial discrimination in public education is unconstitutional. inferior courts should, while giving weight to public considerations and private interest of litigants, require that school authorities make prompt and reasonable start toward full compliance with ruling.

In proceedings to implement Supreme Court's decision that racial discrimination in public education is unconstitutional, public school authorities have burden of establishing that grant of additional time for transition is necessary in public interest and is consistent with good faith compliance at earliest practicable date.

Inferior courts, in implementing Supreme Court's determination that racial discrimination in public education is unconstitutional, may consider problems related to administration, arising from physical condition of school plant, school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve system of determining admission to public schools on a nonracial basis, and revision of local laws and regulations, and many consider adequacy of any plans school authorities may propose to meet these problems and to effectuate a transition to racially nondiscriminatory school system.

Inferior courts, on remand from Supreme Court's determination that discrimination in public education is unconstitutional, were directed to retain jurisdiction of cases during period of transition to nondiscriminatory school systems.

Mr. Robert L. Carter, New York City, for appellants in No. 1.

Mr. Harold R. Fatzer, Topeka, Kan., for appellees in No. 1.

Messrs. Thurgood Marshall, New York City, and Spottswood W. Robinson, III, Richmond, VA., for appellants in Nos. 2 and 3.

Messrs. S. E. Rogers, Summerton, S. C., and Robert McC. Figg, Jr., Charleston, S.C., for appellees in No. 2.

Messrs. Archibald G. Robertson, Richmond, Va., and J. Lindsay Almond, Jr., Atty. Gen., for appellees in No. 3.

Messrs. George E. C. Hayes and James M. Nabrit, Jr., Washington, D.C., for petitioners in No. 4.

Mr. Milton D. Korman, Washington, D.C., for respondents in No. 4.

Mr. Joseph Donald Craven, Wilmington, Del., for petitioners in No. 5.

Mr. Louis L. Redding, Wilmington. Del., for respondents in No. 5.

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

[1] These cases were decided on May 17, 1954. The opinions of that date,[1] declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded.

Because these cases arose under different local conditions and their disposition will involve a variety of local problems, we requested further argument on the question of relief.[2] In view of the nationwide importance of the deci-

[1] 347 U.S. 43, 74 S.Ct. 686, 98 L.Ed. 873, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884.

[2] Further argument was requested on the following questions, 347 U.S. 483, 495–496, note 13, 74 S.Ct. 686, 692, 98 L.Ed. 873, previously propounded by the Court:

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based color distinctions?

"5. On the assumption on which questions 4 (*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (*b*),

"(*a*) should this Court formulate detailed decrees in these cases;

"(*b*) if so, what specific issues should the decrees;

"(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

sion. we invited the Attorney General of the United States and the Attorneys General of all states requiring or permitting racial discrimination in public education to present their views on that question. The parties, the United States, and the States of Florida, North Carolina, Arkansas, Oklahoma, Maryland, and Texas filed briefs and participated in the oral argument.

These presentations were informative and helpful to the Court in its consideration of the complexities arising from the transition to a system of public education freed of racial discrimination. The presentations also demonstrated that substantial steps to eliminate racial discrimination in public schools have already been taken, not only in some of the communities in which these cases arose, but in some of the states appearing as *amici curiae*, and in other states as well. Substantial progress has been made in the District of Columbia and in the communities in Kansas and Delaware involved in this litigation. The defendants in the cases coming to us from South Carolina and Virginia are awaiting the decisions of this Court concerning relief.

[2,3] Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility of elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.[3]

[4,5] In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies[4] and by a facility for adjusting and reconciling public and private needs.[5] These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in marking the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

[6–9] While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a

"(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

[3] The cases coming to us from Kansas, South Carolina, and Virginia were originally heard by three-judge District Courts convened under 28 U.S.C. §§ 2281 and 2284, 28 U.S.C.A. §§ 2281, 2284. These cases will accordingly be remanded to those three-judge courts. See *Briggs v. Elliott*, 342 U.S. 350, 72 S.Ct. 327, 96 L.Ed. 392.

[4] See *Alexander v. Hillman*, 296 U.S. 222, 239, 56 S.Ct. 204, 209, 80 L.Ed. 192.

[5] See *Hecht Co, v, Bowles*, 321 U.S. 321, 329–330, 64 S.Ct. 587, 591, 592, 88 L.Ed. 754.

U.S. SUPREME COURT, 1955

racially nondiscriminatory basis with all deliberate speed the parties to these cases. The judgment in the Delaware case—ordering the immediate admission of the plaintiffs to schools previously attended only by white children—is affirmed on the basis of the principles stated in our May 17, 1954, opinion, but the case is remanded to the Supreme Court of Delaware for such further proceedings as that Court may deem necessary in light of this opinion.

It is so ordered.

Judgments, except that in case No. 5, reversed and cases remanded with directions; judgment in case No. 5 affirmed and case remanded with directions.

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# Lawrence v. Texas

## ISSUE

Gay and Lesbian Rights

## HOW TO USE MILESTONES IN THE LAW

This section allows readers to investigate the facts, the arguments, and the legal reasoning that produced the *Lawrence v. Texas* decision. It also sheds light on the roles and required skills of attorneys and judges in resolving disputes.

As you read this section you may wish to consider the following issues:

- How did the appellant's description of the issues before the Court, or questions presented, differ from the appellee's description?
- How did the courts and the two parties differ in describing the meaning of particular prior cases to the present case?
- How did the holdings (conclusions of law) of the appeals court differ from those of the Supreme Court?
- On what points in the Supreme Court's majority opinion do the concurring and dissenting justices agree and disagree?

## THIS CASE IN HISTORY

*Lawrence v. Texas* was a significant gain for the cause of gay and lesbian civil rights. In this decision, the Supreme Court held that state laws prohibiting sodomy were unconstitutional, arguing that any government interest in consensual sex between adults, either homosexual or heterosexual, infringed upon the right to liberty protected by the Due Process clause of the Fourteenth Amendment. This argument follows the analysis made in rulings such as *Roe v. Wade* and *Griswold v. Connecticut,* which struck down bans on abortion and birth control (respectively) on the basis that such bans infringed on a person's right to liberty, which has been determined to include the rights to privacy and autonomy. *Lawrence* essentially overturned the 1986 precedent of *Bowers v. Hardwick*, in which the Court upheld a Georgia law prohibiting sodomy similar to the one struck down in *Lawrence.* A central argument for the decision in *Bowers* was that a long history of laws existed in Western civilization that have sought to repress homosexual conduct. The majority in *Lawrence* noted, however, that many sodomy laws have been overturned since *Bowers,* reflecting a new trend. Only 13 states in 2003, as compared to all 50 in 1961, still had laws prohibiting sodomy.

The *Lawrence* ruling caused considerable controversy. Opponents to the ruling contended that the majority manipulated the due process clause to push the cause of gay rights. They also disagreed with the overturning of *Bowers v. Hardwick*, because it took away from the states the power to determine their own moral laws.

COURT OF APPEALS OF TEXAS, MARCH 2001

**IN COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON**

**NO. 14–99–00109–CR & NO. 14–99–00111–CR**

JOHN GEDDES LAWRENCE AND TYRON GARNER, APPELLANTS
V.
THE STATE OF TEXAS, APPELLEE

March 15, 2001, Substituted Majority, Concurring, and Dissenting Opinions Filed

PRIOR HISTORY: On Appeal from County Criminal Court at Law No. 10. Trial Court Cause Nos. 98–48530 and 98–48531. Harris County, Texas. Sherman A. Ross, Judge.

This Opinion Substituted on Grant of Rehearing for Withdrawn Opinion of June 8, 2000.

DISPOSITION: Judgment of trial court affirmed.

Mitchell Katine of Houston, TX, Susanne B. Goldberg of New York, NY, Ruth E. Harlow of New York, NY, *for appellants*.

William Delmore, III of Houston, TX, *for appellee*.
J. Harvey Hudson, Justice. Justices Yates, Fowler, Edelman, Wittig, Frost, and Amidei join this opinion; Justice Yates also filed a concurring opinion in which Justices Hudson, Fowler, Edelman, and Frost join; Justice Fowler also filed a concurring opinion in which Justices Yates, Edelman, Frost, and Amidei join. Justice Anderson filed a dissenting opinion in which Senior Chief Justice Murphy joins.
Senior Chief Justice Paul C. Murphy and Former Justice Maurice Amidei sitting by assignment.

## STATEMENT OF THE CASE

Appellants, John Geddes Lawrence and Tyron Garner, were convicted of engaging in homosexual conduct. They were each assessed a fine of two hundred dollars. On appeal, appellants challenge the constitutionality of Section 21.06 of the Texas Penal Code, contending it offends the equal protection and privacy guarantees assured by both the state and federal constitutions. For the reasons set forth below, we find no constitutional infringement.

While investigating a reported "weapons disturbance," police entered a residence where they observed appellants engaged in deviate sexual intercourse.[1] It is a Class C misdemeanor in the State of Texas for a person to engage "in deviate sexual intercourse with another individual of the same sex." TEX. PEN. CODE ANN. § 21.06 (Vernon 1994). However, because appellants subsequently entered pleas of nolo contendere, the facts and circumstances of the offense are not in the record. Accordingly, appellants did not challenge at trial, and do not contest on appeal, the propriety of the police conduct leading to their discovery and arrest. Thus, the narrow issue presented here is whether Section 21.06 is facially unconstitutional.

## ARGUMENT

### EQUAL PROTECTION

In their first point of error, appellants contend Section 21.06 violates federal and state equal protection guarantees by discriminating both in regard to sexual orientation and gender.[2]

The universal application of law to all citizens has been a tenet of English common law since at least the Magna Carta, and our whole system of law is predicated on this fundamental principle. *Truax v. Corrigan,* 257 U.S. 312, 332, 66 L. Ed. 254, 42 S. Ct. 124 (1921). Nevertheless, our federal constitution did not originally contain an express guarantee of equal protection. While an assurance of equal protection could be implied from the Due Process Clause of the Fifth Amendment, this rudimentary guarantee was

[1] "Deviate sexual intercourse" is defined in Texas as "any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals or the anus of another person with an object." TEX. PEN. CODE ANN. § 21.01 (Vernon 1994).

[2] Appellants rely upon the Fourteenth Amendment of the United States Constitution and two provisions of the Texas Constitution, namely, Article I, sections 3 and 3a:

> No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. CONST. amend. XIV, § 1.
>
> All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public service.
>
> TEX. CONST. art. I, § 3.
>
> Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.
>
> TEX. CONST. art. I, § 3a.

COURT OF APPEALS OF TEXAS, MARCH 2001

complicated by constitutional distinctions between "free" persons and persons "held to service or labour." U.S. CONST. arts. I, § 2 & IV, § 2.[3]

Although the constitution did not establish or legalize slavery, it certainly recognized its existence within the states which tolerated it. See *The Amistad,* 40 U.S. 518, 551, 10 L. Ed. 826 (1841). This constitutional recognition of slavery undoubtedly facilitated a union of the original colonies, but it postponed until a later day a resolution of the tension between involuntary servitude and the concept of equal protection of laws implied by the Fifth Amendment.[4] Reconciling the institution of slavery with the notion of equal protection ultimately proved to be impossible. In the end, a constitutional "clarification" was obtained by the force of arms, six hundred thousand lives, and two constitutional amendments.

In 1863, while the outcome of the civil war remained very much in doubt, President Lincoln issued his Emancipation Proclamation purporting to free slaves found within the confederate states. In 1865, just months after general hostilities had ended, the Thirteenth Amendment was adopted. It declared that "neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. The abolition of slavery, however, was not immediately effective in bestowing the equal protection of law upon all persons. Several centuries of slavery had instilled a deep cultural bias against people of color. Individual southern states began enacting the so-called Black Codes which were designed to repress their black citizens and very nearly resurrect the institution of slavery. *City of Memphis v. Greene,* 451 U.S. 100, 132, 67 L. Ed. 2d 769, 101 S. Ct. 1584 (1981) (White, J., concurring). In response to these events, the Republican Congress passed the Civil Rights Act of 1866 in an attempt to ensure equal rights for former slaves. *General Bldgs. Contrs. Assn., Inc. v. Pennsylvania,* 458 U.S. 375, 389, 73 L. Ed. 2d 835, 102 S. Ct. 3141 (1982). In 1868, the Fourteenth Amendment was adopted and its Equal Protection Clause enjoined the states from denying to any person the equal protection of the laws.

Thus, the central purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno,* 509 U.S. 630, 642, 125 L. Ed. 2d 511, 113 S. Ct. 2816 (1993). While the guarantees of "equal protection" and "due process of law" may overlap, the spheres of protection they offer are not coterminous. *Truax*, 257 U.S. at 332, 42 S. Ct. at 129. Rather, the right to "'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law.'" Bolling, 347 U.S. 497, 499, 98 L. Ed. 884, 74 S. Ct. 693 (1954). It is aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. See *Truax*, 257 U.S. at 332–33, 42 S. Ct. at 129. It was not intended, however, "to interfere with the power of the state . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people." *Barbier v. Connolly,* 113 U.S. 27, 31, 28 L. Ed. 923, 5 S. Ct. 357 (1884).

Similarly, Article I, § 3 of the Texas Constitution also guarantees equality of rights to all persons. *Burroughs v. Lyles,* 142 Tex. 704, 181 S.W.2d 570, 574 (Tex. 1944). It was designed to prevent any person, or class of persons, from being singled out as a special subject for discriminating or hostile legislation. *Id*. Because the state and federal equal protection guarantees share a common aim and are similar in scope, Texas cases have frequently followed federal precedent when analyzing the scope and effect of Article I, § 3. *Hogan v. Hallman,* 889 S.W.2d 332, 338 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

The Texas Equal Rights Amendment, however, has no federal equivalent. See TEX. CONST. art. I, § 3a. When Texas voters adopted it in 1972 by a four to one margin, both the United States and Texas constitutions already provided due process and equal protection guarantees. In the Interest of *McLean,* 725 S.W.2d 696, 698 (Tex. 1987). Thus, unless the amendment was an exercise in futility, it must have been intended to be more extensive and provide greater specific protection than either the

[3] These articles were subsequently amended by the Thirteenth and Fourteenth Amendments.

[4] The Due Process Clause of the Fifth Amendment "requires that every man shall have the protection of his day in court, and the benefit of the general law . . . so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society." U.S. CONST. amend. V.

United States or Texas due process and equal protection guarantees. *Id.*

All of the aforementioned state and federal guarantees of equal protection are tempered somewhat by the practical reality that the mere act of governing often requires discrimination between groups and classes of individuals. *Casarez v. State,* 913 S.W.2d 468, 493 (Tex. Crim. App. 1994). A state simply cannot function without classifying its citizens for various purposes and treating some differently than others. See *Sullivan v. U.I.L.,* 616 S.W.2d 170, 172 (Tex. 1981). For example, able-bodied citizens may be required to serve in the armed forces, while the infirm are not. *Casarez,* 913 S.W.2d at 493.

The conflict between the hypothetical ideal of equal protection and the practical necessity of governmental classifications has spawned a series of judicial tests for determining when classifications are and are not permissible. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 440, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985). The general rule gives way, however, when a statute classifies persons by race, alienage, or national origin. *Id.* These factors are so seldom relevant to the achievement of any legitimate state interest that laws separating persons according to these "suspect classifications" are subject to strict scrutiny. *Id.* Accordingly, laws directed against a "suspect class," or which infringe upon a "fundamental right," will be sustained only if they are suitably tailored to serve a compelling state interest. *Id.*; *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 457–58, 101 L. Ed. 2d 399, 108 S. Ct. 2481 (1988).

**Sexual Orientation**

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Relying on the Fourteenth Amendment of the United States Constitution, Article I, § 3 of the Texas Constitution, and the Texas Equal Rights Amendment, appellants contend that Section 21.06 of the Texas Penal Code unconstitutionally discriminates against homosexuals.[5] In other words, the statute improperly punishes persons on the basis of their sexual orientation.

The threshold issue we must decide is whether Section 21.06 distinguishes persons by sexual orientation. On its face, the statute makes no classification on the basis of sexual orientation; rather, the statute is expressly directed at conduct. While homosexuals may be disproportionately affected by the statute, we cannot assume homosexual conduct is limited only to those possessing a homosexual "orientation." Persons having a predominately heterosexual inclination may sometimes engage in homosexual conduct.[6] Thus, the statute's proscription applies, facially at least, without respect to a defendant's sexual orientation.

However, a facially neutral statute may support an equal protection claim where it is motivated by discriminatory animus and its application results in a discriminatory effect. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 264–65, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977). Appellants contend this discriminatory intent is evident in the evolution of Section 21.06. For most of its history, Texas has deemed deviate sexual intercourse, i.e., sodomy, to be unlawful whether performed by persons of the same or different sex.[7] In 1973, however, the Legislature repealed its prohibition of sodomy generally, except when performed by persons of the same sex. Because "homosexual sodomy" is unlawful, while "heterosexual

[5] There is some authority recognizing a distinction between homosexual orientation and homosexual conduct. *Meinhold v. United States Dept. of Defense,* 34 F.3d 1469, 1477 (9th Cir. 1994); *Pruitt v. Cheney,* 963 F.2d 1160, 1164 (9th Cir. 1991); see also *Watkins v. United States Army,* 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring) (stating that "any attempt to criminalize the status of an individual's sexual orientation would present grave constitutional problems").

[6] In his study of human sexuality, Dr. Alfred C. Kinsey classified the "sexual orientation" of his subjects on a seven point continuum: (1) exclusively heterosexual; (2) predominantly heterosexual, only incidentally homosexual; (3) heterosexual, but more than incidentally homosexual; (4) equally heterosexual and homosexual; (5) predominantly homosexual, but more than incidentally heterosexual; (6) predominantly homosexual, but incidentally heterosexual; and (7) exclusively homosexual. Jeffrey S. Davis, Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives, 131 MIL. L. REV. 55, 58 (1991). Kinsey estimated that approximately 50 per cent of the population is exclusively heterosexual; 4 per cent is exclusively homosexual. Id. at 64. See also Sharon Elizabeth Rush, Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation, 13 HARV. BLACKLETTER J. 65, 83–84 (1997); Odeana R. Neal, The Limits of Legal Discourse: Learning From the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights, 40 N.Y.L. SCH. L. REV. 679, 705 (1996).

[7] See Acts 1943, 48th Leg., p. 194, ch.112, § 1; Vernon's Ann. P.C. (1925) art. 524; Rev. P.C. 1911, art. 507; Rev. P.C. 1895, art. 364; and Rev.P.C.1879, art. 342.

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sodomy" is not, appellants contend the statute evidences a hostility toward homosexuals, not shared by heterosexuals.

While we find this distinction may be sufficient to support an equal protection claim, neither the United States Supreme Court, the Texas Supreme Court, nor the Texas Court of Criminal Appeals has found sexual orientation to be a "suspect class."[8] Thus, the prohibition of homosexual sodomy is permissible if it is rationally related to a legitimate state interest.

The State contends the statute advances a legitimate state interest, namely, preserving public morals. One fundamental purpose of government is "to conserve the moral forces of society." *Grigsby v. Reib,* 105 Tex. 597, 607, 153 S.W. 1124, 1129 (Tex. 1913). In fact, the Legislature has outlawed behavior ranging from murder to prostitution precisely because it has deemed these activities to be immoral. Even our civil law rests on concepts of fairness derived from a moral understanding of right and wrong. The State's power to preserve and protect morality has been the basis for upholding such diverse statutes as requiring parents to provide medical care to their children,[9] prohibiting the sale of obscene devices,[10] forbidding nude dancing where liquor is sold,[11] criminalizing child endangerment,[12] regulating the sale of liquor,[13] and punishing incest.[14] Most, if not all, of our law is "based on notions of morality." *Bowers v. Hardwick,* 478 U.S. 186, 196, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986).

Appellants claim the concept of "morality" is simply "the singling out [of] groups of people based on popular dislike or disapproval." Contending this practice was specifically condemned in *Romer v. Evans,* appellants argue that classifications based on sexual orientation can no longer be rationally justified by the State's interest in protecting morality. 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). We find, however, that appellant's broad interpretation of *Romer* is not supported by the text or rationale of the Court's opinion.

In *Romer*, the Supreme Court considered the constitutionality of Colorado's universal prohibition of any statute, regulation, ordinance, or policy making homosexual orientation the basis of any claim of minority status, quota preferences, protected status, or claim of discrimination. Justice Kennedy, writing for the majority, first observed that the Fourteenth Amendment does not give Congress a general power to prohibit discrimination in public accommodations. *Romer*, 517 U.S. at 627–28. Thus, discrimination in employment, accommodations, and other commercial activities has historically been rectified by the enactment of detailed statutory schemes. *Id*. at 628. The Court cited, for illustration, several municipal codes in Colorado that prohibited discrimination on the basis of age, military status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability, or sexual orientation. *Id.* at 629. To the extent these codes protected homosexuals, however, they were rendered invalid by Colorado's constitutional amendment.

In striking down the amendment, the Supreme Court declared that all citizens have the right to petition and seek legislative protection from their government. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."

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[8] The Ninth Circuit Court of Appeals briefly held that homosexuals constitute a "suspect class," but that opinion was later withdrawn. *Watkins v. United States Army,* 847 F.2d 1329, 1349 (9th Cir. 1988), withdrawn, 875 F.2d 699, 711 (9th Cir. 1989), cert. denied, 498 U.S. 957, 111 S. Ct. 384, 112 L. Ed. 2d 395 (1990). No other federal court of appeals has ever applied heightened scrutiny when considering equal protection claims in the context of sexual orientation. See *High Tech Gays v. Defense Indus.* Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990); *Ben-Shalom v. Marsh,* 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States,* 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster,* 261 U.S. App. D.C. 365, 822 F.2d 97, 103 (D.C. Cir. 1987) (all holding that homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes). See also *Romer v. Evans,* 517 U.S. 620, 631–32, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996) (relying on the "rational relationship" test rather than "strict scrutiny" when assessing the constitutionality of Colorado's Second Amendment barring legislation favorable to homosexuals).

[9] *Commonwealth v. Nixon,* 563 Pa. 425, 761 A.2d 1151, 2000 WL 1741296, *5 (Pa. 2000).

[10] *Yorko v. State,* 690 S.W.2d 260, 265–66 (Tex. Crim. App. 1985).

[11] *El Marocco Club, Inc. v. Richardson,* 746 A.2d 1228, 1237–38 (R.I. 2000).

[12] *State v. Wilson,* 267 Kan. 550, 987 P.2d 1060, 1067 (Kan. 1999).

[13] *Altshuler v. Pennsylvania Liquor Control Bd.,* 729 A.2d 1272, 1277 (Pa. Commw. Ct. 1999).

[14] *Smith v. State,* 6 S.W.3d 512, 519–20 (Tenn. Crim. App. 1999).

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*Id*. at 633. "A State cannot . . . deem a class of persons a stranger to its laws." *Id*. at 635. Thus, while no individual, class, or group is guaranteed success, all persons have the right to seek legislation favoring their interests.

Here, appellants do not suggest that Section 21.06 unconstitutionally encumbers their right to seek legislative protection from discriminatory practices. Hence, *Romer* provides no support for appellants' position. *Romer,* for example, does not disavow the Court's previous holding in *Bowers*; it does not elevate homosexuals to a suspect class; it does not suggest that statutes prohibiting homosexual conduct violate the Equal Protection Clause; and it does not challenge the concept that the preservation and protection of morality is a legitimate state interest.[15]

Moreover, while appellants may deem the statute to be based on prejudice, rather than moral insight, our power to review the moral justification for a legislative act is extremely limited. The constitution has vested the legislature, not the judiciary, with the authority to make law. In so doing, the people have granted the legislature the exclusive right to determine issues of public morality.[16] If a court could overturn a statute because it perceived nothing wrong with the prohibited conduct, the judiciary would at once become the rule making authority for society—this the people have strictly forbidden. Accordingly, we must assume for the purposes of our analysis that the Legislature has found homosexual sodomy to be immoral.

The State also contends the legislature could have rationally concluded that "homosexual sodomy" is a different, and more reprehensible, offense than "heterosexual sodomy." This proposition is difficult to confirm because in American jurisprudence courts and legislatures have historically discussed the topic only in terms of vague euphemisms. In fact, statutes often made sodomy a criminal offense without ever defining the conduct. See *Commonwealth v. Poindexter,* 133 Ky. 720, 118 S.W. 943, 944 (Ky. 1909).

In its broadest common law form, the offense "consists in a carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman; or by man or woman, in any manner, with beast." *Prindle v. State,* 31 Tex. Crim. 551, 21 S.W. 360 (Tex. Crim. App. 1893). More restrictive definitions of sodomy, however, were commonly recognized. In many instances, for example, sodomy was restricted to carnal copulation between two human beings—sometimes further restricted to males (perhaps because it was difficult to "imagine that such an offense would ever be committed between a man and a woman"). *Wise v. Commonwealth,* 135 Va. 757, 115 S.E. 508, 509 (Va. 1923). In any event, only homosexual conduct between two men was included among the early capital crimes of the Massachusetts Bay Colony.[17] Moreover, in some jurisdictions, including Texas, sodomy did not include oral sex. *Prindle,* 21 S.W. at 360; *Poindexter,* 118 S.W. at 944. Again, it is difficult to know whether this more narrow definition arose deliberately or was simply the product of legislative ignorance and/or judicial innocence. Conceivably, oral sex was "so unusual and unthinkable as perhaps not to have been even contemplated in the earlier stages of the law." *Wise,* 115 S.E. at 509.

Regardless of how these differing definitions of sodomy arose, we agree with the State's general contention that it has always been the legislature's prerogative to deem some acts more egregious

[15] In fact, the State of Colorado did not cite the preservation of morality as one of its legitimate interests in attempting to uphold the amendment. Rather, the state argued that it had a legitimate interest in: (1) protecting the freedom of association of its citizens, particularly those who might have personal or religious objections to homosexuality, and (2) conserving its resources to combat discrimination against other groups. Id. at 635.

[16] Where a statute does not run afoul of explicit constitutional protections, its moral justification is virtually unreviewable by the judiciary. When the rational basis for an Alabama statute outlawing certain sexual devices was challenged, the United States Eleventh Circuit Court of Appeals wrote:

> However misguided the legislature of Alabama may have been in enacting the statute challenged in this case, the statute is not constitutionally irrational under rational basis scrutiny because it is rationally related to the State's legitimate power to protect its view of public morality. "The Constitution presumes that ... improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97, 99 S. Ct. 939, 942–943, 59 L. Ed. 2d 171 (1979). This Court does not invalidate bad or foolish policies, only unconstitutional ones; we may not "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S. Ct. 2513, 2517, 49 L. Ed. 2d 511 (1976).
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> For the foregoing reasons, we hold the Alabama statute challenged in this case has a rational basis. *Williams v. Pryor,* 229 F.3d 1331, 1339 (11th Cir. 2000).

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than others. For example, the legislature has not chosen to make every homicide a capital offense; depending upon the circumstances, some homicides are first degree felonies,[18] some are second degree felonies,[19] some are state jail felonies,[20] and others are lawful.[21] Moreover, it is the duty of this Court to construe every statute in a manner that renders it constitutional if it is possible to do so consistent with a reasonable interpretation of its language. *Trinity River Authority v. UR Consultants, Inc.* Texas, 869 S.W.2d 367, 370 (Tex. App.—Dallas 1993), aff'd, 889 S.W.2d 259 (Tex. 1994). Accordingly, we find the legislature could have concluded that deviant sexual intercourse, when performed by members of the same sex, is an act different from or more offensive than any such conduct performed by members of the opposite sex.

Because (1) there is no fundamental right to engage in sodomy, (2) homosexuals do not constitute a "suspect class," and (3) the prohibition of homosexual conduct advances a legitimate state interest and is rationally related thereto, namely, preserving public morals, appellant's first contention is overruled.

**Gender**

Appellants also contend Section 21.06 unconstitutionally discriminates on the basis of gender. In Texas, gender is recognized as a "suspect class." *Barber v. Colorado Independent School Dist.,* 901 S.W.2d 447, 452 (Tex. 1995). In light of the Texas Equal Rights Amendment, classifications by gender are subject to "strict scrutiny" and will be upheld only if the State can show such classifications have been suitably tailored to serve a compelling state interest.[22]

Appellants claim Section 21.06 discriminates on the basis of sex because criminal conduct is determined to some degree by the gender of the actors. For example, deviate sexual intercourse is not unlawful per se in Texas. While the physical act is not unlawful as between a man and woman, it is unlawful when performed between two men or two women. Appellants contend that because criminality under the statute is, in some respects, gender-dependent, Section 21.06 runs afoul of state and federal equal protection guarantees.

The State asserts the statute applies equally to men and women, i.e., two men engaged in homosexual conduct face the same sanctions as two women. Thus, the State maintains the statute does not discriminate on the basis of gender. Appellants respond by observing that a similar rationale was expressly rejected in the context of racial discrimination. *Loving v. Virginia,* 388 U.S. 1, 9, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967).

In *Loving,* the State of Virginia attempted to uphold its miscegenation statute in the face of an equal protection challenge by arguing that the statute did not discriminate on the basis of race because it applied equally to whites and blacks. The Supreme Court traced the origins of Virginia's miscegenation statute and concluded that "penalties for miscegenation arose as an incident to slavery." *Loving,* 388 U.S. at 6. Because the clear and central purpose of the Fourteenth Amendment was "to eliminate all official state sources of invidious racial discrimination," the court determined the statute was unconstitutional. *Id.*, at 10.

Here, the State of Texas employs a comparable argument, namely, Section 21.06 does not discriminate on the basis of gender because it applies equally to men and women. Appellants' contend the argument was discredited by *Loving* and should not be followed here. But while the purpose of Virginia's miscegenation statute was to segregate the races and perpetuate the notion that blacks are inferior to whites, no such sinister motive can be ascribed to the criminalization of homosexual conduct. In other words, we find nothing in the history of Section 21.06 to suggest it was intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to

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[17] Bestiality, however, was a capital offense whether committed by a man or a woman. THE LAWS AND LIBERTIES OF MASSACHUSETTS, at 5 (Cambridge 1648).

[18] TEX. PEN. CODE ANN. § 19.02 (Vernon 1994).

[19] TEX. PEN. CODE ANN. § 19.04 (Vernon 1994).

[20] TEX. PEN. CODE ANN. § 19.05 (Vernon 1994).

[21] TEX. PEN. CODE ANN. §§ 9.32, 9.33, 9.42, & 9.43 (Vernon 1994).

[22] Under the Fourteenth Amendment, gender classifications are analyzed according to an intermediate "heightened scrutiny" falling somewhere between the rational relationship test and strict scrutiny. *Mississippi University for Women v. Hogan,* 458 U.S. 718, 724, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982); see also *Craig v. Boren,* 429 U.S. 190, 197, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976) (holding that under the Fourteenth Amendment, classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.

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gender. Thus, we find appellants' reliance on *Loving* unpersuasive.[23]

While Section 21.06 alludes to sex, not every statutory reference to gender constitutes an unlawful "gender-classification." Texas law provides, for example, that counties are authorized to increase participation by "women-owned businesses" in public contract awards by establishing a contract percentage goal for those businesses;[24] when jurors are sequestered overnight, separate facilities must be provided for male and female jurors;[25] employers are prohibited from permitting, requesting, or requiring female children to work topless;[26] the Director of the Texas Department of Transportation must report to each house of the legislature regarding the department's progress in recruiting and hiring women;[27] where a child is adopted by two parents, one must be female and the other male;[28] female patients being transported from a jail to a mental health facility must be accompanied by a female attendant;[29] circumcision of a female under the age of 18 is unlawful;[30] etc. Whether these and many other gender-specific statutes, violate the Texas Equal Rights Amendment is not before us. We must assume, however, that the legislature enacted these provisions with full knowledge of Article I, section 3a of the Texas Constitution and perceived no conflict. The legislature, for example, has specifically admonished the governor and supreme court to ensure the full and fair representation of women when making their appointments to the Board of Directors of the State Bar of Texas, but to also make no "regard to race, creed, sex, religion, or national origin." TEX. GOV'T CODE ANN. § 81.020 (Vernon 1998).

The mere allusion to gender is not a talisman of constitutional invalidity. If a statute does not impose burdens or benefits upon a particular gender, it does not subject individuals to unequal treatment. See *Coalition for Economic Equity v. Wilson,* 122 F.3d 692, 702 (9th Cir. 1997) (holding that while California's Proposition 209 mentions race and gender, it does not logically classify persons by race and gender); see also *Hayden v. County of Nassau,* 180 F.3d 42, 48–49 (2nd Cir. 1999) (entrance exam designed to diminish cultural bias on black applicants did not constitute a "racial classification" because it did not promote one race over another). While Section 21.06 includes the word "sex," it does not elevate one gender over the other. Neither does it impose burdens on one gender not shared by the other.

Where, as here, a statute is gender-neutral on its face, appellants bear the burden of showing the statute has had an adverse effect upon one gender and that such disproportionate impact can be traced to a discriminatory purpose. *Sylvia Development Corp. v. Calvert County, Md.,* 48 F.3d 810, 819 (4th Cir. 1995); *Keevan v. Smith,* 100 F.3d 644, 650 (8th Cir. 1996). Appellants have made no attempt to establish, nor do they even contend, that Section 21.06 has had any disparate impact between men and women. Rather,

[23] See also *Boutwell v. State,* 719 S.W.2d 164 (Tex. Crim. App. 1985). There the Court of Criminal Appeals considered the applicability of the Texas Equal Rights Amendment to Section 21.10 of the Penal Code which, until its repeal in 1983, provided legal defenses to certain heterosexual acts that were specifically denied in the context of homosexual acts. Act of May 24, 1973, 63rd Leg., R.S., ch. 399, § 21.10, 1973 Tex. Gen. Laws 918. When Boutwell was charged with sexual abuse of several boys, he argued the statute was unconstitutional under the Texas Equal Rights Amendment because it discriminated against him on the basis of sex. *Boutwell,* 719 S.W.2d at 167. The Court of Criminal Appeals rejected the contention, stating:

But clearly, a female defendant situated similarly to appellant—that is, a female who had engaged in deviate sexual intercourse with a child 14 years or older who was of the same sex—would likewise be denied the "promiscuity" defense under § 21.10. Thus, appellant's reasoning proceeds upon a fallacy of amphiboly: his complaint is not that he is discriminated against on the basis of "sex" in the sense of "gender;" but rather, that his "sex" act is entitled to protection equal to that given heterosexual conduct under the law as stated in § 21.10(b). Id. at 169; see also *Boulding v. State,* 719 S.W.2d 333 (Tex. Crim. App. 1986). *Boutwell* has been severely criticized, but on grounds different than those at issue here. *McGlothlin v. State,* 848 S.W.2d 139, 139 (Tex. Crim. App. 1992); *Vernon v. State,* 841 S.W.2d 407, 410 (Tex. Crim. App. 1992).

[24] TEX. LOC. GOV'T. CODE ANN. § 381.004 (Vernon 1999).

[25] TEX. CODE CRIM. PROC. ANN. art. 35.23 (Vernon Supp. 2000).

[26] TEX. PEN. CODE ANN. § 43.251 (Vernon 1994).

[27] TEX. TRANS. CODE ANN. § 201.403 (Vernon 1999).

[28] TEX. HEALTH & SAFETY CODE ANN. § 192.008 (Vernon Supp. 2000).

[29] TEX. CODE CRIM. PROC. ANN. art. 46.04 (Vernon Pamph. 2000).

[30] TEX. HEALTH & SAFETY CODE ANN. § 166.001 (Vernon Supp. 2000).

The legislature has mistakenly designated two different statutes as Section 166.001 of the Health and Safety Code. Act of May 18, 1999, 76th Leg., R.S., ch. 450, § 1.02, 1999 Tex. Gen. Laws 2835 (Advance Directives Act) and Act of May 26, 1999, 76th Leg., R.S., ch. 642, § 1, 1999 Tex. Gen. Laws 3213 (Female Genital Mutilation Prohibited).

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appellants complain only that the statute has had a disparate impact between homosexuals and heterosexuals. While we recognize the statute may adversely affect the conduct of male and female homosexuals, this simply does not raise the specter of gender-based discrimination.

As we already have determined, the police power of a state may be legitimately exerted in the form of legislation where such statute bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. *Louis K. Liggett Co. v. Baldridge,* 278 U.S. 105, 111–12, 73 L. Ed. 204, 49 S. Ct. 57 (1928). To the extent the statute has a disproportionate impact upon homosexual conduct, the statute is supported by a legitimate state interest. The first point of error is overruled.

**PRIVACY**

In their second point of error, appellants contend Section 21.06 violates the right to privacy guaranteed by both the state and federal constitutions. Appellants claim the intimate nature of the conduct at issue, when engaged in by consenting adults in private, is beyond the scope of governmental interference.

Neither the state nor federal constitutions contain an explicit guarantee of privacy. Thus, there is no general constitutional right to privacy. However, both constitutions contain express limitations on governmental power from which "zones of privacy" may be inferred. The United States Supreme Court has found five such zones in the Bill of Rights:

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment. . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Griswold v. Connecticut,* 381 U.S. 479, 484, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965).

Similarly, the Texas Supreme Court has found "constitutionally protected zones of privacy emanating from several sections of article I of the Texas Constitution." *City of Sherman v. Henry,* 928 S.W.2d 464, 472 (Tex. 1996). These include: section 6, concerning freedom of worship; section 8, concerning freedom of speech and press; section 9, concerning searches and seizures; section 10, concerning the rights of an accused in criminal prosecutions; section 19, concerning deprivation of life, liberty and property, and due course of law; and section 25, concerning quartering soldiers in houses. Id.

Appellants do not specifically identify the constitutional provision which they claim creates a zone of privacy protecting consensual sexual behavior from state interference. However, we find there are but two provisions of the federal constitution which could arguably be construed to apply here—the Fourth and Ninth Amendments.

The Fourth Amendment is not applicable because appellants do not contest, and have never contested, the entry by police into the residence where they were discovered. Thus, we must assume the police conduct was both reasonable and lawful under the Fourth Amendment.

The Ninth Amendment also offers no support. In *Bowers v. Hardwick,* the defendants were convicted of violating the Georgia sodomy statute. 478 U.S. at 190–91. Relying upon *Griswold v. Connecticut*[31] and other decisions recognizing "reproductive rights," the defendants argued that the Ninth Amendment creates a zone of privacy regarding consensual sexual activity that encompasses homosexual sodomy. The court rejected the argument and said "the position that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable." *Bowers*, 478 U.S. at 191.

Likewise, under the Texas Constitution, we perceive that there are but two provisions that would arguably support appellants' position—sections 9 and 19 of Article I. Again, because appellants have not challenged the search leading to their arrest, we must conclude the police did not violate section 9 of the Texas Constitution.

[31] 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

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Although neither the Texas Supreme Court nor Texas Court of Criminal Appeals has considered whether section 19 creates a zone of privacy that would protect private homosexual behavior, the Supreme Court has held it does not protect private heterosexual behavior. In *City of Sherman v. Henry,* the court was confronted with a case where the city had denied a promotion to a police officer because he was having an adulterous affair with the wife of another officer. See *Henry* 928 S.W.2d at 465. The court held that Article I, section 19 does not create a right of privacy protecting adulterous conduct without state interference.

Sexual relations with the spouse of another is not a right that is "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." Prohibitions against adultery have ancient roots. In the latter half of the 17th century in England, adultery was a capital offense. 4 WILLIAM BLACKSTONE, COMMENTARIES *64. The common law brought to this country by the American colonists included the crime of adultery as previously defined by the canon law of England. *United States v. Clapox,* 13 Sawy. 349, 35 F. 575, 578 (D.Or.1888); FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW vol. 11, §§ 1719–20, p. 524 (9th ed. 1885). Adultery was still considered a crime by courts and commentators in the latter half of the 19th century when the Fourteenth Amendment was ratified. See *Clapox,* 35 F. at 578; WHARTON, supra. In fact, adultery is a crime today in half of the states and the District of Columbia.

* * *

While other states, including Texas, have recently repealed laws criminalizing adultery, the mere fact that such conduct is no longer illegal in some states does not cloak it with constitutional protection. *Henry,* 928 S.W.2d at 470.

Similarly, we find homosexual conduct is not a right that is "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." In America, homosexual conduct was classified as a felony offense from the time of early colonization.[32] In fact, there was such unanimity of condemnation that sodomy was, before 1961, a criminal offense in all fifty states and the District of Columbia. *Bowers v. Hardwick,* 478 U.S. at 193. In Texas, homosexual conduct has been a criminal offense for well over a century.[33]

In addition to an American tradition of statutory proscription, homosexual conduct has historically been repudiated by many religious faiths.[34] Moreover, Western civilization has a long history of repressing homosexual behavior by state action. Under Roman law, Justinian states that a lex Iulia imposed severe criminal penalties against "those who indulge in criminal intercourse with those of their own sex."[35] Blackstone states that the "infamous crime against nature, committed either with man or beast" was a grave offense among the ancient Goths and that it continued to be so under English common law at the time of his writing.[36] In his survey of the law, Montesquieu was prompted to conclude that "the crime against nature" is a "crime, which religion, morality, and civil government equally condemn."[37]

Nevertheless, appellants contend that Texas should join several of our sister states who have legalized homosexual conduct. Certainly, the modern national trend has been to decriminalize many forms of consensual sexual conduct even when such behavior is widely perceived to be destructive and immoral, e.g., seduction, fornication, adultery, bestiality, etc.[38] Our concern, however, cannot be with cultural trends and political movements because these can have no place in our decision without usurping the role of the Legislature. While the Legislature is not infallible in its moral and ethical judgments, it

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[32] See LAWS AND LIBERTIES 5 (Cambridge 1648) (collection of the general laws of the Massachusetts Bay Colony).

[33] See Tex. Penal Code art. 342 (1879); Tex. Penal Code art. 364 (1895); Tex. Penal Code art. 507 (1911); and Tex. Penal Code art. 524 (1925).

[34] "Our society's three major religions—Judaism, Christianity, and Islam—historically have viewed homosexuality as immoral." Richard F. Duncan, Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom, 69 NOTRE DAME L. REV. 393, 404 n.40 (1994) [citing The Jewish Torah (Leviticus 18:22, 20:13), the New Testament (Romans 1:26–28, I Timothy 1:9–10, I Corinthians 6:9–10) and the Koran (The Heights 7:80)].

[35] FLAVIUS JUSTINIAN, THE INSTITUTES OF JUSTINIAN 205 (J. B. Moyle trans., 5th ed., Oxford 1913).

[36] 4 WILLIAM BLACKSTONE, COMMENTARIES * 215–16.

[37] 1 Bankr.N DE MONTESQUIEU, THE SPIRIT OF LAWS 231 (Dublin 1751).

[38] Despite this trend, there are still today many types of "private" conduct which courts have recognized are not protected from state interference. See generally *Washington v. Glucksberg,* 521 U.S. 702, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997) (holding there is no protected right to commit suicide); *Osborne v. Ohio,* 495 U.S. 103, 109 L. Ed. 2d 98, 110 S.

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alone is constitutionally empowered to decide which evils it will restrain when enacting laws for the public good.[39]

Our role was aptly defined over a hundred years ago by Justice Noggle who, while writing for the Idaho Supreme Court, observed: "The court is not expected to make or change the law, but to construe it, and determine the power of the law and the power the legislature had to pass such a law; whether that power was wisely or unwisely exercised, can be of no consequence." *People v. Griffin,* 1 Idaho 476, 479 (1873). Because we find no constitutional "zone of privacy" shielding homosexual conduct from state interference, appellants' second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson

Justice

Judgment rendered and Majority, Consenting, and Dissenting Opinions filed March 15, 2001. (Justices Yates, Fowler, Edelman, Wittig, Frost, and Amidei join this opinion; Justice Yates also filed a concurring opinion in which Justices Hudson, Fowler, Edelman, and Frost join; Justice Fowler also filed a concurring opinion in which Justices Yates, Edelman, Frost, and Amidei join. Justice Anderson filed a dissenting opinion in which Senior Chief Justice Murphy joins.)*

En banc.

Affirmed on Rehearing En Banc; Majority and Dissenting Opinions of June 8, 2000, are Withdrawn and Substituted with Majority, Concurring, and Dissenting Opinions filed March 15, 2001.

### CONCURRING OPINION ON MOTION FOR REHEARING EN BANC

I agree with the result reached by, and reasoning utilized by, the majority opinion. However, I write separately only to address one of the arguments raised by *amicus curiae. Amicus curiae* alleges that by overruling the prior panel's decision, this Court will have succumbed to improper political pressure and asserts "the best way for this Court to rebuke those who attempted to exercise improper political influence in the present case is to affirm the well-reasoned panel opinion."

The Texas Code of Judicial Conduct provides the guiding principals for every judge of this State in the performance of his or her judicial duties. TEX. CODE JUD. CONDUCT, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon 1998 & Supp. 2000). Each judge in Texas is instructed to "not be swayed by partisan interests, public clamor, or fear of criticism." *Id.* at Canon 3(B)(2). What *amicus curiae* requests this Court to do is, in effect, no different from what those who leveled political attacks against the majority in the panel opinion hoped to achieve, i.e., a certain desired result.[1] In other words, *amicus curiae* asks this Court to shirk its bound duty in order to decide a difficult question of law differently from what

Ct. 1691 (1990) (possession of child pornography not a protectable privacy interest even when possessed inside the home); *Bowers*, 478 U.S. at 195 (suggesting that adultery, even when committed in the home, is not a constitutionally protected behavior); *United States v. Miller,* 776 F.2d 978 (11th Cir. 1985) (holding that constitutional right of privacy does not shield a person from personal possession of pornography outside the home); *Potter v. Murray City,* 760 F.2d 1065 (10th Cir. 1985) (holding that because monogamy is inextricably woven into the fabric of our society, ban on plural marriage did not violate right of privacy); *United States v. Fogarty,* 692 F.2d 542 (8th Cir. 1982) (holding there is no fundamental right to possess marijuana); *J.B.K., Inc. v. Caron,* 600 F.2d 710 (8th Cir. 1979) (holding right of privacy does not extend to commercialized sexual activities); *Kuromiya v. United States,* 37 F. Supp. 2d 717 (E.D. Penn. 1999) (holding there is no fundamental right to smoke marijuana).

[39] The fact that unlawful behavior is conducted in private between consenting adults may complicate detection and prosecution, but it does not, ipso facto, render its statutory prohibition unconstitutional. In upholding its sodomy statute, the Supreme Court of Louisiana wrote:

> The question of whether or not a third party is harmed by a consensual and private act of oral or anal sex is a debate which has been ongoing for many years and is nothing which this court needs to address. The legislature is within constitutional authority to proscribe its commission. Any claim that private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.
>
> * * *
>
> There has never been any doubt that the legislature, in the exercise of its police power, has authority to criminalize the commission of acts which, without regard to the infliction of any other injury, are considered immoral.
>
> Simply put, commission of what the legislature determines as an immoral act, even if consensual and private, is an injury against society itself. See *State v. Smith,* 766 So. 2d 501, 509 (La. 2000).

* Senior Chief Justice Paul C. Murphy and Former Justice Maurice Amidei sitting by assignment.

[1] In its brief to this Court, *amicus curiae* describes the political attacks as including a "letter circulated by local [Republican party] officials in an attempt to influence the outcome of the case."

it believes to be the correct resolution. *Amicus curiae's* request is grounded on the mistaken notion that any different result must surely be on the basis of political pressure, without crediting the members of this Court with the integrity to carry out their duties in strict accordance with the Texas Code of Judicial Conduct and with careful consideration of the legal issues presented in this appeal. As *amicus curiae* suggests, attacks on the judiciary, like the one following the panel opinion, may have the effect of increasing the potential that the public's confidence in our courts will diminish because of a perception, however erroneous, that we have made a political decision, not a legal one. But the response to such a reckless and irresponsible act cannot be that we ignore our duty to decide the law we have been entrusted to interpret. Attempts to politicize this opinion—regardless of their origin—have no place in our decision-making process, nor are attacks from opposing interests immune from creating the very same perception in the mind of the public that may now exist as a result of earlier inappropriate attempts to influence this decision.

"Judges are called upon to make hundreds of decisions each year. These decisions are made after consideration of opposing contentions, both of which are often based on reasonable interpretations of the laws of the United States and the Constitution." Second Circuit Chief Judges Criticize Attacks on Judge Baer, 215 N.Y.L.J. 4 (March 29, 1996). Unless there is a basis for disqualification or recusal, all judges must decide the matter brought before them. TEX. CODE JUD. CONDUCT, Canon 3(B)(1); *Rogers v. Bradley,* 909 S.W.2d 872, 879 (Tex. 1995) (Enoch, J., responding to Justice Gammage's declaration of recusal) (citing *Sun Oil Co. v. Whitaker,* 483 S.W.2d 808, 823–24 (Tex. 1972)). As one jurist has commented with regard to our duty to decide difficult matters presented to us:

All judges face the likelihood of being publicly criticized . . . for decisions that they render. It goes with the territory. A judge's oath is to decide cases based on the law and the facts . . . . Carl E. Stewart, Contemporary Challenges to Judicial Independence, 43 LOY. L. REV. 293, 306 (1997). There is simply no place for suggesting that the members of this Court are pandering to certain political groups or deciding a case as a means to achieve a politically desired end.[2] And to do so only adds unnecessarily to the already politically charged climate created by the people *amicus curiae* purports to condemn.

Today we have been called upon to decide whether section 21.06 of the Texas Penal Code lacks a rational basis or otherwise violates the constitutional right to privacy found in the constitutions of either Texas or the United States. We have done so—not because of political pressures, as *amicus curiae* has suggested, but despite them.

/s/ Leslie Brock Yates

Justice

Judgment rendered and Concurring Opinion filed March 15, 2001.

En banc.

### CONCURRING OPINION ON MOTION FOR REHEARING EN BANC

Today the Court holds that section 21.06 of the Texas Penal Code is not unconstitutional. I join in the court's opinion, however I write separately to make the following comments.

First, once the decision is made that the classifications in section 21.06 are not gender based, the analysis is relatively straightforward. A gender-based classification would require a heightened scrutiny of section 21.06 because gender is a protected class. However, sexual preference has not been designated a protected class by the United States Supreme Court, the Texas Supreme Court, or the Texas Court of Criminal Appeals. See Majority Op. n. 8 supra. Consequently, in deciding whether 21.06 is constitutionally sound, we look only for a rational relationship between section 21.06 and the State's reasons for enacting it.[1]

The State argues that 21.06 is directly related to the legislature's right to legislate morality. The United States Supreme Court has held that it is within a State's legitimate police power to legis-

[2] See, e.g., Stephen B. Bright, Policital Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?, 72 N.Y.U. L. Rev. 308, 313 (1997) (observing that "it is irresponsible for critics of the courts to argue that only results matter, without regard to the legal principles that govern judicial decisionmaking.").

[1] The dissent argues that the rational relationship test we are to use here is a higher standard than the rational relationship test normally is; however, that distinction is not apparent in the case law, and the dissent does not point to any particular language that supports this argument.

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late on grounds of morality. *Bowers v. Hardwick,* 478 U.S. 186, 196, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986); *Berman v. Parker,* 348 U.S. 26, 32, 99 L. Ed. 27, 75 S. Ct. 98 (1954). Thus, we need only determine if section 21.06 is related "to the pursuit" of implementing morality.

The United States Circuit Court for the Fifth Circuit has already held that 21.06 concerns issues of morality. *Baker v. Wade,* 769 F.2d 289, 292 (5th Cir. 1985). In reviewing section 21.06, that court held, "in view of the strong objection to homosexual conduct, which has prevailed in Western culture for the past seven centuries, we cannot say that section 21.06 is 'totally unrelated to the pursuit of,' implementing morality, a permissible state goal." (internal citations omitted). That is the same justification upon which the majority relies to reach the conclusion that the Texas Legislature was exercising valid legislative powers in enacting section 21.06. I agree that the justification is legally sound. It is not our duty to assess the wisdom or desirability of the law, see *New Orleans v. Dukes,* 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976), nor does "this court ... invalidate bad or foolish policies, only unconstitutional ones; we may not 'sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.'" *Id.* As the majority states, "our power to review the moral justification for a legislative act is extremely limited."

Secondly, I concur with the majority in its rationale and holdings as to both the Equal Protection and Privacy sections of the opinion. I would only add that, as to whether section 21.06 unconstitutionally discriminates on the basis of gender, it clearly does not. This is not merely because of the equal application of the statute to men and women, but because this statute does not contain a discriminatory classification based on gender.

The dissent contends that, like the statute struck down in *Loving v. Virginia,* this statute "equally punishes," in this case, based on gender classification, which makes the statute gender based. 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). That argument is creative, but misguided. In *Loving,* the Court struck down a statute because the statute furthered a loathsome discrimination—racism that implied a "superior" white person marrying an "inferior" black person does so at the risk of both being punished. The *Loving* court correctly recognized that this was the kind of discriminatory law sought to be vanquished by the Fourteenth Amendment; one that advanced the fallacy of racial superiority. However, *Loving* is not on point in this case because section 21.06 does not advance the fallacy of gender superiority. It prohibits a same-sex sexual relationship. The fact that sexual orientation necessarily depends upon the sex of the parties does not mean that section 21.06 is the kind of statute that discriminates on the basis of gender. Gender is treated as an elevated class under the Fourteenth Amendment because this country saw a need to rid itself of outdated notions of a woman's inferiority to a man.[2] *Reed v. Reed,* 404 U.S. 71, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971); *Phillips v. Marietta Corp.,* 400 U.S. 542, 27 L. Ed. 2d 613, 91 S. Ct. 496 (1971); *Seidenberg v. McSorleys' Old Ale House, Inc.,* 317 F. Supp. 593 (S.D.N.Y. 1970); *Sail'er Inn, Inc. v. Kirby,* 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (Cal. 1971). There is nothing in section 21.06 that furthers any unequal treatment between the sexes. The dissent's argument to the contrary is not a legally sustainable one.

Finally, I also take issue with the dissent's treatment of the majority's reliance on *Bowers v. Hardwick.* The dissent correctly points out that *Bowers v. Hardwick* deals with the Due Process Clause, while the majority's analysis depends upon the Equal Protection Clause of the Fourteenth Amendment. The dissent remarks that "this blending of quite distinct elements of the Federal Constitution blunts the force of the majority's equal protection arguments." I disagree.

First, the dissent overlooks the fact that the ultimate analysis in both *Bowers* and this case turns on the application of the rational basis test. This test does not differ depending on whether it is applied in a "due process" or an "equal protection" context. The test remains the same: does the statute further some legitimate, articulated state purpose? *Kadrmas v. Dickinson Pub. Sch.,* 487 U.S. 450, 461–62, 101 L. Ed. 2d 399, 108 S. Ct. 2481 (1988) (analyzing a Fourteenth Amendment Equal Protection claim based on whether the statute at issue had a

[2] As the majority stated, "neither the United States Supreme Court, the Texas Supreme Court, nor the Texas Court of Criminal Appeals has found sexual orientation to be a 'suspect class.'"

"rational relation to a legitimate government objective . . ."); *Williamson v. Lee Optical of Okla.,* 348 U.S. 483, 488, 99 L. Ed. 563, 75 S. Ct. 461, (1955) (analyzing a Fourteenth Amendment Due Process claim under the rational basis test by stating, ". . . to be constitutional, it is enough that there is an [issue] at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); see *Richardson v. Belcher,* 404 U.S. 78, 81, 30 L. Ed. 2d 231, 92 S. Ct. 254 (1971) (analyzing a Fifth Amendment Due Process claim using a rational basis test drawn from Equal Protection cases that stated the statute must be "rationally based and free from invidious discrimination . . ."). *Bowers* holds that states are within the scope of legislative authority—and further a legitimate state purpose—when their legislatures base laws on concepts of morality. Therefore, the application of *Bowers* does not "blunt[] the force of the majority's equal protection arguments." Secondly, the dissent charges that the majority merges *Bowers*' due process analysis with the equal protection issue in this case. That statement is incorrect. The majority cites *Bowers* only three times: (1) in reference to legislating on notions of morality; (2) in reference to the privacy issue; and (3) for the contention that sodomy was an offense in all fifty states and in the District of Columbia prior to 1961. The majority's analysis of whether section 21.06 should be subject to some level of heightened scrutiny in an equal protection analysis does not depend on the *Bowers* decision. The dissent's implication to the contrary is inaccurate.

/s/ Wanda McKee Fowler

Justice

Judgment rendered and Concurring Opinion filed March 15, 2001.

En banc.

**DISSENTING OPINION**

I respectfully dissent to the majority's Herculean effort to justify the discriminatory classification of section 21.06 of the Penal Code despite the clear prohibitions on such discrimination contained in the Equal Protection Clause of the United States Constitution and the Texas Equal Rights Amendment in the Bill of Rights of the Texas Constitution.

Appellants are before this court challenging the constitutionality of Texas Penal Code section 21.06. They bring four issues: (1) whether the statute violates the right to federal constitutional equal protection as applied and on its face; (2) whether the statute violates the right to state constitutional equal protection as applied and on its face; (3) whether the statute violates the appellants' right to privacy under the Texas Constitution; and (4) whether the statute violates the appellants' right to privacy under the United States Constitution.

I believe appellants' federal right to privacy challenge is controlled by the Supreme Court's determination in *Bowers v. Hardwick.* The Due Process Clause of the Federal Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986). I would reach the same conclusion on appellants' privacy claim under the Texas Constitution. The Texas Supreme Court, borrowing heavily from *Bowers*, denied the existence of an asserted privacy right by insisting that adultery is "not a right implicit in the concept of liberty in Texas or deeply rooted in this state's history and tradition." *Henry v. City of Sherman,* 928 S.W.2d 464, 470 (Tex. 1996). "Because homosexual conduct is not a fundamental right under the United States Constitution, adultery, likewise, cannot be a fundamental right." *Id.* Accordingly, I concur in the result reached by the majority on appellants' third and fourth issues, but for the reasons set forth below, strongly disagree with the majority's treatment of appellants' state and federal equal protection arguments.

**I.**

**Application of Equal Protection to Section 21.06: An Overview**

Appellants contend section 21.06 violates their rights of equal protection under the United States and Texas Constitutions. Under the Fourteenth Amendment, the statute must fail because even applying the most deferential standard, the rational basis standard, the statute cannot be justified on the majority's sole asserted basis of preserving public morality, where the same conduct, defined as "deviate sexual intercourse" is criminalized for same sex participants but not for heterosexuals. The contention that the same conduct is moral for some but not for others merely repeats, rather than legitimizes, the Legislatures' unconstitutional edict. The statute must also fail because statutory classifications that are not gender neutral are analyzed

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under the heightened scrutiny standard of review, and there is no showing by the State either that there is an exceedingly persuasive justification for the classification, or that there is a direct, substantial relationship between the classification and the important government objectives it purports to serve.

Similarly, section 21.06 cannot withstand scrutiny under the Texas ERA, Article I, § 3a of the Texas Constitution. The ERA is part of the Texas Bill of Rights. Under Article I, § 29 of the Bill of Rights, the Inviolability Clause, statutes that contravene anything in the Bill of Rights are per se void. Because section 21.06 discriminates on the basis of gender, thus violating Article I, § 3a, it is void. Moreover, applying the less rigorous standard of strict scrutiny, mandated by *McLean,* produces the same result. *In re McLean,* 725 S.W.2d 696 (Tex. 1987). Under strict scrutiny as applied in Texas, the proponent of gender discrimination must demonstrate a compelling interest and that there is no other manner to protect the state's compelling interest. *Id.* This requirement places the burden to support the statute squarely upon the State and not on the challenger, and the State, as discussed here and in this Court's original opinion, has failed to make the required showing to defeat a challenge under the Texas ERA.

**II.**

**Section 21.06 and the Fourteenth Amendment: Equal Protection, Gender, and Heightened Scrutiny Review**

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *City of Cleburne, Tex. v. Cleburne Living Center,* 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985). The general rule is that legislation is presumed valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Id.* However, within the three-tiered federal equal protection scheme, legislative classifications based on gender call for a heightened standard of review, one step below the most rigorous strict scrutiny review applied to statutory classifications based on race, alienage, or national origin. *Id.* Under the heightened standard, a gender classification fails unless it is substantially related to a sufficiently important governmental interest. *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982).[1]

**A. Section 21.06 Is Not Gender Neutral**

In its analysis of appellants' gender discrimination contention, the majority attempts to transfer the burden of proof to appellants to show the statute has had an adverse effect upon one gender, and that such disproportionate impact can be traced to a discriminatory purpose. This transfer is based on the naked assertion that section 21.06 is gender-neutral because it does not impose burdens on one gender not shared by the other. That 21.06 is not gender neutral is manifest based on application of the statute to the following events:

There are three people in a room: Alice, Bob, and Cathy. Bob approaches Alice, and with her consent, engages with her in several varieties of "deviate sexual intercourse," the conduct at issue here. Bob then leaves the room. Cathy approaches Alice, and with her consent, engages with her in several kinds of "deviate sexual intercourse." Cathy is promptly arrested for violating section 21.06.

I have indulged in this tableau to demonstrate one important point: one person simply committed a sex act while another committed a crime. While the acts were exactly the same, the gender of the actors was different, and it was this difference alone that determined the criminal nature of the conduct. In other words, because he is a man, Bob committed no crime and may freely indulge his predilection for "deviate sexual intercourse," but because she is a woman, Cathy is a criminal. Thus, women are treated differently in this scenario, and therefore, are discriminated against by the explicit gender-based prohibition of section 21.06, and to suggest oth-

[1] The best short analysis of the three tests for considering whether legislation violates the Equal Protection Clause of the Fourteenth Amendment is set out in *Clark v. Jeter,* 486 U.S. 456, 461, 100 L. Ed. 2d 465, 108 S. Ct. 1910 (1988):

> At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. Classifications based on race or national origin, and classifications affecting fundamental rights are given the most exacting [or strict] scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.

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erwise is disingenuous at best.[2] It is also no answer to insist that because the statute also subjects men to similar discrimination in different scenarios, somehow the discrimination here is rendered constitutionally acceptable. Discrimination in one instance is not cured by additional discrimination in another. Moreover, section 21.06 grew out of the revision of the penal code in 1973.[3] In the new statute, two standards were created, demarcated by the sex of the actors: deviate sexual intercourse when performed by a man and a woman would henceforth be legal, but deviate sexual intercourse performed by two men or two women would remain illegal. Thus, after 1974, the distinction between legal and illegal conduct was clearly not the act, but rather the sex of one of the participants.

### B. Equal Discrimination Argument Not A Cure

While not precisely a model of clarity, the majority appears to accept the State's contention that because section 21.06 applies equally to men and women, the statute does not discriminate on the basis of gender. I draw this conclusion based on the majority's rejection of appellants' argument that *Loving v. Virginia,* 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967) discredited the "equal application" defense of 21.06, and conclusion that 21.06 does not impose burdens on one gender not shared by the other. However, the United States Supreme Court has rejected the majority's position in a variety of cases.

One example of the Court's rejection of the "equal discrimination" argument is found in *United Bldg. and Const. Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden,* 465 U.S. 208, 217–18, 79 L. Ed. 2d 249, 104 S. Ct. 1020 (1984). In that case, the Supreme Court invalidated a municipal ordinance in Camden, New Jersey, requiring that at least forty percent of employees working on city construction projects be city residents. Camden's Mayor and City Council argued the ordinance did not violate the strictures of the Privileges and Immunities Clause of the Fourteenth Amendment, which requires that out-of-state residents be afforded the same job opportunities as in-state residents, because not only out-of-state residents were burdened by the ordinance. In fact, the respondents argued, many in-state residents, who did not live within the city of Camden, were as burdened by the ordinance as the out-of-state workers who brought the suit. Rejecting the "equal discrimination" argument, the Supreme Court stated "the Camden ordinance is not immune from constitutional review at the behest of out-of-state residents merely because some in-state residents are similarly disadvantaged." *Id.* (citing *Zobel v. Williams,* 457 U.S. 55, 75, 72 L. Ed. 2d 672, 102 S. Ct. 2309 [1982] [O'Connor, J., concurring]).

A second example of the Court's rejection of additional "curative" discrimination is noted in *Hunter v. Underwood,* 471 U.S. 222, 85 L. Ed. 2d 222, 105 S. Ct. 1916 (1985). In *Hunter,* the Court struck down a provision of the Alabama Constitution that mandated disenfranchisement for people who committed "crimes of moral turpitude." Although facially neutral, the Court determined the provision was enacted with the intent of discriminating against blacks and disparately impacted blacks as well because it had disenfranchised ten times as many blacks as whites. *Id.* at 227. Appellant, the State of Alabama, argued that although the constitutional provision was intended to discriminate against blacks, it did not violate the Equal Protection Clause because it was also intended to discriminate against poor whites. The Court held that the intention to additionally discriminate against whites "hardly saves [the Alabama provision] from invalidity." *Id.* at 231. An additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against blacks. *Id.* at 232. Thus, again, the Court declined to accept additional discrimination as a purported cure for a clearly discriminatory law.

Finally, the Supreme Court discussed the logic of an argument analogous to the State's argument here in *Loving v. Virginia,* 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967). There, the State of Virginia argued that Virginia's miscegenation statutes do not constitute invidious racial discrimination because the statutes apply equally to whites and blacks. *Id.* at 8. The miscegenation statutes, the State contended, equally penalized both whites who intermarried and blacks who intermarried; therefore, the "equal

[2] The characteristic injury of gender discrimination lies not in the failure to be treated on a gender-blind basis, but rather in being deprived of opportunity because one is a woman, or because one is a man. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16–29 (2d. ed. 1988).

[3] Convening in 1973, the 63rd Legislature, passed the revised Penal Code, which was enacted in 1974. See Acts 1973, 63rd Leg., ch. 399, § 1, 1973 Tex. Gen. Laws 917.

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application" of the statutes rendered them acceptable under the Fourteenth Amendment using a rational basis standard. *Id.* Rejecting this sophistry, the Court responded that the mere equal application of a statute containing racial classifications does not remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discrimination. *Id.* By using the race of an individual as the sole determinant of the criminality of his conduct, the State created and perpetuated an invidious racial classification in violation of the Fourteenth Amendment. *Loving*, 388 U.S. at 11. Accordingly, the Court reaffirmed the propriety of strict scrutiny and struck down the Virginia statutes as unconstitutional. *Id.* at 12.

I would also reject the equal application argument offered here. Merely punishing men who engage in sodomy with other men and women who engage in sodomy with other women equally, neither salvages nor cures the discriminatory classification contained in this statute. The simple fact is, the same behavior is criminal for some but not for others, based solely on the sex of the individuals who engage in the behavior. In other words, the sex of the individual, not the conduct, is the sole determinant of the criminality of the conduct.

Indeed, the State's and the majority's utilization of the equal application justification for 21.06 detrimentally impacts their unified position. If in *Loving* the equal application of the anti-miscegenation statutes to both blacks and whites did not negate the existence of a racial classification, then here, equal application of the anti-homosexual-sodomy statute to both men and women does not negate the existence of a sex classification. Alternatively, if 21.06 does not contain a sex-based classification because it applies equally to men and women, then the anti-miscegenation statutes in *Loving* did not contain a race-based classification, with the logical corollary that *Loving* was wrongly decided. Here, the State and the majority go to great lengths to manufacture a conclusion that 21.06 is gender neutral. They must, because acknowledging the facial and as applied gender discrimination within 21.06 vitiates any defense of that statute inasmuch as the State has failed to establish either that the classification created by the statute is substantially related to important and legitimate government objectives, the test applied under heightened scrutiny, or identify a compelling state interest for purposes of strict scrutiny.

The issue regarding whether 21.06 is gender neutral lies at the core of this case. The majority, in a somewhat cursory fashion, dispenses with *Loving* and moves quickly to the conclusion of gender neutrality without addressing, among other things, the tableau set forth above in this part II. This conclusion of neutrality is essential for the majority to access the rational basis review, avoid heightened scrutiny mandated for gender discrimination, and most importantly, avoid any analysis of appellants' claims under the Texas ERA. However, limiting analysis of 21.06 to rational basis review is incomplete.

In an equal protection analysis of a legislative classification such as that drawn in 21.06, the appropriate framework for reviewing the scheme is to first ask whether the law survives rational basis analysis, and, if it does, the second inquiry is whether the distinction will pass heightened scrutiny. *Hooper v. Bernalillo County Assessor,* 472 U.S. 612, 618, 86 L. Ed. 2d 487, 105 S. Ct. 2862 (1985). Both *Hooper* and *Zobel v. Williams*, 457 U.S. 55, 72 L. Ed. 2d 672, 102 S. Ct. 2309 (1982) analyzed statutory classifications violating the Equal Protection Clause by deferring heightened scrutiny analysis until a determination is made that it survived a rational basis analysis. *Attorney Gen. of New York v. Soto-Lopez,* 476 U.S. 898, 904, 90 L. Ed. 2d 899, 106 S. Ct. 2317 (1986). Thus, here, because the majority has determined that 21.06 survives rational basis scrutiny, and fails to then apply heightened scrutiny review, its analysis under the Equal Protection Clause is incomplete. *Romer v. Evans,* 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996) is consistent with this approach. There, because Amendment 2 was in violation of the Equal Protection Clause applying rational basis review, there was no need to examine the statute under heightened scrutiny. Thus, the majority's conclusion that 21.01 is gender neutral will not allow omission of heightened scrutiny review.

### C. Standard of Review For Gender Discrimination

Inasmuch as section 21.06 is not gender-neutral, the next inquiry is determining the appropriate burden of proof and assigning that burden. In 1982, in Mississippi University for Women, the Court held that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of

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showing an "exceedingly persuasive justification" for the classification. 458 U.S. at 724. The burden is met only by showing, at a minimum, that the classification serves important governmental objectives. *Id.* There is, however, a further inquiry if the State's objective is legitimate and important. The reviewing court must then determine whether the requisite direct, substantial relationship between the objective sought and means used is present. *Id.* This is heightened scrutiny.

The Supreme Court again addressed the issue of whether the Equal Protection Clause forbids gender based discrimination in *J.E.B. v. Alabama* ex rel. T.B., 511 U.S. 127, 128 L. Ed. 2d 89, 114 S. Ct. 1419 (1994). Specifically, the Court examined the use of peremptory challenges on the basis of gender under the dictates of the Equal Protection Clause and the court's holding in *Batson v. Kentucky,* which prohibits peremptory strikes solely on the basis of race. 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The court held the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender. *J.E.B.*, 511 U.S. at 146. In reaching that conclusion, the *J.E.B.* Court acknowledged that "our Nation has had a long and unfortunate history of sex discrimination," a history which warrants the heightened scrutiny afforded all gender-based classifications. *Id.*

In *United States v Virginia,* 518 U.S. 515, 533, 135 L. Ed. 2d 735, 116 S. Ct. 2264 (1996), the Supreme Court reiterated the burden of proof for cases of official classification based on gender as requiring the reviewing court to determine whether the proffered justification is exceedingly persuasive, and declared "the burden of justification is demanding and it rests entirely on the State." Further, the Court held that the justification must be genuine, not hypothesized or invented post hoc in response to litigation. *Id.* And, it must not rely on overbroad generalizations about different talents, capacities, or preferences of males and females. *Id.* This is the heightened review standard applied to classifications based on sex. *Id.*

### D. Failure to Satisfy the Heightened Scrutiny Standard

In its original brief filed with this court, the State contends that section 21.06 must be upheld if there is any rational relationship between the disparity of treatment reflected in that statute and a legitimate state interest. The State seeks to apply the general rule that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *City of Cleburne,* 473 U.S. at 440. To satisfy the rational relationship burden, the State asserts the statute is rationally related to permissible governmental purposes, the discouragement of behavior historically perceived to be immoral, and the promotion of family values. This assertion was reiterated in the State's brief in support of its motion for rehearing en banc. The majority also adopts this rational relationship standard.[4] The State's and the majority's arguments that 21.06 survives a challenge under federal equal protection are untenable.[5]

First, the State and the majority have applied the wrong standard. As set out in *City of Cleburne,* the three standards of equal protection review, from highest to lowest, are strict scrutiny, heightened review, and rational relationship. 473 U.S. at 440–441. Under *Heitman v. State,* the court held that decisions of the Supreme Court represent the minimum protections that a state must afford its citizens. 815 S.W.2d 681, 690 (Tex. Crim. App. 1991). The federal constitution sets the floor for individual rights, and state constitutions cannot subtract from the rights guaranteed by the United States Constitution; however, they can provide additional rights to their citizens. *Id.* It appears, therefore, that the State and the majority have

[4] The majority's entire analysis of appellants' equal protection issues is premised on the belief that 21.06 is gender neutral on its face. The comparison of 21.06 and the definition of "deviate sexual intercourse" in 21.01 set out in note 9 below, I believe, adequately dismantles facial neutrality contentions. This misinterpretation of 21.06 has led the majority into error. Moreover, for unexplained reasons, the majority has merged a due process analysis with an equal protection analysis by stating there is no fundamental right to engage in sodomy. Whatever the merits of that contention, it is sourced from the Court's analysis of the Due Process Clause in *Bowers v. Hardwick* where the Court was unwilling to extend the Due Process Clause to confer "a fundamental right to engage in acts of consensual sodomy." 478 U.S. 186, 192, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986). This blending of quite distinct elements of the Federal Constitution blunts the force of the majority's equal protection arguments. Indeed, that the majority is in fact attempting to analyze 21.06 under the Due Process Clause is manifest from (a) its failure to address how a ban of homosexual sodomy preserves public morals while permitting heterosexual sodomy, but (b) justifying the statute based on historical analysis and the common law, and references to seventeenth century laws banning homosexual conduct in the Massachusetts Bay Colony. See discussion of Cass

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attempted to apply a lower threshold standard of review to gender-based discrimination than the heightened standard mandated by the United States Supreme Court. It is not within the discretion of an intermediate court to ignore United States Supreme Court precedent regarding the appropriate standard of review for gender based classifications challenged, as appellants have done here, under the Equal Protection Clause of the Fourteenth Amendment. The court in *Heitman* stated the rule more succinctly: this court is not at liberty to reduce the protections afforded its citizens to a level less than that established under the federal constitution. 815 S.W.2d at 690. A fortiori, by applying the improper standard of review, the majority has accomplished the following: it has afforded appellants a level of protection less than that prescribed by courts whose opinions we are required to follow.

Second, the majority apparently has accepted the State's obfuscation of the issue of gender discrimination in 21.06, thus lowering the State's burden of proof. It is well established that a gender classification fails unless the party seeking to uphold the statute satisfies the dual burden of showing a persuasive justification or objective for the classification and that the discriminatory means employed are substantially related to the objective. *Mississippi Univ. for Women,* 458 U.S. at 724–725. Where, as here, there is not even a whisper or hint in the majority opinion purporting to demonstrate how the State satisfied the minimum rational relationship showing required to sustain 21.06 in the face of an equal protection challenge, it is difficult to understand how the majority can conclude 21.06 does not violate appellants' federal equal protection rights.[6]

### E. Proper Application of Heightened Scrutiny Review

Turning now to the case sub judice, a rather succinct two part test exists for evaluating the validity of the gender-based classification in 21.06 against a federal equal protection challenge, and it is couched in terms of dual burdens on the proponent of the statute: (1) has the proponent demonstrated a legitimate and exceedingly persuasive justification for the gender based classification contained in 21.06; and (2) has the proponent demonstrated the requisite direct, substantial relationship between the classification and the important government objectives it purports to serve. *Heckler v. Mathews,* 465 U.S. 728, 745, 79 L. Ed. 2d 646, 104 S. Ct. 1387 (1984).

(1). The justification asserted here for 21.06 is promotion of family values and discouragement of immoral behavior. At the outset, it should be noted that "promotion of family values" has not been defined by the State, but it is not illogical to assume that it has some relationship to the institution of marriage and procreation. Thus, the State's contention must be that permitting deviate sexual intercourse between heterosexual couples promotes family values while such conduct by same sex couples promotes something less than that. What is interesting to note is the fact that deviate sexual intercourse, as defined in section 21.01 of the Penal Code, regardless of the gender of one's sex partner, will not permit a female's ovum to be fertilized, thus creating a pregnancy. It must, therefore, be concluded that the State's acquies-

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Sunstein's analysis of the distinctions between the Due Process and Equal Protection Clauses at note 12 below.

Nevertheless, even assuming the statute is gender neutral on its face, it is not gender neutral as applied, an argument also advanced by appellants. I have, in part II A above, demonstrated the application of section 21.06 is not gender neutral when applied to appellants. The majority recognizes that a facially neutral statute may support an equal protection claim where it is motivated by discriminatory intent and its application results in a discriminatory effect, citing *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977). Despite this acknowledgment of the rule, the majority prefers here, as elsewhere in the opinion, to impose a burden of proof not required in an inquiry based on gender discrimination. The Supreme Court has consistently subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of archaic and overbroad generalizations. *J.E.B.,* 511 U.S. 127, 135, 128 L. Ed. 2d 89, 114 S. Ct. 1419 (1994).

[5] The majority's statement that the State can, in many instances, pass laws the purpose of which is to preserve morals is correct. However, that license is subject to the Equal Protection Clause, and if the statute is not rationally related to the asserted State interest, or classifies on the basis of gender without a compelling state interest, the license is revoked.

[6] As noted above, the majority's equal protection analysis is incomplete because it fails to engage in intermediate scrutiny required for review of a challenged classification under the Equal Protection Clause where, as here, the majority has concluded 21.06 satisfies rational basis review. *Hooper,* 472 U.S. at 618.

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cence in heterosexual deviate sexual intercourse permits heterosexuals, whether married or not, to engage in a variety of historically repugnant "recreational sex" acts. To contend, as the State must, that a man somehow promotes family values by engaging in deviate sexual intercourse with a woman, but undermines those values by performing the same deviate sex act with a man, does not, in my view, constitute a showing of an exceedingly persuasive justification for the gender based classification in 21.06.[7]

Nor does the asserted justification of discouraging immoral behavior constitute such a showing. The behavior to be discouraged is deviate sexual intercourse between same sex couples. That same behavior between heterosexual couples is, by implication, moral and something to be encouraged. Sodomy is either immoral or it is not. It appears that the State's vigorous defense of 21.06 has been advanced without due consideration of the inconsistency of, on the one hand, condemning sodomy as immoral, but on the other implicitly embracing sodomy as perfectly moral. Again, such incongruity is not exceedingly persuasive.

(2). Because the test articulated in *Heckler* is described in the conjunctive, it follows that if the State has failed to articulate a legitimate and exceedingly persuasive justification, we need not reach the second part of the test. Nevertheless, even if family values and prevention of immoral behavior were legitimate and persuasive justifications for the gender classification, the discussion above demonstrates there is no connection between penalizing homosexual sodomy and the achievement of those objectives. Neither heterosexual sodomy nor homosexual sodomy can create a new life. Further, encouraging heterosexual sodomy and punishing homosexual sodomy, as a Class C misdemeanor with a fine only, scuttles the State's asserted purpose of preventing immoral behavior inasmuch as 21.06 permits deviate sexual intercourse by any man with any woman. Thus, the State has failed to make a showing of how the gender-based classification is substantially and directly related to the proffered objective of discouraging immoral behavior. Perhaps this failure rests, in part, on the apparent impossibility of logically explaining how the classification in 21.06 is even remotely related to that objective where such behavior is simultaneously sanctioned and is presumably engaged in routinely. Where, as here, the proponent of a gender-based statutory classification fails to establish the requisite relationship between the objective and the means used to achieve it, the statute is invalid. See *Mississippi Univ. for Women,* 458 U.S. at 730.

The mere recitation of a benign purpose is not an automatic shield that protects against any inquiry into the actual purposes underlying a statutory scheme. *Mississippi Univ. for Women,* 458 U.S. at 728. Having performed the analysis dictated by intermediate scrutiny, it must be concluded the State failed both to articulate a persuasive justification and to demonstrate a direct relationship between the tendered objectives and the means utilized to achieve those objectives in 21.06. In the absence of legitimate objectives, the inevitable inference is raised that the disadvantage to homosexuals contained in 21.06 is born of animosity toward the persons affected. See *Romer*, 517 U.S. at 634. The Legislature's removal of the prohibition on heterosexual sodomy while retaining it for homosexual sodomy cannot, in my view, be explained by anything but animus toward the persons it affects.[8]

Indeed, the State's purported justification for the classification in 21.06 in terms of upholding public morality founders on the distinction between public and private morality. The private morality of an individual is not synonymous with nor necessarily has an effect on what is known as public morality. The majority believes 21.06 preserves public morals. That conclusion is apparently reached *sua sponte* without the slightest showing by the State that such consequence flows from enforcement of 21.06. As set forth above, the State's general contention is that the statute discourages immoral

[7] Because the Court in *Romer v. Evans,* 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996), implicitly rejected the justification of promoting family values in a rational basis analysis of a statute that discriminated against homosexuals based on sexual orientation, it follows that those same justifications, advanced here, could not satisfy heightened scrutiny. See part III below.

[8] My conclusion that 21.06 was born out of animus towards the persons affected thereunder is buttressed by the statute's evolution. Until 1974, the penal code prohibited oral and anal copulation "with another human being." Thus, the statute prohibited all acts of sodomy, whether performed by members of the opposite or the same sex. *Pruett v. State,* 463 S.W.2d 191, 193 (Tex. Crim. App. 1970). In 1974, a new penal code was enacted wherein sodomy performed by members of the same sex continued to be proscribed, but the same act performed by members of the opposite sex became, for the first time in 114 years, legal.

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behavior, without regard to the public or private nature thereof. Nevertheless, addressing the majority's contention, we are not told how government interference with the practice of adult only, consensual personal choice in matters of intimate sexual behavior out of view of the public and with no commercial component will serve to advance the cause of "public morality" or do anything other than restrict individual conduct and impose a concept of private morality chosen by the State. Here again, when one applies the clear test, articulated in Heckler and elsewhere, that a gender-based classification must fail an equal protection challenge absent a showing that the classification is substantially and directly related to the preservation of public morality, the conclusion is obvious. Perhaps this is the reason the majority labors so hard to conclude 21.06 is gender neutral.[9]

**III.**

**Equal Protection, Improper Classifications and Rational Basis Review**

**A. Romer v. Evans** I firmly believe 21.06 establishes a gender-based classification, on its face and as applied, in the Penal Code of the State of Texas that will not withstand middle tier scrutiny mandated for the analysis of such classifications under the Equal Protection Clause of the Fourteenth Amendment. Appellants, however, also challenge the statute because it unconstitutionally discriminates against homosexuals, thus imposing an unequal burden on them based on their sexual orientation because heterosexuals are not targeted by 21.06 when engaging in the same conduct. Here, the rational basis test, much preferred by the State, is applicable, but the result of a correct analysis applying federal precedent is contrary to the outcome sought by the State. The case that controls the disposition of appellants' contention that section 21.06 discriminates against a class based on sexual orientation is *Romer v. Evans,* 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996).[10] In *Romer,* the United States Supreme Court held that a Colorado constitutional amendment (Amendment 2) prohibiting official protection from discrimination on the basis of sexual orientation violated the Fourteenth Amendment's Equal Protection Clause. Using a rational basis standard of review, the most deferential test, the Court invalidated Amendment 2 which (1) contained a classification of "homosexuals," and (2) withdrew from homosexuals, but no others, legal protection from discrimination and prohibited reinstatement of these laws and policies. *See id.* at 627.

The primary rationale advanced by the State for Amendment 2, adverted to in the opinion, was respect for other citizens' freedom of association, and, in particular, the liberties of landlords or employers who have personal or religious objections to homosexuality. *Id*. at 635. In striking down Amendment 2, the Court stated, that "equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Id*. at 633. The inequality the Court detected was that homosexuals were singled out by Amendment 2 and accorded less protection of the law solely by virtue of their membership in the class. *Id*. at 635. Although the Court utilized a rational basis standard for its analysis, Amendment 2 still failed this most deferential standard because the Court found the amendment advanced no legitimate government interest. *Id*. Thus, the *Romer* Court concluded Amendment 2 classified homosexuals not to further a proper legislative end, but to make them unequal to everyone else. *Id*.

Interestingly, Petitioner, the State of Colorado, offered other justifications for Amendment 2 similar to those offered by the State here.[11] In *Romer*, the State argued the "legitimate governmental interests" of Amendment 2 were the promotion of traditional moral norms

[9] That 21.06 is not gender neutral on its face is demonstrated by the language in the statute. "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." TEX. PEN. CODE ANN. § 21.06 (Vernon 1994) (emphasis added). The statute clearly specifies what the gender of the actors must be to constitute a criminal offense. Curiously, the definition of "deviate sexual intercourse" contained in section 21.01 is gender neutral. Such conduct is defined as "any contact between any part of the genitals of one person and the mouth or anus of another person; or ...the penetration of the genitals or the anus of another person with an object." TEX. PEN. CODE ANN. § 21.01 (Vernon 1994) (emphasis added).

[10] Section B of this part III examines the application of the rational basis review to a city ordinance where the justifications for the classification it contained did not justify singling out one group for different treatment, thus rendering the classification irrational and unconstitutional as applied.

[11] In note 15, the majority refused to accept the fact that the State of Colorado did in fact make those arguments in its brief. Even though the arguments are not set out in the opinion, a reader may access them by going through the WestLaw reference in the *Romer* opinion, which brings up the briefs containing the rejected arguments. 517 U.S. at 621.

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and family values. See Petitioner's Brief at 45–47, *Romer* (1995 WL 310026). Specifically, the State posited the amendment fostered "family privacy and the ability to convey values to their children," by disallowing the "implicit endorsement of homosexuality fostered by laws granting special protections [that] could undermine the efforts of some parents to teach traditional moral values," and deterred factionalism within the state by "maximizing individual liberty, including the preservation of traditional norms." *Id*.

Far from accepting these justifications as legitimate, the Court apparently did not find they even merited review in the opinion. Thus, the Court, *sub silentio*, rejected the "implementation of traditional notions of morality" justification deemed sufficient in *Bowers v. Hardwick,* 478 U.S. at 196, and *Baker v. Wade,* 769 F.2d 289, 292 (5th Cir. 1985), both of which are relied upon by the State here.[12] In *Romer,* the Supreme Court focused, instead, upon the animus apparent from a provision that drew a classification "for the purpose of disadvantaging the group burdened by the law." 517 U.S. at 633. Because Amendment 2 drew such a classification, and then proceeded to disadvantage homosexuals because of their membership in the class, the amendment violated the equal protection of the law guaranteed by the Fourteenth Amendment.

The statute at issue here, much like Amendment 2, draws a classification for the purpose of disadvantaging the group burdened by the law. In fact, Justice Scalia, in his dissent to *Romer* readily agreed that, "here can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Id*. at 641. I agree with Justice Scalia that the statute at issue here, by proscribing "deviate sexual intercourse" only when engaged in with members of one's own sex, does discriminate against homosexuals. However, following *Romer,* I view the justifications proffered by the State, enforcement of traditional norms of morality and family values, as nothing more than politically-charged, thinly-veiled, animus-driven cliches.[13] Section 21.06 is, like Amendment 2, a status-based enactment divorced from any factual context from which one can discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. *Id*. at 635. Although a state's police powers are broad and comprehensive, the constitution, both state and federal, "forbids its exercise when the result would be the destruction of the rights, guarantees, privileges, and restraints excepted from the powers of government by the Bill of Rights." *Fazekas v. University of Houston,* 565 S.W.2d 299, 305 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd

[12] Justice Scalia's dissent in *Romer* concedes as much. He notes, that in "placing the prestige of [the Supreme Court] behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias," the Court has essentially sub silentio overruled *Bowers*. *Romer*, 517 U.S. at 636–37. I agree with this characterization of *Romer*, and further note the rational basis analysis employed by the *Romer* Court may be more exacting than that employed by the Court in *Bowers*. The concurring opinion by Justice Fowler fails to appreciate the difference in the rational basis test as applied in a *Bowers* due process analysis versus a *Romer* equal protection analysis.

Although both *Bowers* and *Romer* applied the rational basis analysis to the state action in question, there is, nevertheless, a difference in the analysis of rational basis review under the Due Process Clause and under the Equal Protection Clause. These two clauses perform quite different functions. In its substantive dimension, the Due Process Clause protects a range of basic rights; it does not speak to the constitutionality of classifications. The Equal Protection Clause operates as a functional complement to the Due Process Clause, addressing a different set of questions. The Due Process Clause has frequently been understood as an effort to restrict short-term or shortsighted deviations from widely held social norms; it has an important backward looking dimension. For purposes of due process, the baseline for inquiry has tended to be the common law, Anglo American practice, or the status quo. The Due Process Clause is, therefore, closely associated with the view that the role of the Supreme Court is to limit dramatic and insufficiently reasoned change, to protect tradition and to bring a more balanced and disinterested perspective to legislation. See Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. CHI. L. REV. 1161, 1171 (1988). Thus, in *Bowers*, the Court declined to find, as respondent requested, a fundamental right to engage in homosexual sodomy because sodomy was not a fundamental liberty that was deeply rooted in this Nation's history and tradition. *Bowers*, 478 U.S. at 192.

The Equal Protection Clause, on the other hand, has served an entirely different set of purposes from the Due Process Clause. That clause is emphatically not an effort to protect traditionally held values against novel or short-term deviations. The clause is not backward looking at all; it was consciously designed to eliminate practices that existed at the time of ratification and that were expected to endure. The function of the Equal Protection Clause is to protect disadvantaged groups against the effects of past and present discrimination by political majorities. It is not rooted in

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n.r.e.) (citing *Travelers' Ins. Co. v. Marshall,* 124 Tex. 45, 76 S.W.2d 1007 [1934]). Thus, stripped of its asserted justifications, the classification drawn in 21.06 is arbitrary and irrational, and fails the rational basis test.

Regarding appellants' issue on sexual orientation discrimination aspect of 21.06, the majority, *inter alia*, concludes there is no fundamental right to engage in sodomy, and homosexuals do not constitute a suspect class. These two conclusions are irrelevant here because appellants do not raise these arguments, and the first conclusion implicates *Bowers v. Hardwick* where equal protection was not argued or addressed.

**B. *City of Cleburne*** Legislation containing a classification challenged under the Equal Protection Clause must, in order to withstand rational basis review, be rationally related to a legitimate governmental purpose. *City of Cleburne,* 473 U.S. at 446. The State may not rely, however, on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Zobel, 457 U.S. at 61–63. Objectives such as a bare desire to harm a politically unpopular group are not legitimate State interests. *City of Cleburne,* 473 U.S. at 447.

In *City of Cleburne,* the Court struck down a city zoning ordinance requiring a special use permit for a home for the mentally retarded, but exempting from such a permit apartment houses, fraternity houses, apartment hotels, hospitals, private clubs and other specified uses. *Id.* Plainly stated, the equal protection issue there presented was: "May the city require the permit for this facility when other care and multiple dwelling facilities are freely permitted?" *City of Cleburne,* 473 U.S. at 448. The Federal District Court had found, and the Court of Appeals and Supreme Court repeated the obvious fact that if the potential residents of the home for the mentally retarded were not in fact so afflicted, and the home was the same in all other respects, its use would be authorized under the zoning ordinance. *City of Cleburne,* 473 U.S. at 449.

The city presented several bases supporting the ordinance: fear and negative attitudes by residents living near the facility; location of the home in a five hundred year flood plain; the size of the home and the number of people who would occupy it. The *City of Cleburne* Court demonstrated how each factor presented by the city made no sense in light of how the city treated other groups similarly situated in relevant respects. *City of Cleburne,* 473 U.S. at 448–450. Because none of the asserted bases rationally justified singling out a home for the retarded for the special use permit, while imposing no such restrictions on other uses freely permitted in the neighborhood, the Supreme Court concluded:

Requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, including those who would occupy the [home] and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law. *City of Cleburne,* 473 U.S. at 450.

Applying the *City of Cleburne* rational basis review here, because the State's grounds purporting to justify 21.06 do not rationally justify criminalizing same sex sodomy while imposing no such burden on others engaging in acts defined as deviate sexual intercourse, the classification is arbitrary and irrational and driven by

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common law or status quo baselines or in Anglo-American conventions. The baseline is instead a principle of equality that operates as a criticism of existing practice. The clause does not safeguard traditions; it protects against traditions, however long standing and deeply rooted. Sunstein, 55 U. CHI. L. REV. at 1174. Thus, Justice Fowler's conclusion, that rational basis review under the Due Process Clause is the same as rational basis review under the Equal Protection Clause ignores the important distinction between the functions of the two clauses and how that distinction shapes review under each clause using the rational basis standard.

[13] I am not unmindful of the sensibilities of many persons who are deeply persuaded that homosexual sodomy is evil and should be prohibited. That is not the issue here. Rather, the federal equal protection issue before this court, which I believe should be answered in the negative, is whether the Federal Constitution permits discriminatory recourse to the sanctions of the criminal law for the achievement of that objective. The community and its members remain entirely free to employ theological teaching, moral persuasion, parental advice, psychological and psychiatric counseling, and other noncoercive means to condemn the practice of homosexual sodomy. *People v. Onofre,* 51 N.Y.2d 476, 415 N.E.2d 936, 941 n.3, 434 N.Y.S.2d 947 (N.Y. 1980). Alternatively, if the legislature wishes to abolish what it views as immoral behavior, it is free to do so, provided that it does not single out a class of people for the prohibition, while freely permitting other classes to engage in the same behavior, thereby, again, running afoul of the federal Equal Protection Clause. But the law regarding the use of the criminal law to implement biases is clear: "private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *City of Cleburne,* 473 U.S. at 448 (using rational relationship test to invalidate zoning ordinance requiring a special use permit for home for the mentally retarded where no special permit required for other similar multiple dwelling facilities).

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prejudice. It makes no sense for the State to contend that morals are preserved by criminalizing homosexual sodomy while supporting sodomy by heterosexual couples, including unmarried persons. The State simply may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *Zobel,* 457 U.S. at 61–63. Where, as here, the State interest of preserving morality is irrational in light of authorization of the same immoral acts by others, the statute fails rational basis review under the Equal Protection Clause and should be held in violation of the United States Constitution. *Heller v. Doe by Doe,* 509 U.S. 312, 324, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993) (stating a statutory classification fails rational basis review when it rests on grounds wholly irrelevant to achievement of the state's objective).

The majority's discussion of the historical definitions of sodomy, which includes a reference to a seventeenth century law of the Massachusetts Bay Colony, suggests that homosexuals have been subjected to a tradition of disfavor. In his concurring opinion in *City of Cleburne,* Justice Stevens, joined by Chief Justice Burger, distanced himself from the tiered analysis of equal protection claims because, he believed, the rational basis test is suitable for all such inquiries. 473 U.S. at 452. In every equal protection case, he wrote, we have to ask certain basic questions: What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? *City of Cleburne,* 473 U.S. at 453. In a footnote to this question, Justice Stevens stated the following:

The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a tradition of disfavor [for] a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is made. *Id.* at n.6.

Because the State has not shown a valid state interest for 21.06 that is rationally served by proscribing sodomy only when performed by homosexuals, the unavoidable conclusion is that the statute was merely a continuation of the stereotyped reaction to a traditionally disfavored group. By its unquestioning acceptance of the State's justification for the statute, the majority has overlooked the illegitimate stereotyping lying at the core of 21.06.

C. Judge Norris, concurring in *Watkins v. U.S. Army,* 875 F.2d 699, 720 (9th Cir. 1989), captured, in my view, the core rationale underlying the Equal Protection Clause of the Fourteenth Amendment. He wrote that the equal protection doctrine does not prevent the majority from enacting laws based on its substantive value choices. Equal protection simply requires that the majority apply its values evenhandedly. *Id.* Indeed, the equal protection doctrine plays an important role in perfecting, rather than frustrating, the democratic process. The constitutional requirement of evenhandedness advances the political legitimacy of majority rule by safeguarding minorities from majoritarian oppression. *Id.*

Therefore, I would hold section 21.06 violates the Equal Protection Clause based on appellants' contentions that it discriminates based on both gender and sexual orientation. Accordingly, I would sustain appellants' first point of error challenging 21.06 on federal equal protection grounds, as applied and on its face.

**IV.**

Section 21.06 and The Texas Equal Rights Amendment Appellants also challenge 21.06 contending it violates Article I, § 3a of the Texas Constitution in that it proscribes otherwise lawful behavior solely on the basis of the sex of the participants. That provision of the Texas Bill of Rights provides as follows:

Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.

In my opinion, there are two standards by which review of section 21.06 may be made in the face of a challenge under the Texas ERA. The first is a per se rule based on the mandate of Article I, § 29 of the Texas Bill of Rights, and the second is strict scrutiny under the guidance of *In re McLean,* 725 S.W.2d 696 (Tex. 1987).

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**A. Per Se Rule** Article I, § 29 of the Texas Bill of Rights states the following rule regarding the power of the state government to usurp any of the rights contained in Article I of the Texas Constitution:

To guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.

Section 29 has been interpreted as follows: any provision of the Bill of Rights is self-executing to the extent that anything done in violation of it is void. *City of Beaumont v. Bouillion,* 896 S.W.2d 143, 148–149 (Tex. 1995). When a law conflicts with rights guaranteed by Article I, the constitution declares that such acts are void because the Bill of Rights is a limit on State power. *Id.* at 149. Indeed, the Bill of Rights consists of express limitations of power on the legislature, executive officers, and the judiciary. *Republican Party of Texas v. Dietz,* 940 S.W.2d 86, 90 (Tex. 1997) (citing *Travelers' Ins. Co. v. Marshall,* 124 Tex. 45, 76 S.W.2d 1007 (Tex. 1934)). The framers of the Texas Constitution articulated what they intended to be the means of remedying a constitutional violation: a law contrary to a constitutional provision is void. *Bouillion,* 896 S.W.2d at 149.

Thus, while the State, in the exercise of its police powers, may enact legislation reasonably tending to promote the health, comfort or welfare of the public, the extent of this power is limited and must be exercised in conformance with the limitations prescribed by the constitution. *Faulk v. Buena Vista Burial Park Ass'n,* 152 S.W.2d 891, 891–95 (Tex. Civ. App.—El Paso 1941, no writ); see also *Villarreal v. State,* 935 S.W.2d 134, 139 (Tex. Crim. App. 1996) (McCormick, P.J., concurring) (characterizing dissent's approach to "privacy expectation" analysis as coming "perilously close to subjecting our constitutional rights too closely to majoritarian political processes and temporary passions of the moment, which is inconsistent with the idea underlying the Bill of Rights.").

Therefore, when the equality guaranteed by the Texas ERA is viewed through the prism of the Texas "Inviolability Clause,"[14] it becomes clear that section 21.06, as a non-gender neutral classification created by the legislature in violation of Article I, § 3a, is void.[15]

**B. Strict Scrutiny Under *In re McLean*** Before examining the precise manner in which the *McLean* court analyzed a statute that discriminated on the basis of sex, it is informative to review what that court had to say about the meaning of the Texas ERA.

The *McLean* court declined to give the Texas ERA an interpretation identical to that given state and federal due process and equal guarantees. 725 S.W.2d at 697. Both the United States Constitution and the Texas Constitution had due process and equal protection guarantees before the ERA was adopted in Texas in 1972. Id. If the due process and equal protection provisions and the ERA are given identical interpretations, then the 1972 amendment, adopted by a four to one margin by Texas voters, was an exercise in futility. *Id.* Thus, the *McLean* court concluded the Equal Rights Amendment is more extensive and provides more specific protection than both the United States and Texas due process and equal protection guarantees. *McLean*, 725 S.W.2d at 698. The *McLean* court did not, however, adopt a per se standard,[16] but instead concluded the Texas ERA elevated sex to a suspect class, thus subjecting any gender discrimination to strict scrutiny, placing the burden on the proponent of the discriminatory provision to demonstrate a compelling interest, and that there is no other manner to protect the state's compelling interest. *Id.* (citing *Mercer v. Board of Trust.,* North Forest Indep. Sch. Dist., 538 S.W.2d 201, 206 [Tex. Civ. App.—Houston

[14] Article I, § 29 excepts everything in the bill of rights out of the general powers of government and states such rights included therein are to remain inviolate, thus placing these rights beyond the power of the state government to usurp. TEX. CONST. Art. I, § 29 interp. commentary (Vernon 1997).

[15] The majority never really addresses the Texas ERA, or the companion Inviolability Clause, in its analysis of appellants' challenge to 21.06 on the basis of gender discrimination under the Texas Constitution, even though Rule 47.1 requires that opinions from this Court "address[] every issue raised and necessary to final disposition of the appeal." TEX. R. APP. P. 47.1. Nevertheless, by its decision today the majority renders meaningless the action of the people of Texas in placing the ERA in the state constitution, engaging in nothing less than the gratuitous nullification of an act of the people of Texas and totally disregarding their expressed constitutional will. See *Barber v. Colorado Indep.Sch.Dist.,* 901 S.W.2d 447, 455 (Tex. 1995) (Gammage, J., dissenting to majority's refusal to intervene and apply Texas ERA to a class action challenging high school's hair length and earring restrictions under the ERA based on gender discrimination).

[16] There is no reference in *McLean* to Article I, § 29.

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(14th Dist.) 1976, writ ref'd n.r.e.] [holding any classification based on sex is suspect classification; thus any law or regulation classifying persons for different treatment on basis of their sex is subject to strictest judicial scrutiny]). The Austin Court of Appeals has also concluded the Equal Rights Amendment elevates sex to a suspect class, thereby invoking strict scrutiny review when a law differentiates on the basis of gender. *Lens Express, Inc. v. Ewald,* 907 S.W.2d 64, 69 (Tex. App.—Austin 1995, no writ).

Neither the State nor the majority have applied the strict scrutiny mandated by *McLean* and Mercer. Nevertheless, that standard must be applied. *McLean* established a two step process for examining a statute challenged as a violation of the ERA. The first step is to determine whether equality under the law has been denied. 725 S.W.2d at 697. That first inquiry is relatively simple. The denial of equality here was under the law because appellants were prosecuted under 21.06 of the Texas Penal Code. In *McLean*, the court held that because disparate treatment of an illegitimate child's father and mother was required by a statute in the Texas Family Code, the denial of equality was under the law. *Id*.

The second inquiry is whether equality was denied because of a person's membership in a protected class of sex, race, color, creed, or national origin. *Id*. As I have discussed above in connection with the analysis of appellants' federal equal protection challenge to 21.06, it is manifest on the face of that statute it is the gender of the particular actors that serves as the trigger for 21.06's prohibitions, so that discussion need not be repeated here. Thus, addressing the second part of the *McLean* test, the focus is on whether the discrimination in 21.06 is prohibited by the ERA. *Id*. Sex-based discrimination is allowed to co-exist with the ERA only when the proponent of the discrimination can prove there is no other manner to protect the state's compelling interest. *Id*. Surprisingly, counsel for the State conceded at oral argument that he could not "even see how he could begin to frame an argument that there was a compelling State interest," much less demonstrate that interest for this Court. The State did offer, however, what it characterized as legitimate purposes for the statute: enforcement of principles of morality and promotion of family values.

It is simply not enough for the State to say it has an important interest furthered by the discriminatory law. *McLean*, 725 S.W.2d at 698. Even the loftiest goal does not justify sex-based discrimination in light of the clear constitutional prohibition contained in the Texas ERA. *Id*. Strict scrutiny is not satisfied until the State has met a two part test: articulation of a compelling state interest, and a showing that there is no other manner to protect the state's compelling interest. *Id*. Thus, even accepting the morality and family values bases supporting the discrimination as compelling state interests, there is no showing here that there is no other manner of protecting morality and family values other than prosecuting same sex sodomy. It would appear that the state's goal of protecting these interests was originally achieved on a non-discriminatory basis when the prohibition of sodomy applied to all persons. See n.8, supra. There are other avenues for achieving the State's objectives without resorting to 21.06 as pointed out by the court in Onofre. See n.13, supra. It is manifestly illogical to suggest that sodomy, when performed by heterosexuals promotes morality and family values, and that the same acts when performed by same sex couples, denigrates morality and family values.

As noted above, implicitly rejecting "morality" and "family values" as justifications for Colorado's discriminatory constitutional amendment, the United States Supreme Court struck down the amendment under a rational basis standard. See n.12, supra. Logic dictates that if the promotion of morality norms and family values as rationalizations for state sponsored discrimination will not pass a rational basis standard of review, such contentions would wilt in the face of strict scrutiny mandated by *McLean*. I conclude, therefore, that because the State has not shown there are no alternate means to protect the State's asserted interests of family values and morality other than through the gender-based discrimination in 21.06, the statute violates Article I, § 3a of the Texas Constitution and is, therefore, void. See TEX. CONST. Art. I, § 29.

Accordingly, I would sustain appellant's point of error two challenging 21.06 under the Texas ERA.

**V.**

Conclusion Analyzed correctly under binding Supreme Court precedent, Texas Penal Code section 21.06 is in violation of the Equal Protection Clause of the Federal Constitution

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because it is neither rationally related to the legitimate State objective presented for its support, nor viable under heightened scrutiny because the State failed to articulate a compelling interest served by the gender discrimination exhibited by 21.06 on its face and as applied. Further, under the Texas Bill of Rights, because the gender discrimination in 21.06 contravenes the Equal Rights Amendment, it is automatically void without regard to any justification.

The holding here that 21.06 is unconstitutional is not tantamount to a conclusion that there is nothing wrong with the prohibited conduct. The majority correctly states that mere disagreement with the Legislature over whether the conduct proscribed by 21.06 is or is not a bad deed is not a basis for overturning a statute. This statement, however, is incomplete because it ignores the duty a judge has when confronted by a statute in conflict with the constitution.

The courts may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative. Being required to declare what the law is in the cases which come before them, they must enforce the constitution as the paramount law, whenever a legislative enactment comes in conflict with it. In exercising this high authority, the judges claim no judicial supremacy; they are only the administrators of the public will [expressed in the constitution]. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law. *Ex parte Rodriguez,* 39 Tex. 705, 751 (1873).

The Texas Constitution does not protect morality; it does, however, guarantee equality to all persons under the law. TEX. CONST. art. I, § 3a. My personal views on the conduct involved here are irrelevant to the outcome that I believe is required. The foregoing is my duty in the preparation of opinions because Cannon 3B(5) of the Texas Code of Judicial Conduct requires a judge to "perform judicial duties without bias or prejudice." Thus, the result reached in this dissent is purely a function of the application of the Texas and Federal Constitutions to section 21.06, and nothing more. Accordingly, I respectfully dissent.

/s/ John S. Anderson

Justice

Dissenting Opinion filed March 15, 2001.

En Banc.

# In the Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER, PETITIONERS
V.
STATE OF TEXAS, RESPONDENT.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS FOURTEENTH DISTRICT

## BRIEF OF PETITIONERS

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## QUESTIONS PRESENTED

1. Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law—which criminalizes adult, consensual same-sex intimate behavior, but not identical behavior by different-sex couples—violate the Fourteenth Amendment right to equal protection of the laws?

2. Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and

privacy protected by the Due Process Clause of the Fourteenth Amendment?

3. Whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled?

## BRIEF OF PETITIONERS

The State of Texas arrested Petitioners Lawrence and Garner, charged them with a crime, and convicted them under the State's "Homosexual Conduct" law for engaging in consensual same-sex intimacy in the privacy of Lawrence's home. The Texas law and Petitioners' convictions are constitutionally indefensible for two reasons. First, the law discriminates without a legitimate and rational State purpose, in violation of the Equal Protection Clause. In 1973, Texas broke with both the evenhanded laws of the past and the decisive modern trend toward decriminalization. Instead, the State chose to criminalize consensual, adult sexual behaviors *only* for those whose partners are of the same sex—gay men and lesbians. Texas's decision to classify along that line brands gay men and lesbians as lawbreakers and fuels a whole range of further discrimination, effectively relegating them to a form of second-class citizenship. Second, this criminal law directly implicates fundamental interests in intimate relationships, bodily integrity, and the home. Texas's law and the few other remaining consensual sodomy statutes—both those that discriminate and those that do not—trample on the substantive liberty protections that the Constitution erects in order to preserve a private sphere shielded from government intrusion. Here, where the State authorizes such intrusion into the homes and lives only of same sex couples, the constitutional injury is especially clear and disturbing.

## OPINIONS AND ORDERS BELOW

The Texas Court of Criminal Appeals' orders refusing discretionary review are unreported. Pet. App. 1a, 2a. The decision of the *en banc* Court of Appeals for the Fourteenth District of Texas is reported at 41 S.W.3d 349. Pet. App. 4a. The court's prior panel opinion is unreported. Pet. App. 80a. The judgments of the Harris County Criminal Court are unreported. Pet. App. 107a, 109a.

## JURISDICTION

The judgment of the Court of Appeals was entered on March 15, 2001. Pet. App. 3a. On April 17, 2002, the Texas Court of Criminal Appeals denied a timely consolidated petition for discretionary review. Pet. App. 1a, 2a. Petitioners filed their timely petition for a writ of certiorari in this Court on July 16, 2002. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

## STATUTORY AND CONSTITUTIONAL PROVISIONS

Texas Penal Code § 21.06 ("Homosexual Conduct") provides: "(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. (b) An offense under this section is a Class C misdemeanor."

Texas Penal Code § 21.01(1) provides: "'Deviate sexual intercourse' means: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

## STATEMENT OF THE CASE

### A. Petitioners' Arrests, Convictions, And Appeals.

Late in the Evening of September 17, 1998, Harris County, Texas, sheriff's officers entered John Lawrence's home and there intruded on Lawrence and Tyron Garner having sex. The officers were responding to a false report of a "weapons disturbance." Pet. App. 129a, 141a.[1] They arrested petitioners, jailed them, and did not release them from custody until the next day. Clerk's Record in *State v. Lawrence*, at 3 ("C.R.L."); Clerk's Record in *State v. Garner*, at 3 ("C.R.G.").

The State charged Petitioners with violating the Texas "Homosexual Conduct" statute, Tex. Pen. Code § 21.06 (the "Homosexual Conduct

[1] The person who called in the report later admitted his allegations were false and was convicted of filing a false report. *See* R. A. Dyer, *Two Men Charged Under State's Sodomy Law,* Hous. Chron., Nov. 6, 1998, at A1.

Law" or "Section 21.06"), which criminalizes so-called "deviate sexual intercourse" with another person of the same sex, but not identical conduct by different-sex couples. *Id.* The sole facts alleged by the State to make out a violation were that each Petitioner "engage[d] in deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." Pet. App. 127a, 139a. The State did not allege that the conduct was public, non-consensual, with a minor, or in exchange for money. *Id.* The charges rested solely on consensual, adult sexual relations with a partner of the same sex in the privacy of Lawrence's home. *Id.*

After proceedings and initial convictions in the Justice of the Peace Court, Petitioners appealed for a trial *de novo* to the Harris County Criminal Court. C.R.L. 15; C.R.G. 12. They filed motions to quash the charges on the ground that the law violates the Fourteenth Amendment's guarantees of equal protection and privacy, both on its face and as applied to their "consensual, adult, private sexual relations with another person of the same sex." Pet. App. 117a–118a, 121a–122a, 130a–131a, 134a–135a. On December 22, 1998, the court denied the motions to quash. Pet. App. 113a. Lawrence and Garner then pled *nolo contendere,* Pet. App. 114a, preserving, under Texas procedural rules, their right to pursue previously asserted defenses. Tex. Code Crim. P. § 44.02. The court imposed on each a fine of $200 and court costs of $141.25. Pet. App. 107a–108a, 109a–110a, 116a.

In consolidated appeals to the Texas Court of Appeals, Lawrence and Garner argued that Section 21.06 impermissibly discriminates between citizens "[u]nder any characterization of the classification." Amended Brief of Appellants at 4, 5, 6–17 (Tex. App. filed Apr. 30, 1999) ("Am. Br."); Additional Brief of Appellants 1 n.1, 14–22 (Tex. App. filed Aug. 11, 2000) ("Add'l Br."); Petition for Discretionary Review at 7–13 (Tex. Crim. App. filed Apr. 13, 2001) ("Pet. Disc. Rev."). Petitioners also argued that the statute invades their right of privacy and preserved their contention that *Bowers v. Hardwick,* 478 U.S. 186 (1986), was wrongly decided. Am. Br. 5, 23–26; Add'l Br. 23 n.20; Pet. Disc. Rev. 16–19.

At oral argument in the Court of Appeals, counsel for the State conceded that "he could not 'even see how he could begin to frame an argument that there was a compelling State interest'" served by Section 21.06. Pet. App. 76a (quoting counsel for Texas). Texas has repeatedly identified its only aim as "enforcement of principles of morality and the promotion of family values." *See, e.g.,* State's Brief in Support of Rehearing En Banc 16 (Tex. App. filed Aug. 23, 2000) ("States' Br. in Supp. of Reh'g En Banc").

On June 8, 2000, a panel of the Court of Appeals reversed Petitioners' convictions under the Texas Equal Rights Amendment, holding that Section 21.06 impermissibly discriminates on the basis of sex. Pet. App. 86a–92a. After rehearing *en banc,* the Court of Appeals reinstated Petitioners' convictions on March 15, 2001. Pet. App. 3a, 4a. Citing *Bowers,* the court rejected Petitioners' substantive due process claim. Pet. App. 24a–31a. As to the federal equal protection claim, the court held that the statute was subject to and survived rational basis review, because it "advances a legitimate state interest, namely, preserving public morals." Pet. App. 13a. The court distinguished *Romer v. Evans,* 517 U.S. 620 (1996), as limited to discrimination in the right to seek legislation. Pet. App. 14a–15a.

Two Justices of the appellate court "strongly" dissented from the rejection of Petitioners' federal equal protection arguments. Pet. App. 42a. The dissent reasoned that:

> where the same conduct, defined as "deviate sexual intercourse[,]" is criminalized for same sex participants but not for heterosexuals[,] [t]he contention that the same conduct is moral for some but not for others merely repeats, rather than legitimizes, the Legislature's unconstitutional edict.

Pet. App. 44a. Petitioners timely sought discretionary review from the Texas Court of Criminal Appeals, which was refused. Pet. App. 1a, 2a.

### B. THE HOMOSEXUAL CONDUCT LAW

The Homosexual Conduct Law is of comparatively recent vintage. It was enacted in 1973 when Texas repealed all of its then-existing laws that criminalized private sexual conduct between consenting adults. *See* 1973 Tex. Gen. Laws ch. 399, §§ 1, 3. Prior to that time, the criminality of consensual sexual conduct in Texas did not depend on whether a couple was same sex or different-sex. In particular, oral as well as anal sex was a crime for all. 1943 Tex. Gen. Laws ch. 112, § 1. *See generally Baker v. Wade,* 553 F. Supp. 1121, 1148–53 (N.D. Tex. 1982) (reviewing history of Texas sodomy laws),

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BRIEF OF PETITIONERS

*rev'd,* 769 F.2d 289 (5th Cir. 1985) (en banc).[2] Until 1973 Texas also criminalized fornication and adultery. *See* Tex. Pen. Code arts. 499–504 (1952) (repealed by 1973 Tex. Gen. Laws, ch. 399, § 3).

The 1973 repeals abolished all those crimes, 1973 Tex. Gen. Laws ch. 399, § 3, freeing heterosexual adult couples, married or unmarried, to engage in all forms of consensual, private, non-commercial sexual intimacy without state intrusion. In the same enactment, however, the Legislature adopted Section 21.06, *see id.* § 1, which for the first time singled out same-sex couples for criminal sanctions. Section 21.06 applies to "deviate sexual intercourse," which is defined as oral, anal, and certain other sexual conduct without regard to whether the actors are of the same or different sexes. *See* Tex. Pen. Code § 21.01(1).[3] But "deviate sexual intercourse" is *not* a crime when engaged in privately by two consenting adults of different sexes. Rather, Section 21.06 criminalizes only "Homosexual Conduct," making it a punishable offense to engage in "deviate sexual intercourse with another individual of the same sex," but not identical conduct by heterosexual couples. Tex. Pen. Code § 21.06.[4]

Texas, of course, also has and enforces other laws that criminalize sexual conduct that takes place in public, Tex. Pen. Code §§ 21.07(a)(2), 21.08, that is violent or without consent, *id.* § 22.011(a)(1), that is in exchange for money, *id.* § 43.02, or that is committed with a minor, *id.* §§ 22.011(a)(2), 21.11. All of these prohibitions apply without regard to whether the actors are of the same or different sexes. Section 21.06, in contrast, applies to non-commercial, consensual, private sexual conduct between two adults—but only if they are of the same sex.

Because it singles out same-sex couples, this Texas law is unlike older legal prohibitions of "sodomy," *see infra* Point I.A.3, and differs fundamentally from the facially evenhanded Georgia law considered by the Court in *Bowers, see* 478 U.S. at 188 n.1. The Homosexual Conduct Law was substituted for a facially nondiscriminatory law at a time when many States, prompted by changing views about the proper limits of government power that were reflected in the American Law Institute's *Model Penal Code,* were revising their criminal codes and completely abandoning offenses like fornication and sodomy. *See Model Penal Code and Commentaries* §§ 213.2 cmt. 2, 213.6 note (1980). By 1986, 26 States had invalidated their sodomy laws. *Bowers,* 478 U.S. at 193–94. Today, only nine States retain criminal laws that bar consensual sodomy for all.[5] Between 1969 and 1989, Texas and seven other States legislatively replaced general laws with laws targeting homosexual couples. *See infra* at 21–22 & note 15. Four of those discriminatory laws have already been judicially invalidated, and one has been repealed. *See id.* Now only Texas and two other States criminalize same-sex conduct but not identical different-sex conduct by statute, while one other State has reached the same result through judicial construction of a facially evenhanded law.[6] Similarly, all but a few States have repealed criminal laws prohibiting fornication. *Infra* note 18.

Since its enactment, Section 21.06 has narrowly survived several federal and state constitutional challenges. In *Baker v. Wade*, a federal district court held that Section 21.06 violates the

[2] Before 1943, an 1860 statute criminalized "the abominable and detestable crime against nature," Tex. Pen. Code art. 342 (1860); *see Baker,* 553 F. Supp. at 1148, which was held *not* to apply to oral sex. *See, e.g., Munoz v. State,* 281 S.W. 857 (Tex. Crim. App. 1926); *Prindle v. State,* 21 S.W. 360, 361 (Tex. Crim. App. 1893). Like the 1943 law, however, the 1860 statute applied to heterosexual as well as homosexual conduct. *See Adams v. State,* 86 S.W. 334 (Tex. Crim. App. 1905); *Lewis v. State,* 35 S.W. 372 (Tex. Crim. App. 1896).

[3] The present definition of "deviate sexual intercourse" reflects a 1981 amendment adding § 21.01(1)(B) to encompass penetration with "objects," which has been construed to include any part of the body. *See C.M. v. State,* 680 S.W.2d 53, 55–56 (Tex. App. 1984). In 1993, facing a sunset provision, Texas reenacted most of the Penal Code, including Section 21.06. *See* 1993 Tex. Sess. Law Serv. ch. 900 (Vernon). Several attempts to repeal the law have failed, *see, e.g.,* H.B. 687, 2001 Leg. 77th (R) Sess. (Tex.); *see also Baker,* 553 F. Supp. at 1126 & n.4, 1151.

[4] "Homosexual conduct" is a Class C misdemeanor punishable by a fine of up to $500. Tex. Pen. Code §§ 21.06(b), 12.23.

[5] Ala. Code §§ 13A-6-60(2), 13A-6-65(a)(3); Fla. Stat. Ann. § 800.02; Idaho Code § 18-6605; La. Rev. Stat. Ann. § 14:89; Miss. Code Ann. § 97-29- 59; N.C. Gen. Stat. § 14-177; S.C. Code Ann. § 16-15-120; Utah Code Ann. § 76-5-403(1); Va. Code Ann. § 18.2-361(A).

[6] Kansas and Missouri have same-sex-only statutes, Kan. Stat. Ann. § 21-3505(a)(1); Mo. Rev. Stat. § 566.090, although one intermediate court of appeals in Missouri has held that State's statute applicable only to nonconsensual conduct, *State v. Cogshell*, 997 S.W.2d 534 (Mo. Ct. App. 1999). Oklahoma's general statute has been construed to exclude different-sex couples. Okla. Stat. tit. 21, § 886; *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986).

constitutional rights of privacy and equal protection. 553 F. Supp. at 1125. The court rejected the State's claimed justifications for Section 21.06 and found that, even when not enforced, the law results in serious harms to gay persons, including employment discrimination. *Id.* at 1130, 1146–47. Although the Texas Attorney General withdrew the State's appeal, a divided *en banc* Fifth Circuit allowed an appeal by an intervenor and reversed, citing the summary affirmance in *Doe v. Commonwealth's Attorney,* 425 U.S. 901 (1976). *Baker v. Wade,* 769 F.2d 289, 292 (5th Cir. 1985) (en banc).

In the early 1990s, Texas Courts of Appeals declared Section 21.06 unconstitutional in two cases exercising state equity jurisdiction. *City of Dallas v. England,* 846 S.W.2d 957 (Tex. App. 1993); *State v. Morales,* 826 S.W.2d 201 (Tex. App. 1992), *rev'd on jurisdictional grounds,* 869 S.W.2d 941 (Tex. 1994). In both cases, the intermediate appellate court struck down the Homosexual Conduct Law under the Texas Constitution and found that the statute inflicted severe harms beyond the direct threat of criminal convictions. *See England,* 846 S.W.2d at 959; *Morales,* 826 S.W.2d at 202. As the State itself stipulated in *Morales,* Section 21.06 "brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law." *Id.* at 202–03.

In 1994, *Morales* was set aside by the Texas Supreme Court as reaching beyond the power of the State's equity courts. 869 S.W.2d at 943–47. The court ruled that constitutional review should occur in the context of a criminal prosecution, with final review in the Texas Court of Criminal Appeals. *Id.*[7] In the present criminal case, however, the Court of Criminal Appeals refused to exercise its jurisdiction to review the validity of the law, Pet. App. 1a, 2a, leaving its burdens in effect throughout Texas.

## SUMMARY OF ARGUMENT

As the experience of Lawrence and Garner vividly illustrates, Section 21.06 puts the State of Texas inside its citizens' homes, policing the details of their most intimate and private physical behavior and dictating with whom they may share a profound part of adulthood. Texas has enacted and enforced a criminal law that takes away—from same-sex couples only—the freedom to make their own decisions, based upon their own values and relationships, about the forms of private, consensual sexual intimacy they will engage in or refrain from. The State defends this law only by saying the majority wants it so. Texas asserts a power of the majority to free itself from state dictates about private, consensual sexual choices, while using the criminal law to condemn and limit the choices of a minority.

This law and its application to Petitioners violate both the guarantee of equal protection *and* fundamental liberties safeguarded by the Fourteenth Amendment. Petitioners explain below why the equality claim and the liberty claim are each well rooted in the Constitution. The Court, however, need not rule on both constitutional violations if it chooses to focus on one infirmity rather than the other. Petitioners discuss the fundamental liberty claim under the Due Process Clause first, because even if the Court were not to reach that issue, a full appreciation of the personal interests affected by Section 21.06 also illuminates and informs the equal protection analysis that follows.

Fundamental liberty and privacy interests in adults' private, consensual sexual choices are essential to the ordered liberty our Constitution protects. The State may not, without overriding need, regiment and limit this personal and important part of its citizens' lives. More so than in 1986, when *Bowers v. Hardwick* was decided, it is clear today that such a fundamental right is supported by our basic constitutional structure, by multiple lines of precedent, and by a decisive historical turn in the vast majority of the States to repudiate this type of government invasion into private life. The well-established fundamental interests in intimate relationships, bodily integrity, and the sanctity of the home all converge in the right asserted here. *See Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Planned Parenthood of S.E. Pa. v. Casey,* 505 U.S. 833 (1992). That right belongs to all Americans, including gay men and lesbians, and should be shielded from Section 21.06's unjustified invasion. Much more is needed to outweigh fundamental individual interests than the majority's preferences. Indeed,

[7] Although the Texas Supreme Court did not review *England,* due to a jurisdictional defect in that court, *see Morales,* 869 S.W.2d at 942 n.5 (noting dismissal of writ of error in *England* without reaching merits), the state supreme court's ruling in *Morales* removed the underpinnings of *England.*

the Fourteenth Amendment's protection of liberty exists to guard against the very impulse Texas acted on here. Principles of *stare decisis* do not, in these circumstances, justify adherence to *Bowers.*

Texas also has violated the Fourteenth Amendment's guarantee of equal protection of the laws. The Homosexual Conduct Law creates classes of persons, treating the same acts of consensual sexual behavior differently depending on who the participants are. By this law, Texas imposes a discriminatory prohibition on all gay and lesbian couples, requiring them to limit their expressions of affection in ways that heterosexual couples, whether married or unmarried, need not. The law's discriminatory focus sends the message that gay people are second-class citizens and lawbreakers, leading to ripples of discrimination throughout society. Such a discriminatory law cannot satisfy even the minimal requirement that a legislative classification must be rationally related to a legitimate State purpose. *See Romer,* 517 U.S. 620. The bare negative attitudes of the majority, whether viewed as an expression of morality, discomfort, or blatant bias, cannot take away the equality of a smaller group. *See id.*; *United States Dep't of Agric. v. Moreno,* 413 U.S. 528, 534 (1973); *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 448 (1985).

## ARGUMENT

**I. Section 21.06 Violates Constitutional Rights to Liberty and Privacy Possessed by All Americans.**

"It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey,* 505 U.S. at 847. It is well settled that the Due Process Clause of the Fourteenth Amendment guarantees the personal liberty of Americans against encroachment by the States, and that this protection of liberty encompasses substantive fundamental rights and interests that are unenumerated. *See, e.g., Troxel v. Granville,* 530 U.S. 57, 65–66 (2000); *Casey,* 505 U.S. at 846–51; *Cruzan v. Director, Mo. Dep't of Health,* 497 U.S. 261, 278–79 (1990); *Carey v. Population Servs. Int'l,* 431 U.S. 678, 684–85 (1977); *Moore v. City of E. Cleveland,* 431 U.S. 494, 501–03 (1977); *Roe v. Wade,* 410 U.S. 113, 152–53 (1973); *Griswold,* 381 U.S. at 482–85*; Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary,* 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 399–400 (1923). Giving substance to "liberty" is necessary to maintain the individual freedoms that are the essence of American democracy, while also allowing government action that is justified by the collective good. *See Casey,* 505 U.S. at 849–51.

Among the liberties protected by the Constitution is the right of an adult to make choices about whether and in what manner to engage in private consensual sexual intimacy with another adult, including one of the same sex. This extremely personal sphere implicates three aspects of liberty that have long been recognized as fundamental: the interests in intimate associations, in bodily integrity, and in the privacy of the home. For the State to limit and dictate the intimate choices of American couples in this realm without any substantial justification is repugnant to ordered liberty. *Stare decisis* does not require continued adherence to the Court's contrary decision in *Bowers.*

**A. American Adults Have Fundamental Liberty and Privacy Interests in Making Their Own Choices About Private, Consensual Sexual Relations.**

**1. Well-Established Protections for Intimate Relationships, Bodily Integrity, and the Privacy of the Home Converge in This Vital Freedom.**

Being forced into a life without sexual intimacy would represent an intolerable and fundamental deprivation for the overwhelming majority of individuals. Equally repugnant is any form of external compulsion to engage in sexual relations. There should be no doubt, then, that the Constitution imposes substantive limits on the power of government to compel, forbid, or regulate the intimate details of private sexual relations between two consenting adults.

All adults have the same fundamental liberty interests in their private consensual sexual choices. This fundamental protection is rooted in three well-recognized aspects of personal liberty—in intimate relationships, in bodily integrity, and in the privacy of the home. These aspects of liberty should not be viewed as "a series of isolated points," but are part of a "rational continuum" that constitutes the full scope of liberty of a free people. *Casey,* 505 U.S. at 848 (quotation marks omitted); *see also Board of Regents v. Roth,* 408 U.S. 564, 572 (1972) ("In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be

broad indeed"). Sexual intimacy marks an intensely personal and vital part of that continuum.

The Court has recognized that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. United States Jaycees,* 468 U.S. 609, 617–18 (1984). "[T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.* at 619; *see also Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481U.S. 537, 545–46 (1987).

The adult couple whose shared life includes sexual intimacy is undoubtedly one of the most important and profound forms of intimate association. The Court has rightly recognized that regulation of the private details of sexual relations between two adults sharing an intimate relationship has "a maximum destructive impact upon that relationship." *Griswold,* 381 U.S. at 485. *Griswold* struck down a law that intruded directly into a married couple's private sexual intimacy—and thus their intimate relationship—by criminalizing the use of contraceptives and allowing intercourse only if accompanied by the risk of pregnancy. *Id.* at 485–86. Since *Griswold,* the Court has recognized that all adults, regardless of marital status or other facets of their relationship, have the same interest in making their own intimate choices in this area. *See Eisenstadt,* 405 U.S. at 453 ("If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person") (emphasis in original); *Casey,* 505 U.S. at 898 ("The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power"); *id.* at 852 (reaffirming *Eisenstadt* and *Griswold*).

Sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973). One's sexual orientation, the choice of one's partner, and whether and how to connect sexually are profound attributes of personhood where compulsion by the State is anathema to liberty. *Cf. Casey*, 505 U.S. at 851.[8] Thus, the essential associational freedom here is the freedom to structure one's own private sexual intimacy with another adult. Section 21.06 utterly destroys that freedom by forbidding most sexual behavior for all same-sex couples, whether they are in a committed, long-standing relationship, a growing one, or a new one.

State regulation of sexual intimacy also implicates the liberty interest in bodily integrity. "It is settled now … that the Constitution places limits on a State's right to interfere with a person's most basic decisions about … bodily integrity." *Casey,* 505 U.S. at 849 (citations omitted); *see also id.* at 896 ("state regulation … is doubly deserving of scrutiny … [where] the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman"). Stated generally, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body." *Glucksberg,* 521 U.S. at 777 (Souter, J., concurring) (quotation marks omitted); *see also id.* at 720; *Rochin v. California,* 342 U.S. 165, 166, 173–74 (1952); *Cruzan,* 497 U.S. at 278.

Control over one's own body is fundamentally at stake in sexual relations, involving as they do the most intimate physical interactions conceivable. Like the decision whether to continue or terminate a pregnancy, or the decision whether to permit or decline medical procedures, the physical, bodily dimensions of how two persons express their sexuality in intimate relations are profoundly personal. Indeed, consent is a critically important dividing line in legal and societal views about sexuality for the very reason that individual control over sexual activity is of fundamental importance to every person's autonomy. Texas invades the liberty

[8] For many adults in modern society, sexual intimacy is an important aspect of forming or building a committed relationship where one does not already exist. *See Roberts*, 468 U.S. at 618 (Constitution protects "the *formation* and preservation" of "highly personal relationships") (emphasis added); Richard A. Posner, *Sex and Reason* 349 (1992) ("Consensual sex in whatever form is as we know a method of cementing a relationship").

interest in bodily integrity by dictating that citizens may not share sexual intimacy unless they perform acts approved by the legislature, and by attempting to coerce them to select a sexual partner of the other sex.

The liberty interest at issue here also involves the deeply entrenched interest in the privacy of the home. "In the home, [the Court's] cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo v. United States,* 533 U.S. 27, 37 (2001) (emphasis in original); *Minnesota v. Olson,* 495 U.S. 91, 98 (1990) (overnight guest receives protection under "everyday expectations of privacy that we all share"). The importance of shielding the home from intrusion goes beyond the Fourth Amendment. In *Frisby v. Schultz*, 487 U.S. 474 (1988), for example, the Court relied on the constitutional status of the home in rejecting a First Amendment challenge to an ordinance against picketing targeted at a home. *Id*. at 484 ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society") (quotation marks omitted). And constitutional protection for the home was an important consideration in *Griswold* itself. *See* 381 U.S. at 485 (rejecting intrusion into "sacred precincts of marital bedrooms"). "[I]f the physical curtilage of the home is protected, it is surely as a result of the solicitude to protect the privacies of the life within." *Poe v. Ullman,* 367 U.S. 497, 551 (1961) (Harlan, J., dissenting); *see also Stanley v. Georgia,* 394 U.S. 557 (1969).

Even without actual physical entry by the police, Section 21.06 directly invades the privacy of the home by criminalizing the private intimate conduct taking place there. *Poe,* 367 U.S. at 549, 551–52 (Harlan, J., dissenting). But this case also graphically illustrates how laws criminalizing consensual adult sexual intimacy permit invasion of the privacy of the home in the starkest sense. Although Petitioners do not challenge the lawfulness of the police entry into Lawrence's home in response to a report of an armed gunman, the officers did not withdraw after discovering the report was false. Instead, under license of Section 21.06, they multiplied their intrusion exponentially by scrutinizing the specific intimate acts in which Petitioners were involved, arresting them, hauling them off to jail, and charging them with a crime for which they were later convicted.

Denying the existence of a liberty interest in private consensual adult sexual activity would give constitutional legitimacy to the grossest forms of intrusion into the homes of individuals and couples. To investigate this "criminal" conduct, the police could use every investigative method appropriate when ordinary criminal activity, such as drug use or distribution, occurs in the home: obtaining warrants to search for physical evidence of sexual activity; interrogating each member of the couple about the intimate details of the relationship; and surveillance, wiretaps, confidential informants, and questioning of neighbors. That these routine police methods are so repugnant and unthinkable in the context of adult consensual sexual relations is a strong indication that the conduct at issue differs in a fundamental way from ordinary criminal conduct that happens to occur in the home. *Cf. Romer,* 517 U.S. at 645 (Scalia, J., dissenting) ("'To obtain evidence [in sodomy cases], police are obliged to resort to behavior which tends to degrade and demean both themselves personally and law enforcement as an institution'") (quoting Kadish, *The Crisis of Overcriminalization,* 374 Annals of Am. Acad. of Pol. & Soc. Sci. 157, 161 [1967]).[9]

The core liberty interests at stake in this case are a bulwark against an overly controlling and intrusive government. The "fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize," *Pierce,* 268 U.S. at 535, or "to coerce uniformity," *West Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 640 (1943).

> The right of privacy exists because democracy must impose limits on the extent of control and direction that the state exercises over the day-to-day conduct of individual lives. . . . People do not meaningfully govern themselves if their lives are … molded into standard, rigid, normalized roles.

[9] The argument here in no way implies that ordinary criminal conduct may find refuge in the home. In the present context, "the privacy of the home is constitutionally protected not only because the home is seen as a sanctuary, privileged against prying eyes, but also because it is the place where most intimate associations are centered." Kenneth L. Karst, *The Freedom of Intimate Association,* 89 Yale L.J. 624, 634 (1980) (footnote omitted); *see also Poe,* 367 U.S. at 551 (Harlan, J., dissenting) ("[t]he home derives its pre-eminence as the seat of family life").

Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 783, 804–05 (1989).

**2. There Is No Constitutional Exception to Liberty for Gay and Lesbian Citizens.**

Gay and lesbian Americans have the same liberty interests as heterosexuals in private consensual sexual intimacy free from unwarranted intrusion by the State. Gay adults, like their heterosexual counterparts, have vital interests in their intimate relationships, their bodily integrity, and the sanctity of their homes. Today, family lives centered on same-sex relationships are apparent in households and communities throughout the country. Likewise, the special interplay between the privacy of the home and individual decisions about sexual expression applies to lesbians and gay men as it does to others.

A gay or lesbian sexual orientation is a normal and natural manifestation of human sexuality. A difference in sexual orientation means a difference only in that one personal characteristic. Mental health professionals have universally rejected the erroneous belief that homosexuality is a disease. For example, in 1973 the American Psychiatric Association concluded that "homosexuality *per se* implies no impairment in judgment, stability, reliability, or general social or vocational capabilities."[10] For gay adults, as for heterosexual ones, sexual expression is integrally linked to forming and nurturing the close personal bonds that give humans the love, attachment, and intimacy they need to thrive. *See, e.g.,* Lawrence A. Kurdeck, *Sexuality in Homosexual and Heterosexual Couples, in Sexuality in Close Relationships* 177–91 (K. McKinney & S. Sprecher eds., 1991); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws,* 35 Harv. C.R.-C.L. L. Rev. 103, 119–20 (2000). "[M]ost lesbians and gay men want intimate relationships and are successful in creating them. Homosexual partnerships appear no more vulnerable to problems and dissatisfactions than their heterosexual counterparts." Letitia A. Peplau, *Lesbian and Gay Relationships, in Homosexuality* 177, 195 (J. Gonsiorek & J. Weinrich eds., 1991). Same-sex relationships often last a lifetime, and provide deep sustenance to each member of the couple. *See, e.g., A. Steven Bryant & Demian, Relationship Characteristics of American Gay and Lesbian Couples,* 1 J. Gay & Lesbian Soc. Servs. 101 (1994).

That gay Americans have exactly the same vital interests as all others in their bodily integrity and the privacy of their homes is so plain that it appears never to have been disputed in the law. In contrast, the vital liberty interest that gay adults have in their intimate relationships has not always been recognized. Even a few decades ago, intense societal pressure, including many anti-gay government measures, ensured that the vast majority of gay people hid their sexual orientation—even from their own parents—and thus hid the important intimate relationships that gave meaning to their lives. *See infra* Point II.B.2. Lesbians and gay men, moreover, were falsely seen as sick and dangerous. *See infra* at 46. As recently as 1986, it was still possible not to perceive the existence and dignity of the families formed by gay adults. *See, e.g., Bowers*, 478 U.S. at 191, 195.

Today, the reality of these families is undeniable. The 2000 United States Census identified more than 600,000 households of same-sex partners nationally, including almost 43,000 in Texas. These families live in 99.3% of American counties.[11] Many state and local governments and thousands of private employers have adopted domestic partner benefits or more extensive protections for same-sex couples.[12] Virtually every State permits gay men and lesbians to adopt children individually, jointly and/or through "second-parent adoptions" that are analogous to stepparent adoptions. *See, e.g., Lofton v. Kearney,* 157 F. Supp. 2d 1372, 1374 n.1 (S.D. Fla. 2001) (observing that Florida is currently "the only state" "to statutorily ban adoption by gay or lesbian adults"); American Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 2.12 cmt. f, at

[10] *Resolution of the American Psychiatric Ass'n* (Dec. 15, 1973), 131 Am. J. Psychiatry 497 (1974); *accord* American Psychological Ass'n, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975); National Ass'n of Social Workers, *Policy Statement on Lesbian and Gay Issues, reprinted in* Nat'l Ass'n of Social Workers, *Social World Speaks: NASW Policy Statements* 162, 162–65 (3d ed. 1994).

[11] *See* William B. Rubenstein, et al., Some Demographic Characteristics of the Gay Community in the United States 3 (Table 1), 5 (Williams Project, UCLA School of Law 2003), available at http://www1.law.ucla.edu/~erg/pubs/GD/Gay Demographics.pdf (accessed Jan. 15, 2003).

[12] *See Employers That Offer Domestic Partner Health Benefits, available at* http://www.hrc.org/worknet/dp/index.asp (accessed Jan. 15, 2003).

312 (2002). These and other legal doctrines have secured parental bonds for many of the estimated millions of children in the United States with gay parents. Ellen C. Perrin, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents,* 109 Pediatrics 341, 341 & n.1 (Feb. 2002) (estimating one to nine million children with at least one lesbian or gay parent); *see also, e.g., T.B. v. L.R.M.,* 786 A.2d 913 (Pa. 2001) (allowing claim for partial custody by lesbian second parent under *in loco parentis* doctrine).

The reality of these families cannot be disregarded just because they do not match the "nuclear" model of a married couple with their biological children. *See, e.g., Troxel,* 530 U.S. at 63 ("The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household"); *id.* at 85 (Stevens, J., dissenting); *id.* at 98–101 (Kennedy, J., dissenting); *Michael H. v. Gerald D.,* 491 U.S. 110, 124 n.3 (1989) (plurality opinion) ("The family unit accorded traditional respect in our society … includes the household of unmarried parents and their children"). For gay men and lesbians, their family life—their intimate associations and the homes in which they nurture those relationships—is every bit as meaningful and important as family life is to heterosexuals.

Thus, the liberty interest at issue here should not be defined in terms of sexual orientation as the "right of homosexuals to engage in acts of sodomy," *Bowers,* 478 U.S. at 191, or reduced in value on that account. If heterosexual adults have a fundamental interest in consensual sexual intimacy, including the choice to engage in oral or anal sex, then so too must homosexual adults. The Due Process Clause itself does not distinguish among classes of citizens, extending the Constitution's shield to the highly personal associations and choices of some, but not protecting the very same associations and choices for others. These liberties are important to and protected for all Americans.

**3. Objective Considerations Support Recognition of Fundamental Interests Here.**

To ensure that its decisions in this area are firmly grounded, the Court has sought objective guideposts for the recognition of fundamental liberties. *See County of Sacramento v. Lewis,* 523 U.S. 833, 857–58 (1998) (Kennedy, J., concurring, joined by O'Connor, J.) (emphasizing that "objective considerations," including but not limited to "history and precedent," determine substantive due process interests). As just discussed, this Court's precedents and our constitutional structure indicate that the personal liberty protected by the Constitution must include adults' private choices about sexual intimacy. Foremost among other guideposts has been the history of legislation concerning the matter at hand, from prior centuries through the present. *See, e.g., Glucksberg,* 521 U.S. at 710–19.

In reviewing relevant legal traditions, the Court has made clear that protected liberty interests are not limited to those explicitly recognized when the Fourteenth Amendment was ratified. *Casey,* 505 U.S. at 847, 850 ("such a view would be inconsistent with our law"); *Rochin,* 342 U.S. at 171–72 ("To believe that … judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges"). Abundant examples exist of the Court giving meaning to contemporary truths about freedom, where earlier generations had failed to acknowledge and specify an essential aspect of liberty. *See, e.g., Turner v. Safley,* 482 U.S. 78, 94–99 (1987); *Roe,* 410 U.S. at 152–53; *Loving v. Virginia,* 388 U.S. 1, 12 (1967); *Griswold,* 381 U.S. at 482–85; *Pierce,* 268 U.S. at 534–35; *Meyer,* 262 U.S. at 399–400. *See generally Casey,* 505 U.S. at 847–48.

Similarly, in cases *rejecting* asserted liberty interests, the Court's decisions have never rested on past legal history alone. Because constitutional "tradition is a living thing," *Casey,* 505 U.S. at 850 (quotation marks omitted), the Court has always deemed it essential that the relevant legal tradition have continuing vitality today. In *Glucksberg,* for example, the Court rejected the claimed liberty interest in doctor-assisted suicide based not only on the common law's criminalization of assisted suicide, but also on the fact that "the States' assisted-suicide bans have in recent years been reexamined and, generally"—with a single exception—"reaffirmed." 521 U.S. at 716; *see also Michael H.,* 491 U.S. at 127. Even in *Bowers,* the Court looked not only to criminal laws concerning sodomy in 1787 and 1868, but also to the fact that half the States con-

tinued to outlaw such conduct in 1986. 478 U.S. at 192–94.[13]

Over the last half century, the Nation has firmly broken from its prior legal tradition of criminalizing many adult choices about private sexual intimacy. Even before 1960, however, the relevant legal tradition is more complicated than an initial examination might reveal. *Bowers* observed that when the Fourteenth Amendment was ratified, 32 of 37 States had criminal laws against sodomy. 478 U.S. at 192–93. But a critical feature of those 19th century and earlier laws was not discussed by the *Bowers* majority: Almost without exception, such laws historically have applied to certain specified sex acts without regard to whether same-sex or different-sex couples were involved. *See, e.g.,* Anne B. Goldstein, *History, Homosexuality, and Political Values*, 97 Yale L.J. 1073, 1082–86 (1988).[14] In addition, actual prosecutions for *private* intimacy have been exceedingly rare since the Nation's founding. *See* John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 66–67 (1988). And the scope of the specific sexual conduct covered has varied over time. *See, e.g.,* Goldstein, 97 Yale L.J. at 1085–86.

Texas law is a case in point. A Texas statute adopted in 1860 penalized "the abominable and detestable crime against nature" for all persons, Tex. Pen. Code art. 342 (1860); *supra* note 2, and an amendment in 1943 extended that ban to oral sex for all persons, 1943 Tex. Gen. Laws ch. 112, § 1. *See supra* at 5. Only in 1973 did Texas—like a handful of other States in the same period—replace its general ban with one that singled out the sexual intimacy of same-sex couples for criminal prohibition. 1973 Tex. Gen. Laws ch. 399, §§ 1, 3.[15] Thus, our Nation has no longstanding legal tradition of defining permissible or prohibited sexual conduct in terms of sexual orientation. Rather, the tradition exemplified by actual legislation is one of facial neutrality. The few discriminatory laws singling out lesbians and gay men show the divide that existed in the 1970s and 1980s between the majority's view of its own liberties and its lingering anti-gay attitudes.

Most importantly, however, both evenhanded and discriminatory bans on private sexual conduct between consenting adults have been rejected in contemporary times. Since the 1960s, there has been a steady stream of repeals and state judicial invalidations of laws criminalizing consensual sodomy and fornication.[16] "The unmistakable trend … nationally … is to curb government intrusions at the threshold of one's door and most definitely at the threshold of one's bedroom." *Jegley v. Picado,* 80 S.W.3d 332, 356 (Ark. 2002) (Brown, J., concurring). By 1986, when *Bowers* was decided, 26 States had already removed consensual sodomy laws from their criminal codes. *See* 478 U.S. at 193–94. Today,

[13] The Court has repeatedly rejected the notion that fundamental rights encompass only those recognized at "the most specific level" at the time the Fourteenth Amendment was adopted. *Casey,* 505 U.S. at 847–59; *Michael H.,* 491 U.S. at 132 (O'Connor, J., joined by Kennedy, J., concurring in part) (the Court's cases have discussed "asserted rights at levels of generality that might not be 'the most specific level' available"). While the Court has sought carefully to describe fundamental liberty interests, as Petitioners do in this case, careful description means neither restriction to the most specific level nor limitation to historically recognized rights. Moreover, to the extent the Court prefers to characterize the asserted right parallel to the historical legal treatment, laws regulating consensual sex between adults, and state decisions to abolish such regulation, have almost always been written generally—*not* specifically to apply only to same-sex relationships.

[14] In 1868, at most three of the 32 States with sodomy prohibitions limited them to sexual conduct between two men; even in those three States, however, there is some uncertainty whether heterosexual couples were also covered. *See* Goldstein, 97 Yale L.J. at 1084 nn.60 & 66. Statutes using the word "mankind" frequently included sexual relations between men and women, as was the case in Texas. *See Lewis,* 35 S.W. at 372 ("Woman is included under the term 'mankind'"). In any event, three of 37 States is no legal tradition.

[15] *See also* 1977 Ark. Acts 828 (struck down by *Jegley v. Picado,* 80 S.W.3d 332 (Ark. 2002)); 1969 Kan. Sess. Laws ch. 180, *codified* at Kan. Stat. Ann. § 21-3505; 1974 Ky. Laws ch. 406 (struck down by *Commonwealth v. Wasson,* 842 S.W.2d 487 (Ky. 1992)); 1977 Mo. Laws sec. 1, § 566.090, *codified at* Mo. Rev. Stat. § 566.090; 1973 Mont. Laws ch. 513 (struck down by *Gryczan v. State,* 942 P.2d 112 (Mont. 1997)); 1977 Nev. Stat. ch. 598 (repealed by 1993 Nev. Stat. ch. 236); 1989 Tenn. Pub. Acts ch. 591 (struck down by *Campbell v. Sundquist,* 926 S.W.2d 250 (Tenn. Ct. App. 1996)).

[16] "With nonmarital sex so utterly commonplace, the word *fornication,*with its strong pejorative connotation, has virtually passed out of the language." Posner, *Sex and Reason* 55 (emphasis in original). Likewise, "sodomy" is a term now used rarely outside legal contexts, while oral sex and anal sex are openly discussed in the media and society.

Consensual sodomy and fornication have been the *only* criminal laws in American history where the State has acted solely to limit forms of intimacy by consenting adults. Other crimes relating to sexuality have included additional elements reflecting other state concerns. Adultery and bigamy laws, for example, aim to enforce the legal marriage contract. Incest and under-age sex laws, *inter alia,* seek to protect vulnerable individuals who may not be capable of true consent. Prostitution and public-sex laws address commercial or pub-

only 13 States still have such prohibitions.[17] Moreover, of those 13 States, Texas and the three others that have discriminatory rules have eliminated criminal prohibitions in this area for the vast majority of adult couples. Similarly, only six States and the District of Columbia still criminalize fornication.[18] In contrast, when *Loving* was decided in 1967, 16 States still had criminal laws against interracial marriage. *Loving,* 388 U.S. at 6 n.5; *see also id.* at 12 (holding that such laws violate fundamental liberty).

The "consistency of the direction of change" among the States, *Atkins v. Virginia*, 122 S. Ct. 2242, 2249 (2002), is indicative of a strong national consensus reflecting profound judgments about the limits of government's intrusive powers in a civilized society. The principles and sentiments that have led the States to eliminate these laws are yet another objective indicator of the fundamental interests at stake. For example, when the Georgia Supreme Court struck down, under the state constitution, the very law upheld by this Court in *Bowers*, it stated: "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity." *Powell v. State,* 510 S.E.2d 18, 24 (Ga. 1998); *accord, e.g., Gryczan v. State*, 942 P.2d 112, 122 (Mont. 1997) ("all adults regardless of gender, fully and properly expect that their consensual sexual activities will not be subject to the prying eyes of others or to governmental snooping or regulation"); *Campbell v. Sundquist*, 926 S.W.2d 250, 261 n.9 (Tenn. App. 1996) ("Infringement of such individual rights cannot be tolerated until we tire of democracy and are ready for communism or a despotism"); *Commonwealth v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980) ("regulat[ing] the private [sexual] conduct of consenting adults … exceeds the valid bounds of the police power"); *State v. Ciuffini*, 395 A.2d 904, 908 (N.J. Super. Ct. App. Div. 1978) (because consensual sodomy law only "serves as an official sanction of certain conceptions of desirable lifestyles, social mores, or individualized beliefs, it is not an appropriate exercise of the police power"). Legislative repeals reflect the same deepseated values. As Governor Jane Hull said when signing the bill repealing Arizona's sodomy law, "At the end of the day, I returned to one of my most basic beliefs about government—It does not belong in our private lives." Howard Fischer, *Hull OKs Repeal of 'Archaic' Sex Laws,* Ariz. Daily Star, May 9, 2001, at A1.

A final confirmation underscoring that America has repudiated a role for government as enforcer of permitted forms of intimacy is the virtually non-existent enforcement today of the laws that still are on the books. In the 13 States that still proscribe sodomy, the laws are almost never enforced in criminal proceedings against

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lic interactions that have a negative impact on the larger community. This case concerns the narrow but important freedom to choose the expressions of sexual intimacy one shares with another adult partner in private, and does not challenge these other types of State regulation.

[17] Repeal or invalidation of same-sex-only sodomy laws since *Bowers:* 1993 Nev. Stat. ch. 236 (repealing Nev. Rev. Stat. § 201.193); *Jegley,* 80 S.W.3d 332 (Ark.); *Wasson,* 842 S.W.2d 487 (Ky.); *Gryczan,* 942 P.2d 112 (Mont.); *Campbell,* 926 S.W.2d 250 (Tenn.).

Repeal or invalidation of facially evenhanded sodomy laws since *Bowers:* 2001 Ariz. Legis. Serv. 382 (West) (repealing Ariz. Rev. Stat. §§ 13-1411, 13-1412); 1993 D.C. Laws 10–14 (amending D.C. Stat. § 22-3502 to exclude private consensual adult conduct); 1998 R.I. Pub. Laws 24 (amending R.I. Gen. Laws § 11-10-1 to exclude conduct with other persons); *Powell v. State,* 510 S.E.2d 18 (Ga. 1998); *Williams v. State,* No. 98036031/CL-1059, 1998 Extra LEXIS 260 (Md. Cir. Ct. Balt. City Oct. 15, 1998); *Michigan Org. for Human Rights v. Kelley,* No. 88-815820 CZ (Mich. Cir. Ct. Wayne County July 9, 1990); *Doe v. Ventura,* No. MC 01-489, 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001). In Maryland, Michigan, and Minnesota, the States did not appeal the lower court decisions striking down the laws.

One state high court upheld a sodomy law against a constitutional challenge in recent years. *See State v. Smith,* 766 So. 2d 501 (La. 2000).

[18] As with sodomy laws, fornication laws have been struck down as contrary to the right of privacy protected by state constitutions. *See, e.g., In re J.M.,* No. SO2A1432, 2003 WL 79330 (Ga. Jan. 13, 2003) (invalidating Ga. Code Ann. § 16-6-18). The fornication laws remaining in seven jurisdictions criminalize any act of sexual intercourse between unmarried persons. *See* D.C. Stat. Ann. § 22-1602; Idaho Code § 18-6603; Mass. Gen. Laws ch. 272, § 18; *id.* ch. 277 § 39; Minn. Stat. § 609.34; Utah Code Ann. § 76-7-104; Va. Code Ann. § 18.2-344; W. Va. Code § 61-8-3. Seven other States, although purporting in some cases to proscribe "fornication," prohibit a narrower category of sexual intercourse between unmarried persons, such as where it is "open and notorious," 720 Ill. Comp. Stat. 5/11-8; N.D. Cent. Code § 12.1-20-10, or where the parties cohabit or engage in habitual intercourse, Fla. Stat. Ann. § 798.02; Mich. Comp. Laws Ann. § 750.335; Miss. Code Ann. § 97-29-1; N.C. Gen. Stat. § 14-184; S.C. Code Ann. §§ 16-15-60, 16-15-80. *See generally* Richard A. Posner & Katharine B. Silbaugh, *A Guide to America's Sex Laws* 99-102 (1996) (summarizing criminal fornication and cohabitation laws; Arizona's and New Mexico's laws cited

private consensual intimacy. *See Bowers,* 478 U.S. at 198 n.2 (Powell, J., concurring) ("prior to the complaint against respondent Hardwick, there had been no reported decision involving prosecution for private homosexual sodomy under this statute for several decades"); *Morales,* 826 S.W.2d at 203 ("The State concedes that it rarely, if ever, enforces § 21.06"). But as this rare case of prosecution vividly demonstrates, the laws remaining on the books still sometimes strike like lightning, causing the grossest of governmental invasions of privacy through criminal enforcement. The Court should recognize the liberty interests that Petitioners and all Americans have in being free from such invasions.

**B. Texas Cannot Justify Section 21.06's Criminal Prohibition of Petitioners' and Other Adults' Private Sexual Intimacy.**

Recognition of the fundamental liberty interest at stake here does not end the inquiry, for due regard must also be given to any countervailing interests the State may have and the means used to achieve them. The Court has rejected rigid or mechanical tests in this area. Rather, it has given careful consideration to any weighty governmental interests that stand opposed to a fundamental liberty interest, and has looked closely at the degree and nature of the burden on the liberty interest, before ruling on the ultimate question of constitutionality. *See, e.g., Casey,* 505 U.S. at 849–51 (opinion of Court); *id.* at 871–79 (plurality opinion of O'Connor, Kennedy, and Souter, JJ.); *Troxel,* 530 U.S. at 73 (plurality opinion); *id.* at 101–02 (Kennedy, J., dissenting); *Cruzan,* 497 U.S. at 280–81.

Here, however, there is no countervailing State interest remotely comparable to those weighed by this Court in other recent cases involving fundamental liberties, such as the State's interests in protecting the potentiality of human life, *Casey,* 505 U.S. at 871–79 (opinion of O'Connor, Kennedy, and Souter, JJ.), in protecting the welfare of children, *see Troxel,* 530 U.S. at 73 (plurality opinion), or in protecting and preserving existing human life, *Cruzan,* 497 U.S. at 280–81. *See also Glucksberg,* 521 U.S. at 728–35 (reviewing numerous "important and legitimate" interests furthered by ban on assisted suicide).

In stark contrast to those cases, counsel for Texas has conceded that Section 21.06 furthers no compelling state interest. Pet. App. 76a. The sole justification urged throughout this litigation by the State is the majority's desire to espouse prevailing moral principles and values. *See, e.g.,* State's Br. in Supp. of Reh'g En Banc 16. The State claims no distinct harm or public interest other than a pure statement of moral condemnation. This Court, however, has never allowed fundamental freedoms to be circumscribed simply to enforce majority preferences or moral views concerning deeply personal matters. *See, e.g., Casey,* 505 U.S. at 850–51. Indeed, the discriminatory moral standard employed in the Homosexual Conduct Law is illegitimate under the Equal Protection Clause. *See infra* Point II.

In arriving at the constitutional balance, the Court must also consider that Texas is using "the full power of the criminal law." *Poe,* 367 U.S. at 548 (Harlan, J., dissenting). Section 21.06 empowered the police to inspect closely Lawrence and Garner's intimate behavior in Lawrence's home and haul them off to jail. Although prosecutions may be rare and wholly arbitrary, this case shows that the criminal penalties of such laws are on occasion enforced. Criminal sanctions always impose an extreme burden.

Lawrence and Garner were arrested and held in custody for more than a day—a humiliating invasion of personal dignity. "A custodial arrest exacts an obvious toll on an individual's liberty and privacy, even when the period of custody is relatively brief. . . . And once the period of custody is over, the fact of the arrest is a permanent part of the public record." *Atwater v. City of Lago Vista,* 532 U.S. 318, 364–65 (2001) (O'Connor, J., dissenting). Petitioners now each have a criminal conviction for private consensual sexuality. This "finding of illegality is a burden by itself. In addition to a declaration of illegality and whatever legal consequences flow from that, the finding also poses the threat of reputational harm that is different and additional to any burden posed by other penalties." *BE &K Constr. Co. v. NLRB*, 122 S. Ct. 2390, 2398 (2002).

Moreover, "[t]he Texas courts have held that the crime of homosexual conduct … is a crime involving moral turpitude." *In re Longstaff,* 538 F. Supp. 589, 592 (N.D. Tex. 1982) (citation omitted), *aff'd,* 716 F.2d 1439 (5th Cir. 1983). Petitioners' convictions therefore disqualify or restrict Lawrence and Garner from practicing

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therein were since repealed, *see* 2001 Ariz. Legis. Serv. ch. 382, § 1 (West); 2001 N.M. Laws ch. 32).

dozens of professions in Texas, from physician to athletic trainer to bus driver.[19] In four states, Lawrence and Garner are considered sex offenders and would have to register as such with law enforcement.[20] And while Section 21.06 does not authorize imprisonment as a penalty, prison terms can be imposed in the 12 other States with sodomy prohibitions, in some cases up to ten years.[21]

Even where there is no direct enforcement, Section 21.06 intrudes into the privacy of innumerable homes by regulating the actual physical details of how consenting adults must conduct their most intimate relationships. As discussed above, *see supra* Point I.A., such an invasion starkly offends the fundamental freedom of adulthood that is at stake. The Homosexual Conduct Law's absolute criminal ban is a harsh burden for all covered by the law.

The balance in this case thus heavily favors individual liberty. Texas's justification—amounting to a mere declaration that the State disapproves of same-sex couples engaging in the conduct at issue, in the absence of any asserted public need or harm—cannot be sufficient. *See Casey,* 505 U.S. at 850–53; *Roe,* 410 U.S. at 162; *Poe,* 367 U.S. at 548 (Harlan, J., dissenting). If it were, the power of the government to restrict liberty interests would be unlimited. The very meaning of fundamental liberty interests is that this kind of decision—affecting the most personal and central aspects of one's life—should be made by the individual, not the State.

While Texas may advocate a majority view about sexual morality, it may not excessively burden the liberty interests of those citizens who profoundly disagree. *See, e.g., Maher v. Roe*, 432 U.S. 464, 475–76 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity . . . . Constitutional concerns are greatest when the State attempts to impose its will by force of law"). Texas may not impose its particular view through the intrusive force of a criminal law regulating the very forms of physical intimacy that consenting adults may choose in the privacy of their own homes. By claiming the power to impose its own moral code where constitutional guarantees of personal liberty are at stake, Texas is reversing the proper relationship between the government and a free people.

The Court long ago made clear that the Constitution "excludes any general power of the state to standardize its children" because "[t]he child is not the mere creature of the state." *Pierce*, 268 U.S. at 535; *accord Troxel*, 530 U.S. at 68 (plurality opinion). Yet, what Texas claims here is the power to standardize its adult citizens and render them mere creatures of the State by compelling conformity in the most private and intimate personal matters. By vote of the majority, one particular view of how to conduct one's most private relationships is imposed on all. But "fundamental rights may not be submitted to vote; they depend on the outcome of no election." *Barnette,* 319 U.S. at 638. The precepts advocated by Texas, aimed at "submerg[ing] the individual," are "wholly different from those upon which our institutions rest." *Meyer,* 262 U.S. at 402. Section 21.06 unjustifiably infringes the personal liberty and privacy guaranteed by the Constitution and should be struck down.

**C. *Bowers* Should Not Block Recognition and Enforcement of These Fundamental Interests.**

Vindication of Petitioners' constitutionally protected liberty interests should not be blocked by continued adherence to *Bowers*. In light of the fundamental interests at stake and the consistent and profound legal, political, and social developments since *Bowers*, principles of *stare decisis* do not bar the Court's reconsideration of that decision.

*Stare decisis* is a "principle of policy," not an "inexorable command." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (quotation marks omitted); *see also, e.g., Agostini v. Felton*, 521 U.S. 203, 235–36 (1997) (same). That is "particularly

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[19] Tex. Occ. Code § 164.051(a)(2)(B) (physician); *id.* § 301.409(a)(1)(B) (registered nurse); *id*. § 401.453(a) (speech-language pathologist); *id*. § 451.251(a)(1) (athletic trainer); *id.* § 1053.252(2) (interior designer); *id*. § 2001.102 (bingo licensee); Tex. Transp. Code § 512.022(f) (school bus driver); Tex. Alco. Bev. Code § 11.46(a)(3) (liquor sales).

[20] *See* Idaho Code § 18-8304; La. Rev. Stat. Ann. § 15:541; Miss. Code Ann. § 45-33-23; S.C. Code Ann. § 23-3-430.

[21] *See* Ala. Code §§ 13A-6-60(2), 13A-5-7(a)(1) (one year); Fla. Stat. Ann. §§ 800.02, 775.082(4)(b) (60 days); Idaho Code § 18-6605 (five years); Kan. Stat. Ann. §§ 21-3505, 21-4502(1)(b) (six months); La. Rev. Stat. Ann. 14:89 (five years); Miss. Code Ann. 97-29-59 (ten years); Mo. Rev. Stat. §§ 566.090, 558.011 (one year); N.C. Gen. Stat. §§ 14-177, 15A-1340.17 (one year); Okla. Stat. tit. 21, § 886, *amended by* 2002 Okla. Sess. Law Serv. ch. 460, § 8 (West) (ten years); S.C. Code Ann. § 16-15-120 (five years); Utah Code Ann. §§ 76-5-403(1), 76-3-204(2) (6 months); Va. Code Ann. §§ 18.2-361, 18.2-10 (five years).

true in constitutional cases, because in such cases correction through legislative action is practically impossible." *Seminole Tribe*, 517 U.S. at 63 (quotation marks omitted). For these reasons, the Court has not hesitated to overrule earlier constitutional decisions that have been recognized as erroneous. *See, e.g., Payne v. Tennessee,* 501 U.S. 808, 828 & n.1 (1991) (surveying cases); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 J. S. Ct. Hist. 13 (same).

Where, as here, a prior decision has erroneously *denied* a fundamental constitutional right of citizens over and against the State and no countervailing rights of other individuals are at stake, there is a compelling need to correct the error. *See, e.g., Barnette*, 319 U.S. at 630–42 (overruling *Minersville Sch. Dist. v. Gobitis,* 310 U.S. 586 [1940]); *see also, e.g., Brown v. Board of Educ.,* 347 U.S. 483, 494–95 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 [1896]). That is especially true here, because laws of the kind upheld by *Bowers*—whether facially evenhanded or discriminatory—are used to legitimize widespread discrimination against gay and lesbian Americans. *See infra* Point II.B.1. Indeed, the holding of *Bowers* itself has been cited as justifying state-sponsored discrimination. *See, e.g., Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) ("If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open … to conclude that state sponsored discrimination against the class is invidious"); *Romer*, 517 U.S. at 641 (Scalia, J., dissenting) (same).

In this respect *Bowers* is fundamentally different from decisions like *Roe* or *Miranda v. Arizona,* 384 U.S. 436 (1966), which recognized individual rights that then became incorporated into the very fabric of our society. *See Casey*, 505 U.S. at 854; *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Indeed, there are no considerations like those identified in *Casey* or other *stare decisis* cases that might favor continued adherence to *Bowers.*

Unlike the right recognized in *Roe* and its progeny, there is no pattern of individuals who "have relied reasonably on the [*Bowers*] rule's continued application" to their advantage, Casey, 505 U.S. at 855; *see also, e.g., Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 233 (1995). Individuals have only been harmed by the *Bowers* decision. Nor has *Bowers* become "part of our national culture," *Dickerson,* 530 U.S. at 443. Just the opposite is true. Developments in the law and in the facts—or in society's perception of the facts, *see Casey,* 505 U.S. at 863—have steadily eroded any support for *Bowers.* Since *Bowers,* the Nation has continued to reject the extreme intrusion into the realm of personal privacy approved in that case, so that now three-fourths of the States have repealed or invalidated such laws—including the very law upheld by *Bowers. See supra* Point I.A.3.

Also since *Bowers,* the Nation has steadily moved toward rejecting second-class-citizen status for gay and lesbian Americans. In *Romer*, this Court held that venerable equal protection principles protect gay and lesbian Americans against invidious discrimination. Thirteen States and the District of Columbia, plus countless municipalities—including at least four in Texas—have now added sexual orientation to laws barring discrimination in housing, employment, public accommodations, and other areas.[22] More than half the States now have enhanced penalties for hate crimes motivated by the victim's sexual orientation.[23] And the reality of gay and lesbian couples and families with children has been increasingly recognized by the law and by society at large. *See supra* at 17–19. This is thus a case in which the Court must respond to basic facts and constitutional principles that the country has "come to understand already, but which the Court of an earlier day … had not been able to perceive." *Casey*, 505 U.S. at 863; *see also, e.g., Vasquez v. Hillery,* 474 U.S. 254, 266 (1986) (*stare decisis* must give way when necessary "to bring [the Court's] opinions into agreement with experience and with facts newly ascertained") (quotation marks omitted).

*Bowers* is an isolated decision that, like the cases overturned in *Payne*, was "decided by the

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[22] 1999 Cal. Legis. Serv. ch. 592 (West); 1991 Conn. Legis. Serv. 91-58 (West); Human Rights Act of 1977, D.C. Laws 2-38; 1991 Haw. Sess. Laws Act 2; 2001 Md. Laws ch. 340; 1989 Mass. Legis. Serv. ch. 516 (West); 1993 Minn. Sess. Law Serv. ch. 22 (West); 1999 Nev. Stat. ch. 410; 1997 N.H. Laws ch. 108; 1991 N.J. Sess. Law Serv. ch. 519 (West); 2002 N.Y. Laws ch. 2; 1995 R.I. Pub. Laws ch. 95-32; 1992 Vt. Acts & Resolves 135; 1981 Wis. Laws ch. 112; Austin, Tex., City Code, vol. I, tit. VII; Dallas, Tex., Mun. Ordinance 24927 (May 8, 2002); Fort Worth, Tex., Code of Ordinances ch. 17, art. III; Houston, Tex., City Code ch. 2, tit. XIV.

[23] *See* Nat'l Gay and Lesbian Task Force, *Hate Crime Laws in the U.S., available at* http://www.ngltf.org/downloads/hatecrimeslawsmap.pdf (accessed Jan. 14, 2003).

narrowest of margins, over spirited dissents challenging [its] basic underpinnings." *Payne*, 501 U.S. at 828–29. Far from being "an essential feature of our legal tradition," *Mitchell v. United States*, 526 U.S. 314, 330 (1999), *Bowers* stands today as "a doctrinal anachronism discounted by society," *Casey,* 505 U.S. at 855. Many of the bedrock principles of contemporary constitutional law were announced in cases overruling contrary precedent—whether after only a few intervening years, or following decades of legal, political, and social development. *See, e.g., Barnette,* 319 U.S. at 630; Brown, 347 U.S. at 494–95; *Gitlow v. New York,* 268 U.S. 652, 666 (1925); *Malloy v. Hogan*, 378 U.S. 1, 4–6 (1964). As in those cases, the Court "cannot turn the clock back." *Brown,* 347 U.S. at 492–93. It accordingly should overturn *Bowers* and protect the fundamental liberty interests of Petitioners.

**II. Section 21.06 Discriminates Without Any Legitimate and Rational Basis, Contrary to the Guarantee of Equal Protection.**

Texas's Homosexual Conduct Law violates the Fourteenth Amendment for the additional reason that it "singl[es] out a certain class of citizens for disfavored legal status," *Romer*, 517 U.S. at 633, in violation of the most basic requirements of the Equal Protection Clause. The statute directly conflicts with the Constitution's "commitment to the law's neutrality." *Id*. at 623. It fails equal protection scrutiny even under the deferential "rational basis" standard.[24] And this discriminatory classification is "embodied in a criminal statute … where the power of the State weighs most heavily," a context in which the Court "must be especially sensitive to the policies of the Equal Protection Clause." *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

By its terms, Section 21.06 treats the *same* consensual sexual behavior differently depending on *who* the participants are. The behaviors labeled "deviate sexual intercourse" by Texas are widely practiced by heterosexual as well as gay adults.[25] But the statute makes this common conduct illegal only for same-sex couples and not for different-sex ones. Tex. Pen. Code § 21.06. And the State offers only a tautological, illegitimate, and irrational purported justification for such discrimination.

The group targeted and harmed by the Homosexual Conduct Law is, of course, gay people. Gay people have a same-sex sexual orientation and heterosexuals have a different-sex one. *See, e.g.,* John C. Gonsiorek & James D. Weinrich, *The Definition and Scope of Sexual Orientation, in Homosexuality: Research Implications for Public Policy* 1 (J. Gonsiorek & J. Weinrich eds., 1991) ("sexual orientation is erotic and/or affectional disposition to the same and/or opposite sex"); *cf. Romer*, 517 U.S. at 624, 626–31 (in civil rights laws, "sexual orientation" is defined by an individual's "choice of sexual partners" or "heterosexuality, homosexuality or bisexuality"). The Homosexual Conduct Law overtly uses that defining characteristic to set up its disparate treatment. Section 21.06 "prohibit[s] lesbians and gay men from engaging in the same conduct in which heterosexuals may legally engage." *Morales,* 826 S.W.2d at 204; *see also Wasson*, 842 S.W.2d at 502 (where same-sex but not different-sex sodomy is criminalized, "[s]exual preference, and not the act committed, determines criminality, and is being punished").

A straightforward application of the rational basis test shows that this law and Texas's attempted justification for it cannot satisfy the requirement that every classification must at least "bear a rational relationship to an independent and legitimate legislative end." *Romer*, 517 U.S. at 633. When broader realities and history are considered, as this Court appropriately does in any equal protection case, the constitutional violation is only magnified. The Homosexual Conduct Law and its badge of criminality function to make gay people unequal in myriad spheres of everyday life and continue an ignominious history of discrimination based on sexual orientation. Ultimately, the equal protection and liberty concerns in this case reinforce one

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[24] Heightened equal protection scrutiny is appropriate for laws like Section 21.06 that use a sexual-orientation-based classification. It is also appropriate where, as here, the law employs a gender-based classification to discriminate against gay people. The classification in this law, however, does not even have a legitimate and rational basis.

Of course, if the Court agrees with Petitioners that the challenged law invades a fundamental liberty, analysis of the law's discriminatory classification would be as stringent as the analysis outlined in Point I. *See, e.g., Dunn v. Blumstein,* 405 U.S. 330, 337 (1972). In this Point II, Petitioners urge a distinct constitutional violation that does not depend on the Court finding that a fundamental liberty is at stake.

[25] *See, e.g.,* Edward O. Laumann *et al., The Social Organization of Sexuality* 98–99 (1994) (comprehensive study by University of Chicago researchers of sexual practices of American adults, finding that approximately 79% of all men and 73% of all women had engaged in oral sex, and 26% of all men and 20% of all women had engaged in anal sex).

another, and further underscore that this unequal law and its broad harms are intolerable in this country.

**A. Section 21.06's Classification Is Not Rationally Related to Any Legitimate Purpose and Serves Only the Illegitimate Purpose of Disadvantaging One Group.**

"[C]onventional and venerable" principles require that legislative discrimination must, at a minimum, "bear a rational relationship to an independent and legitimate legislative end." *Romer*, 517 U.S. at 633, 635; *see also, e.g., Cleburne*, 473 U.S. at 446; *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981). This test is deferential, but meaningful.

> [E]ven in the ordinary equal protection case … , [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sort of laws it can pass; and it marks the outer limits of [the judiciary's] own authority.

*Romer*, 517 U.S. at 632.

Under the Equal Protection Clause, the *classification*—the different treatment of different people—is what must be justified. *See Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366–67 (2001) (rational basis review searches for "distinguishing characteristics" between the two groups that are "relevant to interests the State has the authority to implement") (quotation marks omitted); *Rinaldi v. Yeager*, 384 U.S. 305, 308–09 (1966) (equal protection "imposes a requirement of some rationality in the nature of the class singled out"); *McLaughlin*, 379 U.S. at 191 ("courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose—… whether there is an arbitrary or invidious discrimination between those classes covered … and those excluded"). The classification must be rationally connected to an independent and permissible government objective to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.

Section 21.06 fails that essential test. As the Supreme Court of Kentucky observed in striking down that State's discriminatory consensual sodomy law on state equal protection grounds:

> In the final analysis we can attribute no legislative purpose to this statute except to single out homosexuals for different treatment for indulging their sexual preference by engaging in the same activity heterosexuals are now at liberty to perform . . . . The question is whether a society that no longer criminalizes adultery, fornication, or deviate sexual intercourse between heterosexuals, has a rational basis to single out homosexual acts for different treatment.

*Wasson*, 842 S.W.2d at 501. That court found no "rational basis for different treatment," and emphasized that "[w]e need not sympathize, agree with, or even understand the sexual preference of homosexuals in order to recognize their right to equal treatment before the bar of criminal justice." *Id.*; *accord Jegley*, 80 S.W.3d at 353 ("[w]e echo Kentucky in concluding that 'we can attribute no legislative purpose to this statute except to single out homosexuals'"). That conclusion applies with equal force to the identical classification employed by Texas's law.

When Texas enacted Section 21.06 in the early 1970s, there was no "practical necessity" to draw a classification among its residents with regard to the subject matter of consensual, adult oral and anal sex. *Cf. Romer*, 517 U.S. at 631. For decades, the State had included an evenhanded prohibition on those acts within its criminal code. When the legislature determined that its old law was unduly intrusive, it had the obvious choice of repealing it for *all* its citizens—as three-fourths of the States have done. *See supra* at 23 & note 17. Instead, it decided to single out same-sex couples for intrusive regulation and condemnation, and to free all heterosexual couples to make their own choices about particular forms of intimacy.

Throughout this litigation, the only justification that Texas has offered for this discriminatory classification is the moral judgment of the majority of its electorate. The State asserts that its "electorate evidently continues to believe" that the discriminatory line drawn by the Homosexual Conduct Law is desirable because it expresses the majority's moral views. Pet. Opp. 18.

The Homosexual Conduct Law's classification fails rational basis analysis, for several reasons. *First*, the State's position amounts to no "independent … legislative end" at all. *Cf. Romer,* 517 U.S. at 633. This "justification" merely restates that Texas believes in and wants to have this criminal law. The Equal Protection

Clause requires that the State's classification serve a distinct legislative end—an objective or purpose—independent of the classification itself. There must be a "link between classification and objective," *id.* at 632, or "some relation between the classification and the purpose it serve[s]," *id.* at 633. The test would be meaningless—a mere rubberstamp for discrimination—unless the purpose is independent of the classification. But the "justification" offered by Texas is circular and not an independent objective served. In the words of the dissenters below, "[t]he contention that the same conduct is moral for some but not for others merely repeats, rather than legitimizes, the Legislature's unconstitutional edict." Pet. App. 44a.

The State's approach gives *carte blanche* to presumed majority sentiment, and leaves those targeted by a discriminatory law without recourse. If majority moral or value judgments were enough to answer an equal protection challenge, the amendment struck down in *Romer* would have survived, because the votes of a majority of Coloradans clearly signaled that including gay people within civil rights protections was antithetical to their values. Instead, this Court recognized that Amendment 2—like Section 21.06 here—was a "classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." 517 U.S. at 635. Government "may not avoid the strictures of that Clause by deferring to the wishes or objections … of the body politic." *Cleburne*, 473 U.S. at 448.

*Second*, even if Texas's objective could somehow be characterized as independent of the classification, mere negative views about the disfavored group—"moral" or otherwise—are not a legitimate basis for legal discrimination. *Cleburne*, 473 U.S. at 448 ("mere negative attitudes … unsubstantiated by factors which are properly cognizable [by government] are not permissible bases" for discriminatory legal rules). This Court has many times repeated the core principle of rejecting bias, however characterized, in law: Legal distinctions may not give effect to the majority's desire to condemn an unpopular group, *see Moreno*, 413 U.S. at 534, the negative reactions of neighbors, *see Cleburne*, 473 U.S. at 448, the fears of people who are different, *see id.,* a reaction of discomfort toward a minority, *see O'Connor v. Donaldson,* 422 U.S. 563, 575 (1975); *Cleburne*, 473 U.S. at 448–49, private prejudice, *Palmore v. Sidoti,* 466 U.S. 429, 433 (1984), or any other manifestation of unfounded animosity toward one group, *Romer,* 517 U.S. at 633–35. History unquestionably teaches that the moral views of a given time, just like fears, dislikes, and blatant prejudices, often reflect prevailing negative attitudes about different groups of people in society. *Cf. Whitney v. California,* 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Men feared witches and burnt women"). Indeed, negative attitudes toward a group can always be recast in terms of a discriminatory moral code. Using a moral lens to describe negative attitudes about a group that are not tied to any distinct, objective and permissible factors cannot cleanse those bare negative attitudes of their illegitimacy in government decisionmaking.

Texas's approach of dictating that same-sex couples are "more 'immoral and unacceptable,'" Pet. Opp. 18, than heterosexual couples under the very same circumstances—if they choose any of the behaviors defined as "deviate sexual intercourse"—must be rejected as impermissible. *Neutral, evenhanded* laws that truly restrict all persons in the same way could, if there were no fundamental interests at stake, be justified by a moral position. Here, however, Texas impermissibly attempts to impose a *discriminatory* moral code.[26] The State's law and its proffered justification embody a bald preference for those with the most common sexual orientation and dislike of a smaller group who are different. Texas simply wants to judge those with a same-sex sexual orientation more harshly for the same behavior.[27]

The Constitution and this Court's precedents forbid that. In *Palmore*, a mother lost custody of her child because her interracial "'life-style'" was

[26] *See* Pet. App. 70a–71a (Anderson, J., dissenting) ("[E]qual protection doctrine does not prevent the majority from enacting laws based on its substantive value choices. Equal protection simply requires that the majority apply its values evenhandedly. . . . The constitutional requirement of evenhandedness advances the political legitimacy of majority rule by safeguarding minorities from majoritarian oppression").

[27] This conclusion is reinforced by the fact that Texas's 1973 enactment discriminates against gay people whereas traditional morality did not. "[T]he practice of deviate sexual intercourse violates traditional morality. But so does the same act between heterosexuals, which activity is decriminalized. . . . The issue here is … whether [sexual activity traditionally viewed as immoral] can be punished solely on the basis of sexual preference." *Jegley,* 80 S.W.3d at 352 (quotation marks omitted).

"'unacceptable … to society.'" 466 U.S. at 431 (quoting investigator's report). But this Court emphatically held that such negative views have no place in the law. Id. at 433 ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"). Likewise, unequal treatment may not be based on archaic and unfounded negative attitudes toward a group, whether grounded in morality, religious conviction, or "nature." In *Mississippi University for Women v. Hogan,* 458 U.S. 718 (1982), for example, the Court stressed the need to set aside archaic ideas about gender, such as that women are "innately inferior" or that unique "'moral and social problems'" would arise if women tended bar or otherwise enjoyed equal opportunities. *Id.* at 725 & n.10.

Similarly, negative attitudes toward those with a particular personal characteristic—even where advanced with the toned down patina of morality—are also not a legitimate justification for discrimination under rational basis scrutiny. In *Romer,* the Court refused to endorse the dissent's position that Amendment 2's anti-gay classification could be sustained as an attempt "to preserve traditional sexual mores," *Romer,* 517 U.S. at 636 (Scalia, J., dissenting). In *Moreno,* faced with a regulation that targeted the morally disfavored group of "hippies," the Court emphasized that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare … desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Moreno,* 413 U.S. at 534. Instead, different treatment must be supported by "reference to [some independent] considerations in the public interest." *Id.* (alteration in original). Whether termed a moral judgment, fear, discomfort, or bias, "mere negative attitudes" about one subset of the diverse American population cannot justify distinctions in legal treatment. *See Cleburne,* 473 U.S. at 448.

*Third,* there is no other legitimate justification that can save this law. The distinction drawn by the Homosexual Conduct Law does not rationally further any permissible goal of the State. There are no valid concerns of the government here that correlate with sexual orientation, which is a deeply rooted personal characteristic that we all have. Variation among heterosexuals, homosexuals, and bisexuals has no "relevan[cy] to interests the State has the authority to implement," *Garrett,* 531 U.S. at 366, or to "factors which are properly cognizable," *Cleburne,* 473 U.S. at 448, in writing the criminal law. Thus, Section 21.06's linedrawing does not turn on or respond to any differences in maturity or age, in intent, or in the specifics of the actors' relationship, other than its same-sex or different-sex nature. It does not incorporate the use of force, a public location, or a commercial context in its elements, to address those types of important concerns. Indeed, Texas has other laws that criminalize sexual conduct that is non-consensual, or public, or commercial, or with a minor. *See supra* at 6. Likewise, the law's discriminatory regulation of "deviate sexual intercourse" is unrelated to any interest in reproduction, for oral and anal sex are obviously not methods of reproduction for any couple.

Where government itself offers a reason that is illegitimate, as Texas has done here, or other factors indicate that the law rests on negative attitudes, the Court has carefully assessed any additional, purportedly rational and legitimate basis for challenged differential treatment. *See Cleburne,* 473 U.S. at 449 (careful assessment, and ultimate rejection, of other proffered reasons, where negative attitudes were clearly one basis for legal discrimination); *Moreno,* 413 U.S. at 535–38 (same). In such rational basis cases, the Court has not tried to supply new, "conceivable" reasons to support the classification. *See also Romer,* 517 U.S. at 635. It is, after all, only "*absent some reason to infer antipathy*" that the "Constitution presumes that … even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted." *Vance v. Bradley* 440 U.S. 93, 97 (1979) (emphasis added). Here, Texas offers nothing more than the majority's negative moral judgment to support its discrimination, and that should end the matter with a ruling of unconstitutionality.

This 1970s classification is "divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests." *Romer*, 517 U.S. at 635. It is solely an effort to mark a difference in status, to send a message in the criminal law that one group is condemned by the majority. This impermissible and irrational double standard must be removed from Texas's criminal code.

**B. The Broader Realities Reinforce This Law's Affront to Core Principles of Equal Protection.**

Additional considerations confirm the violation of equal protection here. First, the Homosexual Conduct Law does not just discriminate against gay and lesbian Texans in their private intimate relations, but brands gay persons as second-class citizens and legitimizes discrimination against them in all aspects of life. Second, the discrimination worked by this law reflects and reinforces a century-long history of discrimination against gay Americans. The real-world context and history of discrimination further expose the law's illegitimacy. *See Romer*, 517 U.S. at 623–31 (considering in detail the functioning and historical background of challenged enactment); *Moreno,* 413 U.S. at 537 (considering "practical effect" of classification); *Eisenstadt,* 405 U.S. at 447–52 (considering social and legal backdrop in finding equal protection violation under rational basis standard). Where a law "circumscribe[s] a class of persons characterized by some unpopular trait or affiliation," there is a "special likelihood of bias on the part of the ruling majority." *N.Y. Trans. Auth. v. Beazer,* 440 U.S. 568, 593 (1979).

**1. The Homosexual Conduct Law Brands Gay Persons as Second-Class Citizens and Licenses Wide-Ranging Discrimination Against Them.**

On the surface, the Homosexual Conduct Law may appear to discriminate against gay men and lesbians in only one sphere of life—albeit a vitally important one, *see supra* Point I—by criminalizing the sexual intimacy of same-sex adult couples but not the very same conduct engaged in by different-sex couples. In reality, the scope of the discrimination is much broader. Today, sodomy laws—even facially even-handed sodomy laws—are widely understood to brand gay citizens as criminals by virtue of their sexual orientation, and are thus used to legitimate across-the-board discrimination. Texas's enactment of a facially discriminatory law formalizes that pejorative classification of lesbians and gay men as second-class citizens.

Historically, the vast majority of consensual sodomy laws have not differentiated between same-sex and different-sex couples, and nine of the 13 sodomy laws still on the books today retain that traditional characteristic of being facially evenhanded. *See supra* at 6 & note 5, 21–22. In recent eventimes, however, facially non-discriminatory laws have been understood as targeting gay men and lesbians rather than heterosexual couples who engage in identical forms of private sexual intimacy covered by the laws. This contemporary understanding of these laws was reflected in—and reinforced by—the Court's reasoning in *Bowers,* which read Georgia's facially *neutral* law as reflecting "the presumed belief of a majority of the electorate in Georgia that *homosexual* sodomy is immoral and unacceptable." 478 U.S. at 196 (emphasis added). *See generally* Nan D. Hunter, *Life After Hardwick,* 27 Harv. C.R.-C.L. L. Rev. 531, 542 (1992).

Thus, in recent decades, the existence of facially nondiscriminatory sodomy laws—indeed, the mere power of state legislatures to pass such laws, whether or not that power is exercised—has been used to justify myriad forms of discrimination against gay and lesbian Americans as presumptive criminals. For example, sodomy laws are often invoked to deny or restrict gay parents' custody of or visitation with their own children,[28] to deny public employment to gay people,[29] and to block protection of gay citizens under hate-crime legislation.[30]

[28] *See, e.g., Ex Parte D.W.W.,* 717 So. 2d 793, 796 (Ala. 1998) (affirming imposition of severe visitation restrictions on lesbian mother, reasoning, "the conduct inherent in lesbianism is illegal in Alabama"); *Bottoms v. Bottoms,* 457 S.E.2d 102, 108 (Va. 1995) (removing child from lesbian mother and giving custody to child's grandmother, concluding, "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth, Code § 18.2-361; thus, that conduct is another important consideration in determining custody"); *see also Ex parte H.H.,* 830 So. 2d 21, 35 (Ala. 2002) (Moore, C.J., specially concurring) ("disfavoring practicing homosexuals in custody matters promotes the general welfare of the people of our State in accordance with our law").

[29] *See, e.g., Shahar v. Bowers,* 114 F.3d 1097, 1105 & n.17 (11th Cir. 1997); *see also Walls v. City of Petersburg,* 895 F.2d 188, 193 (4th Cir. 1990) (upholding public employment application question about homosexual relations "because the *Bowers* decision is controlling").

[30] An amendment to include "sexual orientation" in the Utah hate crime bill was defeated after a representative referred to Utah's sodomy law, stating that the "effect of granting special protection under [the hate crime act] to homosexuals would be contradictory under Utah law." *See* Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men,* 1994 Utah L. Rev. 209, 222 (quotation marks omitted). Similarly, a hate crime bill in North Carolina covering sexual orientation was rejected in 2000 after the House heard testimony about the illegality of sodomy. People for the Am. Way Found., *Hostile Climate: Report on Anti-Gay Activity 257 (2000).*

Indeed, the dissent in *Romer* argued that the Court's holding in *Bowers* alone was sufficient justification for the sweeping discrimination against gay citizens worked by Colorado Amendment 2, *Romer,* 517 U.S. at 640–43 (Scalia, J., dissenting)—even though Colorado's former sodomy law had applied to all and had been repealed years before, *see* 1971 Colo. Sess. Laws ch. 121.

Texas has gone further, abandoning any pretense of nondiscriminatory legislation in this area by enacting a law that facially discriminates against gay and lesbian couples. By introducing that express classification into the criminal law, Texas has placed its imprimatur on discrimination based on sexual orientation. That has had far-reaching implications for gay citizens in virtually every area of their lives. As the State stipulated in an earlier challenge to Section 21.06, the law "brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law," including "in the context of employment, family issues, and housing." *Morales,* 826 S.W.2d at 202–03; *see also Jegley,* 80 S.W.3d at 343 (under same-sex-only sodomy laws, gay people "suffer the brand of criminal impressed upon them by a[n] … unconstitutional law").

The Homosexual Conduct Law and similar statutes in other States have been routinely invoked to limit the custody or visitation that fit, gay parents would otherwise have with their own children.[31] Likewise, this law is cited as a basis for preventing lesbians and gay men from serving as foster parents, simply because of their presumed "criminal status" and wholly apart from any inquiry into the best interests of children awaiting a home. *See, e.g.,* Polly Hughes, *Bill Would Ban Gay Texans From Adopting Children,* Hous. Chron., Dec. 11, 1998, at A38 (reporting on adoption and foster-care policies). Section 21.06 and other discriminatory consensual sodomy offenses have been used to interfere with equal employment opportunities for lesbians and gay men. *England,* 846 S.W.2d at 958; *Childers v. Dallas Police Dep't,* 513 F. Supp. 134, 144, 147–48 (N.D. Tex. 1981) (upholding denial of employment to gay man), *aff'd,* 669 F.2d 732 (5th Cir. 1982); *Baker,* 553 F. Supp. at 1130, 1147. These laws are also used to block the adoption of civil rights ordinances that would prohibit sexual orientation discrimination in employment and other core aspects of civil society.[32] The Homosexual Conduct Law has even been cited in arguments for imposing the death penalty on a gay defendant, *Burdine v. Johnson,* 66 F. Supp. 2d 854, 857 (S.D. Tex. 1999), *aff'd,* 262 F.3d 336 (5th Cir. 2001) (*en banc*), *cert. denied,* 122 S. Ct. 2347 (2002). In these many ways and others, the Homosexual Conduct Law is functioning as a legal reference point that endorses gay inequality.

Thus, even in the absence of actual arrest and prosecution, the Homosexual Conduct Law labels gay men and lesbians as criminals and legitimates discrimination against them on that basis.[33] Classification of gay Texans as second-class citizens is indeed the primary function of this law in society, as evidenced by the rarity of direct criminal enforcement. Texas makes no pretense of vigorously enforcing this law or of actually preventing any private, consensual adult sexual behavior. *Morales*, 826 S.W.2d at 203 ("The State concedes that it rarely, if ever, enforces § 21.06"). Only rare couples who are caught through some extremely unlucky series of events, like Lawrence and Garner in this case, ever directly suffer criminal prosecution and punishment for their discreet intimacy. *Model Penal Code* § 213.2 cmt. 2 ("To the extent … that laws against deviate sexual behavior are enforced

[31] *See, e.g., Jegley,* 80 S.W.3d at 343 (observing that Arkansas sodomy statute had been used in harmful ways "outside the criminal context," including in prior case denying lesbian custody of her children); *see also* Jo Ann Zuniga, *Gay Parents Are Fighting Back Against Blackmail, Court Bias,* Hous. Chron., June 27, 1994, at A11 (reporting that common tactic of vilifying gay parents in custody battle is "give[n] … teeth [by] Section 21.06"); *J.P. v. P.W.,* 772 S.W.2d 786, 792 (Mo. Ct. App. 1989) (restricting gay father's visitation rights, in part because a "statute of this state declares that deviate sexual intercourse with another person of the same sex is illegal. § 566.090.1"). *See generally* Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation,* 79 Tex. L. Rev. 813 (2001).

[32] *See, e.g.*, Dianna Hunt, *Plan to Ban Anti-Gay Bias in Fort Worth Dies,* Dallas Morning News, Jan. 20, 1999, at 32A (local anti-discrimination measure in Texas abandoned after several members of town council expressed desire to wait until status of state's sodomy law was resolved); see also Arthur S. Leonard, *Legislative Notes,* 1998 Lesbian/Gay L. Notes 101, 115 (Kansas sodomy law cited in support of halting Topeka Human Rights Commission from investigating anti-gay discrimination).

[33] In Texas, calling someone a "homosexual" or using epithets that mean the same is slanderous *per se* because of the implication that he or she has violated the Homosexual Conduct Law. *Thomas v. Bynum,* No. 04-02-00036-CV, 2002 WL 31829509, at *2 (Tex. App. Dec. 18, 2002); *Head v. Newton,* 596 S.W.2d 209, 210 (Tex. App. 1980).

against private conduct between consenting adults, the result is episodic and capricious selection of an infinitesimal fraction of offenders for severe punishment"). The branding function of the Homosexual Conduct Law and the civil harms that follow from it forcefully underscore that the law violates equal protection. It "has the peculiar property of imposing a broad and undifferentiated disability on a single named group," *Romer,* 517 U.S. at 632, without rational and legitimate justification.

**2. The Homosexual Conduct Law Reflects and Helps Fuel a Continuing History of Discrimination Against Gay Americans.**

The Homosexual Conduct Law is only one manifestation of a history of irrational anti-gay discrimination.[34] Although our Nation has no legal tradition making the criminality of private sexuality turn on whether a couple is homosexual or heterosexual, *see supra* at 21–22, the laws of this Nation have reflected and played a role in virulent anti-gay discrimination over the last century. In enforcing the Equal Protection Clause today, this history informs the Court's assessment of whether a legal classification that discriminates against those with a same-sex sexual orientation rests on irrational bias. *See Vance*, 440 U.S. at 97 (Court is attuned to "some reason to infer antipathy"); *see also, e.g., Romer*, 517 U.S. at 624–31.

Anti-gay discrimination was long justified by the false view that gay individuals were "sick." Until 1973, the year Section 21.06 was passed, homosexuality was incorrectly classified as a mental disease. *See supra* note 10; see also *Boutilier v. INS*, 387 U.S. 118 (1967) (holding that "psychopathic personality" exclusion in immigration law applied to homosexual persons). Deeming them to be "sex deviants," States involuntarily committed gay men and lesbians to mental institutions under extremely inhumane conditions. *See, e.g.,* James A. Garland, *The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime,* 10 L. & Sexuality 1, 75–76 (2001). "Treatments" to "cure" homosexuality were often sadistically cruel. *See, e.g.,* Jonathan N. Katz, *Gay/Lesbian Almanac* 156 (1983) (describing "treatment" involving "repeated searing with a hot iron or chemical of [the] 'pervert' patient's loins"); Jonathan N. Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 129–208 (rev. ed. 1992). Even today, discredited "therapies" to "change" the very sexual orientation of gay adults continue this destructive pathologizing of gay citizens.[35]

The Homosexual Conduct Law is a remnant of a historical pattern of repressive law enforcement measures that have reinforced an outcast status for gay citizens. In the past, state laws authorized the arrest of individuals simply for "appearing" to be gay or lesbian, and the closure of businesses simply for serving gay patrons. *See, e.g., One Eleven Wines & Liquors, Inc. v. Division of Alcohol Beverage Control,* 235 A.2d 12, 14 (N.J. 1967) (reviewing and rejecting agency policy of suspending businesses' licenses simply for "permitting the congregation of apparent homosexuals"). McCarthy-era and later witch hunts led to the firing from federal and federal-contractor employment of thousands of persons suspected of being homosexuals. Katz, *Gay American History,* at 91–109; *Norton v. Macy,* 417 F.2d 1161, 1162 (D.C. Cir. 1969).[36]

Official repression has often been directed at preventing gay Americans from organizing politically to advocate for and protect their rights. The earliest gay political organization in America, formed in Chicago in the mid-1920s, was silenced by police raids, arrests, and firings from employment. *See, e.g,* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law,* 150 U. Pa. L. Rev. 419, 438 & n.77 (2001). Similar groups that emerged after World War II also suffered severe harassment. *See, e.g., id.* at 443–48. Educational publications about homosexuality were censored as "obscene." *See, e.g., One, Inc. v. Olesen,* 241 F.2d 772 (9th Cir. 1957), *rev'd,* 355 U.S. 371 (1958) (per curiam).

Since the late 1960s and early 1970s, gay Americans have made substantial strides toward securing equal rights. *See supra* at 17–19, 30–31.

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[34] *See generally* Jonathan N. Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* (rev. ed. 1992); John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* (2d ed. 1997); *Hidden From History: Reclaiming the Gay and Lesbian Past* (Martin Duberman, Martha Vicinus & George Chauncey, Jr. eds., 1990); *Lesbians, Gay Men and the Law* (William B. Rubenstein ed., 1993).

[35] *See, e.g.,* American Psychiatric Ass'n, *Position Statement: Psychiatric Treatment and Sexual Orientation* (1998), *available at* http://www.psych.org/archives/980020.pdf.

[36] Private institutions like Harvard University also mounted secret but systematic efforts to root out gay people. Amit R. Paley, *The Secret Court of 1920,* Harv. Crimson, Nov. 21, 2002, *available at* http://www.thecrimson.com/article.aspx?ref=255428 (accessed Jan. 14, 2003).

But there is still substantial inequality and backlash. In passing a statute last year that protects against sexual-orientation discrimination, the New York state legislature found that anti-gay prejudice "has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering." N.Y. Sexual Orientation Non-Discrimination Act, 2002 N.Y. Laws ch. 2. Cruel anti-gay harassment in schools remains common. *See, e.g., Nabozny v. Podlesny,* 92 F.3d 446 (7th Cir. 1996). And violence motivated by irrational hatred of gay people can result in crimes of unimaginable brutality, as occurred with the murder of college student Matthew Shepard. *See, e.g., A Vicious Attack on Gay Student, Beaten, Burned and Left for Dead,* N.Y. Newsday, Oct. 10, 1998, at A4. Such killings, together with lesser forms of violence, intimidation, and discrimination, remain extremely effective in deterring gay Americans from revealing their sexual orientation, and thus from working openly to end anti-gay discrimination. By marking gay men and lesbians as criminals, discriminatory sodomy laws reinforce and intensify the irrational prejudice that leads to such violence. *See* Leslie, *Creating Criminals*, 35 Harv. C.R.-C.L. L. Rev. at 124.

The Constitution "neither knows nor tolerates classes among citizens." *Romer*, 517 U.S. at 623 (quotation marks omitted). In distinguishing laws based on hostility from ordinary legislative linedrawing, the Court should not ignore the persistent and destructive American history of anti-gay discrimination. The Homosexual Conduct Law is the State's own endorsement of discrimination against gay men and lesbians.

**C. Equal Protection Concerns Are Particularly Strong Here Because of the Personal Burdens Imposed by This Criminal Law.**

The Constitution's equal protection and due process protections are articulated together. U.S. Const. amend. XIV, § 1. Those dual safeguards reinforce one another, including in cases where liberty concerns may not rise to the level of a fundamental right or may be indirectly implicated. In this case, regardless of the Court's ultimate ruling on Point I, the personal burdens and restrictions on freedom imposed by Section 21.06 strengthen the need to reject its discriminatory classification.

On numerous occasions, the Court has held that where an extremely important personal interest is at stake, the State may *not* grant some citizens the ability to vindicate that interest but altogether deny other citizens that ability, even if the State *could* employ an evenhanded denial to all citizens. For example, there is no due process right to appellate review of decrees severing the parent-child bond. *M.L.B. v. S.L.J.,* 519 U.S. 102, 120 (1996). Where, however, the State grants review of such decrees to its citizens generally, it may not deny review to the few who cannot pay costs. *Id*. at 107; *see also, e.g., Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (although there is no right to obtain divorce, where State makes divorce available to most couples, it may not bar indigent persons from divorce due to inability to pay). That is so, even though wealth classifications are not inherently suspect, *see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), and the imposition of costs on litigants is otherwise rationally related to a legitimate state interest, *M.L.B.,* 519 U.S. at 123. Because the imposition of costs in *M.L.B.* at least indirectly implicated "state controls or intrusions on family relationships," *id.* at 116, the Court closely examined the unique burden the State had placed on the poor and rejected it as offensive to the combined guarantees of equal protection and due process. *See id*. at 120. The constitutional challenge in this case is also of an especially serious order, because it "endeavor[s] to defend against the States's destruction of family bonds, and to resist the brand associated with" criminality that is now imposed only on the deeply personal and intimate sexual relations of gay adults. *Cf. id.* at 125. As in *M.L.B.,* the outcome here should "reflect both equal protection and due process concerns." *Id.* at 120.

Similarly, there is no fundamental right to an education, and undocumented aliens are not a suspect class, but in light of the importance of the interest in education in our society, a law barring undocumented aliens from receiving a state-funded education will be rigorously scrutinized. *Plyler v. Doe,* 457 U.S. 202, 216–24 (1982). The nature of the deprivation, though not a fundamental right, informs and strengthens the equal protection claim. As the Court reasoned in *Plyler,* exclusion of one isolated group from such an important sphere "poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." *Id.* at 221–22. It imposes a "stigma" that "will mark them for the

rest of their lives." *Id.* at 223. Here, too, the Court must not ignore the stigma and the obstacle to equal advancement in society that accompanies the discriminatory law that Texas seeks to defend in assessing its validity under the Equal Protection Clause. This classification likewise "involve[s] the State in the creation of permanent class distinctions" and relegates gay men and lesbians to "second-class social status." *Cf. id.* at 234 (Blackmun, J., concurring).

The Equal Protection Clause is a critical guardian of liberty as well as equality. It defends against unreasonable exactions by the State because it "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan,* 497 U.S. at 300 (Scalia, J., concurring); *accord Railway Express Agency v. New York,* 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring). The Texas Homosexual Conduct Law makes a mockery of that principle. Just as the majority may not decide that the availability of divorce or education is critical for the majority itself but then deny those benefits to a few, so Texas may not determine that freedom from state intrusion into the private sexual intimacy of two consenting adults is an important aspect of liberty for most of its citizens, but then deny that liberty to a minority—particularly a minority historically subject to discrimination. Consensual sexual decisions are too clearly matters for individual decisionmaking, not for imposition by the State. The discriminatory criminal law at issue here seriously diminishes the personal relationships and legal standing of a distinct class, and under the Fourteenth Amendment cannot stand.

## CONCLUSION

For the foregoing reasons, the judgment of the Texas Court of Appeals upholding Section 21.06 and affirming Petitioners' criminal convictions thereunder should be reversed.

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# In The Supreme Court of the United States

JOHN GEDDES LAWRENCE AND
TYRON GARNER, PETITIONERS,
V.
STATE OF TEXAS, RESPONDENT.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE FOURTEENTH DISTRICT

## RESPONDENT'S BRIEF

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## QUESTIONS PRESENTED

1. Whether the petitioners' criminal prosecutions for the offense of engaging in homosexual conduct, as defined by section 21.06 of the Texas Penal Code, violated the Fourteenth Amendment guarantee of equal protection of the law.

2. Whether the petitioners' criminal prosecutions under section 21.06 of the Texas Penal Code violated their constitutional rights to liberty and privacy, as protected by the Due Process Clause of the Fourteenth Amendment.

3. Whether *Bowers v. Hardwick,* 478 U.S. 186 (1986), should be overruled.

## STATEMENT

A citizen informed Harris County sheriff's deputies that an armed man was "going crazy" in the apartment of petitioner Lawrence. Pet. App. 129a. The investigating officers entered the apartment and observed the petitioners engaged in anal sexual intercourse. *Id.* They were then charged by complaint in a Harris County justice court with the commission of the Class C misdemeanor offense of engaging in homosexual conduct, an offense defined by TEX. PENAL CODE § 21.06(a) (Vernon 1994), as follows: "A person commits an offense if he engages in deviate sexual intercourse with another individual of

the same sex."[1] A Class C misdemeanor is punishable only by a fine not to exceed five hundred dollars. TEX. PENAL CODE § 12.23 (Vernon 1994).

After the petitioners were convicted and fined in the justice court,[2] they gave notice of appeal and the proceedings were transferred to Harris County Criminal Court at Law No. 10.[3] The petitioners moved to quash the complaints on various constitutional grounds. Pet. App. 117a, 130a. In support of those motions, the petitioners offered into evidence only the complaints themselves and the supporting "probable cause affidavits" filed by a sheriff's deputy in the justice court. See Pet. App. 129a, 141a. The two affidavits contained identical descriptions of the events leading to the filing of the complaints:

Officers dispatched to 794 Normandy # 833 reference to a weapons disturbance. The reportee advised dispatch a black male was going crazy in the apartment and he was armed with a gun. Officers met with the reportee who directed officers to the upstairs apartment. Upon entering the apartment and conducting a search for the armed suspect, officers observed the defendant engaged in deviate sexual conduct namely, anal sex, with another man.

After the county court denied the petitioners' motions to quash the complaints, they entered pleas of *nolo contendere*, and the court found them guilty of engaging in homosexual conduct. The court sentenced each petitioner, pursuant to a plea bargain, to payment of a fine in the amount of two hundred dollars, and the petitioners again gave notice of appeal from their convictions.[4]

A three-judge panel of the Court of Appeals for the Fourteenth District of Texas initially held that the State's prosecution of the petitioners under section 21.06 violated the Equal Rights Amendment of the Texas Constitution,[5] with one justice dissenting. The State's motion for rehearing *en banc* was granted, however, and on March 15, 2001, the *en banc* court of appeals rejected all of the petitioners' constitutional challenges to the enforcement of section 21.06. See *Lawrence v. State,* 41 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2001, pet. ref 'd) (Pet. App. 4a, et seq.). The *en banc* opinion of the court of appeals may be briefly summarized as follows:

1. Enforcement of the statute prohibiting homosexual conduct does not violate the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, § 3, of the Texas Constitution, because the statute does not implicate fundamental rights or a suspect class, and it has a rational basis in the Texas Legislature's determination that homosexual sodomy is immoral. The fact that heterosexual sodomy is no longer a criminal offense under Texas law is not constitutionally significant, because the Legislature could rationally distinguish between an act performed with a person of the same sex and a similar act performed with a person of different sex. Pet. App. 13a-18a.
2. Enforcement of section 21.06 does not violate the Equal Rights Amendment of the Texas Constitution, because the statute applies equally to both men and women who engage in the prohibited conduct, and it is not the product of prejudice towards persons of either gender. Pet. App. 20a-24a.
3. The State's prosecution of the petitioners for the offense of engaging in homosexual conduct did not violate any constitutional right to privacy under the State or Federal Constitutions, in light of the long history of the imposition of criminal sanctions for such conduct, because it could not be said that the State of Texas or the United States recognized any "fundamental right" to engage in homosexual activity. Pet. App. 25a-31a.

A petition for discretionary review was denied, without written opinion, by the Texas Court of Criminal Appeals. Pet. App. 1a.

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[1] The term "deviate sexual intercourse" is defined in the Texas Penal Code as "any contact between any part of the genitals of one person and the mouth of or anus of another person," or "the penetration of the genitals or the anus of another person with an object." TEX. PENAL CODE § 21.01(1) (Vernon 1994).

[2] The record contains no information concerning the course of proceedings which occurred in the justice court.

[3] An appeal from a judgment of conviction in a Texas justice court results in a trial de novo in a county court. TEX. CODE CRIM. PROC. art. 45.042 (Vernon Supp. 2003).

[4] A case which has been appealed from a Texas justice court to a county court may be further appealed to a court of appeals if the fine exceeds $100 or the sole issue is the constitutionality of the statute on which the conviction is based. TEX. CODE CRIM. PROC. art. 4.03 (Vernon Supp. 2003).

[5] TEX. CONST. art. I, § 3a.

## SUMMARY OF ARGUMENT

1. The record is inadequate to serve as a basis for recognition of a limited constitutional right to engage in extramarital sexual conduct, because the absence of information concerning the petitioners and the circumstances of their offense precludes a determination of whether they would actually benefit from the Court's recognition of the limited right which they assert. The record is also inadequate to establish that the petitioners belong to the class for which they seek equal protection relief.
2. The States of the Union have historically prohibited a wide variety of extramarital sexual conduct, a legal tradition which is utterly inconsistent with any recognition, at this point in time, of a constitutionally protected liberty interest in engaging in any form of sexual conduct with whomever one chooses. Nothing in this Court's "substantive due process" jurisprudence supports recognition of a constitutional right to engage in sexual misconduct outside the venerable institution of marriage. This Court should adhere to its previous holding on this issue in *Bowers v. Hardwick,* 478 U.S. 186 (1986), and it should reaffirm that the personal liberties protected by the Due Process Clause of the Fourteenth Amendment from State regulation are limited to those "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Palko v. Connecticut,* 302 U.S. 319, 325 (1937).
3. Since enforcement of the homosexual conduct statute does not interfere with the exercise of a fundamental right, and the statute is not based upon a suspect classification, it must only be rationally related to a permissible state goal in order to withstand equal protection challenge. This legislative proscription of one form of extramarital sexual misconduct is in keeping with longstanding national tradition, and bears a rational relationship to the worthy governmental goals of implementation of public morality and promotion of family values.
4. The petitioners cannot meet their burden of establishing a discriminatory purpose to the original enactment of a statute which is facially applicable to both persons of exclusively homosexual orientation and persons who regard themselves as bisexual or heterosexual. When the statute is viewed in historical perspective, it can reasonably be inferred that the Texas Legislature acted with nondiscriminatory intent in limiting the scope of the predecessor sodomy statute to fit within the commonly understood parameters of this Court's then-emerging privacy jurisprudence.

## ARGUMENT

### I. Substantive Due Process Under the Fourteenth Amendment.

**A. The appellate record is inadequate to support the recognition of the limited constitutional right asserted by the petitioners.** The appellate record does not establish that the petitioners would actually benefit from recognition of the particular liberty interest which they assert; therefore, it does not provide this Court with a factual basis for recognizing that interest.

Precise identification of an asserted liberty interest is critical to the determination of whether it falls within the scope of the Due Process Clause of the Fourteenth Amendment. An appellate court's substantive due process analysis "must begin with a careful description of the asserted right," because the "doctrine of judicial self-restraint" requires a court "to exercise the utmost care whenever [it] is asked to break new ground in this field." *Reno v. Flores,* 507 U.S. 292, 302 (1993) (quoting *Collins v. Harker Heights,* 503 U.S. 115, 125 [1992]). The petitioners initially advocate the recognition of a broadly drawn constitutional right to choose to engage in any "private consensual sexual intimacy with another adult, including one of the same sex." Brief of Petitioners 10. However, the petitioners later clarify that their challenge does not extend to the validity of statutes prohibiting prostitution, incest or adultery, which they describe as implicating additional "state concerns" not present in this case. *Id.* at 22 n.16. In short, the petitioners are asking the Court to recognize a fundamental right of an adult to engage in private, non-commercial, consensual sex with an unrelated, unmarried adult.

The slim record reveals only that the petitioners are adult males and that they engaged in anal intercourse in an apartment that petitioner Lawrence identified as his residence. It does not answer any of the following questions concerning the factual basis of their constitutional claims:

- Whether the petitioners' sexual conduct was noncommercial.[6]
- Whether the petitioners' sexual conduct was mutually consensual.[7]
- Whether the petitioners' conduct was "private."[8]
- Whether the petitioners are related to one another.
- Whether either of the petitioners is married.
- Whether either (or both) of the petitioners is exclusively homosexual.[9]

While the petitioners possess standing to challenge the constitutionality of a statute under which they have actually been prosecuted and convicted, see *Eisenstadt v. Baird,* 405 U.S. 438, 443-444 (1972), they should not be permitted to argue that a protected liberty interest exists under some specified set of circumstances without showing that those circumstances actually exist. This Court will not issue an opinion "advising what the law would be upon a hypothetical state of facts," and it will not "decide questions that cannot affect the rights of litigants in the case before [it]." *North Carolina v. Rice,* 404 U.S. 244, 246 (1971) (citations omitted). For example, in cases not involving expressive activity protected by the First Amendment, litigants have no standing to argue that a statute "would be unconstitutional if applied to third parties in hypothetical situations." *County Court of Ulster County v. Allen,* 442 U.S. 140, 155 (1979).[10]

In recognizing constitutional liberty interests under the Fourteenth Amendment, appellate courts "must use considerable restraint, including careful adherence to the incremental instruction given by the precise facts of particular cases, as they seek to give further and more precise definition to the right." *Troxel v. Granville,* 530 U.S. 57, 95-96 (2000) (Kennedy, J., dissenting).

Simply put, the record in this case provides an insufficient foundation for the meaningful review of the important and complex question of whether there is a constitutional right to engage in private, non-commercial, consensual sex with an unrelated, unmarried adult. At best, the record would support only the recognition of an extremely broad right to engage in sexual conduct with any other adult, regardless of any other circumstance which might attend that conduct—a right so broad that the petitioners themselves disavow any claim to it.

Because the record is inadequate to permit this Court to scrutinize and identify the contours and limitations of any protected liberty interest that might be recognized in this case, the State respectfully suggests that this Court dismiss the petition for writ of certiorari as improvidently granted. In the alternative, the respondent asks that the Court affirm the judgment of the Texas court of appeals on ground that the record is inadequate to support an effort to identify a limited constitutional right to engage in sexual conduct.

**B. The Court has adopted an historical approach to the recognition of liberty interests protected under the Due Process Clause.** In addressing claims that a state has interfered with an individual's exercise of a previously unrecognized liberty interest protected by the

[6] The lack of profit motivation cannot be inferred from the lack of prosecution for the more serious offense of prostitution, see TEX. PENAL CODE § 43.02 (Vernon Supp. 2003), because the police could not possibly determine whether prostitution was occurring if both participants in the sexual conduct declined to discuss that issue.

[7] While neither of the petitioners was charged with any variant of sexual assault, prosecution for such an offense would require an acknowledgment from at least one of the parties that the sexual activity was non-consensual. Because there are any number of reasons why a person might choose not to cooperate with authorities in the investigation and prosecution of a sexual offense, mutual consent cannot necessarily be inferred from the parties' silence.

[8] While the record reflects that the sexual conduct occurred in Lawrence's apartment, the record does not indicate whether anyone else was present in that apartment at the time. Lower courts have held that any right of privacy that protects marital sex from governmental interference is waived when an onlooker is welcomed into the marital bedchamber. See *Lovisi v. Slayton,* 539 F.2d 349, 351-352 (4th Cir. 1976), *cert. denied,* 429 U.S. 977 (1977).

[9] The sexual orientation of the petitioners appears to be irrelevant to the disposition of their substantive due process argument, because they assert a constitutional right to engage in sodomy with persons of either gender, but it may be significant in determining whether the petitioners are members of any specific class in addressing their arguments premised upon the Equal Protection Clause, *infra.*

[10] Thus, in *United States v. Lemons,* 697 F.2d 832, 834-835 (9th Cir. 1983), in which the defendant was convicted of engaging in homosexual sodomy in violation of an Arkansas statute, the court of appeals held that the defendant would not be heard to argue that the statute would be unconstitutional if applied to persons who committed sodomy in a private place, in light of the fact that the defendant was arrested while engaging in an act of oral sex in a public place, i.e., the restroom of a national park.

Fourteenth Amendment, this Court has looked to the nation's history and legal traditions to determine whether the asserted interest is actually so fundamental to our system of ordered liberty as to merit constitutional protection from state regulation. For instance, in *Moore v. City of East Cleveland,* 431 U.S. 494 (1976) (plurality opinion), the Court observed that, "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teaching of history [and], solid recognition of the basic values that underlie our society'." *Id*. at 503 (quoting *Griswold v. Connecticut,* 381 U.S. 479, 501 [1965] [Harlan, J., concurring]). Thus the "Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id*.

In *Bowers,* 478 U.S. at 192–194, the Court rejected an asserted fundamental right to engage in homosexual conduct because, in light of pervasive State criminalization of such conduct throughout the nation's history, it could not seriously be asserted that a right to engage in homosexual sodomy was "deeply rooted in this Nation's history and tradition." Three years later, in *Michael H. v. Gerald D.,* 491 U.S. 110 (1989) (plurality opinion), the Court noted that in its attempts to "limit and guide interpretation of the [Due Process] Clause," it has "insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that in isolation is hard to objectify), but also that it be an interest traditionally protected by our society." *Id*. at 122–123.

Two of the opinions issued in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833 (1992), expressed doubt or disagreement that the Due Process Clause protects only those practices, "defined at the most specific level," which were protected by law at the time of ratification of the Fourteenth Amendment.[11] Emphasis upon the nation's legal traditions appeared only in the dissenting opinions.[12] However, less than a year later, the Court's opinion in *Reno v. Flores,* 507 U.S. 292 (1993), unambiguously stated that the "mere novelty" of a claimed constitutional liberty interest was "reason enough to doubt that 'substantive due process' sustains it," because it could not be considered "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id*. at 303 (quoting *United States v. Salerno,* 481 U.S. 739, 751 [1987], and *Snyder v. Massachusetts,* 291 U.S. 97, 105 [1934]).

This issue of the importance of national legal tradition in substantive due process jurisprudence was resolved in *Washington v. Glucksberg,* 521 U.S. 702 (1997), in which the Court emphasized the necessity of "examining our Nation's history, legal traditions, and practices" in order to determine whether a claimed liberty interest was, "objectively, 'deeply rooted in this Nation's history and tradition'" and "implicit in the concept of ordered liberty," and, therefore, merited protection under the Fourteenth Amendment:

> Our established method of substantive due process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," [*Moore v. City of East Cleveland*], at 503 (plurality opinion); *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut,* 302 U.S. 319, 325, 326 (1937). Second, we have required in substantive due process cases a "careful description" of the asserted fundamental liberty interest. Flores, supra, at 302; *Collins* [*v. Harker Heights,* 503 U.S. 115 (1992)] at 125; *Cruzan* [*v. Director, Missouri Department of Health,* 497 U.S. 261 (1990)] at 277–278. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," *Collins, supra,* at 125, that direct and restrain our exposition of the Due Process Clause. 521 U.S. at 720–721.

The Court declined to recognize the constitutional liberty interest proposed in Glucksberg—a right to assisted suicide—because its recognition would have required the Court to "reverse centuries of legal doctrine and practice" and to elevate to the status of a protected liberty interest a practice that was traditionally prohib-

[11] *See Casey,* 505 U.S. at 847 (joint opinion of O'Connor, J., Kennedy, J., and Souter, J.); id. at 923 (Blackmun, J., concurring).

[12] *See Casey,* 505 U.S. at 952-953 (Rehnquist, C.J., dissenting); id. at 980 (Scalia, J., dissenting).

ited by state law. *Id.* at 723, 728. In addition to the opinion of the Court, Justice Stevens in a concurring opinion agreed that "[h]istory and tradition provide ample support for refusing to recognize an open-ended constitutional right to commit suicide." *Id.* at 740 (Stevens, J., concurring).[13]

Since Glucksberg was decided, the Court has had little opportunity to consider the recognition of previously unacknowledged liberty interests under the Due Process Clause.[14] In *County of Sacramento v. Lewis,* 523 U.S. 833 (1998), the Court held that a determination of whether executive action violated an individual's right to substantive due process did not require the same historical and traditional analysis utilized in reviewing legislative action. A concurring justice suggested that "history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry," leaving room for an "objective assessment of the necessities of law enforcement"; but that opinion did not suggest that *Glucksberg* was incorrect in its emphasis upon American legal tradition in determining the existence of a substantive due process right in the context of review of a legislative enactment. *Id*. at 857–858 (Kennedy, J., concurring). A subsequent statement in the same concurring opinion that "objective considerations, including history and precedent, are the controlling principle, regardless of whether the State's action is legislative or executive in character," *id*. at 858 (Kennedy, J., concurring), indicated no disagreement with the basic principle expressed in *Glucksberg:* that recognition of protected liberty interests under the Fourteenth Amendment must be based upon objective historical evidence that a particular practice is a cherished American tradition, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of [the] Court." *Glucksberg,* 521 U.S. at 720.

**C. This nation has no deep-rooted tradition of protecting a right to engage in sodomy.** Turning to the question of whether a right to engage in sodomy is "so rooted in the traditions and conscience of our people as to be ranked as fundamental," the Court's previous resolution of that issue in *Bowers v. Hardwick* is unassailable. As noted in *Bowers,* sodomy was a serious criminal offense at common law;[15] it was forbidden by the laws of the original thirteen states at the time of the ratification of the Bill of Rights; and it was punishable as a crime in all but five of the thirty-seven states in existence at the time of the ratification of the Fourteenth Amendment. *Bowers,* 478 U.S. at 192–193.

As further noted in *Bowers,* sodomy remained punishable as a crime in every state of the Union prior to the year 1961, *id*. at 193, when Illinois became the first state to adopt the American Law Institute's Model Penal Code approach to decriminalization of some sexual offenses. *Id*. at 193 n.7.

Our nation's history has not been rewritten in the seventeen years since *Bowers* was decided, and that history contradicts any assertion that a right to engage in homosexual anal intercourse has been a valued and protected right of American citizens. The fact that the states have traditionally prohibited the act as a crime is utterly inconsistent with any claim that our legal tradition has treated the choice to engage in that act as a "fundamental" right.

It is true that some change has occurred since *Bowers* was decided: three more states and the District of Columbia, in appropriate exercise of the democratic process, have repealed or limited the scope of their statutes prohibiting sodomy in general or homosexual sodomy in particular; and a small number of state appellate courts have found that such statutes violate a state constitutional right to privacy. See Brief of Petitioners 23 n.17. The State of Texas is now one of thirteen states in which consensual

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[13] The "traditionalistic approach" adopted by the Court in *Glucksberg* has been described as "wise, workable, and firmly grounded in principles of American constitutionalism," in that it "provides a check against particular states or local jurisdictions whose practices contradict what most Americans would deem to be fundamental rights, but does so without licensing courts to second-guess democratic judgments on the basis of their own ideological or philosophical preferences." Michael W. McConnell, The Right to Die and the Jurisprudence of Tradition, 1997 Utah L. Rev. 665, 681 (1997).

[14] The Court's opinions in *City of Chicago v. Morales,* 527 U.S. 41 (1999), and *Troxel v. Granville,* 530 U.S. 57 (2000), both included acknowledgement of the existence of substantive rights under the Due Process Clause, but in each of those cases the particular liberty interest in question had long been recognized by the Court: the freedom to loiter in a public place, see *Morales,* 527 U.S. at 53-54; and parents' liberty interest in the care, custody and control of their own children, see *Troxel,* 530 U.S. at 65-66.

[15] *See also* William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 157 (1999).

homosexual sodomy remains a criminal offense. *Id.* at 27 n.21. The fact that several states have ceased treating sodomy as a criminal offense, however, is no evidence of a national tradition of espousing, honoring or safeguarding a right to engage in deviate sexual intercourse.

The petitioners concede that this Court requires "objective guideposts," such as "history and precedent," in the process of identification of liberty interests protected by the Fourteenth Amendment. They point to the gradual trend towards decriminalization of consensual sexual behavior among adults as the necessary objective evidence of a fundamental right firmly rooted in the traditions and conscience of American citizens. See Brief of Petitioners 19–25. Four decades of gradual but incomplete decriminalization does not erase a history of one hundred and fifty years of universal reprobation. A recent trend towards uneasy toleration—even a trend involving a majority of the fifty states—cannot establish a tradition "deeply rooted" in our national history and tradition. The petitioners mistake new growth for deep roots.

The petitioners argue that the "consistency of the direction of change" indicates a national consensus sufficient to satisfy the need for objective indicia in identifying a constitutionally protected liberty interest, utilizing a key phrase from the Court's recent decision in *Atkins v. Virginia,* 122 S.Ct. 2242, 2249 (2002), in which the Court found that the execution of mentally retarded criminal defendants violated the Eighth Amendment. The petitioners' argument suffers from a logical flaw in that, prior to 1961, every State treated sodomy as a criminal offense, so only one direction of change is possible. Compare *Atkins,* 122 S.Ct. at 2263 (Scalia, J., dissenting). A State's affirmative choice to maintain the status quo demonstrates the absence of consensus. Several states have made such a choice, in that their appellate courts have upheld the constitutionality of statutes prohibiting the commission of sodomy or homosexual conduct. For instance, the Louisiana Supreme Court held in *State v. Smith,* 766 So.2d 501, 508-510 (La. 2000), that the constitutional right to privacy expressly recognized by that state's constitution did not extend to the commission of oral or anal sex in private, observing that there "has never been any doubt that the legislature, in the exercise of its police power, has the authority to criminalize the commission of acts which, without regard to the infliction of any other injury, are considered immoral."[16] Accord *Missouri v. Walsh,* 713 S.W.2d 508 (Mo. 1986) (holding that a prosecution under the Missouri homosexual conduct statute did not violate any constitutional right to privacy under the state or federal constitution). Should just a few more states join Texas, Louisiana and Missouri in upholding the state's power to punish acts of sodomy, one could argue that the prevailing trend was actually the rejection of a constitutional privacy right extending to consensual sodomy.

In any event, currently evolving standards are an unstable basis for recognition of fundamental rights protected by the Fourteenth Amendment. The Eighth Amendment has long been construed to require consideration of "evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles,* 356 U.S. 86, 101 (1958), permitting reliance upon "contemporary values" as evidenced by recent legislative enactments. See *Penry v. Lynaugh,* 492 U.S. 302, 331 (1989). In contrast, none of this Court's precedents so much as suggests that recent legislative activity should be accepted as proof of "deeply rooted" fundamental rights, and the Court's decisions exploring the possible existence of unrecognized liberty interests under the Fourteenth Amendment have never taken into account rapidly "evolving standards." The approach advocated by the petitioners would require this Court to serve as a micro-managing super-legislature, continually assessing current legislative trends to determine the current extent of protection under the Fourteenth Amendment—an approach which is entirely inconsistent with the Court's reliance in *Glucksberg* upon history and legal tradition.

The petitioners also argue that previously recognized "fundamental interests . . . converge in the right asserted here," Brief of Petitioners 11–16, but considered separately, the recognized

[16] The Louisiana court also held that the separation of powers provision of its state constitution precluded the Court from usurping the legislative function of determining "the public policy of Louisiana on the practice of oral and anal sex"; and it pungently observed that the "only perceptible unconstitutionality in this case is that which would be evident if this court would . . . elevate [its] own personal notions of individual liberty over the collective wisdom of the voters' elected representatives' belief " that the proscription of "oral and anal sex, consensual or otherwise, is in furtherance of the moral welfare of the public mind." Smith, 766 So.2d at 510.

liberty interests upon which the petitioners rely do not implicate the conduct in question, and no logical process extends their reach when they are lumped together.

The petitioners first assert a constitutionally protected right to choose to enter into "intimate relationships," citing *Roberts v. United States Jaycees,* 468 U.S. 609, 617-618 (1984), but no court has held that this nebulously defined right extended to the protection of sexual misconduct prohibited by State law. For example, in *Marcum v. McWhorter,* 308 F.3d 635, 641-643 (6th Cir. 2002), the court held that the freedom to choose to enter into personal relationships could not extend to an adulterous relationship, since adultery has been punishable as a crime for centuries. In this case, while the petitioners may have a constitutional right to associate with one another, the right to form an "intimate relationship" does not protect any and all sexual conduct in which they might engage in the context of that relationship.[17]

The petitioners also rely upon the recognized constitutional right to "bodily integrity," but the Court's decisions regarding bodily integrity generally pertain to unwarranted government invasion of an individual's body, and the individual's right to control his own medical treatment, see *Glucksberg,* 521 U.S. at 777-778 (Souter, J., concurring), and those decisions have nothing to do with the manner in which an individual interacts with third parties or invades another person's body.

The right to privacy in the home has long been recognized under both the First Amendment, see *Stanley v. Georgia,* 394 U.S. 557, 564-565 (1969), and the Fourth Amendment, see *Kyllo v. United States,* 533 U.S. 27, 31 (2001). However, the decision in *Stanley* involved the individual's freedom of thought, rather than conduct, *Stanley* 394 U.S. at 565-566, and that decision has never been extended to prohibit state regulation of conduct that does not involve expression protected by the First Amendment. The Fourth Amendment protects against unreasonable police entry and search of the home, but it has never been found to protect one from prosecution for otherwise criminal conduct that occurs within that home.18 See *Osborne v. Ohio,* 495 U.S. 103, 108-110 (1990); *Bowers,* 478 U.S. at 195-196; Stanley, 394 U.S. at 568 n.11.

By arguing that their asserted liberty interest under the Fourteenth Amendment may be located at the "convergence" of these previously recognized rights, the petitioners implicitly admit that none of them, standing alone, has ever been construed in a fashion that would protect an individual from state prosecution for sexual misconduct occurring in a private residence. The petitioners' assertion of a patchwork of constitutional rights which do not implicate their conduct does not logically prove that the conduct is in fact protected by a previously unrecognized liberty interest.

D. No tradition of protection exists at any level of specificity of designation of an asserted liberty interest. The petitioners' other quarrel with *Bowers* involves the level of specificity at which the nation's traditions are to be analyzed in assessing the existence of a protected liberty interest under the Fourteenth Amendment, an issue that does not seem to have been definitively resolved at this time. See Michael H., 491 U.S. 110, 127 n.6 (plurality opinion), 132 (O'Connor, J., concurring); *County of Sacramento v. Lewis,* 523 U.S. 833, 847 n.8 (1998).[19] Assuming that issue does remain open at this time, it should not be necessary to resolve it in this case, since the petitioners cannot establish a historical tradition of exalting and protecting the conduct for which they were prosecuted at any level of specificity.

At the most specific level, the nation has a longstanding tradition, only recently waning, of criminalizing anal sodomy—the offense once known as "buggery"—as a serious criminal offense. See *Bowers,* 478 U.S. 192-194; William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 157-158, 328-337 (App.

[17] Parents might well have a constitutionally protected right to maintain an intimate relationship with their children, but no one would argue that their protected liberty interest would extend to having sexual relations with the children.

[18] The petitioners understandably disavow any complaint regarding the manner in which the police entered Lawrence's apartment, Brief of Petitioners 14-15, since few citizens would want to impede an officer's ability to enter their residence to search for an armed man said to be "going crazy" on the premises. Pet. App. 129a.

[19] The opinion in Lewis noted: "*Glucksberg* presented a disagreement about the significance of historical examples of protected liberty in determining whether a given statute could be judged to contravene the Fourteenth Amendment. The differences of opinion turned on the issues of how much history indicating recognition of the asserted right, viewed at what level of specificity, is necessary to support the finding of a substantive due process right entitled to prevail over state legislation." *Id.*

A) (1999).[20] But even if the topic is broadened to include other acts of extramarital sexual intercourse, such as fornication, adultery, incest, prostitution, etc., the nation's tradition is still one characterized by prohibition and criminalization. Most of the states have maintained, through most of their history, statutes which made it a criminal offense to engage in fornication and adultery as well as sodomy, and there is no long-standing tradition of protecting the right to engage in any sort of extramarital sexual conduct. Fornication was a punishable offense in colonial times, and it remained illegal in forty states until the early 1970s. See Tracy Shallbettor Stratton, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication,* 73 Wash. L. Rev. 767, 780 (1998). As of 1998, it was still a crime in thirteen states and the District of Columbia. *See id*. at 767 n.2; accord, Richard Green, *Griswold's Legacy: Fornication and Adultery as Crimes,* 16 Ohio N.U.L. Rev. 545, 546 n.8 (1989).

Adultery was once a capital offense, under some circumstances, in colonial Massachusetts, and it was punished as a crime during the colonial period in almost every jurisdiction. See *Oliverson v. West Valley City,* 875 F. Supp. 1465, 1474 (D. Utah 1995). Adultery was still punishable as a crime "in most states . . . in 1900," *see id*. (quoting Lawrence M. Friedman, *Crime and Punishment in American History* 13 (1993)), and as of 1996, it remained a crime in twenty-five states and the District of Columbia. *City of Sherman v. Henry,* 928 S.W.2d 464, 470 n.3 (Tex. 1996); Green, *supra* at n.7.

Thus, the legislatures of the various states have shown significant concern for the sexual morality of the citizenry, and statutes criminalizing extramarital sexual conduct have been pervasive throughout our national history. The constitutionality of those statutes previously has been thought to be "beyond doubt," *Griswold v. Connecticut,* 381 U.S. 479, 498 (Goldberg, J. concurring), and recent decisions from the lower courts have held that the statutes are, in fact, constitutional. See, e.g., *Henry,* 928 S.W.2d at 471-472; *Marcum,* 308 F.3d at 642-643. Furthermore, criminal prosecutions aside, the United States had no history whatsoever of protecting the right to engage in extramarital sex, at least until a few state appellate courts began in the 1990s to invalidate their sodomy statutes as violative of a state constitutional right to privacy.[21] This Court, in particular, has never recognized any right to engage in extramarital sexual conduct, and it is telling that most of the fundamental liberty interests the Court has recognized under the Fourteenth Amendment are rooted in marriage, procreation and childrearing. An asserted right to engage in homosexual sodomy is actually inimical to the fundamental rights that this Court has endeavored to protect.

The Court catalogued the liberty interests to which it has accorded Fourteenth Amendment protection in *Glucksberg,* 521 U.S. at 720, as follows: In a long line of cases, we have held that, in

[20] While acknowledging the widespread and longstanding existence of sodomy statutes, Professor Eskridge is critical of the historical basis for the Court's decision in *Bowers,* on grounds that early sodomy statutes were aimed primarily at the prohibition of buggery and similar forms of unnatural coitus, rather than the oral sex act for which the defendant in *Bowers* was prosecuted. See Eskridge at 156-157. That concern is absent in this case, since it is undisputed that the act of anal sodomy was a serious crime—originally a capital offense—from the earliest days of the colonization period.

[21] The handful of state appellate courts that have invalidated sodomy or homosexual conduct statutes have all predicated their holdings upon objective indications that their state constitutions provided more privacy protection than the Federal Constitution. See *Commonwealth v. Wasson,* 842 S.W.2d 487, 492 (Ky. 1992) (basing its ruling upon the "textual and structural differences between the United States Bill of Rights and our own, which suggest a different conclusion from that reached by the United States Supreme Court is more appropriate"); *Campbell v. Sundquist,* 926 S.W.2d 250, 261 (Tenn. Ct. App. 1996) (noting that both the "Tennessee Constitution and this State's constitutional jurisprudence establish that the right to privacy provided to Tennesseans under our Constitution is in fact more extensive than the corresponding right to privacy provided by the Federal Constitution"); *Gryczan v. State,* 942 P.2d 112, 121-22 (Mont. 1997) (invalidating a statute prohibiting "deviate sexual conduct" and noting that "Montana's Constitution affords citizens broader protection of their right to privacy than does the federal constitution"); *Powell v. State,* 510 S.E.2d 18, 22 (Ga. 1998) (in which a general sodomy statute was invalidated upon a finding that the " 'right to be let alone' guaranteed by the Georgia Constitution is far more extensive than the right of privacy protected by the U.S. Constitution"); *Jegley v. Picado,* 80 S.W.3d 332, 344 (Ark. 2002) (stating that "Arkansas's Constitution can be held to provide greater privacy rights than the United States Constitution"). The fact that five state courts have invalidated sodomy statutes in the last eleven years, on state constitutional grounds, is meager evidence of a deeply rooted national tradition of protecting the privacy of the conduct in issue. Too few states have taken such a step, over too brief a period of time, to support any such inference.

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addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia,* 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut,* 381 U.S. 479 (1965); to use contraception, ibid.; *Eisenstadt v. Baird,* 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California,* 342 U.S. 165 (1952), and to abortion, *Casey, supra.* We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan,* 497 U.S., at 278-279.

The conduct at issue in this case has nothing to do with marriage or conception or parenthood and it is not on a par with those sacred choices. Homosexual sodomy cannot occur within or lead to a marital relationship. It has nothing to do with families or children. The decision to engage in homosexual acts is not like the acts and decisions that this Court previously has found worthy of constitutional protection, and it should not be added to the list of fundamental rights protected by the Fourteenth Amendment.

The difference between protected conduct within the marriage relationship and unprotected sexual conduct outside marriage has been recognized on a number of occasions, most famously in Justice Harlan's dissenting opinion in *Poe v. Ullman,* 367 U.S. 497, 545-546, 552-553 (1961), in which he expressed the view that "any Constitutional doctrine in this area" must be built upon the division between acts occurring within and without the marital relationship:

Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis. . . .

The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. So much has been explicitly recognized in acknowledging the State's rightful concern for its people's moral welfare. See 367 U.S. at pages 545-548, *supra.* But not to discriminate between what is involved in this case and either the traditional offenses against good morals or crimes which, though they may be committed anywhere, happen to have been committed or concealed in the home, would entirely misconceive the argument that is being made. Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

As noted in a concurring opinion in *Glucksberg,* Justice Harlan's proposed dichotomy "provides a lesson for today," in that his identification of the traditionally protected liberty interest in *Poe v. Ullman* served to distinguish "between areas in which government traditionally had regulated (sexual relations outside of marriage) and those in which it had not (private marital intimacies) and thus was broad enough to cover the claim at hand without being so broad as to be shot-through by exceptions." 521 U.S. at 770-772 (Souter, J., concurring).

Therefore, should the Court consider expanding the level of specificity with which it identifies the proposed liberty interest at issue in this case, the State urges the Court to draw the line at the threshold of the marital bedroom, in

keeping with its past decisions emphasizing the American tradition of marital privacy. Outside that threshold, nothing in our nation's "history, legal traditions, and practices" offer the "crucial 'guideposts for responsible decisionmaking' . . . that direct and restrain [the Court's] exposition of the Due Process Clause." *Glucksberg,* 521 U.S. at 721 (quoting *Collins v. Harker Heights,* 503 U.S. 115, 125 (1992)).

**E. Principles of stare decisis counsel against recognition of a new protected liberty interest.** Stare decisis mandates that the Court adhere to its holdings in *Bowers.* Seventeen years should be considered a very brief period indeed, in the context of the development of fundamental rights under the Fourteenth Amendment, and the principle of stare decisis counsels against rapid change in this area. If a right is truly fundamental, its public acceptance and societal value should not be the subject of vehement and widespread disagreement. Fundamental rights should be rock solid, and vacillation is inconsistent with the level of durability of rights which should be deemed "fundamental" to our society. "Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification." *Arizona v. Rumsey,* 467 U.S. 203, 212 (1984). The petitioners argue that such special justification exists in the steady "erosion" of support for *Bowers* and the concomitant advancement of the gay rights movement, Brief of Petitioners 30-31, but the Court reaffirmed in *Glucksberg* that *Bowers* utilized the correct mode of analysis in the determination of the existence of a new liberty interest under the Fourteenth Amendment. The fact that a few more states have eased criminal sanctions on sodomy or homosexual conduct since 1986 does not logically affect the validity of the conclusion in *Bowers* that no right to engage in homosexual conduct can be found "deeply rooted in this Nation's history and tradition." *Bowers,* 478 U.S. at 192.

"It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The principle of federalism that encourages the state to undertake such experiments also operates to permit states to decline to participate in them. All change is not for the better, and the right to be first should be accompanied by a right to be among the last to accept a change of debatable social value.

In *Atkins,* the State of Texas found itself in a minority of states which had not legislatively limited its capital punishment statutes in a particular fashion, and it was obligated to join the herd because of the Eighth Amendment requirement that it comply with "evolving standards" of "contemporary values." 122 S.Ct. at 2247. This is not an Eighth Amendment case, and any indicia of recent "evolving standards" is irrelevant to the identification of those truly fundamental rights which form the core of our democratic society. Courts cannot concern themselves "with cultural trends and political movements" without "usurping the role of the Legislature," and while the Legislature "may not be infallible in its moral and ethical judgments, it alone is constitutionally empowered to decide which evils it will restrain when enacting laws for the public good." *Lawrence,* 41 S.W.2d at 362. For these reasons, this Court should reject the petitioners' due process challenge and affirm the judgment of the court below.

### II. Equal Protection Under the Fourteenth Amendment.

The petitioners also argue that their prosecution for engaging in homosexual conduct violates the Equal Protection Clause of the Fourteenth Amendment. They argue that section 21.06 improperly criminalizes sexual conduct with a person of the same sex that is otherwise legal when done with a person of the opposite sex, and they claim that the State cannot articulate any rational basis for this classification.

This challenge fails on two grounds. First, given the evolution of the Texas sodomy statute towards more liberality with respect to sexual activity, petitioners cannot establish that the Texas Legislature purposefully discriminated against persons engaging in homosexual conduct. Instead, this Court reasonably can infer that the legislature, in good faith, incrementally narrowed the State's neutral proscriptions against sodomy in accordance with contemporaneous developments in due process jurisprudence. As such, instead of being the product of a legislative choice to discriminate against homosexuals, section 21.06 is the vestigial remainder of a predecessor sodomy statute, reduced to its present form as a result of the legislature's 1973 reform of the Texas Penal Code.

Second, this Court can infer a rational basis for the legislature's enactment of section 21.06. The State of Texas has a legitimate state interest in legislatively expressing the long-standing moral traditions of the State against homosexual conduct, and in discouraging its citizens—whether they be homosexual, bisexual or heterosexual—from choosing to engage in what is still perceived to be immoral conduct. Section 21.06 rationally furthers that goal by publishing the State's moral disapproval in a penal code of conduct for its citizens and by creating a disincentive against the conduct. The Legislature reasonably could have concluded that lesser, unenforceable expressions of disapproval would be ineffective to deter that conduct. Moreover, the narrowing of the predecessor sodomy statute to avoid constitutional challenge is in itself a rational basis for the legislative action: viewed in historical context, the Texas Legislature's decision was a reasonable response to the evolving due process jurisprudence of the late 1960s and early 1970s.

This rational-basis analysis is consistent with this Court's analysis in *Bowers v. Hardwick,* 478 U.S. 186 (1986), which addressed the rationality of basing legislation on moral tradition. Although *Bowers* was decided on substantive due process grounds, it stands alone as the only modern case in which this Court has approved moral tradition as a submitted rational basis for legislation. Nothing has changed in the sixteen years since *Bowers* to justify abandonment of its conclusion.[22]

**A. The Equal Protection Clause—standard of review.** The Equal Protection Clause of the Fourteenth Amendment creates no substantive rights. *Vacco v. Quill,* 521 U.S. 793, 799 (1997). Instead, it "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Id.*; see also *City of Cleburne, Texas v. Cleburne Living Center,* 473 U.S. 432, 439 (1985) (construing Equal Protection Clause as "essentially a direction that all persons similarly situated should be treated alike").

[22] As discussed in more detail infra, *Romer v. Evans,* 517 U.S. 620 (1996), does not dictate otherwise. Instead, *Romer* is notable for what it does not do: in striking down a constitutional amendment remarkably overbroad for the purposes it purported to further, the majority's opinion pointedly neither revisited the rationality of moral classifications in legislation nor distinguished *Bowers.*

Unless a classification warrants some form of heightened review because it jeopardizes the exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. *Nordlinger v. Hahn,* 505 U.S. 1, 10 (1992).

1. *Rational-basis review.* Rational-basis review is "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin,* 490 U.S. 19, 26 (1989). "In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger,* 505 U.S. at 11 (citations omitted); see also *Romer,* 517 U.S. at 632 (1996) ("In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.")

The rational-basis standard of review is a paradigm of judicial restraint. *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 314 (1993). Rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices, nor does it authorize the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. *Heller v. Doe* by Doe, 509 U.S. 312, 319 (1993). The Court summarized the evidentiary presumptions in rational-basis review in *Heller* as follows:

[A] legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." Instead, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evi-

dence or empirical data." A statute is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record. *Id*. at 320-21 (citations omitted).

When social legislation is at issue, the Equal Protection Clause allows the states wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes. *Cleburne,* 473 U.S. at 440; see also *Dandridge v. Williams,* 397 U.S. 471, 486 (1970) (holding that the rational basis standard "is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy").

2. *Heightened review is neither sought nor required.* The petitioners suggest only in a footnote that laws which incorporate a sexual-orientation-based classification, or a gender-based classification to discriminate against homosexuals, should be reviewed pursuant to a heightened scrutiny standard. Brief of Petitioners 32 n.24. This assertion is not implicated by the litigation, briefed by the petitioners, or mandated by law.

The petitioners do not brief their request for heightened review and continue to rely solely on the rational-basis standard of review in their equal protection challenge to the constitutionality of section 21.06. See *Lawrence,* 41 S.W.2d at 378 (Anderson, J., dissenting) (in response to majority's conclusions that there is no fundamental right to engage in sodomy, and homosexuals do not constitute a suspect class, dissent characterizes these conclusions as "irrelevant here because appellants do not raise these arguments") (emphasis added). Accordingly, this Court's jurisprudence would be ill-served by consideration of a new standard not actually in controversy between the parties. See *Heller,* 509 U.S. at 319 ("Even if respondents were correct that heightened scrutiny applies, it would be inappropriate for us to apply that standard here. Both parties have been litigating this case for years on the theory of rational-basis review, which . . . does not require the State to place any evidence in the record, let alone the extensive evidentiary showing that would be required for these statutes to survive heightened scrutiny. It would be imprudent and unfair to inject a new standard at this stage in the litigation.").

The appropriateness of applying a rational-basis analysis to classifications based upon sexual orientation is not a matter of controversy in this Court or the federal courts of appeals. In *Romer v. Evans,* 517 U.S. 620 (1996), a case in which the amendment in question specifically classified the affected individuals in terms of sexual orientation, this Court nonetheless utilized the rational-basis test. Id. at 631-636. Likewise, in the federal courts of appeals, the profusion of litigation involving the exclusion of homosexuals from military service has provided ample opportunity for consideration of the appropriate standard of review, and it appears that those courts are unanimous in finding that homosexuals do not constitute a suspect class and that there is no fundamental right to engage in homosexual conduct.[23]

Heightened review of section 21.06 as a statute discriminating on the basis of gender is likewise unnecessary. This Court's heightened scrutiny in gender cases has been directed at legislative classifications that "create or perpetuate

[23] *See,* e.g., *Thomasson v. Perry,* 80 F.3d 915, 928 (4th Cir.), *cert. denied,* 519 U.S. 948 (1996) ("rational basis is . . . the suitable standard for review" of the military "don't ask/don't tell" policy); *Baker v. Wade,* 769 F.2d 289, 292 (5th Cir. 1985), *cert. denied,* 478 U.S. 1022 (1986) ("the standard for review is whether § 21.06 [of the Texas Penal Code] is rationally related to a legitimate state end"); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati,* 128 F.3d 289, 292-293 (6th Cir. 1997), *cert. denied,* 525 U.S. 943 (1998) (holding that city charter amendment pertaining to sexual orientation was subject to review "under the most common and least rigorous equal protection norm . . . the 'rational relationship' test"); *Ben-Shalom v. Marsh,* 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied,* 494 U.S. 1004 (1990) ("deferential standard of review" held applicable to military regulation targeting homosexuals).

*See also Richenberg v. Perry,* 97 F.3d 256, 260 (8th Cir. 1996), *cert. denied,* sub nom. *Richenberg v. Cohen,* 522 U.S. 807 (1997) (rejecting contention that homosexuality is "suspect classification" requiring heightened scrutiny); *Holmes v. California Army National Guard,* 124 F.3d 1126, 1132 (9th Cir. 1997), *cert. denied,* 525 U.S. 1067 (1998) ("because homosexuals do not constitute a suspect or quasi-suspect class," the military "don't ask/don't tell" policy is subject only "to rational basis review"); *Rich v. Secretary of the Army,* 735 F.2d 1220, 1229 (10th Cir. 1984) ("classification based on one's choice of sexual partners is not suspect"); *Steffan v. Perry,* 41 F.3d 677, 684, n.3 (D.C. Cir. 1994) (holding that a group "defined by reference" to homosexual conduct "cannot constitute a suspect class"); *Woodward v. United States,* 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied,* 494 U.S. 1003 (1990) (holding that a homosexual "is not a member of a class to which heightened scrutiny must be afforded").

the legal, social, and economic inferiority of women." *United States v. Virginia,* 518 U.S. 515, 534 (1996). Such heightened scrutiny has been mandated in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of "archaic and overbroad" generalizations about gender, see *Schlesinger v. Ballard,* 419 U.S. 498, 506- 507 (1975), or based on "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'" *Craig v. Boren,* 429 U.S. 190, 198-199 (1976). See also *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 441 (1985) (differential treatment of the sexes "very likely reflect[s] outmoded notions of the relative capabilities of men and women"). *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 135 (1994); see also *United States v. Virginia,* 518 U.S. at 532 (stating that the Court will "carefully inspect[ ] official action that closes a door or denies opportunity to women [or to men]"). Enforcement of section 21.06 does not involve gender stereotyping or exclusion. The homosexual conduct statute indulges in no stereotypes about the respective capabilities of men and women, and it does not penalize one gender at the expense of the other. See *Miller v. Albright,* 523 U.S. 420, 444-45 (1998) (rejecting claim of improper genderbased classification in Fifth Amendment equal protection analysis of statute because "[n]one of the premises on which the statutory classification is grounded can be fairly characterized as an accidental byproduct of a traditional way of thinking about the members of either sex"); *Coalition for Economic Equity v. Wilson,* 122 F.3d 692, 702 (9th Cir. 1997) (holding that, while California's Proposition 209 mentions race and gender, it does not logically classify persons by race and gender).

Given these circumstances, heightened review for statutes that classify on the basis of sexual orientation or gender is neither raised nor required in this case.

**B. The petitioners have not established their membership in the class for which equal protection relief is sought** Before rational-basis review is necessary, the petitioners must establish that Texas impermissibly discriminated against them. From the record and the briefs, however, it is unclear what class the petitioners purport to represent in this challenge.

The classifications challenged in the petitioners' respective motions to quash the complaints against them in the trial court were the criminalization of "consensual sexual acts, including those in private, according to the sex and sexual orientation of those who engage in them," and the "discriminatory classification against gay people." See Pet. App. 119a-120a, 131a-132a. However, the record is silent as to the sexual orientation of the petitioners and whether the charged conduct was occurring consensually. See id., Appendices E, F & G, pp. 107a-141a (entirety of trial court record).

In *United States v. Hays,* 515 U.S. 737 (1995), the Court summarized the elements necessary to establish standing:

First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 742-743 (1995). The Court emphasized that, to avoid dismissal on standing grounds, the party who seeks the exercise of jurisdiction in his favor must clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute, and thereafter support this allegation by evidence adduced at trial. *Id.* at 743.

In this instance, if the petitioners contend that they were denied equal protection because they belong to the class of individuals who are foreclosed from having deviate sexual intercourse with another person of the same sex, they do not state an equal protection violation. Under the facially neutral conduct prohibitions of section 21.06, everyone in Texas is foreclosed from having deviate sexual intercourse with another person of the same sex. If the petitioners contend, however, that they were denied equal protection because they belong to a class of individuals who have been disproportionately impacted by section 21.06, the record is silent as to whether they in fact belong to such a class.

This Court accords equal protection standing only to "those persons who are personally denied equal treatment." *See id.* at 743-744 (quoting *Allen v. Wright,* 468 U.S. 737, 755 (1984). While the petitioners clearly have been prosecuted under section 21.06, it is not estab-

lished in this record that they possess the same-sex orientation that they contend is singled out for discrimination by the statute. As such, the writ of certiorari should be dismissed as improvidently granted, or standing should be denied to these petitioners for lack of an adequate record to establish an equal protection violation against them personally.

**C. The Texas Legislature did not purposefully discriminate in the passage of section 21.06.** Although the petitioners assert that the "group targeted and harmed by the Homosexual Conduct Law is, of course, gay people," see Brief of Petitioners 33, and much of their briefing is related to the unequal protection of the laws with respect to homosexuals, *see id.* at 40-50, section 21.06 does not expressly classify its offenders on the basis of their sexual orientation. Rather, it criminalizes homosexual conduct without reference to a defendant's sexual orientation. *Lawrence,* 41 S.W.2d at 353; see also Editors of the Harvard Law Review, *Sexual Orientation and the Law,* at 16 (Harvard University Press 1990) ("Although litigants and courts have assumed that [samesex] sodomy statutes classify based on sexual preference, the statutes actually prevent all persons from engaging in same-sex sodomy, regardless of sexual orientation.").[24]

The focus of section 21.06 on conduct, rather than sexual orientation, does not foreclose equal protection review. A statute, though facially neutral, may still be challenged as constitutionally infirm under the Equal Protection Clause if the challenger can prove that the statute was enacted because of a discriminatory purpose. *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 279 (1979). This intent component is significant: equal protection jurisprudence focuses on the purposeful marginalization of disfavored groups. *See id.* at 274, 279 (holding that "discriminatory purpose" implies more than intent as volition or intent as awareness of the consequences; it implies that the decisionmaker [in that case a state legislature] selected or reaffirmed a particular course of action at least partly "because of," and not merely "in spite of," its adverse effects upon an identifiable group); *Hernandez v. New York,* 500 U.S. 352, 372-73 (1991) (O'Connor, J., concurring) ("An unwavering line of cases from this Court holds that a violation of the Equal Protection Clause requires state action motivated by discriminatory intent; the disproportionate effects of state action are not sufficient to establish such a violation.").

As such, assuming that petitioners appear as representatives of the class of individuals who are disproportionately affected by section 21.06, it is incumbent upon them to prove the purposeful intent of the Texas Legislature in order to perfect their equal protection claim. Cf. *State v. Baxley,* 656 So.2d 973, 978 (La. 1995) ("Given the presumption of the constitutionality of legislation which does not classify on its face, it is incumbent upon the challenger of the legislation to prove the discriminatory purpose. In the present case, the record is devoid of any evidence that the crime against nature statute was enacted for the purpose of discriminating against gay men and lesbians. Therefore, the statute is not constitutionally infirm on these grounds.").

The record on appeal—which essentially consists of complaints, "probable cause affidavits," motions to quash, and pleas of guilty—provides no such evidence. Likewise, the petitioners have submitted no evidence of the Legislature's intent to invidiously discriminate.

Although commentators have speculated that section 21.06 was enacted in its present form because of political concerns about the impact of decriminalizing homosexual conduct, an alternative interpretation of the Legislature's intent can be inferred from the historical context within which section 21.06 was passed.

In 1854, the State's Fifth Legislature determined that the conduct engaged in by the petitioners in this case—homosexual anal intercourse—should be punishable by hard labor in the penitentiary for up to five years: Sec. 40. If any person shall commit the abominable and detestable crime against nature, either with mankind or with any beast, he shall be punished by confinement to hard labor in the Penitentiary not exceeding five years. Act of February 9, 1854,

[24] The authors of the Harvard Law Review treatise go on to assert, however, that an invidious classification can be inferred from the disparate impact of the statute. Id. As will be discussed herein, disparate impact is insufficient in itself to establish an equal protection classification. There must be purposeful invidious discrimination against the affected class, and a review of the historical context in which the Texas statute was enacted does not suggest the presence of such discrimination.

5th Leg., R.S., ch. XLIX, § 40, 1854 Tex. Gen. Laws 58, 66.

Six years later, the Eighth Legislature increased both the minimum and maximum periods of confinement to be assessed upon conviction of that offense: Art. 399c. If any person shall commit with mankind or beast the abominable and detestable crime against nature, he shall be deemed guilty of sodomy, and on conviction thereof, he shall be punished by confinement in the penitentiary for not less than five nor more than fifteen years. Act of February 11, 1860, 8th Leg., R.S., ch. 74, 1860 Tex. Gen. Laws 95, 97.

A Reconstruction-era Texas Supreme Court found the prohibition of the "abominable and detestable crime against nature" to be too vague to be enforced, *Fennell v. State,* 32 Tex. 378 (1869), but by 1893, the Court of Criminal Appeals was willing to look to the common law for guidance in determining what constituted a "crime against nature," and it found that the conduct prohibited by the statute was anal sexual intercourse. See *Prindle v. State,* 21 S.W. 360 (Tex. Crim. App. 1893). In 1943, the statute was amended to the following form:

> Article 524. Sodomy.
>
> Whoever has carnal copulation with a beast, or in an opening of the body, except sexual parts, with another human being, or whoever shall use his mouth on the sexual parts of another human being for the purpose of having carnal copulation, or who shall voluntarily permit the use of his own sexual parts in a lewd and lascivious manner by any minor, shall be guilty of sodomy, and upon conviction thereof shall be deemed guilty of a felony, and shall be confined in the penitentiary not less than two (2) nor more than fifteen (15) years.

Act of April 5, 1943, 48th Leg., R.S., ch. 112, § 1, 1943 Tex. Gen. Laws 194 (hereinafter "article 524").

In 1965, this Court recognized in *Griswold v. Connecticut,* 381 U.S. 479 (1965), a constitutional right of privacy forbidding government regulation of a married couple's access to the use of contraceptives. Decisions followed that further delineated similar rights of privacy, including *Loving v. Virginia,* 388 U.S. 1 (1967), *Eisenstadt v. Baird,* 405 U.S. 438 (1972), and *Roe v. Wade,* 410 U.S. 113 (1973).[25]

As a result of those decisions, article 524 came under attack in federal district court, see *Buchanan v. Batchelor,* 308 F. Supp. 729 (N.D. Tex. 1970), rev'd on other grounds, 401 U.S. 989 (1971), and in the Texas Court of Criminal Appeals. See *Pruett v. State,* 463 S.W.2d 191 (Tex. Crim. App. 1971). The *Buchanan* court, a three-judge panel, declared article 524 unconstitutional because it violated the liberty of married couples in their private conduct by subjecting them to felony prosecution for private acts of sodomy, "an intimate relation of husband and wife." *Id.* at 732-33. The court declined to extend its holding to homosexual conduct, specifically noting the limited applicability of *Griswold* to the marital context. *Id.* at 733. The Court thus held article 524 unconstitutional "insofar as it reaches the private, consensual acts of married couples." *Id.* at 735.

Although *Buchanan* was later reversed by this Court and remanded for consideration as to whether abstention was necessary in light of the Court's decision in *Younger v. Harris,* 401 U.S. 37 (1971), and the Texas Court of Criminal Appeals ultimately declined to find article 524 unconstitutional in *Pruett,*[26] these cases were certainly within the constructive knowledge of the 1973 Texas Legislature as it considered what to do with the sodomy statute.

As such, it is a reasonable inference from this context that the Texas Legislature's enactment of section 21.06 in 1973 was not purposefully discriminatory against homosexuals, but was instead a reform of article 524 in accordance with what then appeared to be the direction in which constitutional privacy law was heading. The reformatory nature of the amendments is indicated as well by the Legislature's reduction of the offense from a felony punishable by confinement in the penitentiary for a minimum two years to a misdemeanor punishable only by a fine of up to two hundred dollars, and the

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[25] In fact, *Roe* was announced on January 23, 1973, just two weeks after the 63rd Texas Legislature convened on January 9, 1973, to enact the legislation that would ultimately include the 1974 Texas Penal Code. See 1973 Tex. Gen. Laws vi (noting date of convening as January 9, 1973).

[26] The reluctance of the Texas Court of Criminal Appeals to invalidate the sodomy statute in *Pruett* may have been related to the facts of the case. *Pruett* was essentially a homosexual rape case, in which the adult defendant "confessed that he committed the offense, after the victim had refused to consent, by striking him in the face with his fist and making him submit." *Pruett,* 463 S.W.2d at 192. The Court expressly noted that it had not been called upon to consider the "question of whether the sodomy statute may be invoked against married couples for private consenual [sic] acts." Id. at 194.

Legislature's formulation of the statute to forbid only certain kinds of homosexual conduct.[27]

The residual differences left over from this kind of benign incremental reform do not amount to purposeful discrimination.[28] See, e.g., *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802, 809 (1969) ("[A] legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.") (citations omitted); *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 316 (1993) ("[S]cope-of-coverage provisions are unavoidable components of most economic or social legislation. [The necessity of drawing a line of demarcation] renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally."). Because there is no evidence establishing that the Texas Legislature acted with discriminatory intent in 1973, the presumption of constitutionality persists. The petitioners have not demonstrated purposeful discrimination against the class they purport to represent.

**D. Section 21.06 is rationally related to a legitimate state interest.**

If a rational-basis analysis is necessary with regard to the promulgation of section 21.06, the State's legitimate interest in protecting its statute from constitutional challenge was in itself a rational basis for legislative action. In addition, section 21.06 rationally furthers other legitimate state interests, namely, the continued expression of the State's long-standing moral disapproval of homosexual conduct, and the deterrence of such immoral sexual activity, particularly with regard to the contemplated conduct of heterosexuals and bisexuals.

1. *Section 21.06 was enacted for the purpose of avoiding litigation and possible invalidation of the predecessor statute.* As noted above, section 21.06 was enacted by a 1973 Texas Legislature which was cognizant of changing judicial attitudes towards the constitutionality of legislation restricting private decisions of married couples. Accordingly, the decision to narrow article 524 was not the irrational product of invidious discrimination against homosexuals, but rather a reasonable retrenchment of the statute to address what may have been perceived to be a constitutional limitation of state authority to regulate marital behavior. No similar concerns existed at that time with respect to the possible constitutional protection of homosexual conduct, thus vitiating the need for immediate legislative reform in that direction.

For the reasons more fully expressed *supra,* this neutral motivation for the amendment of article 524 into the present-day statute—i.e., to avoid a potentially successful challenge to the State's sodomy law by individuals engaging in consensual heterosexual conduct—represents a rational basis for the classification of conduct upon which section 21.06 is based.

2. *Section 21.06 furthers the legitimate governmental interest of promotion of morality.* The promotion of morality has long been recognized as a lawful function of government. See, e.g., *Barbier v. Connolly,* 113 U.S. 27, 31 (1884) (holding that the Equal Protection Clause was not intended "to interfere with the power of the state . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people"); *Louis K. Liggett Co. v. Baldridge,* 278 U.S. 105, 111-12 (1928) ("The police power may be exerted in the form of state legislation . . . only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare."); *Berman v. Parker,* 348 U.S. 26, 32 (1954) (identifying "[p]ublic safety, public health, morality, peace and quiet [and] law and order" as appropriate "application[s] of the police power to municipal affairs"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (plurality opinion) (holding that police powers of the State extend to "public health, safety and morals").

Similarly, protection of family and morality has motivated many valid governmental actions.

[27] For example, the homosexual conduct statute does not forbid kissing or sexual stimulation of another person of the same sex with hands or fingers. See *Baker v. Wade,* 553 F. Supp. 1121, 1134 (N.D. Tex. 1982), rev'd, 769 F.2d 289 (5th Cir. 1985), *cert. denied,* 478 U.S. 1022 (1986).

[28] The Texas Legislature reenacted the Texas Penal Code in 1993, leaving section 21.06 intact. Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3589. As was the case in 1973, this reenactment of the status quo was also consistent with the thenprevailing law with respect to recognition of privacy for homosexuals. See *Bowers v. Hardwick,* 478 U.S. 186 (1986). An invidious intent cannot be inferred from the Legislature's passive maintenance of the status quo.

See, e.g., *Barnes,* 501 U.S. at 569 (recognizing legislature's right to "protect 'the social interest in order and morality'" in enacting public indecency statutes); *Michael H. v. Gerald D.,* 491 U.S. 110, 131 (1989) (protection of "integrity of the marital union" as legitimate state interest for denying third-party standing to challenge legitimacy of birth); *City of Dallas v. Stanglin,* 490 U.S. 19, 27 (1989) (protection of teenagers from "corrupting influences" as legitimate state interest for limiting access to dancehall); *Ginsberg v. United States,* 390 U.S. 629, 639 (1968) (approving legislature's legislation against distribution of "girlie magazines" to minors because "legislature could properly conclude that parents and others . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility").

This moral component was at the core of the Fifth Circuit's decision affirming the constitutionality of section 21.06 in 1985. Sitting *en banc*, that court found that "in view of the strong objection to homosexual conduct, which has prevailed in Western culture for the past seven centuries," section 21.06 was rationally related to the implementation of "morality, a permissible state goal," and, therefore, did not violate the Equal Protection Clause. *Baker v. Wade,* 769 F.2d 289, 292 (5th Cir. 1985), *cert. denied,* 478 U.S. 1022 (1986). Other courts at that time reached similar conclusions. See *Dronenburg v. Zech,* 741 F.2d 1388, 1397 (D.C. Cir. 1984) (upholding naval regulations excluding homosexuals from service as a permissible implementation of public morality, and noting the unlikelihood that "very many laws exist whose ultimate justification does not rest upon the society's morality"); *State v. Walsh,* 713 S.W.2d 508, 511-12 (Mo. 1986) (holding that "punishing homosexual acts as a Class A misdemeanor . . . is rationally related to the State's constitutionally permissible objective of implementing and promoting the public morality").

Shortly before the courts in *Baker and Dronenburg* upheld legislation related to homosexual conduct, the Eleventh Circuit reached an opposite conclusion with respect to Georgia's sodomy statute. See *Hardwick v. Bowers,* 760 F.2d 1202, 1212 (11th Cir. 1985) (holding that the Georgia statute implicated *Hardwick's* fundamental rights because his homosexual activity was a private and intimate association placed beyond the reach of state regulation by the Ninth Amendment and the "notion of fundamental fairness embodied in the due process clause of the Fourteenth Amendment").

This Court granted the Georgia Attorney General's petition for *certiorari,* and declined to invalidate Georgia's sodomy statute, finding that there was no fundamental right to engage in homosexual sodomy. *Bowers,* 478 U.S. at 191. In reaching this conclusion, the Court noted the long history of moral disapproval of homosexual conduct, noting that "[p]roscriptions against that conduct have ancient roots," and that, until 1961, sodomy had been illegal in all fifty states. *Id*. at 192; *see also id.* at 196-97 (Burger, C.J., concurring) (detailing historical genesis of sodomy statutes).

This Court dismissed *Hardwick's* assertion that there was no rational basis for the Georgia sodomy statute, explicitly rejecting the notion that laws may not be based upon perceptions of morality:

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis. *Id*. at 196. This Court shortly thereafter declined to review the constitutionality of section 21.06 of the Texas Penal Code. See *Baker v. Wade,* 478 U.S. 1022 (1986) (denying petition for writ of certiorari).

Nothing in this Court's jurisprudence since *Bowers* justifies revisiting its conclusion that morality constitutes an appropriate basis for legislative action. Petitioners cite *Romer v. Evans,* 517 U.S. 620 (1996) as antithetical to *Bowers,* but a careful review of *Romer* indicates that its application of equal protection principles to an overbroad state constitutional amendment does not implicate the legislature's authority to prohibit

what has traditionally been perceived as immoral conduct.

In *Romer,* the citizens of the State of Colorado approved a constitutional amendment that invalidated municipal ordinances banning discrimination on the basis of sexual orientation, and prohibited all legislative, executive or judicial action at any level of state or local government designed to protect homosexuals, lesbians, or bisexuals. *See id*. at 627. The Court summarized the impact of the amendment:

Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies. *Id*.

In overturning the amendment on equal protection grounds, the Court found that the statute "has the peculiar property of imposing a broad and undifferentiated disability on a single named group" that is "at once too narrow and too broad," identifying "persons by a single trait and then den[ying] them protection across the board." *Id*. at 632-33. In other words, the Colorado initiative was held unconstitutional because it went beyond punishment of the act of engaging in homosexual conduct and sought to disenfranchise individuals because of the mere tendency or predilection to engage in such conduct.

Section 21.06 does not suffer from that flaw. It is the homosexual conduct that is viewed as immoral, and a statute rendering that conduct illegal is obviously related to the goal of discouraging the conduct and thereby implementing morality. A statute that, say, prohibited all individuals with a homosexual orientation from attending public schools would not be rationally related to that goal and would violate the Equal Protection Clause, but a statute imposing criminal liability only upon persons who actually engage in homosexual conduct is perfectly tailored to implement the communal belief that the conduct is wrong and should be discouraged.

Notably, the issue of morality as a rational basis for the amendment was not implicated in *Romer*.[29] The lawyers challenging Amendment 2 did not ask this Court to overrule *Bowers,* and the lawyers for the State of Colorado avoided relying on it in their arguments. *Romer,* 517 U.S. at 635 (identifying primary rationale for Amendment 2 as "respect for other citizens' freedom of association" and Colorado's "interest in conserving resources to fight discrimination against other groups"); 517 U.S. at 641 (Scalia, J., dissenting) ("Respondents' briefs did not urge overruling *Bowers,* and at oral argument respondents' counsel expressly disavowed any intent to seek such overruling."); see generally Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 U. Colo. L. Rev. 373, 375 & notes 13-14 (1997) (discussing general absence of advocacy related to *Bowers* in the *Romer* litigation).

In the absence of any party raising morality as a justification, the *Romer* court prudentially declined to raise the issue itself. As the court below observed: *Romer* . . . does not disavow the Court's previous holding in *Bowers*; it does not elevate homosexuals to a suspect class; it does not suggest that statutes prohibiting homosexual conduct violate the Equal Protection Clause; and it does not challenge the concept that the preservation and protection of morality is a legitimate state interest.

*Lawrence,* 41 S.W.3d at 355. As such, *Romer* does not contradict the ultimate conclusion in *Bowers*—that majoritarian moral standards can be a rational basis for prohibitions against certain homosexual conduct. The State does not dispute that invidious intent can be inferred from classifications based on race, gender, economic status, or mental retardation. See, e.g., *Palmore v. Sidoti,* 466 U.S. 429 (1984) (reversing order denying custody based on racial considerations); *Frontiero v. Richardson,* 411 U.S. 677 (1973) (reversing gender-based classification in distribution of military benefits); *United States Department of Agriculture v. Moreno,* 413 U.S. 528 (1973) (striking down grossly overbroad classification discriminating against "individuals who live in households containing one or more members who are unrelated to the rest"); *Cleburne,* 473 U.S. 432 (1985) (striking down zoning restriction against group home for men-

[29] The Colorado constitutional amendment, which one commentator characterized as a "squirrelly antigay initiative adopted by narrow margins in an outlier state," see William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 229 (1999), lent itself to a holding that bypassed the role of morality in legislation. See also Lynn A. Baker, *The Missing Pages of the Majority Opinion in Romer v. Evans,* 68 U. Colo. L. Rev. 387, 408 (1997) (arguing that *Romer* is generally limited to its facts because "it is Amendment 2's unjustifiable and unprecedented scope, [its] 'sheer breadth,' that distinguishes it" from other legislation).

tally retarded based on negative reactions of neighbors to proximity). In those cases, the Court fairly reduced the asserted bases for discriminatory classifications to unsubstantiated negative views about the affected individuals. See *Romer,* 517 U.S. at 635 (prohibiting "status-based" legislation that is "a classification of persons undertaken for its own sake"). Those classifications do not implicate a moral component, though, as does a classification identifying types of homosexual conduct. As previously noted, the history of prohibitions against homosexual sodomy—in the common law, American law, and Texas law—is ancient, and the legislature's deference to these moral traditions is appropriate and rational.[30]

The prohibition of homosexual conduct in section 21.06 represents the reasoned judgment of the Texas Legislature that such conduct is immoral and should be deterred.[31] Although the application of sodomy statutes is not common because of the nature and circumstances of the offense, the statutes, like many others, express a baseline standard expressing the core moral beliefs of the people of the State. Whether this Court perceives this position to be wise or unwise, long-established principles of federalism dictate that the Court defer to the Texas Legislature's judgment and to the collective good sense of the people of the State of Texas, in their effort to enforce public morality and promote family values through the promulgation of penal statutes such as section 21.06.

[30] *See* Michael McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law,* 98 Yale L. Rev. 1501 (1989), arguing that deference to traditions of morality is "natural and inevitable . . . but it is also sensible":

> An individual has only his own, necessarily limited, intelligence and experience (personal and vicarious) to draw upon. Tradition, by contrast, is composed of the cumulative thoughts and experiences of thousands of individuals over an expanse of time, each of them making incremental and experimental alterations (often unconsciously), which are then adopted or rejected (again, often unconsciously) on the basis of experience—the experience, that is, of whether they advance the good life.

[31] In fact, although the statute is unlikely to deter many individuals with an exclusively homosexual orientation, the Legislature rationally could have concluded that section 21.06 would be effective to some degree in deterring the remaining population (i.e., persons with a heterosexual or bisexual orientation) from detrimentally experimenting in homosexual conduct.

**III. Summary.**

Public opinion regarding moral issues may change over time, but what has not changed is the understanding that government may require adherence to certain widely accepted moral standards and sanction deviation from those standards, so long as it does not interfere with constitutionally protected liberties. The legislature exists so that laws can be repealed or modified to match prevailing views regarding what is right and wrong, and so that the citizens' elected representatives can fine-tune the severity of the penalties to be attached to wrongful conduct. Perhaps homosexual conduct is not now universally regarded with the same abhorrence it inspired at the time of the adoption of our Federal Constitution, but any lag in legislative response to a mere change of public opinion—if such a lag actually exists—cannot and must not constitute the basis for a finding that the legislature's original enactment exceeded its constitutional authority.

As stated in *Glucksberg,* 521 U.S. at 735-36, there is "an earnest and profound debate about the morality, legality and practicality" of the statute in question; and the affirmance of the decision of the court of appeals in this case will "permit this debate to continue, as it should in a democratic society."

## CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be dismissed as improvidently granted, or, in the alternative, that the judgment of the Texas Court of Appeals for the Fourteenth District should be in all things affirmed.

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U.S. SUPREME COURT, JUNE 2003

# IN THE SUPREME COURT OF THE UNITED STATES

JOHN GEDDES LAWRENCE AND TYRON GARNER, APPELLANTS
V.
THE STATE OF TEXAS, APPELLEE

In Writ of Certiorari to the Court of Appeals of Texas, Fourteenth District

No. 02-102. Argued March 26, 2003–Decided June 26, 2003

## SUMMARY OF ARGUMENT

Responding to a reported weapons disturbance in a private residence, Houston police entered petitioner Lawrence's apartment and saw him and another adult man, petitioner Garner, engaging in a private, consensual sexual act. Petitioners were arrested and convicted of deviate sexual intercourse in violation of a Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct. In affirming, the State Court of Appeals held, *inter alia,* that the statute was not unconstitutional under the Due Process Clause of the Fourteenth Amendment. The court considered *Bowers v. Hardwick,* 478 U. S. 186, controlling on that point.

Held: The Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause. pp. 3–18.

(a) Resolution of this case depends on whether petitioners were free as adults to engage in private conduct in the exercise of their liberty under the Due Process Clause. For this inquiry the Court deems it necessary to reconsider its *Bowers* holding. The *Bowers* Court's initial substantive statement—"The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy ... ," 478 U. S., at 190—discloses the Court's failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it said that marriage is just about the right to have sexual intercourse. Although the laws involved in *Bowers* and here purport to do not more than prohibit a particular sexual act, their penalties and purposes have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. They seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons. pp. 3–6.

(b) Having misapprehended the liberty claim presented to it, the *Bowers* Court stated that proscriptions against sodomy have ancient roots. 478 U. S., at 192. It should be noted, however, that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally, whether between men and women or men and men. Moreover, early sodomy laws seem not to have been enforced against consenting adults acting in private. Instead, sodomy prosecutions often involved predatory acts against those who could not or did not consent: relations between men and minor girls or boys, between adults involving force, between adults implicating disparity in status, or between men and animals. The longstanding criminal prohibition of homosexual sodomy upon which *Bowers* placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character. Far from possessing "ancient roots," *ibid.,* American laws targeting same-sex couples did not develop until the last third of the 20th century. Even now, only nine States have singled out same-sex relations for criminal prosecution. Thus, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger there indicated. They are not without doubt and, at the very least, are overstated. The *Bowers* Court was, of course, making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral, but this Court's obligation is to define the liberty of all, not to mandate its own moral code, *Planned Parenthood of Southeastern Pa. v.*

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*Casey,* 505 U. S. 833, 850. The Nation's laws and traditions in the past half century are most relevant here. They show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. See *County of Sacramento v. Lewis,* 523 U. S. 833, 857. pp. 6–12.

(c) *Bowers*' deficiencies became even more apparent in the years following its announcement. The 25 States with laws prohibiting the conduct referenced in *Bowers* are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States, including Texas, that still proscribe sodomy (whether for same-sex or heterosexual conduct), there is a pattern of nonenforcement with respect to consenting adults acting in private. *Casey, supra,* at 851—which confirmed that the Due Process Clause protects personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education—and *Romer v. Evans,* 517 U. S. 620, 624—which struck down class-based legislation directed at homosexuals—cast *Bowers*' holding into even more doubt. The stigma the Texas criminal statute imposes, moreover, is not trivial. Although the offense is but a minor misdemeanor, it remains a criminal offense with all that imports for the dignity of the persons charged, including notation of convictions on their records and on job application forms, and registration as sex offenders under state law. Where a case's foundations have sustained serious erosion, criticism from other sources is of greater significance. In the United States, criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. And, to the extent *Bowers* relied on values shared with a wider civilization, the case's reasoning and holding have been rejected by the European Court of Human Rights, and that other nations have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent. Stare decisis is not an inexorable command. *Payne v. Tennessee,* 501 U. S. 808, 828. *Bowers*' holding has not induced detrimental reliance of the sort that could counsel against overturning it once there are compelling reasons to do so. *Casey, supra,* at 855–856. *Bowers* causes uncertainty, for the precedents before and after it contradict its central holding. pp. 12–17.

(d) *Bowers*' rationale does not withstand careful analysis. In his dissenting opinion in *Bowers* Justice Stevens concluded that (1) the fact a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice, and (2) individual decisions concerning the intimacies of physical relationships, even when not intended to produce offspring, are a form of "liberty" protected by due process. That analysis should have controlled *Bowers*, and it controls here. *Bowers* was not correct when it was decided, is not correct today, and is hereby overruled. This case does not involve minors, persons who might be injured or coerced, those who might not easily refuse consent, or public conduct or prostitution. It does involve two adults who, with full and mutual consent, engaged in sexual practices common to a homosexual lifestyle. Petitioners' right to liberty under the Due Process Clause gives them the full right to engage in private conduct without government intervention. *Casey, supra,* at 847. The Texas statute furthers no legitimate state interest which can justify its intrusion into the individual's personal and private life. pp. 17–18.

41 S. W. 3d 349, reversed and remanded.

Kennedy, J., delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined. O'Connor, J., filed an opinion concurring in the judgment. Scalia, J., filed a dissenting opinion, in which Rehnquist, C. J., and Thomas, J., joined. Thomas, J., filed a dissenting opinion.

Justice Kennedy delivered the opinion of the Court.

## ARGUMENT

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

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I

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody over night, and charged and convicted before a Justice of the Peace.

The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." App. to Pet. for Cert. 127a, 139a. The applicable state law is Tex. Penal Code Ann. §21.06(a) (2003). It provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "[d]eviate sexual intercourse" as follows:

"(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or

"(B) the penetration of the genitals or the anus of another person with an object." §21.01(1).

The petitioners exercised their right to a trial *de novo* in Harris County Criminal Court. They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution. Tex. Const., Art. 1, §3a. Those contentions were rejected. The petitioners, having entered a plea of *nolo contendere,* were each fined $200 and assessed court costs of $141.25. App. to Pet. for Cert. 107a–110a.

The Court of Appeals for the Texas Fourteenth District considered the petitioners' federal constitutional arguments under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. After hearing the case en banc the court, in a divided opinion, rejected the constitutional arguments and affirmed the convictions. 41 S. W. 3d 349 (Tex. App. 2001). The majority opinion indicates that the Court of Appeals considered our decision in *Bowers v. Hardwick,* 478 U. S. 186 (1986), to be controlling on the federal due process aspect of the case. *Bowers* then being authoritative, this was proper.

We granted certiorari, 537 U. S. 1044 (2002), to consider three questions:

1. "Whether Petitioners' criminal convictions under the Texas 'Homosexual Conduct' law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of laws?
2. "Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?
3. "Whether *Bowers v. Hardwick,* 478 U. S. 186 (1986), should be overruled?" Pet. for Cert. i.

The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.

II

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers*.

There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including *Pierce v. Society of Sisters,* 268 U. S. 510 (1925), and *Meyer v. Nebraska,* 262 U. S. 390 (1923); but the most pertinent beginning point is our decision in *Griswold v. Connecticut,* 381 U. S. 479 (1965).

In *Griswold* the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or aiding and abetting the use of contraceptives. The Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom. *Id.,* at 485.

After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In *Eisenstadt v. Baird,* 405 U. S. 438 (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried per-

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sons. The case was decided under the Equal Protection Clause, *id.,* at 454; but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights, *ibid.* It quoted from the statement of the Court of Appeals finding the law to be in conflict with fundamental human rights, and it followed with this statement of its own:

> "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. . . . If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.,* at 453.

The opinions in *Griswold* and Eisenstadt were part of the background for the decision in *Roe v. Wade,* 410 U. S. 113 (1973). As is well known, the case involved a challenge to the Texas law prohibiting abortions, but the laws of other States were affected as well. Although the Court held the woman's rights were not absolute, her right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause. The Court cited cases that protect spatial freedom and cases that go well beyond it. *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.

In *Carey v. Population Services Int'l,* 431 U. S. 678 (1977), the Court confronted a New York law forbidding sale or distribution of contraceptive devices to persons under 16 years of age. Although there was no single opinion for the Court, the law was invalidated. Both *Eisenstadt* and *Carey,* as well as the holding and rationale in *Roe,* confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults. This was the state of the law with respect to some of the most relevant cases when the Court considered *Bowers v. Hardwick.*

The facts in *Bowers* had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hardwick, in his own bedroom, engaging in intimate sexual conduct with another adult male. The conduct was in violation of a Georgia statute making it a criminal offense to engage in sodomy. One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex. *Hardwick* was not prosecuted, but he brought an action in federal court to declare the state statute invalid. He alleged he was a practicing homosexual and that the criminal prohibition violated rights guaranteed to him by the Constitution. The Court, in an opinion by Justice White, sustained the Georgia law. Chief Justice Burger and Justice Powell joined the opinion of the Court and filed separate, concurring opinions. Four Justices dissented. 478 U. S., at 199 (opinion of Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ.); *id.,* at 214 (opinion of Stevens, J., joined by Brennan and Marshall, JJ.).

The Court began its substantive discussion in *Bowers* as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Id.,* at 190. That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain

their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: "Proscriptions against that conduct have ancient roots." *Id.,* at 192. In academic writings, and in many of the scholarly amicus briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*. Brief for Cato Institute as *Amicus Curiae* 16–17; Brief for American Civil Liberties Union et al. as *Amici Curiae* 15–21; Brief for Professors of History et al. as *Amici Curiae* 3–10. We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men. See, e.g., *King v. Wiseman,* 92 Eng. Rep. 774, 775 (K. B. 1718) (interpreting "mankind" in Act of 1533 as including women and girls). Nineteenth-century commentators similarly read American sodomy, buggery, and crime-against-nature statutes as criminalizing certain relations between men and women and between men and men. See, e.g., 2 J. Bishop, Criminal Law §1028 (1858); 2 J. Chitty, Criminal Law 47–50 (5th Am. ed. 1847); R. Desty, A Compendium of American Criminal Law 143 (1882); J. May, The Law of Crimes §203 (2d ed. 1893). The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century. See, e.g., J. Katz, *The Invention of Heterosexuality* 10 (1995); J. D'Emilio & E. Freedman, *Intimate Matters: A History of Sexuality in America* 121 (2d ed. 1997) ("The modern terms *homosexuality* and *heterosexuality* do not apply to an era that had not yet articulated these distinctions"). Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. Thus the model sodomy indictments presented in a 19th-century treatise, see 2 Chitty, *supra*, at 49, addressed the predatory acts of an adult man against a minor girl or minor boy. Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.

To the extent that there were any prosecutions for the acts in question, 19th-century evidence rules imposed a burden that would make a conviction more difficult to obtain even taking into account the problems always inherent in prosecuting consensual acts committed in private. Under then-prevailing standards, a man could not be convicted of sodomy based upon testimony of a consenting partner, because the partner was considered an accomplice. A partner's testimony, however, was admissible if he or she had not consented to the act or was a minor, and therefore incapable of consent. See, e.g., F. Wharton, Criminal Law 443 (2d ed. 1852); 1 F. Wharton, Criminal Law 512 (8th ed. 1880). The rule may explain in part the infrequency of these prosecutions. In all events that infrequency

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makes it difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults. The longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.

The policy of punishing consenting adults for private acts was not much discussed in the early legal literature. We can infer that one reason for this was the very private nature of the conduct. Despite the absence of prosecutions, there may have been periods in which there was public criticism of homosexuals as such and an insistence that the criminal laws be enforced to discourage their practices. But far from possessing "ancient roots," *Bowers*, 478 U. S., at 192, American laws targeting same-sex couples did not develop until the last third of the 20th century. The reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880–1995 are not always clear in the details, but a significant number involved conduct in a public place. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 14–15, and n. 18.

It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. See 1977 Ark. Gen. Acts no. 828; 1983 Kan. Sess. Laws p. 652; 1974 Ky. Acts p. 847; 1977 Mo. Laws p. 687; 1973 Mont. Laws p. 1339; 1977 Nev. Stats. p. 1632; 1989 Tenn. Pub. Acts ch. 591; 1973 Tex. Gen. Laws ch. 399; see also *Post v. State,* 715 P. 2d 1105 (Okla. Crim. App. 1986) (sodomy law invalidated as applied to different-sex couples). Post-*Bowers* even some of these States did not adhere to the policy of suppressing homosexual conduct. Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them. See, e.g., *Jegley v. Picado,* 349 Ark. 600, 80 S. W. 3d 332 (2002); *Gryczan v. State,* 283 Mont. 433, 942 P. 2d 112 (1997); *Campbell v. Sundquist,* 926 S. W. 2d 250 (Tenn. App. 1996); *Commonwealth v. Wasson,* 842 S. W. 2d 487 (Ky. 1992); see also 1993 Nev. Stats. p. 518 (repealing Nev. Rev. Stat. §201.193).

In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U. S. 833, 850 (1992).

Chief Justice Burger joined the opinion for the Court in *Bowers* and further explained his views as follows: "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards." 478 U. S., at 196. As with Justice White's assumptions about history, scholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults. See, e.g., Eskridge, Hardwick and Historiography, 1999 U. Ill. L. Rev. 631, 656. In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *County of Sacramento v. Lewis,* 523 U. S. 833, 857 (1998) (Kennedy, J., concurring).

This emerging recognition should have been apparent when *Bowers* was decided. In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private."

ALI, Model Penal Code §213.2, Comment 2, p. 372 (1980). It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail. ALI, Model Penal Code, Commentary 277-280 (Tent. Draft No. 4, 1955). In 1961 Illinois changed its laws to conform to the Model Penal Code. Other States soon followed. Brief for Cato Institute as *Amicus Curiae* 15–16.

In *Bowers* the Court referred to the fact that before 1961 all 50 States had outlawed sodomy, and that at the time of the Court's decision 24 States and the District of Columbia had sodomy laws. 478 U. S., at 192–193. Justice Powell pointed out that these prohibitions often were being ignored, however. Georgia, for instance, had not sought to enforce its law for decades. *Id.,* at 197–198, n. 2 ("The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct")

The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later. Sexual Offences Act 1967, §1.

Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom,* 45 Eur. Ct. H. R. (1981) ¶ ;52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.

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In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances. *State v. Morales,* 869 S. W. 2d 941, 943.

Two principal cases decided after *Bowers* cast its holding into even more doubt. In *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U. S. 833 (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.,* at 851. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

> "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Ibid.*

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.

The second post-*Bowers* case of principal relevance is *Romer v. Evans,* 517 U. S. 620 (1996). There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. *Romer* invalidated an amendment to Colorado's constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," *id.,* at 624 (internal quotation marks

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omitted), and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose. *Id.,* at 634.

As an alternative argument in this case, counsel for the petitioners and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions. Just this Term we rejected various challenges to state laws requiring the registration of sex offenders. *Smith v. Doe,* 538 U. S. __ (2003); *Connecticut Dept. of Public Safety v. Doe,* 538 U. S. 1 (2003). We are advised that if Texas convicted an adult for private, consensual homosexual conduct under the statute here in question the convicted person would come within the registration laws of a least four States were he or she to be subject to their jurisdiction. Pet. for Cert. 13, and n. 12 (citing Idaho Code §§18–8301 to 18–8326 (Cum. Supp. 2002); La. Code Crim. Proc. Ann., §§15:540–15:549 (West 2003); Miss. Code Ann. §§45–33–21 to 45–33–57 (Lexis 2003); S. C. Code Ann. §§23–3–400 to 23–3–490 (West 2002)). This underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition. Furthermore, the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.

The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer.* When our precedent has been thus weakened, criticism from other sources is of greater significance. In the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. See, e.g., C. Fried, Order and Law: Arguing the Reagan Revolution—A Firsthand Account 81–84 (1991); R. Posner, Sex and Reason 341–350 (1992). The courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment, see *Jegley v. Picado,* 349 Ark. 600, 80 S. W. 3d 332 (2002); *Powell v. State,* 270 Ga. 327, 510 S. E. 2d 18, 24 (1998); *Gryczan v. State,* 283 Mont. 433, 942 P. 2d 112 (1997); *Campbell v. Sundquist,* 926 S. W. 2d 250 (Tenn. App. 1996); *Commonwealth v. Wasson,* 842 S. W. 2d 487 (Ky. 1992).

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom.* See *P. G. & J. H. v. United Kingdom,* App. No. 00044787/98, ¶ ;56 (Eur. Ct. H. R., Sept. 25, 2001); *Modinos v. Cyprus,* 259 Eur. Ct. H. R. (1993); *Norris v. Ireland,* 142 Eur. Ct. H. R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as *Amici Curiae* 11–12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental inter-

est in circumscribing personal choice is somehow more legitimate or urgent.

The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. *Payne v. Tennessee,* 501 U. S. 808, 828 (1991) ("*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision'") (quoting *Helvering v. Hallock,* 309 U. S. 106, 119 [1940]). In *Casey* we noted that when a Court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. 505 U. S., at 855–856; see also *id.,* at 844 ("Liberty finds no refuge in a jurisprudence of doubt"). The holding in *Bowers* however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so.*Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.

The rationale of *Bowers* does not withstand careful analysis. In his dissenting opinion in *Bowers* Justice Stevens came to these conclusions:

> "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons." 478 U. S., at 216 (footnotes and citations omitted).

Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here.

*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey, supra,* at 847. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

The judgment of the Court of Appeals for the Texas Fourteenth District is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice O'Connor, concurring in the judgment.

The Court today overrules *Bowers v. Hardwick,* 478 U. S. 186 (1986). I joined *Bowers,* and do not join the Court in overruling it. Nevertheless, I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional. See Tex. Penal Code Ann. §21.06 (2003). Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.

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The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.,* 473 U. S. 432, 439 (1985); see also *Plyler v. Doe,* 457 U. S. 202, 216 (1982). Under our rational basis standard of review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne v. Cleburne Living Center, supra,* at 440; see also *Department of Agriculture v. Moreno,* 413 U. S. 528, 534 (1973); *Romer v. Evans,* 517 U. S. 620, 632-633 (1996); *Nordlinger v. Hahn,* 505 U. S. 1, 11-12 (1992).

Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Cleburne v. Cleburne Living Center, supra,* at 440; see also *Fitzgerald v. Racing Assn. of Central Iowa, ante,* p. ___; *Williamson v. Lee Optical of Okla., Inc.,* 348 U. S. 483 (1955). We have consistently held, however, that some objectives, such as "a bare ... desire to harm a politically unpopular group," are not legitimate state interests. *Department of Agriculture v. Moreno, supra,* at 534. See also *Cleburne v. Cleburne Living Center, supra,* at 446–447; *Romer v. Evans, supra,* at 632. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.

We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships. In *Department of Agriculture v. Moreno,* for example, we held that a law preventing those households containing an individual unrelated to any other member of the household from receiving food stamps violated equal protection because the purpose of the law was to "'discriminate against hippies.'"413 U. S., at 534. The asserted governmental interest in preventing food stamp fraud was not deemed sufficient to satisfy rational basis review. *Id.,* at 535–538. In *Eisenstadt v. Baird,* 405 U. S. 438, 447–455 (1972), we refused to sanction a law that discriminated between married and unmarried persons by prohibiting the distribution of contraceptives to single persons. Likewise, in *Cleburne v. Cleburne Living Center, supra,* we held that it was irrational for a State to require a home for the mentally disabled to obtain a special use permit when other residences—like fraternity houses and apartment buildings—did not have to obtain such a permit. And in *Romer v. Evans,* we disallowed a state statute that "impos[ed] a broad and undifferentiated disability on a single named group"—specifically, homosexuals. 517 U. S., at 632. The dissent apparently agrees that if these cases have stare decisis effect, Texas' sodomy law would not pass scrutiny under the Equal Protection Clause, regardless of the type of rational basis review that we apply. See post, at 17–18 (opinion of Scalia, J.).

The statute at issue here makes sodomy a crime only if a person "engages in deviate sexual intercourse with another individual of the same sex." Tex. Penal Code Ann. §21.06(a) (2003). Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by §21.06.

The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction. It appears that prosecutions under Texas' sodomy law are rare. See *State v. Morales,* 869 S. W. 2d 941, 943 (Tex. 1994) (noting in 1994 that §21.06 "has not been, and in all probability will not be, enforced against private consensual conduct between adults"). This case shows, however, that prosecutions under §21.06 do occur. And while the penalty imposed on petitioners in this case was relatively minor, the consequences of conviction are not. As the Court notes, see *ante,* at 15, petitioners' convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design. See, e.g., Tex. Occ. Code Ann. §164.051(a)(2)(B) (2003 Pamphlet) (physician); §451.251 (a)(1) (athletic trainer); §1053.252(2) (interior designer). Indeed, were petitioners to move to one of four States, their convictions would require them to register as sex offenders to local law enforcement. See, e.g., Idaho Code §18–8304 (Cum.

Supp. 2002); La. Stat. Ann. §15:542 (West Cum. Supp. 2003); Miss. Code Ann. §45–33–25 (West 2003); S. C. Code Ann. §23–3–430 (West Cum. Supp. 2002); cf. *ante,* at 15.

And the effect of Texas' sodomy law is not just limited to the threat of prosecution or consequence of conviction. Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. Indeed, Texas itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law "legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law," including in the areas of "employment, family issues, and housing." *State v. Morales,* 826 S. W. 2d 201, 203 (Tex. App. 1992).

Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality. In *Bowers,* we held that a state law criminalizing sodomy as applied to homosexual couples did not violate substantive due process. We rejected the argument that no rational basis existed to justify the law, pointing to the government's interest in promoting morality. 478 U. S., at 196. The only question in front of the Court in *Bowers* was whether the substantive component of the Due Process Clause protected a right to engage in homosexual sodomy. *Id.,* at 188, n. 2.*Bowers* did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished.

This case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. See, e.g., *Department of Agriculture v. Moreno, supra,* at 534; *Romer v. Evans,* 517 U. S., at 634–635. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be "drawn for the purpose of disadvantaging the group burdened by the law." *Id.,* at 633. Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating "a classification of persons undertaken for its own sake." *Id.,* at 635. And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior. The Texas sodomy law "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.,* at 634.

Texas argues, however, that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Id.,* at 641 (Scalia, J., dissenting) (internal quotation marks omitted). When a State makes homosexual conduct criminal, and not "deviate sexual intercourse" committed by persons of different sexes, "that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Ante,* at 14.

Indeed, Texas law confirms that the sodomy statute is directed toward homosexuals as a class. In Texas, calling a person a homosexual is slander per se because the word "homosexual" "impute[s] the commission of a crime." *Plumley v. Landmark Chevrolet, Inc.,* 122 F. 3d 308, 310 (CA5 1997) (applying Texas law); see also *Head v. Newton,* 596 S. W. 2d 209, 210 (Tex. App. 1980). The State has admitted that because of the sodomy law, being homosexual carries the presumption of being a criminal. See *State v. Morales,* 826 S. W. 2d, at 202–203 ("[T]he statute brands lesbians and gay men as criminals and

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thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law"). Texas' sodomy law therefore results in discrimination against homosexuals as a class in an array of areas outside the criminal law. See *ibid.* In *Romer v. Evans,* we refused to sanction a law that singled out homosexuals "for disfavored legal status." 517 U. S., at 633. The same is true here. The Equal Protection Clause "'neither knows nor tolerates classes among citizens.'" *Id.,* at 623 (quoting *Plessy v. Ferguson,* 163 U. S. 537, 559 [1896] [Harlan, J. dissenting]).

A State can of course assign certain consequences to a violation of its criminal law. But the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. The Texas sodomy statute subjects homosexuals to "a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass ... cannot be reconciled with" the Equal Protection Clause. *Plyler v. Doe,* 457 U. S., at 239 (Powell, J., concurring).

Whether a sodomy law that is neutral both in effect and application, see *Yick Wo v. Hopkins,* 118 U. S. 356 (1886), would violate the substantive component of the Due Process Clause is an issue that need not be decided today. I am confident, however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society. In the words of Justice Jackson:

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Railway Express Agency, Inc. v. New York,* 336 U. S. 106, 112–113 (1949) (concurring opinion).

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational-basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

A law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review. I therefore concur in the Court's judgment that Texas' sodomy law banning "deviate sexual intercourse" between consenting adults of the same sex, but not between consenting adults of different sexes, is unconstitutional.

Justice Scalia, with whom The Chief Justice and Justice Thomas join, dissenting.

"Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U. S. 833, 844 (1992). That was the Court's sententious response, barely more than a decade ago, to those seeking to overrule *Roe v. Wade,* 410 U. S. 113 (1973). The Court's response today, to those who have engaged in a 17-year crusade to overrule *Bowers v. Hardwick,* 478 U. S. 186 (1986), is very different. The need for stability and certainty presents no barrier.

Most of the rest of today's opinion has no relevance to its actual holding—that the Texas statute "furthers no legitimate state interest which can justify" its application to petitioners under rational-basis review. *Ante,* at 18 (overruling *Bowers* to the extent it sustained Georgia's anti-sodomy statute under the rational-basis test). Though there is discussion of "fundamental proposition[s]," *ante,* at 4, and "fundamental decisions," *ibid.* nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a "fundamental right." Thus, while overruling the outcome of *Bowers,* the Court leaves strangely untouched its central legal conclusion: "[R]espondent would have us announce ... a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do." 478 U. S., at 191. Instead the Court simply describes

petitioners' conduct as "an exercise of their liberty"—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case. *Ante,* at 3.

I

I begin with the Court's surprising readiness to reconsider a decision rendered a mere 17 years ago in *Bowers v. Hardwick.* I do not myself believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine. Today's opinions in support of reversal do not bother to distinguish—or indeed, even bother to mention—the paean to *stare decisis* coauthored by three Members of today's majority in *Planned Parenthood v. Casey.* There, when *stare decisis* meant preservation of judicially invented abortion rights, the widespread criticism of was strong reason to *reaffirm* it:

> "Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe*[,] ... its decision has a dimension that the resolution of the normal case does not carry. . . . [T]o overrule under fire in the absence of the most compelling reason ... would subvert the Court's legitimacy beyond any serious question." 505 U. S., at 866–867.b

Today, however, the widespread opposition to *Bowers,* a decision resolving an issue as "intensely divisive" as the issue in *Roe,* is offered as a reason in favor of overruling it. See *ante,* at 15–16. Gone, too, is any "enquiry" (of the sort conducted in *Casey*) into whether the decision sought to be overruled has "proven 'unworkable,'" *Casey, supra,* at 855.

Today's approach to *stare decisis* invites us to overrule an erroneously decided precedent (including an "intensely divisive" decision) if: (1) its foundations have been "eroded" by subsequent decisions, *ante,* at 15; (2) it has been subject to "substantial and continuing" criticism, *ibid.*; and (3) it has not induced "individual or societal reliance" that counsels against overturning, *ante,* at 16. The problem is that *Roe* itself—which today's majority surely has no disposition to overrule—satisfies these conditions to at least the same degree as*Bowers.*

(1) A preliminary digressive observation with regard to the first factor: The Court's claim that *Planned Parenthood v. Casey, supra,* "casts some doubt" upon the holding in *Bowers* (or any other case, for that matter) does not withstand analysis. *Ante,* at 10. As far as its holding is concerned, *Casey* provided a less expansive right to abortion than did *Roe,* which was already on the books when *Bowers* was decided. And if the Court is referring not to the holding of *Casey,* but to the dictum of its famed sweet-mystery-of-life passage, *ante,* at 13 ("'At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life'"): That "casts some doubt" upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all. I have never heard of a law that attempted to restrict one's "right to define" certain concepts; and if the passage calls into question the government's power to regulate actions based on one's self-defined "concept of existence, etc.," it is the passage that ate the rule of law.

I do not quarrel with the Court's claim that *Romer v. Evans,* 517 U. S. 620 (1996), "eroded" the "foundations" of *Bowers*' rational-basis holding. See *Romer, supra,* at 640-643 (Scalia, J., dissenting).) But *Roe* and *Casey* have been equally "eroded" by *Washington v. Glucksberg,* 521 U. S. 702, 721 (1997), which held that only fundamental rights which are "'deeply rooted in this Nation's history and tradition'" qualify for anything other than rational basis scrutiny under the doctrine of "substantive due process." *Roe* and *Casey,* of course, subjected the restriction of abortion to heightened scrutiny without even attempting to establish that the freedom to abort was rooted in this Nation's tradition.

(2) *Bowers,* the Court says, has been subject to "substantial and continuing [criticism], disapproving of its reasoning in all respects, not just as to its historical assumptions." *Ante,* at 15. Exactly what those nonhistorical criticisms are, and whether the Court even agrees with them, are left unsaid, although the Court does cite two books. See *ibid.* (citing C. Fried, Order and Law: Arguing the Reagan Revolution—A Firsthand Account 81–84 (1991); R. Posner, Sex and Reason 341–350 (1992)).[1] Of course, *Roe* too (and by extension *Casey*) had been (and still is) subject to unrelenting criticism, including criticism from the two commentators cited by the

[1] This last-cited critic of *Bowers* actually writes: "[*Bowers*] is correct nevertheless that the right to engage in homosexual acts is not deeply rooted in America's history and tradition." Posner, Sex and Reason, at 343.

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Court today. See Fried, *supra,* at 75 ("*Roe* was a prime example of twisted judging"); Posner, *supra,* at 337 ("[The Court's] opinion in *Roe* ... fails to measure up to professional expectations regarding judicial opinions"); Posner, Judicial Opinion Writing, 62 U. Chi. L. Rev. 1421, 1434 (1995) (describing the opinion in *Roe* as an "embarrassing performanc[e]").

(3) That leaves, to distinguish the rock-solid, unamendable disposition of *Roe* from the readily overrulable *Bowers,* only the third factor. "[T]here has been," the Court says, "no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding . . . ." *Ante,* at 16. It seems to me that the "societal reliance" on the principles confirmed in *Bowers* and discarded today has been overwhelming. Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is "immoral and unacceptable" constitutes a rational basis for regulation. See, e.g., *Williams v. Pryor,* 240 F. 3d 944, 949 (CA11 2001) (citing *Bowers* in upholding Alabama's prohibition on the sale of sex toys on the ground that "[t]he crafting and safeguarding of public morality ... indisputably is a legitimate government interest under rational basis scrutiny"); *Milner v. Apfel,* 148 F. 3d 812, 814 (CA7 1998) (citing *Bowers* for the proposition that "[l]egislatures are permitted to legislate with regard to morality ... rather than confined to preventing demonstrable harms"); *Holmes v. California Army National Guard* 124 F. 3d 1126, 1136 (CA9 1997) (relying on *Bowers* in upholding the federal statute and regulations banning from military service those who engage in homosexual conduct); *Owens v. State,* 352 Md. 663, 683, 724 A. 2d 43, 53 (1999) (relying on *Bowers* in holding that "a person has no constitutional right to engage in sexual intercourse, at least outside of marriage"); *Sherman v. Henry,* 928 S. W. 2d 464, 469–473 (Tex. 1996) (relying on *Bowers* in rejecting a claimed constitutional right to commit adultery). We ourselves relied extensively on *Bowers* when we concluded, in *Barnes v. Glen Theatre, Inc.,* 501 U. S. 560, 569 (1991), that Indiana's public indecency statute furthered "a substantial government interest in protecting order and morality," *ibid.,* (plurality opinion); see also *id.,* at 575 (Scalia, J., concurring in judgment). State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. See *ante,* at 11 (noting "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" [emphasis added]). The impossibility of distinguishing homosexuality from other traditional "morals" offenses is precisely why *Bowers* rejected the rational-basis challenge. "The law," it said, "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." 478 U. S., at 196.[2]

What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails. Not so the overruling of *Roe,* which

[2] While the Court does not overrule *Bowers*' holding that homosexual sodomy is not a "fundamental right," it is worth noting that the "societal reliance" upon that aspect of the decision has been substantial as well. See 10 U. S. C. §654(b)(1) ("A member of the armed forces shall be separated from the armed forces ... if ... the member has engaged in ... a homosexual act or acts"); *Marcum v. McWhorter,* 308 F. 3d 635, 640–642 (CA6 2002) (relying on *Bowers* in rejecting a claimed fundamental right to commit adultery); *Mullins v. Oregon,* 57 F. 3d 789, 793–794 (CA9 1995) (relying on *Bowers* in rejecting a grandparent's claimed "fundamental liberty interes[t]" in the adoption of her grandchildren); *Doe v. Wigginton,* 21 F. 3d 733, 739–740 (CA6 1994) (relying on *Bowers* in rejecting a prisoner's claimed "fundamental right" to on-demand HIV testing); *Schowengerdt v. United States,* 944 F. 2d 483, 490 (CA9 1991) (relying on *Bowers* in upholding a bisexual's discharge from the armed services); *Charles v. Baesler,* 910 F. 2d 1349, 1353 (CA6 1990) (relying on *Bowers* in rejecting fire department captain's claimed "fundamental" interest in a promotion); *Henne v. Wright,* 904 F. 2d 1208, 1214–1215 (CA8 1990) (relying on *Bowers* in rejecting a claim that state law restricting surnames that could be given to children at birth implicates a "fundamental right"); *Walls v. Petersburg,* 895 F. 2d 188, 193 (CA4 1990) (relying on *Bowers* in rejecting substantive-due-process challenge to a police department questionnaire that asked prospective employees about homosexual activity); *High Tech Gays v. Defense Industrial Security Clearance Office,* 895 F. 2d 563, 570–571 (CA9 1988) (relying on *Bowers*' holding that homosexual activity is not a fundamental right in rejecting—on the basis of the rational-basis standard—an equal-protection challenge to the Defense Department's policy of conducting expanded investigations into backgrounds of gay and lesbian applicants for secret and top-secret security clearance).

would simply have restored the regime that existed for centuries before 1973, in which the permissibility of and restrictions upon abortion were determined legislatively State-by-State. *Casey,* however, chose to base its *stare decisis* determination on a different "sort" of reliance. "[P]eople," it said, "have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail." 505 U. S., at 856. This falsely assumes that the consequence of overruling *Roe* would have been to make abortion unlawful. It would not; it would merely have permitted the States to do so. Many States would unquestionably have declined to prohibit abortion, and others would not have prohibited it within six months (after which the most significant reliance interests would have expired). Even for persons in States other than these, the choice would not have been between abortion and childbirth, but between abortion nearby and abortion in a neighboring State.

To tell the truth, it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of *stare decisis* set forth in *Casey*. It has thereby exposed *Casey*'s extraordinary deference to precedent for the result-oriented expedient that it is.

II

Having decided that it need not adhere to *stare decisis*, the Court still must establish that *Bowers* was wrongly decided and that the Texas statute, as applied to petitioners, is unconstitutional.

Texas Penal Code Ann. §21.06(a) (2003) undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to "liberty" under the Due Process Clause, though today's opinion repeatedly makes that claim. *Ante,* at 6 ("The liberty protected by the Constitution allows homosexual persons the right to make this choice"); *ante,* at 13 ("'These matters ... are central to the liberty protected by the Fourteenth Amendment'"); *ante,* at 17 ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government"). The Fourteenth Amendment expressly allows States to deprive their citizens of "liberty," so long as "due process of law" is provided:

> "No state shall ... deprive any person of life, liberty, or property, without due process of law." Amdt. 14 (emphasis added).

Our opinions applying the doctrine known as "substantive due process" hold that the Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg,* 521 U. S., at 721. We have held repeatedly, in cases the Court today does not overrule, that only fundamental rights qualify for this so-called "heightened scrutiny" protection—that is, rights which are "'deeply rooted in this Nation's history and tradition,'" *ibid.* See *Reno v. Flores,* 507 U. S. 292, 303 (1993) (fundamental liberty interests must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental" (internal quotation marks and citations omitted)); *United States v. Salerno,* 481 U. S. 739, 751 (1987) (same). See also *Michael H. v. Gerald D.,* 491 U. S. 110, 122 (1989) ("[W]e have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' ... but also that it be an interest traditionally protected by our society"); *Moore v. East Cleveland,* 431 U. S. 494, 503 (1977) (plurality opinion); *Meyer v. Nebraska,* 262 U. S. 390, 399 (1923) (Fourteenth Amendment protects "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men" [emphasis added]).[3] All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest.

*Bowers* held, first, that criminal prohibitions of homosexual sodomy are not subject to heightened scrutiny because they do not impli-

[3] The Court is quite right that "history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry," *ante,* at 11. An asserted "fundamental liberty interest" must not only be "deeply rooted in this Nation's history and tradition," *Washington v. Glucksberg,* 521 U. S. 702, 721 (1997), but it must also be "implicit in the concept of ordered liberty," so that "neither liberty nor justice would exist if [it] were sacrificed," *ibid.* Moreover, liberty interests unsupported by history and tradition, though not deserving of "heightened scrutiny," are still protected from state laws that are not rationally related to any legitimate state interest. *Id.,* at 722. As I proceed to discuss, it is this latter principle that the Court applies in the present case.

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cate a "fundamental right" under the Due Process Clause, 478 U. S., at 191-194. Noting that "[p]roscriptions against that conduct have ancient roots," *id.,* at 192, that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights," *ibid.,* and that many States had retained their bans on sodomy, *id.,* at 193, *Bowers* concluded that a right to engage in homosexual sodomy was not "'deeply rooted in this Nation's history and tradition,'" *id.,* at 192.

The Court today does not overrule this holding. Not once does it describe homosexual sodomy as a "fundamental right" or a "fundamental liberty interest," nor does it subject the Texas statute to strict scrutiny. Instead, having failed to establish that the right to homosexual sodomy is "'deeply rooted in this Nation's history and tradition,'" the Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test, and overrules *Bowers*' holding to the contrary, see *id.,* at 196. "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Ante,* at 18.

I shall address that rational-basis holding presently. First, however, I address some aspersions that the Court casts upon *Bowers*' conclusion that homosexual sodomy is not a "fundamental right"—even though, as I have said, the Court does not have the boldness to reverse that conclusion.

III

The Court's description of "the state of the law" at the time of *Bowers* only confirms that *Bowers* was right. *Ante,* at 5. The Court points to *Griswold v. Connecticut,* 381 U. S. 479, 481–482 (1965). But that case expressly disclaimed any reliance on the doctrine of "substantive due process," and grounded the so-called "right to privacy" in penumbras of constitutional provisions other than the Due Process Clause. *Eisenstadt v. Baird,* 405 U. S. 438 (1972), likewise had nothing to do with "substantive due process"; it invalidated a Massachusetts law prohibiting the distribution of contraceptives to unmarried persons solely on the basis of the Equal Protection Clause. Of course *Eisenstadt* contains well known dictum relating to the "right to privacy," but this referred to the right recognized in *Griswold*—a right penumbral to the specific guarantees in the Bill of Rights, and not a "substantive due process" right.

*Roe v. Wade* recognized that the right to abort an unborn child was a "fundamental right" protected by the Due Process Clause. 410 U. S., at 155. The *Roe* Court, however, made no attempt to establish that this right was "'deeply rooted in this Nation's history and tradition'"; instead, it based its conclusion that "the Fourteenth Amendment's concept of personal liberty ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" on its own normative judgment that anti-abortion laws were undesirable. See *id.,* at 153. We have since rejected *Roe*'s holding that regulations of abortion must be narrowly tailored to serve a compelling state interest, see *Planned Parenthood v. Casey,* 505 U. S., at 876 (joint opinion of O'Connor, Kennedy, and Souter, JJ.); *id.,* at 951–953 (Rehnquist, C. J., concurring in judgment in part and dissenting in part)—and thus, by logical implication, *Roe*'s holding that the right to abort an unborn child is a "fundamental right." See 505 U. S., at 843–912 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (not once describing abortion as a "fundamental right" or a "fundamental liberty interest").

After discussing the history of antisodomy laws, *ante,* at 7–10, the Court proclaims that, "it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter," *ante,* at 7. This observation in no way casts into doubt the "definitive [historical] conclusion," *id.,* on which *Bowers* relied: that our Nation has a longstanding history of laws prohibiting sodomy in general—regardless of whether it was performed by same-sex or opposite-sex couples:

> "It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. *Sodomy* was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had *criminal sodomy laws.* In fact, until 1961, all 50 States outlawed *sodomy,* and today, 24 States and the District of Columbia continue to provide criminal penalties for *sodomy* performed in private and between consenting adults. Against this background, to claim that

> a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." 478 U. S., at 192–194 (citations and footnotes omitted; emphasis added).

It is (as *Bowers* recognized) entirely irrelevant whether the laws in our long national tradition criminalizing homosexual sodomy were "directed at homosexual conduct as a distinct matter." *Ante,* at 7. Whether homosexual sodomy was prohibited by a law targeted at same-sex sexual relations or by a more general law prohibiting both homosexual and heterosexual sodomy, the only relevant point is that it was criminalized—which suffices to establish that homosexual sodomy is not a right "deeply rooted in our Nation's history and tradition." The Court today agrees that homosexual sodomy was criminalized and thus does not dispute the facts on which *Bowers actually* relied.

Next the Court makes the claim, again unsupported by any citations, that "[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private." *Ante,* at 8. The key qualifier here is "acting in private"—since the Court admits that sodomy laws were enforced against consenting adults (although the Court contends that prosecutions were "infrequent," *ante,* at 9). I do not know what "acting in private" means; surely consensual sodomy, like heterosexual intercourse, is rarely performed on stage. If all the Court means by "acting in private" is "on private premises, with the doors closed and windows covered," it is entirely unsurprising that evidence of enforcement would be hard to come by. (Imagine the circumstances that would enable a search warrant to be obtained for a residence on the ground that there was probable cause to believe that consensual sodomy was then and there occurring.) Surely that lack of evidence would not sustain the proposition that consensual sodomy on private premises with the doors closed and windows covered was regarded as a "fundamental right," even though all other consensual sodomy was criminalized. There are 203 prosecutions for consensual, adult homosexual sodomy reported in the West Reporting system and official state reporters from the years 1880–1995. See W. Eskridge, Gaylaw: Challenging the Apartheid of the Closet 375 (1999) (hereinafter Gaylaw). There are also records of 20 sodomy prosecutions and 4 executions during the colonial period. J. Katz, Gay/Lesbian Almanac 29, 58, 663 (1983). *Bowers*' conclusion that homosexual sodomy is not a fundamental right "deeply rooted in this Nation's history and tradition" is utterly unassailable.

Realizing that fact, the Court instead says: "[W]e think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Ante,* at 11 (emphasis added). Apart from the fact that such an "emerging awareness" does not establish a "fundamental right," the statement is factually false. States continue to prosecute all sorts of crimes by adults "in matters pertaining to sex": prostitution, adult incest, adultery, obscenity, and child pornography. Sodomy laws, too, have been enforced "in the past half century," in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy. Gaylaw 375. In relying, for evidence of an "emerging recognition," upon the American Law Institute's 1955 recommendation not to criminalize "'consensual sexual relations conducted in private,'" *ante,* at 11, the Court ignores the fact that this recommendation was "a point of resistance in most of the states that considered adopting the Model Penal Code." Gaylaw 159.

In any event, an "emerging awareness" is by definition not "deeply rooted in this Nation's history and tradition[s]," as we have said "fundamental right" status requires. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct. The *Bowers* majority opinion *never* relied on "values we share with a wider civilization," *ante,* at 16, but rather rejected the claimed right to sodomy on the ground that such a right was not "'deeply rooted in *this Nation's* history and tradition,'" 478 U. S., at 193-194 (emphasis added). *Bowers*' rational-basis holding is likewise devoid of any reliance on the views of a "wider civilization," see *id.,* at 196. The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta,

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however, since "this Court ... should not impose foreign moods, fads, or fashions on Americans." *Foster v. Florida,* 537 U. S. 990, n. (2002) (Thomas, J., concurring in denial of certiorari).

**IV**

I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack. This proposition is so out of accord with our jurisprudence—indeed, with the jurisprudence of any society we know—that it requires little discussion.

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," *Bowers, supra,* at 196—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this was a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual," *ante,* at 18 (emphasis addded). The Court embraces instead Justice Stevens' declaration in his *Bowers* dissent, that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice," *ante,* at 17. This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review.

**V**

Finally, I turn to petitioners' equal-protection challenge, which no Member of the Court save Justice O'Connor, *ante,* at 1 (opinion concurring in judgment), embraces: On its face §21.06(a) applies equally to all persons. Men and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex. To be sure, §21.06 does distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women. But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.

The objection is made, however, that the antimiscegenation laws invalidated in *Loving v. Virginia,* 388 U. S. 1, 8 (1967), similarly were applicable to whites and blacks alike, and only distinguished between the races insofar as the partner was concerned. In *Loving,* however, we correctly applied heightened scrutiny, rather than the usual rational-basis review, because the Virginia statute was "designed to maintain White Supremacy." *Id.,* at 6, 11. A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race. See *Washington v. Davis,* 426 U. S. 229, 241–242 (1976). No purpose to discriminate against men or women as a class can be gleaned from the Texas law, so rational-basis review applies. That review is readily satisfied here by the same rational basis that satisfied it in *Bowers*—society's belief that certain forms of sexual behavior are "immoral and unacceptable," 478 U. S., at 196. This is the same justification that supports many other laws regulating sexual behavior that make a distinction based upon the identity of the partner—for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage.

Justice O'Connor argues that the discrimination in this law which must be justified is not its discrimination with regard to the sex of the partner but its discrimination with regard to the sexual proclivity of the principal actor.

> "While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class." *Ante,* at 5.

Of course the same could be said of any law. A law against public nudity targets "the conduct that is closely correlated with being a nudist," and hence "is targeted at more than conduct"; it is "directed toward nudists as a class." But be that as it may. Even if the Texas law does deny equal protection to "homosexuals as a class," that denial still does not need to be justified by anything more than a rational basis, which our cases show is satisfied by the enforcement of traditional notions of sexual morality.

Justice O'Connor simply decrees application of "a more searching form of rational basis review" to the Texas statute. *Ante,* at 2. The cases she cites do not recognize such a standard, and reach their conclusions only after finding, as required by conventional rational-basis analysis, that no conceivable legitimate state interest supports the classification at issue. See *Romer v. Evans,* 517 U. S., at 635; *Cleburne v. Cleburne Living Center, Inc.,* 473 U. S. 432, 448–450 (1985); *Department of Agriculture v. Moreno,* 413 U. S. 528, 534–538 (1973). Nor does Justice O'Connor explain precisely what her "more searching form" of rational-basis review consists of. It must at least mean, however, that laws exhibiting "'a ... desire to harm a politically unpopular group,'" *ante,* at 2, are invalid even though there may be a conceivable rational basis to support them.

This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. Justice O'Connor seeks to preserve them by the conclusory statement that "preserving the traditional institution of marriage" is a legitimate state interest. *Ante,* at 7. But "preserving the traditional institution of marriage" is just a kinder way of describing the State's moral disapproval of same-sex couples. Texas's interest in §21.06 could be recast in similarly euphemistic terms: "preserving the traditional sexual mores of our society." In the jurisprudence Justice O'Connor has seemingly created, judges can validate laws by characterizing them as "preserving the traditions of society" (good); or invalidate them by characterizing them as "expressing moral disapproval" (bad).

* * *

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school must seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct. See *Romer, supra,* at 653.

One of the most revealing statements in today's opinion is the Court's grim warning that the criminalization of homosexual conduct is "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Ante,* at 14. It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream"; that in most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal; that proposals to ban such "discrimination" under Title VII have repeatedly been rejected by Congress, see Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong., 2d Sess. (1994); Civil Rights Amendments, H. R. 5452, 94th Cong., 1st Sess. (1975); that in some cases such "discrimination" is mandated by federal statute, see 10 U. S. C. §654(b)(1) (mandating discharge from the armed forces of any service member who engages in or intends to engage in homosexual acts); and that in some cases such "discrimination" is a constitutional right, see *Boy Scouts of America v. Dale,* 530 U. S. 640 (2000).

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more require a State to criminalize homosexual acts—or, for that matter, display any moral disappro-

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bation of them—than I would forbid it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change. It is indeed true that "later generations can see that laws once thought necessary and proper in fact serve only to oppress," *ante,* at 18; and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.

One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action, so that that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada (in a decision that the Canadian Government has chosen not to appeal). See *Halpern v. Toronto,* 2003 WL 34950 (Ontario Ct. App.); Cohen, Dozens in Canada Follow Gay Couple's Lead, Washington Post, June 12, 2003, p. A25. At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Ante,* at 17. Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and then declares that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Ante,* at 13 (emphasis added). Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, *ante,* at 18; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring," *ante,* at 6; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution," *ibid.*? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.

The matters appropriate for this Court's resolution are only three: Texas's prohibition of sodomy neither infringes a "fundamental right" (which the Court does not dispute), nor is unsupported by a rational relation to what the Constitution considers a legitimate state interest, nor denies the equal protection of the laws. I dissent.

Justice Thomas, dissenting.

I join Justice Scalia's dissenting opinion. I write separately to note that the law before the Court today "is ... uncommonly silly." *Griswold v. Connecticut,* 381 U. S. 479, 527 (1965) (Stewart, J., dissenting). If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.

Notwithstanding this, I recognize that as a member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to "decide cases 'agreeably to the Constitution and laws of the United States.'" *Id.,* at 530. And, just like Justice Stewart, I "can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy," *ibid.,* or as the Court terms it today, the "liberty of the person both in its spatial and more transcendent dimensions," *ante,* at 1.

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# MIRANDA V. ARIZONA

## ISSUE

Criminal Procedure

## HOW TO USE MILESTONES IN THE LAW

In the opinions* and briefs* that follow, the reader is invited to explore the issue of interrogation of criminal suspects and the question of when a suspect's confession to a crime should be admitted at trial. As you read this section, you may wish to consider the following questions:

- Why does the Constitution protect a criminal suspect from being a witness against himself or herself?
- Under what circumstances could a police officer ask an individual questions about a crime without having to give the person the Miranda warnings?
- What is the purpose of the right to counsel?

## THIS CASE IN HISTORY

> *You have the right to remain silent. Anything you say may be used for or against you in a court of law. You have the right to an attorney now or at any time during questioning. If you cannot afford an attorney, one will be appointed to represent you, without cost, by the courts.* [sample Miranda warning]

Law enforcement officers in movies, TV shows, and real life all utter some version of the *Miranda* warnings prior to interrogating a criminal suspect. In *Miranda versus Arizona,* the Supreme Court attempted to clarify a criminal suspect's privilege against self-incrimination under the Fifth Amendment, and right to counsel under the Sixth Amendment, during interrogation. *Miranda,* which was actually a review of four similar cases at once, was the Court's attempt to balance the rights of a person accused of a crime with the rights of society to prosecute those who commit criminal acts. Since it was handed down in 1966, the *Miranda* case has been the subject of continuing analysis and debate, yet its requirements, for the most part, have withstood the test of time.

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In the interest of space, only the opinions of the supreme courts of Arizona and California, which reached different results, and only the briefs in *Miranda v. Arizona,* are presented.

SUPREME COURT OF ARIZONA, APRIL 1965

## State v. Miranda

**CITE AS 401 P.2D 721**

STATE OF ARIZONA, APPELLEE,
V.
ERNEST ARTHUR MIRANDA, APPELLANT.
NO. 1394.

Supreme Court of Arizona.
En Banc.
April 22, 1965.
98 Ariz. 18

Prosecution on count of kidnapping and rape. The Superior Court, Maricopa County, Yale McFate, J., entered judgment on guilty verdict, and defendant appealed. The Supreme Court, McFarland, J., held that confession of defendant, who from previous arrests was familiar with legal proceedings and personal rights in court and who was picked from police lineup by complaining witness as person who allegedly kidnapped and raped her, made after police had informed him of his rights but had not specifically informed him of right to assistance of council and he himself had not requested and been denied assistance of counsel, was not inadmissible by reason of defendant's lacking attorney at time it was made.

Affirmed.

Reference to "rape" in kidnapping count of information against defendant was proper where rape was alleged to be purpose of kidnapping. A.R.S. § 13–492, subsecs. A-C.

Where allegation in kidnapping information against defendant that defendant had allegedly perpetrated kidnapping for purpose of raping complaining witness was necessary and proper element of information, subsequent reiterated reference to alleged rape by use of words "and did rape" were not objectionable as being inflammatory inasmuch as those words stated no more than the original necessary reference to matter. A.R.S. § 13–492, subsecs. A-C.

Use of word "rape" in first or kidnapping count of information against defendant, to define necessary element of defendant's alleged purpose for alleged kidnapping, was not, by itself, prejudicial to defendant where use of word was necessary in second or "rape" count of information. A.R.S. § 13–492, subsecs. A-C.

Descriptive phrase "not being related in any way to the defendant" in first or kidnapping count of information against defendant, which had mere object of indicating that defendant's alleged taking of 18-year-old girl did not fall within exception in statute providing for taking of minor by parent, could not have had any inflammatory contents which prejudiced defendant. A.R.S. § 13–492, subsecs. A-C.

Where word "fear" originally alleged in second or "rape" count of indictment against defendant had been stricken from information prior to trial and, therefore, was not included in information read to jury, original inclusion could not have prejudiced defendant. A.R.S. §§ 13–492, subsecs. B, C, 13–611, subsec. A, par. 2.

Allowing defendant charged with rape and kidnapping, on his own motion, to have sanity hearing that caused delay of trial, through late filing of medical report, past 60-day period that rule required trial to be brought in, except in case of appropriate showing of good cause by affidavit or defendant's consent or action, was "good cause," within section, for continuing trial for additional five days beyond 60-day period. 17 A.R.S. Rules of Criminal Procedure, rules 236, 250.

Where prosecuting attorney, who had wide latitude in his argument to jury, stated conclusion in argument, justified by evidence, that 18-year-old complaining witness had acquiesced in alleged act of rape due to her fear of defendant, and trial court's immediate instruction to jury to disregard statement and instruction at close of trial limiting jury's consideration to rape offense charged had effect of precluding prejudice from inflammatory aspect of statement, prejudicial error did not appear. A.R.S. § 13–611, subsec. A, par. 2.

Whether defendant charged with rape of complaining witness had actually penetrated 18–year-old complaining witness, as witness affirmatively testified and as defendant's confession indicated, and whether thereby rape was actually perpetrated were questions for jury. A.R.S. § 13–611, subsec. A, par. 2.

All inferences must be construed in light most favorable to sustaining verdict in criminal case.

Where there is evidence to support criminal verdict, Supreme Court will not disturb finding of jury.

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A chief duty of both sheriff's office and county attorney's office is to make sure that people are not unjustly charged with crime; both have duty to protect innocent as well as to detect the guilty.

Confession may be admissible when made without an attorney if it is voluntary and does not violate constitutional rights of defendant. U.S.C.A. Const. Amends. 6, 14.

Confession of defendant, who from previous arrests was familiar with legal proceedings and personal rights in court, made after police had informed him of his rights but had not specifically informed him of right to assistance of counsel and he himself had not requested and been denied assistance of counsel, was not inadmissible by reason of defendant's lacking attorney at time it was made.

Darrell F. Smith, Atty. Gen., Robert W. Pickrell, former Atty. Gen., Stirley Newell, former Asst. Atty. Gen., Allen L. Feinstein, Phoenix, of counsel, for appellee.

Alvin Moore, Phoenix, for appellant.

McFarland, Justice:

Appellant was convicted of the crime of kidnapping, Count I; and Rape, Count II; and sentenced to serve from twenty to thirty years on each count, to run concurrently. From the judgement and sentence of the court he appeals. Appellant, hereinafter called defendant, was in another information charged with the crime of robbery. After arraignment in the instant case, on motion of the county attorney, the trial on the robbery case was consolidated with the instant case, but thereafter—one day prior to the trial of this case—separate trials were granted. Defendant was tried and convicted on the robbery charge, from which he is also appealing in the companion case of State v. Miranda, No. 1397, 98 Ariz. 11, 401 P.2d 716.

The facts, as they relate to the defense as charged under Counts I and II in the instant case are as follows: On March 3, 1963, the complaining witness—a girl eighteen years of age—had been working in the concession stand at the Paramount Theatre in downtown Phoenix, and had taken the bus to 7th Street and Marlette. After getting off the bus, she had started to walk toward her home. She observed a car, which afterwords proved to be defendant's, which had been parked behind the ballet school on Marlette. The car pulled out of the lot, and came so close to her that she had to jump back to prevent being hit. It then parked across from some apartments in the same block. Defendant then left his car, walked toward her, and grabbed her. He told her not to scream, that he would not hurt her. He held her hands behind her back, put a hand over her mouth, and pulled her toward the car. He put her in the back seat, tied her hands and feet, and put a sharp thing to her neck and said to her "Feel this." She stated it all happened so suddenly that she did not have time to do anything. Defendant was unknown to the complaining witness. She had not seen him before and he was not related to her in any way.

He then drove the car for about twenty minutes, during which time complaining witness was lying in the back seat crying. When defendant stopped the car, he came to the back seat, and untied her hands and feet. He told her to pull off her clothes. She said "no," whereupon he started to remove them. She tried to push away from him, but he proceeded to remove her clothing. And, then, after one unsuccessful attempt, made a successful sexual penetration, while she pushed with her hands and was screaming. She testified:

> "I was pushing against him with my hands. I kept screaming, I was trying to get away but he was a lot stronger than I was, and I couldn't do anything."

He then drove her to 12th Street and Rose Lane, during which time she dressed. She ran home, and told her family who called the police. Her sister testified that the complaining witness came home that morning crying and looking as if she had been in a fight. On March 13, 1963, defendant was apprehended by the police. The officers who picked him up both testified that he was put into the "line-up" and was identified by complaining witness. Thereafter he confessed that he had forced complaining witness into his car, drove away with her, and raped her. After these statements he signed a statement, partly typed and partly in his own handwriting, which was substantially to the same effect as the testimony of the officers. Defendant offered no evidence in his defense at the trial of his case.

Defendant assigns as error the following: denial of the motion to quash the information; denial of his motion to dismiss the action on the ground that the case was not brought to trial within sixty days, under Rule 236, Rules of Criminal Procedure, 17 A.R.S. (1956); the coun-

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ty attorney's arguing the proposition of fear to the jury; the admission of the confession of defendant; that the verdict was not sustained by the evidence; and denial of defendant's motion for an instructed verdict.

We shall consider first the denial of the motion to quash the information. A.R.S. § 13–492 reads as follows:

> "A. A person, except in the case of a minor by the parent, who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains such individual for ransom, reward or otherwise, or to commit extortion or robbery, or to exact from relatives of such person or from any other person any money or valuable thing, or a person who aids or abets any such conduct, is guilty of a felony.
>
> "B. A person, except in the case of a minor by the parent, who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any child under the age of fourteen years by any means whatsoever with intent to hold or detain, or who holds or detains such child for the purpose of raping or committing sodomy, or lewd or lascivious acts upon the person of such child, or a person who aids or abets any such conduct, is guilty of a felony.
>
> "C. A person convicted under subsections A or B of this section shall be punished as follows:
>
> "1. If the person subjected to the acts mentioned in subsections A or B suffers serious bodily harm inflicted by the person found guilty, the person found guilty shall be punished by death or by life imprisonment without possibility of parole, whichever the jury recommends.
>
> "2. If the person subjected to any acts mentioned in subsection A or B does not suffer serious bodily harm the person found guilty shall be punished by imprisonment in the state prison from twenty to fifty years without possibility of parole until the minimum sentence has been served. As amended Laws 1956, Ch. 92, § 1."

Defendant contents that there were objectionable, prejudicial and redundant, and unnecessary words in the following portion of the information:

> "[D]id then and there wilfully, unlawfully and feloniously, seize, confine, abduct, conceal, kidnap or carry away one [complaining witness] for the purpose of raping *and did not rape* said [complaining witness], *said [complaining witness] not being related in any way to said defendant,* * * *."(Italics added.)

The words which he complains of were the words italicized. We have held the word otherwise," in A.R.S. § 13–492 Subsec. A, includes other crimes such as rape. *State v. Jacobs*, 93 Ariz. 336, 380 P.2d 998; and *State v. Taylor*, 82 Ariz. 289, 312 P.2d 162.

[1–4] In *State v. Jacobs*, supra, we stated:

> "We therefore now hold that the crime of kidnapping with intent to commit rape may be charged under A.R.S. § 13–492, subd. A." 93 Ariz. at 341, 380 P.2d at 1002.

The history and reason for the broadening of the kidnapping statute was well set forth in the *Jacobs* case. The information properly referred to "rape" because that was the purpose of the kidnapping. The use of the words "and did rape" was no more inflammatory than the allegation "for the purpose of raping," which was necessary and proper, as held in *Jacobs* supra. The commission of rape was charged in Count II, and so defendant could not have been prejudiced by the use of the word on Count I. The objection to the other language—namely, "not being related in any way to the defendant"—certainly is without foundation. The only object of the allegation was to show that the case did not fall within the exception, i.e., the taking of a minor by a parent. Under no stretch of the imagination could these words be construed as inflammatory, as contended by defendant.

[5] As to the second part of the information charging the crime of rape, defendant contends that because originally the word "fear" was in the information it was prejudicial. However, defendant made a motion to quash the information, and, on May 2d, before the trial, the court entered an order denying defendant's motion to quash but ordered the word "fear" to be stricken from the information. Hence the information upon which defendant was tried and which was read to the jury did not contain the word "fear." So the word "fear" originally in the information could not have had any prejudicial effect. The case was submitted under proper instructions defining rape under A.R.S. § 13–611, Subsec. A. Par. 2 namely:

> "2. Where the female resists, but her resistance is overcome by force or violence."

[6] Defendant contends that it was error to deny his motion to dismiss the action on the

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ground that the case was not brought to trial within the sixty days provided for under Rule of Criminal Procedure, No. 236, which reads:

> "When a person has been held to answer for an offense, if an information is not filed against him for the offense within thirty days thereafter, or when a person has been indicted or informed against for an offense, if he is not brought to trial for the offense within sixty days after the indictment has been found or the information filed, the prosecution shall be dismissed upon the application of such person, or of the county attorney, or on the motion of the court itself, unless good cause to the contrary is shown by affidavit, or unless the action has not proceeded to trial because of the defendant's consent or by his action. When good cause is shown, the action may be continued, in which event the defendant if bailable shall be released on bail either on his own recognizance or on the undertaking of sureties." 17 A.R.S. (1956).

This contention is without merit, as defendant made application for a sanity hearing under Rules of Criminal Procedure, No. 250, 17 A.R.S. (1956), just one week prior to the time of the original trial setting. The trial setting was well within the 60–day period. It was defendant's application for the sanity hearing which caused the delay. At the hearing on this application, and without objection of defendant's counsel, a new date for trial was set—June 10, 1963—which was also within the 60–day period. One of the medical reports was not filed until June 7, 1963. Defendant was thereafter promptly tried—just two days after the ruling was made on the motion for the sanity hearing. Thus, it is evident that the delay of the trial was due to defendant's waiting until just one week before trial date to make his motion for the sanity hearing. This was good cause for continuance. Even with the delay occasioned by defendant's own action, trial was held June 20, 1963, only five days beyond the 60–day period. Where good cause is shown, under Rules of Criminal Procedure, No. 236, an action may be continued. *Westover v. State*, 66 Ariz. 145, 185 P.2d 315; *Power v. State*, 43 Ariz. 329, 30 P.2d 1059.

[7] Defendant contends that there was prejudicial error committed by the deputy county attorney when he argued before the jury that the victim acquiesced in the act due to fear. Defendant contends that this argument, notwithstanding the court's instruction to disregard it, was so prejudicial and inflammatory as to deny defendant a fair and impartial trial. We cannot agree with defendant's interpretation. Certainly the testimony justified the county attorney's conclusion of fear. There was such testimony by the complaining witness as: "He had my hands behind my back, and one hand over my mouth, and started pulling me toward the car"; "He tied my hands and my ankles, after he got out, he put this sharp thing to my neck and said 'Feel this' * * * I kept screaming 'Please let me go,'"; and when he was undressing her, she stated she was crying again and said "Please don't." This court has repeatedly held that attorneys are given a wide latitude in their arguments to the jury. *State v. Dowthard*, 92 Ariz. 44, 373 P.2d 357; *State v. Thomas*, 78 Ariz. 52, 275 P.2d 408; *State v. McLain*, 74 Ariz. 132, 245 P.2d 278. In addition, any possible prejudice was corrected by the court's prompt instruction to disregard, coupled with the instructions given at the close of a trial, viz., limiting the jury's consideration to the offense charged—Rape, A.R.S. § 13–611, Subsec. A, Par 2.

[8–10] Defendant contends that the verdict is unsupported by the evidence, viz., there is no showing that the victim resisted the perpetration of the rape. This court cannot find merit in this contention. The victim testified that she pushed against defendant with her hands, and kept screaming; that she was trying to get away, and she testified that he was a lot stronger than she was, and she could not do anything. She also testified to penetration and defendant's confession showed penetration. These were questions for the jury, and the jury decided against defendant. We have repeatedly held that all inferences must be construed in the light most favorable to sustaining the verdict, and that where there is evidence to support a verdict we will not disturb a finding of a jury. *State v. Hernandez*, 96 Ariz. 28, 391 P.2d 586; *State v. Maxwell*, 95 Ariz. 396, 391 P.2d 560.

Defendant contends that admission into evidence of his written confession was error for the reason that he did not have an attorney at the time the statement was made and signed. The police officers Young and Cooley testified to oral statements made to them before the signing of the written confession. Their testimony was substantially the same. They first saw defendant at his home at 2525 West Maricopa on March 13, 1963, when they went there for the purpose of investigating a rape. They took defendant to the

police station and placed him in a "line-up" with "four other Mexican males, all approximately the same age and height, build," and brought in the complaining witness who identified him as the one who had perpetrated the acts against her. Then they immediately interrogated him. They advised him of his rights. They testified that he made the statement of his own free will; and that there were no threats, or use of force and coercion, or promises of immunity; that they had informed him of his legal rights and that any statement he made might be used against him.

The oral statement by defendant, as related to police officers, is set forth in the testimony of Detective Carroll Cooley:

"A He saw this girl walking on the street, he said, so he decided he would pull up ahead of her and stop. He stopped and got out of his car and opened the back door of his automobile. He said when the girl approached him he told her, he said, 'Don't make any noise, and get into the car,' and he said she got into the car, he said, in the back seat.

"After getting into the car, he said he took a small rope he had inside the car and he tied her hands and her ankles, then he got into the front seat behind the driver's wheel and he drive to a location several miles from there in the northeast direction to the area of a desert.

"Q Did he tell you what street this took place on?

"A He didn't know the street. I asked him the street, and he didn't know the name of the street, he didn't know exactly where he was located when he stopped. It was just in the desert area, couple of miles from where he picked the girl up.

"He said then when he got there he noticed that the girl was untied, and he got into the back seat and he asked her if she would, or he told her to take her clothes off and she said, 'No, would you please take me home?'

"He said then he took her clothes off for her. After he had undressed her, she began to cry, and started begging him not to do this. She said she had never had any relations with a man before.

"He said he went ahead and performed the act of intercourse, and in so doing was only able to get about a half inch of his penis in and at which time he said he did reach a climax, but he didn't believe that he had reached a climax inside of her.

"He said after the act of intercourse, he then told her to get dressed and asked her where she lived and she told him in the area, she told him 10th or 12th Street. He couldn't remember where, so he said he drove her back to the area where he picked her up and dropped her off in that general area.

"When he started to let her out, why she told him, 'Well this is not where I live.'

"He said, 'This is as far as I am taking you,' and then he asked her if she would pray for him. She got out of the car and he left and he said then he went home.

"Q Was that the essence of the conversation you had with him at that time?

"A That was the essence of the conversation.

"Q Officer, was this conversation reduced, or was the defendant's conversation with you reduced to writing?

"A Yes, Sir it was.

"Q Who wrote it down, Officer?

"A He wrote his own statement down.

"Q He wrote it down?

"A Yes, Sir.

"Q Were you present, Officer, when he wrote this?

"A Yes, Sir, I was."

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This oral statement was corroborated by the testimony of Officer Young. At the conclusion of Officer Cooley's testimony the statement of defendant was offered in evidence. Officer Cooley was examined on voir dire, as follows:

"Q Is this the statement that you said the defendant reduced to writing?

"A Yes, Sir, it is.

"[Prosecuting Attorney]: At this time, State will move to introduce the exhibit in evidence.

"[Defense Attorney]: May I ask some questions on voir dire?

"THE COURT: Yes, you may.

"[Defense Attorney]: Q Officer Cooley, in the taking of this statement, what did you say to the defendant to get him to make this statement?

"A I asked the defendant if he would tell us, write the same story that he had just told me, and he said that he would.

"Q Did you warn him of his rights?

"A Yes, Sir, at the heading of the statement is a paragraph typed out, and I read this paragraph to him out loud.

"Q Did you read that to him outloud?

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"A Yes, Sir.

"Q But did you ever, before or during your conversation or before taking this statement, did you ever advise the defendant he was entitled to the services of an attorney?

"A When I read —

"Q Before he made any statement?

"A When I read the statement right there.

"Q I don't see in the statement that it says where he is entitled to the advise of an attorney before he made it.

"A No, Sir.

"Q It is not in the statement?

"A It doesn't say anything about an attorney. Would you like for me to read it?

"Q No, it will be an exhibit if it is admitted and the jury can read it, but you didn't tell him he could have an attorney?"

The signed statement admitted in evidence is as follows:

> I, Ernest A. Miranda, do hereby swear that I make this statement voluntarily and out of my own free will, with no threats, coercion, or promises of immunity, and with full knowledge of my legal rights, understanding any statement I make may be used against me.
>
> "I, Ernest A. Miranda, am 23 year of age and have completed the 8th grade in school.
>
> "Seen a girl walking up street stopped a little ahead of her got out of car walked towards her grabbed her by the arm and asked to get in the car. Got in car without force tied hands & ankles. Drove away for a few miles. Stopped asked to take clothes off. Did not, asked me to take her back home. I started to take clothes off her without any force, and with cooperation. Asked her to lay down and she did. Could not get penis into vagina got about 1/2 (half) inch in. Told her to get clothes back on. Drove her home. I couldn't say I was sorry for what I had done. But asked her to say a prayer for me.
>
> "I have read and understand the foregoing statement and hereby swear to its truthfulness.
>
> "/s/ Ernest A. Miranda
>
> "WITNESS: /s/ Carroll Cooley
>
> /s/ Wilfred M. Young, #182

It will be noted that the only objection made to the testimony was in regard to the narrative form of the answers. The record shows the trial court did not err in the exercise of its discretion in the admission of this evidence.

The only objection made to the introduction of the signed statement was:

> "We are objecting because the Supreme Court of the United States says the man is entitled to an attorney at the time of his arrest."

No objection was made on the ground that the statement was not shown to be voluntary, and no request was made for a determination of the voluntariness of the confession outside of the presence of the jury.

In *State v. Owen*, 96 Ariz. 274, 394 P.2d 206, after the Supreme Court of the United States (378 U.S. 574, 84 S.Ct. 1932, 12 L.Ed.2d 1041) granted a petition for a writ of certiorari, judgement was vacated, and the case remanded for further proceedings not inconsistent with the opinion in *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908, and, in accordance with the mandate of the U.S. Supreme Court, we held:

> "However, since the Supreme Court vacated the judgement of this Court [*Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed2d 908] we are of the opinion that it was intended that we follow the rule that statements or admissions, which have been induced by a method in violation of a defendant's constitutional rights, are subject to the same exclusionary rule as a confession. (Cases cited.)" 96 Ariz. at 276, 394 P.2d at 207.

In the instant case request was not made for a determination of the voluntariness of the testimony out of the presence of the jury, nor was its voluntariness questioned or evidence offered to prove it involuntary. No question was presented to the court—either from the evidence or by the attorney—suggesting that there should be a determination as to the voluntariness of the evidence, and no request was made therefor. Officers Cooley and Young had testified to substantially the same facts as were contained in the written statement without objection except to the form of the questions. In his appeal, defendant's only contention is that he did not have an attorney. The evidence clearly shows that the statement was voluntary. The officers testified that there were no threats or use of any force or coercion, and no promise of immunity; that defendant was advised of his rights, and that any statement he made might be used against him. The record in this case, and the companion robbery case, No. 1397, shows that defendant was

identified, interrogated, and signed confessions in both cases in approximately two hours.

The procedure to be followed in regard to confessions is clearly set forth in State v. Owen, supra, where we held, in line with *Jackson v. Denno*, supra, that:

> "* * * when a question is raised as to voluntariness of a statement constituting either admissions against interest, exculpatory or otherwise, or a confession, it must be resolved by the judge outside the presence of the jury. If he determines it was involuntary, it will not be admitted. If he determines it was voluntary, it may be admitted." 96 Ariz. at 277, 394 P.2d at 208.

Counsel for defendant evidently determined that the statement was voluntary, or he would have made a request for a hearing out of the presence of the jury. There not having been an issue presented in regard to voluntariness—either from evidence or by request made for a hearing on its voluntariness—and a proper foundation having been laid for its introduction, there was no question to be determined by the court. The failure of the court to give such a hearing is not assigned as error in this case. The only question presented is whether it is proper to admit a statement voluntarily made where defendant did not have an attorney at the time he signed the statement.

The facts of *Jackson v. Denno*, supra, were different from those of the instant case. In that case there was a serious question in regard to whether the confession was voluntary, so the court laid down the rule which was followed by this court in the Owen case. We held that when requested there must first be a determination by the court in the absence of the jury as to whether a statement was voluntary. If it were involuntary, that ended the matter. If the court determined it to be voluntary, following the Massachusetts rule, we held it was still the duty of the court to submit the question again to the jury, and the jury might reject it on the grounds that it was involuntary.

The voluntariness and the truth of the confession were not denied. However, the defendant did not have an attorney at the time he made the confession. The sole question before the court, then, is whether there was a violation of the rights of defendant under the Sixth and Fourteenth Amendments to the Constitution by admission of the voluntary statement made without an attorney.

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We recognize that in passing upon constitutional provisions applicable to the instant case it is our duty to follow the interpretations of the Supreme Court of the United States. There is a long list of these cases, the most recent of which are *Escobedo v. State of Illinois* (1964), 378 U.S. 478, 84 S.Ct. 1758, 121 L.Ed.2d 977; and *Massiah v. United States* (1964) 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246.

In *Massiah*, supra, the court held invalid a conviction on statements which were secured by placing a hidden radio microphone in a co-defendant's car so that government agents could pick up a conversation between defendants. Indictment already had been returned, and counsel retained by defendant.

The *Massiah* case is not in point. The defendant in that case was not aware that his conversation was being picked up by the government agents, and he had not been put on notice that what he was saying might be used against him, nor did he know that the federal agents were eavesdropping on his conversation. Under these circumstances it was evident that he did not know his statement might be used against him, and the court held that such an incriminating statement was inadmissible.

In the *Escobedo* case, supra, defendant's brother-in-law had been fatally shot on January 19, 1960. Defendant had been arrested at 2:30 a. m. the next morning without a warrant and interrogated. He was released at 5:00 p. m. pursuant to a state court writ of habeas corpus. On January 30th, one DiGerlando, who was then in custody and later indicted along with defendant, told police that Escobedo had fired the fatal shot. That evening between 8:00 and 9:00 o'clock, Escobedo and his sister, the widow of deceased, were arrested and taken to headquarters. Escobedo had been handcuffed. Escobedo was told by the detective, in his words, that "they had us pretty well, up pretty tight, and we might as well admit to this crime." Escobedo then told them he wanted a lawyer. The police officer testified that although defendant was not formally charged he was in custody and could not walk out of the door.

The facts of the case also show that shortly after defendant reached police headquarters his lawyer arrived, and that he requested to see defendant, which request was denied. This was between 9:30 and 10:00 in the evening. Also, that all during questioning defendant asked to speak

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to his lawyer, and the police said his lawyer didn't want to see him. Notwithstanding both the request of the defendant and his retained lawyer, he was denied the opportunity to consult with his lawyer during the course of the entire interrogation. The court, in discussing the testimony, stated:

> "The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 795, 9 L.Ed.2d 799, and thereby renders inadmissible in a state criminal trial any incriminating statement elicited by the police during the interrogation." 378 U.S. at 479, 84 S.Ct. at 1759.

Under these circumstances, after review of the facts and the decisions on the question, the court stated:

> "We hold, therefore, that where, as the, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus, on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon v. Wainwright*, 372 U.S., at 342, 83 S.Ct., at 795, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial. [378 U.S. at 490, 84 S.Ct. at 1765]
>
> * * * * * *
>
> "Nothing we have said today affects the powers of the police to investigate'an unsolved crime,' *Spano v. [People of the State of] New York*, 360 U.S. 315, 327, 79 S.Ct. 1202, 1209 [3 L.Ed.2d 1265] (Stewart J., concurring), by gathering information from witnesses and by other 'proper investigative efforts.' *Haynes v. [State of] Washington*, 373 U.S. 503, 519, 83 S.Ct. 1336, 1346 [10 L.Ed.2d 513]. We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system beings to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." 378 U.S. at 492, 84 S.Ct. at 1766.

It will be noted that the court in the Escobedo case set forth the circumstances under which a statement would be held inadmissible, namely: (1) The general inquiry into an unsolved crime must have begun to focus on a particular suspect. (2) The suspect must have been taken into police custody. (3) The police in its interrogation must have elicited an incriminating statement. (4) The suspect must have requested and been denied an opportunity to consult with his lawyer. (5) The police must not have effectively warned the suspect of his constitutional rights to remain silent.

[11] When all of these five factors occur, then the *Escobedo* case is a controlling precedent. As to whether identification of a defendant in a "line-up" is sufficient to focus the investigation upon a defendant depends upon all of the facts and circumstances surrounding the case. We call attention to the fact that the crime committed in the instant case occurred in the night time, and that there is always a chance of a mistake in identity under such circumstances on account of the excitement of the complaining witness, and difficulty of identity at night. Even where a complaining witness identifies a defendant in a line-up, as in the instant case, officers may well feel that a defendant should have the right and privilege of explaining his whereabouts at the particular time which could be checked by the officers. One of the chief duties of both the sheriff's office and the county attorney's office is to make sure that people are not unjustly charged with crime. It is their duty to protect the innocent as well as detect the guilty. In *United States v. Konigsberg*, 2 Cir., 336 F.2d 844 (1964), the court stated:

> "In this appeal at the time the F.B.I. agents talked with Konigsberg the process was definitely investigative and never shifted to accusatory. Its purpose was not to elicit a confession: there were no threats or attempt to extract admissions from Konigsberg, damaging or otherwise. The uncontradicted purpose of the discussion was to give Konigsberg a chance to explain his presence in the garage if he could; to hear Konigberg's side of the story." 336 F.2d at 853.

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The question of whether the investigation had focused on the accused at the time of the making of the statement and thereby shifted "from investigatory to accusatory" is not the deciding factor in regard to the admissibility of the confession in the instant case. There are other factors under the ruling of the *Escobedo* case. Defendant in the instant case was advised of his rights. He had not requested counsel, and had not been denied assistance of counsel. We further call attention to the fact that, as pointed out in the companion case here on appeal, *State v. Miranda*, No. 1397, defendant had a record which indicated that he was not without courtroom experience. *State v. Cuzick*, 97 Ariz. 130, 397 P.2d 269, 631. It included being arrested in California on suspicion of armed robbery, and a conviction and sentence in Tennessee on violations of the Dyer Act. Under these circumstances he was certainly not unfamiliar with legal proceedings and his rights in court. The police testified they had informed defendant of his rights, and he stated in his written confession that he understood his rights (which would certainly include the right to counsel), and it is not for this court to dispute his statement that he did. His experience under previous cases indicate that his statement that he understood his rights was true.

In the case of *Commonwealth (Pa.) v. Coyle*, 415 Pa. 379, 203 A.2d 782, the court said:

> "During the course of Lt. Cullinane's questioning, the record is convincing that the appellant did not ask for the assistance of counsel. We note that this, in itself, is not controlling since if such assistance were constitutionally required, the right thereto would not depend on a request: *Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962). However, this factor substantially distinguishes the present case from the situation presented in *Escobedo v. State of Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). Further, we do not interpret *Escobedo* mean that, counsel must immediately be afforded one taken into custody, under all circumstances, particularly where none is requested. The mere fact that appellant was unrepresented by counsel during the questioning does not invalidate admissions made against interest. See, *Commonwealth v. Graham*, 408 Pa. 155, 182 A.2d 727 (1962); *Crooker v. State of California*, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1488 (1958); *Cicenia v. LaGay*, 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958)." 203 A.2d at 794.

In *Anderson v. State of Maryland*, 237 Md. 45, 205 A.2d 281 (1964) the court stated:

> "The appellant urges that the confession was inadmissible because he did not have counsel when he made it, citing *Escobedo v. [State of] Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). This contention is without merit since there is no evidence that he ever requested counsel. See *Green v. State*, supra [236 Md. 334, 203 A.2d 870], and *Mefford and Blackburn v. State*, 253 Md. 497, 201 A.2d 824 (1964).
>
> "Careful inspection of the record concerning the circumstances surrounding the giving of the confession reveals no evidence that it was not freely and voluntarily made. There is no evidence that the appellant ever asked to contact his family or requested food. He was not questioned by relays of officers. According to the police testimony and the written confession itself, the appellant was advised that his statement must voluntary, that there would be no threats or promises, and that it could be used in a court of law against him. There was no contradictory evidence. The trial court's finding that the confession was voluntary was supported by the evidence." 205 A.2d at 285.

We also note the interpretation of the federal court of the effect of the *Escobedo* case, at set forth in *Jackson v. United States*, D.C.Cir., 337 F.2d 136 (1964).

> "Defense counsel moved to suppress 'any and all confessions and admissions written or oral obtained by the United States since the date of his arrest and presentation to a committing magistrate.' As grounds for the motion, appellant claimed that the confessions and admissions were elicited from him 'involuntarily' in violation of the Fifth Amendment and of the appellant's right to counsel under the Sixth Amendment. [337 F.2d at 138].
>
> "Obviously neither *Escobedo* nor *Massiah* can be read as barring use of this appellant's confession. Many, learned in the law, deeply believe that no accused should be convicted out of his own mouth. But the Supreme Court never announced any such proposition—not even where the accused had no attorney and had received no Rule 5 'judicial caution.' *United States v. Mitchell*, 322 U.S. 65, 70, 64 S.Ct. 896, 88 L.Ed. 1140 (1944). We said as much ourselves only a month ago in *Ramey v. United States*, 118 U.S.App.D.C. 355, 336 F.2d 743 (1964), cert. denied [379 U.S. 840], 85 S.Ct. 79 [13 L.Ed.2d 47] (1964) and see *United States v. Carignan*, 342 U.S. 36, 72 S.Ct. 97, 96 L.Ed. 48 (1951) where Rule 5

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advice had been imparted. If there were a rule that a confession may not be received *if made by an accused without counsel*, that would be the end of this case—and of scores like it.

"We conclude that no rule of law required the exclusion of this appellant's confession, voluntarily made, after he had been warned by the F.B.I., the police and the United States Commissioner acting pursuant to Rule 40(b). He had not requested that counsel be appointed; he had retained no lawyer; that one was not then appointed for him denied him no right; and as the law now stands, there is no automatic rule of exclusion which will bar use of such a confession by an accused who has no lawyer, under circumstances such as appear on the record before us." 337 F.2d at 140.

Other cases, in interpreting the effect of *Massiah* and *Escobedo*, have held that the test of admissibility of a statement was not whether defendant had counsel but whether the statement was in effect voluntary, some even holding that it was not necessary that he be warned that it might be used against him. *People v. Hartgraves*, 31 Ill.2d 375, 202 N.E.2d 33; *People v. Agar*, 44 Misc.2d 396, 253 N.Y.S.2d 761; *Commonwealth (Pa.) v. Patrick*, 416 Pa. 437, 206 A.2d 295; *United States v. Konigsberg*, supra; *State v. Fox*, 131 N.W.2d 684 (Iowa); *State v. Worley*, 178 Neb. 232, 132 N.W.2d 764.

What is the purpose of the right to counsel? What is the purpose of the Sixth and Fourteenth Amendments? Without question it is to protect individual rights which we cherish, but there must be a balance between the competing interests of society and the rights of the individual. Society has the right of protection against those who roam the streets for the purpose of violating the law, but that protection must not be at the expense of the rights of the individual guaranteed under the Sixth and Fourteenth Amendments to our Constitution.

In *Bean v. State* (Nev.), 398 P.2d 251 (1965), the court, after discussing the *Escobedo* case, stated:

"Here it is true that the investigation had begun to focus upon *Bean*; that he had been taken into police custody; that the police were about to commence a process of interrogation to elicit incriminating statements, and did so; that *Bean* was not warned of his absolute constitutional right to remain silent. However, *Bean* did not request counsel, nor was he denied the assistance counsel. Absent such a request, and denial of counsel, rule of Escobedo does not apply.

* * * * * *

"In *Morford v. State*, 80 Nev.—, 395 P.2d 861, we discussed the Dorado case, pointing out that it is an extension of the rule announced in *Escobedo*, and chose not to follow it." 398 P.2d at 254.

We are familiar with the case of *State of California v. Dorado*, Cal., 40 Cal.Rptr. 264, 394 P.2d 952, and, like the Supreme Court of Nevada, do not choose to follow Dorado in the extension of the rule announced in Escobedo, supra.

[12] It will be noted in the discussion of these cases—particularly the *Escobedo* case—the ruling of the court is based upon the circumstances of the particular case. The court, in making its holding in the *Escobedo* case, stated "under the circumstances here, the accused must be permitted to consult with his lawyer." Most of the cases distinguish the *Escobedo* case on the grounds that the defendant.

Each case must largely turn upon its own facts, and the court must examine all the circumstances surrounding the taking of the statement in determining whether it is voluntary, and whether defendant's constitutional rights have been violated.

[13] The facts and circumstances in the instant case show that the statement was voluntary, made by defendant of his own free will, that no threats or use of force or coercion or promise, of immunity were made; and that he understood his legal right and the statement might be used against him. Under such facts and circumstances we hold that, notwithstanding the fact that he did not have an attorney at the time he made the statement, and the investigation was beginning to focus upon him, defendant's constitutional rights were not violated, and it was proper to admit the statement in evidence.

Judgment affirmed.

Lockwood, C.J., Struckmeyer, V.C.J., and Bernstein and Udall, JJ., concurring.

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## People v. Stewart

**CITE AS 400 P.2D 97**

THE PEOPLE, PLAINTIFF AND RESPONDENT,
V.
ROY ALLEN STEWART, DEFENDANT AND APPELLANT.
CR. 7662

Supreme Court of California,
In Bank.
March 25, 1965
As Modified on Denial of Rehearing
April 21, 1965.
43 Cal.Rptr. 201

Prosecution for robbery and murder. The Superior Court, Los Angeles County, Benjamin Landis, J., rendered judgment, and defendant appealed. The Supreme Court, Tobriner, J., held that accusatory stage had been reached and defendant was entitled to counsel with respect to taking of confession where defendant had been in custody for five day and had been interrogated daily, although incriminating evidence in defendant's house was found not among his possessions of another and four other suspects were in custody, and that it would not be presumed that warning had been given.

Reversed.

Schauer and McComb, J.J., dissented.

Accusatory or critical stage has been reached and suspect is entitled to counsel when officers have arrested suspect and have undertaken process of interrogation that lends itself to eliciting incriminating statements.

Accusatory or critical stage at which suspect is entitled to counsel does not begin with arrest alone.

Process of interrogation following arrest is not necessarily interrogation lending itself to eliciting incriminating statements so as to entitle suspect to counsel.

To determine if police are carrying out process of interrogation that lends itself to eliciting incriminating statements, so as to entitle suspect to counsel, court must analyze total situation which envelopes questioning by considering such factors as length of interrogation, place and time of interrogation, nature of questions, conduct of police and all other relevant circumstances; test is objective.

Accusatory stage had been reached and defendant was entitled to counsel with respect to taking of confession where defendant had been in custody for five days and had been interrogated daily, although incriminating evidence in defendant's house was found not among his possessions but in bureau drawer containing possessions of another and four other suspects were in custody.

Court cannot presume that police acted in accordance with unannounced constitutional principle.

It would not be presumed that suspect had been advised of his right to counsel and right to remain silent at police interrogation where, at time of interrogation, state law did not give him right to counsel during prearraignment interrogation and did not require that warning be given. West's Ann.Penn.Code. § 825.

Use of defendant's confession obtained in violation of his constitutional right to counsel required reversal of his conviction for the robbery and murder which he confessed and also reversal of his conviction for other robberies which he did not confess, where there was such an inter-relationship among these crimes that his confession composed strong evidence of his guilt of the robberies which he did not confess.

Edwin Malmuth, Los Angeles, under appointment by Supreme Court, for defendant and appellant.

Stanley Mosk and Thomas C. Lynch, Attys. Gen., William E. James, Asst. Atty. Gen., and Gordon Ringer, Deputy Atty. Gen., for plaintiff and respondent.

Tobriner, Justice.

The jury found defendant guilty of robbery and murder of the first degree and fixed the penalty at death. The trial court denied his motion for a new trial and for a reduction of the penalty. This appeal is automatic (Pen.Code, § 1239, subd. (b).

Defendant contends that his confession was improperly admitted at the trial because he was not informed of his right to counsel and of his right to remain silent prior to the time he confessed and because he gave his confession involuntarily. He also contends that during the penalty trial the trial judge gave an instruction

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condemned in *People v. Morse* (1964) 60 Cal. 2d 631, 36 Cal.Rptr. 201, 388 P.2d 33.

Since we conclude that the admission of defendant's confession constituted reversible error in view of our recent holding in *People v. Dorado* (1965) 62 A.C. 350, 42 Cal.Rptr. 169 398 P.2d 361, we need not reach the issues raised by defendant's other contentions.

During December 1962 and January 1963 a series of robberies accompanied by beatings took place in a neighborhood of Los Angeles. On December 21, 1962, an assailant struck Mrs. Meriwether Wells while she was walking down the street and took from her a handbag containing $5 to $10, a wallet bearing her maiden name, charge-a-plates in the names of Mr. and Mrs. Robert K. Wells, a salary check payable to Mrs. Wells, a salary check payable to Mr. Wells, and three dividend checks. Mrs. Wells, who suffered a fractured jaw, said the culprit was a "colored man," but she was unable to identify him.

On January 10, 1963, someone robbed Mrs. Tsuru Miyuchi of her leather lunch bag, containing a red change purse with her daughter's name on it, pictures, keys, and $8 to $10 in cash. As she was walking down the street, the assailant hit her on the head with a blunt instrument, causing her to suffer a fractured skull and a broken nose. She could not identify the robber.

On January 19, 1963, Miss Lucile O. Mitchell was beaten and robbed of a silver cufflink, a transistor earplug, a watch, and a charge-a-plate. Miss Mitchell, who was found on a house porch, subsequently, without having identified the attacker, died from a head wound.

On January 25, 1963, Mrs. Beatrice Dixon, while walking down a street, was hit on the head and robbed of her large leather bag containing a billfold, $23, a black coin purse, cash, and a door key on a chain bearing her initial, "B" Mrs. Dixon could not identify the person who hit and robbed her.

When, on January 30, 1963, Miss Maria Louisa Ramirez was walking down a street, someone hit her on the side of her head. When she regained consciousness, her purse containing a wallet, a coin purse, and a pair of glasses in a case were gone. The police officer investigating the robbery found the charge-a-plate taken from Miss Mitchell on the ground about 18 inches from the place where Miss Ramirez had been lying. A witness to the crime testified at the trial that defendant looked like the assailant, but she did not make a positive identification.

Mr. Wells, husband of the first of the above victims, reported to the police that the dividend checks stolen from his wife bore the endorsement, "Robert K.Wells." He said that he had never endorsed the checks. The police then interviewed a Mr. Sam Newman, who operated the market where the checks had been cashed. Mr. Newman related that because the person who cashed the checks lacked identification, a Mrs. Lena Franklin, who was then in the store and was apparently acquainted with the defendant, cosigned them. On January 31, Mrs. Franklin pointed out to a police officer the defendant as the one who cashed the checks.

The police officer went to defendant's residence and there informed him that he was under arrest for a series of "purse snatch robberies." When the officer asked if he could search the house, the defendant replied, "Go ahead." During the search, the officer found Mrs. Wells' purse and wallet, Mrs. Miyauchi's coin purse attached to a key that operated the door to defendant's house, Miss Mitchell's watch, Mrs. Dixon's coin purse and initialed key, and Miss Ramirez' wallet. On February 3, during a further search of the house the police found Miss Ramirez' glasses and Miss Mitchell's cufflink, transistor earplug and case.

Likewise on January 31, the police arrested four other people who were in the house at the time of defendant's arrest. The police later determined that besides defendant the only other people who actually lived in the house were a woman referred to as Lillian Lara[1] and her daughter. The police interrogated all five persons.

The police officers testified at the trial that during the interrogations of the defendants on January 31 and on February 1 he denied any knowledge of the checks, even though confronted by Mrs. Franklin, the cosigner of the checks. A tape of the January 31 interrogation was introduced at the trial for impeachment purposes. According to one of the officers, on February 3 defendant said that if he could see Lillian Lara

[1] Some question arose as the whether defendant and Lillian Lara were married. During the January 31 interrogation, which was recorded, defendant referred to a "Lillian Davis" as a "girl friend" at whose house he spent two or three nights a week. Defendant testified that he and Lillian Lara had been married in Mexico.

he might have "something to say." After a meeting with her, defendant admitted signing Wells' name to the checks and cashing them, but he claimed that he found the checks; he also denied having seen any of Mrs. Wells' other belongings prior to the date of the interrogation.

On February 4 the police showed defendant the objects found in his residence, bur according to the police officers, he denied having seen them before. One of the officers testified that defendant then said that he had brought the purse, subsequently identified as belonging to Mrs. Wells, to his house when he had moved there two months earlier. He also told the police that other people had brought some of the other stolen objects into house. A police officer testified that defendant denied having seen Miss Ramirez' wallet; but the defendant said he found Mrs. Miysuchi's coin pates on the street. Another officer testified that when the defendant was shown Miss Mitchell's watch he at first denied having previously seen it, but then said someone brought it to his house. He later said he had bought the watch on the street and had given it to Lillian Lara.[2]

On February 5 defendant admitted that he robbed Miss Mitchell. An officer testified that defendant expressed sorrow at having killed Miss Mitchell and said, "I didn't mean to kill her." The police then recorded an interrogation during which defendant gain admitted robbing Miss Mitchell. He denied hitting Mrs. Mitchell on the head; he did say, however, that he could have kicked her in the head after she fell and while he was escaping. He continued to insist that he had not participated in the other robberies.

The police brought defendant before a magistrate for the first time shortly after his confession. They then released the other persons arrested in connection with the crimes. An officer testified that an investigation of these people revealed "no evidence to connect them with any crime."

The transcriptions of the January 31 interrogation and of the February 5 confession of the robbery and other incriminating statements were admitted into evidence without objection, although during the trial defendant contended that he gave his confession involuntarily.[3] Nothing in the record indicates whether or not defendant was informed prior to his confession of his rights to counsel and to remain silent or whether he otherwise knowingly and intelligently waived those rights.[4]

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Following the decision of the United States Supreme Court in *Escobedo v. State of Illinois* (1964) 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, we held in *People v. Dorado* (1965) 62 A.C. 350, 365, 42 Cal. Rptr. 169, 179, 398 P.2d 361, 371, "that defendant's confession could not properly be introduced into evidence because (1) the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect, (2) the suspect was in custody, (3) the authorities had carried out a process of interrogations that lent itself to eliciting incriminating statements, (4) the authorities had not effectively informed defendant of his right to counsel or of his absolute right to remain silent, and no evidence establishes that he had waived these rights."

The instant case presents the following principal questions: (1) whether, at the time defendant uttered the confession, the investigation had reached the accusatory or critical stage so that he was entitled to counsel, and hence to be advised of his rights to counsel and to remain silent if he did not otherwise waive those rights; (2) whether the lack of any indication in the record that defendant was advised of his rights to counsel and to remain silent preludes a finding that he was so advised. We set forth our reasons for answering each of these questions in the affirmative.

The United States Supreme Court in *Esobedo* fixed the point at which a suspect is entitled to

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[2] At the trial defendant denied having said at any time that he had never seen the dividend checks or that had found the checks. He asserted that a Jackie Jackson gave him the checks to cash. He also denied having said that he never saw Miss Mitchell's watch or having said that he had purchased it. He testified that Jackie Jackson and a Louis Bookman brought the stolen goods to his house. Jackie Jackson also testified that Louis Bookman brought the stolen goods to the house. Linda Lara, Lillian Lara's daughter, testified that Bookman and Jackie Jackson were in the house and that Jackie Jackson used Miss Mitchell's charge-a-plate.

[3] Although the record does not indicate that the trial judge made an independent determination of whether the confession was voluntary, we do not probe the problem raised by *Jackson v. Denno* (1964) 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 980, since we reverse on other grounds.

[4] The Attorney General admits that there is nothing "specifically showing whether appellant was or was not advised of his 'right to counsel and right to remain silent at the interrogation.'" In a number of instances, the police officers conducting the interrogations were asked to relate everything that was said during specific interrogations. They at no time indicated that they had advised defendant of his rights to counsel and to remain silent.

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counsel as that at which "the process shifts from investigators to accusatory—when its focus is on the accused and its purpose is to elicit a confession * * *." (378 U.S. at p. 492, 84 S.Ct. at p. 1766). The court also characterized the time when a person needs the "guiding hand counsel" as the when the "investigation had ceased to be a general investigation of 'an unsolved crime'"; at that time the defendant "had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so." (Id. at pp. 485, 486, 84 S.Ct. at p. 1762).

[1] Normally "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect:" (Id. at p. 490, 84 S.Ct. at p. 1765) at that point when the police officers place that suspect under arrest. But *Escobedo* indicates that the accusatory or critical stage is not reached unless another event occurs: the police must "carry out a process interrogations that lends itself to eliciting incriminating statements." (Id. at pp. 490–491, 84 S.Ct.at p. 1765; see also Id. at pp. 485, 492, 84 S.Ct. at pp. 1762, 1766.) That process may be undertaken either before or after arrest. Whenever the two conditions are met, that is, when the officers have arrested the suspects and the officers have undertaken a process of interrogations that lends itself to eliciting incriminating statements, the accusatory or critical stage has been reached and the suspect is entitled to counsel.

We believe that the arrest encompasses two of the circumstances which produced the accusatory stages in the *Esobedo* and *Dorado* cases: (1) the investigation is no linger a general inquiry into an unsolved crime but has begun to focus on a particular suspect, and (2) the suspect is in custody.

An arrest fulfills the first requirement that the investigation has begun to focus on a particular suspect. The Penal Code itself conditions the arrest upon the presence of reasonable ground for the belief that the individual committed the offense; section 813 predicates the issuance of a warrant upon "reasonable ground to believe that the defendant has committed" the offense; section 836 requires that the arrest must rest upon the officer's reasonable cause for believing the person committed the offense.

"Probable cause for an arrest," we have said, "is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused. * * * there may some room for doubt. * * The test in such case is not whether the evidence upon which the officer made the arrest is sufficient to convict but only whether the prisoner should stand trial." *(People v. Fischer* (1957) 49 Cal.2d 442, 446, 317 P.2d 967, 970; see generally. Witkin, Cal. Criminal Procedure (1963) pp. 102–104; Fricke, Cal. Criminal Procedure (6th ed. 1962) pp. 19–20.)

The arrest includes "custody," the second condition present in *Esobedo* and *Dorado*. By definition in this state, an element of an arrest is custody. Thus, section 834 of the Penal Code states "Am arrest is taking a person into custody * * *."

Since, once a person has been properly placed under arrest, probate cause must support it, we conclude that the investigation has at least "*begun* to focus on a particular suspect." (378 U.S. at p. 490, 84 S.Ct. at p. 1765; emphasis added.) Indeed, as the court said in a case which, although based upon the McNabb-Mallory rule, cites *Esobedo*, "Ordinarily, arrest is the culmination, not the beginning, of police investigation." (*Greenwell v. United States* (D.C.Cir.1964) 336 F.2d 962, 966.)

[2,3] We turn to the further requirement of *Esobedo* that, beyond the "focus" and custody, the accusatory stage matures upon, the undertaking by the police of a "process of interrogation that lends itself to eliciting incriminating statements." (378 U.S. at p. 491, 84 S.Ct. at p. 1765; see id. at pp. 485, 492, 84 S.Ct. at pp. 1762, 1766; *United States v. Konigsberg* (3d Cir.1964) 336 F.2d 844, 853.)[5] Although in most cases the process of interrogations following an arrest will so lend itself, it does not necessarily do so.

In the *Konigsberg* case, supra, Federal Bureau of Investigation agents apprehended the defendants in a garage containing stolen goods, arrest-

[5] We do not agree with the suggestion of some writers that, for purposes of Escobedo, the accusatory or critical stage begins with the arrest alone. See Anderson, Representation of Defendants, Panel Discussion (1965) 36 F.R.D. 129, 141; Enker and Elsen, Counsel for the Suspect: *Massiah v, United States* and *Esobedo v. Illinois* (1964) 49 Minn.L.Rev. 47, 70–73; Note, The Supreme Court, 1963 Term (1964) 78 Harv.L.Rev. 143, 220.

[6] Section 825 of the Penal Code, guaranteeing a person arrested the right to see an attorney, does not signify that counsel must be allowed to be present during interrogations. (*People v. Garner* (1961) 57 Cal.2d 135, 165, 18 Cal.Rptr. 40, 367 P.2d 680 (Traynor, J., concurring).)

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ed them and took them to the bureau's office. At that office, prior to an arraignment, the agents asked Konigsberg "'why he was in this garage and just what had taken place * * * and * * * if he wished to cleanse himself or explain * * * what his reasons for being there, were, why at the other individuals were there.'" (Id. at p. 852.) Konigsberg then male some incriminating statements. Among other reasons for not applying *Escobedo*, the court said that the purpose of the interrogation, even though it took place after the arrest, was not to elicit a confession. The court stated, "The uncontradicted purpose of the discussion was to give Konigsberg a chance to explain his presence in the garage if he could; to hear Konigsberg's side of the story. * * If Konigsberg or any of the other people caught in the garage could account for their presence this was their opportunity," (Id. at p. 853; see *People v. Ghimenti* (1965) 232 A.C.A. 111, 119, 43 Cal.Rptr. 504.)

[4] The test which we have described does not propose a determination of the actual intent or subjective purpose of the police in undertaking the interrogations but a determination based upon the objective intent of the interrogators, we must, in order to determine if the police are carrying out "a process of interrogations that lends itself to eliciting incriminating statements" (*Escobedo v. State of Illinois*, supra, 378 U.S, ar p. 491, 84 S.Ct. at p. 1765), analyze the total situation which envelops the questioning by considering such factors as the length of the interrogation, the place and time of the interrogation, the nature of the questions, the conduct of the police and all other relevant circumstances.

As some writers have suggested, "An objective test is * * * likely for the new American rule. for it is noteworthy that the question of 'purpose to elicit a confession' may be more readily determined from the objective evidence—such as the nature of the questions and accusations put to defendant and the length of the interrogation—than the question whether the police had decision to charge the defendant." (Enker and Elsen, Counsel for the Suspect: *Massiah v. United States* and *Esobedo v. Illinois* (1964) 49 Minn.L.Rev. 47, 71.)

[5] In the instant case all of the above conditions had been fulfilled. Defendant was not only under arrest at the time he confessed but had been in custody for five days and had been interrogated daily. In his summation, the prosecutor referred to the interrogation of the defendant on January 31 concerning the robber of Mrs. Wells as an "accusatory circumstances." A police officer testified that on February 5 police office testified that on February 5 he entered the interrogation room and said to the defendant, "Roy, you killed that old woman. * * * " Such extensive interrogations during the period of defendant's incarceration could serve no other purpose than to elicit incriminating statements. Thus, prior to his confession, the defendant was entitled to counsel under the *Esobedo* case. for the "accusatory" stage had been reached.

We do not think the contrary contention of the Attorney General that defendant's confession was procured at the investigatory stage can prevail in the light of the above facts. The Attorney General argues that the fact that the Mitchell watch had not been found among defendant's possessions but in a bureau drawer containing the possessions of Lillian Lara, as well as the fact of the continued custody of four other suspects of the crime, establishes that the police were still conducting a "general inquiry" and had not "begun to focus" on the defendant demonstrates that the police believed that they had reasonable ground for attributing to him the commission of the crimes. The continued custody of other suspects does not automatically negate the advent of the accusatory stage as to defendant; the above conduct of the police destroys the contention.

Concluding, therefore, that prior to his confession defendant was entitled to counsel under *Esobedo*, we probe the second major premise of the Attorney General that, despite the absence of a showing advice to defendant of his rights to counsel and to remain silent, we can presume that such warning was given. The Attorney General bases his contention upon *People v. Farrara* (1956) 46 Cal.2d 265, 294 P.2d 21, which, in the absence of evidence to the contrary, expressed a presumption that the officers in that case lawfully performed their duties.

*Farrara*, we believe, can readily be distinguished from the instant case. There, appellants contended that the police obtained certain of the adduced evidence during and illegal search and seizure. Since the trial occurred prior to our decision in *People v. Cahan* (1955) 44, Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513, declaring such evidence inadmissible, the record was barren of any showing as to the legality of the

SUPREME COURT OF CALIFORNIA, MARCH 1965

search. This court said, "It is settled * * * that error will not be presumed on appeal, * * * and in the absence of evidence to the contrary it must also presumed that the officers regularly and lawfully performed their duties. Code Civ. Proc. § 1963 (1, 15, 33) * * *." (46 Cal.2d ar p. 268, 294 P.2d ar p. 23).

[6,7] Whereas, long before *Cahan*, searches and seizures illegal under federal law had been illegal California (Cal. Const., art. I, § 19), no such antecedent illegality had been present in the *Esobedo* situation. Indeed, *Cahan* merely provided a remedy in the form of exclusion for evidence illegally seized. Until *Escobedo* and *Dorado*, however, the law of this state did not give an accused a right to counsel during prearraignment interrogations and therefore did not require that an accused be advised of his rights to counsel and to remain silent if he had not otherwise waived those rights.[6] We cannot presume that the police acted in accordance with an unannounced constitutional principle. We therefore cannot presume in the face of a silent record that the police informed defendant of his right to remain silent and of his right to counsel. (See *Carnley v. Cochran* (1962) 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70.)

In *Carnley v. Cochran* (1962) 369 U.S. 506, 82 S.Ct. 884, the United States Supreme Court, said, "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understanding rejected the offer. Anything less is not waiver." (Id. at p. 516, 82 S.Ct. at p. 890.) It follows that in order to establish a waiver of the right to the assistance of counsel the record must indicate that the defendant was advised of his right to counsel and to remain silent or that he knew of these rights and intelligently and knowingly waived them.

To presume in the instant case that absent the warnings defendant knew of his right to counsel at the prearraignment stage prior to the time that the United States Supreme Court established this right in *Esobedo* would be to ascribe to him an utterly fictitious clairvoyance.

[8] Since we have said that the use of a confession obtained in violation of the defendant's constitutional right to counsel compels a reversal, we must reverse the judgment on the counts involving the robbery and murder of Miss Mitchell. (*People v. Dorado* (1965) 62 A.C. 350, 368–369, 42 Cal.Rptr. 169, 398 P.2d 361.)

Because defendant, however, confessed only to the robbery and murder of Miss Mitchell, we must determine if the erroneous admission of his confession constituted prejudicial error as to those other robberies for which he was convicted but as to which he did not confess. (See *People v. Dorado*, supra, 62 A.C. 350, 368, 42 Cal.Rptr. 169, 398 P.2d 361.) A full examination of the record indicates that the error requires the reversal of the judgment on these counts since "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 837, 299 P.2d 243, 255.)

Thus the evidence adduced at the trial indicated that the same person participated in all of the charge robberies. All of the robberies took place in the same neighborhood; they were all committed in the same fashion; the police found at defendant's residence items stolen during each of the robberies. Because of the inter-relationship among these crimes, defendant's confession to the robbery and murder of Miss Mitchell composed strong evidence of his guilt on each of the robberies to which he did not confess.

The judgment is reversed.

Traynor, C. J., and Peters and Peek, JJ., concur.

Burke, Justice (concurring).

The majority bases its reversal upon the admission into evidence of a voluntary confession in violation of the defendant's constitutional right to counsel, based upon this court's decision in *People v. Dorado*, 62 A.C. 350, 42 Cal.Rptr. 169, 398 P.2d 361. As noted in my dissent in *Dorado*, concurred in by Mr. Justice Schauer, assuming that there was error in the admission of such voluntary confession the mandate of section 4½ of article VI of the California Constitution requires this court to review the entire record to determine the probability that a result more favorable to the defendant would have been reached had the error not been committed (*People v. Watson* (1956) 46 Cal.2d 818, 299 P.2d 243) and that therefore there was a miscarriage of justice. The majority opinion in the case at hand does not indicate that there was a review of "the entire cause, including the evidence" and that the majority is of "the opinion that the error complained of has resulted in a miscarriage of justice." (Const., art VI, § 4½.)

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Under the mandate of article VI, section 4½, and of the supplemental rule of this court as to the test to be applied in determining whether such an error in the admission of evidence compels reversal (*People v. Watson*, supra (1956) 46 Cal.2d 818, 836, 299 P.2d 243), I have reviewed the entire cause, including the evidence, and have concluded that it is reasonably probable that a result more favorable to the defendant would have been reached if the subject evidence had not been erroneously admitted against him. Under these circumstances the error compels reversal and I, therefore, concur in the reversal of the judgment of conviction.

Schauer, Justice* (dissenting).

I concur generally in the law as stated by Mr. Justice Burk in his concurring opinion, but after review of the entire cause, including the evidence, am not affirmatively persuaded that a result more favorable to the defendant would have been reached in the absence of the declared error.

The encompassing net of interwoven circumstances established by the prosecution is to me inherently more convincing than the direct uncorroborated statement of any single witness could ordinarily be. The confession here is significant principally because it is consistent with the only conclusion reasonably supported by the proof independently made. Assuming that such additional—in effect, cumulative—proof was erroneously received does not persuade me to the conclusion that in the absence of the error a result more favorable to the defendant would have been probable.

I would affirm the judgment in its entirety.

McComb, J., concurs.

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

U.S. SUPREME COURT, OCTOBER 1965

BRIEF FOR PETITIONER

# In the Supreme Court of the United States

## October Term, 1965

## No. 759

ERNESTO A. MIRANDA, PETITIONER,
V.
THE STATE OF ARIZONA, RESPONDENT

## On Writ of Certiorari to the Supreme Court of the State of Arizona

## Brief for Petitioner

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### OPINION

This is a certiorari to the Supreme Court of Arizona, to review a decision reported at 98 Ariz. 18, 401 P. 2d 721, and reprinted R. 72.

### JURISDICTION

Certiorari has been granted to review a judgment of the Supreme Court of Arizona in a criminal case, entered on April 22, 1965, which became final on May 7, 1965. The petition for writ of certiorari, filed in July of 1965, was granted on November 22, 1965, and the case, in forma pauperis, was placed on the appellate docket and summary calendar. The issue is whether the conviction of petitioner violates his constitutional rights under the Sixth and Fourteenth Amendments to the Federal Constitution. This Court has jurisdiction under 28 U.S.C. Sec. 1257(3).

### CONSTITUTIONAL PROVISIONS INVOLVED

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

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

jurisdiction the equal protection of the laws." (U.S.C. Const. Amend. XIV, Sec. 1.)

## QUESTION PRESENTED

Whether the confession of a poorly educated, mentally abnormal, indigent defendant, not told of his right to counsel, taken while he is in police custody and without the assistance of counsel, which was not requested, can be admitted into evidence over specific objection based on the absence of counsel?

## STATEMENT

### A. Proceedings on interrogation and trial

Petitioner was charged with having kidnapped and raped an eighteen year old girl in the vicinity of Phoenix, Arizona, on March 3, 1963.

A psychiatric report, made by a court-appointed psychiatrist (R. 6-9), gives the background of petitioner. Miranda, an indigent, was 23 years old at the time of the interrogation, and working as a truck driver and warehouseman. He had completed eighth grade and started on ninth grade before dropping out of school. Petitioner has a considerable sexual preoccupation, as illustrated in his interpretation of certain proverbs;[1] he has been involved in a series of sex offenses. The doctor concluded that petitioner "has an emotional illness. I would classify him as a schizophrenic reaction, chronic, undifferentiated type" (R. 9).

Petitioner was, at the time of his apprehension, suspected of another, wholly unrelated crime. That incident, the robbery of a woman, may also have involved a threat of rape. The robbery occurred several months before the instant episode (R. 6-7). On March 13, 1963, defendant was arrested at his home and taken in custody to the police station where he was put in a lineup consisting of four persons.[2] He was there confronted and identified by the two complaining witnesses, the one for robbery and the other for rape. Miranda was then taken to Interrogation Room 2 at the local police headquarters (R. 37) and there interrogated on both matters.

The two matters were at first consolidated in the trial court, with one sanity examination covering both, but were later separated for trial. (See report in 401 P. 2d at 718.) The petitioner was convicted of both offenses in separate trials. The two cases were treated by the Supreme Court of Arizona as companions; *State* v. *Miranda,* 98 Ariz. 11, 401 P. 2d 716 (not this case) and 98 Ariz. 18, 401 P. 2d 721 (this case), both decided on April 22, 1965.

Only the kidnapping-rape case has been brought here. However, since the interrogation was joint, some reference needs to be made to the other record, and, with the consent of opposing counsel, an extract has been tendered to this Court. It is reprinted as an appendix to this brief and is the basis of this paragraph. After the lineup, it was Officer Cooley, who had arrested Miranda, who took petitioner to Interrogation Room 2. There he and Officer Young conducted the questioning. Officer Young did not tell Miranda that anything he said would be held against him, nor did he tell Miranda of his right to consult an attorney (Appendix, reproduction of Transcript, p. 48). Officer Young believes that Miranda was told that he need not answer their questions (Appendix, reproduction of Transcript, p. 60) but no mention was made of the right to counsel.

The absence of advice to petitioner regarding his right to counsel is amplified by the record in the instant case. Here, Officer Cooley also testified as to interrogation in Room 2 of the Detective Bureau (R. 37), and narrated extensively a confession he attributed to the petitioner (R. 38-40). A written statement,[3] obtained from Miranda while he was under the interrogation in Room 2, was then put into evidence (R. 40, R. 69). Officer Young confirmed that defendant was not told of any right to advice of counsel (R. 45). When the confession was offered into evidence, defense counsel expressly objected "because the Supreme Court of the United States says a man is entitled to an

[1] "A rolling stone gathers no moss" is interpreted by Miranda to mean "if you don't have sex with a woman, she can't get pregnant." The proverb "people in glass houses shouldn't throw stones" is interpreted by Miranda to mean, "a person with one woman shouldn't go to another woman." Apart from this preoccupation, petitioner also believes that "a stitch in time saves nine" means "if you try to shut something in, you keep it from going out" (R. 8-9).

[2] See R. 37, 38 where police officers refer variously to custody and arrest. Under Arizona law, custody is arrest; see Rule 14, Arizona Rules of Criminal Procedure, Vol. 17, Ariz. Rev. Stat. p. 175; and Ariz. Rev. Stat. Sec. 13-1401.

[3] The written confession says, "I started to take clothes off her without any force and with cooperation. Asked her to lay down and she did. Could not get penis into vagina got about ½(half) inch in." It strains credulity to the breaking point to believe that this sentence was the product of a man of petitioner's mentality and comprehension as indicated by his answers to the questions set forth in footnote 1.

attorney at the time of his arrest." The confession was admitted over this objection (R. 41). In summation, the prosecutor emphasized to the jury the officer's testimony as to the interrogation, and the written confession (R. 50-51).

The two cases, the robbery and the rape-kidnapping, were tried by this same judge. In the instant case Miranda was given a sentence of twenty to thirty years, and in the robbery case he was given a sentence of twenty to twenty-five years. He thus faces imprisonment of forty to fifty-five years.

### B. Proceedings in the Arizona Supreme Court

The Arizona Supreme Court, setting forth the language of both the oral and the written confessions at length (R. 79-82), considered the admissibility of the confessions under the decisions of this Court. It held that *Escobedo* v. *Illinois,* 378 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977 (1964) was "a controlling precedent" only where five elements occur, one of which is that "The suspect must have requested and been denied the opportunity to consult with his lawyer" (R. 87). This element being absent, the court held that:

> "[N]otwithstanding the fact that he did not have an attorney at the time he made the statement, and the investigation was beginning to focus upon him, defendant's constitutional rights were not violated, and it was proper to admit the statement in evidence" (R. 93).

Accordingly, Miranda's conviction was affirmed.

## SUMMARY OF ARGUMENT

There is a right to counsel for arrested persons when interrogated by the police. The law has been growing in this direction for more than thirty years. The federal experience from *Johnson* v. *Zerbst,* 304 U.S. 458, 58 Sup. Ct. 1019, 82 L. Ed. 1461 (1938) through the series of cases culminating in *Mallory* v. *United States,* 354 U.S. 449, 77 Sup. Ct. 1356, 1 L. Ed. 2d 1479 (1957), and the Public Defender Act of 1964 (78 Stat. 552, 18 U.S.C. Sec. 3006A), and applying Federal Criminal Rules 5 and 44, amount to a requirement that all defendants be informed of their right to counsel and be given counsel swiftly upon their arrest. In the states, *Powell* v. *Alabama,* 287 U.S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158 (1932) asserted as a constitutional requirement of state procedure that a person charged with a capital crime have "the guiding hand of counsel at every step in the proceedings against him." 287 U.S. at 69. This requirement was buttressed by repeated decisions of this Court that it would accept no forced confessions, *Brown* v. *Mississippi,* 297 U.S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936), or those obtained in such circumstances that the exclusion of "friends, advisers, or counselors" made it highly likely that force was used, *Chambers* v. *Florida,* 309 U.S. 227, 238, 60 Sup. Ct. 472, 84 L. Ed. 716 (1940).

The right to counsel remained in some suspense during the period governed by *Betts* v. *Brady,* 316 U.S. 455, 62 Sup. Ct. 1252, 86 L. Ed. 1595 (1942), but during the years following *Betts,* the views were rapidly developed by just short of a majority of this Court that secret confessions obtained without counsel between arrest and arraignment were invalid; *Haley* v. *Ohio,* 332 U.S. 596, 68 Sup. Ct. 302, 92 L. Ed. 224 (1948); *In re Groban's Petition,* 352 U.S. 330, 77 Sup. Ct. 510, 1 L. Ed. 2d 376 (1957). This view had the support of four Justices of the present Court in *Crooker* v. *California,* 357 U.S. 433, 78 Sup. Ct. 1287, 2 L. Ed. 2d 1448 (1958); *Cicenia* v. *La Gay,* 357 U.S. 504, 78 Sup. Ct. 1297, 2 L. Ed. 2d 1523 (1958).

When the right to counsel was recognized at the arraignment period, *Hamilton* v. *Alabama,* 368 U.S. 52, 82 Sup. Ct. 157, 7 L. Ed. 2d 114 (1961), and for all crimes at trial, *Gideon* v. *Wainwright,* 372 U.S. 335, 83 Sup. Ct. 792, 9 L. Ed. 2d 799 (1963), and when it was recognized that the privilege against self-incrimination applied to the states as well as the federal government, *Malloy* v. *Hogan,* 378 U.S. 1, 84 Sup. Ct. 1489, 12 L. Ed. 2d 653 (1964), any view that counsel was not required for interrogation became untenable. Hence counsel was required for interrogation at least where requested in *Escobedo* v. *Illinois,* 378 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977 (1964); and the fact that a request happens to have been made at that particular case cannot be controlling for *Carnley* v. *Cochran,* 369 U.S. 506, 82 Sup. Ct. 884, 8 L. Ed. 2d 70 (1962) held that the right to be furnished counsel does not depend upon a request.

We therefore urge upon the Court that line of cases interpreting *Escobedo* which holds that there is a right to counsel during the interrogation period for any person under arrest; *People* v. *Dorado,* 42 Cal. Rptr. 169, 398 P. 2d 361 (1965);

*Wright* v. *Dickson,* 336 F. 2d 878 (9th Cir. 1964); *United States ex rel. Russo* v. *New Jersey,* 351 F. 2d 429 (3d Cir. 1965); *Collins* v. *Beto,* 348 F. 2d 823 (5th Cir. 1965); *Commonwealth* v. *Negri,* 213 A. 2d 670 (Pa. 1965).

We deal with the basic principle, the principle expressed by Justice Douglas in his concurring opinion in *Culombe* v. *Connecticut,* 367 U.S. 568, 637, 81 Sup. Ct. 1860, 6 L. Ed. 2d 1037 (1961), that "any accused—whether rich or poor—has the right to consult a lawyer before talking with the police."

This constitutional principle is not incompatible with proper law enforcement. It will have no effect on organized crime, whose members know the method of combat with society all too well; the principle here advocated as a practical matter of solid experience applies primarily to the poor, the ignorant, and frequently, those of limited mental ability. The right to counsel under public defender systems may well be costly, but the dollar cost of preservation of a constitutional right is no reason for ignoring that right.

The larger problem is whether extending the right to counsel into the interrogation period will unduly handicap the police in their work. Numerous reports of actual experience are analyzed in the brief to show that this hazard need not be heavily weighed. Concrete experiences for various cities are reported including the observation of Judge George Edwards of the United States Court of Appeals for the Sixth Circuit who had been Detroit's police commissioner in 1962 and 1963. Judge Edwards attempted to apply "Supreme Court standards." He found no ill effects and much benefit. A review of actual experience shows that third degree abuses are not some remote fantasy; they happen now, and so does wrongful detention without charge and without counsel. These things occur in great numbers in today's United States. They are practices which, as the scrupulously meticulous Horsky Report for the District of Columbia concludes, "arrest for investigation should cease immediately."

At best, as a practical matter, confessions obtained from ignorant persons without counsel are the product of skilled leading by trained prosecutors or investigators. See the opinion of Judge Smith in *United States* v. *Richmond,* 197 F. Supp. 125 (D. Conn. 1960). Even without physical abuse, confessions are obtained by means wholly unworthy of free people. The evil of the "led confession" is particularly apparent in the instant case in which the defendant was clearly led into assertions which only dubiously originated with him, and without which would have led to his conviction for a grave but lesser offense.

When this defendant went into Interrogation Room 2, instead of having "the guiding hand of counsel" to which we believe the principles of *Powell* v. *Alabama* entitled him, he had the guiding hand of two policemen. When he came out of Interrogation Room 2, there was no longer any point in giving him counsel—his case was over. We believe that such practices are barred by the Sixth and Fourteenth Amendments to the Constitution of the United States.

## ARGUMENT

When Miranda walked out of Interrogation Room 2 on March 13, 1963, his life for all practical purposes was over. Whatever happened later was inevitable; the die had been cast in that room at that time. There was no duress, no brutality. Yet when Miranda finished his conversation with Officers Cooley and Young, only the ceremonies of the law remained; in any realistic sense, his case was done. We have here the clearest possible example of Justice Douglas' observation, "what takes place in the secret confines of the police station may be more critical than what takes place at the trial." *Crooker* v. *California,* 357 U.S. 433, 444-45, 78 Sup. Ct. 1287, 2 L. Ed. 2d 1448 (1958) (dissenting opinion).

The question presented is whether a defendant in such circumstances is entitled to be told of his right to counsel and to have a meaningful opportunity to consult counsel before the law disposes of him. For "what use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?" Justices Douglas, Black, and Brennan in *Spano* v. *New York,* 360 U.S. 315, 326, 79 Sup. Ct. 1202, 3 L. Ed. 2d 1265 (1959).

### I. THERE IS A RIGHT TO COUNSEL FOR ARRESTED PERSONS WHEN INTERROGATED BY THE POLICE

We deal here with growing law, and look to where we are going by considering where we have been. The existence of a right to counsel of any sort at any time did not exist in medieval England; Plucknett tells us that not until the 15th Century was counsel allowed to argue points of law; that in 1695 counsel was allowed

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in treason trials; and that not until 1836 was counsel allowed in felony cases.[4]

While English statutes did not provide for counsel in felony cases before 1836, in practice counsel did participate in English criminal trials before the American Revolution.[5] This is of consequence in understanding early American constitutional and statutory provisions of substantially the same vintage as the Bill of Rights. Many of these expressly or in practice asserted a right to counsel (New Hampshire, Vermont, Massachusetts, Rhode Island, New York, Maryland, North Carolina, Georgia), and some of them even at that early time required that appointed counsel be made available (Connecticut, New York (*dubitante*), Pennsylvania, New Jersey, Delaware, and South Carolina).[6] Speaking broadly, therefore, the Sixth Amendment was in general accord with the English and American practice of its time: "In all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defence."

Sixth Amendment problems came to the Court surprisingly late, both as to federal and state procedure.

#### A. Federal experience

The leading case is *Johnson* v. *Zerbst,* 304 U.S. 458, 58 Sup. Ct. 1019, 82 L. Ed. 1461 (1938). In that case, petitioner, without counsel, had been convicted of counterfeiting. There was a conflict as to whether or not he had asked for counsel. The decision decisively establishes as an "obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty… . " 304 U.S. at 462-63. The opinion, quoting from *Powell* v. *Alabama,* 287 U.S. 45, 68, 69, 53 Sup. Ct. 55, 77 L. Ed. 158 (1932), repeats that a defendant "'requires the guiding hand of counsel at every step in the proceedings against him.'" 304 U.S. at 463. Hence in *Johnson* v. *Zerbst,* the Court declared that "the Sixth Amendment withholds from Federal Court, in all criminal proceedings, the power and authority to deprive an accused of his life and liberty unless he has or waives the assistance of counsel." *Ibid.*[7]

The Court further declared that "since the Sixth Amendment constitutionally entitled one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential judicial prerequisite to a federal court's authority to deprive an accused of his life or liberty." *Id.* at 467.

The requirements of *Johnson* v. *Zerbst* were carried into effect by Rules 5 and 44 of the Rules of Criminal Procedure. Rule 5 expressly provides that any arrested person should be taken "without unnecessary delay before the nearest available commissioner" who is to tell the accused both of his right to stand silent and of his right to counsel. Rule 44 confirmed this provision by providing for appointment of counsel if need be. But it should always be remembered that these rules were simply manifestations of the Sixth Amendment as declared in *Johnson* v. *Zerbst.*

Rule 5 with its provision for arraignment "without unnecessary delay" became the battleground for the immediate issue now before the Court. If the defendant is brought before the commissioner instantly, he cannot be interrogated before being informed of his right to counsel. On the other hand, if the period pending presentment is protracted, the right to counsel can, as in the instant case, be made meaningless because the defendant may be in such a position before the arraignment that a combination of Clarence Darrow and John W. Davis reincarnated could do him no good. In *McNabb* v. *United States,* 318 U.S. 332, 63 Sup. Ct. 608, 87 L. Ed. 219 (1943), the issue was whether a confession should be excluded which was obtained in the course of an extended interrogation. The defendants "had no lawyer. There is no evidence that they requested the assistance of counsel, or that they were told that they were entitled to such assistance." 318 U.S. at 335. This Court, taking up the matter from the standpoint of "civilized standards" of justice, *id.* at 340, found that the procedure followed "tends to undermine the integrity of the criminal proceeding." *Id.* at 342. The Court, analyzing the proper division of functions in criminal law enforcement, declared that prop-

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[4] Plucknett, *A Concise History of the Common Law,* 385-86 (2d ed. 1936), citing for the 1837 development to 6 & 7 Will. IV, c. 114.

[5] Comment, *An Historical Argument [etc.],* 73 Yale L.J. 1000, 1027-28 (1964); and see historical analysis in *Powell* v. *Alabama,* 287 U.S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158 (1932).

[6] *Id.,* appendix, 73 Yale L.J. at 1055-57.

[7] The case also considered the subject of waiver, a matter we do not develop here because there is no waiver question in the *Miranda* case, there being no suggestion that the defendant had the faintest notion of any right to counsel.

er procedure "aims to avoid all the evil implications of secret interrogation of persons accused of crimes." *Id.* at 344.

*McNabb* scrupulously avoids constitutional interpretation, restricting itself to a matter of proper federal practice. The *McNabb* rule was not applied in *United States* v. *Mitchell,* 322 U.S. 65, 64 Sup. Ct. 896, 88 L. Ed. 1140 (1944) where the confession was held to be so immediate that it was construed to be spontaneous. However, the rule was applied again in *Upshaw* v. *United States,* 335 U.S. 410, 69 Sup. Ct. 170, 93 L. Ed. 100 (1948), a case in which the defendant confessed during a thirty-hour detention. The Court in *Upshaw* stressed that the object of the *McNabb* rule and of Rule 5 was to "check resort by officers to 'secret interrogation of persons accused of crime.'" 335 U.S. at 412. The matter of obtaining counsel was considered by the dissent, which observed that the practical effect of speedy application of the rule was that "prompt hearing gives an accused an opportunity to obtain a lawyer," with all of the consequences of giving legal advice to "the illiterate and inexperienced." 335 U.S. at 424.

The matter was again reviewed in *Mallory* v. *United States,* 354 U.S. 449, 77 Sup. Ct. 1356, 1 L. Ed. 2d 1479 (1957). In *Mallory,* the defendant, like the defendant here, was charged with rape. He was interrogated for about ten hours after his arrest, the inquiry going deep into the night, at the end of which he made a confession. The next morning he was brought before a commissioner. The Court noted that the Criminal Rules were adopted "since such unwarranted detention led to tempting utilization of intensive interrogation, easily gliding into the evils of 'the third degree;'" and that therefore the police could detain a person only until "a committing magistrate was readily accessible." 354 U.S. at 453.

The Court held that the time interval permitted between arrest and presentation to a magistrate was intended to give "little more leeway than the interval between arrest and the ordinary administrative steps required to bring a suspect before the nearest available magistrate." It added that a person was to be arraigned "as quickly as possible so that he may be advised of his rights … But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt." *Id.* at 453-54. The Court noted that the defendant had not been "told of his rights to counsel or to a preliminary examination before a magistrate, nor was he warned that he might keep silent … " *Id.* at 455. The opinion concluded "it is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.' " *Id.* at 456.

*Mallory* was the unanimous expression of this Court. Once again the case did not formally involve a constitutional issue, but rather the interpretation of the rules of criminal procedure. Unlike its predecessor, the opinion did not refer to constitutional standards. Nonetheless, *Mallory,* by its express recognition of the legitimate need for counsel during the interrogation, went far to establish for the federal system the principle here advocated.

### B. The constitutional principles applied to state criminal proceedings; the development to Escobedo

The development of constitutional doctrine as applied to state proceedings can be grouped around three key decisions, *Powell* v. *Alabama,* 287 U.S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158 (1932); *Betts* v. *Brady,* 316 U.S. 455, 62 Sup. Ct. 1252, 86 L. Ed. 1595 (1942); and *Gideon* v. *Wainwright,* 372 U.S. 335, 83 Sup. Ct. 792, 9 L. Ed. 2d 799 (1963).

**(a) The Powell period (1932–1942)** *Powell* is too familiar to warrant restatement. In this famous rape case, counsel was appointed but exercised only a nominal function, permitting defendants to be hustled to trial. The function of counsel was described as "pro forma." The Court held that:

> "defendants were not accorded the right of counsel in any substantial sense. To decide otherwise would simply be to ignore actualities… . The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result the defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense." 287 U.S. at 58-59.

This Court in *Powell* recognized that the right to counsel was a growing, not a static, constitutional right. It refused to be guided by the standards of England at the time the Constitution was adopted, following instead the more

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liberal practice of the various colonies. The right to counsel was held to be one of those " 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" *id.* U.S. at 67, quoting *Hebert* v. *Louisiana,* 272 U.S. 312, 316, 47 Sup. Ct. 103, 71 L. Ed. 270 (1926); it was expressly held to be an integral part of the right to a fair hearing. This led Justice Sutherland to the classic passage: the person charged with the crime "requires the guiding hand of counsel at every step in the proceedings against him." This said the Court, was true for men of intelligence and even more true for "the ignorant and illiterate, or those of feeble intellect." 287 U.S. at 69. The trial court therefore must first give the defendant the right to employ counsel, and second, if need be, must appoint counsel. The Court made no decision as to non-capital cases, but as to capital cases it held that:

> "where the defendant was unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

*Miranda* strikingly parallels the *Scottsboro* case; here, as there, the defendant did not have counsel "at such times or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

Immediately after *Powell,* the right to counsel cases began to relate directly to the forced confession cases; as this Court said in *Mallory, supra,* secret interrogation, which is interrogation without counsel, tends to slide into the third degree. Thus in *Brown* v. *Mississippi,* 297 U.S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936), the leading confession by torture case, the Court mentioned *Powell* as illustrative of the principles of basic justice, observing that "the state may not deny to the accused the aid of counsel." In *Brown,* trial counsel failed to make proper objections to confessions obtained by violent beating. In *Chambers* v. *Florida,* 309 U.S. 227, 60 Sup. Ct. 472, 84 L. Ed. 716 (1940), a long additional step was taken. In *Brown,* it was indisputable that physical violence had been applied to the defendants. In *Chambers* there was a factual dispute as to whether or not there had been physical compulsion. This Court nonetheless held that the protracted questioning, in all of the circumstances, banned the confession under the Fourteenth Amendment, noting that the defendants had been held and interrogated "without friends, advisers, or counselors." 309 U.S. at 238.

The state of the law as it stood in relation to right to counsel and confessions in 1940 may fairly be summarized as follows:

In the federal courts there was an absolute right to counsel in criminal cases. In the state courts there was an absolute right to counsel, and appointed counsel at that, at least in capital cases, the matter being reserved as to non-capital cases. A confession obtained by force could not be used, and a confession obtained by protracted interrogation where there was an unresolved dispute as to force, and where the defendant had been interrogated, among other things, "without counselors" denied due process. There was, however, an ambiguity left open by the *Powell* case. The Court had declared in *Powell* that a person charged with a crime "requires the guiding hand of counsel at every step in the proceedings against him;" but there had not yet been resolved the question of whether "every step in the proceedings" really meant "every step in the proceedings," which would include interrogation, or whether, despite the broad sweep in the language, something less was intended.[8]

**(b) The Betts period (1942–1963)** *Betts,* like *Powell,* is too familiar to need restatement. The case held, in its chief conclusions, that while counsel was required in capital cases and in some undefined other cases, it was not required

[8] This summary does not take account of *Lisenba* v. *California,* 314 U.S. 219, 62 Sup. Ct. 280, 86 L. Ed. 166 (1941). *Lisenba* involved a confession obtained upon protracted interrogation. The majority noted expressly that "counsel had been afforded [the petitioner] and had advised him." Apparently petitioner saw his attorney as much as he wished up to the critical day of his interrogation and confession. 314 U.S. at 230-31, 240. Hence the majority, in upholding the use of the confession, expressly noted that this was not a case in which he had been interrogated "without the advice of friends or of counsel;" (*id.* at 240) and the Court further observed that if a person held were incommunicado, subject to questioning for a long period, "and deprived of the advice of counsel," (*ibid.*) it would inspect the matter with great care. On the other hand, the dissent shows that the defendant was without counsel on the critical confession day, 314 U.S. at 242. In view of these specialized facts, we put the case aside in considering the immediate problem.

in all cases. But on the way to reaching that decision, *Betts* also decided one other point of great importance in the instant case. It expressly recognized that under the Sixth Amendment as interpreted in *Johnson* v. *Zerbst, supra,* appointed counsel was required "in all cases where a defendant is unable to procure the services of an attorney." 316 U.S. at 464. It thereupon examined the question of whether Sixth Amendment principles should in fact be imported into the interpretation of the Fourteenth Amendment. This vital question is answered in the negative, thus laying the foundation for the particular conclusion *Betts* reached. Justices Black, Douglas and Murphy dissenting did so expressly on the ground that the Sixth Amendment is applicable to state criminal proceedings, the view adopted twenty years later in *Gideon.*

During the reign of *Betts,* the confession cases turned on "special circumstances," as is illustrated in the citations in the concurring opinion of Justice Clark in *Gideon* v. *Wainwright,* 372 U.S. at 347-49. This same specialized notion of the circumstances applied also to the right to counsel as it related to the interrogation. An example is *Haley* v. *Ohio,* 332 U.S. 596, 68 Sup. Ct. 302, 92 L. Ed. 224 (1948). In this case a fifteen year old boy was interrogated for five hours before he confessed to murder. The judgment of the Court reversing the conviction was announced by Justice Douglas, and joining with him in an opinion were Justices Black, Murphy and Rutledge. This opinion particularly stressed that "at no time was this boy advised of his right to counsel." Noting the youth of the defendant, the opinion said:

> "He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him. No friend stood at the side of this 15-year old boy as the police, working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during the critical hours of questioning. A photographer was admitted once this lad broke and confessed. But not even a gesture towards getting a lawyer for him was ever made."
>
> "This disregard of the standards of decency is underlined by the fact that he was kept incommunicado for over three days during which the lawyer retained to represent him twice tried to see him and twice was refused admission." 332 U.S. at 600.

It was asserted that the petitioner had signed a confession, and that the signed confession asserted that he knew fully of his rights. Said these four Justices: "That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice. We cannot indulge those assumptions." *Id.* at 601. The four Justices made clear that they were not announcing a principle simply for boys in custody, but one which applied equally to any defendant: "The Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them." *Ibid.*

We assume that the opinion in *Haley,* had it been of five Justices, would totally control in the instant situation. The interrogation, though at an odd hour, was relatively brief, and the opinion, emphasizing the necessity of counsel, tells us that the same principles apply to adults. But there were not five. Justice Frankfurter concurred specially, also noting the interrogation without counsel carries temptations for abuse. *Id.* at 605. He concluded that the confession should be barred because of specialized circumstances in the particular case, without reaching the broader question. The dissenting Justices were apparently content that the boy had not asked for counsel before his arraignment.

In 1957, two new voices were added in this Court on the right to counsel at the interrogation state. The case was *In re Groban's Petition,* 352 U.S. 330, 77 Sup. Ct. 510, 1 L. Ed. 2d 376 (1957), in which the issue was the validity of an inquiry by the Ohio State Fire Marshal into the cause of a fire, the inquiry involving compulsory testimony without presence of counsel. The majority opinion, by Justice Reed on his last day on the Court, found distinctions because this was an administrative hearing and therefore did not reach the principal question. Justice Black, for Chief Justice Warren and Justices Douglas and Brennan, did. What was said by those four Justices there synthesizes everything we have to say in the instant case (352 U.S. at 340-44). At any secret hearing,

1. "The witness has no effective way to challenge his interrogator's testimony as to what

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was said and done at the secret inquisition. The officer's version frequently may reflect an inaccurate understanding of an accused's statements or, on occasion, may be deliberately distorted or falsified. While the accused may protest against these misrepresentations, his protestations will normally be in vain… . "

2. "Behind closed doors he [the defendant] can be coerced, tricked or confused by officers into making statements which may be untrue or may hide the truth by creating misleading impressions. While the witness is in the custody of the interrogators, as a practical matter, he is subject to their uncontrolled will." *Id.* at 341-42.
3. "Nothing would be better calculated to prevent misuse of official power in dealing with a witness or suspect than the scrutiny of his lawyer or friends or even of disinterested bystanders."
4. "I also firmly believe that the Due Process Clause requires that a person interrogated be allowed to use legal counsel whenever he is compelled to give testimony to law-enforcement officers which may be instrumental in his prosecution and conviction for a criminal offense. This Court has repeatedly held that an accused in a state criminal prosecution has an unqualified right to make use of counsel at every stage of the proceedings against him."
5. "The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination."

These same dissenting Justices expressed their views again in *Crooker* v. *California,* 357 U.S. 433, 78 Sup. Ct. 1287, 2 L. Ed. 2d 1448 (1958) and *Cicenia* v. *LaGay,* 357 U.S. 504, 78 Sup. Ct. 1297, 2 L. Ed. 2d 1523 (1958). Crooker confessed during interrogation after he had asked for counsel and it was refused him. The Court, in passing upon the admissibility of the confession, concluded that the sole real issue was whether he had been coerced by the denial of his request for counsel. Citing various cases to the effect that confessions made prior to State appointment of counsel are not thereby rendered involuntary, the Court upheld the conviction. Applying the special circumstances test, it concluded that the particular petitioner was able to take care of himself without counsel at that stage. The Court held that State refusal of a request to engage counsel was a denial of constitutional rights "if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence" of fundamental fairness. 357 U.S. at 439. This, it was held, depended on the circumstances of the case. The Court rejected the view, as having a "devastating effect on enforcement of criminal law," that police questioning, fair as well as unfair, should be precluded until the accused is given an opportunity to call his attorney. *Id.* at 440.

Justice Douglas, for Chief Justice Warren and Justices Black and Brennan, gave an emphatic and detailed analysis of the absolute need for counsel at the pretrial stage, first to avoid the third degree, second because of the impossibility of determining disputes over what actually happened in the secret chamber, and finally, because of the importance of pretrial period. These Justices adopted the view that "'the pre-trial period is so full of hazards for the accused that, if unaided by competent legal advice, he may lose any legitimate defense he may have long before he is arraigned and put on trial.' " *Id.* at 445-46. They also adopted the statement of Professor Chafee, "A person accused of crime needs a lawyer right after his arrest probably more than at any other time." *Id.* at 446. Adopting the views of *Powell* v. *Alabama* and the views of the dissent of *In re Groban's Petition,* both *supra,* this opinion concluded that "The demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at any time after the moment of arrest." *Id.* at 448.

*Cicenia* involved similar issues. The defendant, before his indictment, was interrogated at the police station. He wanted counsel then and his family wanted to provide it, but the police did not permit the petitioner to meet with his lawyer or his family until after they had the confession. A majority rejected the view "that any state denial of a defendant's request to confer with counsel during police questioning violates due process, irrespective of the particular circumstances involved." 357 U.S. at 509. The same dissenters as in *Crooker* (except Justice Brennan, not participating) disagreed; they believed that *Cicenia* was "the occasion to bring our decision into tune with the constitutional requirement

for fair criminal proceedings against the citizen." *Id.* at 512.[9]

Soon after *Crooker* and *Cicenia,* the tide which was to overrule *Betts* began to flow with new vigor. In *McNeal* v. *Culver,* 365 U.S. 109, 81 Sup. Ct. 413, 5 L. Ed. 2d 445 (1961), Justices Douglas and Brennan called outright for the overruling of *Betts.* In *Culombe* v. *Connecticut,* 367 U.S. 568, 81 Sup. Ct. 1860, 6 L. Ed. 2d 1037 (1961), Justices Frankfurter and Stewart, applying the particular circumstances approach, held that a confession should not be admitted. Those Justices pointedly rejected the view that all persons under interrogation should be entitled to counsel. Observing that "Legal counsel for the suspect will generally prove a thorough obstruction to the investigation," 367 U.S. at 580, their opinion reviewed the practice of other countries and again observed that the *McNabb* principles had not been applied to state cases. Justices Douglas and Black wished to rest frankly on the principle "that any accused—whether rich or poor—has the right to consult a lawyer before talking with the police; and if he makes the request for a lawyer and it is refused," his constitutional rights are violated. *Id.* at 637. While an attorney may tell a defendant of his constitutional right not to testify, these Justices felt that all defendants are entitled to know their constitutional rights.

At the end of the *Betts* period, the condition of the constitutional law on the right to counsel at trial or during interrogation and the meaning of that right was this: a majority of this Court, so far as decisions were concerned, either had participated in *Betts* or had not yet disapproved it. The state of the law therefore was while a person was entitled to counsel of his choice in every case, *Chandler* v. *Fretag,* 348 U.S. 3, 75 Sup. Ct. 1, 99 L. Ed. 4 (1954), he was not yet entitled to appointed counsel at actual trial in every case. He was entitled to counsel in all federal cases; he was entitled to counsel at trial in all state capital cases; and he was entitled to counsel at trial in all other cases dependent upon special circumstances. This right in capital cases extended also to the arraignment, at least where the arraignment was "a critical stage in a criminal proceeding," because "What happens there may affect the whole trial." *Hamilton* v. *Alabama,* 368 U.S. 52, 54, 82 Sup. Ct. 157, 7 L. Ed. 2d 114 (1961). Four Justices of this Court (Chief Justice Warren and Justices Black, Douglas and Brennan) had expressed views indicating a belief that there was a right to counsel at interrogation, but a majority was not ready to go so far.

**(c) The Gideon period (1963– )** In overruling *Betts,* Justice Black for the Court closed the circle by applying the principle of his own 1938 opinion of *Johnson* v. *Zerbst, supra,* to state proceedings. This Court in *Gideon* thus erased the fundamental distinction between the state and federal cases by holding that the Sixth Amendment guarantee of counsel was of such character that it applied to the states in full. The Court, readopting the conclusive authority of *Powell* v. *Alabama,* declared that "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." 372 U.S. at 344. Justice Douglas, concurring, noted that this did not mean that some kind of a watered-down version of the Sixth Amendment was made applicable to the states—its totality applied to both.

It follows that so far as the Sixth Amendment is concerned, after March 18, 1963, there is no difference between the right to counsel as provided in that Amendment in the two court systems. *Gideon* was followed shortly by *Haynes* v. *Washington,* 373 U.S. 503, 83 Sup. Ct. 1336, 10 L. Ed. 2d 513 (1963), holding that the failure to tell a defendant under interrogation that he is entitled to be represented by counsel is one of the factors relevant to determining whether his confession was voluntary, 373 U.S. at 516-17;

[9] Another case of this special circumstances type is *Reck* v. *Pate,* 367 U.S. 433, 81 Sup. Ct. 1541, 6 L. Ed. 2d 948 (1961). Justice Douglas concurring said, "I would hold that any confession obtained by the police while the defendant is under detention is inadmissible unless there is prompt arraignment and unless the accused is informed of his right to silence and accorded an opportunity to consult counsel." 367 U.S. at 448. See also *Spano* v. *New York,* 360 U.S. 315, 79 Sup. Ct. 1202, 3 L. Ed. 2d 1265 (1959), in which the defendant had been indicted and thereafter confessed without counsel. Chief Justice Warren for the Court said that the "abhorrence of society to the use of involuntary confessions" among other things "turns on the deep rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." 360 U.S. at 320-21, footnote 2 on 321 summarizing the confession cases from *Brown* to this point. Justices Douglas, Black and Brennan, concurring, held that after indictment certainly the Government can never interrogate the accused in secret when he has asked for his lawyer. Justice Stewart, concurring, rested heavily on the fact that this defendant was under indictment.

and by *White* v. *Maryland,* 373 U.S. 59, 83 Sup. Ct. 1050, 10 L. Ed. 2d 193 (1963), which further extended the rule of *Hamilton* v. *Alabama.* In *White,* at a preliminary hearing, defendant pled guilty without counsel. Thereafter he was always afforded counsel. This Court held in effect that any stage at which a person can plead guilty is "critical" and he is entitled to counsel then.

**C. Escobedo and the present day**

The welter of cases obscures the simple lines of the situation. As of the spring of 1963, this law applied to these situations:

1. Defendants were entitled to counsel at all trials in the federal courts under *Johnson* v. *Zerbst, supra.*
2. Defendants in state courts were entitled to counsel in all trials, *Gideon* v. *Wainwright, supra.*
3. Persons were entitled to counsel in all federal arraignments (Rule 5 of the Rules of Criminal Procedure, as repeatedly interpreted), and in all arraignments or analogous proceedings under state law at which anything of consequence can happen; *Hamilton* v. *Alabama, supra;* and *White* v. *Maryland, supra.*
4. Several Justices believed that in all cases, a person who requested counsel at pre-arraignment investigation was entitled to it, at least in cases in which he wanted to consult his own lawyer; but this was not yet a majority view, *Crooker* v. *California, supra,* and *Cicenia* v. *La Gay, supra.*
5. Several Justices believed that, requested or not, a person has a right to counsel upon interrogation unless he intelligently waived that right. See for the views of Chief Justice Warren and Justices Black, Douglas, and Brennan, variously the *Groban, Crooker,* and *Cicenia* cases, *supra.*

Situation 5 is that presented in the instant case. *Escobedo* v. *Illinois,* 378 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977 (1964) settled point 4. In *Escobedo,* the defendant, after arrest but before indictment, repeatedly asked to see his counsel and was effectively barred from doing so by the police. The Court held that it was immaterial whether the defendant had yet been indicted—"It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment." *Id.* at 486. The Court, following the New York rule in *People* v. *Donovan,* 13 N.Y. 2d 148, 243 N.Y.S. 2d 841, 193 N.E. 2d 628 (1963) held that a confession even prior to indictment after an attorney had been requested and denied access to see the person, could not be used in a criminal trial.[10]Following the dissenting opinion of *In re Groban, supra,* the Court held that it would make a mockery of the right to counsel if a person were entitled to counsel at trial but not at an earlier stage which in truth disposed of the case. *Cicenia* and *Crooker,* after some attempt to distinguish them, were put aside with the observation that insofar as they might "be inconsistent with the principles announced today, they are not to be regarded as controlling." *Id.* at 492. In summary, *Escobedo* held: "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." *Ibid.*[11]

We cannot in candor assert that *Escobedo* unequivocally establishes a right to counsel at the interrogation stage in all situations. Certainly, the three dissenting Justices so construed it, *Id.* at 496-97. On the other hand, any case may depend on its facts. In *Escobedo,* without doubt, the defendant did ask for counsel at the interrogation stage, this was denied him, and

[10] This had special importance because of *Malloy* v. *Hogan,* 378 U.S. 1, 84 Sup. Ct. 1489, 12 L. Ed. 2d 653 (1964), holding that the states cannot, any more than the federal government, abridge the privilege against self-incrimination. Since a principal function of counsel is to advise a defendant of his constitutional rights, including specifically the right against self-incrimination, and since the most significant point of this abridgment is at the interrogation stage, *Malloy* buttressed the necessity of the right to counsel at this point.

[11] *Escobedo* further developed *Massiah* v. *United States,* 377 U.S. 201, 84 Sup. Ct. 1199, 12 L. Ed. 2d 246 (1964) an opinion by Justice Stewart in which the defendant was induced to make statements, without counsel present, after his indictment. The Court adopted the rule that any "secret interrogation" after the indictment without the protection of counsel vitiated any confession so obtained. Three dissenting judges in *Massiah* thought that the reasoning of the case should apply equally to "statements obtained at any time after the right to counsel attaches, whether there has been an indictment or not," 377 U.S. at 208; and in *Escobedo,* the majority took the view that no meaningful distinction can be drawn between interrogation of an accused before indictment or after. However, in *Escobedo* Justice Stewart expressed his own view that the fact of indictment "makes all the difference." 378 U.S. at 493.

the Court did mention this as one of the factual elements in its decision. For an expression of honest puzzlement as to the scope of *Escobedo,* see *Miller* v. *Warden, Maryland Penitentiary,* 338 F. 2d 201, 204 (4th Cir. 1964).

Shortly before *Escobedo,* Justice Douglas, in discussing the need for counsel at the interrogation stage, said that "the federal law here is still halting or yet unborn." Douglas, *The Right to Counsel,* 45 Minn. L. Rev. 693-94 (1961). The new birth which Justice Douglas anticipated in 1961 has led to a nationwide series of conflicting decisions of which the instant case and *People* v. *Dorado,* 42 Cal. Rptr. 169, 398 P. 2d 361 (1965), are typical. The Arizona Supreme Court in the instant case focused upon the fact that in *Escobedo,* the defendant asked for counsel whereas in the instant case, he did not, and therefore reached opposite results dependent upon that request. Chief Justice Traynor had already, before *Escobedo,* led the way toward a right to counsel at the interrogation stage in *People* v. *Garner,* 57 Cal. 2d 135, 18 Cal. Rptr. 40, 367 P. 2d 680, 693 (1961) (concurring). This landmark analysis put aside any distinction between a right to counsel after as distinguished from before indictment.[12]

The only difference between *Escobedo* and *Dorado* was that Dorado had neither retained nor requested counsel. The California court concluded that whether or not the accused had requested counsel was "a formalistic distinction." It read *Escobedo* to mean that defendant's right to counsel did mature at the accusatory stage; "the stage when legal aid and advice were most critical" to defendant; therefore California held that his vocalization of that right cannot be the determinative factor. 42 Cal. Rptr. At 175, with comprehensive citations following. Hence, California concluded that "the right to counsel matures at this critical accusatory stage; the right does not originate in the accused's assertion of it." *Id.* at 176.

Indeed, there are numerous decisions of this Court holding that the right to counsel, where it indisputably exists, does not depend upon a request for it; see for example, *Carnley* v. *Cochran,* 369 U.S. 506, 82 Sup. Ct. 884, 8 L. Ed. 2d 70 (1962), holding with numerous citations that "it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." 369 U.S. at 513; and see, for post-*Gideon* application of this rule, *Doughty* v. *Maxwell,* 376 U.S. 202, 84 Sup. Ct. 702, 11 L. Ed. 2d 650 (1964). Relying on the *Carnley* opinion, the California court concluded that the presence or absence of the request was immaterial, a conclusion reached also because "we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize the defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it." 42 Cal. Rptr. At 177-78. Hence, it held that at the interrogation stage a defendant must be informed of his rights so that he can intelligently waive them.

As noted, the cases have divided. *Wright* v. *Dickson,* 336 F. 2d 878, 882 (9th Cir. 1964) expressly holds that under *Escobedo,* the test is whether "the investigation was then no longer a general inquiry but had focused on appellant," and it is immaterial whether or not "appellant asked to consult retained counsel or to be provided with the assistance of appointed counsel, nor, indeed, whether he requested counsel at all, except as the latter fact might bear upon waiver." See to the same effect, *United States ex rel. Russo* v. *New Jersey,* 351 F. 2d 429, 438 (3d Cir. 1965);[13] and see the opinion of Tuttle, J., in *Collins* v. *Beto,* 348 F. 2d 823, 830-31 (5th Cir. 1965), with abundant citations. See also, as an example of a state reversing itself to accord with this position, *Commonwealth* v. *Negri,* 213 A. 2d 670 (Pa. 1965).

[12] "It is a formalistic assumption that indictment is the point when a defendant particularly needs the advice and protection of counsel. Often a defendant is arrested under highly suspicious circumstances and from the time he is apprehended his guilt is a foregone conclusion in the minds of the police. Frequently too, suspicion falls upon him at some intermediate point before indictment. In some cases the evidence against the accused may be stronger at the moment of arrest than it may be in other cases when the indictment is returned. It is hardly realistic to assume that a defendant is less in need of counsel an hour before indictment than he is an hour after." 367 P. 2d at 695.

[13] "No sound reasoning that we can discover will support the conclusion that although at other stages in the proceedings in which the right attaches there must be an intelligent waiver, at the interrogation level a failure to request counsel may be deemed to be a waiver."

Yet not only the instant case, but numerous others go the other way. See for example, *People* v. *Gunner,* 15 N.Y. 2d 226, 205 N.E. 2d 852 (1965), although Chief Judge Desmond and Judge Fuld disagree with that conclusion; see 205 N.E. 2d at 855-56. See also as illustrations of cases limiting *Escobedo* to its facts, *Latham* v. *Crouse,* 338 F. 2d 658 (10th Cir. 1964); *Jackson* v. *United States,* 337 F. 2d 136 (D. C. Cir. 1964); *United States* v. *Ogilvie,* 334 F. 2d 837 (7th Cir. 1964); *Mefford* v. *States,* 235 Md. 497, 201 A. 2d 824 (1964).[14]

### D. The right to counsel at interrogation: 1966

The issue is whether, under the Sixth Amendment to the Federal Constitution as made applicable to the states by the Fourteenth, there is the same right to counsel at interrogation of an arrested suspect as there is at arraignment (*Hamilton* v. *Alabama, supra; People* v. *White, supra*) or at trial (*Johnson* v. *Zerbst, supra; Gideon* v. *Wainwright, supra*).

The right does exist. It is the same. This is not the result of a single case, *Escobedo* or any other. Rather, there is a tide in the affairs of men, and it is this engulfing tide which is washing away the secret interrogation of the unprotected accused. The *McNabb-Mallory* line of cases may in terms be restricted to the rules, but the rules themselves are a reflection of the Sixth Amendment as interpreted in *Johnson* v. *Zerbst, supra.* Once the Sixth Amendment is clearly applicable to the states (*Gideon* v. *Wainwright*), then the constitutional standards are the same. *Escobedo,* although all that was involved there was a fact situation in which a request had been made and denied, necessarily transcends its facts because it recognizes the interrogation as one of the sequence of proceedings covered by the Sixth Amendment. Since *Carnley* v. *Cochran, supra,* bars unwitting waiver under the Sixth Amendment, it necessarily applies to the totality of that to which the Sixth Amendment applies, and this must necessarily run, as it does, from the interrogation after arrest through the appeal.[15]

We have in this galaxy of cases not a series of isolated phenomena, but reflections of basic belief, beliefs which were expressed in the dissents in *In re Groban; Crooker;* and *Cicenia;* in *Gideon;* in *Malloy* v. *Hogan, supra,* extending the freedom from self-incrimination to the states; and in *Escobedo.* These are all different manifestations of the view expressed by Justice Douglas in *Culombe* v. *Connecticut, supra,* concurring, where he said, the "principle is that any accused—whether rich or poor—has the right to consult a lawyer before talking with the police."

This case is not to be decided by the color-matching technique of determining whether one case looks just like another case. We deal with fundamentals of liberty, and so, in consequence, with basic belief. The suggestion that the defendant must ask for counsel is to make a great matter depend upon a formal distinction. We warmly commend to this Court *Oregon* v. *Neely,* 239 Ore. 487, 398 P. 2d 482, 486 (1965):

> "Adoption of the distinction advanced by the state would lead to results contrary to the basic beliefs of the United States Supreme Court and of this court… . If the state's distinction were accepted, we would grant the assistance of counsel to those educated enough to demand it and deny it to those too ignorant to ask for it. The United States Constitution demands equal treatment during the criminal process for the inexperienced and the uneducated."

## II. PRACTICAL CONSIDERATIONS OF LAW ENFORCEMENT ACCORD WITH GIVING THE SIXTH AMENDMENT ITS FULL MEANING

Whenever rights are recognized for those charged with crime, sincere people will inescapably be concerned as to the effect of those rights on law enforcement. In *Powell* v. *Alabama, supra,* the defendants were tried within a few days of the crime, and in holding that this matter had been hustled too much, this Court found it necessary to discuss also the problem of the "great and inexcusable delay in the enforcement of our criminal law" as "one of the grave evils of our time." 287 U.S. at 59. In

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[14] For other cases to the same effect, see Note, *The Right to Counsel During Police Interrogation,* 25 Md. L. Rev. 165, 172, n. 58 (1965); and see Dowling, *Escobedo and Beyond,* 56 J. Crim. Law 143, 155, notes 81 and 82 (1965). Outstandingly useful articles relating to the problems of this case are Comments at 53 Calif. L. Rev. 337 (1965); 52 Geo. L.J. 825 (1964); 25 Md. L. Rev. 165 (1965); and 32 U. Chi. L. Rev. 560 (1965).

[15] For able development of a similar approach and view, see the dissenting opinion of Chief Judge Brune in *Prescoe* v. *State,* 231 Md. 486, 191 A. 2d 226, 232 (1963). We have not considered any of the problems of waiver or any of the problems of pre-arrest interrogation in this case since they are not here.

*Chambers* v. *Florida, supra,* the Court observed that "we are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws," 309 U.S. at 240, with a note analyzing the literature in relation to the use of the third degree to obtain confessions. Justice Jackson, in *Watts* v. *Indiana,* 338 U.S. 49, 57, 69 Sup. Ct. 1347, 93 L. Ed. 1801 (1949) made the classic statement of the conflict:

> "To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of crime … [A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no such statement to police under any circumstances."[16]

Justice White, dissenting for himself and Justices Clark and Stewart in *Escobedo,* expressed concern for the crippling effect of the decision on law enforcement, 378 U.S. at 499. Justice White, joined by Justices Clark and Harlan, in their dissent in *Massiah, supra,* also developed the matter largely in terms of the effect of the rule on law enforcement, moving from the premise that "a civilized society must maintain its capacity to discover transgressions of the law and to identify those who flout it." 377 U.S. at 207.

With so many members of this Court concerned with the constitutional rule from the practical standpoint of law enforcement, that matter requires independent consideration. The principal practical concerns are two: first, that the system established will be expensive; and second, that it will prevent the detection and punishment of the guilty. At a time when American society is deeply and justly concerned both with rising crime rates and with the menacing existence of organized crime, these are genuinely serious problems.

We begin by observing that the principles here advocated will have exactly zero effect on organized crime. This case involves an important constitutional principle, but it must not be made more important than it is. This case is not a grand caucus on whether sin or virtue should be the order of the day; we are dealing with the precise problem of whether a person charged with crime is to be made effectively aware of his right to counsel at the interrogation stage, and whether he is to be supplied counsel if he needs it at that point. None of this has any application to organized crime at all. The criminal gangs know perfectly well what tools, both physical and legal, they may use in their battle with society. The confession and right to counsel cases which have been before this Court so constantly since *Powell* v. *Alabama* have almost never involved gang-type criminals. The crimes from *Powell* (rape) to *Miranda* (rape) have almost always been rapes and murders, involving defendants poor, poorly educated, and very frequently, as here, of very limited mental abilities. The rich, the wellborn, and the able are adequately protected under existing constitutional standards, and the sophisticates of crime do not need this protection. We are talking here about precisely what was involved in *Chambers* v. *Florida* twenty-five years ago, the "helpless, weak, outnumbered." 309 U.S. at 241.

### A. Cost factors

Public defender systems cost money. Many defendants are indigents, and extending the right to counsel into the interrogation stage will increase personnel, paperwork, costs of all kinds. It will make some kind of public defender system virtually obligatory.[17] But the cost increase will by no means be limited to defense costs. As Mr. J. Edgar Hoover observed in 1952, full use of proper scientific methods should make it unnecessary for officers to use dishonorable methods of detection;[18] this inescapably means increased prosecution costs. A laboratory costs more than a strap, and so does the training of those who wield a microscope rather than a whip.

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[16] Justice Jackson continued: "If the State may rest on suspicion and interrogate without counsel, there is no denying the fact that it largely negates the benefits of the constitutional guarantee of the right to assistance of counsel. Any lawyer who has ever been called into a case after his client has 'told all' and turned any evidence he has over to the Government knows how helpless he is to protect his client against the facts thus disclosed." 338 U.S. at 59.

[17] Pollock, *Equal Justice in Practice,* 45 Minn. L. Rev. 737, 738-39 (1961) estimates 2,000,000 arrests for major offenses in a year, with 1,000,000 needing free legal representation and only 100,000 getting it. Birzon, Kasanof and Forma, in *The Right to Counsel,* 14 Buff. L. Rev. 428, 433 (1965) estimate 65% to 90% indigency among felony defendants in New York. For brief references, see Note, 1962 U. Ill. L.F. 645, n. 37, and for more extensive citations on the burdens involved, Comment, *Escobedo* v. *Illinois,* 32 U. Chi. L. Rev. 560, 580, n. 92 (1965); and see for anticipated cost analysis under federal legislation, Rep. Emanuel Celler, *Federal Legis. Proposals,* 45 Minn. L. Rev. 697 (1961).

[18] FBI Law Enforcement Bull., Sept., 1952.

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There are undoubtedly cheaper methods of law enforcement than those contemplated by the American Constitution. While some critics have contested the right to counsel in cost terms, no member of this Court has ever attempted to put a price tag on constitutional rights. Pepper in the eyes is cheaper than a fair trial and respect for constitutional rights in law enforcement will inescapably cost money.

Let it.

**B. The effect on law enforcement**

Some members of this Court have had severe doubts about the effect of the application of these principles in the operation of the criminal law, and some outside criticisms have been uninhibited. Professor Inbau regards *Escobedo* as "the hardest body blow the Court has struck yet against enforcement of law in this nation."[19] More temperate criticism of *Escobedo* develops the view that it "creates unnecessary and undesirable impediments to police investigation."[20]

While figures vary as to the number of crimes which are solved by confessions, that number is clearly extremely large. As Justice Jackson observed in the passage quoted above from *Watts* v. *Indiana,* a lawyer at the interrogation stage may well tell his client to stand mute, and the practical effect will be to eliminate large numbers of confessions.[21]

There have been several congressional inquiries into the problems of police interrogation.[22] Professor Louis B. Schwartz of the University of Pennsylvania has testified that in his experience, very few proper convictions had been lost because of the *Mallory* rule.[23] Senator Dominick noted the contradictory attitudes of the police and prosecutors as to the effect of the *Mallory* rule on the crime rate, with the police uniformly taking the position that the increase in crime in the District is directly related to the *Mallory* rule, while the United States Attorney and the Department of Justice indicate that the rule has very little effect on the releasing of guilty persons.[24]

Deputy Attorney General Ramsay Clark for the Department of Justice testified that the *Mallory* rule had not been shown to be a direct causative factor in crime or its increase; and the report of the United States Attorney attributes only two "lost" cases a year to the operation of the *Mallory* rule.[25] On the other hand, a report from the House Committee of the District of Columbia, H. Rep. 176, 89th Cong., 1st Sess. (1965) accompanying House Bill 5688, providing for amendment to the *Mallory* rule, does report an apparent relationship of the increase of the District of Columbia crime rate with *Mallory.*[26] A strong minority report shows that while there is a rise in crime in the District, nothing connects it to the *Mallory* rule or makes the rise attributable to *Mallory* in any way.[27]

There are other conflicting views. The New York City Police Commissioner in September of 1965 estimated that confessions were essential to conviction in 50 per cent of the homicides com-

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[19] As quoted in Dowling, *Escobedo and Beyond,* 56 J. Crim. L. 143, 145 (1965). Professor Inbau expresses himself also in *Restrictions in the Law of Interrogations and Confessions,* 52 Nw. U. L. Rev. 77 (1957).

[20] Enker and Elsen, *Counsel for the Suspect,* 49 Minn. L. Rev. 47, 48 (1965). See in particular, *Id.* at 62-63, n. 52, on the current developments under the English Judges' Rules.

[21] See Weisberg, "Police Interrogation of Arrested Persons," in *Police Power and Individual Freedom.* 153, 179 (Sowle Ed. 1962).

[22] See *Hearings on the Constitutional Aspects of Police Detention Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 85th Cong., 2d Sess. (1958) (hereafter, *1958 Hearings*). See also the various Hearings on bills to alter the rule of *Mallory* v. *United States, supra. E.g., Hearings on H.R. 5688 and 5.1526 Before the Senate Committee on the District of Columbia,* 89th Cong., 1st Sess., pts. 1-2 (1965) (hereafter *1965 Hearings*). Prior to these Senate Hearings, the House Committee on the District of Columbia had submitted H.R. Rep. No. 176, 89th Cong., 1st Sess. (1965) (hereafter, *1965 Report*) to accompany H.R. 5688.

[23] *1965 Hearings,* pt. 1, at 107.

[24] *Id.* at 299. In earlier hearings, the Deputy Chief of Police for Washington, D.C., had contended that the *Mallory* rule results in freeing guilty persons and unduly hampers law enforcement, *1958 Hearings* 124-35. See also the testimony of Chief Layton, *1965 Hearings,* pt. 1, at 299.

The District Attorney of the District of Columbia, Mr. David Acheson, in 1964 said:

> " … Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain… . "

Quoted in the address of Judge J. Skelly Wright before the Annual Convention of the International Academy of Trial Lawyers, p. 10 (unpub., 1965), from which many of the conceptions of this brief are drawn.

[25] For Mr. Clark's statement, see *id.,* pt. 2, at 495; for that of Mr. Acheson, see note 36, *infra.*

[26] *1965 Report* 5. There is some testimony to the effect that it is very difficult to obtain convictions of criminals where neither scientific evidence nor eye witness identification is available. *Id.* at 65.

[27] *Id.* at 119.

mitted in New York in 1964 and, on the other hand, State Supreme Court Justice Nathan R. Sobel describes the view that confessions are the backbone of law enforcement as "carelessly nurtured nonsense."[28] New York District Attorney Frank S. Hogan says that the police are heavily dependent on confessions to get convictions in many cases and that "the whole purpose of a police investigation is frustrated if a suspect is entitled to have a lawyer during preliminary questioning, for any lawyer worth his fee will tell him to keep his mouth shut."[29] On the other hand, Brooklyn District Attorney Aaron E. Koota believes that a person should have a lawyer "at the moment he comes into contact with the law." While some law enforcement officials claim that 75 to 85 per cent of all convictions are based on confessions, Judge Sobel's study, based on 1,000 Brooklyn indictments from February to April, 1965, showed that fewer than 10 per cent involved confessions.[30]

An extremely experienced point of view is that of Judge George Edwards of the United States Court of Appeals for the Sixth Circuit, who resigned from the Michigan Supreme Court to be Detroit Police Commissioner in 1962 and 1963. Judge Edwards said, "We did take prisoners promptly before a judge. And the town did not fall apart. Murder and pillage did not run rampant." He added that he had attempted to run the Detroit Police Department by United States Supreme Court standards, and that it made law enforcement more effective, convincing more people that "we were moving toward making it more nearly equal in its application to all people, regardless of race or color."[31]

The Criminal Justice Act of 1964, 78 Stat. 552, 18 U.S.C. Sec. 3006A, reflects the belief that early advice of right to counsel is compatible with good law enforcement. The Congressional Committee considered a report of the special committee of the Association of the Bar of the City of New York and of the National Legal Aid Association, which concluded that the public defender "system should come into operation at a sufficiently early stage of the proceedings so that it can fully advise and protect and should continue through appeal."[32] The Congress was also advised of the report of the Attorney General's Committee on Poverty and Administration of Federal Justice, February 25, 1963. This report in turn referred to the 1958 report of the New York City Bar and National Legal Aid Association Committee, asserting that "if the rights of the defendant are to be fully protected, the defense of his criminal case should begin as soon after the arrest as possible." A majority of the Attorney General's Committee endorsed this view, and recognized "strong argument that the time the defendant needs counsel most is immediately after his arrest and until trial."[33]

The Attorney General's Committee "after careful consideration" did not adopt that view for legislative purposes at that time but the actual bill which passed provides that the United States Commissioner for the Court should advise the defendant of his right to be represented by counsel and in appropriate circumstances should appoint counsel for him. 18 U.S.C. Sec. 3006A(b). Coupled with the *Mallory* rule, this for all practical purposes means forthwith advice of the right to counsel almost at once upon arrest.

The District of Columbia is the best testing ground for the effect of the Court's standards since it has been most affected by the *McNabb-Mallory* line of cases and at the same time is most analogous to the states of any part of the federal system. The leading study is *Report and Recommendations of the Commissioner's Committee on Police Arrests for Investigation* (1962), commonly known as the Horsky Report, for its chairman, Mr. Charles A. Horsky. The Horsky study shows that a very large number of arrests for investigation have been made in the District of Columbia, the number of persons being arrested on suspicion running about a third of those arrested for felonies.[34] An analysis of hundreds of cases of arrest for investigation, in which persons were interrogated privately,

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[28] *New York Times,* Nov. 20, 1965, p. 1. Judge Sobel's views are published in N.Y.L.J., Nov. 22, 1965, p. 1, 4-5, and have very comprehensive statistics on various crimes and their relation to confessions.

[29] *New York Times,* Dec. 2, 1965, p. 1.

[30] *New York Times,* Nov. 22, 1965, p. 1, pt. 2.

[31] *New York Times,* Dec. 7, 1965, p. 33.

[32] Hearing Before Senate Committee on the Judiciary on S. 1057, p. 24 (1963).

[33] *Id.* 197-205.

[34] Horsky Report, p. 9. For comparable Chicago experience, with statistical detail on the numbers of persons detained for investigation, see American Civil Liberties Union "Secret Detention by the Chicago Police" (Free Press, Glencoe, Ill., 1959). Based on a study of police records, the report concludes that in 1956 approximately 20,000 persons were held incommunicado for at least 17 hours, and 2,000 for 48 hours or more.

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showed that this was not in fact a fruitful source of criminal convictions; only about five per cent were ever charged, and even this exaggerates the practical importance of the procedure.[35] As noted, the former United States Attorney, Mr. David Acheson, reported that only an average of about two cases a year were lost because of the *Mallory* decision.[36]

The Horsky Report is the richest single source on the practical aspects of secret interrogations. On both principle and practical considerations "the committee recommends that arrest for 'investigation' should cease immediately."[37] They invoked directly the principle of Blackstone's Commentaries:

> "To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to a gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government."[38]

As a practical matter, we cannot know with assurance whether the amplification of the right to counsel in the interrogation period will severely handicap the police; we end by trading opinions.[39] The best of interrogation, as expounded for example by the principal publicist for secret inquiries, Professor Inbau, makes a poor case for itself as is illustrated in the note attached.[40] But assuming that there may be some unpredictable decline in the efficiency of the conviction machinery, there are some distinctly practical plusses to be balanced against this. As Justice Douglas said in *United States* v. *Carignan,* 342 U.S. 36, 46, 72 Sup. Ct. 97, 96 L. Ed. 48 (1951), when a person is detained without arraignment,

> "the accused is under the exclusive control of the police, subject to their mercy, and beyond the reach of counsel or of friends. What happens behind doors that are opened and closed at the sole discretion of the police is a black chapter in every country—the free as well as the despotic, the modern as well as the ancient."

We are not talking with some learned historicity about the *lettre de cachet* of pre-Revolutionary France or the secret prisons of a distant Russia. We are talking about conditions in the United States, in the Twentieth Century, and now.[41]

Moreover, some of the cost and efficiency comes from giving American citizens exactly what they are entitled to under the Constitution. It is, after all, the man's privilege to be silent, *Mallory* v. *Hogan, supra,* and it does smack of denial of equal protection to say that this is a right only for those well educated enough to know about it. But one need not reach to constitutional principle; there are, practically, equally impor-

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[35] Horsky Report, pp. 33-34.

[36] Horsky Report, p. 17.

[37] Horsky Report, pp. 41-71.

[38] Quoted at Report, p. 43.

[39] See for example the conflict between Inbau, *Police Interrogation—a Practical Necessity, in Police Power and Individual Freedom,* 147 (Sowle ed. 1962) with Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View, id.,* 153.

[40] The following note is taken bodily from Comment, *The Right to Counsel During Police Interrogation,* 53 Cal. L. Rev. 337, 351-52, note 75 (1965):

> "75. See Inbau & Reid, *Criminal Interrogation and Confessions* (1962); Kidd, *Police Interrogation* (1954); Gerber & Schroeder, *Criminal Investigation and Interrogation* (1962). The Inbau and Reid book is a very specific and highly illuminating study of recommended techniques of interrogation. A paraphrase of the author's advice to the would-be interrogator might read: Impress the accused with your certainty of his guilt, and comment upon his psychological symptoms of guilt, such as the pulsation of a carotid artery, nail biting, dryness of the mouth, etc.; smoking should be discouraged because this is a tension-reliever for the guilty subject trying desperately not to confess; the sympathetic approach—anyone else under such circumstances would have acted the same way, suggests a less repulsive reason for the crime, and, once he confesses, extract the real reason, condemn the victim, the accomplice or anyone else upon whom some degree of moral responsibility might be placed; understanding approach—a gentle pat on the shoulder, a confession is the only decent thing to do, I would tell my own brother to confess; forceful approach—exaggerate the charges against the accused, sweet and sour technique (one policeman is hostile to him while other acts as his friend); interrogation of the recalcitrant witness—at first be gentle and promise him police protection, then, if he still refuses to talk, attempt to break the bond of loyalty between him and the accused or even accuse him of the offense and interrogate him as if he were the offender.
>
> "The book written by Lt. Kidd provides fascinating reading for the novice. The following paraphrased extracts offer examples: The officer should not interrogate in a business office where there might be a recording device because he may make some statements which would be embarrassing if played back in court to rebut his testimony; feed

tant workaday considerations. As is well developed by Judge Smith in *United States* v. *Richmond,* 197 F. Supp. 125, 129 (D. Conn. 1960):

> "Statements elicited during questioning are bound to be colored to some extent by the purpose of the questioner who inevitably leads the witness in the absence of court control. This coloring is compounded where the statement is not taken down stenographically, but written out as a narrative in language supplied by the questioner. Where the state of mind of the defendant is an issue in the case, as in determining the degree of a homicide, this wording of his account of the crime is of vital importance… . Had counsel been available to Reid he might have advised Reid of the danger to one on trial for his life on charges such as were faced by Reid of adopting the language of another in a statement signed by him.

"Reid appears to have been suggestible, as might be expected in view of his age, mentality and education."[42]

Judge Smith's highly practical observations are of special application in the instant case. We deal here with rape and with what is, on the facts, an actual issue of penetration.[43] This defendant was obviously led in his alleged talk about vagina and penis, and had he not made or acquiesced in this very clearly led statement, might have been convicted for a lesser offense.

## CONCLUSION

The day is here to recognize the full meaning of the Sixth Amendment. As a matter of constitutional theory and of criminal procedure, if a defendant cannot waive counsel unwittingly in one part of the conviction procedure, he should not be able to waive it at another. As a matter of practicality in law enforcement, we cannot know the precise effects of giving counsel at the beginning as the law does at the end; but we can know that there is not the faintest sense in deliberately establishing an elaborate and costly system of counsel—to take effect just after it is too late to matter. Yet that is precisely the *Miranda* case.

We invoke the basic principles of *Powell* v. *Alabama:* "He requires the guiding hand of counsel at every step in the proceedings against him." When Miranda stepped into Interrogation Room 2, he had only the guiding hand of Officers Cooley and Young.

We respectfully submit that the decision of the court below should be reversed.

Respectfully submitted,

LEWIS ROCA SCOVILLE BEAUCHAMP & LINTON

By John P. Frank[44]

John J. Flynn

January, 1966.

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upon suspect's likes and dislikes—love of mother, hatred of father, concern for children; never release pressure even when tears begin to flow; don't allow the accused any form of tension release at a critical moment in the questioning, such as a cigarette, a drink of water, or a trip to the washroom; play two co-conspirators against each other (often termed bluffing on a split pair)—claim that one talked and blamed the other, possibly using a false recording to substantiate this claim, continually take one out separately but never question him—the other will believe it necessary to tell his side of the story; aggressive approach—blame accused for crimes he didn't commit, play on the fact that many defendants fear the mental asylum more than jail. "An interesting article in the Gerber and Schroeder book noted the similarity between the methods of interrogation used today and the practices of the German Inquisition. See Gerber & Schroeder, *op. cit. supra* at 361-62."

See also, for illustration of interrogation methods, Sutherland, *Crime and Confession,* 79 Harv. L. Rev. 21, 31-32 (1965).

[41] "The 'war on crime' is not a sporadic crisis, here today and gone tomorrow, justifying during its brief combat stage a shelving of long-standing immunities of the citizen." Sutherland, *supra,* n. 40, 79 Harv. L. Rev. at 40-41, supported by contemporary illustrations; and see citations collected in the Horsky Report, pp. 46-47.

[42] We are not unaware that this case was reversed on other grounds, three to two by the Second Circuit, Judges Clark and Waterman dissenting on the issue of rehearing, 295 F. 2d 83 (2d Cir. 1961) and that certiorari was denied, 368 U.S. 948, 82 Sup. Ct. 390, 7 L. Ed. 2d 344 (1962). We respectfully commend it as a good case all the same.

[43] Without the "half-inch" statement in the confession (R. 69), there might have been no rape in this case at all. There was no medical testimony of any rape. In response to the prosecution's questions, the prosecutrix testified that at first the defendant was unable to make penetration; that later he did, but whether with his finger or his penis, she "was not sure" (R. 19). A few lines later, she said he made penetration with his penis (R. 20); but on cross, in response to the question of whether entry had been made "with his finger or his penis," she replied, "I don't know" (R. 32), and later she said, "I guess it was with his penis" (R. 33).

[44] Counsel notes with appreciation the research assistance of Mr. Robert Jensen of the Minnesota bar and Mr. Paul Ulrich of the California bar, both clerks in the office of counsel.

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## APPENDIX

Extracts from record in the companion case of *State* v. *Miranda,* 98 Ariz. 11, 401 P. 2d 716 (1965).

Mr. Turoff: What was your answer to this? Let me repeat the question. Did you make any threats to the defendant? Did you answer that?

A. Yes, I answered that. I didn't make any threats.

Q. Did you use any force on the defendant?

A. No, Sir.

Q. Did you offer the defendant any promises of immunity?

A. No, Sir, I did not.

Q. Officer, were you the arresting officer?

A. Yes, Sir.

Q. Did you arrest the defendant?

A. Yes, Sir.

Q. Are you the officer who brought him into the Interrogation Room?

A. Yes, Sir.

Q. Officer Young, was he also in the Interrogation Room?

A. Yes, Sir, he was with me during the time.

Q. And in your presence, did Officer Young make any threats?

A. No, Sir, he did not.

Q. Did Officer Young use any force on the defendant?

A. No, Sir, he did not.

Q. Did Officer Young make any promises of immunity to the defendant?

A. No, Sir, he did not.

Q. Officer, I ask you again, what was your question to the defendant and what was his answer to that question?

Mr. Moore: Comes now the defendant and objects for the reason—I would like to ask a question on voir dire before I make the objection.

The Court: All right, Mr. Moore.

By Mr. Moore:

Q. Did you say to the defendant at any time before he made the statement you are about to answer to, that anything he said would be held against him?

A. No, Sir.

Q. You didn't warn him of that?

A. No, Sir.

Q. Did you warn him of his rights to an attorney?

A. No, Sir.

Mr. Moore: We object, not voluntarily given.

Mr. Turoff: I don't believe that is necessary.

The Court: Overruled.

By Mr. Turoff:

Q. Would you tell us, Officer, now, what you said to the defendant after Miss McDaniels made her statement and what the defendant said to you regarding this charge.

A. I asked him, I said, "Is this the woman that you took money from?" and he said, "Yes, this is her."

Q. Did you ask him anything else? Was there any further conversation regarding the taking of this money?

A. Yes, Sir, we then—I believe he just volunteered the information and was saying—part of the conversation was with the woman at the time that the occurrence had happened.

Q. I didn't get that, Officer. He told you what conversation he had with her?

A. Yes, he did.

Q. I see; did he tell you also where this took place and when?

A. He wasn't exactly sure of the exact location. It was at approximately 2nd Street just north of Van Buren up around Taylor, somewhere in that vicinity. He wasn't sure of the exact location of the occurrence, but just the approximate location.

Mr. Turoff: I have no further question of this witness.

A. No, not right away.

Q. Later on when Miss McDaniels was present, did you have a discussion with the defendant concerning that charge?

A. Yes, Sir.

Q. Who was present at that conversation, Officer?

A. Myself, Detective Cooley, Mr. Miranda and Barbara McDaniels.

Q. I see; prior to that, had you made any threats or used any force on the defendant?

A. No, Sir.

Q. Had you offered the defendant any immunity?

A. No, Sir.

Q. In your presence, had Officer Cooley done any of these acts?

A. No, Sir.

Q. About what time did this conversation take place, Officer?

A. Approximately 1:30.

Q. Shortly after Miss McDaniels made her first statement, is that correct?

A. Yes, Sir.

Q. Can you tell us now, Officer, regarding the charge of robbery, what was said to the defendant and what the defendant answered in your presence?

A. I asked Mr. Miranda if he recognized * * *

A. When Mrs. McDaniels was in there, we were not armed—I was not.

Q. You were not?

A. No, Sir.

Q. But the defendant did know you were policemen?

A. Yes, Sir.

Q. And you did question him?

A. Yes, Sir.

Q. And you didn't warn him of his rights?

A. What is that?

Q. You never warned him he was entitled to an attorney nor anything he said would be held against him, did you?

A. We told him anything he said would be used against him, he wasn't required by law to tell us anything.

Q. Did you tell him that or did Mr. Cooley tell him that?

A. We both had told him.

Q. That is all you know about this? You don't know a thing about this except the conversation you heard, this robbery trial, isn't that right?

A. Yes.

Q. The conversation you heard in the interrogation room?

U.S. SUPREME COURT, OCTOBER 1965

BRIEF FOR RESPONDENT

# In the Supreme Court of the United States

## October Term, 1965

## No. 759

ERNESTO A. MIRANDA, PETITIONER,
V.
THE STATE OF ARIZONA, RESPONDENT

### ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

### BRIEF FOR RESPONDENT

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### OPINION BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS INVOLVED

Pursuant to Rule 40, Subd. 3, Rules of the Supreme Court, 28 U.S.C. Rules, as amended, the respondent accepts petitioner's presentation of the above referenced portions of the brief.

### QUESTION PRESENTED

While your respondent accepts the legal substance of the Question Presented as posed by the petitioner, serious issue is taken with the descriptive phrases, "poorly educated, mentally abnormal".[1] The propriety of this description of the petitioner, insofar as it may enhance the question presented for review, is no doubt one of the key issues to be decided by the Court and respondent reserves the right to present argument, *infra,* concerning the description's accuracy and impact.

### STATEMENT OF THE CASE

Pursuant to Rule 40 of this Court, *supra,* respondent deems it necessary to set forth additional facts from the record of this case which are considered essential to the complete resolution of the issues presented for review.

A psychiatric report is part of the record (R. 6) and has been referred to by petitioner in his Statement of the Case.[2] The totality of this report is essential for an adequate determination of critical factual and background matters, and the report is therefore fully incorporated by reference into this Statement of the Case and reprinted verbatim in Appendix A, *infra.*

The psychiatrist quoted the petitioner as making the following statements:[3]

> "Don't worry. If I had wanted to rape you, I would have done it before. [R. 7]

[1] Brief of Petitioner, at 2.
[2] *Id.* at 3.
[3] These are in addition to those quoted responses to proverbs cited in petitioner's brief, *Id.* n. 1.

"You don't have to scream. I am not going to hurt you. [R. 7]

"I didn't know how to ask her for forgiveness. [R. 7]

"I never could get adjusted to her. [R. 8]"

The psychiatrist sets forth in detail Miranda's experience with law enforcement agencies.[4](R. 8)

Petitioner made a written statement concerning the events in question (State's Exhibit 1; R. 41, 69). Petitioner makes selected references to the statement.[5] Respondent incorporates the whole of this written instrument into this brief; it is reprinted herein as Appendix B, *infra.*

A portion of the statement was typewritten and part of it was written in long-hand by the petitioner himself (R. 40, 41). The following portion of the statement was actually written by the petitioner in his own hand:

"E.A.M. Seen a girl walking up street stopped a little ahead of her got out of car walked towards her grabbed her by the arm and asked to get in the car. Got in car without force tied hands & ankles. Drove away for a few miles. Stopped asked to take clothes off. Did not, asked me to take her back home. I started to take clothes off her without any force and with cooperation. Asked her to lay down and she did could not get penis into vagina got about ½(half) inch in. Told her to get clothes back on. Drove her home. I couldn't say I was sorry for what I had done. But asked her to say a prayer for me. E.A.M." (R. 69)

Finally, petitioner cites the Court to the opinion of the Arizona Supreme Court (R. 72-93), but once again is selective in the portions set forth in the Statement of the Case.[6] Acting on the assumption that petitioner considered the selected portions of the opinion "all that is material to the consideration of the Questions Presented,"[7] the respondent must expand this Statement of the Case to include the whole of the opinion below of the Arizona Supreme Court (98 Ariz. 18, 401 P. 2d 721) and hereby incorporates the whole of the opinion herein by reference.

The following specific excerpts, at a minimum, are vital for a determination of the factual and legal predicate of the Arizona Court in its resolution of the Federal Constitutional Question:

"The question of whether the investigation had focused on the accused at the time of the making of the statement and thereby shifted 'from investigatory to accusatory' is not the deciding factor in regard to the admissibility of the confession in the instant case. There are other factors under the ruling of the *Escobedo* case. Defendant in the instant case was advised of his rights. He had not requested counsel, and had not been denied assistance of counsel. We further call attention to the fact that, as pointed out in the companion case here on appeal, *State v. Miranda*, No. 1397 [98 Ariz. 11, 401 P. 2d 716] defendant had a record which indicated he was not without courtroom experience. [Citation omitted] It included being arrested in California on suspicion of armed robbery, and a conviction and sentence in Tennessee on violations of the Dwyer [sic] Act. Under the circumstances he was certainly not unfamiliar with legal proceedings and his rights in court. The police testified they had informed defendant of his rights, and he stated in his written confession that he understood his rights (which would certainly include his right to counsel), and it is not for this court to dispute his statement that he did. His experience under previous cases would indicate that his statement that he understood his rights was true. (R. 88-89)

* * *

"What is the purpose of the right to counsel? What is the purpose of the Sixth and Fourteenth Amendments? Without question it is to protect individual rights which we cherish, but there must be a balance between the competing interests of society and the rights of the individual. Society has the right of protection against those who roam the streets for the purpose of violating the law, but that protection must not be at the expense of the rights of the individual guaranteed under the Sixth and Fourteenth Amendments to our Constitution. (R. 91-92)

* * *

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[4] 1) Aged 14, Stolen Car, Probation.

2) Three weeks later, Fort Grant (Arizona Industrial School for Boys), 6 months.

3) Assault and Attempted Rape, 1 year sentence.

4) Aged 17, Peeping Tom charge, Los Angeles, Probation.

5) Arrested twice, Los Angeles, Suspicion of Armed Robbery.

6) Military service, Peeping Tom charge, confinement and Undesirable Discharge.

7) December 1959, Dwyer Act Violation, Federal Penitentiary.

[5] Brief of Petitioner, n. 3.

[6] *Id.* at 5-6.

[7] Rule 40, Subd. 1 (e), Supreme Court Rules, 28 U.S.C., Rules, as amended.

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> "It will be noted in the discussion of these cases—particularly the *Escobedo* case—the ruling of the court is based upon the circumstances of the particular case. The court, in making its holding in the *Escobedo* case, stated 'under the circumstances here the accused must be permitted to consult with his lawyer.'"
>
> "Most of the cases distinguished the Escobedo case on the grounds that the defendant requested and was denied the right to counsel during interrogation. The *Escobedo* case merely points out factors under which—if all exist—it would not be admissible. We hold that a confession may be admissible when made without an attorney if it is voluntary and does not violate the constitutional rights of the defendant."
>
> "Each case must largely turn upon its own facts, and the court must examine all the circumstances surrounding the taking of the statement in determining whether it is voluntary and whether defendant's constitutional rights have been violated."
>
> "The facts and circumstances in the instant case show that the statement was voluntary, made by defendant of his own free will, that no threats or use of force or coercion or promise of immunity were made; and that he understood his legal rights and the statement might be used against him. Under such facts and circumstances we hold that, notwithstanding the fact that he did not have an attorney at the time he made the statement, and the investigation was beginning to focus upon him, defendant's constitutional rights were not violated, and it was proper to admit the statement in evidence." (R. 92-93)

## SUMMARY OF ARGUMENT

Petitioner was in no way denied his constitutional right to counsel in this case. He neither merits, nor is he reason for, the pronouncement of the broad constitutional principle which is sought.

Petitioner received a full elementary education and, although he had an emotional illness, he had sufficient mentality and emotional stability to understand what he was doing when he was doing it, and to fully appreciate all the potential consequences of his act.

Clearly there was no police brutality or any possible official overreaching in the acquisition of the statements here in question. Yet petitioner, nonetheless, portrays the police generally in the worst possible light, in attempting to justify the need for the rule he seeks. The examples of bad police activity represent the exceptions to the general rule as regards police conduct and attitude, and do not merit or require an overly broad constitutional rule which would strike down the good with the bad.

Petitioner infers that since he stood no chance of victory in the trial of the case after the statements were given, he was therefore deprived of some right. Nothing could be further from the truth. He has no such right to "win." The Constitution insures that he must not be convicted as a result of any violations of those rights which we all cherish; it doesn't insure that he won't be convicted.

The decision of the Arizona Supreme Court below rested on many factors, of which the lack of a request for counsel was but one. It determined that the totality of these factors did not result in affirmative conduct which denied petitioner his right to counsel. There was no element of waiver involved in the Arizona Court's decision.

The decision of this Court in *Escobedo v. Illinois,* 378 U.S. 478 (1964) does not require the reversal of this case. The facts are significantly different. The legal principles therein announced, considered within the context of that decision as it discusses not only the particular facts of the case but also the significance of the prior decisions of this Court on the same subject matter, implement an exclusionary rule directed to deter the police from affirmative conduct calculated, under the facts of any given case, to deny an accused from consulting with counsel. Such a rule, in proper perspective and balance, will protect the accused from any infringement of his right to counsel, while not unduly or unnecessarily curtailing the oft times essential investigative questioning of a suspect.

## ARGUMENT

### I. Introduction

Petitioner states that his life for all practical purposes was over when he walked out of Interrogation Room #2 on March 13, 1963.[8] The real fact is that Miranda's life was unalterably destined ten days earlier during the late evening hours of March 2 and the early morning hours of March 3, when he kidnapped and raped his victim, Patricia Weir. What followed must not be described in cynical terms as "the ceremonies of the law";[9] they

[8] Brief of Petitioner, at 10.
[9] *Ibid.*

were, and are, the carefully ordained processes of our judicial system, designed, at the optimum, to discover the truth, mete out justice to all, insure the guilty their just and proper recompense and vindicate the innocent. To be sure, thoroughly interwoven into these processes at all stages and levels is the implementation and zealous protection of those cherished rights and privileges guaranteed to all by the Constitutions of the United States and the several states; no police officer, prosecutor or judge dedicated to the basic precepts of our system of government advocates that it should be any different.

Unfortunately, or perhaps fortunately, so long as human beings rather than computers administer the processes of justice, mistakes and error will occur and injustices will be done. The courts of our land, including this Court with its highest and most final jurisdiction, are daily exposing and correcting these mistakes to the best of their ability. The question here before the Court is whether there was such a mistake or error in this case of a dimension to result in the denial of petitioner's right to counsel as set down in the Constitution of the United States, and as proclaimed by this Court in its decisions thereunder.

**II. There are no inherent defects either in this defendant, the operation of law enforcement agencies, or in our system of criminal justice, which require a rule of the constitutional impact and proportions here sought by petitioner**

**A. The defendant** The very description of the petitioner in his Question Presented[10] subtly introduces a factual issue into this case which is of the gravest importance in resolving the ultimate legal question.

The words so carefully used were "poorly educated, mentally abnormal." No doubt other descriptive words and phrases could have been added—poor, motherless, unloved, downtrodden, culturally deprived, misguided, unguided, harassed, *ad infinitum.*

It is practically impossible to pick up a national magazine, professional journal, or listen to an address without some dramatic usage of these descriptive adjectives to characterize some greater or lesser portion of the American population.[11] And in the proper perspective, such attention, whether it be by this Court,[12] the Congress,[13] the executive,[14] or state and local governments,[15] is long overdue and, hopefully, will do something about the root-source of our

most perplexing problems—not the least of which is the rising crime rate.[16]

However, to use these heart-rending descriptions in an attempt to justify or excuse the knowing and deliberate violation of our criminal statutes and the imposition of violence and suffering and depravation upon some individuals of our society by others, is misleading to say the least. Of this ilk, Miranda is a clear example.

Perhaps an eighth grade education, under a literal definition of the term and in the context of our affluent society, is a "poor education." Under no stretch of the imagination, however, can Miranda be deemed to be uneducated or illiterate. In addition to his formal schooling, petitioner had considerable and varied experiences which broadened his knowledge, particularly in the area which is of primary importance to us now.[17]

Counsel would have us believe that petitioner was incapable of producing the statement which was admitted against him (Appendix B. *infra*).[18] A simple reading and viewing of the statement refutes such a contention. The portion of the statement describing the actual events of the incident is in petitioner's hand and was written by him. Certainly the officers, if they were interested in putting words into Miranda's mouth, could have typed in these words also, in a favorable context, and simply obtained Miranda's signature to the whole. And although petitioner's grammar, sentence structure and punctuation leave much to be desired, the conclusion is inescapable that his knowledge and

[10] *Id.* at 2.

[11] E.g. *Nine "Unadoptable" Children Joined by Love,* Look Magazine, Oct. 19, 1965, at 54; *Winters, Counsel for the Indigent Accused in Wisconsin,* 49 Marq. L. J. 1 (1965); Inaugural Address of President John F. Kennedy, January 20, 1961, 107 Congressional Record, 1013.

[12] E.g. *Brown v. Board of Education,* 347 U.S. 483 (1954).

[13] E.g. Public Works and Economic Development Act of 1965, 42 U.S.C. §§ 3121-3226.

[14] E.g. State of the Union Address, President Lyndon B. Johnson, January 12, 1966, 112 Congressional Record 129.

[15] E.g. Operation LEAP (Leadership and Education for the Advancement of Phoenix), Ordinance No. S-3205, Dec. 15, 1964, City Council of Phoenix, Arizona, Implementing Resolution No. 11887, November 4, 1964.

[16] E.g. Hoover, *Annual Report of the Federal Bureau of Investigation, Fiscal Year 1965,* U.S. Department of Justice.

[17] See n. 4, *supra.*

[18] Brief of Petitioner, n. 3.

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understanding of the difference between simple promiscuity and the crime of rape is more highly sophisticated than most of the Ph.Ds in our country.[19]

Miranda is also labeled as "mentally abnormal." The basis for this is the psychiatric report (Appendix A, *infra*). While Miranda had an "emotional illness," it is questionable that this even made him "abnormal."[20] Clearly the diagnosis of the psychiatrist was to the effect that the illness was not disabling and that Miranda was able to understand the predicament he was in and knew the conduct society demanded of him at the time he chose to ignore those demands.[21]

**B. The police** Admittedly there is no possible element of police brutality or coercion in this case, whether direct or subtle.[22] Yet petitioner, nevertheless, paints a picture of police disregard for rights guaranteed by our Constitution. The picture is inaccurate—but proving it so is almost a practical impossibility.

The articles, the studies, and the cases,[23] dealing, as they almost unanimously do, with the negative aspect of the problem, make it difficult to see the rule because of the emphasis on the exception. It is true that all police officers are not interested in protecting the rights of the accused; it is true that there are convictions obtained by use of trumped-up evidence and wrongfully elicited incriminating statements and confessions; but these are the very few exceptions to the general rule. For every case of police insensitivity to individual rights, there are literally thousands of unreported incidents of the unstinting efforts of police and prosecutors which result in the extrication of an otherwise helpless and innocent victim, hopelessly intertwined in a web of circumstantial evidence of guilt.[24] The prime reason the vast majority of such instances go unreported and unstatisticized, is that the police and the prosecutor alike consider this just another important, but routine part of their work, which they do with the same dedication as they do the more spectacular phases.[25]

This Court, together with all the courts of our land, should and will continue to firmly and courageously deal with the exceptions to this rule. We must be careful, however, not to foreclose, limit or unduly hamper investigative techniques which, in their legitimate use, are not barred by any Constitutional mandate, solely because a few use the techniques to effect an unconstitutional result. The promulgation of such a rule of constitutional dimension in any given case would be as necessary as "Dr." Jerry Colona's recently suggested solution to Bob Hope's medical problem of a sore and infected big toe—to cut off Hope's head to relieve the excess weight on the toe.[26] While it goes without saying that the problem of the big toe would most certainly be forever solved, it is question-

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[19] Note petitioner's careful use of the words "without force," "without force and with cooperation," "asked her to lay down, and she did." Appendix B, *infra.* See also petitioner's quoted sentence responses, statement of the case, *supra,* at 2.

[20] It has been estimated that at least 10% of our entire population have emotional illnesses of one type or another which should be treated professionally. Milt, *How to Deal With Mental Problems,* (National Association for Mental Health, Booklet, 1962).

[21] "It is my opinion that Mr. Mirande [sic] is aware of the charges that have been brought against him and is able to cooperate with his attorney in his own defense. Although Mr. Mirande [sic] has an emotional illness, I feel that at the time the acts were committed that he was aware of the nature and quality of the acts and that he was further aware that what he did was wrong." Appendix A, *infra.*

[22] Brief of Petitioner, at 10.

[23] E.g. LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices,* 1962 Wash. U.L.Q. 331; Smith, *Police Systems in the United States,* (2d rev. ed. 1960); *Ashcraft v. Tennessee,* 322 U.S. 143 (1944).

[24] A person cannot talk to a police officer or prosecutor of many years tenure without hearing of numerous such incidents, many made possible by not only investigating extrinsic physical facts, but also by investigative questioning.

[25] The Law Enforcement Code of Ethics, as set forth in The Detroit Police Manual, and cited in Norris, *Constitutional Law Enforcement is effective Law Enforcement:* [Etc.], 43 U. Det. L. J. 203 (1965), n. 30, clearly reflects the importance of this particular responsibility, and represents the rule and not the exception:

"Law Enforcement Code of Ethics"

As a Law Enforcement Officer, my fundamental duty is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional rights of all men to liberty, equality and justice.

I will keep my private life unsullied as an example to all, maintain courageous calm in the face of danger, scorn or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

I will never act officiously or permit personal feelings, prejudices, animosities, or friendships to influence my deci-

able whether the patient would be at all happy with the ancillary side effects of the treatment. As to whether a similarly undesirable side effect would be forthcoming from an unnecessarily broad constitutional rule in this case, we must look ahead.

**C. The nature of the contest** Petitioner, it seems, would have us interpret our adversary system of criminal justice as giving the accused a right to "win" the contest.[27] While it may be inherent in the very nature of our system, with its vital and essential safeguards to individual freedom, that a person who actually commits a criminal act may have extra opportunities to escape punishment for his crime, it must be clear without comment or citation that the intent of the Constitutional safeguards were to insure, as much as humanly possible, that the innocent and unpopular would not be wrongfully harassed, intimidated or convicted—not that the guilty should have any special chances for acquittal or other favorable result.

If the prosecuting authorities have gained an overwhelming advantage over a particular defendant, assuming they have done so by proper methods, and not by violating any of his constitutional rights, this is to be highly commended, not condemned. It is a vital attribute of our society that the law enforcement machinery apprehend, convict and punish and/or rehabilitate those who would break the laws and endanger, if not destroy, our domestic tranquility. Law enforcement is not a game of chance, *Massiah v. United States,* 377 U.S. 201, 213 (1964) (Dissenting Opinion); *McGuire v. United States,* 273 U.S. 95 (1927). There is no "gamesmanship" or "sportsmanship" involved here, at least insofar as the criminal is concerned. He follows no code of conduct or canons of ethics. The death, suffering, and depravation caused by crime is as real to those who are touched by its sting as is that of any war ever fought. Certainly the criminal gives no quarter; and none should be given in return except as is required to insure the integrity and continuation of the system which we all cherish.

Criminals, like the rest of us, are inherently unequal. Some are skilled, some not; some intelligent, some not; some trained, some not; some blabbermouths, some not; some strong, some not; some cruel, some not, etc. It certainly would not be urged that if a criminal is foolish enough to leave physical clues, the police should not be allowed to use them because X, who committed the same crime, was more careful. Or if Y was callous enough, or "intelligent" enough, to kill his rape victim to prevent identification, certainly Z, who also raped, should not be given the same opportunity to kill so as to have an equal chance at the trial to "win." So, too, are there differences between what happened to Ernesto A. Miranda as contrasted with what happened to Danny Escobedo[28] which militate in favor of a different resolution of their problem by this Court.

### III. Miranda was not denied his right to counsel as guaranteed to him by the Sixth and Fourteenth Amendments to the Constitution of the United States

The decision in this case must rest upon the scope and effect to be attributed to this Court's decision concerning right to counsel at the interrogation stage, in *Escobedo v. Illinois,* 378 U.S. 478 (1964). While petitioner's historical analysis is to be highly commended for the care and effort which it reflects, his almost cursory treatment of *Escobedo,* coupled as it is with an inaccurate treatment of the Arizona Court's decision in the instant case, belies some doubt as to the absolute accuracy of the conclusion forecast as unassailable. Rather than obscuring the "simple lines of the situation,"[29] the welter of the cases, the majority of which disagree with petitioner's conclusion,[30] coupled with the rather sharp divergence of opinion on this Court, not only in the recent decisions on this point, e.g., *Massiah v. United States,* 377 U.S. 201 (1964) and *Escobedo v. Illinois, supra,* but in the earlier decisions as well, e.g., *Crooker v. California,* 357 U.S.

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sions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.

I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to hold so long as I am true to the ethics of police service. I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession—Law Enforcement."

[26] Bob Hope Christmas Special, N.B.C. Television Network, January 26, 1966, 8:30 P.M., M.S.T.

[27] Brief of Petitioner, at 9.

[28] *Escobedo v. Illinois,* 378 U.S. 478 (1964).

[29] Brief of Petitioner, at 28.

[30] For an exhaustive citation of the cases construing *Escobedo,* both on a State and Federal level, see: Sokol, *Brief of Amicus Curiae in The Escobedo Cases* (The Michie Company, 1966).

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433 (1958) and *Cicenia v. LaGay,* 357 U.S. 504 (1958), indicate the problem posed here to be anything but simple.

**A. The Arizona court's decision** Petitioner, at least twice,[31] states that the Arizona Supreme Court rested its opinion on petitioner's refusal to request counsel. A reading of the opinion clearly reveals that this was only one factor in many which resulted in a determination that Miranda was not denied his right to counsel (Statement of the Case, *supra,* at 4). The nature and length of the questioning, the warning advice given, and the background of the petitioner were equally important factors. Petitioner is correct in stating that the Arizona Court's decision did not in any way purport to rest on a waiver doctrine.[32] This is made amply clear in the Arizona Supreme Court's decision in *State v. Goff,* ___Ariz. ___, 407 P. 2d 55 (1965), where the court referred to this aspect of its decision in *Miranda:*

> "We did not conclude from Escobedo that the Supreme Court of the United States held that arbitrarily and in every instance admissions made to police officers after an investigation has become accusatory are inadmissible in evidence unless a suspect has knowingly waived his right to counsel." *Id,* 407 P. 2d at 57.

The Supreme Court of California, in *People v. Dorado,* 42 Cal. Rptr. 169, 398 P. 2d 361 (1965), and indeed the dissenting Justices of this Court in *Escobedo v. Illinois, supra,* 378 U.S. at 495, have forecast, as a minimum, a contrary conclusion. If this latter view is proved to be correct, that is the end of this case, and untold thousands like it throughout the length and breadth of this land. We choose, however, in turning our attention to *Escobedo,* to approach the import of that decision with the "hope" expressed by Justice Stewart in concluding his separate dissenting opinion in *Escobedo v. Illinois, Ibid.*

**B. Escobedo v. Miranda** Petitioner prefers to dwell on the implicit in *Escobedo.*[33] The explicit facts of the case are considered by respondent to be highly relevant and very crucial to the indicated result in Miranda.

Danny Escobedo had retained counsel and repeatedly requested to consult with him. The requests were all denied. Escobedo was even told at one time that his lawyer didn't want to see him. On the contrary, Escobedo's lawyer was trying desperately to see his client, and was thwarted at every turn by the police, in spite of a specific Illinois statute requiring the police to admit the lawyer. *Escobedo v. Illinois, supra,* 378 U.S. at 480. Escobedo had no record of previous experience with the police. He was interrogated not only by police officers, but by a skilled and experienced lawyer. Escobedo was told that another suspect had pointed the finger at him as the guilty one. At no time was he ever advised of his constitutional rights by either the police or the prosecutor.

Ernesto A. Miranda was not represented by counsel at the time of the questioning here involved. He had not requested that counsel be provided, or that he be given an opportunity to consult with counsel prior to talking to the police. The officers did not deny him an opportunity to consult with counsel, nor did they in any way use chicanery in their questioning of Miranda. Petitioner had had considerable and varied experience with the police on previous occasions. Petitioner was advised of his constitutional rights, specifically including his right to remain silent, the fact that his statement had to be voluntary, and that anything he did say could be used against him.[34]

In setting forth the holding of the case, this Court very carefully enumerated the factors which resulted in the denial of counsel to *Escobedo:*

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied counsel, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the assistance of counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the states by the Fourteenth Amendment,' *Gideon v. Wainright,* 372 U.S. at 342, and that no statement elicited by the police during the

[31] Brief of Petitioner, at 6, 30.

[32] *Id,* nn. 7 and 15.

[33] *Id,* at 30—in fact, it would appear, on the following page of his brief, that he relies perhaps more upon the guiding light of the California Supreme Court than the pronouncements of this Court.

[34] It is not here disputed that petitioner was not specifically advised of his right to counsel.

> interrogation may be used against him at a criminal trial." *Escobedo v. Illinois, supra,* 378 U.S. at 490 and 491.

Of the five specific elements, which might be set forth as: (1) Accusatory Stage; (2) Police Custody; (3) Interrogation to elicit incriminating statements; (4) Request and Denial of an opportunity to consult counsel; and (5) Effective Warning of his absolute right to remain silent, petitioner contends that only (4) is absent here and that its absence is not crucial. Both premises are incorrect.

The Arizona Court clearly considered that Miranda had been warned of his absolute right to remain silent. The facts cited in that opinion, together with the Appendix to Petitioner's Brief, provided an ample basis for such a conclusion. And to discount item (4) concerning the request, is to completely ignore not only the plain wording of the opinion in *Escobedo,* but to completely disregard the factual and legal bases for the opinions cited in petitioner's historical analysis as demanding the ultimate ruling sought herein. E.g., *Crooker v. California, supra,* (Douglas, J., dissenting):[35] *Spano v. New York,* 360 U.S. 315, 325 (1959), (Douglas, J., concurring).[36] The court lays a great stress on this factor, together with the failure of the police to warn the accused of his absolute right to remain silent. *Escobedo v. Illinois, supra,* 378 U.S. at 479, 480, 481, 482, 485, 486, 491, 492.

There are two other matters in the opinion itself which militate against petitioner's sought-for rule being all but announced. They are: (1) The treatment accorded the prior decisions of this Court in *Crooker v. California, supra,* 357 U.S. 433 and *Cicenia v. LaGay, supra* 357 U.S. 504, and (2) The Court's special and clear emphasis of the request for and denial of counsel in spite of its recent restatement that the right to counsel did not depend upon a formal request, *Carnley v. Cochran,* 369 U.S. 506 (1962).

Instead of completely overruling *Crooker* and *Cicenia,* the Court noted that the holding itself in *Crooker,* on the distinguishable facts in that case, which were set forth in some detail (*Escobedo v. Illinois, supra,* 378 U.S. at 491, 492), would possibly have been the same under the principles announced in *Escobedo.* In implicitly accepting the result in *Crooker,* while discarding the language inconsistent with the principles of *Escobedo,* the Court specifically approves the rejection of the absolute rule sought by *Crooker:*

> "That 'every state denial of a request to contact counsel [is] an infringement of the constitutional right *without regard to the circumstances of the case*." *Id,* at 491. (Emphasis in *Crooker.*)

The continued rejection of the absolute rule sought by *Crooker,* implying as it does that in some cases a state could even deny a request without denying an accused his constitutional right to counsel, clearly rejects, *a fortiori,* the absolute rule sought by petitioner.

This result is also pointed to by the inclusion and emphasis of the request for counsel as a vital factor in *Escobedo* while not even including a reference to this Court's recent reemphasis of the unimportance of a request for counsel in the implementation of the absolute right to be provided counsel in *Carnley v. Cochran, supra,* 369 U.S. 506. The omission of reference to *Carnley* must be considered to have been by design and not accident. Thus the scope of the rule, and the force of its emphasis, must be and is different.

The decision in *Escobedo* announces an exclusionary rule directed against the affirmative conduct of police and prosecutors calculated to deny to an accused his right to counsel. Any incriminating statements received thereafter, regardless of the fact that they are clearly the product of the free and uncoerced will of the accused, are inadmissible, *Escobedo v. Illinois, supra,* 378 U.S. at 491. The decision in *Massiah v. United States, supra,* 377 U.S. 201, although involving a federal prosecution, certainly reinforces this view of the *Escobedo* doctrine, particularly the last two paragraphs thereof.[37]

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[35] "This demand for an attorney was made over and again prior to the time a confession was extracted from the accused. Its denial was in my view a denial of that due process of law guaranteed the citizen by the Fourteenth Amendment." 357 U.S. at 442.

[36] "The question is whether after the indictment and before the trial the Government can interrogate the accused **in secret** when he asked for his lawyer and when his request was denied." 360 U.S. at 325. (Emphasis in original.)

[37] "The Solicitor General, in his brief and oral argument, has strenuously contended that the federal law enforcement agents had the right, if not indeed the duty, to continue their investigation of the petitioner and his alleged criminal associates even though the petitioner had been indicted. He points out that the Government was continuing its investigation in order to uncover not only the source of narcotics found on the S.S. Santa Maria, but also their intended buyer. He says that the quantity of narcotics involved was such as to suggest that the petitioner was part of a large and well-organized ring, and indeed that the continuing investigation confirmed this suspicion, since it resulted in criminal

The rule announced is a parallel to that announced in *Mapp v. Ohio,* 367 U.S. 643 (1961), designed as a specific deterrent to police activity calculated to render meaningless the citizen's rights under the search and seizure provision of the Fourth Amendment to the Federal Constitution. It must also be applied with the same practical, non-technical, common sense approach as is the *Mapp* exclusionary rule. *United States v. Ventresca,* 380 U.S. 102 (1965).

A contrary application would result in attempting to make police officers part-time defense counsel and part-time magistrates, or deprive them completely of an investigative technique which, in its proper use and application, is as invaluable as any modern, scientific tool for the detection and prevention of crime.

The legal scholars and commentators have produced volumes of material on *Escobedo.*[38] It ranges the complete spectrum, from law professors and lawyers[39] to second and third year law students.[40] Both poles of the controversy are forcefully presented, including extensive citations to both primary and secondary authority, in the very recent publication of the University Press of Virginia: Kamisar, Inbau, and Arnold, *Criminal Justice in Our Time,* (Magna Carta Essays, Howard ed. 1965).

Ultimately, however, neither the overwhelming weight of the writings of the commentators, nor the weight of the decisions of the Judges and Justices of the other appellate tribunals of our land, whether state or federal, can dictate or necessarily foreshadow this Court's determination of the scope and effect of the principles announced in *Escobedo.*

If the rule sought by petitioner is forthcoming, we can only re-echo the ominous warnings and misgivings of the dissenters in *Massiah* and *Escobedo, supra.* Miranda and Escobedo are not equal and there is no Constitutional reason for this Court to equate them in the manner sought by petitioner, any more than there would be for this Court to balance their skill in committing and concealing their crime. No amount of scientific advancements in crime detection will produce evidence which a clever criminal has not been foolish enough to provide for discovery. If a criminal has been clever in the commission of his crime, but is foolish or careless in his handling of the police interrogation of him concerning that crime, the evidence obtained as a result of the only honest investigative avenue left open to the law enforcement agency, should not be suppressed unless that evidence is determined not to be the product of the free and uncoerced will of the accused, or if it is obtained after the police have undertaken a course of conduct calculated to deny the accused his right to counsel. Certainly nothing less will be tolerated, but the United States Constitution requires no more.

## CONCLUSION

Quite appropriately, Justice Goldberg, who authored *Escobedo v. Illinois, supra,* provides the words most appropriate to conclude this brief. Speaking for the Court in *United States v. Ventresca, supra,* 380 U.S. 102, he said:

> "This court is alert to invalidate unconstitutional searches and seizures whether with or without a warrant. [Presumably, for purposes of this case, confessions and admissions may be substituted for the final phrase concerning searches and seizures.] [Citations omitted.] By doing so, it vindicates individual liberties and strengthens the administration of justice by promoting respect for law and order. This court is equally concerned to uphold the actions of law enforcement officers consistently following the proper constitutional course. This is no less important to the administration of justice than the invali-

charges against many defendants. Under these circumstances the Solicitor General concludes that the government agents were completely 'justified in making use of Colson's cooperation by having Colson continue his normal associations and by surveilling them.'

"We may accept and, at least for present purposes, completely approve all that this argument implies, Fourth Amendment problems to one side. We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against **him** at his trial." *Massiah v. United States,* 377 U.S. at pages 206 and 207. (Emphasis in original.)

[38] For an exhaustive collection of citations see: Sokol, *Brief of Amicus Curiae in the Escobedo Cases, supra,* n. 29.

[39] E.g. Sutherland, *Crime and Confession,* 79 Harv. L. Rev. 21 (1965); Dowling, *Escobedo and Beyond,* 56 J. Crim. L., C.&P.S., 143 (1965); Herman, *The Supreme Court and Restrictions on Police Interrogation,* 25 Ohio St. L.J. 449 (1964).

[40] E.g. Comment, *Escobedo v. Illinois,* 25 Md. L. Rev. 165 (1965); Comment, *Right to Counsel During Police Interrogation, The Aftermath of Escobedo,* 53 Calif. L. Rev. 337 (1965); Note, *Escobedo in the courts, May Anything You Say Be Held Against You,* 19 Rutgers L. Rev. 111 (1964).

> dation of convictions because of disregard of individual rights or official overreaching. In our view the officers in this case did what the Constitution requires.
>
> * * *
>
> *"It is vital that having done so their actions should be sustained under a system of justice responsive both to the needs of individual liberty and to the rights of the community." Id,* at 111 and 112. (Emphasis added).

The officers in this case also acted within the constitutional standards, and it is equally vital that their actions be sustained.

The judgment and decision of the Arizona Supreme Court in this case below should be affirmed.

Respectfully submitted,

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GARY K. NELSON,
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of Counsel
February, 1966

## APPENDIX A

JAMES M. KILGORE JR., M.D.
Suite 209
461 West Catalina Drive
Phoenix 13, Arizona
PSYCHIATRY
May 28, 1963

Honorable Warren L. McCarthy
Judge of the Superior Court
Maricopa County
Court House
Phoenix, Arizona

MIRANDA, Ernest Arthur Criminal Cause #41947, #41948

Ernest Arthur Miranda is a 23-year-old Mexican male who was examined by me in the County Jail on May 26, 1963.

Mr. Miranda is charged with the offense of robbery in relation to one Barbara Sue McDaniel on November 27, 1962. Mr. Miranda states that on that evening approximately 9:30 p.m. he saw a lady go to her car in the parking lot alone. He approached the car and got in the front seat. He stated at the time that he didn't know whether he would rob or rape the lady. She asked him if he didn't want to go to her apartment. Mr. Miranda stated that this frightened him in that she was so eager for sex and decided at that point to ask for money which she readily gave to him. He then said, "Don't worry. If I had wanted to rape you, I would have done it before."

The second offense for which Mr. Miranda is charged occurred on March 3, 1963, at which time he is supposed to have kidnapped and raped Patricia Ann Weir. Mr. Miranda stated that he knew Patricia Ann Weir, an 18-year-old single girl who worked in the theater. He had occasionally seen her there and on the evening of March 3 at approximately 11:00 p.m. he saw her walking toward the bus stop. He drove ahead of the bus and when she got off close to her home he was waiting for her. As she came close to the car he said to her, "You don't have to scream. I am not going to hurt you." He then told her to get into the car, which she did, and they drove out into the desert. He asked her to remove her clothing, which she did without resistance. He removed his clothes and performed the act of sexual intercourse. Miss Weir, according to the patient, did not resist, but during the process of sexual relations was tearful. Mr. Miranda was somewhat upset when he learned that the girl had not previously had sexual relations. He stated that if at any time the girl had refused or resisted, that he would not have proceeded. He then took her within a block or two of her house where he let her out. He asked if she would "tell on me." The girl did not respond. He stated "I didn't know how to ask her for forgiveness."

Mr. Miranda is age 23 and he has a common-law wife, age 30. They have been living together since August, 1961. His wife has two children by her first husband, a son, 11, and a daughter, 10. Mr. Miranda and his wife have a daughter, 9½ months of age. He has worked as a truck driver and also as a worker in a warehouse. Mr. Miranda's father is age 55 and works as a painter in Mesa. He stated that he did not get along with his father during his adolescent years and was frequently beaten up by his father when he got into trouble. Mr. Miranda's mother died in 1946 at the age of 34 when Mr. Miranda was

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BRIEF FOR RESPONDENT

six years of age. He was reared by his stepmother, age unknown. He stated with reference to her, "I never could get adjusted to her." Mr. Miranda completed half of the ninth grade at the age of 15. Mr. Miranda was first placed on probation at the age of 14 after having stolen a car. Three months later he was sent to Fort Grant for a period of six months. Shortly after returning he was sentenced for a year on an attempted rape and assault charge. According to Mr. Miranda's description of this incident, he was walking by a home in which he saw a lady lying in bed with no clothes on. He went up to the front door and it was open; he entered the home and crawled in bed with the woman. Her husband returned home shortly and the police were called. In 1957 at the age of 17 Mr. Miranda was picked up in Los Angeles for being a peeping tom and charged with lack of supervision and was placed on probation. He was also arrested twice in L.A. on suspicion of armed robbery. He was in the Army from April, 1958, to July, 1959. He was placed in the brig for being a peeping tom and given an undesirable discharge. In December, 1959, he was sentenced to the Federal Penitentiary for transporting a stolen automobile across state lines.

Mr. Miranda is a 23-year-old Mexican man who is alert and oriented as to time, place, and person. His general knowledge and information is estimated to be within normal limits as is his intelligence. He is emotionally bland, showing little if any effect. He is shy, somewhat withdrawn. He tends to be somewhat hypoactive. The patient's responses to proverbs are autistic and somewhat bizarre; for example, to the proverb "a rolling stone gathers no moss," the patient interpreted this to mean "If you don't have sex with a woman, she can't get pregnant." To the proverb "a stitch in time saves nine," Mr. Miranda's response is "If you try to shut something in, you keep it from going out." To the proverb "people in glass houses shouldn't throw stones," Mr. Miranda states "A person with one woman shouldn't go to another women." Mr. Miranda states that he is not particularly concerned about himself at this point or the trouble that he is in except in that it might interfere with his looking after his wife and child.

It is my diagnostic impression that Mr. Miranda has an emotional illness. I would classify him as a schizophrenic reaction, chronic, undifferentiated type.

It is my opinion that Mr. Miranda is aware of the charges that have been brought against him and is able to cooperate with his attorney in his own defense. Although Mr. Miranda has an emotional illness, I feel that at the time the acts were committed that he was aware of the nature and quality of the acts and that he was further aware that what he did was wrong.

/s/ JAMES M. KILGORE JR.

JAMES M. KILGORE JR., M.D.

JMK/db

## APPENDIX B

STATE'S EXHIBIT 1

CITY OF PHOENIX, ARIZONA

POLICE DEPARTMENT

Form 2000-66-D Witness/Suspect

Rev. Nov. 59 Statement

SUBJECT: Rape D.R. 63-08380

STATEMENT OF: Ernest Arthur Miranda

TAKEN BY: C. Cooley #413—W. Young #182

DATE: 3-13-63 Time: 1.30 P.M.

PLACE TAKEN: Interr Rm #2

I, Ernest A. Miranda, do hereby swear that I make this statement voluntarily and of my own free will, with no threats, coercion, or promises of immunity, and with full knowledge of my legal rights, understanding any statement I make may be used against me.

I, Ernest A. Miranda, am 23 years of age and have completed the 8th grade in school.

E.A.M. Seen a girl walking up street stopped a little ahead of her got out of car walked towards her grabbed her by the arm and asked to get in the car. Got in car without force tied hands & ankles. Drove away for a few miles. Stopped asked to take clothes off. Did not, asked me to take her back home. I started to take clothes off her without any force and with cooperation. Asked her to lay down and she did could not get penis into vagina got about ½(half) inch in. Told her to get clothes back on. Drove her home. I couldn't say I was sorry for what I had done. But asked her to say a prayer for me. E.A.M.

I have read and understand the foregoing statement and hereby swear to its truthfulness.

/s/ ERNEST A. MIRANDA

WITNESS /s/ Carroll Cooley

Wilfred M. Young #182

# Miranda v. State of Arizona

U.S. SUPREME COURT, OCTOBER 1966

ERNESTO A. MIRANDA, PETITIONER,
V.
STATE OF ARIZONA.

MICHAEL VIGNERA, PETITIONER,
V.
STATE OF NEW YORK.

CARL CALVIN WESTOVER, PETITIONER,
V.
UNITED STATES.

STATE OF CALIFORNIA, PETITIONER,
V.
ROY ALLEN STEWART.

NOS. 759–761, 584.

Argued Feb. 28, March 1 and 2, 1966.
Decided June 13, 1966.
Rehearing Denied No. 584
Oct. 10, 1966.
See 87 S.Ct. 11.

**384 U.S. 436**

Criminal prosecutions. The Superior Court, Maricopa County, Arizona, rendered judgment, and the Supreme Court of Arizona, 98 Ariz. 18, 401 P.2d 721, affirmed. The Supreme Court, Kings County, New York, rendered judgment, and the Supreme Court, Appellate Division, Second Department, 21 A.D.2d 752, 252 N.Y.S.2d 19, affirmed, as did the Court of Appeals of the State of New York at 15 N.Y.2d 970, 259 N.Y.S.2d 857, 207 N.E.2d 527. The United States District Court for the Northern District of California, Northern Division, rendered judgment, and the United States Court of Appeals for the Ninth Circuit, 342 F.2d 684, affirmed. The Superior Court, Los Angeles County, California, rendered judgment and the Supreme Court of California, 62 Cal.2d 571, 43 Cal. Rptr. 201, 400 P.2d 97, reversed. In the first three cases, defendants obtained certiorari, and the State of California obtained certiorari in the fourth case. The Supreme Court, Mr. Chief Justice Warren, held that statements obtained from defendants during incommunicado interrogation in police-dominated atmosphere, without full warning of constitutional rights, were inadmissible as having been obtained in violation of Fifth Amendment privilege against self-incrimination.

Judgments in first three cases reversed and judgment in fourth case affirmed.

Mr. Justice Harlan, Mr. Justice Stewart, and Mr. Justice White dissented; Mr. Justice Clark dissented in part.

Certiorari was granted in cases involving admissibility of defendants' statements to police to explore some facets of problems of applying privilege against self-incrimination to in-custody interrogation and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.

Constitutional rights to assistance of counsel and protection against self-incrimination were secured for ages to come and designed to approach immortality as nearly as human institutions can approach it. U.S.C.A.Const. Amends. 5, 6.

Prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of defendant unless it demonstrates use of procedural safeguards effective to secure privilege against self-incrimination. U.S.C.A.Const. Amend. 5.

"Custodial interrogation," within rule limiting admissibility of statements stemming from such interrogation, means questioning initiated by law enforcement officers after person has been taken into custody or otherwise deprived of his freedom of action in any significant way. U.S.C.A.Const. Amend. 5.

Unless other fully effective means are devised to inform accused person of the right to silence and to assure continuous opportunity to exercise it, person must, before any questioning, be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has right to presence of attorney, retained or appointed. U.S.C.A.Const. Amend. 5.

Defendant may waive effectuation of right to counsel and to remain silent, provided that waiver is made voluntarily, knowingly and intelligently. U.S.C.A.Const. Amends. 5, 6.

There can be no questioning if defendant indicates in any manner and at any stage of interrogation process that he wishes to consult with attorney before speaking. U.S.C.A.Const. Amend. 6.

U.S. SUPREME COURT, OCTOBER 1966

Police may not question individual if he is alone and indicates in any manner that he does not wish to be interrogated.

Mere fact that accused may have answered some questions or volunteered some statements on his own does not deprive him of right to refrain from answering any further inquiries until he has consulted with attorney and thereafter consents to be questioned. U.S.C.A.Const. Amends. 5, 6.

Coercion can be mental as well as physical and blood of accused is not the only hallmark of unconstitutional inquisition. U.S.C.A.Const. Amend. 5.

Incommunicado interrogation of individuals in police-dominated atmosphere, while not physical intimidation, is equally destructive of human dignity, and current practice is at odds with principle that individual may not be compelled to incriminate himself. U.S.C.A.Const. Amend. 5.

Privilege against self-incrimination is in part individual's substantive right to private enclave where he may lead private life. U.S.C.A.Const. Amend. 5.

Constitutional foundation underlying privilege against self-incrimination is the respect a government, state or federal, must accord to dignity and integrity of its citizens.

Government seeking to punish individual must produce evidence against him by its own independent labors, rather than by cruel, simple expedient of compelling it from his own mouth. U.S.C.A.Const. Amend. 5.

Privilege against self-incrimination is fulfilled only when person is guaranteed right to remain silent unless he chooses to speak in unfettered exercise of his own will. U.S.C.A.Const. Amend. 5.

Individual swept from familiar surroundings into police custody, surrounded by antagonistic forces and subjected to techniques of persuasion employed by police, cannot be otherwise than under compulsion to speak. U.S.C.A.Const. Amend. 5.

When federal officials arrest individuals they must always comply with dictates of congressional legislation and cases thereunder. Fed.Rules Crim.Proc.rule 5(a), 18 U.S.C.A.

Defendant's constitutional rights have been violated if his conviction is based, in while or in part, on involuntary confession, regardless of its truth or falsity, even if there is ample evidence aside from confession to support conviction.

Whether conviction was in federal or state court, defendant may secure post-conviction hearing based on alleged involuntary character of his confession, provided that he meets procedural requirements.

Voluntariness doctrine in state cases encompasses all interrogation practices which are likely to exert such pressure upon individual as to disable him from making free and rational choice. U.S.C.A.Const. Amend. 5.

Independent of any other constitutional proscription, preventing attorney from consulting with client is violation of Sixth Amendment right to assistance of counsel and excludes any statement obtained in its wake. U.S.C.A.Const. Amend. 6.

Presence of counsel in cases presented would have been adequate protective device necessary to make process of police interrogation conform to dictates of privilege; his presence would have insured that statements made in government-established atmosphere were not product of compulsion. U.S.C.A.Const. Amends. 5, 6.

Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed from being compelled to incriminate themselves. U.S.C.A.Const. Amend. 5.

To combat pressures in in-custody interrogation and to permit full opportunity to exercise privilege against self-incrimination, accused must be adequately and effectively apprised of his rights and exercise of these rights must be fully honored. U.S.C.A.Const. Amend. 5.

If person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has right to remain silent, as threshold requirement for intelligent decision as to its exercise, as absolute prerequisite in overcoming inherent pressures of interrogation atmosphere, and to show that interrogators are prepared to recognize privilege should accused choose to exercise it. U.S.C.A.Const. Amend. 5.

Awareness of right to remain silent is threshold requirement for intelligent decision as to its exercise. U.S.C.A.Const. Amend. 5.

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It is impermissible to penalize individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. U.S.C.A.Const. Amend. 5.

Prosecution may not use at trial fact that defendant stood mute or claimed his privilege in face of accusation.

Whatever background of person interrogated, warning at time of interrogation as to availability of right to remain silent is indispensable to overcome pressures of in-custody interrogation and to insure that individual knows that he is free to exercise privilege at that point and time. U.S.C.A.Const. Amend. 5.

Warning of right to remain silent, as prerequisite to in-custody interrogation, must be accompanied by explanation that anything said can and will be used against individual; warning is needed to make accused aware not only of privilege but of consequences of foregoing it and also serves to make him more acutely aware that he is faced with phase of adversary system. U.S.C.A.Const. Amend. 5.

Right to have counsel present at interrogation is indispensable to protection of Fifth Amendment privilege. U.S.C.A.Const. Amend. 5.

Need for counsel to protect Fifth Amendment privilege comprehends not merely right to consult with counsel prior to questioning but also to have counsel present during any questioning if defendant so desires. U.S.C.A.Const. Amends. 5, 6.

Preinterrogation request for lawyer affirmatively secures accused's right to have one, but his failure to ask for lawyer does not constitute waiver. U.S.C.A.Const. Amend. 5.

No effective waiver of right to counsel during interrogation can be recognized unless specifically made after warnings as to rights have been given. U.S.C.A.Const. Amend. 5.

Proposition that right to be furnished counsel does not depend upon request applies with equal force in context of providing counsel to protect accused's Fifth Amendment privilege in face of interrogation. U.S.C.A.Const. Amend. 5.

Individual held for interrogation must be clearly informed that he has right to consult with lawyer and to have lawyer with him during interrogation, to protect Fifth Amendment privilege. U.S.C.A.Const. Amend. 5.

Warning as to right to consult lawyer and have lawyer present during interrogation is absolute prerequisite to interrogation, and no amount of circumstantial evidence that person may have been aware of this right will suffice to stand in its stead. U.S.C.A.Const. Amend. 5.

If individual indicates that he wishes assistance of counsel before interrogation occurs, authorities cannot rationally ignore or deny request on basis that individual does not have or cannot afford retained attorney.

Privilege against self-incrimination applies to all individuals U.S.C.A.Const. Amend. 5.

With respect to affording assistance of counsel, while authorities are not required to relieve accused of his poverty, they have obligation not to take advantage of indigence in administration of justice. U.S.C.A.Const. Amend. 6.

In order fully to apprise person interrogated of extent of his rights, it is necessary to warn him not only that he has right to consult with attorney, but also that if he is indigent lawyer will be appointed to represent him. U.S.C.A.Const. Amend. 6.

Expedient of giving warning as to right to appointed counsel is too simple and rights involved too important to engage in ex post facto inquiries into financial ability when there is any doubt at all on that score, but warning that indigent may have counsel appointed need not be given to person who is known to have attorney or is known to have ample funds to secure one. U.S.C.A.Const. Amend. 6.

Once warnings have been given, if individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, interrogation must cease. U.S.C.A.Const. Amend. 5.

If individual indicates desire to remain silent, but has attorney present, there may be some circumstances in which further questioning would be permissible; in absence of evidence of overbearing, statements then made in presence of counsel might be free of compelling influence of interrogation process and might fairly be construed as waiver of privilege for purposes of these statements. U.S.C.A.Const. Amend. 5.

Any statement taken after person invokes Fifth Amendment privilege cannot be other than product of compulsion. U.S.C.A.Const. Amend. 5.

If individual states that he wants attorney, interrogation must cease until attorney is pres-

U.S. SUPREME COURT, OCTOBER 1966

ent; at that time, individual must have opportunity to confer with attorney and to have him present during any subsequent questioning. U.S.C.A.Const. Amends. 5, 6.

While each police station need not have "station house lawyer" present at all times to advise prisoners, if police propose to interrogate person they must make known to him that he is entitled to lawyer and that if he cannot afford one, lawyer will be provided for him prior to any interrogation. U.S.C.A.Const. Amend. 5.

If authorities conclude that they will not provide counsel during reasonable period of time in which investigation in field is carried out, they may refrain from doing so without violating person's Fifth Amendment privilege so long as they do not question him during that time. U.S.C.A.Const. Amend. 5.

If interrogation continues without presence of attorney and statement is taken, government has heavy burden to demonstrate that defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. U.S.C.A.Const. Amend. 5.

High standards of proof for waiver of constitutional rights apply to in-custody interrogation.

State properly has burden to demonstrate knowing and intelligent waiver of privilege against self-incrimination and right to counsel, with respect to incommunicado interrogation, since state is responsible for establishing isolated circumstances under which interrogation takes place and has only means of making available corroborated evidence of warnings given.

Express statement that defendant is willing to make statement and does not want attorney, followed closely by statement, could constitute waiver, but valid waiver will not be presumed simply from silence of accused after warnings are given or simply from fact that confession was in fact eventually obtained.

Presuming waiver from silent record is impermissible, and record must show, or there must be allegations and evidence, that accused was offered counsel but intelligently and understandingly rejected offer.

Where in-custody interrogation is involved, there is no room for contention that privilege is waived if individual answers some questions or gives some information on his own before invoking right to remain silent when interrogated. U.S.C.A.Const. Amend. 5.

Fact of lengthy interrogation or incommunicado incarceration before statement is made is strong evidence that accused did not validly waive rights. U.S.C.A.Const. Amend. 5.

Any evidence that accused was threatened, tricked, or cajoled into waiver will show that he did not voluntarily waive privilege to remain silent. U.S.C.A.Const. Amend. 5.

Requirement of warnings and waiver of right is fundamental with respect to Fifth Amendment privilege and not simply preliminary ritual to existing methods of interrogation.

Warnings or waiver with respect to Fifth Amendment rights are, in absence of wholly effective equivalent, prerequisites to admissibility of any statement made by a defendant, regardless of whether statements are direct confessions, admissions of part or all of offense, or merely "exculpatory." U.S.C.A.Const. Amend. 5.

Privilege against self-incrimination protects individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination.

Statements merely intended to be exculpatory by defendant, but used to impeach trial testimony or to demonstrate untruth in statements given under interrogation, are incriminating and may not be used without full warnings and effective waiver required for any order statement. U.S.C.A.Const. Amend. 5.

When individual is in custody on probable cause, police may seek out evidence in field to be used at trial against him, and may make inquiry of persons not under restraint.

Rules relating to warnings and waiver in connection with statements taken in police interrogation do not govern general on-the-scene questioning as to facts surrounding crime or other general questioning of citizens in fact-finding process. U.S.C.A.Const. Amend. 5.

Confessions remain a proper element in law enforcement.

Any statement given freely and voluntarily without compelling influences is admissible.

Volunteered statements of any kind are not barred by Fifth Amendment; there is no requirement that police stop person who enters police station and states that he wishes to confess a crime or a person who calls police to offer con-

fession or any other statements he desires to make. U.S.C.A.Const. Amend. 5.

When individual is taken into custody or otherwise deprived of his freedom by authorities in any significant way and is subjected to questioning, privilege against self-incrimination is jeopardized, and procedural safeguards must be employed to protect privilege. U.S.C.A.Const. Amend. 5.

Unless other fully effective means are adopted to notify accused in custody or otherwise deprived of freedom of his right of silence and to assure that exercise of right will be scrupulously honored, he must be warned before questioning that he has right to remain silent, that anything he says can be used against him in court, and that he has right to presence of attorney and to have attorney appointed before questioning if he cannot afford one; opportunity to exercise these rights must be afforded to him throughout interrogation; after such warnings have been given and opportunity afforded, accused may knowingly and intelligently waive rights and agree to answer questions or make statements, but unless and until such warnings and waiver are demonstrated by prosecution at trial, no evidence obtained as a result of interrogation can be used against them. U.S.C.A.Const. Amends. 5, 6.

Fifth Amendment provision that individual cannot be compelled to be witness against himself cannot be abridged. U.S.C.A.Const. Amend. 5.

In fulfilling responsibility to protect rights of client, attorney plays vital role in administration of criminal justice. U.S.C.A.Const. Amend. 6.

Interviewing agent must exercise his judgment in determining whether individual waives right to counsel, but standard for waiver is high and ultimate responsibility for resolving constitutional question lies with courts.

Constitution does not require any specific code of procedures for protecting privilege against self-incrimination during custodial interrogation, and Congress and states are free to develop their own safeguards for privilege, so long as those required by court. U.S.C.A.Const. Amend. 5.

Issues of admissibility of statements taken during custodial interrogation were of constitutional dimension and must be determined by courts.

Where rights secured by Constitution are involved, there can be no rule making or legislation which would abrogate them.

Statements taken by police in incommunicado interrogation were inadmissible in state prosecution, where defendant had not been in any way apprised of his right to consult with attorney or to have one present during interrogation, and his Fifth Amendment right not to be compelled to incriminate himself was not effectively protected in any other manner, even though he signed statement which contained typed in clause that he had full knowledge of his legal rights. U.S.C.A.Const. Amends. 5, 6.

Mere fact that interrogated defendant signed statement which contained typed in clause stating that he had full knowledge of his legal rights did not approach knowing and intelligent waiver required to relinquish constitutional rights to counsel and privilege against self-incrimination.

State defendant's oral confession obtained during incommunicado interrogation was inadmissible where he had not been warned or any of his rights before questioning, and thus was not effectively apprised of Fifth Amendment privilege or right to have counsel present. U.S.C.A.Const. Amends. 5, 6.

Confessions obtained by federal agents in incommunicado interrogation were not admissible in federal prosecution, although federal agents gave warning of defendant's right to counsel and to remain silent, where defendant had been arrested by state authorities who detained and interrogated him for lengthy period, both at night and the following morning, without giving warning, and confessions were obtained after some two hours of questioning by federal agents in same police station. U.S.C.A.Const. Amends. 5, 6.

Defendant's failure to object to introduction of his confession at trial was not a waiver of claim of constitutional inadmissibility, and did not preclude Supreme Court's consideration of issue, where trial was held prior to decision in *Escobedo v. Illinois.*

Federal agents' giving of warning alone was not sufficient to protect defendant's Fifth Amendment privilege where federal interrogation was conducted immediately following state interrogation in same police station and in same compelling circumstances, after state interrogation in which no warnings were given, so that

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federal agents were beneficiaries of pressure applied by local in-custody interrogation; however, law enforcement authorities are not necessarily precluded from questioning any individual who has been held for period of time by other authorities and interrogated by them without appropriate warning.

California Supreme Court decision directing that state defendant be retired was final judgment, from which state could appeal to federal Supreme Court, since in event defendant were successful in obtaining acquittal on retrial state would have no appeal. 28 U.S.C.A. § 1257(3).

In dealing with custodial interrogation, court will not presume that defendant has been effectively apprised of rights and that has privilege against self-incrimination has been adequately safeguarded on record that does not show that any warnings have been given or that any effective alternative has been employed, nor can knowing and intelligent waiver of those rights be assumed on silent record. U.S.C.A.Const. Amend. 5.

State defendant's inculpatory statement obtained in incommunicado interrogation was inadmissible as obtained in violation of Fifth Amendment privilege where record did not specifically disclose whether defendant had been advised of his rights, he was interrogated on nine separate occasions over five days' detention, and record was silent as to waiver. U.S.C.A.Const. Amend. 5.

No. 759:

John J. Flynn, Phoenix, Ariz., for petitioner.

Gary K. Nelson, Phoenix, Ariz., for respondent.

Telford Taylor, New York City, for State of New York, as amicus curiae, by special leave of Court. (Also in Nos. 584, 760, 761 and 762)

Duane R. Nedrud, for National District Attorneys Ass'n, as amicus curiae, by special leave of Court. (Also in Nos. 760, 762 and 584)

No. 760:

Victor M. Earle, III, New York City, for petitioner.

William I. Siegel, Brooklyn, for respondent.

No. 761:

F. Conger Fawcett, San Francisco, Cal., for petitioner.

Sol. Gen. Thurgood Marshall, for respondent.

No. 584:

Gordon Ringer, Los Angeles, Cal., for petitioner.

William A. Norris, Los Angeles, Cal., for respondent.

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

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

We dealt with certain phases of this problem recently in *Escobedo v. State of Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said "I didn't shoot Manuel, you did it," they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him. We held that the statements thus made were constitutionally inadmissible.

[1] This case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago. Both state and federal courts, in accessing its implications, have arrived at varying conclusions.[1] A wealth of

[1] Compare *United States v. Childress,* 347 F.2d 448 (C.A. 7th Cir. 1965), with *Collins v. Beto,* 348 F.2d 823 (C.A. 5th Cir. 1965). Compare *People v. Dorado,* 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361 (1964) with *People v. Hartgraves,* 31 Ill.2d 375, 202 N.E.2d 33 (1964).

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scholarly material has been written tracing its ramifications and underpinnings.[2] Police and prosecutor have speculated on its range and desirability.[3] We granted certiorari in these cases, 382 U.S. 924, 925, 937, 86 S.Ct. 318, 320, 395, 15 L.Ed. 2d 338, 339, 348, in order further to explore some facets of the problems, thus exposed, of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.

[2] We start here, as we did in *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that "No person * * * shall be compelled in any criminal case to be a witness against himself," and that "the accused shall * * * have the Assistance of Counsel"—rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured "for ages to come, and * * * designed to approach immortality as nearly as human institutions can approach it," *Cohens v. Commonwealth of Virginia,* 6 Wheat. 264, 387, 5 L.Ed. 257 (1821).

Over 70 years ago, our predecessors on this Court eloquently stated:

> "The maxim *'Nemo tenetur seipsum accusare,'* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, [were] not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him my assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a

[2] See, e. g., Enker & Elsen, Counsel for the Suspect: *Messiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 and *Escobedo v. State of Illinois,* 49 Minn.L.Rev. 47 (1964); Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St.L.J. 449 (1964); Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 1 (1965); Dowling, Escobedo and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure, 56 J.Crim.L., C. & P.S. 143, 156 (1965).

The complex problems also prompted discussions by jurists. Compare Bazelon, Law, Morality, and Civil Liberties, 12 U.C.L.A.L.Rev. 13 (1964), with Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif.L.Rev. 929 (1965).

[3] For example, the Los Angeles Police Chief stated that "If the police are required * * * to * * * establish that the defendant was apprised of his constitutional guarantees of silence and legal counsel prior to the uttering of any admission or confession, and that he intelligently waived these guarantees * * * a whole Pandora's box is opened as to under what circumstances * * * can a defendant intelligently waive these rights. * * * Allegations that modern criminal investigations can compensate for the lack of a confession or admission in every criminal case it totally absurd!" Parker, 40 L.A.Bar Bull. 603, 607, 642 (1965). His prosecutorial counterpart, District Attorney Younger, stated that "[I]t begins to appear that many of these seemingly restrictive decisions are going to contribute directly to a more effective, efficient and professional level of law enforcement." *L. A. Times,* Oct. 2, 1965, p. 1. The former Police Commissioner of New York, Michael J. Murphy, stated of *Escobedo:* "What the Court is doing is akin to requiring one boxer to fight by Marquis of Queensbury rules while permitting the other to butt, gouge and bite." *N. Y. Times,* May 14, 1965, p. 39. The former United States Attorney for the District of Columbia, David C. Acheson, who is presently Special Assistant to the Secretary of the Treasury (for Enforcement), and directly in charge of the Secret Service and the Bureau of Narcotics, observed that "Prosecution procedure has, at most, only the most remote casual connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain." Quoted in Herman, supra, n. 2, at 500, n. 270. Other views on the subject in general are collected in Weisberg, Police Interrogation of Arrested Persons; A Skeptical View, 52 J.Crim.L., C. & P.S. 21 (1961).

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> mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." *Brown v. Walker,* 161 U.S. 591, 596–597, 16 S.Ct. 644, 646, 40 L.Ed. 819 (1896).

In stating the obligation of the judiciary to apply these constitutional rights, this Court declared in *Weems v. United States,* 217 U.S. 349, 373, 30 S.Ct. 544, 551, 54 L.Ed. 793 (1910):

> "* * * our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction."

This was the spirit in which we delineated, in meaningful language, the manner in which the constitutional rights of the individual could be enforced against overzealous police practices. It was necessary in *Escobedo,* as here, to insure that what was proclaimed in the Constitution had not become but a "form of words," *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319 (1920), in the hands of government officials. And it is in this spirit, consistent with our role as judges, that we adhere to the principles of *Escobedo* today.

[3–9] Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.[4] As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

I.

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogation stems from the fact that in this country they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the "third degree" flourished at that time.[5] In a series of cases decid-

[4] This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused.

[5] See, for example, IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931) [Wickersham Report]; Booth, Con-fessions and Methods Employed in Procuring Them, 4 So.Calif.L. Rev. 83 (1930); Kauper, Judicial Examination of the Accused — A Remedy for the Third Degree, 30 Mich.L.Rev.

ed by this Court long after these studies, the police resorted to physical brutality — beatings, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions.[6] The Commission on Civil Rights in 1961 found much evidence to indicate that "some policemen still resort to physical force to obtain confessions," 1961 Comm'n on Civil Rights Rep., Justice, pt. 5, 17. The use of physical brutality and violence is not, unfortunately, relegated to the past of to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party. *People v. Portelli,* 15 N.Y.2d 235, 257 N.Y.S.2d 931, 205 N.E.2d 857 (1965).[7]

The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future. The conclusion of the Wickersham Commission Report, made over 30 years ago, is still pertinent:

> "To the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey): 'It is not admissible to do a great right by doing a little wrong. * * * It is not sufficient to do justice by obtaining a proper result by irregular or improper means.' Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said, 'It is a short cut and makes the police lazy and unenterprising.' Or, as another official quoted remarked: 'If you use your fists, you are not so likely to use your wits.' We agree with the conclusion expressed in the report, that 'The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public.'" IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 5 (1931).

[10] Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, "Since *Chambers v. State of Florida,* 309 U.S. 227, 60 S. Ct. 472, 84 L.Ed. 716, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. State of Alabama,* 361 U.S. 199, 206, 80 S.Ct. 274, 279 4 L.Ed.2d 242 (1960). Interrogation still takes place in privacy. Privacy results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend

1224 (1932). It is significant that instances of third-degree treatment of prisoners almost invariably took place during the period between arrest and preliminary examination. Wickersham Report, at 169; Hall, the Law of Arrest in Relation to Contemporary Social Problems, 3 U.Chi.L. Rev. 345, 357 (1936). See also Foote, Law and Police Practice: Safeguards in the Law of Arrest, 52 Nw.U.L.Rev. 16 (1957).

[6] *Brown v. State of Mississippi,* 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936); *Chambers v. State of Florida,* 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940); *Canty v. State of Alabama,* 309 U.S. 629, 60 S.Ct. 612, 84 L.Ed. 988 (1940); *White v. State of Texas,* 310 U.S. 530, 60 S.Ct. 1032, 84 L.ED. 1342 (1940); *Vernon v. State of Alabama,* 313 U.S. 547, 61 S.Ct. 1092, 85 L.Ed. 1513 (1941); *Ward v. State of Texas,* 316 U.S. 547, 62 S.Ct. 1139, 86 L.Ed. 1663 (1942); *Ashcraft v. State of Tennessee,* 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944); *Malinski v. People of State of New York,* 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029 (1945); *Leyra v. Denno,* 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1954). See also *Williams v. United States,* 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774 (1951).

[7] In addition, see *People v. Wakat,* 415 Ill. 610, 114 N.E.2d 706 (1953); *Wakat v. Harlib,* 253 F.2d 59 (C.A. 7th Cir.1958) (defendant suffering from broken bones, multiple bruises and injuries sufficiently serious to require eight months' medical treatment after being manhandled by five policeman); *Kier v. State,* 213 Md. 556, 132 A.2d 494 (1957) (police doctor told accused, who was strapped to a chair completely nude, that he proposed to take hair and skin scrapings from anything that looked like blood or sperm from various parts of his body); *Bruner v. People,* 113 Colo. 194, 156 P.2d 111 (1945) (defendant held in custody over two months, deprived of food for 15 hours, forced to submit to a lie detector test when he wanted to go to the toilet); *People v. Matlock,* 51 Cal.2d 682, 336 P.2d 505, 71 A.L.R.2d 605 (1959) (defendant questioned incessantly over an evening's time, made to lie on cold board and to answer questions whenever it appeared he was getting sleepy). Other cases are documented in American Civil Liberties Union, Illinois Division, Secret Detention by the Chicago Police (1959); Potts, The Preliminary Examination and "The Third Degree," 2 Baylor L.Rev. 131 (1950); Sterling, Police Interrogation and the Psychology of Confession, 14 J.Pub.L. 25 (1965).

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various other effective tactics.[8] These texts are used by law enforcement agencies themselves as guides.[9] It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these texts and other data, it is possible to describe procedures observed and noted around the country.

The officers are told by the manuals that the "principal psychological factor contributing to a successful interrogation is privacy—being alone with the person under interrogation."[10] The efficacy of this tactic has been explained as follows:

> "If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indigent, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law."[11]

To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense,[12] to cast blame on the victim or on society.[13] These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.

The texts thus stress that the major qualities an interrogator should possess are patience and perseverance. One writer describes the efficacy of these characteristics in this manner:

> "In the preceding paragraphs emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgement of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the

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[8] The manuals quoted in the text following are the most recent and representative of the texts currently available. Material of the same nature appears in Kidd, Police Interrogation (1940); Mulbar, Interrogation (1951); Dienstein, Technics for the Crime Investigator 97–115 (1952). Studies concerning the observed practices of the police appear in LaFave, Arrest: The Decision To Take a Suspect Into Custody 244–437, 490–521 (1965); LaFave, Detention for Investigation by the Police: An Analysis of Current Practices, 1962 Wash.U.L.Q. 331; Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif.L.Rev. 11 (1962); Sterling, supra, n. 7, at 47–65.

[9] The methods described in Inbau & Reid Criminal Interrogation and Confessions (1962), are a revision and enlargement of material presented in three prior editions of a predecessor text, Lie Detection and Criminal Interrogation (3d ed. 1953). The authors and their associates are officers of the Chicago Police Scientific Crime Detection Laboratory and have had extensive experience in writing, lecturing and speaking to law enforcement authorities over a 20–year period. They say that the techniques portrayed in their manuals reflect their experiences and are the most effective psychological stratagems to employ during interrogation. Similarly, the techniques described in O'Hara, Fundamentals of Criminal Investigation (1956), were gleaned from long service as observer, lecturer in police science, and work as a federal criminal investigator. All these texts have had rather extensive use among law enforcement agencies and among students of police science, with total sales and circulation of over 44,000.

[10] Inbau & Reid, Criminal Interrogation and Confessions (1962), at 1.

[11] O'Hara, supra, at 99.

[12] Inbau & Redi, supra, at 34–43, 87. For example, in *Leyra v. Denno,* 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1954), the interrogator-psychiatrist told the accused, "We do sometimes things that are not right, but in a fit of temper or anger we sometimes do things we aren't really responsible for," id., at 562, 74 S.Ct. at 719, and again, "We know that morally you were just in anger. Morally, you are not to be condemned," id., at 582, 74 S.Ct. at 729.

[13] Inbau & Reid, supra, at 43–55.

> subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable."[14]

The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt. Where there is a suspected revenge-killing, for example, the interrogator may say:

> "Joe, you probably didn't got out looking for this fellow with the purpose of shooting him. My guess is, however, that you expected something from him and that's why you carried a gun—for your own protection. You knew him for what he was, no good. Then when you met him he probably started using foul, abusive language and he gave some indication that he was about to pull a gun on you, and that's when you had to act to save your own life. That's about it, isn't it, Joe?"[15]

Having then obtained the admission of shooting, the interrogator is advised to refer to circumstantial evidence which negates the self-defense explanation. This should enable him to secure the entire story. One text notes that "Even if he fails to do so, the inconsistency between the subject's original denial of the shooting and his present admission of at least doing the shooting will serve to deprive him of a self-defense 'out' at the time of trial."[16]

When the techniques described above prove unavailing, the texts recommend they be alternated with a show of some hostility. One ploy often used has been termed with the "friendly-unfriendly" or the "Mutt and Jeff" act:

> "* * * In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt's tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room."[17]

The interrogators sometimes are instructed to induce a confession out of trickery. The technique here is quite effective in crimes which require identification or which run in series. In the identification situation, the interrogator may take a break in his questioning to place the subject among a group of men in a line-up. "The witness or compliant (previously coached, if necessary) studies the line-up and confidently points out the subject as the guilty party."[18] Then the questioning resumes "as though there were no doubt about the guilt of the subject." A variation on this technique is called the "reverse line-up:"

> "The accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations."[19]

The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. "This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses the subject with the apparent fairness of his interrogator."[20] After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect's refusal to talk:

> "Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O.K. But

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[14] O'Hara, supra, at 112.

[15] Inbau & Reid, supra, at 40.

[16] Ibid.

[17] O'Hara, supra, at 104, Inbau & Reid, supra, at 58–59. See *Spano v. People of State of New York,* 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959). A variant on the technique of creating hostility is one of engendering fear. This is perhaps best described by the prosecuting attorney in *Malinski v. People of State of New York,* 324 U.S. 401, 407, 65 S.Ct. 781, 784, 89 L.Ed. 1029 (1945): "Why this talk about being undressed? Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking."

[18] O'Hara, supra, at 105–106.

[19] Id., at 106.

[20] Inbau & Reid, supra, at 111.

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> let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over."[21]

Few will persist in their initial refusal to talk, it is said, if this monologue is employed correctly.

In the event that the subject wishes to speak to a relative or an attorney, the following advice is tendered:

> "[T]he interrogator should respond by suggesting that the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter. If the request is for an attorney, the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, 'Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself.'"[22]

From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained."[23] When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.[24] This fact may be illustrated simply by referring to three confession cases decided by this Court in the Term immediately preceding our *Escobedo* decision. In *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), the defendant was a 19–year-old heroin addict, described as a "near mental defective," id., at 307–310, 83 S.Ct. at 754–755. The defendant in *Lynumn v. State of Illinois,* 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963), was a woman who confessed to the arresting officer after bring importuned to "cooperate" in order to prevent her children from being taken by relief authorities. This Court as in those cases reversed the conviction of a defendant in *Haynes v. State of Washington,* 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963), whose persistent request during his interrogation was to phone his wife or attorney.[25] In other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed.

In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. In No. 759, *Miranda v. Arizona,* the police arrested the defendant and took him to a special interrogation room where they secured a confession. In No. 760, *Vignera v. New York,* the

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[21] Ibid.

[22] Inbau & Reid, supra, at 112.

[23] Inbau & Reid, Lie Detection and Criminal Interrogation 185 (3d ed. 1953).

[24] Interrogation procedures may even give rise to a false confession. The most recent conspicuous example occurred in New York, in 1964, when a Negro of limited intelligence confessed to two brutal murders and a rape which he had not committed. When this was discovered, the prosecutor was reported as saying: "Call if what you want—brain-washing, hypnosis, fright. They made him give an untrue confession. The only thing I don't believe is that Whitmore was beaten." *N. Y. Times,* Jan. 28, 1965, p. 1, col. 5. In two other instances, similar events had occurred. *N. Y. Times,* Oct. 20, 1964, p. 22, col. 1; *N. Y. Times,* Aug. 25, 1965, p. 1, col. 1. In general, see Borchard, Convicting the Innocent (1932); Frank & Frank, Not Guilty (1957).

[25] In the fourth confession case decided by the Court in the 1962 Term, *Fay v. Noia,* 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), our disposition made it unnecessary to delve at length into the facts. The facts of the defendant's case there, however, paralleled those of his co-defendants, whose confessions were found to have resulted from continuous and coercive interrogation for 27 hours, with denial of requests for friends or attorney. See United States ex rel. *Caminito v. Murphy,* 222 F.2d 698 (C.A.2d Cir. 1955) (Frank, J.); *People v. Bonino,* 1 N.Y.2d 752, 152 N.Y.S.2d 298, 135 N.E. 2d 51 (1956).

defendant made oral admissions to the police after interrogation in the afternoon, and then signed an inculpatory statement upon being questioned by an assistant district attorney later the same evening. In No. 761, *Westover v. United States,* the defendant was handed over to the Federal Bureau of Investigation by local authorities after they had detained and interrogate him for a lengthy period, both at night and the following morning. After some two hours of questioning, the federal officers had obtained signed statements from the defendant. Lastly, in No. 584, *California v. Stewart,* the local police held the defendant five days in the station and interrogated him on nine separate occasions before they secured his inculpatory statement.

In these cases, we might not find the defendant's statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in *Miranda,* where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart,* in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

[11] It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.[26] The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

II.

We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times.[27] Perhaps the critical historical event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber Oath in 1637. The oath would have bound him to answer all questions posed to him on any subject. The Trial of John Liburn and John Wharton, 3 How.St.Tr. 1315 (1637). He resisted the oath and declaimed the proceedings, stating:

> "Another fundamental right I then contended for, was, that no man's conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so." Haller & Davies, The Leveller Tracts 1647–1653, p. 454 (1944).

On account of the Liburn Trial, Parliament abolished the inquisitorial Court of Star

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[26] The absurdity of denying that a confession obtained under these circumstances is compelled is aptly portrayed by an example in Professor Sutherland's recent article, Crime and Confession, 79 Harv.L. Rev. 21, 37 (1965):

> "Suppose a well-to-do testatrix says she intends to will her property to Elizabeth. John and James want her to bequeath it to them instead. They capture the testatrix, put her in a carefully designed room, out of touch with everyone but themselves and their convenient 'witnesses,' keep her secluded there for hours while they make insistent demands, weary her with contradictions of her assertions that she wants to leave her money to Elizabeth, and finally induce her to execute the will in their favor. Assume that John and James are deeply and correctly convinced that Elizabeth is unworthy and will make base use of the property if she gets her hands on it, whereas John and James have the noblest and most righteous intentions. Would any judge of probate accept the will so procured as the 'voluntary' act of the testatrix?"

[27] Thirteenth century commentators found an analogue to the privilege grounded in the Bible. "To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree." Maimonides, Mishneh Torah

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Chamber and went further in giving him generous reparation. The lofty principles to which Liburn had appealed during his trial gained popular acceptance in England.[28] These sentiments worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights.[29] Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing * * * by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States,* 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746 (1886). The privilege was elevated to constitutional status and has always been "as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock,* 142 U.S. 547, 562, 12 S.Ct. 195, 198, 35 L.Ed. 1110 (1892). We cannot depart from this noble heritage.

[12–15] Thus we may have view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." *United States v. Grunewald,* 233 F.2d 556, 579, 581–582 (Frank, J., dissenting), rev'd, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957). We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values, *Murphy v. Waterfront Comm. of New York Harbor,* 378 U.S. 52, 55–57, n. 5, 84 S.Ct. 1594, 1596–1597, 12 L.Ed.2d 678 (1964); *Tehan v. United States ex rel. Shott,* 382 U.S. 406, 414–415, n. 12, 86 S.Ct. 459, 464, 15 L.Ed.2d 453 (1966). All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," 8 Wigmore, Evidence 317 (McNaughton rev. 1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. *Chambers v. State of Florida,* 309 U.S. 227, 235–238, 60 S.Ct. 472, 476–477, 84 L.Ed. 716 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan,* 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964).

[16] The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation. In this Court, the privilege has consistently been accorded a liberal construction. *Albertson v. Subversive Activities Control Board,* 382 U.S. 70, 81, 86 S.Ct. 194, 200, 15 L.Ed.2d 165 (1965); *Hoffman v. United States,* 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed.2d 1118 (1951); *Arnstein v. McCarthy,* 254 U.S. 71, 72–73, 41 S.Ct. 26, 65 L.Ed. 138 (1920); *Counselman v. Hitchcock,* 142 U.S. 547, 562, 12 S.Ct. 195, 197, 35 L.Ed. 1110 (1892). We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery."[30]

This question, in fact, could have been taken as settled in federal courts almost 70 years ago, when, in *Bram v. United States,* 168 U.S. 532,

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(Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, ¶ 6, III Yale Judaica Series 52–53. See also Lamm, The Fifth Amendment and Its Equivalent in the Halakhah, 5 Judaism 53 (Winter 1956).

[28] See Morgan, The Privilege Against Self-Incrimination, 34 Minn.L.Rev. 1, 9–11 (1949); 8 Wigmore, Evidence 285–295 (McNaughton rev. 1961). See also Lowell, The Judicial Use of Torture, Parts I and II, 11 Harv.L.Rev. 220, 290 (1897).

[29] See Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va.L. Rev. 763 (1935); *Ullmann v. United States,* 350 U.S. 422, 445–449, 76 S.Ct. 497, 510–512, 100 L.Ed. 511 (1956) (Douglas, J., dissenting).

[30] Compare *Brown v. Walker,* 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1896); *Quinn v. United States,* 349 U.S. 155, 75 S.Ct. 668, 99 L.Ed. 964 (1955).

542, 18 S.Ct. 183, 187, 42 L.Ed. 568 (1897), this Court held:

> "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment * * * commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"

In *Bram,* the Court reviewed the British and American history and case law and set down the Fifth Amendment standard for compulsion which we implement today:

> "Much of the confusion which has resulted from the effort to deduce from the adjudged cases what would be a sufficient quantum of proof to show that a confession was or was not voluntary has arisen from a misconception of the subject to which the proof must address itself. The rule is not that, in order to render a statement admissible, the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that, from the causes which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement when but for the improper influences he would have remained silent. * * *" 168 U.S., at 549, 18 S.Ct. at 189. And see, id., at 542, 18 S.Ct. at 186.

The Court has adhered to this reasoning. In 1924, Mr. Justice Brandeis wrote for a unanimous Court in reversing a conviction resting on a compelled confession, *Ziang Sung Wan v. United States,* 266 U.S. 1, 45 S.Ct. 1, 69 L.Ed. 131. He stated:

> "In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. *Bram v. United States,* 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568." 266 U.S., at 14–15, 45 S.Ct. at 3.

In addition to the expansive historical development of the privilege and the sound policies which have nurtured its evolution, judicial precedent thus clearly establishes its application to incommunicado interrogation. In fact, the Government concedes this point as well established in No. 761, *Westover v. United States,* stating: "We have no doubt * * * that it is possible for a suspect's Fifth Amendment right to be violated during in-custody questioning by a law-enforcement officer."[31]

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[17] Because of the adoption by Congress of Rule 5(a) of the Federal Rules of Criminal Procedure, and the Court's effectuation of that Rule in *McNabb v. United States,* 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943), and *Mallory v. United States,* 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957), we have had little occasion in the past quarter century to reach the constitutional issues in dealing with federal interrogations. These supervisory rules, requiring production of an arrested person before a commissioner "without unnecessary delay" and excluding evidence obtained in default of that statutory obligation, were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States. In *McNabb,* 318 U.S., at 343–344, 63 S.Ct. at 614, and in *Mallory,* 354 U.S., at 455–456, 77 S.Ct. at 1359–1360, we recognized both the dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself.[32]

[18–20] Our decision in *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), necessitates an examination of the scope of the privilege in state cases as well. In *Malloy,* we squarely held the privilege applicable to the States, and held that the substantive standards underlying the privilege applied with full force to state court proceedings. There, as in *Murphy v. Waterfront Comm. of New York Harbor,* 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964), and *Griffin v. State of California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106

[31] Brief for the United States, p. 28. To the same effect, see Brief for the United States, pp. 40–49, n. 44, *Anderson v. United States,* 318 U.S. 350, 63 S.Ct. 599, 87 L.Ed. 829 (1943); Brief for the United States, pp. 17–18, *McNabb v. United States,* 318 U.S. 332, 63 S.Ct. 608 (1943).

[32] Our decision today does not indicate in any manner, of course, that these rules can be disregarded. When federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder. See generally, Hogan & Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo.L.J.1 (1958).

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(1965), we applied the existing Fifth Amendment standards to the case before us. Aside from holding itself, the reasoning in *Malloy* made clear what had already become apparent—that the substantive and procedural safeguards surrounding admissibility of confessions exacting, reflecting all the policies embedded in the privilege, 378 U.S., at 7–8, 84 S.Ct. at 1493.[33] The voluntariness doctrine in the state cases, as *Malloy* indicates, encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice.[34] The implications of this proposition were elaborated in our decision in *Escobedo v. State of Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, decided one week after *Malloy* applied the privilege to the States.

Our holding there stressed the fact that the police had not advised the defendant of his constitutional privilege to remain silent at the outset of the interrogation, and we drew attention to that fact at several points in the decision, 378 U.S., at 483, 485, 491, 84 S.Ct. at 1761, 1762, 1765. This was no isolated factor, but an essential ingredient in our decision. The entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment. The abdication of the constitutional privilege—the choice on his part to speak to the police—was not made knowingly or competently because of the failure to apprise him of his rights; the compelling atmosphere of the incustody interrogation, and not an independent decision on his part, cause the defendant to speak.

[21, 22] A different phase of the *Escobedo* decision was significant in its attention to the absence of counsel during the questioning. There, as in the cases today, we sought a protective device to dispel the compelling atmosphere of the interrogation. In *Escobedo,* however, the police did not relieve the defendant of the anxieties which they had created in the interrogation rooms. Rather, they denied his request for the assistance of counsel, 378 U.S., at 481, 488, 491, 84 S.Ct. at 1760, 1763, 1765.[35] This heightened his dilemma, and made his later statements the product of this compulsion. Cf. *Haynes v. State of Washington,* 373 U.S. 503, 514, 83 S.Ct. 1336, 1343 (1963). The denial of the defendant's request for his attorney thus undermined his ability to exercise the privilege—to remain silent if he chose or to speak without any intimidation, blatant or subtle. The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.

It was in this manner that *Escobedo* explicated another facet of the pre-trial privilege, noted in many of the Court's prior decisions: the protection of rights at trial.[36] That counsel is

[33] The decision of this Court have guaranteed the same procedural protection for the defendant whether his confession was used in a federal or state court. It is now axiomatic that the defendant's constitutional rights have been violated if his conviction is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity. *Rogers v. Richmond,* 365 U.S. 534, 544, 81 S.Ct. 735, 741, 5 L.Ed.2d 760 (1961); *Siang Sung Wan v. United States,* 266 U.S. 1, 45 S.Ct. 1, 69 L.Ed. 131 (1924). This is so even if there is ample evidence aside from the confession to support the conviction, e. g., *Malinski v. People of State of New York,* 324 U.S. 401, 404, 65 S.Ct. 781, 783, 89 L.Ed. 1029 (1945); *Bram v. United States,* 168 U.S. 532, 540–542, 18 S.Ct. 183, 185–186 (1897). Both state and federal courts now adhere to trial procedures which seek to assure a reliable and clear-cut determination of the voluntariness of the confession offered at trial, *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 904 (1964); *United States v. Carignan,* 342 U.S. 36, 38, 72 S.Ct. 97, 98, 96 L.Ed. 48 (1951); see also *Wilson v. United States,* 162 U.S. 613, 624, 16 S.Ct. 895, 900, 40 L.Ed. 1090 (1896). Appellate review is exacting, see *Haynes v. State of Washington,* 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); *Blackburn v. State of Alabama,* 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960). Whether his conviction was in a federal or state court, the defendant may secure a post-conviction hearing based on the alleged involuntary character of his confession, provided he meets the procedural requirements, *Fay v. Noia,* 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). In addition, see *Murphy v. Waterfront Comm. of New York Harbor,* 378 U.S. 52, 84 S.Ct. 1594 (1964).

[34] See *Lisenba v. People of State of California,* 314 U.S. 219, 241, 62 S.Ct. 280, 292, 86 L.Ed. 166 (1941); *Ashcraft v. State of Tennessee,* 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944); *Malinski v. People of State of New York,* 324 U.S. 401, 65 S.Ct. 781 (1945); *Spano v. People of State of New York,* 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959); *Lynumn v. State of Illinois,* 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963); *Haynes v. State of Washington,* 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963).

[35] The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake. See *People v. Donovan,* 13 N.Y.2d 148, 243 N.Y.S. 2d 841, 193 N.E.2d 628 (1963) (Fuld, J.).

present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding processes in court. The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warning and the rights of the counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police." Mapp v. Ohio, 367 U.S. 643, 685, 81 S.Ct. 1684, 1707, 6 L.Ed.2d 1081 (1961) (Harlan, J., dissenting). Cf. *Pointer v. State of Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

III.

[23, 24] Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of incustody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitu-tion necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional strait-jacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

[25–28] At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury.[37] Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

[29] The Fifth Amendment privilege is so fundamental to our system of constitutional

[36] *In re Groban,* 352 U.S. 330, 340–352, 77 S.Ct. 510, 517–523, 1 L.Ed.2d 376 (1957) (Black, J., dissenting); Note, 73 Yale L.J. 1000, 1048–1051 (1964); Comment, 31 U.Chi.L.Rev. 313, 320 (1964) and authorities cited.

[37] See p. 1617, supra. Lord Devlin has commented:

> "It is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not." Devlin, The Criminal Prosecution in England 32 (1958).

In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. Cf. *Griffin v. State of California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *Malloy v. Hogan,* 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964); Comment, 31 U.Chi.L.Rev. 556 (1964); Developments in the Law—Confessions, 79 Harv.L.Rev. 935, 1041–1044 (1966). See also *Bram v. United States,* 168 U.S. 532, 562, 18 S.Ct. 183, 194, 42 L.Ed. 568 (1897).

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rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation;[38] a warning is a clearcut fact. More important, whatever the background of the person interrogated is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

[30] The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

[31, 32] The circumstances surrounding incustody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the in terrogation process. A once-stated warning, delivered by those who will conduct the interrogation, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more "will benefit only the recidivist and the professional." Brief for the National District Attorneys Association as *amicus curiae,* p. 14. Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Cf. *Escobedo v. State of Illinois,* 378 U.S. 478, 485, n. 5, 84 S.Ct. 1758, 1762. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that statement is rightly reported by the prosecution at trial. See *Crooker v. State of California,* 357 U.S. 433, 443–448, 78 S.Ct. 1287, 1293–1296, 2 L.Ed.2d 1448 (1958) (Douglas, J., dissenting).

[33–35] An individual need not make a preinterrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel. As the California Supreme Court has aptly put it:

> "Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it." *People v. Dorado,* 62 Cal.2d 338, 351, 42 Cal. Rptr. 169, 177–178, 398 P.2d 361, 369–370, (1965) (Tobriner, J.).

[38] Cf. *Betts v. Brady,* 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), and the recurrent inquiry into special circumstances it necessitated. See generally, Kamisar, Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values, 61 Mich.L.Rev. 219 (1962).

In *Carnley v. Cochran,* 369 U.S. 506, 513, 82 S.Ct. 884, 889, 8 L.Ed.2d 70 (1962), we stated: "[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." This proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation.[39] Although the role of the counsel at trial differs from the role during interrogation, the differences are not relevant to the question whether a request is a prerequisite.

[36, 37] Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

[38–40] If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retired attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. The cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel.[40] While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice.[41] Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and *Douglas v. People of State of California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

[41, 42] In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to be indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present.[42] As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.[43]

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[39] See Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St.L.J. 449, 480 (1964).

[40] Estimates of 50–90% indigency among felony defendants have been reported. Pollock, Equal Justice in Practice, 45 Minn.L.Rev. 737, 738–739 (1961); Birzon, Kasanof & Forma, The Right to Counsel and the Indigent Accused in Courts of Criminal Jurisdiction in New York State, 14 Buffalo L.Rev. 428, 433 (1965).

[41] See Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 1, 64–81 (1965). As was stated in the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 9 (1963):

> "When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice."

[42] Cf. *United States ex rel. Brown v. Fay,* 242 F.Supp. 273, 277 (D.C.S.D.N.Y. 1965); *People v. Witenski,* 15 N.Y.2d 392, 259 N.Y.S.2d 413, 207 N.E.2d 358 (1965).

[43] While a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, the expedient of giving a warning is too simple and the rights involved too important to engage in *ex post facto* inquiries into financial ability when there is any doubt at all on that score.

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[43–46] Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.[44] At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

[47, 48] This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time.

[49–51] If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Escobedo v. State of Illinois,* 378 U.S. 478, 490, n. 14, 84 S.Ct. 1758, 1764, 12 L.Ed.2d 977. This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and we reassert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

[52–54] An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in *Carnley v. Cochran,* 369 U.S. 506, 516, 82 S.Ct. 884, 890, 8 L.Ed.2d 70 (1962), is applicable here:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

See also *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated.[45]

[55–57] Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any

[44] If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements.

[45] Although this Court held in *Rogers v. United States,* 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344 (1951), over strong dissent, that a witness before a grand jury may not in certain circumstances decide to answer some questions and then refuse to answer others, that decision has no application to the interrogation situation we deal with today. No legislative or judicial fact-finding authority is involved here, nor is there a possibility that the individual might make self-serving statements of which he could make use at trial while refusing to answer incriminating statements.

notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

[58–60] The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilty by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement. In *Escobedo* itself, the defendant fully intended his accusation of another as the slayer to be exculpatory as to himself.

The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself as the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.

[61, 62] Our decision is not intended to hamper the traditional function of police officers in investigating crime. See *Escobedo v. State of Illinois,* 378 U.S. 478, 492, 84 S.Ct. 1758, 1765. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.[46]

[63–65] In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime,[47] or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

[66, 67] To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeop-

[46] The distinction and its significance has been aptly described in the opinion of a Scottish court:

> "In former times such questioning, if undertaken, would be conducted by police officers visiting the house or place of business of the suspect and there questioning him, probably in the presence of a relation or friend. However convenient the modern practice may be, it must normally create a situation very unfavorable to the suspect." *Chalmers v. H. M. Advocate,* [1954] Sess.Cas. 66, 78 (J.C.).

[47] See *People v. Dorado,* 62 Cal.2d 338, 354, 42 Cal.Rptr. 169, 179, 398 P.2d 361, 371 (1965).

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ardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in the court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.[48]

IV.

[68] A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. See, e. g., *Chambers v. State of Florida,* 309 U.S. 227, 240–241, 60 S.Ct. 472, 478–479, 84 L.Ed. 716 (1940). The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged. As Mr. Justice Brandeis once observed:

> "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means * * * would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." *Olmstead v. United States,* 227 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944 (1928) (dissenting opinion).[49]

In this connection, one of our country's distinguished jurists has pointed out: "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."[50]

[69] If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement. As we have noted, our decision does not in a way preclude police from carrying out their traditional investigatory functions. Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the "need" for confessions. In each case authorities conducted interrogations ranging up to five days in duration despite the presence,

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[48] In accordance with our holdings today and in *Escobedo v. State of Illinois,* 378 U.S. 478, 492, 84 S.Ct. 1758, 1765; *Crooker v. State of California,* 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958) and *Cicenia v. La Gay,* 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958) are not to be followed.

[49] In quoting the above from the dissenting opinion of Mr. Justice Brandeis we, of course, do not intend to pass on the constitutional questions involved in the *Olmstead* case.

[50] Schaefer, Federalism and State Criminal Procedure, 70 Harv.L.Rev. 1, 26 (1956).

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through standard investigating practices, of considerable evidence against each defendant.[51] Further examples are chronicled in our prior cases. See, e. g., *Haynes v. State of Washington,* 373 U.S. 503, 518–519, 83 S.Ct. 1336, 1345, 1346, 10 L.Ed.2d 513 (1963); *Rogers v. Richmond,* 365 U.S. 534, 541, 81 S.Ct. 735, 739, 5 L.Ed.2d 760 (1961); *Malinski v. People of State of New York,* 324 U.S. 401, 402, 65 S.Ct. 781, 782 (1945).[52]

It is also urged that an unfettered right to detention for interrogation should be allowed because it will often redound to the benefit of the person questioned. When police inquiry determines that there is no reason to believe that the person has committed any crime, it is said, he will be released without need for further formal procedures. The person who has committed no offense, however, will be better able to clear himself after warnings with counsel present than without. It can be assumed that in such circumstances a lawyer would advise his client to talk freely to police in order to clear himself.

Custodial interrogation, by contrast, does not necessarily afford the innocent an opportunity to clear themselves. A serious consequence of the present practice of interrogation alleged to be beneficial for the innocent is that many arrests "for investigation" subject large numbers of innocent persons to detention and interrogation. In one of the cases before us, No. 584, *California v. Stewart,* police held four persons, who were in the defendant's house at the time of the arrest, in jail for five days until defendant confessed. At that time they were finally released. Police stated that there was "no evidence to connect them with any crime." Available statistics on the extent of this practice where it is condoned indicate that these four are far from alone in being subjected to arrest, prolonged detention, and interrogation without the requisite probable cause.[53]

Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay.[54] A letter received from the Solicitor General is response to a question from the Bench makes it clear that the present pattern of warnings and respect for the rights of the individual followed as a practice by the FBI is consistent with the procedure which we delineate today. It states:

> "At the oral argument of the above cause, Mr. Justice Fortas asked whether I could provide certain information as to the practices followed by the Federal Bureau of Investigation. I have directed these questions to the attention of the Director of the Federal Bureau of

[51] Miranda, Vignera, and Westover were identified by eyewitnesses. Marked bills from the bank robbed were found in Westover's car. Articles stolen from the victim as well as from several other robbery victims were found in Stewart's home at the outset of the investigation.

[52] Dealing as we do here with constitutional standards in relation to statements made, the existence of independent corroborating evidence produced at trial is, of course, irrelevant to our decisions. *Haynes v. State of Washington,* 373 U.S. 503, 518–519, 83 S.Ct. 1336, 1345–1346 (1963); *Lynumn v. State of Illinois,* 372 U.S. 528, 537–538, 83 S.Ct. 917, 922, 9 L.Ed.2d 922 (1963); *Rogers v. Richmond,* 365 U.S. 534, 541, 81 S.Ct. 735, 739 (1961); *Blackburn v. State of Alabama,* 361 U.S. 199, 206, 80 S.Ct. 274, 279, 4 L.Ed.2d 242 (1960).

[53] See, e. g., Report and Recommendations of the [District of Columbia] Commissioners' Committee on Police Arrests for Investigation (1962); American Civil Liberties Union, Secret Detention by the Chicago Police (1959). An extreme example of this practice occurred in the District of Columbia in 1958 . Seeking three "stocky" young Negroes who had robbed a restaurant, police rounded up 90 persons of that general description. Sixty-three were held overnight before being released for lack of evidence. A man not among the 90 arrested was ultimately charged with the crime. *Washington Daily News,* January 21, 1958, p. 5, col. 1; Hearings before a Subcommittee of the Senate Judiciary Committee on H.R. 11477, S. 2970, S. 3325, and S. 3355, 85th Cong., 2d Sess. (July 1958), pp. 40, 78.

[54] In 1952, J. Edgar Hoover, Director of the Federal Bureau of Investigation, stated:

> "Law enforcement, however, in defeating the criminal, must maintain inviolate the historic liberties of the individual. To turn back the criminal, yet, by so doing, destroy the dignity of the individual, would be a hollow victory.
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> "We can have the Constitution, the best laws in the land, and the most honest reviews by courts — but unless the law enforcement profession is stepped in the democratic tradition, maintains the highest in ethics, and makes its work a career of honor, civil liberties will continually — and without end — be violated. * * * The best protection of civil liberties is an alert, intelligent and honest law enforcement agency. There can be no alternative."
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> * * * * *
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> "* * * Special Agents are taught that any suspect or arrested person, at the outset of an interview, must be advised that he is not required to make a

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Investigation and am submitting herewith a statement of the questions and of the answers which we have received."

"'(1) When an individual is interviewed by against of the Bureau, what warning is given to him?"

"'The standard warning long given by Special Agents of the FBI to both suspects and persons under arrest is that the person has a right to say nothing and a right to counsel, and that any statement he does make may be used against him in court. Examples of this warning are to be found in the *Westover* case at 342 F.2d 684 (1965), and *Jackson v. U.S.,* [119 U.S.App.D.C. 100] 337 F.2d 136 (1964), cert. den. 380 U.S. 935, 85 S.Ct. 1353,

"'After passage of the Criminal Justice Act of 1964, which provides free counsel for Federal defendants unable to pay, we added to our instructions to Special Agents the requirement that any person who is under arrest for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, must also be advised of his right to free counsel if he is unable to pay, and the fact that such counsel will be assigned by the Judge. At the same time, we broadened the right to counsel warning to read counsel of his own choice, or anyone else with whom he might wish to speak."

"'(2) When is the warning given?

"The FBI warning is given to a suspect at the very outset of the interview, as shown in the *Westover* case, cited above. The warning may be given to a person arrested as soon as practicable after the arrest, as shown in the *Jackson* case, also cited above, and in *U.S. v. Konigsberg,* 336 F.2d 844 (1964), cert. den. [*Celso v. United States*] 379 U.S. 933 [85 S.Ct. 327, 13 L.Ed.2d 342] but in any event it must precede the interview with the person for a confession or admission of his own guilt."

"'(3) What is the Bureau's practice in the event that (a) the individual requests counsel and (b) counsel appears?"

"'When the person who has been warned of his right to counsel decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point, *Schultz v. U.S.,* 351 F.2d 287 ([10 Cir.] 1965). It may be continued, however, as to all matters *other* than the person's own guilt or innocence. If he is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent. For example, in *Hiram v. U.S.,* 354 F.2d 4 ([9 Cir.] 1965), the Agent's conclusion that the person arrested had waived his right to counsel was upheld by the courts.

"'A person being interviewed and desiring to consult counsel by telephone must be permitted to do so, as shown in *Caldwell v. U.S.,* 351 F.2d 459 ([1 Cir.] 1965). When counsel appears in person, he is permitted to confer with his client in private.'"

"'(4) What is the Bureau's practice if the individual requests counsel, but cannot afford to retain an attorney?'"

"'If any person being interviewed after warning of counsel decides that he wishes to consult with counsel before proceeding further the interview is terminated, as shown above. FBI Agents do not pass judgment on the ability of the person to pay for counsel. They do, however, advise those who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, of a right to free counsel *if* they are unable to pay, and the availability of such counsel from the Judge.'"[55]

[70] The practice of the FBI can readily be emulated by state and local enforcement agencies. The argument that the FBI deals with different crimes than are dealt with by state authorities does not mitigate the significance of the FBI experience.[56]

The experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed. The

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statement and that any statement given can be used against him in court. Moreover, the individual must be informed that, if he desires, he may obtain the services of an attorney of his own choice."

Hoover, Civil Liberties and Law Enforcement: The Role of the FBI, 37 Iowa L. Rev. 175, 177–182 (1952).

[55] We agree that the interviewing agent must exercise his judgment in determining whether the individual waives his right to counsel. Because of the constitutional basis of the right, however, the standard for waiver is necessarily high. And, of course, the ultimate responsibility for resolving this constitutional question lies with the courts.

[56] Among the crimes within the enforcement jurisdictions of the FBI are kidnapping, 18 U.S.C. § 1201 (1964 ed.), white slavery, 18 U.S.C. §§ 2421–2423 (1964 ed.), bank robbery, 18 U.S.C. § 2113 (1964 ed.), interstate transportation and sale of stolen property, 18 U.S.C. §§ 2311–2317 (1964 ed.), all manner of conspiracies, 18 U.S.C. § 371 (1964 ed.), and violation of civil rights, 18 U.S.C. §§ 241–242 (1964 ed.). See also 18 U.S.C. § 1114 (1964 ed.) (murder of officer or employee of the United States).

English procedure since 1912 under the Judge's Rule is significant. As recently strengthened, the Rules require that a cautionary warning be given an accused by a police officer as soon as he has evidence that affords reasonable grounds for suspicion; they also require that any statement made be given by the accused without questioning by police.[57] The right of the individual to consult with an attorney during this period is expressly recognized.[58]

The safeguards present under Scottish law may be even greater than in England. Scottish judicial decisions bar use in evidence of most confessions obtained through police interrogation.[59] In India, confessions made to police not in the presence of a magistrate have been excluded by rule of evidence since 1872, at a time when it operated under British law.[60] Identical provisions appear in the Evidence Ordinance of Ceylon, enacted in 1895.[61] Similarly, in our country the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him.[62] Denial of the right to consult counsel during interrogation has also been proscribed by military tribunals.[63] There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules. Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them. Moreover, it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdiction described. We deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution, whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined.[64]

[71–73] It is also urged upon us that we withhold decision on this issue until state legislative bodies and advisory groups have had an opportunity to deal with these problems by rule making.[65] We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it. In any event, however, the issues presented are of constitutional dimensions and must be determined by the courts. The admissibility of a statement in the face of a claim that it was obtained in viola-

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[57] [1964] Crim.L.Rev., at 166–170. These Rules provide in part:

> "II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offense, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence."
>
> "The caution shall be in the following terms:
>
> 'You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.'"
>
> "When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present."
>
> * * * * *
>
> "III. * * *
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> * * * * *
>
> "(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted.
>
> * * * * *
>
> "IV. All written statements made after caution shall be taken in the following manner:"
>
> "(a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says."
>
> "He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him." * * *
>
> "(b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material."
>
> * * * * *
>
> "(d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matters: he shall not prompt him."

The prior Rules appear in Devlin, The Criminal Prosecution in England 137–141 (1958).

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tion of the defendant's constitutional rights is an issue the resolution of which has long since been undertaken by this Court. See *Hopt v. People of Territory of Utah,* 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884). Judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. That was our responsibility when *Escobedo* was before us and it is our responsibility today. Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.

V.

Because of the nature of the problem and because of its recurrent significance in numerous cases, we have to this point discussed the relationship of the Fifth Amendment privilege to police interrogation without specific concentration on the facts of the case before us. We turn now to these facts to consider the application to these cases of the constitutional principles discussed above. In each instance, we have concluded that statements were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.

No. 759. *Miranda v. Arizona*

On March 13, 1963, petitioner, Ernesto Miranda, was arrested at his home and taken into custody to a Phoenix police station. He was there identified by the complaining witness. The police then took him to "Interrogation Room No. 2" of the detective bureau. There he was questioned by two police officers. The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present.[66] Two hours later, the officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and "with full knowledge of my legal rights, understanding any statement I make may be used against me."[67]

At his trial before a jury, the written confession was admitted into evidence over the objection of defense counsel, and the officers testified to the prior oral confession made by Miranda during the interrogation. Miranda was found guilty of kidnapping and rape. He was sentenced to 20 to 30 years' imprisonment on each count, the sentences to run concurrently. On appeal, the Supreme Court of Arizona held that Miranda's constitutional rights were not violated in obtaining the confession and affirmed the conviction. 98 Ariz. 18, 401 P.2d 721. In reaching its decision, the court emphasized heavily the fact that Miranda did not specifically request counsel.

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Despite suggestions of some laxity in enforcement of the Rules and despite the fact some discretion as to admissibility is invested in the trial judge, the Rules are a significant influence in the English criminal law enforcement system. See, *e. g.*, [1964] Crim.L.Rev., at 182; and articles collected in [1960] Crim.L.Rev., at 298–356.

[58] The introduction to the Judge's Rules states in part:

> These Rules do not affect the principles
>
> * * * * *
>
> "(c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so. * * *" [1964] Crim.L.Rev., at 166–167.

[59] As stated by the Lord Justice General in *Chalmers v. H. M. Advocate,* [1954] Sess.Cas. 66, 78 (J.C.):

> "The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, *e. g.*, to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded. Once the accused has been apprehended and charged he has the statutory right to a private interview with a solicitor and to be brought before a magistrate with all convenient speed so that he may, if so advised, emit a declaration in presence of his solicitor under conditions which safeguard him against prejudice."

[60] "No confession made to a police officer shall be proved as against a person accused of any offense." Indian Evidence Act § 25.

"No confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate, shall be proved as against such person." Indian Evidence Act § 26. See 1 Ramaswami & Rajagopalan, Law of Evidence in India 553–569 (1962). To avoid any continuing effect of police pressure or inducement, the Indian Supreme Court has invalidated a confession made shortly after police brought a suspect before a magistrate, suggesting: [I]t would, we think, be reasonable to insist upon giving an accused person at least 24 hours to

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[74, 75] We reverse. From the testimony of the officers and by the admission of respondent, it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had "full knowledge" of his "legal rights" does not approach the knowing and intelligent waiver required to relinquish constitutional rights. Cf. *Haynes v. State of Washington,* 373 U.S. 503, 512–513, 83 S.Ct. 1336, 1342, 10 L.Ed.2d 513 (1963); *Haley v. State of Ohio,* 332 U.S. 596, 601, 68 S.Ct. 302, 304, 92 L.Ed.224 (1948) (opinion of Mr. Justice Douglas).

No. 760 *Vignera v. New York.*

Petitioner, Michael Vignera, was picked up by New York police on October 14, 1960, in connection with the robbery three days earlier of a Brooklyn dress shop. They took him to the 17th Detective Squad headquarters in Manhattan. Sometime thereafter he was taken to the 66th Detective Squad. There a detective questioned Vignera with respect to the robbery. Vignera orally admitted the robbery to the detective. The detective was asked on cross-examination at trial by defense counsel whether Vignera was warned of his right to counsel before being interrogated. The prosecution objected to the question and the trial judge sustained the objection. Thus, the defendant was precluded from making any showing that warnings had not been given. While at the 66th Detective Squad, Vignera was identified by the store owner and a saleslady as the man who robbed the dress shop. At about 3 p.m. he was formally arrested. The police then transported him to still another station, the 70th Precinct in Brooklyn, "for detention." At 11 p.m. Vignera was questioned by an assistant district attorney in the presence of a hearing reporter who transcribed the questions and Vignera's answers. This verbatim account of these proceedings contains no statement of any warnings given by the assistant district attorney. At Vignera's trial on charge of first degree robbery, the detective testified as to the oral confession. The transcription of the statement taken was also introduced in evidence. At the conclusion of the testimony, the trial judge charged the jury in part as follows:

> "The law doesn't say that the confession is void or invalidated because the police officer didn't advise the defendant as to his rights. Did you hear what I said? I am telling you what the law of the State of New York is."

Vignera was found guilty of first degree robbery. He was subsequently adjudged a third-felony offender and sentenced to 30 to 60 years' imprisonment.[68] The conviction was affirmed without opinion by the Appellate Division, Second Department, 21 A.D.2d 752, 252 N.Y.S.2d 19, and by the Court of Appeals, also without opinion, 15 N.Y.2d 970, 259 N.Y.S.2d 857, 207 N.E.2d 527, remittitur amended, 16 N.Y.2d 614, 261 N.Y.S.2d 65, 209 N.E.2d 110. In argument to the Court of Appeals, the State contended that Vignera had no constitutional right to be advised of his right to counsel or his privilege against self-incrimination.

[76] We reverse. The foregoing indicates that Vignera was not warned of any of his rights

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decide whether or not he should make a confession." *Sarwan Singh v. State of Punjab,* 44 All India Rep. 1957, Sup.Ct. 637, 644.

[61] I Legislative Enactments of Ceylon 211 (1958).

[62] 10 U.S.C. § 831(b) (1964 ed.).

[63] *United States v. Rose,* 24 CMR 251 (1957); *United States v. Gunnels,* 23 CMR 354 (1957).

[64] Although no constitution existed at the time confessions were excluded by rule of evidence in 1872, India now has a written constitution which includes the provision that "No person accused of any offence shall be compelled to be a witness against himself." Constitution of India, Article 20(3). See Tope, The Constitution of India 63–67 (1960).

[65] Brief for United States in No. 761, *Westover v. United States,* pp. 44–47; Brief for the State of New York as *amicus curiae*, pp. 35–39. See also Brief for the National District Attorneys Association as *amicus curiae*, pp. 23–26.

[66] Miranda was also convicted in a separate trial on an unrelated robbery charge not presented here for review. A statement introduced at that trial was obtained from Miranda during the same interrogation which resulted in the confession involved here. At the robbery trial, one officer testified that during the interrogation he did not tell Miranda that anything he said would be held against him or that he could consult with an attorney. The other officer stated that they had both told Miranda that anything he said would be used against him and that he was not required by law to tell them anything.

[67] One of the officers testified that he read this paragraph to Miranda. Apparently, however, he did not do so until after Miranda had confessed orally.

[68] Vignera thereafter successfully attacked the validity of one of the prior convictions, *Vignera v. Wilkins,* Civ. 9901 (D.C.W.D. N.Y. Dec. 31, 1961) (unreported), but was then resentenced as a second-felony offender to the same term of imprisonment as the original sentence. R. 31–33.

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before the questioning by the detective and by the assistant district attorney. No other steps were taken to protect these rights. Thus he was not effectively apprised of his Fifth Amendment privilege or of his right to have counsel present and his statements are inadmissible.

No. 761. *Westover v. United States*.

At approximately 9:45 p.m. on March 20, 1963, petitioner, Carl Calvin Westover, was arrested by local police in Kansas City as a suspect in to Kansas City robberies. A report was also received from the FBI that he was wanted on a felony charge in California. The local authorities took him to a police station and placed him in a line-up on the local charges, and at about 11:45 p.m. he was booked. Kansas City police interrogated Westover on the night of his arrest. He denied any knowledge of criminal activities. The next day local officers interrogated him again throughout the morning. Shortly before noon they informed the FBI that they were through interrogating Westover and that the FBI could proceed to interrogate him. There is nothing in the record to indicate that Westover was ever given any warning as to his rights by local police. At noon, three special agents of the FBI continued the interrogation in a private interview room of the Kansas City Police Department, this time with respect to the robbery of a savings and loan association and bank in Sacramento, California. After two or two and one-half hours, Westover signed separate confessions to each of these two robberies which had been prepared by one of the agents during the interrogation. At trial one of the agents testified, and a paragraph on each of the statements states, that the agents advised Westover that he did not have to make a statement, that any statement he made could be used against him, and that he had the right to see an attorney.

[77, 78] Westover was tried by a jury in federal court and convicted of the California robberies. His statements were introduced at trial. He was sentenced to 15 years' imprisonment on each count, the sentences to run consecutively. On appeal, the conviction was affirmed by the Court of Appeals for the Ninth Circuit. 342 F.2d 684.

We reverse. On the facts of this case we cannot find that Westover knowingly and intelligently waived his right to remain silent and his right to consult with counsel prior to the time he made the statement.[69] At the time the FBI agents began questioning Westover, he had been in custody for over 14 hours and had been interrogated at length during that period. The FBI interrogation began immediately upon the conclusion of the interrogation by Kansas City police and was conducted in local police headquarters. Although the two law enforcement authorities are legally distinct and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning. There is no evidence of an articulated waiver of rights after the FBI commenced its interrogation. The record simply shows that the defendant did in fact confess a short time after being turned over to the FBI following interrogation by local police. Despite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view the warnings came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed.

[79] We do not suggest that law enforcement authorities precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them. But here the FBI interrogation was conducted immediately following the state interrogation in the same police station—in the same compelling surroundings. Thus, in obtaining a confession from Westover the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation. In these circumstances the giving of warnings alone was not sufficient to protect the privilege.

No. 584. *California v. Stewart.*

[69] The failure of defense counsel to object to the introduction of the confession at trial, noted by the Court of Appeals and emphasized by the Solicitor General, does not preclude our consideration of the issue. Since the trial was held prior to our decision in *Escobedo* and, of course, prior to our decision today making the objection available, the failure to object at trial does not constitute a waiver of the claim. See, e. g., *United States ex rel. Angelet v. Fay,* 333 F.2d 12, 16 (C.A.2d Cir. 1964), aff'd, 381 U.S. 654, 85 S.Ct. 1750, 14 L.Ed.2d 625 (1965). Cf. *Ziffrin, Inc. v. United States,* 318 U.S. 73, 78, 63 S.Ct. 465, 87 L.Ed. 621 (1943).

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In the course of investigating a series of purse-snatch robberies in which one of the victims had died of injuries inflicted by her assailant, respondent, Roy Allen Stewart, was pointed out to Los Angeles police as the endorser of dividend checks taken in one of the robberies. At about 7:15 p.m., January 31, 1963, police officers went to Stewart's house and arrested him. One of the officers asked Stewart if they could search the house, to which he replied, "Go ahead." The search turned up various items taken from the robbery victims. At the time of Stewart's arrest, police also arrested Stewart's wife and three other persons who were visiting him. These four were jailed along with Stewart and were interrogated. Stewart was taken to the University Station of the Los Angeles Police Department where he was placed in a cell. During the next five days, police interrogated Stewart on nine different occasions. Except during the first interrogation session, when he was confronted with an accusing witness, Stewart was isolated with his interrogators.

During the ninth interrogation session, Stewart admitted that he had robbed the deceased and stated that he had not meant to hurt her. Police then brought Stewart before a magistrate for the first time. Since there was no evidence to connect them with any crime, the police then released the other four persons arrested with him.

Nothing in the record specifically indicates whether Stewart was or was not advised of his right to remain silent or his right to counsel. In a number of instances, however, the interrogating officers were asked to recount everything that was said during the interrogations. None indicated that Stewart was ever advised of his rights.

[80] Stewart was charged with kidnapping to commit robbery, rape, and murder. At his trial, transcripts of the first interrogation and the confession at the last interrogation were introduced in evidence. The jury found Stewart guilty of robbery and first degree murder and fixed the penalty as death. On appeal, the Supreme Court of California reversed. 62 Cal.2d 571, 43 Cal.Rptr. 201, 400 P.2d 97. It held that under this Court's decision in *Escobedo,* Stewart should have been advised of his right to remain silent and of his right to counsel and that it would not presume in the face of a silent record that the police advised Stewart of his rights.[70]

[81, 82] We affirm.[71] In dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been employed. Nor can a knowing and intelligent waiver of these rights be assumed on a silent record. Furthermore, Stewart's steadfast denial of the alleged offenses through eight of the nine interrogations over a period of five days is subject to no other construction than that he was compelled by persistent interrogation to forgo his Fifth Amendment privilege.

Therefore, in accordance with this foregoing, the judgments of the Supreme Court of Arizona in No. 759, of the New York Court of Appeals in No. 760, and of the Court of Appeals for the Ninth Circuit in No. 761 are reversed. The judgment of the Supreme Court of California in No. 584 is affirmed. It is so ordered.

Judgments of Supreme Court of Arizona in No. 759, of New York Court of Appeals in No. 760, and of the Court of Appeals for the Ninth Circuit in No. 761 reversed.

Judgment of Supreme Court of California in No. 584 affirmed.

Mr. Justice Clark, dissenting in Nos. 759, 760, and 761, and concurring in the result in No. 584.

It is with regret that I find it necessary to write in these cases. However, I am unable to join the majority because its opinion goes too far on too little, while my dissenting brethren do not go quite far enough. Nor can I join in the

[70] Because of this disposition of the case, the California Supreme Court did not reach the claims that the confession was coerced by police threats to hold his ailing wife in custody until he confessed, that there was no hearing as required by *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), and that the trial judge gave an instruction condemned by the California Supreme Court's decision in *People v. Morse,* 60 Cal.2d 631, 36 Cal. Rptr. 201, 388 P.2d 33 (1964).

[71] After certiorari granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U.S.C. § 1257(3) (1964 ed.), we denied the motion. 383 U.S. 903, 86 S.Ct. 885.

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Court's criticism of the present practices of police and investigatory agencies as to custodial interrogation. The materials it refers to as "police manuals"[1] are, as I read them, merely writings in this field by professors and some police officers. Not one is shown by the record here to be the official manual of any police department, much less in universal use in crime detection. Moreover the examples of police brutality mentioned by Court[2] are rare exceptions to the thousands of cases that appear every year in the law reports. The police agencies—all the way from municipal and state forces to the federal bureaus—are responsible for law enforcement and public safety in this country. I am proud of their efforts, which in my view are not fairly characterized by the Court's opinion.

**I.**

The *ipse dixit* of the majority has no support in our cases. Indeed, the Court admits that "we might not find the defendant's statements [here] to have been involuntary in traditional terms." Ante, p. 1618. In short, the Court has added more to the requirements that the accused is entitled to consult with his lawyer and that he must be given the traditional warning that he may remain silent and that anything he says may be used against him. *Escobedo v. State of Illinois,* 378 U.S. 478, 490–491, 84 S.Ct. 1758, 1764–1765, 12 L.Ed.2d 977 (1964). Now, the Court fashions a constitutional rule that the police may engage in no custodial interrogation without additionally advising the accused that he has a right under the Fifth Amendment to the presence of counsel during interrogation and that, if he is without funds, counsel will be furnished him. When at any point during an interrogation the accused seeks affirmatively or impliedly to invoke his rights to silence or counsel, interrogation must be forgone or postponed. The Court further holds that failure to follow the new procedures requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof. Such a strict constitutional specific inserted at the nerve center of crime detection may well kill the patient.[3] Since there is at this time a paucity of information and an almost total lack of empirical knowledge on the practical operation of requirements truly comparable to those announced by the majority, I would be more restrained lest we go too far too fast.

**II.**

Custodial interrogation has long been recognized as "undoubtedly an essential tool in effective law enforcement." *Haynes v. State of Washington,* 373 U.S. 503, 515, 83 S.Ct. 1336, 1344, 10 L.Ed.2d 513 (1963). Recognition of this fact should put us on guard against the promulgation of doctrinaire rules. Especially is this true where the Court finds that "the Constitution has prescribed" its holding and where the light of our past cases, from *Hopt v. People of Territory of Utah,* 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), down to *Haynes v. State of Washington,* supra, is to the contrary. Indeed, even in *Escobedo* the Court never hinted that an affirmative "waiver" was a prerequisite to questioning; that the burden of proof as to waiver was on

[1] *E.g.*, Inbau & Reid, Criminal Interrogation and Confessions (1962); O'Hara, Fundamentals of Criminal Investigation (1956); Dienstein, Technics for the Crime Investigator (1952); Mulbar, Interrogation (1951); Kidd, Police Interrogation (1940).

[2] As developed by my Brother Harlan, post, pp. 1644–1649, such cases, with the exception of the long-discredited decision in *Bram v. United States,* 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897), were adequately treated in terms of due process.

[3] The Court points to England, Scotland, Ceylon and India as having equally rigid rules. As my Brother Harlan points out, post, pp. 1652–1653, the Court is mistaken in this regard, for it overlooks counterbalancing prosecutorial advantages. Moreover, the requirements of the Federal Bureau of Investigation do not appear from the Solicitor General's letter, ante, pp. 1633–1634, to be as strict as those imposed today in at least two respects: (1) The offer of counsel is articulated only as "a right to counsel," nothing is said about a right to have counsel present at the custodial interrogation. (See also the examples cited by the Solicitor General, *Westover v. United States,* 342 F.2d 684, 685 (9 Cir., 1965) ("right to consult counsel"); *Jackson v. United States,* 119 U.S.App.D.C. 100, 337 F.2d 136, 138 (1964) (accused "entitled to an attorney").) Indeed, the practice is that whenever the suspect "decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point. * * * When counsel appears in person, he is permitted to confer with his client in private." This clearly indicates that the FBI does not warn that counsel may be present during custodial interrogation. (2) The Solicitor General's letter states: "[T]hose who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, [are advised] of a right to free counsel *if* they are unable to pay, and the availability of such counsel from the Judge." So phrased, this warning does not indicate that the agent will secure counsel. Rather, the statement may well be interpreted by the suspect to mean that the burden is placed upon himself and that he may have counsel appointed only when brought before the judge or at trial — but not at custodial interrogation. As I view the FBI practice, it is not as broad as the one laid down today by the Court.

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the prosecution; that the presence of counsel—absent a waiver—during interrogation was required; that a waiver can be withdrawn at the will of the accused; that counsel must be furnished during an accusatory stage to those unable to pay; nor that admissions and exculpatory statements are "confessions." To require all those things at one gulp should cause the Court to choke over more cases than *Crooker v. State of California,* 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958), and *Cicenia v. La Gay,* 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958), which it expressly overrules today.

The rule prior to today—as Mr. Justice Goldberg, the author of the Court's opinion in *Escobedo,* stated it in *Haynes v. Washington*—depended upon "a totality of circumstances evidencing an involuntary * * * admission of guilt." 373 U.S., at 514, 83 S.Ct. at 1343. And he concluded:

> "Of course, detection and solution of crime is, at best, a difficult and arduous task requiring determination and persistence on the part of all responsible officers charged with the duty of law enforcement. And, certainly, we do not mean to suggest that all interrogation of witnesses and suspects is impermissible. Such questioning is undoubtedly an essential tool in effective law enforcement. The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused. * * * We are here impelled to the conclusion, from all of the facts presented, that the bounds of due process have been exceeded." Id., at 514–515, 83 S.Ct. at 1344.

### III.

I would continue to follow that rule. Under the "totality of circumstances" rule of which my Brother Goldberg spoke in *Haynes,* I would consider in each case whether the police officer prior to custodial interrogation added the warning that the suspect might have counsel present at the interrogation and, further, that a court would appoint one at his request if he was too poor to employ counsel. In the absence of warnings, the burden would be on the State to prove that counsel was knowingly and intelligently waived or that in the totality of the circumstances, including the failure to give the necessary warnings, the confession was clearly voluntary.

Rather than employing the arbitrary Fifth Amendment rule[4] which the Court lays down I would follow the more pliable dictates of the Due Process Clauses of the Fifth and Fourteenth Amendments which we are accustomed to administrating and which we know from our cases are effective instruments in protecting persons in police custody. In this way we would not be acting in the dark nor in one full sweep changing the traditional rules of custodial interrogation which this Court has for so long recognized as a justifiable and proper tool in balancing individual rights against the rights of society. It will be soon enough to go further when we are able to appraise with somewhat better accuracy the effect of such a holding.

I would affirm the conviction in *Miranda v. Arizona,* No. 759; *Vignera v. New York,* No. 760; and *Westover v. United States,* No. 761. In each of those cases I find from the circumstances no warrant of reversal. In *California v. Stewart,* No. 584, I would dismiss the writ of certiorari for want of a final judgment, 28 U.S.C. § 1257(3) (1964 ed.); but if the merits are to be reached I would affirm on the ground that the State failed to fulfill its burden, in the absence of a showing that appropriate warnings were given, of proving a waiver or a totality of circumstances showing voluntariness. Should there be a retrial, I would leave the State free to attempt to prove these elements.

Mr. Justice Harlan, whom Mr. Justice Stewart and Mr. Justice White join, dissenting.

I believe the decision of the Court represents poor constitutional law and entails harmful consequences for the country at large. How serious these consequences may prove to be only time can tell. But the basic flaws in the Court's justification seem to me readily apparent now once all sides of the problem are considered.

### I. INTRODUCTION

At the outset, it is well to note exactly what is required by the Court's new constitutional code of rules for confessions. The foremost require-

[4] In my view there is "no significant support" in our cases for the holding of the Court today that the Fifth Amendment privilege, in effect, forbids custodial interrogation. For a discussion of this point see the dissenting opinion of my Brother White, post, pp. 1655–1657.

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ment, upon which later admissibility of a confession depends, is that a fourfold warning be given to a person in custody before he is questioned, namely, that he has a right to remain silent, that anything he says may be used against him, that he has a right to have present an attorney during the questioning, and that if indigent he has a right to a lawyer without charge. To forgo these rights, some affirmative statement of rejection is seemingly required, and threats, tricks, or cajolings to obtain this waiver are forbidden. If before or during questioning the suspect seeks to invoke his right to remain silent, interrogation must be forgone or cease; a request for counsel brings about the same result until a lawyer is produced. Finally, there are a miscellany of minor directives, for example, the burden of proof of waiver is on the State, admissions and exculpatory statements are treated just like confessions, withdrawal of a waiver is always permitted, and so forth.[1]

While the fine points of this scheme are far less clear than the Court admits, the tenor is quite apparent. The new rules are not designed to guard against police brutality or other unmistakably banned forms or coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers. Rather, the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward "voluntariness" in a utopian sense, or to view it from a different angle, voluntariness with a vengeance.

To incorporate this notion into the Constitution requires a strained reading of history and precedent and a disregard of the very pragmatic concerns that alone may on occasion justify such strains. I believe that reasoned examination will show that the Due Process Clauses provide an adequate tool for coping with confessions and that, even if the Fifth Amendment privilege against self-incrimination be invoked, its precedents taken as a whole do not sustain the present rules. Viewed as a choice based on pure policy, these new rules prove to be a highly debatable, if not one-sided, appraisal of the competing interests, imposed over widespread objection, at the very time when judicial restraint is most called for by the circumstances.

## II. CONSTITUTIONAL PREMISES

It is most fitting to begin in inquiry into the constitutional precedents by surveying the limits on confessions the Court has evolved under the Due Process Clause of the Fourteenth Amendment. This is so because these cases show that there exists a workable and effective means of dealing with confessions in a judicial manner; because the cases are the baseline from which the Court now departs and so serve to measure the actual as opposed to the professed distance it travels; and because examination of them helps reveal how the Court has coasted into its present position.

The earliest confession cases in this Court emerged from federal prosecutions and were settled on a nonconstitutional basis, the Court adopting the common-law rule that the absence of inducements, promises, and threats made a confession voluntary and admissible. *Hopt v. People of Territory of Utah,* 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262; *Pierce v. United States,* 160 U.S. 355, 16 S.Ct. 321, 40 L.Ed. 454. While a later case said the Fifth Amendment privilege controlled admissibility, this proposition was not itself developed in subsequent decisions.[2] The Court did, however, heighten the test of admissibility in federal trials to one of voluntariness "in fact," *Ziang Sung Wan v. United States,* 266 U.S. 1, 14, 45 S.Ct. 1, 3, 69 L.Ed. 131 (quoted, ante, p. 1621), and then by and large left federal judges to apply the same standards the Court began to drive in a string of state court cases.

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[1] My discussion in this opinion is directed to the main questions decided by the Court and necessary to its decision; in ignoring some of the collateral points, I do not mean to imply agreement.

[2] The case was *Bram v. United States,* 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (quoted, ante, p. 1621). Its historical premises were afterwards disproved by Wigmore, who concluded "that no assertions could be more unfounded." 3 Wigmore, Evidence § 823, at 250, n. 5 (3d ed. 1940). The Court in *United States v. Carignan,* 342 U.S. 36, 41, 72 S.Ct. 97, 100, 96 L.Ed. 48, declined to choose between *Bram* and Wigmore, and *Stein v. People of State of New York,* 346 U.S. 156, 191, n. 35, 73 S.Ct. 1077, 1095, 97 L.Ed. 1522, cast further doubt on *Bram.* There are, however, several Court opinions which assume in dicta the relevance of the Fifth Amendment privilege to confessions. *Burdeau v. McDowell,* 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048; see *Shotwell Mfg. Co. v. United States,* 371 U.S. 341, 347, 83 S.Ct. 448, 453, 9 L.Ed.2d 357. On *Bram* and the federal confession cases generally, see Developments in the Law—Confessions, 79 Harv.L.Rev. 935, 959–961 (1966).

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This new line of decisions, testing admissibility by the Due Process Clause, began in 1936 with *Brown v. State of Mississippi,* 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682, and must now embrace somewhat more than 30 full opinions of the Court.[3] While the voluntariness rubric was repeated in many instances, e. g., *Lyons v. State of Oklahoma,* 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481, the Court never pinned it down to a single meaning but on the contrary infused it with a number of different values. To travel quickly over the main themes, there was an initial emphasis on reliability, e. g., *Ward v. State of Texas,* 316 U.S. 547, 62 S.Ct. 1139, 86 L.Ed. 1663, supplemented by concern over the legality and fairness of the police practices, e. g., *Ashcraft v. State of Tennessee,* 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192, in an "accusatorial" system of law enforcement, *Watts v. State of Indiana,* 338 U.S. 49, 54, 69 S.Ct. 1347, 1350, 93 L.Ed. 1801, and eventually by close attention to the individual's state of mind and capacity for effective choice, e.g., *Gallegos v. State of Colorado,* 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325. The outcome was a continuing re-evaluation on the facts of each case of *how much* pressure on the suspect was permissible.[4]

Among the criteria often taken into account were threats or imminent danger, e.g., *Payne v. State of Arkansas,* 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975, physical deprivations such as lack of sleep or food, e. g., *Reck v. Pate,* 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948, repeated or extended interrogation, e.g., *Chambers v. State of Florida,* 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716, limits on access to counsel or friends, *Crooker v. State of California,* 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448; *Cicenia v. La Gay,* 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523, length and illegality of detention under state law, e.g., *Haynes v. State of Washington,* 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513, and individual weakness or incapacities, *Lynumn v. State of Illinois,* 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922. Apart from direct physical coercion, however, no single default or fixed combination of defaults guaranteed exclusion, and synopses of the cases would serve little use because the overall gauge has been steadily changing, usually in the direction of restricting admissibility. But to mark just what point had been reached before the Court jumped the rails in *Escobedo v. State of Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, it is worth capsulizing the then-recent case of *Haynes v. State of Washington,* 373 U.S. 503, 83 S.Ct. 1366. There, Haynes had been held some 16 or more hours in violation of state law before signing the disputed confession, had received no warnings of any kind, and despite requests had been refused access to his wife or to counsel, the police indicating that access would be allowed after a confession. Emphasizing especially this last inducement and rejecting some contrary indicia of voluntariness, the Court in a 5-to-4 decision held the confession inadmissible.

There are several relevant lessons to be drawn from this constitutional history. The first is that with over 25 years of precedent the Court has developed an elaborate, sophisticated, and sensitive approach to admissibility of confessions. It is "judicial" in its treatment of one case at a time, see *Culombe v. Connecticut,* 367 U.S. 568, 635, 81 S.Ct. 1860, 1896, 6 L.Ed.2d 1037 (concurring opinion of The Chief Justice), flexible in its ability to respond to the endless mutations of fact presented, and ever more familiar to the lower courts. Of course, strict certainty is not obtained in this developing process, but this is often so with constitutional principles, and disagreement is usually confined to that borderland of close cases where it matters least.

The second point is that in practice and from time to time in principle, the Court has given ample recognition to society's interest in suspect questioning as an instrument of law enforcement. Cases countenancing quite significant pressures can be cited without difficulty,[5] and the lower courts may often have been yet

[3] Comment, 31 U.Chi.L.Rev. 313 & n. 1 (1964), states that by the 1963 Term 33 state coerced-confession cases had been decided by this Court, apart from *per curians. Spano v. People of State of New York,* 360 U.S. 315, 321, n. 2, 79 S.Ct. 1202, 1206, 3 L.Ed.2d 1265, collects 28 cases.

[4] Bator & Vorenberg, Arrest, Detention, Interrogation and the Right to Counsel, 66 Col.L.Rev. 62, 73 (1966); "In fact, the concept of involuntariness seems to be used by the courts as a shorthand to refer to practices which are repellent to civilized standards of decency or which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice." See Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St.L.J. 449, 452–458 (1964); Developments, supra, n. 2, at 964–984.

[5] See the cases synopsized in Herman, supra, n. 4, at 456, nn. 36–39. One not too distant example is *Stroble v. State of California,* 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872, in which the suspect was kicked and threatened after his arrest, questioned a little later for two hours, and isolated from a lawyer trying to see him; the resulting confession was held admissible.

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more tolerant. Of course the limitations imposed today were rejected by necessary implication in case after case, the right to warnings having been explicitly rebuffed in this Court many years ago. *Powers v. United States,* 223 U.S. 303, 32 S.Ct. 281, 56 L.Ed. 448; *Wilson v. United States,* 162 U.S. 613, 16 S.Ct. 895, 40 L.Ed. 1090. As recently as *Haynes v. State of Washington,* 373 U.S. 503, 515, 83 S.Ct. 1336, 1344, the Court openly acknowledged that questioning of witnesses and suspects "is undoubtedly an essential tool in effective law enforcement." Accord, *Crooker v. State of California,* 357 U.S. 433, 441, 78 S.Ct. 1287, 1292.

Finally, the cases disclose that the language in many of the opinions overstates the actual course of decision. It has been said, for example, that an admissible confession must be made by the suspect "in the unfettered exercise of his own will," *Malloy v. Hogan,* 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653, and that "a prisoner is not 'to be made the deluded instrument of his own conviction,'" *Culombe v. Connecticut,* 367 U.S. 568, 581, 81 S.Ct. 1860, 1867, 6 L.Ed.2d 1037 (Frankfurter, J., announcing the Court's judgment and an opinion). Though often repeated, such principles are rarely observed in full measure. Even the word "voluntary" may be deemed somewhat misleading, especially when one considers many of the confessions that have been brought under its umbrella. See, e. g., supra, n. 5. The tendency to overstate may be laid in part to the flagrant facts often before the Court; but in any event one must recognize how it has tempered attitudes and lent some color of authority to the approach now taken by the Court.

I turn now to the Court's asserted reliance on the Fifth Amendment, an approach which I frankly regard as a *trompe l'oeil.* The Court's opinion in my view reveals no adequate basis for extending the Fifth Amendment's privilege against self-incrimination to the police station. Far more important, it fails to show that the Court's new rules are well supported, let alone compelled, by Fifth Amendment precedents. Instead, the new rules actually derive from quotation and analogy drawn from precedents under the Sixth Amendment, which should properly have no bearing on police interrogation.

The Court's opening contention, that the Fifth Amendment governs police station confessions, is perhaps not an impermissible extension of the law but it has little to comment itself in the present circumstances. Historically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions, for which distinct standards evolved; indeed, "the *history* of the two principles is wide apart, differing by one hundred years in origin, and derived through separate lines of precedents. * * *" 8 Wigmore, Evidence § 2266, at 401 (McNaughton rev. 1961). Practice under the two doctrines has also differed in a number of important respects.[6] Even those who would readily enlarge the privilege must concede some linguistic difficulties since the Fifth Amendment in terms proscribes only compelling any person "in any criminal case to be a witness against himself." Cf. Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 1, 25–26 (1965).

Though weighty, I do not say these points and similar ones are conclusive, for, as the Court reiterates, the privilege embodies basic principles always capable of expansion.[7] Certainly the perspective does represent a protective concern for the accused and an emphasis upon accusatorial rather than inquisitorial values in law enforcement, although this is similarly true of other limitations such as the grand jury requirement and the reasonable doubt standard. Accusatorial values, however, have openly been absorbed into the due process standard governing confessions; this indeed is why at present "the kinship of the two rules [governing confessions and self-incrimination] is too apparent for denial." McCormick, Evidence 155 (1954). Since extension of the general principle has already occurred, to insist that the privilege applies as such serves only to carry over inapposite historical details and engaging rhetoric and to obscure the policy choices to be made in regulating confessions.

[6] Among the examples given in 8 Wigmore, Evidence § 2266, at 401 (McNaughton rev. 1961), are these: the privilege applies to any witness, civil or criminal, but the confession rule protects only criminal defendants; the privilege deals only with compulsion, while the confession rule may exclude statements obtained by trick or promise; and where the privilege has been nullified — as by the English Bankruptcy Act — the confession rule may still operate.

[7] Additionally, there are precedents and even historical arguments that can be arrayed in favor of bringing extra-legal questioning within the privilege. See generally Maguire. Evidence of Guilt § 2.03, at 15–16 (1959).

Having decided that the Fifth Amendment privilege does apply in the police station, the Court reveals that the privilege imposes more exacting restrictions than does the Fourteenth Amendment's voluntariness test.[8] It then emerges from a discussion of *Escobedo* that the Fifth Amendment requires for an admissible confession that it be given by one distinctly aware of his right not to speak and shielded from "the compelling atmosphere" of interrogation. See ante, pp. 1623–1624. From these key premises, the Court finally develops the safeguards of warning, counsel, and so forth. I do not believe these premises are sustained by precedents under the Fifth Amendment.[9]

The more important premise is that pressure on the suspect must be eliminated though it be only the subtle influence of the atmosphere and surroundings. The Fifth Amendment, however, has never been thought to forbid *all* pressure to incriminate one's self in the situations covered by it. On the contrary, it has been held that failure to incriminate one's self can result in denial of removal of one's case from state to federal court, *State of Maryland v. Soper,* 270 U.S. 9, 46 S.Ct. 185, 70 L.Ed. 449; in refusal of a military commission, *Orloff v. Willoughby,* 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842; in denial of a discharge in bankruptcy, *Kaufman v. Hurwitz,* 4 Cir., 176 F.2d 210; and in numerous other adverse consequences. See 8 Wigmore, Evidence § 2272, at 441–444, n. 18 (McNaughton rev. 1961); Maguire, Evidence of Guilt § 2.062 (1959). This is not to say that short of jail or torture any sanction is permissible in any case; policy and history alike may impose sharp limits. See, e. g., *Griffin v. State of California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106. However, the Court's unspoken assumption that *any* pressure violates the privilege is not supported by the precedents and it has failed to show why the Fifth Amendment prohibits that relatively mild pressure the Due Process Clause permits.

The Court appears similarly wrong in thinking that precise knowledge of one's rights is a settled prerequisite under the Fifth Amendment to the loss of its protections. A number of lower federal court cases have held that grand jury witnesses need not always be warned of their privilege, e. g., *United States v. Scully,* 2 Cir., 225 F.2d 113, 116, and Wigmore states this to be the better rule for trial witnesses. See 8 Wigmore, Evidence § 2269 (McNaughton rev. 1961). Cf. *Henry v. State of Mississippi,* 379 U.S. 443, 451–452, 85 S.Ct. 564, 569, 13 L.Ed.2d 408 (waiver of constitutional rights by counsel despite defendant's ignorance held allowable). No Fifth Amendment precedent is cited for the Court's contrary view. There might of course be reasons apart from Fifth Amendment precedent for requiring warning or any other safeguard on questioning but that is a different matter entirely. See infra, pp. 1649–1650.

A closing word must be said about the Assistance of Counsel Clause of the Sixth Amendment, which is never expressly relied on by the Court but whose judicial precedents turn out to be linchpins of the confession rules announced today. To support its requirement of a knowing and intelligent waiver, the Court cites *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, ante, p. 1628; appointment of counsel for the indigent suspect is tied to *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, and *Douglas v. People of State of California,* 372 U.S. 353, 83 S.Ct. 884, 8 L.Ed.2d 70, ante, p. 1628, as is the right to an express offer of counsel, ante, p. 1626. All these cases imparting glosses to the Sixth Amendment concerned counsel at trial or on appeal. While the Court finds no pertinent difference between judicial proceedings and police interrogation, I believe the differences are so vast as to disqualify wholly the Sixth Amendment precedents as suitable analogies in the present cases.[10]

The only attempt in this Court to carry the right to counsel into the station house occurred in *Escobedo,* the Court repeating several times that the stage was no less "critical" than trial itself. See 378 U.S. 485–488, 84 S.Ct. 1762–1763. This is hardly persuasive when we consider that a grand jury inquiry, the filing of a certiorari petition, and certainly the purchase of narcotics by an undercover agent from a prospective

[8] This, of course, is implicit in the Court's introductory announcement that "[o]ur decision in *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) [extending the Fifth Amendment privilege to the States] necessitates an examination of the scope of the privilege in state cases as well." Ante, p. 1622. It is also inconsistent with *Malloy* itself, in which extension of the Fifth Amendment to the States rested in part on the view that the Due Process Clause restriction on state confessions has in recent years been "the same standard" as the imposed in federal prosecutions assertively by the Fifth Amendment. 378 U.S., at 7, 84 S.Ct., at 1493.

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defendant may all be equally "critical" yet provision of counsel and advice on the score have never been thought compelled by the Constitution in such cases. The sound reason why this right is so freely extended for a criminal trial is the severe injustice risked by confronting an untrained defendant with a range of technical points of law, evidence, and tactics familiar to the prosecutor but not to himself. This danger shrinks markedly in the police station where indeed the lawyer in fulfilling his professional responsibilities of necessity may become an obstacle of truthfinding. See infra, n. 12. The Court's summary citation of the Sixth Amendment cases here seems to me best described as "the domino method of constitutional adjudication * * * wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation." Friendly, supra, n. 10, at 950.

### III. POLICY CONSIDERATIONS

Examined as an expression of public policy, the Court's new regime proves so dubious that there can be no due compensation for its weakness in constitutional law. The foregoing discussion has shown, I think, how mistaken is the Court in implying that the Constitution has struck the balance in favor of the approach the Court takes. Ante, p. 1630. Rather, precedent reveals that the Fourteenth Amendment in practice has been construed to strike a different balance, that the Fifth Amendment gives the Court little solid support in this context, and that the Sixth Amendment should have no bearing at all. Legal history has been stretched before to satisfy deep needs of society. In this instance, however, the Court has not and cannot make the powerful showing that its new rules are plainly desirable in the context of our society, something which is surely demanded before those rules are engrafted onto the Constitution and imposed on every State and county in the land.

Without at all subscribing to the generally black picture of police conduct painted by the Court, I think it must be frankly recognized at the outset that police questioning allowable under due process precedents may inherently entail some pressure on the suspect and may seek advantage in his ignorance or weaknesses. The atmosphere and questioning techniques, proper and fair though they be, can in themselves exert a tug on the suspect to confess, and in this light "[t]o speak of any confession of crime made after arrest as being 'voluntary' or 'uncoerced' is somewhat inaccurate, although traditional. A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser." *Ashcraft v. State of Tennessee,* 322 U.S. 143, 161, 64 S.Ct. 921, 929, 88 L.Ed. 1192 (Jackson, J., dissenting). Until today, the role of the Constitution has been only to sift out *undue* pressure, not to assure spontaneous confessions.[11]

The Court's new rules aim to offset these minor pressures and disadvantages intrinsic to any kind of police interrogation. The rules do not serve due process interests in preventing blatant coercion since, as I noted earlier, they do nothing to contain the policeman who is prepared to lie from the start. The rules work for reliability in confessions almost only in the Pickwickian sense that they can prevent some from being given at all.[12] In short, the benefit of this new regime is simply to lessen or wipe out the inherent compulsion and inequalities to which the Court devotes some nine pages of description. Ante, pp. 1614–1618.

What the Court largely ignores is that its rules impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it.[13] There can be little doubt that the Court's new code would markedly decrease the number of confessions. To warn the suspect that he may remain silent and remind him that his confession may

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[11] See supra, n. 4, and text. Of course, the use of terms like voluntariness involves questions of law and terminology quite as much as questions of fact. See *Collins v. Beto,* 5 Cir., 348 F.2d 823, 832 (concurring opinion); Bator & Vorenberg, supra, n. 4, at 72–73.

[12] The Court's vision of a lawyer "mitigat[ing] the dangers of untrustworthiness" ante, p. 1626, by witnessing coercion and assisting accuracy in the confession is largely a fancy; for if counsel arrives, there is rarely going to be a police station confession. *Watts v. State of Indiana,* 338 U.S. 49, 59, 69 S.Ct. 1347, 1358, 93 L.Ed. 1801 (separate opinion of Jackson, J.): "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." See Enker & Elsen, Counsel for the Suspect, 49 Minn.L.Rev. 47, 66–68 (1964).

[13] This need is, of course, what makes so misleading the Court's comparison of a probate judge readily setting aside as involuntary the will of an old lady badgered and beleaguered by the new heirs. Ante, p. 1619, n. 26. With wills, there is no public interest save in a totally free choice; with confessions, the solution of crime is a countervailing gain, however the balance is resolved.

be used in court are minor obstructions. To require also an express waiver by the suspect and an end to questioning whenever he demurs must heavily handicap questioning. And to suggest or provide counsel for the suspect simply invites the end of interrogation. See, supra, n. 12.

How much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy. Evidence on the role of confessions is notoriously incomplete, see Developments, supra, n. 2, at 941–944, and little is added by the Court's reference to the FBI experience and the resources believed wasted in interrogation. See infra, n. 19, and text. We do know that some crimes cannot be solved without confessions, that ample expert testimony attests to their importance in crime control,[14] and that the Court is taking a real risk with society's welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation.

While passing over the costs and risks of its experiment, the Court portrays the evils of normal police questioning in terms which I think are exaggerated. Albeit stringently confined by the due process standards interrogation is no doubt often inconvenient and unpleasant for the suspect. However, it is no less so for a man to be arrested and jailed, to have his house searched, or to stand trial in court, yet all this may properly happen to the most innocent given probable cause, a warrant, or an indictment. Society has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law.

This brief statement of the competing considerations seem to me ample proof that the Court's preference is highly debatable at best and therefore not to be read into the Constitution. However, it may make the analysis more graphic to consider the actual facts of one of the four cases reversed by the Court. *Miranda v. Arizona* serves best, being neither the hardest nor easiest of the four under the Court's standards.[15]

On March 3, 1963, an 18-year-old girl was kidnapped and forcibly raped near Phoenix, Arizona. Ten days later, on the morning of March 13, petitioner Miranda was arrested and taken to the police station. At this time Miranda was 23 years old, indigent, and educated to the extent of completing half the ninth grade. He had "an emotional illness" of the schizophrenic type, according to the doctor who eventually examined him; the doctor's report also stated that Miranda was "alert and oriented as to time, place, and person," intelligent within normal limits, competent to stand trial, and sane within legal definition. At the police station, the victim picked Miranda out of a line-up, and two officers then took him into a separate room to interrogate him, starting about 11:30 a.m. Though at first denying his guilt, within a short time Miranda gave a detailed oral confession and then wrote out in his own hand and signed a brief statement admitting and describing the crime. All this was accomplished in two hours or less without any force, threats or promises and —I will assume this though the record is uncertain, ante, 1636–1637 and nn. 66–67—without any effective warnings at all.

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Miranda's oral and written confessions are now held inadmissible under the Court's new rules. One is entitled to feel astonished that the Constitution can be read to produce this result. These confessions were obtained during brief, daytime questioning conducted by two officers and unmarked by any of the traditional indicia of coercion. They assured a conviction for a brutal and unsettling crime, for which the police had and quite possibly could obtain little evidence other than the victim's identifications, evidence which is frequently unreliable. There was, in sum, a legitimate purpose, no perceptible unfairness, and certainly little risk of injustice in the interrogation. Yet the resulting confession, and the responsible course of police practice they represent, are to be sacrificed to the Court's own finespun conception of fairness which I seriously doubt is share by many thinking citizens in this country.[16] The tenor of judicial opinion also falls well short of supporting the Court's new approach. Although *Escobedo* has widely been interpreted as an open invitation to lower courts to rewrite the law of confessions, a

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[15] In *Westover*, a seasoned criminal was practically given the Court's full complement of warnings and did not heed them. The *Stewart* case, on the other hand, involves long detention and successive questioning. In *Vignera,* the facts are complicated and the record somewhat incomplete.

[16] "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Commonwealth of Massachusetts,* 291 U.S. 97, 122, 54 S.Ct. 330, 338, 78 L.Ed. 674 (Cardozo, J.).

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significant heavy majority of the state and federal decisions in point have sought narrow interpretations.[17] Of the courts that have accepted the invitation, it is hard to know how many have felt compelled by their best guess as to this Court's likely construction; but none of the state decisions saw fit to rely on the state privilege against self-incrimination, and no decision at all has gone as far as this Court goes today.[18]

It is also instructive to compare the attitude in this case of those responsible for law enforcement with the official views that existed when the Court undertook three major revisions of prosecutorial practice prior to this case, *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, and *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 0 L.Ed.2d 799. In Johnson, which established that appointed counsel must be offered the indigent in federal criminal trials, the Federal Government all but conceded the basic issue, which had in fact been recently fixed as Department of Justice policy. See Beaney, Right to Counsel 29–30, 36–42 (1955). In *Mapp,* which imposed the exclusionary rule on the States for Fourth Amendment violations, more than half of the States had themselves already adopted some such rule. See 367 U.S., at 651, 81 S.Ct., at 1689. In *Gideon,* which extended *Johnson v. Zerbst* to the States, an *amicus* brief was filed by 22 States and Commonwealths urging that course; only two States besides that of the respondent came forward to protest. See 372 U.S., at 345, 83 S.Ct., at 797. By contrast, in this case new restrictions on police questioning have been opposed by the United States and in an *amicus* brief signed by 27 States and Commonwealths, not including the three other States which are parties. No State in the country has urged this court to impose the newly announced rules, nor has any State chosen to go nearly so far on its own.

The Court in closing its general discussion invokes the practice in federal and foreign jurisdictions as lending weight to its new curbs on confessions for all the States. A brief résumé will suffice to show that none of these jurisdictions has struck so one-sided a balance as the Court does today. Heaviest reliance is placed on the FBI practice. Differing circumstances may make this comparison quite untrustworthy,[19] but in any event the FBI falls sensibly short of the Court's formalistic rules. For example, there is no indication the FBI agents must obtain an affirmative "waiver" before they pursue their questioning. nor is it clear that one invoking his right to silence may not be prevailed upon to change his mind. And the warning as to appointed counsel apparently indicates only that one will be assigned by the judge when the suspect appears before him; the trust of the Court's rules is to induce the suspect to obtain appointed counsel before continuing the interview. See ante, pp. 1633–1634. Apparently American military practice, briefly mentioned by the Court, has these same limits and is still less favorable to the suspect than the FBI warning, making no mention of appointed counsel. Developments, supra, n. 2, at 1084–1089.

The law of the foreign countries described by the Court also reflects a more moderate conception of the rights of the accused as against those of society when other data are considered. Concededly, the English experience is most relevant. In that country, a caution as to silence but not counsel has long been mandated by the "Judge's Rules," which also place other somewhat imprecise limits on police cross-

[17] A narrow reading is given in: *United States v. Robinson,* 354 F.2d 109 (C.A.2d Cir.): *Davis v. State of North Carolina,* 339 F.2d 770 (C.A.4th Cir.); *Edwards v. Holman,* 342 F.2d 679 (C.A.5th Cir.); *United States ex rel. Townsend v. Ogilvie,* 334 F.2d 837 (C.A.7th Cir.); *People v. Hartgraves,* 31 Ill.2d 375, 202 N.E.2d 33; *State v. Fox,* 131 N.W.2d 684 (Iowa); *Rowe v. Commonwealth,* 394 S.W.2d 751 (Ky.); *Parker v. Warden,* 236 Md. 236, 203 A.2d 418; *State v. Howard,* 383 S.W.2d 701 (Mo.); *Bean v. State,* 398 P.2d 251 (Nev.); *State of New Jersey v. Hodgson,* 44 N.J. 151, 207 A.2d 542; *People v. Gunner,* 15 N.Y.2d 226, 257 N.Y.S.2d 924, 205 N.E.2d 852; *Commonwealth ex rel. Linde v. Maroney,* 416 Pa. 331, 206 A.2d 288; *Browne v. State,* 24 Wis.2d 491, 129 N.W.2d 175, 131 N.W.2d 169.

An ample reading is given in: *United States ex rel. Russo v. State of New Jersey,* 351 F.2d 429 (C.A.3d Cir.); *Wright v. Dickson,* 336 F.2d 878 (C.A. 9th Cir.); *People v. Dorado,* 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361; *State v. Dufour,* 206 A.2d 82 (R.I.); *State v. Neely,* 239 Or. 487, 395 P.2d 557, modified 398 P.2d 482.

The cases in both categories are those readily available; there are certainly many others.

[18] For instance, compare the requirements of the catalytic case of *People v. Dorado,* 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361, with those laid down today. See also Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U.Chi.L.Rev. 657, 670.

[19] The Court's *obiter dictum* notwithstanding ante, p. 1634, there is some basis for believing that the staple of FBI criminal work differs importantly from much crime within the ken of local police. The skill and resources of the FBI may also be unusual.

examination of suspects. However, in the court's discretion confessions can be and apparently quite frequently are admitted in evidence despite disregard of the Judge's Rule, so long as they are found voluntary under the common-law test. Moreover, the check that exists on the use of pretrial statements is counterbalanced by the evident admissibility of fruits of an illegal confession and by the judge's often-used authority to comment adversely on the defendant's failure to testify.[20]

India, Ceylon and Scotland are the other examples chosen by the Court. In India and Ceylon the general ban on police-adduced confessions cited by the Court is subject to a major exception: if evidence is uncovered by police questioning, it is fully admissible at trial along with the confession itself, so far as it relates to the evidence and is not blatantly coerced. See Developments, supra, n. 2, at 1106–1110; *Reg v. Ramasamy* [1965] A.C. 1 (P.C.). Scotland's limits on interrogation do measure up to the Court's; however, restrained comment at trial on the defendant's failure to take the stand is allowed the judge, and in many other respects Scotch law redresses the prosecutor's disadvantage in ways not permitted in this country.[21] The Court ends its survey by imputing added strength to our privilege against self-incrimination since, by contrast to other countries, it is embodied in a written Constitution. Considering the liberties the Court has today taken with constitutional history and precedent, few will find this emphasis persuasive.

In closing this necessarily truncated discussion of policy considerations attending the new confession rules, some reference must be made to their ironic untimeliness. There is now in progress in this country a massive re-examination of criminal law enforcement procedures on a scale never before witnessed. Parcipitants in this undertaking include a Special Committee of the American Bar Association, under the chairmanship of Chief Judge Lumbard of the Court of Appeals for the Second Circuit; a distinguished study group of the American Law Institute, headed by Professors Vorenberg and Bator of the Harvard Law School; and the President's Commission on Law Enforcement and Administration of Justice, under the leadership of the Attorney General of the United States.[22] Studies are also being conducted by the District of Columbia Crime Commission, the Gerogetown Law Center, and by others equipped to do practical research.[23] There are also signs that legislatures in some of the States may be preparing to re-examine the problem before us.[24]

It is no secret that concern has been expressed lest long-range and lasting reforms be frustrated by this Court's too rapid departure from existing constitutional standards. Despite the Court's disclaimer, the practical effect of the decision made today must inevitably be to handicap seriously sound efforts at reform, not least by removing options necessary to a just compromise of competing interests. Of course legislative reform is rarely speedy or unanimous, though this Court has been more patient in the past.[25] But the legislative reforms when they come would have the vast advantage of empirical data and comprehensive study, they would allow experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs.

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[20] For citations and discussion covering each of these points, see Developments, supra, n. 2, at 1091–1097, and Enker & Elsen, supra, n. 12, at 80 & n. 94.

[21] On Comment, see Hardin, Other Answers: Search and Seizure, Coerced Confession, and Criminal Trial in Scotland, 113 U.Pa.L.Rev. 165, 181 and nn. 96–97 (1964). Other examples are less stringent search and seizure rules and no automatic exclusion for violation of them, id., at 167–169; guilt based on majority jury verdicts, id., at 185; and pre-trial discovery of evidence on both sides, id., at 175.

[22] Of particular relevance is the ALI's drafting of a Model Code of Pre-Arraignment Procedure, now in its first tentative draft. While the ABA and National Commission studies have wider scope, the former is lending its advice to the ALI project and the executive director of the latter is one of the reporters for the Model Code.

[23] See Brief for the United States in *Westover,* p. 45. The *N. Y. Times,* June 3, 1966, p. 41 (late city ed.) reported that the Food Foundation has awarded $1,100,000 for a five-year study of arrests and confessions in New York.

[24] The New York Assembly recently passed a bill to require certain warnings before an admissible confession is taken, though the rules are less strict than are the Court's. *N. Y. Times,* May 24, 1966, p. 35 (late city ed.).

[25] The Court waited 12 years after *Wolf v. People of State of Colorado,* 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, declared privacy against improper state intrusions to be constitutionally safeguarded before it concluded in *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, that adequate state remedies had not been provided to protect this interest so the exclusionary rule was necessary.

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## IV. CONCLUSIONS

All four of the cases involved here present express claims that confessions were inadmissible, not because of coercion in the traditional due process sense, but solely because of lack of counsel or lack of warnings concerning counsel and silence. For the reasons stated in this opinion, I would adhere to the due process test and reject the new requirements inaugurated by the Court. On this premise my disposition of each of these cases can be stated briefly.

In two of the three cases coming from state courts, *Miranda v. Arizona* (No. 759) and *Vignera v. New York* (No. 760), the confessions were held admissible and no other errors worth comment are alleged by petitioners. I would affirm in these two cases. The other state case is *California v. Stewart* (No. 584), where the state supreme court held the confession inadmissible and reversed the conviction. In that case I would dismiss the writ of certiorari on the ground that no final judgment is before us, 28 U.S.C. § 1257 (1964 ed.); putting aside the new trial open to the State in any event, the confession itself has not even been finally excluded since the California Supreme Court left the State free to show proof of a waiver. If the merits of the decision in *Stewart* be reached, then I believe it should be reversed and the case remanded so the state supreme court may pass on the other claims available to respondent.

In the federal case, *Westover v. United States* (No. 761), a number of issues are raised by petitioner apart from the one already dealt with in this dissent. None of these other claims appears to me tenable, nor in this context to warrant extended discussion. It is urged that the confession was also inadmissible because not voluntary even measured by due process standards and because federal-state cooperation brought the McNabb-Mallory rule into play under *Anderson v. United States,* 318 U.S. 350, 63 S.Ct. 599, 87 L.Ed. 829. However, the facts alleged fall well short of coercion in my view, and I believe the involvement of federal agents in petitioner's arrest and detention by the State too slight to invoke *Anderson.* I agree with the Government that the admission of the evidence now protested by petitioner was at most harmless error, and two final contentions—one involving weight of the evidence and another improper prosecutor comment—seem to me without merit. I would therefore affirm Westover's conviction.

In conclusion: Nothing in the letter or the spirit of the Constitution or in the precedents squares with the heavy-handed and one-sided action that is so precipitously taken by the Court in the name of fulfilling its constitutional responsibilities. The foray which the Court makes today brings to mind the wise and farsighted words of Mr. Justice Jackson in *Douglas v. City of Jeannette,* 319 U.S. 157, 181, 63 S.Ct. 877, 889, 87 L.Ed. 1324 (separate opinion): "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added."

Mr. Justice White, with whom Mr. Justice Harlan and Mr. Justice Stewart join, dissenting.

### I.

The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment. As for the English authorities and the common-law history, the privilege, firmly established in the second half of the seventeenth century, was never applied except to prohibit compelled judicial interrogations. The rule excluded coerced confessions matured about 100 years later, "[b]ut there is nothing in the reports to suggest that the theory has its roots in the privilege against self-incrimination. And so far as the cases reveal, the privilege, as such, seems to have been given effect only in judicial proceedings, including the preliminary examinations by authorized magistrates." Morgan, the Privilege Against Self-Incrimination, 34 Minn.L.Rev. 1, 18 (1949).

Our own constitutional provision provides that no person "shall be compelled in any criminal case to be a witness against himself." These words, when "[c]onsidered in the light to be shed by grammar and the dictionary * * * appear to signify simply that nobody will be compelled to give oral testimony against himself in a criminal proceeding under way in which he is defendant." Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich.L.Rev. 1, 2. And there is very little in the surrounding circumstances of the adoption of the Fifth Amendment or in the provisions of the then existing state constitutions or in state practice which would give the constitutional provi-

sion any broader meaning. Mayers, The Federal Witness' Privilege Against Self-Incrimination: Constitutional or Common-Law? 4 American Journal of Legal History 107 (1960). Such a construction, however, was considerably narrower than the privilege at common law, and when eventually faced with the issues, the Court extended the constitutional privilege to the compulsory production of books and papers, to the ordinary witness before the grand jury and to witnesses generally. *Boyd v. United States,* 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, and *Counselman v. Hitchcock,* 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110. Both rules had solid support in common-law history, if not in the history of our own constitutional provision.

A few years later the Fifth Amendment privilege was similarly extended to encompass the then well-established rule against coerced confessions: "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment to the constitution of the United States, commanding that no person shall be compelled in any criminal case to be a witness against himself." *Bram v. United States,* 168 U.S. 532, 542, 18 S.Ct. 183, 187, 42 L.Ed. 568. Although this view has found approval in other cases, *Burdeau v. McDowell,* 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048; *Powers v. United States,* 223 U.S. 303, 313, 32 S.Ct. 281, 283, 56 L.Ed. 448; *Shotwell Mfg. Co. v. United States,* 371 U.S. 341, 347, 83 S.Ct. 448, 453, 9 L.Ed.2d 357, it has also been questioned, see *Brown v. State of Mississippi,* 297 U.S. 278, 285, 56 S.Ct. 461, 464, 80 L.Ed. 682; *United States v. Carignan,* 342 U.S. 36, 41, 72 S.Ct. 97, 100, 96 L.Ed. 48; *Stein v. People of State of New York,* 346 U.S. 156, 191, n. 35, 73 S.Ct. 1077, 1095, 97 L.Ed. 1522, and finds scant support in either the English or American authorities, see generally *Regina v. Scott, Dears. & Bell* 47; 3 Wigmore, Evidence § 823 (3d ed. 1940), at 249 ("a confession is not rejected because of any connection with the *privilege against self-incrimination*"), and 250, n. 5 (particularly criticizing *Bram*); 8 Wigmore, Evidence § 2266, at 400–401 (McNaughton rev. 1961). Whatever the source of the rule excluding coerced confessions, it is clear that prior to the application of the privilege itself to state courts, *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653, the admissibility of a confession in a state criminal prosecution was tested by the same standards as were applied in federal prosecutions. Id., at 6–7, 10, 84 S.Ct., at 1492–1493, 1494.

*Bram,* however, itself rejected the proposition which the Court now espouses. The question in *Bram* was whether a confession, obtained during custodial interrogation, had been compelled, and if such interrogation was to be deemed inherently vulnerable the Court's inquiry could have ended there. After examining the English and American authorities, however, the Court declared that:

> "In this court also it has been settled that the mere fact that the confession is made to a police officer, while the accused was under arrest in or out of prison, or was drawn out by his questions, does not necessarily render the question involuntary; but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not the statements of the prisoner were voluntary." 168 U.S., at 558, 18 S.Ct., at 192.

In this respect the Court was wholly consistent with prior and subsequent pronouncements in this Court.

Thus prior to *Bram* the Court, in *Hopt v. People of Territory of Utah,* 110 U.S. 574, 583–587, 4 S.Ct. 202, 206, 28 L.Ed. 262, had upheld the admissibility of a confession made to police officers following arrest, the record being silent concerning what conversation had occurred between the officers and the defendant in the short period preceding the confession. Relying on *Hopt,* the Court ruled squarely on the issue in *Sparf and Hansen v. United States,* 156 U.S. 51, 55, 15 S.Ct. 273, 275, 39 L.Ed. 343:

> "Counsel for the accused insist that there cannot be a voluntary statement, a free, open confession, while a defendant is confined and in irons, under an accusation of having committed a capital offence. We have not been referred to any authority in support of that position. It is true that the fact of a prisoner being in custody at the time he makes a confession is a circumstance not to be overlooked, because it bears upon the inquiry whether the confession was voluntarily made, or was extorted by threats or violence or made under the influence of fear. But confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary and was not obtained by putting the prisoner in fear or by promises. Whart[on's] Cr.Ev. (9th Ed.) §§ 661, 663, and authorities cited."

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Accord, *Pierce v. United States,* 160 U.S. 355, 357, 16 S.Ct. 321, 322, 40 L.Ed. 454.

And in *Wilson v. United States,* 162 U.S. 613, 623, 16 S.Ct. 895, 899, 40 L.Ed. 1090, the Court had considered the significance of custodial interrogation without any antecedent warnings regarding the right to remain silent or the right to counsel. There the defendant had answered questions posed by a Commissioner, who had failed to advise him of his rights, and his answers were held admissible over his claim of involuntariness. "The fact that [a defendant] is in custody and manacled does not necessarily render his statement involuntary, nor is that necessarily the effect of popular excitement shortly proceeding. * * * And it is laid down that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him; but, on the contrary, if the confession was voluntary, it is sufficient, though it appear that he was not so warned."

Since *Bram,* the admissibility of statements made during custodial interrogation has been frequently reiterated. *Powers v. United States,* 223 U.S. 303, 32 S.Ct. 281, cited *Wilson* approvingly and held admissible as voluntary statements the accused's testimony at a preliminary hearing even though he was not warned that what he said might be used against him. Without any discussion of the presence or absence of warnings, presumably because such discussion was deemed unnecessary, numerous other cases have declared that "[t]he mere fact that a confession was made while in the custody of the police does not render it admissible," *McNabb v. United States,* 318 U.S. 332, 346, 63 S.Ct. 608, 615, 87 L.Ed. 819; accord, *United States v. Mitchell,* 322 U.S. 65, 64 S.Ct. 896, 88 L.Ed. 1140, despite its having been elicited by police examination. *Ziang Sung Wan v. United States,* 266 U.S. 1, 14, 45 S.Ct. 3; *United States v. Carignan,* 342 U.S. 36, 39, 72 S.Ct. 97, 99. Likewise, in *Crooker v. State of California,* 357 U.S. 433, 437, 78 S.Ct. 1287, 1290, 2 L.Ed.2d 1448, the Court said that "[t]he bare fact of police 'detention and police examination in private of one in official state custody' does not render involuntary a confession by the one so detained." And finally, in *Canada v. La Gay,* 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523, a confession obtained by police interrogation after arrest was held voluntary even through the authorities refused to permit the defendant to consult with his attorney. See generally *Culombe v. Connecticut,* 367 U.S. 568, 587–602, 81 S.Ct. 1860, 1870, 6 L.Ed.2d 1037 (opinion of Frankfurter, J.); 3 Wigmore, Evidence § 851, at 313 (3d ed. 1940); see also Jay, Admissibility of Confessions 38, 46 (1842).

Only a tiny minority of our judges who have dealt with the question, including today's majority, have considered in-custody interrogation, without more, to be a violation of the Fifth Amendment. And this Court, as every member knows, has left standing literally thousands of criminal convictions that rested at least in part on confessions taken in the course of interrogation by the police after arrest.

**II.**

That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment. It does, however, underscore the obvious—that the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution.[1] This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.

But if the Court is here and now to announce new and fundamental policy to govern certain aspects of our affairs, it is wholly legitimate to examine the mode of this or any other constitutional decision in this Court and to inquire into the advisability of its end product in terms of the long-range interest of the country. At the very least, the Court's text and reasoning should withstand analysis and be a fair exposition of the constitutional provision which its opinion interprets. Decisions like these can-

[1] Of course the Court does not deny that it is departing from prior precedent; it expressly overrules *Crooker* and *Cicenia,* ante, at 1630, n. 48, and it acknowledges that in the instant "cases we might not find the defendants' statements to have been involuntary in traditional terms," ante, at 1618.

not rest alone on syllogism, metaphysics or some ill-defined notions of natural justice, although each will perhaps play its part. In proceeding to such constructions as it now announces, the Court should also duly consider all the factors and interests bearing upon the cases, at least insofar as the relevant materials are available; and if the necessary considerations are not treated in the record or obtainable from some other reliable source, the Court should not proceed to formulate fundamental policies based on speculation alone.

**III.**

First, we may inquire what are the textual and factual bases of this new fundamental rule. To reach the result announced on the grounds it does, the Court must stay within the confines of the Fifth Amendment, which forbids self-incrimination only if *compelled.* Hence the core of the Court's opinion is that because of the "compulsion inherent in custodial surroundings, no statement obtained from [a] defendant [in custody] can truly be the product of his free choice," ante, at 1619, absent the use of adequate protective devices as described by the Court. However, the Court does not point to any sudden inrush of new knowledge requiring the rejection of 70 years' experience. Nor does it assert that its novel conclusion reflects a changing consensus among state courts, see *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, or that a succession of cases had steadily eroded the old rule and proved it unworkable, see *Gideon v. Wainwright,* 372 U.S. 355, 83 S.Ct. 792, 9 L.Ed.2d 799. Rather than asserting new knowledge, the Court concedes that it cannot truly know what occurs during custodial questioning, because of the innate secrecy of such proceedings. It extrapolates a picture of what it conceives to be the norm from police investigatorial manuals, published in 1959 and 1962 or earlier, without any attempt to allow for adjustments in police practices that may have occurred in the wake of more recent decisions of state appellate tribunals or this Court. But even if the relentless application of the described procedures could lead to involuntary confessions, it most assuredly does not follow that each and every case will disclose this kind of interrogation or this kind of consequence.[2] Insofar as appears from the Court's opinion, it has not examined a single transcript of any police interrogation, let alone the interrogation that took place in any one of these cases which it decides today. Judged by any of the standards for empirical investigation utilized in the social sciences the factual basis for the Court's premise is patently inadequate.

Although in the Court's view in-custody interrogation is inherently coercive, the Court says that the spontaneous product of the coercion of arrest and detention is still to be deemed voluntary. An accused, arrested on probable cause, may blurt out a confession which will be admissible despite the fact that he is alone and in custody, without any showing that he had any notion of his right to remain silent or of the consequences of his admission. Yet, under the Court's rule, if the police ask him a single question such as "Do you have anything to say?" or "Did you kill your wife?" his response, if there is one, has somehow been compelled, even if the accused has been clearly warned of his right to remain silent. Common sense informs us to the contrary. While one may say that the response was "involuntary" in the sense the question provoked or was the occasion for the response and thus the defendant was induced to speak out when he might have remained silent if not arrested and not questioned, it is patently unsound to say the response is compelled.

Today's result would not follow even if it were agreed that to some extent custodial interrogation is inherently coercive. See *Ashcraft v. State of Tennessee,* 322 U.S. 143, 161, 64 S.Ct. 921, 929, 88 L.Ed. 1192 (Jackson, J., dissenting). The test has been whether the totality of circumstances deprived the defendant of a "free choice to admit, to deny, or to refuse to answer," *Lisenba v. People of State of California,* 314 U.S. 219, 241, 62 S.Ct. 280, 292, 86 L.Ed. 166, and whether physical or psychological coercion was of such a degree that "the defendant's will was overborne at the time he confessed," *Haynes v. State of Washington,* 373 U.S. 503, 513, 83 S.Ct. 1336, 1343, 10 L.Ed.2d 513; *Lynumn v. State of*

[2] In fact, the type of sustained interrogation described by the Court appears to be the exception rather than the rule. A survey of 399 cases in one city found that in almost half of the cases the interrogation lasted less than 30 minutes. Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif.L.Rev. 11, 41–45 (1962). Questioning tends to be confused and sporadic and is usually concentrated on confrontations with witnesses or new items of evidence, as these are obtained by officers conducting the investigation. See generally LaFave, Arrest: The Decision to Take a Suspect into Custody 386 (1965); ALI, A Model Code of Pre-Arraignment Procedure, Commentary § 5.01, at 170, n. 4 (Tent.Draft No. 1, 1966).

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*Illinois,* 372 U.S. 528, 534, 83 S.Ct. 917, 920, 9 L.Ed.2d 922. The duration and nature of incommunicado custody, the presence or absence of advice concerning the defendant's constitutional rights, and the granting or refusal of requests to communicate with lawyers, relatives or friends have all been rightly regarded as important data bearing on the basic inquiry. See, e. g., *Ashcraft v. State of Tennessee,* 322 U.S. 143, 64 S.Ct. 921; *Haynes v. State of Washington,* 373 U.S. 503, 83 S.Ct. 1336.[3] But it has never been suggested, until today, that such questioning was so coercive and accused persons so lacking in hardihood that the very first response to the very first question following the commencement of custody must be conclusively presumed to be the product of an overborne will.

If the rule announced today were truly based on a conclusion that all confessions resulting from custodial interrogation are coerced, then it would simply have no rational foundation. Compare *Tot v. United States,* 319 U.S. 463, 466, 63 S.Ct. 1241, 1244, 87 L.Ed. 1519; *United States v. Romano,* 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210. A *fortiori* that would be true of the extension of the rule to exculpatory statements, which the Court effects after a brief discussion of why, in the Court's view, they must be deemed incriminatory but without any discussion of why they must be deemed coerced. See *Wilson v. United States,* 162 U.S. 613, 624, 16 S.Ct. 895, 900, 40 L.Ed. 1090. Even if one were to postulate that the Court's concern is not that all confessions included by police interrogation are coerced but rather that some such confessions are coerced and present judicial procedures are believed to be inadequate to identify the confessions that are coerced and those that are not, it would still not be essential to impose the rule that the Court has now fashioned. Transcripts or observers could be required, specific time limits, tailored to fit the cause, could be imposed, or other devices could be utilized to reduce the chances that otherwise indiscernible coercion will produce inadmissible confession.

On the other hand, even if one assumed that there was an adequate factual basis for the conclusion that all confessions obtained during incustody interrogation and the product of compulsion, the rule propounded by the Court will still be irrational, for, apparently, it is only if the accused is also warned of his right to counsel and waives both that right and the right against self-incrimination that the inherent compulsiveness of interrogation disappears. But if the defendant may not answer without a warning a question such as "Where were you last night?" without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint? And why if counsel is present and the accused nevertheless confesses, or counsel tells the accused to tell the truth, and that is what the accused does, is the situation any less coercive insofar as the accused is concerned? The Court apparently realizes its dilemma of foreclosing questioning without the necessary warnings but at the same time permitting the accused, sitting in the same chair in front of the same policeman, to waive his right to consult an attorney. It expects, however, that the accused will not often waive the right; and if it is claimed that he has, the State faces a severe, if not impossible burden of proof.

All of this makes very little sense in terms of the compulsion which the Fifth Amendment proscribes. That amendment deals with compelling the accused himself. It is his free will that is involved. Confessions and incriminating admissions, as such, as not forbidden evidence; only those which are compelled are banned. I doubt that the Court observes these distinctions today. By considering any answers to any interrogation to be compelled regardless of the content and course of examination and by escalating the requirements to prove waiver, the Court not only prevents the use of compelled confessions but for all practical purposes forbids interrogation except in the presence of counsel. That is, instead of confining itself to protection of the right

[3] By contrast, the Court indicates that in applying this new rule it "will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." Ante, at 1625. The reason given is that assessment of the knowledge of the defendant based on information as to age, education, intelligence, or prior contact with authorities can never be more than speculation, while a warning is a clear-cut fact. But the officers' claim that they gave the requisite warnings may be disputed, and facts respecting the defendant's prior experience may be undisputed and be of such a nature as to virtually preclude any doubt that the defendant knew of his rights. See *United States v. Bolden,* 355 F.2d 453 (C.A.7th Cir.1965), petition for cert. pending No. 1146, O.T. 1965 (Secret Service agent); *People v. Du Bont,* 235 Cal.App.2d 844, 45 Cal.Rptr. 717, pet. for cert. pending No. 1053, Misc., O. T. 1965 (former police officer).

against compelled self-incrimination the Court has created a limited Fifth Amendment right to counsel—or, as the Court expresses it, a "need for counsel to protect the Fifth Amendment privilege * * *." Ante, at 1625. The focus then is not on the will of the accused but on the will of the counsel and how much influence he can have on the accused. Obviously there is no warrant in the Fifth Amendment for thus installing counsel as the arbiter of the privilege.

In sum, for all the Court's expounding on the menacing atmosphere of police interrogation procedures, it has failed to supply any foundation for the conclusions it draws or the measures it adopts.

**IV.**

Criticism of the Court's opinion, however, cannot stop with a demonstration that the factual and textual bases for the rule it propounds are, at best, less than compelling. Equally relevant is an assessment of the rule's of the rule's consequences measured against community values. The Court's duty to assess the consequences of its action is not satisfied by the utterance of the truth that a value of our system of criminal justice is "to respect the inviolability of the human personality" and to require government to produce the evidence against the accused by its own independent labors. Ante, at 1620. More than the human dignity of the accused is involved; the human personality of others in the society must also be preserved. Thus the values reflected by the privilege are not the sole desideratum; society's interest in the general security is of equal weight.

The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions. As the Court declares that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not. This is the not so subtle overtone of the opinion—that it is inherently wrong for the police to gather evidence from the accused himself. And this is precisely the nub of this dissent. I see nothing wrong or immoral, and certainly nothing unconstitutional, in the police's asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife or in confronting him with the evidence on which the arrest was based, at least where he has been plainly advised that he may remain completely silent, see *Escobedo v. State of Illinois,* 378 U.S. 478, 499, 84 S.Ct. 1758, 1769, 12 L.Ed.2d 977 (dissenting opinion). Until today, "the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence." *Brown v. Walker,* 161 U.S. 591, 596, 16 S.Ct. 644, 646, 40 L.Ed. 819, see also *Hopt v. People of Territory of Utah,* 110 U.S. 574, 584–585, 4 S.Ct. 202, 207. Particularly when corroborated, as where the police have confirmed the accused's disclosure of the hiding place of implements or fruits of the crime, such confessions have the highest reliability and significantly contribute to the certitude with which we may believe the accused is guilty. Moreover, it is by no means certain that the process of confessing is injurious to the accused. To the contrary it may provide psychological relief and enhance the prospects for rehabilitation.

This is not to say that the value of respect for the inviolability of the accused's individual personality should be accorded no weight or that all confessions should be indiscriminately admitted. This Court has long read the Constitution to proscribe compelled confessions, a salutary rule from which there should be no retreat. But I see no sound basis, factual or otherwise, and the Court gives none, for concluding that the present rule against the receipt of coerced confessions is inadequate for the task of sorting out inadmissible evidence and must be replaced by the *per se* rule which is now imposed. Even if the new concept can be said to have advantages of some sort over the present law, they are far outweighed but its likely undesirable impact on other very relevant and important interests.

The most basic function of any government is to provide for the security of the individual and for his property. *Lanzetta v. State of New Jersey,* 306 U.S. 451, 455, 59 S.Ct., 618, 619, 83 L.Ed. 888. These ends of society are served by the criminal laws which for the most part are aimed at the prevention of crime. Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values.

The modes by which the criminal laws serve the interest in general security are many. First

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the murderer who has taken the life of another is removed from the streets, deprived of his liberty and thereby prevented from repeating his offense. In view of the statistics on recidivism in this country[4] and of the number of instances in which apprehension occurs only after repeated offenses, no one can sensibly claim that this aspect of the criminal law does not prevent crime or contribute significantly to the personal security of the ordinary citizen.

Secondly, the swift and sure apprehension of those who refuse to respect the personal security and dignity of their neighbor unquestionably has its impact on others who might be similarly tempted. That the criminal law is wholly or partly ineffective with a segment of the population or with many of those who have been apprehended and convicted is a very faulty basis for concluding that it is not effective with respect to the great bulk of our citizens or for thinking that without the criminal laws, or in the absence of their enforcement, there would be no increase in crime. Arguments of this nature are not borne out by any kind of reliable evidence that I have seen to this date.

Thirdly, the law concerns itself with those whom it has confined. The hope and aim of modern penology, fortunately, is as soon as possible to return the convict to society a better and more law-abiding man than when he left. Sometimes there is success, sometimes failure. But at least the effort is made, and it should be made to the very maximum extent of our present and future capabilities.

The rule announced today will measurably waken the ability of the criminal law to perform these tasks. It is a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty and to increase the number of trials.[5] Criminal trials, no matter how efficient the police are, are not sure bets for the prosecution, nor should they be if the evidence is not forthcoming. Under the present law, the prosecution fails to prove its case in about 30% of the criminal cases actually tried in the federal courts. See Federal Offenders: 1964, supra, note 4, at 6 (Table 4), 59 (Table 1); Federal Offenders; 1963, supra, note 4, at 5 (Table 3); District of Columbia Offenders; 1963, supra, note 4, at 2 (Table 1). But it is something else again to remove from the ordinary criminal case all those confessions which heretofore have been held to be free and voluntary acts of the accused and to thus establish a new constitutional barrier to the ascertainment of truth by the judicial process. There is, in my view, every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if

[4] Precise statistics on the extent of recidivism are unavailable, in part because not all crimes are solved and in part because criminal records of convictions in different jurisdictions are not brought together by a central data collection agency. Beginning in 1963, however, the Federal Bureau of Investigation began collating data on "Careers in Crime," which it publishes in its Uniform Crime Reports. Of 92,869 offenders processed in 1963 and 1964, 76% had a prior arrest record on some charge. Over a period of 10 years the group had accumulated 434,000 charges. FBI, Uniform Crime Reports — 1964, 27–28. In 1963 and 1964 between 23% and 25% of all offenders sentenced in 88 federal district courts (excluding the District Court for the District of Columbia) whose criminal records were reported had previously been sentenced to at term of imprisonment of 13 months or more. Approximately an additional 40% had a prior record less than prison (juvenile record, probation record, etc.). Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1964, x, 36 (hereinafter cited as Federal Offenders: 1964); Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1963, 25–27 (hereinafter cited as Federal Offenders: 1963). During the same two years in the District Court for the District of Columbia between 28% and 35% of those sentenced had prior prison records and from 37% to 40% had a prior record less than prison. Federal Offenders: 1964, xii, 64, 66; Administrative Office of the United States Courts, Federal Offenders in the United States District Court for the District of Columbia; 1963, 8, 10 (hereinafter cited as District of Columbia Offenders: 1963).

A similar picture is obtained if one looks at the subsequent records of those released from confinement. In 1964, 12.3% of persons on federal probation had their probation revoked because of the commission of major violations (defined as one in which the probationer has been committed to imprisonment for a period of 90 days or more, been placed on probation for over one year on a new offense, or has absconded with felony charges outstanding). Twenty-three and two-tenths percent of paroles and 16.9% of those who had been mandatorily released after service of a portion of their sentence likewise committed major violations. Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts: 1965, 138. See also Mandel et al., Recidivism Studied and Defined, 56 J. Crim.L., C. & P.S. 59 (1965) (within five years of release 62.33% of sample had committed offenses placing them in recidivist category).

[5] Eighty-eight federal district courts (excluding the District Court for the District of Columbia) disposed of the cases of

the State's evidence, minus the confessions, is put to the test of litigation.

I have no desire whatsoever to share the responsibility for any such impact on the present criminal process.

In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case.

Nor can this decision do other than have a corrosive effect on the criminal laws as an effective device to prevent crime. A major component in its effectiveness in this regard is its swift and sure enforcement. The easier it is to get away with rape and murder, the less the deterrent effect on those who are inclined to attempt it. This is still good common sense. If it were not, we should posthaste liquidate the whole law enforcement establishment as a useless, misguided effort to control human conduct.

33,381 criminal defendants in 1964. Only 12.5% of those cases were actually tried. Of the remaining cases, 89.9% were terminated by convictions upon pleas of guilty and 10.1% were dismissed. Stated differently, approximately 90% of all convictions resulted from guilty pleas. Federal Offenders: 1964, supra, note 4, 3–6. In the District Court for the District of Columbia a higher percentage, 27%, went to trial, and the defendant pleaded guilty in approximately 78% of the cases terminated prior to trial. *Id.*, at 58–59. No reliable statistics are available concerning the percentage of cases in which guilty pleas are induced because of the existence of a confession or of physical evidence unearthed as a result of a confession. Undoubtedly the number of such cases is substantial.

Perhaps of equal significance is the number of instances of known crimes which are not solved. In 1964, only 388, 946, or 23.9% of 1,626,574 serious known offenses were cleared. The clearance rate ranged from 89.8% for homicides to 18.7% for larceny. FBI, Uniform Crime Reports — 1964, 20–22, 101. Those who would replace interrogation as an investigatorial tool by modern scientific investigation techniques significantly overestimate the effectiveness of present procedures, even when interrogation is included.

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And what about the accused who has confessed or would confess in response to simple, noncoercive questioning and whose guilt could not otherwise be proved? Is it so clear that release is the best thing for him in every case? Has it so unquestionably been resolved that in each and every case it would be better for him not to confess and to return to his environment with no attempt whatsoever to help him? I think not. It may well be that in many cases it will be no less than a callous disregard for his own welfare as well as for the interests of his next victim.

There is another aspect to the effect of the Court's rule on the person whom the police have arrested on probable cause. The fact is that he may not be guilty at all and may be able to extricate himself quickly and simply if he were told the circumstances of his arrest and were asked to explain. This effort, and his release, must now await the hiring of a lawyer or his appointment by the court, consultation with counsel and then a session with the police or the prosecutor. Similarly, where probable cause exists to arrest several suspects, as where the body of the victim is discovered in a house having several residents, compare *Johnson v. State*, 238 Md. 140, 207 A.2d 643 (1965), cert. denied, 382 U.S. 1013, 86 S.Ct. 623, 15 L.Ed.2d 528, it will often be true that a suspect may be cleared only through the results of interrogation of other suspects. Here too the release of the innocent may be delayed by the Court's rule.

Much of the trouble with the Court's new rule is that it will operate indiscriminately in all criminal cases, regardless of the severity of the crime or the circumstances involved. It applies to every defendant, whether the professional criminal or one committing a crime of momentary passion who is not part and parcel of organized crime. It will slow down the investigation and the apprehension of confederates in those cases where time is of the essence, such as kidnapping, see *Brinegar v. United States,* 338 U.S. 160, 183, 69 S.Ct. 1302, 1314, 93 L.Ed 1879 (Jackson, J., dissenting); *People v. Modesto,* 62 Cal.2d 436, 446, 42 Cal.Rptr. 417, 423, 398 P.2d 753, 759 (1965), those involving the national security, see *United States v. Drummond,* 354 F.2d 132, 147 (C.A.2d Cir. 1965) (*en banc*) (espionage case), pet. for cert. pending, No. 1203, Misc., O.T. 1965; cf. *Gessner v. United States,* 354 F.2d 726, 730, n. 10 (C.A.10th Cir. 1965) (upholding, in espionage case, trial ruling that

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Government need not submit classified portions of interrogation transcript), and some of those involving organized crime. In the later context the lawyer who arrives may also be the lawyer for the defendant's colleagues and can be relied upon to insure that no breach of the organization's security takes place even though the accused may feel that the best thing he can do is to cooperate.

At the same time, the Court's *per se* approach may not be justified on the ground that it provides a "bright line" permitting the authorities to judge in advance whether interrogation may safely be pursued without jeopardizing the admissibility of any information obtained as a consequence. Nor can it be claimed that judicial time and effort, assuming that is a relevant consideration, will be conserved because of the ease of application of the new rule. Today's decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, and whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation, all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution. For all these reasons, if further restrictions on police interrogation are desirable at this time, a more flexible approach makes much more sense than the Court's constitutional straightjacket which forecloses more discriminating treatment by legislative or rule-making pronouncements.

Applying the traditional standards to the cases before the Court, I would hold these confessions voluntary. I would therefore affirm in Nos. 759, 760, and 761, and reverse in No. 584.

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# New York Times v. Sullivan

## ISSUE

Freedoms of Speech and Press

## HOW TO USE MILESTONES IN THE LAW

In this section, the reader is invited to study the court opinions and briefs* that shaped a major facet of First Amendment law. As you read the following pages, you may wish to consider these issues:

- What were the inaccuracies upon which Sullivan's claims of libel were based?
- What about the advertisement made Sullivan believe it was directed at him?
- How did the descriptions of the issues before the Court, and of their significance, differ as presented by the different parties?
- What facts and legal principles did the Alabama Supreme Court rely on for its decision, and how was the U.S. Supreme Court's approach different?
- What sorts of misstatements about a government official do you think would be permissible, and impermissible, under this case?

*The Court heard the cases between Sullivan and the *Times*, and Sullivan and the four clergymen, together. Both sets of briefs are included.

## THIS CASE IN HISTORY

*New York Times v. Sullivan*, handed down in the midst of the civil rights movement, changed the inquiry for libel actions, strengthening the freedoms of speech and press when directed at government behavior. L. B. Sullivan, a city commissioner in Montgomery, Alabama, sued the *Times* and four black clergymen over an advertisement placed by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. The full page ad, which described abuses that students and civil rights activists had suffered at the hands of police and state authorities in various southern cities, contained several inaccuracies. Though the inaccuracies were minor, the Supreme Court of Alabama upheld a judgment of $500,000 against the defendants. In a unanimous 9–0 decision, the U.S. Supreme Court reversed, holding that public officials cannot recover damages for false statements regarding their official conduct unless they can prove actual malice—that is, that the defendant or defendants knew the statements were false or made them with reckless disregard as to whether they were true or false. The decision freed the press and others to comment on government conduct by reducing fears of enormous damage awards based on minor inaccuracies.

# New York Times Company v. Sullivan

SUPREME COURT OF ALABAMA, AUGUST 1962

**CITE AS 144 SO.2D 25**

THE NEW YORK TIMES COMPANY ET AL.
V.
L. B. SULLIVAN.
3 DIV. 961.

Supreme Court of Alabama.
Aug. 30, 1962.

Suit for libel against nonresident, corporate, newspaper publisher and others. The Circuit Court, Montgomery County, Walter B. Jones, J., entered a judgment for the plaintiff and the defendants appealed. The Supreme Court, Harwood, J., held that the publication of libelous matter in another state and the distribution of such matter within Alabama gave rise to a cause of action for libel in Alabama, and the evidence justified an award of $500,000 damages.

Affirmed.

Activities of foreign corporation, which published newspaper and sent representatives into Alabama to solicit advertisements and gather news stories, were amply sufficient to meet minimal standards required for service of process in libel suit on corporation's resident "stringer" correspondent who was paid only for such articles as were accepted by corporation. Laws 1953, p. 347.

Statute providing for substituted service on nonresident corporations fully meets requirements of due process. Laws 1953, p. 347.

Affidavit filed by plaintiff, suing foreign newspaper corporation for libel, stated, sufficient facts to invoke statute providing substituted service on nonresident corporation. Laws 1953, p. 347.

Legislature's purpose in calling for affidavit to invoke substituted service statute was not to require detailed quo modo of business done but to furnish Secretary of Stare with sufficient information so that he could perform duties imposed on him. Laws 1953, p. 347.

Ultimate determination of whether nonresident corporation has done business in state or performed work or services in state, and whether cause of action accrues from such acts, thereby coming within substituted service statute, is judicial and not ministerial. Laws 1953, p. 347.

When nonresident prints libel beyond boundaries of state and distributes published libel in Alabama, cause of action for libel arises in Alabama as well as in state of printing or publishing of libel.

Where foreign newspaper corporation published libelous advertisement in New York and sent its papers into Alabama with carrier as its agent, freight prepaid, and with title passing on delivery to consignee, cause of action for libel arose from acts of newspaper in Alabama. Code 1940, Tit. 57, § 25; Laws 1953, p. 347.

Scope of substituted service is as broad as permissible limits of due process. Laws 1953, p. 347.

Nonresident corporation, by including in motion to quash service of process, prayer that court dismiss action as to corporation for lack of jurisdiction of subject matter of action, went beyond question of jurisdiction over corporate person and made a general appearance which waived any defects in service of process and submitted its corporate person to jurisdiction of court.

Pleading based on lack of jurisdiction of person are in their nature pleas in abatement which find no special favor in law, are purely dilatory and amount to no more than declaration that defendant is in court in proper action, after actual notice, but because of defect in service he is not legally before court.

Where words published tend to injure person libeled by them in his reputation, profession, trade or business, or charge him with indictable offense, or tend to bring individual into public contempt words are libelous per se.

Publication is not to be measured by its effect when subjected to critical analysis of trained legal mind, but must be construed and determined by its natural and probable effect upon mind of average lay reader.

Impersonal reproach of indeterminate class is not actionable but if words may by any reasonable application import charge against several defendants, under some general description of general name, it is for jury to decide whether charge has personal application averred by plaintiff.

Court would judicially know that City of Montgomery operates under commission form

SUPREME COURT OF ALABAMA, AUGUST 1962

of government and that by provision of statute executive and administrative powers are distributed into departments of public health and public safety; streets, parks and public property and improvements; accounts, finances, and public affairs; and that assignments of commissioners may be changed at any time by majority of board. Laws 1931, p. 30; Code 1940, Tit. 37, § 51.

It is common knowledge that average person knows that municipal agents such as police and firemen are under control and direction of city governing body, and more particularly under direction and control of a single commissioner. Code 1940, Tit. 37, § 51.

Advertisement which falsely recounted activities of city police on college campus and elsewhere was libelous per se, and libelous matter was of and connected with plaintiff police commissioner.

Where advertisement was libelous per se it was not necessary to allege special damages and complaint could be very simple and brief and there was no need to set forth innuendo.

Complaint referring to false advertisement concerning police activities was sufficient to state a cause of action for libel in favor of plaintiff police commissioner.

Broad right of parties to interrogate jurors as to interest or bias is limited by propriety and pertinence and is exercised within sound discretion of trial court. Code 1940, Tit. 30, § 52.

Refusal to allow newspaper sued for libel to ask certain questions of jury venire as to bias against newspaper was not an abuse of discretion where prospective jurors had already indicated that there was no reason which would cause them to hesitate to return a verdict for newspaper. Code 1940, Tit. 30, § 52.

Refusal to allow defendant newspaper, being sued for libel, to ask of jury venire if any of them had been plaintiffs in litigation in court was not an abuse of discretion, considering completeness of qualification of prospective jurors and remoteness of question. Code 1940, Tit. 30, § 52.

First Amendment of United States Constitution does not protect libelous publications. U.S.C.A.Const. Amend. 1.

Fourteenth Amendment of United States Constitution is directed against state and not private action. U.S.C.A.Const. Amend. 14.

Where words are actionable per se complaint need not specify damages and proof of pecuniary injury is not required since such injury is implied.

Testimony of witness that they associated libelous statements in advertisement with plaintiff who was suing defendant newspaper was admissible. Code 1940, Tit. 7, § 910.

Admission of testimony by witness, who had already testified that they had associated plaintiff with libelous advertisement, that if they had believed matter contained in advertisement they would have thought less of plaintiff was not error on ground that answers were hypothetical and implied that witness thought ad was published of an concerning plaintiff.

Proof of common knowledge is harmless though it is unnecessary to offer such proof. Supreme Court Rules, rule 45.

It is matter of common knowledge that publication of matter that is libelous per se would, of believed, lessen person in eyes of any recipient of libel.

Court's reference to witness for defendant newspaper in libel action as a very high official of newspaper was not, in view of witness' background and state of record, reversible error. Supreme Court Rules, rule 45.

Where no objections were interposed to argument of counsel nothing was presented for review by claim of prejudicial statements of counsel in argument.

Defendant newspaper could not predicate error in libel trial because of hostile newspaper articles where at no time did defendant suggest continuance or charge of venue.

Defendant newspaper could not predicate error in libel trial due to presence of photographers in courtroom where at no time did was an objection interposed to their presence.

Where newly discovered evidence was not basis of motion for new trial court was confined, upon hearing motion, to matters contained in record of trial.

Court's oral charge must be considered as whole and if instruction as a whole states law correctly there is no reversible error even though part of instruction, when considered alone, might be erroneous.

Charge of court, when considered as whole, was a fair, accurate, and clear expression of gov-

erning principles and that portion of charge which referred to libelous advertisement aimed at plaintiff did not remove from jury question of whether advertisement was of an concerning plaintiff.

Statement that counsel excepted to described portions of court's charge was descriptive of subject matter only and was too indefinite to invite review.

Charges instructing jury that if the jury "find" or "find from the evidence" were refused without error in that predicate for jury's determination in civil suit is "reasonably satisfied from the evidence."

Court cannot be reversed for refusal of charges which are not expressed in exact and appropriate terms of law.

Judgment will not be reversed or affirmed because of refusal, or giving, of "belief" charges.

Refusal to sustain individual defendant's objection in libel action to way one of plaintiff's counsel pronounced word "Negro" presented nothing for review where no further objections were interposed after colloquy between court and counsel and no exceptions were reserved.

Claims that error infected record in libel action because courtroom was segregated during trial and because judge was not legally elected due to alleged deprivation of Negro voting rights could not be presented for review where such matters were not presented in trial below.

Claim that parties were deprived of fair trial in that judge was, by virtue of statute, member of jury commission must be considered waived where it was not raised in trial below. Loc.Laws 1939, p. 66.

Where there are no judgments on motion for new trial and such motions had become discontinued, assignments attempting to raise questions as to weight of evidence and excessiveness of damages were ineffective and presented nothing for review on appeal.

Questions as to weight of evidence and excessiveness of damages can be presented only by motion for new trial.

Evidence authorized award of $500,000 damages against defendant newspaper for publication of libelous advertisement and against individual defendants who subscribed their names to such advertisement.

There is presumption of correctness of verdict where trial judge has refused to grant new trial.

SUPREME COURT OF ALABAMA, AUGUST 1962

T. Eric Embry, Beddow, Embry & Beddow and Fred Blanton, Birmingham, and Lord, Day & Lord and Herbert Wechsler, New York City, for appellant New York Times.

Chas. S. Conley and Vernon Z. Crawford, Montgomery. for individual appellants.

R. E. Steiner, III, Sam Rice Baker, M. R. Nachman, Jr., Steiner, Crum & Baker and Calvin M. Whitesell, Montgomery, for appellee.

Harwood, Justice.

This is an appeal from a judgment in the amount of $500,000.00 awarded as damages in a libel suit. The plaintiff below was L. B. Sullivan, a member of the Board of Commissioners of the City of Montgomery, where he served as Police Commissioner. The defendants below were *The New York Times*, a corporation, and four individuals, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery.

Service of the complaint upon *The New York Times* was by personal service upon Dan McKee as an agent of the defendant, and also by publication pursuant to the provisions of Sec. 199(1) of Tit. 7, Code of Alabama 1940.

*The Times* moved to quash service upon it upon the grounds that McKee was not its agent, and *The Times*, a foreign corporation, was not doing business in Alabama, and that service under Sec. 199(1) was improper, and to sustain either of the services upon it would be unconstitutional.

After hearing upon the motion to quash, the lower court denied such motion.

In this connection the plaintiff presented evidence tending to show *The Times* gathers new from national press services, from its staff correspondents, and from string correspondents, sometimes called "stringers."

*The Times* maintained a staff correspondent in Atlanta, Claude Sitton, who covered eleven southern states, including Alabama.

During the period from 1956 through April 1960, regular staff correspondents of *The Times* spent 153 days in Alabama to gather new articles for submission to *The Times*. Forty-nine staff news articles so gathered were introduced in evidence.

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Sitton himself was assigned to cover in Alabama, at various times, the so-called "demonstrations," the hearings of the Civil Rights Commission in Montgomery, and proceedings in the United States District Court in Montgomery. During his work in Alabama, he also conducted investigations and interviews in such places as Clayton and Union Springs. On some of his visits to Alabama, Sitton would stat as long as a week or ten days.

In May of 1960, he came to Alabama for the purpose of covering the Martin Luther King trial. After his arrival in Montgomery, he "understood" an attempt would be made to serve him. He contacted Mr. Roderick McLeod Jr., an attorney representing The Times, and was advised to leave Alabama. Shortly after this he call McKee, the "stringer" in Montgomery, and talked generally about the King trial with him.

In addition, *The Times* made an active effort to keep a resident "stringer" in Montgomery at all times, and as a matter of policy wanted to have three "stringers" in Alabama at all times.

The work of "stringers" was outlined by Sitton as follows: "When *The Times* feels there is a news story of note going on in an area where a particular stringer lives * * * The Times calls on a stringer for a story."

"Stringers" fill out blank cards required by *The Times*, which refer to them as "our correspondents." Detailed instructions are also given to "stringers" by *The Times*.

"Stringers" also on occasions initiate stories to *The Times* by telephone recordation. If these stories were not accepted, *The Times* pays the telephone tolls.

A "stringer" is usually employed by another newspaper, or news agency and is called upon for stories occasionally, or offers upon for stories his own. A "stringer" is paid at about the rate of a penny a word. No deductions are made from these payments for such things as income tax, social security, insurance contributions, etc., and "stringers" are not carried on the payroll of *The Times*. Up to July 25 for the year 1960, *The Times* he paid Chadwick, the "stringer" in Birmingham, $135.00 for stories accepted, and paid McKee $90.00.

It further appears that upon receipt of a letter from the plaintiff Sullivan demanding a retraction and apology for the statements appearing in the advertisement, which is the basis of this suit, the general counsel of *The Times* in New York requested the Assistant Managing Editor of *The Times* to have an investigation made of the correctness of the facts set forth in the advertisement in question. *The Times* thereupon communicated with McKee and asked for a report. After his investigation, McKee sent a lengthy wire to *The Times* setting forth facts which demonstrated with clarity the utter falsity of the allegations contained in the advertisement. McKee was also paid $25.00 by *The Times* for help given Harrison Salisbury, a staff correspondent of *The Times* when he was in Alabama on an assignment in the spring of 1960.

*The Times* also has a news service and sells to other papers stories sent it by its staff correspondents, "stringers," and local reporters. In this connection the lower court observed:

> "Obviously, The Times considered the news gathering activities of these staff correspondents and 'stringers' a valuable and unique complement to the news gathering facilities of the Associated Press and other wire services of which The Times is a member. The stories of the 'stringers' appear under the 'slug' 'Special to The New York Times,' and there were 59 such 'specials' in the period from January 1, 1956, through April of 1960."

### ADVERTISING

About three quarters of the revenue of *The Times* comes from advertisements. In 1956, The New York Times Sales, Inc., was set up. This a wholly owned subsidiary of *The Times* and its sole function is to solicit advertising for *The Times* only.

All of the officials of "Sales" are also officials of *The Times*.

Two solicitors for "Sales," as well as two employees of *The Times* have at various times come into Alabama seeking advertising for the *The Times*. Between July 1959 and June 3, 1960, one representative spent over a week in this State, another spent a week and a third spent three days. Advertising business was solicited in Birmingham, Montgomery, Mobile, and Selma. Between January 1, 1960 and May 1960, inclusive, approximately seventeen to eighteen thousand dollars worth of advertising was thus sold in Alabama, while in the period of 1956 through April 1960, revenues of $26, 801.64 were realized by *The Times* from Alabama advertisers.

**CIRCULATION**

*The Times* sends about 390 daily, and 2,500 Sunday editions into Alabama.

Shipments are made by mail, rail, and air, with transportation charges being prepaid by *The Times*. Dealers are charged for the papers.

Credit is given for unsold papers and any loss in transit is paid by *The Times*.

Claims for losses are handled by baggagemen in Alabama, and *The Times* furnished claim cards to dealers who bring them to the baggagemen, *The Times* paying for losses or incomplete copies upon substantiation by the local Alabama baggagemen.

Account cards of various Alabama *Times* dealers show that credit was thus given for unsold merchandise.

We are here confronted with the question of in personal jurisdiction acquired by service upon an alleged representative of a foreign corporation.

The severe limitations of the doctrine of *Bank of Augusta v. Earle* (1839) 13 Pet. 519, 13 U.S. 519, 10 L.Ed.2d 274, that a corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty," proving unsatisfactory, the courts, by resort to fictions of "presence," "consent," and "doing business," attempted to find answers compatible with social and economic needs. Until comparatively recent years these bases of jurisdictions have tended only to confuse rather than clarify, leading the late Judge Learned Hand to remark that it was impossible to determine any established rule, but that "we must step from tuft to tuft across the morass." *Htuchinson v. Chase and Gilbert*, (2 Cir.) 45 F.2d 139.

In *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565, the court held that the Fourteenth Amendment to the Federal Constitution required a relationship between the State and the person jurisdiction, and there must be a reasonable notification to the person upon whom the state seeks to exercise its jurisdiction. The required relationship between the State and the person was held to be presence within the State, and as a corollary, no state could "extend its process beyond that territory so as to subject either persons or property to its decisions."

In *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71, L.Ed. 1091 (1927), the United States Supreme Court sustained the validity of a non-resident motorist statute which provided that the mere act of driving an automobile in a state should be deemed an appointment of a named state official as agent to receive service in a suit arising out of the operation of the motor vehicle on the highway of such state. The dangerous nature of motor vehicle was deemed to justify the statute as a reasonable exercise of police power to preserve the safety of the citizens of the state, and the consent for service exacted by the State for use of its highways was reasonable.

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In 1935 the same reasoning was applied in upholding a state statute permitting service on an agent of a non-resident individual engaged in the sale of corporate securities in the state in claims arising out of such business.*Henry L. Doherty and Co. v. Goodman*,

Corporations being mere legal entities and incapable of having physical presence as such in a foreign state, and its agents being limited by the scope of their employment, neither the "presence" theory nor the "consent" theory could satisfactorily be applied as a basis for personal jurisdiction.

As to personal jurisdiction over non-resident corporation, the rule therefore evolved that such jurisdiction could be based upon the act of such corporations "doing business" in a state, though echoes of the "presence" and "consent" doctrines may be found in some decisions purportedly applying the "doing business" doctrine in suits against foreign corporations. See *Green v. Chicago Burlington and Quincy Ry*., 205 U.S. 530, 27 S.Ct. 595, 51 L.Ed. 916, when "presence" of a corporation was found to exist from business done in a state, and *Old Wayne Mutual Life Ass'n. of Indianapolis v. McDonough*, 204 U.S. 8, 27 S.Ct. 236, 51 L.Ed. 345, where implied consent to jurisdiction was said to arise from business done in the state of the forum.

The term "doing business" carries no inherent criteria. It is a concept dependent upon each court's reaction to facts. These reactions were varied, and the conflicting decisions evoked the observation of Judge Learned Hand, then fully justified, but no longer apt since the "morass" has been considerably firmed up by subsequent decisions of the United States Supreme Court.

In *International Shoe v. State of Washington et al.*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, the old bases of personal jurisdiction were re-cast, the court saying:

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> "To say that the corporation is so far 'present' there as to satisfy due process requirements * * * is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. * * * Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place a business is relevant in this connection.

That the new test enunciated is dependent upon the degree of contacts and activities exercised in the forum state is made clear, the court saying:

> "* * * due process requires only that in order to subject a defendant to a judgment *in personal*, if he be not present within the territory of the forum, we have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

In accord with the above doctrine is our case of *Boyd v. Warren Paint and Color Co.*, 254 Ala. 687, 49 So.2d 559.

In 1957 the United States Supreme Court handed down its opinion in *McCoy v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223.This case involved the validity of a California judgment rendered in a processing where service was had upon the defendant company by registered mail addressed to the respondent at its principal place of business in Texas. A California statute subjecting foreign corporations to suit in California on insurance contracts with California residents even though such corporations could not be served with process within its borders.

The facts show that petitioner's son, a resident of California, bought a life insurance policy from an Arizona corporation, naming petitioner as beneficiary. Later, respondent, a Texas corporation, agreed to assume the insurance obligations of the Arizona company, and mailed a re-insurance certificate to the son in California, offering to insure him in accordance with his policy. He accepted the offer and paid premiums by mail from California to the company's office in Texas. Neither corporation ever had any office in California, nor any agent therein, nor had solicited or done any other business in the state. Petitioner sent proofs of her son's death to respondent, but it refused to pay the claim.

The Texas court refused to enforce the California judgment holding it void under the Fourteenth Amendment because of lack of valid service. *McGee v. International Life Insurance Company*, Tex.Civ.App., 288 S.W.2d 579.

In reversing the Texas Court, the United States Supreme Court wrote:

> "Since *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565, this Court has held that Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries. But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. In a continuing process of evolution this Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such corporations. See Henderson, The Position of Foreign Corporations in American Constitutional Law, c. V. Mores recently in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, the Court decided that 'due process requires only that order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum. he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316, 66 S.Ct. at 158.
>
> "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

[1] Under the above and more recent doctrines, we are clear to the conclusion that the activities of *The New York Times* as heretofore set

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out, are amply sufficient to more than meet the minimal standards required for service upon its representative McKee.

The adjective "string" in McKee's designation is redundant, and in no wise lessens his status as a correspondent and agent of *The New York Times* in Alabama. Justice demands that Alabama be permitted to protect its citizens from tortious libels, the effects of such libels certainly occurring to a substantial degree in this State.

### SUBSTITUTED SERVICE

By Act No. 282, approved 5 August 1953 (Acts of Alabama, Reg.Sess.19s3, page 347) amending a prior Act of 1949, it was provided that any non-resident person, firm, partnership or corporation, not qualified to do business in this State, who shall do any business or perform any character of work or service in this State shall by so doing, be deemed to have appointed the Secretary of State to be his lawful attorney or agent of such non-resident, upon whom process may be served in any action accruing from the acts in this State, or incident thereto, by any non-resident, or his or its agent, servant or employee.

The act further provides that service of process may be made by service of three copies of the process on the Secretary of State, upon the non-resident, provided that notice of such service and a copy of the process are forthwith sent by registered mail by the Secretary of State to the defendant, at his last known address, which shall be stated in the affidavit of the plaintiff, said matter so mailed shall be marked "Deliver to Addressee Only" and "Return Receipt Requested," and provided further that such return receipt shall be received by the Secretary of State purporting to have been signed by the said non-resident.

It is further provided in the Act that any party desiring to obtain service under that Act shall make and file in the cause an affidavit stating facts showing that this Act is applicable.

[2] A mere reading of the above Act demonstrates the sufficiency of the provisions for notice to the non-resident defendant, and that service under the provisions of the Act fully meet the requirements of due process.

Counsel for appellant argues however that the service attempted under Act 282, supra, is defective in two aspects. First, that the affidavit in accompanying the complaint is conclusionary and does not show facts bringing the Act into operation, and second, that the Act complained of did not accrue from acts done in Alabama.

The affidavit filed by the plaintiff avers that the defendant " * * * has actually done and is doing business or performing work or services in the State of Alabama; that this cause of action has arisen out of the doing of such business or as an incident thereof by said defendant in the State of Alabama."

[3–5] The affidavit does state facts essential to the invocation of Act 282, supra. We do not think the legislative purpose in requiring the affidavit was to require a detailed quo modo of the business done, but rather was to furnish the Secretary of State with information sufficient upon which to perform the duties imposed upon that official. The ultimate determination of whether the non-resident has done business or performed work or services in this State, and whether the cause of action accrues from such acts, is judicial, and not ministerial, as demonstrated by appellant's motion to quash.

As to appellant's second contention that the cause did not accrue from any acts of *The Times* in Alabama, it is our conclusion that this contention is without merit.

Equally applicable to newspaper publishing are the observations made in *Consolidated Cosmetics v. D-A Pub. Co., Inc., et al.*, 7 Cir. 186 F.2d 906 at 908, relative to the functions of a magazine publishing company:

> "The functions of a magazine publishing company, obviously, include gathering material to be printed, obtaining advertisers and subscribers, printing, selling and delivering the magazines for sale. Each of these, we think, constitutes as essential factor of the magazine publication business. Consequently if a non-resident corporation sees fit to perform any one of those essential functions in a given jurisdiction, it necessarily follows that it is conducting its activities in such a manner as to be subject to jurisdiction."

[6,7] It is clear under our decisions that when a non-resident prints a libel beyond the boundaries of the State, and distributes and publishes the libel in Alabama, a cause of action arises in Alabama, as well as in the State of the printing or publishing of the libel. *Johnson Publishing Co. v. Davis*, 271 Ala. 474, 124 So.2d 441; *Weir v. Brotherhood of Railroad Trainmen*, 221 Ala. 494, 129 So. 267; *Bridwell v. Brotherhood of Railroad Trainmen*, 227 Ala. 443, 150 So. 338;

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*Collins v. Brotherhood of Railroad Trainmen*, 226 Ala. 659, 148 So. 133

[8] The scope of substituted service is as broad as the process. *Boyd v. Warren Paint & Color Co*., 254 Ala. 687, 49 So.2d 559; *Ex parte Emerson*, 270 Ala. 697, 121 So.2d 914.

The evidence shows that *The Times* sent its papers into Alabama, with its carrier as its agent, freight prepaid, with title passing on delivery to the consignee. See Tit. 57, Sec.25, Code of Alabama 1940; 2 Williston on Sales, Sec. 279(b), p. 90. Thence the issue went to newsstands for sale to the public in Alabama, in accordance with a long standing business practice.

*The Times* or its wholly owned advertising subsidiary, on several occasions, had agents in Alabama for substantial periods of time soliciting, and procuring in substantial amounts advertising to appear in *The Times*.

Furthermore, upon the receipt of the letter from the plaintiff demanding a retraction of the matter appearing in the advertisement, *The Times* had its string correspondent in Montgomery, Mr. McKee, investigate the truthfulness of the assertions in the advertisement. The fact that McKee was not devoting his full time to the service of *The Times* is "without constitutional significance." *Scripto Inc, v. Carson, Sheriff, et al*., 362 U.S. 207, 80 S.Ct 619, 4 L.Ed.2d 660.

In *WSAZ, Inc. v. Lyons*, 254 F.2d 242 (6 Cir.), the defendant television corporation was located in West Virginia. Its broadcasts covered several counties in Kentucky, and the defendant contracted for advertising in the Kentucky counties, all contracts for such advertising being sent to the corporation West Virginia for acceptance.

The alleged libel sued upon occurred during a news broadcast.

Service was obtained by serving the Kentucky Secretary of State under the provisions of a Kentucky statute providing for such service upon a foreign corporation doing business in Kentucky where the action arose out of or was "connected" with the business done by such corporation in Kentucky.

In sustaining the judgment awarded the plaintiff, the court wrote in connection with the validity of the service to support the judgment:

> "All that is necessary here is that the cause of action asserted shall be 'connected' with the business done. Defendant asserts that the alleged libel has no connection with its business done in Kentucky. But in view of its admission that its usual business was the business of telecasting and that this included new programs, and in view of the undisputed fact that the alleged libel was part of new programs regularly broadcast by defendant, this contention has no merit.
>
> "The question due process would seem to be settled by the case of *McGee v. International Life Insurance Co*. (citation), as well as by *International Shoe Co. v. State of Washington*, supra. While defendant was not present in the territory of the forum, it certainly had substantial contacts with it . It sought and executed contracts with it. It sought and executed contracts for the sale of advertising service to be performed and actually performed by its own act within the territory of the forum. We conclude that the maintenance of the suit does not offend 'traditional notions of fair play and substantial notions of fair play and substantial justice.'"

In the present case the evidence shows that the publishing of advertisements was a substantial part of the business of *The Times*, and its newspapers were regularly sent into Alabama. Advertising was solicited in Alabama. Its correspondent McKee was called upon by *The Times* to investigate the truthfulness or falsity of the matters contained in the advertisement after the letter from the plaintiff. The acts therefore disclose not only certain general conditions with reference to newspaper publishing, but also specific acts directly connected with, and directly incident to the business of *The Times* done in Alabama.

The service acquired under the provisions of Act No. 282, supra, was valid.

### GENERAL APPEARANCE BY THE TIMES

[9] The trial court also found that *The Times*, by including as a ground of the prayer in its motion to quash, the following, "* * * that this court dismiss this action as to The New York Times Company, A Corporation, for lack of jurisdiction of the subject matter of said action * * *" did thereby go beyond the question of jurisdiction over the corporate person of *The Times*, and made a general appearance, thereby waiving any defects in service of process, and thus submitted its corporate person to the jurisdiction of the court.

The conclusions of the trial court in this aspect are in accord with the doctrines of a majority of our sister states, and the doctrines of our own decisions.

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[10] Pleadings based upon lack of jurisdiction of the person are in their nature pleas in abatement, and find no special favor in the law. They are purely dilatory and amount to no more than a declaration by a defendant that he is in court in a proper action, after actual notice, bur because of a defect in service, he is not legally before the court. See *Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317*.

In *Roberts v. Superior Court*, 30 Cal.App. 714, 159 P. 465, the court observed:

> "The motion to dismiss the complaint on the ground that the court was without jurisdiction of the subject-matter of the action amounted, substantially or in legal effect, to a demurrer to the complaint on that ground. At all events, a motion to dismiss on the ground of want of jurisdiction of the subject-matter of the action necessarily calls for relief which may be demanded only by a party to the record. It has been uniformly so held, as logically it could not otherwise be held, and, furthermore, that where a party appears and asks for such relief, although expressly characterizing his appearance as special and for the special purpose of objecting to the jurisdiction of the court over his person, he as effectually submits himself to the jurisdiction of the court as though he had legally been served with process."

The reason dictating such conclusion is stated by the Supreme Court of North Carolina in *Dailey Motor Co. v. Reaves*, 184 N.C. 260 114 S.E. 175, to be:

> "Any course that, in substance, is the equivalent of an effort by the defendants to try the matter and obtain a judgment on the merits, in any material aspect of the case, while standing just outside the threshold of the court, cannot be permitted to avail them. A party will not be allowed to occupy so ambiguous a position. He cannot deny the authority of the court to take cognizance of his action for want of jurisdiction of the person or proceeding, and at the same time seek a judgment in his favor on the ground that there is no jurisdiction of the cause of action.
>
> * * * * * *
>
> "We might cite cases and authorities indefinitely to the same purpose and effect, but those to which we have briefly referred will suffice to show how firmly and unquestionable it is established, that it is not only dangerous, but fatal, to couple with a demurrer, or other form of objection based upon the ground that the court does not have jurisdiction of the person, an objection in the form of a demurrer, answer, or otherwise, which substantially pleads to the merits, and, as we have seen, such an objection is presented when the defendant unites with his demurrer for lack of jurisdiction of the person, a cause of demurrer for want of jurisdiction of the cause or subject of the action, and that is exactly what was done in this case."

We will excerpt further from the decisions from other jurisdictions in accord with the doctrine of the above cases, but point out that innumerable authorities from a large number of states may be founds set forth in an annotation to be found in 25 A.L.R.2d, pages 838 through 842.

In *Thompson v. Wilson*, 224 Ala., 299, 140 So. 439, this court stated:

> "If there was a general appearance made in this case, the lower court had jurisdiction of the person of the appellant. (Authorities cited).
>
> "The filing of a demurrer, unless based solely on the ground of lack of jurisdiction of the person, constitutes a general appearance."

Again, in *Blankenship v. Blankenship*, 263 Ala. 297, 82 So.2d 335, the court reiterated the above doctrine.

Thus the doctrine of our cases is in accord with that of a majority of our sister states that despite an allegation in a special appearance that it is for the sole purpose of questioning the jurisdiction of the court, if matters going beyond the question of jurisdiction of the person are set forth, then the appearance is deemed general, and defects in the service are to be deemed waived.

We deem the lower court's conclusions correct, that *The Times*, by questioning the jurisdiction of the lower court over the subject matter of this suit, made a general appearance, and thereby submitted itself to the jurisdiction of the lower court.

Appellant's assignment No. 9 is to the effect the lower court erred in overruling defendant's demurrers as last amended to plaintiff's complaint.

The defendant's demurrers contain a large number of grounds, and the argument of the appellant is directed toward the propositions that:

> "1. As a matter of law, the advertisement was not published of an concerning the plaintiff, as appears in the face of the complaint.
>
> 2. The publication was not libelous per se.

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3. The complaint was defective in failing to allege special damages

4. The complaint was defective in failing to allege facts or innuendo showing how plaintiff claimed the article had defamed him.

5. The complaint was bad because it stated two causes of action."

Both counts of the complaint aver among other things that " * * * defendants falsely and maliciously published in the City of New York, State of New York, and in the City of Montgomery, Alabama. and throughout the State of Alabama, of and concerning the plaintiff, in a paper entitled *The New York Times*, in the issue of March 29, 1960, on page 25, in an advertisement entitled 'Heed Their Rising Voices' (a copy of said advertisement being attached hereto and made a part hereof as Exhibit 'A'), false and defamatory matter or charges reflecting upon the conduct of the plaintiff as a member of the Board of Commissioners of the City of Montgomery, Alabama, and imputing improper conduct to him, and subjecting him to public contempt, ridicule and shame, and prejudicing the plaintiff in his office, profession, trade or business, with an intent to defame the plaintiff, and particularly the following false and defamatory matter contained therein:

" 'In Montgomery, Alabama, after students sang "My Country 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

* * * * * *

" 'Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering," and similar "offenses." And now they have charged him with "perjury"—a *felony* under which they could imprison him for *ten years*."

[11] Where the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt are libelous per se. *White v. Birmingham Post Co.*, 233 Ala. 547, 172 So. 649; Iron Age Pub. Co. v. Crudup, 85 Ala. 519, 5 So. 332.

[12] Further, "the publication is not to be measured by its effects when subjected to the critical analysis of a trained legal mind, but must be construed and determined by its natural and probable effect upon the mind of the average lay reader." *White v. Birmingham Post Co.*, supra.

We hold that the matter complained of is, under the above doctrine. libelous per se, if it was published of and concerning the plaintiff.

In "Dangerous Words—A Guide to the Law of Libel," by Philip Wittenberg, we find the following observations, at pages 227 and 228:

"There are groupings which may be finite enough so that a description of the body is a description of the members. Here the problem is merely one of evaluation. Is the description of the member implicit in the description of the body, or is there a possibility that a description of the body may consist of a variety of persons, those included within the charge, and those excluded from it?

* * * * * *

"The groupings in society today are innumerable and varied. Chances of recovery for libel of the members of such groups diminish with increasing size, and increase as the class or group decreases. Whenever a class or group decreases. Whenever a class decreases so that the individuals become obvious, they may recover for a libel descriptive of the group. In cases where the group is such that it is definite in number; where its composition is easily recognizable and the forms of its organization are apparent, then recognition of individuals libeled by group defamation becomes clear."

[13] The same principle is aptly stated in *Gross v. Cantor*, 270 N.Y. 93, 200 N.E. 592, as follows:

"An action for defamation lies only in case the defendant has published the matter 'of and concerning the plaintiff.' * * * Consequently an impersonal reproach of an indeterminate class is not actionable. * * * 'But if the words may by any reasonable application, import a charge against several individuals, under some general description or general name, the plaintiff has the right to go on to trial, and it is for the jury to decide, whether the charge has the personal application averred by the plaintiff.'

"We cannot go beyond the face of this complaint. It does not there appear that the pub-

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> lication was so scattered a generality or described so large a class as such that no one could have been personally injured by it. Perhaps the plaintiff will be able to satisfy a jury of the reality of his position that the article was directed at him as an individual and did not miss the mark."

And in *Wofford v. Meeks*, 129 Ala.; 349, 30 So. 625, we find this court saying:

> "Mr. Freeman, in his note to case of *Jones v. Stare*, (Tex.Cr.App.) 43 S.W. 78,70 Am.St.Rep. 756, after reviewing the cases, says: 'We apprehend the true rule is that, although the libelous publication is directed against a particular class of persons or a group, yet any one of the class or group may maintain an action, upon showing that the words apply especially to him.' And further, he cites the cases approvingly which hold that each of the persons composing the class may maintain the action. We think this the correct doctrine, and it is certainly supported by the great weight of authority. 13 Am. & Eng.Enc.Law, 392, and note 1; *Hardy v. Williamson*, 86 Ga.551, 12 S.E. 874, 22 Am.St.Rep. 479."

[14] We judicially know that the City of Montgomery operates under a commission form of government. (See Act 20, Gen.Acts of Alabama 1931, page 30.) We further judicially know that under the provisions of Sec. 51, tit. 37, Code of Alabama 1940, that under this form of municipal government the executive and administrative powers are distributed into departments of (1) public health and public safety, (2) streets, parks and public property and improvements, and , (3) accounts, finances, and public affairs; and that the assignments of the commissioners may be changed at any time by a majority of the board.

The appellant contends that the word "police" encompasses too broad a group to permit the conclusion that the statement in the advertisement was of and concerning the plaintiff since he was not mentioned by name.

[15] We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body. Such common knowledge and belief has its origin in established legal patterns as illustrated by Sec. 51, supra.

In *De Hoyos v. Thornton*, 259 App.Div. 1, 18 N.Y.S.2d 121, a resident of Monticello, New York, a town of 4000 population, had published in a local newspaper an article in which she stated that a proposed acquisition of certain property by the municipality was "another scheme to bleed the taxpayers and force more families to lose their homes. * * * It seems to me it might be better to relieve the tension on the taxpayers right now and get ready for the golden age * * * and not be dictated to by gangsters and Chambers of Commerce."

The mayor and the three trustees of Monticello brought libel actions. The court originally considering the complaint dismissed the actions on the grounds that the plaintiffs were not mentioned in the article, and their connection with the municipality was not stated in the complaint. In reversing this decision the Appellate Division of the Supreme Court wrote: "There is no room for doubt as to who were the objects of her attack. Their identity is as clear to local readers from the article itself as if they were mentioned by name."

[16] The court did not err in overruling the demurrer in the aspect that the libelous matter was not of and concerning the plaintiffs.

[17] The advertisement being libelous per se, it was not necessary to allege special damages in the complaint. *Iron Age Pub. Co. v. Crudup*, 85 Ala. 519, 5 So. 332.

[18] Where, as in this case, the matter published is libelous per se, then the complaint may be very simple and brief (*Penry v. Dozier*, 161 Ala. 292, 49 So. 909), and there is no need to set forth innuendo. *White v. Birmingham Post Co.*, 233 Ala. 547, 172 So. 649. Further, a complaint in all respects similar to the present was considered sufficient in our recent case of *Johnson Publishing Co. v. Davis*, 271 Ala. 474, 124 So.2d 441.

The *Johnson* case, supra, is also to the effect that where a newspaper publishes a libel in New York, and by distribution of the paper further publishes the libel in Alabama, a cause of action arises in Alabama, as well as in New York, and that the doctrine of *Age-Herald Pub. Co, v. Huddleston*, 207 Ala. 40, 92 So. 193, 37 S.L.R. 898, concerned venue, and venue statutes do not apply to a foreign corporation not qualified to do business in Alabama.

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In view of the principles above set forth, we hold that the lower court did not err in overruling the demurrer to the complaint in the aspects contended for and argued in appellant's brief.

Assignments of error Nos. 14, 15, 16 and 17, related to the court's refusal to permit certain questions to be put to the venire in qualifying the jurors.

The appellant contends that *The Times* was unlawfully deprived of its right to question the jury venire to ascertain the existence of bias or prejudice. The trial court refused to allow four questions which were in effect, (1) Do you have any conviction, opinion or pre-disposition which would compel you to render a verdict against *The Times*? (2) Have any of you been plaintiffs in litigation in this court? (3) If there is no evidence of malice, would you refuse to punish *The Times*? (4) Is there any reason which would cause you to hesitate to return a verdict in favor of the *The Times*?

The prospective jurors had already indicated that the were unacquainted with any of the facts in the case, that they had not discussed the case with anyone nor had it been discussed in their presence nor were they familiar in any manner with the contentions of the parties. Appellant was permitted to propound at some length other questions designed to determine whether there was any opinion or pre-disposition which would influence the juror's judgment. The jurors indicated that there was no reason whatsoever which would cause them to hesitate to return a verdict for *The Times*.

[19, 20] Sec. 52, Tit. 30 Code of Alabama 1940, gives the parties a broad tight to interrogate jurors as to interest or bias. This right is limited by propriety and pertinence. It is exercised within the sound discretion of the trial court. has been abused where similar questions have already been answered by the prospective jurors. *Dyer v. State*, 241 Ala. 679, 4 So.2d 311.

[21] Only the second question could have conceivably revealed anything which was not already brought out by appellant's interrogation of the prospective jurors. Considering the completeness of the qualification and the remoteness of the second question, the exclusion of that inquiry by the trial court will not be regarded as an abuse of discretion. *Noah v. State*, 38 Ala. App. 531, 89 So.2d 231.

Appellant contends that without the right to adequately question the prospective jurors, a defendant cannot adequately ensure that his case is being tried before a jury which meets the federal constitutional standards laid downing such decisions as *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 751. It is sufficient to say that the jurors who tried this case were asked repeatedly, and in various forms, by counsel for *The Times* about their impartiality in every reasonable manner.

Appellant's assignment of error 306 pertains to the refusal of requested charge T. 22, which was affirmative in nature.

It is appellant's contention that refusal of said charge contravenes Amendment One of the United States Constitution and results in an improper restraint of freedom of the press, further, that refusal of said charge is violative of the Fourteenth Amendment of the federal constitution.

In argument in support of this assignment, counsel for appellant asserts that the advertisement was only an appeal for support of King and "thousands of Southern Negro students" said to be "engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights."

The fallacy of such argument is that is overlooks the libelous portions of the advertisement which are the very crux of this suit.

[22] The First Amendment of the U.S. Constitution does not protect libelous publications. *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357; *Konigsberg v. State Bar of California*, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105; *Times Film Corporation v. City of Chicago*, 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403; *Chaplinsky v. Ne Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031; *Beauharnais v. Illinois*, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919.

[23] The Fourteenth Amendment is directed against State action and not private action. *Collins v. Hardyman*, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253.

Assignment of error No, 306 is without merit.

Appellant's assignment of error No. 94 also pertains to the court's refusal of its requested charge T. 22.

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Appellant's argument under this assignment asserts it was entitled to have charge T. 22 given because of the plaintiff's failure to plead or prove special damages.

[24] In libel action, where the words are actionable per se, the complaint need not specify damages (*Johnson v. Robertson*, 8 Port. 486), nor is proof of pecuniary injury required, such injury being implied. *Johnson Publishing Co. v. Davis*. supra.

[25] Assignments 18, 19, 21, 23, 25, 27, 30 and 32, relate to the action of the court in overruling defendant's objections to questions propounded to six witnesses presented by the plaintiff as to whether they associated the statements in the advertisement with the plaintiff. All of the witnesses answered such questions in such manner as to indicate that they did so associate the advertisement.

Without such evidence the plaintiff's cause would of necessity fall, for that the libel was of or concerning the plaintiff is the essence of plaintiff's claim.

Section 910 of Title 7, Code of Alabama 1940, pertaining to libel, among other things, provides that " * * * and if the allegation be denied, the plaintiff must prove, on the trial, the facts showing that the defamatory matter was published or spoken of him." This statute would seem to require the proof here admitted. And in *Wofford v. Meeks*, 129 Ala. 349, 30 So. 625, 55 L.R.A. 214, the court stated that where the libel is against a group, any one of that group may maintain an action "upon showing that the words apply specially to him," and in *Chandler v. Birmingham New Co.*, 209 Ala. 208 95 So. 886, this court said, "Any evidence which tended to show it was not intended 'of and concerning him' was material and relevant to the issue."

In *Hope v. Hearst Consolidated Publications*, (2 Cir.1961), 294 F.2d 681, the court said as to the admissibility of testimony that a witness believed the defamatory matter referred to the plaintiff:

> "In this regard it appears that the New York exclusionary rule represents a distinct, if not a lone, minority voice. The vast majority of reported cases, from both American state and British courts, espouse the admission of such evidence; the text writers similarly advocate its admissibility."

* * * * * *

"The plaintiff, as a necessary element in obtaining relief, would have to prove that the coercive lies were understood, by customers, to be aimed in his direction. In a case where the plaintiff was not specifically named, the exact issue now before us would be presented."

In accord with the doctrine that the instant evidence was admissible may be cited, among authorities *Marr v. Putnam Oil Co.*, 196 Or. 1, 246 P.2d 509; *Red River Valley Pub. Co., Inc. v. Bridges*, (Tex.Civ.App.) 254 S.W.2d 854; *Colbert v. Journal Pub. Co.*, 19 N.M. 156, 142 P. 146; *Prosser v. Callis et al.*, 117 Ind. 105, 19 N.E. 735; *Martin County Bank v. Day*, 73 Minn. 195, 75 N.W. 1115; *Ball v. Evening American Pub. Co.*, 237 Ill. 592, 86 N.E. 1097; *Children v. Shinn*, 168 Iowa 531, 150 N.W. 864.

Counsel for appellant argues that the questions " * * * inescapably carried the implication that the witness thought the ad was published of and concerning the plaintiff." Each and every one of the above named witnesses had testified previous to the instant questions, that they had associated the City Commissioners, or the plaintiff, with the advertisement upon reading it. The questions where therefore based upon the witnesses' testimony that they associated the advertisement with the plaintiff, and not merely an implication that might be read into the question.

Counsel further argues that the question is hypothetical in that none of the witnesses testified they believed the advertisement, or that they thought less of the plaintiff.

While we think such evidence of small probative value, yet it would have relevancy not only as to its effect upon the recipient, but also as to the effect such publication may reasonably have had upon other recipients. See "Defamation," 69 Harv.L.R., 877, at 884.

[27] This aside, we cannot see that the answers elicited were probably injurious to the substantial rights of the appellant. Sup.Court Rule 45. Proof of common knowledge is without injury, though it be unnecessary to offer such proof.

[28] Clearly we think it common knowledge that publication of matter libelous per se would, if believed, lessen the person concerned in the eyes of any recipient of the libel. See *Tidmore v. Mills*, 33 Ala. App. 243, 32 So.2d 769, and cases cited therein.

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[29] Assignment of error No. 63 asserts error arising out of the following instance during the cross-examination of Gershon Aronson, a witness for *The Times*, which matter, as shown by the record, had been preceded by numerous objections, and considerable colloquy between counsel and court:

> "Q Would you state now sir, what that word means to you; whether it has only a time meaning or whether it also to your eye and mind has a cause and effect meaning?
>
> "Mr. Embry: Now, we object to that, Your Honor. That's a question for the jury to determine—
>
> "The Court: Well, of course, it probably will be a question for the jury, but this gentleman here is a very high official of *The Times and I should think he can testify*—
>
> Mr. Daly: I object to that, Your Honor. He isn't a high official of *The Times* at all—
>
> Mr. Embry: He is just a man that has a routine job there, Your Honor. He is not—
>
> "The Court: Let me give you an exception to the Court's ruling.
>
> "Mr. Embry: We except."

We do not think it can be fairly said that the record discloses a ruling by the trial court on counsel's objection to the use of the term "very high official." The ruling made by the court is palpably to the question to which the objection was interposed. Counsel interrupted the court to object to the term "very high official," and second counsel added, "He is just man that has a routine job there, Your Honor." Apparently this explanation satisfied counsel, as the court's use of the term was not pursued to the extent of obtaining a ruling upon this aspect, and the court's ruling was upon the first, and main objection.

Mr. Aronson testified that he had been with *The Times* for twenty-five years, and Assistant Manager of the Advertising Acceptability Department of *The Times*, and was familiar with the company's policies regarding advertising in all it aspects, that is, sales, acceptability, etc., and that advertisements of organizations and committees that express a point of view comes within the witness's particular duties.

In view of the above background of Mr. Aronson, and the state of the record immediately above referred to, we are unwilling to cast error upon the lower court in the instance brought forth under assignment No. 63.

Assignment of error No. 81 is to the effect that the lower court erred in denying appellant's motion for a new trial. Such an assignment is an indirect assignment of all of the grounds of the motion for a new trial which appellant sees fit to bring forward and specify as error in his brief.

The appellant under this assignment has sought to argue several grounds of its motion for a new trial.

Counsel, in this connection, seeks to cast error on the lower court because of an alleged prejudicial statement made by counsel for the appellee in his argument to the jury.

[30] The record fails to show any objections were interposed to any argument by counsel for any of the litigants during the trial. There is therefore nothing presented to us for review in this regard. *Woodward Iron Co. v. Earley*, 247 Ala. 556, 25 So.2d 267, and cases therein cited.

Counsel also argues two additional grounds contained in the motion for a new trial, (1) that the appellant was deprived of due process in the trial below because of hostile articles in Montgomery newspapers, and (2) because of the presence of photographers in the courtroom and the publication of the names and pictures of the jury prior to the rendition of the verdict.

[31] As to the first point, the appellant sought to introduce in the hearing on the motion for a new trial newspaper articles dated prior to, and during, the trial. The court refused to admit these articles.

At no time during the course of the trial below did the appellant suggest a continuance, or a change of venue, or that it did not have knowledge of said articles.

[32] Likewise, at no time was any objection interposed to the presence of photographers in the courtroom.

[33] Newly discovered evidence was not the basis of the motion for a new trial. This being so, the court was confined upon the hearing on the motion to matters contained in the record of the trial. *Thomason v. Silvey*, 123 Ala. 694, 26 So. 644; *Alabama Gas Co, v. Jones*, 244 Ala. 413, 13 So.2d 873.

Assignment of error 78 pertains to an alleged error occurring in the court's oral charge.

In this connection the record shows the following:

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> "Mr. Embry: We except, your Honor. We except, your Honor. We except the oral portions of Your's Charge wherein Your Honor charged on libel per se. We object to that portion of Your Honor's Charge wherein Your Honor charged as follows: 'So, as I said, if you are reasonably satisfied from the evidence before you, considered in connection with the rules of the law the Court has stated to you, you would come to consider the question of damages and, where as here, the Court has ruled the matter complained of proved to your reasonable satisfaction and aimed at the plaintiff in this case, is libelous per se then punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown.'
>
> "The Court: Overruled and you have an exception."

Preceding the above exception the court had instructed the jury as follows:

> "Now, as stated, the defendants say that the ad complained of does not name the plaintiff, Sullivan, by name and that the ad is not published of an concerning him. * * * The plaintiff, Sullivan, as a member of the group referred to must show by the evidence to your reasonable satisfaction that the words objected to were spoken of an concerning him. The reason for this being that while any one of a class or group may maintain an action because of alleged libelous words, he must show to the reasonable satisfaction of the jury that the words he complained of apply especially to him or are published of and concerning him.
>
> * * * * * *
>
> "So, at the very outset of our deliberations you come to this question: Were the words complained of in counts 1 and 2 of this complaint spoken of and concerning the plaintiff, Sullivan? That's the burden he has. He must show that to your reasonable satisfaction and if the evidence in this case does not reasonably satisfy you that the words published were spoken of or concerning Sullivan or that they related to him, why then of course he would not be entitled to any damages and you would not go any further."

In addition the court gave some eleven written charges at defendant's request, instructing the jury in substance that the burden was upon the plaintiff to establish to the reasonable satisfaction of the jury that the advertisement in question was of an concerning the plaintiff, and that without such proof the plaintiff could not recover.

It is to be noted that in the portion of the complained of instructions excerpted above, the court first cautioned the jury they were to consider the evidence in connection with the rules of law stated to them. The court had previously made it crystal clear that he jury were to determine to their reasonable satisfaction from the evidence that the words were spoken of and concerning the plaintiff.

Counsel for appellant contend that because of the words "and aimed at the plaintiff in this case," the instruction would be taken by the jury as charge that the advertisement was of an concerning the plaintiff, and hence the instruction was invasive of the provision of the jury.

Removed from the full context of the court's instructions the charge complained of, because of its inept mode of expression, might be criticized as confused and misleading.

[34] However, it is basic that a court's oral charge must be considered as a whole and the part excepted to should be considered in the light of the entire instruction. If as a whole the instructions state the law correctly, there is no reversible error even though a part of the instructions, if considered alone, might even erroneous.

Innumerable authorities enunciating the above doctrines may be found in 18 Ala.Dig. Trial 295(1) through (11).

Specially, in reference to portions of oral instructions that might be criticized because tending to be invasive of the province of the jury, we find the following stated in 89 C.J.S. Trial § 438, the text being amply supported by citations:

> "A charge which, taken as a whole, correctly submits the issues to the jury will not be held objectionable because certain instructions, taken in their severalty, may be subject to criticism on the ground they invade the province of the jury, * * * *."

To this same effect, see *Abercombie v. Martin and Hoyt Co.*, 227 Ala. 510, 150 So. 497; *Choctaw Coal and Mining Co., v. Dodd*, 201 Ala. 622, 79 So. 54.

[35] We have carefully read the court's entire oral instruction to the jury. It is a fair, accurate, and clear expression of the governing legal principles. In light of the entire charge we consider that the portion of the charge complained of to be inconsequential, and unlikely to have affected the jury's conclusion. We do not consider it

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probable that this appellant was injured in any substantial right by this alleged misleading instruction in view of the court's repeated and clear exposition of the principles involved, and the numerous written charges given at the defendant's request further correctly instructing the jury in the premises.

The individual appellants, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery have also filed briefs and arguments in their respective appeals. Many of the assignments of error in these individual appeals are governed by our discussion of the principles relating to the appeal of *The Times*. We therefore will now confine our review in the individual appeals to those assignments that may present questions not already covered.

[36] In their assignment of error No. 41, the individual appellants assert that the lower court erred in it oral instructions as to ratification of the use of their names in the publication of the advertisement. The instructions of the court in this regard run for a half a page or better. The record shows that an exception was attempted in the following language:

> "Lawyer Gray: Your Honor, we except to the Court's charge dealing with ratification as well as the Court's charge in connection with the advertisement being libelous per se in behalf of each of individual defendants."

The above attempted exception was descriptive of the subject matter only, and is too indefinite to invite our review. *Birmingham Ry. Light and Power Co. v. Friedman*, 187 Ala. 562, 65 So. 939; *Conway v, Robinson*, 216 Ala. 495, 113 So. 531; *Birmingham Ry, Light and Power Co. v. Jackson*, 198 Ala. 378, 73 So. 627.

[37, 38] Several of the charges instruct the jury that if the jury "find" etc., while others use the term "find from the evidence." These charges were refused without error in that the predicate for the jury's determination in a civil suit is "reasonably satisfied from the evidence." A court cannot be reversed for its refusal of charges which are not expressed in the exact and appropriate terms of the law. *W. P. Brown and Sons Lumber Co, v. Rattray*, 238 Ala. 406, 192 So. 851, 129 A.L.R. 526.

[39] Others of the refused charges, not affirmative in nature, are posited on "belief," or "belief from the evidence." A judgment will not be reversed or affirmed because of the refusal, or giving, of "belief" charges. *Sovereign Camp, W. O. W. v. Sirten*, 234 Ala. 421, 175 So. 539; *Pan American Petroleum Co. v. Byars*, 228 Ala. 372, 153 So. 616; *Casino Restaurant v. McWhorter*, 35 Ala.App. 332, 46 So.2d 582.

[40] Specification of error number 6 asserts error in the court's action in refusing to sustain the individual defendants' objection to the way one of the plaintiff's counsel pronounced the word "negro." When this objection was interposed, the court instructed plaintiff's counsel to "read it jut like it is," and counsel replied, "I have pronouncing it that way all my life." The court then instructed counsel to proceed. No further objections were interposed, nor exceptions reserved.

We consider this assignment mere quibbling, and certainly nothing is presented for our review in the state of the record.

[41] Counsel have also argued assignments to the effect that error infects this record because, (1) the courtroom was segregated during the trial below, and (2) the trial judge was not duly and legally elected because of alleged deprivation of voting rights to negroes.

Neither of the above matters were presented in trial below, and cannot now be presented for review.

[42] Counsel further argues that the appellants were deprived of a fair trial in that the trial judge was, by virtue of Local Act No. 118, 1939 Local Act of Alabama, p. 66, a member of the jury commission of Montgomery County. This act is constitutional. *Reeves v. State*, 260 Ala. 66, 68 So.2d 14.

Without intimating that any merit attaches to this correction it is sufficient to point out that this point was not raised in the trial below, and must be considered as having been waived. *De Moville v. Merchants & Farmers Bank of Greene County*, 237 Ala. 347, 186 So. 704.

Assignments 42, 121, 122, assert error in the court's refusal to hear the individual appellant's motions for new trials, and reference in brief is made to pages 2058–2105 of the record in this connection.

These pages of the record merely show that the individual appellants filed and presented to the court their respective motions for a new trial on 2 December 1960, the respective motions were continued to 14 January 1961. No further orders in reference to the motions of the individual appellants appear in the record, no judg-

ment of any of the motions of the individual appellants appears in the record.

The motions of the individual appellants therefore became discontinued after 14 January 1961.

[43, 44] There being no judgments on the motion for a new trial of the individual appellants, and they having become discontinued, those assignments by the individual appellants attempting to raise questions as to the weight of the evidence, and the excessiveness of the damages are ineffective and present nothing for review. Such matters can be presented only by a motion for a new trial. See 2 Ala.Dig. Appeal and Error 294(1) and 295, for innumerable authorities.

Other matters are argued in the briefs of the individual appellants. We conclude they are without merit and do not invite discussion, though we observe that some of the matters attempted to be brought forward are insufficiently presented to warrant review.

**EVIDENCE ON THE MERITS**

The plaintiff first introduced the depositional testimony of Harding Bancroft, secretary of *The Times*.

Mr. Bancroft thus testified that one John Murray brought the original of the advertisement to *The Times* where it was delivered to Gershon Aronson, an employee of *The Times* a Thermo-fax copy of the advertisement was turned over to Vincent Redding, manager of the advertising department, and Redding approved it for insertion in *The Times*. The actual insertion order issued by the Union Advertising Service of New York City.

Redding determined that the advertisement was endorsed by a large number of people who reputation for truth he considered good.

Numerous new stories from its correspondents, published in *The Times*, relating to certain events which formed the basis of the advertisement and which had been published from time to time in *The Times* were identified. These new stories were later introduced in evidence as exhibits.

Also introduced through this witness was a letter from A. Philip Randolph certifying that the four individual defendants had all given permission to use their names in furthering the work of the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South."

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Mr. Bancroft further testified that *The Times* received a letter from the plaintiff date 7 April 1960, demanding a retraction of the advertisement. They replied by letter dared 15 April 1960, which they asked Mr. Sullivan what statements in the advertisement reflected on him.

After the receipt of the letter from the plaintiff, *The Times* had McKee its "string" correspondent in Montgomery, and Sitton, its staff correspondent in Atlanta, investigate the truthfulness of the allegations in the advertisement. Their lengthy telegraphic reports, introduced in evidence showed that the Alabama College officials had informed them that the statement that the dining room at the College had been padlocked to starve the students into submission was absolutely false; that all but 28 of the 1900 students had re-registered and meal service was furnished all students on the campus and was available even to those who had not registered, upon payment for the meals; that the Montgomery police entered the campus upon request of the College officials, and then only after a mob of rowdy students had threatened the negro college custodian, and after a college policeman had fired his pistol in the air several times in an effort to control the mob. The city police had merely tried to see that the orders of the Alabama College officials were not violated.

Sitton's report contained the following pertinent statements:

> " * * * Paragraph 3 of the advertisement, which begins, 'In Montgomery, Alabama, after students sang' and so forth, appears t be virtually without any foundation. The students sand the National Anthem. Never at any time did police 'ring' the campus although on three occasions they were deployed near the campus in large numbers. Probably a majority of the student body was at one time or another involved in the protest but not 'entire student body.' I have been unable to find any one who has heard that the campus dining room was padlocked. * * * In reference to the 6th paragraph, beginning: 'Again and again the Southern violators' and so forth, Dr. King's home was bombed during the bus boycott some four years ago. his wife and child were there but were not (repeat not) injured in any way. King says that the only assault against his person took place when he was arrested some four years ago for loitering outside a courtroom. The arresting

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officer twisted King's arm behind the minister's back in taking him to be booked.

The reports further show that King had been arrested only twice by the Montgomery police. Once for spending on which charge he was convicted and paid a $10.00 fine, and once for "loitering"on which charge he was convicted and fined $14.00, this fine being paid by the then police commissioner whom the plaintiff succeeded in office.

Mr. Bancroft further testified that upon receipt of a letter from John Patterson, Governor of Alabama, *The Times*' judgment no statement in the advertisement in the advertisement referred to John Patterson either personally or as Governor of Alabama. However, *The Times* felt that since Patterson held the high office of Governor of Alabama and believed that he had been libeled, they should apologize.

Grover C. Hall, Jr., Arnold D. Blackwell, William H. MacDonald, Harry W. Kaminsky, H. M. Price, Sr., William M. Parker, Jr., and Horace W. White, all residents of the city of Montgomery, as well as the plaintiff, testified over the defendant's objections that upon reading the advertisement they associated it with the plaintiff, who was Police Commissioner.

E. Y. Lacy, Lieutenant of detectives for the City of Montgomery, testified that he had investigated the bombings, "The Police Department did extensive research work with overtime and extra personnel and we did everything that we knew including inviting and working with other departments throughout the country."

O. M. Strickland, a police officer of the City of Montgomery, testified that he had arrested King on the loitering charge after King had attempted to force his way into an already overcrowded courtroom, Strickland having been instructed not to admit any additional persons to the courtroom unless they had been subpoenaed as a witness. At no time did he nor anyone else assault King in any manner, and King was permitted to make his own bond and was released.

In his own behalf the plaintiff, Sullivan, testified that he first read the advertisement in the Mayor's office in Montgomery. He testified that he took office as a Commissioner of the City of Montgomery in October 1959, and had occupied that position since. Mr. Sullivan testified that upon reading the advertisement he associated it with himself, and in response to a question on cross-examination, stated that he felt that he had been greatly injured by it.

Mr. Sullivan gave further testimony as to the falsity of the assertions contained in the advertisement.

For the defense, Gershon Aronson, testified that the advertisement was brought to him by John Murray and he only scanned it hurriedly before the advertisement was sent to the Advertising Acceptability Department of *The New York Times*. As to whether the word "they" as used in the paragraph of the advertisement charging that "Southern violators" had bombed King's home, assaulted his person, arrested him seven times, etc., referred to the same people as "they" in the paragraph wherein it was alleged that the Alabama College students were padlocked out of their dining room in an attempt to starve them into submission and that the campus was ringed with police, armed with shotguns, tear gas, etc. Aronson first stated, "Well, it may have referred to the same people. It is rather difficult to tell"and a short while later Aronson stated, "Well, I think now it probably refers to the same people."

*The Times* was paid in the vicinity of $4,800 for publishing the advertisement.

D. Vincent Redding, assistant to the manager of the Advertising Acceptability Department of *The Times*, testified that he examined the advertisement and approved it, seeing nothing in it to cause him to believe it was false, and further he placed reliance upon the endorsers "whose reputations I had no reason to question." On cross-examination Mr. Redding testified he had not checked with any of the endorsers as their familiarity with the events in Montgomery to determine the accuracy of their statements, nor could he say whether he had read any news accounts concerning such events which had been published in *The Times*. The following is an excerpt from Mr. Redding's cross-examination:

> "Q Now, Mr. Redding, wouldn't't it be a fair statement to say that you really didn't check this ad at all for accuracy?"
>
> "A That's a fair statement, yes."

Mr. Harding Bancroft, Secretary of *The Times*, whose testimony taken by deposition had been introduced by the plaintiff, testified in the trial below as a witness for the defendants. His testimony is substantially in accord with that

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given in his deposition and we see no purpose in an additional delineation of it.

As a witness for the defense, John Murray testified that he was a writer living in New York City. He was a volunteer worker for the "Committee to Defend Martin Luther King," etc., and as such was called upon, together with two other writers, to draft the advertisement in question.

These three were given material by Bayard Rustin, the Executive Director Committee, a basis for composing the advertisement. Murray stated that Rustin is a professional organizer, he guessed along the line of raising funds. Murray knew that Rustin had been affiliated with the War Resisters League, among others.

After the first proof of the advertisement was ready, Rustin called Jim to his office and stated he was dissatisfied with it as it did not have the kind of appeal it should have if it was to get the response in funds the Committee needed.

Rustin then stated they could add the names of the individual defendants since by virtue of their membership in the Southern Christian Leadership Conference, which supported the work of the Committee, he felt they need not consult them.

The individual defendants' names were them placed on the advertisement under the legend "We in the South who are struggling daily for dignity and freedom warmly endorse this appeal."

Murray further testified that he and Rustin rewrote the advertisement "to get money" and "project the ad in the most appealing form from the material we were getting."

As to the accuracy of the advertisement, Murray testified:

> "Well, that did not enter the—it did not enter into consideration at all except we took it for granted that it was accurate—we took it for granted that it was accurate—they were accurate—and if they hadn't been—I mean we would have stopped to question it—I mean we would have stopped to question it. We had every reason to believe it."

The individual defendants all testified to the effect that they had not authorized *The New York Times*, Philip Randolph, the "Committee to Defend Martin Luther King," etc., nor any other person to place their names on the advertisement, and in fact did not see the contents of the advertisement until receipt of the letter from the plaintiff.

They all testified that after receiving the letter demanding a retraction of the advertisement they had not replied thereto, not had they contacted any person or group concerning the advertisement or its retraction.

### AMOUNT OF DAMAGES

[45] Under assignment of error No. 81, *The Times* argues those grounds of its motion for a new trial asserting that the damages awarded the plaintiff are excessive, and the result of bias, passion, and prejudice.

In *Johnson Publishing Co. v. Davis, supra*, Justice Stakely in rather definitive discussion of a court's approach to the question of the amount of damages awarded in libel actions made the following observations:

> "* * * The punishment by way of damages is intended not alone to punish the wrongdoer, but as a deterrent to others similarly minded. *Liberty National Life Insurance Co. v. Weldon*, supra; *Advertiser Co. v. Jones*, supra [267 Ala. 171, 100 So.2d 696, 61 A.L.R.2d 1346]; *Webb v. Gray*, 181 Ala. 408, 62 So.194."
>
> "Where words are libelous per se and as heretofore stated we think the published words in the present case were libelous per se, the right to damages results as a consequence, because there is a tendency of such libel to injure the person libeled in his reputation, profession, trade or business, and proof of such pecuniary injury is not required, such injury being implied. *Advertiser Co. v. Jones*, supra [169 Ala. 196, 53 So.759]; *Webb v. Gray*, supra; *Brown v. Publishers: George Knapp & Co.*, 213 Mo. 655, 112 S.W. 474; *Maytag Co. v. Meadows Mfg. Co.*, 7 Cir., 45 F.2d 299."
>
> "Because damages are presumed from the circulation of a publication which is libelous per se, it is not necessary that there be any correlation between the actual and punitive damages. *Advertiser Co. v. Jones*, supra; *Webb v. Gray*, supra; *Whitcomb v. Hearst Corp.*, 329 Mass. 193, 107 N.E.2d 295."
>
> "The extent of the circulation of the libel is a proper matter of consideration by the jury in assessing plaintiff's damages. *Foerster v. Ridder*, Sup., 57 N.Y.S.2d 668; *Whitcomb v. Hearst Corp.*, supra."
>
> * * * * * *
>
> "In *Webb v. Gray*, supra [181 Ala. 408, 62 So.196], this court made it clear that a different rule for damages is applicable in libel than in malicious prosecution cases and

**SUPREME COURT OF ALABAMA, AUGUST 1962**

other ordinary tort cases. In this case the court stated in effect that in libel cases actual damages are presumed if the statement is libelous per se and accordingly no actual damages need be proved.

* * * * * *

"In *Advertiser Co. v. Jones*, supra, this Court considered in a libel case the claim that the damages were excessive and stated: 'While the damages are large in this case we cannot say they were excessive. There was evidence from which the jury might infer malice, and upon which they might award punitive damages. This being true, neither the law nor the evidence furnishes us any standard by which can ascertain certainly that they were excessive. The trial court heard all of this evidence, saw the witnesses, observed their expression and demeanor, and hence was in a better position to judge of the extent of punishment which the evidence warranted than we are, who must form our conclusions upon the mere narrative of the transcript. This court, in treating of excessive verdicts in cases in which punitive damages could be awarded. through Justice Haralson spoke and quoted as follows: 'There is no legal measure of damages in cases of this character.'"

* * * * * *

"The Supreme Court of Missouri considered the question in *Brown v. Publishers: George Knapp & Co.*, 213 Mo. 655, 112 S.W. 474, 485, and said: 'The action for libel is one to recover damages for injury to man's reputation and good name. It is not necessary, in order to recover general damages for words which are actionable per se, that the plaintiff should have suffered any actual or constructive pecuniary loss. In such action, the plaintiff is entitled to recover as general damages for the injury to his feelings which the libel of the defendant has caused and the mental anguish or suffering which he had endured as a consequence thereof. *So many considerations enter into the awarding of damages by a jury in a libel case that the courts approach the question of the excessiveness of a verdict in such case with great reluctance.* The question of damages for a tort especially in a case of libel or slander is peculiarly within the province of the jury, and unless the damages are so unconscionable as to impress the court with its injustice, and thereby to induce the court to believe the jury were actuated by prejudice, partiality, or corruption, it rarely interferes with the verdict.'". (Emphasis supplied.)

In the present case the evidence shows that the advertisement in question was first written by a professional organizer of drives, and rewritten, or "revved up" to make it more "appealing." *The Times* in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement. Upon demand by the Governor of Alabama, *The Times* published a retraction of the advertisement insofar as the Governor of Alabama was concerned. Upon receipt of the letter from the plaintiff demanding a retraction of the allegations in the advertisement, *The Times* had investigations made by a staff corespondent, and by its "string" correspondent. Both made a report demonstrating the falsity of the allegations. Even in the face of these reports, *The Times* adamantly refused to right the wrong it knew it had done the plaintiff. In the trial below none of the defendants questioned the falsity of the allegations in the advertisement.

On the other hand, during his testimony it was the contention of the Secretary of *The Times* that the advertisement was "substantially correct." In the face of this cavalier ignoring of the falsity of the advertisement, the jury could not have but been impressed with the bad faith of *The Times*, and its maliciousness inferable therefrom.

While in the Johnson Publishing Co. case, supra, the damages were reduced by was of requiring a remittitur, such reduction was on the basis that there was some element of truth in part of the alleged libelous statement. No such reason to mitigate the damages is present in this case.

It is common knowledge that as of today the dollar is worth only 50 cents or less of its former value.

*The Times* retracted the advertisement as to Governor Patterson, but ignored this plaintiff's demand for retraction. The matter contained in the advertisement was equally false as to both parties.

*The Times* could not justify its nonretraction as to this plaintiff by fallaciously asserting that the advertisement was substantially true, and further, that the advertisement as presented to *The Times* bore the names of endorsers whose reputation for truth it considered good.

The irresponsibility of these endorsers in attaching their names to this false and malicious advertisement cannot shield The Times from its irresponsibility in printing the advertisement and scattering it to the four winds.

[46] All in all we do not feel justified in mitigating the damages awarded by the jury, and

SUPREME COURT OF ALABAMA, AUGUST 1962

approved by the trial judge below, by its judgment on the motion for a new trial, with the favorable presumption which attends the correctness of the verdict of the jury where the trial judge refuses to grant a new trial. *Housing Authority of City of Decatur v. Decatur Land Co.*, 258 Ala. 607, 64 So.2d 594.

In our considerations we have examined the case of *New York Times Company v. Conner*, (5CCA) 291 F.2d 492 (1961), wherein the Circuit Court of Appeals for the Fifth Circuit, relying exclusively upon *Age Herald Publishing Co. v. Huddleston*, 207 Ala. 40, 92 So. 193, 37 A.L.R. 898, held that no cause of action for libel arose in Alabama where the alleged libel appeared in a newspaper primarily in New York.

This case overlooks, or ignores, the decisions of this court in *Johnson Publishing Co. v. Davis*, 271 Ala. 474, 124 So.2d 441, wherein this court rejected the argument that the whole process of writing, editing, printing, transportation and distribution of a magazine should be regarded as one libel, and the locus of such libel was the place of primary publication. This court further, with crystal clarity, held that *Age Herald Publishing Co. v. Huddleston*, supra, concerned a venue statute, and that venue statutes do not apply to foreign corporations not qualified to do business in Alabama.

The statement of Alabama law in the *Conner* case, supra, is erroneous in light of our enunciation of what is the law of Alabama as set forth in the *Johnson Publishing Company* case, supra. This erroneous premise, as we interpret the *Conner* case, renders the opinion faulty, and of no persuasive authority in our present consideration.

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." Sec. 1652, Title 28, U.S.C.A., 62 Stat. 944.

It is our conclusion that the judgment below is due to be affirmed, and it is so ordered.

Affirmed.

Livingston, C. J., and Simpson and Merrill, JJ., concur.

U.S. SUPREME COURT, OCTOBER 1963

BRIEF FOR THE PETITIONER

# In the Supreme Court of the United States

## October Term, 1963

## No. 39

THE NEW YORK TIMES COMPANY,
PETITIONER,
V.
L. B. SULLIVAN, RESPONDENT

### ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

### BRIEF FOR THE PETITIONER

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Appendix A

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### OPINIONS BELOW

The opinion of the Supreme Court of Alabama (R. 1139) is reported in 273 Ala. 656, 144 So. 2d 25. The opinion of the Circuit Court, Montgomery County, on the petitioner's motion to quash service of process (R. 49) is unreported. There was no other opinion by the Circuit Court.

### JURISDICTION

The judgment of the Supreme Court of Alabama (R. 1180) was entered August 30, 1962. The petition for a writ of certiorari was filed November 21, 1962 and was granted January 7, 1963. 371 U.S. 946. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

## QUESTIONS PRESENTED

1. Whether, consistently with the guarantee of freedom of the press in the First Amendment as embodied in the Fourteenth, a State may hold libelous *per se* and actionable by an elected City Commissioner published statements critical of the conduct of a department of the City Government under his general supervision, which are inaccurate in some particulars.
2. Whether there was sufficient evidence to justify, consistently with the constitutional guarantee of freedom of the press, the determination that published statements naming no individual but critical of the conduct of the "police" were defamatory as to the respondent, the elected City Commissioner with jurisdiction over the Police Department, and punishable as libelous *per se.*
3. Whether an award of $500,000 as "presumed" and punitive damages for libel constituted, in the circumstances of this case, an abridgment of the freedom of the press.
4. Whether the assumption of jurisdiction in a libel action against a foreign corporation publishing a newspaper in another State, based upon sporadic news gathering activities by correspondents, occasional solicitation of advertising and minuscule distribution of the newspaper within the forum state, transcended the territorial limitations of due process, imposed a forbidden burden on interstate commerce or abridged the freedom of the press.

**Constitutional and statutory provisions involved** The constitutional and statutory provisions involved are set forth in Appendix A, *infra,* pp. 91–95.

## STATEMENT

On April 19, 1960, the respondent, one of three elected Commissioners of the City of Montgomery, Alabama, instituted this action in the Circuit Court of Montgomery County against *The New York Times,* a New York corporation, and four co-defendants resident in Alabama, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery. The complaint (R. 1) demanded $500,000 as damages for libel allegedly contained in two paragraphs of an advertisement (R. 6) published in *The New York Times* on March 29, 1960. Service of process was attempted by delivery to an alleged agent of *The Times* in Alabama and by substituted service (R. 11) pursuant to the "long-arm" statute of the State. A motion to quash, asserting constitutional objections to the jurisdiction of the Circuit Court (R. 39, 43–44, 47, 129) was denied on August 5, 1960 (R. 49). A demurrer to the complaint (R. 58, 67) was overruled on November 1, 1960 (R. 108) and the cause proceeded to a trial by jury, resulting on November 3 in a verdict against all defendants for the full $500,000 claimed (R. 862). A motion for new trial (R. 896, 969) was denied on March 17, 1961 (R. 970). The Supreme Court of Alabama affirmed the judgment on August 30, 1962 (R. 1180).[1] The Circuit Court and the Supreme Court both rejected the petitioner's contention that the liability imposed abridged the freedom of the press.

**1. The nature of the publication** The advertisement, a copy of which was attached to the complaint (R. 1, 6), consisted of a full page statement (reproduced in Appendix B, *infra* p. 97) entitled "Heed Their Rising Voices," a phrase taken from a *New York Times* editorial of March 19, 1960, which was quoted at the top of the page as follows: "The growing movement of peaceful mass demonstrations by Negroes is something new in the South, something understandable … Let Congress heed their rising voices, for they will be heard."

The statement consisted of an appeal for contributions to the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South" to support "three needs—the defense of Martin Luther King—the support of the embattled students—and the struggle for the right-to-vote." It was set forth over the names of sixty-four individuals, including many who are well known for achievement in religion, humanitarian work, public affairs,

[1] Libel actions based on the publication of the same statements in the same advertisement were also instituted by Governor Patterson of Alabama, Mayor James of Montgomery, City Commissioner Parks and former Commissioner Sellers. The James case is pending on motion for new trial after a verdict of $500,000. The Patterson, Parks and Sellers cases, in which the damages demanded total $2,000,000, were removed by petitioner to the District Court. That court sustained the removal (195 F. Supp. 919 [1961]) but the Court of Appeals, one judge dissenting, reversed and ordered a remand (308 F. 2d 474 [1962]). A petition to review that decision on certiorari is now pending in this Court. *New York Times Company* v. *Parks and Patterson,* No. 687, October Term, 1962, No. 52, this Term.

trade unions and the arts. Under a line reading "We in the South who are struggling daily for dignity and freedom warmly endorse this appeal" appeared the names of twenty other persons, eighteen of whom are identified as clergymen in various southern cities. A New York address and telephone number were given for the Committee, the officers of which were also listed, including three individuals whose names did not otherwise appear.

The first paragraph of the statement alluded generally to the "non-violent demonstrations" of Southern Negro students "in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights." It went on to charge that in "their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom… ."

The second paragraph told of a student effort in Orangeburg, South Carolina, to obtain service at lunch counters in the business district and asserted that the students were forcibly ejected, tear-gassed, arrested en masse and otherwise mistreated.

The third paragraph spoke of Montgomery, Alabama and complained of the treatment of students who sang on the steps of the State Capitol, charging that their leaders were expelled from school, that truckloads of armed police ringed the Alabama State College Campus and that the College dining-hall was padlocked in an effort to starve the protesting students into submission.

The fourth paragraph referred to "Talla-hassee, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond, Charlotte and a host of other cities in the South," praising the action of "young American teenagers, in face of the entire weight of official state apparatus and police power," as "protagonists of democracy."

The fifth paragraph speculated that "The Southern violators of the Constitution fear this new, non-violent brand of freedom fighter … even as they fear the upswelling right-to-vote movement," that "they are determined to destroy the one man who more than any other, symbolizes the new spirit now sweeping the South—the Rev. Dr. Martin Luther King, Jr., world-famous leader of the Montgomery Bus Protest." It went on to portray the leadership role of Dr. King and the Southern Christian Leadership Conference, which he founded, and to extol the inspiration of "his doctrine of non-violence."

The sixth paragraph asserted that the "Southern violators" have repeatedly "answered Dr. King's protests with intimidation and violence" and referred to the bombing of his home, assault upon his person, seven arrests and a then pending charge of perjury. It stated that "their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance and support, and thereby to intimidate *all* leaders who may rise in the South", concluding that the defense of Dr. King "is an integral part of the total struggle for freedom in the South."

The remaining four paragraphs called upon "men and women of good will" to do more than "applaud the creative daring of the students and the quiet heroism of Dr. King" by adding their "moral support" and "the material help so urgently needed by those who are taking the risks, facing jail and even death in a glorious reaffirmation of our Constitution and its Bill of Rights."

**2. The allegedly defamatory statements** Of the ten paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel.

(a) The third paragraph was as follows:

> "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shot-guns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission."

Though the only part of this statement that respondent thought implied a reference to him was the assertion about "truckloads of police" (R. 712), he undertook and was permitted to deal with the paragraph in general by adducing evidence depicting the entire episode involved. His evidence consisted mainly of a story by Claude Sitton, the southern correspondent of *The Times,* published on March 2, 1960 (R. 655, 656–7, Pl. Ex. 169, R. 1568), a report requested by *The Times* from Don McKee, its "stringer" in Montgomery, after institution of this suit was threatened (R. 590–593, Pl. Ex. 348, R. 1931–1935), and a later telephoned report from

Sitton to counsel for *The Times,* made on May 5, after suit was brought (R. 593–595, Pl. Ex. 348, R. 1935–1937).

This evidence showed that a succession of student demonstrations had occurred in Montgomery, beginning with an unsuccessful effort by some thirty Alabama State College students to obtain service at a lunch counter in the Montgomery County Court House. A thousand students had marched on March 1, 1960, from the College campus to the State Capitol, upon the steps of which they said the Lord's Prayer and sang the National Anthem before marching back to the campus. Nine student leaders of the lunch counter demonstration were expelled on March 2 by the State Board of Education, upon motion of Governor Patterson, and thirty-one others were placed on probation (R. 696–699, Pl. Ex. 364, R. 1972–1974), but the singing at the Capitol was not the basis of the disciplinary action or mentioned at the meeting of the Board (R. 701). Alabama State College students stayed away from classes on March 7 in a strike in sympathy with those expelled but virtually all of them returned to class after a day and most of them re-registered or had already done so. On March 8, there was another student demonstration at a church near the campus, followed by a march upon the campus, with students dancing around in conga lines and some becoming rowdy. The superintendent of grounds summoned the police and the students left the campus, but the police arrived as the demonstrators marched across the street and arrested thirty-two of them for disorderly conduct or failure to obey officers, charges on which they later pleaded guilty and were fined in varying amounts (R. 677–680, 681, 682).

A majority of the student body was probably involved at one time or another in the protest but not the "entire student body". The police did not at any time "ring" the campus, although they were deployed near the campus on three occasions in large numbers. The campus dining hall was never "padlocked" and the only students who may have been barred from eating were those relatively few who had neither signed a pre-registration application nor requested temporary meal tickets (R. 594, 591).

The paragraph was thus inaccurate in that it exaggerated the number of students involved in the protest and the extent of police activity and intervention. If, as the respondent argued (R. 743), it implied that the students were expelled for singing on the steps of the Capitol, this was erroneous; the expulsion was for the demand for service at a lunch counter in the Courthouse. There was, moreover, no foundation for the charge that the dining hall was padlocked in an effort to starve the students into submission, an allegation that especially aroused resentment in Montgomery (R. 605, 607, 949, 2001, 2002, 2007).

(b) The portion of the sixth paragraph of the statement relied on by respondent read as follows:

> "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home, almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a *felony* under which they could imprison him for *ten* years."

As to this paragraph, which did not identify the time or place of the events recited, but which respondent read to allude to himself because it also "describes police action" (R. 724), his evidence showed that Dr. King's home had in fact been bombed twice when his wife and child were at home, though one of the bombs failed to explode—both of the occasions antedating the respondent's tenure as Commissioner (R. 594, 685, 688); that Dr. King had been arrested only four times, not seven, three of the arrests preceding the respondent's service as Commissioner (R. 592, 594–595, 703); that Dr. King had in fact been indicted for perjury on two counts, each carrying a possible sentence of five years imprisonment (R. 595), a charge on which he subsequently was acquitted (R. 680). It also showed that while Dr. King claimed to have been assaulted when he was arrested some four years earlier for loitering outside a courtroom (R. 594), one of the officers participating in arresting him and carrying him to a detention cell at headquarters denied that there was a physical assault (R. 692–693)—this incident also antedating the respondent's tenure as Commissioner (R. 694).

On the theory that the statement could be read to charge that the bombing of Dr. King's home was the work of the police (R. 707), respondent was permitted to call evidence that the police were not involved; that they in fact

dismantled the bomb that did not explode; and that they did everything they could to apprehend the perpetrators of the bombings (R. 685–687)—also before respondent's tenure as Commissioner (R. 688). In the same vein, respondent testified himself that the police had not bombed the King home or assaulted Dr. King or condoned the bombing or assaulting; and that he had had nothing to do with procuring King's indictment (R. 707–709).

**3. The impact of the statements on respondent's reputation** As one of the three Commissioners of the City of Montgomery since October 5, 1959, specifically Commissioner of Public Affairs, respondent's duties were the supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales (R. 703). He was normally not responsible, however, for day-to-day police operations, including those during the Alabama State College episode referred to in the advertisement, these being under the immediate supervision of Montgomery's Chief of Police—though there was one occasion when the Chief was absent and respondent supervised directly (R. 720). It was stipulated that there were 175 full time policemen in the Montgomery Police Department, divided into three shifts and four divisions, and 24 "special traffic directors" for control of traffic at the schools (R. 787).

As stated in respondent's testimony, the basis for his role as aggrieved plaintiff was the "feeling" that the advertisement, which did not mention him or the Commission or Commissioners or any individual, "reflects not only on me but on the other Commissioners and the community" (R. 724). He felt particularly that statements referring to "police activities" or "police action" were associated with himself, impugning his "ability and integrity" and reflecting on him "as an individual" (R. 712, 713, 724). He also felt that the other statements in the passages complained of, such as that alluding to the bombing of King's home, referred to the Commissioners, to the Police Department and to him because they were contained in the same paragraphs as statements mentioning police activities (R. 717–718), though he conceded that as "far as the expulsion of students is concerned, that responsibility rests with the State Department of Education" (R. 716).

In addition to this testimony as to the respondent's feelings, six witnesses were permitted to express their opinions of the connotations of the statements and their effect on respondent's reputation.

Grover C. Hall, editor of the Montgomery Advertiser, who had previously written an editorial attacking the advertisement (R. 607, 613, 949), testified that he thought he would associate the third paragraph "with the City Government—the Commissioners" (R. 605) and "would naturally think a little more about the police commissioner" (R. 608). It was "the phrase about starvation" that led to the association; the "other didn't hit" him "with any particular force" (R. 607, 608). He thought "starvation is an instrument of reprisal and would certainly be indefensible … in any case" (R. 605).

Arnold D. Blackwell, a member of the Water Works Board appointed by the Commissioners (R. 621) and a businessman engaged in real estate and insurance (R. 613), testified that the third paragraph was associated in his mind with "the Police Commissioner" and the "people on the police force"; that if it were true that the dining hall was padlocked in an effort to starve the students into submission, he would "think that the people on our police force or the heads of our police force were acting without their jurisdiction and would not be competent for the position" (R. 617, 624). He also associated the statement about "truck-loads of police" with the police force and the Police Commissioner (R. 627). With respect to the "Southern violators" passage, he associated the statement about the arrests with "the police force" but not the "sentences above that" (R. 624) or the statement about the charge of perjury (R. 625).

Harry W. Kaminsky, sales manager of a clothing store (R. 634) and a close friend of the respondent (R. 644), also associated the third paragraph with "the Commissioners" (R. 635), though not the statement about the expulsion of the students (R. 639). Asked on direct examination about the sentences in the sixth paragraph, he said that he "would say that it refers to the same people in the paragraph that we look at before," i.e., to "The Commissioners," including the respondent (R. 636). On cross-examination, however, he could not say that he associated those statements with the respondent, except that he thought that the reference to arrests "implicates the Police Department … or the authorities that would do that—arrest folks for speeding and loitering and such as that" (R. 639-640). In general,

he would "look at" the respondent when he saw "the Police Department" (R. 641).

H. M. Price, Sr., owner of a small food equipment business (R. 644), associated "the statements contained" in both paragraphs with "the head of the Police Department," the respondent (R. 646). Asked what it was that made him think of the respondent, he read the first sentence of the third paragraph and added: "Now, I would just automatically consider that the Police Commissioner in Montgomery would have to put his approval on those kind of things as an individual" (R. 647). If he believed the statements contained in the two paragraphs to be true, he would "decide that we probably had a young Gestapo in Montgomery" (R. 645–646).

William M. Parker, Jr., a friend of the respondent and of Mayor James (R. 651), in the service station business, associated "those statements in those paragraphs" with the City Commissioners (R. 650) and since the respondent "was the Police Commissioner," he "thought of him first" (R. 651). If he believed the statements to be true, he testified that he would think the respondent "would be trying to run this town with a strong arm—strong armed tactics, rather, going against the oath he took to run his office in a peaceful manner and an upright manner for all citizens of Montgomery" (R. 650).

Finally, Horace W. White, proprietor of the P. C. White Truck Line (R. 662), a former employer of respondent (R. 664), testified that both of the paragraphs meant to him "Mr. L. B. Sullivan" (R. 663). The statement in the advertisement that indicated to him that it referred to the respondent was that about "truck-loads of police," which made him think of the police and of respondent "as being the head of the Police Department" (R. 666). If he believed the statements, he doubted whether he "would want to be associated with anybody who would be a party to such things" (R. 664) and he would not re-employ respondent for P. C. White Truck Line if he thought that "he allowed the Police Department to do the things the paper say he did" (R. 667, 664, 669).

None of the six witnesses testified that he believed any of the statements that he took to refer to respondent and all but Hall specifically testified that they did not believe them (R. 623, 636, 647, 651, 667). None was led to think less kindly of respondent because of the advertisement (R. 625, 638, 647, 651, 666). Nor could respondent point to any injury that he had suffered or to any sign that he was held in less esteem (R. 721–724).

Four of the witnesses, moreover, Blackwell, Kaminsky, Price and Parker, saw the publication first when it was shown to them in the office of respondent's counsel to equip them as witnesses (R. 618, 637, 643, 647, 649). Their testimony should, therefore, have been disregarded under the trial court's instruction that the jury should "disregard … entirely" the testimony of any witness "based upon his reading of the advertisement complained of here, only after having been shown a copy of same by the plaintiff or his attorneys" (R. 833). White did not recall when he first saw the advertisement; he believed, though he was not sure, that "somebody cut it out of the paper and mailed it" to him or left it on his desk (R. 662, 665, 668). Only Hall, whose testimony was confined to the phrase about starving students into submission (R. 605, 607), received the publication in ordinary course at *The Montgomery Advertiser* (R. 606, 726–727).

**4. The circumstances of the publication** The advertisement was published by *The Times* upon an order from the Union Advertising Service, a reputable New York advertising agency, acting for the Committee to Defend Martin Luther King (R. 584–585, 737, Pl. Ex. 350, R. 1957). The order was dated March 28, 1960, but the proposed typescript of the ad had actually been delivered on March 23 by John Murray, a writer acting for the Committee, who had participated in its composition (R. 731, 805). Murray gave the copy to Gershon Aaronson, a member of the National Advertising Staff of *The Times* specializing in "editorial type" advertisements (R. 731, 738), who promptly passed it on to technical departments and sent a thermo-fax copy to the Advertising Acceptability Department, in charge of the screening of advertisements (R. 733, 734, 756). D. Vincent Redding, the manager of that department, read the copy on March 25 and approved it for publication (R. 758). He gave his approval because he knew nothing to cause him to believe that anything in the proposed text was false and because it bore the endorsement of "a number of people who are well known and whose reputation" he "had no reason to question" (R. 758, 759–760, 762–763). He did not make or think it necessary to make any further check as to the accuracy of the statements (R. 765, 771).

When Redding passed on the acceptability of the advertisement, the copy was accompanied by a letter from A. Philip Randolph, Chairman of the Committee, to Aaronson, dated March 23 (R. 587, 757, Def. Ex. 7, R. 1992) and reading:

> "This will certify that the names included on the enclosed list are all signed members of the Committee to Defend Martin Luther King and the Struggle for Freedom in the South.
>
> "Please be assured that they have all given us permission to use their names in furthering the work of our Committee."

The routine of *The Times* is to accept such a letter from a responsible person to establish that names have not been used without permission and Redding followed that practice in this case (R. 759). Each of the individual defendants testified, however, that he had not authorized the Committee to use his name (R. 787–804) and Murray testified that the original copy of the advertisement, to which the Randolph letter related, did not contain the statement "We in the South … warmly endorse this appeal" or any of the names printed thereunder, including those of these defendants. That statement and those names were added, he explained, to a revision of the proof on the suggestion of Bayard Rustin, the Director of the Committee. Rustin told Murray that it was unnecessary to obtain the consent of the individuals involved since they were all members of the Southern Christian Leadership Conference, as indicated by its letterhead, and "since the SCLC supports the work of the Committee … he [Rustin] … felt that there would be no problem at all, and that you didn't even have to consult them" (R. 806–809). Redding did not recall this difference in the list of names (R. 767), though Aaronson remembered that there "were a few changes made … prior to publication" (R. 739).

*The New York Times* has set forth in a booklet its "Advertising Acceptability Standards" (R. 598, Pl. Ex. 348, Exh. F, R. 1952) declaring, *inter alia,* that *The Times* does not accept advertisements that are fraudulent or deceptive, that are "ambiguous in wording and … may mislead" or "[a]ttacks of a personal character." In replying to the plaintiff's interrogatories, Harding Bancroft, Secretary of *The Times,* deposed that "as the advertisement made no attacks of a personal character upon any individual and otherwise met the advertising acceptability standards promulgated" by *The Times,* D. Vincent Redding had approved it (R. 585).

Though Redding and not Aaronson was thus responsible for the acceptance of the ad, Aaronson was cross-examined at great length about such matters as the clarity or ambiguity of its language (R. 741–753), the court allowing the interrogation on the stated ground that "this gentleman here is a very high official of *The Times,*" which he, of course, was not (R. 744). In the course of this colloquy, Aaronson contradicted himself on the question whether the word "they" in the "Southern violators" passage refers to "the same people" throughout or to different people, saying first "It is rather difficult to tell" (R. 745) and later: "I think now that it probably refers to the same people" (R. 746). Redding was not interrogated on this point, which respondent, in his Brief in Opposition, deemed established by what Aaronson "conceded" (Brief in Opposition, p. 7).

*The Times* was paid "a little over" $4800 for the publication of the advertisement (R. 752). The total circulation of the issue of March 29, 1960, was approximately 650,000, of which approximately 394 copies were mailed to Alabama subscribers or shipped to newsdealers in the State, approximately 35 copies going to Montgomery County (R. 601–602, Pl. Ex. 348, R. 1942–1943).

**5. The response to the demand for a retraction** On April 8, 1960, respondent wrote to the petitioner and to the four individual defendants, the letters being erroneously dated March 8 (R. 588, 671, 776, Pl. Ex. 348, 355–358, R. 1949, 1962–1968). The letters, which were in identical terms, set out the passages in the advertisement complained of by respondent, asserted that the "foregoing matter, and the publication as a whole charge me with grave misconduct and of [*sic*] improper actions and omissions as an official of the City of Montgomery" and called on the addressee to "publish in as prominent and as public a manner as the foregoing false and defamatory material contained in the foregoing publication, a full and fair retraction of the entire false and defamatory matter so far as the same relates to me and to my conduct and acts as a public official of the City of Montgomery, Alabama."

Upon receiving this demand and the report from Don McKee, the *Times* stringer in Montgomery referred to above (p. 7), petition-

er's counsel wrote to the respondent on April 15, as follows (R. 589, Pl. Ex. 363, R. 1971):

> Dear Mr. Commissioner:
>
> Your letter of April 8 sent by registered mail to The New York Times Company has been referred for attention to us as general counsel.
>
> You will appreciate, we feel sure, that the statements to which you object were not made by The New York Times but were contained in an advertisement proffered to The Times by responsible persons.
>
> We have been investigating the matter and are somewhat puzzled as to how you think the statements in any way reflect on you. So far, our investigation would seem to indicate that the statements are substantially correct with the sole exception that we find no justification for the statement that the dining hall in the State College was "padlocked in an attempt to starve them into submission."
>
> We shall continue to look into the subject matter because our client, The New York Times, is always desirous of correcting any statements which appear in its paper and which turn out to be erroneous.
>
> In the meanwhile you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you.
>
> Very truly yours,
>
> Lord, Day & Lord

The respondent filed suit on April 19, without answering this letter.

Subsequently, on May 9, 1960, Governor John Patterson of Alabama, sent a similar demand for a retraction to *The Times,* asserting that the publication charged him "with grave misconduct and of [*sic*] improper actions and omissions as Governor of Alabama and Ex-Officio Chairman of the State Board of Education of Alabama" and demanding publication of a retraction of the material so far as it related to him and to his conduct as Governor and Ex-Officio Chairman.

On May 16, the President and Publisher of *The Times* wrote Governor Patterson as follows (R. 773, Def. Ex. 9, R. 1998):

> Dear Governor Patterson:
>
> In response to your letter of May 9th, we are enclosing herewith a page of today's New York Times which contains the retraction and apology requested.
>
> As stated in the retraction, to the extent that anyone could fairly conclude from the advertisement that any charge was made against you, The New York Times apologizes.
>
> Faithfully yours,
>
> ORVIL DRYFOOS

The publication in *The Times* (Pl. Ex. 351, R. 1958), referred to in the letter, appeared under the headline "Times Retracts Statement in Ad" and the subhead "Acts on Protest of Alabama Governor Over Assertions in Segregation Matter." After preliminary paragraphs reporting the Governor's protest and quoting his letter in full, including the specific language of which he complained, the account set forth a "statement by The New York Times" as follows:

> The advertisement containing the statements to which Governor Patterson objects was received by The Times in the regular course of business from and paid for by a recognized advertising agency in behalf of a group which included among its subscribers well-known citizens.
>
> The publication of an advertisement does not constitute a factual news report by The Times nor does it reflect the judgment or the opinion of the editors of The Times. Since publication of the advertisement, The Times made an investigation and consistent with its policy of retracting and correcting any errors or misstatements which may appear in its columns, herewith retracts the two paragraphs complained of by the Governor.
>
> The New York Times never intended to suggest by the publication of the advertisement that the Honorable John Patterson, either in his capacity as Governor or as ex-officio chairman of the Board of Education of the State of Alabama, or otherwise, was guilty of "grave misconduct or improper actions and omission." To the extent that anyone can fairly conclude from the statements in the advertisement that any such charge was made, The New York Times hereby apologizes to the Honorable John Patterson therefor.

The publication closed with a recapitulation of the names of the signers and endorsers of the advertisement and of the officers of the Committee to Defend Martin Luther King.

In response to a demand in respondent's pre-trial interrogatories to "explain why said retraction was made but no retraction was made on the demand of the plaintiff," Mr. Bancroft, Secretary of *The Times,* said that *The Times* published the retraction in response to the Governor's demand "although in its judgment no statement in said advertisement referred to

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John Patterson either personally or as Governor of the State of Alabama, nor referred to this plaintiff [Sullivan] or any of the plaintiffs in the companion suits. The defendant, however, felt that on account of the fact that John Patterson held the high office of Governor of the State of Alabama and that he apparently believed that he had been libeled by said advertisement in his capacity as Governor of the State of Alabama, the defendant should apologize" (R. 595–596, Pl. Ex. 348, R. 1942). In further explanation at the trial, Bancroft testified: "We did that because we didn't want anything that was published by The Times to be a reflection on the State of Alabama and the Governor was, as far as we could see, the embodiment of the State of Alabama and the proper representative of the State and, furthermore, we had by that time learned more of the actual facts which the ad purported to recite and, finally, the ad did refer to the action of the State authorities and the Board of Education presumably of which the Governor is ex-officio chairman … " (R. 776–777). On the other hand, he did not think that "any of the language in there referred to Mr. Sullivan" (R. 777).

This evidence, together with Mr. Bancroft's further testimony that apart from the statement in the advertisement that the dining hall was padlocked, he thought that "the tenor of the content, the material of those two paragraphs in the ad … are … substantially correct" (R. 781, 785), was deemed by the Supreme Court of Alabama to lend support to the verdict of the jury and the size of its award (R. 1178).

**6. The rulings on the merits** The Circuit Court held that the facts alleged and proved sufficed to establish liability of the defendants, if the jury was satisfied that the statements complained of by respondent were published of and concerning him. Overruling a demurrer to the complaint (R. 108) and declining to direct a verdict for petitioner (R. 728–729, 818), the court charged the jury (R. 819–826) that the statements relied on by the plaintiff were "libelous per se"; that "the law implies legal injury from the bare fact of the publication itself"; that "falsity and malice are presumed"; that "[g]eneral damages need not be alleged or proved but are presumed" (R. 824); and that "punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown" (R. 825). While the court instructed, as requested, that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages" (R. 836), it refused to instruct that the jury must be "convinced" of malice, in the sense of "actual intent" to harm or "gross negligence and recklessness" to make such an award (R. 844). It also declined to require that a verdict for respondent differentiate between compensatory and punitive damages (R. 846).

Petitioner challenged these rulings as an abridgment of the freedom of the press, in violation of the First and the Fourteenth Amendments, and also contended that the verdict was confiscatory in amount and an infringement of the constitutional protection (R. 73–74, 898, 929–930, 935, 936–937, 945–946, 948). A motion for new trial, assigning these grounds among others (R. 896–949), was denied by the Circuit Court (R. 969).

The Supreme Court of Alabama sustained these rulings on appeal (R. 1139, 1180). It held that where "the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt," they are "libelous per se"; that "the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning the plaintiff" (R. 1155); and that it was actionable without "proof of pecuniary injury …, such injury being implied" (R. 1160–1161). It found no error in the trial court's ruling that the complaint alleged and the evidence established libelous statements which the jury could find were "of and pertaining to" respondent (R. 1158, 1160), reasoning as follows (R. 1157):

> "We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body."

The Court also approved the trial court's charge as "a fair, accurate and clear expression of the governing legal principles" (R. 1167) and sustained its determination that the damages awarded by the verdict were not excessive (R. 1179). On the latter point, the Court endorsed a statement in an earlier opinion that there "is no

legal measure of damages in cases of this character" (R. 1177) and held to be decisive that "The Times in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement"; that "The Times retracted the advertisement as to Governor Patterson, but ignored this plaintiff's demand for retraction" though the "matter contained in the advertisement was equally false as to both parties"; that in "the trial below none of the defendants questioned the falsity of the allegations in the advertisement" and, simultaneously, that "during his testimony it was the contention of the Secretary of The Times that the advertisement was 'substantially correct'" (R. 1178).

Petitioner's submissions under the First and the Fourteenth Amendments (assignments of error 81, 289–291, 294, 296, 298, 306–308, 310; R. 1055, 1091–1094, 1096–1097, 1098) were summarily rejected with the statements that the "First Amendment of the U.S. Constitution does not protect libelous publications" and the "Fourteenth Amendment is directed against State action and not private action" (R. 1160).

**7. The jurisdiction of the Alabama courts** Respondent sought to effect service in this action (R. 11) by delivery of process to Don McKee, the *New York Times* stringer in Montgomery, claimed to be an agent under § 188, Alabama Code of 1940, title 7 (Appendix A, *infra,* pp. 91–92), and by delivery to the Secretary of State under § 199(1), the "long-arm" statute of the State (Appendix A, *infra,* pp. 92–95). Petitioner, appearing specially and only for this purpose, moved to quash the service on the ground, among others, that the subjection of *The Times* to Alabama jurisdiction in this action would transcend the territorial limitations of due process in violation of the Fourteenth Amendment, impose a burden on interstate commerce forbidden by the Commerce Clause and abridge the freedom of the press (R. 39, 43–44, 47; see also, *e.g.,* R. 129).

The evidence adduced upon the litigation of the motion (R. 130–566) established the following facts:

Petitioner is a New York corporation which has not qualified to do business in Alabama or designated anyone to accept service of process there (R. 134–135). It has no office, property or employees resident in Alabama (R. 146, 403–404, 438–439). Its staff correspondents do, however, visit the State as the occasion may arise for purposes of newsgathering. From the beginning of 1956 through April, 1960, nine correspondents made such visits, spending, the courts below found, 153 days in Alabama, or an average of some thirty-six man-days per year. In the first five months of 1960, there were three such visits by Claude Sitton, the staff correspondent stationed in Atlanta (R. 311–314, 320, Pl. Ex. 91–93, R. 1356–1358) and one by Harrison Salisbury (R. 145, 239, Pl. Ex. 117, R. 1382). *The Times* also had an arrangement with newspapermen, employed by Alabama journals, to function as "stringers," paying them for stories they sent in that were requested or accepted at the rate of a cent a word and also using them occasionally to furnish information to the desk (*e.g.,* R. 175, 176) or to a correspondent (R. 136–137, 140, 153, 154). The effort was to have three such stringers in the State, including one in Montgomery (R. 149, 309) but only two received payments from *The Times* in 1960, Chadwick of *South Magazine,* who was paid $155 to July 26, and McKee of *The Montgomery Advertiser,* who was paid $90, covering both dispatches and assistance given Salisbury (R. 140, 143, 155, 159, 308–309, 441). McKee was also asked to investigate the facts relating to respondent's claim of libel, which he did (R. 202, 207). The total payments made by petitioner to stringers throughout the country during the first five months of 1960 was about $245,000 (R. 442). Stringers are not treated as employees for purposes of taxes or employee benefits (R. 439–440, 141–143).

The advertisement complained of in this action was prepared, submitted and accepted in New York, where the newspaper is published (R. 390–393, 438). The total daily circulation of *The Times* in March, 1960, was 650,000, of which the total sent to Alabama was 394–351 to mail subscribers and 43 to dealers. The Sunday circulation was 1,300,000, of which the Alabama shipments totaled 2,440 (Def. Ex. No. 4, R. 1981, R. 401–402). These papers were either mailed to subscribers who had paid for a subscription in advance (R. 427) or they were shipped prepaid by rail or air to Alabama newsdealers, whose orders were unsolicited (R. 404–408, 444) and with whom there was no contract (R. 409). *The Times* would credit dealers for papers which were unsold or arrived late, damaged or incomplete, the usual custom being for the dealer to get the irregularities certified by the railroad baggage man upon a card provided by *The*

*Times* (R. 408–409, 410–412, Pl. Ex. 276–309, R. 1751–1827, R. 414, 420–426), though this formality had not been observed in Alabama (R. 432–436). Gross revenue from this Alabama circulation was approximately $20,000 in the first five months of 1960 of a total gross from circulation of about $8,500,000 (R. 445). *The Times* made absolutely no attempt to solicit or promote its sale or distribution in Alabama (R. 407–408, 428, 450, 485).

*The Times* accepted advertising from Alabama sources, principally advertising agencies which sent their copy to New York, where any contract for its publication was made (R. 344–349, 543); the agency would then be billed for cost, less the amount of its 15% commission (R. 353–354). The New York Times Sales, Inc., a wholly-owned subsidiary corporation, solicited advertisements in Alabama, though it had no office or resident employees in the State (R. 359–361, 539, 482). Two employees of Sales, Inc. and two employees of *The Times* spent a total of 26 days in Alabama for this purpose in 1959; and one of the Sales, Inc. men spent one day there before the end of May in 1960 (R. 336–338, Def. Ex. 1, R. 1978, 546, 548–551). Alabama advertising linage, both volunteered and solicited, amounted to 5471 in 1959 of a total of 60,000,000 published; it amounted to 13,254 through May of 1960 of a total of 20,000,000 lines (R. 342–344, 341, Def. Ex. 2, R. 1979). An Alabama supplement published in 1958 (R. 379, Pl. Ex. 273, R. 1689–1742) produced payments by Alabama advertisers of $26,801.64 (R. 380). For the first five months of 1960 gross revenue from advertising placed by Alabama agencies or advertisers was $17,000 to $18,000 of a total advertising revenue of $37,500,000 (R. 443). The gross from Alabama advertising and circulation during this period was $37,300 of a national total of $46,000,000 (R. 446).

On these facts, the courts below held that petitioner was subject to the jurisdiction of the Circuit Court in this action, sustaining both the service on McKee as a claimed agent and the substituted service on the Secretary of State and rejecting the constitutional objections urged (R. 49, 51–57, 1139, 1140–1151). Both courts deemed the newsgathering activities of correspondents and stringers, the solicitation and publication of advertising from Alabama sources and the distribution of the paper in the State to constitute sufficient Alabama "contacts" to support the exercise of jurisdiction (R. 56–57, 1142–1147). They also held that though petitioner had appeared specially upon the motion for the sole purpose of presenting these objections, as permitted by the Alabama practice, the fact that the prayer for relief asked for dismissal for "lack of jurisdiction of the subject matter" of the action, as well as want of jurisdiction of the person of defendant, constituted a general appearance and submission to the jurisdiction of the Court (R. 49–51, 1151–1153).

## SUMMARY OF ARGUMENT

**I.**

Under the doctrine of "libel per se" applied below, a public official is entitled to recover "presumed" and punitive damages for a publication found to be critical of the official conduct of a governmental agency under his general supervision if a jury thinks the publication "tends" to "injure" him "in his reputation" or to "bring" him "into public contempt" as an official. The publisher has no defense unless he can persuade the jury that the publication is entirely true in all its factual, material particulars. The doctrine not only dispenses with proof of injury by the complaining official, but presumes malice and falsity as well. Such a rule of liability works an abridgment of the freedom of the press.

The court below entirely misconceived the constitutional issues, in thinking them disposed of by the propositions that "the Constitution does not protect libelous publications" and that the "Fourteenth Amendment is directed against State action and not private action" (R. 1160). The requirements of the First Amendment are not satisfied by the "mere labels" of State law. *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 429 (1963); see also *Beauharnais* v. *Illinois,* 343 U.S. 250, 263–264 (1952). The rule of law and the judgment challenged by petitioner are, of course, state action within the meaning of the Fourteenth Amendment.

If libel does not enjoy a talismanic insulation from the limitations of the First and Fourteenth Amendments, the principle of liability applied below infringes "these basic constitutional rights in their most pristine and classic form." *Edwards* v. *South Carolina,* 372 U.S. 229, 235 (1963). Whatever other ends are also served by freedom of the press, its safeguard "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes

desired by the people." *Roth* v. *United States,* 354 U.S. 476, 484 (1957). It is clear that the political expression thus protected by the fundamental law is not delimited by any test of truth, to be administered by juries, courts, or by executive officials. *N.A.A.C.P.* v. *Button, supra,* at 445; *Cantwell* v. *Connecticut,* 310 U.S. 296, 310 (1940). It also is implicit in this Court's decisions that speech or publication which is critical of governmental or official action may not be repressed upon the ground that it diminishes the reputation of those officers whose conduct it deplores or of the government of which they are a part.

The closest analogy in the decided cases is provided by those dealing with contempt, where it is settled that concern for the dignity and reputation of the bench does not support the punishment of criticism of the judge or his decision, whether the utterance is true or false. *Bridges* v. *California,* 314 U.S. 252, 270 (1941); *Pennekamp* v. *Florida,* 328 U.S. 331, 342 (1946); *Wood* v. *Georgia,* 370 U.S. 375 (1962). Comparable criticism of an elected, political official cannot consistently be punished as a libel on the ground that it diminishes his reputation. If political criticism could be punished on the ground that it endangers the esteem with which its object is regarded, none safely could be uttered that was anything but praise.

That neither falsity nor tendency to harm official reputation, nor both in combination, justifies repression of the criticism of official conduct was the central lesson of the great assault on the short-lived Sedition Act of 1798, which the verdict of history has long deemed inconsistent with the First Amendment. The rule of liability applied below is even more repressive in its function and effect than that prescribed by the Sedition Act: it lacks the safeguards of criminal sanctions; it does not require proof that the defendant's purpose was to bring the official into contempt or disrepute; it permits, as this case illustrates, a multiplication of suits based on a single statement; it allows legally limitless awards of punitive damages. Moreover, reviving by judicial decision the worst aspect of the Sedition Act, the doctrine of this case forbids criticism of the government as such on the theory that top officers, though they are not named in statements attacking the official conduct of their agencies, are presumed to be hurt because such critiques are "attached to" them (R. 1157).

Assuming, without conceding, that the protection of official reputations is a valid interest of the State and that the Constitution allows room for the "accommodation" of that interest and the freedom of political expression, the rule applied below is still invalid. It reflects no compromise of the competing interests; that favored by the First Amendment has been totally rejected, the opposing interest totally preferred. If there is scope for the protection of official reputation against criticism of official conduct, measures of liability far less destructive of the freedom of expression are available and adequate to serve that end. It might be required, for example, that the official prove special damage, actual malice, or both. The Alabama rule embraces neither mitigation. Neither would allow a judgment for respondent on the evidence that he presents.

The foregoing arguments are fortified by the privilege the law of libel grants to an official if he denigrates a private individual. It would invert the scale of values vital to a free society if citizens discharging the "political duty" of "public discussion" (Brandeis, J., concurring in *Whitney* v. *California,* 274 U.S. 357, 375 [1927]) did not enjoy a fair equivalent of the immunity granted to officials as a necessary incident of the performance of official duties.

Finally, respondent's argument that the publication is a "commercial advertisment," beyond the safeguard of the First Amendment, is entirely frivolous. The statement was a recital of grievances and protest against claimed abuse dealing squarely with the major issue of our time.

**II.**

Whether or not the rule of liability is valid on its face, its application in this case abridges freedom of the press. For nothing in the evidence supports a finding of the type of injury or threat to the respondent's reputation that conceivably might justify repression of the publication or give ground for the enormous judgment rendered on the verdict.

Complaining broadly against suppression of Negro rights throughout the South, the publication did not name respondent or the Commission of which he is a member and plainly was not meant as an attack on him or any other individual. Its protests and its targets were imper-

sonal: "the police," "the state authorities," "the Southern violators." The finding that these collective generalities embodied an allusion to respondent's personal identity rests solely on the reference to "the police" and on his jurisdiction over that department. But the police consisted of too large a group for such a personal allusion to be found. The term "police" does not, in fact, mean all policemen. No more so does it mean the Mayor or Commissioner in charge. This fatal weakness in the claim that the respondent was referred to by the publication was not cured by his own testimony or that of his six witnesses; they did no more than express the opinion that "police" meant the respondent, because he is Commissioner in charge. These "mere general asseverations" (*Norris* v. *Alabama,* 294 U.S. 587, 595 [1935]) were not evidence of what the publication said or what it reasonably could be held to mean.

Even if the statements that refer to "the police" could validly be taken to refer to the respondent, there was nothing in those statements that suffices to support the judgment. Where the publication said that "truckloads" of armed police "ringed the Alabama State College Campus," the fact was that only "large numbers" of police "were deployed near the campus" upon three occasions, without ringing it on any. And where the statement said "They have arrested him seven times," the fact was that Dr. King had been arrested only four times. That these exaggerations or inaccuracies cannot rationally be regarded as tending to injure the respondent's reputation is entirely clear. The advertisement was also wrong in saying that when "the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission." Only a few students refused to re-register and the dining hall was never padlocked. But none of these erroneous assertions had a thing to do with the police and even less with the respondent. It was equally absurd for respondent to claim injury because the publication correctly reported that some unidentified "they" had twice bombed the home of Dr. King, and to insist on proving his innocence of that crime as the trial court permitted him to do.

That the respondent sustained no injury in fact from the publication, the record makes entirely clear.

Even if there were in this record a basis for considering the publication an offense to the respondent's reputation, there was no rational relationship between the gravity of the offense and the size of the penalty imposed. A "police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive." Brandeis, J., concurring in *Whitney* v. *California,* 274 U.S. 357, 377 (1927). The proposition must apply with special force when the "harsh" remedy has been explicitly designed as a deterrent of expression. Upon this ground alone, this monstrous judgment is repugnant to the Constitution.

**III.**

The assumption of jurisdiction in this action by the Circuit Court, based on service of process on McKee and substituted service on the Secretary of State, transcended the territorial limits of due process, imposed a forbidden burden on interstate commerce and abridged the freedom of the press.

There was no basis for the holding by the courts below that petitioner forfeited these constitutional objections by making an involuntary general appearance in the cause. The finding of a general appearance was based solely on the fact that when petitioner appeared specially and moved to quash the attempted service for want of jurisdiction of its person, as permitted by the Alabama practice, the prayer for relief concluded with a further request for dismissal for "lack of jurisdiction of the subject matter of said action." That prayer did not manifest an intention to "consent" or to make "a voluntary submission to the jurisdiction of the court," which the Alabama cases have required to convert a special into a general appearance. *Ex parte Cullinan,* 224 Ala. 263, 266 (1931). The papers made entirely clear that the sole ruling sought by the petitioner was that it was not amenable to Alabama jurisdiction, as a New York corporation having no sufficient contact with the State to permit the assertion of jurisdiction *in personam* in an action based upon a publication in New York.

Moreover, even if petitioner could validly be taken to have made an involuntary general appearance, that appearance would not bar the claim that in assuming jurisdiction of this action the state court imposed a forbidden burden on interstate commerce or that it abridged the free-

dom of the press. *Davis* v. *Farmers Co-operative Co.,* 262 U.S. 312 (1923); *Michigan Central R. R. Co.* v. *Mix,* 278 U.S. 492, 496 (1929); *Denver & R. G. W. R. Co.* v. *Terte,* 284 U.S. 284, 287 (1932).

The decisions of this Court do not support the holding that the sporadic newsgathering activities of correspondents and stringers of *The Times* in Alabama, the occasional solicitation and publication of advertising from Alabama sources and the minuscule shipment of the newspaper to subscribers and newsdealers in the State constitute sufficient Alabama contacts to satisfy the requirements of due process.

The petitioner's peripheral relationship to Alabama does not involve "continuous corporate operations" which are "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *International Shoe Co.* v. *Washington,* 326 U.S. 310, 318 (1945); *Perkins* v. *Benguet Mining Co.,* 342 U.S. 437 (1952). Hence, if the jurisdiction is sustained, it must be on the ground that the cause of action alleged is so "connected with" petitioner's "activities within the state" as to "make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there." *International Shoe Co.* v. *Washington, supra,* at 319, 317. There is no such connection. Here, as in *Hanson* v. *Denckla,* 357 U.S. 235, 252 (1958), the "suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in" the State. The liability alleged is not based on any activity of correspondents or stringers of *The Times* in covering the news in Alabama; and such activity does not rest on a privilege the State confers, given the rights safeguarded by the Constitution. Nor is this claim connected with the occasional solicitation of advertisements in Alabama. Finally, the negligible circulation of *The Times* in Alabama does not involve an act of the petitioner within the State. Copies were mailed in New York to Alabama subscribers or shipped in New York to newsdealers who were purchasers, not agents of *The Times.*

Even if the shipment of the paper may be deemed an act of the petitioner in Alabama, it does not sustain the jurisdiction here affirmed. The standard of *International Shoe* is not "simply mechanical or quantitative"; its application "must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure" (326 U.S. at 319). Measured by this standard, a principle which would require, in effect, that almost every newspaper defend a libel suit in almost any jurisdiction of the country, however trivial its circulation there may be, would not further the "fair and orderly administration of the laws". To the extent that this submission prefers the interest of the publisher to that of the plaintiff, the preference is one supported by the First Amendment. It also is supported by the fact that the plaintiff's grievance rests but fancifully on the insubstantial distribution of the publication in the forum, as distinguished from its major circulation out of state.

The decision in *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957) does not govern the disposition here. The contract executed in *McGee* constituted a continuing legal relationship between the insurer and the insured within the State, a relationship which the States, with the concurrence of Congress, have long deemed to require special regulation. *Hanson* v. *Denckla, supra,* at 252; *Travelers Health Assn.* v. *Virginia,* 339 U.S. 643 (1950). *Scripto* v. *Carson,* 362 U.S. 207 (1960), relied on by respondent, is totally irrelevant to the problem of judicial jurisdiction.

The need for reciprocal restraints upon the power of the States to exert jurisdiction over men and institutions not within their borders is emphasized in our society by the full faith and credit clause of the Constitution. An Alabama judgment in this case would have no practical importance were it not enforceable as such in States where the petitioner's resources are located. Thus jurisdictional delineations must be based on grounds that command general assent throughout the Union. No standard worthy of such general assent sustains the jurisdiction here.

If negligible state circulation of a paper published in another state suffices to establish jurisdiction of a suit for libel threatening the type of judgment rendered here, such distribution interstate cannot continue. So, too, if the interstate movement of correspondents provides a factor tending to sustain such jurisdiction, as the court below declared, a strong barrier to such movement has been erected. In the silence of Congress, such movement and distribution are protected by the commerce clause against burdensome state action, unsupported by an over-

riding local interest. Such a burden has been imposed here.

Newsgathering and circulation are both aspects of the freedom of the press, safeguarded by the Constitution. Neither can continue unimpaired if they subject the publisher to foreign jurisdiction on the grounds and of the scope asserted here. Accordingly, the jurisdictional determination is also repugnant to the First Amendment.

## ARGUMENT

The decision of the Supreme Court of Alabama, sustaining the judgment of the Circuit Court, denies rights that are basic to the constitutional conception of a free society and contravenes a postulate of our federalism.

We submit, first (Points I and II), that the decision gives a scope and application to the law of libel so restrictive of the right to protest and to criticize official conduct that it abridges the protected freedom of the press.

We argue, secondly (Point III), that in requiring petitioner to answer in this action in the courts of Alabama, the decision violates the territorial restrictions that the Constitution places on State process, casts a forbidden burden on interstate commerce and also abridges freedom of the press.

### I. The decision rests upon a rule of liability for criticism of official conduct that abridges freedom of the press.

Under the law of libel as declared below, a public official is entitled to recover "presumed" and punitive damages for a publication found to be critical of the official conduct of a governmental agency under his general supervision if a jury thinks the publication "tends" to "injure" him "in his reputation" or to "bring" him "into public contempt" as an official. The place of the official in the governmental hierarchy is, moreover, evidence sufficient to establish that his reputation has been jeopardized by statements that reflect upon the agency of which he is in charge. The publisher has no defense unless, as respondent noted in his Brief in Opposition (p. 18, n. 10), he can persuade the jury that the publication is entirely true in all its factual, material particulars. *Ferdon* v. *Dickens,* 161 Ala. 181, 185, 200–201 (1909); *Kirkpatrick* v. *Journal Publishing Company,* 210 Ala. 10, 11 (1923); *Alabama Ride Company* v. *Vance,* 235 Ala. 263, 265 (1938); *Johnson Publishing Co.* v. *Davis,* 271 Ala. 474, 495 (1960). Unless he can discharge this burden as to stated facts, he has no privilege of comment. *Parsons* v. *Age-Herald Pub. Co.,* 181 Ala. 439, 450 (1913). Good motives or belief in truth, however reasonable, are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. *Johnson Publishing Co.* v. *Davis, supra,* at 495. A claim of truth which is regarded as unfounded affords evidence of malice, fortifying the presumption that applies in any case (R. 1178).

We submit that such a rule of liability works an abridgment of the freedom of the press, as that freedom has been defined by the decisions of this Court.

**First: The State Court's misconception of the constitutional issues** The reasons assigned by the Court below give no support to its rejection of petitioner's constitutional objections.

The accepted proposition that "[t]he Fourteenth Amendment is directed against State action and not private action" (R. 1160) obviously has no application to the case. The petitioner has challenged a State rule of law applied by a State court to render judgment carrying the full coercive power of the State, claiming full faith and credit through the Union solely on that ground. The rule and judgment are, of course, State action in the classic sense of the subject of the Amendment's limitations. See *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 463 (1958); *Barrows* v. *Jackson,* 346 U.S. 249, 254 (1953); *Shelley* v. *Kraemer,* 334 U.S. 1, 14 (1948).

There is no greater merit in the other reason stated in the Court's opinion, that "the Constitution does not protect libelous publications." Statements to that effect have, to be sure, been made in passing in opinions of this Court. See *Konigsberg* v. *State Bar of California,* 366 U.S. 36, 49 (1961); *Times Film Corporation* v. *City of Chicago,* 365 U.S. 43, 48 (1961); *Roth* v. *United States,* 354 U.S. 476, 486 (1957); *Beauharnais* v. *Illinois,* 343 U.S. 250, 266 (1952); *Pennekamp* v. *Florida,* 328 U.S. 331, 348–349 (1946); *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572 (1942); *Near* v. *Minnesota,* 283 U.S. 697, 715 (1931). But here, no less than elsewhere, a "great principle of constitutional law is not susceptible of comprehensive statement in an adjective." *Carter* v. *Carter Coal Co.,* 298 U.S. 238, 327 (1936) (dissenting opinion of Cardozo, J.).

The statements cited meant no more than that the freedom of speech and of the press is not a universal absolute and leaves the States some room for the control of defamation. None of the cases sustained the repression as a libel of expression critical of governmental action or was concerned with the extent to which the law of libel may be used for the protection of official reputation. The dictum in *Pennekamp* that "when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants" left at large what may amount to defamation and what remedy a public servant has. *Beauharnais* alone dealt with the standards used in judging any kind of libel, sustaining with four dissenting votes a state conviction for a publication held to be both defamatory of a racial group and "liable to cause violence and disorder." Mr. Justice Frankfurter's opinion took pains to reserve this Court's "authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel"—adding that "public men are, as it were, public property," that "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." 343 U.S. at 263–264. Those reservations, rather than the judgment, are apposite here.

Throughout the years this Court has measured by the standards of the First Amendment every formula for the repression of expression challenged at its bar. In that process judgment has been guided by the meaning and the purpose of the Constitution, interpreted as a "continuing instrument of government" (*United States* v. *Classic,* 313 U.S. 299, 316 [1941]), not by the vagaries or "mere labels" of state law. *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 429 (1963). See also Mr. Chief Justice Warren in *Trop* v. *Dulles,* 356 U.S. 86, 94 (1958). Hence libel, like sedition, insurrection, contempt, advocacy of unlawful acts, breach of the peace, disorderly conduct, obscenity or barratry, to name but prime examples, must be defined and judged in terms that satisfy the First Amendment. The law of libel has no more immunity than other law from the supremacy of its command.

**Second: Seditious libel and the Constitution** If libel does not enjoy a talismanic insulation from the limitations of the First and Fourteenth Amendments, the principle of liability applied below, resting as it does on a "common law concept of the most general and undefined nature" (*Cantwell* v. *Connecticut,* 310 U.S. 296, 308 [1940]), infringes "these basic constitutional rights in their most pristine and classic form." *Edwards* v. *South Carolina,* 372 U.S. 229, 235 (1963).

Whatever other ends are also served by freedom of the press, its safeguard, as this Court has said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States,* 354 U.S. 476, 484 (1957). Its object comprehends the protection of that "right of freely examining public characters and measures, and of free communication among the people thereon," which, in the words of the Virginia Resolution, "has ever been justly deemed the only effectual guardian of every other right." 4 *Elliot's Debates* (1876), p. 554. The "opportunity for free political discussion" and "debate" secured by the First Amendment (*Stromberg* v. *California,* 283 U.S. 359, 369 [1931]; *DeJonge* v. *Oregon,* 299 U.S. 353, 365 [1937]; *Terminiello* v. *Chicago,* 337 U.S. 1, 4 [1949]), extends to "vigorous advocacy" no less than "abstract" disquisition. *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 429 (1963). The "prized American privilege to speak one's mind, although not always with perfect good taste," applies at least to such speech "on all public institutions." *Bridges* v. *California,* 314 U.S. 252, 270 (1941). "To many this is, and always will be, folly; but we have staked upon it our all." L. Hand, J., in *United States* v. *Associated Press,* 52 F. Supp. 362, 372 (S.D.N.Y. 1943). That national commitment has been affirmed repeatedly by the decisions of this Court, which have recognized that the Amendment "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow" (*Bridges* v. *California, supra,* at 263); and that its freedoms "need breathing space to survive." *N.A.A.C.P.* v. *Button, supra,* at 433.

It is clear that the political expression thus protected by the fundamental law is not delimited by any test of truth, to be administered by juries, courts, or by executive officials, not to speak of a test which puts the burden of establishing the truth upon the writer. Within this sphere of speech or publication, the constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *N.A.A.C.P.* v. *Button, supra,* at 445. See also *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958). The Amendment "pre-

supposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *United States* v. *Associated Press, supra,* at 372. As Mr. Justice Roberts said in *Cantwell* v. *Connecticut,* 310 U.S. 296, 310 (1940):

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

These affirmations are the premises today of any exploration of the scope of First Amendment freedom undertaken by this Court. It is implicit in those premises that speech or publication which is critical of governmental or official action may not be repressed upon the ground that it diminishes the reputation of the officers whose conduct it deplores or of the government of which they are a part.

The closest analogy in the decided cases is provided by those dealing with contempt.[2] It is settled law that concern for the dignity and reputation of the bench does not support the punishment of criticism of the judge or his decision (*Bridges* v. *California, supra,* at 270), though the utterance contains "half-truths" and "misinformation" (*Pennekamp* v. *Florida, supra,* 328 U.S. at 342, 343, 345). Any such repression must be justified, if it is justified at all, by danger of obstruction of the course of justice; and such danger must be clear and present. See also *Craig* v. *Harney,* 331 U.S. 367, 373, 376, 389 (1947); *Wood* v. *Georgia,* 370 U.S. 375, 388, 389, 393 (1962). We do not see how comparable criticism of an elected, political official may consistently be punished as a libel on the ground that it diminishes his reputation.[3] The supposition that judges are "men of fortitude, able to thrive in a hardy climate" (*Craig* v. *Harney, supra,* at 376) must apply to commissioners as well.

These decisions are compelling not alone for their authority but also for their recognition of the basic principle involved. If political criticism could be punished on the ground that it endangers the esteem with which its object is regarded, none safely could be uttered that was anything but praise.

The point was made in classic terms in Madison's Report on the Virginia Resolutions (4 *Elliot's Debates,* p. 575):

> "… it is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; because those who engage in such discussions, must expect and intend to excite these unfavorable sentiments, so far as they may be thought to be deserved. To prohibit the intent to excite those unfavorable sentiments against those who administer the government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct… ."

If criticism of official conduct may not be repressed upon the ground that it is false or that it tends to harm official reputation, the inadequacy of these separate grounds is not surmounted by their combination. This was the basic lesson of the great assault on the short-lived Sedition Act of 1798, which first crystallized a national awareness of the central meaning of the First Amendment. See, *e.g.,* Levy, *Legacy of Suppression* (1960), p. 249 *et. seq.;* Smith, *Freedom's Fetters* (1956).

That Act declared it a crime "if any person shall write, print, utter or publish … any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress …, or the President …, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them or either of them,

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[2] *Cf.* Kalven, *The Law of Defamation and the First Amendment,* in *Conference on the Arts, Publishing and the Law* (U. of Chi. Law School), p. 4: "It is exactly correct to regard seditious libel, which has been the most serious threat to English free speech, as defamation of government and government officials. It is at most a slight extension of terms to regard contempt of court by publication as a problem of defamation of the judicial process."

[3] Statements about officials dealing with purely private matters unrelated to their official conduct or competence might raise different questions, not presented here.

into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States… . " It specifically provided that the defendant might "give in evidence in his defence, the truth of the matter contained in the publication charged as a libel", a mitigation of the common law not achieved in England until Lord Campbell's Act in 1843. It also reserved the right of the jury to "determine the law and the fact, under the direction of the court, as in other cases," accepting the reform effected by Fox's Libel Act of 1792. Act of July 14, 1798, Secs. 2, 3; 1 Stat. 596. These qualifications were not deemed sufficient to defend the measure against a constitutional attack that won widespread support throughout the nation.

In the House debate upon the bill, John Nicholas of Virginia warned that a law ostensibly directed against falsehood "must be a very powerful restriction of the press, with respect to the publication of important truths." Men "would be deterred from printing anything which should be in the least offensive to a power which might so greatly harass them. They would not only refrain from publishing anything of the least questionable nature, but they would be afraid of publishing the truth, as, though true, it might not always be in their power to establish the truth to the satisfaction of a court of justice." 8 *Annals of Congress* 2144. Albert Gallatin delineated the same peril, arguing that "the proper weapon to combat error was truth, and that to resort to coercion and punishments in order to suppress writings attacking … measures …, was to confess that these could not be defended by any other means." *Id.* at 2164. Madison's Report reiterates these points, observing that some "degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 *Elliot's Debates,* p. 571. Summing up the position in words that have echoed through the years, he asked (*ibid.*):

> "Had Sedition Acts, forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing, at this day, under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?"

Though the Sedition Act was never passed on by this Court, the verdict of history surely sustains the view that it was inconsistent with the First Amendment. Fines levied in its prosecutions were repaid by Act of Congress on this ground. See, *e.g.,* Act of July 4, 1840, c. 45, 6 Stat. 802 (fine imposed on Congressman Matthew Lyon refunded to his heirs).[4] Its invalidity as "abridging the freedom of the press" was assumed by Calhoun, reporting to the Senate on February 4, 1836, as a matter "which no one now doubts." Report with Senate bill No. 122, 24th Cong., 1st Sess. p. 3. The same assumption has been made upon this Court. Holmes, J., dissenting in *Abrams* v. *United States,* 250 U.S. 616, 630 (1919); Jackson, J., dissenting in *Beauharnais* v. *Illinois,* 343 U.S. 250, 288–289 (1952). See also Cooley, *Constitutional Limitations* (8th ed. 1927), p. 900; Chafee, *Free Speech in the United States* (1941), pp. 27–29. These assumptions reflect a broad consensus that, we have no doubt, is part of present law.

Respondent points to Jefferson's distinction between the right of Congress "to control the freedom of the press," which Jefferson of course denied, and that remaining in the States, which he admitted. Brief in Opposition, p. 19; see *Dennis* v. *United States,* 341 U.S. 494, 522, n. 4 (1961) (concurring opinion). That distinction lost its point with the adoption of the Fourteenth Amendment and the incorporation of the First Amendment freedoms in the "liberty" protected against state action. See, *e.g., Bridges* v. *California,* 314 U.S. 252, 268 (1941); *Edwards* v. *South Carolina,* 372 U.S. 229, 235 (1963). The view that there may be a difference in the stringency of the commands embodied in the two Amendments (Jackson, J., in *Beauharnais* v. *Illinois, supra,* 343 U.S. at 288; Harlan, J., concurring in *Alberts* v. *California,* 354 U.S. 476, 501, 503 [1957]) has not prevailed in the decisions of this Court. Even if it had, we think it

[4] The Committee reporting the bill described its basis as follows (H.R. Rep. No. 86, 26th Cong., 1st Sess., p. 3 (1840)): "All that now remains to be done by the representatives of a people who condemned this act of their agents as unauthorized, and transcending their grant of power, to place beyond question, doubt, or cavil, that mandate of the constitution prohibiting Congress from abridging the liberty of the press, and to discharge an honest, just, moral, and honorable obligation, is to refund from the Treasury the fine thus illegally and wrongfully obtained from one of their citizens… ."

See also Acts of June 17, 1844, cc. 136 and 165, 6 Stat. 924 and 931.

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plain that there could be no reasonable difference in the strength of their protection of expression against "frontal attack or suppression" (Harlan, J., dissenting in *N.A.A.C.P.* v. *Button, supra,* 371 U.S. at 455) of the kind with which we are concerned.

The rule of liability applied below is even more repressive in its function and effect than that prescribed by the Sedition Act. There is no requirement of an indictment and the case need not be proved beyond a reasonable doubt. It need not be shown, as the Sedition Act required, that the defendant's purpose was to bring the official "into contempt or disrepute"; a statement adjudged libelous *per se* is *presumed* to be "false and malicious," as the trial court instructed here (R. 824). There is no limitation to one punishment for one offensive statement, as would be required in a criminal proceeding. Respondent is only one of four commissioners, including one former incumbent, not to speak of the former Governor, who claim damages for the same statement. The damages the jury may award them if it deems the statement to apply to their official conduct are both general and punitive—the former for a "presumed" injury to reputation (R. 1160) and the latter "not alone to punish the wrongdoer, but as a deterrent to others similarly minded" (R. 1176). Such damages, moreover, are fettered by "no legal measure" of amount (R. 1177). It does not depreciate the stigma of a criminal conviction to assert that such a "civil" sanction is a more repressive measure than the type of sentence the Sedition Act permitted for the crime that it purported to define. Here, as in *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963), the "form of regulation … creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."

It should be added that the principle of liability, as formulated by the Supreme Court of Alabama, goes even further than to punish statements critical of the official conduct of individual officials; it condemns the critique of government as such. This is accomplished by the declaration that it is sufficient to sustain the verdict that in "measuring the performance or deficiencies" of governmental bodies, "praise or criticism is usually attached to the official in complete control of the body" (R. 1157). On this thesis it becomes irrelevant that the official is not named or referred to in the publication. The most impersonal denunciation of an agency of government may be treated, in the discretion of the jury, as a defamation of the hierarchy of officials having such "complete control." A charge, for example, of "police brutality," instead of calling for investigation and report by supervising officers, gives them a cause of action against the complainant, putting him to proof that will persuade the jury of the truth of his assertion. Such a concept transforms the law of defamation from a method of protecting private reputation to a device for insulating government against attack.

When municipalities have claimed that they were libeled, they have met the answer that "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." *City of Chicago* v. *Tribune Co.,* 307 Ill. 595, 601 (1923). See also *City of Albany* v. *Meyer,* 99 Cal. App. 651 (1929). That answer applies as well to converting "libel on government" into libel of the officials of whom it must be composed. The First Amendment, no less than the Fifteenth, "nullifies sophisticated as well as simple-minded modes" of infringing the rights it guarantees. *Lane* v. *Wilson,* 307 U.S. 268, 275 (1939); *Bates* v. *Little Rock,* 361 U.S. 516, 523 (1960); *Louisiana ex rel. Gremillion* v. *N.A.A.C.P.,* 366 U.S. 293, 297 (1961).

If this were not the case, the daily dialogue of politics would become utterly impossible. That dialogue includes, as Mr. Justice Jackson said, the effort "to discredit and embarrass the Government of the day by spreading exaggerations and untruths and by inciting prejudice or unreasoning discontent, not even hesitating to injure the Nation's prestige among the family of nations." *Communications Assn.* v. *Douds,* 339 U.S. 382, 423 (1950) (opinion concurring and dissenting in part). Sound would soon give place to silence if officials in "complete control" of governmental agencies, instead of answering their critics, could resort to friendly juries to amerce them for their words. Mr. Justice Brewer, in calling for the "freest criticism" of this Court, employed a metaphor that is apposite: "The moving waters are full of life and health; only in the still water is stagnation and death." *Government by Injunction,* 15 Nat. Corp. Rep. 848, 849 (1898). The First Amendment guarantees that motion shall obtain.

**Third: The absence of accommodation of conflicting interests** For the reasons thus far

stated we contend that an expression which is critical of governmental conduct is within the "core of constitutional freedom" (*Kingsley Pictures Corp.* v. *Regents,* 360 U.S. 684, 689 [1959]) and may not be prohibited directly to protect the reputation of the government or its officials. A threat to such reputation is intrinsic to the function of such criticism. It is not, therefore, a "substantive evil" that a State has power to prevent by the suppression of the critical expression (*cf., e.g., Schenck* v. *United States,* 249 U.S. 47, 52 [1919]; *Dennis* v. *United States,* 341 U.S. 494, 506–507, 508–510 [1951]); nor does the protection of such reputation provide one of those "conflicting governmental interests" with which the protected freedom must "be reconciled" or to which it may validly be made to yield. *Konigsberg* v. *State Bar,* 366 U.S. 36, 50 n. 11 (1961); *Gibson* v. *Florida Legislative Comm.,* 372 U.S. 539, 546 (1963).

If this submission overstates the scope of constitutional protection, it surely does so only in denying that there may be room for the accommodation of the two "conflicting interests" represented by official reputation and the freedom of political expression. But even under a standard that permits such accommodation, the rule by which this case was judged is inconsistent with the Constitution.

This conclusion follows because Alabama's law of libel *per se,* as applied to the criticism of officials as officials, does not reconcile the conflicting interests; it subordinates the First Amendment freedom wholly to protecting the official. It reflects no compromise of the competing values which we assume, *arguendo,* a State may validly attempt to balance. The interest favored by the First Amendment has been totally rejected, the opposing interest totally preferred. But here, as elsewhere in the area which is of concern to the First Amendment, the breadth of an abridgment "must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960); *Speiser* v. *Randall,* 357 U.S. 513 (1958); *cf. Dean Milk Co.* v. *City of Madison,* 340 U.S. 349, 354 (1951). If there is room for the protection of official reputation against criticism of official conduct, measures of liability far less destructive of the freedom of expression are available and adequate to serve that end.

The Court of Appeals for the District of Columbia adopted such a standard as its version of the common law of libel in *Sweeney* v. *Patterson,* 128 F. 2d 457 (1942), dismissing a complaint based on a statement charging a Congressman with anti-Semitism in opposing an appointment. Judge Edgerton, joined by Judges Miller and Vinson, noted that "the cases are in conflict" but declared that "in our view it is not actionable to publish erroneous and injurious statements of fact and injurious comment or opinion regarding the political conduct and views of public officials, so long as no charge of crime, corruption, gross immorality or gross incompetence is made and no special damage results. Such a publication is not 'libelous per se.' "The position was placed upon the ground that "discussion will be discouraged, and the public interest in public knowledge of important facts will be poorly defended, if error subjects its author to a libel suit without even a showing of economic loss. Whatever is added to the field of libel is taken from the field of free debate." 128 F. 2d at 458. These are, we argue, grounds which are of constitutional dimension.

The same position was taken by Judge Clark, dissenting in *Sweeney* v. *Schenectady Union Pub. Co.,* 122 F. 2d 288 (2d Cir. 1941), affirmed by an equal division of this Court. 316 U.S. 642 (1942). Deprecating the "dangerous … rationale of the decision that a comment leading an appreciable number of readers to hate or hold in contempt the public official commented on is libelous per se," he concluded that "the common-law requirement of proof of special damages gives" the commentator "the protection he needs, while at the same time it does prevent him from causing really serious injury and loss by false and unfair statements." 122 F. 2d at 291, 292.

Other courts have shown solicitude for the freedom to criticize the conduct of officials by requiring that the aggrieved official prove the critic's malice, abrogating the presumptions and strict liability that otherwise obtain.[5] This

[5] *Gough* v. *Tribune-Journal Company,* 75 Ida. 502, 510 (1954); *Salinger* v. *Cowles,* 195 Iowa 873, 890–891 (1923); *Coleman* v. *MacLennan,* 78 Kan. 711, 723 (1908) (frequently cited as a leading case); *Bradford* v. *Clark,* 90 Me. 298, 302 (1897); *Lawrence* v. *Fox,* 357 Mich. 134, 142 (1959); *Ponder* v. *Cobb,* 257 N.C. 281, 293 (1962); *Moore* v. *Davis,* 16 S.W. 2d 380, 384 (Tex. Civ. App. 1929). Applying the same rule to candidates for public office, see *Phoenix Newspapers* v. *Choisser,* 82 Ariz. 271, 277 (1957); *Friedell* v. *Blakeley Printing Co.,* 163 Minn. 226, 231 (1925); *Boucher* v. *Clark Pub. Co.,* 14 S.D. 72, 82 (1900). And *cf. Charles Parker Co.* v. *Silver City Crystal Co.,* 142 Conn. 605, 614 (1955) (same privilege against private

approach draws a line between expression uttered with the purpose of harming the official by an accusation known to be unfounded, and expression which is merely wrong in fact, with denigrating implications. It thus makes an essential element of liability an intent similar to that which elsewhere has been deemed necessary to sustain a curb on utterance (see, *e.g., Dennis* v. *United States, supra,* at 516; *Smith* v. *California,* 361 U.S. 147 [1959]; *cf. Wieman* v. *Updegraff,* 344 U.S. 183 [1952]) and relieves the defendant of an evidential and persuasive burden of a kind that has been held to be excessive (*Speiser* v. *Randall,* 357 U.S. 513 [1958]), assimilating the criteria of libel law in both respects to those demanded by the Constitution in related fields.

Whether either of these mitigated rules of liability for criticism of official conduct, or both in combination, would conform to First Amendment standards, need not be determined in this case. The Alabama rule embraces neither mitigation. Neither would allow a judgment for respondent on the evidence on which he rests his claim.

**Fourth: The relevancy of the official's privilege** The arguments we have made are fortified by recollection of the privilege the law of libel grants to an official if he denigrates a private individual. In *Barr* v. *Matteo,* 360 U.S. 564, 575 (1959), this Court held the utterance of a federal official absolutely privileged if made "within the outer perimeter" of the official's duties. The States accord the same immunity to statements of their highest officers, though some differentiate their lowlier officials and qualify the privilege they enjoy, taking the position urged by the minority in the *Matteo* case. But all hold that all officials are protected unless actual malice can be proved.[6]

The ground of the official privilege is said to be that the threat of damage suits would otherwise "inhibit the fearless, vigorous, and effective administration of policies of government," that, in the words of Judge Learned Hand (*Gregoire* v. *Biddle,* 177 F. 2d 579, 581 [2d Cir. 1949]), "'to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.'" *Barr* v. *Matteo, supra,* at 571. Mr. Justice Black, concurring, also related the official privilege to the sustenance of "an informed public opinion," dependent on "the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important." 360 U.S. at 577.

It would invert the scale of values vital to a free society if citizens discharging the "political duty" of "public discussion" (Brandeis, J., concurring in *Whitney* v. *California,* 274 U.S. 357, 375 [1927]) did not enjoy a fair equivalent of the immunity granted to officials as a necessary incident of the performance of official duties. The threat of liability for actionable statement is assuredly no less of a deterrent to the private individual (*cf. Farmers Union* v. *WDAY,* 360 U.S. 525, 530 [1959]), who, unlike the official, must rely upon his own resources for defense. And, as Madison observed in words that are remembered, "the censorial power is in the people over the Government, and not in the Government over the people." 4 *Annals of Congress* 934. See also *Report on the Virginia Resolutions* (1799), 4 *Elliot's Debates* (1876), pp. 575–576. "For the same reason that members of the Legislature, judges of the courts, and other persons engaged in certain fields of the public service or in the administration of justice are absolutely immune from actions, civil or criminal, for libel for words published in the discharge of such public duties, the individual citizen must be given a like privilege when he is acting in his sovereign capacity." *City of Chicago* v. *Tribune Co.,* 307 Ill. 595, 610 (1923). The citizen acts in his "sover-

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corporation allegedly libeled in political broadcast). Scholarly opinion, while describing as still a "minority view" in libel law this requirement that a plaintiff officer or candidate prove actual malice, has favored it with substantial unanimity. See, *e.g.,* 1 Harper and James, *The Law of Torts* (1956), pp. 449–450; Noel, *Defamation of Public Officers and Candidates,* 49 Col. L. Rev. 875, 891–895 (1949); *cf. Developments in the Law: Defamation,* 69 Harv. L. Rev. 875, 928 (1956).

[6] *E.g.,* according absolute privilege, *Catron* v. *Jasper,* 303 Ky. 598 (1946) (county sheriff); *Schlinkert* v. *Henderson,* 331 Mich. 284 (1951) (member of liquor commission); *Hughes* v. *Bizzell,* 189 Okla. 472, 474 (1941) (president of state university); *Montgomery* v. *Philadelphia,* 392 Pa. 178 (1958) (deputy commissioner and city architect). Limiting officers below state cabinet rank to a qualified privilege, see, *e.g., Barry* v. *McCollom,* 81 Conn. 293 (1908) (superintendent of schools); *Mills* v. *Denny,* 245 Iowa 584 (1954) (mayor); *Howland* v. *Flood,* 160 Mass. 509 (1894) (town investigating committee); *Peterson* v. *Steenerson,* 113 Minn. 87 (1910) (postmaster). See generally, 1 Harper and James, *The Law of Torts* (1956), pp. 429–30; *Prosser on Torts* (2d ed., 1955), pp. 612–13; *Restatement, Torts,* § 591.

eign capacity" when he assumes to censure the officialdom.

**Fifth: The protection of editorial advertisements** Though the point was not taken by the court below, respondent argues that the fact that the statement was a paid advertisement deprives it of protection "as speech and press." Brief in Opposition, p. 19. The argument is wholly without merit.

The decisions invoked by respondent have no bearing on this case. *Breard* v. *Alexandria,* 341 U.S. 622 (1951), dealt with a regulation of the place, manner and circumstances of solicitation of subscriptions, not with the repression of a publication on the basis of its content, the ideas that are expressed. *Valentine* v. *Christensen,* 316 U.S. 52 (1942), involved a handbill soliciting the inspection of a submarine which its owner exhibited to visitors on payment of a stated fee. An ordinance requiring a permit for street distribution of commercial advertising was sustained as applied to him. It is merely cynical to urge that these determinations bar protection of the statement involved here.

The statement published by petitioner was not a "commercial" advertisement, as it is labeled by respondent. It was a recital of grievances and protest against claimed abuses dealing squarely with the major issue of our time. The fact that its authors sought to raise funds for defense of Dr. King and his embattled movement, far from forfeiting its constitutional protection, adds a reason why it falls within the freedom guaranteed. *Cf. N.A.A.C.P.* v. *Button, supra,* 371 U.S. at 429–431, 439–440. That petitioner received a payment for the publication is no less immaterial in this connection than is the fact that newspapers and books are sold. *Smith* v. *California,* 361 U.S. 147, 150 (1959); *cf. Bantam Books Inc.* v. *Sullivan,* 372 U.S. 58, 64, n. 6 (1963).

It is, of course, entirely true that the published statement did not represent or purport to represent assertions by petitioner, but rather by the sponsoring Committee and the individuals whose names appeared. But since the publisher is held no less responsible than are the sponsors, it must surely have the same protection they enjoy. *Cf. Barrows* v. *Jackson,* 346 U.S. 249 (1953). The willingness of newspapers to carry editorial advertisements is, moreover, an important method of promoting some equality of practical enjoyment of the benefits the First Amendment was intended to secure. *Cf. Lovell* v. *Griffin,* 303 U.S. 444 (1938); *Schneider* v. *State,* 308 U.S. 147 (1939); *Talley* v. *California,* 362 U.S. 60 (1960). The practice encourages "the widest possible dissemination of information from diverse and antagonistic sources," which the First Amendment deems "essential to the welfare of the public." *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945). It has no lesser claim than any other mode of publication to the freedom that the Constitution guarantees.

### II. Even if the rule of liability were valid on its face, the judgment rests on an invalid application.

Assuming, *arguendo,* that the freedom of the press may constitutionally be subordinated to protection of official reputation, as it would be by the rule of liability declared below, the rule is nonetheless invalid as applied, upon the record in this case. Nothing in the evidence supports a finding of the type of injury or threat to the respondent's reputation that, on the assumption stated, justifies repression of the publication. And even if there were a basis for discerning such a threat, there was no ground for the enormous judgment rendered on the verdict.

**First: The scope of review** These submissions fall within the settled scope of review by this Court when it is urged that a federal right has been denied "in substance and effect" by a state court. *Norris* v. *Alabama,* 294 U.S. 587, 590 (1935). If the denial rests on findings of fact which are in law determinative of the existence of the federal right, those findings must be adequately sustained by the evidence. *Norris* v. *Alabama, supra; Fiske* v. *Kansas,* 274 U.S. 380 (1927); *Herndon* v. *Lowry,* 301 U.S. 242, 259–261 (1937). If the denial rests on a conclusion or evaluation governing the application of controlling federal criteria, this Court will make its own appraisal of the record to determine if the facts established warrant the conclusion or evaluation made. *Bridges* v. *California,* 314 U.S. 252, 263, 271 (1941); *Pennekamp* v. *Florida,* 328 U.S. 331, 335, 345–346 (1946); *Craig* v. *Harney,* 331 U.S. 367, 373–374 (1947); *Watts* v. *Indiana,* 338 U.S. 49, 50 (1949) (plurality opinion); *Kingsley Pictures Corp.* v. *Regents,* 360 U.S. 684, 708 (1959) (concurring opinion); *Wood* v. *Georgia,* 370 U.S. 375, 386 (1962); *Edwards* v. *South Carolina,* 372 U.S. 229 (1963).

The decision below that the publication libeled the respondent does not, therefore, foreclose the questions whether, on the facts estab-

lished by the record, it contained a statement "of and concerning" the complainant and, if so, whether such statement injured or jeopardized his reputation to an extent that, as a matter of the First Amendment, justified its punitive repression by the judgment rendered in the Circuit Court. *Bridges* v. *California, supra.* As in the contempt cases, this Court "must weigh the impact of the words against the protection given by the principles of the First Amendment… ." *Pennekamp* v. *Florida, supra,* at 349.

**Second: The failure to establish injury or threat to respondent's reputation** An appraisal of this record in these terms leaves no room for a determination that the publication sued on by respondent made a statement as to him, or that, if such a statement may be found by implication, it injured or jeopardized his reputation in a way that forfeits constitutional protection.

The publication did not name respondent or the Commission of which he is a member and it plainly was not meant as an attack on him or any other individual. Its protests and its targets were impersonal: "the police," the "state authorities," "the Southern violators." The finding that these collective generalities embodied an allusion to respondent's personal identity rests solely on the reference to "the police" and on his jurisdiction over that department. See pp. 7, 9, 10–14, 23–24, *supra.* But the police consisted of a force of 175 full-time officers, not to speak of a Chief responsible for the direction of their operations. See p. 10, *supra.* Courts have not hitherto permitted the mere designation of a group so large to be regarded as a reference to any member, least of all to one related to it only by an ultimate responsibility for its control or management.[7] While this result may well involve an element of judgment as to policy, regardful of "the social interest in free press discussion of matters of general concern" (*Service Parking Corp.* v. *Washington Times Co.,* 92 F. 2d at 505), it rests as well upon a common sense perception of the safety that numbers afford against a truly harmful denigration. The term "police" does not in fact mean all policemen. No more so does it mean the Mayor or Commissioner in charge.

This fatal weakness in the allegation that respondent was referred to by the publication was not cured by his own testimony or that of his six witnesses, four of whom first saw the publication in the office of his counsel. See p. 14, *supra.* We have detailed that testimony in the Statement (*supra,* pp. 11–14) and shall not repeat it *in extenso* here. It was at best opinion as to the interpretation of the writing. No witness offered evidence of an extrinsic fact bearing upon the meaning of an enigmatic phrase or the identity of someone mentioned by description. *Cf., e.g., Hope* v. *Hearst Consolidated Publications, Inc.,* 294 F. 2d 681 (2d Cir. 1961). The weight of the testimony does not, therefore, transcend the ground of the opinions, which was no more than the bare *ipse dixit* that "police" meant the respondent, since he is Commissioner in charge.

Respondent's own conception of the meaning of the language went beyond this, to be sure. His view was that if one statement in a paragraph referred to the police, the other statements must be read to make the same allusion. Thus he considered that the declaration "They have bombed his home" meant that the bombing was the work of the police, because the paragraph contained the statement that "[t]hey have arrested him seven times"; and arrests are made by the police. See pp. 9, 11, *supra.*

We think it is enough to say that these "mere general asseverations" (*Norris* v. *Alabama,* 294 U.S. 587, 595 [1935]) were not evidence of what the publication said or what it reasonably could be held to mean. The problem, on this score, is not unlike that posed in *Fiske* v. *Kansas, supra,* where in determining the "situation presented" on the record, this Court read the crucial document itself to see if it possessed the attributes that had produced its condemnation (274 U.S. at 385). So read, this publication was a totally impersonal attack upon conditions, groups and institutions, not a personal assault of any kind.

Even if the statements that refer to "the police" could validly be taken to refer to the respondent, there was nothing in those statements that suffices to support the judgment. Assertions that were shown to have been accurate by the respondent's evidence cannot be relied on to establish injury to his official or his

[7] See, *e.g., Service Parking Corp.* v. *Washington Times Co.,* 92 F. 2d 502 (D.C. Cir. 1937); *Noral* v. *Hearst Publications, Inc.,* 40 Cal. App. 2d 348 (1940); *Fowler* v. *Curtis Publishing Co.,* 182 F. 2d 377 (D. C. Cir. 1950); *McBride* v. *Crowell-Collier Pub. Co.,* 196 F. 2d 187 (5th Cir. 1952); *Neiman-Marcus* v. *Lait,* 13 F.R.D. 311, 316 (S.D.N.Y. 1952); *cf. Julian* v. *American Business Consultants, Inc.,* 2 N.Y. 2d 1 (1956); *Weston* v. *Commercial Advertiser Assn.,* 184 N. Y. 479, 485 (1906). See also *Restatement of Torts,* § 564, Comment *c; Prosser on Torts* (2d ed. 1955), pp. 583–584.

private reputation; if the truth hurts that surely is a hurt the First Amendment calls on him to bear.[8] Hence, the whole claim of libel rests on two discrepancies between the material statements and the facts. Where the publication said that "truckloads" of armed police "ringed the Alabama State College Campus," the fact was that only "large numbers" of police "were deployed near the campus" upon three occasions, without ringing it on any. See p. 8, *supra.* And where the statement said "They have arrested him seven times," the fact was that Dr. King had been arrested only four times. Three of the arrests had occurred, moreover, before the respondent came to office some six months before the suit was filed. See pp. 9, 10, *supra.* That the exaggerations or inaccuracies in these statements cannot rationally be regarded as tending to injure the respondent's reputation is, we submit, entirely clear.

None of the other statements in the paragraphs relied on by respondent helps to make a colorable case. The advertisement was wrong in saying that when "the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission." This was, indeed, the gravamen of the resentment that the publication seems to have inspired in Montgomery. See p. 9, *supra.* A majority of students did engage in the protest against the expulsions, but only a few refused to re-register, the dining hall was never "padlocked" and, perforce, there was no "attempt to starve" the students "into submission." See p. 8, *supra.* But none of these admittedly erroneous assertions had a thing to do with the police and even less with the respondent. He testified himself that "as far as the expulsion of students is concerned, that responsibility rests with the State Department of Education" (R. 716). If that was so, as it clearly was, it must have been no less the responsibility of the "State authorities," who are alone referred to in the offending sentence, to have padlocked the dining hall, as it alleged. There certainly is no suggestion, express or implied, that the imaginary padlock was attached by the police.

The statement that "the Southern violators have answered Dr. King's peaceful protests with intimidation and violence" was thought by the respondent to refer to himself only because "it is contained in a paragraph" which also referred to arrests (R. 717–718), a point on which his testimony is, to say the least, quite inexplicit, totally ignoring the fact that the paragraph did not even fix the time of the events recited or purport to place them in Montgomery. But whatever the respondent brought himself to think, or badgered Aaronson to say on cross-examination (see p. 17, *supra*), the statement cannot reasonably bear such a construction. The term "Southern violators of the Constitution" was a generic phrase employed in the advertisement to characterize all those whose alleged conduct gave rise to the grievances recited, whether private persons or officials. There was no suggestion that the individuals or groups were all the same, any more than that they were the same in Orangeburg as in Atlanta or Montgomery.

For the same reason, there was no basis for asserting that the statement that "they" bombed his home, assaulted him and charged him with perjury pointed to respondent as the antecedent of the pronoun, though the trial court pointedly permitted him to prove his innocence upon these points. See p. 10, *supra.* There was, to be sure, disputed evidence respecting a police assault but this related to an incident occurring long before respondent was elected a Commissioner (see pp. 9–10, *supra*). Beyond dispute, there were two bombings of King's home and he was charged with perjury. Indeed, to raise funds to defend him on that charge, which proved to be unfounded, was the main objective of the publication. See p. 6, *supra.*

It is, in sum, impossible in our view to see in this mélange of statements, notwithstanding the inaccuracies noted, any falsehood that related to respondent and portended injury to his official reputation. That he sustained no injury in fact was made entirely clear by his own evidence. The most that his witnesses could say was that

[8] This is recognized in part by Alabama law itself, despite the strictness of the rule respecting truth as a defense, since evidence of truth must be received in mitigation under the general issue. Ala. Code of 1940, title 7, § 909; see *Johnson Publishing Co.* v. *Davis,* 271 Ala. 474, 490 (1960). The problem has been met in England by enlarging the defense. See Defamation Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 66, § 5: "In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges." See also *Report of the Committee on the Law of Defamation* (1948) cmd. 7536, p. 21.

they would have thought less kindly of him *if* they had believed the statements they considered critical of his official conduct. They did not in fact believe them and respondent did not fall at all in their esteem. In Alabama, no less than in Virginia, "the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community," as this Court said in *N.A.A.C.P.* v. *Button, supra,* 371 U.S. at 435. This publication was, upon its face, made on behalf of sympathizers with that movement. That such a statement could have jeopardized respondent's reputation anywhere he was known as an official must be regarded as a sheer illusion, not a finding that has any tangible support. In the real world, the words were utterly devoid of any "impact" that can weigh "against the principles of the First Amendment." *Pennekamp* v. *Florida, supra,* 328 U.S. at 349.

Respondent adduced as an aspect of his grievance that *The Times* made a retraction on demand of Governor Patterson but failed to do so in response to his demand. See pp. 18–22, *supra.* It is enough to say that if the statement was protected by the Constitution, as we contend it was, no obligation to retract could be imposed. Beyond this, however, there was an entirely reasonable basis for the distinction made. Petitioner selected Governor Patterson as "the proper representative" of Alabama to be formally assured that *The Times* did not intend the publication to reflect upon the State. It also took account of the fact that the Governor was chairman ex-officio of the State Board of Education; and that the "state authorities" had been referred to in the sentence claiming that the dining hall was padlocked. See pp. 21–22, *supra.* A distinction based upon those grounds was not invidious as to respondent. Far from exacerbating any supposed injury to him, as the court below believed (R. 1178), the retraction was a mollifying factor, weakening, if not erasing, the statement as to anyone who thought himself concerned.

**Third: The magnitude of the verdict** Even if we are wrong in urging that there is no basis on this record for a judgment for respondent, consistently with the protection of the First Amendment, the judgment of $500,000 is so shockingly excessive that it violates the Constitution.

That judgment was rendered, as we have shown, without any proof of injury or special damage. General damages simply were "presumed" and the jury was authorized to levy damages as punishment in its discretion. The trial court refused to charge that the jury should—or even could in its discretion—separately assess compensatory and punitive damages (R. 847, 864, Nos. 59 and 60). Since there was no rational foundation for presuming any damages at all[9], it is both legally correct and factually realistic to regard the entire verdict as a punitive award. *Cf. Stromberg* v. *California,* 283 U.S. 359, 367–368 (1931).

Viewing the publication as an offense to the respondent's reputation, as we do for purposes of argument, there was no rational relationship between the gravity of the offense and the size of the penalty imposed. *Cf. Crowell-Collier Pub. Co.* v. *Caldwell,* 170 F. 2d 941, 944, 945 (5th Cir. 1948). The court below declined, indeed, to weigh the elements of truth embodied in the publication in appraising the legitimacy of the verdict, contrary to its action in a recent case involving charges that a private individual was guilty of grave crimes. *Johnson Publishing Co.* v. *Davis,* 271 Ala. 474, 490 (1960). It chose instead to treat petitioner's assertion of belief in the substantial truth of the advertisement, so far as it might possibly have been related to respondent, as evidence of malice and support for the size of the award. See pp. 22, 24, *supra.*

The judgment is repugnant to the Constitution on these grounds. As Mr. Justice Brandeis said, concurring in *Whitney* v. *California,* 274 U.S. 357, 377 (1927), a "police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive." The proposition must apply with special force when the "harsh" remedy has been explicitly designed as a deterrent of expression. It is, indeed, the underlying basis of the principle that "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell* v. *Connecticut,* 310 U.S. 296, 304, 308 (1940). That

[9] It is relevant in this connection to recall that the entire circulation of *The Times* in Alabama was 394 copies, 35 in Montgomery County (R. 836). Even on the theory of the court below, the reference to "police" could hardly have been read to refer to respondent anywhere but in Montgomery, or at most in Alabama.

principle has been applied by this Court steadily in recent years as measures burdening the freedoms of expression have been tested by "close analysis and critical judgment in the light of the particular circumstances" involved. *Speiser* v. *Randall,* 357 U.S. 513, 520 (1958). See also, *e.g., Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936); *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1958); *Smith* v. *California,* 361 U.S. 147, 150–151 (1959); *Bates* v. *Little Rock,* 361 U.S. 516 (1960); *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *cf. Winters* v. *New York,* 333 U.S. 507, 517 (1948).

Even when the crucial freedoms of the First Amendment have not been at stake, this Court has made clear that a penalty or money judgment may deprive of property without due process where it is "so extravagant in amount as to outrun the bounds of reason and result in sheer oppression." *Life & Casualty Co.* v. *McCray,* 291 U.S. 566, 571 (1934). A statutory penalty recoverable by a shipper has not been permitted to "work an arbitrary, unequal and oppressive result for the carrier which shocks the sense of fairness the Fourteenth Amendment was intended to satisfy… ." *Chicago & N.W. Ry.* v. *Nye Schneider Fowler Co.,* 260 U.S. 35, 44–45 (1922). See also *Missouri Pacific Ry. Co.* v. *Tucker,* 230 U.S. 340, 350–351 (1913); *St. Louis, I. Mt. & So. Ry. Co.* v. *Williams,* 251 U.S. 63, 66–67 (1919). The idea of government under law is hardly older than the revulsion against "punishment out of all proportion to the offense… ." Douglas, J., concurring in *Robinson* v. *California,* 370 U.S. 660, 676 (1962). Such punishment was inflicted here, compounding the affront this judgment offers to the First Amendment.

It is no hyperbole to say that if a judgment of this size can be sustained upon such facts as these, its repressive influence will extend far beyond deterring such inaccuracies of assertion as have been established here. This is not a time—there never is a time—when it would serve the values enshrined in the Constitution to force the press to curtail its attention to the tensest issues that confront the country or to forego the dissemination of its publications in the areas where tension is extreme.

Respondent argued in his Brief in Opposition (pp. 25–26) that the Seventh Amendment bars this Court from considering the size of an award based on the verdict of a jury. The very authorities he cites make clear that any insulation of a verdict from review does not extend to situations where it involves or reflects error of law. See, *e.g., Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U.S. 474, 483–485 (1933); *Chicago, B. & Q. Railroad* v. *Chicago,* 166 U.S. 226, 246 (1897). See also *Dimick* v. *Schiedt,* 293 U.S. 474, 486 (1935); *A. & G. Stevedores* v. *Ellerman Lines,* 369 U.S. 355, 364, 366 (1962). Abridgment of the freedom of the press is surely such an error; and in determining if an abridgment has occurred, it makes no difference what branch or agency of the State has imposed the repression. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 463 (1958); *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 68 (1963). Indeed, the current of authority today regards the Seventh Amendment as inapplicable generally to appellate review of an excessive verdict, viewing the denial of relief below as an error of law. See, *e.g., Southern Pac. Co.* v. *Guthrie,* 186 F. 2d 926, 931 (9th Cir. 1951); *Dagnello* v. *Long Island Rail Road Company,* 289 F. 2d 797, 802 (2d Cir. 1961); *cf. Affolder* v. *New York, Chicago & St. L. R. Co.,* 339 U.S. 96, 101 (1950); 6 *Moore's, Federal Practice* (2d ed. 1953), pp. 3827–3841. That general problem is not presented here because this excess contravenes the First Amendment.

### III. The assumption of jurisdiction in this action by the Courts of Alabama contravenes the Constitution.

In sustaining the jurisdiction of the Circuit Court, the courts below held that petitioner made an involuntary general appearance in this action, subjecting its person to the jurisdiction and forfeiting the constitutional objections urged. They also rejected those objections on the merits, holding that petitioner's contacts with Alabama were sufficient to support State jurisdiction in this cause, based either on the service of process on McKee as a purported agent or on the substituted service on the Secretary of State. The decision is untenable on any ground.

**First: The finding of a general appearance**
The motion to quash stated explicitly that petitioner appeared "solely and specially for the purpose of filing this its motion to quash attempted service of process in this cause and for no other purpose and without waiving service of process upon it and without making a general appearance and expressly limiting its special appearance to the purpose of quashing the attempted service upon it in this case …" (R. 39, 47). The grounds of the motion related to no other issue than that of petitioner's amenability to Alabama

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jurisdiction in this action as a New York corporation, neither qualified to do nor doing business in the State (R. 40–45, 47). The prayer for relief (R. 45–46) was not, however, limited to asking that the service or purported service of process be quashed and that the action be dismissed "for lack of jurisdiction of the person" of petitioner. It concluded with a further request for dismissal for "lack of jurisdiction of the subject matter of said action" (R. 46). That prayer, the courts held, converted the special appearance into a general appearance by operation of the law of Alabama (R. 49–51, 1151–1153).

This ruling lacks that "fair or substantial support" in prior state decisions that alone suffices to preclude this Court's review of federal contentions held to be defeated by a rule of state procedure. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 455–457 (1958). The governing principle of Alabama practice was declared by the court below in *Ex parte Cullinan,* 224 Ala. 263 (1931), holding that a request for "further time to answer or demur or file other motions," made by a party appearing specially, did not constitute a general appearance waiving constitutional objections later made by motion to quash. Noting that a non-resident's objection to the jurisdiction "is not a technical one … but is an assertion of a fundamental constitutional right," the court said the question involved was one "of consent or a voluntary submission to the jurisdiction of the court," an issue of "intent as evidenced by conduct," as to which "the intent and purpose of the context as a whole must control." 224 Ala. at 265, 266, 267. See also *Ex parte Haisten,* 227 Ala. 183, 187 (1933); *cf. Sessoms Grocery Co.* v. *International Sugar Feed Company,* 188 Ala. 232, 236 (1914); *Terminal Oil Mill Co.* v. *Planters W. & G. Co.,* 197 Ala. 429, 431 (1916). For a waiver to be inferred or implied, when the defendant appears specially to move to set aside service of process, he must have taken some "action in relation to the case, disconnected with the motion, and which recognized the case as in court." *Lampley* v. *Beavers,* 25 Ala. 534, 535 (1854).

Petitioner's prayer for relief neither "recognized the case as in court" nor evidenced "consent or voluntary submission" to the jurisdiction. On the contrary, the papers made entirely clear that the sole ruling sought by the petitioner was that it was not amenable to Alabama's jurisdiction, as a New York corporation having no sufficient contact with the State to permit the assertion of jurisdiction *in personam* in an action based upon a publication in New York.

The doctrine of *Ex parte Cullinan* has not been qualified by any other holding of the court below before the instant case. It is, on the other hand, confirmed by cases in which a defendant appearing specially has joined a motion to quash for inadequate service with a plea in abatement challenging the venue of the action—without the suggestion that the plea amounted to a general appearance, though the question that it raised was characterized by the court below as one of "jurisdiction of the subject matter." *St. Mary's Oil Engine Co.* v. *Jackson Ice and Fuel Co.,* 224 Ala. 152, 155, 157 (1931). See also *Seaboard Air Line Ry.* v. *Hubbard,* 142 Ala. 546, 548 (1904); *Dozier Lumber Co.* v. *Smith-Isburg Lumber Co.,* 145 Ala. 317 (1905); *cf. Johnson Publishing Co.* v. *Davis,* 271 Ala. 474, 490 (1960); *Ex parte Textile Workers Union of America,* 249 Ala. 136, 142 (1947). Indeed, the precise equivalent of the prayer of the motion in this case was used in *Harrub* v. *Hy-Trous Corporation,* 249 Ala. 414, 416 (1947), without arousing an objection to adjudication of the issue as to jurisdiction of the person, raised on the special appearance. Beyond this, the late Judge Walter B. Jones, who presided in this case at Circuit, reproduced these very motion papers in the 1962 supplement to his treatise on Alabama practice, as a form of "Motion to Quash Service of Process by Foreign Corporation," without intimation that the prayer addressed to lack of jurisdiction of the subject matter waived the point respecting jurisdiction of the person. 3 Jones, *Alabama Practice and Forms* (1947) § 11207.1a (Supp. 1962).

There is, moreover, a persuasive reason why a foreign corporation challenging its amenability to suit in Alabama by substituted service on the Secretary of State should conceive of its objection as relating in a sense to jurisdiction of the subject matter of the action. The statute (Ala. Code of 1940, title 7, § 199[1]) itself speaks in terms of the sufficiency of service on the Secretary "to give to any of the courts of this state jurisdiction over the cause of action and over such non-resident defendant" (Appendix A, *infra,* p. 94). Hence a contention that the statute is inapplicable or invalid as applied goes,

in this sense, to jurisdiction of the cause as well as jurisdiction of the person.[10] *Cf. St. Mary's Oil Engine Co.* v. *Jackson Ice & Fuel Co., supra,* at 155; *Boyd* v. *Warren Paint & Color Co.,* 254 Ala. 687, 691 (1950). The one conclusion is implicit in the other, not the product of a separate inquiry involving separate grounds.

Against all these indicia of Alabama law, ignored in the decisions of the courts below, the authorities relied on are quite simply totally irrelevant. None involved the alleged waiver of a constitutional objection. Except for *Blankenship* v. *Blankenship,* 263 Ala. 297, 303 (1955), where the court specifically declined to consider whether the appearance had been general or special, deeming the issue immaterial upon the question posed, none involved a special appearance. In *Thompson* v. *Wilson,* 224 Ala. 299 (1932), the defendant, a resident of Alabama, had not even purported to appear specially or attempted to question the court's jurisdiction of his person; his sole objection, taken by demurrer, was to the court's competence to deal with the subject matter of the action and to grant relief of the type asked. In *Vaughan* v. *Vaughan,* 267 Ala. 117, 120, 121 (1957), referred to by the Circuit Court, the movant failed to limit her appearance, leading the court to distinguish *Ex parte Haisten, supra,* on this ground. The additional decisions cited by respondent (Brief in Opposition, p. 36) are no less irrelevant. Neither *Kyser* v. *American Surety Co.,* 213 Ala. 614 (1925) nor *Aetna Insurance Co.* v. *Earnest,* 215 Ala. 557 (1927) involved a special appearance or dealt with a challenge to service of process on constitutional grounds.

The California and North Carolina cases cited and quoted below (*Olcese* v. *Justice's Court,* 156 Cal. 82 [1909]; *Roberts* v. *Superior Court,* 30 Cal. App. 714 [1916]; *Dailey Motor Co.* v. *Reaves,* 184 N.C. 260 [1922]) and the similar decisions referred to in the annotation cited (25 A.L.R. 2d 838–842), to the extent that they treated a challenge to the jurisdiction of the subject matter as a general appearance, all involved situations where the defendant's objection was deemed to ask for relief inconsistent with the absence of jurisdiction of the person or to raise a separate "question whether, considering the nature of the cause of action asserted and the relief prayed by plaintiff, the court had power to adjudicate concerning the subject matter of the class of cases to which plaintiff's claim belonged." *Davis* v. *O'Hara,* 266 U.S. 314, 318 (1924); *cf. Constantine* v. *Constantine,* 261 Ala. 40, 42 (1954). That no such question was presented here the motion papers make entirely clear.

The situation is, indeed, precisely analogous to that presented in the *Davis* case. There the defendant, Director General of Railroads, appeared specially for the purpose of objecting to the jurisdiction of the district court "over the person of the defendant and over the subject matter of this action," on the ground that in the circumstances the Director was immune to suit in the county where action was brought. The Nebraska courts treated the reference to subject matter as a general appearance, waiving the immunity asserted. *O'Hara* v. *Davis,* 109 Neb. 615 (1923). This Court reversed, holding that there "was nothing in the moving papers to suggest that the Nebraska court had no jurisdiction to try and determine actions, founded on negligence, to recover damages for personal injuries suffered by railway employees while engaged in the performance of their work" (266 U.S. at 318). So here, there was nothing in the papers to suggest that the petitioner questioned the competence of the Circuit Court to "exercise original jurisdiction … of all actions for libel…." (Ala. Code, title 13, § 126). The point was only that petitioner, because it is a foreign corporation having only a peripheral relationship to Alabama, was immune to jurisdiction in the action brought.

For the foregoing reasons, we submit that the decision that petitioner made an involuntary general appearance does not constitute an adequate state ground, barring consideration of the question whether Alabama has transcended the due process limitations on the territorial extension of the process of her courts. *Cf. Wright* v.

[10] It should be noted also that prior to the enactment of Ala. Code, title 7, § 97 in 1907, Alabama denied her courts jurisdiction over actions against foreign corporations which did not arise within the State. See *McKnett* v. *St. Louis & San Francisco Ry.,* 292 U.S. 230, 231 (1934). The bar to foreign causes was raised, however, only to suits "in which jurisdiction of the defendant can be legally obtained in the same manner in which jurisdiction could have been obtained if the cause of action had arisen in this state." The claim that McKee was not an "agent" for purposes of service under Ala. Code, title 7, § 188 (Appendix A, *infra,* p. 92), if valid, thus implied a defect of subject matter jurisdiction of this cause of action, which petitioner submitted arose at the place of publication in New York. Compare the statement by the court below upon this point (R. 1179) with *New York Times Company* v. *Conner,* 291 F. 2d 492, 494 (5th Cir. 1961).

*Georgia,* 373 U.S. 284 (1963); *N.A.A.C.P.* v. *Alabama, supra; Staub* v. *City of Baxley,* 355 U.S. 313 (1958); *Davis* v. *Wechsler,* 263 U.S. 22 (1923); *Ward* v. *Love County,* 253 U.S. 17 (1920).[11]

Moreover, even if petitioner could validly be taken to have made an involuntary general appearance by the prayer for dismissal on the ground of lack of jurisdiction of the subject matter, that appearance would not bar the claim that in assuming jurisdiction of this action the state court has cast a burden upon interstate commerce forbidden by the Commerce Clause. That point is independent of the defendant's amenability to process, as this Court has explicitly decided in ruling that the issue remains open, if presented on "a seasonable motion," notwithstanding the presence of the corporation in the State or its appearance generally in the cause. *Davis* v. *Farmers Cooperative Co.,* 262 U.S. 312 (1923); *Michigan Central R.R. Co.* v. *Mix,* 278 U.S. 492, 496 (1929). See also *Denver & R.G.W.R. Co.* v. *Terte,* 284 U.S. 284, 287 (1932) (attachment); *Canadian Pacific Ry. Co.* v. *Sullivan,* 126 F. 2d 433, 437 (1st Cir.), *cert. denied,* 316 U.S. 696 (1942) (agent designated to accept service); *Zuber* v. *Pennsylvania R. Co.,* 82 F. Supp. 670, 674 (N. D. Ga. 1949); *Pantswowe Zaklady Graviozne* v. *Automobile Ins. Co.,* 36 F. 2d 504 (S.D.N.Y. 1928) (commerce objection relates to jurisdiction of subject matter); 42 Harv. L. Rev. 1062, 1067 (1929); 43 *id.* 1156, 1157 (1930). For the same reason, we submit, an implied general appearance would not bar the litigation of petitioner's contention, seasonably urged upon the motion, that by taking jurisdiction in this action, the courts below denied due process by abridging freedom of the press; that also is an issue independent of the presence of petitioner in Alabama or its amenability to process of the court.

**Second: The territorial limits of Due Process** The courts below held that the sporadic newsgathering activities of correspondents and stringers of *The Times* in Alabama, the occasional solicitation and publication of advertising from Alabama sources and the minuscule shipment of the newspaper to subscribers and newsdealers in the State (*supra,* pp. 25–27) constitute sufficient Alabama contacts to permit the exercise of jurisdiction in this action, without transcending the territorial limits of due process.

This assertion of state power finds no sanction in this Court's decisions governing the reach of state authority, despite the relaxation in the limits of due process that we recognize to have occurred in recent years. Neither the "flexible standard" of *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), as it was called in *Hanson* v. *Denckla,* 357 U.S. 235, 251 (1958), nor any of its later applications, sustains, in our submission, the extreme determination here.

It is plain, initially, that the petitioner's peripheral relationship to Alabama does not involve "continuous corporate operations" which are "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *International Shoe Co.* v. *Washington, supra,* at 318. The case bears no resemblance to *Perkins* v. *Benguet Mining Co.,* 342 U.S. 437 (1952), where the central base of operations of the corporation, including its top management, was in the State where suit was brought. It hardly can be argued that *The New York Times* has such a base in Alabama, where, according to this record, it enjoys 6/100ths of one per cent of its daily circulation and 2/10ths of one per cent of its Sunday circulation and where the sources of 46/1000ths of one per cent of its advertising revenue are found (R. 402, 444–445). The occasional visits of correspondents to the State to report on events of great interest to the nation places *The Times* in Alabama no more than in Ankara or Athens or New Delhi, where, of course, similar visits occur.

Hence, if the jurisdiction here asserted is sustained, it must be on the ground that the alleged cause of action is so "connected with" petitioner's "activities within the state" as to "make it reasonable, in the context of our feder-

[11] It should be noted that the Circuit Court also found a waiver of petitioner's special appearance in its application for mandamus to review an order directing the production of documents demanded by respondent to show the extent of petitioner's activities in Alabama. R. 50–51; see also R. 29–39, Pl. Ex. 311–313, R. 1835–1858. The Supreme Court's opinion is silent on this point, presumably in recognition of the proposition that an action must be "disconnected" with the motion to support an inference of waiver. *Lampley* v. *Beavers, supra; cf. Ford Motor Co.* v. *Hall Auto Co.,* 226 Ala. 385, 388 (1933). It would obviously thwart essential self-protective measures if an effort to obtain review of an allegedly abusive ancillary order were regarded as a waiver of the prime submission. *Cf. Ex parte Spence,* 271 Ala. 151 (1960); *Ex parte Textile Workers of America,* 249 Ala. 136 (1947); *Ex parte Union Planters National Bank and Trust Co.,* 249 Ala. 461 (1947). See *Fay* v. *Noia,* 372 U.S. 391, 432, n. 41 (1963).

al system of government, to require the corporation to defend the particular suit which is brought there." *International Shoe Co.* v. *Washington, supra,* at 319, 317. See also *Blount* v. *Peerless Chemicals (P.R.) Inc.,* 316 F. 2d 695, 700 (2d Cir. 1963); *L. D. Reeder Contractors of Ariz.* v. *Higgins Industries, Inc.,* 265 F. 2d 768, 774–775 (9th Cir. 1959); *Partin* v. *Michaels Art Bronze Co.,* 202 F. 2d 541, 545 (3d Cir. 1953) (concurring opinion).

There is, in our view, no such connection. Here, as in *Hanson* v. *Denckla, supra,* at 252, the "suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in" the State. The liability alleged by the respondent certainly is not based on any activity of correspondents or stringers of *The Times* in covering the news in Alabama; and neither entering the State for such reporting, nor the composition nor the filing of reports rests on a privilege the State confers, given the rights safeguarded by the Constitution. Nor is this claim of liability connected with the occasional solicitation of advertisements in Alabama. The advertisement in suit was not solicited and did not reach *The Times* from anyone within the State. There remains, therefore, only the negligible circulation of *The Times* in Alabama on which to mount an argument that this suit relates to the exercise by the petitioner of "the privilege of conducting activities within" the State. *International Shoe Co.* v. *Washington, supra,* at 319.

We contend that this circulation did not involve the exercise of such a privilege. Copies of the paper were mailed to subscribers from New York or shipped from there to dealers who were purchasers, not agents of *The Times.* Such mailing and shipment in New York were not activity of the petitioner within the State of Alabama. See, *e.g., Putnam* v. *Triangle Publications, Inc.,* 245 N. C. 432, 443 (1957); *Schmidt* v. *Esquire, Inc.,* 210 F. 2d 908, 915, 916 (7th Cir. 1954), *cert. denied,* 348 U.S. 819 (1954); *Street & Smith Publications, Inc.* v. *Spikes,* 120 F. 2d 895, 897 (5th Cir.), *cert. denied,* 314 U.S. 653 (1941); *Cannon* v. *Time, Inc.,* 115 F. 2d 423, 425 (4th Cir. 1940); *Whitaker* v. *Macfadden Publications, Inc.,* 105 F. 2d 44, 45 (D. C. Cir. 1939); *Buckley* v. *New York Times Co.,* 215 F. Supp. 893 (E. D. La. 1963); *Gayle* v. *Magazine Management Co.,* 153 F. Supp. 861, 864 (M. D. Ala. 1957); *Brewster* v. *Boston Herald-Traveler Corp.,* 141 F. Supp. 760, 761, 763 (D. Me. 1956); *cf. Erlanger Mills* v. *Cohoes Fibre Mills, Inc.,* 239 F. 2d 502 (4th Cir. 1956); *L. D. Reeder Contractors of Ariz.* v. *Higgins Industries, Inc.,* 265 F. 2d 768 (9th Cir. 1959); *Trippe Manufacturing Co.* v. *Spencer Gifts, Inc.,* 270 F. 2d. 821, 823 (7th Cir. 1959). Whether Alabama may, upon these facts, declare the petitioner responsible for an Alabama "publication" by causing or contributing to the dissemination of those papers in the State is not, of course, the issue. That is a problem of the choice of law[12] which is entirely distinct from the question here presented: whether by its shipment in and from New York petitioner "avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla, supra,* at 253. A State may be empowered to apply its law to a transaction upon grounds quite insufficient to establish "personal jurisdiction over a non-resident defendant," as *Hanson (ibid.)* makes clear. If this were not the case, each of the individual non-resident signers of the advertisement might also be amenable to Alabama's long-arm process, not to speak of every author of a publication sold within the State. See *Calagaz* v. *Calhoon,* 309 F. 2d 248, 254 (5th Cir. 1962). That would, indeed, entail the "demise of all restrictions on the personal jurisdiction of state courts," an eventuality that this Court has declared the trend of its decisions does not herald. *Hanson* v. *Denckla, supra,* at 251. The avoidance of that outcome calls, at least, for a sharp line between a liability based on an act performed within the State and liability based on an act without, which merely is averred to have an impact felt within.[13] Surely the papers

[12] Courts have been no less perplexed than commentators by the conflicts problems incident to multi-state dissemination of an alleged libel; and some have sought to solve them by a "single publication" rule, fixing the time and place of the entire publication when and where the first and primary dissemination occurred. See, *e.g., Hartmann* v. *Time, Inc.,* 166 F. 2d 127 (3d Cir. 1947), *cert. denied,* 334 U.S. 838 (1948); *Insull* v. *New York World-Telegram Corp.,* 273 F. 2d 166, 171 (7th Cir. 1959), *cert. denied,* 362 U.S. 942 (1960); *cf. Mattox* v. *News Syndicate Co.,* 176 F. 2d 897, 900, 904–905 (2d Cir.), *cert. denied,* 338 U.S. 858 (1949). See also, *e.g.,* Prosser, *Interstate Publication,* 51 Mich. L. Rev. 959 (1953); Leflar, *The Single Publication Rule,* 25 Rocky Mt. L. Rev. 263 (1953); Note, 29 U. of Chi. L. Rev. 569 (1962).

[13] *Cf.* L. Hand, J., in *Kilpatrick* v. *Texas & P. Ry. Co.,* 166 F. 2d 788, 791–792 (2d Cir. 1948): "It is settled that, given the proper procedural support for doing so, a state may give judgment in personam against a non-resident, who has only passed through its territory, if the judgment be upon a liability incurred while he was within its borders. That, we con-

mailed to subscribers were delivered to them by petitioner when they were posted in New York. *Cf.* 1 *Williston on Contracts* (3d ed. 1957) § 81, p. 268. So, too, the delivery to carriers in New York for shipment to Alabama dealers, pursuant to their orders, can at most be said to have contributed to sales made by the dealers, but those sales were not the acts of the petitioner in Alabama. *Cf. United States* v. *Smith,* 173 Fed. 227, 232 (D. Ind. 1909). That is a matter to be judged in terms of a "practical conception" of the needs of our federalism, not "the 'witty diversities' … of the law of sales." Holmes, J., in *Rearick* v. *Pennsylvania,* 203 U.S. 507, 512 (1906).

Assuming, however, that the shipment of *The Times* to Alabama may be deemed an act of the petitioner within that State, we still do not believe the jurisdiction here affirmed can be sustained. In *International Shoe* this Court made clear that the new standard there laid down was not "simply mechanical or quantitative" and that its application "must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure" (326 U.S. at 319). See also *Hanson* v. *Denckla, supra,* at 253. The opinion left no doubt that, as Judge Learned Hand had previously pointed out (*Hutchinson* v. *Chase & Gilbert,* 45 F. 2d 139, 141 [2d Cir. 1930]), an "'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection" (326 U.S. at 317). Measured by this standard, a principle which would require, in effect, that almost every newspaper defend a libel suit in almost any jurisdiction of the country, however trivial its circulation there may be, would not further the "fair and orderly administration of the laws." The special "inconvenience" of the foreign publisher in libel actions brought in a community with which its ties are tenuous need not be elaborated. It was perspicuously noted by the court below in a landmark decision more than forty years ago, confining venue to the county where the newspaper is "primarily published." *Age-Herald Publishing Co.* v. *Huddleston,* 207 Ala. 40, 45 (1921). This record surely makes the "inconvenience" clear.

We do not blink the fact that this submission focuses upon the hardship to the foreign publisher and that the plaintiff faces hardship too in litigating far from home. But if these conflicting interests call for balance in relation to the "orderly administration of the laws," there are substantial reasons why the interest of the publisher ought here to be preferred. In the first place, it is the forum which is seeking to extend its power beyond its own borders, carrying the burden of persuasion that the "territorial limitations on the power of the respective states" (*Hanson* v. *Denckla, supra,* at 251) are respected in the extension made. Secondly, the burden cast upon the publisher can only operate to thwart the object of the First Amendment by demanding the cessation of a circulation that entails at best no economic benefit—depriving the state residents who have an interest in the foreign publication of the opportunity to read. Thirdly, the plaintiff's grievance rests but fancifully on the insubstantial distribution of the publication in the forum, as distinguished from its major circulation out of state. If that grievance is to be assigned a locus, it is hardly where 394 copies were disseminated when the full 650,000 were regarded as relevant to the *ad damnum* (R. 2, 3, 601, 945) and a reason for sustaining the award (R. 1176, 1179). The difficulties presented by libel actions based on multi-state dissemination are notorious enough (see, *e.g., Zuck* v. *Interstate Publishing Corp.,* 317 F. 2d 727, 733 [2d Cir. 1963]), without permitting suit against a foreign publisher in every jurisdiction where a copy of the allegedly offending publication has been sold. Finally, but not the least important, this is not an action merely seeking redress for an injury allegedly inflicted on the plaintiff. Its dominant object is to punish the defendant, as the damages demanded made quite clear. Hence,

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ceive, rests upon another principle. The presence of the obligor within the state subjects him to its law while he is there, and allows it to impose upon him any obligation which its law entails upon his conduct. Had it been possible at the moment when the putative liability arose to set up a piepowder court pro hac vice, the state would have had power to adjudicate the liability then and there; and his departure should not deprive it of the jurisdiction in personam so acquired. On the other hand, in order to subject a non-resident who passes through a state to a judgment in personam for liabilities arising elsewhere, it would be necessary to say that the state had power so to subject him as a condition of allowing him to enter at all, and that for this reason his voluntary entry charged him generally with submission to the courts. As a matter of its own law of conflicts of law, no court of one country would tolerate such an attempt to extend the power of another; and, as between citizens of states of the United States, constitutional doubts would arise which, to say the least, would be very grave… ."

the considerations that would be decisive against "long-arm" jurisdiction in a criminal proceeding ought to be persuasive here.

The courts below thought the foregoing arguments against the jurisdiction answered by the decision of this Court in *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957), where suit on an insurance contract was sustained in California against a non-resident insurer, based on the solicitation and the consummation of the contract in the State by mail. But that decision certainly does not control the disposition of this case. The contract executed in *McGee* constituted a continuing legal relationship between the insurer and the insured within the State, a relation which the States, with the concurrence of Congress (15 U.S.C. §§ 1011–1015, 59 Stat. 33), have long deemed to require special state regulation. *Hanson* v. *Denckla, supra,* at 252; *Travelers Health Assn.* v. *Virginia,* 339 U.S. 643 (1950). The liability asserted here derives from no such continuing relationship with someone in the State; and newspaper publication, including circulation (*Lovell* v. *Griffin,* 303 U.S. 444 [1938]; *Talley* v. *California,* 362 U.S. 60 [1960]), far from being exceptionally subject to state regulation, is zealously protected by the First Amendment.

Respondent also relies heavily on *Scripto* v. *Carson,* 362 U.S. 207 (1960) (Brief in Opposition, pp. 39, 41) but the reliance plainly is misplaced. That decision dealt with the minimum connection necessary to permit a State to impose on an out-of-state vendor the compensated duty to collect a use tax due from purchasers on property shipped to them in the State. It held the duty validly imposed where sales were solicited within the State, deeming *General Trading Co.* v. *State Tax Comm'n.,* 322 U.S. 335 (1944) controlling though the salesmen were "independent contractors" rather than employees of the vendor. No issue of judicial jurisdiction was involved. This "familiar and sanctioned device" (322 U.S. at 338) of making the distributor the tax collector for the State he exploits as a market plainly casts no burden comparable to the exercise of jurisdiction *in personam,* with the implications such a jurisdiction has. If the problems were analogous, the relevant decision here would be *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340 (1954), where the imposition of the duty was invalidated because there was "no invasion or exploitation of the consumer market" (*id.* at 347) by the out-of-state vendor. The *New York Times* does not solicit Alabama circulation (*supra,* p. 27); it merely satisfies the very small, local demand.

Viewed in these terms, a different question might be posed if it were shown that the petitioner engaged in activities of substance in the forum state, designed to build its circulation there. *Cf.* Mr. Justice Black, dissenting in part in *Polizzi* v. *Cowles Magazines, Inc.,* 345 U.S. 663, 667, 670 (1953); see also *WSAZ, Inc.* v. *Lyons,* 254 F. 2d 242 (6th Cir. 1958). That would involve a possible analogy to other situations where a foreign enterprise exploits the forum as a market and the cause of action is connected with such effort (*Hanson* v. *Denckla, supra,* at 251–252), though the punitive nature of the action and the special situation of the press must still be weighed. It also would confine the possibilities of litigation to places where the foreign publisher has had the opportunity to build some local standing with the public. No such activities, effort or opportunity existed here.

In a federated nation such as ours, the power of the States to exert jurisdiction over men and institutions not within their borders must be subject to reciprocal restraints on each in the interest of all. *Cf.* L. Hand, J., in *Kilpatrick* v. *Texas & P. Ry. Co.,* p. 81, footnote, *supra.* The need for such restraints is emphasized in our system by the full faith and credit clause of the Constitution. If Alabama stood alone it would be impotent in such a case as this to render any judgment that would be of practical importance to petitioner. What makes this judgment vitally important is the fact that if it is affirmed it is enforceable as such in States where the petitioner's resources are located. Thus jurisdictional delineations must be based on grounds that command general assent throughout the Union; otherwise full faith and credit will become a burden that the system cannot bear. No standard worthy of such general assent sustains the assumption of jurisdiction in this cause.

**Third: The burden on commerce** In forcing the petitioner to its defense of this case in Alabama, the state court has done more than exceed its territorial jurisdiction. It has also cast a burden on interstate commerce that the commerce clause forbids.

It takes no gift of prophecy to know that if negligible state circulation of a paper published in another state suffices to establish jurisdiction

of a suit for libel, threatening the type of judgment rendered here, such distribution interstate cannot continue. So, too, if the interstate movement of correspondents provides a factor tending to sustain such jurisdiction, as the court below declared, a strong barrier to such movement has been erected. Both the free flow of interstate communications and the mobility of individuals are national interests of supreme importance. In the silence of Congress, their protection against burdensome state action, unsupported by an overriding local interest, is the duty of the courts. *Fisher's Blend Station* v. *Tax Commission,* 297 U.S. 650, 654–655 (1936); *Edwards* v. *California,* 314 U.S. 160 (1941). In neither area may a State "gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world." *Id.* at 173. An attempt to isolate a State from strangers or their publications is no less offensive to the commerce clause than the attempts at economic isolation which have been repeatedly condemned. See, *e.g., Minnesota* v. *Barber,* 136 U.S. 313 (1890); *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U.S. 511, 527 (1935); *H. P. Hood & Sons* v. *DuMond,* 336 U.S. 525 (1949); *Dean Milk Co.* v. *City of Madison,* 340 U.S. 349 (1951).

This Court has not hitherto considered a case where the mere assumption of jurisdiction in a transitory action threatened an embargo of this kind. It has, however, held that the subjection of a carrier to suit, whether *in personam* or *in rem,* in a jurisdiction where it is engaged in insubstantial corporate activities may impose an excessive burden upon commerce, because of the special inconvenience and expense incident to the defense of litigation there. *Davis* v. *Farmers Co-operative Co.,* 262 U.S. 312 (1923); *Atchison, Topeka & Santa Fe Ry.* v. *Wells,* 265 U.S. 101 (1924); *Michigan Central R.R. Co.* v. *Mix,* 278 U.S. 492 (1929); *Denver & R. G. W. R. Co.* v. *Terte,* 284 U.S. 284, 287 (1932); *cf. International Milling Co.* v. *Columbia Transportation Co.,* 292 U.S. 511 (1934). See also *Sioux Remedy Co.* v. *Cope,* 235 U.S. 197 (1914); *Erlanger Mills* v. *Cohoes Fibre Mills, Inc.,* 239 F. 2d 502 (4th Cir. 1956); *Overstreet* v. *Canadian Pacific Airlines,* 152 F. Supp. 838 (S.D.N.Y. 1957). The burdens deemed excessive in those cases were as nothing compared to the burden imposed here, for which, as we have shown above (pp. 83–84), there is no overriding local interest.

Respondent argued in his Brief in Opposition (p. 42) that the cases holding that jurisdiction may be an excessive burden became moribund with the pronouncement in *International Shoe.* His contention finds no support in that opinion and ignores *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 781 (1945), where a few months before the *Shoe* decision Chief Justice Stone alluded to the *Davis* and like cases, otherwise affirming the protective principle for which they stand. The need for that protective principle has, indeed, been increased by the progressive relaxation in due process standards. For the considerations leading to that relaxation have to do with the appropriate relationship between a State and foreign enterprise and individuals. They are entirely inapposite in the situation where an interest of the Nation is impaired.

**Fourth: The freedom of the press** We have argued that the jurisdictional determination violates the Constitution, judged by standards that apply to enterprise in general under the constitutional provisions limiting state power in the interest of our federalism as a whole. We need not rest, however, on those standards. Newsgathering and circulation are both aspects of the freedom of the press, safeguarded by the Constitution. Neither can continue unimpaired if they subject the publisher to foreign jurisdiction on the grounds and of the scope asserted here. The decision is, accordingly, repugnant to the First Amendment.

This Court has often held state action inconsistent with the First Amendment, as embodied in the Fourteenth, when it has "the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it" (*Smith* v. *California,* 361 U.S. 147, 151 [1959])—though the action is otherwise consistent with the Constitution. Scienter is not generally deemed a constitutional prerequisite to criminal conviction, but a measure of liability for the possession of obscene publications was invalidated on this ground in *Smith* because of its potential impact on the freedom of booksellers. The allocation of burden of proof in establishing a right to tax-exemption fell in *Speiser* v. *Randall,* 357 U.S. 513 (1958) because it was considered in the circumstances to "result in a deterrence of speech which the Constitution makes free." *Id.* at 526. Compulsory disclosure requires a showing of a more compelling state interest when it tends to inhibit freedom of asso-

ciation than in other situations where disclosure may be forced (see, *e.g., Gibson* v. *Florida Legislative Comm.,* 372 U.S. 539 [1963]; *Talley* v. *California,* 362 U.S. 60 [1960]); and its extent may be more limited. *Shelton* v. *Tucker,* 364 U.S. 479 (1960). Regulation of the legal profession that would raise no question as applied to the solicitation of commercial practice must comply with stricter standards insofar as it inhibits association for the vindication of fundamental rights. *N.A.A.C.P.* v. *Button,* 371 U.S. 415 (1963).

The principle involved in these familiar illustrations plainly applies here. If a court may validly take jurisdiction of a libel action on the basis of sporadic newsgathering by correspondents and trivial circulation of the publication in the State, it can and will do so not only when the plaintiff has a valid cause of action but also when the claim is as unfounded and abusive as the claim presented here. The burden of defense in a community with which the publication has no meaningful connection and the risk of enormous punitive awards by hostile juries cannot be faced with equanimity by any publisher. The inevitable consequence must be the discontinuance of the activities contributing to the assumption of the jurisdiction. The interest of a State in affording its residents the most convenient forum for the institution of such actions cannot justify this adverse impact on the freedom that the First Amendment has explicitly secured. See also pp. 83–84, *supra.* The occasional solicitation of advertising in the State, being wholly unrelated to respondent's cause of action, does not augment the interest of the State in providing the forum challenged here.

## CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Alabama should be reversed, with direction to dismiss the action.

Respectfully submitted,

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## APPENDIX A

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Constitution of the United States

**Article I, Section 8:**

The Congress shall have power * * *

To regulate Commerce with foreign Nations, and among the several States * * *.

* * * * *

### Amendment I

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

* * * * *

### Amendment XIV

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

### Alabama Code of 1940 Title 7

**188. How corporation served** When an action at law is against a corporation the summons may be executed by the delivery of a copy of the summons and complaint to the president, or other head thereof, secretary, cashier, station agent or any other agent thereof. The return of the officer executing the summons that the person to whom delivered is the agent of the corporation shall be prima facie evidence of such fact and authorize judgment by default or otherwise without further proof of such agency and this fact need not be recited in the judgment entry. (1915, p. 607.)

* * * * *

U.S. SUPREME COURT, OCTOBER 1963

BRIEF FOR THE PETITIONER

**199(1). Service on non-resident doing business or performing work or service in state** Any non-resident person, firm, partnership, general or limited, or any corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall do any business or perform any character of work or service in this state shall, by the doing of such business or the performing of such work, or services, be deemed to have appointed the secretary of state, or his successor or successors in office, to be the true and lawful attorney or agent of such non-resident, upon whom process may be served [in any action accrued or accruing from the doing of such business, or the performing of such work, or service, or as an incident thereto by any such non-resident, or his, its or their agent, servant or employee.][14] Service of such process shall be made by serving three copies of the process on the said secretary of state, and such service shall be sufficient service upon the said non-resident of the state of Alabama, provided that notice of such service and a copy of the process are forthwith sent by registered mail by the secretary of the state to the defendant at his last known address, which shall be stated in the affidavit of the plaintiff or complainant hereinafter mentioned, marked "Deliver to Addressee Only" and "Return Receipt Requested," and provided further that such return receipt shall be received by the secretary of state purporting to have been signed by said non-resident, or the secretary of state shall be advised by the postal authority that delivery of said registered mail was refused by said non-resident; and the date on which the secretary of state receives said return receipt, or advice by the postal authority that delivery of said registered mail was refused, shall be treated and considered as the date of service of process on said non-resident. The secretary of state shall make an affidavit as to the service of said process on him, and as to his mailing a copy of the same and notice of such service to the non-resident, and as to the receipt of said return receipt, or advice of the refusal of said registered mail, and the respective dates thereof, and shall attach said affidavit, return receipt, or advice from the postal authority, to a copy of the process and shall return the same to the clerk or register who issued the same, and all of the same shall be filed in the cause by the clerk or register. The party to a cause filed or pending, or his agent or attorney, desiring to obtain service upon a non-resident under the provisions of this section shall make and file in the cause, an affidavit stating facts showing that this section is applicable, and stating the residence and last known post-office address of the non-resident, and the clerk or register of the court in which the action is filed shall attach a copy of the affidavit to the writ or process, and a copy of the affidavit to each copy of the writ or process, and forward the original writ or process and three copies thereof to the sheriff of Montgomery county for service on the secretary of state andit shall be the duty of the sheriff to serve the same on the secretary of state and to make due return of such service. The court in which the cause is pending may order such continuance of the cause as may be necessary to afford the defendant or defendants reasonable opportunity to make defense. Any person who was a resident of this state at the time of the doing of business, or performing work or service in this state, but who is a non-resident at the time of the pendency of a cause involving the doing of said business or performance of said work or service, and any corporation which was qualified to do business in this state at the time of doing business herein and which is not qualified at the time of the pendency of a cause involving the doing of such business, shall be deemed a non-resident within the meaning of this section, and service of process under such circumstances may be had as herein provided.

The secretary of state of the state of Alabama, or his successor in office, may give such non-resident defendant notice of such service upon the secretary of state of the state of Alabama in lieu of the notice of service hereinabove provided to be given, by registered mail, in the following manner: By causing or having a notice of such service and a copy of the process served upon such non-resident defendant, if found within the state of Alabama, by any offi-

[14] Following the decision in *New York Times Company* v. *Conner* 291 F. 2d 492 (5th Cir. 1962) the statute was amended by substituting the following language for the bracketed portion: [in any action accrued, accruing, or resulting from the doing of such business, or the performing of such work or service, or relating to or on an incident thereof, by any such non-resident, or his, its or their agent, servant or employee. And such service shall be valid whether or not the acts done in Alabama shall of and within themselves constitute a complete cause of action.] The amendment applied "only to causes of action arising after the date of the enactment" and therefore has no bearing on this case.

cer duly qualified to serve legal process within the state of Alabama, or if such non-resident defendant is found without the state of Alabama, by a sheriff, deputy sheriff, or United States marshal, or deputy United States marshal, or any duly constituted public officer qualified to serve like process in the state of the jurisdiction where such non-resident defendant is found; and the officer's return showing such service and when and where made, which shall be under oath, shall be filed in the office of the clerk or register of the court wherein such action is pending.

Service of summons when obtained upon any such non-resident as above provided for the service of process herein shall be deemed sufficient service of summons and process to give to any of the courts of this state jurisdiction over the cause of action and over such non-resident defendant, or defendants, and shall warrant and authorize personal judgment against such non-resident defendant, or defendants, in the event that the plaintiff prevails in the action.

The secretary of state shall refuse to receive and file or serve any process, pleading, or paper under this section unless three copies thereof are supplied to the secretary of state and a fee of three dollars is paid to the secretary of state; and no service shall be perfected hereunder unless there is on file in the office of the secretary of state a certificate or statement under oath by the plaintiff or his attorney that the provisions of this section are applicable to the case. (1949, p. 154, §§ 1, 2, appvd. June 23, 1949; 1951, p. 976, appvd. Aug. 28, 1951; 1953, p. 347, § 1, appvd. Aug. 5, 1953.)

COMMITTEE TO DEFEND MLK AND THE STRUGGLE FOR FREEDOM IN THE SOUTH

## Heed Their Rising Voices

**YOUR HELP IS URGENTLY NEEDED . . . NOW!!**

*"The growing movement of peaceful mass demonstrations by Negroes is something new in the South . . . . Let Congress heed their rising voices, for they will be heard." —New York Times editorial Saturday, March 19, 1960*

As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . .

In Orangeburg, South Carolina, when 400 students peacefully sought to buy doughnuts and coffee at lunch counters in the business district, they were forcibly ejected, tear-gassed, soaked to the skin in freezing weather with fire hoses, arrested en masse and herded into an open barbed-wire stockade to stand for hours in the bitter cold.

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempted to starve them into submission.

In Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond, Charlotte, and a host of other cities in the South, young American teenagers, in face of the entire weight of official state apparatus and police power, have boldly stepped forth as protagonists of democracy. Their courage and amazing restraint have inspired millions and given a new dignity to the cause of freedom.

Small wonder that the Southern violators of the Constitution fear this new, non violent brand of freedom fighter . . . even as they fear the upswelling right-to-vote movement. Small wonder that they are determined to destroy the one man who, more than any other, symbolizes the new spirit now sweeping the South—the Rev. Dr. Martin Luther King, Jr., world-famous leader of the Montgomery Bus Protest. For it is his doctrine of non-violence which has inspired and guided the students in their widening wave of sit-ins; and it [is] this same Dr. King who founded and is president of the Southern Christian leadership Conference—the organization which is spearheading the surging right-to-vote movement. Under Dr. King's direction the Leadership Conference conducts Student Workshops and Seminars in the philosophy and technique of non-violent resistance.

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury"—a felony under which they could imprison him for ten years. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance and support, and thereby to intimidate all leaders who may rise in the South. Their strategy is to behead this affirmative movement, and thus to demoralize Negro Americans and weaken their will to struggle. The defense of Martin Luther King, spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of the total struggle for freedom in the South.

Decent-minded Americans cannot help but applaud the creative daring of the students and the quiet heroism of Dr. King. But this is one of those moments in the stormy history of Freedom when men and women of good will must do more than applaud the rising-to-glory of others. The America whose good name hangs in the balance before a watchful world, the America whose heritage of Liberty these Southern Upholders of the Constitution are defending, is our America as well as theirs. . .

We must heed their rising voices—yes—but we must add our own.

We must extend ourselves above and beyond moral support and render the material help so urgently needed by those who are taking the risks,

facing jail, and even death in a glorious re-affirmation of our Constitution and its Bill of Rights.

We urge you to join hands with our fellow Americans in the South by supporting, with your dollars, this Combined Appeal for all three needs—the defense of Martin Luther King—the support of the embattled students—and the struggle for the right to vote.

Stella Adler
Raymond Pace Alexander
Harry Can Arsdale
Harry Belafonte
Julie Belafonte
Dr. Algernon Black
Marc Blitztein
William Branch
Marlon Brando
Mrs. Ralph Bunche
Diahann Carroll
Dr. Alan Knight Chalmers
Richard Coe
Nat King Cole
Cheryl Crawford
Dorothy Dandridge
Ossie Davis
Sammy Davis, Jr.
Ruby Dee
Dr. Philip Elliott
Dr. Harry Emerson Fosdick
Anthony Franciosa
Lorraine Hansbury
Rev. Donald Harrington
Nat Hentoff
James Hicks
Mary Hinkson
Van Heflin
Langston Hughes
Morris Lushewitz
Mahalia Jackson
Mordecai Johnson
John Killens
Eartha Kitt
Rabbi Edward Klein
Hope Lange
John Lewis
Viveca Lindfors
Carl Murphy
Don Murray
John Murray
A.J. Muste
Frederick O'Neal
L. Joseph Overton
Clarence Pickett
Shad Polier
Sidney Poitier
A. Philip Randolph
John Raitt
Elmer Rice
Jackie Robinson
Mrs. Eleanor Roosevelt
Bayard Rustin
Robert Ryan
Maureen Stapleton
Frank Silvera
Hope Stevens
George Tabori
Rev. Gardner C. Taylor
Norman Thomas
Kenneth Tynan
Charles White
Shelley Winters
Max Youngstein

COMMITTEE TO DEFEND MLK AND THE STRUGGLE FOR FREEDOM IN THE SOUTH

**WE IN THE SOUTH WHO ARE STRUGGLING DAILY FOR DIGNITY AND FREEDOM WARMLY ENDORSE THIS APPEAL**

Rev. Ralph D. Abernathy (Montgomery, Ala.)
Rev. Fred L. Shuttlesworth (Birmingham, Ala.)
Rev. Kelley Miller Smith (Nashville, Tenn.)
Rev. W. A. Dennis (Chattanooga, Tenn.)
Rev. C. K. Steele (Tallahassee, Fla.)
Rev. Matthew D. McCollom (Orangeburg, S. C.)
Rev. William Holmes Borders (Atlanta, Ga.)
Rev. Douglas Moore (Durham, N. C.)
Rev. Wyatt Tee Walker (Petersburg, Va.)
Rev. Walter L. Hamilton (Norfolk, Va.)
I. S. Levy (Columbia, S. C.)
Rev. Martin Luther King, Sr. (Atlanta, Ga.)
Rev. Henry C. Bunton (Memphis, Tenn.)
Rev. S. S. Seay, Sr. (Montgomery, Ala.)

COMMITTEE TO DEFEND MLK AND THE STRUGGLE FOR FREEDOM IN THE SOUTH

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Rev. A. L Davis (New Orleans, La.)
Mrs. Katie E. Whickham (New Orleans, La.)
Rev. W. H. Hall (Hattiesburg, Miss.)
Rev. J. E. Lowery (Mobile, Ala.)
Rev. T. J. Jemison (Baton Rouge, La.)

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*Chairmen*: A. Philip Randolph, Dr. Gardner C. Taylor; *Chairmen of Cultural Division*: Harry Belafonte, Sidney Poitier; *Treasurer*: Nat King Cole; *Executive Director*: Bayard Rustin; *Chairmen of Church Division*: Father George B. Ford, Rev. Harry Emerson Fosdick, Rev. Thomas Kilgore, Jr., Rabbi Edward E. Klein; *Chairman of Labor Division*: Morris Iushewitz.

# In the Supreme Court of the United States

## October Term, 1963

## No. 39

THE NEW YORK TIMES COMPANY,
PETITIONER,
V.
L. B. SULLIVAN, RESPONDENT

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA**

**BRIEF FOR RESPONDENT**

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M. ROLAND NACHMAN JR.,
*ATTORNEYS FOR RESPONDENT*

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Appendix A

Respondent adopts petitioner's statement of "Opinions Below" and "Jurisdiction."

### QUESTIONS PRESENTED

**1.** Does a newspaper corporation have a constitutionally guaranteed absolute privilege to defame an elected city official in a paid newspaper advertisement so that the corporation is immune from a private common law libel judgment in a state court in circumstances where, because of the admitted falsity of the publication, the newspaper is unable to plead or prove state afforded defenses of truth, fair comment, privilege or retraction (to show good faith and eliminate punitive damages), and where the corporation has retracted the same false material for another admittedly "on a par" with the city official?

**2.** When the only claimed invasion of a corporation's constitutional rights is that a city official successfully sued it for damages in a private civil action for libel in a state court in circumstances described in Question 1, and when the corporation does not contend that the state trial proceedings have been unfair, has there been an abridgement of the corporation's constitutional rights under the First and Fourteenth Amendments?

**3.** Are libelous utterances in a paid newspaper advertisement within the area of constitutionally protected speech and press?

**4.** When an admittedly false newspaper advertisement published in circumstances described in Question 1 charges that city police massively engaged in rampant, vicious, terroristic and criminal actions in deprivation of rights of others, is a state court holding in a private common law libel action that such an utterance is libelous as a matter of state law—leaving to

U.S. SUPREME COURT, OCTOBER 1963

BRIEF FOR RESPONDENT

the jury the questions of publication, identification with the police commissioner, and damages—an infringement of the newspaper's constitutional rights?

**5.** When a paid newspaper advertisement published in circumstances described in Question 1 contains admittedly false charges described in Question 4 about police action in a named city, may this Court consistently with its decisions and the Seventh Amendment review on certiorari a state jury finding, in a trial concededly fair, that the publication is "of and concerning" the city police commissioner whose name does not appear in the publication, and an award of general and punitive damages to him, when this state jury verdict embodied in a final state judgment has been approved by the state's highest appellate court?

**6.** May this Court consistently with its decisions and the Seventh Amendment re-examine facts tried by a state jury in a trial concededly fair, when those findings have been embodied in a final state judgment affirmed by the highest state appellate court, and when review is sought on assertions that the verdict is wrong and the general and punitive libel damages merely excessive?

**7.** When a foreign corporation makes a general appearance in a private state civil action against it, according to state law consistent with the majority view of all states, is there an adequate independent state ground as to jurisdiction over this foreign corporation?

**8.** Even if there had been no general appearance as described in Question 7, when a foreign newspaper corporation continuously and systematically gathers news by resident and transient correspondents, solicits advertising in person and by mail, and distributes its newspapers for sale in the forum state, and when some of these activities are incident to the cause of action in suit, has this foreign corporation sufficient contacts with the forum state so that suit against it is fair in accordance with decisions of this Court so explicit as to leave no room for real controversy?

## STATUTES INVOLVED

Statutes referred to in this brief are contained in an appendix hereto.

## STATEMENT

In the New York Times of March 29, 1960, there appeared a full-page advertisement, "warmly endorsed" by the four petitioners in No. 40, entitled, "Heed Their Rising Voices."[1] Charging generally "an unprecedented wave of error," the advertisement said of Montgomery:

> "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.
>
> * * * * * * *
>
> "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a **felony** under which they could imprison him for **ten years."**

Respondent, police commissioner of Montgomery, asked $500,000 as damages for this libel from the New York Times and the four "warm endorsers."

After a lengthy hearing the trial court held on August 5, 1960, that the New York Times was amenable to suit in Alabama. It had made a general appearance the court found. And, moreover, its business activities in Alabama, some of which had given rise to the cause of action, were sufficient contacts under due process standards to permit service on a Times string correspondent residing in Alabama, and on the Secretary of State under the Alabama Substituted Service Statute[2] (R. 49–57).

After its demurrers had been overruled (R. 108) the Times filed six separate pleas to the complaint (R. 99–105). Although truth regardless of motive is a complete defense to a libel suit in Alabama (see infra), the Times and its co-defendants filed no plea of truth. Although privilege and fair comment are defenses in Alabama in appropriate circumstances (see infra), the Times and its co-defendants did not plead these defenses. At the conclusion of the trial a jury returned a verdict against all defendants for

[1] App. B of Petitioner's brief, p. 97.

[2] Title 7, § 199 (1), Code of Alabama. The Times has conceded throughout adequate notice and opportunity to defend.

$500,000, and the trial court entered a judgment against all defendants in this amount.[3] Petitioner does not assert here any due process defects in these trial proceedings, and does not attack the motives and conduct of the jury.

The Times filed a motion for new trial, which was overruled (R. 970); the petitioners in No. 40 filed motions for new trial, but allowed them to lapse (R. 984, 998, 1013, 1028).

The Alabama Supreme Court affirmed the judgment as to all defendants (R. 1180).

The Times complains in this Court: (1) The holdings of the Alabama courts that the publication was libelous per se and the jury verdict that it was "of and concerning" respondent abridged its guaranties under the 1st and 14th Amendments, and (2) it was not amenable to suit in Alabama.

### I. Merits

Since the Times has told this Court that the whole libel rests on two discrepancies—mere "exaggerations or inaccuracies"[4] in the course of an "impersonal"[5] discussion "plainly" not meant as an attack on any individual,[6] respondent will state **this** case.[7]

This lawsuit arose because of a wilful, deliberate and reckless attempt to portray in a full-page newspaper advertisement, for which the Times charged and was paid almost $5,000, rampant, vicious, terroristic and criminal police action in Montgomery, Alabama, to a nationwide public of 650,000. The goal was money-raising. Truth, accuracy and long-accepted standards of journalism were not criteria for the writing or publication of this advertisement. The defamatory matter (quoted R. 580–81) describes criminal police action because some college students innocently sang "My Country 'Tis of Thee" from the Alabama State Capitol steps. The innocent singers were expelled from school; police ringed their campus by truckloads armed with shotguns and tear gas;[8] and their dining hall was padlocked to starve the students into submission. All statements charge violation of the students' rights.

The Times is not candid when it tells this Court (Brief p. 7) that "the only part" of the foregoing statement "that Respondent thought implied a reference to him was the assertion about 'truckloads of police.' " Respondent made entirely clear that he considered the padlocking charge—and all other charges except expulsion—as applicable to him as well (R. 716). The Times is also absolutely inaccurate when it tells this Court that respondent's evidence "consisted mainly" (Brief p. 7) of a story by Sitton and a report by McKee. Respondent's evidence also included the Times' answers to interrogatories; respondent's own testimony, and that of his numerous witnesses; the testimony of all of the Times' trial witnesses; the statements and judicial admissions of its attorneys; and the testimony of John Murray who testified for the individual petitioners.

The advertisement in another paragraph charges that the perpetrators of the foregoing alleged barbarisms were the same persons who had intimidated Martin Luther King; bombed his home; assaulted his person; and arrested him. All statements charge criminal conduct. Although the Times' brief tells this Court that the pronoun "they" does not point to respondent, and that such a jury finding is "absurd" (Brief p. 33), the jury was able to make the connection from the Times' own witness, Gershon Aaronson. He conceded that the word "they" as it appeared repeatedly in the quotation in the ad "refers to the same persons" (R. 745).[9]

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[3] Of course, this joint judgment is not collectible more than once. The facts giving rise to liability of petitioners in No. 40 will be related in a separate brief.

[4] Brief, p. 33.

[5] Brief, p. 32.

[6] Ibid.

[7] Respondent, accordingly, will not dignify beyond this comment the "statement" contained in the briefs of the friends of the Times. They are literally second editions of the advertisement and do not even purport to be confined to accurate summaries of the record.

The American Civil Liberties Union Brief, for example, draws most of its statement from newspaper articles, offered by the Times on its motion for new trial, and excluded below. The correctness and propriety of the ruling are not challenged. The brief simply cites the material as evidence anyway. Such practice presumably fosters the "fair trials" to which the organization is "devoted" (Brief, pp. 1 and 2). The other *amici* briefs are consumed with unrelated cases, entirely outside the record, and with inaccurate and incomplete characterizations of and quotations from a scant fraction of the testimony in this case.

[8] The Times apparently hopes to de-emphasize the ad's false allegations that the police were armed with shotguns and tear gas. It describes the ad as speaking of "truckloads of armed police …" (Brief, pp. 5 and 62. See also p. 8).

[9] The Times argues here, remarkable to say, that the jury should have disregarded Aaronson's testimony, because another witness, Redding, was *not* interrogated on the point (Brief, p. 17).

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Accordingly, the same police and the same police commissioner committed or condoned these alleged acts. And a jury unanimously agreed with Aaronson.

In a vain attempt to transfer these devastating statements from the constitutionally unprotected area of socially useless libel, where they belong, to the arena of constitutionally protected speech, where they obviously have no place, the Times and its friends employ various soothing phrases to describe the advertisement. It is called "political expression" and "political criticism" (pp. 29 and 30) of "public men" (p. 41); "the daily dialogue of politics" (p. 50); "a critique of government as such"; "criticism of official conduct" and "of the government" (pp. 30 and passim); "the most impersonal denunciation of an agency of government" (p. 50); a "recital of grievances and protests against claimed abuse dealing squarely with the major issue of our time" (pp. 31 and 57); "an expression which is merely wrong in fact with denigrating implications" (p. 54); an "appeal for political and social change" (A.C.L.U. brief, p. 13); a "critique of attitude and method, a value judgment and opinion" (A.C.L.U. brief, p. 29).

But the ordinary, unsophisticated reader of this ad was bound to draw the plain meaning that such shocking conditions were the responsibility of those charged with the administration of the Montgomery Police Department—respondent and the other two city commissioners. Any other conclusion is impossible. The Times itself can suggest no other reference, except to the police generally, and police are under the direct control and supervision of respondent. Indeed, the Times brief (p. 44) characterizes the ad as "criticism of an elected political official …" and observes that this official should be hardy enough to take it without suing for libel.

A description of such conduct, at war with basic concepts of decency and lawful government, inevitably evokes contempt, indignation, and ridicule for the person charged with the administration of police activities in Montgomery. And obviously this was the precise intent of the authors of the advertisement. One of them, John Murray, so testified.[10]

Significantly, none of the Times' witnesses, and none of the petitioners in No. 40, all of whom testified, presented any evidence designed to show that the statements from the ad were true. Certainly, the individual petitioners in No. 40, two of whom lived in Montgomery, had no reason to withhold testimony harmful to respondent.

The reference to respondent as police commissioner is clear from the ad. In addition, the jury heard the testimony of a newspaper editor (R. 602, et seq.); a real estate and insurance man (R. 613, et seq.); the sales manager of a men's clothing store (R. 634, et seq.); a food equipment man (R. 644, et seq.); a service station operator (R. 649, et seq.); and the operator of a truck line for whom respondent had formerly worked (R. 662, et seq.). Each of these witnesses stated that he associated the statements with respondent, and that if he had believed the statements to be true, he would have considered such conduct reprehensible in the extreme.[11]

Unless the Times is asking this Court to assume the functions of a jury and to weigh the credibility of this relevant testimony, nothing could be more irrelevant than the time and place of the witnesses' first inspection of the ad. Even so, the Times has had to adjust the testimony to make its dubious point,[12] and it seems to forget that all of its witnesses were its own employees.

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[10] "Q. (After reading the first paragraph quoted in the complaint) Was that the way that paragraph was when you first got it with the memorandum or did you give it that added touch for appeal?

"A. Well, it would be a little difficult at this time to recall the exact wording in the memorandum but the sense of what was in the memorandum was certainly the same as what is in here. We may have phrased it a little differently here and there.

"Q. I see. Your purpose was to rev it up a little bit to get money, I take it.

"A. Well, our purpose was to get money and to make the ad as—to project it in the most appealing form from the material we were getting.

"Q. Whether it was accurate or not really didn't make much difference, did it?

"A. Well, that did not enter the—it did not enter into consideration at all except we took it for granted that it was accurate—we took it for granted that it was accurate—they were accurate—and if they hadn't been—I mean we would have stopped to question it. I mean we would have stopped to question it—We had every reason to believe it" (R. 814–815).

[11] One stated, for example: "I don't think there is any question about what I would decide. I think I would decide that we probably had a young Gestapo in Montgomery" (R. 646).

[12] For example, Blackwell testified (R. 619): "He called me into his office and showed me this ad and at that time I indicated that I had seen the ad before but I don't remember just where and under what circumstances …"

Undoubtedly the demonstrable falsity of the statements prevented pleas of truth or privilege or fair comment. Indeed, the Times published a retraction of the same paragraphs for Governor Patterson on May 16, 1960 (R. 596 and 1958–1961):

> "Since publication of the advertisement, The Times made an investigation and consistent with its policy of retracting and correcting any errors or misstatements which may appear in its columns, herewith retracts the two paragraphs complained of by the Governor."

The Times asked its Montgomery string correspondent, McKee, for an investigation. On April 14, 1960, five days before suit was filed, McKee advised that the statements in the first quoted paragraph of the ad were false; and that King had been arrested twice by the Montgomery police for loitering and speeding and twice by the Sheriff's office for violation of the State boycott law and on charge of income tax falsification—a charge on which he was subsequently acquitted. Nevertheless, the Times, instead of retracting, wrote respondent that with the exception of the padlocking statement the rest of the quoted material was "substantially correct" (R. 589).

Later the Times directed another investigation by its regional correspondent, Claude Sitton. While the Times now speaks in this Court of "discrepancies" and "inaccuracies" in two instances, Sitton reported on May 4, 1960, that the first quoted paragraph of the advertisement "appears to be virtually without any foundation" (R. 594). There was no suggestion of involvement of respondent or any other city commissioner, or public employee under their charge, in the matters in the second quoted paragraph.

The Times then retracted for Governor Patterson, but not for respondent. The Times attempted to explain its inconsistency:

> "The defendant … felt that on account of the fact that John Patterson held the high office of Governor of the State of Alabama and that he apparently believed that he had been libeled by said advertisement in his capacity as Governor of the State of Alabama, the defendant should apologize" (R. 595–596).

When confronted with this answer to interrogatories, Harding Bancroft, then secretary of The New York Times, could give no reason for the different treatment of Governor Patterson and respondent. They were "on a par." But there was a retraction for Patterson and not for respondent (R. 779).[13]

Undisputed trial testimony showed that respondent and the other commissioners and the Montgomery police had nothing to do with the King bombings; that a city detective had helped dismantle a live bomb which had been thrown on King's front porch (R. 685); and that the department had exerted extraordinary efforts to apprehend the persons responsible (R. 686–687). The occurrence of this event before respondent took office simply compounds the libelous nature of this advertisement which seeks to portray such matters as current actions which "they" took. The ordinary reader, chronologically unsophisticated, would clearly associate the acts with the current city government.

Another police officer testified without contradiction that no one had assaulted King when he had been arrested for loitering outside the courtroom (R. 692–693).

Frank Stewart, State Superintendent of Education, testified without contradiction that students had not been expelled from school for singing on the capitol steps (R. 700).

The uncontroverted testimony of falsity was so overwhelming that counsel for the Times

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Price testified: " … I saw copies of the two paragraphs myself prior to that time" (R. 648).

Respondent's counsel himself asked Parker whether he had seen the ad "before in my office" (R. 649) but not whether this was the first occasion; and counsel for the Times did not cross-examine on the point, presumably because its counsel had also talked to Parker before the trial (R. 651).

[13] The Times brief, in its lengthy attempt to explain its inconsistency (pp. 21–22), presents an incomplete and inaccurate summary of Bancroft's testimony. It omits the following (R. 779):

"Q. Is there anything contained in this sentence in the Interrogatories that I just read to you which differentiates in any manner the position of Governor Patterson in his suit with Commissioner Sullivan in the present suit?

"A. As I read the thing, the answer is no.

"Q. They are put on a par, aren't they, Governor Patterson and this Plaintiff?

"A. Yes.

"Q. But there was a retraction for Governor Patterson and there was no retraction for this Plaintiff. That is correct, isn't it?

"A. That is correct."

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repeatedly brought out from witnesses that the statements quoted from the ad were not true. Moreover, he stated that truth was not in issue in the case because it had not been pleaded (A compendium of counsel's statements is in Appendix B of the brief in opposition, pp. 48–52). Counsel would not and could not have made such statements if the quoted portions of the ad had been true or if they had contained only a few "discrepancies" or "exaggerations."

Undeterred, however, in the teeth of these judicial admissions, Harding Bancroft maintained to the end an equivocal position about the correctness of the ad, with the exception of the padlocking statement.[14] The Times' brief, on the contrary, candidly recites (pp. 62–65) a chronicle of the ad's falsities in addition to the padlocking statement.

Because of this testimony, when the Times **six months before** had retracted the **same** statements on the basis of the **same** investigation as "errors and misstatements" (R. 595–596, 1958–1961), the court below characterized Bancroft's performance as "cavalier ignoring of the falsity of the advertisement" which surely impressed the jury "with the bad faith of the Times, and its maliciousness inferable therefrom" (R. 1178). The Times is absolutely incorrect when it argues that this statement of the Court was based upon the selected portion of Bancroft's testimony excerpted on pages 21 and 22 of its brief.

Sullivan himself testified that the matters contained in the ad were false (R. 705–709); that the statements reflected "upon my ability and integrity, and certainly it has been established here that they are not true" (R. 713).

The bombing statement "referred to me and to the Police Department and the City Commissioners" (R. 718). Similarly, the other matters contained in the second quoted paragraph of the ad related to him "by virtue of being Police Commissioner and Commissioner of Public Affairs."

When asked on cross-examination whether he felt that the ad had a "direct personal reference" to him, his answer was, and it is the simple answer which any normal reader of the ad would give:

> "It is my feeling that it reflects not only on me but on the other Commissioners and the community. … When it describes police action, certainly I feel it reflects on me as an individual" (R. 724).

Moreover:

> "I have endeavored to try to earn a good reputation and that's why I resent very much the statements contained in this ad which are completely false and untrue" (R. 722).

The circumstances under which this ad was cleared for publication show a striking departure from the Times' usual meticulous screening process. So that it will print only what is "fit to print," the Times has codified an elaborate set of "advertising acceptability standards" (R. 597–601), designed "to exclude misleading, inaccurate, and fraudulent advertisements and unfair competitive statements in advertising. The chief purpose of this policy of The Times is to protect the reader and to maintain the high standards of decency and dignity in its advertising columns which The Times has developed over the years."

To be as charitable as possible, it is remarkable that no person connected with The Times investigated charges that as part of "a wave of terror," public officials in Montgomery, because students sang "My Country 'Tis of Thee" from the Capitol steps, expelled the students from school; ringed their campus with truckloads of police armed with shotguns and tear gas; padlocked dining halls to starve them into submission; and thereby maintained continuity with

[14] When asked whether the Times took the position that the ad's statements, with this exception, were "substantially correct," Bancroft first said: "I think it is a pretty hard question to answer" (R. 781). Then, the Times … "doesn't know anything more than what is set forth in these two responses which our stringer and correspondent there, which are annexed to the Answers to the Interrogatories and we don't have any additional knowledge to that" (R. 782). Next: "I really think I have to answer the question by saying I don't know" (R. 782). Then: "[I]t is awfully difficult to define what The Times thinks," but The Times' lawyers had seemed to indicate on April 15, 1960, that the statements were substantially correct (R. 784). He concluded (R. 785): "I find it terribly difficult to be able to say that The Times, as such, believes something is true or is not true. Now, all I can tell you is what the sources of The Times' knowledge are, and the sources are The Times' knowledge—the complete sources as far as I know, are the two annexes attached to the Answers to the Interrogatories. Now, if you asked me would I use the words 'substantially correct,' now, I think I probably would, yes. The tenor of the content, the material of those two paragraphs in the ad which have been frequently read here are not substantially incorrect. They are substantially correct. Now, what sort of words I can use to give you an answer that would satisfy you, I don't know."

earlier days in which they had bombed King's home, assaulted his person, and arrested him on baseless charges.

Over sixty names appeared on the ad; none of these persons was contacted. A regional correspondent in Atlanta, who the Times admits had written news reports about racial difficulties in Montgomery, was not questioned. The Times had a string correspondent in Montgomery. It directed him to give an immediate report on the demand for retraction. But he was not asked for prior information or investigation.

In its answer to interrogatories, the Times specified sixteen contemporaneous news stories of its own as "relating to certain of the events or occurrences referred to in the advertisement" (R. 586). Aaronson, Redding, and Bancroft—the three Times witnesses—had never bothered to look at any of this news material before publishing the ad.

Aaronson, an employee on the national advertising staff, who first received the ad, testified that he did not read it (R. 741), but simply "scanned it very hurriedly" (R. 742).

Because he knew nothing which would lead him to believe that these monstrous statements were false (R. 758), Vincent Redding, head of the Advertising Acceptability Department, did not check with any of the signers of the ad; or with the regional correspondent in Atlanta; or with the string correspondent in Montgomery; or with the sixteen newspaper stories on file in his office (R. 763–765):

> "Q. Mr. Redding, wouldn't it be a fair statement to say that you really didn't check this ad at all for accuracy?"
>
> "A. That's a fair statement, yes" (R. 765).

One wonders whether the performance of Messrs. Aaronson, Redding and Bancroft inspired the American Civil Liberties Union comment that the Times had suffered "liability without fault" (Brief, p. 26), and the Washington Post evaluation that " … the undisputed record facts disclose that the advertisement was published under circumstances which, by no stretch of the imagination could be characterized as anything other than complete good faith" (Brief, p. 6).

Testimony of John Murray, one of the authors of the ad, and erstwhile Hollywood "scenarist" and Broadway lyricist (R. 815), describing the manner in which the ad was composed, has been quoted previously (Footnote 10, *supra*).

Thus, this "appealing" congeries of monstrous and now undefended falsehoods was sent to The New York Times. Upon payment of almost five thousand dollars, it was published without any investigation as a full-page advertisement in The New York Times of March 29, 1960. Six hundred and fifty thousand copies of it circulated to the nation as part of "All the news that's fit to print." And its purveyors sat back to await the financial return on their investment in "free speech".

### II. Jurisdiction

**General appearance** Petitioner, by moving to dismiss the action because the Alabama court was said to have no jurisdiction of the subject matter, made a general appearance in this case and thereby consented to the jurisdiction of the Alabama courts over its corporate person. This was the holding of both courts below. In addition, the trial court held that by bringing a mandamus action in the Supreme Court of Alabama unrelated to questions of personal jurisdiction, the Times had compounded its general appearance (R. 49–51). The holdings below, as will be demonstrated, accord with Alabama cases as well as those in a majority of the states.

The Times calls this general appearance "involuntary" (Brief, p. 75). But the Times in its brief in the Alabama Supreme Court (p. 54) said:

> "Accordingly, while the motion made it clear that the only grounds for the motion were the defects in the mode of service, the prayer asserted the consequences of these defects—a lack of jurisdiction not only over the person but also over the subject matter."

And the Times still makes the subject matter argument in this Court (Brief, p. 73):

> "Hence a contention that the statute is inapplicable or invalid as applied goes, in this sense, to jurisdiction of the cause as well as jurisdiction of the person."

**Validity of service of process on The New York Times** The courts below held that service on the string correspondent, McKee, and on the Secretary of State were valid. The trial court held that the Times had been sued on a cause of action "incident to" its business in Alabama (R. 55); and the "manifold contacts which The Times maintains with the State of Alabama" make it amenable to this process and suit in the Alabama courts, commenced by service on McKee and on the Secretary of State, "regardless

of its general appearance" (R. 51). The trial court found:

> " … an extensive and continuous course of Alabama business activity—news gathering; solicitation of advertising; circulation of newspapers and other products. These systematic business dealings in Alabama give The Times substantial contact with the State of Alabama, considerably in excess of the minimal contacts required by the Supreme Court decisions. … The Times does business in Alabama" (R. 56–57).

The Alabama Supreme Court affirmed on this point, after extensive findings regarding the business activities of the Times in Alabama (R. 1140–1147). It adopted, as had the trial court, the test of *Consolidated Cosmetics v. D-A Publishing Company,* 186 F. 2d 906, 908 (7th Cir. 1951):

> "The functions of a magazine publishing company, obviously, include gathering material to be printed, obtaining advertisers and subscribers, printing, selling and delivering the magazines for sale. Each of these, we think, constitutes an essential factor of the magazine publication business. Consequently if a non-resident corporation sees fit to perform any one of those essential functions in a given jurisdiction, it necessarily follows that it is conducting its activities in such a manner as to be subject to jurisdiction."

The court below concluded (R. 1149–1150):

> "The evidence shows that The Times sent its papers into Alabama, with its carrier as its agent, freight prepaid, with title passing on delivery to the consignee. See Tit. 57, Sec. 25, Code of Alabama 1940; 2 Williston on Sales, Sec. 279 (b), p. 90. Thence the issue went to newsstands for sale to the public in Alabama, in accordance with a long standing business practice.
>
> "The Times or its wholly owned advertising subsidiary, on several occasions, had agents in Alabama for substantial periods of time soliciting, and procuring in substantial amounts advertising to appear in The Times.
>
> "Furthermore, upon the receipt of the letter from the plaintiff demanding a retraction of the matter appearing in the advertisement, The Times had its string correspondent in Montgomery, Mr. McKee, investigate the truthfulness of the assertions in the advertisement. The fact that Mr. McKee was not devoting his full time to the service of The Times is 'without constitutional significance.' Scripto, Inc. v. Carson, Sheriff, et al., 362 U.S. 207."

Moreover, the court below found (R. 1151):

> "In the present case the evidence shows that the publishing of advertisements was a substantial part of the business of The Times, and its newspapers were regularly sent into Alabama. Advertising was solicited in Alabama. Its correspondent McKee was called upon by The Times to investigate the truthfulness or falsity of the matters contained in the advertisement after the letter from the plaintiff. The acts therefore disclose not only certain general conditions with reference to newspaper publishing, but also specific acts directly connected with, and directly incident to the business of The Times done in Alabama."

The exhaustive findings of fact contained in the opinions of both Alabama courts are fully substantiated in the record, and are not challenged in the Times Brief. In a qualitative sense, the test of *International Shoe Co. v. Washington,* 326 U.S. 310, 319–320, these decisions below were clearly correct. The Times from 1956 through April, 1960, conducted an extensive and continuous course of business activity in Alabama. The annual revenue was over twice as great as the $42,000 which this Court found sufficient to establish adequate Florida contacts in *Scripto v. Carson,* 362 U.S. 207.

## SUMMARY OF ARGUMENT

**I.**

The commercial advertisement in suit sought to, and did, portray criminal and rampant police state activity—an "unprecedented wave of ter ror"—resulting from students singing "My Country 'Tis of Thee" from the state capitol steps. This falsely alleged "wave of terror" against innocent persons was said to include expulsion from school; ringing of a college campus with truckloads of police armed with shotguns and tear gas; padlocking of the dining hall to starve protesting students into submission; and the arrest of Martin Luther King for loitering and speeding by those who had also bombed his home, assaulted his person and indicted him for perjury. The ad did not name respondent, but massive, terroristic and criminal acts of the police carry the sure meaning to the average, reasonably intelligent reader that the police activity is that of the police commissioner.

A. Alabama libel laws provided petitioner with the absolute defense of truth and with the privilege of fair comment. Petitioner did not plead or attempt to prove truth or fair comment. Its attorneys suggested in open court that the defamatory matter was not true and would not

be believed, and that truth was not in issue. The Times itself, in a contemporaneous retraction for another person whom it considered to be "on a par" with respondent, admitted that the material in the ad was erroneous and misleading.

Alabama law provides for untruthful and unprivileged defamers an opportunity to retract and thereby to eliminate all damages except special. Though the Times retracted for another "on a par," it refused to do so for respondent.

The Times makes no claim that it was denied a fair and impartial trial of this libel action, and raises no question of procedural due process.

In these circumstances, no provision of the Constitution of the United States confers an absolute immunity to defame public officials. On the contrary, this Court has repeatedly held that libelous utterances are not protected by the Constitution. *Beauharnais v. Illinois,* 343 U.S. 250; *Near v. Minnesota,* 283 U.S. 697, 715; *Konigsberg v. State Bar of California,* 366 U.S. 36, 49–50; *Roth v. U.S.,* 354 U.S. 476, 483; *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571–572; *Barr v. Matteo,* 360 U.S. 564; *Farmers Union v. WDAY, Inc.,* 360 U.S. 525; and *Pennekamp v. Florida,* 328 U.S. 331, 348–349. Historical commentary on "freedom of the press" accords. See, Thomas Jefferson to Abigail Adams in 1804; Thomas Jefferson's Second Inaugural Address (1805); Chafee, Book Review, 62 Harvard L. Rev. 891, 897, 898 (1949). Moreover, commercial advertisements are not constitutionally protected as speech and press. *Valentine v. Chrestensen,* 316 U.S. 52, 54; and *Breard v. City of Alexandria,* 341 U.S. 622, 643. Because such libelous utterances are not constitutionally protected speech, "it is unnecessary, either for us or for the state courts, to consider the issues behind the phrase 'clear and present danger.' " *Beauharnais v. Illinois,* 343 U.S. 250, 266.

B. It is fantasy for petitioner to argue that the ad which falsely charged respondent, as police commissioner, with responsibility for the criminal and rampant "unprecedented wave of terror" is "the daily dialogue of politics" and mere "political criticism" and "political expression." If the Times prevails, any false statement about any public official comes within this protected category. The absolute immunity would cover false statements that the Secretary of State had given military secrets to the enemy; that the Secretary of the Treasury had embezzled public funds; that the Governor of a state poisoned his wife; that the head of the public health service polluted water with germs; that the mayor and city council are corrupt; that named judges confer favorable opinions on the highest bidder; and that a police commissioner conducted activities so barbaric as to constitute a wave of terror.

C. Since the Times did not invoke Alabama defenses of truth, fair comment or privilege, the question of the constitutional adequacy of these defenses is entirely academic. Nevertheless, Alabama libel law conforms to constitutional standards which this Court has repeatedly set and to the libel laws of most states. "Only in a minority of states is a public critic of Government even qualifiedly privileged where his facts are wrong." *Barr v. Matteo,* 360 U.S. 564, 585 (dissenting opinion of Chief Justice Warren). The constitution has never required that states afford newspapers the privilege of leveling false and defamatory "facts" at persons simply because they hold public office. The great weight of American authority has rejected such a plea by newspapers. *Burt v. Advertiser Company,* 154 Mass. 238, 28 N. E. 1, 4 (opinion by Judge, later Mr. Justice Holmes); *Post Publishing Company v. Hallam,* 59 F. 530, 540 (6th Cir. 1893) (opinion by Judge, later Mr. Chief Justice Taft); *Washington Times Company v. Bonner,* 86 F. 2d 836, 842 (D. C. Cir. 1936); *Pennekamp v. Florida,* 328 U.S. 331, 348–349: "For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants."

D. Alabama's definition of libel *per se* as a false publication which tends to injure the person defamed in his reputation, which brings him into public contempt as a public official, or which charges him with a crime, is a familiar one and accords with that of most states. This Court approved it in *Beauharnais v. Illinois,* 343 U.S. 250, 257, n. 5, citing *Grant v. Reader's Digest,* 151 F. 2d 733, 735 (2d Cir. 1945), opinion by Judge Learned Hand; *Hogan v. New York Times,* 313 F. 2d 354, 355 (2d Cir. 1963). The presumption of general damages from libel *per se* is the majority rule throughout the country. *Developments in the Law—Defamation,* 69 Harvard L. Rev. 875 at 934 and 937; 3 *Restatement of Torts,* § 621, pp. 313–316.

E. In Alabama, as elsewhere, punitive damages and general damages, where there has been no retraction, are permitted, and the jury is given broad discretion in fixing the amount of the award. *Reynolds v. Pegler,* 123 F. Supp. 36, 38,

affirmed 223 F. 2d 429 (2d Cir.), cert. den. 350 U.S. 846; *Faulk v. Aware, Inc.,* 231 N. Y. S. 2d 270; and *Beauharnais v. Illinois,* 343 U.S. 250, 266. In assessing punitive damages, the jury may properly consider the nature and degree of the offense, as well as the higher moral consideration that these damages may deter such illegal practices in the future. The award in this case is but a fraction of two recent libel awards in the *Faulk* case and by a Georgia Federal jury of more than three million dollars, with punitive damages alone of two and one-half million dollars and three million dollars respectively.

This Court has always considered itself barred by the Seventh Amendment of the Constitution from setting aside state and federal damage awards as inadequate or excessive. *Chicago, B. & Q. v. Chicago,* 166 U.S. 226, 242–243; *Fairmount Glass Works v. Cub Fork Coal Co.,* 287 U.S. 474; *Neese v. Southern Ry.,* 350 U.S. 77. Many other cases are cited in this brief.

There is no constitutional infirmity in Alabama procedure which preserves the jury's long-standing common law right to return a general verdict. *Statement of Mr. Justice Black and Mr. Justice Douglas,* 31 F. R. D. 617 at 618–619.

In setting punitive damages, the jury could properly contrast the judicial admissions of the Times' attorneys that the advertisement was false and the Times' retraction of the same matter for another person as misleading and erroneous, with the trial testimony of the secretary of the corporation that the advertisement was substantially correct with the exception of one incident described in the ad.

**II.**

It is patently frivolous for the Times to argue that no ordinary person of reasonable intelligence could read the advertisement in suit as referring to the Montgomery police commissioner. Certainly the jury is not required as a matter of law to hold that the ad is not of and concerning respondent. Its finding is entitled to all of the safeguards of the Seventh Amendment. *Gallick v. B. & O. R. Co.,* 372 U.S. 108; *Chicago B. & Q. R. Co. v. Chicago,* 166 U.S. 226 at 242–243; and *Fairmount Glass Works v. Cub Fork Coal Co.,* 287 U.S. 474. While the ad's reference is clear enough, the jury heard witnesses who associated respondent with its false allegations. *Hope v. Hearst Consolidated Publications,* 294 F. 2d 681 (2d Cir.), cert. denied 368 U.S. 956; *Chagnon v. Union Leader Corp.,* 103 N. H. 426, 174 A. 2d 825, 831–832, cert. denied 369 U.S. 830.

This Court in *Beauharnais v. Illinois,* 343 U.S. 250, and courts generally, have held that a plaintiff need not be named in a defamatory publication in order to have a cause of action for libel. *Cosgrove Studio, Inc. v. Pane,* 408 Pa. 314, 182 A. 2d 751, 753; *Hope v. Hearst Consolidated Publications,* supra; *Nieman-Marcus v. Lait,* 13 F. R. D. 311 (S. D. N. Y. 1952); *National Cancer Hospital v. Confidential, Inc.*. 136 N. Y. S. 2d 921; *Weston v. Commercial Advertisers,* 184 N. Y. 479, 77 N. E. 660; *Bornmann v. Star Co.,* 174 N. Y. 212, 66 N. E. 723; *Chapa v. Abernethy* (Tex. Civ. App.), 175 S. W. 165; *Gross v. Cantor,* 270 N. Y. 93, 200 N. E. 592; *Fullerton v. Thompson,* 119 Minn. 136, 143 N. W. 260; *Children v. Shinn,* 168 Iowa 531, 150 N. W. 864; *Reilly v. Curtiss,* 53 N. J. 677, 84 A. 199; 3 *Restatement of Torts,* § 564 (c), p. 152; and *Developments in the Law—Defamation,* 69 Harvard L. Rev. 894 et seq.

**III.**

A. The courts below held that under Alabama practice the Times appeared generally in the action because it objected to jurisdiction of the subject matter as well as to jurisdiction of the person. This holding, which accords with the majority rule (25 A. L. R. 2d 835 and 31 A. L. R. 2d 258) is an adequate independent state ground as to jurisdiction over the Times which bars review of that question. *Herb v. Pitcairn,* 324 U.S. 117, 125–126; *Murdock v. Memphis,* 20 Wall. 590, 626; *Fox Film Corporation v. Muller,* 296 U.S. 207, 210; *Minnesota v. National Tea Company,* 309 U.S. 551, 556–557. A state court's interpretation of its own law is binding here. *Fox River Paper Company v. Railroad Commission,* 274 U.S. 651, 655; *Guaranty Trust Company v. Blodgett,* 287 U.S. 509, 513; *United Gas Pipeline Company v. Ideal Cement Company,* 369 U.S. 134.

B. Even if the Times had not made a general appearance in this case, effective service of process on a Times string correspondent residing in Alabama and on the Secretary of State of Alabama under a Substituted Service Statute, Title 7, § 199 (1), Alabama Code of 1940 as amended, is based on decisions of this Court so explicit as to leave no room for real controversy. Suit against the Times in Alabama accorded with traditional concepts of fairness and orderly administration of the laws. *International Shoe Company v. Washington,* 326 U.S. 310, 319;

*McGee v. International Insurance Company,* 355 U.S. 220; *Scripto v. Carson,* 362 U.S. 207; *Travelers Health Association v. Virginia,* 339 U.S. 643. The Times maintained three resident string correspondents in Alabama, and, since 1956, carried on an extensive, systematic and continuous course of business activity there, including news gathering, solicitation of advertising and circulation of newspapers and other products. It performed all of the functions of a newspaper outlined in *Consolidated Cosmetics v. D. A. Publishing Company,* 186 F. 2d 906, 908 (7th Cir. 1951). Its business activity produced more than twice the revenue which Scripto derived from Florida (see *Scripto v. Carson,* 362 U.S. 207), and its regular employees combined their efforts with those of independent dealers to produce this result.

It would be manifestly unfair to make respondent bring his libel suit in New York instead of in his home state where the charges were likely to harm him most. See Justice Black's dissenting opinion in *Polizzi v. Cowles Magazines,* 345 U.S. 663, 667.

When other business corporations may be sued in a foreign jurisdiction, so may newspaper corporations on similar facts. This Court has refused newspaper corporations special immunity from laws applicable to businesses in general. *Mabee v. White Plains Publishing Co.,* 327 U.S. 178, 184 (Fair Labor Standards Act); *Associated Press v. N. L. R. B.,* 301 U.S. 103 (National Labor Relations Act); and *Lorain Journal Company v. United States,* 342 U.S. 143 (Anti-trust laws).

## ARGUMENT

### I. The Constitution confers no absolute immunity to defame public officials

The New York Times, perhaps the nation's most influential newspaper, stooped to circulate a paid advertisement to 650,000 readers—an advertisement which libeled respondent with violent, inflammatory, and devastating language. The Times knew that the charges were uninvestigated and reckless in the extreme. It failed to retract for respondent with subsequent knowledge of the falsity of the material in the advertisement. Yet it retracted as misleading and erroneous the same defamatory matter for another "on a par."

Petitioner was unable to plead truth; or fair comment; or privilege. Alabama provides these classic defenses so that the press may be free within the rubric of its libel laws.[15] Since petitioner did not invoke these Alabama defenses, its belated attack on their constitutional adequacy is hollow and entirely academic. Nevertheless, the Alabama law of libel conforms to constitutional standards which this Court has repeatedly set and to the libel laws of most states. "Only in a minority of states is a public critic of Government even qualifiedly privileged where his facts are wrong."[16] Moreover, "[t]he majority of American courts do not give a privilege to a communication of untrue facts, or to a comment based on them, even though due care was exercised in checking their accuracy."[17] *A fortiori* there is no such privilege where there was no check whatever. (See Aaronson, Redding and Bancroft testimony).

The Times' trial attorneys conceded that truth was not in issue; and made plain to the jury that the material was so patently false as to be unbelievable in the community. No defendant attempted to introduce testimony to substantiate the charges. The Times does not claim that it was denied a fair and impartial trial of the libel action. The petition raises no question of procedural due process.

> "This cause was tried in the courts of [the state] in accordance with regular court procedure applicable to such cases. The facts were submitted to a jury as provided by the constitution and laws of that State, and in harmony with the traditions of the people of this nation. Under these circumstances, no proper interpretation of the words 'due process of law' contained in the Fourteenth Amendment can justify the conclusion that appellant has been deprived of its property contrary to that 'due process.' "[18]

**Libelous utterances have no constitutional protection** The Times does not seek review of a

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[15] Substantial truth in all material respects is a complete defense if specially pleaded. *Ferdon v. Dickens,* 161 Ala. 181, 49 So. 888; *Kirkpatrick v. Journal Publishing Company,* 210 Ala. 10, 97 So. 58; *Alabama Ride Company v. Vance,* 235 Ala. 263, 178 So. 438.

Privilege and fair comment, too, are defenses, if specially pleaded. *Ferdon v. Dickens,* supra; *W. T. Grant v. Smith,* 220 Ala. 377, 125 So. 393.

A retraction completely eliminates punitive damages. Title 7, Sections 913–917, Alabama Code (App. A. p. 67).

[16] Chief Justice Warren, dissenting in *Barr v. Matteo,* 360 U.S. 564, 585.

[17] *Developments in the Law—Defamation,* 69 Harvard L. Rev. 877, 927 (1956).

[18] *United Gas Public Service Company v. Texas,* 303 U.S. 123, 153, Black J. concurring.

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BRIEF FOR RESPONDENT

federal question—substantial or otherwise. For libelous utterances have never been protected by the Federal Constitution. Throughout its entire history, this Court has never held that private damage suits for common law libel in state courts involved constitutional questions.[19] Respondent vigorously disputes the Times' assertion that this Court is wrong in its history (Brief, pp. 44–48), and that the constitutional pronouncements in those cases are mere "adjectives" and statements "made in passing" (Brief, p. 40). Respondent is confident that this Court meant what it said in *Roth v. U.S.,* 354 U.S. 476, 483, for example:

> "In light of this history it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech (citation)."

Again in *Konigsberg* this Court pronounced that it "has consistently recognized [that] … certain forms of speech [have] been considered outside the scope of constitutional protection." 366 U.S. 36, 50, citing *Beauharnais* and *Roth.*

Moreover, commercial advertisements are not constitutionally protected as speech and press, since there is no real restraint on speech and press where commercial activity is involved. *Valentine v. Chrestensen,* 316 U.S. 52, 54; *Breard v. City of Alexandria,* 341 U.S. 622, 643.[20] The Times has termed the citation of these cases "frivolous" and "cynical" (Brief, pp. 31 and 57). But its analysis of *Valentine v. Chrestensen* is incomplete—the other side of the handbill protested a city department's refusal of wharfage facilities. And the Times itself classified the ad as a commercial one, and submitted it to the Advertising Acceptability Department and to the standards of censorship which that department is supposed to impose. The Times charged the regular commercial advertising rate of almost five thousand dollars, scarcely as "an important method of promoting some equality of practical enjoyment of the benefits the First Amendment was intended to secure" (Brief, p. 58).

This Court last term in *Abernathy v. Patterson,* 368 U.S. 986, declined to review a decision of the Court of Appeals, 295 F. 2d 452, 456–457, which had held this very publication unprotected constitutionally as a libelous utterance. The Court of Appeals stated that the only constitutional claim could be one relating to the conduct of the trial.

In 1804, Thomas Jefferson wrote to Abigail Adams, referring to his condemnation of the Sedition Act of 1798:

> "Nor does the opinion of the unconstitutionality and consequent nullity of that law remove all restraint from the overwhelming torrent of slander which is confounding all vice and virtue, all truth and falsehood in the U.S. The power to do that is fully possessed by the several state legislatures. It was reserved to them, and was denied to the general government, by the constitution according to our construction of it. While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the states, and their exclusive right, to do so."[21]

Again in his second inaugural address on March 4, 1805, Jefferson said:

> "No inference is here intended that the laws provided by the States against false and defamatory publications should not be enforced; he who has time renders a service to public morals and public tranquility in reforming these abuses by the salutary coercions of the law; but the experiment is noted to prove that, since truth and reason have maintained their ground against false opinions in league with false facts, the press, confined to truth, needs no other legal restraint; the public judgment will correct false reasonings and opinions on a full hearing of all parties; and no other definite line can be drawn between the inestimable liberty of the press and its demoralizing licentiousness."[22]

A century and a quarter later, Justices Holmes and Brandeis joined Chief Justice Hughes, who spoke for the Court in *Near v. Minnesota,* 283 U.S. 697, 715:

> "But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the

[19] *Beauharnais v. Illinois,* 343 U.S. 250; *Near v. Minnesota,* 283 U.S. 697, 715; *Konigsberg v. State Bar of California,* 366 U.S. 36, 49–50; *Roth v. U.S.,* 354 U.S. 476, 483; *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571–572.

[20] Lower Federal court decisions accord. *Pollak v. Public Utilities Commission,* 191 F. 2d 450, 457 (D. C. Cir. 1951); *E. F. Drew & Co. v. Federal Trade Commission,* 235 F. 2d 735, 740 (2d Cir. 1956), cert. den. 352 U.S. 969.

[21] Quoted in *Dennis v. U.S.,* 341 U.S. 494, 522, n. 4, and in *Beauharnais v. Illinois,* 343 U.S. 250, 254, n. 4.

[22] I *Messages and Papers of the Presidents,* Joint Committee on Printing, 52nd Congress, pp. 366, 369 (1897).

> libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions."

Twenty years thereafter, this Court upheld an Illinois criminal group libel statute which had been applied to one who had distributed a pamphlet charging that Negroes as a class were rapists, robbers, carriers of knives and guns, and users of marijuana. *Beauharnais v. Illinois,* 343 U.S. 250, 266:

> "Libelous utterances, not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' "

Since *Beauharnais,* as the table contained in Appendix A of respondent's brief in opposition shows, this Court has declined to review forty-four libel cases coming from the state and federal courts. It has reviewed three. Two of them[23] resulted in a holding that certain lower echelon federal executive personnel had an absolute privilege. The third[24] held that a radio and television station, which gave equal time to all political candidates because of the dictates of § 315 of the Federal Communications Act, was absolutely immune, by virtue of the same act, from state libel suits growing out of any such broadcasts.

The Times and its powerful corporate newspaper friends obviously realize that history and precedent support the holding below that this libelous advertisement is not constitutionally protected. They assert, therefore, at least for themselves and others who conduct the business of mass communication, an absolute privilege to defame all public officials—even in paid advertisements; even when the defamation renders the classic defenses of truth, fair comment and privilege unavailable; even when there is no retraction to show good faith. They urge this Court to write such a fancied immunity into the constitution—at least for themselves, for they are silent on whether this new constitutional protection is to extend to ordinary speakers and writers. The obvious consequence of such a holding would be the confiscation of the rights of those defamed to assert their traditional causes of action for defamation in state courts.

The Times attempts to cloak this defamatory advertisement with constitutional respectability. The ad is called "the daily dialogue of politics" and mere "political criticism" and "political expression." Surely desperation leads the Times so to characterize a charge that respondent, as police commissioner, was responsible for the criminal and rampant "unprecedented wave of terror" which this ad sought to portray falsely.

If the Times prevails, then any statement about any public official becomes "the daily dialogue of politics," "political expression and criticism" and "a critique of attitude and method, a value judgment and opinion." The absolute immunity would cover false statements that the Secretary of State had given military secrets to the enemy; that the Secretary of the Treasury had embezzled public funds; that the Governor of a state poisoned his wife; that the head of the public health service polluted water with germs; that the mayor and city council are corrupt; that named judges confer favorable opinions on the highest bidder; and that a police commissioner conducted activities so barbaric as to constitute a wave of terror. If a state court indulges in "mere labels" without constitutional significance when it holds such utterances libelous, and if such defamatory statements about "public men" are to be protected as legitimate and socially useful speech, then the Times and its friends urge this Court to "convert the constitutional Bill of Rights into a suicide pact."[25]

Clearly, Congress and this Court did not find such a constitutional immunity, hence Section 315 and *Farmers Union v. WDAY,* 360 U.S. 525. The very reason for such Congressionally conferred immunity was the "widely recognized" existence of causes of action for libel by defamed candidates for public office "throughout the states" (360 U.S. 525 at 535). This Court found that Congress had given immunity because broadcasters would have too much difficulty determining whether a particular equal time broadcast was defamatory in terms of relevant state law. 360 U.S. 525 at 530. Surely this Court

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[23] *Barr v. Matteo,* 360 U.S. 564; and *Howard v. Lyons,* 360 U.S. 593.

[24] *Farmers Union v. WDAY, Inc.,* 360 U.S. 525.

[25] Jackson, J. dissenting in *Terminiello v. Chicago,* 337 U.S. 1, 37.

The Times wrongly argues that Mr. Justice Frankfurter's caveat in *Beauharnais* was designed for such a purpose (Brief, p. 41). He examined the hypothetical dangers of permitting statutes which outlawed libels of political parties. Justice Frankfurter observed that such attempts would "raise quite different problems not now before us" (343 U.S. 250, 264), and it was in this context that he observed that the doctrine of fair comment would come into play "since political parties, like public men, are, as it were, public property." The case at bar, too, presents far different problems.

did not decide *WDAY* on an assumption that the Constitution already provided such immunity absent a "clear and present danger."

*Beauharnais,* 343 U.S. 250 at 266, disposes of petitioner's "clear and present danger" cases (pp. 13–15) involving criminal prosecutions for breach of peace, criminal syndicalism and contempt of court.[26] Indeed, the background of one of them, *Pennekamp v. Florida,* 328 U.S. 331, 348–349, sharply distinguishes these cases from the one at bar. This Court told Pennekamp that even those hardy judges described by petitioner could bring private suits for defamation in state courts. "For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants."[27]

Pennekamp—editor of the Miami Herald—ignored this warning. Perhaps he assumed, as does the Times, that the official's remedy was "left at large," and that there was an absolute privilege to level not only fair but false and defamatory criticism at public officials. Pennekamp discovered that he was wrong, and that the remedy had been brought in tow, when his paper libeled a prosecuting attorney who recovered $100,000 in damages. *Miami Herald v. Brautigam* (Fla.), 127 So. 2d 718. Even though Pennekamp and his paper were able to plead fair comment and truth, and claimed the editorial expression as their own,[28] this Court declined to review despite the same First and Fourteenth Amendment arguments which the Times advances in its brief. 369 U.S. 821.

Two of this Court's greatest figures rejected a contention that newspapers should have an absolute privilege to defame public officials and a consequent absolute immunity from private libel suits. Mr. Justice, then Judge Holmes, in *Burt v. Advertiser Company,* 154 Mass. 238, 28 N. E. 1, 4, upholding a trial court charge to the jury that newspaper statements of fact, as distinguished from opinion, if false, were not privileged, said:

> "But what the interest of private citizens in public matters requires is freedom of discussion rather than of statement. Moreover, the statements about such matters which come before the courts are generally public statements, where the harm done by a falsehood is much greater than in the other case."
>
> "If one private citizen wrote to another that a high official had taken a bribe, no one would think good faith a sufficient answer to an action. He stands no better, certainly, when he publishes his writing to the world through a newspaper, and the newspaper itself stands no better than the writer."

Mr. Chief Justice, then Judge Taft, upholding a similar trial court charge in *Post Publishing Company v. Hallam,* 59 F. 530, 540 (6th Cir., 1893), wrote:

> "[I]f the [absolute] privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable ground. We think that not only is such a sacrifice not required of everyone who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good."

Judge Taft rejected the argument, urged here by the Times and its newspaper friends, that the privilege of fair comment "extends to statement of fact as well as comment" when made by one "who has reasonable grounds for believing, and does believe, that [the public officer or candidate] has committed disgraceful acts affecting his fitness for the office he seeks" (59 F. 530 at 540).

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[26] *Cantwell v. Connecticut,* 310 U.S. 296; *DeJonge v. Oregon,* 299 U.S. 353; *Bridges v. California,* 314 U.S. 252; *Pennekamp v. Florida,* 328 U.S. 331; *Craig v. Harney,* 331 U.S. 367; *Wood v. Georgia,* 370 U.S. 375; *Edwards v. South Carolina,* 372 U.S. 229; *Terminiello v. Chicago,* 337 U.S. 1; *Whitney v. California,* 274 U.S. 357; *Stromberg v. California,* 283 U.S. 359. While *Cantwell* is cited by the Times for the proposition that political expression is not limited by any test of truth, it omits the more relevant observation just following:

"There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish" (at p. 310).

[27] Surely the Times does not assert seriously that this Court "left at large" what may amount to defamation and what remedy a public servant has (Brief, p. 41). He has the same remedy under the laws of his state that any other citizen has.

[28] In the Supreme Court of Alabama, the Times literally disavowed the advertisement as its utterance: "The ad was not written by anyone connected with The Times; it was not printed as a report of facts by The Times, nor as an editorial or other expression of the views of The Times" (Reply Brief, p. 12).

Judge Taft's admonitions still obtain, as Chief Justice Warren observed, in the majority of the states which hold that a public critic of government "is not even qualifiedly privileged where his facts are wrong." *Barr v. Matteo,* 360 U.S. 564, 585. Alabama is in accord with the great weight of state and federal authority.[29]

A noted commentator, Professor Zechariah Chafee, an old and close friend of free speech and press, also disagrees with the Times' law and history:

> "Especially significant is the contemporaneous evidence that the phrase 'freedom of the press' was viewed against a background of familiar legal limitations which men of 1791 did not regard as objectionable, such as damage suits for libel. Many state constitutions of this time included guaranties of freedom of speech and press which have been treated as having approximately the same scope as the federal provisions. Some of these, as in Massachusetts, were absolute in terms, while others, as in New York, expressly imposed responsibility for the abuse of the right. The precise nature of the state constitutional language did not matter; the early interpretation was much the same. Not only were private libel suits allowed, but also punishments for criminal libel and for contempt of court. For instance, there were several Massachusetts convictions around 1800 for libels attacking the conduct of the legislature and of public officials. This evidence negatives the author's idea of a firmly established purpose to make all political discussion immune."[30]

The Times can cite no authority holding that the Federal Constitution grants it an absolute privilege to defame a public official.

**The advertisement was libelous per se** The Times and its friends complain that the court below has held libelous *per se* a publication which is false, which tends to injure the person defamed in his reputation, which brings him into public contempt as an official, and which charges him with crime. Such a standard, they argue, is a common law concept of the most general and undefined nature. But this Court in *Beauharnais v. Illinois,* 343 U.S. 250, 257, n. 5, approved Judge Learned Hand's definition of libel in *Grant v. Reader's Digest,* 151 F. 2d 733, 735 (2d Cir. 1945), "in accordance with the usual rubric, as consisting of utterances which arose 'hatred, contempt, scorn, obloquy or shame,' and the like." Such a definition, this Court held, was a familiar—not a general and undefined—common law pronouncement.

The Times objects because the court decided the question of whether the publication was libelous *per se.* But the Times' contention opposes *Baker v. Warner,* 231 U.S. 588, 594. And see *Beauharnais,* 343 U.S. 250, 254:

> "Similarly, the action of the trial court in deciding as a matter of law the libelous character of the utterance, leaving to the jury only the question of publication, follows the settled rule in prosecutions for libel in Illinois and other States."

The Times complains because Alabama presumes general damages from a publication libelous *per se,* including the uncertain future damage of loss of job. This is the law generally.[31]

This publication charged a public official in devastating fashion with departing from all civilized standards of law and decency in the administration of his official duties. The correctness of the determination below that it is libelous *per se* is underscored by *Sweeney v. Schenectady Union Publishing Company,* 122 F. 2d 288, affirmed 316 U.S. 642. There a statement that a Congressman opposed a federal judicial appointment because of anti-Semitism was held libelous *per se* as a matter of law.

Very recently this same Court in *Hogan v. New York Times,* 313 F. 2d 354, 355 (2d Cir. 1963), observed that the Times did not even contest on appeal a district court holding that its news article describing a dice game raid of two policemen as a Keystone cop performance was "libelous per se as a matter of law."

Clearly the court below has correctly applied the Alabama common law of libel—law which accords in all relevant particulars with that of many other states.

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[29] See *Washington Times Company v. Bonner,* 86 F. 2d 836, 842 (D. C. Cir. 1936).

[30] Chafee, Book Review, 62 Harvard L. Rev. 891, 897–898 (1949) (Footnotes omitted).

[31] Commentators precisely oppose the Times' view. See Note, *Exemplary Damages in the Law of Torts,* 70 Harvard L. Rev. 517, 531 (1957), where it was observed that a requirement of correlation between actual and punitive damages "fails to carry out the punitive function of exemplary damages, since it stresses the harm which actually results rather than the social undesirability of the defendant's behavior."

See, *Developments in the Law—Defamation,* 69 Harvard L. Rev. 875, at 934, et seq. And see ibid. at 937: "Because defamation is a tort likely to cause substantial harm of a type difficult to prove specifically, courts will allow a substantial recovery of general damages on a presumption of harm even though the plaintiff offers no proof of harm." See also 3 *Restatement of Torts,* § 621, pp. 313–316.

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BRIEF FOR RESPONDENT

**Damages awarded by the jury may not be disturbed** The Times' objection that punitive damages in libel should not be imposed to deter the libeler and others like him from similar misconduct does not square with *Beauharnais,* 343 U.S. 250, 263. The Alabama test is precisely that of *Reynolds v. Pegler,* 123 F. Supp. 36, 38, affirmed 223 F. 2d 429 (2d Cir.), cert. den. 350 U.S. 846.[32] There the jury brought back one dollar compensatory damages and $175,000 in punitive damages.

In its argument that the size of this verdict impinges its constitutional rights, the Times has ignored a recent New York decision refusing to disturb a verdict of $3,500,000, of which the sum of $2,500,000 was punitive damages, against a publication and another for stating that plaintiff was linked to a Communist conspiracy. *Faulk v. Aware, Inc.,* 231 N. Y. S. 2d 270, 281:

> "In libel suits, of course, punitive damages have always been permitted in the discretion of the jury. The assessment of a penalty involves not only consideration of the nature and degree of the offense but the higher moral consideration that it may serve as a deterrent to anti-social practices where the public welfare is involved. The jury, representing the community, assesses such a penalty as, in its view, is adequate to stop the practices of defendants and others having similar designs."

The New York Times did not condemn the *Faulk* verdict—seven times as great as the one at bar—as heralding the demise of a free press. Instead, the Times applauded the verdict as "having a healthy effect."[33]

Quite recently a Federal jury returned a libel verdict of $3,060,000 in favor of a former college athletic director who was charged with rigging a football game. The specified punitive damages were $3,000,000, even higher than those in the *Faulk* case.[34]

Another commentator has observed that in England "the survival of honorific values and standards of communal decency keep defamation at a minimum and subject it, when it raises its head, to staggering jury verdicts." Riesman, *Democracy and Defamation,* 42 Columbia L. Rev. 727, 730.

It is appropriate here to remind this Court that it has always considered itself barred by the Seventh Amendment from setting aside state and federal jury damage awards as inadequate or excessive. *Chicago, B. & Q. v. Chicago,* 166 U.S. 226, 242–243 ($1 verdict in condemnation proceeding); *Fairmount Glass Works v. Cub Fork Coal Co.,* 287 U.S. 474 (and cases cited); *St. Louis, etc., Ry. Co. v. Craft,* 237 U.S. 648; *Maxwell v. Dow,* 176 U.S. 581, 598; *Southern Ry. v. Bennett,* 233 U.S. 80, 87; *Herencia v. Guzman,* 219 U.S. 44, 45; *Eastman Kodak v. Southern Photo Materials,* 273 U.S. 359; *L. & N. v. Holloway,* 246 U.S. 525; cf. *Neese v. Southern Ry.,* 350 U.S. 77. See also, *Justices v. U.S. ex rel. Murray,* 9 Wall. 274, said by this Court to be one of many cases showing "the uniform course of decision by this Court for over a hundred years in recognizing the legal autonomy of state and federal governments." *Knapp v. Schweitzer,* 357 U.S. 371, 378–379.

In an attempt to avoid this precedent, the Times first cites a series of cases which hold statutory penalties subject to judicial review as excessive—cases obviously having nothing to do with appellate review of jury verdicts.[35]

Next the Times urges that respondent's cases permit appellate review of excessive jury damage awards as errors of law (Brief, p. 69). But the cases themselves are otherwise. They cite, as examples of errors of law, awards which exceed the statutory limits; or are less than the undisputed amount; or are pursuant to erroneous instructions on measure of damages; or are in clear contravention of instructions of the court. *Fairmount Glass Works v. Cub Fork Coal Company,* 287 U.S. 474, 483–484. Another case, *Chicago, B. & Q. RR. v. Chicago,* 166 U.S. 226, 246, holds instead:

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[32] "Punitive or exemplary damages are intended to act as a deterrent upon the libelor so that he will not repeat the offense, and to serve as a warning to others. They are intended as punishment for gross misbehavior *for the good of the public* and have been referred to as a 'sort of hybrid between a display of ethical indignation and the imposition of a criminal fine.' *Punitive damages are allowed on the ground of public policy and not because the plaintiff has suffered any monetary damages for which he is entitled to reimbursement; the award goes to him simply because it is assessed in his particular suit.* The damages may be considered expressive of the community attitude towards one who wilfully and wantonly causes hurt or injury to another" (Emphasis supplied; footnotes omitted).

[33] Editorial of June 30, 1962, p. 18.

[34] *New York Times,* August 21, 1963, p. 1.

[35] *Life & Casualty Co. v. McCray,* 291 U.S. 566; *Chicago and N. W. Ry. v. Nye Schneider Fowler Company,* 260 U.S. 35; *Mo. Pac. Ry. Co. v. Tucker,* 230 U.S. 340; *St. Louis, etc. Ry. v. Williams,* 251 U.S. 63. The other case cited for this purpose is a criminal case dealing with the Sixth Amendment. *Robinson v. California,* 370 U.S. 660 (Brief, p. 68).

> "We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation."

Another case, *Dimick v. Schiedt,* 293 U.S. 474, did not hold that the question of excessive or inadequate verdicts was one of law, but on the contrary that it was "a question of fact." 293 U.S. 474 at 486. And *A. & G. Stevedores v. Ellerman Lines,* 369 U.S. 355, 360, cited by the Times, stated that the Seventh Amendment "fashions 'the federal policy favoring jury decisions of disputed fact questions'."

The Times then argues that this Court may review the amount of damages because alleged abridgment of freedom of the press must take precedence over the Seventh Amendment (Brief, p. 69). It cites no authority for this amazing argument—one which scarcely accords with this Court's observation in *Jacob v. City of New York,* 315 U.S. 752 and 753:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

The Times quickly moves on to an argument almost as tenuous, namely, that modern authority "regards the Seventh Amendment as inapplicable generally to appellate review of an excessive verdict …" (Brief, p. 69). The premise clashes with *Neese v. Southern Ry.,* 350 U.S. 77, as well as with such cases as *Fairmount, supra,* 287 U.S. 474, 481:

> "The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate." (Footnotes omitted.)

Finally, the Times complains that there was constitutional infirmity in the failure of the Alabama court to permit special interrogatories to the jury on damages, and thereby to deprive the jury of its right to return a general verdict.[36] Surely there is no constitutional defect in Alabama's adherence to the common law general verdict so recently eulogized by Justices Black and Douglas when they condemned an extension of the practice of submitting special interrogatories to federal juries:

> "Such devices are used to impair or wholly take away the power of a jury to render a general verdict. One of the ancient, fundamental reasons for having general jury verdicts was to preserve the right of trial by jury as an indispensable part of a free government. Many of the most famous constitutional controversies in England revolved around litigants' insistence, particularly in seditious libel cases, that a jury had the right to render a general verdict without being compelled to return a number of subsidiary findings to support its general verdict. Some English jurors had to go to jail because they insisted upon their right to render general verdicts over the repeated commands of tyrannical judges not to do so."[37]

Accordingly, a review of the damages awarded by the jury in this case is beyond the powers of this Court. Moreover, the verdict, as the court below held, conforms to the general damages suffered by the respondent and to the wrong which the Times committed. The Times does not claim here that the jury was motivated by passion or prejudice or corruption or any improper motive. Two state courts have found that it was not.

The jury was no doubt struck by the amazing lack of concern and contrition exhibited by the Times' representatives at the trial, and it certainly contrasted their conduct. The Times' attorneys did not plead truth; did not attempt to introduce evidence of truth; suggested in cross-examination of respondent's witnesses that the matter was untrue and would not be believed; stated in open court that truth was not in issue; and could not plead fair comment or privilege. The Times retracted the same matter as erroneous and misleading for another person whom it considered to be "on a par" with respondent. But the secretary of the corporation, who had signed its answers to interrogatories, said that with the exception of the padlocking incident he believed the matters in the ad were not substantially incorrect.

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[36] *Johnson Pub. Co. v. Davis,* 271 Ala. 474, 496, 124 So. 2d 441; *All States Life Ins. Co. v. Jaudon,* 230 Ala. 593, 162 So. 668; *Little v. Sugg,* 243 Ala. 196, 8 So. 2d 866; *Spry v. Pruitt,* 256 Ala. 341, 54 So. 2d 701.

[37] Statement of Mr. Justice Black and Mr. Justice Douglas on the Rules of Civil Procedure and the Proposed Amendments, 31 F. R. D. 617, at 618–619.

Even more recently the conduct of the Times' business has warranted judicial condemnation. *Hogan v. New York Times,* 313 F. 2d 354, 355–356 (2d Cir. 1963):

> "We believe that sufficient evidence existed to sustain the jury verdict on either of the two possible grounds upon which its decision that defendant abused its qualified privilege might have been based: (1) improper purpose in publishing the article, or (2) reckless disregard for the truth or falsity of the story, amounting to bad faith."

The Times had its chance to retract and eliminate punitive damages, but chose not to do so for this respondent though it retracted for another person "on a par." A restriction of respondent to special damages would compound the evils described by Mr. Chafee in the following statement which he quoted with approval:

> " 'To require proof of special damages would mean virtual abolition of legal responsibility for inadvertent newspaper libel. Newspaper slips are usually the result of reprehensible conduct of members of the defendant's organization. To deny plaintiffs recovery for retracted libel unless they prove special damages, is to do away with newspapers' financial interest in accuracy. The tendency towards flamboyance and haste in modern journalism should be checked rather than countenanced. If newspapers could atone legally for their mistakes merely by publishing corrections, the number of mistakes might increase alarmingly… ' "[38]

### II. There is no ground for reviewing a jury determination that the advertisement was "of and concerning" the Plaintiff

The Times' assertion that this Court should decide as a matter of constitutional law that the jury which tried this case was wrong in finding that the advertisement was "of and concerning" respondent is astounding. Respondent will not repeat here the thorough discussion of the testimony analyzing the false allegations of the ad and their reference to respondent as police commissioner of Montgomery. Apparently a reading of this testimony has now impressed even the Times. It has omitted from its brief on the merits the cases of *Thompson v. Louisville,* 362 U.S. 199, and *Garner v. Louisiana,* 368 U.S. 157, cited in its petition for certiorari for the proposition that there was no evidence to support the verdict.

Again the Times seeks to overturn imbedded constitutional principles. This case has been tried in a state court according to admittedly proper court procedure, and a jury has decided the facts. This Court simply does not go behind these factual determinations and review a state court judgment, entered on a jury verdict and affirmed by the highest state appellate court. *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226 at 242–243; *United Gas Public Service Co. v. Texas,* 303 U.S. 123, 152–153 (Black, J., concurring); *Fairmount Glass Works v. Cub Fork Coal Co.,* 287 U.S. 474; *Maxwell v. Dow,* 176 U.S. 581, 598.[39]

When this Court in *Gallick v. B. & O. R. Co.,* 372 U.S. 108, 9 L. Ed. 2d 618, 627, held that its duty was to reconcile state jury findings "by exegesis if necessary," it surely assigned no lesser place to the Seventh Amendment than that described by Justices Black and Douglas:

> "The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. Either the judge or the jury must decide facts and to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain."[40]

Similar principles permeated the judicial philosophy of Judge Learned Hand:

> "And so only the most unusual circumstances could justify judicial veto of a legislative act … or a jury verdict. Hand's standard for intervention was essentially the same in both

[38] Quoted in Chafee, *Possible New Remedies for Errors in the Press.* 60 Harvard L. Rev., 1, 23.

[39] The Times seeks to circumvent these cases—and the 7th Amendment—by citing inapposite cases dealing with review here of state court conclusions as to a federal right where facts inadequately support the conclusion. *Norris v. Alabama,* 294 U.S. 587; *Wood v. Georgia,* 370 U.S. 375; *Craig v. Harney,* 331 U.S. 367; *Pennekamp v. Florida,* 328 U.S. 331; *Bridges v. California,* 314 U.S. 252; *Edwards v. South Carolina,* 372 U.S. 229—cases involving state court (not jury) determinations of questions of discrimination in the selection of a grand jury, and of the existence of a clear and present danger; *Watts v. Indiana,* 338 U.S. 49—a state court determination as to a coerced confession; *Herndon v. Lowry,* 301 U.S. 242—a case invalidating a conviction because the criminal statute prescribed "no reasonably ascertainable standard of guilt" (at 264); and *Fiske v. Kansas,* 274 U.S. 380— overturning a conviction under a criminal syndicalism act where the prosecution had introduced no evidence other than a preamble of the constitution of the Industrial Workers of the World which this Court found to be no evidence to support the conviction.

[40] *Galloway v. United States,* 319 U.S. 372, 407 (Black, Douglas and Murphy, JJ., dissenting).

> cases. It came simply to this: if there was room for doubt, legislation—like a verdict—must stand, however, mistaken it might seem to judges. Ambivalence in the law was the province of jury and legislature—the two authentic voices of the people. Judicial intervention was permissible only when a court was prepared to hold that **no** reasonable mind could have found as the legislature or jury did find."[41]

Regarding falsity, the statements in the ad have been discussed exhaustively in this brief. The Times was unable to plead truth; and conceded falsity before the trial by its retraction to Governor Patterson and at the trial through the statements of its attorneys. It is surely paradoxical for the Times to assert in this Court that the record is so "devoid" of evidence of falsity as to invoke the certiorari jurisdiction of this Court. Nothing could be more idle than to debate with the Times and its friends the question of whether Alabama imposes the burden of proving truth on the wrong party, when the Times by its judicial admissions has conceded falsity.[42]

Moreover, this record reveals this ad's devastating effect on respondent's reputation among those who believed it. Courts have easily and effectively dealt with the Times' argument that the publication was not libelous or injurious because it was not believed in the community (Brief, p. 65).[43] Perhaps the Times would also argue that those in a crowded theater who did not see or smell smoke would not believe a person who yelled "fire."

It is patently frivolous for the Times to argue that no ordinary person of reasonable intelligence[44] could possibly read this advertisement as referring to the Montgomery police commissioner. Nor is a jury bound by the Federal Constitution to take the Times' construction of these words after its attorneys have completed a sanitizing operation in an attempt to dull the cutting edges of these words.[45]

*Beauharnais v. Illinois,* 343 U.S. 250, teaches that a libel plaintiff need not be named in the defamatory publication. There the criminal prosecution was for defamation of the entire Negro race.[46]

It is difficult to believe that the Times is serious when it argues that this record is entirely devoid of evidence to support the jury finding that these defamatory words were of and concerning respondent.

The ad sought to, and did, portray criminal and rampant police state activity resulting from the singing of "My Country, 'Tis of Thee" from the State Capitol steps. It sought to portray, and did, a resultant "wave of terror" against innocent persons—expulsion from school; ringing of the campus of Alabama State College with truckloads of police armed with shotguns and tear gas; and padlocking of the dining hall to starve protesting students into submission. And the ad returned to Montgomery in the second quoted paragraph to charge that pursuant to the same "wave of terror," those who had arrested King for loitering and speeding also had bombed his home, assaulted his person, and indicted him for perjury.[47]

The effect of this publication was as deadly as intended—to instill in the minds of the readers the conclusion that these acts had been perpetrated by Montgomery city officials, specifically the police commissioner. The Times

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[41] Mendelson, *Learned Hand: Patient Democrat,* 76 Harvard L. Rev. 322, 323–324 (1962).

[42] Completely inapposite, therefore, are the Times' citations of *Speiser v. Randall,* 357 U.S. 513 and *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, regarding inadequate state procedures where the speech or writing itself may be limited.

[43] See e.g. *Reynolds v. Pegler,* 123 F. Supp. 36, 37–38, affirmed 223 F. 2d 429 (2d Cir.), cert. denied 350 U.S. 846:

> "'A person may be of such high character that the grossest libel would damage him none; but that would be no reason for withdrawing his case from the wholesome, if not necessary, rule in respect of punitive damages …'
>
> To adopt the contrary view … would mean that a defamer gains a measure of immunity no matter how venomous or malicious his attack simply because of the excellent reputation of the defamed; it would mean that the defamer, motivated by actual malice, becomes the beneficiary of that unassailable reputation and so escapes punishment. It would require punitive damages to be determined in inverse ratio to the reputation of the one defamed."

[44] This is the test everywhere. See *Albert Miller & Co. v. Corte,* 107 F. 2d 432, 435 (5th Cir. 1939), which holds that Alabama cases to this effect accord with libel law generally. See also *Peck v. Tribune Co.,* 214 U.S. 185 (where the wrong person was named); *Grant v. Reader's Digest,* 151 F. 2d 733 (2d Cir. 1945); *Spanel v. Pegler,* 160 F. 2d 619 (7th Cir. 1949); 3 *Restatement of Torts,* § 580, Comments (b) and (c), pp. 205–207.

[45] Authorities in Footnote 44.

[46] See also *Cosgrove Studio, Inc. v. Pane,* 408 Pa. 314, 182 A. 2d 751, 753: "The fact that the plaintiff is not specifically named in the advertisement is not controlling. A party defamed need not be specifically named, if pointed to by description or circumstances tending to identify him… ."

[47] Even Gershon Aaronson of the Times so read "they" as used in this paragraph of the advertisement (R. 745).

can suggest no one else except the police, whose massive acts in the public mind are surely the work of the commissioner. The connotation is irresistible—certainly not, as the Times argues, completely devoid of rationality.

Moreover, the jury heard witnesses who made the association. *Hope v. Hearst Consolidated Publications,* 294 F. 2d 681 (2d Cir.), cert. denied 368 U.S. 956; *Chagnon v. Union Leader Corp.,* 103 N. H. 426, 174 A. 2d 825, 831–832, cert. denied 369 U.S. 830.

Respondent sued as a member of a group comprising three city commissioners. Libel suits by members of private or public groups of this size are widely permitted. The decision below accords with the law generally.[48]

**III. This case provides no occasion for excursions from this record and from accepted constitutional standards.**

In a desperate effort to secure review in this Court, the Times and its friends go outside the record and refer this Court to other libel suits pending in Alabama. With the exception of two brought by the other Montgomery commissioners, all are erroneously and uncandidly labeled "companion cases."[49]

But the effort is as revealing as it is desperate. Clearly, petitioner feels that this case, standing on its own, does not present grounds for review.

These cases are not yet tried. There are different plaintiffs; different defendants; different publications; different communications media; different forums; different attorneys; different issues;[50] no final judgment in any; and a trial on the merits in only one of them. The Times urges this Court to jettison libel laws that have existed since the founding of this Republic, and hold: (a) there is an absolute privilege to defame public officials, at least those living in Alabama; (b) private libel suits for defamation are available to all citizens of the United States in state courts according to state libel laws, but not to persons who happen to hold public office in Alabama; (c) plaintiffs in those cited cases shall be deprived of their rights to have their libel cases heard on their merits.

The Times seems to hint to this Court that because the publication contained statements regarding racial tensions, the law of libel should perforce "confront and be subordinated to" a constitutional privilege to defame.[51] Surely in a field so tense, truthful statements by huge and influential newspapers are imperative. For as this Court said in *Beauharnais,* 343 U.S. 250 at 262:

> "Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion."

The confrontation which the jury hoped to achieve was the confrontation of the Times with the truth.

The enormity of petitioner's wrong is clear. Hopefully the decision below will impel adherence by this immensely powerful newspaper to high standards of responsible journalism commensurate with its size.

> "A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise. No institution in a democracy, either governmental or private, can have absolute

[48] *Hope v. Hearst Consolidated Publications,* 294 F. 2d 681 (2d Cir.), cert. denied 368 U.S. 956 (One of Palm Beach's richest men caught his blonde wife in a compromising spot with a former FBI agent); *Nieman-Marcus v. Lait,* 13 F. R. D. 311 (S. D. N. Y. 1952) (immoral acts attributed to department store's 9 models and 25 salesmen); *National Cancer Hospital v. Confidential, Inc.,* 136 N. Y. S. 2d 921 (libelous article about "hospital" gave cause of action to those who conducted hospital); *Weston v. Commercial Advertisers,* 184 N. Y. 479, 77 N. E. 660 (4 coroners); *Bornmann v. Star Co.,* 174 N. Y. 212, 66 N. E. 723 (charges about a hospital stall with 12 doctors in residence); *Chapa v. Abernethy* (Tex. Civ. App.), 175 S. W. 165 (charges about a posse); *Gross v. Cantor,* 270 N. Y. 93, 200 N. E. 592 (12 radio editors); *Fullerton v. Thompson,* 119 Minn. 136, 143 N. W. 260 (State Board of Medical Examiners, of which there were 9); *Children v. Shinn,* 168 Iowa 531, 150 N. W. 864 (Board of Supervisors); *Reilly v. Curtiss,* 53 N. J. 677, 84 A. 199 (an election board).

Commentators have agreed. See 3 *Restatement of Torts,* Sec. 564 (c), p. 152:

"[A] statement that all members of a school board or a city council are corrupt is sufficiently definite to constitute a defamatory publication of each member thereof." And see *Developments in the Law—Defamation,* 69 Harvard L. Rev. 894, et seq.

[49] Times' petition for certiorari, p. 19. Even the Times does not follow the reckless averment of its friends that this suit is part of an "attempt by officials in Alabama to invoke the libel laws against all those who had the temerity to criticize Alabama's conduct in the intense racial conflict" (Brief of Washington Post, p. 8).

[50] For example, the Times retracted for Patterson, but not for respondent. Obviously, the Times, while guilty of clear inconsistency, has nevertheless in Patterson's case sought to eliminate punitive damages by retraction, as permitted by Alabama statute.

[51] Times petition, p. 20 and *amici* briefs generally.

> power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. (Citation.) In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. Most State constitutions expressly provide for liability for abuse of the press's freedom. That there was such legal liability was so taken for granted by the framers of the First Amendment that it was not spelled out. Responsibility for its abuse was imbedded in the law. The First Amendment safeguarded the right."[52]

These freedoms are amply protected when a newspaper in a state court can plead and prove truth; can plead and prove fair comment; and can plead and prove privilege. Even when it cannot, it can retract, show its good faith, and eliminate punitive damages. Alabama thus provides the very safeguards which, the Times and its friends argue, are essential to protect petitioner's constitutional rights.

When it can do none of these, and when it has indeed defamed in a commercial advertisement, no constitutional right, privilege or immunity expounded by this Court during its entire history shields a newspaper from damages in a common law libel suit.

The Times and its cohorts would have this Court abandon basic constitutional standards which have heretofore obtained and which Justice Harlan recently described:

> "No member of this Court would disagree that the validity of state action claimed to infringe rights assured by the Fourteenth Amendment is to be judged by the same basic constitutional standards whether or not racial problems are involved."[53]

### IV. The Times was properly before the Alabama courts.

1. Because both courts below held that the Times had made a general appearance,[54] an adequate independent state ground as to jurisdiction over the Times in this suit is a bar to review here. *Herb v. Pitcairn,* 324 U.S. 117, 125–126; *Murdock v. Memphis,* 20 Wall. 590, 626; *Fox Film Corporation v. Muller,* 296 U.S. 207, 210; *Minnesota v. National Tea Company,* 309 U.S. 551, 556–557.

The Times intended to assert, and did, that the trial court was without jurisdiction of the subject matter of this action. Indeed, the Times still argues in this Court that there was no jurisdiction of the subject matter (Brief, p. 63). This act, alone, is a general appearance in Alabama and in a majority of state courts. In addition, the Times compounded its general appearance by other activities in the Alabama courts unrelated to the claimed lack of personal jurisdiction.

Petitioner argues that the Alabama Supreme Court has incorrectly interpreted its own decisions, and that the decision below is in error. This is obviously the wrong forum for such an argument.[55]

But even if an examination of state law were appropriate, the court below followed its earlier cases. Alabama has held, as have other states, that there is a clear distinction between jurisdiction of the person and subject matter. *Constantine v. Constantine,* 261 Ala. 40, 42, 72 So. 2d 831. A party's appearance in a suit for any purpose other than to contest the court's jurisdiction over the person is a general appearance.[56]

The Alabama cases cited by the Times do not conflict with the decisions below. One case holds that a request for extension of time to file pleadings is not a general appearance;[57] another recognized that defendant might have converted a special appearance into a general appearance, but held that even so a circuit court had authority to set aside a default judgment within thirty days, and denied an extraordinary writ;[58] a third involved a limited attack on "the court jurisdiction over the person of defen-

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[52] Frankfurter J., concurring in *Pennekamp v. Florida,* 328 U.S. 331, 355–356 (Footnotes omitted).

[53] *NAACP v. Button,* 371 U.S. 415, 9 L. Ed. 2d 405, 427 (dissenting opinion of Harlan, Clark and Stewart, J. J.).

[54] A state court's interpretation of its own case law is binding here. *Fox River Paper Company v. Railroad Commission,* 274 U.S. 651, 655; *Guaranty Trust Company v. Blodgett,* 287 U.S. 509, 513; *United Gas Pipeline Company v. Ideal Cement Company,* 369 U.S. 134.

Texas, for example, long provided that any appearance at all was a general appearance. *York v. Texas,* 137 U.S. 15, 20.

[55] See Footnote 54.

[56] *Kyser v. American Surety Company,* 213 Ala. 614, 616, 105 So. 689; *Blankenship v. Blankenship,* 263 Ala. 297, 303, 82 So. 2d 335; *Thompson v. Wilson,* 224 Ala. 299–300, 140 So. 439; *Aetna Insurance Company v. Earnest,* 215 Ala. 557, 112 So. 145. And see *Vaughan v. Vaughan,* 267 Ala. 117, 121, 100 So. 2d 1:

"[R]espondent … by not limiting her appearance and by including non-jurisdictional as well as jurisdictional grounds in her motion to vacate has made a general appearance and has thereby waived any defect or insufficiency of service."

[57] *Ex Parte Cullinan,* 224 Ala. 263, 139 So. 255.

[58] *Ex Parte Haisten,* 227 Ala. 183, 149 So. 213.

dant;"[59] one did not even consider the question, since apparently neither the trial judge nor the parties had noticed it;[60] one discussed the proper way to plead misnomer;[61] and in the last two the defendants conceded jurisdiction of the person.[62]

Moreover, there is nothing novel about the Alabama holding of general appearance. This Court in such cases as *Western Loan & Savings Company v. Butte, etc. Mining Company,* 210 U.S. 368, 370 and *Davis v. Davis,* 305 U.S. 32, 42, as well as leading text writers,[63] and the majority of the jurisdictions of this country have recognized the binding effect of this rule.[64]

Petitioner argues that the general appearance ground is an untenable non-federal one. Its cases simply do not support its contention. No novel state procedure, of which a party could not fairly be deemed to have been apprised, thwarted all means of raising a federal question.[65] Nor is the Alabama rule—in accord with the majority one—an "arid ritual of meaningless form."[66] Clearly beside the point is a case where an admitted special appearance by a party, an officer appointed to run the railroads for the federal government, was not deemed by the state court to be a special appearance for his successor.[67]

Nor do petitioner's cases (pp. 76–77) support the contention that even if there had been jurisdiction by consent because of the general appearance, the commerce clause forbids its exercise. These cases simply hold that a carrier must be given an opportunity to make a seasonable objection to court jurisdiction, and cannot be deprived of doing so by state machinery making a special appearance a general one. Cf. *York v. Texas,* 137 U.S. 15, 20. Alabama does permit a special appearance, and does not prevent a "seasonable motion." But when a foreign corporation makes, instead, a general appearance, the commerce clause does not bar the exercise of court jurisdiction by consent.

*Davis v. O'Hara,* 266 U.S. 314, 318, discussed by the Times (Brief, pp. 74–75) involved Nebraska, not Alabama law, and held that under Nebraska practice a special appearance was not required to object to jurisdiction over the person.

2. Even if the Times had not made a general appearance in this case, effective service of process is based on decisions of this Court so explicit as to leave no room for real controversy. The Times, having already argued that this Court should cast aside its many decisions permitting libel suits against newspapers, now asks this Court to cast aside its cases permitting tort actions against foreign corporations in states where those corporations do business. In short, the Times seeks absolute immunity on the merits, and jurisdictional immunity from suit outside New York state.

The crucial test is simple. Did the Times have sufficient business contacts with Alabama so that suit against it there accorded with traditional concepts of fairness and orderly administration of the laws? *International Shoe Company v. Washington,* 326 U.S. 310, 319. The court below, and indeed the trial court, after painstaking analysis of the jurisdictional facts of record, held that there were sufficient contacts. The qualitative functions of a newspaper outlined in *Consolidated Cosmetics v. DA Publishing*

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[59] *St. Mary's Oil Engine Company v. Jackson Ice & Fuel Company,* 224 Ala. 152, 155, 138 So. 834. See also *Sessoms Grocery Co. v. International Sugar Feed Co.,* 188 Ala. 232; *Terminal Oil Mill Co. v. Planters, etc. Co.,* 197 Ala. 429; and *Dozier Lumber Co. v. Smith-Isberg Lumber Co.,* 145 Ala. 317, also cited by the Times.

[60] *Harrub v. Hy-Trous Corp.,* 249 Ala. 414, 31 So. 2d 567.

[61] *Ex Parte Textile Workers,* 249 Ala. 136, 142, 30 So. 2d 247.

[62] *Seaboard Ry. v. Hubbard,* 142 Ala. 546, and *Johnson Publishing Co. v. Davis,* 271 Ala. 474, 124 So. 2d 441.

[63] *Restatement of Conflict,* § 82, Comment (b); and Kur- land, *The Supreme Court, The Due Process Clause and The In Personam Jurisdiction of State Courts,* 25 U. of Chicago L. Rev. 569, 575:

"The mere appearance of a defendant in a lawsuit for a purpose other than to attack the jurisdiction of the court over him is considered a voluntary submission to the court's power."

[64] 25 A. L. R. 2d 835, 838 and 31 A. L. R. 2d 258, 265. New York itself prior to statutory amendment, held in *Jackson v. National Grain Mutual Liability Company,* 299 N. Y. 333, 87 N. E. 2d 283, 285:

"Under its special appearance, the defendant company could do nothing but challenge the jurisdiction of the Justice's court over its person … (citation). Hence by its attempt to deny jurisdiction of the subject of the action, the company waived that special appearance and submitted its person to the jurisdiction of the court."

Civil Practice Act, § 273 (a), was necessary to enable a litigant to combine in New York an attack on jurisdiction of the person and of the subject matter without appearing generally in the action. *Ray v. Fairfax County Trust Company,* 186 N. Y. S. 2d 347.

[65] *NAACP v. Alabama,* 357 U.S. 449, and *Wright v. Georgia,* 373 U.S. 284.

[66] *Staub v. City of Baxley,* 355 U.S. 313, 320.

[67] *Davis v. Wechsler,* 263 U.S. 22.

*Company,* 186 F. 2d 906, 908 (7th Cir. 1951), were carried on in Alabama.

The Times plainly maintained an extensive and continuous pattern of business activity in Alabama at least since 1956. The resident string correspondents and staff correspondents, who repeatedly came into Alabama, were a unique and valuable complement to the news gathering facilities of the Associated Press and United Press and other wire services upon which smaller newspapers rely. Such widespread news gathering facilities unquestionably increase the scope and detail of the Times' news columns, and enhance, accordingly, its prestige, its circulation, and the prices which it can command in the advertising market. In turn, these far-flung news gathering tentacles subject the Times to potential suit in the states into which they reach. If financial reward comes to the Times from its on-the-spot news coverage in Alabama, it is fair that citizens of Alabama should be able to sue the Times here when it has wronged them.

Scoffing at the quantitative size of its business activities in Alabama, the Times apparently ignored the most recent pronouncement of this Court in *Scripto v. Carson,* 362 U.S. 207, cited by the courts below. *Scripto* derived less than half of the revenue from Florida which the Times has derived from Alabama—and regular employees of the Times have combined their efforts with those of independent dealers to produce this result.

The Times attempts to distinguish *Scripto* by the inaccurate observation that "no issue of judicial jurisdiction was involved" (Brief p. 85). But this Court's opinion in *Scripto* stated that the Florida courts had "held that appellant does have sufficient jurisdictional contacts in Florida [to be made a collector of use tax] … We agree with the result reached by Florida's courts" (362 U.S. 207, 208). While the Times would argue that due process standards for jurisdiction to sue are stricter than those for jurisdiction to make a tax collector out of a foreign corporation, objective commentators have not agreed. The due process clause "might well be deemed to impose more stringent limitations on collection requirements than on personal jurisdiction."[68]

One contract negotiated entirely by mail with a predecessor company gave California sufficient contact with a successor insurance company. A default judgment against it was upheld. *McGee v. International Insurance Company,* 355 U.S. 220.[69] Mail transactions alone enabled a Virginia Securities Commission to regulate an out-of-state insurance company. *Travelers Health Association v. Virginia,* 339 U.S. 643. And this Court, as noted in the decision below, commented upon more enlightened concepts resulting in expanded scope of state jurisdiction over foreign corporations. *McGee v. International Insurance Company,* 355 U.S. 220, 222–223. Moreover, state activity through the means of independent contractors, as distinguished from agents or employees, is without constitutional significance. *Scripto v. Carson,* 362 U.S. 207, 211. The Times does not cite *Scripto* on this point, but it is nevertheless the law.

A recent decision, interpreting Alabama's Substituted Service Statute, *Callagaz v. Calhoon,* 309 F. 2d 248, 256 (5th Cir. 1962) observed:

> "Since [*Travelers Health* and *McGee*] it is established that correspondence alone may establish sufficient contacts with a state to subject a non-resident to a suit in that state on a cause of action arising out of those contacts."

Justice Black's dissenting opinion in *Polizzi v. Cowles Magazines,* 345 U.S. 663, 667, considered a magazine publisher subject to Florida libel suit, under old or new concepts, when its only contact there was two circulation road men who checked retail outlets in a multi-state area which included Florida. Presumably no reporting or advertising solicitation was carried on. Mr. Justice Black's opinion, which has been widely quoted as expressive of the prevailing view, found it manifestly unfair to make the plaintiff "bring his libel suit in a federal district court in the corporation's home state of Iowa … [and not] in a federal court in the state where Polizzi lived and where the criminal charges were likely to do him the most harm" (345 U.S. 663 at 668).

Obviously the case at bar does not present an instance of "forum shopping" such as was

[68] *Developments in the Law—Federal Limitations on State Taxation of Interstate Business,* 75 Harvard L. Rev. 953, 998 (1962).

[69] Noteworthy is the fact that the foreign corporation held amenable to California process had never solicited or done any insurance business in California apart from the policy involved. The "continuing legal relationship" on the basis of which the Times attempts to distinguish *McGee* (Brief, p. 84) could not possibly consist of more than transmission of premiums by mail. Such "continuing legal relationship" scarcely compares with the vastly more extensive and continuing relationship which the Times maintained with Alabama according to evidence going back to 1956.

faced by Judge Hand in *Kilpatrick v. T. & P. Ry. Co.,* 166 F. 2d 788 (2d Cir. 1948). The court's remarks (quoted Brief, p. 81) were directed to a Texas plaintiff, injured in Texas, who had brought his suit in New York. Even so, the district court was reversed for dismissing the plaintiff's action.

McKee, an Alabama resident, conducted all of the usual activities of a stringer for the New York Times. In addition, he performed the delicate task, to which he "naturally" fell heir, of investigating respondent's demand for retraction. The Times was efficaciously brought into court by service on McKee. It is inconceivable, for example, that if while helping Harrison Salisbury obtain material for his Alabama stories, Don McKee had run an automobile into a plaintiff, the Times could have escaped liability by maintaining that McKee was an independent contractor.

Similarly substituted service under the Alabama statute[70] was valid. Alabama business activity of the Times preceded and followed the printing of this libelous material in New York. The ad itself was supposedly cleared on the basis of prior news gathering; it was later sent into Alabama by the Times, with a carrier as its agent, freight prepaid, with title passing on delivery to the consignee. Thence the issue went to newsstands for sale to the Alabama public, in accordance with the longstanding business practice of the Times.[71]

*Scripto v. Carson,* 362 U.S. 207, lays to rest the significance of any contention that sales to the public in Alabama were through the medium of independent contractors. It is not necessary for this Court to reach the question of whether isolated newsstand sales, disconnected from any other business activity in Alabama, would be a sufficient contact to sustain substituted service. This is not the case. For the Times has also solicited advertising and gathered news in a systematic and continuous fashion, and has thereby established a firm business connection with Alabama.[72]

Due process and the commerce clause do not immunize the Times from Alabama suit.

As *Polizzi* makes clear, newspapers are not to be in a special category. When other corporations may be sued in a foreign jurisdiction, so may they on similar facts. Newspaper corporations are no more entitled to the favored position which the Times and its friends would accord them than they are entitled to many other preferences for which they have unsuccessfully argued. In *Mabee v. White Plains Publishing Co.,* 327 U.S. 178, 184, this Court held: "As the press has business aspects, it has no special immunity from laws applicable to business in general." This case concerned the applicability of the Fair Labor Standards Act to newspapers. This Court has likewise held newspaper corporations subject to the National Labor Relations Act, *Associated Press v. N. L. R. B.,* 301 U.S. 103 and to the anti-trust laws, *Lorain Journal Company v. United States,* 342 U.S. 143.

*Hanson v. Denckla,* 357 U.S. 235, relied upon by the Times as contrary to the decisions below, is easily distinguishable. As this Court pointed out, there was no solicitation of business in Florida by the foreign corporation, either in person or by mail. In the case at bar the Times solicited business in both manners. The cause of action in *Hanson v. Denckla* did not arise out of an act done or transaction consummated in the forum. On the contrary, this cause of action arose out of the very distribution of the newspapers by the Times in Alabama. Surely the Times cannot contend that its introduction of these newspapers in Alabama was involuntary.[73] The

[70] Title 7, § 199 (1), Code of Alabama.

[71] If the cases cited by the Times (Brief, pp. 79–80) are supposed to conflict with the decision below, they conflict also with the decisions of this Court cited in this section of respondent's brief and by the court below. They conflict, too, with such cases as *Paulos v. Best Securities, Inc.* (Minn.), 109 N. W. 2d 576; *WSAZ v. Lyons,* 254 F. 2d 242 (6th Cir. 1958); *Gray v. American Radiator Corporation,* 22 Ill. 2d 432, 176 N. E. 2d 761; *Sanders Associates, Inc. v. Galion Iron Works,* 304 F. 2d 915 (1st Cir. 1962); *Beck v. Spindler* (Minn.), 99 N. W. 2d 670; and *Smyth v. Twin State Improvement Corporation,* 116 Vt. 569, 80 A. 2d 664. Moreover, the court in *Insull v. New York World-Telegram,* 273 F. 2d 166, 169 (7th Cir. 1959), indicated that its result would have been different if the newspaper "employ[ed] or ha[d] any reporters, advertising solicitors or other persons who are located in Illinois …"

[72] A remarkably similar case is *WSAZ v. Lyons,* 254 F. 2d 242 (6th Cir. 1958), cited by the courts below. There the court upheld a Kentucky libel judgment against a foreign television station which had beamed the libelous television matter into Kentucky from outside the state. Service was had under a Kentucky statute covering causes of action "arising out of" or "connected" with the doing of business by foreign corporations in Kentucky. The court cited *McGee* and *International Shoe.* Moreover, it held irrelevant the fact that Kentucky produced only 1.03 per cent of the total annual advertising revenue.

[73] But compare Times Brief, p. 81.

foreign corporation in *Hanson v. Denckla* had received no benefit from the laws of the forum. The manifold business activities of the Times—news gathering, solicitation of advertising and distribution—have received the protection of Alabama laws.

Finally (Brief, pp. 86–88) the Times suggests that even though it might be amenable to suit in Alabama under due process standards, the commerce clause nevertheless bars the Alabama action. The most recent decision of this Court cited in support of this proposition was handed down in 1932. It seems scarcely necessary to observe that this Court, which has developed enlightened standards giving expanded scope to jurisdiction over foreign corporations in such cases as *International Shoe, McGee, Travelers Health* and *Scripto* will not grant review to turn the clock back to 1932, and invoke the rigid concepts of earlier days under the aegis of the commerce clause. And the Times must concede that this Court has not "hitherto" held that tort actions against foreign corporations—fairly subject to *in personam* jurisdiction—are unconstitutional as undue burdens on interstate commerce (Brief, p. 87).

Accordingly, even without a general appearance, the Times would have presented no unsettled federal question of jurisdiction for review by this Court on certiorari.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the writ of certiorari should be dismissed as improvidently granted; in the alternative, respondent respectfully submits that this case should be affirmed.

Respectfully submitted,

ROBERT E. STEINER III,

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Attorneys for Respondent.

STEINER, CRUM & BAKER,

CALVIN WHITESELL,

Of Counsel.

## CERTIFICATE

I, M. Roland Nachman, Jr., of Counsel for Respondent, and a member of the bar of this Court, hereby certify that I have mailed copies of the foregoing Brief and of respondent's Brief in No. 40, *Abernathy v. Sullivan*, air mail, postage prepaid, to Messrs. Lord, Day & Lord, Counsel for petitioner, at their offices at 25 Broadway, New York, New York. I also certify that I have mailed a copy of the foregoing Brief, air mail, postage prepaid, to Edward S. Greenbaum, Esquire, 285 Madison Avenue, New York, New York, as attorney for American Civil Liberties Union and the New York Civil Liberties Union, as *amici curiae;* to Messrs. Kirkland, Ellis, Hodson, Chaffetz & Masters, attorneys for The Tribune Company, as *amicus curiae,* at their offices at 130 East Randolph Drive, Chicago 1, Illinois; and to William P. Rogers, Esquire, attorney for The Washington Post Company, as *amicus curiae,* at his office at 200 Park Avenue, New York 17, New York.

This … day of October, 1963.

… … … … … … … … … … …

M. Roland Nachman Jr.,

Of Counsel for Respondent.

## APPENDIX A

Title 7, Section 909 of the Code of Alabama:

> "TRUTH OF THE WORDS, ETC., EVIDENCE UNDER THE GENERAL ISSUE.—In all actions of slander or libel, the truth of the words spoken or written, or the circumstances under which they were spoken or written, may be given in evidence under the general issue in mitigation of the damages."

Truth specially pleaded is an absolute bar to a civil libel action, *Webb v. Gray,* 181 Ala. 408, 62 So. 194; *Ripps v. Herrington,* 241 Ala. 209, 212, 1 So. 2d 899; *Johnson Publishing Co. v. Davis,* 271 Ala. 474, 124 So. 2d 441.

Title 7, Section 910 of the Code of Alabama:

> "LIBEL OR SLANDER; DEFAMATORY MATTER.—In an action for libel or slander, it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff; and if the allegation be denied, the plaintiff must prove, on the trial, the facts showing that the defamatory matter was published or spoken of him."

Title 7, Section 913 of the Code of Alabama:

> "RETRACTION MITIGATES DAMAGES.—The defendant in an action of slander or libel may prove under the general issue in mitigation of damages that the charge was made by mistake or through inadvertence, and that he has retracted the charge and offered amends before suit by publishing an apology in a newspaper when the charge had been thus promulgated, in a prominent position; or

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verbally, in the presence of witnesses, when the accusation was verbal or written, and had offered to certify the same in writing."

Title 7, Section 914 of the Code of Alabama:

"AGGRIEVED PERSON MUST GIVE NOTICE TO PUBLISHERS OF ALLEGED LIBEL BEFORE VINDICTIVE DAMAGES CAN BE RECOVERED.—Vindictive or punitive damages shall not be recovered in any action for libel on account of any publication concerning the official conduct or actions of any public officer, or for the publication of any matter which is proper for public information, unless five days before the bringing of the suit the plaintiff shall have made written demand upon the defendant for a public retraction of the charge or matter published; and the defendant shall have failed or refused to publish within five days in as prominent and public a place or manner as the charge or matter published occupied, a full and fair retraction of such charge or matter."

Title 7, Section 915 of the Code of Alabama:

"WHEN ACTUAL DAMAGES ONLY RECOVERABLE.— If it shall appear on the trial of an action for libel that an article complained of was published in good faith, that its falsity was due to mistake and misapprehension, and that a full correction or retraction of any false statement therein was published in the next regular issue of said newspaper, or in case of daily newspapers, within five days after service of said notice aforesaid, in as conspicuous a place and type in said newspaper as was the article complained of, then the plaintiff in such case shall recover only actual damages."

Title 7, Section 916 of the Code of Alabama:

"RECANTATION AND TENDER; EFFECT OF.—If the Defendant, after or before suit brought, make the recantation and amends recited in the preceding sections, and also tender to the plaintiff a compensation in money, and bring the same into court, the plaintiff can recover no costs, if the jury believe and find the tender was sufficient."

Title 7, Section 917 of the Code of Alabama:

"EFFECT OF TENDER RECEIVED.—The receipt of the money tendered, if before suit brought, is a bar to the action; if after suit, releases the defendant from all damages and costs, except the costs which accrued before the tender and receipt of the money."

# In the Supreme Court of the United States

## October Term, 1963

## No. 40

RALPH D. ABERNATHY,
FRED L. SHUTTLESWORTH,
S. S. SEAY, SR., AND
J. F. LOWERY, PETITIONERS,
V.
L. B. SULLIVAN, RESPONDENT

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA**

**BRIEF FOR THE PETITIONERS**

HARRY H. WACHTEL,
SAMUEL R. PIERCE JR.,
JOSEPH B. RUSSELL,
DAVID N. BRAININ,
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Argument

**I.** This court must nullify schemes which encroach on freedom of utterance under the guise of punishing libel

**II.** The proceedings below constitute prohibited state action and, together with the concepts of libel enunciated by the Alabama courts, unconstitutionally abridge freedoms of press, speech, assembly and association

- **A.** Prohibited state action is clearly involved
- **B.** The First and Fourteenth Amendments protect criticism and discussion of the political conduct and actions of public officials
- **C.** Vagueness and indefiniteness of standards require reversal of the judgment below
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**III.** The judgment and proceedings below violate petitioners' First and Fourteenth Amendment rights in that the record is devoid of evidence of authorization or publication of the ad in suit, and they require of total strangers to the publication expression of disbelief and disavowal

- **A.** Lack of evidence as denial of due process of law
- **B.** Prejudicial rulings below concerning "ratification;" silence as consent
- **C.** Compulsory disclosure of belief

**IV.** Petitioners' rights to Due Process and Equal Protection of Law and to a fair and impartial trial as guaranteed by the Fourteenth Amendment were flagrantly violated and abridged by the proceedings below

Jurisdiction to redress flagrant violations of fundamental constitutional rights "is not to be defeated under the name of local practice"

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Appendix A

Appendix B

Petitioners Abernathy, Shuttlesworth, Seay, and Lowery submit this brief for reversal of the judgment of the Supreme Court of Alabama entered on August 30, 1962, which affirmed a $500,000 libel judgment for punitive damages entered on November 3, 1960 in the Circuit Court of Montgomery County, Alabama against petitioners and The New York Times Company,

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their co-defendant, in a suit for alleged libel, based on an advertisement (R. 6, 1925; reproduced in Appendix A *infra,* p. 63) printed in The New York Times on March 29, 1960, appealing for contributions to aid the civil rights movement in the South.

### OPINIONS BELOW

The Trial Court (Circuit Court of Montgomery County) did not write an opinion. Its judgment is printed at R. 862. The Opinion of the Alabama Supreme Court (R. 1139) affirming said judgment is reported at 273 Ala. 656.

### JURISDICTION

The judgment of the Supreme Court of Alabama was entered on August 30, 1962 (R. 1180). The petition for writ of certiorari was filed on November 21, 1962 and was granted on January 7, 1963, 371 U.S. 946 (R. 1194). The jurisdiction of this Court rests upon 28 U. S. C. § 1257(3).[1]

### QUESTIONS PRESENTED[2]

**1.** May the State of Alabama, under the guise of civil libel prosecutions, suppress criticism of the political conduct of unnamed public officials, consistently with the guaranteed freedoms of speech, press, assembly and association of the First and Fourteenth Amendments?

**2.** Were petitioners' rights to due process of law, as guaranteed by the Fourteenth Amendment, violated by a $500,000 punitive judgment against them upon a record devoid of evidence of authorization, consent, publication or malice on their part or of pecuniary damage to respondent?

**3.** Does the rule of law adopted by the State of Alabama below, requiring total strangers to the challenged publication, to procure and study it and, under pain of $500,000 punitive damages, "retract" any claimed libel therein, impose an arbitrary and onerous burden which unconstitutionally infringes petitioners' rights under the First and Fourteenth Amendments?

**4.** Were the rights of Negro petitioners to equal protection, due process of law and fair and impartial trial under the Fourteenth Amendment violated by the trial of the suit brought against them by a white public official of Montgomery (i) in a segregated Courtroom, rife with racial bias and community hostility, (ii) before an all-white jury (from which Negro citizens were intentionally and systematically excluded), and (iii) before a trial judge, not properly qualified, who has stated from the Bench that the Fourteenth Amendment is inapplicable in Alabama Courts, which are governed by "white man's justice"?[3]

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions involved are the First, Fourteenth and Fifteenth Amendments to the United States Constitution which are set forth in Appendix B, *infra,* pp. 65–66.

The Statutes involved are Title 7, Sections 913–16 of the Code of Alabama (i.e., the Alabama "Retraction" Statute) and Title 14, Sections 347 and 350 thereof (i.e., the Alabama "Criminal Libel" Statute) which read as follows:

Title 7, Section 913 of the Code of Alabama:

> "RETRACTION MITIGATES DAMAGES.—The defendant in an action of slander or libel may prove under the general issue in mitigation of damages that the charge was made by mistake or through inadvertence, and that he has retracted the charge and offered amends before suit by publishing an apology in a newspaper when the charge had been thus promulgated, in a prominent position; or verbally, in the presence of witnesses, when the accusation was verbal or written, and had offered to certify the same in writing."

Title 7, Section 914 of the Code of Alabama:

> "AGGRIEVED PERSON MUST GIVE NOTICE TO PUBLISHERS OF ALLEGED LIBEL BEFORE VINDICTIVE DAMAGES CAN BE RECOVERED.—Vindictive or punitive damages shall not be recovered in any action for libel on account of any publication

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[1] By letter of the Clerk of this Court dated August 9, 1963, the time of petitioners to file this brief has been extended to September 9, 1963.

[2] Influenced by the landmark decisions of this Court in the "sit in" cases (n. 6, *infra*), *NAACP* v. *Button,* 371 U.S. 415 and *Johnson* v. *Virginia,* 373 U.S. 61 among others, and the historic events which have taken place since the filing of the petition for writ of certiorari herein on November 21, 1962, petitioners have in this brief consolidated the five questions there presented to this Court so as to focus their argument on the all-pervasive issue of the impingement on and serious threat to their First and Fourteenth Amendment rights.

[3] Judge Jones *On Courtroom Segregation,* 22 The Alabama Lawyer, No. 2, pp. 190–192 (1961), which reprints "Statement made from the Bench of the Circuit Court of Montgomery County, February 1, 1961, …" during the trial of the related libel action by Mayor Earl James of Montgomery against The New York Times Company and the four Negro petitioners herein. On March 17, 1961, Judge Jones entered his order denying the new trial application herein (R. 970).

concerning the official conduct or actions of any public officer, or for the publication of any matter which is proper for public information, unless five days before the bringing of the suit the plaintiff shall have made written demand upon the defendant for a public retraction of the charge or matter published; and the defendant shall have failed or refused to publish within five days in as prominent and public a place or manner as the charge or matter published occupied, a full and fair retraction of such charge or matter."

Title 7, Section 915 of the Code of Alabama:

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Title 7, Section 916 of the Code of Alabama:

"RECANTATION AND TENDER; EFFECT OF.—If the defendant, after or before suit brought, make the recantation and amends recited in the preceding sections, and also tender to the plaintiff a compensation in money, and bring the same into court, the plaintiff can recover no costs, if the jury believe and find the tender was sufficient."

Title 14, Section 347 of the Code of Alabama:

"LIBEL.—Any person who publishes a libel of another which may tend to provoke a breach of the peace, shall be punished, on conviction, by fine and imprisonment in the county jail, or hard labor for the county; the fine not to exceed in any case five hundred dollars, and the imprisonment or hard labor not to exceed six months."

Title 14, Section 350 of the Code of Alabama:

"DEFAMATION.—Any person who writes, prints, or speaks of and concerning any woman, falsely imputing to her a want of chastity; and any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude, shall, on conviction, be punished by fine not exceeding five hundred dollars, and imprisonment in the county jail, or sentenced to hard labor for the county, not exceeding six months; one or both, at the discretion of the jury.

## STATEMENT

Numerous recent decisions of this Court[4] have focused sharply on the intense nationwide efforts to secure the constitutional rights of Negroes, and on the numerous unconstitutional acts committed in various Southern states to frustrate these efforts. The four petitioners herein are Negro ministers (resident in Alabama at all relevant times) and religious and spiritual leaders of the movement to secure civil rights in Alabama and throughout the South.

### 1. The nature of the publication

To enlist public support and raise funds for the legal defense of Dr. Martin Luther King, Jr. (who shortly before had been indicted in Alabama for perjury)[5], and in aid of the nonviolent demonstrations against racial segregation, a New York group called "The Committee to Defend Martin Luther King and the Struggle for Freedom in the South" ("Committee" hereinafter), with which petitioners had no connection, caused to be printed and published in The New York Times ("*The Times*" hereinafter) on March 29, 1960, an advertisement entitled: "Heed Their Rising Voices" (R. 6; Pl. Ex. 347 at R. 1925, reproduced in full in Appendix "A" p. 63, *infra*). The advertisement commented on the activities of *unnamed* governmental authorities, in cities in a number of Southern states, designed to stifle the then-current protest demonstrations[6] against segregation by students in various Southern institutions (including Alabama State College at Montgomery). In commenting on such activities, the advertise-

[4] *United States* v. *Alabama,* 373 U.S. 545; *United States* v. *Barnett,* 373 U.S. 920; *NAACP* v. *Alabama,* 357 U.S. 449; *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U.S. 293; *Fair* v. *Meredith,* 305 F. 2d 341 (C. A. 5), cert. den., 371 U.S. 828; *Brown* v. *Board of Education,* 347 U.S. 483; *Holmes* v. *City of Atlanta,* 350 U.S. 879; *Cooper* v. *Aaron,* 358 U.S. 1; *Morgan* v. *Virginia,* 328 U.S. 373.

[5] Dr. King was later acquitted of this charge (R. 680).

[6] See Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First 60 days,* DUKE L. J. 315 (Summer, 1960), describing in detail (at 323–325) repressive acts and statements of Alabama public officials.

This Court has already reversed as unconstitutional a number of such repressive actions of officials of various Southern States including Alabama. *Shuttlesworth* v. *City of Birmingham,* 373 U.S. 262; *Gober* v. *City of Birmingham,* 373 U.S. 374; *Peterson* v. *City of Greenville,* 373 U.S. 244; *Garner* v. *Louisiana,* 368 U.S. 157; *Lombard* v. *Louisiana,* 373 U.S. 267.

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ment used the broad, generic term "Southern violators of the Constitution".

The ad referred to the harassments to which Rev. King had been subjected, including arrests, imprisonment, the bombings of his home, and the then-pending perjury indictment, and concluded with an appeal for contributions to be sent to the Committee's office in New York in support of Dr. King's defense, the desegregation movement, and the voter registration drive in the South.

Under the text of the appeal appeared the names of some sixty eminent sponsors (including Mrs. Eleanor Roosevelt, Drs. Harry Emerson Fosdick, Mordecai Johnson, Alan Knight Chalmers and Algernon Black, and Messrs. Raymond Pace Alexander, Elmer Rice and Norman Thomas).

Below the list of sponsors appeared the caption "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal", under which caption were printed the names of eighteen (18) ministers from various Southern states, including the four petitioners.

The appeal concludes with the following plea for funds:

> "We must extend ourselves above and beyond moral support and render the material help so urgently needed by those who are taking the risks, facing jail, and even death in a glorious re-affirmation of our Constitution and its Bill of Rights.
>
> "We urge you to join hands with our fellow Americans in the South by supporting, with your dollars, this Combined Appeal for all three needs—the defense of Martin Luther King—the support of the embattled stu dents—and the struggle for the right-to-vote."

#### 2. The evidence concerning publication

The undisputed record facts demonstrate that the names of petitioners were added to the advertisement without consultation with them and without their authorization or consent (R. 788–90; 792–4; 797–8; 801–2; 806–10; 824–5; 1175). Indeed, the record is clear that their first knowledge of *The Times* ad came when they received in the mail respondent Sullivan's identical letters which had been posted on or about April 8, 1960, and which were admittedly misdated "March 8, 1960" (Pl. Exs. 355–8, R. 1962–7). Moreover, these letters did not contain a copy of the ad, but merely quoted out of context the two paragraphs on which Sullivan based his complaint, and demanded that each petitioner "publish in as prominent and public a manner" as *The Times* ad, "a full and fair retraction of the entire false and defamatory matter …" (R. 1962–8). Petitioners could not possibly comply with this demand; and, before they could consult counsel or even receive appropriate advice in regard thereto, suit was instituted by respondent on April 19, 1960 (R. 789; 793; 798; 801–3).

The undisputed record facts further show a complete lack of connection between petitioners and the publication of the advertisement. The typescript was submitted to *The Times* by one John Murray (R. 732), with a space order from The Union Advertising Service (R. 736). Names of sponsors (the Committee) were typed at the foot (R. 739). Accompanying (or submitted shortly following) the typescript was a letter, signed by A. Philip Randolph, (R. 739, 756–757) purporting to authorize the use of the names of the "signed members of the Committee" as sponsors (R. 1992). It is not disputed that petitioners' names did not appear on the manuscript as submitted (R. 806–7). Petitioners' names were subsequently placed on the advertisement by one Bayard Rustin, on his own motion, without any consultation with petitioners as shown by the undisputed evidence (R. 808–810) and the findings of the Court below (R. 1174–5). No representative of *The Times* ever asked petitioners whether they had consented to this use of their names (R. 754–5, 770, 790, 793, 797–8, 802).

None of the petitioners saw the *full text* of the advertisement prior to the commencement on April 19, 1960 of respondent Sullivan's suit (R. 789, 793, 798, 801); petitioners' first notice of *The Times* ad (and only of the language complained of) came from Sullivan's aforementioned misdated letters mailed on or about April 8, 1960 (R. 789, 793, 798, 802). Petitioners each wholly denied any knowledge of the ad prior to its publication, any consent to the use of their names and any responsibility for its publication (R. 788–90, 792–4, 795, 797–8, 801–2). Respondent in no way disputed these record facts which are confirmed in the opinion of the Court below (R. 1174–5).

#### 3. The alleged libel

*The Times* ad in suit, without identifying or naming any particular individual or fixing any particular time period, refers to various inci-

dents of claimed repression in numerous cities throughout the South, commencing with "Orangeburg, South Carolina" and continuing on to "Montgomery, Alabama" and "Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Charlotte and a host of other cities in the South… ."

On October 5, 1959, respondent Sullivan became one of the City Commissioners of Montgomery, Alabama (R. 694). Nowhere in *The Times* ad in suit was respondent Sullivan or any other southern official referred to by name or office. Many of the repressive actions in Montgomery, referred to in the ad, occurred prior to Sullivan's term of office, as Sullivan himself admitted (R. 703–19).

The entire *gravamen* of Sullivan's complaint (which alleged no special damage but sought $500,000 as punitive damages) concerned the following two paragraphs of the advertisement (*i.e.,* the third and sixth), which were alleged to be defamatory:

> "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission."
>
> *******
>
> "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding', 'loitering' and similar 'offenses'. And now they have charged him with 'perjury'—a *felony* under which they could imprison him for *ten years.*" (R. 2–4).

Although Sullivan's complaint (R. 2–3) and his letters to petitioner demanding retraction (R. 1962–7) suggest that the above quoted paragraphs followed one another in consecutive order in *The Times* ad in suit, the record fact is that the first paragraph quoted is separated from the second by two lengthy paragraphs comprising almost a complete column of the ad—one relating to events in numerous cities in Southern states other than Alabama, and the other lauding Dr. King as the "world famous leader of the Montgomery Bus Protest" and the symbol of "the new spirit now sweeping the South" (Pl. Ex. 347, R. 1923–6, reproduced in full in Appendix "A" hereto).

Moreover, Sullivan's entire claim of libel rests on the following minor discrepancy: whereas the ad said that "truckloads" of armed police "ringed the Alabama State College Campus," the fact was that "on three occasions they [police] were deployed near the Campus in large numbers" (R. 594).

Clearly no distinction of substance can validly be drawn between police "ringing" the campus and being "deployed near the campus in large numbers"—particularly in the context of comment and criticism of official conduct on this most vital public issue.

Further, the ad said that Dr. King was arrested "seven times". The testimony was that he was arrested three or four times in Montgomery, Alabama (three of which arrests admittedly occurred prior to the respondent's term of office) (R. 592, 594–5); but there is nothing in the text or context of the advertisement which either requires or permits the inference that the seven arrests occurred in Montgomery or anywhere else in Alabama. Other alleged inaccuracies in the ad were conceded by respondent Sullivan to refer to matters within the jurisdiction of the State Education Department or other agencies, and to matters occurring long prior to respondent's taking office (R. 684–5, 688, 694, 701, 716, 719, 725).

None of Sullivan's witnesses (four of whom first saw the ad when called to the office of plaintiff's counsel shortly before the trial to be prepared as witnesses) testified that they believed the ad, or that they thought any less of respondent by reason of its publication (R. 623, 625, 636, 638, 644, 647, 651, 667).

#### 4. Biased trial and judgment

Alabama has enacted sweeping racial segregation laws,[7] which reflect the community hostilities and prejudices that were funneled

[7] See Southern School News, August 1960, Vol. 9, No. 2, p. 1, (no desegregation in Alabama schools);

Alabama Code Recompiled 1958, Title 44 § 10 (Segregation of paupers) *id.,* Title 45 §§ 52, 121–3 (Segregation of prisoners) *id.,* Title 48 § 186 (Segregation of railroad waiting rooms) *id.,* Title 48 §§ 196–7 (Segregation of railroad coaches) *id.,* Title 48 § 301 (31a) (Segregation of motor busses) *id.,* Title 51 § 244 (Accounts of poll taxes paid by each race must be kept separate) *id.,* Title 52 § 613(1)

into the Courtroom. Continuous denunciations of the defendants and of the material in the advertisement appeared in Montgomery newspapers prior to the trial, and continued throughout the trial and while the defendants' motions for new trial and appeals were pending (R. 1999–2243; 871–89). The trial itself took place in a carnival-like atmosphere, with press photographers in the Courtroom taking pictures of all the jurors for the two local newspapers (R. 951, 955), and television cameras following the jury to the very door of the juryroom[8] (R. 889–90, 2242). Two Montgomery newspapers, one on its front page, carried the names of the jurors (R. 2079–80, 952).

This suit was tried in November 1960, in Montgomery County, before Judge Walter B. Jones, and an all-white jury. The Trial Judge himself was a member of the jury commission of Montgomery County, the group responsible for the selection of the jury panel (R. 936, 971), from which Negroes have been intentionally and systematically excluded.

Respondent Sullivan's counsel was permitted by the Trial Judge, without restraint, over objections of petitioners' counsel, to indulge in such inflammatory appeals to racial bias as the mispronunciation of the word "Negro" as "Nigra" and "Nigger" in the presence of the jury, (R. 579–80), and in an invidious reference in his summation to purported events in the Congo (R. 929–30, 939–41). The Opinion of the Alabama Supreme Court below, in condoning such conduct, accepts counsel's lame excuse that he pronounced "the word 'negro' " as he did because that was the way he had pronounced it "all my life"[9] (R. 1168–9).

Throughout the proceedings below, petitioners took all possible steps to preserve their constitutional rights. They demurred to the complaint (R. 15–24) and filed Amended Demurrers (R. 74–99); their demurrers, as amended, were all overruled (R. 108–9). They made numerous proper objections and excepted to the repeated admission of improper testimony of respondent's witnesses (R. 1102–09). They twice moved to exclude plaintiffs' evidence (R. 109–14, 728, 816), which motions were denied (R. 728, 816–17). They made motions for special findings (R. 114–18) and submitted written requests to charge (see R. 827); they made due and timely objections and exceptions to the denial of their motions and requests. Petitioners moved (see, *e.g.,* R. 109–14; 728, 816) for a dismissal at the end of plaintiff's case and for a directed verdict at the conclusion of the entire case, which motions were denied (R. 728, 816–18). Each petitioner duly and timely submitted a motion for new trial (R. 970–1028) on which Judge Jones refused to rule. This evasion of duty by the trial court was, in turn, seized upon by the Alabama Supreme Court as a pretext for denying review (R. 1169–70).

The treatment afforded petitioners' motions for new trial underlines the repeated denial to petitioners of proper opportunity to be heard below. On December 2, 1960 petitioners properly and timely made, filed and submitted motions for new trials. Petitioners duly appeared, in compliance with Title 13, Sec. 119 of the Alabama Code, on December 16, 1960, the day to which said motions (and the motions of their co-defendant, The New York Times) had been continued. On March 3, 1961, the day on which, the general understanding was, the motions of petitioners and The New York Times would be heard together, the Trial Court heard extensive argument on behalf of The New York Times in support of its motion for a new trial and then refused to hear petitioners' counsel, or permit him to argue, or allow him even to make a statement for the record (R. 895–6). Despite the fact that he had petitioners' papers properly before him, Judge Jones erroneously refused repeated demands by petitioners' counsel for rulings on their motions for new trials (R. 984, 998–9, 1013, 1027–8). On March 17, 1961, Judge Jones denied the Times' motion for a new trial (R. 970); arbitrarily, he never ruled on petitioners' motions (R. 895–6).

All of the foregoing rulings were properly objected to and challenged, and embodied in petitioners' Assignments of Error to the Ala-

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(Segregation of delinquents) *id.,* Title 45 § 4 (Segregation of tubercular patients) *id.,* Title 45 § 248 (Segregation of patients in mental institutions) *cf. Green* v. *State,* 58 Ala. 190 (no intermarriage).

[8] The Judicial Conference of the United States strongly condemned such practices "as inconsistent with fair judicial proceedings …" by resolution adopted at its meeting in March 1962 (See New York Law Journal, July 13, 1962, at p. 1).

[9] *Cf. Screws* v. *United States,* 325 U.S. 91, 135, where Mr. Justice Murphy stated in dissent: "As such, he [Robert Hall, a Negro citizen] was entitled to all the respect and fair treatment that befits the dignity of man, a dignity that is recognized and guaranteed by the Constitution." [Brackets added].

bama Supreme Court, duly filed therein and affixed to the certified transcript Record duly submitted and filed with this Court (R. 1100–1132).

In this setting and notwithstanding the complete absence of any evidence of or legal basis for liability of petitioners or any showing of actual damage suffered by respondent, the jury, upon the clearly erroneous instructions of the Trial Judge (R. 819–28), on November 3, 1960 rendered a one sentence verdict in "favor of the plaintiff" in the sum of $500,000 (R. 862), on which the Trial Judge entered judgment[10] (R. 863).

## SUMMARY OF ARGUMENT

The State of Alabama and its public officials have developed refined and sophisticated schemes of repression, striking directly at the rights of free speech and press, the roots of our democracy. To silence people from criticizing and protesting their wrongful segregation activities, Alabama officials now seek to utilize civil libel prosecutions which require still less proof than was required under the infamous Sedition Act of 1798, 1 Stat. 596.

The libel prosecutions and enormous judgment herein are clearly induced by Alabama's massive "cradle to grave" statutory system of racial segregation, and clearly constitute another "ingenious" scheme by the State of Alabama and its public officials to suppress criticism of the political conduct of Southern public officials. As such, they clearly constitute prohibited state action and cannot be protected from review by mere labels such as "libel per se."

The preferred First and Fourteenth Amendments' freedoms of speech, press, assembly and association are the very cornerstone of the Bill of Rights. Moreover, the constitutional protection of criticism of the political conduct and actions of public officials extends even to exaggerations and inaccuracies.

Since " … public men are as it were, public property" (*Beauharnais* v. *Illinois,* 343 U.S. 250, 263), criticism and defamation of their official conduct is clearly within the protections guaranteed by the First and Fourteenth Amendments. The judgment and proceedings below clearly abridge these basic constitutional protections, especially in view of the vital public interest in the integration struggle, the role of petitioners as spiritual leaders of the non-violent resistance movement, and the unconscionable penalty imposed below.

In addition to their patent disregard of these preferred constitutional protections, the Alabama Courts rendered and affirmed the judgment below on a record devoid of evidence of publication by petitioners, evidence of their consent to or authorization of publication, or evidence of damage of any kind to respondent due to the publication of the alleged libel. This disregard is all the more flagrant where the libel alleged is based solely on one claimed minor discrepancy in an advertisement (which is substantially correct) that nowhere mentions respondent by name or refers to him by office or title. Further, they attempted to meet petitioners' defenses that they had not published the ad and that it was not libelous, by adopting definitions of libel, libel per se and ratification, so strained, vague and detached from established legal principles as to amount in and of themselves to unconstitutional infringements of petitioners' rights.

Moreover, imposition of such liability because of petitioners' silence abridges petitioners' First Amendment rights of free association and belief.

Coupled with all of these violations of basic rights is the fact that the trial proceedings patently denied petitioners due process and equal protection of laws. Clearly, when four Negro ministers are sued by a white City Commissioner for an ad seeking support for Dr. Martin Luther King, and the case is tried in a segregated court room in Montgomery, Alabama, during a Civil War Centennial, before an all-white jury and a trial judge elected at polls from which Negroes were excluded, and when that very Judge states that "white man's justice" governs in his court and permits respondent's counsel to say "Nigger" and "Nigra" to the jury, then the Fourteenth Amendment does indeed become the "pariah" that the Trial Judge below called it. (See n. 20, pp. 26–27, *infra;* n. 3, p. 3, *supra*).

[10] *The Times*' Trial Counsel stated that the Sullivan verdict "could only have been the result of the passion and prejudice revived by that celebration [the Centennial Commemoration] and other events embraced within that Civil War celebration" and the failure of the Court to adjourn the trial even during the day "while ceremonies took place changing the name of the Court Square to "Confederate Square" (R. 2222); and again that plaintiff [Sullivan] "was allowed to present the case to the jury as a sectional conflict rather than as a cause of action for libel" (R. 944).

U.S. SUPREME COURT, OCTOBER 1963

BRIEF FOR THE PETITIONERS

## ARGUMENT

**I. This court must nullify schemes which encroach on freedom of utterance under the guise of punishing libel** The century-long struggle of the Negro people for complete emancipation and full citizenship has been met at each step by a distinct pattern of resistance, with only the weapons changing, from lynching, violence and intimidation, through restrictive covenants, Black Codes,[11] and Jim Crow laws, to avoidance, "interposition," "nullification," tokenism and open contempt. Into this pattern, the case at bar fits naturally as a further refinement.

In recent years, when tremendous advances have occurred, "when growing self-respect has inspired the Negro with a new determination to struggle and sacrifice until first-class citizenship becomes a reality" (King, *Stride Toward Freedom* 154 (1958)), when there has come "an awakening moral consciousness on the part of millions of white Americans concerning segregation" (*id.,* p. 154), a national crisis has developed. This crisis was created when the aspirations of the Negroes were met "with tenacious and determined resistance" by "the guardians of the status quo," which "resistance grows out of the desperate attempt of the White South to perpetuate a system of human values that came into being under a feudalistic plantation system which cannot survive" today (*id.,* pp. 155, 156, 158).[12]

Because the essence of this brief is that the civil libel prosecutions involved herein constitute another of the "evasive schemes for racial segregation whether attempted 'ingeniously' or 'ingenuously' " (*Cooper* v. *Aaron,* 358 U.S. 1, 18), we believe it pertinent and material to view this "scheme" historically, in the "mirror"[13] of the Supreme Court's approach and reaction to other, related "schemes" to preserve segregation.

Even if consideration be limited to the fields of education, voting and housing, such "evasive schemes" have been struck down because of this Court's conviction that "constitutional rights would be of little value if they could be thus indirectly denied" (*Smith* v. *Allwright,* 321 U.S. 649, 664).

Thus, the "separate but equal" concept of *Plessy* v. *Ferguson,* 163 U.S. 537 (1896) entrenched segregation in schools until 1954[14] when this Court, in *Brown* v. *Board of Education,* 347 U.S. 483, enunciated the fundamental constitutional principle that racial segregation in the field of public education stamped Negroes with a "badge of inferiority" and violated the equal protection of the laws guaranteed by the Fourteenth Amendment.

For almost a decade, to this very day, there has been "massive resistance" to this decision. (Mendelson, *Discrimination* 40 (1962); also see *id.,* pp. 33–68 *passim*). The State of Alabama has been a leader of the resistance. This Court in 1958 was compelled to observe that the constitutional rights of school children "can neither be nullified openly and directly by state legislators or state executives or judicial officers, nor nullified indirectly by them through evasive schemes

[11] Immediately following the Civil War, the former slave owners sought to replace the shackles of slavery "with peonage and to make the Negroes an inferior and subordinate economic caste … [T]he consequences of slavery were to be maintained and perpetuated." Konvitz, *A Century of Civil Rights* 15 (1961); see also Franklin, *From Slavery to Freedom* 299 (1956); Du Bois, *Black Reconstruction* 381–525 (1935).

[12] "The articulate and organized group, however, was the one favoring the maintenance of the caste system, and it used boycotts, effective appeals to the Southern legislatures, violence and *other means to resist the changes.* In general this group is larger and more effective in the Deep South … [Emphasis Added]

"All of the continuing leaders of the Southern resistance are persons with some traditional and legitimate authority. They apparently have a strong racist ideology, and strong personal desires to keep the Negro subordinate …" *Postscript Twenty Years Later* to Myrdal, *The American Dilemma* XXXVII (1962).

[13] "The Court is a good mirror, an excellent mirror, of which historians for some reason have little availed themselves, of the struggle of dominant forces outside the Court." Mr. Justice Frankfurter, as quoted in the preface of Vose, *Caucasians Only* (1959).

[14] The 1960 Report of the U.S. Commission on Civil Rights (1863–1963 Freedom to the Free—Century of Emancipation) p. 5, refers to the period of 1875–1900 as "Reaction, Redemption and Jim Crow," when "the former masters would have mastered the techniques of maintaining separation of the races through the agencies of the law." It was the period when "the Supreme Court was becoming attuned to the changing temper of the times" (*Id.,* p. 62). See, *e.g., Slaughterhouse Cases,* 83 U.S. 36 (1873); *United States* v. *Reese,* 92 U.S. 214 (1876); *Cruikshank* v. *United States,* 92 U.S. 542 (1876); *Civil Rights Cases,* 109 U.S. 3 (1883); and *Plessy* v. *Ferguson,* 163 U.S. 537 (1896). But note the sole dissent of the first Mr. Justice Harlan which foreshadowed the reversal in the *Brown* case 58 years later. " … [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law" (*Id.,* p. 559).

for segregation whether attempted '*ingeniously or ingenuously*'" (*Cooper* v. *Aaron,* 358 U.S. 1, 17) [Emphasis added]. In 1960, this Court in a unanimous memorandum made it clear that it would brook no further delay through the series of laws based upon the "concept" of "interposition" (*Bush* v. *Orleans School Board,* 364 U.S. 500). Dilatory requests for review have been refused. "Tokenism" as a device is under challenge.[15]

The resistance techniques have taken many forms, some subtle and others overt, including contempt of federal court orders by the Governors of Alabama and Mississippi which required the use of federal troops to enforce basic constitutional rights. Ironically, the resistance took the equitable concept of "all deliberate speed," (*Brown* v. *Board of Education,* 349 U.S. 294, 301), which this Court proffered as a shield, and converted it to a sword. It was employed not for "consideration" of a "prompt and reasonable start towards full compliance" (349 U.S. at 300), but for resistance and nullification. This Court in its last term recognized that the concept of "all deliberate speed" had been abused and subverted. *Watson* v. *City of Memphis,* 373 U.S. 526.[16]

This Court has been vigilant, as it pledged it would be in *Cooper* v. *Aaron, supra,* to invalidate direct and indirect schemes seeking to preserve racial segregation.[17] Such vigilance must now be directed against the "civil libel" scheme so "ingeniously" and "ingenuously" and to date successfully employed as a weapon against the Negro petitioners and The New York Times.

Similarly, in the realm of Negro voting rights and other appurtenances of full citizenship, this Court has exposed the use of "evasive schemes" designed to nullify and sterilize Negro civil rights.

After this Court struck down a Texas law which bluntly denied the Negro the right to vote in a Democratic Party primary (*Nixon* v. *Herndon,* 273 U.S. 536), circumvention and more subtle means were employed. When these too failed to pass this Court's scrutiny (*Nixon* v. *Condon,* 286 U.S. 73), Texas repealed all such laws and fell back successfully to the legal sanctuary of "private action", placing the device beyond the reach of the Fourteenth Amendment (*Grovey* v. *Townsend,* 295 U.S. 45).

But, several years later, in 1944, this Court in *Smith* v. *Allwright,* 321 U.S. 649, overcame the "private action" device by going behind the white primary. Mr. Justice Reed aptly described this Court's searching approach to nullification of constitutional rights by indirection (321 U.S. at 664):

> "The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a *form* which permits a private organization to practice racial discrimination in the election. *Constitutional rights would be of little value if they could be thus indirectly denied*" (Emphasis added).

Foreshadowing the aftermath of *Brown* v. *Board of Education, supra, Smith* v. *Allwright* "aroused a storm of denunciation in the south, participated in by members of Congress, governors and others who proclaimed that 'white supremacy' must be preserved. They threatened that the decision would be disregarded or circumvented." Fraenkel, *The Supreme Court and Civil Liberties* 31 (1963). Thus, each "evasive scheme" thereafter employed to achieve discrim-

[15] "This Court … condemns the Pupil Placement Act when, with a fanfare of trumpets, it is hailed as the instrument for carrying out a desegregation plan while all the time the entire public knows that in fact it is being used to maintain segregation by allowing a little token desegregation" (*Bush* v. *Orleans Parish School Board,* 308 F. 2d 491, 499 (CA 5)).

[16] Mr. Justice Goldberg stated "*Brown* never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools, let alone other public facilities not involving the same physical problems or comparable conditions. [373 U.S. 526, 530]

" … Hostility to the constitutional precepts underlying the original decision was expressly and firmly pretermitted as such an operative factor… ." [*Id.,* p. 531]

"Most importantly, of course, it must be recognized that even the delay countenanced by *Brown* was a necessary, albeit significant, adaptation of the usual principle that any deprivation of constitutional rights calls for prompt rectification. The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled." (*Id.,* pp. 532–3).

[17] Thus, for example, peonage and involuntary servitude imposed through ingenious subterfuges, whether by contract or otherwise, have been stripped of their "casting" and branded violations of the Thirteenth Amendment. This Court went behind the basic agreement between private individuals—being alert and vigilant to subtle means of reimposing slavery. *Bailey* v. *Alabama,* 219 U.S. 219; *Taylor* v. *Georgia,* 315 U.S. 25; *Pollack* v. *Williams,* 322 U.S. 4.

ination in primary machinery was struck down. See *Terry* v. *Adams,* 345 U.S. 461; Fraenkel, *supra,* p. 31; Myrdal, *The American Dilemma* 479–86 (1944).[18]

In addition to the right to vote, full citizenship includes the right of jury service. Southern efforts to restrict and prevent jury service by Negroes reflect a similar pattern of resort to the full arsenal of "evasive schemes" after the passage of direct laws denying Negroes service on juries was barred by this Court. *Strauder* v. *West Virginia,* 100 U.S. 303. It was in this context that this Court first observed that it would not tolerate discrimination "whether accomplished ingeniously or ingenuously." *Smith* v. *Texas,* 311 U.S. 128, 132; see also *Norris* v. *Alabama,* 294 U.S. 587; *Cassell* v. *Texas,* 339 U.S. 282; *Avery* v. *Georgia,* 345 U.S. 559. Even the finding of a state court that no discrimination existed did not bar this Court from going behind the facade to unmask, after review of the facts, subtle techniques for achieving denial of impartial jury. *Ross* v. *Texas,* 341 U.S. 918; *Shepherd* v. *Florida,* 341 U.S. 50.

Grand jury selections which directly or indirectly discriminated were interdicted. *Smith* v. *Texas, supra; Eubanks* v. *Louisiana,* 356 U.S. 584.

This Court overcame the artifice of gerrymandering which is in essence an "evasive scheme" to disenfranchise Negroes. *Gomillion* v. *Lightfoot,* 364 U.S. 339; and in *Baker* v. *Carr,* 369 U.S. 186, it has begun to grapple with more subtle, deeply entrenched means of effective disenfranchisement. In the same spirit, this Court did not permit voting registrars who committed wrongful acts to be insulated from liability by the designation of "private persons." *United States* v. *Raines,* 362 U.S. 17.

Finally, in the realm of housing, the use of artificial forms and "legalisms" as techniques for perpetuating discrimination was struck down. Racially restrictive zoning ordinances were declared illegal. *Buchanan* v. *Warley,* 245 U.S. 60; *Harmon* v. *Tyler,* 273 U.S. 668. In this field, the label of "private action" on racially restrictive covenants remained an impregnable fortress for discrimination for many decades (cf. *Civil Rights Cases,* 109 U.S. 3; Vose, *Caucasians Only* (1959)). Through racially restrictive covenants, efforts of Negroes to move out of slums and ghettoes to find better homes and schools were effectively and "legally" thwarted.[19]

In *Shelley* v. *Kraemer,* 334 U.S. 1, 19, this Court breached the walls of the fortress protecting these obnoxious covenants and held that the "private action" of contracting parties, when enforced by state courts, resulted in state action, saying: "active intervention of the state courts supported by the full panoply of state power" resulted in state action in the full and complete sense of the phrase.

Again, as with *Smith* v. *Allwright* and *Brown* v. *Board of Education,* both *supra,* a landmark declaration of positive constitutional right and privilege was met by resistance. A search was on to nullify, interpose or circumvent. (Vose, *op. cit., supra,* 227–34). This Court, five years later, in 1953 had to stem a tide of damage suits which had victimized those who "breached" the racial covenants. *Barrows* v. *Jackson,* 346 U.S. 249. Mr. Justice Minton, in a decision which bears close scrutiny as applicable to the case at bar, concluded that the grant of damages by a state court constituted state action under the Fourteenth Amendment; that to allow damages against one who refuses to discriminate "would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants … [T]he Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of laws to other individuals" (346 U.S. at 254–60).

The foregoing discussion of "ingenious" efforts to find "evasive schemes" for segregation was intended to place the case at bar in true perspective. It brings to the fore Mr. Justice Frankfurter's statement, in *Beauharnais* v. *Illinois, supra,* that this Court "retains and exercises authority to nullify action which encroaches on freedom of utterance under the *guise* of punishing libel" (343 U.S. at 263–4) [Emphasis added]. We submit that the civil libel prosecutions involved in the case at bar represent just such a "guise"; that they fall squarely within the

[18] This text under the heading "Southern Techniques for Disfranchising of Negroes" refers not only to evasive legal schemes but to "violence, terror and intimidation" as the effective means used to disfranchise Negroes in the South (p. 485).

[19] A leading Negro newspaper, "The Chicago Defender," is quoted in Vose, *Caucasians Only:* "These covenants have been responsible for more human misery, more crime, more disease and violence than any other factor in our society. They have been used to build the biggest ghettoes in history. They have been used to pit race against race and to intensify racial and religious prejudice in every quarter" (p. 213).

pattern of devices and subterfuges which this Court has struck down in the realm of education, peonage, voting rights and housing, and must strike down here.

**II. The proceedings below constitute prohibited state action and, together with the concepts of libel enunciated by the Alabama courts, unconstitutionally abridge freedoms of press, speech, assembly and association**

**A. Prohibited state action is clearly involved** To insulate this case against critical review by this Court, the erroneous assertion was made in the courts below[20] that there is an absence of "state action" and that this is merely a "private action of libel." This contention has no validity.

In *Shelley* v. *Kraemer,* 334 U.S. 1, 14, the Court stated:

> "That the action of *state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court.*" [Emphasis added].
>
> *******
>
> "We have no doubt that there has been state action in these cases in the full and complete sense of the phrase." (*Id.,* p. 19).

See *Barrows* v. *Jackson,* 346 U.S. 249, 254 (state court suit between private parties, seeking damages for breach of a racially restrictive covenant, held barred by the Fourteenth Amendment); *American Federation of Labor* v. *Swing,* 312 U.S. 321 (state court's enforcement of a common law policy held state action within the Fourteenth Amendment); accord: *Bridges* v. *California,* 314 U.S. 252; *Wood* v. *Georgia,* 370 U.S. 375.

Moreover, the action by respondent Sullivan and the actions and pronouncements of other public officials (including the Attorney General and Governor of the State of Alabama) *in and of themselves* clearly constitute "State action" within the concepts enunciated by this Court in *Lombard* v. *Louisiana,* 373 U.S. 267.

The record herein notes that the instant case was instituted by Sullivan several days after the public announcement by Attorney General Gallion of Alabama that, on instructions from Governor Patterson, he was examining the legal aspects of damage actions by the State against the New York Times and others based on the advertisement here involved (R. 1999, 2001). The related companion libel suits filed by Mayor James, Commissioner Parks, former Commissioner Sellers and Governor Patterson, as well as the instant case, were instituted soon thereafter. All of these suits were based on substantially identical claims of libel and were instituted against petitioners and The New York Times based on the same advertisement, in the same circuit court of Montgomery County. (See *Parks* v. *New York Times,* 195 F. Supp. 919 (M. D. Ala.), rev'd on other grounds, 308 F. 2d 474 (C. A. 5), cert. pending; *Abernathy* v. *Patterson,* 295 F. 2d 452 (C. A. 5), cert. den., 368 U.S. 986).

Governor Patterson's complaint prays for damages in the sum of $1,000,000, and the Parks and Sellers and James complaints each pray for $500,000 damages.

Four other libel suits were instituted by Birmingham officials, seeking a total of $1,300,000 in damages, based on articles on racial tensions by Harrison Salisbury in *The Times.* Alabama officials have also filed libel actions against the Columbia Broadcasting System, seeking $1,500,000 in damages based on a television news program devoted, in part, to the difficulties experienced by Negro citizens of Montgomery in registering to vote. *Morgan, Connor & Waggoner* v. *CBS, Inc.* (N. D. Ala., So. Div.) Civ. Nos. 10067–10069S; *Willis & Ponton* v. *CBS, Inc.* (M. D. Ala., No. Div.) Civ. Nos. 1790–1791N.

On May 22, 1960, shortly after the institution of the above-described actions against petitioners and *The Times,* the Montgomery Advertiser (a prominent local newspaper) stated editorially:

[20] Trial Judge Jones' disregard of the guarantees and requirements of the Fourteenth Amendment is understandable in view of his shockingly biased statement from the Bench during the trial of the related *James* case (n. 3 at p. 3, *supra*): "… [T]*he XIV Amendment has no standing whatever in this court, it is a pariah and an outcast,* if it be construed to … direct … this Court as to the manner in which … its internal operations [requiring racial segregation in seating persons in the courtroom] … shall be conducted …"

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"We will now continue the trial of this case under the laws of the State of Alabama, and not under the XIV Amendment, and in the belief and knowledge that *the white man's justice* … will give the parties … equal justice under law." *Judge Jones on Courtroom Segregation,* 22 The Alabama Lawyer, 190 at pp. 191–2 (1961) [Emphasis and brackets added].

> "The Advertiser has no doubt that the recent checkmating of The Times in Alabama will impose a restraint upon other publications which have hitherto printed about the South what was supposed to be." (R. 2025).

It is difficult to believe that this flood of libel prosecutions instituted by public officials of the State of Alabama was simply a spontaneous, individual response to a critical newspaper advertisement. One is compelled to conclude that these actions by public officials are part of a concerted, calculated program to carry out a policy of punishing, intimidating and silencing all who criticize and seek to change Alabama's notorious political system of enforced segregation (See n. 7, p. 12, *supra*).

The Sullivan case, considered in conjunction with the activities of the other Alabama city and state officials, is clearly within the state action doctrine enunciated in the *Lombard* case, *supra.* "A State or a city may act as authoritatively through its executive as through its legislative body" (373 U.S. at 273). Clearly, Alabama has interceded, by its judiciary and its city and state officials, to put state sanctions behind its racial segregation practices.

Once the shelter of "private action" is removed from the "libel" judgment below, that judgment and its affirmance are exposed as another "scheme" to abridge the petitioners' basic constitutional rights of free political expression.

**B. The First and Fourteenth Amendments protect criticism and discussion of the political conduct and actions of public officials** Since this Court in the public interest accords to public officials immunity from libel (*Barr* v. *Matteo,* 360 U.S. 564), the same public interest must insure a corresponding protection to those who criticize public officials.[21]

Public officials, backed not only by the full power of their offices but also by the aura of power, must be held to strictest account. To expect such account to be received dispassionately and dealt with in polite phrases by press and public is to deny effective criticism and comment.

In *Roth* v. *United States,* 354 U.S. 476, 484, this Court ruled that the First and Fourteenth Amendments were "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

In Justice Hughes' classic statement is found support for the key role of political discussion:

> "[I]mperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of consti-

[21] *Cf.* Chief Justice Warren's comment in his dissent: " … The public interest in limiting libel suits against officers in order that the public might be adequately informed is paralleled by another interest of equal importance: that of preserving the opportunity to criticize the administration of our Government and the action of its officials without being subjected to unfair—and absolutely privileged—retorts. If it is important to permit government officials absolute freedom to say anything they wish in the name of public information, it is at least as important to preserve and foster public discussion concerning our Government and its operation" (at p. 584).

See also *Douglas, The Right of The People* 25 (1961), quoting "as the true spirit of the Bill of Rights":

"In times like those through which we have recently passed, the doctrine of fair comment should be extended as far as the authorities will permit. With unprecedented social and governmental conditions, our own institutions threatened, national legislators who participate in the formation of governmental policies should be held to the strictest official accountability. History has shown that this is promoted through free exercise of the right to criticize official acts. The people furnish the legislators with an extensive and expensive secretariat, give them the right to use the mails at public expense. Their colleagues are generous in granting leave to print. With these opportunities for personal praise and propaganda, opposition newspapers and editorial writers should not be limited to weak, tepid, and supine criticism and discussion" (*Hall* v. *Binghamton Press Co.,* 263 App. Div. 403, 411, (3d Dept.)).

See also *Hall* v. *Binghamton, supra,* 263 App. Div. at pp. 412–13 (concurrence of Justice Bliss) for an eloquent dictum on this subject:

"Ours is a representative government, and one who assumes to represent our citizens in a legislative hall must expect that his acts will be commented upon and criticized…. Freedom of speech and press are guaranteed to us in our form of government, and it is the right of the free press to criticize severely and of a free citizenry to speak plainly to and of its representatives… . If the press or our citizens honestly believe that the acts of a legislative representative lend comfort to our nation's enemies there must be no question about the right to tell him just that in no uncertain terms. Queasy words will not do. How else can a democracy function? If the citizens believe such acts may be setting up a government of Quislings, they must have the right to say so. It is one of the verities of democracy that eternal vigilance is the price of liberty. The courts may not muzzle those who maintain such vigilance. Great issues require strong language."

> tutional government" (*De Jonge* v. *Oregon,* 299 U.S. 353, 365).

Such criticism and discussion of the actions of public officials are constitutionally protected not only against prior restraint but also against subsequent punishment. *Wood* v. *Georgia, supra; Schneider* v. *State,* 308 U.S. 147; *Bridges* v. *California,* 314 U.S. 252; *Grosjean* v. *American Press Co.,* 297 U.S. 233, 243–245; *Near* v. *Minnesota,* 283 U.S. 697, 707; *Thornhill* v. *Alabama,* 310 U.S. 88; *Cantwell* v. *Connecticut,* 310 U.S. 296.

Perhaps more than any other issue in the history of the United States, the demand of Negro Americans to be granted full rights as citizens, from the slave revolts through the Abolition Movement and the Civil War to the present non-violent movement, has been a most graphic witness to these observations by Justice Jackson:

> "… a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purposes when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminello* v. *Chicago,* 337 U.S. 1, 4.

This Court ruled in *Cantwell, supra,* that the Fourteenth Amendment invalidates state court judgments "based on a common law concept of the most general and undefined nature" (310 U.S. at 308) used by those on one side of "sharp differences" to penalize those on the other side. It concluded that:

> "… the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of citizens of a democracy" (310 U.S. at 310).

This Court has repeatedly recognized that the preferred First and Fourteenth Amendment freedoms of speech, press, assembly and association are the very cornerstone of the Bill of Rights and our entire democratic heritage (*Wood* v. *Georgia, supra; Thomas* v. *Collins,* 323 U.S. 516; *Schneider* v. *State,* 308 U.S. 147, 161; *De Jonge* v. *Oregon, supra,* 364); and that the constitutional protection of such criticism of public officials extends even to "half truths," "misinformation," exaggerations and inaccuracies (*Pennekamp* v. *Florida,* 328 U.S. 331; *Bridges* v. *California,* 314 U.S. 252; *Cantwell* v. *Connecticut,* 310 U.S. 296, 310). "Freedom of petition, assembly, speech and press could be greatly abridged by a practice of meticulously scrutinizing every editorial, speech, sermon or other printed matter to extract two or three naughty words on which to hang charges of 'group libel'" (Mr. Justice Black, dissenting, in *Beauharnais* v. *Illinois,* 343 U.S. 250, 273).

Neither the State of Alabama nor any other state may foreclose the exercise of these basic constitutional rights by the appellation of "libel per se" or any other like label (*NAACP* v. *Button,* 371 U.S. 415, 429; *Wood* v. *Georgia,* 370 U.S. 375, 386; *Craig* v. *Harney,* 331 U.S. 367; *Norris* v. *Alabama,* 294 U.S. 587).

As this Court ruled in *NAACP* v. *Button, supra:*

> "A State cannot foreclose the exercise of constitutional rights by mere labels" (371 U.S. at 429).

The decision and judgment below clearly conflict with these prior decisions.

Indeed, as emphasized by the context in which they arose, the proceedings below are nothing more than a subterfuge to employ legal sanctions, and the fear of legal sanctions, to silence criticism of the official conduct of public officials, and to thus, revive, in new guise, the heinous, long-proscribed doctrines of "Seditious Libel." This tyrannical device and its civil counterpart, Scandalum Magnatum (described in Odgers, *Libel and Slander* 65 (6th Ed. 1929)), have long been considered barred by the preferred constitutional guarantees of freedom of speech, press, assembly and association embodied in the First and Fourteenth Amendments (see Holmes, J., in *Abrams* v. *United States,* 250 U.S. 616, 630; *De Jonge* v. *Oregon,* 299 U.S. 353, 365; *Sillars* v. *Collier,* 151 Mass. 50; Chafee, *Free Speech in the United States* 27–29 (1941); Schofield, "*Freedom of Press in the United States,*" ESSAYS ON CONSTITUTIONAL LAW AND EQUITY 540–541 (1921)). They must not now be permitted resurrection for any purpose, much less that repressive use attempted here.

This Court's recent decision in *Wood* v. *Georgia, supra,* restates and reaffirms the well-established doctrine that criticism of the official conduct of public officials is protected against state infringement by the First and Fourteenth Amendments. There, the Court found these Amendments protected Sheriff Wood's written accusations to a Grand Jury that the Superior

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Court Judges of Georgia were guilty of abusing their offices, misusing the state criminal law, attempted intimidation of Negro residents, fomenting racial hatred, "race baiting" and "physical demonstrations such as used by the Ku Klux Klan." In so holding, this Court said, per Mr. Chief Justice Warren:

> "Men are entitled to speak as they please on matters vital to them; errors in judgment or unsubstantiated opinions may be exposed, of course, but not through punishment for contempt for the expression. *Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgement of the rights of free speech and assembly.*" (370 U.S. at 389) [Emphasis added].

*A fortiori, The Times* advertisement, which contained no official's name, no charge of crime or corruption in office, but rather which treated of vital and significant issues of the times, must fall well within that constitutionally protected ambit. Nor can any reasonable representation be made, to remove this case from that protected area, that *The Times* advertisement created any likelihood of immediate danger of conflict or violence. (*Whitney* v. *California,* 274 U.S. 357).

Further, the enormous sum of $500,000, awarded as punitive damages on a record so thoroughly devoid of crucial evidence, is wholly unconscionable. Such penalty by way of punitive damages (which, the jury was charged, constitutes "punishment" designed to deter defendants and others (R. 825–6)) represents a grave impairment of free expression and an unconstitutional restraint upon "the public need for information and education with respect to the significant issues of the times" (*Thornhill* v. *Alabama,* 310 U.S. at 102, quoted with approval in *Wood* v. *Georgia, supra*). The mere threat[22] of such "punishment" is far greater than the $400 fine and 20-day sentence for contempt which this Court has reversed as violative of the First and Fourteenth Amendments. (*Wood* v. *Georgia, supra.* See also *Barrows* v. *Jackson,* 346 U.S. 249; *Grosjean* v. *American Press Co.,* 297 U.S. 233).

The Alabama Supreme Court sustained the $500,000 verdict and judgment solely as proper "punitive damages" (R. 1175–9).[23] The technical and formal distinction that this huge penalty was imposed through civil rather than criminal libel prosecution is, in this situation, disingenuous at best, and lends no support to the judgment below.

For both this Court and the Circuit Court of Appeals have recognized that both civil and criminal libel prosecutions may encroach on the preferred rights guaranteed by the First and Fourteenth Amendments. See, *e.g., Beauharnais* v. *Illinois,* 343 U.S. 250, 263–4 (criminal); *Sweeney* v. *Patterson,* 128 F. 2d 457 (C. A., D. C.), cert. den., 317 U.S. 678 (civil).

In *Beauharnais* this Court stated:

> "'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel. Of course discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." (343 U.S. at 263, 264)

and significantly added in a footnote:

> "If a statute sought to outlaw libels of political parties, quite different problems not now before us would be raised. For one thing, the whole doctrine of fair comment as indispensable to the democratic political process would come into play [citing cases]. Political parties, like public men, are, as it were, public property." (*Id.,* p. 263, n. 18).

Criticism and discussion of the actions of public officials are a *sine qua non* of the democratic process.[24] It may fairly be said that the genius of our Bill of Rights lies precisely in its guarantee of the right to speak freely on public issues and to criticize public officials' conduct on the assumption that only an informed people is fit to govern itself. First Amendment freedoms

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[22] In *Farmers Ed. & Coop. Union* v. *WDAY,* 360 U.S. 525, 530, this Court said: "Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution." See also Riesman, *Democracy and Defamation: Fair Game and Fair Comment,* 42 COLUM. L. REV. 1282 (1943): There is a "need for protecting political and economic criticism against intimidation by the libel laws" (at p. 1309) " … smaller journals, struggling along on subsidies or barely managing on their own, are, of course, highly vulnerable to a libel suit …" (at p. 1310).

[23] Sullivan proved no special damages. Moreover, his testimony and that of his witnesses left little doubt that there was no injury to his reputation or standing in the community; more than likely, the contrary was true (R. 625, 638, 647, 651, 666, 721–4).

[24] "In dealing with governmental affairs, or the fitness of a political candidate for office, the law, however, has come to recognize a very broad privilege to comment freely and even criticize harshly. On matters of public concern, the expression of ideas may not be suppressed just because someone decides that the ideas are false. In that way we encourage the widest and broadest debate on public issues." Douglas, *A Living Bill of Rights* 26 (1961).

are "the most cherished policies of our civilization"[25] "vital to the maintenance of democratic institutions."[26]

This Court has recognized that the right to speak out for the civil rights of Negro citizens, and against those in public or private life who would deny them, is under bitter attack in Southern States, and has acted to protect that right in a long line of cases. *Gibson* v. *Florida Legislative Investigation Committee,* 372 U.S. 539; *NAACP* v. *Button,* 371 U.S. 415; *Shelton* v. *Tucker,* 364 U.S. 479; *Bates* v. *City of Little Rock,* 361 U.S. 516; *NAACP* v. *Alabama,* 357 U.S. 449.

In *Button,* this Court stated:

> "We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community …" (371 U.S. at 435).

In *Bates,* this Court noted that:

> "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." (361 U.S. at 523).

The award of punitive damages to a criticized official may well be more subversive of the freedom to criticize the government than is compelled disclosure of affiliation, which this Court has ruled inconsistent with the First Amendment in the cases cited above. See also *Gibson, supra; West Va. Board of Education* v. *Barnette,* 319 U.S. 624.

Indeed, "punishment by way of damages … not alone to punish the wrongdoer, but as a deterrent to others similarly minded,"[27] where such damages are subject to "no legal measure,"[28] exceeds even the criminal punishment of Seditious Libel. For here the "fine" is limited only by the complainant's *ad damnum* clause, and may be imposed without indictment or proof beyond a reasonable doubt. The Alabama courts require neither an intent to bring the official "into contempt or disrepute," as in the Sedition Act (Act of July 14, 1798, 1 Stat. 596), nor any proof of actual injury to reputation. The Trial Court below ruled the ad libelous *per se,* and instructed the jury (R. 823) that it was to be presumed to be "malicious." Further, the Court below ruled it was legally sufficient to constitute libel *per se* that the criticism, "if believed,"[29] would "tend to injure … [the official] in his reputation."[30]

Were the libel theory of the Alabama courts below allowed to stand, the danger to freedom of written expression would be tremendous. Its infection would spread quickly and disastrously, bringing suit next for slander for spoken words. A veritable blackout of criticism, a deadening conformity, would follow inexorably. It requires little imagination to picture the destructiveness of such weapons in the hands of those who, only yesterday, used dogs and fire hoses in Birmingham, Alabama against Negro petitioners leading non-violent protests against segregation practices.

**C. Vagueness and indefiniteness of standards require reversal of the judgment below** Such vague rules of liability, as were employed in the Trial Court's judgment and upheld in the Alabama Supreme Court's affirmance, restrict the exercise of First Amendment rights more seriously than would have the penalties stricken down in *Wood, supra,* or *Cantwell, supra,* or the compulsory disclosure prohibited in *Gibson, supra.* For the uncertainty created thereby is even greater than that involved in the following cases in which this Court has found vagueness constitutionally offensive.

In *NAACP* v. *Button,* 371 U.S. 415, a Virginia statute was condemned on the ground that the conduct it prohibited was "so broad and uncertain" as to "lend itself to selective enforcement against unpopular causes." As the Court said in *Button, supra:*

> "Broad prophylactic rules in the area of free expression are suspect [citing cases]. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." (371 U.S. at 435).

Similarly, in *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 71, the Court struck down a statute ostensibly designed to shield youthful readers from obscenity on the ground that the statutory mandate was "vague and uninformative," leaving the distributor of books "to speculate" as to whether his publication fell within the statute.

Perhaps the most telling of all statements on this point is contained in the dissent of Messrs. Justice Reed and Douglas in *Beauharnais:*

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[25] *Bridges* v. *California,* 314 U.S. 252, 260.
[26] *Schneider* v. *State,* 308 U.S. 147, 161.
[27] Ala. Sup. Ct. (R. 1176)
[28] *Ibid.* (R. 1177)
[29] *Ibid.* (R. 1162–3)
[30] *Ibid.* (R. 1155)

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> " … Racial, religious, and political biases and prejudices lead to charge and countercharge, acrimony and bitterness. If words are to be punished criminally, the Constitution at least requires that only words or expressions or statements that can be reasonably well defined, or that have through long usage an accepted meaning, shall furnish a basis for conviction.
>
> "These words—'virtue,' 'derision,' and 'obloquy'—have neither general nor special meanings well enough known to apprise those within their reach as to limitations on speech [citing case]. Philosophers and poets, thinkers of high and low degree from every age and race have sought to expound the meaning of virtue, but each teaches his own conception of the moral excellence that satisfies standards of good conduct. Are the tests of the Puritan or the Cavalier to be applied, those of the city or the farm, the Christian or non-Christian, the old or the young? Does the Bill of Rights permit Illinois to forbid any reflection on the virtue of racial or religious classes which a jury or a judge may think exposes them to derision or obloquy, words themselves of quite uncertain meaning as used in the statute? I think not. A general and equal enforcement of this law would restrain the mildest expressions of opinion in all those areas where 'virtue' may be thought to have a role. Since this judgment may rest upon these vague and undefined words, which permit within their scope the punishment of incidents secured by the guarantee of free speech, the conviction should be reversed." *Beauharnais* v. *Illinois,* 343 U.S. 250, 283–284.

Accordingly, on grounds of vagueness and uncertainty alone, the judgment below must be reversed.

**D. Respondent's erroneous contentions as to the defense of truth** Respondent, in opposing certiorari, contended that the availability of the defense of truth suffices to protect the First Amendment freedoms against encroachment by a common law libel action. This argument has been rejected by the courts and by history. *Sweeney* v. *Patterson,* 128 F. 2d 457, 458 (C. A., D. C.), cert. den., 317 U.S. 678, held:

> "Cases which impose liability for *erroneous reports of the political conduct of officials* reflect the obsolete doctrine that the governed must not criticize their governors … Information and discussion will be discouraged, and the public interest in public knowledge of important facts will be poorly defended if error subjects its author to a libel suit without even a showing of economic loss. *Whatever is added to the field of libel is taken from the field of free debate.*" [Emphasis added].

To the same argument, raised in defense of the Sedition Act of 1798, James Madison replied:

> " … [A] very few reflections will prove that [the Sedition Act's] baneful tendency is little diminished by the privilege of giving in evidence the truth of the matter contained in political writings."
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> * * * * *
>
> "But in the next place, it must be obvious to the plainest minds; that opinions, and inferences, and conjectural observations, are not only in many cases inseparable from the facts, but may often be more the objects of the prosecution than the facts themselves; or may even be altogether abstracted from particular facts; and that opinions and inferences, and conjectural observations, cannot be subjects of that kind of proof which appertains to facts, before a court of law." (*Kentucky-Virginia Resolutions and Mr. Madison's Report of 1799,* Virginia Commission on Constitutional Government 71 (1960)).

Respondent's case confirms Madison's observations, resting as it does on one minor inaccuracy in *The Times* ad and the strained inferences there from of respondent and his witnesses.

Nor, as this Court has expressly stated in *NAACP* v. *Button, supra,* is the truth of ideas and beliefs a precondition for their constitutional protection:

> " … For the Constitution protects expression and association without regard to the race, creed or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity or social utility of the ideas and beliefs which are offered." (371 U.S. at 444–5).

And the use by the Alabama Supreme Court (R. 1178) of the testimony of the Secretary of The Times, that the advertisement was "substantially correct" (R. 785), to sustain both an inference of malice and the $500,000 verdict, is best rebutted by Judge Clark in his cogent dissent in *Sweeney* v. *Schenectady Union Pub. Co.,* 122 F. 2d 288, 292 (C. A. 2), aff'd per curiam by an equally divided Court, 316 U.S. 642.

> "I do not think it an adequate answer to such a threat against public comment, which seems to me necessary if democratic processes are to function, to say that it applies only to false statements. For this is comment and inference, … and hence not a matter of explicit proof or disproof. The public official

> will always regard himself as not bigoted, and will so testify, sincerely enough. And then the burden of proving the truth of the defense will rest upon the commentator, who must sustain the burden of proving his inference true. If he fails in even a minority of the suits against him—as the sporting element in trials to juries susceptible to varying shades of local opinion would make probable—he is taught his lesson, and a serious brake upon free discussion established."

In sum, this Court must not permit a discredited technique of oppression, no matter how "subtle" or sophisticated or refined its new guise (*Bates* v. *Little Rock, supra,* at 523) to be restored as an effective device for men in office to

> " … injure and oppress the people under their administration, provoke them to cry out and complain; and then make that very complaint the foundation for new oppression and prosecutions."[31]

### III. The judgment and proceedings below violate petitioners' First and Fourteenth Amendment rights in that the record is devoid of evidence of authorization or publication of the ad in suit, and they require of total strangers to the publication expression of disbelief and disavowal

**A. Lack of evidence as denial of Due Process of Law** The record below is devoid of probative evidence of authorization or publication by any of the petitioners of the alleged libel or of any malice on their part (see pp. 8–12, *supra*).

In examining this record, District Judge Johnson, in *Parks* v. *New York Times Co.,* 195 F. Supp. 919 (M. D. Ala.), rev'd on other grounds by a two to one decision, 308 F. 2d 474 (C. A. 5), petition for cert. pending, (No. 687, 1962 Term, renumbered No. 52, 1963 Term), found and ruled as follows (pp. 922–3):

> "This Court reaches the conclusion that from the evidence presented upon the motion to remand in each of these cases there is no legal basis whatsoever for the claim asserted against the resident defendants Abernathy, Shuttlesworth, Seay, Sr., and Lowery [petitioners herein]. *From the facts available to this Court, no liability on the part of the four resident defendants existed under any recognized theory of law; this is true even with the application of the Alabama 'scintilla rule'.*"
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> * * * * *
>
> "They were neither officers nor members of the Committee, and had not authorized the committee, or Murray, or The New York Times, or anyone else to use their names in such a manner. *Neither resident defendant knew his name had been used until some time after the publication of the article in question. The theory that the article was authorized and that the individual resident defendants had authorized the use of their names through the Southern Christian Leadership Conference is without any evidentiary basis whatsoever. As a matter of fact, all the evidence is to the contrary and uncontradicted.*" [Emphasis and brackets supplied].[32]

The courts below relied on the unfounded premise that the petitioners were linked with the advertisement in question by the letter from A. Philip Randolph (R. 1948–9; 1992), which the Alabama Supreme Court seized upon and characterized as a certification that the petitioners had consented to the use of their names in the advertisement (R. 1170). On the contrary, however, it is undisputed that the letter referred to "signed members of the Committee" and that the petitioners' names were not attached thereto (R. 805–10, 818).

Therefore, as their names were used without their knowledge or consent (R. 754–5, 806–10), the assertion of the court below (R. 1170) that the Randolph letter certified petitioners' permission to use their names is clearly groundless and constitutes distorted fact finding.

In *Stein* v. *New York,* 346 U.S. 156, 181, this Court set forth the established rule:

> "Of course, this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a

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[31] Andrew Hamilton, Argument to the Jury, *Zenger's Trial,* 17 How. St. Tr. 675, 721–2.

[32] The majority decision of the 5th Circuit Court of Appeals in *Parks* v. *New York Times, supra,* is clearly shown by the Opinion to rest on matters not contained in the Record in this case (see 308 F. 2d 478, at 479, 482), and the issue there considered was the question of "colorable liability" of petitioners to defeat removal to the federal courts of other libel suits.

In fact, the two majority judges in the *Parks* case had before them the complete Record in the *Sullivan* case at bar and took no issue with District Judge Johnson's findings and decision that, on that Record, there was not a scintilla of evidence or any "recognized theory of law" to support any claim against petitioners (195 F. Supp. 919, 922). This is further confirmed by the dissenting Opinion of Judge Ainsworth in the *Parks* case, which states in relevant part:

"The majority opinion apparently agrees with the principal findings of fact of the court below [*i.e.,* of District Judge Johnson as quoted above] …", 308 F. 2d 474, 483 [brackets added].

> claim of federal right, else federal law could be frustrated by distorted fact finding."

Accord: *Wood* v. *Georgia,* 370 U.S. 375; *Craig* v. *Harney,* 331 U.S. 367; *Pennekamp* v. *Florida,* 328 U.S. 331.

As indicated, the judgment against petitioners clearly lacks any rational connection with, and is in fact directly contrary to, the undisputed record facts. Accordingly, the result below conflicts with this Court's decisions in *Thompson* v. *Louisville,* 362 U.S. 199; *Postal Telegraph Cable Co.* v. *City of Newport, Ky.,* 247 U.S. 464; *Tot* v. *United States,* 319 U.S. 463.[33]

Since there is no rational evidentiary support in the record for the finding that petitioners authorized the use of their names as sponsors of the advertisements, the judgment below clearly violates the "due process" requirements of the Fourteenth Amendment and must be set aside for lack of evidence. *Garner* v. *Louisiana,* 368 U.S. 157; *Thompson* v. *Louisville,* 362 U.S. 199.

**B. Prejudicial rulings below concerning "ratification;" silence as consent** Absent any evidence that petitioners published or authorized publication of the advertisement at issue, and in the face of uncontroverted evidence that petitioners' names were used without authorization or consent, the trial court improperly charged the jury (R. 824–5):

> "… although you may believe … that they did not sign this advertisement and did not authorize it, yet it is the contention of the plaintiff … that the four individuals … after knowing of the publication of the advertisement and after knowing of its content, ratified the use of their names … and we here define ratification as the approval by a person of a prior act which did not bind him but which was professedly done on his account or in his behalf whereby the act, the use of his name, the publication, is given effect as if authorized by him in the very beginning. Ratification is really the same as a previous authorization and is a confirmation or approval of what has been done by another on his account."

Petitioners duly excepted, and the Trial Judge duly granted an exception, to this crucial and prejudicial portion of the oral charge (R. 829); but the Supreme Court of Alabama nevertheless refused to rule thereon, on the purported ground that the "attempted exception was descriptive of the subject matter only, and is too indefinite to invite our review" (R. 1168).

The quoted oral charge rests solely on the silence of petitioners for approximately eight days, between their receipt, on or about April 11, 1960 (R. 799), of respondent's demand for retraction, and April 19, 1960, the date of commencement of respondent's suit; for the record is wholly devoid of any other act or omission of petitioners subsequent to the publication of the advertisement. Thus, the charge invited the jury to impose liability on petitioners solely on the basis of their silence subsequent to publication of the advertisement. But such silence does not have sufficient rational connection with the publication of the advertisement to satisfy the Due Process Clause of the Fourteenth Amendment, nor can the erroneous refusal of the Alabama Supreme Court to rule on petitioners' exceptions and Assignments of Error preclude review by this Court.

Moreover, the trial judge, contrary to established principles, in effect directed the jury to find the New York Times' ad in suit "libelous per se" (R. 823); and the Supreme Court of Alabama, while finding this charge "confused" and "invasive" of the province of the jury (R. 1166–7), still refused to find prejudice to petitioners (R. 1167).

Such erroneous and prejudicial rulings by the courts below unconstitutionally infringed petitioners' basic rights in their gross misapplication of controlling decisions of this Court, and in the oppressive and unreasonable judgment they buttressed. No state court can, particularly on such evidence, exact a price of $500,000 for *eight* days' silence and remain consistent with the First and Fourteenth Amendments.

Nor do petitioners' failures to reply constitute a ratification. Governing authority is clear that a prerequisite of "ratification" (even in contract cases) is knowledge by the "ratifying" party of all the relevant facts involved. Petitioners did not have such knowledge here (R. 787–804). Neither respondent nor the Courts below cited any applicable authority to negate this accepted definition of ratification. (*Cf. A. B. Leach & Co.*

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[33] In *Williams* v. *Tooke,* 108 F. 2d 758, 759 (C. A. 5), cert. den., 311 U.S. 655, the established rule was cogently restated as follows:

"[I]f a case between private parties is arbitrarily and capriciously decided, in violation of settled principles of law and contrary to undisputed facts, though the court so deciding had jurisdiction over the suit, the judgment may be in violation of the 14th Amendment. *Postal Telegraph Cable Co.* v. *Newport, Ky.,* 247 U.S. 464, 38 S. Ct. 566, 62 L. ed. 1215."

v. *Peirson,* 275 U.S. 120; and see *Angichiodo* v. *Cerami,* 127 F. 2d 849, 852 (C. A. 5)).

**C. Compulsory disclosure of belief** Moreover, any such attempt to require petitioners to retract or deny publication fatally conflicts with the freedoms of thought and association guaranteed by the Constitution and the decisions of this Court. *Gibson* v. *Florida Legislative Investigation Committee; NAACP* v. *Button; Talley* v. *California; Bates* v. *City of Little Rock; NAACP* v. *Alabama; West Va. Board of Education* v. *Barnette; De Jonge* v. *Oregon,* all *supra.*

The applicability of the doctrine of these cases to a failure to retract or deny cannot be seriously disputed. It is patent that compelled expression of disbelief, such as would result from imposition of liability for failure to retract a publication neither made nor authorized, is at least as dangerous as compulsion to disclose belief (*Talley* v. *California, supra; NAACP* v. *Alabama, supra*) or express belief (*West Va. Board of Education* v. *Barnette, supra*). This Court has ruled such compulsions unconstitutional.

These cases guarantee petitioners freedom to believe in the aims of the advertisement as well as freedom to associate themselves with others to accomplish such aims. As this Court said in *Gibson* (*supra,* 544):

> "This Court has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments (citing cases). The respondent Committee does not contend otherwise, nor could it, for, as was said in *NAACP* v. *Alabama, supra,* 'it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.' 357 U.S. at 460. *And it is equally clear that the guarantee encompasses protection of privacy of association …*" [Emphasis added].

Respondent, abetted by the coercive power of the State of Alabama, cannot constitutionally compel petitioners to decide within an *eight* day period whether or not to associate themselves publicly with, or dissociate themselves from, an advertisement seeking to achieve goals which petitioners may constitutionally support, especially under penalty of imputing malice to them and of punitive damages. Certainly no such compulsion can be constitutionally imposed on petitioners to make such disavowal of an ad, the full text of which they had not seen. Any such application of the Alabama retraction statutes cited by respondent (Title 7, Sections 913–16 of the Code of Alabama, at pp. 4–5, *supra*), or any such "rule of evidence" as respondent seeks to apply, would deprive petitioners of their right to obtain a copy of the advertisement, study the content thereof, investigate the accuracy of the statements claimed to be false, analyze the effect of the advertisement, consult with legal counsel, and—in the light of such study, investigation, analysis and consultation—decide either to deny publication, support the advertisement, remain silent or adopt some other course of conduct consistent with their consciences and beliefs.

The Alabama statutes as herein applied compelled petitioners to choose between public dissociation from beliefs and ideas and the legal imputation that they are associated with such beliefs and ideas. The First and Fourteenth Amendments, as interpreted in the controlling decisions cited above, prohibit such compulsory disclosure of association or dissociation.

Moreover, the Alabama "retraction statute" requires in part that defendant shall "publish … in as prominent and public a place or manner as the charge or matter published occupied, a full and fair retraction of such charge or matter." (Title 7, Section 914 of the Code of Alabama, set forth in full at p. 4, *supra*).

Assuming *arguendo* that petitioners might have been willing to "retract," it was clearly impossible for them to meet the conditions imposed by the Alabama statute. To make such retraction would require petitioners to place and pay for an advertisement in *The Times.* The record (together with the subsequent attachments and levies on petitioners made by respondent Sullivan) indicates that the limited salaries of petitioners would probably have made the cost of such an advertisement prohibitive to them. Accordingly, the Alabama retraction statute, as applied in the case at bar, clearly appears to discriminate against the indigent and in favor of the wealthy. It is, thus, apparent that the Alabama retraction statutes, as so applied against petitioners, deny equal protection of law in violation of the Fourteenth Amendment. *Cf. Gideon* v. *Wainwright,* 372 U.S. 335.

This Court has repeatedly held that freedom of thought and belief is absolute (*Cf. Cantwell* v. *Connecticut, supra,* 303; *West Va. Board of Education* v. *Barnette, supra*). Whatever may be

the power of the State to restrict or compel actions, the right to remain silent as to a choice of such conflicting beliefs is absolutely protected. The statement at issue here is a constitutionally protected expression of opinion on important public issues. However, even if this case involved a statement not within the safeguards of the First and Fourteenth Amendments, failure during an *eight* day period to deny publication could not sustain liability for publication of a claimed libel, without unconstitutionally restricting freedom of belief and association. *Gibson, supra; NAACP* v. *Alabama, supra.*

**IV. Petitioners' rights to Due Process and Equal Protection of Law and to a fair and impartial trial as guaranteed by the Fourteenth Amendment were flagrantly violated and abridged by the proceedings below**

Petitioners submit that their trial below was a "race trial," in which they were from first to last placed in a patently inferior position because of the color of their skins.

Throughout the trial below, the jury had before it an eloquent assertion of the inequality of the Negro in the segregation of the one room, of all rooms, where men should find equality, before the law. This Court's landmark decision in *Brown* v. *Board of Education, supra,* gave Constitutional recognition to the principle that segregation is inherently unequal; that it denies Negroes the equal protection of the law, stamps them with a "badge of inferiority" and deprives them of the full benefits of first-class citizenship.

In *Johnson* v. *Virginia, supra,* this Court specifically held:

> "Such a conviction [for contempt for refusing to sit in a Negro section of the court room] cannot stand, for it is no longer open to question that a State may not constitutionally require segregation of public facilities [Citing cases]. State-compelled segregation in a court of justice is a manifest violation of the State's duty to deny no one the equal protection of its laws." 373 U.S. at 62 [Brackets added].

Where Sullivan, a white public official, sued Negro petitioners represented by Negro counsel before an all-white jury, in Montgomery, Alabama, on an advertisement seeking to aid the cause of integration, the impact of courtroom segregation could only denote the inferiority of Negroes and taint and infect all proceedings, thereby denying petitioners the fair and impartial trial to which they are constitutionally entitled. And such courtroom segregation has been judicially noted to be a long-standing practice in the state courts of Alabama,[34] as well as throughout the South.[35]

In such a context and in light of Alabama's massive system of segregation,[36] the segregated courtroom, even if it be the immediate result of the acts of private persons in "voluntarily" segregating themselves, must be viewed as the direct result of state action and policy in contravention of the Equal Protection Clause. *Lombard* v. *Louisiana,* 373 U.S. 267. Here, as in *Lombard,* state policy and action has dictated, and is legally responsible for, the "private act" of segregation.

State courts and judges have an affirmative duty to secure the equal protection of laws (*Gibson* v. *Mississippi,* 162 U.S. 565, 586), which duty cannot be sidestepped, as below, by ignoring, or merely failing to discharge, the obligation. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715. Such duty can only be a more stringent obligation when the violation of equal protection occurs within the judge's own courtroom.

Compounding this unconstitutional segregation were the racial animosities of the community which the Trial Judge permitted, indeed encouraged, to enter and pervade the courtroom. See pp. 12–15, *supra.* The conclusion is inescapable that the trial denied petitioners equal protection and due process of law. *Irvin* v. *Dowd,* 366 U.S. 717; *Marshall* v. *United States,* 360 U.S. 310; *Shepherd* v. *Florida,* 341 U.S. 50, 54–5; *Craig* v. *Harney,* 331 U.S. 367.[37]

The conduct of the trial itself emphasized the race and racial inferiority of petitioners. In his summation to the jury, respondent's counsel, without so much as a rebuke from the Bench, made the following highly prejudicial and inflammatory remark:

> "In other words, all of these things that happened did not happen in Russia where the police run everything, they did not happen in the Congo where they still eat them, they happened in Montgomery, Alabama, a law-abiding community." (R. 929–30, 941).

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[34] See *U.S. ex rel Seals* v. *Wiman,* 304 F. 2d 53 (C. A. 5), cert. den., 372 U.S. 915.

[35] See *Johnson* v. *Virginia, supra.*

[36] See n. 7, p. 12, *supra.*

[37] Nor does it matter whether the cause of such denial was state action or private action (see *Moore* v. *Dempsey,* 261 U.S. 86, 91) such as inflammatory local newspaper reports. See *Irvin* v. *Dowd, supra.*

Respondent's counsel was also permitted by the Trial Judge, without restraint and over the objections of petitioners' counsel, to mispronounce the word "Negro" as "Nigra" and "Nigger" in the presence of the jury (R. 579–80). The acceptance by the Court below of the lame excuse that this was "the way respondent's counsel had always pronounced it all his life" (R. 580) is directly in conflict with the decisions of this Court. Customs or habits of an entire community (and, *a fortiori,* of an individual) cannot support the denial of constitutional rights. *Cooper* v. *Aaron,* 358 U.S. 1; *Eubanks* v. *Louisiana,* 356 U.S. 584, 588.

More than fifty years ago in *Battle* v. *United States,* 209 U.S. 36, 39, Justice Holmes noted that racist epithets should never be permitted in a court of law, and that the trial judge should prevent such prejudicial and offensive conduct:

> "Finally, an exception was taken to an interruption of the judge, asking the defendant's counsel to make an argument that did not tend to degrade the administration of justice. The reference was to an appeal to race prejudice and to such language as this: 'You will believe a white man not on his oath before you will a negro who is sworn. You can swallow those niggers if you want to, but John Randolph Cooper will never swallow them.' The interruption was fully justified."

The very use of the term "Nigger" in referring to a defendant or a witness has been recognized by numerous state appellate courts to constitute prejudicial, reversible error. See, *e.g., Taylor* v. *State,* 50 Tex. Crim. Rep. 560, *Harris* v. *State,* 96 Miss. 379; *Collins* v. *State,* 100 Miss. 435; *Roland* v. *State,* 137 Tenn. 663; *Hamilton* v. *State,* 12 Okla. Crim. Rep. 62.

Perhaps the most subtle and personally offensive example of racial derogation is the seeming difference in the Judge's forms of address to the various trial attorneys. Petitioners' trial counsel, all of whom are Negroes, were never addressed or referred to as "Mister" but always impersonally; indeed, in the transcript they are peculiarly referred to as "Lawyer" (*e.g.,* "Lawyer Gray," "Lawyer Crawford"); whereas all white attorneys in the case were consistently and properly addressed as "Mister" (see, *e.g.,* R. 787–90). Such suggested purposeful differentiation by the Judge himself not only would appear to classify Negro petitioners and their counsel as somehow different; it strongly intimates to all present, including the jurors, that in Alabama courts the Negro practitioner at the bar may be a "lawyer" but is not quite a man to be dignified as "mister."

Furthermore, the systematic and intentional exclusion of Negroes from the jury panel itself again stamped the Negro petitioners inferior and unequal, and inevitably denied them a fair trial. From *Norris* v. *Alabama,* 294 U.S. 587, decided by this Court in 1935, through the recent *U.S. ex rel. Seals* v. *Wiman,* 304 F. 2d 53, cert. den., 372 U.S. 915, the federal judiciary has struck down, as violative of the Equal Protection Clause, the systematic exclusion of Negroes from the jury panels of Alabama.

Such exclusion is "an evil condemned by the Equal Protection Clause" (*Akins* v. *Texas,* 325 U.S. 398, 408), which violates the basic constitutional guarantee of a "fair trial in a fair tribunal" (*In re Murchison,* 349 U.S. 133, 136). For such exclusion deprived petitioners of a tribunal of impartial and indifferent jurors from the locality without discrimination (*Strauder* v. *West Virginia,* 100 U.S. 303; see *Irvin* v. *Dowd,* 366 U.S. 717), and firmly rooted in the minds of all those within the courtroom (most significantly, the twelve white jurors) that Negroes are unqualified to sit and render justice over their fellow citizens (*Strauder* v. *West Virginia, supra;* see *Cassell* v. *Texas,* 339 U.S. 282).

The denial of a fair trial is still further evidenced by the illegal election of the trial judge, even under the Alabama Constitution, which requires the lawful election of a judge as a prerequisite to his exercise of judicial power.[38] Yet, as the federal judiciary has recognized, the State of Alabama unconstitutionally deprives Negroes of their franchise. *Alabama* v. *United States,* 304 F. 2d 583, aff'd 371 U.S. 37.[39] And the United States Civil Rights Commission has documented in detail the county by county exclusion of qualified Negroes from the Alabama electorate.[40]

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[38] Ala. Const. of 1901, Sec. 152.

[39] Thereinbelow the U.S. District Court stated (192 F. Supp. 677, 679 (M. D. Ala.)):

"The evidence in this case is overwhelming to the effect that the State of Alabama, acting through its agents, including former members of the Board of Registrars of Macon County, has deliberately engaged in acts and practices designed to discriminate against qualified Negroes in their efforts to register to vote."

[40] 1961 Report of U.S. Civil Rights Commission (see p. 26 for paragraph summary of voting registration discrimination in Montgomery County). The detailed factual findings of this eminent government agency are entitled to consideration by

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Such long-standing exclusion of Negroes from voting in elections for State judges insured that the Trial Judge, in whom was vested "justice" in the form of the "atmosphere of the court room,"[41] would reflect, as in fact he did, the prejudice of the dominant, white community that elected him.

In this atmosphere of hostility, bigotry, intolerance, hatred and "intense resentment of the … white community …,"[42] can anyone expect or believe that an all-white jury could render a true and just verdict? It is inconceivable that these twelve men, with the attention of the whole community of their friends and neighbors focused on them, would be able to give their attention to the complex shadings of "truth," malice, fair comment and to the nuances of libel *per se,* injury to reputation and punitive damages despite the absence of proof of pecuniary damages. These twelve men were not, in fact or probably in their own minds, a jury of "peers" of petitioners, but rather an instrumentality for meting out punishment to critics of the political activities of their elected City Commissioner.

The provision of Section 2 of the Fourteenth Amendment, providing for reduction in representation in the event of denial of the right to vote in a federal election or in the election of "the Executive and Judicial officers of a State" is, in part, an implicit recognition that those so elected cannot sit as representatives of those discriminated against, and, therefore, cannot claim full representation. (*Cf. Baker* v. *Carr,* 369 U.S. 186).

In the case at bar, the Trial Judge was not only passively elected by a dominant, prejudiced, white electorate; he actively participated in the perpetuation of white supremacy within the State courts of Alabama. At the very time Trial Judge Jones was considering petitioners' motions for a new trial, he stated in a companion libel case to this one that the Fourteenth Amendment was "a pariah," and inapplicable in proceedings in Alabama State courts which are governed by "white man's justice."[43]

Given the cumulative pressure of all of these forms and techniques of emphasizing petitioners' racial inequality, it is clear that petitioners could not possibly receive a fair trial. The answer prescribes the remedy; for "the apprehended existence of prejudice was one inducement which led to the adoption of the Fourteenth Amendment," *U.S. ex rel. Goldsby* v. *Harpole,* 263 F. 2d 71, 81 (C. A. 5), cert. den., 361 U.S. 838; see also *Shelley* v. *Kraemer, supra.* **Jurisdiction to redress flagrant violations of fundamental constitutional rights "is not to be defeated under the name of local practice"**[44] Petitioners properly presented numerous objections to all these violations of fundamental rights, to the segregated courtroom, the racial bias and community hostility which pervaded the trial, the improper newspaper and television coverage of the trial,[45] the intentional and systematic exclusion of Negroes from the jury and from voting, the illegal election and improper qualification of the presiding Trial Judge and the *ad hominem* appeals of respondent's attorneys. Such abridgements of due process and equal protection were not and could not be waived, and, under established authority, are properly before this Court for review.

These violations are inherent and implicit in the trial transcript, and too obvious for this Court not to notice. And, they are shockingly manifest outside the transcript as well. For, three decades after the decision in *Norris* v. *Alabama, supra,* one need only read *U.S. ex rel. Seals* v. *Wiman, supra,* to learn that Alabama still excludes Negroes from juries; *Alabama* v. *United States,* 304 F. 2d 583 (C. A. 5), aff'd 371 U.S. 37, to learn that Negroes are still excluded from voting in Alabama. In fact, state enforced racial segregation is the rule for all areas of public and civil activity,[46] a rule that will not, assuredly, be changed voluntarily by the officials of that state, if recent history is any accurate basis for prediction.[47]

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this court. See *H. J. Heinz Co.* v. *NLRB,* 311 U.S. 514. The attempt to conceal the voting record of Montgomery County from federal government inspection is a fact also known to the federal courts. See *Alabama* v. *Rogers,* 187 F. Supp. 848 (M. D. Ala.), aff'd 285 F. 2d 430 (C. A. 5), cert. den. 366 U.S. 913.

[41] Judge Learned Hand in *Brown* v. *Walter,* 62 F. 2d 798, 799–800 (C. A. 2); See also *Herron* v. *Southern P. Co.,* 283 U.S. 91, 95.

[42] *NAACP* v. *Button, supra* at 435.

[43] See n. 3, p. 3, *supra* and n. 20, pp. 26–7, *supra.*

[44] *Davis* v. *Wechsler,* 263 U.S. 22, 24.

[45] See pp. 12–15, *supra* and n. 10 at p. 15, *supra.*

[46] See n. 7, p. 12, *supra.*

[47] Desegregation of the State University of Alabama was only achieved with the direct assistance of federal law enforcement authorities, and in the face of vigorous dissent by Alabama public officials. *Alabama* v. *United States,* 373 U.S. 545.

Public facilities in Alabama have been desegregated only after court litigation, and over strenuous opposition of state and local authorities. See: *Browder* v. *Gayle,* 142 F. Supp. 707 (M. D. Ala.), aff'd 352 U.S. 903, reh. den., 352 U.S. 950;

This Court has held repeatedly that violations of fundamental constitutional rights, which plainly appear on the record, are properly reviewable whether or not state "local forms" of practice have been complied with. *Fay* v. *Noia,* 372 U.S. 391; *Williams* v. *Georgia,* 349 U.S. 375; *Terminello* v. *Chicago,* 337 U.S. 1; *Patterson* v. *Alabama,* 294 U.S. 600; *Blackburn* v. *Alabama,* 361 U.S. 199; *U.S. ex rel. Goldsby* v. *Harpole,* 263 F. 2d 71 (C. A. 5), cert. den., 361 U.S. 838.

Moreover, where, as hereinabove shown, petitioners have raised objections as best they can, and have put the issues plainly before this Court, established authority requires review of these objections, even if they were not raised strictly in accordance with local forms of practice and procedural technicalities. *Rogers* v. *Alabama,* 192 U.S. 226. In *Rogers,* a Negro's objection to the selection of the Grand Jury, because Negroes had been excluded from the list of eligible persons, was stricken by the Alabama Court as not in statutorily prescribed form. This Court reviewed the objection and reversed the judgment below, even though it "assume[d] that this section was applicable to the motion," saying (p. 230):

> "It is a necessary and well-settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

Accord: *Brown* v. *Mississippi,* 297 U.S. 278, 285; *Davis* v. *Wechsler, supra; American Ry. Express Co.* v. *Levee,* 263 U.S. 19, 21; *Ward* v. *Love County,* 253 U.S. 17, 22.

As this Court held in *Davis* v. *Wechsler, supra,* at p. 24:

> " … the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

## CONCLUSION

Petitioners respectfully submit that the headlong clash between the proceedings and judgment below and the United States Constitution as interpreted by this Court requires reversal of the judgment and dismissal of respondent's suit herein, in order to preserve and protect those rights which are the Constitution's greatest gift.

Respectfully submitted,

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## APPENDIX B

### Constitutional and statutory provisions involved

The constitutional provisions herein involved are the First, Fourteenth and Fifteenth Amendments to the Constitution of the United States, which read as follows:

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*Baldwin* v. *Morgan,* 251 F. 2d 780 (C. A. 5); *Baldwin* v. *Morgan,* 287 F. 2d 750 (C. A. 5); *Gilmore* v. *City of Montgomery,* 176 F. Supp. 776 (M. D. Ala.), modified and aff'd, 277 F. 2d 364 (C. A. 5); *Boman* v. *Birmingham Transit Co.,* 280 F. 2d 531 (C. A. 5); *Lewis* v. *The Greyhound Corp.,* 199 F. Supp. 210 (M. D. Ala.); *Sawyer* v. *City of Mobile, Alabama,* 208 F. Supp. 548 (S. D. Ala.); *Shuttlesworth* v. *Gaylord,* 202 F. Supp. 59 (N. D. Ala.), aff'd *sub. nom. Hanes* v. *Shuttlesworth,* 310 F. 2d 303 (C. A. 5); *Cobb* v. *Montgomery Library Board,* 207 F. Supp. 880 (M. D. ala.).

Alabama has failed to desegregate its public school system in compliance with the mandate of this Court in *Brown* v. *Board of Education, supra,* and has purposefully passed a series of statutes designed to evade compliance therewith. (See Alabama Code, Title 52 § 61 (13) authorizing the closing of integration-threatened schools by boards of education; *Id.,* Title 52 § 197(1)–(30) providing for secession of individual schools from local and state systems and for their organization into independent districts; *Id.,* Title 52 § 61(20) permitting allocation of education funds to private schools, etc.) See also *Statistical Summary, November 1961,* Southern Education Reporting Service, 5–6.

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**Amendment I**

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

* * * * *

**Amendment XIV**

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

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

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

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

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

**Amendment XV**

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

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

# In the Supreme Court of the United States

## October Term, 1963

## No. 40

RALPH D. ABERNATHY ET AL., PETITIONERS,
V.
L. B. SULLIVAN, RESPONDENT

### ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

### BRIEF FOR RESPONDENT[1]

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Appendix A

### OPINIONS BELOW

The opinion of the Supreme Court of Alabama (R. 1139) is reported in 273 Ala. 656, 144 So. 2d 25.

### JURISDICTION

Petitioners have sought to invoke this Court's jurisdiction under 28 U.S.C., § 1257 (3).

### QUESTIONS PRESENTED

**1.** Will this Court review a state jury verdict in a private common law libel action, embodied in a final state judgment and affirmed by a state's highest appellate court, when alleged federal questions asserted in this Court were not timely raised below in accordance with state procedure, and when there is nothing in the record to support the allegations of the petition and brief?

**2.** Is there a constitutionally guaranteed absolute privilege to defame an elected city official, under guise of criticism, in a paid newspaper advertisement so that participants in the publication of this defamation are immune from private common law libel judgment in a state court in circumstances where, because of the admitted falsity of the publication, the participants are unable to plead truth, privilege or retraction (to show good faith and eliminate punitive damages)?

**3.** Are libelous utterances in a paid newspaper advertisement within the area of constitutionally protected speech and press?

**4.** When persons whose names appear on a defamatory newspaper advertisement as "warm endorsers" of the advertisement do not deny participation in its publication in response to a

[1] To conserve the time of this Court the brief filed by this respondent in No. 39, New York Times Company v. Sullivan, will be referred to throughout this brief when the same issues have been covered there.

demand for retraction which charges publication, and ratify by silence, and when there is other evidence of authority for use of their names on the advertisement, will this Court re-examine a state jury verdict of liability in a private common law libel action, embodied in a final judgment affirmed by the highest state appellate court on a record which a Federal Court of Appeals has found to contain state questions of "substance" which could "go either way." on a bare assertion that the same record is totally devoid of evidence of petitioners' participation in the publication of this defamatory advertisement?

**5.** When an admittedly false newspaper advertisement charges that city police massively engaged in rampant, vicious, terroristic and criminal actions in deprivation of the rights of others, is a state court holding in a private common law libel action that such an utterance is libelous as a matter of state law—leaving to the jury the questions of publication, identification with the police commissioner, and damages—an infringement of constitutional rights of a participant in the publication of the libel?

**6.** When a paid newspaper advertisement published in circumstances described in Questions 2 and 4 contains admittedly false charges described in Question 5 about police action in a named city, may this Court consistently with its decisions and the 7th Amendment review on certiorari a state jury finding that the publication is "of and concerning" the city police commissioner whose name does not appear in the publication, and an award of general and punitive damages to him, when this state jury verdict embodied in a final state judgment has been approved by the state's highest appellate court?

**7.** May this Court consistently with its decisions and the 7th Amendment re-examine facts tried by a state jury when those findings have been embodied in a final state judgment affirmed by the highest state appellate court, and when review is sought on assertions that the verdict is wrong and the general and punitive libel damages merely excessive?

## STATUTES INVOLVED

Statutes referred to in this brief are contained in an appendix.

## STATEMENT

Petitioners, whose names appeared in a paid advertisement in the New York Times of March 29, 1960 (described in No. 39) as "warm endorsers" of the material contained in the advertisement, were joined as co-defendants in a common law libel action against The New York Times. The nature of the ad as a defamation, and not a political expression; its extensive falsity, not one "minor discrepancy" (Brief pp. 11, 17 and 42);[2] its reference to respondent; the questions of libel *per se* and truth as a limitation on libelous utterances; the circumstances of the ad's composition, publication and distribution; and other relevant facts of record are fully discussed in respondent's brief in No. 39. As observed there, these petitioners, two residents of Montgomery, and all residents of Alabama, introduced no testimony whatever to attempt to substantiate in any manner the truth of the defamatory material in the advertisement. Nor did they plead specially truth, or privilege.

The jury returned a joint verdict against The New York Times and petitioners in accordance with Alabama procedure,[3] for Five Hundred Thousand Dollars, and the trial court entered a judgment thereon.

In the case which was tried below, as distinguished from the case which petitioners attempt to bring in this Court, the only alleged defect of due process which petitioners asserted at the trial was a contention that there was an entire absence of evidence connecting them with the publication of the advertisement.

Petitioners filed motions for new trial but allowed them to lapse (R. 984, 999, 1013, 1028). Petitioners' assertion that there was a "general understanding" (Brief, pp. 14–15) which should have prevented this lapse and which was violated by the trial court and presumably by respondent's attorneys is absolutely contrary to fact. The record is barren of even a hint of such an understanding. The record shows that petitioners' then attorneys (none of whom have

[2] Petitioners are entirely inaccurate in their observation that other "alleged inaccuracies in the ad were conceded by respondent Sullivan to refer to matters within the jurisdiction of the State Education Department or other agencies, and to matters occurring long prior to respondent's taking office" (Brief, p. 12).

[3] Such a joint verdict against joint tort-feasors is required by Alabama procedure, *Bell v. Riley Bus Lines,* 257 Ala. 120, 57 So. 2d 612. It is, of course, collectible only once.

appeared in this Court) made no attempt to continue the motion within each thirty day period as required by Alabama statutory and case law. The Times' attorneys obviously were unaware of such an "understanding" since they continued The Times' motion from January 14, 1961 to February 10, 1961 (R. 968) and from February 10, 1961 to March 3, 1961 (R. 968), when the motion was heard. Moreover, none of the assignments of error in the Supreme Court of Alabama relating to their motion for new trial (R. 1100–1132) even mentioned that there was any "understanding." Clearly there was not. And clearly the motion lapsed.[4]

The court below affirmed the judgment as to all defendants.

At the trial petitioners denied any connection with the publication of the advertisement. But contrary to what petitioners would have this Court believe, their denial was far from "undisputed", as this record and the following summary of it make clear. Certainly the jury was not required as a matter of law to believe petitioners' protestations of innocence.

Respondent showed at the trial that the names of the petitioners were on the advertisement. They did not reply to respondent's demand for retraction, and their silence in the face of the demand's inculpatory charges that each published the libel under circumstances normally calling for a reply, was evidence from which a jury could find that they had admitted the statements contained in the demand, namely, that they had published the material in the ad. Their failure to deny publication—not their failure to retract—is the basis of the admission.

Moreover, petitioners' silence, and their failure in any manner to disavow the advertisement, constituted a ratification.

In addition, a letter from A. Philip Randolph (R. 587) went to the jury without objection from petitioners as part of The Times' answer to an interrogatory asking for authorization from the signers of the advertisement.[5]

Though petitioners recite that "undisputed" evidence (Brief, pp. 8 and 46) established that their names were not on the Randolph letter, and called the contrary finding below "distorted," the sworn answers to the interrogatories were in evidence, and Times witness Redding, according to the Times' brief in this Court, "did not recall this difference in the list of names …" (Times Brief in No. 39, p. 16).

A witness for the Times, Aaronson, testified without objection from petitioners, that the Randolph letter was a "written communication confirming the fact that the persons whose names were given here had authorized it" (R. 739), and that such a letter was "our usual authorization" (R. 740). Murray, the author of the ad, a witness for petitioners, testified that the executive director of the committee which inserted the ad, one Bayard Rustin, had stated that the southern ministers, including petitioners, did not have to be contacted or consulted since they were all members of the Southern Christian Leadership Conference, and supported the work of the committee (R. 809).

While not in this record, the report of *Abernathy v. Patterson,* 295 F. 2d 452 (5th Cir.), cert. den. 368 U.S. 986, shows that the complaint of these petitioners in that case verified by oath of Petitioner Abernathy strongly underlines the correctness of the jury verdict.[6]

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[4] Title 13, § 119, Code of Alabama, 1940 (App. A. p. 29); *Mount Vernon Woodbury Mills v. Judges,* 200 Ala. 168, 75 So. 916; *Ex parte Margart,* 207 Ala. 604, 93 So. 505; *Southern Ry. Co. v. Blackwell,* 211 Ala. 216, 100 So. 215.

[5] This letter stated:

"This will certify that the names included on the enclosed list are all signed members of the Committee to Defend Martin Luther King and The Struggle for Freedom in the South. Please be assured that they have all given me permission to use their names in furthering the work of our Committee."

[6] The painstaking analysis of the Court of Appeals revealed:

1. "(The complaint) alleges that on or about March 29, 1960, 'supporters of the plaintiffs and the movement for equality which they lead' inserted in The New York Times a paid advertisement …" (295 F. 2d at 453).

2. The advertisement "purports to be signed by twenty ministers including the four plaintiffs" (295 F. 2d at 454).

3. "The complaint then alleges: 'The defendants … conspired and planned … to deter and prohibit the plaintiffs and their supporters as set forth above, from utilizing their constitutional rights and in particular their right to access to a free press, by instituting fraudulent actions in libel against the plaintiffs …' " (295 F. 2d at 454).

4. "Irreparable damage is alleged, as follows: ' … (b) … the plaintiffs herein … will be deterred from using the media of a free press and all other rights guaranteed under the 1st Amendment …' " (295 F. 2d at 454).

5. "The relief prayed for is as follows: '… (c) … Restraining each of the defendants … from engaging in the aforesaid conspiracy designed to deter and prohibit the plaintiffs from exercising rights guaranteed by the 1st and

U.S. SUPREME COURT, OCTOBER 1963

BRIEF FOR RESPONDENT

The foregoing states the facts relating to this case.

The following matters, stated by petitioners to be in this case, are not.

**A. Matters outside the record which petitioners did not raise in the trial court, but attempted to raise for the first time in the Supreme Court of Alabama**

**1.** An alleged racially segregated court room. There is nothing in the record to support this. It was not raised in the trial court. Had it been, respondent would have strongly controverted the allegation as entirely untrue.[7]

**2.** An alleged "atmosphere of racial bias, passion and hostile community pressures" (Petition, p. 2). This was not raised in the trial court. There was no motion for change of venue, continuance, or for mistrial, though three lawyers represented the petitioners and five represented The New York Times at the trial (R. 567–568). Their silence in this regard speaks eloquently for the fair and impartial manner in which the trial judge conducted the trial. There is nothing in the record to support this allegation.

**3.** Alleged improper newspaper and television coverage at the trial. This was not raised in the trial court, nor were there motions for mistrial, change of venue, or continuance. There is nothing in the record to support the allegations. Had there been timely trial motions attacking the propriety of newspaper and television coverage of the trial, respondent would have strongly controverted them.

**4.** Alleged intentional and systematic exclusion of Negroes from the jury. This was not raised in the trial court and there is nothing in the record to support the allegation. Had the allegation been made, respondent would have strongly controverted it.[8]

**5.** Alleged unqualified trial judge—illegally elected and illegally a member of the county jury commission. This matter was not raised in the trial court. There was no motion seeking disqualification of the trial judge. There is nothing in the record to support the allegation. Had the charge been made in timely fashion, it would have been strongly controverted.

**6.** Alleged improper closing argument of one of the attorneys for respondent. There is nothing in the trial record about this. No objection to any argument of any attorney is in the record. There was no motion for mistrial. Had such objection or motion been made, respondent would have strongly controverted any suggestion of an improper argument. It is noteworthy that the Times makes no such allegation in this Court.

The record references contained in petitioners' brief on some of these points concern testimony offered by The Times in support of its motion for new trial, after petitioners' motion had lapsed. As the court below held, the trial court correctly excluded such evidence under the well-settled Alabama rule that only when newly discovered evidence is the basis for a motion for new trial is the trial court permitted to extend the hearing to matters not contained in the record of the trial.[9] Obviously the Times and these petitioners realize that the trial court ruling was correct. No petitioner challenges the ruling of the courts below here. Unlike the Times, however, these petitioners simply cite this rejected material as evidence anyway, and ask this Court to consider matters outside the record which were not raised in the trial below.

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14th Amendments with respect to freedom of speech, press …' " (295 F. 2d at 455).

6. "As has been noted (on page 454), the plaintiffs' claim of irreparable injury and loss is based (1) upon the claim that 'the plaintiffs and the Negro citizens of the State of Alabama will be deterred from using the media of a free press …' " (295 F. 2d at 456).

7. "Libelous utterances or publications are not within the area of constitutionally protected speech and press. The plaintiffs' claim that they will be deterred from using the media of a free press must therefore be predicated upon their claims of denial of a fair and impartial trial of the libel actions and the absence of a plain, adequate and complete remedy at law" (295 F. 2d at 456–457).

[7] Petitioners tell this Court that court room segregation "has been judicially noted to be a longstanding practice in the state courts of Alabama …" (Brief, p. 53). They cite *U.S. ex rel. Seals v. Wiman,* 304 F. 2d 53 (5th Cir. 1962). But that case specifically held that the question of a segregated courthouse, there sought to be raised, "[was] not presented to the State courts on the appeal from the judgment of conviction, on the petition for leave to file coram nobis, or in any other manner. Those questions cannot therefore be considered here" (304 F. 2d at 56).

[8] When this question was appropriately raised in a recent case, the method of selecting Montgomery County juries passed constitutional muster in this Court. *Reeves v. Alabama,* 355 U.S. 368, dismissing the writ of certiorari "as improvidently granted."

[9] (R. 1165) citing *Thomason v. Silvey,* 123 Ala. 694, 26 So. 644; and *Alabama Gas Company v. Jones,* 244 Ala. 413, 13 So. 2d 873.

**B. Matters outside the record which petitioners did not seek to raise in the trial court or in the Supreme Court of Alabama**

**1.** Petitioners object to the court reporter's transcript designation of their attorneys as "Lawyer." This matter was not raised in either court below. The record was obviously transcribed by the court reporter after the trial was over. It was prepared at the instance of The New York Times; filed by The Times with the clerk of the trial court; and "joined in" by these petitioners (R. 1031). Under Alabama procedure, these petitioners had an opportunity to make any objection to the transcript which they desired, and to bring the matter to the attention of the trial court for ruling.[10] Moreover, the transcript, noting appearances, refers to these, and all other attorneys, as "Esq." (R. 567–568).

Obviously these designations by the court reporter are his own, and were made after the trial had closed. They do not purport to be, nor are they, quotations of the manner of address used by the attorneys in the case or by the trial judge. A search of the record reveals that only an attorney for the New York Times used this form of address in the proceedings before the trial court without a jury.[11]

**2.** Petitioners object to an alleged statement by the trial judge regarding "white man's justice," said to have been made by him three months after this trial concluded. The matter was not raised in either court below. There was no motion to disqualify the judge.

But this record **does** reveal that this judge stated to the jury in his oral charge (R. 819–20):

> "Now, one other thing I would like to say although I think it is hardly necessary—one of the defendants in this case is a corporate defendant and some of the others belong to various races and in your deliberation in arriving at your verdict, all of these defendants whether they be corporate or individuals or whether they belong to this race or that doesn't have a thing on earth to do with this case but let the evidence and the law be the two pole stars that will guide you and try to do justice in fairness to all of these parties here. They have no place on earth to go to settle this dispute except to come before a Court of our country and lay the matter before a jury of twelve men in whose selection each party has had the right to participate and out of all the jurors we had here at this term of Court, some fifty jurors, the parties here have selected you because they have confidence in your honesty, your integrity, your judgment and your common sense. Please remember, gentlemen of the jury, that all of the parties that stand here stand before you on equal footing and are all equal at the Bar of Justice."

**3.** The allegation that there was a "general understanding" about petitioners' motion for new trial has already been covered. The point was not raised in either court below.

**4.** The allegation that an all-white jury deprived petitioners of their rights. This allegation was not made in either court below. Any such allegation of misconduct on the part of the jury would have been strongly controverted by respondent.

**5.** The pendency of other libel suits is a matter entirely outside this record; and not presented in either court below. The utter desperation involved in this attempt to bring in other libel suits is fully discussed in respondent's Brief in Opposition in No. 39. The argument will not be repeated here. The baseless and totally unfounded charge that this case is "part of a concerted, calculated program to carry out a policy of punishing, intimidating and silencing all who criticize and seek to change Alabama's notorious political system of enforced segregation" (Brief, p. 29) is simply a figment of the imagination of petitioners and their appellate lawyers. The charge is totally without foundation in the record or in fact. Significantly, none of the numerous attorneys representing the Times and these petitioners at the trial even questioned respondent about such a preposterous matter.

**6.** Alleged "deliberate, arbitrary, capricious, and discriminatory misapplications of law" (Petition, p. 12). It is impossible to determine what the reference is. It cannot have been raised in either court below.

It is not clear from petitioners' brief whether they claim that these matters outside the record (sub-heads "A" and "B") were raised by "steps" said to have been taken "to preserve their constitutional rights" (Brief, p. 14). Petitioners summarize these "steps" as demurrers to the complaint; objections to the admission of evidence; motions to exclude evidence as insufficient; motions for

[10] Title 7, § 827 (1a), Alabama Code, Appendix A, p. 27.

[11] "Mr. Embry: … I will read Lawyer Gray's examinations" (R. 550).

"Mr. Embry: At this time, your Honor, Lawyer Gray said, 'That's all' " (R. 551).

special jury findings; written requests to charge the jury; and motions for directed verdict in their favor (Brief, p. 14). Obviously, such "steps" could not raise the foregoing points in "A" and "B" under any known rules of practice. It is perfectly plain that the questions were never presented at the trial. And later observations that the questions are "inherent and implicit in the trial transcript" (Brief, p. 59), and "shockingly manifest outside the transcript as well" (Brief, p. 60), reveal clearly that petitioners, too, know these matters were never raised, and are not part of the record before this Court.

### C. Matters raised below but concluded to petitioners' apparent satisfaction at the time

This category relates to the pronunciation of the word "Negro." This entirely spurious objection vanished when, whatever the pronunciation had been, the pronouncing attorney was told to "read it just like it is" (R. 579). That was the end of the matter. No further objection was lodged by counsel for these petitioners, even though respondent's counsel spoke the word on at least a dozen additional occasions.[12] Moreover, there is nothing in the record to show precisely how the word was pronounced.

### D. Matters foreclosed from the statement of facts by virtue of petitioners' improper procedure below

When petitioners allowed their motions for new trial to lapse, they were foreclosed from raising questions regarding alleged excessiveness of the verdict or alleged insufficiency of the evidence.[13]

## SUMMARY OF ARGUMENT[14]

### I.

When the only defect of procedural due process asserted at the trial was an alleged entire absence of evidence connecting petitioners with the publication of the ad, they cannot go outside the record and seek to present to this Court new matters—none of which were raised in the trial court, and many of which were not asserted in the Supreme Court of Alabama. Included in this category are those arguments in this Court which allege a segregated trial courtroom; a hostile and prejudiced trial atmosphere; improper newspaper and television coverage of the trial; illegal composition of the jury; improper argument of one of the lawyers for respondent; improper court reporter's designation of petitioners' attorneys in the appellate transcript of the record prepared many months **after** the trial was over; improper statements allegedly made by the trial judge three months **after** the trial had ended; pendency of other libel suits by different plaintiffs, against different defendants, regarding different publications, in different communications media, brought in different forums, with different attorneys, and different issues; illegal election of the trial judge.

Had these allegations been made before or during the trial, they would have been strongly controverted. Since these assertions of alleged federal questions were not made in timely fashion, this Court will not go outside the record to consider them. *Stroble v. California,* 343 U.S. 181, 193–194 (charges of inflammatory newspaper accounts and community prejudice); *Michel v. Louisiana,* 350 U.S. 91 (systematic exclusion of Negroes from grand jury panels not raised in time); *Edelman v. California,* 344 U.S. 357, 358–359 (vagueness of vagrancy statute not raised at the trial); *Stembridge v. Georgia,* 343 U.S. 541, 547 (federal rights asserted for first time in state appellate court); *Bailey v. Anderson,* 326 U.S. 203, 206–207 (same holding); *Herndon v. Georgia,* 295 U.S. 441, 443 (trial court rulings not preserved in accordance with state practice); *Hanson v. Denckla,* 357 U.S. 235, 243–244.

Since petitioners allowed their motions for new trial to lapse, they may not question the size of the verdict against them or the sufficiency of the evidence. *State v. Ferguson,* 269 Ala. 44, 45, 110 So. 2d 280; *Shelley v. Clark,* 267 Ala. 621, 625, 103 So. 2d 743.

Moreover, it is noteworthy that the Times does not argue that the trial proceedings were defective or that they were other than fair and impartial.

### II.

The only federal question of due procedure raised at the trial was whether there was **any** evi-

[12] R. 580; 581; 592; 593; 631; and 656.

[13] *State v. Ferguson,* 269 Ala. 44, 45, 110 So. 2d 280; *Shelley v. Clark,* 267 Ala. 621, 625, 103 So. 2d 743.

[14] Respondent refers this Court to his summary of argument in New York Times Company v. Sullivan, No. 39, where applicable. Respondent has there set out a summary of the constitutional questions relating to the substantive Alabama law of libel as applied in this case. Those arguments will not be repeated in this brief.

dence connecting petitioners with the publication of the ad. Positive evidence of authority for the use of their names on the ad, supplemented by evidence of their conduct and admissions, proved the case against petitioners for submission to a jury.

Their names were on the ad; and the Randolph letter, according to the Times' answers to interrogatories, showed authorization.

In addition, petitioners did not reply to Sullivan's demand for retraction which expressly charged them with publication. Their silence in the face of the inculpatory charges contained in this demand, under circumstances normally calling for a reply, was evidence from which a jury could find an admission of the statements contained in the letters demanding retraction. This failure to deny publication—not their failure to retract—is the basis of admission. A litigant will not be heard to say that his extrajudicial statements or conduct, inconsistent with his position taken at the trial, is so little worthy of credence that the trier of fact should not even consider them. *Parks v. New York Times Company,* 308 F. 2d 424 (5th Cir. 1962); *Perry v. Johnston,* 59 Ala. 648, 651; *Peck v. Ryan,* 110 Ala. 336, 17 So. 733; *Craft v. Koonce,* 237 Ala. 552, 187 So. 730; *Sloss-Sheffield Co. v. Sharp,* 156 Ala. 284, 47 So. 279; Annotation 70 A. L. R. 2d 1099; Wigmore on *Evidence,* § 1071; Morgan on Admissions, included in *Selected Writings on Evidence,* p. 829.

Closely allied to the doctrine of silence as admission is the equally well-established principle that one may ratify by silence and acquiescence the act of another, even though the persons involved are strangers. This Alabama rule applies whether or not there is a preexisting agency relationship. *Parks v. New York Times Company,* 308 F. 2d 424 (5th Cir. 1962); *Birmingham News Co. v. Birmingham Printing Co.,* 209 Ala. 403, 407, 96 So. 336, 340–341; *Goldfield v. Brewbaker Motors* (Ala. App.), 36 Ala. App. 152, 54 So. 2d 797, cert. denied 256 Ala. 383, 54 So. 2d 800; *Woodmen of the World Ins. Co. v. Bolin,* 243 Ala. 426, 10 So. 2d 296; *Belcher Lumber Co. v. York,* 245 Ala. 286, 17 So. 2d 281; 1 *Restatement of Agency 2d,* Sec. 94, page 244; Comments (a) and (b); 3 *Restatement of Agency 2d* (App. pages 168 and 174).

**III.**

Libelous utterances are not within the area of constitutionally protected speech and press. *Roth v. United States,* 354 U.S. 476, 483; *Beauharnais v. Illinois,* 343 U.S. 250, 256; *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571–572; *Konigsberg v. State Bar of California,* 366 U.S. 36, 49–50; *Near v. Minnesota,* 283 U.S. 697, 715.

## ARGUMENT

### I. This court will not go outside the record to consider federal questions which were not timely raised in accordance with state procedure

This brief should be stricken for failure to comply with Rule 40 (5) of the Rules of this Court.[15] In addition to the matters outside the record which were not raised in the trial court, and in some instances not even in the Supreme Court of Alabama, petitioners' brief contains lengthy expositions of cases and other materials relating to racial matters involving peonage, education, voting, housing and zoning, public transportation, parks, libraries, petit and grand jury service, municipal boundaries, and reapportionment. In the aggregate, such material and excursions from the record consume almost forty-five per cent of petitioners' brief.

Quite apart from the duty of attorneys to confine issues and discussions to matters appearing in the record, particularly when seeking review in this Court, it is noteworthy that not one of the attorneys appearing here for these petitioners was their counsel in the trial court and none was present there. These appellate attorneys are, therefore, peculiarly unqualified to comment on matters not in the record.

This Court will surely note that the brief of The New York Times in No. 39 does not support petitioners' characterization of the trial proceedings. Several of its attorneys were personally present at the trial; participated in it; and know how it was conducted. They make no complaints of trial unfairness.

This is the second time petitioners have brought their baseless charges here. Their petition in *Abernathy v. Patterson,* 368 U.S. 986, climaxed a

[15] "Briefs must be compact, logically arranged with proper headings, concise, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court."

parade of these same groundless attacks through the entire federal judiciary. The District Court called them "impertinent"; the Court of Appeals upheld that court's dismissal of the complaint, 295 F. 2d 452 and this Court denied certiorari.

It is too elemental for argument that this Court will not go outside the record to consider alleged federal questions which were not timely raised in accordance with state procedure. *Stroble v. California,* 343 U.S. 181, 193–194 (charges of inflammatory newspaper accounts and community prejudice); *Michel v. Louisiana,* 350 U.S. 91 (systematic exclusion of Negroes from grand jury panels not raised in time); *Edelman v. California,* 344 U.S. 357, 358–359 (vagueness of vagrancy statute not raised at the trial); *Stembridge v. Georgia,* 343 U.S. 541, 547 (federal rights asserted for first time in state appellate court); *Bailey v. Anderson,* 326 U.S. 203, 206–207 (same holding); *Herndon v. Georgia,* 295 U.S. 441, 443 (trial court rulings not preserved in accordance with state practice); *Hanson v. Denckla,* 357 U.S. 235, 243–244:

> "We need not determine whether Florida was bound to give full faith and credit to the decree of the Delaware Chancellor since the question was not seasonably presented to the Florida court. Radio Station WOW v. Johnson, 326 U.S. 120, 128."

Thus, aside from the question of whether petitioners have an asserted absolute privilege to defame public officials under the guise of criticism, and thereby to avoid Alabama libel laws—a matter fully discussed in respondent's brief in No. 39, incorporated herein by reference—the only question which petitioners can argue on this record is whether it is "devoid of probative evidence of authorization or publication by any of the petitioners of the alleged libel or of any malice on their part" (Brief, p. 44).

As this Court held in *Garner v. Louisiana,* 368 U.S. 157, 163–164:

> "As in Thompson v. Louisville (citation), our inquiry does not turn on a question of sufficiency of evidence to support a conviction, but on whether these convictions rest upon **any evidence** which would support a finding that the petitioners' acts caused a disturbance of the peace." (Emphasis supplied.)

### II. There was ample evidence of petitioners' publication for submission to a jury

Positive evidence of authority for use of their names on the ad, supplemented by evidence of their conduct and admissions, proved the case against petitioners for submission to a jury.

Their names were on the ad; they did not reply to Sullivan's demand for a retraction which expressly charged them with publication, and their silence in the face of the inculpatory charges contained in the demand for retraction, under circumstances normally calling for a reply, was evidence from which a jury could find an admission of the statements contained in the letters demanding retraction. This admission came from their failure to deny publication—not their failure to retract.

Moreover, their silence and their failure in any manner to disavow the ad constituted a ratification.

The Randolph letter, according to The Times' answers to interrogatories, showed authorization. Testimony of Murray and of The Times' witness, Aaronson, has been cited. Clearly such evidence permitted a jury to decide where the truth lay. And, as pointed out, the sworn complaint in *Abernathy v. Patterson,* 295 F. 2d 452 (5th Cir.), cert. denied 368 U.S. 986, strongly corroborated the correctness of this verdict.

The Alabama trial court and Supreme Court held that there was a jury question on the issue of petitioners' liability as participants in the publication. The Court of Appeals in *Parks v. New York Times Company,* 308 F. 2d 474 (5th Cir. 1962), held that the position of this respondent in the state courts had substance, and that on the question of liability of these petitioners the judgment could "go either way" (308 F. 2d at 480–481). This is the classic situation for jury determination.

It is impossible to understand petitioners' assertion here that the Court of Appeals reversed the District Court "on other grounds" (Brief, p. 44). This erroneous assertion is simply in direct conflict with the holding of the Court. Moreover, in view of the Court's extensive and exhaustive discussion of silence in the face of the inculpatory charges in the demand for retraction as evidence from which a jury could "infer ratification or adoption" (308 F. 2d at 479), it is inconceivable that petitioners argue here (Brief, p. 45) that *Parks* "is clearly shown by the Opinion to rest on matters not contained in the Record in this case …" The very record on the merits in this case was introduced in the District Court in *Parks.*

The Alabama courts and the Federal Court of Appeals were clearly correct. Petitioners, in their lengthy brief, do not even attempt to challenge the legal authorities cited by respondent in his brief in opposition (pp. 15–18) except to say that they are inapplicable (Brief, pp. 48–49). But they are not, and give solid support to the jury finding of petitioners' liability.

**A. Silence as admission**

**1.** Petitioners' silence was an admission. This failure to deny publication—not their failure to retract—is the basis of the admission. Petitioners seem unable to distinguish between a retraction and a denial of publication. It is as simple as the rationale of admissions—that a litigant will not be heard to say that his extrajudicial statements or conduct inconsistent with his position taken at the trial, is so little worthy of credence that the trier of facts should not even consider them.[16]

The Legislature of Alabama, too, has given considerable importance to a demand for retraction in libel cases. Title 7, § 914, Code of Alabama (App. A of Brief in No. 39). The plaintiff in a libel suit such as this may not obtain punitive damages unless he seeks retraction from the defendant; and a defendant may eliminate his liability for punitive damages by retracting.

In much less compelling circumstances, *Gould v. Kramer,* 253 Mass. 433, 149 N. E. 142, 144, held that an admission of the truth of a letter charging defendant with authorship of another letter which had defamed the plaintiff could be considered from the silence of the defendant on receiving the written charge. This suit sought damages for false and malicious statements made by the defendant about the plaintiff in a letter to plaintiff's employer. Defendant contended that he had not signed or authorized the libelous matter contained in the letter.

While the principle of silence as an admission has been held not to obtain when the inculpatory statement was made in an unanswered letter, a well-recognized exception to this letter principle occurs where the unanswered letter contains a demand, or where it is part of a mutual correspondence.[17]

**2.** The absurd argument in petitioners' brief (pp. 49–52) that this rule of admissions—long a part of the law of evidence throughout this country—somehow violates a fancied federal right deserves no answer. It is undoubtedly based upon the inability of petitioners to distinguish between a denial of publication and a retraction. A denial does not involve a "dissociation" of belief in the underlying subject matter. If one has published a defamatory statement, he can and should be liable for civil damages in a common law libel action. If he had nothing to do with the defamatory publication, he certainly knows it, and is in a position to deny promptly. In short, these petitioners could have done exactly what they did at the trial—deny publication in an answer to the letter charging it.

Moreover, petitioners' argument that the retraction statute imposes too great a financial burden upon them is equally frivolous. If these petitioners had wanted a forum as wide as that of the advertisement, they could have written, most inexpensively, a letter to the New York Times for publication and there explained their alleged innocence.

These petitioners in response to the demand for retraction were not called upon to restate their views of the subject matter if in fact they had not participated in the publication. All the demand required in order to avoid this well established rule of evidence was a denial of publication. This is the rule of liability about which petitioners here complain. It involves no federal question whatever. It is as plain and simple a question of a state rule of evidence as can be imagined.

**B. Petitioners ratified and acquiesced in the use of their names on the advertisement**

Closely allied to the doctrine of silence as an admission is the equally well established principle that one may ratify by silence and acquiescence the act of another even though the persons involved are strangers. Alabama authorities and those elsewhere are thoroughly

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[16] See *Perry v. Johnston,* 59 Ala. 648, 651; *Peck v. Ryan,* 110 Ala. 336, 17 So. 733; *Craft v. Koonce,* 237 Ala. 552, 187 So. 730; *Sloss-Sheffield Co. v. Sharp,* 156 Ala. 284, 47 So. 279; Annotation 70 A. L. R. 2d 1099; Wigmore on *Evidence,* § 1071; Morgan on *Admissions,* included in *Selected Writings on Evidence,* p. 829.

[17] See annotations in 8 A. L. R. 1163; 34 A. L. R. 560; 55 A. L. R. 460. Alabama, too, recognizes this exception to the letter rule. See *Denson v. Kirkpatrick Drilling Co.,* 225 Ala. 473, 479–480, 144 So. 86, and *Fidelity & Casualty Co. v. Beeland Co.,* 242 Ala. 591, 7 So. 2d 265. Among the cases cited for this exception to the letter rule in *Beeland* are *Leach & Co. v. Pierson,* 275 U.S. 120, which recognizes an exception to the unanswered letter rule where the letter contains a demand.

explored in *Parks v. New York Times Company,* 308 F. 2d 474, 480 (5th Cir. 1962).[18]

This Alabama rule applies whether or not there is a pre-existing agency relationship, and thereby accords with the law set out in Professor Warren A. Seavey's notes to Restatement of Agency 2d, cited in footnote eighteen.

Obviously, the foregoing matters involve plain questions of state law, and present no occasion for the exercise of certiorari jurisdiction. If there was **any** evidence against petitioners, there is no federal question. Two Alabama Courts and one Federal Court of Appeals have held there was.[19] Apposite is this Court's observation in *Stein v. New York,* 346 U.S. 156, 181:

> "Of course, this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding. But that does not mean that we give no weight to the decision below, or approach the record de novo or with the latitude of choice open to some state appellate courts, such as the New York Court of Appeals."

This case does not entitle petitioners to ask this Court to sit as a jury and substitute its collective judgment for that of the jury which tried this case.

### III.

Respondent is reluctant to dignify by comment the statements in petitioners' brief which vilify respondent and his attorneys for bringing this libel suit. Surely, this Court will note the striking fact that nowhere in this lengthy and vituperative document is there the slightest suggestion that these petitioners, or indeed The New York Times, even attempted to introduce any testimony to substantiate the truth of the matters contained in the paid advertisement.

Respondent cares deeply about freedom of press and speech. And he is also concerned that these basic freedoms do not degenerate into a license to lie. As a commentator cited by petitioners has observed: "In the rise of the Nazis to power in Germany, defamation was a major weapon." Riesman, *Democracy and Defamation,* 42 Columbia L. Rev. 727, 728.

As venerable as John Peter Zenger is the imbedded constitutional principle that libelous utterances are not within the area of constitutionally protected speech and press.[20]

### CONCLUSION

For the foregoing reasons it is respectfully submitted that the writ of certiorari should be dismissed as improvidently granted; in the alternative, respondent respectfully submits that this case should be affirmed.

Respectfully submitted,

ROBERT E. STEINER III,

SAM RICE BAKER,

M. ROLAND NACHMAN JR.,

Attorneys for Respondent.

STEINER, CRUM & BAKER,

CALVIN WHITESELL,

Of Counsel.

I, M. Roland Nachman, Jr., of Counsel for Respondent, and a member of the bar of this Court, hereby certify that I have mailed copies of the foregoing Brief and of Respondent's Brief in No. 39, The New York Times Company v. Sullivan, air mail, postage prepaid, to I. H. Wachtel, Esquire, Counsel for petitioners, at his office at 1100 17th Street N. W., Washington, D.C. I also certify that I have mailed a copy of the foregoing Brief, air mail, postage prepaid, to Edward S. Greenbaum, Esquire, 285 Madison Avenue, New York, New York, as attorney for American Civil Liberties Union and the New York Civil Liberties Union, as *amici curiae.*

This … day of October, 1963.

M. Roland Nachman Jr.,

Of Counsel for Respondent.

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[18] These and others are: *Birmingham News Co. v. Birmingham Printing Co.,* 209 Ala. 403, 407, 96 So. 336, 340–341; *Goldfield v. Brewbaker Motors* (Ala. App.), 36 Ala. App. 152, 54 So. 2d 797. cert. denied 256 Ala. 383, 54 So. 2d 800; *Woodmen of the World Ins. Co. v. Bolin,* 243 Ala. 426, 10 So. 2d 296; *Belcher Lumber Co. v. York,* 245 Ala. 286, 17 So. 2d 281; 1 Restatement of Agency 2d, Sec. 94, page 244, comments (a) and (b); 3 Restatement of Agency 2d (App. pages 168 and 174).

[19] It is, of course, elemental that signers of an advertisement—or those who later ratified the use of their names—would be liable for its publication since every individual participant in the publication of a defamatory statement, except a disseminator, is held strictly liable. *Peck v. Tribune Co.,* 214 U.S. 185; *Developments in the Law—Defamation,* 69 Harvard L. Rev. at 912.

[20] *Roth v. United States,* 354 U.S. 476, 483; *Beauharnais v. Illinois,* 343 U.S. 250, 256; *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571–572; *Konigsberg v. State Bar of California,* 366 U.S. 36, 49–50; *Near v. Minnesota,* 283 U.S. 697, 715.

## APPENDIX A

Title 7, Section 827 (1), of the Code of Alabama:

> "BILLS OF EXCEPTION ABOLISHED IN CERTAIN COURTS; TRANSCRIPT OF EVIDENCE.—Bills of exception in the trial of cases at law in the circuit court and courts of like jurisdiction and all other courts of record having a full time court reporter and from which appeals lie directly to the court of appeals or the supreme court of Alabama, in the state of Alabama, are hereby abolished. If a party to a cause tried in such court desires to appeal from a judgment rendered, he shall, within five days after he perfects his appeal give notice to the court reporter, in writing, that he desires to appeal and request the evidence to be transcribed. The court reporter shall then promptly transcribe the evidence, including objections, oral motions, rulings of the court, and the oral charge of the court, certify the same and file it with the clerk within sixty days from the date on which the appeal was taken, or within sixty days from the date of the court's ruling on the motion for a new trial, whichever date is later. He shall also identify and copy all documents offered in evidence in the order in which offered. The evidence so transcribed and certified and filed shall be a part of the record, and assignments of error may be made as though the transcript constituted a bill of exceptions. If the reproduction of documents offered in evidence, such as maps or photographs, be difficult or impracticable, the court reporter shall so certify, and the clerk shall thereupon attach the original or a photostatic copy thereof to the transcript on appeal, and such original or photostatic copy thereof shall be a part of the transcript on appeal. If bulky or heavy objects be offered in evidence as exhibits which are not capable of being attached to the transcript, the court reporter shall certify that such exhibits are bulky or heavy objects which are not capable of being attached to the transcript; that he has identified them as part of the transcript on appeal. The court reporter shall include in his certificate a statement that he has notified both parties or their attorneys of record of the filing of the transcript of testimony. (1943, p. 423, § 1, effective Sept. 1, 1943; 1951, p. 1527, § 1, appvd. Sept. 12, 1951; 1956, 1st Ex. Sess., p. 43, § 1, appvd. Feb. 9, 1956.)"

Title 7, Section 827 (1a) of the Code of Alabama:

> "EXTENSION OF TIME FOR FILING TRANSCRIPT; OBJECTIONS TO TRANSCRIPT; HEARING AND RULINGS THEREON.—The period of time within which the reporter must file the transcript may be extended by the trial court for cause. Within ten (10) days after the filing with the clerk of the certified transcript by the court reporter, either party may file with the clerk objections to the certified transcript, with his certificate that he has notified the opposing party, or attorney of record, that the same will be called to the attention of the trial court at a specified time and place. If no objections are filed within such ten (10) days the transcript shall be conclusively presumed to be correct. The hearing of objections and the ruling of the court thereon shall be concluded within a period of ninety (90) days from the date of the taking of the appeal, provided that this period may be extended by the trial court for cause. The trial court shall endorse its ruling on the transcript, sign the same, all within said ninety (90) days period, except as hereinbefore provided. Any ruling of the trial court upon such requested hearing, as well as any ruling on objections to a succinct statement, provided for in section 827 (c) of this title, shall be reviewable, with error duly assigned by the dissatisfied party upon the appeal of the cause, and the evidence upon such hearing shall be duly certified by the court reporter. (1951, p. 1528, § 2, appvd. Sept. 12, 1951.)"

Title 13, Section 119 of the Code of Alabama:

> "EXECUTION ON JUDGMENT; NEW TRIAL MUST BE ASKED IN THIRTY DAYS.—After the lapse of ten days from the rendition of a judgment or decree, the plaintiff may have execution issued thereon, and after the lapse of thirty days from the date on which a judgment or decree was rendered, the court shall lose all power over it, as completely as if the end of the term had been on that day, unless a motion to set aside the judgment or decree, or grant a new trial has been filed and called to the attention of the court, and an order entered continuing it for hearing to a future day; provided that in any county in which the trial judge did not reside on the date of the trial such motion may be filed in the office of the clerk, or register, of the court of the county having jurisdiction of said cause, within thirty days from the date of the rendition of the judgment or decree, and the court shall lose all power over it sixty days after the date of the rendition of such judgment or decree as completely as if the end of the term had been on that day unless such motion is called to the attention of the court and an order entered continuing it for hearing to a future date. (1915, p. 707; 1939, p. 167.)"

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# New York Times Company v. Sullivan

**CITE AS 84 S.CT. 710 (1964)**

THE NEW YORK TIMES COMPANY,
PETITIONER,
V.
L. B. SULLIVAN.

RALPH D. ABERNATHY ET AL.,
PETITIONERS,
V.
L. B. SULLIVAN.

NOS. 39, 40.

Argued Jan. 6 and 7, 1964.
Decided March 9, 1964.
376 U.S. 254

William P. Rogers and Samuel R. Pierce, Jr., New York City, for petitioner in No. 40.

Herbert Wechsler, New York City, for petitioners in No. 39.

M. Roland Nachman, Jr., Montgomery, Ala., for respondent.

Mr. Justice Brennan delivered the opinion of the Court.

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.

Respondent L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He testified that he was "Commissioner of Public Affairs and the duties are supervision of the Police Department, Fire Department of Scales." He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company, a New York corporation which publishes the *New York Times* a daily newspaper. A jury in the Circuit Court of Montgomery County awarded him damages of $500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed. 273 Ala. 656, 144 So.2d 25.

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the *New York Times* on March 29, 1960.[1] Entitled "Heed Their Rising Voices," the advertisement began by stating that "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights." It went on to charge that "in their efforts to uphold these guarantees, they are being met by an unprecendented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. * * *" Succeeding paragraphs purported to illustrate the "wave of terror" by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, "the struggle for the right-to-vote," and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

The text appeared over the names of 64 persons, many widely known of their activities in public affairs, religion, trade unions, and the performing arts. Below these names, and under a line reading "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal," appeared the names of the four individual petitioners and of 16 other persons, all but two of whom were identified as clergymen in various Southern cities. The advertisement was signed at the bottom of the page by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," and the officers of the Committee were listed.

Of the 10, paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows:

> Third paragraph:
>
> "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission."
>
> Sixth paragraph:

[1] A replica of the advertisement follows this document.

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> "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have changed him with 'perjury'—a *felony* under which they could imprison him for *ten years*. * * *"

Although neither of these statements mentions respondent by name, he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of "ringing" the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission.[2] As to the sixth paragraph, he contended that since arrests are ordinarily made by the police, the statement "They have arrested [Dr. King] seven times" would be read as referring to him; he further contended that the "They" who did the arresting would be equated with the "They" who committed the other described acts and with the "Southern violators." Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King's protests with "intimidation and violence," bombing his home, assaulting his person, and charging him with perjury. Respondents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capital steps, they sang the National Anthem and not "My Country, 'Tis of Thee." Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

On the premise that the charges in the sixth paragraph could be read as referring to him, respondent was allowed to prove that he had not participated in the events described. Although Dr. King's home had in fact been bombed twice when his wife and child were there, both of these occasions antedated respondent's tenure as Commissioner, and the police were not only not implicated in the bombings, but had made every effort to apprehend those who were. Three of Dr. King's four arrests took place before respondent became Commissioner. Although Dr. King had in fact been indicted (he was subsequently acquitted) on two counts of perjury, each of which carried a possible five-year sentence, respondent had nothing to do with procuring the indictment.

Respondent mad no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel.[3] One of his witnesses, a former employer, testified that if he had believed the statements, he doubted whether he "would want to be associated with anybody who would be a party to such things that are stated in that ad," and that he would not re-employ respondent if he believed "that he allowed the Police Department to do the things that the paper say he did." But neither this witness nor any of the others testified that he had actually believed the statements in their supposed reference to respondent.

The cost of the advertisement was approximately $4800, and it was published by the *Times*

[2] Respondent did not consider the charge of expelling the students to be applicable to him, since "that responsibility rests with the State Department of Education."

[3] Approximately 394 copies of the edition of the *Times* containing the advertisement were circulated in Alabama. Of these, about 35 copies were distributed in Montgomery County. The total circulation of the Times for that day was approximately 650,000 copies.

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upon an order from a New York advertising agency acting for the signatory Committee. The agency submitted the advertisement with a letter from A. Philip Randolph, Chairman of the Committee, certifying that the persons whose names appeared on the advertisement had given their permission. Mr. Randolph was known to the *Times*' Advertising Acceptability Department as a responsible person, and in accepting the letter as sufficient proof of authorization it followed its established practice. There was testimony that the copy of the advertisement which accompanied the letter listed only the 64 names appearing under the text, and that the statement, "We in the south * * * warmly endorse this appeal," and the list of names thereunder, which included those of the individual petitioners, were subsequently added when the first proof of the advertisement was received. Each of the individual petitioners testified that he had not authorized the use of his name, and that he had been unaware of its use until receipt of respondent's demand for a retraction. The manager of the Advertising Acceptability Department testified that he had approved the advertisement for publication because he knew nothing to cause him to believe that anything in it was false, and because it bore the endorsement of "a number of people who are well known and whose reputation" he "had no reason to question." Neither he nor anyone else at the *Times* made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means.

Alabama law denies a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. Alabama Code, Tit. 7, § 914. Respondent served such a demand upon each of the petitioners. None of the individual petitioners responded to the demand, primarily because each took the position that he had not authorized the use of his name on the advertisement and therefore had not published the statements that respondent alleged had libeled him. The Times did not publish a retraction in response to the demand but wrote respondent a letter stating, among other things, that "we * * * are somewhat puzzled as to how you think the statements in any way reflect on you," and "you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you." Respondent filed this suit a few days later without answering the letter. The Times did, however, subsequently publish a retraction of the advertisement upon the demand of Governor John Patterson of Alabama, who asserted that the publication charged him with "grave misconduct and * * * improper actions and omissions as Governor of Alabama and Ex-Officio Chairman of the State Board of Education of Alabama." When asked to explain why there had been a retraction for the Governor but not for respondent, the Secretary of the Times testified: "We that because we didn't want anything that was published by the *The Times* to be a reflection on the State of Alabama and the Governor was, as far as we could see, the embodiment of the State of Alabama and the proper representative of the State and, furthermore, we had by that time learned more of the actual facts which the ad purported to recite and, finally, the ad did refer to the action of the State authorities and the Board of Education presumably of which the Governor is the ex-officio chairman * * *." On the other hand, he testified that he did not think that "any of the language in there referred to Mr. Sullivan."

The trial judge submitted the case to the jury under instructions that the statements in the advertisement were "libelous per se" and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made "of concerning" respondent. The jury was instructed that, because the statements were libelous *per se*, the law * * * implies legal injury from the bare fact of publication itself," "falsity and malice are presumed," general damages need not be alleged or proved but are presumed," and "punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown." An award of punitive damages—as distinguished from "general" damages, which are compensatory in nature—apparently Alabama law, and the judge charged that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages." He refused to charge, however, that the jury must be "convinced" of malice, in the sense of "actual intent" to harm or "gross negligence and recklessness," to make such an award, and he also refused to require that a verdict for respondent differentiate between com-

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pensatory and punitive damages. The judge rejected petitioners' contention that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments.

In affirming the judgment, the Supreme Court of Alabama sustained the trial judge's rulings and instructions in all respects. 273 Ala. 656, 144 So.2d. 25. It held that "[w]here the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the indictable offense, or tends to bring the individual into public contempt," they are "libelous per se"; that "the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning the plaintiff;" and that it was actionable without "proof of pecuniary injury * * *, such injury being implied." Id., at 673, 676, 144 So.2d, at 37, 41. It approved the trial court's ruling that the jury could find that statements to have been made "of and concerning" respondent, stating: "We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups praise or criticism is usually attached to the official in complete control of the body." Id., at 674–675, 144 So.2d at 39. In sustaining the trial court's determination that the verdict was not excessive, the court said that malice could be inferred from the *Times* "irresponsibility" in printing the advertisement while "*The Times* in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement"; from the *Times*' failure to retract for respondent while retracting for the Governor, whereas the falsity of some of the allegations was then known to the *Times* and "the matter contained in the advertisement was equally false as to both parties"; and from the testimony of the *Times*' Secretary that apart from the statement that the dining hall was padlocked, he thought the two paragraphs were "substantially correct." Id., at 686–687, 144 So.2d, at 50–51. The court reaffirmed a statement in an earlier opinion that "There is no legal measure of damages in case of this character." Id., at 686, 144 So.2d, at 50. It rejected petitioners' constitutional contentions with the brief statements that "The First Amendment of the U.S. Constitution does not protect libelous publications" and "The Fourteenth Amendment is directed against State action and not private action." Id., at 676, 144 So.2d, at 40.

[1, 2] Because of the importance of the constitutional issues involved, we granted the separate petitions for certiorari of the individual petitioners and of the *Times*. 371 U.S. 946, 83 S.Ct. 510, 9 L.Ed.2d 496. We reverse the judgment. We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.[4] We further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

I.

[3] We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court—that "The Fourteenth Amendment is directed against State action and not private action." That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a

[4] Since we sustain the contentions of all the petitioners under the First Amendment's guarantees of freedom of speech and of the press as applied to the States by the Fourteenth Amendment, we do not decide the questions presented by the other claims of violation of the Fourteenth Amendment. The individual petitioners contend that the judgment against them offends the Due Process Clause because there was no evidence to show that they had published or authorized the publication of the alleged libel, and that the Due Process and Equal Protection Clauses were violated by racial segregation and racial bias in the courtroom. The Times contends that the assumption of jurisdiction over its corporate person by the Alabama courts overreaches the territorial limits of the Due Process Clause. The latter claim is foreclosed from our review by the ruling of the Alabama courts that the *Times* entered a general appearance in the action and thus waived its jurisdictional objection; we cannot say that this ruling lacks "fair or substantial support" in prior Alabama decisions. See *Thompson v Wilson*, 224 Ala. 299, 140 So. 439 (1932); compare *N. A. A. C. P. v Alabama*, 357 U.S. 449, 454–458, 78 S.Ct. 1163, 2 L.Ed.2d 1488.

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civil action and that it is common law only, though supplemented by statute. See, e. g., Alabama Code, Tit. 7, §§ 908–917. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised. See Ex parte Virginia, 100 U.S. 339, 346–47, 25 L.Ed. 676; *American Federation of Labor v. Swing*, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855.

The second contention is that the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the *Times* is concerned, because the allegedly libelous statements were published as part of a paid, "commercial" advertisement. The argument relies on *Valentine v. Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262, where the Court held that a city ordinance forbidding street distribution of commercial and business advertising matter did not abridge the First Amendment freedoms, even as applied to a handbill having a commercial message on one side but a protest against certain official action on the other. The reliance is wholly misplaced. The Court in Chrestensen reaffirmed the constitutional protection for "the freedom of communicating information and disseminating opinion"; its holding was based upon the factual conclusions that the handbill was "purely commercial advertising" and that the protest against official action had been added only to evade the ordinance.

The publication here was not a "commercial" advertisement in the sense in which the word was used in Chrestensen. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. See *N. A. A. C. P. v. Button*, 371 U.S. 415, 435, 83 S.Ct. 328, 9 L.Ed.2d 405. That the Times was paid for publishing the advertisement is as immaterial in this connection as in the fact that newspapers and books are sold. *Smith v. California* 361 U.S. 147, 150, 80 S.Ct. 215, 4 L.Ed.2d 205; cf. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64, n. 6, 83 S.Ct. 631, 9 L.Ed.2d 584. Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. Cf. *Lovell v. City of Griffin*, 303 U.S. 444, 452, 58 S.Ct. 666, 82 L.Ed. 949; *Schneider v. State*, 308 U.S. 147, 164, 60 S.Ct. 146, 84 L.Ed. 155. The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013. To avoid placing such a handicap upon the freedoms of expression, we hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement.[5]

Under Alabama law as applied in this case, a publication is "libelous per se" if the words "tend to injure a person * * in his reputation" or to "bring [him] into public contempt;" the trial court stated that the standard was met if the words are such as to "injure him in his public office, or want of official integrity, or want of fidelity to a public trust * *." The jury must find that the words were published "of and concerning" the plaintiff, but where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once "libel per se" has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. *Alabama Ride Co. v. Vance*, 235 Ala. 263, 178 So. 438 (1938); *Johnson Publishing Co. v. Davis*, 271 Ala. 474, 494–495, 124 So.2d 441, 457–458 (1960). His privilege of "fair comment" for expressions of opinion depends on the truth of the facts upon which the comment is based. *Parsons v. Age-Herald Publishing Co.*, 181 Ala. 439, 450, 61 So. 345, 350 (1913). Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an

[5] See American Law Institute, Restatement of Torts, § 593, Comment b (1938).

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inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. *Johnson Publishing Co. v. Davis*, supra, 271 Ala., at 495, 124 So.2d, at 458.

The question before us in whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

[5] Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications.[6] Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. The dictum in *Pennekamp v. Florida*, 328 U.S. 331, 348–349, 66 S.Ct. 1029, 1038, 90 L.Ed. 1295, that "when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants," implied no view as to what remedy might constitutionally be afforded to public officials. In *Beauharnais v. Illinois*, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919, the Court sustained an Illinois criminal libel statute as applied to a publication held to be both defamatory of a racial group and "liable to cause violence and disorder." But the Court was careful to note that it "retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel"; for "public men, are, as it were, public property," and "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." Id., at 263–264, 72 S.Ct. at 734, 96 L.Ed. 919 and n. 18. In the only previous case that did present the question of constitutional limitations upon the power to award damages for libel of a public official, the Court was equally divided and the question was not decided. *Schenectady Union Pub. Co. v. Sweeney*, 316 U.S. 642, 62 S.Ct. 1031, 86 L.Ed. 1727. In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. *N. A. A. C. P. v. Button* , 371 U.S. 415, 429, 83 S.Ct. 328, 9 L.Ed.2d 405. Like insurrection,[7] contempt,[8] advocacy of unlawful acts,[9] breach of the peace,[10] obscenity,[11] solicitation of legal business,[12] and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

[6–8] The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369, 51 S.Ct. 532, 536, 75 L.Ed. 1117. "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," *Bridges v. California*, 314 U.S. 252, 270, 62 S.Ct. 190, 197, 86 L.Ed. 192, and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." *N. A. A. C. P. v. Button*, 371 U.S. 415, 429, 83 S.Ct. 328, 9 L.Ed.2d 405. The First Amendment, Said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F.Supp. 362, 372

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[6] *Konigsberg v. State Bar of California*, 366 U.S. 36, 49, and n. 10, 81 S.Ct. 997, 6 L.Ed.2d 105; *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 48, 81 S.Ct. 391, 5 L.Ed.2d 403; *Roth v. United States*, 354 U.S. 476, 486–487, 77 S.Ct. 1304, 1 L.Ed.2d 1498; *Beaubarnais v. Illinois*, 343 U.S. 250, 266, 72 S.Ct. 725, 96 L.Ed. 919; *Pennekamp v. Florida*, 328 U.S. 331, 348–349, 66 S.Ct. 1029, 90 L.Ed. 1295; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 80 L.Ed. 1031; *Near v. Minnesota*, 283 U.S. 697, 715, 51 S.Ct. 625, 75 L.Ed. 1357.

[7] *Herndon v. Lowry*, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066.

[8] *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192; *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295.

[9] *De Jonge v. Oregon*, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278.

[10] *Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697.

[11] *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

[12] *N. A. A. C. P. v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405.

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(D.C.S.D.N.Y.1943). Mr. Justice Brandeis, in his concurring opinion in *Whitney v. California*, 274 U.S. 357, 375–376, 47 S.Ct. 641, 648, 71 L.Ed. 1095, gave the principle its classic formulation:

> "Those who won our independence believed * * * that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

[9] Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. See *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Fd. 1131; *De Jonge v. Oregon*, 299 U.S. 353, 365, 57 S.Ct. 255, 81 L.Ed. 278. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

[10] Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. Cf. *Speiser v. Randall*, 357 U.S. 513, 525–526, 78 S.Ct. 1332, 2 L.Ed.2d 1460. The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *N. A. A. C. P. v. Button*, 371 U.S. 415, 445, 83 S.Ct. 328, 344, 9 L.Ed.2d 405. As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." *4 Elliot's Debates on the Federal Constitution* (1876), p. 571. In *Cantwell v. Connecticut*, 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213, the Court declared:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they need * * * to survive," *N. A. A. C. P. v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405, was also recognized by the Court of Appeals for the District of Columbia Circuit in *Sweeney v. Patterson*, 76 U.S.App.D.C. 23, 24, 128 F.2d 457, 458 (1942), cert. denied, 317 U.S. 678, 63 S.Ct. 160, 87 L.Ed. 544. Judge Edgerton spoke for a unanimous court which affirmed the dismissal of a Congressmen's libel suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. He said:

> "Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. * * * The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressman. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. * * * Whatever is added to the field of libel is taken from the field of free debate."[13]

[13] See also Mill, *On Liberty* (Oxford: Blackwell, 1947), at 47:

"* * * [T]o argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion * * * all this, even to the most aggravated degree, is so continually done in perfect good faith, by

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[11, 12] Injury to official reputation error affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192. This is true even though the utterance contains "half-truths" and "misinformation." *Pennekamp v. Florida*, 328 U.S. 331, 342, 343, n. 5, 345, 66 S.Ct. 1029, 90 L.Ed. 1295. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. See also *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546; *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569. If judges are to be treated as "men of fortitude, able to thrive in a hardy climate," *Craig v. Harney*, supra, 331 U.S., at 376, 67 S.Ct., at 1255, 91 L.Ed. 1546, surely the same must be true of other government officials, such as elected city commissioners.[14] Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

[13, 14] If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment. See Levy, *Legacy of Suppression* (1960), at 258 et seq.; Smith, *Freedom's Fetters* (1956), at 426, 431 and *passim.* That statute made it a crime, punishable by a $5,000 fine and five years in prison, "if any person shall write, print, utter or publish * * * any false, scandalous and malicious writing and writings against the government of the United States, or either house of the Congress * * *, or the President * * *, with intent to defame * * * or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." The Act allowed the defendant the defense of truth, and provided that the jury were to be judges both of the law and the facts. Despite these qualifications, the Act, was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. In the famous Virginia Resolutions of 1798, the General Assembly of Virginia resolved that it

> "doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the 'Alien and Sedition Acts,' passed at the last session of Congress * * *. [The Sedition Act] exercises * * * a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto—a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which was ever been justly deemed the only effectual guardian of every other right." *4 Elliot's Debates,* supra, pp. 553–554.

Madison prepared the Report in support of the protest. His premise was that the Constitution created a form of government under which "The people, not the government, possess the absolute sovereignty." The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels. This form of government was "altogether different" from the British form, under which the Crown was sovereign and the people were subjects. "Is it not natural and necessary, under such different circumstances," he asked, "that a different degree of freedom in the use of the press should be contemplated?" *Id.*, pp. 569–570. Earlier, in a debate in the House of Representatives, Madison had said: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." *4 Annals of Congress*, p. 934 (1794). Of the exercise

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persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct."

[14] The climate in which public officials operate, especially during a political campaign, has been described by one commentator in the following terms: "Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent." Noel, *Defamation of Public Officers and Candidates*, 49 Col.L.Rev. 875 (1949).

For a similar description written 60 years earlier, see Chase, *Criticism of Public Officers and Candidates for Office*, 23 Am.L.Rev. 346 (1889).

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of that power by the press, his Report said: "In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands * * *." *4 Elliot's Debates*, supra, p. 570. The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government.[15]

Although the Sedition Act was never tested in this Court,[16] the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. See, e. g., Act of July 4, 1840, c. 45, 6 Stat. 802, accompanied by H.R. Rep. No. 86, 26th Cong., 1st Sess. (1840). Calhoun, reporting to the Senate on February 4, 1836, assumed that its invalidity was a matter "which no one now doubts." Report with Senate bill No. 122, 24th Cong., 1st Sess., p. 3. Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: "I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." Letter to Mrs. Adams, July 22, 1804, *4 Jefferson's Works* (Washington ed.), pp. 555, 556. The invalidity of the Act has also been assumed by Justices of this Court. See Holmes, J., dissenting and joined by Brandeis, J., in *Abrams v. United States*, 250 U.S. 616, 630, 40 S. Ct. 17, 63 L.Ed. 1173; Jackson, J., dissenting in *Beauharnais v. Illinois*, 343 U.S. 250, 288–289, 72 S.Ct. 725, 96 L.Ed. 919; Douglas, *Constitutional Limitations* (8th ed., Carrington, 1927), pp. 899–900; Chafee, *Free Speech in the United States* (1942), pp. 27–28. These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.

[15] There is no force in respondent's argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States. It is true that the First Amendment was originally addressed only to action by the Federal Government, and that Jefferson, for one, while denying the power of Congress "to control the freedom of the press," recognized such a power in the States. See the 1804 Letter to Abigail Adams quoted in *Dennis v. United States*, 341 U.S. 494, 522, n. 4, 71 S.Ct. 857, 95 L.Ed. 1137 (concurring opinion). But this distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment's restrictions. See e. g., *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138; *Schneider v. State*, 308 U.S. 147, 160, 60 S.Ct. 146, 84 L.Ed. 155; *Bridges v. California*, 314 U.S. 252, 268, 62 S.Ct. 190, 86 L.Ed. 192; *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 9 L.Ed.2d 697.

[16, 17] What a State may not constitutionally bring about by means of a criminal statue is likewise beyond the reach of its civil law of libel.[17] The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. See *City of Chicago v. Tribune Co.,* 307 Ill. 595, 607, 139 N.E. 86, 90 (1923). Alabama, for example, has a criminal libel law which subjects to prosecution "any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude," and which allows as punishment upon conviction a fine

[15] The Report on the Virginia Resolutions further stated:

"[I]t is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; * * * which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct. Nor can there be a doubt * * * that a government thus intrenched in penal statutes against the just and natural effects of a culpable administration, will easily evade the responsibility which is essential to a faithful discharge of its duty.

"Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits of the candidates respectively."*4 Elliot's Debates*, supra, p. 575.

[16] The Act expired by its terms in 1801.

[17] Cf. *Farmers Educational and Cooperative Union of America v. WDAY*, 360 U.S. 525, 535, 79 S.Ct. 1302, 3 L.Ed.2d 1407.

not exceeding $500 and a prison sentence of six months. Alabama Code, Tit. 14, § 350. Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the sedition Act. And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication.[18] Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584.

[18] The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in *Smith v. California,* 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale. We said:

> "For if the bookseller is criminally liable without knowledge of the contents, * * * he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. * * * and the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. * * * [H]is timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally press directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded." (361 U.S. 147, 153–154, 80 S.Ct. 215, 218, 4 L.Ed.2d 205.)

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A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.[19] Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. See, e.g., *Post Publishing Co. v. Hallam,* 59 F. 530, 540 (C.A.6th Cir. 1893); see also Noel, *Defamation of Public Officers and Candidates,* 49 Col.L. Rev. 875, 892 (1949). Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." *Speiser v. Randall,* supra, 357 U.S., at 526, 78 S.Ct. at 1342, 2 L.Ed.2d 1460. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

[19, 20] The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. An oft-cited statement of a like rule, which has been adopted by a number of state courts,[20] is found in the Kansas

[18] *The Times* states that four other libel suits based on the advertisement have been filed against it by others who have served as Montgomery City Commissioners and by the Governor of Alabama; that another $500,000 verdict has been awarded in the only one of these cases that has yet gone to trial; and that the damages sought in the other three total $2,000,000.

[19] Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about "the clearer perception and livelier impression of truth, produced by its collision with error." Mill, *On Liberty* (Oxford: Blackwell, 1947), at 15; see also Milton, *Areopagitica, in Prose Works* (Yale, 1959), Vol. II, at 561.

[20] E. g., *Ponder v. Cobb,* 257 N.C. 281, 299, 126 S.E.2d 67, 80 (1962); *Lawrence v. Fox,* 357 Mich. 134, 146, 97 N.W.2d 719,

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case of *Coleman v. MacLennan,* 78'Kan. 711, 98 P. 281 (1908). The State Attorney General, a candidate for re-election and a member of the commission charged with the management and control of the state school fund, sued a newspaper publisher for alleged libel in an article purporting to state facts relating to his official conduct in connection with a school-fund transactions. The defendant pleaded privilege and the trial judge, over the plaintiff's objection, instructed the jury that

> "where an article is published and circulated among voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without malice, the article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff; and such a case the burden is on the plaintiff to show actual malice in the publication of the article."

In answer to a special question, the jury found that the plaintiff had not proved actual malice, and a general verdict was returned for the defendant. On appeal the Supreme Court of Kansas, in an opinion by Justice Burch, reasoned as follows (78 Kan., at 724, 98 P., at 286);

> "[I]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great and the chance of injury to private character so small that such discussion must be privileged."

The court thus sustained the trial court's instruction as a correct statement of the law, saying:

> "In such a case the occasion gives rise to a privilege qualified to this extent. Any one claiming to be defamed by the communication must show actual malice, or go remediless. This privilege extends to a great variety of subjects and includes matters of public concern, public men, and candidates for office." 78 Kan., at 723, 98 P., at 285.

Such a privilege for criticism of official conduct[21] is appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen. In *Barr v. Matteo,* 360 U.S. 564, 575, 79 S.Ct. 1335, 1341, 3 L.Ed.2d 1434, this Court held the utterance of a federal official to be absolutely privileged if made "within the outer perimeter"of his duties. The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy.[22] But all hold that all officials are protected unless actual malice can be proved. The rea-

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725 (1959); *Stice v. Beacon Newspaper Corp.,* 185 Kan. 61, 65–67, 340 P.2d 396, 400–401, 76 A.L.R.2d 687 (1959); *Bailey v. Charleston Mail Assn.,* 126 W.Va. 292, 307, 27 S.E.2d 837, 844, 150 A.L.R. 348 (1943); *Salinger v. Cowles,* 195 Iowa 873, 889, 191 N.W. 167, 174 (1922); *Snively v. Record Publishing Co.,* 185 Cal. 565, 571–576, 198 P. 1 (1921); *McLean v. Merriman,* 42 S.D. 394, 175 N.W. 878 (1920). Applying the same rule to candidates for public office, see, e. g., *Phoenix Newspapers v. Choisser,* 82 Ariz. 271, 276–277, 312 P.2d 150, 154 (1957); *Friedell v. Blakely Printing Co.,*163 Minn. 226, 230, 203 N.W. 974, 975 (1925). And see *Chagnon v. Union-Leader Corp.,* 103 N.H. 426, 438, 174 A.2d 825, 833 (1961), cert. denied, 269 U.S. 830, 82 S.Ct. 846, 7 L.Ed.2d 795.

The consensus of scholarly opinion apparently favors the rule that is here adopted. E. g., 1 Harper and James, *Torts,*§ 5.26, at 449–450 (1956); Noel, *Defamation of Public Officers and Candidates,* 49 Col.L.Rev. 875, 891–895, 897, 903 (1949); Hallen, *Fair Comment,* 8 Tex.L.Rev. 41, 61 (1929); Smith, *Charging Against Candidates.*18 Mich.L.Rev. 1, 115 (1919); Chase, *Criticism of Public Officers and Candidates for Office,* 23 Am.L.Rev. 346, 367–371 (1889); Cooley, *Constitutional Limitations* (7th ed., Lane, 1903), at 604, 616–628. But see, e.g., American Law Institute, *Restatement of Torts,* § 598, Comment a (1938) (reversing the position taken in Tentative Draft 13, § 1041(2) (1936); Veeder, *Freedom of Public Discussion,* 23 Harv.L.Rev. 413, 419 (1910).

[21] The privilege immunizing honest misstatements of facts is often referred to as a "conditional" privilege to distinguish it from the "absolute" privilege recognized in judicial, legislative, administrative and executive proceedings. See, e.g., Prosser, *Torts* (2d ed., 1955), § 95.

[22] See 1 Harper and James, *Torts,*§ 5.23, at 429–430 (1956). Prosser, *Torts,* (2d ed., 1955), at 612–613; American Law Institute, *Restatement of Torts* (1938), § 519.

We have no occasion here to determine how far down into the lower ranks of government employees the "public official" designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. *Barr v. Matteo,* 360 U.S. 564, 573–575, 79 S.Ct. 1335, 1340–1341, 3 L.Ed.2d 1434. Nor need we here determine the boundaries of the "official conduct" concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department. As to

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son for the official privilege is said to be that the threat of damage suits would otherwise "inhibit the fearless, vigorous, and effective administration of policies of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Barr v. Matteo,* supra, 360 U.S., at 571, 79 S.Ct., at 1339, 3 L.Ed.2d 1434. Analogous considerations support the privilege for the citizen-critic of government. It as much his duty to criticize as it is the official's duty to administer. See *Whitney v. California,* 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (concurring opinion of Mr. Justice Brandeis), quoted supra, pp. 720, 721. As Madison said, see supra, p. 723, "the censorial power is in the people over the Government, and not in the Government over the people." It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.

We conclude that such a privilege is required by the First and Fourteenth Amendments.

III.

[21–23] We hold today that Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their officials against critics of their official conduct. Since this is such an action,[23] the rule requiring proof of actual malice is applicable. While Alabama law apparently requires proof of actual malice for an award of punitive damages,[24] where general damages are concerned malice is "presumed." Such a presumption is inconsistent with the federal rule. "The power to create presumptions is not a means of escape from constitutional restrictions," *Bailey v. Alabama,* 219 U.S. 219, 239, 31 S.Ct. 145, 151, 55 L.Ed. 191; "[t]he showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff * *," *Lawrence v. Fox,* 357 Mich. 134, 146, 97 N.W.2d 719, 725 (1959).[25] Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. Because of this uncertainty, the judgment must be reversed and the case remanded. *Stromberg v. California,* 283 U.S. 359, 367–368, 51 S.Ct. 532, 535, 75 L.Ed. 1117; *Williams v. North Carolina,* 317 U.S. 287, 291–292, 63 S.Ct. 207, 209–210, 87 L.Ed. 279; see *Yates v. United States,* 354 U.S. 298, 311–312, 77 S.Ct. 1064, 1073, 1 L.Ed. 2d 1356; *Cramer v. United States,* 325 U.S. 1, 36, n. 45, 65 S.Ct. 918, 935, 940, 89 L.Ed. 1441.

[24–26] Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech which may legitimately be regulated."

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the statements alleging the assaulting of Dr. King and the bombing of his home, it is immaterial that they might not be considered to involve respondent's official conduct if he himself had been accused of perpetrating the assault and the bombing. Respondent does not claim that the statements charged him personally with these acts; his contention is that the advertisement connects him with them only in his official capacity as the Commissioner supervising the police, might be equated with the "They" who did the bombing and assaulting. Thus, if these allegations can be read as referring to respondent at all, they must be read as describing his performance of his official duties.

[24] *Johnson Publishing Co. v Davis,* 271 Ala. 474, 487, 124 So.2d 441, 450 (1960). Thus the trial judge here instructed the jury that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages in an action for libel."

The court refused, however, to give the following instruction which had been requested by the *Times:*

"I charge you * * * that punitive damages, as the name indicates, are designed to punish the defendant, the New York Times Company, a corporation, and the other defendants in this case, * * * and I further charge you that such punitive damages may be awarded only in the event that you, the jury, are convinced by a fair preponderance of the evidence that the defendant * * * was motivated by personal ill-will, that is actual intent to do the plaintiff harm, or that the defendant * * * was guilty of gross negligence and recklessness and not of just ordinary negligence or carelessness in publishing the matter complained of so as to indicate a wanton disregard of plaintiff's rights."

The trial court's error in failing to require any finding of actual malice for an award of general damages makes it unnecessary for us to consider the sufficiency under the federal standard of the instructions regarding actual malice that were given as to punitive damages.

[25] Accord, *Coleman v. MacLennan,* supra, 78 Kan., at 741, 98 P., at 292; *Gough v. Tribune-Journal Co.,* 75 Idaho 502, 510, 275 P.2d 663, 668 (1954).

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*Speiser v. Randall,* 357 U.S. 513, 525, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see * * * whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp v. Florida,* 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295; see also *One, Inc. v. Olesen,* 355 U.S. 371, 78 S.Ct. 364, 2 L.Ed.2d 352; *Sunshine Book Co. v. Summerfield,* 355 U.S. 372, 78 S.Ct. 365, 2 L.Ed.2d 352. We must "make an independent examination of the whole record," *Edwards v. South Carolina,* 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.[26]

[27] Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. The case of the individual petitioners requires little discussion. Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support.

As to the *Times,* we similarly conclude that the facts do not support a finding of actual malice. The statement by the *Times*' Secretary that, apart from the padlocking allegation, he thought the advertisement was "substantially correct," affords no constitutional warrant for the Alabama Supreme Court's conclusion that it was a "cavalier ignoring of the falsity of the advertisement [from which], the jury could not have but been impressed with the bad faith of *The Times,* and its maliciousness inferable therefrom." The statement does not indicate malice at the time of the publication; even if the advertisement was not "substantially correct"—although respondent's own proofs tend to show that it was—that opinion was at least a reasonable one, and there was no evidence to impeach the witness' good faith in holding it. *The Times*' failure to retract upon respondent's demand, although it later retracted upon the demand of Governor Patterson, is likewise not adequate evidence of malice for constitutional purposes. Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. *First,* the letter written by the *Times* reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. *Second,*it was not a final refusal, since it asked for an explanation on this point—a request that respondent chose to ignore. Nor does the retraction upon the demand of the Governor supply the necessary proof. It may be doubted that a failure to retract which is not itself evidence of malice can retroactively become such by virtue of a retraction subsequently made to another party. But in any event that did not happen here, since the explanation given by the *Times*' Secretary for the distinction drawn between respondent and the Governor was a reasonable one, the good faith of which was not impeached.

Finally, there is evidence that the *Times* published the advertisement without checking its accuracy against the news stories in the *Times*' own files. The mere presence of the stories in the files does not, of course, establish that the *Times* "knew" the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the *Times*' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, know to them as a responsible individual, certifying that the use of the names

[26] Seventh Amendment does not, as respondent contends, preclude such an examination by this Court. That Amendment, providing that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," is applicable to state cases coming here. *Chicago, B. & Q. R. Co. v. Chicago,*166 U.S. 226, 242–243, 17 S.Ct. 581, 587, 41 L.Ed. 979; cf.*The Justices v. Murray,* 9 Wall. 274, 19 L.Ed. 658. But its ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. "[T]his Court will review the finding of facts by a State court * * * where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske v. Kansas,* 274 U.S. 380, 385–386, 47 S.Ct. 655, 656–657, 71 L.Ed. 1108. See also *Haynes v. Washington,* 373 U.S. 503, 515–516, 83 S.Ct. 1336, 1344, 10 L.Ed.2d 513.

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was authorized. There was testimony that the persons handling the advertisement was nothing in it that would render it unacceptable under the *Times*' policy of rejecting advertisements containing "attacks of a personal character;"[27] their failure to reject it on this ground was not unreasonable. We think the evidence against the *Times* supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice. Cf.*Charles Parker Co. v. Silver City Crystal Co.,* 142 Conn. 605, 618, 116 A.2d 440, 446 (1955); *Phoenix Newspapers, Inc. v. Choisser,* 82 Ariz. 271, 277–278, 312 P.2d 150, 154–155 (1957).

[28] We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent. Respondent relies on the words of the advertisement and the testimony of six witnesses to establish a connection between it and himself. Thus, in his brief to this Court, he states:

> "The reference to respondent as police commissioner is clear from the ad. In addition, the jury heard the testimony of a newspaper editor * * *; a real estate and insurance man * * *; the sales manager of a men's clothing store * * *; a food equipment man * * *; a service station operator * * *; and the operator of a truck line for whom respondent had formerly worked * * *. Each of these witnesses stated that he associated the statements with respondent * *." (Citations to record omitted).

There was no reference to respondent in the advertisement, either by name or official position. A number to respondent in the advertisement, either by name or official position. A number of the allegedly libelous statements—the charges that the dining hall was padlocked and that Dr. King's home was bombed, his person assaulted, and a perjury prosecution instituted against him—did not even concern the police; despite the ingenuity of the arguments which would attach this significance to the word "They," it is plain that these statements could not reasonably be read as accusing respondent of personal involvement in the acts in question. The statements upon which respondent principally relies as referring to him are the two allegations that did concern the police or police functions: that "truckloads of police * * * ringed the Alabama State College Campus" after the demonstration on the State Capitol steps, and that Dr. King had been arrested * * * seven times." These statements were false only in that the police had been "deployed near" the campus but had not actually "ringed" it and had not gone there in connection with the State Capitol demonstration, and in that Dr. King had been arrested only four times. The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here. Although the statements may be taken as referring to the police, they did not on their face make even an oblique reference to respondent as an individual. Support for the asserted reference must, therefore, be sought in the testimony of respondent's witnesses. But none of them suggested any basis for the belief that respondent himself was attacked in the advertisement beyond the bare fact that he was in overall charge of the Police Department and thus bore official responsibility for police conduct; to the extent that some of the witnesses thought respondent to have been charged with ordering or approving the conduct or otherwise being personally involved in it, they based this notion not on any statements in the advertisement, and not on any evidence that he had in fact been so involved, but solely on the unsupported assumption that, because of his official position, he must have been.[28] This reliance on the bare

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[27] *The Times* has set forth in a booklet its "Advertising Acceptability Standards." Listed among the classes of advertising that the newspaper does not accept are advertisements that are "fraudulent or deceptive," that are "fraudulent or deceptive," that are "ambiguous in wording and * * * may mislead," and that contain "attacks of a personal character." In replying to respondent's interrogatories before the trial, the Secretary of the Times stated that "as the advertisement made no attacks of a personal character upon any individual and otherwise met the advertising acceptability standards promulgated," it had been approved for publication.

[28] Respondent's own testimony was that "as Commissioner of Public Affairs it is part of my duty to supervise the Police Department and I certainly feel like it [a statement] is associated with me when it describes police activities." He thought that "by virtue of being Police Commissioner and Commissioner of Public Affairs," he was charged with "any activity on the part of the Police Department." "When it describes police action, certainly I feel it reflects on me as an individual." He added that "It is my feeling that it reflects not only on me but on the other Commissioners and the community."

Grove C. Hall testified that to him the third paragraph of the advertisement called to mind "the City government—

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fact of respondent's official position[29] was made explicit by the Supreme Court of Alabama. That court, in holding that the trial court "did not err in overruling the demurrer [of the *Times*] in the aspect that the libelous matter was not and concerning the [plaintiff,]" based its ruling on the proposition that:

> "We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body." 273 Ala., at 674–675, 144 So.2d, at 39.

[29] This proposition has disquieting implications for criticism of governmental conduct. For good reason, "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." *City of Chicago v. Tribune Co.,* 307 Ill. 595, 601, 139 N.E. 86, 88, 28 A.L.R. 1368 (1923). The present proposition would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. There is no legal alchemy by which a State may thus create the cause of action that would otherwise be denied for a publication which, as respondent himself said of the advertisement, "reflects not only on me but on the other Commissioners and the community." Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression.[30] We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other evidence to connect the statement with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent.

The judgment of the Supreme Court of Alabama is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice Black, with whom Mr. Justice Douglas joins (concurring).

I concur in reversing this half-million-dollar judgment against the New York Times Company and the four individual defendants. In reversing the Court holds that "the Constitution delimits a

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the Commissioners," and that "now that you ask it I would naturally think a little more about the police Commissioner because his responsibility is exclusively with the constabulary." It was "the phrase about starvation" that led to the association; "the other didn't hit me with any particular force."

Arnold D. Blackwell testified that the third paragraph was associated in his mind with "the Police Commissioner and the police force. The people on the police force." If he had believed the statement about the padlocking of the dining hall, he would have thought "that the people on our police force or the heads of our police force were acting without their jurisdiction and would not be competent for the position." I would assume that the Commissioner had ordered the police force to do that and therefore it would be his responsibility."

Harry W. Kaminsky associated the statement about "truckloads of police" with respondent "because he is the Police Commissioner." He thought that the reference to arrests in the sixth paragraph "implicates the Police Department, I think, or the authorities that would do that—arrest folks for speeding and loitering and such as that." Asked whether he would associate with respondent a newspaper report that the police had "beat somebody up or assaulted them on the streets of Montgomery," he replied; "I still say he is the Police Commissioner and those men are working directly under him and therefore I would think that he would have something to do with it." In general, he said, "I look at Mr. Sullivan when I see the Police Department."

H. M. Price, Sr., testified that he associated the first sentence of the third paragraph with respondent because: "I would just automatically consider that the Police Commissioner in Montgomery would have to put his approval on those kind of things as an individual."

William M. Parker, Jr. testified that he associated the statements in the two paragraphs with "the Commissioners of the City of Montgomery," and since respondent "was the Police Commissioner," he "thought of him first." He told the examining counsel: "I think if you were the Police Commissioner I would have thought it was speaking of you."

Horace W. White, respondent's former employer, testified that the statement about "truck-loads of police" made him think of respondent "as being the head of the Police Department." Asked whether he read the statement as charging respondent himself with ringing the campus or having shotguns and tear-gas, he replied: "Well, I thought of his department being charged with it, yes, sir. He is the head of the Police Department as I understand it." He further said that the reason he would have been unwilling to re-employ respondent if he had believed the advertisement was "the

State's power to award damages for libel in actions brought by public officials against critics of their official conduct." Ante, p. 727. I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct" but completely prohibit a State from exercising such a power. The Court goes on to hold that a State can subject such critics to damages if "actual malice" can be proved against them. "Malice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the *Times* and the individual defendants had an absolute, unconditional constitutional right to publish in the *Times* advertisement their criticisms of the Montgomery agencies and officials. I do not base my vote to reverse on any failure to prove that these individual defendants signed the advertisement or that their criticism of the Police Department was aimed at the plaintiff Sullivan, who was then the Montgomery City Commissioner having supervision of the city's police; for present purposes I assume these things were proved. Nor is my reason for reversal the size of the half-million-dollar judgment, large as it is. If Alabama has constitutional power to use its civil libel law to impose damages on the press for criticizing the way public officials perform or fail to perform their duties, I know of no provision in the Federal Constitution which either expressly or impliedly bars the State from fixing the amount of damages.

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The half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. The factual background of this case emphasizes the imminence and enormity of that threat. One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places, despite our several holdings that such a state practice is forbidden by the Fourteenth Amendment. Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called "outside agitators," a term which can be made to fit papers like the *Times,* which is published in New York. The scarcity of testimony to show that Commissioner Sullivan suffered any actual damages at all suggests that these feelings of hostility had at least as much to do with rendition of this half-million-dollar verdict as did an appraisal of damages. Viewed realistically, this record lends support to an inference that instead of being damaged Commissioner Sullivan's political, social, and financial prestige has likely been enhanced by the *Times*' publication. Moreover, a second half-million-dollar libel verdict against the Times based on the same advertisement has already been awarded to another Commissioner. There a jury again gave the full amount claimed. There is no reason to believe that there are not more such huge verdicts lurking just around the corner for the *Times* or any other newspaper or broadcaster which might dare to criticize public officials. In fact, briefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the *Times* seeking $5,600,000, and five such suits against the Columbia Broadcasting System seeking $1,700,000. Moreover, this technique for harassing and punishing a free press—now that it has been shown to be possible—is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.

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fact that he allowed the Police Department to do the things that the paper say he did."

[29] Compare *Ponder v. Cobb,* 257 N.C. 281, 126 S.E.2d 67 (1962).

[30] Insofar as the proposition means only that the statements about police conduct libeled respondent by implicitly criticizing his ability to run the Police Department, recovery is also precluded in this case by the doctrine of fair comment. See American Law Institute, Restatement of Torts (1938), § 607. Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice, as was not done here.

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In my opinion the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction—by granting the press an absolute immunity for criticism of the way public officials do their public duty. Compare *Barr v. Matteo,* 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434. Stopgap measures like those the Court adopts are in my judgment not enough. This record certainly does not indicate that any different verdict would have been rendered here whatever the Court had charged the jury about "malice," "truth," "good motives," "justifiable ends," or any other legal formulas which in theory would protect the press. Nor does the record indicate that any of these legalistic words would have caused the courts below to set aside or to reduce the half-million-dollar verdict in any amount.

I agree with the Court that the Fourteenth Amendment made the First applicable to the States.[1] This means to me that since the adoption of the Fourteenth Amendment a State has no more power than the Federal Government to use a civil libel law or any other law to impose damages for merely discussing public affairs and criticizing public officials. The power of the United to do that is, in my judgment, precisely nil. Such was the general view held when the First Amendment was adopted and ever since.[2] Congress never has sought to challenge this viewpoint by passing any civil libel law. It did pass the Sedition Act in 1798,[3] which made it a crime—"seditious libel"—to criticize federal officials or the Federal Government. As the Court's opinion correctly points out however, ante, pp. 722–723, that Act came to an ignominious end and by common consent has generally been treated as having been a wholly unjustifiable and much to be regretted violation of the First Amendment. Since the First Amendment is now made applicable to the States by the Fourteenth, it no more permits the States to impose damages for libel than it does the Federal Government.

We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the people and the press free to criticize officials and discuss public affairs with impunity. This Nation of our elects many of its important officials; so do the States, the municipalities, the counties, and even many precincts. These officials are responsible to the people for the way they perform their duties. While our Court has held that some kinds of speech and writings, such as "obscenity," *Roth v. United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, and "fighting words," *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S.Ct. 766, 85 L.Ed. 1061, are not expression within the protection of the First Amendment,[4] freedom to discuss public affairs and public officials is unquestionably, as the Court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion. To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. "For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it."[5] An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.[6]

I regret that the Court has stopped short of this holding indispensable to preserve our free press from destruction.

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[1] See cases collected in *Speiser v. Randall,* 357 U.S. 513, 530, 78 S.Ct. 1332, 1344, 2 L.Ed.2d 1460 (concurring opinion).

[2] See, e. g., 1 Tucker, *Blackstone's Commentaries* (1803), 297–299 (editor's appendix). St. George Tucker, a distinguished Virginia jurist, took part in the Annapolis Convention of 1786, sat on both state and federal courts, and was wisely known for his writings on judicial and constitutional subjects.

[3] Act of July 14, 1798, 1 Stat. 596.

[4] But see *Smith v. California,* 361 U.S. 147, 155, 80 S.Ct. 215, 219, 4 L.Ed.2d 205 (concurring opinion); *Roth v. United States,* 354 U.S. 476, 508, 77 S.Ct. 1304, 1321, 1 L.Ed.2d 1498 (dissenting opinion).

[5] 1 Tucker, *Blackstone's Commentaries*(1803), 297 (editor's appendix; cf. Brant, *Seditious Libel: Myth and Reality,* 39 N.Y.U.L.Rev. 1.

[6] Cf. Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948).

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Mr. Justice Goldberg, with whom Mr. Justice Douglas joins (concurring in the result).

The Court today announces a constitutional standard which prohibits "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Ante, at p. 726. The Court thus rules that the Constitution gives citizens and newspapers a "conditional privilege" immunizing nonmalicious misstatements of fact regarding the official conduct of a government officer. The impressive array of history[1] and precedent marshaled by the Court, however, confirms my belief that the Constitution affords greater protection than that provided by the Court's standard to citizen and press in exercising the right of public criticism.

In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses. The prized American right "to speak one's mind," cf. *Bridges v. California,* 314 U.S. 252, 270, 62 S.Ct. 190, 197, 86 L.Ed. 192, about public officials and affairs needs "breathing space to survive," *N.A.A.C.P. v. Button,* 371, U.S. 415, 433, 82 S.Ct. 328, 338, 9 L.Ed.2d 405. The right should not depend upon a probing by the jury of the motivation[2] of the citizen or press. The theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious. In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel.

It has been recognized that "prosecutions for libel on government have [no] place in the American system of jurisprudence." *City of Chicago v. Tribune Co.,* 307 Ill. 595, 601, 139 N.E. 86, 28 A.L.R. 1368. I fully agree. Government, however, is not an abstraction; it is made up of individuals—of governors responsible to the governed. In a democratic society where men are free by ballots to remove those in power, any statement critical of government. If the rule that libel on government has no place in our Constitution is to have real meaning, then libel on the official conduct of the governors likewise can have no place in our Constitution.

We must recognize that we are writing upon a clean slate.[3] As the Court notes, although there have been "statements of this Court to the effect that the Constitution does not protect libelous publications * * * [n]one of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials." Ante, at p. 719. We should be particularly careful, therefore, adequately to protect the liberties which are embodied in the First and Fourteenth Amendments. It may be

[1] I fully agree with the Court that the attack upon the validity of the Sedition Act of 1798, 1 Stat. 596, "has carried the day in the court of history," ante, at p. 723, and that the Act would today be declared unconstitutional. It should be pointed out, however, that the Sedition Act proscribed writings which were "false, scandalous *and malicious.*" (Emphasis added.) For prosecutions under the Sedition Act charging malice, see e. g., Trial of Matthew Lyon (1798), in Wharton, *State Trials of the United States* (1849), p. 333; Trial of Thomas Cooper (1800), in *id,* at 684; Trial of James Thompson Callender (1800), in *id,* at 688.

[2] The requirement of proving actual malice or reckon disregard may, in the mind of the jury, add little to the requirement of proving falsity, a requirement which the Court recognizes not to be adequate safeguard. The thought suggested by Mr. Justice Jackson in *United States v. Ballard,* 322 U.S. 78, 92–93, 64 S.Ct. 882, 889, 88 L.Ed. 1148, is relevant here; "[A]s a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen." See note 4, infra.

[3] It was not until *Gitlow v. New York,*268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138, decided in 1925, that it was intimated that the freedom of speech guaranteed by the First Amendment was applicable to the States by reason of the Fourteenth Amendment. Other intimations followed. See *Whitney v. California,* 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095; *Fiske v. Kansas,* 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108. In 1931 Chief Justice Hughes speaking for the Court in *Stromberg v. California,* 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117, declared; "It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech." Thus we deal with a constitutional principle enunciated less than four decades ago, and consider for the first time the application of that principle to issues arising in libel cases brought by state officials.

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urged that deliberately and maliciously false statements have no conceivable value as free speech. That argument, however, is not responsive to the real issue presented by this case, which is whether that freedom of speech which all agree is constitutionally protected can be effectively safeguarded by a rule allowing the imposition of liability upon a jury's evaluation of the speaker's state of mind. If individual citizens may be held liable in damages for strong words, which a jury finds false and maliciously motivated, there can be little doubt that public debate and advocacy will be constrained. And if newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished. Cf. *Farmers Educational & Coop. Union v. WDAY, Inc.,* 360 U.S. 525, 530, 79 S.Ct. 1302, 1305, 3 L.Ed.2d 1407. The opinion of the Court conclusively demonstrates the chilling effect of the Alabama libel laws on First Amendment freedoms in the area of race relations. The American Colonists were not willing, nor should we be, to take the risk that "[m]en who injure and oppress the people under their administration [and] provoke them to cry out and complain" will also be empowered to "make that very complaint the foundation for new oppressions and prosecutions." The Trial of John Peter Zenger, 17 Howell's St. Tr. 675, 721–722 (1735) (argument of counsel to the jury). To impose liability for critical, albeit erroneous or even malicious, comments on official conduct would effectively resurrect "the obsolete doctrine that the governed must not criticize their governors." Cf. *Sweeney v. Patterson,* 76 U.S.App.D.C. 23, 24, 128 F.2d 457, 458.

Our national experience teaches that repressions breed hate and "that hate menaces stable government." *Whitney v. California,* 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 095 (Brandeis, J., concurring). We should be ever mindful of the wise counsel of Chief Justice Hughes:

> "[I]mperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."*De Jonge v. Oregon,* 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278.

This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Freedom of press and of speech insures that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.[4] This, of course, cannot be said "where public officials are concerned or where public matters are involved. * * * * [O]ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it." *The Right of the People* (1958), p. 41.

In many jurisdictions, legislators, judges and executive officers are clothed with absolute immunity against liability for defamatory words uttered in the discharge of their public duties. See, e. g., *Barr v. Matteo,* 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434; *City of Chicago v. Tribune Co.,* 307 Ill., at 610, 139 N.E., at 91. Judge Learned Hand ably summarized the policies underlying the rule:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that is impossible to know

[4] In most cases, as in the case at bar, there will be little difficulty in distinguishing defamatory speech relating to private conduct form that relating to official conduct. I recognize, of course, that there will be a gray area. The difficulties of applying a public-private standard are, however, certainly, of a different genre from those attending the differentiation between a malicious and nonmalicious state of mind. If the constitutional standard is to be shaped by a concept of malice, the speaker takes the risk not only that the jury will inaccurately determine his state of mind but also that the injury will fail properly to apply the constitutional standard set by the elusive concept of malice. See note 2, supra.

> whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may later find himself hard to put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. * * *
>
> "The decisions have, indeed always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. * * *" *Gregoire v. Biddle,* 2 Cir., 177 F.2d 579, 581.

If the government official should be immune from libel actions so that his ardor to serve the public will not be dampened and "fearless, vigorous, and effective administration of policies of government" not be inhibited, *Barr v. Matteo,* supra, 360 U.S. at 571, 79 S.Ct. at 1339, 3 L.Ed.2d 1434, then the citizen and the press should likewise be immune from libel actions for their criticism of official conduct. Their ardor as citizens will thus not be dampened and they will be free "to applaud or to criticize the way public employees do their jobs, from the least to the most important."[5] If liability can attach to political criticism because it damages the reputation of a public official, then no critical citizen can safely utter anything but faint praise about the government or its officials. The vigorous criticism by press and citizen of the conduct of the government of the day by the officials of the day will soon yield to silence if officials in control of government agencies, instead of answering criticisms, can resort to friendly juries to forestall criticism of their official conduct.[6]

The conclusion that the Constitution affords the citizen and the press an absolute privilege for criticism of official conduct does not leave the public official without defenses against unsubstantiated opinions or deliberate misstatements. "Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment * * * of free speech * * *." *Wood v. Georgia,* 370 U.S. 375, 389, 82 S.Ct. 1364, 1372, 8 L.Ed.2d 569. The public official certainly has equal if not greater access than most private citizens to media of communication. In any event, despite the possibility that some excesses and abuses may go unremedied, we must recognize that "the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, [certain] liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut,* 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213. As Mr. Justice Brandeis correctly observed, "sunlight is the most powerful of all disinfectants."[7]

For these reasons I strongly believe that the Constitution accords citizens and press an unconditional freedom to criticize official conduct. It necessarily follows that in a case such as this, where all agree that the allegedly defamatory statements related to official conduct, the judgments for libel cannot constitutionally be sustained.

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[5] Mr. Justice Black concurring in *Barr v. Matteo,* 360 U.S. 564, 577, 79 S.Ct. 1335, 1342, 3 L.Ed.2d 1434, observed that: "The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important."

[6] See notes 2, 4, supra.

[7] See Freund, *The Supreme Court of the United States* (1949), p. 61.

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# ROE V. WADE

## ISSUE

Abortion

## HOW TO USE MILESTONES IN THE LAW

This section allows readers to investigate the facts, the arguments, and the legal reasoning that produced the *Roe v. Wade* decision. It also sheds light on the roles and required skills of attorneys and judges in resolving disputes.

As you read this section, you may wish to consider the following issues:

- How did the appellant's description of the issues before the Court, or questions presented, differ from the appellee's descriptions?
- How did the courts and the two parties differ in describing the meaning of particular prior cases to the present case?
- How did the holdings (conclusions of law) of the district court differ from those of the Supreme Court?
- On what points in the Supreme Court's majority opinion do the concurring and dissenting justices agree and disagree?
- How would you decide this case?

## THIS CASE IN HISTORY

*Roe versus Wade* may be the most well known and the most controversial decision of the modern Supreme Court. With this decision, the Court recognized a woman's right to obtain an abortion under certain circumstances. Virtually from the moment it was handed down, *Roe v. Wade* has divided lawyers, politicians, and the public into those who support the decision and those who would like it overturned, either by the Supreme Court itself or by act of the legislature. A judge's or politician's position on the subject of abortion has played a major role in countless appointments and elections. After the decision and for the rest of his life, the opinion brought its author, Justice Harry Blackmun, an unending stream of mail both praising and vilifying him for the decision.

# Roe v. Wade

U.S. DISTRICT COURT, JUNE 1970

JANE ROE, PLAINTIFF,
V.
HENRY WADE, DEFENDANT,
V.
JAMES HUBERT HALLFORD, M.D.,
INTERVENOR.

JOHN DOE AND MARY DOE, PLAINTIFFS,
V.
HENRY WADE, DEFENDANT.

CIV. A. NOS. 3–3690–B, 3–3691–C.
UNITED STATES DISTRICT COURT,
N. D. TEXAS,
DALLAS DIVISION.
JUNE 17, 1970.

Action for judgment declaring Texas abortion laws unconstitutional and to enjoin their enforcement. The three-judge District Court held that laws prohibiting abortions except for purpose of saving life of a mother violated right secured by the Ninth Amendment to choose whether to have children and were unconstitutionally overwhelmed and vague, but Court would abstain from issuing injunction against enforcement of the laws.

Order accordingly.

Linda N. Coffee, Dallas, Tex., Sarah Weddington, Austin, Tex., for plaintiffs.

Fred Bruner, Daugherty, Bruner, Lastelick & Anderson, Ray L. Merrill, Jr., Dallas, Tex., for intervenor.

John B. Tolle, Asst. Dist. Atty., Dallas, Tex., Jay Floyd, Asst. Atty. Gen., Austin, Tex., for defendant.

Before Goldberg, Circuit Judge, and Hughes and Taylor, District Judges.

**PER CURIAM:**

Two similar cases are presently before the Court on motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.The defendant in both cases is Henry Wade, District Attorney of Dallas County, Texas. In once action plaintiffs are John and Mary Doe, and in the other Jane Roe and James Hubert Hallford, M.D., intervenor.[1]

[**1**] From their respective positions of married couple, single woman, and practicing physician, plaintiffs attack Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code,[2] hereinafter referred to as the Texas Abortion Laws. Plaintiffs allege that the Texas Abortion Laws deprive married couples and single women of the right to choose whether to have children, a right secured by the Ninth Amendment.

Defendant challenges the standing of each of the plaintiffs to bring this action. However, it appears to the Court that Plaintiff Roe and plaintiff-intervenor Hallford occupy positions *vis-a-vis* the Texas Abortion Laws sufficient to differentiate them from the general public. Compare Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 1678, 14 L.Ed.2d 510 (1965),[3] with Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). Plaintiff Roe filed her portion of the suit as a pregnant woman wishing

[1] On March 3, 1970, plaintiff Jane Roe filed her original complaint in CA-3–3690–B umder the First Fourth, Fifth, Eighthm Ninth, and Fourteenth Amendments to the United States Constitution. She alleged jurisdiction to be conferred upon the Court by Title 28, United States Code, Sections 1331, 1343, 2201, 2202, 2281, and 2284 and by Title 42, United States Code, Section 1983. On April 22, plaintiff Roe amended her complaint to sue "on behalf of herself and all others similarly situated."

On March 23, James Hubert Hallford, M.D., was given leave to intervene. Hallford's complaint recited the same constitutional and jurisdictional grounds as the complaint to plaintiff Roe. According to his petition for intervention, Hallford seeks to represent "himself and the class of people who are physicians, licensed to practice medicine under the laws of the State of Texas and who fear future prosecution."

On March 3, 1970, plaintiffs John and Mary Doe filed their original complaint in CA-3–3691–C. The complaint of plaintiffs Doe recited the same constitutional and jurisdiction grounds as had the complaint of plaintiff Roe in CA-3–3690 and, like Roe, plaintiffs Doe subsequently amended their complaint so as to assert a class action.

Plaintiffs Roe and Doe have adopted pseudonyms for purposes of anonymity.

[2] *Article 1191 Abortion*

If any person shall designedly administer to a pregnant woman of knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

*Article 1192 Furnishing the Means*

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

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to exercise the asserted constitutional right to choose whether to bear the child she was carrying. Intervenor Hallford alleged in his portion of the suit that, in the course of daily exercise of his duty as a physician and in order to give his patients access to what he asserts to be their constitutional right to choose whether to have children, he must act so as to render criminal liability for himself under the Texas Abortion Laws a likelihood. Dr. Hallford further alleges that Article 1196 of the Texas Abortion Laws is so vague as to deprive him of warning of what produces criminal liability in that portion of his medical practice and consultations involving abortions.

[**2**] On the basis of plaintiffs' substantive contentions,[4] it appears that there then exists a "nexus between the status asserted by the litigant[s] and the claim[s] [they present]." Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

[**3**] Further, we are satisfied that there presently exists a degree of contentiousness between Roe and Hallford and the defendant to establish a "case of actual controversy" as required by Title 28, United States Code, Section 2201. Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969).

Each plaintiff seeks a relief, *first*, a judgment declaring Texas Abortion Laws unconstitutional on their face and *second*, an injunction against their enforcement. The nature of the relief requested suggests the order in which the issues presented should be passed upon[5]. Accordingly, we see the issues presented as follows:

> I. Are plaintiffs entitled to a declaratory judgment that the Texas Abortion Laws are unconstitutional on their face?
>
> II. Are plaintiffs entitled to an injunction against the enforcement of these laws?

I.

Defendants have suggested that this Court should abstain from rendering a decision on plaintiffs' request for a declaratory judgment. However, we are guided to an opposite conclusion by the authority of Zwickler v. Koota, 389 U.S. 241, 248–249, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967):

> "The judge-made doctrine of abstention * * * sanctions * * * escape only in narrowly limited 'special circumstances' * * * is the susceptibility of a state statute of a construction by the state courts that would avoid or modify the constitutional question."

The Court in Zwickler v. Koota subsequently quoted from United States v. Livingston, 179 F.Supp. 9, 12–13 (E.D.S.C.1959):

> "Regard for the interest and sovereignty of the state and reluctance needlessly to adjudicate constitutional issues may require a federal District Court to abstain from adjudication if parties may avail themselves of an appropriate procedure to obtain state interpretation of state laws requiring construction. * * * The decision [Harrison v. N.A.A.C.P., 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152], however, is not a broad encyclical commanding automatic remission to the state courts of all federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit."[6]

[**4**] Inasmuch as there is no possibility that state question adjudication in the courts of Texas would eliminate the necessity for this Court to pass upon plaintiffs' Ninth Amendment claim or Dr. Hallford's attack on Article 1196 for vagueness, abstention as to their request for declaratory judgment is unwarranted. Compare City of Chicago v. Atchison, T. & S. F. R. Co., 357 U.S. 77, 84,78 S.Ct. 1063, 2 L.Ed.2d 1174 (1958), with Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct.788, 25 L.Ed.2d 68 (1970).

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*Article 1193 Attempt at Abortion*

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

*Article 1194 Murder in Producing Abortion*

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

*Article 1196 By Medical Advice*

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

[3] By the authority of *Griswold*, Dr. Hallford has standing to raise the rights of his patients, single women and married couples, as well as rights of his own.

[4] "[I]n ruling on standing, it is both appropriate and necessary to look to the substantive issues * * * to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

[5] Zwickler v. Koota, 389 U.S. 241, 254, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); Cameron v. Johnson, 390 U.S. 611, 615, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968).

[6] 389 U.S.at 250–251, 88 S.Ct. at 396–397. (Citations omitted).

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[5] On the merits, plaintiffs argue as their principal contention[7] that the Texas Abortion Laws must be declared unconstitutional because they deprive single women and married couple of their rights secured by the Ninth Amendment[8] to choose whether to have children. We agree.

The essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on their privacy of individuals. The manner by which such interests are secured by the Ninth Amendment is illustrated by the concurring opinion of Mr. Justice Goldberg in Griswold v. Connecticut, 381 U.S. 479, 492, 85, S.Ct. 1678 14 L.Ed.2d 510 (1965):

> "[T]he Ninth Amendment shows a belief of the Constitution's authors that *fundamental*-rights exist that ate not expressly enumerated in the first eight amendments and intent that the list of rights included there not be deemed exhaustive." * * *
>
> "The Ninth Amendment simply shows the intent of the Constitution's authors that other *fundamental* personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments." (Emphasis added.)[9]

Relative sanctuaries for such "fundamental" interests have been established for the family,[10] the marital couple[11] and individual.[12]

Freedom to choose in the matter of abortions has been accorded the status of a "fundamental" right in every case coming to the attention of this Court where the question has been raised. Babitz v. McCann, 312 F.Supp. 725 (E.D. Wis.1970); People v. Belous, 80 Cal. Reptr. 354, 458 P.2d 194 (Cal.1969); State v. Munson, (South Dakota Circuit Court, Pennington County, Aoril 6, 1970). *Accord*, United States v. Vuitch, 305 F.Supp. 1032 (D.D.C.1969). The California Supreme Court in *Belous* stated:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." 80 Cal.Rptr. at 359, 458 P.2d at 199.

The District Court in *Vuitch* wrote:

> "There has been * * * an increasing indication in the decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy." 305 F.Supp.at 1035.

Writing about Griswold v. Connecticut, *supra*, and the decisions leading up to it, former Associate Justice Tom C. Clark observed:

> "The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution."[13]

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[7] Aside from their Ninth Amendment an dvagueness arguments, plaintiffs have presented an array of constitutional arguments. However, as plaintiffs conceded in oral argument, these additional arguments are peripheral to the main issues. Consequently, they will not be passed upon.

[8] "The enumeration in the Constitution, of certain rights shall not be contrued to deny or disparage others retained by the people."

[9] At 492, 85 S.Ct. at 1686 the opinion states: "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to detetmine whether a principle is 'so rooted [there] * * * as to be ranked as fundamental.' Snyder v. [Commonwealth of] Massachusetts, 291 U.S. 97, 105 [54 S.Ct. 330, 78 L.Ed. 674]. The inquiry is whether a right invilved 'is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." * * *' Powell v. Alabama, 287 U.S. 45, 67 [53 S.Ct. 55, 77 L.Ed. 158]."

[10] Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 LEd. 1042 (1923); and Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944).

[11] Loving v. Commonwealth of Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); and Buchanan v. Batchelor, 308 F.Supp. 729 (N.D.Tex.1970).

[12] Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); and Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

[13] Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola Univ. L.Rev. 1, 8 (1969). Mr. Justice Clark goes on to write, "* * * abortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidence by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent contraception, why can he not nullify that conception when prevention has failed?" *Id.* at 9.

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[**6**] Since the Texas Abortion Laws infringe upon plaintiffs' fundamental right to choose whether to have children, the burden is on the defendant to demonstrate to the satisfaction of the Court that such infringement is necessary to support a compelling state interest.[14] The defendant has failed to meet this burden.

To be sure, the defendant has presented the Court several compelling justifications for state presence in the area of abortions. These include the legitimate interests of the state in seeing to it that abortions are performed by competent persons and in adequate surroundings. Concern over abortion of the "quickened" fetus may well rank as another such interest. The difficulty with the Texas Abortion Law is that, even if they promote these interest,[15] they far outstrip these justifications in their impact by prohibiting all *all* abortions except those performed "for the purpose of saving the life of the mother."[16]

[**7–9**] It is axiomatic that the fact that a statutory scheme serves permissible or even compelling state interests will not save it from the consequences of unconstitutional overbreadth. *E. g.*, Thornhill v. Alabama, 310 U.S, 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); Buchanan v. Batchelor, 308 F.Supp. 729 (n.D.Tex. 1970). While the Ninth Amendment right to choose to have an abortion is not unqualified or unfettered, a statute designed to regulate the circumstances of abortions must restrict its scope to compelling state interests. There is unconstitutional overbreadth in the Texas Abortion Laws because the Texas Legislature did not limit the scope of the statutes to such interests. On the contrary, the Texas statutes, in their monolithic interdiction, sweep far beyond any areas of compelling state interest.

[**10**] Not only are the Texas Abortion Laws unconstitutionally overbroad, they are also unconstitutionally vague. The Supreme Court has declared that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939). *See also* Giaccio v. Pennsylvania, 382, U.S. 399, 402–403, 86 S.Ct. 518, 15 L.Ed.2d. 447 (1966). Under this standard the Texas statutes fail the vagueness test.

The Texas Abortion Laws fail to provide Dr. Hallford and physicians of his class with proper notice of what acts in their daily practice and consultation will subject them to criminal liability. Article 1196 provides:

> "Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saying the life of the mother."

It is apparent that there are grave and manifold uncertainties in the application of Article 1196. How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? It is sufficient if having the child will shorten the life of the woman by number of years. These questions simply cannot be answered?

The grave uncertainties in the application of Article 1196 and the consequent uncertainty concerning criminal liability under the related abortion statutes are more than sufficient to render the Texas Abortion Laes unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.

II.

We come finally to a consideration of the appropriateness of plaintiffs' request for injunc-

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[14] "In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationships to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling,' Bates v. [City of] Little Rock, 361 U.S. 516, 524, [80 S.Ct. 412, 4 L.Ed.2d 480]." Griswold v. Conneticut, 381 U.S. 479, 497, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (concurring opinion of Mr. Justice Goldberg). *See also* Kramet v. Union Free School District, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d. 583 (1969).

[15] It is not clear whether the Texas laws presently serve the interests asserted by the defendant. For instance, the Court gathers from a reading of the challenged statutes that they presently would permit an abortion "for the purpose of saving the life of the mother" to be performed *anywhere* and quite possibly by *one other than a physician*.

[16] Article 1196.

tive relief. Plaintiffs have suggested in oral argument that, should the Court declare the Texas Abortion Laws unconstitutional, that the decision would of itself warrant the issuance of an injunction against state enforcement of the statutes. However, the Court is of the opinion that is must abstain from granting the injunction.

Clearly, the question whether to abstain concerning an injunction against the enforcement of state criminal laws is divorced from concerns of abstention in rendering a declaratory judgment. Quoting from Zwickler v. Koota,

> "[A] request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against enforcement of that statue. We hold that a federal district court has the duty to decide the appropriateness and merits of the declaratory request irrespective of its conclusion as to the propriety of its issuance of the injunction." 389 U.S. at 254, 88 S.Ct. at 399

[**11**] The strong reluctance of federal courts to interfere with the process of state criminal procedure was reflected in Dombrowski v. Pfister, 380 U.S. 479, 484–485, 85 S.Ct. 1116, 1120–21, 14 L.Ed.2d 22(1965):

> "[T]he Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

This federal policy of non-interference with state criminal prosecutions must be followed except in cases where "statutes are justifiably attacked on their face as abridging free expressions," or where statues are justifiably attacked "as applied for the purpose of discouraging protected activities." Dombrowski v. Pfister, 380 U.S. at 489–490, 85 S.Ct. at 1122.

[**12**] Neither of the above prerequisites can be found here. While plaintiffs' first substantive argument rests on notions of privacy which are to a degree common to the First and Ninth Amendments, we do not believe that plaintiffs can seriously argue that the Texas Abortion Laws are vulnerable "on their face as abridging free expression."[17] Further, deliberate application of the statues "for the purpose of discouraging protected activities" has not been alleged. We therefore conclude that we must abstrain from issuing an injunction against enforcement of the Texas Abortion Laws.

## CONCLUSION

In the absence of any contested issues of fact, we hold that the motions for summary judgment of the plaintiff Roe and plaintiff-intervenor Hallford should be granted as to their request for declaratory judgment. In granting declaratory relief, we find the Texas Abortion Laws unconstitutional for vagueness and overbreadth, though for the reasons herein stated we decline to issue an injunction. We need not here delineate the factors which could qualify the right of a mother to have an abortion. It is sufficient to state that legislation concerning abortion must address itself to more than a bare negation of that right.

## JUDGMENT

This action came on for hearing on motions for summary judgment before a three-judge court composed of Irving L. Goldberg, Circuit Judge, Sarah T. Hughes and W. M. Taylor, Jr., District Judges. The defendant in both cases is Henry Wade, District Attorney of Dallas County, Texas. In one action plaintiffs are John and Mary Doe, husband and wife, and in the other Jane Roe and James Hubert Hallford, M.D., intervenor.

The case having been heard on the merits, the Court, upon consideration of affidavits, briefs and arguments of counsel, finds as follows:

### Findings of Fact

(1) Plaintiff Jane Roe, plaintiff-intervenor James Hubert Hallford, M.D., and the members of their respective classes have standing to bring this lawsuit.

(2) Plaintiffs John and Mary doe failed to allege facts sufficient to create a present controversy and therefore do not have standing.

(3) Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code, hereinafter referred to as

[17] "[T]he door is not open to all who would test the validity of state statues or conduct a federally supervised pre-trail of a state prosecution by the simple expedient of allerging that the prosecution somehow affects First Amendement rights." Porter v. Kimzey, 309 F.Supp. 993, 995 (N.D.Ga.1970).

U.S. DISTRICT COURT, JUNE 1970

the Texas Abortion Laws, are so written as to deprive single women and married persons of the opportunity to choose whether to have children.

(4) The Texas Abortion Laws are so vaguely worded as to produce grave and manifold uncertainties concerning the circumstances which would produce criminal liability.

**Conclusions of Law**

(1) This case is a proper one for a three-judge court.

(2) Abstention, concerning plaintiffs' request for a declaratory judgment, is unwarranted.

(3) The fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment.

(4) The Texas Abortion Laws infringe upon this right.

(5) The defendant has not demonstrated that the infringement of plaintiffs' Ninth Amendment rights by the Texas Abortion Laws is necessary to support a compelling state interest.

(6) The Texas Abortion Laws are consequently void on their face because they are unconstitutionally overbroad.

(7) The Texas Abortion Laws are void on their face because they are vague in violation of the Due Process Clause of the Fourteenth Amendment.

(8) Abstention, concerning plaintiffs' request for an injunction against the enforcement of the Texas Abortion Laws, is warranted.

It is therefore ordered, adjudged and decreed that: (1) the complaint of John and Mary Doe be dismissed; (2) the Texas Abortion Laws are declared void on their face for unconstitutional overbreadth and for vagueness; (3) plaintiffs' application for injunction be dismissed.

# In the Supreme Court of the United States

## October Term, 1970

## No. .....

JANE ROE, JOHN DOE, AND MARY DOE,
APPELLANTS,
JAMES HUBERT HALLFORD, M.D.,
APPELLANT-INTERVENOR,
V.
HENRY WADE, APPELLEE.
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

### BRIEF FOR APPELLANT

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II. A married couple, and others similarly situated, have standing to challenge the Texas anti-abortion laws, because said laws have a present and destructive effect on their marital relations, they are unable to utilize fully effective contraceptive methods, pregnancy would seriously harm the woman's health, and such a couple could not obtain judicial relief in sufficient time after pregnancy to prevent irreparable injury

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### BRIEF FOR APPELLANT

Appellants bring this direct appeal from a judgment entered June 17, 1970, by a statutory three-judge United States District Court for the Northern District of Texas. The judgment appealed from granted these Appellants (Plaintiffs below) a declaration that the Texas anti-abortion statues were unconstitutional on their face, by reason of overbreath affecting fundamental individual rights, and that provisions in the statue suffered from unconstitutional uncertainty. However, the judgment denied a permanent injunction which had been sought as necessary in aid of the District Court's jurisdiction to enjoin future enforcement of the statute declared invalid. Appellants submit this Statement to show that this is a direct appeal over which this Court has jurisdiction, and that the appeal presents important and substantial federal questions which merit plenary review.

### CITATION TO OPINIONS BELOW

The June 17, 1970, opinion of the statutory three-judge United States District Court for the Northern District Texas is not yet reported. The text of the decision is set out in the Appendix, *infra*, at 7a.

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BRIEF FOR APPELLANT

## JURISDICTION

(i) On March 3, 1970, Appellant Jane Roe filed her original complaint,[1] basing jurisdiction on 28 U.S. C. § 1343(3) (1964 ed.), and complementary remedial statutes, 28 U.S.C. § 1983 (1964 ed.). On the same day Appellants John and Mary Doe filed a complaint predicting federal jurisdiction on the same statutes. On March 23, 1970, the District Court granted leave for Appellant James H. Hallford, M.D., to intervene as a party-plaintiff, on the basis of a complaint alleging a class action and the same jurisdictional grounds set out above. Subsequently, on April 22, 1970, Appellant Jane Roe amended her complaint to sue "on behalf of herself and all others similarly situated" (App. at 8a n. 1). Appellants John and Mary Doe also amended their complaints to asserts a class action (*Id.*). All Appellants, from their respective position as married couples, pregnant single women, and practicing physicians asked that the Texas antiabortion statutes[2] be declared unconstitutional on their face, and for an injunction against future enforcement of the statutes. A statutory three-judge United States District Court was requested and convened pursuant to 28 U.S.C. §§ 2281, 2284 (1964 ed.).

(ii) The final judgment of the statutory three-judge District Court, granting Appellants' request for a declaratory judgment, but denying any injunctive relief, was entered on June 17, 1970 (App. at 4a). On Monday, August 17, 1970, all Appellants filed with the United States District Court for the Northern District of Texas notices of appeal to this Court (App. at 1a), pursuant to 28 U.S.C. § 2101(b) (1964 ed.), and SUP. CT. RULES 11, 34 (July 1, 1970 ed.), 398 U.S. 1015, 1021, 1045 (1970 ed.). A protective appeal to the United States Court of Appeals for the Fifth Circuit was noticed on July 23, 1970, by Appellant Hallford (App. at 23a), and on July 24, 1970, by Appellant Jane Roe (App. at 21a).

(iii) Jurisdiction of this Court to review by direct appeal the three-judge District Court's final judgment denying a permanent injunction is conferred by 28 U.S.C. § 1253 (1964 ed.).

(iv) Cases which sustain the jurisdiction of this Court are: *Evans* v. *Cornman*, 398 U.S. 419, 420 (1970); *Goldberg* v. *Kelly*, 397 U.S. 254, 261 (1970); *Carter* v. *Fury Comm'n of Greene County*, 396 U.S. 320, 328, (1970); *Moore* v. *Ogilivie*, 394 U.S. 814, 815–16 (1969); *Williams* v. *Rhodes*, 393 U.S. 23, 26–28 (1968); *Dinis* v. *Volpe*, 389 U.S. 570 (1968) (per curiam); *Hale* v. *Bimco Trading Co*., 306 U.S. 375, 376–78 (1939).

## STATUTES INVOLVED

2A TEXAS PENAL CODE art. 1196, at 436 (1961):

> Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

2A TEXAS PENAL CODE art. 1191, at 429 (1961):

> If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

2A TEXAS PENAL CODE art. 1192, at 433 (1961):

> Whoever furnishes the means for procuring an abortion knowing the purpose intended is an accomplice.

2A TEXAS PENAL CODE art. 1193, at 434 (1961):

> If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

2A TEXAS PENAL CODE art. 1194, at 435 (1961):

> If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

## QUESTIONS PRESENTED

**I.** Whether the Three-Judge Court Should Have Enjoined Future Enforcement of the Texas Anti-Abortion Laws, Which the Court Had Declared Unconstitutional, Where an Injunction

[1] The complaint and all other documents referred to in this Jurisdictional Statement are part of the record on appeal.

[2] The statutes, set out verbatim, *infra*, at 4–5, are 2A TEXAS PENAL CODE arts. 1191–1194, 1196, at 429–36 (1961).

was Necessary in Aid of the Court's Jurisdiction, Proper to Effectuate the Declaratory Judgment, and Needed to Prevent Irreparable Injury to Important Federal Rights of the Class of Pregnant Women Who Are or Will be Seeking Abortions, and the Class of Physicians Who are Forced to Reject such Women as Patients Because of a Reasonable Fear of Prosecution.

**II.** Whether a Married Couple, and Others Similarly Situated, Have Standing to Challenge the Texas Anti-Abortion Laws, Where Said Laws Have a Present and Destructive Effect on their Marital Relations, They are Unable to Utilize Fully Effective Contraceptive Methods, Pregnancy Would Seriously Harm the Woman's Health, and Such a Couple Not Obtain Judicial Relief in Sufficient Time After Pregnancy to Prevent Irreparable Injury.

## STATEMENT OF THE CASE

Appellants brought three actions on behalf of three variously situated classes of Plaintiffs.

John and Mary Doe, a childless married couple, sued on behalf of themselves and all others similarly situated. Mary Doe has a neural-chemical disorder which renders pregnancy a threat to her physical and mental health, although not to her survival. Her physician has so advised her, and has also advised against using oral contraceptives. The alternate means of contraception used by John and Mary Doe is subject to a significant risk of failure. In such event, Mary Doe would like to, but legally could not, obtain a therapeutic abortion in a suitable medical facility in Texas. The probability of contraceptive failure in the class represented by Mary Doe is unquestionably high, when the size of the class is considered. Also, the limitations of judicial relief for a pregnant woman seeking an abortion are well known.[3] For Mary Doe and others in her positions, a pre-pregnancy ruling on the validity of the Texas anti-abortion laws was the only ruling that could grant her the relief she would be seeking. Any other decision would simply be too late to prevent irreparable injury. Accordingly, John and Mary Doe brought an action for declaratory and injunctive relief against the present effect of the Texas statutes on their marital relations, and the inevitable future effect the statutes would have, in the certain event that a member of the class would become pregnant and not qualify for a legal abortion in Texas.

Jane Roe, an unmarried pregnant woman, also brought an action of the same nature, on her own behalf and for all others similarly situated. Jane Roe had been unable to obtain a legal abortion in a medical facility in Texas, because her survival was not threatened by continued pregnancy, and no hospital would perform the abortion, in light of the Texas anti-abortion statutes.[4] Jane Roe was financially unable to journey to another jurisdiction with less restrictive laws on abortion, and according had no recourse other than continuing an unwanted pregnancy, or risking her life and health at the hands of a non-medical criminal abortionist.

James H. Hallford, M.D., intervened as a Plaintiff, representing himself and other licensed Texas physicians similarly situated. Dr. Hallford's interest was twofold. As a physician, he is requested by patients, on a regular and recurring basis, to arrange for medically induced abortions in hospitals or other appropriate clinical facilities. This he cannot do, for several reasons. The Texas anti-abortion statues are unclear in their potential application to the situations in which patients request abortions. Consequently, both physician and hospital must exercise special caution to avoid prosecution. Also, the potential sweep of the statutes is so drastic that the only

[3] The period between pregnancy detection, which normally occurs after the fourth week, and the safest time for a therapeutic abortion, before the twelfth week, leaves little time for judicial deliberation. With the notable exception of the Seventh Circuit, courts have declined to render a decision on behalf of a pregnant woman in the limited time available. In the present case, the first complaint was filed March 3, 1970, and followed after fifteen full weeks by a decision in the merits, June 17, 1970. Compare *Doe* v. *Randall*, 314 F. Supp. 32 (D. Minn. 1970) (nearly five weeks between decision and complaint); *Doe* v. *Randall*, *Doe* v. *Lefowitz*, 69 Civ. 4423 (S.D.N.Y. Dec. 12, 1969) (per curiam) (preliminary injunction denied until all factual materials developed by deposition); and *California* v. *Belous*, 71 Cal. 2d—, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) (argument March 3, 1969; decision September 5, 1969); with *Doe* v. *Scott*, No. 18382 (7th Cir.Mar. 30, 1970) (per curiam), *rev'g* 310 F. Supp. 688 (N.D. Ill. Mar. 27, 1970) (order entered in three days where pregnancy caused by rape).

[4] While Texas does not punish the woman who persuades a physician to abort her, the anti-abortion statutes impose a felony sanction of up to five years for physician. 2A TEXAS PENAL CODE art. 1191, at 429 (1961). Moreover, the physician risks cancellation of his license to practice. 12B TEXAS CIV. STAT. art. 4505, at 541 (1966); *id*. art. 4506, at 132 (Supp. 1969–70). Also, the hospital can lose its operating license for permitting an illegal abortion with its facilities. 12B TEXAS CIV. STAT. art. 4437f, § 9, at 216 (1966).

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clear case of legal abortion is one in which the patients is near to certain death. These cases are rare; hence the typical patient's case will be legally uncertain, or of certain illegality. To avoid the realistic possibility of severe penal and administrative sanctions, the physician must turn away typical patient. Since the conscientious physicians knows full well that such a patient may seek out an incompetent non-medical abortionist, thereby endangering her life or health, he will continually be forced by the statute to breach his professional duty of care to the patient.[5] To rectify this invasion of the physician-patient relationship, Dr. Hallford brought this action to enjoin future enforcement of the Texas anti-abortion statutes, against himself, or against any other physician similarly situated.

Dr. Hallford's second interest in bringing the action was to seek relief against two indictments outstanding against him on abortion charges[6] Under Texas law, a physicians charged with abortion is presumed guilty, if the State is able to establish the fact of the abortion. The physician, in such a case, must admit complicity in the act, waive his privilege against self-incrimination, and defend on the basis that the abortion was "procured or attempted by medical advice for the purpose of saving the life of the [woman]." 2A TEXAS PENAL CODE art. 1196, at 436 (1961). Decisions such as *Veevers* v. *State*, 354 S.W.2d 161 (Tex. Ct. Crim. App. 1962), hold that the Article 1196 exception is an affirmative defense, which the physician must raise and prove. In numerous respects, this settled state-law practical deprives a physician of essential constitutional rights. Moreover, state practice invades the privacy of physician and patient by exposing intimate and confidential associations to the public glare of a criminal trial. In addition, the possibility of conviction carries with it the revocation of the physician's license before appeal. These elements of state practice render defense to criminal abortion charges a wholly inadequate means of vindicating the physician's constitutional rights. Accordingly, Dr. Halliford brought the present actions filed by Jane Roe, John Doe, and Mary Doe. The cases were consolidated, and argued together.

Essentially, the federal questions raised by each individual Plaintiff were raised by all. The complaints charged that the Texas anti-abortion statutes deprived physicians and patients of rights protected by the First, Fourth Fifth, Eighth, Ninth and Fourteenth Amendments, as construed by this Court in decisions such as *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).[7] Defendants interposed objections to the standing of each Plaintiff, the propriety of adjudications versus abstention, the ripeness of the dispute for present decision, and the propriety of injunctive relief

A statutory three-judge court, convened in response to Plaintiffs' request for injunctive relief from the Texas anti-abortion statutes, granted a declaratory judgment that the statutes were unconstitutionally vague and overbroad.

After dealing with the jurisdictional questions of standing,[8] ripeness,[9] and abstention,[10] raised by the Defendants, the three-judge court stated:

> [T]he Texas Abortion Laws must be declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children

Reliance was placed on decisions by this Court establishing "[r]elative sanctuaries for such 'fundamental' interests [as] the family,[11]

[5] If prior cases on abortion prosecutions in Texas are a reliable index, patients who are turned away by physicians have recourse only to an assortment of quacks. *See, e.g., Fletcher* v. *State*, 362 S.W.2d 845 (Tex. Ct. Crim. App. 1962) (non-physician using crude techniques in "cottage on the river"; hysterectomy necessary to prevent girl's death); *Catching* v. *State*, 364 S.W.2d 691 (Tex. Ct. Crim. App. 1962) (non-physician; police found "tool box containing several catheters, a knitting needle, and other items").

[6] *State* v. *Hallford*, Nos. C-69–2524–H & C-69–5307–IH (Tex. Crim. Ct., Dallas County).

[7] In the brief on the merits, Appellants will more fully elaborate this complex substantive constitutional point. For purposes of this Statement, however, it is sufficient to not that *Griswold* has been applied in the abortion context by numerous state and federal courts. *See* cases cited in notes 31–37, *infra*, and accompanying text.

[8] Jane Roe, the pregnant Plaintiff, and Dr. Hallford, had standing because they "occupy positions *vis-à-vis* the Texas Abortion Laws sufficient to differentiate them from the general public." App. at 9a Also, on authority of *Griswold*, Dr. Hallford had standing to raise the "rights of his patients, single women and married couples, as well as rights of his own." App. at 9a n. 3. John and Mary Doe, however, were held to lack standing. App. at 5a.

[9] The district court was "satisfied that there presently exists a degree of contentiousness between Roe and Hallford and the defendant to establish a 'case of actual controversy' . . " App. at 10a

[10] *Zwickler* v. *Koota*, 389 U.S. 241, 248–49 (1967), was sufficient authority to preclude abstention. App. at 11a.

[11] *See Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), all cited by the district court. App. at 13a.

the marital couple,[12] and the individual."[13] Further precedent was found in similar decisions by other federal and state courts,[14] as well as a major treatment of *Griswold* in the abortion setting by Retired Justice Tom C. Clark, see Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal,* 2 LOYOLA UNIV. (L.A.) L. REV. 1 (1969).

Not only were the statues overbroad, and not justified by a narrowly drawn compelling State interest, but the language of the statutes was unconstitutionally vague. Although a physician might lawfully perform an abortion "for the purpose of saving the life of the [pregnant woman]," [15] the circumstances giving rise to such necessity were far from clear. The district court detailed a few of the more apparent ambiguities:

> How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death that would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered.

App. at 71a.

After finding the Texas anti-abortion statues unconstitutional on two grounds, the district court considered the propriety of injunctive relief. Acting on the assumption that *Dombroski* v. *Pfister*, 380 U.S. 479 (1965) controlled, the court refused to enjoin any present or future enforcement of the statutes. Appellants have brought this appeal to review the denial of injunctive relief.

## THE QUESTIONS ARE SUBSTANTIAL

The present appeal presents important and unresolved federal questions which have not been but should be determined by this Court. A district court's refusal to enjoin present and future enforcement of a statute declared facially unconstitutional raises important issues for the vindication by federal courts of rights guaranteed by the Constitution. Decisions by this Court have not in recent years clarified the propriety of federal injunctive relief against state criminal statutes outside the pristine speech area of the First Amendment. A decision by this Court is needed, particularly where, as here, the injunction was sought by some Appellants who were total strangers to any pending prosecutions, and by one Appellant for whom defense of state court prosecution would be a wholly inadequate means of vindicating his federally protected rights.

In addition, the substantive issues in the case, which will surely be raised for further review by Appellee, are novel issues of profound national import, affecting the lives of many thousands of American citizens each year. Further, the same issues are presented in four appeals already docketed,[16] a variety of conflicting decisions in the lower courts,[17] and a host of pending actions in federal and state lower courts.

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[12] *See Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

[13] See *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

[14] *See, e.g., McCann* v. *Babbitz*, 310 F. Supp. 293 (E.D.Wis.) (per curiam), *appeal docketed*, 38 U.S.L.W, 3524 (U.S. June 20, 1970) (No. 297, Oct. 1970 Term); *United States* v. *Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969), *ques, of juris. postponed to merits*, 397 U.S. 1061, *further juris. questions propounded*, 399 U.S. 923 (1970); *California* v. *Belous*, 71 Cal. 2d—, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert denied* 397 U.S, 915 (1970).

[15] 2A TEXAS PENAL CODE art 1196, at 36 (1961).

[16] (1) *United States* v. *Vuitch*, No. 84, arises under a differently worded felony abortion statute, however, and poses numerous alternate grounds for affirmance other than the central questions presented here, of overbreadth and vagueness.

(2) *McCann* v. *Babbitz*, No. 297, was decided at the federal district court level on grounds virtually the same as those below in the present case. It appears in *McCann*, however, that the appeal was taken by the State solely from the granting of a declaratory judgment for Dr. Babbitz. No appeal was taken from denial of an injunction, as 28 U.S.C. § 1253 (1964 ed.), would seem to require, and as this Court twice held last Term, *Mitchell* v. *Donovan*, 398 U.S. 427 (1970) (per curiam), *vacating* 300 F. Supp. 1145 (D. Minn. 1969), with directions enter a fresh judgment of dismissal, to enable appellants to appeal to the Eighth Circuit; *Rockeller* v. *Catholic Medical Center*, 397 U.S. 820 (1970) (per curiam).

(3) *Hodgson* v. *Randall*, No. 728, is an appeal from a three-judge federal court decision refusing to enjoin state court prosecution of a physician who sought federal relief before performing a hospital therapeutic abortion for German measles indications, and long before the state indictment.

(4) *Hodgson* v. *Minnesota*, No. 729, involves the same subject matter as No. 728, and is an appeal from the Supreme Court of Minnesota's denial of a writ of prohibition to a state trial court which had upheld the constitutionality of an abortion statute, where unconstitutionality was the defense to the charges.

[17] *See* cases cited in not 31–37, *infra*, and accompanying text.

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BRIEF FOR APPELLANT

## INTRODUCTION

In the remainder of this Jurisdictional Statement, Appellants will show that the questions presented are substantial, and merit plenary review by the full Court. Because of the novelty and complexity of the issues, and the limited function of a Jurisdictional Statement, this showing will not undertake to develop all arguments in depth.

**I. The three-judge court should have enjoined future enforcement of the Texas anti-abortion laws, which the court had declared unconstitutional, because an injunction was necessary in aid of the court's jurisdiction, proper to effectuate the declaratory judgment, and needed to prevent irreparable injury to important federal rights of the class of pregnant women who are or will be seeking abortions, and the class of physicians who are forced to reject such women as patients out of a reasonable fear of prosecution**

**A. The subject matter of the merits involves important and substantial federal constitutional questions.** On the merits, Appellants argued successfully that decisions by this Court, construing the First, Fourth, Ninth, and Fourteenth Amendments supported a claim that the Texas anti-abortion statutes swept too broadly and thereby invaded rights protected by the Constitution (Pay out 5a, 6a, 12a-16a).[19] Moreover, the statues in question were held to be so vague and indefinite as to violate the Fourteenth Amendment due process guarantee of reasonably specific legislation (App. at 5a, 6a, 16a-18a). That guarantee is particularly significant where, as here, important personal rights are at stake, and an impermissibly vague statute operates to inhibit a wide range of constitutionally protected conduct.[20]

Ultimately, the substantive question presented is whether a State may enact a felony statute to punish a physician, a woman, and her husband, with five years in state prison, where the couple requests, and the physician performs, a therapeutic surgical procedure to abort a pregnancy which the couple did not want, but were unable to prevent.[21] Under *Griswold v. Connecticut*, 381 U.S. 479 (1965), it is clear that a husband and wife[22] are constitutionally privileged to control the size and spacing of their family by contraception. The failure of contraception, however, is commonplace.[23] Authoritative estimated are that between 750,000 and 1,000,000 births each year are unwanted.[24] These are in addition to the 200,000 to 1,000,000 unwanted pregnancies which are estimated to end in abortion induced outside of the clinical setting.[25] Taken together, some 950,000 to 2,000,000 unwanted births plus non-clinical abortions occur yearly. Accordingly, one must conclude that restrictive anti-abortion statutes, such as the Texas law in question here, drastically affect the conduct of literally millions of American citizens.

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[18] *See* cases cited in not 38, *infra*.

[19] In particular, Appellants relied upon the reasoning of *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), where this Court invalidated a state law prohibiting use of contraceptive devices, because the law swept too broadly and invaded "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." 381 U.S. at 485.

[20] The most reliable estimates hold that fewer than 10,000 hospital therapeutic abortions are performed yearly, in states where there has been no abortion law reform. *See* Tietze, *Therapeutic Abortions in the United States*, 101 Am.J. OBST. and GYNEC. 784, 787 (1968). These constitute a minute proportion of all unwanted pregnancies which face American couples each year. Those excluded from hospitals have two alternatives: continuation of unwanted pregnancy, or extra-hospital, probably illegal, induced abortion.

[21] The woman is not an accomplice under Texas law, but other participants, including her husband, are fully liable. *See Willingham* v. *State*, 33 Tex. Crim. 98, 25 S.W. 424 (1894) (woman neither principal nor accomplice).

[22] *Griswold* was silent on the more significant problem of access by unmarried persons to contraceptives. A result of non-access, and failure, is the birth of over 100,000 illegitimate children yearly to girls age nineteen or younger. *See U.S. Bureau of the Census: Statistical Abstract of the United States: 1969*, Table 59, at 50 (90th ed. 1969).

Outside of the state judiciary in Massachusetts, authorities have uniformly held the *Griswold* rationale applicable to litigants who had not entered into the marriage contract. *Compare Baird* v. *Eisenstadt*, — F.2d—, No. 7578 (1st Cir. July 6, 1970) (invalidating Massachusetts statute which outlawed distribution of contraceptives to the unmarried), *Mindel* v. *United States Civil Service Comm'n*, 312 F. Supp. 485 (N.D. Calif. 1970) (reinstating postal clerk who had been dismissed for cohabitation without benefit of marriage), *and* the present case, *Roe* v. *Wade*, — F. Supp.—, Civ. No. 3–3690–B (N.D. Tex. June 17, 1970) (per curiam) (Texas anti-abortion statutes "deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children.", *with Sturgis* v. *Attorney General*, 260 N.E.2d 687, 6900 (Mass.1970) (directly contrary to federal decision *Baird*).

[23] If a married couple is to have private control over numbers and spacing of children, induced abortion is absolutely necessary as a backstop to contraceptive failure. For compilation of contraceptive failure rates according to method used, see P. EHRLICH AND A. EHRLICH, POPULATION RESOURCES ENVIRONMENT 218–19 and TABLE 9–1 (1970); N. EAST-

The national significance of the issues in this case can be also be inferred from increased activity within the medical profession, and in the legislatures. On June 25, 1970, the House of Delegates of the American Medical Association voted to permit licensed physicians to perform abortions in hospitals, with sole additional qualification that two other physicians can be consulted.[26] Physicians were cautioned, however, not to violate existing state statues, forty-seven of which are far more restrictive.[27] Three states in 1970—New York, Alaska, and Hawaii—removed, for the most part, any criminal penalties which might previously have been imposed upon physicians for performing abortions in appropriate medical facilities.[28] From 1967 to 1970, twelve states had adopted therapeutic abortion statutes similar to that of the Model Penal Code's 1962 Proposed Official Draft. More recently, on August 4, the Commissioner on Uniform State Laws issued a Second Tentative Draft of a Uniform Abortion Act. The Act sanctioned abortions by licensed physicians "within 24 weeks after the commencement of the pregnancy; or of after 24 weeks . . ." under the circumstances set out in the Model Penal Code proposal.

These developments bear witness to the importance of the issues presented here.

While policy-making and legislative bodies have debated the issue of abortion, courts, confined to the constitutional framework, have been asked to resolve the questions of individual and legislative power which are presented here. Although the questions framed in this case have not been decided[30] by this Court, numerous federal and state decisions attest to the substantiality of the federal questions. Moreover, the sometimes sharp divisions in the courts below illustrate further the need for a decision at this level. In showing that the Court has jurisdiction, and that the questions are substantial, Appellants will outline the divisions among lower courts.

In September, 1969 the Supreme Court of California became the first appellant court to recognize the constitutional stature of a "fundamental right of the woman to choose whether to bear children. . . ."[31] The *Belous* court found this right implicit in this Court's "repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex."[32]

More recently, three different decisions by statutory three-judge federal courts have invalidated restrictions on access to medical abortion in Wisconsin and Georgia, as well as in the present case from Texas. The first, *McCann* v. *Babbitz*,[33] recognized in that jurisdiction a woman's

> "basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which has not yet quickened." 310 F. Supp. at 302

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MAN AND L. HELLMAN, WILLIAMS OBSTETRICS 1068–75 (13th ed. 1966); Hardin, *History and Future of Birth Control*, 10 PERSPECTIVES IN BIOLOGY & MED. 1, 7–13 (1966); Tietze, *Clinical Effectiveness of Contraceptive Methods*, 78 AM. J. OBST. AND GYNEC. 650 (1959).

[24] The most recent scholarly examination of unwanted birth magnitudes will appear in a forthcoming issue of SCIENCE. A summary of these findings by Dr. Charles F. Westoff of Princeton University's Office of Population Research, analyzing in 1965 National Fertility Study, appeared in the N.Y.Times, Oct. 29, 1969, at 25, col. 3.

[25] Secret induced abortions are inherently incapable of quantification. Nonetheless, one can be certain that the number is very high. For estimates, see Fisher, *Criminal Abortion*, in ABORTION IN AMERICA 3–6 (H. Rosen ed. 1967); M. CALERONE (ed.), ABORTION IN THE UNITED STATES 180 (1958); P. GEBHARD *et al.*, PREGNANCY, BIRTH AND ABORTION 136–37 (1958); F. TAUSSIG, ABORTION: SPONTANEOUS AND INDUCED 25 (1936); Regine, *A Study of Pregnancy Wastage*, 13 MILBANK MEM. FUND QUART. No. 4, at 347–65 (1935).

[26] *See* N.Y. Times, June 26, 1970, at 1, col. 1. The statement has not yet been published in an official A.M.A. document. A recent issue of the J.A.M.A. noted that only 26 physicians had resigned from the body because of new policy. 213 J.A.M.A. 1242 (Aug. 24, 1970).

[27] For analysis of abortion laws in the United States prior to the most recent changes, See Lucas, *Laws of the United States*, in I ABORTION IN A CHANGING WORLD 127 (R. Hall ed. 1970); George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. RES. L. REV. 371 (1966).

[28] *See, e.g.*, N.Y. PENAL LAW § 125.05(3), at 79 (McKinney Supp. 1970–71).

[29] *See* MODEL PENAL CODE § 230.3(2) (Proposed Official Draft, 1962). The states are Arkansas, New Mexico, North Carolina, Oregon, South Carolina, and Virginia.

On least eight occasions this Court has declined to review state court decisions which involved restrictive anti-abortion laws.

The eight denials are: *Mucie* v. *Missouri*, 398 U.S. 938 (June 1, 1970), *denying cert, to* 448 S.W.2d 879 (Mo. 1970) (manslaughter abortion conviction where patient died); *California* v. *Belous*, 397 U.S. 915 (Feb. 24, 1970), *denying cert. to* 71 Cal. 2d —, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) (statute repealed after prosecution commenced); *Molinaro* v. *New Jersey*, 396 U.S. 365 (Jan. 19, 1979) (per curiam), *dismissing appeal from* 54 N.J. 246, 254 A.2d 792 (1969) (defendant jumped bail after appeal filed); *Knight* v.*Louisiana Bd. of Medical Examiners*, 395 U.S. 933 (June 2, 1969), *denying*

*McCann* grew out of the prosecution of a physician, but the three-judge court had no difficulty holding that a physician has standing to assert the rights of pregnant patients.[34]

The second recent federal decision is the present case, *Roe* v. *Wade*,[35] declaring the Texas anti-abortion statutes unconstitutional on the similar ground that

> "they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children."

A third federal decision, *Doe* v. *Bolton*,[36] followed *Belous, McCann,* and *Roe*, holding:

> "[T]he concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy.
>
> ". . .[T]he reasons for an abortion may not be proscribed. . ."

Numerous lower courts have followed this lead, in both federal and state disputes.[37] In addition, three-judge courts have been requested and/or convened in a number of states to consider questions quite similar to those raised here.[38] The convening of a statutory court, of course, requires that the questions presented be "substantial."[39]

Scholarly commentary also recognizes that these issues are tremendous national importance, and "substantial" in the sense of warranting determination by this Court. Retired Justice Clark addressed himself to the applicability of *Griswold* in the abortion context more than a year ago.[40] According to Justice Clark's analysis,

> "Griswold's act[41] was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention fails?"[42]

To examine Justice Clark's hypothetical question in full constitutional context, and to decide the propriety of injunctive relief in this case, the Court should not probable jurisdiction, and set the matter down for full briefing and argument.

**B. Having determined the merits in appellants' favor, the three-judge court should have enjoined future enforcement of the invalid.** Not only do the substantive issues in this case involve important federal questions, but the remedy following judgment also presents a novel point of which this Court has not clearly ruled.

Although no state proceedings were pending or imminently threatened against Appellants Jane Roe, John Doe, and Mary Doe, or members of their respective classes, the District Court declined to grant any injunctive relief whatever. This denial of necessary relief is contrary to decisions by this Court, and has the probable effect of inviting federal-state friction, rather than lessening such untoward interaction.

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*cert. to* 252 La. 889, 214 So.2d 716 (1968) (per curiam) (federal questions not properly raised and preserved); *Morin* v. *Garra*, 395 U.S. 935 (June 2, 1969), *denying cert. to* 53 N.J. 82 (1968) (per curiam) (same); *Moretti* v. *New Jersey*, 393 U.S. 952 (Nov. 18, 1968), *denying cert. to* 52 N.J. 182, 244 A.2d 499 (1968) (conspiracy conviction; abortion to have been performed by barber); *Fulton* v. *Illinois*, 390 U.S. 953 (Mar. 4, 1968), *denying cert, to* 84 Ill. App.2d 280, 228 N.E.2d 203 (1967); *Carter* v. *Florida*, 376 U.S. 648 (Mar. 30, 1964), *dismissing appeal from* 150 So.2d 787 (Fla. 1963).

[31] *California* v. *Belous*, 71 Cal. 2d —, —. 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969), *cert denied*, 397 U.S. 915 (1970). *Belous*, a state court appeal of a conspiracy conviction of a physician, involved a statute worded almost identically to that in the present case.

One year earlier, a California trial court had ruled that the Eighth and Fourteenth Amendments prohibited license revocation proceedings against physicians who had performed hospital approved abortions on patients exposed in early pregnancy to German measles. The opinion of the trial court, however, simply enumerated those Amendments among various conclusions of law, without supporting the conclusions with any attempt at reasoned analysis. Nonetheless, the result, and the factual similarities between that and the present case, are of interest. *See Shively* v. *Board of Medical Examiners*, No. 590333 (Calif. Super, Ct., San Fran. County Sept. 24, 1968) (not reported), *on remand from* 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1968) (granting physicians' motions for discovery, without reference to merits).

[32] 71 Cal. 2d at —, 458 P.2d at 199, 80 Cal. Rptr. at 359, *citing, e.g.*, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 536 (1942).

[33] 310 F.Supp. 293 (E.D. Wis. 1970) (per curiam), *appeal docketed*, 38 U.S.L.W. 3524 (U.S. June 20, 1970) (No. 297, Oct. 1970 Term).

[34] The standing of a physician to assert a patient's rights along with his own follows from *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965), and *Barrows* v. *Jackson*, 346 U.S. 249, 257 (1953). On this standing point, lower court decisions involving abortion laws all agree. *See also Planned Parenthood Ass'n of Phoenix* v. *Nelson*, Civ. No. 70–334 PHX (D. Ariz. Aug. 24, 1970) (per curiam); *Doe* v. *Bolton*, — F. Supp. —, Civ. No. 13676 (N.D. Ga. July 31, 1970) (per curiam); *United States ex rel. Williams* v. Follette, 313 F. Supp. 269, 273 (S.D.N.Y. May 12, 1970).

[35] — F. Supp. —, Civ. No. 3–3690–B (N.D. Tex. June 17, 1970) (per curiam).

[36] — F. Supp. —, Civ, No. 13676 (N.D. Ga July 31, 1970) (per curiam).

Moreover, the denial of injunctive relief to Dr. Hallford was equally improper, as he had requested an injunction against the commencement of any future prosecutions. As to charges then pending against Dr. Hallford, an injunction would have been proper in addition, for reasons which shall appear more fully hereinafter

Relying entirely on *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), the three-judge court recognized a "federal policy of non-interference with state criminal prosecutions [which] must be followed except in cases where 'statutes are justifiably attacked on their face as abridging free expression,' or where statutes are justifiably attacked 'as applied for the purpose of discouraging protected activities.'" 380 U.S. at 489–90. The quote from *Dombrowski*, however, was not pertinent, for Appellants' principal thrust was not against pending prosecutions, but against any *future* enforcement and effects of the challenged statutes. The pregnant Plaintiff, Jane Roe, for example, could never be prosecuted under Texas law regardless of the number of abortions she underwent, but the statute, unless enjoined, would have the effect of keeping her from obtaining an abortion.

For the most part, Appellants were strangers to any existing or contemplated prosecutions. Their chief controversy was over the drastic impact of the statutes on their lives, not any possibility of imminent enforcement. In *Dombrowski*, the appellants were actively threatened with prosecution, and an injunction would necessarily have abated that threat by operating directly on law officers who stood ready to go forward with existing indictments. Accordingly, "special circumstances" were necessary to justify the conclusion ultimately reached.

If, however, *Dombrowski* had been purely a challenge to quantifiable and recurring effects of a state criminal statute, without the pendency of criminal charges, the case would have been different. This is shown by the ease with which this Court has reversed lower courts that refused declaratory and injunctive relief against loyalty oath statutes backed by criminal sanctions. *See Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Baggett* v. *Bullitt*, 377 U.S.360, 365–66 (1964). Injunctive relief against the statute in *Dombrowski* would have presented no special problem, if the statute had been a loyalty oath backed by the very same criminal penalties, and no indictments had been waiting in the wings.

*Dombrowski* falls in the middle ground between (1) injunctive actions which are filed and completed prior to the commencement of any state criminal proceedings, and (2) actions which are filed after "proceedings in a State court,"[43] are underway. The *Dombrowski* case itself was filed but not completed before State proceedings began.[44] Hence, while *Dombrowski* acknowledged that "[28 U.S.C. § 2283 (1964

[37] *See, eg., State* v. *Munson* (S.D. 7th Jud. Cir., Pennington County Apr. 6, 1970) (Clarence P. Coper, F.) (recognizing the woman's "' private decision whether to bear her unquickened child'"); *State*v. *Ketchum* (Mich. Dist. Ct. Mar 30, 1970) (Reid, *F.*) ("the statute as written infringes on the right of privacy in the physician-patient's right to safe relationship, and may violate the patient's right to safe and adequate medical advice and treatment"); *Commonwealth*v. *Page*, Centre County Leg. J. at 285 (Pa. Ct. Comm. Pl., Centre County July 23, 1970) (Campbell, P.F.) ("the abortion statute interferes with the individual's private right to have or not to have children."); *People* v. *Gwynne*, No. 176601 (Calif. Mun. Ct., Orange County Aug. 13, 1970) (Schwab, F.); *People* v. *Gwynne*, No. 173309 (Calif. Mun. Ct., Orange County June 16, 1970) (Thomson, *F.*); *People* v. *Barksdale*, No. 33237C (Calif. Mun. Ct., Alameda County Mar. 24, 1970) (Foley, *F.*); *People* v. *Robb*, Nos. 149005 and 159061 (Calif, Mun. Ct., Orange County Jan. 9, 1970) (Mast, *F.*); *People* v. *Anast*, No. 69–3429 (Ill. Cir. Ct., Cook County, 1970) (Dolezal, F.) (holding the Illinois abortion statute "unconstitutional (1) for vagueness; and (2) for infringing upon a woman's right to control her body."); *cf. United States* v. *Vitch*, 305 F. Supp. 1032 (D.D.C. 1969), *ques. of juris. postponed to merits*, 397 U.S. 1061, *further juris. questions propounded*, 399 U.S. 923 (1970); *United States ex rel. Williams* v. *Follette*, 313 F. Supp. 269, 272–73 (S.D.N.Y. 1970) (questions substantial, but habeas petitioner-physician remitted to state courts).

[38] *See, e.g., Gwynne* v. *Hicks*, Civ. No. 70–1088–CC (C.D. Calif., filed May 18, 1970); *Arnold* v. *Sendak*, IP 70–C-217 (S.D. Ind., filed Mar. 29, 1970); *Corkey* v. *Edwards*, Civ No. 2665 (W.D.N.C., filed May 12, 1970); *YMCA of Princeton* v. *Kugler*, Civ. No. 264–70 (D.N.J., filed Mar. 5, 1970); *Hall* v. *Lefkowitz*, 305 F. Supp. 1030 (S.D.N.Y. 1969), *dismissed as moot* Op. No. 36936 (S.D.N.Y. July 1, 1970) (per curiam) (statute repealed); *Benson* v. *Johnson*, Civ. No. 70–226 (D. Ore., filed Aug. 4, 1970); *Doe* v. *Dunbar*, Civ. No. C-2402 (D. Colo., filed July 2, 1970); *Henrie* v. *Blankenship*, Civ. No. 70–C-211 (N.D. Okla., filed July 6, 1970); *Planned Parenthood Ass'n of Phoenix* v. *Nelson*, Civ. No. 70–334 PHX (D. Ariz. Aug. 24, 1970) (per curiam); *Ryan* v. *Specter*, Civ. No. 70–2527 (E.D. Pa., filed Sept. 14, 1970); *Doe* v. *Rampton*, Civ. No. 234–70 (D. Utah, filed Sept. 16, 1970).

[39] *Idlewild Bon Voyage Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962) (per curiam).

[40] Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA UNIV. (L.A.) L. Rev. 1–11 (1969).

[41] Although it is a minor point, Griswold was the Executive Director of Planned Parenthood in the *Griswold* case. It was the physician, the late Dr. Buxton of the Yale Medical School

ed.)], and its predecessors do not preclude injunctions against the institution of state court proceedings, but only bar stays of suits already instituted,"[45] this Court nonetheless required "special circumstances" to justify interference with a criminal proceeding begun shortly after the federal complaint was filed.

The present case lies chronologically in the earliest of the categories, (1), because, as to the bulk of relief sought against future enforcement of the anti-abortion statute, state proceedings have never been contemplated. Appellants were thus in the same position as petitioners contesting a loyalty oath that was backed by criminal sanctions. Their entitlement to an injunction against future enforcement should have followed as a matter of course. Put another way, Appellants were "strangers to [any pending] state court proceedings." *Hale* v. *Bimco Trading Co*., 306 U.S. 375, 378 (1939) (Frankfurter, *F.*).[46] The fact of pending prosecutions against other physicians, or against Dr. Hallford based upon alleged past conduct, had no bearing on Appellant's request for prospective injunctive relief.

Accordingly, the three-judge court should have undertaken an inquiry as to the propriety of injunctive relief without reference to *Dombrowski* v. *Pfister*, and without any greater concern for hypothetical federal-state friction than exists in the ordinary case where state judicial machinery has not entered the controversy. Indeed, denial of injunctive relief was an open invitation for Texas authorities to maintain existing enforcement policies. Should this have occurred against Dr. Hallford, or any other physician member of the class he represented, a federal injunction would have been sought from the district court as "necessary in aid of its jurisdiction, or to protect or effectuate its"[47] declaratory judgment invalidating the statute. A confrontation between federal and state judiciary might then have ensued. To avoid such a possibility, the three-judge court should have enjoined future enforcement of the statute on June 17, 1970, when it ruled the statute invalid. In other words, an injunction *ab initio* would have prevented federal-state conflict, and enhanced the very policy the three-judge court thought it was following be denying the injunction.

A further reason for having granted the injunction was to avoid irreparable injury to individuals in the class of Jane Roe, and to physicians deterred by the ongoing possibility that the State might continue to enforce the statute until the controversy was determined by *this* court. Without a coercive order on record, Texas law enforcement authorities are free to ignore the declaratory judgment rendered below, because the judgment is subject to possible reversal here. It requires no argument to show that a declaratory judgment by this Court ends the controversy,[48]

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who had examined the patients and the prescribed contraceptive devices.

[42] Clark, *supra*, not 40, at 9.

[43] 28 U.S.C. § 2283 (1964 ed).

[44] While*Dombrowski* did not clarify the thorny definitional problems surrounding the concept of a "proceeding" in a state court, the Court did hold that at least an indictment must be returned. The federal complaint came before the indictments in *Dombrowski*, and was held to relate back where a district court erroneously dismissed the complaint. An almost identical situation in the abortion context is before this Court in *Hodges* v. *Randall*, No. 728, docketed Sept. 21, 1970, where law enforcement authorities secured the dismissal of a federal action for want of a case or controversy, and proceeded within two days to obtain an indictment against a physician who had been a federal plaintiff.

[45] 380 U.S. at 484 n. 2.

[46] *Hale* teaches that strangers to state proceedings may secure federal injunctive relief against a state statute, even though the effect of the federal decision may be to confuse cases pending at the same time before the highest court of the state. *Hale* affirmed a three-judge court decision enjoining enforcement of a Florida statute although "the injunction in effect stayed proceedings in the Supreme Court of Florida." 306 U.S. at 376.

[47] 28 U.S.C. § 2283 (1964 ed.).

[48] A decision by this Court on the propriety of injunctive relief, however, is necessary for guidance of lower courts in similar future controversies. Otherwise, the law of the district courts would be final law in all cases where the merits were correctly resolved, but an injunction improperly denied. In addition, as commentators have frequently observed, this Court has not resolved a sufficient variety of cases concerning the parameters of 28 U.S.C. § 2283 (1964 ed.), to provide answers to questions such as those presented here. The criteria for commencement of "proceedings in a State court," for example, are uncertain, as is the relevance of a State proceeding brought after a federal complaint. Also, the extent to which the anti-injunction statute affects declaratory judgments is in dispute, as well as the availability of injunctions against future prosecutions where one or more indictments is outstanding, or prosecutions threatened. Similarly, the availability of injunctive relief against prosecutions which threaten to inhibit wide areas of constitutionally protected conduct outside the First Amendment context is uncertain. For a more comprehensive review of the need for further guidelines from this Court in these areas, see Stickgold, *Variations on the Theme of Dombrowski v. Pfister: Federal Intervention in State Criminal Proceedings Affecting First Amendment Rights*, 1968 WIS. L. REV. 369; Brewer, *Dombrowski v. Pfister: Federal Injunction Against*

but such judgments at the district court level carry much less practical import.

Appellant Dr. Hallford sought not only an injunction against future enforcement of the Texas anti-abortion statutes, but also an injunction to bar the commencement of State proceedings against him based upon two outstanding indictments. This request for injunctive relief presents several substantial questions which merit review by this Court.

Assuming that the district court improperly denied an injunction directed generally against future enforcement of the anti-abortion laws, one question is whether that injunction, if entered, should cover the commencement of prosecution under the aforesaid indictments. Whether a bare indictment, returned from the secrecy of a grand jury, alone constitutes a "proceeding in a State court" is an open question.[49] If there is no "proceeding," as this Court found in *Dombrowski*, the degree of irreparable injury needed to justify an injunction must apparently be considered nonetheless. Here, unlike *Dombrowski*, law enforcement authorities have not to date gone forward with prosecutions; hence the degree of friction between state federal judicial systems is considerably lessened.

Also here, as in *Griswold* v. *Connecticut*,[50] and unlike *Dombrowski*, the permissible range of leeway for State regulation of marital and personal privacy is small. While government may regulate many facets of speech coupled with conduct, there is much doubt whether government can so intrude into the domain of privacy. Thus, to allow any prosecution at all of Dr. Hallford is to permit the State in invade the privacy of physician and patient in an area where the district court concluded that the State had little business at all.

If one assumes that 28 U.S.C. § 2283 (1964 ed.), is *prima facie* a bar to an injunction on Dr. Hallord's behalf, the further question remains whether, notwithstanding § 2283, an injunction would be "necessary in aid of [the three-judge court's] jurisdiction," or "to protect or effectuate" the outstanding declaratory judgment. On this theory, since the court had jurisdiction to the grant an injunction on behalf of all parties, it would be incongruous to exclude Dr. Hallford. Indeed, the alleged patients who were aborted, according to the two indictments, might be able to enjoin the compulsion of process against them in order to protect their privacy.

In light of the above, the questions presented in this case, both on the merits, and with respect to relief, are substantial, novel, and hitherto unresolved by this Court. Accordingly, the Court should not probable jurisdiction, and set the case down for plenary review.

**II. A married couple, and others similarly situated, have standing to challenge the Texas anti-abortion laws, because said laws have a present and destructive effect on their marital relations, they are unable to utilize fully effective contraceptive methods, pregnancy would seriously harm the woman's health, and such a couple could not obtain judicial relief in sufficient time after pregnancy to prevent irreparable injury.**

A further aspect of the judgment below is presented on this appeal. In one part of the lower court's opinion is the holding that "Dr. Hallford has standing to raise the rights of his patients, single women and married couples, as well as rights of his own" (App. at 9a n.3). Yet, the judgment states that "[p]laintiffs John and Mary Doe failed to allege facts sufficient to create a present controversy and therefore do not have standing" (App. at 5a). Accordingly, both declaratory and injunctive relief were denied as to John and Mary Doe.

John and Mary Doe alleged a present impact of the Texas anti-abortion laws on their marital relations which, when considered in light of their assertion of the interests of a class, created a present controversy over a future right to relief in the event Mary Doe or another class member became pregnant.

This statement has already pointed out, *supra* at 6–7, that the judicial machinery is not equipped to grant relief to a party such as Mary Doe after she becomes pregnant. The only

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*State Prosecution in Civil Rights Cases—A New Trend in Federal-State Judicial Relations*, 34 FORDHAM L. REV. 71 (1965); Note, *The Federal Anti-Injunctions Statute and Declaratory Judgments in Constitutional Litigations*, 83 HARV L. REV. 1870 (1970); Comment, *Federal Injunctions Against State Actions*, 35 GEO. WASH. L. REV. 744 (1967).

[49] Taken together, *Dombrowski*, 380 U.S. at 484 n. 2, and *Hill* v. *Martin*, 296 U.S. 393, 403 (1935), suggest that a "proceeding" begins at some time after indictment. Respectable authorities argue that the indictment or information is an administrative act, done *ex parte* and in secrecy; hence, no "proceeding" exists until trial or arraignment, when both parties are first before a "State court." See Brewer, *supra* note 48, at 92; Comment, 35 GEO. WASH. L. REV. at 766–67.

[50] 381 U.S. 479 (1965).

meaningful relief must be forthcoming prior to the twelfth week of pregnancy. While twelve weeks is a lengthy period of time, pregnancy is rarely detected before the fourth week, and often not until considerably later, depending upon the degree of medical sophistication of the patient.

Based upon an assumed size of the class represented by Mary Doe, and the known failure rate of the contraceptive she used, it would not be speculative to assume that one or more members of the class would be or become pregnant during the litigation. To assume to the contrary, as the district court did, was not only medically unsound, but served to elevate "ripeness" requirements to an unnecessarily high point, namely a point which deprived the entire class of relief sought simply because no class member stepped forward as pregnant. Indeed, Jane Roe, the pregnant plaintiff, won a judgment which proved meaningless to her, because it was too late.

Ample precedent, moreover, could have been found to conclude that a present controversy existed between the Does and Appellees. Not only should the lower court have considered "'the hardship of denying judicial relief,'"[51] but the dilemma faced by the class of Mary Does when they become pregnant is "'capable of repetition, yet evading review' . . ." *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969). The situation, admittedly difficult if one ignores its uniqueness, is nonetheless one in which the "mere possibility of [recurrence] . . . serves to keep the case alive." *United States* v. *W.T. Grant Co*., 345 U.S. 629, 633 (1953). To the extent that the lower court, almost without discussion, rejected the standing of John and Mary Doe for want of an Article III case or controversy, the court erred. To the Does the case was and is a very real one. The was never an absence of adversity. The relief requested had significant meaning for the Does throughout, and the denial of the relief could provide harmful precedent for similar situations. Accordingly, this Court should reverse the determination below, after noting jurisdiction to consider the claim by John and Mary Doe that they too were entitled to declaratory and injunctive relief.

[51] Friendly, *F*., in *Toilet Goods Ass'n* v. *Gardener*, 360 F.2d 677, 684 (2d Cir. 1966), *aff'd*, 387 U.S. 167, 170 (1967).

## CONCLUSION

For the reasons set out in this Jurisdictional Statement, the Court should note probable jurisdiction, and set the case down for plenary consideration with briefs on the merits and oral argument.

Respectfully submitted,

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# In the Supreme Court of the United States

## No. 78–18, 1971 Term

Jane Roe, John Doe, Mary Doe, and
James Hubert Hallford, M.D.
Appellants,
vs.
Henry Wade, District Attorney of Dallas County, Texas
Appellee.

**On Direct Appeal from the United States District Court for the Northern District of Texas**

# Brief for Appellee

### STATEMENT OF THE CASE

Appellant Jane Roe instituted an action, suing on behalf of herself and all others similarly situated, contending she was an unmarried pregnant female who desired to terminate her pregnancy by "abortion"and that she was unable to secure a legal abortion in the State of Texas because of the prohibitions of the Texas Penal Code, Articles 1191, 1192, 1193, 1194, and 1196.[1] She further contends she cannot afford to travel to another jurisdiction to secure a legal abortion.[2]

Appellants John and Mary Doe instituted their action, suing on behalf of themselves and all others similarly situated, contending they were a childless married couple and that Appellant Mary Doe's *physician had advised her to avoid pregnancy because of a neural-chemical disorder*.[3] They further contend *their physician has further advised against the use of birth control pills* and, though they are now practicing an alternative method of contraception, *they understand* there is nevertheless a significant risk of contraceptive failure.[4] They contend that *should* Appellant Mary Doe become pregnant, she would want to terminate such pregnancy by abortion and would be unable to do so in the State of Texas because of the above prohibitory statutes.[5]

Appellant James Hubert Hallford, M.D., filed his Application for Leave for Intervene in Appellant Roe's action[6] and his Application was granted.[7] He contends he is in the active practice of medicine and contends of the Texas Abortion Laws are a principal deterrent to physicians and patients in their relationship in connection with therapeutic hospital and clinical abortions.[8] Appellant Hallford was under indictment in two (2) cases in Dallas County, Texas, charged with offense of abortion in violation of the Statutes in issue.[9]

In substance, Appellants contended in their Complaints filed in the lower court that (1) the Texas Abortion Laws are unconstitutionally vague and uncertain on their face, (2) they deprive a woman of the "fundamental right to choose whether and when to bear children," (3) they infringe upon a woman's right to personal privacy and privacy in the physician-patient relationship, (4) they deprive women and their physicians of rights protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States.[10]

Appellants sought declaratory relief that the Texas Abortion Laws were unconstitutional in violation of the Constitution of the United States and injunctive relief against the future enforcement of such Statutes.[11] They prayed that a three-judge court be convened to hear and determine their causes of action.[12]

Appellee Henry Wade filed his Answer to Appellant Roe's Complaint[13] his Motion to Dismiss the Complaint of Appellants John and Mary Doe[14] and his Answer to Appellant Hallford's Complaint.[15] The State of Texas was granted leave to respond to the Appellants' Complaints and filed its Motion to Dismiss all Complaints and its alternative plea for Judgment on the Pleadings.[16] Both Motions to Dismiss challenged the standing of Appellants John and Mary Doe[17] and the State of Texas'

[1] A. 11 (The Statutes in issue are commonly referred to as the Texas Abortion Laws and are set out verbatim, *infra*, at pp. 5–6).
[2] A. 12.
[3] A. 16.
[4] A 16–17.
[5] A. 17.
[6] A 22–23.
[7] A. 36.
[8] A 28.
[9] A. 30. (These cases are still pending.)
[10] A. 12–13, 19–20, 31, 34.
[11] A. 14, 20–21, 34.
[12] A. 13, 20–21 34.
[13] A. 37–39.
[14] A. 40–41.
[15] A. 42–46.
[16] A. 47–49.
[17] A. 40, 48.

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Motion to Dismiss challenged the standing of Appellants Roe and Hallford.[18] In addition, the State of Texas' Motion to Dismiss asserted that Appellants (1) failed to state a claim upon which relief may be granted, (2) failed to raise a substantial Constitutional question, (3) failed to show irreparable injury and the absence of an adequate remedy at law, and (4) Appellant Hallford's Complaint was barred by 38 U.S.C. 2283.[19]

In the course of proceeding in the lower court, Appellants filed their Motions for Summary Judgment.[20] In support of Appellant Jane Doe's Motion for Summary Judgment, she filed her affidavit[21] and an affidavit of one Paul Carey Trickett, M.D.[22] Appellant Hallford Filed his affidavit in support of his Motion for Summary Judgment[23] and annexed copies of the indictments pending against him.[24]

The cases were consolidated and processed to a hearing before the Honorable Irving L. Goldberg, Circuit Judge, and the Honorable Sarah T. Hughes and W.M. Taylor, Jr., District Judges.[25] Neither the Appellants nor the Appellee offered any evidence at such hearing [26] and arguments were presented by all parties. The Court tendered its Judgment[27] and Opinion[28] on June 17, 1970.

Appellants filed Notice of Appeal to this Court pursuant to the provisions of 28 U.S.C. 1253.[29] Appellants Roe and Hallford and Appellee Wade filed Notice of Appeal to the United State Court of Appeals for the Fifth Circuit.[30] Appellants filed their Motion to Hold Appeal to Fifth Circuit of Appellee Wade in Abeyance Pending Decision by the Supreme Court of the United States[31], which Motion was granted.[32]

The lower court found that Appellants Roe and Hallford and the *member of their respective classes*[33] had standing to bring their lawsuits, but Appellants John and Mary Doe had failed to allege facts sufficient to create a present controversy and did not have standing.[34] That court held the Texas Abortion Laws unconstitutional in that they deprived single women and married persons of the right to choose whether to have children in violation of the Ninth Amendment to the Constitution of the United States and that such Laws were void on their face for unconstitutional overbreadth and vagueness.[35] The court denied Appellants' applications for injunctive relief.[36]

### STATUES IN ISSUES

The Texas Abortion Laws and the statutes in issue are contained in the Texas Penal Code and consist of the following:

#### Article 1191. Abortion

> If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use toward her any violence or means whatsoever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary for not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth shall be caused.

#### Art. 1192. Furnishing the Means

> Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

#### Art. 1193. Attempt at Abortion

> If the means used shall fail to produce and abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means was calculated to produce that result, and shall be fined not less that one hundred nor more than one thousand dollars.

#### Art. 1194 Murder in Producing Abortion

> If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

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[18] A. 48.
[19] A. 47–48.
[20] 50, 59–60.
[21] A. 56–60. (an alias affidavit)
[22] A. 51–55.
[23] A 61–72.
[24] A 73, 74.
[25] A. 75–110.
[26] A. 77.
[27] A. 124–126.
[28] A. 111–132.
[29] A. 127–129.
[30] A. 133, 134, 135.
[31] A. 136–138.
[32] A. 139–140. (The Court of Appeals has taken no further action in these cases).
[33] A. 124.
[34] A. 124
[35] A. 125–126.
[36] A. 126.

**Art. 1196. By Medical Advice**

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.[37]

## QUESTIONS PRESENTED

In Appellee's opinion the questions presented may be precisely stated as follows:

I. Whether appellants Jane Roe, and John and Mary Doe, present a justiciable controversy in their challenge to the Texas abortion laws?

II. Whether the court should enjoin the enforcement of the Texas abortion laws as to appellant Hallford in the light of pending state criminal charges?

III. Did the district court err in refusing to enjoin future enforcement of the Texas abortion laws after declaring such laws unconstitutional?

IV. Whether this court can consider plenary review of an entire case when a lower court grants declaratory relief holding a state statue unconstitutional, but refuses to enjoin future enforcement of such statute, and the appeal to this court is from that portion of the judgment denying injunctive relief?

V. Whether articles 1191, 1192, 1193, 1194 and 1196 of Texas penal code are void on their face because of unconstitutional overbreadth and vagueness?

VI. Whether the constitution of the United States guarantees a woman the right to abort an unborn fetus?

VII. Whether the state of Texas has a legitimate interest in preventing abortion except under the limited exception of "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother?"

## SUMMARY OF ARGUMENT

Appellant Jane Roe has not presented a justiciable controversy admitting of specific relief for this Court in her challenge to the Texas Abortion Laws. She has not shown that she has sustained or is immediately in danger of sustaining some direct injury as a result of enforcement of the Texas Abortion Laws. Any cause of action that she may have had is not established by the record and has been mooted by the termination of her pregnancy.

Appellants John and Mary Doe's cause of action is based on speculation and conjecture and they also have shown they have sustained or are immediately in danger of sustaining some direct injury as a result of enforcement of the Texas Abortion Laws essential to standing and a justiciable controversy.

Appellant Hallford is under indictment in two cases for violation of the statutes he attacks in the controversy before the Court. The Court should abstain from exercising jurisdiction under the principles enunciated in *Younger* v. *Harris*, etc. Appellant Hallford is not entitled to assert a cause of action on behalf of his patients in the physician-patient relationship.

For a federal court to grant injunctive relief against the enforcement of a state statute, there must be a clear and persuasive showing of unconstitutionally and irreparable harm. The lower court can divorce injunctive and declaratory relief under its equity power and declare a statute unconstitutional, yet refuse to enjoin the enforcement of such statute.

Once a federal court has assumed jurisdiction of a cause, it may properly assume jurisdiction of the entire controversy and render a decision on all questions presented and involved in the case. If this Court determines that is has jurisdiction to consider the denial of injunctive relief to Appellants by the lower court, it may consider the constitutionality of the Texas Abortion Laws determined to be unconstitutional by the Court below.

The Texas Abortion Laws are not violative of the Constitution of the United States as being unconstitutionally vague and overbroad. *United States* v. *Vuitch* is decisive of the issues in the case as to vagueness and overbreadth.

Though the right of "marital privacy" and "personal privacy" are recognized, they have never been regarded as absolute. The "right to privacy" is a relative right that, in the matter of abortion, is not attached to an express right guaranteed under the Constitution of the United States. The right to life of the unborn child is superior to the right of privacy of the mother.

[37] The omitted article, Article 1195, concerns destruction of the vitality or life of a child in a state of being born and before actual, birth, which such child would otherwise have been born alive.

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The state has a legitimate, if not compelling, interest in prohibiting abortion except under limited circumstances. In the light of recent findings and research in medicine, the fetus is a human being and the state has an interest in the arbitrary and unjustified destruction of this being.

## ARGUMENT

**I. Appellants Jane Roe, John and Mary Doe, have not presented a justiciable controversy in their challenge to the Texas abortion laws**

**A. Justiciability and standing** Article III of the Constitution of the United States limits the judicial power of Federal Courts to "cases" and "controversies." This has been construed by the courts to prohibit the giving of advisory opinions. *Flast v. Cohen,* 392 U.S. 83 (1968); *Bell v. Maryland,* 378 U.S. 226 (1964); *United States v, Fearful,* 365 U.S. 146 (1961). There must be a real and substantial controversy admitting of specific relief as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. *Aetna Life Insurance Company v, Hayworth,* 300 U.S. 227 (1937); accord, *Public Service Commission of Utah v. Wycoff Company,* 344 U.S. 237 (1952); *Baker v. Carr,* 369 U.S. 186 (1962); *Golden v. Zwickler,* 394 U.S. 103 (1969). Correctively, a party challenging a statute as invalid must show that he has sustained or is immediately in danger of sustaining some direct injury as a result of the statue's enforcement before a three-judge court or any Federal court can entertain the action, *Frothingham v. Mellon*[38] 262 U.S. 447 (1923); *Ex parte Levitt*, 302 U.S. 633 (1937); *Fairchild v. Hughes* 258 U.S. 126 (1922); *Poe v. Ullman*, 367 U.S. 497 (1961). In a per curiam opinion this Court stated in *Ex Parte Levitt*:

> "It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action and *it is not sufficient that he has merely a general interest common to all members of the public.*" (Emphasis added). 302 U.S. at 634.

In *Flask v. Cohen*, supra, this Court gave careful consideration to the nexus between *standing* and *justiciability* and stated that "Standing is an aspect of justiciability and, as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability." 392 U.S. at 98–99. Most probably, the best known decision of this Court on standing is *Frothingham v. Mellon*, supra, in which Mrs. Frothingham claimed that she was a taxpayer of the United States and sued to restrain payments from Treasury to the several states which chose to participate in a program created by the Maternity Act of 1921. She claimed that Federal government lacked power to appropriations would cause an unconstitutional increase in her future taxes. After considerations of the interest of an individual taxpayer, remoteness, and other issues, this Court finally stated that its power to declare statutes unconstitutional exists only where the statute is involved in a justiciable case, and that to present such a case the plaintiff "must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that suffers in some indefinite way in common with the people generally." 262 U.S. at 488. See, *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Baker v. Carr*, supra; *National Association for the Advancement of Colored People v. Button*, 271 U.S. 415 (1963).

A Review and analysis of the decisions on standing indicated they are not easy to reconcile on the facts. It is frequently stated that to have standing a party must be able to demonstrate injury to a legally protected right or interest. *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1937); *Alabama Power Company v. Ickes*, 302 U.S. 464 (1938); *Perkins v. Lukens Steel Co.*, 310 U.S. 113(1940).

**B. Standing of Appellants John and Mary Doe** Applying the standards of justiciability and standing stated above, an examination of the cause of action asserted by Appellants John and Mary Doe discloses they do not have standing. In their Complaint they contend they are a childless married couple and Mary Doe was not pregnant at the time.[39] Their cause of action is based upon their fear of contraceptive failure resulting in pregnancy to Mary Doe at a time *when they are not properly prepared to accept the responsibilities of parenthood* and upon the *advice of their physician to avoid pregnancy until her health condition improves.*[40] The record is

[38] This case is usually referred to as *Massachusetts v. Mellori.*
[39] A. 16.
[40] A. 17.

wholly lacking in proof of these contentions. The lower court properly and correctly denied standing to these Appellants upon finding they failed to allege facts sufficient to create a present controversy.[41]

Initially, it may be states that neither Appellants Doe nor Roe can be prosecuted under the Texas Abortion Laws for securing an abortion or for attempted abortion. *Gray v. State*, 178 S.W. 337 (Tex.Crim. 1915); *Shaw v, State*, 165 S.W. 930 (Tex.Crim. 1914). Appellants John and Mary Doe's cause of action is based upon speculation that these Appellants will not at that time be prepared for parenthood and, further, that Appellant Mary Doe's health condition at that time will be impaired by pregnancy. These speculative fears cannot support a caused of action. See, *Younger v. Harris*, 401 U.S. 37 (1971); *Golden v. Zwickler*, supra. For a court to decide the merits of Appellants John and Mary Doe's cause of action would result in giving an advisory opinion upon a hypothetical state of facts contrary to Federal Constitutional limitations and this Court's holding in *Flask v. Cohen*, supra, and cases cited, supra, at p. 9.

**C. Standing of Appellant Jane Roe** Appellant Jane Roe occupies a more unique position in regard to standing. She filed her Amended Complaint in the District Court on April 22, 1970,[42] and an "alias affidavit" on May 21, 1970.[43] *The only support in the record for her contentions and allegations giving rise to her cause of action is found in her Amended Complaint and her "alias affidavit."* The affidavit filed after the commencement of her action indicates she did not desire an abortion at the time of its filing.[44] This affidavit further shows that Appellant Roe had been pregnant for several months prior to its filing.[45] The hearing was held before the three-judge panel on July 22, 1970,[46] some four and one-half (4 and a half months after the filing of her Original Complaint[47] and on November 3, 1971, some twenty (20) months will have expired since the filing of said Original Complaint. There is no indication in the record the Appellant Jane Roe was pregnant at the time of the hearing on July 22, 1970, and it can be reasonably concluded that she is not now pregnant.[48]

The argument that Appellant Jane Roe has not presented a justiciable controversy to give her standing is not intended to be fictitious or spurious. If her statements in her affidavit did not moot her cause of action, resort may be had to *Golden v. Zwickler*; supra, wherein this Court stated:

> "The District Court erred in holding that Zwickler was entitled to declaratory relief if the elements essential to that relief existed '[w]hen this action was initiated.' The proper inquiry was whether a 'controversy' requisite to relief under the Declaratory Judgement Act existed at the time of the hearing on remand." 394 U.S. at 108.[49]

*Golden v. Zwickler* indicated that this Court should consider an issue as to standing *at the time* it reviews the case and not when the suit was filed. This is supported to some extent by *Bryan v. Austin*. 354 U.S. 933 (1957), wherein Plaintiffs sought to have a South Carolina statute declared unconstitutional and, pending appeal, the statute in question was repealed. In a per curiam opinion this Court stated that the repeal of the statute in issue after the decision of the District Court rendered the cause moot. *Atherton Mills v. Johnston*, 259 U.S. 13 (1922), involved a suit for injunctive relief to prevent the discharge of a minor employee because of the Child Labor Act of 1919, which was challenged as being invalid. While the case was on appeal, the minor employee involved became of age. This Court held that the case became moot by the lapse of time and the case could not be considered by the Court.

Mootness deprives a federal court of its judicial power since no case or controversy exists. *Mechling Barge Lines, Inc., v. United States*, 368 U.S. 3224 (1961); *Local No. 8–6 v. Missouri*, 361 U.S. 363 (1960); *Flast v. Cohen*, supra; *Parker v. Ellis*, 362 U.S. 574 (1960).

**D. Class action aspects** It is questionable whether the requirements of Rule 23, Fed. Rules Civ. Proc., have been complied with in connection with Appellants Roe and John and Mary Doe's attempt to bring their suits as class actions. These Appellants have alleged the pre-

[41] A. 124.
[42] A. 10.
[43] A. 56.
[44] "At the time I filed the lawsuit I wanted to terminate my pregnancy by means of an abortion. . ." (A. 57) and "I wanted to terminate my pregnancy because. . ." (A. 57).
[45] "Each month I am barely able to make ends meet" (A. 58).
[46] A. 77.
[47] Docket Entries in CA-3–3690–B (A-1).
[48] The Court may desire to take judicial notice of this fact.
[49] This case was reversed and remanded with direction to enter a new judgment dismissing the complaint.

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requisites required in Rule 23 (a),[50] but have not designated whether their actions are (b) (1) or (b) (2) actions under Rule 23. Again, the record is wholly void of any showing of the propriety of class action relief and the only other mention of this aspect of the case is found in the lower court's judgment as follows:

> "(1) Plaintiff Jane Roe, plaintiff-intervenor James Hubert Hallford, M.D. and the members of their respective classes have standing to bring this lawsuit." (A. 124).[51]

The 1966 amendments to Rule 242 require the judgment in a (b) (1) or (b) (2) class action to include and describe those whom the court finds to be members of the class. In a Rule 23 (b) (3) class action the 1966 amendments require the judgment include and specify or describe those to whom notice was directed, as required by Rule 23 (c) (2), and who have not requested exclusion, and who are found by the court to be members of the class.

In *Hall v. Beals*, 396 U.S. 45 (1969), this Court had before it on direct appeal a case involving new residents of the State of Colorado, who had moved into the State four (4) or five (5) months prior to the November, 1968 presidential election. They were refused permission to vote because of a Colorado statute imposing a six (6) months residency requirement. They commenced a suit as a class action challenging the constitutionality of the statute. A three-judge court upheld the constitutionality of the statute. Thereafter, the election was held, and the State statute was amended to reduce the residency requirement for a presidential election to two (2) months. This Court, in a per curiam opinion, held that, aside from the fact that the election had been held, the case was rendered moot by the amendment to the statute that reduced the residency requirement to two (2) months, and under which the Appellants could vote, since the case had lost its character as a present, live controversy, notwithstanding that the Appellants had denominated their suit as a class action and had expressed opposition to residency requirements in general. In *Golden v. Zwickler*, supra, a distributor of anonymous handbills criticizing a congressman's voting record sought a declaratory judgment concerning the constitutionality of a New York statute which penalized the distributor of anonymous literature in connection with an election campaign. While the case was pending, the congressman left the House of Representatives and accepted a term as a justice on the Supreme Court of New York. The United States District Court held that the distributor was nevertheless entitled to a declaratory judgment because a genuine controversy had existed as the commencement of the action. This Court held there was no "controversy" of "sufficient immediacy and reality" to warrant a declaratory judgment and, in addition, stated as follows:

> "It is not enough to say, as did the District Court, that nevertheless Zwickler has a 'further and far broader right to a general adjudication of unconstitutionality. . . [in] [h]is *own interest as well as that of others* who would with like anonymity practice free speech in a political environment. . . .' The constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance." (Emphasis added). 394 U.S. at 118.

See, *Burrows v. Jackson*, 346 U.S. 249 (1953).

The Federal Constitution limitation in Article III cannot be extended or limited by asserting a "class action" under Rule 23. Rule 82, Fed. Rules Civ. Proc., in referring to the preceding rules, including Rule 23, provides in part that "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . "

**II. This court should refuse declaratory and injunctive relief to Appellant James Hubert Hallford, M.D.**

In Indictment No. 2023 A, Appellant James Hubert Hallford stands charged by the State of Texas with performing an abortion on Frances C. King,[52] and in Indictment No. 556 J with performing an abortion on Jane Wilhelm.[53] He sought and obtained leave to intervene in Appellant Roe's action[54] seeking a permanent injunction against the enforcement of the Texas Abortion Laws,[55] but reserving a right to make an application for an interlocutory injunction.[56] In reality, Appellant Hallford is seeking to avoid

[50] A. 12, 19.

[51] Appellant Hallford's Complaint makes no mention of class action relief. (A. 24–35).

[52] A. 73.

[53] A. 74.

[54] A. 22, 36.

[55] A. 34.

[56] A. 34 (it is submitted that Appellant Hallford reserved this right in the event the pending cases were set for trial).

criminal prosecution in the criminal cases pending against him.

Historically there has been great reluctance by the federal courts to interfere in the operations of a state court. *Stefanelli v. Minard*, 342 U.S. 117 (1951). General principles should be enough to show that an independent federal action is not an appropriate means to raise what should be a state court defense, but this does not stand alone. A statute almost as old as the Republic, the Anti-Injunction Act of 1793, has, with some variations in language over the years, provided that a court of the United States "may not grant an injunction to stay proceedings in a State court . . ." 28 U.S.C. 2283. This statute is no happenstance. It is a "limitation of the power of federal courts dating almost from the beginning of our history and expressing an important Congressional policy—to prevent friction between state and federal courts" *Oklahoma Packing Co. v. Oklahoma & Elec. Co*., 309 U.S. 4 (1940).

Appellant Hallford's Complaint allegations do not justify the conclusion that any criminal charges have been brought against him in bad faith or under any conditions that would place his case within *Dombrowski's* "special circumstances." *Dombrowski v. Pfister*, 380 U.S. 479 (1965). There is no relationship worthy of note in the allegations contained in Paragraph 14 of this Complaint[57] to *Dombrowski's* "special circumstances." He appears to indicate that the State of Texas must negate the exception provided in Article 1196, supra,[58] and that he cannot offer medical testimony to bring him within the purview of the exception.

In *Atlantic Coast Line R. Co. v. Engineers*, 398 U.S. 281 (1970), the railroad obtained a state injunction against a union's picketing and the union sought and obtained in the Federal District Court an injunction against the enforcement of the state court injunction. The Court of Appeals for the Fifth Circuit affirmed the Federal District Court's judgment and, on certiorari, this Court reversed and remanded stating as follows:

> "First, a federal court does not have inherent power to ignore the limitations of Section 2283 and to enjoin state court proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. This rule applies regardless of whether the federal court itself has jurisdiction over the controversy, or whether it is ousted from jurisdiction for the same reason that the state court is." (Omitting authority). 398 U.S. at 294.-295.

The above principle of federal abstention is further enunciated in *Spinally Motor Sales Co., Inc., v. Dodge*, 295 U.S. 89 (1935); *Cameron v. Johnson*, 390 U.S. 611 (1968); *Shaw v. Garrison*, 293 F.Supp. 937 (E.D.La. 1968); *City of Greenwood v. Peacock*, 384 U.S. 8080 (1966).

Most recently, this Court has announced certain guidelines on the subject of federal court interference with pending state criminal proceedings in what is sometimes referred to as the "February 23rd Decisions." *Younger v. Harris*, supra, *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Perez v, Ledesma*, 401 U.S. 82 (1971); *Bryne v. Karalexis*, 401 U.S. 216 (1971). These cases very strongly indicate the availability of federal injunctive relief against pending state criminal prosecutions has been severely curtailed even in the area of First Amendment rights of expression. Thus, federal interference, even to the extent of granting preliminary restraining orders and convening three-judge courts is by far the exception rather than the rule.

The above cases further indicate that, independent of any obstacles posed by the federal anti-injunction statute, the primary prerequisite to federal court intervention in the present context, is a showing or irreparable injury. Even irreparable injury is insufficient unless it is "both great and immediate." In *Younger v. Harris*, supra, this Court stated as follows:

> "Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the Plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." 401 U.S. at 46.

Accord, *Byrne v. Karalexis*, supra.

*Samuels v. Mackell*, supra, considered declaratory relief prayed for in relation to the federal court's reluctance to interfere with pend-

[57] A. 30.

[58] See Article 1196, supra, at p. 6 containing the exception "procured or attempted by medical advice for the purpose of saving the life of the mother."

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ing state criminal proceedings and this Court stated:

> "We therefore hold that, in cases where the state criminal prosecution was begun prior to the federal suit, same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that *where an injunction would be impermissible under these principles, declaratory relief should be denied as well.* . . . Ordinarily, however, the practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment as it would be by an injunction." (Emphasis added). 401 U.S. at 73.

Nor can Appellant rely upon his patients' rights, which a statute supposedly threatens. See *Glisten v. Ullman*, 318 U.S. 44 (1943); accord, *Golden v. Zwicker*, supra; *Burrows v. Jackson*, supra.

Applying the guidelines set forth in *Younger v. Harris*, supra, and the other "February 23rd Decisions," this Court can properly conclude Appellant Hallford has not suffered, nor under the present state of the record, will suffer both great and immediate irreparable injury of the nature required to authorize federal injunctive or declaratory relief. His case is precisely the type to which this Court was addressing itself in the recent pronouncements condemning, except in very limited circumstances, federal court equitable injunctive and declaratory interference with pending state criminal prosecutions.

**III. The United States District Court did not err in refusing to enjoin future enforcement of the Texas abortion laws after declaring such laws unconstitutional.**

This Court has been unwaivering in holding that a three-judge court cannot consider an action for injunctive relief under 28 U.S.C. 2281 on its merits without a preliminary showing of irreparable harm and no adequate legal remedy. In *Spielman Motor Sales Co. Inc., v. Dodge*, supra, a suit requesting a three-judge court to rejoin a New York district attorney from instituting criminal prosecutions against certain defendants under an alleged unconstitutional state statute, this court affirmed the lower court's dismissal of the action and stated:

> "The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. . . To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." 295 U.S. at 95.

In *Mayo v. Lakeland Highlands Canning Co., Inc.*, 309 U.S. 310 (1940), a suit was brought before a three-judge court seeking to enjoin the Florida Agriculture Commission from enforcing an alleged unconstitutional state statute. This Court reversed the lower court's disposition on the merits and made the following observation:

> "The legislation requiring the convening of a court of three judges in cases such as this was intended to insure that the enforcement of a challenged statute should not be suspended by injunction except upon a clear and persuasive showing of unconstitutionality and irreparable injury." 309 U.S. at 318–319.

Accord, *Beal v. Missouri Pacific Railroad Corporation*, 312 U.S. 45 (1961); *Douglas v. City of Jeannette*, 319 U.S. 157 (1943); *Bryne v. Karalexis*, supra; *Dyson v, Stein*, supra; *Samuels v. Mackell*, supra; *Younger v. Harris*, supra.

The lower court cited *Dombrowski v. Pfister*, supra, and *Zwickler v. Koota*, 389 U.S. 241 (1967), as authority for the court to divorce injunctive and declaratory relief,[59] In *Powell v. McCormick*, 395 U.S. 486 (1969), this Court held that a court may grant declaratory relief even though it chooses not to issue an injunction or mandamus. 395 U.S. at 504. See, *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

**IV. This court can consider plenary review of the entire case when a lower court grants declaratory relief holding a state statute unconstitutional, but refuses to enjoin future enforcement of such statute, and the appeal to this court is from that portion of the judgment denying injunctive relief.**

Should this Court determine that it has jurisdiction to consider the propriety of injunctive relief in this case, it can properly assume jurisdiction of this entire controversy and render a decision on all questions involved in this case, including the constitutionally of the Texas Abortion Laws. Appellee joins Appellants in requesting this Court reach the issue of the Constitutionality of the Texas Abortion Laws. Appellee is in a somewhat awkward procedural position in that it lost on the merits in the lower

[59] A. 121, 122.

court as to declaratory relief and neither the grant nor the refusal of a declaratory judgment, without more, will support a direct appeal to this Court under 28 U.S.C. 1253. *Mitchell v. Donovan*, 398 U.S. 427 (1970); *Gunn v. University Committee*, 399 U.S. 383 (1971). Appellee has the avenue of appeal to the Fifth Circuit.[60] Should this Court in the present case hold that the lower court properly grant declaratory relief but improperly denied injunctive relief, it then might bed faced, at least indirectly, with the consideration and decision of the same constitutional issues that are being directly raised by the Appellee in the Court of Appeals for the Fifth Circuit.

Though not directly in point, *Public Service Commission of Utah v. Wycoff Co*., supra, lends support to the premise that a federal court has the right, power, and authority to decide and determine the entire controversy and all the issues and questions involved in a case of which it has properly acquired jurisdiction. Accord, *Just v. Chambers*, 312 U.S. 383 (1941), *Florida Lime and Avocado Growers v. Jacobson*, 362 U.S. 73 (1960); cf, *Hartford Accident & Indemnity Company v. Southern Pacific Company*, 273 U.S. 207 (1927); *British Transport Commission v. United States*, 354 U.S. 129 (1957). In *Sterling v. Constantin*, 287 U.S. 378 (1932); this Court stated that:

> "As the validity of provisions of the state constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. Straton v. St. Louis S. W. R. Co., 282 U.S. 10, 75 L. Ed. 135, 51 S.Ct. 8. The jurisdiction of the District Court so constituted, and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the *court to rest its judgment on the decisions of such of the questions as in its opinion effectively dispose of the case." (Omitting authority). 287 U.S. at 393–394.

**V. Articles 1191, 1192, 1193, 1194 and 1196 of the Texas Penal Code are not unconstitutional on their face because of overbreath and vagueness.**

The possible vagueness of state abortion statutes which allow for such a procedure only when the life, or in some cases, health, of the expectant mother is threatened has recently come under judicial scrutiny in a number of instances. One author, in commenting on the decision of the California Supreme Court in *People v. Belous*, 71 Cal. Rptr. 354, 458 P.2d 194 (1969), cert.denied, 397 U.S. 915 (1970), stated as follows:

> "In attempting to define the phrase 'necessary to preserve . . . life . . .' the California Supreme Court first examined the isolated words of the statute, and concluded that no clear meaning of 'necessary' and 'preserve' could be ascertained. It is not surprising that a seriatim examination of the words convinced the court that the phrase was vague. Necessity is a relative concept and must refer to a particular object to be meaningful. Nor can the word 'preserve' be understood out of context. In the abstract, such words are not just vague, they are meaningless. Taken in context, however, these words do have meaning. The object of the necessity in this statute is 'to preserve life.' The term is defined by its object—life." 118 U. Penn. L. Rev. 643, 644 (1970).

There is some inherent vagueness in many homicide laws, such as laws which define justifiable homicide as self-defense, or those which differentiate between first- and second-degree murder. The courts, like society, however, have learned to live with a certain element of inevitable vagueness in all laws and have learned to apply it reasonably. See, *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Connally v. General Construction Company*, 269 U.S. 385 (1926). In order for a statute to be unconstitutionally vague, it must be so vague and lacking in standards so as to compel men of ordinary intelligence to guess as its meaning. *Adderley v. Florida*, 385 U.S. 39 (1967); *Cameron v. Johnson*, supra.

A number of three-judge panels have been convened recently to consider the constitutionality of abortion laws which allowed for the performance of such operations only when the life of the mother was threatened by continuance of the pregnancy. While one such court, in dealing with such a law in Wisconsin, did hold the statute to be unconstitutional on other grounds, it said that whatever vagueness existed in the law was not sufficient, of itself. for a declaration of unconstitutionality. *Babbitz v. McCann*, 310 F.Supp. 293 (E.D. Wis. 1970). The court observed:

[60] Appellee has appealed to the United States Court of Appeals for the Fifth Circuit (A. 135) and this appeal is being held in abeyance pending a decision of this Court (A. 139–140).

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> "We have examined the challenged phraseology and are persuaded that it is not indefinite or vague. In our opinion, the word 'necessary' and the expression 'to save the life of the mother' are both reasonably comprehensible in their meaning." 310 F.Supp. at 297.

Accord, *Rosen v. Louisiana State Board of Medical Examiners*, 318 F.Supp. 1217 (E.D. La. 1970).

In *United States v. Petrillo*, 332 U.S. 1 (1947), this Court said:

> "[That] there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense, *Robinson v, United States*, 324 U.S. 282, 285, 286, 89 L.Ed. 944, 946, 947, 65 S. Ct. 666. It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was willfully attempting to compel another to hire unneeded employees." (Omitting authority). 332 U.S. at 7–8.

See *Jordan v. DeGeorge*, 341 U.S. 223 (1951); *United States v. Ragen*, 314 U.S. 513 (1942); *United States v. Wurzback*, 280 U.S. 396 (1930).

This court below did not have the advantage of this Court's decision in *United States v. Vuitch*, 402 U.S. 62 (1971), at the time it handed down its decision in this case. In *Vuitch* this Court reversed the decision of a district court judge who had found that the District of Columbia abortion law was unconstitutionally vague. The exception clause in *Vuitch* stated in part "unless the same were done as necessary for the preservation of the mother's life or health."[61] Though this Court directed its attention to the word "health," its holding should be dispositive of the case at bar in that the exception clause is less certain of meaning that the exception found in the Texas Abortion Laws. This Court in *Vuitch* further disposed of the contention of the physician that once an abortion is performed he is "presumed guilty."

**VI. The Constitution of the United States does not guarantee a woman the right to abort an unborn fetus.**

**A. The interest of marital privacy** One must recognize the interest of a husband and wife in preserving their conjugal relations from state interference, an interest which, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), was found to be violated by Connecticut's statute forbidding the use of contraceptives. This law interfered with the most private aspect of the martial relation, sexual intercourse, making it criminal for a couple to engage in sexual intercourse when using contraceptives. In contrast, the usual statute restricting abortions does not affect the sexual relations of a couple except under some circumstances and only for a limited time. Prevention of abortion does not entail, therefore, state interference with the right of marital intercourse, nor does enforcement of the statute requiring invasions of the conjugal bedroom.

Assuming arguendo that there are other marital rights the state must respect, may it then be urged that the right of marital privacy includes the freedom of a married couple to raise and educate a child they do not want, or commit infanticide, incest, engage in pandering and the like. Family privacy, like personal privacy, is highly valued, but not absolute. The new media publicize the events that occur when a family is victimized by criminals though they seek seclusion. *Time v. Hill*, 385 U.S. 374 (1967). The family may not practice polygamy,[62] may not prohibit schooling for a child,[63] or prohibit the child's labor,[64] or expose the community or a child to communicable disease.[65] In *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967), the unborn child's right to live came into conflict with family privacy. The Gleitmans contended that their doctor failed to warn that Mrs. Gleitman was suffering from German measles and this failure deprived the family of the opportunity of terminating the pregnancy. They alleged the child was born with grave defects as a result of the doctor's omission. The court stated as follows:

> "The right to life is inalienable in our society. . . .
>
> We are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle. It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against

[61] 22 D C Code 201.
[62] *Reynolds v. United States*, 98 U.S. 145 (1879).
[63] *Prince v. Massachusetts*, 321 U.S. 158 (1944).
[64] Id.
[65] Id.

> the preciousness of a single human life to support a remedy in tort." 227 A.2d at 693.

**B. Physician-patient relationship** Proponents of abortion-on-demand assert that anti-abortion laws unlawfully intrude into the privacy of the physician-patient relationship. They assume necessarily that the doctor treating a pregnancy owes an obligation of good medical care to only one patient, the pregnant woman.

In *Jones v. Jones*, 208 Misc. 721, 144 N.Y.S.2d 820 spout. 1955), the court stated (concerning an unborn child) as follows:

> ". . .became a patient of the mother's obstetrician, as well as the mother herself. In so holding, I can think of the infant as a third-party beneficiary of the mother-doctor contract or perhaps a principal for whom the mother acted as agent." 144 N.Y.S.2d at 826.

As a patient of the obstetrician, the child may recover damages for a prenatal injury suffered as the result of the negligence of his doctor. *Sylvia v. Gobeille*, 101 R.I. 76, 220 A.2d 222 (1966); *Seattle-First National Bank v. Rankin*, Wash. 2d 288, 367 P.2d 835 (1962). It is elemental that a doctor cannot be freed from legal restraints in making socio-moral judgments. The state may regulate the medical profession to protect the health and welfare of all its citizens. See *Wasmuth v. Allen*, 14 N.Y.2d 391, 200 N.E.2d 756, 252 N.Y.S.2d 65 (1964), appeal dismissed, 379 U.S. 11 (1964); *Barksy v. Board of Regents*, 347 U.S. 442 (1954). Appellant's contentions of intrusion upon physicians-patient relationship are not self-sustaining and must be associated with and connected to a violation of some basic right.

**C. The interests of the woman** Personal privacy is an exalted right but, as in marital privacy, it has never been regarded as absolute. A person may be subjected to a "stop and frisk" though it constitutes an intrusion upon his person,[66] or a person may be required to submit to a vaccination,[67] and a blood sample may forcibly be extracted from the body of an individual arrested for suspicion of driving while intoxicated.[68] A woman has been required to submit to a blood transfusion necessary to preserve her life in order that her small child shall not be left without a mother.[69] The "right of privacy" is a highly cherished right—however one which is nowhere expressly mentioned in the Constitution of the United States or its amendments. Numerous examples in tort and criminal law indicate the right to privacy is a relative right.[70] A woman cannot in privacy, even though she harm no other person, legally utilize or even posses certain forbidden drugs, such as LSD or heroin. The right to privacy was considered a mere relative right by the framers of the Constitution. Had they not considered the right to privacy a mere relative right, they would have carefully defined additional protection for the small portion of the right to privacy protected by the guarantee against unreasonable search and seizure. In *Katz v. United States*, 389 U.S. 347 (1967), referring to searches and seizures, stated that the Fourth Amendment to the Constitution of the United States cannot be translated into a general constitutional "right of privacy." See, *Lewis v. United States*, 385 U.S. 206 (1966).

When the "right of privacy" is attached to an "express right" such as the "right of freedom of religion" a very strong constitutional basis exists for upholding the "right"—except when in conflict with the most basic and fundamental of all rights—the "right to life." In *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964), cert. denied, 377 U.S. 985 (1964), the New Jersey Supreme Court was asked to decide just such an issue—a conflict between the mother's privacy and the life of the unborn child. The issue was whether the rights of a child *in utero* were violated by the pregnant woman's refusal on religious grounds to submit to a blood transfusion necessary preserve the lives of both the mother and the unborn child. The Court's finding favored the right to life of the unborn child over the pregnant woman's freedom of religion and stated:

> "The blood transfusions (including transfusions made necessary by the delivery) may be administered if necessary to save her life or the life of the child, as the physician in charge at the time may determine." 201 A.2d at 538.

**D. The human-ness of the fetus** The crux of the moral and legal debate over abortion is, in essence, the right of the woman to determine whether or not she should bear a particular child versus the right of the child to life. The proponents of liberalization of abortion laws speak of

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[66] *Terry v. Ohio*, 392 U.S. 1 (1968).

[67] *Jacobson v, Massachusetts*, 197 U.S. 11 (1905).

[68] *Schmerber v. California*, 384 U.S. 757 (1966).

[69] *Application of President and Directors of Georgetown, Col.*, 331 F.2d 1000 (D.C. Cir, 1966), cert. denied, 377 U.S. 978 (1964).

[70] See Tort Law limitations on the Right of Privacy as outlined in *Prosser on Torts*, 3rd Edition, 1964, Chapter.

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the fetus as "a blob of protoplasm" and feel it has not right to life until it has reached a certain stage of development.[71] On the other hand, the opponents of liberalization maintain the fetus is human from the time of conception, and so interruption of pregnancy cannot be justified from the time of fertilization. It most certainly seems logical that from the stage of differentiation, after which neither twinning nor recombination will occur, the fetus implanted in the uterine wall deserves respect as a human life. If we take the definition of life as being said to be present when an organism shows evidence of individual animate existence, then from the blastocyst stage the fetus qualifies for respect. It is alive because it has the ability to reproduce dying cells. It is human because it can be distinguished from other non-human species, and once implanted in the uterine wall it requires only nutrition and time to develop into one of us.

The recent recognition of autonomy of the unborn child has led to the development of new medical specialties concerning the unborn child from the earliest stages of the pregnancy.[72*] Modern obstetrics has discarded as unscientific the concept that the child in the womb is but tissue of the mother. Dr. Liley, the New Zealand pediatrician, who perfected the intra-uterine transfusion, has said:

> "Another medical fallacy that modern obstetrics discards is the idea that the pregnant woman can be treated as a patient alone. No problem in fetal health or disease can any longer be considered in isolation. At the very least two people are involved, the mother and her child." Liley, H.M.I.: *Modern Motherhood*, Random House, Rev. Ed. 1969.

Yet the attack on the Texas statute assumes this discredited scientific concept and argues that abortions should be considered no differently than any medical measure taken to protect maternal health, (see appellants brief pp. 94–98) thus completely ignoring the developing human being in the mother's womb.

The court has also abandoned that concept in *Kelly v. Gregory*, 282 App.Div. 542, 125 N.Y.S.2d 696 (1953), wherein the court stated:

> "We ought to be safe in this respect in saying that legal separability should begin where there is biological separability. We know something more of the actual process of conception and fetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception.
>
> "The mother's biological contribution from conception on is nourishment and protection; but the fetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe the conditions under which life will not continue." 125 N.Y.S.2d at 697.

It is our task in the next subsections to show how clearly and conclusively modern science—embryology, fetology, genetics, perinatology, all of biology—establishes the humanity of the unborn child. We submit that the data not only shows the constitutionality of the Texas legislature's effort to save the unborn from indiscriminate extermination, *but in fact suggests a duty to do so*. We submit also that no physician who understands this will argue that the law is vague, uncertain or overbroad for he will understand that the law calls upon him to exercise his art for the benefit of his *two patients*: mother *and* child.

From conception the child is a complex, dynamic, rapidly growing organism. By a natural and continuous process the single fertilized ovum will, over approximately nine months, develop into the trillions of cells of the newborn. The natural end of the sperm and ovum is death unless fertilization occurs. At fertilization a new and unique being is created which, although receiving one-half of its chromosomes from each parent, is really unlike either.[73]

About seven to nine days after conception, when there are already several hundred cells of the new individual formed, contact with the uterus is made and implantation begins. Blood cells begin at 17 days and a hear as early as 18 days. This embryonic heart which begins as a

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[71] This is given variously as from 12 weeks to 28 weeks of intrauterine life, and some apparently feel it has no life at all until after full-term delivery.

[72] Gairdner, Douglas: *Fetal Medicine: When Is To Practice It*, J. Obster, and Gynec. Brit. Commonwealth, 75:1123–1124, Dec. 1968.

*The citations in this and the following are according to Medical Journal Practice.

[73] Ingelman-Sundberg, Axel, and Wirsen, Cloes: *A Child Is Born: The Drama of Life Before Birth*, photos by Lennart Nilsson, Dell Publishing Co., New York, 1965. Arey, Leslie B.:*Developmental Anatomy*, 6th Ed. Philadelphia W.B. Saunders Co. 1954 Chap. II IV. Patten, Bradley M.: *Human Embryology*, 3rd Ed. McGraw-Hill Book Co. New York, 1968 Chap. VII.

simple tube starts irregular pulsations at 24 days, which, in about one week, smooth into a rhythmic contraction and expansion.[74] It has been shown that the ECG on a 23 mm embryo (7.5 weeks) presents the existence of a functionally complete cardiac system and the possible existence of a myoneurol or humor regulatory mechanism. All the classic elements of the adult ECG were seen.[75] Occasional contractions of the heart in a 6 mm (2 week) embryo have been observed as well as tracing exhibiting the classical elements of the ECG tracing of an adult in a 15 mm embryo (5 weeks).[76]

Commencing at 18 days the developmental emphasis is on the nervous system even though other vital organs, such as the heart, are commencing development at the same time. Such early development is necessary since of the nervous system integrates the action of all other systems. By the end of the 20th day the foundation of the child's brain, spinal cord and entire nervous system will have been established. By the 6th week after conception this system will have developed so well that it is controlling movement of the baby's muscles, even though the woman may not be aware that she is pregnant. By the 33rd day the cerebral cortex, that part of the central nervous system that governs motor activity as well as intellect may be seen.

The baby's eyes begin to form at 19 days. By the end of the first month the foundation of the brain, spinal cord, nerves and sense organs is completely formed. By the 28 days the embryo has the building blocks for 40 pairs of muscles situated from the base of its skull to the lower end of its spinal column. By the end of the first month the child has completed the period of relatively greatest size increase and the greatest physical change of a lifetime. He or she is ten thousand times larger than the fertilized egg and will increase its weight six billion times by birth, having in only the first month gone from the one cell state to millions of cells.[78]

Shettles and Rugh describes this first month of development as follows:

> "This, then, is the greatest planning period, when out of apparently nothing comes evidence of a well integrated individual, who will form along certain well tried patterns, but who will, in the end, be distinguishable from every other human being virtue of ultra microscopic chromosomal difference." Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama of Life's Beginnings, supra* at p. 35.

By the beginning of the second month the unborn child, small as it is, looks distinctly human. Yet, by this time the child's mother is not even aware that she is pregnant.[79]

As Shettles and Rugh state:

> "And as for the question, 'when does the embryo become human?' The answer is that is *always* had human potential, and *no other*, from the instant the sperm and the egg came together because of its chromosomes." (Emphasis in original). Id at p. 40.

At the end of the first month the child is about 1/4 of an inch in length. At 30 days the primary brain is present and the eyes, ears, and nasal organs have started to form. Although the heart is still incomplete, it is beating regularly and pumping blood cells through a closed vascular system.[80] The child and mother do not exchange blood, the child having from a very early point in its development its own and complete vascular system.[81]

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[74] Ingelman-Sunberg, Axel and Wirsen, Cloes: *A Child Is Born: The Drama of Life Before Birth, supra.*

[75] Arey, Leslie B.: *Developmental Anatomy*, supra. Patten, Bradley M.: *Human Embryology*, supra. Rugh, Robert, and Shettles, Landrum B., with Ronald N. Einhorn: *From Conception To Birth: The Drama of Life's Beginnings*, Harper and Row, New York 1971. Straus, Rueben, et al: *Direct Electrocardiographic Recording of A Twenty-Three Millimeter Human Embryo*, The American Journal of Cardiology, September 1961, pp. 443–447.

[76] Marcel, M.P., and Exchaquet, J.P.: *L'Electrocardiogramme Du Foetus Human Avec Un Ca De Double Rythne Auriculair Verifie*, Arch. Mal. Couer, Paris 31: 504, 1938.

[77] Arey, Leslie B.: *Developmental Anatomy*, supra. Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn:*From Conception To Birth: The Drama of Life's Beginnings*, supra. Flannagan, G.L.: *The First Nine Months Of Life*, Simon and Schuster, 1962.

[78] Arey, Leslie B.: *Developmental Anatomy*, supra. Patten, Bradley M.: *Human Embryology*, supra. Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama of Life's Beginnings*, supra. Ingelman-Sundberg, Axel, and Wirsen, Cloes: *A Child Is Born: The Drama Of Life Before Birth*, supra. Flannagan, G.L.: *The First Nine Months Of Life*, supra.

[79] Ingelman-Sundberg, Axel, and Wirsen, Cloes: *A Child Is Born: The Drama Of Life Before Birth*, supra.

[80] Arey Leslie B.: *Developmental Anatomy*, supra.

[81] Arey Leslie B.: *Developmental Anatomy*, supra. Patten Bradley M.: *Human Embryology*, supra. Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama of Life's Beginnings*, supra. Marcel, M.P., and Exhaquet, J.P.: *L'Electrocardiogramme Du Foetus Human Avec Un Cas De Double Rythme Auriculaire Verife*, supra. Flannagan, G.L.: *The First Nine Months of Life*, supra.

Earliest reflexes begin as early as the 42nd day. The male penis begins to form. The child is almost 1/2 inch long and cartilage has begun to develop.[82]

Even at 5 1/2 weeks the fetal heartbeat is essentially similar to that of an adult in general configuration. The energy output is about 20% that of the adult, but the fetal heart is functionally complete and normal by 7 weeks. Shettles and Rugh describe the child at this point of its development as a 1–inch miniature doll with a large head, but gracefully formed arms and legs and an unmistakably human face.[83]

By the end of the seventh week we see a well proportioned small scale baby. In its seventh week, it bears the familiar external features and all the internal organs of the adult, even though it is less an inch long and weighs only 1/30th of an ounce. The body has become nicely rounded, padded with muscles and covered by a thin skin. The arms are only as long as printed exclamation marks, and have hands with fingers and thumbs. The slower growing legs have recognizable knees, ankles and toes.[84]

The new body not only exists, it also functions. The brain in configuration is already like the adult brain and sends out impulses that coordinate the function of the other organs. The brain waves have been noted at 43 days.[85] The heart beast sturdily. The stomach produces digestive juice. The liver manufactures blood cells and the kidney begins to function by extracting uric acid from the child's blood.[86] The muscles of the arms and body can already be set in motion.[87]

After the eighth week no further primordia will form; *everything* is already present that will be found in the full term baby.[88] As one author describes this period:

> "As human face with eyelids half closed as they are in someone who is about to fall asleep. Hands that soon will begin to grip, feet, trying their first gentle kicks." Rugh, Roberts, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama of Life's Beginnings*, supra at p. 71.

From this point until adulthood, when full growth is achieved somewhere between 25 and 27 years, the changes in the body will be mainly in dimension and in gradual refinement of the working parts.

The development of the child, while very rapid, is also very specific. The genetic pattern set down in the first day of life instructs the development of a specific anatomy. The ears are formed by seven weeks and are specific, and may resemble a family pattern.[90] The lines in the hands start to be engraved by eight weeks and remain a distinctive feature of the individual.[91]

The primitive skeletal system has completely developed by the end of six weeks.[92] This marks the end of the child's embryonic (from Greek, to swell or teem within ) period. From this point, the child will be called a fetus (Latin, young one or off spring).[93]

In the third month, the child becomes very active. By end of the month he can kick his legs, turn his feet, curl and fan his toes, make a fist, move his thumb, bend his wrist, turn his head, squint, frown, open his mouth, press his lips tightly together.[94] He can swallow and drinks the amniotic fluid that surrounds him. Thumb sucking is first noted at this age. The first respiratory motions move fluid in and out of his

[82] Arey, Leslie B.: *Developmental Anatomy*, supra. Patten, Bradley M.:*Human Embryology*, supra.

[83] Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama of Life's Beginnings*, supra at p. 54.

[84] Arey Leslie B.: *Developmental Anatomy*, supra. Patten Bradley M.: *Human Embryology*, supra. Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama of Life's Beginnings*, supra. Ingelman-Sundberg, Axel, and Wirsen, Cloes: *A Child Is Born: The Drama Of Life Before Birth*, supra.

[85] Still, J.W.:J. Washington Acad. Sci, 59:46, 1969.

[86] Flannagan, G.L.: *The First Nine Months Of Life*, supra. Gesell, Arnold: *The Embryology of Behavior*, Harper and Bros. Publishers, 1945, Chap. IV, V, VI, X.

[87] Hooker, Davenport: *The Prenatal Origin of Behavior*, Univ. of Kansas Press, 1952.

[88] Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama of Life's Beginnings*, supra at p.71.

[89] Arey, Leslie B.: *Developmental Anatomy*, supra. Potter, Edith: *Pathology Of The Fetus And Infant*, Year Book Publishers Inc., Chicago, 1961.

[90] Streeter, Geo. L.: *Developmental Of The Auricle In The Human Embryo*, Contributions to Embryology, Vol. XIII No. 61, 1921.

[91] Miller, James, R.: *Dermal Ridge Patterns: Tecnique For Their Study In Human Fetuses*, J. Pediatric, Vol. 73, No. 4, Oct. 1969, pp. 6114–616.

[92] Arey, Leslie B.: *Developmental Anatomy*, supra. Patten, Bradley M.: *Human Embryology*, supra.

[93] Patten, Bradley M.: *Human Embryology*, supra.

[94] Hooker, Davenport: *The Prenatal Origin of Behavior*; supra.

lungs with inhaling and exhaling respiratory movements.

The movement of the child has been recorded at this early stage by placing delicate shock recording devices on the mother's abdomen and direct observations have been made by the famous embryologist, Davenport Hooker, M.D. Over the last thirty years, Dr. Hooker has recorded the movement of the child on film, some as early as six weeks of age. His films show that prenatal behavior develops in an orderly progression.

The prerequisites for motion are muscles and nerves. In the sixth to seventh weeks, nerves and muscles work together for the first time.[97] If the area of the lips, the first to become sensitive to touch, is gently stroked, the child responds by bending the upper body to one side and making a quick backward motion with his arms. This is called a total pattern response because it involves most of the body, rather than a local part. Localized and more appropriate reactions such as swallowing follow in the third month. By the beginning of the ninth week, the baby moves spontaneously without being touched. Sometimes his whole body swings back and forth for a few moments. By eight and a half weeks the eyelids and the palms of the hands become sensitive to touch. If the eyelid is stroked, the child squints. On stroking the palm, the fingers close into a small fist.[98]

In the ninth and tenth weeks, the child's activity leaps ahead. Now if the forehead is touched, he may turn his head away and pucker up his brow and frown. He know his full use of his arms, and can bend the elbow and wrist independently. In the same week, the entire body becomes sensitive to touch.[99]

The twelfth week brings a whole new range of responses. The baby can now move his thumb in opposition to his fingers. He now swallows regularly. He can pull up his upper lip, the initial step in the development of the sucking reflex.[100] By the end of the twelfth week, the quality of muscular response is altered. It is no longer marionette-like or mechanical—the movements are now graceful and fluid, as they are in the newborn. The child is active and the reflexes are becoming more vigorous. All this is before the mother feels any movement.[101]

Every child shows a distinct individuality in his behavior by the end of the third month. This is because the actual structure of the muscles varies from baby to baby. The alignment of the muscles of the face, for example, follow an inherited pattern. The facial expressions of the baby in his third month are already similar to the facial expressions of his parents.[102]

Further refinements are noted in the third month. The fingernails appear. The child's face becomes much prettier. His eyes, previously far apart, now move closer together. The eyelids close over the eyes. Sexual differentiation is apparent in both internal and external sex organs, and primitive eggs and sperm are formed. The vocal cords are completed. In the absence of air they cannot produce sound; the child cannot cry aloud until birth, although he is capable of crying long before.[103]

From the twelfth to the sixteenth week, the child grows very rapidly.[104] His weight increases six times, and he grows to eight to ten inches in height. For this incredible growth spurt the child

[95] Flannagan, G.L.: *The First Nine Months Of Life*, supra. Hooker, Davenport: *The Prenatal Origin of Behavior*; supra

[96] Hooker, Davenport: *The Prenatal Origin of Behavior*; supra. Hooker, Davenport: *Early Human Fetal Behavior With A Preliminary Note On Double Simultaneous Fetal Stimulation*, Proceedings of the Association for Research in Nervous and Mental Disease, Baltimore The Williams and Wilkins Co., 1954. Gesell, Arnold, M.D., Amatruda, C.S., M.D.: *Developmental Diagnosis*, P.S. Hoeber, 1958 pp. 8–9.

[97] Arey, Leslie M.: *Developmental Anatomy*, supra.

[98] Hooker, Davenport: *Early Human Fetal Behavior With A Preliminary Note On Double Simultaneous Fetal Stimulation*, supra. Hooker Davenport: *The Prenatal Origin of Behavior*; supra. Flannagan, G.L.: *The First Nine Months Of Life*, supra. Hooker, Davenport: *The Origin Overt Behavior*, Ann Arbor, Univ. of Michigan Press, 1944.

[99] Hooker, Davenport: *The Prenatal Origin of Behavior*, supra.

[100] Gairdner, Douglas: *Fetal Medicine: Who Is To Practice It*, supra.

[101] Gairdner, Douglas: *Fetal Medicine: Who Is To Practice It*, supra. Hooker, Davenport: *The Origin Overt Behavior*; supra

[102] Flannagan, G.L.: *The First Nine Months Of Life*, supra. Still J.W.: J. Washington Acad. Sci., supra. Gesell, Arnold: *The Embryology of Behavior*, supra.

[103] Arey, Leslie M.: *Developmental Anatomy*, supra. Flannagan, G.L.: *The First Nine Months Of Life*, supra. Patten, Bradley M.: *Human Embryology*, supra. Gairdner, Douglas: *Fetal Medicine: Who Is To Practice It*, supra.

[104] Hellman, L.M., et al.: *Growth And Development Of The Human Fetus Prior To The 20th Week of Gestation*, Am. J. Obstet. and Gynec. Vol. 103, No. 6, March 15, 1969, pp. 789–800.

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needs oxygen and food. This he receives from his mother through the placental attachment—much like he receives food from her after he is born. His dependence does not end with expulsion into the external environment.[105] We now know that he placenta belongs to the baby, not the mother, as was long thought.[106]

In the fifth month, the baby gains two inches in height and ten ounces in weight. By the end of the month he will be about one foot tall and will weigh one pound. Fine baby hair begins to grow on his eyebrows and on his head and a fringe of eyelashes appear. Most of the skeleton hardens. The baby's muscles become larger his mother finally perceives his many activities.[107] The child's mother come to recognize the movement and can feel the baby's head, arms and legs. She may even perceive a rhythmic jolting movement—fifteen to thirty per minute. This is due to the child his coughing.[108] The doctor can now hear the heartbeat with is stethoscope.[109]

The baby sleeps and wakes just as it will after birth.[110] When he sleeps he invariably settles into his favorite position called his "lie." Each baby has a characteristic lie[111] When he awakens he moves about freely in the buoyant fluid turning from side to side, and frequently head over heel. Sometimes his head will be up and sometimes it will be down. He may sometimes be aroused from sleep by external vibrations. He may wake up from a loud tap on the tub when his mother is taking a bath. A loud concert or the vibrations of a washing machine may also stir him into activity.[112] The child hears and recognizes his mother's voice before birth.[113] Movements of the mother, whether locomotive, cardiac or respiratory, are communicated to the child.[114]

In the sixth month, the baby will grow about two more inches, to become fourteen inches tall. He will also begin to accumulate a little fat under his skin and will increase his weight to a pound and three-quarters. This month the permanent teeth buds come in high in the gums behind the milk teeth. Now his closed eyelids will open and close, and his eyes look up, down and sideways. Dr. Liley of New Zealand feels that the child may perceive light through the abdominal wall.[115] Dr. Still has noted that electroencephalographic waves have been obtained in forty-three to forty-five day old fetuses, and so conscious experience is possible after this date.[116]

In the sixth month, the child develops a strong muscular grip with his hands. He also starts to breathe regularly and can maintain respiratory response for twenty-four hours if born prematurely. He may even have a slim change of surviving in an incubator. The youngest children known to survive were between twenty to twenty-five weeks old.[117] The concept of *viability* is not a static one. Dr. Andre Hellegers of Georgetown University states that 10% of children born between twenty weeks and twenty-four weeks gestation will survive.[118] Modern medical intensive therapy has salvaged many children that would have been considered non-viable only a few years ago. The concept of an artificial placenta may be a reality in the near future and will push the date of viability back even further, and perhaps to the earliest stages of gestation.[119] After twenty-four to twenty-eight weeks the child's chances of survival are much greater.

This review has covered the first six months of life. By this time the individuality of this human being should be clear to all unbiased

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[105] Arey, Leslie M.: *Developmental Anatomy*, supra. Patten, Bradley M.: *Human Embryology*, supra.

[106] Gairdner, Douglas: *Fetal Medicine: Who Is To Practice It*, supra.

[107] Arey, Leslie M.: *Developmental Anatomy*, supra.

[108] Flannagan, G.L.: *The First Nine Months Of Life*, supra. Gairdner, Douglas: *Fetal Medicine: Who Is To Practice It*, supra.

[109] Arey, Leslie M.: *Developmental Anatomy*, supra. Flannagan, G.L.: *The First Nine Months Of Life*, supra.

[110] Petre-Quadens, O., et al.: *Sleep In Pregnancy: Evidence Of Fetal Sleep Characteristics*, J. Neurologic Science, 4:600–605, May, June, 1967.

[111] Gairdner, Douglas: *Fetal Medicine: Who Is To Practice It*, supra.

[112] Flannagan, G.L.: *The First Nine Months Of Life*, supra.

[113] Wood, Carl: *Weightlessness: Its Implications For The Human Fetus*, J. Obstetrics and Gynecology of the British Commonwealth, 1970 Vol. 77, pp. 333–336. Liley, Albert W.: *Auckland MD To Measure Light And Sound Inside Uterus*, Medical Tribune Report, May 26, 1969.

[114] Wood, Carl: *Weightlessness: Its Implications For The Human Fetus*, supra.

[115] Liley, Albert W.: *Auckland MD To Measure Light And Sound Inside Uterus*, supra.

[116] Still, J.W,: Washington Acad. Sci., supra.

[117] Flannagan, G.L.: *The First Nine Months Of Life*, supra.

[118] Monroe, *Canadian Medical Association's Journal*, 1939. Hellegers, Andre. M.D.: *National Symposium On Abortion*, May 15, 1970, Prudential Plaza, Chicago, Illinois.

[119] Zapol, Warren, and Kolobow, Theodore: *Medical World News*, May 30, 1969. Alexander, D.P.; Britton, H.G.; Nixon, D.A.; *Maintenance Of Sheep Fetuses By An Extra Cororeal Circuit For Periods Up To 24 Hours*, Am. J. Obstet. and Gynec, Vol. 102, No. 7, Dec. 1968, pp. 969–975.

[120] *Fetology: The Smallest Patients, The Sciences*, published by

observers. When one views the present state of medical science, we find that the artificial distinction between born and unborn has vanished. The whole thrust of medicine is in support of the motion that the child in its mother is a distinct individual in need of the most diligent study and care, and that he is also a patient whom science and medicine treat just as they do any other person.

This review of the current medical status of the unborn serves us several purposes. Firstly, it shows conclusively the humanity of the fetus by showing that human life is a continuum which commences in the womb. There is no magic in birth. The child is as much a child in those several days before birth as he is those several days after birth. The maturation process, commenced in the womb, continues through the post-natal period, infancy, adolescence, maturity and old age. Dr. Arnold Gesell points out in his work that no king ever had any other beginning than have had all of us in our mother's womb.[121] Quickening is only a relative concept which depends upon the sensitivity of the mother, the position of the placenta, and the size of the child.*

**VII. The state of Texas has a legitimate interest in prohibiting abortion except by medical advice for the purpose of "saving the life of the mother."**

There seems little argument necessary if one can conclude the unborn child is a human being with birth but a convenient landmark in a continuing process—a bridge between two stages of life. The basic postulates from which the Appellees' arguments proceed are : (1) the pregnant woman has a right of control over her own body as a matter of privacy guaranteed to her by the Constitution of the United States; and (2) this right cannot be interfered with by the state since the state cannot demonstrate any compelling interest to justify its intrusion. The contrary position is the state's interest in preventing the arbitrary and unjustified destruction of an unborn child—a living human being in the very earliest stages of its development. Whatever personal right of privacy a pregnant woman may have with respect to the disposition and use of her body must be balanced against the personal right of the unborn child to life.

Whatever the metaphysical view of it is, or may have been, it is beyond argument the legal concepts as to the nature and rights of the unborn child have drastically changed, based on expanded medical knowledge, over the last 2,500 years.

In addition to the provisions of 22 D C Code 201,[122] the Congress of the United States has clearly indicated a firm general policy of the Federal government against abortion: 18 U.S.C. 1461 provides in part as follows:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device or substance; and—
>
> Every article, instrument, substance, drug medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing *abortion*, or for any indecent or immoral purpose; and
>
> Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> . . . ." (Emphasis added).

It most seriously argued that the "life" protected by the Due Process of Law Clause of the Fifth Amendment includes the life of the unborn child. Further, it would be a denial of equal protection of law not to accord protection of the life of a person who had not yet been born but still in the womb of its mother. If it is a denial of equal protection for a statute to distinguish between a thief and an embezzler under a

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the New York Academy of Sciences, Vol.8 No. 10, Oct. 1968, pp. 11–15. Gairdner, Douglas: *Fetal Medicine: Who Is To Practice It*, supra.

[121] Gesell, Arnold: *The Embryology Of Behavior*, supra. *If the court is interested in the actual medical history on nineteenth century legislative opposition to abortion, it may consult the American Medical Association, 1846–1951 *Digest of Official Actions* (edited F.J.L. Blasingame 1959), p. 66, where a list of the repeated American Medical Association attacks on abortion are compiled. It will be seen that the great medical battle of the nineteenth century was to persuade legislatures to eliminate the requirement of quickening and to condemn abortion from conception, see Isaac M. Quimbly *Introduction to Medical Jurisprudence*, Journal of American Medical Association, August 6, 1887, Vol. 9, p. 164 and H.C. Markham *Foeticide and Its Prevention*, ibid. Dec. 8, 1888, Vol. 11, p. 805. It will be seen that the Association unanimously condemned abortion as the destruction of "human life", American Medical Association, *Minutes of the Annual Meeting* 1859, The American Medical Gazette 1859, Vol. 10, p. 409.

[122] The District of Columbia abortion statute in issue in *United States v. Vuitch*

statute providing for the sterilization of the one and not the other,[123] then it is surely a denial of equal protection for either the state or federal government to distinguish between a person who has been born and one living in the womb of its mother.

In *Katz v.United States*, supra, this Court, after concluding that the Fourth Amendment cannot be translated into a general constitutional "right to privacy" and after making reference to other forms of governmental intrusion,[124] stated that ". . . the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and his very life, left largely to the law of the individual States." 389 U.S. at 352. Compare *Kovacs v. Cooper*, 336 U.S. 77 (1949).

If it be true the compelling state interest in prohibiting or regulating abortion did not exist at one time in the stage of history, under the result of the findings and research of modern medicine, a different legal conclusion can now be reached. The fact that a statute or law may originally have been enacted to serve one purpose does not serve to condemn it when the same statute, with the passage of time, serves a different but equally valid public purpose. See *McGowan v. Maryland,* 366 U.S. 420 (1961).

## CONCLUSION

For the reasons above stated Appellee submits that the appeal from the judgment of the lower court denying injunctive relief to the appellants should be affirmed; that this Court consider plenary review of this entire case and reverse the judgment of the court below declaring Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code unconstitutional and enters its order accordingly.

Respectfully submitted,

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[123] *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

[124] Note 5 at page 510.

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# In the Supreme Court of the United States

**NO. 70–18, 1972 TERM**

Jane Roe, John Doe, Mary Doe, and
James Hubert Hallford, M.D.
Appellants
v.
Henry Wade, District Attorney of Dallas County, Texas
Appellee

On Appeal from the United States District Court for the Northern District of Texas

# Supplemental Brief for Appellants

## STATEMENT

The instant case was argued before this Court on December 13, 1971. It is a direct appeal from the decision of a three-judge federal panel declaring the Texas abortion law to be unconstitutional but refusing to grant injunctive relief and denying standing to Appellants Doe.

On June 27, 1972, the case was restored to the calendar for reargument. 40 U.S.L.W. 3617. Reargument is scheduled for October 11, 1972.

Several pertinent decisions have been rendered since the submission of Appellants' original brief. This supplemental brief is submitted to inform the Court of those decisions.

**Request for injunctive relief**

As to their request for injunctive relief, Appellants would once again point out that the injunction requested was one against *future* prosecutions only. Appellant Hallford had *not* requested injunctive relief to prevent continuation of the state criminal charge pending against him.

**The continuing situation in Texas**

Despite the District Court holding in June, 1970, that the Texas abortion law is unconstitutional, in November, 1971, the Texas Court of Criminal Appeals (Texas' highest criminal court), in *Thompson v, State*, No. 44,071 (Tex. Ct. Crim. App., Nov. 2, 1971), *petition for cert. filed*, 40 U.S.L.W. 3532 (U.S. March 20, 1972) (No. 71–1200), rendered a decision which directly contradicted that of the District Court. Without interpreting the abortion statue, the Texas court held that the Texas law was not vague. It specifically did not reach the issue of privacy but held the State has a compelling interest in protecting the fetus through legislation.

Since the District Court refused to grant injunctive relief and since there is now a direct dichotomy between state federal decisions, Texas physicians continue to refuse to perform abortions for fear of prosecution. During the last nine months of 1971, 1,658 Texas women travelled to New York to obtain abortions. Texas women continue to be unable to obtain abortion procedures in Texas and thereby continue to suffer irreparable injury.

**Actions regarding abortion**

At its 1972 Midyear Meeting, the American Bar Association House of Delegates approved the Uniform Abortion Act as drafted by the National Conference of Commissioners on Uniform State Laws. 58 A.B.A.J. 380 (1972). The Uniform Abortion Act allows termination of pregnancy up to twenty weeks of pregnancy and thereafter for reasons such as rape, incest, fetal deformity, and the mental or physical health of the woman.

The Rockefeller Commission on Population and the American Future has recommended that the matter of abortion should be left to the conscience of the individual concerned. *Abele v. Markle*, 342 F. Supp. 800, 802 (D. Conn. 1972).

## ARGUMENT

**I. Recent cases support appellants' contentions regarding standing**

In the oral argument before the three-judge panel, the attorney for Henry Wade, the sole defendant herein, admitted that Appellant Dr. Hallford has standing and that Appellant Roe has standing as an individual and as the representative of the class. (A. 104). The defendent-appellee did not accede standing to John and Mary Doe.

Several recent cases support Appellants' arguments regarding standing.

This Court, in *Eisenstadt v. Baird*, 405 U.S. 438 (1972) held that Appellee Baird had standing to assert the rights of unmarried persons denied access to contraceptives even though he was not a physician or pharmacist and was not an unmarried person denied access to contraceptives.

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Just as Baird was allowed to raise the rights of persons who were affected by the statute but who were affected but who were not subject to prosecution thereunder, here Appellant Hallford should be allowed to raise, in addition to his own constitutional claims, the claims of women who are vitally affected by the Texas abortion law but now subject to prosecution thereunder.

*Young Women's Christian Association v. Kugler*, 342 F.Supp. 1048 (D.N.J. 1972), declared the New Jersey abortion laws unconstitutional. Such laws prohibited persons from causing miscarriage "without lawful justification."

Saying that "the alleged deprivations of unconstitutional rights depend upon the contingency of pregnancy," 342 F.Supp. at 1056, the Court dismissed all the women plaintiffs since none alleged pregnancy. There is no indication that any had alleged status as persons wishing to give advice or assistance to women seeking abortions.

The Court recognized that all the physician plaintiffs, two of whom had lost their licenses to practice medicine and one of whom was incarcerated at the time of the action, had standing to raise the constitutional questions both on behalf of and pertaining to themselves and their women patients.

The plaintiff physicians alleged that they had been forced to turn away patients seeking advice and information about the possibility of obtaining abortions, as have Dr. Hallford and the classes he represents in the instant case. Dr. Hallford and his fellow physicians are also subject to prosecution under the law if they should perform an abortion that a jury finds was not for the purpose of saving the life of the woman.

Dr. Hallford should be recognized to have standing to litigate the constitutional claims of his class of physicians and those of women patients.

In *Abele v. Markle*, 342 F.Supp. 800 (D. Conn. 1972), the Connecticut anti-abortion statutes were declared to be unconstitutional. Much like the Texas law, the statutes prohibited all abortions except those necessary to preserve the life of the mother or fetus. Prior to the District Court's consideration of the merits the Circuit Court held that pregnant women and medical personnel desiring to give advice and aid regarding abortions had standing to challenge to statute. *Abele v. Markle*, 452 F.2d 1121 (2 Cir. 1971).

In this Texas case, Appellant Jane Roe was pregnant when the action was filed. Appellants John and Mary Doe in their complaint outlined their desire to actively participate in organizations giving advice and counselling regarding abortions, along with information to specifically assist in securing abortion. (A. 18). Although the Connecticut abortion laws more specifically applied to giving aid, advice, and encouragement to bring about abortion, Texas law is such that Appellants Doe have been effectively stopped from giving such aid, advice, and encouragement for fear of being subjected to prosecution under either 1 Texas Penal Code art. 70 (1952) as accomplices to the crime of abortion, or 3 Texas Penal Code art 1628 (1953) for conspiring to commit the crime of abortion. (A. 19). Like the Connecticut medical personnel desiring to give advice and aid regarding abortions, Appellants Doe should be recognized to have standing to challenge the Texas law.

In *Poe v. Menghini*, 339 F.Supp. 986 (D. Kan. 1972), the three-judge panel recognized that two women who were pregnant when the action was commenced and a doctor had standing to challenge certain restrictions applicable to the performance of abortions. In the instant case, Appellant Jane Roe, who was pregnant when the action was commenced, and Appellant Dr. Hallford would correspondingly have standing to challenge the Texas abortion laws.

*Beecham v. Leahy*, 287 A.2d 836 (Vt. 1972), declared unconstitutional the Vermont abortion law, which, like Texas law, made abortion a criminal offense unless the same is necessary to preserve the life of the woman. The Vermont statute stated that the woman was not liable to the penalties prescribed by the section.

The plaintiffs in *Beecham* were an unmarried pregnant woman who wanted an abortion and a physician who, except for the law, was willing to terminate the pregnancy but who had not done so and who (unlike Appellant Dr. Hallford) was not the subject of pending state criminal action. The Court held that unmarried pregnant woman had standing but that the physician did not. There is no indication in the opinion as to whether or not the physician sought to adjudicate the rights of his patients, which other cases have allowed.

Regarding the woman the Court said:

> By reducing her rights to ephemeral status without confronting them, the ability of the

> plaintiff to produce a case or controversy in the ordinary sense is likewise frustrated. She cannot sue the doctor for an action by him that cannot be compelled. She is not herself subject to legal action, by statutory exemption. Yet a very real wrong, in the eyes of the law, exists . . . Therefore, . . . we declare that she is entitled to proceed in her action founded on her petition. . .287 A.2d at 840.

Appellant Jane Roe was similarly found by the lower court to have standing. She, too, was pregnant, had sought but been unable to find a physician to terminate the pregnancy, was not subject to state prosecution, and yet had suffered a very real wrong.

**II. The right to seek and receive medical care for the protection of health and well-being is a fundamental personal liberty**

As shown in the original brief of Appellants, the Texas abortion law effectively denies Appellants Jane Roe and Mary Doe access to health care.

Although under Texas case law it is not a crime for a pregnant woman to terminate her own pregnancy or to persuade someone else to perform an abortion on her, the Texas law effectively denies her assistance of trained medical personnel in doing what she is otherwise legally allowed to do.

The Supreme Court in Vermont, in *Beecham v. Leahy, supra*, observed that:

> On the one hand the legislation, by specific reference, leaves untouched in the woman herself those rights respecting her own choice to bear children now coming to be recognized in many jurisdictions... *Yet, tragically, unless her life itself is at stake, the law leaves her only to the recourse of attempts at self-induced abortion, uncounselled and unassisted by a doctor, in a situation where medical attention is imperative*. 287 A.2d at 839 (emphasis added).

The woman is guilty of no crime in Texas, although by case law rather than by statute. Tragically, Texas women effectively prevented from securing the services of a doctor when medical expertise and experience are imperative to avoid such pitfalls as the piercing of the uterine wall and infection. By preventing the availability of medical assistance, the state effectively endangers the health and well-being of citizens in direct contravention of their best interests and fundamental rights.

**III. The Texas abortion law violates fundamental rights of privacy**

As the opinion of this Court in *Eisenstadt v. Baird, supra*, states:

> If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or begat a child. 405 U.S. 438.

In *Vuitch v. Hardy*, Civil No. 71–1129–Y (D. Md. June 22, 1972), the Court stated: "However, this Court is convinced that a woman does have a constitutionally protected, 'fundamental personal right' to seek an abortion," citing *Griswold* and the above language from Eisenstadt.

*Y.W.C.A. v. Kugler, supra*, resulted in the New Jersey abortion law being declared unconstitutional in part as a violation of rights of privacy.

> The scope of interests found to be constitutionally protected by the Supreme Court demonstrates that it views both the sanctity of the individual's person and his relationships within a family as so vital to our free society that they should be ranked as fundamental, or implicit in the concept of ordered liberty. 342 F.Supp at 1071.
>
> Accordingly, we are persuaded that the freedom to determine whether to bear a child and to terminate a pregnancy in its early stages is so significantly related to the fundamental individual and family rights already found to exist in the Constitution that it follows directly in their channel and requires recognition. Whether a constitutional right of privacy this area is conceptualized as a family right, as in *Griswold*, as a personal and individual right, or as deriving from both sources is of no significance and applies equally to all women regardless of marital status, for the restriction on abortion by the New Jersey statutes immediately involves and interferes with the protected areas of both family and individual freedom. Hence we hold that a woman has a constitutional right of privacy recognizable under the Ninth and Fourteenth Amendments to determine for herself whether to bear a child or to terminate a pregnancy in its early stages, free from unreasonable interference by the State. 342 F.Supp at 1072.

The fundamental impact of the question of abortion on women was emphasized by the *Abele* Connecticut panel:

> The decision to carry and bear a child has extraordinary ramifications for a woman. Pregnancy entails profound physical changes.

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> Childbirth presents some danger to life and health. Bearing and raising a child demands difficult psychological and social adjustments. The working or student mother must curtail or end her employment or educational opportunities. The mother with an unwanted child may find that it overtaxes her and her family's financial or emotional resources. *Thus, determining whether or not to bear a child is of fundamental importance to a woman*. 342 F.Supp. at 801 (emphasis added).

As the lower Court found in the instant case, the Texas abortion law must be declared unconstitutional because it deprives women of their right, secured by the Ninth and Fourteenth Amendments, to choose whether or not to carry a pregnancy to term.

**I. The Texas statute does not advance any state interest of compelling importance in a manner which is narrowly drawn.**

The legislative purposes that the Texas abortion law was meant to serve are not altogether clear. No legislative history specifically applicable to Texas is available.

Appellee during the oral argument before the lower court said the State has only one interest, that of protecting the unborn (A. 104–05). Appellee's brief and Dec. 13th argument before this Court advance no other State interest.

It is important to note that Appellee give no authority whatsoever that even tends to establish that the purpose of the Texas legislature in adopting the abortion law was in fact what Appellee suggests.

On the other hand, Appellants' original brief establish that the purpose of the Texas legislature in adopting the abortion law was in fact what Appellee suggests.

On the other hand, Appellants' original brief establishes that the legislative purpose in other states was to protect the pregnant woman from the dangers of antiseptic surgery.

Further *Watson v, State*, 9 Tex. App. 237 (Tex. Crim. App. 1880), states that the *woman* is the *victim* of the crime of abortion.

*People v. Nixon*, Dkt. No. 9579 (Ct. App. 2 Div., Aug. 23, 1972), involved a challenge to the constitutionality of the Michigan abortion statute making a criminal actions terminate a pregnancy unless the same was necessary to preserve the life of the woman. The Court concluded that the "so-called 'abortion' statute was not intended to protect the 'rights' of the unquickened fetus" but rather that the obvious purpose was to protect the pregnant woman.

The Court pointed out that the woman was not subject to prosecution for self-induced abortion and concluded:

> . . .it must be assumed that the harm the statute was attempting to punish ran only to the woman and not to the fetus. If the statute were intended to protect the continued existence of the fetus, then there would be no reason for exempting the woman from prosecution. Opinion at 4, n.9.

Similarly, since self-abortion is not a crime in Texas, it is not logical to assume that the purpose of the legislature in passing the so-called "abortion" law was to protect the fetus. It is logical that the legislative purpose was to protect the woman and her health.

Appellants' original brief establishes that the Texas abortion law no longer serves to protect the health of the pregnant woman; in fact it is a hindrance to health.

Even if Appellee could establish that the legislative purpose of the Texas abortion law was to protect the life of the unborn, the state certainly cannot meet its burden of proving that the statute now has a compelling interest in such regulation not that the law is sufficiently narrow.

The fetus, as such, is not and never has been protected in Texas, with the possible exception of the abortion statutes. In Texas, the so-called protections for the "unborn child" are dependent on the live birth of the child. Thus under Texas law, once born a child may have rights retroactive to the time prior to birth but such rights are meant to benefit those who have survived birth.

Under the criminal laws of Texas, the fetus is given little protection. Self-abortion is not a crime, and the pregnant woman who seeks or receives the help of others in terminating her pregnancy is guilty of no crime. Even the severity of the penalty for another having performed an abortion depends upon whether or not the woman consented to the procedure.

To destroy the life of a fetus has never been considered as homicide in Texas. In order to obtain a murder conviction, the state must ". . . prove that the child was born alive; (and) that it had an existence independent of the mother . . ." *Harris v, State*, 28 Tex. App. 308, 309, 12 S.W. 1102, 1103 (1889). In *Wallace v. State*, 7 Tex. App. 570, 10 S.W. 255 (1880), the mother stran-

gled her child with string. The court overturned her murder conviction, saying that the state failed to prove either that the child was born live or that the actual childbirth process had been completed before the child was killed.

Texas courts are not alone in following the common law rule that a child must be born alive to be the subject of the crime of murder. *State v. Dickinson*, 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971); *Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 662, 87 Cal. Rptr. 481 (1970); *Clark v. State*, 117 Ala. 1, 23 So. 671 (1898); *Abrams v, Foshee*, Clark 274 (Iowa 1856). In those cases where a person has actually been convicted of a crime for causing the death of a fetus, it has not been under the regular homicide statute but under some special statutory provision, such as a feticide statute. Most feticide statutes have as one of their essential elements a *malicious intent to kill the mother. Passley v. State*, 194 Ga. 327, 21 S.E.2d 230 (1942); *State v. Harness*, 280 S.W.2d 11 (Mo. 1955). An intent to cause a miscarriage without an intent to kill the woman would not be sufficient to sustain a conviction of feticide. The penalties under such statutes are also generally lighter than those prescribed by the homicide laws.

Viewed from another angle, there are ironical contradictions between some Texas criminal laws, and the abortion law. As stated in *Abele v. Markle, supra*, "(t)he statutes force a woman to carry to natural term a pregnancy that is the result of rape or incest. Yet these acts are prohibited by the state at least in part to avoid the offspring of such unions." 342 F.Supp at 804.

Similarly, Texas makes rape and incest criminal offenses, 2A Texas Penal Code, art 1183 at 372 (1961), and 1 Texas Penal Code, art. 495, at 553 (1952), and prohibits the marriage of persons closely related, Texas Family Code section 2.21, at 17 (1971). Persons who have any infectious condition of syphilis or other veneral disease cannot obtain a marriage license. Texas Family Code, section 1.21, at 9, and 1.31 at 11 (1972).

The fetus gets no more protection under Texas tort laws than it does under Texas criminal law. The Texas courts did not recognize a right to recover for injuries received prior to birth until 1967 (113 years after the Texas abortion law was enacted) in *Leal v. C.C. Pitts Sand and Gravel, Inc.*, 429 S.W.2d 820 (Tex. 1967). *Leal* involved a wrongful death action brought by the parents of a child who died two days after birth as the result of pre-natal injuries received in an automobile collision. In allowing the wrongful death action, the Texas Supreme Court held that the child, *had it lived*, could have maintained an action for damages for the pre-natal injuries.

In *Delgado v. Yandell*, 468 S.W.2d 475 (Tex. Civ. App. 1971), the Texas Supreme Court approved the holding of the Court of Civil Appeals that a cause of action does exist for pre-natal injuries sustained at any pre-natal stage *provided the child is born alive and survives*. The damages in such a case are not paid to the fetus; they are compensation to a *living* child for having to spend all or a part of his life under a disability caused prior to birth by another's wrongful act.

Thus the claimed "rights" of the fetus in the tort area are actually rights which may only be exercised by a live child after birth or are the right of bereaved potential parents to be compensated for their loss.

Though much has been written concerning the property rights of the fetus, these rights are really legal fictions which have developed to protect the rights of living children. In order to receive the benefit of its supposed rights, the fetus must be born alive. There has never been a case in Texas where a fetus which stillborn or destroyed through miscarriage or abortion has been treated as a person for the purpose of determining property rights. When certain kinds of inheritances are involved, even unconceived children can be considered to have some property "rights" in that they may receive a legacy on their subsequent birth. *Byrn v. New York City Health & Hospitals Corp.*, No. 210 72 (Ct. App. 1972). However, this has not prevented the United States Supreme Court from finding a constitutional right on the part of a woman to practice contraception. *Griswold v. Connecticut*, 38 U.S. 479 (1965).

There are other areas where Texas does not treat a fetus as a person. For example, under the rules of the Texas Welfare Department, a needy pregnant woman cannot get welfare payments for her unborn child. The state compels the birth of the child, yet does not provide the assistance often needed to produce a healthy child.

Texas does not regard the fetus as a person and had made no attempt to put the fetus on an equal footing with a living child.

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SUPPLEMENTAL BRIEF FOR APPELLANTS

Several courts have recently dealt directly with the question of whether the fetus is a person within the meaning of the United States Constitution. Arguably this Court's opinion in *Vuitch* implicitly rejected the claim that the fetus is a person under the Fifth and Fourteenth Amendments.

*McGarvey v. Magee-Womens Hospital*, Civil Action No. 71–196 (W.D.Pa. Mar. 17, 1972), held that the embryo or fetus is not a person or citizen within the meaning of the Fourteenth Amendment or the Civil Rights Act.

In *Byrn v. New York City Health & Hospitals Corp., supra*, the issue whether children in embryo are and must be recognized as legal persons or entities entitled under the State and Federal Constitutions to a right to life. The Court's conclusion was the Constitution does not confer or require legal personality for the unborn.

The Appellee has failed to produce any authority for the proposition that the fetus is considered a person under the Constitution. There is evidence in the Constitution that "person" applies only to a live born person. The clause requiring a decennial census says "the whole number must be counted. U.S. Const. Art. I, § 2, Cl. 3. From the first census in 1790 to the present, census takers have counted only those born. Means, *The Phoenix of Abortional Freedom*, 17 N.Y.L. Forum 335, 402–03 (1971).

Although on its face, the Texas abortion law applies any time after conception, the Brief for Appellee submitted to this Court at page 30 states:

> It most certainly seems logical that from the stage of differentiation . . . the fetus implanted in the uterine wall deserves respect as a human life.

Here Appellee seems to suggest that the law should apply instead only after implantation. Yet on page 32 Appellee devotes a paragraph to describing the "child" during the seven to nine days *before* implantation. During oral argument Appellee suggested that the Texas hospitals intervene to terminate pregnancy when a rape victim is brought in (Tr. 47–48), although there is no exception for rape in the Texas statute.

Appellee's ambivalence is but on indication that the statute does not evidence a compelling interest which could not be protected by less restrictive means.

**V. The Texas abortion law is unconstitutionally vague**

In *Thompson v. State, supra*, the Texas Court of Criminal Appeals upheld the conviction of a physician who allegedly had performed an abortion. The court held, relying on *United States v. Vuitch*, 402 U.S. 62 (1971), that the Texas abortion law was not vague.

The Court in *Thompson* erred. Whether or not a statute is vague is to be determined from the standpoint of the person who is considering performing an act. The Supreme Court in *Vuitch* emphasized that a doctor's day-to-day task was one of consideration for the *health* of his patients; the District of Columbia statute allowed physicians to act to preserve the life or *health* of patients. Texas, however, allows physicians to act only when necessary to protect *life*; that is not the sort of criteria physicians are accustomed to dealing with. From the physician's standpoint, as the District Court in this case pointed out, there are many uncertainties inherent in the language of the statute. Vuitch is not authority for upholding the Texas abortion law.

Further, in *Vuitch* the Court upheld the D.C. statute as interpreted by the lower courts to include both mental and physical health. In Texas there has been no interpretation of the Texas statute. *Thompson* does not even discuss application of the statute.

Recent decisions have declared laws in New Jersey and Florida to be unconstitutionally vague. In *Y.W.C.A. v. Kugler, supra*, a federal panel declared vague to the New Jersey statute against performing an abortion "unless the same shall have been necessary to preserve the life of the mother" was declared unconstitutionally vague by the Florida Supreme Court in *State v. Barquet*, 262 So.2d 432 (1972).

The Florida court said that "if the statutes contained a clause reading 'necessary to the preservation of the mother's life *or health*' instead of the clause necessary 'to preserve *the* life,' the statutes could be held constitutional. . ." 262 So.2d at 433.

*Chaney v. Indiana*, No. 1171 S 321 (Ind. July 24, 1972), however, rejects the vagueness arguments as to a non-medical person.

**VI. The Texas abortion law places an unconstitutional burden of proof in the physician**

Appellant's original brief details the unconstitutionality of placing upon the physician

charged with allegedly performing an abortion the burden of showing that the procedure was necessary for the purpose of saving the life of the woman. Although the burden of proof issue was not before, them, the Texas Court of Criminal Appeals in a footnote in *Thompson, supra*, recognized that the *Vuitch* case does call into question the validity of Texas' statutory scheme as to who has the burden of proof on the exemption.

## CONCLUSION

For the reasons stated in Appellants' original brief and this supplemental brief, this Court should reverse the lower court's judgment denying standing to Appellants Doe and denying injunctive relief; declare that the Texas Abortion Statutes, Art 1191, 1192, 1193, 1194 and 1196, Texas Penal Code, violate the United States Constitution; and remand with instructions that a permanent injunction against enforcement of said statutes be entered.

Respectfully submitted,

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U.S. SUPREME COURT, JANUARY 1973

# Roe v. Wade

**CITE AS 93 S.CT. 705 (1973)**

**410 U.S. 113, 35 L.Ed.2d 147**

**Jane Roe, et al., Appellants,**
**v.**
**Henry Wade.**
**No. 70–18.**

Argued Dec. 13, 1971.
Reargued Oct. 11, 1972.
Decided Jan. 22, 1973.

Rehearing Denied Feb. 26, 1973.
See 410 U.S. 959, 93 S.Ct. 1409.

Action was brought for a declaratory and injunctive relief respecting Texas criminal abortion laws which were claimed to be unconstitutional. A three-judge United States District Court for the Northern District of Texas, 314 F.Supp. 1217, entered judgment declaring laws unconstitutional and an appeal was taken. The Supreme Court, Mr. Justice Blackmun, held that the Texas criminal abortion statutes prohibiting abortions at any stage of pregnancy except to save the life of the mother are unconstitutional; that prior to approximately the end of the first trimester the abortion decision and its effectuation must be left to the medical judgement of the pregnant woman's attending physician, subsequent to approximately the end of the first trimester the state may regulate abortion procedure in ways reasonably related to maternal health, and at the stage subsequent to viability the state may regulate and even proscribe abortion except where necessary in appropriate medical judgment for preservation of life or health of mother.

Affirmed in part and reversed in part.

Mr. Chief Justice Burger, Mr. Justice Douglas and Mr. Justice Stewart filed concurring opinions.

Mr. Justice White filed a dissenting opinion in which Mr. Justice Rehnquist joined.

Mr. Justice Rehnquist filed a dissenting opinion.

Supreme Court was not foreclosed from review of both the injunctive and declaratory aspects of case attacking constitutionally of Texas criminal abortion statutes where case was properly before Supreme Court on direct appeal from decision of three-judge district court specifically denying injunctive relief and the arguments as to both aspects were necessarily identical. 28 U.S.C.A. 1253.

With respect to single, pregnant female who alleged that she was unable to obtain a legal abortion in Texas, when viewed as of the time of filing of case and for several months thereafter, she had standing to challenge constitutionality of Texas criminal abortion laws, even though record did not disclose that she was pregnant at time of district court hearing or when the opinion and judgment were filed, and she presented a justiciable controversy; the termination of her pregnancy did not render case moot. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196.

Usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review and not simply at date action is initiated.

Where pregnancy of plaintiff was a significant fact in litigation and the normal human gestation period was so short that pregnancy would come to term before usual appellate process was complete, and pregnancy often came more than once to the same woman, fact of that pregnancy provided a classic justification for conclusion of nonmootness because of termination.

Texas physician, against whom there were pending indictments charging him with violations of Texas abortion laws who made no allegation of any substantial and immediate threat to any federally protected right that could not be asserted in his defense against state prosecutions and who had not alleged any harassment or bad faith prosecution, did not have standing to intervene in suit seeking declaratory and injunctive relief with respect to Texas abortion statutes which were claimed to be unconstitutional. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196.

Absent harassment and bad faith, defendant in pending state criminal case cannot affirmatively challenge in federal court the statutes under which state is prosecuting him.

Application for leave to intervene making certain assertions relating to a class of people was insufficient to establish party's desire to intervene on behalf of class, where the complaint failed to set forth the essentials of class suit.

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Childless married couple alleging that they had no desire to have children at the particular time because of medical advice that the wife should avoid pregnancy and for other highly personal reasons and asserting an inability to obtain a legal abortion in Texas were not, because of the highly speculative character of their position, appropriate plaintiffs in federal district court suit challenging validity of Texas criminal abortion statutes. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196.

Right to personal privacy or a guarantee of certain areas or zones of privacy does exist under Constitution, and only personal rights that can be deemed fundamental or implicit in the concept of odered liberty are included in this guarantee of personal privacy; the right has some extension to activities relating to marriage. U.S.C.A.Const. Amends. 1, 4, 5, 9, 14, 13, § 1.

Constitutional right to privacy is broad enough to encompass woman's decision whether or not to terminate her pregnancy, but the woman's right to terminate pregnancy is not absolute since state may properly assert important interests in safeguarding health, in maintaining medical standards and in protecting potential life, and at some point in pregnancy these respective interests become sufficiently compelling to sustain regulation of factors that govern the abortion decision. U.S.C.A.Const. Amends. 9, 14.

Where certain fundamental rights are involved, regulation limiting these rights may be justified only by a compelling state interest and the legislative enactments must be narrowly drawn to express only legitimate state interests at stake.

Word "person" as used in the Fourteenth Amendment does not include the unborn. U.S.C.A.Const. Amend. 14.

Prior to approximately the end of the first trimester of pregnancy the attending physician in consultation with his patient is free to determine, without regulation by state, that in his medical judgment the patient's pregnancy should be terminated, and if that decision is reached such judgment may be effectuated by an abortion without interference by the state.

From and after approximately the end of the first trimester of pregnancy a state may regulate abortion procedure to extent that the regulation reasonably relates to preservation and protection of maternal health.

If state is interested in protecting fetal life after viability it may go so far as to proscribe abortion during that period except when necessary to preserve the life or the health of the mother.

State criminal abortion laws like Texas statutes making it a crime to procure or attempt an abortion except an abortion on medical advice for purpose of saving life of the mother regardless of stage of pregnancy violate due process clause of Fourteenth Amendment protecting right to privacy against state action. U.S.C.A.Const. Amend, 14; Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196.

State in regulating abortion procedures may define "physician" as a physician currently licensed by State and may proscribe any abortion by a person who is not a physician as so defined.

Conclusion that Texas criminal abortion statue proscribing all abortions except to save life of mother is unconstitutional meant that the abortion statutes as a unit must fall, and the exception could not be struck down separately for then the state would be left with statue proscribing all abortion procedures no matter how medically urgent the case. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196.

### SYLLABUS*

A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health. A three-judge District Court, which consolidated the actions,

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 409.

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held that Roe and Hallford, and members of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, thought not injunctive, relief was warranted, the court declared the abortion statutes void as vague and overbroadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford. *Held*:

1. While 28 U.S.C. § 1253 authorizes no direct appeal to this Court from the grant or denial of declaratory relief alone, review is not foreclosed when the case is properly before the Court on appeal from specific denial of injunctive relief and the arrangements as to both injunctive and declaratory relief are necessarily identical. pp. 711–712.

2. Roe has standing to sue; the Does and Hallford do not. pp. 712–715.

(a) Contrary to appellees's contention, the natural termination of Roe's pregnancy did not moot her suit. Litigation involving pregnancy, which is "capable of repetition, yet evading review," is an exception to the usual federal rule that an actual controversy must exist at review stages and not simply when the action is initiated. pp. 712–713.

(b) The District Court correctly refused injunctive, but erred in granting declaratory, relief to Hallford, who alleged no federally protected right not assertable as a defense against the good-faith state prosecutions pending against him. Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688. pp. 713–714.

(c) The Does' complaint, based as it is on contingencies, any one or more of which may not occur, is too speculative to present an actual case or controversy.

3. State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term. pp. 726–732.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. pp. 731–732.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. pp. 731–732.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. pp. 732–733.

4. The State may define the term "physician" to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined. pp. 732–733.

5. It is unnecessary to decide the injunctive relief issue since the Texas authorities will doubtless fully recognize the Court's ruling that the Texas criminal abortion statutes are unconstitutional. p. 733.

314 F.Supp. 1217, affirmed in part and reversed in part.

Sarah R. Weddington, Austin, Tex., for appellants.

Robert C. Flowers, Asst. Atty. Gen. of Texas, Austin, Tex., for appellee on reemergence.

Jay Floyd, Asst. Atty. Gen., Austin, Tex., for appellee on original argument.

Mr. Justice BLACKMUN delivered the opinion of the Court.

This Texas federal appeal and its Georgia companion, Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously re-

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flects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in Lochner v. New York, 198 U.S. 45, 76, 25 S.Ct. 539, 547, 49 L.Ed. 937 (1905):

> "[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

I

The Texas statutes that concern us here art Arts. 1191–1194 and 1196 of the State's Penal Code,[1] Vernon's Ann.P.C. these make it a crime to "procure an abortion," as therein defined, or to attempt one, except with respect to "an abortion procured or attempted my medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States.[2]

Texas first enacted a criminal abortion statue in 1854. Texas Laws 1854, c. 49, § 1, set forth in 3 H. Gammel, Laws of Texas 1502 (1898). This was soon modified into language that has remained substantially unchanged to the present time. See Texas Penal Code of 1857, c. 7, Arts. 531–536; G. Paschal, Laws of Texas, Arts. 2192–2197 (1866); Texas Rev.Stat., c. 8, Arts. 536–541 (1879); Texas Rev.Crim.Stat., Arts. 1071–1076 (1911). The final article in each of these compilations provided the same exception, as does the present Article 1196, for an abortion by "medical advice for the purpose of saving the life of the mother."[3]

II

Jane Roe[4] a single woman who was residing in Dallas County, Texas, instituted this federal

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[1] "Article 1191. Abortion.

"If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent; the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

"Art. 1192. Furnishing the means."

"Whoever furnishes the means for procuring an abortion knowing the purpose is intended is guilty as an accomplice."

"Art. 1193. Attempt at abortion."

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars."

"Art. 1194. Murder in producing abortion."

"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder."

"Art. 1196. By medical advice."

"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

The foregoing Articles, together with Art. 1195, compose Chapter 9 of title 15 of the Penal Code. Article 1195, not attacked here reads:

"Art. 1195. Destroying unborn child."

"Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

[2] Ariz.Rev.Stat.Ann. § 13–211 (1956); Conn.Pub.Act No. 1 (May 1972 special session) (in 4 Conn.Leg.Serv. 677 (1972)), and Conn.Gen.Stat.Rev. §§ 53–29, 53–30 (1968) (or unborn child); Idaho Code § 18–601 (1948); Ill.Rev. Stat., c. 38, § 23–1 (1971); Ind.Code § 35–158–1 (1971); Ky.Rev.Stat. § 436.020 (1962); La.Rev.Stat. § 37:1285(6) (1964) (loss of medical license) (but see § 14–87 (Supp.1972) containing no exception for the life of the mother under the criminal statute); Me.Rev.Stat.Ann., Tit. 17, § 51 (1964); Mass.Gen. Laws Ann., c. 272, § 19 (1970) (using the term "unlawfully"

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action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint Roe purported to sue "on behalf of herself and all other women similarly situated."

James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In his complaint he alleged that he had been arrested previously for violations of the Texas abortion statutes and that two such prosecutions were pending against him. He described conditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to determine whether they fell within or outside the exception recognized by Article 1196. He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

John and Mary Doe,[5] a married couple, filed a companion complaint to that of Roe. They also named the District Attorney as defendant, claimed like constitutional deprivations, and sought declaratory and injunctive relief. The Does alleged that they were a childless couple; that Mrs. Doe was suffering from a "neural-chemical" disorder; that her physician had "advised her to avoid pregnancy until such time as her condition has materially improved" (although a pregnancy at the present time would not present "a serious risk" to her life); that, pursuant to medical advice, she had discontinued use of birth control pills; and that if she should become pregnant, she would want to terminate the pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. By an amendment to sue "on behalf of themselves and all couples similarly situated."

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construed to exclude an abortion to save the mother's life, Kudish v. Bd. of Registration, 356 Mass. 98, 248 N.E. 2d 264 (1969); Mich.Comp.Laws § 750.14 (1948); Minn.Stat. § 617.18 (1971); Mo.Rev.Stat. § 559.100 (1969); Mont.Rev. Codes Ann. § 94–401 (1969); Neb.Rev.Stat. § 28–405 (1964); Nev.Rev. Stat. § 200.220 (1967); N.H.Rev.Stat. Ann. § 585:13 (1955); N.J.Stat.Ann. § 2A:87–1 (1969) ("without lawful justification"); N.D.Cent.Code § § 12–25–01, 12–25–02 (1960); Ohio Rev.Code Ann. § 2901.16 (1953); Okla.Stat.Ann., Tit. 21, § 861 (1972–1973 Supp.); Pa.Stat. Ann., Tit 18, § § 4718, 4719 (1963) ("unlawful"); R.I.Gen.Laws Ann. § 11–3–1 (1969); S.D.Comp.Laws Ann. § 22–17–1 (1967); Tenn.Code Ann. § § 39–301, 39–302 (1956); Utah Code Ann. § § 76–2–1, 76–2–2 1953); Vt.Stat.Ann., Tit. 13, § 101 (1958); W.Va.Code. Ann. § 61–2–8 (1966); Wis.Stat. § 940.04 (1969); Wyo.Stat.Ann. § § 6–77, 6–78 (1957).

[3] Long ago, a suggestion was made that the Texas statutes were unconstitutionally vague because of definitional deficiencies. The Texas Court of Criminal Appeals disposed of that suggestion peremptorily, saying only,

"It is also insisted in the motion in arrest of judgment that the statue in unconstitutional and void, in that it does not sufficiently define or describe the offense of abortion. We do not concur with counsel in respect to this question." Jackson v. State, 55 Tex.Cr.R. 79, 89, 115 S.W. 262, 268 (1908).

The same court recently has held again that the State's abortion statutes are not unconstitutionally vague or overboard. Thompson v. State, 493 S.W.2d 913 (1971), appeal docketed, No. 7101200. The court held that "the State of Texas has a compelling interest to protect fetal life"; the Art. 1191 "is designed to protect fetal life"; that the Texas homicide statutes, particularly Art. 1205 of the Penal Code, are intended to protect a person "in existence by actual birth" and thereby implicitly recognize other human life that is not "in existence by actual birth"; that the definition of human life is for the legislature and not the courts; that Art. 1196 "is more definite than the District of Columbia statute upheld in [United States v.] Vuitch" (402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed.2d 601); and that the Texas statute "is not vague and indefinite or overboard." A physician's abortion conviction was affirmed.

In 493 S.W.2d, at 920 n. 2, the court observed that any issue as to the court observed that any issue as to the burden of proof under the exemption of Art. 1196 "is not before us." But see Veevers v. State, 172 Tex.Cr.R. 162, 168–169, 354 S.W.2d 161, 166–167 (1962). Cf. United States v. Vuitch, 402 U.S. 62, 69–71, 91 S.Ct. 1294, 1298–1299, 28 L.Ed.2d 601 (1971).

[4] The name is a pseudonym.

[5] These names are pseudonyms.

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The two actions were consolidated and heard together by a duly convened three-judge district court. The suits thus presented the situations of the pregnant single woman, the childless couple, with the wife not pregnant, and the licensed practicing physician, all joining in the attack on the Texas criminal abortion statutes. Upon the filing of affidavits, motions were made for dismissal and for summary judgment. The court held that Roe and members of her class, and Dr. Hallford, had standing to sue and presented justiciable controversies, but that the Does had failed to allege facts sufficient to state a present controversy and did not have standing. It concluded that, with respect to the requests for a declaratory judgment, abstention was not warranted. On the merits, the District Court held that the "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment," and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiff's Ninth Amendment rights. The court then held that abstention was warranted with respect to the requests for an injunction. It therefore dismissed the Does' complaint, declared the abortion statutes void, and dismissed the application for injunctive relief. 314 F.Supp. 1217, 1225 (N.D. Tex.1970).

The plaintiffs Roe and Doe and the intervenor Hallford, pursuant to 28 U.S.C. § 1253, have appealed to this Court from the part of the District Court's judgment denying the injunction. The defendant District Attorney has purported to cross-appeal, pursuant to the same statue, from the court's grant of declaratory relief to Roe and Hallford. Both sides also have taken protective appeals for the Fifth Circuit. That court ordered the appeals held in abeyance pending decision here. We postponed decision on jurisdiction to the hearing on the merits. 402 U.S. 941, 91 S.Ct. 1610, 29 L.Ed.2d 108 (1971).

III

It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief. Our decisions in Mitchell v. Donovan, 398 U.S. 427, 90 S.Ct. 1763, 26 L.Ed.2d (1970), and Gunn v. University Committee, 399 U.S. 383, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970), are to the effect that § 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not foreclose our review of both the injunctive and the declaratory aspects of a case of this kind when it is properly here, as this one is, on appeal under § 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical. See Carter v. Jury Comm'n 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970); Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73; 80–81, 80 S.Ct. 568, 573–574, 4 L.Ed.2d 568 (1960). It would be destructive of time and energy for all concerned were we to rule otherwise. Cf. Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201.

IV

We are next confronted with issues of justiciability, standing, and abstention. Have Roe and the Does established that "personal stake in the outcome of the controversy," Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), that insures that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution," Flast v. Cohen, 392 U.S. 83, 101, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947 (1968), and Sierra Club v. Morton, 405 U.S. 727, 732, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636 (1972)? And what effect did the pendency of criminal abortion charges against Dr. Hallford in state court have upon the propriety of the federal court's granting relief to him as a plaintiff-intervenor?

[2] A. *Jane Roe.* Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.

Viewing Roe's case as of the time of its filing and thereafter until as late as May, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had

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standing to challenge those statutes. Abele v. Markle, 452 F.2d 1121, 1125 (CA2 1971); Crossen v. Breckenridge, 446 F.2d 833, 838–839 (CA6 1971); Poe v. Menghini, 339 F. Supp. 986, 990–991 (D.C.Kan. 1972). See Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915). Indeed, we do not read the appellee's brief as really asserting anything to the contrary. The "logical nexus between the status asserted and the claim sought to be adjudicated," Flast v. Cohen, 392 U.S., at 102, 88 S.Ct., at 1953, and the necessary degree of contentiousness, Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969), are both present.

The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970,[6] or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.

[3] The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. United States v. Munsing-wear, Inc., 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950); Golden v. Zwickler, *supra*; SEC v. Medical Committee for Human Rights, 404 U.S. 403, 92 S.Ct. 577, L.Ed.2d 560 (1972).

[4] But when, as here, pregnancy is a significant fact in the litigation, the normal 266–day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911). See Moore v. Ogilvie, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494, 23 L.Ed.2d 1 (1969); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 178–179, 89 S.Ct. 347, 350, 351, 21 L.Ed.2d 325 (1968); United States v. W. T. Grant Co., 345 U.S. 629, 632–633, 73 S.Ct. 894, 897–898, 97 L.Ed. 1303 (1953).

We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot.

[5] B. *Dr. Hallford*. The doctor's position is different. He entered Roe's litigation as a plaintiff-intervenor, alleging in his complaint that he:

> "[I]n the past has been arrested for violating the Texas Abortion Laws and at the present time stands charged by indictment with violating said laws in the Criminal District Court of Dallas County, Texas to-wit: (1) The State of Texas vs. James H. Hallford, No. C—69–5307–IH, and (2) The State of Texas vs. James H. Hallford, No. C—69–2524–H. In both cases the defendant is charged with abortion . . ."

In his application for leave to intervene, the doctor made like representations as to the abortion charges pending in the state court. These representations were also repeated in the affidavit he executed and filed in support of his motion for summary judgment.

[6] Dr. Hallford is, therefore in the position of seeking, in a federal court, declaratory and injunctive relief with respect to the same statutes under which he stands charged in criminal prosecutions simultaneously pending in state cout. Although he stated that he has been arrested in the past for violating the State's abortion laws, he makes no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions. Neither is there any allegation of harassment or bad-faith prosecution. In order to escape the rule articulated in the cases cited in the next paragraph of this opinion that, absent harassment and bad faith, a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the State is prosecuting him, Dr. Hallford seeks to distinguish his status as a "potential future defendant" and to assert only the latter for standing purposes here.

We see no merit in that distinction. Our decision in Samuels v. Mackell, 401 U.S. 66, 91

[6] The appellee twice states in his brief that the hearing before the District Court was held on July 22, 1970. Brief for Appellee 13. The docket entries, App. 2, and the transcript, App. 76, reveal this to be an error. The July date appears to be the time of the reporter's transcription. See App. 77.

S.Ct. 764, 27 L.Ed.2d 688 (1971), compels the conclusion that the District Court erred when it granted declaratory relief to Dr. Hallford instead of refraining from so doing. The court, of course, was correct in refusing to grant injunctive relief to the doctor. The reasons supportive of that action, however, are those expressed in Samuels v. Mackell, *supra*, and in Younger v. Harris, 401 U.S. 37, 81 S.Ct. 746, 27 L.Ed.2d 669 (1971); Boyle v. Landry, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971); and Byrne v. Karalexis, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971). See also Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116; 14 L.Ed.2d 22 (1965). We note, in passing that *Younger* and its companion cases were decided after the three-judge District Court decision in this case.

[7] Dr. Hallford's complaint in intervention, therefore, is to be dismissed.[7] He is remitted to his defenses in the state criminal proceedings against him. We reverse the judgment of the District Court insofar as it granted Dr. Hallford relief and failed to dismiss his complaint in intervetnion.

[8] C. *The Does*. In view of our ruling as to Roe's standing in her case, the issue of the Doe's standing in their case has little significance. The claims they assert are essentially the same as those of Roe, and they attack the same statutes. Nevertheless, we briefly note the Doe's posture.

Their pleadings present them as a childless married couple, the woman not being pregnant, who have no desire to have children at this time because of their having received medical advice that Mrs. Doe should avoid pregnancy, and for "other highly personal reasons." But they "fear . . . they may face the prospect of becoming parents." And if pregnancy ensues, they "would want to terminate" it by an abortion. They assert an inability to obtain an abortion legally in Texas and, consequently, the prospect of obtaining an illegal abortion there or of going outside Texas to some place where the procedure could be obtained legally and competently.

We thus have as plaintiffs a married couple who have, as their asserted immediate and present injury, only an alleged "detrimental effect upon [their] marital happiness" because they are forced to "the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy." Their claim is that sometime in the future Mrs. Doe might become pregnant because of possible failure of contraceptive measures, and at that time in the future she might want an abortion that might then be illegal under the Texas statutes.

This very phrasing of the Doe's position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. In the Doe's estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. Younger v. Harris, 401 U.S., at 41–42, 91 S.Ct., at 749; Golden Zwickler, 394 U.S., at 109–110, 89 S.Ct., at 960; Abele v. Markle, 452 F.2d, at 1124–1125; Crossen v. Breckenridge, 446 F.2d, at 839. The Doe's claim falls far short of those resolved otherwise in the cases that the Does' urge upon us, namely, Investment Co. Institute v. Camp, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); and Epperson v. Arkansas, 393 U.S. 87, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). See also Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915).

The Does therefore are not appropriate plaintiffs in this litigation. Their complaint was properly dismissed by the District Court, and we affirm that dismissal.

V

The principal trust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant

[7] We need not consider what different result, if any, would follow if Dr. Hallford's intervention were on behalf of a class. His complaint in intervention does not purport to assert a class suit and makes no reference to any class apart from an allegation that he "and others similarly situated" must necessarily guess at the meaning of Art. 1196. His application for leave to intervene goes somewhat further, for it asserts that plaintiff Roe does not adequately protect the interest of the doctor "and the class of people who are physicians . . . [and] the class of people who are . . . patients . . ." The leave application, however, is not the complaint. Despite the District Court's statement to the contrary, 314 F.Supp., at 1225, we fail to perceive the essentials of a class suit in the Hallford complaint.

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woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); *id*, at 460, 92 S.Ct. 1029, at 1042, 31 L.Ed.2d 349 (White, J., concurring in result); or among those rights reserved to the people be the Ninth Amendment, Griswold v. Connecticut, 381 U.S., at 486, 85 S.Ct., at 1682 (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

VI

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.

1. *Ancient attitudes*. These are not capable of precise determination. We are told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished.[8] We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era,[9] and that "it was resorted to without scruple."[10] The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable.[11] Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion.[12]

2. *The Hippocratic Oath*. What then of the famous Oath that has stood so long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)-377(?) B.C.), who has been described as the Father of Medicine, the "wisest and the greatest practitioner of his art," and the "most important and most complete medical personality of antiquity," who dominated the medical schools of his time, and who typified the sum of the medical knowledge of the past?[13] The Oath varies somewhat according to the particular translation, but in any translation the content is clear: "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion,"[14] or "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy."[15]

Although the Oath is not mentioned in any of the principal briefs in this case or in Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory:[16] The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, Republic, V, 461; Aristotle, Politics, VII, 1335b 25. For the Pythagoreans, however, it was a matter of dogma. For them the embryo was animate form the moment of conception, and abortion meant destruction of a living being.

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[8] A. Castiglioni, A History of Medicine 84 (2d ed. 1947), E. Krumbhaar, translator and editor (hereinafter Castiglioni).
[9] J. Ricci, The Genealogy of Gynaecology 52, 84, 113, 149 (2d ed. 1950) (herein after Ricci); L. Lader, Abortion 75–77 (1966) (hereinafter Lader); K. Niswander, Medical Abortion Practices in the United States, in Abortion Practices in the United States, in Abortion and the Law 37, 38–40 (D. Smith ed. 1967); G. Williams, The Sanctity of Life and the Criminal Law 148 (1957) (herein after Williams); J. Noonan, An Almost Absolute Value in History, in the Morality of Abortion 1, 3–7 (J. Noonan ed. 1970) (hereinafter Noonan); Quay, Justifiable Abortion-Medical and Legal Foundations, (pt. 2), 49 Geo.L.J. 395, 406–422 (1961) (hereinafter Quay).
[10] L. Edelstein, The Hippocratic Oath 10 (1943) (hereinafter Edelstein). But see Castiglioni 227.
[11] Edelstein 12; Ricci 113–114, 118–119; Noonan 5.
[12] Edelstein 13–14.
[13] Castiglioni 148.
[14] *Id*., at 154.
[15] Edelstein 3.
[16] *Id*., at 12, 15–18.

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The abortion clause of the Oath, therefore, "echoes Pythagorean doctrines," and "[i]n no other stratum of Greek opinion were such views held or proposed in the same spirit of uncompromising austerity."[17]

Dr. Edelstein then concludes that the Oath Originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (A.D. 130–200) "give evidence of the violation of almost every one of its injunctions."[18] But with the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Pythagorean ethic. The Oath "became the nucleus of all medical ethics" and "was applauded as the embodiment of truth." Thus, suggests Dr. Edelstein, it is "a Pythagorean manifesto and not the expression of an absolute standard of medical conduct."[19]

This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long-accepted and revered statement of medical ethics.

3. *The common law*. It is undisputed that at common law, abortion performed *before* "quickening"—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy[20]—was not an indictable offense.[21] The absence of a common-law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became "formed" or recognizably human, or in terms of when a "person" came into being, that is infused with a "soul" or "animated." A loose concensus evolved in early English law that these events occurred at some point between conception and live birth.[22] This was "mediate animation." Although Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that prior to this point the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40–80–day view, and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening was echoed by

[17] *Id*., at 18; Lader 76.

[18] Edelstein 63.

[19] *Id*., at 64.

[20] Dorland's Illustrated Medical Dictionary 1261 (24th ed. 1965).

[21] E. Coke, Institutes III *50; 1 W. Hawkins, Pleas of the Crown, c. 31, § 16 (4th ed. 1762); 1 W. Blackstone, Commentaries *129–130; M. Hale, Pleas of the Crown 433 (1st Amer. ed. 1847). For discussion of the role of the quickening concept in English common law, see Lader 78; Noonan 223–226; Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1964–1968: A Case of Cessation of Constitutionality (pt. 1), 14 N.Y.L.F. 411, 418–428 (1968) (hereinafter Means I); Stern, Abortion: Reform and the Law, 59 J.Crim.L.C. & P.S. 84 (1968) (hereinafter Stern): Quay 430–432; Williams 152.

[22] Early philosophers believed that the embryo or fetus did not become formed and begin to live until at least 40 days after conception for a male and 80 to 90 days for a female. See, for example, Aristotle,Hist.Anim. 7.3.583b; Gen.Anim. 2.3.736, 2.5.741; Hippocrates, Lib. de Nat.Puer., No. 10. Aristotle's thinking derived from his three-stage theory of life: vegetable, animal, rational. The vegetable stage was reached at conception, the animal at "animation," and the rational soon after live birth. This theory together with the 40/80 day view, came to be accepted by early Christian thinkers.

The theological debate was reflected in the writings of St. Augustine, who made a distinction between *embryo inanimatus*, not yet endowed with a soul, and *embryo animatus*. He may have drawn upon Exodus 21:22. At one point, however, he expressed the view that human powers cannot determine the point, during fetal development at which the critical change occurs. See Augustine, De Origine Animae 4.4 (Pub.Law 44.527). See also W. Reany, The Creation of the Human Soul, c. 2 and 83–86 (1932); Huser, The Crime of Abortion in Canon Law 15 (Catholic Univ. of America, Canon Law Studies No. 162, Washington, D.C., 1942).

Galen, in three treaties related to embryology, accepted the thinking of Aristotle and his followers. Quay 426–427. Later, Augustine on abortion was incorporated by Gratian into the Decretum, published about 1140. Decretum Magistri Gratiani 2.32.2.7 to 2.32.2.10, in 1 Corpus Juris Canonici 1122, 1123 (A. Friedberg, 2d ed. 1879). This Decretal and the Decretals that followed were recognized as the definitive body of canon law until the new Code of 1917.

For discussion of the canon-law treatment, see Means I, pp. 411–412; Noonan 20–26; Quay 426–430; see also J. Noonan, Contraception: A History of Its Treatment by the Catholic Theologians and Canonists 18–29 (1965).

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later common-law scholars and found its way into the received common law in this country.

Whether abortion of a *quick* fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the 13th century, thought it homicide.[23] But the later and predominant view, following the great common-law scholars, has been that it was, at most, a lesser offence. In a frequently cited passage, Coke took the position that abortion of a woman "quick with childe" is "a great misprision, and no murder"[24] Blackstone followed, saying that while abortion after quickening had once been considered manslaughter (though not murder), "modern law" took a less severe view.[25] A recent review of the common-law precedents argues, however, that those precedents contradict Coke and that even post-quickening abortion was never established as a common-law crime.[26] This is of some importance because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law,[27] others followed Coke instating that abortion of a quick fetus was a "misprision," a term they translated to mean "misdemeanor."[28] That their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common-law prosecutions for post-quickening abortion), makes it now appear doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.

4. *The English statutory law*. England's first criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58, came in 1803. It made abortion of a quick fetus, § 1, a capital crime, but in §2 it provided lesser penalties for the felony of abortion before quickening, and thus preserved the "quickening" distinction. This contrast was continued in the general revision of 1828, 9 Geo. 4, c. 31, § 13. It disappeared, however, together with the death penalty, in 1837, 7 Will. 4 & 1 Vict., c. 85, § 6, and did not reappear in the Offenses Against the Person Act of 1861, 24 & 25 Vict., c. 100, § 59, that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929, the Infant Life (Preservation) Act, 19 & 20 Geo. 5, c. 34, came into being. Its emphasis was upon the destruction of "the life of a child capable of being born alive." It made a willful act performed with the necessary intent a felony. It contained a proviso that one was not to be found guilty of the offense "unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."

A seemingly notable development in the English law was the case of Rex v. Bourne, [1939] 1 K.B. 687. This case apparently answered in the affirmative the question whether an abortion necessary to preserve the life of the pregnant

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Bracton took the position that abortion by blow or poison was homicide "if the foetus be already formed and animated and particularly if it be animated." 2 H. Bracton, De Legibus et Consuetudinibus Angliae 279 (T. Twiss ed. 1879), or, as a later translation puts it, "if the foetus is already formed or quickened, especially if it is quickened," 2 H. Bracton, On the Laws and Customs of England 341 (S. Thorne ed. 1968). See Quay 431: see also 2 Fleta 60–61 (Book 1, c. 23) (Selden Society ed. 1955).

[24] E. Coke, Institutes III * 50.

[25] 1 W. Blackstone, Commentaries *129–130.

[26] Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?, 17 N.Y.L.F. 335 (1971) (hereinafter Means II). The author examines the two principal precedents cited marginally by Coke, both contrary to his dictum, and traces the treatment of these and other cases by earlier commentators. He concludes that Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law. The author even suggests a reason: Coke's strong feelings against abortion, coupled with his determination to assert common-law (secular) jurisdiction to assess penalties for an offense that traditionally had been an exclusively ecclesiastical or cannon-law crime. See also Lader 78–79, who notes that some scholars doubt that the common law ever was applied to abortion; that the English ecclesiastical courts seem to have lost interest in the problem after 1527; and that the preamble to the English legislation of 1803, 43 Geo. 3, c. 58, § 1, referred to in the text, *infra*, at 718, states that "no adequate means have been hitherto provided for the prevention and punishment of such offenses."

[27] Commonwealth v. Bangs, 9 Mass. 387, 388 (1812); Commonwealth v. Parker, 50 Mass. (9 Metc.) 263, 265–266 (1845); State v. Cooper, 22 N.J.L. 52, 58 (1849); Abrams v. Foshee, 3 Iowa 274, 278–280 (1856); Smith v. Gaffard, 31 Ala. 45, 51 (1857); Mitchell v. Commonwealth, 78 Ky. 204, 210 (1879); Eggart v. State, 40 Fla. 527, 532, 25 So. 144, 145 (1898); State v. Alcorn, 7 Idaho 599, 606, 64 P.1014, 1016 (1901); Edwards v. State, 79 Neb. 251, 252, 112 N.W. 611, 612 (1907); Gray v. State, 77 Tex.Cr.R. 221, 224, 178 S.W. 337, 338 (1915); Miller v. Bennett, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949). Contra Mills v. Commonwealth, 13 Pa. 631, 633 (1850); State v. Slagle, 83 N.C. 630, 632 (1880).

[28] See Smith v. State, 33 Me. 48, 55 (1851); Evans v. People, 49 N.Y. 86, 88 (1872); Lamb v. State, 67 Md. 524, 533, 10 A. 208 (1887).

woman was expected from the criminal penalties of the 1861 Act. In his instructions to the jury, Judge Macnaghten referred to the 1929 Act, and observed that the Act related to "the case where a child is killed by a willful act at the time when it is being delivered in the ordinary course of nature," *Id.*, at 691. He concluded that the 1861 Act's use of the word "unlawfully," imported the same meaning expressed by the specific proviso in the 1929 Act, even though there was no mention of preserving the mother's life in the 1861 Act. He then constructed the phrase "preserving the life of the mother" broadly, that is, "in a reasonable sense," to include a serious and permanent threat to the mother's *health*, and instructed the jury to acquit Dr. Bourne if it found he had acted in a good-faith belief that the abortion was necessary for this purpose. *Id.*, at 693–694. The jury did acquit.

Recently, Parliament enacted a new abortion law. This is the Abortion Act of 1967, 15 & 16 Eliz. 2, c. 87. The Act permits a licensed physician to perform an abortion where two other licensed physicians agree (a) "that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated," or (b) "that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped." The Act also provides that, in making this determination, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment." It also permits a physician, without the concurrence of others, to terminate a pregnancy where he is of the good-faith opinion that the abortion "is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman."

5. *The American law*. In this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a woman "quick with child."[29] The death penalty was not imposed. Abortion before quickening was made a crime in the State only in 1860.[30] In 1828, New York enacted legislation[31] that, in two respects, was to serve as a model for early anti-abortion statutes. First, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it "shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose." By 1840, when Texas had received the common law,[32] only eight American States had statutes dealing with abortion.[33] It was not until after the War Between the States the legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared and the typical law required that the procedure actually be necessary for that purpose.

Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother.[34] The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health.[35] Three States permitted abortions that were not "unlawfully" performed or that were not "without lawful justification," leaving inter-

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[29] Conn.Stat., Tit. 20 § 14 (1821).

[30] Conn.Pub.Acts, c. 71, § 1 (1860).

[31] N.Y.Rev.Stat., pt. 4, c. 1, Tit. 2, Art. 1, § 9, p. 691, and Tit. 6, § 21, p. 694 (1829).

[32] Act of Jan. 20, 1840, § 1, set forth in 2 H. Gammel, Laws of Texas 177–178 (1898); see Grigsby v. Reib, 105 Tex. 597, 600, 153 S.W. 1124, 1125 (1913).

[33] The early statutes are discussed in Quay 435–438. See also Lader 85–88; Stern 85–86; and Means II 375–376.

[34] Criminal abortion statutes in effect in the States as of 1961, together with historical statutory development and important judicial interpretations of the state statutes, are cited and quoted in Quay 447–520. See Comment, A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems, 1972 U.Ill.L.F. 177, 179, classifying the abortion statutes and listing 25 States as permitting abortion only if necessary to save or preserve the mother's life.

[35] Ala.Code Tit. 14, § 9 (1958); D.C. Code Ann. § 22–201 (1967).

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pretation of those standards to the courts.[36] In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, § 230.3,[37] set forth as Appendix B to the opinion in Doe v. Bolton, 410 U.S. 205, 93 S.Ct. 754.

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

6. *The position of the American Medical Association*. The anti-abortion mood prevalent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period.

An AMA Committee on Criminal Abortion was appointed in May 1857. It presented its report, 12 Trans. of the Am.Med.Assn. 73–78 (1859), to the Twelfth Annual Meeting. That report observed that the Committee had been appointed to investigate criminal abortion "with a view to its general suppression." It deplored abortion and its frequency and it listed three causes of "this general demoralization.":

> "The first of these causes is a wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.
>
> "The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life . . .
>
> "The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it, and to its life as yet denies all protection." *Id*., at 75–76.

The Committee then offered, and the Association adopted, resolutions protesting "against such unwarrantable destruction of human life," calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies "in pressing the subject." *Id*., at 28, 78.

In 1871 a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation, "We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less," 22 Trans. of the Am.Med.Assn. 258 (1871). It proffered resolutions, adopted by the Association, *id*., at 38–39, recommending, among other things, that it "be unlawful and unprofessional for any physician to induce abortion or premature labor, without the concurrent opinion of at least

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[36] Mass.Gen.Laws Ann. c. 272, § 19 (1970); N.J.Stat.Ann. § 2A:87–1 (1969); PA.Stat.Ann. Tit. 18, §§ 4718, 4719 (1963).

[37] Fourteen States have adopted some form of the ALI statute. See Ark.Stat.Ann. §§ 41–303 to 41–310 (Supp.1971); Calif. Health & Safety Code §§ 25950–25955.5 (Supp.1972); Colo. Rev.Stat.Ann. §§ 40–2–50 to 40–2–53 (Cum.Supp.1967); Del. Code Ann. Tit. 24 §§ 1790–1793 (Supp. 1972); Florida Law of Apr. 13, 1972, c. 72–196, 1972 Fla.Sess.Law Serv., pp. 380–382; Ga.Code §§ 26–1201 to 26–1203 (1972); Kan.Stat.Ann. § 21–3407 (Supp.1971); Md.Ann.Code, Art. 43, §§ 137–139 (1971); Miss.Code Ann. § 2223 (Supp.1972); N.M.Stat.Ann. §§ 40A-5–1 to 40A-5–3 (1972); N.C.Gen. Stat. § 14–45.1 (Supp.1971); Ore.Rev. Stat. §§ 435.405 to 435.495 (1971); S.C.Code Ann. §§ 16–82 to 16–89 (1962 and Supp.1971); Va.Code Ann. §§ 18.1–62 to 18.1–62.3 (Supp.1972). Mr. Justice Clark described some of these States as having "fed the way." Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola U. (L.A.) L.Rev. 1, 11 (1969).

By the end of 1970, four other States had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements. Alaska Stat. § 11.15.060 (1970); Haw.Rev.Stat. § 453–16 (Supp.1971); N.Y.Penal Code § 125.05, subd. 3 (Supp.1972–1973); Wash.Rev.Code §§ 9.02.060 to 9.02.080 (Supp.1972). The precise status of criminal abortion laws in some States is made unclear by recent decisions in state and federal courts striking down existing state laws, in whole or in part.

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one respectable consulting physician, and then always with a view to the safety of the child—if that be possible," and calling "the attention of the clergy of all denominations to the perverted views of morality entertained by a large class of females—aye, and men also, on this important question."

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967. In that year, the Committee on Human Reproduction urged the adoption of a stated policy of opposition to induced abortion, except when there is "documented medical evidence" of a threat to the health or life of the mother, or that the child "may be born with incapacitating physical deformity or mental deficiency," or that a pregnancy "resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the "patient," two other physicians "chosen because of their recognized professional competency have examined the patient and have concurred in writing," and the procedure "is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals." The providing of medical information by physicians to state legislatures in their consideration of legislation regarding therapeutic abortion was "to be considered consistent with the principles of ethics of the American Medical Association." This recommendation was adopted by the House of Delegates. Proceedings of the AMA House of Delegates 40–51 (June 1967).

In 1970, after the introduction of a variety of proposed resolutions, and of a report from its Board of Trustees, a reference committee noted "polarization of the medical profession on this controversial issue"; division among those who had testified; a difference of opinion among AMA councils and committees; "the remarkable shift in testimony" in six months, felt to be influenced "by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available," and a feeling "that this trend will continue." On June 25, 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee. The preambles emphasized "the best interests of the patient," "sound clinical judgment," and "informed patient consent," in contrast to "mere acquiescence to the patient's demand." The resolutions asserted that abortion is a medical procedure that should be performed by a licensed physician in an accredited hospital only after consultation with two other physicians and in conformity with state law, and that no party to the procedure should be required to violate personally held moral principles.[38] Proceedings of the AMA House of Delegates 220 (June 1970). The AMA Judicial Council rendered a complementary opinion.[39]

[38] "Whereas, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient since good medical practice requires due consideration for the patient's welfare and not mere acquiescence to the patient's demand; and

"Whereas, The standards of sound clinical judgment, which, together with informed patient consent should be determinative according to the merits of each individual case; therefore be it.

"RESOLVED, That abortion is a medical procedure and should be performed only by a duly licensed physician and surgeon in an accredited hospital acting only after consultation with two other physicians chosen because of their professional competency and in conformance with standards of good medical practice and the Medical Practice Act of his State; and be it further

"RESOLVED, that no physicians or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice." Proceedings of the AMA House of Delegates 220 (June 1970).

[39] "The principles of Medical Ethics of the AMA do not prohibit a physician form performing an abortion that is performed in accordance with good medical practice and under circumstances that do not violate the laws of the community in which he practices.

"In the matter of abortions, as of any other medical procedure, the Judicial Council becomes involved whenever there is alleged violation of the Principles of Medical Ethics as established by the House of Delegates."

"UNIFORM ABORTION ACT

"Section 1. [*Abortion Defined: When Authorized.*]

"(a) 'Abortion' means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.

"(b) An abortion may be performed in this state only if it is performed:

"(1) by a physician licensed to practice medicine [or osteopathy] in this state or by a physician practicing medicine [or osteopathy] in the employ of the government of the United States or of this state, [and the abortion is performed [in the physician's office or in a medical clinic, or] in a hospital approved by the [Department of Health] or operated

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7. *The position of the American Public Health Association.* In October 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number:

> a. Rapid and simple abortion referral must be readily available through state and local public health departments, medical societies, or other non-profit organizations.
>
> b. An important function of counseling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services.
>
> c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services, psychiatric consultation should be sought for definite indications and not on a routine basis.
>
> d. A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.
>
> e. Contraception and/or sterilization should be discussed with each abortion patient." Recommended Standards for Abortion Services, 61 Am.J.Pub.Health 396 (1971).

Among factors pertinent to life and health risks associated with abortion were three that "are recognized as important":

> a. the skill of the physician,
>
> b. the environment in which the abortion is performed, and above all
>
> c. the duration of pregnancy, as determined by uterine size and confirmed by menstrual history." *Id.*, at 397.

It was said that "a well-equipped hospital" offers more protection "to cope with unforeseen difficulties than an office or clinic without such resources. . . . The factor of gestational age is of overriding importance." Thus, it was recommended that abortions in the second trimester and early abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures. For pregnancies in the first trimester, abortion in the hospital with or without overnight stay "is probably the safest practice." An abortion in an extramural facility, however, is an acceptable alternative "provided arrangements exist in advance to admit patients promptly if unforeseen complications develop." Standards for an abortion facility were listed. It was said that at present abortions should be performed by physicians or osteopaths who are licensed to practice and who have "adequate training." *Id.*, at 398.

8. *The position of the American Bar Association.* At its meeting in February 1972 the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the proceeding August by the Conference of Commissioners on Uniform State Laws. 58 A.B.A. J. 380 (1972). We set forth the Act in full in the margin.[40] The Conference has appended an enlightening Prefatory Note.[41]

VII

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

It has been argued occasionally that these laws were the product of a Victorian social con-

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by the United States, this state, or any department, agency, or political subdivision of either;] or by a female upon herself upon the advice of the physician; and

"(2) within [20] weeks after the commencement of the pregnancy [or after [20] weeks only if the physician has reasonable cause to believe (i) there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, (ii) that the child would be born with grave physical or mental defect, or (iii) that the pregnancy resulted form rape or incest, or illicit intercourse with a girl under the age of 16 years].

"Section 2. [*Penalty.*] Any person who performs or procures an abortion other than authorized by this Act is guilty of a [felony] and, upon conviction thereof, may be sentenced to pay a fine not exceeding [$1,000] or to imprisonment [in the state penitentiary] not exceeding [5 years], or both.

"Section 3. [*Uniformity of Interpretation.*] This Act shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

"Section 4. [*Short Title*]. This Act may be cited as the Uniform Abortion Act.

"Section 5. [*Severability.*] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

"Section 6. [*Repeal*]. The following acts and parts of acts are repealed:

"(1)

"(2)

"(3)

"Section 7. [*Time of Taking Effect*]. This Act shall take effect _____."

[41] "This Act is based largely upon the New York abortion act following a review of the more recent laws on abortion in several states and upon recognition of a more liberal trend in laws on this subject. Recognition was given also to several

cern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously.[42] The appellants and *amici* contend, moreover, that this is not a proper state purpose at all and suggest that, if it were, the Texas statutes are overboard in protecting it since the law fails to distinguish between married and unwed mothers.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman.[43] This was particularly true prior to the development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dilation and curettage were not nearly so safe as they are today. Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellants and various *amici* refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth.[44] Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the areas of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

The third reason is the State's interest—some phrase it in terms of duty—in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception.[45] The State's interest and general obligation to

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decisions in state and federal courts which show a further trend toward liberalization of abortion laws, especially during the first trimester of pregnancy.

"Recognizing that a number of problems appeared in New York, a shorter time period for 'unlimited' abortions was advisable. The time period was bracketed to permit the various states to insert a figure more in keeping with the different conditions that might exist among the states. Likewise, the language limiting the place or places in which abortions may be performed was also bracketed to account for different conditions among the states. In addition, limitations on abortions after the initial "unlimited' period were placed in brackets so that individual states may adopt all or any of these reasons, or place further restrictions upon abortions after the initial period.

"This Act does not contain any provision relating to medical review committees or prohibitions against sanctions imposed upon medical personnel refusing to participate in abortions because of religious or other similar reasons, or the like. Such provisions, while related, do not directly pertain to when, where, or by whom abortions may be performed; however, the Act is not drafted to exclude such a provision by a state wishing to enact the same."

[42] See for example, YWCA v. Kugler, 342 F.Supp. 1048, 1074 (D.C.N.J.1972); Abele v. Markle, 342 F.Supp. 800, 805–806 (D.C.Conn.1972) (Newman, J., concurring in result), appeal docketed, No. 72–56; Walsingham v. State, 250 So.2d 857, 863 (Ervin J., concurring) (Fla. 1971); State v. Gedicke, 43 N.J.L. 86, 90 (1881); Means II 381–382.

[43] See C. Haagensen & W. Lloyd, A Hundred Years of Medicine 19 (1943).

[44] Potts, Postconceptive Control of Fertility, 8 Int'l J. of G. & O. 957, 967 (1970) (England and Wales); Abortion Mortality, 20 Morbidity and Mortality 208, 209 (June 12, 1971) (U.S. Dept. of HEW, Public Health Service) (New York City); Tietze, United States: Therapeutic Abortions, 1963–1968, 59 Studies in Family Planning 5, 7 (1970); Tietze, Mortality with Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969) (Japan, Czechoslovakia, Hungary); Tietze & Lehfeldt, Legal Abortion in Eastern Europe, 175 J.A. M.A. 1149, 1152 (April 1961). Other sources are discussed in Lader 17–23.

[45] See Brief of Amicus National Right to Life Committee; R. Drinan, The Inviolability of the Right to Be Born, in Abortion and the Law 107 (D. Smith ed. 1967); Louisell,

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protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life.[46] Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose.[47] The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus.[48] Proponents of this view point out that in many States, including Texas,[49] by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.[50] They claim that adoption of the "quickening" distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.

It is with these interests, and the weight to be attached to them, that this case is concerned.

VIII

[9] The Constitution does not explicitly mention any right to privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8–9, 88 S.Ct. 1868, 1872–1873, 20 L.Ed.2d 889 (1968), Katz v. United States, 389 U.S. 347, 350, 88 S.Ct. 507, 510, 19 L.Ed.2d 576 (1967); Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), see Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S., at 484–485, 85 S.Ct., at 1681–1682; in the Ninth Amendment, *id.*, at 486 85 S.Ct. at 1682 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541–542, 62 S.Ct. 1110, 1113–1114, 86 L.Ed. 1665 (1942); contraception, Eisenstadt v. Baird, 405 U.S., at 453–454, 92 S.Ct., at 1038–1039; *id.*, at 460, 463–465, 92 S.Ct. at 1042, 1043–1044 (White, J. concurring in result); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166, 64

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Abortion, The Practice of Medicine and the Due Process of Law, 16 U.C.L.A.L.Rev. 233 (1969); Noonan 1.

[46] See, *e.g.*, Abele v. Markle, 342 F.Supp. 800 (D.C.Conn. 1972), appeal docketed, No. 72–56.

[47] See discussions in Means I and Means II.

[48] See, *e.g.*, State v. Murphy, 27 N.J.L. 112, 114 (1858).

[49] Watson v. State, 9 Tex.App. 237, 244–245 (1880); Moore v. State, 37 Tex. Cr.R. 552, 561, 40 S.W. 287, 290 (1897); Shaw v. State, 73 Tex.Cr.R. 337, 339, 165 S.W. 930, 931 (1914); Fondren v. State, 74 Tex.Cr.R. 552, 557, 169 S.W. 411, 414 (1914); Gray v. State, 77 Tex.Cr.R. 221, 229, 178 S.W. 337, 341 (1915). There is no immunity in Texas for the father who is not married to the mother. Hammett v. State, 84 Tex.Cr.R. 635, 209 S.W. 661 (1919); Thompson v. State, Tex.Cr.App., 493 S.W.2d 913 (1971), appeal pending.

[50] See Smith v. State, 33 Me., at 55; In re Vince, 2 N.J. 443, 450, 67 A.2d 141, 144 (1949). A short discussion of the modern law on this issue is contained in the Comment to the ALI's Model Penal Code § 207.11, at 158 and nn. 35–37 (Tent.Draft No. 9, 1959).

[51] Tr. of Oral Rearg. 20–21.

S.Ct. 438, 442, 88 L.Ed. 645 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925), Meyer v. Nebraska, *supra*.

[10] This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is board enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these appellant and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905) (vaccination); Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927) (sterilization).

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional, at least in part, because of vagueness or because of overbreadth and abridgment of rights. Abele v. Markle, 342 F.Supp. 800 (D.C.Conn.1972), appeal docketed, No. 72–56; Abele v. Markle, 351 F.Supp. 224 (D.C.Conn. 1972), appeal docketed, No. 72–730; Doe v. Bolton, 319 F.Supp. 1048 (N.D.Ga.1970), appeal decided today, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201; Doe v. Scott, 321 F.Supp. 1385 (N.D.Ill.1971), appeal docketed, No. 70–105; Poe v. Menghini, 339 F.Supp. 986 (D.C.Kan. 1972); YWCA v. Kugler, 342 F.Supp. 1048 (D.C.N.J. 1972); Babbitz v. McCann, 310 F.Supp. 293 (E.D.Wis.1970), appeal dismissed, 400 U.S. 1, 91 S.Ct. 12, 27 L.Ed.2d 1 (1970); People v. Belous, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), cert. denied, 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970); State v. Barquet, 262 So.2d 431 (Fla.1972).

Others have sustained state statutes. Crossen v. Attorney General, 344 F. Supp. 587 (E.D.Ky. 1972), appeal docketed, No. 72–256; Rosen v. Louisiana State Board of Medical Examiners, 318 F.Supp. 1217 (E.D.La.1970), appeal docketed, 70–42; Corkey v. Edwards, 322 F.Supp. 1248 (W.D.N.C.1971), appeal docketed, No. 71–92; Steinberg v. Brown, 321 F.Supp. 741 (N.D.Ohio 1970); Doe v. Rampton, 366 F.Supp. 189 (Utah 1971), appeal docketed, No. 71–5666; Cheaney v. State, Ind., 285 N.E.2d 265 (1972); Spears v. State, 257 So. 2d 876 (Miss.1972); State v. Munson, S.D., 201 N.W.2d 123 (1972), appeal docketed, No. 72–631.

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Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

[11] Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," Kramer v. Union Free School District, 395 U.S. 621, 627, 89 S.Ct. 1886, 1890, 23 L.Ed.2d 583 (1969); Shapiro v. Thompson, 394 U.S., 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969); Sherbert v. Verner, 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965 (1963), and that legislative enactments must be narrowly drawn to express only legitimate state interests at stake. Griswold v. Connecticut, 381 U.S., at 485, 85 S.Ct., at 1682; Aptheker v. Secretary of State, 378 U.S. 500, 508, 84 S.Ct. 1659, 1664, 12 L.Ed.2d 992 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307–308, 60 S.Ct. 900, 904–905, 84 L.Ed. 1213 (1940); see Eisenstadt v. Baird, 405 U.S., at 460, 463–464, 92 S.Ct., at 1042, 1043–1044 (White, J., concurring in result).

In the recent abortion cases, cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interests in protecting health and potential life, and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

IX

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest, and that, although the appellee presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." 314 F.Supp., at 1222–1223. Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life form and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

A. The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument.[51] On the other hand, the appellee conceded on reargument,[52] that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first in defining "citizens," speaks of "persons" born or naturalized in the United States." The word also appears both in the Due Process Clause in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art. I § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3;[53] in the migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the provision outlining qualifications for the office of President, Art. II, § 1, cl.5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application.[54]

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[52] Tr. of Oral Rearg. 24.

[53] We are not aware that in the taking of any census under this clause, a fetus has ever been counted.

[54] When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always

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[12] All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.[55] This is in accord with the results reached in those few cases where the issue has been squarely presented. McGarvey v. Magee-Womens Hospital, 340 F.Supp. 751 (W.D.Pa.1972); Byrn v. New York City Health & Hospitals Corp., 31 N.Y.2d 194, 335 N.Y.S.2d 390, 286 N.E.2d 887 (1972), appeal docketed, No. 72–730. Cf. Cheaney v. State, Ind., 285 N.E.2d at 270; Montana v. Rogers, 278 F.2d 68, 72 (CA7 1960), aff'd sub nom. Montana v. Kennedy, 366 U.S. 308, 81 S.Ct. 1336, 6 L.Ed.2d 313 (1961); Keeler v. Superior Court, 2 Cal. 3d 619, 87 Cal.Rptr. 481, 470 P.2d 617 (1970); State v. Dickinson, 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971); Indeed, our decision in United States v. Vuitch, 402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971), inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.

This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations.

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478–479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold, Stanley, Loving, Skinner* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy she possesses must be measured accordingly.

Texas urges that, apart form the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There was always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics.[56] It appears to be the predominant, though not the unanimous, attitude of the Jewish faith.[57] It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion as a matter for the conscience of the individual and her family.[58] As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes

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exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command

There are other inconsistencies between Fourteenth Amendment status and the typical abortion statue. It has already been pointed out, n. 49, *supra*, that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

[55] Cf. the Wisconsin abortion statute, defining "unborn child" to mean "a human being from the time of conception until it is born alive," Wis.Stat. § 940.04(6) (1969), and the new Connecticut statue, Pub. Act No. 1 (May 1972 Special Session), declaring it to be the public policy of the State and the legislative intent "to protect and preserve human life from the moment of conception."

[56] Edelstein 16.

[57] Lader 97–99; D. Feldman, Birth Control in Jewish Law 251–294 (1968). For a stricter view, see I. Jakobovits, Jewish Views on Abortion, in Abortion and the Law 124 (D. Smith ed. 1967).

[58] Amicus Brief for the American Ethical Union et al. For the position of the National Council of Churches and of other denominations, see Lader 99–101.

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"viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid.[59] Viability is usually placed at about seven months (28 weeks) but many occur earlier, even at 24 weeks.[60] The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th Century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from the moment of conception.[61] The latter is now, of course, the official belief of the Catholic Church. As one brief *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs.[62]

In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive.[63] That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held.[64] In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries.[65] Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*.[66] Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

X

In view, of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still *another*-important and legitimate interest in protecting the potentially of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

[13, 14] With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 725, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that,

[59] L. Hellman & J. Pritchard, Williams Obstetrics 493 (14th ed. 1971); Dorland's Illustrated Medical Dictionary 1689 (24th ed. 1965).

[60] Hellman & Pritchard, *supra*, n. 59, at 493.

[61] For discussions of the development of the Roman Catholic position, see D. Callahan, Abortion: Law, Choice, and Morality 409–447 (1970); Noonan 1.

[62] See Brodie, The New Biology and the Prenatal Child, 9 J.Family L. 391, 397 (1970); Gorney, The New Biology and the Future of Man, 15 U.C.L.A.L. Rev. 273 (1968); Note, Criminal Law—Abortion—The "Morning-After Pill" and Other Pre-Implantation Birth-Control Methods and the Law, 46 Ore.L.Rev. 211 (1967); G. Taylor, The Biological Time Bomb 32 (1968); A. Rosenfeld, The Second Genesis 138–139 (1969); Smith, Through a Test Tube Darkly; Artificial Insemination and the Law, 67 Mich.L. Rev. 127 (1968); Note, Artificial Insemination and the Law, 1968 U.Ill.L.F. 203.

[63] W. Prosser, The Law of Torts 335–338 (4th ed. 1971); 2 F. Harper & F. James, The Law of Torts 1028–1031 (1956); Note, 63 Harv.L.Rev. 173 (1949).

[64] See cases cited in Prosser, *supra*, n. 63, at 336–338; Annotation, Action for Death of Unborn Child, 15 A.L.R.3d 992 (1967).

[65] Prosser, *supra*, n. 63, at 338; Note, The Law and the Unborn Child: The Legal and Logical Inconsistencies, 46 Notre Dame Law. 349, 354–360 (1971).

[66] Louisell, Abortion, The Practice of Medicine and the Due Process of Law, 16 U.C.L.A.L.Rev. 233, 235–238 (1969); Note, 56 Iowa L.Rev. 994, 999–1000 (1971); Note, The Law and the Unborn Child, 46 Notre Dame Law, 349, 351–354 (1971).

from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

[15] With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

[16] Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statue, therefore, cannot survive the constitutional attack made upon it here.

This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness. See United States v. Vuitch, 402 U.S., at 67–72, 91 S.Ct., at 1296–1299.

XI

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

[17] 2. The State may define the term "physician," as it has been employed in the proceeding paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.

In Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, procedural requirements contained in one of the modern abortion statutes are considered. That opinion and this one, of course, are to be read together.[67]

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves

[67] Neither in this opinion nor in Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example, N.C.Gen.Stat. § 14–45.1 (Supp.1971), requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age, 41 N.C.A.G. 489 (1971); if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional.

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the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

XII

[18] Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be struck down separately, for then the State would be left with a statute proscribing all abortion procedures no matter how medically urgent the case.

Although the District Court granted appellant Roe declaratory relief, it stopped short of issuing an injunction against enforcement of the Texas statutes. The Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the other. Zwickler v. Koota, 389 U.S. 241, 252–255, 88 S.Ct. 391, 397–399, 19 L.Ed.2d 22 (1965). We are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under *Dombrowski* and refined in Younger v. Harris, 401 U.S., at 50, 91 S.Ct., at 753.

We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.

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

It is so ordered.

Affirmed in part and reversed in part.

Mr. Justice STEWART, concurring.

In 1963, this Court in Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93, purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in *Skrupa* put it: "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.*, at 730, 83 S.Ct., at 1031.[1]

Barely two years later, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in *Skrupa*, the Court's opinion in *Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution.[2] So it was clear to me then, and it is equally clear to me now, that the Griswold decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment.[3] As so understood, *Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such.

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[1] Only Mr. Justice Harlan failed to join the Court's opinion, 372 U.S., at 733, 83 S.Ct., at 1032.

[2] There is no constitutional right of privacy, as such. "[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy—his right to be let alone by other people—is like the protection of his property and of his very life, left largely to the law of the individual States." Katz v. United States, 389 U.S. 347, 350–351, 88 S.Ct. 507, 510–511, 19 L.Ed.2d 576 (footnotes omitted).

[3] This was also clear to Mr. Justice Black, 381 U.S., at 507, (dissenting opinion); to Mr. Justice Harlan, 381 U.S., at 499, 85 S.Ct., at 1689 (opinion concurring in the judgment); and to Mr. Justice White, 381 U.S., at 502, 85 S.Ct., at 1691 (opinion concurring in the judgment). See also Mr. Justice Harlan's thorough and thoughtful opinion dissenting from dismissal of the appeal in Poe v. Ullman, 367 U.S. 497, 522, 81 S.Ct. 1752, 1765, 6 L.Ed.2d 989.

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"In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." Board of Regents v. Roth, 408 U.S. 564, 572, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. See Schware v. Board of Bar Examiners, 353 U.S. 232, 238–239, 77 S.Ct. 752, 755–756, 1 L.Ed.2d 796; Pierce v. Society of Sisters, 268 U.S. 510, 534–535, 45 S.Ct. 571, 573–574, 69 L.Ed.1070; Meyer v. Nebraska, 262 U.S. 390, 399–400, 43 S.Ct. 625, 626–627, 67 L.Ed. 1042. Cf. Shapiro v. Thompson, 394 U.S. 618, 629–630, 89 S.Ct. 1322, 1328–1329, 22 L.Ed.2d 600; United States v. Guest, 383 U.S. 745, 757–758, 86 S.Ct. 1170, 1177–1178, 16 L.Ed.2d 239; Carrington v. Rash, 380 U.S. 89, 96, 85 S.Ct. 775, 780, 13 L.Ed.2d 675; Aptheker v. Secretary of State, 378 U.S. 500, 505, 84 S.Ct. 1659, 1663, 12 L.Ed.2d 992; Kent v. Dulles, 357, U.S. 116, 127, 78 S.Ct. 1113, 1118, 2 L.Ed.2d 1204; Bolling v. Sharpe, 347 U.S. 497, 499–500, 74 S.Ct. 693, 694–695, 98 L.Ed. 884; Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131.

As Mr. Justice Harlan once wrote: "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." Poe v. Ullman, 367 U.S. 497, 543, 81 S.Ct. 1752, 1776, 6 L.Ed.2d 989 (opinion dissenting from dismissal of appeal) (citations omitted). In the words of Mr. Justice Frankfurter, "Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from expertise. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646, 69 S.Ct. 1173, 1195, 93 L.Ed. 1556 (dissenting opinion).

Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010; Griswold v. Connecticut *supra*: Pierce v. Society of Sisters, *supra*; Meyer v. Nebraska, *supra* . See also Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645; Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655. As recently as last Term, in Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349, we recognized "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. "Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), or the right to teach a foreign language protected in Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)." Abele v. Markle, 351 F.Supp. 224, 227 (D.C. Conn.1972).

Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.

It is evident that the Texas abortion statute infringes that right directly. Indeed, it is difficult to imagine a more complete abridgment of a constitutional freedom than that worked by the inflexible criminal statute now in force in Texas. The question then becomes whether the state interests advanced to justify this abridgment can survive the "particularly careful scrutiny" that the Fourteenth Amendment here requires.

The asserted state interests are protection of the health and safety of the pregnant woman, and protection of the potential future human

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life within her. These are legitimate objectives, amply sufficient to permit a State to regulate abortions as it does other surgical procedures, and perhaps sufficient to permit a State to regulate abortions more stringently or even to prohibit them in the late stages of pregnancy. But such legislation is not before us, and I think the Court today has thoroughly demonstrated that these state interests cannot constitutionally support the broad abridgment of personal liberty worked by the existing Texas law. Accordingly, I join the Court's opinion holding that that law is invalid under the Due Process Clause of the Fourteenth Amendment.

Mr. Justice REHNQUIST, dissenting.

The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it that invalidate the Texas statute in question, and therefore dissent.

I

The Court's opinion decides that a State may impose virtually no restriction on the performance of abortions during the first trimester of pregnancy. Our previous decisions indicate that a necessary predicate for such an opinion is a plaintiff who was in her first trimester of pregnancy at some time during the pendency of her lawsuit. While a party may vindicate his own constitutional rights, he may not seek vindication for the rights of others. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972); Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). The Court's statement of facts in this case makes clear, however, that the record in no way indicates the presence of such a plaintiff. We know only that plaintiff Roe at the time of filing her complaint was a pregnant woman; for aught that appears in this record, she may have been in her *last* trimester of pregnancy as of the date the complaint was filed.

Nothing in the Court's opinion indicates that Texas might not constitutionally apply its proscription of abortion as written to a woman in that stage of pregnancy. Nonetheless, the Court uses her complaint against the Texas statute as a fulcrum for deciding that States may impose virtually no restrictions on medical abortions performed during the *first* trimester of pregnancy. In deciding such a hypothetical lawsuit, the Court departs from the longstanding admonition that it should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885). See also Ashwander v. TVA, 297 U.S. 288, 345, 56 S.Ct. 466, 482, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).

II

Even if there were a plaintiff in this case capable of litigating the issue which the Court decides, I would reach a conclusion opposite to that reached by the Court. I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this in not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of Mr. Justice STEWART in his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, only against deprivation, without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. Williamson v. Lee Optical Co., 348 U.S. 483, 491, 75 S.Ct. 461, 466, 99 L.Ed. 563 (1955). The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas

statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson, supra*. But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under the standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

The Court eschews the history of the Fourteenth Amendment in its reliance on the "compelling state interest" test. See Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 179, 92 S.Ct. 1400, 1408, 31 L.Ed.2d 768 (1972) (dissenting opinion). But the Court adds a new wrinkle to this test by transposing it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment. Unless I misapprehend the consequences of this transplanting of the "compelling state interest test," the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.

While the Court's opinion quotes from the dissent of Mr. Justice Holmes in Lochner v. New York, 198 U.S. 45, 74, 25 S.Ct. 539, 551, 49 L.Ed. 937 (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States reflecting, after all the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 675 (1934). Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellant would have us believe.

To reach its result, the Court necessarily has had to find within the Scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature. Conn.Stat., Tit. 22, §§ 14, 16. By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion.[1] While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today.[2] Indeed, the Texas statute struck down today was, as the majority notes, first enacted in 1857 and "has remained substantially unchanged to the present time." *Ante*, at 710.

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment

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[1] Jurisdictions having enacted abortion laws prior to the adoption of the Fourteenth Amendment in 1868:

1. Alabama—Ala.Acts, c.6, § 2 (1840).

2. Arizona—Howell Code, c. 10 § 45 (1865).

3. Arkansas—Ark.Rev.Stat. c. 44, div. III, Art. II, § 6 (1838).

4. California—Cal.Sess.Laws, c. 99 § 45, p. 233 (1849–1850).

5. Colorado (Terr.)—Colo.Gen.Laws of Terr. of Colo., 1st Sess., § 42, pp. 296–297 (1861).

6. Connecticut—Conn.Stat. Tit. 20, §§ 14, 16 (1821). By 1868, this statute had been replaced by another abortion law. Conn.Pub.Acts, c. 71, §§ 1, 2, p. 65 (1860).

7. Florida—Fla.Acts 1st Sess., c. 1637, subc. 3, §§ 10, 11, subc. 8, §§ 9, 10, 11 (1868), as amended, now Fla.Stat.Ann. §§ 782.09, 782.10, 797.01, 797.02, 782.16 (1965).

8. Georgia—Ga.Penn.Code, 4th Div., § 20 (1833).

9. Kingdom of Hawaii—Hawaii Pen. Code, c. 12, §§ 1, 2, 3 (1850).

10. Idaho (Terr.)—Idaho (Terr.) Laws, Crimes and Punishments §§ 33, 34, 42, pp. 441, 443 (1863).

11. Illinois—Ill.Rev. Criminal Code §§ 40, 41, 46, pp. 130, 131 (1827). By 1868, this statute had been replaced by a subsequent enactment. Ill.Pub.Laws §§ 1, 2, 3, p. 89 (1867).

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withdraw form the States the power to legislate with respect to this matter.

III

Even if one were to agree that the case that the Court decides were here, and that the enunciation of the substantive constitutional law in the Court's opinion were proper, the actual disposition of the case by the Court is still difficult to justify. The Texas statute is struck down *in toto*, even though the Court apparently concedes that at later periods of pregnancy Texas might impose these selfsame statutory limitations on abortion. My understanding of past practice is that a statute found to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply "struck down" but is, instead, declared unconstitutional as applied to the fact situation before the Court. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

For all of the foregoing, reasons, I respectfully dissent.

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12. Indiana—Ind.Rev.Stat. §§ 1, 3, p. 224 (1838). By 1868 this statute had been superseded by a subsequent enactment. Ind.Laws, c. LXXXI, § 2 (1859).

13. Iowa (Terr.)—Iowa (Terr.) Stat., 1st Legis., 1st Sess., § 18, p. 145 (1838). By 1868, this statute had been superseded by a subsequent enactment. Iowa (Terr.) Rev.Stat., c. 49, §§ 10, 13 (1843).

14. Kansas (Terr.)—Kan. (Terr.) Stat., c. 48, §§ 9, 10, 39 (1855). By 1868, this statute had been superseded by a subsequent enactment. Kan. (Terr.) Laws, c. 28, §§ 9, 10, 37 (1859).

15. Louisana—La.Rev.Stat., Crimes and Offenses § 24, p. 138 (1856).

16. Maine—Me.Rev.Stat., c. 160, §§ 11, 12, 13, 14 (1840).

17. Maryland—Md. Laws, c. 179, § 2, p. 315 (1868).

18. Massachusetts—Mass.Acts & Resolves, c. 27 (1845).

19. Michigan—Mich.Rev.Stat., c. 153, §§ 32, 33, 34, p. 662 (1846).

20. Minnesota (Terr.)—Minn. (Terr.) Rev.Stat., c. 100 §§ 10, 11, p. 493 (1851).

21. Mississippi—Miss.Code, c. 64 §§ 8, 9, p. 958 (1848).

22. Missouri—Mo.Rev.Stat., Art. II, §§ 9, 10, 36, pp. 168, 172 (1835).

23. Montana (Terr.)—Mont. (Terr.) Laws, Criminal Practice Acts § 41, p. 184 (1864).

24. Nevada (Terr.)—Nev. (Terr.) Laws, c. 28 § 42, p. 63 (1861).

25. New Hampshire—N.H.Laws, c. 743, § 1, p. 708 (1848).

26. New Jersey—N.J.Laws, p. 266 (1849).

27. New York—N.Y.Rev.Stat., pt. 4, c. 1, Tit. 2, §§ 8, 9, pp. 12–13 (1828). By 1868, this statute had been superseded. N.Y.Laws, c. 260, §§ 1, 2, 3, 4, 5, 6, pp. 285–286 (1845); N.Y.Laws, c. 22 § 1, p. 19 (1846).

28. Ohio—Ohio Gen.Stat §§ 111(1), 112(2), p. 252 (1841).

29. Oregon—Ore.Gen.Laws, Crim.Code, c. 43, § 509, p. 528 (1845–1964).

30. Pennsylvania—Pa.Laws No. 374 87, 88, 89 (1860).

31. Texas—Tex.Gen.Stat.Dig., c. VII, Arts. 531–536, p. 524 (Oldham & White 1859).

32. Vermont—Vt.Acts No. 33, § 1 (1846). By 1968, this statute had been amended. Vt.Acts No. 57, §§ 1, 3 (1867).

33. Virginia—Va.Acts, Tit. II, c. 3, § 9, p. 96 (1848).

34. Washington (Terr.)—Wash. (Terr.) Stats., C. II, §§ 37, 38, p. 81 (1854).

35. West Virginia—Va.Acts, Tit. II, c. 3, § 9, p. 96 (1848).

36. Wisconsin—Wis.Rev.Stat., c. 133, §§ 10, 11 (1849). By 1868, this statute had been superseded. Wis.Rev.Stat., c. 164, §§ 10, 11; c. 169, §§ 58, 59 (1858).

[2] Abortion laws in effect in 1868 and still applicable as of August 1970:

1. Arizona (1865).
2. Connecticut (1860).
3. Florida (1868).
4. Idaho (1863).
5. Indiana (1838).
6. Iowa (1843).
7. Maine (1840).
8. Massachusetts (1845).
9. Michigan (1846).
10. Minnesota (1851).
11. Missouri (1835).
12. Montana (1864).
13. Nevada (1861).
14. New Hampshire (1848).
15. New Jersey (1849).
16. Ohio (1841).
17. Pennsylvania (1860).
18. Texas (1859).
19. Vermont (1867).
20. West Virginia (1848).
21. Wisconsin (1858).

# WEST'S ENCYCLOPEDIA *of* AMERICAN LAW

2ND EDITION

# How to Use This Book

❚1❚ Article Title

❚2❚ Definition in italics with Latin translation provided

❚3❚ First-level subhead

❚4❚ Timeline for subject of biography, including general historical events and life events

❚5❚ Sidebar expands upon an issue addressed briefly in the article

❚6❚ Quotation from subject of biography

❚7❚ Biography of contributor to American law

❚8❚ Internal cross-reference to entry within WEAL

❚9❚ In Focus article examines a controversial or complex aspect of the article topic

❚10❚ Cross-references at end of article

❚11❚ Full cite for case

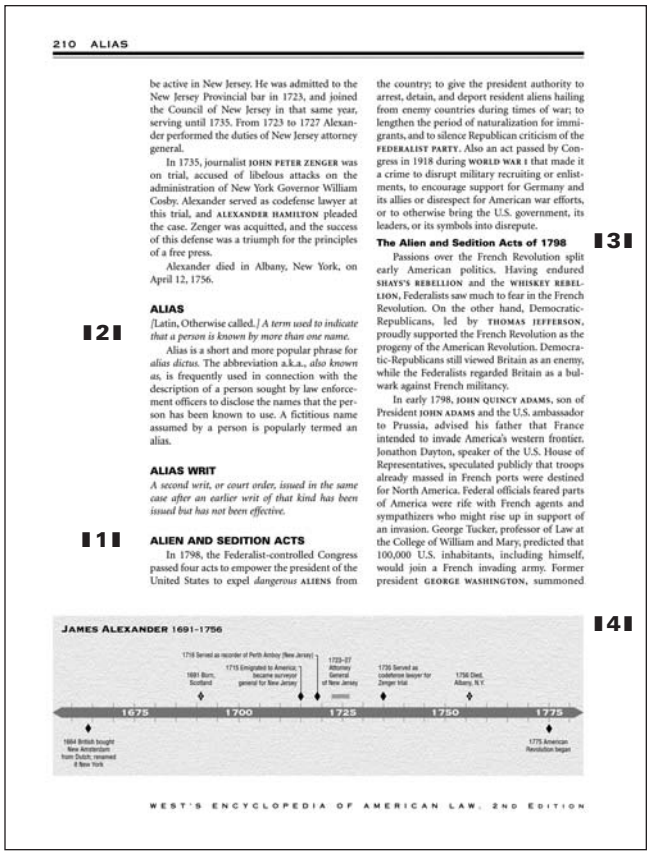



be active in New Jersey. He was admitted to the New Jersey Provincial bar in 1723, and joined the Council of New Jersey in that same year, serving until 1735. From 1723 to 1727 Alexander performed the duties of New Jersey attorney general.

In 1735, journalist JOHN PETER ZENGER was on trial, accused of libelous attacks on the administration of New York Governor William Cosby. Alexander served as codefense lawyer at this trial, and ALEXANDER HAMILTON pleaded the case. Zenger was acquitted, and the success of this defense was a triumph for the principles of a free press.

Alexander died in Albany, New York, on April 12, 1756.

**ALIAS**

❚2❚ *[Latin, Otherwise called.] A term used to indicate that a person is known by more than one name.*

Alias is a short and more popular phrase for *alias dictus.* The abbreviation a.k.a., *also known as,* is frequently used in connection with the description of a person sought by law enforcement officers to disclose the names that the person has been known to use. A fictitious name assumed by a person is popularly termed an alias.

**ALIAS WRIT**

*A second writ, or court order, issued in the same case after an earlier writ of that kind has been issued but has not been effective.*

❚1❚ **ALIEN AND SEDITION ACTS**

In 1798, the Federalist-controlled Congress passed four acts to empower the president of the United States to expel *dangerous* ALIENS from the country; to give the president authority to arrest, detain, and deport resident aliens hailing from enemy countries during times of war; to lengthen the period of naturalization for immigrants, and to silence Republican criticism of the FEDERALIST PARTY. Also an act passed by Congress in 1918 during WORLD WAR I that made it a crime to disrupt military recruiting or enlistments, to encourage support for Germany and its allies or disrespect for American war efforts, or to otherwise bring the U.S. government, its leaders, or its symbols into disrepute.

❚3❚ **The Alien and Sedition Acts of 1798**

Passions over the French Revolution split early American politics. Having endured SHAYS'S REBELLION and the WHISKEY REBELLION, Federalists saw much to fear in the French Revolution. On the other hand, Democratic-Republicans, led by THOMAS JEFFERSON, proudly supported the French Revolution as the progeny of the American Revolution. Democratic-Republicans still viewed Britain as an enemy, while the Federalists regarded Britain as a bulwark against French militancy.

In early 1798, JOHN QUINCY ADAMS, son of President JOHN ADAMS and the U.S. ambassador to Prussia, advised his father that France intended to invade America's western frontier. Jonathon Dayton, speaker of the U.S. House of Representatives, speculated publicly that troops already massed in French ports were destined for North America. Federal officials feared parts of America were rife with French agents and sympathizers who might rise up in support of an invasion. George Tucker, professor of Law at the College of William and Mary, predicted that 100,000 U.S. inhabitants, including himself, would join a French invading army. Former president GEORGE WASHINGTON, summoned

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## The First Payments of Social Security

After the enactment of the Social Security Act of 1935 (42 U.S.C.A. § 301 et seq.) and the creation of the Social Security Administration (SSA), the federal government had a short time to establish the program before beginning to pay benefits. Monthly benefits were to begin in 1940. The period from 1937 to 1940 was to be used both to build up the trust funds and to provide a minimum period for participation for persons to qualify for monthly benefits.

From 1937 until 1940, however, Social Security paid benefits in the form of a single, lump-sum payment. The purpose of these one-time payments was to provide some compensation to people who contributed to the program but would not participate long enough to be vested for monthly benefits.

The first applicant for a lump-sum benefit was Ernest Ackerman, a Cleveland motorman who retired one day after the Social Security Program began. During his one day of participation in the program, five cents was withheld from Ackerman's pay for Social Security, and upon retiring, he received a lump-sum payment of seventeen cents.

Payments of monthly benefits began in January 1940. On January 31, 1940, the first monthly retirement check was issued to Ida May Fuller of Ludlow, Vermont, in the amount of $22.54. Fuller died in January 1975 at the age of one hundred. During her thirty-five years as a beneficiary, she received more than $20,000 in benefits.

tions to Social Security. There is no financial need requirement to be satisfied. Once a worker qualifies for protection, his family is also entitled to protection. The entire program is geared toward helping families as a matter of social policy.

Two large funds of money are held in trust to pay benefits earned by people under OASDI: the Old Age and Survivors Trust Fund and the Disability Insurance Trust Fund. As workers and employers make payroll contributions to these funds, money is paid out in benefits to people currently qualified to receive monthly checks.

The OASDI program is funded by payroll taxes levied on employees and their employers and on the self-employed. The tax is imposed upon the employee's taxable income, up to a maximum taxable amount, with the employer contributing an equal amount. The self-employed person contributes twice the amount levied on an employee. In 2003 the rate was 6.2 percent, levied on earned income up to a maximum of $87,000.

**Old Age Benefits** A person becomes eligible for Social Security old age benefits by working a minimum number of calendar quarters. The number of quarters required for full insurance increases with the worker's age. Forty quarters is the maximum requirement. The individual is credited for income up to the maximum amount of money covered by Social Security for those years. This amount is adjusted to reflect the impact of inflation on normal earnings and ensure that a worker who pays increasing Social Security contributions during his or her work life will receive retirement benefits that keep pace with inflation.

Persons born before 1950 can retire at age 65 with full benefits based on their average income during their working years. For those born between 1950 and 1960, the retirement age for full benefits has increased to age 66. Persons born in 1960 or later will not receive full retirement benefits until age 67. Any person, however, may retire at age 62 and receive less than full benefits. At age 65, a worker's spouse who has not contributed to Social Security receives 50 percent of the amount paid to the worker.

Since 1975 Social Security benefits have increased annually to offset the corrosive effects of inflation on fixed incomes. These increases, known as cost of living allowances (COLAs), are based on the annual increase in consumer prices. Allowing benefits to increase automatically ended the need for special acts of Congress, but it has also steadily increased the cost of the Social Security Program.

have the same inheritance rights as other children. The ruling was believed to be the first on the controversial issue by any state supreme court.

Also in January 2002, Marshall addressed the Massachusetts Bar Association Conference, where she called for "a revolution in the administration of justice" stating that the court system needed to improve its management system as well as its staffing and budget controls. In March 2002, her discussion of the court system's problems were amplified in a 52-page report that was published by a blue-ribbon panel appointed by Marshall.

FURTHER READINGS

Teicher, Stacy A. 2000." A Subtle Revolution as Women Lead the Bench." *Christian Science Monitor* (January 5).

Lavoie, Denise. 2002. "Court Rules on Posthumous Conception." *Associated Press* (January 2)

**[6]**

*THE GOVERNMENT [THAT THE FRAMERS OF THE CONSTITUTION] DEVISED REQUIRED SEVERAL AMENDMENTS, A CIVIL WAR, AND MOMENTOUS SOCIAL TRANSFORMATION TO ATTAIN THE SYSTEM OF CONSTITUTIONAL GOVERNMENT, AND ITS RESPECT FOR THE INDIVIDUAL FREEDOMS AND HUMAN RIGHTS, THAT WE HOLD AS FUNDAMENTAL TODAY.*
*THURGOOD MARSHALL*

## MARSHALL PLAN

After **WORLD WAR II**, Europe was devastated and urgently needed an organized plan for reconstruction and economic and technical aid. The Marshall Plan was initiated in 1947 to meet this need.

The originator of the plan, U.S. Secretary of State George C. Marshall, introduced it in a speech at Harvard University on June 5, 1947. He pointed out two basic reasons for providing aid to Europe: the United States sought the reestablishment of the European countries as independent nations capable of conducting valuable trade with the United States; and the threat of a Communist takeover was more prevalent in countries that were suffering economic depression.

In 1947 a preliminary conference to discuss the terms of the program convened in Paris. The Soviet Union was invited to attend but subsequently withdrew from the program, as did other Soviet countries.

Sixteen European countries eventually participated, and, in July 1947, the Committee for European Economic Cooperation was established to allow representatives from member countries to draft a report that listed their requirements for food, supplies, and technical assistance for a four-year period.

The Committee for European Economic Cooperation subsequently became the Organization of European Economic Cooperation, an expanded and permanent organization that was responsible for submitting petitions for aid. In 1948, Congress passed the Economic Cooperation Act (62 Stat. 137), establishing funds for the Marshall Plan to be administered under the Economic Cooperation Administration, which was directed by Paul G. Hoffman.

Between 1948 and 1952, the sixteen-member countries received more than $13 billion dollars in aid under the Marshall Plan. The plan was generally regarded as a success that led to industrial and agricultural production, while stifling the Communist movement. The plan was not without its critics, however, and many Europeans believed the **COLD WAR** hostilities between the Soviet nations and the free world were aggravated by it.

**[7]**

## ◊ MARSHALL, THURGOOD

Thurgood Marshall, the first African American to serve on the U.S. Supreme Court, saw law as a catalyst for social change. For nearly 60 years, as both a lawyer and a jurist, Marshall worked to dismantle the system of **SEGREGATION** and improve the legal and social position of minorities.

Marshall was born July 2, 1908, in Baltimore, the son of a Pullman porter and a schoolteacher. He was a graduate of Lincoln University, a small, all-black college in Pennsylvania, and Howard University Law School in Washington, D.C. At Howard, Marshall excelled under the guidance of Vice Dean **CHARLES HAMILTON HOUSTON**, the first African American to win a case before the U.S. Supreme Court. Houston encouraged his students to become not just lawyers but "social engineers" who could use the legal system to improve society. Marshall graduated first in his law class in 1933.

Marshall's attendance at predominantly black Howard University illustrates the barriers faced by African Americans during the early twentieth century. Although Marshall wished to attend law school at the University of Maryland (a public institution in his home town of Baltimore), he was prohibited by law from doing so because of his race. This injustice helped set Marshall on a course of opposing all forms of official segregation that denied equal opportunities to African Americans.

After law school, Marshall set up a practice in Baltimore, representing indigent clients in civil rights cases. In 1936, his mentor Houston offered him a position with the National Association for the Advancement of Colored People (**NAACP**),





and in 1940, Marshall became director of the **NAACP LEGAL DEFENSE AND EDUCATIONAL FUND**, a position he held until 1961. Determined to eliminate segregation, Marshall coordinated a nationwide campaign to integrate higher education. He filed several successful lawsuits against public graduate and professional schools that refused to accept African-American students. These suits paved the way for similar cases at the high school and elementary school levels. Marshall also journeyed throughout the deep South, traveling fifty thousand miles a year to fight **JIM CROW LAWS** (a series of laws that provided for racial segregation in the South) and to represent criminal defendants.

Marshall argued 32 cases before the U.S. Supreme Court and won 29 of them. No doubt his most famous and far-reaching triumph before the High Court was **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). In that case, the father of African-American student Linda Brown sued the school board of Topeka, Kansas, over its segregation policy. Brown was required by law to attend an all African-American school several blocks from her home even though an all white public school was located in her own neighborhood. Under Kansas law, cities of more than 15,000 people, such as Topeka, could choose to operate segregated schools. Marshall argued that these segregated schools, defended by officials as "separate but equal," were unconstitutional.

**[8]**

The **SEPARATE-BUT-EQUAL** doctrine originated in **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), a case allowing segregated public accommodations for whites and blacks. In a plainspoken argument, Marshall dismissed as fallacy the notion that segregated schools offered the same educational experiences to black and white students. Sociological and psychological studies demonstrated that black children were in fact harmed by the policy of school segregation. The students' self-esteem was damaged and their future diminished when they were forced to accept inadequate facilities, equipment, and educational opportunities. Marshall argued that the only purpose segregation served was to perpetuate the myth of African-Americans' inferiority. A unanimous Court agreed and struck down the separate-but-equal doctrine, a

*Thurgood Marshall.*
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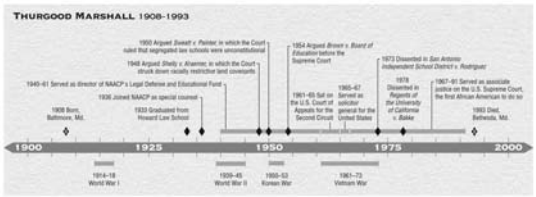






# THE FUTURE OF SOCIAL SECURITY

**[9]**

The payment of **OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE** (OASDI) benefits has been a cornerstone of U.S. social welfare policy since the establishment of the **SOCIAL SECURITY ADMINISTRATION** in 1935. At the same time, the long-term financial stability of OASDI has been a constant worry. In the early years of the twenty-first century, concerns about Social Security mounted as policy makers assessed the impact of the retirement of the "Baby Boom" generation. Many younger people raised the issue of "generation equity." They express doubt that Social Security benefits will be available when they retire, and anger that they will be forced to pay, through payroll taxes, for the baby boomers' retirement benefits.

Reform of the Social Security system has always been a political hot potato. Retirees and those approaching retirement form a strong **LOBBYING** force, and they zealously protect their benefits. Employers and employees are equally vocal in their opposition to higher payroll taxes to fund OASDI. Thus, changes in Social Security required bipartisan support, which materialized in the face of an impending Social Security crisis. The 1982–83 National Commission on Social Security Reform successfully secured from Congress the short-term financing of OASDI. As a result, Congress passed a series of laws meant to accumulate surpluses as a hedge against future burdens. The Social Security surplus is the amount by which revenue from the federal payroll tax exceeds the amount of Social Security benefits paid out.

IN FOCUS

Shortly after these new laws went into effect, Social Security began running a surplus. Surplus Social Security revenue can be used to fund other government programs and to help retire the national debt. During the favorable economic climate of the late 1990s, Congress began to use the surplus to pay down the federal debt, hoping to better position the government to meet its obligations to future retirees. And, in 2000, the federal government generated enough revenue so that the entire Social Security surplus was available for paying off debt.

The state of Social Security became a major campaign issue in the 2000 elections, with both Republicans and Democrats attempting to appear as though they were guardians of Social Security assets. Candidates from both parties promised to create a "lockbox," meaning that the Social Security surplus would be spent entirely on debt retirement. With the advent of fiscally lean years in the early 2000s, the lockbox approach was largely disregarded by politicians who advanced other ideas about what to do with Social Security surpluses. These ideas included using the surplus to help offset decreases in revenues brought about by tax cuts and using the surplus to fund new or expanded spending initiatives.

Analysts argue that the real issue often is clouded. It is not how to spend the surplus now, but how to maintain the long-term solvency of the Social Security trust fund. Planners estimate that the income from the trust fund will exceed expenses each year until 2020. The trust fund balances will then start to decline as investments are redeemed to meet the increased expenses from a swelling retired workforce. Although it is estimated that 75 percent of the costs would continue to be met from current payroll and income taxes, in the absence of any changes, full benefits could not be paid beginning in 2030.

In its 1996 report, the Social Security Administration's Advisory Council looked at various long-term financing options for OASDI. The council could not reach consensus on a specific long-term plan, but it did suggest several types of financing that represent a marked departure from previous efforts to fund Social Security. The council noted that past efforts have generally featured cutting benefits and raising tax rates on a "pay-as-you-go" basis. The council agreed that this approach must be changed and offered three ways of restoring financial solvency.

One approach, called Maintenance of Benefits (MB), calls for an increase in income taxes on OASDI benefits, a redirection of some revenue from other trust funds, and, most importantly, the adoption of a plan allowing the federal government to invest a portion of the trust fund assets directly in common stocks. Rates of returns on stocks have historically exceeded those on federal government bonds, where all Social Security

A person who continues to work past the retirement age may lose some benefits because Social Security is designed to replace lost earnings. If earnings from employment do not exceed the amount specified by law, the person receives the full benefits. If earnings are greater than that amount, one dollar of benefit is withheld for every two dollars in wages earned above the exempt amount. Once a person reaches age 70, however, he does not have to report earnings to the SSA, and the benefit is not reduced.

**Survivors' Benefits** Survivors' benefits are paid to family members when a worker dies. Survivors can receive benefits if the deceased worker was employed and contributed to Social





momentous victory for Marshall, affecting public schools in twenty-one states.

Marshall was appointed to the U.S. Court of Appeals for the Second Circuit in 1961, and served there until 1965 when he was named **SOLICITOR GENERAL** for the United States. He was appointed to the U.S. Supreme Court in 1967 by President **LYNDON B. JOHNSON** and served as an associate justice for 24 years.

While on the Court, Marshall was known more for his impassioned dissents than for his majority opinions. In particular, as a staunch opponent of **CAPITAL PUNISHMENT**, he regularly voiced his disagreement with the majority in death penalty cases. He was also a firm backer of **AFFIRMATIVE ACTION** and contributed one of his most famous dissents in **REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE**, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In that case, Marshall criticized the high court's ruling that a public medical school's policy of reserving 16 of 100 spots for minority students was unconstitutional. Marshall also dissented in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), disagreeing with the majority view that a Texas property tax system used to fund public education was acceptable, even though it allowed wealthier districts to provide a better school system for students in those districts than less wealthy districts could provide. Marshall objected strongly to the property tax arrangement, claiming that it deprived poor children of an equal education.

Marshall wrote the majority opinion in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968), in which the Court declared that a shopping center was a public forum from which picketers could not be barred by private owners.

Marshall retired from the Court in 1991, but continued his criticism of government policies that were detrimental to African Americans or other disenfranchised groups.

Marshall died on January 24, 1993, in Bethesda, Maryland. Upon Marshall's death, nearly 20,000 mourners filed by his casket during the 12 hours it lay in state in the Great Hall of the U.S. Supreme Court.

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CROSS-REFERENCES

**[10]**

*Civil Rights Movement; Integration; School Desegregation.*

## MARTIAL LAW

*The exercise of government and control by military authorities over the civilian population of a designated territory.*

**[11]**

Martial law is an extreme and rare measure used to control society during war or periods of civil unrest or chaos. According to the Supreme Court, the term *martial law* carries no precise meaning (*Duncan v. Kahanamoku*, 327 U.S. 304, 66 S. Ct. 606, 90 L. Ed. 688 [1946]). However, most declarations of martial law have some common features. Generally, the institution of martial law contemplates some use of military force. To a varying extent, depending on the martial law order, government military personnel have the authority to make and enforce civil and criminal laws. Certain civil liberties may be suspended, such as the right to be free from unreasonable **SEARCHES AND SEIZURES**, **FREEDOM OF ASSOCIATION**, and freedom of movement. And the writ of **HABEAS CORPUS** may be suspended (this writ allows persons who are unlawfully imprisoned to gain freedom through a court proceeding).

In the United States, martial law has been instituted on the national level only once, during the Civil War, and on a regional level only once, during **WORLD WAR II**. Otherwise, it has been limited to the states. Uprisings, political protests, labor strikes, and riots have, at various times, caused several state governors to declare some measure of martial law.

Martial law on the national level may be declared by Congress or the president. Under

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# PREFACE

The U.S. legal system is admired around the world for the freedoms it allows the individual and the fairness with which it attempts to treat all persons. On the surface, it may seem simple, yet those who have delved into it know that this sytem of federal and state constitutions, statutes, regulations, and common-law decisions is elaborate and complex. It derives from the English common law, but includes principles older than England, along with some principles from other lands. The U.S. legal system, like many others, has a language all its own, but too often it is an unfamiliar language: many concepts are still phrased in Latin. The second edition of *West's Encyclopedia of American Law (WEAL)* explains legal terms and concepts in everyday language, however. It covers a wide variety of persons, entities, and events that have shaped the U.S. legal system and influenced public perceptions of it.

## MAIN FEATURES OF THIS SET

### Entries

This encyclopedia contains nearly 5,000 entries devoted to terms, concepts, events, movements, cases, and persons significant to U.S. law. Entries on legal terms contain a definition of the term, followed by explanatory text if necessary. Entries are arranged alphabetically in standard encyclopedia format for ease of use. A wide variety of additional features, listed later in this preface, provide interesting background and supplemental information.

**Definitions** Every entry on a legal term is followed by a definition, which appears at the beginning of the entry and is italicized. The Dictionary and Indexes volume includes a glossary containing all the definitions from *WEAL*.

**Further Readings** To facilitate further research, a list of Further Readings is included at the end of a majority of the main entries.

**Cross-References** *WEAL* provides two types of cross-references, within and following entries. Within the entries, terms are set in small capital letters—for example, LIEN—to indicate that they have their own entry in the encyclopedia. At the end of the entries, related entries the reader may wish to explore are listed alphabetically by title.

Blind cross-reference entries are also included to direct the user to other entries throughout the set.

### In Focus Essays

In Focus essays accompany related entries and provide additional facts, details, and arguments on particularly interesting, important, or controversial issues raised by those entries. The subjects covered include hotly contested issues, such as abortion, capital punishment, and gay rights; detailed processes, such as the Food and Drug Administration's approval process for new drugs; and important historical or social issues, such as debates over the formation of the U.S. Constitution.

### Sidebars

Sidebars provide brief highlights of some interesting facet of accompanying entries. They complement regular entries and In Focus essays by adding informative details. Sidebar topics include the Million Man March and the branches of the U.S. armed services. Sidebars appear at the top of a text page and are set in a box.

### Biographies

*WEAL* profiles a wide variety of interesting and influential people—including lawyers, judges, government and civic leaders, and historical and modern figures—who have played a part in creating or shaping U.S. law. Each biography includes a timeline, which shows important moments in the subject's life as well as important historical events of the period. Biographies appear alphabetically by the subject's last name.

## ADDITIONAL FEATURES OF THIS SET

**Enhancements** Throughout *WEAL*, readers will find a broad array of photographs, charts, graphs, manuscripts, legal forms, and other visual aids enhancing the ideas presented in the text.

**Indexes** *WEAL* features a cases index and a cumulative general index in a separate volume.

### Appendixes

Three appendix volumes are included with *WEAL*, containing hundreds of pages of documents, laws, manuscripts, and forms fundamental to and characteristic of U.S. law.

### Milestone Cases in the Law

A special Appendix volume entitled Milestones in the Law, allows readers to take a close look at landmark cases in U.S. law. Readers can explore the reasoning of the judges and the arguments of the attorneys that produced major decisions on important legal and social issues. Included in each Milestone are the opinions of the lower courts; the briefs presented by the parties to the U.S. Supreme Court; and the decision of the Supreme Court, including the majority opinion and all concurring and dissenting opinions for each case.

### Primary Documents

There is also an Appendix volume containing more than 60 primary documents, such as the English Bill of Rights, Martin Luther King Jr.'s Letter from Brimingham Jail, and several presidential speeches.

### Citations

Wherever possible, *WEAL* entries include citations for cases and statutes mentioned in the text. These allow readers wishing to do additional research to find the opinions and statutes cited. Two sample citations, with explanations of common citation terms, can be seen below and opposite.

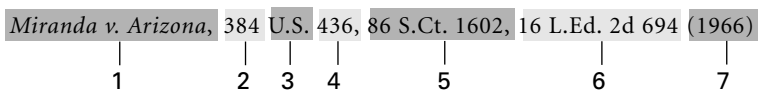


1. *Case title.* The title of the case is set in italics and indicates the names of the parties. The suit in this sample citation was between Ernesto A. Miranda and the state of Arizona.
2. *Reporter volume number.* The number preceding the reporter name indicates the reporter volume containing the case. (The volume number appears on the spine of the reporter, along with the reporter name.)
3. *Reporter name.* The reporter name is abbreviated. The suit in the sample citation is from the reporter, or series of books, called *U.S. Reports,* which contains cases from the U.S. Supreme Court. (Numerous reporters publish cases from the federal and state courts.)
4. *Reporter page.* The number following the reporter name indicates the reporter page on which the case begins.
5. *Additional reporter citation.* Many cases may be found in more than one reporter. The suit in the sample citation also appears in volume 86 of the *Supreme Court Reporter,* beginning on page 1602.
6. *Additional reporter citation.* The suit in the sample citation is also reported in volume 16 of the *Lawyer's Edition,* second series, beginning on page 694.
7. *Year of decision.* The year the court issued its decision in the case appears in parentheses at the end of the cite.

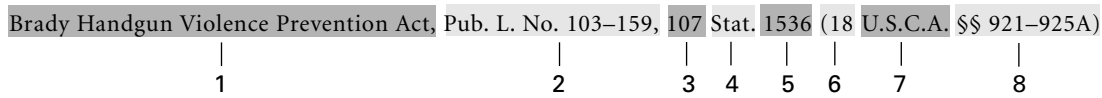


1. *Statute title.*
2. *Public law number.* In the sample citation, the number 103 indicates that this law was passed by the 103d Congress, and the number 159 indicates that it was the 159th law passed by that Congress.
3. *Reporter volume number.* The number preceding the reporter name indicates the reporter volume containing the statute.
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5. *Reporter page.* The number following the reporter name indicates the reporter page on which the statute begins.
6. *Title number.* Federal laws are divided into major sections with specific titles. The number preceding a reference to the *U.S. Code Annotated* is the title number. title 18 of the U.S. Code is Crimes and Criminal Procedure.
7. *Additional reporter.* The statute in the sample citation may also be found in the *U.S. Code Annotated*.
8. *Section number.* The section numbers following a reference to the *U.S. Code Annotated* indicate where the statute appears in that reporter.

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# FOUNDATIONS OF U.S. LAW

English Law

The Colonial Period

Conflict and Resolution

Origins of U.S. Government

# ENGLISH LAW

- MAGNA CHARTA
- ENGLISH BILL OF RIGHTS
- SECOND TREATISE ON GOVERNMENT

The development of U.S. law is rooted in English political and legal history. The colonial settlers of North America were primarily from England, and until the 1760s they viewed themselves as English rather than "American." They brought with them the English COMMON LAW and the English constitutional tradition.

Unlike the United States, England has never had a written constitution. Instead, the English constitutional tradition is based on the substance and procedures of the common law, along with key documents, such as Magna Charta and the English Bill of Rights. In the seventeenth and eighteenth centuries, political philosophers, especially JOHN LOCKE, challenged the absolute authority of the monarchy and introduced the democratic idea that the people have a right to a government that meets their needs. These documents and ideas assumed great importance as the American colonists moved toward independence in the 1770s. In this sense English ideas paved the way for the American Revolution and the writing of the U.S. Constitution.

# English Law

## Magna Charta

The document that has come to be known as Magna Charta (spelled variously as "charta" or "carta"), or Great Charter, is recognized as a fundamental part of the English constitutional tradition. Although it is not a constitution, it contains provisions on criminal law that were incorporated into the Bill of Rights of the U.S. Constitution.

In 1215 King John of England (1199–1216) fought more than forty English barons and their followers in a civil war. The king had angered the barons by extracting revenues based on their feudal obligations in order to fight a war in France. After John lost the war, the barons rebelled against the king.

The rebels first demanded that the king confirm the Charter of Henry I, a coronation charter from 1100 in which King Henry I had promised to abolish all evil customs that oppressed the realm. Additional grievances were added to the charter, which King John was forced to accept at Runnymede in June 1215, after the rebels occupied London.

Magna Charta contains sixty-three chapters. Many of the chapters defined the king's feudal rights over his vassals, preventing the king from arbitrarily collecting revenue from the barons. Chapter 39 established the right to due process of law, and in chapter 40 the king promised that he would not sell, deny, or delay justice to anyone.

Magna Charta did not resolve the dispute between the barons and King John. Within months they were fighting again. In August 1215 the charter was annulled by Pope Innocent III, John's feudal overlord, on the grounds that it had been executed under duress. In 1216, however, after John's death the charter was reissued with some modifications. At the conclusion of the civil war in 1217, it was reissued again with minor revisions. This version of Magna Charta became part of the English constitutional tradition; confirmed by later kings and interpreted by Parliament, it is still revered as a symbol of English liberties.

### Magna Charta

John, by the grace of God, king of England, lord of Ireland, duke of Normandy and Aquitaine, count of Anjou, to all his archbishops, bishops, abbots, earls, barons, justiciars, foresters, sheriffs, stewards, servants, and all bailiffs and faithful men, health. Know that we by looking to God, and for the health of our soul, and of all our ancestors and heirs, to the honor of God, and the exaltation of his holy Church, and the rectifying of our realm by the counsel of our venerable fathers, Stephen, archbishop of Canterbury, primate of all England and cardinal of the holy Roman Church; Henry, archbishop of Dublin; William of London, Peter of Winchester, Joscelin of Bath and Glastonbury, Hugh of Lincoln, Walter of Worcester, William of Coventry and Benedict of Rochester, bishops; Master Pandulf, subdeacon of our lord pope and servant; brother Eymeric, master of the knights of the Temple in England; and of nobles, William Marshall, Earl of Pembroke; William, Earl of Salisbury; William, Earl Warrenne;

William, Earl of Arundel; Alan of Galway, constable of Scotland; Warin, son of Gerold; Peter, son of Herbert; Hubert de Burg, seneschal of Poitou; Hugh de Neville; Matthew, son of Herbert; Thomas Basset; Alan Basset; Philip de Albini; Robert de Ropley; John Marshall; John, son of Hugh; and others our lieges.

### CHAPTER 1

First, we grant to God, and by this our present charter we confirm, for us and our heirs forever, that the English church be free, and have its rights whole and its liberties unimpaired; *and so we will to be observed, which appears from the fact that we have of pure and free will, before difference arose between us and our barons, granted, and by our charter confirmed, freedom of elections, which is conceived greatest and most necessary for the English church, and have got it confirmed from our lord Pope Innocent III, which we will observe ourselves and will to be observed in good faith by our heirs forever.*[1] We have granted to all free men of our realm, for ourself and our heirs forever, all these underwritten liberties to have and to hold, for themselves and their heirs, from us and our heirs.

### CHAPTER 2

If any of our earls or barons, or other tenant of us in chief by military service, die, and when he dies, his heir be of full age, and owe a relief, he shall have his inheritance by the old relief, to wit, the heir, or heirs of an earl, for the whole barony of an earl by P100; the heir or heirs of a baron, the whole barony by P100; the heir or heirs of a knight for a whole military fee by 100*s.* at most, and he who owes less should pay less according to the ancient custom of fees.

### CHAPTER 3

If the heir of any of these be below age, and be in wardship, when he comes to full age he shall have his inheritance without relief or fine.

### CHAPTER 4

The guardians of the land of any heir, who is below age, shall not take from the land of the heir more than reasonable exits [revenues], and reasonable customs, and reasonable services, and this without destruction and waste of men or property; and if we commit the wardship of any such land to the sheriff or any one else, who is to answer to us for the exits, and he made destruction or waste of his wardship, we will take recompense of him, and the land shall be committed to two lawful and discreet men of that fee, who will answer to us of the exits, or to him to whom we have assigned them; and if we have given or sold to any one the wardship of any such land, and he does destruction or waste, he shall lose his wardship, and give it to two lawful and discreet men of that fee, who shall in like manner answer to us as is aforesaid.

### CHAPTER 5

The guardian, as long as he have wardship of the land, shall keep up houses, parks, stews, pools, mills, and other things belonging to that land, from the exits of the same land, and restore to the heir, when he comes to full age, all that land stocked with teams, according to what the season of teams demands, and the exits of the land can reasonably sustain.[2]

### CHAPTER 6

Heirs shall be married without disparagement, *so that before they contract matrimony it be communicated to the kinsmen in blood of the heir.*

### CHAPTER 7

A widow after the death of her husband shall at once and without hindrance have her marriage and inheritance, nor give anything for her dower, or for her marriage, or for her inheritance, which inheritance she and her husband had on the day of her husband's death, and she shall remain in her husband's home for forty days after his death, within which her dower shall be assigned to her.[3]

### CHAPTER 8

No widow shall be forced to marry as long as she wills to live without a husband, so that she

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Source: Selections from *The Second Treatise on Government,* 5 J. Locke, WORKS (1823). The footnotes have been renumbered.

[1] The full text of the Charter of 1215 has been included here. Sections that were omitted in later versions of the charter are printed in italic type on this and subsequent pages. Unless otherwise indicated, the omissions were made in 1216. Important alterations and additions have been indicated in the notes.

[2] A clause added in 1216 stipulated that the chapter also applied to ecclesiastical properties except that those wardships should not be sold.

[3] In 1217 a clause was added that guaranteed a widow one-third of her husband's lands unless a smaller dower had been assigned at the time of the marriage. In 1225 chapters 7 and 8 were combined into one.

give security that she will not marry without our assent, if she hold from us, or without the assent of the lord from whom she holds, if she holds from another.

### CHAPTER 9

Neither we nor our bailiffs will seize any land or rent for any debt, as long as the chattels of the debtor suffice for paying the debt, nor shall the sureties of the debtor be distrained, as long as that debtor in chief suffices for the payment of the debt, and if the debtor in chief fail in paying the debt, not having whence to pay, the sureties shall answer for the debt, and if they will, shall have the land and rents of the debtor till they are satisfied of the debt which they paid for him, unless the debtor in chief show that he is quit thence against these sureties.

### CHAPTER 10

*If anyone borrows anything from the Jews, more or less, and dies before the debt is paid, the debt shall not bear usury as long as the heir is under age, from whoever he holds it, and if that debt fall into our hands we will take only the chattel contained in the deed.*

### CHAPTER 11

*And if anyone die and owes a debt to the Jews, his wife shall have her dower and pay nothing of that debt, and if the children of the dead man are under age, necessaries shall be provided for them according to the holding of the dead man, and the debt shall be paid from the residue, the service of the lords saved, and in the same way shall it be done with debts which are owed to other than Jews.*

### CHAPTER 12

*No scutage or aid shall be laid on our realm except by the common counsel of our realm, unless for ransoming our person, and making our eldest son a knight, and marrying our eldest daughter once, and this must only be a reasonable aid, and so shall it be with the aids of the city of London.*

### CHAPTER 13

And the city of London shall have all its ancient liberties and its free customs, *both by land and by water.* Besides we will and grant that all other cities, and burghs [boroughs], and vills [towns], and ports shall have all their liberties and free customs.

### CHAPTER 14

*And to have a common counsel of our realm on assessing an aid other than in the three aforenamed cases, or assessing a scutage, we will cause to be summoned archbishops, bishops, abbots, earls, and greater barons, singly by our letters, and we will also cause to be summoned in general, by our sheriffs and bailiffs, all those who hold of us in chief, at a certain day, to wit, at least forty days after, and a certain place; and in all letters of summons we will express the cause of summons, and when summons is made the business assigned for the day shall proceed according to the council of those who are present, though not all who are summoned come.*

### CHAPTER 15

*We will grant to no one in future that he take aid from his free men, except to ransom his person, to make his eldest son a knight, and to marry his eldest daughter once, and for this there shall only be a reasonable aid.*

### CHAPTER 16

No one shall be distrained to do a greater service for a knight's fee, or any other frank [free] tenement than is due from it.

### CHAPTER 17

Common pleas shall not follow our court, but shall be held in some certain place.

### CHAPTER 18

Recognizances of novel disseisin, mort d'ancestor, and darrein presentment shall not be taken except in their own counties and in this manner; we, or, if we be out of the realm, our chief justiciar, will send two justices to each county four times in the year, who, with four knights of each county, elected by the county, shall take in the county and day and place the aforenamed assises of the county.[4]

### CHAPTER 19

And if the aforesaid assises of the county cannot be taken on that day, so many knights and free tenants shall remain of those who were at the county on that day, by whom judgments

[4] In 1217 the text was changed to say that justices (number unspecified) would be sent through each county once a year to hold assises with knights of the county (number unspecified). A separate chapter was created that stipulated that assises involving darrein presentment should always be held before the justices of the bench.

can be sufficiently effected, according as the business is great or small.

### CHAPTER 20

A free man shall not be amerced for a small offense unless according to the measure of the offense, and for a great offense he shall be amerced according to the greatness of the offense, saving his tenement, and the merchant in the same manner, saving his merchandise, and the villein shall be amerced in the same manner, saving his tools of husbandry, if they fall into our mercy, and none of the aforenamed mercies shall be imposed except by the oath of reputable men of the vicinage.

### CHAPTER 21

Earls and barons shall not be amerced but by their equals, and only according to the measure of the offense.

### CHAPTER 22

No cleric shall be amerced *of his lay tenement,* except according to the measure of the other aforesaid, and not according to the size of his ecclesiastical benefice.[5]

### CHAPTER 23

No vill or man shall be distrained to make bridges at rivers, unless he who of old, or by right, is bound to do so.

### CHAPTER 24

No sheriff, constable, coroners, or others of our bailiffs shall hold pleas of our crown.

### CHAPTER 25

*All counties, hundreds, wapentakes, and ridings shall be at the old farms [rents] without any increase, saving the manors of our demesne.*

### CHAPTER 26

If anyone holding a lay fee [fief] of us dies, and the sheriff or our bailiff shows our letters patent of the summonses of a debt which the dead man owed us, it shall be lawful for our sheriff or bailiff to attach and enroll the chattels of the dead man found in this fee to the value of the debt by the view of lawful men, so that nothing be moved thence till our debt which is clear be paid us, and the residue shall be left to the executors to fulfill the testament of the deceased, and if nothing be owed us by the deceased, all his chattels shall go to the deceased, save the reasonable shares to his wife and children.

### CHAPTER 27

*If any free man die intestate, his chattels shall be distributed by his nearest relations and friends, by the view of the church, save the debts due to each which the deceased owed.*

### CHAPTER 28

No constable, or other bailiff of ours, shall take the corn or chattels of anyone, unless he forthwith pays money for them, or can have any respite by the good will of the seller.[6]

### CHAPTER 29

No constable shall distrain any knight to give money for the wardship of a castle [military service in the garrison of a castle], if he be willing to perform that wardship in his own person, or by some other reputable man, if he cannot do it himself for some reasonable cause, and if we have led or sent him to an army, he shall be quit of the wardship, according to the length of time that he is with us in the army.

### CHAPTER 30

No sheriff or bailiff of ours, or any other, shall take horses and carts of any free man for carrying, except by the will of the free man.[7]

### CHAPTER 31

Neither we nor our bailiffs will take any wood for our castles, or other our works, except by consent of the man whose wood it is.

### CHAPTER 32

We will not hold the lands of those who are convict of felony, except for one year and one day, and then the lands shall be returned to the lords of the fees.

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[5] In 1225 chapters 20, 21, and 22 were combined in a single chapter.

[6] In 1216 the chapter was modified to say that constables and their bailiffs should not take the goods of anyone who is not from the village where the castle is located unless they pay cash or make arrangements to pay later; persons from the village should be paid in three weeks. In 1217 the three weeks was changed to forty days.

[7] In 1216 the chapter was modified to say that the horses and carts should not be taken unless the owner received a specified amount of money. In 1217 a chapter was inserted that prohibited bailiffs from taking carts from the demesne of a cleric, a knight, or a lady. In 1225 chapters 30 and 31 from the Charter of 1215 and the new chapter were combined into a single chapter.

### CHAPTER 33

All kidells [fish-weirs] shall for the future be wholly taken away from the Thames and the Medway, and through all England, except at the coast of the sea.

### CHAPTER 34

The writ which is called *praecipe* for the future shall not issue to anyone about any tenement from which a free man may lose his court.

### CHAPTER 35

There shall be one measure of wine throughout our whole realm, and one measure of beer, and one measure of corn, to wit, the London quarter, and one breadth of dyed cloth, and russet and haberget cloth, to wit, two ells within the lists, and of weights it shall be as of measures.

### CHAPTER 36

Nothing shall be given or taken hereafter for the writ of inquisition on life or limb, but it shall be granted freely, and not denied.

### CHAPTER 37

If anyone holds of us by fee-farm, either by socage or by burgage, or of any other land by military service, we shall not have the wardship of the heir or his land which belongs to another's fee, because of that fee-farm, or socage or burgage, nor shall we have wardship of that fee-farm, or socage or burgage, unless the fee-farm itself owes military service. We shall not either have wardship of heir or any land, which he holds of another by military service, by reason of some petty serjeanty which he holds of us, by the service of paying us knives, or arrows, or the like.

### CHAPTER 38

No bailiff in future shall put anyone to law by his mere word, without trustworthy witnesses brought forward for it.

### CHAPTER 39

No free man shall be seized, or imprisoned, or disseised, or outlawed, or exiled, or injured in any way, nor will we enter on him or send against him except by the lawful judgment of his peers, or by the law of the land.[8]

### CHAPTER 40

We will sell to no one, or deny to no one, or put off right or justice.

### CHAPTER 41

All merchants shall have safe conduct and security to go out of England or come into England, and to stay in, and go through England, both by land and water, for buying or selling, without any evil tolls, by old and right customs, except in time of war; and if they be of the land at war against us, and if such shall be found in our land, at the beginning of war, they shall be attached without loss of person or property, until it be known by us or our chief justiciar how the merchants of our land are treated who are found then in the land at war with us; and if ours be safe there, others shall be safe here.[9]

### CHAPTER 42

*It shall be lawful for anyone hereafter to go out of our realm, and return, safe and sound, by land or by water, saving fealty to us, except in time of war for some short time, for the common weal of the realm, except imprisoned men, and outlaws according to the law of the realm, and as natives of a land at war against us, and to the merchants of whom is done as is aforesaid.*

### CHAPTER 43

If any person holds of any escheat, as of the honor of Wallingford, Nottingham, Boulogne, Lancaster, or of other escheats which are in our hands, and they are baronies, and he dies, his heir shall not pay any other relief, or do us any other service but that which he would do for the baron, if the barony were in the hand of a baron, and we similarly will hold him in the same way that the baron held him.[10]

### CHAPTER 44

*Men who dwell without the forest shall not come hereafter before our justices of the forest, by common summonses, unless they are in plea, or sureties of one or more, who are attached for the forest.*[11]

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[8] In 1217 the words "of his freehold liberties or free customs" were inserted after "disseised." In 1225 the words "in the future" were inserted after "No free man shall," and the chapter and the one following it were joined together.

[9] In 1216 the words "unless formerly they have been publicly prohibited" were inserted after "All merchants."

[10] In 1217 a sentence added at the end of the chapter stipulated that the king would not have an escheat or wardship by reason of such an escheat or barony unless the person who held the property was a tenant-in-chief for other property.

[11] Chapter 44 of the Charter of 1215 was retained in the Charter of 1216, but in 1217 it was transferred to the separate Charter of the Forest. In 1217 a new chapter was inserted at

### CHAPTER 45

*We will not make justices, constables, sheriffs, or bailiffs except from those who know the law of the realm, and are willing to keep it.*

### CHAPTER 46

All barons who have founded abbeys, whence they have charters of the kings of England, or ancient tenure, shall have their custody while vacant, as they ought to have it.

### CHAPTER 47

*All forests which have been afforested in our time shall be forthwith deforested, and so with the rivers which have been forbidden by us in our time.*[12]

### CHAPTER 48

*All ill customs of forests and warrens, and foresters and warreners, sheriffs and their servants, rivers and their keepers, shall be forthwith inquired into in each county by twelve sworn knights of the same county, who should be chosen by the reputable men of the same county; and, within forty days after the inquest is over, they shall be wholly done away by them, never to be recalled, so we know this first, or our justiciar, if we are not in England.*

### CHAPTER 49

*We will forthwith return all hostages and charters which were delivered to us by the English as security of peace or faithful service.*

### CHAPTER 50

*We will wholly remove from their bailiwicks the relations of Gerard de Athée so that hereafter they shall have no bailiwick in England, Engelard de Cigogné, Andrew, Peter, and Guy de Chanceux, Geoffrey de Martigny and his brothers, Philip Mark and his brothers, and Geoffrey his nephew, and all their following.*

### CHAPTER 51

*And immediately after the restoration of peace, we will remove from the realm all foreign knights, bowmen, officers, and mercenaries who came with horses and arms to the harm of the realm.*

### CHAPTER 52

*If anyone has been disseised or deprived by us without lawful judgment of his peers, from lands, castles, liberties, or his right, we will forthwith restore him; and if a dispute arise about this, judgment shall then be made by twenty-five barons, of whom mention is made below, for the security of peace, and of all those matters of which a man has been disseised or deprived without the lawful judgment of his peers, by King Henry our father, or by King Richard our brother, which lands we have in our hands, or which others have, which we ought to warrant, we will have respite up to the common term of the crusaders, those being excepted of which the plea was raised or inquisition was made by our order, before the taking of our cross, and when we return from our journey, or if we chance to remain from our journey, we will forthwith show full justice thence.*

### CHAPTER 53

*We will have the same respite, and in the same way, about exhibiting justice of deforesting or maintaining the forests, which Henry our father, or Richard our brother afforested, and of the wardship of the lands which are of another's fee, of which thing we have hitherto had the wardship, by reason of the fee, because someone held of us by military service, and of the abbeys which were founded on the fee of another than our own, in which the lord of the fee says he has the right; and when we return, or if we stay from our journey, we will afford full justice to those who complain of these things.*

### CHAPTER 54

No one shall be seized or imprisoned for the appeal of a woman about the death of any other man but her husband.

### CHAPTER 55

*All fines which have been made unjustly and against the law of the land with us, and all amercements made unjustly and against the law of the land, shall be wholly excused, or it shall be done with them by the judgment of twenty-five barons, of whom mention will be made below on the security of the peace, or by the judgment of the greater part of them, along with the aforenamed Stephen, archbishop of Canterbury, if he can be present, and others whom he wills to summon to him, and if he be unable to be present, nevertheless the business shall go on without him, so that if one or more of the aforenamed twenty-five barons are*

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this point that stipulated that no free man should give or sell so much of his land that he would be prevented from doing the full service due from the fief.

[12] In 1217 the first clause was transferred to the Charter of the Forest; the second clause became a separate chapter.

*in a like suit, they may be removed as far as this judgment is concerned, and others be appointed, elected, and sworn for this matter only, by the residue of the same twenty-five.*

### CHAPTER 56

*If we have disseised or deprived the Welsh of their lands or liberties or other goods, without lawful judgment of their peers, in England or in Wales, let these things be forthwith restored, and if a dispute arise upon this, let it be thereafter settled in the march by the judgment of their peers; on tenements in England according to the law of England; on tenements in Wales according to the law of Wales; on tenements in the march according to the law of the march. The Welshmen shall do the same to us and ours.*[13]

### CHAPTER 57

*In all these matters in which anyone of the Welsh was disseised or deprived without lawful judgment of his peers, by King Henry our father, or King Richard our brother, which we have in our hands, or which others hold, and which we ought to warrant, we will have respite to the common term of the crusaders, those excepted in which our plea has been raised, or inquisition has been made by our order, before we took the cross; but, when we return, or if by chance we wait from our journey, we will show full justice to them thence, according to the laws of Wales, and the aforesaid parties.*

### CHAPTER 58

*We will restore the son of Llewellyn forthwith, and all the hostages of Wales, and the charters which have been delivered to us for the security of peace.*

### CHAPTER 59

*We will do to Alexander, king of Scots, about his sisters, and restoring his hostages, and his liberties, and his right, according to the form in which we have dealt with our other barons of England, unless they are bound to other matters by the charters which we have of William his father, once king of the Scots, and this shall be by judgment of their peers in our court.*

### CHAPTER 60

All these aforesaid customs and liberties which we have granted to be held in our realm, as far as belongs to us, towards our own, all in our realm, both clergy and lay, shall observe, as far as belongs to them, towards their own.

### CHAPTER 61

*But since, for the sake of God and for the bettering of our realm, and for better quieting the discord which has arisen between us and our barons, we have ganted all the aforesaid, wishing to enjoy them in pure and firm security forever, we make and grant them the underwritten security: viz. that the barons choose twenty-five barons from the realm, whom they will, who should with all their power keep, hold, and cause to be kept, the peace and liberties which we grant them, and by this our present charter confirm, so that, if we, or our justiciar, or our bailiffs, or any of our servants, do wrong in any case to anyone, or we transgress any of the articles of peace and security, and the offense is shown to four out of the aforenamed twenty-five barons, those four barons shall come to us, or our justiciar, if we are out of the realm, to show the wrong; they shall seek that we cause that wrong to be rectified without delay. And if we do not rectify the wrong, or if we are without the realm, our justiciar does not rectify it within forty days from the time in which it was shown to us or our justiciar, if we are without the realm, the aforesaid four barons shall bring the case before the rest of the twenty-five barons, and those twenty-five barons, with the commonalty of the whole realm, shall distrain and distress us, in every way they can, to wit, by the capture of castles, lands, possessions, and other ways in which they can, till right is done according to their will, saving our person and that of our queen and our children; and, when right is done, they shall obey us as before. And whoever of the land wishes, may swear that he will obey the orders of the aforesaid twenty-five barons, in carrying out all the aforesaid, and that he will distress us as far as he can, with them, and we give publicly and freely license to all to swear who wills, and we will forbid no one to swear. But all those in the land who will not, by themselves and of their own accord, swear to the twenty-five barons about distraining and distressing us with them, we will cause them to swear by our orders, as is aforesaid. And if any one of the twenty-five barons dies, or quits the country, or in any way is hindered from being able to carry out the aforesaid, the remainder of the aforesaid twenty-five barons may choose another into his place, at their discretion, who shall be sworn in like manner with the rest. In all those matters which are committed to the barons*

[13] Chapter 56 was retained in the Charter of 1216 but was omitted thereafter.

*to carry out, if these twenty-five happen to be present and differ on any one point, or others summoned by them will not or cannot be present, that must be had settled and fixed which the majority of those who are present provides or decides, just as if all the twenty-five agreed on it, and the aforesaid twenty-five shall swear that they will faithfully keep all the aforesaid, and cause them to be kept with all their power. And we will ask nothing from anyone, by ourselves or any other, by which any one of these grants and liberties shall be revoked or lessened; and if we do obtain any such thing, it shall be vain and void, and we will never use it by ourselves or by another.*

### CHAPTER 62

*And all ill will, wrath, and rancor, which has arisen between us and our men, clerics and laymen, from the time of the discord, we fully have remitted and condoned to all. Besides, all the offenses done by reason of the same discord, from Easter in the sixteenth year of our reign to the renewal of peace, we wholly remit to all, clerics and laymen, and as far as we are concerned fully have condoned. And, moreover, we have caused letters patent to be made to them, in witness of this, of lord Stephen, archbishop of Canterbury, of lord Henry, archbishop of Dublin, and of the aforesaid bishops, and of Master Pandulf, as the aforenamed security and grants.*

### CHAPTER 63

*Wherefore we will and firmly order that the English church should be free, and that the men of our realm should have and hold all the aforenamed liberties, rights, and grants, well and in peace, freely and quietly, fully and completely, for them and their heirs, from us and our heirs, in all things and places, forever, as is aforesaid. It is sworn both by us, and on the part of the barons, that all these aforesaid shall be kept in good faith and without ill meaning. Witnesses, the abovenamed and many others. Given by our hand, in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June, in the seventeenth year of our reign.*[14]

[14] Several chapters were added in 1217 that regulated the sheriff's tourn (tour through the hundreds, or subdivisions, of a county to hold court) and view of frankpledge; made it illegal for anyone to give land to a religious house and receive it back to hold as a tenant; established that scutage should be taken as it had been during the reign of King Henry II (1154–1189); and decreed that all adulterine castles (castles built without the king's permission) that had been erected since the beginning of the war between John and the barons should be destroyed. All but the last chapter were retained in 1225.

# ENGLISH LAW

## English Bill of Rights

An Act Declaring the Rights and Liberties of the Subject
and Settling the Succession of the Crown

The English Bill of Rights grew out of the Glorious Revolution of 1688. During the revolution King James II abdicated and fled from England. He was succeeded by his daughter, Mary, and her husband, William of Orange, a Dutch prince. Parliament proposed a Declaration of Rights and presented it to William and Mary on February 13, 1689. Only after they accepted the declaration did Parliament proclaim them king and queen of England. Parliament then added several clauses to the declaration and formally enacted the amended bill as the Bill of Rights on December 16, 1689.

The Bill of Rights combined past grievances against the deposed king with a more general statement of basic liberties. The statute prohibited the monarch from suspending laws or levying taxes or customs duties without Parliament's consent and prohibited the raising and maintaining of a standing army during peacetime. More importantly, it proclaimed fundamental liberties, including freedom of elections, freedom of debate in Parliament, and freedom from excessive bail and from cruel and unusual punishments. To prevent a recurrence of the religious divisions that beset the Catholic James in ruling a largely Protestant England, the Bill of Rights also barred Roman Catholics from the throne.

The Bill of Rights became one of the cornerstones of the unwritten English constitution. The Bill of Rights has also had a significant impact on U.S. law, with many of its provisions becoming part of the U.S. Constitution and Bill of Rights.

### English Bill of Rights

Whereas the Lords Spiritual and Temporal and Commons assembled at Westminster, lawfully, fully, and freely representing all the states of people of this realm, did upon the thirteenth day of February in the year of our Lord one thousand six hundred eighty-eight present unto their Majesties, then called and known by the names and style of William and Mary, prince and princess of Orange, being present in their proper persons, a certain declaration in writing made by the said Lords and Commons in the words following, viz:[1]

Whereas the late King James the Second, by the assistance of divers evil councilors, judges, and ministers employed by him, did endeavor to subvert and extirpate the Protestant religion and the laws and liberties of the kingdom;

By assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament;

By committing and prosecuting divers worthy prelates for humbly petitioning to be excused from concurring to the said assumed power;

By issuing and causing to be executed a commission under the great seal for erecting a

Source: Selections from *The Second Treatise on Government,* 5 J. Locke, WORKS (1823). The footnotes have been renumbered.

[1] English monarchs styled themselves king or queen of France between 1340 and 1801. The custom began when the English became embroiled in the Hundred Years War with France and King Edward III of England, whose mother was a French princess, claimed the French throne.

court called the Court of Commissioners for Ecclesiastical Causes;

By levying money for and to the use of the Crown by pretense of prerogative for other time and in other manner than the same was granted by Parliament;

By raising and keeping a standing army within this kingdom in time of peace without consent of Parliament and quartering soldiers contrary to law;

By causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law;

By violating the freedom of election of members to serve in Parliament;

By prosecutions in the Court of King's Bench for matters and causes cognizable only in Parliament and by divers other arbitrary and illegal courses;

And whereas of late years, partial, corrupt, and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason which were not freeholders;

And excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberty of the subjects;

And excessive fines have been imposed;

And illegal and cruel punishments inflicted;

And several grants and promises made of fines and forfeitures before any conviction or judgment against the persons upon whom the same were to be levied;

All which are utterly and directly contrary to the known laws and statutes and freedom of this realm.

And whereas the said late King James the Second having abdicated the government, and the throne being thereby vacant, his Highness the prince of Orange (whom it hath pleased Almighty God to make the glorious instrument of delivering this kingdom from popery and arbitrary power) did, by the advice of the Lords Spiritual and Temporal and divers principal persons of the Commons, cause letters to be written to the Lords Spiritual and Temporal being Protestants and other letters to the several counties, cities, universities, boroughs, and cinque ports for the choosing of such persons to represent them as were of right to be sent to Parliament, to meet and sit at Westminster upon the two-and-twentieth day of January in this year one thousand six hundred eighty and eight, in order to such an establishment as that their religion, laws, and liberties might not again be in danger of being subverted; upon which letters, elections have been accordingly made.

And thereupon the said Lords Spiritual and Temporal and Commons, pursuant to their respective letters and elections being now assembled in a full and free representative of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties, declare

That the pretended power of suspending of laws or the execution of laws by regal authority without consent of Parliament is illegal;

That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal;

That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious;

That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal;

That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal;

That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law;

That the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law;

That election of members of Parliament ought to be free;

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament;

That excessive bail ought not to be required, nor excessive fines imposed, or cruel and unusual punishments inflicted;

That jurors ought to be duly impaneled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders;

That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void;

And that, for redress of all grievances and for the amending, strengthening, and preserving of the laws, Parliaments ought to be held frequently.

And they do claim, demand, and insist upon all and singular the premises as their undoubted rights and liberties, and no declarations, judgments, doings, or proceedings to the prejudice of the people in any of the said premises ought in any wise to be drawn hereafter into consequence or example. To which demand of their rights, they are particularly encouraged by the declaration of his Highness the prince of Orange, as being the only means for obtaining a full redress and remedy therein. Having therefore an entire confidence that his said Highness the prince of Orange will perfect the deliverance so far advanced by him and will still preserve them from the violation of their rights which they have here asserted and from all other attempts upon their religion, rights, and liberties, the said Lords Spiritual and Temporal and Commons assembled at Westminster do resolve that William and Mary, prince and princess of Orange, be and be declared king and queen of England, France, and Ireland and the dominions thereunto belonging,[2] to hold the Crown and royal dignity of the said kingdom and dominions to them, the said prince and princess, during their lives and the life of the survivor of them; and that the sole and full exercise of the regal power be only in and executed by the said prince of Orange in the names of the said prince and princess during their joint lives, and after their deceases the said Crown and royal dignity of the said kingdoms and dominions to be to the heirs of the body of the said princess, and for default of such issue to the Princess Anne of Denmark and the heirs of her body, and for default of such issue to the heirs of the body of the said prince of Orange. And the Lords Spiritual and Temporal and Commons do pray the said prince and princess to accept the same accordingly; and that the oaths hereafter mentioned be taken by all persons of whom the oaths of allegiance and supremacy might be required by law, instead of them; and that the said oaths of allegiance and supremacy be abrogated:

> I, A. B., do sincerely promise and swear that I will be faithful and bear true allegiance to their Majesties King William and Queen Mary. So help me God.
>
> I, A. B., do swear that I do from my heart abhor, detest, and abjure as impious and heretical this damnable doctrine and position, that princes excommunicated or deprived by the pope or any authority of the see of Rome may be deposed or murdered by their subjects or any other whatsoever. And I do declare that no foreign prince, person, prelate, state, or potentate hath or ought to have any jurisdiction, power, superiority, preeminence, or authority, ecclesiastical or spiritual, within this realm. So help me God.

Upon which their said Majesties did accept the Crown and royal dignity of the kingdoms of England, France, and Ireland and the dominions thereunto belonging, according to the resolution and desire of the said Lords and Commons contained in the said declaration. And thereupon their Majesties were pleased that the said Lords Spiritual and Temporal and Commons, being the two Houses of Parliament, should continue to sit and, with their Majesties' royal concurrence, make effectual provision for the settlement of the religion, laws, and liberties of this kingdom, so that the same for the future might not be in danger again of being subverted. To which the said Lords Spiritual and Temporal and Commons did agree and proceed to act accordingly.

Now in pursuance of the premises, the said Lords Spiritual and Temporal and Commons in Parliament assembled, for the ratifying, confirming, and establishing the said declaration and the articles, clauses, matters, and things therein contained by the force of a law made in due form by authority of Parliament, do pray that it may be declared and enacted that all and singular the rights and liberties asserted and claimed in the said declaration are the true ancient and indubitable rights and liberties of the people of this kingdom and so shall be esteemed, allowed, adjudged, deemed, and taken to be; and that all and every the particulars aforesaid shall be firmly and strictly holden and observed as they are expressed in the said declaration; and all officers and ministers whatsoever shall serve their Majesties and their successors according to the same in all times to come. And the said Lords Spiritual and Temporal and Commons, seriously considering how it hath pleased Almighty God in his marvelous providence and merciful goodness to this nation to

provide and preserve their said Majesties' royal persons most happily to reign over us upon the throne of their ancestors, for which they render unto him from the bottom of their hearts their humblest thanks and praises, do truly, firmly, assuredly, and in the sincerity of their hearts think, and do hereby recognize, acknowledge, and declare that King James the Second having abdicated the government and their Majesties having accepted the Crown and royal dignity as aforesaid, their said Majesties did become, were, are, and of right ought to be by the laws of this realm our sovereign liege lord and lady, king and queen of England, France, and Ireland and the dominions thereunto belonging; in and to whose princely persons, the royal state, Crown, and dignity of the said realms with all honors, styles, titles, regalities, prerogatives, powers, jurisdictions, and authorities to the same belonging and appertaining are most fully, rightfully, and entirely invested and incorporated, united and annexed.

And for preventing all questions and divisions in this realm by reason of any pretended titles to the Crown, and for preserving a certainty in the succession thereof, in and upon which the unity, peace, tranquility, and safety of this nation doth under God wholly consist and depend, the said Lords Spiritual and Temporal and Commons do beseech their Majesties that it may be enacted, established, and declared that the Crown and regal government of the said kingdoms and dominions, with all and singular the premises thereunto belonging and appertaining, shall be and continue to their said Majesties and the survivor of them during their lives and the life of the survivor of them; and that the entire, perfect, and full exercise of the regal power and government be only in and executed by his Majesty in the names of both their Majesties during their joint lives; and after the deceases, the said Crown and premises shall be and remain to the heirs of the body of her Majesty and, for default of such issue, to her Royal Highness the Princess Anne of Denmark and the heirs of her body and, for default of such issue, to the heirs of the body of his said Majesty. And thereunto the said Lords Spiritual and Temporal and Commons do in the name of all the people aforesaid most humbly and faithfully submit themselves, their heirs, and posterities forever and do faithfully promise that they will stand to maintain and defend their said Majesties and also the limitation and succession of the Crown, herein specified and contained, to the utmost of their powers with their lives and estates against all persons whatsoever that shall attempt any thing to the contrary.

And whereas it hath been found by experience that it is inconsistent with the safety and welfare of this Protestant kingdom to be governed by a popish prince, or by any king or queen marrying a papist, the said Lords Spiritual and Temporal and Commons do further pray that it may be enacted that all and every person and persons that is, are, or shall be reconciled to, or shall hold communion with, the see or church of Rome, or shall profess the popish religion or shall marry a papist, shall be excluded and be forever incapable to inherit, possess, or enjoy the Crown and government of this realm and Ireland and the dominions thereunto belonging or any part of the same, or to have, use, or exercise any regal power, authority, or jurisdiction within the same. And in all and every such case or cases, the people of these realms shall be and are hereby absolved of their allegiance. And the said Crown and government shall from time to time descend to and be enjoyed by such person or persons being Protestants, as should have inherited and enjoyed the same in case the said person or persons so reconciled, holding communion, or professing or marrying as aforesaid were naturally dead. And that every king and queen of this realm, who at any time hereafter shall come to and succeed in the imperial Crown of this kingdom, shall on the first day of the meeting of the first Parliament next after his or her coming to the Crown, sitting in his or her throne in the House of Peers, in the presence of the Lords and Commons therein assembled, or at his or her coronation before such person or persons who shall administer the coronation oath to him or her at the time of his or her taking the said oath (which shall first happen), make, subscribe, and audibly repeat the declaration mentioned in the statute made in the thirtieth year of the reign of King Charles the Second entitled *An act for the more effectual preserving the king's person and government by disabling papists from sitting in either House of Parliament.* But if it shall happen that such a king or queen upon his or her succession to the Crown of this realm shall be under the age of twelve years, then every such king or queen shall make, subscribe, and audibly repeat the said declaration at his or her coronation, or the first day of the meeting of the first

Parliament as aforesaid which shall first happen after such king or queen shall have attained the said age of twelve years. All which their Majesties are contented and pleased shall be declared, enacted, and established by authority of this present Parliament and shall stand, remain, and be the law of this realm forever. And the same are by their said Majesties, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in Parliament assembled and by the authority of the same, declared, enacted, and established accordingly.

And be it further declared and enacted by the authority aforesaid that, from and after this present session of Parliament, no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed but that the same shall be held void and of no effect, except a dispensation be allowed of in such statutes, and except in such cases as shall be specially provided for by one or more bill or bills to be passed during this present session of Parliament.

Provided that no charter or grant or pardon granted before the three-and-twentieth day of October in the year of our Lord one thousand six hundred eighty-nine shall be anyway impeached or invalidated by this act, but that the same shall be and remain of the same force and effect in law and no other than as if this act had never been made.

# ENGLISH LAW

## Second Treatise on Government

John Locke, 1690

The Englishman JOHN LOCKE is regarded as one of the world's most important political philosophers, and his "Second Treatise on Government" has proved to be one of the seminal documents on the liberal political state. The U.S. system of government was built on Locke's ideas, including such core premises as the ultimate sovereignty of the people, the necessity of restraints on the exercise of arbitrary power by the executive or the legislature, and the revocability of the social contract by the people when power has been arbitrarily used against them. The Declaration of Independence and the U.S. Constitution are testaments to many of Locke's core ideas.

The "Second Treatise" (the second part of *Two Treatises on Government*) was written during the period preceding the abdication of King James II. Locke's work, which was published in 1690, became a justification for the Glorious Revolution of 1688, when government was reformed along the lines outlined by Locke in his *Two Treatises.* As a result of these reforms, England became a constitutional monarchy under Parliament's control. Greater measures of religious toleration and freedom of expression and thought were permitted, as set out in the English Bill of Rights.

In part, the *Two Treatises* were an attack upon political absolutism. The first treatise refuted the theory of the divine right of kings, which posited that monarchs derived their authority from God. The second treatise, however, has had the more lasting impact on the United States, for it sets out a theory of politics that found its way into U.S. law.

Locke maintained that people are naturally tolerant and reasonable, but that without a governing force, a certain amount of chaos and other inconveniences will occur. In his view all people are inherently equal and free to pursue "life, liberty, health, and property." To do this, they engage in a social contract in which they consent to give up a certain amount of power to a government dedicated to maintaining the well-being of the whole. At the same time, however, individuals' right to freedom of thought, speech, and worship must be preserved. In addition, the government must preserve citizens' private property.

Locke believed that the government is the trustee of the people's power and that it exercises power specifically for the purpose of serving the people. If the government abuses that trust, however, the people have a right to revoke the trust and assume the reins of government themselves or place them in new hands. This idea provided justification for the American Revolution in 1776.

Thomas Jefferson drew upon Locke's ideas of the law of nature, popular sovereignty, and the sanctity of the right of private property in writing the Declaration of Independence. The U.S. Constitution, with its separation of church and state and its guarantee of personal freedoms, reflects Locke's influence as well.

# Second Treatise on Government

## CHAPTER VII.

### Of Political or Civil Society.

§ 77. God having made man such a creature, that in his own judgment it was not good for him to be alone, put him under strong obligations of necessity, convenience, and inclination, to drive him into society, as well as fitted him with understanding and language to continue and enjoy it. The first society was between man and wife, which gave beginning to that between parents and children; to which, in time, that between master and servant came to be added: and though all these might, and commonly did meet together, and make up but one family, wherein the master or mistress of it had some sort of rule proper to a family; each of these, or all together, came short of political society, as we shall see, if we consider the different ends, ties, and bounds of each of these.

* * *

§ 85. Master and servant are names as old as history, but given to those of far different condition; for a free-man makes himself a servant to another, by selling him, for a certain time, the service he undertakes to do, in exchange for wages he is to receive: and though this commonly puts him into the family of his master, and under the ordinary discipline thereof: yet it gives the master but a temporary power over him, and no greater than what is contained in the contract between them. But there is another sort of servants, which by a peculiar name we call slaves, who being captives taken in a just war, are by the right of nature subjected to the absolute dominion and arbitrary power of their masters. These men having, as I say, forfeited their lives, and with it their liberties, and lost their estates; and being in the state of slavery, not capable of any property; cannot in that state be considered as any part of civil society; the chief end whereof is the preservation of property.

§ 86. Let us therefore consider a master of a family with all these subordinate relations of wife, children, servants, and slaves, united under the domestic rule of a family; which, what resemblance soever it may have in its order, offices, and number too, with a little commonwealth, yet is very far from it, both in its constitution, power, and end: or if it must be thought a monarchy, and the pater-familias the absolute monarch in it, absolute monarchy will have but a very shattered and short power, when it is plain, by what has been said before, that the master of the family has a very distinct and differently limited power, both as to time and extent, over those several persons that are in it: for excepting the slave (and the family is as much a family, and his power as pater-familias as great, whether there be any slaves in his family or no), he has no legislative power of life and death over any of them, and none too but what a mistress of a family may have as well as he. And he certainly can have no absolute power over the whole family, who has but a very limited one over every individual in it. But how a family, or any other society of men, differ from that which is properly political society, we shall best see by considering wherein political society itself consists.

§ 87. Man being born, as has been proved, with a title to perfect freedom, and uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with any other man, or number of men in the world, hath by nature a power, not only to preserve his property, that is, his life, liberty, and estate, against the injuries and attempts of other men; but to judge of and punish the breaches of that law in others, as he is persuaded the offence deserves, even with death itself, in crimes where the heinousness of the fact, in his opinion, requires it. But because no political society can be, nor subsist, without having in itself the power to preserve the property, and, in order thereunto, punish the offences of all those of that society; there, and there only is political society, where every one of the members hath quitted this natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it. And thus all private judgment of every particular member being excluded, the community comes to be umpire, by settled standing rules, indifferent, and the same to all parties; and by men having authority from the community, for the execution of those rules, decides all the differences that may happen between any members of that society concerning any matter of right; and punishes those offences which any member hath committed against the society, with such penalties as the law has established: whereby it is easy to discern who are, and who are not, in political society together. Those who are united into one body, and have a common established law and judica-

ture to appeal to, with authority to decide controversies between them, and punish offenders, are in civil society one with another: but those who have no such common appeal, I mean on earth, are still in the state of nature, each being, where there is no other, judge for himself, and executioner: which is, as I have before showed it, the perfect state of nature.

§ 88. And thus the commonwealth comes by a power to set down what punishment shall belong to the several transgressions which they think worthy of it, committed amongst the members of that society, (which is the power of making laws) as well as it has the power to punish any injury done unto any of its members, by any one that is not of it, (which is the power of war and peace:) and all this for the preservation of the property of all the members of that society, as far as is possible. But though every man who has entered into civil society, and is become a member of any commonwealth, has thereby quitted his power to punish offences against the law of nature, in prosecution of his own private judgment; yet with the judgment of offences, which he has given up to the legislative in all cases, where he can appeal to the magistrate, he has given a right to the commonwealth to employ his force, for the execution of the judgments of the commonwealth, whenever he shall be called to it; which indeed are his own judgments, they being made by himself, or his representative. And herein we have the original of the legislative and executive power of civil society, which is to judge by standing laws, how far offences are to be punished, when committed within the commonwealth; and also to determine, by occasional judgments founded on the present circumstances of the fact, how far injuries from without are to be vindicated; and in both these to employ all the force of all the members, when there shall be need.

§ 89. Whenever therefore any number of men are so united into one society, as to quit every one his executive power of the law of nature, and to resign it to the public, there and there only is a political or civil society. And this is done, wherever any number of men, in the state of nature, enter into society to make one people, one body politic, under one supreme government; or else when any one joins himself to, and incorporates with any government already made: for hereby he authorizes the society, or, which is all one, the legislative thereof, to make laws for him, as the public good of the society shall require; to the execution whereof, his own assistance (as to his own degrees) is due. And this puts men out of a state of nature into that of a commonwealth, by setting up a judge on earth, with authority to determine all the controversies, and redress the injuries that may happen to any member of the commonwealth; which judge is the legislative, or magistrate appointed by it. And wherever there are any number of men, however associated, that have no such decisive power to appeal to, there they are still in the state of nature.

§ 90. Hence it is evident, that absolute monarchy, which by some men is counted the only government in the world, is indeed inconsistent with civil society, and so can be no form of civil government at all: for the end of civil society being to avoid and remedy those inconveniences of the state of nature which necessarily follow from every man being judge in his own case, by setting up a known authority, to which every one of that society may appeal upon any injury received, or controversy that may arise, and which every one of the society ought to obey;[66] wherever any persons are, who have not such an authority to appeal to, for the decision of any difference between them, there those persons are still in the state of nature; and so is every absolute prince, in respect of those who are under his dominion.

§ 91. For he being supposed to have all, both legislative and executive power in himself alone, there is no judge to be found, no appeal lies open to any one, who may fairly, and indifferently, and with authority decide, and from whose decision relief and redress may be expected of any injury or inconveniency, that may be suffered from the prince, or by his order: so that such a man, however entitled, czar, or grand seignior, or how you please, is as much in the state of nature, with all under his dominion, as he is with the rest of

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Source: Selections from *The Second Treatise on Government,* 5 J. Locke, WORKS (1823). The footnotes have been renumbered.

[66] "The public power of all society is above every soul contained in the same society; and the principal use of that power is to give laws unto all that are under it which laws in such cases we must obey, unless there be reason showed which may, necessarily enforce that the law of reason, or of God, doth enjoin the contrary" (Hooker's *Eccl. Pol.* lib. i. sect. 16). [Ed. note] In the Keble edition of Hooker's Works, the appropriate citation for this passage would be Book I, chapter xvi, § 5.

mankind: for wherever any two men are, who have no standing rule, and common judge to appeal to on earth, for the determination of controversies of right betwixt them, there they are still in the state of nature[67], and under all the inconveniences of it, with only this woeful difference to the subject, or rather slave of an absolute prince: that whereas in the ordinary state of nature he has a liberty to judge of his right, and, according to the best of his power, to maintain it; now, whenever his property is invaded by the will and order of his monarch, he has not only no appeal, as those in society ought to have, but, as if he were degraded from the common state of rational creatures, is denied a liberty to judge of, or to defend his right: and so is exposed to all the misery and inconveniences, that a man can fear from one, who being in the unrestrained state of nature, is yet corrupted with flattery, and armed with power.

§ 92. For he that thinks absolute power purifies men's blood, and corrects the baseness of human nature, need read but the history of this, or any other age, to be convinced of the contrary. He that would have been insolent and injurious in the woods of America, would not probably be much better in a throne; where perhaps learning and religion shall be found out to justify all that he shall do to his subjects, and the sword presently silence all those that dare question it: for what the protection of absolute monarchy is, what kind of fathers of their countries it makes princes to be, and to what a degree of happiness and security it carries civil society, where this sort of government is grown to perfection; he that will look into the late relation of Ceylon may easily see.

§ 93. In absolute monarchies indeed, as well as other governments of the world, the subjects have an appeal to the law, and judges to decide any controversies, and restrain any violence that may happen betwixt the subjects themselves, one amongst another. This every one thinks necessary, and believes he deserves to be thought a declared enemy to society and mankind who should go about to take it away. But whether this be from a true love of mankind and society, and such a charity as we all owe one to another, there is reason to doubt: for this is no more than what every man, who loves his own power, profit, or greatness, may and naturally must do, keep those animals from hurting or destroying one another, who labour and drudge only for his pleasure and advantage; and so are taken care of, not out of any love the master has for them, but love of himself, and the profit they bring him: for if it be asked, what security, what fence is there, in such a state, against the violence and oppression of this absolute ruler? the very question can scarce be borne. They are ready to tell you, that it deserves death only to ask after safety. Betwixt subject and subject, they will grant, there must be measures, laws, and judges, for their mutual peace and security: but as for the ruler, he ought to be absolute, and is above all such circumstances; because he has power to do more hurt and wrong, it is right when he does it. To ask how you may be guarded from harm, or injury, on that side where the strongest hand is to do it, is presently the voice of faction and rebellion: as if when men quitting the state of nature entered into society, they agreed that all of them but one should be under the restraint of laws, but that he should still retain all the liberty of the state of nature, increased with power, and made licentious by impunity. This is to think, that men are so foolish, that they take care to avoid what mischiefs may be done them by polecats, or foxes; but are content, nay think it safety, to be devoured by lions.

§ 94. But whatever flatterers may talk to amuse people's understandings, it hinders not men from feeling; and when they perceive that any man, in what station soever, is out of the bounds of the civil society which they are of, and that they have no appeal on earth against any harm they may receive from him, they are apt to think themselves in the state of nature in respect of him whom they find to be so; and to take care, as soon as they can, to have that safety and security in civil society for which it was instituted, and for which only they entered into it. And therefore, though perhaps at first (as shall be showed more at large hereafter in the following part of this discourse), some one good and excellent man having got a pre-eminency amongst the rest, had this deference paid to his goodness and virtue, as to a kind of natural authority, that the chief rule, with arbitration of their differences, by a tacit consent devolved into his hands, without any other caution but the assurance they had of his uprightness and wisdom; yet when time, giving authority, and (as

[67] [Ed. note] In a footnote, Locke here quotes a long passage from Hooker, LAWS OF ECCLESIASTICAL POLITY, Bk. I, c. x, § 4.

some men would persuade us) sacredness to customs, which the negligent and unforeseeing innocence of the first ages began, had brought in successors of another stamp; the people finding their properties not secure under the government as then it was[68] (whereas government has no other end but the preservation of property), could never be safe nor at rest, nor think themselves in civil society, till the legislature was placed in collective bodies of men, call them senate, parliament, or what you please. By which means every single person became subject, equally with other the meanest men, to those laws which he himself, as part of the legislative, had established; nor could any one, by his own authority, avoid the force of the law when once made; nor by any pretence of superiority plead exemption, thereby to license his own, or the miscarriages of any of his dependents. "No man in civil society can be exempted from the laws of it:"[69] for if any man may do what he thinks fit, and there be no appeal on earth, for redress or security against any harm he shall do; I ask, whether he be not perfectly still in the state of nature, and so can be no part or member of that civil society; unless any one will say the state of nature and civil society are one and the same thing, which I have never yet found any one so great a patron of anarchy as to affirm.

## CHAPTER VIII.

### Of the Beginning of Political Societies.

§ 95. Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community, for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it. This any number of men may do, because it injures not the freedom of the rest; they are left as they were in the liberty of the state of nature. When any number of men have so consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest.

§ 96. For when any number of men have, by the consent of every individual, made a community, they have thereby made that community one body, with a power to act as one body, which is only by the will and determination of the majority; for that which acts any community being only the consent of the individuals of it, and it being necessary to that which is one body to move one way; it is necessary the body should move that way whither the greater force carries it, which is the consent of the majority: or else it is impossible it should act or continue one body, one community, which the consent of every individual that united into it agreed that it should; and so every one is bound by that consent to be concluded by the majority. And therefore we see that in assemblies, empowered to act by positive laws, where no number is set by that positive law which empowers them, the act of the majority passes for the act of the whole, and of course determines; as having, by the law of nature and reason, the power of the whole.

§ 97. And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority, and to be concluded by it; or else this original compact, whereby he with others incorporate into one society, would signify nothing, and be no compact, if he be left free, and under no other ties than he was in before in the state of nature. For what appearance would there be of any compact? what new engagement, if he were no farther tied by any decrees of the society than he himself thought fit, and did actually consent to? This would be still as great a liberty as he himself had before his compact, or any one else in the state of nature hath, who may submit himself and consent to any acts of it if he thinks fit.

§ 98. For if the consent of the majority shall not, in reason, be received as the act of the whole, and conclude every individual, nothing but the consent of every individual can make any thing to be the act of the whole: but such a consent is next to impossible ever to be had, if we consider the infirmities of health, and avocations of business, which in a number, though much less than that of a commonwealth, will necessarily keep many away from the public

[68] [Ed. note] In a footnote, Locke here quotes from Hooker, LAWS OF ECCLESIASTICAL POLITY, Bk. I, c. x, § 5.

[69] "Civil law, being the act of the whole body politic, doth therefore over-rule each several part of the same body" (Hooker, *Ibid.*). [Ed. note] Bk. I, c. x, § 13.

assembly. To which if we add the variety of opinions, and contrariety of interests which unavoidably happen in all collections of men, the coming into society upon such terms would be only like Cato's coming into the theatre, only to go out again.[70] Such a constitution as this would make the mighty leviathan of a shorter duration than the feeblest creatures, and not let it outlast the day it was born in: which cannot be supposed, till we can think that rational creatures should desire and constitute societies only to be dissolved: for where the majority cannot conclude the rest, there they cannot act as one body, and consequently will be immediately dissolved again.

§ 99. Whosoever therefore out of a state of nature unite into a community, must be understood to give up all the power necessary to the ends for which they unite into society, to the majority of the community, unless they expressly agreed in any number greater than the majority. And this is done by barely agreeing to unite into one political society, which is all the compact that is, or needs be, between the individuals that enter into, or make up a commonwealth. And thus that which begins and actually constitutes any political society, is nothing but the consent of any number of freemen capable of a majority, to unite and incorporate into such a society. And this is that, and that only, which did or could give beginning to any lawful government in the world.

§ 100. To this I find two objections made.

First, "That there are no instances to be found in story, of a company of men independent and equal one amongst another, that met together, and in this way began and set up a government."

Secondly, "It is impossible of right, that men should do so, because all men being born under government, they are to submit to that, and are not at liberty to begin a new one."

§ 101. To the first there is this to answer, that it is not at all to be wondered, that history gives us but a very little account of men that lived together in the state of nature. The inconveniences of that condition, and the love and want of society, no sooner brought any number of them together, but they presently united and incorporated, if they designed to continue together. And if we may not suppose men ever to have been in the state of nature, because we hear not much of them in such a state, we may as well suppose the armies of Salmanasser[71] or Xerxes were never children, because we hear little of them till they were men, and embodied in armies. Government is every where antecedent to records, and letters seldom come in amongst a people till a long continuation of civil society has, by other more necessary arts, provided for their safety, ease, and plenty: and then they begin to look after the history of their founders, and search into their original, when they have outlived the memory of it: for it is with commonwealths as with particular persons, they are commonly ignorant of their own births and infancies: and if they know any thing of their original, they are beholden for it to the accidental records that others have kept of it. And those that we have of the beginning of any politics in the world, excepting that of the Jews, where God himself immediately interposed, and which favours not at all paternal dominion, are all either plain instances of such a beginning as I have mentioned, or at least have manifest footsteps of it.

§ 102. He must show a strange inclination to deny evident matter of fact, when it agrees not with his hypothesis, who will not allow, that the beginnings of Rome and Venice were by the uniting together of several men free and independent one of another, amongst whom there

[70] [Ed. note] The reference of course is to Cato the Elder (Marcus, 234–149 B.C.) who was called Cato the Censor because of his opposition to the introduction into Rome of Greek refinement and luxury. This is the same Cato who continually urged the destruction of Carthage, an event which finally occurred three years after his death.

[71] [Ed. note] Undoubtedly a reference to Shalmaneser V (or IV), King of Assyria (727–22 B.C.) who defeated the Israelites (the inhabitants of the Northern Kingdom of Israel consisting of ten of the twelve tribes of Israel). He besieged the capital, Samaria, which fell to his successor Sargon II, who carried the inhabitants off to captivity in Assyria. These incidents are referred to in II Kings (in the Catholic Bible, IV Kings) 17. As "Salmanazar," he has achieved a certain measure of immortality by providing the name of an oversized bottle of wine holding 9.6 liters or the equivalent of 12 regular-size bottles of champagne (about ten U.S. quarts). Xerxes (d. 465 B.C.), who is mentioned next in the text is of course the "Great King" (of Persia) who led the second Persian invasion of Greece. He forced the pass at Thermopylae and burned Athens, but was defeated in the famous sea battle of Salamis (480 B.C.); after he returned to Asia Minor, his Army was routed at the battle of Plataea in 479 B.C.

was no natural superiority or subjection. And if Josephus Acosta's[72] word may be taken, he tells us, that in many parts of America there was no government at all. "There are great and apparent conjectures," says he, "that these men, speaking of those of Peru, for a long time had neither kings nor commonwealths, but lived in troops, as they do this day in Florida, the Cheriquanas, those of Brasil, and many other nations, which have no certain kings, but as occasion is offered, in peace or war, they choose their captains as they please," l. i. c. *25.* If it be said that every man there was born subject to his father, or the head of his family; that the subjection due from a child to a father took not away his freedom of uniting into what political society he thought fit, has been already proved. But be that as it will, these men, it is evident, were actually free; and whatever superiority some politicians now would place in any of them, they themselves claimed it not, but by consent were all equal, till by the same consent they set rulers over themselves. So that their politic societies all began from a voluntary union, and the mutual agreement of men freely acting in the choice of their governors and forms of government.

§ 103. And I hope those who went away from Sparta with Palantus, mentioned by Justin,[73] l. iii. c. 4, will be allowed to have been freemen, independent one of another, and to have set up a government over themselves, by their own consent. Thus I have given several examples out of history, of people free and in the state of nature, that being met together incorporated and began a commonwealth. And if the want of such instances be an argument to prove that governments were not, nor could not be so begun, I suppose the contenders for paternal empire were better let it alone than urge it against natural liberty: for if they can give so many instances out of history, of governments begun upon paternal right, I think (though at best an argument from what has been, to what should of right be, has no great force) one might, without any great danger, yield them the cause. But if I might advise them in the case, they would do well not to search too much into the original of governments, as they have begun *de facto;* lest they should find, at the foundation of most of them, something very little favourable to the design they promote, and such a power as they contend for.

§ 104. But to conclude, reason being plain on our side, that men are naturally free, and the examples of history showing, that the governments of the world, that were begun in peace, had their beginning laid on that foundation, and were made by the consent of the people; there can be little room for doubt, either where the right is, or what has been the opinion or practice of mankind about the first erecting of governments.

§ 105. I will not deny that if we look back as far as history will direct us, towards the original of commonwealths, we shall generally find them under the government and administration of one man. And I am also apt to believe, that where a family was numerous enough to subsist by itself, and continued entire together, without mixing with others, as it often happens, where there is much land and few people, the government commonly began in the father: for the father having, by the law of nature, the same power with every man else to punish, as he thought fit, any offences against that law, might thereby punish his transgressing children, even when they were men, and out of their pupilage; and they were very likely to submit to his punishment, and all join with him against the offender in their turns, giving him thereby power to execute his sentence against any transgression, and so in effect make him the lawmaker and governor over all that remained in conjunction with his family. He was fittest to be trusted; paternal affection secured their property and interest under his care; and the custom of obeying him in their childhood, made it easier to submit to him rather than to any other. If, therefore, they must have one to rule them, as government is hardly to be avoided amongst men that live together, who so likely to be the man as he that was their common father, unless negligence, cruelty, or any other defect of mind or body made him unfit for it? But when either

[72] [Ed. note] José de Acosta, c.1539–1600, a Spanish Jesuit missionary who spent about fifteen years in the Spanish possessions in the new world, principally Peru, and who wrote *Historia Natural y Moral de las Indias (A Natural and Moral History of the Indians),* translated into English in 1604 and reprinted in 1880.

[73] [Ed. note] The reference is to Marcus Junianus Justinus, a Roman historian of the third century A.D. (or possibly later) whose major work was a summary of an earlier history, now lost, of Gnaeus Pompeius Trogus, who flourished around the first century B.C. to the first century A.D. The event described in the text was the founding of Tarentum (modern Taranto) in Southern Italy by dissatisfied Spartans under Phalanthus at around 708 B.C. This was the only colony ever founded by Sparta.

the father died, and left his next heir, for want of age, wisdom, courage, or any other qualities, less fit for rule, or where several families met and consented to continue together, there, it is not to be doubted, but they used their natural freedom to set up him whom they judged the ablest, and most likely to rule well over them. Conformable hereunto, we find the people of America, who (living out of the reach of the conquering swords and spreading domination of the two great empires of Peru and Mexico) enjoyed their own natural freedom, though, *cæteris paribus,* they commonly prefer the heir of their deceased king; yet if they find him any way weak or incapable, they pass him by, and set up the stoutest and bravest man for their ruler.

§ 106. Thus, though looking back as far as records give us any account of peopling the world, and the history of nations, we commonly find the government to be in one hand; yet it destroys not that which I affirm, viz. that the beginning of politic society depends upon the consent of the individuals, to join into, and make one society; who, when they are thus incorporated, might set up what form of government they thought fit. But this having given occasion to men to mistake, and think that by nature government was monarchical, and belonged to the father; it may not be amiss here to consider, why people in the beginning generally pitched upon this form: which though perhaps the father's preeminency might, in the first institution of some commonwealth, give a rise to, and place in the beginning the power in one hand; yet it is plain that the reason that continued the form of government in a single person, was not any regard or respect to paternal authority; since all petty monarchies, that is, almost all monarchies, near their original, have been commonly, at least upon occasion, elective.

§ 107. First then, in the beginning of things, the father's government of the childhood of those sprung from him, having accustomed them to the rule of one man, and taught them that where it was exercised with care and skill, with affection and love to those under it, it was sufficient to procure and preserve to men all the political happiness they sought for in society; it was no wonder that they should pitch upon, and naturally run into that form of government, which from their infancy they had been all accustomed to; and which, by experience, they had found both easy and safe. To which, if we add, that monarchy being simple, and most obvious to men, whom neither experience had instructed in forms of government, nor the ambition or insolence of empire had taught to beware of the encroachments of prerogative, or the inconveniencies of absolute power, which monarchy in succession was apt to lay claim to, and bring upon them; it was not at all strange that they should not much trouble themselves to think of methods of restraining any exorbitancies of those to whom they had given the authority over them, and of balancing the power of government, by placing several parts of it in different hands. They had neither felt the oppression of tyrannical dominion, nor did the fashion of the age, nor their possessions, or way of living (which afforded little matter for covetousness or ambition), give them any reason to apprehend or provide against it; and therefore it is no wonder they put themselves into such a frame of government, as was not only, as I said, most obvious and simple, but also best suited to their present state and condition, which stood more in need of defence against foreign invasions and injuries, than of multiplicity of laws. The equality of a simple poor way of living, confining their desires within the narrow bounds of each man's small property, made few controversies, and so no need of many laws to decide them, or variety of officers to superintend the process, or look after the execution of justice, where there were but few trespasses, and few offenders. Since then those who liked one another so well as to join into society, cannot but be supposed to have some acquaintance and friendship together, and some trust one in another; they could not but have greater apprehensions of others than of one another: and therefore their first care and thought cannot but be supposed to be, how to secure themselves against foreign force. It was natural for them to put themselves under a frame of government which might best serve to that end, and choose the wisest and bravest man to conduct them in their wars, and lead them out against their enemies, and in this chiefly be their ruler.

§ 108. Thus we see that the kings of the Indians in America, which is still a pattern of the first ages in Asia and Europe, whilst the inhabitants were too few for the country, and want of people and money gave men no temptation to enlarge their possessions of land, or contest for wider extent of ground, are little more than generals of their armies; and though they command

absolutely in war, yet at home and in time of peace they exercise very little dominion, and have but a very moderate sovereignty; the resolutions of peace and war being ordinarily either in the people, or in a council. Though the war itself, which admits not of plurality of governors, naturally devolves the command into the king's sole authority.

* * *

[Section 109 contains a discussion of illustrations taken from the history of Israel as contained in the Old Testament.]

§ 110. Thus, whether a family by degrees grew up into a commonwealth, and the fatherly authority being continued on to the elder son, every one in his turn growing up under it, tacitly submitted to it; and the easiness and equality of it not offending any one, every one acquiesced, till time seemed to have confirmed it, and settle a right of succession by prescription: or whether several families, or the descendants of several families, whom chance, neighbourhood, or business brought together, uniting into society: the need of a general, whose conduct might defend them against their enemies in war, and the great confidence the innocence and sincerity of that poor but virtuous age (such as are almost all those which begin governments, that ever come to last in the world) gave men of one another, made the first beginners of commonwealths generally put the rule into one man's hand, without any other express limitation or restraint, but what the nature of the thing and the end of government required: whichever of those it was that at first put the rule into the hands of a single person, certain it is that nobody was intrusted with it but for the public good and safety, and to those ends, in the infancies of commonwealths, those who had it, commonly used it. And unless they had done so, young societies could not have subsisted; without such nursing fathers, tender and careful of the public weal, all governments would have sunk under the weakness and infirmities of their infancy, and the prince and the people had soon perished together.

§ 111. But though the golden age (before vain ambition, and *amor sceleratus habendi,* evil concupiscence, had corrupted men's minds into a mistake of true power and honour) had more virtue, and consequently better governors, as well as less vicious subjects; and there was then no stretching prerogative on the one side, to oppress the people; nor consequently on the other, any dispute about privilege, to lessen or restrain the power of the magistrate; and so no contest betwixt rulers and people about governors or government: yet, when ambition and luxury in future ages[74] would retain and increase the power, without doing the business for which it was given; and, aided by flattery, taught princes to have distinct and separate interests from their people; men found it necessary to examine more carefully the original and rights of government, and to find out ways to restrain the exorbitancies, and prevent the abuses of that power, which they having intrusted in another's hands only for their own good, they found was made use of to hurt them.

§ 112. Thus we may see how probable it is, that people that were naturally free, and by their own consent either submitted to the government of their father, or united together out of different families to make a government, should generally put the rule into one man's hands, and choose to be under the conduct of a single person, without so much as by express conditions limiting or regulating his power, which they thought safe enough in his honesty and prudence: though they never dreamed of monarchy being *jure divino,* which we never heard of among mankind, till it was revealed to us by the divinity of this last age; nor ever allowed paternal power to have a right to dominion, or to be the foundation of all government. And thus much may suffice to show, that, as far as we have any light from history, we have reason to conclude, that all peaceful beginnings of government have been laid in the consent of the people. I say peaceful, because I shall have occasion in another place to speak of conquest, which some esteem a way of beginning of governments.

The other objection I find urged against the beginning of politics, in the way I have mentioned, is this, viz.

§ 113. "That all men being born under government, some or other, it is impossible any of them should ever be free, and at liberty to unite together, and begin a new one, or ever be able to erect a lawful government."

If this argument be good, I ask, how came so many lawful monarchies into the world? for if

[74] [Ed. note] In a footnote, Locke here quotes again (*see* note 67, *supra*) but at greater length from Hooker, LAWS OF ECCLESIASTICAL POLITY, Bk. I, c. x, § 5.

any body, upon this supposition, can show me any one man in any age of the world free to begin a lawful monarchy, I will be bound to show him ten other free men at liberty at the same time to unite and begin a new government under a regal, or any other form; it being demonstration, that if any one, born under the dominion of another, may be so free as to have a right to command others in a new and distinct empire, every one that is born under the dominion of another may be so free too, and may become a ruler, or subject of a distinct separate government. And so by this their own principle, either all men, however born, are free, or else there is but one lawful prince, one lawful government in the world. And then they have nothing to do, but barely to show us which that is; which when they have done, I doubt not but all mankind will easily agree to pay obedience to him.

§ 114. Though it be a sufficient answer to their objection, to show that it involves them in the same difficulties that it doth those they use it against; yet I shall endeavour to discover the weakness of this argument a little farther.

"All men, 'say they,' are born under government, and therefore they cannot be at liberty to begin a new one. Every one is born a subject to his father, or his prince, and is therefore under the perpetual tie of subjection and allegiance." It is plain mankind never owned nor considered any such natural subjection that they were born in, to one or to the other, that tied them, without their own consents, to a subjection to them and their heirs.

§ 115. For there are no examples so frequent in history, both sacred and profane, as those of men withdrawing themselves, and their obedience, from the jurisdiction they were born under, and the family or community they were bred up in, and setting up new governments in other places; from whence sprang all that number of petty commonwealths in the beginning of ages, and which always multiplied as long as there was room enough, till the stronger, or more fortunate, swallowed the weaker; and those great ones again breaking to pieces, dissolved into lesser dominions. All which are so many testimonies against paternal sovereignty, and plainly prove that it was not the natural right of the father descending to his heirs, that made governments in the beginning, since it was impossible, upon that ground, there should have been so many little kingdoms; all must have been but only one universal monarchy, if men had not been at liberty to separate themselves from their families and the government, be it what it will, that was set up in it, and go and make distinct commonwealths and other governments, as they thought fit.

§ 116. This has been the practice of the world from its first beginning to this day; nor is it now any more hinderance to the freedom of mankind, that they are born under constituted and ancient polities, that have established laws and set forms of government, than if they were born in the woods, amongst the unconfined inhabitants that run loose in them: for those who would persuade us, that "by being born under any government, we are naturally subjects to it," and have no more any title or pretence to the freedom of the state of nature; have no other reason (bating that of paternal power, which we have already answered) to produce for it, but only because our fathers or progenitors passed away their natural liberty, and thereby bound up themselves and their posterity to a perpetual subjection to the government which they themselves submitted to. It is true, that whatever engagement or promises any one has made for himself, he is under the obligation of them, but cannot, by any compact whatsoever, bind his children or posterity: for his son, when a man, being altogether as free as the father, any "act of the father can no more give away the liberty of the son," than it can of any body else: he may indeed annex such conditions to the land he enjoyed as a subject of any commonwealth, as may oblige his son to be of that community, if he will enjoy those possessions which were his father's; because that estate being his father's property; he may dispose or settle it as he pleases.

§ 117. And this has generally given the occasion to mistake in this matter; because commonwealths not permitting any part of their dominions to be dismembered, nor to be enjoyed by any but those of their community, the son cannot ordinarily enjoy the possessions of his father, but under the same terms his father did, by becoming a member of the society; whereby he puts himself presently under the government he finds there established, as much as any other subject of that commonwealth. And thus "the consent of freemen, born under government, which only makes them members of it," being given separately in their turns, as each comes to be of age, and not in a multiude together; people take no notice of it, and think-

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ing it not done at all, or not necessary, conclude they are naturally subjects as they are men.

§ 118. But it is plain governments themselves understand it otherwise; they claim "no power over the son, because of that they had over the father;" nor look on children as being their subjects, by their fathers being so. If a subject of England have a child by an English woman in France, whose subject is he? Not the king of England's; for he must have leave to be admitted to the privileges of it: nor the king of France's; for how then has his father a liberty to bring him away, and breed him as he pleases? and who ever was judged as a traitor or deserter, if he left or warred against a country, for being barely born in it of parents that were aliens there? It is plain then, by the practice of governments themselves, as well as by the law of right reason, that "a child is born a subject of no country or government."[75] He is under his father's tuition and authority till he comes to age of discretion; and then he is a freeman, at liberty what government he will put himself under, what body politic he will unite himself to: for if an Englishman's son, born in France, be at liberty, and may do so, it is evident there is no tie upon him by his father's being a subject of this kingdom; nor is he bound up by any compact of his ancestors. And why then hath not his son, by the same reason, the same liberty, though he be born any where else? Since the power that a father hath naturally over his children is the same, wherever they be born, and the ties of natural obligations are not bounded by the positive limits of kingdoms and commonwealths.

§ 119. Every man being, as has been showed, naturally free, and nothing being able to put him into subjection to any earthly power, but only his own consent; it is to be considered, what shall be understood to be a sufficient declaration of a man's consent, to make him subject to the laws of any government. There is a common distinction of an express and a tacit consent, which will concern our present case. Nobody doubts but an express consent of any man entering into any society, makes him a perfect member of that society, a subject of that government. The difficulty is, what ought to be looked upon as a tacit consent, and how far it binds, *i.e.* how far any one shall be looked on to have consented, and thereby submitted to any government, where he has made no expressions of it at all. And to this I say, that every man, that hath any possessions, or enjoyment of any part of the dominions of any government, doth thereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government, during such enjoyment, as any one under it; whether this his possession be of land, to him and his heirs for ever, or a lodging only for a week; or whether it be barely travelling freely on the highway; and, in effect, it reaches as far as the very being of any one within the territories of that government.

§ 120. To understand this the better, it is fit to consider, that every man, when he at first incorporates himself into any commonwealth, he, by his uniting himself thereunto, annexes also, and submits to the community those possessions which he has, or shall acquire, that do not already belong to any other government: for it would be a direct contradiction for any one to enter into society with others for the securing and regulating of property, and yet to suppose his land, whose property is to be regulated by the laws of the society, should be exempt from the jurisdiction of that government, to which he himself, the proprietor of the land, is a subject. By the same act therefore, whereby any one unites his person, which was before free, to any

[75] [Ed. note] In this connection it should be noted that Locke derives the power of sovereign nations to punish aliens who commit crimes within their borders from the right of every man in the state of nature to punish those who violate the laws of nature.

> … I desire them to resolve me by what right any prince or state can put to death or punish an alien for any crime he commits in their country. It is certain their laws, by virtue of any sanction they receive from the promulgated will of the legislative, reach not a stranger: they speak not to him, nor, if they did, is he bound to harken to them. The legislative authority, by which they are in force over the subjects of that commonwealth, hath no power over him. Those who have the supreme power of making laws in England, France, or Holland, are to an Indian but like the rest of the world, men without authority: and therefore, if by the law of nature every man hath not a power to punish offences against it, as he soberly judges the case to require, I see not how the magistrates of any community can punish an alien of another country; since, in reference to him, they can have no more power than what every man naturally may have over another.

J. Locke, *The Second Treatise on Government* Para. 9 [5 J. Locke, WORKS 342 (1823 ed.) from which these readings were taken]. Locke seems driven to this *a priori* rejection of the *ius sanguinis* and *ius soli* as legitimate bases of jurisdiction by his insistence that governmental power can only originate from consent.

commonwealth, by the same he unites his possessions, which were before free, to it also: and they become, both of them, person and possession, subject to the government and dominion of that commonwealth, as long as it hath a being. Whoever, therefore, from thenceforth, by inheritance, purchase, permission, or otherways, enjoys any part of the land so annexed to, and under the government of that commonwealth, must take it with the condition it is under; that is, of submitting to the government of the commonwealth, under whose jurisdiction it is, as far forth as any subject of it.

§ 121. But since the government has a direct jurisdiction only over the land, and reaches the possessor of it (before he has actually incorporated himself in the society) only as he dwells upon, and enjoys that; the obligation any one is under, by virtue of such enjoyment, to "submit to the government, begins and ends with the enjoyment:" so that whenever the owner, who has given nothing but such a tacit consent to the government, will, by donation, sale, or otherwise, quit the said possession, he is at liberty to go and incorporate himself into any other commonwealth; or to agree with others to begin a new one, in *vacuis locis,* in any part of the world they can find free and unpossessed: whereas he that has once, by actual agreement, and any express declaration, given his consent to be of any commonwealth, is perpetually and indispensably obliged to be, and remain unalterably a subject to it, and can never be again in the liberty of the state of nature; unless, by any calamity, the government he was under comes to be dissolved, or else by some public act cuts him off from being any longer a member of it.

§ 122. But submitting to the laws of any country, living quietly, and enjoying privileges and protection under them, makes not a man a member of that society: this is only a local protection and homage due to and from all those, who, not being in a state of war, come within the territories belonging to any government, to all parts whereof the force of its laws extends. But this no more makes a man a member of that society, a perpetual subject of that commonwealth, than it would make a man a subject to another, in whose family he found it convenient to abide for some time; though, whilst he continued in it, he were obliged to comply with the laws, and submit to the government he found there. And thus we see, that foreigners, by living all their lives under another government, and enjoying the privileges and protection of it, though they are bound, even in conscience, to submit to its administration, as far forth as any denison; yet do not thereby come to be subjects or members of that commonwealth. Nothing can make any man so, but his actually entering into it by positive engagement, and express promise and compact. This is that which I think concerning the beginning of political societies, and that consent which makes any one a member of any commonwealth.

## CHAPTER IX.

### Of the Ends of Political Society and Government.

§ 123. If man in the state of nature be so free as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to nobody, why will he part with his freedom, why will he give up this empire, and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of nature he hath such a right yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others; for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name property.

§ 124. The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property. To which in the state of nature there are many things wanting.

First, There wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them: for though the law of nature be plain and intelligible to all rational creatures: yet men being biassed by their interest, as well as ignorant for want of studying it, are not apt to allow of it as a law binding to them in the application of it to their particular cases.

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§ 125. Secondly, In the state of nature there wants a known and indifferent judge, with authority to determine all differences according to the established law: for every one in that state being both judge and executioner of the law of nature, men being partial to themselves, passion and revenges very apt to carry them too far, and with too much heat, in their own cases; as well as negligence and unconcernedness, to make them too remiss in other men's.

§ 126. Thirdly, In the state of nature there often wants power to back and support the sentence when right, and to give it due execution. They who by any injustice offend, will seldom fail, where they are able, by force to make good their injustice; such resistance many times makes the punishment dangerous, and frequently destructive to those who attempt it.

§ 127. Thus mankind, notwithstanding all the privileges of the state of nature, being but in an ill condition, while they remain in it, are quickly driven into society. Hence it comes to pass, that we seldom find any number of men live any time together in this state. The inconveniencies that they are therein exposed to, by the irregular and uncertain exercise of the power every man has of punishing the transgressions of others, make them take sanctuary under the established laws of government, and therein seek the preservation of their property. It is this makes them so willingly give up every one his single power of punishing, to be exercised by such alone as shall be appointed to it amongst them; and by such rules as the community, or those authorized by them to that purpose, shall agree on. And in this we have the original right of both the legislative and executive power, as well as of the governments and societies themselves.

§ 128. For in the state of nature, to omit the liberty he has of innocent delights, a man has two powers.

The first is to do whatsoever he thinks fit for the preservation of himself and others within the permission of the law of nature: by which law, common to them all, he and all the rest of mankind are one community, make up one society, distinct from all other creatures. And, were it not for the corruption and viciousness of degenerate men, there would be no need of any other; no necessity that men should separate from this great and natural community, and by positive agreements combine into smaller and divided associations.

The other power a man has in the state of nature, is the power to punish the crimes committed against that law. Both these he gives up when he joins in a private, if I may so call it, or particular politic society, and incorporates into any commonwealth, separate from the rest of mankind.

§ 129. The first power, viz. "of doing whatsoever he thought fit for the preservation of himself" and the rest of mankind, he gives up to be regulated by laws made by the society, so far forth as the preservation of himself and the rest of that society shall require; which laws of the society in many things confine the liberty he had by the law of nature.

§ 130. Secondly, The power of punishing he wholly gives up, and engages his natural force (which he might before employ in the execution of the law of nature, by his own single authority, as he thought fit), to assist the executive power of the society, as the law thereof shall require: for being now in a new state, wherein he is to enjoy many conveniences, from the labour, assistance, and society of others in the same community, as well as protection from its whole strength; he is to part also with as much of his natural liberty, in providing for himself, as the good, prosperity, and safety of the society shall require; which is not only necessary, but just, since the other members of the society do the like.

§ 131. But though men, when they enter into society, give up the equality, liberty, and executive power they had in the state of nature, into the hands of the society, to be so far disposed of by the legislative as the good of the society shall require; yet it being only with an intention in every one the better to preserve himself, his liberty and property (for no rational creature can be supposed to change his condition with an intention to be worse); the power of the society, or legislative constituted by them, can never be supposed to extend farther than the common good; but is obliged to secure every one's property, by providing against those three defects above-mentioned, that made the state of nature so unsafe and uneasy. And so whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees; by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home, only in the execution

of such laws; or abroad to prevent or redress foreign injuries, and secure the community from inroads and invasion. And all this to be directed to no other end but the peace, safety, and public good of the people.

## CHAPTER X.

### Of the Forms of a Commonwealth.

§ 132. The majority having, as has been showed, upon men's first uniting into society, the whole power of the community naturally in them, may employ all that power in making laws for the community from time to time, and executing those laws by officers of their own appointing; and then the form of the government is a perfect democracy: or else may put the power of making laws into the hands of a few select men, and their heirs or successors; and then it is an oligarchy: or else into the hands of one man, and then it is a monarchy: if to him and his heirs, it is an hereditary monarchy: if to him only for life, but upon his death the power only of nominating a successor to return to them, an elective monarchy. And so accordingly of these the community may make compounded and mixed forms of government, as they think good. And if the legislative power be at first given by the majority to one or more persons only for their lives, or any limited time, and then the supreme power to revert to them again; when it is so reverted, the community may dispose of it again anew into what hands they please, and so constitute a new form of government: for the form of government depending upon the placing the supreme power, which is the legislative (it being impossible to conceive that an inferior power should prescribe to a superior, or any but the supreme make laws), according as the power of making laws is placed, such is the form of the commonwealth.

§ 133. By commonwealth, I must be understood all along to mean, not a democracy, or any form of government, but any independent community, which the Latines signified by the word *civitas;* to which the word which best answers in our language is commonwealth, and most properly expresses such a society of men, which community or city in English does not: for there may be subordinate communities in government; and city amongst us has a quite different notion from commonwealth: and therefore, to avoid ambiguity, I crave leave to use the word commonwealth in that sense, in which I find it used by king James the First; and I take it to be its genuine signification; which if any body dislike, I consent with him to change it for a better.

## CHAPTER XI.

### Of the Extent of the legislative Power.

§ 134. The great end of men's entering into society being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society; the first and fundamental positive law of all commonwealths is the establishing of the legislative power; as the first and fundamental natural law, which is to govern even the legislative itself, is the preservation of the society, and (as far as will consist with the public good) of every person in it. This legislative is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have once placed it; nor can any edict of any body else, in what form soever conceived, or by what power soever backed, have the force and obligation of a law, which has not its sanction from that legislative which the public has chosen and appointed: for without this the law could not have that which is absolutely necessary to its being a law, the consent of the society; over whom nobody can have a power to make laws, but by their own consent, and by authority received from them.[76] And therefore all the obedience, which by the most solemn ties any one can be obliged to pay, ultimately terminates in this supreme power, and is directed by those laws which it enacts: nor can any oaths to any foreign power whatsoever, or any domestic subordinate power, discharge any member of the society from his obedience to the legislative, acting pursuant to their trust; nor oblige him to any obedience contrary to the laws so enacted, or farther than they do allow; it being ridiculous to imagine one can be tied ultimately to obey any power in the society which is not supreme.

§ 135. Though the legislative, whether placed in one or more, whether it be always in being, or only by intervals, though it be the supreme power in every commonwealth; yet,

[76] [Ed. note] Locke, in a footnote here quotes several passages from Hooker, *Laws of Ecclesiastical Polity*, Bk. I, c. x, § 8. The quoted passages include the famous sentence "Laws they are not therefore which public approbation hath not made so."

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First, It is not, nor can possibly be absolutely arbitrary over the lives and fortunes of the people: for it being but the joint power of every member of the society given up to that person or assembly which is legislator; it can be no more than those persons had in a state of nature before they entered into society, and gave up to the community: for nobody can transfer to another more power than he has in himself; and nobody has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another. A man, as has been proved, cannot subject himself to the arbitrary power of another; and having in the state of nature no arbitrary power over the life, liberty, or possession of another, but only so much as the law of nature gave him for the preservation of himself and the rest of mankind; this is all he doth, or can give up to the commonwealth, and by it to the legislative power, so that the legislative can have no more than this. Their power, in the utmost bounds of it, is limited to the public good of the society. It is a power that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the subjects.[77] The obligations of the law of nature cease not in society, but only in many cases are drawn closer, and have by human laws known penalties annexed to them, to enforce their observation. Thus the law of nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions must, as well as their own and other men's actions be conformable to the law of nature, *i.e.* to the will of God, of which that is a declaration; and the "fundamental law of nature being the preservation of mankind, no human sanction can be good or valid against it."

§ 136. Secondly, The legislative or supreme authority cannot assume to itself a power to rule by extemporary, arbitrary decrees; but is bound to dispense justice, and to decide the rights of the subject, by promulgated, standing laws, and known authorized judges.[78] For the law of nature being unwritten, and so nowhere to be found, but in the minds of men, they who, through passion, or interest, shall miscite, or misapply it, cannot so easily be convinced of their mistake, where there is no established judge: and so it serves not, as it ought, to determine the rights, and fence the properties of those that live under it; especially where every one is judge, interpreter, and executioner of it too, and that in his own case: and he that has right on his side, having ordinarily but his own single strength, hath not force enough to defend himself from injuries, or to punish delinquents. To avoid these inconveniences, which disorder men's properties in the state of nature, men unite into societies, that they may have the united strength of the whole society to secure and defend their properties, and may have standing rules to bound it, by which every one may know what is his. To this end it is that men give up all their natural power to the society which they enter into, and the community put the legislative power into such hands as they think fit; with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty as it was in the state of nature.

§ 137. Absolute arbitrary power, or governing without settled standing laws, can neither of them consist with the ends of society and government, which men would not quit the freedom of the state of nature for, and tie themselves up under, were it not to preserve their lives, liberties, and fortunes, and by stated rules of right and property to secure their peace and quiet. It cannot be supposed that they should intend, had they a power so to do, to give to any one, or more, an absolute arbitrary power over their persons and estates, and put a force into the magistrate's hand to execute his unlimited will arbitrarily upon them. This were to put themselves into a worse condition than the state of nature, wherein they had a liberty to defend their right against the injuries of others, and were upon equal terms of force to maintain it, whether invaded by a single man, or many in combination. Whereas by supposing they have given up themselves to the absolute arbitrary power and will of a legislator, they have dis-

[77] [Ed. note] Locke here, in a footnote, inserts a rather lengthy quote from Hooker, *Laws of Ecclesiastical Polity*, Bk. I, c. x, § 1.

[78] "Human laws are measures in respect of men whose actions they must direct, howbeit such measures they are as have also their higher rules to be measured by, which rules are two, the law of God, and the law of nature; so that laws human must be made according to the general laws of nature, and without contradiction to any positive law of Scripture, otherwise they are ill-made" (Hooker's *Eccl. Pol.* lib. iii. sect. 9). [Bk. III, c. ix, § 2. In this passage, Hooker cites St. Thomas, *Summa Theologica*, Pt. II (1st Pt.), Q. 95, Art. 3, reprinted at p. 118, *supra.*] "To constrain men to anything inconvenient doth seem unreasonable" (*Ibid.* lib. i. sect. 10). [Bk. I, c. x, § 7].

armed themselves, and armed him, to make a prey of them when he pleases; he being in a much worse condition, who is exposed to the arbitrary power of one man, who has the command of 100,000, than he that is exposed to the arbitrary power of 100,000 single men; nobody being secure that his will, who has such a command, is better than that of other men, though his force be 100,000 times stronger. And therefore, whatever form the commonwealth is under, the ruling power ought to govern by declared and received laws, and not by extemporary dictates and undetermined resolutions; for then mankind will be in a far worse condition than in the state of nature, if they shall have armed one or a few men with the joint power of a multitude, to force them to obey at pleasure the exorbitant and unlimited degrees of their sudden thoughts, or unrestrained, and till that moment unknown wills, without having any measures set down which may guide and justify their actions: for all the power the government has being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws; that both the people may know their duty, and be safe and secure within the limits of the law; and the rulers too kept within their bounds, and not be tempted, by the power they have in their hands, to employ it to such purposes, and by such measures, as they would not have known, and own not willingly.

§ 138. Thirdly, The supreme power cannot take from any man part of his property without his own consent: for the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires, that the people should have property, without which they must be supposed to lose that, by entering into society, which was the end for which they entered into it; too gross an absurdity for any man to own. Men therefore in society having property, they have such right to the goods, which by the law of the community are theirs, that nobody hath a right to take their substance or any part of it from them, without their own consent: without this they have no property at all; for I have truly no property in that, which another can by right take from me, when he pleases, against my consent. Hence it is a mistake to think, that the supreme or legislative power of any commonwealth can do what it will, and dispose of the estates of the subject arbitrarily, or take any part of them at pleasure. This is not much to be feared in governments where the legislative consists, wholly or in part, in assemblies which are variable, whose members, upon the dissolution of the assembly, are subjects under the common laws of their country, equally with the rest. But in governments where the legislative is in one lasting assembly always in being, or in one man, as in absolute monarchies, there is danger still that they will think themselves to have a distinct interest from the rest of the community; and so will be apt to increase their own riches and power, by taking what they think fit from the people: for a man's property is not at all secure, though there be good and equitable laws to set the bounds of it between him and his fellow-subjects, if he who commands those subjects have power to take from any private man what part he pleases of his property, and use and dispose of it as he thinks good.

§ 139. But government, into whatsoever hands it is put, being, as I have before showed, entrusted with this condition, and for this end, that men might have and secure their properties; the prince, or senate, however it may have power to make laws for the regulating of property between the subjects one amongst another, yet can never have a power to take to themselves the whole or any part of the subject's property without their own consent: for this would be in effect to leave them no property at all. And to let us see, that even absolute power, where it is necessary, is not arbitrary by being absolute, but is still limited by that reason, and confined to those ends, which required it in some cases to be absolute, we need look no farther than the common practice of martial discipline: for the preservation of the army, and in it of the whole commonwealth, requires an absolute obedience to the command of every superior officer, and it is justly death to disobey or dispute the most dangerous or unreasonable of them; but yet we see, that neither the serjeant, that could command a soldier to march up to the mouth of a cannon, or stand in a breach, where he is almost sure to perish, can command that soldier to give him one penny of his money; nor the general, that can condemn him to death for deserting his post, or for not obeying the most desperate orders, can yet, with all his absolute power of life and death, dispose of one farthing of that soldier's estate, or seize one jot of his goods; whom yet he can command any thing, and hang for the least disobedience; because such a blind obedi-

ence is necessary to that end for which the commander has his power, viz. the preservation of the rest; but the disposing of his goods has nothing to do with it.

§ 140. It is true, governments cannot be supported without great charge, and it is fit every one who enjoys his share of the protection, should pay out of his estate his proportion for the maintenance of it. But still it must be with his own consent, *i.e.* the consent of the majority, giving it either by themselves, or their representatives chosen by them: for if any one shall claim a power to lay and levy taxes on the people by his own authority, and without such consent of the people, he thereby invades the fundamental law of property, and subverts the end of government: for what property have I in that which another may by right take, when he pleases, to himself?

§ 141. Fourthly, The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, we will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen, and authorized to make laws for them. The power of the legislative being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.

§ 142. These are the bounds which the trust that is put in them by the society, and the law of God and nature, have set to the legislative power of every commonwealth, in all forms of government.

First, They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court, and the countryman at plough.

Secondly, These laws also ought to be designed for no other end ultimately, but the good of the people.

Thirdly, They must not raise taxes on the property of the people, without the consent of the people, given by themselves or their deputies. And this properly concerns only such governments where the legislative is always in being, or at least where the people have not reserved any part of the legislative to deputies, to be from time to time chosen by themselves.

Fourthly, The legislative neither must nor can transfer the power of making laws to any body else, or place it any where, but where the people have.

## CHAPTER XII.

### Of the legislative, executive, and federative Power of the Commonwealth.

§ 143. The legislative power is that, which has a right to direct how the force of the commonwealth shall be employed for preserving the community and the members of it. But because those laws which are constantly to be executed, and whose force is always to continue, may be made in a little time, therefore there is no need that the legislative should be always in being, not having always business to do. And because it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them; whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government: therefore in well ordered commonwealths, where the good of the whole is so considered, as it ought, the legislative power is put into the hands of divers persons, who, duly assembled, have by themselves or jointly with others, a power to make laws; which when they have done, being separated again, they are themselves subject to the laws they have made; which is a new and near tie upon them, to take care that they make them for the public good.

§ 144. But because the laws, that are at once, and in a short time made, have a constant and lasting force, and need a perpetual execution, or an attendance thereunto; therefore it is necessary there should be a power always in being, which should see to the execution of the laws that are made, and remain in force. And thus the

legislative and executive power come often to be separated.

§ 145. There is another power in every commonwealth, which one may call natural, because it is that which answers to the power every man naturally had before he entered into society: for though in a commonwealth, the members of it are distinct persons still in reference to one another, and as such are governed by the laws of the society; yet in reference to the rest of mankind, they make one body, which is, as every member of it before was, still in the state of nature with the rest of mankind. Hence it is, that the controversies that happen between any man of the society with those that are out of it, are managed by the public; and an injury done to a member of their body engages the whole in the reparation of it. So that, under this consideration, the whole community is one body in the state of nature, in respect of all other states or persons out of its community.

§ 146. This therefore contains the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth; and may be called federative, if any one pleases. So the thing be understood, I am indifferent as to the name.

§ 147. These two powers, executive and federative, though they be really distinct in themselves, yet one comprehending the execution of the municipal laws of the society within itself, upon all that are parts of it; the other the management of the security and interest of the public without, with all those that it may receive benefit or damage from; yet they are always almost united. And though this federative power in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive laws, than the executive; and so must necessarily be left to the prudence and wisdom of those whose hands it is in, to be managed for the public good: for the laws that concern subjects one amongst another, being to direct their actions, may well enough precede them. But what is to be done in reference to foreigners, depending much upon their actions, and the variation of designs, and interests, must be left in great part to the prudence of those who have this power committed to them, to be managed by the best of their skill, for the advantage of the commonwealth.

§ 148. Though, as I said, the executive and federative power of every community be really distinct in themselves, yet they are hardly to be separated, and placed at the same time in the hands of distinct persons: for both of them requiring the force of the society for their exercise, it is almost impracticable to place the force of the commonwealth in distinct, and not subordinate hands; or that the executive and federative power should be placed in persons that might act separately, whereby the force of the public would be under different commands; which would be apt some time or other to cause disorder and ruin.

## CHAPTER XIII.

### Of the Subordination of the Powers of the Commonwealth.

§ 149. Though in a constituted commonwealth, standing upon its own basis, and acting according to its own nature, that is, acting for the preservation of the community, there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate; yet the legislative being only a fiduciary power to act for certain ends, there remains still "in the people a supreme power to remove or alter the legislative," when they find the legislative act contrary to the trust reposed in them: for all power given with trust for the attaining an end, being limited by that end: whenever that end is manifestly neglected or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security. And thus the community perpetually retains a supreme power of saving themselves from the attempts and designs of any body, even of their legislators, whenever they shall be so foolish, or so wicked, as to lay and carry on designs against the liberties and properties of the subject: for no man, or society of men, having a power to deliver up their preservation, or consequently the means of it, to the absolute will and arbitrary dominion of another; whenever any one shall go about to bring them into such a slavish condition, they will always have a right to preserve what they have not a power to part with; and to rid themselves of those who invade this fundamental, sacred, and unalterable law of self-preservation, for which they entered into society. And thus the community may be said in this respect to be

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always the supreme power, but not as considered under any form of government, because this power of the people can never take place till the government be dissolved.

§ 150. In all cases, whilst the government subsists, the legislative is the supreme power: for what can give laws to another, must needs be superior to him; and since the legislative is no otherwise legislative of the society, but by the right it has to make laws for all the parts, and for every member of the society, prescribing rules to their actions, and giving power of execution, where they are transgressed; the legislative must needs be the supreme, and all other powers, in any members or parts of the society, derived from and subordinate to it.

§ 151. In some commonwealths, where the legislative is not always in being, and the executive is vested in a single person, who has also a share in the legislative; there that single person in a very tolerable sense may also be called supreme; not that he has in himself all the supreme power, which is that of law-making; but because he has in him the supreme execution, from whom all inferior magistrates derive all their several subordinate powers, or at least the greatest part of them: having also no legislative superior to him, there being no law to be made without his consent, which cannot be expected should ever subject him to the other part of the legislative, he is properly enough in this sense supreme. But yet it is to be observed, that though oaths of allegiance and fealty are taken to him, it is not to him as supreme legislator, but as supreme executor of the law, made by a joint power of him with others: allegiance being nothing but an obedience according to law, which when he violates, he has no right to obedience, nor can claim it otherwise than as the public person invested with the power of the law; and so is to be considered as the image, phantom, or representative of the commonwealth, acted by the will of the society, declared in its laws; and thus he has no will, no power, but that of the law. But when he quits this representation, this public will, and acts by his own private will, he degrades himself, and is but a single private person without power, and without will, that has no right to obedience; the members owing no obedience but to the public will of the society.

§ 152. The executive power, placed any where but in a person that has also a share in the legislative, is visibly subordinate and accountable to it, and may be at pleasure changed and displaced; so that it is not the supreme executive power that is exempt from subordination: but the supreme executive power vested in one, who having a share in the legislative, has no distinct superior legislative to be subordinate and accountable to, farther than he himself shall join and consent; so that he is no more subordinate than he himself shall think fit, which one may certainly conclude will be but very little. Of other ministerial and subordinate powers in a commonwealth we need not speak, they being so multiplied with infinite variety, in the different customs and constitutions of distinct commonwealths, that it is impossible to give a particular account of them all. Only thus much, which is necessary to our present purpose, we may take notice of concerning them, that they have no manner of authority, any of them, beyond what is by positive grant and commission delegated to them, and are all of them accountable to some other power in the commonwealth.

§ 153. It is not necessary, no, nor so much as convenient, that the legislative should be always in being; but absolutely necessary that the executive power should; because there is not always need of new laws to be made, but always need of execution of the laws that are made. When the legislative hath put the execution of the laws they make into other hands, they have a power still to resume it out of those hands, when they find cause, and to punish for any male administration against the laws. The same holds also in regard of the federative power, that and the executive being both ministerial and subordinate to the legislative, which, as has been showed, in a constituted commonwealth is the supreme. The legislative also in this case being supposed to consist of several persons, (for if it be a single person, it cannot but be always in being, and so will, as supreme, naturally have the supreme executive power, together with the legislative) may assemble, and exercise their legislature, at the times that either their original constitution, or their own adjournment, appoints, or when they please; if neither of these hath appointed any time, or there be no other way prescribed to convoke them: for the supreme power being placed in them by the people, it is always in them, and they may exercise it when they please, unless by their original constitution they are limited to certain seasons, or by an act of their supreme power they have adjourned to a certain

time; and when that time comes, they have a right to assemble and act again.

§ 154. If the legislative, or any part of it, be made up of representatives chosen for that time by the people, which afterwards return into the ordinary state of subjects, and have no share in the legislature but upon a new choice, this power of choosing must also be exercised by the people, either at certain appointed seasons, or else when they are summoned to it; and in this latter case the power of convoking the legislative is ordinarily placed in the executive, and has one of these two limitations in respect of time: that either the original constitution requires their assembling and acting at certain intervals, and then the executive power does nothing but ministerially issue directions for their electing and assembling according to due forms; or else it is left to his prudence to call them by new elections, when the occasions or exigencies of the public require the amendment of old, or making of new laws, or the redress or prevention of any inconveniences, that lie on, or threaten the people.

§ 155. It may be demanded here, What if the executive power, being possessed of the force of the commonwealth, shall make use of that force to hinder the meeting and acting of the legislative, when the original constitution or the public exigencies require it? I say, using force upon the people without authority, and contrary to the trust put in him that does so, is a state of war with the people, who have a right to reinstate their legislative in the exercise of their power: for having erected a legislative, with an intent they should exercise the power of making laws, either at certain set times, or when there is need of it; when they are hindered by any force from what is so necessary to the society, and wherein the safety and preservation of the people consists, the people have a right to remove it by force. In all states and conditions, the true remedy of force without authority is to oppose force to it. The use of force without authority always puts him that uses it into a state of war, as the aggressor, and renders him liable to be treated accordingly.

§ 156. The power of assembling and dismissing the legislative, placed in the executive, gives not the executive a superiority over it, but is a fiduciary trust placed in him for the safety of the people, in a case where the uncertainty and variableness of human affairs could not bear a steady fixed rule: for it not being possible that the first framers of the government should, by any foresight, be so much masters of future events as to be able to prefix so just periods of return and duration to the assemblies of the legislative, in all times to come, that might exactly answer all the exigencies of the commonwealth; the best remedy could be found for this defect was to trust this to the prudence of one who was always to be present, and whose business it was to watch over the public good. Constant frequent meetings of the legislative, and long continuations of their assemblies, without necessary occasion, could not but be burdensome to the people, and must necessarily in time produce more dangerous inconveniencies, and yet the quick turn of affairs might be sometimes such as to need their present help; any delay of their convening might endanger the public; and sometimes too their business might be so great, that the limited time of their sitting might be too short for their work, and rob the public of that benefit which could be had only from their mature deliberation. What then could be done in this case to prevent the community from being exposed some time or other to eminent hazard, on one side or the other, by fixed intervals and periods, set to the meeting and acting of the legislative; but to intrust it to the prudence of some, who being present, and acquainted with the state of public affairs, might make use of this prerogative for the public good? and where else could this be so well placed as in his hands, who was intrusted with the execution of the laws for the same end? Thus supposing the regulation of times for the assembling and sitting of the legislative not settled by the original constitution, it naturally fell into the hands of the executive, not as an arbitrary power depending on his good pleasure, but with this trust always to have it exercised only for the public weal, as the occurrences of times and change of affairs might require. Whether settled periods of their convening, or a liberty left to the prince for convoking the legislative, or perhaps a mixture of both, hath the least inconvenience attending it, it is not my business here to inquire; but only to show, that though the executive power may have the prerogative of convoking and dissolving such conventions of the legislative, yet it is not thereby superior to it.

§ 157. Things of this world are in so constant a flux, that nothing remains long in the same state. Thus people, riches, trade, power, change their stations, flourishing mighty cities come to ruin, and prove in time neglected desolate cor-

ners, whilst other unfrequented places grow into populous countries, filled with wealth and inhabitants. But things not always changing equally, and private interest often keeping up customs and privileges, when the reasons of them are ceased; it often comes to pass, that in governments, where part of the legislative consists of representatives chosen by the people, that in tract of time this representation becomes very unequal and disproportionate to the reasons it was at first established upon. To what gross absurdities the following of custom, when reason has left it, may lead, we may be satisfied, when we see the bare name of a town, of which there remains not so much as the ruins, where scarce so much housing as a sheepcote, or more inhabitants than a shepherd is to be found, sends as many representatives to the grand assembly of law-makers as a whole county, numerous in people, and powerful in riches. This strangers stand amazed at, and every one must confess needs a remedy; though most think it hard to find one; because the constitution of the legislative being the original and supreme act of the society, antecedent to all positive laws in it, and depending wholly on the people, no inferior power can alter it. And therefore the people, when the legislative is once constituted, having, in such a government as we have been speaking of, no power to act as long as the government stands; this inconvenience is thought incapable of a remedy.

§ 158. *Salus populi suprema lex,* is certainly so just and fundamental a rule, that he, who sincerely follows it, cannot dangerously err. If therefore the executive, who has the power of convoking the legislative, observing rather the true proportion than fashion of representation, regulates not by old custom, but true reason, the number of members in all places that have a right to be distinctly represented, which no part of the people, however incorporated, can pretend to, but in proportion to the assistance which it affords to the public; it cannot be judged to have set up a new legislative, but to have restored the old and true one, and to have rectified the disorders which succession of time had insensibly, as well as inevitably introduced; for it being the interest as well as intention of the people, to have a fair and equal representative; whoever brings it nearest to that, is an undoubted friend to, and establisher of the government, and cannot miss the consent and approbation of the community: prerogative being nothing but a power in the hands of the prince, to provide for the public good, in such cases, which depending upon unforeseen and uncertain occurrences, certain and unalterable laws could not safely direct; whatsoever shall be done manifestly for the good of the people, and the establishing the government upon its true foundations, is, and always will be, just prerogative. The power of erecting new corporations, and therewith new representatives, carries with it a supposition that in time the measures of representation might vary, and those places have a just right to be represented which before had none; and by the same reason, those cease to have a right, and be too inconsiderable for such a privilege, which before had it. It is not a change from the present state, which perhaps corruption or decay has introduced, that makes an inroad upon the government; but the tendency of it to injure or oppress the people, and to set up one part or party, with a distinction from and an unequal subjection of the rest. Whatsoever cannot but be acknowledged to be of advantage to the society, and people in general, upon just and lasting measures, will always, when done, justify itself; and whenever the people shall choose their representatives upon just and undeniably equal measures, suitable to the original frame of the government, it cannot be doubted to be the will and act of the society, whoever permitted or caused them so to do.

## CHAPTER XIV.

### Of Prerogative.

§ 159. Where the legislative and executive power are in distinct hands, (as they are in all moderated monarchies and well-framed governments) there the good of the society requires, that several things should be left to the discretion of him that has the executive power: for the legislators not being able to foresee, and provide by laws, for all that may be useful to the community, the executor of the laws having the power in his hands, has by the common law of nature a right to make use of it for the good of the society, in many cases, where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it. Many things there are, which the law can by no means provide for; and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require:

nay, it is fit that the laws themselves should in some cases give way to the executive power, or rather to this fundamental law of nature and government, viz. That, as much as may be, all the members of the society are to be preserved: for since many accidents may happen, wherein a strict and rigid observation of the laws may do harm; (as not to pull down an innocent man's house to stop the fire, when the next to it is burning) and a man may come sometimes within the reach of the law, which makes no distinction of persons, by an action that may deserve reward and pardon; it is fit the ruler should have a power, in many cases, to mitigate the severity of the law, and pardon some offenders: for the end of government being the preservation of all, as much as may be, even the guilty are to be spared, where it can prove no prejudice to the innocent.

§ 160. This power to act according to discretion for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative: for since in some governments the law-making power is not always in being, and is usually too numerous, and so too slow for the despatch requisite to execution; and because also it is impossible to foresee, and so by laws to provide for all accidents and necessities that may concern the public, or to make such laws as will do no harm, if they are executed with an inflexible rigour on all occasions, and upon all persons that may come in their way; therefore there is a latitude left to the executive power, to do many things of choice which the laws do not prescribe.

§ 161. This power, whilst employed for the benefit of the community, and suitably to the trust and ends of the government, is undoubted prerogative and never is questioned; for the people are very seldom or never scrupulous or nice in the point; they are far from examining prerogative, whilst it is in any tolerable degree employed for the use it was meant; that is, for the good of the people, and not manifestly against it: but if there comes to be a question between the executive power and the people, about a thing claimed as a prerogative, the tendency of the exercise of such prerogative to the good or hurt of the people will easily decide that question.

§ 162. It is easy to conceive, that in the infancy of governments, when commonwealths differed little from families in number of people, they differed from them too but little in number of laws: and the governors being as the fathers of them, watching over them for their good, the government was almost all prerogative. A few established laws served the turn, and the discretion and care of the ruler supplied the rest. But when mistake or flattery prevailed with weak princes to make use of this power for private ends of their own, and not for the public good, the people were fain by express laws to get prerogative determined in those points wherein they found disadvantage from it: and thus declared limitations of prerogative were by the people found necessary in cases which they and their ancestors had left, in the utmost latitude, to the wisdom of those princes who made no other but a right use of it; that is, for the good of their people.

§ 163. And therefore they have a very wrong notion of government, who say, that the people have encroached upon the prerogative, when they have got any part of it to be defined by positive laws: for in so doing they have not pulled from the prince any thing that of right belonged to him, but only declare, that that power which they indefinitely left in his or his ancestors' hands, to be exercised for their good, was not a thing which they intended him when he used it otherwise: for the end of government being the good of the community, whatsoever alterations are made in it, tending to that end, cannot be an encroachment upon any body, since nobody in government can have a right tending to any other end: and those only are encroachments which prejudice or hinder the public good. Those who say otherwise, speak as if the prince had a distinct and separate interest from the good of the community, and was not made for it; the root and source from which spring almost all those evils and disorders which happen in kingly governments. And indeed, if that be so, the people under his government are not a society of rational creatures, entered into a community for their mutual good; they are not such as have set rulers over themselves, to guard and promote that good; but are to be looked on as an herd of inferior creatures under the dominion of a master, who keeps them and works them for his own pleasure or profit. If men were so void of reason, and brutish, as to enter into society upon such terms, prerogative might indeed be, what some men would have it, an arbitrary power to do things hurtful to the people.

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§ 164. But since a rational creature cannot be supposed, when free, to put himself into subjection to another, for his own harm; (though, where he finds a good and wise ruler, he may not perhaps think it either necessary or useful to set precise bounds to his power in all things) prerogative can be nothing but the people's permitting their rulers to do several things, of their own free choice, where the law was silent, and sometimes too against the direct letter of the law, for the public good; and their acquiescing in it when so done: for as a good prince, who is mindful of the trust put into his hands, and careful of the good of his people, cannot have too much prerogative, that is, power to do good; so a weak and ill prince, who would claim that power which his predecessors exercised without the direction of the law, as a prerogative belonging to him by right of his office, which he may exercise at his pleasure, to make or promote an interest distinct from that of the public; gives the people an occasion to claim their right, and limit that power, which, whilst it was exercised for their good, they were content should be tacitly allowed.

§ 165. And therefore he that will look into the history of England, will find, that prerogative was always largest in the hands of our wisest and best princes; because the people, observing the whole tendency of their actions to be the public good, contested not what was done without law to that end: or, if any human frailty or mistake (for princes are but men, made as others) appeared in some small declinations from that end; yet it was visible, the main of their conduct tended to nothing but the care of the public. The people, therefore, finding reason to be satisfied with these princes, whenever they acted without, or contrary to the letter of the law, acquiesced in what they did, and, without the least complaint, let them enlarge their prerogative as they pleased; judging rightly, that they did nothing herein to the prejudice of their laws, since they acted conformably to the foundation and end of all laws, the public good.

§ 166. Such God-like princes, indeed, had some title to arbitrary power by that argument, that would prove absolute monarchy the best government, as that which God himself governs the universe by; because such kings partook of his wisdom and goodness. Upon this is founded that saying, That the reigns of good princes have been always most dangerous to the liberties of their people: for when their successors, managing the government with different thoughts, would draw the actions of those good rulers into precedent, and make them the standard of their prerogative, as if what had been done only for the good of the people was a right in them to do for the harm of the people, if they so pleased; it has often occasioned contest, and sometimes public disorders, before the people could recover their original right, and get that to be declared not to be prerogative, which truly was never so: since it is impossible that any body in the society should ever have a right to do the people harm; though it be very possible and reasonable that the people should not go about to set any bounds to the prerogative of those kings or rulers, who themselves transgressed not the bounds of the public good; for "prerogative is nothing but the power of doing public good without a rule."

§ 167. The power of calling parliaments in England, as to precise time, place, and duration, is certainly a prerogative of the king, but still with this trust, that it shall be made use of for the good of the nation, as the exigencies of the times, and variety of occasions shall require: for it being impossible to foresee which should always be the fittest place for them to assemble in, and what the best season, the choice of these was left with the executive power, as might be most subservient to the public good, and best suit the ends of parliaments.

§ 168. The old question will be asked in this matter of prerogative, "But who shall be judge when this power is made a right use of?" I answer: between an executive power in being, with such a prerogative, and a legislative that depends upon his will for their convening, there can be no judge on earth; as there can be none between the legislative and the people, should either the executive or the legislative, when they have got the power in their hands, design or go about to enslave or destroy them. The people have no other remedy in this, as in all other cases where they have no judge on earth, but to appeal to heaven: for the rulers, in such attempts, exercising a power the people never put into their hands (who can never be supposed to consent that any body should rule over them for their harm), do that which they have not a right to do. And where the body of the people, or any single man, is deprived of their right, or under the exercise of a power without right, and have no appeal on earth, then they have a liberty to

appeal to heaven, whenever they judge the cause of sufficient moment. And therefore, though the people cannot be judge, so as to have, by the constitution of that society, any superior power to determine and give effective sentence in the case; yet they have, by a law antecedent and paramount to all positive laws of men, reserved that ultimate determination to themselves which belongs to all mankind, where there lies no appeal on earth, viz. to judge whether they have just cause to make their appeal to heaven.—And this judgment they cannot part with, it being out of a man's power so to submit himself to another, as to give him a liberty to destroy him; God and nature never allowing a man so to abandon himself, as to neglect his own preservation: and since he cannot take away his own life, neither can he give another power to take it. Nor let any one think this lays a perpetual foundation for disorder; for this operates not till the inconveniency is so great that the majority feel it, and are weary of it, and find a necessity to have it amended. But this the executive power, or wise princes, never need come in the danger of: and it is the thing, of all others, they have most need to avoid, as of all others the most perilous.

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## CHAPTER XIX.

### Of the Dissolution of Government.

§ 211. He that will with any clearness speak of the dissolution of government, ought in the first place to distinguish between the dissolution of the society and the dissolution of the government. That which makes the community, and brings men out of the loose state of nature into one politic society, is the agreement which every one has with the rest to incorporate, and act as one body, and so be one distinct commonwealth. The usual, and almost only way whereby this union is dissolved, is the inroad of foreign force making a conquest upon them: for in that case (not being able to maintain and support themselves as one entire and independent body), the union belonging to that body which consisted therein, must necessarily cease, and so every one return to the state he was in before, with a liberty to shift for himself, and provide for his own safety, as he thinks fit, in some other society. Whenever the society is dissolved, it is certain the government of that society cannot remain. Thus conquerors' swords often cut up governments by the roots, and mangle societies to pieces, separating the subdued or scattered multitude from the protection of, and dependence on, that society which ought to have preserved them from violence. The world is too well instructed in, and too forward to allow of, this way of dissolving of governments, to need any more to be said of it; and there wants not much argument to prove, that where the society is dissolved, the government cannot remain; that being as impossible, as for the frame of a house to subsist when the materials of it are scattered and dissipated by a whirlwind, or jumbled into a confused heap by an earthquake.

§ 212. Besides this overturning from without, governments are dissolved from within.

First, When the legislative is altered. Civil society being a state of peace, amongst those who are of it from whom the state of war is excluded by the umpirage, which they have provided in their legislative, for the ending all differences that may arise amongst any of them; it is in their legislative, that the members of a commonwealth are united, and combined together into one coherent living body. This is the soul that gives form, life, and unity to the commonwealth: from hence the several members have their mutual influence, sympathy, and connexion: and therefore, when the legislative is broken or dissolved, dissolution and death follows: for, the essence and union of the society consisting in having one will, the legislative, when once established by the majority, has the declaring, and as it were keeping of that will. The constitution of the legislative is the first and fundamental act of society, whereby provision is made for the continuation of their union, under the direction of persons, and bonds of laws, made by persons authorized thereunto, by the consent and appointment of the people; without which no one man, or number of men, amongst them, can have authority of making laws that shall be binding to the rest. When any one, or more, shall take upon them to make laws, whom the people have not appointed so to do, they make laws without authority, which the people are not therefore bound to obey; by which means they come again to be out of subjection, and may constitute to themselves a new legislative, as they think best, being in full liberty to resist the force of those, who without authority would impose any thing upon them. Every one is at the disposure of his own will, when those who had, by the delegation of the society, the declaring of the

public will, are excluded from it, and others usurp the place, who have no such authority or delegation.

§ 213. This being usually brought about by such in the commonwealth who misuse the power they have, it is hard to consider it aright, and know at whose door to lay it, without knowing the form of government in which it happens. Let us suppose then the legislative placed in the concurrence of three distinct persons.

1. A single hereditary person, having the constant, supreme, executive power, and with it the power of convoking and dissolving the other two, within certain periods of time.

2. An assembly of hereditary nobility.

3. An assembly of representatives chosen, *pro tempore,* by the people. Such a form of government supposed, it is evident.

§ 214. First, That when such a single person, or prince, sets up his own arbitrary will in place of the laws, which are the will of the society, declared by the legislative, then the legislative is changed: for that being in effect the legislative, whose rules and laws are put in execution, and required to be obeyed; when other laws are set up, and other rules pretended, and enforced, than what the legislative, constituted by the society, have enacted, it is plain that the legislative is changed. Whoever introduces new laws, not being thereunto authorized by the fundamental appointment of the society, or subverts the old; disowns and overturns the power by which they were made, and so sets up a new legislative.

§ 215. Secondly, When the prince hinders the legislative from assembling in its due time, or from acting freely, pursuant to those ends for which it was constituted, the legislative is altered: for it is not a certain number of men, no, nor their meeting, unless they have also freedom of debating, and leisure of perfecting, what is for the good of the society, wherein the legislative consists: when these are taken away or altered, so as to deprive the society of the due exercise of their power, the legislative is truly altered: for it is not names that constitute governments, but the use and exercise of those powers that were intended to accompany them; so that he, who takes away the freedom, or hinders the acting of the legislative in its due seasons, in effect takes away the legislative, and puts an end to the government.

§ 216. Thirdly, When, by the arbitrary power of the prince, the electors, or ways of election, are altered, without the consent, and contrary to the common interest of the people, there also the legislative is altered: for if others than those whom the society hath authorized thereunto, do choose, or in another way than what the society hath prescribed, those chosen are not the legislative appointed by the people.

§ 217. Fourthly, The delivery also of the people into the subjection of a foreign power, either by the prince or by the legislative, is certainly a change of the legislative, and so a dissolution of the government: for the end why people entered into society being to be preserved one entire, free, independent society, to be governed by its own laws; this is lost, whenever they are given up into the power of another.

§ 218. Why, in such a constitution as this, the dissolution of the government in these cases is to be imputed to the prince, is evident; because he, having the force, treasure, and offices of the state to employ, and often persuading himself, or being flattered by others, that as supreme magistrate he is uncapable of control; he alone is in a condition to make great advances toward such changes, under pretence of lawful authority, and has it in his hands to terrify or suppress opposers, as factious, seditious, and enemies to the government: whereas no other part of the legislative, or people, is capable by themselves to attempt any alteration of the legislative, without open and visible rebellion, apt enough to be taken notice of; which, when it prevails, produces effects very little different from foreign conquest. Besides, the prince in such a form of government having the power of dissolving the other parts of the legislative, and thereby rendering them private persons, they can never in opposition to him, or without his concurrence, alter the legislative by a law, his consent being necessary to give any of their decrees that sanction. But yet, so far as the other parts of the legislative any way contribute to any attempt upon the government, and do either promote, or not (what lies in them) hinder such designs; they are guilty, and partake in this, which is certainly the greatest crime men can be guilty of one towards another.

§ 219. There is one way more whereby such a government may be dissolved, and that is, when he who has the supreme executive power, neglects and abandons that charge, so that the laws already made can no longer be put in execution. This is demonstratively to reduce all to anarchy, and so effectually to dissolve the gov-

ernment: for laws not being made for themselves, but to be, by their execution, the bonds of the society, to keep every part of the body politic in its due place and function; when that totally ceases, the government visibly ceases, and the people become a confused multitude, without order or connexion. Where there is no longer the administration of justice, for the securing of men's rights, nor any remaining power within the community to direct the force, or provide for the necessities of the public; there certainly is no government left. Where the laws cannot be executed, it is all one as if there were no laws; and a government without laws is, I suppose, a mystery in politics, inconceivable to human capacity, and inconsistent with human society.

§ 220. In these and the like cases, when the government is dissolved, the people are at liberty to provide for themselves, by erecting a new legislative, differing from the other, by the change of persons, or form, or both, as they shall find it most for their safety and good: for the society can never, by the fault of another, lose the native and original right it has to preserve itself; which can only be done by a settled legislative, and a fair and impartial execution of the laws made by it. But the state of mankind is not so miserable that they are not capable of using this remedy, till it be too late to look for any. To tell people they may provide for themselves, by erecting a new legislative, when by oppression, artifice, or being delivered over to a foreign power, their old one is gone, is only to tell them, they may expect relief when it is too late, and the evil is past cure. This is in effect no more than to bid them first be slaves, and then to take care of their liberty; and when their chains are on, tell them they may act like freemen. This, if barely so, is rather mockery than relief; and men can never be secure from tyranny, if there be no means to escape it till they are perfectly under it; and therefore it is, that they have not only a right to get out of it, but to prevent it.

§ 221. There is therefore, secondly, another way whereby governments are dissolved, and that is, when the legislative, or the prince, either of them act contrary to their trust.

First, the legislative acts against the trust reposed in them, when they endeavour to invade the property of the subject, and to make themselves, or any part of the community, masters, or arbitrary disposers of the lives, liberties, or fortunes of the people.

§ 222. The reason why men enter into society is the preservation of their property; and the end why they choose and authorize a legislative is, that there may be laws made, and rules set, as guards and fences to the properties of all the members of the society: to limit the power, and moderate the dominion, of every part and member of the society: for since it can never be supposed to be the will of the society that the legislative should have a power to destroy that which every one designs to secure by entering into society, and for which the people submitted themselves to legislators of their own making; whenever the legislators endeavour to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge, which God hath provided for all men, against force and violence. Whensoever therefore the legislative shall transgress this fundamental rule of society; and either by ambition, fear, folly, or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties, and estates of the people; by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and, by the establishment of a new legislative, (such as they shall think fit) provide for their own safety and security, which is the end for which they are in society. What I have said here, concerning the legislative in general, holds true also concerning the supreme executor, who having a double trust put in him, both to have a part in the legislative, and the supreme execution of the law, acts against both, when he goes about to set up his own arbitrary will as the law of the society. He acts also contrary to his trust, when he either employs the force, treasure, and offices of the society to corrupt the representatives, and gain them to his purposes; or openly pre-engages the electors, and prescribes to their choice, such, whom he has, by solicitations, threats, promises, or otherwise, won to his designs; and employs them to bring in such, who have promised beforehand what to vote, and what to enact. Thus to regulate candidates and electors, and new-model the ways of election, what is it but to cut up the government by the roots, and poison the very fountain of public security? for the people having reserved to themselves the choice of their

representatives, as the fence to their properties, could do it for no other end, but that they might always be freely chosen, and so chosen, freely act, and advise, as the necessity of the commonwealth and the public good should, upon examination and mature debate, be judged to require. This, those who give their votes before they hear the debate, and have weighed the reasons on all sides, are not capable of doing. To prepare such an assembly as this, and endeavour to set up the declared abettors of his own will, for the true representatives of the people, and the law-makers of the society, is certainly as great a breach of trust, and as perfect a declaration of a design to subvert the government, as is possible to be met with. To which if one shall add rewards and punishments visibly employed to the same end, and all the arts of perverted law made use of, to take off and destroy all that stand in the way of such a design, and will not comply and consent to betray the liberties of their country, it will be past doubt what is doing. What power they ought to have in the society, who thus employ it contrary to the trust that went along with it in its first institution, is easy to determine; and one cannot but see, that he, who has once attempted any such thing as this, cannot any longer be trusted.

§ 223. To this perhaps it will be said, that the people being ignorant, and always discontented, to lay the foundation of government in the unsteady opinion and uncertain humour of the people, is to expose it to certain ruin; and no government will be able long to subsist, if the people may set up a new legislative, whenever they take offence at the old one. To this I answer, quite the contrary. People are not so easily got out of their old forms, as some are apt to suggest. They are hardly to be prevailed with to amend the acknowledged faults in the frame they have been accustomed to. And if there be any original defects, or adventitious ones introduced by time, or corruption; it is not an easy thing to get them changed, even when all the world sees there is an opportunity for it. This slowness and aversion in the people to quit their old constitutions, has in the many revolutions, which have been seen in this kingdom, in this and former ages, still kept us to, or, after some interval of fruitless attempts, still brought us back again to, our old legislative of king, lords, and commons: and whatever provocations have made the crown be taken from some of our princes' heads, they never carried the people so far as to place it in another line.

§ 224. But it will be said, this hypothesis lays a ferment for frequent rebellion. To which I answer,

First, No more than any other hypothesis: for when the people are made miserable, and find themselves exposed to the ill usage of arbitrary power, cry up their governors as much as you will, for sons of Jupiter; let them be sacred and divine, descended, or authorized from heaven; give them out for whom or what you please, the same will happen. The people generally ill-treated, and contrary to right, will be ready upon any occasion to ease themselves of a burden that sits heavy upon them. They will wish, and seek for the opportunity, which in the change, weakness, and accidents of human affairs, seldom delays long to offer itself. He must have lived but a little while in the world, who has not seen examples of this in his time; and he must have read very little, who cannot produce examples of it in all sorts of governments in the world.

§ 225. Secondly, I answer, such revolutions happen not upon every little mismanagement in public affairs. Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty, will be borne by the people without mutiny or murmur. But if a long train of abuses, prevarications, and artifices, all tending the same way, make the design visible to the people, and they cannot but feel what they lie under, and see whither they are going; it is not to be wondered, that they should then rouse themselves, and endeavour to put the rule into such hands which may secure to them the ends for which government was at first erected; and without which, ancient names, and specious forms, are so far from being better, that they are much worse, than the state of nature, or pure anarchy; the inconveniencies, being all as great and as near, but the remedy farther off and more difficult.

§ 226. Thirdly, I answer, that this doctrine of a power in the people of providing for their safety anew, by a new legislative, when their legislators have acted contrary to their trust, by invading their property, is the best fence against rebellion, and the probablest means to hinder it: for rebellion being an opposition, not to persons, but authority, which is founded only in the constitutions and laws of the government; those, whoever they be, who by force break through, and by force justify their violation of them, are truly and properly rebels: for when men, by entering into society and civil government, have

excluded force, and introduced laws for the preservation of property, peace, and unity amongst themselves; those who set up force again in opposition to the laws, do *rebellare,* that is, bring back again the state of war, and are properly rebels: which they who are in power, (by the pretence they have to authority, the temptation of force they have in their hands, and the flattery of those about them) being likeliest to do; the properest way to prevent the evil is to show them the danger and injustice of it, who are under the greatest temptation to run into it.

§ 227. In both the fore-mentioned cases, when either the legislative is changed, or the legislators act contrary to the end for which they were constituted, those who are guilty are guilty of rebellion: for if any one by force takes away the established legislative of any society, and the laws by them made pursuant to their trust, he thereby takes away the umpirage, which every one had consented to, for a peaceable decision of all their controversies, and a bar to the state of war amongst them. They, who remove, or change the legislative, take away this decisive power, which nobody can have but by the appointment and consent of the people; and so destroying the authority which the people did, and nobody else can set up, and introducing a power which the people hath not authorized, they actually introduce a state of war, which is that of force without authority; and thus, by removing the legislative established by the society (in whose decisions the people acquiesced and united, as to that of their own will) they untie the knot, and expose the people anew to the state of war. And if those, who by force take away the legislative, are rebels, the legislators themselves, as has been shown, can be no less esteemed so; when they, who were set up for the protection and preservation of the people, their liberties and properties, shall by force invade and endeavour to take them away; and so they putting themselves into a state of war with those who made them the protectors and guardians of their peace, are properly, and with the greatest aggravation, *rebellantes,* rebels.

§ 228. But if they, who say, "it lays a foundation for rebellion," mean that it may occasion civil wars, or intestine broils, to tell the people they are absolved from obedience when illegal attempts are made upon their liberties or properties, and may oppose the unlawful violence of those who were their magistrates, when they invade their properties contrary to the trust put in them; and that therefore this doctrine is not to be allowed, being so destructive to the peace of the world: they may as well say, upon the same ground, that honest men may not oppose robbers or pirates, because this may occasion disorder or bloodshed. If any mischief come in such cases, it is not to be charged upon him who defends his own right, but on him that invades his neighbour's. If the innocent honest man must quietly quit all he has, for peace sake, to him who will lay violent hands upon it, I desire it may be considered, what a kind of peace there will be in the world, which consists only in violence and rapine; and which is to be maintained only for the benefit of robbers and oppressors. Who would not think it an admirable peace betwixt the mighty and the mean, when the lamb, without resistance, yielded his throat to be torn by the imperious wolf? Polyphemus's den gives us a perfect pattern of such a peace, and such a government, wherein Ulysses and his companions had nothing to do, but quietly to suffer themselves to be devoured. And no doubt Ulysses, who was a prudent man, preached up passive obedience, and exhorted them to a quiet submission, by representing to them of what concernment peace was to mankind; and by showing the inconveniencies might happen, if they should offer to resist Polyphemus, who had now the power over them.

§ 229. The end of government is the good of mankind: and which is best for mankind that the people should be always exposed to the boundless will of tyranny; or that the rulers should be sometimes liable to be opposed, when they grow exorbitant in the use of their power, and employ it for the destruction, and not the preservation of the properties of their people?

§ 230. Nor let any one say, that mischief can arise from hence, as often as it shall please a busy head, or turbulent spirit, to desire the alteration of the government. It is true, such men may stir, whenever they please; but it will be only to their own just ruin and perdition: for till the mischief be grown general, and the ill designs of the rulers become visible, or their attempts sensible to the greater part, the people, who are more disposed to suffer than right themselves by resistance, are not apt to stir. The examples of particular injustice or oppression, of here and there an unfortunate man, moves them not. But if they universally have a persuasion, grounded upon

manifest evidence, that designs are carrying on against their liberties, and the general course and tendency of things cannot but give them strong suspicions of the evil intention of their governors, who is to be blamed for it? Who can help it, if they, who might avoid it, bring themselves into this suspicion? Are the people to be blamed, if they have the sense of rational creatures, and can think of things no otherwise than as they find and feel them? And is it not rather their fault, who put things into such a posture, that they would not have them thought to be as they are? I grant, that the pride, ambition, and turbulency of private men have sometimes caused great disorders in commonwealths, and factions have been fatal to states and kingdoms. But whether the mischief hath oftener begun in the people's wantonness, and a desire to cast off the lawful authority of their rulers, or in the rulers' insolence, and endeavours to get and exercise an arbitrary power over their people; whether oppression, or disobedience, gave the first rise to the disorder; I leave it to impartial history to determine. This I am sure, whoever, either ruler or subject, by force goes about to invade the rights of either prince or people, and lays the foundation for overturning the constitution and frame of any just government, is highly guilty of the greatest crime, I think, a man is capable of; being to answer for all those mischiefs of blood, rapine, and desolation, which the breaking to pieces of governments bring on a country. And he who does it, is justly to be esteemed the common enemy and pest of mankind, and is to be treated accordingly.

§ 231. That subjects or foreigners, attempting by force on the properties of any people, may be resisted with force, is agreed on all hands. But that magistrates, doing the same thing, may be resisted, hath of late been denied: as if those who had the greatest privileges and advantages by the law, had thereby a power to break those laws, by which alone they were set in a better place than their brethren: whereas their offence is thereby the greater, both as being ungrateful for the greater share they have by the law, and breaking also that trust, which is put into their hands by their brethren.

§ 232. Whosoever uses force without right, as every one does in society, who does it without law, puts himself into a state of war with those against whom he so uses it; and in that state all former ties are cancelled, all other rights cease, and every one has a right to defend himself, and to resist the aggressor. This is so evident, that Barclay[79] himself, that great asserter of the power and sacredness of kings, is forced to confess, that it is lawful for the people, in some cases, to resist their king; and that too in a chapter, wherein he pretends to show, that the divine law shuts up the people from all manner of rebellion. Whereby it is evident, even by his own doctrine, that, since they may in some cases resist, all resisting of princes is not rebellion. . . .

[79] [Ed. note] William Barclay, c. 1546–1608; Scottish jurist and political theorist who wrote in Latin. Even more than Filmer, it may be appropriate to say that Locke rescued him from (complete?) oblivion.

# THE COLONIAL PERIOD

- MAYFLOWER COMPACT
- THE LAWS AND LIBERTIES OF MASSACHUSETTS
- FRAME OF GOVERNMENT
- SOUTH CAROLINA SLAVE CODE

The development of the law in the thirteen American colonies between 1620 and 1776 was marked by the willingness of the colonists to apply elements of English common law and to devise new, and often simpler, ways of handling legal matters. Because many of the colonial settlements were geographically isolated, the law varied from place to place, and local traditions, customs, religious beliefs, and economic conditions often played major roles in shaping the law.

The Pilgrims who left England in 1620 to settle in Massachusetts were escaping from religious intolerance and persecution. Their religious beliefs, rooted in a strict version of Protestantism, led them to create a government that was dominated by the church leadership. By the beginning of the eighteenth century, however, Massachusetts had become a more heterogeneous and secular society with a growing commercial class that created a demand for trained lawyers and judges.

Other colonies were shaped by different traditions. In Pennsylvania the Quakers played a decisive role in the development of law and social arrangements. In the southern colonies, law became an instrument to support the institution of slavery. Laws in slaveholding colonies presumed that slaves were chattel (personal property) rather than human beings.

# THE COLONIAL PERIOD

## Mayflower Compact

In 1620 the ship *Mayflower* departed from England for the New World. Many of those on board were religious dissenters, known then as Separatists and later as Pilgrims or Puritans, who preferred to separate altogether from the Church of England rather than try to change the church as other dissenters attempted to do. The passengers also included emigrants who were not members of the Separatist congregation. The combined group of Separatists and "strangers," as they were called by the Separatists, had obtained a charter from the Virginia Company of London, giving them permission to settle within the boundaries of the colony of Virginia.

The *Mayflower,* however, did not reach Virginia. Instead, it arrived off the coast of what is now Cape Cod, Massachusetts, which was not within the boundaries of any established colonial government. The strangers asserted that they would not be bound by any laws, but WILLIAM BRADFORD, the Separatists' leader, insisted that all male passengers sign an agreement to abide by the laws that the colonial leaders would establish at the colony they called Plymouth.

On November 21, 1620, forty-one adult male passengers signed the Mayflower Compact. The compact served as a device to preserve order and establish rules for self-government. The signers agreed to combine themselves into a "civil Body Politick" that would enact and obey "just and equal laws" that were made for the "general good of the colony." This commitment to justice and equality would be reiterated in many later documents, including the U.S. Constitution.

### Mayflower Compact

In the name of God, amen. We, whose names are underwritten, the loyal subjects of our dread sovereign lord King James, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. Having undertaken for the glory of God, and advancement of the Christian faith, and the honor of our king and country, a voyage to plant the first colony in the northern parts of Virginia, do by these presents, solemnly and mutually, in the presence of God and one another, covenant and combine ourselves together into a civil body politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof do enact, constitute, and frame such just and equal laws, ordinances, acts, constitutions, and officers, from time to time, as shall be thought most meet and convenient for the general good of the colony; unto which we promise all due submission and obedience. In witness whereof we have hereunto subscribed our names at Cape Cod the eleventh of November, in the reign of our sovereign lord King James, of England, France, and Ireland, the eighteenth, and of Scotland, the fifty-fourth, anno Domini, 1620.[1]

Source: Ben Perley Poore, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States,* vol. 1 (1878), p. 931.

[1] English monarchs styled themselves king or queen of France between 1340 and 1801. The custom began when the English became embroiled in the Hundred Years War with France and King Edward III of England, whose mother was a French princess, claimed the French throne.

Mr. John Carver
Mr. William Bradford
Mr. Edward Winslow
Mr. William Brewster
Isaac Allerton
Miles Standish
John Alden
John Turner
Francis Eaton
James Chilton
John Craxton
John Billington
Joses Fletcher
John Goodman
Mr. Samuel Fuller
Mr. Christopher Martin
Mr. William Mullins
Mr. William White
Mr. Richard Warren
John Howland
Mr. Steven Hopkins
Digery Priest
Thomas Williams
Gilbert Winslow
Edmund Margesson
Peter Brown
Richard Bitteridge
George Soule
Edward Tilly
John Tilly
Francis Cooke
Thomas Rogers
Thomas Tinker
John Ridgdale
Edward Fuller
Richard Clark
Richard Gardiner
Mr. John Allerton
Thomas English
Edward Doten
Edward Liester

# THE COLONIAL PERIOD

## The Laws and Liberties of Massachusetts

The Laws and Liberties of Massachusetts, enacted in 1648, served as the basis for civil and criminal law in the colony until the eighteenth century. This code was a revision of a 1641 code known as *The Body of Liberties,* which was written by NATHANIEL WARD, a Puritan minister and teacher. The Laws and Liberties reflect the Puritans' concern that members of the community should live a Christian life true to the principles of the sect. Laws were meant to guide the righteous and punish the wicked, but they were also to be administered fairly. Religious heresy was severely punished as were fornication, adultery, and other behavior that violated the moral teachings of the colonists. Nevertheless, the code mandated that individuals could not be punished or penalized without DUE PROCESS OF LAW.

### The Laws and Liberties of Massachusetts

To Our Beloved Brethren and Neighbours
the Inhabitants of the Massachusetts, the Governour,
Assistants and Deputies assembled in the General Court
of that Jurisdiction with grace and peace in our
Lord Jesus Christ

So soon as God had set up Political Government among his people Israel he gave them a body of laws for judgment both in civil and criminal causes. These were brief and fundamental principles, yet withall so full and comprehensive as out of them clear deductions were to be drawn to all particular cases in future times. For a Commonwealth without lawes is like a Ship without rigging and steeradge. Nor is it sufficient to have principles or fundamentalls, but these are to be drawn out into so many of their deductions as the time and conditions of that people may have use of. And it is very unsafe & injurious to the body of the people to put them to learn their duty and libertie from generall rules, nor is it enough to have lawes except they be also just. Therefore among other priviledges which the Lord bestowed upon his peculiar people, these he calls them specially to consider of, that God was neerer to them and their lawes were more righteous then other nations. God was sayd to be amongst them or neer to them because of his Ordinances established by himselfe, and their lawes righteous because himselfe was their Lawgiver: yet in the comparison are implyed two things, first that other nations had something of Gods presence amongst them. Secondly that there was also somewhat of equitie in their lawes, for it pleased the Father (upon the Covenant of Redemption with his Son) to restore so much of his Image to lost man as whereby all nations are disposed to worship God, and to advance righteousness: … They did by nature the things contained in the law of God. But the nations corrupting his Ordinances (both of Religion, and Justice) God withdrew his presence from them proportionably whereby they vvere given up to abominable lusts. … Wheras if they had vvalked according to that light & lavv of nature they might have been preserved from such moral evils and might have injoyed common blessing in all their natural and civil Ordinances: now, if it might have been so

with the nations who were so much strangers to the Covenant of Grace, what advantage have they who have interests in this Covenant, and may injoye the special presence of God in the puritie and native simplicitie of all his Ordinances by which he is so neer to his owne people. This hath been no small priviledge, and advantage to us New-England that our Churches, and civil State have been planted and growne up (like two vines) together like that of Israel in the vvilderness by which we were put in minde (and had opportunity put into our hands) not only to gather our Churches, and set up the Ordinances of Christ Jesus in them according to the Apostolick patterne by such lights as the Lord graciously afforded us: but also withall to frame our civil Politie, and lawes according to the rules of his most holy word whereby each do help and strengthen other (the Churches the civil Authoritie, and the Civil Authoritie the Churches) and so both prosper the better without such emulation, and contention for priviledges or priority as have proved the misery (if not ruine) of both in other places.

* * *

These Lawes which were made successively in divers former years, we have reduced under several heads in an alphabeticall method, that so they might the more readilye be found … wherin (upon every occasion) you might readily see the rule which you ought to walke by.

* * *

You have called us from among the rest of our Bretheren and given us power to make the lawes: we must now call upon you to see them executed: remembring that old & true proverb, The execution of the law is the life of the law. If one sort of you viz: non-Freemen should object that you had no hand in calling us to this worke, and therfore think yourselvs not bound to obedience &c. Wee answer that a subsequent, or implicit consent is of like force in this case, as an express precedent power: for in puting your persons and estates into the protection and way of subsistance held forth and exercised within this Jursidiction, you doe tacitly submit to this Government and to all the wholesome lawes thereof[.]

* * *

If any of you meet with some law that seemes not to tend to your particular benefit, you must consider that lawes are made with respect to the whole people, and not to each particular person: and obedience to them must be yielded with respect to the common welfare, not to thy private advantage, and as thou yeildest obedience to the law for common good, but to thy disadvantage: so another must observe some other law for thy good, though to his own damage; thus must we be content to bear one anothers burden and so fullfill the Law of Christ.

That distinction which is put between the Lawes of God and the lawes of men, becomes a snare to many as it is mis-applyed in the ordering of their obedience to civil Authoritie; for when the Authoritie is of God and that in way of an Ordinance … and when the administration of it is according to deductions, and rules gathered from the word of God, and the clear light of nature in civil nations, surely there is no humane law that tendeth to common good (according to those principles) but the same is mediately a law of God, and that in way of an Ordinance which all are to submit unto and that for conscience sake. . . .

THE
BOOK OF THE GENERAL LAVVES AND
LIBERTYES CONCERNING &C:

Forasmuch as the free fruition of such Liberties, Immunities, priviledges as humanitie, civilitie & christianity call for as due to everie man in his place, & proportion, without impeachment & infringement hath ever been, & ever will be the tranquility & stability of Churches & Comonwealths; & the deniall or deprivall thereof the disturbance, if not ruine of both:

It is therefore ordered by this Court, & Authority thereof, That no mans life shall be taken away; no mans honour or good name shall be stayned; no mans person shall be arrested, restrained, bannished, dismembered nor any wayes punished; no man shall be deprived of his wife or children; no mans goods or estate shal be taken away from him; nor any wayes indamaged under colour of Law or countenance of Authoritie unless it be by the vertue or equity of some expresse law of the Country warranting the same established by a General Court & sufficiently published; or in case of the defect of a law in any particular case by the word of God. And in capital cases, or cases concerning dismembring or banishment according to that word to be judged by the General Court.

# THE COLONIAL PERIOD

## Frame of Government

William Penn, 1682

In 1681 King Charles II of England granted William Penn a large tract of land on the west bank of the Delaware River, which Penn named Pennsylvania in honor of his father. Penn, a member and intellectual leader of the Quakers (Society of Friends), saw Pennsylvania as a refuge for Quakers and other persecuted peoples.

Penn believed in religious toleration on both pragmatic and moral grounds. He thought that a harmonious society, unhampered by intolerance, would be a prosperous society as well. In 1682, before he left England to become the first governor of Pennsylvania, Penn wrote the Frame of Government, which served as the colony's first constitution.

The Frame of Government was an expression of Penn's religious and political ideas. He sought to create a framework that would frustrate political mischief and prevent a ruler from assuming absolute power to the detriment of the community. To prevent absolutism, Penn employed the concept of balancing forces, a concept that the Framers of the U.S. Constitution later would use liberally. Freedom of worship was to be absolute, and all the traditional English rights were to be protected.

In practice, the government outlined in the Frame of Government proved in some respects to be unworkable. Penn, however, had included an amending clause, the first in any written constitution, so that the Frame of Government could be changed as circumstances required.

### Frame of Government

#### PREFACE

I know what is said by the several admirers of monarchy, aristocracy and democracy, which are the rule of one, a few, and many, and are the three common ideas of government, when men discourse on the subject. But I chuse to solve the controversy with this small distinction, and it belongs to all three: Any government is free to the people under it (whatever be the frame) where the laws rule, and the people are a party to those laws, and more than this is tyranny, oligarchy, or confusion. . . .

* * *

Governments, like clocks, go from the motion men give them; and as governments are made and moved by men, so by them they are ruined too. Wherefore governments rather depend upon men, than men upon governments. Let men be good, and the government cannot be bad; if it be ill, they will cure it. But, if men be bad, let the government be never so good, they will endeavor to warp and spoil it to their turn.

I know some say, let us have good laws, and no matter for the men that execute them: but let them consider, that though good laws do well, good men do better: for good laws may want good men, and be abolished or evaded by ill men: but good men will never want good laws, nor suffer ill ones. It is true, good laws have some awe upon ill ministers, but that is where they have not power to escape or abolish them,

and the people are generally wise and good: but a loose and depraved people (which is the question) love laws and an administration like themselves. That, therefore, which makes a good constitution, must keep it, viz: men of wisdom and virtue, qualities, that because they descend not with worldly inheritances, must be carefully propagated by a virtuous education of youth; for which after ages will owe more to the care and prudence of founders, and the successive magistracy, than to their parents, for their private patrimonies. . . .

* * *

But, next to the power of necessity (which is a solicitor, that will take no denial) this induced me to a compliance, that we have (with reverence to God, and good conscience to men) to the best of our skill contrived and composed to the frame and laws of this government, to the great end of all government, viz: To support power in reverence with the people and to secure the people from the abuse of power; that they may be free by their just obedience, and the magistrates honourable, for their administration: for liberty without obedience is confusion, and obedience without liberty is slavery. To carry this evenness is partly owing to the constitution, and partly to the magistracy: where either of these fail, government will be subject to convulsions; but where both are wanting, it must be totally subverted; then where both meet, the government is like to endure. Which I humbly pray and hope God will please to make the lot of this Pensilvania. Amen.

# THE COLONIAL PERIOD

## South Carolina Slave Code

The southern colonies relied on slave labor to cultivate the cash crops raised on large plantations. The first slave ships reached the colonies in the 1620s, and by the end of the century, the slave trade between West Africa and the southern colonies was thriving.

The social and legal relations between the English colonists and the African slaves were governed by racial beliefs and economics. Since the first meetings of West Africans and Europeans, Europeans had judged Africans to be their cultural inferiors. This belief shaped the slave codes that the colonies began to enact in the late seventeenth century. Africans were human chattel with no civil rights.

The South Carolina Slave Code of 1740 reflected concerns about controlling slaves. Section X authorized a white person to detain and examine any slave found outside a house or plantation who was not accompanied by a white person. Section XXXVI prohibited slaves from leaving their plantation, especially on Saturday nights, Sundays, and holidays. Slaves who violated the law could be subjected to a "moderate whipping." Section XLV prohibited white persons from teaching slaves to read and write.

Criminal behavior by slaves, especially actions directed against white persons, was severely punished under the code. Section IX provided that in the case of a capital crime, a slave must be brought to trial in a summary proceeding within three days of apprehension. Under section XVII, the killing of a white person by a slave was a capital crime, but section XXXVII treated a white person who killed a slave quite differently. Willfull murder of a slave was punished by a fine of 700 pounds. Killing a slave "on a sudden heat of passion" resulted in a fine of 350 pounds.

The code did recognize that slaves were entitled to a sufficient level of food, clothing, and shelter. Section XXXVIII permitted a complaint to be filed against a slave owner who was derelict in providing the necessities. A court could order the owner to provide relief to the slaves. Likewise, section XLIV authorized the fining of slave owners who worked their slaves more than fifteen hours a day during the hottest time of the year.

### South Carolina Slave Code

#### AN ACT FOR THE BETTER ORDERING AND GOVERNING [OF]

#### NEGROES AND OTHER SLAVES IN THIS PROVINCE

Whereas in his majesty's plantations in America, slavery has been introduced and allowed; and the people commonly called negroes, Indians, mulatos and mestizos have [been] deemed absolute slaves, and the subjects of property in the hands of particular persons the extent of whose power over slaves ought to be settled and limited by positive laws so that the slaves may be kept in due subjection and obedience, and the owners and other persons having the care and government of slaves, may be restrained from exercising too great rigour and cruelty over them; and that the public peace and order of this Province may be preserved:

Be it enacted, that all negroes, Indians (free Indians in amity with this government, and negroes, mulatos and mestizos who are now free excepted) mulatos or mestizos who now are or shall hereafter be in this Province, and all their issue and offspring born or to be born, shall be and they are hereby declared to be and remain for ever herafter absolute slaves, and shall follow the condition of the mother; and shall be deemed, … taken, reputed and adjudged in law to be chattels personal in the hands of their owners and possessors and their executors, administrators and assigns to all intents, constructions and purposes whatsoever, Provided that if any negro Indian mulato, or mestizo shall claim his or her freedom, it shall and may be lawful for such negro, Indian, mulato, or mestizo, or any person or persons whatsoever, on his or her behalf to apply to the justices of his Majesty's court of common pleas by petition or motion, either during the sitting of the said court, or before any of the justices of the same court at any time in the vacation. And the said court or any of the justices thereof, shall and they are hereby fully impowered to admit any person so applying, to be guardian for any negro, Indian, mulato or mestizo, claiming his, her or their freedom, and such guardians shall be enabled, intitled and capable in law to bring an action of trespass, in the nature of ravishment of ward against any person who shall claim property in, or who shall be in possession of any such negro, Indian, mulato or mestizo.

* * *

Provided that in any action or suit to be brought in pursuance of the direction of this act the burthen of the proof shall lay upon the plaintiff, and it shall be always presumed, that every negro, Indian, mulato, and mestizo, is a slave unless the contrary can be made appear (the Indians in amity with this government excepted) in which case the burden of the proof shall lie on the defendant.

* * *

III. And for the better keeping slaves in due order and subjection: be it further enacted that no person whatsoever, shall permit or suffer any slave under his or their care or management, and who lives, or is employed in Charlestown, or any other town in this Province to go out of the limits of the said town, or any such slave, who lives in the country to go out of the plantation to which such slave belongs, or in which plantation such slave is usually employed, without a letter subscribed and directed, or a ticket in the words following. . . .

* * *

V. If any slave who shall be out of the house or plantation where such slave shall live or shall be usually employed, or without some white person in company with such slave, shall refuse to submit or to undergo the examination of any white person, it shall be lawful for any such white Person to pursue, apprehend and moderately correct such slave; and if such slave shall assault and strike such white person, such slave may be lawfully killed.

* * *

IX. And whereas natural justice forbids, that any person of what condition soever should be condemned unheard, and the order of civil government requires that for the due and equal administration of justice, some convenient method and form of trial should be established, Be it therefore enacted, that all crimes and offences which shall be committed by slaves in this Province and for which capital punishment shall or lawfully may be inflicted, shall be heard, examined, tried, adjudged, and finally determined by any 2 justices assigned to keep the peace, and any number of freeholders not less than 3 or more than 5 in the county where the offence shall be committed and can be most conveniently assembled; either of which justices, on complaint made or information received of any such offence committed by a slave, shall commit the offender to the safe custody of the constable of the parish where such offence shall be committed, and shall without delay by warrant under his hand and seal, call to his assistance, and request any one of the nearest justices of the peace to associate with him; and shall by the same warrant summon such a number of the neighbouring freeholders as aforesaid, to assemble and meet together with the said justices, at a certain day and place not exceeding 3 days after the apprehending of such slave or slaves: and the justices and freeholders being so assembled, shall cause the slave accused or charged, to be brought before them, and shall hear the accusations which shall be brought against such slave, and his or her defence, and shall proceed to the examination of witnesses, and other evidence, and finally hear and determine the matter brought before them, in the most summary and expeditious manner; and in case the offender

shall be convicted of any crime for which by law the offender ought to suffer death, the said justices shall give judgment, and award and cause execution of their sentence to be done, by inflicting such manner of death, and at such time as the said justices, by and with the consent of the freeholders shall direct, and which they shall judge will be most effectual to deter others from offending in the like manner.

* * *

[XVI.] Be it therefore enacted, that the several crimes and offences hereinafter particularly enumerated, are hereby declared to be felony without the benefit of the clergy, That is to say, If any slave, free negro, mulatto, Indian, or mestizo, shall willfully and maliciously burn or destroy any stack of rice, corn or other grain, of the product, growth or manufacture of this Province; or shall willfully and maliciously set fire to, burn or destroy any tar kiln, barrels of pitch, tar, turpentine or rosin, or any other of the goods or commodities of the growth, produce or manufacture of this Province; or shall feloniously steal, take or carry away any slave, being the property of another, with intent to carry such slave out of this Province; or shall willfully and maliciously poison, or administer any poison to any person, free man, woman, servant or slave; every such slave, free negro, mulatto, Indian (except as before excepted) and mestizo, shall suffer death as a felon.

XVII. Any slave who shall be guilty of homicide of any sort, upon any white person, except by misadventure or in defence of his master or other person under whose care and government such slave shall be, shall upon conviction thereof as aforesaid, suffer death. And every slave who shall raise or attempt to raise an insurrection in this Province, or shall endeavor to delude or entice any slave to run away and leave this Province; every such slave and slaves, and his and their accomplices, aiders and abettors, shall upon conviction as aforesaid suffer death. Provided always, That it shall and may be lawful to and for the justices who shall pronounce sentence against such slaves, and by and with the advice and consent of the freeholders as aforesaid, if several slaves shall receive sentence at one time, to mitigate and alter the sentence of any slave other than such as shall be convicted of the homicide of a white person, who they shall think may deserve mercy, and may inflict such corporal punishment (other than death) on any such slave, as they in their discretion shall think fit, any thing herein contained to the contrary thereof in any wise notwithstanding. Provided, That one or more of the said slaves who shall be convicted of the crimes or offences aforesaid, where several are concerned, shall be executed for example, to deter others from offending in the like kind.

* * *

XXXIII. And whereas several owners of slaves do suffer their slaves to go and work where they please, upon condition of paying to their owners certain sums of money agreed upon between the owner and slave; which practice occasioned such slaves to pilfer and steal to raise money for their owners, as well as to maintain themselves in drunkenness and evil courses; for prevention of which practices for the future, Be it enacted, that no owner, master or mistress of any slave, after the passing of this act, shall permit or suffer any of his, her or their slaves to go and work out of their respective houses or families, without a ticket in writing under pain of forfeiting the sum of current money, for every such offence.

* * *

XXXVI. And for that as it is absolutely necessary to the safety of this Province, that all due care be taken to restrain the wanderings and meetings of negroes and other slaves, at all times, and more especially on Saturday nights, Sundays and other holidays, and the using and carrying wooden swords, and other mischievous and dangerous weapons, or using and keeping of drums, horns, or other loud instruments, which may call together or give sign or notice to one another of their wicked designs and purposes; and that all masters, overseers and others may be enjoined diligently and carefully to prevent the same, Be it enacted, that it shall be lawfull for all masters, overseers and other persons whomsoever, to apprehend and take up any negro or other slave that shall be found out of the plantation of his or their master or owner, at any time, especially on Saturday nights, Sundays or other holidays, not being on lawful business, and with a letter from their master or a ticket, or not having a white person with them, and the said negro or other slave or slaves correct by a moderate whipping.

XXXVII. And whereas cruelty is not only highly unbecoming those who profess them-

selves Christians, but is odious in the eyes of all men who have any sense of virtue or humanity; therefore to restrain and prevent barbarity being exercised toward slaves, Be it enacted, That if any person or persons whosoever, shall willfully murder his own slave, or the slave of another person, every such person shall upon conviction thereof, forfeit and pay the sum of £700 current money, and shall be rendered, and is hereby declared altogether and forever incapable of holding, exercising, enjoying or receiving the profits of any office, place or employment civil or military within this Province: … And if any person shall on a sudden heat of passion, or by undue correction, kill his own slave or the slave of any person, he shall forfeit the sum of £350 current money, And in case any person or persons shall wilfully cut out the tongue, put out the eye, castrate or cruelly scald, burn, or deprive any slave of any limb or member, or shall inflict any other cruel punishment, other than by whipping or beating with a horsewhip, cowskin, switch or small stick, or by putting irons on, or confining or imprisoning such slave; every such person shall for every such offence, forfeit the sum of £100 current money.

XXXVIII. That in case any person in this Province, who shall be owner, or who shall have the care government or charge of any slave, or slaves, shall deny, neglect or refuse to allow such slave or slaves under his or her charge, sufficient cloathing, covering or food, it shall and may be lawfull for any person or persons, on behalf of such slave or slaves, to make complaint to the next neighbouring justice in the parish where such slave or slaves live, or are usually employed; and if there shall be no justice in the parish, then to the next justice in nearest parish: and the said justice shall summon the party against whom such complaint shall be made, and shall enquire of, hear and determine the same: and if the said justice shall find the said complaint to be true, or that such person will not exculpate or clear himself from the charge, by his or her own oath, which such person shall be at liberty to do in all cases where positive proof is not given of the offence, such justice shall and may make such orders upon the same for the relief of such slave or slaves, as he in his discretion shall think fit, and shall and may let and impose a fine or penalty on any person who shall offend in the premises, in any sum not exceeding £20 current money, for each offence.

* * *

XLIV. And whereas many owners of slaves, and others who have the care, management and overseeing of slaves, do confine them so closely to hard labour; that they have not sufficient time for natural rest—Be it therefore enacted, That if any owner of slaves, or other person who shall have the care, management, or overseeing of any slaves, shall work or put any such slave or slaves to labour, more than 15 hours in 24 hours, from the 25th day of March to the 25th day of September, or more than 14 hours in 24 hours, from the 25th day of September to the 25th day of March; every such person shall forfeit any sum not exceeding or under £20, nor under £5 current money, for every time he, she or they shall offend herein, at the discretion of the justice before whom the complaint shall be made.

XLV. And whereas the having of slaves taught to write, or suffering them to be employed in writing, may be attended with great inconveniences; Be it enacted, that all and every person and persons whatsoever, who shall hereafter teach, or cause any slave or slaves to be taught to write, or shall use or employ any slave as a scribe in any manner of writing whatsoever, hereafter taught to write; every such person and persons shall, for every such offence, forfeit the sum of £100 current money.

# CONFLICT AND REVOLUTION

- STAMP ACT
- TOWNSHEND ACTS
- DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS
- COMMON SENSE
- VIRGINIA DECLARATION OF RIGHTS
- DECLARATION OF INDEPENDENCE
- TREATY OF PARIS

By the 1750s the American colonies had grown in both population and economic strength. Increasingly, the colonists expressed dissatisfaction with Great Britain's control of their political and economic affairs. The colonies chafed under the rules of British mercantilism, the idea that colonies were to be exploited as a source of raw materials and a market for the mother country. The king and Parliament, however, viewed the colonies as part of the empire and sought to maintain the status quo.

The road to the American Revolution began with the French and Indian War (1756–1763), also known as the Seven Years' War. The war was fought to determine whether France or Great Britain would rule North America. Though Britain won the war, relations between Parliament and the colonies were strained. During the war the colonies had asserted their economic independence by trading with the enemy, flagrantly defying customs laws, and evading trade regulations. After the war the British government resolved to bring the colonies into proper subordination and to use them as a source of revenue for repaying the war debt.

Accordingly, Parliament passed a series of acts that required the colonies to pay taxes and import duties on a variety of goods and raw materials. The colonists, however, detested the STAMP ACT and the TOWNSHEND ACTS and refused to comply with them. Ultimately, these acts pushed the colonists to demand more autonomy in governing their affairs.

In 1774 armed conflict began in Massachusetts, and the colonies moved closer to declaring their independence. Nevertheless, many colonists still hoped to reach an accommodation with Britain. Public opinion shifted toward independence, however, when King George III issued orders to put down the colonial rebellion. The CONTINENTAL CONGRESS reacted by enacting the Declaration of the Causes and Necessity of Taking up Arms. In January 1776 THOMAS PAINE, the firebrand pamphleteer, published *Common Sense,* which was a direct attack on the king and a call for independence.

In July 1776 the DECLARATION OF INDEPENDENCE cut the cord with the mother country by asserting the independence of the thirteen colonies. In writing the declaration, THOMAS JEFFERSON borrowed phrases and ideas from the VIRGINIA DECLARATION OF RIGHTS of 1776, which had been adopted a few weeks earlier. The WAR OF INDEPENDENCE lasted from 1775 until 1783, when Britain renounced control of the colonies in the TREATY OF PARIS.

# CONFLICT AND REVOLUTION

## STAMP ACT

In 1765 the British Parliament passed the STAMP ACT, which imposed the first direct tax on the American colonies. The revenue measure was intended to help pay off the debt the British had incurred during the French and Indian War and to pay for the continuing defense of the colonies. To Parliament's great surprise, the Stamp Act ignited colonial opposition and outrage, leading to the first concerted effort by the colonists to resist Parliament and British authority.

The Stamp Act was designed to raise almost one-third of the revenue needed to support the military establishment permanently stationed in the colonies at the end of the French and Indian War. The act placed a tax on newspapers, almanacs, pamphlets and broadsides, legal documents of all kinds, insurance policies, ship's papers, licenses, and even playing cards and dice. All these documents and objects had to carry a tax stamp.

In October 1765 nine of the thirteen colonies sent delegates to New York to attend the Stamp Act Congress. The Congress issued a "Declaration of Rights and Grievances" declaring that British subjects in the colonies had the same "rights and liberties" as the king's subjects in Britain. The Congress, noting that the colonies were not represented in Parliament, concluded that no taxes could be constitutionally imposed on them except by their own legislatures. Colonial merchants also organized an effective economic boycott that led to the bankruptcy of some London merchants.

The Stamp Act was repealed in 1766. Nevertheless, Parliament then passed the Declaratory Act, which asserted that Parliament had full authority to make laws that were legally binding on the colonies.

### Stamp Act

**An Act for Granting and Applying Certain Stamp Duties, and Other Duties, in the British Colonies and Plantations in America, towards Further Defraying the Expenses of Defending, Protecting, and Securing the Same; and for Amending Such Parts of the Several Acts of Parliament Relating to the Trade and Revenues of the Said Colonies and Plantations, as Direct the Manner of Determining and Recovering the Penalties and Forfeitures Therein Mentioned**

#### CHAPTER 1

Whereas by an act made in the last session of Parliament, several duties were granted, continued, and appropriated towards defraying the expenses of defending, protecting, and securing the British colonies and plantations in America; and whereas it is just and necessary that provision be made for raising a further revenue within your Majesty's dominions in America, towards defraying the said expenses, we, your Majesty's most dutiful and loyal subjects, the

Source: Danby Pickering, ed., *The Statutes at Large from Magna Carta to the End of the Eleventh Parliament of Great Britain, Anno 1761: Continued,* vol. 26 (1765), pp. 179–205.

Commons of Great Britain in Parliament assembled, have therefore resolved to give and grant unto your Majesty the several rates and duties hereinafter mentioned; and do most humbly beseech your Majesty that it may be enacted, and be it enacted by the king's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, that from and after the first day of November, one thousand seven hundred and sixty-five, there shall be raised, levied, collected, and paid unto his Majesty, his heirs, and successors throughout the colonies and plantations in America which now are, or hereafter may be, under the dominion of his Majesty, his heirs, and successors,

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any declaration, plea, replication, rejoinder, demurrer, or other pleading, or any copy thereof, in any court of law within the British colonies and plantations in America, a stamp duty of three pence.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any special bail and appearance upon such bail in any such court, a stamp duty of two shillings.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any petition, bill, answer, claim, plea, replication, rejoinder, demurrer, or other pleading in any court of chancery or equity within the said colonies and plantations, a stamp duty of one shilling and six pence.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any copy of any petition, bill, answer, claim, plea, replication, rejoinder, demurrer, or other pleading in any such court, a stamp duty of three pence.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any monition, libel, answer, allegation, inventory, or renunciation in ecclesiastical matters in any court of probate, court of the ordinary, or other court exercising ecclesiastical jurisdiction within the said colonies and plantations, a stamp duty of one shilling.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any copy of any will (other than the probate thereof), monition, libel, answer, allegation, inventory, or renunciation in ecclesiastical matters in any such court, a stamp duty of six pence.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any donation, presentation, collation, or institution of or to any benefice, or any writ or instrument for the like purpose, or any register, entry, testimonial, or certificate of any degree taken in any university, academy, college, or seminary of learning within the said colonies and plantations, a stamp duty of two pounds.

For every skin or piece of vellum or parchment or sheet or piece of paper, on which shall be engrossed, written, or printed any monition, libel, claim, answer, allegation, information, letter of request, execution, renunciation, inventory, or other pleading, in any admiralty court within the said colonies and plantations, a stamp duty of one shilling.

For every skin or piece of vellum or parchment or sheet or piece of paper on which any copy of any such monition, libel, claim, answer, allegation, information, letter of request, execution, renunciation, inventory, or other pleading shall be engrossed, written, or printed, a stamp duty of six pence.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed, any appeal, writ of error, writ of dower, *ad quod damnum,* certiorari, statute merchant, statute staple, attestation, or certificate by any officer or exemplification of any record or proceeding in any court whatsoever within the said colonies and plantations (except appeals, writs of error, certiorari, attestations, certificates, and exemplifications, for or relating to the removal of any proceedings from before a single justice of the peace), a stamp duty of ten shillings.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any writ of covenant for levying of fines, writ of entry for suffering a common recovery, or attachment issuing out of, or returnable into, any court within the said colonies and plantations, a stamp duty of five shillings.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any judgment, decree, sentence, or dismission, or any record of *nisi prius* or *postea,* in any court within the said colonies and plantations, a stamp duty of four shillings.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any affidavit, common bail or appearance, interrogatory deposition, rule, order, or warrant of any court, or any *dedimus potestatem, capias, subpoena,* summons, compulsory citation, commission, recognizance, or any other writ, process, or mandate, issuing out of, or returnable into, any court or any office belonging thereto or any other proceeding therein whatsoever or any copy thereof or of any record not herein before charged within the said colonies and plantations (except warrants relating to criminal matters and proceedings thereon or relating thereto), a stamp duty of one shilling.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any license, appointment, or admission of any counselor, solicitor, attorney, advocate, or proctor to practice in any court, or of any notary within the said colonies and plantations, a stamp duty of ten pounds.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any note or bill of lading, which shall be signed for any kind of goods, wares, or merchandise to be exported from, or any cocket [a document sealed by the Custom House] or clearance granted within, the said colonies and plantations, a stamp duty of four pence.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed letters of marque, or commission for private ships of war, within the said colonies and plantations, a stamp duty of twenty shillings.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any grant, appointment, or admission of or to any public beneficial office or employment for the space of one year, or any lesser time, of or above the value of twenty pounds per annum sterling money in salary, fees, and perquisites within the said colonies and plantations (except commissions and appointments of officers of the army, navy, ordnance, or militia, of judges, and of justices of the peace), a stamp duty of ten shillings.

For every skin or piece of vellum or parchment or sheet or piece of paper on which any grant of any liberty, privilege, or franchise under the seal of any of the said colonies or plantations, or under the seal or sign manual of any governor, proprietor, or public officer alone or in conjunction with any other person or persons, or with any council, or any council and assembly, or any exemplification of the same, shall be engrossed, written, or printed within the said colonies and plantations, a stamp duty of six pounds.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any license for retailing of spirituous liquors, to be granted to any person who shall take out the same within the said colonies and plantations, a stamp duty of twenty shillings.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any license for retailing of wine, to be granted to any person who shall not take out a license for retailing of spirituous liquors within the said colonies and plantations, a stamp duty of four pounds.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any license for retailing of wine, to be granted to any person who shall take out a license for retailing of spirituous liquors within the said colonies and plantations, a stamp duty of three pounds.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any probate of a will, letters of administration, or of guardianship for any estate above the value of twenty pounds sterling money; within the British colonies and plantations upon the continent of America, the islands belonging thereto, and the Bermuda and Bahama islands, a stamp duty of five shillings.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any such probate, letters of administration or of guardian-

ship within all other parts of the British dominions in America, a stamp duty of ten shillings.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any bond for securing the payment of any sum of money, not exceeding the sum of ten pounds sterling money, within the British colonies and plantations upon the continent of America, the islands belonging thereto, and the Bermuda and Bahama islands, a stamp duty of six pence.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any bond for securing the payment of any sum of money above ten pounds, and not exceeding the sum of twenty pounds sterling money, within such colonies, plantations, and islands, a stamp duty of one shilling.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any bond for securing the payment of any sum of money above twenty pounds, and not exceeding forty pounds sterling money, within such colonies, plantations, and islands, a stamp duty of one shilling and six pence.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any order or warrant for surveying or setting out any quantity of land, not exceeding one hundred acres, issued by any governor, proprietor, or any public officer alone, or in conjunction with any other person or persons, or with any council or any council and assembly, within the British colonies and plantations in America, a stamp duty of six pence.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any such order or warrant for surveying or setting out any quantity of land above one hundred, and not exceeding two hundred acres, within the said colonies and plantations, a stamp duty of one shilling.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any such order or warrant for surveying or setting out any quantity of land above two hundred, and not exceeding three hundred and twenty acres, and in proportion for every such order or warrant for surveying or setting out every other three hundred and twenty acres within the said colonies and plantations, a stamp duty of one shilling and six pence.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any original grant or any deed, mesne conveyance, or other instrument whatsoever by which any quantity of land not exceeding one hundred acres shall be granted, conveyed, or assigned within the British colonies and plantations upon the continent of America, the islands belonging thereto, and the Bermuda and Bahama islands (except leases for any term not exceeding the term of twenty-one years), a stamp duty of one shilling and six pence.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any such original grant or any such deed, mesne conveyance, or other instrument whatsoever by which any quantity of land above one hundred, and not exceeding two hundred acres, shall be granted, conveyed, or assigned within such colonies, plantations, and islands, a stamp duty of two shillings.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any such original grant or any such deed, mesne conveyance, or other instrument whatsoever by which any quantity of land above two hundred, and not exceeding three hundred and twenty acres, shall be granted, conveyed, or assigned, and in proportion for every such grant, deed, mesne conveyance, or other instrument, granting, conveying, or assigning, every other three hundred and twenty acres within such colonies, plantations, and islands, a stamp duty of two shillings and six pence.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any such original grant or any such deed, mesne conveyance, or other instrument whatsoever by which any quantity of land not exceeding one hundred acres shall be granted, conveyed, or assigned within all other parts of the British dominions in America, a stamp duty of three shillings.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any such original grant or any such deed, mesne conveyance,

or other instrument whatsoever by which any quantity of land above one hundred, and not exceeding two hundred acres, shall be granted, conveyed, or assigned within the same parts of the said dominions, a stamp duty of four shillings.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any such original grant or any such deed, mesne conveyance, or other instrument whatsoever whereby any quantity of land above two hundred, and not exceeding three hundred and twenty acres, shall be granted, conveyed, or assigned, and in proportion for every such grant, deed, mesne conveyance, or other instrument, granting, conveying, or assigning every other three hundred and twenty acres within the same parts of the said dominions, a stamp duty of five shillings.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any grant, appointment, or admission of or to any public beneficial office or employment, not herein before charged, above the value of twenty pounds per annum sterling money in salary, fees, and perquisites, or any exemplification of the same, within the British colonies and plantations upon the continent of America, the islands belonging thereto, and the Bermuda and Bahama islands (except commissions of officers of the army, navy, ordnance, or militia, and of justices of the peace), a stamp duty of four pounds.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any such grant, appointment, or admission, of or to any such public beneficial office or employment, or any exemplification of the same, within all other parts of the British dominions in America, a stamp duty of six pounds.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any indenture, lease, conveyance, contract, stipulation, bill of sale, charter party, protest, articles of apprenticeship, or covenant (except for the hire of servants not apprentices, and also except such other matters as are herein before charged) within the British colonies and plantations in America, a stamp duty of two shillings and six pence.

For every skin or piece of vellum or parchment or sheet or piece of paper on which any warrant or order for auditing any public accounts, beneficial warrant, order, grant, or certificate under any public seal, or under the seal or sign manual of any governor, proprietor, or public officer alone, or in conjunction with any other person or persons, or with any council or any council and assembly not herein before charged, or any passport or let-pass, surrender of office, or policy of assurance shall be engrossed, written, or printed within the said colonies and plantations (except warrants or orders for the service of the navy, army, ordnance, or militia, and grants of offices under twenty pounds per annum in salary, fees, and perquisites), a stamp duty of five shillings.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any notarial act, bond, deed, letter of attorney, procuration, mortgage, release, or other obligatory instrument not herein before charged within the said colonies and plantations, a stamp duty of two shillings and three pence.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any register, entry, or enrollment of any grant, deed, or other instrument whatsoever herein before charged within the said colonies and plantations, a stamp duty of three pence.

For every skin or piece of vellum or parchment or sheet or piece of paper on which shall be engrossed, written, or printed any register, entry, or enrollment of any grant, deed, or other instrument whatsoever not herein before charged within the said colonies and plantations, a stamp duty of two shillings.

And for and upon every pack of playing cards and all dice which shall be sold or used within the said colonies and plantations, the several stamp duties following (that is to say):

For every pack of such cards, the sum of one shilling.

And for every pair of such dice, the sum of ten shillings.

And for and upon every paper, commonly called a pamphlet, and upon every newspaper containing public news, intelligence, or occurrences, which shall be printed, dispersed, and made public, within any of the said colonies and

plantations, and for and upon such advertisements as are hereinafter mentioned, the respective duties following (that is to say):

For every such pamphlet and paper contained in half a sheet, or any lesser piece of paper, which shall be so printed, a stamp duty of one halfpenny for every printed copy thereof.

For every such pamphlet and paper (being larger than half a sheet and not exceeding one whole sheet), which shall be so printed, a stamp duty of one penny for every printed copy thereof.

For every such pamphlet and paper being larger than one whole sheet and not exceeding six sheets in octavo, or in a lesser page, or not exceeding twelve sheets in quarto, or twenty sheets in folio, which shall be so printed, a duty after the rate of one shilling for every sheet of any kind of paper which shall be contained in one printed copy thereof.

For every advertisement to be contained in any gazette, newspaper, or other paper, or any pamphlet which shall be so printed, a duty of two shillings.

For every almanac or calendar for any one particular year, or for any time less than a year, which shall be written or printed on one side only of any one sheet, skin, or piece of paper, parchment, or vellum within the said colonies and plantations, a stamp duty of two pence.

For every other almanac or calendar for any one particular year, which shall be written or printed within the said colonies and plantations, a stamp duty of four pence.

And for every almanac or calendar written or printed within the said colonies and plantations to serve for several years, duties to the same amount respectively shall be paid for every such year.

For every skin or piece of vellum or parchment or sheet or piece of paper on which any instrument, proceeding, or other matter or thing aforesaid shall be engrossed, written, or printed within the said colonies and plantations in any other than the English language, a stamp duty of double the amount of the respective duties before charged thereon.

And there shall be also paid in the said colonies and plantations a duty of six pence for every twenty shillings, in any sum not exceeding fifty pounds sterling money, which shall be given, paid, contracted, or agreed for, with or in relation to any clerk or apprentice, which shall be put or placed to or with any master or mistress to learn any profession, trade, or employment.

* * *

### CHAPTER 12

And be it further enacted by the authority aforesaid that the said several duties shall be under the management of the commissioners, for the time being, of the duties charged on stamped vellum, parchment, and paper in Great Britain: and the said commissioners are hereby empowered and required to employ such officers under them for that purpose as they shall think proper; and to use such stamps and marks to denote the stamp duties hereby charged as they shall think fit; and to repair, renew, or alter the same, from time to time, as there shall be occasion; and to do all other acts, matters, and things necessary to be done for putting this act in execution with relation to the duties hereby charged.

### CHAPTER 13

And be it further enacted by the authority aforesaid that the commissioners for managing the said duties, for the time being, shall and may appoint a fit person or persons to attend in every court or public office within the said colonies and plantations to take notice of the vellum, parchment, or paper upon which any of the matters or things hereby charged with a duty shall be engrossed, written, or printed, and of the stamps or marks thereupon, and of all other matters and things tending to secure the said duties; and that the judges in the several courts and all other persons to whom it may appertain shall, at the request of any such officer, make such orders and do such other matters and things for the better securing of the said duties, as shall be lawfully or reasonably desired in that behalf: and every commissioner and other officer, before he proceeds to the execution of any part of this act, shall take an oath in the words, or to the effect following (that is to say):

> I A.B. do swear that I will faithfully execute the trust reposed in me, pursuant to an act of Parliament made in the fifth year of the reign of his majesty King George the Third for granting certain stamp duties and other duties in the British colonies and plantations in America without fraud or concealment; and will from time to time true account make of my doing therein and deliver the same to such person or persons as his Majesty, his heirs, or successors shall appoint to receive such account; and will take no fee, reward, or

profit for the execution or performance of the said trust or the business relating thereto from any person or persons other than such as shall be allowed by his Majesty, his heirs, and successors, or by some other person or persons under him or them to that purpose authorized.

Or if any such officer shall be of the people commonly called Quakers, he shall take a solemn affirmation to the effect of the said oath; which oath or affirmation shall and may be administered to any such commissioner or commissioners by any two or more of the same commissioners, whether they have or have not previously taken the same: and any of the said commissioners or any justice of the peace within the kingdom of Great Britain, or any governor, lieutenant governor, judge, or other magistrate within the said colonies or plantations, shall and may administer such oath or affirmation to any subordinate officer.

### CHAPTER 14

And be it further enacted by the authority aforesaid that the said commissioners and all officers to be employed or entrusted by or under them as aforesaid shall, from time to time, in and for the better execution of their several places and trusts observe such rules, methods, and orders as they respectively shall, from time to time, receive from the high treasurer of Great Britain or the commissioners of the treasury or any three or more of such commissioners for the time being; and that the said commissioners for managing the stamp duties shall take especial care that the several parts of the said colonies and plantations shall, from time to time, be sufficiently furnished with vellum, parchment, and paper, stamped or marked with the said respective duties.

### CHAPTER 15

And be it further enacted by the authority aforesaid that if any person or persons shall sign, engross, write, print, or sell, or expose to sale or cause to be signed, engrossed, written, printed, or sold or exposed to sale in any of the said colonies or plantations or in any other part of his Majesty's dominions any matter or thing for which the vellum, parchment, or paper is hereby charged to pay any duty before the same shall be marked or stamped with the marks or stamps to be provided as aforesaid, or upon which there shall not be some stamp or mark resembling the same; or shall sign, engross, write, print, or sell, or expose to sale or cause to be signed, engrossed, written, printed, or sold or exposed to sale any matter or thing upon any vellum, parchment, or paper that shall be marked or stamped for any lower duty than the duty by this act made payable in respect thereof; every such person so offending shall, for every such offense, forfeit the sum of ten pounds.

### CHAPTER 16

And be it further enacted by the authority aforesaid that no matter or thing whatsoever by this act charged with the payment of a duty shall be pleaded or given in evidence or admitted in any court within the said colonies and plantations, to be good, useful, or available in law or equity, unless the same shall be marked or stamped in pursuance of this act with the respective duty hereby charged thereon, or with an higher duty.

### CHAPTER 17

Provided nevertheless, and be it further enacted by the authority aforesaid that if any vellum, parchment, or paper containing any deed, instrument, or other matter or thing shall not be duly stamped in pursuance of this act at the time of the signing, sealing, or other execution or the entry or enrollment thereof, any person interested therein, or any person on his or her behalf, upon producing the same to any one of the chief distributors of stamped vellum, parchment, and paper, and paying to him the sum of ten pounds for every such deed, instrument, matter, or thing, and also double the amount of the duties payable in respect thereof, shall be entitled to receive from such distributor vellum, parchment, or paper stamped pursuant to this act to the amount of the money so paid; a certificate being first written upon every such piece of vellum, parchment, or paper, expressing the name and place of abode of the person by or on whose behalf such payment is made, the general purport of such deed, instrument, matter, or thing, the names of the parties therein and of the witnesses (if any) thereto, and the date thereof, which certificate shall be signed by the said distributor; and the vellum, parchment, or paper shall be then annexed to such deed, instrument, matter, or thing, by or in the presence of such distributor, who shall impress a seal upon wax to be affixed on the part where such annexation shall be made in the presence of a magistrate, who shall attest such signature and sealing; and

the deed, instrument, or other matter or thing from thenceforth shall and may, with the vellum, parchment, or paper so annexed, be admitted and allowed in evidence in any court whatsoever and shall be as valid and effectual as if the proper stamps had been impressed thereon at the time of the signing, sealing, or other execution or entry or enrollment thereof: and the said distributor shall once in every six months, or oftener if required by the commissioners for managing the stamp duties, send to such commissioners true copies of all such certificates and an account of the number of pieces of vellum, parchment, and paper so annexed and of the respective duties impressed upon every such piece.

**CHAPTER 18**

And be it further enacted by the authority aforesaid that if any person shall forge, counterfeit, erase, or alter any such certificate, every such person so offending shall be guilty of felony and shall suffer death as in cases of felony without the benefit of clergy.

**CHAPTER 19**

And be it further enacted by the authority aforesaid that if any person or persons shall, in the said colonies or plantations or in any other part of his Majesty's dominions, counterfeit or forge any seal, stamp, mark, type, device, or label to resemble any seal, stamp, mark, type, device, or label which shall be provided or made in pursuance of this act; or shall counterfeit or resemble the impression of the same upon any vellum, parchment, paper, cards, dice, or other matter or thing thereby to evade the payment of any duty hereby granted; or shall make, sign, print, utter, vend, or sell any vellum, parchment, or paper or other matter or thing with such counterfeit mark or impression thereon, knowing such mark or impression to be counterfeited; then every person so offending shall be adjudged a felon and shall suffer death as in cases of felony without the benefit of clergy.

**CHAPTER 20**

And it is hereby declared that upon any prosecution or prosecutions for such felony, the dye, tool, or other instrument made use of in counterfeiting or forging any such seal, stamp, mark, type, device, or label, together with the vellum, parchment, paper, cards, dice, or other matter or thing having such counterfeit impression, shall, immediately after the trial or conviction of the party or parties accused, be broke, defaced, or destroyed in open court.

**CHAPTER 21**

And be it further enacted by the authority aforesaid that if any register, public officer, clerk, or other person in any court, registry, or office within any of the said colonies or plantations shall, at any time after the said first day of November, one thousand seven hundred and sixty-five, enter, register, or enroll any matter or thing hereby charged with a stamp duty, unless the same shall appear to be duly stamped; in every such case such register, public officer, clerk, or other person shall, for every such offense, forfeit the sum of twenty pounds.

* * *

**CHAPTER 49**

And be it further enacted by the authority aforesaid that the high treasurer of Great Britain, or the commissioners of his Majesty's treasury, or any three or more of such commissioners, for the time being shall once in every year at least set the prices at which all sorts of stamped vellum, parchment, and paper shall be sold by the said commissioners for managing the stamp duties and their officers; and that the said commissioners for the said duties shall cause such prices to be marked upon every such skin and piece of vellum and parchment and sheet and piece of paper: and if any officer or distributor to be appointed by virtue of this act shall sell, or cause to be sold, any vellum, parchment, or paper for a greater or higher price or sum than the price or sum so set or affixed thereon; every such officer or distributor shall, for every such offense, forfeit the sum of twenty pounds.

**CHAPTER 50**

And be it also enacted by the authority aforesaid that several officers who shall be respectively employed in the raising, receiving, collecting, or paying the several duties hereby charged within the said colonies and plantations shall every twelve months or oftener, if thereunto required by the said commissioners for managing the said duties, exhibit his and their respective account and accounts of the said several duties upon oath, or if a Quaker upon affirmation, in the presence of the governor, or commander in chief, or principal judge of the colony or plantation where such officers shall be respec-

tively resident, in such manner as the high treasurer, or the commissioners of the treasury, or any three or more of such commissioners for the time being shall, from time to time, direct and appoint, in order that the same may be immediately afterwards transmitted by the said officer or officers to the commissioners for managing the said duties, to be comptrolled and audited according to the usual course and form of comptrolling and auditing the accounts of the stamp duties arising within this kingdom: and if any of the said officers shall neglect or refuse to exhibit any such account, or to verify the same upon oath or affirmation, or to transmit any such account so verified to the commissioners for managing the said duties in such manner, and within such time, as shall be so appointed or directed; or shall neglect or refuse to pay, or cause to be paid into the hands of the receiver general of the stamp duties in Great Britain, or to such other person or persons as the high treasurer, or commissioners of the treasury, or any three or more of such commissioners for the time being shall, from time to time, nominate or appoint, the monies respectively raised, levied, and received by such officers under the authority of this act, at such times, and in such manner as they shall be respectively required by the said high treasurer, or commissioners of the treasury; or if any such officers shall divert, detain, or misapply all or any part of the said monies so by them respectively raised, levied, and received, or shall knowingly return any person or persons *insuper* for any monies or other things duly answered, paid, or accounted for by such person or persons, whereby he or they shall sustain any damage or prejudice; in every such case, every such officer shall be liable to pay treble the value of all and every sum and sums of money so diverted or misapplied; and shall also be liable to pay treble damages to the party grieved, by returning him *insuper*.

### CHAPTER 51

And be it further enacted by the authority aforesaid that the commissioners, receiver or receivers general, or other person or persons who shall be respectively employed in Great Britain in the directing, receiving, or paying the monies arising by the duties hereby granted shall, and are hereby required, between the tenth day of October and the fifth day of January following, and so from year to year, yearly, at those times, to exhibit their respective accounts thereof to his Majesty's auditors of the imprest in England for the time being, or one of them, to be declared before the high treasurer or commissioners of the treasury and chancellor of the exchequer for the time being, according to the course of the exchequer.

### CHAPTER 52

And be it further enacted by the authority aforesaid that if the said commissioners for managing the said duties, or the said receiver or receivers general, shall neglect or refuse to pay into the exchequer all or any of the said monies in such manner as they are required by this act to pay the same, or shall divert or misapply any part thereof, then they, and every of them so offending, shall be liable to pay double the value of all and every sum and sums of money so diverted or misapplied.

### CHAPTER 53

And be it further enacted by the authority aforesaid that the comptroller or comptrollers for the time being of the duties hereby imposed shall keep perfect and distinct accounts in books fairly written of all the monies arising by the said duties; and if any such comptroller or comptrollers shall neglect his or their duty therein, then he or they, for every such offense, shall forfeit the sum of one hundred pounds.

### CHAPTER 54

And be it further enacted by the authority aforesaid that all the monies which shall arise by the several rates and duties hereby granted (except the necessary charges of raising, collecting, recovering, answering, paying, and accounting for the same, and the necessary charges from time to time incurred in relation to this act, and the execution thereof) shall be paid into the receipt of his Majesty's exchequer, and shall be entered separate and apart from all other monies, and shall be there reserved to be from time to time disposed of by Parliament towards further defraying the necessary expenses of defending, protecting, and securing the said colonies and plantations.

### CHAPTER 55

And whereas it is proper that some provision should be made for payment of the necessary expenses which have been and shall be incurred in relation to this act and the execution thereof; and of the orders and rules to be established

under the authority of the same before the said duties shall take effect, or the monies arising thereby shall be sufficient to discharge such expenses; be it therefore enacted by the authority aforesaid that his Majesty may, and he is hereby empowered by any warrant or warrants under his royal sign manual, at any time or times before the twentieth day of April, one thousand seven hundred and sixty-six, to cause to be issued and paid out of any of the surpluses, excesses, overplus monies, and other revenues composing the fund commonly called *The sinking fund* (except such monies of the said sinking fund as are appropriated to any particular use or uses, by any former act or acts of Parliament in that behalf) such sum and sums of money as shall be necessary to defray the said expenses; and the monies so issued shall be reimbursed by payment into the exchequer of the like sum or sums out of the first monies which shall arise by virtue of this act; which monies, upon the payment thereof into the exchequer, shall be carried to the account, and made part of the said fund.

### CHAPTER 56

And it is hereby further enacted and declared that all the powers and authorities by this act granted to the commissioners for managing the duties upon stamped vellum, parchment, and paper shall and may be fully and effectually carried into execution by any three or more of the said commissioners, anything herein before contained to the contrary notwithstanding.

### CHAPTER 57

And be it further enacted by the authority aforesaid that all forfeitures and penalties incurred after the twenty-ninth day of September, one thousand seven hundred and sixty-five, for offenses committed against an act passed in the fourth year of the reign of his present Majesty, entitled, *An act for granting certain duties in the British colonies and plantations in America;* for continuing, amending, and making perpetual an act passed in the sixth year of the reign of his late Majesty King George the Second, entitled, *An act for the better securing and encouraging the trade of his Majesty's sugar colonies in America;* for applying for produce of such duties, and of the duties to arise by virtue of the said act towards defraying the expenses of defending, protecting, and securing the said colonies and plantations; for explaining an act made in the twenty-fifth year of the reign of King Charles the Second, entitled, *An act for the encouragement of the Greenland and Eastland trades, and for the better securing the plantation trade;* and for altering and disallowing several drawbacks on exports from this kingdom, and more effectually preventing the clandestine conveyance of goods to and from the said colonies and plantations, and improving and securing the trade between the same and Great Britain, and for offenses committed against any other act or acts of Parliament relating to the trade or revenues of the said colonies of plantations; shall and may be prosecuted, sued for, and recovered in any court of record, or in any court of admiralty in the respective colony or plantation where the offense shall be committed, or in any court of vice admiralty appointed or to be appointed, and which shall have jurisdiction within such colony, plantation, or place (which courts of admiralty or vice admiralty are hereby respectively authorized and required to proceed, hear, and determine the same) at the election of the informer or prosecutor.

### CHAPTER 58

And it is hereby further enacted and declared by the authority aforesaid that all sums of money granted and imposed by this act as rates or duties, and also all sums of money imposed as forfeitures or penalties, and all sums of money required to be paid, and all other monies herein mentioned shall be deemed and taken to be sterling money of Great Britain, and shall be collected, recovered, and paid to the amount of the value which such nominal sums bear in Great Britain; and that such monies shall and may be received and taken according to the proportion and value of five shillings and six pence the ounce in silver; and that all the forfeitures and penalties hereby inflicted, and which shall be incurred in the said colonies and plantations, shall and may be prosecuted, sued for, and recovered in any court of record, or in any court of admiralty in the respective colony or plantation where the offense shall be committed, or in any court of vice admiralty appointed or to be appointed, and which shall have jurisdiction within such colony, plantation, or place (which courts of admiralty or vice admiralty are hereby respectively authorized and required to proceed, hear, and determine the same) at the election of the informer or prosecutor; and that from and after the twenty-ninth day of September, one

thousand seven hundred and sixty-five, in all cases where any suit or prosecution shall be commenced and determined for any penalty or forfeiture inflicted by this act, or by the said act made in the fourth year of his present Majesty's reign, or by any other act of Parliament relating to the trade or revenues of the said colonies or plantations in any court of admiralty in the respective colony or plantation where the offense shall be committed, either party, who shall think himself aggrieved by such determination, may appeal from such determination to any court of vice admiralty appointed or to be appointed, and which shall have jurisdiction within such colony, plantation, or place (which court of vice admiralty is hereby authorized and required to proceed, hear, and determine such appeal) any law, custom, or usage to the contrary notwithstanding; and the forfeitures and penalties hereby inflicted, which shall be incurred in any other part of his Majesty's dominions, shall and may be prosecuted, sued for, and recovered with full costs of suit in any court of record within the kingdom, territory, or place where the offense shall be committed, in such and the same manner as any debt or damage, to the amount of such forfeiture or penalty, can or may be sued for and recovered.

### CHAPTER 59

And it is hereby further enacted that all the forfeitures and penalties hereby inflicted shall be divided, paid, and applied as follows; (that is to say) one-third part of all such forfeitures and penalties recovered in the said colonies and plantations shall be paid into the hands of one of the chief distributors of stamped vellum, parchment, and paper residing in the colony or plantation wherein the offender shall be convicted, for the use of his Majesty, his heirs, and successors; one-third part of the penalties and forfeitures so recovered, to the governor or commander in chief of such colony or plantation; and the other third part thereof to the person who shall inform or sue for the same; and that one moiety of all such penalties and forfeitures recovered in any other part of his Majesty's dominions shall be to the use of his Majesty, his heirs, and successors, and the other moiety thereof to the person who shall inform or sue for the same.

### CHAPTER 60

And be it further enacted by the authority aforesaid that all the offenses which are by this act made felony and shall be committed within any part of his Majesty's dominions, shall and may be heard, tried, and determined before any court of law within the respective kingdom, territory, colony, or plantation where the offense shall be committed, in such and the same manner as all other felonies can or may be heard, tried, and determined in such court.

### CHAPTER 61

And be it further enacted by the authority aforesaid that all the present governors or commanders in chief of any British colony or plantation shall, before the said first day of November, one thousand seven hundred and sixty-five, and all who hereafter shall be made governors or commanders in chief of the said colonies or plantations, or any of them, before their entrance into their government shall take a solemn oath to do their utmost that all and every the clauses contained in this present act be punctually and bona fide observed, according to the true intent and meaning thereof, so far as appertains unto the said governors or commanders in chief, respectively, under the like penalties, forfeitures, and disabilities, either for neglecting to take the said oath, or for wittingly neglecting to do their duty accordingly, as are mentioned and expressed in an act made in the seventh and eighth year of the reign of King William the Third, entitled, *An act for preventing frauds and regulating abuses in the plantation trade;* and the said oath hereby required to be taken shall be administered by such person or persons as hath or have been, or shall be appointed to administer the oath required to be taken by the said act made in the seventh and eighth year of the reign of King William the Third.

### CHAPTER 62

And be it further enacted by the authority aforesaid that all records, writs, pleadings, and other proceedings in all courts whatsoever, and all deeds, instruments, and writings whatsoever, hereby charged, shall be engrossed and written in such manner as they have been usually accustomed to be engrossed and written, or are now engrossed and written within the said colonies and plantations.

**CHAPTER 63**

And it is hereby further enacted that if any person or persons shall be sued or prosecuted, either in Great Britain or America, for anything done in pursurance of this act, such person and persons shall and may plead the general issue, and give this act and the special matter in evidence; and if it shall appear so to have been done, the jury shall find for the defendant or defendants: and if the plaintiff or plaintiffs shall become nonsuited, or discontinue his or their action after the defendant or defendants shall have appeared, or if judgment shall be given upon any verdict or demurrer against the plaintiff or plaintiffs, the defendant or defendants shall recover treble costs and have the like remedy for the same, as defendants have in other cases by law.

# CONFLICT AND REVOLUTION

## Townshend Acts

Parliament wasted little time in attempting to reassert its authority over the colonies. Between June 15 and July 2, 1767, it enacted four measures to raise revenue to pay the salaries of British governors and other officials in the colonies so that these officials would be independent of the colonial legislatures, which had been paying their salaries. The statutes came to be known as the Townshend Acts after Charles Townshend, the chancellor of the exchequer, who sponsored them.

The Townshend Acts accomplished four things. One act suspended the New York legislature until it complied with the Quartering Act of 1765, which required legislatures to house and provide supplies to British troops stationed in the colonies. Another act imposed import duties on tea, lead, paper, paint, and glass, while a third act allowed tea to be imported to the colonies free of the taxes that were levied in Great Britain. The fourth act restructured the customs service in the colonies, placing its headquarters in Boston.

As with the STAMP ACT, the colonies met the new legislation with widespread opposition. The colonists saw the acts as a threat to their rights to govern themselves and levy taxes through colonial legislatures. Angry colonists threatened customs collectors and evaded the duties, while colonial merchants refused to import British goods. The situation in Boston escalated, culminating in the BOSTON MASSACRE on March 5, 1770, in which five men were killed.

On the same day as the massacre, Parliament repealed all the import duties except that on tea, lifted the requirements of the Quartering Act, and ordered the removal of troops from Boston. Nevertheless, the Townshend Acts had had devastating effects on relations between the British government and the colonies. Colonists continued to argue that taxation without representation was not legitimate and began to discuss the necessity of political independence.

### Townshend Acts

**An Act for Restraining and Prohibiting the Governor, Council, and House of Representatives of the Province of New York, until Provision Shall Have Been Made for Furnishing the King's Troops with All the Necessaries Required by Law, from Passing or Assenting to Any Act of Assembly, Vote, or Resolution for Any Other Purpose**

**[CHAPTER 1]**

Whereas an act of Parliament was made in the fifth year of his present Majesty's reign, entitled, *An act to amend and render more effectual, in his Majesty's dominions in America, an act passed in this present session of Parliament, entitled, An act for punishing mutiny and desertion and for the better payment of the army and their quarters;* wherein several directions were given, and rules and regulations established and appointed for the supplying his Majesty's troops

Source: Danby Pickering, ed., *The Statutes at Large from Magna Carta to the End of the Eleventh Parliament of Great Britain, Anno 1761: Continued,* vol. 27 (1768), pp. 505–512.

in the British dominions in America with such necessaries as are in the said act mentioned during the continuance thereof, from the twenty-fourth day of March, one thousand seven hundred and sixty-five, until the twenty-fourth day of March, one thousand seven hundred and sixty-seven; and whereas the House of Representatives of his Majesty's province of New York in America have, in direct disobedience of the authority of the British legislature, refused to make provision for supplying the necessaries and in the manner required by the said act; and an act of assembly hath been passed within the said province for furnishing the barracks in the cities of New York and Albany with firewood and candles, and the other necessaries therein mentioned, for his Majesty's forces inconsistent with the provisions and in opposition to the directions of the said act of Parliament; and whereas by an act made in the last session, entitled, *An act to amend and render more effectual, in his Majesty's dominions in America, an act passed in this present session of Parliament entitled, An act for punishing mutiny and desertion, and for the better payment of the army and their quarters, the like directions, rules, and regulations were given and established for supplying with necessaries his Majesty's troops within the said dominions during the continuance of such act, from the twenty-fourth day of* March, *one thousand seven hundred and sixty-six, until the twenty-fourth day of* March, *one thousand seven hundred and sixty-eight;* which act was, by an act made in this present session of Parliament, entitled, *An act for further continuing an act of the last session of Parliament entitled, An act to amend and render more effectual, in his Majesty's dominions in America, an act passed in this present session of Parliament entitled, An act for punishing mutiny and desertion, and for the better payment of the army and their quarters, further continued until the twenty-fourth day of* March, *one thousand seven hundred and sixty-nine.* In order therefore to enforce within the said province of New York the supplying of his Majesty's troops with the necessaries and in the manner required by the said acts of Parliament, may it please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same that from and after the first day of October, one thousand seven hundred and sixty-seven, until provision shall have been made by the said assembly of New York for furnishing his Majesty's troops within the said province with all such necessaries as are required by the said acts of Parliament, or any of them, to be furnished for such troops, it shall not be lawful for the governor, lieutenant governor, or person presiding or acting as governor or commander in chief, or for the council for the time being, within the colony, plantation, or province of New York in America, to pass, or give his or their assent to, or concurrence in, the making or passing of any act of assembly; or his or their assent to any order, resolution, or vote in concurrence with the House of Representatives for the time being within the said colony, plantation, or province; or for the said House of Representatives to pass or make any bill, order, resolution, or vote (orders, resolutions, or votes for adjourning such house only, excepted) of any kind, for any other purpose whatsoever; and that all acts of assembly, orders, resolutions, and votes whatsoever, which shall or may be passed, assented to, or made contrary to the tenor and meaning of this act after the said first day of October, one thousand seven hundred and sixty-seven, within the said colony, plantation, or province before and until provision shall have been made for supplying his Majesty's troops with necessaries as aforesaid, shall be and are hereby declared to be null and void, and of no force or effect whatsoever.

### CHAPTER 2

Provided nevertheless, and it is hereby declared to be the true intent and meaning of this act that nothing herein before contained shall extend, or be construed to extend, to hinder, prevent, or invalidate the choice, election, or approbation of a speaker of the House of Representatives for the time being within the said colony, plantation, or province.

**An Act for Granting Certain Duties in the British Colonies and Plantations in America; for Allowing a Drawback of the Duties of Customs upon the Exportation from This Kingdom of Coffee and Cocoa Nuts of the Produce of the Said Colonies or Plantations; for Discontinuing the Drawbacks Payable on China Earthenware Exported to America; and for More Effectually Preventing the Clandestine Running of Goods in the Said Colonies and Plantations**

**[CHAPTER 1]**

Whereas it is expedient that a revenue should be raised in your Majesty's dominions in America for making a more certain and adequate provision for defraying the charge of the administration of justice and the support of civil government in such provinces where it shall be found necessary; and towards further defraying the expenses of defending, protecting, and securing the said dominions; we, your Majesty's most dutiful and loyal subjects, the Commons of Great Britain in Parliament assembled have therefore resolved to give and grant unto your Majesty the several rates and duties hereinafter mentioned; and do most humbly beseech your Majesty that it may be enacted, and be it enacted by the king's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same that from and after the twentieth day of November, one thousand seven hundred and sixty-seven, there shall be raised, levied, collected, and paid unto his Majesty, his heirs, and successors for and upon the respective goods herein after mentioned which shall be imported from Great Britain into any colony or plantation in America which now is, or hereafter may be, under the dominion of his Majesty, his heirs, or successors, the several rates and duties following; that is to say,

For every hundredweight avoirdupois of crown, plate, flint, and white glass, four shillings and eight pence.

For every hundredweight avoirdupois of green glass, one shilling and two pence.

For every hundredweight avoirdupois of red lead, two shillings.

For every hundredweight avoirdupois of white lead, two shillings.

For every hundredweight avoirdupois of painters colors, two shillings.

For every poundweight avoirdupois of tea, three pence.

For every ream of paper usually called or known by the name of Atlas Fine, twelve shillings.

For every ream of paper called Atlas Ordinary, six shillings.

For every ream of paper called Bastard, or Double Copy, one shilling and six pence.

For every single ream of blue paper for sugar bakers, ten pence half-penny.

For every ream of paper called Blue Royal, one shilling and six pence.

For every bundle of brown paper containing forty quires, not made in Great Britain, six pence.

**CHAPTER 2**

And it is hereby further enacted by the authority aforesaid that all other paper (not being particularly rated and charged in this act) shall pay the several and respective duties that are charged by this act upon such paper as is nearest above in size and goodness to such unrated paper.

**CHAPTER 3**

And be it declared and enacted by the authority aforesaid that a ream of paper chargeable by this act shall be understood to consist of twenty quires, and each quire of twenty such sheets.

**CHAPTER 4**

And it is hereby further enacted by the authority aforesaid that the said rates and duties charged by this act upon goods imported into any British American colony or plantation shall be deemed and are hereby declared to be sterling money of Great Britain; and shall be collected, recovered, and paid to the amount of the value which such nominal sums bear in Great Britain; and that such monies may be received and taken according to the proportion and value of five shillings and six pence the ounce in silver; and shall be raised, levied, collected, paid, and recovered in the same manner and form and by such rules, ways, and means and under such penalties and forfeitures as any other duties now payable to his Majesty upon goods imported into the said colonies or plantations, may be raised, levied, collected, paid, and recovered by any act or acts of Parliament now in force, as fully and effectually to all intents and purposes, as if the several clauses, powers, directions, penalties, and forfeitures relating thereto were particularly repeated and again enacted in the body of this present act: and that all the monies that shall arise by the said duties (except the necessary charges of raising, collecting, levying, recovering, answering, paying, and accounting for the same) shall be applied in the first place, in such manner as is hereinafter mentioned, in making a

more certain and adequate provision for the charge of the administration of justice and the support of civil government in such of the said colonies and plantations where it shall be found necessary; and that the residue of such duties shall be paid into the receipt of his Majesty's exchequer, and shall be entered separate and apart from all other monies paid or payable to his Majesty, his heirs, or successors; and shall be there reserved, to be from time to time disposed of by Parliament towards defraying the necessary expenses of defending, protecting, and securing the British colonies and plantations in America.

**CHAPTER 5**

And be it further enacted by the authority aforesaid that his Majesty and his successors shall be, and are hereby empowered from time to time, by any warrant or warrants under his or their royal sign manual or sign manuals, countersigned by the high treasurer, or any three or more of the commissioners of the treasury for the time being, to cause such monies to be applied out of the produce of the duties granted by this act as his Majesty or his successors shall think proper or necessary for defraying the charges of the administration of justice and the support of the civil government within all or any of the said colonies or plantations.

**CHAPTER 6**

And whereas the allowing a drawback of all the duties of customs upon the exportation from this kingdom of coffee and cocoa nuts, the growth of the British dominions in America may be a means of encouraging the growth of coffee and cocoa in the said dominions, be it therefore enacted by the authority aforesaid that from and after the said twentieth day of November, one thousand seven hundred and sixty-seven, upon the exportation of any coffee or cocoa nuts, of the growth or produce of any British colony or plantation in America, from this kingdom as merchandise, the whole duties of customs payable upon the importation of such coffee or cocoa nuts shall be drawn back and repaid in such manner, and under such rules, regulations, penalties, and forfeitures as any drawback or allowance, payable out of the duties of customs upon the exportation of such coffee or cocoa nuts, was, could, or might be paid before the passing of this act; any law, custom, or usage to the contrary notwithstanding.

**CHAPTER 7**

And it is hereby further enacted by the authority aforesaid that no drawback shall be allowed for any china earthenware sold after the passing of this act as the sale of the united company of merchants of England trading to the East Indies, which shall be entered for exportation from Great Britain to any part of America; any law, custom, or usage to the contrary notwithstanding.

**CHAPTER 8**

And it is hereby further enacted by the authority aforesaid that if any china earthenware sold after the passing of this act at the sale of the said united company shall be entered for exportation to any part of America as china earthen ware that had been sold at the sale of the said company before that time, or, if any china earthenware shall be entered for exportation to any parts beyond the seas other than to some part of America in order to obtain any drawback thereon, and the said china earthenware shall nevertheless be carried to any part of America and landed there, contrary to the true intent and meaning of this act; that then, in each and every such case the drawback shall be forfeited; and the merchant or other person making such entry and the master or person taking the charge of the ship or vessel on board which the said goods shall be loaden for exportation shall forfeit double the amount of the drawback paid, or to be paid for the same, and also treble the value of the said goods; one moiety to and for the use of his Majesty, his heirs, and successors; and the other moiety to such officer of the customs as shall sue for the same; to be prosecuted, sued for, and recovered in such manner and form, and by the same rules and regulations, as other penalties inflicted for offenses against the laws relating to the customs may be prosecuted, sued for, and recovered by any act or acts of Parliament now in force.

**CHAPTER 9**

And for the more effectual preventing the clandestine running of goods in the British dominions in America, be it further enacted by the authority aforesaid that from and after the said twentieth day of November, one thousand seven hundred and sixty-seven, the master or other person having or taking the charge or command of every ship or vessel arriving in any British colony or plantation in America shall,

before he proceeds with his vessel to the place of unlading, come directly to the customhouse for the port of district where he arrives and make a just and true entry, upon oath, before the collector and comptroller, or other principal officer of the customs there, of the burthen [burden], contents, and lading of such ship or vessel with the particular marks, numbers, qualities, and contents of every parcel of goods therein laden, to the best of his knowledge; also where and in what port she took in her lading; of what country built; how manned; who was master during the voyage, and who are owners thereof; and whether any and what goods during the course of such voyage had or had not been discharged out of such ship or vessel, and where: and the master or other person having or taking the charge or command of every ship or vessel going out from any British colony or plantation in America, before he shall take in or suffer to be taken into or laden on board any such ship or vessel any goods, wares, or merchandises to be exported shall in like manner enter and report outwards such ship or vessel, with her names and burden, of what country built, and how manned, with the names of the master and owners thereof, and to what port or place he intends to pass or sail. And before he shall depart with such ship or vessel out of any such colony or plantation, he shall also bring and deliver unto the collector and comptroller, or other principal officer of the customs at the port or place where he shall lade, a content in writing under his hand of the name of every merchant, or other person, who shall have laden or put on board any such ship or vessel any goods or merchandise, together with the marks and numbers of such goods or merchandise; and such master or person having or taking the charge or command of every such ship or vessel, either coming into or going out of any British colony or plantation as aforesaid, whether such ship or vessel shall be laden or in ballast, or otherwise, shall likewise publicly in the open customhouse, to the best of his knowledge, answer upon oath to such questions as shall be demanded of him by the collector and comptroller, or other principal officer of the customs for such port or place, concerning such ship or vessel and the destination of her voyage, or concerning any goods or merchandise that shall or may be laden on board her, upon forfeiture of one hundred pounds sterling money of Great Britain for each and every default or neglect; to be sued for, prosecuted, recovered, and divided in the same manner and form by the same rules and regulation in all respects as other pecuniary penalties for offenses against the laws relating to the customs or trade of his Majesty's colonies in America, may, by any act or acts of Parliament now in force, be prosecuted, sued for, recovered, and divided.

### CHAPTER 10

And whereas by an act of Parliament made in the fourteenth year of the reign of King Charles the Second, entitled *An act for preventing frauds and regulating abuses in his Majesty's customs* and several other acts now in force, it is lawful for any officer of his Majesty's customs, authorized by writ of assistance under the seal of his Majesty's Court of Exchequer, to take a constable, headborough, or other public officer inhabiting near unto the place and in the daytime to enter and go into any house, shop, cellar, warehouse, or room or other place and, in case of resistance, to break open doors, chests, trunks, and other package there to seize, and from thence to bring, any kind of goods or merchandise whatsoever prohibited or uncustomed and to put and secure the same in his Majesty's storehouse next to the place where such seizure shall be made. And whereas by an act made in the seventh and eighth years of the reign of King William the Third, entitled, *An act for preventing frauds, and regulating abuses in the plantation trade,* it is, amongst other things, enacted that the officers for collecting and managing his Majesty's revenue and inspecting the plantation trade in America shall have the same powers and authorities to enter houses or warehouses to search and seize goods prohibited to be imported or exported into or out of any of the said plantations, or for which any duties are payable, or ought to have been paid; and that the like assistance shall be given to the said officers in the execution of their office, as, by the said recited act of the fourteenth year of King Charles the Second, is provided for the officers in England. But no authority being expressly given by the said act made in the seventh and eighth years of the reign of King William the Third to any particular court to grant such writs of assistance for the officers of the customs in the said plantations, it is doubted whether such officers can legally enter houses and other places on land to search for and seize goods in the manner directed by the said recited acts. To obviate such doubts for the future, and in order to carry the intention of the said recited acts into effectual

execution, be it enacted, and it is hereby enacted by the authority aforesaid, that from and after the said twentieth day of November, one thousand seven hundred and sixty-seven, such writs of assistance to authorize and empower the officers of his Majesty's customs to enter and go into any house, warehouse, shop, cellar, or other place in the British colonies or plantations in America to search for and seize prohibited or uncustomed goods in the manner directed by the said recited acts shall and may be granted by the said superior or supreme court of justice having jurisdiction within such colony or plantation, respectively.

### CHAPTER 11

And be it further enacted by the authority aforesaid that if any action or suit shall be commenced, either in Great Britain or America, against any person or persons for anything done in pursuance of this act, the defendant or defendants in such action or suit may plead the general issue and give this act and the special matter in evidence at any trial to be had thereupon; and that the same was done in pursuance and by the authority of this act. And if it shall appear so to have been done, the jury shall find for the defendant or defendants. And if the plaintiff shall be nonsuited, or discontinue his action after the defendant or defendants shall have appeared, or if judgment shall be given upon any verdict or demurrer against the plaintiff, the defendant or defendants shall recover treble costs and have the like remedy for the same as defendants have in other cases by law.

**An Act to Enable His Majesty to Put the Customs, and Other Duties, in the British Dominions in America, and the Execution of the Laws Relating to Trade There, under the Management of Commissioners to be Appointed for that Purpose, and to be Resident in the Said Dominions**

### [CHAPTER 1]

Whereas in pursuance of an act of Parliament made in the twenty-fifth year of the reign of King Charles the Second, entitled, *An act for the encouragement of the Greenland and Eastland trades, and for the better securing the plantation trade,* the rates and duties imposed by that, and several subsequent acts of Parliament upon various goods imported into, or exported from the British colonies and plantations in America, have been put under the management of the commissioners of the customs in England for the time being, by and under the authority and directions of the high treasurer, or commissioners of the treasury for the time being; and whereas the officers appointed for the collection of the said rates and duties in America are obliged to apply to the said commissioners of the customs in England for their special instructions and directions, upon every particular doubt and difficulty which arises in relation to the payment of the said rates and duties, whereby all persons concerned in the commerce and trade of the said colonies and plantations are greatly obstructed and delayed in the carrying on and transacting of their business; and whereas the appointing of commissioners to be resident in some convenient part of his Majesty's dominions in America, and to be invested with such powers as are now exercised by the commissioners of the customs in England by virtue of the laws in being, would relieve the said merchants and traders from the said inconveniences, tend to the encouragement of commerce and to the better securing of the said rates and duties, by the more speedy and effectual collection thereof; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same, that the customs and other duties imposed by any act or acts of Parliament upon any goods or merchandises brought or imported into, or exported or carried from any British colony or plantation in America, may from time to time be put under the management and direction of such commissioners to reside in the said plantations, as his Majesty, his heirs, and successors, by his or their commission or commissions under the great seal of Great Britain, shall judge to be most for the advantage of trade and security of the revenue of the said British colonies; any law, custom, or usage to the contrary notwithstanding.

### CHAPTER 2

And it is hereby further enacted by the authority aforesaid that the said commissioners to be appointed, or any three or more of them, shall have the same powers and authorities for carrying into execution the several laws relating to the revenues and trade of the said British colonies in America, as were, before the passing of this act, exercised by the commissioners of the

customs in England, by virtue of any act or acts of Parliament now in force, and it shall and may be lawful to and for his Majesty, his heirs, and successors, in such commission or commissions, to make provision for putting in execution the several laws relating to the customs and trade of the said British colonies; any law, custom, or usage to the contrary notwithstanding.

### CHAPTER 3

Provided always, and it is hereby further enacted by the authority aforesaid, that all deputations and other authorities granted by the commissioners of the customs in England before the passing of this act, or which may be granted by them before any commission or commissions shall issue in pursuance of this act, to any officer or officers acting in the said colonies or plantations shall continue in force as fully, to all intents and purposes, as if this act had not been made, until the deputation, or other authorities so granted to such officer or officers, respectively, shall be revoked, annulled, or made void by the high treasurer of Great Britain, or commissioners of the treasury for the time being.

**An Act for Taking Off the Inland Duty of One Shilling per Pound Weight upon All Black and Singlo Teas Consumed in Great Britain; and for Granting a Drawback upon the Exportation of Teas to Ireland and the British Dominions in America, for a Limited Time, upon Such Indemnification to Be Made in Respect Thereof by the East India Company, as Is Therein Mentioned; for Permitting the Exportation of Teas in Smaller Quantities Than One Lot to Ireland, or the Said Dominions in America; and for Preventing Teas Seized and Condemned from Being Consumed in Great Britain**

### [CHAPTER 1]

Whereas by an act of Parliament made in the eighteenth year of the reign of his late Majesty King George the Second, entitled, *An act for repealing the present inland duty of four shillings per poundweight upon all tea sold in Great Britain, and for granting to his Majesty certain other inland duties in lieu thereof; and for better securing the duty upon tea and other duties of excise; and for pursuing offenders out of one county into another;* an inland duty of one shilling per poundweight avoirdupois, and in that proportion for a greater or lesser quantity, was imposed and charged upon all tea to be sold in Great Britain; and also a further duty of twenty-five pounds for every one hundred pounds of the gross price at which such teas should be sold at the public sales of the united company of merchants of England trading to the East Indies, and proportionably for a greater or lesser sum; which duties were to commence from the twenty-fourth day of June, one thousand seven hundred and forty-five, over and above all customs, subsidies, and duties, payable to his Majesty for the same, upon importation thereof, to be paid in manner as in the said act is directed; and whereas by an act of Parliament made in the twenty-first year of his said late Majesty's reign, tea was allowed to be exported from this kingdom to Ireland and his Majesty's plantations in America without payment of the said inland duties; and whereas the taking off the said inland duty of one shilling per poundweight upon black and singlo teas, granted by the said act, and the allowing, upon the exportation of all teas which shall be exported to Ireland and his Majesty's plantations in America, the whole of the duty paid upon the importation thereof into this kingdom, appear to be the most probable and expedient means of extending the consumption of teas legally imported within this kingdom, and of increasing the exportation of teas to Ireland and to his Majesty's plantations in America, which are now chiefly furnished by foreigners in a course of illicit trade; and whereas the united company of merchants of England trading to the East Indies are willing and desirous to indemnify the public, in such manner as is hereinafter provided, with respect to any diminution of the revenue which shall or may happen from this experiment. We, your Majesty's most dutiful and loyal subjects, the Commons of Great Britain in Parliament assembled, do therefore most humbly beseech your Majesty, that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same, that for and during the space of five years, to be computed from the fifth day of July, one thousand seven hundred and sixty-seven, the said inland duty of one shilling per poundweight upon teas shall not be paid for or in respect of any bohea, congo, souchong, or pekoe teas, commonly called black teas, or any teas known by the denomination of singlo teas, which shall be cleared for consumption within

Great Britain, out of the warehouses of the united company of merchants of England trading to the East Indies, or their successors; but that all such teas so to be cleared, whether the same have been already, or shall be hereafter, sold by the said company, or their successors, shall be and are hereby freed and discharged during the said term from the said inland duty.

**CHAPTER 2**

And it is hereby further enacted by the authority aforesaid, that for and during the like space of five years, to be computed from the fifth day of July, one thousand seven hundred and sixty-seven, there shall be drawn back and allowed for all teas exported from this kingdom as merchandise to Ireland, or any of the British colonies or plantations in America, the whole duties of customs payable upon the importation of such teas; which drawback or allowance, with respect to such teas as shall be exported to Ireland, shall be made to the exporter in such manner, and under such rules, regulations, securities, penalties, and forfeitures, as any drawback or allowance is now payable out of the duty of customs upon the exportation of foreign goods to Ireland; and with respect to such teas as shall be exported to the British colonies and plantations in America, the said drawback or allowance shall be made in such manner, and under such rules, regulations, penalties, and forfeitures, as any drawback or allowance payable out of the duty of customs upon foreign goods exported to foreign parts was, could, or might be made before the passing of this act (except in such cases as are otherwise provided for by this act).

**CHAPTER 3**

Provided always, and it is hereby enacted by the authority aforesaid, that the drawback allowed by this act shall not be paid or allowed for any teas which shall not be exported directly from the warehouse or warehouses wherein the same shall be lodged, pursuant to the directions of an act made in the tenth year of the reign of his late Majesty King George the First.

**CHAPTER 4**

And, for making good any diminution which may happen in the revenues of customs and excise by the discontinuance of the said duty and the allowance of the said drawback during the term aforesaid, be it enacted by the authority aforesaid, that on or before the first day of September, one thousand seven hundred and sixty-eight, and on or before the first day of September in each of the four succeeding years, a true and exact account shall be taken, slated, and made up by the proper officers of the customs and excise, respectively, of the net produce of all the duties of customs for and in respect of teas sold by the said company, or their successors, and also of the net produce of the duties of excise upon teas cleared out of the warehouses belonging to the said company, or their successors, within the year, ending the fifth day of July immediately preceding the taking, stating, and making up, such account; and that a sum, which shall be equal to the annual net produce of the duties of customs paid upon the importation of teas which were exported to Ireland and the British colonies and plantations in America, upon an average for five years preceding the fifth day of July, one thousand seven hundred and sixty-seven, shall be deducted from the total of the net produce, so stated, of the said duties of customs and excise in the said account, for the year ending the said fifth day of July, one thousand seven hundred and sixty-eight, and for each of the said four succeeding years, respectively; and if, after such deduction shall have been made, the remaining sum shall not amount to such a sum as shall be equal to the annual net produce of all the duties of customs for and in respect of teas sold by the said company; and also to the annual net produce of the duties of excise upon teas cleared out of the warehouses of the said company on an average for five years preceding the said fifth day of July, one thousand seven hundred and sixty-seven; then, and in every such case, from time to time, as often as such case shall so happen, the said company, or their successors, within forty days after a copy of such yearly account respectively shall have been delivered to their chairman, deputy chairman, secretary, cashier, or accomptant [accountant] general shall advance and pay, for every such year, respectively, into the receipt of his Majesty's exchequer, for his Majesty's use, such sum of money as shall, with the monies remaining in such respective annual account after the deduction aforesaid shall have been made, amount to such a sum as shall be equal to the annual net produce of all the said duties of customs and excise upon teas, on the said average of five years preceding the said fifth day of July, one thousand seven hundred and sixty-seven; so as the money to be paid by the said company, or

their successors, in pursuance of this act, shall not, in any one of the said five years, exceed such a sum as shall be equal to the annual net amount of the said inland duty of one shilling per pound weight upon teas cleared from the warehouses of the said company for consumption within Great Britain; and also to the annual net amount of the duties of customs paid on the importation of teas which were exported to Ireland and the British colonies and plantations in America upon an average for five years preceding the said fifth day of July, one thousand seven hundred and sixty-seven.

**CHAPTER 5**

And be it further enacted by the authority aforesaid, that in case the said united company of merchants of England trading to the East Indies, or their successors, shall make failure in any of the payments hereby directed, required, or appointed to be made into the receipt of his Majesty's exchequer, in the manner, or on or before the respective times herein before limited or appointed for that purpose; that then, from time to time, as often as such case shall so happen, the money, whereof such failure in payment shall be made, shall and may be recovered to his Majesty's use, by action of debt, or upon the case, bill, suit, or information, in any of his Majesty's courts of record at Westminster; wherein no essoin, protection, privilege, or wager of law shall be allowed, or any more than one imparlance; in which action, bill, suit, or information, it shall be lawful to declare that the said united company of merchants of England trading to the East Indies, or their successors, are indebted to his Majesty the monies of which they shall have made default in payment, according to the form of this statute, and have not paid the same, which shall be sufficient; and in or upon such action, bill, suit, or information, there shall be further recovered to his Majesty's use, against the said united company of merchants of England trading to the East Indies, or their successors, damages, after the rate of twelve pounds per centum per annum, for the respective monies so unpaid, contrary to this act, together with full costs of suit; and the said united company, and their successors, and all their stock, funds, and all other their estate and property whatsoever and wheresoever shall be and are hereby made subject and liable to the payment of such monies, damages, and costs.

**CHAPTER 6**

And be it further enacted by the authority aforesaid, that all the monies which shall be paid into the receipt of his Majesty's exchequer in pursuance of this act shall be applied to such uses and purposes, and in such proportions, as the present duties on teas are now made applicable.

**CHAPTER 7**

And whereas by an act made in the twenty-first year of the reign of his late Majesty, entitled, *An act for permitting tea to be exported to Ireland, and his Majesty's plantations in America, without paying the inland duties charged thereupon by an act of the eighteenth year of his present Majesty's reign; and for enlarging the time for some of the payments to be made on the subscription of six millions three hundred thousand pounds, by virtue of an act of this session of Parliament,* it is enacted, that from and after the first day of June, one thousand seven hundred and forty-eight, no tea should be exported to the kingdom of Ireland, or to any of his Majesty's plantations in America, in any chest, cask, tub, or package whatsoever, other than that in which it was originally imported into Great Britain, nor in any less quantities than in the entire lot or lots in which the same was sold at the sale of the said united company, under the penalty of the forfeiture of such tea and the package containing the same; and whereas the prohibiting the exportation of tea in any less quantity than one entire lot has been very inconvenient to merchants and traders and tends to discourage the exportation of tea to Ireland, and the said colonies; be it therefore enacted by the authority aforesaid, that from and after the fifth day of July, one thousand seven hundred and sixty-seven, the said recited clause shall be, and is hereby, repealed.

**CHAPTER 8**

And be it further enacted by the authority aforesaid, that from and after the said fifth day of July, one thousand seven hundred and sixty-seven, no tea shall be exported to the kingdom of Ireland, or to any of his Majesty's plantations in America, in any chest, cask, tub, or package whatsoever other than that in which it was originally imported into Great Britain; nor in any less quantity than the whole and entire quantity contained in any chest, cask, tub, or package in which the same was sold at the public sale of the united company of merchants of England trad-

ing to the East Indies; under the penalty of the forfeiture of such tea, and the package containing the same, which shall and may be seized by any officer of the customs; and such forfeiture shall be recovered and applied in such and the same manner, as any of the penalties or forfeitures mentioned in the said act, made in the twenty-first year of the reign of his late Majesty, are thereby directed to be recovered and applied; and all tea exported under the authority of this act is hereby freed and discharged from the payment of the inland duties of excise, in such and the same manner, and shall be subject to the same rules and regulations, as are mentioned, appointed, and prescribed by the said act, in relation to tea exported by virtue thereof.

### CHAPTER 9

And be it enacted by the authority aforesaid, that from and after the twenty-fourth day of July, one thousand seven hundred and sixty-seven, all teas which shall be seized and condemned for being illegally imported, or for any other cause, shall not be sold for consumption within this kingdom, but shall be exported to Ireland, or to the British colonies in America; and that no such teas, after the sale thereof, shall be delivered out of any warehouse belonging to his Majesty, otherwise than for exportation as aforesaid, or be exported in any package containing a less quantity than fifty pounds weight; which exportation shall be made in like manner, and under the same rules, regulations, penalties, and forfeitures, except in respect to the allowance of any drawback, as are by this act prescribed, appointed, and inflicted in relation to the exportation of teas sold by the said company; and upon the like bond and security as is required by the said act made in the twenty-first year of the reign of his late Majesty King George the Second, to be approved of by the commissioners of the customs or excise in England for the time being, or any three of them, respectively, or by such person or persons as they shall respectively appoint for that purpose.

### CHAPTER 10

And be it further enacted by the authority aforesaid, that if any action or suit shall be commenced against any person or persons for anything by him or them done or executed in pursuance of this act, the defendant or defendants in such action or suit shall and may plead the general issue, and give this act, and the special matter, in evidence, at any trial to be had thereupon; and that the same was done in pursuance and by the authority of this act; and if afterwards a verdict shall pass for the defendant or defendants, or the plaintiff or plaintiffs shall become nonsuited, or discontinue his, her, or their action or prosecution, or judgment shall be given against him, her or them, upon demurrer, or otherwise, then such defendant or defendants shall have treble costs awarded to him or them against such plaintiff or plaintiffs.

# CONFLICT AND REVOLUTION

## Declaration of the Causes and Necessity of Taking up Arms

A declaration by the representatives of the united colonies of North America, now met in Congress at Philadelphia, setting forth the causes and necessity of their taking up arms

Following the outbreak of hostilities in Concord and Lexington, Massachusetts, in April 1775, the Second Continental Congress met in Philadelphia. The Congress created the Continental Army, appointed GEORGE WASHINGTON commander, and, on July 8, adopted the Declaration of the Causes and Necessity of Taking up Arms.

JOHN DICKINSON, a delegate from Pennsylvania, was the principal author of the declaration. Although the declaration describes the actions by the British government that had angered the colonists and justifies the need to resist the British with arms, it does not proclaim a desire to break with the mother country. Instead the declaration expresses the need to conserve old liberties and the old order "in defence of the freedom that is our birth right and which we ever enjoyed until the late violation of it."

### Declaration of the Causes and Necessity of Taking up Arms

If it was possible for men, who exercise their reason to believe, that the divine Author of our existence intended a part of the human race to hold an absolute property in, and an unbounded power over others, marked out by his infinite goodness and wisdom, as the objects of a legal domination never rightfully resistible, however severe and oppressive, the inhabitants of these colonies might at least require from the parliament of Great-Britain some evidence, that this dreadful authority over them, has been granted to that body. But a reverence for our Creator, principles of humanity, and the dictates of common sense, must convince all those who reflect upon the subject, that government was instituted to promote the welfare of mankind, and ought to be administered for the attainment of that end. The legislature of Great-Britain, however, stimulated by an inordinate passion for a power not only unjustifiable, but which they know to be peculiarly reprobated by the very constitution of that kingdom, and desparate of success in any mode of contest, where regard should be had to truth, law, or right, have at length, deserting those, attempted to effect their cruel and impolitic purpose of enslaving these colonies by violence, and have thereby rendered it necessary for us to close with their last appeal from reason to arms. Yet, however blinded that assembly may be, by their intemperate rage for unlimited domination, so to sight justice and the opinion of mankind, we esteem ourselves bound by obligations of respect to the rest of the world, to make known the justice of our cause. Our forefathers, inhabitants of the island of Great-Britain, left their native land, to seek on these shores a residence for civil and religious freedom. At the expense of their blood, at the hazard of their fortunes, without the least charge to the country from which they removed, by unceasing labour, and an unconquerable spirit, they effected settlements in the distant and unhospitable wilds of America, then filled with numerous and warlike barbarians.—Societies or

governments, vested with perfect legislatures, were formed under charters from the crown, and an harmonious intercourse was established between the colonies and the kingdom from which they derived their origin. The mutual benefits of this union became in a short time so extraordinary, as to excite astonishment. It is universally confessed, that the amazing increase of the wealth, strength, and navigation of the realm, arose from this source; and the minister, who so wisely and successfully directed the measures of Great-Britain in the late war, publicly declared, that these colonies enabled her to triumph over her enemies.—Towards the conclusion of that war, it pleased our sovereign to make a change in his counsels.—From that fatal movement, the affairs of the British empire began to fall into confusion, and gradually sliding from the summit of glorious prosperity, to which they had been advanced by the virtues and abilities of one man, are at length distracted by the convulsions, that now shake it to its deepest foundations.—The new ministry finding the brave foes of Britain, though frequently defeated, yet still contending, took up the unfortunate idea of granting them a hasty peace, and then subduing her faithful friends.

These colonies were judged to be in such a state, as to present victories without bloodshed, and all the easy emoluments of statuteable plunder.—The uninterrupted tenor of their peaceable and respectful behaviour from the beginning of colonization, their dutiful, zealous, and useful services during the war, though so recently and amply acknowledged in the most honourable manner by his majesty, by the late king, and by parliament, could not save them from the meditated innovations.—Parliament was influenced to adopt the pernicious project, and assuming a new power over them, have in the course of eleven years, given such decisive specimens of the spirit and consequences attending this power, as to leave no doubt concerning the effects of acquiescence under it. They have undertaken to give and grant our money without our consent, though we have ever exercised an exclusive right to dispose of our own property; statutes have been passed for extending the jurisdiction of courts of admiralty and vice-admiralty beyond their ancient limits; for depriving us of the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property; for suspending the legislature of one of the colonies; for interdicting all commerce to the capital of another; and for altering fundamentally the form of government established by charter, and secured by acts of its own legislature solemnly confirmed by the crown; for exempting the "*murderers*" of colonists from legal trial, and in effect, from punishment; for erecting in a neighbouring province, acquired by the joint arms of Great-Britain and America, a despotism dangerous to our very existence; and for quartering soldiers upon the colonists in time of profound peace. It has also been resolved in parliament, that colonists charged with committing certain offences, shall be transported to England to be tried. But why should we enumerate our injuries in detail? By one statute it is declared, that parliament can "*of right make laws to bind us in all cases whatsoever.*" What is to defend us against so enormous, so unlimited a power? Not a single man of those who assume it, is chosen by us; or is subject to our control or influence; but, on the contrary, they are all of them exempt from the operation of such laws, and an American revenue, if not diverted from the ostensible purposes for which it is raised, would actually lighten their own burdens in proportion, as they increase ours. We saw the misery to which such despotism would reduce us. We for ten years incessantly and ineffectually besieged the throne as supplicants; we reasoned, we remonstrated with parliament, in the most mild and decent language.

Administration sensible that we should regard these oppressive measures as freemen ought to do, sent over fleets and armies to enforce them. The indignation of the Americans was roused, it is true; but it was the indignation of a virtuous, loyal, and affectionate people. A Congress of delegates from the United Colonies was assembled at Philadelphia, on the fifth day of last September. We resolved again to offer an humble and dutiful petition to the King, and also addressed our fellow-subjects of Great-Britain. We have pursued every temperate, every respectful measure; we have even proceeded to break off our commercial intercourse with our fellow-subjects, as the last peaceable admonition, that our attachment to no nation upon earth should supplant our attachment to liberty.—This, we flattered ourselves, was the ultimate step of the controversy: but subsequent events have shewn, how vain was this hope of finding moderation in our enemies.

Several threatening expressions against the colonies were inserted in his majesty's speech; our petition, tho' we were told it was a decent one, and that his majesty had been pleased to receive it graciously, and to promise laying it before his parliament, was huddled into both houses among a bundle of American papers, and there neglected. The lords and commons in their address, in the month of February, said, that *"a rebellion at that time actually existed within the province of Massachusetts-Bay; and that those concerned with it, had been countenanced and encouraged by unlawful combinations and engagements, entered into by his majesty's subjects in several of the other colonies; and therefore they besought his majesty, that he would take the most effectual measures to inforce due obediance to the laws and authority of the supreme legislature."*—Soon after, the commercial intercourse of whole colonies, with foreign countries, and with each other, was cut off by an act of parliament; by another several of them were intirely prohibited from the fisheries in the seas near their coasts, on which they always depended for their sustenance; and large reinforcements of ships and troops were immediately sent over to general Gage.

Fruitless were all the entreaties, arguments, and eloquence of an illustrious band of the most distinguished peers, and commoners, who nobly and strenuously asserted the justice of our cause, to stay, or even to mitigate the heedless fury with which these accumulated and unexampled outrages were hurried on.—equally fruitless was the interference of the city of London, of Bristol, and many other respectable towns in our favor. Parliament adopted an insidious manoeuvre calculated to divide us, to establish a perpetual auction of taxations where colony should bid against colony, all of them uninformed what ransom would redeem their lives; and thus to extort from us, at the point of the bayonet, the unknown sums that should be sufficient to gratify, if possible to gratify, ministerial rapacity, with the miserable indulgence left to us of raising, in our own mode, the prescribed tribute. What terms more rigid and humiliating could have been dictated by remorseless victors to conquered enemies? in our circumstances to accept them, would be to deserve them.

Soon after the intelligence of these proceedings arrived on this continent, general Gage, who in the course of the last year had taken possession of the town of Boston, in the province of Massachusetts-Bay, and still occupied in it a garrison, on the 19th day of April, sent out from that place a large detachment of his army, who made an unprovoked assault on the inhabitants of the said province, at the town of Lexington, as appears by the affidavits of a great number of persons, some of whom were officers and soldiers of that detachment, murdered eight of the inhabitants, and wounded many others. From thence the troops proceeded in warlike array to the town of Concord, where they set upon another party of the inhabitants of the same province, killing several and wounding more, until compelled to retreat by the country people suddenly assembled to repel this cruel aggression. Hostilities, thus commenced by the British troops, have been since prosecuted by them without regard to faith or reputation.—The inhabitants of Boston being confined within that town by the general their governor, and having, in order to procure their dismission, entered into a treaty with him, it was stipulated that the said inhabitants having deposited their arms with their own magistrate, should have liberty to depart, taking with them their other effects. They accordingly delivered up their arms, but in open violation of honour, in defiance of the obligation of treaties, which even savage nations esteemed sacred, the governor ordered the arms deposited as aforesaid, that they might be preserved for their owners, to be seized by a body of soldiers; detained the greatest part of the inhabitants in the town, and compelled the few who were permitted to retire, to leave their most valuable effects behind.

By this perfidy wives are separated from their husbands, children from their parents, the aged and the sick from their relations and friends, who wish to attend and comfort them; and those who have been used to live in plenty and even elegance, are reduced to deplorable distress.

The general, further emulating his ministerial masters, by a proclamation bearing date on the 12th day of June, after venting the grossest falsehoods and calumnies against the good people of these colonies, proceeds to *"declare them all, either by name or description, to be rebels and traitors, to supercede the course of the common law, and instead thereof to publish and order the use and exercise of the law martial."*—His troops have butchered our countrymen, have wantonly burnt Charlestown, besides a considerable num-

ber of houses in other places; our ships and vessels are seized; the necessary supplies of provisions are intercepted, and he is exerting his utmost power to spread destruction and devastation around him.

We have received certain intelligence, that general Carleton, the governor of Canada, is instigating the people of that province and the Indians to fall upon us; and we have but too much reason to apprehend, that schemes have been formed to excite domestic enemies against us. In brief, a part of these colonies now feel, and all of them are sure of feeling, as far as the vengeance of administration can inflict them, the complicated calamities of fire, sword and famine. We are reduced to the alternative of chusing an unconditional submission to the tyranny of irritated ministers, or resistance by force.—The latter is our choice.—We have counted the cost of this contest, and find nothing so dreadful as voluntary slavery.—Honour, justice, and humanity, forbid us tamely to surrender that freedom which we received from our gallant ancestors, and which our innocent posterity have a right to receive from us. We cannot endure the infamy and guilt of resigning succeeding generations to that wretchedness which inevitably awaits them, if we basely entail hereditary bondage upon them.

Our cause is just. Our union is perfect. Our internal resources are great, and, if necessary, foreign assistance is undoubtedly attainable.—We gratefully acknowledge, as signal instances of the Divine favour towards us, that his Providence would not permit us to be called into this severe controversy, until we were grown up to our present strength, had been previously exercised in warlike operation, and possessed of the means of defending ourselves. With hearts fortified with these animating reflections, we most solemnly, before God and the world, declare, that, exerting the utmost energy of those powers, which our beneficent Creator hath graciously bestowed upon us, the arms we have been compelled by our enemies to assume, we will, in defiance of every hazard, with unabating firmness and perseverence, employ for the preservation of our liberties; being with one mind resolved to die freemen rather than to live slaves.

Lest this declaration should disquiet the minds of our friends and fellow-subjects in any part of the empire, we assure them that we mean not to dissolve that union which has so long and so happily subsisted between us, and which we sincerely wish to see restored.—Necessity has not yet driven us into that desperate measure, or induced us to excite any other nation to war against them.—We have not raised armies with ambitious designs of separating from Great-Britain, and establishing independent states. We fight not for glory or for conquest. We exhibit to mankind the remarkable spectacle of a people attacked by unprovoked enemies, without any imputation or even suspicion of offence. They boast of their privileges and civilization, and yet proffer no milder conditions than servitude or death.

In our own native land, in defence of the freedom that is our birthright, and which we ever enjoyed till the late violation of it—for the protection of our property, acquired solely by the honest industry of our fore-fathers and ourselves, against violence actually offered, we have taken up arms. We shall lay them down when hostilities shall cease on the part of the aggressors, and all danger of their being renewed shall be removed, and not before.

With an humble confidence in the mercies of the supreme and impartial Judge and Ruler of the Universe, we most devoutly implore his divine goodness to protect us happily through this great conflict, to dispose our adversaries to reconciliation on reasonable terms, and thereby to relieve the empire from the calamities of civil war.

# CONFLICT AND REVOLUTION

## COMMON SENSE

Thomas Paine, 1776

In January 1776 THOMAS PAINE published his fifty-page pamphlet *Common Sense.* It called for political independence and the establishment of a republican government. The pamphlet created a sensation, as much for its passionate rhetoric as for its political views. It sold more than 500,000 copies within a few months and is credited with creating the political momentum that led to the issuance of the DECLARATION OF INDEPENDENCE on July 4, 1776.

In *Common Sense,* Paine turned his vitriol on King George III and the institution of the monarchy, calling the king a "royal brute" and a "crowned ruffian." Insisting that people did not have to live under such a regime, he declared "that in America the law is king."

### Common Sense

This is supposing the present race of kings in the world to have had an honorable origin; whereas it is more than probable, that, could we take off the dark covering of antiquity and trace them to their first rise, we should find the first of them nothing better than the principal ruffian of some restless gang; whose savage manners or preeminence in subtility obtained him the title of chief among plunderers: and who by increasing in power and extending his depredations, overawed the quiet and defenceless to purchase their safety by frequent contributions. . . .

* * *

England since the conquest hath known some few good monarchs, but groaned beneath a much larger number of bad ones; yet no man in his senses can say that their claim under William the Conqueror is a very honorable one. A French bastard landing with an armed banditti and establishing himself king of England against the consent of the natives is in plain terms a very paltry rascally original. It certainly hath no divinity in it. However it is needless to spend much time in exposing the folly of hereditary rights: if there were any so weak as to believe it, let them promiscuously worship the ass and the lion, and welcome. I shall neither copy their humility, nor disturb their devotion. . . . The plain truth is, that the antiquity of English monarchy will not bear looking into.

* * *

In England a king hath little more to do than to make war and give away places; which, in plain terms, is to empoverish the nation and set it together by the ears. A pretty business indeed for a man to be allowed eight hundred thousand sterling a year for, and worshipped into the bargain! Of more worth is one honest man to society, and in the sight of God, than all the crowned ruffians that ever lived.

* * *

But where, say some, is the king of America? I'll tell you, he reigns above, and doth not make havoc of mankind like the royal brute of Great Britain. Yet that we may not appear to be defec-

Selections from *Common Sense* by Thomas Paine.

tive even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law, the Word of God; let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America the law is king. For as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other. But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is.

# CONFLICT AND REVOLUTION

## Virginia Declaration of Rights

The VIRGINIA DECLARATION OF RIGHTS was adopted by the Virginia colonial constitutional convention on June 12, 1776. Its sixteen sections enumerated specific civil liberties that could not be legitimately taken away by government.

Most of the Declaration of Rights was written by GEORGE MASON, a plantation owner, real estate speculator, and neighbor of GEORGE WASHINGTON. A strong believer in human liberty and limited government, Mason crafted a document that guaranteed the citizens of Virginia, upon achieving independence from Great Britain, all the civil liberties they had lost under British rule.

The Declaration of Rights enumerates specific civil liberties, including freedom of the press, the free exercise of religion, and the injunction that "no man be deprived of his liberty, except by the law of the land or the judgement of his peers." Other provisions prohibited excessive bail or cruel and unusual punishments, required authorities to have evidence and good cause before obtaining a search warrant to enter a place, guaranteed the right to trial by jury, and said that a "well regulated militia" should be "under strict subordination" to the civilian government. Many of these provisions were later incorporated into the Bill of Rights.

### Virginia Declaration of Rights

**I**

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

**II**

That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

**III**

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration; and that, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

**IV**

That no man, or set of men, are entitled to exclusive or separate emoluments or privileges

Source: Ben Perley Poore, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States,* vol. 2 (1878), pp. 1908–1909.

from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.

**V**

That the legislative and executive powers of the state should be separate and distinct from the judicative; and, that the members of the two first may be restrained from oppression by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

**VI**

That elections of members to serve as representatives of the people in assembly ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.

**VII**

That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people is injurious to their rights and ought not to be exercised.

**VIII**

That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land or the judgment of his peers.

**IX**

That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

**X**

That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not be granted.

**XI**

That in controversies respecting property and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.

**XII**

That the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments.

**XIII**

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

**XIV**

That the people have a right to uniform government; and therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.

**XV**

That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.

**XVI**

That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

# CONFLICT AND REVOLUTION

## DECLARATION OF INDEPENDENCE

In Congress, July 4, 1776
The Unanimous Declaration of the thirteen united States of America

The DECLARATION OF INDEPENDENCE, perhaps the most famous document in U.S. history, was adopted by the Second Continental Congress on July 4, 1776. The preparation of the declaration began on June 11, when Congress appointed a committee composed of THOMAS JEFFERSON, JOHN ADAMS, BENJAMIN FRANKLIN, ROBERT R. LIVINGSTON, and ROGER SHERMAN. Jefferson actually wrote the declaration, appropriating some of the language in the VIRGINIA DECLARATION OF RIGHTS. Jefferson's famous phrase concerning "life, liberty, and the pursuit of happiness" is a slight reworking of the wording of the Virginia declaration.

After debate on Jefferson's draft, the Congress made several changes, yet the document remained an expression of the liberal political ideas articulated by JOHN LOCKE and others. The second section, with its reference to "He," is an indictment of the actions of King George III. Like *Common Sense,* this section destroyed the aura surrounding the monarchy and helped move the colonists toward psychological as well as political independence from Great Britain.

For the members of the CONTINENTAL CONGRESS, the declaration served as a vehicle for publicizing their grievances and winning support for the revolutionary cause. It affirmed the natural rights of all people and the right of the colonists to "dissolve the political bands" with the British government. Later generations have laid more stress on the political ideals expressed in the declaration and, in particular, have found inspiration in the phrase "all men are created equal."

### Declaration of Independence

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.—We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils

Source: *The United States Government Manual.*

are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.—He has refused his Assent to Laws, the most wholesome and necessary for the public good.—He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.—He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.—He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository or their public Records, for the sole purpose of fatiguing them into compliance with his measures.—He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.—He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.—He has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriations of Lands.—He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.—He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.—He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance.—He has kept among us, in times of peace, Standing Armies, without the Consent of our legislatures.—He has affected to render the Military independent of and superior to the Civil power.—He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:—For quartering large bodies of armed troops among us:—For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:—For cutting off our Trade with all parts of the world:—For imposing Taxes on us without our Consent:—For depriving us in many cases, of the benefits of Trial by Jury:—For transporting us beyond Seas to be tried for pretended offences:—For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:—For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:—For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.—He has abdicated Government here, by declaring us out of his Protection and waging War against us.—He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.—He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.—He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.—He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions. In every state of these Oppressions We have Petitioned for Redress in the most humble terms. Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a

Tyrant, is unfit to be the ruler of a free people. Nor have We been wanting in attentions to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.—

WE, THEREFORE, the REPRESENTATIVES of the UNITED STATES OF AMERICA, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be FREE AND INDEPENDENT STATES; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally disolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.—And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

John Hancock
Button Gwinnett
Lyman Hall
Geo. Walton
Wm. Hooper
Joseph Hewes
John Penn
Edward Rutledge
Thos. Heyward, Jr.
Thomas Lynch, Jr.
Arthur Middleton
Samuel Chase
Wm. Paca
Thos. Stone
Charles Carroll of Carrollton
George Wythe
Richard Henry Lee
Th. Jefferson
Benj. Harrison
Thos. Nelson, Jr.
Francis Lightfoot Lee
Carter Braxton
Robt. Morris
Benjamin Rush
Benj. Franklin
John Morton
Geo. Clymer
Jas. Smith
Geo. Taylor
James Wilson
Geo. Ross
Caesar Rodney
Geo. Read
Tho. M. Kean
Wm. Floyd
Phil. Livington
Frans. Lewis
Lewis Morris
Richd. Stockton
Jno. Witherspoon
Fras. Hopkinson
John Hart
Abra. Clark
Josiah Bartlett
Wm. Whipple
Saml. Adams
John Adams
Robt. Treat Paine
Elbridge Gerry
Step. Hopkins
William Ellery
Roger Sherman
Sam. Huntington
Wm. Williams
Oliver Wolcott
Matthew Thornton

# CONFLICT AND REVOLUTION

## Treaty of Paris

The TREATY OF PARIS of 1783 ended the WAR OF INDEPENDENCE and granted the thirteen colonies political freedom. A preliminary treaty between Great Britain and the United States had been signed in 1782, but the final agreement was not signed until September 3, 1783.

Peace negotiations began in Paris, France, in April 1782. The U.S. delegation included BENJAMIN FRANKLIN, JOHN ADAMS, JOHN JAY, and Henry Laurens, while the British were represented by Richard Oswald and Henry Strachey. The negotiators concluded the preliminary treaty on November 30, 1782, but the agreement was not effective until Great Britain concluded treaties with France and Spain concerning foreign colonies.

In the final agreement, the British recognized the independence of the United States. The treaty established generous boundaries for the United States; U.S. territory now extended from the Atlantic Ocean to the Mississippi River in the west, and from the Great Lakes and Canada in the north to the 31st parallel in the south. The U.S. fishing fleet was guaranteed access to the fisheries off the coast of Newfoundland with their plentiful supply of cod.

Navigation of the Mississippi River was to be open to both the United States and Great Britain. Creditors of both countries were not to be impeded from collecting their debts, and Congress was to recommend to the states that loyalists to the British cause during the war should be treated fairly and their rights and confiscated property restored.

### Treaty of Paris

In the name of the most holy and undivided Trinity.

It having pleased the Divine Providence to dispose the hearts of the most serene and most potent Prince George the Third, by the grace of God, king of Great Britain, France, and Ireland, defender of the faith, duke of Brunswick and Lunebourg, arch-treasurer and prince elector of the Holy Roman Empire etc., and of the United States of America, to forget all past misunderstandings and differences that have unhappily interrupted the good correspondence and friendship which they mutually wish to restore, and to establish such a beneficial and satisfactory intercourse, between the two countries upon the ground of reciprocal advantages and mutual convenience as may promote and secure to both perpetual peace and harmony; and having for this desirable end already laid the foundation of peace and reconciliation by the Provisional Articles signed at Paris on the 30th of November 1782, by the commissioners empowered on each part, which articles were agreed to be inserted in and to constitute the Treaty of Peace proposed to be concluded between the Crown of Great Britain and the said United States, but which treaty was not to be concluded until terms of peace should be agreed upon between Great Britain and France and his Britannic Majesty

Source: United States. Department of State, *Treaties and Other International Agreements of the United States of America, 1776–1949* (compiled under the direction of Charles I. Bevans), vol. 12 (1974), pp. 8–12.

should be ready to conclude such treaty accordingly; and the treaty between Great Britain and France having since been concluded, his Britannic Majesty and the United States of America, in order to carry into full effect the Provisional Articles above mentioned, according to the tenor thereof, have constituted and appointed, that is to say his Britannic Majesty on his part, David Hartley, Esqr., member of the Parliament of Great Britain, and the said United States on their part, John Adams, Esqr., late a commissioner of the United States of America at the court of Versailles, late delegate in Congress from the state of Massachusetts, and chief justice of the said state, and minister plenipotentiary of the said United States to their high mightinesses the States General of the United Netherlands; Benjamin Franklin, Esqr., late delegate in Congress from the state of Pennsylvania, president of the convention of the said state, and minister plenipotentiary from the United States of America at the court of Versailles; John Jay, Esqr., late president of Congress and chief justice of the state of New York, and minister plenipotentiary from the said United States at the court of Madrid; to be the plenipotentiaries for the concluding and signing the present definitive treaty; who after having reciprocally communicated their respective full powers have agreed upon and confirmed the following articles.

### ARTICLE 1

His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free sovereign and independent states, that he treats with them as such, and for himself, his heirs, and successors, relinquishes all claims to the government, propriety, and territorial rights of the same and every part thereof.

### ARTICLE 2

And that all disputes which might arise in future on the subject of the boundaries of the said United States may be prevented, it is hereby agreed and declared, that the following are and shall be their boundaries, viz.: from the northwest angle of Nova Scotia, viz., that angle which is formed by a line drawn due north from the source of St. Croix River to the highlands; along the said highlands which divide those rivers that empty themselves into the river St. Lawrence, from those which fall into the Atlantic Ocean, to the northwesternmost head of Connecticut River; thence down along the middle of that river to the forty-fifth degree of north latitude; from thence by a line due west on said latitude until it strikes the river Iroquois or Cataraquy; thence along the middle of said river into Lake Ontario; through the middle of said lake until it strikes the communication by water between that lake and Lake Erie; thence along the middle of said communication into Lake Erie, through the middle of said lake until it arrives at the water communication between that lake and Lake Huron; thence along the middle of said water communication into the Lake Huron, thence through the middle of said lake to the water communication between that lake and Lake Superior; thence through Lake Superior northward of the Isles Royal and Phelipeaux to the Long Lake; thence through the middle of said Long Lake and the water communication between it and the Lake of the Woods, to the said Lake of the Woods; thence through the said lake to the most northwestern point thereof, and from thence on a due west course to the river Mississippi; thence by a line to be drawn along the middle of the said river Mississippi until it shall intersect the northernmost part of the thirty-first degree of north latitude. South, by a line to be drawn due east from the determination of the line last mentioned in the latitude of thirty-one degrees north of the equator, to the middle of the river Apalachicola or Catahouche; thence along the middle thereof to its junction with the Flint River, thence straight to the head of Saint Mary's River; and thence down along the middle of Saint Mary's River to the Atlantic Ocean; east, by a line to be drawn along the middle of the river Saint Croix, from its mouth in the Bay of Fundy to its source, and from its source directly north to the aforesaid highlands which divide the rivers that fall into the Atlantic Ocean from those which fall into the river Saint Lawrence; comprehending all islands within twenty leagues of any part of the shores of the United States, and lying between lines to be drawn due east from the points where the aforesaid boundaries between Nova Scotia on the one part and East Florida on the other shall, respectively, touch the Bay of Fundy and the Atlantic Ocean, excepting such islands as now are or heretofore have been within the limits of the said province of Nova Scotia.

**ARTICLE 3**

It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank and on all the other banks of Newfoundland, also in the Gulf of Saint Lawrence and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish. And also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use, (but not to dry or cure the same on that island) and also on the coasts, bays, and creeks of all other of his Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled, but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground.

**ARTICLE 4**

It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted.

**ARTICLE 5**

It is agreed that Congress shall earnestly recommend it to the legislatures of the respective states to provide for the restitution of all estates, rights, and properties, which have been confiscated belonging to real British subjects; and also of the estates, rights, and properties of persons resident in districts in the possession of his Majesty's arms and who have not borne arms against the said United States. And that persons of any other description shall have free liberty to go to any part or parts of any of the thirteen United States and therein to remain twelve months unmolested in their endeavors to obtain the restitution of such of their estates, rights, and properties as may have been confiscated; and that Congress shall also earnestly recommend to the several states a reconsideration and revision of all acts or laws regarding the premises, so as to render the said laws or acts perfectly consistent not only with justice and equity but with that spirit of conciliation which on the return of the blessings of peace should universally prevail. And that Congress shall also earnestly recommend to the several states that the estates, rights, and properties, of such last mentioned persons shall be restored to them, they refunding to any persons who may be now in possession the bona fide price (where any has been given) which such persons may have paid on purchasing any of the said lands, rights, or properties since the confiscation.

And it is agreed that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights.

**ARTICLE 6**

That there shall be no future confiscations made nor any prosecutions commenced against any person or persons for, or by reason of, the part which he or they may have taken in the present war, and that no person shall on that account suffer any future loss or damage, either in his person, liberty, or property; and that those who may be in confinement on such charges at the time of the ratification of the treaty in America shall be immediately set at liberty, and the prosecutions so commenced be discontinued.

**ARTICLE 7**

There shall be a firm and perpetual peace between his Britannic Majesty and the said states, and between the subjects of the one and the citizens of the other, wherefore all hostilities both by sea and land shall from henceforth cease. All prisoners on both sides shall be set at liberty, and his Britannic Majesty shall with all convenient speed, and without causing any destruction, or carrying away any Negroes or other property of the American inhabitants, withdraw all his armies, garrisons, and fleets from the said United States, and from every post, place, and harbor within the same; leaving in all fortifications, the American artillery that may be therein; and shall also order and cause all archives, records, deeds, and papers belonging to any of the said states, or their citizens, which in the course of the war may have fallen into the hands of his officers, to be forthwith restored and delivered to the proper states and persons to whom they belong.

**ARTICLE 8**

The navigation of the river Mississippi, from its source to the ocean, shall forever remain free and open to the subjects of Great Britain and the citizens of the United States.

**ARTICLE 9**

In case it should so happen that any place or territory belonging to Great Britain or to the United States should have been conquered by the arms of either from the other before the arrival of the said Provisional Articles in America, it is agreed that the same shall be restored without difficulty and without requiring any compensation.

**ARTICLE 10**

The solemn ratifications of the present treaty expedited in good and due form shall be exchanged between the contracting parties in the space of six months or sooner, if possible, to be computed from the day of the signature of the present treaty. In witness whereof we the undersigned, their ministers plenipotentiary, have in their name and in virtue of our full powers, signed with our hands the present definitive treaty and caused the seals of our arms to be affixed thereto.

Done at Paris, this third day of September in the year of our Lord, one thousand seven hundred and eighty-three.

*D. Hartley* [Seal]

*John Adams* [Seal]

*B. Franklin* [Seal]

*John Jay* [Seal]

# ORIGINS OF U.S. GOVERNMENT

- ARTICLES OF CONFEDERATION
- NORTHWEST ORDINANCE
- THE VIRGINIA, OR RANDOLPH, PLAN
- THE NEW JERSEY, OR PATERSON, PLAN
- CONSTITUTION OF THE UNITED STATES
- BILL OF RIGHTS
- FEDERALIST, NUMBER 10
- FEDERALIST, NUMBER 78
- THE VIRGINIA AND KENTUCKY RESOLVES
- MONROE DOCTRINE

After declaring their independence in 1776, the thirteen states had to determine both what type of central government they should form and how the individual states would be related to that central government. Their initial efforts to answer those questions resulted in the ARTICLES OF CONFEDERATION. The Articles were drafted in 1776 but were modified during the ratification process, which ended when the Articles went into effect on March 1, 1781.

The Articles of Confederation created a weak national government, which lacked both an executive and a judicial branch. The national government consisted only of a Congress, which prosecuted the end of the WAR OF INDEPENDENCE and negotiated the TREATY OF PARIS. By the end of the war, however, the Congress of the Confederation of the States found itself receiving less cooperation from the individual states. The Congress did enact the NORTHWEST ORDINANCE in 1787, which provided for the government of the Northwest Territory and established a procedure by which states could be carved out of the territory.

Dissatisfaction with the Articles of Confederation grew during the 1780s until Congress finally summoned a convention to amend and revise the Articles. All of the states except Rhode Island sent delegates to the convention, which convened in Philadelphia, Pennsylvania, in May 1787. A fundamental problem for the delegates was resolving a split between the states that favored a strong national government and those that preferred the strong state governments established by the Articles of Confederation.

As the convention debated the issues, it soon became apparent that a stronger national government was needed and that the Articles of Confederation would have to be replaced. A major conflict developed, however, between the large states, which favored a legislature apportioned by population, and the small states, which preferred a system under which each state would have an equal vote. The large states proposed the Virginia Plan, also known as the Randolph Plan, and the small states offered the New Jersey, or Paterson, Plan. At first, neither side would yield on the issue of representation. Finally, ROGER SHERMAN, along with OLIVER ELLSWORTH, proposed the Connecticut, or Great, Compromise, which called for a bicameral legislature with proportional representation in the lower house and equal representation in the upper house.

The U.S. Constitution was completed on September 17, 1787. It established three branches of government (legislative, executive, judicial) with an intricate set of checks and balances aimed at preventing one branch of government from gaining absolute control. The separation of powers is one of the hallmarks of the Constitution. The Framers did not, however, resolve the question of slavery. Southern states won the Three-fifths Compromise, which allowed them to count each slave as three-fifths of a white person in apportioning the House of Representatives and the electoral college.

Though opponents of the Constitution argued that it gave too much power to the national government, it was ratified by the req-

uisite number of states by June 1788. GEORGE MASON, drafter of the VIRGINIA DECLARATION OF RIGHTS, and other STATES' RIGHTS advocates opposed ratification because the Constitution included no guarantees of basic personal liberties. In response, the first Congress convened under the Constitution in 1789 enacted the first ten amendments to the Constitution, known as the BILL OF RIGHTS.

During the ratification battle of 1787 and 1788, ALEXANDER HAMILTON, JAMES MADISON, and JOHN JAY wrote eighty-five short essays in support of the Constitution. The essays, known as the FEDERALIST PAPERS, sought to convince the voters of New York to persuade their legislators to vote in favor of the proposed federal constitution. The writers so clearly articulated the reasoning and scope of many of the constitutional provisions that the *Federalist Papers* have taken on lasting historical and legal significance.

The early years of the Republic saw a clash between the Federalists, led by Hamilton, and the Republicans, led by Thomas Jefferson. Jefferson and other proponents of strong state governments accused Hamilton and other advocates of a strong national government of going beyond the constitutional restrictions on the power of the national government. This debate escalated after the federal ALIEN AND SEDITION ACTS (1 Stat. 570, 596) were enacted in 1798. Jefferson and Madison prepared resolves, or resolutions, for the Virginia and Kentucky legislatures that proposed a "compact" theory of the U.S. Constitution. Under this theory state legislatures possessed all powers not specifically granted to the federal government, and states had the right to pass upon the constitutionality of federal legislation.

In the first years of the new nation, it was unclear whether the Supreme Court had the right to review an executive or legislative act and invalidate it if the act was contrary to constitutional principles. Article III of the Constitution was silent on the subject, but the Supreme Court settled the issue in 1803, when it ruled in MARBURY V. MADISON, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60, that a particular act of Congress was unconstitutional.

The United States entered the field of international relations in 1823, when President JAMES MONROE enunciated a statement on foreign policy that has come to be known as the MONROE DOCTRINE. The Monroe Doctrine asserted U.S. dominance over the Western Hemisphere and warned European nations not to interfere with the free nations of the region.

# ORIGINS OF U.S. GOVERNMENT

## ARTICLES OF CONFEDERATION

The Articles of Confederation were the first constitution of the United States. During 1776–1777, a congressional committee led by JOHN DICKINSON of Pennsylvania (who had drafted the Declaration of the Causes and Necessity of Taking up Arms in 1775) wrote the Articles and submitted them to the states for ratification in 1777. Ratification was delayed by disputes between the states with extensive western lands and the "landless" states such as Maryland. On March 1, 1781, after the landed states agreed to cede their lands to Congress, the new government came into existence.

The Articles of Confederation reflected the new nation's fear of centralized power and authority. Under the Articles the states were more powerful than the central government, which consisted only of a Congress. Each state had one vote in Congress, with that vote determined by a delegation of from two to seven representatives. Though the Congress had the authority to regulate foreign affairs, wage war, and maintain the postal system, it had no power to levy and collect taxes or regulate interstate commerce.

Critics of the Articles multiplied until finally, in 1787, Congress summoned a convention to draft a revised constitution. On March 4, 1789, the new U.S. Constitution took effect, superseding the Articles of Confederation.

### Articles of Confederation

To all to whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting

Whereas the Delegates of the United States of America in Congress assembled did on the fifteenth day of November in the Year of our Lord One Thousand Seven Hundred and Seventy-seven, and in the Second Year ofthe Independence of America agree to certain articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhode-island, and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia in the Words following, viz.

Articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts-bay, Rhode-island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia

#### ARTICLE I

The stile of this confederacy shall be "The United States of America."

Source: Ben Perley Poore, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States,* vol. 1 (1878), pp. 7–12.

### ARTICLE II

Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

### ARTICLE III

The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty trade or any other pretence whatever.

### ARTICLE IV

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not exceed so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense.

Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings to the courts and magistrates of every other State.

### ARTICLE V

For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

### ARTICLE VI

No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state; nor shall any person holding any office or profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the United States in Congress assembled or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any way without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted: nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subject thereof, against which war has been so declared and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

### ARTICLE VII

When land-forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

### ARTICLE VIII

All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress Assembled.

### ARTICLE IX

The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to

appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall, in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward:" provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdiction as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States.—fixing the standard of weights and measures throughout the United States.—regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated—establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces, in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "a Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction—to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses—to borrow money or emit bills on the credit of the United States transmitting every half year to the respective States an account of the sums of money so borrowed or emitted,—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men and cloath, arm

and equip them in a soldier like manner, at the expense of the United States; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled: but if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secresy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or her request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the Legislatures of the several States.

### ARTICLE X

The committee of the States, or any nine of them, shall be authorized to execute in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine States in the Congress of the United States assembled is requisite.

### ARTICLE XI

Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

### ARTICLE XII

All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

### ARTICLE XIII

Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

And whereas it has pleased the Great Governor of the world to incline the hearts of the Legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective con-

stituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained: and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said confederation are submitted to them. And that the articles thereof shall be inviolably observed by the States we re[s]pectively represent, and that the Union shall be perpetual.

In witness whereof we have hereunto set our hands in Congress.

Done at Philadelphia in the State of Pennsylvania the ninth day of July in the year of our Lord one thousand seven hundred and seventy-eight, and in the third year of the independence of America.

On the part and behalf of the State of New Hampshire

JOSIAH BARTLETT, August 8th, 1778.

JOHN WENTWORTH, Junr.,

On the part and behalf of the State of Massachusetts Bay

JOHN HANCOCK, FRANCIS DANA,
SAMUEL ADAMS, JAMES LOVELL,
ELBRIDGE GERRY, SAMUEL HOLTEN.

On the part and behalf of the State of Rhode Island and Providence Plantations

WILLIAM ELLERY, JOHN COLLINS.
HENRY MARCHANT,

On the part and behalf of the State of Connecticut

ROGER SHERMAN, TITUS HOSMER,
SAMUEL HUNTINGTON,
OLIVER WOLCOTT, ANDREW ADAMS.

On the part and behalf of the State of New York

JAS. DUANE, WM. DUER,
FRA. LEWIS, GOUV. MORRIS.

On the part and in behalf of the State of New Jersey, Novr. 26, 1778

JNO. WITHERSPOON, NATHL. SCUDDER.

On the part and behalf of the State of Pennsylvania

ROBT. MORRIS, WILLIAM CLINGAN,
DANIEL ROBERDEAU, JOSEPH REED,
JONA. BAYARD SMITH, 22d July, 1778.

On the part & behalf of the State of Delaware

THO. M'KEAN, Feby. 12, 1779.
NICHOLAS VAN DYKE.
JOHN DICKINSON, May 5th, 1779

On the part and behalf of the State of Maryland

JOHN HANSON, Mar. 1, 1781.
DANIEL CARROLL, March 1, 1781.

On the part and behalf of the State of Virginia

RICHARD HENRY LEE, JNO. HARVIE,
JOHN BANISTER, THOMAS ADAMS,
FRANCIS LIGHTFOOT LEE.

On the part and behalf of the State of No. Carolina

JOHN PENN, July 21st, 1778.
CORNS. HARNETT, JNO. WILLIAMS.

On the part & behalf of the State of South Carolina

HENRY LAURENS, RICHD. HUTSON,
WILLIAM HENRY DRAYTON,
JNO. MATHEWS, THOS. HEYWARD, Junr.

On the part & behalf of the State of Georgia

JNO. WALTON, 24th July, 1778.
EDWD. TELFAIR
EDWD. LANGWORTHY.

# ORIGINS OF U.S. GOVERNMENT

## Northwest Ordinance

An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio

The Northwest Ordinance (officially the Ordinance of 1787) was enacted by the Congress of the Confederation of the States on July 13, 1787. This statute provided for the government of the Northwest Territory, an area bounded by the Ohio and Mississippi Rivers and the Great Lakes, and created a procedure by which states could be established within this territory and admitted to the Union. Congress was spurred to enact the ordinance when the Ohio Company of Associates, a group of land speculators, made plans to purchase more than one million acres in the territory.

The Northwest Ordinance set several important precedents. It established that unlike many nations, which left their new territories in a position inferior to the old, the United States would admit new states to the Union on an equal basis with the original states. The ordinance also set aside land in each township for schools, thus setting a precedent for federal support to education. In addition, the ordinance prohibited slavery in the territory and included the first full statement of U.S. Indian policy, which stressed that "utmost good faith shall always be observed toward the Indians."

### Northwest Ordinance

Be it ordained by the United States in Congress assembled that the said territory, for the purposes of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

Be it ordained by the authority aforesaid that the estates both of resident and nonresident proprietors in the said territory, dying intestate, shall descend to and be distributed among their children and the descendants of a deceased child in equal parts, the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one-third part of the personal estate; and this law relative to descents and dower shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be (being of full age) and attested by three witnesses;—and real estates may be conveyed by lease and release, or bargain and sale, signed,

Source: Francis Newton Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America,* vol. 2 (1909), pp. 957–962.

sealed, and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers shall be appointed for that purpose; and personal property may be transferred by delivery, saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskies, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

Be it ordained by the authority aforesaid that there shall be appointed from time to time, by Congress, a governor whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.

There shall be appointed from time to time, by Congress, a secretary whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department, and transmit authentic copies of such acts and proceedings every six months to the secretary of Congress. There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdiction, and reside in the district and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original states, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

The governor, for the time being, shall be commander in chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

Previous to the organization of the general assembly the governor shall appoint such magistrates and other civil officers in each county or township as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized, the powers and duties of magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed shall, during the continuance of this temporary government, be appointed by the governor.

For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

So soon as there shall be five thousand free male inhabitants of full age in the district, upon giving proof thereof to the governor they shall receive authority, with time and place, to elect representatives from their counties or townships to represent them in the general assembly: provided that for every five hundred free male inhabitants there shall be one representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulated by the legislature: provided that no person be eligible or qualified to act as a representative unless he shall have been a citizen of one of the United States three years and be a resident in the district, or unless he shall have resided in the district three years; and in either case, shall likewise hold in his own right, in fee simple, two hundred acres of land within the same: provided also that a freehold in fifty acres of land in the district, having been a citizen of

one of the states, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative.

The representatives thus elected shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township for which he was a member to elect another in his stead, to serve for the residue of the term.

The general assembly or legislature shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum: and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected the governor shall appoint a time and place for them to meet together, and when met they shall nominate ten persons, residents in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress, five of whom Congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy and return their names to Congress, one of whom Congress shall appoint and commission for the residue of the term; and every five years, four months at least before the expiration of the time of service of the members of the council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress, five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives shall have authority to make laws in all cases for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house and by a majority in the council, shall be referred to the governor for his assent; but no bill or legislative act whatever shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.

The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district shall take an oath or affirmation of fidelity and of office; the governor before the president of Congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house, assembled in one room, shall have authority by joint ballot to elect a delegate to Congress who shall have a seat in Congress, with a right of debating, but not of voting, during this temporary government.

And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments which forever hereafter shall be formed in the said territory; to provide also for the establishment of states, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original states, at as early periods as may be consistent with the general interest:

It is hereby ordained and declared by the authority aforesaid that the following articles shall be considered as articles of compact, between the original states and the people and states in the said territory, and forever remain unalterable, unless by common consent, to wit:

### ARTICLE I

No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments in the said territory.

### ARTICLE II

The inhabitants of the said territory shall always be entitled to the benefits of the writs of habeas corpus and of the trial by jury; of a proportionate representation of the people in the legislature and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers,

or the law of the land, and should the public exigencies make it necessary for the common preservation to take any person's property, or to demand his particular services, full compensation shall be made for the same. And in the just preservation of rights and property, it is understood and declared that no law ought ever to be made or have force in the said territory that shall in any manner whatever interfere with or affect private contracts, or engagements, bona fide, and without fraud previously formed.

### ARTICLE III

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.

### ARTICLE IV

The said territory, and the states which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the Federal debts contracted or to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other states; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new states, as in the original states, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts, or new states, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers. No tax shall be imposed on land the property of the United States; and in no case shall nonresident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and Saint Lawrence and the carrying places between the same shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefore.

### ARTICLE V

There shall be formed in the said territory not less than three nor more than five states; and the boundaries of the states, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: The western state in the said territory shall be bounded by the Mississippi, the Ohio, and the Wabash rivers; a direct line drawn from the Wabash and Post Vincents, due north to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle state shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line, and by the said territorial line. The eastern state shall be bounded by the last-mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: provided, however, and it is further understood and declared, that the boundaries of these three states shall be subject so far to be altered that, if Congress shall hereafter find it expedient, they shall have authority to form one or two states in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original states in all respects whatever; and shall be at liberty to form a permanent constitution and state government: provided the constitution and government so to be formed shall be republican, and in conformity to the principles contained in these articles, and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period,

and when there may be a less number of free inhabitants in the state than sixty thousand.

### ARTICLE VI

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted: provided always that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.

Be it ordained by the authority aforesaid that the resolutions of the 23d of April, 1784, relative to the subject of this ordinance, be, and the same are hereby, repealed and declared null and void.

Done by the United States, in Congress assembled, the 13th day of July, in the year of our Lord one thousand seven hundred and eighty-seven, and of their sovereignty and independence the twelfth.

# ORIGINS OF U.S. GOVERNMENT

## The Virginia, or Randolph, Plan

At the Constitutional Convention in 1787, a deep division emerged between the large, more populated states and the smaller states over the apportionment of the national legislature. The Virginia Plan, also known as the Randolph Plan, after its sponsor, EDMUND JENNINGS RANDOLPH, called for a two-house legislature with representation of each state based on its population or wealth.

ROGER SHERMAN, along with OLIVER ELLSWORTH, proposed the Connecticut, or Great, Compromise. This plan created a bicameral legislature with proportional representation in the lower house and equal representation in the upper house. All revenue measures would originate in the lower house. The compromise was accepted, and the Constitution was soon approved by the convention.

### The Virginia, or Randolph, Plan

[Virginia Governor Edmund Randolph] then commented on the difficulty of the crisis, and the necessity of preventing the fulfillment of the prophecies of the American downfall.

He observed that in revising the federal system we ought to inquire 1. into the properties, which such a government ought to possess, 2. the defects of the confederation, 3. the danger of our situation & 4. the remedy.

1. The Character of such a government ought to secure 1. against foreign invasion: 2. against dissensions between members of the Union, or seditions in particular states: 3. to procure to the several States various blessings, of which an isolated situation was incapable: 4. to be able to defend itself against incroachment: & 5. to be paramount to the state constitutions.

* * *

He then proceeded to enumerate the defects: 1. that the confederation produced no security against foreign invasion; congress not being permitted to prevent a war nor to support it by their own authority—Of this he cited many examples; most of which tended to shew, that they could not cause infractions of treaties or of the law of nations, to be punished: that particular states might by their conduct provoke war without controul; and that neither militia nor draughts being fit for defence on such occasions, inlistments only could be successful, and these could not be executed without money. 2. that the federal government could not check the quarrels between states, nor a rebellion in any, not having constitutional power nor means to interpose according to the exigency:

3. that there were many advantages, which the U.S. might acquire, which were not attainable under the confederation—such as a productive impost—counteraction of the commercial regulations of other nations—pushing of commerce ad libitum—etc.etc.

4. that the federal government could not defend itself against the incroachments from the states.

5. that it was not even paramount to the state constitutions, ratified, as it was in ma[n]y of the states.

ORIGINS OF U.S. GOVERNMENT

THE VIRGINIA, OR RANDOLPH, PLAN

3. He next reviewed the danger of our situation, appealed to the sense of the best friends of the U.S.—the prospect of anarchy from the laxity of government every where; and to other considerations.

4. He then proceeded to the remedy; the basis of which he said must be the republican principle.

He proposed as conformable to his ideas the following resolutions, which he explained one by one… .

1. Resolved that the Articles of Confederation ought to be so corrected & enlarged as to accomplish the objects proposed by their institution; namely, "common defence, security of liberty, and general welfare."

2. Resolved therefore that the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.

3. Resolved that the National Legislature ought to consist of two branches.

4. Resolved that the members of the first branch of the National Legislature ought to be elected by the people of the several States every for the term of [.]

* * *

5. Resolved that the members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual Legislatures[.]

* * *

6. Resolved that each branch ought to possess the right of originating Acts; that the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof.

7. Resolved that a National Executive be instituted; to be chosen by the National Legislature for the term of years, to receive punctually at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the Magistracy, existing at the time of increase or diminution, and to be ineligible a second time; and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.

8. Resolved that the Executive and a convenient number of the National Judiciary, ought to compose a Council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by of the members of each branch.

9. Resolved that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution; that the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy, cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.

* * *

Mr. Wilson. He wished for vigor in the Government, but he wished that vigorous authority to flow immediately from the legitimate source of all authority. The Government ought to possess not only first the force, but secondly the mind or sense of the people at large. The Legislature ought to be the most exact transcript of the whole Society. Representation is made necessary only because it is impossible for the people to act collectively. The opposition was to be expected he said from the Governments, not from the Citizens of the States. The latter had parted as was observed (by

Mr. King) with all the necessary powers; and it was immaterial to them, by whom they were exercised, if well exercised. The State officers were to be the losers of power. The people he supposed would be rather more attached to the national Government than to the State Governments as being more important in itself, and more flattering to their pride. There is no danger of improper elections if made by large districts. Bad elections proceed from the smallness of the districts which give an opportunity to bad men to intrigue themselves into office.

* * *

Colonel Mason. Under the existing Confederacy, Congress represent the States not the people of the States; their acts operate on the States, not on the individuals. The case will be changed in the new plan of Government. The people will be represented; they ought therefore to choose the Representatives. The requisites in actual representation are that the Representatives should sympathize with their constituents; should think as they think, & feel as they feel; and that for these purposes should even be residents among them. Much he said had been alleged against democratic elections. He admitted that much might be said; but it was to be considered that no Government was free from imperfections & evils; and that improper elections in many instances, were inseparable from Republican Governments. But compare these with the advantage of this Form in favor of the rights of the people, in favor of human nature. He was persuaded there was a better chance for proper elections by the people, if divided into large districts, than by the State Legislatures.

# ORIGINS OF U.S. GOVERNMENT

## The New Jersey, or Paterson, Plan

At the Constitutional Convention in 1787, a deep division emerged between the large, more populated states and the smaller states over the apportionment of the national legislature. WILLIAM PATERSON, a delegate from New Jersey, proposed an apportionment plan on behalf of the small states that would allow each state to have one vote in a unicameral Congress.

ROGER SHERMAN, along with OLIVER ELLSWORTH, proposed the Connecticut, or Great, Compromise. This plan created a bicameral legislature with proportional representation in the lower house and equal representation in the upper house. All revenue measures would originate in the lower house. The compromise was accepted, and the Constitution was soon approved by the convention.

### The New Jersey, or Paterson, Plan

Mr. Paterson, said as he had on a former occasion given his sentiments on the plan proposed by Mr. Randolph he would now avoiding repetition as much as possible give his reasons in favor of that proposed by himself. He preferred it because it accorded 1. with the powers of the Convention, 2. with the sentiments of the people. If the confederacy was radically wrong, let us return to our States, and obtain larger powers, not assume them of ourselves.

* * *

… If the sovereignty of the States is to be maintained, the Representatives must be drawn immediately from the States, not from the people: and we have no power to vary the idea of equal sovereignty. The only expedient that will cure the difficulty, is that of throwing the States into Hotchpot.

* * *

Mr. Wilson entered into a contrast of the principal points of the two plans so far he said as there had been time to examine the one last proposed. These points were 1. in the Virginia plan there are two & in some degree three branches in the Legislature: in the plan from N.J. there is to be a single legislature only—2. Representation of the people at large is the basis of the one:—the State Legislatures, the pillars of the other—3. proportional representation prevails in one:—equality of suffrage in the other—4. A single Executive Magistrate is at the head of the one:—a plurality is held out in the other.—5. in the one the majority of the people of the U.S. must prevail:—in the other a minority may prevail. 6. the National Legislature is to make laws in all cases to which the separate States are incompetent &—:—in place of this Congress are to have additional power in a few cases only—7. A negative on the laws of the States:—in place of this coertion to be substituted—8. The Executive to be removable on impeachment & conviction;—in one plan: in the other to be removeable at the instance of majority of the Executives of the States—9. Revision of the laws provided for in one:—no such check in the other—10. inferior

national tribunals in one:—none such in the other. 11. In the one jurisdiction of National tribunals to extend etc.—; an appellate jurisdiction only allowed in the other. 12. Here the jurisdiction is to extend to all cases affecting the National peace & harmony: there, a few cases only are marked out. 13. finally the ratification is in this way to be by the people themselves:—in that by the legislative authorities according to the thirteenth article of Confederation.

# ORIGINS OF U.S. GOVERNMENT

## CONSTITUTION OF THE UNITED STATES

The U.S. Constitution was drafted in 1787 in Philadelphia by delegates to the CONSTITUTIONAL CONVENTION. The delegates decided soon after their arrival that the ARTICLES OF CONFEDERATION could not be saved through amendment and that an entirely new constitution should be written to replace it. The document that emerged from the convention was the product of a series of compromises.

Once the Constitution had been offered to the states for ratification, critics opposed it on several grounds. Most importantly, they argued that the Constitution created an overly powerful central government that could abuse the rights of citizens and criticized the Framers for failing to include a bill of rights. To win over the opposition, the supporters of the Constitution agreed that the enactment of a bill of rights should be among the business of the first Congress. By June 21, 1788, the requisite nine states had ratified the Constitution. Virginia and New York ratified it a few days later, while North Carolina did so in 1789 and Rhode Island agreed to the Constitution in 1790.

Since the Constitution went into effect in 1789, only twenty-seven amendments have been added to correct deficiencies in the original document or to adapt it to changing needs and principles.

### Constitution of the United States

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

#### ARTICLE I

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

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

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives *and direct Taxes* shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, *which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.*[1] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall

by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; *and until such enumerations shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.*

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

The House of Representatives shall chuse their speaker and other Officers; and shall have the sole Power of Impeachment.

*Section 3.* The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature thereof,*[2] for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; *and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.*[3]

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

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

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the concurrence of two thirds of the Members present. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to law.

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

The Congress shall assemble at least once in every Year, *and such Meeting shall be on the first Monday in December,*[4] unless they shall by Law appoint a different Day.

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

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

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

Neither House, during the Session of Congress, shall, without the Consent of the

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Source: *The United States Government Manual.*

[1] Provisions that have been changed by amendments or other legislation or have become obsolete have been printed in italic type. The Sixteenth Amendment overturned the provision on direct taxes. The provision on apportionment was overturned by the Thirteenth Amendment, which abolished slavery, and by the Fourteenth Amendment, which stipulated that all persons excluding Indians should be counted. Since 1940 Indians have also been counted.

[2] Changed by the Seventeenth Amendment.

[3] Modified by the Seventeenth Amendment.

[4] Changed by the Twentieth Amendment, Section 2, to January 3.

other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

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

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

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

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

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

*Section 8.* The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the Credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, *and with the Indian Tribes;*[5]

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

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

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

To establish Post Offices and post Roads;

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

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, *grant Letters of Marque and Reprisal,*[6] and make rules concerning Captures on Land and Water;

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

To provide and maintain a Navy;

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[5] Formal treaty arrangements with the Indians were abandoned after 1871.

[6] The Declaration of Paris in 1856 and other treaties have outlawed letters of marque and reprisal.

To make rules for the Government and Regulation of the land and naval Forces;

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

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

*To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square), as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States,*[7] and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

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

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

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

*No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.*[8]

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

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

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

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

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

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

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

## ARTICLE II

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

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of

[7] Modified by the District of Columbia Home Rule Act of 1973.

[8] Changed by the Sixteenth Amendment which permits a Federal income tax, and the Twenty-fourth Amendment, which prohibits Federal pollution.

Trust or Profit under the United States, shall be appointed an Elector.

*The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.*[9]

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

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

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, *and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.*[10]

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

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

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

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

[9] Modified by the Twelfth and Twenty-third Amendments.
[10] Clarified by the Presidential Succession Act of 1947 and by the Twenty-fifth Amendment.

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

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

### ARTICLE III

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

*Section 2.* The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; *between a State and Citizens of another State;*[11]— between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

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

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

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

### ARTICLE IV

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

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

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

*No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service of Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.*[12]

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

[11] Changed by the Eleventh Amendment.

[12] Made obsolete by the Thirteenth Amendment.

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

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

### ARTICLE V

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

### ARTICLE VI

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

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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

### ARTICLE VII

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

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth In witness whereof We have hereunto subscribed our Names,

G° Washington—Presidt and deputy from Virginia

| | |
|---|---|
| New Hampshire | John Langdon |
| | Nicholas Gilman |
| Massachusetts | Nathaniel Gorham |
| | Rufus King |
| Connecticut | Wm Saml Johnson |
| | Roger Sherman |
| New York | Alexander Hamilton |
| New Jersey | Wil: Livingston |
| | David Brearley. |
| | Wm Paterson. |
| | Jona: Dayton |
| Pennsylvania | B Franklin |
| | Thomas Mifflin |
| | Robt Morris |
| | Geo. Clymer |
| | Thos. FitzSimons |
| | Jared Ingersoll |
| | James Wilson |
| | Gouv Morris |
| Delaware | Geo: Read |
| | Gunning Bedford jun |
| | John Dickinson |
| | Richard Bassett |
| | Jaco: Broom |
| Maryland | James McHenry |
| | Dan of St Thos. Jenifer |
| | Danl Carroll |

| | |
|---|---|
| Virginia | John Blair— |
| | James Madison Jr. |
| North Carolina | Wm Blount |
| | Richd Dobbs Spaight. |
| | Hu Williamson |
| South Carolina | J. Rutledge |
| | Charles Cotesworth Pinckney |
| | Charles Pinckney |
| | Pierce Butler. |
| Georgia | William Few |
| | Abr Baldwin |

### AMENDMENTS

(The first ten amendments were ratified December 15, 1791, and form what is known as the "Bill of Rights.")

### AMENDMENT 1

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

### AMENDMENT 2

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

### AMENDMENT 3

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

### AMENDMENT 4

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

### AMENDMENT 5

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

### AMENDMENT 6

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

### AMENDMENT 7

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

### AMENDMENT 8

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

### AMENDMENT 9

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

### AMENDMENT 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

### AMENDMENT 11

(Ratified February 7, 1795)

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

## AMENDMENT 12

(Ratified July 27, 1804)

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

## AMENDMENT 13

(Ratified December 6, 1865)

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

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

## AMENDMENT 14

(Ratified July 9, 1868)

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

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

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

Congress may by a vote of two-thirds of each House, remove such disability.

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

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

### AMENDMENT 15

(Ratified February 3, 1870)

*Section 1.* The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

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

### AMENDMENT 16

(Ratified February 3, 1913)

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

### AMENDMENT 17

(Ratified April 8, 1913)

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

### AMENDMENT 18

(Ratified January 16, 1919. Repealed December 5, 1933, by Amendment 21.)

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

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

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

### AMENDMENT 19

(Ratified August 18, 1920)

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

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

### AMENDMENT 20

(Ratified January 23, 1933)

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

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

*Section 3.* If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to

qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

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

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

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

### AMENDMENT 21

(Ratified December 5, 1933)

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

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

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

### AMENDMENT 22

(Ratified February 27, 1951)

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

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

### AMENDMENT 23

(Ratified March 29, 1961)

*Section 1.* The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

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

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

### AMENDMENT 24

(Ratified January 23, 1964)

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

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

### AMENDMENT 25

(Ratified February 10, 1967)

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

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

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

*Section 4.* Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

### AMENDMENT 26

(Ratified July 1, 1971)

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

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

### AMENDMENT 27

(Ratified May 7, 1992)

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

# ORIGINS OF U.S. GOVERNMENT

## Bill of Rights

The Bill of Rights, which consists of the first ten amendments to the U.S. Constitution, was drafted by the first Congress of the new government in 1789 and went into effect on December 15, 1791, when Virginia became the eleventh state to ratify the amendments.

The Bill of Rights followed a tradition in Anglo-American law of drawing up a list of basic rights to which all the people in the state were entitled. The English Bill of Rights, enacted in 1689, included the right to petition the government with grievances, the right to trial by jury, and the right not to be subjected to cruel and unusual punishments. In 1774 the First Continental Congress drew up a Declaration of Rights, which included such liberties as freedom of the press and a prohibition against standing armies in peacetime.

The VIRGINIA DECLARATION OF RIGHTS, enacted in 1776, quickly became the model for other states. By 1781 eight states had enacted bills of rights, and four others had included statements guaranteeing individual rights either in the prefaces to their constitutions or in supplementary statutes. The ARTICLES OF CONFEDERATION did not include a bill of rights, however. The drafters of the Articles believed that the protection of individual rights was a state responsibility.

At the 1787 CONSTITUTIONAL CONVENTION, EDMUND RANDOLPH and GEORGE MASON of Virginia and Elbridge Gerry of Massachusetts sought unsuccessfully to include a bill of rights in the new constitution. Most delegates took the view that the state bills of rights would continue to protect individual rights at the state level and that Congress would resist any attempts to infringe upon individual liberties at the federal level.

When the lack of a bill of rights became an issue in the ratification process, James Madison promised that the first Congress would enact a bill of rights as part of its business. As a member of the first House of Representatives, Madison reminded the members of this pledge. He drafted much of the final document, using Mason's VIRGINIA DECLARATION OF RIGHTS as a model.

The Bill of Rights plays a central role in the protection of civil liberties and civil rights. When enacted, the ten amendments applied only to the actions of the federal government. In a long series of decisions, however, the U.S. Supreme Court has ruled that almost all the provisions in the Bill of Rights also apply to the states. Therefore, the Bill of Rights safeguards the basic rights of individuals from encroachment by all levels of government.

### Bill of Rights

#### AMENDMENT 1

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

Source: *The United States Government Manual.*

### AMENDMENT 2

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

### AMENDMENT 3

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

### AMENDMENT 4

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

### AMENDMENT 5

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

### AMENDMENT 6

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

### AMENDMENT 7

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

### AMENDMENT 8

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

### AMENDMENT 9

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

### AMENDMENT 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

# ORIGINS OF U.S. GOVERNMENT

## Federalist, Number 10

James Madison, 1787

The *Federalist Papers* were published by ALEXANDER HAMILTON, JAMES MADISON, and JOHN JAY to help convince the citizens of New York that ratification of the U.S. Constitution was justified. The essays not only discuss many of the Constitution's provisions but also elaborate on the authors' own vision of the proper role of a national government.

Madison's first essay, *Federalist,* no. 10, is the most frequently quoted of the group. In it, Madison discussed the idea of political factions. At the time it was commonly agreed that democratic society needed to prevent factions because they would ultimately undermine the government and lead to violence. Madison agreed that factions can divide government but came to the opposite conclusion: the more factions, the better. In Madison's view more factions would make it less likely that any one party or coalition of parties would be able to gain control of government and invade the rights of other citizens. The system of checks and balances contained in the Constitution was part of Madison's plan for frustrating factions.

### Federalist, Number 10

Among the numerous advantages promised by a well constructed Union, none deserve to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments, never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail therefore to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure to it. The instability, injustice and confusion introduced into the public councils, have in truth been the mortal diseases under which popular governments have every where perished; as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations. The valuable improvements made by the American Constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality, to contend that they have as effectually obviated the danger on this side as was wished and expected. Complaints are every where heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty; that our governments are too unstable; that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice, and the rights of the minor party; but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true. It will be found indeed, on a candid review of our situation, that some of the distresses under which we labor, have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account for many of our heaviest mis-

fortunes; and particularly, for the prevailing and increasing distrust of public engagements, and alarm for private rights, which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice, with which a factious spirit has tainted our public administrations.

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interest of the community.

* * *

As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of Government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them every where brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning Government and many other points, as well of speculation as of practice; and attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have in turn divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions, and excite their most violent conflicts. But the most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a monied interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern Legislation, and involves the spirit of party and faction in the necessary and ordinary operations of Government.

* * *

The inference to which we are brought, is, that the causes of faction cannot be removed; and that relief is only to be sought in the means of controlling its effects.

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote: It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government on the other hand enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our enquiries are directed: Let me add that it is the great desideratum, by which alone this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority at the same time, must be prevented; or the majority, having such co-existent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an

adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together; that is, in proportion as their efficacy becomes needful.

From this view of the subject, it may be concluded, that a pure Democracy, by which I mean, a Society, consisting of a small number of citizens, who assemble and administer the Government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of Government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths. Theoretic politicians, who have patronized this species of Government, have erroneously supposed, that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A Republic, by which I mean a Government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure Democracy, and we shall comprehend both the nature of the cure, and the efficacy which it must derive from the Union.

The two great points of difference between a Democracy and a Republic are, first, the delegation of the Government, in the latter, to a small number of citizens elected by the rest: secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may by intrigue, by corruption or by other means, first obtain the suffrages, and then betray the interests of the people. The question resulting is, whether small or extensive Republics are most favorable to the election of proper guardians of the public weal: and it is clearly decided in favor of the latter by two obvious considerations.

In the first place it is to be remarked that however small the Republic may be, the Representatives must be raised to a certain number, in order to guard against the cabals of a few; and that however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence the number of Representatives in the two cases, not being in proportion to that of the Constituents, and being proportionally greatest in the small Republic, it follows, that if the proportion of fit characters, be not less, in the large than in the small Republic, the former will present a greater option, and consequently a greater possibility of a fit choice.

In the next place, as each Representative will be chosen by a greater number of citizens in the large than in the small Republic, it will be more difficult for unworthy candidates to practise with success the vicious arts, by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre on men who possess the most attractive merit, and the most diffusive and established characters.

* * *

The other point of difference is, the greater number of citizens and extent of territory which may be brought within the compass of Republican, than of Democratic Government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former, than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of

oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

# ORIGINS OF U.S. GOVERNMENT

## Federalist, Number 78

Alexander Hamilton, 1788

The *Federalist Papers* were published by ALEXANDER HAMILTON, JAMES MADISON, and JOHN JAY to help convince the citizens of New York that ratification of the U.S. Constitution was justified. The essays not only discuss many of the Constitution's provisions but also elaborate on the authors' own vision of the proper role of a national government.

In *Federalist,* no. 78, Hamilton discussed the role of the judiciary. He defended the concept of judicial review, which was generally regarded as neither legitimate nor desirable by most political leaders. Hamilton also defended the independence of the judiciary and the need for judicial discretion.

### Federalist, Number 78

According to the plan of the convention, all the judges who may be appointed by the United States are to hold their offices during good behaviour, which is conformable to the most approved of the state constitutions; and among the rest, to that of this state. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection which disorders their imaginations and judgments. The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the depotism of the prince: In a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws.

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

This simple view of the matter suggests several important consequences. It proves incontestibly that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can

never be endangered from that quarter: I mean, so long as the judiciary remains truly distinct from both the legislative and executive. For I agree that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its coordinate branches; and that as nothing can contribute so much to its firmness and independence, as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution; and in a great measure as the citadel of the public justice and the public security.

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

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

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

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

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

This exercise of judicial discretion in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix

their meaning and operation; so far as they can by any fair construction be reconciled to each other; reason and law conspire to dictate that this should be done. Where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first. But this is mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an equal authority, that which was the last indication of its will, should have the preference.

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

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

If then the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed constitution will never concur with its enemies in questioning that fundamental principle of republican government, which admits the right of people to alter or abolish the established constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing constitution, would on that account be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have by some solemn and authoritative act annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act.

# ORIGINS OF U.S. GOVERNMENT

## The Virginia and Kentucky Resolves

In 1798 JAMES MADISON wrote the VIRGINIA RESOLVES, and THOMAS JEFFERSON wrote the KENTUCKY RESOLVES. These legislative resolutions challenged the legitimacy of the federal ALIEN AND SEDITION ACTS of 1798. Enacted as internal security laws, these acts restricted aliens and limited freedom of the press on the assumption that the United States might soon be at war with France.

Madison and Jefferson argued that Congress did not have the express constitutional authority to deport aliens nor to prosecute persons for seditious libel. They asserted in the resolves that state legislatures had the right to determine whether the federal government was complying with the mandate of the Constitution. In the second of the Kentucky Resolves, Jefferson contended that the "sovereign and independent states" had the right to "interpose" themselves between their citizens and improper national legislative actions and to "nullify" acts of Congress they deemed unconstitutional.

The resolves became an important component of Southern political resistance in the nineteenth century. These ideas ultimately became the legal justification for the secession of the Southern states from the Union in 1861.

### The Virginia and Kentucky Resolves

#### KENTUCKY RESOLVE

**November 10, 1798**

1. Resolved, That the several states composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and no force; that to this compact each state acceded as a state, and is an integral party; that this government, created by this compact, was not made the exclusive or final judge of the extent of the powers delegated to itself, since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as the mode and measure of redress.

2. Resolved, That the Constitution of the United States having delegated to Congress a power to punish treason, counterfeiting the securities and current coin of the United States, piracies and felonies committed on the high seas, and offences against the laws of nations, and no other crimes whatever; and it being true, as a general principle, and one of the amendments to the Constitution having also declared "that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respec-

tively, or to the people,"—therefore, also, the [Sedition Act] (and all other their acts which assume to create, define, or punish crimes other than those enumerated in the Constitution,) are altogether void, and of no force; and that the power to create, define, and punish, such other crimes is reserved, and of right appertains, solely and exclusively, to the respective states, each within its own territory.

3. Resolved, That it is true, as a general principle, and is also expressly declared by one of the amendments to the Constitution, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people;" and that, no power over the freedom of religion, freedom of speech, or freedom of the press, being delegated to the United States by the Constitution, nor prohibited by it to the states, all lawful powers respecting the same did of right remain, and were reserved to the states, or to the people; . . . . That therefore the act of the Congress of the United States, passed on the 14th of July, 1798, entitled "An Act in Addition to the Act entitled 'An Act for the Punishment of certain Crimes against the United States,'" which does abridge the freedom of the press, is not law, but is altogether void, and of no force.

* * *

7. Resolved, That the construction applied by the general government [of the necessary-and-proper clause] goes to the destruction of all the limits prescribed to their power by the Constitution; that words meant by that instrument to be subsidiary only to the execution of the limited powers, ought not to be so construed as themselves to give unlimited powers, nor a part so to be taken as to destroy the whole residue of the instrument[.]

* * *

In questions of power, then, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution. That this commonwealth does therefore call on its co-states for an expression of their sentiments on the acts concerning aliens, and for the punishment of certain crimes herein before specified, plainly declaring whether these acts are or are not authorized by the federal compact. And it doubts not that their sense will be so announced as to prove their attachment to limited government, whether general or particular, and that the rights and liberties of their co-states will be exposed to no dangers by remaining embarked on a common bottom with their own; but they will concur with this commonwealth in considering the said acts as so palpably against the Constitution as to amount to an undisguised declaration, that the compact is not meant to be the measure of the powers of the general government, but that it will proceed in the exercise over these states of all powers whatsoever. That they will view this as seizing the rights of the states, and consolidating them in the hands of the general government, with a power assumed to bind the states, not merely in cases made federal, but in all cases whatsoever, by laws made not with their consent, but by others against their consent; that this would be to surrender the form of government we have chosen, and live under one deriving its powers from its own will, and not from our authority; and that the co-states, recurring to their natural rights not made federal, will concur in declaring these void and of no force, and will each unite with this commonwealth in requesting their repeal at the next session of Congress.

Thomas Jefferson

### VIRGINIA RESOLVE

**December 21, 1798**

That this Assembly doth explicitly and peremptorily declare, that it views the powers of the federal government as resulting from the compact to which the states are parties, as limited by the plain sense and intention of the instrument constituting that compact, as no further valid than they are authorized by the grants enumerated in that compact; and that, in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states, who are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights and liberties, appertaining to them.

That the General Assembly doth also express its deep regret, that a spirit has, in sundry instances, been manifested by the federal government to enlarge it powers by forced constructions of the constitutional charter which defines them; and that indications have appeared of a design to expound certain general phrases (which, having been copied from the very limited grant of powers in the former

Articles of Confederation, were the less liable to be misconstrued) so as to destroy the meaning and effect of the particular enumeration which necessarily explains and limits the general phrases, and so as to consolidate the states, by degrees, into one sovereignty, the obvious tendency and inevitable result of which would be, to transform the present republican system of the United States into an absolute, or, at best, a mixed monarchy.

James Madison

### KENTUCKY RESOLVE

**November 14, 1799**

Resolved, That this commonwealth considers the federal Union, upon the terms and for the purposes specified in the late compact, conducive to the liberty and happiness of the several states: That it does now unequivocally declare its attachment to the Union, and to that compact, agreeably to its obvious and real intention, and will be among the last to seek its dissolution: That, if those who administer the general government be permitted to transgress the limits fixed by that compact, by a total disregard to the special delegations of power therein contained, an annihilation of the state governments, and the creation, upon their ruins, of a general consolidated government, will be the inevitable consequence: That the principle and construction, contended for by sundry of the state legislatures, that the general government is the exclusive judge of the extent of the powers delegated to it, stop not short of despotism—since the discretion of those who administer the government, and not the Constitution, would be the measure of their powers: That the several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of the infraction; and, That a nullification, by those sovereignties, of all unauthorized acts done under color of that instrument, is the rightful remedy: That this commonwealth does, under the most deliberate reconsideration declare, that the said Alien and Sedition Laws, are in their opinion, palpable violations of the said Constitution; and however cheerfully it may be disposed to surrender its opinion to a majority of its sister states, in matters of ordinary or doubtful policy, yet, in momentous regulations like the present, which so vitally wound the best rights of the citizen, it would consider a silent acquiescence as highly criminal: That, although this commonwealth, as a party to the federal compact, will bow to the laws of the Union, yet it does, at the same time, declare, that it will not now, or ever hereafter, cease to oppose, in a constitutional manner, every attempt, at what quarter soever offered, to violate that compact: And finally, in order that no pretext or arguments may be drawn from a supposed acquiescence, on the part of this commonwealth, in the constitutionality of those laws, and be thereby used as precedents for similar future violations of the federal compact, this commonwealth now enter against them in solemn Protest.

Thomas Jefferson

# ORIGINS OF U.S. GOVERNMENT

## Monroe Doctrine

On December 23, 1823, in his annual message to Congress, President JAMES MONROE made a statement on foreign policy that came to be known as the Monroe Doctrine. At that time the United States feared that Russia intended to establish colonies in Alaska and, more importantly, that the continental European states would intervene in Central and South America to help Spain recover its former colonies, which had won their independence in a series of wars in the early nineteenth century.

President Monroe announced that North and South America were closed to colonization, that the United States would not become involved in European wars or colonial wars in the Americas, and, most importantly, that any intervention by a European power in the independent states of the Western Hemisphere would be viewed by the United States as an unfriendly act against the United States.

Later presidents reiterated the Monroe Doctrine. In the early twentieth century, it was extended to justify U.S. intervention in the states of Latin America.

### Monroe Doctrine

Fellow citizens of the Senate and House of Representatives:

Many important subjects will claim your attention during the present session, of which I shall endeavor to give, in aid of your deliberations, a just idea in this communication. I undertake this duty with diffidence, from the vast extent of the interests on which I have to treat and of their great importance to every portion of our Union. I enter on it with zeal from a thorough conviction that there never was a period since the establishment of our revolution when, regarding the condition of the civilized world and its bearing on us, there was greater necessity for devotion in the public servants to their respective duties, or for virtue, patriotism, and union in our constituents.

Meeting in you a new Congress, I deem it proper to present this view of public affairs in greater detail than might otherwise be necessary. I do it, however, with peculiar satisfaction, from a knowledge that in this respect I shall comply more fully with the sound principles of our government. The people being with us exclusively the sovereign, it is indispensable that full information be laid before them on all important subjects, to enable them to exercise that high power with complete effect. If kept in the dark, they must be incompetent to it. We are all liable to error, and those who are engaged in the management of public affairs are more subject to excitement and to be led astray by their particular interests and passions than the great body of our constituents, who, living at home in the pursuit of their ordinary avocations, are calm but deeply interested spectators of events and of the conduct of those who are parties to them. To the

Source: James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents,* vol. 2 (1897), pp. 207–219.

people every department of the government and every individual in each are responsible, and the more full their information the better they can judge of the wisdom of the policy pursued and of the conduct of each in regard to it. From their dispassionate judgment much aid may always be obtained, while their approbation will form the greatest incentive and most gratifying reward for virtuous actions and the dread of their censure the best security against the abuse of their confidence. Their interests in all vital questions are the same, and the bond, by sentiment as well as by interest, will be proportionably strengthened as they are better informed of the real state of public affairs, especially in difficult conjunctures. It is by such knowledge that local prejudices and jealousies are surmounted, and that a national policy, extending its fostering care and protection to all the great interests of our Union, is formed and steadily adhered to. . . .

At the proposal of the Russian imperial government, made through the minister of the emperor residing here, a full power and instructions have been transmitted to the minister of the United States at St. Petersburg to arrange by amicable negotiation the respective rights and interests of the two nations on the northwest coast of this continent. A similar proposal had been made by his imperial Majesty to the government of Great Britain, which has likewise been acceded to. The government of the United States has been desirous by this friendly proceeding of manifesting the great value which they have invariably attached to the friendship of the emperor and their solicitude to cultivate the best understanding with his government. In the discussions to which this interest has given rise and in the arrangements by which they may terminate the occasion has been judged proper for asserting, as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers. . . .

It was stated at the commencement of the last session that a great effort was then making in Spain and Portugal to improve the condition of the people of those countries, and that it appeared to be conducted with extraordinary moderation. It need scarcely be remarked that the result has been so far very different from what was then anticipated. Of events in that quarter of the globe, with which we have so much intercourse and from which we derive our origin, we have always been anxious and interested spectators. The citizens of the United States cherish sentiments the most friendly in favor of the liberty and happiness of their fellow men on that side of the Atlantic. In the wars of the European powers in matters relating to themselves, we have never taken any part, nor does it comport with our policy so to do. It is only when our rights are invaded or seriously menaced that we resent injuries or make preparation for our defense. With the movements in this hemisphere we are of necessity more immediately connected, and by causes which must be obvious to all enlightened and impartial observers. The political system of the allied powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective governments; and to the defense of our own, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted. We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power, we have not interfered and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power in any other light than as the manifestation of an unfriendly disposition toward the United States. In the war between those new governments and Spain, we declared our neutrality at the time of their recognition, and to this we have adhered, and shall continue to adhere, provided no change shall occur which, in the judgment of the competent authorities of this government, shall make a corresponding change on the part of the United States indispensable to their security.

The late events in Spain and Portugal show that Europe is still unsettled. Of this important fact no stronger proof can be adduced than that

the allied powers should have thought it proper, on any principle satisfactory to themselves, to have interposed by force in the internal concerns of Spain. To what extent such interposition may be carried, on the same principle, is a question in which all independent powers whose governments differ from theirs are interested, even those most remote, and surely none more so than the United States. Our policy in regard to Europe, which was adopted at an early stage of the wars which have so long agitated that quarter of the globe, nevertheless remains the same, which is, not to interfere in the internal concerns of any of its powers; to consider the government *de facto* as the legitimate government for us; to cultivate friendly relations with it, and to preserve those relations by a frank, firm, and manly policy, meeting in all instances the just claims of every power, submitting to injuries from none. But in regard to those continents, circumstances are eminently and conspicuously different. It is impossible that the allied powers should extend their political system to any portion of either continent without endangering our peace and happiness; nor can anyone believe that our southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore, that we should behold such interposition in any form with indifference. If we look to the comparative strength and resources of Spain and those new governments, and their distance from each other, it must be obvious that she can never subdue them. It is still the true policy of the United States to leave the parties to themselves in the hope that other powers will pursue the same course.

# Civil Rights

Slavery

From Segregation
to Civil Rights

Women's Rights

Native American Rights

# Slavery

- MISSOURI COMPROMISE
- WILMOT PROVISO
- COMPROMISE OF 1850
- KANSAS-NEBRASKA ACT
- DRED SCOTT V. SANDFORD
- "A HOUSE DIVIDED" SPEECH
- EMANCIPATION PROCLAMATION

Slavery was introduced to the American colonies in the 1620s. By 1700 the slave population, located primarily in the southern colonies, had grown dramatically. After independence, the United States debated whether slavery should be allowed to continue. Though the NORTHWEST ORDINANCE of 1787 banned slavery in the western territories, the Framers of the U.S. Constitution did not outlaw it. For the most part the Constitution ignored the issue, but the Three-fifths Compromise permitted southern states to count each slave as three-fifths of a white person for legislative APPORTIONMENT.

The invention of the cotton gin by Eli Whitney, which revolutionized cotton processing and vastly increased the profitability of cotton growing, and the LOUISIANA PURCHASE of 1803 forced the United States to consider whether slavery should be confined to the Southern states or extended to the new states carved out of the territory west of the Mississippi River. Legislative compromises succeeded in holding the Union together until mid-century. The *Dred Scott* case (DRED SCOTT V. SANDFORD, 60 U.S. [19 How.] 393, 15 L. Ed. 691 [1857]), however, destroyed the legal basis for compromise by holding that Congress could not prohibit slavery in the territories.

Abolitionist opposition to slavery increased after *Dred Scott.* ABRAHAM LINCOLN's hostility to slavery, expressed in his "House Divided" speech, frightened the Southern states. His election as president in 1860 led to the secession of the Southern states and the U.S. CIVIL WAR. Though Lincoln saw the preservation of the Union as his main goal, he recognized that slavery had to be ended. The EMANCIPATION PROCLAMATION of January 1, 1863, decreed the freedom of slaves in Southern territories, but it took the THIRTEENTH AMENDMENT, ratified in December 1865, to abolish slavery in the United States.

# SLAVERY

## Missouri Compromise

The Missouri Compromise of 1820 was a congressional agreement that regulated the extension of SLAVERY in the United States for thirty years. Under the agreement, the territory of Missouri was admitted as a slave state, the territory of Maine was admitted as a free state, and the boundaries of slavery were limited to the same latitude as the southern boundary of Missouri, 36°30' north latitude.

By 1818 the rapid growth in population in the North had left the Southern states, for the first time, with less than 45 percent of the seats in the U.S. House of Representatives. The U.S. Senate was evenly balanced between eleven slave and eleven free states. Therefore, Missouri's 1818 application for statehood, if approved, would give the slave states a majority in the Senate and reduce the Northern majority in the House.

In 1819 the free territory of Maine applied for statehood. Speaker of the House HENRY CLAY of Kentucky saw this event as an opportunity to maintain the balance of free and slave states. He made it clear to Northern representatives that Maine would not be admitted without an agreement to admit Missouri. Clay persuaded opponents of slavery to drop efforts to ban it in the territories. In return, the Southern states agreed to limit slavery to the territory below 36°30' north latitude. Under this provision the unsettled portions of the LOUISIANA PURCHASE north and west of Missouri would be free from slavery. The only area remaining for further expansion of slavery would be the territory that would become Arkansas and Oklahoma. To preserve the sectional equality in the Senate, Missouri and Maine were to be admitted to the Union simultaneously. Clay managed to pass the compromise in the House by a three-vote margin.

In 1821 Missouri complicated matters, however, by inserting a provision into its state constitution that prohibited free blacks and mulattoes from entering the state. Northern representatives objected to this language and refused to give final approval for statehood until it was removed. Clay then negotiated a second compromise that removed the offensive language from the Missouri constitution and substituted a provision that prohibited Missouri from discriminating against citizens from other states. Left unsettled was the question of who was a citizen. With this change Missouri and Maine were admitted to the Union.

### Missouri Compromise

**An Act to Authorize the People of the Missouri Territory to Form a Constitution and State Government, and for the Admission of Such State into the Union on an Equal Footing with the Original States, and to Prohibit Slavery in Certain Territories**

Source: *Statutes at Large,* vol. 6 (1822), pp. 545–548, 645; Ben Perley Poore, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States,* vol. 2 (1878), pp. 1107–1108.

SLAVERY

MISSOURI COMPROMISE

**[SECTION 1]**

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that the inhabitants of that portion of the Missouri territory included within the boundaries hereinafter designated, be, and they are hereby, authorized to form for themselves a constitution and state government and to assume such name as they shall deem proper; and the said state, when formed, shall be admitted into the Union, upon an equal footing with the original states, in all respects whatsoever.

**SECTION 2**

And be it further enacted, that the said state shall consist of all the territory included within the following boundaries, to wit: beginning in the middle of the Mississippi River, on the parallel of thirty-six degrees of north latitude; thence west, along that parallel of latitude, to the St. Francis River; thence up, and following the course of that river, in the middle of the main channel thereof, to the parallel of latitude of thirty-six degrees and thirty minutes; thence west, along the same, to a point where the said parallel is intersected by a meridian line passing through the middle of the mouth of the Kansas River, where the same empties into the Missouri River, thence, from the point aforesaid north, along the said meridian line, to the intersection of the parallel of latitude which passes through the rapids of the river Des Moines, making the said line to correspond with the Indian boundary line; thence east, from the point of intersection last aforesaid, along the said parallel of latitude, to the middle of the channel of the main fork of the said river Des Moines; thence down and along the middle of the main channel of the said river Des Moines, to the mouth of the same, where it empties into the Mississippi River; thence, due east, to the middle of the main channel of the Mississippi River; thence down, and following the course of the Mississippi River, in the middle of the main channel thereof, to the place of beginning: provided, the said state shall ratify the boundaries aforesaid. And provided also, that the said state shall have concurrent jurisdiction on the river Mississippi and every other river bordering on the said state, so far as the said rivers shall form a common boundary to the said state; and any other state or states, now or hereafter to be formed and bounded by the same, such rivers to be common to both; and that the river Mississippi and the navigable rivers and waters leading into the same shall be common highways, and forever free, as well to the inhabitants of the said state as to other citizens of the United States, without any tax, duty, impost, or toll, therefore, imposed by the said state.

**SECTION 3**

And be it further enacted, that all free white male citizens of the United States, who shall have arrived at the age of twenty-one years, and have resided in said territory three months previous to the day of election, and all other persons qualified to vote for representatives to the general assembly of the said territory, shall be qualified to be elected, and they are hereby qualified and authorized to vote, and choose representatives to form a convention, who shall be apportioned amongst the several counties as follows:

From the county of Howard, five representatives. From the county of Cooper, three representatives. From the county of Montgomery, two representatives. From the county of Pike, one representative. From the county of Lincoln, one representative. From the county of St. Charles, three representatives. From the county of Franklin, one representative. From the county of St. Louis, eight representatives. From the county of Jefferson, one representative. From the county of Washington, three representatives. From the county of St. Genevieve, four representatives. From the county of Madison, one representative. From the county of Cape Girardeau, five representatives. From the county of New Madrid, two representatives. From the county of Wayne, and that portion of the county of Lawrence which falls within the boundaries herein designated, one representative.

And the election for the representatives aforesaid shall be holden on the first Monday and two succeeding days of May next, throughout the several counties aforesaid in the said territory, and shall be, in every respect, held and conducted in the same manner and under the same regulations as is prescribed by the laws of the said territory regulating elections therein for members of the general assembly, except that the returns of the election in that portion of Lawrence County included in the boundaries aforesaid shall be made to the county of Wayne, as is provided in other cases under the laws of said territory.

**SECTION 4**

And be it further enacted, that the members of the convention thus duly elected, shall be,

and they are hereby authorized to meet at the seat of government of said territory on the second Monday of the month of June next; and the said convention, when so assembled, shall have power and authority to adjourn to any other place in the said territory, which to them shall seem best for the convenient transaction of their business; and which convention, when so met, shall first determine by a majority of the whole number elected, whether it be, or be not, expedient at that time to form a constitution and state government for the people within the said territory, as included within the boundaries above designated; and if it be deemed expedient, the convention shall be, and hereby is, authorized to form a constitution and state government; or, if it be deemed more expedient, the said convention shall provide by ordinance for electing representatives to form a constitution or frame of government; which said representatives shall be chosen in such manner, and in such proportion as they shall designate; and shall meet at such time and place as shall be prescribed by the said ordinance; and shall then form for the people of said territory, within the boundaries aforesaid, a constitution and state government: provided, that the same, whenever formed, shall be republican and not repugnant to the Constitution of the United States; and that the legislature of said state shall never interfere with the primary disposal of the soil by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers; and that no tax shall be imposed on lands the property of the United States; and in no case shall nonresident proprietors be taxed higher than residents.

### SECTION 5

And be it further enacted, that until the next general census shall be taken, the said state shall be entitled to one representative in the House of Representatives of the United States.

### SECTION 6

And be it further enacted, that the following propositions be, and the same are hereby, offered to the convention of the said territory of Missouri, when formed, for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory upon the United States:

1. That section numbered sixteen in every township, and when such section has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be shall be granted to the state for the use of the inhabitants of such township for the use of schools.

2. That all salt springs, not exceeding twelve in number, with six sections of land adjoining to each, shall be granted to the said state for the use of said state, the same to be selected by the legislature of the said state, on or before the first day of January, in the year one thousand eight hundred and twenty-five; and the same, when so selected, to be used under such terms, conditions, and regulations as the legislature of said state shall direct. Provided, that no salt spring, the right whereof now is, or hereafter shall be, confirmed or adjudged to any individual or individuals, shall, by this section, be granted to the said state: and provided also, that the legislature shall never sell or lease the same, at any one time, for a longer period than ten years, without the consent of Congress.

3. That 5 percent of the net proceeds of the sale of lands lying within the said territory or state, and which shall be sold by Congress from and after the first day of January next, after deducting all expenses incident to the same, shall be reserved for making public roads and canals, of which three-fifths shall be applied to those objects within the state, under the direction of the legislature thereof; and the other two-fifths in defraying, under the direction of Congress, the expenses to be incurred in making of a road or roads, canal or canals, leading to the said state.

4. That four entire sections of land be, and the same are hereby, granted to the said state, for the purpose of fixing their seat of government thereon; which said sections shall, under the direction of the legislature of said state, be located, as near as may be, in one body, at any time, in such townships and ranges as the legislature aforesaid may select, on any of the public lands of the United States. Provided, that such locations shall be made prior to the public sale of the lands of the United States surrounding such location.

5. That thirty-six sections, or one entire township, which shall be designated by the president of the United States, together with the other lands heretofore reserved for that purpose, shall be reserved for the use of a seminary of learning, and vested in the legislature of said state, to be appropriated solely to the use of such

seminary by the said legislature. Provided, that the five foregoing propositions herein offered, are on the condition that the convention of the said state shall provide by an ordinance, irrevocable without the consent of the United States, that every and each tract of land sold by the United States, from and after the first day of January next, shall remain exempt from any tax laid by order or under the authority of the state, whether for state, county, or township, or any other purpose whatever, for the term of five years from and after the day of sale; and further, that the bounty lands granted, or hereafter to be granted, for military services during the late war shall, while they continue to be held by the patentees or their heirs, remain exempt as aforesaid from taxation for the term of three years from and after the date of the patents, respectively.

### SECTION 7

And be it further enacted, that in case a constitution and state government shall be formed for the people of the said territory of Missouri, the said convention or representatives, as soon thereafter as may be, shall cause a true and attested copy of such constitution, or frame of state government, as shall be formed or provided, to be transmitted to Congress.

### SECTION 8

And be it further enacted, that in all that territory ceded by France to the United States under the name of Louisiana, which lies north of thirty-six degrees and thirty minutes north latitude, not included within the limits of the state contemplated by this act, slavery and involuntary servitude, otherwise than in the punishment of crimes whereof the parties shall have been duly convicted, shall be, and is hereby, forever prohibited. Provided always, that any person escaping into the same, from whom labor or service is lawfully claimed in any state or territory of the United States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.

Approved, March 6, 1820.

## SECTIONS OF THE MISSOURI CONSTITUTION OF 1820 DEALING WITH SLAVERY

### SECTION 26

The general assembly shall not have power to pass laws—

1. For the emancipation of slaves without the consent of their owners; or without paying them, before such emancipation, a full equivalent for such slaves so emancipated; and,

2. To prevent bona fide immigrants to this state, or actual settlers therein, from bringing from any of the United States, or from any of their territories, such persons as may there be deemed to be slaves, so long as any persons of the same description are allowed to be held as slaves by the laws of this state.

They shall have power to pass laws—

1. To prohibit the introduction into this state of any slaves who may have committed any high crime in any other state or territory;

2. To prohibit the introduction of any slave for the purpose of speculation, or as an article of trade or merchandise;

3. To prohibit the introduction of any slave, or the offspring of any slave, who heretofore may have been, or who hereafter may be, imported from any foreign country into the United States, or any territory thereof, in contravention of any existing statute of the United States; and,

4. To permit the owners of slaves to emancipate them, saving the right of creditors, where the person so emancipating will give security that the slave so emancipated shall not become a public charge.

It shall be their duty, as soon as may be, to pass such laws as may be necessary—

1. To prevent free Negroes and mulattoes from coming to and settling in this state, under any pretext whatsoever; and,

2. To oblige the owners of slaves to treat them with humanity and to abstain from all injuries to them extending to life or limb.

### SECTION 27

In prosecutions for crimes, slaves shall not be deprived of an impartial trial by jury, and a slave convicted of a capital offense shall suffer the same degree of punishment, and no other, that would be inflicted on a white person for a like offense; and courts of justice, before whom slaves shall be tried, shall assign them counsel for their defense.

### SECTION 28

Any person who shall maliciously deprive of life or dismember a slave shall suffer such pun-

ishment as would be inflicted for the like offense if it were committed on a free white person.

### RESOLUTION PROVIDING FOR THE ADMISSION OF THE STATE OF MISSOURI INTO THE UNION, ON A CERTAIN CONDITION

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, that Missouri shall be admitted into this Union on an equal footing with the original states in all respects whatever upon the fundamental condition that the fourth clause of the twenty-sixth section of the third article of the constitution submitted on the part of said state to Congress shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto, by which any citizen, of either of the states in this Union, shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States. Provided, that the legislature of the said state, by a solemn public act, shall declare the assent of the said state to the said fundamental condition and shall transmit to the president of the United States, on or before the fourth Monday in November next, an authentic copy of the said act; upon the receipt whereof, the president, by proclamation, shall announce the fact; whereupon, and without any further proceeding on the part of Congress, the admission of the said state into this Union shall be considered as complete.

Approved, March 2, 1821.

# SLAVERY

## Wilmot Proviso

The Wilmot Proviso was an unsuccessful congressional amendment, offered for the first time in 1846, that sought to ban slavery in the territories acquired from Mexico after the Mexican War. Named after its sponsor, Democratic Representative DAVID WILMOT of Pennsylvania, the proviso never passed both houses of Congress, but it did ignite an intense national debate over slavery that led to the creation of the antislavery Republican party in 1854.

In August 1846 President JAMES K. POLK asked Congress for $2 million to help him negotiate peace and settle the boundary with Mexico. Polk sought the acquisition of Texas and other Mexican territories. Wilmot quickly offered his amendment, which he attached to Polk's funding measure. The House approved the bill and sent it to the Senate for action. The Senate, however, adjourned before discussing the issue.

When the next Congress convened, a new appropriations bill for $3 million was presented, but the Wilmot Proviso was again attached to the measure. The House passed the bill, and the Senate was forced to consider the proposal. Under the leadership of Senator JOHN C. CALHOUN of South Carolina and other proslavery senators, the Senate refused to accept the Wilmot amendment and approved the funds for the negotiations without the proviso.

Though the amendment was never enacted, it became a rallying point for opponents of slavery. The creation of the REPUBLICAN PARTY in 1854 was based on an antislavery platform that endorsed the Wilmot Proviso.

### Wilmot Proviso

Provided, that, as an express and fundamental condition to the acquisition of any territory from the Republic of Mexico by the United States, by virtue of any treaty which may be negotiated between them, and to the use by the executive of the moneys herein appropriated, neither slavery nor involuntary servitude shall ever exist in any part of said territory, except for crime, whereof the party shall first be duly convicted.

Source: *Congressional Globe,* 29th Congress, 1st session (August 12, 1846), p. 1217.

# SLAVERY

## Compromise of 1850

The Compromise of 1850 is the name given to a series of congressional statutes enacted in September 1850 in an attempt to resolve long-standing disputes over slavery. Southern slave owners had long demanded a more stringent fugitive slave law while Northern abolitionists insisted that slavery should be abolished in the District of Columbia. The unsuccessful WILMOT PROVISO of 1846–1847 also revealed deep opposition to the expansion of slavery into the newly acquired Mexican territories. The debate over slavery intensified in 1849 when California applied for admission to the Union as a free state. Concern grew over the possibility that some Southern states might secede, leading to the dissolution of the Union.

Senator HENRY CLAY of Kentucky, aided by Senators DANIEL WEBSTER of Massachusetts and STEPHEN A. DOUGLAS of Illinois, proposed a compromise that passed the Congress after much difficulty. The compromise consisted of five statutes. One statute created the New Mexico Territory, and a second created the Utah Territory. Both statutes left it up to the inhabitants to decide whether to enter the Union as a free state or a slave state. This approach, whose leading advocate was Douglas, became known as "popular sovereignty." A third statute admitted California to the Union as a free state, and a fourth statute prohibited bringing slaves into the District of Columbia for sale or transportation. The fifth statute was the most controversial, for it established a more rigorous fugitive slave law. The strengthening of federal enforcement of the FUGITIVE SLAVE ACT (9 Stat. 462) angered many Northerners and led to growing sectional conflict.

### Compromise of 1850

**An Act Proposing to the State of Texas the Establishment of Her Northern and Western Boundaries, the Relinquishment by the Said State of All Territory Claimed by Her Exterior to Said Boundaries, and of All Her Claims upon the United States, and to Establish a Territorial Government for New Mexico**

**[Section 1]**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following propositions shall be, and the same hereby are, offered to the state of Texas, which, when agreed to by the said state, in an act passed by the general assembly, shall be binding and obligatory upon the United States, and upon the said state of Texas: provided, the said agreement by the said general assembly shall be given on or before the first day of December, eighteen hundred and fifty:

1. The state of Texas will agree that her boundary on the north shall commence at the point at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes

Source: *Statutes at Large,* vol. 9 (1851), pp. 446–458, 462–465, 467–468.

SLAVERY

COMPROMISE OF 1850

north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two degrees of north latitude to the Rio Bravo del Norte, and thence with the channel of said river to the Gulf of Mexico.

2. The state of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she agrees to establish by the first article of this agreement.

3. The state of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender to the United States of her ships, forts, arsenals, custom houses, custom house revenue, arms and munitions of war, and public buildings with their sites, which became the property of the United States at the time of the annexation.

4. The United States, in consideration of said establishment of boundaries, cession of claim to territory, and relinquishment of claims, will pay to the state of Texas the sum of ten millions of dollars in a stock bearing 5 percent interest, and redeemable at the end of fourteen years, the interest payable half-yearly at the treasury of the United States.

5. Immediately after the president of the United States shall have been furnished with an authentic copy of the act of the general assembly of Texas accepting these propositions, he shall cause the stock to be issued in favor of the state of Texas, as provided for in the fourth article of this agreement: provided, also, that no more than five millions of said stock shall be issued until the creditors of the state holding bonds and other certificates of stock of Texas for which duties on imports were specially pledged, shall first file at the treasury of the United States releases of all claim against the United States for or on account of said bonds or certificates in such form as shall be prescribed by the secretary of the treasury and approved by the president of the United States: provided, that nothing herein contained shall be construed to impair or qualify anything contained in the third article of the second section of the "joint resolution for annexing Texas to the United States," approved March first, eighteen hundred and forty-five, either as regards the number of states that may hereafter be formed out of the state of Texas, or otherwise.

**Section 2**

And be it further enacted, that all that portion of the territory of the United States bounded as follows: beginning at a point in the Colorado River where the boundary line with the republic of Mexico crosses the same; thence eastwardly with the said boundary line to the Rio Grande; thence following the main channel of said river to the parallel of the thirty-second degree of north latitude; thence east with said degree to its intersection with the one hundred and third degree of longitude west of Greenwich; thence north with said degree of longitude to the parallel of thirty-eighth degree of north latitude; thence west with said parallel to the summit of the Sierra Madre; thence south with the crest of said mountains to the thirty-seventh parallel of north latitude; thence west with said parallel to its intersection with the boundary line of the state of California; thence with said boundary line to the place of beginning—be, and the same is hereby, erected into a temporary government, by the name of the territory of New Mexico. Provided, that nothing in this act contained shall be construed to inhibit the government of the United States from dividing said territory into two or more territories, in such manner and at such times as Congress shall deem convenient and proper, or from attaching any portion thereof to any other territory or state. And provided, further, that, when admitted as a state, the said territory, or any portion of the same, shall be received into the Union, with or without slavery, as their constitution may prescribe at the time of their admission.

**Section 3**

And be it further enacted, that the executive power and authority in and over said territory of New Mexico shall be vested in a governor, who shall hold his office for four years, and until his successor shall be appointed and qualified, unless sooner removed by the president of the United States. The governor shall reside within said territory, shall be commander in chief of the militia thereof, shall perform the duties and receive the emoluments of superintendent of Indian affairs, and shall approve all laws passed by the legislative assembly before they shall take effect; he may grant pardons for offenses against the laws of said territory, and reprieves for offenses against the laws of the United States, until the decision of the president can be made known thereon; he shall commission all officers

who shall be appointed to office under the laws of the said territory and shall take care that the laws be faithfully executed.

**Section 4**

And be it further enacted, that there shall be a secretary of said territory, who shall reside therein, and hold his office for four years, unless sooner removed by the president of the United States; he shall record and preserve all the laws and proceedings of the legislative assembly hereinafter constituted and all the acts and proceedings of the governor in his executive department; he shall transmit one copy of the laws and one copy of the executive proceedings, on or before the first day of December in each year, to the president of the United States, and, at the same time, two copies of the laws to the speaker of the House of Representatives and the president of the Senate, for the use of Congress. And, in case of the death, removal, resignation, or other necessary absence of the governor from the territory, the secretary shall have, and he is hereby authorized and required to execute and perform all the powers and duties of the governor during such vacancy or necessary absence, or until another governor shall be duly appointed to fill such vacancy.

**Section 5**

And be it further enacted, that the legislative power and authority of said territory shall be vested in the governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of thirteen members, having the qualifications of voters as hereinafter prescribed, whose term of service shall continue two years. The house of representatives shall consist of twenty-six members, possessing the same qualifications as prescribed for members of the council, and whose term of service shall continue one year. An apportionment shall be made, as nearly equal as practicable, among the several counties or districts, for the election of the council and house of representatives, giving to each section of the territory representation in the ratio of its population (Indians excepted), as nearly as may be. And the members of the council and of the house of representatives shall reside in, and be inhabitants of, the district for which they may be elected respectively. Previous to the first election, the governor shall cause a census or enumeration of the inhabitants of the several counties and districts of the territory to be taken, and the first election shall be held at such time and places and be conducted in such manner, as the governor shall appoint and direct; and he shall, at the same time, declare the number of the members of the council and house of representatives to which each of the counties or districts shall be entitled under this act. The number of persons authorized to be elected having the highest number of votes in each of said council districts, for members of the council, shall be declared by the governor to be duly elected to the council; and the person or persons authorized to be elected having the greatest number of votes for the house of representatives, equal to the number to which each county or district shall be entitled, shall be declared by the governor to be duly elected members of the house of representatives. Provided, that in case of a tie between two or more persons voted for, the governor shall order a new election to supply the vacancy made by such tie. And the persons thus elected to the legislative assembly shall meet at such place and on such day as the governor shall appoint; but thereafter, the time, place, and manner of holding and conducting all elections by the people, and the apportioning the representation in the several counties or districts to the council and house of representatives according to the population, shall be prescribed by law, as well as the day of the commencement of the regular sessions of the legislative assembly: provided, that no one session shall exceed the term of forty days.

**Section 6**

And be it further enacted, that every free white male inhabitant, above the age of twenty-one years, who shall have been a resident of said territory at the time of the passage of this act, shall be entitled to vote at the first election and shall be eligible to any office within the said territory; but the qualifications of voters and of holding office, at all subsequent elections, shall be such as shall be prescribed by the legislative assembly. Provided, that the right of suffrage, and of holding office, shall be exercised only by citizens of the United States, including those recognized as citizens by the treaty with the republic of Mexico, concluded February second, eighteen hundred and forty-eight.

**Section 7**

And be it further enacted, that the legislative power of the territory shall extend to all rightful

subjects of legislation, consistent with the Constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents. All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect.

**Section 8**

And be it further enacted, that all township, district, and county officers, not herein otherwise provided for, shall be appointed or elected, as the case may be, in such manner as shall be provided by the governor and legislative assembly of the territory of New Mexico. The governor shall nominate and, by and with the advice and consent of the legislative council, appoint all officers not herein otherwise provided for; and in the first instance the governor alone may appoint all said officers, who shall hold their offices until the end of the first session of the legislative assembly, and shall lay off the necessary districts for members of the council and house of representatives, and all other officers.

**Section 9**

And be it further enacted, that no member of the legislative assembly shall hold, or be appointed to, any office which shall have been created, or the salary or emoluments of which shall have been increased while he was a member, during the term for which he was elected, and for one year after the expiration of such term; and no person holding a commission or appointment under the United States, except postmasters, shall be a member of the legislative assembly, or shall hold any office under the government of said territory.

**Section 10**

And be it further enacted, that the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said territory annually, and they shall hold their offices during the period of four years. The said territory shall be divided into three judicial districts, and a district court shall be held in each of said districts by one of the justices of the supreme court, at such time and place as may be prescribed by law; and the said judges shall, after their appointments, respectively, reside in the districts which shall be assigned them. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace, shall be as limited by law. Provided, that justices of the peace shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars; and the said supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction. Each district court, or the judge thereof, shall appoint its clerk, who shall also be the register in chancery and shall keep his office at the place where the court may be held. Writs of error, bills of exception, and appeals shall be allowed in all cases from the final decisions of said district courts to the supreme court, under such regulations as may be prescribed by law, but in no case removed to the supreme court shall trial by jury be allowed in said court. The supreme court, or the justices thereof, shall appoint its own clerk, and every clerk shall hold his office at the pleasure of the court for which he shall have been appointed. Writs of error and appeals from the final decisions of said supreme court shall be allowed, and may be taken to the Supreme Court of the United States, in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property or the amount in controversy, to be ascertained by the oath or affirmation of either party, or other competent witness, shall exceed one thousand dollars; except only that in all cases involving title to slaves, the said writs of error or appeals shall be allowed and decided by the said Supreme Court without regard to the value of the matter, property, or title in controversy; and except also that a writ of error or appeal shall also be allowed to the Supreme Court of the United States from the decision of the said supreme court created by this act, or of any judge thereof, or of the district courts created by this act, or of any judge thereof, upon any writ of habeas corpus involving the question of personal freedom; and each of the said district courts shall have and exercise

the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States; and the said supreme and district courts of the said territory, and the respective judges thereof, shall and may grant writs of habeas corpus in all cases in which the same are grantable by the judges of the United States in the District of Columbia; and the first six days of every term of said courts, or so much thereof as shall be necessary, shall be appropriated to the trial of causes arising under the said Constitution and laws; and writs of error and appeals in all such cases shall be made to the supreme court of said territory, the same as in other cases. The said clerk shall receive in all such cases the same fees which the clerks of the district courts of Oregon Territory now receive for similar services.

**Section 11**

And be it further enacted, that there shall be appointed an attorney for said territory, who shall continue in office for four years, unless sooner removed by the president, and who shall receive the same fees and salary as the attorney of the United States for the present territory of Oregon. There shall also be a marshal for the territory appointed, who shall hold his office for four years, unless sooner removed by the president, and who shall execute all processes issuing from the said courts when exercising their jurisdiction as circuit and district courts of the United States; he shall perform the duties, be subject to the same regulation and penalties, and be entitled to the same fees as the marshal of the district court of the United States for the present territory of Oregon, and shall, in addition, be paid two hundred (dollars) annually as a compensation for extra services.

**Section 12**

And be it further enacted, that the governor, secretary, chief justice and associate justices, attorney, and marshal shall be nominated and, by and with the advice and consent of the Senate, appointed by the president of the United States. The governor and secretary, to be appointed as aforesaid, shall, before they act as such, respectively take an oath or affirmation, before the district judge, or some justice of the peace in the limits of said territory, duly authorized to administer oaths and affirmations by the laws now in force therein, or before the chief justice or some associate justice of the Supreme Court of the United States, to support the Constitution of the United States, and faithfully to discharge the duties of their respective offices; which said oaths, when so taken, shall be certified by the person by whom the same shall have been taken, and such certificates shall be received and recorded by the said secretary among the executive proceedings; and the chief justice and associate justices, and all other civil officers in said territory, before they act as such, shall take a like oath or affirmation, before the said governor or secretary, or some judge or justice of the peace of the territory, who may be duly commissioned and qualified; which said oath or affirmation shall be certified and transmitted, by the person taking the same to the secretary, to be by him recorded as aforesaid; and afterwards, the like oath or affirmation shall be taken, certified, and recorded in such manner and form as may be prescribed by law. The governor shall receive an annual salary of fifteen hundred dollars as governor, and one thousand dollars as superintendent of Indian affairs. The chief justice and associate justices shall each receive an annual salary of eighteen hundred dollars. The secretary shall receive an annual salary of eighteen hundred dollars. The said salaries shall be paid quarter-yearly, at the treasury of the United States. The members of the legislative assembly shall be entitled to receive three dollars each per day during their attendance at the sessions thereof, and three dollars each for every twenty miles' travel in going to and returning from the said sessions, estimated according to the nearest usually traveled route. There shall be appropriated annually the sum of one thousand dollars, to be expended by the governor, to defray the contingent expenses of the territory; there shall also be appropriated annually a sufficient sum to be expended by the secretary of the territory, and upon an estimate to be made by the secretary of the treasury of the United States, to defray the expenses of the legislative assembly, the printing of the laws, and other incidental expenses; and the secretary of the territory shall annually account to the secretary of the treasury of the United States for the manner in which the aforesaid sum shall have been expended.

**Section 13**

And be it further enacted, that the legislative assembly of the territory of New Mexico shall

hold its first session at such time and place in said territory as the governor thereof shall appoint and direct; and at said first session, or as soon thereafter as they shall deem expedient, the governor and legislative assembly shall proceed to locate and establish the seat of government for said territory at such place as they may deem eligible; which place, however, shall thereafter be subject to be changed by the said governor and legislative assembly.

**Section 14**

And be it further enacted, that a delegate to the House of Representatives of the United States, to serve during each Congress of the United States, may be elected by the voters qualified to elect members of the legislative assembly, who shall be entitled to the same rights and privileges as are exercised and enjoyed by the delegates from the several other territories of the United States to the said House of Representatives. The first election shall be held at such time and places, and be conducted in such manner, as the governor shall appoint and direct; and at all subsequent elections, the times, places, and manner of holding the elections shall be prescribed by law. The person having the greatest number of votes shall be declared by the governor to be duly elected, and a certificate thereof shall be given accordingly; provided, that such delegate shall receive no higher sum for mileage than is allowed by law to the delegate from Oregon.

**Section 15**

And be it further enacted, that when the lands in said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same.

**Section 16**

And be it further enacted, that temporarily and until otherwise provided by law, the governor of said territory may define the judicial districts of said territory, and assign the judges who may be appointed for said territory to the several districts, and also appoint the times and places for holding courts in the several counties or subdivisions in each of said judicial districts, by proclamation to be issued by him; but the legislative assembly, at their first or any subsequent session, may organize, alter, or modify such judicial districts, and assign the judges, and alter the times and places of holding the courts, as to them shall seem proper and convenient.

**Section 17**

And be it further enacted, that the Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said territory of New Mexico as elsewhere within the United States.

**Section 18**

And be it further enacted, that the provisions of this act be, and they are hereby, suspended until the boundary between the United States and the state of Texas shall be adjusted; and when such adjustment shall have been effected, the president of the United States shall issue his proclamation, declaring this act to be in full force and operation, and shall proceed to appoint the officers herein provided to be appointed in and for said territory.

**Section 19**

And be it further enacted, that no citizen of the United States shall be deprived of his life, liberty, or property, in said territory, except by the judgment of his peers and the laws of the land.

Approved, September 9, 1850.

## AN ACT FOR THE ADMISSION OF THE STATE OF CALIFORNIA INTO THE UNION

Whereas the people of California have presented a constitution and asked admission into the Union, which constitution was submitted to Congress by the president of the United States, by message dated February thirteenth, eighteen hundred and fifty, and which, on due examination, is found to be republican in its form of government:

**[Section 1]**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the state of California shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever.

**Section 2**

And be it further enacted, that, until the representatives in Congress shall be apportioned according to an actual enumeration of the inhabitants of the United States, the state of California shall be entitled to two representatives in Congress.

**Section 3**

And be it further enacted, that the said state of California is admitted into the Union upon the express condition that the people of said state, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States, and in no case shall nonresident proprietors, who are citizens of the United States, be taxed higher than residents; and that all the navigable waters within the said state shall be common highways, and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost, or duty therefore: provided, that nothing herein contained shall be construed as recognizing or rejecting the propositions tendered by the people of California as articles of compact in the ordinance adopted by the convention which formed the constitution of that state.

Approved, September 9, 1850.

## AN ACT TO ESTABLISH A TERRITORIAL GOVERNMENT FOR UTAH

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that all that part of the territory of the United States included within the following limits, to wit: bounded on the west by the state of California, on the north by the territory of Oregon, and on the east by the summit of the Rocky Mountains, and on the south by the thirty-seventh parallel of north latitude, be, and the same is hereby, created into a temporary government, by the name of the territory of Utah; and, when admitted as a state, the said territory, or any portion of the same, shall be received into the Union, with or without slavery, as their constitution may prescribe at the time of their admission: provided, that nothing in this act contained shall be construed to inhibit the government of the United States from dividing said territory into two or more territories, in such manner and at such times as Congress shall deem convenient and proper, or from attaching any portion of said territory to any other state or territory of the United States.

* * *

**Section 14**

And be it further enacted, that the sum of five thousand dollars be, and the same is hereby, appropriated out of any moneys in the treasury not otherwise appropriated, to be expended by and under the direction of the said governor of the territory of Utah, in the purchase of a library, to be kept at the seat of government for the use of the governor, legislative assembly, judges of the supreme court, secretary, marshal, and attorney of said territory, and such other persons, and under such regulations, as shall be prescribed by law.

## AN ACT TO AMEND, AND SUPPLEMENTARY TO, THE ACT ENTITLED "AN ACT RESPECTING FUGITIVES FROM JUSTICE, AND PERSONS ESCAPING FROM THE SERVICE OF THEIR MASTERS," APPROVED FEBRUARY TWELFTH, ONE THOUSAND SEVEN HUNDRED AND NINETY-THREE

**[Section 1]**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the persons who have been, or may hereafter be, appointed commissioners, in virtue of any act of Congress, by the circuit courts of the United States, and who, in consequence of such appointment, are authorized to exercise the powers that any justice of the peace, or other magistrate of any of the United States, may exercise in respect to offenders for any crime or offense against the United States, by arresting, imprisoning, or bailing the same under and by virtue of the thirty-third section of the act of the twenty-fourth of September, seventeen hundred and eighty-nine, entitled "An act to establish the judicial courts of the United States," shall be, and are hereby, authorized and required to exercise and discharge all the powers and duties conferred by this act.

SLAVERY

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**Section 2**

And be it further enacted, that the superior court of each organized territory of the United States shall have the same power to appoint commissioners to take acknowledgments of bail and affidavits, and to take depositions of witnesses in civil causes, which is now possessed by the circuit court of the United States; and all commissioners, who shall hereafter be appointed for such purposes by the superior court of any organized territory of the United States, shall possess all the powers, and exercise all the duties, conferred by law upon the commissioners appointed by the circuit courts of the United States for similar purposes and shall moreover exercise and discharge all the powers and duties conferred by this act.

**Section 3**

And be it further enacted, that the circuit courts of the United States and the superior courts of each organized territory of the United States shall from time to time enlarge the number of commissioners, with a view to afford reasonable facilities to reclaim fugitives from labor and to the prompt discharge of the duties imposed by this act.

**Section 4**

And be it further enacted, that the commissioners above named shall have concurrent jurisdiction with the judges of the circuit and district courts of the United States, in their respective circuits and districts within the several states, and the judges of the superior courts of the territories, severally and collectively, in termtime and vacation; and shall grant certificates to such claimants, upon satisfactory proof being made, with authority to take and remove such fugitives from service or labor, under the restrictions herein contained, to the state or territory from which such persons may have escaped or fled.

**Section 5**

And be it further enacted, that it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant, or other process, when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of such claimant, on the motion of such claimant, by the circuit or district court for the district of such marshal; and after arrest of such fugitive by such marshal or his deputy, or whilst at any time in his custody under the provisions of this act, should such fugitive escape, whether with or without the assent of such marshal or his deputy, such marshal shall be liable, on his official bond, to be prosecuted for the benefit of such claimant, for the full value of the service or labor of said fugitive in the state, territory, or district whence he escaped. And the better to enable the said commissioners, when thus appointed, to execute their duties faithfully and efficiently in conformity with the requirements of the Constitution of the United States and of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; with authority to such commissioners, or the persons to be appointed by them, to execute process as aforesaid, to summon and call to their aid the bystanders, or *posse comitatus* of the proper county, when necessary to ensure a faithful observance of the clause of the Constitution referred to, in conformity with the provisions of this act; and all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required, as aforesaid, for that purpose; and said warrants shall run, and be executed by said officers, anywhere in the state within which they are issued.

**Section 6**

And be it further enacted, that when a person held to service or labor in any state or territory of the United States has heretofore or shall hereafter escape into another state or territory of the United States, the person or persons to whom such service or labor may be due or his, her, or their agent or attorney, duly authorized by power of attorney in writing, acknowledged and certified under the seal of some legal officer or court of the state or territory in which the same may be executed, may pursue and reclaim such fugitive person, either by procuring a warrant from some one of the courts, judges, or commissioners aforesaid, of the proper circuit,

district, or county, for the apprehension of such fugitive from service or labor or by seizing and arresting such fugitive, where the same can be done without process, and by taking, or causing such person to be taken, forthwith before such court, judge, or commissioner, whose duty it shall be to hear and determine the case of such claimant in a summary manner; and upon satisfactory proof being made, by deposition or affidavit in writing, to be taken and certified by such court, judge, or commissioner, or by other satisfactory testimony, duly taken and certified by some court, magistrate, justice of the peace, or other legal officer authorized to administer an oath and take depositions under the laws of the state or territory from which such person owing service or labor may have escaped, with a certificate of such magistracy or other authority, as aforesaid, with the seal of the proper court or officer thereto attached, which seal shall be sufficient to establish the competency of the proof, and with proof, also by affidavit, of the identity of the person whose service or labor is claimed to be due as aforesaid, that the person so arrested does in fact owe service or labor to the person or persons claiming him or her, in the state or territory from which such fugitive may have escaped as aforesaid, and that said person escaped, to make out and deliver to such claimant, his or her agent or attorney, a certificate setting forth the substantial facts as to the service or labor due from such fugitive to the claimant, and of his or her escape from the state or territory in which such service or labor was due, to the state or territory in which he or she was arrested, with authority to such claimant, or his or her agent or attorney, to use such reasonable force and restraint as may be necessary, under the circumstances of the case, to take and remove such fugitive person back to the state or territory whence he or she may have escaped as aforesaid. In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence; and the certificates in this and the first (fourth) section mentioned, shall be conclusive of the right of the person or persons in whose favor granted, to remove such fugitive to the state or territory from which he escaped, and shall prevent all molestation of such person or persons by any process issued by any court, judge, magistrate, or other person whomsoever.

**Section 7**

And be it further enacted, that any person who shall knowingly and willingly obstruct, hinder, or prevent such claimant, his agent or attorney, or any person or persons lawfully assisting him, her, or them, from arresting such a fugitive from service or labor, either with or without process as aforesaid, or shall rescue, or attempt to rescue, such fugitive from service or labor, from the custody of such claimant, his or her agent or attorney, or other person or persons lawfully assisting as aforesaid, when so arrested, pursuant to the authority herein given and declared; or shall aid, abet, or assist such person so owing service or labor as aforesaid, directly or indirectly, to escape from such claimant, his agent or attorney, or other person or persons legally authorized as aforesaid; or shall harbor or conceal such fugitive, so as to prevent the discovery and arrest of such person, after notice or knowledge of the fact that such person was a fugitive from service or labor as aforesaid, shall, for either of said offenses, be subject to a fine not exceeding one thousand dollars and imprisonment not exceeding six months, by indictment and conviction before the district court of the United States for the district in which such offense may have been committed, or before the proper court of criminal jurisdiction, if committed within any one of the organized territories of the United States; and shall moreover forfeit and pay, by way of civil damages to the party injured by such illegal conduct, the sum of one thousand dollars, for each fugitive so lost as aforesaid, to be recovered by action of debt, in any of the district or territorial courts aforesaid, within whose jurisdiction the said offense may have been committed.

**Section 8**

And be it further enacted, that the marshals, their deputies, and the clerks of the said district and territorial courts, shall be paid, for their services, the like fees as may be allowed to them for similar services in other cases; and where such services are rendered exclusively in the arrest, custody, and delivery of the fugitive to the claimant, his or her agent or attorney, or where such supposed fugitive may be discharged out of custody for the want of sufficient proof as aforesaid, then such fees are to be paid in the whole by such claimant, his agent or attorney; and in all cases where the proceedings are before a commissioner, he shall be entitled to a fee of ten

dollars in full for his services in each case, upon the delivery of the said certificate to the claimant, his or her agent or attorney; or a fee of five dollars in cases where the proof shall not, in the opinion of such commissioner, warrant such certificate and delivery, inclusive of all services incident to such arrest and examination, to be paid, in either case, by the claimant, his or her agent or attorney. The person or persons authorized to execute the process to be issued by such commissioners for the arrest and detention of fugitives from service or labor as aforesaid shall also be entitled to a fee of five dollars each for each person he or they may arrest and take before any such commissioner as aforesaid, at the instance and request of such claimant, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them: such as attending at the examination, keeping the fugitive in custody, and providing him with food and lodging during his detention, and until the final determination of such commissioner; and, in general, for performing such other duties as may be required by such claimant, his or her attorney or agent, or commissioner in the premises, such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county, as near as may be practicable, and paid by such claimants, their agents or attorneys, whether such supposed fugitives from service or labor be ordered to be delivered to such claimants by the final determination of such commissioners or not.

**Section 9**

And be it further enacted, that, upon affidavit made by the claimant of such fugitive, his agent or attorney, after such certificate has been issued, that he has reason to apprehend that such fugitive will be rescued by force from his or their possession before he can be taken beyond the limits of the state in which the arrest is made, it shall be the duty of the officer making the arrest to retain such fugitive in his custody and to remove him to the state whence he fled, and there to deliver him to said claimant, his agent, or attorney. And to this end, the officer aforesaid is hereby authorized and required to employ so many persons as he may deem necessary to overcome such force and to retain them in his service so long as circumstances may require. The said officer and his assistants, while so employed, to receive the same compensation, and to be allowed the same expenses, as are now allowed by law for transportation of criminals, to be certified by the judge of the district within which the arrest is made, and paid out of the treasury of the United States.

**Section 10**

And be it further enacted, that when any person held to service or labor in any state or territory, or in the District of Columbia, shall escape therefrom, the party to whom such service or labor shall be due, his, her, or their agent or attorney, may apply to any court of record therein, or judge thereof in vacation, and make satisfactory proof to such court, or judge in vacation, of the escape aforesaid, and that the person escaping owed service or labor to such party. Whereupon the court shall cause a record to be made of the matters so proved, and also a general description of the person so escaping, with such convenient certainty as may be; and a transcript of such record, authenticated by the attestation of the clerk and of the seal of the said court, being produced in any other state, territory, or district in which the person so escaping may be found, and being exhibited to any judge, commissioner, or other officer authorized by the law of the United States to cause persons escaping from service or labor to be delivered up, shall be held and taken to be full and conclusive evidence of the fact of escape, and that the service or labor of the person escaping is due to the party in such record mentioned. And upon the production by the said party of other and further evidence if necessary, either oral or by affidavit, in addition to what is contained in the said record of the identity of the person escaping, he or she shall be delivered up to the claimant. And the said court, commissioner, judge, or other person authorized by this act to grant certificates to claimants of fugitives, shall, upon the production of the record and other evidences aforesaid, grant to such claimant a certificate of his right to take any such person identified and proved to be owing service or labor as aforesaid, which certificate shall authorize such claimant to seize or arrest and transport such person to the state or territory from which he escaped: provided, that nothing herein contained shall be construed as requiring the production of a transcript of such record as evidence as aforesaid. But in its absence the claim shall be heard and

determined upon other satisfactory proofs, competent in law.

Approved, September 18, 1850.

## AN ACT TO SUPPRESS THE SLAVE TRADE IN THE DISTRICT OF COLUMBIA

### [Section 1]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that from and after the first day of January, eighteen hundred and fifty-one, it shall not be lawful to bring into the District of Columbia any slave whatever, for the purpose of being sold, or for the purpose of being placed in depot, to be subsequently transferred to any other state or place to be sold as merchandise. And if any slave shall be brought into the said district by its owner, or by the authority or consent of its owner, contrary to the provisions of this act, such slave shall thereupon become liberated and free.

### Section 2

And be it further enacted, that it shall and may be lawful for each of the corporations of the cities of Washington and Georgetown, from time to time, and as often as may be necessary, to abate, break up, and abolish any depot or place of confinement of slaves brought into the said district as merchandise, contrary to the provisions of this act, by such appropriate means as may appear to either of the said corporations expedient and proper. And the same power is hereby vested in the Levy Court of Washington County, if any attempt shall be made, within its jurisdictional limits, to establish a depot or place of confinement for slaves brought into the said district as merchandise for sale contrary to this act.

Approved, September 20, 1850.

# SLAVERY

## Kansas-Nebraska Act

An Act to Organize the Territories of Nebraska and Kansas

The Kansas-Nebraska Act of 1854 was the third and last of the series of compromises enacted before the U.S. CIVIL WAR in an attempt to resolve the question of whether SLAVERY should be permitted in the western territories. Senator STEPHEN A. DOUGLAS of Illinois, drafted the legislation that revoked the MISSOURI COMPROMISE of 1820, which had banned slavery north of 36°30' latitude. Douglas applied the doctrine of popular sovereignty to the Kansas and Nebraska Territories, as he had successfully urged Congress to do in the COMPROMISE OF 1850. The 1850 law left to New Mexico and Utah the decision of whether to enter the Union as free or slave states.

The Kansas-Nebraska Act failed to end the national conflict over slavery. Antislavery forces viewed the statute as a capitulation to the South, and many abandoned the Whig and Democratic parties to form the REPUBLICAN PARTY. Kansas soon became a battleground over slavery. On May 25, 1856, the militant abolitionist JOHN BROWN led a raid against proslavery supporters at Pottawatomie Creek, Kansas, killing five persons. The violence between the abolitionists and those who were proslavery soon gave the territory the name "Bleeding Kansas."

### Kansas-Nebraska Act

#### [SECTION 1]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that all that part of the territory of the United States included within the following limits, except such portions thereof as are hereinafter expressly exempted from the operations of this act, to wit: beginning at a point in the Missouri River where the fortieth parallel of north latitude crosses the same; thence west on said parallel to the east boundary of the territory of Utah, on the summit of the Rocky Mountains; thence on said summit northward to the forty-ninth parallel of north latitude; thence east on said summit northward to the forty-ninth parallel of north latitude; thence east on said parallel to the western boundary of the territory of Minnesota; thence southward on said boundary to the Missouri River; thence down the main channel of said river to the place of beginning, be, and the same is hereby, created into a temporary government by the name of the territory of Nebraska; and when admitted as a state or states, the said territory, or any portion of the same, shall be received into the Union with or without slavery, as their constitution may prescribe at the time of their admission. Provided, that nothing in this act contained shall be construed to inhibit the government of the United States from dividing said territory into two or more territories, in such manner and at such times as Congress shall deem convenient and proper, or from attaching any portion of said territory to any other state or territory of the United States. Provided further, that nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the

Source: *Statutes at Large,* vol. 10 (1855), pp. 277–290.

Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Nebraska, until said tribe shall signify their assent to the president of the United States to be included within the said territory of Nebraska, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed.

### SECTION 2

And be it further enacted, that the executive power and authority in and over said territory of Nebraska shall be vested in a governor, who shall hold his office for four years, and until his successor shall be appointed and qualified, unless sooner removed by the president of the United States. The governor shall reside within said territory and shall be commander in chief of the militia thereof. He may grant pardons and respites for offenses against the laws of said territory and reprieves for offenses against the laws of the United States, until the decision of the president can be made known thereon; he shall commission all officers who shall be appointed to office under the laws of the said territory and shall take care that the laws be faithfully executed.

### SECTION 3

And be it further enacted, that there shall be a secretary of said territory, who shall reside therein and hold his office for five years, unless sooner removed by the president of the United States; he shall record and preserve all the laws and proceedings of the legislative assembly hereinafter constituted and all the acts and proceedings of the governor in his executive department; he shall transmit one copy of the laws and journals of the legislative assembly within thirty days after the end of each session and one copy of the executive proceedings and official correspondence semiannually, on the first days of January and July in each year, to the president of the United States and two copies of the laws to the president of the Senate and to the speaker of the House of Representatives, to be deposited in the libraries of Congress; and in case of the death, removal, resignation, or absence of the governor from the territory, the secretary shall be, and he is hereby, authorized and required to execute and perform all the powers and duties of the governor during such vacancy or absence, or until another governor shall be duly appointed and qualified to fill such vacancy.

### SECTION 4

And be it further enacted, that the legislative power and authority of said territory shall be vested in the governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of thirteen members having the qualifications of voters, as hereinafter prescribed, whose term of service shall continue two years. The house of representatives shall, at its first session, consist of twenty-six members, possessing the same qualifications as prescribed for members of the council, and whose term of service shall continue one year. The number of representatives may be increased by the legislative assembly, from time to time, in proportion to the increase of qualified voters; provided, that the whole number shall never exceed thirty-nine. An apportionment shall be made, as nearly equal as practicable, among the several counties or districts, for the election of the council and representatives, giving to each section of the territory representation in the ratio of its qualified voters as nearly as may be. And the members of the council and of the house of representatives shall reside in, and be inhabitants of, the district or county or counties for which they may be elected, respectively. Previous to the first election, the governor shall cause a census, or enumeration of the inhabitants and qualified voters of the several counties and districts of the territory, to be taken by such persons and in such mode as the governor shall designate and appoint; and the persons so appointed shall receive a reasonable compensation therefore. And the first election shall be held at such time and places and be conducted in such manner, both as to the persons who shall superintend such election and the returns thereof, as the governor shall appoint and direct; and he shall at the same time declare the number of members of the council and house of representatives to which each of the counties or districts shall be entitled under this act. The persons having the highest number of

legal votes in each of said council districts for members of the council shall be declared by the governor to be duly elected to the council; and the persons having the highest number of legal votes for the house of representatives shall be declared by the governor to be duly elected members of said house. Provided, that in case two or more persons voted for shall have an equal number of votes, and in case a vacancy shall otherwise occur in either branch of the legislative assembly, the governor shall order a new election; and the persons thus elected to the legislative assembly shall meet at such place and on such day as the governor shall appoint; but thereafter, the time, place, and manner of holding and conducting all elections by the people and the apportioning the representation in the several counties or districts to the council and house of representatives, according to the number of qualified voters, shall be prescribed by law, as well as the day of the commencement of the regular sessions of the legislative assembly; provided, that no session in any one year shall exceed the term of forty days, except the first session, which may continue sixty days.

### SECTION 5

And be it further enacted, that every free white male inhabitant above the age of twenty-one years who shall be an actual resident of said territory and shall possess the qualifications hereinafter prescribed shall be entitled to vote at the first election and shall be eligible to any office within the said territory; but the qualifications of voters, and of holding office, at all subsequent elections, shall be such as shall be prescribed by the legislative assembly. Provided, that the right of suffrage and of holding office shall be exercised only by citizens of the United States and those who shall have declared on oath their intention to become such and shall have taken an oath to support the Constitution of the United States and the provisions of this act; and provided further, that no officer, soldier, seaman, or marine, or other person in the army or navy of the United States, or attached to troops in the service of the United States, shall be allowed to vote or hold office in said territory by reason of being on service therein.

### SECTION 6

And be it further enacted, that the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents. Every bill which shall have passed the council and house of representatives of the said territory shall, before it become a law, be presented to the governor of the territory; if he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it originated, who shall enter the objections at large on their journal and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, to be entered on the journal of each house respectively. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the assembly, by adjournment, prevents its return, in which case it shall not be a law.

### SECTION 7

And be it further enacted, that all township, district, and county officers, not herein otherwise provided for, shall be appointed or elected, as the case may be, in such manner as shall be provided by the governor and legislative assembly of the territory of Nebraska. The governor shall nominate and, by and with the advice and consent of the legislative council, appoint all officers not herein otherwise provided for; and in the first instance the governor alone may appoint all said officers, who shall hold their offices until the end of the first session of the legislative assembly, and shall lay off the necessary districts for members of the council and house of representatives and all other officers.

### SECTION 8

And be it further enacted, that no member of the legislative assembly shall hold, or be appointed to, any office which shall have been created, or the salary or emoluments of which shall have been increased, while he was a member, during the term for which he was elected,

and for one year after the expiration of such term; but this restriction shall not be applicable to members of the first legislative assembly; and no person holding a commission or appointment under the United States, except postmasters, shall be a member of the legislative assembly, or hold any office under the government of said territory.

### SECTION 9

And be it further enacted, that the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said territory annually, and they shall hold their offices during the period of four years, and until their successor shall be appointed and qualified. The said territory shall be divided into three judicial districts, and a district court shall be held in each of said districts by one of the justices of the supreme court at such times and places as may be prescribed by law; and the said judges shall, after their appointments, respectively, reside in the districts which shall be assigned them. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace, shall be as limited by law: provided, that justices of the peace shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars; and the said supreme and districts courts, respectively, shall possess chancery as well as commonlaw jurisdiction. Each district court, or the judge thereof, shall appoint its clerk, who shall also be the register in chancery, and shall keep his office at the place where the court may be held. Writs of error, bills of exception, and appeals shall be allowed in all cases from the final decisions of said district courts to the supreme court, under such regulations as may be prescribed by law; but in no case removed to the supreme court shall trial by jury be allowed in said court. The supreme court, or the justices thereof, shall appoint its own clerk, and every clerk shall hold his office at the pleasure of the court for which he shall have been appointed. Writs of error and appeals from the final decisions of said supreme court shall be allowed, and may be taken to the Supreme Court of the United States, in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property, or the amount in controversy, to be ascertained by the oath or affirmation of either party or other competent witness, shall exceed one thousand dollars; except only that in all cases involving title to slaves, the said writs of error or appeals shall be allowed and decided by the said supreme court, without regard to the value of the matter, property, or title in controversy; and except also that a writ of error or appeal shall also be allowed to the Supreme Court of the United States, from the decision of the said supreme court created by this act, or of any judge thereof, or of the district courts created by this act, or of any judge thereof, upon any writ of habeas corpus, involving the question of personal freedom. Provided, that nothing herein contained shall be construed to apply to or affect the provisions to the "Act respecting fugitives from justice, and persons escaping from the service of their masters," approved February twelfth, seventeen hundred and ninety-three, and the "Act to amend and supplementary to the aforesaid act," approved September eighteen, eighteen hundred and fifty; and each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States; and the said supreme and district courts of the said territory, and the respective judges thereof, shall and may grant writs of habeas corpus in all cases in which the same are granted by the judges of the United States in the District of Columbia; and the first six days of every term of said courts, or so much thereof as shall be necessary, shall be appropriated to the trial of causes arising under the said constitution and laws and writs of error and appeal in all such cases shall be made to the supreme court of said territory, the same as in other cases. The said clerk shall receive in all such cases the same fees which the clerks of the district courts of Utah Territory now receive for similar services.

### SECTION 10

And be it further enacted, that the provisions of an act entitled "An act respecting fugitives from justice, and persons escaping from the service of their masters," approved February twelve, seventeen hundred and ninety-three, and

the provisions of the act entitled "An act to amend, and supplementary to, the aforesaid act," approved September eighteen, eighteen hundred and fifty, be, and the same are hereby, declared to extend to and be in full force within the limits of said territory of Nebraska.

**SECTION 11**

And be it further enacted, that there shall be appointed an attorney for said territory, who shall continue in office for four years, and until his successor shall be appointed and qualified, unless sooner removed by the president, and who shall receive the same fees and salary as the attorney of the United States for the present territory of Utah. There shall also be a marshal for the territory appointed, who shall hold his office for four years, and until his successor shall be appointed and qualified, unless sooner removed by the president, and who shall execute all processes issuing from the said courts when exercising their jurisdiction as circuit and district courts of the United States; he shall perform the duties, be subject to the same regulation and penalties, and be entitled to the same fees, as the marshal of the district court of the United States for the present territory of Utah, and shall, in addition, be paid two hundred dollars annually as a compensation for extra services.

**SECTION 12**

And be it further enacted, that the governor, secretary, chief justice and associate justices, attorney, and marshal shall be nominated and, by and with the advice and consent of the Senate, appointed by the president of the United States. The governor and secretary to be appointed as aforesaid shall, before they act as such, respectively take an oath or affirmation before the district judge or some justice of the peace in the limits of said territory, duly authorized to administer oaths and affirmations by the laws now in force therein, or before the chief justice, or some associate justice of the Supreme Court of the United States, to support the Constitution of the United States and faithfully to discharge the duties of their respective offices, which said oaths, when so taken, shall be certified by the person by whom the same shall have been taken; and such certificates shall be received and recorded by the said secretary among the executive proceedings; and the chief justice and associate justices, and all other civil officers in said territory, before they act as such, shall take a like oath or affirmation before the said governor or secretary, or some judge or justice of the peace of the territory, who may be duly commissioned and qualified, which said oath or affirmation shall be certified and transmitted by the person taking the same to the secretary, to be by him recorded as aforesaid; and afterwards, the like oath or affirmation shall be taken, certified, and recorded, in such manner and form as may be prescribed by law. The governor shall receive an annual salary of two thousand five hundred dollars. The chief justice and associate justices shall each receive an annual salary of two thousand dollars. The secretary shall receive an annual salary of two thousand dollars. The said salaries shall be paid quarter-yearly, from the dates of the respective appointments, at the treasury of the United States; but no such payment shall be made until said officers shall have entered upon the duties of their respective appointments. The members of the legislative assembly shall be entitled to receive three dollars each per day during their attendance at the sessions thereof and three dollars each for every twenty miles' travel in going to and returning from the said sessions, estimated according to the nearest usually travelled route; and an additional allowance of three dollars shall be paid to the presiding officer of each house for each day he shall so preside. And a chief clerk, one assistant clerk, a sergeant-at-arms, and doorkeeper may be chosen for each house; and the chief clerk shall receive four dollars per day, and the said other officers three dollars per day during the session of the legislative assembly; but no other officers shall be paid by the United States; provided, that there shall be but one session of the legislature annually, unless, on an extraordinary occasion, the governor shall think proper to call the legislature together. There shall be appropriated annually the usual sum, to be expended by the governor, to defray the contingent expenses of the territory, including the salary of a clerk of the executive department; and there shall also be appropriated annually a sufficient sum, to be expended by the secretary of the territory, and upon an estimate to be made by the secretary of the treasury of the United States, to defray the expenses of the legislative assembly, the printing of the laws, and other incidental expenses; and the governor and secretary of the territory shall, in the disbursement of all moneys entrusted to them, be governed solely by the instructions of the secretary of the treasury of the United States and shall,

semiannually, account to the said secretary for the manner in which the aforesaid moneys shall have been expended; and no expenditure shall be made by said legislative assembly for objects not specially authorized by the acts of Congress, making the appropriations, nor beyond the sums thus appropriated for such objects.

### SECTION 13

And be it further enacted, that the legislative assembly of the territory of Nebraska shall hold its first session at such time and place in said territory as the governor thereof shall appoint and direct; and at said first session, or as soon thereafter as they shall deem expedient, the governor and legislative assembly shall proceed to locate and establish the seat of government for said territory at such place as they may deem eligible; which place, however, shall thereafter be subject to be changed by the said governor and legislative assembly.

### SECTION 14

And be it further enacted, that a delegate to the House of Representatives of the United States, to serve for the term of two years, who shall be a citizen of the United States, may be elected by the voters qualified to elect members of the legislative assembly, who shall be entitled to the same rights and privileges as are exercised and enjoyed by the delegates from the several other territories of the United States to the said House of Representatives, but the delegate first elected shall hold his seat only during the term of the Congress to which he shall be elected. The first election shall be held at such time and places and be conducted in such manner as the governor shall appoint and direct; and at all subsequent elections the times, places, and manner of holding the elections shall be prescribed by law. The person having the greatest number of votes shall be declared by the governor to be duly elected; and a certificate thereof shall be given accordingly. That the Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said territory of Nebraska as elsewhere within the United States, except the eighth section of the act preparatory to the admission of Missouri into the Union, approved March sixth, eighteen hundred and twenty, which, being inconsistent with the principle of nonintervention by Congress with slavery in the states and territories, as recognized by the legislation of eighteen hundred and fifty, commonly called the Compromise Measures, is hereby declared inoperative and void; it being the true intent and meaning of this act not to legislate slavery into any territory or state, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States: provided, that nothing herein contained shall be construed to revive or put in force any law or regulation which may have existed prior to the act of March sixth, eighteen hundred and twenty, either protecting, establishing, prohibiting, or abolishing slavery.

### SECTION 15

And be it further enacted, that there shall hereafter be appropriated, as has been customary for the territorial governments, a sufficient amount, to be expended under the direction of the said governor of the territory of Nebraska, not exceeding the sums heretofore appropriated for similar objects, for the erection of suitable public buildings at the seat of government, and for the purchase of a library, to be kept at the seat of government for the use of the governor, legislative assembly, judges of the supreme court, secretary, marshal, and attorney of said territory, and such other persons, and under such regulations, as shall be prescribed by law.

### SECTION 16

And be it further enacted, that when the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory and in the states and territories hereafter to be erected out of the same.

### SECTION 17

And be it further enacted, that, until otherwise provided by law, the governor of said territory may define the judicial districts of said territory and assign the judges who may be appointed for said territory to the several districts; and also appoint the times and places for holding courts in the several counties or subdivisions in each of said judicial districts by proclamation, to be issued by him; but the legislative assembly, at their first or any subsequent

session, may organize, alter, or modify such judicial districts and assign the judges and alter the times and places of holding the courts, as to them shall seem proper and convenient.

### SECTION 18

And be it further enacted, that all officers to be appointed by the president, by and with the advice and consent of the Senate, for the territory of Nebraska, who, by virtue of the provisions of any law now existing, or which may be enacted during the present Congress, are required to give security for moneys that may be entrusted with them for disbursement, shall give such security at such time and place and in such manner as the secretary of the treasury may prescribe.

### SECTION 19

And be it further enacted, that all that part of the territory of the United States included within the following limits, except such portions thereof as are hereinafter expressly exempted from the operations of this act, to wit, beginning at a point on the western boundary of the state of Missouri, where the thirty-seventh parallel of north latitude crosses the same; thence west on said parallel to the eastern boundary of New Mexico; thence north on said boundary to latitude thirty-eight; thence following said boundary westward to the east boundary of the territory of Utah, on the summit of the Rocky Mountains; thence northward on said summit to the fortieth parallel of latitude; thence east on said parallel to the western boundary of the state of Missouri; thence south with the western boundary of said state to the place of beginning, be, and the same is hereby, created into a temporary government by the name of the territory of Kansas; and when admitted as a state or states, the said territory, or any portion of the same, shall be received into the Union with or without slavery, as their constitution may prescribe at the time of their admission: provided, that nothing in this act contained shall be construed to inhibit the government of the United States from dividing said territory into two or more territories, in such manner and at such times as Congress shall deem convenient and proper, or from attaching any portion of said territory to any other state or territory of the United States. Provided further, that nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries and constitute no part of the territory of Kansas, until said tribe shall signify their assent to the president of the United States to be included within the said territory of Kansas, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed.

[Sections 20–30 and 32–36 are identical to the sections establishing a territorial government for Nebraska and have therefore been omitted.]

### SECTION 31

And be it further enacted, that the seat of government of said territory is hereby located temporarily at Fort Leavenworth; and that such portions of the public buildings as may not be actually used and needed for military purposes may be occupied and used, under the direction of the governor and legislative assembly, for such public purposes as may be required under the provisions of this act.

### SECTION 37

And be it further enacted, that all treaties, laws, and other engagements made by the government of the United States with the Indian tribes inhabiting the territories embraced within this act, shall be faithfully and rigidly observed, notwithstanding anything contained in this act; and that the existing agencies and superintendencies of said Indians be continued with the same powers and duties which are now prescribed by law, except that the president of the United States may, at his discretion, change the location of the office of superintendent.

Approved, May 30, 1854.

# SLAVERY

## DRED SCOTT V. SANDFORD

The U.S. Supreme Court attempted to resolve the legal status of African Americans in *Dred Scott v. Sandford*. Chief Justice ROGER TANEY's belief that the Court could settle the issue proved mistaken, however. The decision heightened tensions and convinced abolitionists that the legal system was immoral.

Dred Scott was a slave owned by an army surgeon, John Emerson, who resided in Missouri. In 1836 Emerson took Scott to Fort Snelling, in what is now Minnesota, but then was a territory in which slavery had been expressly forbidden by the Missouri Compromise of 1820. In 1846 Scott sued for his freedom in Missouri state court, arguing that his residence in a free territory had released him from slavery. The Missouri Supreme Court rejected his argument, and Scott appealed to the U.S. Supreme Court.

The Court heard arguments on *Dred Scott* in 1855 and 1856. The Court could have disposed of the case on narrower grounds by holding that Scott had not become free through his temporary stay with Emerson in free territory. Instead, Taney decided that the Court needed to address the broader issue of the status of slavery in the territories. He wrote a tortuous opinion, arguing that because of the attitudes toward slavery and African Americans that prevailed in 1787–1789, when the Constitution was drafted and ratified, a slave was not and never could become a federal citizen. In addition, Taney ruled that the free descendants of slaves were not federal citizens and that property in slaves was entitled to such protection that Congress could not constitutionally forbid slavery in the territories.

The immediate effect of the *Dred Scott* decision was to convince abolitionists that the South and the Supreme Court planned to impose slavery throughout the Union. With the start of the U.S. CIVIL WAR in 1861, it became clear that Taney's decision had failed in its essential purpose.

### *Dred Scott, Plff. in Er., v. John F.A. Sandford.*

(See S. C. 19 How. 393–633.)

Plea in abatement, when may be reviewed—the word "citizen" in the Constitution does not embrace one of the negro race—negro cannot become a citizen—slave not made free by residence in a free state or territory—Declaration of Independence does not include slaves as part of the people—the rights and privileges conferred by the constitution upon citizens do not apply to the negro race—Constitution should have the meaning intended when it was adopted—court may examine other errors besides plea in abatement—Constitution expressly affirms right of property in slaves—Missouri compromise unconstitutional and void.

Where a plea in abatement, by defendant, to the jurisdiction of the court below is overruled on demurrer, and the defendant thereupon pleads in bar, upon which issues were joined and the trial and verdict were in his favor, and the plaintiff thereupon brought the case into this court by writ of error, and the plea and demur-

rer and judgment of the court below upon it are part of the record; held, that this court has power to review the decision of the court below upon the plea in abatement.

It is therefore the duty of the court to decide whether the facts stated in the plea, are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in the court of the United States.

The provisions of the Constitution of the United States in relation to the personal rights and privileges to which the citizen of a state should be entitled, do not embrace the negro African race, at that time in this country, or who might afterwards be imported, who had then been or should afterwards be made free in any state.

Such provisions of the Constitution do not put it in the power of a single state to make out one of the negro African race a citizen of the United States, and to endue him with the full rights of citizenship in every other state without their consent.

The Constitution of the United States does not act upon one of the negro race whenever he shall be made free under the laws of a state, and raise him to the rank of a citizen, and immediately clothe him with all the privileges of a citizen of any other state, and in its own courts.

The plaintiff in error was a negro slave, and brought into a free State (Illinois), and in the free territory of the United States for about four years, during which time he was married to another negro slave who also was in said free territory. One of their children (Eliza) was born on the River Mississippi, north of the north line of Missouri, and another of their children was born in the State of Missouri, to which state he had returned.

Held, that the plaintiff in error could not be and was not a citizen of the State of Missouri, within the meaning of the constitution of the United States, and consequently was not entitled to sue in its courts.

The legislation and histories of the times, and the language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as part of the people, nor intended to be included in the general words used in that instrument.

The descendants of Africans who were imported into this country and sold as slaves, when they shall become emancipated, or who are born of parents who had become free before their birth, are not citizens of a state in the sense in which the word "citizens" is used in the Constitution of the United States.

The enslaved African race was not intended to be included in, and formed no part of, the people who framed and adopted the Declaration of Independence.

When the framers of the Constitution were conferring special rights and privileges upon the citizens of a state in every other part of the Union, it is impossible to believe that these rights and privileges were intended to be extended to the negro race.

The words of the Constitution should be given the meaning they were intended to bear, when that instrument was framed and adopted.

Where this court has decided against the jurisdiction of the Circuit Court on a plea of abatement, it has still the right to examine any question presented by exception or by the record, and may reverse the judgement for errors committed, and remand the case to the Circuit Court for it to dismiss the case for want of jurisdiction.

The right of property in a slave is distinctly and expressly affirmed in the Constitution.

The Act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned (thirty-six degrees thirty minutes north latitude), is not warranted by the Constitution, and is therefore void.

Neither Dred Scott himself, nor any of his family were made free by being carried into such territory; even if they had been carried there by their owner with the intention of becoming permanent residents.

Scott was not made free by being taken to Rock Island in the State of Illinois.

As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back into Missouri in that character, his status, as free or slave, depended on the laws of Missouri, and not of Illinois. He and his family were not free, by the laws of Missouri, the property of defendant.

Argued Feb. 11, 12, 13 and 14, 1856. May 12, 1856, ordered to be re-argued at the next term.

Re-argued Dec. 15, 16, 17 and 18, 1856. Decided March 6, 1857.

In Error to the Circuit Court of the United States for the District of Missouri.

On November 2, 1853, Dred Scott, by his attorney, filed in the clerk's office of the Circuit Court of the United States for the District of Missouri, the following declaration against the defendant, John F.A. Sandford:

Dred Scott, of St. Louis, in the State of Missouri, and a citizen of the State of Missouri, complains of John F.A. Sandford, of the City of New York, and a citizen of the State of New York, in the plea of trespass for that the defendant heretofore, to wit: on the 1st day of January, A.D. 1853, at St. Louis, in the County of St. Louis and State of Missouri, with force and arms assaulted the plaintiff, and without law or right held him as a slave, and imprisoned him for the space of six hours and more, and then and there did threaten to beat the plaintiff and to hold him in prison, and restrained of liberty, so that by means of such threats the plaintiff was put in fear and could not attend to his business, to wit: $2,500, and other wrongs to the plaintiff then and there did, against the peace and to the damage of the plaintiff $3,000.

And also for that the defendant heretofore, on the 1st day of January, A.D. 1853, with force and arms at St. Louis aforesaid, an assault did make on Harriet Scott, then and still the wife of the plaintiff, and then and there did imprison said Harriet, and hold her as a slave, without law or right, for the space of six hours, and then and there did threaten to beat said Harriet and hold her as a slave, so that by means of the premises said Harriet was put in great fear and pain, and could not and did not attend to the plaintiff's business, and the plaintiff lost and was deprived of the society, comfort and assistance of his wife, and thereby lost great gains and profits, of the value, to wit: of $2,500, and other wrongs to the plaintiff, the defendant then and there did, against the peace and to the plaintiff's damage, $3,000.

And also for that the defendant heretofore, to wit: on the 1st day of January, A.D. 1853, with force and arms at St. Louis aforesaid, made an assault on Eliza Scott and Lizzie Scott, then and still infant daughters and servants of the plaintiff, and then and here imprisoned and held as slaves said Eliza and Lizzie, for a long space of time, to wit: six hours, and then and there did threaten to beat said Eliza and Lizzie and hold them as slaves and restrained of their liberty, so that by means of the premises, said Eliza and Lizzie were put in great fear, and could not and did not attend to plaintiff's business as otherwise they might and would have done, and the plaintiff thereby lost the comfort, society, service and assistance of his said children and servants, of great value, to wit: $2,500, and other wrongs to the plaintiff, the defendant then and there did against the peace, and to the damage of plaintiff $3,000, and the plaintiff on account of the aforesaid several grievances, brings suit, etc. by his attorney, R.M. Field.

The defendant, by his attorney, filed the following plea:

Plea to the jurisdiction of the court. April Term, 1854.

And the said John F.A. Sandford, in his own proper person, comes and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that said cause of action, and each and every of them, if any such have accrued to the said Dred Scott, accrued to the said Dred Scott out of the jurisdiction of this court and exclusively within the jurisdiction of the courts of the State of Missouri; for that, to wit: the said plaintiff Dred Scott is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African descent, his ancestors were of pure African blood, and were brought into this country and sold as negro slaves, and this the said Sandford is ready to verify; wherefore he prays judgment whether this court can or will take further cognizance of the action aforesaid.

The plea was verified.

The plaintiff filed the following demurrer to this plea:

And now comes the plaintiff and demurs in law to the plea of the defendant to the jurisdiction of the court, and says that the said plea and the matters therein contained are not sufficient in law to preclude the court of its jurisdiction of this case, and that the plaintiff is not bound by law to reply to said plea. Wherefore the plaintiff prays judgment of said plea, and that the defendant answer further to the plaintiff's said action, etc.

On April 24, 1854, the matters of law arising upon the demurrer were argued and submitted to the court. On April 25, the court rendered a decision that the law was for plaintiff on said

demurrer, and that the said demurrer be, and the same is hereby sustained.

On May 4, 1854, in accordance with an agreement by the attorneys, the defendant filed pleas, Nos. 1, 2 and 3, to all of which pleas the plaintiff filed replications. Said attorneys also filed an agreement upon the statement of the facts in this case. The pleas are as follows:

1. And the said John F.A. Sandford, by H.A. Garland, his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the said supposed trespass above laid to his charge, or any part thereof in manner and form as the said Dred Scott hath above thereof complained against him, and of this he, the said Sandford, putteth himself upon the country.

2. And for a further plea in this behalf, as to the making of said assault on said Dred Scott in the first count in said declaration mentioned, imprisoning him and keeping and detaining him in prison, etc., the said Sandford, by leave of the court first obtained, says that the said Dred Scott ought not have or maintain his aforesaid action thereof against him, because he says that before, and at the time when, etc., in the said first count mentioned, the said Dred Scott was a negro slave, the lawful property of the defendant, and as such slave he gently laid his hands upon him, and only restrained him of such liberty as he had a right to do, and this the said Sandford is ready to verify, wherefore he prays judgment whether the said Scott ought to have or maintain his aforesaid action thereof against him.

3. And for a further plea in this behalf, as to making the said assault upon Harriet, the wife, and Eliza and Lizzie, the daughters of the said Dred Scott, in the second and third counts of the said declaration mentioned, and imprisoning them and keeping and detaining them in prison, etc., the said John F.A. Sandford, by leave of the court obtained, says that said Dred Scott out not to have or maintain his aforesaid action thereof against him, because he says that before and at the said time, etc., when etc., in the said second and third counts mentioned, the said Harriet, wife of said Scott, and Eliza and Lizzie, his daughters, were the lawful slaves of the said Sandford, and as such slaves he gently laid his hands upon them and restrained them of their liberty as he had a right to do. And this he is ready to verify. Wherefore he prays judgment, etc.

Garland, for defendant.

The replications are as follows:

The plaintiff, as to the plea of the defendant firstly above pleaded, and whereof he has put himself on the country, doth do like. Field.

And the plaintiff, as to the plea of the defendant secondly above pleaded as to said several trespasses in the introductory part of that plea mentioned and therein attempted to be justified, says that the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having and maintaining his aforesaid action against the defendant, because he says that said defendant at said time, when, etc., of his own wrong, and without the cause by him in his said second plea alleged, committed the said several trespasses in the introductory part of that plea mentioned, in manner and form as the plaintiff has above in his declaration complained, and this the plaintiff prays may be inquired of by the country.

The replication to the third plea was similar to the second.

The agreed statement of facts was as follows:

In the year 1834 the plaintiff was a negro slave belonging to Doctor Emerson, who was a surgeon in the Army of the United States. In that year, 1834, said Doctor Emerson took the plaintiff from the State of Missouri to the military post at Rock Island in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Doctor Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi River in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of 36 degrees 30 minutes north, and north of the State of Missouri. Said doctor Emerson held the plaintiff in slavery at said Fort Snelling, from said last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the Army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave at said Fort Snelling unto the said Doctor Emerson hereinbefore named.

Said Doctor Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836 the plaintiff and said Harriet, at said Fort Snelling, with the consent of said Doctor Emerson, who then claimed to be heir master and owner, intermarried and took each other for husband and wife, Eliza and Lizzie named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board of the steamboat Gipsey, north of the north line of the State of Missouri, and upon the River Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Doctor Emerson remove the plaintiff and said Harriet and their said daughter Eliza from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Doctor Emerson sold and conveyed the plaintiff, said Harriet, Eliza and Lizzie, to the defendant as slaves, and the defendant has ever since claimed to hold them, and each of them as slaves.

At the times mentioned in the plaintiff's declaration, the defendant, claiming to be owner as aforesaid, laid his hands upon said plaintiff, Harriet, Eliza and Lizzie, and imprisoned them, doing in this respect, however no more than what he might lawfully do, if they were of right his slaves at such time.

Further proof may be given on the trial for either party.

Mr. R.M. Field, for plaintiff.

Mr. H.A. Garland for defendant.

The case was tried, at the Circuit Court held for the District of Missouri at St. Louis on May 15, 1854, before the court and a jury.

The jury found the following verdict, *viz.*:

"As to the first issue joined in this case, we of the jury find the defendant not guilty; and as to the issue secondly above joined, we of the jury find, that before and at the time when, etc., in the first count mentioned, the said Dred Scott was a negro slave, the lawful property of the defendant. And as to the issue thirdly above joined, we the jury find, that before and at the time when, etc., in the second and third counts mentioned, the said Harriet wife of said Dred Scott, and Eliza and Lizzie the daughters of the said Dred Scott were negro slaves, the lawful property of the defendant." Whereupon it is now considered by the court, that the plaintiff take nothing by his writ in this case, and that the defendant John F.A. Sandford go hence without day and recover against said plaintiff, Dred Scott, the costs by him expended in the defense of this suit.

A motion for a new trial was made by the attorneys for the plaintiff, which the court overruled. Thereupon the said plaintiff filed a bill of exception, which is as follows:

*Dred Scott v. John F.A. Sandford.*

April Term, 1854.

On the trial of this cause by the jury, the plaintiff, to maintain the issues on his part, read to the jury, the following agreed statement of facts.

"It is agreed that Dred Scott brought suit for his freedom, in the Circuit Court of St. Louis County; that there was a verdict and judgment in his favor; that on a writ of error to the Supreme Court, the judgment below was reversed, and the same remanded to the Circuit Court, where it has been continued to await the decision of this case.

Mr. Field, for plaintiff.

Mr. Garland, for defendant."

No further testimony was given to the jury by either party. Thereupon the plaintiff moved the court to give the jury, the following instructions:

Plaintiff's Instruction.

The jury are instructed, that upon the facts agreed to by the parties, they ought to find for the plaintiff.

The court refused to give such instruction to the jury, and the plaintiff to such refusal then and there duly excepted. The court then gave the following instruction to the jury, on motion of the defendant:

Defendant's Instruction.

The jury are instructed, that upon the facts in this case the law is with the defendant.

To the giving of such instruction the plaintiff then and there duly excepted.

The jury found the verdict as above. The plaintiff thereupon immediately filed in court the following motion for a new trial:

And now, after verdict, and before judgment, the plaintiff comes and moves the court to set

aside the verdict and grant a new trial, because the court misdirected the jury in matter of law on said trial. Field.

The court overruled the said motion and gave judgment on verdict for the defendant; and to such action of the court the plaintiff then and there duly excepted.

The plaintiff writes this bill of exceptions and prays that it may be allowed, and signed and sealed. Field.

Allowed and signed and sealed, May 15, 1854.

R. W. Wells. [seal.]

A writ of error was issued, and in the Supreme Court of the United States, December Term, 1854, the following was filed:

And now comes said plaintiff in error and says that in the record of the proceedings, and in the giving of judgment below, there is manifest error, because the court below gave judgment for the defendant below, when the judgment should have been for plaintiff below, wherefore for said errors and others the plaintiff prays judgment of reversal here, and that he may be restored to all he has lost.

By his attorney, Nathaniel Holmes. Filed, Dec. 30, 1854.

Messrs. M. Blair and Curtis, for the plaintiff in error:

1. The first question is, whether this court will consider the question raised in the Circuit Court by the plea to the jurisdiction, no final judgment having been rendered on the demurrer to that plea, and the defendant having pleaded over after the demurrer was sustained, and the final judgment assigned for error having been rendered on the issue on the merits.

2. Whether, if the ruling of the Circuit Court on the demurrer to the plea in abatement is subject to be reviewed here, the judgment of the court, in holding the plaintiff to be "a citizen" in such sense as to enable him to maintain an action in that character in the courts of the United States, was erroneous.

3. Whether the facts stated in the agreed case entitle the plaintiff and his family to freedom, supposing the 8th section of the Act of 1820, known as the Missouri Compromise, to be constitutional.

4. Whether the said Act is constitutional.

Upon the first point the counsel cited, *Shephard v. Graves*, 14 How. 519; *U. S. v. Boyd*, 5 How. 51; *Smith v. Kernochen*, 7 How. 216; *Sims v. Hundley*, 6 How. 1; *Bailey v. Dozier*, 6 How . 23; *Conard v. Atlantic Ins. Co.* 1 Pet. 386; *De Wolf v. Rabaud,* 1 Pet. 476; *Evans v. Gee*, 11 Pet. 89; 1 Wash. C. C. 70, 80; 2 Sumn. 251; 2 Dall. 341; 4 Dall. 330, and then said: In this case, as in those cited, the declaration gives jurisdiction, and the facts alleged in support of it can only be contested by making an issue as in other cases. If that issue be not made, or be waived in the conduct of the cause according to a well-settled practice of the court, there is no reason in this case more than in any other why the objection should be available at a later stage of the case. If the fact had been that plaintiff was not a resident of Missouri, and that was the reason why he was not a citizen, no advantage could be taken of the fact at any subsequent stage of the case. What difference does it make that another fact is relied on to show that he is not a citizen? It is the right to sue as "a citizen" of Missouri, which is questioned: and it is immaterial whether the right be questioned on account of residence, or on account of any other circumstances which deprives him of the character of a citizen of Missouri.

2. But if the court should be of opinion that the question raised by the plea in abatement, and the demurrer thereto, is not waived, and that the judgment of the Circuit Court therein must be maintained before it will consider the questions affecting his right to freedom, I submit the following considerations in support of the judgment on the demurrer:

The opinion of the court in *Amy v. Smith*, 1 Litt. 326, 4 Ga. 68, that free negroes are not citizens within the meaning of the 2d section of the 4th article of the Constitution, delivered in the spring of 1822, displays no research, logic or learning. On the other hand, the dissenting opinion of Judge Mills, p. 337, is sustained by the views of Judge Washington in *Corfield v. Coryell*, 4 Wash. C. C. 71.

21 Ala. 434; *State v. Manuel*, 4 Dev. & Bat. 24.

The other decisions relied on, Meigs, 339; 1 English, 509, are to the same effect as the decision in *Amy v. Smith*, and simply follow that.

The argument most relied on by those who deny the citizenship of free colored men is, that the Acts of Congress on the subject of naturalization provide for naturalizing white persons only. But even naturalization was not limited to the whites by the Constitution, and it has been

extended repeatedly by treaty and Act of Congress to Indians and negroes.

Treaty with Choctaws, art. 14, 20th September , 1830; Treaty with the Cherokees, 12th art. Vol. V. U. S. Laws, 647; Treaties of 1803 for Louisiana, 1819 for Florida, 1847 for California; 21 Ala. 454; and as Judge Gaston says, 4 Dev. & Bat. 24, there is no connection between the subject of citizenship as acquired by birth and that acquired under the laws of Congress, and it would be a dangerous mistake to confound them. That citizenship is acquired by birth, is a well settled common law principle.

Vattel, ch. 19, secs. 212, 313, 314; Justinian, Lib. 1, Tit. 5, sec. 3; Constitution, sec. 5, art. 2.

The Constitution of the United States recognizes but two kinds of free persons, citizens and aliens. Nobody supposes that free negroes are aliens. They must therefore be citizens.

Opinions Atty.-Gen. Vol. IV. p. 417; 3d sec. Act march 6, 1820; 6th sec. Act of 1812, to form a territorial government in Missouri; Militia Act, May 17, 1792; Constitutions of Kentucky, Louisiana, Mississippi, Connecticut and Missouri.

All of the above define the qualifications of electors in terms, "free white male citizens;" and thus show that it is as a class of citizens that the negroes are excluded. These considerations would authorize the conclusion that the framers of the Constitutions and the patriots of that era regarded this class of persons as citizens, and included them in that character in the provisions of the Constitutions; and this is fully confirmed by reference to the laws and records of that day.

Act of Mass. 6th March, 1788; Proposal of South Carolina, Jan. 25, 1778. to amend the 4th article; Journals, Vol. II. p. 606; Journals, Vol. IV. p. 183; Organization of the Western Territory, Resolutions, April 23, 1784; Ordinance 1787, art. 4; 2 Kent's Com. p. 258, note b.

Missouri Rev. Laws of 1845, p. 755, and Code of 1835, allude to free negroes who were "citizens."

No reason can be imagined for permitting a suit between free white persons of different states, for wrongs which the local tribunals were deemed inadequate to redress, which will not apply with equal force to controversies to which a free negro may be a party. They have equal capacity with other citizens to hold property and carry on business, and therefore to create the mischief against which the national judiciary was provided. The words of a law are to be construed with reference to the object of the law.

16 Pet. 640; 12 Wheat. 441; 16 Pet. 104.

In 1 Paine, C. C. 394, the courts say that a person need not have acquired political rights; it is only necessary that he should have acquired a domicil, to enable him to sue as a citizen; and in 3 Wash. C. C. 546, that "citizenship means nothing but residence."

3. The next question to be considered is, whether Dred and his family, or either of them, was emancipated by being taken to Illinois, and to that part of Louisiana Territory lying north of 36 degrees 30 minutes, and being detained there in the manner described in the agreed case. The eldest child, Eliza, having been born north of the Missouri line, on the boat whilst descending the Mississippi, was free under the Constitution of Illinois, and well settled legal principles.

Constitutions of Illinois, art. 6, secs. 1 and 2; 3 U. S. Stat. at L. p. 544; *Spotts v. Gillaspie*, 6 Rand. (Va.), 572; *Commonwealth v. Holloway*, 2 S. & R. 305.

The Circuit Court decided against the plaintiff on the strength of *Scott v. Emerson*, 15 Mo. 586.

But the question depends on general principles, and the courts of the United States, whilst they will respectfully consider the decisions of the State Court, decide such questions according to their own judgment of the law.

*Swift v. Tyson*, 16 Pet. 1; *Carpenter v. Ins. Co*. 16 Pet. 511; *Lane v. Vick*, 3 How. 476; *Foxcroft v. Mallett*, 4 How 379.

During the time that Dr. Emerson kept Dred at his station at Rock Island, and Harriet at Fort Snelling, there is no evidence that he had or claimed a residence elsewhere, and this court, in *Ennis v. Smith*, 14 how. 423, "where a party lives, is taken prima facie to be his domicil."

See, also *Sylvia v. Kirby*, 17 Mo. 434.

In the case of *Scott v. Emerson*, 15 Mo. 576, the court base their decision on two grounds:

1st. That by returning to Missouri to reside the master's right, which was suspended during the residence in Illinois, and in the Territory, is revived.

2d. The Constitution of Illinois, and the 8th sec. of the Act of 1820, are penal statutes which

the courts of other States were not bound to enforce.

In support of the first position, *Ex parte Grace*, 2 Hagg. 90; *Commonwealth v. Aves*, 18 Pick. 193, and *Mahoney v. Ashton*, 4 H. & McH. 295, were cited.

These decisions are inapplicable to the case at bar, for the present case the Constitution and Statute of Illinois expressly provide that emancipation shall be the effect of the violation of the provision. The laws under which the above decisions were made were different.

*David v. Porter*, 4 H. & McH. 418; *Betty v. Horton*, 1 Lee, 615.

The second ground relied upon by the court was equally untenable. See opinion of Judge Gambles, of the same case of *Emerson v. Scott*, "in this State it has been recognized from the beginning of the government as a correct position in law, that the master who takes his slave to reside in a state or territory where slavery is prohibited, emancipates his slave.

Also *McMicken v. Amos*, 4 Rand. 134; *Bank v. Earle,* 13 Pet. 590; *Spencer v. Dennis*, 8 Gill 321.

4. The freedom of Harriet and her daughter Lizzie depends on the validity of the 8th section of the Act of March 6, 1820, entitled "An Act to authorize the people of Missouri Territory to form a constitution and state government," etc.

The section is as follows:

That in all that territory ceded by France to the United States, which lies north of 36 degrees 30 minutes north latitude, not included within the limits of the State contemplated by this Act, slavery and involuntary servitude, otherwise than in the punishment of crimes whereof the party shall have been duly convicted, shall be, and the same is hereby forever prohibited.

Provided, always, that any person escaping into the same, from whom labor or service is lawfully claimed in any State or Territory of the United States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.

The Validity of this section is denied, on the ground that Congress possessed no power to prohibit slavery in the Territories.

It is not the power to govern the Territories, but the extent of the power which is questioned. Even those who deny any constitutional power on the ground of necessity; but they say where the necessity stops, there the power ceases. But this concedes the whole question; for it be lawful to legislate at all, the quantum which may be necessary is purely a legislative question; and indeed, whether the Constitution confers directly the legislative power in question or not is immaterial, seeing that it owns the lands, and has power to pass what laws it may deem expedient to dispose of and make them available.

Undoubtedly, for temporary purposes, it is indispensable that provision be made to govern the people in order that the lands shall posses any value, or that what remains after part is sold, may not be seized and confiscated. What would be proper provisions to this end, is not within the scope of judicial inquiry. If it were, it is demonstrable that the provision in question is most judicious, as a mere regulation to facilitate the disposition of public lands.

But it is alleged that the particular provision prohibiting slavery is violative of some part of the Constitution, which establishes the quality of the States and the rights of slave holders to take that species of property into the Territories of the United States. I admit that whether the power of Congress to legislate be given expressly or implication, it is given with the limitation that it shall be exercised in subordination to the Constitution, and that if it be exercised in violation of any provisions of the Constitution, the Act would be void. Subject to this limitation, Congress is at liberty to adopt any means to accomplish its object.

*McCulloch v. Maryland,* 4 Wheat. 316.

But where is it written in the Constitution that no law shall be passed prohibiting slavery in the territories? Not only was this measure adopted as one deemed advisable and proper to the well government of the territories under both the Confederation and the Constitution, but when the Mississippi Territory was ceded in 1798, it was deemed necessary to stipulate that slavery should not be prohibited, in order to limit the discretion of Congress. The limitation sought to be imposed is one dependent altogether upon state laws, and subjects Congress to the State Legislatures. The Act is now claimed as unconstitutional, because a species of property recognized in the laws of the States cannot be held in the Territories; but it would become constitutional if the States should cease to recognize such property; and again unconstitutional if the States should recognize it again. How the law in

question affects the States as States, in any respect, is not perceived; it is not pretended that any State has legislative rights in the Territories.

*Pollard v. Hagan,* 3 How. 322.

On other subjects, there are difficulties in adjusting the rights of the general and state governments; but there can be no conflict on this. Over the Territories, the general government alone has any power; and in the exercise of that, as of all other powers, is a government of the people. "In form and substance (this court says, it emanates from them, its powers are granted by them, and are to be exercised on them and for their benefit."

On this branch of the subject, the counsel cited the following authorities: Story's Com. Const. Vol. III., pp. 193, 195; 1 Kent's Com. 360; Sergeant, Const. Law, 389; *McCulloch v. Maryland,* 4 Wheat. 422; *Am. Ins. Co. v. Canter,* 1 Pet. 543; *Cherokee Nation v. Georgia,* 5 Pet. 44; *Menard v. Aspasia,* 5 Pet. 505; *Strader v. Graham,* 10 How. 93; *Cross v. Harrison,* 16 How. 193; *Hogg v. Zanesville Canal Co.* 5 Ohio, 410; *Phoebe v. Jay,* Breese, 210; *Spooner v. McConnell,* 1 McL. 341; *Harry v. Decker,* Walker (Miss.) 36; *Rachael v. Walker,* 4 Mo. 350; 3 How 223. And the following Acts of Congress; 1 Stat. at L., pp. 50, 551; 2 Stat. at L., pp. 58, 283, 309, 514; 3 Stat. at L., p. 546; 4 Stat. at L., p. 740; 5 Stat. at L., pp. 10, 235, 797; 9 Stat. at L., pp. 223, 447.

Messrs. H. S. Geyer and R. Johnson, for the defendant in error:

This cause was argued before this court at the December Term, 1855, when it was ordered to be re-argued by counsel for their respective parties, at a next term of court, and especially upon the following points:

1. Whether or not the facts being admitted by the demurrer to the plea to the jurisdiction, the judgment on the demurrer being that the defendant answer over, and the submission of the defendant to that judgment, by pleading over the merits, the appellate court can take notice of these facts thus admitted upon the record, in determining the question of the jurisdiction to the court below, to hear and fully dispose of the case.

2. Whether or not, assuming that the appellate court is bound to take notice of the facts thus appearing upon the record, the plaintiff is a citizen of the State of Missouri within the meaning of the 11th section of the Judiciary Act of 1789.

l. The averment that the plaintiff is a citizen of the State of Missouri, is a necessary averment. If it had been omitted or defectively stated, it would have been error in the Circuit Court to entertain jurisdiction, even though the defendant had not traversed the averment, but pleaded to the merits.

3 Dall. 382; 2 Cranch, 1, 126; *Sullivan v. Fulton Steamboat Co.* 6 Wheat. 450; *Turner v. Enrille,* 4 Dall. 7; *Capron v. Van Noorden,* 2 Cranch, 126.

If the plea demurred to, is to be regarded as a traverse or averment of citizenship of the plaintiff, then the fact on which the plaintiff claims a right to sue in the Circuit Court does not appear by the record; on the contrary, it appears affirmatively that he had no right to sue in that court. The whole question, whether the court could entertain jurisdiction and allow the defendant to plead over, depends on the decision on the demurrer. If that was erroneous, it was error to proceed further, and the defendants pleading over could not give jurisdiction.

2. It appears by the record that the defendant is a negro, born a slave; and therefore, whether he is entitled to freedom or not, by his temporary residence at Rock Island or Fort Snelling, or both, he is not and cannot be a citizen of the State of Missouri, within the meaning of the Constitution, or sec. 11 of the Judiciary Act.

Citizens, within the meaning of art. 3, sec. 2, are citizens of the United States, who are citizens of the state in which they respectively reside.

*Read v. Bertrand,* 4 Wash. C. C. 516; *Knox v. Greenleaf,* 4 Dall. 360; 3 Story on Const. 565, secs. 1687, 1688; 6 Pet. 761.

Citizens are natives or naturalized. All persons born in the United States are not citizens.

Exceptions are:

First. Children of foreign ambassadors.

Second. Indians.

Third. In general, persons of color.

1 Bouv. Inst. pp. 16, 64; *Amy v. Smith,* 1 Lit. Ky. 334; 2 Kent's Com. p. 258, note b.

Free blacks are not citizens within the provision of the Constitution, art. 4, sec. 2; so held by Dagget, Ch. J., in Connecticut. See note Kent's Com. supra.

See also, *State v. Claiborne,* 1 Meigs, 331; Opinions Atty.Gen. Vol. I. 382, ed. 41; Vol. I. p. 506, ed. 52. "An inquiry into the political grade

of the free colored population, under the Constitution of the United States," by John P. Denny.

Persons who are not citizens of the United States by birth, can become such only by virtue of treaty, or in pursuance of some law of the United States.

The power of naturalization is exclusively vested in Congress.

*U.S. v. Villato,* 2 Dall. 370; *Chirac v. Chirac,* 2 Wheat. 269; *Houston v. Moore,* 5 Wheat. 48.

A slave cannot become a citizen merely by a discharge from bondage.

3. Assuming that the Circuit Court had jurisdiction, the facts, as agreed by the parties, do not establish the right of the plaintiff, his wife and children, or either of them, to freedom.

Sec. 1 of art. 5 of the Constitution of Illinois, and sec. 8 of the Act of 6 March, 1820, do not declare the consequence of bringing a slave within the Territory, embraced. There is no exception or saving in respect to the rights of travelers. The effect of the provision is, in terms, the same, whether a slave is introduced to reside there or for some temporary purpose. Neither clause changes the condition of the slave brought into the Territory embraced by it. The slave is held to be free while he remains within such State or country, only because his owner has not the authority of law to restrain him of his liberty.

The owner's authority is restored if the slave is found within a State or country where slavery exists by law.

*The Slave Grace,* 2 Hagg. Adm. 94; *Willard v. The People,* 4 Scam. 461; *Graham v. Strader,* 5 B. Mon. 181; 7 B. Mon. 633; *Collins v. America,* 9 B. Mon 565; *Mercer v. Gilman,* 11 B. Mon. 210; *Maria v. Kirby,* 12 B. Mon. 542; *Lewis v. Fullerton,* 1 Rand. 15.

It has been held that where an owner of a slave brings him into a State or country in which slavery does not exist, or is prohibited by law, with the intention to make it his domicil, it operates as an emancipation, and the master cannot resume domain, though the slave return to, or is found in a country where slavery exists by law.

*Rankin v. Lydia,* 2 A. K. Marsh. 467; *Griffith v. Fanny,* Gilm. (Va.) 143; *Lunsford v. Coquillon,* 2 Mart. N. S. 405; *Josephine v. Poultney,* 1 La. Ann. 329; *Winney v. Whitesides,* 1 Mo. 472; *Milly v. Smith,* 2 Mo. 172; *Nat v. Ruddle,* 8 Mo. 282; *Rachel v. Walker,* 4 Mo. 350; overruled in *Scott v. Emerson,* 15 Mo. 570; *Sylvia v. Kirby,* 17 Mo. 434.

These are cases of emancipation by the voluntary act of the master, binding upon him everywhere, as would be emancipation upon any other proof recognized by law. Slaves, however, attending their owners temporarily sojourning in, or traveling through a State wherein slavery does not exist by law, are not thereby emancipated.

2 A. K. Marsh. 467; *Graham v. Strader,* 5 B. Mon. 181; *Mercer v. Gilman,* 11 B. Mon. 210; *Maria v. Kirby,* 12 B. Mon. 542; *Lewis v. Fullerton,* 1 Rand. 15; *Henry v. Ball,* 1 Wheat. 1; *Spragg v. Mary,* 3 Harr. & J.; *Pocock v. Hendricks,* 8 Gill & J. 421; *The Slave Grace,* 2 Hagg. 94; *Commonwealth v. Aves,* 18 Pick. 193; *Mahoney v. Ashton,* 4 H. & McH. 295.

The present plaintiff in error was held not entitled to his freedom, on the same state of facts as is now in evidence, in *Scott v. Emerson,* 15 Mo. 576.

This decision was affirmed in *Sylvia v. Kirby,* 17 Mo. 434.

By the laws of Missouri, therefore, the claimants are slaves, and these laws must determine their condition in the courts of the United States.

*Strader v. Graham,* 10 How. 93.

4. No residence of a slave at Fort Snelling could change his condition or devest the title of his owner.

Slavery existed by law in all the territory ceded by France to the United States, and Congress has not the constitutional power to repeal that law, or abolish or prohibit slavery within any part of that Territory.

Sec. 8 of the Act of March 6, 1820, is the first, and almost the only instance of an assumption by Congress of the power to abolish slavery in the Territory. It has never been recognized by this court. It is understood to be claimed that authority of Congress to erect territorial governments is confirmed by art. 4, sec. 3, of the Constitution, which gives the "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," or to result from the power to acquire territory; and in either

case, it comprehends a power of legislation exclusive, universal, absolute and unlimited.

3 Story, const. secs. 1314, 1315, 1318, 1319, 1320, 1322; 1 Kent's Com. 423.

The clause of the Constitution, however, has been judicially interpreted to be a power to dispose of and make all needful rules and regulations respecting the lands and other property of the United States.

*U. S. v. Gratiot,* 14 Pet. 526, 537; *Am. Ins. Co. v. Canter,* 1 Pet. 342; see, also, *Federalist,* No. 43.

The subject of the power conferred by art. 4, sec. 3, is property, and the property only of the United States. This power is over unappropriated lands.

To organize a municipal government or corporation for the district or country, to prohibit slavery, is not to make needful rules and regulations respecting the territory or other property belonging within such district; therefore, the power to institute such a government, and more specially an unlimited power to legislate in all cases over the inhabitants in a territory and their property, cannot be deduced from the clause under consideration.

The power of Congress to institute temporary government over any territory, results necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. It is a power resulting from the necessity of the State, and is limited to the necessity from which it arises; to change the law of property, to emancipate slavery, to abolish slavery where, by the law it exists, to confiscate property, or devest vested rights, cannot be necessary or proper to institution of a temporary government. The power of Congress over the territory belonging to the United States cannot authorize legislation which practically excludes from such territory the people of any portion of the Union, or prevents them from taking with them and holding in such territory any property recognized by the Constitution, and the local laws of the territory.

Mr. Chief Justice Taney delivered the opinion of the court:

This case has been twice argued. After the argument at the last term, differences of opinion were found to exist among the members of the court; and as the questions in controversy are the highest importance, and the court wax at that time much pressed by the ordinary business of the term, it was deemed advisable to continue the case, and direct a re-argument on some of the points, in order that we might have an opportunity of giving to the whole subject a more deliberate consideration. It has accordingly been again argued by counsel, and considered by the court; and I now proceed to deliver its opinion.

There are two leading questions presented by the record:

l. Had the Circuit court of the United States jurisdiction to hear and determine the case between these parties? And,

2. If it had jurisdiction, is the judgment it has given erroneous or not?

The plaintiff in error, who was also the plaintiff in the court below, was, with his wife and children, held as slaves by the defendant, in the State of Missouri, and he brought this action in the Circuit Court of the United States for that district, to assert the title of himself and his family to freedom.

The declaration is in the form usually adopted in that State to try questions of this description, and contains the averment necessary to give the court jurisdiction; that he and the defendant are citizens of different States; that is, he is a citizen of Missouri, and the defendant a citizen of New York.

The defendant pleaded in abatement to the jurisdiction of the court, that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The court overruled the plea, and gave judgment that the defendant should answer over. And he thereupon put in sundry pleas in bar, upon which issues were joined, and at the trial the verdict and judgment were in his favor. Whereupon the plaintiff brought this writ of error.

Before we speak of the pleas in bar, it will be proper to dispose of the questions which have arisen on the plea in abatement.

That plea denies the right of the plaintiff to sue in a court of the United States, for the reasons therein stated.

SLAVERY

DRED SCOTT V. SANDFORD

If the question raised by it is legally before us, and the court should be of opinion that the facts stated in it disqualify the plaintiff from becoming a citizen, in the sense in which that word is used in the Constitution of the United States, then the judgment of the Circuit Court is erroneous, and must be reversed.

It is suggested, however, that this plea is not before us; and that as the judgment in the court below on this plea was in favor of the plaintiff, he does not seek to reverse it, or bring it before the court for revision by his writ of error; and also that the defendant waived this defense by pleading over, and thereby admitted the jurisdiction of the court. But in making this objection, we think the peculiar and limited jurisdiction of courts of the United States has not been adverted to. This peculiar and limited jurisdiction had made it necessary, in these courts, to adopt different rules and principles of pleading, so far as jurisdiction is concerned, from those which regulate courts of common law in England and in the different States of the Union which have adopted the common law rules.

In these last mentioned courts, where their character and rank are analogous to that of a circuit court of the United States; in other words, where they are what the law terms courts of general jurisdiction, they are presumed to have jurisdiction unless the contrary appears. No averment in the pleadings of the plaintiff is necessary, in order to give jurisdiction. If the defendant objects to it, he must plead it specially, and unless the fact on which he relies is found to be true by a jury, or admitted to be true by the plaintiff, the jurisdiction cannot be disputed in an appellate court.

Now, it is not necessary to inquire whether in courts of that description a party who pleads over in bar, when a plea to the jurisdiction has been ruled against him, does or does not waive his plea; nor whether upon a judgment in his favor on the pleas in bar, and writ of error brought by the plaintiff, the question upon the plea in abatement would be open for revision in the appellate court. Cases that may have been decided in such courts, or rules that may have been laid down by common law pleaders, can have no influence in the decision in this court. Because, under the constitution and laws of the United States, the rules which govern the pleadings in its courts, in questions of jurisdiction, stand on different principles and are regulated by different laws.

This difference arises, as we have said, from the peculiar character of the government of the United States. For although it is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the Constitution, have been conferred upon it; and neither the Legislative, Executive nor Judicial Departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution. And in regulating the Judicial Department, the cases in which the courts of the United States shall have jurisdiction are particularly and specifically enumerated and defined; and they are not authorized to take cognizance of any case which does not come within the description therein specified. Hence, when a plaintiff sues in a court of the United States, it is necessary that he should show, in his pleading, that the suit he brings is within the jurisdiction of the court, and that he is entitled to sue there. And if he omits to do this, and should, by an oversight of the Circuit Court, obtain a judgment in his favor, the judgment would be reversed in the appellate court for want of jurisdiction in the court below. The jurisdiction would not be presumed, as in the case of a common law, English, or state court, unless the contrary appeared. But the record, when it comes before the appellate court, must show, affirmatively, that the inferior court had authority, under the Constitution, to hear and determine the case. And if the plaintiff claims a right to sue in a circuit court of the United States, under that provision of the Constitution which gives jurisdiction in controversies between citizens of different states, he must distinctly aver in his pleading that they are citizens of different states; and he cannot maintain his suit without showing that fact in the pleading.

This point was decided in the case of *Bingham v. Cabot,* 3 Dall. 382, and ever since adhered to by the court. And in *Jackson v. Ashton,* 8 Pet. 148, it was held that the objection to which it was open could not be waived by the opposite party, because consent of parties could not give jurisdiction.

It is needless to accumulate cases on this subject. Those already referred to, and the cases of *Chapron v. Van Noorden,* in 2 Cranch, 126,

and *Montalet v. Murray,* 4 Cranch, 46, are sufficient to show the rule of which we have spoken. The case of *Capron v. Van Noorden* strikingly illustrates the difference between a common law court and a court of the United States.

If, however, the fact of citizenship is averred in the declaration, and the defendant does not deny it, and put it in issue by plea in abatement, he cannot offer evidence at the trial to disprove it, and consequently cannot avail himself of the objection in the appellate court, unless the defect should be apparent in some other part of the record. For if there is no plea in abatement, and the want of jurisdiction does not appear in any other part of the transcript brought up by the writ of error, the undisputed averment of citizenship in the declaration must be taken in this court to be true. In this case, the citizenship is averred, but it is denied by the defendant in the manner required by the rules of pleading, and the fact upon which the denial is based is admitted by the demurrer. And if the plea and demurrer, and judgment of the court below upon it, are before us upon this record, the question to be decided is, whether the facts stated in the plea are sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States.

We think they are before us. The plea in abatement and the judgment of the court upon it, are a part of the judicial proceedings in the Circuit Court, and are there recorded as such; and a writ of error always bring us up to the superior court the whole record of the proceedings in the court below. And in the case of *The Bank of the U.S. v. Smith,* 11 Wheat. 172, this court said, that the case being brought up by writ of error, the whole record was under the consideration of this court. And this being the case in the present instance, the plea in abatement is necessarily under consideration; and it becomes, therefore, our duty to decide whether the facts stated in the plea are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States.

This is certainly a very serious question, and one that now for the first time has been brought for decision before this court. But it is brought here by those who have a right to bring it, and it is our duty to meet it and decide it.

The question is simply this: can a negro, whose ancestors were imported into this country and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen. One of these rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a state, in the sense in which the word "citizen" is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only that is, of those persons who are the descendants of Africans who were imported into this country and sold as slaves.

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor Colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian governments were regarded and treated as foreign governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English Colonies to the present day, by the different governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities

have always been treated as foreigners not living under our government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign government, be naturalized by the authority of Congress, and become citizens of a State and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.

We proceed to examine the case as presented by the pleadings.

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body, who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty. We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can, therefore, claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy of these laws. The decision of that question belonged to the political or lawmaking power; to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In discussing this question, we must not confound the rights of citizenship which a state may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of the citizen of a state, and yet not be entitled to the rights and privileges of a citizen in any other State. For previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of a citizen, and to endow him with all its rights. But this character, of course, was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a State under the federal government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.

It is very clear, therefore, that no State can, by any Act or law of its own, passed, since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same

reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a state should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endue him with the full rights of citizenship in every other State without their consent. Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised here to the rank of citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guarantied to citizens of this new sovereignty were intended to embrace those only who were then members of the several state communities, or who should afterwards, by birthright or otherwise, become members, according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at the time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon perfect equality with its own citizen as to rights of person and rights of property; it made him a citizen of the United States.

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the governments and institutions of the thirteen Colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognized as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in the memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it, in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at the time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English government and English people. They not only seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far

more extensively engaged in this commerce than any other nation in the world.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen Colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. The slaved were more or less numerous in the different Colonies, as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time.

The legislation of the different Colonies furnishes positive and indisputable proof of this fact.

It would be tedious, in this opinion to enumerate the various laws they passed upon this subject. It will be sufficient, as a sample of the legislation which then generally prevailed throughout the British Colonies, to give the laws of two of them; one being still a large slaveholding State, and the other the first State in which slavery ceased to exist.

The Province of Maryland, in 1717 (ch. 13, sec. 5), passed a law declaring "that if any free negro or mulatto intermarry with any white woman, or if any white man shall intermarry with any negro or mulatto woman, such negro or mulatto shall be a slave during life, excepting mulattoes born of white women, who, for such intermarriage, shall only become servants for seven years, to be disposed of as the Justices of the County Court, where such marriage so happens, shall think fit; to be applied by them towards the support of a public school within the said county. And any white man or white woman shall become servants during the term of seven years, and shall be disposed of by the justices as aforesaid, and be applied to the uses aforesaid."

The other colonial law to which we refer was passed by Massachusetts in 1705 (chap. 6). It is entitled "An Act for the better preventing of a spurious and mixed issue," etc.; and it provides, that "if any negro or mulatto shall presume to smite or strike any person of the English or other Christian nation, such negro or mulatto shall be severely whipped, at the discretion of the justices before whom the offender shall be convicted."

And "that none of Her Majesty's English or Scottish subjects, nor of any other Christian nation, within this province, shall contract matrimony with any negro or mulatto; nor shall any person duly authorized to solemnize marriage, presume to join any such in marriage, on pain of forfeiting the sum of fifty pounds; one moiety thereof to Her Majesty, for and towards the support of the government within this province, and the other moiety to him or them that shall inform and sue for the same in any of Her Majesty's courts of record within the Province, by will, plaint, or information."

We give both of these laws in the words used by the respective legislative bodies, because the language in which they are framed, as well as the provisions contained in them, show, too plainly to be misunderstood, the degraded condition of this unhappy race. They were still in force when the Revolution began, and are a faithful index to the state of feeling towards the class of persons of whom they speak, and of the position they occupied throughout the thirteen colonies, in the eyes and thoughts of the men who framed the Declaration of Independence and established the State constitutions and governments. They show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnaturally and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

We refer to these historical facts for the purpose of showing the fixed opinions concerning that race, upon which the statesmen of that day spoke and acted. It is necessary to do this, in order to determine whether the general terms used in the Constitution of the United States, as to the rights of man and the rights of the people, was intended to include them, or to give to them or their posterity the benefit of any of its provisions.

The language of the Declaration of Independence is equally conclusive.

It begins by declaring that, "when in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and nature's God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to the separation."

It then proceeds to say: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among them is life, liberty, and pursuit of happiness; that to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day, would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this Declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this Declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not, in any part of the civilized world, be supposed to embraced the negro race, which, by common consent, had been excluded from civilized governments and the family of nations, and doomed to slavery. The spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.

This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.

The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It declares that it is formed by the people of the United States; that is to say, by those who were members of the different political communities in the several States; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the people of the United States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the people. It uses them as terms so well understood that no further description or definition was necessary.

But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people of citizens of the government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808, if it thinks proper. And the importation which it thus sanctions was unquestionably of persons of the race of which we are speaking, as the traffic in slaves in the United States had always been confined to them. And by the other provision the States pledge themselves to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories. By the first above-mentioned clause, therefore, the right to purchase and hold this property is directly sanctioned and authorized for twenty years by the people who framed the Constitution. And by the second, they pledge themselves to maintain and uphold the right of the master in the manner specified, as long as the government they then formed should endure. And these two provisions show, conclusively, that neither the description of persons therein referred to, nor their descendants, were embraced in any of the other provisions of the Constitution; for certainly these two

clauses were not intended to confer on them or their posterity the blessings or liberty, or any of the personal rights so carefully provided for the citizen.

No one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise. The number that had been emancipated at that time were but few in comparison with those held in slavery; and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free. It is obvious that they were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union.

Indeed, when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them.

It is very true, that in that portion of the Union where the labor of the negro race was found to be unsuited to the climate, and unprofitable to the master, but few slaves were held at the time of the Declaration of Independence; and when the Constitution was adopted, it had entirely worn out in one of them, and measures had been taken for its gradual abolition in several others. But this change had not been produced by any change of opinion in relation to this race; but because it was discovered, from experience, that slave labor was unsuited to the climate and productions of these States: for some of the States, where it had ceased or nearly ceased to exist, were actively engaged in the slave trade, procuring cargoes on the coast of Africa, and transporting them for sale to those parts of the Union where their labor was found to be profitable, and suited to the climate and productions. And this traffic was openly carried on, and fortunes accumulated by it, without reproach from the people of the States where they resided. And it can hardly be supposed that, in the States where it was then countenanced in it worst form—that is, in the seizure and transportation—the people could have regarded those who were emancipated as entitled to equal rights with themselves.

And we may here again refer, in support of this proposition, to the plain and unequivocal language of the laws of the several States, some passed after the Declaration of Independence and before the Constitution was adopted, and some since the government went into operation.

We need not refer, on this point, particularly to the laws of the present slaveholding States. Their statute books are full of provisions in relation to this class, in the same spirit with the Maryland law which we have before quoted. They have continued to treat them as an inferior class, and to subject them to strict police regulation, drawing a broad line of distinction between the citizen and the slave races, and legislating in relation to them upon the same principle which prevailed at the time of the Declaration of Independence. As relates to these States, it is too plain for argument, that they have never been regarded as a part of the people or citizens of the State, nor supposed to possess any political rights which the dominant race might not withhold or grant at their pleasure. And as long as 1822, the Court of Appeals of Kentucky decided that free negroes and mulattoes were not citizens within the meaning of the Constitution of the United States; and the correctness of this decision is recognized, and the same doctrine affirmed, in 1 Meigs' Tenn. 321.

And if we turn to the legislation of the States where slavery had worn out, or measures taken for its speedy abolition, we shall find the same opinions and principles equally fixed and equally acted upon.

Thus, Massachusetts, in 1786, passed a law similar to the colonial one of which we have spoken. The law of 1786, like the Law of 1705, forbids the marriage of any white person with any negro, Indian or mulatto, and inflicts a penalty of £50 upon anyone who shall join them in marriage; and declares all such marriages absolutely null and void, and degrades thus the unhappy issue of the marriage by fixing upon it the stain of bastardy. And this mark of degradation was renewed, and again impressed upon the race, in the careful and deliberate preparation of their Revised Code published in 1836. This Code forbids any person from joining in marriage any white person with any Indian, negro or mulatto, and subjects the party who shall offend in this respect, to imprisonment, not exceeding six months, in the common jail, or hard labor, and to a fine of not less than fifty nor more than two hundred dollars; and, like the Law of 1786, it declares the marriage to be absolutely null and void. It will be seen that the punishment is increased by the Code upon the person who

shall marry them, by adding imprisonment to a pecuniary penalty.

So, too, in Connecticut. We refer more particularly to the legislation of this State, because it was not only among the first to put an end to slavery within its own territory, but was the first to fix a mark of reprobation upon the African slave trade. The law last mentioned was passed in October, 1788, about nine months after the State had ratified and adopted the Present Constitution of the United States; and by that law it prohibited its own citizens, under severe penalties, from engaging in the trade, and declared all policies of insurance on the vessel or cargo made in the State to be null and void. But, up to the time of the adoption of the Constitution, there is nothing in the legislation of the State indicating any change of opinion as to the relative rights and position of the white and black races in this country, or indicating that it meant to place the latter, when free, upon a level with its citizens. And certainly nothing which would have led the slaveholding States to suppose that Connecticut designed to claim for them, under the new Constitution, the equal rights and privileges and rank of citizens in every other state.

The first step taken by Connecticut upon this subject was as early as 1774, when it passed an Act forbidding the further importation of slaves into the State. But the section containing the prohibition is introduced by the following preamble:

"And whereas the increase of slaves in this State is injurious to the poor, and inconvenient."

This recital would appear to have been carefully introduced, in order to prevent any misunderstanding of the motive which induced the Legislature to pass the law, and places it distinctly upon the interest and convenience of the white population—excluding the inference that it might have been intended in any degree for the benefit of the other.

And in the Act of 1784, by which the issue of slaves, born after the time therein mentioned, were to be free at a certain age, the section is again introduced by a preamble assigning a similar motive for the Act. It is in these words:

"Whereas sound policy requires that the abolition of slavery should be effected as soon as may be consistent with the rights of individuals, and the public safety and welfare"—showing that the right of property on the master was to be protected, and that the measure was one of policy, and to prevent the injury and inconvenience, to the whites, of a slave population in the State.

And still further pursuing its legislation, we find that in the same Statute passed in 1774, which prohibited the further importation of slaves into the State, there is also a provision by which any negro, Indian or mulatto servant, who was found wandering out of the town or place to which he belonged, without a written pass such as is therein described, was made liable to be seized by anyone, and taken before the next authority to be examined and delivered up to his master—who was required to pay the charge which had accrued thereby. And a subsequent section of the same law provides, that if any free negro shall travel without such pass, and shall be stopped, seized or taken up, he shall pay all charges arising thereby. And this law was in full operation when the Constitution of the United States was adopted, and was not repealed till 1797. So that up to that time free negroes and mulattoes were associated with servants and slaves in the police regulations established by the laws of the State.

And again, in 1833, Connecticut passed another law, which made it penal to set up or establish any school in that State for the instruction of persons of the African race not inhabitants of the State, or to instruct or teach in any such school or institution, or board or harbor for that purpose, any such person, without previous consent in writing of the civil authority of the town in which such school or institution might be.

And it appears by the case of *Crandall v. The State,* reported in 10 Conn. 340, that upon an information filed against Prudence Crandall for a violation of this law, one of the points raised in the defense was, that the law was a violation of the Constitution of the United States; and that the persons instructed, although of the African race, were citizens of other States, and therefore entitled to the rights and privileges of citizens in the State of Connecticut. But Chief Justice Daggett, before whom the case was tried, held, that persons of that description were not citizens of a State, within the meaning of the word "citizen" in the Constitution of the United States, and were not, therefore, entitled to the privileges and immunities of citizens in other States.

SLAVERY

DRED SCOTT V. SANDFORD

The case was carried up to the Supreme Court of Errors of the State, and the question fully argued there. But the case went off upon another point, and no opinion was expressed on this question.

We have made this particular examination into the legislative and judicial action of Connecticut, because, from the early hostility it displayed to the slave trade on the coast of Africa, we may expect to find the laws of that State as lenient and favorable to the subject race as those of any other State in the Union; and if we find that at the time the Constitution was adopted, they were not even there raised to the rank of citizens, but were still held and treated as property, and the laws relating to them passed with reference altogether to the interest and convenience of the white race, we shall hardly find them elevated to a higher rank anywhere else.

A brief notice of the laws of two other States, and we shall pass on to other considerations.

By the laws of New Hampshire, collected and finally passed in 1815, no one was permitted to be enrolled in the militia of the State but free white citizens; and the same provision is found in a subsequent collection of the laws made in 1855. Nothing could more strongly mark the entire repudiation of the African race. The alien is excluded, because, being born in a foreign country, he cannot be a member of the community until he is naturalized. Buy why are the African race, born in the State, not permitted to share in one of the highest duties of the citizen? The answer is obvious; he is not by the institutions and laws of the State numbered among its people. He forms no part of the sovereignty of the State, and is not, therefore, called on to uphold and defend it.

Again in 1822, Rhode Island in its Revised Code, passed a law forbidding persons who were authorized to join persons in marriage from joining in marriage any white person with any negro, Indian or mulatto, under the penalty of $200, and declaring all such marriages absolutely null and void; and the same law was again re-enacted in its Revised Code of 1844. So that, down to the last mentioned period, the strongest mark of inferiority and degradation was fastened upon the African race in that State.

It would be impossible to enumerate and compress, in the space usually allotted to an opinion of a court, the various laws, marking the condition of this race, which were passed from time to time after the Revolution, and before and since the adoption of the Constitution of the United States. In addition to those already referred to, it is sufficient to say that Chancellor Kent, whose accuracy and research no one will question, states in the sixth edition of his Commentaries, published in 1848, 2d vol. 258, note b, that in no part of the country, except Maine, did the African race, in point of fact, participate equally with the whites in the exercise of civil and political rights.

The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards, throughout the thirteen States by which that instrument was framed; and it is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or that when they met in convention to form the Constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens. It cannot be supposed that they intended to secure to them rights and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion. More especially, it cannot be believed that the large slaveholding States regarded them as included in the word "citizens," or would have consented to a constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestations,

unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

It is impossible, it would seem, to believe that the great men of the slaveholding States, who took so large a share in framing in Constitution of the United States, and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them.

Besides, this want of foresight and care would have been utterly inconsistent with the caution displayed in providing for the admission of new members into this political family. For, when they gave to the citizens of each State the privileges and immunities of citizens in the several States, they at the same time took from the several States the power of naturalization, and confined that power exclusively to the Federal Government. No state was willing to permit another State to determine who should or should not be admitted as one of its citizens, and entitled to demand equal rights and privileges with their own people, within their own territories. The right of naturalization was therefore, with one accord, surrendered by the States, and confined to the Federal Government. And this power granted to Congress to establish an uniform rule of naturalization is, by the well-understood meaning of the word, confined to persons born in a foreign country, under a foreign government. It is not a power to raise to the rank of a citizen anyone born in the United States, who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class. And when we find the States guarding themselves from the indiscreet or improper admission by other states of emigrants from other countries, by giving the power exclusively to Congress, we cannot fail to see that they could never have left with the States a much more important power—that is, the power of transforming into citizens a numerous class of persons, who in that character would be much more dangerous to the peace and safety of a large portion of the Union than the few foreigners one of the States might improperly naturalize. The Constitution, upon its adoption, obviously took from the States all power by any subsequent legislation to introduce as a citizen into the political family of the United States anyone, no matter where he was born, or what might be his character or condition; and it gave to Congress the power to confer this character upon those only who were born outside of the dominions of the United States. And no law of a State, therefore, passed since the Constitution was adopted, can give any right of citizenship outside of its own territory.

A clause, similar to the one in the Constitution, in relation to the rights and immunities of citizens of one State in the other States, was contained in the Articles of Confederation. But there is a difference of language, which is worthy of note. The provision in the Articles of Confederation was, "that the free inhabitants of each of the States, paupers, vagabonds, and fugitives from justice excepted, should be entitled to all the privileges and immunities of free citizens, in the several States."

It will be observed, that under this Confederation each State had the right to decide for itself, and in its own tribunals, whom it would acknowledge as a free inhabitant of another state. The term "free inhabitant," in the generality of its terms, would certainly include one of the African race who had been manumitted. But no example, we think, can be found of his admission to all the privileges of citizenship in any State of the Union after these Articles were formed, and while they continued in force. And notwithstanding the generality of the words "free inhabitants," it is very clear that, according to their accepted meaning in that day, they did not include the African race, whether free or not; for the 5th section of the 9th article provides that Congress should have the power "to agree upon the number of land forces to be raised, and to make requisitions from each State for its quota in proportion to the number of white inhabitants in such State, which requisition should be binding."

Words could hardly have been used which more strongly mark the line of distinction between the citizen and the subject—the free and the subjugated races. The latter were not

even counted when the inhabitants of a State were to be embodied in proportion to its numbers for the general defense. And it cannot for a moment be supposed, that a class of persons thus separated and rejected from those who formed the sovereignty of the States, were yet intended to be included under the words "free inhabitants," in the preceding article, to whom privileges and immunities were so carefully secured in every State.

But although this clause of the Articles of Confederation is the same in principle with that inserted in the Constitution, yet the comprehensive word "inhabitant," which might be construed to include an emancipated slave, is omitted, and the privilege is confined to "citizens" of the State. And this alteration in words would hardly have been made unless a different meaning was intended to be conveyed, or a possible doubt removed. The just and fair inference is, that as this privilege was about to be placed under the protection of the general government, and the words expounded by its tribunals, and all power in relation to it taken from the State and its courts, it was deemed prudent to describe with precision and caution the persons to whom this high privilege was given—and the word "citizen" was on that account substituted for the words "free inhabitant." The word "citizen" excluded, and no doubt intended to exclude, foreigners who had not become citizens of some one of the States when the Constitution was adopted; and also every description of persons who were not fully recognized as citizens in the several States. This, upon any fair construction of the instruments to which we have referred, was evidently the object and purpose of this change of words.

To all this mass of proof we have still to add, that Congress has repeatedly legislated upon the same construction of the Constitution that we have given. Three laws, two of which were passed almost immediately after the government went into operation, will be abundantly sufficient to show this. The first two are particularly worthy of notice, because many of the men who assisted in framing the Constitution, and took an active part in procuring its adoption, were then in the halls of legislation, and certainly understood what they meant when they used the words "people of the United States" and "citizen" in that well considered instrument.

The first of these Acts is the Naturalization Law, which was passed at the second session of the first Congress, March 26, 1790, and confines the right of becoming citizens "to aliens being free white persons."

Now, the Constitution does not limit the power of Congress in this respect to white persons. And they may, if they think proper, authorize the naturalization of anyone, of any color, who was born under allegiance to another government. But the language of the law above quoted shows that citizenship at that time was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the government.

Congress might, as we before said, have authorized the naturalization of Indians, because they were aliens and foreigners. But, in their then untutored and savage state, no one would have thought of admitting them as citizens in a civilized community. And, moreover, the atrocities they had but recently committed, when they were the allies of Great Britain in the Revolutionary War, were yet fresh in the recollection of the people of the United States, and they were even then guarding themselves against the threatened renewal of Indian hostilities. No one supposed then that any Indian would ask for, or was capable of enjoying, the privileges of an American citizen, and the word "white" was not used with any particular reference to them.

Neither was it used with any reference to the African race imported into or born in this country; because Congress had no power to naturalize them, and therefore there was not necessity for using particular words to exclude them.

It would seem to have been used merely because it followed out the line of division which the Constitution has drawn between the citizen race, who formed and held government, and the African race, which they held in subjection and slavery, and governed at their own pleasure.

Another of the early laws of which we have spoken, is the first Militia Law, which was passed in 1792, at the first session of the second Congress. The language of this law is equally plain and significant with the one just mentioned. It directs that every "free able-bodied white male citizen" shall be enrolled in the militia. The word "white" is evidently used to exclude the African race, and the word "citizen" to exclude unnaturalized foreigners, the latter

forming no part of the sovereignty; owing it no allegiance, and therefore under no obligation to defend it. The African race, however, born in the country, did owe allegiance to the government, whether they were slave or free; but it is repudiated, and rejected from the duties and obligations of citizenship in marked language.

The third Act to which we have alluded is even still more decisive; it was passed as late as 1813 (2 Stat. 809), and it provides: "That from and after the termination of the war in which the United States are now engaged with Great Britain, it shall not be lawful to employ, on board of any public or private vessels of the United States, any person or persons except citizens of the United States, or person of color, natives of the United States.

Here the line of distinction is drawn in express words. Persons of color, in the judgment of Congress, were not included in the word "citizen," and they are described as another and different class of persons, and authorized to be employed, if born in the United States.

And even as late as 1820 (chap. 104, sec. 8), in the charter to the City of Washington, the Corporation is authorized "to restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes," thus associating them together in its legislation; and after prescribing the punishment that may be inflicted on the slaves, proceeds in the following words: "And to punish such free negroes and mulattoes by penalties not exceeding twenty dollars for any one offense; and in case of the inability of any such free negro or mulatto to pay any such penalty and cost thereon, to cause him or her to be confined to labor for any time not exceeding six calendar months." And in a subsequent part of the same section, the Act authorizes the Corporation "to prescribe the terms and conditions upon which free negroes and mulattoes may reside in the city."

This law, like the laws of the States, shows that this class of persons were governed by special legislation directed expressly to them, and always connected with provisions for the government of slaves, and not with those for the government of free white citizens. And after such an uniform course of legislation as we have stated, by the Colonies, by the States, and by Congress, running through a period of more than a century, it would seem that to call persons thus marked and stigmatized, "citizens" of the United States, "fellow-citizens," a constituent part of the sovereignty, would be an abuse of terms, and not calculated to exalt the character of an American citizen in the eyes of other nations.

The conduct of the Executive Department of the government has been in perfect harmony upon this subject with this course of legislation. The question was brought officially before the late William Wirt, when he was the Attorney General of the United States, in 1821, and he decided that the words "citizens of the United States" were used in the Acts of Congress in the same sense as in the Constitution; and that free persons of color were not citizens, within the meaning of the Constitution and laws; and his opinion has been confirmed by that of the late Attorney-General, Caleb Cushing, in a recent case, and acted upon by the Secretary of State, who refused to grant passports to them as "citizens of the United States."

But it is said that a person may be a citizens, and entitled to that character, although he does not possess all the rights which may belong to other citizens; as, for example, the right to vote, or to hold particular offices; and that yet, when he goes into another State, he is entitled to be recognized there as a citizen, although the State may measure his rights by the rights which it allows to persons of a like character or class, resident in the State, and refuse to him the full rights of citizenship.

This argument overlooks the language of the provision in the Constitution of which we are speaking.

Undoubtedly, a person may be a citizen, that is, a member of the community who from the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who from a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet they are citizens.

So, too, a person may be entitled to vote by the law of the State, who is not a citizen even of the State itself. And in some of the States of the Union foreigners not naturalized are allowed to vote. And the State may give the right to free negroes and mulattoes, but that does not make them citizens of the State, and still less of the United States. And the provision in the

Constitution giving privileges and immunities in other States, does not apply to them.

Neither does it apply to a person who, being the citizen of a State, migrates to another State. For then he becomes subject to the laws of the State in which he lives, and he is no longer a citizen of the State from which he removed. And the State in which he resides may then, unquestionably, determine his status or condition, and place him among the class of persons who are not recognized as citizens, but belong to an inferior and subject race; and may deny him the privileges and immunities enjoyed by its citizens.

But so far as mere rights of person are concerned, the provision in question is confined to citizens of a State who are temporarily in another State without taking up their residence there. It gives them no political rights in the state as to voting or holding office, or in any other respect. For a citizen of one State has no right to participate in the government of another. But if he ranks as a citizen of the State to which he belongs, within the meaning of the Constitution of the United States, then, whenever he goes into another State, the constitution clothes him, as to the rights of person, with all the privileges and immunities which belong to citizens of the State. And if persons of the African race are citizens of a state, and of the United States, they wold be entitled to all of these privileges and immunities in every State, and the State could not restrict them; for they would hold these privileges and immunities, under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the State to the contrary notwithstanding. And if the State could limit or restrict them, or place the party in an inferior grade, this clause of the constitution would be unmeaning, and could have no operation; and would give no rights to the citizen when in another State. He would have none but what the State itself chose to allow him. This is evidently not the construction or meaning of the clause in question. It guarantees rights to the citizen, and the State cannot withhold them. And these rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States.

The case of *Legrand v. Darnall,* 2 Pet. 664, has been referred to for the purpose of showing that this court has decided that the descendant of a slave may sue as a citizen in a court of the United States; but the case itself shows that the question did not arise and could not have arisen in the case.

It appears from the report that Darnall was born in Maryland, and was the son of a white man by one of his slaves, and his father executed certain instruments to manumit him, and devised to him some landed property in the State. This property Darnall afterwards sold to Legrand, the appellant, who gave his notes for the purchase money. But becoming afterwards apprehensive that the appellee had not been emancipated according to the laws of Maryland, he refused to pay the notes until he could be better satisfied as to Darnall's right to convey. Darnall, in the meantime, had taken up his residence in Pennsylvania, and brought suit on the notes and recovered judgment in the Circuit Court for the District of Maryland.

The whole proceeding, as appears by the report, was an amicable one; Legrand being perfectly willing to pay the money, if he could obtain a title, and Darnall not wishing him to pay unless he could make him a good one. In point of fact, the whole proceeding was under the direction of the counsel who argued the case for the appellee, who was the mutual friend of the parties, and confided in by both of them, and whose only object was to have the rights of both parties established by judicial decision in the most speedy and least expensive manner.

Legrand, therefore, raised no objection to the jurisdiction of the courts in the suit at law, because he was himself anxious to obtain the judgment of the court upon his title. Consequently, there was nothing in the record before the court to show that Darnall was of African descent, and the usual judgment and award of execution was entered. And Legrand thereupon filled his bill on the equity side of the Circuit Court, stating that Darnall was born a slave, and had not been legally emancipated, and could not, therefore, take the land devised to him, nor make Legrand a good title; and praying an injunction to restrain Darnall from proceeding to execution on the judgment, which was granted. Darnall answered, averring in his

answer that he was a free man, and capable of conveying a good title. Testimony was taken on this point, and at the hearing the Circuit Court was of opinion that Darnall was a free man and his title good, and dissolved the injunction and dismissed the bill; and that decree was affirmed here, upon the appeal of Legrand.

Now, it is difficult to imagine how any question about the citizenship of Darnall, or his right to sue in that character, can be supposed to have arisen and been decided in that case. The fact that he was of African descent was first brought before the court upon the bill in equity. The suit at law had then passed into judgment and award of execution, and the Circuit Court, as a court of law, had no longer any authority over it. It was a valid and legal judgment, which the court that rendered it had not the power to reverse or set aside. And unless it had jurisdiction as a court of equity to restrain him from using its process as a court of law, Darnall, if he thought proper, would have been at liberty to proceed on his judgment, and compel the payment of the money, although the allegations in the bill were true, and he was incapable of making a title. No other court could have enjoined him, for certainly no State equity court could interfere in what way with the judgment of a circuit court of the United States.

But the Circuit Court as a court of equity certainly had equity jurisdiction over its own judgment as a court of law, without regard to the character of the parties; and had not only the right, but it was its duty—no matter who were the parties in the judgment—to prevent them from proceeding to enforce it by execution, if the court was satisfied that the money was not justly and equitably due. The ability of Darnall to convey did not depend upon his citizenship, but upon his title to freedom. And if he was free, he could hold and convey property, by the laws of Maryland, although he was not a citizen. But if he was by law still a slave, he could not. It was, therefore, the duty of the court, sitting as a court of equity in the latter case, to prevent him from using its process, as a court of common law, to compel the payment of the purchase money, when it was evident that the purchaser must lose the land. But if he was free, and could make a title, it was equally the duty of the court not to suffer Legrand to keep the land, and refuse the payment of the money, upon the ground that Darnall was incapable of suing or being sued as a citizen in a court of the United States. The character or citizenship of the parties had no connection with the question of jurisdiction, and the matter in dispute had no relation to the citizenship of Darnall. Nor is such a question alluded to in the opinion of the court.

Besides, we are by no means prepared to say that there are not many cases, civil as well as criminal, in which a circuit court of the United States may exercise jurisdiction, although one of the African race is a party; that broad question is not before the court. The question with which we are now dealing is, whether a person of the African race can be a citizen of the United States, and become thereby entitled to a special privilege, by virtue to his title to that character, and which, under the Constitution, no one but a citizen can claim. It is manifest that the case of *Legrand v. Darnall* has no bearing on that question, and can have no application to the case now before the court.

This case, however, strikingly illustrates the consequences that would follow the construction of the Constitution which would give the power contended for, to a State. It would, in effect, give it also to an individual. For if the father of young Darnall had manumitted him in his lifetime, and sent him to reside in a State which recognized him as a citizen, he might have visited and sojourned in Maryland as he pleased, and as long as he pleased, as a citizen and tribunals would be compelled by the paramount authority of the Constitution, to receive him and treat him as one of its citizens, exempt from the laws and police of the state in relation to a person of that description, and allow him to enjoy all the rights and privileges of citizenship, without respect to the laws of Maryland, although such laws were deemed by it absolutely essential to its own safety.

The only two provisions which point to them and include them, treat them as property, and make it the duty of the government to protect it; no other power, in relation to this race, is to be found in the Constitution; and as it is a government of special, delegated powers, no authority beyond these two provisions can be constitutionally exercised. The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think jus-

tice, humanity, and the interests and safety of society, require. The States evidently intended to reserve this power exclusively to themselves.

No one, we presume, supposes that any change in public opinion or feeling in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.

What the construction was at that time, we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word "citizen" and the word "people."

And upon a full and careful consideration of the subject, the court is of opinion that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous.

We are aware that doubts are entertained by some of the members of the court, whether the plea in abatement is legally before the court upon this writ of error; but if that plea is regarded as waived, or out of the case upon any other ground, yet the question as to the jurisdiction of the Circuit Court is presented on the face of the bill of exception itself, taken by the plaintiff at the trial; for he admits that he and his wife were born slaves, but endeavors to make out this title to freedom and citizenship by showing that they were taken by their owner to certain places, hereinafter mentioned, where slavery could not by law exist, and that they thereby became free, and upon their return to Missouri became citizens of that State.

Now, if the removal of which he speaks did not give them their freedom, then by his own admission he is still a slave; and whatever opinions may be entertained in favor of the citizenship of a free person of the African race, no one supposes that a slave is a citizen of the State or of the United States. If, therefore, the acts done by his owner did not make them free persons, he is still a slave, and certainly incapable of suing in the character of a citizen.

The principle of law it too well settled to be disputed, that a court can give no judgment for either party, where it has no jurisdiction; and if, upon the showing of Scott himself, it appeared that he was still a slave, the case ought to have been dismissed, and the judgment against him and in favor of the defendant for costs, is, like that on the plea in abatement, erroneous, and the suit ought to have been dismissed by the Circuit Court for want of jurisdiction in that court.

But, before we proceed to examine this part of the case, it may be proper to notice an objection taken to the judicial authority of this court to decide it; and it has been said, that as this court has decided against the jurisdiction of the Circuit Court on the plea in abatement, it has no right to examine any question presented by the exception; and that anything it may say upon that part of the case will be extrajudicial, and mere obiter dicta.

This is a manifest mistake; there can be no doubt as to the jurisdiction of this court to revise the judgement of a circuit court, and to reverse it for any error of giving judgment in a case over which it had no jurisdiction, or any other material error; and this, too, whether there is a plea in abatement or not.

The objection appears to have arisen from confounding writs of error to a state court, with writs of error to a circuit court of the United States. Undoubtedly, upon a writ of error to state court, unless the record shows a case that gives jurisdiction, the case must be dismissed for want of jurisdiction in this court. And if it is dismissed on that ground, we have no right to examine and decide upon any questions presented by the bill of exceptions, or any other part of the record. But writs of error to a state court, and to a circuit court of the United States, are regulated by different laws, and stand upon entirely different principles. And in a writ of error to a circuit court of the United States, the whole record is before this court for examination and decision; and if the sum in controversy is large enough to give jurisdiction, it is not only the right, but it is the judicial duty of the court, to examine the whole case as presented by the record; and if it appears upon its face that any material error or errors have been committed by the court below, it is the duty of this court to reverse the judgment, and remand the case. And certainly an error in passing a judgment upon the merits in favor of either party, in a case which it was not authorized to try, and over which it had no jurisdiction, is as grave an error as a court can commit.

The plea in abatement is not a plea to the jurisdiction of this court, but to the jurisdiction of the Circuit Court. And it appears by the record before us, that the Circuit Court committed an error, in deciding that it had jurisdiction, upon the facts in the case, admitted by the pleadings. It is the duty of the appellate tribunal to correct this error; but that could not be done by dismissing the case for want of jurisdiction here—for that would leave the erroneous judgment in full force, and the injured party without remedy. And the appellate court, therefore, exercises the power for which alone appellate courts are constituted, by reversing the judgment of the court below for this error. It exercises its proper and appropriate jurisdiction over the judgment and proceedings of the Circuit Court as they appear upon the record brought up by the writ of error.

The correction of one error in the court below does not deprive the appellate court of the power of examining further into the record, and correcting any other material errors which may have been committed by the inferior court. There is certainly no rule of law—nor any practice—nor any decision of a court—which even questions this power in the appellate tribunal. On the contrary, it is the daily practice of this court, and of all appellate courts where they reverse the judgment of an inferior court for error, to correct by its opinions whatever errors may appear on the record material to the case; and they have always held it to be their duty to do so where the silence of the court might lead to misconstruction or future controversy, and the point has been relied on by either side, and argued before the court.

In the case before us, we have already decided that the Circuit Court erred in deciding that it had jurisdiction upon the facts admitted by the pleadings. And it appears that, in the further progress of the case, it acted upon the erroneous principle it had decided on the pleadings, and gave judgment for the defendant, where, upon the facts admitted in the exception, it had no jurisdiction.

We are at a loss to understand upon what principle of law, applicable to appellate jurisdiction, it can be supposed that this court has not judicial authority to correct the last mentioned error because they had before corrected the former; or by what process of reasoning it can be made out, that the error of an inferior court in actually pronouncing judgment for one of the parties, in a case in which it had no jurisdiction, cannot be looked into or corrected by this court, because we have decided a similar question presented in the pleadings. The last point is distinctly presented by the facts contained in the plaintiff's own bill of exceptions, which he himself brings here by this writ of error. It was the point which chiefly occupied the attention of the counsel on both sides in the argument—and the judgment which this court must render upon both errors is precisely the same. It must, in each of them, exercise jurisdiction over the judgment, and reverse it for the errors committed by the court below; and issue a mandate to the Circuit Court to conform its judgment to the opinion pronounced by this court, by dismissing

the case for want of jurisdiction in the Circuit Court. This is the constant an invariable practice of this court where it reverses a judgment for want of jurisdiction in the Circuit Court.

It can scarcely be necessary to pursue such a question further. The want of jurisdiction in the court below may appear on the record without any plea in abatement. This is familiarly the case where a court of chancery has exercised jurisdiction in a case where the plaintiff had a plain and adequate remedy at law, and it so appears by the transcript when brought here by appeal. So, also where it appears that a court of admiralty has exercised jurisdiction in a case belonging exclusively to a court of common law. In these cases there is no plea in abatement. And for the same reason, and upon the same principles, where the defect of jurisdiction is patent on the record, this court is bound to reverse the judgment, although the defendant has not pleaded in abatement to the jurisdiction of the inferior court.

The cases of *Jackson v. Ashton,* 8 Pet. 148, and of *Capron v. Van Noorden,* 2 Cranch, 126, to which we have referred in a previous part of this opinion, are directly in point. In the last mentioned case, Capron brought an action against Van Noorden in a circuit court of the United States, without showing, by the usual averments of citizenship, that the court had jurisdiction. There was no plea in abatement put in, and the parties went to trial upon the merits. The court gave judgment in favor of the defendant with costs. The plaintiff thereupon brought his writ of error, and this court reversed the judgment given in favor of the defendant, and remanded the case with directions to dismiss it, because it did not appear by the transcript that the Circuit Court had jurisdiction.

The case before us still more strongly, imposes upon this court the duty of examining whether the court below has not committed an error, in taking jurisdiction and giving a judgment for costs in favor of the defendant; for in *Capron v. Van Noorden* the judgment was reversed, because it did not appear that the parties were citizens of different States. They might or might not be. But in this case it does not appear that the plaintiff was born a slave; and if the facts upon which he relies have not made him free, then it appears affirmatively on the record that he is not a citizen, and consequently his suit against Sandford was not a suit between citizens of different States, and the court had no authority to pass any judgment between the parties. The suit ought, in this view of it, to have been dismissed by the Circuit Court, and its judgement in favor of Sandford is erroneous, and must be reversed.

It is true that the result either way, by dismissal or by a judgment for the defendant, makes very little, if any difference in a pecuniary or personal point of view to either party. But the fact that the result would be very nearly the same to the parties in either form of judgment, would not justify this court in sanctioning an error in the judgment which is patent on the record, and which, if sanctioned, might be drawn into precedent, and lead to serious mischief and injustice in some future suit.

We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom.

The case, as he himself states it, on the record, brought here by his writ of error, is this: The plaintiff was a negro slave, belonging to Dr. Emerson, who was a surgeon in the Army of the United States. In the year 1834, he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi River, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling, from said last mentioned date until the year 1838. In the year 1835, Harriet, who is named in the second count of the count of the plaintiff's declaration, was a negro slave of Major Taliaferro, who belonged to the Army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave, at said Fort Snelling, unto the said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling, until the year 1838. In the year 1836, the plaintiff and Harriet intermarried, at Fort Selling, with the consent of Dr. Emerson, who then claimed to be

their master and owner. Eliza and Lizzie, named in the third count of the plaintiffs declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsey, north of the north line of the State of Missouri, and upon the River Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet, and their said daughter Eliza, from said Fort Snelling, to the State of Missouri, where they have ever since resided. Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, and Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them, and each of them, as slaves.

In considering this part of the controversy, two questions arise: 1st. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore mentioned? And 2d. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?

We proceed to examine the first question.

The Act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of that territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this part of the inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon one who is held as a slave under the laws of any one of the States.

The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" but, in the judgement of the court, that provision has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the Treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign government. It was a special provision for a known and particular Territory, and to meet a present emergency, and nothing more.

A brief summary of the history of the times, as well as the careful and measured terms in which the article is framed, will show the correctness of this proposition.

It will be remembered that, from the commencement of the Revolutionary War, serious difficulties existed between the States, in relation to the disposition of large and unsettled territories which were included in the chartered limits of some of the States. And some of the other States, and more especially Maryland, which had no unsettled lands, insisted that as the unoccupied lands, if wrested from Great Britain, would owe their preservation to the common purse and the common sword, the money arising from them ought to be applied in just proportion among the several States to pay the expense of the war, and ought not to be appropriated to the use of State in whose chartered limits they might happen to lie, to the exclusion of the other States by whose combined efforts and common expense the territory was defended and preserved against the claim of the British Government.

These difficulties caused much uneasiness during the War, while the issue was in some degree doubtful, and the future boundaries of the United States yet to be defined by treaty, if we achieved our independence.

The majority of the Congress of the Confederation obviously concurred in opinion with the State of Maryland, and desired to obtain from the States which claimed it a cession of this territory, in order that Congress might raise money on this security to carry on the War. This appears by the resolution passed on the 6th of September, 1780 strongly urging the States to cede these lands to the United States, both for the sake of peace and union among themselves, and to maintain the public credit; and this was followed by the resolution of October 10th, 1780, by which Congress pledged itself, that if the lands were ceded, as recommended by the resolution above mentioned, they should be disposed of for the common benefit of the United

States, and be settled and formed into distinct republican States, which should become members of the Federal Union, and have the same rights of sovereignty, and freedom, and independence as other States.

But these difficulties became much more serious after peace took place, and the boundaries of the United States were established. Every State, at that time, felt severely the pressure of its war debt; but in Virginia, and some other States there were large territories of unsettled lands, the sale of which would enable them to discharge their obligations without much inconvenience; while other States which had not such resource, saw before them many years of heavy and burdensome taxation, and the latter insisted, for the reasons before stated, that these unsettled lands should be treated as the common property of the States, and the proceeds applied to their common benefit.

The letters from the statesman of that day will show how mush this controversy occupied their thoughts, and the dangers that were apprehended from it. It was the disturbing element of the time, and fears were entertained that it might dissolve the Confederation by which the States were then united.

These fears and dangers were, however, at once removed, when the State of Virginia, in 1784, voluntarily ceded to the United States the immense tract of country lying northwest of the River Ohio, and which was within the acknowledged limits of the State. The only object of the State, in making this cession, was to put an end to the threatening and exciting controversy, and to enable the Congress of that time to dispose of the lands, and appropriate the proceeds as a common fund for the common benefit of the States. It was not ceded because it was inconvenient to the State to hold and govern it, nor from any expectation that it could be better or more conveniently governed by the United States.

The example of Virginia was soon afterwards followed by other States, and, at the time of the adoption of the Constitution, all of the States, similarly situated, had ceded their unappropriated lands, except North Carolina and Georgia. The main object for which these cessions were desired and made, was on account of their money value, and to put an end to a dangerous controversy, as to who was justly entitled to the proceeds when the lands should be sold. It is necessary to bring this part of the history of these cessions thus distinctly into view, because it will enable us the better to comprehend the phraseology of the Article of the Constitution so often referred to in the argument.

Undoubtedly the powers of sovereignty and the eminent domain were ceded with the land. This was essential, in order to make it effectual, and to accomplish its objects. But it must be remembered that, at that time, there was no Government of the United States in existence with enumerated and limited powers; what was then called the United States, were thirteen separate, sovereign, independent States, which had entered into a league or confederation for their mutual protection and advantage, and the Congress of the United States was composed of the representatives of these separate sovereignties, meeting together, as equals, to discuss and decide on certain measures which the States, by the Articles of Confederation, had agreed to submit to their decision. But this Confederation had none of the attributes of sovereignty in legislative, executive, or judicial power. It was little more than a congress of ambassadors, authorized to represent separate nations, in matters in which they had a common concern.

It was this Congress that accepted the cession from Virginia. They had no power to accept it under the Articles of Confederation. But they had an undoubted right, as independent sovereignties, to accept any cession of territory for their common benefit, which all of them assented to; and it is equally clear, that as their common property, and having no superior to control them, they had the right to exercise absolute dominion over it, subject only to the restrictions which Virginia had imposed in her Act of Cession. There was, as we have said, no Government of the United States then in existence with special enumerated and limited powers. The territory belonged to sovereignties, who, subject to the limitations above mentioned, had a right to establish any form of government they pleased, by compact or treaty among themselves, and to regulate rights of person and property in the territory as they might deem proper. It was by a Congress, representing the authority of these several and separate sovereignties, and acting under their authority and command (but not from any authority derived from the Articles of Confederation), that the instrument, usually called the Ordinance of 1787, was adopted; regulating in much detail the

principles and the laws by which this Territory should be governed; and among other provisions, slavery is prohibited in it. We do not question the power of the States, by agreement among themselves, to pass this Ordinance, nor its obligatory force in the Territory, while the confederation or league of the States in their separate sovereign character continued to exist.

This was the state of things when the Constitution of the United States was formed. The territory ceded by Virginia belonged to the several confederated States as common property, and they had united in establishing in it a system of government and jurisprudence, in order to prepare it for admission as States, according to the terms of the cession. They were about to dissolve this federative Union, and to surrender a portion of their independent sovereignty to a new government, which, for certain purposes, would make the people of the several States one people, and which was to be supreme and controlling within its sphere of action throughout the United States; but this government was to be carefully limited in its powers, and to exercise no authority beyond those expressly granted by the Constitution, or necessarily to be implied from the language of the instrument, and the objects it was intended to accomplish; and as this league of States would, upon the adoption of the new government, cease to have any power over the territory, and the Ordinance they had agreed upon be incapable of execution, and a mere nullity, it was obvious that some provision was necessary to give the new government sufficient power to enable it to carry into effect the objects for which it was ceded, and the compacts and agreements which the States had made each other in the exercise of their powers of sovereignty. It was necessary that the lands should be sold to pay the war debt; that a government and system of jurisprudence should be maintained in it, to protect the citizens of the United States, who should migrate to the Territory, in their rights of person and of property. It was also necessary that the new government, about to be adopted, should be authorized to maintain the claim of the United States to the unappropriated lands in North Carolina and Georgia, which had not then been ceded, but the cession of which was confidently anticipated upon some terms that would be arranged between the general government and these two States. And, moreover, there were many articles of value besides this property in land, such as arms, military stores, munitions, and ships of war, which were the common property of the States, when acting in their independent characters as confederates, which neither the new government nor anyone else would have a right to take possession of or control, without authority from them; and it was to place these things under the guardianship and protection of the new government, and to clothe it with the necessary powers, that the clause was inserted in the Constitution which gives Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." It was intended for a specific purpose, to provide for the things we have mentioned. It was to transfer to the new government the property then held in common by the States, and to give to that government power to apply it to the objects for which it had been destined by mutual agreement among the States before their league was dissolved. It applied only to the property which the States held in common at that time, and has no reference whatever to any territory or other property which the new sovereignty might afterwards itself acquire.

The language used in the clause, the arrangement and combination of the powers, and the somewhat unusual phraseology it uses, when it speaks of the political power to be exercised in the government of the territory, all indicate the design and meaning of the clause to be such as we have mentioned. It does not speak of any Territory, nor of Territories, but uses language which, according to its legitimate meaning, points to a particular thing. The power is given in relation only to the territory of the United States—that is, to a Territory then in existence, and then known or claimed as the territory of the United States. It begins its enumeration of powers by that of disposing, in other words, making sale of the lands, or raising money from them, which, as we have already said, was the main object of the cession, and which is accordingly the first thing provided for in the Article. It then gives the power which was necessarily associated with the disposition and sale of the lands—that is, the power of making needful rules and regulations respecting the Territory. And whatever construction may now be given to these words, everyone, we think, must admit that they are not the word usually employed by statesman in giving supreme power of legislation. They are certainly very unlike the words used in the power granted to legislate over terri-

tory which the new government might afterwards itself obtain by cession form a state, either for its seat of government, or for forts, magazines, arsenals, dockyards, and other needful buildings.

And the same power of making needful rules respecting the Territory is, in precisely the same language, applied to the other property belonging to the United States—associating the power over the Territory in this respect with the power over movable or personal property—that is, the ships, arms, and munitions of war, which then belonged in common to the State sovereignties. And it will hardly be said, that this power, in relation to the last mentioned objects, was deemed necessary to be thus specially given to the new government, in order to authorize it to make needful rules and regulations respecting the ships it might itself build, or arms and munitions of war it might itself manufacture or provide for the public service.

No one, it is believed, would think a moment of deriving the power of Congress to make needful rules and regulations in relation to property of this kind from this clause of the Constitution. Nor can it, upon any fair construction, be applied to any property but that which the new government was about to receive from the confederate States. And if this be true as to this property, it must be equally true and limited as to the territory, which is so carefully and precisely coupled with it—and like it referred to as property in the power granted. The concluding words of the clause appear to render this construction irresistible; for, after the provisions we have mentioned, it proceeds to say, "that nothing in the Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

Now, as we have before said, all of the States, except North Carolina and Georgia, had made the cession before the Constitution was adopted, according to the resolution of Congress of October 10, 1780. The claims of other States, that the unappropriated lands in these two States should be applied to the common benefit, in like manner, was still insisted on, but refused by the States. And this member of the clause in question evidently applies to them, and can apply to nothing else. It was to exclude the conclusion that either party, by adopting the Constitution, would surrender what they deemed their rights. And when the latter provision relates so obviously to the unappropriated lands not yet ceded by the States, and the first clause makes provision for those then actually ceded, it is impossible, by any just rule of construction, to make the first provision general, and extend to all territories, which the Federal Government might in any way afterwards acquire, when the latter is plainly and unequivocally confined to a particular territory; which was a part of the same controversy, and involved in the same dispute, and depended upon the same principles. The union of the two provisions in the same clause shows that they were kindred subjects, and that the whole clause is local, and relates only to lands, within the limits of the United States, which had been or then were claimed by a State; and that no other Territory was in the mind of the framers of the Constitution, or intended to be embraced in it. Upon any other construction it would be impossible to account for the insertion of the last provision in the place where it is found, or to comprehend why, or for what object, it was associated with the previous provision.

This view of the subject is confirmed by the manner in which the present Government of the United States dealt with the subject as soon as it came into existence. It must be borne in mind that the same States that formed the Confederation also formed and adopted the new government, to which so large a portion of their former sovereign powers were surrendered. It must also be borne in mind that all of these same States which had then ratified the new Constitution were represented in the Congress which passed the first law for the government of this territory; and many of the members of that legislative body had been deputies from the States under the Confederation—had united in adopting the Ordinance of 1787, and assisted in forming the new government under which they were then acting, and whose powers they were then exercising. And it is obvious from the law they passed to carry into effect the principles and provisions of the Ordinance, that they regarded it as the Act of the States done in the exercise of their legitimate powers at the time. The new government took the territory as it found it, in the condition in which it was transferred, and did not attempt to undo anything that had been done. And among the earliest laws passed under the new government, is one reviving the Ordinance of 1787, which had become inoperative and a nullity upon the adoption of

the Constitution. This law introduces no new form or principles for its government, but recites, in the preamble, that it is passed in order that this Ordinance may continue to have full effect, and proceeds to make only those rules and regulations which were needful to adapt it to the new government, into whose hands the power had fallen. It appears, therefore, that this Congress regarded the purposes to which the land in this territory was to be applied, and the form of government and principles of jurisprudence which were to prevail there, while it remained in the territorial state, as already determined on by the States when they had full power and right to make the decision; and that the new government, having received it in this condition, ought to carry substantially into effect the plans and principles which had been previous; adopted by the States, and which no doubt the States anticipated when they surrendered their power to the new government. And if we regard this clause of the Constitution as pointing to this Territory, with a territorial government already established in it, which had been ceded to the States for the purposes hereinbefore mentioned—every word in it is perfectly appropriate and easily understood, and the provisions it contains are in perfect harmony with the objects for which it was ceded, and with the condition of its government as a Territory at the time. We can, then, easily account for the manner in which the first Congress legislated on the subject—and can also understand why this power over the Territory was associated in the same clause with the other property of the United States, and subjected to the like power of making needful rules and regulations. But if the clause is construed in the expanded sense contended for, so as to embrace any territory acquired from a foreign nation by the present government, and to give it in such territory a despotic and unlimited power over persons and property, such as the confederated States might exercise in their common property, it would be difficult to account for the phraseology used, when compared with other grants of power—and also for its association with the other provisions in the same clause.

The Constitution has always been remarkable for the felicity of its arrangement of different subjects, and the perspicuity and appropriateness of the language it uses. But if this clause is construed to extend to territory acquired by the present government from a foreign nation, outside of the limits of any charter from the British Government to a Colony, it would be difficult to say, why it was deemed necessary to give the government the power to sell any vacant lands belonging to the sovereignty which might be found within it; and if this was necessary, why the grant of this power should precede the power to legislate over it and establish a government there; and still more difficult to say, why it was deemed necessary so specially and particularly to grant the power to make needful rules and regulations in relation to any personal or movable property it might acquire there. For the words, "other property," necessarily, by every known rule of interpretation, must mean property of a different description from territory or land. And the difficulty would perhaps be insurmountable in endeavoring to account for the last member of the sentence, which provides that "nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State," or to say how any particular State could have claims in or to a Territory ceded by a foreign government, or to account for associating this provision with the preceding provisions of the clause, with which it would appear to have no connection.

The words "needful rules and regulations" would seem, also, to have been cautiously used for some definite object. They are not the words usually employed by statesman, when they mean to give the powers of sovereignty, or to establish a government, or to authorize its establishment. Thus, in the law to renew and keep alive the Ordinance of 1787, and to reestablish the government, the title of the law is: "An Act to provide for the government of the territory northwest of the River Ohio." And in the Constitution, when granting the power to legislate over the territory that may be selected for the seat of government independently of a state, it does not say Congress shall have power "to make all needful rules and regulations respecting the territory;" but it declares that "Congress shall have power to exercise exclusive legislation in all cases whatsoever over such District (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States.

The words "rules and regulations" are usually employed in the Constitution in speaking of some particular specified power which it means to confer on the government, and not, as we

have seen, when granting general powers of legislation. As, for example, in the particular power of Congress "to make rules for the government and regulations of the land and naval forces, or the particular and specific power to regulate commerce;" "to establish an uniform rule of naturalization;" "to coin money and regulate the value thereof." And to construe the words of which we are speaking as a general and unlimited grant of sovereignty over territories which the government might afterwards acquire, is to use them in a sense and for a purpose for which they were not used in any other part of the instrument. But if confined to a particular territory, in which a government and laws had already been established, but which would require some alterations to adapt it to the new government, the words are peculiarly applicable and appropriate for that purpose.

The necessity of this special provision in relation to property and the rights or property held in common by the confederated State, is illustrated by the 1st clause of the 6th article. This clause provides that "all debts, contracts and engagements entered into before the adoption of this Constitution, shall be as valid against the United States under this government as under the Confederation." This provision, like the one under consideration, was indispensable if the new Constitution was adopted. The new government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one. But, when the present United States came into existence under the new government, it was a new political body, a new nation, then for the first time taking its place in the family of nations. It took nothing by succession from the Confederation. It had no right, as its successor, to any property or rights of property which it had acquired, and was not liable for any of its obligations. It was evidently viewed in this light by the framers of the Constitution. And as the several States would cease to exist in their former confederated character upon the adoption of the Constitution, and could not, in that character, again assemble together, special provisions were indispensable to transfer to the new government the property and rights which at that time they held in common; and at the same time to authorize it to pay taxes and appropriate money to pay the common debt which they had contracted; and this power could only be given to it by special provisions in the Constitution.

The clause in relation to the territory and other property of the United States provided for the first, and the clause last quoted provided for the other. They have no connection with the general powers and rights of sovereignty delegated to the new government, and can neither enlarge nor diminish them. They were inserted to meet a present emergency, and not to regulate its powers as a government.

Indeed, a similar provision was deemed necessary, in relation to treaties made by the Confederation; and when in the clause next succeeding the one of which we have last spoken, it is declared that treaties shall be the supreme law of the land, care is taken to include, by express words, the Treaties made by the confederate States. The language is: "an all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

Whether, therefore, we take the particular clause in question by itself, or in connection with the other provisions of the Constitution, we think it clear, that it applies only to the particular territory of which we have spoken, and cannot, by any just rule of interpretation, be extended to a territory which the new government might afterwards obtain from a foreign nation. Consequently, the power which Congress may have lawfully exercised in this territory, while it remained under a territorial government, and which may have been sanctioned by judicial decision, can furnish no justification and no argument to support a similar exercise of power over territory afterwards acquired by the Federal Government. We put aside, therefore, any argument, drawn from precedents, showing the extent of the power which the general government exercised over slavery in this territory, as altogether inapplicable to the case before us.

But the case of *The American and Ocean Insurance Companies v. Canter,* 1 Pet. 511, has been quoted as establishing a different construction of this clause of the Constitution. There is, however, not the slightest conflict between the opinion now given and the one referred to; and it is only by taking a single sentence out of the latter and separating it form the context, that even an appearance of conflict can be shown. We need not comment on such a mode of expounding an opinion of the court. Indeed it most com-

monly misrepresents instead of expounding it. And this is fully exemplified in the case referred to, where if one sentence is taken by itself, the opinion would appear to be in direct conflict with that now given; but the words which immediately follow that sentence show that the court did not mean to decide the point, but merely affirmed the power of Congress to establish a government in the Territory, leaving it an open question, whether that power was derived from this clause in the Constitution, or was to be necessarily inferred from a power to acquire territory by cession from a foreign government. The opinion on this part of the case is short, and we give the whole of it to show how well the selection of a single sentence is calculated to mislead.

The passage referred to is in page 542, in which the court, in speaking of the power of Congress to establish a territorial government in Florida until it should become a State, uses the following language:

"In the meantime Florida continues to be a Territory of the United States, governed by that clause of the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property of the United States. Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source from which the power is derived, the possession of it is unquestionable."

It is thus clear, from the whole opinion on this point, that the court did not mean to decide whether the power was derived from the clause in the Constitution, or was the necessary consequence of the right to acquire. They do decide that the power in Congress is unquestionable, and in this we entirely concur, and nothing will be found in this opinion to the contrary. The power stands firmly on the latter alternative put by the court, that is, as "the inevitable consequence of the right to acquire territory."

And what still more clearly demonstrates that the court did not mean to decide the question, but leave it open for future consideration, is the fact that the case was decided in the Circuit Court by Mr. Justice Johnson, and his decision was affirmed by the Supreme Court. His opinion at the Circuit is given in full in a note to the case, and in that opinion he states, in explicit terms, that the clause of the Constitution applies only to the territory then within the limits of the United States, and not to Florida, which had been acquired by cession from Spain. This part of his opinion will be found in the note in page 517 of the report. But he does not dissent from the opinion of the Supreme Court; thereby showing that, in his judgment, as well as that of the court, the case before them did not call for a decision on that particular point, and the court abstained from deciding it. And in a part of its opinion subsequent to the passage we have quoted, where the court speak of the legislative power of Congress in Florida, they still speak with the same reserve. And in page 546, speaking of the power of Congress to authorize the Territorial Legislature to establish courts there, the court say: "They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States."

It has been said that the construction given to this clause is new, and now for the first time brought forward. The case which we are speaking, and which has been so much discussed, shows that the fact is otherwise. It shows that precisely the same question came before Mr. Justice Johnson, at his circuit, thirty years ago—was fully considered by him, and the same construction given by this court. And that upon an appeal from his decision the same question was brought before this court, but was not decided because a decision upon it was not required by the case before the court.

There is another sentence in the opinion which has been commented on, which even in a still more striking manner shows how one may mislead or be misled by taking out a single sentence from the opinion of a court, and leaving out of view what precedes and follows. It is in page 546, near the close of the opinion, in which the court say: "In legislating for them" (the Territories of the United States), "Congress exercises the combined powers of the general and of a state government." And it is said, that as a State may unquestionably prohibit slavery within its

territory of the United States, exercising there the powers of a State, as well as the power of the general government.

The examination of this passage in the case referred to, would be more appropriate when we come to consider in another part of this opinion what power Congress can constitutionally exercise in a Territory, over the rights of person or rights of property of a citizen. But, as it is in the same case with passage we have before commented on, we dispose of it now, as it will save the court from the necessity of referring again to the case. And it will be seen upon reading the page in which this sentence is found, that it has not reference, whatever to the power of Congress over rights of person or rights of property—but relates altogether to the power of establishing judicial tribunals to administer the laws constitutionally passed, and defining the jurisdiction they may exercise.

The law of Congress establishing a territorial government in Florida, provided that the Legislature of the Territory should have legislative powers over "all rightful objects of legislation; but no law should be valid which was inconsistent with the laws and Constitution of the United States."

Under the power thus conferred, the Legislature of Florida passed an Act, erecting a tribunal at Key West to decide cases of salvage. And in the case of which we are speaking, the question arose whether the Territorial Legislature could be authorized by Congress to establish such a tribunal, with such powers; and one of the parties, among other objections, insisted that Congress could not under the Constitution authorize the Legislature of the Territory to establish such a tribunal with such powers, but that it must be established by Congress itself; and that a sale of cargo made under its order, to pay salvors, was void, as made without legal authority, and passed no property to the purchaser.

It is disposing of this objection that the sentence relied on occurs, and the court begin that part of the opinion by stating with great precision the point which they are about to decide.

They say: "It has been contended that by the Constitution of the United States, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction; and that the whole of the judicial power must be vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. Hence it has been argued that Congress cannot vest admiralty jurisdiction in courts created by the Territorial Legislature."

And after thus clearly stating the point before them, and which they were about to decide, they proceed to show that these territorial tribunals were not constitutional courts, but merely legislative, and that Congress might, therefore, delegate the power to the territorial government to establish the court in question; and they conclude that part of the opinion in the following words: "Although admiralty jurisdiction can be exercised in the states in those courts only which are established in pursuance of the 3d article of the Constitution, the same limitation does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the general and state governments."

Thus it will be seen by these quotations from the opinion, that the court, after stating the question it was about to decide, in a manner too plain to be misunderstood, proceeded to decide it, and announced, as the opinion of the tribunal, that in organizing the Judicial Department of the government in a Territory of the United States, Congress does not act under, and is not restricted by, the 3d article in the Constitution, and is not bound, in a Territory, to ordain and establish courts in which the judges hold their offices during good behavior; but may exercise the discretionary power which a state exercises in establishing it's judicial department, and regulating the jurisdiction of its courts, and may authorize the territorial government to establish, or may itself establish, courts in which the judges hold their offices for a term of years only, and may vest in them judicial power upon subjects confided to the judiciary of the United States. And in doing this, Congress undoubtedly exercises the combined power of the general and a state government. It exercises the discretionary power of a state government in authorizing the establishment of a court in which the judges hold their appointments for a term of years only, and not during good behavior; and it exercises the power of the general government in investing that court with admiralty jurisdiction over which the general government had exclusive jurisdiction in the Territory.

No one, we presume, will question the correctness of that opinion; nor is there anything in

conflict with it in the opinion now given. The point decided in the case cited has no relation to the question now before the court. That depended on the construction of the 3d article of the Constitution, in relation to the judiciary of the United States, and the power which Congress might exercise in a territory in organizing the Judicial Department of the government. The case before us depends upon other and different provisions of the Constitution, altogether separate and apart from the one above mentioned. The question as to what courts Congress may ordain or establish in a territory to administer laws which the Constitution authorizes it to pass, and what laws it is or is not authorized by the Constitution to pass, are widely different—are regulated by different and separate articles of the Constitution, and stand upon different principles. And we are satisfied that no one who reads attentively the page in Peters' Reports to which we have referred, can suppose that the attention of the court was drawn for a moment to the question now before this court, or that it meant in that case to say that Congress had a right to prohibit a citizen of the United States from taking any property which he lawfully held, into a Territory of the United States.

This brings us to examine by what provisions of the Constitution the present Federal Government under its delegated and restricted powers, is authorized to acquire territory outside of the original limits of the United States, and what powers it may exercise therein over the person or property of a citizen of the United States, while it remains a territory, and until it shall be admitted as one of the States of the Union.

There is certainly no power given by the Constitution to the Federal Government to establish or maintain Colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. That power is plainly given; and if a new State is admitted it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the State, and the citizens of the State, and the Federal Government. But no power is given to acquire a Territory to be held and governed permanently in that character.

And indeed the power exercised by Congress to acquire territory and establish a government there, according to its own unlimited discretion, was viewed with great jealously by the leading statesmen of the day. And in the *Federalist,* No. 38, written by Mr. Madison, he speaks of the acquisition of the Northwestern Territory by the confederated States, by the cession from Virginia and the establishment of a government there, as an exercise of power not warranted by the Articles of Confederation, and dangerous to the liberties of the people. And he urges the adoption of the Constitution as a security and safeguard against such an exercise of power.

We do not mean, however, to question the power of Congress in this respect. The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a state upon an equal footing with the other States, must rest upon the same discretion. It is a question for the Political Department of the government, and not the judicial; and whatever the Political Department of the government shall recognize as within the limits of the United States, the Judicial Department is also bound to recognize, and to administer in it the laws of the United States, so far as they apply, and to maintain in the territory the authority and rights of the government; and also the personal rights of property of individual citizens, as secured by the Constitution. All we mean to say on this point is, that as there is no express regulation in the Constitution defining the power which the general government may exercise over the person or property of a citizen in a territory thus acquired, the court must necessarily look to the provisions and principles of the Constitution, and its distribution of powers, for the rules and principles by which its decision must be governed.

Taking this rule to guide us, it may be safely assumed that citizens of the United States who migrate to a territory belonging to the people of

the United States, cannot be ruled as mere colonists, dependent upon the will of the general government, and to be governed by any laws it may think proper to impose. The principle upon which our governments rest, and upon which alone they continue to exist, is the union of States, sovereign and independent within their own limits in their internal and domestic concerns, and bound together as one people by a general government, possessing certain enumerated and restricted powers, delegated to it by the people of the several States, and exercising supreme authority within the scope of the powers granted to it, throughout the dominion of the United States. A power, therefore, in the general government to obtain and hold Colonies and dependent Territories, over which they might legislate without restriction, would be inconsistent with its own existence in its present form. Whatever it acquires, it acquires for the benefit of the people of the several States who created it. It is their trustee acting for them, and charged with the duty of promoting the interests of the whole people of the Union in the exercise of the powers specifically granted.

At the time when the Territory in question was obtained by cession from France, it contained no population fit to be associated together and admitted as a State; and it therefore was absolutely necessary to hold possession of it as a Territory belonging to the United States until it was settled and inhabited by a civilized community capable of self-government, and in a condition to be admitted on equal terms with the other States as a member of the Union. But, as we have before said, it was acquired by the general government as the representative and trustee of the people of the United States, and it must, therefore, be held in that character for their common and equal benefit; for it was the people of the several States, acting through the agent and representative, the Federal Government, who in fact acquired the territory in question, and the government holds it for their common use until it shall be associated with the other States as a member of the Union.

But until that time arrives, it is undoubtedly necessary that some government should be established, in order to organize society, and to protect the inhabitants in their persons and property; and as the people of the United States could act in this matter only through the government which represented them, and through which they spoke and acted when the territory was obtained, it was not only within the scope of its powers, but it was its duty to pass such laws and establish such a government as would enable those by whose authority they acted to reap the advantages anticipated from its acquisition, and to gather there a population which would enable it to assume the position to which it was destined among the States of the Union. The power to acquire, necessarily carries with it the power to preserve and apply to the purposes for which it was acquired. The form of government to be established necessarily rested in the discretion of Congress. It was their duty to establish the one that would be best suited for the protection and security of the citizens of the United States and other inhabitants who might be authorized to take up their abode there, and that must always depend upon the existing condition of the Territory, as to the number and character of its inhabitants, and the situation in the Territory. In some cases a government, consisting of persons appointed by the Federal Government, would best subserve the interests of the Territory, when the inhabitants were few and scattered, and new to one another. In other instances, it would be more advisable to commit the powers of self-government to the people who had settled in the territory, as being the most competent to determine what was best for their own interests. But some form of civil authority would be absolutely necessary to organize and preserve civilized society, and prepare it to become a state; and what is the best form must always depend on the condition of the territory at the time, and the choice of the mode must depend upon the exercise of a discretionary power by Congress acting within the scope of its constitutional authority, and not infringing upon the rights of person or rights of property of the citizen who might go there to reside or for any other lawful purpose. It was acquired by the exercise of this discretion and it must be held and governed in like manner, until it is fitted to be a state.

But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of government. The powers of the government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the territory becomes a part of the United States, the Federal Government enters into possession in the char-

acter impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and acts as a government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a territory of the United States, put off its character, and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States, and the duties it owes them under the provisions of the Constitution. The territory being a part of the United States, the government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved.

A reference to a few of the provisions of the Constitution will illustrate this proposition.

For example, no one, we presume, will contend that Congress can make any law in a territory respecting the establishment of religion or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the territory peaceably to assemble and to petition the government for the redress of grievances.

Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel anyone to be a witness against himself in a criminal proceeding.

These powers, and others in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the general government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty and property, without due process of law. And an Act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law.

So, too, it will hardly be contended that Congress could by law quarter a soldier in a house in a territory without the consent of the owner, in time of peace; nor in time of war, but in a manner prescribed by law. Nor could they by law forfeit the property of a citizen in a territory who was convicted of treason, for a longer period than the life of the person convicted; nor take private property of public use without just compensation.

The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under territorial government, as well as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the general government might attempt, under the plea of implied or incidental powers. And if Congress itself cannot do this—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a territorial government to exercise them. It could confer no power on any local government, established by its authority, to violate the provisions of the Constitution.

It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writings of eminent jurists upon the rights and duties, and the powers which governments may exercise over it, have been dwelt upon in the argument.

But in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their governments and interfering with their relation to each other. The powers of the government, and the rights of the citizen under it, are positive and practical regu-

lations plainly written down. The people of the United States have delegated to it certain enumerated powers, and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the government, or take from the citizens the rights they have reserved. And if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the governments.

Now, as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. And the government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words—too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the Act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.

We have so far examined the case, as it stands under the Constitution of the United States, and the powers thereby delegated to the Federal Government.

But there is another point in the case which depends on state power and state law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States; and being so made free he was not again reduced to a state of slavery by being brought back to Missouri.

Our notice of this part of the case will be very brief; for the principle on which it depends was decided in this court, upon much consideration, in the case of *Strader et al. v. Graham,* reported in 10th Howard, 82. In that case, the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterwards brought back to Kentucky. And this court held that their status or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that State, and not of Ohio; and that this court had no jurisdiction to revise the judgement of a state court upon its own laws. This was the point directly before the court, and the decision that this court had not jurisdiction, turned upon it, as will be seen by the report of the case.

So in this case: as Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his status, as free or slave, depended on the laws of Missouri, and not of Illinois.

It has, however, been urged in the argument, that by the laws of Missouri he was free on this return, and that this case, therefore, cannot be governed by the case of *Strader et al. v. Graham,* where it appeared, by the laws of Kentucky, that the plaintiffs continued to be slaves on their return from Ohio. But whatever doubts or opinions may, at one time, have been entertained upon this subject, we are satisfied, upon a careful examination of all the cases decided in the State courts of Missouri referred to, that it is now firmly settled by the decisions of the highest court in the State, that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant; and that the Circuit Court of the United States had no jurisdiction, when, by the laws of the State, the plaintiff was a slave and not a citizen.

Moreover, the plaintiff, it appears, brought a similar action against the defendant in the State court of Missouri, claiming the freedom of him-

self and his family upon the same grounds and the same evidence upon which he relies in the case before the court. The case was carried before the Supreme Court of the State; was fully argued there; and that court decided that neither the plaintiff nor his family were entitled to freedom, and were still the slaves of the defendant; and reversed the judgment of the inferior State court, which had given a different decision. If the plaintiff supposed that this judgment of the Supreme Court of the State was erroneous, and that this court had jurisdiction to revise and reverse it, the only mode by which he could legally bring it before this court was by writ of error directed to the Supreme Court of the State, requiring it to transmit the record to this court. It this had been done, it is too plain for argument that the writ must have been dismissed for want of jurisdiction in this court. The case of *Strader et al. v. Graham* is directly in point; and, indeed, independent of any decision, the language of the 25th section of the Act of 1789 is too clear and precise to admit of controversy.

But the plaintiff did not pursue the mode prescribed by law for bringing the judgment of a state court before this court for revision, but suffered the case to be remanded to the inferior State court, where it is still continued, and is, by agreement of parties, to await the judgment of this court on the point. All of this appears on the record before us and by the printed report of the case.

And while the case is yet open and pending in the inferior State court, the plaintiff goes into the Circuit Court of the United States, upon the same case and the same evidence, and against the same party, and proceeds to judgment, and then brings here the same case from the Circuit Court, which the law would not have permitted him to bring directly from the State court. And if this court takes jurisdiction in this form, the result, so far as the rights of the respective parties are concerned, is in every respect substantially the same as if it had, in open violation of law, entertained jurisdiction over the judgment of the State court upon a writ of error, and revised and reversed its judgment upon the ground that its opinion upon the question of law was erroneous. It would ill become this court to sanction such an attempt to evade the law, or to exercise an appellate power in this circuitous way, which it is forbidden to exercise in the direct and regular and invariable forms of judicial proceedings.

Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the same sense in which that word is used in the Constitution; and the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it.

Its judgment for the defendant must, consequently, be reversed, and a mandate issued directing the suit to be dismissed for want of jurisdiction.

Mr. Justice Wayne:

Concurring as I do entirely in the opinion of the court, as it has been written and read by the Chief Justice—without any qualification of its reasoning or its conclusions—I shall neither read nor file an opinion of my own in this case which I prepared when I supposed it might be necessary and proper for me to do so.

The opinion of the court meets fully and decides every point which was made in the argument of the case by the counsel on either side of it. Nothing belonging to the case has been left undecided, nor has any point been discussed and decided which was not called for by the record, or which was not necessary for the judicial disposition of it, in the way that it has been done, by more than a majority of the court.

In doing this the court neither sought nor made the case. It was brought to us in the course of the administration of the laws which Congress has enacted, for the review of cases from the circuit courts by the Supreme Court.

In our action upon it, we have only discharged our duty as a distinct and efficient department of the government, as the framers of the Constitution meant the judiciary to be, and as the States of the Union and the people of those States intended it should be, when they ratified the Constitution of the United States.

The case involves private rights of value, and constitutional principles of the highest importance, about which there had become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision.

It would certainly be a subject to regret, that the conclusions of the court have not been assented to by all of its members, if I did not

know from its history and my own experience how rarely it has happened that the judges have been unanimous upon constitutional questions of moment, and if our decision in this case had not been made by as large a majority of them as has been usually had on constitutional questions of importance.

Two of the judges, Mr. Justices McLean and Curtis, dissent from the opinion of the court. A third, Mr. Justice Nelson, gives a separate opinion upon a single point in the case, with which I concur, assuming that the Circuit Court had jurisdiction; but he abstains altogether from expressing any opinion upon the 8th section of the Act of 1820 known commonly as the Missouri Compromise Law, and six of us declare that it was unconstitutional.

But it has been assumed, that this court has acted extrajudicially in giving an opinion upon the 8th section Act of 1820, because, as it has decided that the Circuit Court had no jurisdiction of the case, this court has no jurisdiction to examine the case upon its merits.

But the error of such an assertion had arisen in part from a misapprehension of what has been heretofore decided by the Supreme Court, in cases of a like kind with that before us; in part, from a misapplication to the circuit courts of the United States, of the rules of pleading concerning pleas to the jurisdiction which prevail in common law courts; and from its having been forgotten that this case was not brought to this court by appeal or writ of error from a state court, but by a writ of error to the Circuit Court of the United States.

The cases cited by the Chief Justice to show that this court has now only done what it has repeatedly done before in other cases, without any question of its correctness, speak for themselves. The differences between the rules concerning pleas to the jurisdiction in the courts of the United States and common law courts have been stated and sustained by reasoning and adjudged cases; and it has been shown that writs of error to a state court and to the circuit courts of the United States are to be determined by different laws and principles. In the first, it is our duty to ascertain if this court has jurisdiction, under the 25th section of the judiciary Act, to review the case from the State court; and if it shall be found that it has not, the case is at end, so far as this court is concerned; for our power to review the case upon its merits has been made, by the 25th section, to depend upon its having jurisdiction; when it has not, this court cannot criticize, controvert, or give any opinion upon the merits of a case from a state court.

But in a case brought to this court, by appeal or by writ of error from a circuit court of the United States, we begin a review of it, not by inquiring if this court has jurisdiction, but if that court has it. If the case has been decided by that court upon its merits, but the record shows it to be deficient in those averments which by the law of the United States must be made by the plaintiff in the action, to give the court jurisdiction of his case, we send it back to the court from which it was brought, with directions to be dismissed, though it has been decided there upon its merits.

So, in a case containing the averments by the plaintiff which are necessary to give the Circuit Court jurisdiction, if the defendant shall file his plea in abatement denying the truth of them, and the plaintiff shall demur to it, and the court should erroneously sustain the plaintiff's demurrer, or declare the plea to be insufficient, and doing so require the defendant to answer over by a plea to the merits, and shall decide the case upon such pleading, this court has the same authority to inquire into jurisdiction of that court to do so, and to correct its error in that regard, that it had in the other case to correct its error, in trying a case in which the plaintiff had not made those averments which were necessary to give the court jurisdiction. In both cases the record is resorted to, to determine the point of jurisdiction, but, as the power of review of cases from a federal court, is not limited by the law to a part of the case, this court may correct an error upon the merits; and there is the same reason for correcting an erroneous judgment of the Circuit Court, where the want of jurisdiction appears from any part of the record, that there is for declaring a want of jurisdiction for a want of necessary averments. Any attempt to control the court from doing so by the technical common law rules of pleading in cases of jurisdiction, when a defendant has been denied his plea to it, would tend to enlarge the jurisdiction of the Circuit Court, by limiting this court's review of its judgments in that particular. But I will not argue a point already so fully discussed. I have every confidence in the opinion of the court upon the point of jurisdiction, and do not allow myself to doubt that the error of a contrary con-

clusion will be fully understood by all who shall read the argument of the Chief Justice.

I have already said that the opinion of the court has my unqualified assent.

Mr. Justice Nelson:

I shall proceed to state the grounds upon which I have arrived at the conclusion that the judgment of the court below should be affirmed. The suit was brought in the court below by the plaintiff, for the purpose of asserting his freedom, and that of Harriet, his wife, and two children.

The defendant pleaded, in abatement to the suit, that the cause of action, if any, accrued to the plaintiff out of the jurisdiction of the court, and exclusively within the jurisdiction of the courts of the State of Missouri; for that the said plaintiff is not a citizen of the State of Missouri, as alleged in the declaration, because he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The court below sustained the demurrer, holding that the plea was insufficient in law to abate the suit.

The defendant then pleaded over in bar of the action.

1. The general issue. 2. That the plaintiff was a negro slave, the lawful property of the defendant. And 3. That Harriet, the wife of said plaintiff, and the two children, were the lawful slaves of the said defendant. Issue was taken upon these pleas, and the cause went down to trial before the court and jury, and an agreed state of facts was presented, upon which the trial proceeded, and resulted in a verdict for the defendant, under the instructions of the court.

The facts agreed upon were substantially as follows:

That in the year 1834, the plaintiff, Scott, was a negro slave of Dr. Emerson, who was a surgeon in the Army of the United States; and in that year he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May 1836. At this date, Dr. Emerson removed, with the plaintiff, from the Rock Island post to the military post at For Snelling, situate on the west bank of the Mississippi River, in the Territory of Upper Louisiana, and north of the latitude thirty-six degrees thirty minutes, and north of the State of Missouri. That he held the plaintiff in slavery at Fort Snelling, from the last mentioned date until the year 1838.

That in the year 1835, Harriet, mentioned in the declaration, was a negro slave of Major Taliaferro, who belonged to the Army of the United States; and in that year he took her to Fort Snelling, already mentioned, and kept her there as a slave until the year 1836, and then sold and delivered her to Dr. Emerson, who held her in slavery, at Fort Snelling until the year 1838. That in the year 1836 the plaintiff and Harriet were married, at Fort Snelling, with the consent of their master. The two children, Eliza and Lizzie, are the fruit of this marriage. The first is about fourteen years of age, and was born on board the steamboat Gipsey, north of the State of Missouri, and upon the Mississippi River; the other, about seven years of age, was born in the State of Missouri, at the military post called Jefferson Barracks.

In 1838 Dr. Emerson removed the plaintiff Harriet, and their daughter Eliza, from Fort Snelling to the State of Missouri, where they have ever since resided. And that before the commencement of this suit, they were sold by the Doctor to Sandford, the defendant, who has claimed and held them as slaves ever since.

The agreed case also states that the plaintiff brought a suit for his freedom, in the Circuit Court of the State of Missouri, on which a judgment was rendered in his favor; but that, on a writ of error from the Supreme Court of the State, the judgment of the court below was reversed, and the cause remanded to the circuit for a new trial.

On closing the testimony on the court below, the counsel for the plaintiff prayed the court to instruct the jury, upon the agreed state of facts, that they ought to find for the plaintiff; when the court refused, and instructed them that, upon the facts, the law was with the defendant.

With respect to the plea in abatement, which went to the citizenship of the plaintiff, and his competency to bring a suit in the federal courts, the common law rule of pleading is, that upon a judgment against the plea on demurrer, and that the defendant answer over, and the defendant submits to the judgment, and pleads over to the merits, the plea in abatement is deemed to be waived, and is not afterwards to be regarded as a part of the record in deciding upon the rights of

the parties. There is some question, however, whether this rule of pleading applies to the peculiar system and jurisdiction of the federal courts. As, in these courts, if the facts appearing on the record show that the Circuit Court had no jurisdiction, its judgment will be reversed in the appellate court for that cause, and the case remanded with directions to be dismissed.

In the view we have taken of the case, it will not be necessary to pass upon this question, and we shall therefore proceed at once to an examination of the case upon its merits. The questions upon the merits, in general terms, is whether or not the removal of the plaintiff, who was a slave, with this master, from the State of Missouri to the State of Illinois, with a view to a temporary residence, and after such residence and return to the slave State, such residence in the free State works an emancipation.

As appears from an agreed statement of facts, this question has been before the highest court of the State of Missouri, and a judgment rendered that this residence in the free State has no such effect; but, on the contrary, that his original condition continued unchanged.

The court below, the Circuit Court of the United States for Missouri, in which this suit was afterwards brought, followed the decision of the State court, and rendered a like judgment against the plaintiff.

The argument against these decisions is, that the laws of Illinois, forbidding slavery within her territory, had the effect to set the slave free while residing in that State, and to impress upon him the condition and status of a freeman; and that, by force of these laws, this status and condition accompanied him on his return to the slave State, and of consequence he could not be there held as a slave.

This question has been examined in the courts of several of the slaveholding States, and different opinions expressed and conclusions arrived at. We shall hereafter refer to some of them, and to the principles upon which they are founded. Our opinion is, that the question is one which belongs to each State to decide for itself, either by its Legislature or courts of justice; and hence, in respect to the case before us, to the State of Missouri law, and which, when determined by that State, it is the duty of the federal courts to follow it. In other words, except in cases where the power is restrained by the Constitution of the United States, the law of the State is supreme over the subject of slavery within its jurisdiction.

As a practical illustration of the principle, we may refer to the legislation of the free States in abolishing slavery, and prohibiting its introduction into their territories. Confessedly, except as restrained by the Federal Constitution, they exercised, and rightfully, complete and absolute power over the subject. Upon what principle, then, can it be denied to the State of Missouri? The power flows from the sovereign character of the States of this Union; sovereign, not merely as respects the federal government—except as they have consented to its limitation—but sovereign as respects each other. Whether, therefore, the State of Missouri will recognize or give effect to the laws of Illinois within her territories, on the subject of slavery, is a question for her to determine. Nor is there any constitutional power in this government that can rightfully control her.

Every State or nation possesses an exclusive sovereignty and jurisdiction within her own territory; and her laws effect and bind all property and persons residing within it. It may regulate the manner and circumstances under which property is held, and the condition, capacity and state, of all persons therein; and, also, the remedy and modes of administering justice. And it is equally true, that no State or nation can effect or bind property out of its territory, or persons residing within it. No State, therefore, can enact laws to operate beyond its own dominions, and, if it attempts to do so, it may be lawfully refused obedience. Such laws can have no inherent authority extraterritorially. This is the necessary result of the independence of distinct and separate sovereignties.

Now, it follows from these principles, that whatever force or effect the laws of one State or nation may have in the territories of another, must depend solely upon the laws and municipal regulations of the latter, upon its own jurisprudence and polity, and upon its own express or tacit consent.

Judge Story observes, in his *Conflict of Laws,* p. 24, "that a State may prohibit the operation of all foreign laws, and the rights growing out of them, within its territories." "And that when its code speaks positively on the subject, it must be obeyed by all persons who are within reach of its sovereignty; when its customary unwritten or common law speaks directly on the subject, it is equally to be obeyed."

Nations, from convenience and comity, and from mutual interest, and a sort of moral necessity to do justice, recognize and administer the laws of other countries. But, of the nature, extent and utility, of them, respecting property, or the state and conditions of persons within her territories, each nation judges for itself; and is never bound, even upon the ground of comity, to recognize them, if prejudicial to her own interests. The recognition if purely from comity, and not from any absolute or paramount obligation.

Judge Story again observes (398), "that the true foundation and extent of the obligation of the laws of one nation within another is the voluntary consent of the latter, and is inadmissible whey they are contrary to its known interests." And he adds, "in the silence of any positive rule affirming or denying or restraining the operation of the foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests." See, also, 2 Kent's Com. p. 457; 13 Pet. 519, 589.

These principles fully establish that it belongs to the sovereign State of Missouri to determine by her laws the question of slavery within her jurisdiction, subject only to such limitations as may be found in the Federal Constitution; and, further, that the laws of other States of the Confederacy, whether enacted by their Legislatures or expounded by their courts, can have no operation within her territory, or effect rights growing out of her own laws on the subject. This is the necessary result of the independent and sovereign character of the State. The principle is not peculiar to the State of Missouri, but is equally applicable to each State belonging to the Confederacy. The laws of each have no extraterritorial operation within the jurisdiction of another, except such as may be voluntarily conceded by her laws or courts of justice. To the extent of such concession upon the rule of comity of nations, the foreign law may operate, as it then becomes a part of the municipal law of the State. When determined that the foreign law shall have effect, the municipal law of the State retires, and gives place to the foreign law.

In view of these principles, let us examine a little more closely the doctrine of those who maintain that the law of Missouri is not to govern the status and condition of the plaintiff. They insist that the removal and temporary residence with his master in Illinois, where slavery is inhibited, had the effect to set him free, and that the same effect is to be given to the law of Illinois, within the State of Missouri, after his return. Why was he set free in Illinois? Because the law of Missouri, under which he was held as a slave, had no operation by its own force extraterritorially; and the State of Illinois refused to recognize its effect within her limits, upon principles of comity, as a state of slavery was inconsistent withe her laws, and contrary to her policy. But, how is the case different on the return of the plaintiff to the State of Missouri? Is she bound to recognize and enforce the law of Illinois? For, unless she is, the status and condition of the slave upon his return remains the same as originally existed. Has the law of Illinois any greater force within the jurisdiction of Missouri, than the laws of the latter within that of the former? Certainly not. They stand upon an equal footing. Neither has any force extraterritorially, except what may be voluntarily conceded to them.

It has been supposed, by the counsel for the plaintiff, that a rule laid down by Huberus had some bearing upon that question. Huberus observes that "personal qualities, impressed by the laws of any place, surround and accompany the person wherever he goes, with this effect: that in every place he enjoys and is subject to the same law which other persons of his class elsewhere enjoy or are subject to." De Confl. Leg. lib. 1, tit. 3, sec. 12; 4 Dall. 375, n; 1 Story, Com. Laws, pp. 59, 60.

The application sought to be given to the rule was this; that as Dred Scott was free while residing in the State of Illinois, by the laws of that State, on his return to the State of Missouri he carried with him the personal qualities of freedom, and that the same effect must be given to his status there as in the former State. But the difficulty in the case is in the total misapplication of the rule.

These personal qualities, to which Huberus refers, are those impressed upon the individual by the law of the domicil; it is this that the author claims should be permitted to accompany the person into whatever country he might go, and should supersede the law of the place where he had taken up a temporary residence.

Now, as the domicil of Scott was in the State of Missouri, where he was a slave, and from whence he was taken by his master into Illinois

for a temporary residence, according to the doctrine of Huberus, the law of his domicil would have accompanied him, and during his residence there he would remain in the same condition as in the State of Missouri. In order to have given effect to the rule, as claimed in the argument, it should have been first shown that a domicil had been acquired in the free State, which cannot be pretended upon the agreed facts in the case. But the true answer to the doctrine of Huberus is, that the rule, in any aspect in which it may be reviewed, has no bearing upon either side of the question before us, even if conceded to the extent laid down by the author; for he admits that foreign governments give effect to these laws of the domicil no further than they are consistent with their own laws, and not prejudicial to their own subjects; in other words, their force and effect depend upon the law of comity of the foreign government. We should add, also, that this general rule of Huberus, referred to, has not been admitted in the practice of nations, nor is it sanctioned by the most approved jurists of international law. Story, Com. secs. 91, 96, 103, 104; 2 Kent's Com. pp. 457, 458; 1 Burge, Con. Laws, pp. 12, 127.

We come now to the decision of this court in the case of *Strader et al. v. Graham,* 10 How. p. 82. The case came up form the Court of Appeals, in the State of Kentucky. The question in the case was, whether certain slaves of Graham, a resident of Kentucky, who had been employed temporarily at several places in the State of Ohio, with their master's consent, and had returned to Kentucky into his service, had thereby become entitled to their freedom. The Court of Appeals held that they had not. The law was brought to this court under the 25th section of the Judiciary Act. This court held that it had no jurisdiction, for the reason, the question was one that belonged exclusively to the State of Kentucky. The Chief Justice, in delivering the opinion of the court, observed that "every State has an undoubted right to determine the status or domestic and social condition of the persons domiciled within its territory, except in so far as the powers of the States in this respect are restrained, or duties and obligations imposed upon them by the Constitution of the United States. There is nothing in the Constitution of the United States, he observes, that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine, for herself, whether their employment in another State should or should not make them free on their return."

It has been supposed, in the argument on the part of the plaintiff, that the 8th section of the Act of Congress passed March 6, 1820 (3 stat. al L. p. 544), which prohibited slavery north of thirty-six degrees thirty minutes, within which the plaintiff and his wife temporarily resided at Fort Snelling, possessed some superior virtue and effect, extraterritorially and within the State of Missouri, beyond that of the laws of Illinois, or those of Ohio in the case of *Strader et al. v. Graham.* A similar ground was taken and urged upon the court in the case just mentioned, under the Ordinance of 1787, which was enacted during the time of the Confederation, and reenacted by Congress after the adoption of the Constitution, with some amendments adapting it to the new government. 1 Stat. at L. p. 50.

In answer to this ground, the Chief Justice, in delivering the opinion of the court, observed: The argument assumes that the six articles which that Ordinance declares to be perpetual, are still in force in the States since formed within the territory, and admitted into the Union. If this proposition could be maintained, it would not alter the question; for the Regulations of Congress, under the old Confederation or the present Constitution, for the government of a particular territory, could have no force beyond its limits. It certainly could not restrict the power of the States, within their respective territories, nor in any manner interfere with their laws and institutions, nor give this court control over them.

"The Ordinance in question," he observes, "if still in force, could have no more operation than the laws of Ohio, in the State of Kentucky, and could not influence the decision upon the rights of the master of the slaves in that State."

This view, thus authoritatively declared, furnishes a conclusive answer to the distinction attempted to be set up between the extraterritorial effect of a state law and the Act of Congress in question.

It must be admitted that Congress possesses no power to regulate or abolish slavery within the States; and that if this Act had attempted any such legislation, it would have been a nullity.

And yet the argument, here, if there be any force in it, leads to the result, that effect may be given to such legislation; for it is only by giving the Act of Congress operation within the State of Missouri, that it can have any effect upon the question between the parties. Having no such effect directly, it will be difficult to maintain, upon any consistent reasoning, that it can be made to operate indirectly upon the subject.

The argument, we think, in any aspect in which it may be reviewed, is utterly destitute of support upon any principles of constitutional law, as, according to that, Congress has no power whatever over the subject of slavery within the State; and is also subversive of the established doctrine of international jurisprudence, as, according to that, it is an axiom that the laws of one government have no force within the limits of another, or extraterritorially, except from the consent of the latter.

It is perhaps not unfit to notice, in this connection, that many of the most eminent statesmen and jurists of the country entertain the opinion that this provision of the Act of Congress, even within the territory to which it relates, was not authorized by any power under the Constitution. The doctrine here contended for, not only upholds its validity in the territory, but claims for it effect beyond and within the limits of a sovereign state—an effect, as insisted, that displaces the laws of the State, and substitutes its own provisions in their place.

The consequences of any such construction are apparent. If Congress possesses the power, under the Constitution, to abolish slavery in a territory, it must necessarily possess the like power to establish it. It cannot be a one sided power, as may suit the convenience or particular views of the advocates. It is a power, if it exists at all, over the whole subject; and then, upon the process of reasoning which seeks to extend its influence beyond the territory, and within the limits of a state, if Congress should establish, instead of abolish, slavery, we do not see but that, if a slave should be removed from the territory into a free State his status would accompany him, and continue, notwithstanding its laws against slavery. The laws of the free State, according to the argument, would be displaced, and the Act of Congress, in its effect, be substituted in their place. We do not see how this conclusion could be avoided, if the construction against which we are contending should prevail. We are satisfied, however it is unsound, and that the true answer to it is, that even conceding, for the purposes of the argument, that this provision of the Act of Congress is valid within the territory for which it was enacted, it can have no operation or effect beyond its limits, or within the jurisdiction of a state. It can neither displace its laws nor change the status or condition of its inhabitants.

Our conclusion, therefore, is, upon this branch of the case, that the question involved is one depending solely upon the law of Missouri, and that the federal court sitting in the State, and trying the case before us, was bound to follow it.

The remaining question for consideration is: what is the law of the State of Missouri on this subject. And it would be a sufficient answer to refer to the judgment of the highest court of the State in the very case, were it not due to that tribunal to state somewhat at large the course of decision and the principles involved, on account of some diversity of opinion in the cases. As we have already stated, this case was originally brought in the Circuit Court of the State, which resulted in a judgment for the plaintiff. The case was carried up to the Supreme Court for revision. That court reversed the judgement below, and remanded the cause to the Circuit, for a new trial. In that state of the proceeding, a new suit was brought by the plaintiff in the Circuit Court of the United States, and tried upon the issues and agreed case before us, and a verdict and judgment for the defendant, that court following the decision of the Supreme Court of the State.

The judgment of the Supreme Court is reported in the 15 Mo. p. 576. The court placed the decision upon the temporary residence of the master with the slaves in the State and territory to which they removed, and their return to the slave State; and upon the principles of international law, that foreign laws have no extraterritorial force, except such as the State within which they are sought to be enforced may see fit to extend to them, upon the doctrine of comity of nations.

This is the substance of the grounds of the decision.

The same question has been twice before that court since, and the same judgment given. 15 Mo. 595; 17 Ib. 434. It must be admitted, therefore, as the settled law of the State, and, according to the decision in the case of *Strader et*

*al. v. Graham,* 10 How. 82, is conclusive of the case in this court.

It is said, however, that the previous cases and course of decision in the State of Missouri on this subject were different, and that the courts had held the slave to be free on his return from a temporary residence in the free State. We do not see, were this to be admitted, that the circumstance would show that the settled course of decision at the time this case was tried in the court below, was not to be considered the law of the State. Certainly, it must be, unless the first decision of a principle of law by a state court is to be permanent and irrevocable. The idea seems to be, that the courts of a state are not to change their opinions, or, if they do, the first decision is to be regarded by this court as the law of the State. It is certain, if this be so, in the case before us, it is an exception to the rule governing this court in all other cases. But what court has not changed its opinions? What judge has not changed his?

Waiving, however, this view, and turning to the decisions of the courts of Missouri, it will be found that there is no discrepancy between the earlier and the present cases upon this subject. There are some eight of them reported previous to the decision in the case before us, which was decided in 1852. The last of the earlier cases was decided in 1836. In each on of these, with two exceptions, the master or mistress removed into the free State with the slave, with a view to a permanent residence—in other words, to make that his or her domicil. And in several of the cases, this removal and permanent residence were relied on as the ground of the decision in favor of the plaintiff. All these states, therefore, are not necessarily in conflict with it. In one of the tow excepted cases, the master had hired the slave in the State of Illinois from 1817 to 1825. In the other, the master was an officer in the army, and removed with his slave to the military post of Fort Snelling, and at Prairie du Chien, in Michigan, temporarily, while acting under the orders of his government. It is conceded the decision in this case was departed from in the case before us, and in those that have followed it. But it is to be observed that these subsequent cases are in conformity with those in all the slave States bordering on the free—in Kentucky, 2 Marsh. 476; 5 B. Monroe, 176; 9 Ib. 565,—in Virginia, 1 Rand. 15; 1 Leigh, 172; 10 Grat. 495,—in Maryland, 4 Harr. & McH. 295, 322, 325. In conformity, also, with the law of England on this subject, *Ex parte Grace,* 2 Hagg Adm. 94, and with the opinions of the most eminent jurists of the country. Story's Confl. 396 a; 5 Kent's Com. 258 n; 18 Pick. 193, Chief Justice Shaw. Sec Corresp. between Lord Stowell and Judge Story, 1 vol. Life of Story, p. 552, 558.

Lord Stowell, in communicating his opinions in the case of *The Slave Grace* to the Judge Story, states, in his letter, what the question was before him, namely: "Whether the emancipation of a slave brought to England insured a complete emancipation to him on his return to his own country, or whether it only operated as a suspension of slavery in England, and is original character devolved on him again upon his return." He observed, "the question had never been examined since an end was put to slavery fifty years ago," having reference to the decision of Lord Mansfield in the case of Somersett, but the practise, he observed, "has regularly been, that on his return to this own country, the slave resume his original character as a slave." And so Lord Stowell held in the case.

Judge Story, in his letter in reply, observes: "I have read with great attention your judgement in the slave case, etc. Upon the fullest consideration which I have been able to give the subject, I entirely concur in your views. If I had been called upon to pronounce a judgement in a like case, I should have certainly arrived at the same result." Again he observes: "In my native State (Massachusetts), the state of slavery is not recognized as legal; and yet, if a slave should come hither, and afterwards return to his own home, we should certainly think that the local law attached upon him and this servile character would be reintegrated."

We may remark in this connection, that the case before the Maryland court, already referred to, and which was decided in 1799, presented the same question as that before Lord Stowell and received a similar decision. Tis was nearly thirty years before the decision in that case, which was in 1828. The Court of Appeals observed, in deciding the Maryland case, that "however the laws of Great Britain in such instances, operating upon such persons there, might interfere so as to prevent the exercise of certain acts by the masters, not permitted, as in the case of Somersett, yet, upon the bringing Ann Joice into this State (then the Province of Maryland), the relation of master and slave continued in its

extent, as authorized by the laws of this State." And Luther Martin, one of the counsel in that case, stated, on the argument, that the question had been previously decided the same way in the case of slaves returning from a residence in Pennsylvania, where they had become free under her laws.

The State of Louisiana, whose courts had gone further in holding the slave free on his return from a residence in a free State than the courts of her sister States, has settled the law, by an Act of her Legislature, in conformity with the law of the court of Missouri in the case before us. Sess. Law, 1846.

The case before Lord Stowell presented much stronger features for giving effect to the law of England in the case of *The Slave Grace* than exists in the cases that have arisen in this country, for in that case the slave returned to a colony of England over which the imperial government exercised supreme authority. Yet, on the return of the slave to the colony, from a temporary residence in England, he held that the original condition of the slave attached. The question presented in cases arising here, is as to the effect and operation to be given to the laws of a foreign State, on the return of the slave within an independent sovereignty.

Upon the whole, it must be admitted that the current of authority, both in England and in this country, is in accordance with the law as declared by the courts of Missouri in the case before us, and we think the court below was not only right, but bound to follow it.

Some question has been made as to the character of the residence in this case in the free State. But we regard the facts a set forth in the agreed case as decisive. The removal of Dr. Emerson from Missouri to the military posts was in the discharge of his duties as surgeon in the army, and under the orders of his government. He was liable at any moment to be recalled, as he was in 1838, and ordered to another post. The same is also true as it respects Major Taliaferro. In such a case, the officer goes to his post for a temporary purpose, to remain there for an uncertain time, and not for the purpose of fixing his permanent abode. The question we think too plain to require argument. The case of *The Attorney General v. Napier,* 6 Welsb. H. & G. Exch. 216, illustrates and applies the principle in the case of an officer of the English army.

A question has been alluded to, on the argument, namely: the right of the master with his slave of transit into or through a free State, on business or commercial pursuits, or in the exercise of a federal right, or the discharge of a federal duty, being a citizen of the United States, which is not before us. This question depends upon different considerations and principles from the one in hand, and turns upon the rights and privileges secured to a common citizen of the republic, under the Constitution of the United States. When that question arises, we shall be prepared to decide it.

Our conclusion is, that the judgment of the court below should be affirmed.

Mr. Justice Grier:

I concur in the opinion delivered by Mr. Justice Nelson on the questions discussed by him.

I also concur with the opinion of the court as delivered by the Chief Justice, that the Act of Congress of 6th March, 1820, is unconstitutional and void; and that, assuming the facts as stated in the opinion, the plaintiff cannot sue as a citizen of Missouri in the courts of the United States. But, that the record shows a prima facie case of jurisdiction, requiring the court to decide all the questions properly arising in it; and as the decision of the pleas in bar shows that the plaintiff is a slave, and therefore not entitled to sue in a court of the United States, the form of the judgment is of little importance; for whether the judgment be affirmed or dismissed for want of jurisdiction, it is justified by the decision of the court, and is the same in effect between the parties to the suit.

Mr. Justice Daniel:

It may with truth be affirmed, that since the establishment of the several communities now constituting the States of this Confederacy, there never has been submitted to any tribunal within its limits questions surpassing in importance those now claiming the consideration of this court. Indeed it is difficult to imagine, in connection with the systems of polity peculiar to the United States, a conjuncture of graver import than that must be, within which it is aimed to comprise, and to control, not only the faculties and practical operation appropriate to the American Confederacy as such, but also the rights and powers of its separate and independent members, with reference alike to their inter-

nal and domestic authority and interests, and the relations they sustain to their confederates.

To my mind it is evident that nothing less than the ambitious and far-reaching pretension to compass these objects of vital concern, is either directly essayed, or necessarily implied in the positions attempted in the argument for the plaintiff in error.

How far these position have any foundation in the nature of the rights and relations of separate, equal and independent governments, or in the provisions of our own federal compact, or the laws enacted under and in pursuance of the authority of that compact, will be presently investigated.

In order correctly to comprehend the tendency and force of these positions, it is proper her succinctly to advert to the facts upon which the questions of law propounded in the argument have arisen.

This was an action of trespass *vi et armis,* instituted in the Circuit Court of the United States for the District of Missouri, in the name of the plaintiff in error, a negro held as a slave, for the recovery of freedom for himself, his wife, and two children, also negroes.

To the declaration in this case that defendant below, who is also the defendant in error, pleaded in abatement that the court could not take cognizance of the cause because the plaintiff was not a citizen of the State of Missouri, as averred in the declaration, but was a negro of African descent, and that his ancestors were of pure African blood, and were brought into this country and sold as negro slaves; and hence it followed, from the 2d section of the 3d article of the Constitution, which creates the judicial power of the United States, with respect to controversies between citizens of different States, that the Circuit Court could not take cognizance of the action.

To this plea in abatement, a demurrer having been interposed on behalf of the plaintiff, it was sustained by the court. After the decision sustaining the demurrer, the defendant, in pursuance of a previous agreement between counsel, and with the leave of the court, pleaded in bar of the action; 1st, not guilty; 2d, that the plaintiff was a negro slave, the lawful property of the defendant, and as such the defendant gently laid his hands upon him, and thereby had only restrained him, as the defendant had a right to do; 3d, that with respect to the wife and daughters of the plaintiff, in the second and third counts of the declaration mentioned, the defendant had, as to them, only acted in the same manner, and in virtue of the same legal right.

Issues having been joined upon the above pleas in bar, the following statement, comprising all the evidence in the case, was agreed upon and signed by the counsel of the respective parties, viz:

"In the year 1834, the plaintiff was a negro slave belonging to Dr. Emerson, who was a surgeon in the Army of the United States. In that year, 1834, said Dr. Emerson took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836, At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi River, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling, from said last mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the Army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave at said Fort Snelling unto the said Dr. Emerson, hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Ford Snelling until the year 1838.

In the year 1836, the plaintiff and said Harriet, at said Fort Snelling, with the consent of said Dr. Emerson, who then claimed to be their master and owner, intermarried and took each other for husband and wife. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsey, north of the north line of the State of Missouri, and upon the River Mississippi. Lizzie is about seven years old, and was born in the State of Missouri at a military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet, and their said daughter Eliza, from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, said Harriet, Eliza and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them and each of them as slaves.

At the time mentioned in the plaintiff's declaration, the defendant, claiming to be owner as aforesaid, laid his hands upon said plaintiff, Harriet, Eliza and Lizzie, and imprisoned them, doing in this respect, however, no more than what he might lawfully do if they were of right his slaves at such times.

Further proof may be given on the trial for either party.

R. M. Field, for plaintiff,

H. A. Garland, for defendant."

"It is agreed that Dred Scott brought suit for his freedom in the Circuit Court of St. Louis County; that there was a verdict and judgment in his favor; that on a writ of error to the Supreme Court, the judgment below was reversed, and the cause remanded to the Circuit Court, where it has been continued to await the decision of this case.

Field, for plaintiff,

Garland, for defendant."

Upon the aforegoing agreed facts, the plaintiff prayed the court to instruct the jury that they ought to find for the plaintiff, and upon the refusal of the instruction thus prayed for, the plaintiff excepted to the court's opinion. The court then, upon the prayer of the defendant, instructed the jury, that upon the facts of this case agreed as above, the law was with the defendant. To this opinion, also, the plaintiff's counsel excepted, as he did to the opinion of the court denying to the plaintiff a new trial after the verdict of the jury in favor of the defendant.

The question first in order presented by the record in his case, is that which arises upon the plea in abatement, and the demurrer to that plea; and upon this question it is my opinion that the demurrer should have been overruled, and the plea sustained.

On behalf of the plaintiff it has been urged, that by the pleas interposed in bar of a recovery in the court below (which pleas both in fact and in law are essentially the same with the objections averred in abatement), the defense in abatement has been displaced or waived; that it could, therefore, no longer be relied on in the Circuit Court, and cannot claim the consideration of this court in reviewing this cause. This position is regarded as wholly untenable. On the contrary, it would seem to follow conclusively from the peculiar character of the courts of the United States, as organized under the Constitution and the statutes, and as defined by numerous and unvarying adjudications from this bench; and there is not one of those courts whose jurisdiction and powers can be deduced from mere custom or tradition; not one, whose jurisdiction and powers must not be traced palpably to, and invested exclusively by, the constitution and statutes of the United States; not one, that is not bound, therefore, at all times, and at all stages of its proceedings, to look and to regard the special and declared extent and bounds of its commission and authority. There is no such tribunal of the United States as a court of general jurisdiction, in the sense in which that phrase is applied to the superior courts under the common law; and even with respect to the courts existing under that system, it is a well settled principle, that consent can never give jurisdiction.

The principles above stated, and the consequences regularly deducible from them, have, as already remarked, been repeatedly and unvaryingly propounded from this bench. Beginning with the earliest decisions of this court, we have the cases of *Bingham v. Cabot et al.* 3 Dall. 382; *Turner v. Enrille,* 4 Dall. 7; *Abercrombie v. Dupuis et al.* 1 Cranch, 343; *Wood v. Wagnon,* 2 Cranch, 9; *The United States v. The Brig Union et al.* 4 Cranch, 216; *Sulivan v. The Fulton Steamboat Company,* 5 Wheat. 450; *Mollan et al. v. Torrence,* 9 Wheat. 537; *Brown v. Keene,* 8 Pet. 112, and *Jackson v. Ashton,*. 8 Pet. 148; ruling, uniform and unbroken current, the doctrine that it is essential to the jurisdiction of the courts of the United States, that the facts upon which it is founded should appear upon the record. Nay, to such an extent and so inflexibly has this requisite to the jurisdiction been enforced, that in the case of *Capron v. Van Noorden,* 2 Cranch, 126, it is declared, that the plaintiff in this court may assign for error his own omission in the pleadings in the court below, where they go to the jurisdiction. This doctrine has been, if possible,

more strikingly illustrated in a latter decision, the case of *The State of R.I. v. The State of Mass.* 12 Pet. 657, 755

In this case, on p. 718 of the volume, this court, with reference to a motion to dismiss the cause for want of jurisdiction, have said: "However late this objection has been made or may be made, in any cause in an inferior or appellate court of the United States, it must be considered and decided before any court can move and farther step in the cause, as any movement is necessarily to exercise the jurisdiction. Jurisdiction is the power to hear and determine the subject matter in controversy between the parties to a suit; to adjudicate or exercise any judicial power over them. The question is, whether on the case before the court their action is judicial or extrajudicial; with or without the authority of law to render a judgment or decree upon the rights of the litigant parties. A motion to dismiss a cause pending in the courts of the United States, is not analogous to a pleas to the jurisdiction of a court of common law or equity in England; there, the superior courts have a general jurisdiction over all persons within the realm, and all causes of action between them. It depends on the subject matter, whether the jurisdiction shall be exercised by a court of law or equity; but that court to which it appropriately belongs can act judicially upon the party and the subject of the suit, unless it shall be made apparent to the court that the judicial determination of the case has been withdrawn from the court of general jurisdiction to an inferior and limited one. It is a necessary presumption that the court of general jurisdiction can act upon the given case; when nothing to the contrary appears; hence has arisen the rule that the party claiming an exemption from its process must set out the reason by a special plea in abatement, and show that some inferior court of law or equity has the exclusive cognizance of the case; otherwise the superior court must proceed in virtue of its general jurisdiction. A motion to dismiss, therefore, cannot be entertained, as it does not disclose a case of exception; and if a plea in abatement is put in, it must not only make out the exception, but point to the particular court to which the case belongs. There are other classes of cases where the objection to the jurisdiction is of a different nature, as on a bill in chancery, that the subject matter is cognizable only by the King in Council, or that the parties defendant cannot be brought before any municipal court on account of their sovereign character or the nature of the controversy; or to the very common cases which present the question, whether the case belong to a court of law or equity. To such cases, a plea in abatement would not be applicable, because the plaintiff could not sue in an inferior court. The objection goes to a denial of any jurisdiction of a municipal court in the one class of cases, and to the jurisdiction of any court of equity or of law in the other, on which last the court decides according to its discretion.

"An objection to jurisdiction on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by appearance and pleading to issue; but when the objection goes to the power of the court over the parties or the subject matter, the defendant need not, for he cannot give the plaintiff a better writ. Where an inferior court can have no jurisdiction of a case of law or equity, the ground of objection is not taken by plea in abatement, as an exception of the given case from the otherwise general jurisdiction of the court; appearance does not cure the defect of judicial power, and it may be relied on by plea, answer, demurrer, or at the trial or hearing. As denial of jurisdiction over the subject matter of a suit between parties within the realm, over which and whom the court has power to act, cannot be successful in an English court of general jurisdiction, a motion like the present could not be sustained consistently with the principles of its constitution. But as this court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the Constitution and laws have authorized it to act; any proceedings without the limits prescribed is coram non judice, and its action a nullity. And whether the want or excess of power is objected to by a party, or is apparent to the court, it must surcease its action or proceed extrajudicially."

In the constructing of pleadings either in abatement or in bar, every fact or position constituting a portion of the public law, or of known or general history, is necessarily implied. Such fact or position need not be specially averred and set forth; it is what the world at large and every individual are presumed to know—nay, are bound to know and to be governed by.

If, on the other hand, there exists facts or circumstance by which a particular case would be

withdrawn or exempted from the influence of public law or necessary historical knowledge, such facts and circumstances form an exception to the general principle, and these must be specially set forth and established by those who would avail themselves of such exception.

Now, the following are truths which a knowledge of the history of the world, and particularly of that of our own country, compels us to know—that the African negro race never have been acknowledged as belonging to the family of nations; that as amongst them there never has been known or recognized by the inhabitants of other countries anything partaking of the character of nationality, or civil or political polity; that this race has been by all the nations of Europe regarded as subjects of capture or purchase; as subjects of commerce or traffic; and that the introduction of that race into section of this country was not as members of civil or political society, but as slaves, as property in the strictest sense of the term.

In the plea in abatement, the character or capacity of citizen on the part of the plaintiff is denied; and the causes which show the absence of that character or capacity are set forth by averment. The verity of those causes, according to the settled rules of pleading, being admitted by the demurrer, it only remained for the Circuit Court to decide upon their legal sufficiency to abate the plaintiff's action. And it now becomes the province of this court to determine whether the plaintiff below (and in error here), admitted to be a negro of African descent, whose ancestors were of pure African blood, and were brought into this country and sold as negro slaves—such being his status, and such the circumstances surrounding his position—whether he can by correct legal induction from that status and those circumstances, be clothed with the character and capacities of a citizen of the State of Missouri.

It may be assumed as a postulate, that to a slave, as such, there appertains and can appertain no relation, civil or political, with the State or the government. He is himself strictly property, to be used in subserviency to the interests, the convenience or the will, of his owner; and to suppose, with respect of the former, the existence of any privilege or discretion, or of any obligation to others incompatible with the magisterial rights just defined, would be by implication, if not directly, to deny the relation of master and slave, since none can possess and enjoy as his own, that which another has a paramount right and power to withhold. Hence it follows necessarily, that a slave, the peculium or property of a master, and possessing within himself no civil nor political rights or capacities, cannot be a citizen. For who, it may be asked, is a citizen? What do the character and status of citizen import? Without fear of contradiction, it does not import the condition of being private property, the subject of individual power and ownership. Upon a principle of etymology alone, the term "citizen," as derived from civitas, conveys the ideas of connection or identification with the State or government, and a participation of its functions. But beyond this, there is not, it is believed, to be found, in the theories of writers on government, or in any actual experiment heretofore tried, an exposition of the term "citizen," which has not been understood as conferring the actual possession and enjoyment, or the perfect right of acquisition and enjoyment, or an entire equality of privileges, civil and political.

Thus Vattel, in the preliminary chapter to his treatise on the Law of the Nations, says: "Nations or State are bodies politic; societies of men united together for the purpose of promoting their mutual safety and advantage, by the joint efforts of their mutual strength. Such a society has her affairs and her interests; she deliberates and takes resolutions in common; thus becoming a moral person, who possesses an understanding and a will peculiar to herself." Again, in the first chapter of the first book of the treatise just quoted, the same writer, after repeating his definition of a State, proceeds to remark, that, "from the very design that induces a number of men to form a society, which has its common interests and which is to act in concert, it is necessary that there should be established a public authority, to order and direct what is to be done by each, in relation to the end of the association. This political authority is the sovereignty."Again this writer remarks: "The authority of all over each member essentially belongs to the body politic or the state."

By this same writer it is also said: "The citizens are the member of the civil society; bound to this society by certain duties, and subject to its authority; they equally participate in its advantages. The natives, or natural born citizens, are those born in the country, of parents who are citizens. As society cannot perpetuate itself otherwise than by the children of the citizens, those

children naturally follow the condition of their parents, and succeed to all their rights." Again: "I say, to be of the country, it is necessary to be born of a person who is a citizen; for if he be born there of a foreigner, it will be only the place of birth, and not his country. The inhabitants, as distinguished from citizens, are foreigners who are permitted to settle and stay in the country." Vattel, Book 1, cap. 19, p. 101.

From the views here expressed, and they seem to be unexceptionable, it must follow, that with the slave, with one devoid of rights or capacities, civil or political, there could be no pact; that one thus situated could be no party to, or actor in the association of those possessing free will, power, discretion. He could form no part of the design, no constituent ingredient or portion of a society based upon common, that is, upon equal interests and powers. He could not at the same time be the sovereign and the slave.

But it has been insisted, in argument, that the emancipation of a slave, effected either by the direct act and assent of the master, or by causes operating in contravention of his will, produces a change in the status or capacities of the slave, such as will transform him from a mere subject of property, into a being possessing a social, civil, and political equality with a citizen; in other words, will make him a citizen of the State within which he was, previously to his emancipation, a slave.

It is difficult to perceive by what magic the mere surcease or renunciation of an interest in a subject of property, by an individual possessing that interest, can alter the essential character of that property with respect to persons or communities unconnected with such renunciation. Can it be pretended that an individual in any State, by his single act, though voluntarily or designedly performed, yet without the operation or warrant of the government, perhaps in opposition to its policy or its guaranties, can create a citizen of that State? Much more emphatically may it be asked, how such a result could be accomplished by means wholly extraneous, and entirely foreign to the government of the State. The argument thus urged must lead to these extraordinary conclusions. It is regarded at once as wholly untenable, and as unsustained by the direct authority or by the analogies of history.

The institution of slavery, as it exists and has existed from the period of its introduction into the United States, though more humane and mitigated in character than was the same institution, either under the republic or the empire of Rome, bears both in is tenure and in the simplicity incident to the mode of its exercise, a closer resemblance to Roman slavery than it does to the condition of villanage, as it formerly existed in England. Connected with the latter, there were peculiarities, from custom or positive regulation, which varied it materially from the slavery of the Romans, or from slavery at any period within the United States.

But with regard to slavery amongst the Romans, it is by no means true that emancipation, either during the republic or the empire, conferred, by the act itself, or implied, the status or the rights of citizenship.

The proud title of Roman citizen, with the immunities and rights incident thereto, and as contradistinguished alike from the condition of conquered subjects or of the lower grades of native domestic residents, was maintained throughout the duration of the Republic, and until a late period of the eastern empire and at last was in effect destroyed less by an elevation of the inferior classes than by the degradation of the free, and the previous possessors of rights and immunities civil and political, to the indiscriminate abatement incident to absolute and simple despotism.

By the learned and elegant historian of the decline and fall of the Roman Empire we are told that "In the decline of the Roman Empire, the proud distinctions of the republic were gradually abolished; and the reason or instinct of Justinian completed the simple form of an absolute monarchy. The Emperor could not eradicate the popular reverence which always waits on the possession of hereditary wealth or the memory of famous ancestors. He delighted to honor with titles and emoluments his generals, magistrates and senators, and his precarious indulgence communicated some rays of their glory to their wives and children. But in the eye of the law all Roman citizens were equal, and all subjects of the empire were citizens of Rome. That inestimable character was degraded to an obsolete and empty name. The voice of a Roman could no longer enact his laws, or create the annual ministers of his powers; his constitutional rights might have checked the arbitrary will of a master; and the bold adventurer from Germany or Arabia was admitted with equal favor to the civil and military command which

the citizen alone had been once entitled to assume over the conquests of his fathers. The first Caesars had scrupulously guarded the distinction of ingenuous and servile birth, which was decided by the condition of the mother. The slaves who were liberated by a generous master, immediately entered into the middle class of libertini or freedmen; but they could never be enfranchised from the duties of obedience and gratitude; whatever were the fruits of their industry, their patron and his family inherited the third part, or even the whole of their fortune, if they died without children and without a testament. Justinian respected the rights of patrons, but his indulgence removed the badge of disgrace from the two inferior orders of freedman; whoever ceased to be a slave, obtained, without reserve or delay, the station of a citizen; and at length the dignity of an ingenuous birth was created or supposed by the omnipotence of the Emperor.[1]

The above account of slavery and its modifications will be found in strictest conformity with the institutes of Justinian. Thus, (book 1st, title 3d), it is said: "The first general division of persons in respect of their rights is into freeman and slaves." The same title, sec. 4th: "Slaves are born such, or become so. They are born such of bondwomen; they become so either by the law of nations, as by capture, or by the civil law." Section 5th: "In the condition of slaves there is no diversity; but among free persons there are many. Thus some are ingenui or freemen, others libertini or freedmen."

Tit. 4th De. Ingenuis.— "A freeman is who is born free by being born in matrimony, of parents who both are free, or both freed; or of parents one free and the other freed. But one born of a free mother, although the father be a slave or unknown, is free."

Tit. 5th. De Libertinis.—"Freedmen are those who have been manumitted from just servitude."

Section 3d of the same title states that "freedmen were formerly distinguished by a threefold division." But the Emperor proceeds to say: "Our piety leading us to reduce all things into a better state, we have amended our laws, and re-established the ancient usage; for anciently liberty was simple and undivided—that is, was conferred upon the slave as his manumittor possessed it, admitting this single difference, that the person manumitted became only a freed man, although his manumittor was a free man." And he further declares: "We have made all freed men in general become citizens of Rome, regarding neither the age of the manumitted, nor the manumittor, nor the ancient forms of manumission. We have also introduced many new methods by which slaves may become Roman citizens."

By the references above given it is shown, from the nature and objects of civil and political associations, and upon the direct authority of history, that citizenship was not conferred by the simple fact of emancipation, but that such a result was deduced therefrom in violation of the fundamental principles of free political association; by the exertion of despotic will to establish under a false and misapplied denomination, one equal and universal slavery; and to effect this result required the exertions of absolute power—of a power both in theory and practice, being, in its most plenary acceptation, the sovereignty, the State itself—it could not be produced by a less or inferior authority, much less by the will or the act of one who, with reference to civil and political rights, was himself a slave. The master might abdicate or abandon his interest or ownership in his property, but his act would be a mere abandonment. It seems to involve an absurdity to impute to it the investiture of rights which the sovereignty alone had power to impart. There is not, perhaps, a community in which slavery is recognized, in which the power of emancipation, and the modes of its exercise are not regulated by law—that is, by the sovereign authority; and none can fail to comprehend the necessity for such regulation, for the preservation of order, and even of political and social existence.

By the argument for the plaintiff in error, a power equally despotic is vested in every member of the association, and the most obscure or unworthy individual it comprises may arbitrarily invade and derange its most deliberate and solemn ordinances. At assumptions anomalous as these, so fraught with mischief and ruin, the mind at once is revolted, and goes directly to the conclusions, that to change or to abolish a fundamental principle of the society itself—of the sovereignty; and that none other can admit to a participation of that high attribute. It may fur-

[1] Vide Gibbon's *Decline and Fall of the Roman Empire*. London edition of 1825, Vol. III., chap. 44, p. 183.

ther expose the character of the argument urged for the plaintiff, to point out some of the revolting consequences, which it would authorize. If that argument possesses any integrity, it asserts the power in any citizen, or quasi citizen, or a resident foreigner of any one of the States, from a motive either of corruption or caprice, not only to infract the inherent and necessary authority of such state, but also materially to interfere with the organization of the Federal Government, and with the authority of the separate and independent States. He may emancipate his negro slave, by which process he first transforms that slave into a citizen of his own State; he may next, under color of article 4th, section 2d, of the Constitution of the United States, obtrude him, and on terms of civil and political equality, upon any and every State in this Union, in defiance of all regulations of necessity or policy, ordained by those States for their internal happiness or safety. Nay, more: this manumitted slave may, by a proceeding springing from the will or act of his master alone, be mixed up with the institutions of the Federal Government, to which he is not a party, and in opposition to the laws of that government which, in authorizing the extension by naturalization of the rights and immunities of citizens of the United States to those not originally parties to the federal compact, have restricted that boon to free white aliens alone. If the rights and immunities connected with or practiced under the institutions of the United States can by any indirection be claimed or deduced from sources or modes other than the Constitution and laws of the United States, it follows that the power of naturalization vested in Congress is not exclusive—that it has in effect no existence, but is repealed or abrogated.

But it has been strangely contended that the jurisdiction of the Circuit Court might be maintained upon the ground that the plaintiff was a resident of Missouri, and that, for the purpose of vesting the court with jurisdiction over the parties, residence within the State was sufficient.

The first, and to my mind a conclusive reply to this singular argument, is presented in the fact that the language of the Constitution restricts the jurisdiction of the courts to cases in which the parties shall be citizens, and is entirely silent with respect to residence. A second answer to this strange and latitudinous notion is, that it so far stultifies the sages by whom the Constitution was framed, as to impute to them ignorance of the material distinction existing between citizenship and mere residence or domicil, and of the well known facts, that a person confessedly an alien may be permitted to reside in a country in which he can possess no civil or political rights, or of which he is neither a citizen nor subject; and that for certain purposes a man may have a domicil in different countries, in no one of which he is an actual personal resident.

The correct conclusions upon the question here considered would seem to be these:

That in the establishment of the several communities now the States of this Union, and in the formation of the Federal Government, the African was not deemed politically a person. He was regarded and owned in every State in the Union as property merely, and as such was not and could not be a party or an actor, much less a peer in any compact or form of government established by the States or the United States. That if, since the adoption of the state governments, he has been or could have been elevated to the possession of political rights or powers, this result could have been effected by no authority less potent than that of the sovereignty—the State—exerted to that end, either in the form of legislation, or in some other mode of operation. It could certainly never have been accomplished by the will of an individual operating independently of the sovereign power, and even contravening and controlling that power. That so far as rights and immunities appertaining to citizens have been defined and secured by the Constitution and laws of the United States, the African race is not and never was recognized either by the language or purposes of the former; and it has been expressly excluded by every Act of Congress providing for the creation of citizens by naturalization, these laws, as has already been remarked, being restricted to free white aliens exclusively.

But it is evident that, after the formation of the Federal Government by the adoption of the Constitution, the highest exertion of State power would be incompetent to bestow a character or status created by the Constitution, or conferred in virtue of its authority only. Upon those, therefore, who were not originally parties to the federal compact, or who are not admitted and adopted as parties thereto, in the mode prescribed by its paramount authority, no State could have power to bestow the character or the

rights and privileges exclusively reserved by the States for the action of the Federal Government by that compact.

The States, in the exercise of their political power, might, with reference to their peculiar government and jurisdiction, guaranty the rights of person and property, and the enjoyment of civil and political privileges, to those whom they should be disposed to make the objects of their bounty: but they could not reclaim or exert the powers which they had invested exclusively in the government of the United States. They could not add to or change in any respect the class of persons to whom alone the character of citizen of the United States appertained, at the time of the adoption of the Federal Constitution. They could not create citizens of the United States by any direct or indirect proceeding.

According to the view taken of the law, as applicable to the demurrer to the plea in abatement in this cause, the questions subsequently raised upon the several pleas in bar might be passed by, as requiring neither a particular examination, nor an adjudication directly upon them. But as these questions are intrinsically of primary interest and magnitude, and have been elaborately discussed in argument, and as with respect to them the opinions of a majority of the court, including my own, are perfectly coincident, to me it seems proper that they should here be fully considered, and, so far as it is practicable for this court to accomplish such an end, finally put to rest.

The questions, then, to be considered upon the several pleas in bar, and upon the agreed statement of facts between the counsel, are: 1st. Whether the admitted master and owner of the plaintiff, holding him as his slave in the State of Missouri, and in conformity with his rights guarantied to him by the laws of Missouri then and still in force, by carrying with him for his own benefit and accommodation, and as his own slave, the person of the plaintiff during the commorancy of the master within the State of Illinois, had, upon his return with his slave into the State of Missouri, forfeited his rights as master, by reason of any supposed operation of the prohibitory provision in the Constitution of Illinois, beyond the proper territorial jurisdiction of the latter State. 2d. Whether a similar removal of the plaintiff by his master from the State of Missouri, and his retention in service at a point included within no State, but situated north of thirty-six degrees thirty minutes of north latitude, worked a forfeiture of the right of property of the master, and the manumission of the plaintiff.

In considering the first of these questions, the acts of declarations of the master, as expressive of his purpose to emancipate, may be thrown out of view, since none will deny the right of the owner to relinquish his interest in any subject of property at any time or in any place. The inquiry here bears no relation to acts or declarations of the owner as expressive of his intent or purpose to make such a relinquishment; it is simply a question whether, irrespective of such purpose and in opposition thereto, that relinquishment can be enforced against the owner of property within his own country, in defiance of every guaranty promised by its laws; and this through the instrumentality of a claim to power entirely foreign and extraneous with reference to himself, to the origin and foundation of his title, and to the independent authority of his country. A conclusive negative answer to such an inquiry is at once supplied, by announcing a few familiar and settled principles and doctrines of public law.

Vattel, in his chapter on the general principle of the laws of nations, section 15th, tells us, that "nations being free and independent of each other in the same manner that men are naturally free and independent, the second general law of their society is, that each nation should be left in the peaceable enjoyment of that liberty which she inherits from nature."

"The natural society of nations," says this writer, "cannot subsist unless the natural rights of each be respected." In section 16th he says, "as a consequence of that liberty and independence, it exclusively belongs to each nation to form her own judgment of what her conscience prescribes for her—of what it is proper or improper for her to do; and of course it rests whether she can perform any office for another nation without neglecting a duty she owes to herself. In all cases, therefore, in which a nation has the right of judging what her duty requires, no other nation can compel her to act in such or such a particular manner, for any attempt at such compulsion would be an infringement on the liberty of nations." Again, in section 18th of the same chapter, "nations composed of men, and considered as so many free persons living together in a

state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not produce any difference. A small republic is no less a sovereign state than the most powerful kingdom."

So, in section 20: "A nation, then, is mistress of her own actions, so long as they do not affect the proper and perfect rights of any other nation—so long as she is only internally bound, and does not lie under any external and perfect obligation. If she makes an ill use of her liberty, she is guilty of a breach of duty; but other nations are bound to acquiesce in her conduct, since they have no right to dictate to her. Since nations are free, independent, and equal, and since each possesses the right of judging, according to the dictates of her conscience, what conduct she is to pursue, in order to fulfill her duties, the effect of the whole is to produce, at least externally, in the eyes of mankind, perfect equality of rights between nations, in the administration of their affairs, and in the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgement."

Chancellor Kent, in the 1st volume of his Commentaries, lecture 2d, after collating the opinions of Grotius, Heineccius, Vattel, and Rutherford, enunciates the following positions as sanctioned by these and other learned publicists, *viz.*: "nations are equal in respect to each other, and entitled to claim equal consideration for their rights, whatever may be their relative dimensions and strength, or however greatly they may differ in government, religion, or manners. This perfect equality and entire independence of all distinct States is a fundamental principle of public law. It is a necessary consequence of this equality, that each nation has a right to govern itself as it may think proper, and no one nation is entitled to dictate a form of government or religion, or a course of internal policy to another." This writer gives some instances of the violation of this great national immunity, and amongst them the constant interference by the ancient Romans, under the pretext of settling disputes between their neighbors, but with the real purpose of reducing those neighbors to bondage; the interference of Russia, Prussia, and Austria, for the dismemberment of Poland; the more recent invasion of Naples by Austria in 1821, and of Spain by the French Government in 1823, under the excuse of suppressing a dangerous spirit of international revolution and reform.

With reference to this right of self-government in independent sovereign States, an opinion has been expressed, which, whilst it concedes this right as inseparable from, and as a necessary attribute of sovereignty and independence, asserts, nevertheless, some implied and paramount authority of a supposed international law, to which this right of self-government must be regarded and exerted as subordinate; and from which independent and sovereign States can be exempted only by a protest, or by some public and formal rejection of that authority. With all respect for those by whom this opinion has been professed, I am constrained to regard it as utterly untenable, as palpably inconsistent, and as presenting in argument a complete *felo de se*.

Sovereignty, independence, and a perfect right of self-government, can signify nothing less than a superiority to and an exemption from all claims by any extraneous power, however expressly they may be asserted, and render all attempts to enforce such claims merely attempts at usurpation. Again; could such claims from extraneous sources be regarded as legitimate, the effort to resist or evade them, by protest or denial, would be as irregular and unmeaning as it would be futile. It could in nowise affect the question of superior right. For the position here combated, no respectable authority has been, and none, it is thought, can be adduced. It is certainly irreconcilable with the doctrines already cited from the writers upon public law.

Neither the case of James Somersett, 20 Howell's St. Tr. so often vaunted as the proud evidence of devotion to freedom under a government which has done as much perhaps to extend the reign of slavery as all the world besides; nor does any decision founded upon the authority of Somersett's case, when correctly expounded, assail or impair the principle of national equality, enunciated by each and all of the publicists already referred to. In the case of Somersett, although the applicant for the habeas corpus and the individual claiming property in that applicant were both subjects and residents within the British Empire, yet the decision cannot be correctly understood as ruling absolutely and under all circumstances against the right of property in the claimant. That decision goes no farther than to determine, that within the realm of England there was no authority to justify the

detention of an individual in private bondage. If the decision in Somersett's case had gone beyond that point, it would have presented the anomaly of a repeal by laws enacted for and limited in their operation to the realm alone, of other laws and institutions established for places and subjects without limits of the realm of England; laws and institutions at that very time, and long subsequently, sanctioned and maintained under the authority of the British Government, and which the full and combined action of the King and Parliament was required to abrogate.

But could the decision in Somersett's case be correctly interpreted as ruling the doctrine which it has been attempted to deduce from it, still that doctrine must be considered as having been overruled by the lucid and able opinion of Lord Stowell in the more recent case of The Slave Grace, reported in the second volume of Haggard, p. 94; in which opinion, whilst it is conceded by the learned judge that there existed no power to coerce the slave whilst in England, that yet, upon her return to the Island of Antigua, her status as a slave was revived, or, rather, that the title of the owner to the slave as property had never been extinguished, but had always existed in that Island. If the principle of this decision be applicable as between different portions of one and the same empire, with how much more force does it apply as between nations or governments entirely separate, and absolutely independent of each other? For in this precise attitude the States of this Union stand with reference to this subject, and with reference to the tenure of every description of property vested under their laws and held within their territorial jurisdiction.

A strong illustration of the principle ruled by Lord Stowell, and of the effect of that principle, even in a case of express contract, is seen in the case of *Lewis v. Fullerton*, decided by the Supreme Court of Virginia, and reported in the first volume of Randolph, p. 15. The case was this: a female slave, the property of a citizen in the State of Ohio, was taken from his possession under a writ of habeas corpus, and set at liberty. Soon, or immediately after, by agreement between this slave and her master, a deed was executed in Ohio by the latter, containing a stipulation that this slave should return to Virginia, and after a service of two years in that State should there be free. The law of Virginia regulating emancipation required that deeds of emancipation should, within a given time from their date, be recorded in the courts of the county in which the grantor resided, and declared that deeds with regard to which this requisite was not complied with should be void. Lewis, an infant son of this female, under the rules prescribed in such cases, brought an action, in *forma pauperis*, in one of the courts of Virginia, for the recovery of his freedom, claimed in virtue of the transactions above mentioned. Upon an appeal to the Supreme Court from a judgement against the plaintiff, Roane, Justice, in delivering the opinion of the court, after disposing of other questions discussed in that case, remarks:

"As to the deed of emancipation contained in the record, that deed, taken in connection with the evidence offered in support of it, shows that it had a reference to the State of Virginia; and the testimony shows that it formed a part of this contract, whereby the slave Milly was to be brought back (as she was brought back) into the State of Virginia. Her object was, therefore, to secure her freedom by the deed within the State of Virginia, after the time should have expired for which she had intended herself, and when she should be found abiding within the State of Virginia.

If, then, this contract had an eye to the State of Virginia for its operation and effect, the *lex loci* ceased to operate. In that case it must, to have its effect, conform to the laws of Virginia. It is insufficient under those laws to effectuate an emancipation, for want of a due recording in the county court, as was decided in the case of *Givens v. Mann*, 6 Munf. 190, in this court. It is also ineffectual within the Commonwealth of Virginia for another reason. The *lex loci* is also to be taken subject to the exception, that it is not to be enforced in another country, when it violates some moral duty or the policy of that country, or is not consistent with a positive right secured to a third person or party by the laws of that country in which it is sought to be enforced. In such a case we are told, 'magis jus nostrum quam jus alienum servemus.'" Huberus, tom. 2. lib. 1, tit. 3; 2 Fonblanque, p. 444. "That third party, in this instance, is the Commonwealth of Virginia, and her policy and interests are also to be attended to. These turn the scale against the *lex loci* in the present instance."

The second or last mentioned position assumed for the plaintiff under the pleas in bar, as it rests mainly if not solely upon the provision

of the Act of Congress of March 6, 1820, prohibiting slavery in Upper Louisiana north of thirty-six degrees thirty minutes north latitude, popularly called the Missouri Compromise, that assumption renews the question, formerly so zealously debated, as to the validity of the provision in the Act of Congress, and upon the constitutional competency of Congress to establish it.

Before proceeding, however, to examine the validity of the prohibitory provision of the law, it may, so far as the rights involved in this cause are concerned, be remarked, that conceding to that provision the validity of a legitimate exercise of power, still this concession could by no rational interpretation imply the slightest authority for its operation beyond the territorial limits comprised within its terms; much less could there be inferred from it a power to destroy or in any degree to control rights, either of person or property, entirely within the bounds of a distinct and independent sovereignty—rights invested and fortified by the guaranty of that sovereignty. These surely would remain in all their integrity, whatever effect might be ascribed to the prohibition within the limits defined by its language.

But beyond and in defiance of this conclusion, inevitable and undeniable as it appears, upon every principle of justice or sound induction, it has been attempted to convert this prohibitory provision of the Act of 1820 not only into a weapon with which to assail the inherent—the necessary inherent—powers of independent sovereign governments, but into a means of forfeiting that equality of rights and immunities which are the birthright or the donative from the Constitution of every citizen of the United States within the length and breadth of the nation. In this attempt, there is asserted power in Congress, whether from incentives or interest, ignorance, faction, partiality or prejudice, to bestow upon a portion of the citizens of this nation that which is the common property and privilege of all—the power, in fine, of confiscation, in retribution for no offense, or, if for an offense, for that of accidental locality only.

It may be that, with respect to future cases, like the one now before the court, there is felt an assurance of the impotence of such a pretension; still, the fullest conviction of the result can impart to it no claim to forbearance, nor dispense with the duty of antipathy and disgust at its sinister aspect, whenever it may be seen to scowl upon the justice, the order, the tranquillity, and fraternal feeling, which are the surest, nay, the only means, of promoting or preserving the happiness and prosperity of the nation, and which were the great and efficient incentives to the formation of this government.

The power of Congress to impose the prohibition in the 8th section of the Act of 1820 has been advocated upon an attempted construction of the 2d clause of the 3d section of the 4th article of the Constitution, which declares that "Congress shall have the power to dispose of and to make all needful rules and regulations respecting the territory and other property belonging to the United States."

In the discussions in both houses of Congress, at the time of adopting this 8th section of the Act of 1820, great weight was given to the peculiar language of this clause, *viz.*: territory and other property belonging to the United States, as going to show that the power of disposing of and regulating, thereby vested in Congress, was restricted to a proprietary interest in the territory or land comprised therein, and did not extend to the personal or political rights of citizens or settlers, inasmuch as this phrase in the Constitution, "territory or other property," identified territory with property, and inasmuch as citizens or persons could not be property, and especially were not property belonging to the United States. And upon every principle or reason or necessity, this power to dispose of and to regulate the territory of the nation could be designed to extend no farther than to its preservation and appropriation to the uses of those to whom it belonged, *viz.*: the nation. Scarcely anything more illogical or extravagant can be imagined than the attempt to deduce from this provision in the Constitution a power to destroy or in any wise to impair the civil and political rights of the citizens of the United States, and much more so the power to establish inequalities amongst those citizens by creating privileges in one class of those citizens, and by the disfranchisement of other portions or classes, by degrading them from the position they previously occupied.

There can exist no rational or natural connection or affinity between a pretension like this and the power vested by the Constitution in Congress with regard to the territories; on the

contrary, there is an absolute incongruity between them.

But whatever the power vested in Congress, and whatever the precise subject to which that power extended, it is clear that the power related to a subject appertaining to the United States, and one to be disposed of and regulated for the benefit and under the authority of the United States. Congress was made simply the agent or trustee for the United States, and could not, without a breach of trust and a fraud, appropriate the subject of the trust to any other beneficiary or *cestui que trust* than the United States, or to the people of the United States, upon equal grounds, legal or equitable. Congress could not appropriate that subject to any one class or portion of the people, to the exclusion of others, politically and constitutionally equals; but every citizen would if anyone could claim it, have the like rights of purchase, settlement, occupation, or any other right, in the national territory.

Nothing can be more conclusive to show the equality of this with every other right in all the citizens of the United States, and the iniquity and absurdity of the pretension to exclude or to disfranchise a portion of them because they are the owners of slaves, than the fact that the same instrument, which imparts to Congress its very existence and its every function, guaranties to the slaveholder the title to his property, and gives him the right to its reclamation throughout the entire extent of the nation; and farther, that the only private property which the Constitution has specifically recognized, and has imposed it as a direct obligation both on the States and the Federal Government to protect and enforce, is the property of the master in his slave; no other right of property is placed by the Constitution upon the same high ground, nor shielded by a similar guaranty.

Can there be imputed to the sages and patriots by whom the Constitution was framed, or can there be detected in the text of that Constitution, or in any rational construction or implication deducible therefrom, a contradiction so palpable as would exist between a pledge to the slaveholder of an equality with his fellow-citizens, and of the formal and solemn assurance for the security and enjoyment of his property, and a warrant given, as it were, *uno flatu*, to another, to rob him of that property, or to subject him to proscription and disfranchisement for processing or for endeavoring to retain it? The injustice and extravagance necessarily implied in a supposition like this, cannot be rationally imputed to the patriotic or the honest, or to those who were merely sane.

A conclusion in favor of the prohibitory power in Congress, as asserted in the 8th section of the Act of 1820, has been attempted, as deducible from the precedent of the Ordinance of the Convention of 1787, concerning the cession by Virginia of the territory northwest of the Ohio; the provision in which Ordinance, relative to slavery, it has been attempted to impose upon other and subsequently acquired territory.

The first circumstance which, in the consideration of this provision, impresses itself upon my mind, is its utter futility and want of authority. This court has, in repeated instances, ruled, that whatever may have been the force according to this Ordinance of 1787 at the period of its enactment, its authority and effect ceases, and yielded to the paramount authority of the Constitution, from the period of the adoption of the latter. Such is the principle ruled in the cases of *Pollard's Lessee v. Hagan*, 3 How 212; *Permoli v. New Orleans*, 3 How. 589; *Strader v. Graham*, 10 How. 82. But apart from the superior control of the Constitution, and anterior to the adoption of that instrument, it is obvious that the inhibition in question never had and never could have any legitimate and binding force. We may seek in vain for any power in the convention, either to require or to accept a condition or restriction upon the cession like that insisted on; a condition inconsistent with, and destructive of the object of the grant. The cession was, as recommended by the old Congress in 1780, made originally and completed in terms to the United States, i.e., for the people, all the people, of the United States. The condition subsequently sought to be annexed in 1787 (declared, too, to be perpetual and immutable), being contradictory to the terms and destructive of the purposes of the cession, and after the cession was consummated, and the powers of the ceding party terminated, and the rights of the grantees, the people of the United States, vested, must necessarily, so far, have been *ab initio* void. With respect to the power of the convention to impose this inhibition, it seems to be pertinent in this place to recur to the opinion of one contemporary with the establishment of the government, and whose distinguished services in the formation and adoption of our national charter, point him out

as the *artifex maximus* of our federal system. James Madison, in the year 1819, speaking with reference to the prohibitory power claimed by Congress, then threatening the very existence of the Union, remarks of the language of the 2d clause of the 3d section of article 4th of the Constitution, "that it cannot be well extended beyond a power over the territory as property, and the power to make provisions really needful or necessary for the government of settlers, until ripe for admission into the Union."

Again he says, "with respect to what has taken place in the Northwest Territory, it may be observed that the Ordinance giving it its distinctive character on the subject of slaveholding proceeded from the old Congress, acting with the best intentions, but under a charter which contains no shadow of the authority exercised; and it remains to be decided how far the states formed within the Territory, and admitted into the Union, are on a different footing from its other member as to their legislative sovereignty. As to the power of admitting new States into the federal compact, the questions offering themselves are, whether Congress can attach conditions, or the new States concur in conditions, which after admission would abridge or enlarge the constitutional rights of legislation common to other States; whether Congress can, by a compact with a new State, take power either to or from itself, or place the new member above or below the equal rank and rights possessed by the others; whether all such stipulations expressed or implied would not be nullities, and be so pronounced when brought to a practical test. It falls within the scope of your inquiry to state the fact, that there was a proposition in the convention to discriminate between the old and the new States by an article in the Constitution. The proposition, happily, was rejected. The effect of such a discrimination is sufficiently evident."[2]

In support of the Ordinance of 1787, there may be adduced the semblance at least of obligation deducible from compact, the form of assent or agreement between the grantor and grantee; but this form of similitude, as is justly remarked by Mr. Madison, is rendered null by the absence of power or authority in the contracting parties, and by the more intrinsic and essential defect of incompatibility with the rights and avowed purposes of those parties, and with their relative duties and obligations to others. If, then, with the attendant formalities of assent or compact, the restrictive power claimed was void as to the immediate subject of the Ordinance, how much more unfounded must be the pretension to such a power as derived from that source (*viz.*: the Ordinance of 1787), with respect to territory acquired by purchase or conquest under the supreme authority of the Constitution—territory not the subject of mere donation, but obtained in the name of all, by the combined efforts and resources of all, and with no condition annexed or pretended.

In conclusion, my opinion is, that the decision of the Circuit Court, upon the law arising upon the several pleas in bar, is correct, but that it is erroneous in having sustained the demurrer to the plea in abatement of the jurisdiction; that for this error the decision of the Circuit Court should be reversed, and the cause remanded to that court, with instructions to abate the action, for the reason set forth and pleaded in the plea in abatement.

In the foregoing examination of this cause, the circumstance that the questions involved therein had been previously adjudged between these parties by the court of the State of Missouri, has not been adverted to; for although it has been ruled by this court, that in instances of concurrent jurisdiction, the court first obtaining possession or cognizance of the controversy should retain and decide it, yet, as in this case there had been no plea, either of a former judgment or of autre action pendent, it was thought that the fact of a prior decision, however conclusive it might have been if regularly pleaded, could not be incidentally taken into view.

Mr. Justice Campbell:

I concur in the judgment pronounced by the Chief Justice, but the importance of the cause, the expectation and interest it has awakened, and the responsibility involved in its determination, induce me to file a separate opinion.

The case shows that the plaintiff, in the year 1834, was a negro slave in Missouri, the property of Dr. Emerson, a surgeon in the Army of the United States. In 1834, his master took him to the military station at Rock Island, on the border of Illinois, and in 1836 to Fort Snelling, in the present Minnesota, then Wisconsin Territory. While at Fort Snelling, the plaintiff married a slave who was there with her master, and two

[2] Letter from James Madison to Robert Walsh, November 27th, 1819, on the subject of the Missouri Compromise.

children have been born of this connection; one during the journey of the family in returning to Missouri, and the other after their return to that State.

Since 1838, the plaintiff and the members of his family have been in Missouri in the condition of slaves. The object of this suit is to establish their freedom. The defendant, who claims the plaintiff and his family, under the title of Dr. Emerson, denied the jurisdiction of the Circuit Court, by the plea that the plaintiff was a negro of African blood, the descendant of Africans who had been imported and sold in this country as slaves, and thus he had no capacity as a citizen of Missouri to maintain a suit in the Circuit Court. The court sustained a demurrer to this plea; a trial was then had upon the general issue, and special pleas to the effect that the plaintiff and his family were slaves belonging to the defendant.

My opinion in this case is not affected by the plea to the jurisdiction, and I shall not discuss the questions it suggests. The claim of the plaintiff to freedom depends upon the effect to be given to his absence from Missouri, in company with his master, in Illinois and Minnesota, and this effect is to be ascertained by a reference to the laws of Missouri. For the trespass complained of was committed upon one claiming to be a freeman and a citizen, in that State, and who had been living for years under the dominion of its laws. And the rule is, that whatever is a justification where the thing is done, must be a justification in the forum where the case is tried.

20 How. St. Tri. 234; Cowp. S. C. 161.

The Constitution of Missouri recognizes slavery as a legal condition, extends guaranties to the masters of slaves, and invites immigrants to introduce them, as property, by a promise of protection. The laws of the State charge the master with the custody of the slave, and provide for the maintenance and security of their relation.

The Federal Constitution and the Acts of Congress provide for the return of escaping slaves within the limits of the Union. No removal of the slave beyond the limits of the State, against the consent of the master, nor residence there in another condition, would be regarded as an effective manumission by the courts of Missouri, upon his return to the State. "*Sicut liberis captis status restituitur sic servus domino.*" Nor can the master emancipate the slave within the State except through the agency of a public authority. The inquiry arises, whether the manumission of the slave is effected by his removal, with the consent of the master, to community where the law of slavery does not exist, in a case where neither the master nor slave discloses a purpose to remain permanently, and where both parties have continued to maintain their existing relations. What is the law of Missouri in such a case? Similar inquiries have arisen in a great number of suits, and the discussions in the State courts have relieved the subject of much of its difficulty.

12 B. M. Ky. 545; *Foster v. Foster*, 10 Gratt. Va. 485; 4 Hrr. & McH. Md. 295; *Scott v. Emerson* 15 Mo. 576; 4 Rich. S. C. 186; 17 Mo. 434; 15 Mo. 596; 5 B. M. 173; 8 B. M. 540, 633; 9 B. M. 565; 5 Leigh, 614; 1 Rand. 15; 18 Pick. 193.

The result of these discussions is, that, in general, the status, or civil and political capacity of a person, is determined, in the first instance, by the law of the domicil where he is born; that the legal effect on persons, arising from the operation of the law of that domicil, is not indelible, but that a new capacity or status may be acquired by a change of domicil. That questions of status are closely connected with considerations arising out of the social and political organization of the State where they originate, and each sovereign power must determine them within its own territories.

A large class of cases has been decided upon the second of the propositions above stated, in the Southern and Western courts—cases in which the law of the actual domicil was adjudged to have altered the native condition and status of the slave, although he had never actually possessed the status of freedom in that domicil.

*Rankin v. Lydia*, 2 A. K. Marsh. 467; *Harny v. Decker*, Walk. Miss. 36; 4 Mart. 385; 1 Mo. 472; *Hunter v. Fulcher*, 1 Leigh, 172.

I do not impugn the authority of these cases. No evidence is found in the record to establish the existence of a domicil acquired by the master and slave, either in Illinois or Minnesota. The master is described as an officer of the army, who was transferred from one station to another, along the Western frontier, in the line of his duty, and who, after performing the usual tours of service, returned to Missouri; these slaves returned to Missouri with him, and had been there for near fifteen years, in that condition, when this suit was instituted. But absence, in the performance of military duty, without more, is a fact of no importance in determining a question

of a change of domicil. Questions of that kind depend upon acts and intentions, and are ascertained from motives, pursuits, the condition of the family, and fortune of the party, and no change will be inferred, unless evidence shows that one domicil was abandoned, and there was an intention to acquire another.

11 L. & Eq. 6; 6 exch. 217; 6 M. & W. 511; 2 Curt. Ecc. 368.

The cases first cited deny the authority of a foreign law to dissolve relations which have been legally contracted in the State where the parties are, and have their actual domicil—relations which were never questioned during their absence from that State—relations which are consistent with the native capacity and condition of the respective parties, and with the policy of the State where they reside; but which relations were inconsistent with the policy or laws of the State or Territory within which they had been for a time, and from which they had returned, with these relations undisturbed. It is upon the assumption, that the law of Illinois or Minnesota was indelibly impressed upon the slave, and its consequences carried into Missouri, that the claim of the plaintiff depends. The importance of the case entitles the doctrine on which it rests to a careful examination.

It will be conceded, that in countries where no law or regulation prevails, opposed to the existence and consequences of slavery, persons who are born in that condition in a foreign State, would not be liberated by the accident of their introgression. The relation of domestic slavery is recognized in the law of nations, and the interference of the authorities of one State with the rights of a master belonging to another, without a valid cause is a violation of that law.

Wheat. Law of Na. 724; 5 Stats. at L. 601; calh. Sp. 378; Reports of the Com. U. S. and G. B. 187, 238, 241.

The public law of Europe formerly permitted a master to reclaim his bondsman, within a limited period, wherever he could find him, and one of the capitularies of Charlemagne abolishes the rule of prescription. He directs, "that wheresoever, within the bounds of Italy, either the runaway slave of the King, or of the church, or of any other man, shall be found by his master, he shall be restored without any bar or prescription of years; yet upon the provision that the master be a Frank or German, or of any other nation (foreign); but if he be a Lombard or a Roman, he shall acquire or receive his slaves by that law which has been established from ancient times among them." Without referring for precedents abroad, or to the colonial history, for similar instances, the history of the Confederation and Union affords evidence to attest the existence of this ancient law. In 1783, Congress directed General Washington to continue his remonstrances to the commander of the British forces respecting the permitting negroes belonging to the citizens of these States to leave New York, and to insist upon the discontinuance of that measure. In 1788, the resident minister of the United States at Madrid was instructed to obtain from the Spanish Crown orders to its governors in Louisiana and Florida, "to permit and facilitate the apprehension of fugitive slaves from the States, promising that the States would observe the like conduct respecting fugitives from Spanish subjects." The committee that made the report of this resolution consisted of Hamilton, Madison an Sedgwick (2 Hamilton's Works, 473); and the clause in the Federal Constitution providing for the restoration of fugitive slaves is a recognition of this ancient right, and of the principle that a change of place does not effect a change of condition. The diminution of the power of a master to reclaim his escaping bondsman in Europe commenced in the enactment of laws of prescription in favor of privileged communes. Bremen, Spire, Worms, Vienna, and Ratisbon, in Germany; Carcassonne, Beziers, Toulouse, and Paris, in France, acquired privileges on this subject at an early period. The Ordinance of William the Conqueror, that a residence of any of the servile population of England, for a year and a day, without being claimed, in any city, burgh, walled town, or castle of the King, should entitle them to perpetual liberty, is a specimen of these laws.

The earliest publicist who has discussed this subject is Bodin, a jurist of the sixteenth century, whose work was quoted in the early discussions of the courts in France and England on this subject. He says: "In France, although there be some remembrance of old servitude, yet it is not lawful here to make a slave or to buy any one of others, in so much as the slaves of strangers, as soon as they set their foot within France, become frank and free, as was determined by an old decree of the court of Paris against an ambassador of Spain, who had brought a slave with him into France." He states another case, which arose in the City of Toulouse, of a

Genoese merchant, who had carried a slave into that city on his voyage from Spain; and when the matter was brought before the magistrates, the "procureur of the city, out of the records, showed certain ancient privileges given unto them of Toulouse, wherein it was granted that slaves, so soon as they should come into Toulouse, should be free." These cases were cited with much approbation in the discussion of the claims of the West India slaves of Verdelin for freedom, in 1738, before the judges in admiralty (15 Causes Celébrés, p. 1; 2 Masse Droit Com. sec. 58) and were reproduced before Lord Mansfield, in the cause of Somersett, in 1772. Of the cases cited by Bodin, it is to be observed that Charles V. of France exempted all the inhabitants of Paris from serfdom, or other feudal incapacities, in 1371, and this was confirmed by several of his successors (3 Dulaire Hist. de Par. 546; Broud. Cout. de Par. 21), and the Ordinance of Toulouse is preserved as follows: "Civitas Tholosana fuit et erit sine fine libera, adeo ut servi et ancillæ sclavi et sclavæ, dominos habentes, cum rebus vel sine rebus suis, and Tholosam vel infrà terminos extra urbem terminatos accedentes acquirant libertatem."

Hist. de Langue, tome 3, p. 69; Ibid. 6, p. 8; Loysel Inst. b. 1. sec. 6.

The decisions were made upon special ordinances, or charters, which contained positive prohibitions of slavery, and where liberty had been granted as a privilege; and the history of Paris furnishes but little support for the boast that she was a "*sacro sancta civitas*," where liberty always had an asylum, or for the "self-complacent rhapsodies" of the French advocates in the case of Verdelin, which amused the grave lawyers who argued the case of Somersett. The case of Verdelin was decided upon a special ordinance, which prescribed the conditions on which West India slaves might be introduced into France, and which had been disregarded by the master.

The case of Somersett was that of a Virginia slave carried to England by his master in 1770, and who remained there two years. For some cause, he was confined on a vessel destined to Jamaica, where he was to be sold. Lord Mansfield, upon a return to a habeas corpus, states the question involved. "Here, the person of the slave himself," he says, "is the immediate subject of inquiry. Can any dominion, authority or coercion be exercised in this country, according to the American laws?" He answers: "The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme, and yet many of those consequences are absolutely contrary to the municipal law of England." Again he says: "The return states that the slave departed, and refused to serve; whereupon, he was kept to be sold abroad." "So high an act of dominion must be recognized by the law of the country where it is used. The power of the master over his slave has been extremely different in different countries." "The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself, from whence it was created, are erased from the memory. It is so odious, that nothing can be suffered to support it but positive law." That there is a difference in the systems of States, which recognize and which do not recognize the institution of slavery, cannot be disguised. Constitutional law, punitive law, police, domestic economy, industrial pursuits, and amusements, the modes of thinking and of belief of the population of the respective communities, all show the profound influence exerted upon society by this single arrangement. This influence was discovered in the Federal Convention, in the deliberations on the plan of the Constitution. Mr. Madison observed, "that the States were divided into different interests, not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from the effects of their having or not having slaves. These two causes concur in forming the great division of interests in the United States."

The question to be raised with the opinion of Lord Mansfield, therefore, is not in respect to the incongruity of the two systems, but whether slavery was absolutely contrary to the law of England; for if it was so, clearly, the American laws could not operate there. Historical research ascertains that at the date of the Conquest the rural population of England were generally in a servile condition, and under various names, denoting slight variances in condition, they were sold with the land like cattle, and were a part of its living money. Traces of the existence of African slaves are to be found in the early chronicles. Parliament, in the time of Richard II., and also of Henry VIII., refused to adopt a general law of emancipation. Acts of emancipation by

the last-named monarch and by Elizabeth are preserved.

The African slave trade had been carried on, under the unbounded protection of the Crown, for near two centuries, when the case of Somersett was heard, and no motion for its suppression had ever been submitted to Parliament, while it was forced upon and maintained in unwilling colonies by the Parliament and Crown of England at that moment. Fifteen thousand negro slaves were then living in that island, where they had been publicly sold for near a century in the markets of London. In the northern part of the kingdom of Great Britain there existed a class of from 30,000 to 40,000 persons of whom the Parliament said, in 1775 (15 George III, chap. 28) "many colliers, coal heavers, and salters, are in a state of slavery or bondage, bound to the collieries and salt works, where they work for life, transferable with the collieries and salt works when their original masters have no use for them; and whereas the emancipating or setting free the colliers, coal heavers, and salters, in Scotland, who are now in a state of servitude, gradually and upon reasonable conditions, would be the means of increasing the number of colliers, coal heavers, and salters, to the great benefit of the public, without doing any injury to the present masters, and would remove the reproach of allowing such a state of servitude to exist in a free country." etc.: and again, in 1799, "they declare that many colliers and coal heavers still continue in a state of bondage." No statute, from the Conquest till the 15 George III., had been passed upon the subject of personal slavery. These facts have led the most eminent civilian of England to question the accuracy of this judgment, and to insinuate that in this judgment the offense of *ampliare jurisdictionem* by private authority was committed by the eminent magistrate who pronounced it.

This sentence is distinguishable from those cited from the French courts in this: that there positive prohibitions existed against slavery, and the right to freedom was conferred on the immigrant slave by positive law; whereas here the consequences of slavery merely—that is, the public policy— were found to be contrary to the law of slavery. The case of *The Slave Grace*, 2 Hagg. 94, with four others, came before Lord Stowell in 1827, by appeals from the West India vice admiralty courts. They were cases of slaves who had returned to those islands, after a residence in Great Britain, and where the claim to freedom was first presented in the colonial forum. The learned judge in that case said: "This suit fails in its foundation. She (Grace) was not a free person; no injury is done her by her continuance in slavery, and she has no pretensions to any other station than that which was enjoyed by every slave of a family. If she depends upon such freedom conveyed by a mere residence in England, she complains of a violation of right which she possessed no longer than whilst she resided in England, but which totally expired when that residence ceased, and she was imported into Antigua."

The decision of Lord Mansfield was, "that so high an act of dominion" as the master exercises over his slave, in sending him abroad for sale, could not be exercised in England under the American laws, and contrary to the spirit of their own.

The decision of Lord Stowell is, that the authority of the English laws terminated when the slave departed from England. That the laws of England were not imported into Antigua, with the slave, upon her return, and that the colonial forum had no warrant for applying a foreign code to dissolve relations which had existed between persons belonging to that island, and which were legal according to its own system. There is no distinguishable difference between the case before us and that determined in the admiralty of Great Britain.

The complaint here, in my opinion, amounts to this: that the judicial tribunals of Missouri have not denounced as odious the Constitution and laws under which they are organized, and have not superseded them on their own private authority, for the purpose of applying the laws of Illinois, or those passed by Congress for Minnesota, in their stead. The 8th section of the Act of Congress of the 6th March, 1820 (3 Stat. at L. 545), entitled, "An Act to authorize the people of Missouri to form a State government," etc., etc., is referred to as affording the authority to this court to pronounce the sentence which the Supreme Court of Missouri felt themselves constrained to refuse. That section of the Act prohibits slavery in the district of country west of the Mississippi, north of thirty-six degrees thirty minutes north latitude, which belonged to the ancient Province of Louisiana, not included in Missouri.

It is a settled doctrine of this court, that the Federal Government can exercise no power over the subject of slavery within the States, nor control the intermigration of slaves, other than fugitives, among the States. Nor can that government affect the duration of slavery within the States, other than by a legislation over the foreign slave trade. The power of Congress to adopt the section of the Act above cited must, therefore, depend upon some condition of the Territories which distinguishes them from States, and subjects them to a control more extended. The 3d section of the 4th article of the Constitution is referred to as the only and all-sufficient grant to support this claim. It is, that "new States may be admitted by the Congress to this Union; but no new State shall be formed or erected within the jurisdiction of any other State, not any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory, or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

It is conceded, in the decisions of this court, that Congress may secure the rights of the United States in the public domain, provide for the sale or lease of any part of it, and establish the validity of the titles of the purchasers, and may organize territorial governments, with powers of legislation.

3 How. 212; 12 How. 1; Pet. 511; 13 Pet. 436; 16 How. 164.

But the recognition of a plenary power in Congress to dispose of the public domain, or to organize a government over it, does not imply a corresponding authority to determine the internal polity, or to adjust the domestic relations, or the persons who may lawfully inhabit the territory in which it is situated. A supreme power to make needful rules respecting the public domain, and a similar power of framing laws to operate upon persons and things within the territorial limits where it lies, are distinguished by broad lines of demarcation in American history. This court has assisted us to define them. In *Johnson v. McIntosh*, 8 Wheat. 543–605, they say: "According to the theory of the British Constitution, all vacant lands are vested in the Crown; and the exclusive power to grant them is admitted to reside in the Crown, as a branch of the royal prerogative.

All the lands we hold were originally granted by the Crown, and the establishment of a royal government has never been considered as impairing its right to grant lands within the chartered limits of such colony."

And the British Parliament did claim a supremacy of legislation co-extensive with the absoluteness of the dominion of the sovereign over the crown lands. The American doctrine, to the contrary, is embodied in two brief resolutions of the people of Pennsylvania, in 1774: 1st. "That the inhabitants of these Colonies are entitled to the same rights and liberties, within the Colonies, that the subjects born in England are entitled within the realm." 2d. "That the power assumed by Parliament to bind people of these Colonies by statutes, in all cases whatever, is unconstitutional, and therefore the source of these unhappy difficulties." The Congress of 1774, in their statement of rights and grievances, affirm "a free and exclusive power of legislation" in their several provincial Legislatures, "in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed." 1 Jour. Cong. 32

The unanimous consent of the people of the Colonies, then, to the power of their sovereign, "to dispose of and make all needful rules and regulations respecting the territory" of the Crown, in 1774, was deemed by them as entirely consistent with opposition, remonstrance, the renunciation of allegiance, and proclamation of civil war, in preference to submission to his claim of supreme power in the Territories.

I pass now to the evidence afforded during the Revolution and Confederation. The American Revolution was not a social revolution. It did not alter the domestic condition or capacity of persons within the Colonies, not was it designed to disturb the domestic relations existing among them. It was a political revolution, by which thirteen dependent Colonies became thirteen independent States. "The Declaration of Independence was not," says Justice Chase, "a declaration that the united Colonies jointly, in a collective capacity, were independent States, etc., etc., etc., but that each of them was a sovereign and independent State: that is, that each of them had a right to govern itself by its own authority and its

own laws, without any control from any other power on earth."

3 Dall. 199; 4 Cranch, 212,

These sovereign and independent States, being united as a Confederation, by various public acts of cession, became jointly interested in territory, and concerned to dispose of and make all needful rules and regulations respecting it. It is a conclusion not open to discussion in this court, "that there was no territory within the (original) United States, that was claimed by them in any other right than that of some of the confederate States." *Harcourt v. Gaillard*, 12 Wheat. 523. "The question whether the vacant lands within the United States," says Chief Justice Marshall, "became joint property, or belonged to the separate States, was a momentous question, which threatened to shake the American Confederacy to its foundations. This important and dangerous question has been compromised, and the compromise is not now to be contested." 6 Cranch, 87.

The cessions of the States to the Confederation were made on the condition that the territory ceded should be laid out and formed into distinct republican States which would be admitted as members to the Federal Union, having the same rights of sovereignty, freedom and independence, as the other States. The first effort to fulfill this trust was made in 1785, by the offer of a charter or compact to the inhabitants who might come to occupy the land.

Those inhabitants were to form for themselves temporary state governments, founded on the constitutions of any of the States, but to be alterable—at the will of their Legislature; and permanent governments were to succeed these, whenever the population became sufficiently numerous to authorize the State to enter the Confederacy; and Congress assumed to obtain powers from the States to facilitate this object. Neither in the deeds of cession of the States, nor in this compact, was a sovereign power for Congress to govern the Territories asserted. Congress retained power, by this Act, "to dispose of and to make rules and regulations respecting the public domain," but submitted to the people to organize a government harmonious with those of the confederate States.

The next stage in the progress of colonial government was the adoption of the Ordinance of 1787, by eight States, in which the plan of a territorial government, established by Act of Congress, is first seen. This was adopted while the Federal Convention to form the Constitution was sitting. The plan placed the government in the hands of a governor, secretary, and judges, appointed by Congress, and conferred power on them to select suitable laws from the codes of the States, until the population should equal 5,000. A legislative council, elected by the people, was then to be admitted to a share of the legislative authority, under the supervision of Congress; and States were to be formed whenever the number of the population should authorize the measure.

This Ordinance was addressed to the inhabitants as a fundamental compact, and six of its articles define the conditions to be observed in their Constitution and laws. These conditions were designed to fulfill the trust in the agreements of cession, that the States to be formed of the ceded Territories should be "distinct republican States." This Ordinance was submitted to Virginia in 1788, and the 5th article, embodying as it does a summary of the entire Act, was specifically ratified and confirmed by that State. This was an incorporation of the Ordinance into her Act of Cession. It was conceded, in the argument, that the authority of Congress was not adequate to the enactment of the ordinance, and that it cannot be supported upon the Articles of Confederation. To a part of the engagements, the assent of nine states was required, and for another portion no provision had been made in those Articles. Mr. Madison said, in a writing nearly contemporary but before the Confirmatory Act of Virginia, "Congress have proceeded to form new states, to erect temporary governments, to appoint officers for them, and to prescribe the conditions on which such States shall be admitted into the Confederacy; all this has been done, and done without the least color of constitutional authority." Federalist, No. 38. Richard Henry Lee, one of the committee who reported the Ordinance to Congress, transmitted it to General Washington (15th July, 1787), saying: "It seemed necessary, for the security of property among uninformed and perhaps licentious people, as the greater part of those who go there are, that a strong-toned government should exist, and the rights of property be clearly defined." The consent of all the States represented in Congress, the consent of inhabitants of the territory, all concur to support the authority of this enactment. It is apparent, in the frame of the Constitution, that the Convention recognized its validity, and adjusted parts of their work with reference to it.

The authority to admit new States into the Union, the omission to provide distinctly for territorial governments, and the clause limiting the foreign slave trade to States then existing, which might not prohibit it, show that they regarded this territory as provided with a government and organized permanently with a restriction on the subject of slavery. Justice Chase, in the opinion already cited, says of the government before, and it is in some measure true during the Confederation, "that the powers of Congress originated from necessity, and arose out of and were only limited by events, or, in other words, they were revolutionary in their very nature. Their extent depended upon the exigencies and necessities of public affairs;" and there is only one rule of construction, in regard to the acts done, which will fully support them, *viz.*: that the powers actually exercised were rightfully exercised, wherever they were supported by the implied sanction of the State Legislatures, and by the ratifications of the people.

The clauses in the 3d section of the 4th article of the Constitution, relative to the admission of new States, and the disposal and regulation of the territory of the United States, were adopted without debate in the Convention.

There was a warm discussion on the clauses that relate to the subdivision of the States, and the reservation of the claims of the United States and each of the States from any prejudice. The Maryland members revived the controversy in regard to the Crown lands of the Southwest. There was nothing to indicate any reference to a government of territories not included within the limits of the Union; and the whole discussion demonstrates that the Convention was consciously dealing with a Territory whose condition, as to government, had been arranged by a fundamental and unalterable compact.

An examination of this clause of the Constitution, by the light of the circumstances in which the Convention was placed, will aid us to determine its significance. The first clause is, "that new States may be admitted by the Congress into this Union." The condition of Kentucky, Vermont, Rhode Island and the new States to be formed in the Northwest, suggested this, as a necessary addition to the powers of Congress. The next clause, providing for the subdivision of States, and the parties to consent to such an alteration, was required, by the plans on foot, for changes in Massachusetts, New York, Pennsylvania, North Carolina and Georgia. The clause which enables Congress to dispose of and make regulations respecting the public domain, was demanded by the exigencies of an exhausted treasury and a disordered finance, for relief by sales, and the preparation for sales, of the public lands; and the last clause, that nothing in the Constitution should prejudice the claims of the United States or a particular State, was to quiet the jealousy and irritation of those who had claimed for the United States all the unappropriated lands. I look in vain, among the discussions of the time for the assertion of a supreme sovereignty for Congress over the territory then belonging to the United States, or that they might thereafter acquire. I seek in vain for an enunciation that a consolidated power had been inaugurated, whose subject comprehended an empire, and which had no restriction but the discretion of Congress. This disturbing element of the Union entirely escaped the apprehensive provisions of Samuel Adams, George Clinton, Luther Martin, and Patrick Henry; and, in respect to dangers from power vested in a central government over distant settlements, colonies, or provinces, their instincts were always alive. Not a word escaped them, to warn their countrymen that here was a power to threaten the landmarks of this federative Union, and with them the safeguards of popular and constitutional liberty; or that under this Article there might be introduced, on our soil, a single government over a vast extent of country—a government foreign to the persons over whom it might be exercised and capable of binding those not represented by statutes, in all cases whatever. I find nothing to authorize these enormous pretensions, nothing in the expositions of the friends of the Constitution, nothing in the expressions of alarm by its opponents—expressions which have since been developed as prophecies. Every portion of the United States was then provided with a municipal government, which this Constitution was not designed to supersede, but merely to modify as to its condition.

The compacts of cession by North Carolina and Georgia, are subsequent to the Constitution. They adopt the Ordinance of 1787, except the clause respecting slavery. But the precautionary repudiation of that article forms an argument quite as satisfactory to the advocates for federal power, as its introduction would have done. The refusal of a power to Congress to legislate in one place, seems to justify the seizure of

the same power when another place for its exercise is found.

This proceeds from a radical error, which lies at the foundation of much of this discussion. It is, that the Federal Government may lawfully do whatever is not directly prohibited by the Constitution. This would have been a fundamental error, if no amendments to the Constitution had been made. But the final expression of the will of the people of the States, in the 10th Amendment, is, that the powers of the Federal Government are limited to the grants of the Constitution.

Before the cession of Georgia was made, Congress asserted rights, in respect to a part of her territory, which require a passing notice. In 1798 and 1800, Acts for the settlement of limits with Georgia, and to establish a government in the Mississippi Territory were adopted. A territorial government was organized, between the Chattahoochee and Mississippi Rivers. This was within the limits of Georgia. These Acts dismembered Georgia. They established a separate government on her soil, while they rather derisively professed, "that the establishment of that government shall in no respect impair the rights of the State of Georgia, either to the jurisdiction or soil of the territory." The Constitution provided that the importation of such persons as any of the existing States shall think proper to admit, shall not be prohibited by Congress before 1808. By these enactments, a prohibition was placed upon the importation of slaves into Georgia, although her Legislature had made none.

This court have repeatedly affirmed the paramount claim of Georgia to this territory. They have denied the existence of any title in the United States. 6 Cranch. 87; 12 Wheat. 523; 3 How. 212; 13 How. 381. Yet these Acts were cited in the argument as precedents to show the power of Congress in the Territories. These Statutes were the occasion of earnest expostulation and bitter remonstrance on the part of the authorities of the State, and the memory of their injustice and wrong remained long after the legal settlement of the controversy by the compact of 1802. A reference to these Acts terminates what I have to say upon the constitutions of the territory within the original limits of the United States. These constitutions were framed by the concurrence of the States making the cessions, and Congress, and were tendered to immigrants who might be attracted to the vacant territory. The legislative powers of the officers of this government were limited to the selection of laws from the States; and provision was made for the introduction of popular institutions, and their emancipation from federal control, whenever a suitable opportunity occurred. The limited reservation of legislative power to the officers of the Federal Government was excused on the plea of necessity; and the probability is, that the clauses respecting slavery embody some compromise among the statesmen of that time; beyond these, the distinguishing features of the system which the patriots of the Revolution had claimed as their birthright, from Great Britain, predominated in them.

The acquisition of Louisiana, in 1803, introduced another system into the United States. This vast Province was ceded by Napoleon, and its population had always been accustomed to a viceroyal government, appointed by the Crowns of France or Spain. To establish a government constituted on similar principles, and with like conditions, was not an unnatural proceeding.

But there was a great difficulty in finding constitutional authority for the measure. The 3d section of the 4th article of the Constitution, was introduced into the Constitution on the motion of Mr. Gouverneur Morris. In 1803, he was appealed to for information in regard to its meaning. "I am very certain I had it not in contemplation to insert a decree de coercendo imperio in the Constitution of America.* * * I knew then, as well as I do now, that all North America must at length be annexed to us. Happy, indeed, if the lust of dominion stop here. It would, therefore, have been perfectly Utopian to oppose a paper restriction to the violence of popular sentiment, in a popular government." 3 Mor. Writ. 185. A few days later, he makes another reply to his correspondents, "I perceive," he says, "I mistook the drift of your inquiry, which substantially is whether Congress can admit, as a new State, territory which did not belong to the United States when the Constitution was made. In my opinion, they cannot. I always thought, when we should acquire Canada and Louisiana, it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the 3d section of the 4th article, I went as far as circumstances would permit, to establish the exclusion. Candor obliges me to add my belief, that had it been more pointedly expressed, a strong opposition would have been made." 3 Mor. Writ.

192. The first territorial government of Louisiana was an Imperial one, founded upon a French or Spanish model. For a time, the Governor, judges, legislative council, marshal, secretary, and officers of the militia, were appointed by the President[3]

Besides these anomalous arrangements, the acquisition gave rise to jealous inquiries, as to the influence it would exert in determining the men and States that were to be "the arbiters and the rulers" of the destinies of the Union; and unconstitutional opinions, having for their aim to promote sectional divisions, were announced and developed. "Something," said an eminent statesman, "something has suggested to the members of Congress the policy of acquiring geographical majorities. This is a very direct step towards disunion, for it must foster the geographical enmities by which alone it can be effected. This something must be a contemplation of particular advantages to be derived from such majorities; and is it not notorious that they consist of nothing else but usurpations over persons and property, by which they can regulate the internal wealth and prosperity of States and individuals?"

The most dangerous of the efforts to employ geographical political power, to perpetuate a geographical preponderance in the Union, is to be found in the deliberations upon the Act of the 6th of March, 1820, before cited. The attempt consisted of a proposal to exclude Missouri from a place in the Union, unless her people would adopt a constitution containing a prohibition upon the subject of slavery, according to a prescription of Congress. The sentiment is now general, if not universal, that Congress had no constitutional power to impose the restriction. This was frankly admitted at the bar in the course of this argument. The principles which this court have pronounced condemn the pretension then made on behalf of the Legislative Department. In *Groves v. Slaughter*, 15 Pet., the Chief Justice said: "The power over this subject is exclusively with the several States, and each of them has a right to decide for itself whether it will or will not allow persons of this description to be brought within its limits." Justice McLean said: "The Constitution of the United States operates alike in all the States, and one State has the same power over the subject of slavery as every other State." In *Pollard's Lessee v. Hagan*, 3 How. 212, the court say: "The United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in cases where it is delegated, and the court denies the faculty of the Federal Government to add to its powers by treaty or compact."

This is a necessary consequence, resulting from the nature of the Federal Constitution, which is a federal compact among the States, establishing a limited government, with powers delegated by the people of distinct and independent communities, who reserved to their state governments, and to themselves, the powers they did not grant. This claim to impose a restriction upon the people of Missouri involved a denial of the constitutional relations between the people of the States and Congress, and affirmed a concurrent right for the latter, with their people to constitute the social and political system of the new States. A successful maintenance of this claim would have altered the basis of the Constitution. The new States would have become members of a Union defined in part by the Constitution and in part by Congress. They would not have been admitted to "this Union." Their sovereignty would have been restricted by Congress as well as the Constitution. The demand was unconstitutional and subversive, but was prosecuted with an energy, and aroused such animosities among the people, that patriots, whose confidence had not failed during the Revolution, began to despair for the Constitution.[4] Amid the utmost violence of this extraordinary contest, the expedient contained in the 8th section of this Act was proposed, to moderate it, and to avert the catastrophe it menaced. It was not seriously

[3] Mr. Varnum said: "The bill provided such a government as had never been known in the United States." Mr.Eustis: "The government laid down in this bill is certainly a new thing in the United States." Mr. Lucas: "It has been remarked, that this bill establishes elementary principles never previously introduced in the government of any territory of the United States. Granting the truth of this observation," etc. etc. Mr. Macon: "My first objection to the principle contained in this section is, that it establishes species of government unknown to the United States." Mr. Boyle: "Were the President an angel instead of a man, I would not clothe him with this power." Mr. G. W. Campbell: "On examining the section, it will appear that it really establishes a complete despotism." Mr. Sloan: "Can anything be more repugnant to the principles of just government? Can anything be more despotic?—Annals of Congress, 1803–'4.

[4] Mr. Jefferson wrote: "The Missouri question is the most portentous one that ever threatened our Union. In the gloomiest moments of the Revolutionary War, I never had any apprehension equal to that I feel from this source."

debated, nor were its constitutional aspects severely scrutinized by Congress. For the first time, in the history of the country, has its operation been embodied in a case at law, and been presented to this court for their judgment. The inquiry is, whether there are conditions in the constitutions of the Territories which subject the capacity and status of persons within their limits to the direct action of Congress. Can Congress determine the condition and status of persons who inhabit the Territories?

The Constitution permits Congress to dispose of and to make all needful rules and regulations respecting the territory of other property belonging to the United States. This power applies as well to territory belonging to the United States within the States, as beyond them. It comprehends all the public domain, wherever it may be. The argument is, that the power to make "all needful rules and regulations" "is a power of legislation," "a full legislative power;" "that it includes all subjects of legislation in the territory," and is without any limitations, except the positive prohibitions which affect all the powers of Congress. Congress may then regulate or prohibit slavery upon the public domain within the new States, and such a prohibition would permanently affect the capacity of a slave, whose master might carry him to it. And why not? Because no power has been conferred on Congress. This is a conclusion universally admitted. But the power to "make rules and regulations respecting the territory" is not restrained by State lines, nor are there any constitutional prohibitions upon its exercise in the domain of the United States within the States; and whatever rules and regulations respecting territory Congress may constitutionally make, are supreme and are not dependent on the situs of "the territory."

The author of the *Farmer's Letters*, so famous in the ante-revolutionary history, thus states the argument made by the American loyalists to legislate in all cases whatever over the Colonies: "It has been urged with great vehemence against us," he says, "and it seems to be thought their fort, by our adversaries, that a power of regulation is a power of legislation; and a power of legislation, if constitutional, must be universal and supreme, in the utmost sense of the word. It is, therefore, concluded that the Colonies, by acknowledging the power of regulation, acknowledged every other power."

This sophism imposed upon a portion of the patriots of that day. Chief Justice Marshall, in his *Life of Washington*, says "that many of the best informed men in Massachusetts had, perhaps adopted the opinion of the parliamentary right of internal government over the Colonies;" "that the English statute book furnishes many instances of its exercise;" "that in no case recollected, was their authority openly controverted;" and "that the General Court of Massachusetts, on a late occasion, openly recognized the principle."

Marsh. Wash. Vol. II. pp. 75, 76.

But the more eminent men of Massachusetts rejected it; and another patriot of the time employs the instance to warn us of "the stealth with which oppression approaches," and "the enormities towards which precedents travel." And the people of the United States, as we have seen, appealed to the last argument, rather than acquiesce in their authority. Could it have been the purpose of Washington and his illustrious associates, by the use of ambiguous, equivocal, and expansive words, such as "rules," "regulations," "territory," to re-establish in the Constitution of their country that fort which had been prostrated amid the toils and with the sufferings and sacrifices of seven years of war? Are there words to be understood as the Norths, the Grenvilles, Hillsboroughs, Hutchinsons, and Dunmores—in a word, as George III. would have understood them—or are we to look for their interpretation to Patrick Henry or Samuel Adams, to Jefferson, and Jay, and Dickinson; to the sage Franklin, or to Hamilton, who from his early manhood was engaged in combating British constructions of such words? We know that the resolution of Congress of 1780 contemplated that the new States to be formed under their recommendation were to have the same rights of sovereignty, freedom and independence, as the old. That every resolution, cession, compact and ordinance, of the States, observed the same liberal principle. That the Union of the Constitution is a Union formed of equal States; and that new States, when admitted, were to enter "this Union." Had another Union been proposed in "any pointed manner," it would have encountered not only "strong" but successful opposition. The disunion between Great Britain and her colonies originated in the antipathy of the latter to "rules and regulations" made by a remote power respecting their internal policy. In forming the Constitution, this fact

was ever present in the minds of its authors. The people were assured by their most trusted statesman "that the jurisdiction of the Federal Government is limited to certain enumerated objects, which concern all members of the republic," and "that the local or municipal authorities form distinct portions or supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them within its own sphere." Still, this did not content them. Under the lead of Hancock and Samuel Adams, of Patrick Henry and George Mason, they demanded an explicit declaration that no more power was to be exercised than they had delegated. And the 9th and 10th Amendments to the Constitution were designed to include the reserved rights of the States, and the people, within all the sanctions of that instrument, and to bind the authorities, state and federal, by the judicial oath it prescribes, to their recognition and observance. Is it probable, therefore, that the supreme and irresponsible power, which is now claimed for Congress over boundless territories, the use of which cannot fail to react upon the political system of the States, to its subversion, was ever within the contemplation of the statesmen who conducted the counsels of the people in the formation of this Constitution? When the questions that came to the surface upon the acquisition of Louisiana were presented to the mind of Jefferson, he wrote: "I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty-making power as boundless. If it is, then we have no Constitution. If it has bounds, they can be no others than the definitions of the powers which that instrument gives. It specifies and delineates the operations permitted to the Federal Government, and gives the powers necessary to carry them into execution." The publication of the journals of the Federal Convention in 1819, of the debates reported by Mr. Madison in 1840, and the mass of private correspondence of the early statesmen before and since, enable us to approach the discussion of the aims of those who made the Constitution, with some insight and confidence.

I have endeavored, with the assistance of these, to find a solution for the grave and difficult question involved in this inquiry. My opinion is, that the claim for Congress of supreme power in the Territories, under the grant to "dispose of and make all needful rules and regulations respecting territory," is not supported by the historical evidence drawn from the Revolution, the Confederation, or the deliberations which preceded the ratifications of the Federal Constitution. The Ordinance of 1787 depended upon the action of the Congress of the Confederation, the assent of the State of Virginia, and the acquiescence of the people who recognized the validity of that plea of necessity, which supported so many of the Acts of the governments of that time; and the Federal Government accepted the Ordinance as a recognized and valid engagement of the Confederation.

In referring to the precedents of 1798 and 1800, I find the Constitution was plainly violated by the invasion of the rights of a sovereign State, both of soil and jurisdiction; and in reference to that of 1804, the wisest statesmen protested against it, and the President more than doubted its policy and the power of the government.

Mr. John Qunicy Adams, at a later period, says of the last Act, "that the President found Congress mounted to the pitch of passing those acts, without inquiring where they acquired the authority, and he conquered his own scruples as they had done theirs." But this court cannot undertake for themselves the same conquest. They acknowledge that our peculiar security is in the possession of a written Constitution, and they cannot make it blank paper by construction.

They look to its delineation of the operations of the Federal Government, and they must not exceed the limits it marks out, in their administration. The court have said "that Congress cannot exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, beyond what has been delegated." We are then to find the authority for supreme power in the Territories in the Constitution. What are the limits upon the operations of a government invested with the legislative, executive and judiciary powers, and charged with the power to dispose of and to make all needful rules and regulations respecting a vast public domain? The feudal system would have recognized the claim made on behalf

of the Federal Government for supreme power over persons and things in the Territories, as an incident to this title—that is, the title to dispose of and make rules and regulations respecting it.

The Norman lawyers or William the Conqueror would have yielded an implicit assent to the doctrine, that a supreme sovereignty is an inseparable incident to a grant, to dispose of and to make all needful rules and regulations respecting the public domain. But an American patriot, in contrasting the European and American systems, may affirm, "that European sovereigns give lands to their colonists, but reserve to themselves a power to control their property, liberty and privileges; but the American Government sells the lands belonging to the people of the several States (i. e., United States) to their citizens, who are already in the possession of personal and political rights, which the government did not give, and cannot take away." And the advocates for government sovereignty in the Territories have been compelled to abate a portion of the presentations originally made in its behalf, and to admit that the constitutional prohibitions upon Congress operate in the Territories. But a constitutional prohibition is not requisite to ascertain a limitation upon the authority of the several departments of the Federal Government. Nor are the States or people restrained by any enumertaion of definition of their rights or liberties.

To impair or diminish either, the Department must produce an authority from the people themselves, in their Constitution; and as we have seen, a power to make rules and regulations respecting the public domain does not confer a municipal sovereignty over persons and thing upon it. But as this is "thought their fort" by our adversaries, I propose a more definite examination of it. We have seen, Congress does not dispose of or make rules and regulations respecting domain belonging to themselves, but belonging to the United States.

These conferred on their mandatory, Congress, authority to dispose of the territory which belonged to them in common; and to accomplish that object beneficially and effectually, they gave an authority to make suitable rules and regulations respecting it. When the power of disposition is fulfilled, the authority to make rules and regulations terminates, for it attaches only upon territory "belonging to the United States."

Consequently, the power to make rules and regulations, from the nature of the subject, is restricted to such administrative and conservatory Acts as are needful for the preservation of the public domain, and its preparation for sale or disposition. The system of land surveys; the reservations for schools, internal improvements, military sites, and public buildings; the preemption claims of settlers; the establishment of land offices and boards of inquiry, to determine the validity of land titles; the modes of entry and sale, and of conferring titles; the protection of the lands from trespass and waste; the partition of the public domain into municipal subdivisions, having reference to the erection of territorial governments and States; and perhaps the selection, under their authority, of suitable laws for the protection of the settlers, until there may be a sufficient number of them to form a self-sustaining municipal government—these important rules and regulations will sufficiently illustrate the scope and operation of the 3d section of the 4th article of the Constitution. But this clause in the Constitution does not exhaust the powers of Congress within the territorial subdivisions, or over the persons who inhabit them. Congress may exercise there all the powers of government which belong to them as the Legislature of the United States, of which these Territories make a part. *Loughborough v. Blake,* 5 Wheat. 317. Thus the laws of taxation, for the regulation of foreign, federal and Indian commerce, and so for the abolition of the slave trade, for the protection of copyrights and inventions, for the establishment of postal communication and courts of justice, and for the punishment of crimes, are as operative there as within the States. I admit that to mark the bounds for the jurisdiction of the Government of the United States within the Territory, and of its power in respect to persons and things within the municipal subdivisions it has created, is a work of delicacy and difficulty, and, in a great measure is beyond the cognizance of the Judiciary Department of that government. How much municipal power may be exercised by the people of the Territory, before their admission to the Union, the courts of justice cannot decide. This must depend, for the most part, on political considerations, which cannot enter into the determination of a case of law or equity. I do not feel called upon to define the jurisdiction of Congress. It is sufficient for the decision of this case to ascertain whether the residuary sover-

eignty of the States or people has been invaded by the 8th section of the Act of 6th March, 1820, I have cited, in so far as it concerns the capacity and status of persons in the condition and circumstances of the plaintiff and his family.

These States, at the adoption of the Federal Constitution, were organized communities, having distinct systems of municipal law, which, though derived from a common source, and recognizing in the main similar principles, yet in some respects had become unlike, and on a particular subject promised to be antagonistic.

Their systems provided protection for life, liberty and property, among their citizens, and for the determination of the condition and capacity of the persons domiciled within their limits. These institutions, for the most part, were placed beyond the control of the Federal Government. The Constitution allows Congress to coin money, and regulate its value; to regulate foreign and federal commerce; to secure, for a limited period, to authors and inventors a property in their writings and discoveries; and to make rules concerning captures in war; and within the limits of these powers, it has exercised, rightly, to a greater or less extent, the power to determine what shall and what shall not be property.

But the great powers of war and negotiation, finance, postal communication and commerce, in general, when employed in respect to the property of a citizen, refer to, and depend upon, the municipal laws of the States, to ascertain and determine what is property, and the rights of the owner, and the tenure by which it is held.

Whatever these Constitutions and laws validly determine to be property, it is the duty of the Federal Government, through the domain of jurisdiction merely federal, to recognize to be property.

And this principle follows from the structure of the respective governments, state and federal, and their reciprocal relations. They are different agents and trustees of the people of the several States, appointed with different powers and with distinct purposes, but whose Acts, within the scope of their respective jurisdictions, are mutually obligatory. They are respectively the depositories of such powers of legislation as the people were willing to surrender, and their duty is to cooperate within their several jurisdictions to maintain the rights of the same citizens under both governments, unimpaired. A proscription, therefore, of the constitution and laws of one or more States, determining property, on the part of the Federal Government, by which the stability of its social system may be endangered, is plainly repugnant to the conditions on which the Federal Constitution was adopted, or which that government was designed to accomplish. Each of the States surrendered its powers of war and negotiation, to raise armies and to support a navy, and all these powers are sometime required to preserve a State from disaster and ruin. The Federal Government was constituted to exercise these powers for the preservation of the States, respectively, and to secure to all their citizens the enjoyment of the rights which were not surrendered to the Federal Government. The provident care of the statesmen who projected the Constitution was signalized by such a distribution of the powers of government as to exclude many of the motives and opportunities for promoting provocations and spreading discord among the States, and for guarding against those partial combinations, so destructive of the community of interest, sentiment and feeling, which are so essential to the support of the Union. The distinguishing features of their system consist in the exclusion of the Federal Government from the local and internal concerns of, and in the establishment of an independent internal government within, the States. And it is a significant fact in the history of the United States, that those controversies which have been productive of the greatest animosity, and have occasioned most peril to the peace of the Union, have had their origin in the well-sustained opinion of a minority among the people, that the Federal Government had overstepped its constitutional limits to grant some exclusive privilege, or disturb the legitimate distribution of property or power among the States or individuals. Nor can a more signal instance of this be found than is furnished by the Act before us. No candid or rational man can hesitate to believe, that if the subject of the 8th section of the Act of March, 1820, had never been introduced into Congress and made the basis of legislation, no interest common to the Union would have been seriously affected. And certainly the creation, within this Union, or large confederacies of unfriendly and frowning States, which has been the tendency, and, to an alarming extent, the result, produced by the agitation arising from it, does not commend it to the patriot or statesman. This court have determined that intermigration of slaves

was not committed to the jurisdiction or control of Congress. Wherever a master is entitled to go within the United States, his slave may accompany him, without any impediment from, or fear of, Congressional legislation or interference. The question then arises, whether Congress, which can exercise no jurisdiction over the relations of master and slave within the limits of the Union, and is bound to recognize and respect the rights and relations that validity exist under the constitutions and laws of the States, can deny the exercise of those rights, and prohibit the continuance of those relations within the Territories.

And the citation of state statutes prohibiting the immigration of slaves, and of the decisions of state courts enforcing the forfeiture of the master's title in accordance with their rule, only darkens the discussion. For the question is, have Congress the municipal sovereignty in the territories which the State Legislatures have derived from the authority of the people, and exercise in the States.

And this depends upon the construction of the article in the Constitution before referred to.

And, in my opinion, that clause confers no power upon Congress to dissolve the relations of the master and slave on the domain of the United States either within or without any of the States.

The 8th section of the Act of Congress of the 6th of March, 1820, did not, in my opinion, operate to determine the domestic condition and status of the plaintiff and his family during their sojourn in Minnesota Territory, or after their return to Missouri.

The question occurs as to the judgment to be given in this case. It appeared upon the trial that the plaintiff, in 1834, was in a state of slavery in Missouri, and he had been in Missouri for near fifteen years in that condition, when this suit was brought. Nor does it appear that he at any time possessed another state or condition, de facto. His claim to freedom depends upon his temporary elocation, from the domicil of his origin, in company with his master, to communities where the law of slavery did not prevail. My examination is confined to the case, as it was submitted upon uncontested evidence, upon appropriate issues to the jury, and upon the instructions given and refused by the court upon that evidence. My opinion is, that the opinion of the Circuit Court was correct upon all the claims involved in those issues, and that the verdict of the jury was justified by the evidence and instructions.

The jury have returned that the plaintiff and his family are slaves.

Upon this record, it is apparent that this is not a controversy between citizens of different States; and that the plaintiff, at no period of the life which has been submitted to the view of the court, has had capacity to maintain a suit in the courts of the United States. And in so far as the argument of the Chief Justice upon the plea in abatement has a reference to the plaintiff or his family, in any of the conditions or circumstances of their lives as presented in the evidence, I concur in that portion of his opinion. I concur in the judgment which expresses the conclusion that the Circuit Court should not have rendered a general judgment.

The capacity of the plaintiff to sue is involved in the pleas in bar, and the verdict of the jury discloses an incapacity under the Constitution. Under the Constitution of the United States, his is an incapacity to sue in their courts, while, by the laws of Missouri, the operation of the verdict would be more extensive. I think it a safe conclusion to enforce the lesser disability imposed by the Constitution of the United States, and leave to the plaintiff all his rights in Missouri. I think the judgment should be affirmed on the ground that the Circuit Court had not jurisdiction, or that the case should be reversed and remanded that the suit may be dismissed.

Mr. Justice Catron:

The defendant pleaded to the jurisdiction of the Circuit Court, that the plaintiff was a negro of African blood; the descendant of Africans, who had been imported and sold in this country as slaves, and thus had no capacity as a citizen of Missouri to maintain a suit in the Circuit Court. The court sustained a demurrer to this plea, and a trial was had upon the pleas, of general issue, and also that the plaintiff and his family were slaves, belonging to the defendant. In this trial a verdict was given for the defendant.

The judgment of the Circuit Court upon the plea in abatement is not open, in my opinion, to examination in this court upon the plaintiff's writ.

The judgment was given for him conformably to the prayer or his demurrer. He cannot assign an error in such a judgment.

Tidd's Pr. 1163; 2 Williams' Saund. 46a; 2 Iredell, N. C. 87; 2 W. & S. 391.

Nor does the fact that the judgment was given on a plea to the jurisdiction, avoid the application of this rule.

*Capron v. Van Noorden,* 2 Cranch, 126; 6 Wend. 465; 7 Met. 598; 5 Pike, 1005.

The declaration discloses a case within the jurisdiction of the court—a controversy between citizens of different States. The plea in abatement, impugning these jurisdictional averments, was waived when the defendant answered to the declaration by pleas to the merits. The proceedings on that plea remain a part of the technical record, to show the history of the case, but are not open to the review of this court by a writ of error. The authorities are very conclusive on this point.

*Shepherd v. Graves,* 14 How. 505; *Bailey v. Dozier,* 6 How. 23; 1 Stewart (Ala.), 46; 10 Ben. Monroe (Ky.) 555; 2 Stew. (Ala.) 370, 443; 2 Scam. (Ill.) 78.

Nor can the court assume, as admitted facts, the averments of the plea from the confession of the demurrer. That confession was for a single object, and cannot be used for any other purpose than to test the validity of the plea. *Tompkins v. Ashby,* 1 Moo. & Mal. 32; 33 Me. 96, 100.

There being nothing in controversy here but the merits, I will proceed to discuss them.

The plaintiff claims to have acquired property in himself, and became free, by being kept in Illinois during two years.

The Constitution, laws, and policy, of Illinois, are somewhat peculiar respecting slavery. Unless the master becomes an inhabitant of that State, the slaves he takes there do not acquire their freedom; and if they return with their master to the slave State of his domicil, they cannot assert their freedom after their return. For the reasons and authorities on this point, I refer to the opinion of my brother Nelson with which I not only concur, but think his opinion is the most conclusive argument on the subject within my knowledge.

It is next insisted for the plaintiff, that his freedom (and that of his wife and eldest child) was obtained by force of the Act of Congress of 1820, usually known as the Missouri Compromise Act, which declares: "That in all that territory ceded by France to the United States, which lies north of thirty-six degrees thirty minutes north latitude, slavery and involuntary servitude shall be, and are hereby forever prohibited."

From this prohibition, the Territory now constituting the State of Missouri was excepted; which exception to the stipulation gave it the designation of a compromise.

The first question presented on this Act is, whether Congress has power to make such compromise. For, if power was wanting, then no freedom could be acquired by the defendant under the Act.

That Congress has no authority to pass laws and bind men's rights beyond the powers conferred by the Constitution, is not open to controversy. But it is insisted that, by the Constitution, Congress has power to legislate for and govern the Territories of the United States, and that, by force of the power to govern, laws could be enacted, prohibiting slavery in any portion of the Louisiana Territory; and, of course, to abolish slavery in all parts of it, whilst it was, or is, governed as a Territory.

My opinion is, that Congress is vested with power to govern the Territories of the United States by force of the 3d section of the 4th article of the Constitution. And I will state my reasons for this opinion.

Almost every provision in that instrument has a history that must be understood, before the brief and sententious language employed can be comprehended in the relations its authors intended. We must bring before us the state of things presented to the Convention, and in regard to which it acted, when the compound provision was made, declaring: 1st. That "new States may be admitted by the Congress into this Union." 2d. "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. And nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or any particular State."

Having ascertained the historical facts giving rise to these provisions, the difficulty of arriving at the true meaning of the language employed will be greatly lessened.

The history of these facts is substantially as follows:

The King of Great Britain, by his proclamation of 1763, virtually claimed that the country

west of the mountains had been conquered from France, and ceded to the Crown of Great Britain by the Treaty of Paris of that year, and he says: "We reserve it under our sovereignty, protection, and dominion, for the use of the Indians."

This country was conquered from the Crown of Great Britain, and surrendered to the United States by the Treaty of Peace of 1783. The colonial charters of Virginia, North Carolina and Georgia, included it. Other States set up pretensions of claim to some portions of the territory north of the Ohio, but they were of no value, as I suppose. 5 Wheat. 375.

As this vacant country had been won by the blood and treasure of all the States, those whose charters did not reach it, insisted that the country belonged to the States united, and that the land should be disposed of for the benefit of the whole; and to which end, the Western Territory should be ceded to the States united. The contest was stringent and angry, long before the Convention convened, and deeply agitated that body. As a matter of justice, and to quiet the controversy, Virginia consented to cede the country north of the Ohio as early as 1783; and in 1784 the deed of cession was executed, by her delegates in the Congress of the Confederation, conveying to the United States, in Congress assembled, for the benefit of said States, "all right, title and claim, as well of soil as of jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying, and being to the northwest of the River Ohio." In 1787 (July 13), the Ordinance was passed by the old Congress to govern the Territory.

Massachusetts had ceded her pretension of claim to western territory in 1785, Connecticut hers in 1786, and New York had ceded hers. In August, 1787, South Carolina ceded to the Confederation her pretension of claim to territory west of that State. And North Carolina was expected to cede hers, which she did do, in April, 1790. And so Georgia was confidently expected to cede her large domain, now constituting the territory of the States of Alabama and Mississippi.

At the time the Constitution was under consideration, there had been ceded to the United States, or was shortly expected to be ceded, all the western country, from the British Canada line to Florida, and from the head of the Mississippi almost to its mouth, except that portion which now constitutes the State of Kentucky.

Although Virginia had conferred on the Congress of the Confederation power to govern the territory north of the Ohio, still, it cannot be denied, as I think, that power was wanting to admit a new State under the Articles of Confederation.

With these facts prominently before the Convention, they proposed to accomplish these ends:

1st. To give power to admit new States.

2d. To dispose of the public lands in the Territories, and such as might remain undisposed of in the new States after they were admitted.

And third, to give power to goven to different Territories as incipient States, not of the Union, and fit them for admission. No one in the Convention seems to have doubted that these power were necessary. As early as the third day of its session (May 29th), Edmund Randolph brought forward a set of resolutions containing nearly all the germs of the Constitution, the 10th of which is as follows:

"Resolved, That provision ought to be made for the admission of the States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory or otherwise, with the consent of a number of voices in the National Legislature less than the whole."

August 18th, Mr. Madison submitted, in order to be referred to the committee of detail, the following powers as proper to be added to those of the General Legislature:

"To dispose of the unappropriated lands of the United States." "To institute temporary governments for new States arising therein." 3 Madison Papers, 1353.

These, with the resolution, that a district for the location of the seat of government should be provided, and some others, were referred, without a dissent, to the committee of detail, to arrange and put them into satisfactory language.

Gouverneur Morris constructed the clauses, and combined the views of a majority on the two provisions, to admit new States; and second, to dispose of the public lands, and to govern the Territories, in the mean time, between the cessions of the States and the admission

into the Union of new States arising in the ceded territory.

3 Madison Papers, 1456 to 1466.

It was hardly possible to separate the power "to make all needful rules and regulations" respecting the government of the territory and the disposition of the public lands.

North of the Ohio, Virginia conveyed the lands, and vested the jurisdiction in the thirteen original States, before the Constitution was formed. She had the sole title and sole sovereignty, and the same power to cede, on any terms she saw proper, that the King of England had to grant the Virginia Colonial Charter of 1609, or to grant the Charter of Pennsylvania to William Penn. The thirteen States, through their representatives and deputed ministers in the old Congress, had the same right to govern that Virginia had before the cession. Baldwin's constitutional Views, 90. And the 6th article of the Constitution adopted all engagements entered into by the Congress of the Confederation, as valid against the United States; and that the laws, made in pursuance of the new Constitution, to carry out this engagement, should be the supreme law of the land, and the judges bound thereby. To give the compact, and the Ordinance, which was part of it, full effect under the new government, the Act of August 7th, 1789, was passed, which declares, "Whereas in order that the Ordinance of the United States in Congress assembled, for the government of the territory northwest of the River Ohio, may have full effect, it is requisite that certain provisions should be made, so as to adapt the same to the present Constitution of the United States." It is then provided that the Governor and other offices should be appointed by the President, with the consent of the Senate; and be subject to removal, etc., in like manner that they were by the old Congress, whose functions had ceased.

By the powers to govern, given by the Constitution, those amendments to the Ordinance could be made, but Congress guardedly abstained from touching the compact of Virginia, further than to adapt it to the new Constitution.

It is due to myself to say, that it is asking much of a judge, who has for nearly twenty years been exercising jurisdiction, from the western Missouri line to the Rocky Mountains, and, on this understanding of the Constitution, inflicting the extreme penalty of death for crimes committed where the direct legislation of Congress was the only rule, to agree that he had been all the while acting in mistake, as an usurper.

More than sixty years have passed away since Congress has exercised power to govern the Territories, by its legislation directly, or by territorial charters, subject to repeal at all times, and it is now too late to call that power into question, if this court could disregard its own decisions; which it cannot do, as I think. It was held in the case of *Cross v. Harrison,* 16 How. 193, 194, that the sovereignty of California was in the United States, in virtue of the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power to admit new States into the Union. That decision followed preceding ones, there cited. The question was then presented, how it was possible for the judicial mind to conceive that the United States Government, created solely by the Constitution, could, by a lawful treaty, acquire territory over which the acquiring power had no jurisdiction to hold and govern it, by force of the instrument under whose authority the country was acquired; and the foregoing was the conclusion of this court on the proposition. What was there announced, was most deliberately done, and with a purpose. The only question here is, as I think, how far the power of Congress is limited.

As to the Northwest Territory, Virginia had the right to abolish slavery there; and she did so agree in 1787, with the other States in the Congress of the Confederation, by assenting to and adopting the Ordinance of 1787, for the government of the Northwest Territory. She did this also by an act of her Legislature, passed afterwards, which was a treaty in fact.

Before the new Constitution was adopted, she had as much right to treat and agree as any European government had. And, having excluded slavery, the new government was bound by that engagement by Article six of the new Constitution. This only meant that slavery should not exist whilst the United States exercised the power of government, in the territorial form; for, when a State came in, it might do so, with or without slavery.

My opinion is, that Congress had no power, in face of the compact between Virginia and the twelve other States to force slavery into the

Northwest Territory, because there, it was bound to that "engagement," and could not break it.

In 1790, North Carolina ceded her western territory, now the State of Tennessee, and stipulated that the inhabitants thereof should enjoy all the privileges and advantages of the Ordinance for governing the territory north of the Ohio River, and that Congress should assume the government, and accept the cession, under the express conditions contained in the Ordinance: Provided, "That no regulation made, or to be made, by Congress, shall tend to emancipate slaves."

In 1802, Georgia ceded her western territory to the United States, with the provision that the Ordinance of 1787 should in all its parts extend to the territory ceded, "that article only excepted which forbids slavery." Congress had no more power to legislate slavery out from the North Carolina and Georgia cessions, than it had power to legislate slavery in, north of the Ohio. No power existed in Congress to legislate at all, affecting slavery, in either case. The inhabitants, as respected this description of property, stood protected, whilst they were governed by Congress, in like manner that they were protected before the cession was made and when they were respectively, parts of North Carolina and Georgia.

And how does the power of Congress stand west of the Mississippi River? The country there was acquired from France, by Treaty, in 1803. It declares, that the First Consul, in the name of the French Republic, doth hereby cede to the United States, in full sovereignty, the Colony or Province of Louisiana, with all the rights and appurtenances of the said Territory. And, by article 3d, that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities, of citizens of the United States; and, in the mean time, they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

Louisiana was a Province where slavery was not only lawful, but where property in slaves was the most valuable of all personal property. The Province was ceded as a unit, with an equal right pertaining to its inhabitants, in every part thereof, to own slaves. It was, to a great extent, a vacant country, having in it few civilized inhabitants. No one portion of the Colony, of a proper size for a State of the Union, had a sufficient number of inhabitants to claim admission into the Union. To enable the United States to fulfill the Treaty, additional population was indispensable, and obviously desired with anxiety by both sides, so that the whole country should, as soon as possible, become States of the Union. And for this contemplated future population, the Treaty as expressly provided as it did for the inhabitants residing in the province when the Treaty was made. All these were to be protected "in the mean time;" that is to say, at all times, between the date of the Treaty and the time when the portion of the Territory where the inhabitants resided was admitted into the Union as a State.

At the date of the Treaty, each inhabitant had the right to the free enjoyment of his property, alike with his liberty and his religion, in every part of Louisiana; the Province then being one Country, he might go everywhere in it, and carry his liberty, property, and religion, with him, and in which he was to be maintained and protected, until he became a citizen of a State of the Union of the United States. This cannot be denied by the original inhabitants and their descendants. And, if it be true that immigrants were equally protected, it must follow that they can also stand on the Treaty.

The settled doctrine in the State courts of Louisiana is, that a French subject coming to the Orleans Territory, after the Treaty of 1803 was made, and before Louisiana was admitted into the Union, and being an inhabitant at the time of the admission, became a citizen of the United States by that Act; that he was one of the inhabitants contemplated by the 3d article of the Treaty, which referred to all the inhabitants embraced within the new State on it admission.

That this is the true construction, I have no doubt.

If power existed to draw a line at thirty-six degrees thirty minutes north, so Congress had equal power to draw the line on the thirtieth degree—that is, due west from the City of New Orleans—and to declare that north of that line slavery should never exist. Suppose this had been done before 1812, when Louisiana came into the Union, and the question of infraction of the Treaty had then been presented on the present assumption of power to prohibit slavery,

who doubts what the decision of this court would have been on such an Act of Congress; yet, the difference between the supposed line, and that on thirty-six degrees thirty minutes north, is only in the degree of grossness presented by the lower line.

The Missouri compromise line of 1820 was very aggressive; it declared that slavery was abolished forever throughout a country reaching from the Mississippi River to the Pacific Ocean, stretching over thirty-two degrees of longitude, and twelve and a half degrees of latitude on its eastern side, sweeping over four fifths, to say no more, of the original Province of Louisiana.

That the United States Government stipulated in favor of the inhabitants to the extent here contended for has not been seriously denied, as far as I know; but the argument is, that Congress had authority to repeal the 3d article of the Treaty of 1803, in so far as it secured the right to hold slave property, in a portion of the ceded territory, leaving the right to exist in other parts. In other words, that Congress repeal the 3d article entirely, at its pleasure. This I deny.

The compacts with North Carolina and Georgia were Treaties also, and stood on the same footing of the Louisiana Treaty; on the assumption of power to repeal the one, it must have extended to all, and Congress could have excluded the slaveholder of North Carolina from the enjoyment of his lands in the Territory, now the State, of Tennessee, where the citizens of the mother State were the principal proprietors.

And so in the case of Georgia. Her citizens could have been refused the right to emigrate to the Mississippi or Alabama Territory, unless they left their most valuable and cherished property behind them.

The Constitution was framed in reference to facts then existing or likely to arise: the instrument looked to no theories of government. In the vigorous debates in the Convention, as reported by Mr. Madison and others, surrounding facts, and the condition and necessities of the country, gave rise to almost every provision; and among those facts, it was prominently true, that Congress dare not be intrusted with power to provide that, if North Carolina or Georgia ceded her western territory, the citizens of the State (in either case) could be prohibited, at the pleasure of Congress, from removing to their lands, then granted to a large extent, in the country likely to be ceded, unless they left their slaves behind. That such an attempt, in the face of a population fresh from the war of the Revolution, and then engaged in war with the great confederacy of Indians, extending from the mouth of the Ohio to the Gulf of Mexico, would end in open revolt, all intelligent men knew.

In view of these facts, let us inquire how the question stands by the terms of the Constitution, aside from the Treaty. How it stood in public opinion when the Georgia cession was made, in 1802, is apparent from the fact that no guaranty was required by Georgia of the United States for the protection of slave property. The Federal Constitution was relied on, to secure the rights of Georgia and her citizens during the territorial condition of the country. She relied on the indisputable truths, that the States were by the Constitution made equals in political rights, and equals in the right to participate in the common property of all the States united, and held in trust for them. The Constitution having provided that "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States," the right to enjoy the territory as equals was reserved to the States, and to the citizens of the States, respectively. The cited clause is not that citizens of the United States shall have equal privileges in the Territories, but the citizens of each State shall come there in right of his State, and enjoy the common property. He secures his equality through the equality of his State, by virtue of that great fundamental condition of the Union—the equality of the States.

Congress cannot do indirectly what the Constitution prohibits directly. If the slaveholder is prohibited from going to the Territory with his slaves, who are parts of his family in name and in fact, it will follow that men owning lawful property in their own States, carrying with them the equality of their State to enjoy the common property, may be told, you cannot come here with your slaves, and he will be held out at the border. By this subterfuge, owners of slave property, to the amount of thousands of millions, might be almost as effectually excluded from removing into the Territory of Louisiana north of thirty-six degrees thirty minutes, as if the law declared that owners of slaves, as a class, should be excluded, even if their slaves were left behind.

Just as well might Congress have said to those of the North, you shall not introduce into the territory south of said line your cattle or horses, as the country is already overstocked; nor can you introduce your tools of trade, or machines as the policy of Congress is to encourage the culture of sugar and cotton, south of the line, and so to provide that the Northern people shall manufacture for those of the South, and barter for the staple articles slave labor produces. And thus the Northern farmer and mechanic would be held out, as the slaveholder was for thirty years, by the Missouri restriction.

If Congress could prohibit one species of property, lawful throughout Louisiana when it was acquired, and lawful in the State from whence it was brought, so Congress might exclude any or all property.

The case before us will illustrate the construction contended for. Dr. Emerson was a citizen of Missouri; he had an equal right to go to the Territory with every citizen of other States. This is undeniable, as I suppose. Scott was Dr. Emerson's lawful property in Missouri; he carried his Missouri title with him; and the precise question here is, whether Congress had the power to annul that title. It is idle to say, that if Congress could not defeat the title directly, that it might be done indirectly, by drawing a narrow circle around the slave population of Upper Louisiana, and declaring that if the slave went beyond it he should be free. Such assumption is mere evasion, and entitled to no consideration. And it is equally idle, to contend that because Congress has express power to regulate commerce among the Indian tribes, and to prohibit intercourse with the Indians, that therefore Dr. Emerson's title might be defeated within the country ceded by the Indians to the United States as early as 1805, and which embraces Fort Snelling. Am. State Papers, Vol. I. p. 734. We must meet the question whether Congress had the power to declare that a citizen of a State, carrying with him his equal rights, secured to him through his State, could be stripped of his goods and slaves, and be deprived of any participation in the common property. If this be the true meaning of the Constitution, equality of rights to enjoy a common country (equal to a thousand miles square) may be cut off by a geographical line, and a great portion of our citizens excluded from it.

Ingenious, indirect evasions of the Constitution have been attempted and defeated heretofore. In the *Passenger Cases*, 7 How. 283, the attempt was made to impose a tax on the masters, crews and passengers of vessels, the Constitution having prohibited a tax on the vessel itself; but this court held the attempt to be a mere evasion, and pronounced the tax illegal.

I admit that Virginia could, and lawfully did, prohibit slavery northwest of the Ohio, by her charter of cession, and that the Territory was taken by the United States with this condition imposed. I also admit that France could, by the Treaty of 1803, have prohibited slavery in any part of the ceded Territory, and imposed it on the United States as a fundamental condition of the cession, in the mean time, till new States were admitted into the Union.

I concur with Judge Baldwin, that federal power is exercised over all the territory within the United States, pursuant to the Constitution; and the conditions of the cession, whether it was a part of the original territory of a State of the Union, or of a foreign state, ceded by deed or treaty; the right of the United States in or over it depends on the contract of cession, which operates to incorporate as well the territory as its inhabitants into the Union.

Baldwin's Constitutional Views, 84.

My opinion is, that the 3d article of the Treaty of 1803, ceding Louisiana to the United States, stands protected by the Constitution, and cannot be repealed by Congress.

And, secondly, that the Act of 1820, known as the Missouri Compromise, violates the most leading feature of the Constitution—a feature on which the Union depends, and which secures to the respective States and their citizens an entire equality of rights, privileges and immunities.

On these grounds, I hold the Compromise Act to have been void; and consequently, that the plaintiff, Scott, can claim no benefit under it.

For the reasons above stated, I concur with my brother judges that the plaintiff, Scott, is a slave, and was so when this suit was brought.

Mr. Justice McLean, dissenting:

This case is before us on a writ of error from the Circuit Court for the District of Missouri.

An action of trespass was brought, which charges the defendant with an assault and imprisonment of the plaintiff, and also of Harriet Scott,

his wife, Eliza and Lizzie, his two children, on the ground that they were his slaves, which was without right on his part, and against law.

The defendant filed a plea in abatement, "that said causes of action, and each and every of them, if any such accrued to the said Dred Scott accrued out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of the State of Missouri, for that, to wit: said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African descent, his ancestors were of pure African blood; and were brought into this country and sold as negro slaves; and this the said Sandford is ready to verify; wherefore he prays judgment whether the court can or will take further cognizance of the action aforesaid."

To this a demurrer was filed, which, on argument, was sustained by the court, the plea in abatement being held insufficient; the defendant was ruled to plead over. Under this rule he pleaded: 1. Not guilty; 2. That Dred Scott was a negro slave, the property of the defendant; and 3. That Harriet, the wife, and Eliza and Lizzie, the daughters of the plaintiff, were the lawful slaves of the defendant.

Issue was joined on the first plea, and replications of *de injuria* were filed to the other pleas.

The parties agreed to the following facts: in the year 1834, the plaintiff was a negro slave belonging to Dr. Emerson, who was a surgeon in the Army of the United States. In that year, Dr. Emerson took the plaintiff from the State of Missouri to the post of Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, Dr. Emerson removed the plaintiff from Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi River, in the Territory known as Upper Louisiana., acquired by the United States of France, and situate north of latitude thirty-six degrees thirty minutes north, and north of the State of Missouri. Dr. Emerson held the plaintiff in slavery, at Fort Snelling, from the last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the Army of the United States. In that year, Major Taliaferro took Harriet to Fort Snelling, a military post situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave, at Fort Snelling, unto Dr. Emerson, who held her in slavery, at that place, until the year 1838.

In the year 1836, the plaintiff and Harriet were married at Fort Snelling, with the consent of Dr. Emerson, who claimed to be their master and owner. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsey, north of the north line of the State of Missouri, and upon the River Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, Dr. Emerson removed the plaintiff and said Harriet and their daughter Eliza from Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of the suit, Dr. Emerson sold and conveyed the plaintiff, Harriet, Eliza and Lizzie, to the defendant, as slaves, and he has ever since claimed to hold them as slaves.

At the times mentioned in the plaintiff's declaration, the defendant, claiming to be the owner, laid his hands upon said plaintiff, Harriet, Eliza and Lizzie, and imprisoned them; doing in this respect, however, no more than he might lawfully do, if they were of right his slaves at such times.

In the first place, the plea to the jurisdiction is not before us, on this writ of error. A demurrer to the plea was sustained, which ruled the plea bad, and the defendant, on leave, pleaded over.

The decision on the demurrer was in favor of the plaintiff; and as the plaintiff prosecutes this writ of error, he does not complain of the decision on the demurrer. The defendant might have complained of this decision, as against him, and have prosecuted a writ of error, to reverse it. But as the case, under the instruction of the court to the jury, was decided in his favor, of course he had no ground of complaint.

But it is said, if the court, on looking at the record, shall clearly perceive that the Circuit Court had no jurisdiction, it is a ground for the dismissal of the case. This may be characterized as rather a sharp practice, and one which seldom, if ever, occurs. No case was cited in the argument as authority, and not a single case

precisely in point is recollected in our reports. The pleadings do not show a want of jurisdiction. This want of jurisdiction can only be ascertained by a judgment on the demurrer to the special plea. No such case, it is believed, can be cited. But if this rule of practice is to be applied in this case, and the plaintiff in error is required to answer and maintain as well the points ruled in his favor, as to show the error of those ruled against him, he has more than an ordinary duty to perform. Under such circumstances, the want of jurisdiction in the Circuit Court must be so clear as not to admit of doubt. Now, the plea which raises the question of jurisdiction, in my judgment, is radically defective. The gravamen of the plea is this: "That the plaintiff is a negro of African descent, his ancestors being of pure African blood, and were brought into this country, and sold as negro slaves."

There is no averment in this plea which shows or conduces to show an inability in the plaintiff to sue in the Circuit Court. It does not allege that the plaintiff had his domicil in any other State, nor that he is not a free man in Missouri. He is averred to have had a negro ancestry, but this does not show that he is not a citizen of Missouri, within the meaning of the Act of Congress authorizing him to sue in the Circuit Court. It has never been held necessary, to constitute a citizen within the Act, that he should have the qualifications of an elector. Females and minors may sue in the Federal courts, and so may any individual who has a permanent domicil in the State under whose laws his rights are protected, and to which he owes allegiance.

Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term "citizen" is "a freeman." Being a freeman, and having his domicil in a State different from that of the defendant, he is a citizen within the Act of Congress, and the courts of the Union are open to him.

It has often been held, that the jurisdiction, as regards parties, can only be exercised between citizens of different States, and that a mere residence is not sufficient; but this has been said to distinguish a temporary from a permanent residence.

To constitute a good plea to the jurisdiction, it must negative those qualities and rights which enable an individual to sue in the Federal courts. This has not been done; and on this ground the plea was defective, and the demurrer was properly sustained. No implication can aid a plea in abatement or in bar; it must be complete in itself; the facts stated, if true, must abate or bar the right of the plaintiff to sue. This is not the character of the above plea. The facts stated, if admitted, are not inconsistent with other facts, which may be presumed, and which bring the plaintiff within the Act of Congress.

The pleader has not the boldness to allege that the plaintiff is a slave, as that would assume against him the matter in controversy, and embrace the entire merits of the case in a plea to the jurisdiction. But beyond the facts set out in the plea, the court, to sustain it, must assume the plaintiff to be a slave, which is decisive on the merits. This is a short and an effectual mode of deciding the cause; but I am yet to learn that it is sanctioned by any known rule of pleading.

The defendant's counsel complain, that if the court take jurisdiction on the ground that the plaintiff is free, the assumption is against the right of the master. This argument is easily answered. In the first place, the plea does not show him to be a slave; it does not follow that a man is not free whose ancestors were slaves. The reports of the Supreme Court of Missouri show that this assumption has many exceptions; and there is no averment in the plea that the plaintiff is not within them.

By all the rules of pleading, this is a fatal defect in the plea. If there be doubt, what rule of construction has been established in the slave States? In *Jacob v. Sharp*, Meigs' Tenn. 114, the court held, when there was doubt as to the construction of a will which emancipated a slave, "it must be construed to be subordinate to the higher and more important right of freedom."

No injustice can result to the master, from an exercise of jurisdiction in this cause. Such a decision does not in any degree affect the merits of the case; it only enables the plaintiff to assert his claims to freedom before this tribunal. If the jurisdiction be ruled against him, on the ground that he is a slave, it is decisive of his fate.

It has been argued that, if a colored person be made a citizen of a State, he cannot sue in the Federal court. The Constitution declares that federal jurisdiction "may be exercised between citizens of different States," and the same is provided in the Act of 1789. The above argument is properly met, by saying that the Constitution

was intended to be a practical instrument; and where its language is too plain to be misunderstood, the argument ends.

In *Chirac v. Chirac*, 2 Wheat. 261, 15 U.S., this court says: "That the power of naturalization is exclusively in Congress does not seem to be, and certainly ought not to be, controverted." No person can legally be made a citizen of a State, and consequently a citizen of the United States, of foreign birth, unless he be naturalized under the Acts of Congress. Congress has power "to establish a uniform rule of naturalization."

It is a power which belongs exclusively to Congress, as intimately connected with our federal relations. A State may authorize foreigners to hold real estate within its jurisdiction, but it has no power to naturalize foreigners, and give them the rights of citizens. Such a right is opposed to the Acts of Congress on the subject of naturalization, and subversive of the federal powers. I regret that any countenance should be given from this bench to a practice like this in some of the States, which has no warrant in the Constitution.

In the argument, it was said that a colored citizen would not be an agreeable member of society. This is more a matter of taste than of law. Several of the States have admitted persons of color to the right of suffrage, and in this view have recognized them as citizens; and this has been done in the slave as well as the free States. On the question of citizenship, it must be admitted that we have not been very fastidious. Under the late Treaty with Mexico, we have made citizens of all grades, combinations, and colors. The same was done in the admission of Louisiana and Florida. No one ever doubted, and no court ever held, that the people of these Territories did not become citizens under the Treaty. They have exercised all the rights of citizens, without being naturalized under the Acts of Congress.

There are several important principles involved in this case, which have been argued, and which may be considered under the following heads:

1. The locality of slavery, as settled by this court and the courts of the States.

2. The relation which the Federal Government bears to slavery in the States.

3. The power of Congress to establish territorial governments, and to prohibit the introduction of slavery therein.

4. The effect of taking slaves into a new State or Territory, and so holding them, where slavery is prohibited.

5. Whether the return of a slave under the control of his master, after being entitled to his freedom, reduces him to his former condition.

6. Are the decisions of the Supreme Court of Missouri, on the questions before us, binding on this court, within the rule adopted?

In the course of my judicial duties, I have had occasion to consider and decide several of the above points.

1. As to the locality of slavery. The civil law throughout the Continent of Europe, it is believed, without an exception, is, that slavery can exist only within the territory where it is established; and that, if a slave escapes, or is carried beyond such territory, his master cannot reclaim him, unless by virtue of some express stipulations.

Grotius, lib. 2, chap. 15, 5, 1; lib. 10. chap. 10 2, 1; Wicqueposts Ambassador, lib. 1, p. 418; 4 Martin, 385; case of *The Creole in the House of Lords*, 1842; 1 Phillimore on International Law, 316, 335.

There is no nation in Europe which considers itself bound to return to his master a fugitive slave, under the civil law or the law of nations. On the contrary, the slave is held to be free where there is no treaty obligation, or compact in some other form, to return him to his master. The Roman law did not allow freedom to be sold. An ambassador or any other public functionary could not take a slave to France, Spain, or any other country of Europe, without emancipating him. A number of slaves escaped from a Florida plantation, and were received on board of ship by Admiral Cochrane. By the King's Bench, they were held to be free. 2 B. & C. 440.

In the great and leading case of *Prigg v. The State of Pennsylvania*, 16 Pet. 594, 41 U.S., this court say that, by the general law of nations, no nation is bound to recognize the state of slavery, as found within its territorial dominions, where it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is organized. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognized in Somersett's case, Lafft's

Rep. 1, 20 Howell's State Trials, 79, which was decided before the American Revolution.

There was some contrariety of opinion among the judges on certain points ruled in Prigg's case, but there was none in regard to the great principle, that slavery is limited to the range of the laws under which it is sanctioned.

No case in England appears to have been more thoroughly examined than that of Somersett. The judgment pronounced by Lord Mansfield was the judgment of the Court of King's Bench. The cause was argued at great length, and with great ability, by Hargrave and others, who stood among the most eminent counsel in England. It was held under advisement from term to term, and a due sense of its importance was felt and expressed by the Bench.

In giving the opinion of the court, Lord Mansfield said:

"The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself, from whence it was created, is erased from the memory; it is of a nature that nothing can be suffered to support it but positive law."

He referred to the contrary opinion of Lord Hardwicke, in October, 1749, as Chancellor: "That he and Lord Talbot, when Attorney and Solicitor-General, were of opinion that no such claim, as here presented, for freedom, was valid."

The weight of this decision is sought to be impaired, from the terms in which it was described by the exuberant imagination of Curran. The words of Lord Mansfield, in giving the opinion of the court, were such as were fit to be used by a great judge, in a most important case. It is a sufficient answer to all objections to that judgement, that it was pronounced before the Revolution, and that it was considered by this court as the highest authority. For near a century, the decision in Somersett's case has remained the law of England. The case of *The Slave Grace*, decided by Lord Stowell in 1827, does not, as has been supposed, overrule the judgment of Lord Mansfield. Lord Stowell held that, during the residence of the slave in England, "No dominion, authority, or coercion, can be exercised over him." Under another head, I shall have occasion to examine the opinion in the case of Grace.

To the position, that slavery can only exist except under the authority of law, it is objected, that in few if in any instances has it been established by statutory enactment. This is no answer to the doctrine laid down by the court. Almost all the principles of the common law had their foundation in usage. Slavery was introduced into the Colonies of this country by Great Britain at an early period of their history, and it was protected and cherished, until it became incorporated into the colonial policy. It is immaterial whether a system of slavery was introduced by express law, or otherwise, if it have the authority of law. There is no slave state where the institution is not recognized and protected by statutory enactments and judicial decisions. Slaves are made property by the laws of the slave States, and as such are liable to the claims of creditors; they descend to heirs, are taxed, and in the South they are a subject of commerce.

In the case of *Rankin v. Lydia*, 2. A. K. Marsh, 467, Judge Mills, speaking for the Court of Appeals of Kentucky, says: "In deciding the question (of slavery), we disclaim the influence of the general principles of liberty, which we all admire, and conceive it ought to be decided by the law as it is, and not as it ought to be. Slavery is sanctioned by the laws of this State, and the right to hold slaves under our municipay regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature, or the unwritten and common law."

I will now consider the relation which the Federal Government bears to slavery in the States:

Slavery is emphatically a state institution. In the 9th section of the 1st article of the Constitution, it is provided "that the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each."

In the Convention, it was proposed by a committee of eleven to limit the importation of slaves to the year 1800, when Mr. Pinckney moved to extend the time to the year 1808. This motion was carried—New Hampshire, Massachusetts, Connecticut, Maryland, North Carolina, South Carolina and Georgia voting in

the affirmative; and New Jersey, Pennsylvania and Virginia, in the negative. In opposition to the motion, Mr. Madison said: "Twenty years will produce all the mischief that can be apprehended from the liberty to import slaves; so long a term will be more dishonorable to the American character than to say nothing about it in the Constitution." Madison Papers.

The provision in regard to the slave trade shows clearly that Congress considered slavery a state institution, to be continued and regulated by its individual sovereignty; and to conciliate that interest, the slave trade was continued twenty years, not as a general measure, but for the "benefit of such States as shall think proper to encourage it."

In the case of *Groves v. Slaughter*, 15 Pet. 449, 40 U.S. Messrs. Clay and Webster contended that, under the commercial power, Congress had a right to regulate the slave trade among the several States, but the court held that Congress had no power to interfere with slavery as it exists in the States, or to regulate what is called the slave trade among them. If this trade were subject to the commercial power, it would follow that Congress could abolish or establish slavery in every State of the Union.

The only connection which the Federal Government holds with slaves in a State, arises from that provision of the Constitution which declares that "No person held to service in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due."

This being a fundamental law of the Federal Government, it rests mainly for its execution, as has been held, on the judicial power of the Union; and so far as the rendition of fugitives from labor has become a subject of judicial action, the federal obligation has been faithfully discharged.

In the formation of the Federal Constitution, care was taken to confer no power on the Federal Government, to interfere with this institution in the States. In the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the Constitution.

We need not refer to the mercenary spirit which introduced the infamous traffic in slaves, to show the degradation of negro slavery in our country. This system was imposed upon our colonial settlements by the mother country, and it is due to truth to say that the commercial Colonies and States were chiefly engaged in the traffic. But we know as a historical fact, that James Madison, that great and good man, a leading member in the Federal Convention, was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man.

I prefer the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings, rather than to look behind that period, into a traffic which is now declared to be piracy, and punished with death by Christian nations. I do not like to draw the sources of our domestic relations from so dark a ground. Our independence was a great epoch in the history of freedom; and while I admit the government was not made especially for the colored race, yet many of them were citizens of the New England States, and exercised the rights of suffrage when the Constitution was adopted, and it was not doubted by any intelligent person that its tendencies would greatly ameliorate their condition.

Many of the States, on the adoption of the Constitution, or shortly afterward, took measures to abolish slavery within their respective jurisdictions; and it is a well-known fact that a belief was cherished by the leading men, South as well as North, that the institution of slavery would gradually decline, until it would become extinct. The increased value of slave labor, in the culture of cotton and sugar, prevented the realization of this expectation. Like all other communities and states, the South were influenced by what they considered to be their own interests.

But if we are to turn our attention to the dark ages of the world, why confine our view to colored slavery? On the same principles white men were made slaves. All slavery has its origin in power, and is against right.

The power of Congress to establish territorial governments, and to prohibit the introduction of slavery therein, is the next point to be considered.

After the cession of western territory by Virginia and other States, to the United States,

the public attention was directed to the best mode of disposing of it for the general benefit.

While is attendance on the Federal Convention, Mr. Madison, in a letter to Edmund Randolph, dated the 22d April, 1787, says: "Congress are deliberating on the plan most eligible for disposing of the western territory not yet surveyed. Some alteration will probably be made in the ordinance on that subject." And in the same letter he says: "The inhabitants of the Illinois complain of the land jobbers, etc., who are purchasing titles among them. Those of St. Vincent's complain of the defective criminal and civil justice among them, as well as of military protection." And on the next day he writes to Mr. Jefferson: "The government of the settlements on the Illinois and Wabash is a subject very perplexing in itself, and rendered more so by our ignorance of the many circumstances on which a right judgment depends. The inhabitants at those places claim protection against the savages, and some provision for both civil and criminal justice."

In May, 1787, Mr. Edmund Randolph submitted to the Federal Convention certain propositions, as the basis of a Federal Government, among which was the following:

"Resolved, that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory or otherwise, with the consent of a number of voices in the National Legislature less that the whole."

Afterward, Mr. Madison submitted to the Convention, in order to be referred to the committee of detail, the following powers, as proper to be added to those of general legislation: "To dispose of the unappropriated lands of the United States. To institute temporary governments for new States arising therein. To regulate affairs with the Indians, as well within as without the limits of the United States."

Other propositions were made in reference to the same subjects, which it would be tedious to enumerate. Mr. Gouverneur Morris proposed the following:

"The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution contained shall be so construed as to prejudice any claims either of the United States or of any particular State."

This was adopted as a part of the Constitution, with two verbal alterations—Congress was substituted for Legislature, and the word "either" was stricken out.

In the organization of the new government, but little revenue for a series of years was expected from commerce. The public lands were considered as the principal resource of the country for the payment of the Revolutionary debt. Direct taxation was the means relied on to pay the current expenses of the government. The short period that occurred between the cession of western lands to the Federal Government by Virginia and other States, and the adoption of the Constitution, was sufficient to show the necessity of a proper land system and a temporary government. This was clearly seen by propositions and remarks in the Federal Convention, some of which are above cited, by the passage of the Ordinance of 1787, and the adoption of that instrument by Congress, under the Constitution, which gave to it validity.

It will be recollected that the deed of cession of western territory was made to the United States by Virginia in 1784, and that it required the territory ceded to be laid out into States, that the land should be disposed of for the common benefit of the States, and that all right, title, and claim, as well of soil as of jurisdiction, were ceded; and this was the form of cession from other States.

On the 13th of July, the Ordinance of 1787 was passed, "for the government of the United States territory northwest of the River Ohio," with but one dissenting vote. This instrument provided there should be organized in the territory not less than three, nor more than five, States, designating their boundaries. It was passed while the Federal Convention was in session, about two months before the Constitution was adopted by the Conventions. The members of the Convention must, therefore, have been well acquainted with the provisions of the Ordinance. It provided for a temporary government, as initiatory to the formation of state governments. Slavery was prohibited in the territory.

Can anyone suppose that the eminent men of the Federal Convention could have overlooked or neglected a matter so vitally important to the country, in the organization of tem-

porary governments for the vast territory northwest of the River Ohio? In the 3d section of the 4th article of the Constitution, they did make provision for the admission of new States, the sale of the public lands, and the temporary government of the territory. Without a temporary government, new States could not have been formed nor could the public lands have been sold.

If the 3d section were before us now for consideration for the first time, under the facts stated, I could not hesitate to say there was adequate legislative power given in it. The power to make all needful rules and regulations is a power to legislate. This no one will controvert, as Congress cannot make "rules and regulations," except by legislation. But it is argued that the word "territory" is used as synonymous with the word "land"; and that the rules and regulations of Congress are limited to the disposition of lands and other property belonging to the United States. That this is not the true construction of the section, appears from the fact that in the first line of the section "the power to dispose of the public lands" is given expressly, and, in addition, to make all needful rules and regulations. The power to dispose of it is complete in itself, and requires nothing more. It authorizes Congress to use the proper means within its discretion, and any further provision for this purpose would be a useless verbiage. As a composition, the Constitution is remarkably free from such a charge.

In the discussion of the power of Congress to govern a territory, in the case of *The Atlantic Insurance Company v. Canter*, 1 Pet. 511; 7 Curt. 685, Chief Justice Marshall, speaking for the court, said, in regard to the people of Florida, "they do not, however, participate in political power; they do not share in the government till Florida shall become a state; in the mean time, Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.'"

And he adds, "perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory; whichever may be the source whence the power is derived, the possession of it is unquestioned." And in the close of the opinion, the court say, "in legislating for them [the territories], Congress exercises the combined powers of the general and state governments."

Some consider the opinion to be loose and inconclusive; others that it is obiter dicta; and the last sentence is objected to as recognizing absolute power in Congress over Territories. The learned and eloquent Wirt, who, in the argument of a cause before the court, had occasion to cite a few sentences from an opinion of the Chief Justice, observed, "no one can mistake the style, the words so completely match the thought."

I can see no want of precision in the language of the Chief Justice; his meaning cannot be mistaken. He states, first, the 3d section as giving power to Congress to govern the territories, and two other grounds from which the power may also be implied. The objection seems to be, that the Chief Justice did not say which of the grounds stated he considered the source of the power. He did not specifically state this, but he did say, "whichever may be the source whence the power is derived, the possession of it is unquestioned." No opinion of the court could have been expressed with a stronger emphasis; the power in Congress is unquestioned. But those who have undertaken to criticise the opinion, consider it without authority, because the Chief Justice did not designate specially the power. This is a singular objection. If the power be unquestioned, it can be a matter of no importance on which ground it is exercised.

The opinion clearly was not *obiter dicta*. The turning point in the case was, whether Congress had power to authorize the Territorial Legislature of Florida to pass the law under which the Territorial Court was established, whose decree was brought before this court for revision. The power of Congress, therefore, was the point in issue.

The word "territory," according to Worcester means "land, country, a district of country, under a temporary government." The words "territory or other property," as used, do imply, from the use of the pronoun other, that territory was used as descriptive of land; but does it follow that it was not used also as descriptive of

a district of country? In both of these senses it belonged to the United States—as land, for the purpose of sale; as territory, for the purpose of government.

But, if it be admitted that the word "territory" as used means land, and nothing but land, the power of Congress to organize a temporary government is clear. It has power to make all needful regulations respecting the public lands, and the extent of those "needful regulations" depends upon the direction of Congress, where the means are appropriate to the end, and do not conflict with any of the prohibitions of the Constitution. If a temporary government be deemed needful, necessary, requisite, or is wanted, Congress has power to establish it. This court says, in *McCulloch v. The State of Maryland*, 4 Wheat. 316 "If a certain means to carry into effect any of the powers expressly given by the Constitution to the government of the Union be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance.

The power to establish post offices and post roads gives power to Congress to make contracts for the transportation of the mail, and to punish all who commit depredations upon it in its transit, or at its places of distribution. Congress has power to regulate commerce, and, in the exercise of its discretion, to lay an embargo, which suspends commerce; so under the same power, harbors, lighthouses, breakwaters, etc., are constructed.

Did Chief Justice Marshall, in saying that Congress governed a Territory, by exercising the combined powers of the federal and state governments, refer to unlimited discretion? A government which can make white men slaves? Surely, such a remark in the argument must have been inadvertently uttered. On the contrary, there is no power in the Constitution by which Congress can make either white or black men slaves. In organizing the government of a territory, Congress is limited to means appropriate to the attainment of the constitutional object. No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit; so that, whether the object may be the protection of the persons and property of purchasers of the public lands, or of communities who have been annexed to the Union by conquest or purchase, they are initiatory to the establishment of state governments, and no more power can be claimed or exercised, than is necessary to the attainment of the end. This is the limitation of all the federal powers.

But Congress has no power to regulate the internal concerns of a State, as of a Territory; consequently, in providing for the government of a Territory, to some extent, the combined powers of the federal and state governments are necessarily exercised.

If Congress should deem slaves or free colored persons injurious to the population of a free Territory, as conducing to lessen the value of the public lands, or on any other ground connected with the public interest, they have the power to prohibit them from becoming settlers in it. This can be sustained on the ground of a sound national policy, which is so clearly shown in our history by practical results, that it would seem no considerate individual can question it. And, as regards any unfairness of such a policy to our Southern brethren, as urged in the argument, it is only necessary to say that, with one fourth of the federal population of the Union, they have in the slave States a larger extent of fertile territory than is included in the free States; and it is submitted, if masters of slaves be restricted from bringing them into free territory, that the restriction on the free citizens of non-slaveholding States, by bringing slaves into free territory, is four times greater than that complained of by the South. But, not only so; some three or four hundred thousand holders of slaves, by bringing them into free territory, impose a restriction on twenty millions of the free States. The repugnancy to slavery would probably prevent fifty or a hundred freemen from settling in a slave Territory, where one slaveholder would be prevented from settling in a free Territory.

This remark is made in answer to the argument urged, that a prohibition of slavery in the free Territories is inconsistent with the continuance of the Union. Where a territorial government is established in a slave Territory, it has uniformly remained in that condition until the people form a State constitution; the same course where the Territory is free, both parties acting in good faith, would be attended with satisfactory results.

The sovereignty of the Federal Government extends to the entire limits of our territory. Should any foreign power invade our jurisdic-

tion, it would be repelled. There is a law of Congress to punish our citizens for crimes committed in districts of country where there is no organized government. Criminals are brought to certain Territories or States, designated in the law, for punishment. Death has been inflicted in Arkansas and in Missouri, on individuals, for murders committed beyond the limit of any organized Territory or State; and no one doubts that such a jurisdiction was rightfully exercised. If there be a right to acquire territory, there necessarily must be an implied power to govern it. When the military force of the Union shall conquer a country, may not Congress provide for the government of such country? This would be an implied power essential to the acquisition of new territory. This power has been exercised, without doubt of its constitutionality on territory acquired by conquest and purchases.

And when there is a large district of country within the United States and not within any state government, if it be necessary to establish a temporary government to carry out a power expressly vested in Congress—as the disposition of the public lands—may not such government be instituted by Congress? How do we read the Constitution? Is it not a practical instrument?

In such cases, no implication of a power can arise which is inhibited by the Constitution, or which may be against the theory of its construction. As my opinion rests on the 3d section, these remarks are made as an intimation that the power to establish a temporary government may arise, also, on the other two grounds stated in the opinion of the court in the insurance case, without weakening the 3d section

I would here simply remark, that the Constitution was formed for our whole country. An expansion or contraction of our territory required no change in the fundamental law. When we consider the men who laid the foundation of our government and carried it into operation, the men who occupied the Bench, who filled the halls of legislation and the Chief Magistracy, it would seem, if any question could be settled clear of all doubt, it was the power of Congress to establish territorial governments. Slavery was prohibited in the entire Northwestern Territory, with the approbation of leading men, South and North; but this prohibition was not retained when this Ordinance was adopted for the government of southern Territories, where slavery existed. In a late republication of a letter of Mr. Madison, dated November 27, 1819, speaking of this power of Congress to prohibit slavery in a Territory, he infers there is no such power, from the fact that it has not been exercised. This is not a very satisfactory argument against any power, as there are but few, if any subjects on which the constitutional powers of Congress are exhausted. It is true, as Mr. Madison states, that Congress, in the Act to establish a government in the Mississippi Territory, prohibited the importation of slaves into it from foreign parts; but it is equally true, that in the Act erecting Louisiana into two Territories, Congress declared, "it shall not be lawful for any person to bring into Orleans Territory, from any port or place within the limits of the United States, any slave which shall have been imported, except by a citizen of the United States who settles in the Territory, under the penalty of the freedom of such slave." The inference of Mr. Madison, therefore, against the power of Congress, is of no force, as it was founded on a fact supposed, which did not exist.

It is refreshing to turn to the early incidents of our history, and learn wisdom from the acts of the great men who have gone to their account. I refer to a report in the House of Representatives, by John Randolph, of Roanoke, as chairman of a committee, in March, 1803—fifty-four years ago. From the Convention held at Vincennes, in Indiana, by their president, and from the people of the Territory, a petition was presented to Congress, praying the suspension of the provision which prohibited slavery in that Territory. The report stated "that the rapid population of the State of Ohio sufficiently evinces, in the opinion of your committee, that the labor of slaves is not necessary to promote the growth and settlement of colonies in that region. That this labor, demonstrably the dearest of any, can only be employed to advantage in the cultivation of products more valuable than any known to that quarter of the United States; that the committee deem it highly dangerous and inexpedient to impair a provision wisely calculated to promote the happiness and prosperity of the Northwestern country, and to give strength and security to that extensive frontier. In the salutary operation of this sagacious and benevolent restraint, it is believed that the inhabitants will, at no very distant day, find ample remuneration for a temporary privation of labor and of emigration."

1 vol. State Papers, Public Lands, 160.

The judicial mind of this country, State and Federal, has agreed on no subject, within its legitimate action, with equal unanimity, as on the power of Congress to establish territorial governments. No court, State or Federal, no judge or statesman, is known to have had any doubts on this question for nearly sixty years after the power was exercised. Such governments have been established from the sources of the Ohio to the Gulf of Mexico, extending to the Lakes on the north and the Pacific Ocean on the west, and from the lines of Georgia to Texas.

Great interests have grown up under the territorial laws over a country more than five times greater in extent than the original thirteen States; and these interests, corporate or otherwise, have been cherished and consolidated by a benign policy, without anyone supposing the law-making power had united with the judiciary, under the universal sanction of the whole country, to usurp a jurisdiction which did not belong to them. Such as discovery at this late date is more extraordinary than anything which has occurred in the judicial history of this or any other country. Texas, under a previous organization, was admitted as a State; but no State can be admitted into the Union which has not been organized under some form of government. Without temporary governments, our public lands could not have been sold, nor our wilderness reduced to cultivation, and the population protected; nor could our flourishing States, west and south, have been formed.

What do the lessons of wisdom and experience teach, under such circumstances, if the new light, which has so suddenly and unexpectedly burst upon us, be true? Acquiescence; acquiescence under a settled construction of the Constitution for sixty years, though it may be erroneous; which has secured to the country an advancement and prosperity beyond the power of computation.

An act of James Madison, when President, forcibly illustrates this policy. He had made up his opinion that Congress had no power under the Constitution to establish a National Bank. In 1815, Congress passed a bill to establish a bank. He vetoed the bill, on objections other than constitutional. In his message, he speaks as a wise statesman and Chief Magistrate, as follows:

"Waiving the question of the constitutional authority of the Legislature to establish an incorporated bank, as being precluded, in my judgement, by the repeated recognitions under varied circumstances of the validity of such an institution, in acts of the Legislature, Executive, and Judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation."

Has this impressive lesson of practical wisdom become lost to the present generation?

If the great and fundamental principles of our Government are never to be settled, there can be no lasting prosperity. The Constitution will become a floating waif on the billows of popular excitement.

The prohibition of slavery north of thirty-six degrees thirty minutes, and of the State of Missouri, contained in the Act admitting that State into the Union, was passed by a vote of 134, in the House of Representatives, to 42. Before Mr. Monroe signed the Act, it was submitted by him to his Cabinet, and they held the restriction of slavery in a Territory to be within the constitutional powers of Congress. It would be singular, if in 1804 Congress had power to prohibit the introduction of slaves in Orleans Territory from any other part of the Union, under the penalty of freedom to the slave, if the same power embodied in the Missouri Compromise, could not be exercised in 1820.

But this law of Congress, which prohibits slavery north of Missouri and of thirty-six degrees thirty minutes, is declared to have been null and void by my brethren. And this opinion is founded mainly, as I understand, on the distinction drawn between the Ordinance of 1787 and the Missouri compromise line. In what does the distinction consist? The Ordinance, it is said, was a compact entered into by the confederated States before the adoption of the Constitution; and that in the cession of territory, authority was given to establish a territorial government.

It is clear that the Ordinance did not go into operation by virtue of the authority of the Confederation, but by reason of its modification and adoption by Congress under the Constitution. It seems to be supposed, in the opinion of the court, that the articles of cession placed it on a different footing from Territories subsequently acquired. I am unable to perceive the force of this distinction. That the Ordinance was intended for the government of the Northwestern Territory, and was limited to such Territory, is admitted. It was extended to southern

Territories, with modifications, by Acts of Congress, and to some northern Territories. But the Ordinance was made valid by the Act of Congress, and without such Act could have been of no force. It rested for its validity on the Act of Congress, the same, in my opinion, as the Missouri compromise line.

If Congress may establish a territorial government in the exercise of its discretion, it is a clear principle that a court cannot control that discretion. This being the case, I do not see on what ground the Act is held to be void. It did not purport to forfeit property, or take it for public purposes. It only prohibited slavery; in doing which, it followed the Ordinance of 1787.

I will now consider the fourth head, which is: "The effect of taking slaves into a State or Territory, and so holding them, where slavery is prohibited."

If the principle laid down in the case of *Prigg v. The State of Pennsylvania* is to be maintained, and it is certainly to be maintained until overruled, as a law of this court, there can be no difficulty on this point. In that case, the court says: "The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws." If this be so, slavery can exist nowhere except under the authority of law, founded on usage having the force of law, or by statutory recognition. And the court further says: "It is manifest, from this consideration, that if the Constitution had not contained the clause requiring the rendition of fugitives from labor, every non-slaveholding State in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of the masters."

Now, if a slave abscond, he may be reclaimed, but if he accompany his master into a State or Territory where slavery is prohibited, such slave cannot be said to have left the service of his master where his services were legalized. And if slavery be limited to the range of the territorial laws, how can the slave be coerced to serve in a State or Territory, not only without the authority of law, but against its express provisions? What gives the master the right to control the will of his slave? The local law, which exists in some form. But where there is no such law, can the master control the will of the slave by force? Where no slavery exists, the presumption, without regard to color, is in favor of freedom. Under such a jurisdiction, may the colored man be levied on as the property of his master by a creditor? On the decease of the master, does the slave descend to his heirs as property? Can the master sell him? Any one or all of these acts may be done to the slave, where he is legally held to service. But where the law does not confer this power, it cannot be exercised.

Lord Mansfield held that a slave brought into England was free. Lord Stowell agreed with Lord Mansfield in this respect, and that the slave could not be coerced in England; but on her voluntary return to Antigua, the place of her slave domicil, her former status attached. The law of England did not prohibit slavery, but did not authorize it. The jurisdiction which prohibits slavery is much stronger in behalf of the slave within it, than where it only does not authorize it.

By virtue of what law is it, that a master may take his slave into free territory, and exact from him the duties of a slave? The law of the territory does not sanction it. No authority can be claimed under the Constitution of the United States, or any law of Congress. Will it be said that the slave is taken as property, the same as other property which the master may own? To this I answer, that colored persons are made property by the law of the State, and no such power has been given to Congress. Does the master carry with him the law of the State from which he removes into the Territory? And does that enable him to coerce his slave in the Territory? Let us test this theory. If this may be done by a master from one slave State, it may be done by a master from every other slave State. This right is supposed to be connected with the person of the master, by virtue of the local law. Is it transferable? May it be negotiated, as a promissory noted or bill of exchange? If it be assigned to a man from a free State, may he coerce the slave by virtue of it? What shall this thing be denominated? Is it personal or real property? Or is it an indefinable fragment of sovereignty, which every person carries with him from his late domicil? One thing is certain, that its origin has been very recent, and it is unknown to the laws of any civilized country.

A slave is brought to England from one of its islands, where slavery was introduced and maintained by the mother country. Although there is no law prohibiting slavery in England, yet there is no law authorizing it; and, for near a century,

its courts have declared that the slave there is free from the coercion of the master. Lords Mansfield and Stowell agree upon this point, and there is no dissenting authority.

There is no other description of property which was not protected in England, brought from one of its slave islands. Does not this show that property in a human being does not arise from nature or from the common law, but, in the language of this court, "it is a mere municipal regulation, founded upon and limited to the range of the territorial laws?" This decision is not a mere argument, but it is the end of the law, in regard to the extent of slavery. Until it shall be overturned, it is not a point for argument; it is obligatory on myself and by brethren, and on all judicial tribunals over which this court exercises an appellate power.

It is said the Territories are common property of the States, and that every man has a right to go there with his property. This is not controverted. But the court say a slave is not property beyond the operation of the local law which makes him such. Never was a truth more authoritatively and justly uttered by man. Suppose a master of a slave in a British island owned a million of property in England; would that authorize him to take his slaves with him to England? The Constitution, in express terms, recognizes the status of slavery as founded on the municipal law. "No person held to service or labor in one State, under the laws thereof, escaping into another, shall," etc. Now, unless the fugitive escape from a place where, by the municipal law, he is held to labor, this provision affords no remedy to the master. What can be more conclusive than this? Suppose a slave escape from a Territory where slavery is not authorized by law, can he be reclaimed?

In this case, a majority of the court have said that a slave may be taken by his master into a Territory of the United States, the same as a horse, or any other kind of property. It is true, this was said by the court, as also many other things, which are of no authority. Nothing that has been said by them, which has not a direct bearing on the jurisdiction of the court, against which they decided, can be considered as authority. I shall certainly not regard it as such. The question of jurisdiction, being before the court, was decided by them authoritatively, but nothing beyond that question. A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence.

Under this head I shall chiefly rely on the decisions of the Supreme Courts of the Southern States, and especially of the State of Missouri.

In the 1st and 2d sections of the 6th article of the Constitution of Illinois, it is declared that neither slavery nor involuntary servitude shall hereafter be introduced into this State, otherwise than for the punishment of crimes whereof the party shall have been duly convicted; and in the 2d section it is declared that any violation of this article shall effect the emancipation of such person from his obligation to service. In Illinois, a right of transit through the State is given the master with his slaves. This is a matter which, as a I suppose, belongs exclusively to the State.

The Supreme Court of Illinois, in the case of *Jarrot v. Jarrot*, 2 Gilman, 7, said:

"After the conquest of this Territory by Virginia, she ceded it to the United States, and stipulated that the titles and possessions, right and liberties of the French settlers, should be guarantied to them. This, it has been contended, secured them in the possession of those negroes as slaves which they held before that time, and that neither Congress nor the Convention had power to deprive them of it; or, in other words, that the Ordinance and Constitution should not be so interpreted and understood as applying to such slaves, when it is therein declared that there shall be neither slavery nor involuntary servitude in the Northwest Territory, nor in the State of Illinois, otherwise than in the punishment of crimes. But it was held that those rights could not be thus protected, but must yield to the Ordinance and Constitution."

The first slave case decided by the Supreme Court of Missouri, contained in the reports, was *Winny v. Whitesides*, 1 Mo. 473, at October Term, 1824. It appeared that, more than twenty-five years before, the defendant, with her husband, had removed from Carolina to Illinois, and brought with them the plaintiff; that they continued to reside in Illinois three or four years, retaining the plaintiff as a slave; after which, they removed to Missouri, taking her with them.

The court held, that if a slave be detained in Illinois until he be entitled to freedom, the right

of the owner does not revive when he finds the negro in a slave State.

That when a slave is taken to Illinois by his owner, who takes up his residence there, the slave is entitled to freedom.

In the case of *Lagrange v. Chouteau*, 2 Mo. 20 at May Term, 1828, it was decided that the Ordinance of 1787 was intended as a fundmental law for those who may choose to live under it, rather than as a penal statute.

That any sort of residence contrived or permitted by the legal owner of the slave, upon the faith of secret trusts or contracts, in order to defeat or evade the Ordinance, and thereby introduced slavery de facto, would entitle such slave to freedom.

In *Julia v. McKinney*, 3 Mo. 270, it was held, where a slave was settled in the State of Illinois, but with an intention on the part of the owner to be removed at some future day, that hiring said slave to a person to labor for one or two days, and receiving the pay for the hire, the slave is entitled to her freedom, under the 2d section of the 6th article of the Constitution of Illinois.

*Rachel v. Walker*, 4 Mo. 350, June Term, 1836, is a case involving, in every particular, the principles of the case before us. Rachel sued for her freedom; and it appeared that she had been bought as a slave in Missouri, by Stockton an officer of the army, taken to Fort Snelling, where he was stationed, and she was retained there as a slave a year; and then Stockton removed to Prairie du Chien, taking Rachel with him as a slave, where he continued to hold her three years, and then he took her to the State of Missouri, and sold her as a slave.

"Fort Snelling was admitted to be on the west side of the Mississippi River, and north of the State of Missouri, in the territory of the United States. That Prairie du Chien was in the Michigan Territory, on the east side of the Mississippi River. Walker, the defendant, held Rachel under Stockton."

The court said, in this case:

"The officer lived in Missouri Territory, at the time he bought the slave; he sent to a slave-holding country and procured her; this was his voluntary act, done without any other reason than that of his convenience; and he and those claiming under him must be holden to abide the consequences of introducing slavery both in Missouri Territory and Michigan, contrary to law; and on that ground Rachel was declared to be entitled to freedom."

In answer to the argument that, as an officer of the army, the master had a right to take his slave into free territory, the court said no authority of law or the government compelled him to keep the plaintiff there as a slave.

"Shall it be said, that because an officer of the army owns slaves in Virginia, that when, as officer and soldier, he is required to take the command of a fort in the non-slave-holding States or Territories, he thereby has a right to take with him as many slaves as will suit his interests or convenience? It surely cannot be law. If this be true, the court say, then it is also true that the convenience or supposed convenience of the officer repeals, as to him and others who have the same character, the Ordinance and the Act of 1821, admitting Missouri into the Union, and also the prohibition of the several laws and constitutions of the non-slaveholding States.

In *Wilson v. Melvin*, 4 Mo. 592, it appeared the defendant left Tennessee with an intention of residing in Illinois, taking his negroes with him. After a month's stay in Illinois, he took his negroes to St. Louis, and hired them, then returned to Illinois. On these facts, the inferior court instructed the jury that the defendant was a sojourner in Illinois. This the Supreme Court held was error, and the judgment was reversed.

The case of *Dred Scott v. Emerson*, 15 Mo. 576, March Term, 1852, will now be stated. This case involved the identical question before us, Emerson having, since the hearing, sold the plaintiff to Sandford, the defendant.

Two of the judges ruled the case, the Chief Justice dissenting. It cannot be improper to state the grounds of the opinion of the court, and the dissent.

The court says: "Cases of this kind are not strangers in our court. Persons have been frequently here adjudged to be entitled to their freedom, on the ground that their masters held them in slavery in Territories or States in which that institution is prohibited. From the first case decided in our court, it might be inferred that this result was brought about by a presumed assent of the master, from the fact of having voluntarily taken his slave to a place where the relation of master and slave did not exist. But subsequent cases base the right to 'exact the forfeiture of emancipation,' as they term it, on the ground,

it would seem, that it was the duty of the courts of this State to carry into effect the constitution and laws of other States and Territories, regardless of the rights, the policy, or the institutions, of the people of this State."

And the court say that the States of the Union, in their municipal concerns, are regarded as foreign to each other; that the courts of one State do not take notice of the laws of other States, unless proved as facts, and that every State has the right to determine how far its comity to other States shall extend; and it is laid down, that when there is no act of manumission decreed to the free State, the courts of the slave States cannot be called to give effect to the law of the free State. Comity, it alleges, between States, depends upon the discretion of both, which may be varied by circumstances. And it is declared by the court, "that times are not as they were when the former decisions on this subject were made." Since then, not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures whose inevitable consequence must be the overthrow and destruction of our government. Under such circumstances, it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit. She is willing to assume her full responsibility for the existence of slavery within her limits, nor does she seek to share or divide it with others.

Chief Justice Gamble dissented from the other two judges. He says:

"In every slaveholding State in the Union, the subject of emancipation is regulated by statute; and the forms are prescribed in which it shall be effected. Whenever the forms required by the laws of the State in which the master and slave are resident are complied with, the emancipation is complete, and the slave is free. If the right of the person thus emancipated is subsequently drawn in question in another State, it will be ascertained and determined by the law of the State in which the slave and his former master resided; and when it appears that such law has been complied with, the right to freedom will be fully sustained in the courts of all the slaveholding States, although the act of emancipation may not be in the form required by law in which the court sits.

"In all such cases, courts continually administer the law of the country where the right was acquired; and when that law becomes known to the court, it is just as much a matter of course to decide the rights of the parties according to its requirements, as it is to settle the title of real estate situated in our State by its own laws."

This appears to me a most satisfactory answer to the argument of the court. Chief Justice continues:

"The perfect equality of the different States lies at the foundation of the Union. As the institution of slavery in the States is one over which the Constitution of the United States gives no power to the general government, it is left to be adopted or rejected by the several States, as they think best; nor can any one State, or number of States, claim the right to interfere with any other State upon the question of admitting or excluding this institution.

"A citizen of Missouri, who removes with his slave to Illinois, has no right to complain that the fundamental law of that State to which he removes, and in which he makes his residence, dissolves the relation between him and his slave. It is as much his own voluntary act, as if he had executed a deed of emancipation. No one can pretend ignorance of this constitutional provision, and," he says, "the decisions which have heretofore been made in this State, and in many other slaveholding States, give effect to this and other similar provisions, on the ground that the master, by making the free State the residence of his slave, has submitted his right to the operation of the law of such State; and this," he says, "is the same in law as a regular deed of emancipation."

He adds:

"I regard the question as conclusively settled by repeated adjudications of this court, and, if I doubted or denied the propriety of those decisions, I would not feel myself anymore at liberty to overturn them, than I would any other series of decisions by which the law of any other question was settled. There is with me," he says, "nothing in the law relating to slavery which distinguishes it from the law on any other subject, or allows any more accommodation to the temporary public excitements which are gathered around it."

"In this State," he says, "it has been recognized from the beginning of the government as a correct position in law, that a master who takes his slave to reside in a State or Territory where

slavery is prohibited, thereby emancipates his slave." These decisions, which come down to the year 1837, seemed to have so fully settled the question, that since that time there has been no case bringing it before the court for any reconsideration, until the present. In the case of "*Winny v. Whitesides*, 1 Mo. 473, the question was made in the argument, "whether one nation would execute the penal laws of another," and the court replied in this language (Huberus, quoted in 4 Dallas), which says, "personal rights or disabilities obtained or communicated by the laws of any particular place are of a nature which accompany the person wherever he goes;" and the Chief Justice observed, in the case of *Rachel v. Walker*, 4 Mo. 350, the Act of Congress called the Missouri Compromise was held as operative as the Ordinance of 1787.

When Dred Scott, his wife and children, were removed from Fort Snelling to Missouri, in 1838, they were free as the law was then settled, and continued for fourteen years afterwards, up to 1852, when the above decision was made. Prior to this, for nearly thirty years, as Chief Justice Gamble declares, the residence of a master with his slave in the State of Illinois, or the Territory north of Missouri, where slavery was prohibited by the Act called the Missouri Compromise, would manumit the slave as effectually as if he had executed a deed of emancipation; and that an officer of the army who takes his slave into that State or Territory; and holds him there as a slave, liberates him the same as any other citizen—and down to the above time it was settled by numerous and uniform decisions; and that on the return of the slave to Missouri, his former condition of slavery did not attach. Such was the settled law of Missouri until the decision of *Scott v. Emerson*.

In the case of *Sylvia v. Kirby*, 17 Mo. 434, the court followed the above decision, observing that it was similar in all respects to the case of *Scott v. Emerson*.

This court follows the established construction of the statutes of a State by its Supreme Court. Such a construction is considered as a part of the Statute, and we follow it to avoid two rules of property in the same State. But we do not follow the decisions of the Supreme Court of a State beyond a statutory construction as a rule of decision for this court. State decisions are always viewed with respect and treated as authority; but we follow the settled construction of the statutes, not because it is of binding authority, but in pursuance of a rule of judicial policy.

But there is no pretense that the case of *Dred Scott v. Emerson* turned upon the construction of a Missouri Statute; nor was there any established rule of property which could have rightfully influenced in the decision. On the contrary, the decision overruled the settled law for nearly thirty years.

This is said by my brethren to be a Missouri question; but there is nothing which gives it this character, except that it involves the right to persons claimed as slaves who reside in Missouri, and the decision was made by the Supreme Court of that State. It involves a right claimed under an Act of Congress and the Constitution of Illinois, and which cannot be decided without the consideration and construction of those laws. But the Supreme Court of Missouri held, in this case, that it will not regard either of those laws, without which there was no case before it; and Dred Scott, having been a slave, remains a slave. In this respect it is admitted this is a Missouri question—a case which has but one side, if the Act of Congress and the Constitution of Illinois are not recognized.

And does such a case constitute a rule of decision for this court—a case to be followed by this court? The course of decision so long and so uniformly maintained established a comity or law between Missouri and the free States and Territories where slavery was prohibited, which must be somewhat regarded in this case. Rights sanctioned for twenty-eight years ought not and cannot be repudiated, with any semblance of justice, by one or two decisions, influenced, as declared, by a determination to counteract the excitement against slavery in the free States.

The courts of Louisiana having held, for a series of years, that where a master took his slave to France, or any free state, he was entitled to freedom, and that on bringing him back the status of slavery did not attach, the Legislature of Louisiana declared by an Act that the slave should not be made free under such circumstances. This regulated the rights of the master from the time the Act took effect. But the decision of the Missouri court, reversing a former decision, affects all previous decisions, technically, made on the same principles, unless such decisions are protected by the lapse of time or the Statute of Limitations. Dred Scott and his family, beyond all controversy, were free under

the decisions made for twenty-eight years, before the case of *Scott v. Emerson*. This was the undoubted law of Missouri for fourteen years after Scott and his family were brought back to that State. And the grave question arises, whether this law may be so disregarded as to enslave free persons. I am strongly inclined to think that a rule of decision so well settled as not to be questioned, cannot be annulled by a single decision of the court. Such rights may be inoperatives under the decision in future; but I cannot well perceive how it can have the same effect in prior cases.

It is admitted, that when a former decision is reversed, the technical effect of the judgment is to make all previous adjudications on the same question erroneous. But the case before us was not that the law had been erroneously construed, but that, under the circumstances which then existed, that law would not be recognized; and the reason for this is declared to be the excitement against the institution of slavery in the free States. While I lament this excitement as much as anyone, I cannot assent that it shall be made a basis for judicial action.

In 1816, the common law, by statute, was made a part of the law of Missouri; and that includes the great principles of international law. These principles cannot be abrogated by judicial decisions. It will require that same exercise of power to abolish the common law, as to introduce it. International law is founded in the opinions generally received and acted on by civilized nations, and enforced by moral sanctions. It becomes a more authoritative system when it results from special compacts, founded on modified rules adapted to the exigencies of human society; it is in fact an international morality, adapted to the best interests of nations. And in regard to the States of this Union, on the subject of slavery, it is eminently fitted for a rule of action, subject to the Federal Constitution.

"The laws of nations are but the natural rights of man applied to nations." Vattel.

If the common law have the force of a statutory enactment in Missouri, it is clear, as it seems to me, that a slave who, by a residence in Illinois in the service of his master, becomes entitled to his freedom, cannot again be reduced to slavery by returning to his former domicil in a slave State. It is unnecessary to say what legislative power might do by a general Act in such a case, but it would be singular if a freeman could be made a slave by the exercise of a judicial discretion. And it would be still more extraordinary if this could be done, not only in the absence of special legislation, but in a State where the common law is in force.

It is supposed by some that the 3d article in the Treaty of Cession of Louisiana to this country, by France, in 1803, may have some bearing on this question. The article referred to provides "that the inhabitants of the ceded Territory shall be incorporated into the Union, and enjoy all the advantages of citizens of the United States, and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion they profess."

As slavery existed in Louisiana at the time of the cession, it is supposed this is a guaranty that there should be no change in its condition.

The answer to this is, in the first place, that such a subject does not belong to the treaty-making power; and any such arrangement would have been nugatory. And, in the second place, by no admissible construction can the guaranty be carried further than the protection of property in slaves at that time in the ceded Territory. And this has been complied with. The organization of the slave States of Louisiana, Missouri and Arkansas, embraced every slave in Louisiana at the time of the cession. This removes every ground of objection under the Treaty. There is, therefore, no pretense, growing out of the Treaty, that any part of the Territory of Louisiana, as ceded, beyond the organized States, is slave territory.

Under the fifth head, we were to consider whether the status of slavery attached to the plaintiff and wife on their return to Missouri.

This doctrine is not asserted in the late opinion of the Supreme Court of Missouri, and up to 1852 the contrary doctrine was uniformly maintained by that court.

In its late decision, the court say that it will not give effect in Missouri to the laws of Illinois, or the law of Congress called the Missouri Compromise. This was the effect of the decision, though its terms were, that the court would not take notice, judicially, of those laws.

In 1851, the Court of Appeals of South Carolina recognized the principle, that a slave, being taken to a free State, became free. *Commonwealth v. Pleasant*, 10 Leigh, 697. In *Betty v. Horton,* the Court of Appeals held that

the freedom of the slave was acquired by the action of the laws of Massachusetts, by the said slave being taken there. 5 Leigh, 615.

The slave States have generally adopted the rule, that where the master, by a residence with his slave in a State or Territory where slavery is prohibited, the slave was entitled to his freedom everywhere. This was the settled doctrine of the Supreme Court of Missouri. It has been so held in Mississippi, in Virginia, in Louisiana, formerly in Kentucky, Maryland, and in other States.

The law, where a contract is made and is to be executed, governs it. This does not depend upon comity, but upon the law of the contract. And if, in the language of the Supreme Court of Missouri, the master, by taking his slave to Illinois, and employing him there as a slave, emancipates him as effectually as by a deed of emancipation, is it possible that such an act is not matter for adjudication in any slave State where the master may take him? Does not the master assent to the law when he places himself under it in a free State?

The States of Missouri and Illinois are bounded by a common line. The one prohibits slavery, the other admits it. This has been done by the exercise of that sovereign power which appertains to each. We are bound to respect the institutions of each, as emanating from the voluntary action of the people. Have the people of either any right to disturb the relations of the other? Each State rests upon the basis of its own sovereignty, protected by the Constitution. Our Union has been the foundation of our prosperity and national glory. Shall we not cherish and maintain it? This can only be done by respecting the legal rights of each State.

If a citizen of a free State shall entice or enable a slave to escape from the service of his master, the law holds him responsible, not only for the loss of the slave, but he is liable to be indicted and fined for the misdemeanor. And I am bound here to say that I have never found a jury in the four States which constitute my circuit, which have not sustained this law, where the evidence required them to sustain it. And it is proper that I should also say that more cases have arisen in my circuit by reason of its extent and locality, than in all other parts of the Union. This has been done to vindicate the sovereign rights of the Southern States, and protect the legal interests of our brethren of the South.

Let these facts be contrasted with the case now before the court. Illinois has declared in the most solemn and impressive form that there shall be neither slavery not involuntary servitude in that State, and that any slave brought into it, with a view of becoming a resident, shall be emancipated. And effect has been given to this provision of the Constitution by the decision of the Supreme Court of that State. With a full knowledge of these facts, a slave is brought from Missouri to Rock Island, in the State of Illinois, and is retained there as a slave for two years, and then taken to Fort Snelling, where slavery is prohibited by the Missouri Compromise Act, and there he is detained two years longer in a state of slavery. Harriet, his wife, was also kept at the same place four years as a slave, having been purchased in Missouri. They were then removed to the State of Missouri, and sold as slaves, and in the action before us they are not only claimed as slaves, but a majority of my brethren have held that on their being returned to Missouri the status of slavery attached to them.

I am not able to reconcile this result with the respect due to the State of Illinois. Having the same rights of sovereignty as the State of Missouri in adopting a constitution, I can perceive no reason why the institutions of Illinois should not receive the same consideration as those of Missouri. Allowing to my brethren the same right of judgment that I exercise myself, I must be permitted to say that it seems to me the principle laid down will enable the people of a slave State to introduce slavery into a free State, for a longer or shorter time, as may suit their convenience; and by returning the slave to the State whence he was brought, by force or otherwise, the status of slavery attaches, and protects the rights of the master, and defies the sovereignty of the free State. There is no evidence before us that Dred Scott and his family returned to Missouri voluntarily. The contrary is inferable from the agreed case: "In the year 1838, Dr. Emerson removed the plaintiff and said Harriet, and their daughter Eliza, from Fort Snelling to the State of Missouri, where they have ever since resided." This is the agreed case; and can it be inferred from this that Scott and family returned to Missouri voluntarily? He was removed; which shows that he was passive, as a slave, having exercised no volition on the subject. He did not resist the master by absconding or force. But that was not sufficient to bring him within Lord Stowell's

decision; he must have acted voluntarily. It would be a mockery of law and an outrage on his rights to coerce his return, and then claim that it was voluntary, and on that ground that his former status of slavery attached.

If the decision be placed on this ground, it is a fact for a jury to decide, whether the return was voluntary, or else the fact should be distinctly admitted. A presumption against the plaintiff in this respect, I say with confidence is not authorized from the facts admitted.

In coming to the conclusion that a voluntary return by Grace to her former domicil, slavery attached, Lord Stowell took great pains to show that England forced slavery upon her Colonies, and that it was maintained by numerous Acts of Parliament and public policy, and, in short, that the system of slavery was not only established by Great Britain in her West Indian colonies, but that it was popular and profitable to many of the wealthy and influential people of England, who were engaged in trade, or owned and cultivated plantations in the Colonies. No one can read his elaborate views and not be struck with the great difference between England and her Colonies, and the free and slave States of this Union. While slavery in the Colonies of England is subject to the power of the mother country, our States, especially in regard to slavery, are independent, resting upon their own sovereignties, and subject only to international laws, which apply to independent States.

In the case of Williams, who was a slave in Granada, having run away, came to England, Lord Stowell said: "The four judges all concur in this—that he was a slave in Granada, though a free man in England, and he would have continued a free man in all other parts of the world except Granada."

*Strader v. Graham*, 10 How. 82, and 18 Curt. 305, has been cited as having a direct bearing in the case before us. In that case the court say: "It was exclusively in the power of Kentucky to determine, for itself, whether the employment of slaves in another State should or should not make them free on their return." No question was before the court in that case, except that of jurisdiction. And any opinion given on any other point is obiter dictum, and of no authority. In the conclusion of his opinion, the Chief Justice said: "In every view of the subject, therefore, this court has no jurisdiction of the case, and the writ of error must on that ground be dismissed."

In the case of *Spencer v. Negro Dennis*, 8 Gill, 321, the court say "Once free, and always free, is the maxim of Maryland law upon the subject. Freedom having once vested, by no compact between the master and the liberated slave, nor by any condition subsequent, attached by the master to the gift of freedom, can a state of slavery be reproduced."

In *Hunter v Fulcher*, 1 Leigh, 172.

"By a Statute of Maryland of 1796, all slaves brought into that State to reside are declared free; a Virginian-born slave is carried by his master to Maryland; the master settled there, and keeps the slave there in bondage for twelve years, the statute in force all the time; then he brings him as a slave to Virginia, and sells him there. Adjudged, in an action brought by the man against the purchaser, that he is free."

Judge Kerr, in the case, says:

"Agreeing, as I do, with the general view taken in this case by my brother Green, I would not add a word, but to mark the exact extent to which I mean to go. The law of Maryland having enacted that slaves carried into that State for sale or to reside shall be free, and the owner of the slave here having carried him to Maryland, and voluntarily submitting himself and the slave to that law, it governs the case."

In every decision of a slave case prior to that of *Dred Scott v. Emerson*, the Supreme Court of Missouri considered it as turning upon the Constitution of Illinois, the Ordinance of 1787, or the Missouri Compromise Act of 1820. The court treated these Acts as in force, and held itself bound to execute them, by declaring the slave to be free who had acquired a domicil under them with the consent of his master.

The late decision reversed this whole line of adjudication, and held that neither the Constitution and laws of the States, nor Acts of Congress in relation to Territories, could be judicially noticed by the Supreme Court of Missouri. This is believed to be in conflict with the decisions of all the courts in the Southern States, with some exceptions of recent cases.

In *Marie Louise v. Marot et. al.* 9 La. 475, it was held, where a slave having been taken to the kingdom of France or other country by the owner, where slavery is not tolerated, operates on the condition of the slave, and produces

immediate emancipation; and that, where a slave thus becomes free, the master cannot reduce him again to slavery.

*Josephine v. Poultney*, 1 La. Ann. 329 "where the owner removes with a slave into a State in which slavery is prohibited, with the intention of residing there, the slave will be thereby emancipated, and their subsequent return to the State of Louisiana cannot restore the relation of master and slave." To the same import are the cases of *Smith v. Smith*, 13 La. 441; *Thomas v. Generis*, 16 La. 483; *Harry et al. v. Decker and Hopkins*, Walk. (Miss.) 36. It was held that "slaves within the jurisdiction of the Northwestern Territory became freemen by virtue of the Ordinance of 1787, and can assert their claim to freedom in the courts of Mississippi." *Griffith v. Fanny*, 1 Virginia, 143. It was decided that a negro held in servitude in Ohio, under a deed executed in Virginia is entitled to freedom by the Constitution of Ohio.

The case of *Rhodes v. Bell*, 2 How. 397, involved the main principle in the case before us. A person residing in Washington City purchased a slave in Alexandria, and brought him to Washington. Washington continued under the law of Maryland, Alexandria under the law of Virginia. The Act of Maryland of November, 1796, 2 Maxcy's Laws, 351, declared anyone who shall bring any negro, mulatto, or other slave, into Maryland, such slave should be free. The above slave, by reason of his being brought into Washington City, was declared by this court to be free. This, it appears to me, is a much stronger case against the slave than the facts in the case of Scott.

In *Bush v. White*, 3 Monroe, 104, the court say:

"That the Ordinance was paramount to the territorial laws, and restrained the legislative power there as effectually as a Constitution in an organized State. It was a public Act of the Legislature of the Union, and a part of the supreme law of the land; and, as such, this court is as much bound to take notice of it as it can be of any other law."

In the case of *Rankin v. Lydia*, 2 A. K. Marsh. 467, before cited, Judge Mills, speaking for the Court of Appeals of Kentucky, says:

"If, by the positive provision in our code, we can and must hold our slaves in the one case, and statutory provisions equally positive decide against that right in the other, and liberate the slave, he must, by an authority equally imperious, be declared free. Every argument which supports the right of the master on one side, based upon the force of written law, must be equally conclusive in favor of the slave, when he can point out in the statute the clause which secures his freedom."

And he further said:

"Free people of color in all the States are, it is believed, quasi citizens, or, at least, denizens. Although none of the States may allow them the privilege of office and suffrage, yet all other civil and conventional rights are secured to them; at least, such rights were evidently secured to them by the Ordinance in question for the government of Indiana. If these rights are vested in that or any other portion of the United States, can it be compatible with the spirit of our confederated government to deny their existence in any other part? Is there less comity existing between State and State, or State and Territory, than exists between the despotic governments of Europe."

These are the words of a learned and great judge, born and educated in a slave State.

I now come to inquire, under the sixth and last head, "whether the decisions of the Supreme Court of Missouri, on the question before us, are binding on this court."

While we respect the learning and high intelligence of the state courts, and consider their decisions, with others, as authority, we follow them only where they give a construction to the state statutes. On this head, I consider myself fortunate in being able to turn to the decision of this court, given by Mr. Justice Grier, in *Pease v. Peck*, a case from the State of Michigan, 18 How. 595, decided in December Term, 1855. Speaking for the court, Judge Grier said:

"We entertain the highest respect for that learned court (the Supreme Court of Michigan), and in any question affecting the construction of their own laws, where we entertain any doubt, would be glad to be relieved from doubt and responsibility by reposing on their decision. There are, it is true, many dicta to be found in our decisions, averring that the courts of the United States are bound to follow the decisions of the state courts on the construction of their own laws. But although this may be correct, yet a rather strong expression of a general rule, it

cannot be received as the annunciation of a maxim of universal application. Accordingly, our reports furnish many cases of exceptions of it. In all cases where there is a settled construction of the laws of a State, by its highest judicature established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it, without criticism or further inquiry. When the decisions of the State court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions; and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines subversive of former safe precedent."

These words, it appears to me, have a stronger application to the case before us than they had to the cause in which they were spoken as the opinion of this court; and I regret that they do not seem to be as fresh in the recollection of some of my brethren as in my own. For twenty-eight years, the decisions of the Supreme Court of Missouri were consistent on all the points made in this case. But this consistent course was suddenly terminated, whether by some new light suddenly springing up, or an excited public opinion, or both, it is not necessary to say. In the case of *Scott v. Emerson*, in 1852, they were overturned and repudiated.

This, then, is the very case in which seven of my brethren declared that they would not follow the last decision. On this authority I may well repose. I can desire no other or better basis.

But there is another ground which I deem conclusive, and which I will restate.

The Supreme Court of Missouri refused to notice the Act of Congress or the Constitution of Illinois, under which Dred Scott, his wife and children, claimed that they are entitled to freedom.

This being rejected by the Missouri court, there was no case before it, or at least it was a case with only one side. And this is the case which, in the opinion of this court, we are bound to follow. The Missouri court disregards the express provisions of an Act of Congress and the constitution of a sovereign State, both of which laws for twenty-eight years if had not only regarded, but carried into effect.

If a State court may do this, on a question involving the liberty of a human being, what protection do the laws afford? So far from this being a Missouri question, it is a question, as it would seem, within the 25th sec. of the Judiciary Act, where a right to freedom being set up under the Act of Congress, and the decision being against such right, it may be brought for revision before this court, from the Supreme Court of Missouri.

I think the judgment of the court below should be reversed.

Mr. Justice Curtis, dissenting:

I dissent from the opinion pronounced by the Chief Justice, and from the judgment which the majority of the court think it proper to render in this case. The plaintiff alleged in his declaration, that he was a citizen of the State of Missouri, and that the defendant was a citizen of the State of New York. It is not doubted that it was necessary to make each of these allegations, to sustain the jurisdiction of the Circuit Court. The defendant denied, by a plea to the jurisdiction, either sufficient or insufficient, that the plaintiff was a citizen of the State of Missouri. The plaintiff demurred to that plea. The Circuit Court adjudged the plea insufficient, and the first question for our consideration is, whether the sufficiency of that plea is before this court for judgment, upon this writ of error. The part of the judicial power of the United States, conferred by Congress on the circuit courts, being limited to certain described cases and controversies, the question whether a particular case is within the cognizance of a circuit court, may be raised by a plea to the jurisdiction of such court. When that question has been raised, the Circuit Court must, in the first instance, pass upon and determine it. Whether its determination be final, or subject to review by this appellate court, must depend upon the will of Congress; upon which body the Constitution has conferred the power, with certain restrictions, to establish inferior courts to determine their jurisdiction, and to regulate the appellate power of this court. The 22d section of the Judiciary Act of 1789, which allows a writ of error from final judgments of circuit courts, provides that there shall be no reversal in this court, on such writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court. Accordingly it has been held, from the origin of the court to the present day, that circuit courts have not been made by Congress the final judges of their own jurisdiction in civil cases. And that

when a record comes here upon a writ of error or appeal, and, on its inspection, it appears to this court that the Circuit Court had not jurisdiction, its judgment must be reversed, and the cause remanded, to be dismissed for want of jurisdiction.

It is alleged by the defendant in error, in this case, that the plea to the jurisdiction was a sufficient plea; that it shows, on inspection of its allegations, confessed by the demurrer, that the plaintiff was not a citizen of the State of Missouri; that upon this record, it must appear to this court that the case was not within the judicial power of the United States, as defined and granted by the Constitution, because it was not a suit by a citizen of one State against a citizen of another State.

To this it is answered, first, that the defendant, by pleading over, after the plea to the jurisdiction was adjudged insufficient, finally waived all benefit of that plea.

When that plea was adjudged insufficient, the defendant was obliged to answer over. He held no alternative. He could not stop the further progress of the case in the Circuit Court by a writ of error, on which the sufficiency of his plea to the jurisdiction could be tried in this court, because the judgment on that plea was not final, and no writ of error would lie. He was forced to plead to the merits. It cannot be true, then, that he waived the benefit of his plea to the jurisdiction by answering over. Waiver includes consent. Here, there was no consent. And if the benefit of the plea was finally lost, it must be, not by any waiver, but because the laws of the United States have not provided any mode of reviewing the decision of the Circuit Court on such a plea, when that decision is against the defendant. This is not the law. Whether the decision of the Circuit Court on a plea to the jurisdiction be against the plaintiff, or against the defendant, the losing party may have any alleged error in law, in ruling such a plea examined in this court on a writ of error, when the matter in controversy exceeds the sum or value of $2,000. If the decision be against the plaintiff, and his suit dismissed for want of jurisdiction, the judgment is technically final, and he may at once sue out his writ of error.

*Mollan v. Torrance*, 9 Wheat. 537.

If the decision be against the defendant, though he must answer over, and wait for a final judgment in the cause, he may then have his writ of error, and upon it obtain the judgment of this court on any question of law apparent on the record, touching the jurisdiction. The fact that he pleaded over to the merits, under compulsion, can have no effect on his right to object to the jurisdiction. If this were not so, the condition of the two parties would be grossly unequal. For if a plea to the jurisdiction were ruled against the plaintiff, he could at once take his writ of error and have the ruling reviewed here; while, if the same plea were ruled against the defendant, he must not only wait for a final judgment, but could in no event have the ruling of the Circuit Court upon the plea reviewed by this court. I know of no ground for saying that the laws of the United States have thus discriminated between the parties to a suit in its courts.

It is further objected, that as the judgment of the Circuit Court was in favor of the defendant, and the writ of error in this cause was sued out by the plaintiff, the defendant is not in a condition to assign any error in the record, and therefore this court is precluded from considering the question whether the Circuit Court had jurisdiction.

The practice of this court does not require a technical assignment of errors. See the rule. Upon a writ of error, the whole record is open for inspection; and if any error be found in it, the judgment is reversed.

*Bank of U.S. v. Smith*, 11 Wheat. 171.

It is true, as a general rule, that the court will not allow a party to rely on anything as cause for reversing a judgment, which was for his advantage. In this, we follow an ancient rule of the common law. But so careful was that law of the preservation of the course of its courts, that it made an exception out of that general rule, and allowed a party to assign for error that which was for his advantage, if it were a departure by the court itself from its settled course of procedure. The cases on this subject are collected in Bac. Abr. Error, H. 4. And this court followed this practice in *Capron v. Van Noorden*, 2 Cranch, 126, where the plaintiff below procured the reversal of a judgment for the defendant, on the ground that the plaintiff's allegations of citizenship had not shown jurisdiction.

But it is not necessary to determine whether the defendant can be allowed to assign want of jurisdiction as an error in a judgment in his own favor. The true question is, not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgment of the

Circuit Court on the merits, when it appears on the record, by a plea to the jurisdiction, that it is a case to which the judicial power of the United States does not extend. The course of the court is, where no motion is made by either party, on its own motion, to reverse such a judgment for want of jurisdiction, not only in cases where it is shown, negatively, by a plea to the jurisdiction, that jurisdiction does not exist, but even where it does not appear, affirmatively, that it does exist. *Piquignot v. The Pennsylvania R. R. Co.* 16 How. 104. It acts upon the principle, that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted. *Cutler v. Rae,* 7 How. 729. I consider, therefore, that when there was a plea to the jurisdiction of the Circuit Court in a case brought here by a writ of error, the first duty of this court is, *sua sponte,* if not moved to it by either party, to examine the sufficiency of that plea; and thus to take care that neither the Circuit Court nor this court shall use the judicial power of the United States in a case to which the Constitution and laws of the United States have not extended that power.

I proceed, therefore, to examine the plea to the jurisdiction.

I do not perceive any sound reason why it is not to be judged by the rules of the common law applicable to such pleas. It is true, where the jurisdiction of the Circuit Court depends on the citizenship of the parties, it is incumbent on the plaintiff to allege on the record the necessary citizenship; but when he has done so, the defendant must interpose a plea in abatement, the allegations whereof show that the court has not jurisdiction; and it is incumbent on him to prove the truth of his plea.

In *Sheppard v. Graves,* 14 How. 505, the rules on this subject are thus stated in the opinion of the court: "That although, in the courts of the United States, it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, yet wherever jurisdiction shall be averred in the pleadings, in conformity with the laws creating those courts, it must be taken prima facie, as existing; and it is incumbent on him who would impeach that jurisdiction for causes dehors the pleading, to allege and prove such causes; that the necessity for the allegation, and the burden of sustaining it by proof, both rest upon the party taking the exception." These positions are sustained by the authorities there cited, as well as by *Wickliffe v. Ownings,* 17 How. 47.

When, therefore, as in this case, the necessary averments as to citizenship are made on the record, and jurisdiction is assumed to exist, and the defendant comes by a plea to the jurisdiction to displace that presumption, he occupies, in my judgment, precisely the position described in Bacon Abr. Abatement: "Abatement, in the general acceptation of the word, signifies a plea, put in by the defendant, in which he shows cause to the court why he should not be impleaded; or, if at all, not in the manner and form he now is."

This being, then, a plea in abatement, to the jurisdiction of the court, I must judge of its sufficiency by those rules of the common law applicable to such pleas.

The plea was as follows: "And the said John F.A. Sandford, in his own proper person, comes and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that said cause of action, and each and every of them (if any such have accrued to the said Dred Scott), accrued to the said Dred Scott out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of the State of Missouri; for that, to wit: the said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves; and this the said Sandford is ready to verify. Wherefore, he prays judgment whether this court can or will take further cognizance of the action aforesaid."

The plaintiff demurred, and the judgment of the Circuit Court was, that the plea was insufficient.

I cannot treat this plea as a general traverse of the citizenship alleged by the plaintiff. Indeed, if it were so treated, the plea was clearly bad, for it concludes with a verification, and not to the country, as a general traverse should. And though this defect in a plea in bar must be pointed out by a special demurrer, it is never necessary to demur specially to a plea in abatement; all matters, though of form only, may be taken advantage of upon a general demurrer to such a plea.

Chitty on Pl. 465.

The truth is, that though not drawn with the utmost technical accuracy, it is a special traverse of the plaintiff's allegation of citizenship, and was a suitable and proper mode of traverse under the circumstances. By reference to Mr. Stephen's description of the uses of such a traverse, contained in his excellent analysis of pleadings (Steph. on Pl. 176), it will be seen how precisely this plea meets one of his discriptions. No doubt the defendant might have traversed, by a common or general traverse, the plainiff's allegation that he was a citizen of the State of Missouri; concluding to the country. The issue thus presented being joined, would have involved matter of law, on which the jury must have passed, under the direction of the court. But by traversing the plaintiff's citizenship specially—that is, averring those facts as a decision therefrom—opportunity was given to do what was done; that is, to present directly to the court, by a demurrer, the sufficiency of those facts to negative, in point of law, the plaintiff's allegation of citizenship. This, then, being a special, and not a general or common traverse, the rule is settled, that the facts thus set out in the plea, as the reason or ground of the traverse, must of themselves constitute, in point of law, a negative of the allegation thus traversed. Steph. on Pl. 183; Ch. on Pl. 620. And upon a demurrer to this plea, the question which arises is, whether the facts, that the plaintiff is a negro of African descent, whose ancestors were of pure African blood, and were brought into this country and sold as negro slaves, may all be true, and yet the plaintiff be a citizen of the State of Missouri, within the meaning of the Constitution and laws of the United States, which confer on citizens of one State the right to sue citizens of another State in the circuit courts. Undoubtedly, if these facts, taken together, amount to an allegation that, at the time of action brought, the plaintiff was himself a slave, the plea is sufficient. It has been suggested that the plea, in legal effect, does so aver because, if his ancestors were sold as slaves, the presumption is they continued slaves; and if so, the presumption is, the plaintiff was born a slave; and if so, the presumption is, he continued to be a slave to the time of action brought.

I cannot think such presumptions can be resorted to, to help out defective averments in pleading; especially, in pleading in abatement, where the utmost certainty and precision are required. Chit. Pl. 457. That the plaintiff himself was a slave at the time of action brought, is a substantive fact, having no necessary connection with the fact that his parents were sold as slaves. For they might have been sold after he was born; or the plaintiff himself, if once a slave, might have become a freeman before action was brought.. To aver that his ancestor were sold as slaves, is not equivalent, in point of law to an averment that he was a slave. If it were, he could not even confess and avoid the averment of the slavery of his ancestors, which would be monstrous; and if it be not equivalent in point of law, it cannot be treated as amounting thereto when demurred to; for a demurrer confesses only those substantive facts which are well pleaded, and not other distinct substantive facts which might be inferred therefrom by a jury. To treat an averment that the plaintiff's ancestors were Africans, brought to this country and sold as slaves as amounting to an averment on the record that he was a slave, because it may lay some foundation for presuming so, is to hold that the facts actually aleged may be treated as intended as evidence of another distinct fact not alleged. But, it is a cardinal rule of pleading, laid down in Dowman's case, 9 Rep. b, and in even earlier authorities therein referred to, "that evidence shall never be pleaded, for it only tends to prove matter of fact; and therefore the matter of fact shall be pleaded." Or, as the rule is sometimes stated, pleadings must not be argumentative. Steph. Pl. 384, and authorities cited by him. In Com. Dig. Pleader, E. 3, and Bac. Abr. Pleas I. 5, and Steph. Pl., many decisions under this rule are collected. In trover, for an indenture whereby A granted a manor, it is no plea that A did not grant the manor, for it does not answer the declaration except by argument. Yelv. 223.

So in trespass for taking and carrying away the plaintiff's goods, the defendant pleaded that the plaintiff never had any goods. The court said, "this is an infallible argument that the defendant is not guilty, but it is no plea." Dyer, a 43.

In ejectment, the defendant pleaded a surrender of a copyhold by the hand of Fosset, the steward. The plaintiff replied that Fosset was not steward. The court held this no issue, for it traversed the surrender only argumentatively, Cro. Eliz. 260.

In these cases, and many others reported in the books, the inferences from the facts stated were irresistible. But the court held they did not, when demurred to, amount to such inferable facts. In the case at bar, the inference that the

defendant was a slave at the time of action brought, even if it can be made at all, from the fact that his parents were slaves, is certainly not a necessary inference. This case, therefore, is like that of *Digby v. Alexander,* 8 Bing. 416. In that case, the defendant pleaded many facts strongly tending to show that he was once Earl of Stirling; but as there was no positive allegation that he was so at the time of action brought, and as every fact averred might be true, and yet the defendant not have been Earl of Stirling at the time of action brought, the plea was held to be insufficient.

A lawful seisin of land is presumed to continue. But if, in an action of trespass quare clausum, the defendant were to plead that he was lawfully seised of the *locus in quo,* one month before the time of the alleged trespass, I should have no doubt it would be a bad plea. See *Mollan v. Torrance,* 9 Wheat. 537. So if a plea to the jurisdiction, instead of alleging that the plaintiff was a citizen of the same State as the defendant, were to allege that the plaintiff's ancestors were citizens of that State, I think the plea could not be supported. My judgment would be, as it is in this case, that if the defendant meant to aver a particular substantive fact, as existing at the time of action brought, he must do it directly and explicitly, and not by way of inference from certain other averments, which are quite consistent with the countrary hypothesis. I cannot therefore, treat this plea as containing an averment that the plaintiff himself was a slave at the time of action brought; and the inquiry recurs, whether the facts, that he is of African descent, and that his parents were once slaves, are necessarily inconsistent with his own citizenship in the State of Missouri, within the meaning of the Constitution and laws of the United States.

In *Gassies v. Ballon,* 6 Pet. 761, the defendant was described on the record as a naturalized citizen of the United States, residing in Louisiana. The court held this equivalent to an averment that the defendant was a citizen of Louisiana; because a citizen of the United States, residing in any State of the Union, is, for purposes of jurisdiction, a citizen of that State. Now, the plea to the jurisdiction in this case does not controvert the fact that the plaintiff resided in Missouri at the date of the writ. If he did then reside there, and was also a citizen of the United States, no provisions contained in the Constitution or laws of Missouri can deprive the plaintiff of his right to sue citizens of States other than Missouri, in the courts of the United States.

So that, under the allegations contained in this plea, and admitted by the demurrer, the question is, whether any person of African descent, whose ancestors were sold as slaves in the United States, can be a citizen of the United States. If any such person can be a citizen, this plaintiff has the right to the judgment of the court that he is so; for no cause is shown by the plea, why he is not so, except his descent and the slaverly of his ancestors.

The 1st section of the 2d Article of the Constitution uses the language, "a citizen of the United States at the time of the adoption of the Constitution." One mode of approaching this question is, to inquire who were citizens of the United States at the time of the adoption of the Constitution.

Citizens of the United States at the time of the adoption of the Constitution can have been no other than the citizens of the United States under the Confederation. By the Articles of Confederation, a government was organized, the style whereof was, "The United States of America." This government was in existence when the Constitution was framed and proposed for adoption, and was to be superseded by the new Government of the United States of America, organized under the Constitution. When, therefore, the Constitution speaks of citizenship of the United States, existing at the time of adoption of the Constitution, it must necessarily refer to citizenship under the government which existed prior to and at the time of such adoption.

Without going into any question concerning the powers of the confederation to govern the territory of the United States out of the limits of the States, and consequently to sustain the relation of Government and citizen in respect to the inhabitants of such territory, it may safely be said that the citizens of the several States were citizens of the United States under the Confederation.

That government was simply a confederacy of the several States, possessing a few defined powers over subjects of general concern, each State retaining every power, jurisdiction, and right, not expressly delegated to the United States in Congress assembled. And no power was thus delegated to the government of the

Confederation, to act on any question of citizenship, or to make any rules in respect thereto. The whole matter was left to stand upon the action of the several States, and to the natural consequence of such action, that the citizens of each State should be citizens of that Confederacy into which that State had entered, the style whereof was, "The United States of America."

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors on equal terms with other citizens.

The Supreme Court of North Carolina, in the case of *The State v. Manuel,* 4 Dev. & Bat. 20, has declared the law of that State on this subject, in terms which I believe to be as sound law in the other States I have enumerated, as it was in North Carolina.

"According to the laws of this State," says Judge Gaston, in delivering the opinion of the court, "all human beings within it, who are not slaves, fall within one of two classes. Whatever distinctions may have existed in the Roman laws between citizens and free inhabitants, they are unknown to our institutions. Before our Revolution, all free persons born within the dominions of the King of Great Britain, whatever their color or complexion, were native-born British subjects—those born out of his allegiance were aliens. Slavery did not exist in England, but it did in the British Colonies. Slaves were not in legal parlance persons, but property. The moment the incapacity, the disqualification of slavery, was removed, they became persons, and were then either British subjects, or not British subjects, according as they were or were not born within the allegiance of the British King. Upon the Revolution, no other change took place in the laws of North Carolina than was consequent on the transition from a Colony dependent on a European King, to a free and sovereign State. Slaves remained slaves. British subjects in North Carolina became North Carolina freemen, and therefore, if born within North Carolina, are citizens of North Carolina, and all free persons born within the State are born citizens of the State. The Constitution extended the elective franchise to every freeman who had arrived at the age of twenty-one, and paid a public tax; and it is a matter of universal notoriety, that, under it, free persons, without regard to color, claimed and exercised the franchise, until it was taken from free men of color a few years since by our amended Constitution."

In *The State v. Newcomb*, 5 Ired. 253, decided in 1844, the same court referred to this case of *The State v. Manuel,* and said: "That case underwent a very laborious investigation, both by the Bar and the Bench. The case was brought here by appeal, and was felt to be one of great importance in principle. It was considered with an anxiety and care worthy of the principle involved, and which give it a controlling influence and authority on all questions of a similar character."

An argument from speculative premises, however well chosen, that the then state of opinion in the Commonwealth of Massachusetts was not consistent with the natural rights of people of color who were born on that soil, and that they were not, by the Constitution of 1780 of that State, admitted to the condition of citizens, would be received with surprise by the people of that State, who know their own political history. It is true, beyond all controversy, that persons of color, descended from African slaves, were by that Constitution made citizens of the State; and such of them as have had the necessary qualifications, have held and exercised the elective franchise, as citizens, from that time to the present. See *Com. v. Aves,*18 pick. 210.

The Constitution of New Hampshire confered the elective franchise upon "every inhabitant of the State having the necessary qualifications," of which color or descent was not one.

The Constitution of New York gave the right to vote to "every male inhabitant, who shall have resided," etc.; making no discrimination between the colored persons and others. See Con. of N.Y. Art. 2, Rev. Stats. of N. Y. Vol. I. p. 126.

That of New Jersey, to "all inhabitants of this Colony, of full age, who are worth £50 proclamation money, clear estate."

New York, by its Constitution of 1820, required colored persons to have some qualifications as prerequisites for voting, which white persons need not possess. And New Jersey, by its present Constitution, restricts the right to vote to white male citizens. But these changes can have no other effect upon the present inquiry, except to show, that before they were made, no such restrictions existed; and colored, in common with white persons, were not only citizens of those States, but entitled to the elective franchise on the same qualifications as white persons, as they now are in New Hampshire and Massachusetts. I shall not enter into an examination of the existing opinions of that period respecting the African race, nor into any discussion concerning the meaning of those who asserted, in the Declaration of Independence, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. My own opinion is, that a calm comparison of these assertions of universal abstract truths, and of their own individual opinions and acts, would not leave these men under any reproach of inconsistency; that the great truths they asserted on that solemn occasion, they were ready and anxious to make effectual, wherever a necessary regard to circumstances, which no statesman can disregard without producing more evil than good, would allow; and that it would not be just to them, nor true in itself, to allege that they intended to say that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts. But this is not the place to vindicate their memory. As I conceive, we should deal here, not with such disputes, if there can be a dispute concerning this subject, but with those substantial facts evinced by the written constitutions of States, and by the notorious practice under them. And they show, in a manner which no argument can obscure, that in some of the original thirteen States, free colored persons, before and at the time of the formation of the Constitution, were citizens of those States.

The 4th of the fundamental articles of the Confederation was as follows: "The free inhabitants of each of these States, paupers, vagabounds and fugitives from justice expected, shall be entitled to all the privileges and immunities of free citizens in the several States."

The fact that free persons of color were citizens of some of the several States, and the consequence, that this 4th Article of the Confederation would have the effect to confer on such persons the privileges and immunities of general citizenship, were not only known to those who framed and adopted those articles, but the evidence is decisive, that the 4th Article was intended to have the effect, and that more restricted language, which would have excluded such persons, was deliberately and purposely rejected.

On the 25th of June, 1778, the Articles of Confederation being under consideration by the Congress, the delegates from South Carolina moved to amend this 4th Article, by inserting after the word "free," and before the word "inhabitants," the word "white," so that the privileges and immunities of general citizenship would be secured only to white persons. Two States voted for the amendment, eight states against it, and the vote of one State was divided. The language of the article stood unchanged, and both its terms of inclusion, "free inhabitants," and the strong implication from its terms of exclusion, "paupers, vagabonds and fugitives from justice," who alone were excepted, it is clear, that under the Confederation, and at the time of the adoption of the Constitution, free colored persons of African descent might be, and, by reason of their citizenship in certain States, were, entitled to the privileges and immunities of general citizenship of the United States.

Did the Constitution of the United States deprive them or their descendants of citizenship?

That Constitution was ordained and established by the people of the United States through the action, in each State, of those persons who were qualified by its laws to act thereon, in behalf of themselves and all other citizens of that State. In some of the States, as we have seen, colored persons were among those qualified by law to act on this subject. These colored persons were not only included in the body of "the people of the United States by whom the Consititution was ordained and established," but in at least five of the States they had the power to act, and doubtless did act, by their suffrages, upon the question of its adoption. It would be strange, if we were to find in that instrument

anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established.

I can find nothing in the Constitution which, *proprio vigore,* deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any State after its adoption; nor any power enabling Congress to disfranchise persons born on the soil of any State, and entitled to citizenship of such State by its constitution and laws. And my opinion is, that under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States.

I will proceed to state the grounds of that opinion.

The 1st Section of the 2d Article of the Constitution uses the language, "natural-born citizen." It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well-understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth. At the Declaration of Independence, and ever since, the received general doctorine has been, in conformity with the common law, that free persons born within either of the colonies were subjects of the King; that by the Declaration of Independence, and the consequent acquisition of sovereignty by the several States, all such persons ceased to be subjects, and became citizens of the several States, except so far as some of them were disfranchised by the legislative power of the States, or availed themselves, seasonably, of the right to adhere to the British Crown in the civil contest, and thus to continue British subjects. *McIvaine v. Coxe's Lessee,* 4 Cranch, 209; *Inglis v. Sailors' Snug Harbor,* 3 Pet. p. 99; *Shanks v. Dupont,* Ibid, p. 242.

The Constitution having recognized the rule that persons born within the several States, one of four things must be true:

First. That the Constitution itself has described what native-born persons shall or shall not be citizens of the United States; or,

Second. That it has empowered Congress to do so; or,

Third. That all free persons, born within the several States, are citizens of the United States; or,

Fourth. That it is left to each State to determine what free persons, born within its limits, shall be citizens of such State, and thereby be citizens of the United States.

If there be such a thing as citizenship of the United States acquired by birth within the States, which the Constitution expressly recognizes, and no one denies, then these four alternatives embrace the entire subject, and it only remains to select that one which is true.

That the Constitution itself has defined citizenship of the United States by declaring what persons, born within the several States, shall or shall not be pretended. It contains no such declaration. We may dismiss the first alternative, as without doubt unfounded.

Has it empowered Congress to enact what free persons, born within the several States, shall or shall not be citizens of the United States?

Before examining the various provisions of the Constitution which may relate to this question, it is important to consider for a moment the substantial nature of this inquiry. It is, in effect, whether the Constitution has empowered Congress to create privileged classes within the States, who alone can be entitled to the franchises and powers of citizenship of the United States. If it be admitted that the Constitution has enabled Congress to declare what free persons, born within the several States, shall be citizens of the United States, it must, at the same time, be admitted that it is an unlimited power. If this subject is within the control of Congress, it must depend wholly on its discretion. For, certainly, no limits of that discretion can be found in the Constitution, which is wholly silent concerning it; and the necessary consequence is, that the Federal Government may select classes of persons within the several States who alone can be entitled to the political privileges of citizenship of the United States. If this power exists, what persons born within the States may be President or Vice President of the United States, or members of either house of Congress, or hold any office or enjoy any privilege whereof citizenship of the United States is a necessary qualification, must depend solely on the will of Congress. By virtue of it, though Congress can grant no title of nobility, they may create an oligarchy, in whose hands would be concentrated the entire power of the Federal Government.

It is a substantive power, distinct in its nature from all others; capable of affecting not only the relations of the States to the General Government, but of controlling the political condition of the people of the United States. Certainly we ought to find this power granted by the Constitution, at least by some necessary inference, before we can say it does not remain to the States or the people. I proceed, therefore, to examine all the provisions of the Constitution which may have some bearing on this subject.

Among the powers expressly granted to Congress is "the power to establish a uniform rule of naturalization." It is not doubted that this is a power to prescribe a rule for the removal of the disabilities consequent on foreign birth. To hold that it extends further than this, would do violence to the meaning of the term naturalization, fixed in the common law (Co. Litt, & a, 129 a; 2 Ves. Sr. 286; 2 Bl. Com. 293), and in the minds of those who concurred in framing and adopting the Constitution. It was in this sense of conferring on an alien and his issue the rights and powers of a native-born citizen, that it was employed in the Declaration of Independence. It was in this sense it was expounded in the Federalist (No. 42), has been understood by Congress, by the Judiciary (2 Wheat.259, 269; 3 Wash. 313, 322; 12 Wheat. 277), and by commentators on the Constitution. 3 Story's Com. on Const. 1–3; 1 Rawle on Const. 84–88; 1 Tucker's Bl. Com. App. 225–259.

It appears, then, that the only power expressly granted to Congress to legislate concerning citizenship, is confined to the removal of the disabilities of foreign birth.

Whether there be anything in the Constitution from which a broader power may be implied, will best be seen when we come to examine the two other alternatives, which are, whether all free persons, born on the soil of the several States, or only such of them as may be citizens of each State, respectively, are thereby citizens of the United States. The last of these alternatives, in my judgment, contains the truth.

Undoubtedly, as has already been said, it is a principle of public law, recognized by the Constitution itself, that birth on the soil of a country both creates the duties and confers the rights of citizenship. But it must be remembered, that though the Constitution was to form a government, and under it the United States of America were to be one united sovereign nation, to which loyalty and obedience, on the one side, and from which protection and privileges on the other, would be due, yet the several sovereign States, whose people were the citizens, were not only to continue in existence, but with powers unimpaired, except so far as they were granted by the people to the National Government.

Among the powers unquestionably possessed by the several States, was that of determining what persons should and what persons should not be citizens. It was practicable to confer on the government of the Union this entire power. It embraced what may, well enough for the purpose now in view, be divided into three parts: First. The power to remove the disabilities of alienage, either by special acts in reference to each individual case, or by establishing a rule of naturalization to be administered and applied by the courts. Second. Determining what persons should enjoy the privileges of citizenship, in respect to the internal affairs of the several States. Third. What native born persons should be citizens of the United States.

The first named power, that of establishing a uniform rule of naturalization, was granted; and here the grant, according to its terms, stopped. Construing a constitution containing only limited and defined powers of government, the argument derived from this definite and restricted power to establish a rule of naturalization, must be admitted to be exceedingly strong. I do not say it is necessarily decisive. It might be controlled by other parts of the Constitution. But when this particular subject of citizenship was under consideration, and in the clause specially intended to define the extent of power concerning it, we find a particular part of this entire power separated from the residue, and conferred on the General Government, there arises a strong presumption that this is all which is granted, and that the residue is left to the States and to the people. And this presumption is, in my opinion, converted into a certainty by an examination of all such other clauses of the Constitution as touch this subject.

I will examine each which can have any possible bearing on this question.

The 1st clause of the 2d Section of the 3d Article of the Constitution is: "The judicial power shall extend to controversies between a State and citizens of another State between citizens of different States; between citizens of the same State, claiming lands under grants of dif-

ferent States; and between States, or the citizens thereof, and foreign states, citizens or subjects." I do not think this clause has any considerable bearing upon the particular inquiry now under consideration. Its purpose was, to extend the judicial power to those controversies into which local feelings or interests might so enter as to disturb the course of justice, or give rise to suspicions that they had done so, and thus possibly give occasion to jealously or ill will between different States, or a particular State and a foreign nation. At the same time, I would remark, in passing, that it has been held—I do not know that it has ever been supposed—that any citizen of a State could bring himself under this clause and the 11th and 12th sections of the Judiciary Act of 1789, passed in pursuance of it, who was not a citizen of the United States. But I have referred to the clause, only because it is one of the places where citizenship is mentioned by the Constitution. Whether it is entitled to any weight in this inquiry or not, it refers only to citizenship of the several States; it recognizes that; but it does not recognize citizenship of the United States as something distinct therefrom.

As has been said, the purpose of this clause did not necessarily connect it with citizenship of the United States, even if that were something distinct from citizenship of the several States, in the contemplation of the Constitution. This cannot be said of other clauses of the Constitution, which I now proceed to refer to.

"The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." Nowhere else in the Constitution is there anything concerning a general citizenship; but here, privileges and immunities to be enjoyed throughout the United States, under and by force of the national compact, are granted and secured. In selecting those who are to enjoy these national rights of citizenship—how are they described? As citizens of each State. It is to them these national rights are secured. The qualification for them is not to be looked for in any provision of the Constitution or laws of the United States. They are to be citizens of the several States, and, as such, the privileges and immunities of general citizenship, derived from and guarantied by the Constitution, are to be enjoyed by them. It would seem that if it had been intended to constitute a class of native born persons within the States, who should derive their citizenship of the United States from the action of the Federal Government, this was an occasion for referring to them. It cannot be supposed that it was the purpose of this article to confer the privileges and immunities of citizens in all the States upon persons not citizens of the United States.

And if it was intended to secure these rights only to citizens of the United States, how was the Constitution here described such persons? Simply as citizens of each State.

But, further: though, as I shall presently more fully state, I do not think the enjoyment of the elective franchise essential to citizenship, there can be no doubt it is one of the chiefest attributes of citizenship under the American Constitutions; and the just and constitutional possession of this right is decisive evidence of citizenship. The provisions made by a constitution on this subject must therefore be looked to as bearing directly on the question what persons as are allowed by the Constitution to exercise the elective franchise, and thus to participate in the Government of the United States, must be deemed citizens of the United States.

Here, again, the consideration presses itself upon us, that if there was designed to be a particular class of native-born persons within the States, deriving their citizenship from the Constitution and laws of the United States, they should at least have been referred to as those by whom the President and House of Representatives were to be elected, and to whom they should be responsible.

Instead of that, we again find this subject referred to the laws of the several States. The electors of President are to be appointed in such manner as the Legislature of each State may direct, and the qualifications of electors of members of the House of Representatives shall be the same as for electors of the most numerous branch of the State Legislature.

Laying aside, then, the case of aliens, concerning which the Constitution of the United States has provided, and confining our view to free persons born within the several States, we find that the Constitution has recognized the general principle of public law, that allegiance and citizenship depend on the place of birth; that it has not attempted practically to apply this principle by designating the particular classes of persons who should or should not come under it; that when we turn to the Constitution for an answer to the question, what free persons, born

within the several States, are citizens of the United States, the only answer we can receive from any of its express provisions is, the citizens of the several States, are to enjoy the privileges and immunities of citizens in every State, and their franchise as electors under the Constitution depends on their citizenship in the several States. Add to this, that the Constitution was ordained by the citizens of the several States; that they were "the people of the United States," for whom and whose posterity the government was declared in the preamble of the Constitution to be made; that each of them was "a citizen of the United States at the time of the adoption of the Constitution," within the meaning of those words in that instrument; that by them the government was to be and was in fact organized; and that no power is conferred on the Government of the Union to discriminate between them, or to disfranchise any of them—the necessary conclusion is, that those persons born within the several States, who, by force of their respective constitutions and laws, are citizens of the State, are thereby citizens of the United States.

It may be proper here to notice some supposed objections to this view of the subject.

It has been often asserted that the Constitution was made exclusively by and for the white race. It has already been shown that in five of the thirteen original States, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established. If so, it is not true, in point of fact, that the Constitution was made exclusively by the white race. And that it was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration, that it was ordained and established by the people of the United States, for themselves and their posterity. And as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established.

Again; it has been objected, that if the Constitution has left to the several States the rightful power to determine who of their inhabitants shall be citizens of the United States, the States may make aliens citizens.

The answer is obvious. The Constitution has left to the States the determination what persons, born within their respective limits, shall acquire by birth citizenship of the United States; it has not left to them any power to prescribe any rule for the removal of the disabilities of alienage. This power is exclusively in Congress.

It has been further objected, that if free colored persons, born within a particular State, and made citizens of that State by its constitution and laws, are thereby made citizens of the United States, then, under the 2d section of the 4th article of the Constitution, such persons would be entitled to all the privileges and immunities of citizens in the several States; and if so, then colored persons could vote, and be eligible to not only federal offices, but offices even in those State whose Constitutions and laws disqualify colored persons from voting or being elected to office.

But this position rests upon an assumption which I deem untenable. Its basis is, that no one can be deemed a citizen of the United States who is not entitled to enjoy all the privileges and franchises which are conferred on any citizen. See 1 Lit. Ky. 326. That this is not true, under the Constitution of the United States, seems to me clear.

A naturalized citizen cannot be President of the United States, not a Senator till after the lapse of nine years, nor a Representative till after the lapse of seven years, from his naturalization.Yet, as soon as naturalized, he is certainly a citizen of the United States. Nor is any inhabitant of the District of Columbia, or of either of the Territories, eligible to the office of Senator or Representative in Congress, though they may be citizens of the United States. So, in all the States, numerous persons, though citizens, cannot vote, or cannot hold office, either on account of their age or sex, or the want of the necessary legal qualifications. The truth is, that citizenship, under the Constitution of the United States, is not dependent on the possession of any particular political or even of all civil rights; and any attempt so to define it must lead to error. To what citizens the elective franchise shall be confided, is a question to be determined by each State, in accordance with its own views of the necessities or expediences of its condition. What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they

may be gained or lost, are to be determined in the same way.

One may confine the right of suffrage to white male citizens; another may extend it to colored persons and females; one may allow all persons above a prescribed age to convey property and transact business; another may exclude married women. But whether native-born women, or persons under age, or under guardianship because insane or spendthrifts, be excluded from voting or holding office, or allowed to do so, I apprehend no one will deny that they are citizens of the United States. Besides this clause of the Constitution does not confer on the citizens of one State, in all other States, specific and enumerated privileges and immunities. They are entitled to such as belong to citizenship, but not such as belong to particular citizens attended by other qualifications. Privileges and immunities which belong to certain citizens of a State, by reason of the operation of causes other than mere citizenship, are not conferred. Thus, if the laws of a State require, in addition to citizenship of the State, some qualification for office, or the exercise of the elective franchise, citizens of all other States, coming thither to reside, and not possessing those qualifications, cannot enjoy those privileges, not because they are not to be deemed entitled to the privileges of citizens of the State in which they reside, but because they, in common with the native-born citizens of that State, must have the qualifications prescribed by law for the enjoyment of such privileges under its constitution and laws. It rests with the States themselves so to frame their constitutions and laws as not to attach a particular privilege or immunity to mere naked citizenship. If one of the States will not deny to any of its own citizens a particular privilege or immunity, if it confer it on all of them by reason of mere naked citizenship, then it may be claimed by every citizen of each State by force of the Constitution; and it must be borne in mind, that the difficulties which attend the allowance of the claims of colored persons to be citizens of the United States are not avoided by saying that, though each State may make them its citizens, they are not thereby made citizens of the United States, because the privileges of general citizenship are secured to the citizens of each State. The language of the Constitution is: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." If each State may make such persons its citizens, they become, as such, entitled to the benefits of this article, if there be a native-born citizenship of the United States distinct from a native-born citizenship of several states.

There is one view of this article entitled to consideration in this connection. It is manifestly copied from the 4th of the Articles of Confederation, with only slight changes of phraseology, which render its meaning more precise, and dropping the clause which excluded paupers, vagabonds and fugitives from justice, probably because these cases could be dealt with under the police powers of the States, and a special provision therefor was not necessary. It has been suggested, that in adopting it into the Constitution, the words "free inhabitants" were changed for the word "citizens." An examination of the forms of expression commonly used in the state papers of that day, and an attention to the substance of this article of the Confederation, will show that the words "free inhabitants," as then used, were synonymous with citizens. When the Articles of Confederation were adopted, we were in the midst of the War of the Revolution, and there were very few persons then embraced in the words "free inhabitants," who were not born on our soil. It was not a time when many, save the children of the soil, were willing to embark their fortunes in our cause; and though there might be an inaccuracy in the uses of words to call free inhabitants citizens, it was then a technical rather than a substantial difference. If we look into the constitutions and state papers of that period, we find the inhabitants or people of these Colonies or the inhabitants of this State, or Commonwealth, employed to designate those whom we should now denominate "citizens." The substance and purpose of the article prove it was in this sense it used these words: It secures to the free inhabitants of each State the privileges and immunities of free citizens in every State. It is not conceivable that the States should have agreed to extend the privileges of citizenship to persons not entitled to enjoy the privileges of citizens in the States where they dwelt; that under this article there was a class of persons in some of the States, not citizens, to whom were secured all the privileges and immunities of citizens when they went into other States; and the just conclusion is, that though the Constitution cured an inaccuracy of language, it left the substance of this article in

the National Constitution the same as it was in the Articles of Confederation.

The history of this 4th article, respecting the attempt to exclude free persons of color from its operation, has been already stated. It is reasonable to conclude that this history was known to those who framed and adopted the Constitution. That under this 4th article of the Confederation, free persons of color might be entitled to the privileges of general citizenship, if otherwise entitled thereto, is clear. When this article was, in substance, placed in and made part of the Constitution of the United States, with no change in its language calculated to exclude free colored persons from the benefit of its provisions, the presumption is, to say the least, strong, that the practical effect which it was designed to have, and did have, under the former government, it was designed to have, and should have, under the new government.

It may be further objected, that if free colored persons may be citizens of the United States, it depends only on the will of a master whether he will emancipate his slave and thereby make him a citizen. Not so. The master is subject to the will of the State. Whether he shall be allowed to emancipate his slave at all; if so, on what conditions; and what is to be the political status of the freed man, depend , not on the will of the master, but on the will of the State, upon which the political status of all its native-born inhabitants depends. Under the Constitution of the United States, each State has retained this power of determining the political status of its native-born inhabitants, and no exception thereto can be found in the Constitution. And if a master in a slaveholding State should carry his slave into a free State, and there emancipate him, he would not thereby make him a native-born citizen of that State, and consequently no privileges could be claimed by such emancipated slave as a citizen of the United States. For, whatever powers of the States may exercise to confer privileges of citizenship on persons not born on their soil, the Constitution of the United States does not recognize such citizens. As has already been said, it recognizes the great principle of public law, that allegiance and citizenship spring from the place of birth. It leaves to the States the application of that principle to individual cases. It secured to the citizens of each State the privileges and immunities of citizens in every other State. But it does not allow to the States the power to make aliens citizens, or permit one State to take persons born on the soil of another State, and, contrary to the laws and policy of the States where they were born, make them its citizens, and so citizens of the United States. No such deviation from the great rule of public law was contemplated by the Constitution; and when any such attempt shall be actually made, it is to be met by applying to those rules of law and those principles of good faith which will be sufficient to decide it, and not, in my judgment, by denying that all the free native-born inhabitants of a State, who are its citizens under its constitution and laws, are also citizens of the United States.

It has sometimes been urged that colored persons are shown not to be citizens of the United States, by the fact that the naturalization laws apply only to white persons. But whether a person born in the United States be or be not a citizen, cannot depend on laws which refer only to aliens, and do not affect the status of persons born in the United States. The utmost effect which can be attributed to them is, to show that Congress has not deemed it expedient generally to apply the rule to colored aliens. That they might do so, if thought fit, is clear. The Constitution has not excluded them. And since that has conferred the power on Congress to naturalize colored aliens, it certainly shows that color is not a necessary qualification for citizenship under the Constitution of the United States. It may be added, that the power to make colored persons citizens of the United States, under the Constitution, has been actually exercised in repeated and important instances. See the Treaties with the Choctaws, of Sept. 27, 1830, art. 14; with the Cherokees, of May 23, 1836, art. 12; Treaty of Guadaloupe Hidalgo, Feb. 2, 1848, art. 8.

I do not deem it necessary to review at length the legislation of Congress having more or less bearing on the citizenship of colored persons. It does not seem to me to have any considerable tendency to prove that it has been considered by the Legislative Department of the government, that no such persons are citizens of the United States. Undoubtedly they have been debarred from the exercise of particular rights or privileges extended by white persons, but, I believe, always in terms which, by implication, admit they may be citizens. Thus the Act of may 17, 1792, for the organization of the militia, directs the enrollment of "every free, able-bodied, white male citizen." An assumption that none but

white persons are citizens, would be as inconsistent with the just import of this language, as that all citizens are able-bodied, or males.

So the Act of February 28, 1803, 2 Stat. at L. 205, to prevent the importation of certain persons into States, when by the laws thereof their admission is prohibited, in its 1st section forbids all masters of vessels to import or bring "any negro, mulatto, or other person of color, not being a native, a citizen, or registered seaman of the United States," etc.

The Acts of March 3, 1813, sec. 1, 2 Stat. at L. 809, and March 1, 1817, sec. 3, 3 Stat. at L. 351, concerning seamen, certainly imply there may be persons of color, natives of the United States, who are not citizens of the United States. This implication is undoubtedly in accordance with the fact. For not only slaves, but free persons of color, born in some of the States, are not citizens. But there is nothing in these laws inconsistent with the citizenship of persons of color in others of the States, nor with their being citizens of the United States.

Whether much or little weight should be attached to the particular phraseology of these and other laws, which were not passed with any direct reference to this subject, I consider their tendency to be, as already indicated, to show that, in the apprehension of their framers, color was not a necessary qualification of citizenship. It would be strange, if laws were found on our statute book to that effect, when by solemn treaties, large bodies of Mexican and North American Indians, as well as free colored inhabitants of Louisiana, have been admitted to citizenship of the United States.

In the legislative debates which preceded the admission of the State of Missouri into the Union, this question was agitated. Its result is found in the resolution of Congress, of March 5, 1821, for the admission of that State into the Union. The Constitution of Missouri, under which that State applied for admission into the Union, provided, that it should be the duty of the Legislature "to pass laws to prevent free negroes and mulattoes from coming to and settling in the State, under any pretext whatever." One ground of objection to the admission of the State under this Constitution was, that it would require the Legislature to exclude free persons of color, who would be entitled, under the 2d section of the 4th article of the Constitution, not only to come within the State, but to enjoy there the privileges and immunities of citizens. The resolutions of Congress admitting the State was upon the fundamental condition, "that the Constitution of Missouri shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto, by which any citizen of either of the States of this Union shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States." It is true, that neither this legislative declaration, nor anything in the Constitution or laws of Missouri, could confer or take away any privilege or immunity granted by the Constitution. But it is also true, that it expresses the then conviction of the legislative power of the United Sates, that free negroes, as citizens of some of the States, might be entitled to the privileges and immunities of citizens in all the States.

The conclusions at which I have arrived on this part of the case are:

First. That the free native-born citizens of each State are citizens of the United States.

Second. That as free colored persons born within some of the States are citizens of those States, such persons are also citizens of the United States.

Third. That every such citizen, residing in any State, has the right to sue and is liable to be sued in the federal courts, as a citizen of that State in which he resides.

Fourth. That as the plea to the jurisdiction in this case shows no facts, except that the plaintiff was of African descent, and his ancestors were sold as slaves, and as these facts are not inconsistent with his citizenship of the United States, and his residence in the State of Missouri, the plea to the jurisdiction was bad and the judgment of the Circuit Court overruling it, was correct.

I dissent, therefore, from that part of the opinion of the majority of the court, in which it is held that a person of African descent cannot be a citizen of the United States; and I regret I must go further, and dissent both from what I deem their assumption of authority to examine the constitutionality of the Act of Congress commonly called the Missouri Compromise Act, and the grounds and conclusions announced in their opinion.

SLAVERY

DRED SCOTT V. SANDFORD

Having first decided that they were bound to consider the sufficiency of the plea to the jurisdiction of the Circuit Court, and having decided that this plea showed that the Circuit Court had not jurisdiction, and consequently that this is a case to which the judicial power of the United States does not extend, they have gone on to examine the merits of the case as they appeared on the trial before the court and jury, on the issues joined on the pleas in bar, and so have reached the question of the power of Congress to pass the Act of 1820. On so grave a subject as this, I feel obliged to say that, in my opinion, such an exertion of judicial power transcends the limits of the authority of the court, as described by its repeated decisions, and, as I understand, acknowledged in this opinion of the majority of the court.

In the course of that opinion, it became necessary to comment on the case of *Legrand v. Darnall,* reported in 2 Pet. 664. In that case, a bill was filed, by one alleged to be a citizen of Maryland, against one alleged to be a citizen of Pennsylvania. The bill stated that the defendant was the son of a white man by one of his slaves; and that the defendant's father devised to him certain lands, the title to which was put in controversy by the bill. These facts were admitted in the answer, and upon these and other facts the court made its decree, founded on the principle that a devise of land by a master to a slave was by implication also a bequest of his freedom. The facts that the defendant was of African descent, and was born a slave, were not only before the court, but entered into the entire substance of its inquiries. The opinion of the majority of my brethren in this case disposes of the case of *Legrand v. Darnall,* by saying, among other things, that as the fact that the defendant was born a slave only came before this court on the bill and answer, it was then too late to raise the question of the personal disability of the party, and therefore that decision is altogether inapplicable in this case.

In this I concur. Since the decision of this court in *Livingston v. Story,* II Pet. 351, the law has been settled, that when the declaration or bill contains the necessary averments of citizenship, this court cannot look at the record, to see whether those averments are true, except so far as they are put in issue by a plea to the jurisdiction. In that case, the defendant denied by his answer that Mr. Livingston was a citizen of New York, as he had alleged in the bill. Both parties went into proofs. The court refused to examine those proofs, with reference to the personal disability of the plaintiff. This is the settled law of the court, affirmed so lately as *Sheppard v. Graves,* 14 How. 505, and *Wickliffe v. Owings* 17 How. 51; see also, *De Wolf v. Rabaud*, I Pet. 476. But I do not understand this to be a rule which the court may depart from at its pleasure. If it be a rule, it is as binding on the court as on the suitors. If it removes from the latter the power to take any objection to the personal disability of a party alleged by the record to be competent, which is not shown by a plea to the jurisdiction, it is because the court are forbidden by law to consider and decide on objections so taken. I do not consider it to be within the scope of the judicial power of the majority of the court to pass upon any question respecting the plaintiff's citizenship in Missouri save that raised by the plea to the jurisdiction; and I do not hold any opinion of this court or any court, binding, when expressed on a question not legitimately before it. *Carroll v. Carroll,* 16 How. 275. The judgment of this court is, that the case is to be dismissed for want of jurisdiction, because the plaintiff was not a citizen of Missouri, as he alleged in his declaration. Into that judgment, according to the settled course of this court, nothing appearing after a plea to the merits can enter. A great question of constitutional law, deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached.

But as, in my opinion, the Circuit Court had jurisdiction, I am obliged to consider the question whether its judgment on the merits of the case should stand or be reversed.

The residence of the plaintiff in the State of Illinois, and the residence of himself and his wife in the Territory acquired from France lying north of latitude thirty-six degrees thirty minutes, and north of the State of Missouri, are each relied on by the plaintiff in error. As the residence in the Territory affects the plaintiff's wife and children as well as himself, I must inquire what was its effect.

The general question may be stated to be, whether the plaintiff's status, as a slave, was so changed by his residence within that Territory, that he was not a slave in the State of Missouri, at the time this action was brought.

In such cases, two inquiries arise, which may be confounded, but should be kept distinct.

The first is, what was the law of the Territory into which the master and slave went, respecting the relation between them?

The second is, whether the State of Missouri recognizes and allows the effect of that law of the Territory, on the status of the slave, on his return within its jurisdiction.

As to the first of these questions, the will of States and nations, by whose municipal law slavery is not recognized, has been manifested in three different ways.

One is, absolutely to dissolve the relation, and terminate the rights of the master existing under the law of the country whence the parties came. This is said by Lord Stowell, in the case of *The Slave Grace,* 2 Hagg. Ad. 94, and by the Supreme Court of Louisiana in the case of *Maria Louise v. Marot,* 9 La. 473, to be the law of France; and it has been the law of several States of this Union, in respect to slaves introduced under certain conditions.

*Wilson v. Isabel,* 5 Call, 430; *Hunter v. Fulcher,* 1 Leigh, 172; *Stewart v. Oakes,* 5 Harr. & J. 107.

The second is, where the municipal law of a country not recognizing slavery, it is the will of the State to refuse the master all aid to exercise any control over his slave; and if he attempt to do so, in a manner justifiable only by that relation, to prevent the exercise of that control. But no law exists, designed to operate directly on the relation of master and slave, and put an end to that relation. This is said by Lord Stowell, in the case above mentioned to be the law of England, and by Mr. Chief Justice Shaw, in the case of *The Commonwealth v. Ave,* 18 Pick. 193, to be the law of Massachusetts.

The third is, to make a distinction between the case of a master and his slave only temporarily in the country, amino non manendi, and those who are there to reside for permanent or indefinite purposes. This is said by Mr. Wheaton to be the law of Prussia, and was formerly the statute law of several States of our Union. It is necessary in this case to keep in view this distinction between those countries whose laws are designed to act directly on the status of a slave, and make him a freeman, and those where the master can obtain no aid from the laws to enforce his rights.

It is to the last case only that the authorities, out of Missouri, relied on by defendant, apply, when the residence in the non-slaveholding Territory was permanent. In *The Commonwealth v. Aves,* 18 Pick. 218, Mr. Chief Justice Shaw said: "From the principle above stated on which a slave brought here becomes free, to wit; that he becomes entitled to the protection of our laws, it would seem to follow, as a necessary conclusion, that if the slave waives the protection of those laws, and returns to the State where he is held as a slave, his condition is not changed." It was upon this ground, as is apparent from his whole reasoning, that Sir William Scott rests his opinion in the case of *The Slave Grace.* To use one of his expressions, the effect of the law of England was to put the liberty of the slave into a parenthesis. If there had been an Act of Parliament declaring that a slave coming to England with his master should thereby be deemed no longer to be a slave, it is easy to see that the learned judge could not have arrived at the same conclusion. This distinction is very clearly stated and shown by President Tucker, in his opinion in the case of *Betty v. Horton,* 5 Leigh's Va. 615.

See, also, *Hunter v. Fulcher,* 1 Leigh's Va. 172; *Maria Louise v. Marot,* 9 La. 473; *Smith v. Smith,* 13 la. 441; *Thomas v. Generis,* 16 La. 483; *Rankin v. Lydia,* 2 A. K. Marsh. 467; *Davis v. Tingle,* 8 B. Mon. 539; *Griffeth v. Fanny,* Gilm. Va. 143; *Lunsford v. Coquillon,* 2 Mart. N. S. 405; *Josephine v. Poultney,* 1 La. Ann. 329.

But if the Acts of Congress on this subject are valid, the law of the Territory of Wisconsin, within whose limits the residence of the plaintiff and his wife, and their marriage and the birth of one or both of their children, took place, falls under the first category, and is a law operating directly on the status of the slave. By the 8th section of the Act of March 6, 1820, 3 Stat. at L. 548, it was enacted that within this Territory "slavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby forever prohibited: Provided, always, that any person escaping into the same, from whom labor or service is lawfully claimed in any State or Territory of the United States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or services, as aforesaid."

By the Act of April 20, 1836, 4 Stat. at L. 10, passed in the same month and year of the removal of the plaintiff to Fort Snelling, this part of the Territory ceded by France, where Fort

Snelling is, together with so much of this territory of the United States east of the Mississippi as now constitutes the State of Wisconsin, was brought under the name of the Territory of Wisconsin. By the 18th section of this Act, it was enacted, "That the inhabitants of this Territory shall be entitled to and enjoy all and singular the rights, privileges and advantages, granted and secured to the people of the Territory of the United States northwest of the River Ohio, by the articles of compact contained in the Ordinance for the government of said Territory, passed on the 13th day of July, 1787; and shall be subject to all the restrictions and prohibitions in said articles of compact imposed upon the people of the said Territory." The 6th article of that compact is, "there shall be neither slavery nor involuntary servitude in the said Territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: Provided, always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service, as aforesaid." By other provisions of this Act establishing the Territory of Wisconsin, the laws of the United States, and the then existing laws of the State of Michigan, are extended over the Territory; the latter being subject to alteration and repeal by the legislative power of the Territory created by the Act.

Fort Snelling was within the Territory of Wisconsin, and these laws were extended over it. The Indian title to that site for a military post had been acquired from the Sioux nation as early as September 23, 1805 (Am. State Papers, Indian Affairs, Vol. I. p. 744), and until the erection of the territorial government, the persons at that post were governed by the Rules and Articles of War, and such laws of the United States, including the 8th section of the Act of March 6, 1820, prohibiting slavery, as were applicable to their condition; but after the erection of the Territory, and the extension of the laws of the United States and the laws of Michigan over the whole of the Territory, including this military post, the persons residing there were under the dominion of those laws in all particulars to which the Rules and Articles of War did not apply.

It thus appears that, by these Acts of Congress, not only was a general system of municipal law borrowed from the State of Michigan, which did not tolerate slavery, but it was positively enacted that slavery and involuntary servitude, with only one exception, specifically described, should not exist there. It is not simply that slavery is not recognized and cannot be aided by the municipal law. It is recognized for the purpose of being absolutely prohibited, and declared incapable of existing within the Territory, save in the instance of a fugitive slave.

It would not be easy for the Legislature to employ more explicit language to signify its will that the status of slavery should not exist within the Territory, than the words found in the Act of 1820, and in the Ordinance of 1787; and if any doubt could exist concerning their application to cases of masters coming into the Territory with their slaves to reside, that doubt must yield to the inference required by the words of exception. That exception is, of cases of fugitive slaves. An exception from a prohibition marks the extent of the prohibition; for it would be absurd, as well as useless, to except from a prohibition a case not contained within it. 9 Wheat. 200. I must conclude, therefore, that it was the will of Congress that the state of involuntary servitude of a slave, coming into the Territory with his master, should cease to exist. The Supreme Court of Missouri so held in *Rachel v. Walker,* 4 Mo. 350, which was the case of a military officer going into the Territory with two slaves.

But it is a distinct question, whether the law of Missouri recognized and allowed effect to the change wrought in the status of the plaintiff, by force of the laws of the Territory of Wisconsin.

I say the law of Missouri, because a judicial tribunal, in one State or nation, can recognize personal rights acquired by force of the law of any other State or nation, only so far as it is the law of the former State that those rights should be recognized. But, in the absence of positive law to the contrary, the will of every civilized State must be presumed to be to allow such effect to foreign laws as is in accordance with the settled rules of international law. And legal tribunals are bound to act on this presumption. It may be assumed that the motive of the State in allowing such operation to foreign laws is what has been termed comity. But, as has justly been said (per Chief Justice Taney, 13 Pet. 589), it is the comity of the State, not of the court. The judges have nothing to do with the motive of the State. Their duty is simply to ascertain and give effect to its

will. And when it is found by them that its will to depart from a rule of international law has not been manifested by the State, they are bound to assume that its will is to give effect to it. Undoubtedly, every sovereign State may refuse to recognize a change, wrought by the law of a foreign State, on the status of a person, while within such foreign State, even in cases where the rules of international law require that recognition. Its will to refuse such recognition may be manifested by what we term statute law, or by the customary law of the State. It is within the province of its judicial tribunals to inquire and adjudge whether it appears, from the statute or customary law of the State, to be the will of the State to refuse to recognize such changes of status by force of foreign law, as the rules of the law of nations require to be recognized. But, in my opinion, it is not within the province of any judicial tribunal to refuse such recognition from any political considerations, or any view it may take of the exterior political relations between the State and one or more foreign States, or any impressions it may have that a change of foreign opinion and action on the subject of slavery may afford a reason why the State should change its own action. To understand and give just effect to such considerations, and to change the action of the State in consequence of them, are functions of diplomatists and legislators, not of judges.

The inquiry to be made on this part of the case is, therefore, whether the State of Missouri has, by its statute, or its customary law, manifested its will to displace any rule of international law, applicable to a change of the status of a slave, by foreign law.

I have not heard it suggested that there was any statute of the State of Missouri bearing on this question. The customary law of Missouri is the common law, introduced by statute in 1816. 1 Ter. Laws, 436. And the common law, as Blackstone says (4 Com. 67) adopts, in its full extent, the law of nations, and holds it to be a part of the law of the land.

I know of no sufficient warrant for declaring that any rule of international law, concerning the recognition, in that State, of a change of status, wrought by an extraterritorial law, has been displaced or varied by the will of the State of Missouri.

I proceed, then, to inquire what the rules of international law prescribe concerning the change of status of the plaintiff wrought by the law of the Territory of Wisconsin.

It is generally agreed by writers upon international law, and the rule has been judicially applied in a great number of cases, that wherever any question may arise concerning the status of a person, it must be determined according to that law which has next previously rightfully operated on and fixed that status. And further, that the laws of a country do not rightfully operate upon and fix the status of persons who are within its limits in itinere, or who are abiding there for definite temporary purposes, as for health, curiosity, or occasional business; that these laws, known to writers on public and private international law as personal statutes, operate only on the inhabitants of the country. Not that it is or can be denied that each independent nation may, if it thinks fit, apply them to all persons within their limits. But when this is done, not in conformity with the principles of international law, other States are not understood to be willing to recognize or allow effect to such applications of personal statutes.

It becomes necessary, therefore, to inquire whether the operation of the laws of the Territory of Wisconsin upon the status of the plaintiff was or was not such an operation as these principles of international law require other States to recognize and allow effect to.

And this renders it needful to attend to the particular facts and circumstances of this case. It appears that this case came on for trial before the Circuit Court and a jury, upon an issue, in substance, whether the plaintiff, together with his wife and children, were the slaves of the defendant.

The court instructed the jury that, "upon the facts in this case, the law is with the defendant." This withdrew from the jury the consideration and decision of every matter of fact. The evidence in the case consisted of written admissions, signed by the counsel of the parties. If the case had been submitted to the judgment of the court, upon an agreed statement of facts, entered of record, in place of a special verdict, it would have been necessary for the court below, and for this court, to pronounce its judgment solely on those facts, thus agreed, without inferring any other facts therefrom. By the rules of the common law applicable to such a case, and by force of the 7th article of the Amendments of the Constitution, this court is precluded from find-

ing any fact not agreed to by the parties on the record. No submission to the court on a statement of facts was made. It was a trial by jury, in which certain admissions, made by the parties were the evidence. The jury were not only competent, but were bound to draw from that evidence every inference which, in their judgment exercised according to the rules of law, it would warrant. The Circuit Court took from the jury the power to draw any inferences form the admissions made by the parties, and decided the case for the defendant. This course can be justified here, if at all, only by its appearing that upon the facts agreed, and all such inferences of fact favorable to the plaintiff's case, as the jury might have been warranted in drawing from those admissions, the law was with the defendant. Otherwise, the plaintiff would be deprived of the benefit of his trial by jury, by whom, for aught we can know, those inferences favorable to his case would have been drawn.

The material facts agreed, bearing on this part of the case, are, that Dr. Emerson, the plaintiff's master, resided about two years at the military post of Fort Snelling, being a surgeon in the Army of the United States, his domicil of origin being unknown; and what, if anything, he had done, to preserve or change his domicil prior to his residence at Rock Island, being also unknown.

Now, it is true, that under some circumstances the residence of a military officer at a particular place, in the discharge of his official duties does not amount to the acquisition of a technical domicil. But it cannot be affirmed, with correctness, that it never does. There being actual residence, and this being presumptive evidence of domicil, all the circumstances of the case must be considered, before a legal conclusion can be reached, that his place of residence is not his domicil. If a military officer, stationed at a particular post, should entertain an exception that his residence there would be indefinitely protracted, and in consequence should remove his family to the place where his duties were to be discharged, form a permanent domestic establishment there, exercise there the civil rights and discharge the civil duties of an inhabitant, while he did no act and manifested no intent to have a domicil elsewhere, I think no one would say that the mere fact that he was himself liable to be called away by the orders of the Government would prevent his acquisition of a technical domicil at the place of the residence of himself and his family. In other words, I do not think a military officer incapable of acquiring a domicil. *Bruce v. Bruce,* 2 Bos. & P. 230; *Monroe v. Douglas,* 5 Madd. Ch. 379. This being so this case stands thus: there was evidence before the jury that Emerson resided about two years at Fort Snelling, in the Territory of Wisconsin. This may or may not have been with such intent as to make it his technical domicil. The presumption is that it was. It is so laid down by this court in *Ennis v. Smith,* 14 How. 400, and the authorities in support of the position are there referred to. His intent was a question of fact for the jury. *Fitchburg v. Winchendon,* 4 Cush 190.

The case was taken from the jury. If they had power to find that the presumption of the necessary intent had not been rebutted, we cannot say on this record, that Emerson had not his technical domicil at Fort Snelling. But, for reason which I shall now proceed to give, I do not deem it necessary in this case to determine the question of the technical domicil of Dr. Emerson.

It must be admitted that the inquiry whether the law of a particular country has rightfully fixed the status of a person, so that in accordance with the principles of international law that status should be recognized in other jurisdictions, ordinarily depends on the question whether the person was domiciled in the country whose laws are asserted to have fixed his status. But, in the United States, questions of this kind may arise, where an attempt to decide solely with reference to technical domicil, tested by the rules which are applicable to changes of places of abode from one country to another, would not be consistent with sound principles. And in my judgment, this is one of those cases.

The residence of the plaintiff, who was taken by his master, Dr. Emerson, as a slave, from Missouri, to the State of Illinois, and thence to the Territory of Wisconsin, must be deemed to have been for the time being, and until he asserted his own separate intention, the same as the residence of his master; and the inquiry, whether the personal statutes of the Territory were rightfully extended over the plaintiff, and ought, in accordance with the rules of international law, to be allowed to fix his status, must depend upon the circumstances under which Dr. Emerson went into that Territory, and remained there;

and upon the further question, whether anything was there rightfully done by the plaintiff to cause those personal statutes to operate on him.

Dr. Emerson was an officer in the Army of the United States. He went into the Territory to discharge his duty to the United States. The place was out of the jurisdiction of any particular State, and within the exclusive jurisdiction of the United States. It does not appear where the domicil of origin of Dr. Emerson was, nor whether or not he had lost it, and gained another domicil, nor of what particular State, if any, he was a citizen.

On what ground can it be denied that all valid laws of the United States, Constitutionally enacted by Congress for the government of the Territory, rightfully extended over an officer of the United States and his servant who went into the Territory to remain there for an indefinite length of time, to take part in its civil or military affairs? They were not foreigners, coming from abroad. Dr. Emerson was a citizen of the country which had exclusive jurisdiction over the Territory; and not only a citizen, but he went there in a public capacity, in the service of the same sovereignty which made the laws. Whatever those laws might be, whether of the kind denominated personal statutes, or not, so far as they were intended by the legislative will, constitutionally expressed, to operate on him and his servant, and on the relations between them, they had a rightful operation, and no other State or country can refuse to allow that those laws might rightfully operate on the plaintiff and his servant, because such a refusal would be a denial that the United States could, by laws constitutionally enacted, govern their own servants, residing on their own territory, over which the United States had the exclusive control, and in respect to which they are an independent sovereign power. Whether the laws now in question were constitutionally enacted, I repeat once more, is a separate question. But, assuming that they were, and that they operated directly on the status of the plaintiff, I consider that no other State or country could question the rightful power of the United States so to legislate, or, consistently with the settled rules of international law could refuse to recognize the effects of such legislation upon the status of their officers and servants, as valid everywhere.

This alone would, in my apprehension, be sufficient to decide this question.

But there are other facts stated on the record which should not be passed over. It is agreed that in the year 1836, the plaintiff, while residing in the Territory, was married, with the consent of Dr. Emerson, to Harriet, named in the declaration as his wife, and that Eliza and Lizzie were the children of that marriage, the first named having been born on the Mississippi River, north of the line of Missouri, and the other having been born after their return to Missouri. And the inquiry is, whether, after the marriage of the plaintiff in the Territory, with the consent of Dr. Emerson, any other State or country can, consistently with the settled rules of international law, refuse to recognize and treat him as a free man, when suing for the liberty of himself, his wife, and the children of that marriage. It is in reference to his status, as viewed in other States and countries, that the contract of marriage and the birth of children becomes strictly material. At the same time, it is proper to observe that the female to whom he was married having been taken to the same military post of Fort Snelling as a slave, and Dr. Emerson claiming also to be her master at the time of her marriage, her status, and that of the children of the marriage, are also affected by the same consideration.

If the laws of Congress governing the Territory of Wisconsin were constitutional and valid laws, there can be no doubt these parties were capable of contracting a lawful marriage, attended with all the usual civil rights and obligations of that condition. In that Territory they were absolutely free persons, having full capacity to enter into the civil contract of marriage.

It is a principle of international law, settled beyond controversy in England and America, that a marriage, valid by the law of the place where it was contracted, and not in fraud of the law of any other place, is valid everywhere: and that no technical domicil at the place of the contract is necessary to make it so. See Bishop on mar. and Div. 125–129, where the cases are collected.

If, in Missouri, the plaintiff were held to be a slave, the validity and operation of his contract of marriage must be denied. He can have no legal rights; of course, not those of a husband and father. And the same is true of his wife and children. The denial of his rights is the denial of theirs. So that, though lawfully married in the Territory, when they came out of it, into the State of Missouri, they were no longer husband and wife; and a child of that lawful marriage,

though born under the same dominion where its parents contracted a lawful marriage, is not the fruit of that marriage, nor the child of its father, but subject to the maxim, *partus sequitur ventrem.*

It must be borne in mind that in this case there is no ground for the injury, whether it be the will of the State of Missouri not to recognize the validity of the marriage of a fugitive slave, who escapes into a State or country where slavery is not allowed, and there contracts a marriage; or the validity of such a marriage, where the master, being a citizen of the State of Missouri, voluntarily goes with his slave in itinere, into a State or country which does not permit slavery to exist, and the slave there contracts marriage without the consent of his master; for in this case, it is agreed, Dr. Emerson did consent; and no further question can arise concerning his rights, so far as their assertion is inconsistent with the validity of the marriage. Nor do I know of any ground for the assertion that this marriage was in fraud of any law of Missouri. It has been held by this court, that a bequest of property by a master to his slave, by necessary implication entitles the slave to his freedom; because, only as a freeman could he take and hold the bequest. *Legrand v. Darnall,* 2 Pet. 664. It has also been held, that when a master goes with his slave to reside for an indefinite period in a State where slavery is not tolerated, this operates as an act of manumission; because it is sufficiently expressive of the consent of the master that the slave should be free. 2 Marsh. Ky. 470; 14 Mart. La. 401.

What, then, shall we say of the consent of the master, that the slave may contract a lawful marriage attended with all the civil rights and duties which belong to that relation; that he may enter into a relation which none but a free man can assume—a relation which involves not only the rights and duties of the slave, but those of the other party to the contract, and of their descendants to the remotest generation? In my judgment, there can be no more effectual abandonment of the legal rights of a master over his slave, than by the consent of the master that the slave should enter into a contract of marriage, in a free State, attended by all the civil rights and obligations which belong to that condition.

And any claim by Dr. Emerson, or anyone claiming under him, the effect of which is to deny the validity of this marriage, and the lawful paternity of the children born from it, wherever asserted, is, in my judgment, a claim inconsistent with good faith and sound reason, as well as with the rules of international law. And I go further: in my opinion, a law of the State of Missouri, which should thus annual marriage, lawfully contracted by these parties while resident in Wisconsin, not in fraud of any law of Missouri, or of any right of Dr. Emerson, who consented thereto, would be a law impairing the obligation of a contract, and within the prohibition of the Constitution of the United States. See 4 Wheat. 629, 695, 696.

To avoid misapprehension on this important and difficult subject, I will state, distinctly, the conclusions at which I have arrived. They are:

First. The rules of international law respecting the emancipation of slaves, by the rightful operation of the laws of another State or country upon the status of the slave, while resident in such foreign State or country, are part of the common law of Missouri, and have not been abrogated by any statute law of that State.

Second. The laws of the United States, constitutionally enacted, which operated directly on and changed the status of a slave coming into the Territory of Wisconsin with his master, who went thither to reside for an indefinite length of time, in the performance of his duties as an officer of the United States, had a righful operation on the status of the slave, and it is conformity with the rules of international law that this change of status should be recognized everywhere.

Third. The laws of the United States, in operation in the Territory of Wisconsin at the time of the plaintiff's residence there, did act directly on the status of the plaintiff, and change his status to that of a free man.

Fourth. The plaintiff and his wife were capable of contracting, and, with the consent of Dr. Emerson, did contract a marriage in that Territory, valid under its laws; and the validity of this marriage cannot be questioned in Missouri, save by showing that it was in fraud of the laws of that State, or of some right derived from them; which cannot be shown in this case, because the master consented to it.

Fifth. That the consent of the master that his slave, residing in a country which does not tolerate slavery, may enter into a lawful contract of marriage, attended with the civil rights and duties which belong to that condition, is an

effectual act of emancipation. And the law does not enable Dr. Emerson, or anyone claiming under him, to assert a title to the married persons as slaves, and thus destroy the obligation of the contract of marriage, and bastardize their issue, and reduce them to slavery.

But it is insisted that the Supreme Court of Missouri has settled this case by its decision in *Scott v. Emerson,* 15 Mo. 576; and that this decision is in conformity with the weight of authority elsewhere, and with sound principles. If the Supreme Court of Missouri had placed its decision on the ground that it appeared Dr. Emerson never became domiciled in the Territory, and so its laws could not rightfully operate on him and his slave; and the facts that he went there to reside indefinitely, as an officer of the United States, and that the plaintiff was lawfully married there, with Dr. Emerson's consent, were left out of view, the decision would find support in other cases, and I might not be prepared to deny its correctness. But the decision is not rested on this ground. The domicil of Dr. Emerson in that Territory is not questioned in that decision: and it is placed on a broad denial, of the operation, in Missouri, of the law of any foreign State or country, upon the status of a slave, going with his master from Missouri into such foreign State or country, even though they went thither to become, and actually became, permanent inhabitants of such foreign State or country, the laws whereof acted directly on the status of the slave, and changed his status to that of a freeman.

To the correctness of such a decision I cannot assent. In my judgment, the opinion of the majority of the court in that case is in conflict with its previous decisions, with a great weight of judicial authority in other slaveholding States, and with fundamental principles of private international law. Mr. Chief Justice Gamble in his dissenting opinion in that case, said:

"I regard the question as conclusively settled by repeated adjudications of this court; and if I doubted or denied the propriety of those decisions, I would not feel myself any more at liberty to overturn them, than I would any other series of decisions by which the law upon any other question had been settled. There is with me nothing in the law of slavery which distinguishes it from the law on any other subject, or allows any more accommodation to the temporary excitements which have gathered around it . . . But in the midst of all such excitement, it is proper that the judicial mind, calm and self-balanced, should adhere to principles established when there was no feeling to disturb the view of the legal questions upon which the rights of parties depend."

"In this State, it has been recognized from the beginning of the government as a correct position in law, that the master who takes his slave to reside in a State or Territory where slavery is prohibited, thereby emancipates his slave." *Whinney v. Whitesides,* 1 Mo. 473; *Le Grange v. Chouteau,* 2 Mo. 20; *Milley v. Smith,* 2 Mo.36; *Ralph v. Duncan,* 3 Mo. 194; *Julia v. McKinney,* 3 Mo. 270; *Nat v. Ruddle,* 3 Mo. 400; *Rachel v. Walker,* 4 Mo. 350; *Wilson v. Melvin,* 4 Mo. 592.

Chief Justice Gamble has also examined the decisions of the courts of other States in which slavery is established, and finds them in accordance with these preceding decisions of the Supreme Court of Missouri to which he refers.

It would be a useless parade of learning for me to go over the ground which he has so fully and ably occupied.

But it is further insisted we are bound to follow this decision. I do not think so. In this case, it is to be determined what laws of the United States were in operation in the Territory of Wisconsin, and what was their effect on the status of the plaintiff. Could the plaintiff contract a lawful marriage there? Does any law of the State of Missouri impair the obligation of the contract of marriage, destroy his rights as a husband, bastardize the use of marriage, and reduce them to a state of slavery?

The questions which arise exclusively under the Constitution and laws of the United States, this court, under the Constitution and laws of the United States, has the rightful authority finally to decide. And if we look beyond these questions, we come to the consideration whether the rules of international law, which are part of the laws of Missouri until displaced by some statute not alleged to exist, do or do not require the status of the plaintiff, as fixed by the laws of the Territory of Wisconsin, to be recognized in Missouri. Upon such a question, not depending on any statute or local usage, but on principles of universal jurisprudence, this court has repeatedly asserted it could not hold itself bound by the decisions of State Courts, however great respect might be felt for their learning, ability, and impartiality. See *Swift v. Tyson,* 16

Pet. 1; *Carpenter v. The Providence Ins. Co.* 16 Pet. 495; *Foxcroft v. Mallet,* 4 How. 353; *Rowan v. Runnels,* 5 How. 134.

Some reliance has been placed on the fact that the decision in the Supreme Court of Missouri was between these parties, and the suit there was abandoned to obtain another trial in the courts of the United States.

In *Homer v. Brown,* 16 How. 354, this court made a decision upon the construction of a devise of lands, in direct opposition to the unanimous opinion of the Supreme Court of Massachusetts, between the same parties, respecting the same subject matter—the claimant having become nonsuit in the State Court, in order to bring his action in the Circuit Court of the United States. I did not sit in that case, having been of counsel for one of the parties while at the bar; but, on examining the report of the argument of the counsel for the plaintiff in error, I find they made the point, that this court ought to give effect to the construction put upon by the will by the State Court, to the end that rights respecting lands may be governed by one law, and that the law of the place where the lands are situated; that they referred to the state decision of the case, reported in 3 Cushing, 390, and to many decisions of this court. But this court does not seem to have considered the point of sufficient importance to notice it in their opinions. In *Miller v. Austin,* 13 How. 218, an action was brought by the endorsee of a written promise. The question was, whether it was negotiable under a statute of Ohio. The Supreme Court of that State having decided it was not negotiable, the plaintiff became nonsuit, and brought his action in the Circuit Court of the United States. The decision of the Supreme Court of the State, reported in 4 Ves. L. J. 527, was relied on. This court unanimously held the paper to be negotiable.

When the decisions of the highest court of a State are directly in conflict with each other, it has been repeatedly held, here, that the last decision is not necessarily to be taken as the rule. *State Bank v. Knoop,* 16 How. 369; *Pease v. Peck,* 18 How. 599.

To these considerations I desire to add, that it was not made known to the Supreme Court of Missouri, so far as appears, that the plaintiff was married in Wisconsin with the consent of Dr. Emerson, and it is not made known to us that Dr. Emerson was a citizen of Missouri, a fact to which that court seem to have attached much importance.

Sitting here to administer the law between these parties, I do not feel at liberty to surrender my own convictions of what the law requires, to the authority of the decision in 15 Missouri Reports.

I have thus far assumed, merely for the purpose of the argument, that the laws of the United States, respecting slavery in this Territory, were Constitutionally enacted by Congress. It remains to inquire whether they are constitutional and binding laws.

In the argument of this part of the case at bar, it was justly considered by all the counsel to be necessary to ascertain the source of the power of Congress over the Territory belonging to the United States. Until this is ascertained, it is not possible to determine the extent of that power. On the one side it was maintained that the Constitution contains no express grant of power to organize and govern what is known to the laws of the United States as a Territory. That whatever power of this kind exists, is derived by implication from the capacity of the United States to hold and acquire territory out of the limits of any State, and the necessity for its having some government.

On the other side it was insisted that the Constitution has not failed to make an express provision for this end, and that it is found in the 3rd Section of the 4th Article of the Constitution.

To determine which of these is the correct view, it is needful to advert to some facts respecting this subject, which existed when the Constitution was framed and adopted. It will be found that these facts not only shed much light on the question, whether the framers of the Constitution omitted to make a provision concerning the power of Congress to organize and govern Territories, but they will also aid in the construction of any provision which may have been made respecting this subject.

Under the Confederation, the unsettled territory within the limits of the United States had been a subject of deep interest. Some of the States insisted that these lands were within their chartered boundaries, and that they had succeeded to the title of the Crown to the soil. On the other hand, it was argued that the vacant lands had been acquired by the United States by

the war carried on by them under a common government and for the common interest.

This dispute was further complicated by unsettled questions of boundary among several States. It not only delayed the accession of Maryland to the Confederation, but at one time seriously threatened its existence. 5 Jour. of Cong. 208, 442. Under the pressure of these circumstances, Congress earnestly recommended to the several States a cession of their claims and rights to the United States. 5 Jour. of Cong. 442. And before the Constitution was framed, it had been begun. That by New York had been made on the 1st day of March, 1781; that of Virginia on the 1st day of March, 1784; that of Massachusetts on the 19th day of April, 1785, that of Connecticut on the 14th day of September, 1786; that of South Carolina on the 8th day of August, 1787, while the convention for framing the Constitution was in session.

It is very material to observe, in this connection, that each of these Acts cedes, in terms, to the United States, as well the jurisdiction as the soil.

It is also equally important to note that, when the Constitution was framed and adopted, this plan of vesting in the United States, for the common good, the great tracts of ungranted lands claimed by the several States, in which so deep an interest was felt, was yet incomplete. It remained for North Carolina and Georgia to cede their extensive and valuable claims. These were made, by North Carolina on the 25th day of February, 1790, and by Georgia on the 24th day of April, 1802. The terms of these last mentioned cessions will hereafter be noticed in another connection; but I observe here that each of them distinctly shows, upon its face, that they were not only in execution of the general plan proposed by the Congress of the Confederation, but of a formed purpose of each of these States, existing when the assent of their respective people was given to the Constitution of the United States.

It appears, then, that when the Federal Constitution was framed and presented to the people of the several States for their consideration, the unsettled territory was viewed as justly applicable to the common benefit, so far as it then had or might attain thereafter a pecuniary value; and so far as it might become the seat of new States, to be admitted into the Union upon an equal footing with the original States. And also that relations of the United States to that unsettled territory were of different kinds. The titles of the States of New York, Virginia, Massachusetts, Connecticut and South Carolina, as well of soil as of jurisdiction had been transferred to the United States. North Carolina and Georgia had not actually made transfers, but a confident expectation, founded on their appreciation of the justice of the general claim, and fully justified by the results, was entertained, that these cessions would be made. The Ordinance of 1787 had made provision for the temporary government of so much of the territory, actually ceded, as lay northwest of the River Ohio.

But it must have been apparent, both to the framers of the Constitution and the people of the several States who were to act upon it, that the government thus provided for could not continue, unless the Constitution should confer on the United States the necessary powers to continue it. That temporary government, under the Ordinance, was to consist of certain officers, to be appointed by and responsible to the Congress of the Confederation; their powers had been conferred and defined by the ordinance. So far as it provided for the temporary government of the Territory, it was an ordinary Act of legislation, deriving its force from the legislative power of Congress, and depending for its vitality upon the continuance of that legislative power. But the officers to be appointed for the Northwestern Territory, after the adoption of the Constitution, must necessarily be officers of the United States, and not of the Congress of the Confederation; appointed and commissioned by the President, and exercising powers derived from the United States under the Constitution.

Such was the relation between the United States and the Northwestern Territory, which all reflecting men must have foreseen would exist, when the government created by the Constitution should supersede that of the Confederation. That if the new government should be without power to govern this Territory, it could not appoint and commission officers, and send them into the Territory, to exercise their legislative, judicial and executive power; and that this Territory, which was even then foreseen to be so important, both politically and financially, to all the existing States, must be left not only without the control of the General Government, in respect to its future political relations to the rest

of the States, but absolutely without any government, save what its inhabitants, acting in their primary capacity, might from time to time create for themselves.

But this Northwestern Territory was not the only Territory, the soil and jurisdiction whereof were then understood to have been ceded to the United States. The cession by South Carolina, made in August, 1787, was of "all the territory included within the River Mississippi, and a line beginning at that part of the said river which is intersected by the southern boundary of North Carolina, and continuing along the said boundary line until it intersects the ridge or chain of mountains which divides the Eastern from the Western waters; then to be continued along the top of the said ridge of mountains, until it intersects a line to be drawn due west form the head of the southern branch of the Tugaloo River, to the said mountains; and thence to run a due west course to the River Mississippi."

It is true that by subsequent explorations it was ascertained that the source of the Tugaloo River, upon which the title of the South Carolina depended, was so far to the northward, that the transfer conveyed only a narrow slip of land, about twelve miles wide, lying on the top of the ridge of mountains, and extending from the northern boundary of Georgia to the southern boundary of North Carolina. But this was a discovery made long after the cession, and there can be no doubt that the State of South Carolina, in making the cession, and the Congress in accepting it, viewed it as a transfer to the United States of the soil and jurisdiction of an extensive and important part of the unsettled territory ceded by the Crown of Great Britain by the Treaty of Peace, though its quantity or extent then remained to be ascertained.[5]

It must be remembered also, as has been already stated, that not only was there a confident expectation entertained by the other States, that North Carolina and Georgia would complete the plan already so far executed by New York, Virginia, Massachusetts, Connecticut, and South Carolina, but that the opinion was in no small degree prevalent, that the just title to the "back country," as it was termed, had vested in the United States by the Treaty of Peace, and could not rightfully be claimed by an individual State.

There is another consideration applicable to this part of the subject, and entitled, in my judgment, to great weight.

The Congress of the Confederation had assumed the power not only to dispose of the lands ceded, but to institute governments and make laws for their inhabitants. In other words, they had proceeded to act under the cession, which, as we have seen, was as well of the jurisdiction as of the soil. This ordinance was passed on the 13th of July, 1787. The Convention for framing the Constitution was then in session at Philadelphia. The proof is direct and decisive, that it was know to the Convention.[6] It is equally clear that it was admitted and understood not to be within the legitimate powers of the Confederation to pass this Ordinance. *Jefferson's Works,* Vol. IX. pp. 251, 276; *Federalist,* Nos. 38, 43.

The importance of conferring on the new government regular powers commensurate with the objects to be attained, and thus avoiding the alternative of a failure to execute the trust assumed by the acceptance of the cessions made and expected, or its execution by usurpation, could scarcely fail to be perceived. That it was in fact perceived, is clearly shown by the *Federalist* (No. 38), where this very argument is made use of in commendation of the Constitution. Keeping these facts in view, it may confidently be asserted that there is very strong reason to believe, before we examine the Constitution itself, that the necessity for a competent grant of power to hold, dispose of, and govern territory, ceded and expected to be ceded, could not have escaped the attention of those who framed or adopted the Constitution; and that if it did not escape their attention, it would not fail to be adequately provided for.

Any other conclusion would involve the assumption that a subject of the gravest national concern, respecting which the small States felt

[5] Note by Mr. Justice Curtis. This statement that some territory did actually pass by this cession, is taken from the opinion of the court, delivered by Mr. Justice Wayne, in the case of *Howard v. Ingersoll*, reported in 13 How. 405. It is an obscure matter, and, on some examination of it, I have been led to doubt whether any territory actually passed this cession. But as the fact is not important to the argument, I have not thought it necessary further to investigate it.

[6] It was published in a newspaper at Philadelphia, in May, and a copy of it was sent by R. H. Lee to Gen. Washington, on the 15th of July. See p. 261, *Cor. of Am. Rev.* Vol. IV., and *Writings of Washington*, Vol. IX. p. 174.

so much jealousy that it had been almost an insurmountable obstacle to the formation of the Confederation, and as to which all the States had deep pecuniary and political interests, and which had been so recently and constantly agitated, was nevertheless overlooked; or that such a subject was not overlooked, but designedly left unprovided for, though it was manifestly a subject of common concern, which belonged to the care of the General Government, and adequate provision for which could not fail to be deemed necessary and proper.

The admission of new States, to be framed out of the ceded territory, early attracted the attention of the Convention. Among the resolutions introduced by Mr. Randolph, on the 29th of May, was one on this subject (Res. No. 10, 5 Elliot, 128), which having been affirmed in Committee of the Whole, on the 5th of June (5 Elliot, 156), and reported to the Convention on the 13th of June (5 Elliot, 190), was referred to the Committee of Detail, to prepare the Constitution, on the 26th of July (5 Elliot, 376). This committee reported an article for the admission of new States "lawfully constituted or established." Nothing was said concerning the power of Congress to prepare or form such States. This omission struck Mr. Madison, who, on the 18th of August (5 Elliott, 439), moved for the insertion of power to dispose of the unappropriated lands of the United States, and to institute temporary governments for new States arising therein.

On the 29th of August (5 Elliot, 492), the report of the committee was taken up, and after debate, which exhibited great diversity of views concerning the proper mode of providing for the subject, arising out of the supposed diversity of interests of the large and small States, and between those which had and those which had not unsettled territory, but no difference of opinion respecting the propriety and necessity of some adequate provision for the subject, Gouverneur Morris moved the clause as it stands in the Constitution. This met with general approbation, and was at once adopted. The whole section is as follows:

"New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without consent of the Legislatures of the States concerned, as well as of Congress."

The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State."

That Congress has some power to institute temporary governments over the Territory, I believe all agree; and, if it be admitted that the necessity of some power to govern the Territory of the United States could not and did not escape the attention of the Convention and the people, and the necessity is so great that, in the absence of any express grant, it is strong enough to raise an implication of the existence of that power, it would seem to follow that it is also strong enough to afford material aid in construing an express grant of power respecting that Territory; and that they who maintain the existence of the power, without finding any words at all in which it is conveyed, should be willing to receive a reasonable interpretation of language of the Constitution, manifestly intended to relate to the Territory, and to convey to Congress some authority concerning it.

It would seem, also, that when we find the subject matter of the growth and formation and admission of new States, and the disposal of the Territory of these ends, were under consideration, and that some provision therefor was expressly made, it is improbable that it would be, in its terms, a grossly inadequate provision; and that an indispensably necessary power to institute temporary governments, and to legislate for the inhabitants of the Territory, was passed silently by, and left to be deduced from the necessity of the case.

In the argument at the bar, great attention has been paid to the meaning of the word "territory."

Ordinarily, when the territory of a sovereign power is spoken of, it refers to that tract of country which is under the political jurisdiction of that sovereign power. Thus Chief Justice Marshall, in *United States v. Bevans,* 3 Wheat. 386, says: "What, then, is the extent of jurisdiction which a State possess? We answer, without hesitation, the jurisdiction of a State is co-extensive with its territory." Examples might easily be multiplied of this use of the word, but they are unnecessary, because it is familiar. But the word

"territory" is not used in this broad and general sense in this clause of the Constitution.

At the time of the adoption of the Constitution, the United States held a great tract of country northwest of the Ohio; another tract, then of unknown extent, ceded by South Carolina; and a confident expectation was then entertained, and afterwards realized, that they then were or would become the owners of other great tracts, claimed by North Carolina and Georgia. These ceded tracts lay within the limits of the United States, and out of the limits of any particular State; and the cessions embraced the civil and political jurisdiction, and so much of the soil as had not previously been granted to individuals.

These words, "territory belonging to the United States," were not used in the Constitution to describe an abstraction, but to identify and apply to these actual subjects, matter then existing and belonging to the United States, and other similar subjects which might afterwards be acquired; and this being so, all the essential qualities and incidents attending such actual subjects are embraced within the words "territory belonging to the United States," as fully as if each of those essential qualities and incidents had been specifically described.

I say, the essential qualities and incidents. But in determining what were the essential qualities and incidents of the subject with which they were dealing, we must take into consideration not only all the particular facts which were immediately before them, but the great consideration, ever present to the minds of those who framed and adopted the Constitution, that they were making a frame of government for the people of the United States and their posterity, under which they hoped the United States might be, what they have now become, a great and powerful nation, possessing the power to make war and to conclude treaties, and thus to acquire territory. See *Sere v. Pitot,* 6 Cranch, 336; *Am. Ins. Co. v. Canter,* I Pet. 542. With these in view, I turn to examine the clause of the article now in question.

It is said this provision has no application to any territory save that then belonging to the United States. I have already shown that, when the Constitution was framed, a confident expectation was entertained, which was speedily realized, that North Carolina and Georgia would cede their claims to that great Territory which lay west of those States. No doubt has been suggested that the first clause of this same article, which enabled Congress to admit new States, refers to and includes new States to be formed out of this Territory, and expected to be thereafter ceded by North Carolina and Georgia, as well as new States to be formed out of territory northwest of the Ohio, which then had been ceded by Virginia. It must have been seen, therefore, that the same necessity would exist for an authority to dispose of and make all needful regulations respecting this Territory, when ceded, as existed for a like authority respecting territory which had been ceded.

No reason has been suggested why any reluctance should have been felt, by the framers of the Constitution, to apply this provision to all the territory which might belong to the United States, or why any distinction should have been made, founded on the accidental circumstance in no way material as respects the necessity for rules and regulations, or the propriety of conferring on the Congress power to make them. And if we look at the course of the debates in the Convention on this article, we shall find that the then unceded lands, so far from having been left out of view in adopting this article, constituted, in the minds of members, a subject of even paramount importance.

Again; in what an extraordinary position would the limitation of this clause to territory then belonging to the United States, place the Territory which lay within the chartered limits of North Carolina and Georgia. The title to that Territory was then claimed by those States, and by the United States; their respective claims are purposely left unsettled by the express words of this clause; and when cessions were made by those States, they were merely of their claims to this Territory, the United States neither admitting nor denying the validity of those claims; so that it was impossible then, and has ever since remained impossible, to know whether this Territory did or did not then belong to the United States; and, consequently, to know whether it was within or without the authority conferred by this clause, to dispose of and make rules and regulations respecting the territory of the United States. This attributes to the eminent men who acted on this subject a want of ability and forecast, or a want of attention to the known facts upon which they were acting, in which I cannot concur.

There is not, in my judgment, anything in the language, the history, or the subject matter of this article, which restricts its operation to the territory owned by the United States when the Constitution was adopted.

But it is also insisted that provisions of the Constitution respecting territory belonging to the United States do not apply to territory acquired by treaty from a foreign nation. This objection must rest upon the position that the Constitution did not authorize the Federal Government to acquire foreign territory, and consequently has made no provision for its government when acquired; or, that though the acquisition of foreign territory was contemplated by the Constitution, its provisions concerning the admission of new States, and the making of all needful rules and regulations respecting territory belonging to the United States, were not designed to be applicable to territory acquired from foreign nations.

It is undoubtedly true, that at the date of the treaty of 1803, between the United States and France, for the cession of Louisiana, it was made a question, whether the Constitution had conferred on the Executive Department of the Government of the United States power to acquire foreign territory by a treaty.

There is evidence that very grave doubts were then entertained concerning the existence of this power. But that there was then a settled opinion in the executive and legislative branches of the government, that this power did not exist, cannot be admitted, without at the same time imputing to those who negotiated and ratified the Treaty, and passed the laws necessary to carry it into execution, a deliberate and known violation of their oaths to support the Constitution; and whatever doubts may then have existed, the question must now be taken to have been settled. Four distinct acquisitions of foreign territory have been made by as many different treaties, under as many different administrations. Six States, formed on such territory, are now in the Union. Every branch of this government, during a period of more than fifty years, has participated in these transactions. To question their validity now, is vain. As was said by Mr. Chief Justice Marshall, in *The American Insurance Company v. Canter,* 1 Pet. 542, "the Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or treaty." See *Sere v. Pitot,* 6 Cranch, 336. And I add, it also possesses the power of governing it, when acquired, not by resorting to suppositious powers, nowhere found described in the Constitution, but expressly granted in the authority to make all needful rules and regulations, respecting the Territory of the United States.

There was to be established by the Constitution a frame of government, under which the people of the United States and their posterity were to continue indefinitely. To take one of its provisions, the language of which is broad enough to extend throughout the existence of the government, and embrace all territory belonging to the United States throughout all time, and the purposes and objects of which apply to all Territory of the United States, and narrow it down to territory belonging to the United States when the Constitution was framed, while at the same time it is admitted that the Constitution contemplated and authorized the acquisition, from time to time, of other and foreign territory, seems to me to be an interpretation as inconsistent with the nature and purposes of the instrument, as it is with its language, and I can have no hesitation in rejecting it.

I construe this clause, therefore, as if it had read, Congress shall have power to make all needful rules and regulations respecting the tracts of country, out of the limits of the several States, which the United States have acquired, or may hereafter acquire, by cessions, as well of the jurisdiction as of the soil, so far as the soil may be the property of the party making the cession, at the time of making it.

It has been urged that the words "rules and regulations" are not appropriate terms in which to convey authority to make laws for the government of the Territory.

But it must be remembered that this is a grant of power to the Congress—that it is, therefore, necessarily a grant of power to legislate—and certainly, rules and regulation respecting a particular subject, made by the legislative power of a country, can be nothing but laws. Nor do the particular terms employed, in my judgment, tend in any degree to restrict this legislative power. Power granted to a Legislature to make all needful rules and regulations respecting the

Territory, is a power to pass all needful laws respecting it.

The word regulate, or regulation, is several times used in the Constitution. It is used in the 4th section of the 1st article to describe those laws of the States which prescribe the times, places, and manner, of choosing Senator or Representatives; in the 2d section of the 4th article, to designate the legislative action of a State on the subject of fugitives from service, having a very close relation to the matter of our present inquiry; in the 2d section of the 3d article, to empower Congress to fix the extent of the appellate jurisdiction of this court; and, finally, in the 8th section of the 1st article in the words, "Congress shall have power to regulate commerce."

It is unnecessary to describe the body of legislation which has been enacted under this grant of power; its variety and extent are well known. But it may be mentioned, in passing, that under this power to regulate commerce, Congress has enacted a great system of municipal laws, and extended it over the vessels and crews of the United States on the high seas and in foreign ports, and even over citizens of the United States resident in China; and has established judicatures, with power to inflict even capital punishment within that country.

If, then, this clause does contain a power to legislate respecting the Territory, what are the limits of that power?

To this I answer, that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an ex post facto law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution.

Besides this, the rules and regulations must be needful. But undoubtedly the question whether a particular rule or regulation be needful, must be finally determined by Congress itself. Whether a law be needful, is a legislative or political, not a judicial, question. Whatever Congress deems needful, is so under the grant of power.

Nor am I aware that it has ever been questioned that laws providing for the temporary government of the settlers on the public lands are needful, not only to prepare them for admission to the Union as States, but even to enable the United States to dispose of the lands.

Without government and social order there can be no property; for without law, its ownership, its use and the power of disposing of it, cease to exist, in the sense in which those words are used and understood in all civilized States.

Since, then, this power was manifestly conferred to enable the United States to dispose of its public lands to settlers, and to admit them into the Union as States, when in the judgment of Congress they should be fitted therefor, since these were the needs provided for, since it is confessed that Government is indispensable to provide for those needs, and the power is, to make all needful rules and regulations respecting the Territory, I cannot doubt that this is a power to govern the inhabitants of the Territory, by such laws as Congress deems needful, until they obtain admission as States.

Whether they should be thus governed solely by laws enacted by Congress, or partly by laws enacted by legislative power conferred by Congress, is one of those questions which depend on the judgment of Congress—a question which of these is needful.

But it is insisted, that whatever other powers Congress may have respecting the Territory of the United States, the subject of negro slavery forms as an exception.

The Constitution declares that Congress shall have power to make "all needful rules and regulation" respecting the Territory belonging to the United States.

The assertion is, though the Constitution says all, it does not mean all—though it says all, without qualification, it means all except such as allow or prohibit slavery. It cannot be doubted that it is incumbent on those who would thus introduce an exception not found in the language of the instrument, to exhibit some solid and satisfactory reason, drawn from the subject matter or the purposes and objects of the clause, the context, or from other provisions of the Constitution, showing that the words employed in this clause are not to be understood, according to their clear, plain, and natural signification.

The subject matter is the Territory of the United States out of the limits of every State, and consequently under the exclusive power of the people of the United States. Their will respecting it, manifested in the Constitution, can be subject

to no restriction. The purposes and objects of the clause were the enactment of laws concerning the disposal of the public lands, and the temporary government of the settlers thereon, until new States should be formed. It will not be questioned that, when the Constitution of the United States was framed and adopted, the allowance and the prohibition of negro slavery were recognized subjects of municipal legislation; every State had in some measure acted thereon; and the only legislative Act concerning the Territory—the Ordinance of 1787, which had then so recently been passed—contained a prohibition of slavery. The purpose and object of the clause being to enable Congress to provide a body of municipal law for the government of the settlers, the allowance or the prohibition of slavery comes within the known and recognized scope of that purpose and object.

There is nothing in the context which qualifies the grant of power. The regulations must be "respecting the Territory." An enactment that slavery may or may not exist there, is a regulation respecting the Territory. Regulations must be needful; but is necessarily left to the legislative discretion to determine whether a law be needful. No other clause of the Constitution has been seen by me, which imposes any restriction or makes any exception concerning the power of Congress to allow or prohibit slavery in the territory belonging to the United States.

A practical construction, nearly contemporaneous with the adoption of the Constitution, and continued by repeated instances through a long series of years, may always influence, and in doubtful cases should determine, the judicial mind, on a question of the interpretation of the Constitution. *Stuart v. Laird*, 1 Cranch, 299; *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 264; *Prigg v. Pennsylvania*, 16 Pet. 621; *Cooley v. Port Wardens*, 12 How. 315.

In this view, I proceed briefly to examine the practical construction placed on the clause now in question, so far as it respects the inclusion therein of power to permit or prohibit slavery in the Territories.

It has already been stated, that after the Government of the United States was organized under the Constitution, the temporary government of the Territory northwest of the River Ohio could no longer exist, save under the powers conferred on Congress by the Constitution. Whatever legislative, judicial, or executive authority should be exercised therein could be derived only from the people of the United States under the Constitution. And, accordingly, an Act was passed on the 7th day of August, 1789, 1 Stat. at L. 50, which recites: "Whereas, in order that the Ordinance of the United States in Congress assembled, for the government of the Territory northwest of the River Ohio, may continue to have full effect, it is required that certain provisions should be made, so as to adapt the same to the present Constitution of the United States." It then provides for the appointment by the President of all officers, who, by force of the Ordinance, were to have been appointed by the Congress of the Confederation, and their commission in the manner required by the Constitution; and empowers the Secretary of the Territory to exercise the powers of the Governor in case of the death or necessary absence of the latter.

Here is an explicit declaration of the will the first Congress, of which fourteen members, including Mr. Madison, had been members of the Convention which framed the Constitution, that the Ordinance, one article of which prohibited slavery, "should continue to have good effect." Gen. Washington, who signed this bill, as President, was the President of the Convention.

It does not appear to me to be important, in this connection, that that clause in the Ordinance which prohibited slavery was one of series of articles of what is therein termed a compact. The Congress of the Confederation had no power to make such a compact, nor to act at all on the subject; and after what had been so recently said by Mr. Madison on this subject, in the thirty-eighth number of the *Federalist*, I cannot suppose that he, or any others who voted for this bill, attributed any intrinsic effect to what was denominated in the Ordinance a compact between "the original States and the people and States in the new territory;" there being no new States then in existence in the Territory, with whom a compact could be made, and the few scattered inhabitants, unorganized into a political body, not being capable of becoming a party to a treaty, even if the Congress of the Confederation had had power to make one touching the government of that Territory.

I consider the passage of this law to have been an assertion by the first Congress of the power of the United States to prohibit slavery within this part of the Territory of the United

States; for it clearly shows that slavery was there after to be prohibited there, and it could be prohibited only by an exertion of the power of the United Sates, under the Constitution; no other power being capable of operating within that Territory after the Constitution took effect.

On the 2d of April, 1790, 1 Stat. at L. 106, the first Congress passed an Act accepting a deed of cession by North Carolina of that Territory afterwards erected into the State of Tennessee. The fourth express condition contained in this deed of cession, after providing that the inhabitants of the Territory shall be temporarily governed in the same manner as those beyond the Ohio, is followed by these words: "Provided, always, that no regulations made or to be made by Congress shall tend to emancipate slaves."

This provision shows that it was then understood Congress might make a regulation prohibiting slavery, and that Congress might also allow it to continue to exist in the Territory; and accordingly, when a few days later, Congress passed the Act of May 20th, 1790, 1 Stat. at L. 123, for the government of the Territory south of the River Ohio, it provided, "and the government of the Territory south of the Ohio shall be similar to that now exercised in the Territory northwest of the Ohio, except so far as is otherwise provided in the conditions expressed in an Act of Congress of the present session, entitled 'An Act to accept a cession of the claims of the State of North Carolina to a certain district of western territory.'" Under the government thus established, slavery existed until the Territory became the State of Tennessee.

On the 7th of April, 1798, 1 Stat. at L. 649, an Act was passed to establish a government in the Mississippi Territory in all respects like that exercised in the Territory northwest of the Ohio, "excepting and excluding the last article of the Ordinance made for the government thereof by the late Congress on the 13th day of July, 1787." When the limits of this Territory had been amicably settled with Georgia and the latter ceded all its claim thereto, it was one stipulation in the compact of cession, that the ordinance of July 13th, 1787, "shall in all its parts extend to the Territory contained in the present Act of Cession, that article only excepted which forbids slavery." The government of this Territory was subsequently established and organized under the Act of May 10th, 1800; but so much of the Ordinance as prohibited slavery was not put in operation there.

Without going minutely into the details of each case, I will now give reference to two classes of Acts, in one of which Congress has extended the Ordinance of 1787, including the article prohibiting slavery, over different Territories, and thus exerted its power to prohibit it; in the other, Congress has erected governments over Territories acquired from France and Spain, in which slavery already existed, but refused to apply to them that part of the government under the Ordinance which excluded slavery.

Of the first class are the Act of May 7th, 1800, 2 Stat. at L. 58, for the government of the Indian Territory; the Act of Jan. 11th, 1805, 2 Stat. at L. 309, for the government of Michigan Territory; the Act of May 3d, 1809, 2 Stat. at L. 514, for the government of the Illinois Territory; the Act of April 20th, 1836, 5 Stat. at L. 10, for government of the Territory of Wisconsin; the Act of June 12th, 1838; for the government of the Territory of Iowa; the Act of Aug. 14th, 1848, government of the Territory of Oregon. To These instances should be added the Act of March 6th, 1820, 3 Stat. at L. 548, prohibiting slavery in the Territory acquired from France, being northwest of Missouri, and north of thirty-six degrees thirty minutes north latitude.

Of the second class, in which Congress refused to interfere with slavery already existing under the municipal law of France or Spain, and established governments by which slavery was recognized and allowed, are: the Act of March 26th, 1804, 2 Stat. at L. 283, for the government of Louisiana; the Act of March 2d, 1805, 2 Stat. at L. 322, for the government of the Territory of Orleans; the Act of June 4th, 1812, 3 Stat. at L. 743, for the government of the Missouri Territory; the Act of March 30th, 1822, 3 Stat. at L. 654, for the government of the Territory of Florida. Here are eight distinct instances, beginning with the first Congress, and coming down to the year of 1848, in which Congress has excluded slavery from the Territory of the United States; and six distinct instances in which Congress organized governments of Territories by which slavery was recognized and continued, beginning also with the first Congress, and coming down to the year 1822. These Acts were severally signed by seven Presidents of the United States, beginning with General Washington, and coming regularly down as far as Mr. John

Quincy Adams, thus including all who were in public life when the Constitution was adopted.

If the practical construction of the Constitution contemporaneously with its going into effect, by men intimately acquainted with the history from their personal participation in framing and adopting it, and continued by them through a long series of Acts of the gravest importance, be entitled to weight in the judicial mind on a question of construction, it would seem to be difficult to resist the force of the Acts above adverted to.

It appears, however, from what has taken place at the bar, that notwithstanding the language of the Constitution, and the long line of legislative and executive precedents under it, three different and opposite views are taken of the power of Congress respecting slavery in the Territories.

One is, that though Congress can make a regulation prohibiting slavery in a Territory, they cannot make a regulation allowing it; another is, that it can neither be established nor prohibited by Congress, but that the people of a Territory, when organized by Congress, can establish or prohibit slavery; while the third is, that the Constitution itself secures every citizen who holds slaves, under the laws of any State, the indefeasible right to carry them into any Territory, and there hold them as property.

No particular clause of the Constitution has been referred to at the bar in support of either of these views. The first seems to be rested upon general considerations concerning the social and moral evils of slavery, its relations to republican governments, its inconsistency with the Declaration of Independence and with natural right.

The second is drawn from considerations equally general, concerning the right of self-government, and the nature of the political institutions which have been established by people of the United States.

While the third is said to rest upon the equal right of all citizens to go with their property upon the public domain, and the inequality of a regulation which would admit the property of some and exclude the property of other citizens; and inasmuch as slaves are chiefly held by citizens of those particular States where slavery is established, it is insisted that a regulation excluding slavery from a Territory operates, practically, to make an unjust discrimination between citizens of different States, in respect to their use and enjoyment of the territory of the United States.

With the weight of either of these considerations, when presented to Congress to influence its action, this court has no concern. One or the other may be justly entitled to guide or control the legislative judgment upon what is a needful regulation. The question here is, whether they are sufficient to authorize this court to insert into this clause of the Constitution an exception of the exclusion or allowance of slavery, not found therein, nor in any other part of that instrument. To engraft on any instrument a substantive exception not found in it, must be admitted to be a matter attended with great difficulty. And the difficulty increases with the importance of the instrument, and the magnitude and complexity of the interests involved in its construction. To allow this to be done with the Constitution, upon reasons purely political, renders its judicial interpretation impossible—because judicial tribunals, as such, cannot decide upon political considerations. Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican government, with limited and defined powers, we have a government which is merely an exponent of the will of Congress; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court.

If it can be shown by anything in the Constitution itself that when it confers on Congress the power to make all needful rules and regulations respecting the Territory belonging to the United States, the exclusion or the allowance of slavery was excepted; or if any thing in the history of this provision tends to show that such an exception was intended by those who framed and

adopted the Constitution to be introduced into it, I hold it to be my duty carefully to consider, and to allow just weight to such considerations in interpreting the positive text of the Constitution. But where the Constitution has said all needful rules and regulations, I must find something more than theoretical reasoning to induce me to say it did not mean all.

There have been eminent instances in this court closely analogous to this one, in which such an attempt to introduce an exception, not found in the Constitution itself, has failed of success.

By the 8th section of the 1st article, Congress has the power of exclusive legislation in all cases whatsoever within this district.

In the case of *Loughborough v. Blake*, 5 Wheat. 324 the question arose, whether Congress has power to impose direct taxes on persons and property. It was insisted, that though the grant of power was in its terms broad enough to include direct taxation, it must be limited by the principle, that taxation and representation are inseparable. It would not be easy to fix on any political truth, better established or more fully admitted in our country, than that taxation and representation must exist together. We went into the War of the Revolution to assert it, and it is incorporated as fundamental into all American Governments. But however true and important this maxim may be, it is not necessarily of universal application. It was for the people of the United States, who ordained the Constitution, to decide whether it should or should not be permitted to operate within this district. Their decision was embodied in the words of the Constitution; and as that maintained no such exception as would permit the maxim to operate in this district, this court interpreting that language, held that the exception did not exist.

Again; the Constitution confers on Congress power to regulate commerce with foreign nations. Under this, Congress passed an Act on the 22d of December, 1807, unlimited in duration, laying an embargo on all ships and vessels in the ports or within the limits and jurisdiction of the United States. No law of the United States ever pressed so severely upon particular States. Though the constitutionality of the law was contested with an earnestness and zeal proportioned to the ruinous effects which were felt from it, and though, as Mr. Chief Justice Marshall has said, 9 Wheat. 192, "a want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility will not be imputed to those who were arrayed in opposition to this" I am not aware that the fact that its prohibited the use of a particular species of property, belonging almost exclusively to citizens of a few States, and this indefinitely, was ever supposed to show that is was unconstitutional. Something much more stringent, as a ground of legal judgment, was relied on—that the power to regulate commerce did not include the power to annihilate commerce.

But the decision was, that under the power to regulate commerce, the power of Congress over the subject was restricted only by those exceptions and limitations contained in the Constitution; and as neither the clause in question, which was a general grant of power to regulate commerce, nor any other clause of the Constitution, imposed any restrictions as to the duration of an embargo, an unlimited prohibition of the use of the shipping of the country was within the power of Congress. On this subject, Mr. Justice Daniel, speaking for the court in the case of *U.S. v. Marigold,* 9 How. 560, says: "Congress are, by the Constitution, vested with power to regulate commerce with foreign nations; and however, at periods of high excitement, an application of the terms 'to regulate commerce,' such as would embrace absolute prohibition, may have been questioned, yet, since the passage of the Embargo and Non-Intercourse Laws, and the repeated judicial sanctions these statutes have received, it can scarcely, at this day, be open to doubt, that every subject falling legitimately within the sphere of commercial regulation may be partially or wholly excluded, when either measure shall be demanded by the safety or the important interests of the entire nation. The power once conceded, it may operate on any and every subject of commerce to which the legislative discretion may apply it."

If power to regulate commerce extends to an indefinite prohibition of the use of all vessels belonging to citizens of the several States, and may operate, without exception, upon every subject of commerce to which the legislative discretion may apply it, upon what grounds can I say that power to make all needful rules and regulations respecting the territory of the United States is subject to an exception of the allowance or prohibition of slavery therein?

While the regulation is one "respecting the Territory," while it is, in the judgment of Congress, "a needful regulation," and is thus completely within the words of the grant, while no other clause of the Constitution can be shown, which requires the insertion of an exception respecting slavery, and while the practical construction for a period of upwards of fifty years forbids such an exception, it would, in my opinion, violate every sound rule of interpretation to force that exception into the Constitution upon the strength of abstract political reasoning, which we are bound to believe the people of the United States thought insufficient to induce them to limit the power of Congress, because what they have said contains no such limitation.

Before I proceed further to notice some other grounds of supposed objection to this power of Congress, I desire to say, that if it were not for my anxiety to insist upon what I deem a correct exposition of the Constitution; if I looked only to the purposes of the argument, the source of the power of Congress asserted in the opinion of the majority of the court would answer those purposes equally well. For they admit that Congress has power to organize and govern the Territories until they arrive at a suitable condition for admission to the Union; they admit, also, that the kind of government which shall thus exist, should be regulated by the condition and wants of each Territory, and that it is necessarily committed to the discretion of Congress to enact such laws for that purpose as that discretion may dictate; and no limit to that discretion has been shown, or even suggested save those positive prohibitions to legislate, which are found in the Constitution.

I confess myself unable to perceive any difference whatever between my own opinion of the general extent of the power of Congress and the opinion of the majority of the court, save that I consider it derivable from the express language of the Constitution, while they hold it to be silently implied from the power to acquire territory. Looking at the power of Congress over the Territories as of the extent just described, what positive prohibition exists in the Constitution, which restrained Congress from enacting a law in 1820 to prohibit slavery north of thirty-six degrees thirty minutes north latitude?

The only one suggested is that clause in the 5th article of the Amendments of the Constitution which declares that no person shall be deprived of his life, liberty, or property, without due process of law. I will now proceed to examine the question, whether this clause is entitled to the effect thus contributed to it. It is necessary, first, to have a clear view of the nature and incidents of that particular species of property which is now in question.

Slavery being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but is inferable from the Constitution, and has been explicitly declared by this court. This Constitution refers to slaves as "persons held to service in one State, under the laws thereof." Nothing can more clearly describe a status created by municipal law. In *Prigg v. Pennsylvania*, 16 Pet. 611, this court said: "The state of slavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws." In *Rankin v. Lydia*, 2 A. K. Marsh, 470, the Supreme Court of Appeals of Kentucky said: "Slavery is sanctioned by the laws of this State, and the right to hold them under the municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature or the unwritten common law." I am not acquainted with any case or writer questioning the correctness of this doctrine. See, also, 1 Burge, Col., and For. Laws, 738–741, where the authorities are collected.

The status of slavery is not necessarily always attended with the same powers on the part of the master. The master is subject to the supreme power of the State, whose will controls his action towards his slave, and this control must be defined and regulated by the municipal law. In one State, as at one period of the Roman law, it may put the life of the slave into the hand of the master; others, as those of the United States, which tolerate slavery, may treat the slave as a person when the master takes his life; while in others, the law may recognize a right of the slave to be protected from cruel treatment. In other words, the status of slavery embraces every condition, from that in which the slave is known to the law simply as a chattel, with no civil rights, to that in which he is recognized as a person for all purposes, save the compulsory power of directing and receiving the fruits of his labor. Which of these conditions shall attend the status

of slavery, must depend on the municipal law which creates and upholds it.

And not only must the status of slavery be created and measured by municipal law, but the rights, powers and obligations which grow out of the status, must be defined, protected and enforced by such laws. The liability of the master for the torts and crimes of his slave, and of third persons for assaulting or injuring or harboring or kidnapping him, the forms and modes of emancipation and sale, their subjection to the debts of the master, succession by the death of the master, suits for freedom, the capacity of the slave to be party to a suit, or to be a witness, with such police regulations as have existed in all civilized States where slavery has been tolerated, are among the subjects upon which municipal legislation becomes necessary when slavery is introduced.

Is it conceivable that the Constitution has conferred the right on every citizen to become a resident on the Territory of the United States with his slaves, and there to hold them as such, but has neither made nor provided for any municipal regulations which are essential to the existence of slavery?

Is it not more rational to conclude that they who framed and adopted the Constitution were aware that persons held to service under the laws of a State are property only to the extent and under the conditions fixed by those laws; that they must cease to be available as property, when their owners voluntarily place them permanently within another jurisdiction, where no municipal laws on the subject of slavery exist; and that, being aware of these principles, and having said nothing to interfere with or displace them, or compel Congress to legislate in any particular manner on the subject, and having empowered Congress to make all needful rules and regulations respecting the Territory of the United States, it was their intention to leave to the discretion of Congress what regulations, if any, should be made concerning slavery therein? Moreover, if the right exists, what are its limits, and what are its conditions? If citizens of the United States have the right to take their slaves to a Territory, and hold them there as slaves, without regard to the laws of the Territory, I suppose this right is not to be restricted to the citizens of slave-holding States. A citizen of a State which does not tolerate slavery can hardly be denied the power of doing the same thing. And what law of slavery does either take with him to the Territory? If it be said to be those laws respecting slavery which existed in the particular State from which each slave last came, what an anomaly is this? Where else can we find, under the law of any civilized country, the power to introduce and permanently continue diverse systems of foreign municipal law, for holding persons in slavery? I say, not merely to introduce, but permanently to continue these anomalies. For the offspring of the female must be governed by the foreign municipal laws to which the mother was subject: and when any slave is sold or passes by succession on the death of the owner, there must pass with him, by a species of subrogation, and as a kind of unknown *jus in re*, the foreign municipal laws which constituted, regulated, and preserved, the status of the slave before his exportation. Whatever theoretical importance may now be supposed to belong to maintenance of such a right, I feel a perfect conviction that it would, if ever tried, prove to be as impracticable in fact, as it is, in my judgment, monstrous in theory.

I consider the assumption which lies at the basis of this theory to be unsound; not in its just sense, and when properly understood, but in the sense which has been attached to it. That assumption is, that the Territory ceded by France was acquired for the equal benefit of all the citizens of the United States. I agree to the position. But it was acquired for their benefit in their collective, not their individual, capacities. It was acquired for their benefit, as an organized political society, subsisting as "the people of the United States," under the Constitution of the United States; to be administered justly and impartially, and as nearly as possible for the equal benefit of every individual citizen, according to the best judgment and discretion of the Congress; to whose power, as the Legislature of the nation which acquired it, the people of United States have committed its administration. Whatever individual claims may be founded on local circumstances, or sectional differences of condition, cannot, in my opinion, be recognized in this court, without arrogating to the judicial branch of the government powers not committed to it; and which, with all unaffected respect I feel for it, when acting in its proper sphere, I do not think it fitted to wield.

Nor, in my judgment, will the position, that a prohibition to bring slaves into a Territory

deprives any one of his property without due process of law, bear examination.

It must be remembered that this restriction on the legislative power is not peculiar to the Constitution of the United States; it was borrowed from Magna Charta; was brought to America by our ancestors, as part of their inherited liberties, and has existed in all the States, usually in the very words of the Great Charter. It existed in every political community in America in 1787, when the Ordinance prohibiting slavery north and west of the Ohio was passed.

And if a prohibition of slavery in a Territory in 1820 violated this principle of Magna Charta, the Ordinance of 1787 also violated it; and what power had, I do not say the Congress of the Confederation alone, but the Legislature of Virginia, or the Legislature of any or all the States of the Confederacy, to consent to such a violation? The people of the States had conferred no such power. I think I may at least say, if the Congress did then violate Magna Charta by the Ordinance, no one discovered that violation. Besides, if the prohibition upon all persons, citizens as well as others, to bring slaves into a Territory, and a declaration that if brought they shall be free, deprives citizens of their property without due process of law, what shall we say of the legislation of many of the slaveholding States which have enacted the same prohibition? As early as October, 1778, a law was passed in Virginia, that thereafter no slave should be imported into that Commonwealth by sea or by land, and that every slave who should be imported should become free. A citizen of Virginia purchased in Maryland a slave who belonged to another citizen of Virginia, and removed with the slave to Virginia. The slave sued for her freedom, and recovered it; as may be seen in *Wilson v. Isbel*, 5 Call. 425. See also, *Hunter v. Hulsher*, 1 Leigh, 172; and a similar law has been recognized as valid in Maryland, in *Stewart v. Oakes*, 5 Harr. & Johns, 107. I am not aware that such laws, though they exist in many States, were ever supposed to be in conflict with the principle of Magna Charta incorporated into the state constitutions. It was certainly understood by the Convention which framed the Constitution, and has been so understood ever since, that, under the power to regulate commerce, Congress could prohibit the importation of slaves; and the exercise of the power was restrained till 1808. A citizen of the United States owns slaves in Cuba, and brings them to the United States, where they are set free by the legislation of Congress. Does this legislation deprive him of his property without due process of law? If so, what becomes of the laws prohibiting the slave trade? If not, how can a similar regulation respecting a Territory violate the 5th Amendment of the Constitution.

Some reliance was placed by the defendant's counsel upon the fact that the prohibition of slavery in this Territory was in the words, "that slavery, &c., shall be, and is hereby forever prohibited." But the insertion of the word "forever" can have no legal effect. Every enactment not expressly limited in its duration continues in force until repealed or abrogated by some competent power, and the use of the word "forever" can give to the law no more durable operation. The argument is, that Congress cannot so legislate as to bind the future States formed out of the Territory, and that in this instance it has attempted to do so. Of the political reasons which may have induced the Congress to use these words, and which caused them to expect that subsequent Legislatures would conform their action to the then general opinion of the country that it ought to be permanent, this court can take no cognizance.

However fit such considerations are to control the action of Congress, and however reluctant a statesman may be disturb what has been settled, every law made by Congress may be repealed, and, saving private rights, and public rights gained by States, its repeal is subject to the absolute will of the same power which enacted it. If Congress had enacted that the crime of murder, committed in this Indian Territory, north of thirty-six degrees thirty minutes, by or on any white man, should forever be punishable with death, it would seem to be an insufficient objection to an indictment, found while it was a Territory, that at some future day States might exist there, and so the law was invalid, because by its terms, it was to continue in force forever. Such as objection rests upon a misapprehension of the province and power of courts respecting the constitutionality of laws enacted by the Legislature.

If the Constitution prescribe one rule, and the law another and different rule, it is the duty of the courts to declare that the Constitution, and not the law, governs the case before them for judgment. If the law include no case save those

for which the Constitution has furnished a different rule, or no case which the Legislature has the power to govern, then the law can have no operation. If it includes cases which the Legislature has power to govern, and concerning which the Constitution does not prescribe a different rule, the law governs those cases, though it may, in its terms, attempt to include others, on which it cannot operate. In other words, this court cannot declare void an Act of Congress which constitutionally embraces some cases, though other cases, within its terms, are beyond the control of Congress, or beyond the reach of that particular law. If, therefore, Congress had power to make a law excluding slavery form this Territory while under the exclusive power of the United States, the use of the word "forever" does not invalidate the law, so long as Congress has the exclusive legislative power in the Territory.

But it is further insisted that the Treaty of 1803, between the United States and France, by which this Territory was acquired, has so restrained the constitutional powers of Congress, that it cannot, by law, prohibit the introduction of slavery into that part of this Territory north and west of Missouri, and north of thirty-six degrees thirty minutes north latitude.

By a treaty with a foreign nation, the United States may rightfully stipulate that the Congress will or will not exercise its legislative power in some particular manner, on some particular subject. Such promises, when made, should be voluntarily kept, with the most scrupulous good faith. But that a treaty with a foreign nation can deprive the Congress of any part of the legislative power conferred by the people, so that it no longer can legislate as it was empowered by the Constitution to do, I more than doubt.

The powers of the government do and must remain unimpaired. The responsibility of the government to a foreign nation, for the exercise of those powers, is quite another matter. That responsibility is to be met, and justified to the foreign nation, according to the requirements of the rules of public law; but never upon the assumption that the United States had parted with or restricted any power of acting according to its own free will, governed solely by its own appreciation of its duty.

The 2d section of the 4th article is: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land." This has made treaties part of our municipal law; but it has not assigned to them any particular degree of authority, nor declared that laws so enacted shall be irrepealable. No supremacy is assigned to treaties over Acts of Congress. That they are not perpetual, and must be in some way repealable, all will agree.

If the President and the Senate alone possess the power to repeal or modify a law found in a treaty, inasmuch as they can change or abrogate one treaty only by making another inconsistent with the first, the Government of the United States could not act at all, to that effect, without the consent of some foreign government. I do not consider—I am not aware it has ever been considered—that the Constitution has placed our country in this helpless condition. The action of Congress in repealing the Treaties with France by the Act of July 7th, 1798, 1 Stat. at L. 578, was in conformity with these views. In the case of *Taylor et. al. v. Morton,* 2 Curt. Cir. Ct. 454, I had occasion to consider this subject, and I adhere to the views there expressed.

If, therefore, it were admitted that the Treaty between the United States and France did contain an express stipulation that the United States would not exclude slavery from so much of the ceded territory as is now in question, this court could not declare that an Act of Congress excluding it was void by force of the Treaty. Whether or not a case existed sufficient to justify a refusal to execute such a stipulation, would not be a judicial, but a political and legislative question, wholly beyond the authority of this court to try and determine. It would belong to diplomacy and legislation, and not to the administration of existing laws. Such a stipulation in a treaty, to legislate or not to legislate in a particular way, has been repeatedly held in this court to address itself to the political or the legislative power, by whose action thereon this court is bound, *Foster v. Neilson,* 2 Pet. 314; *Garcia v. Lee,* 12 Pet. 519.

But, in my judgment, this Treaty contains no stipulation in any manner affecting the action of the United States respecting the Territory in question. Before examining the language of the Treaty, it is material to bear in mind that the part of the ceded Territory lying north of thirty-six degrees thirty minutes, and west and north of the present State of Missouri, was then a wilder-

ness, uninhabited save by savages, whose possessory title had not then been extinguished.

It is impossible for me to conceive on what ground France could have advanced a claim, or could have desired to advance a claim, to restrain the United States from making any rules and regulations respecting this Territory, which the United States might think fit to make; and still less can I conceive of any reason which would have induced the United States to yield to such a claim. It was to be expected that France would desire to make the change of sovereignty and jurisdiction as little burdensome as possible to the then inhabitants of Louisiana, and might well exhibit even an anxious solicitude to protect their property and persons, and to secure to them and their posterity their religious and political rights; and the United States, as a just government, might readily accede to all proper stipulations respecting those who were about to have their allegiance transferred. But what interest France could have in uninhabited Territory, which, in the language of the Treaty, was to be transferred "forever, and in full sovereignty," to the United States, or how the United States could consent to allow a foreign nation to interfere in its purely internal affairs, in which that foreign nation had no concern whatever, is difficult for me to conjecture. In my judgment, this Treaty contains nothing of the kind.

The 3d article is supposed to have a bearing on the question. It is as follows: "The inhabitants of the ceded Territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States; and in the meantime they shall be maintained and protected in the enjoyment of their liberty, property, and the religion they profess."

There are two views of this article, each of which, I think, decisively shows that it was not intended to restrain the Congress from excluding slavery from that part of the ceded Territory then uninhabited. The first is, that, manifestly, its sole object was to protect individual rights of the then inhabitants of the Territory. They are to be "maintained and protected in the free enjoyment of their liberty, property, and the religion they profess." But this Article does not secure to them the right to go upon the public domain ceded by this Treaty, either with or without their slaves. The right or power of doing this did not exist before or at the time the Treaty was made. The French and Spanish Governments, while they held the country, as well as the United States when they acquired it, always exercised the undoubted right of excluding inhabitants from the Indians country, and of determining when and on what conditions it should be opened to settlers. And a stipulation, that the then inhabitants of Louisiana should be protected in their property, can have no reference to their use of that property, where they had no right, under the Treaty, to go with it, save at the will of the United States. If one who was an inhabitant of Louisiana at the time of the Treaty had afterwards taken property then owned by him, consisting of fire-arms, ammunition, and spirits, and had gone into the Indian country north of thirty-six degrees thirty minutes, to sell them to the Indians, all must agree the 3d article of the Treaty would not have protected him from indictment under the Act of Congress of March 30, 1802, 2 Stat. at L. 139, adopted and extended to this Territory by the Act of March 26, 1804, 2 Stat. at L. 283.

Besides, whatever rights were secured were individual rights. If Congress should pass any law which violated such rights of any individual, and those rights were of such a character as not to be within the lawful control of Congress under the Constitution, that individual could complain, and the Act of Congress, as to such rights of his, would be inoperative; but it would be valid and operative as to all other persons, whose individual rights did not come under the protection of the Treaty. And inasmuch as it does not appear that any inhabitant of Louisiana, whose rights were secured by Treaty, had been injured, it would be wholly inadmissible for this court to assume, first, that one or more such cases may have existed; and second, that if any did exist, the entire law was void—not only as to those cases, if any, in which it could not rightfully operate, but as to all others, wholly unconnected with the Treaty, in which such law could rightfully operate.

But it is quite unnecessary, in my opinion, to pursue this inquiry further, because it clearly appears from the language of the Article, and it has been decided by this court that the stipulation was temporary, and ceased to have any effect when the then inhabitants of the Territory

of the Louisiana, in whose behalf the stipulation was made, were incorporated into the Union.

In the case of *New Orleans v. De armas et al.* 9 Pet . 224, the question was, whether a title to property, which existed at the date of the Treaty, continued to be protected by the Treaty after the State of Louisiana was admitted to the Union. The 3d article of the Treaty was relied on. Mr. Chief Justice Marshall said: "This article obviously contemplates two objects. One, that Louisiana shall be admitted into the Union as soon as possible, on an equal footing with the other States; and the other, that, till such admission, the inhabitants of the ceded Territory shall be protected in the free enjoyment of their liberty, property and religion. Had any one of these rights been violated while these stipulations continued in force, the individual supposing himself to be injured might have brought his case into this court under the 25th section of the Judicial Act. But this stipulation ceased to operate when Louisiana became a member of the Union, and its inhabitants were "admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States."

The case of *Chateau v. Marguerita,* 12 Pet. 507, and *Permoli v. New Orleans,* 3 How. 589, are in conformity with this view of the Treaty.

To convert this temporary stipulation of the Treaty, in behalf of French subjects who then inhabited a small portion of Louisiana, into a permanent restriction upon the power of Congress to regulate territory then uninhabited, and to assert that it not only restrains Congress from affecting the rights of property of the then inhabitants, but enable them and all other citizens of the United States to go into any part of the ceded Territory with their slaves and hold them there, is a construction of this Treaty so opposed to its natural meaning, and so far beyond it subject matter and the evident design of the parties, that I cannot assent to it. In my opinion, this Treaty has no bearing on the present question.

For these reasons, I am of opinion that so much of the several Acts of Congress as prohibited slavery and involuntary servitude within that part of the Territory of Wisconsin lying north of thirty-six degrees thirty minutes north latitude, and west of the River Mississippi, were constitutional and valid laws.

I have expressed my opinion, and the reasons therefore, at far greater length than I could have wished, upon the different questions on which I have found it necessary to pass, to arrive at a judgment on the case at bar. These questions are numerous, and the grave importance of some of them required me to exhibit fully the grounds of my opinion. I have touched no question which, in the view I have taken, it was not absolutely necessary for me to pass upon, to ascertain whether the judgement of the Circuit Court should stand or be reversed. I have avoided no question on which the validity of that judgment depends. To have done either more or less, would have been inconsistent with my views of my duty.

In my opinion, the judgment of the Circuit Court should be reversed, and the cause remanded for a new trial.

# SLAVERY

## "A House Divided" Speech

Abraham Lincoln, June 16, 1858

In 1856 ABRAHAM LINCOLN, an Illinois lawyer and politician, left the WHIG PARTY over the issue of SLAVERY and joined the newly-formed, antislavery REPUBLICAN PARTY. Lincoln was outraged at the KANSAS-NEBRASKA ACT of 1854 and the *Dred Scott* decision. He was particularly displeased with Senator STEPHEN A. DOUGLAS (D-Ill.) for championing the popular sovereignty doctrine, which allowed territories to decide whether to be free or slave states. The *Dred Scott* case suggested that there was no legal way to prevent slavery in the North as well.

The Republicans chose Lincoln as their candidate in the 1858 Illinois senatorial race against Douglas. The campaign was marked by a series of seven brilliant debates between the two contenders. Lincoln advocated loyalty to the Union, regarded slavery as unjust, and was opposed to any further expansion of slavery. He opened his campaign on June 16, 1858, with the declaration "'A house divided against itself cannot stand.' I believe this government cannot endure permanently half *slave* and half *free.*" His speech attacked the morality and legitimacy of popular sovereignty and warned that whether slavery could be permitted in the North was still an open question.

Lincoln lost the election due to an unfavorable APPORTIONMENT of legislative seats in Illinois. At that time U.S. senators were elected by a vote of the state legislature. Though Lincoln garnered more popular votes, the legislators chose to reelect Douglas. Despite the loss, Lincoln's firm antislavery position had enhanced his national reputation and helped him win election as president in 1860.

### "A House Divided" Speech

"A house divided against itself cannot stand."

I believe this government cannot endure, permanently half *slave* and half *free.*

I do not expect the Union to be *dissolved*—I do not expect the house to *fall*—but I *do* expect it will cease to be divided.

It will become *all* one thing, or *all* the other.

Either the *opponents* of slavery, will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in course of ultimate extinction; or its *advocates* will push it forward, till it shall become alike lawful in *all* the states, *old* as well as *new—North* as well as *South.*

Have we no *tendency* to the latter condition?

Let any one who doubts, carefully contemplate that now almost complete legal combination—piece of *machinery* so to speak—compounded of the Nebraska doctrine, and the Dred Scott decision. . . .

* * *

. . .[The Kansas-Nebraska Act] opened all the national territory to slavery. . . . This . . . had been provided for . . . in the notable argument of "*squatter sovereignty,*" otherwise called "*sacred right of self government,*" which latter phrase, though expressive of the only rightful basis of any government, was so perverted in this

attempted use of it as to amount to just this: That if any *one* man, choose to enslave *another,* no *third* man shall be allowed to object.

* * *

While the Nebraska Bill was passing through Congress, a law case, involving the question of a negro's freedom … was passing through the U.S. Circuit Court for the District of Missouri; and both Nebraska Bill and law suit were brought to a decision in the same month of May, 1854. The Negro's name was "Dred Scott". . . .

* * *

[The points decided by the *Dred Scott* decision include] that whether the holding a negro in actual slavery in a free state, makes him free, as against the holder, the United States courts will not decide, but will leave to be decided by the courts of any slave state the negro may be forced into by the master.

This point is made, not to be pressed immediately … [that] the logical conclusion that what Dred Scott's master might lawfully do with Dred Scott, in the free state Illinois, every other master may lawfully do with any other *one,* or one *thousand* slaves, in Illinois, or in any other free state.

* * *

While the opinion of … Chief Justice Taney, in the Dred Scott case … expressly declare[s] that the Constitution of the United States neither permits congress nor a territorial legislature to exclude slavery from any United States territory, … [Taney] *omit*[s] to declare whether or not the same constitution permits a *state,* or the people of a state, to exclude it.

Possibly, this was a mere omission; but who can be quite sure. . . .

The nearest approach to the point of declaring the power of a state over slavery, is made by Judge Nelson. He approaches it more than once, using the precise idea, and *almost* the language too, of the Nebraska Act. On one occasion his exact language is, "except in cases where the power is restrained by the Constitution of the United States, the law of the State is supreme over the subject of slavery within its jurisdiction."

In what *cases* the power of the *states* is so restrained by the U.S. Constitution, is left an *open* question, precisely as the same question, as to the restraint on the power of the *territories* was left open in the Nebraska Act. Put *that* and *that* together, and we have another nice little niche, which we may, ere long, see filled with another Supreme Court decision, declaring that the Constitution of the United States does not permit a *state* to exclude slavery from its limits.

* * *

Such a decision is all that slavery now lacks of being alike lawful in all the states.

Welcome or unwelcome, such decision *is* probably coming, and will soon be upon us, unless the power of the present political dynasty shall be met and overthrown.

We shall *lie down* pleasantly dreaming that the people of Missouri are on the verge of making their state *free;* and we shall *awake* to the *reality,* instead, that the Supreme Court has made *Illinois* a *slave* state.

# SLAVERY

## EMANCIPATION PROCLAMATION

By the President of the United States of America

President ABRAHAM LINCOLN supported the U.S. CIVIL WAR to preserve the Union, not to end SLAVERY. Though he was personally opposed to slavery, he had been elected on a platform that pledged the continuation of slavery in states where it already existed. Wartime pressures, however, drove Lincoln toward emancipation of the slaves. Military leaders argued that an enslaved labor force in the South allowed the Confederate states to place more soldiers on the front lines. By the summer of 1862, Lincoln had prepared an EMANCIPATION PROCLAMATION, but he did not want to issue it until Union armies had had greater success on the battlefield. He feared that otherwise the proclamation might be seen as a sign of weakness.

The Union army's victory at the Battle of Antietam encouraged the president to issue a preliminary proclamation on September 22, 1862, that announced the abolition of slavery in areas occupied by the Confederacy effective January 1, 1863. The wording of the Emancipation Proclamation on that date made clear that slavery would still be tolerated in the border states and areas occupied by Union troops, so as not to jeopardize the war effort. Lincoln was uncertain that the Supreme Court would uphold the constitutionality of his action, so he lobbied Congress to adopt the THIRTEENTH AMENDMENT, which totally abolished slavery.

## Emancipation Proclamation

### A PROCLAMATION

Whereas, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and sixty-two, a proclamation was issued by the president of the United States, containing, among other things, the following, to wit:

"That on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves within any state or designated part of a state, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward and forever, free; and the executive government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom.

"That the executive will, on the first day of January aforesaid, by proclamation, designate the states and parts of states, if any, in which the people thereof, respectively, shall then be in rebellion against the United States; and the fact that any state, or the people thereof, shall on that day be in good faith represented in the Congress of the United States, by members chosen thereto at elections wherein a majority of the qualified voters of such states shall have participated,

Source: *Statutes at Large,* vol. 12 (1864), pp. 1268–1269.

shall, in the absence of strong countervailing testimony, be deemed conclusive evidence that such state, and the people thereof, are not then in rebellion against the United States."

Now, therefore, I, Abraham Lincoln, president of the United States, by virtue of the power in me vested as commander in chief of the army and navy of the United States, in time of actual armed rebellion against the authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion, do, on this first day of January, in the year of our Lord one thousand eight hundred and sixty-three, and in accordance with my purpose so to do, publicly proclaimed for the full period of one hundred days from the day first above mentioned, order and designate as the states and parts of states wherein the people thereof, respectively, are this day in rebellion against the United States, the following, to wit:

Arkansas, Texas, Louisiana (except the parishes of St. Bernard, Plaquemines, Jefferson, St. John, St. Charles, St. James, Ascension, Assumption, Terre Bonne, Lafourche, St. Mary, St. Martin, and Orleans, including the city of New Orleans), Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Virginia (except the forty-eight counties designated as West Virginia, and also the counties of Berkeley, Accomac, Northampton, Elizabeth City, York, Princess Ann, and Norfolk, including the cities of Norfolk and Portsmouth), and which excepted parts are for the present left precisely as if this proclamation were not issued.

And by virtue of the power and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated states and parts of states are, and henceforward shall be, free; and that the executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons.

And I hereby enjoin upon the people so declared to be free to abstain from all violence, unless in necessary self-defense; and I recommend to them that, in all cases when allowed, they labor faithfully for reasonable wages.

And I further declare and make known that such persons, of suitable condition will be received into the armed service of the United States to garrison forts, positions, stations, and other places and to man vessels of all sorts in said service.

And upon this act, sincerely believed to be an act of justice, warranted by the Constitution upon military necessity, I invoke the considerate judgment of mankind and the gracious favor of Almighty God.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this first day of January, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States of America the eighty-seventh.

By the President:

Abraham Lincoln

William H. Seward, Secretary of State.

# From Segregation to Civil Rights

- "THE CIVIL RIGHTS CASES"
- PLESSY V. FERGUSON
- BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS
- LETTER FROM BIRMINGHAM CITY JAIL
- "I HAVE A DREAM" SPEECH
- CIVIL RIGHTS ACT OF 1964
- VOTING RIGHTS ACT OF 1965

After the U.S. CIVIL WAR the THIRTEENTH, FOURTEENTH, and FIFTEENTH AMENDMENTS to the U.S. Constitution, along with many pieces of CIVIL RIGHTS legislation, were enacted to protect the rights of the newly freed slaves. Nevertheless, African Americans were soon ensnared in a southern political and legal system that limited their political, economic, and social freedoms.

Initially after the war, during the RECONSTRUCTION era (1865–1876), the former Confederate states were placed under federal military control. During this time African Americans were able to register to vote and to be elected to state and local government posts. This period was also marked by white vigilantism, however, in the form of the KU KLUX KLAN (KKK). The KKK used terror to discourage African Americans from voting or from asserting their other constitutional rights.

The presidential election of 1876 resulted in a deadlocked ELECTORAL COLLEGE and allegations of election fraud. A congressional compromise was reached in which Republican RUTHERFORD B. HAYES became president. In exchange, southern Democrats were rewarded with the withdrawal of federal troops and the end of Reconstruction.

During the 1870s the U.S. Supreme Court was called on to decide the scope of the Fourteenth Amendment. In the CIVIL RIGHTS CASES, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883), the Court struck down the CIVIL RIGHTS ACT of 1875, which had been based on the Fourteenth Amendment. The Court held that the amendment prohibited only official, state-sponsored discrimination and did not reach discrimination by private parties. By the 1890s African Americans had lost virtually all their civil rights as southern states, emboldened by the *Civil Rights* cases, passed laws that segregated all public facilities and public transportation on the basis of race. In PLESSY V. FERGUSON, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), the Supreme Court endorsed "separate-but-equal" laws, holding that they did not violate the Constitution.

Beginning in the 1930s, the National Association for the Advancement of Colored People (NAACP) fought a series of court battles against various aspects of state-sponsored segregation. The NAACP's main focus, however, was the desegregation of public schools. A team of talented attorneys, which included future Supreme Court justice THURGOOD MARSHALL, led the fight. Ultimately, they succeeded in having *Plessy* struck down. In BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the Supreme Court ordered the end of state-sponsored segregated schools.

Despite these legal victories, most African Americans in the South were not able to vote or to exercise their civil rights. In response, MARTIN LUTHER KING JR. started the modern CIVIL RIGHTS MOVEMENT in the 1950s. Instead of lawsuits, he used nonviolent public protests to attract the nation's attention to the conditions under which African Americans were forced to live. King and his followers were jailed for their demonstrations, but by the early 1960s it was clear that legal change must come.

President LYNDON B. JOHNSON pushed for the enactment of the landmark Civil Rights Act of 1964 (42 U.S.C.A. § 2000a et seq.), which prohibited racial and other types of discrimination in employment, education, and public accommodations. The act outlawed both state-sponsored and private segregation in hotels, restaurants, and public transportation. Johnson also introduced the VOTING RIGHTS ACT OF 1965 (42 U.S.C.A. § 1971 et seq.), which ensured protection against discriminatory voting practices. This act changed the South, as African Americans were allowed to register to vote for the first time since Reconstruction.

# From Segregation to Civil Rights

## "The Civil Rights Cases"

The *Civil Rights* cases involved five prosecutions and civil suits from California, Kansas, Missouri, New York, and Tennessee for denying African Americans access to public accommodations (hotels, theaters, and railroad cars) in violation of the Civil Rights Act of 1875. Justice Joseph P. Bradley, writing for the majority of the Supreme Court, held that the Fourteenth Amendment prohibited only official, state-sponsored discrimination and could not reach discrimination practiced by privately owned places of public accommodation.

Justice John M. Harlan, in a dissenting opinion, argued that segregation in public accommodations was a "badge of slavery" for the recently freed African Americans and that the act could be constitutionally justified by looking to the Thirteenth Amendment. This amendment gave Congress the authority to outlaw all "badges and incidents" of slavery. Not until the passage of Title II of the Civil Rights Act of 1964 would the federal government achieve the desegregation of public accommodations.

### "The Civil Rights Cases"

***UNITED STATES V. STANLEY.***

[On a Certificate of Division in Opinion between the Judges of the Circuit Court of the United States for the District of Kansas.]

***UNITED STATES V. RYAN.***

[In Error to the Circuit Court of the United States for the District of California.]

***UNITED STATES V. NICHOLS.***

[On a Certificate of Division in Opinion between the Judges of the Circuit Court of the United States for the Western District of Missouri.]

***UNITED STATES V. SINGLETON.***

[On a Certificate of Division in Opinion between the Judges of the Circuit Court of the United States for the Southern District of New York.]

***ROBINSON AND WIFE V. MEMPHIS & CHARLESTON R. CO.***

[In Error to the Circuit Court of the United States for the Western District of Tennessee.]

Supreme Court of the United States

3 S.Ct. 18

27 L.Ed. 835

(Cite as: 109 U.S. 3, 3 S.Ct. 18)

October 15, 1883.

Harlan, J., dissents.

Sol. Gen. Phillips, for plaintiff, the United States.

No counsel for defendants, Stanley, Ryan, Nichols, and Singleton.

Wm. M. Randolph, for plaintiffs in error, Robinson and wife.

W. Y. C. Humes, for defendant in error, the Memphis & Charleston R. Co.

Bradley, J.

These cases are all founded on the first and second sections of the act of Congress known as the "Civil Rights Act," passed March 1, 1875, entitled "An act to protect all citizens in their civil and legal rights." 18 St. 335. Two of the

cases, those against Stanley and Nichols, are indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them, those against Ryan and Singleton, are, one an information, the other an indictment, for denying to individuals the privileges and accommodations of a theater, the information against Ryan being for refusing a colored person a seat in the dress circle of Maguire's theater in San Francisco; and the indictment against Singleton being for denying to another person, whose color is not stated, the full enjoyment of the accommodations of the theater known as the Grand Opera House in New York, "said denial not being made for any reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude." The case of Robinson and wife against the Memphis & Charleston Railroad Company was an action brought in the Circuit Court of the United States for the Western District of Tennessee, to recover the penalty of $500 given by the second section of the act; and the gravamen was the refusal by the conductor of the railroad company to allow the wife to ride in the ladies' car, for the reason, as stated in one of the counts, that she was a person of African descent. The jury rendered a verdict for the defendants in this case upon the merits under a charge of the court, to which a bill of exceptions was taken by the plaintiffs. The case was tried on the assumption by both parties of the validity of the act of Congress; and the principal point made by the exceptions was that the judge allowed evidence to go to the jury tending to show that the plaintiff, the wife, was an improper person, because she was in company with a young man whom he supposed to be a white man, and on that account inferred that there was some improper connection between them; and the judge charged the jury, in substance, that if this was the conductor's bona fide reason for excluding the woman from the car, they might take it into consideration on the question of the liability of the company. The case is brought here by writ of error at the suit of the plaintiffs. The cases of Stanley, Nichols, and Singleton come up on certificates of division of opinion between the judges below as to the constitutionality of the first and second sections of the act referred to; and the case of Ryan, on a writ of error to the judgment of the Circuit Court for the District of California sustaining a demurrer to the information.

It is obvious that the primary and important question in all the cases is the constitutionality of the law; for if the law is unconstitutional none of the prosecutions can stand.

The sections of the law referred to provide as follows:

> "Section 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."
>
> "Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall, also, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than $500 nor more than $1,000, or shall be imprisoned not less than 30 days nor more than one year: Provided, that all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by state statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this act or the criminal law of any state: And provided, further, that a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively."

Are these sections constitutional? The first section, which is the principal one, cannot be fairly understood without attending to the last clause, which qualifies the preceding part. The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theaters; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servi-

tude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theaters, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement, as are enjoyed by white citizens; and vice versa. The second section makes it a penal offense in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments. The power is sought, first, in the Fourteenth Amendment, and the views and arguments of distinguished senators, advanced while the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power. We have carefully considered those arguments, as was due to the eminent ability of those who put them forward, and have felt, in all its force, the weight of authority which always invests a law that Congress deems itself competent to pass. But the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have.

The first section of the Fourteenth Amendment—which is the one relied on—after declaring who shall be citizens of the United States, and of the several states, is prohibitory in its character, and prohibitory upon the states. It declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is state action of a particular character that is prohibited. Individual invasion of individual right is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state law and state acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in *U.S. v. Cruikshank*, 92 U.S. 542; *Virginia v. Rives*, 100 U.S. 313, and *Ex parte Virginia*, Id. 339.

An apt illustration of this distinction may be found in some of the provisions of the original Constitution. Take the subject of contracts, for example. The Constitution prohibited the states from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide

remedies by which the impairment of contracts by state legislation might be counteracted and corrected; and this power was exercised. The remedy which Congress actually provided was that contained in the twenty-fifth section of the Judiciary Act of 1789, giving to the Supreme Court of the United States jurisdiction by writ of error to review the final decisions of state courts whenever they should sustain the validity of a state statute or authority, alleged to be repugnant to the Constitution or laws of the United States. By this means, if a state law was passed impairing the obligation of a contract, and the state tribunals sustained the validity of the law, the mischief could be corrected in this court. The legislation of Congress, and the proceedings provided for under it, were corrective in their character. No attempt was made to draw into the United States courts the litigation of contracts generally, and no such attempt would have been sustained. We do not say that the remedy provided was the only one that might have been provided in that case. Probably Congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a state law; and, under the broad provisions of the act of March 3, 1875, giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States, it is possible that such jurisdiction now exists. But under that or any other law, it must appear, as well by allegation as proof at the trial, that the Constitution had been violated by the action of the state legislature. Some obnoxious state law passed, or that might be passed, is necessary to be assumed in order to lay the foundation of any federal remedy in the case, and for the very sufficient reason that the constitutional prohibition is against state laws impairing the obligation of contracts.

And so in the present case, until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity, for the prohibitions of the amendment are against state laws and acts done under state authority. Of course, legislation may and should be provided in advance to meet the exigency when it arises, but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, state laws or state action of some kind adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the state legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty, and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the state without due process of law, Congress may, therefore, provide due process of law for their vindication in every case; and that, because the denial by a state to any persons of the equal protection of the laws is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizens, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the states may adopt or enforce, and which by the amendment they are prohibited from making or enforcing, or such acts and proceedings as the states may commit or take, and which by the amendment they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

An inspection of the law shows that is makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the states. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the states; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws as to those which arise in states that may have violated the prohibition of the amendment. In other words, it steps into the

domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the state or its authorities.

If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress, with equal show of authority, enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the states may deprive persons of life, liberty, and property without due process of law, (and the amendment itself does suppose this,) why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theaters. The truth is that the implication of a power to legislate in this manner is based upon the assumption that if the states are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such state legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

We have not overlooked the fact that the fourth section of the act now under consideration has been held by this court to be constitutional. That section declares

> "that no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United State, or of any state, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars. *In Ex parte Virginia*, 100 U.S. 339, it was held that an indictment against a state officer under this section for excluding persons of color from the jury list is sustainable. But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws, namely, those which make mere race or color a disqualification; and the second clause is directed against those who, assuming to use the authority of the state government, carry into effect such a rule of disqualification. In the Virginia case, the state, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. Whether the statute-book of the state actually laid down any such rule of disqualification or not, the state, through its officer, enforced such a rule; and it is against such state action, through its officers and agents, that the last clause of the section is directed. This aspect of the law was deemed sufficient to divest it of any unconstitutional character, and makes it differ widely from the first and second sections of the same act which we are now considering.

These sections, in the objectionable features before referred to, are different also from the law ordinarily called the "Civil Rights Bill," originally passed April 9, 1866, and re-enacted with some modifications in sections 16, 17, 18, of the enforcement act, passed May 31, 1870. That law, as re-enacted, after declaring that all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding, proceeds to enact that any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any state or territory to the deprivation of any rights secured or protected by the preceding section, (above quoted,) or to different punishment, pains, or penalties, on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and subject to fine and imprisonment as specified in the act. This law is clearly corrective in its character, intended to counteract and furnish redress against state laws and proceedings, and customs having the force of law, which sanction the wrongful acts speci-

fied. In the Revised Statutes, it is true, a very important clause, to-wit, the words "any law, statute, ordinance, regulation, or custom to the contrary not-withstanding," which gave the declaratory section its point and effect, are omitted; but the penal part, by which the declaration is enforced, and which is really the effective part of the law, retains the reference to state laws by making the penalty apply only to those who should subject parties to a deprivation of their rights under color of any statute, ordinance, custom, etc., of any state or territory, thus preserving the corrective character of the legislation. Rev. St. §§ 1977, 1978, 1979, 5510. The civil rights bill here referred to is analogous in its character to what a law would have been under the original constitution, declaring that the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it under color or pretense that it had been rendered void or invalid by a state law, he should be liable to an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defense.

In this connection it is proper to state that civil rights, such as are guarantied by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow-citizen; but unless protected in these wrongful acts by some shield of state law or state authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefore to the laws of the state where the wrongful acts are committed. Hence, in all those cases where the constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the state by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the congress with power to provide a remedy. This abrogation and denial of rights, for which the states alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some state law or state authority for its excuse and perpetration.

Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the states, as in the regulation of commerce with foreign nations, among the several states, and with the Indian tribes, the coining of money, the establishment of post-offices and post-roads, the declaring of war, etc. In these cases congress has power to pass laws for regulating the subjects specified, in every detail, and the conduct and transactions of individuals respect thereof. But where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular state legislation or state action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers.

If the principles of interpretation which we have laid down are correct, as we deem them to be—and they are in accord with the principles laid down in the cases before referred to, as well as in the recent case of *U.S. v. Harris*, decided at the last term of this court [1 Sup. Ct. Rep. 601]—it is clear that the law in question cannot be sustained by any grant of legislative power made to congress by the Fourteenth Amendment. That amendment prohibits the states from denying to any person the equal protection of the laws, and declares that Congress shall have

power to enforce, by appropriate legislation, the provisions of the amendment. The law in question, without any reference to adverse state legislation on the subject, declares that all persons shall be entitled to equal accommodation and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces state legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject, is not now the question. What we have to decide it, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment, and, in our judgment, it has not.

We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodations and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no state can abridge or interfere with. Whether it is such a right or not is a different question, which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine.

We have also discussed the validity of the law in reference to cases arising in the states only; and not in reference to cases arising in the territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. Whether the law would be a valid one as applied to the territories and the district is not a question for consideration in the cases before us; they all being cases arising within the limits of states. And whether Congress, in the exercise of its power to regulate commerce among the several states, might or might not pass a law regulating rights in public conveyances passing from one state to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.

But the power of Congress to adopt direct and primary, as distinguished from corrective, legislation on the subject in hand, is sought, in the second place, from the Thirteenth Amendment, which abolishes slavery. This amendment declares

> "that neither slavery, not involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction;"

and it gives Congress power to enforce the amendment by appropriate legislation.

This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

It is true that slavery cannot exist without law any more than property in lands and goods can exist without law, and therefore the Thirteenth Amendment may be regarded as nullifying all state laws which establish or uphold slavery. But is has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States; and upon this assumption it is claimed that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances, and places of public amusement; the argument being that the denial of such equal accommodations and privileges is in itself a subjection to a species of servitude within the meaning of the amendment. Conceding the major proposition to be true, that Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and

incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theater, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the Thirteenth Amendment.

In a very able and learned presentation of the cognate question as to the extent of the rights, privileges, and immunities of citizens which cannot rightfully be abridged by state laws under the Fourteenth Amendment made in a former case, a long list of burdens and disabilities of a servile character, incident to feudal vassalage in France, and which were abolished by the decrees of the national assembly, was presented for the purpose of showing that all inequalities and observances exacted by one man from another, were servitudes or badges of slavery, which a great nation, in its effort to establish universal liberty, made haste to wipe out and destroy. But these were servitudes imposed by the old law, or by long custom which had the force of law, and or by long custom which had the force of law, and exacted by one man from another without the latter's consent. Should any such servitudes be imposed by a state law, there can be no doubt that the law would be repugnant to the Fourteenth, no less than to the Thirteenth, Amendment; nor any greater doubt that Congress has adequate power to forbid any such servitude from being exacted.

But is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theater, of its accommodations and privileges to an individual, even through the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge or either, arise from such an act of denial? Whether it might not be a denial of a right which, if sanctioned by the state law, would be obnoxious to the prohibitions of the Fourteenth Amendment, is another question. But what has it to do with the question of slavery? It may be that by the Black Code, (as it was called,) in the times when slavery prevailed, the proprietors of inns and public conveyances were forbidden to receive persons of the African race, because it might assist slaves to escape from the control of their masters. This was merely a means of preventing such escapes, and was no part of the servitude itself. A law of that kind could not have any such object now, however justly it might be deemed an invasion of the party's legal right as a citizen, and amenable to the prohibitions of the Fourteenth Amendment.

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible from; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens. Whether this legislation was fully authorized by the Thirteenth Amendment alone, without the support which it afterwards received from the Fourteenth Amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to for purpose of showing that at that time (in 1866) Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different: the former simply abolished slavery: the latter prohibited the states from abridging the privileges or immunities of citizens of the United States, from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the

powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment, it has only to do with slavery and its incidents. Under the Fourteenth Amendment, it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities which have the effect to abridge any deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against state regulations or proceedings.

The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by and individual, and without any sanction or support from any state law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse-stealing, for example) to be seized and hung by the *posse comitatus* without regular trial; or denying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others. What is called class legislation would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment, but would not to the prohibitions of the Fourteenth when not involving the idea of any subjection of one man of another. The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery. The Fourteenth Amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.

Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the states by the Fourteenth Amendment are forbidden to deny to any person? and is the Constitution violated until the denial of the right has some state sanction or authority? Can the act of a mere individual, the owner of the inn, the public conveyance, or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the state, and presumably subject to redress by those laws until the contrary appears?

After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the state; or, if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of state laws, or state action, prohibited by the Fourteenth Amendment. It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discriminations, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy under that amendment and in accordance with it.

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man,

are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as white citizens; yet no one, at that time, thought that it was any invasion of their personal status as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the Thirteenth Amendment, (which merely abolishes slavery,) but by force of the Fourteenth and Fifteenth Amendments.

On the whole, we are of opinion that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several states is concerned.

This conclusion disposes of the cases not under consideration. In the cases of *U.S. v. Ryan*, and of *Robinson v. Memphis & C.R. Co.*, the judgments must be affirmed. In the other cases, the answer to be given will be, that the first and second sections of the act of Congress of March 1, 1875, entitled "An act to protect all citizens in their civil and legal rights," are unconstitutional and void, and that judgment should be rendered upon the several indictments in those cases accordingly. And it is so ordered.

Harlan, J., dissenting.

The opinion in these cases proceeds, as it seems to me, upon grounds entirely too narrow and artificial. The substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. "It is not the words of the law but the internal sense of it that makes the law. The letter of the law is the body; the sense and reason of the law is the soul." Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law. By this I do not mean that the determination of these cases should have been materially controlled by considerations of mere expediency or policy. I mean only, in this form to express an earnest conviction that the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted.

The purpose of the first section of the act of Congress of March 1, 1875, was to prevent race discrimination. It does not assume to define the general conditions and limitations under the general conditions and limitations under which inns, public conveyances, and places of public amusement may be conducted, but only declares that such conditions and limitations, whatever they may be, shall not be applied, by way of discrimination, on account of race, color, or previous condition of servitude. The second section provides a penalty against any one denying, or aiding or inciting the denial, to any citizen that equality of right given by the first section, except for reasons by law applicable to citizens of every race or color, and regardless of any previous condition of servitude.

There seems to be no substantial difference between my brethren and myself as to what was the purpose of Congress; for they say that the essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theaters, but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. The effect of the statute, the court says, is that colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white person, and vice versa.

The court adjudges that Congress is without power, under either the Thirteenth or Fourteenth Amendment, to establish such regulations, and that the first and second sections of

the statute are, in all their parts, unconstitutional and void.

Before considering the particular language and scope of these amendments it will be proper to recall the relations which, prior to their adoption, subsisted between the national government and the institution of slavery, as indicated by the provisions of the Constitution, the legislation of Congress, and the decisions of this court. In this mode we may obtain keys with which to open the mind of the people, and discover the thought intended to be expressed.

In section 2 of article 4 of the Constitution it was provided that

> "no person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

Under the authority of that clause Congress passed the Fugitive Slave Law of 1793, establishing the mode for the recovery of a fugitive slave, and prescribing a penalty against any person knowingly and willingly obstructing or hindering the master, his agent or attorney, in seizing, arresting, and recovering the fugitive, or who should rescue the fugitive from him, or who should harbor or conceal the slave after notice that he was a fugitive.

In *Prigg v. Com.* 16 Pet 539, this court had occasion to define the powers and duties of congress in reference to fugitives from labor. Speaking by Mr. Justice Story, the court laid down these propositions: That a clause of the Constitution conferring a right should not be so construed as to make it shadowy, or unsubstantial, or leave the citizen without a remedial power adequate for its protection, when another mode, equally accordant with the words and the sense in which they were used, would enforce and protect the right so granted; that Congress is not restricted to legislation for the exertion of tis powers expressly granted; but, for the protection of rights guarantied by the Constitution, it may employ, through legislation, such means, not prohibited, as are necessary and proper, or such as are appropriate, to attain the ends proposed; that the Constitution recognized the master's right of property in his fugitive slave, and, as incidental thereto, the right of seizing and recovering him, regardless of any state law, or regulation, or local custom whatsoever; and that the right of the master to have his slave, so escaping, delivered up on claim, being guarantied by the Constitution, the fair implication was that the national government was clothed with appropriate authority and functions to enforce it.

The court said:

> "The fundamental principle, applicable to all cases of this sort, would seem to be that when the end is required the means are given, and when the duty is enjoined the ability to perform it is contemplated to exist on the part of the functionary to whom it is intrusted."

Again:

> "It would be a strange anomaly and forced construction to suppose that the national government meant to rely for the due fulfillment of its own proper duties, and the rights which it intended to secure, upon state legislation, and not upon that of the Union. *A fortiori*, it would be more objectionable to suppose that a power which was to be the same throughout the Union should be confided to state sovereignty, which could not rightfully act beyond its own territorial limits."

The act of 1793 was, upon these grounds, adjudged to be a constitutional exercise of the powers of Congress.

It is to be observed, from the report of Prigg's Case, that Pennsylvania, by her attorney general, pressed the argument that the obligation to surrender fugitive slaves was on the states and for the states, subject to the restriction that they should not pass laws or establish regulations liberating such fugitives; that the Constitution did not take from the states the right to determine the status of all persons within their respective jurisdictions; that it was for the state in which the alleged fugitive was found to determine, through her courts, or in such modes as she prescribed, whether the person arrested was, in fact, a freeman or a fugitive slave; that the sole power of the general government in the premises was, by judicial instrumentality, to restrain and correct, not to forbid and prevent in the absence of hostile state action; and that, for the general government to assume primary authority to legislate on the subject of fugitive slaves, to the exclusion of the state, would be a dangerous encroachment on state sovereignty. But to such suggestions this court turned a deaf ear, and adjudged that primary legislation by Congress to enforce the master's right was authorized by the Constitution.

We next come to the Fugitive Slave Act of 1850, the constitutionality of which rested, as did that of 1793, solely upon the implied power of Congress to enforce the master's rights. The provisions of that act were far in advance of previous legislation. They placed at the disposal of the master seeking to recover his fugitive slave, substantially, the whole power of the nation. It invested commissioners, appointed under the act, with power to summon the *posse comitatus* for the enforcement of its provisions, and commanded "all good citizens" to assist in its prompt and efficient execution whenever their services were required as part of the *posse comitatus*. Without going into the details of that act, it is sufficient to say that Congress omitted from it nothing which the utmost ingenuity could suggest as essential to the successful enforcement of the master's claim to recover his fugitive slave. And this court, in *Ableman v. Booth*, 21 How. 526, adjudged it to be, "in all of its provisions, fully authorized by the Constitution of the United States."

The only other decision prior to the adoption of the recent amendments, to which reference will be made, is *Dred Scott v. Sandford*, 19 How. 393. That suit was instituted in a circuit court of the United States by Dred Scott, claiming to be a citizen of Missouri, the defendant being a citizen of another state. Its object was to assert the title of himself and family to freedom. The defendant pleaded in abatement to the jurisdiction of the court that Scott—being of African descent, whose ancestors, of pure African blood, were brought into this country, and sold as slaves—was not a citizen. The only matter in issue, said the court, was whether the descendants of slaves so imported and sold, when they should be emancipated, or who were born of parents who had become free before their birth, are citizens of a state in the sense in which the word "citizen" is used in the Constitution of the United States.

In determining that question the court instituted an inquiry as to who were citizens of the several states at the adoption of the constitution, and who, at that time, were recognized as the people whose rights and liberties had been violated by the British government. The result was a declaration by this court, speaking through Chief Justice Taney, that the legislation and histories of the times, and the language used in the Declaration of Independence, showed

> "that neither the class of persons who had been imported as slaves, nor their descedants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used that instrument:"

that

> "they had for more than a century before been regarded as beings of an inferior race, and altogether unfit to associate with the white race, either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit;"

that he was

> "bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it;"

and that

> "this opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without for a moment doubting the correctness of this opinion."

The judgment of the court was that the words "people of the United States" and "citizens" meant the same thing, both describing

> "the political body who, according to our republican institutions, form the sovereignty and hold the power and conduct the government through their representatives;"

that

> "they are what we familiarly call the "sovereign people," and every citizen is one of this people and a constituent member of this sovereignty;"

but that the class of persons described in the plea in abatement did not compose a portion of this people, were not

> "included, and were not intended to be included, under the word "citizens" in the Constitution;"

that, therefore, they could

> "claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States;"

that,

> "on the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the

> dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them."

Such were relations which, prior to the adoption of the Thirteenth Amendment, existed between the government, whether national or state, and the descendants, whether free or in bondage, of those of African blood who had been imported into this country and sold as slaves.

The first section thereof provides that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Its second section declares that "Congress shall have power to enforce this article by appropriate legislation." This amendment was followed by the Civil Rights Act of April 9, 1866, which, among other things, provided that "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." 14 St. 27. The power of Congress, in this mode, to elevate the race thus liberated to the plane of national citizenship, was maintained, by the supporters of the act of 1866, to be as full and complete as its power, by general statute, to make the children, being of full age, of persons naturalized in this country, citizens of the United States without going through the process of naturalization. The act of 1866, in this respect, was also likened to that of 1843, in which Congress declared

> "that the Stockbridge tribe of Indians, and each and every one of them, shall be deemed to be, and are hereby declared to be, citizens of the United States to all intent and purposes, and shall be entitled to all the rights, privileges, and immunities of such citizens, and shall in all respects be subject to the laws of the United States."

If the act of 1866 was valid, as conferring national citizenship upon all embraced by its terms, then the colored race, liberated by the Thirteenth Amendment, became citizens of the United States prior to the adoption of the Fourteenth Amendment. But, in the view which I take of the present case, it is not necessary to examine this question.

The terms of the Thirteenth Amendment are absolute and universal. They embrace every race which then was, or might thereafter be, within the United States. No race, as such, can be excluded from the benefits or rights thereby conferred. Yet it is historically true that amendment was suggested by the condition, in this country, of that race which had been declared by this court to have had, according to the opinion entertained by the most civilized portion of the white race at the time of the adoption of the constitution, "no rights which the white man was bound to respect," none of the privileges or immunities secured by that instrument to citizens of the United States. It had reference, in a peculiar sense, to a people which (although the larger part of them were in slavery) had been invited by an act of Congress to aid, by their strong right arms, in saving from overthrow a government which, theretofore, by all of its departments, had treated them as an inferior race, with no legal rights or privileges except such as the white race might choose to grant them.

These are the circumstances under which the Thirteenth Amendment was proposed for adoption. They are now recalled only that we may better understand what was in the minds of the people when that amendment was being considered, and what were the mischiefs to be remedied, and the grievances to be redressed.

We have seen that the power of Congress by legislation, to enforce the master's right to have his slave delivered up on claim was implied from the recognition and guaranty of that right in the national constitution. But the power conferred by the Thirteenth Amendment does not rest upon implication or inference. Those who framed it were not ignorant of the discussion, covering many years of the country's history, as to the constitutional power of Congress to enact the fugitive slave laws of 1793 and 1850. When, therefore, it was determined by a change in the fundamental law, to uproot the institution of slavery wherever it existed in this land, and to establish universal freedom, there was a fixed purpose to place the power of Congress in the premises beyond the possibility of doubt. Therefore, *ex industria*, the power to enforce the Thirteenth Amendment, by appropriate legislation, was expressly granted. Legislation for that purpose, it is conceded, may be direct and primary. But to what specific ends may it be directed? This court has uniformly held that the national government has the power, whether expressly given or not, to secure and protect rights conferred or guarantied by the constitution. *U.S. v. Reese*, 92 U.S. 214; *Strauder v. West*

*Virginia*, 100 U.S. 303. That doctrine ought not now to be abandoned, when the inquiry is not as to an implied power to protect the master's rights, but what may Congress do, under powers expressly granted, for the protection of freedom, and the rights necessarily inhering in a state of freedom.

The Thirteenth Amendment, my brethren concede, did something more than to prohibit slavery as an institution, resting upon distinctions of race, and upheld by positive law. They admit that it established and decreed universal civil freedom throughout the United States. But did the freedom thus established involve nothing more than exemption from actual slavery? Was nothing more intended than to forbid one man from owning another as property? Was it the purpose of the nation simply to destroy the institution, and then remit the race, theretofore held in bondage, to the several states for such protection, in their civil rights, necessarily growing out of freedom, as those states, in their discretion, choose to provide? Were the states, against whose solemn protest the institution was destroyed, to be left perfectly free, so far as national interference was concerned, to make or allow discriminations against that race, as such, in the enjoyment of those fundamental rights that inhere in a state of freedom? Had the Thirteenth Amendment stopped with the sweeping declaration, in its first section, against the existence of slavery and involuntary servitude, except for crime, Congress would have had the power, by implication, according to the doctrines of *Prigg v. Com.*, repeated in *Strauder v. West Virginia*, to protect the freedom thus established, and consequently to secure the enjoyment of such civil rights as were fundamental in freedom. But that it can exert its authority to that extent is now made clear, and was intended to be made clear, by the express grant of power contained in the second section of that amendment.

That there are burdens and disabilities which constitute badges of slavery and servitude, and that the express power delegated to Congress to enforce, by appropriate legislation, the Thirteenth Amendment, may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable. They lie at the very foundation of the Civil Rights Act of 1866. Whether that act was fully authorized by the Thirteenth Amendment alone, without the support which it afterwards received from the Fourteenth Amendment, after the adoption of which it was re-enacted with some additions, the court, in its opinion, says it is unnecessary to inquire. But I submit, with all respect to my brethren, that its constitutionality is conclusively shown by other portions of their opinion. It is expressly conceded by them that the Thirteenth Amendment established freedom; that there are burdens and disabilities, the necessary incidents of slavery, which constitute its substance and visible form; that Congress, by the act of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property as is enjoyed by white citizens; that under the Thirteenth Amendment Congress has to do with slavery and its incidents; and that legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not. These propositions being conceded, it is impossible, as it seems to me, to question the constitutional validity of the Civil Rights Act of 1866. I do not contend that the Thirteenth Amendment invests Congress with authority, by legislation, to regulate the entire body of the civil rights which citizens enjoy, or may enjoy, in the several states. But I do hold that since slavery, as the court has repeatedly declared, was the moving or principal cause of the adoption of that amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, on account of their race, of any civil rights enjoyed by other freemen in the same state; and such legislation may be of a direct and primary character, operating upon

states, their officers and agents, and also upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the state.

By way of testing the correctness of this position, let us suppose that, prior to the adoption of the Fourteenth Amendment, a state had passed a statute denying to freemen of African descent, resident within its limits, the same rights which were accorded to white persons, of making or enforcing contracts, or of inheriting, purchasing, leasing, selling, and conveying property; or a statute subjecting colored people to severer punishment for particular offenses than was prescribed for white persons, or excluding that race from the benefit of the laws exempting homesteads from execution. Recall the legislation of 1865–66 in some of the states, of which this court, in the *Slaughter-house Cases*, said that it imposed upon the colored race onerous disabilities and burdens; curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value; forbade them to appear in the towns in any other character than menial servants; required them to reside on and cultivate the soil, without the right to purchase or own it; excluded them from many occupations of gain; and denied them the privilege of giving testimony in the courts where a white man was a party. 16 Wall. 57. Can there by any doubt that all such legislation might have been reached by direct legislation upon the part of Congress under its express power to enforce the Thirteenth Amendment? Would any court have hesitated to declare that such legislation imposed badges of servitude in conflict with the civil freedom ordained by that amendment? That it would have been also in conflict with the Fourteenth Amendment, because inconsistent with the fundamental rights of American citizenship, does not prove that it would have been consistent with the Thirteenth Amendment.

What has been said is sufficient to show that the power of Congress under the Thirteenth Amendment is not necessarily restricted to legislation against slavery as an institution upheld by positive law, but may be exerted to the extent at least of protecting the race, so liberated, against discrimination, in respect of legal rights belonging to freemen, where such discrimination is based upon race.

It remains now to inquire what are the legal rights of colored persons in respect of the accommodations, privileges, and facilities of public conveyances, inns, and places of public amusement.

1. As to public conveyances on land and water. In *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 382, this court, speaking by Mr. Justice Nelson, said that a common carrier is "in the exercise of a sort of public office and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned." To the same effect is *Munn v. Illinois*, 94 U.S. 113. In *Olcott v. Sup'rs*, 16 Wall. 694, it was ruled that railroads are public highways, established, by authority of the state, for the public use; that they are none the less public highways because controlled and owned by private corporations; that it is a part of the function of government to make and maintain highways for the conveyance of the public; that no matter who is the agent, and what is the agency, the function performed is that of the state; that although the owners may be private companies, they may be compelled to permit the public to use these works in the manner in which they can be used; that upon these grounds alone have the courts sustained the investiture of railroad corporations with the state's right of eminent domain, or the right of municipal corporations, under legislative authority, to assess, levy, and collect taxes to aid in the construction of railroads. So in *Town of Queensbury v. Culver*, 19 Wall. 91, it was said that a municipal subscription of railroad stock was in aid of the construction and maintenance of a public highway and for the promotion of a public use. Again, in *Township of Pine Grove v. Talcott*, 19 Wall. 676: "Though the corporation [railroad] was private, its work was public; as much so as if it were to be constructed by the state." To the like effect are numerous adjudications in this and the state courts with which the profession is familiar. The Supreme Judicial Court of Massachusetts, in Inhabitants of *Worcester v. Western R. Corp.* 4 Metc. 566, said, in reference to a certain railroad:

> "The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike, or highway, a public easement. * * * It is true that the real and

> personal property necessary to the establishment and management of the railroad is vested in the corporation; but it is in trust for the public."

In *Erie & N. E. R. Co. v. Casey*, 26 Pa. St. 287, the court, referring to an act repealing the charter of a railroad, and under which the state took possession of the road, said, speaking by Black, J.:

> "It is public highway, solemnly devoted to public use. When the lands were taken it was for such use, or they could not have been taken at all. * * * Railroads established upon land taken by the right of eminent domain by authority of the commonwealth, created by her laws as thoroughfares for commerce, are her highways. No corporation has property in them, though it may have franchises annexed to and exercisable within them."

In many courts it has been held that because of the public interest in such a corporation the land of a railroad company cannot be levied on and sold under execution by a creditor. The sum of the adjudged cases is that a railroad corporation is a governmental agency, created primarily for public purposes, and subject to be controlled for the public benefit. It is upon that ground that the state, when unfettered by contract, may regulate, in its discretion, the rates of fares of passengers and freight. And upon this ground, too, the state may regulate the entire management of railroads in all matters affecting the convenience and safety of the public; as, for example, by regulating speed, compelling stops of prescribed length at stations, and prohibiting discriminations and favoritism. If the corporation neglect or refuse to discharge its duties to the public, it may be coerced to do so by appropriate proceedings in the name or in behalf of the state.

Such being the relations these corporations hold to the public, it would seem that the right of a colored person to use an improved public highway, upon the terms accorded to freemen of other races, is as fundamental in the state of freedom, established in this country, as are any of the rights which my brethren concede to be so far fundamental as to be deemed the essence of civil freedom. "Personal liberty consists," says Blackstone, "in the power of locomotion, of changing situation, or removing one's person to whatever place one's own inclination may direct, without restraint, unless by due course of law." But of what value is this right of locomotion, if it may be logged by such burdens as Congress intended by the act of 1875 to remove? They are burdens which lay at the very foundation of the institution of slavery as it once existed. They are not to be sustained, except upon the assumption that there is still, in this land of universal liberty, a class which may yet be discriminated against, even in respect of rights of a character so essential and so supreme, that, deprived of their enjoyment, in common with others, a freeman is not only branded as one inferior and infected, but, in the competitions of life, is robbed of some of the most necessary means of existence; and all this solely because they belong to a particular race which the nation has liberated. The Thirteenth Amendment alone obliterated the race line, so far as all rights fundamental in a state of freedom are concerned.

As to inns. The same general observations which have been made as to railroads are applicable to inns. The word "inn" has a technical legal signification. It means, in the act of 1875, just what it meant at common law. A mere private boardinghouse is not an inn, nor is its keeper subject to the responsibilities, or entitled to the privileges of a common innkeeper. "To constitute one an innkeeper, within the legal force of that term, he must keep a house of entertainment or lodging for all travelers or wayfarers who might choose to accept the same, being of good character or conduct." Redf. Carr. § 575. Says Judge Story:

> "An innkeeper may be defined to be the keeper of a common inn for the lodging and entertainment of travelers and passengers, their horses and attendants. An innkeeper is bound to take in all travelers and wayfaring person, and to entertain them, if he can accommodate them, for a reasonable compensation; and he must guard their goods with proper diligence. * * * If an innkeeper improperly refuses to receive or provide for a guest, he is liable to be indicted therefor. * * * They [carriers of passengers] are no more at liberty to refuse a passenger, if they have sufficient room and accommodations, than an innkeeper is to refuse suitable room and accommodations to a guest." Story, Bailm §§ 475, 476.

Said Mr. Justice Coleridge, in *Rex v. Ivens*, 7 Car. & P. 213, (32 E. C. L. 495:)

> "An indictment lies against an innkeeper who refuses to receive a guest, he having at the time room in his house; and either the price of the guest's entertainment being tendered to him, or such circumstances occurring as will dispense with that tender. This law is founded in good sense. The innkeeper is not to select his guests. He has no right to say to one, you shall come to my inn, and to anoth-

> er you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants, they having in return a kind of privilege of entertaining travelers and supplying them with that they want."

These authorities are sufficient to show a keeper of an inn is in the exercise of a quasi public employment. The law gives him special privileges, and he is charged with certain duties and responsibilities to the public. The public nature of his employment forbids him from discriminating against any person asking admission as a guest on account of the race or color of that person.

3. As to places of public amusement. It may be argued that the managers of such places have no duties to perform with which the public are, in any legal sense, concerned, or with which the public have any right to interfere; and that the exclusion of a black man from a place of public amusement on account of his race, or the denial to him, on that ground, of equal accommodations at such places, violates no legal right for the vindication of which he may invoke the aid of the courts. My answer to that argument is that places of public amusement, within the meaning of the act of 1875, are such as are established and maintained under direct license of the law. The authority to establish and maintain them comes from the public. The colored race is a part of that public. The local government granting the license represents them as well as all other races within its jurisdiction. A license from the public to establish a place of public amusement, imports, in law, equality of right, at such places, among all the members of that public. This must be so, unless it be—which I deny—that the common municipal government of all the people may, in the exertion of its powers, conferred for the benefit of all, discriminate or authorize discrimination against a particular race, solely because of its former condition of servitude.

I also submit whether it can be said—in view of the doctrines of this court as announced in *Munn v. Illinois*, U.S. 123, and reaffirmed in *Peik v. Chicago & N. W. Ry. Co.* 94 U.S. 178—that the management of places of public amusement is a purely private matter, with which government has no rightful concern. In the Munn Case the question was whether the state of Illinois could fix, by law, the maximum of charges for the storage of grain in certain warehouses in that state—the private property of individual citizens. After quoting a remark attributed to Lord Chief Justice Hale, to the effect that when private property is "affected with a public interest it ceases to be *juris privati* only," the court says:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control."

The doctrines of *Munn v. Illinois* have never been modified by this court, and I am justified, upon the authority of that case, in saying that places of public amusement, conducted under the authority of the law, are clothed with a public interest, because used in a manner to make them of public consequence and to affect the community at large." The law may therefore regulate, to some extent, the mode in which they shall be conducted, and consequently the public have rights in respect of such places which may be vindicated by the law. It is consequently not a matter purely of private concern.

Congress has not, in these matters, entered the domain of state control and supervision. It does not assume to prescribe the general conditions and limitations under which inns, public conveyances, and places of public amusement shall by conducted or managed. It simply declares in effect that since the nation has established universal freedom in this country for all time, there shall be no discrimination, based merely upon race or color, in respect of the legal rights in the accommodations and advantages of public conveyances, inns, and places of public amusement.

I am of opinion that such discrimination is a badge of servitude, the imposition of which Congress may prevent under its power, through appropriate legislation, to enforce the Thirteenth Amendment; and consequently, without reference to its enlarged power under the Fourteenth Amendment, the act of March 1, 1875, is not, in my judgment, repugnant to the Constitution.

It remains now to consider these cases with reference to the power Congress has possessed since the adoption of the Fourteenth Amendment.

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Before the adoption of the recent amendments it had become, as we have seen, the established doctrine of this court that negroes, whose ancestors had been imported and sold as slaves, could not become citizens of a state, or even of the United States, with the rights and privileges guarantied to citizens by the national constitution; further, that one might have all the rights and privileges of a citizen of a state without being a citizen in the sense in which that word was used in the national constitution, and without being entitled to the privileges and immunities of citizens of the several states. Still further, between the adoption of the Fourteenth Amendment.

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Remembering that this court, in the *Slaughter-house Cases*, declared that the one pervading purpose found in all the recent amendments, lying at the foundation of each, and without which none of them would have been suggested, was

> "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him;"

that each amendment was addressed primarily to the grievances of that race—let us proceed to consider the language of the Fourteenth Amendment. Its first and fifth sections are in these words:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> * * *
>
> "Sec. 5. That Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

It was adjudged in *Strauder v. West Virginia* and *Ex parte Virginia*, 100 U.S. 307, 345, and my brethren concede, that positive rights and privileges were intended to be secured, and are in fact secured, by the Fourteenth Amendment.

But when, under what circumstances, and to what extent may Congress, by means of legislation, exert its power to enforce the provisions of this amendment? The logic of the opinion of the majority of the court—the foundation upon which its whole reasoning seems to rest—is that the general government cannot, in advance of hostile state laws or hostile state proceedings, actively interfere for the protection of any of the rights, privileges, and immunities secured by the Fourteenth Amendment. It is said that such rights, privileges, and immunities are secured by way of prohibition against state laws and state proceedings affecting such rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; also, that congressional legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect.

In illustration of its position, the court refers to the clause of the Constitution forbidding the passage by a state of any law impairing the obligation of contracts. The clause does not, I submit, furnish a proper illustration of the scope

and effect of the fifth section of the Fourteenth Amendment. No express power is given Congress to enforce, by primary direct legislation, the prohibition upon state laws impairing the obligation of contracts. Authority is, indeed, conferred to enact all necessary and proper laws for carrying into execution the enumerated powers of Congress, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. And, as heretofore shown, there is also, by necessary implication, power in Congress, by legislation, to protect a right derived from the national Constitution. But a prohibition upon a state is not a power in Congress or in the national government. It is simply a denial of power to the state. And the only mode in which the inhibition upon state laws impairing the obligation of contracts can be enforced, is, indirectly, through the courts, in suits where the parties raise some question as to the constitutional validity of such laws. The judicial power of the United States extends to such suits, for the reason that they are suits arising under the Constitution. The Fourteenth Amendment presents the first instance in our history of the investiture of Congress with affirmative power, by legislation, to enforce an express prohibition upon the states. It is not said that the judicial power of the nation may be exerted for the enforcement of that amendment. No enlargement of the judicial power was required, for it is clear that had the fifth section of the Fourteenth Amendment been entirely omitted, the judiciary could have stricken down all state laws and nullified all state proceedings in hostility to rights and privileges secured or recognized by that amendment. The power given it, in terms, by congressional legislation, to enforce the provisions of the amendment.

The assumption that this amendment consists wholly of prohibitions upon state laws and state proceedings in hostility to its provisions, is unauthorized by its language. The first clause of the first section—"all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside"—is of a distinctly affirmative character. In its application to the colored race, previously liberated, it created and granted, as well citizenship of the United States, as citizenship of the state in which they respectively resided. It introduced all of that race, whose ancestors had been imported and sold as slaves, at once, into the political community known as the "People of the United States." They became, instantly, citizens of the United States, and of their respective states. Further, they were brought, by this supreme act of the nation, within the direct operation of that provision of the Constitution which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Article 4, §2.

The citizenship thus acquired by that race, in virtue of an affirmative grant by the nation, may be protected, not alone by the judicial branch of the government, but by congressional legislation of a primary direct character; this, because the power of Congress is not restricted to the enforcement of prohibitions upon state laws or state action. It is, in terms distinct and positive, to enforce "the provisions or this article" of amendment; not simply those of a prohibitive character, but the provisions—all of the provisions—affirmative and prohibitive, of the amendment. It is, therefore, a grave misconception to suppose that the fifth section of the amendment has reference exclusively to express prohibitions upon state laws or state action. If any right was created by that amendment, the grant of power, through appropriate legislation, to enforce its provisions authorizes Congress, by means of legislation operating throughout the entire Union, to guard, secure, and protect that right.

It is, therefore, an essential inquiry what, if any, right, privilege, or immunity was given by the nation to colored persons when they were made citizens of the state in which they reside? Did the national grant of state citizenship to that race, of its own force, invest them with any rights, privileges, and immunities whatever? That they became entitled, upon the adoption of the Fourteenth Amendment, "to all privileges and immunities of citizens in the several states," within the meaning of section 2 of article 4 of the Constitution, no one, I suppose, will for a moment question. What are the privileges and immunities to which, by that clause of the Constitution, they became entitled? To this it may be answered, generally, upon the authority of the adjudged cases, that they are those which are fundamental in citizenship in a free government, "common to the citizens in the latter states under their constitutions and laws by virtue of their being citizens." Of that provision it has been said, with the approval of this court,

that no other one in the Constitution has tended so strongly to constitute the citizens of the United States one people. *Ward v. Maryland*, 12 Wall. 430; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Paul v. Virginia*, 8 Wall. 180; *Slaughter-house Cases*, 16 Wall. 77.

Although this court has wisely forborne any attempt, by a comprehensive definition, to indicate all the privileges and immunities to which the citizens of each state are entitled of right to enjoy in the several state, I hazard nothing, in view of former adjudications, in saying that no state can sustain her denial to colored citizens of other states, while within her limits, of privileges or immunities, fundamental in republican citizenship, upon the ground that she accords such privileges and immunities only to hear white citizens and withholds them from her colored citizens. The colored citizens of other states, within the jurisdiction of that state, could claim, under the Constitution, every privilege and immunity which that state secures to her white citizens. Otherwise, it would be in the power of any state, by discriminating class legislation against its own citizens of a particular race or color, to withhold from citizens of other states, belonging to that proscribed race, when within her limits, privileges and immunities of the character regarded by all courts as fundamental in citizenship; and that, too, when the constitutional guaranty is that the citizens of each state shall be entitled to "all privileges and immunities of citizens of the several states." No state may, by discrimination against a portion of its own citizens of a particular race, in respect of privileges and immunities fundamental in citizenship, impair the constitutional right of citizens of other states, of whatever race, to enjoy in that state all such privileges and immunities as are there accorded to her most favored citizens. A colored citizen of Ohio or Indiana, being in the jurisdiction of Tennessee, is entitled to enjoy any privilege or immunity, fundamental in citizenship, which is given to citizens of the white race in the latter state. It is not to be supposed that any one will controvert this proposition.

But what was secured to colored citizens of the United States—as between them and their respective states—by the grant to them of state citizenship? With what rights, privileges, or immunities did this grant from the nation invest them? There is one, if there be no others—exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same state. That, surely, is their constitutional privilege when within the jurisdiction of other states. And such must be their constitutional right, in their own state, unless the recent amendments be "splendid baubles," thrown out to delude those who deserved fair and generous treatment at the hands of the nation. Citizenship in this country necessarily imports equality of civil rights among citizens of every race in the same state. It is fundamental in American citizenship that, in respect of such rights, there shall be no discrimination by the state, or its officers, or by individuals, or corporations exercising public functions or authority, against any citizen because of his race or previous condition of servitude. In *U.S. v. Cruikshank*, 92 U.S. 555, it was said that "the equality of rights of citizens is a principle of republicanism." And in *Ex parte Virginia*, 100 U.S. 344, the emphatic language of this court is that

> "one great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the states."

So, in *Strauder v. West Virginia*, Id. 306, the court, alluding to the Fourteenth Amendment, said:

> "This is one of a series of constitutional provisions having a common purpose, namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy."

Again, in *Neal v. Delaware*, 103 U.S. 386, it was ruled that this amendment was designed, primarily, "to secure to the colored race, thereby invested with the rights, privileges, and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons."

Much light is thrown upon this part of the discussion by the language of this court in reference to the Fifteenth Amendment. In *U.S. v. Cruikshank* it was said:

> "In *U.S. v. Reese*, 92 U.S. 214, we held that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship, but

> that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the states comes from the states; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been."

Here, in language at once clear and forcible, is stated the principle for which I contend. It can hardly be claimed that exemption from race discrimination, in respect of civil rights, against those to whom state citizenship was granted by the nation, is any less for the colored race a new constitutional right, derived from and secured by the national Constitution, than is exemption from such discrimination in the exercise of the elective franchise. It cannot be that the latter is an attribute of national citizenship, while the other is not essential in national citizenship, or fundamental in state citizenship.

If, then, exemption from discrimination in respect of civil rights is a new constitutional right, secured by the grant of state constitutional right, secured by the grant of state citizenship to colored citizens of the United States, why may not the nation, by means of its own legislation of a primary direct character, guard, protect, and enforce that right? It is a right and privilege which the nation conferred. It did not come from the states in which those colored citizens reside. It has been the established doctrine of this court during all its history, accepted as vital to the national supremacy, that Congress, in the absence of a positive delegation of power to the state legislatures, may by legislation enforce and protect any right derived from or created by the national Constitution. It was so declared in *Prigg v. Com.* It was reiterated in *U.S. v. Reese*, 92 U.S. 214, where the court said that "rights and immunities created by and dependent upon the Constitution of the United States can be protected by Congress. The form and manner of the protection may be such as Congress, in the legitimate exercise of its discretion, shall provide. These may be varied to meet the necessities of the particular right to protected." It was distinctly reaffirmed in *Strauder v. West Virginia*, 100 U.S. 310, where we said that "a right or immunity created by the Constitution or only guarantied by it, even without any express delegation of power, may be protected by Congress." Will any one claim, in view of the declarations of this court in former cases, or even without them, that exemption of colored citizens within their states from race discrimination, in respect of the civil rights of citizens, is not an immunity created or derived from the national Constitution?

This court has always given a broad and liberal construction to the Constitution, so as to enable Congress, by legislation, to enforce rights secured by that instrument. The legislation Congress may enact, in execution of its power to enforce the provisions of this amendment, is that which is appropriate to protect the right granted. Under given circumstances, that which the court characterizes as corrective legislation might be sufficient. Under other circumstances primary direct legislation may be required. But it is for Congress, not the judiciary, to say which is best adapted to the end to be attained. In *U.S. v. Fisher*, 2 Cranch, 358, this court said that "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution." "The sound construction of the Constitution," said Chief Justice Marshall,

> "must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate—let it be within the scope of the constitution—and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 4 Wheat. 423.

Must these rules of construction be now abandoned? Are the powers of the national legislature to be restrained in proportion as the rights and privileges, derived from the nation, are more valuable? Are constitutional provisions, enacted to secure the dearest right of freemen and citizens, to be subjected to that rule of construction, applicable to private instruments, which requires that the words to be interpreted must be taken most strongly against those who employ them? Or shall it be remembered that

> "a constitution of government, founded by the people for themselves and their posterity, and for objects of the most momentous nature—for perpetual union, for the establishment of justice, for the general welfare, and for a perpetuation of the blessings of liberty—necessarily requires that every interpretation of its powers should have a

> constant reference to these objects? No interpretation of the words in which those powers are granted can be a sound one which narrows down their ordinary import so as to defeat those objects." 1 Story, Const. § 422.

The opinion of the court, as I have said, proceeds upon the ground that the power of Congress to legislate for the protection of the rights and privileges secured by the Fourteenth Amendment cannot be brought into activity except with the view, and as it may become necessary, to correct and annul state laws and state proceedings in hostility to such right and privileges. In the absence of state laws or state action, adverse to such rights and privileges, the nation may not actively interfere for their protection and security. Such I understand to be the position of my brethren. If the grant to colored citizens of the United States of citizenship in their respective states imports exemption from race discrimination, in their states, in respect of the civil rights belonging to citizenship, then, to hold that the amendment remits that right to the states for their protection, primarily, and stays the hands of the nation, until it is assailed by state laws or state proceedings, is to adjudge that the amendment, so far from enlarging the powers of congress—as we have heretofore and it did—not only curtails them, but reverses the policy which the general government has pursued from its very organization. Such an interpretation of the amendment is a denial to Congress of the power, by appropriate legislation, to enforce one of its provisions. In view of the circumstances under which the recent amendments were incorporated into the Constitution, and especially in view of the peculiar character of the new rights they created and secured, it ought not to be presumed that the general government has abdicated its authority, by national legislation, direct and primary in its Character, to guard and protect privileges and immunities secured by that instrument. Such an interpretation of the Constitution ought not to be accepted if it be possible to avoid it. Its acceptance would lead to this anomalous result: that whereas, prior to the amendments, Congress, with the sanction of this court, passed the most stringent laws—operating directly and primarily upon states, and their officers and agents, as well as upon individuals—in vindication of slavery and the right of the master, it may not now, by legislation of a like primary and direct character, guard, protect, and secure the freedom established, and the most essential right of the citizenship granted, by the constitutional amendments. I venture, with all respect for the opinion of others, to insist that the national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves. If fugitive slave laws, providing modes and prescribing penalties whereby the master could seize and recover his fugitive slave, were legitimate exertions of an implied power to protect and enforce a right recognized by the constitution, why shall the hands of congress be tied, so that—under an express power, by appropriate legislation, to enforce a constitutional provision, granting citizenship—it may not, by means of direct legislation, bring the whole power of this nation to bear upon states and their officers, and upon such individuals and corporations exercising public functions, as assume to abridge, impair, or deny rights confessedly secured by the supreme law of the land?

It does not seem to me that the fact that, by the second clause of the first section of the Fourteenth Amendment, the states are expressly prohibited from making or enforcing laws abridging the privileges and immunities of citizens of the United States, furnishes any sufficient reason for holding or maintaining that the amendment was intended to deny Congress the power, by general, primary, and direct legislation, of protecting citizens of the United States, being also citizens of their respective states, against discrimination, in respect to their rights as citizens, founded on race, color, or previous condition of servitude. Such an interpretation of the amendment is plainly repugnant to its fifth section, conferring upon Congress power, by appropriate legislation, to enforce, not merely the provisions containing prohibitions upon the states, but all of the provisions, express and implied, of the grant of citizenship in the first clause of the first section of the article. This alone is sufficient for holding that Congress is not restricted to the enactment of laws adapted to counteract and redress the operation of state legislation, or the action of state officers of the character prohibited by the amendment. It was perfectly well known that the great danger to the equal enjoyment by citizens of their rights, as citizens, was to be apprehended, not altogether from unfriendly state legislation, but from the hostile action of

corporations and individuals in the states. And it is to be presumed that it was intended, by that section, to clothe Congress with power and authority to meet that danger. If the rights intended to be secured by the act of 1875 are such as belong to the citizen, in common or equally with other citizens in the same state, then it is not to be denied that such legislation is appropriate to the end which Congress is authorized to accomplish, viz., to protect the citizen, in respect of such rights, against discrimination on account of his race. As to the prohibition in the Fourteenth Amendment upon the making or enforcing of state laws abridging the privileges of citizens of the United States, it was impossible for any state to have enforced laws of that character. The judiciary could have annulled all such legislation under the provision that the Constitution shall be the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding. The states were already under an implied prohibition not to abridge any privilege or immunity belonging to citizens of the United States as such. Consequently, the prohibition upon state laws hostile to the rights belonging to citizens of the United States, was intended only as an express limitation on the powers of the states, and was not intended to diminish, in the slightest degree, the authority which the nation has always exercised, of protecting, by means of its own direct legislation, rights created or secured by the Constitution. The purpose not to diminish the national authority is distinctly negatived by the express grant of power, by legislation, to enforce every provision of the amendment, including that which, by the grant of citizenship in the state, secures exemption from race discrimination in respect of the civil rights of citizens.

It is said that any interpretation of the Fourteenth Amendment different from that adopted by the court, would authorize Congress to enact a municipal code for all the states, covering every matter affecting the life, liberty, and property of the citizens of the several states. Not so. Prior to the adoption of that amendment the constitutions of the several states, without, perhaps, an exception, secured all persons against deprivation of life, liberty, or property, otherwise than by due process of law, and, in some form, recognized the right of all persons to the equal protection of the laws. These rights, therefore, existed before that amendment was proposed or adopted. If, by reason of that fact, it be assumed that protection in these rights of persons still rests, primarily, with the states, and that Congress may not interfere except to enforce, by means of corrective legislation, the prohibitions upon state laws or state proceedings inconsistent with those rights, it does not at all follow that privileges which have been granted by the nation may not be protected by primary legislation upon the part of Congress. The rights and immunities of persons recognized in the prohibitive clauses of the amendments were always under the protection, primarily, of the states, while rights created by or derived from the United States have always been, and, in the nature of things, should always be, primarily, under the protection of the general government. Exemption from race discrimination in respect of the civil rights which are fundamental in citizenship in a republican government, is, as we have seen, a new constitutional right, created by the nation, with express power in Congress, by legislation, to enforce the constitutional provision from which it is derived. If, in some sense, such race discrimination is a denial of the equal protection of the laws, within the letter of the last clause of the first section, it cannot be possible that a mere prohibition upon state denial of such equal protection to persons within its jurisdiction, or a prohibition upon state laws abridging the privileges and immunities of citizens of the United States, takes from the nation the power which it has uniformly exercised of protecting, by primary direct legislation, those privileges and immunities which existed under the constitution before the adoption of the Fourteenth Amendment, or which have been created by that amendment in behalf of those thereby made citizens of their respective states.

It was said of *Dred Scott v. Sandford* that this court in that case overruled the action of two generations, virtually inserted a new clause in the Constitution, changed its character, and made a new departure in the workings of the federal government. I may be permitted to say that if the recent amendments are so construed that Congress may not, in its own discretion, and independently of the action or non-action of the states, provide, by legislation of a primary and direct character, for the security of rights created by the national Constitution; if it be adjudged that the obligation to protect the fundamental privileges and immunities granted by the Fourteenth Amendment to citizens residing in the several states, rests, primarily, not on the

FROM SEGREGATION TO CIVIL RIGHTS

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nation, but on the states; if it be further adjudged that individuals and corporations exercising public functions may, without liability to direct primary legislation on the part of Congress, make the race of citizens the ground for denying them that equality of civil rights which the constitution ordains as a principle of republican citizenship—then, not only the foundations upon which the national supremacy has always securely rested will be materially disturbed, but we shall enter upon an era of constitutional law when the rights of freedom and American citizenship cannot receive from the nation that efficient protection which heretofore was accorded to slavery and the rights of the master.

But if it were conceded that the power of Congress could not be brought into activity until the rights specified in the act of 1875 had been abridged or denied by some state law or state action, I maintain that the decision of the court is erroneous. There has been adverse state action within the Fourteenth Amendment as heretofore interpreted by this court. I allude to *Ex parte Virginia*, supra. It appears, in that case, that one Cole, judge of a county court, was charged with the duty, by the laws of Virginia, of selecting grand and petit jurors. The law of the state did not authorize or permit him, in making such selections, to discriminate against colored citizens because of their race. But he was indicated in the federal court, under the act of 1875, for making such discriminations. The attorney general of Virginia contended before us that the state had done its duty, and had not authorized or directed that county judge to do what he was charged with having done, and consequently that the state had not denied to the colored race the equal protection of the laws, and the act of Cole must therefore be deemed his individual act, in contravention of the will of the state. Plausible as this argument was, it failed to convince this court, and after saying that the Fourteenth Amendment had reference to the political body denominated a state, "by whatever instruments or in whatever modes that action may be taken," and that a state acts by its legislative, executive, and judicial authorities, and can act in no other way, we proceeded:

> "The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and, as he acts under the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annual or evade it. But the constitutional amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon person, not upon the abstract thing denominated a state, but upon the persons who are the agents of the state, in the denial of the rights which were intended to be secured." 100 U.S. 346, 347

In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents of the state, because amenable, in respect of their public duties and functions, to public regulation. It seems to me that, within the principle settled in *Ex parte Virginia*, a denial by these instrumentalities of the state to the citizen, because of his race, of that equality of civil rights secured to him by law, is a denial by the state within the meaning of the Fourteenth Amendment. If it be not, then that race is left, in respect of the civil rights under discussion, practically at the mercy of corporation and individuals wielding power under public authority.

But the court says that Congress did not, in the act of 1866, assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community. I agree that government has nothing to do with social, as distinguished from technically legal, rights of individuals. No government ever has brought, or ever can bring, its people into social intercourse against their wishes. Whether one person will permit or maintain social relations with another is a matter with which government has not concern. I agree that if one citizen chooses not to hold social intercourse with another, he is not and cannot be made amenable to the law for his conduct in that regard; for no legal right of a citizen is violated by the refusal of others to maintain merely social relations with him, even upon grounds of race. What I affirm is that no state,

nor the officers of any state, nor any corporation or individual wielding power under state authority for the public benefit or the public convenience, can, consistently either with the freedom established by the fundamental law, or with that equality of civil rights which now belongs to every citizen, discriminate against freemen or citizens, in their civil rights, because of their race, or because they once labored under disabilities imposed upon them as a race. The rights which Congress, by the act of 1875, endeavored to secure and protect are legal, not social, rights. The right, for instance, of a colored citizen to use the accommodations of a public highway upon the same terms as are permitted to white citizens is no more a social right than his right, under the law, to use the public streets of a city, or a town, or a turnpike road, or a public market, or a post-office, or his right to sit in a public building with others of whatever race, for the purpose of hearing the political questions to the day discussed. Scarcely a day passes without our seeing in this court-room citizens of the white and black races sitting side by side watching the progress of our business. It would never occur to any one that the presence of a colored citizen in a court-house or court-room was an invasion of the social rights of white persons who may frequent such places. And yet such a suggestion would be quite as sound in law—I say it with all respect—as is the suggestion that the claim of a colored citizen to use, upon the same terms as is permitted to white citizens, the accommodations of public highways, or public inns, or places of public amusement, established under the license of the law, is an invasion of the social rights of the white race.

The court, in its opinion, reserves the question whether Congress, in the exercise of its power to regulate commerce among the several states, might or might not pass a law regulating rights in public conveyances passing from one state to another. I beg to suggest that precise question was substantially presented here in the only one of these cases relating to railroads—*Robinson v. Memphis & C. R. Co.* In that case it appears that Mrs. Robinson, a citizen of Mississippi, purchased a railroad ticket entitling her to be carried from Grand Junction, Tennessee, to Lynchburg, Virginia. Might not the act of 1875 be maintained in that case, as applicable at least to commerce between the states, notwithstanding it does not, upon its face, profess to have been passed in pursuance of the power given to Congress to regulate commerce? Has it ever been held that the judiciary should overturn a statute because the legislative department did not accurately recite therein the particular provision of the constitution authorizing its enactment? We have often enforced municipal bonds in aid of railroad subscriptions where they failed to recite the statute authorizing their issue, but recited one which did not sustain their validity. The inquiry in such cases has been, was there in any statute authority for the execution of the bonds? Upon this branch of the case it may be remarked that the state of Louisiana, in 1869, passed a statute giving to passengers, without regard to race or color, equality of right in the accommodations of railroad and street cars, steam-boats, or other water-crafts, stage-coaches, omnibuses, or other vehicles. But in *Hall v. De Cuir*, 95 U.S. 487, that act was pronounced unconstitutional so far as it related to commerce between the state, this court saying that "if the public good requires such legislation it must come from Congress and not from the state." I suggest that it may become a pertinent inquiry whether Congress may, in the exertion of its power to regulate commerce among the states, enforce among passengers on public conveyances quality of right without regard to race, color, or previous condition of servitude, if it be true—which I do not admit—that such legislation would be an interference by government with the social rights of the people.

My brethren say that when a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. What the nation, through Congress, has sought to accomplish in reference to that race is, what had already been done in every state in the Union for the white race, to secure and protect rights belonging to them as freemen and citizens; nothing more. The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of their legal right to take that rank, and to secure the enjoyment of privileges

belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained. At every step in this direction the nation has been confronted with class tyranny, which a contemporary English historian says is, of all tyrannies, the most intolerable, "for it is ubiquitous in its operation, and weighs, perhaps, most heavily on those whose obscurity or distance would withdraw them from the notice of a single despot." Today it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time it may be some other race that will fall under the ban. If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against freemen and citizens because of their race, color, or previous condition of servitude. To that decree—for the due enforcement of which, be appropriate legislation, Congress has been invested with express power—every one must bow, whatever may have been, or whatever now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect.

For the reasons stated I feel constrained to withhold my assent to the opinion of the court.

# From Segregation to Civil Rights

## Plessy v. Ferguson

At issue in *Plessy v. Ferguson* was an 1890 Louisiana law that required passenger trains operating within the state to provide "equal but separate" accommodations for "white and colored races." The Supreme Court upheld the law by a 7–1 vote, in the process putting a stamp of approval on all laws that mandated racial segregation. In his majority opinion, Justice Henry Billings Brown concluded that the Fourteenth Amendment "could not have intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either."

Justice John M. Harlan, the lone dissenter, responded that the "arbitrary separation of citizens on the basis of race" was equivalent to imposing a "badge of servitude" on African Americans. He contended that the real intent of the law was not to provide equal accommodations but to compel African Americans "to keep to themselves." This was intolerable because "our Constitution is color-blind, and neither knows nor tolerates classes among citizens." Nevertheless, *Plessy* was the law of the land until 1954.

### *Plessy v. Ferguson*

(May 18, 1896.)

No. 210.

1. An act requiring white and colored persons to be furnished with separate accommodations on railway trains does not violate Const. Amend. 13, abolishing slavery and involuntary servitude. 11 South. 948, affirmed.

2. A state statute requiring railway companies to provide separate accommodations for white and colored persons, and making a passenger insisting on occupying a coach or compartment other than the one set apart for his race liable to fine or imprisonment, does not violate Const. Amend. 14, by a abridging the privileges or immunities of United States citizens, or depriving persons of liberty or property without due process of law, or by denying them the equal protection of the laws. 11 South. 948. affirmed.

Mr. Justice Harlan dissenting.

In Error to the Supreme Court of the State of Louisiana.

This was a petition for writs of prohibition and certiorari originally filed in the supreme court of the state by Plessy, the plaintiff in error, against the Hon. John H. Ferguson, judge of the criminal district court for the parish of Orleans, and setting forth, in substance, the following facts:

That petitioner was a citizen of the United States and a resident of the state of Louisiana, of mixed descent, in the proportion of seven-eighths Caucasian and one-eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege, and immunity secured to the citizens of the United States of the white race by its constitution and laws; that on June 7, 1892, he engaged and paid for a first-class passage on the East Louisiana Railway,

from New Orleans to Covington, in the same state, and thereupon entered a passenger train, and took possession of a vacant seat in a coach where passengers of the white race were accommodated; that such railroad company was incorporated by the laws of Louisiana as a common carrier, and was not authorized to distinguish between citizens according to their race, but, withstanding this, petitioner was required by the conductor, under penalty of ejection from said train and imprisonment, to vacate said coach, and occupy another seat, in a coach assigned by said company for persons not of the white race, and for no other reason than that petitioner was of the colored race; that, upon petitioner's refusal to comply with such order, he was, with the aid of a police officer, forcibly ejected from said coach, and hurried off to, and imprisoned in, the parish jail of New Orleans, and there held to answer a charge made by such officer to the effect that he was guilty of having criminally violated an act of the general assembly of the state, approved July 10, 1890, in such case made and provided.

The petitioner was subsequently brought before the recorder of the city of preliminary examination, and committed for trial to the criminal district court for the parish of Orleans, where an information was filed against him in the matter above set forth, for a violation of the above act, which act the petitioner affirmed to be null and void, because in conflict with the constitution of the United States; that petitioner interposed a plea to such information, based upon the unconstitutionality of the act of the general assembly, to which the district attorney, on behalf of the state, filed a demurrer; that, upon issue being joined upon such demurrer and plea, the court sustained the demurrer, overruled the plea, and ordered petitioner to plead over to the facts set forth in the information, and that, unless the judge of the said court be enjoined by a writ of prohibition from further proceeding in such case, the court will proceed to fine and sentence petitioner to imprisonment, and thus deprive him of his constitutional rights set forth in his said plea, notwithstanding the unconstitutionality of the act under which was being prosecuted; that no appeal lay from such sentence, and petitioner was without relief or remedy except by writs of prohibition and certiorari. Copies of the information and other proceedings in the criminal district court were annexed to the petition as an exhibit.

Upon the filing of this petition, an order was issued upon the respondent to show cause why a writ of prohibition should not issue, and be made perpetual, and further order that the record of the proceedings had in the criminal cause be certified and transmitted to the supreme court.

To this order the respondent made answer, transmitting a certified copy of the proceedings, asserting the constitutionality of the law, and averring that, instead of pleading or admitting that he belonged to the colored race, the said Plessy declined and refused, either by pleading or otherwise, to admit that he was in any sense or in any proportion a colored man.

The case coming on for hearing before the supreme court, that court was of opinion that the law under which the prosecution was had was constitutional and denied the relief prayed for by the petitioner (*Ex parte Plessy*, 45 La. Ann. 80, 11 South. 948); whereupon petitioner prayed for a writ of error from this court, which was allowed by the chief justice of the Supreme Court of Louisiana.

A.W. Tourgee and S. F. Phillips, for plaintiff in error. Alex. Porter Morse, for defendant in error.

Mr. Justice Brown, after stating the facts in the foregoing language, delivered the opinion of the court.

This case turns upon the constitutionality of an act of the general assembly of the state of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. Acts 1890, No. 111, p. 152.

The first section of the statute enacts

> "that all railway companies in this state, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: provided, that this section shall not be construed to apply to street railroads. No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to."

By the second section it was enacted

> "that the officers of such passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which

> by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this state."

The third section provides penalties for the refusal or neglect of the officers, directors, conductors, and employes of railway companies to comply with the act, with a proviso that "nothing in this act shall be construed as applying to nurses attending children of the other race." The fourth section is immaterial.

The information filed in the criminal district court charged, in substance, that Plessy, being a passenger between two stations within the state of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred.

The petition for the writ of prohibition averred that petitioner was seven-eighths Caucasian and one-eighth African blood; that the mixture of colored blood was not discernible in him; and that he was entitled to every right, privilege, and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate said coach, and take a seat in another, assigned to persons of the colored race, and, having refused to comply with such demand he was forcibly ejected with the aid of a police officer and imprisoned in the parish jail to answer a charge of having violated the above act.

The constitutionality of this act is attacked upon the ground that it conflicts both with the Thirteenth Amendment of the Constitution, abolishing slavery and the Fourteenth Amendment, which prohibits certain restrictive legislation on the part of the states.

1. That is does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or, at least, the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services. This amendment was said in the *Slaughter-House Cases*, 16 Wall. 36, to have been intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude, and that the use of the word "servitude" was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name. It was intimated, however, in that case, that this amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern states, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value; and that the Fourteenth Amendment was devised to meet this exigency

So, too, in the *Civil Rights Cases*, 100 U.S. 3, 3 Sup. Ct. 18, it was said that the act of a mere individual, the owner of an inn, a public conveyance or place of amusement, refusing accommodations to colored people, cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but only as involving an ordinary civil injury, properly cognizable by the laws of the state, and presumably subject to redress by those laws until the contrary appears. "It would be running the slavery question into the ground," said Mr. Justice Bradley,

> "to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business."

A statute which implies merely a legal distinction between the white and colored races—a distinction which is found in the color of the two races, and which must always exist so long

as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude. Indeed, we do not understand that the Thirteenth Amendment is strenuously relied upon by the plaintiff in error in this connection.

2. By the Fourteenth Amendment, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are made citizens of the United States and of the state wherein they reside; and the states are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws.

The proper construction of this amendment was first called to the attention of this court in the *Slaughter-House Cases,* 16 Wall. 36, which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact rights it was intended to secure to the colored race, but it was said generally that its main purpose was to establish the citizenship of the negro, to give definitions of citizenship of the United States and of the states, and to protect from the hostile legislation of the states the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the states.

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is that of *Roberts v. City of Boston,* 5 Cush. 198, in which the supreme judicial court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. "The great principle," said Chief Justice Shaw,

> "advanced by the learned and eloquent advocate for the plaintiff [Mr. Charles Sumner], is that, by the constitution and laws of Massachusetts, all persons, without distinction of age or sex, birth or color, origin or condition, are equal before the law. * * * But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security."

It was held that the powers of the committee extended to the establishment of separate schools for children of different ages, sexes, and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school, and yet not acquired the rudiments of learning, to enable them to enter the ordinary schools. Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia (sections 281–283, 310, 319, Rev. St. D. C.), as well as by the legislatures of many of the states, and have been generally, if not uniformly, sustained by the courts. *State v. McCann* 21 Ohio St. 210; *Lehew v. Brummell* (Mo. Sup.) 15 S. W. 705; *Ward v. Flood,* 48 Cal. 36; *Bertonneau v. Directors of City Schools,* 3 Woods, 177 Fed. Cas. No. 1,361; *People v. Gallagher,* 93 N. Y. 438; *Cory v. Carter,* 48 Ind. 337; *Dawson v. Lee,* 83 Ky. 49.

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state. *State v. Gibson,* 36 Ind. 389.

The distinction between laws interfering with the political equality of the negro and those requiring the separation of two races in schools,

theaters, and railway carriages has been frequently drawn by this court. Thus, in *Strauder v. West Virginia,* 100 U.S. 303, it was held that a law of West Virginia limiting to white male persons 21 years of age, and citizens of the state the right to sit upon juries, was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step towards reducing them to a condition of servility. Indeed, the right of a colored man that in the selection of jurors to pass upon his life, liberty, and property there shall be no exclusion of his race, and no discrimination against them because of color, has been asserted in a number of cases. *Virginia v. Rives,* 100 U. S. 313; *Neal v. Delaware,* 103 U.S. 370; *Bush v. Com.,* 107 U.S. 110, 1 Sup. Ct. 625; *Gibson v. Mississippi,* 162 U.S. 565, 16 Sup. Ct 904. So, where the laws of a particular locality or the charter of a particular railway corporation has provided that no person shall be excluded from the cars on account of color, we have held that this meant that persons of color should travel in the same car as white ones, and that the enactment was not satisfied by the company providing cars assigned exclusively to white persons. *Railroad Co. v. Brown,* 17 Wall. 445.

Upon the other hand, where a statute of Louisiana required those engaged in the transportation of passengers among the states to give to all persons traveling within that state, upon vessels employed in that business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color, and subjected to an action for damages the owner of such a vessel who excluded colored passengers on account of their color from the cabins set aside by him for the use of whites, it was held to be, so far as it applied to interstate commerce, unconstitutional and void. *Hall v. De Cuir,* 95 U. S. 485. The court in this case, however, expressly disclaimed that it had anything whatever to do with the statute as a regulation of internal commerce, or affecting anything else that commerce among the states.

In the *Civil Rights Cases,* 109 U. S. 3, 3 Sup. Ct. 18, it was held that an act of Congress entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, on land or water, theaters, and other places of public amusement, and made applicable to citizens of every race and color, regardless of any previous condition of servitude, was unconstitutional and void, upon the ground that the Fourteenth Amendment was prohibitory upon the states only, and the legislation authorized to be adopted by Congress for enforcing it was not direct legislation on matters respecting which the states were prohibited from making or enforcing certain laws, or doing certain acts, but was corrective legislation, such as might be necessary or proper for counteracting and redressing the effect of such laws or acts. In delivering the opinion of the court, Mr. Justice Bradley observed that the Fourteenth Amendment

> "does not invest Congress with power to legislate upon subjects that are within the domain of state legislation, but to provide modes of relief against state legislation or state action of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights, but to provide modes to redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect."

Much nearer, and, indeed, almost directly in point, is the case of the *Louisville, N. O. & T. Ry Co. v. State,* 133 U.S. 587, 10 Sup. Ct. 348, wherein the railway company was indicted for a violation of a statute of Mississippi, enacting that all railroads carrying passengers should provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a petition, so as to secure separate accommodations. The case was presented in a different aspect from the one under consideration, inasmuch as it was an indictment against the railway company for failing to provide the separate accommodations, but the question considered was the constitutionality of the law. In that case, the Supreme Court of Mississippi (66 Miss. 662, 6 South. 203) had held that the statute applied solely to com-

merce within the state, and that being the construction of the state statute by its highest court, was accepted as conclusive. "If it be a matter," said the court (page 591, 133 U.S., and page 348, 10 Sup. Ct.),

> "respecting commerce wholly within a state, and not interfering with commerce between the states, then, obviously, there is no violation of the commerce clause of the federal constitution. * * * No question arises under this section as to the power of the state to separate in different compartments interstate passengers, or affect, in any manner, the privileges and rights of such passengers. All that we can consider is whether the state has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the state is no invasion of the power given to Congress by the commerce clause"

A like course of reasoning applies to the case under consideration, since the Supreme Court of Louisiana, in the case of *State v. Judge,* 44 La. Ann. 770, 11 South, 74, held that the statute in question did not apply to interstate passengers, but was confined in its application to passengers traveling exclusively within the borders of the state. The case was decided largely upon the authority of *Louisville, N. O. & T. Ry. Co. v. State,* 66 Miss. 662, 6 South. 203, and affirmed by this court in 133 U.S. 587, 10 Sup. Ct. 348. In the present case no question of interference with interstate commerce can possibly arise, since the East Louisiana Railway appears to have been purely a local line, with both its termini within the state of Louisiana. Similar statutes for the separation of the two races upon public conveyances were held to be constitutional in *Railroad v. Miles,* 55 Pa. St. 209; *Day v. Owen,* 5 Mich. 520; *Railway Co. v. Williams,* 55 Ill. 185; *Railroad Co. v. Wells,* 85 Tenn. 613; 4 S. W. 5; *Railroad Co. v. Benson,* 85 Tenn. 627, 4 S. W. 5; *The Sue,* 22 Fed. 843; *Logwood v. Railroad Co.,* 23 Fed. 318; *McGuinn v. Forbes,* 37 Fed. 639; *People v. King* (N. Y. App.) 18 N. E. 245; *Houck v. Railway Co.,* 38 Fed. 226; *Heard v. Railroad Co.,* 3 Inter St. Commerce Com. R. 111, 1 Inter St. Commerce Com. R. 428.

While we think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment, we are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the second section of the act that denies to the passenger compensation in damages for a refusal to receive him into the coach in which he properly belongs is a valid exercise of the legislative power. Indeed, we understand it to be conceded by the state's attorney that such part of the act as exempts from liability the railway company and its officers is unconstitutional. The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular state is to be deemed a white, and who a colored person. This question, though indicated in the brief of the plaintiff in error, does not properly arise upon the record in this case, since the only issue made is as to the unconstitutionality of the act, so far as it requires the railway to provide separate accommodations, and the conductor to assign passengers according to their race.

It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is "property," in the same sense that a right of action or of inheritance is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man, and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called "property." Upon the other hand, if he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.

In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored

men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class. Thus, in *Yick Wo v. Hopkins,* 118 U. S. 356, 6 Sup. Ct. 1064, it was held by this court that a municipal ordinance of the city of San Francisco: to regulate the carrying on of public laundries within the limits of the municipality, violated the provisions of the constitution of the United States, if it conferred upon the municipal authorities arbitrary power, at their own will, and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. While this was the case of a municipal ordinance, a like principle has been held to apply to acts of a state legislature passed in the exercise of the police power. *Railroad Co. v. Husen,* 95 U. S. 465; *Louisville & N. R. Co. v. Kentucky,* 161 U. S. 677, 16 Sup. Ct. 714, and cases cited on page 700, 161 U. S., and page 714, 16 Sup. Ct.; *Daggett v. Hudson,* 43 Ohio St. 548, 3 N. E. 538; *Capen v. Foster,* 12 Pick. 485; *State v. Baker,* 38 Wis. 71; *Monroe v. Collins,* 17 Ohio St. 665; *Hulseman v. Gems,* 41 Pa. St. 396; *Osman v. Riley,* 15 Cal. 48

So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. As was said by the court of appeals of New York in *People v. Gallagher,* 93 N. Y. 438, 448:

> "This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed."

Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states; some holding that any visible admixture of black blood stamps

the person as belonging to the colored race (*State v. Chavers,* 5 Jones [N. C.] 1); others, that it depends upon the preponderance of blood (*Gray v. State,* 4 Ohio, 354; *Monroe v. Collins,* 17 Ohio St. 665); and still others, that the predominance of white blood must only be in the proportion of three-fourths (*People v. Dean,* 14 Mich. 406; *Jones v. Com.,* 80 Va. 544). But these are questions to be determined under the laws of each state, and are not properly put in issue in this case. Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.

The judgment of the court below is therefore affirmed.

Mr. Justice BREWER did not hear the argument or participate in the decision of this case.

Mr. Justice HARLAN dissenting.

By the Louisiana statute the validity of which is here involved, all railway companies (other than street-railroad companies) carrying passengers in that state are required to have separate but equal accommodations for white and colored persons, "by providing two or more passenger coaches for each passenger train or by dividing the passenger coaches by a partition so as to secure separate accommodations." Under this statute, no colored person is permitted to occupy a seat in a coach assigned to white persons; nor any white person to occupy a seat in a coach assigned to a colored persons. The managers of the railroad are not allowed to exercise any discretion in the premises, buy are required to assign each passenger to some coach or compartment set apart for the exclusive use of his race. If a passenger insists upon going into a coach or compartment not set apart for persons of his race, he is subject to be fined, or to be imprisoned in the parish jail. Penalties are prescribed for the refusal or neglect of the officers, directors, conductors, and employes of railroad companies to comply with the provisions of the act.

Only "nurses attending children of the other race" are excepted from the operation of the statute. No exception is made of colored attendants traveling with adults. A white man is not permitted to have his colored servant with him in the same coach, even if his condition of health requires the constant personal assistance of such servant. If a colored maid insists upon riding in the same coach with a white woman whom she has been employed to serve, and who may need her personal attention while traveling, she is subject to be fined or imprisoned for such an exhibition of zeal in the discharge of duty.

While there may be in Louisiana person of different races who are not citizens of the United States, the words in the act "white and colored races" necessarily include all citizens of the United States of both races residing in the state. So that we have before us a state enactment that compels, under penalties, the separation of the two races in railroad passenger coaches, and makes it a crime for a citizen of either race to enter a coach that has been assigned to citizens of the other race.

Thus, the state regulates the use of a public highway by citizens of the United States solely upon the basis of race.

However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the Constitution of the United States.

That a railroad is a public highway, and that the corporation which owns or operates it is in the exercise of public functions, is not, at this day, to be disputed. Mr. Justice Nelson, speaking for this court in *New Jersey Steam Nav. Co. v. Merchants' Bank,* 6 How. 344, 382, said that a common carrier was in the exercise "of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned." Mr. Justice Strong, delivering the judgment of this court in *Olcott v. Supervisors,* 16 Wall. 678, 694, said

> "That railroads, though constructed by private corporations, and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a state's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly, it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for a private use. Yet it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use?"

So, in *Township of Pine Grove v. Talcott,* 19 Wall. 666, 676:

> "Though the corporation [a railroad company] was private, its work was public, as much so as if it were to be constructed by the state."

So, in *Inhabitants of Worcester v. Western R. Corp.,* 4 Metc. (Mass.) 564:

> "The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike, or highway, a public easement."
>
> "It is true that the real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation; but it is in trust for the public."

In respect of civil rights, common to all citizens, the constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and take such action based upon it as to him seems proper. But I can deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States.

The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But, that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment, which added greatly to the dignity and glory of American citizenship, and to the security of personal liberty, by declaring that

> "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the sate wherein they reside,"

and that

> "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it was declared by the Fifteenth Amendment that

> "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude."

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely, to secure "to a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the superior race enjoy." They declared, in legal effect, this court has further said

> "that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states; and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color."

We also said:

> "The words of the amendment, is true, are prohibitory, but they contain a necessary implication of a positive immunity or right, most valuable to the colored—race the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy; and discriminations which are steps towards reducing them to the condition of a subject."

It was, consequently, adjudged that a state law that excluded citizens of the colored race from

juries, because of their race, however well qualified in other respects to discharge the duties of jurymen, was repugnant to the Fourteenth Amendment. *Strauder v. West Virginia,* 100 U.S. 303, 306, 307; *Virginia v. Rives,* Id. 313; *Ex parte Virginia,* Id. 339: *Neal v. Delaware,* 103 U.S. 370, 386; *Bush v. Com.,* 107 U.S. 110, 116, 1 Sup. Ct. 625. At the present term referring to the previous adjudications, this court declared that

> "underlying all of those decisions is the principle that the constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government or the states against any citizen because of his race. All citizens are equal before the law. *Gibson v. State,* 162 U.S. 565, 16 Sup. Ct. 904."

The decisions referred to show the scope of the recent amendments of the constitution. They also show that it is not within the power of a state to prohibit colored citizens, because of their race, from participating as jurors in the administration of justice.

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection, therefore, to the statute, is that it interferes with the personal freedom of citizens. "Personal liberty," it has been well said, "consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1. Bl. Comm. *134. If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from traveling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a state can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street, and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road or street? Why may it not require sheriffs to assign whites to one side of a court room, and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Furthermore, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the state require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?

The answer given at the argument to these question was that regulations of the kind they suggest would be unreasonable, and could not, therefore, stand before the law. Is it meant that the determination of questions of legislative power depends upon the inquiry whether the statute whose validity is questions is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration? A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid, and yet, upon grounds of public policy, may well be characterized as unreasonable. Mr. Sedgwick correctly states the rule when he says that, the legislative intention being clearly ascertained "the courts have no other duty to perform than to execute the legislative will, without any regard to their views as to the wisdom or justice of the particular enactment." Sedg. St. & Const. Law, 324. There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of

judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are co-ordinate and separate. Each must keep within the limits defined by the constitution. And the courts best discharge their duty by executing the will of the lawmaking power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives. Statutes must always have a reasonable construction. Sometimes they are to be construed strictly, sometimes literally, in order to carry out the legislative will. But, however construed, the intent of the legislature is to be respected if the particular statute in question is valid, although the courts, looking at the public interests, may conceive the statute to be both unreasonable and impolitic. If the power exists to enact a statute, that ends the matter so far as the courts are concerned. The adjudged cases in which statutes have been held to be void, because unreasonable, are those in which the means employed by the legislature were not at all germane to the end to which the legislature was competent.

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guarantied by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*.

It was adjudged in that case that the descendants of Africans who were imported into this country, and sold as slaves, were not included nor intended to be included under the word "citizens" in the constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that, at the time of the adoption of the constitution, they were

> "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them." 17 How. 393, 404.

The recent amendments of the constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the states, a dominant race—a superior class of citizens—which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the constitution, by one of which the blacks of this country were made citizens of the United States and of the states in which they respectively reside, and whose privileges and immunities, as citizens, the states are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

The sure guaranty of the peace and security of each race is the clear, distinct, unconditional

FROM SEGREGATION TO CIVIL RIGHTS

PLESSY V. FERGUSON

recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race. State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration; for social equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting.

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But, by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the state and nation, who are not excluded, by law or by reason of their race, from public stations from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race. It is scarcely just to say that a colored citizen should not object to occupying a public coach assigned to his own race. He does not object, nor, perhaps, would he object to separate coaches for his race if his rights under the law were recognized. But he does object, and he ought never to cease objecting, that citizens of the white and black races can be adjudged criminals because they sit, or claim the right to sit, in the same public coach on a public highway.

The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution. It cannot be justified upon any legal grounds.

If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens—our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.

The result of the whole matter is that while this court has frequently adjudged, and at the present term has recognized the doctrine, that a state cannot, consistently with the constitution of the United States, prevent white and black citizens, having the required qualifications for jury service, from sitting in the same jury box, it is now solemnly held that a state may prohibit white and black citizens from sitting in the same passenger coach on a public highway, or may require that they be separated by a "partition" when in the same passenger coach. May it not now be reasonably expected that astute men of the dominant race, who affect to be disturbed at the possibility that the integrity of the white race may be corrupted, or that its supremacy will be imperiled by contact on public highways with black people, will endeavor to procure statutes requiring white and black jurors to be separated in the jury box by a "partition," and that, upon retiring from the court room to consult as to their verdict, such partition, if it be a movable one, shall be taken to their consultation room, and set up in such was as to prevent black jurors from coming too close to their brother jurors of the white race. If the "partition" used in the court room happens to be stationary, provision could be made for screens with openings through which jurors of the two races could confer as to their verdict without coming into

personal contact with each other. I cannot see but that, according to the principles this day announced, such state legislation, although conceived in hostility to, and enacted for the purpose of humiliating, citizens of the United States of a particular race, would be held to be consistent with the constitution.

I do deem it necessary to review the decisions of state courts to which reference was made in argument. Some, and the most important, of them, are wholly inapplicable, because rendered prior to the adoption of the last amendments of the Constitution, when colored people had very few rights which the dominant race felt obliged to respect. Others were made at a time when public opinion, in many localities, was dominated by the institution of slavery; when it would not have been safe to do justice to the black man; and when, so far as the rights of blacks were concerned, race prejudice was, practically, the supreme law of the land. Those decisions cannot be guides in the era introduced by the recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States, and residing here, obliterated the race line from our systems of governments, national and state, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law.

I am of opinion that the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that state, and hostile to both the spirit and letter of the constitution of the United States. If laws of like character should be enacted in the several states of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law, would, it is true, have disappeared from our country; but there would remain a power in the states, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom, to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community, called the "People of the United States," for whom, and by whom through representatives, our government is administered. Such a system is inconsistent with the guaranty given by the Constitution to each state of a republican form of government, and may be stricken down by congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding.

For the reason stated, I am constrained to withhold my assent from the opinion and judgment of the majority.

# From Segregation to Civil Rights

## Civil Rights Act of 1964

After the assassination of President John F. Kennedy in 1963, President Lyndon B. Johnson announced his determination to pass a strong civil rights act that would end racial discrimination in employment, education, and other spheres of life. Deputy Attorney General Nicholas D. Katzenbach, Johnson's congressional liaison, worked with Senator Hubert H. Humphrey (D.-Minn.) and Senate minority leader Everett M. Dirksen (R.-Ill.) to achieve a compromise that would assure final passage. The result was the landmark Civil Rights Act of 1964.

Title I of the act guarantees equal voting rights by removing registration requirements and procedures biased against minorities and the underprivileged. Title II prohibits segregation or discrimination in places of public accommodation involved in interstate commerce. Title VII bans discrimination by trade unions, schools, and employers involved in interstate commerce or doing business with the federal government. This section also applies to discrimination on the basis of sex and established the Equal Employment Opportunity Commission to enforce these provisions. The act also calls for the desegregation of public schools (title IV), broadens the duties of the Civil Rights Commission (title V), and assures nondiscrimination in the distribution of funds under federally assisted programs (title VI).

Initially, the most controversial provision was title II. Because the 1883 Civil Rights cases held that the Fourteenth Amendment cannot reach private discrimination in public accommodations, Congress based title II on the Constitution's Commerce Clause, which gives Congress the authority to regulate interstate commerce. In *Heart of Atlanta Motel v. United States,* 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964), the Supreme Court upheld title II as a constitutional application of the Commerce Clause.

### Civil Rights Act of 1964

For Legislative History of Act, see p. 2355

PUBLIC LAW 88–352; 78 STAT. 241

[H. R. 7152]

An Act to enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:*

This Act may be cited as the "Civil Rights Act of 1964."

#### TITLE I—VOTING RIGHTS

Sec. 101. Section 2004 of the Revised Statutes (42 U.S.C. 1971), as amended by section

1313 of the Civil Rights Act of 1957 (71 Stats. 637), and as further amended by section 601 of the Civil Rights Act of 1960 (74 Stats. 90),[1] is further amended as follows:

(a) Insert "1" after "(a)" in subsection (a) and add at the end of subsection (a) the following new paragraphs:

"(2) No person acting under color of law shall—

"(A) in determining whether any individual is qualified under State law or laws to vote in any Federal election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;

"(B) deny the right of any individual to vote in any Federal election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election; or

"(C) employ any literacy test as a qualification for voting in any Federal election unless (i) such test is administered to each individual and is conducted wholly in writing, and (ii) a certified copy of the test and of the answers given by the individual is furnished to him within twenty-five days of the submission of his request made within the period of time during which records and papers are required to be retained and preserved pursuant to title III of the Civil Rights Act of 1960 (42 U.S.C. 1974–74e; 74 Stat. 88): *Provided, however*, That the Attorney General may enter into agreements with appropriate State or local authorities that preparation, conduct, and maintenance of such tests in accordance with the provisions of applicable State or local law, including such special provisions as are necessary in the preparation, conduct, and maintenance of such tests for persons who are blind or otherwise physically handicapped, meet the purposes of this subparagraph and constitute compliance therewith.

"(3) For purposes of this subsection—

"(A) the term 'vote' shall have the same meaning as in subsection (e) of this section;

"(B) the phrase 'literacy test' includes any test of the ability to read, write, understand, or interpret any matter."

(b) Insert immediately following the period at the end of the first sentence of subsection (c) the following new sentence: "If in any such proceeding literacy is a relevant fact there shall be a rebuttable presumption that any person who has not been adjudged an incompetent and who has completed the sixth grade in a public school in, or in a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico where instruction is carried on predominantly in the English language, possesses sufficient literacy, comprehension, and intelligence to vote in any Federal election."

(c) Add the following subsection "(f)" and designate the present subsection "(f)" as subsection "(g)":

> "(f) When used in subsection (a) or (c) of this section, the words 'Federal election' shall mean any general, special, or primary election held solely or in part for the purpose of electing or selecting any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives."

(d) Add the following subsection "(h)":

> "(h) In any proceeding instituted by the United States in any district court of the United States under this section in which the Attorney General requests a finding of a pattern or practice of discrimination pursuant to subsection (e) of this section the Attorney General, at the time he files the complaint, or any defendant in the proceeding, within twenty days after service upon him of the complaint, may file with the clerk of such court a request that a court of three judges be convened to hear and determine the entire case. A copy of the request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the

[1] 42 U.S.C.A. § 1971.

hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

"In any proceeding brought under subsection (c) of this section to enforce subsection (b) of this section, or in the event neither the Attorney General nor any defendant files a request for a three-judge court in any proceeding authorized by this subsection, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or, in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case."

"It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited."

### TITLE II—INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION

Sec. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

(e) The provisions of this title shall not apply to a private club or other establishment not in

fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsections (b).

Sec. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Sec. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.

Sec. 204. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complaint and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

(b) In any action commenced pursuant to this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

(c) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

(d) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under subsection (a): *Provided*, That the court may refer the matter to the Community Relations Service established by title X of this Act for as long as the court believes there is a reasonable possibility of obtaining voluntarily compliance, but for not more than sixty days: *Provided further*, That upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.

Sec. 205. The Service is authorized to make a full investigation of any complaint referred to it by the court under section 204(d) and may hold such hearings with respect thereto as may be necessary. The Service shall conduct any hearings with respect to any such complaint in executive session, and shall not release any testimony given therein except by agreement of all parties involved in the complaint with the permission of the court, and the Service shall endeavor to bring about a voluntary settlement between the parties.

Sec. 206 (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary

injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) In any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

Sec. 207. (a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(b) The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall prelude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

### TITLE III—DESEGREGATION OF PUBLIC FACILITIES

Sec. 301. (a) Whenever the Attorney General receives a complaint in writing signed by an individual to the effect that he is being deprived of or threatened with the loss of his right to the equal protection of the laws, on account of his race, color, religion, or national origin, by being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision thereof, other than a public school or public college as defined in section 401 of title IV hereof, and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly progress of desegregation in public facilities, the Attorney General is authorized to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenev-

er he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

Sec. 302. In any action or proceeding under this title the United States shall be liable for costs, including a reasonable attorney's fee, the same as a private person.

Sec. 303. Nothing in this title shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in any facility covered by this title.

Sec. 304. A complaint as used in this title is a writing or document within the meaning of section 1001, title 18, United States Code.

## TITLE IV—DESEGREGATION OF PUBLIC EDUCATION

DEFINITIONS

Sec. 401. As used in this title—

(a) "Commissioner" means the Commissioner of Education.

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

(c) "Public school" means any elementary or secondary educational institution, and "public college" means any institution of higher education or any technical or vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source.

(d) "School board" means any agency or agencies which administer a system of one or more public schools and any other agency which is responsible for the assignment of students to or within such system.

SURVEY AND REPORT OF EDUCATIONAL OPPORTUNITIES

Sec. 402. The Commissioner shall conduct a survey and make a report to the President and the Congress, with two years of the enactment of this title, concerning the lack of availability of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public educational institutions at all levels in the United States, its territories and possessions, and the District of Columbia.

TECHNICAL ASSISTANCE

Sec. 403. The Commissioner is authorized, upon the application of any school board, State, municipality, school district, or other governmental unit legally responsible for operating a public school or schools, to render technical assistance to such applicant in the preparation, adoption, and implementation of plans for the desegregation of public schools. Such technical assistance may, among other activities, include making available to such agencies information regarding effective methods of coping with special educational problems occasioned by desegregation, and making available to such agencies personnel of the Office of Education or other persons specially equipped to advise and assist them in coping with such problems.

TRAINING INSTITUTES

Sec. 404. The Commissioner is authorized to arrange, through grants or contracts, with institutions of higher education for the operation of short-term or regular session institutes for special training designed to improve the ability of teachers, supervisors, counselors, and other elementary or secondary school personnel to deal effectively with special educational problems occasioned by desegregation. Individuals who attend such an institute on a full-time basis may be paid stipends for the period of their attendance at such institute in amounts specified by the Commissioner in regulations, including allowances for travel to attend such institute.

GRANTS

Sec. 405. (a) The Commissioner is authorized, upon the application of a school board, to make grants to such board to pay, in whole in part, the cost of—

(1) giving to teachers and others school personnel inservice training in dealing with problems incident to desegregation, and

(2) employing specialists to advise in problems incident to desegregation.

(b) In determining whether to make a grant, and in fixing the amount thereof and the terms and conditions on which it will be made, the

Commissioner shall take into consideration the amount available for grants under this section and the other applications which are pending before him; the financial condition of the applicant and the other resources available to it; the nature, extent, and gravity of its problems incident to desegregation; and such other factors as he finds relevant.

PAYMENTS

Sec. 406. Payments pursuant to a grant or contract under this title may be made (after necessary adjustments on account of previously made overpayments or underpayments) in advance or by way of reimbursement, and in such installments, as the Commissioner may determine.

SUITS BY THE ATTORNEY GENERAL

Sec. 407. (a) Whenever the Attorney General receives a complaint in writing—

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, or national origin, and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

(c) The term "parent" as used in this section includes any person standing in loco parentis. A "complaint" as used in this section is a writing or document within the meaning of section 1001, title 18, United States Code.

Sec. 408. In any action or proceeding under this title the United States shall be liable for costs the same as a private person.

Sec. 409. Nothing in this title shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education.

Sec. 410. Nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.

## TITLE V—COMMISSION ON CIVIL RIGHTS

Sec. 501. Section 102 of the Civil Rights Act of 1957 (42 U.S.C. 1975a; 71 Stat. 634)[2] is amended to read as follows:

"RULES OF PROCEDURE OF THE COMMISSION HEARINGS

"Sec. 102. (a) At least thirty days prior to the commencement of any hearing, the Commission shall cause to be published in the Federal Register notice of the date on which such hearing is to commence, the place at which it is to be held and the subject of the hearing. The Chairman, or one designated by him to act

[2] 42 U.S.C.A. § 1975a.

as Chairman at a hearing of the Commission, shall announce in an opening statement the subject of the hearing.

"(b) A copy of the Commission's rules shall be made available to any witness before the Commission, and a witness compelled to appear before the Commission or required to produce written or other matter shall be served with a copy of the Commission's rules at the time of service of the subpoena.

"(c) Any person compelled to appear in person before the Commission shall be accorded the right to be accompanied and advised by counsel, who shall have the right to subject his client to reasonable examination, and to make objections on the record and to argue briefly the basis for such objections. The Commission shall proceed with reasonable dispatch to conclude any hearing in which it is engaged. Due regard be had for the convenience and necessity of witnesses.

"(d) The Chairman or Acting Chairman may punish breaches of order and decorum by censure and exclusion from the hearings.

"(e) If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall receive such evidence or testimony or summary of such evidence or testimony in executive session. The Commission shall afford any person defamed, degraded, or incriminate by such evidence or testimony an opportunity to appear and be heard in executive session, with a reasonable number of additional witnesses requested by him, before deciding to use such evidence or testimony. In the event the Commission determines to release or use such evidence or testimony in such manner as to reveal publicly the identity of the person defamed, degraded, or incriminate, such evidence or testimony, prior to such public release or use, shall be given at a public session, and the Commission shall afford such person an opportunity to appear as a voluntary witness or to file a sworn statement in his behalf and to submit brief and pertinent sworn statements of others. The Commission shall receive and dispose of requests from such person to subpoena additional witnesses.

"(f) Except as provided in sections 102 and 105(f) of this Act, the Chairman shall receive and the Commission shall dispose of requests to subpoena additional witnesses.

"(g) No evidence or testimony or summary of evidence or testimony taken in executive session may be released or used in public sessions without the consent of the Commission. Whoever releases or uses in public without the consent of the Commission such evidence or testimony taken in executive session shall be fined not more than $1,000, or imprisoned for not more than one year.

"(h) In the discretion of the Commission, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The Commission shall determine the pertinency of testimony and evidence adduced at its hearings.

"(i) Every person who submits data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that a witness in a hearing held in executive session may for good cause be limited to inspection of the official transcript of his testimony. Transcript copies of public sessions may be obtained by the public upon the payment of the cost thereof. An accurate transcript shall be made of the testimony of all witnesses at all hearings, either public or executive sessions, of the Commission or of any subcommittee thereof.

"(j) A witness attending any session of the Commission shall receive $6 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 10 cents per mile for going from and returning to his place of residence. Witnesses who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of $10 per day for expenses of subsistence, including the time necessarily occupied in going to an returning from the place of attendance. Mileage payments shall be tendered to the witness upon service of a subpoena issued on behalf of the Commission or any subcommittee thereof.

"(k) The commission shall not issue any subpoena for the attendance and testimony of witnesses or for the production of written or other matter which would require the presence of the party subpoenaed at a hearing to be held outside of the State wherein the witness is found or resides or is domiciled or transacts business, or has appointed an agent for receipt of service of process except that, in any event, the Commission may issue subpoenas for the atten-

dance and testimony of witnesses and the production of written or other matter at a hearing held within fifty miles of the place where the witness is found or resides or is domiciled or transacts business or has appointed an agent for receipt of service of process.

"(l) The Commission shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including the established places at which, and methods whereby, the public may secure information or make requests; (2) statements of the general course and method by which its functions are channeled and determined, and (3) rules adopted as authorized by law. No person shall in any manner be subject to or required to resort to rules, organization, or procedure not so published."

Sec. 502. Section 103(a) of the Civil Rights Act of 1957 (42 U.S.C. 1975b(a); 71 Stat. 634)[3] is amended to read as follows:

"Sec. 103. (a) Each member of the Commission who is not otherwise in the service of the Government of the United States shall receive the sum of $75 per day for each day spent in the work of the Commission, shall be paid actual travel expenses, and per diem in lieu of subsistence expenses when away from his usual place of residence, in accordance with section 5 of the Administrative Expenses Act of 1946, as amended (5 U.S.C. 73b-2; 60 Stat. 808)."

Sec. 503. Section 103(b) of the Civil Rights Act of 1957 (42 U.S.C. 1975b(b); 71 Stat. 634)[4] is amended to read as follows:

"(b) Each member of the Commission who is otherwise in the service of the Government of the United States shall serve without compensation in addition to that received for such other service, but while engaged in the work of the Commission shall be paid actual travel expenses, and per diem in lieu of subsistence expenses when away from his usual place of residence, in accordance with the provisions of the Travel Expenses Act of 1949, as amended (5 U.S.C. 835–42; 63 Stat. 166)."

Sec. 504. (a) Section 104(a) of the Civil Rights Act of 1957 (42 U.S.C. 1975c(a); 71 Stat. 635), as amended,[5] is further amended to read as follows:

"DUTIES OF THE COMMISSION

"Sec. 104 (a) The Commission shall—

"(1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based;

"(2) study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution because of race, color, religion or national origin or in the administration of justice;

"(3) appraise the laws and policies of the Federal Government with respect to denials of equal protection of the laws under the Constitution because of race, color, religion or national origin or in the administration of justice;

"(4) serve as a national clearinghouse for information in respect to denials of equal protection of the laws because of race, color, religion or national origin, including but not limited to the fields of voting, education, housing, employment, the use of public facilities, and transportation, or in the administration of justice;

"(5) investigate allegations, made in writing and under oath or affirmation, that citizens of the United States are unlawfully being accorded or denied the right to vote, or to have their votes properly counted, in any election of presidential electors, Members of the United States Senate, or of the House of Representatives, as a result of any pattern or practice of fraud or discrimination in the conduct of such election; and

"(6) Nothing in this or any other Act shall be construed as authorizing the Commission, its Advisory Committees, or any person under its supervision or control to inquire into or investigate any membership practices or internal operations of any fraternal organization, any college or university fraternity or sorority, any private club or any religious organization."

(b) Section 104(b) of the Civil Rights Act of 1957 (42 U.S.C. 1975c(b); 71 Stat. 635), as amended,[6] is further amended by striking out the present subsection "(b)" and by substituting therefor:

"(b) The Commission shall submit interim reports to the President and to the Congress at

[3] 42 U.S.C.A. § 1975b(a).
[4] 42 U.S.C.A. § 1975b(b).
[5] 42 U.S.C.A. § 1975c(a).
[6] 42 U.S.C.A. § 1975c(b).

such times as the Commission, the Congress or the President shall deem desirable, and shall submit to the President and to the Congress a final report of its activities, findings, and recommendations not later than January 31, 1968."

Sec. 505. Section 105(a) of the Civil Rights Act of 1957 (42 U.S.C. 1975d(a); 71 Stat. 636)[7] is amended by striking out in the last sentence thereof "$50 per diem" and inserting in lieu thereof "$75 per diem."

Sec. 506. Section 105(f) and section 105(g) of the Civil Rights Act of 1957 (42 U.S.C. 1975d(f) and (g); 71 Stat. 636)[8] are amended to read as follows:

"(f) The Commission, or on the authorization of the Commission any subcommittee of two or more members, at least one of whom shall be of each major political party, may, for the purpose of carrying out the provisions of this Act, hold such hearings and act at such times and places as the Commission or such authorized subcommittee may deem advisable. Subpoenas for the attendance and testimony of witnesses or the production of written or other matter may be issued in accordance with the rules of the Commission as contained in section 102(j) and (k) of this Act, over the signature of the Chairman of the Commission or of such subcommittee, and may be served by any person designated by such Chairman. The holding of hearings by the Commission, or the appointment of a subcommittee to hold hearings pursuant to this subparagraph, must by approved by a majority of the Commission, or by a majority of the members present at a meeting at which at least a quorum of four members is present.

"(g) In case of contumacy or refusal to obey a subpoena, any district court of the United States or the United States court of any territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or is domiciled or transacts business, or has appointed an agent for receipt of service of process, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a subcommittee thereof, there to produce pertinent, relevant and nonprivileged evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof."

Sec. 507. Section 105 of the Civil Rights Act of 1957 (42 U.S.C. 1975d; 71 Stat. 636), as amended by section 401 of the Civil Rights Act of 1960 (42 U.S.C. 1975d(h); 74 Stat. 89),[9] is further amended by adding a new subsection at the end to read as follows:

"(i) The Commission shall have the power to make such rules and regulations as are necessary to carry out the purposes of this Act."

## TITLE VI—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

Sec. 601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Sec. 602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance of guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured

[7] 42 U.S.C.A. § 1975d(a).
[8] 42 U.S.C.A. § 1975d(g).
[9] 42 U.S.C.A. § 1975d(h).

by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program of activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Sec. 603. Any department or agency action taken pursuant to section 602 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 602, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 10 of the Administrative Procedure Act, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

Sec. 604. Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is extended by way of a contract of insurance or guaranty.

Sec. 605. Nothing contained in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

## TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY

DEFINITIONS

Sec. 701. For the purposes of this title—

(a) The term "person" includes one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof, (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954; *Provided*, That during the first year after the effective date prescribed in subsection (a) of section 716, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers: *Provided further*, That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin and the President shall utilize his existing authority to effectuate this policy.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person; but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which

is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) one hundred or more during the first year after the effective date prescribed in subsection (a) of section 716, (B) seventy-five or more during the second year after such date or fifty or more during the third year, or (c) twenty-five or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce;

(3) has chartered a local labor organization or subsidiary body which representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

EXEMPTION

Sec. 702. This title shall not apply to an employer with respect the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment and indi-

vidual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum, of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of productions or to employees who work in different locations, provided that such differences are not the result of an intention to

discrimination because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiate is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d).[10]

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the to any group because of race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, or admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number of percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

Sec. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against an individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Sec. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party, who shall be appointed by the President by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of two years, one for a term of three year, one for a term of four years, one for a term of five years, beginning from the date of enactment of this title, but their successors shall be appointed for terms of five years, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commissions, and shall appoint, in accordance with the civil service laws, such officers, agents, attorneys, and employees as it deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the Classification Act of 1949, as amended. The Vice Chairman shall act as Chairman in the absence or disability of the

[10] 29 U.S.C.A. § 206(d).

Chairman or in the event of a vacancy in that office.

(b) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(c) The Commission shall have an official seal which shall be judicially noticed.

(d) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(e) The Federal Executive Pay Act of 1956, as amended (5 U.S.C. 2201–2209),[11] is further amended—

(1) by adding to section 105 thereof (5 U.S.C. 2204) the following clause:

"(32) Chairman, Equal Employment Opportunity Commission"; and

(2) by adding to clause (45) of section 106(a) thereof (5 U.S.C. 2205(a)) the following: "Equal Employment Opportunity Commission (4)."

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this title.

(g) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken, or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public.

(6) to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 706, or for the institution of a civil action by the Attorney General under Section 707, and to advise, consult, and assist the Attorney General on such matters.

(h) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court.

(i) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(j) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 9 of the Act of August 2, 1939, as amended (the Hatch Act), notwithstanding any exemption contained in such section.

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

Sec. 706 (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets for the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by

[11] 5 U.S.C.A. § 2201 et seq.

informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission, without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(c) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking ay action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy such charge shall be filed by the Commission with the State or local agency.

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance.

(f) Each United States district court and each United States court of a place subject to the

jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101–115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued a civil action brought under subsection (e), the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under subsection (e) and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Sec. 707 (a) Whenever the Attorney General has reasonable cause to believe of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit

judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case of hearing at the earliest practicable date and to cause the case to be in every way expedited.

EFFECT ON STATE LAWS

Sec. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

Sec. 709 (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, utilize the services of such agencies and their employees and, notwithstanding any other provision of law, may reimburse such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements and under which no person may bring a civil action under section 706 in any cases or class of cases specified, or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

(c) Except as provided in subsection (d), every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls and apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which such applications were received, and shall furnish to the Commission, upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would

result in undue hardship may (1) apply to the Commission for an exemption from the application of such regulation or order, or (2) bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, and labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief.

(d) The provisions of subsection (c) shall not apply to any employer, employment agency, and labor organization, or joint labor-management committee with respect to matters occurring in any State or political subdivision thereof which has a fair employment practice law during any period in which such employer, employment agency, and labor organization, or joint labor-management committee keeps or is required to keep as are necessary because of differences in coverage or methods of enforcement between the State or local law and the provisions of this title. Where an employer is required by Executive Order 10925, issued March, 6, 1961, or by any other Executive order prescribing fair employment practices for Government contractors and subcontractors, or by rules or regulations issued thereunder, to file reports relating to his employment practices with any Federal agency or committee, and he substantially in compliance with such requirements, the Commission shall not require him to file additional reports pursuant to subsection (c) of this section.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

INVESTIGATORY POWERS

Sec. 710 (a) For the purposes of any investigation of a charge filed under the authority contained in section 706, the Commission shall have authority to examine witnesses under oath and to require the production of documentary evidence relevant or material to the charge under investigation.

(b) If the respondent named in a charge filed under section 706 fails or refuses to comply with a demand of the Commission for permission to examine or to copy evidence in conformity with the provisions of section 709 (a), or if any person required to comply with the provisions of section 709 (c) or (d) fails or refuse to do so, or if any person fails or refuses to comply with a demand by the Commission to give testimony under oath, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission have jurisdiction to issue to such person an order requiring him to comply with the provisions of section 709 (c) or (d) or to comply with the demand of the Commission, but the attendance of a witness may not be required outside the State where he is found, resides, or transacts business and the production of evidence may not be required outside the State where such evidence is kept.

(c) Within twenty days after the service upon any person charged under section 706 of a demand by the Commission for the production of documentary evidence or for permission to examine or to copy evidence in conformity with the provisions of section 709(a), such person may file in the district court of the United States for the judicial district in which he resides, is found, or transacts business, and serve upon the Commission a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this title or with the limitations generally applicable to compulsory process or upon any constitutional or other legal right or privilege of such person. No objection which is not raised by such a petition may be urged in the defense to a proceeding initiated by the Commission under subsection (b) for enforcement of such a demand unless such proceeding is commenced by the Commission prior to the expiration of the twenty-day period, or unless the court determines that the defen-

dant could not reasonably have been aware of the availability of such ground of objection.

(d) In any proceeding brought by the Commission under subsection (b), except as provided in subsection (c) of this section, the defendant may petition the court for an order modifying or setting aside the demand of the Commission.

NOTICES TO BE POSTED

Sec. 711. (a) Every employer, employment agency, labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS' PREFERENCE

Sec. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

RULES AND REGULATIONS

Sec. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

FORCIBLY RESISTING THE COMMISSION OR ITS REPRESENTATIVES

Sec. 714. The provisions of section 111, title 18, United States Code, shall apply to officers, agents, and employees of the Commission in the performance of their official duties.

SPECIAL STUDY BY SECRETARY OF LABOR

Sec. 715. The Secretary of Labor shall make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected. The Secretary of Labor shall make a report to the Congress not later than June 30, 1965, containing the results of such study and shall include in such report such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable.

EFFECTIVE DATE

Sec. 716. (a) This title shall become effective one year after the date of its enactment.

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c) The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purposes of enabling the leaders of groups whose members will be affected by this title to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this title when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment

opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.

### TITLE VIII—REGISTRATION AND VOTING STATISTICS

Sec. 801. The Secretary of Commerce shall promptly conduct a survey to compile registration and voting statistics in such geographic areas as may be recommended by the Commission on Civil Rights. Such a survey and compilation shall, to the extent recommended by the Commission on Civil Rights, only include a count of persons of voting age by race, color, and national origin, and determination of the extent to which such persons are registered to vote, and have voted in any statewide primary or general election in which the Members of the United States House of Representatives are nominated or elected, since January 1, 1960. Such information shall also be collected and compiled in connection with the Nineteenth Decennial Census, and at such other times as the Congress may prescribe. The provisions of section 9 and chapter 7 of title 13, United States Code, shall apply to any survey, collection, or compilation of registration and voting statistics carried out under this title: *Provided, however*, That no person shall be compelled to disclose his race, color, and national origin, or questioned about his political party affiliation, how he voted, or the reasons therefore, nor shall any penalty be imposed for his failure or refusal to make such disclosure. Every person interrogated orally, by written survey or questionnaire or by any other means with respect to such information shall be fully advised with respect to his right to fail or refuse to furnish such information.

### TITLE IX—INTERVENTION AND PROCEDURE AFTER REMOVAL IN CIVIL RIGHTS CASES

Sec. 901. Title 28 of the United States Code, section 1447(d)[12] is amended to read as follows:

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

Sec. 902. Whenever an action has been commenced in any court of the United States seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race, color, and national origin, the Attorney General for or in the name of the United States may intervene in such action upon timely application if the Attorney General certifies that the case is of general public importance. In such action the United States shall be entitled to the same relief as if it had instituted the action.

### TITLE X—ESTABLISHMENT OF COMMUNITY RELATIONS SERVICE

Sec. 1001. (a) There is hereby established in and as a part of the Department of Commerce a Community Relations Service (hereinafter referred to as the "Service"), which shall be headed by a Director who shall be appointed by the President with the advice and consent of the Senate for a term of four years. The Director is authorized to appoint, subject to the civil service laws and regulations, such other personnel as may be necessary to enable the Service to carry out its functions and duties, and to fix their compensation in accordance with the Classification, Act of 1949, as amended. The Director is further authorized to procure services as authorized by section 15 of the Act of August 2, 1946 (60 Stat. 810; 5 U.S.C. 55(a)), but at rates for individuals not in excess of $75 per diem.

(b) Section 106(a) of the Federal Executive Pay Act of 1956, as amended (5 U.S.C. 2205(a))[13] is further amended by adding the following clause thereto:

"(52) Director, Community Relations Service."

Sec. 1002. It shall be the function of the Service to provide assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, and national origin which impair the rights of persons in such communities under the Constitution or laws of the United States or which affect interstate commerce. The Service may offer its services in cases of such disputes, disagreements, or difficulties whenever, in its judgment, peaceful relations among the citizens of the community involved are threatened thereby, and it may offer its services either upon its own motion or upon the request of an appropriate State or local official or other interested person.

[12] 28 U.S.C.A. § 1447(d).

[13] 5 U.S.C.A. § 2205(a).

Sec. 1003. (a) The Service shall, whenever possible, in performing its function, seek and utilize the cooperation of appropriate State or local, public, or private agencies.

(b) The activities of all officers and employees of the Service in providing conciliation assistance shall be conducted in confidence and without publicity, and the Service shall hold confidential any information acquired in the regular performance of its duties upon the understanding it would be so held. No officer or employee of the Service shall engage in the performance of investigative or prosecuting functions of any department or agency in any litigation arising out of a dispute in which he acted on behalf of the Service. Any officer or other employee of the Service, who shall make public in any manner whatever any information in violation of this subsection, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000 or imprisoned not more than one year.

Sec. 1004. Subject to the provisions of sections 205 and 1003(b) the Director shall, on or before January 31 of each year, submit to the Congress a report of the activities of the Service during the preceding fiscal year.

### TITLE XI—MISCELLANEOUS

Sec. 1101. In any proceeding for criminal contempt arising under title II, III, IV, V, VI, VII of this Act, the accused, upon demand therefor, shall be entitled to a trial by jury, which shall conform as near as may be to the practice in criminal cases. Upon conviction, the accused shall not be fined more than $1,000 or imprisoned for more than six months.

This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to the misbehavior, misconduct, or disobedience of any officer of the court in respect to writs, orders, or process of the court. No person shall be convicted of criminal contempt hereunder unless the act or omission constituting such contempt shall have been intentional, as required in other cases of criminal contempt.

Nor shall anything herein be construed to deprive courts of their power, by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, process, order, rule, decree, or command of the court in accordance with the prevailing usages of law and equity, including the power of detention.

Sec. 1102. No person should be put twice in jeopardy under the laws of the United States for the same act or omission. For this reason, an acquittal or conviction in a prosecution for a specific crime under the laws of the United States shall bar a proceeding for criminal contempt, which is based upon the same act or omission and which arises under the provisions of this Act; and an acquittal or conviction in a proceeding for criminal contempt, which arises under the provisions of this Act, shall bar a prosecution for a specific crime under the laws of the United States based upon the same act or omission.

Sec. 1103. Nothing in this Act shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General or of the United States or any agency or officer thereof under existing law to institute or intervene in any action or proceeding.

Sec. 1104. Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

Sec. 1105. There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

Sec. 1106. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

Approved July 2, 1964.

# From Segregation to Civil Rights

## Voting Rights Act of 1965

The Voting Rights Act of 1965 is a sweeping federal law that seeks to prevent voting discrimination based on race, color, or membership in a language minority group. The act was passed in the aftermath of one of the more violent episodes in the history of the civil rights movement. In 1965 Dr. Martin Luther King Jr., led a group of civil rights supporters on a march to Selma, Alabama, to demand voting rights. They were met by police violence that resulted in the deaths of several marchers. The Selma violence galvanized voting rights supporters in Congress. President Lyndon B. Johnson responded by introducing the Voting Rights Act, the most sweeping piece of civil rights law in one hundred years. Congress enacted the measure five months later.

The passage of the Voting Rights Act was a watershed event in U.S. history. For the first time the federal government undertook voting reforms that had traditionally been left to the states. The act prohibits the states and their political subdivisions from imposing voting qualifications or prerequisites to voting or from imposing standards, practices, or procedures that deny or curtail the right of a U.S. citizen to vote because of race, color, or membership in a language minority group. The act was extended in 1970 and again in 1982, when its provisions were given an additional term of twenty-five years.

Southern states challenged the legislation as a dangerous attack on states' rights, but in *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966), the U.S. Supreme Court upheld the constitutionality of the act, even though it was, in the words of Chief Justice Earl Warren, "inventive."

The initial act covered the seven states in the South that had used poll taxes, literacy tests, and other devices to obstruct registration by African Americans. Under the law a federal court can appoint federal examiners, who are authorized to place qualified persons on the list of eligible voters. The act waived accumulated poll taxes and abolished literacy tests and similar devices in the states to which it applied.

In addition, the act requires the seven states to obtain "preclearance" from the Justice Department or the U.S. District Court for the District of Columbia before changing the electoral system. The 1982 extension of the act expanded this provision to include all the states. Thus, a voter in any state may challenge a voting practice or procedure on the grounds that it is racially discriminatory either by intent or by effect.

The act has been used to create congressional districts that have a majority of minority voters so as to ensure minority representation. In *Shaw v. Hunt,* 517 U.S. 899 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996), however, the Supreme Court ruled that the redrawing of a North Carolina congressional district into a "bizarre-looking" shape so as to include a majority of African Americans violated the Equal Protection Clause of the Fourteenth Amendment and therefore could not be justified by the Voting Rights Act.

# Voting Rights Act of 1965

For Legislative History of Act, see p. 2437

Public Law 89–100; 79 Stat. 437

[S. 1564]

An Act to enforce the Fifteenth Amendment to the Constitution of the United States, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:*

This Act shall be known as the "Voting Rights Act of 1965."

Sec. 2. No voting qualifications or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Sec. 3 (a) Whenever the Attorney General institutes a proceeding under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the Court shall authorize the appointment of Federal examiners by the United States Civil Service Commission in accordance withe section 6 to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the guarantees of the fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such examiners is necessary to enforce such guarantees or (2) as part of any final judgment if the court finds that violations of the Fifteenth Amendment justifying equitable relief have occurred in such State or subdivision: *Provided*, That the court need not authorize the appointment of examiners if any incidents of denial or abridgement of the right to vote on account of race or color (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing of effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(b) If in a proceeding instituted by the Attorney General under any statute to enforce the guarantees of the Fifteenth Amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, it shall suspend the use of tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary.

(c) If in any proceeding instituted by the Attorney General under any statute to enforce the guarantees of the Fifteenth Amendment in any State or political subdivision the court finds that violations of the Fifteenth Amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying abridging the right to vote on account of race or color: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

Sec. 4 (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) or in political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridg-

ing the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reasons to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1, 1964.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e) (1) Congress hereby declares that to secure the rights under the Fourteenth Amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

Sec. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in

the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

Sec. 6. Whenever (a) a court has authorized the appointment of examiners pursuant to the provisions of section 3(a), or (b) unless a declaratory judgment has been rendered under section 4(a), the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 4(b) that (1) he has received complaints in writing from twenty or more residents of such political subdivision alleging that they have been denied the right to vote under color of law on account of race or color, and that he believes such complaints to be meritorious, or (2) that in his judgment (considering, among other factors, whether the ration of nonwhite persons to white persons registered to vote within such subdivision appears to him to be reasonably attributable to violations of the Fifteenth Amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the fifteenth amendment), the appointment of examiners is otherwise necessary to enforce the guarantees of the Fifteenth Amendment, the Civil Service Commission shall appoint as many examiners for such subdivision as it may deem appropriate to prepare and maintain lists of persons eligible to vote in Federal, State and local elections. Such examiners, hearing officers provided for in section 9(a), and other persons deemed necessary by the Commission to carry out the provisions and purposes of this Act shall be appointed, compensated, and separated without regard to the provisions of any statute administered by the Civil Service Commission, and service under this Act shall not be considered employment for the purposes of any statute administered by the Civil Service Commission, except the provisions of section 9 of the Act of August 2, 1939, as amended (5 U.S.C. 118i), prohibiting partisan political activity: *Provided*, That the Commission is authorized, after consulting the head of the appropriate department or agency, to designate suitable persons in the official service of the United States, with their consent, to serve in these positions. Examiners and hearing officers shall have the power to administer oaths.

Sec. 7. (a) The examiners for each political subdivision shall, at such places as the Civil Service Commission shall by regulation designate, examine applicants concerning their qualifications for voting. An application to an examiner shall be in such form as the Commissioner may require and shall contain allegations that the applicant is not otherwise registered to vote.

(b) Any person whom the examiner finds, in accordance with instructions received under section 9(b), to have the qualifications prescribed by State law not inconsistent with the Constitution and laws of the United States shall promptly be placed on a list of eligible voters. A challenge to such listing may be made in accordance with section 9(a) and shall not be the basis for a prosecution under section 12 of this Act. The examiner shall certify and transmit such list, and any supplements as appropriate, at least once a month, to the offices of the appropriate election officials, with copies to the Attorney General and the attorney general of the State, and any such lists and supplements thereto transmitted during the month shall be available for public inspection on the last business day of the month and in any event not later than the forty-fifth day prior to any election. The appropriate State or local election official shall place such names on the official voting list. Any person whose name appears on the examiner's

list shall be entitled and allowed to vote in the election district of his residence unless and until the appropriate election officials shall have been notified that such person has been removed from such list in accordance with subsection (d): *Provided*, That no person shall be entitled to vote in any election by virtue of this Act unless his name shall have been certified and transmitted on such a list to the offices of the appropriate election officials at least forty-five days prior to such election.

(c) The examiner shall issue to each person who name appears on such a list a certificate evidencing his eligibility to vote.

(d) A person whose name appears on such a list shall be removed therefrom by an examiner if (1) such person has been successfully challenged in accordance with the procedure prescribed in section 9, or (2) he has been determined by an examiner to have lost his eligibility to vote under State law not inconsistent with the Constitution and the laws of the United States.

Sec. 8. Whenever an examiner is serving under this Act in any political subdivision, the Civil Service Commission may assign, at the request of the Attorney General, one or more persons, who may be officers of the United States, (1) to enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote, and (2) to enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated. Such persons so assigned shall report to an examiner appointed for such political subdivision, to the Attorney General, and if the appointment of examiners has been authorized pursuant to section 3(a), to the court.

Sec. 9. (a) Any challenge to a listing on an eligibility list prepared by an examiner shall be heard and determined by a hearing officer appointed by and responsible to the Civil Service Commission and under such rules as the Commission shall by regulation designate, and within ten days after the listing of the challenged person is made available for public inspection, and if supported by (1) the affidavits of at least two persons having personal knowledge of the facts constituting grounds for the challenge, and (2) a certification that a copy of the challenge and affidavits have been served by mail or in person upon the person challenged at his place of residence set out in the application. Such challenge shall be determined within fifteen days after has been filed. A petition for review of the decision of the hearing officer may be filed in the United States court of appeals for the circuit in which the person challenged resides within fifteen days after service of such decision by mail on the person petitioning for review but no decision of a hearing officer shall be reversed unless clearly erroneous. Any person listed shall be entitled and allowed to vote pending final determination by the hearing officer and by the court.

(b) The times, places, procedures, and form for application and listing pursuant to this Act and removal from eligibility lists shall be prescribed by regulations promulgated by the Civil Service Commission and the Commission shall, after consultation with Attorney General, instruct examiners concerning applicable State law not inconsistent with the Constitution and laws of the United States with respect to (1) the qualifications required for listing, and (2) loss of eligibility to vote.

(c) Upon the request of the applicant or challenge or on its own motion the Civil Service Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter pending before it under the authority of this section. In case of contumacy or refusal to obey a subpoena, any district court of the United States or the United States court of any territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides of is domiciled or transacts business, or has appointed an agent for receipt of service of process, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a hearing officer, there to produce pertinent, relevant, and nonprivileged documentary evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Sec. 10. (a) The Congress finds that the requirement of the payment of a poll tax as a

precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race color. Upon the basis of these findings, Congress declares the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.

(b) In the exercise of the powers of Congress under section 5 of the Fourteenth Amendment and section 2 of the Fifteenth Amendment, the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefore enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) and the purposes of this section.

(c) The district courts of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designates to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

(d) During the pendency of such actions, and thereafter if the courts, notwithstanding this action by the Congress, should declare the requirement of the payment of a poll tax to be constitutional, no citizen of the United States who is a resident of a State or political subdivision with respect to which determinations have been made under subsection 4(b) and declaratory judgment has not been entered under subsection 4(a), during the first year he becomes otherwise entitled to vote by reason of registration by State or local officials or listing by an examiner, shall be denied the right to vote for failure to pay a poll tax if he tenders payment of such tax for the current year to an examiner or to the appropriate State or local official at least forty-five days prior to election, whether or not such tender would be timely or adequate under State law. An examiner shall have authority to accept such payment from any person authorized by this Act to make an application for listing, and shall issue a receipt for such payment. The examiner shall transmit promptly any such poll tax payment to the office of the State or local official authorized to receive such payment under State law, together with the name and address of the applicant.

Sec. 11. (a) No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this Act or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e).

(c) Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however*, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, or Delegates or Commissioners from the territories or possessions, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the

same be fined not more than $10,000 or imprisoned not more than five years, or both.

Sec. 12. (a) Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, 7, or 10 or shall violate section 11(a) or (b), shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) Whoever, within a year following an election in a political subdivision in which an examiner has been appointed (1) destroys, defaces, mutilates, or otherwise alters the marking of a paper ballot which has been cast in such election, or (2) alters any official record of voting in such election tabulated from a voting machine or otherwise, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(c) Whoever conspires to violate the provisions of subsection (a) or (b) of this section, or interface with any right secured by section 2, 3, 4, 5, 7, 10, or 11(a) or (b) shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(d) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2, 3, 4, 5, 7,10, 11, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes.

(e) Whenever in any political subdivision in which there are examiners appointed pursuant to this Act any persons allege to such an examiner within forty-eight hours after the closing of the polls that notwithstanding (1) their listing under this Act or registration by an appropriate election official and (2) their eligibility to vote, they have not been permitted to vote in such election, the examiner shall forthwith notify then Attorney General may forthwith file with the district court and application for an order providing for the marking, casting, and counting of the ballots of such persons and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto. The district court shall hear and determine such matters immediately after the filing of such application. The remedy provided in this subsection shall not preclude any remedy available under State of Federal law.

(f) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.

Sec. 13. Listing procedures shall be terminated in any political subdivision of any State (a) with respect to examiners appointed pursuant to clause (b) of section 6 whenever the Attorney General notifies the Civil Service Commission, or whether the District Court for the District of Columbia determines in an action for declaratory judgment brought by any political subdivision with respect to which the Director of the Census has determined that more than 50 per centum of the nonwhite persons of voting age residing therein are registered to vote, (1) that all persons listed by an examiner for such subdivision have been placed on the appropriate voting registration roll, and (2) that there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color in such subdivision, and (b), with respect to examiners appointed pursuant to section 3(a), upon order of the authorizing court. A political subdivision may petition the Attorney General for the termination of listing procedures under clause (a) of this section, and may petition the Attorney General to request the Director of the Census to take such survey or census as may be appropriate for the making of the determination provided for in this section. The District Court for the District of Columbia shall have jurisdiction to require such survey or census to be made by the Director of the Census and it shall require him to do so if it deems the Attorney General's refusal to request such survey or census to be arbitrary or unreasonable.

Sec. 14. (a) All cases of criminal contempt arising under the provisions of this Act shall be governed by section 151 of the Civil Rights Act of 1957 (42 U.S.C. 1995).

(b) No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 shall

have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.

(c) (1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(d) In any action for a declaratory judgment brought pursuant to section 4 or section 5 of this Act, subpoenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: *Provided*, That no writ of subpoena shall issue for witnesses without the District of Columbia at a greater distance than one hundred miles from the place of holding court without the permission of the District Court for the District of Columbia being first upon proper application and cause shown.

Sec. 15. Section 2004 of the Revised Statutes (42 U.S.C. 1971),[1] as amended by section 131 of the Civil Rights Act of 1957 (71 Stat. 637), and amended by section 601 of the Civil Rights Act of 1960 (74 Stat. 90), and as further amended by section 101 of the Civil Rights Act of 1964 (78 Stat. 241), is further amended as follows:

(a) Delete the word "Federal" wherever it appears in subsections (a) and (c);

(b) Repeal subsection (f) and designate the present subsections (g) and (h) as (f) and (g), respectively.

Sec. 16. The Attorney General and the Secretary of Defense, jointly, shall make a full and complete study to determine whether, under the laws or practices of any State or States, there are preconditions to voting, which might tend to result in discrimination against citizens serving in the Armed Forces of the United States seeking to vote. Such officials shall, jointly, make a report to the Congress not later than June 30, 1966, containing the results of such study, together with a list of any States in which such preconditions exist, and shall include in such report such recommendations for legislation as they deem advisable to prevent discrimination in voting against citizens serving in the Armed Forces of the United States.

Sec. 17. Nothing in this Act shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision.

Sec. 18. There are hereby authorized to be appropriate such sums as are necessary to carry out the provisions of this Act.

Sec. 19. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be not be affected thereby.

Approved August 6, 1965.

[1] 42 U.S.C.A. § 1971.

# Women's Rights


- SENECA FALLS DECLARATION OF SENTIMENTS
- AIN'T I A WOMAN?
- BRADWELL V. ILLINOIS
- NATIONAL ORGANIZATION FOR WOMEN STATEMENT OF PURPOSE
- GRISWOLD V. CONNECTICUT


The women's rights movement in the United States began in the nineteenth century when some women reformers demanded the right to vote and the same legal rights as men. The participation of women in the abolitionist movement played a crucial role in crystallizing their dissatisfaction with the lack of rights accorded to females. Some, like Lucy Stone, saw parallels between women and slaves: both were expected to be passive, cooperative, and obedient. In addition, the legal status of both slaves and women was unequal to that of white men. Sojourner Truth, an African American evangelist and reformer, also recognized this connection and soon was speaking before women's rights groups, advocating the right to vote.

After the Civil War ended in 1865, many of these women reformers devoted their energies to gaining women's suffrage. Susan B. Anthony, Elizabeth Cady Stanton, and Lucy Stone were the best-known suffrage leaders. Anthony and Stanton fought for a federal constitutional amendment granting women the right to vote, while Stone and her followers sought amendments in state constitutions. The Nineteenth Amendment to the U.S. Constitution, ratified in 1920, finally gave women the right to vote.

During the nineteenth century, women encountered rigid cultural and legal barriers when they sought to enter business and the professions. Women who married had traditionally suffered a loss of legal status, as the identity of the wife merged into that of the husband. He was a legal person but she was not. A married woman could not sign a contract without the signature of her husband. Upon marriage, he received all her personal property and managed all property that she owned. In return, the husband was obliged to support his wife and children. By the 1850s women's rights supporters had convinced many state legislatures to pass married women's separate property acts. These acts gave women the legal right to retain ownership and control of property they brought into the marriage.

Women also had difficulty entering the professions, because the cultural stereotypes of the period dictated that the proper role of an adult woman was to be a wife and mother. According to the prevailing viewpoint, the rough-and-tumble world of business and the professions was no place for women, who had more delicate natures than men. In addition, the male-dominated world believed women to be intellectually inferior and fundamentally incapable of handling the demands of white-collar jobs and the professions. This view was reinforced by the decision in *Bradwell v. Illinois,* 83 U.S. 130, 21 L. Ed. 442 (1872), when the U.S. Supreme Court ruled that it was not unconstitutional for Illinois to deny a woman a license to practice law solely on the basis of her gender.

The quest for women's rights reignited in the 1960s, fueled by the participation of women in the civil rights movement. Just as in the nineteenth century, women compared their legal, economic, and social status with that of persons of color and found similar problems. The National Organization for Women was established in 1966. It quickly became the nation's

largest and most influential feminist organization, but in the process it stimulated opponents of modern feminism to organize as well.

Reproductive rights became a key issue for women in the 1960s. At that time the distribution of birth control devices and information was illegal in many states. In *Griswold v. Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), the Supreme Court struck down a Connecticut law that made the sale and possession of birth control devices a misdemeanor. More importantly, the Court declared that the Constitution contained a right to privacy. In *Eisenstadt v. Baird,* 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972), the Court established that the right of privacy is an individual right and is not limited to married couples.

The *Griswold* and *Eisenstadt* decisions paved the way for *Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), which struck down a Texas law that banned abortions. Justice Harry A. Blackmun concluded that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The *Roe* decision provided women with the right to continue or terminate a pregnancy, at least up to the point of viability. By the 1980s, however, a more conservative Supreme Court began upholding state laws that placed restrictions on this right.

# WOMEN'S RIGHTS

## Seneca Falls Declaration of Sentiments

The feminist political movement began in the nineteenth century with the call for female suffrage. At a convention in Seneca Falls, New York, in July 1848, a group of 240 people (200 women and 40 men) drafted and approved the Declaration of Sentiments. Among those present was Frederick Douglass, a former slave who was now an abolitionist leader. The convention was organized by Lucretia Mott and Elizabeth Cady Stanton, two Quakers whose concern for women's rights was aroused when Mott was denied a seat at an international anti-slavery meeting in London because she was a woman. The delegates adopted a statement of women's rights, deliberately modeled on the Declaration of Independence, as well as a series of resolutions calling for women's suffrage and the reform of marital and property laws that kept women in an inferior status.

### Seneca Falls Declaration of Sentiments

When, in the course of human events, it becomes necessary for one portion of the family of man to assume among the people of the earth a position different from that which they have hitherto occupied, but one to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes that impel them to such a course.

We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed. Whenever any form of government becomes destructive of these ends, it is the right of those who suffer from it to refuse allegiance to it, and to insist upon the institution of a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they were accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object evinces a design to reduce them under absolute despotism, it is their duty to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of the women under this government, and such is now the necessity which constrains them to demand the equal station to which they are entitled.

The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over

her. To prove this, let facts be submitted to a candid world.

He has never permitted her to exercise her inalienable right to the elective franchise.

He has compelled her to submit to laws, in the formation of which she had no voice.

He has withheld from her rights which are given to the most ignorant and degraded men—both natives and foreigners.

Having deprived her of this first right of a citizen, the elective franchise, thereby leaving her without representation in the halls of legislation, he has oppressed her on all sides.

He has made her, if married, in the eye of the law, civilly dead.

He has taken from her all right in property, even to the wages she earns.

He has made her, morally, an irresponsible being, as she can commit many crimes with impunity, provided they be done in the presence of her husband. In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement.

He has so framed the laws of divorce, as to what shall be the proper causes, and in case of separation, to whom the guardianship of the children shall be given, as to be wholly regardless of the happiness of women—the law, in all cases, going upon a false supposition of the supremacy of man, and giving all power into his hands.

After depriving her of all rights as a married woman, if single, and the owner of property, he has taxed her to support a government which recognizes her only when her property can be made profitable to it.

He has monopolized nearly all the profitable employments, and from those she is permitted to follow, she receives but a scanty remuneration. He closes against her all the avenues to wealth and distinction which he considers most honorable to himself. As a teacher of theology, medicine, or law, she is not known.

He has denied her the facilities for obtaining a thorough education, all colleges being closed against her.

He allows her in Church, as well as State, but a subordinate position, claiming Apostolic authority for her exclusion from the ministry, and, with some exceptions, from any public participation in the affairs of the Church.

He has created a false public sentiment by giving to the world a different code of morals for men and women, by which moral delinquencies which exclude women from society, are not only tolerated, but deemed of little account in man.

He has usurped the prerogative of Jehovah himself, claiming it as his right to assign for her a sphere of action, when that belongs to her conscience and to her God.

He has endeavored, in every way that he could, to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.

Now, in view of this entire disfranchisement of one-half the people of this country, their social and religious degradation—in view of the unjust laws above mentioned, and because women do feel themselves aggrieved, oppressed, and fraudulently deprived of their most sacred rights, we insist that they have immediate admission to all the rights and privileges which belong to them as citizens of the United States.

In entering upon the great work before us, we anticipate no small amount of misconception, misrepresentation, and ridicule; but we shall use every instrumentality within our power to effect our object. We shall employ agents, circulate tracts, petition the State and National legislatures, and endeavor to enlist the pulpit and the press in our behalf. We hope this Convention will be followed by a series of Conventions embracing every part of the country.

# WOMEN'S RIGHTS

## Ain't I a Woman?

Sojourner Truth, 1851

Sojourner Truth was a nineteenth-century African American evangelist who embraced abolitionism and women's rights. A charismatic speaker, she became one of the best-known abolitionists of her day. Born a slave and given the name Isabella Baumfree, she was freed in 1828 when a New York law abolished slavery within the state.

In 1843 she had a religious experience and came to believe that God had commanded her to travel beyond New York to spread the Christian gospel. She took the name Sojourner Truth and traveled throughout the eastern states as an evangelist. Truth soon became acquainted with the abolitionist movement and its leaders. She adopted their message, speaking out against slavery. Her speaking tours expanded as abolitionists realized her effectiveness as a lecturer. Though illiterate, she dictated her life story, *The Narrative of Sojourner Truth,* and sold the book at her lectures as a means of supporting herself.

In the early 1850s, she met leaders of the emerging women's rights movement, most notably Lucretia Mott. Truth recognized the connection between the inferior legal status of African Americans and women in general. Her most famous speech, "Ain't I a Woman?" first given in 1851, challenged cultural beliefs, including the natural inferiority of women, and biblical justifications for the second-class status of women.

### Ain't I a Woman?

Well, children, where there is so much racket there must be something out of kilter. I think that 'twixt the negroes of the South and the women at the North, all talking about rights, the white men will be in a fix pretty soon. But what's all this here talking about?

That man over there says that women need to be helped into carriages, and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages, or over mud-puddles, or gives me any best place! And ain't I a woman? Look at me! Look at my arm! I have ploughed and planted, and gathered into barns, and no man could head me! And ain't I a woman? I could work as much and eat as much as a man—when I could get it—and bear the lash as well! And ain't I a woman? I have borne thirteen children, and seen most all sold off to slavery, and when I cried out with my mother's grief, none but Jesus heard me! And ain't I a woman?

Then they talk about this thing in the head; what's this they call it? [member of audience whispers, "intellect"] That's it, honey. What's that got to do with women's rights or negroes' rights? If my cup won't hold but a pint, and yours holds a quart, wouldn't you be mean not to let me have my little half measure full?

Then that little man in black there, he says women can't have as much rights as men, 'cause Christ wasn't a woman! Where did your Christ come from? Where did your Christ come from?

From God and a woman! Man had nothing to do with Him.

If the first woman God ever made was strong enough to turn the world upside down all alone, these women together ought to be able to turn it back, and get it right side up again! And now they is asking to do it, the men better let them.

Obliged to you for hearing me, and now old Sojourner ain't got nothing more to say.

# Women's Rights

## Bradwell v. Illinois

Myra Bradwell's efforts to gain admission to the Illinois bar resulted in a Supreme Court decision. Bradwell had married a lawyer and read the law with her husband. In 1869 she passed the Illinois bar examination but was refused admission to the bar. She appealed to the Supreme Court, arguing that the Fourteenth Amendment's Equal Protection Clause prevented the state from imposing admission requirements based on gender.

In *Bradwell v. Illinois* in 1872, the Court rejected her constitutional argument. In a concurring opinion that revealed the cultural underpinnings of the period, Justice Joseph P. Bradley supported the Illinois Supreme Court's denial of Bradwell's application to practice law in the state. Bradley articulated the widely held view that the "natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." He further concluded that the "paramount destiny and mission of woman is to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

### *Myra Bradwell, Plff. in Err., v. State of Illinois*

(See S. C. 16 Wall. 130–142.)

[*] 1. The supreme court of Illinois having refused to grant to plaintiff a license to practice law in the courts of that state, on the ground that females are not eligible under the laws of that state, such a decision violates no provision of the Federal Constitution.

2. The 2d section of the 4th article is inapplicable, because plaintiff is a citizen of the state whose action she complains, and that section only other states, in that state.

3. Nor is the right to practice law in the state courts a privileges and immunity of a citizen of the United States within the meaning of the 1st section of the 14th article of Amendment of the Constitution of the United States.

4. The power of a state to prescribe the qualifications for admissions to the bar of its own courts, is unaffected by the 14th Amendment, and this court cannot inquire into the reasonableness or properly of the rules it may be prescribe.

[No. 12.]

*Argued Jan. 18, 1873. Decided Apr. 15, 1873.*

In Error to the Supreme Court of the State of Illinois.

The petition in this case was filed in the court below, by the plaintiff in error, for license to practice law. The said application having been denied, the petitioner sued out this writ of error.

The case is stated by the court.

Mr. Matt. H. Carpenter, for plaintiff in error:

The plaintiff in error is a married woman, of full age, a citizen of the United States, and of the state of Illinois; was ascertained and certified to

*Headnotes by Mr. Justice Miller.

be duly qualified in respect to character and attainments; but was denied admission to the bar for the sole reason that she was a married woman. This is the error relied upon to reverse the proceedings below.

By the rules of this court, no person can be admitted to practice at the bar without service for a fixed term in the highest court of the state in which such person resides. Consequently a denial of admission in the highest court of the state is an insurmountable obstacle to admission to the bar of this court.

This record, therefore, presents the broad question whether a married woman, being a citizen of the United States and of a state, and possessing the necessary qualifications, is entitled by the Constitution of the United States to be admitted to practice as an attorney and counselor at law in the courts of the state in which she resides. This is a question, not taste, propriety or politeness, but of civil right.

I have more faith in female suffrage, to reform the abuse of our election system in the large cities, than I have in the penal election laws to be enforced by soldiers and marines. Who believes that if ladies were admitted to seats in Congress, or upon the bench, or were participating in discussions at the bar, such proceedings would thereby be rendered less refined, or that less regard would be paid to the rights of all?

But whether women should be admitted to right of suffrage is one thing and whether this end has already been accomplished is quite another. The 14th Amendment forbids the states to make or enforce any law which shall abridge the privileges or immunities of a citizen. But whether the right to vote is covered by the phrase "the privileges and immunities" was much discussed under the provisions of the old Constitution; and at least one of the earliest decisions drew a distinction between "privileges and immunities" and political rights. On the other hand, Mr. Justice Washington, in a celebrated case, expressed the opinion that the right to vote and hold office was included in this phrase. But in neither of the cases was this point directly involved, and both opinions are *obiter dicta* in relation to it.

But the 14th and 15th Amendments seem to settle this question against the right of female suffrage. These Amendments seem to recognize the distinction at first pointed out between "privileges and immunities" and the right to vote.

The 14th Amendment declares "All persons born and naturalized in the United States, etc., are citizens of the United States, and of the state wherein they reside." Of course women, as well as men, are included in this provision, and recognized as citizens. This Amendment further decisions: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." If the privileges and immunities of a citizen cannot be abridged, then, of course, the privileges and immunities of all citizens must be the same. The 2d section of this Amendment provides, that

> "representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians, not taxed. But when the right to vote at an election, etc., denied to any of the male inhabitants, being twenty-one years of age, etc., the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens thenty-one years of age in such state."

It cannot be denied that the right or power of a state to exclude a portion of its male citizens from the right to vote is recognized by this 2d section; from which it follows that the right to vote is not one of the privileges and immunities which the 1st section declared shall not be abridged by any state.

The 14th Amendment executes itself in every state of the Union. Whatever are the privileges and immunities of a citizen in the state of New York, such citizen emigrating, carries them with him into any other state of the Union. It utters the will of the United States in every state, and silences every state Constitution, usage or law which conflicts with it. If to be admitted to the bar, on attaining the age and learning required by law, be one of the privileges of a white citizen in the state of New York, it is equally the privilege of a colored citizen in that state; and if in that state, then in any state. If no state may make or enforce any law to abridge the privileges of a citizen, it must follows that the privileges of all citizens are the same.

The 14th and 15th Amendments distinguish between privileges and rights, and it must be confessed that it is paradoxical to say, as the 14th Amendment clearly does, that the privileges of a citizen shall not be abridged, while his right to vote may be. But a judicial construction of the

Constitution is wholly different from a mere exercise is philology. The question is not whether certain words are aptly employed, but the context must be searched to ascertain the sense in which such words were used.

It is evident that there are certain privileges and immunities which belong to a citizen of the United States, as such; otherwise it would be nonsense for the 14th Amendment to prohibit a state from abridging them; and it is equally evident from the 14th Amendment that the right to vote is not one of those privileges. And the question recurs, whether or not admission to the bar, the proper qualification being possessed, is one of the privileges which a state may not deny.

In *Cummings v. Mo.* 4 Wall. 321, 18 L. ed. 362, this court says:

> "In France, deprivation or suspension of the civil rights or some of them—and among these the right of voting, of eligibility to office, of taking part in family councils, of being guardian or trustee, of bearing arms, and of teaching or being employed in a school or seminary of learning—are punishments prescribed by her Code.
>
> The theory upon which our political institutions rest is, that all men have certain inalienable rights; that among these are life, liberty, and the pursuit of happiness, all avocations, all honors, all positions are alike open to every one, and that in the protection of these rights are all equal before the law. Any deprivation or extension of any of these rights for past conduct is punishment, and can be in no otherwise defined."

No broader or better enumeration of the privileges which pertain to American citizenship could be given. "Life, liberty, and the pursuit of happiness; and in the pursuit of happiness all avocations, all honors, all positions are alike open to every one; and in the protection of these rights all are equal before the law."

In *Ex parte Garland*, 4 Wall. 378, 18 L. ed. 370, this court says:

> "The profession of an attorney and counselor is not, like an office, created by Congress. which depends for its continuance, its powers and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counselors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. They are officers of the court admitted as such by its order. upon evidence of their possessing sufficient legal learning and fair private character; . . . they hold their office during good behavior and can only be deprived of it for misconduct ascertained and declared by the judgment of the court, after opportunity to be heard has been offered." *Ex parte Heyfron*, 7 How. (Miss.) 127; *Fletcher v. Daingerfield*, 20 Cal. 430.
>
> "Their admissions or their exclusion is not the exercise of a mere ministerial power. It is exercise of judicial power, and has been so held in numerous cases."

It is now well settled that the courts in admitting attorneys to and in expelling them from the bar, act judicially, and that such proceedings are subject to review on writ of error or appeal. as the case may be. *In re Cooper*, 22 N. Y. 67, *Strother v, Mo.* 1 Mo. 005; *Ex parte Secombe*, 19 How. 9, 15 L. ed. 565; *Ex parte Garland*, supra.

From these cases the conclusion is irresistible that the profession of the law, like the clerical profession and that of medicine, is an avocation open to every citizen of the United States. And while the legislature may prescribe qualifications for entering upon this pursuit, it cannot, under the guise of fixing qualifications, exclude a class of citizens from admission to the bar. The legislature may say at what age candidates shall be admitted; may elevate or depress the standard of learning required. But a qualification to which a whole class of citizens can never attain is not a regulation of admission to the bar, but is, as to such citizens, a prohibition. For instance, a state legislature could not, in enumerating the qualifications, require the candidate to be a white citizen. I presume it will be admitted that such an act would be void. The only provisions in the Constitution of the United States which secures to colored male citizens the privilege of admission to the bar, or the pursuit of the other ordinary avocations of life is the provision that "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens." If this provision protects the colored citizen, then it protects every citizen, black or white, male or female.

Why may a colored citizen buy, hold and sell land in any state of the Union? Because he is a citizen of the United States, and that is one of the privileges of a citizen. Why may a colored citizen be admitted to the bar? Because he is a citizen, and that is one of the avocations open to every

citizen, and no state can abridge his right to pursue it. Certainly no other reason can be given.

Now, let us come to the case of Myra Bradwell. She is a citizen of the United States and of the state of Illinois, residing therein. She has been judicially ascertained to be of full age, and to possess the requisite character and learning. Indeed, the court below in its opinion found in the record says: "Of the ample qualifications of the applicant we have no doubt." Still, admission to the bar was denied the petitioner; not upon the ground that she was not a citizen; not for want of age or qualification; not because the profession of the law is not one of those avocations which are open to every American citizen as a matter of right, upon complying with the reasonable regulations prescribed by the legislature; but upon the sole ground that inconvenience would result from permitting her to enjoy her legal rights in this, to wit: that her clients might have difficulty in enforcing the contracts they might make with her as their attorney, because of her being a married woman.

Now, with entire respect to that court, it is submitted that this argument *ab inconvenienti*, which might have been urged with whatever force belongs to it against adopting the 14th Amendment in the full and proper operation, now that it has been adopted.

I maintain that the 14th Amendment opens to every citizen of the United States, male or female, black or white, married or single, the honorable professions as well as the servile employments of life; and that no citizen can be excluded from any one of them. Intelligence, integrity and honor are the only qualifications that can be prescribed as conditions precedent to an entry upon any honorable pursuit or profitable avocation, and all the privileges and immunities which I vindicate to a colored citizen. I vindicate to our mothers, our sisters and our daughters.

Of a bar composed of men and women of equal integrity and learning, women might be more or less frequently retained as the taste or judgment of clients might dictate; but the broad shield of the Constitution is over all, and protects each in that measure of success which his or her individual merits may secure.

(No counsel appeared for the defendant in error.)

Mr. Justice Miller delivered the opinion of the court:

The plaintiff in error, residing in the state of Illinois, made application to the judges of the supreme court of that state for a license to practice law. She accompanied her petition with the usual certificate from an inferior court, of her good character, and that on due examination she had been found to possess the requisite qualifications. Pending this application, she also filed an affidavit to the effect "that she was born in the state of Vermont; that she was (had been) a citizen of that state; that she is now a citizen of the United States, and has been for many years past a resident of the city of Chicago in the state of Illinois." And with this affidavit she also filed a paper claiming that under the foregoing facts she was entitled to the license paid for, by virtue of the 2d section of the 4th article of the Constitution of the United States, and of the 14th article of Amendment of that instrument.

The statute of Illinois on this subject enacts that no person shall be permitted to practice as an attorney or counselor at law, or the commence, conduct, or defend any action, suit, or plaint, in which he is not a party concerned, in any court of record within this state, either by using or subscribing his own name or the name of any other person, without having previously obtained a license for that purpose from two justices of the supreme court, which license shall constitute the person receiving the same an attorney and counselor at law, and shall authorize him to appear in all the courts of record within this state and there to practice as an attorney and counselor at law according to the laws and customs thereof.

The supreme court denied the application apparently upon the ground that it was a woman who made it.

The record is not very perfect, but it may be fairly taken that the plaintiff asserted her right to a license on the grounds, among others, that she was a citizen of the United States, and that having been a citizen of Vermont at one time, she was, in the state of Illinois, entitled to any right granted to citizens of the latter state.

The court having overruled these claims of right founded on the clauses of the Federal Constitution before referred to, those propositions may be considered as properly before this court.

As regards the provision of the Constitution that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, the plaintiff in her affidavit has stated very clearly a case to which it is inapplicable.

The protection designed by that clause, as has been repeatedly held, has no application to a citizen of the state whose laws are complained of. If the plaintiff was a citizen of the state of Illinois, that provision of the Constitution gave her no protection against its courts or it legislation.

The plaintiff seems to have seen this difficulty, and attempts to avoid it by stating that she was born in Vermont.

While she remained in Vermont that circumstance made her a citizen of that state. But she states, at the same time, that she is a citizen of the United States, and that she is now, and has been for many years past, a resident of Chicago, in the state of Illinois.

The 14th Amendment declares that citizens of the United States are citizens of the state within which they reside; therefore the plaintiff was, at the time of making her application, a citizen of the United States and a citizen of the state of Illinois.

We do not here mean to say that there may not be a temporary residence in one state, with intent to return to another, which will not create citizenship in the former. But plaintiff states nothing to take her case out of the definition of citizenship of a state as defined by the 1st section of the 14th Amendment.

In regard to that Amendment counsel for the plaintiff in this court truly says that there are certain privileges and immunities which belong to a citizen in the United States as such; otherwise it would be nonsense for the 14th Amendment to prohibit a state from abridging them, and he proceeds to argue that admission to the bar of a state, of a person who possesses the requisite learning and character, is one of those which a state may not deny.

In this latter proposition we are not able to concur with counsel. We agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a state is forbidden to abridge. But the right to admission to practice in the courts of a state is not one of them. This right in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any state or in any case to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in the state and Federal courts, who were not citizens of the United States or of any state. But, on whatever basis this right may be placed, so far as it can have any relation to citizenship at all, it would seem that, as to the courts of a state, it would relate to citizenship of that state, and as to Federal courts, it would relate to citizenship of the United States.

The opinion just delivered in the *Slaughter-House Cases*, from Louisiana, *ante*, 394, renders elaborate argument in the present case unnecessary; for, unless we are wholly and radically mistaken in the principles on which those cases are decided, the right to control and regulate the granting of license to practice law in the courts of a state is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the partly seeking such license.

It is unnecessary to repeat the argument on which the judgment in those cases is founded. It is sufficient to say, they are conclusive of the present case.

*The judgment of the State Court is, therefore, affirmed.*

Mr. Justice Bradley:

I concur in the judgment of the court in this case, by which the judgment of the supreme court of Illinois is affirmed, but not for reason specified in the opinion just read.

The claim of the plaintiff, who is a married woman, to be admitted to practice as an attorney and counselor at law, is based upon the supposed right of every person, man or woman, to engage in any lawful employment for a livelihood. The supreme court of Illinois denied the application on the ground that, by the common law, which is the basis of the laws of Illinois, only men were admitted to the bar, and the legislature had not made any change in this respect, but had simply provided that no person should be submitted to practice as attorney or counselor without having previously obtained a license for that purpose from two justices of the supreme court, and that no person should receive a license without first obtaining a certificate from the court of some county of his good moral character. In other respects it was left to

the discretion of the court to establish the rules by which admission to the profession should be determined. The court, however, regarded itself as bound by at least two limitations. One was that it should establish such terms of admission as would promote the proper administration of justice, and the other that it should not admit any persons or class of person not intended by the legislature to be admitted, even though not expressly excluded by statute. In view of this latter limitation the court felt compelled to deny the application of females to be admitted as members of the bar. Being contrary to the rules of the common law and the usages of Westminister Hall from time immemorial, it could not be supposed that the legislature had intended to adopt any different rule.

The claim that, under the 14th Amendment of the Constitution, which declares that no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, and the statute law of Illinois, or the common law prevailing in that state, can no longer be set up as a barrier against the right of females to pursue any lawful employment for a livelihood (the practice of law included), assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation or employment in civil life.

It certainly cannot be affirmed, as a historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of the law flowing from and dependent upon this cardinal principle still exist in full force in most states. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the supreme court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counselor.

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

The humane movements of modern society, which have for their object the multiplication of avenues for woman's advancement, and of occupation adapted to her condition and sex, have my heartiest concurrence. But I am prepared to say that is one of her fundamental rights and privileges to be admitted into every office and position. It is not every citizen of every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the state; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which presumed to predominate in the sterner sex.

For these reasons I think that the laws of Illinois now complained of are not obnoxious to the charge of abridging any of the privileges and immunities of citizens of the United States.

Mr. Justice Field and Mr. Justice Swayne; We concur in the opinion of Mr. Justice Bradley.

Dissenting, Mr. Chief Justice Chase.

# Native American Rights

• WORCESTER V. THE STATE OF GEORGIA
• SURRENDER SPEECH
• TREATY WITH SIOUX NATION
• MY SON, STOP YOUR EARS

When Europeans arrived in North America in the 1600s, they discovered that Native American tribes already occupied the land. Between the 1630s and the War of Independence, white settlers gradually pushed the Native Americans, whom they called "Indians," westward. The goals of the settlers, which included colonization, land exploitation, and religious conversion, led to cultural and social conflict that erupted in periodic "Indian wars."

After the formation of the United States, state and federal government leaders agreed that the nation needed to establish a national policy toward Native Americans. By the 1820s the government's policy was to remove Native Americans from their lands and resettle them in the "Great American Desert" to the west. In 1830 Congress passed the Indian Removal Act (4 Stat. 411) and appropriated $500,000 for this purpose. During the presidency of Andrew Jackson (1829–1837), ninety-four removal treaties were negotiated. By 1840 most of the Native Americans in the more settled states and territories had been sent west.

The U.S. Supreme Court confronted the issue of Native American rights in the *Cherokee* cases, the collective name for two cases of the 1830s: *Cherokee Nation v. Georgia,* 30 U.S. 1, 8 L. Ed. 25 (1831), and *Worcester v. Georgia,* 31 U.S. 515, 8 L. Ed. 483 (1832). In *Cherokee Nation,* Chief Justice John Marshall ruled that the Cherokee Indians were not a sovereign nation. The following year Marshall issued an opinion that, while not overruling *Cherokee Nation,* held that the Cherokees were a nation with the right to retain independent political communities. President Jackson refused to abide by this ruling and supported the removal of the Cherokees to Oklahoma, which took place in 1838–1839.

Few tribes willingly moved westward, resulting in more Indian wars. The Black Hawk War of 1832, fought in Illinois, illustrates the situation Native Americans faced. The Sauk and Fox tribes, who had been forced from their lands by white settlers, faced the prospect of famine but were reluctant to move west where they would have to confront the hostile Sioux nation. Accordingly, Chief Black Hawk led the Sauk and Fox in an unsuccessful campaign to reoccupy their former lands.

Throughout the nineteenth century, treaties were made in which tribes ceded areas of land to the federal government in return for compensation in the form of livestock, merchandise, and annuities. These agreements were often accompanied by the establishment of reservations. All treaties that the United States entered into prior to 1871 were written in the formal language of international covenants. The parties would sign the draft treaty, and the document would be submitted to the U.S. Senate for ratification. After 1871 formal treaty arrangements were abandoned in favor of simple agreements between the government and Native American tribes. These agreements required the approval of both houses of Congress and had the same authority as the previous treaty forms, but they effectively abandoned the idea that Native American tribes were independent. For their

part, the tribes came to distrust the federal government for not honoring the treaties, confining them to reservations, and ending a way of life that had endured for centuries. Not until the twentieth century, after the continent had been settled and the tribes restricted to reservations, did the federal government attempt to seek a different policy.

# Native American Rights

## Worcester v. The State of Georgia

The Cherokee nation, located in the state of Georgia, sought to remain on its territory and be viewed legally as an independent, sovereign nation. In *Cherokee Nation v. Georgia* (1831), the tribe fought the state of Georgia's attempts to assert jurisdiction over Cherokee lands. The Cherokees appealed to the U.S. Supreme Court, arguing that they were protected by treaties negotiated with the U.S. government. Chief Justice John Marshall, writing for the majority, ruled that the Court had no jurisdiction to hear the Cherokees' lawsuit. Marshall defined the Cherokees as a "domestic, dependent nation," rather than a sovereign nation. Therefore, under Article III of the Constitution, the Court had no basis for entertaining the lawsuit.

The following year, however, in *Worcester v. Georgia* (1832), the Court modified its holding. In *Worcester,* Georgia sought to prevent white persons from living in Cherokee country without first obtaining a license from the state. The Cherokees challenged this license requirement. The Supreme Court agreed with the Cherokees, ruling that the Georgia laws were unconstitutional because they violated treaties, the Contract and Commerce Clauses of the Constitution, and the sovereign authority of the Cherokee nation.

In his majority opinion, Chief Justice Marshall placed emphasis on the tribe's standing as a nation. He pointed out that the U.S. government had applied the words *treaty* and *nation* "to Indians as we have applied them to the other nations of the earth." In addition, he ruled that Indian nations were distinct peoples with the right to retain independent political communities.

*Worcester*'s affirmation of the validity of the treaty the Cherokees had signed with the United States did not protect them. President Andrew Jackson refused to enforce the Court's ruling and encouraged the removal of the Cherokees. Nearly a quarter of the 15,000 Cherokees died during the relocation, which began in 1838. The Cherokee called the western trek to Oklahoma and Indian Territory the "Trail of Tears." Nevertheless, *Worcester* remains an important decision, for it endorsed the sovereignty of Native American nations and the need to respect the terms and conditions negotiated by treaty.

### *Samuel A. Worcester, Plaintiff in Error, v. the State of Georgia*

A writ of error was issued to "the judges of the Superior Court of Gwinnett in the State of Georgia," commanding them to send to the Supreme Court of the United States, the record and proceedings in the said Superior Court of the County of Gwinnett, between the State of Georgia, plaintiff, and Samuel A. Worcester, defendant, on an indictment in that court. The record of the court of Gwinnett was returned, certified by the clerk, of the court, and was also authenticated by the seal of the court. It was returned with, and annexed to a writ of error issued in regular form, the citation being signed

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by one of the associate justices of the Supreme Court, and served on the Governor and Attorney-General of the State more than thirty days before the commencement of the term to which the writ of error was returnable.

By the Court: The judicial Act, so far as it prescribes the mode of proceeding, appears to have been literally pursued. In February, 1797, a rule was made on this subject in the following words:

> "It is ordered by the court that the clerk of the court to which any writ of error shall be directed, may make return of the same by transmitting a true copy of the record, and of all proceedings in the same, under his hand and the seal of the court."

This has been done. But the signature of the judge has not been added to that of the clerk. The law does not require it. The rule does not require it.

The plaintiff in error was indicted in the Superior Court of the County of Gwinnett in the State of Georgia,

> "for residing on the 15th July, 1831, in that part of the Cherokee Nation attached by the laws of the State of Georgia to that county, without a license or permit from the Governor of the State, or from any one authorized to grant it, and without having taken the oath to support and defend the constitution and laws of the State of Georgia, and uprightly to demean himself as a citizen thereof, contrary to the laws of the said State."

To this indictment he pleaded that he was, on the 15th July, 1531, in the Cherokee Nation, out of the jurisdiction of the court of Gwinnett County; that he was a citizen of Vermont, and entered the Cherokee Nation as a missionary under the authority of the President of the United States, and has not been required by him to leave it, and that with the permission and approval of the Cherokee Nation he was engaged in preaching the gospel: that the State of Georgia ought not to maintain the prosecution, as several treaties had been entered into by the United States with the Cherokee Nation, by which that nation was acknowledged to be a sovereign nation, and by which the territory occupied by them was guaranteed to them by the United States, and that the laws of Georgia, under which the plaintiff in error was indicted, are repugnant to the treaties, and unconstitutional and void, and also that they are repugnant to the Act of Congress of March, 1802, entitled "An Act to regulate trade and intercourse with the Indian tribes." The Superior Court of Gwinnett overruled the plea, and the plaintiff in error was tried and convicted and sentenced "to hard labor in the penitentiary for four years." Held, that this was a case in which the Supreme Court of the United States jurisdiction by writ of error, under the twenty-fifth section of the "Act to establish the judicial court of the United States" passed in 1789.

The indictment and plea in this case draw in question the validity of the treaties made by the United States with the Cherokee Indians: if not so, their construction is certainly drawn in question; and the decision has been, if not against their validity, "against the right, privilege or exemption specially set up and claimed under them." They also draw into question the validity of a statue of the State of Georgia, "on the ground of its being repugnant to the Constitution, treaties and laws of the United States, and the decision is in favor of its validity."

It is too clear for controversy that the act of Congress by which this court is constituted has given it the power, and of course imposed on it the duty of exercising jurisdiction in this case. The record, according to the judiciary act and the rule and practice of the court, is regularly before the court.

The Act of Legislature of Georgia, passed 22 December, 1830, entitled "An Act to prevent the exercise of assumed and arbitrary power by all persons, under pretext of authority from the Cherokee Indians," etc., enacts that

> "all white persons residing within the limits of the Cherokee Nation, on the first day of March next, or at any time thereafter, without a license or permit from his excellency the governor, shall authorize to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and upon conviction thereof shall be punished by confinement to the penitentiary at hard labor, for a term not less than four years." The eleventh section authorizes the governor, should he deem it necessary for the protection of the mines or the enforcement of the laws in force within the Cherokee Nation, to raise and organize a guard,"

etc. The thirteenth section enacts,

> "that the said guard or any member of them shall be, and they are hereby authorized and empowered to arrest any person legally charged with or detected in a violation of the laws of this State, and to convey, as soon as practicable, the person so arrested before a

> justice of the peace, judge of the superior, justice of inferior court of this State, to be dealt with according to law." The extraterritorial power of every legislature being limited in its action to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee Nation, and of the rights and powers consequent thereto.

The principle, "that the discovery of parts of the continent of America gave title to the government by whose subjects, or by whose authority it was made, against all other European governments, which title might be consummated by possession," acknowledged by all Europeans, because it was the interest of all to acknowledge it; gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil, and of making settlements on it. It was an exclusive principle, which shut out the right of competition among those who had agreed to it; not one which could annul the previous right of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

The relations between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this pre-emptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political, but no attempt, so far as is known, has been made to enlarge them. So as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other.

Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects, who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport generally to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim, nor was it so understood.

Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt, on the part of the crown, to interfere with the internal affairs of the Indians farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies, but never intruded with their self-government, so far as respected themselves only.

The third article of the Treaty of Hopewell acknowledges the Cherokees to be under the protection of the United States of America, and of no other power.

This stipulation is found in Indian treaties generally. It was introduced into their treaties with Great Britain; and may probably be found in those with other European powers. Its origin may be traced to the nature of their connection with those powers; and its true meaning is discerned in their relative situation.

The general law of European sovereigns respecting their claims in America, limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things in time of peace. It was sometimes changed in war. The consequence was that their supplies were derived chiefly from that nation, and their trade confined to it. Goods, indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious

from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved practically no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character.

This is the true meaning of the stipulation, and is undoubtedly the sense in which it was made. Neither the British government nor the Cherokees ever understood it otherwise.

The same stipulation entered into with the United States is undoubtedly to be construed in the same manner. They receive the Cherokee Nation into their favor and protection. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected. The manner in which this stipulation was understood by the American government, is explained by the language and acts of our first president.

So with respect to the words "hunting-grounds." Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved.

To the United States, it could be a matter of no concern whether their whole territory was devoted to hunting-grounds, or whether an occasional village, and an occasional corn field interrupted, and gave some variety to the scene.

These terms had been used in their treaties with Great Britain, and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government.

The sixth and seventh articles stipulate for the punishment of the citizens of either country who may commit offenses on or against the citizens of the other. The only inference to be drawn from them is, that the United States considered the Cherokees as a nation.

The ninth article is in these words:

> "For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States, in Congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, as they think proper."

To construe the expression "managing all their affairs," into a surrender of self-government would be a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade. The influence it gave made it desirable that Congress should possess it. The commissioners brought forward the claim, with the profession that their motive was "the benefit and comfort of the Indians, and the prevention of injuries or oppressions." This may be true, as respects the regulation of all affairs connected with their trade; but cannot be true, as respects the management of all their affairs. The most important of these is the cession of their lands and security against intruders on them. Is it credible that they could have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made; or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and more interesting subject, to have devested themselves of the right of self-government on subjects not connected with trade. Such a measure could not be for their benefit and comfort," or for "the prevention of injuries and oppression." Such a construction would be inconsistent with the spirit of this and of all subsequent treaties; especially of those articles which recognize the right of the Cherokees to declare hostilities and to make war. It would convert a treaty of peace covertly into an act annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed.

This treaty contains a few terms capable of being used in a sense which could not have been intended at the time, and which is inconsistent with the practical construction which has always been put on them; but its essential articles treat the Cherokees as a nation capable of maintaining the relations of peace and war, and ascertain the boundaries between them and the United States.

The treaty of Holston, negotiated with the Cherokees in July, 1791, explicitly recognizing the national character of the Cherokees, and

their right of self-government, thus guarantying their lands; assuming the duty of protection, and of course pledging the faith of the United States for that protection, has been frequently renewed, and is now in full force.

To the general pledge of protection have been added several specific pledges, deemed valuable by the Indians. Some of these restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union.

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial; with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties, with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense.

Georgia, herself, has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister States, and by the government of the United States. Various acts of her Legislature have been cited in the argument, including the contract of cession made in the year 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States with their consent; that their territory was separated from that of any State within whose chartered limits they might reside, by a boundary line, established by treaties; that, within their boundary, they possessed rights with which no State could interfere; and that the whole power of regulating the intercourse with them was vested in the United States.

In opposition to the original right possessed by the undisputed occupants of every country to this recognition of that right, which is evidenced by our history in every change through which we have passed, are placed the charters granted by the monarch of a distant and distinct region, parceling out a territory in possession of others, whom he could not remove, and did not attempt to remove, and the cession made of his claims, by the Treaty of Peace. The actual state of things at the time, and all history since, explain these charters; and the King of Great Britain, at the Treaty of Peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties, extending to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state." At the present day, more than one state may be considered as holding its right to self-government under the guarantee and protection of one or more allies.

The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation is, by

our Constitution and laws, vested in the government of the United States.

The act of the State of Georgia under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity.

The acts of the Legislature of Georgia interfere forcibly with the relations established between the United States and the Cherokee Nation, the regulation of which, according to the settled principles of our Constitution, is committed exclusively to the government of the Union.

They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself.

They are in equal hostility with the acts of Congress for regulating the intercourse and giving effect to the treaties.

The forcible seizure and abduction of the plaintiff in error, who was residing in the nation, with its permission, and by authority of the President of the United States, is also a violation of the acts which authorize the chief magistrate to exercise this authority.

Will these powerful considerations avail the plaintiff in error? We think they will. He was seized and forcibly carried away, while under guardianship of treaties guarantying the country in which he resided and taking it under the protection of the United States. He was seized while performing, under the sanction of the chief magistrate of the Union, those duties which the humane policy adopted by Congress had recommended, under color of a law which has been shown to repugnant to the Constitution, laws, and treaties of the United States. Had a judgment, liable to the same objections, been rendered for liable to the same objections, been rendered for property, none would question the jurisdiction of this court. It cannot be less clear when the judgment affects personal liberty, and inflicts disgraceful punishment; if punishment could disgrace when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law than if it affected his property. He is not less entitled to the protection of the Constitution, laws, and treaties of his country.

This was a writ of error to the Superior Court for the County of Gwinnett, in the State of Georgia.

On the 22d December, 1830, the Legislature of the State of Georgia passed the following act:

> "An act to prevent the exercise of assumed and arbitrary power of all persons, under pretext of authority from the Cherokee Indians and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the State within the aforesaid territory.
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> "Be it enacted by the Senate and House of Representatives of the State of Georgia in General Assembly met, and it is hereby enacted by the authority of the same that, after the 1st day of February, 1831, it shall not be lawful for any person or persons, under color or pretense of authority from said Cherokee tribe, to cause or procure by any means the assembling of any council or other pretended legislative body of the said Indians or others living among them, for the purpose of legislating (or for any other purpose whatever). And persons offending against the provisions of this section shall be guilty of a high misdemeanor, and subject to indictment therefor, and, on conviction, shall be punished by confinement at hard labor in the penitentiary for the space of four years.
>
> "Sec. 2. And be it further enacted by the authority aforesaid that, after the time aforesaid, it shall not be lawful for any person or persons, under pretext of authority from the Cherokee tribe, or as representatives, chiefs, headman or warriors of said tribe, to meet or assemble as a council, assembly, convention, or in any other capacity, for the purpose of making laws, orders or regulations for said tribe. And all persons offending against the provisions of this section shall be guilty of a high misdemeanor, and subject to an indictment, and, on conviction thereof, shall undergo an imprisonment in the penitentiary at hard labor for the space of four years.
>
> "Sec. 3. And be it further enacted by the authority aforesaid that, after the time aforesaid, it shall not be lawful for any person or persons, under color or by authority of the Cherokee tribe, or any of its laws or regulations, to hold any court of tribunal whatever, for the purpose of hearing and determining causes, either civil or criminal, or to give any judgment in such cases, or to issue, or cause to issue, any process against the person or property of any of said tribe. And all persons

offending against the provisions of this section shall be guilty of a high misdemeanor, and subject to indictment, and, on conviction thereof, shall be imprisoned in the penitentiary at hard labor for the space of four years.

"Sec. 4. And be it further enacted by the authority aforesaid that, after the time aforesaid, it shall not be lawful for any person or persons, as a ministerial officer, or in any other capacity, to execute any precept, command or process issued by any court or tribunal in the Cherokee tribe, on the persons or property of any of said tribe. And all persons offending against the provisions of this section, shall be guilty of a trespass, and subject to indictment, and, on conviction thereof, shall be punished by fine and imprisonment in the jail or in the penitentiary, not longer than four years, at the discretion of the court.

"Sec. 5. And be it further enacted by the authority aforesaid that, after the time aforesaid, it shall not be lawful for any person or persons to confiscate, or attempt to confiscate, or otherwise to cause a forfeiture of the property or estate of any Indian of said tribe, in consequence of his enrolling himself and family for emigration, or offering to enroll for emigration, or any other act of said Indian, in furtherance of his intention to emigrate. And persons offending against the provisions of this section shall be guilty of high misdemeanor, and, on conviction, shall undergo an imprisonment in the penitentiary at hard labor for the space of four years.

"Sec. 6. And be it further enacted by the authority aforesaid that none of the provisions of this act shall be so construed as to prevent said tribe, its headmen, chiefs or other representatives, from meeting any agent or commissioner, on the part of the State or the United States, for any purpose whatever.

"Sec. 7. And be it further enacted by the authority aforesaid that all white persons residing within the limits of the Cherokee Nation on the 1st day of March next, or at any time thereafter, without a license or permit from his excellency the governor shall authorize to grant such a permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and, upon conviction thereof, shall be punished by confinement to the penitentiary at hard labor for a term not less than four years; provided, that the provisions of this section shall not be so construed as to extend to any authorized agent or agents of the government of the United States or of this State, or to any person or persons who may rent any of those improvements which have been abandoned by Indians who have emigrated west of the Mississippi; provided, nothing contained in this section shall be so construed as to extend to white females, and all male children under twenty-one years of age.

"Sec. 8. And be it further enacted by the authority aforesaid that all white persons, citizens of the State of Georgia, who have procured a license in writing from his excellency the governor, or from such agent as his excellency the governor shall authorize to grant such permit or license, to reside within the limits of the Cherokee Nation, and who have taken the following oath, viz.: 'I, A. B., do solemly swear (or affirm, as the case may be) that I will support and defend the constitution and laws of the State of Georgia, and uprightly demean myself as a citizen thereof, so help me God,' shall be, and the same are hereby declared, exempt and free from the operation of the seventh section of this act.

"Sec. 9. And be it further enacted that his excellency the governor be, and he is hereby authorized to grant licenses to reside within the limits of the Cherokee Nation, according to the provisions of the eighth section of this act.

"Sec. 10. And be it further enacted by the authority aforesaid that no person shall collect or claim any toll from any person for passing any turnpike gate or toll bridge, by authority of any act or law of the Cherokee tribe, or any chief or headman or men of the same.

"Sec. 11. And be it further enacted by the authority aforesaid that his excellency the governor be, and he is hereby empowered, should he deem it necessary, either for the protection of the mines, or for the enforcement of the laws of force within the Cherokee Nation, to raise and organize a guard, to be employed on foot or mounted, as occasion may require, which shall not consist of more than sixty persons, which guard shall be under the command of the commissioner or agent appointed by the governor to protect the mines, with power to dismiss from the service any member of said guard (on paying the wages due for services rendered) for disorderly conduct, and make appointments to fill the vacancies occasioned by such dismissal.

"Sec. 12. And be it further enacted by the authority aforesaid that each person who may belong to said guard, shall receive for his compensation at the rate of fifteen dollars per month when on foot, and at the rate of twenty dollars per month when mounted, for every month when mounted, for every month that such person is engaged in actual service; and, in the event that the commis-

sioner or agent herein referred to should die, resign, or fail to perform the duties herein required of him, his excellency the governor is hereby authorized and required to appoint, in his stead, some other fit and proper person to the command of said guard; and the commissioner or agent, having the command of the guard aforesaid, for the better discipline thereof, shall appoint three sergeants, who shall receive at the rate of twenty dollars per month while serving on foot, and twenty-five dollars per month when mounted, as compensation whilst in actual service.

"Sec. 13. And be it further enacted by the authority aforesaid that the said guard, or any member of them, shall be, and they are hereby authorized and empowered to arrest any person legally charged with, or detected in, a violation of the laws of this State, and to convey as soon as practicable the person so arrested before a justice of the peace, judge of the superior or justice of inferior court of this State, to be dealt with according to law; and the pay and support of said guard be provided out of the fund already appropriated for the protection of the gold mines."

The Legislature of Georgia, on the 19th December, 1829, passed the following Act:

"An Act to add the territory lying within the chartered limits of Georgia, and now in the occupancy of the Cherokee Indians, to the counties of Carroll, DeKalb, Gwinnett, Hall, and Habersham, and to extend the laws of this State over the same, and to annul all laws and ordinances made by the Cherokee Nation of Indians, and to provide for the compensation of officers serving legal process in said territory, and to regulate the testimony of Indians, and to repeal the ninth section of the Act of 1828 upon this subject.

"Sec. 1. Be it enacted by the Senate and House of Representatives of the State of Georgia in General Assembly met, and it is hereby enacted by the authority of the same, that from and after the passing of this act, all that part of the unlocated territory within the limits of this State, and which lies between the Alabama line and the old path leading from the Buzzard Roost on the Chattahoochee, to Sally Hughes's on the Hightower River; thence to Thomas Pelet's on the old federal road; thence with said road to the Alabama line be, and the same is hereby added to, and shall become a part of, the County of Carroll.

"Sec. 2. And be it further enacted that all that part of said territory lying and being north of the last-mentioned line, and south of the road running from Charles Gait's ferry, on the Chattahoochee River, to Dick Roe's, to where it intersects with the path aforesaid, be, and the same is hereby added to, and shall become a part of, the County of DeKalb.

"Sec. 3. And be it further enacted that all that part of said territory lying north of the last-mentioned line, and south of a line commencing at the mouth of Baldridge's Creek; thence up said creek to its source; from thence to where the federal road crosses the Hightower; thence with said road to the Tennessee line, be, and the same is hereby added to, and shall become part of, the County of Gwinnett.

"Sec. 4. And be it further enacted that all that part of said territory lying north of the last-mentioned line, and south of a line commence on the Chestatee River, at the mouth of Yoholo Creek; thence up said creek to the top of the Blue Ridge; thence to the headwaters of Notley River; thence down said river to the boundary line of Georgia, be, and the same is hereby added to, and shall become a part of, the County of Hall.

"Sec. 5. And be it further enacted that all that part of said territory lying north of the last-mentioned line, within the limits of this State, be, and the same is hereby added to, and shall become a part of, the County of Habersham.

"Sec. 6. And be it further enacted that all the laws, both civil and criminal, of this State, be, and the same are hereby extended over said portions of territory, respectively; and all persons whatever residing within the same, shall, after the 1st day of June next, be subject and liable to the operation of said laws, in the same manner as other citizens of this State, or the citizens of said counties, respectively; and all writs and processes whatever, issued by the courts or officers of said courts, shall extend over, and operate on, the portions of territory hereby added to the same, respectively.

"Sec. 7. And be it further enacted that after the 1st day of June next, all laws, ordinances, orders and regulations, of any kind whatever, made, passed or enacted, by the Cherokee Indians, either in general council or in any other way whatever, or by any authority whatever of said tribe, be, and the same are hereby declared to be, null and void, and of no effect, as if the same had never existed; and in all cases of indictment or civil suits, it shall not be lawful for the defendant to justify under any of said laws, ordinances, orders of regulations; nor shall the courts of this State permit the same to be given in evidence on the trial of any suit whatever.

"Sec. 8. And be it further enacted that it shall not be lawful for any person or body of per-

sons, by arbitrary power or by virtue of any pretended rule, ordinance, law or custom of said Cherokee Nation, to prevent by threats, menaces or other means, or endeavor to prevent, any Indian of said nation, residing within the chartered limits of this State, from enrolling as an emigrant, or actually emigrating or removing from said nation; nor shall it be lawful for any person or body of persons, by arbitrary power or by virtue of any pretended rule ordinance, law or custom of said nation, to punish, in any manner, or to molest either the person or property, or to abridge the rights or privileges of any Indian, for enrolling his or her name as an emigrant, or for emigrating or intending to emigrate, from said nation.

"Sec. 9. And be it further enacted that any person or body of persons offending against the provisions of the foregoing section, shall be guilty of a high misdemeanor, subject to indictment, and on conviction shall be punished by confinement in the common jail of any county of this State, or by confinement at hard labor in the penitentiary, for a term not exceeding four years, at the discretion of the court.

"Sec. 10. And be it further enacted that it shall not be lawful for any person or body of persons, by arbitrary power, or under color of any pretended rule, ordinance, law or custom of said nation, to prevent or offer to prevent, or deter any Indian headman, chief or warrior of said nation, residing within the chartered limits of this State, from selling or ceding to the United States, for the use of Georgia, the whole or any part of said territory, or to prevent or offer to prevent, any Indian, headman, chief or warrior of said nation, residing as aforesaid, from meeting in council or treaty any commissioner or commissioners on the part of the United States, for any purpose whatever.

"Sec. 11. And be it further enacted that any person or body of persons offending against the provisions of the foregoing sections, shall be guilty of a high misdemeanor, subject to indictment, and on conviction shall be confined at hard labor in the penitentiary for not less than four nor longer than six years, at the discretion of the court.

"Sec. 12. And be it further enacted that it shall not be lawful for any person or body of persons, by arbitrary force, or under color of any pretended rules, ordinances, law or custom of said nation, to take the life of any Indian residing as aforesaid, for enlisting as an emigrant; attempting to emigrate, ceding, or attempting to cede, as aforesaid, the whole or any part of the said territory; or meeting or attempting meet, in treaty or in council, as aforesaid, any commissioner or commissioners aforesaid; and any person or body of persons offending against the provisions of this section, shall be guilty of murder, subject to indictment, and on conviction, shall suffer death by hanging.

"Sec. 13. And be it further enacted that, should any of the foregoing offenses be committed under color of any pretended rules, ordinances, custom or law of said nation, all persons acting therein, either as individuals or as pretended executive, ministerial or judicial officers, shall be deemed and considered as principals, and subject to the pains and penalties hereinbefore described.

"Sec. 14. And be it further enacted that for all demands which may come within the jurisdiction of a magistrate's court, suit may be brought for the same in the nearest district of the county to which the territory is hereby annexed; and all officers serving any legal process on any person living on any portion of the territory herein named, shall be entitled to recover the sum of five cents for every mile he may ride to serve the same, after crossing the present limits of the said counties, in addition to the fees already allowed by law; and in case any of the said officers should be resisted in the execution of any legal process, issued by any court or magistrate, justice of the inferior court or judge of the Superior Court of any of said counties, he is hereby authorized to call out a sufficient number of the militia of said counties to aid and protect him in the execution of this duty.

"Sec. 15. And be it further enacted that no Indian or descendant of any Indian, residing within the Creek or Cherokee nations of Indians, shall be deemed a competent witness in any court of this State to which a white person may be a party, except such white person resides within the said nation."

In September, 1831, the grand jurors for the County of Gwinnett in the State of Georgia, presented to the Superior Court of the county the following indictment:

> Georgia, Gwinnett County: The Grand Jurors, sworn, chosen and selected for the County of Gwinnett, in the name and behalf of the citizens of Georgia, charge and accuse Elizur Butler, Samuel A. Worcester, James Trott, Samuel Mays, Surry Eaton, Austin Copeland, and Edward D. Losure, white persons of said county, with the offense of residing within the limits of the Cherokee Nation without a license:' For that the said Elizur Butler, Samuel A. Worcester, James Trott, Samuel Mays, Surry Easton, Austin Copeland, and Edward D. Losure, white persons, as aforesaid, on the

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15th day of July, 1831, did reside in that part of the Cherokee Nation attached by the laws of said State to the said county, and in the county aforesaid, without a license or permit from his excellency the governor of said State, or from any agent authorized by his excellency the governor aforesaid to grant such permit or license, and without having taken the oath to support and defend the constitution and laws of the State of Georgia, and uprightly to demean themselves as citizens thereof, contrary to the laws of said State, the good order, peace and dignity thereof."

To this indictment the plaintiff in error pleaded specially as follows:

"And the said Samuel A. Worcester, in his own proper person, comes and says, that this court ought not to take further cognizance of the action and prosecution aforesaid, because he says, that, on the 15th day of July, in the year 1831, he was and still is, a resident in the Cherokee Nation; and that the said supposed crime or crimes, and each of them, were committed, if committed at all, at the town of New Echota, in the said Cherokee Nation, out of the jurisdiction of this court. And this defendant saith that he is a citizen of the State of Vermont, one of the United States of America, and that he entered the aforesaid Cherokee Nation in the capacity of a duly authorized missionary of the American Board of Commissioners for Foreign Missions, under the authority of the President of the United States, and has not since been required by him to leave it: that he was, at the time of his arrest, engaged in preaching the Gospel to the Cherokee Indians, and in translating the sacred Scriptures into their language, with the permission and approval of the said Cherokee Nation, and in accordance with the humane policy of the government of the United States for the civilization and improvement of the Indians; and that his residence there, for this purpose, is the residence charged in the aforesaid indictment: and this defendant further saith, that this prosecution the State of Georgia ought not to have or maintain, because, he saith, that several treaties have, from time to time, been entered into between the United States and the Cherokee Nation of Indians, to wit: at Hopewell, on the 28th day of November, 1785; at Holston, on the 2d day of July, 1791; at Philadelphia, on the 26th day of June, 1794; at Tellico, on the 2d day of October, 1798; at Tellico, on the 24th day of October, 1804; at Tellico, on the 25th day of October, 1805; at Tellico, on the 27th day of October, 1805; at Washington city on the 22d day of March, 1816; at the Chickasaw Council House, on the 14th day of September, 1816; at the Cherokee Agency, on the 8th day of July, 1817, and at Washington city, on the 27th day of February, 1819; all which treaties have been duly ratified by the Senate of the United States of America acknowledge the said Cherokee Nation to be a sovereign nation, authorized to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several States composing the United States of America, in reference to acts done within their own territory; and by which treaties the whole of the territory now occupied by the Cherokee Nation, on the east of the Mississippi, has been solemly guaranteed to them; all of which treaties of Hopewell and Holston, the aforesaid territory is acknowledged to lie without the jurisdiction of the several States composing the Union of the United States; and it is thereby especially stipulated that the citizens of the United States shall not enter the aforesaid territory, even on a visit, without a passport from the governor of a State, or from some one duly authorized thereto by the President of the United States; all of which will more fully and at large appear, by reference to the aforesaid treaties. And this defendant saith that the several acts charged in the bill of indictment were done, or omitted to be done, if at all, within the said territory so recognized as belonging to the said nation, and so, as aforesaid, held by them, under the guaranty of the United States: that for those acts the defendant is not amenable to the laws of Georgia, nor to the jurisdiction of the courts of the said State; and that the laws of the State of Georgia, which profess to add the said territory to the several adjacent counties of the said State, and to extend the laws of Georgia over the said territory and persons inhabiting the same; and, in particular, the act on which this indictment against this defendant is grounded, to wit:

'An Act entitled and Act to prevent the exercise of assumed, and arbitrary power by all persons under pretext of authority from the Cherokee Indians and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the State within the aforesaid territory,' are repugnant to the aforesaid treaties; which according to the Constitution of the United States, compose a part of the supreme law of the land; and that these laws of Georgia are, therefore, unconstitutional, void, and of no effect: that the said laws of Georgia are also unconstitutional and void, because they impair the obliga-

tion of the various contracts formed by and between the aforesaid Cherokee Nation and the said United States of America, as above recited: also, that the said laws of Georgia are unconstitutional and void, because they interfere with, and attempt to regulate and control the intercourse with the said Cherokee Nation, which, by the said Constitution, belongs exclusively to the Congress of the United States; and because the said laws are repugnant to the statute of the United States passed on the —— day of March, 1802, entitled 'An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers:' and that, therefore, this court has no jurisdiction to cause this defendant to make further or other answer to the said bill of indictment, or further to try and punish this defendant for the said supposed offense or offenses alleged in the bill of indictment, or any of them; and, therefore, this defendant prays judgment whether he shall be held bound to answer further to said indictment."

This plea was overruled by the court, and the jurisdiction of the Superior Court of the County of Gwinnett was sustained by the judgment of the court.

The defendant was then arraigned, and pleaded "not guilty;" and the case came on for trial on the 15th of September, 1831, when the jury found the defendants in the indictment guilty. On the same day the court pronounced sentence on the parties so convicted, as follows:

The *State v. B.F. Thompson et al.* Indictment for residing in the Cherokee Nation without license. Verdict, Guilty."

The *State v. Elizur Butler, Samuel A. Worcester et al.* Indictment for residing in the Cherokee Nation without license. Verdict, Guilty."

"The defendants in both of the above cases shall be kept in close custody by the sheriff of this county until they can be transported to the penitentiary of this State, and the keeper thereof is hereby directed to receive them, and each of them, at hard labor in said penitentiary for and during the term of four years."

A writ of error was issued on the application of the plaintiff in error, on the 27th of October, 1831, which, with the following proceedings thereon, was returned to this court:

"United States of America, ss.—The President of the United States to the honorable the judges of the Superior Court for the County of Gwinnett, in the State of Georgia, greeting:

"Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court for the County of Gwinnett, before you, or some of you between the State of Georgia, plaintiff, and Samuel A. Worcester, defendant, on an indictment, being the highest court of law in said State in which a decision could be had in said suit, a manifest error hath happened, to the great damage of said Samuel A. Worcester, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of January next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States, should be done.

"Witness, the Honorable John Marshall, Chief Justice of the said Supreme Court, the first Monday of August, in the year of our Lord one thousand eight hundred and thirty one.

Wm. Thos. Carroll.

Clerk of the Supreme Court of the United States.

"Allowed by Henry Baldwin.

"United States of America to the State of Georgia, greeting:

"You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of January next, pursuant to a writ of error filed in the clerk's office of the Superior Court for the County of Gwinnett, in the State of Georgia, wherein Samuel A. Worcester is plaintiff in error, and the State of Georgia is defendant in error, to show cause, if any there be, why judgment rendered against the said Samuel A. Worcester, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be corrected, and why speedy justice should not be done to parties in that behalf.

"Witness, the Honorable Henry Baldwin, one of the justices of the Supreme Court of the United States, this 27th day of October, in the year of our Lord one thousand eight hundred and thirty-one.

Henry Baldwin.

> "State of Georgia, County of Gwinnett, sct.—On this 26th day of November, in the year of our Lord eighteen hundred and thirty one. William Potter personally appeared before the subscriber, John Mills, a justice of the peace in and fore said country, and being duly sworn on the holy evangelists of Almighty God, deposeth and saith, that on the 24th day of November instant, be delivered a true copy of the within citation to His Excellency Wilson Lumpkin, Governor of the State of Georgia, and another true copy thereof he delivered, on the 22d day of November, instant, to Charles J. Jenkins, Esq., Attorney-General of the State aforesaid, showing to the said governor and attorney-general, respectively, at the times of delivery herein stated, the within situation.
>
> Wm. Potter.
>
> "Sworn to and subscribed before me, the day and year above written.
>
> John Mills, J.P."

This writ of error was returned to the Supreme Court with copies of all the proceedings in the Superior Court of the county of Gwinnett, as stated, and accompanied with certificates of the clerk of that court in the following terms:

> "Georgia, Gwinnett County. I, John G. Park, clerk of the Superior Court of the County of Gwinnett and State aforesaid, do certify that the annexed and foregoing is a full and complete exemplification of the proceedings and judgments had in said court against Samuel A. Worcester, one of the defendants in the case therein mentioned, as they remain, of record, in the said Superior Court.
>
> "Given under my hand, and seal of the court, this 28th day of November, 1831.
>
> John G. Park, Clerk.
>
> "I also certify that the original bond, of which copy is annexed (the bond was in the usual form), and also a copy of the annexed writ of error, were duly deposited and filed in the clerk's office of said court on the 10th day of November, in the year of our Lord eighteen hundred and thirty-one.
>
> "Given under my hand and seal aforesaid, the day and date above written.
>
> John G. Park, Clerk.

The case of *Elizur Butler, plaintiff in error, v. State of Georgia,* was brought before the Supreme Court in the same manner.

The case was argued for the plaintiffs in error by Mr. Sergeant and Mr. Writ, with whom also was Mr. Elisha W. Chester.

The following positions were laid down and supported by Mr. Sergeant and Mr. Wirt:

That the court had jurisdiction of the question brought before them by the writ of error; and the jurisdiction extended equally to criminal and to civil cases.

That the writ of error was duly issued, and duly returned, so as to-bring the question regularly before the court, under the Constitution and laws of the United States, and oblige the court to take cognizance of it.

That the statute of Georgia under which the plaintiff's in error were indicted and convicted was unconstitutional and void; because;

By the Constitution of the United States, the establishment and regulation of intercourse with the Indians belonged exclusively to the government of the United States.

The power thus given, exclusively, to the government of the United States had been exercised by treaties and by acts of Congress, now in force, and applying directly to the case of the Cherokees; and that no State could interfere, without a manifest violation of such treaties and laws, which by the Constitution were the supreme law of the land.

The statute of Georgia assumed the power to change these regulations and laws: to prohibit that which they permitted; and to make that criminal which they declared innocent or meritorious; and to subject to condemnation and punishment, free citizens of the United States who had committed no offense. That the indictment, conviction, and sentence being founded upon a statute of Georgia, which was unconstitutional and void; were themselves also void and of no effect, and ought to be reversed.

These several positions were supported, enforced and illustrated by argument and authority.

The following authorities were referred to: 2 Laws U. S. 65, sec. 25; Judiciary Act of 1789; *Miller v. Nicholls,* 4 Wheat. 311; *Craig v. State of Missouri,* 4 Peters, 400, 429; *Fisher v. Cockerell,* 5 Peters, 248; *Ex-parte Kearney,* 7 wheat. 38; *Cohens v. Virginia,* 6 Wheat. 264; *Martin v. Hunter,* 1 Wheat. 304, 315, 361; 1 Laws U. S. 488,

470, 472, 482, 484, 486, 453; Blunt's Historical Sketch, 106, 107; Treaties with the Cherokees, 28th Nov. 1785; 2d July, 1791; 26th July, 1794; 2d Oct. 1798; 3 Laws U. S. 27, 125, 284, 303, 344, 400; 12 Journ. Congress, 82; Blunt's Hist. Sketch, 113, 110, 111, 114; *Federalist,* No. 42; Laws U. S. 454; *Holland v. Pack,* Peck's Rep. 151; *Johnson v. M'Intosh,* 8 Wheat. 543; *Cherokee Nation v. State of Georgia,* 5 Peters, 1, 16, 27, 31, 48; *Ware v. Hylton,* 3 Dall. 199; *Hughes v. Edwards,* 9 Wheat. 489; *Fisher v. Hamden,* 1 Paine, 55; *Hamilton v. Eaton,* North Carolina Cases, 79; *M'Culloch v. State of Maryland,* 4 Wheat. 316; 2 Laws U. S. 121; 3 Laws U.S. 460; 3 Laws U. S. 750; *Gibbons v. Odgen,* 9 Wheat. 1.

Mr. Chief Justice Marshall delivered the opinion of the court:

This cause, in every point of view in which it can be placed, is of the deepest interest.

The defendant is a State, a member of the Union, which has exercised the powers of government over a people who deny its jurisdiction, and are under the protection of the United States.

The plaintiff is a citizen of the State of Vermont, condemned to hard labor for four years in the penitentiary of Georgia, under color of an act which he alleges to be repugnant to the Constitution, laws, and treaties of the United States.

The legislative power of the State, the controlling power of the Constitution and laws of the United States, the rights, if they have any, the political existence of a once numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered.

It behooves this court in every case, more especially in this, to examine into its jurisdiction with scrutinizing eyes, before it proceeds to the exercise of a power which is controverted.

The first step in the performance of this duty is the inquiry whether the record is properly before the court.

It is certified by the clerk of the court which pronounced the judgment of condemnation under which the plaintiff in error is imprisoned, and is also authenticated by the seal of the court. It is returned with, and annexed to, a writ of error issued in regular form, the citation being signed by one of the associate justices of the Supreme Court, and served on the Governor and Attorney-General of the State more than thirty days before the commencement of the term of which the writ of error was returnable.

The Judicial Act (sec. 22, 25, 2 Laws U. S. 64, 65), so far as it prescribes the mode of proceeding, appears to have been literally pursued.

In February, 1797, a rule (6 Wheat. Rules) was made on this subject in the following words: "It is so ordered by the court that the clerk of the court to which any writ of error shall be directed, may make return of the same by transmitting a true copy of the record, and of all proceedings in the same, under his hand and the seal of the court."

This has been done. But the signature of the judge has not been added to that of the clerk. The law does not require it. The rule does not require it.

In the case of *Martin v. Hunter's Lessee,* 1 Wheat. 304, 361, an exception was taken to the return of the refusal of the State court to enter a prior judgment of reversal by this court, because it was not made by the judge of the State court to which the writ was directed; but the exception was overruled, and the return was held sufficient. In *Buel v. Van Ness,* 8 Wheat, 312, also, a writ of error to a State court, the record was authenticated in the same manner. No exception was taken to it. These were civil cases. But it has been truly said at the bar that, in regard to this process, the law makes no distinction between a criminal and civil cases. The same return is required in both. If the sanction of the court could be necessary for the establishment of this position, it has been silently given.

*M'Culloch v. The State of Maryland,* 4 Wheat. 316, was a *qui tam* action, brought to recover a penalty, and the record was authenticated by the seal of the court and the signature of the clerk, without that of a judge. *Brown et al. v. State of Maryland* was an indictment for a fine and forfeiture. The record in this case, too, was authenticated by the seal of the court and the certificate of the clerk. The practice is both ways.

The record, then, according to the Judiciary Act, and the rule and the practice of the court, is regularly before us. The more important inquiry is, does it exhibit a case cognizable by this tribunal?

The indictment charges the plaintiff in error and others, being white persons, with the offense of "residing within the limits of the Cherokee Nation without a license," and "without having

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taken the oath to support and defend the constitution and the laws of the State of Georgia."

The defendant in the State court appeared in proper, person, and filed the following plea:

> "And the said Samuel A. Worcester, in his own proper person, comes and says that this court ought not to take further cognizance of the action and prosecution aforesaid, because, he says, that on the 15th day of July, in the year 1831, he was, and still is, a resident in the Cherokee Nation; and that the said supposed crime or crimes, and each of them, were committed, if committed at all, at the Town of New Echota, in the said Cherokee Nation, out of the jurisdiction of this court, and not in the county of Gwinnett, or elsewhere, within the jurisdiction of this court; and this defendant saith that he is a citizen of the State of Vermont, one of the United States of America, and that he entered the aforesaid Cherokee Nation in the capacity of a duly authorized missionary of the American Board of Commissioners for Foreign Missions, under the authority of the President of the United States, and has not since been required by him to leave it; that he was, at the time of his arrest, engaged in preaching the Gospel to the Cherokee Indians, and in translating the sacred Scriptures into their language, with the permission and approval of the said Cherokee Nation, and in accordance with the humane policy of the government of the United States for the civilization and improvement of the Indians; and that his residence there, for this purpose, is the residence charged in the aforesaid indictment; and this defendant further said that this prosecution the State of Georgia ought not to have or maintain, because, he saith, that several treaties have, from time to time, been entered into between the United States and the Cherokee Nation of Indians, to wit, at Hopewell, on the 28th day of November, 1785; at Holston, on the 2d day of July, 1791; at Philadelphia, on the 26th day of June, 1794; at Tellico, on the 2d of October, 1798; at Tellico, on the 24th day of October, 1804; at Tellico, on the 25th day of October, 1805; at Tellico, on the 27th day of October, 1805; at Washington city, on the 22d day of March, 1816; at the Chickasaw Council House, on the 14th day of September, 1816; at the Cherokee Agency, on the 8th day of July, 1817; and at Washington city, on the 27th day of February, 1819; all which treaties have been duly ratified by the Senate of the United States of America, and by which treaties the United States of America acknowledge the said Cherokee Nation to be a sovereign nation, authorized to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several States composing the United States of America, in reference to acts done within their own territory; and by which treaties the whole of the territory now occupied by the Cherokee Nation on the east of the Mississippi has been solemly guaranteed to them; all of which treaties are existing treaties at this day, and in full force.
>
> By these treaties, and particularly by the treaties of Hopewell and Holston, the aforesaid territory is acknowledged to lie without the jurisdiction of the several States composing the Union of the United States; and it is thereby specially stipulated that the citizens of the United States shall not enter the aforesaid territory, even on a visit, without a passport from the governor of a State, or from some one duly authorized thereto by the President of the United States; all of which will more fully and at large appear by references to the aforesaid treaties. And this defendant saith, that the several acts charged in the bill of indictment were done, or omitted to de done, if at all, within the said nation, and so, as aforesaid, held by them, under the guarantee of the United States; that, for those acts, the defendant is not amenable to the laws of Georgia, nor to the jurisdiction of the courts of the said State; and that the laws of the State of Georgia, which profess to add the said territory to the several adjacent counties of the said State, and to extend the laws of Georgia over the said territory and persons inhabiting the same; and, in particular, the act on which this indictment against this defendant is grounded, to wit, 'Act entitled an Act to prevent the exercise of assumed and arbitrary power by all persons under a pretext of authority from the Cherokee Indians, and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the State within the aforesaid territory,' are repugnant to the aforesaid treaties; which, according to the Constitution of the United States, compose a part of the supreme law of the land; and that these laws of Georgia are, therefore, unconstitutional, and void, and of no effect; that the said laws of Georgia are also unconstitutional and void, because they impair the obligation of the various contracts formed by and between the aforesaid Cherokee Nation and the said United States of America, as above recited; also, that the said laws of Georgia are unconstitutional and void,

> because they interfere with, and attempt to regulate and control the intercourse with the said Cherokee Nation, which, by the said Constitution, belongs exclusively to the Congress of the United States; and because the said laws are repugnant to the statue of the United States, passed on the — day of March, 1802, entitled 'An Act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontier;' and that, therefore, this court has no jurisdiction to cause this defendant to make further or other answer to the said bill of indictment, or further to try and punish this defendant for the said supposed offense or offenses alleged in the bill of indictment, or any of them; and, therefore, this defendant prays judgment whether he shall be held bound to answer further to said indictment."

This plea was overruled by the court, and the prisoner, being arraigned pleaded not guilty. The jury found a verdict against him, and the court sentenced him to hard labor in the penitentiary for the term of four years.

By overruling this plea, the court decided that the matter if contained was not a bar to the action. The plea, therefore, must be examined for the purpose of determining whether it makes a case which brings the party within the provisions of the twenty-fifth section of the "Act to establish the judicial courts of the United States."

The plea avers that the residence charged in the indictment was under the authority of the President of the United States, and with the permission and approval of the Cherokee Nation. That the treaties subsisting between the United States and the Cherokees, acknowledge their right as a sovereign nation to govern themselves and all persons who have settled within their territory, free from any right of legislative interference by the several States composing the United States of America. That the act under which the prosecution was instituted is repugnant to the said treaties, and is, therefore, unconstitutional and void. That the said act is also unconstitutional, because it interferes with, and attempts to regulate and control the intercourse with the Cherokee Nation which belongs exclusively to Congress, and, because, also, it is repugnant to the statute of the United States, entitled "An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."

Let the averments of this plea be compared with the twenty-fifth section of the Judicial Act.

That section enumerates the cases in which the final judgment or decree of a State court may be revised in the Supreme Court of the United States. These are,

> "where is drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision is against their validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption, especially set up or claimed by either party under such clause of the said Constitution, treaty, statute or commission."

The indictment and plea in this case draw in question, we think, the validity of the treaties made by the United States with the Cherokee Indians; if not so, their construction is certainly drawn in question; and the decision has been, if not against their validity, "against the right, privilege or exemption, specially set up and claimed under them." They also draw into question the validity of a statute of the State of Georgia, "on the ground of its being repugnant to the Constitution, treaties and laws of the United States, and the decision is in favor of its validity."

It is, then, we think, too clear for controversy, that the act of Congress by which this court is constituted, has given it the power, and of course imposed on it the duty, of exercising jurisdiction in this case. This duty, however unpleasant, cannot be avoided. Those who fill the judicial department have no discretion in selecting the subjects to be brought before them. We must explain the defense set up in this plea. We must inquire and decide whether the act of the Legislature of Georgia under which the plaintiff in error has been prosecuted and condemned, be consistent with, or repugnant to the Constitution, laws and treaties of the United States.

It has been said at the bar that the acts of the Legislature of Georgia seize on the whole Cherokee country, parcel it out among the neighboring counties of the State, extend her code over the whole country, abolish its institutions and its laws, and annihilate its political existence.

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If this be the general effect of the system, let us inquire into the effect of the particular statute and section on which the indictment is founded.

It enacts that

> "all white persons, residing within the limits of the Cherokee Nation on the 1st day of March next, or at any time thereafter, without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorize to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and, upon conviction thereof, shall be punished by confinement to the penitentiary, at hard labor for a term not less than four years."

The eleventh section authorizes the governor, should he deem it necessary for the protection of the mines, or the enforcement of the laws in force within the Cherokee Nation, "to raise and organize a guard," etc.

The thirteenth section enacts,

> "that the said guard or any member of them, shall be, and they are hereby authorized and empowered to arrest any person legally charged with or detected in a violation of the laws of this State, and to convey, as soon as practicable,, the person so arrested, before a justice of the peace, judge of the superior, or justice of inferior court of this State, to be dealt with according to law."

The extraterritorial power of every Legislation being limited in its action to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee Nation, and of the rights and powers consequent on jurisdiction.

The first step, then in the inquiry which the Constitution and laws impose on this court, is an examination of the rightfulness of this claim.

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.

After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufacturers, and whose general employment was war, hunting, and fishing.

Did these adventurers, by sailing along the coast and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?

But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin, because holding it in our recollection might shed some light on existing pretensions.

The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any one of them to grasp the whole, and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, "that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession." 8 Wheat. 573.

This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had argued to it; not one which could annul the previous rights of those who had not agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regu-

lated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this pre-emptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them. So far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other.

Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects, who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport, generally, to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim, nor was it so understood.

The power of making war is conferred by these charters on the colonies, but defensive war alone seems to have been contemplated. In the first charter to the first and second colonies, they are empowered, "for their several defenses, to encounter, expulse, repel, and resist, all persons who shall, without license," attempt to inhabit "within the said precincts and limits of the said several colonies, or that shall enterprise or attempt at any time hereafter the least detriment or annoyance of the said several colonies or plantations."

The charter to Connecticut concludes a general power to make defensive war with these terms: "and upon just cause to invade and destroy the natives or other enemies of the said colony."

The same power, in the same words, is conferred on the government of Rhode Island.

This power to repel invasion, and, upon just cause, to invade and destroy the natives, authorizes offensive as well as defensive war, but only "on just cause." The very terms imply the existence of a country to be invaded, and of an enemy who has given just cause of war.

The charter to William Penn contains the following recital: "and because, in so remote a country, near so many barbarous nations, the incursions, as well of the savages themselves, as of other enemies, pirates, and robbers, may probably be feared, therefore we haven given," etc. The instrument then confers the power of war.

These barbarous nations, whose incursions were feared, and to repel whose incursions the power to make was given, were surely not considered as the subjects of Penn, or occupying his lands during his pleasure.

The same clause is introduced into the charter to Lord Baltimore.

The charter to Georgia professes to be granted for the charitable purpose of enabling poor subjects to gain a comfortable subsistence by cultivating lands in the American provinces, "at present waste and desolate." It recites:

> "and whereas our provinces in North America have been frequently ravaged by Indian enemies, more especially that of South Carolina, which in the late war by the neighboring savages, was laid waste by fire and sword, and great numbers of the English inhabitants miserably massacred; and our loving subjects, who now inhabit there, by reason of the smallness of their numbers, will, in case of any new war, be exposed to the like calamities, inasmuch as their whole southern frontier continueth unsettled, and lieth open to the said savages."

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These motives for planting the new colony are incompatible with the lofty ideas of granting the soil and all its inhabitants from sea to sea. They demonstrate the truth that these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned. The power of war is given only for defense, not for conquest.

The charters contain passages showing one of their objects to be the civilization of the Indians and their conversion to Christianity—objects to be accomplished by conciliatory conduct and good example; not by extermination.

The actual state of things, and the practice of European nations, on so much of the American continent as lies between the Mississippi and the Atlantic, explain their claims, and the charters they granted. Their pretensions unavoidably interfered with each other; though the discovery of one was admitted by all to exclude the claim of any other, the extent of that discovery was the subject of unceasing contest. Bloody conflicts arose between them, which gave importance and security to the neighboring nations. Fierce and warlike in their character, they might be formidable enemies or effective friends. Instead of rousing their resentments by asserting claims to their lands, or to dominion over their persons their alliance was sought by flattering professions, and purchased by rich presents. The English, the French, and the Spaniards, were equally competitors for their friendship and their aid. Not well acquainted with the exact meaning of words, nor supposing it to be material whether they were called the subjects, or the children of their father in Europe; lavish in professions of duty and affection, in return for the rich presents they received; so long as their actual independence was untouched, and their right to self-government acknowledged they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country; and this was probably the sense in which the term was understood by them.

Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsides; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.

The general views of Great Britain with regard to the Indians were detailed by Mr. Stuart, Superintendent of Indian Affairs, in a speech delivered at Mobile, in presence of several persons of distinction, soon after the peace of 1763. Towards the conclusion he says,

> "lastly, I inform you that it is the king's order to all his governors and subjects to treat Indians with justice and humanity, and to forbear all encroachments on the territories alloted to them; accordingly, all individuals are prohibited from purchasing any of your lands; but, as you know that, as your white brethren cannot feed you when you visit them unless you give them ground to plant, it is expected that you will cede lands to the king for that purpose. But, whenever you shall be pleased to surrender any of your territories to his majesty, it must be done, for the future, at a public meeting of your nation, when the governors of the provinces, or the superintendent shall be present, and obtain the consent of all your people. The boundaries of your hunting-grounds will be accurately fixed, and no settlement permitted to be made upon them. As you may be assured that all treaties with your people will be faithfully kept, so it is expected that you, also, will be careful strictly to observe them."

The proclamation issued by the King of Great Britain in 1763, soon after the ratification of the articles of peace, forbids the governors of any of the colonies to grant warrants of survey, or pass patents upon any lands whatever, which, not having been ceded to, or purchased by, us (the King), as aforesaid, are reserved to the said Indians, or any of them.

The proclamation proceeds:

> "And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve, under our sovereignty, protection, and dominion, for the use of the said Indians, all the lands and territories lying to the westward of the sources of the rivers which fall into the sea, from the west and north-west as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved,

without our special leave and license for that purpose first obtained."

"And we do further strictly enjoin and require all persons whatever, who have, either willfully or inadvertently, seated themselves upon any lands within the countries above described, or upon any other lands within the countries above described, or upon any other lands which, not having been ceded to, or purchased by us, are still reserved to the said Indians, as aforesaid, forthwith to remove themselves from such settlements."

A proclamation issued by Governor Gage, in 1772, contains the following passage:

"Whereas many persons, contrary to the positive orders of the king upon this subject, have undertaken to make settlements beyond the boundaries fixed by the treaties made with the Indian nations, which boundaries ought to serve nations, particularly on the Ouabache." The proclamation orders such persons to quit those countries without delay.

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted: she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.

This was the settled state of things when the war of our Revolution commenced. The influence of our enemy was established; her resources enabled her to keep up that influence, and the colonist had much cause for the apprehension that the Indian nations would, as the allies of Great Britain, add their arms to hers. This, as was to be expected, became an object of great solicitude to Congress. Far from advancing a claim to their lands, or asserting any right of dominion over them, Congress resolved "that the securing and preserving the friendship of the Indian nations appears to be a subject of the utmost moment to these colonies."

The early journals of Congress exhibit the most anxious desire to conciliate the Indian nations. Three Indian departments were established, and commissioners appointed in each, "to treat with the Indians in their respective departments, in the name and on the behalf of the United Colonies, in order to preserve peace and friendship with the said Indians, and to prevent their taking any part in the present commotions."

The most strenuous exertions were made to procure those supplies on which Indian friendships were supposed to depend; and everything were supposed to depend; and everything which might excite hostility was avoided.

The first treaty was made with the Delawares, in September, 1778.

The language of equality in which it is drawn evinces the temper with which the negotiation was undertaken, and the opinion which then prevailed in the United States.

"That all offenses or acts of hostilities, by one or either of the contracting parties against the other, be mutually forgiven, and buried in the depth of oblivion, never more to be had in remembrance.

"That a perpetual peace and friendship shall, from henceforth, take place and subsist between the contracting parties aforesaid, through all succeeding generations; and if either of the parties are engaged in a just and necessary war, with any other nation or nations, that then each shall assist the other, in due proportion to their abilities, till their enemies are brought to reasonable terms of accommodation," etc.

The third article stipulates, among other things, a free passage for the American troops through the Delaware Nation; and engages that they shall be furnished with provisions and other necessaries at their value.

"For the better security of the peace and friendship now entered into by the contracting parties against all infractions of the same by the citizens of either party; to the prejudice of the other, neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders, by imprisonment or any other competent means, till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties, and natural justice," etc.

The fifth article regulates the trade between the contracting parties, in a manner entirely equal.

The sixth article is entitled to peculiar attention, as it contains a disclaimer of designs which were, at that time, ascribed to the United States by their enemies, and from the impu-

tation of which Congress was then peculiarly anxious to free the government. It is in these words: "Whereas the enemies of the United States have endeavored, by every artifice in their power, to possess the Indians in general with an opinion that it is the design of the States aforesaid to extirpate the Indians and take possession of their country; to obviate such false suggestion the United States do engage to guaranty to the aforesaid nation of Delawares, and their heirs, all their territorial rights, in the fullest and most ample manner, as it hath been bounded by former treaties, as long as the said Delaware Nation shall abide by, and hold fast the chain of friendship now entered into."

The parties further agree that other tribes, friendly to the interest of the United States, may be invited to form a State, whereof the Delaware Nation shall be the heads, and have a representation in Congress.

This treaty, in its language and in its provisions, is formed as near as may be, on the model of treaties between the crowned heads of Europe.

The sixth article shows how Congress then treated the injurious calumny of cherishing designs unfriendly to the political and civil rights of the Indians.

During the war of the Revolution, the Cherokees took part with the British. After its termination, the United States, through desirous of peace, did not feel its necessity so strongly as while the war continued. Their political situation being changed, they might very well think it advisable to assume a higher tone, and to impress on the Cherokees the same respect for Congress which was before felt for the King of Great Britain. This may account for the language of the Treaty of Hopewell. There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language, from the fact that every one makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them.

The treaty is introduced with the declaration that "the commissioners plenipotentiary of the United States give peace to all the Cherokees, and receive them into the favor and protection of the United States of America, on the following conditions."

When the United States gave peace, did they not also receive it? Were not both parties desirous of it? If we consult the history of the day, does it not inform us that the United States were at least as anxious to obtain it as the Cherokees? We may ask, further, did the Cherokees come to the seat of the American government to solicit peace; or, did the American commissioners go to them to obtain it? The treaty was made at Hopewell, not at New York. The word "give," then, has no real importance attached to it.

The first and second articles stipulate for the mutual restoration of prisoners, and are of course equal.

The third article acknowledges the Cherokees to be under the protection of the United States of America, and of no other power.

This stipulation is found in Indian treaties generally. It was introduced into their treaties with Great Britain; and may probably be found in those with other European powers. Its origin may be traced to the nature of their connection with those powers; and its true meaning is discerned in their relative situation.

The general law of European sovereigns, respecting their claims in America, limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things in time of peace. It was sometimes changed in war. The consequence was that their supplies were derived chiefly from that nation, and their trade confined to it. Goods, indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown as a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character.

This is the true meaning of the stipulation, and is undoubtedly the sense in which it was made. Neither the British government nor the Cherokees ever understood it otherwise.

The same stipulation entered into with the United States, is undoubtedly to be construed in the same manner. They receive the Cherokee Nation into their favor and protection. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected. The manner in which this stipulation was understood by the American government is explained by the language and acts of our first President.

The fourth article draws the boundary between the Indians and the citizens of the United States. But, in describing this boundary, the term "alloted" and the term "hunting ground" are used.

Is it reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our languages, should distinguish the word "alloted" from the words "marked out." The actual subject of contract was the dividing line 'between the two nations, and their attention may very well be supposed to have been confined to that subject. When, in fact they were ceding lands to the United States, and describing the extent of their cession, it may very well be supposed that they might not understand the term employed as indicating that instead of granting they were receiving lands. If the term would admit of no other signification, which is not conceded, its being misunderstood is so apparent, results so necessarily from the whole transaction, that it must, we think, be taken in the sense in which it was most obviously used.

So with respect to the words "hunting-grounds." Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed that any intention existed of restricting the full use of the lands they reserved.

To the United States, it could be a matter of no concern whether their whole territory was devoted to hunting-grounds, or whether an occasional village, and an occasional corn field, interrupted and gave some variety to the scene.

These terms had been used in their treaties with Great Britain, and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government.

The fifth article withdraws the protection of the United States from any citizen who has settled, or shall settle, on the lands allotted to the Indians, for their hunting-grounds; and stipulates that if he shall not remove within six months the Indians may punish him.

The sixth and seventh articles stipulate for the punishment of the citizens of either country, who may commit offenses on or against the citizens of the other. The only inference to be drawn from them is, that the United States considered the Cherokees as a nation.

The ninth article is in these words:

> "For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States in Congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, as they think proper.

To construe the expression "managing all their affairs," into a surrender of self-government, would be, we think a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade. The influence it gave made it desirable that Congress should possess it. The commissioners brought forward the claim, with the profession that their motive was "the benefit and comfort of the Indians, and the prevention of injuries or oppressions." This may be true, as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade, but cannot be true as respects the management of all their affairs. The most important of these are the cession of their lands, and security against intruders on them. Is it credible that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made? or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article on another and most interesting subject, to

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have devested themselves of the right of self-government on subjects not connected with trade. Such a measure could not be "for their benefit and comfort," or for "the prevention of injuries and oppression." Such a construction would be inconsistent with the spirit of this and of all subsequent treaties; especially of those articles which recognize the right of the Cherokees to declare hostilities and to make war. It would convert a treaty of peace covertly into an act annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed.

This treaty contains a few terms capable of being used in a sense which could not have been intended at the time, and which is inconsistent with the practical construction which has always been put on them; but its essential articles treat the Cherokees as a nation capable of maintaining the relations of peace and war, and ascertain the boundaries between them and the United States.

The Treaty of Hopewell seems not to have established a solid peace. To accommodate the differences still existing between the State of Georgia and the Cherokee Nation, the Treaty of Holston was negotiated in July, 1791. The existing Constitution of the United States had been then adopted, and the government, having more intrinsic capacity to enforce its just claims, was perhaps less mindful of high sounding expressions denoting superiority. We hear no more of giving peace to the Cherokees. The mutual desire of establishing permanent peace and friendship, and of removing all causes of war, is honestly avowed, and, in pursuance of their desire, the first article declares that there shall be perpetual peace and friendship between all the citizens of the United States of America and all the individuals composing the Cherokee Nation.

The second article repeats the important acknowledgment that the Cherokee Nation is under the protection of the United States of America, and of no other sovereign whosoever.

The meaning of this has been already explained. The Indian nations were, from their situation, necessarily dependent on some foreign potentate for the supply of their essential wants, and for their protection from lawless and injurious intrusions into their country. That power was naturally termed their protector. They had been arranged under the protection of Great Britain; but the extinguishment of the British power in their neighborhood, and the establishment of that of the United States in its place, led naturally to the declaration, on the part of the Cherokees, that they were under the protection of the United States, and of no other power. They assumed the relation with the United States which had before subsisted with Great Britain.

This relation was that of nation claiming and receiving the protection of one more powerful, not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.

The third article contains a perfectly equal stipulation for the surrender of prisoners.

The fourth article declares that "the boundary between the United States and the Cherokee Nation shall be as follows: beginning," etc. We hear no more of "allotments" or of "hunting-grounds." A boundary is described, between nation and nation, by mutual consent. The national character of each; ability of each to establish this boundary, is acknowledged by the other. To preclude forever all disputes, it is agreed that it shall be plainly marked by commissioners, to be appointed by each party; and, in order to extinguish forever all claim of the Cherokees to the ceded lands, an additional consideration is to be paid by the United States. For this additional consideration the Cherokees release and right to the ceded land, forever.

By the fifth article, the Cherokees allow the United States a road through their country, and the navigation of the Tennessee River. The acceptance of these cessions is an acknowledgment of the right of the Cherokees to make or withhold them.

By the sixth article, it is agreed, on the part of the Cherokees, that the United States shall have the sole and exclusive right of regulating their trade. No claim is made to the management of all their affairs. This stipulation has already been explained. The observation may be repeated, that the stipulation is itself an admission of their right to make or refuse it.

By the seventh article, the United States solemnly guaranty to the Cherokee Nation all their lands not hereby ceded.

The eighth article relinquishes to the Cherokees any citizens of the United States who may settle on their lands; and the ninth forbids any citizen of the United States to hunt on their lands or to enter their country without a passport.

The remaining articles are equal, and contain stipulations which could be made only with a nation admitted to be capable of governing itself.

This treaty, thus explicitly recognizing the national character of the Cherokees, and their right to self-government, thus guarantying their lands; assuming the duty of protection, and of course, pledging the faith of the United States for that protection, has been frequently renewed and is now in full force.

To the general pledge of protection have been added several specific pledges, deemed valuable by the Indians. Some of these restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.

From the commencement of our government Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

In 1819, Congress passed an Act for promoting those humane designs of civilizing the neighboring Indians, which had long been cherished by the executive. It enacts,

> "that, for the purpose of providing against the further settlements of the United States, and for introducing among them the habits and arts of civilization, the President of the United States shall be, and he is hereby authorized, in every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced with their own consent, to employ capable persons, of good moral character, to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing and arithmetic; and for performing such other duties as may be enjoined, according to such instructions and rules as the President may give and prescribe for the regulation of their conduct in the discharge of their duties."

This act avowedly contemplates the preservation of the Indian nations as an object sought by the United States, and purposes to effect this object by civilizing and converting them from hunters into agriculturists. Though the Cherokees had already made considerable progress in this improvement, it cannot be doubted that the general words of the act comprehend them. Their advance in the "habits and arts of civilization," rather encouraged perseverance in the laudable exertions still farther to meliorate their condition. This act furnishes strong additional evidence of a settled purpose to fix the Indians in their country by giving them security at home.

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union. Is this the rightful exercise of power, or is it usurpation?

While these States were colonies, this power, in its utmost extent, was admitted to reside in the crown. When our revolutionary struggle commenced, Congress was composed of an assemblage of deputies acting under specific powers granted by the legislatures, or conventions of the several colonies. It was a great popular movement, not perfectly organized; nor were intrusted with the management of affairs accurately defined. The necessities of our situation produced a general conviction that those measures which concerned all, must be transacted by a body in which the representatives of all were assembled, and which could command the confidence of all: Congress, therefore, was considered as invested with all the powers of war and peace, and Congress dissolved our connection with the mother country, and declared these United Colonies to be independent States. Without any written definition of powers, they employed diplomatic agents to represent the United States at the several courts of Europe; offered to negotiate treaties with them, and did actually negotiate treaties with France. From the same necessity, and on the same principles, Congress assumed the management of Indian affairs; first in the name of these United Colonies, and afterwards in the name of the United States. Early attempts were made at negotiation, and to regulate trade with them. These not proving successful, war was carried on under direction, and with the forces of the United States, and the efforts to make peace by

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treaty were earnest and incessant. The confederation found Congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe.

Such was the state of things when the confederation was adopted. That instrument surrendered the powers of peace and war to Congress and prohibited them to the States, respectively, unless a State be actually invaded, "or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of delay till the United States in Congress assembled can be consulted." This instrument also gave the United States in Congress assembled the sole and exclusive right of "regulating the trade and managing all the affairs with the Indians, not members of any of the States: provided that the legislative power of any State within its own limits be not infringed or violated."

The ambiguous phrases which follow the grant of power to the United States were so construed by the States of North Carolina and Georgia as to annul the power itself. The discontent and confusion resulting from these conflicting claims produced representations to Congress, which were referred to a committee, who made their report in 1787. The report does not assent to the construction of the two States, but recommends an accommodation, by liberal cessions of territory, or by an admission on their part of the powers claimed by Congress. The correct exposition of this article is rendered unnecessary by the adoption of our existing Constitution. That instrument confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.

The Indian nations had always been considered as distinct, independent political communities, as distinct, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same scene.

Georgia herself has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister States, and by the government of the United States. Various acts of her Legislature have been cited in the argument, including the contract of cession made in the year 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent; that their territory was separated from that of any State within whose chartered limits they might reside, by a boundary line, established by treaties; that, within their boundary, they possessed rights with which no State could interfere, and that the whole power of regulating the intercourse with them was vested in the United States. A review of these acts, on the part of Georgia, would occupy too much time, and is the less necessary because they have been accurately detailed in the argument at the bar. Her new series of laws, manifesting her abandonment of these opinions, appears to have commenced in December, 1828.

In opposition to this original right, possessed by the undisputed occupants of every country; to this recognition of that right, which is evidenced by our history, in every change through which we have passed, is placed the charters granted by the monarch of a distant and distinct region, parcelling out a territory in possession of others whom he could not remove

and did not attempt to remove, and the cession made of his claims by the Treaty of Peace.

The actual state of things at the time, and all history since, explain these charters; and the King of Great Britain, at the Treaty of Peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties; extending to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger and taking its protection. A weak State in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a State. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states so long as self-government and sovereign and independent authority are left in the administration of the state." At the present day, more than one State may be considered as holding its right of self-government under the guaranty and protection of one or more allies.

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States.

The act of the State of Georgia under which the plaintiff in error was prosecuted is consequently void, and the judgment a nullity. Can this court revise and reverse it?

If the objection to the system of legislation lately adopted by the Legislature of Georgia in relation to the Cherokee Nation was confined to its extraterritorial operation, the objection, though complete, so far as respected mere right, would give this court no power over the subject. But it goes much further. If the review which has been taken be correct, and we think it is, the acts of Georgia are repugnant to the Constitution, laws, and treaties of the United States.

They interfere forcibly with the relations established between the United States and the Cherokee Nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the Union.

They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself.

They are in equal hostility with the acts of Congress for regulating this intercourse, and giving effect to the treaties.

The forcible seizure and abduction of the plaintiff in error, who was residing in the nation with its permission, and by authority of the President of the United States, is also a violation of the acts which authorize the chief magistrate to exercise this authority.

Will these powerful considerations avail the plaintiff in error? We think they will. He was seized and forcibly carried away while under guardianship of treaties guarantying the country in which he resided, and taking it under the protection of the United States. He was seized while performing, under the sanction of the Chief magistrate of the Union those duties which the humane policy adopted by Congress had recommended. He was apprehended, tried, and condemned, under color of a law which has been shown to be repugnant to the Constitution, laws, and treaties of the United States. Had a judgment, liable to the same objections, been rendered for property, none would question the jurisdiction of this court. It cannot be less clear when the judgment affects personal liberty, and inflicts disgraceful punishment, if punishment could disgrace when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law than if it affected his property. He is not less entitled to the protection of the Constitution, laws, and treaties of his country.

This point has been elaborately argued and, after deliberate consideration, decided, in the

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case of *Cohens v. The Commonwealth of Virginia* 6, Wheat. 264.

It is the opinion of this court that the judgment of the Superior Court for the County of Gwinett, in the State of Georgia, condemning Samuel A. Worcester to hard labor in the penitentiary of the State of Georgia for four years, was pronounced by that court under color of a law which is void, as being repugnant to the Constitution, treaties, and laws of the United States, and ought, therefore, to be reversed and annulled.

Mr. Justice M'Lean.

As this case involves principles of the highest importance, and may lead to consequences which shall have an enduring influence on the institutions of this country; and as there are some points in the case on which I wish to state, distinctly, my opinion, I embrace the privilege of doing so.

With the decision just given, I concur.

The plaintiff in error was indicted under a law of Georgia

> "for residing in that part of the Cherokee Nation attached, by the laws of said State, to the County of Gwinnett, without a license or permit from his excellency the governor of the State, or from any agent authorized by his excellency the governor to grant such permit, or license and without having taken the oath to support and defend the constitution and laws of the State of Georgia, and uprightly to demean himself as a citizen thereof."

On this indictment the defendant was arrested, and, on being arraigned before the Superior Court for Gwinnett County, he filed, in substance, the following plea:

He admits that, on the 15th of July, 1831, he was, and still continued to be, a resident in the Cherokee Nation, and that the crime, if any were committed, was committed at the town of New Echota, in said nation, out of the jurisdiction of the court. That he is a citizen of Vermont, and that he entered the Indian country in the capacity of a duly authorized missionary of the American Board of Commissioners for Foreign Missions, under the authority of the President of the United States, and has not since been required by him to leave it. That he was, at the time of his arrest engaged in preaching the Gospel to the Cherokee Indians, and in translating the sacred Scriptures into their language, with the permission and approval of the Cherokee Nation, and in accordance with the humane policy of the government of the United States for the improvement of the Indians.

He then states, as a bar to the prosecution, certain treaties made between the United States and the Cherokee Indians, by which the possession of the territory they now inhabit was solemly guaranteed to them; and also a certain Act of Congress, passed in March, 1802, entitled "An Act to regulate trade and intercourse with the Indian tribes." He also alleges that this subject, by the Constitution of the United States, is exclusively vested in Congress; and that the law of Georgia, being repugnant to the Constitution of the United States, to the treaties referred to, and to the act of Congress specified, is void, and cannot be enforced against him.

This plea was overruled by the court, and the defendant pleaded not guilty.

The jury returned a verdict of guilty, and the defendant was sentenced by the court to be kept in close custody by the sheriff of the county until he could be transported to the penitentiary of the State, and the keeper thereof was directed to receive him into the custody, and keep him at hard labor in the penitentiary, during the term of four years.

Another individual was included in the same indictment, and joined in the plea to the jurisdiction of the court, and was also included in the sentence; but his name is not adverted to, because the principles of the case are fully presented in the above statement.

To reverse this judgment, a writ of error was obtained, which, having been returned with the record of the proceedings, is now before this court.

The first question which it becomes necessary to examine is, whether the record has been duly certified, so as to bring the proceedings regularly before this tribunal.

A writ of error was allowed in this case by one of the justices of this court, and the requisite security taken. A citation was also issued, in the form prescribed, to the State of Georgia, a true copy of which, as appears by the oath of William Patten, was delivered to the governor on the 24th day of November last; and another true copy was delivered on the 22 day of the same month to the Attorney-General of the State.

The record was returned by the clerk, under the seal of the court, who certifies that it is a full

and complete exemplification of the proceedings and judgment had in the case; and he further certifies that the original bond, and a copy of the writ of error, were duly deposited and filed in the clerk's office of said court, on the 10th day of November last.

Is it necessary, in such a case, that the record should be certified by the judge who held the court?

In the case of *Martin v. Hunter's Lessee,* which was a writ of error to the Court of Appeals of Virginia, it was objected that the return to the writ of error was defective, because the record was not so certified; but the court in that case said, "the forms of process, and the modes of proceeding in the exercise of jurisdiction, are, with few exceptions, left by the Legislature to be regulated and changed, as this court may, in its discretion, deem expedient." By a rule of this court,

> "the return of a copy of a record, of the proper court, annexed to the writ of error, is declared to be a sufficient compliance with the mandate of the writ. The record in this case is duly certified by the clerk of the Court of Appeals, and annexed to the writ of error. The objection, therefore, which has been urged to the sufficiency of the return cannot prevail." 1 Wheat. 304.

In 9 Wheat. 526, in case of *Stewart v. Ingle et al.,* which was a writ of error to the Circuit Court for the District Columbia, a certiorari was issued upon a suggestion of diminution in the record, which was returned by the clerk with another record; whereupon a motion was made for a new certiorari, on the ground that the return ought to have been made by the judge of the court below, and not by the clerk. The writ of certiorari, it is known, like the writ of error, is directed to the court.

Mr. Justice Washington, after consultation with the judges, stated that according to the rules and practice of the court, a return made by the clerk was a sufficient return.

To ascertain what has been the general course of practice on this subject, an examination has been made into the manner in which records have been certified from State courts to this court; and it appears that, in the year 1817, six causes were certified, in obedience to writs of error, by the clerk, under the seal of this court. In the year 1819, two were so certified, one of them being the case of *M'Culloch v. The State of Maryland*.

In the year 1821 three cases were so certified; and in the year 1823 there was one. In 1827 there were five, and in the ensuing year, seven.

In the year 1830 there were eight causes so certified, in five of which a State was a party on the record. There were three causes thus certified in the year 1831, and five in the present year.

During the above periods, there were only fifteen causes from State courts where the records were certified by the court or the presiding judge, and one of these was the case of *Cohens v. The State of Virginia.*

This court adopted the following rule on this subject in 1797:

> "It is ordered by the court that the clerk of the court to which any writ of error shall be directed, may make the return of the same by transmitting a true copy of the record, and of all proceedings in the cause, under his hand, and the seal of the court."

The power of the court to adopt this rule cannot be questioned; and it seems to have regulated the practice ever since its adoption. In some cases, the certificate of the court, or the presiding judge has been affixed to the record; but this court has decided, where the question has been raised, that such certificate is unnecessary.

So far as the authentication of the record is concerned, it is impossible to make a distinction between a civil and a criminal case. What may be sufficient to authenticate the proceedings in a civil case, must be equally so in a criminal one. The verity of the record is of as much importance in the one case as in the other.

This is a question of practice; and it would seem that, if any one point in the practice of this court can be considered as settled, this one must be so considered.

In the progress of the investigation, the next inquiry which seems naturally to arise, is, whether this is a case in which a writ of error may be issued.

By the twenty-fifth section of the Judiciary Act of 1789, it is provided

> "that a final judgment or decree in any suit in the highest court of law or equity of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in

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> question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party under such clause of the said constitution, treaty, statute, or commission, may be re-examined, and reversed or affirmed, in the Supreme Court of the United States."

Doubts have been expressed whether a writ of error to a State court is not limited to civil cases. These doubts could not have arisen from reading the above section. Is not a criminal case as much a suit as a civil case? What is a suit but a prosecution; and can anyone suppose that it was the intention of Congress, in using the word "suit," to make a distinction between a civil prosecution and a criminal one?

It is more important that jurisdiction should be given to this court in criminal than in civil cases, under the twenty-fifth section of the Judiciary Act. Would it not be inconsistent both with the spirit and letter of this law, to revise the judgment of a State court, in a matter of controversy respecting damages, where the decision is against a right asserted under the Constitution or a law of the United States; but to deny the jurisdiction, in a case where the property, the character, the liberty and life of a citizen may be destroyed, though protected by the solemn guarantees of the Constitution?

But this is not an open question; it has long since been settled by the solemn adjudications of this court. The above construction, therefore, is sustained both on principle and authority. The provisions of the section apply as well to criminal as to civil cases, where the Constitution, treaties, or laws of the United States come in conflict with the laws of a State, and the latter is sustained by the decision of the court.

It has been said that this court can have no power to arrest the proceedings of a State tribunal in the enforcement of the criminal laws of the State. This is undoubtedly true, so long as a State court, in the execution of its penal laws, shall not infringe upon the Constitution of the United States, or some treaty or law of the Union.

Suppose a State should make it penal for an officer of the United States to discharge his duties within its jurisdiction; as for instance, a land officer, an officer of the customs, or a postmaster, and punish the offender by confinement in the penitentiary; could not the Supreme Court of the United States interpose their power, and arrest or reverse the State proceedings? Cases of this kind are so palpable, that they need only to be stated to gain the assent of every judicious mind. And would not this be an interference with the administration of the criminal laws of a State?

This court have repeatedly decided that they have no appellate jurisdiction in criminal cases from the circuit courts of the United States; writs of error and appeals are given from those courts only in civil cases. But, even in those courts, where the judges are divided on any point in a criminal case, the point may be brought before this court, under a general provision in cases of division of opinion.

Jurisdiction is taken in the case under consideration exclusively by the provisions of the twenty-fifth section of the law which has been quoted. These provisions, as has been remarked, apply indiscriminately to criminal and civil cases, wherever a right is claimed under the Constitution, treaties, or laws of the United States, and the decision, by the State Court, is against such right. In the present case, the decision was against the right expressly set up by the defendant, and it was made by the highest judicial tribunal of Georgia.

To give jurisdiction in such a case, this court need look no further than to ascertain whether the right, thus asserted, was decided against by the State court. The case is clear of difficulty on this point.

The name of the State of Georgia is used in this case because such was the designation given to the cause in the State court. No one ever supposed that the State, in its sovereign capacity, in such a case, is a party to the cause. The form of the prosecution here must be the same as it was in the State court; but so far as the name of the State is used, it is a matter of form. Under a rule of this court, notice was given to the governor and Attorney-General of the State because it is a part of their duty to see that the laws of the State are executed.

In prosecutions for violations of the penal laws of the Union, the name of the United States

is used in the same manner. Whether the prosecution be under a federal or State law, the defendant has a right to question the constitutionality of the law.

Can any doubt exist as to the power of Congress to pass the law under which jurisdiction is taken in this case? Since its passage, in 1789, it has been the law of the land; and has been sanctioned by an uninterrupted course of decisions in this court, and acquiesced in by the State tribunals, with perhaps a solitary exception; and whenever the attention of the national Legislature has been called to the subject, their sanction has been given to the law by so large a majority as to approach almost to unanimity.

Of the policy of this act there can be as little doubt as of the right of Congress to pass it.

The Constitution of the United States was formed, not, in my opinion, as some have contended, by the people of the United States, nor, as others, by the States; but by a combined power exercised by the people through their delegates, limited in their sanctions, to the respective States.

Had the Constitution emanated from the people, and the States had been referred to merely as convenient districts by which the public expression could be ascertained, the popular vote throughout the Union would have been the only rule for the adoption of the Constitution. This course was not pursued; and in this fact, it clearly appears that our fundamental law was not formed, exclusively, by the popular suffrage of the people.

The vote of the people was limited to the respective States in which they resided. So that it appears there was an expression of popular suffrage and State sanction, most happily united, in the adoption of the Constitution of the Union.

Whatever differences of opinion may exist as to the means by which the Constitution was adopted, there would seem to be no ground for any difference as to certain powers conferred by it.

Three co-ordinate branches of the government were established—the executive, legislative and judicial. These branches are essential to the existence of any free government, and that they should possess powers, in their respective spheres, co-extensive with each other.

If the executive have not powers which will enable him to execute the functions of his office, the system is essentially defective; as those duties must, in such a case, be discharged by one of the other branches. This would destroy that balance which is admitted to be essential to the existence of free government, by the wisest and most enlightened statesman of the present day.

It is not less important that the legislative power should be exercised by the appropriate branch of the government, than that the executive duties should devolve upon the proper functionary. And if the judicial power fall short of giving effect to the laws of the Union, the existence of the federal government is at an end.

It is in vain, and worse than in vain, that the national Legislature enact laws, if those laws are to remain upon the statute book as monuments of the imbecility of the national power. It is in vain that the executive is called to superintend the execution of the laws, if he have no power to aid in their enforcement.

Such weakness and folly are in no degree chargeable to the distinguished men through whose instrumentality the Constitution was formed. The powers given, it is true, are limited; and no powers, which are not expressly given, can be exercised by the federal government; but, where given, they are supreme. Within the sphere alloted to them, the co-ordinate branches of the general government revolve, unobstructed by any legitimate exercise of power by the State governments. The powers exclusively given to the federal government are limitations upon the State authorities. But, with the exception of these limitations, the States are supreme; and their sovereignty can be no more invaded by the action of the general government, than the action of the State governments can arrest or obstruct the course of the national power.

It has been asserted that the federal government is foreign to the State governments, and that it must consequently be hostile to them. Such an opinion could not have resulted from a thorough investigation of the great principles which lie at the foundation of our system. The federal government is neither foreign to the State governments, nor is it hostile to them. It proceeds from the same people, and is as much under their control as the State governments.

Where, by the Constitution, the power of legislation is exclusively vested in Congress, they legislate for the people of the Union, and their acts are as binding as are the constitutional enactments of a State Legislature on the people

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of the State. If this were not so, the federal government would exist only in name. Instead of being the proudest monument of human wisdom and patriotism, it would be the frail memorial of the ignorance and mental imbecility of its framers.

In the discharge of his constitutional duties, the federal executive acts upon the people of the Union the same as a governor of a State, in the performance of his duties, acts upon the people of the State. And the judicial power of the United States acts in the same manner on the people. It rests upon the same basis as the other departments of the government. The powers of each are derived from the same source, and are conferred by the same instrument. They have the same limitations and extent.

The Supreme Court of a State, when required to give effect to a statute of the State, will examine its constitution, which they are sworn to maintain, to see if the legislative act be repugnant to it; and if the repugnancy exist, the statute must yield to the paramount law.

The same principle governs the supreme tribunal of the Union. No one can deny that the Constitution of the United States is the supreme law of the land; and, consequently, no act of any State Legislature or of Congress, which is repugnant to it, can be of any validity.

Now, if an act of a State Legislature be repugnant to the constitution of the State, the State court will declare it void; and if such act be repugnant to the Constitution of the Union, or a law made under that Constitution which is declared to be the supreme law of the land, is it not equally void? And, under such circumstances, if this court should shrink from a discharge of their duty in giving effect to the supreme law of the land, would they not violate their oaths, prove traitors to the Constitution, and forfeit all just claim to the public confidence?

It is sometimes objected, if the federal judiciary may declare an act of a State Legislature void, because it is repugnant to the Constitution of the United States, it places the legislation of a State within the power of this court. And might not the same argument must end in the destruction of all constitutions, and the will of the Legislature, like the acts of the Parliament of Great Britain, must be the supreme, and only law of the land.

It is impossible to guard an investiture of power so that it may not, in some form, be abused: an argument, therefore, against the exercise of power, because it is liable to abuse, would go to the destruction of all governments.

The powers of this court are expressly, not constructively, given by the Constitution; and within this delegation of power, this court are the Supreme Court of the people of the United States, and they are bound to discharge their duties, under the same responsibilities as the Supreme Court of a State; and are equally, within their powers, the Supreme Court of the people of each State.

When this court are required to enforce the laws of any State, they are governed by those laws. So closely do they adhere, to this rule, that during the present term, a judgment of a Circuit Court of the United States, made in pursuance of decisions of this court, has been reversed and annulled because it did not conform to the decisions of the State Court, in giving a construction to a local law. But while this court conforms its decisions to those of the State courts on all questions arising under the statutes and constitutions of the respective States, they are bound to revise and correct those decisions, if they annul either the Constitution of the United States or the laws made under it.

It appears, then, that on all questions arising under the laws of a State, the decisions of the courts of such State form a rule for the decisions of this court, and that on all questions arising under the laws of the United States, the decisions of the State courts. Is there anything unreasonable in this? Have not the federal, as well as the State courts, been constituted by the people? Why, then, should one tribunal more than the other be deemed hostile to the interests of the people?

In the second section of the third article of the Constitution, it is declared that "the judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

Having shown that a writ of error will lie in this case, and that the record has been duly certified, the next inquiry that arises is, what are the acts of the United States which relate to the Cherokee Indians and the acts of Georgia; and were these acts of the United States sanctioned by the federal Constitution?

Among the enumerated powers of Congress contained in the eighth section of the first article of the Constitution, it is declared that "Congress shall have power to regulate commerce with foreign nations, and among the Indian tribes." By the Articles of Confederation, which were adopted on the 9th day of July, 1778, it was provided that

> "the United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck, by their own authority, or by that of the respective States; fixing the standard of weights and measures throughout the United States; regulating the trade and management of all affairs with the Indians, not members of any of the States: Provided, that the legislative right of any State, within its own limits, be not infringed or violated."

As early as June 1775, and before the adoption of the Articles of Confederation, Congress took into their consideration the subject of Indian affairs. The Indian country was divided into three departments, and the superintendence of each was committed to commissioners, who were authorized to hold treaties with the Indians, make disbursements of money for their use, and to discharge various duties designed to preserve peace and cultivate a friendly feeling with them towards the colonies. No person was permitted to trade with them without a license from one or more of the commissioners of the respective departments.

In April, 1776, it was

> "resolved, that the commissioners of Indian affairs in the middle department, or any one of them, be desired to employ, for reasonable salaries, a minister of the Gospel, to reside among the Delaware Indians, and instruct them in the Christian religion; a schoolmaster to teach their youth reading, writing, and arithmetic; also a blacksmith. to do the work of the Indians." The general intercourse with the Indians continued to be managed under the superintendence of the continental Congress.

On the 28th of November, 1785, the Treaty of Hopewell was formed which was the first treaty made with the Cherokee Indians. The commissioners of the United States were required to give notice to the executives of Virginia, North Carolina, South Carolina, and Georgia, in order that each might appoint one or more persons to attend the treaty, but they seem to have had no power to act on the occasion.

In this treaty it is stipulated that

> "the commissioners plenipotentiary of the United States in Congress assembled, give peace to all the Cherokees, and receive them into the favor and protection of the United States of America, on the following conditions:"

The Cherokees to restore all prisoners and property taken during the war.

The United States to restore to the Cherokees all prisoners.

The Cherokees acknowledge themselves to be under the protection to the United States, and of no other sovereign whatsoever.

The boundary line between the Cherokees and the citizens of the United States was agreed to as designated.

If any person, not being an Indian, intrude upon the land "alloted" to the Indians, or, being settled on it, shall refuse to remove within six months after the ratification of the treaty, he forfeits the protection of the United States, and the Indians were at liberty to punish him as they might think proper.

The Indians are bound to deliver up to the United States any Indian who shall commit robbery, or other capital crime, on a white person, lying within their protection.

If the same offense be committed on an Indian by a citizen of the United States, he is to be punished.

It is understood that the punishment of the innocent, under the idea of retaliation, is unjust, and shall not be practiced on either side, except where there is a manifest violation of this treaty; and then it shall be preceded, first, by a demand of justice; and, if refused, then by a declaration of hostilities.

> "That the Indians may have full confidence in the justice of the United States respecting their interests, they shall have a right to send a deputy of their choice whenever they think fit, to Congress.

The Treaty of Holston was entered into with the same people, on the 2d day of July, 1791.

This was a treaty of peace, in which the Cherokees again placed themselves under the protection of the United States, and engaged to hold no treaty with any foreign power, individual State, or with individuals of any State. Prisoners were agreed to be delivered up on both sides; a new Indian boundary was fixed, and a

cession of land made to the United States on the payment of a stipulated consideration.

A free, unmolested road, was agreed to be given through the Indian lands, and the free navigation of the Tennessee River. It was agreed that the United States should have the exclusive right of regulating their trade, and a solemn guarantee of their land, not ceded; was made. A similar provision was made as to all persons who might enter the Indian territory, as was contained in the Treaty of Hopewell. Also, that reprisal or retaliation shall not be committed until satisfaction shall have been demanded of the aggressor.

On the 7th day of August, 1786, an ordinance for the regulation of Indian affairs adopted, which repealed the former system.

In 1794 another treaty was made with the Cherokees, the object of which was to carry into effect the Treaty of Holston. And on the plains of Tellico, on the 2d of October, 1798, the Cherokees, in another treaty, agreed to give a right of way, in a certain direction, over their lands. Other engagements were also entered into, which need not be referred to.

Various other treaties were made by the United States with the Cherokee Indians, by which, among other arrangements, cessions of territory were procured and boundaries agreed on.

In a treaty made in 1817, a distinct wish is expressed by the Cherokees to assume a more regular form of government, in which they are encouraged by the United States. By a treaty held at Washington on the 27th day of February, 1819, a reservation of land is made by the Cherokees for a school fund, which was to be surveyed and sold by the United States for that purpose. And it was agreed that all white persons, who had intruded on the Indian lands should be removed.

To give effect to various treaties with this people, the power of the executive has frequently been exercised; and at one time General Washington expressed a firm determination to resort to military force to remove intruders from the Indian territories.

On the 30th of March, 1802, Congress passed an Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.

In this act it is provided that any citizen or resident of the United States, who shall enter into the Indian lands to hunt, or for any other purpose, without a license, shall be subject to a fine and imprisonment. And if any person shall attempt to survey, or actually survey, the Indian lands, shall be liable to forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months. No person is permitted to reside as a trader within the Indian boundaries, without a license or permit. All persons are prohibited, under a heavy penalty, from purchasing the Indian lands; and all such purchases are declared to be void. And it is made lawful for the military force of the United States to arrest offenders against the provisions of the act.

By the seventeenth section, it is provided that the act shall not be construed as to

> "prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual States; or the unmolested use of a road, from Washington district to Metro district, or to prevent the said road." Nor was the act to be construed as to prevent persons from traveling from Knoxville to Price's settlement, provided they shall travel in the tract or path which is usually traveled, and the Indians do not object; but if they object, then all travel on this road to be prohibited, after proclamation by the President, under the penalties provided in the act.

Several acts, having the same object in view, were passed prior to this one; but as they were repealed either before, or by the Act of 1802, their provisions need not be specially noticed.

The acts of the State of Georgia, which the plaintiff in error complains of as being repugnant to the Constitution, treaties, and laws of the United States are found in two statutes.

The first Act was passed the 12th of December, 1829, and is entitled

> "An Act to add the territory lying within the chartered limits of Georgia, and now in the occupancy of the Cherokee Indians, to the counties of Carroll, DeKalb, Gwinnett and Habersham; and to extend the laws of the State over the same, and to annul all laws made by the Cherokee Nation of Indians, and to provide for the compensation of officers serving legal process in said territory, and to regulate the testimony of Indians, and to repeal the ninth section of the Act of 1828 on this subject."

This act annexes the territory to the Indians within the limits of Georgia to the counties named in the title, and extends the jurisdiction of the State over it. It annuls the laws, ordinances, orders and regulations, of any kind, made by the Cherokees, either in council or in any other way, and they are not permitted to be given in evidence in the courts of the State. By this law, no Indian, or the descendant of an Indian, residing within the Creek or Cherokee Nation of Indians, shall be deemed a competent witness in any court of the State to which a white person may be a party, except such white person reside within the nation. Offenses under the act are to be punished by confinement in the penitentiary, in some cases not less than four nor more than six years, and others not exceeding four years.

The second Act was passed on the 22d day of December, 1830, and is entitled

> "An Act to prevent the exercise of assumed and arbitrary power, by all persons, on pretext of authority from the Cherokee Indians and their laws; and to prevent white persons from residing within that part of the chartered limits of Georgia occupied by the Cherokee Indians; and to provide a guard for the protection to the gold mines, and to enforce the laws of the State without the aforesaid territory."

By the first section of this act, it is made a penitentiary offense, after the 1st day of February, 1831, for any person or persons, under color or pretense of authority from the said Cherokee tribe, or as headmen, chiefs or warriors of said tribe, to cause or procure, by any means, the assembling of any council or other pretended legislative body of the said Indians, for the purpose of legislating, etc.

They are prohibited from making laws, holding courts of justice, or executing process. And all white persons, after the lst of March, 1831, who shall reside within the limits of the Cherokee Nation without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorize to grant such permit or license, or who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor; and, upon conviction thereof shall be punished by confinement to the penitentiary at hard labor, for a term not less than four years. From this punishment, agents of the United States are excepted, white females, and male children under twenty-one years of age.

Persons who have obtained license, are required to take the following oath:

> "I. A. B. do solemnly swear that I will support and defend the constitution and laws of the State of Georgia, and uprightly demean myself as a citizen thereof. So help me God."

The governor is authorized to organize a guard, which shall not consist of more than sixty persons, to protect the mines in the Indian territory, and the guard is authorized to arrest all offenders under the act.

It is apparent that these laws are repugnant to the treaties with the Cherokee Indians which have been referred to, and to the law of 1802. This repugnance is made so clear by an exhibition of the respective acts, that no force of demonstration can make it more palpable.

By the treaties and laws of the United States, rights are guaranteed to the Cherokees, both as it respects their territory and internal polity. By the laws of Georgia these rights are abolished; and not only abolished, but an ignominious punishment is inflicted on the Indians and others, for the exercise of them. The important question then arises, which shall stand, the laws of the United States, or the laws of Georgia? No rule of construction, or this question. The response must be, so far as the punishment of the plaintiff in error is concerned, in favor of the one or the other.

Not to feel the full weight of this momentous subject would evidence an ignorance of that high responsibility which is devolved upon this tribunal, and upon its humblest member, in giving a decision in this case.

Are the treaties and law which have been cited, in force? and what, if any obligations, do they impose on the federal government within the limits of Georgia?

A reference had been made to the policy of the United States on the subject of Indian affairs before the adoption of the Constitution, with a view to ascertaining in what light the Indians have been considered by the first official acts, in relation to them, by the United States. For this object, it might not be improper to notice how they were considered by the European inhabitants, who first formed settlements in this part of the continent of America.

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The abstract right of every section of the human race to a reasonable portion of the soil, by which to acquire the means of subsistence, cannot be controverted. And it is equally clear that the range of nations or tribes, who exist in the hunter state, may be restricted within reasonable limits. They shall not be permitted to roam, in the pursuit of game, over an extensive and rich country, whilst in other parts, human beings are crowded so closely together, as to render the means of subsistence precarious. The law of nature, which is paramount to all other laws, gives the right to every nation to the enjoyment of a reasonable extent of country, so as to derive the means of subsistence from the soil.

In this view, perhaps, our ancestors, when they first migrated to this country, might have taken possession of a limited extent of the domain, had they been sufficiently powerful, without negotiation or purchase from the native Indians. But this course is believed to have been nowhere taken. A more conciliatory mode was preferred, and one which was better calculated to impress the Indians, who where then powerful, with a sense of the justice of their white neighbors. The occupancy of their lands was never assumed, except upon the basis of contract, and on the payment of a valuable consideration.

This policy has obtained from the earliest white settlements in this country down to the present time. Some cessions of territory may have been made by the Indians, in compliance with the terms on which peace was offered by the whites, but the soil thus taken was taken by the laws of conquest, and always as an indemnity for the expense of the war commenced by the Indians.

At no time has the sovereignty of the country been recognized as existing in the Indians, but they have been always admitted to possess many of the attributes of sovereignty. All the rights which belong to self-government have been recognized as vested in them. Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. This may be called the right to the ultimate domain, but the Indians have a present right of possession.

In some of the old States—Massachusetts, Connecticut, Rhode Island and others—where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government—the laws of the State have been extended over them, for the protection of their persons and property.

Before the adoption of the Constitution, the mode of treating with the Indians was various. After the formation of the confederacy, this subject was placed under the special superintendence of the United Colonies, though, subsequent to that time, treaties may have been occasionally entered into between a State and the Indians in its neighborhood. It is not considered to be at all important to go into a minute inquiry on this subject.

By the Constitution, the regulation of commerce among the Indian tribes given to Congress. This power must be considered as exclusively vested in Congress, as the power to regulate commerce with foreign nations, to coin money, to establish post-offices, and to declare war. It is enumerated in the same class of powers.

This investiture of power has been exercised in the regulation of commerce with the Indians, sometimes by treaty, and, at other times, by enactments of Congress. In this respect they have been placed by the federal authority, with but few exceptions, on the same footing as foreign nations.

It is said that these treaties are nothing more than compacts, which cannot be considered as obligatory on the United States, from a want of power in the Indians to enter into them.

What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self-government.

Is it essential that each party shall possess the same attributes of sovereignty to give force to the treaty? This will not be pretended; for, on this ground, very few valid treaties could be formed. The only requisite is, that each of the contracting parties shall possess the right of self-government, and the power to perform the stipulations of the treaty.

Under the Constitution, no State can enter into any treaty; and it is believed that, since its adoption, no State, under its own authority, had held a treaty with the Indians.

It must be admitted that the Indians sustain a peculiar relation to the United States. They do not constitute, as was decided at the last term, a foreign state, so as to claim the right to sue in the Supreme Court of the United States; and yet, having the right of self-government, they, in

some sense, form a State. In the management of their internal concerns, they are dependent on no power. They punish offenses under their own laws, and, in doing so, they are responsible to no earthly tribunal. They make war and form treaties of peace. The exercise of these and other powers gives to them a distinct character as a people, and constitutes them, in some respects, a state, although they may not be admitted to possess the right of soil.

By various treaties, the Cherokees have placed themselves under the protection of the United States; they have agreed to trade with no other people, nor to invoke the protection of any other sovereignty. But such engagements do not devest them of the right of self-government, nor destroy their capacity to enter into treaties or compacts.

Every State is more or less dependent on those which surround it; but, unless this dependence shall extend so far as to merge the political existence of the protected people into that of their protectors, they may still constitute a state. They may exercise the powers not relinquished, and bind themselves as a distinct and separate community.

The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend that the word "allotted," in reference to the land guaranteed to the Indians in certain treaties, indicates a favor conferred rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

The question may be asked, is no distinction to be made between a civilized and savage people? Are our Indians to be placed upon a footing with the nations of Europe, with whom we have made treaties?

The inquiry is not what station shall now be given to the Indian tribes in our country? but, what relation have they sustained to us, since the commencement of our government.

We have made treaties with them; and are those treaties to be disregarded on our part because they were entered into with an uncivilized people? Does this lessen the obligation of such treaties? By entering into them, have we not admitted the power of this people to bind themselves, and to impose obligations on us?

The President of the Senate, except under the treaty-making power, cannot enter into compacts with the Indians, or with foreign nations. This power has been uniformly exercised in forming treaties with the Indians.

Nations differ from each other in condition, and that of the same nation may change by the revolutions of time, but the principles of justice are the same. They rest upon a base which will remain beyond the endurance of time.

After a lapse of more than forty years since treaties with the Indians have been solemnly ratified by the general government, it is too late to deny their binding force. Have the numerous treaties which have been formed with them, and the ratifications by the President and Senate, been nothing more than an idle pageantry?

By numerous treaties with the Indian tribes we have acquired accessions of territory of incalculable value to the Union. Except by compact, we have not even claimed a right of way through the Indian lands. We have recognized in them the right to make war. No one has ever supposed that the Indians could commit treason against the United States. We have punished them for their violation of treaties; be we have inflicted the punishment on them as a nation and not on individual offenders among them as traitors.

In the executive, legislative, and judicial branches of our government, we have admitted, by the most solemn sanctions, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state, or separate community—not as belonging to the confederacy, but as existing within it, and, of necessity, bearing to it a peculiar relation.

But, can the treaties which have been referred to, and law of 1802, be considered in force within the limits of the State of Georgia?

In the act of cession made by Georgia to the United States in 1802, of all lands claimed by her west of the line designated, one of the conditions was, "that the United States should, at their own expense, extinguish, for the use of Georgia, as early as the same can be peaceably obtained,

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on reasonable terms, the Indian title to lands within the State of Georgia."

One of the counsel, in the argument, endeavored to show that no part of the country now inhabited by the Cherokee Indians is within what is called the chartered limits of Georgia.

It appears that the charter of Georgia was surrendered by the trustees, and that, like the State of South Carolina, she became a regal colony. The effect of this change was to authorize the crown to alter the boundaries, in the exercise of its discretion. Certain alterations, it seems, were subsequently made; but I do not conceive it can be of any importance to enter into a minute consideration of them. Under its charter, it may be observed that Georgia derived a right to the soil, subject to the Indian title, by occupancy. By the act of cession, Georgia designated a certain line as the limit of that cession, and this line, unless subsequently altered, with the assent of the parties interested, must be considered as the boundary of the State of Georgia. This line having been thus recognized, cannot be contested on any question which may incidentally arise for judicial decision.

It is important, on this part of the case to ascertain in what light Georgia has considered the Indian title to lands generally, and particularly within her own boundaries; and also, as to the right, of the Indians to self-government.

In the first place, she was a party to all the treaties entered into between the United States and the Indians since the adoption of the Constitution. And prior to that period she was represented in making them, and was bound by their provisions, although it is alleged that she remonstrated against the Treaty of Hopewell. In the passage of the intercourse law of 1802, as one of the constituent parts of the Union, she was also a party.

The stipulation made in her act of cession, that the United States should extinguish the Indian title to lands within the State, was a distinct recognition of the right in the federal government to make the extinguishment; and also that, until it should be made, the right of occupancy should remain in the Indians.

In a law of the State of Georgia, "for opening the land-office, and for other purposes," passed in 1783, it is declared that surveys made on Indians lands were null and void; a fine was inflicted on the person making the survey, which if not paid by the offender, he was punished by imprisonment. By a subsequent act, a line was fixed for the Indians, which was a boundary between them and the whites. A similar provision is found in other laws of Georgia, passed before the adoption of the Constitution. By an act of 1787, severe corporeal punishment was inflicted on those who made or attempted to make surveys, "beyond the temporary line designating the Indian hunting-ground."

On the 19th of November, 1814, the following resolutions were adopted by the Georgia Legislature:

> Whereas, many of the citizens of this State, without regard to existing treaties between the friendly Indians and the United States, and contrary to the interest and good policy of this State, have gone, and are frequently going over, and settling and cultivating the lands allotted to the friendly Indians for their hunting-ground, by which means the State is not only deprived of their services in the army, but considerable feuds are engendered between us and our friendly neighboring Indians:
>
> "Resolved, therefore, by the Senate and House of Representatives of the State of Georgia in General Assembly met, that his excellency the governor, be, and is hereby requested to take the necessary means to have all intruders removed off the Indian lands, and that proper steps be taken to prevent future aggressions."

In 1817 the Legislature refused to take any steps to dispose of lands acquired by treaty with the Indians until the treaty had been ratified by the Senate; and, by a resolution, the governor was directed to have the line run between the State of Georgia and the Indians, according to the late treaty. The same thing was again done in the year 1819, under a recent treaty.

In a memorial to the President of the United States by the Legislature of Georgia in 1819, they say,

> "it has long been the desire of Georgia that her settlements should be extended to her ultimate limits.… …The the soil within her boundaries should be subjected to her control, and that her police organization and government should be fixed and permanent.… …That the State of Georgia claims a right to the jurisdiction and soil of the territory within her limits.… …She admits, however, that the right is inchoate—remaining to be perfected by the United States, in the extinction of the Indian title; the United States *pro hac vice* as their agents."

The Indian title was also distinctly acknowledge by the Act of 1796 repealing the Yazoo Act. It is there declared, in reference to certain lands, that "they are the sole property of the State, subject only to the right of the treaty of the United States, to enable the State to purchase, under its pre-emption right, the Indian title to the same;" and, also that the land is vested in the "State, to whom the right of pre-emption to the same belongs, subject only to the controlling power of the United States, to authorize any treaties for, and to superintend the same." This language, it will be observed, was used long before the act of cession.

On the 25th of March, 1825, the Governor of Georgia issued the following proclamation:

> "Whereas it is provided in said treaty that the United States shall protect the Indians against the encroachments, hostilities, and impositions of the whites, so that they suffer no imposition, molestation, or injury in their persons, goods, effects, their dwellings, or the lands that they occupy, until their removal shall have been accomplished according to the terms of the treaty" which had been recently made with the Indians.
>
> "I have therefore thought proper to issue this, my proclamation, warning all persons, citizens of Georgia or others, against trespassing or intruding upon lands occupied by the Indians, within the limits of Georgia, either for the purpose of settlement or otherwise, as every such act will be in direct violation of the provisions of the treaty aforesaid, and will expose the aggressors to the most certain and summary punishment by the authorities of the State and the United States.… …All good citizens, therefore, pursuing the dictates of good faith, will unite in enforcing the obligations of the treaty, as the supreme law," etc.

Many other references might be made to the public acts of the State of Georgia to show that she admitted the obligation of Indian treaties, but the above are believed to be sufficient. These acts did honor to the character of that highly respectable State.

Under the act of cession, the United States were bound, in good faith, to extinguish the Indian title to lands within the limits of Georgia, so soon as it could be done peaceably and on reasonable terms.

The State of Georgia has repeatedly remonstrated to the President on this subject, and called upon the government to take the necessary steps to fulfill its engagement. She complained that, whilst the Indian title to immense tracts of country had been extinguished elsewhere, within the limits of Georgia but little progress had been made; and this was attributed either to a want of effort on the part of the federal government, or to the effect of its policy towards the Indians. In one or more of the treaties, titles in fee-simple were given to the Indians to certain reservations of land; and this was complained of by Georgia as a direct infraction of the condition of the cession. It has also been asserted that the policy of the government, in advancing the cause of civilization among the Cherokees, and inducing them to assume the forms of a regular government and of civilized life, was calculated to increase their attachment to the soil they inhabit, and to render the purchase of their title more difficult, it not impracticable.

A full investigation of this subject may not be considered as strictly within the scope of the judicial inquiry which belongs to the present case. But, to some extent, it has a direct bearing on the question before the court, as it tends to show how the rights and powers of Georgia were construed by her public functionaries.

By the first President of the United States, and by every succeeding one, a strong solicitude has been expressed for the civilization of the Indians. Through the agency of the government, they have been partially induced, in some parts of the Union, to change the hunter state for that of the agriculturist and herdsman.

In a letter addressed by Mr. Jefferson to the Cherokees, dated the 9th of January, 1809, he recommends them to adopt a regular government, that crimes might be punished and property protected. He points out the mode by which a council should be chosen, who should have power to enact laws; and he also recommended the appointment of judicial and executive agents, through whom the law might be enforced. The agent of the government, who resided among them, was recommended to be associated with their council, that he might give the necessary advice on all subjects relating to their government.

In the Treaty of 1817, the Cherokees are encouraged to adopt a regular form of government.

Since that time, a law has been passed making an annual appropriation of the sum of ten thousand dollars, as a school fund for the education of Indian youths, which has been distrib-

uted among the different tribes where schools had been established. Missionary labors among the Indians have also been sanctioned by the government, by granting permits to those who were disposed to engage in such a work, to reside in the Indian country.

That the means adopted by the general government to reclaim the savage from his erratic life, and induce him to assume the forms of civilization, have had a tendency to increase the attachment of the Cherokees to the country they now inhabit is extremely probable; and that it increased the difficulty of purchasing their lands, as by act of cession the general government agreed to do, is equally probable.

Neither Georgia nor the United States, when the cession was made, contemplated that force should be used in the extinguishment of the Indian title, nor that it should be procured on terms that are not reasonable. But, may it not be said, with equal truth, that it was not contemplated by either party that any obstructions to the fulfillment of the compact should be allowed, much less sanctioned, by the United States?

The humane policy of the government towards these children of the wilderness must afford pleasure to every benevolent feeling; and if the efforts made have not proved as successful as was anticipated, still much has been done. Whether the advantages of this policy should not have been held out by the government to the Cherokees within the limits of Georgia, as an inducement for them to change their residence and fix it elsewhere, rather than by such means to increase their attachment to their present home, as has been insisted on, is a question which may be considered by another branch of the government. Such a course might, perhaps, have secured to the Cherokee Indians all the advantages they have realized from the paternal superintendence of the government; and have enabled it, on peaceable and reasonable terms, to comply with the act of cession.

Does the intercourse law of 1802 apply to the Indians who live within the limits of Georgia? The nineteenth section of that act provides

> "that it shall not be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual States? This provision, it has been supposed, excepts from the operation of the law the Indian lands which lie within any State. A moment's reflection will show that this construction is most clearly erroneous.

To constitute an exception to the provisions of this act, the Indian settlement, at the time of its passage, must have been surrounded by settlements of the citizens of the United States, and within the ordinary jurisdiction of a State; not only within the limits of a State, but within the common exercise of its jurisdiction.

No one will pretend that this was the situation of the Cherokees who lived, within the State of Georgia in 1802; or, indeed, that such is their present situation. If then, they are not embraced by the exception, all the provisions of the Act of 1802 apply to them.

In the very section which contains the exception, it is provided that the use of the road from Washington district to Mero district should be enjoyed, and that the citizens of Tennessee, under the orders of the governor, might keep the road in repair. And in the same section, the navigation of the Tennessee River is reserved, and a right to travel from Knoxville to Price's settlement, provided the Indians should not object.

Now, all these provisions relate to the Cherokee country; and can it be supposed, by anyone, that such provisions would have been made in the act if Congress had not considered it as applying to the Cherokee country, whether in the State of Georgia or in the State of Tennessee?

The exception applied exclusively to those fragments of tribes which are found in several of the States, and which came literally within the description used.

Much has been said against the existence of an independent power within a sovereign State; and the conclusion has been drawn that the Indians, as a matter of right, cannot enforce their own laws, within the territorial limits of a State. The refutation of this argument is found in our past history.

The fragments of tribes, having lost the power of self-government, and who lived within the ordinary jurisdiction of a State, have been taken under the protection of the laws, has already been admitted. But there has been no instance where the State laws have been generally extended over a numerous tribe of Indians living within the State and exercising the right of self-government, until recently.

Has Georgia ever, before her late laws, attempted to regulate the Indian communities within her limits? It is true, New York extended her criminal laws over the remains of the tribes within that State, more for their protection than for any other purpose. These tribes were few in number, and were surrounded by a white population. But, even the State of New York has never asserted the power, it is believed, to regulate their concerns beyond the suppression of crime.

Might not the same objection to this interior independent power by Georgia have been urged with as much force as at present, ever since the adoption of the Constitution? Her chartered limits, to the extent claimed, embraced a great number of different nations of Indians, all of whom were governed by their own laws, and were amenable only to them. Has not this been the condition of the Indians with Tennessee, Ohio, and other States?

The exercise of this independent power surely does not become more objectionable, as it assumes the basis of justice and the forms of civilization. Would it not be a singular argument to admit that, so long as the Indians govern by the rifle and the tomahawk, their government may be tolerated, but that it must be suppressed so soon as it shall be administered upon the enlightened principles of reason and justice?

Are not those nations of Indians who have made some advances in civilization better neighbors than those who are still a savage state? And is not the principle, as to their self-government, within the jurisdiction of a State, the same?

When Georgia sanctioned the Constitution, and conferred on the national Legislature the exclusive right to regulate intercourse with the Indians within her limits? This will not be pretended. If such had been the construction of her own powers would they not have been exercised? Did her senators object to the numerous treaties which have been formed with the different tribes who lived within her acknowledged boundaries? Why did she apply to the executive of the Union, repeatedly, to have the Indian title extinguished; to establish a line between the Indians and the State, and to procure a right of way through the Indian lands?

The residence of Indians, governed by their own laws, within the limits of a State, has never been deemed incompatible with State sovereignty until recently. And yet, this has been the condition of many distinct tribes of Indians, since the foundation of the federal government.

How is the question varied by the residence of the Indians in a territory of the United States? Are not the United States sovereign within their territories? And has it ever been conceived by anyone that the Indian governments which exist in the territories are incompatible with the sovereignty of the Union?

A State claims the right of sovereignty commensurate with her territory, as the United States claim it, in their proper sphere, to the extent of the federal limits. This right or power, in some cases, may be exercised, but not in others. Should a hostile force invade the country, at its most remote boundary, it would become the duty of the general government to expel the invaders. But it would violate the solemn compacts with the Indians, without cause, to dispossess them of rights which they possess by nature, and have been uniformly acknowledged by the federal government.

Is it incompatible with State sovereignty to grant exclusive jurisdiction to the federal government over a number of acres of land for military purposes? Our forts and arsenals, though situated in the different States, are not within their jurisdiction.

Does not the constitution give to the United States as exclusive jurisdiction in regulating intercourse with the Indians as has been given to them over any other subjects? Is there any doubt as to this investiture of power? Has it not been exercised by the federal government ever since its formation, not only without objection, but under the express sanction of all the States?

The power to dispose of the pubic domain is an attribute of sovereignty. Can the new States dispose of the lands within their limits which are owned by the federal government? The power to tax is also an attribute of sovereignty; but can the new States tax the lands of the United States? Have they not bound themselves, by compact, not to tax the public lands, nor until five years after they shall have been sold? May they violate this compact at discretion?

Why may not these powers be exercised by the respective States? The answer is, because they have parted with them, expressly for the general good. Why may not a State coin money, issue bills of credit, enter into a treaty of alliance or confederation, or regulate commerce with

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foreign nations? Because these powers have been expressly and exclusively given to the federal government.

Has not the power been as expressly conferred on the federal government to regulate intercourse with the Indians, and is it not as exclusively given as any of the powers above enumerated? There being no exception to the exercise of this power, it must operate on all communities of Indians exercising the right of self-government; and consequently, include those who reside within the limits of a State, as well as others. Such has been the uniform construction of this power by the federal government, and of every State government, until the question was raised by the State of Georgia.

Under this clause of the Constitution, no political jurisdiction over the Indians has been claimed or exercised. The restrictions imposed by the law of 1802 come strictly within the power to regulate trade; not as an incident, but as a part of the principal power. It is the same power, and is conferred in the same words, that has often been exercised in regulating trade with foreign countries. Embargoes have been imposed, laws of non-intercourse have been passed, and numerous acts restrictive of trade, under the power to regulate commerce with foreign nations.

In the regulation of commerce with the Indians, Congress have exercised a more limited power than has been exercised in reference to foreign countries. The law acts upon our own citizens, and not upon the Indian, the same as the laws referred to act upon our own citizens in their foreign commercial intercourse.

It will scarcely be doubted by anyone that, so far as the Indians, as distinct communities, have formed a connection with the federal government by treaties; that such connection is political, and is equally binding on both parties. This cannot be questioned, except upon the ground that in making these treaties, the federal government has transcended the treaty-making power. Such an objection, it is true, has been stated, but it is one of modern invention, which arises out of local circumstances; and is not only opposed to the uniform practice of the government, but also to the letter and spirit of the Constitution.

But the inquiry may be made, is there no end to the exercise of this power over Indians within the limits of a State, by the general government? The answer is, that, in its nature, it must be limited by circumstances.

If a tribe of Indians shall become so degraded or reduced in numbers as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them. The point at which this exercise of power by a State would be proper, need not now be considered; if, indeed, it be a judicial question. Such a question does not seem to arise in this case. So long as treaties and laws remain in full force, and apply to Indian nations exercising the right of self-government within the limits of a State, the judicial power can exercise no discretion in refusing to give effect to those laws, when questions arise under them, unless they shall be deemed unconstitutional.

The exercise of the power of self-government by the Indians within a State, is undoubtedly contemplated to be temporary. This is shown by the settled policy of the government in the extinguishment of their title, and especially by the compact with the State of Georgia. It is a question, not of abstract right, but of public policy. I do not mean to say that the same moral rule which should regulate the affairs of private life should not be regarded by communities or nations. But, a sound national policy does require that the Indian tribes within our States should exchange their territories, upon equitable principles, or, eventually, consent to become amalgamated in our political communities.

At best they can enjoy a very limited independence within the boundaries of a State, and such a residence must always subject them to encroachments from the settlements around them; and their existence within a State as a separate and independent community, may seriously embarrass or obstruct the operation of the State laws. If, therefore, it would be inconsistent with the political welfare of the States and the social advance of their citizens that an independent and permanent power should exist within their limits, this power must give way to the greater power which surrounds it, or seek its exercise beyond the sphere of State authority.

This state of things can only be produced by a co-operation of the State and federal governments. The latter has the exclusive regulation of intercourse with the Indians; and so long as this power shall be exercised, it cannot be obstructed by the State. It is a power given by the Constitution and sanctioned by the most solemn

acts of both the federal and State governments: consequently, it cannot be abrogated at the will of a State. It is one of the powers parted with by the States and vested in the federal government. But, if a contingency shall occur which shall render the Indians who reside in a State incapable of self-government, either by moral degradation or a reduction of their numbers, it would undoubtedly be in the power of a State government to extend to them the aegis of its laws. Under such circumstances, the agency of the general government, of necessity, must cease.

But, if it shall be the policy of the government to withdraw its protection from the Indians who reside within the limits of the respective States, and who not only claim the right of self-government but have uniformly exercised it; the laws and treaties which impose duties and obligations on the general government should be abrogated by the powers competent to do so. So long as those laws and treaties exist, having been formed within the sphere of the federal powers, they must be respected and enforced by the appropriate organs of the federal government.

The plaintiff, who prosecutes this writ of error, entered the Cherokee country, as it appears, with the express permission of the President, and under the protection of the treaties of the United States and the law of 1802. He entered, not to corrupt the morals of this people, nor to profit by their substance; but to teach them, by precept and example, the Christian religion. If he be unworthy of this sacred office; if he had any other object than the one professed; if he sought, by his influence, to counteract the humane policy of the federal government towards the Indians, and to embarrass its efforts to comply with its solemn engagement with Georgia; though his sufferings be illegal, he is not a proper object of public sympathy.

It has been shown that the treaties and laws referred to come within the due exercise of the constitutional powers of the federal government; that they remain in full force, and consequently must be considered as the supreme laws of the land. These laws throw a shield over the Cherokee Indians. They guaranteed to them their rights of occupancy, of self-government, and the full enjoyment of those blessings which might be attained in their humble condition. But, by the enactments of the State of Georgia, this shield is broken in pieces—the infant institutions of the Cherokees are abolished, and their laws annulled. Infamous punishment is denounced against them for the exercise of those rights which have been most solemnly guaranteed to them by the national faith.

Of these enactments, however, the plaintiff in error has no right to complain, nor can he question their validity, except in so far as they affect his interests. In this view and in this view only, has it become necessary, in the present case, to consider the repugnancy of the laws of Georgia to those of the Union.

Of the justice or policy of these laws it is not my province to speak; such considerations belonging to the Legislature by whom they were passed. They have, no doubt, been enacted under a conviction of right, by a sovereign and independent State, and their policy may have been recommended by a sense of wrong under the compact. Thirty years have elapsed since the federal government engaged to extinguish the Indian title within the limits of Georgia. That she has strong ground of complaint arising from this delay must be admitted; but such considerations are not involved in the present case; they belong to another branch of the government. We can look only to the law, which defines our power, and marks out the path of out duty.

Under the administration of the laws of Georgia, a citizen of the United States has been deprived of his liberty; and, claiming protection under the treaties and laws of the United States, he makes the question, as he has a right to make it, whether the laws of Georgia, under which he is now suffering an ignominious punishment, are not repugnant to the Constitution of the United States, and the treaties and laws made under it. This repugnancy has been shown; and it remains only to say, what has before been often said by this tribunal of the local laws of many of the States in this Union, that being repugnant to the Constitution of the United States, and to the laws made under it, they can have no force to devest the plaintiff in error of his property or liberty.

Mr. Justice Baldwin dissented, stating that in his opinion the record was not properly returned upon the writ of error, and ought to have been returned by the State court, and not by the clerk of that court. As to the merits, he said his opinion remained the same as was expressed by him in the case of *The Cherokee Nation v. The State of Georgia,* at the last term.

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The opinion of Mr. Justice Baldwin was not delivered to the reporter.

This cause came on to be heard on the transcript of the record from the Superior Court for the County of Gwinnett, in the State of Georgia, and was argued by counsel; on consideration whereof, it is the opinion of this court that the act of the Legislature of the State of Georgia upon which the indictment in this case is founded, is contrary to the Constitution, treaties, and laws of the United States; and that the special plea in bar pleaded by the said Samuel A. Worcester, in manner aforesaid, and relying upon the Constitution, treaties, and laws of the United States aforesaid, is a good bar and defense to the said indictment, by the Samuel A. Worcester; and as such ought to have been allowed and admitted by the said Superior Court for the County of Gwinnett, in the State of Georgia, before which the said indictment was pending and tried; and that there was error in the said Superior Court of the State of Georgia in overruling the plea so pleaded as aforesaid. It is therefore ordered and adjudged that the judgment rendered in the premises by the said Superior Court of Georgia, upon the verdict upon the plea of "not guilty" afterwards pleaded by the said Samuel A. Worcester, whereby the said Samuel A. Worcester is sentenced to hard labor in the penitentiary of the State of Georgia, ought to be reversed and annulled. And this court proceeding to render such judgment as the said Superior Court of the State of Georgia should have rendered, it is further ordered and adjudged that the said judgment of the said Superior Court be, and hereby is reversed and annulled; and that judgment be, and hereby is, awarded, that the special plea, in bar, so as aforesaid pleaded, is a good sufficient plea in bar in law to the indictment aforesaid; and that all proceedings on the said indictment do forever surcease; and that the said Samuel A. Worcester be, and hereby is henceforth dismissed therefrom, and that he go thereof quit without day. And that a special mandate do go from this court to the said Superior Court, to carry this judgment into execution.

In the case of *Butler, Plaintiff in Error, v. The State of Georgia,* the same judgment was given by the court, and a special mandate was ordered from the court to the Superior Court of Gwinnett County, to carry the judgment into execution.

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## Surrender Speech

Black Hawk, 1832

From April to August 1832, an armed band of Sauk and Fox Indians under Chief Black Hawk sought to reoccupy the lands they had held in the Illinois and Wisconsin Territory. The tribes, who faced famine and hostile Sioux to the west, wanted a place with decent land in which to plant their corn. The Illinois militia chased them into Wisconsin, killing women and children as the tribe attempted to escape across the Mississippi River.

Faced with annihilation, Black Hawk had no choice but to surrender. In his speech he recounted the history of lies and betrayal the white men had perpetuated on Native Americans. President Jackson then sent Black Hawk and his son Whirling Thunder on tour to be displayed as "trophies" of war. But the two prisoners showed such dignity in their ordeal that the public quickly began to sympathize with them.

### Surrender Speech

Black-hawk is an Indian. He has done nothing for which an Indian ought to be ashamed. He has fought for his countrymen, the squaws and papooses, against white men, who came, year after year, to cheat them and take away their lands. You know the cause of our making war. It is known to all white men. They ought to be ashamed of it. The white men despise the Indians, and drive them from their homes. But the Indians are not deceitful. The white men speak bad of the Indian, and look at him spitefully. But the Indian does not tell lies; Indians do not steal.

An Indian, who is as bad as the white men, could not live in our nation; he would be put to death, and eat up by the wolves. The white men are bad schoolmasters; they carry false looks, and deal in false actions; they smile in the face of the poor Indian to cheat him; they shake them by the hand to gain their confidence, to make them drunk, to deceive them, and ruin our wives. We told them to let us alone, and keep away from us; but they followed on, and beset our paths, and they coiled themselves among us, like the snake. They poisoned us by their touch. We were not safe. We lived in danger. We were becoming like them, hypocrites and liars, adulterers, lazy drones, all talkers, and no workers.

We looked up to the Great Spirit. We went to our great father. We were encouraged. His great council gave us fair words and big promises; but we got no satisfaction. Things were growing worse. There were no deer in the forest. The opossum and beaver were fled; the springs were drying up, and our squaws and papooses without victuals to keep them from starving; we called a great council, and built a large fire. The spirit of our fathers arose and spoke to us to avenge our wrongs or die. We all spoke before the council fire. It was warm and pleasant. We set up the war-whoop, and dug up the tomahawk; our knives were ready, and the heart of Black-hawk swelled high in his bosom, when he led his warriors to battle. He is satisfied. He will go to the world of spirits contented. He has done his duty. His father will meet him there, and commend him.

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## Treaty with Sioux Nation

The Sioux were an important confederacy of the North American Indian tribes that inhabited the Great Plains. In the seventeenth century the Sioux had comprised small bands of Woodland Indians in the Mille Lacs region of present-day Minnesota. Conflict with the Ojibwa (also called Chippewa or Anishinabe) forced the Sioux to move to the buffalo ranges of the Great Plains. As they became adept buffalo hunters, the tribes grew and prospered. By 1750 the Sioux comprised some 30,000 persons firmly established in the heartland of the northern plains.

An 1825 treaty confirmed Sioux possession of an immense territory including much of present-day Minnesota, the Dakotas, Wisconsin, Iowa, Missouri, and Wyoming. As white settlers moved onto Sioux lands, violence erupted. Red Cloud's War (1866–1867) resulted in a treaty granting the Black Hills in perpetuity to the Sioux. The United States failed to honor the treaty, however, and allowed gold prospectors and miners to invade the territory in the 1870s. These events were the backdrop for the Battle of Little Bighorn on June 25, 1876, in which General George Armstrong Custer and three hundred troops were killed by Chief Sitting Bull and his Sioux warriors.

In 1877 Congress approved a treaty with certain bands of the Sioux (19 Stat. 254), which changed the terms of the treaty ratified in 1869. Because of pressure by white miners and settlers, the Great Sioux Reservation was reduced, three roads were to be constructed and maintained through the reservation, and the free navigation of the Missouri River was mandated.

In return, the Sioux nation continued to receive annuities negotiated in the 1869 treaty. More importantly, the Sioux were required to select land for a reservation "located in a country where they may eventually become self-supporting and acquire the arts of civilized life." The U.S. government promised the Sioux schools, instruction in "mechanical and agricultural arts," a ration of food, and a "comfortable house." The removal to the reservation meant the end of the Sioux people's traditional way of life. Sporadic resistance continued until the massacre at Wounded Knee, South Dakota, in December 1890, when U.S. troops slaughtered more than two hundred Sioux men, women, and children.

### Treaty with Sioux Nation

FORTIETH CONGRESS SECOND SESSION

CHAPTER 72, AN ACT TO RATIFY AN AGREEMENT WITH CERTAIN BANDS OF THE SIOUX NATION OF INDIANS AND ALSO WITH THE NORTHERN ARAPAHO AND CHEYENNE INDIANS.

BE IT ENACTED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,

that a certain agreement made by George W. Manypenny, Henry B. Whipple, Jared W. Daniels, Albert G. Boone, Henry C. Bulis, Newton Edumunds, and Augustine S. Gaylord, commissioners on the part of the United States,

with the different bands of the Sioux Nation of Indians, and also the Northern Arapaho and Cheyenne Indians, be, and the same is hereby, ratified and confirmed:

PROVIDED, that nothing in this act shall be construed to authorize the removal of Sioux Indians to the Indian Territory and the President of the United States is hereby directed to prohibit the removal of any portion of the Sioux Indians to the Indian Territory until the same shall be authorized by an act of Congress hereafter enacted, except article four, except also the following portion of article six: "And if said Indians shall remove to said Indian Territory as hereinbefore provided, the Government shall erect for each of the principal chiefs a good and comfortable dwelling house" and said article not having been agreed to by the Sioux Nation: said agreement is in words and figures following: namely: "Articles of agreement made pursuant to the provisions of an act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes," approved August 15, 1876, by and between George W. Manypenny, Henry B. Whipple, Jared W. Daniels, Albert G. Boone, Henry C. Bulis, Newton Edumunds, and Augustine S. Gaylord, commissioners on the part of the United States, with the different bands of the Sioux Nation of Indians, and also the Northern Arapaho and Cheyenne Indians, by their chiefs and headmen, whose names are hereto subscribed, they being duly authorized to act in the premises.

### ARTICLE 1

**[Reduction of the Great Sioux Reservation]**

The said parties hereby agree that the northern and western boundaries of the reservation defined by article 2 of the treaty between the United States and different tribes of Sioux Indians, concluded April 29, 1868, and proclaimed February 24, 1869, shall be as follows: The western boundaries shall commence at the intersection of the one hundred and third meridian of longitude with the northern border of the State of Nebraska; thence north along said meridian to its intersection with the South Fork of the Cheyenne River; thence down said stream to its junction with the North Fork; thence up the North Fork of said Cheyenne River to the said one hundred and third meridian; thence north along said meridian to the South Branch of Cannon Ball River or Cedar Creek; and the northern boundary of the said reservation shall follow the said South Branch to its intersection with the main Cannon Ball River, and thence down the said main Cannon Ball River to the Missouri River; and the said Indians do hereby relinquish and cede to the United States all territory lying outside the said reservation, as herein, modified and described, including all privileges of hunting; and article 16 of said treaty is hereby abrogated.

### ARTICLE 2

**[Roads Through Reservation]**

The said Indians also agree and consent that wagon and other roads, not exceeding three in number, may be constructed and maintained, from convenient and accessible points on the Missouri River, through said reservation, to the country lying immediately west thereof, upon such routes as shall be designated by the President of the United States; and they also consent and agree to the free navigation of the Missouri River.

### ARTICLE 3

**[Distribution Points for Annuities to Be Designated]**

The said Indians also agree that they will hereafter receive all annuities provided by the said treaty of 1868, and all subsistence and supplies which may be provided for them under the present or any future act of Congress, at such points and places on the said reservation, and in the vicinity of the Missouri River.

### ARTICLE 4

**[Delegation to Select Home in Indian Territory]**

The Government of the United States and the said Indians, being mutually desirous that the latter shall be located in a country where they may eventually become self-supporting and acquire the arts of civilized life, it is therefore agreed that the said Indians shall select a delegation of five or more chiefs and principal men from each band, who shall, without delay, visit the Indian Territory under the guidance

and protection of suitable persons, to be appointed for that purpose by the Department of the Interior, with a view to selecting therein a permanent home for said Indians. If such delegation shall make a selection which shall be satisfactory to themselves, the people whom they represent, and to the United States, then the said Indians agree that they will remove to the country so selected within one year from this date. And the said Indians do further agree in all things to submit themselves to such beneficent plans as the Government may provide for them in the selection of a country suitable for a permanent home, where they may live like white men.

### ARTICLE 5

**[Assistance, Schools, Rations, Purchase of Surplus, Employment]**

In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868. Also to provide the said Indians with subsistence consisting of a ration for each individual of a pound and a half of beef, (or in lieu thereof, one half pound of bacon,) one-half pound of flour, and one-half pound of corn; and for every one hundred rations, four pounds of coffee, eight pounds of sugar, and three pounds of beans, or in lieu of said articles the equivalent thereof, in the discretion of the Commissioner of Indian Affairs. Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves. Rations shall, in all cases, be issued to the head of each separate family; and whenever schools shall have been provided by the Government for said Indians, no rations shall be issued for children between the ages of six and fourteen years (the sick and infirm excepted) unless such children shall regularly attend school. Whenever the said Indians shall be located upon lands which are suitable for cultivation, rations shall be issued only to the persons and families of those persons who labor, (the aged, sick, and infirm excepted;) and may provide that such persons be furnished in payment for their labor such other necessary articles as are requisite for civilized life. The Government will aid said Indians as far as possible in finding a market for their surplus productions, and in finding employment, and will purchase such surplus, as far as may be required, for supplying food to those Indians, parties to this agreement, who are unable to sustain themselves; and will also employ Indians, so far as practicable, in the performance of Government work upon their reservation.

### ARTICLE 6

**[Erection of Homes]**

Whenever the head of a family shall, in good faith, select an allotment of land upon such reservation and engage in the cultivation thereof, the Government shall, with his aid, erect a comfortable house on such allotment; and if said Indians shall remove to said Indian Territory as hereinbefore provided, the Government shall erect for each of the principal chiefs a good and comfortable dwelling house.

### ARTICLE 7

**[Agency Employees to Be Married]**

To improve the morals and industrious habits of said Indians, it is agreed that the agent, trader, farmer, carpenter, blacksmith, and other artisans employed or permitted to reside within the reservation belonging to the Indians, parties to this agreement, shall be lawfully married and living with their respective families on the reservation; and no person other than an Indian of full blood, whose fitness, morally or otherwise, is not, in the opinion of the Commissioner of Indian Affairs, conducive to the welfare of said Indians, shall receive any benefit from this agreement or former treaties, and may be expelled from the reservation.

### ARTICLE 8

**[Indians Subject to the Laws of the United States]**

The provisions of the said treaty of 1868, except as herein modified, shall continue in full force, and, with the provisions of this agreement, shall apply to any country which may hereafter be occupied by the said Indians as a home; and Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United

States, and each individual shall be protected in his rights, property, person and life.

### ARTICLE 9

**[Indians Pledged to this Agreement]**

The Indians, parties to this agreement, do hereby solemnly pledge themselves, individually and collectively, to observe each and all of the stipulations herein contained, to select allotments of land as soon as possible after their removal to their permanent home, and to use their best efforts to learn to cultivate the same. And they do solemnly pledge themselves that they will at all times maintain peace with the citizens and Government of the United States; that they will observe the laws thereof and loyally endeavor to fulfill all the obligations assumed by them under the treaty of 1868 and the present agreement, and to this end will, whenever called requested by the President of the United States, select so many suitable men from each band to co-operate with him in maintaining order and peace on the reservation as the President may deem necessary, who shall receive such compensation for their services as Congress may provide.

### ARTICLE 10

**[Annual Census]**

In order that the Government may faithfully fulfill the stipulations contained in this agreement, it is mutually agreed that a census of all Indians affected hereby shall be taken in the month of December of each year, and the names of each head of family and adult person registered; said census to be taken in such manner as the Commissioner of Indian Affairs may provide.

### ARTICLE 11

**[Term "Reservation" Defined]**

It is understood that the term reservation herein contained shall be held to apply to any country which shall be selected under the authority of the United States as the future home of said Indians.

This agreement shall not be binding upon either party until it shall have received the approval of the President and Congress of the United States.

Dated and signed at Red Cloud agency, Nebraska, September 26, 1876.

# NATIVE AMERICAN RIGHTS

## My Son, Stop Your Ears

Chief Joseph, Nez Percé leader, 1879 Address to Congress

On January 14, 1879, Chief Joseph, leader of the Nez Percé nation of the Northwest, addressed Congress to explain why his people had declared war on U.S. troops in 1877. Chief Joseph explained that he and his band had refused to leave their Oregon homes despite the yearly demands of U.S. Indian agents. In 1877, after local cowboys stole Nez Percé horses, the Native Americans struck back. For four months and over thirteen hundred miles, they conducted guerrilla warfare against U.S. troops as they sought to escape into Canada. Chief Joseph surrendered just before reaching the border. In this excerpt of his remarks, Chief Joseph discusses the treaties that the tribe had signed with the U.S. government and the subsequent efforts of the government to send his people to a reservation.

### My Son, Stop Your Ears

It has always been the pride of the Nez Percés that they were the friends of the white men. When my father was a young man there came to our country a white man [the Reverend Mr. Spaulding] who talked spirit law. He won the affections of our people because he spoke good things to them. At first he did not say anything about white men wanting to settle on our lands. Nothing was said about that until about twenty winters ago, when a number of white people came into our country and built houses and made farms. At first our people made no complaint. They thought there was room enough for all to live in peace, and they were learning many things from the white men that seemed to be good. But we soon found that the white men were growing rich very fast, and were greedy to possess everything the Indian had. My father was the first to see through the schemes of the white men, and he warned his tribe to be careful about trading with them. He had suspicion of men who seemed so anxious to make money. I was a boy then, but I remember well my father's caution. He had sharper eyes than the rest of our people.

Next there came a white officer [Governor Stevens], who invited all the Nez Percés to a treaty council. After the council was opened he made known his heart. He said there were a great many white people in the country, and many more would come; that he wanted the land marked out so that the Indians and white men could be separated. If they were to live in peace it was necessary, he said, that the Indians should have a country set apart for them, and in that country they must stay. My father, who represented his band, refused to have anything to do with the council, because he wished to be a free man. He claimed that no man owned any part of the earth, and a man could not sell what he did not own.

Mr. Spaulding took hold of my father's arm and said, "Come and sign the treaty." My father pushed him away, and said: "Why do you ask me to sign away my country? It is your business to talk to us about spirit matters, and not to talk to us about parting with our land." Governor Stevens urged my father to sign his treaty, but he refused. "I will not sign your paper," he said; "you go where you please, so do I; you are not a

child. I am no child; I can think for myself. No man can think for me. I have no other home than this. I will not give it up to any man. My people would have no home. Take away your paper. I will not touch it with my hand."

My father left the council. Some of the chiefs of the other bands of the Nez Percés signed the treaty, and then Governor Stevens gave them presents of blankets. My father cautioned his people to take no presents, for "after a while," he said, "they will claim that you have accepted pay for your country." Since that time four bands of the Nez Percés have received annuities from the United States. My father was invited to many councils, and they tried hard to make him sign the treaty, but he was firm as the rock, and would not sign away his home. His refusal caused a difference among the Nez Percés.

Eight years later (1863) was the next treaty council. A chief called Lawyer, because he was a great talker, took the lead in this council, and sold nearly all the Nez Percés' country. My father was not there. He said to me: "When you go into council with the white man, always remember your country. Do not give it away. The white man will cheat you out of your home. I have taken no pay from the United States. I have never sold our land." In this treaty Lawyer acted without authority from our band. He had no right to sell the Wallowa [*winding water*] country. That had always belonged to my father's own people, and the other bands had never disputed our right to it. No other Indians ever claimed Wallowa.

In order to have all people understand how much land we owned, my father planted poles around it and said: "Inside is the home of my people—the white man may take the land outside. Inside this boundary all our people were born. It circles around the graves of our fathers, and we will never give up these graves to any man."

The United States claimed they had bought all the Nez Percés' country outside of Lapwai Reservation, from Lawyer and other chiefs, but we continued to live in this land in peace until eight years ago, when white men began to come inside the bounds my father had set. We warned them against this great wrong, but they would not leave our land, and some bad blood was raised. The white men represented that we were going upon the warpath. They reported many things that were false.

The United States Government again asked for a treaty council. My father had become blind and feeble. He could no longer speak for his people. It was then that I took my father's place as chief.

In this council I made my first speech to white men. I said to the agent who held the council: "I did not want to come to this council, but I came hoping that we could save blood. The white man has no right to come here and take our country. We have never accepted any presents from the Government. Neither Lawyer nor any other chief had authority to sell this land. It has always belonged to my people. It came unclouded to them from our fathers, and we will defend this land as long as a drop of Indian blood warms the hearts of our men."

The agent said he had orders, from the Great White Chief at Washington, for us to go upon the Lapwai Reservation, and that if we obeyed he would help us in many ways. "You *must* move to the agency," he said. I answered him: "I will not. I do not need your help; we have plenty and we are contented and happy if the white man will let us alone. The reservation is too small for so many people with all their stock. You can keep your presents; we can go to your towns and pay for all we need; we have plenty of horses and cattle to sell, and we won't have any help from you; we are free now; we can go where we please. Our fathers were born here. Here they lived, here they died, here are their graves. We will never leave them." The agent went away, and we had peace for a little while.

Soon after this my father sent for me. I saw he was dying. I took his hand in mine. He said: "My son, my body is returning to my mother earth, and my spirit is going very soon to see the Great Spirit Chief. When I am gone, think of your country. You are the chief of these people. They look to you to guide them. Always remember that your father never sold his country. You must stop your ears whenever you are asked to sign a treaty selling your home. A few years more, and white men will be all around you. They have their eyes on this land. My son, never forget my dying words. This country holds your father's body. Never sell the bones of your father and your mother." I pressed my father's hand and told him I would protect his grave with my life. My father smiled and passed away to the spirit-land.

I buried him in that beautiful valley of winding waters. I love that land more than all the rest of the world. A man who would not love his father's grave is worse than a wild animal.

For a short time we lived quietly. But this could not last. White men had found gold in the mountains around the land of winding water. They stole a great many horses from us, and we could not get them back because we were Indians. The white men told lies for each other. They drove off a great many of our cattle. Some white men branded our young cattle so they could claim them. We had no friend who would plead our cause before the law councils. It seemed to me that some of the white men in Wallowa were doing these things on purpose to get up a war. They knew that we were not strong enough to fight them. I labored hard to avoid trouble and bloodshed. We gave up some of our country to the white men, thinking that then we could have peace. We were mistaken. The white man would not let us alone. We could have avenged our wrongs many times, but we did not. Whenever the Government has asked us to help them against other Indians, we have never refused. When the white men were few and we were strong, we could have killed them all off, but the Nez Percés wished to live at peace.

If we have not done so, we have not been to blame. I believe that the old treaty has never been correctly reported. If we ever owned the land we own it still, for we never sold it. In the treaty councils the commissioners have claimed that our country had been sold to the Government. Suppose a white man should come to me and say, "Joseph, I like your horses, and I want to buy them." I say to him, "No, my horses suit me, I will not sell them." Then he goes to my neighbor, and says to him: "Joseph has some good horses. I want to buy them, but he refuses to sell." My neighbor answers, "Pay me the money, and I will sell you Joseph's horses." The white man returns to me, and says, "Joseph, I have bought your horses, and you must let me have them." If we sold our lands to the Government, this is the way they were bought.

# Reflections on Law and Society

## Presidential Speeches

## Legal Scholarship

# Presidential Speeches


- GEORGE WASHINGTON: FAREWELL ADDRESS
- ABRAHAM LINCOLN: GETTYSBURG ADDRESS
- ABRAHAM LINCOLN: SECOND INAUGURAL ADDRESS
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- RONALD W. REAGAN: FIRST INAUGURAL ADDRESS
- GEORGE W. BUSH: ADDRESS TO CONGRESS, SEPTEMBER 20, 2001


Beginning with George Washington, U.S. presidents have addressed the nation concerning various issues of domestic and international policy. A small number of these speeches have become important documents in their own right. They contain ideas, symbols, and memorable statements that have captured the public's imagination and led to significant changes in U.S. law and government.

# PRESIDENTIAL SPEECHES

## GEORGE WASHINGTON: FAREWELL ADDRESS

On September 17, 1796, leading newspapers published President George Washington's Farewell Address to the nation. Washington, who was nearing the end of his second four-year term, had rejected pleas by members of the Federalist party to seek a third term. The address, which was never delivered orally, is now remembered for its comments on foreign policy, but in 1796 Washington was also concerned with domestic politics.

Alexander Hamilton, who helped draft the Constitution and who wrote many of the essays contained in the *Federalist Papers,* prepared an initial version of the speech. Washington then revised and reshaped it into its final form. The president used the address both to end speculation that he would seek a third term and to help the chances of the Federalists in the forthcoming election.

Washington discussed the state of U.S. politics and lamented the bitter rivalry that had developed between the Federalists and the Republicans, who were led by Thomas Jefferson. A proponent of a strong national government, he warned against the dangers of sectionalism, political revenge, and "the insidious wiles of foreign influence." The latter statement referred to the pro-French sentiments of Jefferson and the Republicans. Washington's policy during the wars between Great Britain and France in the early 1790s had been one of strict neutrality.

The most important section of the address dealt with U.S. foreign relations. Washington stated that the "true policy [of the United States] is to steer clear of permanent alliances with any parts of the foreign world." His views provided support and inspiration for U.S. isolationists who sought to prevent the United States from becoming involved with European governments. U.S. isolationism did not disappear as a viable political viewpoint until the nation's entry into World War II in 1941.

### George Washington: Farewell Address

Friends and fellow citizens:

The period for a new election of a citizen to administer the executive government of the United States being not far distant, and the time actually arrived when your thoughts must be employed in designating the person who is to be clothed with that important trust, it appears to me proper, especially as it may conduce to a more distinct expression of the public voice, that I should now apprise you of the resolution I have formed to decline being considered among the number of those out of whom a choice is to be made.

I beg you at the same time to do me the justice to be assured that this resolution has not been taken without a strict regard to all the considerations appertaining to the relation which binds a dutiful citizen to his country; and that in

Source: James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents,* vol. 1 (1896), pp. 213–24.

withdrawing the tender of service, which silence in my situation might imply, I am influenced by no diminution of zeal for your future interest, no deficiency of grateful respect for your past kindness, but am supported by a full conviction that the step is compatible with both.

The acceptance of and continuance hitherto in the office to which your suffrages have twice called me have been a uniform sacrifice of inclination to the opinion of duty and to a deference for what appeared to be your desire. I constantly hoped that it would have been much earlier in my power, consistently with motives which I was not at liberty to disregard, to return to that retirement from which I had been reluctantly drawn. The strength of my inclination to do this previous to the last election had even led to the preparation of an address to declare it to you; but mature reflection on the then perplexed and critical posture of our affairs with foreign nations and the unanimous advice of persons entitled to my confidence impelled me to abandon the idea. I rejoice that the state of your concerns, external as well as internal, no longer tenders the pursuit of inclination incompatible with the sentiment of duty or propriety, and am persuaded, whatever partiality may be retained for my services, that in the present circumstances of our country you will not disapprove my determination to retire.

The impressions with which I first undertook the arduous trust were explained on the proper occasion. In the discharge of this trust I will only say that I have, with good intentions, contributed toward the organization and administration of the government the best exertions of which a very fallible judgment was capable. Not unconscious in the outset of the inferiority of my qualifications, experience in my own eyes, perhaps still more in the eyes of others, has strengthened the motives to diffidence of myself; and everyday the increasing weight of years admonishes me more and more that the shade of retirement is as necessary to me as it will be welcome. Satisfied that if any circumstances have given peculiar value to my services they were temporary, I have the consolation to believe that, while choice and prudence invite me to quit the political scene, patriotism does not forbid it.

In looking forward to the moment which is intended to terminate the career of my political life, my feelings do not permit me to suspend the deep acknowledgment of that debt of gratitude which I owe to my beloved country for the many honors it has conferred upon me; still more for the steadfast confidence with which it has supported me, and for the opportunities I have thence enjoyed of manifesting my inviolable attachment by services faithful and persevering, though in usefulness unequal to my zeal. If benefits have resulted to our country from these services, let it always be remembered to your praise and as an instructive example in our annals that under circumstances in which the passions, agitated in every direction, were liable to mislead; amidst appearances sometimes dubious; vicissitudes of fortune often discouraging; in situations in which not unfrequently want of success has countenanced the spirit of criticism, the constancy of your support was the essential prop of the efforts and a guaranty of the plans by which they were effected. Profoundly penetrated with this idea, I shall carry it with me to my grave as a strong incitement to unceasing vows that Heaven may continue to you the choicest tokens of its beneficence; that your union and brotherly affection may be perpetual; that the free Constitution which is the work of your hands may be sacredly maintained; that its administration in every department may be stamped with wisdom and virtue; that, in time the happiness of the people of these states, under the auspices of liberty may be made complete by so careful a preservation and so prudent a use of this blessing as will acquire to them the glory of recommending it to the applause, the affection, and adoption of every nation which is yet a stranger to it.

Here, perhaps, I ought to stop. But a solicitude for your welfare which can not end but with my life, and the apprehension of danger natural to that solicitude, urge me on an occasion like the present to offer to your solemn contemplation and to recommend to your frequent review some sentiments which are the result of much reflection, of no inconsiderable observation, and which appear to me all important to the permanency of your felicity as a people. These will be offered to you with the more freedom as you can only see in them the disinterested warnings of a parting friend, who can possibly have no personal motive to bias his counsel. Nor can I forget as an encouragement to it your indulgent reception of my sentiments on a former and not dissimilar occasion.

Interwoven as is the love of liberty with every ligament of your hearts, no recommendation of mine is necessary to fortify or confirm the attachment.

The unity of government which constitutes you one people is also now dear to you. It is justly so, for it is a main pillar in the edifice of your real independence, the support of your tranquillity at home, your peace abroad, of your safety, of your prosperity, of that very liberty which you so highly prize. But as it is easy to foresee that from different causes and from different quarters much pains will be taken, many artifices employed, to weaken in your minds the conviction of this truth, as this is the point in your political fortress against which the batteries of internal and external enemies will be most constantly and actively (though often covertly and insidiously) directed, it is of infinite moment that you should properly estimate the immense value of your national union to your collective and individual happiness; that you should cherish a cordial, habitual, and immovable attachment to it; accustoming yourselves to think and speak of it as of the palladium of your political safety and prosperity; watching for its preservation with jealous anxiety; discountenancing whatever may suggest even a suspicion that it can in any event be abandoned, and indignantly frowning upon the first dawning of every attempt to alienate any portion of our country from the rest or to enfeeble the sacred ties which now link together the various parts.

For this you have every inducement of sympathy and interest. Citizens by birth or choice of a common country, that country has a right to concentrate your affections. The name of American, which belongs to you in your national capacity, must always exalt the just pride of patriotism more than any appellation derived from local discriminations. With slight shades of difference, you have the same religion, manners, habits, and political principles. You have in a common cause fought and triumphed together. The independence and liberty you possess are the work of joint councils and joint efforts, of common dangers, sufferings, and successes.

But these considerations, however powerfully they address themselves to your sensibility, are greatly outweighed by those which apply more immediately to your interest. Here every portion of our country finds the most commanding motives for carefully guarding and preserving the union of the whole.

The North, in an unrestrained intercourse with the South, protected by the equal laws of a common government, finds in the productions of the latter great additional resources of maritime and commercial enterprise and precious materials of manufacturing industry. The South, in the same intercourse, benefiting by the same agency of the North, sees its agriculture grow and its commerce expand. Turning partly into its own channels the seamen of the North, it finds its particular navigation invigorated; and while it contributes in different ways to nourish and increase the general mass of the national navigation, it looks forward to the protection of a maritime strength to which itself is unequally adapted. The East, in a like intercourse with the West, already finds, and in the progressive improvement of interior communications by land and water will more and more find, a valuable vent for the commodities which it brings from abroad or manufactures at home. The West derives from the East supplies requisite to its growth and comfort, and what is perhaps of still greater consequence, it must of necessity owe the secure enjoyment of indispensable outlets for its own productions to the weight, influence, and the future maritime strength of the Atlantic side of the Union, directed by an indissoluble community of interest as one nation. Any other tenure by which the West can hold this essential advantage, whether derived from its own separate strength or from an apostate and unnatural connection with any foreign power, must be intrinsically precarious.

While, then, every part of our country thus feels an immediate and particular interest in union, all the parts combined cannot fail to find in the united mass of means and efforts greater strength, greater resource, proportionably greater security from external danger, a less frequent interruption of their peace by foreign nations, and what is of inestimable value, they must derive from union an exemption from those broils and wars between themselves which so frequently afflict neighboring countries not tied together by the same governments, which their own rivalships alone would be sufficient to produce, but which opposite foreign alliances, attachments, and intrigues would stimulate and embitter. Hence, likewise, they will avoid the necessity of those overgrown military establish-

ments which, under any form of government, are inauspicious to liberty, and which are to be regarded as particularly hostile to republican liberty. In this sense, it is that your union ought to be considered as a main prop of your liberty, and that the love of the one ought to endear to you the preservation of the other.

These considerations speak a persuasive language to every reflecting and virtuous mind, and exhibit the continuance of the union as a primary object of patriotic desire. Is there a doubt whether a common government can embrace so large a sphere? Let experience solve it. To listen to mere speculation in such a case were criminal. We are authorized to hope that a proper organization of the whole, with the auxiliary agency of governments for the respective subdivisions, will afford a happy issue to the experiment. It is well worth a fair and full experiment. With such powerful and obvious motives to union affecting all parts of our country, while experience shall not have demonstrated its impracticability, there will always be reason to distrust the patriotism of those who in any quarter may endeavor to weaken its bands.

In contemplating the causes which may disturb our union it occurs as matter of serious concern that any ground should have been furnished for characterizing parties by geographical discriminations—northern and southern, Atlantic and western—whence designing men may endeavor to excite a belief that there is a real difference of local interests and views. One of the expedients of party to acquire influence within particular districts is to misrepresent the opinions and aims of other districts. You cannot shield yourselves too much against the jealousies and heartburnings which spring from these misrepresentations; they tend to render alien to each other those who ought to be bound together by fraternal affection. The inhabitants of our western country have lately had a useful lesson on this head. They have seen in the negotiation by the executive and in the unanimous ratification by the Senate of the treaty with Spain, and in the universal satisfaction at that event throughout the United States, a decisive proof how unfounded were the suspicions propagated among them of a policy in the general government and in the Atlantic states unfriendly to their interests in regard to the Mississippi. They have been witnesses to the formation of two treaties—that with Great Britain and that with Spain—which secure to them everything they could desire in respect to our foreign relations toward confirming their prosperity. Will it not be their wisdom to rely for the preservation of these advantages on the union by which they were procured? Will they not henceforth be deaf to those advisers, if such there are, who would sever them from their brethren and connect them with aliens?

To the efficacy and permanency of your union a government for the whole is indispensable. No alliances, however strict, between the parts can be an adequate substitute. They must inevitably experience the infractions and interruptions which all alliances in all times have experienced. Sensible of this momentous truth, you have improved upon your first essay by the adoption of a Constitution of government better calculated than your former for an intimate union and for the efficacious management of your common concerns. This government, the offspring of our own choice, uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and your support. Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true liberty. The basis of our political systems is the right of the people to make and to alter their constitutions of government. But the constitution which at any time exists till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all. The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government.

All obstructions to the execution of the laws, all combinations and associations, under whatever plausible character, with the real design to direct, control, counteract, or awe the regular deliberation and action of the constituted authorities, are destructive of this fundamental principle and of fatal tendency. They serve to organize faction; to give it an artificial and extraordinary force; to put in the place of the delegated will of the nation the will of a party, often a small but artful and enterprising minority of the community, and, according to the alternate triumphs of different parties, to make

the public administration the mirror of the ill-concerted and incongruous projects of faction rather than the organ of consistent and wholesome plans, digested by common counsels and modified by mutual interests.

However combinations or associations of the above description may now and then answer popular ends, they are likely in the course of time and things to become potent engines by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people, and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion.

Toward the preservation of your government and the permanency of your present happy state, it is requisite not only that you steadily discountenance irregular oppositions to its acknowledged authority, but also that you resist with care the spirit of innovation upon its principles, however specious the pretexts. One method of assault may be to effect in the forms of the Constitution alterations which will impair the energy of the system, and thus to undermine what can not be directly overthrown. In all the changes to which you may be invited remember that time and habit are at least as necessary to fix the true character of governments as of other human institutions; that experience is the surest standard by which to test the real tendency of the existing constitution of a country; that facility in changes upon the credit of mere hypothesis and opinion exposes to perpetual change, from the endless variety of hypothesis and opinion; and remember especially that for the efficient management of your common interests in a country so extensive as ours a government of as much vigor as is consistent with the perfect security of liberty is indispensable. Liberty itself will find in such a government, with powers properly distributed and adjusted, its surest guardian. It is, indeed, little else than a name where the government is too feeble to withstand the enterprises of faction, to confine each member of the society within the limits prescribed by the laws, and to maintain all in the secure and tranquil enjoyment of the rights of person and property.

I have already intimated to you the danger of parties in the state, with particular reference to the founding of them on geographical discriminations. Let me now take a more comprehensive view, and warn you in the most solemn manner against the baneful effects of the spirit of party generally.

This spirit, unfortunately, is inseparable from our nature, having its root in the strongest passions of the human mind. It exists under different shapes in all governments, more or less stifled, controlled, or repressed; but in those of the popular form it is seen in its greatest rankness and is truly their worst enemy.

The alternate domination of one faction over another, sharpened by the spirit of revenge natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism. But this leads at length to a more formal and permanent despotism. The disorders and miseries which result gradually incline the minds of men to seek security and repose in the absolute power of an individual, and sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation on the ruins of public liberty.

Without looking forward to an extremity of this kind (which nevertheless ought not to be entirely out of sight), the common and continual mischiefs of the spirit of party are sufficient to make it the interest and duty of a wise people to discourage and restrain it.

It serves always to distract the public councils and enfeeble the public administration. It agitates the community with ill-founded jealousies and false alarms; kindles the animosity of one part against another; foments occasionally riot and insurrection. It opens the door to foreign influence and corruption, which find a facilitated access to the government itself through the channels of party passion. Thus the policy and the will of one country are subjected to the policy and will of another.

There is an opinion that parties in free countries are useful checks upon the administration of the government, and serve to keep alive the spirit of liberty. This within certain limits is probably true; and in governments of a monarchical cast patriotism may look with indulgence, if not with favor, upon the spirit of party. But in those of the popular character, in governments purely elective, it is a spirit not to be encouraged. From their natural tendency it is certain there will always be enough of that spirit for every salutary purpose; and there being constant danger of excess, the effort ought to be by force of

public opinion to mitigate and assuage it. A fire not to be quenched, it demands a uniform vigilance to prevent its bursting into a flame, lest, instead of warming, it should consume.

It is important, likewise, that the habits of thinking in a free country should inspire caution in those entrusted with its administration to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power and proneness to abuse it which predominates in the human heart is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal against invasions by the others, has been evinced by experiments ancient and modern, some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them. If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness—these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked, Where is the security for property, for reputation, for life, if the sense of religious obligations desert the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

It is substantially true that virtue or morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of free government. Who that is a sincere friend to it can look with indifference upon attempts to shake the foundation of the fabric? Promote, then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.

As a very important source of strength and security, cherish public credit. One method of preserving it is to use it as sparingly as possible, avoiding occasions of expense by cultivating peace, but remembering also that timely disbursements to prepare for danger frequently prevent much greater disbursements to repeal it; avoiding likewise the accumulation of debt, not only by shunning occasions of expense, but by vigorous exertions in time of peace to discharge the debts which unavoidable wars have occasioned, not ungenerously throwing upon posterity the burthen which we ourselves ought to bear. The execution of these maxims belongs to your representatives; but it is necessary that public opinion should cooperate. To facilitate to them the performance of their duty, it is essential that you should practically bear in mind that toward the payment of debts there must be revenue; that to have revenue there must be taxes; that no taxes can be devised which are not more or less inconvenient and unpleasant; that the intrinsic embarrassment inseparable from the selection of the proper objects (which is always a choice of difficulties), ought to be a decisive motive for a candid construction of the conduct of the government in making it, and for a spirit of acquiescence in the measures for obtaining revenue which the public exigencies may at any time dictate.

Observe good faith and justice toward all nations. Cultivate peace and harmony with all. Religion and morality enjoin this conduct. And can it be that good policy does not equally enjoin it? It will be worthy of a free, enlightened, and at no distant period a great nation to give to mankind the magnanimous and too novel exam-

ple of a people always guided by an exalted justice and benevolence. Who can doubt that in the course of time and things the fruits of such a plan would richly repay any temporary advantages which might be lost by a steady adherence to it? Can it be that Providence has not connected the permanent felicity of a nation with its virtue? The experiment, at least, is recommended by every sentiment which ennobles human nature. Alas! is it rendered impossible by its vices?

In the execution of such a plan nothing is more essential than that permanent, inveterate antipathies against particular nations and passionate attachments for others should be excluded, and that in place of them just and amicable feelings toward all should be cultivated. The nation which indulges toward another in habitual hatred or an habitual fondness is in some degree a slave. It is a slave to its animosity or to its affection, either of which is sufficient to lead it astray from its duty and its interest. Antipathy in one nation against another disposes each more readily to offer insult and injury, to lay hold of slight causes of umbrage, and to be haughty and intractable when accidental or trifling occasions of dispute occur.

Hence frequent collisions, obstinate, envenomed, and bloody contests. The nation prompted by ill will and resentment sometimes impels to war the government contrary to the best calculations of policy. The government sometimes participates in the national propensity, and adopts through passion what reason would reject. At other times it makes the animosity of the nation subservient to projects of hostility, instigated by pride, ambition, and other sinister and pernicious motives. The peace often, sometimes perhaps the liberty, of nations has been the victim.

So, likewise, a passionate attachment of one nation for another produces a variety of evils. Sympathy for the favorite nation, facilitating the illusion of an imaginary common interest in cases where no real common interest exists, and infusing into one the enmities of the other, betrays the former into a participation in the quarrels and wars of the latter without adequate inducement or justification. It leads also to concessions to the favorite nation of privileges denied to others, which is apt doubly to injure the nation making the concessions by unnecessarily parting with what ought to have been retained, and by exciting jealousy, ill will, and a disposition to retaliate in the parties from whom equal privileges are withheld; and it gives to ambitious, corrupted, or deluded citizens (who devote themselves to the favorite nation) facility to betray or sacrifice the interests of their own country without odium, sometimes even with popularity, gilding with the appearances of a virtuous sense of obligation, a commendable deference for public opinion, or a laudable zeal for public good the base or foolish compliances of ambition, corruption, or infatuation.

As avenues to foreign influence in innumerable ways, such attachments are particularly alarming to the truly enlightened and independent patriot. How many opportunities do they afford to tamper with domestic factions, to practice the arts of seduction, to mislead public opinion, to influence or awe the public councils! Such an attachment of a small or weak toward a great and powerful nation dooms the former to be the satellite of the latter. Against the insidious wiles of foreign influence (I conjure you to believe me, fellow citizens), the jealousy of a free people ought to be constantly awake, since history and experience prove that foreign influence is one of the most baneful foes of republican government. But that jealousy, to be useful, must be impartial, else it becomes the instrument of the very influence to be avoided, instead of a defense against it. Excessive partiality for one foreign nation and excessive dislike of another cause those whom they actuate to see danger only on one side, and serve to veil and even second the arts of influence on the other. Real patriots who may resist the intrigues of the favorite are liable to become suspected and odious, while its tools and dupes usurp the applause and confidence of the people to surrender their interests.

The great rule of conduct for us in regard to foreign nations is, in extending our commercial relations to have with them as little political connection as possible. So far as we have already formed engagements let them be fulfilled with perfect good faith. Here let us stop.

Europe has a set of primary interests which to us have none or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics or the ordi-

nary combinations and collisions of her friendships or enmities.

Our detached and distant situation invites and enables us to pursue a different course. If we remain one people, under an efficient government, the period is not far off when we may defy material injury from external annoyance; when we may take such an attitude as will cause the neutrality we may at any time resolve upon to be scrupulously respected; when belligerent nations, under the impossibility of making acquisitions upon us, will not lightly hazard the giving us provocation; when we may choose peace or war, as our interest, guided by justice, shall counsel.

Why forgo the advantages of so peculiar a situation? Why quit our own to stand upon foreign ground? Why, by interweaving our destiny with that of any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalship, interest, humor, or caprice?

It is our true policy to steer clear of permanent alliances with any portion of the foreign world, so far, I mean, as we are now at liberty to do it; for let me not be understood as capable of patronizing infidelity to existing engagements. I hold the maxim no less applicable to public than to private affairs that honesty is always the best policy. I repeat, therefore, let those engagements be observed in their genuine sense. But in my opinion it is unnecessary and would be unwise to extend them.

Taking care always to keep ourselves by suitable establishments on a respectable defensive posture, we may safely trust to temporary alliances for extraordinary emergencies.

Harmony, liberal intercourse with all nations are recommended by policy, humanity, and interest. But even our commercial policy should hold an equal and impartial hand, neither seeking nor granting exclusive favors or preferences; consulting the natural course of things; diffusing and diversifying by gentle means the streams of commerce, but forcing nothing; establishing with powers so disposed, in order to give trade a stable course, to define the rights of our merchants, and to enable the government to support them, conventional rules of intercourse, the best that present circumstances and mutual opinion will permit, but temporary and liable to be from time to time abandoned or varied as experience and circumstances shall dictate; constantly keeping in view that it is folly in one nation to look for disinterested favors from another; that it must pay with a portion of its independence for whatever it may accept under that character; that by such acceptance it may place itself in the condition of having given equivalents for nominal favors, and yet of being reproached with ingratitude for not giving more. There can be no greater error than to expect or calculate upon real favors from nation to nation. It is an illusion which experience must cure, which a just pride ought to discard.

In offering to you, my countrymen, these counsels of an old and affectionate friend I dare not hope they will make the strong and lasting impression I could wish—that they will control the usual current of the passions or prevent our nation from running the course which has hitherto marked the destiny of nations. But if I may even flatter myself that they may be productive of some partial benefit, some occasional good—that they may now and then recur to moderate the fury of party spirit, to warn against the mischiefs of foreign intrigue, to guard against the impostures of pretended patriotism—this hope will be a full recompense for the solicitude for your welfare by which they have been dictated.

How far in the discharge of my official duties I have been guided by the principles which have been delineated the public records and other evidences of my conduct must witness to you and to the world. To myself, the assurance of my own conscience is that I have at least believed myself to be guided by them.

In relation to the still subsisting war in Europe, my proclamation of the 22d of April 1793 is the index to my plan. Sanctioned by your approving voice and by that of your representatives in both houses of Congress, the spirit of that measure has continually governed me, uninfluenced by any attempts to deter or divert me from it.

After deliberate examination, with the aid of the best lights I could obtain, I was well satisfied that our country, under all the circumstances of the case, had a right to take, and was bound in duty and interest to take, a neutral position. Having taken it, I determined as far as should depend upon me to maintain it with moderation, perseverance, and firmness.

The considerations which respect the right to hold this conduct it is not necessary on this occasion to detail. I will only observe that, according to my understanding of the matter, that right, so

far from being denied by any of the belligerent powers, has been virtually admitted by all.

The duty of holding a neutral conduct may be inferred, without anything more, from the obligation which justice and humanity impose on every nation, in cases in which it is free to act, to maintain inviolate the relations of peace and amity toward other nations.

The inducements of interest for observing that conduct will best be referred to your own reflections and experience. With me a predominant motive has been to endeavor to gain time to our country to settle and mature its yet recent institutions, and to progress without interruption to that degree of strength and consistency which is necessary to give it, humanly speaking, the command of its own fortunes.

Though in reviewing the incidents of my administration I am unconscious of intentional error, I am nevertheless too sensible of my defects not to think it probable that I may have committed many errors. Whatever they may be, I fervently beseech the Almighty to avert or mitigate the evils to which they may tend. I shall also carry with me the hope that my country will never cease to view them with indulgence, and that, after forty-five years of my life dedicated to its service with an upright zeal, the faults of incompetent abilities will be consigned to oblivion, as myself must soon be to the mansions of rest.

Relying on its kindness in this as in other things, and actuated by that fervent love toward it which is so natural to a man who views in it the native soil of himself and his progenitors for several generations, I anticipate with pleasing expectation that retreat in which I promise myself to realize without alloy the sweet enjoyment of partaking in the midst of my fellow citizens the benign influence of good laws under a free government—the ever-favorite object of my heart, and the happy reward, as I trust, of our mutual cares, labors, and dangers.

# PRESIDENTIAL SPEECHES

## Abraham Lincoln: Gettysburg Address

On November 19, 1863, President Abraham Lincoln delivered an address at the dedication of the national cemetery in Gettysburg, Pennsylvania, that has become one of the most famous speeches of U.S. history. Lincoln's speech came less than six months after the conclusion of the Gettysburg campaign (June 27–July 4, 1863), one of the bloodiest battles of the U.S. Civil War. Confederate General Robert E. Lee and his forces were defeated by Union forces led by General George Meade. The losses for both sides were immense with more than 7,000 killed and 44,000 wounded or missing.

The principal orator at the dedication was Edward Everett, a senator, preacher, and scholar who spoke for more than two hours in the florid style of the time. Lincoln, who presided at the dedication, followed with a few brief remarks in a speech he had written in Washington and then revised slightly before the ceremony. Lincoln honored those who had died at Gettysburg and proclaimed that the cause for which they had died had given the nation a "new birth of freedom."

Lucid, terse, and precise, Lincoln's speech stood in stark contrast to Everett's. Though the crowd that day applauded Lincoln's address without enthusiasm, generations of schoolchildren have memorized and recited it, while Everett's speech was quickly forgotten.

Source: *The Writings of Abraham Lincoln,* Constitutional ed., vol. 7 (G. P. Putnam's Sons, 1906), p. 20.

### Abraham Lincoln: Gettysburg Address

Fourscore and seven years ago our fathers brought forth on this continent a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal.

Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battlefield of that war. We have come to dedicate a portion of that field as a final resting-place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this.

But, in a larger sense, we cannot dedicate—we cannot consecrate—we cannot hallow—this ground. The brave men, living and dead, who struggled here, have consecrated it far above our poor power to add or detract. The world will little note nor long remember what we say here, but it can never forget what they did here. It is for us, the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion; that we here highly resolve that these dead shall not have died in vain; that this nation, under God, shall have a new birth of freedom; and that government of the people, by the people, for the people, shall not perish from the earth.

# PRESIDENTIAL SPEECHES

## Abraham Lincoln: Second Inaugural Address

Abraham Lincoln gave many memorable addresses during his political career, but his second inaugural address is ranked as perhaps his greatest speech. On March 4, 1865, as he began his second term as president, Lincoln delivered the address at the Capitol in Washington, D.C. With the Union forces close to victory—the Civil War would end the following month—Lincoln's address looked forward to the peace that would follow. Throughout the war Lincoln had expressed his desire to preserve the Union. In his address he reminded his listeners that the issue of slavery had been central to the Civil War and suggested that slavery had offended God and brought forth divine retribution in the form of the conflict. Now, with peace at hand, he urged a national reconciliation "with malice toward none, with charity for all." Lincoln did not have the opportunity to shape Reconstruction. He was shot on April 14, 1865, by John Wilkes Booth during the performance of a play at Ford's Theater in Washington, D.C. He died the next day.

### Abraham Lincoln: Second Inaugural Address

Fellow countrymen:

At this second appearing to take the oath of the presidential office, there is less occasion for an extended address than there was at the first. Then a statement somewhat in detail of a course to be pursued seemed fitting and proper. Now, at the expiration of four years, during which public declarations have been constantly called forth on every point and phase of the great contest which still absorbs the attention and engrosses the energies of the nation, little that is new could be presented. The progress of our arms, upon which all else chiefly depends, is as well known to the public as to myself, and it is, I trust, reasonably satisfactory and encouraging to all. With high hope for the future, no prediction in regard to it is ventured.

On the occasion corresponding to this four years ago, all thoughts were anxiously directed to an impending civil war. All dreaded it, all sought to avert it. While the inaugural address was being delivered from this place, devoted altogether to saving the Union without war, insurgent agents were in the city seeking to destroy it without war—seeking to disolve the Union and divide effects by negotiation. Both parties deprecated war, but one of them would make war rather than let the nation survive, and the other would accept war rather than let it perish, and the war came.

One-eighth of the whole population were colored slaves, not distributed generally over the Union, but localized in the southern part of it. These slaves constituted a peculiar and powerful interest. All knew that this interest was somehow the cause of the war. To strengthen, perpetuate, and extend this interest was the object for which the insurgents would rend the Union even by

Source: James D. Richardson, ed. *Messages and Papers of the Presidents: 1789–1897,* vol. 6 (1900), pp. 276–277.

war, while the government claimed no right to do more than to restrict the territorial enlargement of it. Neither party expected for the war the magnitude or the duration which it has already attained. Neither anticipated that the cause of the conflict might cease with or even before the conflict itself should cease. Each looked for an easier triumph, and a result less fundamental and astounding. Both read the same Bible and pray to the same God, and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces, but let us judge not, that we be not judged. The prayers of both could not be answered. That of neither has been answered fully. The Almighty has His own purposes. "Woe unto the world because of offenses; for it must needs be that offenses come, but woe to that man by whom the offense cometh." If we shall suppose that American slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South this terrible war as the woe due to those by whom the offense came, shall we discern therein any departure from those divine attributes which the believers in a living God always ascribe to Him? Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said, "the judgments of the Lord are true and righteous altogether."

With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.

# PRESIDENTIAL SPEECHES

## Woodrow Wilson: Fourteen Points

By the end of the nineteenth century, U.S. presidents had begun to relax the traditional isolationism of U.S. foreign policy. Nevertheless, when World War I began in 1914, the United States remained aloof from the conflict. President Woodrow Wilson was reelected to a second term in 1916 on the slogan "He kept us out of war." Wilson and U.S. public opinion shifted, however, when Germany announced that it would engage in unrestricted submarine warfare beginning on February 1, 1917. On April 6, 1917, Wilson signed the congressional declaration of war against Germany.

Wilson, who had attempted to negotiate a peace among the belligerents in 1916, renewed his efforts by proposing a new framework for negotiations. On January 8, 1918, he delivered an address to Congress that named fourteen points to be used as the guide for a peace settlement. The speech became known as the Fourteen Points and served as a distillation of Wilson's vision of a postwar world. In the address Wilson said that the secret alliances that triggered the war must be replaced with "open covenants of peace, openly arrived at." He proclaimed the need to demilitarize the ocean and reduce military armaments. He also articulated the desire to end European colonialism and allow the various nationalities of the Austro-Hungarian and Ottoman Empires to create their own states. The most important point was the last, which called for a general association of nations that would guarantee political independence and territorial integrity for all countries.

Following the armistice that ended the war on November 9, 1918, President Wilson led the U.S. delegation to the Paris Peace Conference. Wilson was the only representative of the great powers (which also included Great Britain, France, and Italy) who truly wanted an international organization. His influence was instrumental in persuading the delegates to establish the League of Nations. At home, however, he was unable to secure Senate ratification of the peace treaty that included the league. He was opposed both by Republicans who did not want to commit the United States to supporting the league with financial resources and by isolationists from both major political parties who argued that the United States should not interfere in European affairs.

### Woodrow Wilson: Fourteen Points

It will be our wish and purpose that the processes of peace, when they are begun, shall be absolutely open and that they shall involve and permit henceforth no secret understandings of any kind. The day of conquest and aggrandizement is gone by; so is also the day of secret covenants entered into in the interest of particular governments and likely at some unlooked-for moment to upset the peace of the world. It is this happy fact, now clear to the view of every public man whose thoughts do not still linger in an age that is dead and gone, which makes it possible for every nation whose purposes are

consistent with justice and the peace of the world to avow now or at any other time the objects it has in view.

We entered this war because violations of right had occurred which touched us to the quick and made the life of our own people impossible unless they were corrected and the world secure once for all against their recurrence. What we demand in this war, therefore, is nothing peculiar to ourselves. It is that the world be made fit and safe to live in; and particularly that it be made safe for every peace-loving nation which, like our own, wishes to live its own life, determine its own institutions, be assured of justice and fair dealing by the other peoples of the world as against force and selfish aggression. All the peoples of the world are in effect partners in this interest, and for our own part we see very clearly that unless justice be done to others it will not be done to us. The programme of the world's peace, therefore, is our programme; and that programme, the only possible programme, as we see it, is this:

I. Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view.

II. Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants.

III. The removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance.

IV. Adequate guarantees given and taken that national armaments will be reduced to the lowest point consistent with domestic safety.

V. A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.

VI. The evacuation of all Russian territory and such a settlement of all questions affecting Russia as will secure the best and freest cooperation of the other nations of the world in obtaining for her an unhampered and unembarrassed opportunity for the independent determination of her own political development and national policy and assure her of a sincere welcome into the society of free nations under institutions of her own choosing; and, more than a welcome, assistance also of every kind that she may need and may herself desire. The treatment accorded Russia by her sister nations in the months to come will be the acid test of their good will, of their comprehension of her needs as distinguished from their own interests, and of their intelligent and unselfish sympathy.

VII. Belgium, the whole world will agree, must be evacuated and restored, without any attempt to limit the sovereignty which she enjoys in common with all other free nations. No other single act will serve as this will serve to restore confidence among the nations in the laws which they have themselves set and determined for the government of their relations with one another. Without this healing act the whole structure and validity of international law is forever impaired.

VIII. All French territory should be freed and the invaded portions restored, and the wrong done to France by Prussia in 1871 in the matter of Alsace-Lorraine, which has unsettled the peace of the world for nearly fifty years, should be righted, in order that peace may once more be made secure in the interest of all.

IX. A readjustment of the frontiers of Italy should be effected along clearly recognizable lines of nationality.

X. The peoples of Austria-Hungary, whose place among the nations we wish to see safeguarded and assured, should be accorded the freest opportunity to autonomous development.

XI. Rumania, Serbia, and Montenegro should be evacuated; occupied territories restored; Serbia accorded free and secure access to the sea; and the relations of the several Balkan states to one another determined by friendly counsel along historically established lines of allegiance and nationality; and international guarantees of the political and economic independence and territorial integrity of the several Balkan states should be entered into.

XII. The Turkish portion of the present Ottoman Empire should be assured a secure sovereignty, but the other nationalities which are

now under Turkish rule should be assured an undoubted security of life and an absolutely unmolested opportunity of autonomous development, and the Dardanelles should be permanently opened as a free passage to the ships and commerce of all nations under international guarantees.

XIII. An independent Polish state should be erected which should include the territories inhabited by indisputably Polish populations, which should be assured a free and secure access to the sea, and whose political and economic independence and territorial integrity should be guaranteed by international covenant.

XIV. A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike.

In regard to these essential rectifications of wrong and assertions of right we feel ourselves to be intimate partners of all the governments and peoples associated together against the Imperialists. We cannot be separated in interest or divided in purpose. We stand together until the end.

For such arrangements and covenants we are willing to fight and to continue to fight until they are achieved; but only because we wish the right to prevail and desire a just and stable peace such as can be secured only by removing the chief provocations to war, which this programme does remove. We have no jealousy of German greatness, and there is nothing in this programme that impairs it. We grudge her no achievement or distinction of learning or of pacific enterprise such as have made her record very bright and very enviable. We do not wish to injure her or to block in any way her legitimate influence or power. We do not wish to fight her either with arms or with hostile arrangements of trade if she is willing to associate herself with us and the other peace-loving nations of the world in covenants of justice and law and fair dealing. We wish her only to accept a place of equality among the peoples of the world,—the new world in which we now live,—instead of a place of mastery.

# PRESIDENTIAL SPEECHES

## Franklin D. Roosevelt: First Inaugural Address

During the presidential campaign of 1932, with the United States mired in the Great Depression, Franklin D. Roosevelt called for action by the federal government to revive the economy and end the suffering of the thirteen million people who were unemployed. When he took office on March 4, 1933, the national mood was bleak. In his first inaugural address, Roosevelt reassured the nation that "the only thing we have to fear is fear itself." He proposed a New Deal for the people of the United States and promised he would use the power of the executive branch to address the economic crisis.

In his speech Roosevelt criticized the financial community for breeding a culture of greed during the 1920s that led to the economic depression. Declaring that "our greatest task is to put people to work," he proposed to use the government to reinvigorate the economy. He acknowledged that the need for "undelayed action" might require disturbing the "normal balance of executive and legislative authority."

Roosevelt's address helped rally the nation. His call for sweeping actions by the federal government produced a torrent of legislation from Congress in his first hundred days in office. Though the Supreme Court initially struck down many of these acts as unconstitutional, within a few years the Court changed its view. As a result, the federal government greatly expanded its power to regulate the economy. Through Roosevelt's bold initiatives, many U.S. citizens came to view the federal government in a new way—as the catalyst of progressive social change.

### Franklin D. Roosevelt: First Inaugural Address

I am certain that my fellow Americans expect that on my induction into the Presidency I will address them with a candor and a decision which the present situation of our Nation impels. This is preeminently the time to speak the truth, the whole truth, frankly and boldly. Nor need we shrink from honestly facing conditions in our country today. This great Nation will endure as it has endured, will revive and will prosper.

So, first of all, let me assert my firm belief that the only thing we have to fear is fear itself—nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance. In every dark hour of our national life a leadership of frankness and vigor has met with that understanding and support of the people themselves which is essential to victory. I am convinced that you will again give that support to leadership in these critical days.

In such a spirit on my part and on yours we face our common difficulties. They concern, thank God, only material things. Values have shrunken to fantastic levels; taxes have risen; our ability to pay has fallen; government of all kinds is faced by serious curtailment of income; the means of exchange are frozen in the currents of trade; the withered leaves of industrial enterprise lie on every side; farmers find no markets for their produce; the savings of many years in thousands of families are gone.

More important, a host of unemployed citizens face the grim problem of existence, and an equally great number toil with little return. Only a foolish optimist can deny the dark realities of the moment.

Yet our distress comes from no failure of substance. We are stricken by no plague of locusts. Compared with the perils which our forefathers conquered because they believed and were not afraid, we have still much to be thankful for. Nature still offers her bounty and human efforts have multiplied it. Plenty is at our doorstep, but a generous use of it languishes in the very sight of the supply. Primarily this is because the rulers of the exchange of mankind's goods have failed, through their own stubbornness and their own incompetence, have admitted their failure, and abdicated. Practices of the unscrupulous money changers stand indicted in the court of public opinion, rejected by the hearts and minds of men.

True they have tried, but their efforts have been cast in the pattern of an outworn tradition. Faced by failure of credit they have proposed only the lending of more money. Stripped of the lure of profit by which to induce our people to follow their false leadership, they have resorted to exhortations, pleading tearfully for restored confidence. They know only the rules of a generation of self-seekers. They have no vision, and when there is no vision the people perish.

The money changers have fled from their high seats in the temple of our civilization. We may now restore that temple to the ancient truths. The measure of the restoration lies in the extent to which we apply social values more noble than mere monetary profit.

Happiness lies not in the mere possession of money; it lies in the joy of achievement, in the thrill of creative effort. The joy and moral stimulation of work no longer must be forgotten in the mad chase of evanescent profits. These dark days will be worth all they cost us if they teach us that our true destiny is not to be ministered unto but to minister to ourselves and to our fellow men.

Recognition of the falsity of material wealth as the standard of success goes hand in hand with the abandonment of the false belief that public office and high political position are to be valued only by the standards of pride of place and personal profit; and there must be an end to a conduct in banking and in business which too often has given to a sacred trust the likeness of callous and selfish wrongdoing. Small wonder that confidence languishes, for it thrives only on honesty, on honor, on the sacredness of obligations, on faithful protection, on unselfish performance; without them it cannot live.

Restoration calls, however, not for changes in ethics alone. This Nation asks for action, and action now.

Our greatest primary task is to put people to work. This is no unsolvable problem if we face it wisely and courageously. It can be accomplished in part by direct recruiting by the Government itself, treating the task as we would treat the emergency of a war, but at the same time, through this employment, accomplishing greatly needed projects to stimulate and reorganize the use of our natural resources.

Hand in hand with this we must frankly recognize the overbalance of population in our industrial centers and, by engaging on a national scale in a redistribution, endeavor to provide a better use of the land for those best fitted for the land. The task can be helped by definite efforts to raise the values of agricultural products and with this the power to purchase the output of our cities. It can be helped by preventing realistically the tragedy of the growing loss through foreclosure of our small homes and our farms. It can be helped by insistence that the Federal, State, and local governments act forthwith on the demand that their cost be drastically reduced. It can be helped by the unifying of relief activities which today are often scattered, uneconomical, and unequal. It can be helped by national planning for and supervision of all forms of transportation and of communications and other utilities which have a definitely public character. There are many ways in which it can be helped, but it can never be helped merely by talking about it. We must act and act quickly.

Finally, in our progress toward a resumption of work we require two safeguards against a return of the evils of the old order; there must be a strict supervision of all banking and credits and investments; there must be an end to speculation with other people's money, and there must be provision for an adequate but sound currency.

There are the lines of attack. I shall presently urge upon a new Congress in special session detailed measures for their fulfillment, and I shall seek the immediate assistance of the several States.

Through this program of action we address ourselves to putting our own national house in order and making income balance outgo. Our international trade relations, though vastly important, are in point of time and necessity secondary to the establishment of a sound national economy. I favor as a practical policy the putting of first things first. I shall spare no effort to restore world trade by international economic readjustment, but the emergency at home cannot wait on that accomplishment.

The basic thought that guides these specific means of national recovery is not narrowly nationalistic. It is the insistence, as a first consideration, upon the interdependence of the various elements in all parts of the United States—a recognition of the old and permanently important manifestation of the American spirit of the pioneer. It is the way to recovery. It is the immediate way. It is the strongest assurance that the recovery will endure.

In the field of world policy I would dedicate this Nation to the policy of the good neighbor—the neighbor who resolutely respects himself and, because he does so, respects the rights of others—the neighbor who respects his obligations and respects the sanctity of his agreements in and with a world of neighbors.

If I read the temper of our people correctly, we now realize as we have never realized before our interdependence on each other; that we can not merely take but we must give as well; that if we are to go forward, we must move as a trained and loyal army willing to sacrifice for the good of a common discipline, because without such discipline no progress is made, no leadership becomes effective. We are, I know, ready and willing to submit our lives and property to such discipline, because it makes possible a leadership which aims at a larger good. This I propose to offer, pledging that the larger purposes will bind upon us all as a sacred obligation with a unity of duty hitherto evoked only in time of armed strife.

With this pledge taken, I assume unhesitatingly the leadership of this great army of our people dedicated to a disciplined attack upon our common problems.

Action in this image and to this end is feasible under the form of government which we have inherited from our ancestors. Our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form. That is why our constitutional system has proved itself the most superbly enduring political mechanism the modern world has produced. It has met every stress of vast expansion of territory, of foreign wars, of bitter internal strife, of world relations.

It is to be hoped that the normal balance of executive and legislative authority may be wholly adequate to meet the unprecedented task before us. But it may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure.

I am prepared under my constitutional duty to recommend the measures that a stricken nation in the midst of a stricken world may require. These measures, or such other measures as the Congress may build out of its experience and wisdom, I shall seek, within my constitutional authority, to bring to speedy adoption.

But in the event that the Congress shall fail to take one of these two courses, and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. I shall ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe. For the trust reposed in me I will return the courage and the devotion that befit the time. I can do no less.

We face the arduous days that lie before us in the warm courage of the national unity; with the clear consciousness of seeking old and precious moral values; with the clean satisfaction that comes from the stem performance of duty by old and young alike. We aim at the assurance of a rounded and permanent national life.

We do not distrust the future of essential democracy. The people of the United States have not failed. In their need they have registered a mandate that they want direct, vigorous action. They have asked for discipline and direction under leadership. They have made me the present instrument of their wishes. In the spirit of the gift I take it.

In this dedication of a Nation we humbly ask the blessing of God. May He protect each and every one of us. May He guide me in the days to come.

# PRESIDENTIAL SPEECHES

## JOHN F. KENNEDY: INAUGURAL ADDRESS

John F. Kennedy was elected president in 1960 by a slim margin over Vice President Richard M. Nixon. During the campaign Kennedy had charged that the United States had fallen militarily behind the Soviet Union during the administration of President Dwight D. Eisenhower. Therefore, when Kennedy gave his inaugural address on January 20, 1961, he focused on U.S. foreign policy.

Kennedy's address revealed how far the United States had moved in international affairs. The isolationism of the 1930s had given way to a foreign policy based on fighting Communism anywhere in the world. He declared that "the torch has been passed to a new generation of Americans" committed to defending liberty.

The most quoted lines of the address—"ask not what your country can do for you, ask what you can do for your country"—became the patriotic rallying cry for Kennedy's New Frontier initiatives, which emphasized the space program, the Peace Corps, and increased defense spending.

### John F. Kennedy: Inaugural Address

We observe today not a victory of party but a celebration of freedom—symbolizing an end as well as a beginning—signifying renewal as well as change. For I have sworn before you and Almighty God the same solemn oath our forebears prescribed nearly a century and three-quarters ago.

The world is very different now. For man holds in his mortal hands the power to abolish all forms of human poverty and all forms of human life. And yet the same revolutionary beliefs for which our forebears fought are still at issue around the globe—the belief that the rights of man come not from the generosity of the state but from the hand of God.

We dare not forget today that we are the heirs of that first revolution. Let the word go forth from this time and place, to friend and foe alike, that the torch has been passed to a new generation of Americans—born in this century, tempered by war, disciplined by a hard and bitter peace, proud of our ancient heritage—and unwilling to witness to or permit the slow undoing of those human rights to which this nation has always been committed, and to which we are committed today at home and around the world.

Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe to assure the survival and the success of liberty.

This much we pledge—and more.

To those old allies whose cultural and spiritual origins we share, we pledge the loyalty of faithful friends. United, there is little we cannot do in a host of new cooperative ventures. Divided, there is little we can do—for we dare not meet a powerful challenge at odds and split asunder.

To those new states whom we welcome to the ranks of the free, we pledge our word that one form of colonial control shall not have

passed away merely to be replaced by a far more iron tyranny. We shall not always expect to find them supporting our view. But we shall always hope to find them strongly supporting their own freedom—and to remember that, in the past, those who foolishly sought power by riding the back of the tiger ended up inside.

To those people in the huts and villages of half the globe struggling to break the bonds of mass misery, we pledge our best efforts to help them help themselves, for whatever period is required—not because the Communists may be doing it, not because we seek their votes, but because it is right. If a free society cannot help the many who are poor, it cannot save the few who are rich.

To our sister republics south of our border, we offer a special pledge—to convert our good words into good deeds—in a new alliance for progress—to assist free men and free governments in casting off the chains of poverty. But this peaceful revolution of hope cannot become the prey of hostile powers. Let all our neighbors know that we shall join with them to oppose aggression or subversion anywhere in the Americas. And let every other power know that this hemisphere intends to remain the master of its own house.

To that world assembly of sovereign states, the United Nations, our last best hope in an age where the instruments of war have far outpaced the instruments of peace, we renew our pledge of support—to prevent it from becoming merely a forum for invective—to strengthen its shield of the new and the weak—and to enlarge the area in which its writ may run.

Finally, to those nations who would make themselves our adversary, we offer not a pledge but a request: that both sides begin anew the quest for peace, before the dark powers of destruction unleashed by science engulf all humanity in planned or accidental self-destruction.

We dare not tempt them with weakness. For only when our arms are sufficient beyond doubt can we be certain beyond doubt that they will never be employed.

But neither can two great and powerful groups of nations take comfort from our present course—both sides overburdened by the cost of modern weapons, both rightly alarmed by the steady spread of the deadly atom, yet both racing to alter that uncertain balance of terror that stays the hand of mankind's final war.

So let us begin anew—remembering on both sides that civility is not a sign of weakness, and sincerity is always subject to proof. Let us never negotiate out of fear. But let us never fear to negotiate.

Let both sides explore what problems unite us instead of belaboring those problems which divide us.

Let both sides, for the first time, formulate serious and precise proposals for the inspection and control of arms—and bring the absolute power to destroy other nations under the absolute control of all nations.

Let both sides seek to invoke the wonders of science instead of its terrors. Together let us explore the stars, conquer the deserts, eradicate disease, tap the ocean depths and encourage the arts and commerce.

Let both sides unite to heed in all corners of the earth the command of Isaiah—to "undo the heavy burdens … [and] let the oppressed go free."

And if a beachhead of cooperation may push back the jungles of suspicion, let both sides join in creating a new endeavor—not a new balance of power, but a new world of law, where the strong are just and the weak secure and the peace preserved.

All this will not be finished in the first 100 days. Nor will it be finished in the first 1,000 days, nor in the life of this Administration, nor even perhaps in our lifetime on this planet. But let us begin.

In your hands, my fellow citizens, more than mine, will rest the final success or failure of our course. Since this country was founded, each generation of Americans has been summoned to give testimony to its national loyalty. The graves of young Americans who answered the call to service surround the globe.

Now the trumpet summons us again—not as a call to bear arms, though arms we need—not as a call to battle, though embattled we are—but a call to bear the burden of a long twilight struggle year in and year out, "rejoicing in hope, patient in tribulation"—a struggle against the common enemies of man: tyranny, poverty, disease and war itself.

Can we forge against these enemies a grand and global alliance, north and south, east and west, that can assure a more fruitful life for all mankind? Will you join in that historic effort?

In the long history of the world, only a few generations have been granted the role of defending freedom in its hour of maximum danger. I do not shrink from this responsibility—I welcome it. I do not believe that any of us would exchange places with any other people or any other generation. The energy, the faith, the devotion which we bring to this endeavor will light our country and all who serve it—and the glow from that fire can truly light the world.

And so, my fellow Americans: ask not what your country can do for you—ask what you can do for your country.

My fellow citizens of the world: ask not what America will do for you, but what together we can do for the freedom of man.

Finally, whether you are citizens of America or citizens of the world, ask of us here the same high standards of strength and sacrifice which we ask of you. With a good conscience our only sure reward, with history the final judge of our deeds, let us go forth to lead the land we love, asking His blessing and His help, but knowing that here on earth God's work must truly be our own.

# PRESIDENTIAL SPEECHES

## Lyndon B. Johnson: Voting Rights Act Address

On March 15, 1965, President Lyndon B. Johnson addressed a joint session of Congress to urge the passage of new voting rights legislation. Although Johnson had successfully engineered the passage of the landmark Civil Rights Act of 1964 (42 U.S.C.A. § 2000a et seq.) the year before, problems remained. Dr. Martin Luther King Jr., and other civil rights leaders demanded an end to racially discriminatory voting practices in the South. They organized public protests and voter registration drives that were met with intense resistance from local authorities.

When King and civil rights supporters marched to Selma, Alabama, in 1965 to demand voting rights, police met them with violence, and several marchers were murdered. The Selma violence, which was broadcast on television news programs, galvanized voting rights supporters in Congress. One week later, President Johnson responded by introducing the Voting Rights Act (42 U.S.C.A. § 1973 et seq.), which included the harshest penalties ever imposed for denials of civil rights. Congress enacted the measure five months later.

In his address Johnson confronted the problem of racism and racial discrimination. He declared that "every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right." Johnson reminded the nation that the Fifteenth Amendment, which was passed after the Civil War, gives all citizens the right to vote regardless of race or color, yet states had defied the Constitution and erected barriers based on those forbidden grounds. In Johnson's view no constitutional or moral issue was at stake. Congress simply needed to enforce the amendment with strict penalties.

Johnson, a native of Texas, surprised the nation near the close of his speech when he invoked the famous civil rights anthem and declared "we shall overcome." He was greeted by stunned silence, followed by thunderous applause and tears. It was reported that Dr. King, watching the speech on television from Selma, wept. Many historians view the speech as the watershed moment of the civil rights revolution of the 1960s.

### Lyndon B. Johnson: Voting Rights Act Address

I speak tonight for the dignity of man and the destiny of democracy.

I urge every member of both parties—Americans of all religions and of all colors—from every section of this country—to join me in that cause.

At times history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.

There is no Negro problem. There is no southern problem. There is no northern problem. There is only an American problem.

And we are met here tonight as Americans—not as Democrats or Republicans—we are met here as Americans to solve that problem.

This was the first nation in the history of the world to be founded with a purpose. The great phrases of that purpose still sound in every American heart, north and south: "All men are created equal"—"Government by consent of the governed"—"Give me liberty or give me death.". . .

Those words are a promise to every citizen that he shall share in the dignity of man. This dignity cannot be found in man's possessions. It cannot be found in his power or in his position. It really rests on his right to be treated as a man equal in opportunity to all others. It says that he shall share in freedom, he shall choose his leaders, educate his children, provide for his family according to his ability and his merits as a human being. . . .

Many of the issues of civil rights are very complex and most difficult. But about this there can and should be no argument. Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to ensure that right.

Yet the harsh fact is that in many places in this country men and women are kept from voting simply because they are Negroes. . . .

Experience has clearly shown that the existing process of law cannot overcome systematic and ingenious discrimination. No law that we now have on the books—and I have helped to put three of them there—can ensure the right to vote when local officials are determined to deny it.

In such a case our duty must be clear to all of us. The Constitution says that no person shall be kept from voting because of his race or his color. We have all sworn an oath before God to support and to defend that Constitution.

We must now act in obedience to that oath.

Wednesday I will send to Congress a law designed to eliminate illegal barriers to the right to vote. . . .

To those who seek to avoid action by their National Government in their home communities—who want to and who seek to maintain purely local control over elections—the answer is simple. Open your polling places to all your people. Allow men and women to register and vote whatever the color of their skin. Extend the rights of citizenship to every citizen of this land. There is no constitutional issue here. The command of the Constitution is plain. There is no moral issue. It is wrong—deadly wrong—to deny any of your fellow Americans the right to vote in this country. There is no issue of States rights or National rights. There is only the struggle for human rights.

I have not the slightest doubt what will be your answer. . . .

But even if we pass this bill, the battle will not be over. What happened in Selma is part of a far larger movement which reaches into every section and State of America. It is the effort of American Negroes to secure for themselves the full blessings of American life.

Their cause must be our cause too, because it is not just Negroes but really it is all of us, who must overcome the crippling legacy of bigotry and injustice. And we shall overcome. . . .

This great, rich, restless country can offer opportunity and education and hope to all—all black and white, all North and South, sharecropper and city dweller. These are the enemies—poverty, ignorance, disease—they are our enemies, not our fellow man, not our neighbor. And these enemies too—poverty, disease, and ignorance—we shall overcome.

# PRESIDENTIAL SPEECHES

## Ronald Reagan: First Inaugural Address

RONALD REAGAN was elected president in 1980, defeating the incumbent JIMMY CARTER. Reagan, a Republican from California, had campaigned as much against the federal government as against his opponent. He charged that the federal government had become a bloated bureaucracy since its dramatic growth under FRANKLIN D. ROOSEVELT in the 1930s and 1940s. He proposed to cut the size of the federal government and its budget and return power to the states.

In his first inaugural address, delivered on January 20, 1981, Reagan reaffirmed his campaign pledges. With the nation in an economic recession, he declared that "government is not the solution to our problem." Instead, he proposed to remove "the roadblocks that have slowed our economy and reduced productivity," reawaken "this industrial giant," get "government back within its means," and reduce "punitive tax burdens."

In addition, Reagan announced that he would restore the balance between the various levels of government. The federal government's growth would be reversed, and power would be returned to the states and the people. Though he denied any intention of doing away with government, Reagan made clear that "we are a nation that has a government—not the other way around."

Reagan's address signaled a turning point in modern U.S. history, as conservative political views became more popular with the electorate. Almost every facet of modern U.S. government became the subject of a conservative reevaluation that resulted in significant changes in the regulation of the economy and social welfare programs.

### Ronald Reagan: First Inaugural Address

To a few of us here today, this is a solemn and most momentous occasion; and yet, in the history of our Nation, it is a commonplace occurrence. The orderly transfer of authority as called for in the Constitution routinely takes place as it has for almost two centuries and few of us stop to think how unique we really are. In the eyes of many in the world, this every-4-year ceremony we accept as normal is nothing less than a miracle.

Mr. President, I want our fellow citizens to know how much you did to carry on this tradition. By your gracious cooperation in the transition process, you have shown a watching world that we are a united people pledged to maintaining a political system which guarantees individual liberty to a greater degree than any other, and I thank you and your people for all your help in maintaining the continuity which is the bulwark of our Republic.

The business of our nation goes forward. These United States are confronted with an economic affliction of great proportions. We suffer from the longest and one of the worst sustained inflations in our national history. It distorts our economic decisions, penalizes thrift, and crushes the struggling young and the fixed-income elderly alike. It threatens to shatter the lives of

millions of our people. Idle industries have cast workers into unemployment, causing human misery and personal indignity.

Those who do work are denied a fair return for their labor by a tax system which penalizes successful achievement and keeps us from maintaining full productivity. But great as our tax burden is, it has not kept pace with public spending. For decades, we have piled deficit upon deficit, mortgaging our future and our children's future for the temporary convenience of the present. To continue this long trend is to guarantee tremendous social, cultural, political, and economic upheavals. You and I, as individuals, can, by borrowing, live beyond our means, but for only a limited period of time.

Why, then, should we think that collectively, as a nation, we are not bound by that same limitation? We must act today in order to preserve tomorrow. And let there be no misunderstanding—we are going to begin to act, beginning today. The economic ills we suffer have come upon us over several decades. They will not go away in days, weeks, or months, but they will go away. They will go away because we, as Americans, have the capacity now, as we have had in the past, to do whatever needs to be done to preserve this last and greatest bastion of freedom.

In this present crisis, government is not the solution to our problem. From time to time, we have been tempted to believe that society has become too complex to be managed by self-rule, that government by an elite group is superior to government for, by, and of the people. But if no one among us is capable of governing himself, then who among us has the capacity to govern someone else? All of us together, in and out of government, must bear the burden. The solutions we seek must be equitable, with no one group singled out to pay a higher price.

We hear much of special interest groups. Our concern must be for a special interest group that has been too long neglected. It knows no sectional boundaries or ethnic and racial divisions, and it crosses political party lines. It is made up of men and women who raise our food, patrol our streets, man our mines and our factories, teach our children, keep our homes, and heal us when we are sick—professionals, industrialists, shopkeepers, clerks, cabbies, and truckdrivers. They are, in short, "We the people," this breed called Americans.

Well, this administration's objective will be a healthy, vigorous, growing economy that provides equal opportunity for all Americans, with no barriers born of bigotry or discrimination. Putting America back to work means putting all Americans back to work. Ending inflation means freeing all Americans from the terror of runaway living costs. All must share in the productive work of this "new beginning" and all must share in the bounty of a revived economy. With the idealism and fair play which are the core of our system and our strength, we can have a strong and prosperous America at peace with itself and the world. So, as we begin, let us take inventory.

We are a nation that has a government—not the other way around. And this makes us special among the nations of the Earth. Our Government has no power except that granted it by the people. It is time to check and reverse the growth of government which shows signs of having grown beyond the consent of the governed.

It is my intention to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people. All of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government. Now, so there will be no misunderstanding, it is not my intention to do away with government. It is, rather, to make it work—work with us, not over us; to stand by our side, not ride on our back. Government can and must provide opportunity, not smother it; foster productivity, not stifle it.

If we look to the answer as to why, for so many years, we achieved so much, prospered as no other people on Earth, it was because here, in this land, we unleashed the energy and individual genius of man to a greater extent than has ever been done before. Freedom and the dignity of the individual have been more available and assured here than in any other place on Earth. The price for this freedom at times has been high, but we have never been unwilling to pay that price. It is no coincidence that our present troubles parallel and are proportionate to the intervention and intrusion in our lives that result from unnecessary and excessive growth of government.

It is time for us to realize that we are too great a nation to limit ourselves to small dreams.

We are not, as some would have us believe, loomed to an inevitable decline. I do not believe in a fate that will fall on us no matter what we do. I do believe in a fate that will fall on us if we do nothing.

So, with all the creative energy at our command, let us begin an era of national renewal. Let us renew our determination, our courage, and our strength. And let us renew; our faith and our hope. We have every right to dream heroic dreams. Those who say that we are in a time when there are no heroes just don't know where to look. You can see heroes every day going in and out of factory gates. Others, a handful in number, produce enough food to feed all of us and then the world beyond. You meet heroes across a counter—and they are on both sides of that counter. There are entrepreneurs with faith in themselves and faith in an idea who create new jobs, new wealth and opportunity. They are individuals and families whose taxes support the Government and whose voluntary gifts support church, charity, culture, art, and education. Their patriotism is quiet but deep. Their values sustain our national life.

I have used the words "they" and "their" in speaking of these heroes. I could say "you" and "your" because I am addressing the heroes of whom I speak—you, the citizens of this blessed land. Your dreams, your hopes, your goals are going to be the dreams, the hopes, and the goals of this administration, so help me God. We shall reflect the compassion that is so much a part of your makeup. How can we love our country and not love our countrymen, and loving them, reach out a hand when they fall, heal them when they are sick, and provide opportunities to make them self-sufficient so they will be equal in fact and not just in theory? Can we solve the problems confronting us? Well, the answer is an unequivocal and emphatic "yes." To paraphrase Winston Churchill, I did not take the oath I have just taken with the intention of presiding over the dissolution of the world's strongest economy. In the days ahead I will propose removing the roadblocks that have slowed our economy and reduced productivity. Steps will be taken aimed at restoring the balance between the various levels of government. Progress may be slow—measured in inches and feet, not miles—but we will progress.

It is time to reawaken this industrial giant, to get government back within its means, and to lighten our punitive tax burden. And these will be our first priorities, and on these principles, there will be no compromise. On the eve of our struggle for independence a man who might have been one of the greatest among the Founding Fathers, Dr. Joseph Warren, President of the Massachusetts Congress, said to his fellow Americans, "Our country is in danger, but not to be despaired of. . . . On you depend the fortunes of America. You are to decide the important questions upon which rests the happiness and the liberty of millions yet unborn. Act worthy of yourselves."

Well, I believe we, the Americans of today, are ready to act worthy of ourselves, ready to do what must be done to ensure happiness and liberty for ourselves, our children and our children's children. And as we renew ourselves here in our own land, we will be seen as having greater strength throughout the world. We will again be the exemplar of freedom and a beacon of hope for those who do not now have freedom.

To those neighbors and allies who share our freedom, we will strengthen our historic ties and assure them of our support and firm commitment. We will match loyalty with loyalty. We will strive for mutually beneficial relations. We will not use our friendship to impose on their sovereignty, for our own sovereignty is not for sale.

As for the enemies of freedom, those who are potential adversaries, they will be reminded that peace is the highest aspiration of the American people. We will negotiate for it, sacrifice for it; we will not surrender for it—now or ever. Our forbearance should never be misunderstood. Our reluctance for conflict should not be misjudged as a failure of will. When action is required to preserve our national security, we will act. We will maintain sufficient strength to prevail if need be, knowing that if we do so we have the best chance of never having to use that strength.

Above all, we must realize that no arsenal, or no weapon in the arsenals of the world, is so formidable as the will and moral courage of free men and women. It is a weapon our adversaries in today's world do not have. It is a weapon that we as Americans do have. Let that be understood by those who practice terrorism and prey upon their neighbors. I am told that tens of thousands of prayer meetings are being held on this day, and for that I am deeply grateful. We are a nation under God, and I believe God intended for us to be free. It would be fitting and good, I

think, if on each Inauguration Day in future years it should be declared a day of prayer.

This is the first time in history that this ceremony has been held, as you have been told, on this West Front of the Capitol. Standing here, one faces a magnificent vista, opening up on this city's special beauty and history. At the end of this open mall are those shrines to the giants on whose shoulders we stand. Directly in front of me, the monument to a monumental man: George Washington, Father of our country. A man of humility who came to greatness reluctantly. He led America out of revolutionary victory into infant nationhood. Off to one side, the stately memorial to Thomas Jefferson. The Declaration of Independence flames with his eloquence. And then beyond the Reflecting Pool the dignified columns of the Lincoln Memorial. Whoever would understand in his heart the meaning of America will find it in the life of Abraham Lincoln. Beyond those monuments to heroism is the Potomac River, and on the far shore the sloping hills of Arlington National Cemetery with its row on row of simple white markers bearing crosses or Stars of David. They add up to only a tiny fraction of the price that has been paid for our freedom. Each one of those markers is a monument to the kinds of heroes I spoke of earlier. Their lives ended in places called Belleau Wood. The Argonne, Omaha Beach, Salerno and halfway around the world on Guadalcanal, Tarawa, Pork Chop Hill, the Chosin Reservoir, and in a hundred rice paddies and jungles of a place called Vietnam.

Under one such marker lies a young man—Martin Treptow—who left his job in a small town barber shop in 1917 to go to France with the famed Rainbow Division. There, on the western front, he was killed trying to carry a message between battalions under heavy artillery fire. We are told that on his body was found a diary. On the flyleaf under the heading, "My Pledge," he had written these words: "America must win this war. Therefore, I will work, I will save, I will sacrifice, I will endure, I will fight cheerfully and do my utmost, as if the issue of the whole struggle depended on me alone."

The crisis we are facing today does not require of us the kind of sacrifice that Martin Treptow and so many thousands of others were called upon to make. It does require, however, our best effort, and our willingness to believe in ourselves and to believe in our capacity to perform great deeds; to believe that together, with God's help, we can and will resolve the problems which now confront us. And, after all, why shouldn't we believe that? We are Americans. God bless you, and thank you.

# PRESIDENTIAL SPEECHES

## GEORGE W. BUSH: ADDRESS TO CONGRESS, SEPTEMBER 20, 2001

On September 11, 2001, two hijacked aircraft crashed into the World Trade Center in New York City, destroying the complex. Another plane hit the Pentagon, headquarters for the U.S. military, outside Washington, D.C. A fourth plane, also believed to be heading for Washington, D.C., crashed in rural Pennsylvania when passengers attempted to retake control from the hijackers. Almost 3,000 people were killed in the attacks.

Within hours of the attacks, the U.S. government had blamed them on terrorists. Speculation centered around the al Qaeda organization and its leader Osama bin Laden. Bin Laden was believed to be operating out of Afghanistan, a nation controlled by the Taliban, a radical Islamic group sympathetic with bin Laden's ideals. President GEORGE W. BUSH and other administration figures were soon on television and radio telling the nation not to fear and warning the world that the United States would respond to the attacks with determination and vigor.

On September 20th, President Bush spoke before a joint session of Congress in the U.S. Capitol. His speech served many purposes. It honored those who had died in the attacks, and those who were struggling to deal with the aftermath. Bush also sought to reassure Americans that they were safe and that steps were being taken to prevent future attacks. The central message of the speech, however, was that the United States remained strong and unafraid, and that it intended to eliminate terrorist threats through a WAR ON TERROR. President Bush identified al Qaeda as being behind the September 11th attacks and warned the Taliban in Afghanistan that if they failed to cooperate in stopping al Qaeda they would be viewed as collaborators. President Bush went on to make it clear to the American people and the world that a protracted struggle against not just al Qaeda, but world terrorism as a whole, was underway.

President Bush's speech helped honor the fallen and reassure the living, but it did not convince the Taliban to give in to his demands. On October 7, 2001, the United States and its allies began a military campaign against the Taliban and terrorists in Afghanistan. It was eventually successful in driving the Taliban out of power and destroying much of the terrorist's infrastructure in that country.

Mr. Speaker, Mr. President Pro Tempore, members of Congress, and fellow Americans:

In the normal course of events, Presidents come to this chamber to report on the state of the Union. Tonight, no such report is needed. It has already been delivered by the American people.

We have seen it in the courage of passengers, who rushed terrorists to save others on the ground—passengers like an exceptional man named Todd Beamer. And would you please help me to welcome his wife, Lisa Beamer, here tonight.

We have seen the state of our Union in the endurance of rescuers, working past exhaustion.

We have seen the unfurling of flags, the lighting of candles, the giving of blood, the saying of prayers—in English, Hebrew, and Arabic. We have seen the decency of a loving and giving people who have made the grief of strangers their own.

My fellow citizens, for the last nine days, the entire world has seen for itself the state of our Union—and it is strong.

Tonight we are a country awakened to danger and called to defend freedom. Our grief has turned to anger, and anger to resolution. Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done.

I thank the Congress for its leadership at such an important time. All of America was touched on the evening of the tragedy to see Republicans and Democrats joined together on the steps of this Capitol, singing "God Bless America." And you did more than sing; you acted, by delivering $40 billion to rebuild our communities and meet the needs of our military.

Speaker Hastert, Minority Leader Gephardt, Majority Leader Daschle and Senator Lott, I thank you for your friendship, for your leadership and for your service to our country.

And on behalf of the American people, I thank the world for its outpouring of support. America will never forget the sounds of our National Anthem playing at Buckingham Palace, on the streets of Paris, and at Berlin's Brandenburg Gate.

We will not forget South Korean children gathering to pray outside our embassy in Seoul, or the prayers of sympathy offered at a mosque in Cairo. We will not forget moments of silence and days of mourning in Australia and Africa and Latin America.

Nor will we forget the citizens of 80 other nations who died with our own: dozens of Pakistanis; more than 130 Israelis; more than 250 citizens of India; men and women from El Salvador, Iran, Mexico and Japan; and hundreds of British citizens. America has no truer friend than Great Britain. Once again, we are joined together in a great cause—so honored the British Prime Minister has crossed an ocean to show his unity of purpose with America. Thank you for coming, friend.

On September the 11th, enemies of freedom committed an act of war against our country. Americans have known wars—but for the past 136 years, they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war—but not at the center of a great city on a peaceful morning. Americans have known surprise attacks—but never before on thousands of civilians. All of this was brought upon us in a single day—and night fell on a different world, a world where freedom itself is under attack.

Americans have many questions tonight. Americans are asking: Who attacked our country? The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al Qaeda. They are the same murderers indicted for bombing American embassies in Tanzania and Kenya, and responsible for bombing the USS *Cole.*

Al Qaeda is to terror what the mafia is to crime. But its goal is not making money; its goal is remaking the world—and imposing its radical beliefs on people everywhere.

The terrorists practice a fringe form of Islamic extremism that has been rejected by Muslim scholars and the vast majority of Muslim clerics—a fringe movement that perverts the peaceful teachings of Islam. The terrorists' directive commands them to kill Christians and Jews, to kill all Americans, and make no distinction among military and civilians, including women and children.

This group and its leader—a person named Osama bin Laden—are linked to many other organizations in different countries, including the Egyptian Islamic Jihad and the Islamic Movement of Uzbekistan. There are thousands of these terrorists in more than 60 countries. They are recruited from their own nations and neighborhoods and brought to camps in places like Afghanistan, where they are trained in the tactics of terror. They are sent back to their homes or sent to hide in countries around the world to plot evil and destruction.

The leadership of al Qaeda has great influence in Afghanistan and supports the Taliban regime in controlling most of that country. In Afghanistan, we see al Qaeda's vision for the world.

Afghanistan's people have been brutalized—many are starving and many have fled. Women are not allowed to attend school. You can be jailed for owning a television. Religion can be practiced only as their leaders dictate. A man can

be jailed in Afghanistan if his beard is not long enough.

The United States respects the people of Afghanistan—after all, we are currently its largest source of humanitarian aid—but we condemn the Taliban regime. It is not only repressing its own people, it is threatening people everywhere by sponsoring and sheltering and supplying terrorists. By aiding and abetting murder, the Taliban regime is committing murder.

And tonight, the United States of America makes the following demands on the Taliban: Deliver to United States authorities all the leaders of al Qaeda who hide in your land. Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating.

These demands are not open to negotiation or discussion. The Taliban must act, and act immediately. They will hand over the terrorists, or they will share in their fate.

I also want to speak tonight directly to Muslims throughout the world. We respect your faith. It's practiced freely by many millions of Americans, and by millions more in countries that America counts as friends. Its teachings are good and peaceful, and those who commit evil in the name of Allah blaspheme the name of Allah. The terrorists are traitors to their own faith, trying, in effect, to hijack Islam itself. The enemy of America is not our many Muslim friends; it is not our many Arab friends. Our enemy is a radical network of terrorists, and every government that supports them.

Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.

Americans are asking, why do they hate us? They hate what we see right here in this chamber—a democratically elected government. Their leaders are self-appointed. They hate our freedoms—our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other.

They want to overthrow existing governments in many Muslim countries, such as Egypt, Saudi Arabia, and Jordan. They want to drive Israel out of the Middle East. They want to drive Christians and Jews out of vast regions of Asia and Africa.

These terrorists kill not merely to end lives, but to disrupt and end a way of life. With every atrocity, they hope that America grows fearful, retreating from the world and forsaking our friends. They stand against us, because we stand in their way.

We are not deceived by their pretenses to piety. We have seen their kind before. They are the heirs of all the murderous ideologies of the 20th century. By sacrificing human life to serve their radical visions—by abandoning every value except the will to power—they follow in the path of fascism, and Nazism, and totalitarianism. And they will follow that path all the way, to where it ends: in history's unmarked grave of discarded lies.

Americans are asking: How will we fight and win this war? We will direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war—to the disruption and to the defeat of the global terror network.

This war will not be like the war against Iraq a decade ago, with a decisive liberation of territory and a swift conclusion. It will not look like the air war above Kosovo two years ago, where no ground troops were used and not a single American was lost in combat.

Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen. It may include dramatic strikes, visible on TV, and covert operations, secret even in success. We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.

Our nation has been put on notice: We are not immune from attack. We will take defensive measures against terrorism to protect Americans. Today, dozens of federal departments and agencies, as well as state and local governments, have responsibilities affecting homeland security. These efforts must be coordinated at the highest level. So tonight I announce the creation of a Cabinet-level position reporting directly to me—the Office of Homeland Security.

And tonight I also announce a distinguished American to lead this effort, to strengthen American security: a military veteran, an effective governor, a true patriot, a trusted friend—Pennsylvania's Tom Ridge. He will lead, oversee and coordinate a comprehensive national strategy to safeguard our country against terrorism, and respond to any attacks that may come.

These measures are essential. But the only way to defeat terrorism as a threat to our way of life is to stop it, eliminate it, and destroy it where it grows.

Many will be involved in this effort, from FBI agents to intelligence operatives to the reservists we have called to active duty. All deserve our thanks, and all have our prayers. And tonight, a few miles from the damaged Pentagon, I have a message for our military: Be ready. I've called the Armed Forces to alert, and there is a reason. The hour is coming when America will act, and you will make us proud.

This is not, however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilization's fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom.

We ask every nation to join us. We will ask, and we will need, the help of police forces, intelligence services, and banking systems around the world. The United States is grateful that many nations and many international organizations have already responded—with sympathy and with support. Nations from Latin America, to Asia, to Africa, to Europe, to the Islamic world. Perhaps the NATO Charter reflects best the attitude of the world: An attack on one is an attack on all.

The civilized world is rallying to America's side. They understand that if this terror goes unpunished, their own cities, their own citizens may be next. Terror, unanswered, can not only bring down buildings, it can threaten the stability of legitimate governments. And you know what—we're not going to allow it.

Americans are asking: What is expected of us? I ask you to live your lives, and hug your children. I know many citizens have fears tonight, and I ask you to be calm and resolute, even in the face of a continuing threat.

I ask you to uphold the values of America, and remember why so many have come here. We are in a fight for our principles, and our first responsibility is to live by them. No one should be singled out for unfair treatment or unkind words because of their ethnic background or religious faith.

I ask you to continue to support the victims of this tragedy with your contributions. Those who want to give can go to a central source of information, <libertyunites.org>, to find the names of groups providing direct help in New York, Pennsylvania, and Virginia.

The thousands of FBI agents who are now at work in this investigation may need your cooperation, and I ask you to give it.

I ask for your patience, with the delays and inconveniences that may accompany tighter security; and for your patience in what will be a long struggle.

I ask your continued participation and confidence in the American economy. Terrorists attacked a symbol of American prosperity. They did not touch its source. America is successful because of the hard work, and creativity, and enterprise of our people. These were the true strengths of our economy before September 11th, and they are our strengths today.

And, finally, please continue praying for the victims of terror and their families, for those in uniform, and for our great country. Prayer has comforted us in sorrow, and will help strengthen us for the journey ahead.

Tonight I thank my fellow Americans for what you have already done and for what you will do. And ladies and gentlemen of the Congress, I thank you, their representatives, for what you have already done and for what we will do together.

Tonight, we face new and sudden national challenges. We will come together to improve air safety, to dramatically expand the number of air marshals on domestic flights, and take new measures to prevent hijacking. We will come

together to promote stability and keep our airlines flying, with direct assistance during this emergency.

We will come together to give law enforcement the additional tools it needs to track down terror here at home. We will come together to strengthen our intelligence capabilities to know the plans of terrorists before they act, and find them before they strike.

We will come together to take active steps that strengthen America's economy, and put our people back to work.

Tonight we welcome two leaders who embody the extraordinary spirit of all New Yorkers: Governor George Pataki, and Mayor Rudolph Giuliani. As a symbol of America's resolve, my administration will work with Congress, and these two leaders, to show the world that we will rebuild New York City.

After all that has just passed—all the lives taken, and all the possibilities and hopes that died with them—it is natural to wonder if America's future is one of fear. Some speak of an age of terror. I know there are struggles ahead, and dangers to face. But this country will define our times, not be defined by them. As long as the United States of America is determined and strong, this will not be an age of terror; this will be an age of liberty, here and across the world.

Great harm has been done to us. We have suffered great loss. And in our grief and anger we have found our mission and our moment. Freedom and fear are at war. The advance of human freedom—the great achievement of our time, and the great hope of every time—now depends on us. Our nation—this generation—will lift a dark threat of violence from our people and our future. We will rally the world to this cause by our efforts, by our courage. We will not tire, we will not falter, and we will not fail.

It is my hope that in the months and years ahead, life will return almost to normal. We'll go back to our lives and routines, and that is good. Even grief recedes with time and grace. But our resolve must not pass. Each of us will remember what happened that day, and to whom it happened. We'll remember the moment the news came—where we were and what we were doing. Some will remember an image of a fire, or a story of rescue. Some will carry memories of a face and a voice gone forever.

And I will carry this: It is the police shield of a man named George Howard, who died at the World Trade Center trying to save others. It was given to me by his mom, Arlene, as a proud memorial to her son. This is my reminder of lives that ended, and a task that does not end.

I will not forget this wound to our country or those who inflicted it. I will not yield; I will not rest; I will not relent in waging this struggle for freedom and security for the American people.

The course of this conflict is not known, yet its outcome is certain. Freedom and fear, justice and cruelty, have always been at war, and we know that God is not neutral between them.

Fellow citizens, we'll meet violence with patient justice—assured of the rightness of our cause, and confident of the victories to come. In all that lies before us, may God grant us wisdom, and may He watch over the United States of America.

Thank you.

# Legal Scholarship

- LAWYERS AND JUDGES
- WHAT SHALL BE DONE WITH THE PRACTICE OF THE COURTS?
- CONTRACTS
- THE PATH OF THE LAW
- BRIEF FOR THE DEFENDANT IN ERROR, MULLER V. OREGON
- MECHANICAL JURISPRUDENCE
- THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE
- SOME REFLECTIONS ON THE READING OF STATUTES

Since the nineteenth century, the role of lawyers and the nature of law in U.S. society have been the subject of ongoing debate and scrutiny. Legal scholars and practitioners have discussed whether the law is a self-contained body of rules, displaying logic and reason. Some have embraced this view and have aspired to make law a science. Since the early twentieth century, however, other important legal figures have expressed skepticism about the inner logic of the law, preferring to see legal rulings as responses to immediate social, political, and economic pressures. These skeptics eventually became known as legal realists, a school of thought that can be traced to the scholar and jurist Oliver Wendell Holmes Jr.

The French writer Alexis de Tocqueville visited the United States in the 1830s and wrote about his travels in *Democracy in America* (1835), one of the classic works of social analysis. Tocqueville, a nobleman, was struck by the democratic character of U.S. society and devoted a section of his work to the role of lawyers and judges. He concluded that lawyers were vital to the preservation of civil order and democracy.

Lawyers have also been the target of popular criticism. In the late eighteenth and early nineteenth century, U.S. critics contended that lawyers and judges conspired to make the law a mysterious body of arcane language and procedures that needlessly complicated problems. Robert Rantoul Jr., a Massachusetts attorney and member of Congress, was a prominent spokesman for the codification movement, which attacked the common law as unsuitable for a democratic republic. In a famous 1836 oration, Rantoul charged that "judge-made law is *ex post facto* law, and therefore unjust." People could not know the law because "no one knows what the law is before [the judge] lays it down." Moreover, a judge was able to rule differently from case to case.

For Rantoul and others, the only solution was to abandon the common-law system and codify all laws into one book that everyone could read and understand. The codification movement had limited success during the nineteenth century. Rantoul advocated a code but never tried to write one. David Dudley Field, a New York attorney, wrote what became known as the Field Code of civil procedure. His code was enacted in twenty-four states, most of them in the West.

The education and training of lawyers began to change in the nineteenth century. Traditionally, the most popular method of becoming a lawyer had been "reading the law" in a law office, learning legal rules and procedures under the tutelage of a practicing attorney. As the century progressed, however, more law schools were opened. The law school curriculum consisted of attending lectures, reading legal treatises, and memorizing legal rules and concepts. Christopher Columbus Langdell changed the course of U.S. legal education when he published his contracts casebook in 1871. Langdell, a professor and dean of Harvard Law School, introduced the case method, which required students to read judicial opinions and analyze the key points of each case. The Socratic method

of logical inquiry was an integral part of the program: professors called on students in class, asked them to present their analysis, and challenged their presentation.

Langdell also embraced the nineteenth century's belief in progress and in the superiority of scientific inquiry. Langdell's conclusion that the law could be a science became a tenet of legal scholarship, but he was eventually challenged by Oliver Wendell Holmes Jr. Holmes, a professor and scholar before serving on the Supreme Judicial Court of Massachusetts and the U.S. Supreme Court, rejected the assumption that law was a science or a logical system.

Holmes wrote a set of legal essays that was published in 1881 as *The Common Law.* In this volume, which is the most renowned work of legal philosophy in U.S. history, Holmes systematically analyzed, classified, and explained various aspects of U.S. common law, ranging from torts to contracts to crime and punishment. He concluded that:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

By the beginning of the twentieth century, the United States had become an industrialized, urban nation. Some lawyers and legal scholars attempted to inject new ideas and information into the law in hopes of overturning stubbornly held doctrines and restoring public confidence in a legal system that appeared to be unprepared to face the realities of the new century. Famed lawyer and later Supreme Court justice Louis D. Brandeis revolutionized the law by submitting what has come to be known as the "Brandeis brief" in *Muller v. Oregon,* 208 U.S. 412, 28 S. Ct. 324, 52 L. Ed. 551 (1908). The brief contained sociological information on the health and well-being of women that Brandeis believed was relevant to deciding whether an Oregon law limiting work hours for women was constitutional. The U.S. Supreme Court upheld the law, lending credibility to Brandeis's use of nonlegal information.

Roscoe Pound, a scholar, teacher, reformer, and dean of Harvard Law School, worked to link law and society through his sociological jurisprudence and to improve the administration of the judicial system. His 1906 speech, "The Causes of Popular Dissatisfaction with the Administration of Justice," was a call to improve court administration and a preview of his theory of law. In 1908 he published "Mechanical Jurisprudence," attacking the notion that an unchanging and inflexible natural law formed the basis for the common law.

The twentieth century also saw the growth of law through legislation. As state legislatures and the U.S. Congress enacted more statutes containing complex and often unclear provisions, the courts were called upon to interpret these laws by using various rules of statutory construction to determine legislative purpose. In 1947, Harvard law professor and later Supreme Court justice Felix Frankfurter delivered a lecture entitled "Some Reflections on the Reading of Statutes," which expounds on the effect that legislative law has on the courts. Fifty years later, the torrent of legislation remains unabated.

# LEGAL SCHOLARSHIP

## Lawyers and Judges

Alexis de Tocqueville, 1835

Alexis de Tocqueville, a French political scientist, historian, and politician, is best known for *Democracy in America* (1835). A believer in democracy, he was concerned about the concentration of power in the hands of a centralized government. During his visit to the United States in 1831 and 1832, Tocqueville observed the deep social and political divisions produced by slavery. He was impressed, however, by the power of a free press and the importance that citizens placed upon the legal system.

In his observations on lawyers and judges, Tocqueville noted that U.S. courts of law possessed enormous political power. Judges had the power of judicial review, which allowed them to strike down laws as unconstitutional. He also observed that lawyers were active in politics, bringing to government and the political arena the knowledge, skills, and temperament peculiar to their profession. Tocqueville pointed out that lawyers are wedded to the public order and are often conservative. He concluded that "lawyers belong to the people by birth and interest, and to the aristocracy by habit and taste; they may be looked upon as the connecting link between the two great classes of society."

### Lawyers and Judges

Whenever a law that the judge holds to be unconstitutional is invoked in a tribunal of the United States, he may refuse to admit it as a rule; this power is the only one peculiar to the American magistrate, but it gives rise to immense political influence. In truth, few laws can escape the searching analysis of the judicial power for any length of time, for there are few that are not prejudicial to some private interest or other, and none that may not be brought before a court of justice by the choice of parties or by the necessity of the case. But as soon as a judge has refused to apply any given law in a case, that law immediately loses a portion of its moral force.

* * *

Within these limits the power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies.

* * *

When we have examined in detail the organization of the [United States] Supreme Court and the entire prerogatives which it exercises, we shall readily admit that a more imposing judicial power was never constituted by any people. The Supreme Court is placed higher than any other known tribunal, both by the nature of its rights and the class of justiciable parties which it controls.

* * *

The peace, the prosperity, and the very existence of the Union are vested in the hands of the seven Federal judges [of the United States Supreme Court]. Without them the Constitu-

From *Democracy in America.*

tion would be a dead letter: the executive appeals to them for assistance against the encroachments of the legislative power; the legislature demands their protection against the assaults of the executive; they defend the Union from the disobedience of the states, the states from the exaggerated claims of the Union, the public interest against private interests, and the conservative spirit of stability against the fickleness of the democracy. Their power is enormous, but it is the power of public opinion. They are all-powerful as long as the people respect the law; but they would be impotent against popular neglect or contempt of the law. The force of public opinion is the most intractable of agents, because its exact limits cannot be defined; and it is not less dangerous to exceed than to remain below the boundary prescribed.

* * *

Democratic laws generally tend to promote the welfare of the greatest possible number; for they emanate from the majority of the citizens, who are subject to error, but who cannot have an interest opposed to their own advantage. The laws of an aristocracy tend, on the contrary, to concentrate wealth and power in the hands of the minority; because an aristocracy, by its very nature, constitutes a minority. It may therefore be asserted, as a general proposition, that the purpose of a democracy in its legislation is more useful to humanity than that of an aristocracy. This, however, is the sum total of its advantages.

* * *

No political form has hitherto been discovered that is equally favorable to the prosperity and the development of all the classes into which society is divided. These classes continue to form, as it were, so many distinct communities in the same nation; and experience has shown that it is no less dangerous to place the fate of these classes exclusively in the hands of any one of them than it is to make one people the arbiter of the destiny of another. When the rich alone govern, the interest of the poor is always endangered; and when the poor make the laws, that of the rich incurs very serious risks. The advantage of democracy does not consist, therefore, as has sometimes been asserted, in favoring the prosperity of all, but simply in contributing to the well-being of the greatest number.

The men who are entrusted with the direction of public affairs in the United States are frequently inferior, in both capacity and morality, to those whom an aristocracy would raise to power. But their interest is identified and mingled with that of the majority of their fellow citizens. They may frequently be faithless and frequently mistaken, but they will never systematically adopt a line of conduct hostile to the majority; and they cannot give a dangerous or exclusive tendency to the government.

* * *

It is not always feasible to consult the whole people, either directly or indirectly, in the formation of law; but it cannot be denied that, when this is possible, the authority of law is much augmented. This popular origin which impairs the excellence and the wisdom of legislation, contributes much to increase its power. There is an amazing strength in the expression of the will of a whole people; and when it declares itself, even the imagination of those who would wish to contest it is overawed. The truth of this fact is well known by parties, and they consequently strive to make out a majority whenever they can. If they have not the greater number of voters on their side, they assert that the true majority abstained from voting; and if they are foiled even there, they have recourse to those persons who had no right to vote.

In the United States, except slaves, servants, and paupers supported by the townships, there is no class of persons who do not exercise the elective franchise and who do not indirectly contribute to make the laws. Those who wish to attack the laws must consequently either change the opinion of the nation or trample upon its decision.

A second reason, which is still more direct and weighty, may be adduced: in the United States everyone is personally interested in enforcing the obedience of the whole community to the law; for as the minority may shortly rally the majority to its principles, it is interested in professing that respect for the decrees of the legislator which it may soon have occasion to claim for its own. However irksome an enactment may be, the citizen of the United States complies with it, not only because it is the work of the majority, but because it is his own, and he regards it as a contract to which he is himself a party.

In the United States, then, that numerous and turbulent multitude does not exist who, regarding the law as their natural enemy, look upon it with fear and distrust. It is impossible,

on the contrary, not to perceive that all classes display the utmost reliance upon the legislation of their country and are attached to it by a kind of parental affection.

* * *

In visiting the Americans and studying their laws, we perceive that the authority they have entrusted to members of the legal profession, and the influence that these individuals exercise in the government, are the most powerful existing security against the excesses of democracy. This effect seems to me to result from a general cause, which it is useful to investigate, as it may be reproduced elsewhere. . . .

Men who have made a special study of the laws derive from [that] occupation certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude.

The special information that lawyers derive from their studies ensures them a separate rank in society, and they constitute a sort of privileged body in the scale of intellect. This notion of their superiority perpetually recurs to them in the practice of their profession: they are the masters of a science which is necessary, but not very generally known; they serve as arbiters between the citizens; and the habit of directing to their purpose the blind passions of parties in litigation inspires them with a certain contempt for the judgment of the multitude. Add to this that they naturally constitute a body; not by any previous understanding, or by an agreement that directs them to a common end; but the analogy of their studies and the uniformity of their methods connect their minds as a common interest might unite their endeavors.

Some of the tastes and the habits of the aristocracy may consequently be discovered in the characters of lawyers. They participate in the same instinctive love of order and formalities; and they entertain the same repugnance to the actions of the multitude, and the same secret contempt of the government of the people. I do not mean to say that the natural propensities of lawyers are sufficiently strong to sway them irresistibly; for they, like most other men, are governed by their private interests, and especially by the interests of the moment.

* * *

I do not, then, assert that all the members of the legal profession are at all times the friends of order and the opponents of innovation, but merely that most of them are usually so. In a community to which lawyers are allowed to occupy without opposition that high station which naturally belongs to them, their general spirit will be eminently conservative and antidemocratic. When an aristocracy excludes the leaders of that profession from its ranks, it excites enemies who are the more formidable as they are independent of the nobility by their labors and feel themselves to be their equals in intelligence though inferior in opulence and power.

* * *

Lawyers are attached to public order beyond every other consideration, and the best security of public order is authority. It must not be forgotten, also, that if they prize freedom much, they generally value legality still more; they are less afraid of tyranny than of arbitrary power; and, provided the legislature undertakes of itself to deprive men of their independence, they are not dissatisfied.

* * *

The government of democracy is favorable to the political power of lawyers; for when the wealthy, the noble, and the prince are excluded from the government, the lawyers take possession of it, in their own right, as it were, since they are the only men of information and sagacity, beyond the sphere of the people, who can be the object of the popular choice. If, then, they are led by their tastes towards the aristocracy and the prince, they are brought in contact with the people by their interests. They like the government of democracy without participating in its propensities and without imitating its weaknesses; whence they derive a two-fold authority from it and over it. The people in democratic states do not mistrust the members of the legal profession, because it is known that they are interested to serve the popular cause; and the people listen to them without irritation, because they do not attribute to them any sinister designs. The lawyers do not, indeed, wish to overthrow the institutions of democracy, but they constantly endeavor to turn it away from its real direction by means that are foreign to its nature. Lawyers belong to the people by birth and interest, and to the aristocracy by habit and taste; they may be looked upon as the connecting link between the two great classes of society.

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LAWYERS AND JUDGES

The profession of the law is the only aristocratic element that can be amalgamated without violence with the natural elements of democracy and be advantageously and permanently combined with them. I am not ignorant of the defects inherent in the character of this body of men; but without this admixture of lawyer-like sobriety with the democratic principle, I question whether democratic institutions could long be maintained; and I cannot believe that a republic could hope to exist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people.

* * *

In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society. They have therefore nothing to gain by innovation, which adds a conservative interest to their natural taste for public order. If I were asked where I place the American aristocracy, I should reply without hesitation that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and the bar.

The more we reflect upon all that occurs in the United States, the more we shall be persuaded that the lawyers, as a body, form the most powerful, if not the only, counterpoise to the democratic element. In that country we easily perceive how the legal profession is qualified by its attributes, and even by its faults, to neutralize the vices inherent in popular government. When the American people are intoxicated by passion or carried away by the impetuosity of their ideas, they are checked and stopped by the almost invisible influence of their legal counselors. These secretly oppose their aristocratic propensities to the nation's democratic instincts, their superstitious attachment to what is old to its love of novelty, their narrow views to its immense designs, and their habitual procrastination to its ardent impatience.

The courts of justice are the visible organs by which the legal profession is enabled to control the democracy. The judge is a lawyer who, independently of the taste for regularity and order that he has contracted in the study of law, derives an additional love of stability from the inalienability of his own functions. His legal attainments have already raised him to a distinguished rank among his fellows; his political power completes the distinction of his station and gives him the instincts of the privileged classes.

* * *

It must not be supposed, moreover, that the legal spirit is confined in the United States to the courts of justice; it extends far beyond them. As the lawyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to occupy most of the public stations. They fill the legislative assemblies and are at the head of the administration; they consequently exercise a powerful influence upon the formation of the law and upon its execution. The lawyers are obliged, however, to yield to the current public opinion, which is too strong for them to resist; but it is easy to find indications of what they would do if they were free to act. The Americans, who have made so many innovations in their political laws, have introduced very sparing alterations in their civil laws, and that with great difficulty, although many of these laws are repugnant to their social condition. The reason for this is that in matters of civil law the majority are obliged to defer to the authority of the legal profession, and the American lawyers are disinclined to innovate when they are left to their own choice.

* * *

The influence of legal habits extends beyond the precise limits I have pointed out. Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings. As most public men are or have been legal practitioners, they introduce the customs and technicalities of their profession into the management of public affairs. The jury extends this habit to all classes. The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habits and the tastes of the judicial magistrate. The lawyers of the United States form a party which is but little feared and scarcely perceived, which has no badge peculiar to itself, which adapts itself with great flexibility to the exigencies of the time and accommodates itself without resist-

ance to all the movements of the social body. But this party extends over the whole community and penetrates into all the classes which compose it; it acts upon the country imperceptibly, but finally fashions it to suit its own purposes.

# LEGAL SCHOLARSHIP

## What Shall Be Done with the Practice of the Courts?

David Dudley Field, 1847

David Dudley Field was an attorney from a prominent New York family. His brother was Stephen J. Field, a U.S. Supreme Court justice. Field was a leading crusader for the codification movement. He attacked the rules of civil procedure of his time, which were based on English common-law pleading practices. Common-law pleading was an arcane practice filled with traps for the uninitiated that could result in the dismissal of the case on procedural grounds. Field's essay of 1847, "What Shall Be Done with the Practice of the Courts," presented his case for what is now known as code pleading.

As a member of the New York pleading and practice commission, Field prepared a civil procedure code that the legislature adopted in 1848. The code simplified the filing and prosecution of lawsuits. It was a significant improvement over common-law systems of procedure, in that it required that the complaint contain "a plain and concise statement of the facts constituting plaintiff's cause of action." The code used the pleading as a way of narrowing and defining the dispute rather than as a general means of initiating a civil action.

The Field Code was later adopted by Missouri, California, and many other states. In time, however, code pleading became very technical, requiring the pleader to set forth the facts underlying and demonstrating the existence of the cause of action. Matters were simplified in 1938, when the Federal Rules of Civil Procedure were adopted. Rule 8(a) provides that the complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Likewise, the defendant "shall state in short and plain terms" the defenses to the plaintiff's complaint. There is no requirement that facts be alleged.

In the twentieth century, the desire for codification led to the drafting of various sets of uniform laws, including the Uniform Commercial Code and the Uniform Probate Code.

### What Shall Be Done with the Practice of the Courts?

The Constitution of this State [New York, 1846], which goes into effect to-day, will render great changes necessary in our system of legal procedure. It remodels our Courts; unites the administration of law and equity in the same tribunal; directs testimony to be taken in like manner in both classes of cases; abolishes the offices of Master and Examiner in Chancery, hitherto important parts of our equity system; and, finally, directs that the next Legislature shall provide for the appointment of three commissioners, "whose duty it shall be to revise, reform, simplify, and abridge the rules of practice, pleadings, forms, and proceedings of the courts of record," and report thereon to the Legislature for its action.

Important modifications of the equity practice are thus made indispensable, in order to adapt it to the new mode of taking testimony. But I think that the Convention intended, and that the people expect, much greater changes

than these. We know that radical reform in legal proceedings has long been demanded by no inconsiderable number of the people; that a more determined agitation of the subject has been postponed by its friends, till such time as there should be a reorganization of the judicial establishment, upon the idea that a new system of procedure and a new system of Courts ought to come in together; that it was a prominent topic in the Convention itself, where its friends were in an undoubted majority; and that the manifestations of public sentiment out of doors were no less clear than were the sentiments of that body. Indeed, if now, after all that has been done within the last five years, there should be made only such changes as the Constitution absolutely commands, there will be great and general disappointment.

* * *

Every consideration, as it seems to me, makes it expedient for us all now to enter heartily upon the work of amendment. Those of us who have long been laboring for a radical reformation of the law, and those who have felt less inclination for it, should find this an occasion to act together in the common pursuit of thorough and wise reforms. We feel the inconvenience of the present state of things. We know that the technicality and the drudgery of legal proceedings are discreditable to our profession. Justice is entangled in the net of forms.

* * *

Believing, therefore, that great changes are inevitable in any event, and that this is a period favorable to the adoption of all the reforms which are really required, I wish it were possible to engage every member of the legal profession in the promotion of a wise, safe, and radical reform. Radical reform will come sooner or later, with us or without us. Shall we cooperate to make it at the same time wise and safe?

Such a reform, I am persuaded, should have in view nothing less than a uniform course of proceeding, in all cases, legal and equitable.

* * *

What I propose, then, in respect to cases of legal cognizance, is this: that the present forms of action be abolished, and in their stead a complaint and answer required, each setting forth the real claim and defense of the parties. Such pleadings would be precisely similar to those proposed for equity cases, and we should thus have a uniform course of pleading for all cases, legal and equitable. The distinction between the two classes of cases is now merely a distinction in the forms of proceeding. The Court of Chancery has existed only in consequence of the narrow and fixed forms of the common law. If those forms had been abolished, and a natural procedure adopted, the course of the two Courts would long ago have been assimilated.

Let the plaintiff set forth his cause of action in his complaint briefly, in ordinary language, and without repetition; and let the defendant make his answer in the same way. Let each party verify his allegation by making oath that he believes it to be true. The complaint will then acquaint the defendant with the real charge, while the answer will inform the plaintiff of the real defense. The disputed facts will be sifted from the undisputed, and the parties will go to trial knowing what they have to answer. The plaintiff will state his case as he believes it, and as he expects to prove it. The defendant, on his part, will set forth what he believes and expects to establish, and he need set forth no more. He will not be likely to aver what he does not believe. His answer will disclose the whole of his defense, because he will not be allowed to prove anything which the answer does not contain. He will not be perplexed with questions of double pleading, nor shackled by ancient technical rules.

* * *

The legitimate end of every administration of law is to do justice, with the least possible delay and expense. Every system of pleading is useful only as it tends to this end. This it can do but one of two ways: either by enabling the parties the better to prepare for trial, or by assisting the jury and the Court in judging the causes.

* * *

If we adopt the plan of pleading which I propose, we shall save both time and expense. We shall avoid the risk of losing causes from mistaking the rules of pleading; and we take one step, and that a great one, toward introducing simplicity and directness into the machinery of the law.

* * *

And is, indeed, the learning of the profession bound up with the system of common-law pleading? Is the noble science of jurisprudence—the fruit of the experience of ages, at once the monument and the record of civiliza-

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tion—inseparable from such paltry learning as that, "after the declaration, the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance," or that "upon a traverse issue must be tendered," or anything of that sort? Lawyers have enough to learn if their studies are confined to useful knowledge. To assert that the great body of the law, civil and criminal—the law which defines rights and punishes crimes; the law which regulates the proprietorship, the enjoyment, and the transmission of property in all its forms; which explains the nature and the obligations of contracts through all their changes; the law that prevails equally on the sea and the land; the law that is enforced in courts of chancery and courts of admiralty, as well as in the courts of common law—to assert that this vast body of law requires the aid of that small portion which regulates the written statement of the parties in the courts of common law, is to assert a monstrous paradox, fitter for ridicule than for argument.

# LEGAL SCHOLARSHIP

## Contracts

Christopher C. Langdell, 1871

The 1871 publication of *A Selection of Cases on the Law of Contracts* by Christopher Columbus Langdell revolutionized legal education. The book, which consisted of a collection of mostly English judicial opinions, was meant to assist the professor in developing within the student a scientific approach to the law. Langdell chose the cases for the fundamental principles they contained. Students were expected to dispense with the idea that they were attending a vocational school. Instead, they were to apply the principles they learned in the scientific search for truth. In his preface Langdell said that he sought to "select, classify, and arrange all cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines."

### Contracts

#### PREFACE

I entered upon the duties of my present position, a year and a half ago, with a settled conviction that law could only be taught or learned effectively by means of cases in some form. I had entertained such an opinion ever since I knew anything of the nature of law or legal study; but it was chiefly through my experience as a learner that it was formed, as well as subsequently strengthened and confirmed. Of teaching indeed, as a business, I was entirely without experience; nor had I given much consideration to that subject, except so far as proper methods of teaching are involved in proper methods of study.

Now, however, I was called upon to consider directly the subject of teaching, not theoretically but practically, in connection with a large school with its more or less complicated organization, its daily routine, and daily duties. I was expected to take a large class of pupils, meet them regularly from day to day, and give them systematic instruction in such branches of law as had been assigned to me. To accomplish this successfully, it was necessary, first, that the efforts of the pupils should go hand in hand with mine, that is, that they should study with direct reference to my instruction; secondly, that the study thus required of them should be of the kind from which they might reap the greatest and most lasting benefit; thirdly, that the instruction should be of such a character that the pupils might at least derive a greater advantage from attending it than from devoting the same time to private study. How could this threefold object be accomplished? Only one mode occurred to me which seemed to hold out any reasonable prospect of success; and that was, to make a series of cases, carefully selected from the books of reports, the subject alike of study and instruction. But here I was met by what seemed at first to be an insuperable practical difficulty, namely, the want of books; for though it might be practicable, in case of private pupils having free access to a complete library, to refer them directly to the books of reports, such a course was quite out of the question with a large class, all of whom would want the same books at the same time. Nor would such a course be without great drawbacks and inconveniences, even in the case of a single pupil. As he would always have to go

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where the books were, and could only have access to them there during certain prescribed hours, it would be impossible for him to economize his time or work to the best advantage; and he would be liable to be constantly haunted by the apprehension that he was spending time, labor, and money in studying cases which would be inaccessible to him in after life.

It was with a view to removing these obstacles, that I was first led to inquire into the feasibility of preparing and publishing such a selection of cases as would be adapted to my purpose as a teacher. The most important element in that inquiry was the great and rapidly increasing number of reported cases in every department of law. In view of this fact, was there any satisfactory principle upon which such a selection could be made? It seemed to me that there was. Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainly to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless and worse than useless for any purpose of systematic study. Moreover, the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number. It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines; and that such a work could not fail to be of material service to all who desire to study that branch of law systematically and in its original sources.

# LEGAL SCHOLARSHIP

## The Path of the Law

Oliver Wendell Holmes Jr., 1897

Oliver Wendell Holmes Jr. is one of the most celebrated legal figures in U.S. history. His writings on jurisprudence have shaped discussions on the nature of law, and his court opinions have been studied as much for their style as their intellectual content.

Holmes rejected the idea that law could be studied as a science. He also emphatically dismissed Langdell's belief that legal systems obey rules of logic. While his book, *The Common Law* (1881), is a scholarly tour de force, his 1897 essay, "The Path of the Law," has proved to be one of the most influential works in legal theory. In the essay Holmes builds on the themes of *The Common Law,* which included his disassociation of law from morality and his emphasis on policy over logic. He went on to define the law as a prediction of what the courts would do in a particular situation. He proposed a "bad man" theory of justice: a bad man will want to know only what the material consequences of his conduct will be; he will not be motivated by morality or conscience.

Holmes's jurisprudence led to the conclusion that judges make decisions first and then come up with reasons to explain them. His approach, which has been characterized as cynical, touched a nerve with succeeding generations of legal scholars.

### The Path of the Law

When we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

The means of the study are a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years, and now increasing annually by hundreds. In these sibylline leaves are gathered the scattered prophesies of the past upon the cases in which the ax will fall. These are what properly have been called the oracles of the law. Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system. The process is one, from a lawyer's statement of a case, eliminating as it

Source: Reprinted in its entirety from O. W. Holmes, Jr., *The Path of the Law,* 10 HARVARD LAW REVIEW 457 (1897). The footnotes have been renumbered.

does all the dramatic elements with which his client's story has clothed it, and retaining only the facts of legal import, up to the final analyses and abstract universals of theoretic jurisprudence. The reason why a lawyer does not mention that his client wore a white hat when he made a contract, while Mrs. Quickly would be sure to dwell upon it along with the parcel gilt goblet and the sea-coal fire, is that he foresees that the public force will act in the same way whatever his client had upon his head. It is to make the prophecies easier to be remembered and to be understood that the teachings of the decisions of the past are put into general propositions and gathered into textbooks, or that statutes are passed in a general form. The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies. One of the many evil effects of the confusion between legal and moral ideas, about which I shall have something to say in a moment, is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. But, as I shall try to show, a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right.

The number of our predictions when generalized and reduced to a system is not unmanageably large. They present themselves as a finite body of dogma which may be mastered within a reasonable time. It is a great mistake to be frightened by the ever increasing number of reports. The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view. We could reconstruct the corpus from them if all that went before were burned. The use of the earlier reports is mainly historical, a use about which I shall have something to say before I have finished.

I wish, if I can, to lay down some first principles for the study of this body of dogma or systematized prediction which we call the law, for men who want to use it as the instrument of their business to enable them to prophesy in their turn, and, as bearing upon the study, I wish to point out an ideal which as yet our law has not attained.

The first thing for a business-like understanding of the matter is to understand its limits, and therefore I think it desirable at once to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory, and more often and indeed constantly is making trouble in detail without reaching the point of consciousness. You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.

I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men. When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law. For that purpose you must definitely master its specific marks, and it is for that that I ask you for the moment to imagine yourselves indifferent to other and greater things.

I do not say that there is not a wider point of view from which the distinction between law and morals becomes of secondary or no importance, as all mathematical distinctions vanish in presence of the infinite. But I do say that that distinction is of the first importance for the object which we are here to consider,—a right study and mastery of the law as a business with well understood limits, a body of dogma enclosed within definite lines. I have just shown the practical reason for saying so. If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. The theoretical importance of the distinction is no less, if you would reason on your subject aright. The law is full of phraseology drawn from morals, and by the mere force of

language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds. The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy. For instance, when we speak of the rights of man in a moral sense, we mean to mark the limits of interference with individual freedom which we think are prescribed by conscience, or by our ideal, however reached. Yet it is certain that many laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time, or which at all events pass the limit of interference as many consciences would draw it. Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law. No doubt simple and extreme cases can be put of imaginable laws which the statute-making power would not dare to enact, even in the absence of written constitutional prohibitions, because the community would rise in rebellion and fight; and this gives some plausibility to the proposition that the law, if not a part of morality, is limited by it. But this limit of power is not coextensive with any system of morals. For the most part it falls far within the lines of any such system, and in some cases may extend beyond them, for reasons drawn from the habits of a particular people at a particular time. I once heard the late Professor Agassiz[29] say that a German population would rise if you added two cents to the price of a glass of beer. A statute in such a case would be empty words, not because it was wrong, but because it could not be enforced. No one will deny that wrong statutes can be and are enforced, and we should not all agree as to which were the wrong ones.

The confusion with which I am dealing besets confessedly legal conceptions. Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.

Take again a notion which as popularly understood is the widest conception which the law contains;—the notion of legal duty, to which already I have referred. We fill the word with all the content which we draw from morals. But what does it mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money. But from his point of view, what is the difference between being fined and being taxed a certain sum for doing a certain thing? That his point of view is the test of legal principles is shown by the many discussions which have arisen in the courts on the very question whether a given statutory liability is a penalty or a tax. On the answer to this question depends the decision whether conduct is legally wrong or right, and also whether a man is under compulsion or free. Leaving the criminal law on one side, what is the difference between the liability under the mill acts or statutes authorizing a taking by eminent domain and the liability for what we call a wrongful conversion of property where restoration is out of the question? In both cases the party taking another man's property has to pay its fair value as assessed by a jury, and no more. What significance is there in calling one taking right and another wrong from the point of view of the law? It does not matter, so far as the given consequence, the compulsory payment, is concerned, whether the act to which it is attached is described in terms of praise or in terms of blame, or whether the law purports to prohibit it or to allow it. If it matters at all, still speaking from the bad man's point of view, it must be because in one case and not in the other some further disadvantages, or at least some further consequences, are attached to the act by the law. The only other disadvantages thus attached to it which I ever have been able to think of are

[29] [Ed. note] Jean Louis Rodolphe Agassiz (1807–73), a Swiss born naturalist and, *inter alia,* Professor of Natural History at Harvard. His second wife, Elizabeth Cabot (née Cary) (1822–1907) was one of the founders of Radcliffe College and its president from 1894 until 1902.

to be found in two somewhat insignificant legal doctrines, both of which might be abolished without much disturbance. One is, that a contract to do a prohibited act is unlawful, and the other, that, if one of two or more joint wrongdoers has to pay all the damages, he cannot recover contribution from his fellows. And that I believe is all. You see how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law.

Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can. It was good enough for Lord Coke, however, and here, as in many other cases, I am content to abide with him. In Bromage v. Genning,[30] a prohibition was sought in the King's Bench against a suit in the marches of Wales for the specific performance of a covenant to grant a lease, and Coke said that it would subvert the intention of the covenantor, since he intends it to be at his election either to lose the damages or to make the lease. Sergeant Harris for the plaintiff confessed that he moved the matter against his conscience, and a prohibition was granted. This goes further than we should go now, but it shows what I venture to say has been the common law point of view from the beginning, although Mr. Harriman, in his very able little book upon Contracts has been misled, as I humbly think, to a different conclusion.

I have spoken only of the common law, because there are some cases in which a logical justification can be found for speaking of civil liabilities as imposing duties in an intelligible sense. These are the relatively few in which equity will grant an injunction, and will enforce it by putting the defendant in prison or otherwise punishing him unless he complies with the order of the court. But I hardly think it advisable to shape general theory from the exception, and I think it would be better to cease troubling ourselves about primary rights and sanctions altogether, than to describe our prophecies concerning the liabilities commonly imposed by the law in those inappropriate terms.

I mentioned, as other examples of the use by the law of words drawn from morals, malice, intent, and negligence. It is enough to take malice as it is used in the law of civil liability for wrongs,—what we lawyers call the law of torts,—to show you that it means something different in law from what it means in morals, and also to show how the difference has been obscured by giving to principles which have little or nothing to do with each other the same name. Three hundred years ago a parson preached a sermon and told a story out of Fox's Book of Martyrs of a man who had assisted at the torture of one of the saints, and afterward died, suffering compensatory inward torment. It happened that Fox was wrong. The man was alive and chanced to hear the sermon, and thereupon he sued the parson. Chief Justice Wray instructed the jury that the defendant was not liable, because the story was told innocently, without malice. He took malice in the moral sense, as importing a malevolent motive. But nowadays no one doubts that a man may be liable, without any malevolent motive at all, for false statements manifestly calculated to inflict temporal damage. In stating the case in pleading, we still should call the defendant's conduct malicious; but, in my opinion at least, the word means nothing about motives, or even about the defendant's attitude toward the future, but only signifies that the tendency of his conduct under the known circumstances was very plainly to cause the plaintiff temporal harm.[31]

In the law of contract the use of moral phraseology has led to equal confusion, as I have shown in part already, but only in part. Morals deal with the actual internal state of the individual's mind, what he actually intends. From the time of the Romans down to now, this mode of dealing has affected the language of the law as to contract, and the language used has reacted upon the thought. We talk about a contract as a

[30] 1 Roll[e] Rep. 368 [81 Eng.Rep. 540 (1616)].

[31] See Hanson v. Globe Newspaper Co., 159 Mass. 293, 302 [34 N.E. 462, 465 (1893)].

meeting of the minds of the parties, and thence it is inferred in various cases that there is no contract because their minds have not met; that is, because they have intended different things or because one party has not known of the assent of the other. Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent. Suppose a contract is executed in due form and in writing to deliver a lecture, mentioning no time. One of the parties thinks that the promise will be construed to mean at once, within a week. The other thinks that it means when he is ready. The court says that it means within a reasonable time. The parties are bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said. In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs,—not on the parties' having *meant* the same thing but on their having *said* the same thing. Furthermore, as the signs may be addressed to one sense or another,—to sight or to hearing,—on the nature of the sign will depend the moment when the contract is made. If the sign is tangible, for instance, a letter, the contract is made when the letter of acceptance is delivered. If it is necessary that the minds of the parties meet, there will be no contract until the acceptance can be read,—none, for example, if the acceptance be snatched from the hand of the offerer by a third person.

This is not the time to work out a theory in detail, or to answer many obvious doubts and questions which are suggested by these general views. I know of none which are not easy to answer, but what I am trying to do now is only by a series of hints to throw some light on the narrow path of legal doctrine, and upon two pitfalls which, as it seems to me, lie perilously near to it. Of the first of these I have said enough. I hope that my illustrations have shown the danger, both to speculation and to practice, of confounding morality with law, and the trap which legal language lays for us on that side of our way. For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.

So much for the limits of the law. The next thing which I wish to consider is what are the forces which determine its content and its growth. You may assume, with Hobbes and Bentham and Austin, that all law emanates from the sovereign, even when the first human beings to enunciate it are the judges, or you may think that law is the voice of the Zeitgeist, or what you like. It is all one to my present purpose. Even if every decision required the sanction of an emperor with despotic power and a whimsical turn of mind, we should be interested none the less, still with a view to prediction, in discovering some order, some rational explanation, and some principle of growth for the rules which he laid down. In every system there are such explanations and principles to be found. It is with regard to them that a second fallacy comes in, which I think it important to expose.

The fallacy to which I refer is the notion that the only force at work in the development of the law is logic. In the broadest sense, indeed, that notion would be true. The postulate on which we think about the universe is that there is a fixed quantitative relation between every phenomenon and its antecedents and consequents. If there is such a thing as a phenomenon without these fixed quantitative relations, it is a miracle. It is outside the law of cause and effect, and as such transcends our power of thought, or at least is something to or from which we cannot reason. The condition of our thinking about the universe is that it is capable of being thought about rationally, or, in other words, that every part of it is effect and cause in the same sense in which those parts are with which we are most familiar. So in the broadest sense it is true that the law is a logical development, like everything else. The danger of which I speak is not the admission that the principles governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct. This is the natural error of the schools, but it is not confined to them. I once heard a very eminent judge say that he never let a decision go

until he was absolutely sure that it was right. So judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come.

This mode of thinking is entirely natural. The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.[32]

You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self-evident, no matter how ready we may be to accept it, not even Mr. Herbert Spencer's Every man has a right to do what he wills, provided he interferes not with a like right on the part of his neighbors.

Why is a false and injurious statement privileged, if it is made honestly in giving information about a servant? It is because it has been thought more important that information should be given freely, than that a man should be protected from what under other circumstances would be an actionable wrong. Why is a man at liberty to set up a business which he knows will ruin his neighbor? It is because the public good is supposed to be best subserved by free competition. Obviously such judgments of relative importance may vary in different times and places. Why does a judge instruct a jury that an employer is not liable to an employee for an injury received in the course of his employment unless he is negligent, and why do the jury generally find for the plaintiff if the case is allowed to go to them? It is because the traditional policy of our law is to confine liability to cases where a prudent man might have foreseen the injury, or at least the danger, while the inclination of a very large part of the community is to make certain classes of persons insure the safety of those with whom they deal. Since the last words were written, I have seen the requirement of such insurance put forth as part of the programme of one of the best known labor organizations. There is a concealed, half conscious battle on the question of legislative policy, and if any one thinks that it can be settled deductively, or once for all, I only can say that I think he is theoretically wrong, and that I am certain that his conclusion will not be accepted in practice *semper ubique et ab omnibus.*[33]

Indeed, I think that even now our theory upon this matter is open to reconsideration, although I am not prepared to say how I should decide if a reconsideration were proposed. Our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like, where the damages might be taken to lie where they fell by legal judgment. But the torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like. The liability

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[32] [Ed. note] Cf. the famous opening lines from *The Common Law:*

> The object of this book is to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage… .
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> O. W. Holmes, Jr., THE COMMON LAW 1 (1881).

[33] [Ed. note] Literally "forever, everywhere and by everyone."

for them is estimated, and sooner or later goes into the price paid by the public. The public really pays the damages, and the question of liability, if pressed far enough, is really the question how far it is desirable that the public should insure the safety of those whose work it uses. It might be said that in such cases the chance of a jury finding for the defendant is merely a chance, once in a while rather arbitrarily interrupting the regular course of recovery, most likely in the case of an unusually conscientious plaintiff, and therefore better done away with. On the other hand, the economic value even of a life to the community can be estimated, and no recovery, it may be said, ought to go beyond that amount. It is conceivable that some day in certain cases we may find ourselves imitating, on a higher plane, the tariff for life and limb which we see in the Leges Barbarorum.

I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said. When socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England, yet it is certain that it is not a conscious factor in the decisions to which I refer. I think that something similar has led people who no longer hope to control the legislatures to look to the courts as expounders of the Constitutions, and that in some courts new principles have been discovered outside the bodies of those instruments, which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago, and a wholesale prohibition of what a tribunal of lawyers does not think about right. I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.

So much for the fallacy of logical form. Now let us consider the present condition of the law as a subject for study, and the ideal toward which it tends. We still are far from the point of view which I desire to see reached. No one has reached it or can reach it as yet. We are only at the beginning of a philosophical reaction, and of a reconsideration of the worth of doctrines which for the most part still are taken for granted without any deliberate, conscious, and systematic questioning of their grounds. The development of our law has gone on for nearly a thousand years, like the development of a plant, each generation taking the inevitable next step, mind, like matter, simply obeying a law of spontaneous growth. It is perfectly natural and right that it should have been so. Imitation is a necessity of human nature, as has been illustrated by a remarkable French writer, M. Tarde,[34] in an admirable book, "Les Lois de l'Imitation." Most of the things we do, we do for no better reason than that our fathers have done them or that our neighbors do them, and the same is true of a larger part than we suspect of what we think. The reason is a good one, because our short life gives us no time for a better, but it is not the best. It does not follow, because we all are compelled to take on faith at second hand most of the rules on which we base our action and our thought, that each of us may not try to set some corner of his world in the order of reason, or that all of us collectively should not aspire to carry reason as far as it will go throughout the whole domain. In regard to the law, it is true, no doubt, that an evolutionist will hesitate to affirm universal validity for his social ideals, or for the principles which he thinks should be embodied in legislation. He is content if he can prove them best for here and now. He may be ready to admit that he knows nothing about an absolute best in the cosmos, and even that he knows next to nothing about a permanent best for men. Still it is true that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words.

At present, in very many cases, if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition. We follow it

[34] [Ed. note] Gabriel Tarde (1843–1904). French sociologist and criminologist and from 1899 until his death Professor of Modern Philosophy, College de France. Tarde regarded man as an agent striving to realize ends suggested by the social environment and either sanctioned or rejected by that enactment. *Les Lois de l'Imitation* was published in 1890.

into the Year Books, and perhaps beyond them to the customs of the Salian Franks, and somewhere in the past, in the German forests, in the needs of Norman kings, in the assumptions of a dominant class, in the absence of generalized ideas, we find out the practical motive for what now best is justified by the mere fact of its acceptance and that men are accustomed to it. The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. I am thinking of the technical rule as to trespass *ab initio,* as it is called, which I attempted to explain in a recent Massachusetts case.[35]

Let me take an illustration, which can be stated in a few words, to show how the social end which is aimed at by a rule of law is obscured and only partially attained in consequence of the fact that the rule owes its form to a gradual historical development, instead of being reshaped as a whole, with conscious articulate reference to the end in view. We think it desirable to prevent one man's property being misappropriated by another, and so we make larceny a crime. The evil is the same whether the misappropriation is made by a man into whose hands the owner has put the property, or by one who wrongfully takes it away. But primitive law in its weakness did not get much beyond an effort to prevent violence, and very naturally made a wrongful taking, a trespass, part of its definition of the crime. In modern times the judges enlarged the definition a little by holding that, if the wrongdoer gets possession by a trick or device, the crime is committed. This really was giving up the requirement of a trespass, and it would have been more logical, as well as truer to the present object of the law, to abandon the requirement altogether. That, however, would have seemed too bold, and was left to statute. Statutes were passed making embezzlement a crime. But the force of tradition caused the crime of embezzlement to be regarded as so far distinct from larceny that to this day, in some jurisdictions at least, a slip corner is kept open for thieves to contend, if indicted for larceny, that they should have been indicted for embezzlement, and if indicted for embezzlement, that they should have been indicted for larceny, and to escape on that ground.

Far more fundamental questions still await a better answer than that we do as our fathers have done. What have we better than a blind guess to show that the criminal law in its present form does more good than harm? I do not stop to refer to the effect which it has had in degrading prisoners and in plunging them further into crime, or to the question whether fine and imprisonment do not fall more heavily on a criminal's wife and children than on himself. I have in mind more far-reaching questions. Does punishment deter? Do we deal with criminals on proper principles? A modern school of Continental criminalists plumes itself on the formula, first suggested, it is said, by Gall,[36] that we must consider the criminal rather than the crime. The formula does not carry us very far, but the inquiries which have been started look toward an answer of my questions based on science for the first time. If the typical criminal is a degenerate, bound to swindle or to murder by as deep seated an organic necessity as that which makes the rattlesnake bite, it is idle to talk of deterring him by the classical method of imprisonment. He must be got rid of; he cannot be improved, or frightened out of his structural reaction. If, on the other hand, crime, like normal human conduct, is mainly a matter of imitation, punishment fairly may be expected to help to keep it out of fashion. The study of criminals has been thought by some well known men of science to sustain the former hypothesis. The statistics of the relative increase of crime in

[35] Commonwealth v. Rubin, 165 Mass. 453, [43 N.E. 200 (1896)].

[36] [Ed. note] Probably Franz Joseph Gall (1758–1828), a German physician who eventually settled first in Vienna and later in Paris and was the founder of phrenology.

crowded places like large cities, where example has the greatest chance to work, and in less populated parts, where the contagion spreads more slowly, have been used with great force in favor of the latter view. But there is weighty authority for the belief that, however this may be, "not the nature of the crime, but the dangerousness of the criminal, constitutes the only reasonable legal criterion to guide the inevitable social reaction against the criminal."[37]

The impediments to rational generalization, which I illustrated from the law of larceny, are shown in the other branches of the law, as well as in that of crime. Take the law of tort or civil liability for damages apart from contract and the like. Is there any general theory of such liability, or are the cases in which it exists simply to be enumerated, and to be explained each on its special ground, as is easy to believe from the fact that the right of action for certain well known classes of wrongs like trespass or slander has its special history for each class? I think that there is a general theory to be discovered, although resting in tendency rather than established and accepted. I think that the law regards the infliction of temporal damage by a responsible person as actionable, if under the circumstances known to him the danger of his act is manifest according to common experience, or according to his own experience if it is more than common, except in cases where upon special grounds of policy the law refuses to protect the plaintiff or grants a privilege to the defendant.[38] I think that commonly malice, intent, and negligence mean only that the danger was manifest to a greater or less degree, under the circumstances known to the actor, although in some cases of privilege malice may mean an actual malevolent motive, and such a motive may take away a permission knowingly to inflict harm, which otherwise would be granted on this or that ground of dominant public good. But when I stated my view to a very eminent English judge the other day, he said: "You are discussing what the law ought to be; as the law is, you must show a right. A man is not liable for negligence unless he is subject to a duty." If our difference was more than a difference in words, or with regard to the proportion between the exceptions and the rule, then, in his opinion, liability for an act cannot be referred to the manifest tendency of the act to cause temporal damage in general as a sufficient explanation, but must be referred to the special nature of the damage, or must be derived from some special circumstances outside of the tendency of the act, for which no generalized explanation exists. I think that such a view is wrong, but it is familiar, and I dare say generally is accepted in England.

Everywhere the basis of principle is tradition, to such an extent that we even are in danger of making the rôole of history more important than it is. The other day Professor Ames wrote a learned article[39] to show, among other things, that the common law did not recognize the defence of fraud in actions upon specialties, and the moral might seem to be that the personal character of that defence is due to its equitable origin. But if, as I have said, all contracts are formal, the difference is not merely historical, but theoretic, between defects of form which prevent a contract from being made, and mistaken motives which manifestly could not be considered in any system that we should call rational except against one who was privy to those motives. It is not confined to specialties, but is of universal application. I ought to add that I do not suppose that Mr. Ames would disagree with what I suggest.

However, if we consider the law of contract, we find it full of history. The distinctions between debt, covenant, and assumpsit are merely historical. The classification of certain obligations to pay money, imposed by the law irrespective of any bargain as quasi contracts, is merely historical. The doctrine of consideration is merely historical. The effect given to a seal is to be explained by history alone.—Consideration is a mere form. Is it a useful form? If so, why should it not be required in all contracts? A seal is a mere form, and is vanishing in the scroll and in enactments that a consideration must be given, seal or no seal.—Why should any merely historical distinction be allowed to affect the rights and obligations of business men?

Since I wrote this discourse I have come on a very good example of the way in which tradition

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[37] Havelock Ellis, "The Criminal," 41, citing Garofalo [Baron Raffaele, 1851–1934, Italian statesman, jurist, and criminologist].

[38] An example of the law's refusing to protect the plaintiff is when he is interrupted by a stranger in the use of a valuable way, which he has traveled adversely for a week less than the period of prescription. A week later he will have gained a right, but now he is only a trespasser. Examples of privilege I have given already. One of the best is competition in business.

[39] [Ed. note] Unquestionably, *Specialty Contracts and Equitable Defences,* 9 HARV. L.REV. 49 (1895).

not only overrides rational policy, but overrides it after first having been misunderstood and having been given a new and broader scope than it had when it had a meaning. It is the settled law of England that a material alteration of a written contract by a party avoids it as against him. The doctrine is contrary to the general tendency of the law. We do not tell a jury that if a man ever has lied in one particular he is to be presumed to lie in all. Even if a man has tried to defraud, it seems no sufficient reason for preventing him from proving the truth. Objections of like nature in general go to the weight, not to the admissibility, of evidence. Moreover, this rule is irrespective of fraud, and is not confined to evidence. It is not merely that you cannot use the writing, but that the contract is at an end. What does this mean? The existence of a written contract depends on the fact that the offeror and offeree have interchanged their written expressions, not on the continued existence of those expressions. But in the case of a bond the primitive notion was different. The contract was inseparable from the parchment. If a stranger destroyed it, or tore off the seal, or altered it, the obligee could not recover, however free from fault, because the defendant's contract, that is, the actual tangible bond which he had sealed, could not be produced in the form in which it bound him. About a hundred years ago Lord Kenyon undertook to use his reason on this tradition, as he sometimes did to the detriment of the law, and, not understanding it, said he could see no reason why what was true of a bond should not be true of other contracts. His decision happened to be right, as it concerned a promissory note, where again the common law regarded the contract as inseparable from the paper on which it was written, but the reasoning was general, and soon was extended to other written contracts, and various absurd and unreal grounds of policy were invented to account for the enlarged rule.

I trust that no one will understand me to be speaking with disrespect of the law, because I criticise it so freely. I venerate the law, and especially our system of law, as one of the vastest products of the human mind. No one knows better than I do the countless number of great intellects that have spent themselves in making some addition or improvement, the greatest of which is trifling when compared with the mighty whole. It has the final title to respect that it exists, that it is not a Hegelian dream, but a part of the lives of men. But one may criticise even what one reveres. Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of its future, if I hesitated to point it out and to press toward it with all my heart.

Perhaps I have said enough to show the part which the study of history necessarily plays in the intelligent study of the law as it is to-day. In the teaching of this school and at Cambridge it is in no danger of being undervalued. Mr. Bigelow here and Mr. Ames and Mr. Thayer there have made important contributions which will not be forgotten, and in England the recent history of early English law by Sir Frederick Pollock and Mr. Maitland has lent the subject an almost deceptive charm. We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present. I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics. The present divorce between the schools of political economy and law seems to me an evidence of how much progress in philosophical study still remains to be made. In the present state of political economy, indeed, we come again upon history on a larger scale, but there we are called on to consider and weigh the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.

There is another study which sometimes is undervalued by the practical minded, for which I wish to say a good word, although I think a good deal of pretty poor stuff goes under that name. I mean the study of what is called jurisprudence. Jurisprudence, as I look at it, is simply law in its most generalized part. Every effort to reduce a case to a rule is an effort of jurisprudence, although the name as used in English is confined to the broadest rules and most fundamental conceptions. One mark of a great lawyer is that he sees the application of the broadest rules. There is

a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant. The same state of mind is shown in all our common digests and text-books. Applications of rudimentary rules of contract or tort are tucked away under the head of Railroads or Telegraphs or go to swell treatises on historical subdivisions, such as Shipping or Equity, or are gathered under an arbitrary title which is thought likely to appeal to the practical mind, such as Mercantile Law. If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis for prophecy. Therefore, it is well to have an accurate notion of what you mean by law, by a right, by a duty, by malice, intent, and negligence, by ownership, by possession, and so forth. I have in my mind cases in which the highest courts seem to me to have floundered because they had no clear ideas on some of these themes. I have illustrated their importance already. If a further illustration is wished, it may be found by reading the Appendix to Sir James Stephen's Criminal Law on the subject of possession, and then turning to Pollock and Wright's enlightened book.[40] Sir James Stephen is not the only writer whose attempts to analyze legal ideas have been confused by striving for a useless quintessence of all systems, instead of an accurate anatomy of one. The trouble with Austin was that he did not know enough English law. But still it is a practical advantage to master Austin, and his predecessors, Hobbes and Bentham, and his worthy successors, Holland and Pollock. Sir Frederick Pollock's recent little book is touched with the felicity which marks all his works, and is wholly free from the perverting influence of Roman models.

The advice of the elders to young men is very apt to be as unreal as a list of the hundred best books. At least in my day I had my share of such counsels, and high among the unrealities I place the recommendation to study the Roman law. I assume that such advice means more than collecting a few Latin maxims with which to ornament the discourse,—the purpose for which Lord Coke recommended Bracton. If that is all that is wanted, the title "De Regulis Juris Antiqui" can be read in an hour. I assume that, if it is well to study the Roman law, it is well to study it as a working system. That means mastering a set of technicalities more difficult and less understood than our own, and studying another course of history by which even more than our own the Roman law must be explained. If any one doubts me, let him read Keller's[41] "Der Römische Civil Process und die Actionen," a treatise on the pr;aetor's edict, Muirhead's most interesting "Historical Introduction to the Private Law of Rome," and, to give him the best chance possible, Sohm's[42] admirable Institutes. No. The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is; and, finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price.

We have too little theory in the law rather than too much, especially on this final branch of study. When I was speaking of history, I mentioned larceny as an example to show how the law suffered from not having embodied in a clear form a rule which will accomplish its manifest purpose. In that case the trouble was due to the survival of forms coming from a time when a more limited purpose was entertained. Let me now give an example to show the practical importance, for the decision of actual cases, of understanding the reasons of the law, by taking an example from rules which, so far as I know, never have been explained or theorized about in any adequate way. I refer to statutes of limitation and the law of prescription. The end of such rules is obvious, but what is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time? Sometimes the loss of evidence is referred to, but that is a secondary matter. Sometimes the desirability of peace, but why is peace more desirable after twenty years than before? It is increasingly likely to come without the aid of legislation. Sometimes it is said that, if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example. Now if this is

[40] [Ed. note] AN ESSAY ON POSSESSION IN THE COMMON LAW (1888).

[41] [Ed. note] Friedrich Ludwig von Keller (1799–1860).

[42] [Ed. note] Rudolph Sohm (1841–1917).

all that can be said about it, you probably will decide a case I am going to put, for the plaintiff; if you take the view which I shall suggest, you possibly will decide it for the defendant. A man is sued for trespass upon land, and justifies under a right of way. He proves that he has used the way openly and adversely for twenty years, but it turns out that the plaintiff had granted a license to a person whom he reasonably supposed to be the defendant's agent, although not so in fact, and therefore had assumed that the use of the way was permissive, in which case no right would be gained. Has the defendant gained a right or not? If his gaining it stands on the fault and neglect of the landowner in the ordinary sense, as seems commonly to be supposed, there has been no such neglect, and the right of way has not been acquired. But if I were the defendant's counsel, I should suggest that the foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser. Sir Henry Maine has made it fashionable to connect the archaic notion of property with prescription. But the connection is further back than the first recorded history. It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man. It is only by way of reply to the suggestion that you are disappointing the former owner, that you refer to his neglect having allowed the gradual dissociation between himself and what he claims, and the gradual association of it with another. If he knows that another is doing acts which on their face show that he is on the way toward establishing such an association, I should argue that in justice to that other he was bound at his peril to find out whether the other was acting under his permission, to see that he was warned, and, if necessary, stopped.

I have been speaking about the study of the law, and I have said next to nothing of what commonly is talked about in that connection,—text-books and the case system, and all the machinery with which a student comes most immediately in contact. Nor shall I say anything about them. Theory is my subject, not practical details. The modes of teaching have been improved since my time, no doubt, but ability and industry will master the raw material with any mode. Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. The most important improvements of the last twenty-five years are improvements in theory. It is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject. For the incompetent, it sometimes is true, as has been said, that an interest in general ideas means an absence of particular knowledge. I remember in army days reading of a youth who, being examined for the lowest grade and being asked a question about squadron drill, answered that he never had considered the evolutions of less than ten thousand men. But the weak and foolish must be left to their folly. The danger is that the able and practical minded should look with indifference or distrust upon ideas the connection of which with their business is remote. I heard a story, the other day, of a man who had a valet to whom he paid high wages, subject to deduction for faults. One of his deductions was, "For lack of imagination, five dollars." The lack is not confined to valets. The object of ambition, power, generally presents itself nowadays in the form of money alone. Money is the most immediate form, and is a proper object of desire. "The fortune," said Rachel, "is the measure of the intelligence." That is a good text to waken people out of a fool's paradise. But, as Hegel says,[43] "It is in the end not the appetite, but the opinion, which has to be satisfied." To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas. If you want great examples read Mr. Leslie Stephen's "History of English Thought in the Eighteenth Century," and see how a hundred years after his death the abstract speculations of Descartes had become a practical force controlling the conduct of men. Read the works of the great German jurists, and see how much more the world is governed to-day by Kant than by Bonaparte. We cannot all be Descartes or Kant, but we all want happiness. And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the

[43] Phil. des Rechts, § 190.

prize needs other food beside success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.

# LEGAL SCHOLARSHIP

## Brief for the Defendant in Error, Muller v. Oregon

Louis D. Brandeis, October Term, 1907

The World's Experience Upon Which the Legislation Limiting the Hours of Labor for Women is Based

In MULLER V. OREGON in 1908, the U.S. Supreme Court upheld an Oregon law that prohibited the employment of women for more than ten hours a day. The decision was based in large part on a brief submitted by LOUIS D. BRANDEIS in support of the law. The brief emphasized the differences between women and men and presented information showing that long work hours could have injurious effects on the health and welfare of women and their children, including their unborn children. The Court unanimously agreed, noting that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence."

The Brandeis brief signaled a change in the type of evidence a court would consider in determining a case. With the growth of the social sciences, quantitative and qualitative studies conducted by researchers would increasingly find their way into U.S. courtrooms.

### Brief for the Defendant in Error, *Muller v. Oregon*

#### I. THE DANGERS OF LONG HOURS

##### A. Causes

*(1) Physical Differences Between Men and Women.* The dangers of long hours for women arise from their special physical organization taken in connection with the strain incident to factory and similar work.

Long hours of labor are dangerous for women primarily because of their special physical organization. In structure and function women are differentiated from men. Besides these anatomical and physiological differences, physicians are agreed that women are fundamentally weaker than men in all that makes for endurance: in muscular strength, in nervous energy, in the powers of persistent attention and application. Overwork, therefore, which strains endurance to the utmost, is more disastrous to the health of women than of men, and entails upon them more lasting injury.

Report of Select Committee on Shops Early Closing Bill, British House of Commons, 1895.

> Dr. Percy Kidd, physician in Brompton and London Hospitals:
>
> The most common effect I have noticed of the long hours is general deterioration of health; very general symptoms which we medically attribute to over-action, and debility of the nervous system; that includes a great deal more than what is called nervous disease, such as indigestion, constipation, a general slackness, and a great many other indefinite symptoms.
>
> Are those symptoms more marked in women than in men?
>
> I think they are much more marked in women. I should say one sees a great many more women of this class than men; but I have seen precisely the same symptoms in men, I should not say in the same proportion, because one has not been able to make anything like a statistical inquiry. There are other symptoms, but I mention those as being the most common. Another symptom

> especially among women is anemia, bloodlessness or pallor, that I have no doubt is connected with long hours indoors.

Report of the Maine Bureau of Industrial and Labor Statistics, 1888.

> Let me quote from Dr. Ely Van der Warker (1875):
>
> Woman is badly constructed for the purposes of standing eight or ten hours upon her feet. I do not intend to bring into evidence the peculiar position and nature of the organs contained in the pelvis, but to call attention to the peculiar construction of the knee and the shallowness of the pelvis, and the delicate nature of the foot as part of a sustaining column. The knee joint of woman is a sexual characteristic. Viewed in front and extended, the joint in but a slight degree interrupts the gradual taper of the thigh into the leg. Viewed in a semi-flexed position, the joint forms a smooth ovate spheroid. The reason of this lies in the smallness of the patella in front, and the narrowness of the articular surfaces of the tibia and femur, and which in man form the lateral prominences, and thus is much more perfect as a sustaining column than that of a woman. The muscles which keep the body fixed upon the thighs in the erect position labor under the disadvantage of shortness of purchase, owing to the short distance, compared to that of man, between the crest of the ilium and the great trochanter of the femur, thus giving to man a much larger purchase in the leverage existing between the trunk and the extremities. Comparatively the foot is less able to sustain weight than that of man, owing to its shortness and the more delicate formation of the tarsus and metatarsus.

Report of the Massachusetts Bureau of Labor Statistics, 1875.

> A "lady operator," many years in the business, informed us: "I have had hundreds of lady compositors in my employ, and they all exhibited, in a marked manner, both in the way they performed their work and in its results, the difference in physical ability between themselves and men. They cannot endure the prolonged close attention and confinement which is a great part of typesetting. I have few girls with me more than two or three years at a time; they must have vacations, and they break down in health rapidly. I know no reason why a girl could not set as much type as a man, if she were as strong to endure the demand on mind and body."

Report of the Nebraska Bureau of Labor and Industrial Statistics, 1901–1902.

> They (women) are unable, by reason of their physical limitations, to endure the same hours of exhaustive labor as may be endured by men without injury to their health would wreck the constitution and destroy the health of women, and render them incapable of bearing their share of the burdens of the family and the home. The State must be accorded the right to guard and protect women as a class against such a condition, and the law in question to that extent conserves the public health and welfare.
>
> In strength as well as in rapidity and precision of movement women are inferior to men. This is not a conclusion that has ever been contested. It is in harmony with all the practical experience of life. It is perhaps also in harmony with the results of those investigators . . . who have found that, as in the blood of women, so also in their muscles, there is more water than in those of men. To a very great extent it is a certainty, a matter of difference in exercise and environment. It is probably, also, partly a matter of organic constitution.
>
> The motor superiority of men, and to some extent of males generally, is, it can scarcely be doubted, a deep-lying fact. It is related to what is most fundamental in men and in women, and to their whole psychic organization.
>
> There appears to be a general agreement that women are more docile and amenable to discipline; that they can do light work equally well; that they are steadier in some respects; but that, on the other hand, they are often absent on account of slight indisposition, and they break down sooner under strain.

* * *

It has been estimated that out of every one hundred days women are in a semipathological state of health for from fourteen to sixteen days. The natural congestion of the pelvic organs during menstruation is augmented and favored by work on sewing machines and other industrial occupations necessitating the constant use of the lower part of the body. Work during these periods tends to induce chronic congestion of the uterus and appendages, and dysmenorrhea and flexion of the uterus are well known affections of working girls.

### VII. Laundries

The specific prohibition in the Oregon Act of more than ten hours' work in laundries is not an arbitrary discrimination against that trade. Laundries would probably not be included under the general terms of "manufacturing" or

LEGAL SCHOLARSHIP

BRIEF FOR THE DEFENDANT IN ERROR, MULLER V. OREGON

"mechanical establishments"; and yet the special dangers of long hours in laundries, as the business is now conducted, present strong reasons for providing a legal limitation of the hours of work in that business.

### DANGEROUS TRADES. THOMAS OLIVER, MEDICAL EXPERT ON DANGEROUS TRADES COMMITTEES OF THE HOME OFFICE. 1902.

#### Chapter XLVII. Laundry Workers.

It is perhaps difficult to realize that the radical change which has everywhere transformed industrial conditions has already affected this occupation (laundry work) also, and that for good or for evil the washerwoman is passing under the influences which have so profoundly modified the circumstances of her sister of the spinning-wheel and the sewing needle. When the first washing machine and ironing roller were applied to this occupation, alteration in the conditions became as much a foregone conclusion as it did in the case of the textile or the clothing manufactures, when the spinning frame, the power loom, or the sewing machine appeared.

Meanwhile, few industries afford at the present time a more interesting study. From a simple home occupation it is steadily being transformed by the application of power-driven machinery and by the division of labor into a highly organized factory industry, in which complicated labor-saving contrivances of all kinds play a prominent part. The tremendous impetus in the adoption of machinery, and the consequent modification of the system of employment so striking in the large laundries, is not greater than the less obvious but even more important development in the same direction among small laundries. Indeed the difference is rapidly becoming one of degree only. In the large laundries may be found perhaps more machinery and a greater number of the newest devices, but the fundamental change has affected all alike.

* * *

### D. BAD EFFECT UPON MORALS

Report of British Chief Inspector of Factories and Workshops, 1900.

> One of the most unsatisfactory results of the present system of lack of working hours in laundries is the unfortunate moral effect on the women and girls. . . . Women who are employed at arduous work till far into the night are not likely to be early risers nor given to punctual attendance in the mornings, and workers who on one or two days in the week are dismissed to idleness or to other occupations, while on the remaining days they are expected to work for abnormally long hours, are not rendered methodical, industrious, or dependable workers by such an unsatisfactory training. The self-control and good habits engendered by a regular and definite period of moderate daily employment, which affords an excellent training for the young worker in all organized industries, is sadly lacking, and, instead, one finds periods of violent overwork alternating with hours of exhaustion. The result is the establishment of a kind of "vicious circle"; bad habits among workers make compliance by their employers with any regulation as to hours very difficult while a lack of loyal adherence to reasonable hours of employment by many laundry occupiers increases the difficulty for those who make the attempt in real earnestness.

# LEGAL SCHOLARSHIP

## Mechanical Jurisprudence

Roscoe Pound, 1908

ROSCOE POUND followed in Oliver Wendell Holmes's footsteps. In "Mechanical Jurisprudence" (1908), Pound coined the term *mechanical jurisprudence* to refer to the common but odious practice whereby judges woodenly applied previous precedents to the facts of cases without regard to the consequences. For Pound, the logic of previous precedents alone would not solve jurisprudential problems. The essay decries the ossification of legal concepts into self-evident truths.

In opposition to mechanical jurisprudence, Pound offered his theory of sociological jurisprudence. He acknowledged that the common law contains some constant principles, particularly in regard to methods. He gave these principles the name "taught legal tradition." Pound believed that the implementation of this taught legal tradition by wise common-law judges resulted in substantive change, which reflected changes in society. As the interpreters of the common law, judges had a special duty to consider the practical effects of their decisions and to strive to ensure that they facilitated rather than hindered societal growth.

### Mechanical Jurisprudence

"There is no way," says Sir Frederick Pollock, "by which modern law can escape from the scientific and artificial character imposed on it by the demand of modern societies for full, equal, and exact justice:" An Australian judge has stated the same proposition in these words: "The public is more interested than it knows in maintaining the highest scientific standard in the administration of justice." Every lawyer feels this, and every thoughtful student of institutions must admit it. But what do we mean by the word "scientific" in this connection? What is scientific law? What constitutes science in the administration of justice? Sir Frederick Pollock gives us the clue when he defines the reasons that compel law to take on this scientific character as three: the demand for full justice, that is for solutions that go to the root of controversies; the demand for equal justice, that is a like adjustment of like relations under like conditions; and the demand for exact justice, that is for a justice whose operations, within reasonable limits, may be predicted in advance of action. In other words, the marks of a scientific law are, conformity to reason, uniformity, and certainty. Scientific law is a reasoned body of principles for the administration of justice, and its antithesis is a system of enforcing magisterial caprice, however honest, and however much disguised under the name of justice or equity or natural law. But this scientific character of law is a means—a means toward the end of law, which is the administration of justice. Law is forced to take on this character in order to accomplish its end fully, equally, and exactly; and in so far as it fails to perform its function fully, equally, and exactly, it fails in the end for which it exists. Law is scientific in order to eliminate so far as may be the personal equation in judicial administration, to preclude cor-

Source: Reprinted from 8 *Columbia Law Review* 605.

ruption and to limit the dangerous possibilities of magisterial ignorance. Law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.

Two dangers have to be guarded against in a scientific legal system, one of them in the direction of the effect of its scientific and artificial character upon the public, the other in the direction of its effect upon the courts and the legal profession. With respect to the first danger, it is well to remember that law must not become too scientific for the people to appreciate its workings. Law has the practical function of adjusting everyday relations so as to meet current ideas of fair play. It must not become so completely artificial that the public is led to regard it as wholly arbitrary. No institution can stand upon such a basis today. Reverence for institutions of the past will not preserve, of itself, an institution that touches everyday life as profoundly as does the law. Legal theory can no more stand as a sacred tradition in the modern world than can political theory. It has been one of the great merits of English law that its votaries have always borne this in mind. When Lord Esher said, "the law of England is not a science," he meant to protest against a pseudo-science of technical rules existing for their own sake and subserving supposed ends of science, while defeating justice. And it is the importance of the role of jurors in tempering the administration of justice with commonsense and preserving a due connection of the rules governing everyday relations with everyday needs of ordinary men that has atoned for the manifold and conspicuous defects of trial by jury and is keeping it alive. In Germany today one of the problems of law reform is how to achieve a similar tempering of the justice administered by highly trained specialists.

In the other direction, the effect of a scientific legal system upon the courts and upon the legal profession is more subtle and far-reaching. The effect of all systems is apt to be petrifaction of the subject systematized. Perfection of scientific system and exposition tends to cut off individual initiative in the future, to stifle independent consideration of new problems and of new phases of old problems, and to impose the ideas of one generation upon another. This is so in all departments of learning. One of the obstacles to advance in every science is the domination of the ghosts of departed masters. Their sound methods are forgotten, while their unsound conclusions are held for gospel. Legal science is not exempt from this tendency. Legal systems have their periods in which science degenerates, in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence.

Roman law in its decadence furnishes a striking example. The Valentinian "law of citations" made a selection of jurisconsults of the past and allowed their writings only to be cited. It declared them, with the exception of Papinian, equal in authority. It confined the judge, when questions of law were in issue, to the purely mechanical task of counting and of determining the numerical preponderance of authority. Principles were no longer resorted to in order to make rules to fit cases. The rules were at hand in a fixed and final form, and cases were to be fitted to the rules. The classical jurisprudence of principles had developed, by the very weight of its authority, a jurisprudence of rules; and it is in the nature of rules to operate mechanically.

Undoubtedly one cause of the tendency of scientific law to become mechanical is to be found in the average man's admiration for the ingenious in any direction, his love of technicality as a manifestation of cleverness, his feeling that law, as a developed institution, ought to have a certain ballast of mysterious technicality. "Philosophy's queerest arguments," says James, "tickle agreeably our sense of subtlety and ingenuity." Every practitioner has encountered the lay obsession as to invalidity of a signing with a lead pencil. Every law teacher has had to combat the student obsession that notice, however cogent, may be disregarded unless it is "official." Lay hair-splitting over rules and regulations goes far beyond anything of which lawyers are capable. Experienced advocates have insisted that in argument to a jury, along with a just, commonsense theory of the merits, one ought to have a specious technicality for good measure. But apart from this general human tendency, there is the special tendency of the lawyer to regard artificiality in law as an end, to hold science something to be pursued for its own sake, to forget in this pursuit the purpose of law and hence of sci-

entific law, and to judge rules and doctrines by their conformity to a supposed science and not by the results to which they lead. In periods of growth and expansion, this tendency is repressed. In periods of maturity and stability, when the opportunity for constructive work is largely eliminated, it becomes very marked.

> I have known judges, [said Chief Justice Erle] bred in the world of legal studies, who delighted in nothing so much as in a strong decision. Now a strong decision is a decision opposed to common-sense and to common convenience. . . . A great part of the law made by judges consists of strong decisions, and as one strong decision is a precedent for another a little stronger, the law at last, on some matters, becomes such a nuisance that equity intervenes, or an Act of Parliament must be passed to sweep the whole away.

The instance suggested in the conversation from which the foregoing extract is taken illustrates very well the development of a mechanical legal doctrine. Successive decisions upon the construction of wills had passed upon the meaning of particular words and phrases in particular wills. These decisions were used as guides in the construction of other wills. Presently rules grew up whereby it was settled that particular words and phrases had prescribed hard and fast meanings, and the construction of wills became so artificial, so scientific, that it defeated the very end of construction and compelled a series of sections in the Wills Act of 1836.

I have referred to mechanical jurisprudence as scientific because those who administer it believe it such. But in truth it is not science at all. We no longer hold anything scientific merely because it exhibits a rigid scheme of deductions from *a priori* conceptions. In the philosophy of today, theories are "instruments, not answers to enigmas, in which we can rest." The idea of science as a system of deductions has become obsolete, and the revolution which has taken place in other sciences in this regard must take place and is taking place in jurisprudence also. This revolution in science at large was achieved in the middle of the nineteenth century. In the first half of that century, scientific method in every department of learning was dominated by the classical German philosophy. Men conceived that by dialectics and deduction from controlling conceptions they could construe the whole content of knowledge. Even in the natural sciences this belief prevailed and had long dictated theories of nature and of natural phenomena. Linnaeus, for instance, lays down a proposition, *omne vivum ex ovo,* and from this fundamental conception deduces a theory of homologies between animal and vegetable organs. He deemed no study of the organisms and the organs themselves necessary to reach or to sustain these conclusions. Yet, today, study of the organisms themselves has overthrown his fundamental proposition. The substitution of efficient for final causes as explanations of natural phenomena has been paralleled by a revolution in political thought. We do not base institutions upon deduction from assumed principles of human nature; we require them to exhibit practical utility, and we rest them upon a foundation of policy and established adaptation to human needs. It has been asserted that to no small extent the old mode of procedure was borrowed from the law. We are told that it involved a "fundamentally juristic conception of the world in which all kinds of action and every sort of judgment was expressed in legal phraseology." We are told that "in the Middle Ages human welfare and even religion was conceived under the form of legality, and in the modern world this has given place to utility." We have, then, the same task in jurisprudence that has been achieved in philosophy, in the natural sciences and in politics. We have to rid ourselves of this sort of legality and to attain a pragmatic, a sociological legal science.

> What is needed nowadays, [it has been said] is that as against an abstract and unreal theory of State omnipotence on the one hand, and an atomistic and artificial view of individual independence on the other, the facts of the world with its innumerable bonds of association and the naturalness of social authority should be generally recognized, and become the basis of our laws, as it is of our life.

Herein is the task of the sociological jurist. Professor Small defines the sociological movement as "a frank endeavor to secure for the human factor in experience the central place which belongs to it in our whole scheme of thought and action." The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument.

Jurisprudence is last in the march of the sciences away from the method of deduction from

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predetermined conceptions. On the continent of Europe, both the historical school of jurists and the philosophical school, which were dominant until at least the last quarter of the nineteenth century, proceeded in this way. The difference between them lay in the manner in which they arrived at their fundamental conceptions. The former derived them from the history of juristic speculation and the historical development of the Roman sources. The latter, through metaphysical inquiries, arrived at certain propositions as to human nature, and deduced a system from them. This was the philosophical theory behind the eighteenth-century movement for codification. Ihering was the pioneer in the work of superseding this jurisprudence of conceptions (*Begriffsjurisrudenz*) by a jurisprudence of results (*Wirklichkeitsjurisprudenz*). He insisted that we should begin at the other end; that the first question should be, how will a rule or a decision operate in practice? For instance, if a rule of commercial law were in question, the search should be for the rule that best accords with and gives effect to sound business practice. In the Civil Law, the doctrine as to mistake in the formation of a contract affords an example of the working of the two methods. Savigny treated the subject according to the jurisprudence of conceptions. He worked out historically and analytically the conception of a contract and deduced therefrom the rules to govern cases of mistake. It followed, from his conception, that if *A* telegraphed *B* to *buy* shares and the telegram as delivered to *B* read *sell,* there was no contract between *A* and *B,* and hence no liability of *A* to *B;* and for a time it was so held. But this and some of the other resulting rules were so far from just in their practical operation that, following the lead of Ihering, they have been abandoned and the ordinary understanding of businessmen has been given effect. And, in this same connection, the new German code has introduced, as a criterion of error in the content of an expression of the will, the question, what would be regarded as essential in the ordinary understanding of business. Even better examples of the workings of a jurisprudence of conceptions, for our purposes, may be found in the manner in which common-law courts have dealt with points of mercantile law. For instance, the law of partnership is made difficult and often unjust by the insistence of the courts upon deducing its rules from a conception of joint ownership and joint obligation, instead of ascertaining and giving effect to the actual situation as understood and practiced by merchants. The legal theory does not affect the actual course of business an iota. But it leads to unfortunate results when that course of business, for some reason, comes before the courts. Again, the refusal of Lord Holt to recognize the negotiability of promissory notes proceeded upon a deduction from the conception of a chose in action. A jurisprudence of ends would have avoided each of these errors.

In periods of legal development through juristic speculation and judicial decision, we have a jurisprudence of ends in fact, even if in form it is a jurisprudence of conceptions. The Roman *jus gentium* was worked out for concrete causes and the conceptions were later generalizations from its results. The *jus naturale* was a system of reaching reasonable ends by bringing philosophical theory into the scale against the hard and fast rules of antiquity. The development of equity in England was attained by a method of seeking results in concrete causes. The liberalizing of English law through the law merchant was brought about by substituting business practice for juridical conceptions. The development of the common law in America was a period of growth because the doctrine that the common law was received only so far as applicable led the courts, in adapting English case-law to American conditions, to study the conditions of application as well as the conceptions and their logical consequences. Whenever such a period has come to an end, when its work has been done and its legal theories have come to maturity, the jurisprudence of conceptions tends to decay. Conceptions are fixed. The premises are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules. This is the condition against which sociologists now protest, and protest rightly.

A period of legislative activity supervenes to supply, first new rules, then new premises, and finally a systematic body of principles as a fresh start for juristic development. But such periods hitherto have not been periods of growth. Usually legislative activity has not gone beyond the introduction of new rules or of new premises, and the chief result has been a summing up of the juristic accomplishment of the past in improved form. The further step, which is begin-

ning to be taken in our present era of legal development through legislation, is in reality an awakening of juristic activity, as jurists perceive that they may effect results through the legislator as well as through the judge or the doctrinal writer. This step has yet to be taken outside of Germany. And in the first and second stages of a period of legislation the mechanical character of legal science is aggravated by the imperative theory, which is a concomitant of legislative activity. Austin's proposition that law is command so complete that even the unwritten law must be given this character, since whatever the sovereign permits he commands, was simply rediscovered during the legislative ferment of the reform movement in English law. In the flowering-time of Papal legislation the canon law had already asserted it. Moreover, a period of legislation and codification has brought German jurists to a like conclusion. At such times, when law is felt to be positive, to be the command of the law-maker, a tendency to enact rules as such becomes manifest. Roman law, in its period of legislation, can furnish more than one example of the sort of law-making of which we complain to-day.

Before the analytical school, which revived the imperative theory to meet the facts of an age of legislation, had become established, historical jurists led a revolt. But their jurisprudence is a jurisprudence of conceptions. Moreover, they have had little effect upon the actual course of Anglo-American law. The philosophical jurists have protested also and have appealed from purely legal considerations to considerations of reason and of natural law. But theirs, too, is a jurisprudence of conceptions, and their method, of itself, offers no relief. Their service has been in connection with the general sociological movement, in giving natural law a new and a modern aspect, and in promoting a general agreement among jurists on a sociological basis. In Europe, it is obvious that the different schools are coming together in a new sociological school that is to dominate juristic thought. Instead of seeking for an ideal universal law by metaphysical methods, the idea of all schools is to turn "the community of fact of mankind into a community of law in accord with the reasonable ordering of active life." Hence they hold that "the less arbitrary the character of a rule and the more clearly it conforms to the nature of things, the more nearly does it approach to the norm of a perfect law." The utilitarian theory of Bentham was a theory of legislation. The sociological theory of the present is a theory of legal science. Probably the chief merit of the new German code lies in its conformity in so large a degree to this theory. It lays down principles from which to deduce, not rules, but decisions; and decisions will indicate a rule only so long as the conditions to which they are applied cause them to express the principle. This, and not lax methods of equitable application, into which American courts are falling so generally, is the true way to make rules fit cases instead of making cases fit rules.

An efficient cause of the failure of much American legislation is that it is founded on an assumption that it is enough for the State to command. Legislation has not been the product of preliminary study of the conditions to which it was to apply. It has not expressed social standards accurately. It has not responded accurately to social needs. Hence a large proportion has been nugatory in practice. But the difficulty is not, as some have assumed, that matters of private law are not within the legitimate scope of legislation. It is rather that legislation has approached them upon a false theory. Judicial law-making also has acted upon an erroneous theory; and its results are often quite as much disregarded in practice as are statutes. Judicial law-making, however, cannot escape, except within very narrow limits, until it is given a new starting point from without. Legislative law-making, on the contrary, may do so and is beginning to do so.

That our case law at its maturity has acquired the sterility of a fully developed system, may be shown by abundant examples of its failure to respond to vital needs of present-day life. Its inadequacy to deal with employers' liability; the failure of the theory of "general jurisprudence" of the Supreme Court of the United States to give us a uniform commercial law; the failure of American courts, with centuries of discussion before them, to work out a reasonable or certain law of future interests in land; the breakdown of the common law in the matter of discrimination by public service companies because of inability to make procedure enforce its doctrines and rules; its breakdown in the attempt to adjust water rights in our newer states, where there was opportunity for free development; its inability to hold promoters to their duty and to protect the interests of those who invest in corporate enterprises against mismanagement and breach of trust; its failure to

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work out a scheme of responsibility that will hold legal entities, or those who hide behind their skirts, to their duty to the public—all these failures, and many more might be adduced, speak for themselves. But compare these failures with the great achievements of the youth of our case-law, with Lord Mansfield's development of a law of quasi-contracts from the fictions of the common counts, with Lord Mansfield's development of mercantile law by judicial decision, with Kent's working out of equity for America from a handful of English decisions, with Marshall's work in giving us a living constitution by judicial interpretation. Now and then, at present, we see vigorous life in remote corners of our case law, as, for instance, in the newer decisions as to surface and underground waters. But judicial revolt from mechanical methods to-day is more likely to take the form of "officious kindness" and flabby equitable application of law. Our judge-made law is losing its vitality, and it is a normal phenomenon that it should do so.

I have suggested some examples of the failure of our case law to rise to social and legal emergencies. Let me point to some phases of its active operation which lead to the same conclusion.

The manner in which the Fourteenth Amendment is applied affords a striking instance of the workings today of a jurisprudence of conceptions. Starting with the conception that it was intended to incorporate Spencer's Social Statics in the fundamental law of the United States, rules have been deduced that obstruct the way of social progress. The conception of liberty of contract, in particular, has given rise to rules and decisions which, tested by their practical operation, defeat liberty. As Mr. Olney says of the *Adair* Case, "it is archaic, it is a long step into the past, to conceive of and deal with the relations between the employer in such industries and the employee, as if the parties were individuals." The conception of freedom of contract is made the basis of a logical deduction. The court does not inquire what the effect of such a deduction will be, when applied to the actual situation. It does not observe that the result will be to produce a condition precisely the reverse of that which the conception originally contemplated. Again, the Commerce Clause of the Federal Constitution has been taken by one judge, at least, to be a constitutional enactment of a conception of free trade among the states. Deductions from this and like conceptions, assumed to express the meaning and the sole meaning of the clause, have given us rules which, when applied to the existing commercial and industrial situation, are wholly inadequate.

Procedure, with respect to which every thoughtful lawyer must feel that we are inexcusably behind the rest of the English-speaking world, suffers especially from mechanical jurisprudence. The conception of a theory of the case, developed by the common-law forms of action, has, in nearly half of our code jurisdictions, nullified the legislative intent and made the practice more rigid than at common law. But this conception is regarded by many as fundamental. In deductions from this conception they lose sight of the end of procedure, they make scientific procedure an end of itself, and thus, in the result, make adjective law an agency for defeating or delaying substantive law and justice instead of one for enforcing and speeding them. Aristotle discusses a project of a Greek reformer for enabling tribunals to render what he called a divided judgment. At that time, the judgment had to be absolute one way or the other. If a plaintiff claimed twenty *minæ:* when but eighteen were proved to be due him, there was no course but to find for the defendant. The proposal to correct this and to allow a finding for the eighteen *minæ:* due did not meet with Aristotle's approval. He said:

> A juror who votes acquittal decides, not that the defendant owes nothing, but that he does not owe the twenty *minæ:* claimed.

We smile now at Aristotle's hard and fast deduction, in the face of a manifestly absurd result, from his conception of the trial of an issue. But at least half our jurisdictions do the same thing essentially in this matter of the theory of a plaintiff's case. That his pleadings and proofs disclose a case and a good case is not enough. The courts say they are not foreclosing that case; they are merely deciding upon the theory he has chosen to advance.

Again, in the practice as to parties, the common-law conception that there must be a joint interest or a joint liability, because there must be one controversy and joint parties are as one party, has seriously interfered with the liberal plan of the framers of the original Code of Civil Procedure. I can only cite some of the cases. But let me compare with our American cases a recent English decision. In that case two plaintiffs sued

for an injunction against infringement of copyright and for an accounting of profits. Only one was owner of the copyright; the other was a mere licensee. But which one was owner was not clear. The court did not deem it necessary to take up this question and determine whether one only was owner and if so which, although a money recovery was to be had. So long as the plaintiffs were agreed among themselves and the defendant had wronged and owed money to one or the other of them, it affirmed a decree for an injunction and accounting. Although in strictness it might be that only *one* was entitled to judgment and so it would be necessary to determine *which* one, the court wasted no time on that question so long as nothing turned on it. Here the court was conscious that procedure was a mere means. It strove to vindicate the substantive law. It was not set upon adhering with scrupulous exactness to logical deductions from a conception of adjective law at the expense of the merits the latter exists to give effect to.

Trial procedure is full of mechanical jurisprudence born of deduction from conceptions. The decisions as to the effect of a view of the *locus* by a jury, in which judgments are reversed unless jurors are told, in the face of commonsense, not to use what they see as evidence, in order to vindicate a conception of the duty of a court of review; the wilderness of decisions as to the province of court and jury, in which, carrying a conception of distinction between law and fact to extreme logical results, the courts at one moment assume that jurors are perfect and will absolutely follow an abstract instruction to its logical consequences, in the face of commonsense and the evidence, and at the next assume that they are fools and will be misled by anything not relevant that drops from the court; and the practice of instructions, one way or the other, when doubtful points of law arise, a general verdict, and a new trial, if the court of review takes another view of the point, when the verdict could have been taken quite as well subject to the point of law reserved, and a new trial obviated, illustrate forcibly the extent to which procedural conceptions, pursued for their own sake, may defeat the end of procedure and defeat the substance of the law. For delay of justice is denial of justice. Every time a party goes out of court on a mere point of practice, substantive law suffers an injury. The life of the law is in its enforcement.

Evidence also has been a prolific field for the unchecked jurisprudence of conceptions. But one example must suffice. The decisions by which in a majority of jurisdictions jurors are not permitted to learn directly the views of standard texts upon scientific and technical subjects, but must pass upon the conflicting opinions of experts without the aid of the impartial sources of information to which any common-sense man would resort in practice, carry out a conception of the competency of evidence at the expense of the end of evidence. In one case, the question was whether death had taken place from strangulation. The trial was held in a rural community, and the medical experts accessible had had no actual experience of cases of strangulation of the sort involved. But standard medical works did relate cases precisely in point, and, after proof that they were standard authorities, a physician was allowed to testify with respect to the symptoms disclosed in the light of the recorded experience of mankind. For this, the judgment was reversed. To vindicate a juridical conception, the court shut out the best possible means of information, in the circumstances of the case in hand, and allowed an accused person to escape because of the inevitable limits of experience of a rural physician.

How far the mechanical jurisprudence, of which the example just given is an extreme case, forgets the end in the means, is made manifest by the stock objection to attempts at introducing a common-sense and business-like procedure. We are told that formal and technical procedure "makes better lawyers." One might ask whether the making of good lawyers is the end of law. But what is a good lawyer? Let Ulpian answer:

> *Ius est ars boni et æqui. Cuius merito quis nos sacerdotes appellet; iustitiam namque colimus et boni et æqui, notitiam profitemur, æquum ab iniquo separantes, licitum ab illicto discernentes, bonos non solum metu pœnarum, verum etiam præmiorum quoque exhortatione efficere cupientes veram, nisi fallor, philosophiam, non simulatam affectantes.*

The nadir of mechanical jurisprudence is reached when conceptions are used, not as premises from which to reason, but as ultimate solutions. So used, they cease to be conceptions and become empty words. James has called attention to a like vice in philosophical thought:

> Metaphysics has usually followed a very primitive kind of quest. You know how men have always hankered after unlawful magic,

> and you know what a great part in magic *words* have always played. If you have his name, or the formula of incantation that binds him, you can control the spirit, genie, afrite, or whatever the power may be. . . . So the universe has always appeared to the natural mind as a kind of enigma of which the key must be sought in the shape of some illuminating or power-bringing word or name. That word names the universe's *principle,* and to possess it is after a fashion to possess the universe itself. "God," "Matter," "Reason," "the Absolute," "Energy," are so many solving names. You can rest when you have them. You are at the end of your metaphysical quest.

Current decisions and discussions are full of such solving words: estoppel, malice, privity, implied, intention of the testator, vested and contingent—when we arrive at these we are assumed to be at the end of our juristic search. Like Habib in the Arabian Nights, we wave aloft our scimitar and pronounce the talismanic word.

With legislative law-making in the grip of the imperative theory and its arbitrary results, and judicial decision in the grip of a jurisprudence of conceptions and its equally arbitrary results, whither are we to turn? Judicial law-making cannot serve us. As things are, the cure would be worse than the disease. No court could hold such hearings as those had by legislative committees upon measures for the protection of operatives, described by Mrs. Kelley, or that recently had before the Interstate Commerce Commission as to uniform bills of lading. We must soon have a new starting-point that only legislation can afford. That we may put the sociological, the pragmatic theory behind legislation, is demonstrated every day. Legislative reference bureaus, the Comparative Law Bureau, the Conferences of Commissioners on Uniform State Laws, such hearings as the one before the Interstate Commerce Commission already referred to, hearings before legislative committees, such conferences as the one held recently with respect to the Sherman Anti-trust Law, bar-association discussions of reforms in procedure—all these are furnishing abundant material for legislation of the best type. No such resources are open to the courts. Hence common-law lawyers will some day abandon their traditional attitude toward legislation; will welcome legislation and will make it what it should be. The part played by jurists in the best days of Roman legislation, and the part they have taken in modern Continental legislation, should convince us, if need be, that juristic principles may be recognized and juristic speculation may be put into effect quite as well by legislation as by judicial decision.

Herein is a noble task for the legal scholars of America. To test the conceptions worked out in the common law by the requirements of the new juristic theory, to lay sure foundations for the ultimate legislative restatement of the law, from which judicial decision shall start afresh—this is as great an opportunity as has fallen to the jurists of any age. The end of a period of development by judicial decision is marked by the prevalence of two types of judges; those who think it a great display of learning and of judicial independence to render what Chief Justice Erle called "strong decisions," and those who fix their gaze upon the raw equities of a cause and forage in the books for cases to sustain the desired result. But the task of a judge is to make a principle living, not by deducing from it rules, to be, like the Freshman's hero, "immortal for a great many years," but by achieving thoroughly the less ambitious but more useful labor of giving a fresh illustration of the intelligent application of the principle to a concrete cause, producing a workable and a just result. The real genius of our common law is in this, not in an eternal case-law. Let the principles be formulated by whom or derived from whence you will. The Common Law will look to courts to develop and expound them, the Civil Law to doctrinal treatises. It is only a lip service to our common law that would condemn it to a perpetuity of mechanical jurisprudence through distrust of legislation.

# LEGAL SCHOLARSHIP

## The Causes of Popular Dissatisfaction with the Administration of Justice

Roscoe Pound, 1906

ROSCOE POUND presented "The Causes of Popular Dissatisfaction with the Administration of Justice" at the annual convention of the American Bar Association in 1906. The lecture was a call to improve court administration and a preview of his theory of law. It has remained a classic statement on the need for efficient and equitable judicial administration.

Pound acknowledged that some people have always been dissatisfied with the law, but he contended that the courts did indeed need to be administered more effectively. He also noted that the adversary system often turned litigation into a game, irritating parties, jurors, and witnesses and giving the public the "false notion of the purpose and end of law." In addition, he attacked the overlapping jurisdiction of courts and argued that each state had too many courts.

In 1909 Pound organized the First National Conference on Criminal Law and Criminology, which gathered participants from many professions to discuss ways to reform the criminal law. The conference was one of the first of Pound's efforts to give practical application to sociological jurisprudence. Later, in 1929 President HERBERT HOOVER appointed Pound to the Wickersham Commission, the popular name for the National Commission on Law Observance and Enforcement. This commission conducted the first comprehensive national study of crime and law enforcement in U.S. history. The findings of the commission, which were published in fourteen volumes in 1931 and 1932, covered every aspect of the criminal justice system, including the causes of crime, police and prosecutorial procedures, and the importance of probation and parole.

Pound's lecture is a treasure trove of ideas concerning the management of courts. The area of court administration has grown since the 1960s, and court administrators now play an active role in monitoring and managing caseloads. Many states have also heeded Pound's advice and unified their trial courts, thereby eliminating several layers of courts.

### The Causes of Popular Dissatisfaction with the Administration of Justice

Dissatisfaction with the administration of justice is as old as law. Not to go outside of our own legal system, discontent has an ancient and unbroken pedigree. The Anglo-Saxon laws continually direct that justice is to be done equally to rich and to poor and the king exhorts that the peace be kept better than has been wont, and that "men of every order readily submit … each to that law which is appropriate to him." The author of the apocryphal *Mirror of Justices* gives a list of one hundred and fifty-five abuses in legal administration, and names it as one of the chief abuses of the degenerate times in which he lived that executions of judges for corrupt or illegal decisions had ceased. Wyclif complains

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that "lawyers make process by subtlety and cavilations of law civil, that is much heathen men's law, and do not accept the form of the gospel, as if the gospel were not so good as pagan's law." Starkey, in the reign of Henry VIII, says: "Everyone that can color reason maketh a stop to the best law that is beforetime devised." James I reminded his judges that "the law was founded upon reason, and that he and others had reason as well as the judges." In the eighteenth century, it was complained that the bench was occupied by "legal monks, utterly ignorant of human nature and of the affairs of men." In the nineteenth century the vehement criticism of the period of the reform movement needs only to be mentioned. In other words, as long as there have been laws and lawyers, conscientious and well-meaning men have believed that laws were mere arbitrary technicalities, and that the attempt to regulate the relations of mankind in accordance with them resulted largely in injustice. But we must not be deceived by this innocuous and inevitable discontent with all law into overlooking or underrating the real and serious dissatisfaction with courts and lack of respect for law which exists in the United States today.

In spite of the violent opposition which the doctrine of judicial power over unconstitutional legislation at first encountered, the tendency to give the fullest scope to the common law doctrine of supremacy of law and to tie down administration by common law liabilities and judicial review, was, until recently, very marked. Today, the contrary tendency is no less marked. Courts are distrusted, and executive boards and commissions with summary and plenary powers, freed, so far as constitutions will permit, from judicial review, have become the fashion. It will be assumed, then, that there is more than the normal amount of dissatisfaction with the present-day administration of justice in America. Assuming this, the first step must be diagnosis, and diagnosis will be the sole purpose of this paper. It will attempt only to discover and to point out the causes of current popular dissatisfaction. The inquiry will be limited, moreover, to civil justice. For while the criminal law attracts more notice, and punishment seems to have greater interest for the lay mind than the civil remedies of prevention and compensation, the true interest of the modern community is in the civil administration of justice. Revenge and its modern outgrowth, punishment, belong to the past of legal history. The rules which define these invisible boundaries, within which each may act without conflict with the activities of his fellows in a busy and crowded world, upon which investor, promoter, buyer, seller, employer, and employee must rely consciously or subconsciously in their every-day transactions, are conditions precedent of modern social and industrial organization.

With the scope of inquiry so limited, the causes of dissatisfaction with the administration of justice may be grouped under four main heads: (1) Causes for dissatisfaction with *any* legal system, (2) causes lying in the peculiarities of our Anglo-American legal system, (3) causes lying in our American judicial organization and procedure, and (4) causes lying in the environment of our judicial administration.

It needs but a superficial acquaintance with literature to show that all legal systems among all peoples have given rise to the same complaints. Even the wonderful mechanism of modern German judicial administration is said to be distrusted by the people on the time-worn ground that there is one law for the rich and another for the poor. It is obvious, therefore, that there must be some cause or causes inherent in all law and in all legal systems in order to produce this universal and invariable effect. These causes of dissatisfaction with any system of law I believe to be the following: (1) The necessarily mechanical operation of rules, and hence of laws; (2) the inevitable difference in rate of progress between law and public opinion; (3) the general popular assumption that the administration of justice is an easy task, to which anyone is competent; and (4) popular impatience of restraint.

The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules. This is one of the penalties of uniformity. Legal history shows an oscillation between wide judicial discretion on the one hand and strict confinement of the magistrate by minute and detailed rules upon the other hand. From time to time more or less reversion to justice without law becomes necessary in order to bring the public administration of justice into touch with changed moral, social, or political conditions. But such periods of reversion result only in new rules or changed rules. In time the modes of exercising discretion become fixed, the course of judicial action becomes sta-

ble and uniform, and the new element, whether custom or equity or natural law, becomes as rigid and mechanical as the old. This mechanical action of the law may be minimized, but it cannot be obviated. Laws are general rules; and the process of making them general involves elimination of the immaterial elements of particular controversies. If all controversies were alike or if the degree in which actual controversies approximate to the recognized types could be calculated with precision, this would not matter. The difficulty is that in practice they approximate to these types in infinite gradations. When we eliminate immaterial factors to reach a general rule, we can never entirely avoid eliminating factors which will be more or less material in some particular controversy. If to meet this inherent difficulty in administering justice according to law we introduce a judicial dispensing power, the result is uncertainty and an intolerable scope for the personal equation of the magistrate. If we turn to the other extreme and pile up exceptions and qualifications and provisos, the legal system becomes cumbrous and unworkable. Hence the law has always ended in a compromise, in a middle course between wide discretion and over-minute legislation. In reaching this middle ground, some sacrifice of flexibility of application to particular cases is inevitable. In consequence, the adjustment of the relations of man and man according to these rules will of necessity appear more or less arbitrary and more or less in conflict with the ethical notions of individuals.

In periods of absolute or generally received moral systems, the contrast between legal results and strict ethical requirements will appeal only to individuals. In periods of free individual thought in morals and ethics, and especially in an age of social and industrial transition, this contrast is greatly intensified and appeals to large classes of society. Justice, which is the end of law, is the ideal compromise between the activities of all in a crowded world. The law seeks to harmonize these activities and to adjust the relations of every man with his fellows so as to accord with the moral sense of the community. When the community is at one in its ideas of justice, this is possible. When the community is divided and diversified, and groups and classes and interests, understanding each other none too well, have conflicting ideas of justice, the task is extremely difficult. It is impossible that legal and ethical ideas should be in entire accord in such a society. The individual looks at cases one by one and measures them by his individual sense of right and wrong. The lawyer must look at cases in gross and must measure them largely by an artificial standard. He must apply the ethics of the community, not his own. If discretion is given him, his view will be that of the class from which he comes. If his hands are tied by law, he must apply the ethics of the past as formulated in common law and legislation. In either event, judicial and individual ethical standards will diverge. And this divergence between the ethical and the legal, as each individual sees it, makes him say with Luther, "Good jurist, bad Christian."

A closely related cause of dissatisfaction with the administration of justice according to law is to be found in the inevitable difference in rate of progress between law and public opinion. In order to preclude corruption, to exclude the personal prejudices of magistrates, and to minimize individual incompetency, law formulates the moral sentiments of the community in rules to which the judgments of tribunals must conform. These rules, being formulations of public opinion, cannot exist until public opinion has become fixed and settled, and cannot change until a change of public opinion has become complete. It follows that this difficulty in the judicial administration of justice, like the preceding, may be minimized, but not obviated. In a rude age the Teutonic moots in which every free man took a hand might be possible. But these tribunals broke under pressure of business and became ordinary courts with permanent judges. The Athenians conceived that the people themselves should decide each case. But the Athenian dikastery, in which controversies were submitted to blocks of several hundred citizens by way of reaching the will of the democracy, proved to register its caprice for the moment rather than its permanent will. Modern experience with juries, especially in commercial causes, does not warrant us in hoping much from any form of judicial referendum. Public opinion must affect the administration of justice through the rules by which justice is administered rather than through the direct administration. All interference with the uniform and automatic application of these rules, when actual controversies arise, introduces an anti-legal element which becomes intolerable. But, as public opinion affects tribunals through the rules by which they decide and these rules once made, stand till abro-

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gated or altered, any system of law will be made up of successive strata of rules and doctrines representing successive and often widely divergent periods of public opinion. In this sense, law is often in very truth a government of the living by the dead. The unconscious changes of judicial law making and the direct alterations of legislation and codification operate to make this government by the dead reasonably tolerable. But here again we must pay a price for certainty and uniformity. The law does not respond quickly to new conditions. It does not change until ill effects are felt; often not until they are felt acutely. The moral or intellectual or economic change must come first. While it is coming, and until it is so complete as to affect the law and formulate itself therein, friction must ensue. In an age of rapid moral, intellectual, and economic changes, often crossing one another and producing numerous minor resultants, this friction cannot fail to be in excess.

A third perennial source of popular dissatisfaction with the administration of justice according to law may be found in the popular assumption that the administration of justice is an easy task to which anyone is competent. Laws may be compared to the formulas of engineers. They sum up the experience of many courts with many cases and enable the magistrate to apply that experience subconsciously. So, the formula enables the engineer to make use of the accumulated experience of past builders, even though he could not work out a step in its evolution by himself. A layman is no more competent to construct or to apply the one formula than the other. Each requires special knowledge and special preparation. Nonetheless, the notion that anyone is competent to adjudicate the intricate controversies of a modern community contributes to the unsatisfactory administration of justice in many parts of the United States. The older states have generally outgrown it. But it is felt in extravagant powers of juries, lay judges of probate and legislative or judicial law making against *stare decisis,* in most of the commonwealths of the South and West. The public seldom realizes how much it is interested in maintaining the highest scientific standard in the administration of justice. There is no more certain protection against corruption, prejudice, class feeling, or incompetence. Publicity will avail something. But the daily criticism of trained minds, the knowledge that nothing which does not conform to the principles and received doctrines of scientific jurisprudence will escape notice, does more than any other agency for the every-day purity and efficiency of courts of justice.

Another necessary source of dissatisfaction with judicial administration of justice is to be found in popular impatience of restraint. Law involves restraint and regulation, with the sheriff and his posse in the background to enforce it. But, however necessary and salutary this restraint, men have never been reconciled to it entirely. The very fact that it is a compromise between the individual and his fellows makes the individual, who must abate some part of his activities in the interest of his fellows, more or less restive. In an age of absolute theories, monarchical or democratic, this restiveness is acute. A conspicuous example is to be seen in the contest between the king and the common law courts in the seventeenth century. An equally conspicuous example is to be seen in the attitude of the frontiersman toward state-imposed justice. "The unthinking sons of the sage brush," says Owen Wister, "ill tolerate anything which stands for discipline, good order and obedience; and the man who lets another command him they despise. I can think of no threat more evil for our democracy, for it is a fine thing diseased and perverted, namely, the spirit of independence gone drunk." This is an extreme case. But in a lesser degree the feeling that each individual, as an organ of the sovereign democracy, is above the law he helps to make, fosters everywhere a disrespect for legal methods and institutions and a spirit of resistance to them. It is "the reason of this our artificial man the commonwealth," says Hobbes, "and his command that maketh law." This man, however, is abstract. The concrete man in the street or the concrete mob is much more obvious; and it is no wonder that individuals and even classes of individuals fail to draw the distinction.

A considerable portion of current dissatisfaction with the administration of justice must be attributed to the universal causes just considered. Conceding this, we have next to recognize that there are potent causes in operation of a character entirely different.

Under the second main head, causes lying in our peculiar legal system, I should enumerate five: (1) The individualist spirit of our common law, which agrees ill with a collectivist age; (2) the common law doctrine of contentious proce-

dure, which turns litigation into a game; (3) political jealousy, due to the strain put upon our legal system by the doctrine of supremacy of law; (4) the lack of general ideas or legal philosophy, so characteristic of Anglo-American law, which gives us petty tinkering where comprehensive reform is needed; and (5) defects of form due to the circumstance that the bulk of our legal system is still case law.

The first of these, conflict between the individualist spirit of the common law and the collectivist spirit of the present age, has been treated of on another occasion. What was said then need not be repeated. Suffice it to point out two examples. From the beginning, the main reliance of our common law system has been individual initiative. The main security for the peace at common law is private prosecution of offenders. The chief security for the efficiency and honesty of public officers is mandamus or injunction by a taxpayer to prevent waste of the proceeds of taxation. The reliance for keeping public service companies to their duty in treating all alike at reasonable price is an action to recover damages. Moreover, the individual is supposed at common law to be able to look out for himself and to need no administrative protection. If he is injured through contributory negligence, no theory of comparative negligence comes to his relief; if he hires as an employee, he assumes the risk of the employment; if he buys goods, the rule is *caveat emptor.* In our modern industrial society, this whole scheme of individual initiative is breaking down. Private prosecution has become obsolete. Mandamus and injunction have failed to prevent rings and bosses from plundering public funds. Private suits against carriers for damages have proved no preventive of discrimination and extortionate rates. The doctrine of assumption of risk becomes brutal under modern conditions of employment. An action for damages is no comfort to us when we are sold diseased beef or poisonous canned goods. At all these points, and they are points of every-day contact with the most vital public interests, common law methods of relief have failed. The courts have not been able to do the work which the common law doctrine of supremacy of law imposed on them. A widespread feeling that the courts are inefficient has been a necessary result. But, along with this, another phase of the individualism of the common law has served to increase public irritation. At the very time the courts have appeared powerless themselves to give relief, they have seemed to obstruct public efforts to get relief by legislation. The chief concern of the common law is to secure and protect individual rights. "The public good," says Blackstone, "is in nothing more essentially interested than in the protection of every individual's private rights." Such, it goes without saying, is not the popular view today. Today we look to society for protection against individuals, natural or artificial, and we resent doctrines that protect these individuals against society for fear society will oppress us. But the common law guaranties of individual rights are established in our constitutions, state and federal. So that, while in England these common law dogmas have had to give way to modern legislation, in America they stand continually between the people, or large classes of the people, and legislation they desire. In consequence, the courts have been put in a false position of doing nothing and obstructing everything, which it is impossible for the layman to interpret aright.

A no less potent source of irritation lies in our American exaggerations of the common law contentious procedure. The sporting theory of justice, the "instinct of giving the game fair play," as Professor Wigmore has put it, is so rooted in the profession in America that most of us take it for a fundamental legal tenet. But it is probably only a survival of the days when a lawsuit was a fight between two clans in which change of venue had been taken to the forum. So far from being a fundamental fact of jurisprudence, it is peculiar to Anglo-American law; and it has been strongly curbed in modern English practice. With us, it is not merely in full acceptance, it has been developed and its collateral possibilities have been cultivated to the furthest extent. Hence in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interests of justice. The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly

as the professional football coach with the rules of the sport. It leads to exertion to "get error into the record" rather than to dispose of the controversy finally and upon its merits. It turns witnesses, and especially expert witnesses, into partisans pure and simple. It leads to sensational cross-examinations "to affect credit," which have made the witness stand "the slaughter house of reputations." It prevents the trial court from restraining the bullying of witnesses and creates a general dislike, if not fear, of the witness function which impairs the administration of justice. It keeps alive the unfortunate exchequer rule, dead in the country of its origin, according to which errors in the admission or rejection of evidence are presumed to be prejudicial and hence demand a new trial. It grants new trials because by inability to procure a bill of exceptions a party has lost the chance to play another inning in the game of justice. It creates vested rights in errors of procedure, of the benefit whereof parties are not to be deprived. The inquiry is not, What do substantive law and justice require? Instead, the inquiry is: Have the rules of the game been carried out strictly? If any material infraction is discovered, just as the football rules put back the offending team five or ten or fifteen yards, as the case may be, our sporting theory of justice awards new trials, or reverses judgments, or sustains demurrers in the interest of regular play.

The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it. And this is doubly true in a time which requires all institutions to be economically efficient and socially useful. We need not wonder that one part of the community strain their oaths in the jury box and find verdicts against unpopular litigants in the teeth of law and evidence, while another part retain lawyers by the year to advise how to evade what to them are unintelligent and unreasonable restrictions upon necessary modes of doing business. Thus the courts, instituted to administer justice according to law, are made agents or abettors of lawlessness.

Another source of irritation at our American courts is political jealousy due to the strain put upon our legal system by the doctrine of the supremacy of law. By virtue of this doctrine, which has become fundamental in our polity, the law restrains, not individuals alone, but a whole people. The people so restrained would be likely in any event to be jealous of the visible agents of restraint. Even more is this true in that the subjects which our constitutional polity commits to the courts are largely matters of economics, politics, and sociology upon which a democracy is peculiarly sensitive. Not only are these matters made into legal questions, but they are tried as incidents of private litigation. This phase of the common law doctrine was felt as a grievance in the seventeenth century. "I tell you plainly," said Bacon, as attorney general, in arguing a question of prerogative to the judges, "I tell you plainly it is little better than a by-let or crooked creek to try whether the king hath power to erect this office in an assize between Brownlow and Michell." King Demos must feel much the same at seeing the constitutionality of the Missouri Compromise tried in an action of trespass, at seeing the validity of the legal tender laws tried on pleas of payment in private litigation, at seeing the power of the federal government to carry on the Civil War tried judicially in admiralty, at seeing the income tax overthrown in a stockholder's bill to enjoin waste of corporate assets and at seeing the important political questions in the Insular Cases disposed of in forfeiture proceedings against a few trifling imports. Nor is this the only phase of the common law doctrine of supremacy of law which produces political jealousy of the courts. Even more must the layman be struck with the spectacle of law paralyzing administration which our polity so frequently presents. The difficulties with writs of *habeas corpus* which the federal government encountered during the Civil War and the recent case of the income tax will occur to you at once. In my own state, in a few years we have seen a freight-rate law suspended by decree of a court and have seen the collection of taxes from railroad companies, needed for the everyday conduct of public business, tied up by an injunction. The strain put upon judicial institutions by such litigation is obviously very great.

Lack of general ideas and absence of any philosophy of law, which has been characteristic of our law from the beginning and has been a point of pride at least since the time of Coke,

contributes its mite also toward the causes of dissatisfaction with courts. For one thing, it keeps us in the thrall of a fiction. There is a strong aversion to straightforward change of any important legal doctrine. The cry is *interpret it.* But such interpretation is spurious. It is legislation. And to interpret an obnoxious rule out of existence rather than to meet it fairly and squarely by legislation is a fruitful source of confusion. Yet the Bar are trained to it as an ancient common law doctrine, and it has a great hold upon the public. Hence if the law does not work well, says Bentham, with fine sarcasm, "it is never the law itself that is in the wrong; it is always some wicked interpreter of the law that has corrupted and abused it." Thus another unnecessary strain is imposed upon our judicial system and courts are held for what should be the work of the legislature.

The defects of form inherent in our system of case law have been the subject of discussion and controversy too often to require extended consideration. Suffice it to say that the want of certainty, confusion and incompleteness inherent in all case law, and the waste of labor entailed by the prodigious bulk to which ours has attained, appeal strongly to the layman. The compensating advantages of this system, as seen by the lawyer and by the scientific investigator, are not apparent to him. What he sees is another phase of the great game; a citation match between counsel, with a certainty that diligence can rake up a decision *somewhere* in support of any conceivable proposition.

Passing to the third head, causes lying in our judicial organization and procedure, we come upon the most efficient causes of dissatisfaction with the present administration of justice in America. For I venture to say that our system of courts is archaic and our procedure behind the times. Uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community.

Our system of courts is archaic in three respects: (1) In its multiplicity of courts, (2) in preserving concurrent jurisdictions, (3) in the waste of judicial power which it involves. The judicial organizations of the several states exhibit many differences of detail. But they agree in these three respects. Multiplicity of courts is characteristic of archaic law. In Anglo-Saxon law, one might apply to the Hundred, the Shire, the Witan, or the king in person. Until Edward I broke up private jurisdictions, there were the king's superior courts of law, the itinerant justices, the county courts, the local or communal courts, and the private courts of lordships; besides which one might always apply to the king or to the Great Council for extraordinary relief. When later the royal courts had superseded all others, there were the concurrent jurisdictions of King's Bench, Common Pleas, and Exchequer, all doing the same work, while appellate jurisdiction was divided by King's Bench, Exchequer Chamber, and Parliament. In the Fourth Institute, Coke enumerates seventy-four courts. Of these, seventeen did the work that is now done by three, the County Courts, the Supreme Court of Judicature, and the House of Lords. At the time of the reorganization by the Judicature Act of 1873, five appellate courts and eight courts of first instance were consolidated into the one Supreme Court of Judicature. It was the intention of those who devised the plan of the Judicature Act to extend the principle of unity of jurisdiction by cutting off the appellate jurisdiction of the House of Lords and by incorporating the County Courts in the newly formed Supreme Court as branches thereof. The recommendation as to the County Courts was not adopted, and the appellate jurisdiction of the House of Lords was restored in 1875. In this way the unity and simplicity of the original design were impaired. But the plan, although adopted in part only, deserves the careful study of American lawyers as a model modern judicial organization. Its chief features were (1) to set up a single court, complete in itself, embracing all superior courts and jurisdictions; (2) to include in this one court, as a branch thereof, a single court of final appeal. In the one branch, the court of first instance, all original jurisdiction at law, in equity, in admiralty, in bankruptcy, in probate, and in divorce was to be consolidated; in the other branch, the court of appeal, the whole reviewing jurisdiction was to be established. This idea of unification, although not carried out completely, has proved most effective. Indeed, its advantages are self-evident. Where the appellate tribunal and the court of first instance are branches of one court, all expense of transfer of record, of transcripts, bills of exceptions, writs of error, and citations is

wiped out. The records are the records of the court, of which each tribunal is but a branch. The court and each branch thereof knows its own records, and no duplication and certification is required. Again, all appellate practice, with its attendant pitfalls, and all waste of judicial time in ascertaining how or whether a case has been brought into the court of review is done away with. One may search the recent English reports in vain for a case where an appeal has miscarried on a point of practice. Cases on appellate procedure are wanting. In effect there is no such thing. The whole attention of the court and of counsel is concentrated upon the cause. On the other hand, our American reports bristle with fine points of appellate procedure. More than four per cent of the digest paragraphs of the last ten volumes of the *American Digest* have to do with Appeal and Error. In ten volumes of the *Federal Reporter*, namely volumes 129 to 139, covering decisions of the Circuit Courts of Appeals from 1903 till the present, there is an average of ten decisions upon points of appellate practice to the volume. Two cases to the volume, on the average, turn wholly upon appellate procedure. In the ten volumes there are six civil cases turning upon the question whether error or appeal was the proper mode of review, and in two civil cases the question was whether the Circuit Court of Appeals was the proper tribunal. I have referred to these reports because they represent courts in which only causes of importance may be brought. The state reports exhibit the same condition. In ten volumes of the Southwestern Reporter, the decisions of the Supreme Court and Courts of Appeals of Missouri show that nearly twenty per cent involve points of appellate procedure. In volume 87, of fifty-three decisions of the Supreme Court and ninety-seven of the Courts of Appeals, twenty-eight are taken up in whole or in part with the mere technics of obtaining a review. All of this is sheer waste, which a modern judicial organization would obviate.

Even more archaic is our system of concurrent jurisdiction of state and federal courts in causes involving diversity of citizenship; a system by virtue of which causes continually hang in the air between two courts, or, if they do stick in one court or the other, are liable to an ultimate overturning because they stuck in the wrong court. A few statistics on this point may be worth while. In the ten volumes of the Federal Reporter referred to, the decisions of the Circuit Courts of Appeals in civil cases average seventy-six to the volume. Of these, on the average, between four and five in a volume are decided on points of federal jurisdiction. In a little more than one to each volume, judgments of Circuit Courts are reversed on points of jurisdiction. The same volumes contain on the average seventy-three decisions of Circuit Courts in civil cases to each volume. Of these, six, on the average, are upon motions to remand to the state courts, and between eight and nine are upon other points of federal jurisdiction. Moreover, twelve cases in the ten volumes were remanded on the *form* of the petition for removal. In other words, in nineteen and three-tenths per cent of the reported decisions of the Circuit Courts the question was whether those courts had jurisdiction at all; and in seven per cent of these that question depended on the form of the pleadings. A system that permits this and reverses four judgments a year because the cause was brought in or removed to the wrong tribunal is out of place in a modern business community. All original jurisdiction should be concentrated. It ought to be impossible for a cause to fail because brought in the wrong place. A simple order of transfer from one docket to another in the same court ought to be enough. There should be no need of new papers, no transcripts, no bandying of cases from one court to another on orders of removal and of remand, no beginnings again with new process.

Judicial power may be wasted in three ways: (1) By rigid districts or courts or jurisdictions, so that business may be congested in one court while judges in another are idle; (2) by consuming the time of courts with points of pure practice, when they ought to be investigating substantial controversies; and (3) by nullifying the results of judicial action by unnecessary retrials. American judicial systems are defective in all three respects. The Federal Circuit Courts and Circuit Courts of Appeals are conspicuous exceptions in the first respect, affording a model of flexible judicial organization. But in nearly all of the states, rigid districts and hard and fast lines between courts operate to delay business in one court while judges in another have ample leisure. In the second respect, waste of judicial time upon points of practice, the intricacies of federal jurisdiction, and the survival of the obsolete Chinese Wall between law and equity in procedure make our federal courts no less conspicuous sinners. In the ten volumes of the *Federal Reporter* examined, of an average of sev-

enty-six decisions of the Circuit Courts of Appeals in each volume, two turn upon the distinction between law and equity in procedure and not quite one judgment to each volume is reversed on this distinction. In an average of seventy-three decisions a volume by the Circuit Courts, more than three in each volume involve this same distinction, and not quite two in each volume turn upon it. But many states that are supposed to have reformed procedure scarcely make a better showing.

Each state has to a great extent its own procedure. But it is not too much to say that all of them are behind the times. We struck one great stroke in 1848 and have rested complacently or contented ourselves with patchwork amendment ever since. The leading ideas of the New York Code of Civil Procedure marked a long step forward. But the work was done too hurriedly and the plan of a rigid code, going into minute detail, was clearly wrong. A modern practice act lays down the general principles of practice and leaves details to rules of court. The New York Code Commission was appointed in 1847 and reported in 1848. If we except the Connecticut Practice Act of 1878, which shows English influence, American reform in procedure has stopped substantially where that commission left it. In England, beginning with 1826 and ending with 1874, *five* commissions have put forth *nine* reports upon this subject. As a consequence we have nothing in America to compare with the radical treatment of pleading in the English Judicature Act and the orders based thereon. We still try the *record,* not the *case.* We are still reversing judgments for nonjoinder and misjoinder. The English practice of joinder of parties against whom relief is claimed in the alternative, rendering judgment against any that the proof shows to be liable and dismissing the rest, makes an American lawyer rub his eyes. We are still reversing judgments for variances. We still reverse them because the recovery is in excess of the prayer, though sustained by the evidence.

But the worst feature of American procedure is the lavish granting of new trials. In the ten volumes of the *Federal Reporter* referred to, there are, on the average, twenty-five writs of error in civil cases to the volume. New trials are awarded on the average in eight cases a volume, or nearly twenty-nine per cent. In the state courts the proportion of new trials to causes reviewed, as ascertained from investigation of the last five volumes of each series of the National Reporter system, runs over forty per cent. In the last three volumes of the *New York Reports* (180–182), covering the period from December 6, 1904, to October 24, 1905, forty-five new trials are awarded. Nor is this all. In one case in my own state an action for personal injuries was tried six times, and one for breach of contract was tried three times and was four times in the Supreme Court. When with this we compare the statistics of the English Court of Appeal, which does not grant to exceed twelve new trials a year, or new trials in about three per cent of the cases reviewed, it is evident that our methods of trial and review are out of date.

A comparison of the volume of business disposed of by English and by American courts will illustrate the waste and delay caused by archaic judicial organization and obsolete procedure. In England there are twenty-three judges of the High Court who dispose on the average of fifty-six hundred *contested* cases, and have before them, in one form or another, some eighty thousand cases each year. In Nebraska there are twenty-eight district judges who have no original probate jurisdiction and no jurisdiction in bankruptcy or admiralty, and they had upon their dockets last year forty-three hundred and twenty cases, of which they disposed of about seventy per cent. England and Wales, with a population in 1900 of 32,000,000, employ for their whole civil litigation ninety-five judges, that is, thirty-seven in the Supreme Court and House of Lords and fifty-eight county judges. Nebraska, with a population in 1900 of 1,066,000, employs for the same purpose one hundred and twenty-nine. But these one hundred and twenty-nine are organized on an antiquated system and their time is frittered away on mere points of legal etiquette.

Finally, under the fourth and last head, causes lying in the environment of our judicial administration, we may distinguish six: (1) Popular lack of interest in justice, which makes jury service a bore and the vindication of right and law secondary to the trouble and expense involved; (2) the strain put upon law in that it has today to do the work of morals also; (3) the effect of transition to a period of legislation; (4) the putting of our courts into politics; (5) the making the legal profession into a trade, which has superseded the relation of attorney and

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client by that of employer and employee; and (6) public ignorance of the real workings of courts due to ignorant and sensational reports in the press. Each of these deserves consideration, but a few points only may be noticed. Law is the skeleton of social order. It must be "clothed upon by the flesh and blood of morality." The present is a time of transition in the very foundations of belief and of conduct. Absolute theories of morals and supernatural sanctions have lost their hold. Conscience and individual responsibility are relaxed. In other words, the law is strained to do double duty, and more is expected of it than in a time when morals as a regulating agency are more efficacious. Another strain upon our judicial system results from the crude and unorganized character of American legislation in a period when the growing point of law has shifted to legislation. When, in consequence, laws fail to produce the anticipated effects, judicial administration shares the blame. Worse than this is the effect of laws not intended to be enforced. These parodies, like the common law branding of felons, in which a piece of bacon used to be interposed between the branding iron and the criminal's skin, breed disrespect for law. Putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the Bench. Finally, the ignorant and sensational reports of judicial proceedings, from which alone a great part of the public may judge of the daily work of the courts, completes the impression that the administration of justice is but a game. There are honorable exceptions, but the average press reports distract attention from the real proceeding to petty tilts of counsel, encounters with witnesses and sensational by-incidents. In Nebraska, not many years since, the federal court enjoined the execution of an act to regulate insurance companies. In press accounts of the proceeding, the conspiracy clause of the bill was copied *in extenso* under the headline "Conspiracy Charged," and it was made to appear that the ground of the injunction was a conspiracy between the state officers and some persons unknown. It cannot be expected that the public shall form any just estimate of our courts of justice from such data.

Reviewing the several causes for dissatisfaction with the administration of justice which have been touched upon, it will have been observed that some inhere in all law and are the penalty we pay for uniformity; that some inhere in our political institutions and are the penalty we pay for local self-government and independence from bureaucratic control; that some inhere in the circumstances of an age of transition and are the penalty we pay for individual freedom of thought and universal education. These will take care of themselves. But too much of the current dissatisfaction has a just origin in our judicial organization and procedure. The causes that lie here must be heeded. Our administration of justice is not decadent. It is simply behind the times. Political judges were known in England down to the last century. Lord Kenyon, as Master of the Rolls, sat in Parliament and took as active a part in political squabbles in the House of Commons as our state judges today in party conventions. Dodson and Fogg and Sergeant Buzzfuzz wrought in an atmosphere of contentious procedure. Bentham tells us that in 1797, out of five hundred and fifty pending writs of error, five hundred and forty-three were shams or vexatious contrivances for delay. Jarndyce and Jarndyce dragged out its weary course in chancery only half a century ago. We are simply stationary in that period of legal history. With law schools that are rivaling the achievements of Bologna and of Bourges to promote scientific study of the law; with active Bar Associations in every state to revive professional feeling and throw off the yoke of commercialism; with the passing of the doctrine that politics, too, is a mere game to be played for its own sake, we may look forward confidently to deliverance from the sporting theory of justice; we may look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all.

# Legal Miscellany

Presidents and Vice Presidents of the United States

Presidential Nominations to the Supreme Court

Time Chart of the Supreme Court

Succession of Supreme Court Justices

U.S. Attorneys General

Congressional Timeline: Nineteenth Century

Congressional Timeline: Twentieth and Twenty-first Centuries

British Regnal Years

# Legal Miscellany

This section contains a diverse collection of legal, political, and historical information, most of which is organized in tabular form and in chronological order.

The tables provide readers with precise dates of the reigns of British monarchs and the terms of service of U.S. Supreme Court justices, presidents, vice presidents, and attorneys general. Readers may, for example, consult the succession of Supreme Court justices to determine which justices were on the Court when a major case was decided.

Using a chronological sequence, the congressional timeline links pertinent information about the House of Representatives and the Senate (size, political parties, procedural matters) with major court cases, laws, and investigations. Wars, presidential eras, and developments in science, technology, and communications are included as well.

The following tables are included:

- Presidents and Vice Presidents of the United States
- Presidential Nominations to the Supreme Court
- Time Chart of the Supreme Court
- Succession of Supreme Court Justices
- U.S. Attorneys General
- Congressional Timeline: Nineteenth Century
- Congressional Timeline: Twentieth Century
- British Regnal Years

## Presidents and Vice Presidents of the United States

| President | | Service | | | Vice President | | Congress |
|---|---|---|---|---|---|---|---|
| 1 | George Washington, F | April 30, 1789 | to | March 3, 1797 | 1 | John Adams | 1, 2, 3, 4 |
| 2 | John Adams, F | March 4, 1797 | | March 3, 1801 | 2 | Thomas Jefferson | 5, 6 |
| 3 | Thomas Jefferson, D-R | March 4, 1801 | | March 3, 1805 | 3 | Aaron Burr | 7, 8 |
| | Thomas Jefferson, D-R | March 4, 1805 | | March 3, 1809 | 4 | George Clinton | 9, 10 |
| 4 | James Madison, D-R | March 4, 1809 | | March 3, 1813 | | George Clinton | 11, 12 |
| | James Madison, D-R | March 4, 1813 | | March 3, 1817 | 5 | Elbridge Gerry | 13, 14 |
| 5 | James Monroe, D-R | March 4, 1817 | | March 3, 1825 | 6 | Daniel D. Tompkins | 15, 16, 17, 18 |
| 6 | John Quincy Adams, D-R | March 4, 1825 | | March 3, 1829 | 7 | John C. Calhoun | 19, 20 |
| 7 | Andrew Jackson, D | March 4, 1829 | | March 3, 1833 | | John C. Calhoun | 21, 22 |
| | Andrew Jackson, D | March 4, 1833 | | March 3, 1837 | 8 | Martin Van Buren | 23, 24 |
| 8 | Martin Van Buren, D | March 4, 1837 | | March 3, 1841 | 9 | Richard M. Johnson | 25, 26 |
| 9 | William Henry Harrison[a], W | March 4, 1841 | | April 4, 1841 | 10 | John Tyler | 27 |
| 10 | John Tyler, W | April 6, 1841 | | March 3, 1845 | | | 27, 28 |
| 11 | James K. Polk, D | March 4, 1845 | | March 3, 1849 | 11 | George M. Dallas | 29, 30 |
| 12 | Zachary Taylor[a], W | March 5, 1849 | | July 9, 1850 | 12 | Millard Fillmore | 31 |
| 13 | Millard Fillmore, W | July 10, 1850 | | March 3, 1853 | | | 31, 32 |
| 14 | Franklin Pierce, D | March 4, 1853 | | March 3, 1857 | 13 | William R. King | 33, 34 |
| 15 | James Buchanan, D | March 4, 1857 | | March 3, 1861 | 14 | John C. Breckinridge | 35, 36 |
| 16 | Abraham Lincoln, R | March 4, 1861 | | March 3, 1865 | 15 | Hannibal Hamlin | 37, 38 |
| | Abraham Lincoln[a], R | March 4, 1865 | | April 15, 1865 | 16 | Andrew Johnson | 39 |
| 17 | Andrew Johnson, R | April 15, 1865 | | March 3, 1869 | | | 39, 40 |
| 18 | Ulysses S. Grant, R | March 4, 1869 | | March 3, 1873 | 17 | Schuyler Colfax | 41, 42 |
| | Ulysses S. Grant, R | March 4, 1873 | | March 3, 1877 | 18 | Henry Wilson | 43, 44 |
| 19 | Rutherford B. Hayes, R | March 4, 1877 | | March 3, 1881 | 19 | William A. Wheeler | 45, 46 |
| 20 | James A. Garfield[a], R | March 4, 1881 | | September 19, 1881 | 20 | Chester A. Arthur | 47 |
| 21 | Chester A. Arthur, R | September 20, 1881 | | March 3, 1885 | | | 47, 48 |
| 22 | Grover Cleveland, D | March 4, 1885 | | March 3, 1889 | 21 | Thomas A. Hendricks | 49, 50 |
| 23 | Benjamin Harrison, R | March 4, 1889 | | March 3, 1893 | 22 | Levi P. Morton | 51, 52 |
| 24 | Grover Cleveland, D | March 4, 1893 | | March 3, 1897 | 23 | Adlai E. Stevenson | 53, 54 |
| 25 | William McKinley, R | March 4, 1897 | | March 3, 1901 | 24 | Garret A. Hobart | 55, 56 |
| | William McKinley[a], R | March 4, 1901 | | September 14, 1901 | 25 | Theodore Roosevelt | 57 |
| 26 | Theodore Roosevelt, R | September 14, 1901 | | March 3, 1905 | | | 57, 58 |
| | Theodore Roosevelt, R | March 4, 1905 | | March 3, 1909 | 26 | Charles W. Fairbanks | 59, 60 |
| 27 | William H. Taft, R | March 4, 1909 | | March 3, 1913 | 27 | James S. Sherman | 61, 62 |
| 28 | Woodrow Wilson, D | March 4, 1913 | | March 3, 1921 | 28 | Thomas R. Marshall | 63, 64, 65, 66 |
| 29 | Warren G. Harding[a], R | March 4, 1921 | | August 2, 1923 | 29 | Calvin Coolidge | 67 |
| 30 | Calvin Coolidge, R | August 3, 1923 | | March 3, 1925 | | | 68 |
| | Calvin Coolidge, R | March 4, 1925 | | March 3, 1929 | 30 | Charles G. Dawes | 69, 70 |
| 31 | Herbert C. Hoover, R | March 4, 1929 | | March 3, 1933 | 31 | Charles Curtis | 71, 72 |
| 32 | Franklin D. Roosevelt[b], D | March 4, 1933 | | January 20, 1941 | 32 | John N. Garner | 73, 74, 75, 76 |
| | Franklin D. Roosevelt, D | January 20, 1941 | | January 20, 1945 | 33 | Henry A. Wallace | 77, 78 |
| | Franklin D. Roosevelt[a], D | January 20, 1945 | | April 12, 1945 | 34 | Harry S. Truman | 79 |
| 33 | Harry S. Truman, D | April 12, 1945 | | January 20, 1949 | | | 79, 80 |
| | Harry S. Truman, D | January 20, 1949 | | January 20, 1953 | 35 | Alben W. Barkley | 81, 82 |
| 34 | Dwight D. Eisenhower, R | January 20, 1953 | | January 20, 1961 | 36 | Richard M. Nixon | 83, 84, 85, 86 |
| 35 | John F. Kennedy[a], D | January 20, 1961 | | November 22, 1963 | 37 | Lyndon B. Johnson | 87, 88 |
| 36 | Lyndon B. Johnson, D | November 22, 1963 | | January 20, 1965 | | | 88 |
| | Lyndon B. Johnson, D | January 20, 1965 | | January 20, 1969 | 38 | Hubert H. Humphrey | 89, 90 |
| 37 | Richard M. Nixon, R | January 20, 1969 | | January 20, 1973 | 39 | Spiro T. Agnew | 91, 92, 93 |
| | Richard M. Nixon[c], R | January 20, 1973 | | August 9, 1974 | 40 | Gerald R. Ford[d] | 93 |
| 38 | Gerald R. Ford[e], R | August 9, 1974 | | January 20, 1977 | 41 | Nelson A. Rockefeller | 93, 94 |
| 39 | Jimmy Carter, D | January 20, 1977 | | January 20, 1981 | 42 | Walter F. Mondale | 95, 96 |
| 40 | Ronald Reagan, R | January 20, 1981 | | January 20, 1989 | 43 | George H. W. Bush | 97, 98, 99, 100 |
| 41 | George H. W. Bush, R | January 20, 1989 | | January 20, 1993 | 44 | Dan Quayle | 101, 102 |
| 42 | Bill Clinton, D | January 20, 1993 | | January 20, 2001 | 45 | Al Gore | 103, 104, 105, 106 |
| 43 | George W. Bush, R | January 20, 2001 | | | 46 | Dick Cheney | 107, 108 |

[a]Died in office.
[b]First president to be inaugurated under 20th Amendment, Jan. 20, 1937.
[c]Resigned Aug. 9, 1974.
[d]First nonelected vice president, chosen under 25th Amendment procedure.
[e]First nonelected president.
Party affiliation follows each president's name. F = Federalist, D-R = Democratic-Republican, D = Democrat, W = Whig, R = Republican.

SOURCE: *The World Almanac 1997*, White House web page, and U.S. House of Representatives web page.

## Presidential Nominations to the Supreme Court

The following table shows the presidents who nominated the various Supreme Court justices and the states from which the justices were appointed. The names of chief justices are followed by an asterisk.

| President | Nominee | Year Nominated |
|---|---|---|
| George Washington | John Jay (N.Y.)* | 1789 |
| | John Rutledge (S.C.) | 1789 |
| | William Cushing (Mass.) | 1789 |
| | James Wilson (Pa.) | 1789 |
| | Robert H. Harrison (Md.)[a] | 1789 |
| | John Blair (Va.) | 1789 |
| | James Iredell (N.C.) | 1790 |
| | Thomas Johnson (Md.) | 1791 |
| | William Paterson (N.J.) | 1793 |
| | John Rutledge (S.C)*[b] | 1795 |
| | Samuel Chase (Md.) | 1796 |
| | Oliver Ellsworth (Conn.)* | 1796 |
| John Adams | Bushrod Washington (Va.) | 1798 |
| | Alfred Moore (N.C.) | 1799 |
| | John Marshall (Va.)* | 1801 |
| Thomas Jefferson | William Johnson (S.C.) | 1804 |
| | Henry Brockholst Livingston (N.Y.) | 1806 |
| | Thomas Todd (Ky.) | 1807 |
| James Madison | Joseph Story (Mass.) | 1811 |
| | Gabriel Duvall (Md.) | 1811 |
| James Monroe | Smith Thomson (N.Y.) | 1823 |
| John Quincy Adams | Robert Trimble (Ky.) | 1826 |
| Andrew Jackson | John McLean (Ohio) | 1829 |
| | Henry Baldwin (Pa.) | 1830 |
| | James M. Wayne (Ga.) | 1835 |
| | Roger B. Taney (Md.)* | 1836 |
| | Philip B. Barbour (Va.) | 1836 |
| | John Catron (Tenn.) | 1837 |
| Martin Van Buren | John McKinley (Ala.) | 1837 |
| | Peter V. Daniel (Va.) | 1841 |
| John Tyler | Samuel Nelson (N.Y.) | 1845 |
| James Polk | Levi Woodbury (N.H.) | 1845 |
| | Robert C. Grier (Pa.) | 1846 |
| Millard Fillmore | Benjamin R. Curtis (Mass.) | 1851 |
| Franklin Pierce | John A. Campbell (Ala.) | 1853 |
| James Buchanan | Nathan Clifford (Me.) | 1858 |
| Abraham Lincoln | Noah H. Swayne (Ohio) | 1862 |
| | Samuel F. Miller (Iowa) | 1862 |
| | David Davis (Ill.) | 1862 |
| | Stephen J. Field (Calif.) | 1863 |
| | Salmon P. Chase (Ohio)* | 1864 |
| Ulysses S. Grant | William Strong (Pa.) | 1870 |
| | Joseph P. Bradley (N.J.) | 1870 |
| | Ward Hunt (N.Y.) | 1873 |
| | Morrison R. Waite (Ohio)* | 1874 |
| Rutherford Hayes | John M. Harlan (Ky.) | 1877 |
| | William B. Woods (Ga.) | 1881 |
| James Garfield | Stanley Matthews (Ohio) | 1881 |
| Chester Arthur | Horace Gray (Mass.) | 1882 |
| | Samuel Blatchford (N.Y.) | 1882 |
| Grover Cleveland | Lucius Q. C. Lamar (Miss.) | 1888 |
| | Melville W. Fuller (Ill.)* | 1888 |
| Benjamin Harrison | David J. Brewer (Kan.) | 1889 |
| | Henry B. Brown (Mich.) | 1891 |
| | George Shiras Jr. (Pa.) | 1892 |
| | Howell E. Jackson (Tenn.) | 1893 |
| Grover Cleveland | Edward D. White (La.) | 1894 |
| | Rufus W. Peckham (N.Y.) | 1895 |
| William McKinley | Joseph McKenna (Calif.) | 1898 |

[continued]

[a]Declined appointment.
[b]Accepted appointment but delayed taking his seat and later resigned.

## Presidential Nominations to the Supreme Court

The following table shows the presidents who nominated the various Supreme Court justices and the states from which the justices were appointed. The names of chief justices are followed by an asterisk.

| President | Nominee | Year Nominated |
|---|---|---|
| Theodore Roosevelt | Oliver Wendell Holmes Jr. (Mass.) | 1902 |
| | William R. Day (Ohio) | 1903 |
| | William H. Moody (Mass.) | 1906 |
| William Taft | Horace H. Lurton (Tenn.) | 1910 |
| | Edward D. White (La.)* | 1910 |
| | Charles E. Hughes (N.Y.) | 1910 |
| | Willis Van Devanter (Wyo.) | 1911 |
| | Joseph R. Lamar (Ga.) | 1911 |
| | Mahlon Pitney (N.J.) | 1912 |
| Woodrow Wilson | James C. McReynolds (Tenn.) | 1914 |
| | Louis D. Brandeis (Mass.) | 1916 |
| | John H. Clarke (Ohio) | 1916 |
| Warren Harding | William H. Taft (Conn.)* | 1921 |
| | George Sutherland (Utah) | 1922 |
| | Pierce Butler (Minn.) | 1922 |
| | Edward T. Sanford (Tenn.) | 1923 |
| Calvin Coolidge | Harlan F. Stone (N.Y.) | 1925 |
| Herbert Hoover | Charles E. Hughes (N.Y.)* | 1930 |
| | Owen J. Roberts (Pa.) | 1930 |
| | Benjamin N. Cardozo (N.Y.) | 1932 |
| Franklin D. Roosevelt | Hugo L. Black (Ala.) | 1937 |
| | Stanley F. Reed (Ky.) | 1938 |
| | Felix Frankfurter (Mass.) | 1939 |
| | William O. Douglas (Conn.) | 1939 |
| | Frank Murphy (Mich.) | 1940 |
| | Harlan F. Stone (N.Y.)* | 1941 |
| | James F. Byrnes (S.C.) | 1941 |
| | Robert H. Jackson (N.Y.) | 1941 |
| | Wiley B. Rutledge (Iowa) | 1943 |
| Harry S. Truman | Harold H. Burton (Ohio) | 1945 |
| | Fred M. Vinson (Ky.)* | 1946 |
| | Tom C. Clark (Tex.) | 1946 |
| | Sherman Minton (Ind.) | 1949 |
| Dwight D. Eisenhower | Earl Warren (Calif.)* | 1953 |
| | John M. Harlan (N.Y.) | 1955 |
| | William J. Brennan Jr. (Ind.) | 1956 |
| | Charles E. Whittaker (Mo.) | 1957 |
| | Potter Stewart (Ohio) | 1958 |
| John F. Kennedy | Byron R. White (Colo.) | 1962 |
| | Arthur J. Goldberg (Ill.) | 1962 |
| Lyndon B. Johnson | Abe Fortas (Tenn.) | 1965 |
| | Thurgood Marshall (N.Y.) | 1967 |
| Richard M. Nixon | Warren Earl Burger (Minn.)* | 1969 |
| | Harry A. Blackmun (Minn.) | 1970 |
| | Lewis F. Powell (Va.) | 1971 |
| | William H. Rehnquist (Ariz.) | 1971 |
| Gerald Ford | John Paul Stevens (Ill.) | 1976 |
| Ronald Reagan | Sandra Day O'Conner (Ariz.) | 1981 |
| | William H. Rehnquist (Ariz.)* | 1986 |
| | Antonin Scalia (Va.) | 1986 |
| | Anthony M. Kennedy (Calif.) | 1988 |
| George H. W. Bush | David H. Souter (N.H.) | 1990 |
| | Clarence Thomas (Va.) | 1991 |
| Bill Clinton | Ruth Bader Ginsburg (D.C.) | 1993 |
| | Stephen Breyer (Mass.) | 1994 |

## Time Chart of the Supreme Court

This table is designed to aid the user in identifying the composition of the Supreme Court at any given time in U.S. history. Each listing is headed by the chief justice, whose name is italicized. Associate justices are listed following the chief justice in order of seniority. The name of each justice is followed by a symbol representing his or her party affiliation at the time of appointment.

F = Federalist
DR = Democratic-Republican (Jeffersonian)
D = Democrat
W = Whig
R = Republican
I = Independent

| 1789 | 1790 –91 | 1792 | 1793–94 | 1795 | 1796–97 | 1798–99 |
|---|---|---|---|---|---|---|
| *Jay* (F) | *Jay* (F) | *Jay* (F) | *Jay* (F) | *J. Rutledge* (F)[a] | *Ellsworth* (F) | *Ellsworth* (F) |
| J. Rutledge (F) | J. Rutledge (F) | Cushing (F) | Cushing (F) | Cushing (F) | Cushing (F) | Cushing (F) |
| Cushing (F) | Cushing (F) | Wilson (F) | Wilson (F) | Wilson (F) | Wilson (F) | Iredell (F) |
| Wilson (F) | Wilson (F) | Blair (F) | Blair (F) | Blair (F) | Iredell (F) | Paterson (F) |
| Blair (F) | Blair (F) | Iredell (F) | Iredell (F) | Iredell (F) | Paterson (F) | S. Chase (F) |
| | Iredell (F) | T. Johnson (F) | Paterson (F) | Paterson (F) | S. Chase (F) | Washington (F) |

| 1823–25 | 1811–22 | 1807–10 | 1806 | 1804–05 | 1801–03 | 1800 |
|---|---|---|---|---|---|---|
| *J. Marshall* (F) | *J. Marshall* (F) | *J. Marshall* (F) | *J. Marshall* (F) | *J. Marshall* (F) | *J. Marshall* (F) | *Ellsworth* (F) |
| Washington (F) | Washington (F) | Cushing (F) | Cushing (F) | Cushing (F) | Cushing (F) | Cushing (F) |
| W. Johnson (DR) | W. Johnson (DR) | S. Chase (F) | S. Chase (F) | Paterson (F) | Paterson (F) | Paterson (F) |
| Todd (DR) | Livingston (DR) | Washington (F) | Washington (F) | S. Chase (F) | S. Chase (F) | S. Chase (F) |
| Duval (DR) | Todd (DR) | W. Johnson (DR) | W. Johnson (DR) | Washington (F) | Washington (F) | Washington (F) |
| Story (DR) | Duval (DR) | Livingston (DR) | Livingston (DR) | W. Johnson (DR) | Moore (F) | Moore (F) |
| Thompson (DR) | Story (DR) | Todd (DR) | | | | |

| 1826–28 | 1829 | 1830–34 | 1835 | 1836 | 1837–40 | 1841–43 |
|---|---|---|---|---|---|---|
| *J. Marshall* (F) | *J. Marshall* (F) | *J. Marshall* (F) | *J. Marshall* (F) | *Taney* (D) | *Taney (D)* | *Taney (D)* |
| Washington (F) | Washington (F) | W. Johnson (DR) | Duval (DR) | Story (DR) | Story (DR) | Story (DR) |
| W. Johnson (DR) | W. Johnson (DR) | Duval (DR) | Story (DR) | Thompson (DR) | Thompson (DR) | Thompson (DR) |
| Duval (DR) | Duval (DR) | Story (DR) | Thompson (DR) | McLean (D) | McLean (D) | McLean (D) |
| Story (DR) | Story (DR) | Thompson (DR) | McLean (D) | Baldwin (D) | Baldwin (D) | Baldwin (D) |
| Thompson (DR) | Thompson (DR) | McLean (D) | Baldwin (D) | Wayne (D) | Wayne (D) | Wayne (D) |
| Trimble (DR) | McLean (D) | Baldwin (D) | Wayne (D) | Barbour (D) | Barbour (D) | Catron (D) |
| | | | | | Catron (D) | McKinley (D) |
| | | | | | McKinley (D) | Daniel (D) |

| 1861 | 1858–60 | 1853–57 | 1851–52 | 1846–50 | 1845 | 1844 |
|---|---|---|---|---|---|---|
| *Taney* (D) | *Taney* (D) | *Taney* (D) | *Taney* (D) | *Taney* (D) | *Taney* (D) | *Taney* (D) |
| McLean (D) | McLean (D) | McLean (D) | McLean (D) | McLean (D) | McLean (D) | Story (DR) |
| Wayne (D) | Wayne (D) | Wayne (D) | Wayne (D) | Wayne (D) | Wayne (D) | McLean (D) |
| Catron (D) | Catron (D) | Catron (D) | Catron (D) | Catron (D) | Catron (D) | Baldwin (D) |
| Nelson (D) | Daniel (D) | Daniel (D) | McKinley (D) | McKinley (D) | McKinley (D) | Wayne (D) |
| Grier (D) | Nelson (D) | Nelson (D) | Daniel (D) | Daniel (D) | Daniel (D) | Catron (D) |
| Campbell (D) | Grier (D) | Grier (D) | Nelson (D) | Nelson (D) | Nelson (D) | McKinley (D) |
| Clifford (D) | Campbell (D) | Curtis (W) | Grier (D) | Woodbury (D) | Woodbury (D) | Daniel (D) |
| | Clifford (D) | Campbell (D) | Curtis (W) | Grier (D) | | |

| 1862 | 1863 | 1864–65 | 1866 | 1867–69 | 1870–71 | 1872–73 |
|---|---|---|---|---|---|---|
| *Taney* (D) | *Taney* (D) | *S. P. Chase* (R) | *S. P. Chase* (R) | *S. P. Chase* (R) | *S. P. Chase* (R) | *S. P. Chase* (R) |
| Wayne (D) | Wayne (D) | Wayne (D) | Wayne (D)[b] | Nelson (D) | Nelson (D) | Clifford (D) |
| Catron (D) | Catron (D) | Catron (D)[b] | Nelson (D) | Grier (D) | Clifford (D) | Swayne (R) |
| Nelson (D) | Nelson (D) | Nelson (D) | Grier (D) | Clifford (D) | Swayne (R) | Miller (R) |
| Grier (D) | Grier (D) | Grier (D) | Clifford (D) | Swayne (R) | Miller (R) | Davis (R) |
| Clifford (D) | Clifford (D) | Clifford (D) | Swayne (R) | Miller (R) | Davis (R) | Field (D) |
| Swayne (R) | Swayne (R) | Swayne (R) | Miller (R) | Davis (R) | Field (D) | Strong (R) |
| Miller (R) | Miller (R) | Miller (R) | Davis (R) | Field (D) | Strong (R) | Bradley (R) |
| Davis (R) | Davis (R) | Davis (R) | Field (D) | | Bradley (R) | Hunt (R) |
| | Field (D) | Field (D) | | | | |

[continued]

[a]Rutledge was a recess appointment whose confirmation was rejected by the Senate after the 1795 term.
[b]Upon the death of Catron in 1865 and Wayne in 1867, their positions were abolished according to a congressional act of 1866. The Court's membership was reduced to eight until a new position was created by Congress in 1869. The new seat has generally been regarded as a re-creation of Wayne's set.

## Time Chart of the Supreme Court

This table is designed to aid the user in identifying the composition of the Supreme Court at any given time in U.S. history. Each listing is headed by the chief justice, whose name is italicized. Associate justices are listed following the chief justice in order of seniority. The name of each justice is followed by a symbol representing his or her party affiliation at the time of appointment.

F = Federalist
DR = Democratic-Republican (Jeffersonian)
D = Democrat
W = Whig
R = Republican
I = Independent

| 1889 | 1888 | 1882–87 | 1881 | 1880 | 1877–79 | 1874–76 |
|---|---|---|---|---|---|---|
| *Fuller* (D) | *Fuller* (D) | *Waite* (R) | *Waite* (R) | *Waite* (R) | *Waite* (R) | *Waite* (R) |
| Miller (R) | Miller (R) | Miller (R) | Miller (R) | Clifford (D) | Clifford (D) | Clifford (D) |
| Field (D) | Field (D) | Field (D) | Field (D) | Swayne (R) | Swayne (R) | Swayne (R) |
| Bradley (R) | Bradley (R) | Bradley (R) | Bradley (R) | Miller (R) | Miller (R) | Miller (R) |
| Harlan (Ky.) (R) | Harlan (Ky.) (R) | Harlan (Ky.) (R) | Hunt (R) | Field (D) | Field (D) | Davis (R) |
| Gray (R) | Matthews (R) | Woods (R) | Harlan (Ky.) (R) | Bradley (R) | Strong (R) | Field (D) |
| Blatchford (R) | Gray (R) | Matthews (R) | Woods (R) | Hunt (R) | Bradley (R) | Strong (R) |
| L. Lamar (D) | Blatchford (R) | Gray (R) | Matthews (R) | Harlan (Ky.) (R) | Hunt (R) | Bradley (R) |
| Brewer (R) | L. Lamar (D) | Blatchford (R) | Gray (R) | Woods (R) | Harlan (Ky.) (R) | Hunt (R) |

| 1890–91 | 1892 | 1893 | 1894 | 1895–97 | 1898–1901 | 1902 |
|---|---|---|---|---|---|---|
| *Fuller* (D) | *Fuller* (D) | *Fuller* (D) | *Fuller* (D) | *Fuller* (D) | *Fuller* (D) | *Fuller* (D) |
| Field (D) | Field (D) | Field (D) | Field (D) | Field (D) | Harlan (Ky.) (R) | Harlan (Ky.) (R) |
| Bradley (R) | Harlan (Ky.) (R) | Harlan (Ky.) (R) | Harlan (Ky.) (R) | Harlan (Ky.) (R) | Gray (R) | Brewer (R) |
| Harlan (Ky.) (R) | Gray (R) | Gray (R) | Gray (R) | Gray (R) | Brewer (R) | Brown (R) |
| Gray (R) | Blatchford (R) | Blatchford (R) | Brewer (R) | Brewer (R) | Brown (R) | Shiras (R) |
| Blatchford (R) | L. Lamar (D) | Brewer (R) | Brown (R) | Brown (R) | Shiras (R) | E. White (D) |
| L. Lamar (D) | Brewer (R) | Brown (R) | Shiras (R) | Shiras (R) | E. White (D) | Peckham (D) |
| Brewer (R) | Brown (R) | Shiras (R) | H. Jackson (D) | E. White (D) | Peckham (D) | McKenna (R) |
| Brown (R) | Shiras (R) | H. Jackson (D) | E. White (D) | Peckham (D) | McKenna (R) | Holmes (R) |

| 1916–20 | 1914–15 | 1912–13 | 1910–11 | 1909 | 1906–08 | 1903–05 |
|---|---|---|---|---|---|---|
| *E. White* (D) | *E. White* (D) | *E. White* (D) | *E. White* (D) | *Fuller* (D) | *Fuller* (D) | *Fuller* (D) |
| McKenna (R) | McKenna (R) | McKenna (R) | Harlan (Ky.) (R) | Harlan (Ky.) (R) | Harlan (Ky.) (R) | Harlan (Ky.) (R) |
| Holmes (R) | Holmes (R) | Holmes (R) | McKenna (R) | Brewer (R) | Brewer (R) | Brewer (R) |
| Day (R) | Day (R) | Day (R) | Holmes (R) | E. White (D) | E. White (D) | Brown (R) |
| Van Devanter (R) | Hughes (R) | Lurton (D) | Day (R) | McKenna (R) | Peckham (D) | E. White (D) |
| Pitney (R) | Van Devanter (R) | Hughes (R) | Lurton (D) | Holmes (R) | McKenna (R) | Peckham (D) |
| McReynolds (D) | J. Lamar (D) | Van Devanter (R) | Hughes (R) | Day (R) | Holmes (R) | McKenna (R) |
| Brandeis (R)[c] | Pitney (R) | J. Lamar (D) | Van Devanter (R) | Moody (R) | Day (R) | Holmes (R) |
| Clarke (D) | McReynolds (D) | Pitney (R) | J. Lamar (D) | Lurton (D) | Moody (R) | Day (R) |

| 1921 | 1922 | 1923–24 | 1925–29 | 1930–31 | 1932–36 | 1937 |
|---|---|---|---|---|---|---|
| *Taft* (R) | *Taft* (R) | *Taft* (R) | *Taft* (R) | *Hughes* (R) | *Hughes* (R) | *Hughes* (R) |
| McKenna (R) | McKenna (R) | McKenna (R) | Holmes (R) | Holmes (R) | Van Devanter (R) | McReynolds (D) |
| Holmes (R) | Holmes (R) | Holmes (R) | Van Devanter (R) | Van Devanter (R) | McReynolds (D) | Brandeis (R) |
| Day (R) | Van Devanter (R) | Van Devanter (R) | McReynolds (D) | McReynolds (D) | Brandeis (R) | Sutherland (R) |
| Van Devanter (R) | Pitney (R) | McReynolds (D) | Brandeis (R) | Brandeis (R) | Sutherland (R) | Butler (D) |
| Pitney (R) | McReynolds (D) | Brandeis (R) | Sutherland (R) | Sutherland (R) | Butler (D) | Stone (R) |
| McReynolds (D) | Brandeis (R) | Sutherland (R) | Butler (D) | Butler (D) | Stone (R) | Roberts (R) |
| Brandeis (R) | Sutherland (R) | Butler (D) | Sanford (R) | Stone (R) | Roberts (R) | Cardozo (D) |
| Clarke (D) | Butler (D) | Sanford (R) | Stone (R) | Roberts (R) | Cardozo (D) | Black (D) |

| 1946–48 | 1945 | 1943–44 | 1941–42 | 1940 | 1939 | 1938 |
|---|---|---|---|---|---|---|
| *Vinson* (D) | *Stone* (R) | *Stone* (R) | *Stone* (R) | *Hughes* (R) | *Hughes* (R) | *Hughes* (R) |
| Black (D) | Black (D) | Roberts (R) | Roberts (R) | McReynolds (D) | McReynolds (D) | McReynolds (D) |
| Reed (D) | Reed (D) | Black (D) | Black (D) | Stone (R) | Butler (D) | Brandeis (R) |
| Frankfurter (I) | Frankfurter (I) | Reed (D) | Reed (D) | Roberts (R) | Stone (R) | Butler (D) |
| Douglas (D) | Douglas (D) | Frankfurter (I) | Frankfurter (I) | Black (D) | Roberts (R) | Stone (R) |
| Murphy (D) | Murphy (D) | Douglas (D) | Douglas (D) | Reed (D) | Black (D) | Roberts (R) |
| R. Jackson (D) | R. Jackson (D) | Murphy (D) | Murphy (D) | Frankfurter (I) | Reed (D) | Cardozo (D) |
| W. Rutledge (D) | W. Rutledge (D) | R. Jackson (D) | Byrnes (D) | Douglas (D) | Frankfurter (I) | Black (D) |
| Burton (R) | Burton (R) | W. Rutledge (D) | R. Jackson (D) | Murphy (D) | Douglas (D) | Reed (D) |

[continued]

[c]According to Professor Henry Abraham, "Many—and with some justice—consider Brandeis a Democrat, however, he was in fact a registered Republican when nominated" (Henry Abraham, *Freedom and the Court*, 3d ed. 455 [1977]).

## Time Chart of the Supreme Court

This table is designed to aid the user in identifying the composition of the Supreme Court at any given time in U.S. history. Each listing is headed by the chief justice, whose name is italicized. Associate justices are listed following the chief justice in order of seniority. The name of each justice is followed by a symbol representing his or her party affiliation at the time of appointment.

F = Federalist
DR = Democratic-Republican (Jeffersonian)
D = Democrat
W = Whig
R = Republican
I = Independent

| 1949–52 | 1953–54 | 1955 | 1956 | 1957 | 1958–61 | 1962–65 |
|---|---|---|---|---|---|---|
| *Vinson* (D) | *Warren* (R) | *Warren* (R) | *Warren* (R) | *Warren* (R) | *Warren* (R) | *Warren* (R) |
| Black (D) | Black (D) | Black (D) | Black (D) | Black (D) | Black (D) | Black (D) |
| Reed (D) | Reed (D) | Reed (D) | Reed (D) | Frankfurter (I) | Frankfurter (I) | Douglas (D) |
| Frankfurter (I) | Frankfurter (I) | Frankfurter (I) | Frankfurter (I) | Douglas (D) | Douglas (D) | Clark (D) |
| Douglas (D) | Douglas (D) | Douglas (D) | Douglas (D) | Burton (R) | Clark (D) | Harlan (N.Y.) (R) |
| R. Jackson (D) | R. Jackson (D) | Burton (R) | Burton (R) | Clark (D) | Harlan (N.Y.) (R) | Brennan (D) |
| Burton (R) | Burton (R) | Clark (D) | Clark (D) | Harlan (N.Y.) (R) | Brennan (D) | Stewart (R) |
| Clark (D) | Clark (D) | Minton (D) | Harlan (N.Y.) (R) | Brennan (D) | Whittaker (R) | B. White (D) |
| Minton (D) | Minton (D) | Harlan (N.Y.) (R) | Brennan (D) | Whittaker (R) | Stewart (R) | Goldberg (D) |

| 1972–75 | 1971 | 1970 | 1969–70 | 1969 | 1967–69 | 1965–67 |
|---|---|---|---|---|---|---|
| *Burger* (R) | *Burger* (R) | *Burger* (R) | *Burger* (R) | *Burger* (R) | *Warren* (R) | *Warren* (R) |
| Douglas (D) | Douglas (D) | Black (D) | Black (D) | Black (D) | Black (D) | Black (D) |
| Brennan (D) | Brennan (D) | Douglas (D) | Douglas (D) | Douglas (D) | Douglas (D) | Douglas (D) |
| Stewart (R) | Stewart (R) | Harlan (N.Y.) (R) | Harlan (N.Y.) (R) | Harlan (N.Y.) (R) | Harlan (N.Y.) (R) | Clark (D) |
| B. White (D) | B. White (D) | Brennan (D) | Brennan (D) | Brennan (D) | Brennan (D) | Harlan (N.Y.) (R) |
| T. Marshall (D) | T. Marshall (D) | Stewart (R) | Stewart (R) | Stewart (R) | Stewart (R) | Brennan (D) |
| Blackmun (R) | Blackmun (R) | B. White (D) | B. White (D) | B. White (D) | B. White (D) | Stewart (R) |
| Powell (D) | | T. Marshall (D) | T. Marshall (D) | Fortas (D) | Fortas (D) | B. White (D) |
| Rehnquist (R) | | Blackmun (R) | | T. Marshall (D) | T. Marshall (D) | Fortas (D) |

| 1975–81 | 1981–85 | 1986–87 | 1988–89 | 1990 | 1991–92 | 1993 |
|---|---|---|---|---|---|---|
| *Burger* (R) | *Burger* (R) | *Rehnquist* (R) | *Rehnquist* (R) | *Rehnquist* (R) | *Rehnquist* (R) | *Rehnquist* (R) |
| Brennan (D) | Brennan (D) | Brennan (D) | Brennan (D) | B. White (D) | B. White (D) | Blackmun (R) |
| Stewart (R) | B. White (D) | B. White (D) | B. White (D) | T. Marshall (D) | Blackmun (R) | Stevens (R) |
| B. White (D) | T. Marshall (D) | T. Marshall (D) | T. Marshall (D) | Blackmun (R) | Stevens (R) | O'Connor (R) |
| T. Marshall (D) | Blackmun (R) | Blackmun (R) | Blackmun (R) | Stevens (R) | O'Connor (R) | Scalia (R) |
| Blackmun (R) | Powell (D) | Powell (D) | Stevens (R) | O'Connor (R) | Scalia (R) | Kennedy (R) |
| Powell (D) | Rehnquist (R) | Stevens (R) | O'Connor (R) | Scalia (R) | Kennedy (R) | Souter (R) |
| Rehnquist (R) | Stevens (R) | O'Connor (R) | Scalia (R) | Kennedy (R) | Souter (R) | Thomas (R) |
| Stevens (R) | O'Connor (R) | Scalia (R) | Kennedy (R) | Souter (R) | Thomas (R) | Ginsburg (D) |

| 1994–2003 |
|---|
| *Rehnquist* (R) |
| Stevens (R) |
| O'Connor (R) |
| Scalia (R) |
| Kennedy (R) |
| Souter (R) |
| Thomas (R) |
| Ginsburg (D) |
| Breyer (D) |

## Succession of Supreme Court Justices

This table is designed to aid the user in identifying the succession of justices on the Supreme Court. Read vertically, the table lists the succession of justices in each position of the Court and the years served by each.

The number of justices constituting the Supreme Court has varied. Initially, the Court comprised six justices, but Congress increased the number to seven in 1807, to nine in 1837, and then to ten in 1863. In 1866, Congress reduced the number of justices to eight in an effort to prevent President Andrew Johnson from making any appointments to the Court. As a result, the positions of John Catron, who died in 1865, and James M. Wayne, who died in 1867, were abolished. In 1869, Congress raised the number of justices to nine, where it has remained. William Strong, the first justice appointed under the new statute, has generally been considered to have succeeded Wayne. Thus, Catron is the only person who has held the tenth seat on the Court.

| Chief Justices | Associate Justices | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| Jay 1789–1795 | J. Rutledge 1789–1791 | Cushing 1789–1810 | Wilson 1789–1798 | Harrison[f] 1789 | Iredell 1790–1798 | Todd 1807–1826 | Field 1863–1897 | McKinley 1837–1852 | Catron 1837–1865 |
| J. Rutledge[a] 1795 | T. Johnson 1791–1793 | Story 1811–1845 | Washington 1798–1829 | Blair 1789–1796 | Moore 1799–1804 | Trimble 1826–1828 | McKenna 1898–1925 | Campbell 1853–1861 | |
| Ellsworth 1796–1799 | Paterson 1793–1806 | Woodbury 1845–1851 | Baldwin 1830–1844 | S. Chase 1796–1811 | W. Johnson 1804–1834 | McLean 1829–1861 | Stone[h] 1925–1941 | Davis 1862–1877 | |
| J. Marshall 1801–1835 | Livingston 1806–1823 | Curtis 1851–1857 | Grier 1846–1870 | Duvall 1812–1835 | Wayne 1835–1867 | Swayne 1862–1881 | R. Jackson 1941–1954 | Harlan 1877–1911 | |
| Taney 1836–1864 | Thomson 1823–1843 | Clifford 1858–1881 | Bradley 1870–1892 | Barbour 1836–1841 | Strong 1870–1880 | Matthews 1881–1889 | Harlan 1955–1971 | Pitney 1912–1922 | |
| S. P. Chase 1864–1873 | Nelson 1845–1872 | Gray 1882–1902 | Woods 1881–1887 | Daniel 1841–1860 | Shiras 1892–1903 | Brewer 1889–1910 | Rehnquist[i] 1971–1986 | Sanford 1923–1930 | |
| Waite 1874–1888 | Hunt 1873–1882 | Holmes 1902–1932 | L. Lamar 1888–1893 | Miller 1862–1890 | Day 1903–1922 | Hughes 1910–1916 | Scalia 1986– | Roberts 1930–1945 | |
| Fuller 1888–1910 | Blatchford 1882–1893 | Cardozo 1932–1938 | H. Jackson 1893–1895 | Brown 1891–1906 | Butler 1922–1939 | Clarke 1916–1922 | | Burton 1945–1958 | |
| E. White[b] 1910–1921 | E. White[d] 1894–1910 | Frankfurter 1939–1962 | Peckham 1895–1909 | Moody 1906–1910 | Murphy 1940–1949 | Sutherland 1922–1938 | | Stewart 1958–1981 | |
| Taft 1921–1930 | Van Devanter 1911–1937 | Goldberg 1962–1965 | Lurton 1910–1914 | J. Lamar 1911–1916 | Clark 1949–1967 | Reed 1938–1957 | | O'Connor 1981– | |
| Hughes 1930–1941 | Black 1937–1971 | Fortas[e] 1965–1969 | McReynolds 1914–1941 | Brandeis 1916–1939 | T. Marshall 1967–1991 | Whittaker 1957–1962 | | | |
| Stone[c] 1941–1946 | Powell 1971–1988 | Blackmun 1970–1994 | Byrnes 1941–1942 | Douglas 1939–1975 | Thomas 1991– | B. White 1962–1993 | | | |
| Vinson 1946–1953 | Kennedy 1988– | Breyer 1994– | W. Rutledge 1943–1949 | Stevens 1976– | | Ginsburg 1993– | | | |
| Warren 1953–1969 | | | Minton 1949–1956 | | | | | | |
| Burger 1969–1986 | | | Brennan 1956–1990 | | | | | | |
| Rehnquist[g] 1986– | | | Souter 1990– | | | | | | |

[a]Appointment not confirmed.
[b]Associate justice, 1894–1910.
[c]Associate justice, 1925–1941.
[d]Later chief justice, 1910–1921.
[e]Appointment as chief justice but not confirmed; resigned.
[f]Declined appointment.
[g]Associate justice, 1971–1986.
[h]Later chief justice, 1941–1946.
[i]Later chief justice, 1986–.

## U.S. Attorneys General

| Name | Term | President |
|---|---|---|
| Edmund Randolph | 1789-1794 | Washington |
| William Bradford | 1794-1795 | Washington |
| Charles Lee | 1795-1801 | Washington & John Adams |
| Levi Lincoln | 1801-1805 | Jefferson |
| John Breckenridge | 1805-1806 | Jefferson |
| Caesar A. Rodney | 1807-1811 | Jefferson & Madison |
| William Pinkney | 1811-1814 | Madison |
| Richard Rush | 1814-1817 | Madison |
| William Wirt | 1817-1829 | Monroe & John Q. Adams |
| John M. Berrien | 1829-1831 | Jackson |
| Roger B. Taney | 1831-1833 | Jackson |
| Benjamin F. Butler | 1833-1838 | Jackson & Van Buren |
| Felix Grundy | 1838-1839 | Van Buren |
| Henry D. Gilpin | 1840-1841 | Van Buren |
| John J. Crittenden | 1841 | Harrison & Tyler |
| Hugh S. Legare | 1841-1843 | Tyler |
| John Nelson | 1843-1845 | Tyler |
| John Y. Mason | 1845-1846 | Polk |
| Nathan Clifford | 1846-1848 | Polk |
| Issac Toucey | 1848-1849 | Polk |
| Reverdy Johnson | 1849-1850 | Taylor |
| John J. Crittenden | 1850-1853 | Fillmore |
| Caleb Cushing | 1853-1857 | Pierce |
| Jeremiah S. Black | 1857-1860 | Buchanan |
| Edwin M. Stanton | 1860-1861 | Buchanan |
| Edward Bates | 1861-1864 | Lincoln |
| James Speed | 1864-1866 | Lincoln & Johnson |
| Henry Stanberry | 1866-1868 | Johnson |
| William M. Evarts | 1868-1869 | Johnson |
| Ebenezer R. Hoar | 1869-1870 | Grant |
| Amos T. Akerman | 1870-1872 | Grant |
| George H. Williams | 1871-1875 | Grant |
| Edwards Pierrepont | 1875-1876 | Grant |
| Alphonso Taft | 1876-1877 | Grant |
| Charles Devens | 1877-1881 | Hayes |
| Wayne MacVeagh | 1881 | Garfield |
| Benjamin H. Brewster | 1881-1885 | Arthur |
| Augustus H. Garland | 1885-1889 | Cleveland |
| William H.H. Miller | 1889-1893 | Harrison |
| Richard Olney | 1893-1895 | Cleveland |
| Judson Harmon | 1895-1897 | Cleveland |
| Joseph McKenna | 1897-1898 | McKinley |
| John W. Griggs | 1898-1901 | McKinley |
| Philander C. Knox | 1901-1904 | McKinley |
| William H. Moody | 1904-1906 | Roosevelt |
| Charles J. Bonaparte | 1906-1909 | Roosevelt |
| George W. Wickersham | 1909-1913 | Taft |
| James C. McReynolds | 1913-1914 | Wilson |
| Thomas Watt Gregory | 1914-1919 | Wilson |
| A. Mitchell Palmer | 1919-1921 | Wilson |
| Harry M. Daugherty | 1921-1924 | Harding |
| Harlan Fiske Stone | 1924-1925 | Coolidge |
| John G. Sargent | 1925-1929 | Coolidge |
| William D. Mitchell | 1929-1933 | Hoover |
| Homer S. Cummings | 1933-1939 | Roosevelt |
| Frank Murphy | 1939-1940 | Roosevelt |
| Robert H. Jackson | 1940-1941 | Roosevelt |
| Francis Biddle | 1941-1945 | Roosevelt |
| Tom C. Clark | 1945-1949 | Truman |
| J. Howard McGrath | 1949-1952 | Truman |
| James P. McGranery | 1952-1953 | Truman |
| Herbert Brownell Jr. | 1953-1957 | Eisenhower |
| William P. Rogers | 1957-1961 | Eisenhower |

[CONTINUED]

### U.S. Attorneys General

| Name | Term | President |
|---|---|---|
| Robert F. Kennedy | 1961-1964 | Kennedy |
| Nicholas deB. Katzenbach | 1965-1966 | Johnson |
| Ramsey Clark | 1967-1969 | Johnson |
| John N. Mitchell | 1969-1972 | Nixon |
| Richard G. Kleindienst | 1972-1973 | Nixon |
| Elliot L. Richardson | 1973 | Nixon |
| William B. Saxbe | 1974-1975 | Nixon |
| Edward H. Levi | 1975-1977 | Ford |
| Griffin B. Bell | 1977-1979 | Carter |
| Benjamin R. Civiletti | 1979-1981 | Carter |
| William French Smith | 1981-1985 | Reagan |
| Edwin Meese III | 1985-1988 | Reagan |
| Richard Thornburgh | 1988-1991 | Reagan & George Bush |
| William Barr | 1991-1993 | George Bush |
| Janet Reno | 1993-2001 | Clinton |
| John Ashcroft | 2001- | George W. Bush |

SOURCE: U.S. Department of Justice.

Image Not Available

## British Regnal Years

Regnal years run from the date of the monarch's accession to the throne until the same date in the next calendar year. Thus an event occurring on March 24, 1626, would be the first regnal year of King Charles I who acceded to the throne on March 27, 1625. British statutes are usually cited by regnal years.

| Sovereign | Accession | Length of reign |
|---|---|---|
| William I | Oct. 14, 1066 | 21 |
| William II | Sept. 26, 1087 | 13 |
| Henry I | Aug. 5, 1100 | 36 |
| Stephen | Dec. 26, 1135 | 19 |
| Henry II | Dec. 19, 1154 | 35 |
| Richard I | Sept. 23, 1189 | 10 |
| John | May 27, 1199 | 18 |
| Henry III | Oct. 28, 1216 | 57 |
| Edward I | Nov. 20, 1272 | 35 |
| Edward II | July 8, 1307 | 20 |
| Edward III | Jan. 25, 1326 | 51 |
| Richard II | June 22, 1377 | 23 |
| Henry IV | Sept. 30, 1399 | 14 |
| Henry V | March 21, 1413 | 10 |
| Henry VI | Sept. 1, 1422 | 39 |
| Edward IV | March 4, 1461 | 23 |
| Edward V | April 9, 1483 | — |
| Richard III | June 26, 1483 | 3 |
| Henry VII | Aug. 22, 1485 | 24 |
| Henry VIII | April 22, 1509 | 38 |
| Edward VI | Jan. 28, 1547 | 7 |
| Mary | July 6, 1553 | 6 |
| Elizabeth | Nov. 17, 1558 | 45 |
| James I | March 24, 1603 | 23 |
| Charles I | March 27, 1625 | 24 |
| The Commonwealth[a] | Jan. 30, 1649 | 11 |
| Charles II | May 29, 1660 | 37 |
| James II | Feb. 6, 1685 | 4 |
| William III and Mary II | Feb. 13, 1689 | 14 |
| Anne | March 8, 1702 | 13 |
| George I | Aug. 1, 1714 | 13 |
| George II | June 11, 1727 | 34 |
| George III | Oct. 25, 1760 | 60 |
| George IV | Jan. 29, 1820 | 11 |
| William IV | June 26, 1830 | 7 |
| Victoria | June 20, 1837 | 64 |
| Edward VII | Jan. 22, 1901 | 9 |
| George V | May 6, 1910 | 25 |
| Edward VIII | Jan. 20, 1936 | 1 |
| George VI | Dec. 11, 1936 | 15 |
| Elizabeth II | Feb. 6, 1952 | — |

[a]The government established by Parliament after the abolition of the monarchy. The government of Oliver Cromwell and his son (1653–1658) is also known as the Protectorate.

# WEST'S ENCYCLOPEDIA *of* AMERICAN LAW

2ND EDITION

# How to Use This Book

❚1❚ Article Title

❚2❚ Definition in italics with Latin translation provided

❚3❚ First-level subhead

❚4❚ Timeline for subject of biography, including general historical events and life events

❚5❚ Sidebar expands upon an issue addressed briefly in the article

❚6❚ Quotation from subject of biography

❚7❚ Biography of contributor to American law

❚8❚ Internal cross-reference to entry within WEAL

❚9❚ In Focus article examines a controversial or complex aspect of the article topic

❚10❚ Cross-references at end of article

❚11❚ Full cite for case

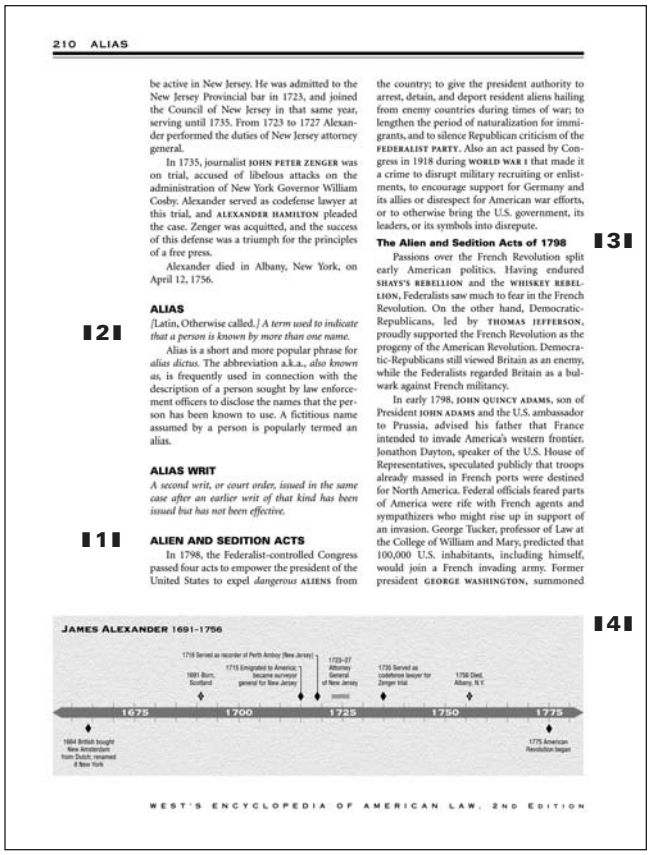



be active in New Jersey. He was admitted to the New Jersey Provincial bar in 1723, and joined the Council of New Jersey in that same year, serving until 1735. From 1723 to 1727 Alexander performed the duties of New Jersey attorney general.

In 1735, journalist JOHN PETER ZENGER was on trial, accused of libelous attacks on the administration of New York Governor William Cosby. Alexander served as codefense lawyer at this trial, and ALEXANDER HAMILTON pleaded the case. Zenger was acquitted, and the success of this defense was a triumph for the principles of a free press.

Alexander died in Albany, New York, on April 12, 1756.

**ALIAS**

❚2❚ *[Latin, Otherwise called.] A term used to indicate that a person is known by more than one name.*

Alias is a short and more popular phrase for *alias dictus.* The abbreviation a.k.a., *also known as,* is frequently used in connection with the description of a person sought by law enforcement officers to disclose the names that the person has been known to use. A fictitious name assumed by a person is popularly termed an alias.

**ALIAS WRIT**

*A second writ, or court order, issued in the same case after an earlier writ of that kind has been issued but has not been effective.*

❚1❚ **ALIEN AND SEDITION ACTS**

In 1798, the Federalist-controlled Congress passed four acts to empower the president of the United States to expel *dangerous* ALIENS from the country; to give the president authority to arrest, detain, and deport resident aliens hailing from enemy countries during times of war; to lengthen the period of naturalization for immigrants, and to silence Republican criticism of the FEDERALIST PARTY. Also an act passed by Congress in 1918 during WORLD WAR I that made it a crime to disrupt military recruiting or enlistments, to encourage support for Germany and its allies or disrespect for American war efforts, or to otherwise bring the U.S. government, its leaders, or its symbols into disrepute.

❚3❚ **The Alien and Sedition Acts of 1798**

Passions over the French Revolution split early American politics. Having endured SHAYS'S REBELLION and the WHISKEY REBELLION, Federalists saw much to fear in the French Revolution. On the other hand, Democratic-Republicans, led by THOMAS JEFFERSON, proudly supported the French Revolution as the progeny of the American Revolution. Democratic-Republicans still viewed Britain as an enemy, while the Federalists regarded Britain as a bulwark against French militancy.

In early 1798, JOHN QUINCY ADAMS, son of President JOHN ADAMS and the U.S. ambassador to Prussia, advised his father that France intended to invade America's western frontier. Jonathon Dayton, speaker of the U.S. House of Representatives, speculated publicly that troops already massed in French ports were destined for North America. Federal officials feared parts of America were rife with French agents and sympathizers who might rise up in support of an invasion. George Tucker, professor of Law at the College of William and Mary, predicted that 100,000 U.S. inhabitants, including himself, would join a French invading army. Former president GEORGE WASHINGTON, summoned

❚4❚

❚5❚

## The First Payments of Social Security

After the enactment of the Social Security Act of 1935 (42 U.S.C.A. § 301 et seq.) and the creation of the Social Security Administration (SSA), the federal government had a short time to establish the program before beginning to pay benefits. Monthly benefits were to begin in 1940. The period from 1937 to 1940 was to be used both to build up the trust funds and to provide a minimum period for participation for persons to qualify for monthly benefits.

From 1937 until 1940, however, Social Security paid benefits in the form of a single, lump-sum payment. The purpose of these one-time payments was to provide some compensation to people who contributed to the program but would not participate long enough to be vested for monthly benefits.

The first applicant for a lump-sum benefit was Ernest Ackerman, a Cleveland motorman who retired one day after the Social Security Program began. During his one day of participation in the program, five cents was withheld from Ackerman's pay for Social Security, and upon retiring, he received a lump-sum payment of seventeen cents.

Payments of monthly benefits began in January 1940. On January 31, 1940, the first monthly retirement check was issued to Ida May Fuller of Ludlow, Vermont, in the amount of $22.54. Fuller died in January 1975 at the age of one hundred. During her thirty-five years as a beneficiary, she received more than $20,000 in benefits.

tions to Social Security. There is no financial need requirement to be satisfied. Once a worker qualifies for protection, his family is also entitled to protection. The entire program is geared toward helping families as a matter of social policy.

Two large funds of money are held in trust to pay benefits earned by people under OASDI: the Old Age and Survivors Trust Fund and the Disability Insurance Trust Fund. As workers and employers make payroll contributions to these funds, money is paid out in benefits to people currently qualified to receive monthly checks.

The OASDI program is funded by payroll taxes levied on employees and their employers and on the self-employed. The tax is imposed upon the employee's taxable income, up to a maximum taxable amount, with the employer contributing an equal amount. The self-employed person contributes twice the amount levied on an employee. In 2003 the rate was 6.2 percent, levied on earned income up to a maximum of $87,000.

**Old Age Benefits** A person becomes eligible for Social Security old age benefits by working a minimum number of calendar quarters. The number of quarters required for full insurance increases with the worker's age. Forty quarters is the maximum requirement. The individual is credited for income up to the maximum amount of money covered by Social Security for those years. This amount is adjusted to reflect the impact of inflation on normal earnings and ensure that a worker who pays increasing Social Security contributions during his or her work life will receive retirement benefits that keep pace with inflation.

Persons born before 1950 can retire at age 65 with full benefits based on their average income during their working years. For those born between 1950 and 1960, the retirement age for full benefits has increased to age 66. Persons born in 1960 or later will not receive full retirement benefits until age 67. Any person, however, may retire at age 62 and receive less than full benefits. At age 65, a worker's spouse who has not contributed to Social Security receives 50 percent of the amount paid to the worker.

Since 1975 Social Security benefits have increased annually to offset the corrosive effects of inflation on fixed incomes. These increases, known as cost of living allowances (COLAs), are based on the annual increase in consumer prices. Allowing benefits to increase automatically ended the need for special acts of Congress, but it has also steadily increased the cost of the Social Security Program.

have the same inheritance rights as other children. The ruling was believed to be the first on the controversial issue by any state supreme court.

Also in January 2002, Marshall addressed the Massachusetts Bar Association Conference, where she called for "a revolution in the administration of justice" stating that the court system needed to improve its management system as well as its staffing and budget controls. In March 2002, her discussion of the court system's problems were amplified in a 52-page report that was published by a blue-ribbon panel appointed by Marshall.

FURTHER READINGS

Teicher, Stacy A. 2000." A Subtle Revolution as Women Lead the Bench." *Christian Science Monitor* (January 5).

Lavoie, Denise. 2002. "Court Rules on Posthumous Conception." *Associated Press* (January 2)

**[6]**

*THE GOVERNMENT [THAT THE FRAMERS OF THE CONSTITUTION] DEVISED REQUIRED SEVERAL AMENDMENTS, A CIVIL WAR, AND MOMENTOUS SOCIAL TRANSFORMATION TO ATTAIN THE SYSTEM OF CONSTITUTIONAL GOVERNMENT, AND ITS RESPECT FOR THE INDIVIDUAL FREEDOMS AND HUMAN RIGHTS, THAT WE HOLD AS FUNDAMENTAL TODAY.*
*THURGOOD MARSHALL*

## MARSHALL PLAN

After **WORLD WAR II**, Europe was devastated and urgently needed an organized plan for reconstruction and economic and technical aid. The Marshall Plan was initiated in 1947 to meet this need.

The originator of the plan, U.S. Secretary of State George C. Marshall, introduced it in a speech at Harvard University on June 5, 1947. He pointed out two basic reasons for providing aid to Europe: the United States sought the reestablishment of the European countries as independent nations capable of conducting valuable trade with the United States; and the threat of a Communist takeover was more prevalent in countries that were suffering economic depression.

In 1947 a preliminary conference to discuss the terms of the program convened in Paris. The Soviet Union was invited to attend but subsequently withdrew from the program, as did other Soviet countries.

Sixteen European countries eventually participated, and, in July 1947, the Committee for European Economic Cooperation was established to allow representatives from member countries to draft a report that listed their requirements for food, supplies, and technical assistance for a four-year period.

The Committee for European Economic Cooperation subsequently became the Organization of European Economic Cooperation, an expanded and permanent organization that was responsible for submitting petitions for aid. In 1948, Congress passed the Economic Cooperation Act (62 Stat. 137), establishing funds for the Marshall Plan to be administered under the Economic Cooperation Administration, which was directed by Paul G. Hoffman.

Between 1948 and 1952, the sixteen-member countries received more than $13 billion dollars in aid under the Marshall Plan. The plan was generally regarded as a success that led to industrial and agricultural production, while stifling the Communist movement. The plan was not without its critics, however, and many Europeans believed the **COLD WAR** hostilities between the Soviet nations and the free world were aggravated by it.

**[7]**

## ◊ MARSHALL, THURGOOD

Thurgood Marshall, the first African American to serve on the U.S. Supreme Court, saw law as a catalyst for social change. For nearly 60 years, as both a lawyer and a jurist, Marshall worked to dismantle the system of **SEGREGATION** and improve the legal and social position of minorities.

Marshall was born July 2, 1908, in Baltimore, the son of a Pullman porter and a schoolteacher. He was a graduate of Lincoln University, a small, all-black college in Pennsylvania, and Howard University Law School in Washington, D.C. At Howard, Marshall excelled under the guidance of Vice Dean **CHARLES HAMILTON HOUSTON**, the first African American to win a case before the U.S. Supreme Court. Houston encouraged his students to become not just lawyers but "social engineers" who could use the legal system to improve society. Marshall graduated first in his law class in 1933.

Marshall's attendance at predominantly black Howard University illustrates the barriers faced by African Americans during the early twentieth century. Although Marshall wished to attend law school at the University of Maryland (a public institution in his home town of Baltimore), he was prohibited by law from doing so because of his race. This injustice helped set Marshall on a course of opposing all forms of official segregation that denied equal opportunities to African Americans.

After law school, Marshall set up a practice in Baltimore, representing indigent clients in civil rights cases. In 1936, his mentor Houston offered him a position with the National Association for the Advancement of Colored People (**NAACP**),





and in 1940, Marshall became director of the **NAACP LEGAL DEFENSE AND EDUCATIONAL FUND**, a position he held until 1961. Determined to eliminate segregation, Marshall coordinated a nationwide campaign to integrate higher education. He filed several successful lawsuits against public graduate and professional schools that refused to accept African-American students. These suits paved the way for similar cases at the high school and elementary school levels. Marshall also journeyed throughout the deep South, traveling fifty thousand miles a year to fight **JIM CROW LAWS** (a series of laws that provided for racial segregation in the South) and to represent criminal defendants.

Marshall argued 32 cases before the U.S. Supreme Court and won 29 of them. No doubt his most famous and far-reaching triumph before the High Court was **BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). In that case, the father of African-American student Linda Brown sued the school board of Topeka, Kansas, over its segregation policy. Brown was required by law to attend an all African-American school several blocks from her home even though an all white public school was located in her own neighborhood. Under Kansas law, cities of more than 15,000 people, such as Topeka, could choose to operate segregated schools. Marshall argued that these segregated schools, defended by officials as "separate but equal," were unconstitutional.

**[8]**

The **SEPARATE-BUT-EQUAL** doctrine originated in **PLESSY V. FERGUSON**, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), a case allowing segregated public accommodations for whites and blacks. In a plainspoken argument, Marshall dismissed as fallacy the notion that segregated schools offered the same educational experiences to black and white students. Sociological and psychological studies demonstrated that black children were in fact harmed by the policy of school segregation. The students' self-esteem was damaged and their future diminished when they were forced to accept inadequate facilities, equipment, and educational opportunities. Marshall argued that the only purpose segregation served was to perpetuate the myth of African-Americans' inferiority. A unanimous Court agreed and struck down the separate-but-equal doctrine, a

*Thurgood Marshall.*
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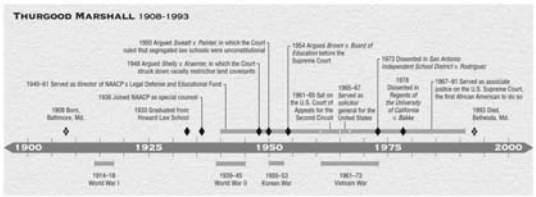






# THE FUTURE OF SOCIAL SECURITY

**[9]**

The payment of **OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE** (OASDI) benefits has been a cornerstone of U.S. social welfare policy since the establishment of the **SOCIAL SECURITY ADMINISTRATION** in 1935. At the same time, the long-term financial stability of OASDI has been a constant worry. In the early years of the twenty-first century, concerns about Social Security mounted as policy makers assessed the impact of the retirement of the "Baby Boom" generation. Many younger people raised the issue of "generation equity." They express doubt that Social Security benefits will be available when they retire, and anger that they will be forced to pay, through payroll taxes, for the baby boomers' retirement benefits.

Reform of the Social Security system has always been a political hot potato. Retirees and those approaching retirement form a strong **LOBBYING** force, and they zealously protect their benefits. Employers and employees are equally vocal in their opposition to higher payroll taxes to fund OASDI. Thus, changes in Social Security required bipartisan support, which materialized in the face of an impending Social Security crisis. The 1982–83 National Commission on Social Security Reform successfully secured from Congress the short-term financing of OASDI. As a result, Congress passed a series of laws meant to accumulate surpluses as a hedge against future burdens. The Social Security surplus is the amount by which revenue from the federal payroll tax exceeds the amount of Social Security benefits paid out.

IN FOCUS

Shortly after these new laws went into effect, Social Security began running a surplus. Surplus Social Security revenue can be used to fund other government programs and to help retire the national debt. During the favorable economic climate of the late 1990s, Congress began to use the surplus to pay down the federal debt, hoping to better position the government to meet its obligations to future retirees. And, in 2000, the federal government generated enough revenue so that the entire Social Security surplus was available for paying off debt.

The state of Social Security became a major campaign issue in the 2000 elections, with both Republicans and Democrats attempting to appear as though they were guardians of Social Security assets. Candidates from both parties promised to create a "lockbox," meaning that the Social Security surplus would be spent entirely on debt retirement. With the advent of fiscally lean years in the early 2000s, the lockbox approach was largely disregarded by politicians who advanced other ideas about what to do with Social Security surpluses. These ideas included using the surplus to help offset decreases in revenues brought about by tax cuts and using the surplus to fund new or expanded spending initiatives.

Analysts argue that the real issue often is clouded. It is not how to spend the surplus now, but how to maintain the long-term solvency of the Social Security trust fund. Planners estimate that the income from the trust fund will exceed expenses each year until 2020. The trust fund balances will then start to decline as investments are redeemed to meet the increased expenses from a swelling retired workforce. Although it is estimated that 75 percent of the costs would continue to be met from current payroll and income taxes, in the absence of any changes, full benefits could not be paid beginning in 2030.

In its 1996 report, the Social Security Administration's Advisory Council looked at various long-term financing options for OASDI. The council could not reach consensus on a specific long-term plan, but it did suggest several types of financing that represent a marked departure from previous efforts to fund Social Security. The council noted that past efforts have generally featured cutting benefits and raising tax rates on a "pay-as-you-go" basis. The council agreed that this approach must be changed and offered three ways of restoring financial solvency.

One approach, called Maintenance of Benefits (MB), calls for an increase in income taxes on OASDI benefits, a redirection of some revenue from other trust funds, and, most importantly, the adoption of a plan allowing the federal government to invest a portion of the trust fund assets directly in common stocks. Rates of returns on stocks have historically exceeded those on federal government bonds, where all Social Security

A person who continues to work past the retirement age may lose some benefits because Social Security is designed to replace lost earnings. If earnings from employment do not exceed the amount specified by law, the person receives the full benefits. If earnings are greater than that amount, one dollar of benefit is withheld for every two dollars in wages earned above the exempt amount. Once a person reaches age 70, however, he does not have to report earnings to the SSA, and the benefit is not reduced.

**Survivors' Benefits** Survivors' benefits are paid to family members when a worker dies. Survivors can receive benefits if the deceased worker was employed and contributed to Social





momentous victory for Marshall, affecting public schools in twenty-one states.

Marshall was appointed to the U.S. Court of Appeals for the Second Circuit in 1961, and served there until 1965 when he was named **SOLICITOR GENERAL** for the United States. He was appointed to the U.S. Supreme Court in 1967 by President **LYNDON B. JOHNSON** and served as an associate justice for 24 years.

While on the Court, Marshall was known more for his impassioned dissents than for his majority opinions. In particular, as a staunch opponent of **CAPITAL PUNISHMENT**, he regularly voiced his disagreement with the majority in death penalty cases. He was also a firm backer of **AFFIRMATIVE ACTION** and contributed one of his most famous dissents in **REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE**, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In that case, Marshall criticized the high court's ruling that a public medical school's policy of reserving 16 of 100 spots for minority students was unconstitutional. Marshall also dissented in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), disagreeing with the majority view that a Texas property tax system used to fund public education was acceptable, even though it allowed wealthier districts to provide a better school system for students in those districts than less wealthy districts could provide. Marshall objected strongly to the property tax arrangement, claiming that it deprived poor children of an equal education.

Marshall wrote the majority opinion in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968), in which the Court declared that a shopping center was a public forum from which picketers could not be barred by private owners.

Marshall retired from the Court in 1991, but continued his criticism of government policies that were detrimental to African Americans or other disenfranchised groups.

Marshall died on January 24, 1993, in Bethesda, Maryland. Upon Marshall's death, nearly 20,000 mourners filed by his casket during the 12 hours it lay in state in the Great Hall of the U.S. Supreme Court.

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CROSS-REFERENCES

**[10]**

*Civil Rights Movement; Integration; School Desegregation.*

## MARTIAL LAW

*The exercise of government and control by military authorities over the civilian population of a designated territory.*

**[11]**

Martial law is an extreme and rare measure used to control society during war or periods of civil unrest or chaos. According to the Supreme Court, the term *martial law* carries no precise meaning (*Duncan v. Kahanamoku*, 327 U.S. 304, 66 S. Ct. 606, 90 L. Ed. 688 [1946]). However, most declarations of martial law have some common features. Generally, the institution of martial law contemplates some use of military force. To a varying extent, depending on the martial law order, government military personnel have the authority to make and enforce civil and criminal laws. Certain civil liberties may be suspended, such as the right to be free from unreasonable **SEARCHES AND SEIZURES**, **FREEDOM OF ASSOCIATION**, and freedom of movement. And the writ of **HABEAS CORPUS** may be suspended (this writ allows persons who are unlawfully imprisoned to gain freedom through a court proceeding).

In the United States, martial law has been instituted on the national level only once, during the Civil War, and on a regional level only once, during **WORLD WAR II**. Otherwise, it has been limited to the states. Uprisings, political protests, labor strikes, and riots have, at various times, caused several state governors to declare some measure of martial law.

Martial law on the national level may be declared by Congress or the president. Under

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# PREFACE

The U.S. legal system is admired around the world for the freedoms it allows the individual and the fairness with which it attempts to treat all persons. On the surface, it may seem simple, yet those who have delved into it know that this sytem of federal and state constitutions, statutes, regulations, and common-law decisions is elaborate and complex. It derives from the English common law, but includes principles older than England, along with some principles from other lands. The U.S. legal system, like many others, has a language all its own, but too often it is an unfamiliar language: many concepts are still phrased in Latin. The second edition of *West's Encyclopedia of American Law (WEAL)* explains legal terms and concepts in everyday language, however. It covers a wide variety of persons, entities, and events that have shaped the U.S. legal system and influenced public perceptions of it.

## MAIN FEATURES OF THIS SET

### Entries

This encyclopedia contains nearly 5,000 entries devoted to terms, concepts, events, movements, cases, and persons significant to U.S. law. Entries on legal terms contain a definition of the term, followed by explanatory text if necessary. Entries are arranged alphabetically in standard encyclopedia format for ease of use. A wide variety of additional features, listed later in this preface, provide interesting background and supplemental information.

**Definitions** Every entry on a legal term is followed by a definition, which appears at the beginning of the entry and is italicized. The Dictionary and Indexes volume includes a glossary containing all the definitions from *WEAL*.

**Further Readings** To facilitate further research, a list of Further Readings is included at the end of a majority of the main entries.

**Cross-References** *WEAL* provides two types of cross-references, within and following entries. Within the entries, terms are set in small capital letters—for example, LIEN—to indicate that they have their own entry in the encyclopedia. At the end of the entries, related entries the reader may wish to explore are listed alphabetically by title.

Blind cross-reference entries are also included to direct the user to other entries throughout the set.

### In Focus Essays

In Focus essays accompany related entries and provide additional facts, details, and arguments on particularly interesting, important, or controversial issues raised by those entries. The subjects covered include hotly contested issues, such as abortion, capital punishment, and gay rights; detailed processes, such as the Food and Drug Administration's approval process for new drugs; and important historical or social issues, such as debates over the formation of the U.S. Constitution.

### Sidebars

Sidebars provide brief highlights of some interesting facet of accompanying entries. They complement regular entries and In Focus essays by adding informative details. Sidebar topics include the Million Man March and the branches of the U.S. armed services. Sidebars appear at the top of a text page and are set in a box.

### Biographies

*WEAL* profiles a wide variety of interesting and influential people—including lawyers, judges, government and civic leaders, and historical and modern figures—who have played a part in creating or shaping U.S. law. Each biography includes a timeline, which shows important moments in the subject's life as well as important historical events of the period. Biographies appear alphabetically by the subject's last name.

## ADDITIONAL FEATURES OF THIS SET

**Enhancements** Throughout *WEAL*, readers will find a broad array of photographs, charts, graphs, manuscripts, legal forms, and other visual aids enhancing the ideas presented in the text.

**Indexes** *WEAL* features a cases index and a cumulative general index in a separate volume.

### Appendixes

Three appendix volumes are included with *WEAL*, containing hundreds of pages of documents, laws, manuscripts, and forms fundamental to and characteristic of U.S. law.

### Milestone Cases in the Law

A special Appendix volume entitled Milestones in the Law, allows readers to take a close look at landmark cases in U.S. law. Readers can explore the reasoning of the judges and the arguments of the attorneys that produced major decisions on important legal and social issues. Included in each Milestone are the opinions of the lower courts; the briefs presented by the parties to the U.S. Supreme Court; and the decision of the Supreme Court, including the majority opinion and all concurring and dissenting opinions for each case.

### Primary Documents

There is also an Appendix volume containing more than 60 primary documents, such as the English Bill of Rights, Martin Luther King Jr.'s Letter from Brimingham Jail, and several presidential speeches.

### Citations

Wherever possible, *WEAL* entries include citations for cases and statutes mentioned in the text. These allow readers wishing to do additional research to find the opinions and statutes cited. Two sample citations, with explanations of common citation terms, can be seen below and opposite.

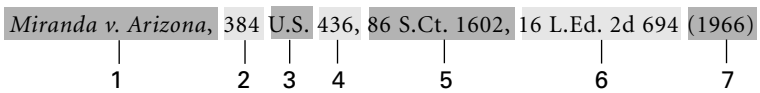


1. *Case title.* The title of the case is set in italics and indicates the names of the parties. The suit in this sample citation was between Ernesto A. Miranda and the state of Arizona.
2. *Reporter volume number.* The number preceding the reporter name indicates the reporter volume containing the case. (The volume number appears on the spine of the reporter, along with the reporter name.)
3. *Reporter name.* The reporter name is abbreviated. The suit in the sample citation is from the reporter, or series of books, called *U.S. Reports,* which contains cases from the U.S. Supreme Court. (Numerous reporters publish cases from the federal and state courts.)
4. *Reporter page.* The number following the reporter name indicates the reporter page on which the case begins.
5. *Additional reporter citation.* Many cases may be found in more than one reporter. The suit in the sample citation also appears in volume 86 of the *Supreme Court Reporter,* beginning on page 1602.
6. *Additional reporter citation.* The suit in the sample citation is also reported in volume 16 of the *Lawyer's Edition,* second series, beginning on page 694.
7. *Year of decision.* The year the court issued its decision in the case appears in parentheses at the end of the cite.

Brady Handgun Violence Prevention Act, Pub. L. No. 103–159, 107 Stat. 1536 (18 U.S.C.A. §§ 921–925A)

1 2 3 4 5 6 7 8

1. *Statute title.*
2. *Public law number.* In the sample citation, the number 103 indicates that this law was passed by the 103d Congress, and the number 159 indicates that it was the 159th law passed by that Congress.
3. *Reporter volume number.* The number preceding the reporter name indicates the reporter volume containing the statute.
4. *Reporter name.* The reporter name is abbreviated. The statute in the sample citation is from *Statutes at Large.*
5. *Reporter page.* The number following the reporter name indicates the reporter page on which the statute begins.
6. *Title number.* Federal laws are divided into major sections with specific titles. The number preceding a reference to the *U.S. Code Annotated* is the title number. title 18 of the U.S. Code is Crimes and Criminal Procedure.
7. *Additional reporter.* The statute in the sample citation may also be found in the *U.S. Code Annotated*.
8. *Section number.* The section numbers following a reference to the *U.S. Code Annotated* indicate where the statute appears in that reporter.

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# DICTIONARY OF LEGAL TERMS

**A fortiori:** *[Latin, With stronger reason.]* This phrase is used in logic to denote an argument to the effect that because one ascertained fact exists, therefore another which is included in it or analogous to it and is less improbable, unusual, or surprising must also exist.

**A mensa et thoro:** *[Latin, From table and bed.]*More commonly translated, "from bed and board."

**A posteriori:** *[Latin, From the effect to the cause.]*

**A priori:** *[Latin, From the cause to the effect.]*

**Ab initio:** *[Latin, From the beginning; from the first act; from the inception.]* An agreement is said to be "void *ab initio*" if it has at no time had any legal validity. A party may be said to be a trespasser, an estate said to be good, an agreement or deed said to be void, or a marriage or act said to be unlawful, *ab initio.* Contrasted in this sense with EX POST FACTO, or with *postea.*

**Abandonment:** The surrender, relinquishment, disclaimer, or cession of property or of rights. Voluntary relinquishment of all right, title, claim, and possession, with the intention of not reclaiming it.

The giving up of a thing absolutely, without reference to any particular person or purpose. For example, vacating property with the intention of not returning, so that it may be appropriated by the next comer or finder. The voluntary relinquishment of possession of a thing by its owner with the intention of terminating ownership, but without vesting it in any other person. The relinquishing of all title, possession, or claim, or a virtual, intentional throwing away of property.

Term includes both the intention to abandon and the external act by which the intention is carried into effect. In determining whether someone has abandoned property or rights, the intention is the first and paramount object of inquiry, for there can be no abandonment without the intention to abandon.

*Abandonment* differs from surrender in that surrender requires an agreement, and also from FORFEITURE, in that forfeiture may be against the intention of the party alleged to have forfeited.

In the case of children, abandonment is the willful forsaking or forgoing of parental duties. Desertion as a legal concept, is similar in this respect, although broader in scope, covering both real and constructive situations; abandonment is generally seen as involving a specific and tangible forsaking or forgoing.

**Abatement:** A reduction, a decrease, or a diminution. The suspension or cessation, in whole or in part, of a continuing charge, such as rent.

**Abatement of an action:** An entire overthrow or destruction of a suit so that it is quashed and ended.

**Abdication:** Renunciation of the privileges and prerogatives of an office. The act of a sovereign in renouncing and relinquishing his or her government or throne, so that either the throne is left entirely vacant, or is filled by a successor appointed or elected beforehand. Also, where a magistrate or person in office voluntarily renounces or gives it up before the time of service has expired. It differs from resignation, in that resignation is made by one who has received an office from another and restores it into that person's hands, as an inferior into the hands of a superior; abdication is the relinquishment of an office which has devolved by act of law. It is said to be a renunciation, quitting, and relinquishing, so as to have nothing further to do with a thing, or the doing of such actions as are inconsistent with the holding of it. Voluntary and permanent withdrawal from power by a public official or monarch.

**Abduction:** The act of restraining another through the use or threat of DEADLY FORCE or through fraudulent persuasion. The requisite restraint generally requires that the abductor intend to prevent the liberation of the abductee. Some states require that the abductee be a minor or that the abductor intend to subject the abductee to prostitution or illicit sexual activity.

**Abet:** To encourage or incite another to commit a crime. This word is usually applied to aiding in the commission of a crime. To abet another to commit a murder is to command, procure, counsel, encourage, induce, or assist. To facilitate the commission of a crime, promote its accomplishment, or help in advancing or bringing it about.

In relation to charge of aiding and abetting, term includes knowledge of the perpetrator's wrongful purpose, and encouragement, promotion or counsel of another in the commission of the criminal offense.

A French word, *abeter*—to bait or excite an animal.

**Abettor:** One who commands, advises, instigates, or encourages another to commit a crime. A person who, being present, incites another to commit a crime, and thus becomes a principal. To be an *abettor,* the accused must have instigated or advised the commission of a crime or been present for the purpose of assisting in its commission; he or she must share criminal intent with which the crime was committed.

**Abeyance:** A lapse in succession during which there is no person in whom title is vested. In the law of estates, the condition of a freehold when there is no person in whom it is vested. In such cases the freehold has been said to be *in nubibus* (in the clouds), *in pendenti* (in suspension); and *in gremio legis* (in the bosom of the law). Where there is a tenant of the freehold, the remainder or reversion in fee may exist for a time without any particular owner, in which case it is said to be in abeyance. A condition of being undetermined or in state of suspension or inactivity. In regard to sales to third parties of property acquired by county at TAX SALE, being held in *abeyance* means that certain rights or conditions are in expectancy.

**Abiding conviction:** A definite conviction of guilt derived from a thorough examination of the whole case. Used commonly to instruct juries on the frame of mind required for guilt proved BEYOND A REASONABLE DOUBT. A settled or fixed conviction.

**Abjuration:** A renunciation or ABANDONMENT by or upon oath. The renunciation under oath of one's citizenship or some other right or privilege.

**Abode:** One's home; habitation; place of dwelling; or residence. Ordinarily means "domicile." Living place impermanent in character. The place where a person dwells. Residence of a legal voter. Fixed place of residence for the time being. For SERVICE OF PROCESS, one's fixed place of residence for the time being; his or her "usual place of abode."

**Abolition:** The destruction, annihilation, abrogation, or extinguishment of anything, but especially things of a permanent nature—such as institutions, usages, or customs, as in the abolition of SLAVERY.

**Abortion:** The spontaneous or artificially induced expulsion of an embryo or fetus. As used in legal context, the term usually refers to induced abortion.

**Abrogation:** The destruction or annulling of a former law by an act of the legislative power, by constitutional authority, or by usage. It stands opposed to *rogation;* and is distinguished from derogation, which implies the taking away of only some part of a law; from SUBROGATION, which denotes the substitution of a clause; from *dispensation,* which only sets it aside in a particular instance; and from *antiquation,* which is the refusing to pass a law.

**Abscond:** To go in a clandestine manner out of the jurisdiction of the courts, or to lie concealed, in order to avoid their process. To hide, conceal, or absent oneself clandestinely, with the intent to avoid legal process. To postpone limitations. To flee from arresting or prosecuting officers of the state.

**Absconding debtor:** One who absconds from creditors to avoid payment of debts. A debtor who has intentionally concealed himself or herself from creditors, or withdrawn from the reach of their suits, with intent to frustrate their just demands. Such act was formerly an *act of bankruptcy*.

**Absentee:** One who has left, either temporarily or permanently, his or her domicile or usual place of residence or business. A person beyond the geographical borders of a state who has not authorized an agent to represent him or her in legal proceedings that may be commenced against him or her within the state.

**Absentee voting:** Participation in an election by qualified voters who are permitted to mail in their ballots.

**Absolute:** Complete; perfect; final; without any condition or incumbrance; as an absolute bond in distinction from a conditional bond. Unconditional; complete and perfect in itself; without relation to or dependence on other things or persons.

Free from conditions, limitations or qualifications, not dependent, or modified or affected by circumstances; that is, without any condition or restrictive provisions.

**Absolute deed:** A document used to transfer unrestricted title to property.

**Abstention doctrine:** The concept under which a federal court exercises its discretion and equitable powers and declines to decide a legal action over which it has jurisdiction pursuant to the Constitution and statutes where the state judiciary is capable of rendering a definitive ruling in the matter.

**Abstract:** To take or withdraw from; as, to abstract the funds of a bank. To remove or separate. To summarize or abridge.

**Abstract of title:** A condensed history, taken from public records or documents, of the ownership of a piece of land.

**Abstraction:** Taking from someone with an intent to injure or defraud.

**Abuse:** Everything that is contrary to good order established by usage. Departure from reasonable use; immoderate or improper use. Physical or mental maltreatment. Misuse. Deception.

To wrong in speech, reproach coarsely, disparage, revile, and malign.

**Abuse excuse:** Description of efforts by some criminal defendants to negate criminal responsibility by showing that they could not tell right from wrong due to abuse by their spouses or parents. Although this defense is not specifically recognized in substantive CRIMINAL LAW, it has been used successfully in some cases to prove, for example, the INSANITY DEFENSE.

**Abuse of discretion:** A failure to take into proper consideration the facts and law relating to a particular matter; an ARBITRARY or unreasonable departure from precedent and settled judicial custom.

**Abuse of power:** Improper use of authority by someone who has that authority because he or she holds a public office.

**Abuse of process:** The use of legal process to accomplish an unlawful purpose; causing a summons, writ, warrant, mandate, or any other process to issue from a court in order to accomplish some purpose not intended by the law.

**Abusive:** Tending to deceive; practicing abuse; prone to ill-treat by coarse, insulting words or harmful acts. Using ill treatment; injurious, improper, hurtful, offensive, reproachful.

**Abut:** To reach; to touch. To touch at the end; be contiguous; join at a border or boundary; terminate on; end at; border on; reach or touch with an end. The term *abutting* implies a closer proximity than the term *adjacent.*

**Academic freedom:** The right to teach as one sees fit, but not necessarily the right to teach evil. The term encompasses much more than teaching-related speech rights of teachers.

**Academic year:** That period of time necessary to complete an actual course of study during a school year.

**Accede:** To consent or to agree, as to accede to another's point of view. To enter an office or to accept a position, as to accede to the presidency.

**Acceleration:** A hastening; a shortening of the time until some event takes place.

**Acceleration clause:** The provision in a credit agreement, such as a mortgage, note, bond, or deed of trust, that allows the lender to require immediate payment of all money due if certain conditions occur before the time that payment would otherwise be due.

**Acceptance:** An express act or implication by conduct that manifests assent to the terms of an offer in a manner invited or required by the offer so that a binding contract is formed. The exercise of power conferred by an offer by performance of some act. The act of a person to whom something is offered or tendered by another, whereby the offeree demonstrates through an act invited by the offer an intention of retaining the subject of the offer.

**Access:** Freedom of approach or communication; or the means, power, or opportunity of approaching, communicating, or passing to and from. Sometimes importing the occurrence of sexual intercourse; otherwise as importing opportunity of communication for that purpose as between HUSBAND AND WIFE.

In real property law, the term *access* denotes the right vested in the owner of the land that adjoins a road or other highway to go and return from his own land to the highway without obstruction. *Access* to property does not necessarily carry with it possession.

For purposes of establishing element of access by defendant in COPYRIGHT infringement action, *access* is ordinarily defined as opportunity to copy.

**Accession:** Coming into possession of a right or office; increase; augmentation; addition.

The right to all that one's own property produces, whether that property be movable or immovable; and the right to that which is united to it by accession, either naturally or artificially. The right to own things that become a part of something already owned.

A principle derived from the CIVIL LAW, by which the owner of property becomes entitled to all that it produces, and to all that is added or united to it, either naturally or artificially (that is, by the labor or skill of another) even where such addition extends to a change of form or materials; and by which, on the other hand, the possessor of property becomes entitled to it, as against the original owner, where the addition made to it by skill and labor is of greater value than the property itself, or where the change effected in its form is so great as to render it impossible to restore it to its original shape.

Generally, *accession* signifies acquisition of title to PERSONAL PROPERTY by bestowing labor on it that converts it into an entirely different thing or by incorporation of property into a union with other property.

The commencement or inauguration of a sovereign's reign.

**Accessory:** Aiding or contributing in a secondary way or assisting in or contributing to as a subordinate.

In CRIMINAL LAW, contributing to or aiding in the commission of a crime. One who, without being present at the commission of an offense, becomes guilty of such offense, not as a chief actor, but as a participant, as by command, advice, instigation, or concealment; either before or after the fact or commission.

One who aids, abets, commands, or counsels another in the commission of a crime.

**Accident:** The word *accident* is derived from the Latin verb *accidere,* signifying "fall upon, befall, happen, chance." In its most commonly accepted meaning, or in its ordinary or popular sense, the word may be defined as meaning: some sudden and unexpected event taking place without expectation, upon the instant, rather than something that continues, progresses or develops; something happening by chance; something unforeseen, unexpected, unusual, extraordinary, or phenomenal, taking place not according to the usual course of things or events, out of the range of ordinary calculations; that which exists or occurs abnormally, or an uncommon occurrence. The word may be employed as denoting a calamity, casualty, catastrophe, disaster, an undesirable or unfortunate happening; any unexpected personal injury resulting from any unlooked for mishap or occurrence; any unpleasant or unfortunate occurrence that causes injury, loss, suffering, or death; some untoward occurrence aside from the usual course of events. An event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event.

**Accidental death benefit:** A provision of a life insurance policy stating that if the insured—the person whose life has been insured—dies in an accident, the beneficiary of the policy—the person to whom its proceeds are payable—will receive twice the face value of the policy.

**Accidental killing:** A death caused by a lawful act done under the reasonable belief that no harm was likely to result.

**Accidental vein:** An imprecise term that refers generally to a continuous body of a mineral or mineralized rock filling a seam other than the principal vein that led to the discovery of the mining claim or location.

**Accidents of navigation:** Mishaps that are peculiar to travel by sea or to normal navigation; accidents caused at sea by the action of the elements, rather than by a failure to exercise good handling, working, or navigating of a ship. Such accidents could not have been avoided by the exercise of nautical skill or prudence.

**Accommodation endorsement:** The act of a third person—the accommodation party—in writing his or her name on the back of a COMMERCIAL PAPER without any consideration, but merely to benefit the person to whom the paper is payable or to enable the person who made the document—the maker— to obtain money or credit on it.

**Accommodation paper:** A type of COMMERCIAL PAPER (such as a bill or note promising that money will be paid to someone) that is signed by another person—the accommodation party—as a favor to the promisor—the accommodated party—so that credit may be extended to him or her on the basis of the paper.

**Accommodation party:** One who signs a COMMERCIAL PAPER for the purpose of lending his or her name and credit to another party to the document—the accommodated party—to help that party obtain a loan or an extension of credit.

**Accompany:** To go along with; to go with or to attend as a companion or associate.

**Accomplice:** One who knowingly, voluntarily, and with common intent unites with the principal offender in the commission of a crime. One who is in some way concerned or associated in commission of crime; partaker of guilt; one who aids or assists, or is an ACCESSORY. One who is guilty of complicity in crime charged, either by being present and aiding or abetting in it, or having advised and encouraged it, though absent from place when it was committed, though mere presence, ACQUIESCENCE, or silence, in the absence of a duty to act, is not enough, no matter how reprehensible it may be, to constitute one an accomplice. One is liable as an accomplice to the crime of another if he or she gave assistance or encouragement or failed to perform a legal duty to prevent it with the intent thereby to promote or facilitate commission of the crime.

**Accomplice witness:** A witness to a crime who, either as principal, ACCOMPLICE, or ACCESSORY, was connected with the crime by unlawful act or omission on his or her part, transpiring either before, at time of, or after commission of the offense, and whether or not he or she was present and participated in the crime.

**Accord:** An agreement that settles a dispute, generally requiring an obligee to accept a compromise or satisfaction from the obligor with something less than what was originally demanded. Also often used synonymously with treaty.

**Accord and satisfaction:** A method of discharging a claim whereby the parties agree to give and accept something in settlement of the claim and perform the agreement, the *accord* being the agreement and the *satisfaction* its execution or performance, and it is a new contract substituted for an old contract which is thereby discharged, or for an obligation or CAUSE OF ACTION which is settled, and must have all of the elements of a valid contract.

**Accouchement:** The act of giving birth to a child.

**Account:** A written list of transactions, noting money owed and money paid; a detailed statement of mutual demands arising out of a contract or a fiduciary relationship.

**Account, action on:** A civil lawsuit maintained under the COMMON LAW to recover money owed on an account.

**Account payable:** A debt owed by a business that arises in the normal course of its dealings, that has not been replaced by a note from another debtor, and that is not necessarily due or past due.

**Account receivable:** A debt owed by a business that arises in the normal course of dealings and is not supported by a negotiable instrument.

**Account rendered:** A statement of transactions made out by a creditor and presented to the debtor.

**Account stated:** An amount that accurately states money due to a creditor; a debt arising out of transactions between a debtor and creditor that has been reduced to a balance due for the items of account.

**Accountant:** A person who has the requisite skill and experience in establishing and maintaining accurate financial records for an individual or a business. The duties of an accountant may include designing and controlling systems of records, auditing books, and preparing financial statements. An accountant may give tax advice and prepare tax returns.

**Accounting:** A system of recording or settling accounts in financial transactions; the methods of determining income and expenses for tax and other financial purposes. Also, one of the remedies available for enforcing a right or redressing a wrong asserted in a lawsuit.

**Accredit:** To give official authorization or status. To recognize as having sufficient academic standards to qualify graduates for higher education or for professional practice. In INTERNATIONAL LAW: (1) To acknowledge; to receive as an envoy and give that person credit and rank accordingly. (2) To send with credentials as an envoy. This latter use is now the accepted one.

**Accredited law school:** A law school that has been approved by the state and the Association of American Law Schools (AALS), the AMERICAN BAR ASSOCIATION (ABA), or both.

**Accretion:** The act of adding portions of soil to the soil already in possession of the owner by gradual deposition through the operation of natural causes.

The growth of the value of a particular item given to a person as a specific bequest under the provisions of a will between the time the will was written and the time of death of the testator—the person who wrote the will.

**Accrual basis:** A method of accounting that reflects expenses incurred and income earned for INCOME TAX purposes for any one year.

**Accrue:** To increase; to augment; to come to by way of increase; to be added as an increase, profit, or damage. Acquired; falling due; made or executed; matured; occurred; received; vested; was created; was incurred.

To attach itself to, as a subordinate or accessory claim or demand arises out of, and is joined to, its principal.

The term is also used of independent or original demands, meaning to arise, to happen, to come into force or existence; to vest, as in the phrase, "The right of action did not *accrue* within six years." To become a present right or demand; to come to pass.

**Accumulated earnings tax:** A special tax imposed on corporations that accumulate (rather than distribute via dividends) their earnings beyond the reasonable needs of the business. The accumulated earnings tax is imposed on accumulated taxable income in addition to the corporate INCOME TAX.

**Accumulation trust:** An arrangement whereby property is transferred by its owner—the settlor—with the intention that it be administered by someone else—a trustee— for another person's benefit, with the direction that the trustee gather, rather than distribute, the income of the trust and any profits made from the sale of any of the property making up the trust until the time specified in the document that created the trust.

**Accumulative judgment:** A second or additional judgment against a person who has already been convicted and sentenced for another crime; the execution of the second judgment is postponed until the person's first sentence has been completed.

**Accumulative sentence:** A sentence—a court's formal pronouncement of the legal consequences of a person's conviction of a crime—additional to others, imposed on a defendant who has been convicted upon an indictment containing several counts, each charging a distinct offense, or who is under conviction at the same time for several distinct offenses; each sentence is to run consecutively, beginning at the expiration of the previous sentence.

**Accusation:** A formal criminal charge against a person alleged to have committed an offense punishable by law, which is presented before a court or a magistrate having jurisdiction to inquire into the alleged crime.

**Accusatory body:** Body such as a GRAND JURY whose duty it is to hear evidence to determine whether a person should be accused of (charged with) a crime; to be distinguished from a traverse or petit jury, which is charged with the duty of determining guilt or innocence.

**Accused:** The generic name for the defendant in a criminal case. A person becomes *accused* within the meaning of a guarantee of SPEEDY TRIAL only at the point at which either formal indictment or information has been returned against him or her, or when he or she becomes subject to actual restraints on liberty imposed by arrest, whichever occurs first.

**Acknowledgment:** To *acknowledge* is to admit, affirm, declare, testify, avow, confess, or own as genuine. Admission or affirmation of obligation or responsibility. Most states have adopted the Uniform Acknowledgment Act.

**Acquiescence:** Conduct recognizing the existence of a transaction and intended to permit the transaction to be carried into effect; a tacit agreement; consent inferred from silence.

**Acquired immune deficiency syndrome:** A disease caused by the human immunodeficiency virus (HIV) that produces disorders and infections that can lead to death.

**Acquisition charge:** A fee imposed upon a borrower who satisfies a loan prior to the date of payment specified in the loan agreement.

**Acquit:** To set free, release or discharge as from an obligation, burden or accusation. To absolve one from an obligation or a liability; or to legally certify the innocence of one charged with a crime.

**Acquittal:** The legal and formal certification of the innocence of a person who has been charged with a crime.

**Act:** Something done; usually, something done intentionally or voluntarily or with a purpose.

**Act of god:** An event that directly and exclusively results from the occurrence of natural causes that could not have been prevented by the exercise of foresight or caution; an inevitable accident.

**Action:** Conduct; behavior; something done; a series of acts.

A case or lawsuit; a legal and formal demand for enforcement of one's rights against another party asserted in a court of justice.

**Action on the case:** One of the old common-law FORMS OF ACTION that provided a remedy for the invasion of personal or property interests.

**Actionable:** Giving sufficient legal grounds for a lawsuit; giving rise to a CAUSE OF ACTION.

**Actionable per se:** Legally sufficient to support a lawsuit in itself.

**Actual cash value:** The fair or reasonable cash price for which a property could be sold in the market in the ordinary course of business, and not at forced sale. The price it will bring in a fair market after reasonable efforts to find a purchaser who will give the highest price. What property is worth in money, allowing for depreciation. Ordinarily, *actual cash value, fair market value,* and *market value* are synonymous terms.

**Actual notice:** Conveying facts to a person with the intention to apprise that person of a proceeding in which his or her interests are involved, or informing a person of some fact that he or she has a right to know and which the informer has a legal duty to communicate.

**Actuary:** A statistician who computes insurance and PENSION rates and premiums on the basis of the experience of people sharing similar age and health characteristics.

**Actus reus:** *[Latin, Guilty act.]* As an element of criminal responsibility, the wrongful act or omission that comprises the physical components of a crime. Criminal statutes generally require proof of both *actus reus* and mens rea on the part of a defendant in order to establish criminal liability.

**Ad damnum:** *[Latin, To the loss.]* The clause in a complaint that sets a maximum amount of money that the plaintiff can recover under a default judgment if the defendant fails to appear in court.

**Ad hoc:** *[Latin, For this; for this special purpose.]* An attorney ad hoc or a guardian or curator ad hoc is one appointed for a special purpose, generally to represent the client, ward, or child in the particular action in which the appointment is made.

**Ad hominem:** *[Latin, To the person.]* A term used in debate to denote an argument made personally against an opponent, instead of against the opponent's argument.

**Ad interim:** *[Latin, In the meantime.]* An officer *ad interim* is a person appointed to fill a position that is temporarily open, or to perform the functions of a particular position during the absence or temporary incapacity of the individual who regularly fulfills those duties.

**Ad litem:** *[Latin, For the suit; for the purposes of the suit; pending the suit.]* A GUARDIAN AD LITEM is a guardian appointed to prosecute or defend a suit on behalf of a party who is legally incapable of doing so, such as an infant or an insane person.

**Ad valorem:** According to value.

**Adaptation:** The act or process of modifying an object to render it suitable for a particular or new purpose or situation.

**Add-on:** A purchase of additional goods before payment is made for goods already purchased.

**Addict:** Any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so drawn to the use of such narcotic drugs as to have lost the power of self-control with reference to his or her drug use.

**Additional extended coverage:** A provision added to an insurance policy to extend the scope of coverage to include further risks to dwellings.

**Additional instructions:** A charge given to a jury by a judge after the original instructions to explain the law and guide the jury in its decision making.

**Additur:** The power of the trial court to assess damages or increase the amount of an inadequate award made by jury verdict, as a condition of a denial of a motion for a new trial, with the consent of the defendant whether or not the plaintiff consents to such action. This is not allowed in the federal system.

**Adduce:** To present, offer, bring forward, or introduce.

**Ademption:** The failure of a gift of personal property—a bequest—or of real property—a devise—to be distributed according to the provisions of a decedent's will because the property no longer belongs to the testator at the time of his or her death or because the property has been substantially changed.

**Adequate:** Sufficient; equal to what is required; suitable to the case or occasion.

**Adequate remedy at law:** Sufficient compensation by way of monetary damages.

**Adhesion contract:** A type of contract, a legally binding agreement between two parties to do a certain thing, in which one side has all the bargaining power and uses it to write the contract primarily to his or her advantage.

**Adjacent:** Lying near or close to; neighboring.

**Adjective law:** The aggregate of rules of procedure or practice. Also called adjectival law, as opposed to that body of law that the courts are established to administer (called *substantive law*), it means the rules according to which the SUBSTANTIVE LAW is administered, e.g., Rules of CIVIL PROCEDURE. That part of the law that provides a method for enforcing or maintaining rights, or obtaining redress for their invasion. Pertains to and prescribes the practice, method, procedure, or legal machinery by which substantive law is enforced or made effective.

**Adjoining landowners:** Those persons, such as next-door and backyard neighbors, who own lands that share common boundaries and therefore have mutual rights, duties, and liabilities.

**Adjourned term:** A CONTINUANCE of a previous or regular court session that results from postponement.

**Adjournment:** A putting off or postponing of proceedings; an ending or dismissal of further business by a court, legislature, or public official—either temporarily or permanently.

**Adjudge:** To determine by a judge; to pass on and decide judicially.

**Adjudication:** The legal process of resolving a dispute. The formal giving or pronouncing of a judgment or decree in a court proceeding; also the judgment or decision given. The entry of a decree by a court in respect to the parties in a case. It implies a hearing by a court, after notice, of legal evidence on the factual issue(s) involved. The equivalent of a determination. It indicates that the claims of all the parties thereto have been considered and set at rest.

**Adjudicative facts:** Factual matters concerning the parties to an administrative proceeding as contrasted with legislative facts, which are general and usually do not touch individual questions of particular parties to a proceeding. Facts that concern a person's motives and intent, as contrasted with general policy issues. Those facts that must be found BEYOND A REASONABLE DOUBT by the trier of fact before there can be a conviction.

*Adjudicative facts,* of which a trial court may take notice if a fact is not subject to reasonable dispute, are those to which law is applied in the process of adjudication; they are facts that, in a jury case, normally go to the jury.

**Adjunction:** Attachment or affixing to another. Something attached as a dependent or auxiliary part.

**Adjuration:** A swearing; taking an oath to be truthful.

**Adjust:** To settle or arrange; to free from differences or discrepancies. To bring to a satisfactory state so that parties are agreed, as to adjust amount of loss by fire or controversy regarding property or estate. To bring to proper relations. To determine and apportion an amount due. The term is sometimes used in the sense of pay, when used in reference to a liquidated claim. Determination of an amount to be paid to insured by insurer to cover loss or damage sustained.

**Adjusted gross income:** The term used for INCOME TAX purposes to describe gross income less certain allowable deductions such as trade and business deductions, moving expenses, ALIMONY paid, and penalties for premature withdrawals from term savings accounts, in order to determine a person's taxable income.

**Adjuster:** A person appointed or employed to settle or arrange matters that are in dispute; one who determines the amount to be paid on a claim.

**Adjustment securities:** Stocks and bonds of a new corporation that are issued to stockholders during a corporate reorganization in exchange for stock held in the original corporation before it was reorganized.

**Administer:** To give an oath, as to administer the oath of office to the president at the inauguration. To direct the transactions of business or government. Immigration laws are administered largely by the Immigration and Naturalization Service. To take care of affairs, as an executor administers the estate of a deceased person. To directly cause the ingestion of medications or poisons. To apply a court decree, enforce its provisions, or resolve disputes concerning its meaning.

**Administration:** The performance of executive duties in an institution or business. The SMALL BUSINESS ADMINISTRATION is responsible for administration of some disaster-relief loans. In government, the practical management and direction of some department or agency in the EXECUTIVE BRANCH; in general, the entire class of public officials and employees managing the executive department. The management and distribution of the estate of a decedent performed under the supervision of the surrogate's or probate court by a person duly qualified and legally appointed. If the decedent made a valid will designating someone called an executor to handle this function, the court will issue that person letters testamentary as authority to do so. If a person dies intestate or did not name an executor in his or her will, the court will appoint an administrator and grant him or her LETTERS OF ADMINISTRATION to perform the duties of administration.

**Administrative acts:** Whatever actions are necessary to carry out the intent of statutes; those acts required by legislative policy as it is expressed in laws enacted by the legislature.

**Administrative adjudication:** The process by which an ADMINISTRATIVE AGENCY issues an order, such order being affirmative, negative, injunctive, or declaratory in form.

**Administrative agency:** An official governmental body empowered with the authority to direct and supervise the implementation of particular legislative acts. In addition to *agency,* such governmental bodies may be called commissions, corporations (e.g., FEDERAL DEPOSIT INSURANCE CORPORATION), boards, departments, or divisions.

**Administrative board:** A comprehensive phrase that can refer to any ADMINISTRATIVE AGENCY but usually means a public agency that holds hearings.

**Administrative discretion:** The exercise of professional expertise and judgment, as opposed to strict adherence to regulations or statutes, in making a decision or performing official acts or duties.

**Administrative law and procedure:** *Administrative law* is the body of law that allows for the creation of public regulatory agencies and contains all of the statutes, judicial decisions, and regulations that govern them. It is created by administrative agencies to implement their powers and duties in the form of rules, regulations, orders, and decisions. *Administrative procedure* constitutes the methods and processes before administrative agencies, as distinguished from judicial procedure, which applies to courts.

**Administrator:** A person appointed by the court to manage and take charge of the assets and liabilities of a decedent who has died without making a valid will.

**Admiralty and maritime law:** A field of law relating to, and arising from, the practice of the admiralty courts (tribunals that exercise jurisdiction over all contracts, TORTS, offenses, or injuries within maritime law) that regulates and settles special problems associated with sea navigation and commerce.

**Admissible:** A term used to describe information that is relevant to a determination of issues in any judicial proceeding so that such information can be properly considered by a judge or jury in making a decision.

**Admission:** A voluntary ACKNOWLEDGMENT made by a party to a lawsuit or in a criminal prosecution that certain facts that are inconsistent with the party's claims in the controversy are true.

**Admission to the bar:** The procedure that governs the authorization of attorneys to practice law before the state and federal courts.

**Admonition:** Any formal verbal statement made during a trial by a judge to advise and caution the jury on their duty as jurors, on the admissibility or nonadmissibility of evidence, or on the purpose for which any evidence admitted may be considered by them. A reprimand directed by the court to an attorney appearing before it cautioning the attorney about the unacceptability of his or her conduct before the court. If the attorney continues to act in the same way, ignoring the admonition, the judge will find him or her in CONTEMPT of court, punishable by a fine, imprisonment, or both. In criminal prosecution, before the court receives and records the plea of the accused, a statement made by a judge informing the accused on the effect and consequences of a plea of guilty to criminal charges.

**Adopt:** To accept, appropriate, choose, or select, as to adopt a child. To consent to and put into effect, as to adopt a constitution or a law.

**Adoption:** A two-step judicial process in conformance to state statutory provisions in which the legal obligations and rights of a child toward the biological parents are terminated and new rights and obligations are created between the child and the adoptive parents.

**Adult:** A person who by virtue of attaining a certain age, generally eighteen, is regarded in the eyes of the law as being able to manage his or her own affairs.

**Adulteration:** Mixing something impure with something genuine, or an inferior article with a superior one of the same kind.

**Adultery:** Voluntary sexual relations between an individual who is married and someone who is not the individual's spouse.

**Advance:** To pay money or give something of value before the date designated to do so; to provide capital to help a planned enterprise, expecting a return from it; to give someone an item before payment has been made for it.

**Advance sheets:** Pamphlets containing recently decided opinions of federal courts or state courts of a particular region.

**Advancement:** A gift of money or property made by a person while alive to his or her child or other legally recognized heir, the value of which the person intends to be deducted from the child's or heir's eventual share in the estate after the giver's death.

**Adversary proceeding:** Any action, hearing, investigation, inquest, or inquiry brought by one party against another in which the party seeking relief has given legal notice to and provided the other party with an opportunity to contest the claims that have been made against him or her. A court trial is a typical example of an adversary proceeding.

**Adversary system:** The scheme of American JURISPRUDENCE wherein a judge or jury renders a decision in a controversy between or among parties who assert contradictory positions during a judicial examination such as a trial, hearing, or other adjudication.

**Adverse interest:** The legal right or liability of a person called to testify as a witness in a lawsuit that might be lost or impaired if the party who called him or her to testify wins the case.

**Adverse possession:** A method of gaining legal title to real property by the actual, open, hostile, and continuous possession of it to the exclusion of its true owner for the period prescribed by state law. PERSONAL PROPERTY may also be acquired by adverse possession.

**Advice and consent:** The authority given by the U.S. Constitution to the Senate to ratify treaties and confirm presidential cabinet, ambassadorial, and judicial appointments.

**Advise:** To give an opinion or recommend a plan or course of action; to give notice; to encourage, inform, or acquaint.

**Advisement:** Deliberation; consultation.

**Advisory jury:** A jury that makes recommendations to a judge but does not render final judgment.

**Advisory opinion:** An opinion by a court as to the legality of proposed legislation or conduct, given in response to a request by the government, legislature, or some other interested party.

**Advocacy:** The act of PLEADING or arguing a case or a position; forceful persuasion.

**Advocate:** To support or defend by argument; to recommend publicly. An individual who presents or argues another's case; one who gives legal advice and pleads the cause of another before a court or tribunal; a counselor. A person admitted to the PRACTICE OF LAW who advises clients of their legal rights and argues their cases in court.

**Aeronautics:** The science and art of flight, encompassing the functioning and ownership of aircraft vehicles from balloons to those that travel into space.

**Affidavit:** A written statement of facts voluntarily made by an affiant under an oath or affirmation administered by a person authorized to do so by law.

**Affiliation proceeding:** A court hearing to determine whether a man against whom the action is brought is the father of an illegitimate child and thus legally bound to provide financial support for the child.

Formerly referred to as BASTARDY ACTIONS or proceedings in many jurisdictions, as of 2003 these were called PATERNITY or FILIATION PROCEEDINGS. In several states, these proceedings are governed in part by the Uniform Parentage Act, first adopted by the COMMISSIONERS ON UNIFORM LAWS in 1973. The purpose of the act is to identify natural fathers through a paternity test so that a court may order CHILD SUPPORT obligations against them.

**Affinity:** The relationship that a person has to the blood relatives of a spouse by virtue of the marriage.

**Affirm:** To ratify, establish, or reassert. To make a solemn and formal declaration, as a substitute for an oath, that the statements contained in an AFFIDAVIT are true or that a witness will tell the truth. In the practice of appellate courts, to declare a judgment, decree, or order valid and to concur in its correctness so that it must stand as rendered in the lower court. As a matter of PLEADING, to allege or aver a matter of fact.

**Affirmance:** A declaration by an appellate court that a judgment, order, or decree of a lower court that has been brought before it for review is valid and will be upheld.

**Affirmation:** A solemn and formal declaration of the truth of a statement, such as an AFFIDAVIT or the actual or prospective testimony of a witness or a party that takes the place of an oath. An affirmation is also used when a person cannot take an oath because of religious convictions.

**Affirmative action:** Employment programs required by federal statutes and regulations designed to remedy discriminatory practices in hiring minority group members; i.e. positive steps designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination; commonly based on population percentages of minority groups in a particular area. Factors considered are race, color, sex, creed, and age.

**Affirmative defense:** A new fact or set of facts that operates to defeat a claim even if the facts supporting that claim are true.

**Affray:** A criminal offense generally defined as the fighting of two or more persons in a public place that disturbs others.

**Aforesaid:** Before, already said, referred to, or recited.

**Aforethought:** In CRIMINAL LAW, intentional, deliberate, planned, or premeditated.

**After-acquired property clause:** A phrase in a mortgage (an interest in land that furnishes security for payment of a debt or performance of an obligation) that provides that any holdings obtained by the borrower subsequent to the date of the loan and mortgage will automatically constitute additional security for the loan.

**After-acquired title:** A legal doctrine under which, if a grantor conveys what is mistakenly believed to be good title to land that he or she did not own, and the grantor later acquires that title, it vests automatically in the grantee.

**After-born child:** A child born after a will has been executed by either parent or after the time in which a class gift made according to a trust arrangement expires.

**Age discrimination:** Prejudicial treatment or denial of rights based on age.

**Age of consent:** The age at which a person may marry without parental approval. The age at which a female is legally capable of agreeing to sexual intercourse, so that a male who engages in sex with her cannot be prosecuted for STATUTORY RAPE.

**Age of majority:** The age at which a person, formerly a minor or an infant, is recognized by law to be an adult, capable of managing his or her own affairs and responsible for any legal obligations created by his or her actions.

**Age of reason:** The age at which a child is considered capable of acting responsibly.

**Agency:** A consensual relationship created by contract or by law where one party, the principal, grants authority for another party, the agent, to act on behalf of and under the control of the principal to deal with a third party. An agency relationship is fiduciary in nature, and the actions and words of an agent exchanged with a third party bind the principal.

**Agent:** One who agrees and is authorized to act on behalf of another, a principal, to legally bind an individual in particular business transactions with third parties pursuant to an agency relationship.

**Aggravated assault:** A person is guilty of aggravated assault if he or she attempts to cause serious bodily injury to another or causes such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life; or attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon. In all jurisdictions statutes punish such aggravated assaults as assault with intent to murder (or rob or kill or rape) and assault with a dangerous (or deadly) weapon more severely than "simple" assaults.

**Aggravation:** Any circumstances surrounding the commission of a crime that increase its seriousness or add to its injurious consequences.

**Aggression:** Unjustified planned, threatened, or carried out use of force by one nation against another.

**Aggressive collection:** Various legal methods used by a creditor to force a debtor to repay an outstanding obligation.

**Aggrieved party:** An individual who is entitled to commence a lawsuit against another because his or her legal rights have been violated.

**Agreement:** A meeting of minds with the understanding and acceptance of reciprocal legal rights and duties as to particular actions or obligations, which the parties intend to exchange; a mutual assent to do or refrain from doing something; a contract.

The writing or document that records the meeting of the minds of the parties. An oral compact between two parties who join together for a common purpose intending to change their rights and duties.

**Agricultural law:** The body of law governing the cultivation of various crops and the raising and management of livestock to provide a food and fabric supply for human and animal consumption.

**Agriculture subsidies:** Payments by the federal government to producers of agricultural products for the purpose of stabilizing food prices, ensuring plentiful food production, guaranteeing farmers' basic incomes, and generally strengthening the agricultural segment of the national economy.

**Aid and abet:** To assist another in the commission of a crime by words or conduct.

**Aid and comfort:** To render assistance or counsel. Any act that deliberately strengthens or tends to strengthen enemies of the United States, or that weakens or tends to weaken the power of the United States to resist and attack such enemies is characterized as aid and comfort.

**Alcohol:** The active principle of intoxicating drinks, produced by the fermentation of sugars.

**Alderman or alderwoman:** A public officer of a town or city council or a local legislative body who is elected to the position by the persons he or she represents.

**Aleatory contract:** A mutual agreement between two parties in which the performance of the contractual obligations of one or both parties depends upon a fortuitous event.

**Alias:** *[Latin, Otherwise called.]* A term used to indicate that a person is known by more than one name.

**Alias writ:** A second writ, or court order, issued in the same case after an earlier writ of that kind has been issued but has not been effective.

**Alien enemy:** In INTERNATIONAL LAW, a foreign born citizen or subject of a nation or power that is hostile to the United States.

**Alienable:** The character of property that makes it capable of sale or transfer.

Absent a restriction in the owner's right, interests in real property and tangible PERSONAL PROPERTY are generally freely and fully alienable by their nature. Likewise, many types of intangible

personal property, such as a patent or TRADEMARK, are alienable forms of property. By comparison, constitutional rights of life, liberty, and property are not transferable and, thus, are termed inalienable. Similarly, certain forms of property, such as employee security benefits, are typically not subject to transfer on the part of the owner and are inalienable forms of property.

**Alienate:** To voluntarily convey or transfer title to real property by gift, disposition by will or the laws of DESCENT AND DISTRIBUTION, or by sale.

**Alienation clause:** A provision in a document permitting or forbidding a person from transferring property that is the subject of the document.

**Alienation of affection:** The removal of love, companionship, or aid of an individual's spouse.

**Aliens:** Foreign-born persons who have not been naturalized to become U.S. citizens under federal law and the Constitution.

**Alimony:** Payment that a family court may order one person in a couple to make to the other person when that couple separates or divorces.

**All fours:** Identical; similar.

**Allegation:** The assertion, claim, declaration, or statement of a party to an action, setting out what he or she expects to prove.

**Allege:** To state, recite, assert, or charge the existence of particular facts in a PLEADING or an indictment; to make an allegation.

**Allegiance:** In ENGLISH LAW, the duty of loyalty and obedience owed by all persons born within the king's realm that attaches immediately upon their birth and that they cannot be relieved of by their own actions.

In U.S. law, the obligation of fidelity and obedience that is owed by native born and naturalized American citizens to the United States that cannot be relinquished without the consent of the government expressed by a statutory enactment.

**Allocation:** The apportionment or designation of an item for a specific purpose or to a particular place.

**Allocution:** The formal inquiry by a judge of an accused person, convicted of a crime, as to whether the person has any legal cause to show why judgment should not be pronounced against him or her or as to whether the person has anything to say to the court before being sentenced.

**Allodial:** Free; not subject to the rights of any lord or superior; owned without obligation of vassalage or fealty; the opposite of feudal.

A description given to the outright ownership of land that did not impose upon its owner the performance of feudal duties.

**Allograph:** A writing or signature made by one person for another.

**Allonge:** Additional paper firmly attached to COMMERCIAL PAPER, such as a promissory note, to provide room to write endorsements.

**Allotment:** A portion, share, or division. The proportionate distribution of shares of stock in a corporation. The partition and distribution of land.

**Alter ego:** A doctrine used by the courts to ignore the corporate status of a group of stockholders, officers, and directors of a corporation in reference to their limited liability so that they may be held personally liable for their actions when they have acted fraudulently or unjustly or when to refuse to do so would deprive an innocent victim of redress for an injury caused by them.

**Alteration:** Modification; changing a thing without obliterating it.

**Alteration of instruments:** A change in the meaning or language of a legal document, such as a contract, deed, lease, or COMMERCIAL PAPER, that is made by one party to the document without the consent of the other after it has been signed or completed.

**Alternative dispute resolution:** Procedures for settling disputes by means other than litigation; e.g., by ARBITRATION, mediation, or minitrials. Such procedures, which are usually less costly and more expeditious than litigation, are increasingly being used in commercial and labor disputes, DIVORCE actions, in resolving motor vehicle and MEDICAL MALPRACTICE tort claims, and in other disputes that would likely otherwise involve court litigation.

**Alternative relief:** Remedies sought in a lawsuit in various forms or in the alternative, such as a demand for SPECIFIC PERFORMANCE of a contract or monetary damages to compensate for the failure to perform the obligation, or both.

**Alternative writ:** An order, issued originally by the king in England but more recently by a court, commanding a person to do a specific thing or to appear and explain why he or she should not be compelled to do it.

**Ambassadors and consuls:** An *ambassador* is the foreign diplomatic representative of a nation who is authorized to handle political negotiations between his or her country and the country where the ambassador has been assigned. A *consul* is the commercial agent of a nation, who is empowered only to engage in business transactions, and not political matters in the country where he or she is stationed.

**Ambiguity:** Uncertainty or doubtfulness of the meaning of language.

**Ambit:** A boundary line that indicates ownership of a parcel of land as opposed to other parcels; an exterior or enclosing line. The limits of a power or jurisdiction. The delineation of the scope of a particular subject matter.

**Ambulance chaser:** A colloquial phrase that is used derisively for a person who is hired by an attorney to seek out NEGLIGENCE cases at the scenes of accidents or in hospitals where injured parties are treated, in exchange for a percentage of the damages that will be recovered in the case.

Also used to describe attorneys who, upon learning of a personal injury that might have been caused by the negligence or the wrongful act of another, immediately contact the victim for consent to represent him or her in a lawsuit in exchange for a CONTINGENT FEE, a percentage of the judgment recovered.

**Ambulatory:** Movable; revocable; subject to change; capable of alteration.

**Amendment:** The modification of materials by the addition of supplemental information; the deletion of unnecessary, undesirable, or outdated information; or the correction of errors existing in the text.

**Amicable action:** An action commenced and maintained by the mutual consent and arrangement of the parties to obtain a judgment of a court on a doubtful QUESTION OF LAW that is based upon facts that both parties accept as being correct and complete.

**Amicus curiae:** Literally, friend of the court. A person with strong interest in or views on the subject matter of an action, but not a party to the action, may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views. Such amicus curiae briefs are commonly filed in appeals concerning matters of a broad public interest; e.g., civil rights cases. They may be filed by private persons or the government. In appeals to the U.S. courts of appeals, an amicus brief may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof.

**Amnesty:** The action of a government by which all persons or certain groups of persons who have committed a criminal offense—usually of a political nature that threatens the sovereignty of the government (such as SEDITION or treason)—are granted IMMUNITY from prosecution.

**Amortization:** The reduction of a debt incurred, for example, in the purchase of stocks or bonds, by regular payments consisting of interest and part of the principal made over a specified time period upon the expiration of which the entire debt is repaid. A mortgage is amortized when it is repaid with periodic payments over a particular term. After a certain portion of each payment is applied to the interest on the debt, any balance reduces the principal.

The allocation of the cost of an intangible asset, for example, a patent or COPYRIGHT, over its estimated useful life that is considered an expense of doing business and is used to offset the earnings of the asset by its declining value. If an intangible asset has an indefinite life, such as good will, it cannot be amortized.

**Amotion:** Putting out; removal; taking away; dispossession of lands.

**Amount in controversy:** The value of the relief demanded or the amount of monetary damages claimed in a lawsuit.

**Analogy:** The inference that two or more things that are similar to each other in some respects are also similar in other respects.

**Anarchism:** The theory espousing a societal state in which there is no structured government or law or in which there is resistance to all current forms of government.

**Ancient lights:** A doctrine of English COMMON LAW that gives a landowner an EASEMENT or right by prescription to the unobstructed passage of light and air from adjoining land if the landowner has had uninterrupted use of the lights for twenty years.

**Ancient writing:** An original document affecting the transfer of real property, which can be admitted as evidence in a lawsuit because its aged condition and its location upon discovery sufficiently establish its authenticity.

**Ancillary:** Subordinate; aiding. A legal proceeding that is not the primary dispute but which aids the judgment rendered in or the outcome of the main action. A descriptive term that denotes a legal claim, the existence of which is dependent upon or reasonably linked to a main claim.

**Ancillary administration:** The settlement and distribution of a decedent's property in the state where it is located and which is other than the state in which the decedent was domiciled.

**Animal rights:** Protection of animals from cruelty through requirements of humane treatment. Laws protecting animal rights proscribe certain forms of brutal and merciless treatment of animals in medical and scientific research and in the handling of and slaughter of animals for human consumption.

**Animus:** *[Latin, Mind, soul, or intention.]* A tendency or an inclination toward a definite, sometimes unavoidable, goal; an aim, objective, or purpose.

**Annexation:** The act of attaching, uniting, or joining together in a physical sense; consolidating.

**Annotation:** A note, summary, or commentary on some section of a book or a statute that is intended to explain or illustrate its meaning.

**Annual percentage rate:** The actual cost of borrowing money, expressed in the form of a yearly measure to allow consumers to compare the cost of borrowing money among several lenders.

**Annual report:** A document published by public corporations on a yearly basis to provide stockholders, the public, and the government with financial data, a summary of ownership, and the accounting practices used to prepare the report.

**Annuity:** A right to receive periodic payments, usually fixed in size, for life or a term of years that is created by a contract or other legal document.

**Annulment:** A judgment by a court that retroactively invalidates a marriage to the date of its formation.

**Anon.:** An abbreviation for anonymous, nameless, or name unknown.

**Answer:** The first responsive pleading filed by the defendant in a civil action; a formal written statement that admits or denies the allegations in the complaint and sets forth any available AFFIRMATIVE DEFENSES.

**Ante:** *[Latin, Before.]* A reference to a previous portion of a report or textbook.

**Antecedent debt:** A legally enforceable obligation, which has been in existence prior to the time in question, to reimburse another with money or property.

**Anticipation:** The performance of an act or obligation before it is legally due. In patent law, the publication of the existence of an invention that has already been patented or has a PATENT PENDING, which are grounds for denying a patent to an invention that has substantially the same structure and function as the earlier invention.

**Anticipatory repudiation:** The unjustifiable denial by a party to a contract of any intention to perform contractual duties, which occurs prior to the time performance is due.

**Antinomy:** An expression in law and logic to indicate that two authorities, laws, or propositions are inconsistent with each other.

**Antitrust law:** Legislation enacted by the federal and various state governments to regulate trade and commerce by preventing unlawful restraints, price-fixing, and monopolies; to promote competition; and to encourage the production of quality goods and services at the lowest prices, with the primary goal of safeguarding public welfare by ensuring that consumer demands will be met by the manufacture and sale of goods at reasonable prices.

**Apparent:** That which is clear, plain, and evident.

**Appeal:** Timely resort by an unsuccessful party in a lawsuit or administrative proceeding to an appropriate superior court empowered to review a final decision on the ground that it was based upon an erroneous application of law.

**Appear:** To come before a court as a party or a witness in a lawsuit.

**Appearance:** A coming into court by a party to a suit, either in person or through an attorney, whether as plaintiff or defendant. The formal proceeding by which a defendant submits to the jurisdiction of the court. The voluntary submission to a court's jurisdiction.

**Appellant:** A person who, dissatisfied with the judgment rendered in a lawsuit decided in a lower court or the findings from a proceeding before an ADMINISTRATIVE AGENCY, asks a superior court to review the decision.

**Appellate:** Relating to appeals; reviews by superior courts of decisions of inferior courts or administrative agencies and other proceedings.

**Appellate advocacy:** Legal representation by an attorney before any state or federal court of intermediate or final appeal.

**Appellate court:** A court having jurisdiction to review decisions of a trial-level or other lower court.

**Appellee:** A party who has won a judgment in a lawsuit or favorable findings in an administrative proceeding, which judgment or findings the losing party, the appellant, seeks to have a higher court reverse or set aside.

**Appoint:** To designate, select, or assign authority to a position or an office.

**Appointment, power of:** A power that is conferred upon a donee to dispose of the donor's property by nominating and selecting one or more third-parties to receive it. The property may consist

of tangible items like cars, boats, and household items, or it may consist of an intangible interest in property, such as the right to receive dividend income from stocks.

**Apportionment:** The process by which legislative seats are distributed among units entitled to representation; determination of the number of representatives that a state, county, or other subdivision may send to a legislative body. The U.S. Constitution provides for a census every ten years, on the basis of which Congress apportions representatives according to population; each state, however, must have at least one representative. Districting is the establishment of the precise geographical boundaries of each such unit or constituency. Apportionment by state statute that denies the rule of ONE-PERSON, ONE-VOTE is violative of EQUAL PROTECTION OF LAWS.

Also, the allocation of a charge or cost such as real estate taxes between two parties, often in the same ratio as the respective times that the parties are in possession or ownership of property during the fiscal period for which the charge is made or assessed.

**Appraisal:** A valuation or an approximation of value by impartial, properly qualified persons; the process of determining the value of an asset or liability, which entails expert opinion rather than express commercial transactions.

**Appraiser:** A person selected or appointed by a competent authority or an interested party to evaluate the financial worth of property.

**Appreciation:** The fair and reasonable estimation of the value of an item. The increase in the financial worth of an asset as compared to its value at a particular earlier date as a result of inflation or greater market demand.

**Apprehension:** The seizure and arrest of a person who is suspected of having committed a crime.

A reasonable belief of the possibility of imminent injury or death at the hands of another that justifies a person acting in SELF-DEFENSE against the potential attack.

**Apprentice:** A person who agrees to work for a specified time in order to learn a trade, craft, or profession in which the employer, traditionally called the master, assents to instruct him or her.

**Appropriation:** The designation by the government or an individual of the use to which a fund of money is to be applied. The selection and setting apart of privately owned land by the government for public use, such as a military reservation or public building. The diversion of water flowing on public domain from its natural course by means of a canal or ditch for a private beneficial use of the appropriator.

**Approval:** The present confirmation, ratification, or assent to some action or thing done by another, which is submitted to an individual, group, or governmental body for judgment. The acceptance by a judge of a bond, security, or other document that is required by law to meet with the judge's satisfaction before it becomes legally effective.

**Appurtenance:** An ACCESSORY or adjunct that is attached and incidental to something that has greater importance or value. As applied to real property, an object attached to or a right to be used with land as an incidental benefit but which is necessary to the complete use and enjoyment of the property.

**Arbiter:** *[Latin, One who attends something to view it as a spectator or witness.]* Any person who is given an absolute power to judge and rule on a matter in dispute.

**Arbitrage:** The simultaneous purchase in one market and sale in another of a security or commodity in hope of making a profit on price differences in the different markets.

**Arbitrary:** Irrational; capricious.

**Arbitration:** The submission of a dispute to an unbiased third person designated by the parties to the controversy, who agree in advance to comply with the award—a decision to be issued after a hearing at which both parties have an opportunity to be heard.

**Architect:** A person who prepares the plan and design of a building or other structure and sometimes supervises its construction.

**Arguendo:** In the course of the argument.

**Argument:** A form of expression consisting of a coherent set of reasons presenting or supporting a point of view; a series of reasons given for or against a matter under discussion that is intended to convince or persuade the listener.

**Argumentative:** Controversial; subject to argument.

**Armistice:** A suspending or cessation of hostilities between belligerent nations or forces for a considerable time. An armistice differs from a mere "suspension of arms" in that the latter is concluded for very brief periods and for local military purposes only, whereas an armistice not only covers a longer period, but is agreed upon for political purposes. It is said to be *general* if it relates to the whole area of the war, and *partial* if it relates to only a portion of that area. Partial armistices are sometimes called truces but there is no hard and fast distinction.

**Arraignment:** A criminal proceeding at which the defendant is officially called before a court of competent jurisdiction, informed of the offense charged in the complaint, information, indictment, or other charging document, and asked to enter a plea of guilty, not guilty, or as otherwise permitted by law. Depending on the jurisdiction, arraignment may also be the proceeding at which the court determines whether to set bail for the defendant or release the defendant on his or her own recognizance.

**Array:** The entire group of jurors selected for a trial from which a smaller group is subsequently chosen to form a petit jury or a GRAND JURY; the list of potential jurors.

**Arrears:** A sum of money that has not been paid or has only been paid in part at the time it is due.

**Arrest:** A seizure or forcible restraint; an exercise of the power to deprive a person of his or her liberty; the taking or keeping of a person in custody by legal authority, especially, in response to a criminal charge.

**Arrest of judgment:** The postponement or stay of an official decision of a court, or the refusal to render such a determination, after a verdict has been reached in an action at law or a criminal prosecution, because some defect appears on the face of the record that, if a decision is made, would make it erroneous or reversible.

**Arrest warrant:** A written order issued by authority of the state and commanding the seizure of the person named.

**Arrogation:** Claiming or seizing something without justification; claiming something on behalf of another. In CIVIL LAW, the ADOPTION of an adult who was legally capable of acting for himself or herself.

**Arson:** At COMMON LAW, the malicious burning or exploding of the dwelling house of another, or the burning of a building within the curtilage, the immediate surrounding space, of the dwelling of another.

**Articles:** Series or subdivisions of individual and distinct sections of a document, statute, or other writing, such as the ARTICLES OF CONFEDERATION. Codes or systems of rules created by written agreements of parties or by statute that establish standards of legally acceptable behavior in a business relationship, such as articles of incorporation or articles of partnership. Writings that embody contractual terms of agreements between parties.

**Articles of confederation:** The document that set forth the terms under which the original thirteen states agreed to participate in a centralized form of government, in addition to their self-rule, and that was in effect from March 1, 1781, to March 4, 1789, prior to the adoption of the Constitution.

**Articles of impeachment:** Formal written allegations of the causes that warrant the criminal trial of a public official before a quasi-political court.

**Articles of incorporation:** The document that must be filed with an appropriate government agency, commonly the office of the SECRETARY OF STATE, if the owners of a business want it to be given legal recognition as a corporation.

**Articles of organization:** A document required to be filed with an appropriate state or local government agency, in order to establish legal recognition of a LIMITED LIABILITY COMPANY (LLC). Articles of organization closely parallel articles of incorporation needed for legal creation and recognition of corporations.

**Articles of partnership:** A written compact by which parties agree to pool their money, labor, and/or skill to carry on a business for profit. The parties sign the compact with the understanding that they will share proportionally the losses and profits according to the provisions and conditions that they have mutually assented would govern their business relationship.

**Articles of war:** Codes created to prescribe the manner in which the ARMED SERVICES of a nation are to be governed.

**Artificial insemination:** The process by which a woman is medically impregnated using semen from her husband or from a third-party donor.

**Artificial person:** A legal entity that is not a human being but for certain purposes is considered by virtue of statute to be a natural person.

**As is:** A term used to describe a sales transaction in which the seller offers goods in their present, existing condition to prospective buyers.

**As per:** A phrase commonly recognized to mean "in accordance with the terms of" a particular document—such as a contract, deed, or affidavit—or "as authorized by the contract."

**Asportation:** The removal of items from one place to another, such as carrying things away illegally.

**Assassination:** Murder committed by a perpetrator without the personal provocation of the victim, who is usually a government official.

**Assault:** At COMMON LAW, an intentional act by one person that creates an apprehension in another of an imminent harmful or offensive contact.

**Assault and battery:** Two separate offenses against the person that when used in one expression may be defined as any unlawful and unpermitted touching of another. Assault is an act that creates an apprehension in another of an imminent, harmful, or offensive contact. The act consists of a threat of harm accompanied by an apparent, present ability to carry out the threat. BATTERY is a harmful or offensive touching of another.

**Assembly:** The congregation of a number of persons at the same location.

**Assent:** An intentional approval of known facts that are offered by another for acceptance; agreement; consent.

**Assess:** To determine financial worth. To ascertain the amount of damages. To fix and adjust the individual shares to be contributed by several persons toward a common beneficial objective in proportion to the benefit each person will receive. To tax by having qualified experts estimate the value of property by considering the nature of the property, its size, the value of other comparable property, and the proportionate share of services that is used by that property. To levy a charge on the owner of property that has been improved at the expense of the local government unit, such as when sewers or sidewalks are installed.

**Assessed valuation:** The financial worth assigned to property by taxing authorities that is used as a basis or factor against which the tax rate is applied.

**Assessment:** The process by which the financial worth of property is determined. The amount at which an item is valued. A demand by the board of directors of a corporation for the payment of any money that is still owed on the purchase of capital stock. The determination of the amount of damages to be awarded to a plaintiff who has been successful in a lawsuit. The ascertainment of the pro rata share of taxes to be paid by members of a group of taxpayers who have directly benefited from a particular common goal or project according to the benefit conferred upon the individual or his or her property. This is known as a special assessment. The listing and valuation of property for purposes of fixing a tax upon it for which its owner will be liable. The procedure by which the INTERNAL REVENUE SERVICE, or other government department of taxation, declares that a taxpayer owes additional tax because, for example, the individual has understated personal gross income or has taken deductions to which he or she is not entitled. This process is also known as a *deficiency assessment.*

**Asset:** Real or PERSONAL PROPERTY, whether tangible or intangible, that has financial value and can be used for the payment of its owner's debts.

**Assign:** To transfer to another, as to assign one's right to receive rental income from property to another. To designate for a particular function, as to assign an attorney to defend an indigent in a criminal prosecution. To specify or point out, as to assign errors in a lower court proceeding on a writ of error that is submitted to request a court to reverse the judgment of the lower court.

**Assigned account:** A type of secured transaction whereby an account receivable is pledged to a bank, factor, or other lender to secure the repayment of a loan.

**Assigned risk:** A danger or hazard of loss or injury that an insurer will not normally accept for coverage under a policy issued by the insurer, but that the insurance company is required by state law to offer protection against by participating in a pool of insurers who are also compelled to provide coverage.

**Assigned risk plan:** An insurance plan created and imposed by state statute under which persons who normally would be denied insurance coverage as bad risks are permitted to purchase insurance from a pool of insurers who must offer coverage to such individuals.

**Assignment:** A transfer of rights in real property or PERSONAL PROPERTY to another that gives the recipient—the transferee—the rights that the owner or holder of the property—the transferor—had prior to the transfer.

**Assignment for benefit of creditors:** The voluntary transfer of all or most of a debtor's property to another person in trust so that he or she will collect any money that is owed to the debtor, sell the debtor's property, and apply the money received to the payment of the debts, returning any surplus to the debtor.

**Assigns:** Individuals to whom property is, will, or may be transferred by conveyance, will, DESCENT AND DISTRIBUTION, or statute; assignees.

**Assistance, writ of:** A court order issued to enforce an existing judgment.

**Assize, or assise:** A judicial procedure in early England whereby a certain number of men in a community were called together to hear and decide a dispute; a type of court. A type of writ, commanding the convening of such a tribunal in order to determine disputed rights to possess land. An edict or statute issued by an ancient assembly.

**Associate justice:** The designation given to a judge who is not the chief or presiding justice of the court on which he or she sits.

**Assumpsit:** *[Latin, He undertook or he promised.]* A promise by which someone assumes or undertakes an obligation to another person. The promise may be oral or in writing, but it is not under seal. It is express when the person making the promise puts it into distinct and specific language, but it may also be implied because the law sometimes imposes obligations based on the conduct of the parties or the circumstances of their dealings.

**Assumption:** The undertaking of the repayment of a debt or the performance of an obligation owed by another.

**Assumption of risk:** A defense, facts offered by a party against whom proceedings have been instituted to diminish a plaintiff's CAUSE OF ACTION or defeat recovery to an action in NEGLIGENCE, which entails proving that the plaintiff knew of a dangerous condition and voluntarily exposed himself or herself to it.

**Assured:** A person protected by insurance coverage against loss or damage stipulated by the provisions of a policy purchased from an insurance company or an underwriter.

**Asylum:** Protection granted to ALIENS who cannot return to their homeland.

**Asylums:** Establishments that exist for the aid and protection of individuals in need of assistance due to disability, such as insane persons, those who are physically handicapped, or persons who are unable to properly care for themselves, such as orphans.

**At issue:** A phrase that describes the status of parties in a lawsuit when they make contradictory statements about a point specified in their pleadings.

**At large:** Not limited to any place, person, or topic; for example, a representative at large is elected by the voters of the state as a whole rather than voters of a particular district. Free from control or restraint, such as a criminal at large.

**At law:** According to law; by, for, or in the law, as in the professional title *attorney at law.* Within or arising from the traditions of the COMMON LAW as opposed to EQUITY, the system of law that developed alongside the common law and emphasized fairness and justice rather than enforcement of technical rules.

**Attachment:** The legal process of seizing property to ensure satisfaction of a judgment.

**Attainder:** At COMMON LAW, that extinction of CIVIL RIGHTS and capacities that took place whenever a person who had committed TREASON or a felony received a sentence of death for the crime.

The effect of *attainder* upon a felon was, in general terms, that all estate, real and personal, was forfeited. In common law, attainder resulted in three ways: *by confession, by verdict,* and *by process* or *outlawry.* The first case was where the prisoner pleaded guilty at the bar, or having fled, confessed guilt and abjured the realm to save his or her life. The second was where the prisoner pleaded not guilty at the bar, and the jury brought in a verdict against him or her. The third, when the person accused made his or her escape and was outlawed.

In England, by statute 33 & 34 Vict. c. 23, attainder upon conviction, with consequent corruption of blood, FORFEITURE, or ESCHEAT, was abolished. In the United States, the doctrine of attainder is now scarcely known, although during and shortly after the Revolution acts of attainder were passed by several of the states. The passage of such bills is expressly forbidden by the Constitution (Art. I, Sec. 9).

*Bills of attainder* are special acts of the legislature that inflict capital punishments upon persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a *bill of pains and penalties,* but both are included in the prohibition in the Constitution (Art. I, Sec. 9).

**Attempt:** An undertaking to do an act that entails more than mere preparation but does not result in the successful completion of the act.

**Attenuate:** To reduce the force or severity; to lessen a relationship or connection between two objects.

**Attest:** To solemnly declare verbally or in writing that a particular document or testimony about an event is a true and accurate representation of the facts; to bear witness to. To formally certify by a signature that the signer has been present at the execution of a particular writing so as to rebut any potential challenges to its authenticity.

**Attestation:** The act of attending the execution of a document and bearing witness to its authenticity, by signing one's name to it to affirm that it is genuine. The certification by a custodian of records that a copy of an original document is a true copy that is demonstrated by his or her signature on a certificate.

**Attorn:** To turn over money, rent, or goods to another. To assign to a specific function or service.

**Attorney-client privilege:** In the law of evidence, a client's privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications between the client and his or her attorney. Such privilege protects communications between attorney and client that are made for the purpose of furnishing or obtaining professional legal advice or assistance. That privilege that permits an attorney to refuse to testify as to communications from the client. It belongs to the client, not the attorney, and hence only the client may waive it. In federal courts, state law is applied with respect to such privilege.

**Attorney:** A person admitted to practice law in at least one jurisdiction and authorized to perform criminal and civil legal functions on behalf of clients. These functions include providing legal counsel, drafting legal documents, and representing clients before courts, administrative agencies, and other tribunals.

**Attorney general:** The chief law enforcement officer of the United States or of a state government, typically serving in an EXECUTIVE BRANCH position. The individual represents the government in litigation and serves as the principal advisor to government officials and agencies in legal matters.

**Attorney misconduct:** Behavior by an attorney that conflicts with established rules of professional conduct and is punishable by disciplinary measures.

**Attorney's lien:** The right of a lawyer to hold a client's property or money until payment has been made for legal aid and advice given.

**Auctions:** A sale open to the general public and conducted by an auctioneer, a person empowered to conduct such a sale, at which property is sold to the highest bidder.

**Audi alteram partem:** [*Latin, hear the other side.*] It embodies the concept in CRIMINAL LAW that no person should be condemned unheard; it is akin to DUE PROCESS. The notion that an individual, whose life, liberty, or property are in legal jeopardy, has the right to confront the evidence against him or her in a fair hearing is one of the fundamental principles of CONSTITUTIONAL LAW in the United States and England.

**Audit:** A systematic examination of financial or accounting records by a specialized inspector, called an auditor, to verify their accuracy and truthfulness. A hearing during which financial data are investigated for purposes of authentication.

**Authentication:** The confirmation rendered by an officer of a court that a certified copy of a judgment is what it purports to be, an accurate duplicate of the original judgment. In the law of evidence, the act of establishing a statute, record, or other document, or a certified copy of such an instrument as genuine and official so that it can be used in a lawsuit to prove an issue in dispute.

**Authorities:** Governmental entities that have been created and delegated with official responsibilities, such as a county highway authority. In legal research and citation, entities cited as sources of law, such as statutes, judicial decisions, and legal textbooks. Parties support their positions in a lawsuit by citing authorities in briefs, motions, and other documents submitted to the court.

**Authorize:** To empower another with the legal right to perform an action.

**Automatism:** An involuntary act such as sleepwalking that is performed in a state of unconsciousness. The subject does not act voluntarily and is not fully aware of his or her actions while in a state of automatism. Automatism has been used as a defense to show that a defendant lacked the

requisite mental state for the commission of a crime. A defense based on automatism asserts that there was no *act* in the legal sense because at the time of the alleged crime, the defendant had no psychic awareness or volition. Some American jurisdictions have recognized automatism as a complete, AFFIRMATIVE DEFENSE to most criminal charges. An INSANITY DEFENSE, by comparison, asserts that the accused possessed psychic awareness or volition, but at the time of the offense, the accused possessed a mental disorder or defect that caused them to commit the offense or prevented them from understanding the wrongness of the offense.

**Autopsy:** The dissection of a dead body by a medical examiner or physician authorized by law to do so in order to determine the cause and time of a death that appears to have resulted from other than natural causes.

**Auxiliary:** Aiding; ancillary; subordinate; subsidiary.

**Aver:** To specifically allege certain facts or claims in a PLEADING.

**Averment:** The allegation of facts or claims in a PLEADING.

**Avoidable consequences:** The doctrine that places the responsibility of minimizing damages upon the person who has been injured.

**Avoidance:** An escape from the consequences of a specific course of action through the use of legally acceptable means. Cancellation; the act of rendering something useless or legally ineffective.

**Avowal:** An open declaration by an attorney representing a party in a lawsuit, made after the jury has been removed from the courtroom, that requests the admission of particular testimony from a witness that would otherwise be inadmissible because it has been successfully objected to during the trial.

**Avulsion:** The immediate and noticeable addition to land caused by its removal from the property of another, by a sudden change in a water bed or in the course of a stream.

**Award:** To concede; to give by judicial determination; to rule in favor of after an evaluation of the facts, evidence, or merits. The decision made by a panel of arbitrators or commissioners, a jury, or other authorized individuals in a controversy that has been presented for resolution. A document that memorializes the determination reached in a dispute.

**Back pay award:** A legally enforceable decree ordering an employer to pay to an employee retroactively a designated increase in his or her salary that occurred during a particular period of employment. A decision rendered by a judicial or QUASI-JUDICIAL body that an employee has a legal right to collect accrued salary that has not been paid out to him or her.

**Back to work agreement:** The accord reached between an employer and a union to which his or her employees belong that establishes the terms and conditions governing the return of striking employees to work.

**Backdating:** Predating a document or instrument prior to the date it was actually drawn. The negotiability of an instrument is not affected by the fact that it is backdated.

**Bad faith:** The fraudulent deception of another person; the intentional or malicious refusal to perform some duty or contractual obligation.

**Bail:** The system that governs the status of individuals charged with committing crimes, from the time of their arrest to the time of their trial, and pending appeal, with the major purpose of ensuring their presence at trial.

**Bail bond:** A written promise signed by a defendant or a surety (one who promises to act in place of another) to pay an amount fixed by a court should the defendant named in the document fail to appear in court for the designated criminal proceeding at the date and time specified.

**Bailee:** One to whom PERSONAL PROPERTY is entrusted for a particular purpose by another, the bailor, according to the terms of an express or implied agreement.

**Bailiff:** An individual who is entrusted with some authority, care, guardianship, or jurisdiction over designated persons or property. One who acts in a managerial or ministerial capacity or takes care of land, goods, and chattels of another in order to make the best profit for the owner. A minor officer of a court serving primarily as a messenger or usher. A low-level court official or sheriff's deputy whose duty is to preserve and protect orderly conduct in court proceedings.

**Bailment:** The temporary placement of control over, or possession of, PERSONAL PROPERTY by one person, the bailor, into the hands of another, the bailee, for a designated purpose upon which the parties have agreed.

**Bailor:** One who places control over or possession of PERSONAL PROPERTY in the hands of another, a bailee, for its care, safekeeping, or use, in accordance to the terms of a mutual agreement.

**Bait and switch:** A deceptive sales technique that involves advertising a low-priced item to attract customers to a store, then persuading them to buy more expensive goods by failing to have a sufficient supply of the advertised item on hand or by disparaging its quality.

**Balance sheet:** A comprehensive financial statement that is a summarized assessment of a company's accounts specifying its assets and liabilities. A report, usually prepared by independent auditors or accountants, which includes a full and complete statement of all receipts and disbursements of a particular business. A review that shows a general balance or summation of all accounts without showing the particular items that make up the several accounts.

**Balancing:** A process sometimes used by state and federal courts in deciding between the competing interests represented in a case.

**Balloon payment:** The final installment of a loan to be paid in an amount that is disproportionately larger than the regular installment.

**Banc:** *[French, Bench.]* The location where a court customarily or permanently sits.

**Banishment:** A form of punishment imposed on an individual, usually by a country or state, in which the individual is forced to remain outside of that country or state.

**Banker's lien:** An enforceable right of a bank to hold in its possession any money or property belonging to a customer and to apply it to the repayment of any outstanding debt owed to the bank, provided that, to the bank's knowledge, such property is not part of a trust fund or is not already burdened with other debts.

**Bankruptcy:** A federally authorized procedure by which a debtor—an individual, corporation, or municipality—is relieved of total liability for its debts by making court-approved arrangements for their partial repayment.

**Banks and banking:** Authorized financial institutions and the business in which they engage, which encompasses the receipt of money for deposit, to be payable according to the terms of the account; collection of checks presented for payment; issuance of loans to individuals who meet certain requirements; discount of COMMERCIAL PAPER; and other money-related functions.

**Bar association:** An organization of lawyers established to promote professional competence, enforce standards of ethical conduct, and encourage a spirit of public service among members of the legal profession.

**Bar examination:** A written test that an individual must pass before becoming licensed to practice law as an attorney.

**Bargain:** A reciprocal understanding, contract, or agreement of any sort usually pertaining to the loan, sale, or exchange of property between two parties, one of whom wants to dispose of an item that the other wants to obtain. To work out the terms of an agreement; to negotiate in GOOD FAITH for the purpose of entering into an agreement.

**Bargaining agent:** A union that possesses the sole authority to act on behalf of all the employees of a particular type in a company.

**Barratry:** In CRIMINAL LAW, the frequent incitement of lawsuits and quarrels that is a punishable offense.

**Barrister:** In ENGLISH LAW, an attorney who has an exclusive right of argument in all the superior courts.

**Barter:** The exchange of goods or services without the use of money as currency.

**Base fee:** An interest in real property that has the potential to last forever, provided a specific contingency does not occur.

**Base line:** Survey line used in the government survey to establish township lines. Horizontal elevation line used as a centerline in a highway survey.

**Basis:** The minimum, fundamental constituents, foundation, or support of a thing or a system without which the thing or system would cease to exist. In accounting, the value assigned to an asset that is sold or transferred so that it can be determined whether a gain or loss has resulted from the transaction. The amount that property is estimated to be worth at the time it is purchased, acquired, and received for tax purposes.

**Bastardy action:** An archaic name given to a court proceeding in which the PATERNITY of an illegitimate child is determined in order to impose and enforce support obligations upon the father.

**Battel:** Physical combat engaged in by an accuser and accused to resolve their differences, usually involving a serious crime or ownership of land. It was recognized by the English king from the eleventh to seventeenth centuries.

**Battered child/spouse syndrome:** A condition created by sustained physical, sexual, and/or emotional abuse, which creates a variety of physical and emotional symptoms.

**Battery:** At common law, an intentional unpermitted act causing harmful or offensive contact with the "person" of another.

**Bearer:** One who is the holder or possessor of an instrument that is negotiable—for example, a check, a draft, or a note—and upon which a specific payee is not designated.

**Belief:** Mental reliance on or acceptance of a particular concept, which is arrived at by weighing external evidence, facts, and personal observation and experience.

**Below:** In an inferior, subordinate, or lower place in regard to any entity.

**Bench:** A forum of justice comprised of the judge or judges of a court. The seat of the court occupied by the judges.

**Bench trial:** A trial conducted before a judge presiding without a jury.

**Bench warrant:** A process that is initiated by the court pro se in order to attach or arrest a person. An order that a judge, or group of judges, issues directly to the police with the purpose of directing a person's arrest.

**Beneficial association:** An incorporated or voluntary nonprofit organization that has been created primarily to protect and aid its members and their dependents.

**Beneficial interest:** Profits or advantages from property derived from the terms of a trust agreement.

**Beneficial use:** A right to utilize real property, including light, air, and access to it, in any lawful manner to gain a profit, advantage, or enjoyment from it. A right to enjoy real or PERSONAL PROPERTY held by a person who has equitable title to it while legal title is held by another.

**Beneficiary:** An organization or a person for whom a trust is created and who thereby receives the benefits of the trust. One who inherits under a will. A person entitled to a beneficial interest or a right to profits, benefit, or advantage from a contract.

**Benefit of clergy:** In old England, the privilege of clergy that allowed them to avoid trial by all courts of the civil government.

**Bequeath:** To dispose of PERSONAL PROPERTY owned by a decedent at the time of death as a gift under the provisions of the decedent's will.

**Bequest:** A gift of PERSONAL PROPERTY, such as money, stock, bonds, or jewelry, owned by a decedent at the time of death which is directed by the provisions of the decedent's will; a legacy.

**Best evidence:** An original document or object offered as proof of a fact in a lawsuit as opposed to a photocopy of, or other substitute for, the item or the testimony of a witness describing it.

**Bestiality:** Sexual relations between a human being and an animal.

**Beyond a reasonable doubt:** The standard that must be met by the prosecution's evidence in a criminal prosecution: that no other logical explanation can be derived from the facts except that the defendant committed the crime, thereby overcoming the presumption that a person is innocent until proven guilty.

**Bias:** A predisposition or a preconceived opinion that prevents a person from impartially evaluating facts that have been presented for determination; a prejudice.

**Bicameral:** The division of a legislative or judicial body into two components or chambers.

**Bifurcated trial:** One judicial proceeding that is divided into two stages in which different issues are addressed separately by the court.

**Bilateral contract:** An agreement formed by an exchange of a promise in which the promise of one party is consideration supporting the promise of the other party.

**Bill:** A declaration in writing. A document listing separate items. An itemized account of charges or costs. In EQUITY practice, the first PLEADING in the action, the paper in which the plaintiff sets out his or her case and demands relief from the defendant.

**Bill of attainder:** A special legislative enactment that imposes a death sentence without a judicial trial upon a particular person or class of persons suspected of committing serious offenses, such as TREASON or a felony.

**Bill of exchange:** A three-party negotiable instrument in which the first party, the drawer, presents an order for the payment of a sum certain on a second party, the drawee, for payment to a third party, the payee, on demand or at a fixed future date.

**Bill of indictment:** A formal written document that is drawn up by a government prosecutor accusing a designated person of having committed a felony or misdemeanor and which is presented to a GRAND JURY so that it may take action upon it.

**Bill of lading:** A document signed by a carrier (a transporter of goods) or the carrier's representative and issued to a consignor (the shipper of goods) that evidences the receipt of goods for shipment to a specified designation and person.

**Bill of particulars:** A written statement used in both civil and criminal actions that is submitted by a plaintiff or a prosecutor at the request of a defendant, giving the defendant detailed information concerning the claims or charges made against him or her.

**Bill of review:** In the practice of EQUITY courts, a paper filed with a court after expiration of the time for filing a petition for a rehearing in order to request, due to exceptional circumstances, the correction or reversal of a final judgment or decree.

**Bill of rights:** A declaration of individual rights and freedoms, usually issued by a national government.

A list of fundamental rights included in each state constitution.

The first ten amendments to the U.S. Constitution, ratified in 1791, which set forth and guarantee certain fundamental rights and privileges of individuals, including freedom of religion, speech, press, and assembly; guarantee of a speedy jury trial in criminal cases; and protection against excessive bail and CRUEL AND UNUSUAL PUNISHMENT.

**Bill of sale:** In the law of contracts, a written agreement, previously required to be under seal, by which one person transfers to another a right to, or interest in, PERSONAL PROPERTY and goods, a legal instrument that conveys title in property from seller to purchaser.

**Bills and notes:** An archaic term that designated the body of law currently known as the law of COMMERCIAL PAPER, which governs the methods by which commercial transactions are financed and facilitated by the execution and transfer of documents that contain promises to repay debts according to the terms specified in the documents.

**Bills of credit:** Non-interest-bearing promissory notes issued by the government and backed by its faith and credit to be paid when presented by their holders, which are in the form of currency and are intended to be circulated and exchanged in the community as money.

**Binder:** A written document that records the essential provisions of a contract of insurance and temporarily protects the insured until an insurance company has investigated the risks to be covered, or until a formal policy is issued.

A receipt for cash or for a check that is deposited by a prospective buyer with the seller to secure the right to purchase real estate at terms that have been agreed upon by both buyer and seller.

**Binding authority:** Source of law that a judge must evaluate when making a decision in a case. For example, statutes from the same state where a case is being brought, or higher court decisions, are binding authority for a judge.

**Binding over:** The requirement imposed by a court or a magistrate upon a person to enter into a recognizance or to post bail to ensure that he or she will appear for trial. The transfer of a case from a lower court to a higher court or to a GRAND JURY after PROBABLE CAUSE to believe that the defendant committed the crime has been established.

**Birth control:** A measure or measures undertaken to prevent conception.

**Black codes:** A body of laws, statutes, and rules enacted by southern states immediately after the Civil War to regain control over the freed slaves, maintain white supremacy, and ensure the continued supply of cheap labor.

**Black letter law:** A term used to describe basic principles of law that are accepted by a majority of judges in most states.

**Blackacre:** A fictitious designation that legal writers use to describe a piece of land.

**Blacklist:** A list of individuals or organizations designated for special discrimination or boycott; also to put a person or organization on such a list.

**Blackmail:** The crime involving a threat for purposes of compelling a person to do an act against his or her will, or for purposes of taking the person's money or property.

**Blackstone's commentaries:** A series of lectures delivered by the English jurist SIR WILLIAM BLACKSTONE at Oxford in 1753 and published as *Commentaries on the Laws of England* in four volumes between 1765 and 1769, which systematized and clarified the amorphous body of ENGLISH LAW.

**Blank:** Lacking something essential to fulfillment or completeness; unrestricted or open. A space left empty for the insertion of one or more words or marks in a written document that will effectuate its meaning or make it legally operative. A printed legal form in which the standard or necessary words are printed in their proper order with spaces left open, to be filled with names, dates, figures, and additional clauses.

**Blank endorsement:** The writing of the name of a person who holds a negotiable instrument on the back of the document without specifically designating to whom the paper is to be paid, which transfers the rights that the signer had in the instrument to the person who presents it for payment.

**Blasphemy:** The malicious or wanton reproach of God, either written or oral. In ENGLISH LAW, the offense of speaking disparaging words about God, Jesus Christ, the Bible, or the Book of Common Prayer with the intent to undermine religious beliefs and promote CONTEMPT and hatred for the church as well as general immorality. In U.S. law, any maliciously intended written or oral accusation made against God or religion with the purpose of dishonoring the divine majesty and alienating mankind from the love and reverence of God.

**Block:** A segment of a town or city surrounded by streets and avenues on at least three sides and usually occupied by buildings, though it may be composed solely of vacant lots. The section of a city enclosed by streets that is described by a map which indicates how a portion of land will be subdivided.

**Blockbusting:** The practice of illegally frightening homeowners by telling them that people who are members of a particular race, religion, or national origin are moving into their neighborhood and that they should expect a decline in the value of their property. The purpose of this scheme is to get the homeowners to sell out at a deflated price.

**Blood feud:** Avenging the WRONGFUL DEATH of a person's kin by killing the murderer or by receiving compensation from the murderer's possessions.

**Blotter:** A written record of arrests and other occurrences maintained by the police. The report kept by the police when a suspect is booked, which involves the written recording of facts about the person's arrest and the charges against him or her.

**Blue book:** A publication that establishes the correct form of case citations or of references to a legal authority showing where information can be found. A volume that explains the organization of a state government and provides the names of state officials. The proper title is "The Bluebook: A Uniform System of Citation." In a generic sense, this term also refers to a report issued by the Joint Committee on Taxation regarding recent tax legislation.

**Blue laws:** A state or local law that prohibits commercial activities on Sunday.

**Blue ribbon jury:** A group of highly qualified persons selected by a court on the request of either party to a lawsuit to decide complex and specialized disputes.

**Blue sky law:** A popular name for state statutes providing for the regulation and supervision of SECURITIES offerings and sales, to protect citizen-investors from investing in fraudulent companies. Most blue sky laws require the registration of new issues of securities with a state agency that reviews selling documents for accuracy and completeness. Blue sky laws also often regulate securities brokers and salespeople.

**Board of directors:** A group of people comprising the governing body of a corporation.

**Board of pardons:** Part of the executive branch of state government authorized to grant pardons, and restore civil and political rights, to individuals convicted of crimes. A pardon, in the legal sense, releases an individual from punishment or penalty, but does not necessarily exonerate them of guilt.

**Board of regents:** An independent governing body that oversees a state's public COLLEGES AND UNIVERSITIES.

**Body:** The principal part of anything as distinguished from its subordinate parts, as in the main part of an instrument. An individual, an organization, or an entity given legal recognition, such as a corporation or "body corporate." A compilation of laws known as a "body of laws."

**Body execution:** An arrest; a seizure of a defendant.

**Boilerplate:** A description of uniform language used normally in legal documents that has a definite, unvarying meaning in the same context that denotes that the words have not been individually fashioned to address the legal issue presented.

**Bona fide:** *[Latin, In good faith.]* Honest; genuine; actual; authentic; acting without the intention of defrauding.

**Bonds:** Written documents by which a government, corporation, or individual—the obligor—promises to perform a certain act, usually the payment of a definite sum of money, to another—the obligee—on a certain date.

**Book value:** The current value of an asset. The book value of an asset at any time is its cost minus its accumulated depreciation. (Depreciation reflects the decrease in the useful life of an asset due to use of the asset.) Companies use book value to determine the point at which they have recovered the cost of an asset.

The net asset value of a company's SECURITIES. This is calculated by subtracting from the company's total assets the following items: intangible assets (such as goodwill), current liabilities, and long-term liabilities and EQUITY issues. This figure, divided by the total number of bonds or of shares of stock, is the book value per bond or per share of stock.

**Booking:** The procedure by which law enforcement officials record facts about the arrest of and charges against a suspect such as the crime for which the arrest was made, together with information concerning the identification of the suspect and other pertinent facts.

**Bookkeeping:** The process of systematically and methodically recording the financial accounts and transactions of an entity.

**Bootstrap doctrine:** A principle in the resolution of conflict of laws that prevents a party from bringing an action in one state's court in an attempt to collaterally attack the final judgment from another state's court. The doctrine is based upon the principle of RES JUDICATA, which prevents a party from litigating a jurisdictional claim that has already been resolved by a prior, final decision, or if the litigants had an opportunity to raise the issue and challenge the other court's lack of jurisdiction and failed to do so.

**Bottomry:** A contract, in maritime law, by which money is borrowed for a specified term by the owner of a ship for its use, equipment, or repair for which the ship is pledged as collateral. If the ship is lost in the specified voyage or during the limited time, the lender will lose his or her money according to the provisions of the contract. A contract by which a ship or its freight is pledged as security for a loan, which is to be repaid only in the event that the ship survives a specific risk, voyage, or period.

**Boundaries:** Natural or artificial separations or divisions between adjoining properties that show their limits.

**Bounty hunter:** Name for a category of persons who are offered a promised gratuity in return for "hunting" down and capturing or killing a designated target, usually a person or animal.

**Boycott:** A lawful concerted attempt by a group of people to express displeasure with, or obtain concessions from, a particular person or company by refusing to do business with them. An un-

lawful attempt that is prohibited by the SHERMAN ANTI-TRUST ACT (15 U.S.C.A. § 1 et seq.), to adversely affect a company through threat, coercion, or intimidation of its employees, or to prevent others from doing business with said company. A practice utilized in labor disputes whereby an organized group of employees bands together and refrains from dealing with an employer, the legality of which is determined by applicable provisions of statutes governing labor-management relations.

**Bracket:** The category of the percentage of INCOME TAX found on the tax tables set by the INTERNAL REVENUE CODE, within which a taxpayer falls based upon his or her taxable income.

**Breach of marriage promise:** A common-law right of action for breaking a commitment to enter into matrimony.

**Breach of the peace:** A comprehensive term encompassing acts or conduct that seriously endanger or disturb public peace and order.

**Breaking:** To use physical force to separate or damage a solid object.

**Bribery:** The offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of an official in the discharge of his or her public or legal duties.

**Bridges:** Structures constructed over obstructions to highways or waterways, such as canals or rivers, in order to provide continuous and convenient passages for purposes of transportation. A bridge includes the necessary abutments and approaches that make it accessible. A public bridge that spans obstructions to a public highway is built on land owned by the state government for public use, while a private bridge is built on private property for the use of particular individuals who own it.

**Brief:** A summary of the important points of a longer document. An abstract of a published judicial opinion prepared by a law student as part of an assignment in the CASE METHOD study of law. A written document drawn up by an attorney for a party in a lawsuit or by a party himself or herself appearing pro se that concisely states the following: (1) issues of a lawsuit; (2) facts that bring the parties to court; (3) relevant laws that can affect the subject of the dispute; and (4) arguments that explain how the law applies to the particular facts so that the case will be decided in the party's favor.

**Bright line rule:** A judicial rule that helps resolve ambiguous issues by setting a basic standard that clarifies the AMBIGUITY and establishes a simple response.

The bright line rule exists to bring clarity to a law or regulation that could be read in two (or more) ways. Often a bright line is established when the need for a simple decision outweighs the need to weigh both sides of a particular issue.

**Bring suit:** To initiate legal proceedings; to start an action for judicial relief.

**Broadcasting:** As a verb, to transmit programs or signals intended to be received by the public through radio, television, or similar means. As a noun, the radio, television, or other program received by the public through the transmission.

**Broker:** An individual or firm employed by others to plan and organize sales or negotiate contracts for a commission.

**Buggery:** The criminal offense of anal or oral copulation by penetration of the male organ into the anus or mouth of another person of either sex or copulation between members of either sex with an animal.

**Building and loan association:** An organization that exists to accumulate a fund, composed of subscriptions and savings of its members, to help facilitate the purchase or construction of real estate by such members by lending them the necessary funds.

**Building codes:** A series of ordinances enacted by a state or local governmental entity, establishing minimum requirements that must be met in the construction and maintenance of buildings.

**Building line:** A line that a MUNICIPAL CORPORATION establishes, beyond which no building may extend to ensure that its streets will appear uniform.

**Bulk transfer:** A sale of all or most of the materials, supplies, merchandise, or other inventory of a business at one time that is not normally done in the ordinary course of the seller's business.

**Bulletin:** A printing of public notices and announcements that discloses the progress of matters affecting the general public and which usually includes provisions for public comment. A summarized report of a newsworthy item for immediate release to the public. The official publication of an association, business, or institution.

**Burden of going forward:** The onus on a party to refute or to explain evidence presented in a case.

**Burden of persuasion:** The onus on the party with the BURDEN OF PROOF to convince the trier of fact of all elements of his or her case. In a criminal case the burden of the government to produce evidence of all the necessary elements of the crime BEYOND A REASONABLE DOUBT.

**Burden of pleading:** The duty of a party to plead a matter to be heard in a lawsuit. The onus on the defendant to introduce or raise the defense for consideration in the lawsuit. This concept is also referred to as *burden of allegation*.

**Burden of proof:** A duty placed upon a civil or criminal defendant to prove or disprove a disputed fact.

**Bureaucracy:** A system of administration wherein there is a specialization of functions, objective qualifications for office, action according to the adherence to fixed rules, and a hierarchy of authority and delegated power.

**Burglary:** The criminal offense of breaking and entering a building illegally for the purpose of committing a crime.

**Business affected with a public interest:** A commercial venture or an occupation that has become subject to governmental regulation by virtue of its offering essential services or products to the community at large.

**Business judgment rule:** A legal principle that makes officers, directors, managers, and other agents of a corporation immune from liability to the corporation for loss incurred in corporate transactions that are within their authority and power to make when sufficient evidence demonstrates that the transactions were made in GOOD FAITH.

**Business record exception:** A rule of evidence that allows routine entries made customarily in financial records, or business logs or files kept in the regular course of business, to be introduced as proof in a lawsuit when the person who made such notations is not available to testify.

**Business trust:** An unincorporated business organization created by a legal document, a declaration of trust, and used in place of a corporation or partnership for the transaction of various kinds of business with limited liability.

**"But for" rule:** In the law of NEGLIGENCE, a principle that provides that the defendant's conduct is not the cause of an injury to the plaintiff, unless that injury would not have occurred except for ("but for") the defendant's conduct.

**Bylaws:** The rules and regulations enacted by an association or a corporation to provide a framework for its operation and management.

**Cabinet:** The counsel or group of advisers of a king or other chief executive of a government. A group of individuals who advise the president of the United States.

**Calendar:** A list of cases that are awaiting trial or other settlement, often called a trial list or docket.

**Call:** To convoke or summon by public announcement; to request the appearance and participation of several people—such as a call of a jury to serve, a roll call, a call of public election, or a call of names of the members of a legislative body.

In contract law, the demand for the payment of money according to the contract terms, usually by formal notice.

As applied to corporation law, the demand of the board of directors that subscribers pay an installment or portion of the amount that is still owed on shares that they have agreed to buy. A *call price* is the price paid by a corporation for the redemption of its own SECURITIES.

In securities, a contract that gives a person the right to demand payment of a certain specified number of shares of stock at a stated price or upon a fixed date.

**Calvo clause:** A provision in an agreement between a private individual and a foreign state that says, in effect, that "aliens are not entitled to rights and privileges not accorded to nationals, and that, therefore, they may seek redress for grievances only before local authorities."

**Calvo doctrine:** The principle set forth by an Argentine jurist, Carlos Calvo, that a government has no duty to compensate ALIENS for losses or injuries that they incur as a result of domestic disturbances or a civil war, in cases where the state is not at fault, and, therefore, no justification exists for foreign nations to intervene to secure the settlements of the claims made by their citizens due to such losses or injuries.

**Camera:** A chamber, room, or apartment in old ENGLISH LAW. A judge's chamber. Treasury, chest, or coffer.

**Canals:** Artificial channels for the conveyance of water, used for navigation, transportation, drainage, or irrigation of land.

**Cancellation of an instrument:** An equitable remedy by which a court relieves both parties to a legal document of their obligations under it due to FRAUD, duress, or other grounds.

**Canon law:** Any church's or religion's laws, rules, and regulations; more commonly, the written policies that guide the administration and religious ceremonies of the Roman Catholic Church.

**Canons of construction:** The system of basic rules and maxims applied by a court to aid in its interpretation of a written document, such as a statute or contract.

**Canons of ethics:** Rules that govern the PRACTICE OF LAW.

**Capacity:** The ability, capability, or fitness to do something; a legal right, power, or competency to perform some act. An ability to comprehend both the nature and consequences of one's acts.

**Capias:** *[Latin, That you take.]* The name for several different kinds of writs, or court orders, all of which require an officer to take the defendant into custody.

**Capital asset:** Property held by a taxpayer, such as houses, cars, stocks, bonds, and jewelry, or a building owned by a corporation to furnish facilities for its employees.

**Capital punishment:** The lawful infliction of death as a punishment; the death penalty.

**Capital stock:** All shares constituting ownership of a business, including common stock and preferred stock. The amount of shares that a corporate charter requires to be subscribed and paid, or secured to be paid, by shareholders. The amount of stock that a corporation may issue; the amount actually contributed, subscribed, or secured to be paid on. The liability of the corporation to its shareholders after creditors' claims have been settled. The valuation of the corporation as a business enterprise.

**Capitalize:** To regard the cost of an improvement or other purchase as a capital asset for purposes of determining INCOME TAX liability. To calculate the net worth upon which an investment is based. To issue company stocks or bonds to finance an investment.

**Capitation tax:** An assessment levied by the government upon a person at a fixed rate regardless of income or worth.

**Caption:** The standardized heading of a legal instrument, such as a motion or a complaint, which sets forth the names of the parties in controversy, the name of the court, the docket number, and the name of the action.

**Care:** Watchful attention; custody; diligence; concern; caution; as opposed to NEGLIGENCE or carelessness.

**Carjacking:** The criminal taking of a motor vehicle from its driver by force, violence, or intimidation.

**Carnal knowledge:** Copulation; the act of a man having sexual relations with a woman.

**Carpetbag judges:** Colloquial term used to describe northern judges during the post-Civil War era who traveled to the South to serve on southern courts, typically for personal gain. "Carpetbag" refers to the judges's practice of carrying their possessions with them in carpetbags.

**Carriers:** Individuals or businesses that are employed to deliver people or property to an agreed destination.

**Carrier's lien:** The right of an individual or organization that publicly advertises itself for hire for the transportation of goods to keep possession of the cargo it has delivered to a destination until the person who is liable to pay the freight charges plus any other expenses incurred by its shipment has done so.

**Carry-back:** The name given to the method provided under federal tax law that allows a taxpayer to apply net operating losses incurred during one year to the recomputation of INCOME TAX owed to the government for three preceding taxable years.

**Carry-over:** The designation of the process by which net operating loss for one year may be applied, as provided by federal tax law, to each of several taxable years following the taxable year of such loss.

**Carrying charges:** Payments made to satisfy expenses incurred as a result of ownership of property, such as land taxes and mortgage payments. Disbursements paid to creditors, in addition to interest, for extending credit.

**Cartel:** A combination of producers of any product joined together to control its production, sale, and price, so as to obtain a MONOPOLY and restrict competition in any particular industry or commodity. Cartels exist primarily in Europe, being illegal in the United States by ANTITRUST LAWS. Also, an association by agreement of companies or sections of companies having common interests, designed to prevent extreme or UNFAIR COMPETITION and allocate markets, and to promote the interchange of knowledge resulting from scientific and technical research, exchange of patent rights, and standardization of products.

In war, an agreement between two hostile powers for the delivery of prisoners or deserters, or authorizing certain nonhostile intercourse between each other that would otherwise be prevented by the state of war, for example, agreements between enemies for intercommunication by post, telegraph, telephone, or railway.

**Case:** A general term for any action, CAUSE OF ACTION, lawsuit, or controversy. All the evidence and testimony compiled and organized by one party in a lawsuit to prove that party's version of the controversy at a trial in court.

**Case agreed on:** An action in which the parties submit a formal written enumeration of facts that they both accept as correct and complete so that a judge can render a decision based upon conclusions of law that can be drawn from the stated facts.

**Case in chief:** The portion of a trial whereby the party with the BURDEN OF PROOF in the case presents its evidence. The term differs from a rebuttal, whereby a party seeks to contradict the other

party's evidence. Case in chief differs from "case" in that the latter term encompasses the evidence presented by both the party with the burden of proof and the party with the burden of rebutting that evidence.

**Case law:** Legal principles enunciated and embodied in judicial decisions that are derived from the application of particular areas of law to the facts of individual cases.

**Case method:** A system of instruction or study of law focused upon the analysis of court opinions rather than lectures and textbooks; the predominant method of teaching in U.S. law schools today.

**Case or controversy:** A term used in Article III, Section 2, of the Constitution to describe the structure by which actual, conflicting claims of individuals must be brought before a federal court for resolution if the court is to exercise its jurisdiction to consider the questions and provide relief.

**Case stated:** An action that is brought upon the agreement of the parties who submit a statement of undisputed facts to the court but who take adversary positions as to the legal ramifications of the facts, thereby requiring a judge to decide the QUESTION OF LAW presented.

**Casebook:** A printed compilation of judicial decisions illustrating the application of particular principles of a specific field of law, such as TORTS, that is used in LEGAL EDUCATION to teach students under the CASE METHOD system.

**Cash basis:** A method of accounting that considers only money actually received as income and only money actually paid out as expense.

**Cash surrender value:** The amount of money that an insurance company pays an insured upon cancellation of a life insurance policy before death and which is a specific figure assigned to the policy at that particular time, reduced by a charge for administrative expenses.

**Casual:** Irregular, occasional, or accidental; happening without being planned or foreseen.

**Casual ejector:** A fictitious and nominal defendant in an action of EJECTMENT.

**Casualty:** A serious or fatal accident. A person or thing injured, lost, or destroyed. A disastrous occurrence due to sudden, unexpected, or unusual cause. Accident; misfortune or mishap; that which comes by chance or without design. A loss from such an event or cause, as by fire, shipwreck, lightning, etc.

**Casus belli:** *[Latin, Cause of war.]* A term used in INTERNATIONAL LAW to describe an event or occurrence giving rise to or justifying war.

**Categorical:** That which is unqualified or unconditional.

**Causa mortis:** *[Latin, In contemplation of approaching death.]* A phrase sometimes used in reference to a deathbed gift, or a gift *causa mortis,* since the giving of the gift is made in expectation of approaching death. A gift causa mortis is distinguishable from a gift inter vivos, which is a gift made during the donor's (the giver's) lifetime.

**Cause:** Each separate antecedent of an event. Something that precedes and brings about an effect or a result. A reason for an action or condition. A ground of a legal action. An agent that brings something about. That which in some manner is accountable for a condition that brings about an effect or that produces a cause for the resultant action or state.

A suit, litigation, or action. Any question, civil or criminal, litigated or contested before a court of justice.

**Cause célèbre:** [*French, famous case.*] A trial or lawsuit in which the subject matter or a participant is particularly newsworthy, unusual, or sensational and that typically attracts a great deal of media attention. For example, the case of Scott Peterson, accused of the murder of his pregnant wife, Laci Peterson, was a cause célèbre in 2003.

**Cause of action:** The fact or combination of facts that gives a person the right to seek judicial redress or relief against another. Also, the legal theory forming the basis of a lawsuit.

**Caveat:** *[Latin, Let him beware.]* A warning; admonition. A formal notice or warning given by an interested party to a court, judge, or ministerial officer in opposition to certain acts within his or her power and jurisdiction.

**Caveat emptor:** *[Latin, Let the buyer beware.]* A warning that notifies a buyer that the goods he or she is buying are "as is," or subject to all defects.

**Cease and desist order:** An order issued by an ADMINISTRATIVE AGENCY or a court proscribing a person or a business entity from continuing a particular course of conduct.

**Cede:** To yield up; to assign; to grant; to surrender; to withdraw. Generally used to designate the transfer of territory from one government to another.

**Celebration of marriage:** A colloquial phrase that refers to the solemnization or formalization of a marriage.

**Cemeteries:** Areas that are set aside by public authority or private persons for the burial of the dead.

**Censorship:** The suppression or proscription of speech or writing that is deemed obscene, indecent, or unduly controversial.

**Censure:** A formal, public reprimand for an infraction or violation.

**Census:** An official count of the population of a particular area, such as a district, state, or nation.

**Century Digest®:** A volume of the American Digest System that arranges by subject summaries of court opinions reported chronologically in the various units of the National Reporter System during the period from 1658 to 1896.

**Certificate:** A written document that is official verification that a condition or requirement has, or has not, been met.

A written assurance issued from a court that is notification to another officer, judge, or court of procedures practiced therein.

A document (such as a birth certificate) prepared by an official during the course of his or her regular duties, and which may be used as evidence for certain purposes.

A document certifying that one has fulfilled certain requirements and may practice in a field.

**Certificate of deposit:** A written recognition by a bank of a deposit, coupled with a pledge to pay the deposited amount plus interest, if any, to the depositor or to his or her order, or to another individual or to his or her order.

A form of COMMERCIAL PAPER that serves as documentary evidence that a savings account exists.

**Certificate of occupancy:** A document issued by a local building or ZONING authority to the owner of premises attesting that the premises have been built and maintained according to the provisions of building or zoning ordinances, such as those that govern the number of fire exits or the safety of electrical wiring.

**Certification proceeding:** An administrative hearing before the NATIONAL LABOR RELATIONS BOARD (NLRB), pursuant to the federal WAGNER ACT (29 U.S.C.A. § 151 et seq. [1935]) to determine whether a group of employees is an appropriate bargaining unit, and if so, to decide whether a particular union should be declared its bargaining agent.

**Certified check:** A written order made by a depositor to a bank to pay a certain sum to the person designated—the payee—which is marked by the bank as "accepted" or "certified," thereby unconditionally promising that the bank will pay the order upon its presentation by the payee.

**Certified copy:** A photocopy of a document, judgment, or record that is signed and attested to as an accurate and a complete reproduction of the original document by a public official in whose custody the original has been placed for safekeeping.

**Certiorari:** *[Latin, To be informed of.]* At COMMON LAW, an original writ or order issued by the Chancery or King's Bench, commanding officers of inferior courts to submit the record of a cause pending before them to give the party more certain and speedy justice.

A writ that a superior appellate court issues in its discretion to an inferior court, ordering it to produce a certified record of a particular case it has tried, in order to determine whether any irregularities or errors occurred that justify review of the case.

A device by which the SUPREME COURT OF THE UNITED STATES exercises its discretion in selecting the cases it will review.

**Cession:** The act of relinquishing one's right.

A surrender, relinquishment, or assignment of territory by one state or government to another. The territory of a foreign government gained by the transfer of sovereignty.

**Cestui que:** *[French, He or she who.]* The person for whom a benefit exists.

**Cf.:** An abbreviation for the Latin word *confer,* meaning "compare."

**C.F.&I.:** An abbreviation for cost, freight, and insurance that is used in a sales contract to indicate that the purchase price quoted for the goods by the seller includes the expense incurred by the seller for shipment of such goods and for insurance of the goods against loss or destruction until their arrival at the destination named by the buyer.

**Chain of custody:** The movement and location of physical evidence from the time it is obtained until the time it is presented in court.

**Chain of title:** A list of successive owners of a parcel of land, beginning from the government, or original owner, to the person who currently owns the land.

**Chain referral:** A type of sales plan that convinces individuals to make purchases based upon the promise that their payment will be reduced for each new purchaser they recommend to the seller.

**Chambers:** A judge's private room or office wherein he or she hears motions, signs papers, and performs other tasks pertaining to his or her office when a session of the court, such as a trial, is not being held.

**Chamizal tract:** A description of the 1895 title dispute between the United States and Mexico that arose over a tract of land in El Paso, Texas, known as "El Chamizal."

**Champerty and maintenance:** Champerty is the process whereby one person bargains with a party to a lawsuit to obtain a share in the proceeds of the suit. Maintenance is the support or promotion of another person's suit initiated by intermeddling for personal gain.

**Chancellor:** A secretary, secretary of state, or minister of a king or other high nobleman.

**Chancery:** The old English court in which the monarch's secretary, or Chancellor, began hearing lawsuits during the fourteenth century.

**Character evidence:** Proof or attestations about an individual's moral standing, general nature, traits, and reputation in the general community.

**Charge:** To impose a burden, duty, obligation, or lien; to create a claim against property; to assess; to demand; to accuse; to instruct a jury on matters of law. To impose a tax, duty, or trust. To entrust with responsibilities and duties (e.g., care of another). In commercial transactions, to bill or invoice; to purchase on credit. In CRIMINAL LAW, to indict or formally accuse.

An encumbrance, lien, or claim; a burden or load; an obligation or duty; a liability; an accusation. A person or thing committed to the care of another. The price of, or rate for, something.

**Charge-off:** Eliminate or write off.

**Charitable trust:** The arrangement by which real or PERSONAL PROPERTY given by one person is held by another to be used for the benefit of a class of persons or the general public.

**Charities:** Organizations created for the purpose of philanthropic rather than pecuniary pursuits.

**Charter:** A grant from the government of ownership rights in land to a person, a group of people, or an organization such as a corporation.

A basic document of law of a MUNICIPAL CORPORATION granted by the state, defining its rights, liabilities, and responsibilities of self-government.

A document embodying a grant of authority from the legislature or the authority itself, such as a corporate charter.

The leasing of a mode of transportation, such as a bus, ship, or plane. A *charter-party* is a contract formed to lease a ship to a merchant in order to facilitate the conveyance of goods.

**Chattel:** An item of PERSONAL PROPERTY that is movable; it may be animate or inanimate.

**Chattel mortgage:** A transfer of some legal or equitable right in PERSONAL PROPERTY as security for the payment of money or performance of some other act. Chattel mortgages have generally been superseded by other types of SECURED TRANSACTIONS under the UNIFORM COMMERCIAL CODE (UCC), a body of law adopted by the states that governs commercial transactions.

**Chattel paper:** A writing or writings that evidence both a monetary obligation and a security interest in or a lease of specific goods. In many instances chattel paper will consist of a negotiable instrument coupled with a security agreement. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper.

**Check:** A written order instructing a bank to pay upon its presentation to the person designated in it, or to the person possessing it, a certain sum of money from the account of the person who draws it.

**Checkoff:** A system whereby an employer regularly deducts a portion of an employee's wages to pay union dues or initiation fees.

**Chief justice:** The presiding, most senior, or principal judge of a court.

**Child abuse:** Physical, sexual, or emotional mistreatment or neglect of a child.

**Child care:** The supervision and nurturing of a child, including casual and informal services provided by a parent and more formal services provided by an organized child care center.

**Child custody:** The care, control, and maintenance of a child, which a court may award to one of the parents following a DIVORCE or separation proceeding.

**Child labor laws:** Federal and state legislation that protects children by restricting the type and hours of work they perform.

**Child molestation:** Child molestation is a crime involving a range of indecent or sexual activities between an adult and a child, usually under the age of 14. In psychiatric terms, these acts are sometimes known as pedophilia. It is important, however, to keep in mind that child molestation and child SEXUAL ABUSE refer to specific, legally defined actions. They do not necessarily imply that the perpetrator bears a particular psychological makeup or motive. For example, not all incidents of child molestation are perpetrated by pedophiles; sometimes the perpetrator has other motives for his or her actions and does not manifest an ongoing pattern of sexual attraction to children. Thus, not all child molestation is perpetrated by pedophiles, and not all pedophiles actually commit child molestation.

**Child pornography:** *Child pornography* is the visual representation of minors under the age of 18 engaged in sexual activity or the visual representation of minors engaging in lewd or erotic behavior designed to arouse the viewer's sexual interest.

**Child support:** A payment that a noncustodial parent makes as a contribution to the costs of raising her or his child.

**Children's rights:** The opportunity for children to participate in political and legal decisions that affect them; in a broad sense, the rights of children to live free from hunger, abuse, neglect, and other inhumane conditions.

**Chilling effect doctrine:** In CONSTITUTIONAL LAW, any practice or law that has the effect of seriously dissuading the exercise of a constitutional right, such as FREEDOM OF SPEECH.

**Choate:** Perfected, complete, or certain.

**Chose:** *[French, Thing.]* Chattel; item of PERSONAL PROPERTY.

**Chose in action:** The right to bring a lawsuit to recover chattels, money, or a debt.

**Churning:** The practice whereby a BROKER dealing in SECURITIES abuses the confidence of a client for personal gain by unnecessarily trading stocks to earn more commissions.

**Circuit:** A territorial or geographical division of a country or state.

**Circuit court:** A specific tribunal that possesses the legal authority to hear cases within its own geographical territory.

**Circumstantial evidence:** Information and testimony presented by a party in a civil or criminal action that permit conclusions that indirectly establish the existence or nonexistence of a fact or event that the party seeks to prove.

**Citation:** A paper commonly used in various courts—such as a probate, matrimonial, or traffic court—that is served upon an individual to notify him or her that he or she is required to appear at a specific time and place.

Reference to a legal authority—such as a case, constitution, or treatise—where particular information may be found.

**Citator:** A volume or set of volumes that is a record of the status of cases or statutes.

**Cite:** To notify a person of a proceeding against him or her or to call a person forth to appear in court.

To make reference to a legal authority, such as a case, in a citation.

**Citizens:** Those who, under the Constitution and laws of the United States, or of a particular community or of a foreign country, owe allegiance and are entitled to the enjoyment of all CIVIL RIGHTS that ACCRUE to those who qualify for that status.

**Civil action:** A lawsuit brought to enforce, redress, or protect rights of private litigants—the plaintiffs and the defendants— not a criminal proceeding.

**Civil death:** The FORFEITURE of rights and privileges of an individual who has been convicted of a serious crime.

**Civil disobedience:** A symbolic, non-violent violation of the law, done deliberately in protest against some form of perceived injustice. Mere dissent, protest, or disobedience of the law does not qualify. The act must be nonviolent, open and visible, illegal, performed for the moral purpose of protesting an injustice, and done with the expectation of being punished.

**Civil law:** A body of rules that delineate private rights and remedies, and govern disputes between individuals in such areas as contracts, property, and FAMILY LAW; distinct from criminal or public law. Civil law systems, which trace their roots to ancient Rome, are governed by doctrines developed and compiled by legal scholars. Legislators and administrators in civil law countries use these doctrines to fashion a code by which all legal controversies are decided.

**Civil procedure:** The methods, procedures, and practices used in civil cases.

**Civil rights:** Personal liberties that belong to an individual, owing to his or her status as a citizen or resident of a particular country or community.

**Civil service:** The designation given to government employment for which a person qualifies on the basis of merit rather than political patronage or personal favor.

**Civilian review boards:** A municipal body composed of citizen representatives charged with the investigation of complaints by members of the public concerning misconduct by police officers. Such bodies may be independent agencies or part of a law enforcement agency.

**C.J.:** An abbreviation for chief justice, the principal presiding judge or the judge with most seniority on a particular court, as well as an abbreviation for circuit judge, the judge of a particular judicial circuit.

**CJS®:** The abbreviation for *Corpus Juris Secundum*, which is a comprehensive encyclopedia of the principles of American law.

**Claim:** To demand or assert as a right. Facts that combine to give rise to a legally enforceable right or judicial action. Demand for relief.

**Claim for relief:** The section of a modern complaint that states the redress sought from a court by a person who initiates a lawsuit.

**Class action:** A lawsuit that allows a large number of people with a common interest in a matter to sue or be sued as a group.

**Clause:** A section, phrase, paragraph, or segment of a legal document, such as a contract, deed, will, or constitution, that relates to a particular point.

**Clause paramount:** In ADMIRALTY LAW, a statement required by federal law to be included in any bill of lading, which evinces a contract for the transportation of goods by sea from U.S. ports in foreign trade.

**Clear:** Free from doubt, burden, or obstacle; without limitation; plain or unencumbered.

**Clear and convincing proof:** A standard applied by a jury or by a judge in a nonjury trial to measure the probability of the truthfulness of particular facts alleged during a civil lawsuit.

**Clear and present danger:** An early standard by which the constitutionality of laws regulating subversive expression were evaluated in light of the First Amendment's guarantee of FREEDOM OF SPEECH.

**Clear title:** Unencumbered or unrestricted legal ownership that is free from doubt as to its validity.

**Clemency:** Leniency or mercy. A power given to a public official, such as a governor or the president, to in some way lower or moderate the harshness of punishment imposed upon a prisoner.

**Clergy malpractice:** A breach of the duty owed by a member of the clergy (e.g., trust, loyalty, confidentiality, guidance) that results in harm or loss to his or her parishioner. A claim for clergy malpractice asserts that a member of the clergy should be held liable for professional misconduct or an unreasonable lack of competence in his or her capacity as a religious leader and counselor.

**Clerical error:** A mistake made in a letter, paper, or document that changes its meaning, such as a typographical error or the unintentional addition or omission of a word, phrase, or figure.

**Clerk:** A person employed in an office or government agency who performs various tasks such as keeping records or accounts, filing, letter writing, or transcribing. One who works in a store and whose job might include working as a cashier, selling merchandise, or waiting on customers.

**Client:** A person who employs or retains an attorney to represent him or her in any legal business; to assist, to counsel, and to defend the individual in legal proceedings; and to appear on his or her behalf in court.

**Client security funds:** State funds that compensate clients of attorneys who have stolen their money. Monies for these funds come from attorney registration and bar association fees.

**Close:** A parcel of land that is surrounded by a boundary of some kind, such as a hedge or a fence. To culminate, complete, finish, or bring to an end. To seal up. To restrict to a certain class. A narrow margin, as in a close election.

**Close writ:** In ENGLISH LAW, a certain kind of letter issued by the sovereign that is sealed with the great seal indicating his or her office and directed to a particular person and for a special purpose.

**Closed account:** A detailed statement of the mutual debit and credit demands between parties to which no further changes can be made on either side.

**Closed corporation:** A type of business corporation that is owned and operated by a small group of people.

**Closed shop:** A shop in which persons are required to join a particular union as a precondition to employment and to remain union members for the duration of their employment.

**Closely held:** A phrase used to describe the ownership, management, and operation of a corporation by a small group of people.

**Closing:** The final transaction between a buyer and seller of real property.

**Closing argument:** The final factual and legal argument made by each attorney on all sides of a case in a trial prior to a verdict or judgment.

**Cloture:** The procedure by which debate is formally ended in a meeting or legislature so that a vote may be taken.

**Cloud on title:** An apparent claim or encumbrance, such as a lien, that, if true, impairs the right of the owner to transfer his or her property free and clear of the interests of any other party.

**Club:** An organization composed of people who voluntarily meet on a regular basis for a mutual purpose other than educational, religious, charitable, or financial pursuits. A club is any kind of group that has members who meet for a social, literary, or political purpose, such as health clubs, country clubs, book clubs, and women's associations. The term *club* is not a legal term per se, but a group that organizes itself as a club must comply with any laws governing its organization and otherwise be cognizant of the legal ramifications in undertaking to organize itself in this manner.

**Co-maker:** One who becomes obligated, an obligor, under a negotiable instrument—such as a check or promissory note—by signing his or her name along with the name of the original obligor, thereby promising to pay on it in full.

A co-maker is a type of accommodation party, who is someone who has signed a COMMERCIAL PAPER to aid someone wishing to raise money on it. An accommodation party lends his or her name to another person and makes a promise to pay the bill or note when it is due if the other person defaults.

**Co:** A prefix that denotes jointness or the state of being conjunct or united. To be together, with, or not separate from; conjoint or combined.

**Code:** A systematic and comprehensive compilation of laws, rules, or regulations that are consolidated and classified according to subject matter.

**Code of judicial conduct:** A collection of rules governing the conduct of judges while they serve in their professional capacity.

**Code pleading:** A statutory scheme that abolished the ancient common-law FORMS OF ACTION and replaced the overly technical system of COMMON-LAW PLEADING with simplified provisions for a plaintiff to bring a lawsuit and a defendant to answer the claims alleged against him or her.

**Codicil:** A document that is executed by a person who had previously made his or her will, to modify, delete, qualify, or revoke provisions contained in it.

**Codification:** The collection and systematic arrangement, usually by subject, of the laws of a state or country, or the statutory provisions, rules, and regulations that govern a specific area or subject of law or practice.

**Coercion:** The intimidation of a victim to compel the individual to do some act against his or her will by the use of psychological pressure, physical force, or threats. The crime of intentionally and unlawfully restraining another's freedom by threatening to commit a crime, accusing the victim of a crime, disclosing any secret that would seriously impair the victim's reputation in the community, or by performing or refusing to perform an official action lawfully requested by the victim, or by causing an official to do so.

A defense asserted in a criminal prosecution that a person who committed a crime did not do so of his or her own free will, but only because the individual was compelled by another through the use of physical force or threat of immediate serious bodily injury or death.

**Cognizable:** The adjective "cognizable" has two distinct (and unrelated) applications within the field of law. A cognizable claim or controversy is one that meets the basic criteria of viability for being tried or adjudicated before a particular tribunal. The term means that the claim or controversy is within the power or jurisdiction of a particular court to adjudicate.

Conversely, a "cognizable group " of jurors or potential jurors refers to that common trait or characteristic among them that is recognized as distinguishing them from others, such as race, ethnicity, and gender. Trial counsel are generally prohibited from eliminating jurors who are in the same cognizable group as that of a party or litigant through discriminatory PEREMPTORY CHALLENGES when that distinction is the basis for the challenge. In *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, 54 USLW 4425 (U.S.Ky., Apr 30, 1986) (NO. 84-6263), the U.S. Supreme Court ruled that prosecutors may not use peremptory challenges to exclude African Americans from a jury solely on the basis of race. Over the years, other cases have expanded the scope of protected or "cognizable groups" of jurors to include gender, religion, and socioeconomic status.

**Cognizance:** The power, authority, and ability of a judge to determine a particular legal matter. A judge's decision to take note of or deal with a cause.

**Cognovit actionem:** *[Latin, He has confessed the action.]* The written confession made by a defendant admitting the merits of the action brought against him or her by a plaintiff. The confession is usually based upon designated conditions, given in court, and impliedly empowers the plaintiff's attorney to sign judgment and issue execution for its enforcement.

**Cognovit note:** An extraordinary document by which a debtor authorizes his or her creditor's attorney to enter a confession in court that allows judgment against the debtor.

**Cohabitation:** A living arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage.

**Coinsurance:** A provision of an insurance policy that provides that the insurance company and the insured will apportion between them any loss covered by the policy according to a fixed percentage of the value for which the property, or the person, is insured.

**Collateral:** Related; indirect; not bearing immediately upon an issue. The property pledged or given as a security interest, or a guarantee for payment of a debt, that will be taken or kept by the creditor in case of a default on the original debt.

**Collateral attack:** An attempt to impeach or overturn a judgment rendered in a judicial proceeding, made in a proceeding other than within the original action or an appeal from it.

**Collateral estoppel:** A doctrine by which an earlier decision rendered by a court in a lawsuit between parties is conclusive as to the issues or controverted points so that they cannot be relitigated in subsequent proceedings involving the same parties.

**Collateral heir:** A successor to property—either by will or descent and distribution—who is not directly descended from the deceased but comes from a parallel line of the deceased's family, such as a brother, sister, uncle, aunt, niece, nephew, or cousin.

**Collateral warranty:** In real estate transactions, an assurance or guaranty of title made by the holder of the title to the person to whom the property is conveyed.

**Collective bargaining:** The process through which a LABOR UNION and an employer negotiate the scope of the employment relationship.

**Collective bargaining agreement:** The contractual agreement between an employer and a LABOR UNION that governs wages, hours, and working conditions for employees and which can be enforced against both the employer and the union for failure to comply with its terms. Such an agreement is ordinarily reached following the process of COLLECTIVE BARGAINING. A high profile example of such bargaining happens in the world of professional BASEBALL.

**Collision:** The violent contact of one vehicle—such as an automobile, ship, or boat— with another vehicle.

**Collusion:** An agreement between two or more people to defraud a person of his or her rights or to obtain something that is prohibited by law.

A secret arrangement wherein two or more people whose legal interests seemingly conflict conspire to commit FRAUD upon another person; a pact between two people to deceive a court with the purpose of obtaining something that they would not be able to get through legitimate judicial channels.

**Color:** The appearance or semblance of a thing, as distinguished from the thing itself.

**Color of law:** The appearance of a legal right.

**Color of office:** A description of an act by an officer done without authority under the pretext that he or she has an official right to do the act by reason of the officer's position.

**Color of title:** The appearance of a legally enforceable right of possession or ownership. A written instrument that purports to transfer ownership of property but, due to some defect, does not have that effect. A document purporting to pass title to land, such as a deed that is defective due to a lack of title in the grantor, passes only color of title to the grantee.

**Colorable:** False; counterfeit; something that is false but has the appearance of truth.

**Combination:** In CRIMINAL LAW, an agreement between two or more people to act jointly for an unlawful purpose; a conspiracy. In patent law, the joining together of several separate inventions to produce a new invention.

**Combination in restraint of trade:** An illegal compact between two or more persons to unjustly restrict competition and monopolize commerce in goods or services by controlling their production, distribution, and price or through other unlawful means.

**Comity:** Courtesy; respect; a disposition to perform some official act out of goodwill and tradition rather than obligation or law. The acceptance or ADOPTION of decisions or laws by a court of another jurisdiction, either foreign or domestic, based on public policy rather than legal mandate.

**Commerce:** The exchange of goods, products, or any type of PERSONAL PROPERTY. Trade and traffic carried on between different peoples or states and its inhabitants, including not only the purchase, sale, and exchange of commodities but also the instrumentalities, agencies, and means by which business is accomplished. The transportation of persons and goods, by air, land, and sea. The exchange of merchandise on a large scale between different places or communities.

**Commerce clause:** The provision of the U.S. Constitution that gives Congress exclusive power over trade activities among the states and with foreign countries and Indian tribes.

**Commerce, electronic:** Any sales transaction that takes place via computer or over the INTERNET.

**Commercial code:** A colloquial designation for the body of law known as the UNIFORM COMMERCIAL CODE (UCC), which governs the various business transactions that are integral parts of the U.S. system of commerce. The UCC has been adopted in virtually all of the states.

**Commercial law:** A broad concept that describes the SUBSTANTIVE LAW that governs transactions between business entities, with the exception of maritime transportation of goods (regulated by ADMIRALTY AND MARITIME LAW). Commercial law includes all aspects of business, including advertising and marketing, collections and BANKRUPTCY, banking, contracts, negotiable instruments, SECURED TRANSACTIONS, and trade in general. It covers both domestic and foreign trade; it also regulates trade between states.

**Commercial paper:** A written instrument or document such as a check, draft, promissory note, or a certificate of deposit, that manifests the pledge or duty of one individual to pay money to another.

**Commingling:** Combining things into one body.

**Commissioner:** A person charged with the management or direction of a board, a court, or a government agency.

**Commitment:** Proceedings directing the confinement of a mentally ill or incompetent person for treatment.

**Commitment fee:** Compensation paid to a lender by a borrower for the lender's promise to give a mortgage at some future time.

**Committee:** An individual or group of people to whom authority has been delegated by a larger group to perform a particular function or duty. A part of a legislative body made up of one or more individuals who have been assigned the task of investigating a certain issue and reporting their observations and recommendations to the legislature. The Senate has various committees, such as the Committee on Nuclear Energy. The name given to the person or group of people appointed by a court and charged with the responsibility of acting as the guardian of an incompetent person.

**Commodity:** A tangible item that may be bought or sold; something produced for commerce.

**Common-law action:** A lawsuit governed by the general principles of law derived from court decisions, as opposed to the provisions of statutes. Actions *ex contractu,* arising out of a breach of contract, and actions *ex delicto,* based upon the commission of a TORT, are common-law actions.

**Common-law courts:** The early royal courts in England that administered the law common to all.

**Common-law pleading:** The system of rules and principles that governed the forms into which parties cast their claims or defenses in order to set an issue before the court.

**Common-law trust:** More commonly known as a BUSINESS TRUST or a Massachusetts trust. A business organization for investment purposes by which trustees manage and control property for the benefit of beneficiaries who are protected against personal liability for any losses incurred.

**Common:** Belonging to or pertaining to the general public. Common lands, also known as public lands, are those that are set aside for use by the community at large, such as parks and public recreation areas. Common also means habitual or recurring, such as offenses that are committed frequently or repeatedly. A *common thief* is one who has been repeatedly convicted of LARCENY. Something that is common is owned equally by two or more people, such as a piece of land. A TENANCY IN COMMON is an interest in land wherein at least two people share ownership.

**Common carrier:** An individual or business that advertises to the public that it is available for hire to transport people or property in exchange for a fee.

**Common council:** In English LEGAL HISTORY, the name given to Parliament. In the U.S. legal system, the legislative body of a city or of a MUNICIPAL CORPORATION.

**Common count:** A traditional type of COMMON-LAW PLEADING that is used in actions to recover a debt of money of the defendant based upon an express or implied promise to pay after performance had been rendered. In a common-count PLEADING, the plaintiff sets forth in account form the facts that constitute the basis of his or her claim, such as money had and received and goods sold and delivered.

**Common disaster:** A set of circumstances in which two individuals die apparently simultaneously.

**Common lands:** An archaic designation of property set aside and regulated by the local, state, or federal government for the benefit of the public for recreational purposes.

**Common law:** The ancient law of England based upon societal customs and recognized and enforced by the judgments and decrees of the courts. The general body of statutes and case law that governed England and the American colonies prior to the American Revolution.

The principles and rules of action, embodied in case law rather than legislative enactments, applicable to the government and protection of persons and property that derive their authority from the community customs and traditions that evolved over the centuries as interpreted by judicial tribunals.

A designation used to denote the opposite of statutory, equitable, or civil, for example, a common-law action.

**Common-law marriage:** A union of two people not formalized in the customary manner as prescribed by law but created by an agreement to marry followed by COHABITATION.

**Common pleas:** Trial-level courts of general jurisdiction. One of the royal common-law courts in England existing since the beginning of the thirteenth century and developing from the Curia Regis, or the King's Court.

**Common scold:** A person who frequently or habitually causes public disturbances or breaks the peace by brawling or quarreling.

**Common stock:** Evidence of participation in the ownership of a corporation that takes the form of printed certificates.

**Communis error facit jus:** [*Latin, common error makes law.*] Another expression for this idea is "common opinion," or *communis opinio.* In ancient Rome, the phrase expressed the notion that a generally accepted opinion or belief about a legal issue makes that opinion or belief the law. Judges have pointed out that universal opinion may also be universal error. Until the error is discovered, however, the belief continues to be the law. The concept of communis opinio is not especially favored by contemporary U.S. courts.

**Communism:** A system of social organization in which goods are held in common.

**Community-oriented policing:** A philosophy that combines traditional aspects of law enforcement with prevention measures, problem-solving, community engagement, and community partnerships.

**Community property:** The holdings and resources owned in common by a HUSBAND AND WIFE.

**Community service:** A sentencing option for persons convicted of crimes in which the court orders the defendant to perform a number of hours of unpaid work for the benefit of the public.

**Commutation:** Modification, exchange, or substitution.

**Compact:** An agreement, treaty, or contract.

**Compact Clause:** A provision contained in Article I, Section 10, Clause 3, of the U.S. Constitution, which states, "No State shall, without the consent of Congress . . . enter into any Agreement or

Compact with another State." Intende to curtail the increase of political power in the individual states that might interfere with the supremacy of the federal government or impose an unconstitutional burden on interstate commerce in violation of the COMMERCE CLAUSE.

**Company:** An organization of individuals conducting a commercial or industrial enterprise. A corporation, partnership, association, or joint stock company.

**Comparable worth:** The idea that men and women should receive equal pay when they perform work that involves comparable skills and responsibility or that is of comparable worth to the employer; also known as pay equity.

**Comparative rectitude:** The principle by which a DIVORCE is awarded to the party whose fault is less serious in cases where both spouses allege grounds that would justify a divorce.

**Compensation:** A pecuniary remedy that is awarded to an individual who has sustained an injury in order to replace the loss caused by said injury, such as WORKERS' COMPENSATION. Wages paid to an employee or, generally, fees, salaries, or allowances. The payment a landowner is given to make up for the injury suffered as a result of the seizure when his or her land is taken by the government through EMINENT DOMAIN.

**Compensatory damages:** A sum of money awarded in a civil action by a court to indemnify a person for the particular loss, detriment, or injury suffered as a result of the unlawful conduct of another.

**Competent:** Possessing the necessary reasoning abilities or legal qualifications; qualified; capable; sufficient.

**Competent evidence:** Information that proves a point at issue in a lawsuit.

**Complainant:** A plaintiff; a person who commences a civil lawsuit against another, known as the defendant, in order to remedy an alleged wrong. An individual who files a written accusation with the police charging a suspect with the commission of a crime and providing facts to support the allegation and which results in the criminal prosecution of the suspect.

**Complaint:** The PLEADING that initiates a civil action; in CRIMINAL LAW, the document that sets forth the basis upon which a person is to be charged with an offense.

**Compliance:** Observance; conformity; obedience.

**Composition with creditors:** A contract made by an insolvent or financially pressed debtor with two or more creditors in which the creditors agree to accept one specific partial payment of the total amount of their claims, which is to be divided pro rata among them in full satisfaction of their claims.

**Compound interest:** Interest generated by the sum of the principal and any accrued interest.

**Compounding a felony:** A criminal offense consisting of the acceptance of a reward or other consideration in exchange for an agreement not to prosecute or reveal a felony committed by another.

**Compounding offense:** A criminal act in which a person agrees not to report the occurrence of a crime or not to prosecute a criminal offender in exchange for money or other consideration.

**Comprise:** To embrace, cover, or include; to confine within; to consist of.

**Compromise and settlement:** Settlement of a dispute by mutual agreement to avoid a lawsuit.

**Comptroller:** An officer who conducts the fiscal affairs of a state or MUNICIPAL CORPORATION.

**Compulsory process:** The method employed by which a person wanted as a witness, or for some other purpose, in a civil or criminal action is forced to appear before the court hearing the proceeding.

**Compurgator:** In early legal practice, one of several character witnesses produced by someone accused of a crime or by a defendant in a civil suit to attest, in court, that he or she believed the defendant on his or her oath.

**Computer-assisted legal research:** Technology that allows lawyers and judges to bypass the traditional law library and locate statutes, court cases, and other legal references in minutes using a personal computer, research software or the INTERNET, and an online connection.

**Computer crime:** The use of a computer to take or alter data, or to gain unlawful use of computers or services.

**Con:** A prefix meaning *with* or *together*. A slang abbreviation for *confidence,* as in *con* man or *con* game. To con someone is to deceive or take advantage of a person through FRAUD or trickery after winning the person's confidence. *Con* is also used as a slang abbreviation for *convict,* as in ex-*con* to mean someone previously incarcerated. An abbreviation for *contra,* which means against. To show the *pros* and *cons* of a particular issue means to present arguments or evidence on both sides.

**Concealment of birth or death:** The crime of refusing to disclose the birth or death of a newborn child.

**Conciliation:** The process of adjusting or settling disputes in a friendly manner through extrajudicial means. Conciliation means bringing two opposing sides together to reach a compromise in an attempt to avoid taking a case to trial. ARBITRATION, in contrast, is a contractual remedy used to settle disputes out of court. In arbitration the two parties in controversy agree in advance to abide by the decision made by a third party called in as a mediator, whereas conciliation is less structured.

**Conciliation, international:** A method by which the differences between nations may be settled by means of a commission employed to consider and report upon such differences.

**Conclusion of law:** The rule by which the rights of parties in a lawsuit are determined by a judge's application of relevant statutes or legal principles to the facts of the case that have been found to be true by the jury. The final judgment or decree rendered by a court based upon the verdict reached by the jury. Legal principles that provide the basis for the decision rendered by a judge in a case tried without a jury or with an ADVISORY JURY after certain facts have been established.

**Conclusive:** Determinative; beyond dispute or question. That which is conclusive is manifest, clear, or obvious. It is a legal inference made so peremptorily that it cannot be overthrown or contradicted.

**Concur:** To agree; coincide; act together. To *concur* is to evidence consent in an affirmative or concrete manner as opposed to merely acquiescing or silently submitting to a decision.

**Concurrent:** Simultaneous; converging; of equal or joint authority.

**Concurrent estates:** Ownership or possession of real property by two or more individuals simultaneously.

**Concurrent jurisdiction:** The authority of several different courts, each of which is authorized to entertain and decide cases dealing with the same subject matter.

**Concurrent resolution:** An action of Congress passed in the form of an enactment of one house, with the other house in agreement, which expresses the ideas of Congress on a particular subject.

**Concurrent writs:** Court orders issued in duplicate originals; several orders issued at the same time for the same purpose.

**Condemn:** To adjudge or find guilty of a crime and sentence. To declare a building or ship unsafe for use or occupancy. To decide that a navigable vessel is a prize or is unfit for service. To take privately owned land for public use in exchange for just compensation by virtue of the power of EMINENT DOMAIN.

**Condemnation:** The process of implementing EMINENT DOMAIN, whereby the government takes private property for public use.

**Condition:** A future and uncertain event upon the happening of which certain rights or obligations will be either enlarged, created, or destroyed.

**Conditional:** Subject to change; dependent upon or granted based on the occurrence of a future, uncertain event.

**Condominium, international:** A non-self-governing territory over which two states share administrative control. In this context the term *coimperium* is sometimes used interchangeably with the term *condominium.*

**Condominiums and cooperatives:** Two common forms of multiple-unit dwellings, with independent owners or lessees of the individual units comprising the multiple-unit dwelling who share various costs and responsibilities of areas they use in common.

**Condonation:** In marriage, the voluntary pardoning by an innocent spouse of an offense committed by his or her partner conditioned upon the promise that it will not recur.

**Confederacy:** The association or banding together of two or more persons for the purpose of committing an act or furthering an enterprise that is forbidden by law, or that, though lawful in itself, becomes unlawful when made the object of the confederacy. More commonly called a *conspiracy.* The union of two or more independent states for the purpose of common safety or a furtherance of their mutual goals.

**Confederation:** A union of states in which each member state retains some independent control over internal and external affairs. Thus, for international purposes, there are separate states, not just one state. A federation, in contrast, is a union of states in which external affairs are controlled by a unified, central government.

**Confession:** A statement by which an individual acknowledges his or her guilt in the commission of a crime.

**Confession and avoidance:** A form of plea that served as the formal answer to a plaintiff's complaint or declaration.

**Confession of judgment:** A procedure whereby a defendant did not enter a plea, the usual response to a plaintiff's declaration in COMMON-LAW PLEADING, but instead either confessed to the accuracy of the plaintiff's claim or withdrew a plea already entered.

**Confidential communication:** A form of PRIVILEGED COMMUNICATION passed from one individual to another, intended to be heard only by the individual addressed.

**Confidential relation:** Any connection between two individuals in which one of the parties has an obligation to act with extreme GOOD FAITH for the benefit of the other party.

**Confiscate:** To expropriate private property for public use without compensating the owner under the authority of the POLICE POWER of the government. To seize property.

**Conflict of interest:** A term used to describe the situation in which a public official or fiduciary who, contrary to the obligation and absolute duty to act for the benefit of the public or a designated individual, exploits the relationship for personal benefit, typically pecuniary.

**Conformed copy:** A duplicate of a document that includes handwritten notations of items incapable of reproduction, such as a signature, which must be inscribed upon the duplicate with the explanation that it was placed there by the person whose signature appears on the original document.

**Conforming use:** When land is employed in compliance with ZONING ordinances in a particular area.

**Confrontation:** A fundamental right of a defendant in a criminal action to come face-to-face with an adverse witness in the court's presence so the defendant has a fair chance to object to the testimony of the witness, and the opportunity to cross-examine him or her.

**Confusion:** The combination or mixture of two things; the process of commingling.

**Confusion of goods:** A blending together of property individually owned by two or more people so as to make it impossible to distinguish who owns what.

**Conglomerate:** A corporation operating in several different and unrelated enterprises, such as the movie industry, baking, and oil refining.

**Congressional-executive agreement:** An accord made by joint authority of the Congress and the president covering areas of INTERNATIONAL LAW that are not within the ambit of treaties.

**Congressional record:** A daily publication of the federal government that details the legislative proceedings of Congress.

**Conjugal:** Pertaining or relating to marriage; suitable or applicable to married people.

**Connecting up doctrine:** A term relating to the admissibility of evidence which means that a fact may be admitted into evidence provided that its relevance will subsequently become apparent when it is linked to other facts presented later.

**Connivance:** The furtive consent of one person to cooperate with another in the commission of an unlawful act or crime—such as an employer's agreement not to withhold taxes from the salary of an employee who wants to evade federal INCOME TAX. The false consent that a plaintiff gave to a defendant's past conduct during their marriage which the plaintiff presently alleges as a ground for DIVORCE.

**Conquest:** A term used in feudal law to designate land acquisition by purchase; or any method other than descent or inheritance by which an individual obtains ownership of an estate. A term used in INTERNATIONAL LAW for the process whereby a sovereign nation is, by force of arms, made to submit to another nation; the defeated country thus becomes part of the empire of the conqueror.

**Consanguinity:** Blood relationship; the relation of people who descend from the same ancestor.

**Conscientious objector:** A person who, because of principles of religious training and moral belief, is opposed to all war regardless of its cause.

**Conscription:** Compulsory enrollment and induction into the military service.

**Consensual alteration:** A change in a legal document agreed to by the parties and binding upon them.

**Consent:** Voluntary ACQUIESCENCE to the proposal of another; the act or result of reaching an accord; a concurrence of minds; actual willingness that an act or an infringement of an interest shall occur.

**Consent decree:** A settlement of a lawsuit or criminal case in which a person or company agrees to take specific actions without admitting fault or guilt for the situation that led to the lawsuit.

**Consequential damages:** Injury or harm that does not ensue directly and immediately from the act of a party, but only from some of the results of such act, and that is compensable by a monetary award after a judgment has been rendered in a lawsuit. Detriment that arises from the interposition of special, unpredictable circumstances. Harm to a person or property directly resulting from any breach of WARRANTY or from a false factual statement, concerning the quality or nature of goods sold, made by the seller to induce the sale and relied on by the buyer.

**Conservator of the peace:** An officer of the government authorized by law to act in such a manner that will preserve and maintain the order and safety of the community and the general public.

**Consideration:** Something of value given by both parties to a contract that induces them to enter into the agreement to exchange mutual performances.

**Consignment:** The delivery of goods to a carrier to be shipped to a designated person for sale. A BAILMENT of goods for sale.

**Consortium:** The marital alliance between a HUSBAND AND WIFE and their respective right to each other's support, cooperation, aid, and companionship.

**Consortium/intergovernmental corporations and consortiums:** Quasi-business associations formed to provide services, arrange financing, or operate certain enterprises.

**Conspiracy:** An agreement between two or more persons to engage jointly in an unlawful or criminal act, or an act that is innocent in itself but becomes unlawful when done by the combination of actors.

**Constable:** An official of a MUNICIPAL CORPORATION whose primary duties are to protect and preserve the peace of the community.

**Constitute:** To comprise or put together. That which is *duly constituted* is properly made up and formally correct and valid.

**Constitution:** The fundamental law, written or unwritten, that establishes the character of a government by defining the basic principles to which a society must conform; by describing the organization of the government and regulation, distribution, and limitations on the functions of different government departments; and by prescribing the extent and manner of the exercise of its sovereign powers.

A legislative charter by which a government or group derives its authority to act.

**Constitution of the United States:** A written document executed by representatives of the people of the United States as the absolute rule of action and decision for all branches and officers of the government, and with which all subsequent laws and ordinances must be in accordance unless it has been changed by a constitutional amendment by the authority that created it.

**Constitutional:** That which is consistent with or dependent upon the fundamental law that defines and establishes government in society and basic principles to which society is to conform.

**Constitutional amendment:** The means by which an alteration to the U.S. Constitution, whether a modification, deletion, or addition, is accomplished.

**Constitutional law:** The written text of the state and federal constitutions. The body of judicial precedent that has gradually developed through a process in which courts interpret, apply, and explain the meaning of particular constitutional provisions and principles during a legal proceeding. Executive, legislative, and judicial actions that conform with the norms prescribed by a constitutional provision.

**Construction:** The process by which the meaning of an ambiguous provision of a statute, written document, or oral agreement is determined.

**Constructive:** That which exists, not in fact, but as a result of the operation of law. That which takes on a character as a consequence of the way it is treated by a rule or policy of law, as opposed to its actual character.

**Constructive desertion:** The end of marital COHABITATION brought about when one spouse, by his or her conduct, forces the other to leave home.

**Constructive eviction:** The disturbance, by a landlord, of a tenant's possession of premises that the landlord makes uninhabitable and unsuitable for the purposes for which they were leased, causing the tenant to surrender possession.

**Constructive trust:** A relationship by which a person who has obtained title to property has an equitable duty to transfer it to another, to whom it rightfully belongs, on the basis that the acquisi-

tion or retention of it is wrongful and would unjustly enrich the person if he or she were allowed to retain it.

**Consular court:** A tribunal convened by public officials who reside in a foreign country to protect the interests of their country for the settlement of civil cases based upon situations that happened in the foreign nation and which is held pursuant to authority granted by treaty.

**Consuls:** Public officials stationed in a foreign country who are responsible for developing and securing the economic interests of their government and safeguarding the welfare of their government's citizens who might be traveling or residing within their jurisdiction.

**Consumer:** An individual who purchases and uses products and services in contradistinction to manufacturers who produce the goods or services and wholesalers or retailers who distribute and sell them. A member of the general category of persons who are protected by state and federal laws regulating price policies, financing practices, quality of goods and services, credit reporting, debt collection, and other trade practices of U.S. commerce. A purchaser of a product or service who has a legal right to enforce any implied or express warranties pertaining to the item against the manufacturer who has introduced the goods or services into the marketplace or the seller who has made them a term of the sale.

**Consumer credit:** Short-term loans made to enable people to purchase goods or services primarily for personal, family, or household purposes.

**Consumer fraud:** Deceptive practices that result in financial or other losses for consumers in the course of seemingly legitimate business transactions.

**Consumer price index:** A computation made and issued monthly by the Bureau of Labor Statistics of the federal LABOR DEPARTMENT that attempts to track the price level of designated goods and services purchased by the average consumer.

**Consumer protection:** Consumer protection laws are federal and state statutes governing sales and credit practices involving consumer goods. Such statutes prohibit and regulate deceptive or UNCONSCIONABLE advertising and sales practices, product quality, credit financing and reporting, debt collection, leases, and other aspects of consumer transactions.

**Consumer software piracy:** The unauthorized use, possession, downloading, duplication, distribution, or sale of copyrighted computer software.

**Consummate:** To carry into completion; to fulfill; to accomplish.

**Contemner:** An individual who intentionally acts to hinder or obstruct the administration of justice by a court, either by refusing to comply with its orders or by disrupting its orderly proceedings, thereby committing CONTEMPT.

**Contemplation of death:** The apprehension of an individual that his or her life will be ended in the immediate future by a particular illness the person is suffering from or by an imminent known danger which the person faces.

**Contempt:** An act of deliberate disobedience or disregard for the laws, regulations, or decorum of a public authority, such as a court or legislative body.

**Contest:** To defend against an adverse claim made in a court by a plaintiff or a prosecutor; to challenge a position asserted in a judicial proceeding, as to contest the probate of a will.

**Context:** The language that precedes and follows a series of words, such as a particular sentence or clause.

**Continental Congress:** The first national legislative assembly in the United States, existing from 1774 to 1789.

**Contingent:** Fortuitous; dependent upon the possible occurrence of a future event, the existence of which is not assured.

**Contingent fee:** Payment to an attorney for legal services that depends, or is contingent, upon there being some recovery or award in the case. The payment is then a percentage of the amount recovered—such as 25 percent if the matter is settled, or 30 percent if it proceeds to trial.

**Continuance:** The adjournment or postponement of an action pending in a court to a later date of the same or another session of the court, granted by a court in response to a motion made by a party to a lawsuit. The entry into the trial record of the adjournment of a case for the purpose of formally evidencing it.

**Contra:** Against; conflicting; opposite.

**Contraband:** Any property that it is illegal to produce or possess. Smuggled goods that are imported into or exported from a country in violation of its laws.

**Contracts:** Agreements between two entities, creating an enforceable obligation to do, or to refrain from doing, a particular thing.

**Contravention:** A term of French law meaning an act violative of a law, a treaty, or an agreement made between parties; a breach of law punishable by a fine of fifteen francs or less and by an imprisonment of three days or less. In the U.S. legal system, a breach or violation of the provisions of a contract, statute, or treaty.

**Contributing to the delinquency of a minor:** Any action by an adult that allows or encourages illegal behavior by a person under the age of 18, or that places children in situations that expose them to illegal behavior. Contributing to the delinquency of a minor can be as simple as keeping a child home from school and thus, making the child a truant. It also can manifest itself in more serious behavior. For example, an adult who commits a crime in the presence of a child can be charged with contributing to the delinquency of a minor, as can an adult who serves alcoholic beverages to anyone under the legal drinking age. Still more egregious is sexual exploitation, which could include having sexual relations with minors or engaging in the production or trafficking of CHILD PORNOGRAPHY.

**Contribution:** In maritime law, where the property of one of several parties with interests in a vessel and cargo has been voluntarily sacrificed for the common safety of the vessel—as by casting goods overboard to lighten the vessel—such loss must be made up by the contribution of the others, which is labeled "general average." In CIVIL LAW, a partition by which the creditors of an insolvent debtor divide among themselves the proceeds of the debtor's property in proportion to the amount of their respective credits. The right of a defendant who has paid an entire debt, or common liability, to recoup a proportionate share of the payment from another defendant who is equally responsible for the payment of that debt or liability.

**Controller:** The key financial officer of a state, private, or MUNICIPAL CORPORATION, who is charged with certain specific responsibilities related to its financial affairs.

**Controversy:** An actual dispute between individuals who seek judicial resolution of their grievances that have arisen from a conflict of their alleged legal rights.

**Controvert:** To contest, deny, or take issue with.

**Contumacy:** Willful disobedience. The intentional failure of an individual to obey a summons to appear in court to defend against a charge or to obey an order rendered by the court.

**Convention:** An agreement or compact, particularly an international agreement, such as the GENEVA CONVENTION. An accord between states or nations, which resembles a treaty: ordinarily applied to agreements prior to an execution of an official treaty or which serve as its foundation; or to international agreements for the regulation of international affairs of common interest not within the ambit of commercial transactions or politics, such as international postage. An agreement between states concerning finance, trade, or other matters considered less significant than those usually governed by a treaty. An assembly or meeting of representatives or members of legislative, political, or fraternal organizations.

**Conventional:** Derived from or contingent upon the mutual agreement of the parties, as opposed to that created by or dependent upon a statute or other act of the law.

**Conversion:** Any unauthorized act that deprives an owner of personal property without his or her consent.

**Conveyance:** The transfer of ownership or interest in real property from one person to another by a document, such as a deed, lease, or mortgage.

**Convict:** To adjudge an accused person guilty of a crime at the conclusion of a criminal prosecution, or after the entry of a plea of guilty or a plea of *nolo contendere*. An individual who has been found guilty of a crime and, as a result, is serving a sentence as punishment for the act; a prisoner.

**Conviction:** The outcome of a criminal prosecution which concludes in a judgment that the defendant is guilty of the crime charged. The juncture of a criminal proceeding during which the question of guilt is ascertained. In a case where the perpetrator has been adjudged guilty and sentenced, a record of the summary proceedings brought pursuant to any penal statute before one or more justices of the peace or other properly authorized persons.

**Cooling-off period:** An interval of time during which no action of a specific type can be taken by either side in a dispute. An automatic delay in certain jurisdictions, apart from ordinary court delays, between the time when DIVORCE papers are filed and the divorce hearing takes place. An amount of time within which a buyer is permitted to cancel a contract for the purchase of consumer goods—designed to effect CONSUMER PROTECTION. A number of states require that a three-day cancellation period must be allowed purchasers following door-to-door sales.

**Cooperative:** An association or corporation established for the purpose of providing services on a nonprofit basis to its shareholders or members who own and control it.

**Copyright:** A bundle of intangible rights granted by statute to the author or originator of certain literary or artistic productions, whereby, for a limited period, the exclusive privilege is given to that person (or to any party to whom he or she transfers ownership) to make copies of the same for publication and sale.

**Copyright arbitration royalty panel:** Three-member ad hoc board empowered to make decisions regarding ratemaking and distributions of COPYRIGHT ROYALTIES collected for compulsory licenses under the Copyright Act of 1976.

**Copyright, international:** The manner in which the exclusive rights to reproduce and distribute copies of various intellectual productions may be obtained in foreign countries.

**Coram:** *[Latin, Before; in the presence of.]*

**Coram nobis:** *[Latin, In our presence; before us.]* The designation of a remedy for setting aside an erroneous judgment in a civil or criminal action that resulted from an error of fact in the proceeding.

**Coram rege:** *[Latin, In the presence of the king himself.]*

**Corespondent:** One of two or more parties against whom a lawsuit is commenced. A person named with others who must answer claims alleged in a bill, petition, or LIBEL in a judicial proceeding. An individual who is accused of ADULTERY with another's spouse being sued for DIVORCE on that ground and who thereby becomes a defendant in the action.

**Corner:** For surveying purposes, the designation given to a particular location formed by the intersection of two boundary lines of real property.

The process by which a group of investors or dealers in a particular commodity exploit its market by purchasing it in large quantities and removing it from general sale for a time, thereby dramatically increasing its market price because its limited supply is greatly exceeded by the demand for it. The condition created when a commitment is made to sell at a special time of delivery in the future, a much greater quantity of a commodity than is available in the present market.

**Corollary:** A consequence or result that can be logically drawn from the existence of a set of facts by the exercise of common sense and reason.

**Coroner:** An official of a MUNICIPAL CORPORATION whose designated functions include the investigation of the cause of any violent or suspicious death that takes place within the geographical boundaries of his or her municipality.

**Corporal punishment:** Physical punishment, as distinguished from pecuniary punishment or a fine; any kind of punishment inflicted on the body.

**Corporate:** Pertaining to or possessing the qualities of a corporation, a legal entity created—pursuant to state law—to serve the purposes set out in its certificate of incorporation.

**Corporate personality:** The distinct status of a business organization that has complied with law for its recognition as a legal entity and that has an independent legal existence from that of its officers, directors, and shareholders.

**Corporations:** Artificial entities that are created by state statute, and that are treated much like individuals under the law, having legally enforceable rights, the ability to acquire debt and to pay out profits, the ability to hold and transfer property, the ability to enter into contracts, the requirement to pay taxes, and the ability to sue and be sued.

**Corporeal:** Possessing a physical nature; having an objective, tangible existence; being capable of perception by touch and sight.

**Corpse:** The physical remains of an expired human being prior to complete decomposition.

**Corpus:** *[Latin, Body, aggregate, or mass.]*

**Corpus delicti:** *[Latin, The body of the crime.]* The foundation or material substance of a crime.

**Corpus juris:** *[Latin, A body of law.]* A phrase used to designate a volume encompassing several collections of law, such as the Corpus Juris Civilis. The name of an American legal encyclopedia, the most recent edition of which is known as *Corpus Juris Secundum* (C.J.S.®.

**Corpus juris civilis:** *[Latin, The body of the civil law.]* The name given in the early seventeenth century to the collection of CIVIL LAW based upon the compilation and CODIFICATION of the Roman system of JURISPRUDENCE directed by the Emperor JUSTINIAN I during the years from 528 to 534 A.D.

**Correlative:** Having a reciprocal relationship in that the existence of one relationship normally implies the existence of the other.

**Correspondence audit:** An examination of the accuracy of a taxpayer's income tax return conducted through the mail by the INTERNAL REVENUE SERVICE, which sends the taxpayer a request for proof of a particular deduction or exemption taken by either completing a special form or sending photocopies of relevant financial records.

**Correspondent:** A bank, SECURITIES firm, or other financial institution that regularly renders services for another in an area or market to which the other party lacks direct access. A bank that functions as an agent for another bank and carries a deposit balance for a bank in another city.

**Corroborate:** To support or enhance the believability of a fact or assertion by the presentation of additional information that confirms the truthfulness of the item.

**Corruption of blood:** In ENGLISH LAW, the result of attainder, in that the attainted person lost all rights to inherit land or other hereditaments from an ancestor, to retain possession of such property and to transfer any property rights to anyone, including heirs, by virtue of his or her conviction for TREASON or a felony punishable by death, because the law considered the person's blood tainted by the crime.

**Cosigner:** An obligor—a person who becomes obligated, under a COMMERCIAL PAPER, such as a promissory note or check—by signing the instrument in conjunction with the original obligor, thereby promising to pay it in full.

**Costs:** Fees and charges required by law to be paid to the courts or their officers, the amount of which is specified by court rule or statute. A monetary allowance, granted by the court to a prevailing party and recoverable from the unsuccessful party, for expenses incurred in instituting or defending an action or a separate proceeding within an action.

**Council:** A legislative body of local government. A group of persons who, whether elected or appointed, serve as representatives of the public to establish state or municipal policies and to assist the chief executive of the government unit in the performance of duties.

**Counsel:** An attorney or lawyer. The rendition of advice and guidance concerning a legal matter, contemplated form of argument, claim, or action.

**Counsellor:** One engaged in the PRACTICE OF LAW; lawyer; advocate.

**Count:** In COMMON-LAW PLEADING or CODE PLEADING, the initial statements made by a plaintiff that set forth a CAUSE OF ACTION to commence a civil lawsuit; the different points of a plaintiff's declaration, each of which constitute a basis for relief. In CRIMINAL PROCEDURE, one of several parts or charges of an indictment, each accusing the defendant of a different offense.

**Counterclaim:** A claim by a defendant opposing the claim of the plaintiff and seeking some relief from the plaintiff for the defendant.

**Counterclaims and setoffs against sovereigns:** A comprehensive term for the vulnerability of a foreign government to retaliatory suits against it arising out of a lawsuit that it commences against a party.

**Counterfeit:** To falsify, deceive, or defraud. A copy or imitation of something that is intended to be taken as authentic and genuine in order to deceive another.

**Counterfeiting:** The process of fraudulently manufacturing, altering, or distributing a product that is of lesser value than the genuine product.

**Counteroffer:** In contract law, a proposal made in response to an original offer modifying its terms, but which has the legal effect of rejecting it.

**Countersign:** The inscription of one's name at the end of a writing, done by a secretary or a subordinate, to attest to the fact that such a writing has been signed by a principal or a superior, thereby vouching for the genuineness of the signature. To write one's name at the end of a document—in addition to the inscription of a name by another—to attest to the authenticity of the signature.

**County:** A political subdivision of a state, the power and importance of which varies from one state to another.

**Coupon:** A certificate evidencing the obligation to pay an installment of interest or a dividend that must be cut and presented to its issuer for payment when it is due.

**Course of dealing:** A clearly recognizable pattern of previous conduct between parties to a business transaction.

**Course of employment:** As set forth in WORKERS' COMPENSATION acts, the time, place, and conditions under which an on-the-job accident occurs. The performance of an act that an employee might prudently do while in the appropriate area during working hours.

**Course of performance:** Evidence of the conduct of parties concerning the execution of obligations under a contract requiring more than one performance that is used for the purpose of interpreting the contract's provisions.

**Court:** A judicial tribunal established to administer justice. An entity in the government to which the administration of justice is delegated. In a broader sense, the term may also refer to a legislative assembly; a deliberative body, such as the General Court of Massachusetts, which is its legislature. The words *court, judge,* or *judges,* when used in laws, are often synonymous. A kangaroo court is a mock legal proceeding that disregards law and justice by issuing a biased, predetermined judgment regardless of the evidence presented before it.

**Court administrator:** An officer of the judicial system who performs administrative and clerical duties essential to the proper operation of the business of a court, such as tracking trial dates, keeping records, entering judgments, and issuing process.

**Court commissioners:** Persons appointed by a judge to find facts, to hear testimony, or to perform a specific function connected with certain types of cases.

**Court hand:** In old English practice, the peculiar style and form of writing in which court records were transcribed from the earliest period to the reign of George II, circa 1760.

**Court-martial:** A tribunal that tries violations of military CRIMINAL LAW. It often refers to the entire military justice process, from actual court proceedings to punishment.

**Court of appeal:** An intermediate federal judicial tribunal of review that is found in thirteen judicial districts, called circuits, in the United States.

A state judicial tribunal that reviews a decision rendered by an inferior tribunal to determine whether it made errors that warrant the reversal of its judgment.

**Court of claims:** A state judicial tribunal established as the forum in which to bring certain types of lawsuits against the state or its political subdivisions, such as a county. The former designation given to a federal tribunal created in 1855 by Congress with original jurisdiction—initial authority—to decide an action brought against the United States that is based upon the Constitution, federal law, any regulation of the executive department, or any express or implied contracts with the federal government.

**Court of probate:** A judicial body that exercises jurisdiction over the acceptance of wills as valid documents and over the management and settlement of the estates of minors or of spendthrifts, of mentally incompetent persons, and of habitual drunkards.

**Court opinion:** A statement that is prepared by a judge or court announcing the decision after a case is tried; includes a summary of the facts, a recitation of the applicable law and how it relates to the facts, the rationale supporting the decision, and a judgment; and is usually presented in writing, though occasionally an oral opinion is rendered.

**Courts of request:** Inferior judicial tribunals in England, created by special enactments of Parliament, that possessed local jurisdiction to determine actions involving claims for small debts. These courts were abolished in 1846 and replaced by county courts.

**Covenant:** An agreement, contract, or written promise between two individuals that frequently constitutes a pledge to do or refrain from doing something.

**Covenant, action of:** One of the old common-law FORMS OF ACTION by which the plaintiff claimed damages for breach of a COVENANT, that is, a contract under seal.

**Covenant marriage:** A legal union of HUSBAND AND WIFE that requires premarital counseling, marital counseling if problems occur, and limited grounds for DIVORCE.

**Cover:** To protect or shelter; to make good; to insure. *To cover a check* means to deposit sufficient funds in a bank account to pay the amount written on a check or checks.

The right of a purchaser to buy goods other than those that were originally contracted for as a remedy in the event of a breach of contract by the seller.

**Coverage:** The risks that are included in the terms of an insurance contract for protection under the policy; the amount and type of insurance.

**Coverture:** An archaic term that refers to the legal status of a married woman.

**CPA:** An abbreviation for certified public accountant. A CPA is a trained accountant who has been examined and licensed by the state. He or she is permitted to perform all the tasks of an ordinary accountant in addition to examining the books and records of various business organizations, such as corporations.

**Craft union:** An association of laborers wherein all the members do the same type of work.

**Credibility:** Believability. The major legal application of the term *credibility* relates to the testimony of a witness or party during a trial. Testimony must be both competent and credible if it is to be accepted by the trier of fact as proof of an issue being litigated.

**Credit:** A term used in accounting to describe either an entry on the righthand side of an account or the process of making such an entry. A credit records the increases in liabilities, owners' EQUITY, and revenues as well as the decreases in assets and expenses.

A sum in taxation that is subtracted from the computed tax, as opposed to a deduction that is ordinarily subtracted from gross income to determine adjusted gross income or taxable income. Claim for a particular sum of money.

The ability of an individual or a company to borrow money or procure goods on time, as a result of a positive opinion by the particular lender concerning such borrower's solvency and reliability. The right granted by a creditor to a debtor to delay satisfaction of a debt, or to incur a debt and defer the payment thereof.

**Credit bureau:** A privately owned, profit-making establishment that—as a regular business—collects and compiles data regarding the solvency, character, responsibility, and reputation of a particular individual or business in order to furnish such information to subscribers, in the form of a report allowing them to evaluate the financial stability of the subject of the report.

**Credit union:** A corporation formed under special statutory provisions to further thrift among its members while providing credit for them at more favorable rates of interest than those offered by other lending institutions. A credit union is a cooperative association that utilizes funds deposited by a small group of people who are its sole borrowers and beneficiaries. It is ordinarily subject to regulation by state banking boards or commissions. When formed pursuant to the Federal Credit Union Act (12 U.S.C.A. § 1751 et seq. [1934]), credit unions are chartered and regulated by the NATIONAL CREDIT UNION ADMINISTRATION.

**Creditor:** An individual to whom an obligation is owed because he or she has given something of value in exchange. One who may legally demand and receive money, either through the fulfillment of a contract or due to injury sustained as a result of another's NEGLIGENCE or intentionally wrongful act. The term *creditor* is also used to describe an individual who is engaged in the business of lending money or selling items for which immediate payment is not demanded but an obligation of repayment exists as of a future date.

**Creditor's bill:** An equitable proceeding initiated by a person who has obtained— and is entitled to enforce—a money judgment against a debtor to collect the payment of a debt that cannot be reached through normal legal procedures.

**Crimes:** Acts or omissions that are in violation of law.

**Criminal:** Pertaining to, or involving, crimes or the administration of penal justice. An individual who has been found guilty of the commission of conduct that causes social harm and that is punishable by law; a person who has committed a crime.

**Criminal action:** The procedure by which a person accused of committing a crime is charged, brought to trial, and judged.

**Criminal conversation:** A TORT under COMMON LAW that involves the seduction of another person's spouse.

**Criminal forfeiture:** The loss of a criminal defendant's rights to property which is confiscated by the government when the property was used in the commission of a crime. The seizure by law enforcement officers of an automobile used in the transportation of illegal narcotics is a criminal forfeiture.

**Criminal law:** A body of rules and statutes that defines conduct prohibited by the government because it threatens and harms public safety and welfare and that establishes punishment to be imposed for the commission of such acts.

**Criminal negligence:** The failure to use reasonable care to avoid consequences that threaten or harm the safety of the public and that are the foreseeable outcome of acting in a particular manner.

**Criminal procedure:** The framework of laws and rules that govern the administration of justice in cases involving an individual who has been accused of a crime, beginning with the initial investigation of the crime and concluding either with the unconditional release of the accused by virtue of acquittal (a judgment of not guilty) or by the imposition of a term of punishment pursuant to a conviction for the crime.

**Criminology:** The scientific study of the causation, correction, and prevention of crime.

**Critical legal studies:** An intellectual movement whose members argue that law is neither neutral nor value free but is in fact inseparable from politics.

**Crop insurance:** A contract of indemnity by which, for a specified premium, one party promises to compensate another for the financial loss incurred by the destruction of agricultural products from the forces of nature, such as rain, hail, frost, or insect infestation.

**Crops:** Commodities produced from the earth which are planted, raised, and gathered within the course of a single season.

**Cross-action:** A separate and independent lawsuit brought by the defendant against a plaintiff for some reason arising from the same transaction or event that is the basis for the plaintiff's lawsuit.

**Cross-claim:** A demand made in a PLEADING against another party on the same side of the lawsuit.

**Cross-complaint:** A type of PLEADING that asserts a claim against any of the parties suing the person making the complaint, or against anyone else involved in the same controversy or having an interest in the same property that is the subject of the lawsuit.

**Cross-demand:** A claim made against someone who has already made a demand of the person asserting that claim.

**Cross-examination:** The questioning of a witness or party during a trial, hearing, or deposition by the party opposing the one who asked the person to testify in order to evaluate the truth of that person's testimony, to develop the testimony further, or to accomplish any other objective. The interrogation of a witness or party by the party opposed to the one who called the witness or party, upon a subject raised during direct examination—the initial questioning of a witness or party—on the merits of that testimony.

**Cruel and inhuman treatment:** Another name for cruelty, or for the intentional, hostile infliction of physical or mental suffering upon another individual, which is a ground for DIVORCE in many states.

**Cruel and unusual punishment:** Such punishment as would amount to torture or barbarity, any cruel and degrading punishment not known to the COMMON LAW, or any fine, penalty, confinement, or treatment that is so disproportionate to the offense as to shock the moral sense of the community.

**Cruelty:** The deliberate and malicious infliction of mental or physical pain upon persons or animals.

**CTA:** An abbreviation for cum testamento annexo, Latin for "with the will attached."

**Culpa:** *[Latin, Fault, blame, or neglect.]* A CIVIL LAW term that implies that certain conduct is actionable.

**Culpable:** Blameworthy; involving the commission of a fault or the breach of a duty imposed by law.

**Culprit:** An individual who has been formally charged with a criminal offense but who has not yet been tried and convicted.

**Cum testamento annexo:** *[Latin, With the will annexed.]* A phrase that describes an administrator named by a probate or surrogate court to settle and distribute an estate according to the terms of a will in which the testator, its maker, has failed to name an executor, or in which the one named refuses to act or is legally incapable of acting.

**Cumulative evidence:** Facts or information that proves what has previously been established by other information concerning the same issue.

**Cumulative sentence:** Separate consecutive terms of imprisonment imposed upon a defendant who has been convicted of two or more distinct offenses; any term of imprisonment that becomes effective subsequent to the expiration of a prior one.

**Cumulative voting:** A method of election of the board of directors used by corporations whereby a stockholder may cast as many votes for directors as he or she has shares of stock, multiplied by the number of directors to be elected.

A plan used for the election of members to the lower house of the Illinois legislature by which voters, each of whom is given three votes, may cast all of the votes for one candidate or allocate them among two or three candidates.

**Cunnilingus:** An act in which the female sexual organ is orally stimulated.

**Cure:** The act of restoring health after injury or illness. Care, including medical and nursing services rendered to a sailor throughout a period of duty, pursuant to the principle that the owner of a vessel must furnish maintenance and cure to a sailor who becomes ill or is injured during service.

The right of a seller, under the UNIFORM COMMERCIAL CODE (UCC), a body of law governing commercial transactions, to correct a delivery of goods that do not conform to contractual terms made to a buyer within the period specified by the contract in order to avoid a breach of contract action.

The actual payment of all amounts that are past due in regard to a default in such payments.

**Curia:** *[Latin, Court.]* A judicial tribunal or court convened in the sovereign's palace to dispense justice. A court that exercised jurisdiction over civil matters, as distinguished from religious matters, which were determined by ecclesiastical courts, a system of courts in England that were held by authority of the sovereign and had jurisdiction over matters concerning the religion and ritual of the established church.

**Curia regis:** *[Latin, The King's Court.]*

**Current account:** A detailed financial statement representing the debit and credit relationship between two parties that has not been finally settled or paid because of the continuous, ongoing dealings of the parties.

**Curtesy:** An estate to which a man is entitled by common-law right on the death of his wife, in all the lands that his wife owned at any time during their marriage, provided a child is born of the marriage who could inherit the land.

**Curtilage:** The area, usually enclosed, encompassing the grounds and buildings immediately surrounding a home that is used in the daily activities of domestic life.

**Custodial interrogation:** Questioning initiated by law enforcement officers after a person is taken into custody or otherwise deprived of his or her freedom in any significant way, thus requiring that the person be advised of his or her applicable constitutional rights.

**Custody:** The care, possession, and control of a thing or person. The retention, inspection, guarding, maintenance, or security of a thing within the immediate care and control of the person to whom it is committed. The detention of a person by lawful authority or process.

**Customs duties:** Tariffs or taxes payable on merchandise imported or exported from one country to another.

**Cy pres:** Abbreviated form of *cy pres comme possible,* French for "as near as possible." The name of a rule employed in the construction of such instruments as trusts and wills, by which the intention of the person who executes the instrument is effectuated as nearly as possible when circumstances make it impossible or illegal to give literal effect to the document.

**Damages:** Monetary compensation that is awarded by a court in a civil action to an individual who has been injured through the wrongful conduct of another party.

**Damnum:** *[Latin, Damage.]* The loss or reduction in the value of property, life, or health of an individual as a consequence of FRAUD, carelessness, or accident.

**Danelage:** A system of law introduced into England as a result of its invasion and conquest by the Danes during the eighth and ninth centuries, which occurred primarily in some of the midland counties and on the eastern coast.

**Dangerous instrumentality:** Any article that is inherently hazardous or has the potential for harming people through its careless use.

**Day certain:** A specified date. A term used in the rules of civil and CRIMINAL PROCEDURE to designate a particular time by which all motions for a new trial must be submitted to the court.

**Day in court:** The opportunity afforded an individual to have a claim litigated in a judicial setting.

**Days of grace:** An extension of the time originally scheduled for the performance of an act, such as payment for a debt, granted merely as a gratuitous favor by the person to whom the performance is owed.

**De bonis non administratis:** *[Latin, Of the goods not administered.]* When an administrator is appointed to succeed another who has left the estate partially unsettled, the administrator is said to be granted "administration *de bonis non,*" that is, of the goods not already administered.

**De facto:** *[Latin, In fact.]* In fact, in deed, actually.

**De jure:** *[Latin, In law.]* Legitimate; lawful, as a MATTER OF LAW. Having complied with all the requirements imposed by law.

**De minimis:** An abbreviated form of the Latin MAXIM *de minimis non curat lex,* "the law cares not for small things." A legal doctrine by which a court refuses to consider trifling matters.

**De novo:** *[Latin, Anew.]* A second time; afresh. A trial or a hearing that is ordered by an appellate court that has reviewed the record of a hearing in a lower court and sent the matter back to the original court for a new trial, as if it had not been previously heard nor decided.

**Dead man's statutes:** State RULES OF EVIDENCE that make the oral statements of a decedent inadmissible in a civil lawsuit against the executor or administrator of the decedent's estate when presented by persons to bolster their claims against the estate.

**Deadly force:** An amount of force that is likely to cause either serious bodily injury or death to another person.

**Death and dying:** *Death* is the end of life. *Dying* is the process of approaching death, including the choices and actions involved in that process.

**Death warrant:** An order from the executive, the governor of a state, or the president directing the warden of a prison or a sheriff or other appropriate officer to carry into execution a sentence of death; an order commanding that a named person be put to death in a specified manner at a specific time.

**Debenture:** *[Latin, Are due.]* A promissory note or bond offered by a corporation to a creditor in exchange for a loan, the repayment of which is backed only by the general creditworthiness of the corporation and not by a mortgage or a lien on any specific property.

**Debit:** A sum charged as due or owing. An entry made on the asset side of a ledger or account. The term is used in bookkeeping to denote the left side of the ledger, or the charging of a person or an account with all that is supplied to or paid out for that person or for the subject of the account. Also, the balance of an account where it is shown that something remains due to the party keeping the account.

As a noun, an entry on the left-hand side of an account. As a verb, to make an entry on the left-hand side of an account. A term used in accounting or bookkeeping that results in an increase to an asset and an expense account and a decrease to a liability, revenue, or owner's EQUITY account.

**Debt:** A sum of money that is owed or due to be paid because of an express agreement; a specified sum of money that one person is obligated to pay and that another has the legal right to collect or receive.

A fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future. In a still more general sense, that which is due from one person to another, whether money, goods, or services. In a broad sense, any duty to respond to another in money, labor, or service; it may even mean a moral or honorary obligation, unenforceable by legal action. Also, sometimes an aggregate of separate debts, or the total sum of the existing claims against a person or company. Thus we speak of the "national debt," the "bonded debt" of a corporation, and so on.

**Debt, action of:** One of the oldest common-law FORMS OF ACTION available to private litigants seeking to collect what is owed to them because of a harm done to them by another.

**Debt poolers:** Individuals or organizations who receive and apply monthly funds from a person owing money to several creditors and who make arrangements to pay these creditors less than what is actually owed.

**Debtor:** One who owes a debt or the performance of an obligation to another, who is called the creditor; one who may be compelled to pay a claim or demand; anyone liable on a claim, whether due or to become due. In BANKRUPTCY law, a person who files a voluntary petition or person against whom an involuntary petition is filed. A person or municipality concerning which a bankruptcy case has been commenced.

**Decedent:** An individual who has died. The term literally means "one who is dying," but it is commonly used in the law to denote one who has died, particularly someone who has recently passed away.

**Deceit:** A MISREPRESENTATION made with the express intention of defrauding someone, which subsequently causes injury to that person.

**Decennial Digest®:** One of the titles of the American Digest System that classifies by topic the summaries of court decisions that were reported chronologically in the various units of the National Reporter System.

**Decision:** A conclusion reached after an evaluation of facts and law.

**Decision on the merits:** An ultimate determination rendered by a court in an action that concludes the status of legal rights contested in a controversy and precludes a later lawsuit on the same CAUSE OF ACTION by the parties to the original lawsuit.

**Declaration:** The first PLEADING in a lawsuit governed by the rule of COMMON-LAW PLEADING. In the law of evidence, a statement or narration made not under oath but simply in the middle of things, as a part of what is happening. Also, a proclamation.

**Declaration of trust:** An assertion by a property owner that he or she holds the property or estate for the benefit of another person, or for particular designated objectives.

**Declaratory judgment:** Statutory remedy for the determination of a JUSTICIABLE controversy where the plaintiff is in doubt as to his or her legal rights. A binding adjudication of the rights and status of litigants even though no consequential relief is awarded.

**Decree:** A judgment of a court that announces the legal consequences of the facts found in a case and orders that the court's decision be carried out. A decree in EQUITY is a sentence or order of the court, pronounced on hearing and understanding all the points in issue, and determining the rights of all the parties to the suit, according to equity and good conscience. It is a declaration of the court announcing the legal consequences of the facts found. With the procedural merger of law and equity in the federal and most state courts under the Rules of Civil Procedure, the term *judgment* has generally replaced *decree.*

**Dedication:** In COPYRIGHT law the first publication of a work that does not comply with the requirements relating to copyright notice and which therefore permits anyone to legally republish it. The gift of land—or an EASEMENT, that is, a right of use of the property of another—by the owner to the government for public use, and accepted for such use by or on behalf of the public.

**Deductible:** That which may be taken away or subtracted. In taxation, an item that may be subtracted from gross income or adjusted gross income in determining taxable income (e.g., interest expenses, charitable contributions, certain taxes).

The portion of an insured loss to be borne by the insured before he or she is entitled to recovery from the insurer.

**Deduction:** That which is deducted; the part taken away; abatement; as in deductions from gross income in arriving at net income for tax purposes.

In CIVIL LAW, a portion or thing that an heir has a right to take from the mass of the succession before any partition takes place.

**Deed:** A written instrument, which has been signed and delivered, by which one individual, the grantor, conveys title to real property to another individual, the grantee; a conveyance of land, tenements, or hereditaments, from one individual to another.

**Deed of trust:** A document that embodies the agreement between a lender and a borrower to transfer an interest in the borrower's land to a neutral third party, a trustee, to secure the payment of a debt by the borrower.

**Deem:** To hold; consider; adjudge; believe; condemn; determine; treat as if; construe.

**Defalcation:** The misappropriation or EMBEZZLEMENT of money.

**Defamation:** Any intentional false communication, either written or spoken, that harms a person's reputation; decreases the respect, regard, or confidence in which a person is held; or induces disparaging, hostile, or disagreeable opinions or feelings against a person.

**Default:** An omission; a failure to do that which is anticipated, expected, or required in a given situation.

**Default judgment:** Judgment entered against a party who has failed to defend against a claim that has been brought by another party. Under rules of CIVIL PROCEDURE, when a party against whom a judgment for affirmative relief is sought has failed to plead (i.e., answer) or otherwise defend, the party is in default and a judgment by default may be entered either by the clerk or the court.

**Defeasance clause:** A provision of a mortgage—an interest in land given to a mortgagee-lender to secure the payment of a debt—which promises that the mortgagor-borrower will regain title to the mortgaged property when all the terms of the mortgage have been met.

**Defeasible:** Potentially subject to defeat, termination, or ANNULMENT upon the occurrence of a future action or event, or the performance of a condition *subsequent.*

**Defect:** Imperfection, flaw, or deficiency.

**Defendant:** The person defending or denying; the party against whom relief or recovery is sought in an action or suit, or the accused in a criminal case.

**Defense:** The forcible repulsion of an unlawful and violent attack, such as the defense of one's person, property, or country in time of war.

The totality of the facts, law, and contentions presented by the party against whom a civil action or ciminal prosecution is instituted in order to defeat or diminish the plaintiff's CAUSE OF ACTION or the prosecutor's case. A reply to the claims of the other party, which asserts reasons why the claims should be disallowed. The defense may involve an absolute denial of the other party's factual allegations or may entail an AFFIRMATIVE DEFENSE, which sets forth completely new factual allegations. Pursuant to the rules of federal CIVIL PROCEDURE, numerous defenses may be asserted by motion as well as by answer, while other defenses must be pleaded affirmatively.

**Deficiency:** A shortage or insufficiency. The amount by which federal INCOME TAX due exceeds the amount reported by the taxpayer on his or her return; also, the amount owed by a taxpayer who has not filed a return. The outstanding balance of a debt secured by a mortgage after the mortgaged property has been sold to satisfy the obligation at a price less than the debt.

**Deficiency judgment:** An assessment of personal liability against a mortgagor, a person who pledges title to property to secure a debt, for the unpaid balance of the mortgage debt when the proceeds of a foreclosure sale are insufficient to satisfy the debt.

**Deficit:** A deficiency, misappropriation, or defalcation; a minus balance; something wanting.

**Definitive:** Conclusive; ending all controversy and discussion in a lawsuit.

**Deforcement:** The common-law name given to the wrongful possession of land to which another person is rightfully entitled; the detention of DOWER from a widow.

**Defraud:** To make a MISREPRESENTATION of an existing material fact, knowing it to be false or making it recklessly without regard to whether it is true or false, intending for someone to rely on the misrepresentation and under circumstances in which such person does rely on it to his or her damage. To practice FRAUD; to cheat or trick. To deprive a person of property or any interest, estate, or right by fraud, deceit, or artifice.

**Degree:** Extent, measure, or scope of an action, condition, or relation. Legal extent of guilt or NEGLIGENCE. Title conferred on graduates of school, college, or university. The state or civil condition of a person. The grade or distance one thing may be removed from another; i.e., the distance, or number of removes that separate two persons who are related by consanguinity. Thus, a sibling is in the second degree of kinship but a parent is in the first degree of kinship.

**Del credere:** *[Italian, Of belief or trust.]* An arrangement in which an agent or factor— an individual who takes possession and agrees to sell goods for another—consents for an additional fee to guarantee that the purchaser, to whom credit has been extended, is financially solvent and will perform the contract.

**Delectus personae:** *[Latin, Choice of the person.]* By this term is understood the right of partners to exercise their choice and preference as to the admission of any new members to the partnership, and as to the persons to be so admitted, if any. The doctrine is equally applicable to close and family corporations and is exemplified in the use of restrictions for the transfer of shares of stock.

**Delegate:** A person who is appointed, authorized, delegated, or commissioned to act in the place of another. Transfer of authority from one to another. A person to whom affairs are committed by another.

A person elected or appointed to be a member of a representative assembly. Usually spoken of one sent to a special or occasional assembly or convention. Person selected by a constituency and authorized to act for it at a party or state political convention.

As a verb, it means to transfer authority from one person to another; to empower one to perform a task in behalf of another, e.g., a landlord may delegate an agent to collect rents.

**Delegation:** A sending away; a putting into commission; the assignment of a debt to another; the entrusting of another with a general power to act for the good of those who depute him or her; a body of delegates. The transfer of authority by one person to another.

The body of delegates from a state to a national nominating convention or from a county to a state or other party convention. The whole body of delegates or representatives sent to a convention or assembly from one district, place, or political unit is collectively spoken of as a *delegation.*

**Deliberate:** Willful; purposeful; determined after thoughtful evaluation of all relevant factors; dispassionate. To act with a particular intent, which is derived from a careful consideration of factors that influence the choice to be made.

**Delictum:** *[Latin, A fault.]* An injury, an offense, or a tort—a wrong done to the property or person of another that does not involve breach of contract. Culpability; blameworthiness of a criminal nature, as in the Latin phrase *in pari delicto*—in equal fault or equally criminal—used to describe accomplices to a crime.

**Delivery:** The transfer of possession of real property or PERSONAL PROPERTY from one person to another.

**Demand:** Peremptory allegation or assertion of a legal right.

**Demeanor:** The outward physical behavior and appearance of a person.

**Demise:** Death. A conveyance of property, usually of an interest in land. Originally meant a posthumous grant but has come to be applied commonly to a conveyance that is made for a definitive term, such as an estate for a term of years. A lease is a common example, and demise is sometimes used synonymously with "lease" or "let."

**Demonstrative evidence:** Evidence other than testimony that is presented during the course of a civil or criminal trial. Demonstrative evidence includes actual evidence (e.g., a set of bloody gloves from a murder scene) and illustrative evidence (e.g., photographs and charts).

**Demonstrative legacy:** A gift by will of money or other PERSONAL PROPERTY that is to be paid to an heir from a fund designated in the provisions of the will but, in any event, is to be paid if there are sufficient available assets in the estate.

**Demur:** To dispute a legal PLEADING or a statement of the facts being alleged through the use of a demurrer.

**Demurrage:** A separate freight charge, in addition to ordinary shipping costs, which is imposed according to the terms of a carriage contract upon the person responsible for unreasonable delays in loading or unloading cargo. In maritime law, demurrage is the amount identified in a charter contract as damages payable to a shipowner as compensation for the detention of a ship beyond the time specified by a charter party for loading and unloading or for sailing.

**Demurrer:** An assertion by the defendant that although the facts alleged by the plaintiff in the complaint may be true, they do not entitle the plaintiff to prevail in the lawsuit.

**Deny:** To refuse to acknowledge something; to disclaim connection with or responsibility for an action or statement. To deny someone of a legal right is to deprive him or her of that right.

**Dependent:** A person whose support and maintenance is contingent upon the aid of another. Conditional.

**Dependent relative revocation:** The doctrine that regards as mutually interrelated the acts of a testator destroying a will and executing a second will. In such cases, if the second will is either never made or improperly executed, there is a rebuttable presumption that the testator would have preferred the former will to no will at all, which allows the possibility of probate of the destroyed will.

**Depletion allowance:** A tax deduction authorized by federal law for the exhaustion of oil and gas wells, mines, timber, mineral deposits or reserves, and other natural deposits.

**Deponent:** An individual who, under oath or affirmation, gives out-of-court testimony in a deposition. A deponent is someone who gives evidence or acts as a witness. The testimony of a deponent is written and carries the deponent's signature.

**Deportation:** Banishment to a foreign country, attended with confiscation of property and deprivation of CIVIL RIGHTS.

The transfer of an alien, by exclusion or expulsion, from the United States to a foreign country. The removal or sending back of an alien to the country from which he or she came because his or her presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated. The grounds for deportation are set forth at 8 U.S.C.A. § 1251, and the procedures are provided for in §§ 1252-1254.

**Depose:** To make a deposition; to give evidence in the shape of a deposition; to make statements that are written down and sworn to; to give testimony that is reduced to writing by a duly qualified officer and sworn to by the deponent.

To deprive an individual of a public employment or office against his or her will. The term is usually applied to the deprivation of all authority of a sovereign.

In ancient usage, to testify as a witness; to give evidence under oath.

**Deposition:** The testimony of a party or witness in a civil or criminal proceeding taken before trial, usually in an attorney's office.

**Depository:** The place where a deposit is placed and kept, e.g., a bank, savings and loan institution, credit union, or trust company. A place where something is deposited or stored as for safekeeping or convenience, e.g., a safety deposit box.

**Deposits in court:** The payments of funds or property to an officer of the court as a precautionary measure during the pendency of litigation.

**Depreciation:** The gradual decline in the financial value of property used to produce income due to its increasing age and eventual obsolescence, which is measured by a formula that takes into account these factors in addition to the cost of the property and its estimated useful life.

**Deputy:** A person duly authorized by an officer to serve as his or her substitute by performing some or all of the officer's functions.

**Derivative action:** A lawsuit brought by a shareholder of a corporation on its behalf to enforce or defend a legal right or claim, which the corporation has failed to do.

**Derivative evidence:** Facts, information, or physical objects that tend to prove an issue in a criminal prosecution but which are excluded from consideration by the trier of fact because they were learned directly from information illegally obtained in violation of the constitutional guarantee against unreasonable SEARCHES AND SEIZURES.

**Derogation:** The partial repeal of a law, usually by a subsequent act that in some way diminishes its ORIGINAL INTENT or scope.

**Descent:** Hereditary succession. Succession to the ownership of an estate by inheritance, or by any act of law, as distinguished from *purchase.* Title by descent is the title by which one person, upon the death of another, acquires the real estate of the latter as an heir at law. The title by inheritance is in all cases called descent, although by statute law the title is sometimes made to ascend. The division among those legally entitled thereto of the real property of intestates.

**Descent and distribution:** The area of law that pertains to the transfer of real property or PERSONAL PROPERTY of a decedent who failed to leave a will or make a valid will and the rights and liabilities of heirs, next of kin, and distributees who are entitled to a share of the property.

**Descriptive word index:** An alphabetically arranged aid used in legal research used to locate cases that have discussed a particular topic.

**Desertion:** The act by which a person abandons and forsakes, without justification, a condition of public, social, or family life, renouncing its responsibilities and evading its duties. A willful ABANDONMENT of an employment or duty in violation of a legal or moral obligation.

Criminal desertion is a husband's or wife's abandonment or willful failure without JUST CAUSE to provide for the care, protection, or support of a spouse who is in ill health or necessitous circumstances.

**Desk audit:** An evaluation of a particular civil service position to determine whether its duties and responsibilities correspond to its job classification and salary grade.

**Destroy:** In general, to ruin completely; may include a taking. To ruin the structure, organic existence, or condition of a thing; to demolish; to injure or mutilate beyond possibility of use; to nullify.

**Desuetude:** The state of being unused; legally, the doctrine by which a law or treaty is rendered obsolete because of disuse. The concept encompasses situations in which a court refuses to enforce an unused law even if the law has not been repealed.

**Detainer:** The act (or the juridical fact) of withholding from a lawfully entitled person the possession of land or goods, or the restraint of a person's personal liberty against his or her will; detention. The wrongful keeping of a person's goods is called an UNLAWFUL DETAINER although the original taking may have been lawful.

A request filed by a criminal justice agency with the institution in which a prisoner is incarcerated asking the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent.

**Detectives:** Individuals whose business it is to observe and provide information about alleged criminals or to discover matters of secrecy for the protection of the public.

**Detention:** The act of keeping back, restraining, or withholding, either accidentally or by design, a person or thing.

**Determinable:** Liable to come to an end upon the happening of a certain contingency. Susceptible of being determined, found out, definitely decided upon, or settled.

**Determinate sentence:** A sentence to confinement for a fixed or minimum period that is specified by statute.

**Determination:** The final resolution or conclusion of a controversy.

**Deterrence:** A theory that criminal laws are passed with well-defined punishments to discourage individual criminal defendants from becoming repeat offenders and to discourage others in society from engaging in similar criminal activity

**Detinue:** One of the old common-law FORMS OF ACTION used to recover PERSONAL PROPERTY from a person who refuses to give it up. Also used to collect money damages for losses caused by the wrongful detention.

**Detriment:** Any loss or harm to a person or property; relinquishment of a legal right, benefit, or something of value.

**Deviance:** Conspicuous dissimilarity with, or variation from, customarily acceptable behavior.

**Devise:** A testamentary disposition of land or realty; a gift of real property by the last will and testament of the donor. When used as a noun, it means a testamentary disposition of real or PERSONAL PROPERTY, and when used as a verb, it means to dispose of real or personal property by will. To contrive; plan; scheme; invent; prepare.

**Dewey decimal system:** A numerical classification system of books employed by libraries.

**Dicta:** Opinions of a judge that do not embody the resolution or determination of the specific case before the court. Expressions in a court's opinion that go beyond the facts before the court and therefore are individual views of the author of the opinion and not binding in subsequent cases as legal precedent. The plural of *dictum.*

**Dictum:** *[Latin, A remark.]* A statement, comment, or opinion. An abbreviated version of obiter dictum, "a remark by the way," which is a collateral opinion stated by a judge in the decision of a case concerning legal matters that do not directly involve the facts or affect the outcome of the case, such as a legal principle that is introduced by way of illustration, argument, analogy, or suggestion.

**Digest:** A collection or compilation that embodies the chief matter of numerous books, articles, court decisions, and so on, disposed under proper heads or titles, and usually by an alphabetical arrangement, for facility in reference.

An index to reported cases, providing brief statements of court holdings or facts of cases, which is arranged by subject and subdivided by jurisdiction and courts.

**Dilatory:** Tending to cause a delay in judicial proceedings.

**Dilatory plea:** In common-law-pleading, any of several types of defenses that could be asserted against a plaintiff's CAUSE OF ACTION, delaying the time when the court would begin consideration of the actual facts in the case.

**Diligence:** Vigilant activity; attentiveness; or care, of which there are infinite shades, from the slightest momentary thought to the most vigilant anxiety. Attentive and persistent in doing a thing; steadily applied; active; sedulous; laborious; unremitting; untiring. The attention and care required of a person in a given situation; the opposite of NEGLIGENCE.

**Diminished capacity:** This doctrine recognizes that although, at the time the offense was committed, an accused was not suffering from a mental disease or defect sufficient to exonerate him or her from all criminal responsibility, the accused's mental capacity may have been diminished by intoxication, trauma, or mental disease so that he or she did not possess the specific mental state or intent essential to the particular offense charged.

**Diminution:** Taking away; reduction; lessening; incompleteness.

**Diplomatic agents:** Government representatives who are sent by one country to live and work in another, to serve as intermediaries between the two countries.

**Diplomatic immunity:** A principle of INTERNATIONAL LAW that provides foreign diplomats with protection from legal action in the country in which they work.

**Direct:** As a verb, to point to; guide; order; command; instruct. To advise; suggest; request. As an adjective, immediate; proximate; by the shortest course; without circuity; operating by an imme-

diate connection or relation, instead of operating through an intermediary; the opposite of *indirect.* In the usual or regular course or order, as distinguished from that which diverts, interrupts, or opposes. The opposite of cross, contrary, collateral, or remote. Without any intervening medium, agency, or influence; unconditional.

**Direct evidence:** Evidence in the form of testimony from a witness who actually saw, heard, or touched the subject of questioning. Evidence that, if believed, proves existence of the fact in issue without inference or presumption. That means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact, and which is distinguished from CIRCUMSTANTIAL EVIDENCE, often called *indirect.*

Evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.

**Direct examination:** The primary questioning of a witness during a trial that is conducted by the side for which that person is acting as a witness.

**Direct tax:** A charge levied by the government upon property, which is determined by its financial worth.

**Directed verdict:** A procedural device whereby the decision in a case is taken out of the hands of the jury by the judge.

**Director:** One who supervises, regulates, or controls.

**Directory:** A provision in a statute, rule of procedure, or the like, that is a mere direction or instruction of no obligatory force and involves no invalidating consequence for its disregard, as opposed to an imperative or mandatory provision, which must be followed. The general rule is that the prescriptions of a statute relating to the performance of a public duty are so far directory that, though neglect of them may be punishable, it does not affect the validity of the acts done under them, as in the case of a statute requiring an officer to prepare and deliver a document to another officer on or before a certain day.

**Disability:** The lack of competent physical and mental faculties; the absence of legal capability to perform an act.

The term *disability* usually signifies an incapacity to exercise all the legal rights ordinarily possessed by an average person. Convicts, minors, and incompetents are regarded to be under a disability. The term is also used in a more restricted sense when it indicates a hindrance to marriage or a deficiency in legal qualifications to hold office.

The impairment of earning capacity; the loss of physical function resulting in diminished efficiency; the inability to work.

**Disaffirm:** Repudiate; revoke consent; refuse to support former acts or agreements.

**Disallow:** To exclude; reject; deny the force or validity of.

**Disaster relief:** Monies or services made available to individuals and communities that have experienced losses due to disasters such as floods, hurricanes, earthquakes, drought, tornadoes, and riots.

**Disbar:** To revoke an attorney's license to practice law.

**Discharge:** To liberate or free; to terminate or extinguish. A discharge is the act or instrument by which a contract or agreement is ended. A mortgage is discharged if it has been carried out to the full extent originally contemplated or terminated prior to total execution.

Discharge also means to release, as from legal confinement in prison or the military service, or from some legal obligation such as jury duty, or the payment of debts by a person who is bankrupt. The document that indicates that an individual has been legally released from the military service is called a discharge.

**Disciplinary rules:** Precepts, such as the Code of Professional Responsibility, that proscribe an attorney from taking certain actions in the PRACTICE OF LAW.

**Disclaimer:** The denial, refusal, or rejection of a right, power, or responsibility.

**Discontinuance:** Cessation; ending; giving up. The discontinuance of a lawsuit, also known as a dismissal or a nonsuit, is the voluntary or involuntary termination of an action.

**Discovery:** A category of procedural devices employed by a party to a civil or criminal action, prior to trial, to require the adverse party to disclose information that is essential for the preparation of the requesting party's case and that the other party alone knows or possesses.

**Discretion in decision making:** *Discretion* is the power or right to make official decisions using reason and judgment to choose from among acceptable alternatives.

**Discretionary trust:** An arrangement whereby property is set aside with directions that it be used for the benefit of another, the beneficiary, and which provides that the trustee (one appointed or required by law to administer the property) has the right to accumulate, rather than pay out to the beneficiary, the annual income generated by the property or a portion of the property itself.

**Discrimination:** In CONSTITUTIONAL LAW, the grant by statute of particular privileges to a class arbitrarily designated from a sizable number of persons, where no reasonable distinction exists between the favored and disfavored classes. Federal laws, supplemented by court decisions, prohibit discrimination in such areas as employment, housing, VOTING RIGHTS, education, and access to public facilities. They also proscribe discrimination on the basis of race, age, sex, nationality, disability, or religion. In addition, state and local laws can prohibit discrimination in these areas and in others not covered by federal laws.

**Disfranchisement:** The removal of the rights and privileges inherent in an association with a group; the taking away of the rights of a free citizen, especially the right to vote. Sometimes called disenfranchisement.

The relinquishment of a person's right to membership in a corporation is distinguishable from a motion, which is the act of removing an officer from an office without depriving him or her of membership in the corporate body.

**Dishonor:** To refuse to accept or pay a draft or to pay a promissory note when duly presented. An instrument is dishonored when a necessary or optional presentment is made and due acceptance or payment is refused, or cannot be obtained within the prescribed time, or in case of bank collections, the instrument is seasonably returned by the midnight deadline; or presentment is excused and the instrument is not duly accepted or paid. Includes the insurer of a letter of credit refusing to pay or accept a draft or demand for payment.

As respects the flag, to deface or defile, imputing a lively sense of shaming or an equivalent acquiescent callousness.

**Disinherit:** To cut off from an inheritance. To deprive someone, who would otherwise be an heir to property or another right, of his or her right to inherit.

**Disinterested:** Free from bias, prejudice, or partiality.

**Dismissal:** A discharge of an individual or corporation from employment. The disposition of a civil or criminal proceeding or a claim or charge made therein by a court order without a trial or prior to its completion which, in effect, is a denial of the relief sought by the commencement of the action.

**Disorderly conduct:** A broad term describing conduct that disturbs the peace or endangers the morals, health, or safety of a community.

**Disorderly house:** A place where individuals reside or which they frequent for purposes that pose a threat to public health, morals, convenience, or safety, and that may create a public NUISANCE.

A *disorderly house* is an all-inclusive term that may be used to describe such places as a house of prostitution, an illegal gambling casino, or a site where drugs are constantly bought and sold. It is any place where unlawful practices are habitually carried on by the public.

**Disparagement:** In old ENGLISH LAW, an injury resulting from the comparison of a person or thing with an individual or thing of inferior quality; to discredit oneself by marriage below one's class. A statement made by one person that casts aspersions on another person's goods, property, or intangible things.

**Disparate impact:** A theory of liability that prohibits an employer from using a facially neutral employment practice that has an unjustified adverse impact on members of a protected class. A facially neutral employment practice is one that does not appear to be discriminatory on its face; rather it is one that is discriminatory in its application or effect.

**Disposable earnings:** That portion of one's income that a person is free to spend or invest as he or she sees fit, after payment of taxes and other obligations.

**Disposition:** Act of disposing; transferring to the care or possession of another. The parting with, alienation of, or giving up of property. The final settlement of a matter and, with reference to decisions announced by a court, a judge's ruling is commonly referred to as disposition, regardless of level of resolution. In CRIMINAL PROCEDURE, the sentencing or other final settlement of a criminal case. With respect to a mental state, means an attitude, prevailing tendency, or inclination.

**Dispositive fact:** Information or evidence that unqualifiedly brings a conclusion to a legal controversy.

**Dispossession:** The wrongful, nonconsensual ouster or removal of a person from his or her property by trick, compulsion, or misuse of the law, whereby the violator obtains actual occupation of the land. *Dispossession* encompasses intrusion, disseisin, or deforcement.

**Dispute:** A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other. The subject of litigation; the matter for which a suit is brought and upon which issue is joined, and in relation to which jurors are called and witnesses examined.

**Disqualify:** To deprive of eligibility or render unfit; to disable or incapacitate.

**Dissent:** An explicit disagreement by one or more judges with the decision of the majority on a case before them.

**Dissolution:** Act or process of dissolving; termination; winding up. In this sense it is frequently used in the phrase *dissolution of a partnership.*

**Dissolve:** To terminate; abrogate; cancel; annul; disintegrate. To release or unloose the binding force of anything.

**Distinguish:** To set apart as being separate or different; to point out an essential disparity.

**Distrain:** To seize the property of an individual and retain it until an obligation is performed. The taking of the goods and chattels of a tenant by a landlord in order to satisfy an unpaid debt.

**Distress:** The seizure of PERSONAL PROPERTY for the satisfaction of a demand.

**Distributee:** An heir; a person entitled to share in the distribution of an estate. This term is used to denote one of the persons who is entitled, under the statute of distributions, to the personal estate of one who is dead intestate.

**Distributor:** A wholesaler; an individual, corporation, or partnership buying goods in bulk quantities from a manufacturer at a price close to the cost of manufacturing them and reselling them at a higher price to other dealers, or to various retailers, but not directly to the general public.

**District:** One of the territorial areas into which an entire state or country, county, municipality, or other political subdivision is divided, for judicial, political, electoral, or administrative purposes.

The circuit or territory within which a person may be compelled to appear. Circuit of authority; province.

**District and prosecuting attorneys:** The elected or appointed public officers of each state, county, or other political subdivision who institute criminal proceedings on behalf of the government.

**District court:** A designation of an inferior state court that exercises general jurisdiction that it has been granted by the constitution or statute which created it. A U.S. judicial tribunal with original jurisdiction to try cases or controversies that fall within its limited jurisdiction.

**Disturbance of the peace:** An offense constituting a malicious and willful intrusion upon the peace and quiet of a community or neighborhood.

**Divers:** Several; any number more than two; different.

**Diversion:** A turning aside or altering of the natural course or route of a thing. The term is chiefly applied to the unauthorized change or alteration of a water course to the prejudice of a lower riparian, or to the unauthorized use of funds.

A program for the disposition of a criminal charge without a criminal trial; sometimes called operation de nova, intervention, or deferred prosecution.

**Diversity of citizenship:** A phrase used with reference to the jurisdiction of the federal courts which, under the U.S. Constitution, Art. III, § 2, extends to cases between citizens of different states designating the condition existing when the party on one side of a lawsuit is a citizen of one state and the party on the other side is a citizen of another state, or between a citizen of a state and an alien. The requisite jurisdictional amount must, in addition, be met.

**Divest:** To deprive or take away.

**Dividend:** The distribution of current or accumulated earnings to the shareholders of a corporation pro rata based on the number of shares owned. Dividends are usually issued in cash. However, they may be issued in the form of stock or property. The dividend on preferred shares is generally a fixed amount; however, on common shares the dividend varies depending on such things as the earnings and available cash of the corporation as well as future plans for the acquisition of property and equipment by the corporation.

**Divine right of kings:** The authority of a monarch to rule a realm by virtue of birth.

**Divorce:** A court decree that terminates a marriage; also known as marital dissolution.

**Dock:** To curtail or diminish, as, for example, to dock a person's wages for lateness or poor work. The cage or enclosed space in a criminal court where prisoners stand when brought in for trial.

**Docket:** A written list of judicial proceedings set down for trial in a court.

To enter the dates of judicial proceedings scheduled for trial in a book kept by a court.

**Doctrine:** A legal rule, tenet, theory, or principle. A political policy.

**Document:** A written or printed instrument that conveys information.

**Document of title:** Any written instrument, such as a bill of lading, a warehouse receipt, or an order for the delivery of goods, that in the usual course of business or financing is considered sufficient proof that the person who possesses it is entitled to receive, hold, and dispose of the instrument and the goods that it covers.

**Documentary evidence:** A type of written proof that is offered at a trial to establish the existence or nonexistence of a fact that is in dispute.

**Doing business:** A qualification imposed in state LONG-ARM STATUTES governing the SERVICE OF PROCESS, the method by which a lawsuit is commenced, which requires nonresident corporations to engage in commercial transactions within state borders in order to be subject to the PERSONAL JURISDICTION of state courts.

**Domain:** The complete and absolute ownership of land. Also the real estate so owned. The inherent sovereign power claimed by the legislature of a state, of controlling private property for public uses, is termed the *right of* eminent domain.

National domain is sometimes applied to the aggregate of the property owned directly by a nation. Public domain embraces all lands, the title to which is in the United States, including land occupied for the purposes of federal buildings, arsenals, dock-yards, and so on, and land of an agricultural or mineral character not yet granted to private owners.

Sphere of influence. Range of control or rule; realm.

**Dombec:** *[Saxon, Judgment book.]* The name given by the Saxons to the code of laws by which they lived.

**Domesday Book:** An ancient record of land ownership in England.

**Domestic:** Pertaining to the house or home. A person employed by a household to perform various servient duties. Any household servant, such as a maid or butler. Relating to a place of birth, origin, or domicile.

**Domestic partnership law:** The area of law that deals with the rights of unmarried adults who choose to live together in the same manner as a married couple but who are not married.

**Domestic violence:** Any abusive, violent, coercive, forceful, or threatening act or word inflicted by one member of a family or household on another can constitute domestic violence.

**Domiciliary administration:** The settlement and distribution of a decedent's estate in the state of his or her permanent residence, the place to which the decedent intended to return even though he or she might actually have resided elsewhere.

**Dominant:** Prevalent; paramount in force or effect; of primary importance or consideration. That which is dominant possesses rights that prevail over those of others.

**Dominant cause:** The essential or most direct source of an accident or injury, regardless of when it occurred.

**Dominion:** Perfect control in right of ownership. The word implies both title and possession and appears to require a complete retention of control over disposition. Title to an article of property, which arises from the power of disposition and the right of claiming it. Sovereignty; as in the dominion of the seas or over a territory.

In CIVIL LAW, with reference to the title to property that is transferred by a sale of it, dominion is said to be either *proximate* or *remote,* the former being the kind of title vesting in the purchaser when he or she has acquired both the ownership and the possession of the article, the latter describing the nature of the title when he or she has legitimately acquired the ownership of the property but there has been no delivery.

**Donative:** Relating to the gratuitous transfer of something as in the nature of a gift.

**Donee:** The recipient of a gift. An individual to whom a power of appointment is conveyed.

**Donor:** The party conferring a power. One who makes a gift. One who creates a trust.

**Doom:** An archaic term for a court's judgment. For example, some criminal sentences still end with the phrase " . . . which is pronounced for doom."

**Dormant:** Latent; inactive; silent. That which is dormant is not used, asserted, or enforced.

**Double entry:** A bookkeeping system that lists each transaction twice in the ledger.

**Double indemnity:** A term of an insurance policy by which the insurance company promises to pay the insured or the beneficiary twice the amount of coverage if loss occurs due to a particular cause or set of circumstances.

**Double insurance:** Duplicate protection provided when two companies deal with the same individual and undertake to indemnify that person against the same losses.

**Double jeopardy:** A second prosecution for the same offense after acquittal or conviction or multiple punishments for same offense. The evil sought to be avoided by prohibiting double jeopardy is double trial and double conviction, not necessarily double punishment.

**Double taxation agreements:** The requirement that an entity or individual pay two separate taxes on the same property for the same purpose and during the same time period. Under Subchapter C of the INTERNAL REVENUE CODE, the federal government imposes double taxation on corporations by taxing both the profits received by the corporation and the earnings distributed to shareholders of the corporation through stock dividends.

**Doubt:** To question or hold questionable. Uncertainty of mind; the absence of a settled opinion or conviction; the attitude of mind toward the acceptance of or belief in a proposition, theory, or statement, in which the judgment is not at rest but inclines alternately to either side.

**Dower:** The provision that the law makes for a widow out of the lands or tenements of her husband, for her support and the nurture of her children. A species of life estate that a woman is, by law, entitled to claim on the death of her husband, in the lands and tenements of which he was seised in fee during the marriage, and which her issue, if any, might by possibility have inherited. The life estate to which every married woman is entitled on the death of her husband, intestate, or, in case she dissents from his will, one-third in value of all lands of which her husband was beneficially seized in law or in fact, at any time during coverture.

**Down payment:** A percentage of the total purchase price of an item that is proffered when the item is bought on credit.

**Draconian laws:** A code of laws prepared by Draco, the celebrated lawgiver of Athens, that, by modern standards, are considered exceedingly severe. The term *draconian* has come to be used to refer to any unusually harsh law.

**Draft:** A written order by the first party, called the drawer, instructing a second party, called the drawee (such as a bank), to pay money to a third party, called the payee. An order to pay a sum certain in money, signed by a drawer, payable on demand or at a definite time, to order or bearer.

A tentative, provisional, or preparatory writing out of any document (as a will, contract, lease, and so on) for purposes of discussion and correction, which is afterward to be prepared in its final form.

Compulsory CONSCRIPTION of persons into military service.

Also, a small arbitrary deduction or allowance made to a merchant or importer, in the case of goods sold by weight or taxable by weight, to cover possible loss of weight in handling or from differences in scales.

**Drafter:** The person who draws or frames a legal document such as a will, PLEADING, conveyance, or contract. One who writes an original legislative bill for the U.S. Senate or House of Representatives is called the drafter of that bill.

**Drain:** A trench or ditch to convey water from wet land; a channel through which water may flow off. The word has no technical legal meaning. Any hollow space in the ground, natural or artificial, where water is collected and passes off, is a ditch or drain.

Also, sometimes, the EASEMENT or servitude (acquired by grant or prescription) that consists of the right to drain water through another's land.

**Dramshop acts:** Statutes, also called civil liability acts, that impose civil liability upon one who sells intoxicating liquors when a third party has been injured as a result of the purchaser's intoxication and such sale has either caused or contributed to the state of intoxication.

**Draw:** To aim a firearm, or deadly weapon, at a particular target.

To prepare a written bill of exchange, COMMERCIAL PAPER, draft, or negotiable instrument and place one's signature on it, creating a legal obligation under its terms. To write a document, such as a deed, complaint, or petition, including the essential information necessary to make it legally effective upon its execution by the designated parties.

To lawfully remove money from an account held in a bank, treasury, or other depository.

**Drawee:** A person or bank that is ordered by its depositor, a drawer, to withdraw money from an account to pay a designated sum to a person according to the terms of a check or a draft.

**Drawer:** A person who orders a bank to withdraw money from an account to pay a designated person a specific sum according to the term of a bill, a check, or a draft. An individual who writes and signs a COMMERCIAL PAPER, thereby becoming obligated under its terms.

**Droit:** *[French, Justice, right, law.]* A term denoting the abstract concept of law or a right.

**Drug courts:** A special court with jurisdiction over cases involving drug-using offenders. Drug courts are treatment-based alternatives to prisons, youth-detention facilities, jails, and PROBATION. These courts make extensive use of comprehensive supervision, drug testing, treatment services, immediate sanctions, and incentives.

**Druggist:** An individual who, as a regular course of business, mixes, compounds, dispenses, and sells medicines and similar health aids.

**Drugs and narcotics:** *Drugs* are articles that are intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals, and any articles other than food, water, or oxygen that are intended to affect the mental or body function of humans or animals. *Narcotics* are any drugs that dull the senses and commonly become addictive after prolonged use.

**Drunkard:** One who habitually engages in the overindulgence of alcohol.

**Drunkenness:** The state of an individual whose mind is affected by the consumption of alcohol.

**Dual nationality:** An equal claim, simultaneously possessed by two nations, to the allegiance of an individual.

**Duces tecum:** *[Latin, Bring with you.]* Commonly called a SUBPOENA DUCES TECUM, a type of legal writ requiring one who has been summoned to appear in court to bring some specified item with him or her for use or examination by the court.

**Due:** Just; proper; regular; lawful; sufficient; reasonable, as in the phrases *due care, due process of law, due notice.*

Owing; payable; justly owed. That which one contracts to pay or perform to another; that which law or justice requires to be paid or done. Owed, or owing, as distinguished from payable. A debt is often said to be *due* from a person where he or she is the party owing it, or primarily bound to pay, whether the time for payment has or has not arrived. The same thing is true of the phrase *due and owing.*

**Due date:** The particular day on or before which something must be done to comply with law or contractual obligation.

**Due notice:** Information that must be given or made available to a particular person or to the public within a legally mandated period of time so that its recipient will have the opportunity to respond to a situation or to allegations that affect the individual's or public's legal rights or duties.

**Due process of law:** A fundamental, constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the

government acts to take away one's life, liberty, or property. Also, a constitutional guarantee that a law shall not be unreasonable, ARBITRARY, or capricious.

**Dueling:** The fighting of two persons, one against the other, at an appointed time and place, due to an earlier quarrel. If death results, the crime is murder. It differs from an affray in this, that the latter occurs on a sudden quarrel, while the former is always the result of design.

**Dummy:** Sham; make-believe; pretended; imitation. Person who serves in place of another, or who serves until the proper person is named or available to take his place (e.g., dummy corporate directors; dummy owners of real estate).

**Duress:** Unlawful pressure exerted upon a person to coerce that person to perform an act that he or she ordinarily would not perform.

**Durham rule:** A principle of CRIMINAL LAW used to determine the validity of the INSANITY DEFENSE asserted by an accused, that he or she was insane at the time of committing a crime and therefore should not be held legally responsible for the action.

**Duty:** A legal obligation that entails mandatory conduct or performance. With respect to the laws relating to CUSTOMS DUTIES, a tax owed to the government for the import or export of goods.

**Duty of tonnage:** A fee that encompasses all taxes and CUSTOMS DUTIES, regardless of their name or form, imposed upon a vessel as an instrument of commerce for entering, remaining in, or exiting from a port.

**DWI:** An abbreviation for *driving while intoxicated,* which is an offense committed by an individual who operates a motor vehicle while under the influence of alcohol or DRUGS AND NARCOTICS.

An abbreviation for *died without issue*, which commonly appears in genealogical tables.

**Dying declaration:** A statement by a person who is conscious and knows that death is imminent concerning what he or she believes to be the cause or circumstances of death that can be introduced into evidence during a trial in certain cases.

**Earned income:** Sources of money derived from the labor, professional service, or entrepreneurship of an individual taxpayer as opposed to funds generated by investments, dividends, and interest.

**Earnest money:** A sum of money paid by a buyer at the time of entering a contract to indicate the intention and ability of the buyer to carry out the contract. Normally such earnest money is applied against the purchase price. Often the contract provides for FORFEITURE of this sum if the buyer defaults. A deposit of part payment of purchase price on sale to be consummated in future.

**Easement:** A right of use over the property of another. Traditionally the permitted kinds of uses were limited, the most important being rights of way and rights concerning flowing waters. The easement was normally for the benefit of adjoining lands, no matter who the owner was (an easement appurtenant), rather than for the benefit of a specific individual (easement in gross).

**Ecclesiastical courts:** In England, the collective classification of particular courts that exercised jurisdiction primarily over spiritual matters. A system of courts, held by authority granted by the sovereign, that assumed jurisdiction over matters concerning the ritual and religion of the established church, and over the rights, obligations, and discipline of the clergy.

**Edict:** A decree or law of major import promulgated by a king, queen, or other sovereign of a government.

**Education law:** The body of state and federal constitutional provisions; local, state, and federal statutes; court opinions; and government regulations that provide the legal framework for educational institutions.

**Effect:** As a verb, to do; to produce; to make; to bring to pass; to execute; enforce; accomplish. As a noun, that which is produced by an agent or cause; result; outcome; consequence. The result that an instrument between parties will produce in their relative rights, or which a statute will produce upon the existing law, as discovered from the language used, the forms employed, or other materials for construing it. The operation of a law, of an agreement, or an act. The phrases *take effect, be in force,* and *go into operation,* are used interchangeably.

In the plural, a person's effects are the real and PERSONAL PROPERTY of someone who has died or who makes a will.

**Effective rate:** Another name for annual percentage rate that refers to the amount of yearly interest to be charged by a lender on the money borrowed by a debtor.

In federal INCOME TAX law, the actual tax rate that an individual taxpayer pays based upon his or her taxable income.

**Efficient cause:** That which actually precipitates an accident or injury.

**E.G.:** An abbreviation for *exempli gratia* [*Latin, for the sake of an example*].

**Ejectment:** One of the old FORMS OF ACTION for recovery of the possession of real property.

**Elder law:** As of the early 2000s a relatively new specialty devoted to the legal issues of SENIOR CITIZENS, including estate planning, HEALTH CARE, planning for incapacity or mental incompetence, the receipt of benefits, and employment discrimination.

**Election of remedies:** The liberty of choosing (or the act of choosing) one out of several means afforded by law for the redress of an injury, or one out of several available FORMS OF ACTION. An *election of remedies* arises when one having two coexistent but inconsistent remedies chooses to exercise one, in which event she or he loses the right to thereafter exercise the other. Doctrine provides that if two or more remedies exist that are repugnant and inconsistent with one another, a party will be bound if he or she has chosen one of them.

**Elections:** The processes of voting to decide a public question or to select one person from a designated group to perform certain obligations in a government, corporation, or society.

**Elective share:** Statutory provision that a surviving spouse may choose between taking that which is provided in the will of the deceased spouse or taking a statutorily prescribed share of the estate. Such election may be presented if the will leaves the spouse less than he or she would otherwise receive by statute. This election may also be taken if the spouse seeks to set aside a will that contains a provision to the effect that an attempt to contest the will defeats the rights of one to take under the will.

**Elector:** A voter who has fulfilled the qualifications imposed by law; a constituent; a selector of a public officer; a person who has the right to cast a ballot for the approval or rejection of a political proposal or question, such as the issuance of bonds by a state or municipality to finance public works projects.

A member of the electoral college—an association of voters elected by the populace of each state and the District of Columbia—which convenes every four years to select the president and vice president of the United States.

**Electoral college:** Nominated persons, known as electors, from the states and the District of Columbia, who meet every four years in their home state or district and cast ballots to choose the president and vice president of the United States.

**Electronic surveillance:** Observing or listening to persons, places, or activities—usually in a secretive or unobtrusive manner—with the aid of electronic devices such as cameras, microphones,

tape recorders, or wire taps. The objective of electronic surveillance when used in law enforcement is to gather evidence of a crime or to accumulate intelligence about suspected criminal activity. Corporations use electronic surveillance to maintain the security of their buildings and grounds or to gather information about competitors.

**Element:** A material factor; a basic component.

**Emancipation:** The act or process by which a person is liberated from the authority and control of another person.

**Embargo:** A proclamation or order of government, usually issued in time of war or threatened hostilities, prohibiting the departure of ships or goods from some or all ports until further order. Government order prohibiting commercial trade with individuals or businesses of other specified nations. Legal prohibition on commerce.

The temporary or permanent SEQUESTRATION of the property of individuals for the purposes of a government, e.g., to obtain vessels for the transport of troops, the owners being reimbursed for this forced service.

**Embargo act:** A legislative measure enacted by Congress in 1807 at the behest of President Thomas Jefferson that banned trade between U.S. ports and foreign nations.

**Embezzlement:** The fraudulent conversion of another's property by a person who is in a position of trust, such as an agent or employee.

**Emblements:** Crops annually produced by the labor of a tenant. Corn, wheat, rye, potatoes, garden vegetables, and other crops that are produced annually, not spontaneously, but by labor and industry. The doctrine of emblements denotes the right of a tenant to take and carry away, after the tenancy has ended, such annual products of the land as have resulted from the tenant's care and labor.

**Embracery:** The crime of attempting to influence a jury corruptly to one side or the other by promises, persuasions, entreaties, entertainments, and the like. The person guilty of it is called an *embraceor.* This is both a state and federal crime, and is commonly included under the offense of obstructing justice.

**Emergency doctrine:** A principle that allows individuals to take action in the face of a sudden or urgent need for aid, without being subject to normal standards of reasonable care. Also called *imminent peril doctrine,* or *sudden peril doctrine.*

**Emigration:** The act of moving from one country to another with intention not to return. It is to be distinguished from expatriation, which means the ABANDONMENT of one's country and renunciation of one's citizenship in it, while emigration denotes merely the removal of person and property to another country. Expatriation is usually the consequence of emigration. *Emigration* is also sometimes used in reference to the removal from one section to another of the same country.

**Eminent domain:** The power to take private property for public use by a state, municipality, or private person or corporation authorized to exercise functions of public character, following the payment of just compensation to the owner of that property.

**Emolument:** The profit arising from office, employment, or labor; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites. Any perquisite, advantage, profit, or gain arising from the possession of an office.

**Employment at will:** A common-law rule that an employment contract of indefinite duration can be terminated by either the employer or the employee at any time for any reason; also known as terminable at will.

**Employment law:** The body of law that governs the employer-employee relationship, including individual employment contracts, the application of TORT and contract doctrines, and a large

group of statutory regulation on issues such as the right to organize and negotiate collective bargaining agreements, protection from discrimination, wages and hours, and health and safety.

**En banc:** *[Latin, French. In the bench.]* Full bench. Refers to a session where the entire membership of the court will participate in the decision rather than the regular quorum. In other countries, it is common for a court to have more members than are usually necessary to hear an appeal. In the United States, the Circuit Courts of Appeal usually sit in panels of judges but for important cases may expand the bench to a larger number, when the judges are said to be sitting *en banc.* Similarly, only one of the judges of the U.S. TAX COURT will typically hear and decide on a tax controversy. However, when the issues involved are unusually novel or of wide impact, the case will be heard and decided by the full court sitting *en banc.*

**Enabling clause:** The section of a constitution or statute that provides government officials with the power to put the constitution or statute into force and effect.

**Enabling statute:** A law that gives new or extended authority or powers, generally to a public official or to a corporation.

**Enact:** To establish by law; to perform or effect; to decree.

**Encroachment:** An illegal intrusion in a highway or navigable river, with or without obstruction. An encroachment upon a street or highway is a fixture, such as a wall or fence, which illegally intrudes into or invades the highway or encloses a portion of it, diminishing its width or area, but without closing it to public travel.

**Encumber:** To burden property by way of a charge that must be removed before ownership is free and clear.

**Encumbrance:** A burden, obstruction, or impediment on property that lessens its value or makes it less marketable. An encumbrance (also spelled incumbrance) is any right or interest that exists in someone other than the owner of an estate and that restricts or impairs the transfer of the estate or lowers its value. This might include an EASEMENT, a lien, a mortgage, a mechanic's lien, or accrued and unpaid taxes.

**Endorse:** To sign a paper or document, thereby making it possible for the rights represented therein to pass to another individual. Also spelled *indorse.*

**Endorsement:** A signature on a COMMERCIAL PAPER or document.

**Endowment:** A transfer, generally as a gift, of money or property to an institution for a particular purpose. The bestowal of money as a permanent fund, the income of which is to be used for the benefit of a charity, college, or other institution.

**Enemy combatant:** Captured fighter in a war who is not entitled to prisoner of war status because he or she does not meet the definition of a lawful combatant as established by the GENEVA CONVENTION; a saboteur.

**Enfeoffment:** Also known as feoffment. Complete surrender and transfer of all land ownership rights from one person to another. In old ENGLISH LAW, an enfeoffment was a transfer of property by which the new owner was given both the right to sell the land and the right to pass it on to heirs, evidenced by *livery of seisin,* a ceremony for transferring the possession of real property from one individual to another.

**Enfranchisement:** The act of making free (as from SLAVERY); giving a franchise or freedom to; investiture with privileges or capacities of freedom, or municipal or political liberty. Conferring the privilege of voting upon classes of persons who have not previously possessed such.

**Engage:** To become involved with, do, or take part in something.

**Engagement:** A binding, pledging, or coming together. A mutual pact, contract, or agreement.

**English-only laws:** Laws that seek to establish English as the official language of the United States.

**English law:** The system of law that has developed in England from approximately 1066 to the present.

**Engross:** To print a final copy of a document. In archaic CRIMINAL LAW, engrossment was the process of forcing higher the price of a good by buying it up and creating a MONOPOLY.

**Engrossed bill:** A legislative proposal that has been prepared in a final form for its submission to a vote of the law-making body after it has undergone discussion and been approved by the appropriate committees.

**Enhancement:** Increase in value; improvement.

**Enjoin:** To direct, require, command, or admonish.

**Enjoyment:** The exercise of a right; the possession and fruition of a right or privilege. Comfort, consolation, contentment, ease, happiness, pleasure, and satisfaction. Such includes the beneficial use, interest, and purpose to which property may be put, and implies right to profits and income therefrom.

**Enrolled bill:** The final copy of a bill or joint resolution that has passed both houses of a legislature and is ready for signature. In legislative practice, a bill that has been duly introduced, finally passed by both houses, signed by the proper officers of each, approved by the governor (or president), and filed by the SECRETARY OF STATE.

**Entail:** To abridge, settle, or limit succession to real property. An estate whose succession is limited to certain people rather than being passed to all heirs.

**Enter:** To form a constituent part; to become a part or partaker; to penetrate; share or mix with, as tin *enters* into the composition of pewter. To go or come into a place or condition; to make or effect an entrance; to cause to go into or be received into.

In the law of real property, to go upon land for the purpose of taking possession of it. In strict usage, the entering is preliminary to the taking possession but in common parlance the entry is now merged in the taking possession.

To place anything before a court, or upon or among the records, in a formal and regular manner, and usually in writing as in to *enter an appearance,* or to *enter a judgment.* In this sense the word is nearly equivalent to setting down formally in writing, in either a full or abridged form.

**Entertainment law:** The areas of law governing professionals and businesses in the entertainment industry, particularly contracts and INTELLECTUAL PROPERTY; more particularly, certain legal traditions and aspects of these areas of law that are unique to the entertainment industry.

**Entice:** To wrongfully solicit, persuade, procure, allure, attract, draw by blandishment, coax, or seduce. To lure, induce, tempt, incite, or persuade a person to do a thing. Enticement of a child is inviting, persuading, or attempting to persuade a child to enter any vehicle, building, room, or secluded place with intent to commit an unlawful sexual act upon or with the person of said child.

**Entirety:** The whole, in contradistinction to a moiety or part only. When land is conveyed to HUSBAND AND WIFE, they do not take by moieties, but both are seised of the *entirety.* Parceners, on the other hand, have not an *entirety* of interest, but each is properly entitled to the whole of a distinct moiety.

**Entitlement:** An individual's right to receive a value or benefit provided by law.

**Entity:** A real being; existence. An organization or being that possesses separate existence for tax purposes. Examples would be corporations, partnerships, estates, and trusts. The accounting entity for which accounting statements are prepared may not be the same as the entity defined by law.

*Entity* includes corporation and foreign corporation; not-for-profit corporation; profit and not-for-profit unincorporated association; BUSINESS TRUST, estate, partnership, trust, and two or more persons having a joint or common economic interest; and state, U.S., and foreign governments.

An existence apart, such as a corporation in relation to its stockholders.

Entity includes person, estate, trust, governmental unit.

**Entrapment:** The act of government agents or officials that induces a person to commit a crime he or she is not previously disposed to commit.

**Entry:** The act of making or entering a record; a setting down in writing of particulars; or that which is entered; an item. Generally synonymous with *recording*.

Passage leading into a house or other building or to a room; a vestibule.

The act of a merchant, trader, or other business-person in recording in his or her account books the facts and circumstances of a sale, loan, or other transaction. The books in which such memoranda are first (or originally) inscribed are called *books of original entry,* and are PRIMA FACIE evidence for certain purposes.

In COPYRIGHT law, depositing with the register of copyrights the printed title of a book, pamphlet, and so on, for the purpose of securing copyright on the same.

In immigration law, any coming of an alien into the United States, from a foreign part or place or from an outlying possession, whether voluntary or otherwise.

In CRIMINAL LAW, entry is the unlawful making of one's way into a dwelling or other house for the purpose of committing a crime therein. In cases of BURGLARY, the least entry with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, is sufficient to complete the offense.

In customs law, the entry of imported goods at the custom house consists in submitting them to the inspection of the revenue officers, together with a statement or description of such goods, and the original invoices of the same, for the purpose of estimating the duties to be paid thereon.

In real property law, the right or authority to assert one's possessory interest or ownership in a piece of land by going onto the land.

**Entry of judgment:** Formally recording the result of a lawsuit that is based upon the determination by the court of the facts and applicable law, and that makes the result effective for purposes of bringing an action to enforce it or to commence an appeal.

**Enumerated:** This term is often used in law as equivalent to *mentioned specifically, designated,* or *expressly named or granted;* as in speaking of *enumerated* governmental powers, items of property, or articles in a tariff schedule.

**Environmental law:** An amalgam of state and federal statutes, regulations, and common-law principles covering AIR POLLUTION, WATER POLLUTION, hazardous waste, the wilderness, and endangered wildlife.

**Equal protection:** The constitutional guarantee that no person or class of persons shall be denied the same protection of the laws that is enjoyed by other persons or other classes in like circumstances in their lives, liberty, property, and pursuit of happiness. The Declaration of Independence states:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

**Equitable remedy:** Court-ordered action that directs parties to do or not to do something; such remedies include injunctive relief and SPECIFIC PERFORMANCE. Alternatively, a non-monetary remedy, such as an INJUNCTION or specific performance, obtained when a legal remedy such as money damages cannot adequately redress the injury.

**Equity:** In its broadest sense, equity is fairness. As a legal system, it is a body of law that addresses concerns that fall outside the jurisdiction of COMMON LAW. Equity is also used to describe the money value of property in excess of claims, liens, or mortgages on the property.

**Equity of redemption:** The right of a mortgagor, that is, a borrower who obtains a loan secured by a pledge of his or her real property, to prevent foreclosure proceedings by paying the amount due on the loan, a mortgage, plus interest and other expenses after having failed to pay within the time and according to the terms specified therein.

**Ergo:** *Latin, therefore; hence; because.*

**Erratum:** *[Latin, Error.]* The term used in the Latin formula for the assignment of mistakes made in a case.

**Error:** A mistake in a court proceeding concerning a MATTER OF LAW or fact, which might provide a ground for a review of the judgment rendered in the proceeding.

**Escalator clause:** A stipulation contained in a union contract stating that wages will be raised or lowered, based upon an external standard such as the cost of living index. A term, ordinarily in a contract or lease, that provides for an increase in the money to be paid under certain conditions.

**Escape:** The criminal offense of fleeing legal custody without authority or consent.

**Escheat:** The power of a state to acquire title to property for which there is no owner.

**Escrow:** Something of value, such as a deed, stock, money, or written instrument, that is put into the custody of a third person by its owner, a grantor, an obligor, or a promisor, to be retained until the occurrence of a contingency or performance of a condition.

**Espionage:** The act of securing information of a military or political nature that a competing nation holds secret. It can involve the analysis of diplomatic reports, publications, statistics, and broadcasts, as well as spying, a clandestine activity carried out by an individual or individuals working under secret identity to gather classified information on behalf of another entity or nation. In the United States, the organization that heads most activities dedicated to espionage is the CENTRAL INTELLIGENCE AGENCY (CIA).

**Esq.:** An abbreviation for esquire, which is a title used by attorneys in the United States. The term *esquire* has a different meaning in ENGLISH LAW. It is used to signify a title of dignity, which ranks above *gentleman* and directly below *knight.*

**Establish:** This word occurs frequently in the Constitution of the United States, and it is used there in different meanings: (1) to settle firmly, to fix unalterably; as in to establish justice, which is the avowed object of the Constitution; (2) to make or form; as in to establish uniform laws governing naturalization or BANKRUPTCY; (3) to found, to create, to regulate; as in "Congress shall have power to establish post offices"; (4) to found, recognize, confirm, or admit; as in "Congress shall make no law respecting an establishment of religion"; and (5) to create, to ratify, or confirm, as in "We, the people . . . do ordain and establish this Constitution."

To settle, make, or fix firmly; place on a permanent footing; found; create; put beyond doubt or dispute; prove; convince. To enact permanently. To bring about or into existence.

**Estate:** The degree, quantity, nature, and extent of interest that a person has in real and PERSONAL PROPERTY. Such terms as estate in land, tenement, and hereditaments may also be used to describe an individual's interest in property.

When used in connection with probate proceedings, the term encompasses the total property that is owned by a decedent prior to the distribution of that property in accordance with the terms of a will, or when there is no will, by the laws of inheritance in the state of domicile of the decedent. It means, ordinarily, the whole of the property owned by anyone, the realty as well as the personalty.

In its broadest sense, the social, civic, or political condition or standing of a person; or, a class of persons grouped for social, civic, or political purposes.

**Estate and gift taxes:** A combined federal tax on transfers by gift or death.

**Estimated tax:** Federal and state tax laws require a quarterly payment of estimated taxes due from corporations, trusts, estates, non-wage employees, and wage employees with income not subject to withholding. Individuals must remit at least 100 percent of their prior year tax liability or 90 percent of their current year tax liability in order to avoid an underpayment penalty. Corporations must pay at least 90 percent of their current year tax liability in order to avoid an underpayment penalty. Additional taxes due, if any, are paid on taxpayer's annual tax return.

**Estoppel:** A legal principle that bars a party from denying or alleging a certain fact owing to that party's previous conduct, allegation, or denial.

**Et al.:** An abbreviated form of *et alia,* Latin for "and others." When affixed after the name of a person, *et al.* indicates that additional persons are acting in the same manner, such as several plaintiffs or grantors.

**Et seq.:** An abbreviation for the Latin *et sequentes* or *et sequentia,* meaning "and the following."

**Ethics, legal:** The branch of philosophy that defines what is good for the individual and for society and establishes the nature of obligations, or duties, that people owe themselves and one another. In modern society, ethics define how individuals, professionals, and corporations choose to interact with one another.

**Euthanasia:** [*Greek, good death.*] The term normally implies an intentional termination of life by another at the explicit request of the person who wishes to die. Euthanasia is generally defined as the act of killing an incurably ill person out of concern and compassion for that person's suffering. It is sometimes called mercy killing, but many advocates of euthanasia define mercy killing more precisely as the ending of another person's life *without* his or her request. Euthanasia, on the other hand, is usually separated into two categories: *passive euthanasia* and *active euthanasia.* In many jurisdictions, active euthanasia can be considered murder or MANSLAUGHTER, whereas passive euthanasia is accepted by professional medical societies, and by the law under certain circumstances.

**Eviction:** The removal of a tenant from possession of premises in which he or she resides or has a property interest done by a landlord either by reentry upon the premises or through a court action.

**Evidence:** Any matter of fact that a party to a lawsuit offers to prove or disprove an issue in the case. A system of rules and standards that is used to determine which facts may be admitted, and to what extent a judge or jury may consider those facts, as proof of a particular issue in a lawsuit.

**Ex dividend:** A phrase used by stockbrokers that denotes that a stock is sold without the purchaser receiving the right to own its recently declared dividend which has not yet been paid to the stockholders.

**Ex officio:** *[Latin, From office.]* By virtue of the characteristics inherent in the holding of a particular office without the need of specific authorization or appointment.

**Ex parte:** *[Latin, On one side only.]* Done by, for, or on the application of one party alone.

**Ex post facto laws:** *[Latin, "After-the-fact" laws.]* Laws that provide for the infliction of punishment upon a person for some prior act that, at the time it was committed, was not illegal.

**Examination:** A search, inspection, or interrogation.

In CRIMINAL PROCEDURE, the PRELIMINARY HEARING held to decide whether a suspect arrested for a crime should be brought to trial.

In trial practice, the interrogation of a witness to elicit his or her testimony in a civil or criminal action, so that the facts he or she possesses are presented before the trial of fact for consideration.

In the law governing real property transactions, an investigation made into the history of the ownership of and conditions that exist upon land so that a purchaser can determine whether a seller is entitled to sell the land free and clear of any claims made by third persons.

In patent law, an inquiry made at the PATENT AND TRADEMARK OFFICE to determine the novelty and utility of an invention for which a patent application has been filed and whether the invention interferes with any other invention.

**Examiner:** An official or other person empowered by another—whether an individual, business, or government agency—to investigate and review specified documents for accuracy and truthfulness.

A court-appointed officer, such as a *master* or referee, who inspects evidence presented to resolve controverted matters and records statements made by witnesses in the particular proceeding pending before that court.

A government employee in the PATENT AND TRADEMARK OFFICE whose duty it is to scrutinize the application made for a patent by an inventor to determine whether the invention meets the statutory requirements of patentability.

A federal employee of the INTERNAL REVENUE SERVICE who reviews income tax returns for accuracy and truthfulness.

**Exception:** The act of excepting or excluding from a number designated or from a description; that which is excepted or separated from others in a general rule or description; a person, thing, or case specified as distinct or not included; an act of excepting, omitting from mention, or leaving out of consideration. Express exclusion of something from operation of contract or deed. An *exception* operates to take something out of a thing granted that would otherwise pass or be included.

Objection to an order or ruling of a trial court. A formal objection to the action of the court, during the trial of a case, in refusing a request or overruling an objection; implying that the party excepting does not acquiesce in the decision of the court, but will seek to procure its reversal, and that he or she means to save the benefit of his or her request or objection in some future proceeding. Under rules practiced in the federal and most state courts, the need for claiming an exception to evidence or to a ruling to preserve appellate rights has been eliminated in favor of an objection.

**Exchange:** An association, organization, or group of persons, incorporated or unincorporated, that constitutes, maintains, or provides a marketplace or facilities for bringing together purchasers and sellers of SECURITIES or commodities futures.

**Exchange of property:** A transaction wherein parties trade goods, or commodities, for other goods, in contrast with a sale or trading of goods for money.

**Excise:** A tax imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege. A tax on the manufacture, sale, or use of goods or on the carrying on of an occupation or activity, or a tax on the transfer of property. In current usage the term has been extended to include various license fees and practically every internal revenue tax except the INCOME TAX (e.g., federal alcohol and tobacco excise taxes).

**Exclusionary clause:** A term in a sales contract that limits the remedies available to one or both parties to it in an action for breach of WARRANTY, statements made as to the quality of the goods sold. A provision of an insurance contract that prohibits recovery pursuant to its terms if certain designated circumstances occur.

**Exclusionary rule:** The principle based on federal CONSTITUTIONAL LAW that evidence illegally seized by law enforcement officers in violation of a suspect's right to be free from unreasonable SEARCHES AND SEIZURES cannot be used against the suspect in a criminal prosecution.

**Exclusive:** Pertaining to the subject alone, not including, admitting, or pertaining to any others. Sole. Shutting out; debarring from interference or participation; vested in one person alone. Apart from all others, without the admission of others to participation.

**Exclusive agency:** Grant to an agent of exclusive right to sell within a particular market or area. A contract to give an *exclusive agency* to deal with property is ordinarily interpreted as not precluding competition by the principal generally, but only as precluding him or her from appointing another agent to accomplish the result. The grant of an *exclusive agency to sell,* that is, the exclusive right to sell the products of a wholesaler in a specified territory, ordinarily is interpreted as precluding competition in any form within the designated area.

**Exculpate:** To clear or excuse from guilt.

**Excuse:** The explanation for the performance or nonperformance of a particular act; a reason alleged in court as a basis for exemption or relief from guilt.

**Execute:** To complete; to make; to sign; to perform; to do; to carry out according to its terms; to fulfill the command or purpose of. To perform all necessary formalities, as to make and sign a contract, or sign and deliver a note.

**Execution:** The carrying out of some act or course of conduct to its completion. In CRIMINAL LAW, the carrying out of a death sentence.

The process whereby an official, usually a sheriff, is directed by an appropriate judicial writ to seize and sell as much of a debtor's nonexempt property as is necessary to satisfy a court's monetary judgment.

With respect to contracts, the performance of all acts necessary to render a contract complete as an instrument, which conveys the concept that nothing remains to be done to make a complete and effective contract.

**Executive branch:** The branch of the U.S. government that is composed of the president and all the individuals, agencies, and departments that report to the president, and that is responsible for administering and enforcing the laws that Congress passes.

**Executive order:** A presidential policy directive that implements or interprets a federal statute, a constitutional provision, or a treaty.

**Executive privilege:** The right of the president of the United States to withhold information from Congress or the courts.

**Executors and administrators:** Those who are designated by the terms of a will or appointed by a court of probate to manage the assets and liabilities of the estate of the deceased.

**Executory:** That which is yet to be fully executed or performed; that which remains to be carried into operation or effect; incomplete; depending upon a future performance or event. The opposite of *executed.*

**Exemplification:** An official copy of a document from public records, made in a form to be used as evidence, and authenticated or certified as a true copy.

**Exercise:** To put into action, practice, or force; to make use of something, such as a right or option.

**Exhaustion of remedies:** The exhaustion-of-remedies doctrine requires that procedures established by statute, COMMON LAW, contract, or custom must be initiated and followed in certain cases before an aggrieved party may seek relief from the courts. After all other available remedies have been exhausted, a lawsuit may be filed.

**Exhibit:** As a verb, to show or display; to offer or present for inspection. To produce anything in public, so that it may be taken into possession. To present; to offer publicly or officially; to file of record. To administer; to cause to be taken, as medicines. To submit to a court or officer in the course of proceedings.

As a noun, a paper or document produced and exhibited to a court during a trial or hearing, or to a person taking depositions, or to auditors or arbitrators as a voucher, or in proof of facts,

or as otherwise connected with the subject matter, and which, on being accepted, is marked for identification and annexed to the deposition, report, or other principal document, or filed of record, or otherwise made a part of the case.

A paper, document, chart, map, or the like, referred to and made a part of an AFFIDAVIT, PLEADING, or brief. An item of physical, tangible evidence that is to be or has been offered to the court for inspection.

**Exoneration:** The removal of a burden, charge, responsibility, duty, or blame imposed by law. The right of a party who is secondarily liable for a debt, such as a surety, to be reimbursed by the party with primary liability for payment of an obligation that should have been paid by the first party.

**Expatriation:** The VOLUNTARY ACT of abandoning or renouncing one's country and becoming the citizen or subject of another.

**Expectancy:** A mere hope, based upon no direct provision, promise, or trust. An expectancy is the possibility of receiving a thing, rather than having a vested interest in it.

**Expert testimony:** Testimony about a scientific, technical, or professional issue given by a person qualified to testify because of familiarity with the subject or special training in the field.

**Expository statute:** A law executed to explain the actual meaning and intent of a previously enacted statute.

**Express:** Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with *implied.*

**Expropriation:** The taking of private property for public use or in the public interest. The taking of U.S. industry situated in a foreign country, by a foreign government.

**Expunge:** To destroy; blot out; obliterate; erase; efface designedly; strike out wholly. The act of physically destroying information—including criminal records—in files, computers, or other depositories.

**Extension:** An increase in the length of time specified in a contract.

A part constituting an addition or enlargement, as in an annex to a building or an extension to a house. Addition to existing facilities.

An allowance of additional time for the payment of debts. An agreement between a debtor and his or her creditors, by which they allow the debtor further time for the payment of liabilities. A creditor's indulgence by giving a debtor further time to pay an existing debt.

The word *extension,* when used in its proper and usual sense in connection with a lease, means a prolongation of the previous leasehold estate. The distinction between extension and *renewal* of lease is chiefly that, in the case of renewal, a new lease is requisite, while, in the case of extension, the same lease continues in force during an additional period upon performance of a stipulated act. An option for renewal implies giving a new lease on the same terms as those of an old lease, while an option for extension contemplates a CONTINUANCE of an old lease for a further period.

Request for additional time to file an income tax return beyond the due date.

**Extenuating circumstances:** Facts surrounding the commission of a crime that work to mitigate or lessen it.

**Extinguishment:** The destruction or cancellation of a right, a power, a contract, or an estate.

**Extort:** To compel or coerce, as in a confession or information, by any means serving to overcome the other's power of resistance, thus making the confession or admission involuntary. To gain by wrongful methods; to obtain in an unlawful manner, as in to compel payments by means of threats of injury to person, property, or reputation. To exact something wrongfully by threatening

or putting in fear. The natural meaning of the word *extort* is to obtain money or other valuable things by compulsion, by actual force, or by the force of motives applied to the will, and often more overpowering and irresistible than physical force.

**Extortion:** The obtaining of property from another induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

**Extra:** *[Latin, Beyond, except, without, out of, outside.]* Additional.

**Extradition:** The transfer of an accused from one state or country to another state or country that seeks to place the accused on trial.

**Extrajudicial:** That which is done, given, or effected outside the course of regular judicial proceedings. Not founded upon, or unconnected with, the action of a court of law, as in extrajudicial evidence or an extrajudicial oath.

That which, though done in the course of regular judicial proceedings, is unnecessary to such proceedings, or interpolated, or beyond their scope, as in an extrajudicial opinion.

**Extraordinary remedy:** The designation given to such writs as HABEAS CORPUS, MANDAMUS, and QUO WARRANTO, determined in special proceedings and granted only where absolutely necessary to protect the legal rights of a party in a particular case, as opposed to the customary relief obtained by the maintenance of an action.

**Extraterritoriality:** The operation of laws upon persons existing beyond the limits of the enacting state or nation but who are still amenable to its laws. Jurisdiction exercised by a nation in other countries by treaty, or by its own ministers or consuls in foreign lands.

**Extremis:** A description of the state of being ill beyond the hope of recovery, with death imminent.

**Extrinsic evidence:** Facts or information not embodied in a written agreement such as a will, trust, or contract.

**Eyewitness:** An individual who was present during an event and is called by a party in a lawsuit to testify as to what he or she observed.

**Face:** The external appearance or surface of anything; that which is readily observable by a spectator. The words contained in a document in their plain or obvious meaning without regard to external evidence or facts.

**Face value:** A readily ascertainable amount of money determinable from the words of a written instrument alone without the aid of any other source.

**Facsimile:** An exact replica of a document that is copied so as to preserve all its original marks and notations.

**Fact:** Incident, act, event, or circumstance. A fact is something that has already been done or an action in process. It is an event that has definitely and actually taken place, and is distinguishable from a suspicion, innuendo, or supposition. A fact is a truth as opposed to fiction or mistake.

**Fact and law:** A term used to denote issues or events that have taken place and the legal jurisdiction that governs how they are viewed. Fact in legal terms, is the event, while law refers to the actual rules that determine how facts are viewed by the courts. Lawyers and courts may separate fact and law to differentiate them; thus, a QUESTION OF FACT concerns the actual events of a case as they might be examined by a jury, while a QUESTION OF LAW focuses on the legal rules and principles as determined by a judge, and applied to the facts by a jury.

**Fact situation:** A concise description of all the occurrences or circumstances of a particular case, without any discussion of their consequences under the law. The fact situation, sometimes referred to as a *fact pattern,* is a summary of what took place in a case for which relief is sought. The fact situation of one case is almost always distinguishable from that of another case.

**Factor:** An event, circumstance, influence, or element that plays a part in bringing about a result.

**Factors:** People who are employed by others to sell or purchase goods, who are entrusted with possession of the goods, and who are compensated by either a commission or a fixed salary.

**Factum:** *[Latin, Fact, act, or deed.]* A fact in evidence, which is generally the central or primary fact upon which a controversy will be decided.

**Failure of consideration:** As applied to contracts, this term does not necessarily mean a want of consideration, but implies that a consideration, originally existing and good, has since become worthless or has ceased to exist or been extinguished, partially or entirely. It means that sufficient consideration was contemplated by the parties at the time the contract was entered into, but either on account of some innate defect in the thing to be given, or nonperformance in whole or in part of that which the promisee agreed to do, nothing of value can be or is received by the promisee.

**Failure of issue:** Dying without having any children or without surviving children.

**Failure to state a claim:** Within a judicial forum, the failure to present sufficient facts which, if taken as true, would indicate that any violation of law occurred or that the claimant is entitled to a legal remedy.

**Fair comment:** A form of qualified privilege applied to news media publications relating to discussion of matters that are of legitimate concern to the community as a whole because they materially affect the interests of all the community. A term used in the defense of LIBEL actions, applying to statements made by a writer (e.g., in the news media) in an honest belief in their truth, relating to official acts, even though the statements are not true in fact. Fair comment must be based on facts truly stated, must not contain imputations of corrupt or dishonorable motives except as warranted by the facts, and must be an honest expression of the writer's real opinion.

**Fair hearing:** A judicial proceeding that is conducted in such a manner as to conform to fundamental concepts of justice and equality.

**Fair market value:** The amount for which real property or PERSONAL PROPERTY would be sold in a voluntary transaction between a buyer and seller, neither of whom is under any obligation to buy or sell.

**Fair-trade laws:** State statutes enacted in the first half of the twentieth century permitting manufacturers to set minimum, maximum, or actual selling prices for their products, and thus to prevent retailers from selling products at very low prices.

**Fairness doctrine:** The doctrine that imposes affirmative responsibilities on a broadcaster to provide coverage of issues of public importance that is adequate and fairly reflects differing viewpoints. In fulfilling its fairness doctrine obligations, a broadcaster must provide free time for the presentation of opposing views if a paid sponsor is unavailable and must initiate programming on public issues if no one else seeks to do so.

**False advertising:** "Any advertising or promotion that misrepresents the nature, characteristics, qualities or geographic origin of goods, services or commercial activities" (LANHAM ACT, 15 U.S.C.A. § 1125(a)).

**False arrest:** A TORT (a civil wrong) that consists of an unlawful restraint of an individual's personal liberty or freedom of movement by another purporting to act according to the law.

**False demonstration:** An inaccurate or erroneous description of an individual or item in a written instrument.

**False imprisonment:** The illegal confinement of one individual against his or her will by another individual in such a manner as to violate the confined individual's right to be free from restraint of movement.

**False personation:** The crime of falsely assuming the identity of another to gain a benefit or avoid an expense.

**False pretenses:** False representations of material past or present facts, known by the wrongdoer to be false, and made with the intent to defraud a victim into passing title in property to the wrongdoer.

**Family car doctrine:** A RULE OF LAW applied in particular cases of NEGLIGENCE that extends liability to the owner of an automobile for damage done by a family member while using the car.

**Family law:** Statutes, court decisions, and provisions of the federal and state constitutions that relate to family relationships, rights, duties, and finances.

**Family medical leave:** Federal, state, and local laws that authorize employees to take paid or unpaid leave for a defined period of time for major health-related medical issues affecting their immediate family.

**Fatal:** Deadly or mortal; destructive; devastating.

**Fault:** Neglect of care; an act to which blame or censure is attached. Fault implies any NEGLIGENCE, error, or defect of judgment.

**Feasance:** The performance of an act.

**Federal:** Relating to the general government or union of the states; based upon, or created pursuant to, the laws of the Constitution of the United States.

**Federal appendix:** A legal reference source containing federal courts of appeals decisions that have not been selected by the court for publication.

**Federal budget:** An annual effort to balance federal spending on such areas as forestry, education, space technology, and the national defense, with revenue, which the United States collects largely through federal taxes.

**Federal courts:** The U.S. judicial tribunals created by Article III of the Constitution, or by Congress, to hear and determine JUSTICIABLE controversies.

**Federal question:** An issue directly involving the U.S. Constitution, federal statutes, or treaties between the United States and a foreign country.

**Federal Register:** A daily publication that makes available to the public the rules, regulations, and other legal notices issued by federal administrative agencies.

**Federal Reporter®:** A legal reference source primarily covering published decisions of federal appellate courts.

**Federal Rules Decision®:** A reporter that reprints decisions rendered by federal district courts that interpret or apply the Federal Rules of Civil, Criminal, and Appellate Procedure and also the FEDERAL RULES OF EVIDENCE.

**Federal rules of evidence:** The FEDERAL RULES OF EVIDENCE generally govern civil and criminal proceedings in the courts of the United States and proceedings before U.S. BANKRUPTCY judges and U.S. magistrates, to the extent and with the exceptions stated in the rules. Promulgated by the U.S. Supreme Court and amended by Congress from time to time, the Federal RULES OF EVIDENCE are considered legislative enactments that have the force of statute, and courts interpret them as they would any other statute, employing traditional tools of statutory construction in applying their provisions.

**Federal Supplement®:** A set of legal reference books containing decisions of federal courts in chronological order.

**Federalism:** *Federalism* is a principle of government that defines the relationship between the central government at the national level and its constituent units at the regional, state, or local levels. Under this principle of government, power and authority is allocated between the national and local governmental units, such that each unit is delegated a sphere of power and authority only it can exercise, while other powers must be shared.

**Federalist papers:** A collection of eighty-five essays by ALEXANDER HAMILTON (1755–1804), JAMES MADISON (1751–1836), and JOHN JAY (1745–1829) that explain the philosophy and defend the advantages of the U.S. Constitution.

**Federation:** A joining together of states or nations in a league or association; the league itself. An unincorporated association of persons for a common purpose.

**Fee:** A compensation paid for particular acts, services, or labor, generally those that are performed in the line of official duties or a particular profession. An interest in land; an estate of inheritance.

**Fee simple:** The greatest possible estate in land, wherein the owner has the right to use it, exclusively possess it, commit waste upon it, dispose of it by deed or will, and take its fruits. A fee simple represents absolute ownership of land, and therefore the owner may do whatever he or she chooses with the land. If an owner of a fee simple dies intestate, the land will descend to the heirs.

**Fee tail:** An estate in land subject to a restriction regarding inheritance.

**Fellatio:** A sexual act in which a male places his penis into the mouth of another person.

**Fellow-servant rule:** A common-law rule governing job-related injuries that prevents employees from recovering damages from employers if an injury was caused by the NEGLIGENCE of a coworker.

**Felon:** An individual who commits a crime of a serious nature, such as BURGLARY or murder. A person who commits a felony.

**Felonious:** Done with an intent to commit a serious crime or a felony; done with an evil heart or purpose; malicious; wicked; villainous.

**Felony:** A serious crime, characterized under federal law and many state statutes as any offense punishable by death or imprisonment in excess of one year.

**Felony-murder rule:** A RULE OF LAW that holds that if a killing occurs during the commission or attempted commission of a felony (a major crime), the person or persons responsible for the felony can be charged with murder.

**Feminist jurisprudence:** A philosophy of law based on the political, economic, and social equality of the sexes.

**Fences:** Enclosures composed of any substance that will present an adequate blockade around a field, yard, or other such expanse of land for the purpose of prohibiting intrusions from outside.

**Feoffment:** Total relinquishment and transfer of all rights of ownership in land from one individual to another.

**Ferae naturae:** *[Latin, Of a wild nature or disposition.]*

**Feres doctrine:** A doctrine that bars claims against the federal government by members of the armed forces and their families for injuries arising from or in the course of activity incident to military service.

**Ferry:** A specially constructed vessel to bring passengers and property across rivers and other bodies of water from one shoreline to another, making contact with a thoroughfare at each terminus. The landing place for a boat. A right or privilege to maintain a vessel upon a body of water in order to transport people and their vehicles across it in exchange for payment of a reasonable toll.

**Fetal rights:** The rights of any unborn human fetus, which is generally a developing human from roughly eight weeks after conception to birth.

**Fetal tissue research:** Scientific experimentation performed upon or using tissue taken from human fetuses.

**Feudalism:** A series of contractual relationships between the upper classes, designed to maintain control over land.

**Fiat:** *[Latin, Let it be done.]* In old English practice, a short order or warrant of a judge or magistrate directing some act to be done; an authority issuing from some competent source for the doing of some legal act.

One of the proceedings in the English BANKRUPTCY practice: a power, signed by the lord chancellor and addressed to the court of bankruptcy, authorizing the petitioning creditor to prosecute his complaint before that court. By the statute 12 & 13 Vict., c. 116, fiats were abolished.

Arbitrary or authoritative order or decision.

**F.I.C.A.:** An abbreviation for the Federal Insurance Contributions Act (26 U.S.C.A. § 3101 et seq. [1954]), which established the SOCIAL SECURITY tax on income received in the form of wages from employment.

**Fiction:** An assumption made by a court and embodied in various legal doctrines that a fact or concept is true when in actuality it is not true, or when it is likely to be equally false and true.

**Fictitious:** Based upon a fabrication or pretense.

**Fidelity bond:** An insurance device in the form of a personal guaranty that protects against loss resulting from disreputable or disloyal employees or other individuals who possess positions of confidence.

**Fidelity insurance:** An agreement whereby, for a designated sum of money, one party agrees to guarantee the loyalty and honesty of an agent, officer, or employee of an employer by promising to compensate the employer for losses incurred as a result of the disloyalty or dishonesty of such individuals.

**Fiduciary:** An individual in whom another has placed the utmost trust and confidence to manage and protect property or money. The relationship wherein one person has an obligation to act for another's benefit.

**Field audit:** A systematic investigation by the INTERNAL REVENUE SERVICE of a taxpayer's financial records and his or her tax return that is conducted at the taxpayer's place of business or at the office of the individual who prepared the return.

**Field code of New York:** The first code of CIVIL PROCEDURE that established simplified rules for PLEADING an action before a court, which was proposed by DAVID DUDLEY FIELD in 1848 for the state of New York and enacted by the state legislature.

**Fieri facias:** *[Latin, Cause (it) to be done.]* The name of a writ of execution that directs a sheriff to seize and sell the goods and chattels of a JUDGMENT DEBTOR in order to satisfy the judgment against the debtor.

**Fifo:** An abbreviation for first-in, first-out, a method employed in accounting for the identification and valuation of the inventory of a business.

**File:** A record of the court. A paper is said to be filed when it is delivered to the proper officer to be kept on file as a matter of record and reference. But in general the terms *file* and *the files* are used loosely to denote the official custody of the court or the place in the offices of a court where the records and papers are kept. The file in a case includes the original complaint and all pleadings and papers belonging thereto.

**Filiation proceeding:** A process whereby a court determines the PATERNITY of an illegitimate child in order to establish the father's duty to provide support for the child.

**Filibuster:** A tactic used by a legislative representative to hinder and delay consideration of and action to be taken on a proposed bill through prolonged, irrelevant, and procrastinating speeches on the floor of the House, Senate, or other legislative body.

**Filius nullius:** *[Latin, A son of nobody.]* An illegitimate child who had few legal rights under the COMMON LAW.

**Final decision:** The resolution of a controversy by a court or series of courts from which no appeal may be taken and that precludes further action. The last act by a lower court that is required for the completion of a lawsuit, such as the handing down of a final judgment upon which an appeal to a higher court may be brought.

**Finance charge:** The amount owed to a lender by a purchaser-debtor to be allowed to pay for goods purchased over a series of installments, as opposed to one lump sum at the time of the sale or billing.

**Financial responsibility acts:** State statutes that require owners of motor vehicles to produce proof of financial accountability as a condition to acquiring a license and registration so that judgments rendered against them arising out of the operation of the vehicles may be satisfied.

**Financial statement:** Any report summarizing the financial condition or financial results of a person or an organization on any date or for any period. Financial statements include the balance sheet and the income statement and sometimes the statement of changes in financial position.

**Finder:** An intermediary who contracts to find, introduce, and bring together parties to a business opportunity, leaving ultimate negotiations and consummation of business transaction to the principals. With respect to a SECURITIES issue, refers to one who brings together an issuer and an underwriter; in connection with mergers, refers to one who brings two companies together. May also refer to one who secures mortgage financing for a borrower, locates a particular type of executive or professional for a corporation, or locates a particular type of business acquisition for a corporation.

**Finding:** The result of the deliberations of a jury or a court. A decision upon a QUESTION OF FACT reached as the result of a judicial examination or investigation by a court, jury, referee, CORONER, etc. A recital of the facts as found. The word commonly applies to the result reached by a judge or jury.

**Finding lost goods:** The discovery of PERSONAL PROPERTY that has been unintentionally removed from its owner's possession through his or her neglect or inadvertence.

**Fines:** Monetary charges imposed upon individuals who have been convicted of a crime or a lesser offense.

**Fingerprints:** Impressions or reproductions of the distinctive pattern of lines and grooves on the skin of human fingertips.

**Fire:** The primary result of combustion. The juridical meaning does not differ from the vernacular meaning.

**Fire statute:** In ADMIRALTY LAW, a federal law that exempts the owner of a vessel from liability to any person for loss of, or damage to, merchandise shipped, taken in, or put on board such vessel as a result of a fire, unless the fire was intentionally or negligently caused by the owner.

**Firm offer:** A definite and binding proposal, in writing, to enter into a contractual agreement.

**First impression:** The initial presentation to, or examination by, a court of a particular QUESTION OF LAW.

**First instance:** The initial trial court where an action is brought.

**Fiscal:** Relating to finance or financial matters, such as money, taxes, or public or private revenues.

**Fishing expedition:** Also known as a "fishing trip." Using the courts to find out information beyond the fair scope of the lawsuit. The loose, vague, unfocused questioning of a witness or the overly broad use of the discovery process. Discovery sought on general, loose, and vague allegations, or on suspicion, surmise, or vague guesses. The scope of discovery may be restricted by protective orders as provided for by the Federal Rules of Civil Procedure.

**Fixed asset:** Property, such as machinery or buildings, utilized in a business that will not be used or liquidated during the current fiscal period.

**Fixed charges:** Costs that do not vary with changes in output and would continue even if a firm produced no output at all, such as most management expenses, interests on bonded debt, depreciation, property taxes, and other irreducible overhead.

**Fixture:** An article in the nature of PERSONAL PROPERTY which has been so annexed to the realty that it is regarded as a part of the real property. That which is fixed or attached to something permanently as an appendage and is not removable.

A thing is deemed to be affixed to real property when it is attached to it by roots, imbedded in it, permanently resting upon it, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.

Goods are fixtures when they become so related to particular real estate that an interest in them arises under real estate law, e.g. a furnace affixed to a house or other building, counters permanently affixed to the floor of a store, or a sprinkler system installed in a building.

Fixtures possess the attributes of both real and personal property.

**Flag:** The official banner of a state or nation, often decorated with emblems or images that symbolize that state or nation.

**Flagrante delicto:** *[Latin, In the act of perpetrating the crime.]*

**Floating capital:** Funds retained for the purpose of paying current expenses as opposed to fixed assets.

**Floating lien:** A security interest retained in collateral even when the collateral changes in character, classification, or location. An inventory loan in which the lender receives a security interest or general claim on all of a company's inventory. A security interest under which the borrower pledges security for present and future advances.

**Flotsam:** A name for the goods that float upon the sea when cast overboard for the safety of the ship or when a ship is sunk. Distinguished from jetsam (goods deliberately thrown over to lighten ship) and ligan (goods cast into the sea attached to a buoy).

**F.O.B.:** An abbreviation for free on board, which means that a vendor or consignor will deliver goods on a railroad car, truck, vessel, or other conveyance without any expense to the purchaser or consignee.

**Follow:** To conform to, comply with, or be fixed or determined by; as in the expression "costs follow the event of the suit." To go, proceed, or come after. To seek to obtain; to accept as authority, as in adhering to precedent.

**Forbearance:** Refraining from doing something that one has a legal right to do. Giving of further time for repayment of an obligation or agreement; not to enforce claim at its due date. A delay in enforcing a legal right. Act by which creditor waits for payment of debt due by a debtor after it becomes due.

Within USURY law, the contractual obligation of a lender or creditor to refrain, during a given period of time, from requiring the borrower or debtor to repay the loan or debt then due and payable.

**Force:** Power, violence, compulsion, or constraint exerted upon or against a person or thing. Power dynamically considered, that is, in motion or in action; constraining power, compulsion; strength directed to an end. Commonly the word occurs in such connections as to show that unlawful or wrongful action is meant, e.g., forcible entry.

Power statically considered, that is, at rest, or latent, but capable of being called into activity upon occasion for its exercise. Efficacy; legal validity. This is the meaning when we say that a statute or a contract is *in force.*

**Force majeure:** *[French, A superior or irresistible power.]* An event that is a result of the elements of nature, as opposed to one caused by human behavior.

**Forced sale:** An involuntary transaction that occurs in the form and at the time specified by law for the purpose of applying the proceeds to satisfy debts, such as a mortgage or a tax lien, incurred by the owner of the property.

**Forcible detainer:** A summary and expeditious statutory remedy used by a party entitled to actual possession of premises to secure its possession, where the occupant initially in lawful possession of it refuses to relinquish it when his or her right to possession ends.

**Forcible entry and detainer:** A summary proceeding to recover possession of land that is instituted by one who has been wrongfully ousted from, or deprived of, possession.

**Foreclosure:** A procedure by which the holder of a mortgage—an interest in land providing security for the performance of a duty or the payment of a debt—sells the property upon the failure of the debtor to pay the mortgage debt and, thereby, terminates his or her rights in the property.

**Foreign:** That which belongs to, or operates in accordance with, another nation, territory, state, or jurisdiction, as in the case of nonresident trustees, corporations, or persons.

**Foreign affairs power:** Under INTERNATIONAL LAW a state has the right to enter into relations with other states. This power to conduct foreign affairs is one of the rights a state gains by attaining independence. The division of authority within a government to exercise its foreign affairs power varies from state to state. In the United States that power is vested primarily in the president, although the Congress retains important express and implied powers over international affairs.

**Forensic:** Belonging to courts of justice.

**Forensic science:** The application of scientific knowledge and methodology to legal problems and criminal investigations.

**Foreseeability:** The facility to perceive, know in advance, or reasonably anticipate that damage or injury will probably ensue from acts or omissions.

**Forfeit:** To lose to another person or to the state some privilege, right, or property due to the commission of an error, an offense, or a crime, a breach of contract, or a neglect of duty; to subject property to confiscation; or to become liable for the payment of a penalty, as the result of a particular act. To lose a franchise, estate, or other property, as provided by the applicable law, due to NEGLIGENCE, misfeasance, or omission.

**Forfeiture:** The involuntary relinquishment of money or property without compensation as a consequence of a breach or nonperformance of some legal obligation or the commission of a crime. The loss of a corporate charter or franchise as a result of illegality, malfeasance, or NONFEASANCE. The surrender by an owner of his or her entire interest in real property, mandated by law as a punishment for illegal conduct or NEGLIGENCE. Under old ENGLISH LAW, the release of land by a tenant to the tenant's lord due to some breach of conduct, or the loss of goods or chattels (articles of PERSONAL PROPERTY) assessed as a penalty against the perpetrator of some crime or offense and as a recompense to the injured party.

**Forgery:** The creation of a false written document or alteration of a genuine one, with the intent to defraud.

**Form:** A prototype of an instrument to be employed in a legal transaction or a judicial proceeding that includes the primary essential matters, the appropriate technical phrases or terms, and any additional material required to render it officially accurate, arranged in suitable and systematic order, and conducive to ADAPTATION to the circumstances of the particular case.

**Formal party:** A person who has no interest in the dispute between the immediate litigants but has an interest in the subject matter that can be expeditiously settled in the current proceedings and thereby prevent additional litigation.

**Formed design:** In CRIMINAL LAW, and especially in regard to HOMICIDE, the killing of one human being by the instigation, act, or omission of another, who has a deliberate and fixed intention to kill, whether or not directed against a certain person.

**Forms of action:** The old common-law patterns for different kinds of lawsuits.

**Fornication:** Sexual intercourse between a man and a woman who are not married to each other.

**Forswear:** In CRIMINAL LAW, to make oath to that which the deponent knows to be untrue. This term is wider in its scope than perjury, for the latter, as a technical term, includes the idea of the oath being taken before a competent court or officer and relating to a material issue, which is not implied by the word *forswear.*

**Forthwith:** Immediately; promptly; without delay; directly; within a reasonable time under the circumstances of the case.

**Forum:** A court of justice where disputes are heard and decided; a judicial tribune that hears and decides disputes; a place of jurisdiction where remedies afforded by the law are pursued.

**Forwarding fee:** A payment of money made by one attorney who receives a client to another attorney who referred the client.

**Foundation:** A permanent fund established and maintained by contributions for charitable, educational, religious, research, or other benevolent purposes. An institution or association given to rendering financial aid to colleges, schools, hospitals, and charities and generally supported by gifts for such purposes.

The founding or building of a college or hospital. The incorporation or endowment of a college or hospital is the foundation, and those who endow it with land or other property are the founders.

Preliminary questions to a witness to establish admissibility of evidence. *Laying a foundation* is a prerequisite to the admission of evidence at trial. It is established by testimony that identifies the evidence sought to be admitted and connects it with the issue in question.

**Four corners:** The document itself; the face of a written instrument.

**Franchise:** A special privilege to do certain things that is conferred by government on an individual or a corporation and which does not belong to citizens generally of common right, e.g., a right granted to offer CABLE TELEVISION service.

A privilege granted or sold, such as to use a name or to sell products or services. In its simplest terms, a franchise is a license from the owner of a TRADEMARK or TRADE NAME permitting another to sell a product or service under that name or mark. More broadly stated, a *franchise* has evolved into an elaborate agreement under which the franchisee undertakes to conduct a business or sell a product or service in accordance with methods and procedures prescribed by the franchisor, and the franchisor undertakes to assist the franchisee through advertising, promotion, and other advisory services.

The right of suffrage; the right or privilege of voting in public elections. Such right is guaranteed by the Fifteenth, Nineteenth, and Twenty-fourth Amendments to the U.S. Constitution.

As granted by a professional sports association, *franchise* is a privilege to field a team in a given geographic area under the auspices of the league that issues it. It is merely an incorporeal right.

**Fraud:** A false representation of a matter of fact—whether by words or by conduct, by false or misleading allegations, or by concealment of what should have been disclosed—that deceives and is intended to deceive another so that the individual will act upon it to her or his legal injury.

**Fraudulent:** The description of a willful act commenced with the SPECIFIC INTENT to deceive or cheat, in order to cause some financial detriment to another and to engender personal financial gain.

**Fraudulent conveyance:** A transfer of property that is made to swindle, hinder, or delay a creditor, or to put such property beyond his or her reach.

**Free agency:** A legal status that allows a professional athlete to negotiate an employment contract with the team of his or her choosing instead of being confined to one team. Athletes may become free agents after they have served a specific amount of time under contract with a team.

**Freedom of association and assembly:** The right to associate with others for the purpose of engaging in constitutionally protected activities.

**Freedom of speech:** The right, guaranteed by the FIRST AMENDMENT to the U.S. Constitution, to express beliefs and ideas without unwarranted government restriction.

**Freedom of the press:** The right, guaranteed by the FIRST AMENDMENT to the U.S. Constitution, to gather, publish, and distribute information and ideas without government restriction; this right encompasses freedom from PRIOR RESTRAINTS on publication and freedom from CENSORSHIP.

**Freehold:** A life estate, an interest in land the duration of which is restricted to the life or lives of a particular person or persons holding it, or an estate in fee, an interest in property that is unconditional and represents the broadest ownership interest recognized by law.

**Freight:** The price or compensation paid for the transportation of goods by a carrier. *Freight* is also applied to the goods transported by such carriers.

**Freight forwarder:** An individual who, as a regular business, assembles and combines small shipments into one lot and takes the responsibility for the transportation of such property from the place of receipt to the place of destination.

**Friend of the court:** A person who has a strong interest in a matter that is the subject of a lawsuit in which he or she is not a party.

**Friendly fire:** Fire burning in a place where it was intended to burn, although damages may result. In a military conflict, the discharge of weapons against one's own troops.

**Friendly suit:** A lawsuit brought by an executor or administrator of the estate of a deceased person in the name of a creditor as if that creditor had initiated the action. The executor or administrator brings the suit against himself or herself in order to compel the creditors to take an equal distribution of the assets of the estate. An action brought by parties who agree to submit some doubtful question to the court in order to obtain an opinion on that issue.

**Frisk:** A term used in CRIMINAL LAW to refer to the superficial running of the hands over the body of an individual by a law enforcement agent or official in order to determine whether such individual is holding an illegal object, such as a weapon or narcotics. A frisk is distinguishable from a search, which is a more extensive examination of an individual.

**Frivolous:** Of minimal importance; legally worthless.

**Frolic:** Activities performed by an employee during working hours that are not considered to be in the course of his or her employment, since they are for the employee's personal purposes only.

**Fruit of the poisonous tree:** The principle that prohibits the use of secondary evidence in trial that was culled directly from primary evidence derived from an illegal SEARCH AND SEIZURE.

**Frustration:** In the law of contracts, the destruction of the value of the performance that has been bargained for by the promisor as a result of a supervening event.

**Fugitive from justice:** An individual who, after having committed a criminal offense, leaves the jurisdiction of the court where such crime has taken place or hides within such jurisdiction to escape prosecution.

**Fund:** A comprehensive term for any money that is set aside for a particular purpose or that is accessible for the satisfaction of debts or claims.

**Fundamental law:** The constitution of a state or nation; the basic law and principles contained in federal and state constitutions that direct and regulate the manner in which government is exercised.

**Fungible:** A description applied to items of which each unit is identical to every other unit, such as in the case of grain, oil, or flour.

**Future acquired property:** Property that is received or obtained by a borrower subsequent to the date that he or she executes a loan agreement which offers property currently owned as collateral.

**Future earnings:** Earnings that, if it had not been for an injury, could have been made in the future, but which were lost as result of the injury.

**Future interest:** A claim on property, real or personal, that will begin at some point in the future. A future interest allows the grantor to retain the right to use that property until the specified transfer date. Future interest agreements are often used by donors for tax purposes. For example, a person may grant a future interest in his or her home to a charity, with the stipulation that he will retain use of the home for the remainder of his life, also called a "life estate". Although the charity will not receive the property until the donor's death, the donor can claim a tax deduction the same year the future interest is granted. Also called *future estate.*

**Futures:** Contracts that promise to purchase or sell standard commodities at a forthcoming date and at a fixed price.

**Gag order:** A court order to gag or bind an unruly defendant or remove her or him from the courtroom in order to prevent further interruptions in a trial. In a trial with a great deal of notoriety, a court order directed to attorneys and witnesses not to discuss the case with the media—such order being felt necessary to assure the defendant of a fair trial. A court order, directed to the media, not to report certain aspects of a crime or criminal investigation prior to trial.

**Gag rule:** A rule, regulation, or law that prohibits debate or discussion of a particular issue.

**Game:** Wild birds and beasts. The word includes all game birds and game animals.

**Gaming:** The act or practice of gambling; an agreement between two or more individuals to play collectively at a game of chance for a stake or wager, which will become the property of the winner and to which all involved make a contribution.

**Garnishee:** An individual who holds money or property that belongs to a debtor subject to an attachment proceeding by a creditor.

**Garnishment:** A legal procedure by which a creditor can collect what a debtor owes by reaching the debtor's property when it is in the hands of someone other than the debtor.

**Gay and lesbian rights:** The goal of full legal and social equality for gay men and lesbians sought by the gay movement in the United States and other Western countries.

**General appearance:** The act by which a defendant completely consents to the jurisdiction of the court by appearing before it either in person or through an authorized representative thereby waiving any jurisdictional defects that might be raised except for that of the competency of the court.

**General creditor:** An individual to whom money is due from a debtor, but whose debt is not secured by property of the debtor. One to whom property has not been pledged to satisfy a debt in the event of nonpayment by the individual owing the money.

**General execution:** A court order commanding a public official, such as a sheriff, to take the PERSONAL PROPERTY of a defendant to satisfy the amount of a judgment awarded against such defendant.

**General intent:** In CRIMINAL LAW and TORT LAW, a mental plan to do that which is forbidden by the law.

**General jurisdiction:** The legal authority of a court to entertain whatever type of case comes up within the geographical area over which its power extends.

**General legacy:** A monetary gift, payable out of the collective assets of the estate of a testator—one who makes a will —and not from a designated source.

**General term:** A sitting of the court en banc, with the participation of the entire membership of the court rather than the regular quorum. A phrase used in some jurisdictions to signify the ordinary session of a court during which the trial determination of actions occur.

**General verdict:** A decision by a jury that determines which side in a particular controversy wins, and in some cases, the amount of money in damages to be awarded.

**General welfare:** The concern of the government for the health, peace, morality, and safety of its citizens.

**Generally accepted accounting principles:** The standard accounting rules, regulations, and procedures used by companies in maintaining their financial records.

**Genetic engineering:** The human manipulation of the genetic material of a cell.

**Genetic screening:** The scientific procedure of examining genetic makeup to determine if an individual possesses genetic traits that indicate a tendency toward acquiring or carrying certain diseases or conditions. In 2001, scientists first published the complete human genome map (a human's genetic blueprint), greatly advancing the capability and use of genetic screening, manipulation, and replication.

**Genocide:** The crime of destroying or conspiring to destroy a national, ethnic, racial, or religious group.

**Gerrymander:** The process of dividing a particular state or territory into election districts in such a manner as to accomplish an unlawful purpose, such as to give one party a greater advantage.

**Gift:** A voluntary transfer of property or of a property interest from one individual to another, made gratuitously to the recipient. The individual who makes the gift is known as the donor, and the individual to whom the gift is made is called the donee.

**Gleaning:** Harvesting for free distribution to the needy, or for donation to a nonprofit organization for ultimate distribution to the needy, an agricultural crop that has been donated by the owner.

**Gloss:** An annotation, explanation, or commentary on a particular passage in a book or document, which is ordinarily placed on the same page or in the margin to elucidate or amplify the passage.

**Going concern value:** The value inherent in an active, established company as opposed to a firm that is not yet established.

The value of the assets of a business considered as an operating whole.

**Going public:** Altering the organization of a corporation from ownership and control by a small group of people, as in a close corporation, to ownership by the general public, as in a publicly held corporation.

**Golden parachute:** An agreement that provides key executives with generous severance pay and other benefits in the event that their employment is terminated as a result of a change of ownership at their employer corporation; known more formally as a change-of-control agreement.

**Good behavior:** Orderly and lawful action; conduct that is deemed proper for a peaceful and law-abiding individual.

**Good cause:** Legally adequate or substantial grounds or reason to take a certain action.

**Good faith:** Honesty; a sincere intention to deal fairly with others.

**Good samaritan doctrine:** A principle of TORT LAW that provides that a person who sees another individual in imminent and serious danger or peril cannot be charged with NEGLIGENCE if that first person attempts to aid or rescue the injured party, provided the attempt is not made recklessly.

**Good time:** The amount of time deducted from time to be served in prison on a given sentence, at some point after the prisoner's admission to prison, contingent upon good behavior or awarded automatically by the application of a statute or regulation. Good time can be forfeited for misbehavior. In some jurisdictions, prisoners may not earn good time during their first year of their sentence.

**Good will:** The favorable reputation and clientele of an established and well-run business.

**Goods:** Items; chattels; things; any PERSONAL PROPERTY.

**Government instrumentality doctrine:** A rule that provides that any organization run by a branch of the government is immune from taxation.

**Grab law:** State statutory provisions and common-law principles that govern the aggressive use of legal and equitable remedies, such as attachment and GARNISHMENT, by creditors to collect payment from debtors.

**Grace period:** In insurance law, a period beyond the due date of a premium (usually thirty or thirty-one days) during which the insurance is continued in force and during which the payment may be made to keep the policy in good standing. The grace period for payment of the premium does not provide free insurance or operate to continue the policy in force after it expires by agreement of the parties. *Grace period* may also refer to a period of time provided for in a loan agreement during which default will not occur even though a payment is overdue.

**Graduated tax:** Tax structured so that the rate increases as the amount of income of taxpayer increases.

**Graft:** A colloquial term referring to the unlawful acquisition of public money through questionable and improper transactions with public officials.

**Grand jury:** A panel of citizens that is convened by a court to decide whether it is appropriate for the government to indict (proceed with a prosecution against) someone suspected of a crime.

**Grand larceny:** A category of larceny—the offense of illegally taking the property of another—in which the value of the property taken is greater than that set for petit larceny.

**Grandfather clause:** A portion of a statute that provides that the law is not applicable in certain circumstances due to preexisting facts.

**Grant:** To confer, give, or bestow. A gift of legal rights or privileges, or a recognition of asserted rights, as in treaty.

**Grantee:** An individual to whom a transfer or conveyance of property is made.

**Granting clause:** The portion of an instrument of conveyance, such as a deed, containing the words that transfer a present interest from the grantor to the grantee.

**Grantor:** An individual who conveys or transfers ownership of property.

**Grantor-grantee index:** A master reference book, ordinarily kept in the office of official records of a particular county, which lists all recorded deeds as evidence of ownership of real property.

**Gratuitous:** Bestowed or granted without consideration or exchange for something of value.

**Gratuitous licensee:** An individual who is permitted, although not invited, to enter another individual's property and who provides no consideration in exchange for such permission.

**Gratuity:** Money, also known as a tip, given to one who provides services and added to the cost of the service provided, generally as a reward for the service provided and as a supplement to the service provider's income.

**Gravamen:** The basis or essence of a grievance; the issue upon which a particular controversy turns.

**Green card:** The popular name for the Alien Registration Receipt Card issued to all immigrants entering the United States on a non-temporary visa who have registered with and been fingerprinted by the Immigration and Naturalization Service. The name *green card* comes from the distinctive coloration of the card.

**Greenmail:** A corporation's attempt to stop a takeover bid by paying a price above market value for stock held by the aggressor.

**Grievance procedure:** A term used in LABOR LAW to describe an orderly, established way of dealing with problems between employers and employees.

**Gross:** Great; culpable; general; absolute. A thing *in gross* exists in its own right, and not as an appendage to another thing. Before or without diminution or deduction. Whole; entire; total; as in the gross sum, amount, weight—as opposed to net. Not adjusted or reduced by deductions or subtractions.

Out of all measure; beyond allowance; flagrant; shameful; as a gross dereliction of duty, a gross injustice, gross carelessness or NEGLIGENCE. Such conduct as is not to be excused.

**Gross estate:** All the real and PERSONAL PROPERTY owned by a decedent at the time of his or her death.

**Gross income:** The financial gains received by an individual or a business during a fiscal year.

**Gross negligence:** An indifference to, and a blatant violation of, a legal duty with respect to the rights of others.

**Ground rent:** Perpetual consideration paid for the use and occupation of real property to the individual who has transferred such property, and subsequently to his or her descendants or someone to whom the interest is conveyed.

**Grounds:** The basis or foundation; reasons sufficient in law to justify relief.

**Group legal services:** Legal services provided under a plan to members, who may be employees of the same company, members of the same organization, or individual consumers.

**Guarantee:** One to whom a guaranty is made. This word is also used, as a noun, to denote the contract of guaranty or the obligation of a guarantor, and, as a verb, to denote the action of assuming the responsibilities of a guarantor.

**Guaranty:** As a verb, to agree to be responsible for the payment of another's debt or the performance of another's duty, liability, or obligation if that person does not perform as he or she is legally obligated to do; to assume the responsibility of a guarantor; to warrant.

As a noun, an undertaking or promise that is collateral to the primary or principal obligation and that binds the guarantor to performance in the event of nonperformance by the principal obligor.

**Guaranty clause:** A provision contained in a written document, such as a contract, deed, or mortgage, whereby one individual undertakes to pay the obligation of another individual.

The stipulation contained in Article IV, Section 4, of the U.S. Constitution, in which the federal government promises a republican form of government to every state and the defense and protection of the federal government if DOMESTIC VIOLENCE occurs.

**Guardian:** A person lawfully invested with the power, and charged with the obligation, of taking care of and managing the property and rights of a person who, because of age, understanding, or self-control, is considered incapable of administering his or her own affairs.

**Guardian ad litem:** A guardian appointed by the court to represent the interests of INFANTS, the unborn, or incompetent persons in legal actions.

**Guardian and ward:** The legal relationship that exists between a person (the guardian) appointed by a court to take care of and manage the property of a person (the ward) who does not possess the legal capacity to do so, by reason of age, comprehension, or self-control.

**Guilty:** Blameworthy; culpable; having committed a TORT or crime; devoid of innocence.

**Gun control:** Government regulation of the manufacture, sale, and possession of firearms.

**Habeas corpus:** *[Latin, You have the body.]* A writ (court order) that commands an individual or a government official who has restrained another to produce the prisoner at a designated time and place so that the court can determine the legality of custody and decide whether to order the prisoner's release.

**Habendum clause:** The portion of a deed to real property that begins with the phrase *To have and to hold* and that provides a description of the ownership rights of the transferee of such property.

**Habitability:** Fitness for occupancy. The requirement that rented premises, such as a house or apartment, be reasonably fit to occupy.

**Habitual:** Regular or customary; usual.

**Harbor:** As a noun, a haven, or a space of deep water so sheltered by the adjacent land and surroundings as to afford a safe anchorage for ships.

As a verb, to afford lodging to, to shelter, or to give a refuge to. To clandestinely shelter, succor, and protect improperly admitted ALIENS. It may be aptly used to describe the furnishing of shelter, lodging, or food clandestinely or with concealment, and under certain circumstances may be equally applicable to those acts divested of any accompanying secrecy. Harboring a criminal is a crime under both federal and state statutes and a person who harbors a criminal is an ACCESSORY after the fact.

**Hate crime:** A crime motivated by racial, religious, gender, sexual orientation, or other prejudice.

**Have and hold:** The opening words, or habendum clause, found in a deed to real property, which describes the ownership rights of the individual to whom such property is being conveyed.

**Hawkers and peddlers:** A *hawker* is an individual who sells wares by carrying them through the streets. The person's ordinary methods of attracting attention include addressing the public, using

placards, labels, and signs, or displaying merchandise in a public place. A *peddler* is defined as a retail dealer who brings goods from place to place, exhibiting them for sale. The terms are frequently defined in state statutes or city ordinances and are often used interchangeably.

**H.B.:** An abbreviation for a *house bill,* a proposed law brought before the House of Representatives, as opposed to the Senate.

**Head of household:** An individual in one family setting who provides actual support and maintenance to one or more individuals who are related to him or her through ADOPTION, blood, or marriage.

**Headnote:** A brief summary of a legal rule or a significant fact in a case that, among other headnotes that apply to the case, precedes the full text opinion printed in the reports or reporters. A syllabus to a reported case that summarizes the points decided in the case and is placed before the text of the opinion.

**Hearing:** A legal proceeding where an issue of law or fact is tried and evidence is presented to help determine the issue.

**Hearing examiner:** An employee of an ADMINISTRATIVE AGENCY who is charged with conducting adjudicative proceedings on matters within the scope of the jurisdiction of the agency.

**Hearsay:** A statement made out of court that is offered in court as evidence to prove the truth of the matter asserted.

**Heart balm acts:** Statutes that abrogate or restrict lawsuits brought by individuals who seek pecuniary damages to salve their broken hearts.

**Heat of passion:** A phrase used in CRIMINAL LAW to describe an intensely emotional state of mind induced by a type of provocation that would cause a reasonable person to act on impulse or without reflection.

**Heir:** An individual who receives an interest in, or ownership of, land, tenements, or hereditaments from an ancestor who has died intestate, through the laws of DESCENT AND DISTRIBUTION. At COMMON LAW, an heir was the individual appointed by law to succeed to the estate of an ancestor who died without a will. It is commonly used today in reference to any individual who succeeds to property, either by will or law.

**Held:** In relation to the opinion of a court, decided.

**Henceforth:** From this time forward.

**Hereafter:** In the future.

**Hereditament:** Anything that can be passed by an individual to heirs.

**Hierarchy:** A group of people who form an ascending chain of power or authority.

**High crimes and misdemeanors:** The offenses for which presidents, vice presidents, and all civil officers, including federal judges, can be removed from office through a process called IMPEACHMENT.

**Highway:** A main road or thoroughfare, such as a street, boulevard, or parkway, available to the public for use for travel or transportation.

**Hijacking:** The seizure of a commercial vehicle—airplane, ship, or truck—by force or threat of force.

**Hold harmless agreement:** An agreement or contract in which one party agrees to hold the other free from the responsibility for any liability or damage that might arise out of the transaction involved.

**Hold over:** To continue in possession of an office and exercise the functions associated therewith following the expiration of the term thereof. To retain possession as a tenant of real property following the termination of the lease or tenancy at will.

**Holder:** An individual who has lawfully received possession of a COMMERCIAL PAPER, such as a check, and who is entitled to payment on such instrument.

**Holder in due course:** An individual who takes a COMMERCIAL PAPER for value, in GOOD FAITH, with the belief that it is valid, with no knowledge of any defects.

**Holding:** A comprehensive term applied to the property, whether real, personal, or both, owned by an individual or a business. The legal principle derived from a judicial decision. That part of the written opinion of a court in which the law is specifically applied to the facts of the instant controversy. It is relied upon when courts use the case as an established precedent in a subsequent case.

**Holding company:** A corporation that limits its business to the ownership of stock in and the supervision of management of other corporations.

**Holiday:** A day of recreation; a consecrated day; a day set apart for the suspension of business.

**Holograph:** A will or deed written entirely by the testator or grantor with his or her own hand and not witnessed.

**Home rule:** The right to local self-government including the powers to regulate for the protection of the public health, safety, morals, and welfare; to license; to tax; and to incur debt.

**Homeless person:** An individual who lacks housing, including one whose primary residence during the night is a supervised public or private facility that provides temporary living accommodations; an individual who is a resident in transitional housing; or an individual who has as a primary residence a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

**Homeowner's warranty:** An insurance protection program offered by a number of builders of residential dwellings in the United States.

**Homestead:** The dwelling house and its adjoining land where a family resides. Technically, and pursuant to the modern homestead exemption laws, an artificial estate in land, created to protect the possession and enjoyment of the owner against the claims of creditors by preventing the sale of the property for payment of the owner's debts so long as the land is occupied as a home.

**Homicide:** The killing of one human being by another human being.

**Honor:** As a verb, to accept a bill of exchange, or to pay a note, check, or accepted bill, at maturity. To pay or to accept and pay, or, where a credit so engages, to purchase or discount a draft complying with the terms of the draft.

As a noun, in old ENGLISH LAW, a seigniory of several manors held under one baron or lord paramount. Also those dignities or privileges, degrees of nobility, knighthood, and other titles that flow from the crown.

In the United States, the customary title of courtesy given to judges, and occasionally to some other officers, as, "his honor," "your honor," "honorable."

**Honorary trust:** An arrangement whereby property is placed in the hands of another to be used for specific noncharitable purposes where there is no definite ascertainable beneficiary—one who profits by the act of another—and that is unenforceable in the absence of statute.

**Hornbook:** A primer; a book explaining the basics, fundamentals, or rudiments of any science or branch of knowledge. The phrase *hornbook law* is a colloquial designation of the rudiments or general principles of law.

A colloquial reference to a series of textbooks that review various fields of law in summary, narrative form, as opposed to casebooks, which are designed as primary teaching tools and include many reprints of court opinions.

**Hostages:** Persons taken by an individual or organized group in order to force a state, government unit, or community to meet certain conditions: payment of ransom, release of prisoners, or some other act.

**Hostile fire:** In insurance law, a combustion that cannot be controlled, that escapes from where it was initially set and confined, or one that was not intended to exist.

**Hostile witness:** A witness at a trial who is so adverse to the party that called him or her that he or she can be cross-examined as though called to testify by the opposing party.

**Hot pursuit:** A doctrine that provides that the police may enter the premises where they suspect a crime has been committed without a warrant when delay would endanger their lives or the lives of others and lead to the escape of the alleged perpetrator; also sometimes called fresh pursuit.

**Hotchpot:** The process of combining and assimilating property belonging to different individuals so that the property can be equally divided; the taking into consideration of funds or property that have already been given to children when dividing up the property of a decedent so that the respective shares of the children can be equalized.

**House arrest:** Confinement to one's home or another specified location instead of incarceration in a jail or prison.

**House of representatives:** The lower chamber, or larger branch, of the U.S. Congress, or a similar body in the legislature of many of the states.

**Housebreaking:** The act of using physical force to gain access to, and entering, a house with an intent to commit a felony inside.

**Household:** Individuals who comprise a family unit and who live together under the same roof; individuals who dwell in the same place and comprise a family, sometimes encompassing domestic help; all those who are under the control of one domestic head.

**Human rights:** Basic rights that fundamentally and inherently belong to each individual.

**Hundred:** A political subdivision in old England.

**Hung jury:** A trial jury duly selected to make a decision in a criminal case regarding a defendant's guilt or innocence, but who are unable to reach a verdict due to a complete division in opinion.

**Huntley hearing:** In New York state, a separate proceeding in a criminal action conducted solely for the purpose of determining the admissibility of the extrajudicial statements made by the defendant.

**Husband and wife:** A man and woman who are legally married to one another and are thereby given by law specific rights and duties resulting from that relationship.

**Hypothecate:** To pledge property as security or collateral for a debt. Generally, there is no physical transfer of the pledged property to the lender, nor is the lender given title to the property, though he or she has the right to sell the pledged property in the case of default.

**Hypothesis:** An assumption or theory.

**Hypothetical question:** A mixture of assumed or established facts and circumstances, developed in the form of a coherent and specific situation, which is presented to an expert witness at a trial to elicit his or her opinion.

**Ibid.:** An abbreviation of the Latin *ibidem,* meaning "in the same place; in the same book; on the same page."

**Idem:** *[Latin, The same.]* Used to indicate a reference that has previously been made and typically abbreviated "id." in legal and scholarly bibliographic citations.

**I.E.:** An abbreviation for the Latin *id est,* "that is to say, meaning."

**Illegitimacy:** The condition before the law, or the social status, of a child whose parents were not married to each other at the time of his or her birth.

**Illicit:** Not permitted or allowed; prohibited; unlawful; as an illicit trade; illicit intercourse.

**Illusory promise:** A statement that appears to assure a performance and form a contract but, when scrutinized, leaves to the speaker the choice of performance or nonperformance, which means that the speaker does not legally bind himself or herself to act.

**Immaterial:** Not essential or necessary; not important or pertinent; not decisive; of no substantial consequence; without weight; of no material significance.

**Immediate cause:** The final act in a series of provocations leading to a particular result or event, directly producing such result without the intervention of any further provocation.

**Immigration:** The entrance into a country of foreigners for purposes of permanent residence. The correlative term *emigration* denotes the act of such persons in leaving their former country.

**Imminent:** Impending; menacingly close at hand; threatening.

**Immunity:** Exemption from performing duties that the law generally requires other citizens to perform, or from a penalty or burden that the law generally places upon other citizens.

**Impanel:** The act of the clerk of the court in making up a list of the jurors who have been selected for the trial of a particular cause. All the steps of ascertaining who shall be the proper jurors to sit in the trial of a particular case up to the final formation.

**Impartial:** Favoring neither; disinterested; treating all alike; unbiased; equitable, fair, and just.

**Impeach:** To accuse; to charge a liability upon; to sue. To dispute, disparage, deny, or contradict; as in to impeach a judgment or decree, or impeach a witness; or as used in the rule that a jury cannot *impeach its verdict.* To proceed against a public officer for crime or misfeasance, before a proper court, by the presentation of a written accusation called ARTICLES OF IMPEACHMENT.

**Impeachment:** A process that is used to charge, try, and remove public officials for misconduct while in office.

**Impediment:** A disability or obstruction that prevents an individual from entering into a contract.

**Impersonation:** The crime of pretending to be another individual in order to deceive others and gain some advantage.

**Impertinence:** Irrelevancy; the flaw of bearing no reasonable relationship to the issues or proceeding at hand.

**Impleader:** A procedural device used in a civil action whereby a defendant brings into the lawsuit a third party who is not already a party to the action but may ultimately be liable for the plaintiff's claim against the defendant.

**Implied:** Inferred from circumstances; known indirectly.

**Implied consent:** Consent that is inferred from signs, actions, or facts, or by inaction or silence.

**Implied warranty:** A promise, arising by operation of law, that something that is sold will be merchantable and fit for the purpose for which it is sold.

**Impossibility:** A legal excuse or defense to an action for the breach of a contract; less frequently, a defense to a criminal charge of an attempted crime, such as attempted ROBBERY or murder.

**Impostor rule:** Under UNIFORM COMMERCIAL CODE, Article 3, Sect. 404(a), a rule stating that if an impostor endorses a negotiable instrument and receives payment in GOOD FAITH, the drawer of the instrument is responsible for the loss. An example would be if an individual impersonates a person for whom a check has been cut or misrepresents himself as that person's agent. If the impostor receives the check, endorses it, and cashes it at the drawer's bank, the drawer is responsible for the loss, because the bank accepted the endorsement in good faith. The bank may be responsible for a percentage of the loss if it failed to exercise "ordinary care"; for example, if the bank did not check the impostor's identification. The imposter rule is based on the assumption that between the bank and the drawer, the drawer is in a better position to prevent the loss. Also spelled *imposter rule.*

**Imposts:** Taxes or duties; taxes levied by the government on imported goods.

**Impoundment:** An action taken by the president in which he or she proposes not to spend all or part of a sum of money appropriated by Congress.

**Impracticability:** Substantial difficulty or inconvenience in following a particular course of action, but not such insurmountability or hopelessness as to make performance impossible.

**Imprimatur:** *[Latin, Let it be printed.]* A license or allowance, granted by the constituted authorities, giving permission to print and publish a book. This allowance was formerly necessary in England before any book could lawfully be printed, and in some other countries is still required.

**Imprisonment:** Incarceration; the act of restraining the personal liberty of an individual; confinement in a prison.

**Improvements:** Additions or alterations to real property that increase the value thereof.

**Imputed:** Attributed vicariously.

**Imputed knowledge:** The comprehension attributed or charged to a person because the facts in issue were open to discovery and it was that person's duty to apprise himself or herself of them; more accurately described as knowledge.

**Imputed notice:** Information regarding particular facts or circumstances that the law permits to affect the legal rights of a person who has no firsthand knowledge of them but who should have learned of them because his or her agent or representative had direct knowledge of that information and a duty to report it to him or her.

**In blank:** Absent limitation or restriction.

**In camera:** In chambers; in private. A judicial proceeding is said to be heard *in camera* either when the hearing is had before the judge in his or her private chambers or when all spectators are excluded from the courtroom.

**In common:** Shared in respect to title, use, or enjoyment; without apportionment or division into individual parts. Held by several for the equal advantage, use, or enjoyment of all.

**In evidence:** Facts, documents, or exhibits that have been introduced before and accepted by the court for consideration as PROBATIVE matter.

**In extremis:** *[Latin, In extremity.]* A term used in reference to the last illness prior to death.

**In forma pauperis:** *[Latin, In the character or manner of a pauper.]* A phrase that indicates the permission given by a court to an indigent to initiate a legal action without having to pay for court fees or costs due to his or her lack of financial resources.

**In kind:** Of the same class, category, or species.

**In lieu of:** Instead of; in place of; in substitution of. It does not mean *in addition to.*

**In loco parentis:** *[Latin, in the place of a parent.]* The legal doctrine under which an individual assumes parental rights, duties, and obligations without going through the formalities of legal ADOPTION.

**In medias res:** *[Latin, Into the heart of the subject, without preface or introduction.]*

**In pari delicto:** *[Latin, In equal fault.]* A descriptive phrase that indicates that parties involved in an action are equally culpable for a wrong.

**In pari materia:** *[Latin, Upon the same subject.]* A designation applied to statutes or general laws that were enacted at different times but pertain to the same subject or object.

**In perpetuity:** Of endless duration; not subject to termination.

**In personam:** *[Latin, Against the person.]* A lawsuit seeking a judgment to be enforceable specifically against an individual person.

**In re:** *[Latin, In the matter of.]* Concerning or regarding. The usual style for the name of a judicial proceeding having some item of property at the center of the dispute rather than adverse parties.

**In rem:** *[Latin, In the thing itself.]* A lawsuit against an item of property, not against a person (in personam).

**In specie:** Specific; specifically. Thus, to decree performance *in specie* is to decree SPECIFIC PERFORMANCE. In kind; in the same or like form. A thing is said to exist *in specie* when it retains its existence as a distinct individual of a particular class.

**In terrorem:** *[Latin, In fright or terror; by way of a threat.]* A description of a legacy or gift given by will with the condition that the donee must not challenge the validity of the will or other testament.

**Inadmissible:** That which, according to established legal principles, cannot be received into evidence at a trial for consideration by the jury or judge in reaching a determination of the action.

**Inadvertence:** The absence of attention or care; the failure of an individual to carefully and prudently observe the progress of a court proceeding that might have an effect upon his or her rights.

**Inalienable:** Not subject to sale or transfer; inseparable.

**Inc.:** An abbreviation for incorporated; having been formed as a legal or political entity with the advantages of perpetual existence and succession.

**Incapacity:** The absence of legal ability, competence, or qualifications.

**Incarceration:** Confinement in a jail or prison; imprisonment.

**Incest:** The crime of sexual relations or marriage taking place between a male and female who are so closely linked by blood or affinity that such activity is prohibited by law.

**Inchoate:** Imperfect; partial; unfinished; begun, but not completed; as in a contract not executed by all the parties.

**Incident of ownership:** Some aspect of the exclusive possession or control over the disposition or use of property that demonstrates that the person with such exclusive rights has not relinquished them.

**Incidental:** Contingent upon or pertaining to something that is more important; that which is necessary, appertaining to, or depending upon another known as the principal.

**Incite:** To arouse; urge; provoke; encourage; spur on; goad; stir up; instigate; set in motion; as in to *incite* a riot. Also, generally, in CRIMINAL LAW to instigate, persuade, or move another to commit a crime; in this sense nearly synonymous with *abet.*

**Income:** The return in money from one's business, labor, or capital invested; gains, profits, salary, wages, etc.

The gain derived from capital, from labor or effort, or both combined, including profit or gain through sale or conversion of capital. Income is not a gain accruing to capital or a growth in the value of the investment, but is a profit, something of exchangeable value, proceeding from the property and being received or drawn by the recipient for separate use, benefit, and disposal. That which comes in or is received from any business, or investment of capital, without reference to outgoing expenditures.

**Income splitting:** The right, created by provisions of federal tax laws, given to married couples who file joint returns to have their combined incomes subject to an INCOME TAX at a rate equal to that which would be imposed if each had filed a separate return for one-half the amount of their combined income.

**Income tax:** A charge imposed by government on the annual gains of a person, corporation, or other taxable unit derived through work, business pursuits, investments, property dealings, and other sources determined in accordance with the INTERNAL REVENUE CODE or state law.

**Incompatibility:** The inability of a HUSBAND AND WIFE to cohabit in a marital relationship.

**Incompetency:** The lack of ability, knowledge, legal qualification, or fitness to discharge a required duty or professional obligation.

**Incompetent evidence:** Probative matter that is not admissible in a legal proceeding; evidence that is not admissible under the FEDERAL RULES OF EVIDENCE. That which the law does not allow to be presented at all, or in connection with a particular matter, due to lack of originality, a defect in the witness or the document, or due to the nature of the evidence in and of itself.

**Inconsistent:** Reciprocally contradictory or repugnant.

**Incontestability clause:** A provision in a life or HEALTH INSURANCE policy that precludes the insurer from alleging that the policy, after it has been in effect for a stated period (typically two or three years), is void because of misrepresentations made by the insured in the application for it.

**Incorporate:** To formally create a corporation pursuant to the requirements prescribed by state statute; to confer a corporate franchise upon certain individuals.

**Incorporation by reference:** The method of making one document of any kind become a part of another separate document by alluding to the former in the latter and declaring that the former shall be taken and considered as a part of the latter the same as if it were completely set out therein.

**Incorporation doctrine:** A constitutional doctrine whereby selected provisions of the BILL OF RIGHTS are made applicable to the states through the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT.

**Incorporeal:** Lacking a physical or material nature but relating to or affecting a body.

**Incremental:** Additional or increased growth, bulk, quantity, number, or value; enlarged.

**Incriminate:** To charge with a crime; to expose to an accusation or a charge of crime; to involve oneself or another in a criminal prosecution or the danger thereof; as in the rule that a witness is not bound to give testimony that would tend to incriminate him or her.

**Inculpate:** To accuse; to involve in blame or guilt.

**Incumbent:** An individual who is in current possession of a particular office and who is legally authorized to discharge the duties of that office.

**Incur:** To become subject to and liable for; to have liabilities imposed by act or operation of law.

**Indefeasible:** That which cannot be defeated, revoked, or made void. This term is usually applied to an estate or right that cannot be defeated.

**Indefinite term:** A prison sentence for a specifically designated length of time up to a certain prescribed maximum, such as one to ten years or twenty-five years to life.

**Indemnify:** To compensate for loss or damage; to provide security for financial reimbursement to an individual in case of a specified loss incurred by the person.

**Indemnity:** Recompense for loss, damage, or injuries; restitution or reimbursement.

**Indenture:** An agreement declaring the benefits and obligations of two or more parties, often applicable in the context of BANKRUPTCY and bond trading.

**Independent audit:** A systematic review of the accuracy and truthfulness of the accounting records of a particular individual, business, or organization by a person or firm skilled in the necessary accounting methods and not related in any way to the person or firm undergoing the audit.

**Independent contractor:** A person who contracts to do work for another person according to his or her own processes and methods; the contractor is not subject to another's control except for what is specified in a mutually binding agreement for a specific job.

**Independent counsel:** An attorney appointed by the federal government to investigate and prosecute federal government officials.

**Indeterminate:** That which is uncertain or not particularly designated.

**Index:** A book containing references, alphabetically arranged, to the contents of a series or collection of documents or volumes; or a section (normally at the end) of a single volume or set of volumes containing such references to its contents.

Statistical indexes are also used to track or measure changes in the economy (for example, the Consumer Price Index) and movement in stock markets (for example, Standard & Poor's Index). Such indexes are usually keyed to a base year, month, or other period of comparison.

In mortgage financing, the term is used to determine adjustable-rate mortgage (ARM) interest rates after the discount period ends. Common indexes for ARMs are one-year Treasury SECURITIES and the national average cost of funds to savings and loan associations.

**Index to legal periodicals:** The set of volumes that lists what has appeared in print from 1926 to the present in the major law reviews and law-oriented magazines in various countries—usually organized according to author, title, and subject, and containing a table of cases.

**Indicia:** Signs; indications. Circumstances that point to the existence of a given fact as probable, but not certain. For example, *indicia of partnership* are any circumstances which would induce the belief that a given person was in reality, though not technically, a member of a given firm.

**Indictment:** A written accusation charging that an individual named therein has committed an act or omitted to do something that is punishable by law.

**Indirect evidence:** Probative matter that does not proximately relate to an issue but that establishes a hypothesis by showing various consistent facts.

**Indispensable party:** An individual who has an interest in the substantive issue of a legal action of such a nature that a final decree cannot be handed down without that interest being affected or without leaving the controversy in a condition whereby its final determination would be totally UNCONSCIONABLE.

**Individual retirement account:** A means by which an individual can receive certain federal tax advantages while investing for retirement.

**Indorse:** To sign a paper or document, thereby making it possible for the rights represented therein to pass to another individual. Also spelled *endorse.*

**Indorsement:** A signature on a COMMERCIAL PAPER or document.

**Inducement:** An advantage or benefit that precipitates a particular action on the part of an individual.

**Industrial union:** A labor organization composed of members employed in a particular field, such as textiles, but who perform different individual jobs within their general type of work.

**Infamy:** Notoriety; condition of being known as possessing a shameful or disgraceful reputation; loss of character or good reputation.

**Infancy:** Minority; the status of an individual who is below the legal age of majority.

**Infants:** Persons who are under the age of legal majority—at COMMON LAW, 21 years, now generally 18 years. According to the sense in which this term is used, it may denote the age of the person, the contractual disabilities that non-age entails, or his or her status with regard to other powers or relations.

**Inference:** In the law of evidence, a truth or proposition drawn from another that is supposed or admitted to be true. A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted. A logical and reasonable conclusion of a fact not presented by direct evidence but which, by process of logic and reason, a trier of fact may conclude exists from the established facts. Inferences are deductions or conclusions that with reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

**Inferior court:** This term may denote any court subordinate to the chief appellate tribunal in the particular judicial system (e.g., trial court); but it is also commonly used as the designation of a court of special, limited, or statutory jurisdiction, whose record must show the existence and attaching of jurisdiction in any given case.

**Infirmity:** Flaw, defect, or weakness.

**Information:** The formal accusation of a criminal offense made by a public official; the sworn, written accusation of a crime.

**Information and belief:** A standard phrase added to qualify a statement made under oath; a phrase indicating that a statement is made, not from firsthand knowledge but, nevertheless, in the firm belief that it is true.

**Informed consent:** Assent to permit an occurrence, such as surgery, that is based on a complete disclosure of facts needed to make the decision intelligently, such as knowledge of the risks entailed or alternatives.

The name for a fundamental principle of law that a physician has a duty to reveal what a reasonably prudent physician in the medical community employing reasonable care would reveal to a patient as to whatever reasonably foreseeable risks of harm might result from a proposed course of treatment. This disclosure must be afforded so that a patient—exercising ordinary care for his or her own welfare and confronted with a choice of undergoing the proposed treatment, alternative treatment, or none at all—can intelligently exercise judgment by reasonably BALANCING the probable risks against the probable benefits.

**Infra:** *[Latin, Below, under, beneath, underneath.]* A term employed in legal writing to indicate that the matter designated will appear beneath or in the pages following the reference.

**Infraction:** Violation or infringement; breach of a statute, contract, or obligation.

**Infringement:** The encroachment, breach, or violation of a right, law, regulation, or contract.

**Ingrossing:** The act of making a perfect copy of a particular instrument, such as a deed, lease, or will, from a rough draft so that it may be properly executed to achieve its purpose.

**Inherent:** Derived from the essential nature of, and inseparable from, the object itself.

**Inherit:** To receive property according to the state laws of intestate succession from a decedent who has failed to execute a valid will, or, where the term is applied in a more general sense, to receive the property of a decedent by will.

**Inheritance:** Property received from a decedent, either by will or through state laws of intestate succession, where the decedent has failed to execute a valid will.

**Initiative:** A process of a participatory democracy that empowers the people to propose legislation and to enact or reject the laws at the polls independent of the lawmaking power of the governing body.

**Injunction:** A court order by which an individual is required to perform, or is restrained from performing, a particular act. A writ framed according to the circumstances of the individual case.

**Injure:** To interfere with the legally protected interest of another or to inflict harm on someone, for which an action may be brought. To damage or impair.

**Injurious falsehood:** A fallacious statement that causes intentional damage to an individual's commercial or economic relations.

Any type of defamatory remark, either written or spoken, that causes pecuniary loss to an individual through disparagement of a particular business dealing.

**Injury:** A comprehensive term for any wrong or harm done by one individual to another individual's body, rights, reputation, or property. Any interference with an individual's legally protected interest.

**Inland waters:** Canals, lakes, rivers, water courses, inlets, and bays that are nearest to the shores of a nation and subject to its complete sovereignty.

**Innkeeper:** An individual who, as a regular business, provides accommodations for guests in exchange for reasonable compensation.

**Innocent:** Absent guilt; acting in GOOD FAITH with no knowledge of defects, objections, or inculpative circumstances.

**Innocent purchaser:** An individual who, in GOOD FAITH and by an honest agreement, buys property in the absence of sufficient knowledge to charge him or her with notice of any defect in the transaction.

**Inns of chancery:** Ancient preparatory colleges where qualified clerks studied the drafting of writs, which was a function of the officers of the Court of Chancery.

**Inns of court:** Organizations that provide preparatory education for ENGLISH LAW students in order to teach them to practice in court.

**Inoperative:** Void; not active; ineffectual.

**Inquest:** An inquiry by a CORONER or medical examiner, sometimes with the aid of a jury, into the cause of a violent death or a death occurring under suspicious circumstances. Generally an inquest may result in a finding of natural death, accidental death, suicide, or murder. Criminal prosecution may follow when culpable conduct has contributed to the death.

The body of jurors called to inquire into the circumstances of a death that occurred suddenly, by violence, or while imprisoned. Any body of jurors called to inquire into certain matters. (A GRAND JURY is sometimes called a grand inquest, for example.)

The determination or findings of a body of persons called to make a legal inquiry or the report issued after their investigation.

**Inquiry, commissions of:** Individuals employed, during conciliation, to investigate the facts of a particular dispute and to submit a report stating the facts and proposing terms for the resolution of the differences.

**Inquisitorial system:** A method of legal practice in which the judge endeavors to discover facts while simultaneously representing the interests of the state in a trial.

**Insanity defense:** A defense asserted by an accused in a criminal prosecution to avoid liability for the commission of a crime because, at the time of the crime, the person did not appreciate the nature or quality or wrongfulness of the acts.

**Insecurity clause:** Provision in a contract that allows a creditor to make an entire debt come due if there is good reason to believe that the debtor cannot or will not pay.

**Insider:** In the context of federal regulation of the purchase and sale of SECURITIES, anyone who has knowledge of facts not available to the general public.

**Insolvency:** An incapacity to pay debts upon the date when they become due in the ordinary course of business; the condition of an individual whose property and assets are inadequate to discharge the person's debts.

**Inspection:** An examination or investigation; the right to see and duplicate documents, enter land, or make other such examinations for the purpose of gathering evidence.

**Installment:** Regular, partial portion of the same debt, paid at successive periods as agreed by a debtor and creditor.

**Instant:** Current or present.

**Instigate:** To incite, stimulate, or induce into action; goad into an unlawful or bad action, such as a crime.

**Institute:** To inaugurate, originate, or establish. In CIVIL LAW, to direct an individual who was named as heir in a will to pass over the estate to another designated person, known as the substitute.

**Institution:** The commencement or initiation of anything, such as an action. An establishment, particularly one that is eleemosynary or public by nature.

**Instructions:** Directives given by a judge to a jury during a trial prescribing the manner in which the jurors should proceed in deciding the case at bar. Jury instructions ordinarily include a statement of the QUESTIONS OF FACT for determination by the jury, as well as a statement of the laws applicable to the facts of the case.

**Instrument:** A formal or legal written document; a document in writing, such as a deed, lease, bond, contract, or will. A writing that serves as evidence of an individual's right to collect money, such as a check.

**Instrumentality rule:** A principle of corporate law that permits a court to disregard the corporate existence of a subsidiary corporation when it is operated solely for the benefit of the parent corporation, which controls and directs the activities of the subsidiary while asserting the shield of limited liability.

**Insurable interest:** A right, benefit, or advantage arising out of property that is of such nature that it may properly be indemnified.

**Insurance:** A contract whereby, for specified consideration, one party undertakes to compensate the other for a loss relating to a particular subject as a result of the occurrence of designated hazards.

**Insured:** The person who obtains or is otherwise covered by insurance on his or her health, life, or property. The *insured* in a policy is not limited to the insured named in the policy but applies to anyone who is insured under the policy.

**Insurer:** An individual or company who, through a contractual agreement, undertakes to compensate specified losses, liability, or damages incurred by another individual.

**Insurrection:** A rising or rebellion of citizens against their government, usually manifested by acts of violence.

**Intangibles:** Property that is a "right" such as a patent, COPYRIGHT, or TRADEMARK, or one that is lacking physical existence, such as good will. A nonphysical, noncurrent asset that exists only in connection with something else, such as the good will of a business.

**Integrated:** Completed; made whole or entire. Desegregated; converted into a nonracial, nondiscriminatory system.

**Integrated agreement:** A contract that contains within its four corners the entire understanding of the parties and is subject to the PAROL EVIDENCE rule, which seeks to preserve the integrity of written agreements by refusing to allow the parties to modify their contract through the introduction of prior or contemporaneous oral declarations.

**Integrated bar:** The process of organizing the attorneys of a state into an association, membership in which is a condition precedent to the right to practice law.

**Integration:** The bringing together of separate elements to create a whole unit. The bringing together of people from the different demographic and racial groups that make up U.S. society.

**Intellectual property:** Intangible rights protecting the products of human intelligence and creation, such as copyrightable works, patented inventions, TRADEMARKS, and trade secrets. Although largely governed by federal law, state law also governs some aspects of intellectual property.

**Intemperance:** A lack of moderation. Habitual intemperance is that degree of intemperance in the use of intoxicating liquor which disqualifies the person a great portion of the time from properly attending to business. Habitual or excessive use of liquor.

**Intent:** A determination to perform a particular act or to act in a particular manner for a specific reason; an aim or design; a resolution to use a certain means to reach an end.

**Inter alia:** *[Latin, Among other things.]* A phrase used in PLEADING to designate that a particular statute set out therein is only a part of the statute that is relevant to the facts of the lawsuit and not the entire statute.

**Inter vivos:** *[Latin, Between the living.]* A phrase used to describe a gift that is made during the donor's lifetime.

**Interest:** A comprehensive term to describe any right, claim, or privilege that an individual has toward real or PERSONAL PROPERTY. Compensation for the use of borrowed money.

**Interest on lawyers trust account:** A system in which lawyers place certain client deposits in interest-bearing accounts, with the interest then used to fund programs, such as legal service organizations who provide services to clients in need.

**Interference:** In the law of PATENTS, the presence of two pending applications, or an existing patent and a pending application that encompass an identical invention or discovery.

**Intergovernmental immunity doctrine:** A principle established under CONSTITUTIONAL LAW that prevents the federal government and individual state governments from intruding on one another's sovereignty. Intergovernmental immunity is intended to keep government agencies from restricting the rights of other government agencies.

**Interim:** *[Latin, In the meantime: temporary; between.]*

**Interlineation:** The process of writing between the lines of an instrument; that which is written between the lines of a document.

**Interlocking directorate:** The relationship that exists between the board of directors of one corporation with that of another due to the fact that a number of members sit on both boards and, therefore, there is a substantial likelihood that neither corporation acts independently of the other.

**Interlocutory:** Provisional; interim; temporary; not final; that which intervenes between the beginning and the end of a lawsuit or proceeding to either decide a particular point or matter that is not the final issue of the entire controversy or prevent irreparable harm during the pendency of the lawsuit.

**Internal audit:** An inspection and verification of the financial records of a company or firm by a member of its own staff to determine the accuracy and acceptability of its accounting practices.

**International law:** The body of law that governs the legal relations between or among states or nations.

**International waterways:** Narrow channels of marginal sea or inland waters through which international shipping has a right of passage.

**Internet:** A worldwide TELECOMMUNICATIONS network of business, government, and personal computers.

**Internet fraud:** A crime in which the perpetrator develops a scheme using one or more elements of the INTERNET to deprive a person of property or any interest, estate, or right by a false representation of a matter of fact, whether by providing misleading information or by concealment of information.

**Interpleader:** An equitable proceeding brought by a third person to have a court determine the ownership rights of rival claimants to the same money or property that is held by that third person.

**Interpolation:** The process of inserting additional words in a complete document or instrument in such manner as to alter its intended meaning; the addition of words to a complete document or instrument.

**Interpretation:** The art or process of determining the intended meaning of a written document, such as a constitution, statute, contract, deed, or will.

**Interrogatories:** Written questions submitted to a party from his or her adversary to ascertain answers that are prepared in writing and signed under oath and that have relevance to the issues in a lawsuit.

**Interstate compact:** A voluntary arrangement between two or more states that is designed to solve their common problems and that becomes part of the laws of each state.

**Intervening cause:** A separate act or omission that breaks the direct connection between the defendant's actions and an injury or loss to another person, and may relieve the defendant of liability for the injury or loss.

**Intervenor:** An individual who is not already a party to an existing lawsuit but who makes himself or herself a party either by joining with the plaintiff or uniting with the defendant in resistance of the plaintiff's claims.

**Intervention:** A procedure used in a lawsuit by which the court allows a third person who was not originally a party to the suit to become a party, by joining with either the plaintiff or the defendant.

**Intestacy:** The state or condition of dying without having made a valid will or without having disposed by will of a segment of the property of the decedent.

**Intestate:** The description of a person who dies without making a valid will or the reference made to this condition.

**Intestate succession:** The inheritance of an ancestor's property according to the laws of DESCENT AND DISTRIBUTION that are applied when the deceased has not executed a valid will.

**Intoxication:** A state in which a person's normal capacity to act or reason is inhibited by alcohol or drugs.

**Intrinsic evidence:** Information necessary for the determination of an issue in a lawsuit that is gleaned from the provisions of a document itself, as opposed to testimony from a witness or the terms of other writings that have not been admitted by the court for consideration by the trier of fact.

**Inure:** To result; to take effect; to be of use, benefit, or advantage to an individual.

**Invalid:** Null; void; without force or effect; lacking in authority.

**Inventory:** An itemized list of property that contains a description of each specific article.

**Investiture:** In ecclesiastical law, one of the formalities by which an archbishop confirms the election of a bishop. During the feudal ages, the rite by which an overlord granted a portion of his lands to his vassal.

**Investment:** The placement of a particular sum of money in business ventures, real estate, or SECURITIES of a permanent nature so that it will produce an income.

**Invitation:** The act by which an owner or occupier of particular land or premises encourages or attracts others to enter, remain in, or otherwise make use of his or her property.

**Invitee:** An individual who enters another's premises as a result of an express or implied invitation of the owner or occupant for their mutual gain or benefit.

**Invoice:** An itemized statement or written account of goods sent to a purchaser or consignee by a vendor that indicates the quantity and price of each piece of merchandise shipped.

**Involuntary confession:** An admission, especially by an individual who has been accused of a crime, that is not freely offered but rather is precipitated by a threat, fear, torture, or a promise.

**Involuntary manslaughter:** The act of unlawfully killing another human being unintentionally.

**Involuntary servitude:** SLAVERY; the condition of an individual who works for another individual against his or her will as a result of force, coercion, or imprisonment, regardless of whether the individual is paid for the labor.

**Ipse dixit:** *[Latin, He himself said it.]* An unsupported statement that rests solely on the authority of the individual who makes it.

**Ipso facto:** *[Latin, By the fact itself; by the mere fact.]*

**Irreconcilable differences:** The existence of significant differences between a married couple that are so great and beyond resolution as to make the marriage unworkable, and for which the law permits a DIVORCE.

**Irregularity:** A defect, failure, or mistake in a legal proceeding or lawsuit; a departure from a prescribed rule or regulation.

**Irrelevant:** Unrelated or inapplicable to the matter in issue.

**Irreparable injury:** Any harm or loss that is not easily repaired, restored, or compensated by monetary damages. A serious wrong, generally of a repeated and continuing nature, that has an equitable remedy of injunctive relief.

**Irresistible impulse:** A test applied in a criminal prosecution to determine whether a person accused of a crime was compelled by a mental disease to commit it and therefore cannot be held criminally responsible for her or his actions; in a WRONGFUL DEATH case, a compulsion to commit suicide created by the defendant.

**Irretrievable breakdown of marriage:** The situation that exists when either or both spouses no longer are able or willing to live with each other, thereby destroying their HUSBAND AND WIFE relationship with no hope of resumption of spousal duties.

**Irrevocable:** Unable to cancel or recall; that which is unalterable or irreversible.

**IRS:** An abbreviation for the INTERNAL REVENUE SERVICE, a federal agency charged with the responsibility of administering and enforcing internal revenue laws.

**Island:** A land area surrounded by water and remaining above sea level during high tide.

**Issue:** To promulgate or send out. In a lawsuit, a disputed point of law or QUESTION OF FACT, set forth in the pleadings, that is alleged by one party and denied by the other.

In the law governing the transfer or distribution of property, a child, children, and all individuals who descend from a common ancestor or descendents of any degree.

**Issue preclusion:** A concept that refers to the fact that a particular QUESTION OF FACT or law, one that has already been fully litigated by the parties in an action for which there has been a judgment on the merits, cannot be relitigated in any future action involving the same parties or their privies (persons who would be bound by the judgment rendered for the party).

**Itemize:** To individually state each item or article.

## J

**Jactitation:** Deceitful boasting, a deceptive claim, or a continuing assertion prejudicial to the right of another.

**Jail:** A building designated or regularly used for the confinement of individuals who are sentenced for minor crimes or who are unable to gain release on bail and are in custody awaiting trial.

**Jailhouse lawyer:** Prison inmates with some knowledge of law who give legal advice and assistance to their fellow inmates.

**J.D.:** An abbreviation for Juris Doctor, the degree awarded to an individual upon the successful completion of law school.

**Jeopardy:** Danger; hazard; peril. In a criminal action, the danger of conviction and punishment confronting the defendant.

**Jetsam:** The casting overboard of goods from a vessel, by its owner, under exigent circumstances in order to provide for the safety of the ship by lightening its cargo load.

**Jobber:** A merchant, middle person, or wholesaler who purchases goods from a manufacturer in lots or bulk and resells the goods to a consumer, or to a retailer, who then sells them to a consumer. One who buys and sells on the stock exchange or who deals in stocks, shares, and SECURITIES.

**John Doe or Jane Doe:** A fictitious name used for centuries in the law when a specific person is not known by name.

**Joinder:** The union in one lawsuit of multiple parties who have the same rights or against whom rights are claimed as coplaintiffs or codefendants. The combination in one lawsuit of two or more causes of action, or grounds for relief. At COMMON LAW the acceptance by opposing parties that a particular issue is in dispute.

**Joint:** United; coupled together in interest; shared between two or more persons; not solitary in interest or action but acting together or in unison. A combined, undivided effort or undertaking involving two or more individuals. Produced by or involving the concurring action of two or more; united in or possessing a common relation, action, or interest. To share common rights, duties, and liabilities.

**Joint and several liability:** A designation of liability by which members of a group are either individually or mutually responsible to a party in whose favor a judgment has been awarded.

**Joint estate:** Property owned by two or more people at the same time, under the same title, with the same interest, and with the same right of possession.

**Joint operating agreement:** Any contract, agreement, JOINT VENTURE, or other arrangement entered into by two or more businesses in which the operations and the physical facilities of a failing business are merged, although each business retains its status as a separate entity in terms of profits and individual mission.

**Joint resolution:** A type of measure that Congress may consider and act upon, the other types being bills, concurrent resolutions, and simple resolutions, in addition to treaties in the Senate.

**Joint stock company:** An association engaged in a business for profit with ownership interests represented by shares of stock.

**Joint tenancy:** A type of ownership of real or PERSONAL PROPERTY by two or more persons in which each owns an undivided interest in the whole.

**Joint tortfeasor:** Two or more individuals with joint and several liability in a tort action for the same injury to the same person or property.

**Joint venture:** An association of two or more individuals or companies engaged in a solitary business enterprise for profit without actual partnership or incorporation; also called a joint adventure.

**Journal:** A book or log in which entries are made to record events on a daily basis. A book where transactions or events are recorded as they occur.

**J.P.:** An abbreviation for JUSTICE OF THE PEACE, a minor ranking judicial officer with limited statutory jurisdiction over preservation of the peace, civil cases, and lesser criminal offenses.

**J.S.D.:** An abbreviation for Doctor of Juridical Science, a degree awarded to highly qualified individuals who have successfully completed a prescribed course of advanced study in law after having earned J.D. and LL.M. degrees.

**Judge:** To make a decision or reach a conclusion after examining all the factual evidence presented. To form an opinion after evaluating the facts and applying the law.

A public officer chosen or elected to preside over and to administer the law in a court of justice; one who controls the proceedings in a courtroom and decides QUESTIONS OF LAW or discretion.

**Judge advocate:** A legal adviser on the staff of a military command. A designated officer of the Judge Advocate General's Corps (JAGC) of the U.S. Army, Navy, Air Force, or Marine Corps.

**Judgment:** A decision by a court or other tribunal that resolves a controversy and determines the rights and obligations of the parties.

**Judgment creditor:** A party to which a debt is owed that has proved the debt in a legal proceeding and that is entitled to use judicial process to collect the debt; the owner of an unsatisfied court decision.

**Judgment debtor:** A party against which an unsatisfied court decision is awarded; a person who is obligated to satisfy a court decision.

**Judgment docket:** A list under which judicial orders of a particular court are recorded by a clerk or other designated officer to be available for inspection by the public.

**Judgment note:** A promissory note authorizing an attorney, holder, or clerk of court to appear for the maker of the note and confess, or assent to, a judgment to be entered against the maker due to default in the payment of the amount owed.

**Judgment notwithstanding the verdict:** A judgment entered by the court in favor of one party even though the jury returned a verdict for the opposing party.

**Judgment proof:** A term used to describe an individual who is financially unable to pay an adverse court decision awarding a sum of money to the opposing party.

**Judicare:** To decide or determine in a judicial manner.

**Judicature:** A term used to describe the judicial branch of government; the judiciary; or those connected with the court system.

**Judicature acts:** English statutes that govern and revise the organization of the judiciary.

**Judicial:** Relating to the courts or belonging to the office of a judge; a term pertaining to the administration of justice, the courts, or a judge, as in judicial power.

**Judicial action:** The adjudication by the court of a controversy by hearing the cause and determining the respective rights of the parties.

**Judicial administration:** The practices, procedures, and offices that deal with the management of the administrative systems of the courts.

**Judicial assistance:** Aid offered by the judicial tribunals of one state to the judicial tribunals of a second state.

**Judicial immunity:** A judge's complete protection from personal liability for exercising judicial functions.

**Judicial notice:** A doctrine of evidence applied by a court that allows the court to recognize and accept the existence of a particular fact commonly known by persons of average intelligence without establishing its existence by admitting evidence in a civil or criminal action.

**Judicial review:** A court's authority to examine an executive or legislative act and to invalidate that act if it is contrary to constitutional principles.

**Judicial sale:** The transfer of title to and possession of a debtor's property to another in exchange for a price determined in proceedings that are conducted under a judgment or an order of court by an officer duly appointed and commissioned to do so.

**Judicial writs:** Orders issued by a judge in the English courts after a lawsuit had begun.

**Judiciary:** The branch of government that is endowed with the authority to interpret and apply the law, adjudicate legal disputes, and otherwise administer justice.

**Junior:** Younger; subsequently born or created; later in rank, tenure, preference, or position.

**Junk bond:** A security issued by a corporation that is considered to offer a high risk to bondholders.

**Jural:** The principles of natural and positive rights recognized by law.

**Jurat:** The certificate of an officer that a written instrument was sworn to by the individual who signed it.

**Juridical:** Pertaining to the administration of justice or to the office of a judge.

**Jurimetrics:** The study of law and science.

**Juris:** *[Latin, Of right; of law.]* A phrase that serves as the root for diverse terms and phrases dealing with the law; for example, jurisdiction, JURISPRUDENCE, or jurist.

**Juris doctor:** The degree awarded to an individual upon the successful completion of law school.

**Jurisdiction:** The geographic area over which authority extends; legal authority; the authority to hear and determine causes of action.

**Jurisdictional dispute:** Conflicting claims made by two different LABOR UNIONS to an employer regarding assignment of the work or union representation.

**Jurisprudence:** From the Latin term *juris prudentia,* which means "the study, knowledge, or science of law"; in the United States, more broadly associated with the philosophy of law.

**Jurist:** A judge or legal scholar; an individual who is versed or skilled in law.

**Juristic act:** An action intended and capable of having a legal effect; any conduct by a private individual designed to originate, terminate, or alter a right.

**Jury:** In trials, a group of people who are selected and sworn to inquire into matters of fact and to reach a verdict on the basis of the evidence presented to them.

**Jury commission:** A group of officials charged with the responsibility of choosing the names of prospective jury members or of selecting the list of jurors for a particular term in court.

**Jury nullification:** A sanctioned doctrine of trial proceedings wherein members of a jury disregard either the evidence presented or the instructions of the judge in order to reach a verdict based upon their own consciences. It espouses the concept that jurors should be the judges of both law and fact.

**Jus:** *[Latin, right; justice; law; the whole body of law; also a right.]* The term is used in two meanings:

*Jus* means *law,* considered in the abstract; that is, as distinguished from any specific enactment, which we call, in a general sense, *the law.* Or it means the law taken as a system, an aggregate, a whole. Or it may designate some one particular system or body of particular laws; as in the phrases *jus civile, jus gentium, jus proetorium.*

In a second sense, *jus* signifies a *right;* that is, a power, privilege, faculty, or demand inherent in one person and incident upon another; or a capacity residing in one person of controlling, with the assent and assistance of the state, the actions of another. This is its meaning in the expressions *jus in rem, jus accrescendi, jus possessionis.*

**Jus cogens:** That body of peremptory principles or norms from which no derogation is permitted; those norms recognized by the international community as a whole as being fundamental to the maintenance of an international legal order.

Elementary rules that concern the safeguarding of peace and notably those that prohibit recourse to force or the threat of force. Norms of a humanitarian nature are included, such as prohibitions against GENOCIDE, SLAVERY, and RACIAL DISCRIMINATION.

**Jus tertii:** The right of a third party. A tenant or bailee or another in possession of property, who pleads that the title is in some person other than that person's landlord or bailor, is said to set up a *jus tertii.*

**Just:** Legally right; conformity with that which is lawful or fair.

**Just cause:** A reasonable and lawful ground for action.

**Just compensation:** Equitable remuneration to the owner of private property that is expropriated for public use through condemnation, the implementation of the governmental power of EMINENT DOMAIN.

**Just desserts:** A retributive theory of criminal punishment that proposes reduced judicial discretion in sentencing and specific sentences for criminal acts without regard to the individual defendant.

**Just war:** As widely used, a term referring to any war between states that meets generally accepted international criteria of justification. The concept of just war invokes both political and theological ideology, as it promotes a peaceful resolution and coexistence between states, and the use of force or the invocation of armed conflict only under certain circumstances. It is not the same as, but is often confused with, the term *jihad* or "holy war," a Muslim religious justification for war.

**Justice:** The proper administration of the law; the fair and equitable treatment of all individuals under the law. A title given to certain judges, such as federal and state supreme court judges.

**Justice of the peace:** A judicial officer with limited power whose duties may include hearing cases that involve civil controversies, conserving the peace, performing judicial acts, hearing minor criminal complaints, and committing offenders.

**Justiciable:** Capable of being decided by a court.

**Justification:** A sufficient or acceptable excuse or explanation made in court for an act that is otherwise unlawful; the showing of an adequate reason, in court, why a defendant committed the offense for which he or she is accused that would serve to relieve the defendant of liability.

A legal excuse for the performance or nonperformance of a particular act that is the basis for exemption from guilt. A classic example is the excuse of SELF-DEFENSE offered as justification for the commission of a murder.

**Juvenile law:** An area of the law that deals with the actions and well-being of persons who are not yet adults.

**Kangaroo court:** *[Slang of U.S. origin.]* An unfair, biased, or hasty judicial proceeding that ends in a harsh punishment; an unauthorized trial conducted by individuals who have taken the law into their own hands, such as those put on by vigilantes or prison inmates; a proceeding and its leaders who are considered sham, corrupt, and without regard for the law.

**Kentucky Resolutions:** A set of proposals formulated by THOMAS JEFFERSON and approved by the state legislature of Kentucky during 1798 and 1799 in opposition to the enactment of the ALIEN AND SEDITION ACTS (1 Stat. 566, 570, 577, 596) by Congress.

**Keogh Plan:** A retirement account that allows workers who are self-employed to set aside a percentage of their net earnings for retirement income.

**Key Numbers®:** A system devised by West Group involving the classification of legal subjects that are organized within their publications according to specific topics and subtopics. Each topic and subtopic is given a key number which consists of one or more digits preceded by the symbol of a key assigned to each individual classification.

**Keycite™:** An interactive, computer-assisted citatory service that allows legal researchers to verify the validity of a case and to find all references that have cited that case as authority.

**Kickback:** The seller's return of part of the purchase price of an item to a buyer or buyer's representative for the purpose of inducing a purchase or improperly influencing future purchases.

**Kidnapping:** The crime of unlawfully seizing and carrying away a person by force or FRAUD, or seizing and detaining a person against his or her will with an intent to carry that person away at a later time.

**Kilberg doctrine:** A principle applied in lawsuits involving conflicts of law that provides that a court in the place where a WRONGFUL DEATH action is brought is not bound by the law of the place where the conduct causing death occurred concerning limitations on damages.

**Kin:** Relation by blood or consanguinity; relatives by birth.

**King's bench or queen's bench:** The highest common-law court in England until its end as a separate tribunal in 1875.

**Kiting:** The unlawful practice of drawing checks against a bank account containing insufficient funds to cover them, with the expectation that the necessary funds will be deposited before such checks are presented for payment.

**Knowingly:** Consciously; willfully; subject to complete understanding of the facts or circumstances.

**Labor law:** An area of the law that deals with the rights of employers, employees, and labor organizations.

**Labor union:** An association, combination, or organization of employees who band together to secure favorable wages, improved working conditions, and better work hours, and to resolve grievances against employers.

**Laches:** A defense to an equitable action, that bars recovery by the plaintiff because of the plaintiff's undue delay in seeking relief.

**Lame duck:** An elected official, who is to be followed by another, during the period of time between the election and the date that the successor will fill the post.

**Lame-duck amendment:** The popular name given to the TWENTIETH AMENDMENT to the U.S. Constitution.

**Land-use control:** Activities such as ZONING, the regulation of the development of real estate, and city planning.

**Land grant:** A conveyance of public property to a subordinate government or corporation; a MUNIMENT OF TITLE issued by a state or government for the donation of some part of the public domain.

**Landlord:** A lessor of real property; the owner or possessor of an estate in land or a rental property, who, in an exchange for rent, leases it to another individual known as the tenant.

**Landlord and tenant:** An association between two individuals arising from an agreement by which one individual occupies the other's real property with permission, subject to a rental fee.

**Landmark:** A structure that has significant historical, architectural, or cultural meaning and that has been given legal protection from alteration and destruction.

**Lapse:** The termination or failure of a right or privilege because of a neglect to exercise that right or to perform some duty within a time limit, or because a specified contingency did not occur. The expiration of coverage under an insurance policy because of the insured's failure to pay the premium.

The common-law principle that a gift in a will does not take effect but passes into the estate remaining after the payment of debts and particular gifts, if the beneficiary is alive when the will is executed but subsequently predeceases the testator.

**Larceny:** The unauthorized taking and removal of the PERSONAL PROPERTY of another by an individual who intends to permanently deprive the owner of it; a crime against the right of possession.

**Lasciviousness:** Lewdness; indecency; OBSCENITY; behavior that tends to deprave the morals in regard to sexual relations.

**Last clear chance:** In the law of TORTS, the doctrine that excuses or negates the effect of the plaintiff's contributory NEGLIGENCE and permits him or her to recover, in particular instances, damages regardless of his or her own lack of ordinary care.

**Last resort:** A court, such as the U.S. Supreme Court, from which there is no further appeal of a judgment rendered by it in review of a decision in a civil or criminal action by a lower court.

**Latent:** Hidden; concealed; that which does not appear upon the face of an item.

**Lateral support:** The right of a landowner to have his or her property naturally upheld by the adjoining land or the soil beneath.

**Law:** A body of rules of conduct of binding legal force and effect, prescribed, recognized, and enforced by controlling authority.

**Law and literature:** An interdisciplinary study that examines the relationship between the fields of law and literature, with each field borrowing insights and methods of analysis from the other.

**Law day:** The date prescribed in a bond, mortgage, or deed for payment of the debt; the maturity date. May 1st, observed in schools, public assemblies, and courts, in honor of our legal system.

**Law French:** A corrupt French dialect used by English lawyers from after the Norman Conquest in 1066 until slightly after the end of the Restoration period in 1688.

**Law journal:** A magazine or newspaper that contains articles, news items, comments on new laws and case decisions, court calendars, and suggestions for practicing law, for use by attorneys.

**Law merchant:** The system of rules and customs and usages generally recognized and adopted by traders as the law for the regulation of their commercial transactions and the resolution of their controversies.

**Law of nations:** The body of customary rules that determine the rights and that regulate the intercourse of independent countries in peace and war.

**Law of the case:** The principle that if the highest appellate court has determined a legal question and returned the case to the court below for additional proceedings, the question will not be determined differently on a subsequent appeal in the same case where the facts remain the same.

**Law of the land:** The designation of general public laws that are equally binding on all members of the community.

**Law of the sea:** The part of public INTERNATIONAL LAW that deals with maritime issues.

**Law reports:** Published volumes of the decisions of courts.

**Law review:** A law school publication containing both case summaries written by student members and scholarly articles written by law professors, judges, and attorneys. These articles focus on current developments in the law, case decisions, and legislation. Law reviews are edited by students, and students contribute notes to featured articles.

**Lawful:** Licit; legally warranted or authorized.

**Lawsuit:** A popular designation of a legal proceeding between two parties in the courts, instituted by one party to compel another to do himself or herself justice, regardless of whether the action is based upon law or EQUITY.

**Lawyer-witness rule:** The principle that prohibits an attorney from serving as an advocate and a witness in the same case. Also known as the *advocate-witness rule,* it keeps attorneys from being placed in a situation that could at best create a conflict of interest for both themselves and their clients. It also keeps adversary attorneys from having to cross-examine opposing counsel in front

of a jury at trial. Attorneys are allowed to serve as witnesses if their testimony is about factual matters that have no bearing on the case; likewise, they are allowed to remain as counsel if their removal from the case would create a substantial hardship for the client. The rule does not prohibit attorneys from being witnesses in general, nor does it prohibit an attorney-witness from assisting in a client's case, for example by acting as a consultant or attending depositions.

**Lawyer:** A person, who through a regular program of study, is learned in legal matters and has been licensed to practice his or her profession. Any qualified person who prosecutes or defends causes in courts of record or other judicial tribunals of the United States, or of any of the states, or who renders legal advice or assistance in relation to any cause or matter. Unless a contrary meaning is plainly indicated this term is synonymous with attorney, attorney at law, or counselor at law.

**Lay:** Nonprofessional, such as a lay witness who is not a recognized expert in the area that is the subject of the person's testimony. That which relates to persons or entities not clerical or ecclesiastical; a person not in ecclesiastical orders. To present the formal declarations by the parties of their respective claims and defenses in pleadings. A share of the profits of a fishing or WHALING voyage, allotted to the officers and seamen, in the nature of wages.

**Layaway:** An agreement between a retail seller and a consumer that provides that the seller will retain designated consumer goods for sale to the consumer at a specified price on a future date, if the consumer deposits with the seller an agreed upon sum of money.

**Leading case:** An important judicial decision that is frequently regarded as having settled or determined the law upon all points involved in such controversies and thereby serves as a guide for subsequent decisions.

**Leading question:** A query that suggests to the witness how it is to be answered or puts words into the mouth of the witness to be merely repeated in his or her response.

**Lease:** A contractual agreement by which one party conveys an estate in property to another party, for a limited period, subject to various conditions, in exchange for something of value, but still retains ownership.

**Leaseback:** A transaction whereby land is sold and subsequently rented by the seller from the purchaser who is the new owner.

**Leasehold:** An estate, interest, in real property held under a rental agreement by which the owner gives another the right to occupy or use land for a period of time.

**Leave:** To give or dispose of by will. Willful departure with intent to remain away.Permission or authorization to do something.

**Ledger:** The principal book of accounts of a business enterprise in which all the daily transactions are entered under appropriate headings to reflect the debits and credits of each account.

**Legacy:** A disposition of PERSONAL PROPERTY by will.

**Legal:** Conforming to the law; required or permitted by law; not forbidden by law.

**Legal advertising:** Any advertising an attorney purchases or places in publications, outdoor installations, radio, television, or any other written or recorded media.

**Legal age:** The time of life at which a person acquires full capacity to make his or her own contracts and deeds and to transact business or to enter into some particular contract or relation, such as marriage.

**Legal aid:** A system of nonprofit organizations that provide legal services to people who cannot afford an attorney.

**Legal assistant:** A person, working under the supervision of a lawyer, qualified through education, training, or work experience to perform substantive legal work that requires knowledge of legal concepts and is customarily, but not exclusively, performed by a lawyer; also known as a paralegal.

**Legal cap:** Long stationery with a wide left-hand margin and a narrow right-hand margin, used by attorneys.

**Legal cause:** In the law of TORTS, conduct that is a substantial factor in bringing about harm, which is synonymous with proximate cause.

**Legal certainty:** A test in CIVIL PROCEDURE designed to establish that a complaint has met the minimum amount in controversy required for a court to have jurisdiction to hear the case. Under this test, if it is apparent from the face of the pleadings, to a "legal certainty" that the plaintiff cannot recover or was never entitled to the amount in the complaint, then the case will be dismissed.

**Legal detriment:** A change in position by one to whom a promise has been made, or an assumption of duties or liabilities not previously imposed on the person, due to the person's reliance on the actions of the one who makes the promise.

**Legal fiction:** An assumption that something occurred or someone or something exists which, in fact, is not the case, but that is made in the law to enable a court to equitably resolve a matter before it.

**Legal history:** The record of past events that deal with the law.

**Legal list statutes:** State laws that enumerate the investments into which certain institutions and fiduciaries—those who manage money and property for another and who must exercise a standard of care in such activity in accordance with law or contract—can venture.

**Legal positivism:** A school of JURISPRUDENCE whose advocates believe that the only legitimate sources of law are those written rules, regulations, and principles that have been expressly enacted, adopted, or recognized by a governmental entity or political institution, including administrative, executive, legislative, and judicial bodies.

**Legal proceedings:** All actions that are authorized or sanctioned by law and instituted in a court or a tribunal for the acquisition of rights or the enforcement of remedies.

**Legal publishing:** The production of texts that report laws or discuss the PRACTICE OF LAW.

**Legal realism:** The school of legal philosophy that challenges the orthodox view of U.S. JURISPRUDENCE under which law is characterized as an autonomous system of rules and principles that courts can logically apply in an objective fashion to reach a determinate and apolitical judicial decision.

**Legal representation:** The legal work that a licensed attorney performs on behalf of a client.

**Legal representative:** In its broadest sense, one who stands in place of, and represents the interests of, another. A person who oversees the legal affairs of another. Examples include the executor or administrator of an estate and a court appointed guardian of a minor or incompetent person.

This term is almost always held to be synonymous with the term *personal representative.* In accident cases, the member of the family entitled to benefits under a WRONGFUL DEATH statute.

**Legal reserve:** Liquid assets that life insurance companies are required by statute to set aside and maintain to assure payment of claims and benefits. In banking, that percentage of bank deposits that must by law be maintained in cash or equally liquid assets to meet the demands of depositors.

**Legal residence:** The place of domicile—the permanent dwelling—to which a person intends to return despite temporary abodes elsewhere or momentary absences.

**Legal right:** An interest that the law protects; an enforceable claim; a privilege that is created or recognized by law, such as the constitutional right to FREEDOM OF SPEECH.

**Legal tender:** All U.S. coins and currencies—regardless of when coined or issued— including (in terms of the FEDERAL RESERVE System) Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations that are used for all debts, public and private, public charges, taxes, duties, and dues.

**Legal title:** Ownership of property that is cognizable or enforceable in a court of law, or one that is complete and perfect in terms of the apparent right of ownership and possession, but that, unlike equitable title, carries no beneficial interest in the property.

**Legalese:** Slang; technical jargon used by attorneys that is often beyond the comprehension of the nonlawyer.

**Legatee:** A person who receives PERSONAL PROPERTY through a will.

**Legation:** The persons commissioned by one government to exercise diplomatic functions at the court of another, including the minister, secretaries, attachés, and interpreters, are collectively called the *legation* of their government. The word also denotes the official residence of a foreign minister.

**Leges henrici:** *[Latin, Laws of Henry.]* A book written between 1114 and 1118 containing Anglo-Saxon and Norman law. It is an invaluable source of knowledge of the period preceding the full development of the Norman law.

**Legislate:** To enact laws or pass resolutions by the lawmaking process, in contrast to law that is derived from principles espoused by courts in decisions.

**Legislation:** Lawmaking; the preparation and enactment of laws by a legislative body.

**Legislative:** Pertaining to the governmental function of lawmaking or to the process of enacting laws.

**Legislative acts:** Statutes passed by lawmakers, as opposed to court-made laws.

**Legislative council:** Research and support arm of state legislatures and assemblies. Council members research legislative issues, draft legislative proposals, prepare legal opinions, and provide general support services. Also called *legislative counsel.*

**Legislative facts:** Matters of such general knowledge that they need not be proven to an ADMINISTRATIVE AGENCY that is deciding a question of policy.

**Legislative history:** The discussions and documents, including committee reports, hearings, and floor debates, surrounding and preceding the enactment of a law.

**Legislature:** A representative assembly of persons that makes statutory laws for a municipality, state, or nation.

**Legitimate:** To make lawful, such as when a child is born prior to the parents' marriage and they subsequently wed and thereby confer upon the child the same legal status as those born in lawful wedlock.

That which is lawful, legal, recognized by law, or in accordance with law, such as legitimate children or legitimate authority; real, valid, or genuine.

**Lemon laws:** Laws governing the rights of purchasers of new and used motor vehicles that do not function properly and which have to be returned repeatedly to the dealer for repairs.

**Lessee:** One who rents real property or PERSONAL PROPERTY from another.

**Lesser included offense:** A lesser crime whose elements are encompassed by a greater crime.

**Lessor:** One who rents real property or PERSONAL PROPERTY to another.

**Let:** To award a contract, such as for the erection of public works, to one of several bidders.

To lease certain property.

**Letter of credit:** A written instrument from a bank or merchant in one location that requests that anyone or a specifically named party advance money or items on credit to the party holding or named in the document.

**Letter of the law:** The strict and exact force of the language used in a statute, as distinguished from the spirit, general purpose, and policy of the statute.

**Letter ruling:** In tax law a written interpretation of certain provisions of federal statutes by the Office of the Assistant Commissioner of the Internal Revenue Service.

**Letters of administration:** A formal document issued by a court of probate appointing a manager of the assets and liabilities of the estate of the deceased in certain situations.

**Letters patent:** An instrument issued by a government that conveys a right or title to a private individual or organization, including conveyances of land and inventions.

**Letters rogatory:** A formal written request made by one judicial body to another court in a different, independent jurisdiction that a witness who resides in that jurisdiction be examined through the use of interrogatories accompanying the request.

A device used in INTERNATIONAL LAW by which the courts of one country ask the courts of another to utilize their procedure to assist the country making the request in the administration of justice within its borders.

**Letters testamentary:** The formal instrument of authority and appointment granted by the proper court to an executor (one designated in a will to manage the estate of the deceased) empowering that person to execute the functions of the office.

**Levees and flood control:** The system constructed and maintained by government to prevent the overflow of water.

**Leverage:** A method of financing an investment by which an investor pays only a small percentage of the purchase price in cash, with the balance supplemented by borrowed funds, in order to generate a greater rate of return than would be produced by paying primarily cash for the investment; the economic benefit gained by such financing.

**Levy:** To assess; raise; execute; exact; tax; collect; gather; take up; seize. Thus, to levy a tax; to levy a NUISANCE; to levy a fine; to levy war; to levy an execution, *i.e.,* to levy or collect a sum of money on an execution.

A seizure. The obtaining of money by legal process through seizure and sale of property; the raising of the money for which an execution has been issued.

**Lewdness:** Behavior that is deemed morally impure or unacceptable in a sexual sense; open and public indecency tending to corrupt the morals of the community; gross or wanton indecency in sexual relations.

**Lex:** *[Latin, Law.]* In medieval JURISPRUDENCE, a body or collection of various laws peculiar to a given nation or people; not a code in the modern sense, but an aggregation or collection of laws not codified or systematized. Also, a similar collection of laws relating to a general subject, and not peculiar to any one people.

**Lex fori:** *[Latin, The law of the forum, or court.]* The positive law of the state, nation, or jurisdiction within which a lawsuit is instituted or remedy sought.

**Lex loci:** *[Latin, The law of the place.]* The law of the state or the nation where the matter in litigation transpired.

**Lexis®:** An online legal information service that provides the full text of opinions and statutes in electronic format. Subscribers use their personal computers to search the LEXIS database for relevant cases. They may download or print the legal information they retrieve.

**Liability:** A comprehensive legal term that describes the condition of being actually or potentially subject to a legal obligation.

**Libel and slander:** Two TORTS that involve the communication of false information about a person, a group, or an entity such as a corporation. Libel is any DEFAMATION that can be seen, such as a writing, printing, effigy, movie, or statue. Slander is any defamation that is spoken and heard.

**Libelant:** Formerly the party who filed an initiatory PLEADING (a formal declaration of a claim) in an ecclesiastical or religious matter or in an ADMIRALTY case, corresponding to the plaintiff in actions at law.

**Libelous:** In the nature of a written DEFAMATION, a communication that tends to injure reputation.

**Libertarianism:** A political philosophy that advocates free will, individual rights, and voluntary cooperation.

**Liberty:** The state of being free; enjoying various social, political, or economic rights and privileges The concept of liberty forms the core of all democratic principles. Yet, as a legal concept, it defies clear definition.

**License:** The permission granted by competent authority to exercise a certain privilege that, without such authorization, would constitute an illegal act, a TRESPASS or a TORT. The certificate or the document itself that confers permission to engage in otherwise proscribed conduct.

**Licentiousness:** Acting without regard to law, ethics, or the rights of others.

**Lien:** A right given to another by the owner of property to secure a debt, or one created by law in favor of certain creditors.

**Life estate:** An estate whose duration is limited to the life of the party holding it, or some other person.

**Life in being:** A phrase used in the common-law and statutory rules against perpetuities, meaning the remaining duration of the life of a person who is in existence at the time when the deed orwill takes effect.

**Life or limb:** The phrase within the FIFTH AMENDMENT to the U.S. Constitution, commonly known as the DOUBLE JEOPARDY Clause, that provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb," pursuant to which there can be no second prosecution after a first trial for the same offense.

**Lifo:** An abbreviation for *last in, first out,* a method used in inventory accounting to value the merchandise of a particular business.

**Lift:** To raise; to take up.

**Ligan:** Goods cast into the sea tied to a buoy, so that they may be found again by the owners. When goods are cast into the sea in storms or shipwrecks and remain there, without coming to land, they are distinguished by the names of jetsam, flotsam, and *ligan.*

**Limitation:** A qualification, restriction, or circumspection.

**Limitations of actions:** Statutes restricting the right to bring suit on certain civil causes of action or criminal prosecutions, which provide that a suit may not be commenced unless it is brought within a designated period after the time that the right to sue accrued.

**Limited:** Restricted in duration, extent, or scope; confined.

**Limited liability company:** A noncorporate business whose owners actively participate in the organization's management and are protected against personal liability for the organization's debts and obligations.

**Limited liability partnership:** A form of general partnership that provides an individual partner protection against personal liability for certain partnership obligations.

**Line of credit:** The maximum borrowing power granted to a person from a financial institution.

**Lineal:** That which comes in a line, particularly a direct line, as from parent to child or grandparent to grandchild.

**Lineup:** A criminal investigation technique in which the police arrange a number of individuals in a row before a witness to a crime and ask the witness to identify which, if any, of the individuals committed the crime.

**Liquid assets:** Cash, or property immediately convertible to cash, such as SECURITIES, notes, life insurance policies with cash surrender values, U.S. savings bonds, or an account receivable.

**Liquidate:** To pay and settle the amount of a debt; to convert assets to cash; to aggregate the assets of an insolvent enterprise and calculate its liabilities in order to settle with the debtors and the creditors and apportion the remaining assets, if any, among the stockholders or owners of the corporation.

**Liquidated damages:** Monetary compensation for a loss, detriment, or injury to a person or a person's rights or property, awarded by a court judgment or by a contract stipulation regarding breach of contract.

**Liquidation:** The collection of assets belonging to a debtor to be applied to the discharge of his or her outstanding debts.

A type of proceeding pursuant to federal BANKRUPTCY law by which certain property of a debtor is taken into custody by a trustee to be sold, the proceeds to be distributed to the debtor's creditors in satisfaction of their claims.

The settlement of the financial affairs of a business or individual through the sale of all assets and the distribution of the proceeds to creditors, heirs, or other parties with a legal claim.

**Lis pendens:** *[Latin, Pending lawsuit.]* A reference to the jurisdiction (or control) that courts obtain over property in a suit awaiting action.

A notice filed in the office of public records that the ownership of real property is the subject of a legal controversy and that anyone who purchases it takes it subject to any claims asserted in the action and thereby its value might be diminished.

**Listing:** An agreement that represents the right of a real estate agent or BROKER to handle the sale of real property and to receive a fee or commission for services.

**Litchfield Law School:** The first law school in America, founded by Tapping Reeve (*b.* October 1744, in Southhold, Long Island, New York; *d.* December 13, 1823, in Litchfield, Connecticut) in 1784 in Litchfield, Connecticut. It continued operation until 1833.

**Literal construction:** The determination by a court of the meaning of the language of a document by an examination of only the actual words used in it, without any consideration of the intent of the parties who signed the writing except for the fact that they chose the language now in dispute.

**Literary property:** The interest of an author in an original and expressive composition, that entitles the author to the exclusive use and profit thereof, with no interest vested in any other individual. The corporal property in which an intellectual production is embodied.

**Litigation:** An action brought in court to enforce a particular right. The act or process of bringing a lawsuit in and of itself; a judicial contest; any dispute.

**Littoral rights:** Rights relating to the ownership of property that abuts an ocean, sea, or lake.

**Litvinov assignment of 1933:** An executive agreement made by President FRANKLIN DELANO ROOSEVELT as part of the arrangements by which the United States recognized the Soviet Union.

**Livery of seisin:** A ceremony performed in medieval England that effected the transfer of land from one party to another.

**Livery stable keepers:** Individuals who, as a regular course of business, provide quarters for the boarding of horses and rent them for hire.

**Living trust:** A property right, held by one party for the benefit of another, that becomes effective during the lifetime of the creator and is, therefore, in existence upon his or her death.

**Living will:** A written document that allows a patient to give explicit instructions about medical treatment to be administered when the patient is terminally ill or permanently unconscious; also called an advance directive.

**LL.B.:** An abbreviation denoting the degree of bachelor of laws, which was the basic degree awarded to an individual upon completion of law school until the late 1960s.

**LL.M.:** An abbreviation for Master of Laws, which is an advanced degree that is awarded to an individual who already holds a J.D. upon the successful completion of a prescribed course of graduate study in law.

**Load lines:** A marking indicating the extent to which the weight of a load may safely submerge a ship; also called *Plimsoll line.*

**Loan commitment:** Commitment to a borrower by a lending institution that it will loan a specific amount at a certain rate on a particular piece of real estate. Such commitment is usually limited to a specified time period (e.g., four months), which is commonly based on the estimated time that it will take the borrower to construct or purchase the home contemplated by the loan.

**Loan shark:** A person who lends money in exchange for its repayment at an interest rate that exceeds the percentage approved by law and who uses intimidating methods or threats of force in order to obtain repayment.

**Lobbying:** The process of influencing public and government policy at all levels: federal, state, and local.

**Local action:** A lawsuit concerning a transaction that could not occur except in some particular place. Any type of lawsuit that can be brought only in one place. A classic example is a situation where recovery of possession of a particular parcel of land is sought.

**Lockout:** Employer's withholding of work from employees in order to gain concession from them; it is the employers' counterpart of the employee's strike. Refusal by the employer to furnish available work to its regular employees, whether refusal is motivated by the employer's desire to protect itself against economic injury, by its desire to protect itself at the bargaining table, or by both.

**Lockup:** A place of detention in a police station, court or other facility used for persons awaiting trial. In corporate law, a slang term that refers to the setting aside of SECURITIES for purchase by friendly interests in order to defeat or make more difficult a takeover attempt. A lockup option is a takeover defensive measure permitting a friendly suitor to purchase divisions of a corporation for a set price when any person or group acquires a certain percentage of the corporation's shares. To be legal, such agreement must advance or stimulate the bidding process, to best serve the interests of the shareholders through encouraged competition.

**Loco parentis:** *[Latin, The place of a parent.]* A description of the relationship that an adult or an institution assumes toward an infant or minor of whom the adult is not a parent but to whom the adult or institution owes the obligation of care and supervision.

**Locus:** *Latin, Place; place where a thing is performed or done.*

**Lodger:** An occupant of a portion of a dwelling, such as a hotel or boardinghouse, who has mere use of the premises without actual or exclusive possession thereof. Anyone who lives or stays in part of a building that is operated by another and who does not have control over the rooms therein.

**Log rolling:** A legislative practice of embracing in one bill several distinct matters, none of which, perhaps, could singly obtain the assent of the legislature, and then procuring its passage by a combination of the minorities in favor of each of the measures into a majority that will adopt them all.

Practice of including in one statute or constitutional amendment more than one proposition, inducing voters to vote for all, notwithstanding they might not have voted for all if amendments or statutes had been submitted separately.

**Logging:** The cutting of, or commercial dealing in, tree trunks that have been cut down and stripped of all branches.

**Logging in:** A colloquial term for the process of making the initial record of the names of individuals who have been brought to the police station upon their arrest.

**Long-arm statute:** A state law that allows the state to exercise jurisdiction over an out-of-state defendant, provided that the prospective defendant has sufficient minimum contacts with the forum state.

**Loophole:** An omission or AMBIGUITY in a legal document that allows the intent of the document to be evaded.

**Loss:** Diminution, reduction, depreciation, decrease in value; that which cannot be recovered.

**Loss of services:** A deprivation of a family member, such as a parent or spouse, of the right to benefit from the performance of various duties, coupled with the privation of love and companionship, provided by the victim of a personal injury or WRONGFUL DEATH.

**Lost instruments:** Documents that cannot be located after a thorough, careful, and diligent search has been made for them.

**Lot:** In sales, a parcel or single article that is the subject matter of a separate sale or delivery, irrespective of whether or not it is adequate to perform the contract. In the SECURITIES and commodities market, a specific number of shares or a particular quantity of a commodity specified for trading. In the law of real estate, one of several parcels into which real property is divided.

**Low-tide elevation:** Offshore land features such as shoals, rocks, or reefs that are exposed at low tide but submerged at high tide are referred to as low-tide elevations.

**Loyalty oath:** An oath that declares an individual's allegiance to the government and its institutions and disclaims support of ideologies or associations that oppose or threaten the government.

**L.S.:** An abbreviation for *locus sigilli,* Latin for "the place of the seal," signifying the place within a written contract where a seal is affixed in order to bind the agreement.

**Lump-sum settlement:** The payment of an entire debt all at once rather than in installments; the payment of a set amount of money to satisfy a pecuniary obligation that might otherwise continue indefinitely.

**Lynching:** Violent punishment or execution, without due process, for real or alleged crimes.

# M

**Magistrate:** Any individual who has the power of a public civil officer or inferior judicial officer, such as a JUSTICE OF THE PEACE.

**Mail cover:** The process governed by the U.S. Postal Regulations (39 C.F.R. § 233.3) that allows the recording of all the information that appears on the outside cover of mail in any class, and also allows the recording of the contents of second-, third-, and fourth-class mail, international parcel post mail, and mail on which the appropriate postage has not been paid.

**Mail fraud:** A crime in which the perpetrator develops a scheme using the mails to defraud another of money or property. This crime specifically requires the intent to defraud, and is a federal offense governed by section 1341 of title 18 of the U.S. Code. The mail fraud statute was first enacted in 1872 to prohibit illicit mailings with the Postal Service (formerly the Post Office) for the purpose of executing a fraudulent scheme.

**Maintenance:** Unauthorized intervention by a nonparty in a lawsuit, in the form of financial or other support and assistance to prosecute or defend the litigation. The preservation of an asset or of a condition of property by upkeep and necessary repairs.

A periodic monetary sum paid by one spouse for the benefit of the other upon separation or the dissolution of marriage; also called ALIMONY or spousal support.

**Majority:** Full age; legal age; age at which a person is no longer a minor. The age at which, by law, a person is capable of being legally responsible for all of his or her acts (e.g. contractual obligations), and is entitled to the management of his or her own affairs and to the enjoyment of civic rights (e.g. right to vote). The opposite of minority. Also the *status* of a person who is a major in age.

The greater number. The number greater than half of any total.

**Maker:** One who makes, frames, executes, or ordains; as a *lawmaker,* or the *maker* of a promissory note. One who signs a note to borrow and, as such, assumes the obligation to pay the note when due. The person who creates or executes a note, that is, issues it, and in signing the instrument makes the promise of payment contained therein. One who signs a check; in this context, synonymous with drawer. One who issues a promissory note or certificate of deposit.

**Mala fides:** *[Latin, Bad faith.]*

**Mala in se:** Wrongs in themselves; acts morally wrong; offenses against conscience.

**Mala prohibita:** *[Latin, Wrongs prohibited.]* A term used to describe conduct that is prohibited by laws, although not inherently evil.

**Malfeasance:** The commission of an act that is unequivocally illegal or completely wrongful.

**Malice:** The intentional commission of a wrongful act, absent justification, with the intent to cause harm to others; conscious violation of the law that injures another individual; a mental state indicating a disposition in disregard of social duty and a tendency toward malfeasance.

**Malice aforethought:** A predetermination to commit an act without legal justification or excuse. A malicious design to injure. An intent, at the time of a killing, willfully to take the life of a human being, or an intent willfully to act in callous and wanton disregard of the consequences to human life; but *malice aforethought* does not necessarily imply any ill will, spite or hatred towards the individual killed.

**Malicious:** Involving malice; characterized by wicked or mischievous motives or intentions.

**Malicious mischief:** Willful destruction of PERSONAL PROPERTY of another, from actual ill will or resentment towards its owner or possessor. Though only a TRESPASS at the COMMON LAW, it is now a misdemeanor in most states.

**Malicious prosecution:** An action for damages brought by one against whom a civil suit or criminal proceeding has been unsuccessfully commenced without PROBABLE CAUSE and for a purpose other than that of bringing the alleged offender to justice.

**Malpractice:** The breach by a member of a profession of either a standard of care or a standard of conduct.

**Man-in-the-house rule:** A regulation that was formerly applied in certain jurisdictions that denied poor families WELFARE payments in the event that a man resided under the same roof with them.

**Managed care:** A general term that refers to health plans that attempt to control the cost and quality of care by coordinating medical and other health-related services.

**Manager:** One who has charge of a corporation and control of its business, or of its branch establishments, divisions, or departments, and who is vested with a certain amount of discretion and independent judgment. A person chosen or appointed to manage, direct, or administer the affairs of another person or of a business, sports team, or the like. The designation of *manager* implies general power and permits reasonable inferences that the employee so designated is invested with the general conduct and control of the employer's business.

**Mandamus:** *[Latin, We comand.]* A writ or order that is issued from a court of superior jurisdiction that commands an inferior tribunal, corporation, MUNICIPAL CORPORATION, or individual to perform, or refrain from performing, a particular act, the performance or omission of which is required by law as an obligation.

**Mandate:** A judicial command, order, or precept, written or oral, from a court; a direction that a court has the authority to give and an individual is bound to obey.

**Mandatory:** Peremptory; obligatory; required; that which must be subscribed to or obeyed.

**Mandatory authority:** Precedents, in the form of prior decisions by a higher court of the same state on point, statutes, or other sources of law that must be considered by a judge in the determination of a legal controversy.

**Manor:** A house, a dwelling, or a residence.

**Manslaughter:** The unjustifiable, inexcusable, and intentional killing of a human being without deliberation, premeditation, and malice. The unlawful killing of a human being without any deliberation, which may be involuntary, in the commission of a lawful act without due caution and circumspection.

**Manufactures:** Items of trade that have been transformed from raw materials, either by labor, art, skill, or machine into finished articles that have new forms, qualities, or properties.

**Margin:** The edge or border; the edge of a body of water where it meets the land. As applied to a boundary line of land, the *margin* of a river, creek, or other watercourse means the center of the stream. But in the case of a lake, bay, or natural pond, the *margin* means the line where land and water meet.

In finance, the difference between market value of loan collateral and face value of loan.

A sum of money, or its equivalent, placed in the hands of a BROKER by the principal or person on whose account a purchase or sale of SECURITIES is to be made, as a security to the former against losses to which he or she may be exposed by subsequent fluctuations in the market value of the stock. The amount paid by the customer when he uses a broker's credit to buy a security.

In commercial transactions the difference between the purchase price paid by an intermediary or retailer and the selling price, or difference between price received by manufacturer for its goods and costs to produce. Also called gross profit margin.

**Margin call:** A demand by a BROKER that an investor who has purchased SECURITIES using credit extended by the broker (on margin) pay additional cash into his or her brokerage account to reduce the amount of debt owed.

**Marital:** Pertaining to the relationship of HUSBAND AND WIFE; having to do with marriage.

**Marital communications privilege:** The right given to a HUSBAND AND WIFE to refuse to testify in a trial as to confidential statements made to each other within and during the framework of their spousal relationship.

**Maritime lien:** The right of a particular individual to compel the sale of a ship because he or she has not been paid a debt owed to him or her on account of such vessel.

**Market value:** The highest price a willing buyer would pay and a willing seller would accept, both being fully informed, and the property being exposed for sale for a reasonable period of time. The market value may be different from the price a property can actually be sold for at a given time (market price). The market value of an article or piece of property is the price that it might be expected to bring if offered for sale in a fair market; not the price that might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular article or piece of property.

**Marketable title:** Ownership and possession of real property that is readily transferable since it is free from valid claims by outside parties.

**Marque and reprisal:** A commission by which the head of a government authorizes a private ship to capture enemy vessels.

**Marriage:** The legal status, condition, or relationship that results from a contract by which one man and one woman, who have the capacity to enter into such an agreement, mutually promise to live together in the relationship of HUSBAND AND WIFE in law for life, or until the legal termination of the relationship.

**Marshal:** A federal court officer whose job entails maintaining the peace, delivering legal papers, and performing duties similar to those of a state sheriff.

**Marshaling assets and securities:** The process of organizing, ranking, and distributing funds in a manner set forth by law as being the most effective way to discharge debts that are owed to various creditors.

**Martial law:** The exercise of government and control by military authorities over the civilian population of a designated territory.

**Martindale-Hubbell Law Directory:** A database containing information about attorneys and law firms around the world.

**Mass communications law:** A body of primarily federal statutes, regulations, and judicial decisions that govern radio; broadcast, cable, and satellite television; and other means of electronic communication.

**Massachusetts trust:** A business arrangement that is used in place of a corporation or partnership in which trustees hold title to property for the advantage of beneficiaries for investment purposes.

**Master:** An individual who hires employees or servants to perform services and who directs the manner in which such services are performed.

A court officer appointed by a judge to perform such jobs as examining witnesses, taking testimony, computing damages, or taking oaths, affidavits, or acknowledgments of deeds.

**Master and servant:** An archaic generic legal phrase that is used to describe the relationship arising between an employer and an employee.

**Material:** Important; affecting the merits of a case; causing a particular course of action; significant; substantial. A description of the quality of evidence that possesses such substantial PROBATIVE value as to establish the truth or falsity of a point in issue in a lawsuit.

**Mathews v. Eldridge test:** A three-part test that determines whether an individual has received DUE PROCESS under the Constitution. The test balances (1) the importance of the interest at stake; (2) the risk of an erroneous deprivation of the interest because of the procedures used, and the probable value of additional procedural safeguards; and (3) the government's interest.

**Matter of fact:** That which is to be determined by the senses or by the testimony of witnesses who describe what they have perceived through the senses of sight, smell, touch, taste, and hearing.

**Matter of law:** That which is determined or ascertained through the use of statutes, rules, court decisions, and interpretations of legal principles.

**Matter of record:** Anything that has been entered in the formal written record of a court, which can be proved by the production of that record.

**Maxim:** A broad statement of principle, the truth and reasonableness of which are self-evident. A rule of EQUITY, the system of justice that complements the COMMON LAW.

**Mayhem:** Mayhem at COMMON LAW required a type of injury that permanently rendered the victim less able to fight offensively or defensively; it might be accomplished either by the removal of (dismemberment), or by the disablement of, some bodily member useful in fighting. Today, by statute, permanent disfigurement has been added; and as to dismemberment and disablement, there is no longer a requirement that the member have military significance. In many states the crime of mayhem is treated as aggravated assault.

**McCarran internal security act:** Legislation proposed by Senator PATRICK ANTHONY MCCARRAN and enacted by Congress in 1950 that subjected alleged members of designated Communist-action organizations to regulation by the federal government.

**M.C.J.:** An abbreviation for master of comparative JURISPRUDENCE, a degree awarded to foreign lawyers trained in CIVIL LAW countries who have successfully completed a year of full-time study of the Anglo-American legal system.

**McNabb-Mallory rule:** A federal judicial doctrine that operates to exclude from evidence a confession that is obtained from a person who was not brought before a judicial officer promptly after the person's arrest.

**Mechanic's lien:** A charge or claim upon the property of another individual as security for a debt that is created in order to obtain priority of payment of the price or value of work that is performed and materials that are provided in the erection or repair of a building or other structure.

**Mediation:** A settlement of a dispute or controversy by setting up an independent person between two contending parties in order to aid them in the settlement of their disagreement.

**Medicaid:** A joint federal-state program that provides HEALTH CARE insurance to low-income persons.

**Medical examiner:** A public official charged with investigating all sudden, suspicious, unexplained, or unnatural deaths within the area of his or her appointed jurisdiction. A medical examiner differs from a CORONER in that a medical examiner is a physician. Medical examiners have replaced coroners in most states and jurisdictions.

**Medical malpractice:** Improper, unskilled, or negligent treatment of a patient by a physician, dentist, nurse, pharmacist, or other HEALTH CARE professional.

**Medicare:** A federally funded system of health and hospital insurance for persons aged 65 and older and for DISABLED PERSONS.

**Meeting of creditors:** One of the first steps in federal BANKRUPTCY proceedings whereby the creditors of a debtor meet in court to present their claims against him or her and a trustee is named to handle the application of the debtor's assets to pay his or her debts.

**Meeting of minds:** The mutual agreement and assent of the parties to a contract to its substance and terms.

**Membership corporation:** A company or organization that is formed for purposes other than generating a profit.

**Memorandum:** An informal record, in the form of a brief written note or outline, of a particular legal transaction or document for the purpose of aiding the parties in remembering particular points or for future reference.

**Memorandum decision:** A court's decision that gives the ruling (what it decides and orders done), but no opinion (reasons for the decision).

**Mens rea:** As an element of criminal responsibility, a guilty mind; a guilty or wrongful purpose; a criminal intent. Guilty knowledge and wilfulness.

**Mensa et thoro:** *[Latin, From bed and board.]* A type of DIVORCE that is a partial termination of the duties of a marital relationship.

**Mental anguish:** When connected with a physical injury, includes both the resultant mental sensation of pain and also the accompanying feelings of distress, fright, and anxiety. As an element of damages implies a relatively high degree of mental pain and distress; it is more than mere disappointment, anger, worry, resentment, or embarrassment, although it may include all of these, and it includes mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair, and/or public humiliation. In other connections, and as a ground for DIVORCE or for compensable damages or an element of damages, it includes the mental suffering resulting from the excitation of the more poignant and painful emotions, such as grief, severe disappointment, indignation, wounded pride, shame, public humiliation, despair, etc.

**Mental cruelty:** A course of conduct on the part of one spouse toward the other spouse that can endanger the mental and physical health and efficiency of the other spouse to such an extent as to render CONTINUANCE of the marital relation intolerable. As a ground for DIVORCE, it is conduct that causes embarrassment, humiliation, and anguish so as to render life miserable and unendurable or to cause a spouse's life, person, or health to become endangered.

**Mercantile:** Relating to trade or commerce; commercial; having to do with the business of buying and selling; relating to merchants.

**Merchantable:** Salable; of quality and type ordinarily acceptable among vendors and buyers.

**Mercian law:** A major body of Anglo-Saxon customs that, along with the Dane law and the West Saxon law, continued to constitute the law in England in the days immediately following the Norman Conquest.

**Merger:** The combination or fusion of one thing or right into another thing or right of greater or larger importance so that the lesser thing or right loses its individuality and becomes identified with the greater whole.

**Mergers and acquisitions:** Methods by which corporations legally unify ownership of assets formerly subject to separate controls.

**Merit system:** System used by federal and state governments for hiring and promoting governmental employees to civil service positions on the basis of competence.

**Merits:** The strict legal rights of the parties to a lawsuit.

**Mesne:** Intermediate; intervening; the middle between two extremes, especially of rank or time. In feudal law, an intermediate lord; a lord who stood between a tenant and the chief lord; a lord who was also a tenant.

**Metes and bounds:** The boundary lines of land, with their terminal points and angles. A way of describing land by listing the compass directions and distances of the boundaries. It is often used in connection with the Government Survey System.

**Military government:** A government that is established during or after military occupation by the victorious country in an armed conflict. According to INTERNATIONAL LAW, the territory that has been placed under the authority of a hostile army continues to belong to the state that has been ousted. However, it may be ruled by the occupiers under a special regime.

**Military law:** The body of laws, rules, and regulations that have been developed to meet the needs of the military. It encompasses service in the military, the constitutional rights of service members, the military criminal justice system, and the INTERNATIONAL LAW of armed conflict.

**Militia:** A group of private citizens who train for military duty in order to be ready to defend their state or country in times of emergency. A militia is distinct from regular military forces, which are units of professional soldiers maintained both in war and peace by the federal government.

**Mill:** One-tenth of one cent: $0.001. A mill rate is used by many localities to compute property taxes. For example, some states levy a one-time nonrecurring tax of two mills per dollar (0.2%) on the fair market value of all notes, bonds, and other obligations for payment of money that are secured by mortgage, deed of trust, or other lien on real property in lieu of all other taxes on such property.

**Mine and mineral law:** The law governing the ownership, sale, and operation of mines, quarries, and wells, and the rights to natural resources found in the earth.

**Mineral right:** An interest in minerals in land, with or without ownership of the surface of the land. A right to take minerals or a right to receive a royalty.

**Minimum wage:** The minimum hourly rate of compensation for labor, as established by federal statute and required of employers engaged in businesses that affect interstate commerce. Most states also have similar statutes governing minimum wages.

**Ministerial:** Done under the direction of a supervisor; not involving discretion or policymaking.

**Minitrial:** A private, voluntary, and informal type of ALTERNATIVE DISPUTE RESOLUTION.

**Minor:** An infant or person who is under the age of legal competence. A term derived from the CIVIL LAW, which described a person under a certain age as *less than* so many years. In most states, a person is no longer a minor after reaching the age of 18 (though state laws might still prohibit certain acts until reaching a greater age; e.g., purchase of liquor). Also, less; of less consideration; lower; a person of inferior condition.

**Minority:** The state or condition of a minor; infancy. Opposite of majority. The smaller number of votes of a deliberative assembly; opposed to majority. In context of the Constitution's guarantee of EQUAL PROTECTION, *minority* does not have merely numerical denotation but refers to identifiable and specially disadvantaged groups such as those based on race, religion, ethnicity, or national origin.

**Minute book:** An account where official proceedings are recorded.

**Minutes:** The written record of an official proceeding. The notes recounting the transactions occurring at a meeting or official proceeding; a record kept by courts and corporations for future reference.

**Miscarriage of justice:** A legal proceeding resulting in a prejudicial outcome.

**Miscegenation:** Mixture of races. A term formerly applied to marriage between persons of different races. Statutes prohibiting marriage between persons of different races have been held to be invalid as contrary to the EQUAL PROTECTION CLAUSE of the Constitution.

**Mischief:** A specific injury or damage caused by another person's action or inaction. In CIVIL LAW, a person who suffered physical injury due to the NEGLIGENCE of another person could allege mischief in a lawsuit in TORT. For example, if a baseball is hit through a person's window by accident, and the resident within is injured, mischief can be claimed. It is distinct from malicious mischief, which is a criminal act usually involving reckless or intentional behavior such as VANDALISM.

**Misdemeanor:** Offenses lower than felonies and generally those punishable by fine, penalty, FORFEITURE, or imprisonment other than in a penitentiary. Under federal law, and most state laws, any

offense other than a felony is classified as a misdemeanor. Certain states also have various classes of misdemeanors (e.g., Class A, B, etc.).

**Misfeasance:** A term used in TORT LAW to describe an act that is legal but performed improperly.

**Misprision:** The failure to perform a public duty.

**Misrepresentation:** An assertion or manifestation by words or conduct that is not in accord with the facts.

**Mistake:** An unintentional act, omission, or error.

**Mistake of fact:** An error that is not caused by the neglect of a legal duty on the part of the person committing the error but rather consists of an unconscious ignorance of a past or present material event or circumstance or a belief in the present existence of a material event that does not exist or a belief in the past existence of a material event that did not exist.

**Mistake of law:** A misconception that occurs when a person with complete knowledge of the facts reaches an erroneous conclusion as to their legal effect; an incorrect opinion or inference, arising from a flawed evaluation of the facts.

**Mistrial:** A courtroom trial that has been terminated prior to its normal conclusion. A mistrial has no legal effect and is considered an invalid or nugatory trial. It differs from a "new trial," which recognizes that a trial was completed but was set aside so that the issues could be tried again.

**Mitigating circumstances:** Circumstances that may be considered by a court in determining culpability of a defendant or the extent of damages to be awarded to a plaintiff. Mitigating circumstances do not justify or excuse an offense but may reduce the severity of a charge. Similarly, a recognition of mitigating circumstances to reduce a damage award does not imply that the damages were not suffered but that they have been partially ameliorated.

**Mitigation of damages:** The use of reasonable care and diligence in an effort to minimize or avoid injury.

**Mittimus:** A court order directing a sheriff or other police officer to escort a convict to a prison.

**Mixed actions:** Lawsuits having two purposes: to recover real property and to obtain monetary damages.

**M'Naghten rule:** A test applied to determine whether a person accused of a crime was sane at the time of its commission and, therefore, criminally responsible for the wrongdoing.

**Mock trial:** A simulated trial-level proceeding conducted by students to understand trial rules and processes. Usually tried before a mock jury, these proceedings are different from MOOT COURT proceedings, which simulate appellate arguments.

**Model acts:** Statutes and court rules drafted by the American Law Institute (ALI), the AMERICAN BAR ASSOCIATION (ABA), the COMMISSIONERS ON UNIFORM LAWS, and other organizations. State legislatures may adopt model acts in whole or in part, or they may modify them to fit their needs. Model acts differ from UNIFORM ACTS, which are usually adopted by the states in virtually the same form proposed by the American Law Institute and other organizations.

**Modification:** A change or alteration in existing materials.

**Modus operandi:** *[Latin, Method of working.]* A term used by law enforcement authorities to describe the particular manner in which a crime is committed.

**Moiety:** One-half.

**Money laundering:** The process of taking the proceeds of criminal activity and making them appear legal.

**Money paid:** The technical name given a declaration in ASSUMPSIT in which the plaintiff declares that the defendant had and received certain money. A COMMON-LAW PLEADING, stating that the defendant received money that, in EQUITY and good conscience, should be paid to the plaintiff.

**Monopoly:** An economic advantage held by one or more persons or companies deriving from the exclusive power to carry on a particular business or trade or to manufacture and sell a particular item, thereby suppressing competition and allowing such persons or companies to raise the price of a product or service substantially above the price that would be established by a free market.

**Monument:** Anything by which the memory of a person, thing, idea, art, science or event is preserved or perpetuated. A tomb where a dead body has been deposited.

In REAL-PROPERTY law and surveying, visible marks or indications left on natural or other objects indicating the lines and boundaries of a survey. Any physical object on the ground that helps to establish the location of a boundary line called for; it may be either natural (e.g., trees, rivers, and other land features) or artificial (e.g., fences, stones, stakes, or the like placed by human hands).

**Moot:** An issue presenting no real controversy.

**Moot court:** A method of teaching law and legal skills that requires students to analyze and argue both sides of a hypothetical legal issue using procedures modeled after those employed in state and federal appellate courts.

**Moral law:** The rules of behavior an individual or a group may follow out of personal conscience and that are not necessarily part of legislated law in the United States.

**Moral relativism:** The philosophized notion that right and wrong are not absolute values, but are personalized according to the individual and his or her circumstances or cultural orientation. It can be used positively to effect change in the law (e.g., promoting tolerance for other customs or lifestyles) or negatively as a means to attempt justification for wrongdoing or lawbreaking. The opposite of moral relativism is moral absolutism, which espouses a fundamental, NATURAL LAW of constant values and rules, and which judges all persons equally, irrespective of individual circumstances or cultural differences.

**Moral turpitude:** A phrase used in CRIMINAL LAW to describe conduct that is considered contrary to community standards of justice, honesty, or good morals.

**Moratorium:** A suspension of activity or an authorized period of delay or waiting. A moratorium is sometimes agreed upon by the interested parties, or it may be authorized or imposed by operation of law. The term also is used to denote a period of time during which the law authorizes a delay in payment of debts or performance of some other legal obligation. This type of moratorium is most often invoked during times of distress, such as war or natural disaster.

**Mortality tables:** A means of ascertaining the probable number of years any man or woman of a given age and of ordinary health will live. A mortality table expresses on the basis of the group studied the probability that, of a number of persons of equal expectations of life who are living at the beginning of any year, a certain number of deaths will occur within that year.

Such tables are used by insurance companies to determine the premium to be charged for those in the respective age groups.

**Mortgage:** A legal document by which the owner (i.e., the buyer) transfers to the lender an interest in real estate to secure the repayment of a debt, evidenced by a mortgage note. When the debt is repaid, the mortgage is discharged, and a satisfaction of mortgage is recorded with the register or recorder of deeds in the county where the mortgage was recorded. Because most people cannot afford to buy real estate with cash, nearly every real estate transaction involves a mortgage.

**Mortmain:** *[French, Dead hand.]* A term to denote the conveyance of ownership of land or tenements to any corporation, religious or secular.

**Mortmain acts:** Statutes designed to prevent lands from being perpetually possessed or controlled by religious corporations.

**Most-favored-nation status:** A method of establishing equality of trading opportunity among states by guaranteeing that if one country is given better trade terms by another, then all other states must get the same terms.

**Motion:** A written or oral application made to a court or judge to obtain a ruling or order directing that some act be done in favor of the applicant. The applicant is known as the moving party, or the MOVANT.

**Motive:** An idea, belief, or emotion that impels a person to act in accordance with that state of mind.

**Movant:** One who makes a motion before a court. The applicant for a judicial rule or order.

**Move:** To make an application to a court for a rule or order, or to take action in any matter. The term comprehends all things necessary to be done by a litigant to obtain an order of the court directing the relief sought. To propose a resolution, or recommend action in a deliberative body. To pass over; to be transferred, as when the consideration of a contract is said to *move* from one party to the other. To occasion; to contribute to; to tend or lead to.

**Movie rating:** A classification given to a commercially released motion picture that indicates to consumers whether the film contains sex, profanity, violence, or other subject matter that may be inappropriate for persons in certain age groups.

**Multidistrict litigation:** A procedure provided by federal statute (28 U.S.C.A. § 1407) that permits civil lawsuits with at least one common (and often intricate) QUESTION OF FACT that have been pending in different federal district courts to be transferred and consolidated for pretrial proceedings before one judge.

**Multilevel distributorship:** A type of referral sales scheme by which an individual who purchases a particular item from a company agrees to solicit and provide additional buyers for the product in exchange for a commission or rebate from the company.

**Multiplicity of actions:** Several unnecessary attempts to litigate the same claim or issue.

**Municipal:** In its narrower and more common sense, pertaining to a local governmental unit, commonly a city or town. In its broader sense, pertaining to the public or governmental affairs of a state, nation, or of a people. Relating to a state or nation, particularly when considered as an entity independent of other states or nations.

**Municipal corporation:** An incorporated political subdivision of a state that is composed of the citizens of a designated geographic area and which performs certain state functions on a local level and possesses such powers as are conferred upon it by the state.

**Muniments of title:** Documents that serve as evidence of ownership of real or PERSONAL PROPERTY. Written instruments, such as stock certificates or deeds to land, by which an owner is enabled to defend his or her ownership rights.

**Murder:** The unlawful killing of another human being without justification or excuse.

**Music publishing:** The contractual relationship between a songwriter or music composer and a music publisher, whereby the writer assigns part or all of his or her music copyrights to the publisher in exchange for the publisher's commercial exploitation of the music.

**Mutilation:** Cutting, tearing, erasing, or otherwise changing a document in a way that changes or destroys its legal effect. It is a federal crime to mutilate public records, coins, or passports.

In CRIMINAL LAW, the crime of violently, maliciously, and intentionally giving someone a serious permanent wound.

**Mutiny:** A rising against lawful or constituted authority, particularly in the naval or ARMED SERVICES.

**Mutual company:** A corporation in which members are the exclusive shareholders and the recipients of profits distributed as dividends in proportion to the business that such members did with the company.

**Mutual fund:** A fund, in the form of an investment company, in which shareholders combine their money to invest in a variety of stocks, bonds, and money-market investments such as U.S. Treasury bills and bank certificates of deposit.

**Mutual mistake:** An error of both parties to a contract, whereby each operates under the identical misconception concerning a past or existing material fact.

**Mutuality of obligation:** The legal principle that provides that unless both parties to a contract are bound to perform, neither party is bound.

**Naked contract:** From the Latin term *nudum pactum,* or "bare promise" An agreement between two parties that is without any legal effect because no consideration has been exchanged between the parties. A naked contract is unenforceable.

**Name:** The designation of an individual person or of a firm or corporation. A word or combination of words used to distinguish a person, thing, or class from others.

**Napoleonic Code:** The first modern organized body of law governing France, also known as the Code Napoleon or Code Civil, enacted by Napoléon I in 1804.

**National mediation board:** A three-person board created by federal statute to resolve disputes in the railroad and airline industries that could disrupt travel or imperil the economy. The board also handles railroad and airline employee representation disputes and provides administrative and financial support in adjusting minor grievances in the railroad industry.

**Natural and probable consequences:** Those ramifications of a particular course of conduct that are reasonably foreseeable by a person of average intelligence and generally occur in the normal course of events.

**Natural law:** The unwritten body of universal moral principles that underlie the ethical and legal norms by which human conduct is sometimes evaluated and governed. Natural law is often contrasted with positive law, which consists of the written rules and regulations enacted by government. The term *natural law* is derived from the Roman term *jus naturale.* Adherents to natural law philosophy are known as naturalists.

**Naturalization:** The process under federal law whereby a foreign-born person may be granted citizenship. In order to qualify for naturalization, an applicant must meet a number of statutory requirements, including those related to residency, literacy, and education, as well as an exhibition of "good moral character" and a demonstration of an attachment to constitutional principles upon which the United States is based.

**Navigable waters:** Waters that provide a channel for commerce and transportation of people and goods.

**Necessaries:** Things indispensable, or things proper and useful, for the sustenance of human life.

**Necessity:** A defense asserted by a criminal or civil defendant that he or she had no choice but to break the law.

**Negative covenant:** A provision found in an employment agreement or a contract of sale of a business that prohibits an employee or seller from competing in the same area or market.

**Neglect:** An omission to do or perform some work, duty, or act.

**Negligence:** Conduct that falls below the standards of behavior established by law for the protection of others against unreasonable risk of harm. A person has acted negligently if he or she has departed from the conduct expected of a reasonably prudent person acting under similar circumstances.

In order to establish negligence as a CAUSE OF ACTION under the law of TORTS, a plaintiff must prove that the defendant had a duty to the plaintiff, the defendant breached that duty by failing to conform to the required standard of conduct, the defendant's negligent conduct was the cause of the harm to the plaintiff, and the plaintiff was, in fact, harmed or damaged.

**Negligent entrustment:** The act of leaving an object, such as an automobile or firearm, with another whom the lender knows or should know could use the object to harm others due to such factors as youth or inexperience.

**Negotiable instrument:** A COMMERCIAL PAPER, such as a check or promissory note, that contains the signature of the maker or drawer; an unconditional promise or order to pay a certain sum in cash that is payable either upon demand or at a specifically designated time to the order of a designated person or to its bearer.

**Negotiate:** To conduct business transactions; to deal with another individual in regard to a purchase and sale; to bargain or trade. To conclude by way of agreement, bargain, or compact. To transfer a *negotiable instrument,* such as a promissory note, or other COMMERCIAL PAPER.

**Net:** The sum that remains following all permissible deductions, including charges, expenses, discounts, commissions, or taxes.

**Net worth:** The difference between total assets and liabilities; the sum total of the assets of an individual or business minus the total amount owed to creditors.

**Neutrality:** The state of a nation that takes no part in a war between two or more other powers.

**Next friend:** An individual who acts on behalf of another individual who does not have the legal capacity to act on his or her own behalf.

The individual in whose name a minor's lawsuit is brought, or who appears in court to represent such minor's interest. The French term prochein ami has been used to designate such an individual, but the term GUARDIAN AD LITEM is more commonly used.

**Next of kin:** The blood relatives entitled by law to inherit the property of a person who dies without leaving a valid will, although the term is sometimes interpreted to include a relationship existing by reason of marriage.

**Nihil:** *[Latin, Nothing.]* The abbreviated designation of a statement filed by a sheriff or constable with a court describing his or her unsuccessful attempts to serve a writ, notice, or process upon the designated person.

**Ninety-day letter:** The name given to a written notice sent to a taxpayer by the INTERNAL REVENUE SERVICE regarding a deficiency in the payment of tax (26 U.S.C.A. § 6212 et seq.).

**Nisi prius:** *[Latin, Unless before.]*

**No bill:** A term that the foreman of the GRAND JURY writes across the face of a bill of indictment (a document drawn up by a prosecutor that states formal criminal charges against a designated individual) to indicate that the criminal charges alleged therein against a suspect have not been sufficiently supported by the evidence presented before it to warrant his or her criminal prosecution.

**No contest:** The English translation of a nolo contendere plea used in criminal cases. Generally the terms *nolo contendere* and *no contest* are used interchangeably in the legal community. The operation of a no contest plea is similar to a plea of guilty. A defendant who enters a no contest plea concedes the charges alleged without disputing or admitting guilt and without offering a defense. No contest has a different meaning in the context of a will.

**No fault:** A kind of automobile insurance that provides that each driver must collect the allowable amount of money from his or her own insurance carrier subsequent to an accident regardless of who was at fault.

**No-load fund:** A type of MUTUAL FUND that does not impose extra charges for administrative and selling expenses incurred in offering its shares for sale to the public.

**Nolle prosequi:** *[Latin, Will not prosecute.]*

**Nolo contendere:** *[Latin, I will not contest it.]* A plea in a criminal case by which the defendant answers the charges made in the indictment by declining to dispute or admit the fact of his or her guilt.

**Nominal:** Trifling, token, or slight; not real or substantial; in name only.

**Nominal damages:** Minimal money damages awarded to an individual in an action where the person has not suffered any substantial injury or loss for which he or she must be compensated.

**Non:** *[Latin, Not.]* A common prefix used to indicate negation.

**Non prosequitur:** *[Latin, He does not pursue, or follow up.]* The name of a judgment rendered by a court against a plaintiff because he or she fails to take any necessary steps, in legal proceedings, within the period prescribed for such proceedings by the practice of court.

**Non sui juris:** *[Latin, Not his own master.]* A term applied to an individual who lacks the legal capacity to act on his or her own behalf, such as an infant or an insane person.

**Non vult contendere:** *[Latin, He does not wish to contest it.]* A type of plea that can be entered by a defendant who is unwilling to admit guilt but is willing to submit to the court for sentencing.

**Nonage:** Infancy or minority; lack of requisite legal age.

**Noncompete agreement:** A contract limiting a party from competing with a business after termination of employment or completion of a business sale.

**Nonconforming use:** Continuing use of real property, permitted by ZONING ordinances, in a manner in which other similar plots of land in the same area cannot ordinarily be used.

**Nonfeasance:** The intentional failure to perform a required duty or obligation.

**Nonprofit:** A corporation or an association that conducts business for the benefit of the general public without shareholders and without a profit motive.

**Nonsuit:** A broad term for any of several ways to terminate a legal action without an actual determination of the controversy on the merits.

**Nonsupport:** The failure of one individual to provide financial maintenance for another individual in spite of a legal obligation to do so.

**Norris-laguardia act:** One of the initial federal LABOR LAWS in favor of organized labor. It was enacted in 1932.

**North American Free Trade Agreement:** A trade agreement between the United States, Canada, and Mexico, which took effect January 1, 1994. Its purpose is to increase the efficiency and fairness of trade among the three nations.

**Northwest Ordinance:** An agreement adopted in 1787 by the Congress of the Confederation of States that created the Northwest Territory, organized its governing structure, and established the procedures by which territories were admitted as states to the Union.

**Notary public:** A public official whose main powers include administering oaths and attesting to signatures, both important and effective ways to minimize FRAUD in legal documents.

**Note:** To take notice of. A COMMERCIAL PAPER that contains an express and absolute promise by the maker to pay to a specific individual, to order, or to bearer a definite sum of money on demand or at a specifically designated time.

**Notes of decisions:** Annotations; concise summaries and references to the printed decisions of cases that are designed to explain particular RULES OF LAW or applicable sections of statutes.

**Notice:** Information; knowledge of certain facts or of a particular state of affairs. The formal receipt of papers that provide specific information.

**Novation:** The substitution of a new contract for an old one. The new agreement extinguishes the rights and obligations that were in effect under the old agreement.

**Nuclear power:** A form of energy produced by an atomic reaction, capable of producing an alternative source of electrical power to that supplied by coal, gas, or oil.

**Nuclear regulatory commission:** An independent regulatory agency that oversees the civilian use of NUCLEAR POWER in the United States.

**Nuclear weapons:** Weapons of mass destruction that are powered by nuclear reaction. Types of nuclear weapons include atom bombs, hydrogen bombs, fission bombs, and fusion bombs.

**Nugatory:** Invalid; lacking legal force.

**Nuisance:** A legal action to redress harm arising from the use of one's property.

**Null:** Of no legal validity, force, or effect; nothing.

**Nunc pro tunc:** *[Latin, Now for then.]* When courts take some action *nunc pro tunc,* that action has retroactive legal effect, as though it had been performed at a particular, earlier date.

**Nuncupative will:** The oral expression of a person's wishes as to the disposition of his or her property to be performed or to take effect after the person's death, dictated by the person in his or her final illness before a sufficient number of witnesses and afterward reduced to writing.

**Oath:** Any type of attestation by which an individual signifies that he or she is bound in conscience to perform a particular act truthfully and faithfully; a solemn declaration of truth or obligation.

An individual's appeal to God to witness the truth of what he or she is saying or a pledge to do something enforced by the individual's responsibility to answer to God.

**Obiter dictum:** *[Latin, By the way.]* Words of an opinion entirely unnecessary for the decision of the case. A remark made or opinion expressed by a judge in a decision upon a cause, "by the way," that is, incidentally or collaterally, and not directly upon the question before the court or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. Such are not binding as precedent.

**Object:** As a verb, to take exception to something; to declare or express the belief that something is improper or illegal.

As a noun, the thing sought to be accomplished or attained; aim; purpose; intention.

**Objection:** A formal attestation or declaration of disapproval concerning a specific point of law or procedure during the course of a trial; a statement indicating disagreement with a judge's ruling.

**Objective theory of contract:** A principle in U.S. law that the existence of a contract is determined by the legal significance of the external acts of a party to a purported agreement, rather than by the actual intent of the parties.

**Obligation:** A generic term for any type of legal duty or liability.

**Obligee:** The individual to whom a particular duty or obligation is owed.

**Obligor:** The individual who owes another person a certain debt or duty.

**Obliteration:** A destruction; an eradication of written words.

**Obscene:** Offensive to recognized standards of decency.

**Obscenity:** The character or quality of being obscene; an act, utterance, or item tending to corrupt the public morals by its indecency or lewdness.

**Obstruction of justice:** A criminal offense that involves interference, through words or actions, with the proper operations of a court or officers of the court.

**Occupancy:** Gaining or having physical possession of real property subject to, or in the absence of, legal right or title.

**Occupational disease:** A disease resulting from exposure during employment to conditions or substances that are detrimental to health (such as black lung disease contracted by miners).

**Of counsel:** A term commonly applied in the PRACTICE OF LAW to an attorney who has been employed to aid in the preparation and management of a particular case but who is not the principal attorney in the action.

**Of course:** Any action or step that an individual might take during judicial proceedings without being required to ask the judge's permission or that will receive the judge's automatic approval if the individual does ask permission; that which is a matter of right.

**Of record:** Entered on the appropriate official documents maintained by a governmental body and that are usually available for inspection by the public.

**Offense:** A breach of law; a crime.

**Offer:** A promise that, according to its terms, is contingent upon a particular act, forbearance, or promise given in exchange for the original promise or the performance thereof; a demonstration of the willingness of a party to enter into a bargain, made in such a way that another individual is justified in understanding that his or her assent to the bargain is invited and that such assent will conclude the bargain.

**Office audit:** A thorough examination and verification of the tax returns and financial records of an individual or firm by the INTERNAL REVENUE SERVICE in the office of the agent who is conducting the review.

**Officer:** An individual with the responsibility of performing the duties and functions of an office, that is a duty or charge, a position of trust, or a right to exercise a public or private employment.

**Officers of the court:** An all-inclusive term for any type of court employee including judges, clerks, sheriffs, marshals, bailiffs, and constables.

**Official gazette:** A compilation published weekly by the PATENT AND TRADEMARK OFFICE listing all the PATENTS and TRADEMARKS issued and registered, thereby providing notice to all interested parties.

**Offset:** A contrary claim or demand that may cancel or reduce a given claim; a counterclaim. A kind of bookkeeping entry that counters the effect of a previous entry.

**Ombudsperson:** A public official who acts as an impartial intermediary between the public and government or bureaucracy, or an employee of an organization who mediates disputes between employees and management.

**Omnibus:** *[Latin, For all; containing two or more independent matters.]* A term frequently used in reference to a legislative bill comprised of two or more general subjects that is designed to compel the executive to approve provisions that he or she would otherwise reject but that he or she signs into law to prevent the defeat of the entire bill.

**On demand:** Payable immediately on request.

**On or about:** Near; approximately; without significant variance from an agreed date.

**On point:** Directly applicable or dispositive of the matter under consideration.

**One person, one vote:** The principle that all citizens, regardless of where they reside in a state, are entitled to equal legislative representation.

**Onus probandi:** *[Latin, The burden of proof.]* In the strict sense, a term used to indicate that if no evidence is set forth by the party who has the BURDEN OF PROOF to establish the existence of facts in support of an issue, then the issue must be found against that party.

**Open:** To make accessible, visible, or available; to submit to review, examination, or inquiry through the elimination of restrictions or impediments.

**Open account:** An unpaid or unsettled account; an account with a balance that has not been ascertained, that is kept open in anticipation of future transactions. A type of credit extended by a seller to a buyer that permits the buyer to make purchases without a note or security and is based on an evaluation of the buyer's credit. A contractual obligation that may be modified by subsequent agreement of the parties, either by expressed consent or by consent implied from the conduct of the parties, provided the agreement changing the contractual obligation is based upon independent consideration.

**Open bid:** An offer to perform a contract, generally of a construction nature, in which the bidder reserves the right to reduce his or her bid to compete with a lower bid.

**Open court:** Common law requires a trial in open court; "open court" means a court to which the public has a right to be admitted. This term may mean either a court that has been formally convened and declared open for the transaction of its proper judicial business or a court that is freely open to spectators.

**Open-end contract:** An agreement that allows a buyer to make purchases over a period of time without a change in the price or terms by the seller.

**Open-end credit:** A type of revolving account that permits an individual to pay, on a monthly basis, only a portion of the total amount due.

**Open-end mortgage:** A mortgage that allows the borrowing of additional sums, often on the condition that a stated ratio of collateral value to the debt be maintained. A mortgage that provides for future advances on the mortgage and which so increases the amount of the mortgage.

**Open listing:** A type of real estate listing contract whereby any agent who has a right to participate in the open listing is entitled to a commission if he or she produces the sale.

**Open shop:** A business in which union and nonunion workers are employed. A business in which union membership is not a condition of securing or maintaining employment.

**Opening statement:** An introductory statement made by the attorneys for each side at the start of a trial. The opening statement, although not mandatory, is seldom waived because it offers a

valuable opportunity to provide an overview of the case to the jury and to explain the anticipated proof that will be presented during the course of the trial.

**Operation of law:** The manner in which an individual acquires certain rights or liabilities through no act or cooperation of his or her own, but merely by the application of the established legal rules to the particular transaction.

**Opinion evidence:** Evidence of what the witness thinks, believes, or infers in regard to facts in dispute, as distinguished from personal knowledge of the facts themselves. The RULES OF EVIDENCE ordinarily do not permit witnesses to testify as to opinions or conclusions.

**Oppression:** The offense, committed by a public official, of wrongfully inflicting injury, such as bodily harm or imprisonment, upon another individual under color of office.

**Option:** A privilege, for which a person has paid money, that grants that person the right to purchase or sell certain commodities or certain specified SECURITIES at any time within an agreed period for a fixed price.

A right, which operates as a continuing offer, given in exchange for consideration—something of value—to purchase or lease property at an agreed price and terms within a specified time.

**Oral contract:** An agreement between parties that is either partly in writing and partly dependent on spoken words or that is entirely dependent on spoken words.

**Ordeal:** One of the most ancient forms of trial in England that required the accused person to submit to a dangerous or painful test on the theory that God would intervene and disclose his or her guilt or innocence.

**Order:** Direction of a court or judge normally made or entered in writing, and not included in a judgment, which determines some point or directs some step in the proceedings.

**Order of the coif:** An unincorporated national scholastic honor society in law. Its purpose is to foster excellence in legal scholarship and to recognize those who have attained high grades in law school or who have distinguished themselves in the teaching of law. There are more than sixty chapters located in law schools throughout the country.

**Ordinance:** A law, statute, or regulation enacted by a MUNICIPAL CORPORATION.

**Organ transplantation:** The transfer of organs such as the kidneys, heart, or liver from one body to another.

**Organic law:** The fundamental law or constitution of a particular state or nation, either written or unwritten, that defines and establishes the manner in which its government will be organized.

**Organization:** A generic term for any type of group or association of individuals who are joined together either formally or legally.

**Organized crime:** Criminal activity carried out by an organized enterprise.

**Original intent:** The theory of interpretation by which judges attempt to ascertain the meaning of a particular provision of a state or federal constitution by determining how the provision was understood at the time it was drafted and ratified.

**Original jurisdiction:** The authority of a tribunal to entertain a lawsuit, try it, and set forth a judgment on the law and facts.

**Original writ:** A document formerly used to commence a lawsuit in English courts.

**Origination fee:** A charge imposed by a lending institution or a bank for the service of processing a loan.

**Orphan's court:** The designation of tribunals in a number of New England states that have probate or surrogate jurisdiction.

**Ostensible:** Apparent; visible; exhibited.

**Out-of-court settlement:** An agreement reached between the parties in a pending lawsuit that resolves the dispute to their mutual satisfaction and occurs without judicial intervention, supervision, or approval.

**Outlawry:** A declaration under Old ENGLISH LAW by which a person found in CONTEMPT on a civil or criminal process was considered an outlaw—that is, someone who is beyond the protection or assistance of the law.

**Output contract:** In the law of sales, an agreement in which one party assents to sell his or her total production to another party, who agrees to purchase it.

**Outstanding warrant:** An order that has not yet been carried out; an order for which the action commanded has not been taken.

**Overbreadth doctrine:** A principle of JUDICIAL REVIEW that holds that a law is invalid if it punishes constitutionally protected speech or conduct along with speech or conduct that the government may limit to further a compelling government interest.

**Overdraft:** A check that is drawn on an account containing less money than the amount stated on the check.

**Overhead:** A sum total of the administrative or executive costs that relate to the management, conduct, or supervision of a business that are not attributable to any one particular product or department.

**Overreaching:** Exploiting a situation through FRAUD or UNCONSCIONABLE conduct.

**Override:** An arrangement whereby commissions are made by sales managers based upon the sales made by their subordinate sales representatives. A term found in an agreement between a real estate agent and a property owner whereby the agent keeps the right to receive a commission for the sale of the property for a reasonable time after the agreement expires if the sale is made to a purchaser with whom the agent negotiated prior to the expiration of the agreement.

**Overrule:** The refusal by a judge to sustain an objection set forth by an attorney during a trial, such as an objection to a particular question posed to a witness. To make void, annul, supersede, or reject through a subsequent decision or action.

**Overt:** Public; open; manifest.

**Overt act:** An open, manifest act from which criminality may be implied. An outward act done in pursuance and manifestation of an intent or design.

**Owner:** The person recognized by the law as having the ultimate control over, and right to use, property as long as the law permits and no agreement or COVENANT limits his or her rights.

**Oyer and terminer:** *[French, To hear and decide.]* The designation "court of oyer and terminer" is frequently used as the actual title, or a portion of the title, of a state court that has criminal jurisdiction over felonious offenses.

**Oyez:** *[French, Hear ye.]* A word used in some courts by the public crier to indicate that a proclamation is about to be made and to command attention to it.

## P

**Pacifism:** A belief or policy in opposition to war or violence as a means of settling disputes. Pacifists maintain that unswerving nonviolence can bestow upon people a power greater than that achieved through the use of violent aggression.

**Packing:** The process of exercising unlawful, improper, or deceitful means to obtain a jury composed of individuals who are favorably disposed to the verdict sought.

**Pact:** A bargain, compact, or agreement. An agreement between two or more nations or states that is similar to, but less complex than, a treaty.

**Pacta sunt servanda:** *[Latin, Promises must be kept.]* An expression signifying that the agreements and stipulations of the parties to a contract must be observed.

**Pactum:** *[Latin, Pact.]* A compact, bargain, or agreement.

**Pairing-off:** In the practice of legislative bodies, a system by which two members, who belong to opposing political parties or are on opposite sides with respect to a certain question, mutually agree that they will both be absent from voting, either for a specified period or when a vote is to be taken on the particular question.

**Pais:** *[French, The country; the neighborhood.]* A trial *per pais* denotes a trial by the country; that is, trial by jury.

**Palm off:** To misrepresent inferior goods of one producer as superior goods made by a reputable, well-regarded competitor in order to gain commercial advantage and promote sales.

**Palpable:** Easily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest.

**Pander:** To pimp; to cater to the gratification of the lust of another. To entice or procure a person, by promises, threats, FRAUD, or deception to enter any place in which prostitution is practiced for the purpose of prostitution.

**Panel:** A list of jurors to serve in a particular court or for the trial of a designated action. A group of judges of a lesser number than the entire court convened to decide a case, such as when a nine-member appellate court divides into three, three-member groups, and each group hears and decides cases. A plan in reference to prepaid legal services.

**Paper:** A document that is filed or introduced in evidence in a lawsuit, as in the phrases *papers in the case* and *papers on appeal.*

Any written or printed statement, including letters, memoranda, legal or business documents, and books of account, in the context of the FOURTH AMENDMENT to the U.S. Constitution, which protects the people from unreasonable SEARCHES AND SEIZURES with respect to their "papers" as well as their persons and houses.

In the context of accommodation paper and COMMERCIAL PAPER, a written or printed evidence of debt.

**Par:** In COMMERCIAL LAW, equal; equality.

**Parallel citation:** A reference to the same case or statute published in two or more sources.

**Paramount title:** In the law of real property, ownership that is superior to the ownership with which it is compared, in the sense that the former is the source or the origin of the latter.

**Parcener:** A joint heir.

**Pardon:** The action of an executive official of the government that mitigates or sets aside the punishment for a crime.

**Parens patriae:** *[Latin, Parent of the country.]* A doctrine that grants the inherent power and authority of the state to protect persons who are legally unable to act on their own behalf.

**Parent and child:** The legal relationship between a father or mother and his or her offspring.

**Parent company:** An enterprise, which is also known as a parent corporation, that owns more than 50 percent of the voting shares of its subsidiary.

**Pari causa:** *[Latin, With equal right.]* Upon an equal footing; having the same rights or claims.

**Pari delicto:** *[Latin, In equal fault.]* The doctrine, also known as *in pari delicto,* that provides that courts will not enforce an invalid contract and that no party can recover in an action where it is necessary to prove the existence of an illegal contract in order to make his or her case.

**Pari materia:** *[Latin, Of the same matter; on the same subject.]* The phrase used in connection with two laws relating to the same subject matter that must be analyzed with each other.

**Pari passu:** *[Latin, By an equal progress; equably; ratably; without preference.]* Used especially to describe creditors who, in marshalling assets, are entitled to receive out of the same fund without any precedence over each other.

**Parity:** Equality in amount or value. Equivalence of prices of farm products to the prices existing at some former date (the base period) or to the general cost of living; equivalence of prices of goods or services in two different markets. The relationship between two currencies such that they are exchangeable for each other at the par or official rate of exchange.

**Parliamentary law:** The general body of enacted rules and recognized usages governing the procedure of legislative assemblies and other deliberative sessions such as meetings of stockholders and directors of corporations, town meetings, and board meetings. Roberts Rules of Order are an example of such rules.

**Parol evidence:** *Parol* refers to verbal expressions or words. Verbal evidence, such as the testimony of a witness at trial.

**Parole:** The conditional release of a person convicted of a crime prior to the expiration of that person's term of imprisonment, subject to both the supervision of the correctional authorities during the remainder of the term and a resumption of the imprisonment upon violation of the conditions imposed.

**Particular average loss:** In maritime law, damage sustained by a ship, cargo, or freight that is not recompensed by contribution from all interests in the venture but must be borne by the owner of the damaged property.

**Particulars:** The details of a claim, or the separate items of an account.

**Parties:** The persons who are directly involved or interested in any act, affair, contract, transaction, or legal proceeding; opposing litigants.

**Partition:** Any division of real property or PERSONAL PROPERTY between co-owners, resulting in individual ownership of the interests of each.

**Partnership:** An association of two or more persons engaged in a business enterprise in which the profits and losses are shared proportionally. The legal definition of a partnership is generally stated as "an association of two or more persons to carry on as co-owners a business for profit" (Revised Uniform Partnership Act § 101 [1994]).

**Party:** Any person involved in a transaction or proceeding. A group of voters organized for the purpose of influencing governmental policy, particularly through the nomination and election of candidates for public office.

**Party of the first part:** A phrase used in a document to avoid repeating the name of the persons first mentioned in it.

**Party wall:** A partition erected on a property boundary, partly on the land of one owner and partly on the land of another, to provide common support to the structures on both sides of the boundary.

**Pass:** As a verb, to utter or pronounce, as when the court *passes* sentence upon a prisoner. Also to proceed; to be rendered or given, as when judgment is said to *pass* for the plaintiff in a suit.

In legislative parlance, a bill or resolution is said to *pass* when it is agreed to or enacted by the house, or when the body has sanctioned its adoption by the requisite majority of votes; in the same circumstances, the body is said to *pass* the bill or motion.

When an auditor appointed to examine any accounts certifies to their correctness, she is said to *pass* them; i.e., they pass through the examination without being detained or sent back for inaccuracy or imperfection.

The term also means to examine anything and then authoritatively determine the disputed questions that it involves. In this sense a jury is said to *pass upon* the rights or issues in litigation before them.

In the language of conveyancing, the term means to move from one person to another; i.e. to be transferred or conveyed from one owner to another.

To publish; utter; transfer; circulate; impose fraudulently. This is the meaning of the word when referring to the offense of *passing* counterfeit money or a forged paper.

As a noun, permission to pass; a license to go or come; a certificate, emanating from authority, wherein it is declared that a designated person is permitted to go beyond certain boundaries that, without such authority, he could not lawfully pass. Also a ticket issued by a railroad or other transportation company, authorizing a designated person to travel free on its lines, between certain points or for a limited time.

**Passim:** *[Latin, Everywhere.]* A term frequently used to indicate a general reference to a book or legal authority.

**Passport:** A document that indicates permission granted by a sovereign to its citizen to travel to foreign countries and return and requests foreign governments to allow that citizen to pass freely and safely.

With respect to INTERNATIONAL LAW, a passport is a license of safe conduct, issued during a war, that authorizes an individual to leave a warring nation or to remove his or her effects from that nation to another country; it also authorizes a person to travel from country to country without being subject to arrest or detention because of the war.

In maritime law, a passport is a document issued to a neutral vessel by its own government during a war that is carried on the voyage as evidence of the nationality of the vessel and as protection against the vessels of the warring nations. This paper is also labeled a *pass, sea-pass, sea-letter,* or *sea-brief.* It usually contains the captain's or master's name and residence; the name, property, description, tonnage, and destination of the ship; the nature and quantity of the cargo; and the government under which it sails.

**Pat. pend.:** An abbreviation displayed prominently on an invention for which an application for a patent has been made but has not yet been issued.

**Patent:** Open; manifest; evident.

**Patent writ:** An open court order in earlier times; a writ that was not folded and sealed up as a close writ would be.

**Patents:** Rights, granted to inventors by the federal government, pursuant to its power under Article I, Section 8, Clause 8, of the U.S. Constitution, that permit them to exclude others from making, using, or selling an invention for a definite, or restricted, period of time.

**Paternity:** The state or condition of a father; the relationship of a father.

**Paternity suit:** A civil action brought against an unwed father by an unmarried mother to obtain support for an illegitimate child and for payment of bills incident to the pregnancy and the birth.

**Patients' rights:** The legal interests of persons who submit to medical treatment.

**Patronage:** The practice or custom observed by a political official of filling government positions with qualified employees of his or her own choosing.

**Pauper:** An impoverished person who is supported at public expense; an indigent litigant who is permitted to sue or defend without paying costs; an impoverished criminal defendant who has a right to receive legal services without charge.

**Pawn:** To deliver PERSONAL PROPERTY to another as a pledge or as security for a debt. A deposit of goods with a creditor as security for a sum of money borrowed.

**Pawnbroker:** A person who engages in the business of lending money, usually in small sums, in exchange for PERSONAL PROPERTY deposited with him or her that can be kept or sold if the borrower fails or refuses to repay the loan.

**Payable:** Justly due; legally enforceable.

**Payee:** The person who is to receive the stated amount of money on a check, bill, or note.

**Payment:** The fulfillment of a promise; the performance of an agreement. A delivery of money, or its equivalent in either specific property or services, by a debtor to a creditor.

**P.C.:** An abbreviation for professional corporation, which is a special corporation established by professionals, such as physicians, accountants, or, in some states, attorneys, who practice together.

**Peace bond:** The posting of money in court, as required by a judge or magistrate, by a person who has threatened to commit a breach of the peace.

**Peace officers:** Sheriffs, constables, marshals, city police officers, and other public officials whose duty it is to enforce and preserve the public order.

**Peculation:** The unlawful appropriation, by a depositary of public funds, of the government property entrusted to the care of the depository; the fraudulent diversion to an individual's personal use of money or goods entrusted to that person's care.

**Pecuniary:** Monetary; relating to money; financial; consisting of money or that which can be valued in money.

**Pederasty:** The criminal offense of unnatural copulation between men.

**Peers:** Equals; those who are an individual's equals in rank and station.

**Pen register:** A device that decodes or records electronic impulses, allowing outgoing numbers from a telephone to be identified.

**Penal:** Punishable; inflicting a punishment.

**Penalty:** A punitive measure that the law imposes for the performance of an act that is proscribed, or for the failure to perform a required act.

**Pendent jurisdiction:** The discretionary power of a federal court to permit the assertion of a related state law claim, along with a federal claim between the same parties, properly before the court, provided that the federal claim and the state law claim derive from the same set of facts.

**Pendente lite:** *[Latin, Pending the litigation.]* During the actual progress of a lawsuit.

**Pending:** Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; in the process of adjustment.

**Penitentiary:** A prison or place of confinement where persons convicted of felonies serve their term of imprisonment.

**Penny stocks:** Inexpensive issues of stock, typically selling at less than $1 a share, in companies that often are newly formed or involved in highly speculative ventures.

**Penology:** The science of prison administration and rehabilitation of criminals.

**Pension:** A benefit, usually money, paid regularly to retired employees or their survivors by private businesses and federal, state, and local governments. Employers are not required to establish pension benefits but do so to attract qualified employees.

**Pent road:** A street that is closed at its terminal points.

**Penumbra:** The rights guaranteed by implication in a constitution or the implied powers of a rule.

**Peonage:** A condition of enforced servitude by which a person is restrained of his or her liberty and compelled to labor in payment of some debt or obligation.

**People:** The aggregate of the individuals who comprise a state or a nation.

**Per:** *[Latin, By, through, or by means of.]*

**Per capita:** *[Latin, By the heads or polls.]* A term used in the DESCENT AND DISTRIBUTION of the estate of one who dies without a will. It means to share and share alike according to the number of individuals.

**Per curiam:** *[Latin, By the court.]* A phrase used to distinguish an opinion of the whole court from an opinion written by any one judge.

**Per quod:** *[Latin, Whereby.]* With respect to a complaint in a civil action, a phrase that prefaces the recital of the consequences of certain acts as a ground of special harm to the plaintiff.

**Per se:** *[Latin, In itself.]* Simply as such; in its own nature without reference to its relation.

**Per stirpes:** *[Latin, By roots or stocks; by representation.]* A term used to denote a method used in dividing the estate of a person. A person who takes per stirpes, sometimes called by right of representation, does not inherit in an individual capacity but as a member of a group.

**Percentage lease:** A rental agreement, usually with respect to a retail business property, whereby a portion of the gross sales or net sales of the tenant is used to determine the rent.

**Peremptory challenge:** The right to challenge a juror without assigning, or being required to assign, a reason for the challenge.

**Peremptory ruling:** An immediate and absolute decision by the court on some point of law that is rendered without consideration of alternatives.

**Perfect:** Complete; finished; executed; enforceable; without defect; merchantable; marketable.

**Performance:** The fulfillment or accomplishment of a promise, contract, or other obligation according to its terms.

**Peril:** The designated contingency, risk, or hazard against which an insured seeks to protect himself or herself when purchasing a policy of insurance.

**Perjury:** A crime that occurs when an individual willfully makes a false statement during a judicial proceeding, after he or she has taken an oath to speak the truth.

**Permissive counterclaim:** A claim by a defendant opposing the claim of the plaintiff and seeking some relief from the plaintiff for the defendant.

**Perpetrator:** A term commonly used by law enforcement officers to designate a person who actually commits a crime.

**Perpetuating testimony:** The procedure permitted by federal and state discovery rules for preserving the attestation of a witness that might otherwise be lost prior to the trial in which it is intended to be used.

**Perpetuation of evidence:** The procedure employed to assure that proof will be available for possible use at a later trial.

**Perquisites:** Fringe benefits or other incidental profits or benefits accompanying an office or position.

**Person:** In general usage, a human being; by statute, however, the term can include firms, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in BANKRUPTCY, or receivers.

**Personal actions:** Lawsuits initiated in order, among other things, to recover damages for some injury to a plaintiff's personal right or property, for breach of contract, for money owed on a debt, or for the recovery of a specific item of PERSONAL PROPERTY.

**Personal injury:** Any violation of an individual's right, other than his or her rights in property.

**Personal jurisdiction:** The power of a court to hear and determine a lawsuit involving a defendant by virtue of the defendant's having some contact with the place where the court is located.

**Personal property:** Everything that is the subject of ownership that does not come under the denomination of real property; any right or interest that an individual has in movable things.

**Personal representative:** A person who manages the financial affairs of another person who is unable to do so.

**Personal service:** The actual delivery of process to the individual to whom it is directed or to someone authorized to receive it on his or her behalf.

**Personalty:** Goods; chattels; articles; movable property, whether animate or inanimate.

**Persuasive authority:** Sources of law, such as related cases or legal encyclopedias, that the court consults in deciding a case, but which, unlike binding authority, the court need not apply in reaching its conclusion.

**Petit jury:** The ordinary panel of twelve persons called to issue a verdict in a civil action or a criminal prosecution.

**Petit larceny:** A form of larceny—the stealing of another's personal property—in which the value of the property taken is generally less than $50.

**Petition:** A written application from a person or persons to some governing body or public official asking that some authority be exercised to grant relief, favors, or privileges.

A formal application made to a court in writing that requests action on a certain matter.

**Petition in bankruptcy:** A document filed in a specialized federal court to commence a proceeding to provide a means by which a debtor who is unwilling or financially unable to pay personal debts will satisfy the claims of his or her creditors as they come due.

**Petitioner:** One who presents a formal, written application to a court, officer, or legislative body that requests action on a certain matter.

**Petitory action:** A legal proceeding by which the plaintiff seeks to establish and enforce his or her title to property, as distinguished from a possessory proceeding, where the plaintiff's right to possession is the issue. Such petitory actions must be based on a claim of legal title to the property, as opposed to a mere equitable interest in it.

In ADMIRALTY, suits to try title to property independent of questions concerning possession.

In the civil-law jurisdiction of Louisiana, a proceeding instituted by an alleged owner who does not have possession to determine ownership against one in possession.

**Petty offense:** A minor crime, the maximum punishment for which is generally a fine or a short term in a prison or a house of correction.

**Philadelphia lawyer:** A colloquial term that was initially a compliment to the legal expertise and competence of an attorney due to the outstanding reputation of the Philadelphia bar during colo-

nial times. More recently the term has become a disparaging label for an attorney who is skillful in the manipulation of the technicalities and intricacies of the law to the advantage of his or her client, although the spirit of the law might be violated.

**Photo lineup:** A presentation of photographs to a victim or witness of a crime.

**Physical fact:** In the law of evidence, an event having a corporeal existence, as distinguished from a mere conception of the mind; one that is visible, audible, or tangible, such as the sound of footsteps or impressions made by human feet on the ground.

**Picketing:** The presence at an employer's business of one or more employees and/or other persons who are publicizing a labor dispute, influencing employees or customers to withhold their work or business, respectively, or showing a union's desire to represent employees; picketing is usually accompanied by patrolling with signs.

**Pilot:** In maritime law, a person who assumes responsibility for a vessel at a particular place for the purpose of navigating it through a river or channel, or from or into a port.

**Pimp:** In feudal England, a type of tenure by which a tenant was permitted to use real property that belonged to a lord in exchange for the performance of some service, such as providing young women for the use and pleasure of the lord.

An individual who, for a fee, supplies another individual with a prostitute for sexual purposes. To pander, or cater to the sexual desires of others in exchange for money.

**Piracy:** The act of violence or depredation on the high seas; also, the theft of INTELLECTUAL PROPERTY, especially in electronic media.

**P.J.:** An abbreviation for presiding judge, the individual who directs, controls, or governs a particular tribunal as its chief officer.

**Plagiarism:** The act of appropriating the literary composition of another author, or excerpts, ideas, or passages therefrom, and passing the material off as one's own creation.

**Plain-error rule:** The principle that an appeals court can reverse a judgment and order a new trial because of a serious mistake in the proceedings, even though no objection was made at the time the mistake occurred.

**Plain-meaning rule:** A principle used by courts in interpreting contracts that provides that the objective definitions of contractual terms are controlling, irrespective of whether the language comports with the actual intention of either party.

**Plain view doctrine:** In the context of searches and seizures, the principle that provides that objects perceptible by an officer who is rightfully in a position to observe them can be seized without a SEARCH WARRANT and are admissible as evidence.

**Plaintiff:** The party who sues in a civil action; a complainant; the prosecution—that is, a state or the United States representing the people—in a criminal case.

**Plaintiff in error:** The unsuccessful party in a lawsuit who commences proceedings for appellate review of the action because a mistake or "error" has been made resulting in a judgment against him or her; an appellant.

**Plat:** A map of a town or a section of land that has been subdivided into lots showing the location and boundaries of individual parcels with the streets, alleys, EASEMENTS, and rights of use over the land of another.

**Plea:** A formal response by the defendant to the affirmative assertions of the plaintiff in a civil case or to the charges of the prosecutor in a criminal case.

**Plea bargaining:** The process whereby a criminal defendant and prosecutor reach a mutually satisfactory disposition of a criminal case, subject to court approval.

**Plea in abatement:** In COMMON-LAW PLEADING, a response by the defendant that does not dispute the plaintiff's claim but objects to its form or the time or place where it is asserted.

**Plea in bar:** An answer to a plaintiff's claim that absolutely and entirely defeats it.

**Pleading:** Asking a court to grant relief. The formal presentation of claims and defenses by parties to a lawsuit. The specific papers by which the allegations of parties to a lawsuit are presented in proper form; specifically the complaint of a plaintiff and the answer of a defendant plus any additional responses to those papers that are authorized by law.

**Pledge:** A BAILMENT or delivery of PERSONAL PROPERTY to a creditor as security for a debt or for the performance of an act.

**Plurality:** The opinion of an appellate court in which more justices join than in any concurring opinion.

The excess of votes cast for one candidate over those votes cast for any other candidate.

**Poaching:** The illegal shooting, trapping, or taking of game or fish from private or public property.

**Pocket part:** An addition to many lawbooks that updates them until a new edition is published.

**Point:** A distinct proposition or QUESTION OF LAW arising or propounded in a case. In the case of shares of stock, a point means $1. In the case of bonds a point means $10, since a bond is quoted as a percentage of $1,000. In the case of market averages, the word point means merely that and no more. If, for example, the Dow-Jones Industrial Average rises from 8,349.25 to 8,350.25, it has risen a point. A point in this average, however, is not equivalent to $1.

With respect to the home mortgage finance industry, a fee or charge of one percent of the principal of the loan that is collected by the lender at the time the loan is made and is in addition to the constant long-term stated interest rate on the face of the loan.

**Poison:** Any substance dangerous to living organisms that if applied internally or externally, destroy the action of vital functions or prevent the CONTINUANCE of life.

*Economic poisons* are those substances that are used to control insects, weeds, fungi, bacteria, rodents, predatory animals, or other pests. Economic poisons are useful to society but are still dangerous.

**Poison pill:** A defensive strategy based on issuing special stock that is used to deter aggressors in corporate takeover attempts.

**Police:** A body sanctioned by local, state, or national government to enforce laws and apprehend those who break them.

**Police corruption and misconduct:** The violation of state and federal laws or the violation of individuals' constitutional rights by police officers; also the commission by officers of crimes for personal gain.

**Police power:** The authority conferred upon the states by the TENTH AMENDMENT to the U.S. Constitution and which the states delegate to their political subdivisions to enact measures to preserve and protect the safety, health, WELFARE, and morals of the community.

**Policy:** The general principles by which a government is guided in its management of public affairs, or the legislature in its measures. A general term used to describe all contracts of insurance.

As applied to a law, ordinance, or RULE OF LAW, the general purpose or tendency considered as directed to the welfare or prosperity of the state or community.

**Political action committee:** A group not endorsed by a candidate or political party but organized to engage in political election activities, especially the raising and spending of money for "campaigning." Some political action committees (PACs) are organized solely to help defeat a candidate deemed undesirable by the group.

**Political campaign law:** Statutes and court rulings that govern candidates running for public office.

**Political crime:** A serious violation of law that threatens the security or existence of the government, such as TREASON or SEDITION.

**Political question:** An issue that the federal courts refuse to decide because it properly belongs to the decision-making authority of elected officials.

**Political trial:** A trial that addresses POLITICAL QUESTIONS, involves political officials, or serves political agendas. In certain circumstances the term is used in a pejorative sense to criticize a particular trial or proceeding as unfair or unjust.

**Poll tax:** A specified sum of money levied upon each person who votes.

**Polling the jury:** A practice whereby the jurors are asked individually whether they assented, and still assent, to the verdict; it consists of calling the name of each juror and requiring a declaration of his or her verdict before it is recorded.

**Polls:** The place where voters cast their ballots. Heads; individuals; persons singly considered.

**Pollution:** The contamination of the air, water, or earth by harmful or potentially harmful substances.

**Polygamy:** The offense of willfully and knowingly having more than one wife or husband at the same time. The offense of willfully and knowingly entering into a *second* marriage while validly married to another individual is bigamy.

**Polygraph:** An instrument used to measure physiological responses in humans when they are questioned in order to determine if their answers are truthful.

**Ponzi scheme:** A fraudulent investment plan in which the investments of later investors are used to pay earlier investors, giving the appearance that the investments of the initial participants dramatically increase in value in a short amount of time.

**Popular name tables:** Reference charts that aid in locating statutes, if the names by which they are commonly referred to are known.

**Pornography:** The representation in books, magazines, photographs, films, and other media of scenes of sexual behavior that are erotic or lewd and are designed to arouse sexual interest.

**Positive evidence:** Direct proof of the fact or point in issue, as distinguished from circumstantial proof; proof that if believed, establishes the truth or falsity of a fact in issue and does not arise from a presumption.

**Positive law:** Those laws that have been duly enacted by a properly instituted and popularly recognized branch of government.

**Positivism:** A school of JURISPRUDENCE whose advocates believe that the only legitimate sources of law are those written rules, regulations, and principles that have been expressly enacted, adopted, or recognized by a government body, including administrative, executive, legislative, and judicial bodies.

**Posse comitatus:** *[Latin, Power of the county.]* Referred at COMMON LAW to all males over the age of fifteen on whom a sheriff could call for assistance in preventing any type of civil disorder.

**Possession:** The ownership, control, or occupancy of a thing, most frequently land or PERSONAL PROPERTY, by a person.

**Possessory action:** A proceeding instituted to obtain or recover the actual possession of property, as distinguished from a proceeding that merely seeks to establish the plaintiff's title or ownership of property.

In ADMIRALTY LAW, a possessory action is one that is brought to recover the possession of a vessel that is had under a claim of title.

**Possessory warrant:** A rare statutory remedy for the recovery of PERSONAL PROPERTY that has been taken by FRAUD, violence, enticement, or seduction, or that has disappeared and is believed to be in the detention and control of the party complained against.

**Post mortem:** *[Latin, After death.]* Pertaining to matters occurring after death. A term generally applied to an autopsy or examination of a corpse in order to ascertain the cause of death or to the inquisition for that purpose by the CORONER.

**Postconviction remedies:** A variety of relief sought by a convicted criminal to have his or her sentence vacated, set aside, or corrected because such a sentence was based upon some violation of the U.S. Constitution.

**Postdate:** To designate a written instrument, such as a check, with a time or date later than that at which it is really made.

**Posthumous child:** An infant who is born subsequent to the death of the father or, in certain cases, the mother.

**Posting:** In accounting, the act of transferring an original entry to a ledger. The act of mailing a document. A form of substituted SERVICE OF PROCESS consisting of displaying the process in a prominent place when other forms of service are unavailing.

In connection with TRESPASS statutes, the act of placing or affixing signs on private property in a manner to give notice of the trespass.

**Postmarital agreement:** An agreement made between spouses after marriage concerning the rights and responsibilities of the parties upon DIVORCE or the death of one of the spouses.

**Pour-over:** A clause in a will or trust that provides that, upon the death of the creator of the trust, his or her money or property will be transferred into some other existing trust.

**Power:** The right, ability, or authority to perform an act. An ability to generate a change in a particular legal relationship by doing or not doing a certain act.

In a restricted sense, a liberty or authority that is reserved by, or limited to, a person to dispose of real or PERSONAL PROPERTY, for his or her own benefit or for the benefit of others, or that enables one person to dispose of an interest that is vested in another.

**Power of attorney:** A written document in which one person (the principal) appoints another person to act as an agent on his or her behalf, thus conferring authority on the agent to perform certain acts or functions on behalf of the principal.

**Power of sale:** A clause commonly inserted in a mortgage and deed of trust that grants the creditor or trustee the right and authority, upon default in the payment of the debt, to advertise and sell the property at public auction, without resorting to a court for authorization to do so.

**Power of termination:** A future interest in real property whereby the grantor conveys an estate to another, called the grantee, subject to a particular condition, the breach of which forfeits the grantee's interest in the property.

**Practice:** Repeated or customary action; habitual performance; a succession of acts of similar kind; custom; usage. The exercise of any profession.

The form or mode or proceeding in courts of justice for the enforcement of rights or the redress of wrongs, as distinguished from the SUBSTANTIVE LAW that gives the right or denounces the wrong. The form, manner, or order of instituting and conducting an action or other judicial proceeding, through its successive stages to its end, in accordance with the rules and principles laid down by law or by the regulations and precedents of the courts.

**Practice of law:** The professional tasks performed by lawyers in their offices or in court on a day-to-day basis. With the growth of specialization, it has become difficult to generalize about the practice

of law. Nevertheless, common elements can be identified in the disparate typical workday of, for example, a criminal defense attorney and a probate attorney.

**Praecipe:** *[Latin, Give an order.]* An original writ, one of the forms of legal process used to commence an action. A praecipe was drawn up in the alternative and commanded the defendant to do what was ordered or to appear and show why he or she had not done it. An order that commands the clerk of a court to issue a formal writ of execution directing the enforcement of a judgment already rendered and commanding a public officer to seize the defendant's property in order to satisfy the debt.

**Prayer:** The request contained in a bill in EQUITY that the court will grant the process, aid, or relief that the complainant desires.

**Preamble:** A clause at the beginning of a constitution or statute explaining the reasons for its enactment and the objectives it seeks to attain.

**Precatory language:** Words in a will or a trust used by the testator (the person making the will) or settlor (the person making a trust) to express a wish or desire to have his or her property disposed of in a certain way or to have some other task undertaken, which do not necessarily impose a mandatory obligation upon anyone to carry out the wish.

**Precedent:** A court decision that is cited as an example or analogy to resolve similar QUESTIONS OF LAW in later cases.

**Precept:** An order, writ, warrant, or process. An order or direction, emanating from authority, to an officer or body of officers, commanding that officer or those officers to do some act within the scope of their powers. Rule imposing a standard of conduct or action.

In ENGLISH LAW, the direction issued by a sheriff to the proper returning officers of cities and boroughs within his jurisdiction for the election of members to serve in parliament.

In old French law, a kind of letters issued by the king in subversion of the laws, being orders to the judges to do or tolerate things contrary to law.

**Precinct:** A constable's or police district. A small geographical unit of government. An election district created for convenient localization of polling places. A county or municipal subdivision for casting and counting votes in elections.

**Preclusion order:** A court sanction that prevents a party who has not complied with a direction to supply information in the discovery stage of a lawsuit from later supporting or challenging designated claims or defenses related to the facts that he or she withheld.

**Preemption:** A doctrine based on the SUPREMACY CLAUSE of the U.S. Constitution that holds that certain matters are of such a national, as opposed to local, character that federal laws preempt or take precedence over state laws. As such, a state may not pass a law inconsistent with the federal law.

A doctrine of state law that holds that a state law displaces a local law or regulation that is in the same field and is in conflict or inconsistent with the state law.

**Preemptive right:** The privilege of a stockholder to maintain a proportionate share of the ownership of a corporation by purchasing a proportionate share of any new stock issues.

**Preference:** The act of an insolvent debtor who pays one or more creditors the full amount of their claims or a larger amount than they would be entitled to receive on a pro rata distribution.

**Preferred stock:** Stock shares that have preferential rights to dividends or to amounts distributable on liquidation, or to both, ahead of common shareholders.

**Prejudice:** A forejudgment; bias; partiality; preconceived opinion. A leaning toward one side of a cause for some reason other than a conviction of its justice.

**Prelaw education:** A preparatory curriculum comprising introductory law courses and interdisciplinary subjects, offered to undergraduate students to instruct them in and acquaint them with

the subject MATTER OF LAW, thereby assisting them in deciding whether to seek admission to law school and facilitating the process of law study in law school.

**Preliminary hearing:** A proceeding before a judicial officer in which the officer must decide whether a crime was committed, whether the crime occurred within the territorial jurisdiction of the court, and whether there is PROBABLE CAUSE to believe that the defendant committed the crime.

**Preliminary injunction:** A temporary order made by a court at the request of one party that prevents the other party from pursuing a particular course of conduct until the conclusion of a trial on the merits.

**Premarital agreement:** A contract made in anticipation of marriage that specifies the rights and obligations of the parties. Such an agreement typically includes terms for property distribution in the event the marriage terminates.

**Premeditate:** To think of an act beforehand; to contrive and design; to plot or lay plans for the execution of a purpose.

**Premium:** A reward for an act done.

**Preponderance of evidence:** A standard of proof that must be met by a plaintiff if he or she is to win a civil action.

**Prerogative:** An exclusive privilege. The special power or peculiar right possessed by an official by virtue of his or her office. In ENGLISH LAW, a discretionary power that exceeds and is unaffected by any other power; the special preeminence that the monarch has over and above all others, as a consequence of his or her sovereignty.

**Prerogative writ:** Formerly a court order issued under certain circumstances on the authority of the extraordinary powers of the monarch.

**Prescription:** A method of acquiring a nonpossessory interest in land through the long, continuous use of the land.

**Present:** To submit for consideration or action. Immediate, not in the future.

**Presentence investigation:** Research that is conducted by court services or a PROBATION officer relating to the prior criminal record, education, employment, and other information about a person convicted of a crime, for the purpose of assisting the court in passing sentence.

**Presentment:** A GRAND JURY statement that a crime was committed; a written notice, initiated by a grand jury, that states that a crime occurred and that an indictment should be drawn.

In relation to COMMERCIAL PAPER, presentment is a demand for the payment or acceptance of a negotiable instrument, such as a check. The holder of a negotiable instrument generally makes a presentment to the maker, acceptor, drawer, or drawee.

**Presents:** The present instrument. The phrase *these presents* is used in any legal document to designate the instrument in which the phrase itself occurs.

**President of the United States:** The head of the EXECUTIVE BRANCH, one of the three branches of the federal government.

**Presidential powers:** The executive authority given to the president of the United States by Article II of the Constitution to carry out the duties of the office.

**Presumption:** A conclusion made as to the existence or nonexistence of a fact that must be drawn from other evidence that is admitted and proven to be true. A RULE OF LAW.

**Presumption of innocence:** A principle that requires the government to prove the guilt of a criminal defendant and relieves the defendant of any burden to prove his or her innocence.

**Pretermitted heir:** A child or other descendent omitted from the will of a testator.

**Pretrial conference:** A meeting of the parties to an action and their attorneys held before the court prior to the commencement of actual courtroom proceedings.

**Prevailing party:** The litigant who successfully brings or defends an action and, as a result, receives a favorable judgment or verdict.

**Preventive detention:** The confinement in a secure facility of a person who has not been found guilty of a crime.

**Price-fixing:** The organized setting of what the public will be charged for certain products or services agreed to by competitors in the marketplace in violation of the SHERMAN ANTI-TRUST ACT (15 U.S.C.A. § 1 et seq.).

**Prima facie:** *[Latin, On the first appearance.]* A fact presumed to be true unless it is disproved.

**Primary authority:** Law, in various forms, that a court must follow in deciding a case.

**Primary evidence:** An authentic document or item that is offered as proof in a lawsuit, as contrasted with a copy of, or substitute for, the original.

**Prime lending rate:** The lowest rate of interest that a financial institution, such as a bank, charges its best customers, usually large corporations, for short-term unsecured loans.

**Primogeniture:** The status of being the firstborn child among several children of the same parents. A rule of inheritance at COMMON LAW through which the oldest male child has the right to succeed to the estate of an ancestor to the exclusion of younger siblings, both male and female, as well as other relatives.

**Principal:** A source of authority; a sum of a debt or obligation producing interest; the head of a school. In an agency relationship, the principal is the person who gives authority to another, called an agent, to act on his or her behalf. In CRIMINAL LAW, the principal is the chief actor or perpetrator of a crime; those who aid, abet, counsel, command, or induce the commission of a crime may also be principals. In investments and banking, the principal refers to the person for whom a BROKER executes an order; it may also mean the capital invested or the face amount of a loan.

**Principal and surety:** A contractual relationship whereby one party—the surety—agrees to pay the principal's debt or perform his or her obligation in case of the principal's default.

**Principle:** A fundamental, well-settled RULE OF LAW. A basic truth or undisputed legal doctrine; a given legal proposition that is clear and does not need to be proved.

**Printers ink statute:** Statutes enacted in a number of states making it a misdemeanor to use representations that are untrue, deceptive, or misleading in advertisements.

**Prior inconsistent statements:** Communications made by a witness before the time he or she takes the stand to testify in an action that contradict subsequent testimony given on the same exact facts.

**Prior restraint:** Government prohibition of speech in advance of publication.

**Prison:** A public building used for the confinement of people convicted of serious crimes.

**Prisoners' rights:** The nature and extent of the privileges afforded to individuals kept in custody or confinement against their will because they have been convicted of performing an unlawful act.

**Privacy:** In CONSTITUTIONAL LAW, the right of people to make personal decisions regarding intimate matters; under the COMMON LAW, the right of people to lead their lives in a manner that is reasonably secluded from public scrutiny, whether such scrutiny comes from a neighbor's prying eyes, an investigator's eavesdropping ears, or a news photographer's intrusive camera; and in statutory law, the right of people to be free from unwarranted drug testing and ELECTRONIC SURVEILLANCE.

**Private:** That which affects, characterizes, or belongs to an individual person, as opposed to the general public.

**Private attorney general:** A private citizen who commences a lawsuit to enforce a legal right that benefits the community as a whole.

**Private bill:** Legislation that benefits an individual or a locality. Also called special legislation or a private act.

**Private international law:** A branch of JURISPRUDENCE arising from the diverse laws of various nations that applies when private citizens of different countries interact or transact business with one another.

**Private law:** That portion of the law that defines, regulates, enforces, and administers relationships among individuals, associations, and corporations. As used in distinction to public law, the term means that part of the law that is administered between citizen and citizen, or that is concerned with the definition, regulation, and enforcement of rights in cases where both the person in whom the right inheres and the person upon whom the obligation rests are private individuals.

**Private roads:** A street or route that is designated by a public authority to accommodate a person or a group of people.

**Privateer:** A privately owned vessel that is commissioned by one power to attack merchant ships from a hostile power. The term also refers to the commander or a crew member of such a vessel.

**Privilege:** A particular benefit, advantage, or IMMUNITY enjoyed by a person or class of people that is not shared with others. A power of exemption against or beyond the law. It is not a right but, rather, exempts one from the performance of a duty, obligation, or liability.

**Privileged communication:** An exchange of information between two individuals in a confidential relationship.

**Privileges and immunities:** Concepts contained in the U.S. Constitution that place the citizens of each state on an equal basis with citizens of other states in respect to advantages resulting from citizenship in those states and citizenship in the United States.

**Privity:** A close, direct, or successive relationship; having a mutual interest or right.

**Privy:** One who has a direct, successive relationship to another individual; a coparticipant; one who has an interest in a matter; private.

**Prize:** Anything offered as a reward for a contest. It is distinguished from a *bet* or *wager* in that it is known before the event who is to give either the premium or the prize, and there is but one operation until the accomplishment of the act, thing, or purpose for which it is offered. In time of war, an enemy vessel or a ship captured at sea by a belligerent power.

**Prize courts:** Tribunals with jurisdiction to decide disputes involving captures made upon the high seas during times of war and to declare the captured property as a prize if it is lawfully subject to that sentence.

**Prize law:** During times of war, belligerent states may attempt to interfere with maritime commerce to prevent ships from carrying goods that will aid the war effort of an opponent. After ships are captured and brought to a friendly port, a local tribunal called a PRIZE COURT will determine the legality of the seizure, or the destruction of the vessel and cargo if the vessel cannot be sailed to a friendly port. The body of customary INTERNATIONAL LAW and treaties that determines the appropriateness of such actions is referred to as prize law.

**Pro:** *[Latin, For; in respect of; on account of; in behalf of.]*

**Pro bono:** Short for *pro bono publico* [*Latin, For the public good* ]. The designation given to the free legal work done by an attorney for indigent clients and religious, charitable, and other nonprofit entities.

**Pro forma:** As a matter of form or for the sake of form. Used to describe accounting, financial, and other statements or conclusions based upon assumed or anticipated facts.

**Pro hac vice:** For this turn; for this one particular occasion. For example, an out-of-state lawyer may be admitted to practice in a local jurisdiction for a particular case only.

**Pro rata:** *[Latin, Proportionately.]* A phrase that describes a division made according to a certain rate, percentage, or share.

**Pro se:** For one's own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself or herself in court.

**Pro tanto:** *[Latin, For so much; for as much as one is able; as far as it can go.]* A term that refers to a partial payment made on a claim.

**Pro tem:** *[Latin, For the time being.]* An abbreviation used for *pro tempore,* Latin for "temporary or provisional."

**Probable cause:** Apparent facts discovered through logical inquiry that would lead a reasonably intelligent and prudent person to believe that an accused person has committed a crime, thereby warranting his or her prosecution, or that a CAUSE OF ACTION has accrued, justifying a civil lawsuit.

**Probate:** The court process by which a will is proved valid or invalid. The legal process wherein the estate of a decedent is administered.

**Probation:** A sentence whereby a convict is released from confinement but is still under court supervision; a testing or a trial period. Probation can be given in lieu of a prison term or can suspend a prison sentence if the convict has consistently demonstrated good behavior.

The status of a convicted person who is given some freedom on the condition that for a specified period he or she act in a manner approved by a special officer to whom the person must report.

An initial period of employment during which a new, transferred, or promoted employee must show the ability to perform the required duties.

**Probationer:** A convict who is released from prison provided he maintains good behavior. One who is on PROBATION whereby she is given some freedom to reenter society subject to the condition that for a specified period the individual conduct herself in a manner approved by a special officer to whom the probationer must report.

**Probative:** Having the effect of proof, tending to prove, or actually proving.

**Procedural law:** The body of law that prescribes formal steps to be taken in enforcing legal rights.

**Procedure:** The methods by which legal rights are enforced; the specific machinery for carrying on a lawsuit, including process, the pleadings, RULES OF EVIDENCE, and rules of CIVIL PROCEDURE or CRIMINAL PROCEDURE.

**Proceeding:** A lawsuit; all or some part of a cause heard and determined by a court, an ADMINISTRATIVE AGENCY, or other judicial authority. Any legal step or action taken at the direction of, or by the authority of, a court or agency; any measures necessary to prosecute or defend an action.

**Proceeds:** The yield, income, money, or anything of value produced from a sale of property or a particular transaction.

**Process:** A series of actions, motions, or occurrences; a method, mode, or operation, whereby a result or effect is produced; normal or actual course of procedure; regular proceeding, as, the process of vegetation or decomposition; a chemical process; processes of nature.

In patent law, an art or method by which any particular result is produced. A definite combination of new or old elements, ingredients, operations, ways, or means to produce a new, improved, or old result, and any substantial change therein by omission, to the same or better result, or by modification or substitution, with different function, to the same or better result, is a new and patentable process.

In civil and criminal proceedings, any means used by a court to acquire or exercise its jurisdiction over a person or over specific property. A summons or summons and complaint; sometimes, a writ.

**Process server:** A person authorized by law to deliver papers, typically the complaint, to the defendant.

**Proclamation:** An act that formally declares to the general public that the government has acted in a particular way. A written or printed document issued by a superior government executive, such as the president or governor, which sets out such a declaration by the government.

**Proctor:** A person appointed to manage the affairs of another or to represent another in a judgment.

In ENGLISH LAW, the name formerly given to practitioners in ecclesiastical and ADMIRALTY courts who performed duties similar to those of solicitors in ordinary courts.

**Procure:** To cause something to happen; to find and obtain something or someone.

**Produce:** As a noun, the product of natural growth, labor, or capital. Articles produced or grown from or on the soil, or found in the soil.

As a verb, to bring forward; to show or exhibit; to bring into view or notice; as, to present a play, including its presentation in motion pictures. To produce witnesses or documents at trial in obedience to a subpoena or to be compelled to produce materials subject to discovery rules.

To make, originate, or yield, as gasoline. To bring to the surface, as oil. To yield, as revenue. Thus, funds are *produced* by taxation, not when the tax is levied, but when the sums are collected.

**Product liability:** The responsibility of a manufacturer or vendor of goods to compensate for injury caused by defective merchandise that it has provided for sale.

**Profanity:** Irreverence towards sacred things; particularly, an irreverent or blasphemous use of the name of God. Vulgar, irreverent, or coarse language.

**Professio juris:** The right of contracting parties to stipulate in the document the law that will govern their agreement.

**Professional responsibility:** The obligation of lawyers to adhere to rules of professional conduct.

**Proffer:** To offer or tender, as, the production of a document and offer of the same in evidence.

**Profit:** Most commonly, the gross proceeds of a business transaction less the costs of the transaction; i.e., net proceeds. Excess of revenues over expenses for a transaction; sometimes used synonymously with net income for the period. Gain realized from business or investment over and above expenditures.

Accession of good, valuable results, useful consequences, avail, or gain. The benefit, advantage, or pecuniary gain accruing to the owner or occupant of land from its actual use; as in the familiar phrase *rents, issues and profits,* or in the expression *mesne profits.*

**Profit a prendre:** *[French, Right of taking.]* The right of persons to share in the land owned by another.

**Progressive tax:** A type of graduated tax that applies higher tax rates as the income of the taxpayer increases.

**Prohibition:** The popular name for the period in U.S. history from 1920 to 1933 when the manufacture and sale of alcoholic beverages were illegal.

**Prohibition, writ of:** An order from a superior court to a lower court or tribunal directing the judge and the parties to cease the litigation because the lower court does not have proper jurisdiction to hear or determine the matters before it.

**Promise:** A written or oral declaration given in exchange for something of value that binds the maker to do, or forbear from, a certain specific act and gives to the person to whom the declara-

tion is made the right to expect and enforce performance or forbearance. An undertaking that something will or will not occur. It is a manifestation of intent to act, or refrain from acting, in a certain manner.

In the law of COMMERCIAL PAPER, an undertaking to pay. It must be more than an acknowledgment of an obligation.

**Promissory estoppel:** In the law of contracts, the doctrine that provides that if a party changes his or her position substantially either by acting or forbearing from acting in reliance upon a gratuitous promise, then that party can enforce the promise although the essential elements of a contract are not present.

**Promissory note:** A written, signed, unconditional promise to pay a certain amount of money on demand at a specified time. A written promise to pay money that is often used as a means to borrow funds or take out a loan.

**Promoter:** A person who devises a plan for a business venture; one who takes the preliminary steps necessary for the formation of a corporation.

**Promulgate:** To officially announce, to publish, to make known to the public; to formally announce a statute or a decision by a court.

**Proof:** The establishment of a fact by the use of evidence. Anything that can make a person believe that a fact or proposition is true or false. It is distinguishable from evidence in that proof is a broad term comprehending everything that may be adduced at a trial, whereas evidence is a narrow term describing certain types of proof that can be admitted at trial.

**Proper:** Fit; correct; reasonably sufficient. That which is well adapted or appropriate.

**Property right:** A generic term that refers to any type of right to specific property whether it is personal or real property, tangible or intangible; e.g., a professional athlete has a valuable property right in his or her name, photograph, and image, and such right may be saleable by the athlete.

**Property settlement:** An agreement entered into by a HUSBAND AND WIFE in connection with a DIVORCE that provides for the division of their assets between them.

**Proponent:** One who offers or proposes.

**Propound:** To offer or propose. To form or put forward an item, plan, or idea for discussion and ultimate acceptance or rejection.

**Proprietary:** As a noun, a proprietor or owner; one who has the exclusive title to a thing; one who possesses or holds the title to a thing in his or her own right; one who possesses the dominion or ownership of a thing in his or her own right.

As an adjective, belonging to ownership; owned by a particular person; belonging or pertaining to a proprietor; relating to a certain owner or proprietor.

**Prorate:** To divide proportionately. To adjust, share, or distribute something or some amount on a pro rata basis.

**Prorogation:** Prolonging or putting off to another day. The discontinuation or termination of a session of the legislature, parliament, or the like. In ENGLISH LAW, a prorogation is the CONTINUANCE of the parliament from one session to another, as an adjournment is a continuation of the session from day to day. In CIVIL LAW, giving time to do a thing beyond the term previously fixed.

**Prosecute:** To follow through; to commence and continue an action or judicial proceeding to its ultimate conclusion. To proceed against a defendant by charging that person with a crime and bringing him or her to trial.

**Prosecutor:** One who prosecutes another for a crime in the name of the government.

**Prospectus:** A document, notice, circular, advertisement, letter, or communication in written form or by radio or television that offers any security for sale, or confirms the sale of any security.

**Prostitution:** The act of offering one's self for hire to engage in sexual relations.

**Protective custody:** An arrangement whereby a person is safeguarded by law enforcement authorities in a location other than the person's home because his or her safety is seriously threatened.

**Protective order:** A court order, direction, decree, or command to protect a person from further harassment, SERVICE OF PROCESS, or discovery.

**Protectorate:** A form of international guardianship that arises under INTERNATIONAL LAW when a weaker state surrenders by treaty the management of some or all of its international affairs to a stronger state.

**Protest:** A formal declaration whereby a person expresses a personal objection or disapproval of an act. A written statement, made by a notary, at the request of a holder of a bill or a note that describes the bill or note and declares that on a certain day the instrument was presented for, and refused, payment.

**Prothonotary:** A title given to the principal clerk of a court.

**Protocol:** A brief summary; the minutes of a meeting; the etiquette of diplomacy.

**Province:** The district into which a country has been divided; as, the province of Ontario in Canada. More loosely, a sphere of activity or a profession such as medicine or law.

**Provisional:** Temporary; not permanent. Tentative, contingent, preliminary.

**Proviso:** A condition, stipulation, or limitation inserted in a document.

**Provocation:** Conduct by which one induces another to do a particular deed; the act of inducing rage, anger, or resentment in another person that may cause that person to engage in an illegal act.

**Proximate cause:** An act from which an injury results as a natural, direct, uninterrupted consequence and without which the injury would not have occurred.

**Proxy:** A representative; an agent; a document appointing a representative.

**Prudent person rule:** A standard that requires that a fiduciary entrusted with funds for investment may invest such funds only in SECURITIES that any reasonable individual interested in receiving a good return of income while preserving his or her capital would purchase.

**Public:** As a noun, the whole body politic, or the aggregate of the citizens of a state, nation, or municipality. The community at large, without reference to the geographical limits of any corporation like a city, town, or county; the people.

As an adjective, open to all; notorious. Open to common use. Belonging to the people at large; relating to or affecting the whole people of a state, nation, or community; not limited or restricted to any particular class of the community.

**Public administrative bodies:** Agencies endowed with governmental functions.

**Public contract:** An agreement to perform a particular task to benefit the community at large that is financed by government funds.

**Public defender:** An attorney appointed by a court or employed by the government to represent indigent defendants in criminal actions.

**Public domain:** Land that is owned by the United States. In COPYRIGHT law, literary or creative works over which the creator no longer has an exclusive right to restrict, or receive a royalty for, their reproduction or use but which can be freely copied by the public.

**Public figure:** A description applied in LIBEL AND SLANDER actions, as well as in those alleging invasion of privacy, to anyone who has gained prominence in the community as a result of his or her name or exploits, whether willingly or unwillingly.

**Public interest:** Anything affecting the rights, health, or finances of the public at large.

**Public lands:** Land that is owned by the United States government.

**Public law:** A general classification of law concerned with the political and sovereign capacity of a state.

**Public offering:** An issue of SECURITIES offered for sale to the public.

**Public policy:** A principle that no person or government official can legally perform an act that tends to injure the public.

**Public utilities:** Businesses that provide the public with necessities, such as water, electricity, natural gas, and telephone and telegraph communication.

**Publication:** Making something known to the community at large, exhibiting, displaying, disclosing, or revealing.

**Publish:** To circulate, distribute, or print information for the public at large.

In LIBEL AND SLANDER law, to utter to a third person or to make public a defamatory statement; in COMMERCIAL PAPER law, to present an instrument for payment or declare or assert that a forged instrument is genuine.

**Publishing law:** The body of law relating to the publication of books, magazines, newspapers, electronic materials, and other artistic works.

**Puffing:** An opinion or judgment that is not made as a representation of fact.

**Punishment:** The imposition of hardship in response to misconduct.

**Punitive damages:** Monetary compensation awarded to an injured party that goes beyond that which is necessary to compensate the individual for losses and that is intended to punish the wrongdoer.

**Purchase:** To buy; the transfer of property from one person to another by an agreement. Under the UNIFORM COMMERCIAL CODE (UCC), taking by sale, discount, negotiation, mortgage, pledge, lien, issue, reissue, gift, or any voluntary transaction.

**Purchase money mortgage:** A security device entered into when the seller of property, as opposed to a bank or financial institution, advances a sum of money or credit to the purchaser in return for holding the mortgage on the property.

**Purchase order:** A document authorizing a seller to deliver goods, with payment to be made at a later date.

**Pure speech:** Written and spoken words that fall within the scope of protection provided by the FIRST AMENDMENT to the Constitution.

**Purge:** To exonerate someone; to clear someone of guilt, charges, or accusations.

**Purport:** To convey, imply, or profess; to have an appearance or effect.

**Pursuant:** According to a prescribed method or some authority. To follow after or follow out; to execute or carry out by reason of something.

**Purview:** The part of a statute or a law that delineates its purpose and scope.

**Put:** An option—a right that operates as a continuing proposal—given in exchange for consideration—something of value—permitting its holder to sell a particular stock or commodity at a fixed price for a stated quantity and within a limited time period.

**Putative:** Alleged; supposed; reputed.

**Qua:** *[Latin, Considered as; in the character or capacity of.]* For example, "the trustee *qua* trustee [that is, in his or her role as trustee] is not liable."

**Qualification:** A particular attribute, quality, property, or possession that an individual must have in order to be eligible to fill an office or perform a public duty or function.

**Qualified acceptance:** In contract law, an assent to an offer that is either conditional or partial and alters the offer by changing the time, amount, mode, or place of payment.

**Quantum meruit:** *[Latin, As much as is deserved.]* In the law of contracts, a doctrine by which the law infers a promise to pay a reasonable amount for labor and materials furnished, even in the absence of a specific legally enforceable agreement between the parties.

**Quantum valebant:** *[Latin, As much as they were worth.]* An archaic form of PLEADING a lawsuit to recover payment for goods that have been sold and delivered.

**Quare:** *[Latin, Wherefore; for what reason; on what account.]* The introductory term used in the Latin form of a number of common-law writs at the beginning of the statement of the reason for the dispute.

**Quash:** To overthrow; to annul; to make void or declare invalid; e.g., "quash a subpoena."

**Quasi:** *[Latin, Almost as it were; as if; analogous to.]* In the legal sense, the term denotes that one subject has certain characteristics in common with another subject but that intrinsic and material differences exist between them.

**Quasi contract:** An obligation that the law creates in the absence of an agreement between the parties. It is invoked by the courts where UNJUST ENRICHMENT, which occurs when a person retains money or benefits that in all fairness belong to another, would exist without judicial relief.

**Quasi in rem jurisdiction:** The power of a court to hear a case and enforce a judgment against a party, even if the party is not personally before the court, solely because the party has an interest in real property or PERSONAL PROPERTY within the geographical limits of the court.

**Quasi-judicial:** The action taken and discretion exercised by public administrative agencies or bodies that are obliged to investigate or ascertain facts and draw conclusions from them as the foundation for official actions.

**Quasi-legislative:** The capacity in which a public administrative agency or body acts when it makes rules and regulations.

**Question of fact:** An issue that involves the resolution of a factual dispute or controversy and is within the sphere of the decisions to be made by a jury.

**Question of law:** An issue that is within the province of the judge, as opposed to the jury, because it involves the application or interpretation of legal principles or statutes.

**Qui tam actions:** Civil actions maintained by private persons on behalf of both themselves and the government to recover damages or to enforce penalties available under a statute prohibiting specified conduct. The term *qui tam* is short for the Latin *qui tam pro domino rege quam pro se ipso in hac parte sequitur,* which means "who brings the action for the king as well as for himself."

**Quick assets:** Personal property that is readily marketable.

**Quid pro quo:** *[Latin, What for what or Something for something.]* The mutual consideration that passes between two parties to a contractual agreement, thereby rendering the agreement valid and binding.

**Quiet enjoyment:** A COVENANT that promises that the grantee or tenant of an estate in real property will be able to possess the premises in peace, without disturbance by hostile claimants.

**Quiet title action:** A proceeding to establish an individual's right to ownership of real property against one or more adverse claimants.

**Quit:** To vacate; remove from; surrender possession.

**Quitclaim deed:** An instrument of conveyance of real property that passes any title, claim, or interest that the grantor has in the premises but does not make any representations as to the validity of such title.

**Quo animo:** *[Latin, With what intention or motive.]* A term sometimes used instead of the word *animus,* which means design or motive.

**Quo warranto:** A legal proceeding during which an individual's right to hold an office or governmental privilege is challenged.

**Quorum:** A majority of an entire body; e.g., a quorum of a legislative assembly.

**Racial and ethnic discrimination:** Acts of bias based on the race or ethnicity of the victim.

**Racial profiling:** The consideration of race, ethnicity, or national origin by a law enforcement officer in deciding when and how to intervene in an enforcement capacity.

**Racketeering:** Traditionally, obtaining or extorting money illegally or carrying on illegal business activities, usually by ORGANIZED CRIME. A pattern of illegal activity carried out as part of an enterprise that is owned or controlled by those who are engaged in the illegal activity. The latter definition derives from the federal Racketeer Influenced and Corruption Organizations Act (RICO), a set of laws (18 U.S.C.A. § 1961 et seq. [1970]) specifically designed to punish racketeering by business enterprises.

**Rape:** A criminal offense defined in most states as forcible sexual relations with a person against that person's will.

**Ratable:** That which can be appraised, assessed, or adjusted through the application of a formula or percentage.

**Rate:** Value, measure, or degree; a charge, payment, or price determined through the application of a mathematical formula or based upon a scale or standard.

**Ratification:** The confirmation or adoption of an act that has already been performed.

**Ratio decidendi:** *[Latin, The ground or reason of decision.]* The legal principle upon which the decision in a specific case is founded.

**Rational basis test:** A judicial standard of review that examines whether a legislature had a reasonable and not an ARBITRARY basis for enacting a particular statute.

**Ravishment:** Unlawful carnal knowledge of a female by a male by force, against her will and without her consent.

**Re:** *[Latin, In the matter of; in the case of.]*

**Real:** In CIVIL LAW, relating to a *thing* (whether movable or immovable), as distinguished from a person. Relating to *land,* as distinguished from PERSONAL PROPERTY. This term is applied to lands, tenements, and hereditaments.

**Real actions:** Lawsuits concerning real property, or land. Under the COMMON LAW, one of three categories of forms of actions, the procedures by which a lawsuit was begun.

**Real estate:** Land, buildings, and things permanently attached to land and buildings. Also called realty and real property.

**Real evidence:** Probative matter furnished by items that are actually on view, as opposed to a verbal description of them by a witness.

**Realized:** Actual; converted into cash.

**Reasonable:** Suitable; just; proper; ordinary; fair; usual.

**Reasonable doubt:** A standard of proof that must be surpassed to convict an accused in a criminal proceeding.

**Reasonable force:** The amount of force necessary to protect oneself or one's property. Reasonable force is a term associated with defending one's person or property from a violent attack, theft, or other type of unlawful aggression. It may be used as a defense in a criminal trial or to defend oneself in a suit alleging tortious conduct. If one uses excessive force, or more than the force necessary for such protection, he or she may be considered to have forfeited the right to defense. Reasonable force is also known as *legal force.*

**Reasonable person:** A phrase frequently used in TORT and CRIMINAL LAW to denote a hypothetical person in society who exercises average care, skill, and judgment in conduct and who serves as a comparative standard for determining liability.

**Reasonable time:** In the absence of an express or fixed time established by the parties to an agreement or contract (especially one that falls under the purview of the UNIFORM COMMERCIAL CODE [UCC]), any time which is not manifestly *unreasonable* under the circumstances. For example, if a contract does not fix a specific time for performance, the law will infer (and impose) a reasonable time for such performance. This is defined as that amount of time which is fairly necessary, conveniently, to do what the contract requires to be done, as soon as circumstances permit. The term "reasonable time" has other (related) applications: UCC 2-206(2) requires that acceptance of an offer be made within a "reasonable time" if no time is specified.

The reasonableness or unreasonableness of time used or taken by a party may be the subject of JUDICIAL REVIEW in light of the nature, purpose, and circumstances of each case. In considering whether there has been unreasonable delay in performance, a court may also consider other factors such as prior dealings between the parties, business routine or custom within the trade, and whether there were any objective manifestations of expectation expressed between the parties.

**Reasonable woman:** A standard used by fact finders in SEXUAL HARASSMENT litigation to determine whether sexual harassment has occurred.

**Rebate:** Discount; diminution of interest on capital lent in consideration of prompt repayment thereof; reduction of a stipulated charge that is not credited in advance but is returned subsequent to payment in full.

**Rebus sic stantibus:** *[Latin, At this point of affairs; in these circumstances.]* A tacit condition attached to all treaties to the effect that they will no longer be binding as soon as the state of facts and conditions upon which they were based changes to a substantial degree.

**Rebut:** To defeat, dispute, or remove the effect of the other side's facts or arguments in a particular case or controversy.

**Rebuttable presumption:** A conclusion as to the existence or nonexistence of a fact that a judge or jury must draw when certain evidence has been introduced and admitted as true in a lawsuit but that can be contradicted by evidence to the contrary.

**Rebutter:** In COMMON-LAW PLEADING, the response made by a defendant to a plaintiff's surrejoinder, which rebuts earlier denials made by the defendant.

**Recall:** The right or procedure by which a public official may be removed from a position by a vote of the people prior to the end of the term of office.

**Recaption:** Regaining possession of; taking back.

**Receipt:** Acknowledgment in writing that something of value, or cash, has been placed into an individual's possession; written confirmation of payment rendered. *Receipt of goods* refers to the act of taking physical possession of them.

**Receiver:** An archaic term, used in common law and CIVIL LAW countries, to designate an individual who holds and conceals stolen goods for thieves. Currently an independent individual appointed by a court to handle money or property during a lawsuit.

**Receivership:** A court order whereby all the property subject to dispute in a legal action is placed under the dominion and control of an independent person known as a receiver.

**Receiving stolen property:** The offense of acquiring goods with the knowledge that they have been stolen, extorted, embezzled, or unlawfully taken in any manner.

**Recess:** In the practice of courts, a brief interval during which all business is suspended without an adjournment.

**Recidivism:** The behavior of a repeat or habitual criminal. A measurement of the rate at which offenders commit other crimes, either by arrest or conviction baselines, after being released from incarceration.

**Reciprocal:** Bilateral; two-sided; mutual; interchanged.

**Recital:** A formal statement appearing in a legal document such as a deed that is preliminary in nature and provides an explanation of the reasons for the transaction.

**Recklessness:** Rashness; heedlessness; wanton conduct. The state of mind accompanying an act that either pays no regard to its probably or possibly injurious consequences, or which, though foreseeing such consequences, persists in spite of such knowledge.

**Recognition:** The confirmation or ACKNOWLEDGMENT of the existence of an act performed, of an event that transpired, or of a person who is authorized by another to act in a particular manner.

**Recognizance:** A recorded obligation, entered into before a tribunal, in which an individual pledges to perform a specific act or to subscribe to a certain course of conduct.

**Reconciliation:** The restoration of peaceful or amicable relations between two individuals who were previously in conflict with one another.

**Reconveyance:** The transfer of real property that takes place when a mortgage is fully paid off and the land is returned to the owner free from the former debt.

**Recording of land titles:** A process by which proof of ownership of real property is filed in the appropriate county office or court to allow purchasers, creditors, and other interested parties to determine the status of the property interests therein.

**Records:** Written accounts of acts, transactions, or instruments that are drawn up pursuant to legal authority by an appropriate officer and appointed to be retained as memorials or permanent evidence of matters to which they are related.

**Recoupment:** To recover a loss by a subsequent gain. In PLEADING, to set forth a claim against the plaintiff when an action is brought against one as a defendant. Keeping back of something that is due, because there is an equitable reason to withhold it. A right of the defendant to have a deduction from the amount of the plaintiff's damages, for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the same contract.

**Recourse:** The right of an individual who is holding a COMMERCIAL PAPER, such as a check or promissory note, to receive payment on it from anyone who has signed it if the individual who originally made it is unable, or refuses, to tender payment.

**Recovered memory:** The remembrance of traumatic childhood events, usually involving SEXUAL ABUSE, many years after the events occurred.

**Recovery:** The acquisition of something of value through the judgment of a court, as the result of a lawsuit initiated for that purpose.

**Recrimination:** A charge made by an individual who is being accused of some act against the accuser.

**Recuse:** To disqualify or remove oneself as a judge over a particular proceeding because of one's conflict of interest. Recusal, or the judge's act of disqualifying himself or herself from presiding over a proceeding, is based on the MAXIM that judges are charged with a duty of impartiality in administering justice.

**Redemption:** The liberation of an estate in real property from a mortgage.

**Redlining:** A discriminatory practice whereby lending institutions refuse to make mortgage loans, regardless of an applicant's credit history, on properties in particular areas in which conditions are allegedly deteriorating.

**Redress:** Compensation for injuries sustained; recovery or restitution for harm or injury; damages or equitable relief. Access to the courts to gain REPARATION for a wrong.

**Reductio ad absurdum:** *[Latin, Reduction to absurdity.]* In logic, a method employed to disprove an argument by illustrating how it leads to an absurd consequence.

**Referee:** A judicial officer who presides over civil hearings but usually does not have the authority or power to render judgment.

**Reference:** The process by which a tribunal sends a civil action, or a particular issue in the action, to an individual who has been appointed by the tribunal to hear and decide upon it, or to obtain evidence, and make a report to the court.

**Referendum:** The right reserved to the people to approve or reject an act of the legislature, or the right of the people to approve or reject legislation that has been referred to them by the legislature.

**Reformation:** A remedy utilized by the courts to correct a written instrument so that it conforms to the ORIGINAL INTENT of the parties to such an instrument.

**Reformatories:** State institutions for the confinement of juvenile delinquents.

**Refreshing memory:** The process of aiding a witness's recollection of certain details during a trial by allowing him or her to consult documents, memoranda, or books in order to better remember past transactions or events about which he or she is testifying.

**Refugees:** Individuals who leave their native country for social, political, or religious reasons, or who are forced to leave as a result of any type of disaster, including war, political upheaval, and famine.

**Refunding:** Reimbursing funds in restitution or repayment. The process of refinancing or borrowing money, ordinarily through the sale of bonds, to pay off an existing debt with the proceeds derived therefrom.

**Register:** To record, or enter precisely in a designated place, certain information in the public records as is mandated by statute. A book of public records.

**Register of deeds:** The designation, in certain jurisdictions, of the public officers who record documents that establish ownership of property, mortgages, and other instruments that relate to real property in official record books provided and maintained for such purpose.

**Registrar:** The public official charged with the duty of making and maintaining public records.

**Registration:** Enrollment; the process of recording entries in an official book.

**Registration of land titles:** A system by which ownership of real property is established through the issuance of an official certificate indicating the name of the individual in whom such ownership is vested.

**Regressive tax:** A tax with a rate that decreases as the taxpayer's income increases.

**Regular:** Customary; usual; with no unexpected or unusual variations; in conformity with ordinary practice.

**Regulation:** A rule of order having the force of law, prescribed by a superior or competent authority, relating to the actions of those under the authority's control.

**Rehabilitation:** The restoration of former rights, authority, or abilities.

**Reinstate:** To restore to a condition that has terminated or been lost; to reestablish.

**Reinsurance:** The contract made between an insurance company and a third party to protect the insurance company from losses. The contract provides for the third party to pay for the loss sustained by the insurance company when the company makes a payment on the original contract.

**Rejoinder:** The answer made by a defendant in the second stage of COMMON-LAW PLEADING that rebuts or denies the assertions made in the plaintiff's replication.

**Relation:** Kin; relative. The connection of two individuals, or their situation with respect to each other, who are associated, either by law, agreement, or kinship in a social status or union for purposes of domestic life, such as PARENT AND CHILD or HUSBAND AND WIFE.

**Relator:** The individual in whose name a legal action is brought by a state; the individual who relates the facts on which an action is based.

**Release:** A contractual agreement by which one individual assents to relinquish a claim or right under the law to another individual against whom such claim or right is enforceable.

**Release time program:** The name of the arrangement by which local public school boards permit students to be dismissed from classes prior to the completion of the regular school day for purposes of religious instruction.

**Relevancy:** The tendency of a fact offered as evidence in a lawsuit to prove or disprove the truth of a point in issue.

**Relief:** Financial assistance provided to the indigent by the government. The redress, or benefit, given by a court to an individual who brings a legal action.

**Remainder:** A future interest held by one person in the real property of another that will take effect upon the expiration of the other property interests created at the same time as the future interest.

**Remand:** To send back.

**Remedial statute:** A law enacted for the purpose of correcting a defect in a prior law, or in order to provide a remedy where none previously existed.

**Remedy:** The manner in which a right is enforced or satisfied by a court when some harm or injury, recognized by society as a wrongful act, is inflicted upon an individual.

**Remission:** Extinguishment or release of a debt.

**Remit:** To transmit or send. To relinquish or surrender, such as in the case of a fine, punishment, or sentence.

**Remittance:** Money sent from one individual to another in the form of cash, check, or some other manner.

**Remittitur:** The procedural process by which an excessive verdict of the jury is reduced. If money damages awarded by a jury are grossly excessive as a MATTER OF LAW, the judge may order the plaintiff to remit a portion of the award.

**Removal:** The transfer of a person or thing from one place to another. The transfer of a case from one court to another. In this sense, removal generally refers to a transfer from a court in one jurisdiction to a court in another, whereas a change of venue may be granted simply to move a case to another location within the same jurisdiction.

**Render:** Return; yield; pay or perform, as in charges or services.

**Renewal:** Rehabilitation; reestablishment; substitution of a new right or obligation for another of the same or similar nature.

**Rent strike:** An organized protest on the part of tenants in which they withhold the payment of consideration for the use or occupation of property from their landlord until their grievances are settled.

**Renunciation:** The ABANDONMENT of a right; repudiation; rejection.

**Renvoi:** The process by which a court adopts the rules of a foreign jurisdiction with respect to any conflict of laws that arises.

**Reorganization:** The process of carrying out, through agreements and legal proceedings, a business plan for winding up the affairs of, or foreclosing a mortgage upon, the property of a corporation that has become insolvent.

**Reorganization plan:** A scheme authorized by federal law and promulgated by the president whereby he or she alters the structure of federal agencies to promote government efficiency and economy through a transfer, consolidation, coordination, authorization, or ABOLITION of functions.

**Reparable injury:** A TORT, or civil wrong, that can be compensated through the payment of pecuniary damages, as distinguished from irreparable injury or harm that is not compensable through the payment of money.

**Reparation:** Compensation for an injury; redress for a wrong inflicted.

**Repeal:** The ANNULMENT or abrogation of a previously existing statute by the enactment of a later law that revokes the former law.

**Replevin:** A legal action to recover the possession of items of PERSONAL PROPERTY.

**Replication:** In COMMON-LAW PLEADING, the response of a plaintiff to the defendant's plea in an action at law, or to the defendant's answer in a suit in EQUITY.

**Reply:** The PLEADING in which a plaintiff responds to the defendant's demand for relief asserted in a set-off or counterclaim.

**Report:** An official or formal statement of facts or proceedings. To give an account of; to relate; to tell or convey information; the written statement of such an account.

**Reporter:** One who prepares a summary or gives an account. A court reporter is a person who records court proceedings as they take place and then later transcribes the account. A published volume of the decisions of a court or a group of courts.

**Repossession:** The taking back of an item that has been sold on credit and delivered to the purchaser because the payments have not been made on it.

**Represent:** To exhibit or expose; to appear in the character of.

**Representation:** Any action or conduct that can be turned into a statement of fact.

**Representative:** An individual who stands in the place of another.

**Representative action:** A legal action in which one or a few members of a class sue on behalf of themselves and other members of the same class; a lawsuit brought by the stockholders of a corporation, on its behalf, for the enforcement of a corporate right.

**Reprieve:** The suspension of the execution of the death penalty for a period of time.

**Reprisal:** The act of punishing another for some injury the latter caused. In terms of INTERNATIONAL LAW, a reprisal is the forcible taking, in time of peace, by the government of one country of the property or territory belonging to another country or belonging to the citizens of the other country, as redress intended to satisfy a claim.

**Republic:** That form of government in which the administration of affairs is open to all the citizens. A political unit or "state," independent of its form of government.

**Republication:** The reexecution or reestablishment by a testator of a will that he or she had once revoked.

**Repudiation:** The rejection or refusal of a duty, relation, right, or privilege.

**Repugnancy:** An inconsistency or opposition between two or more clauses of the same deed, contract, or statute, between two or more material allegations of the same PLEADING or between any two writings.

**Requirements contract:** A written agreement whereby a buyer assents to purchase for a sufficient consideration (the inducement to enter into an agreement) all the merchandise of a designated type that he or she might require for use in his or her own established business.

**Requisition:** A written demand; a formal request or requirement. The formal demand by one government upon another, or by the governor of one state upon the governor of another state, of the surrender of a fugitive from justice. The taking or seizure of property by government.

**Res:** *[Latin, A thing.]* An object, a subject matter, or a status against which legal proceedings have been instituted.

**Res gestae:** *[Latin, Things done.]* Secondhand statements considered trustworthy for the purpose of admission as evidence in a lawsuit when repeated by a witness because they were made spontaneously and concurrently with an event.

**Res ipsa loquitur:** *[Latin, The thing speaks for itself.]* A rebuttable presumption or inference that the defendant was negligent, which arises upon proof that the instrumentality or condition causing the injury was in the defendant's exclusive control and that the accident was one that ordinarily does not occur in the absence of NEGLIGENCE.

**Res judicata:** *[Latin, A thing adjudged.]* A rule that a final judgment on the merits by a court having jurisdiction is conclusive between the parties to a suit as to all matters that were litigated or that could have been litigated in that suit.

**Rescind:** To declare a contract void—of no legal force or binding effect—from its inception and thereby restore the parties to the positions they would have occupied had no contract ever been made.

**Rescission:** The abrogation of a contract, effective from its inception, thereby restoring the parties to the positions they would have occupied if no contract had ever been formed.

**Rescue:** The crime of forcibly and knowingly freeing another from arrest, imprisonment, or legal custody.

In ADMIRALTY AND MARITIME LAW, the taking back of property seized as prize from the possession of the captors by the party who originally lost it.

**Rescue doctrine:** The principle that one who has, through her NEGLIGENCE, endangered the safety of another can be held liable for injuries sustained by a third person who attempts to save the imperiled person from injury.

**Reservation:** A clause in a deed of real property whereby the grantor, one who transfers property, creates and retains for the grantor some right or interest in the estate granted, such as rent or an EASEMENT, a right of use over the land of another. A large tract of land that is withdrawn by public authority from sale or settlement and appropriated to specific public uses, such as parks or military posts. A tract of land under the control of the Bureau of Indian Affairs to which an American Indian tribe retains its original title to ownership, or that has been set aside from the public domain for use by a tribe.

**Reserve:** Funds set aside to cover future expenses, losses, or claims. To retain; to keep in store for future or special use; to postpone to a future time.

**Residence:** Personal presence at some place of abode.

**Residency:** A duration of stay required by state and local laws that entitles a person to the legal protection and benefits provided by applicable statutes.

**Residuary clause:** A provision in a will that disposes of property not expressly disposed of by other provisions of the will.

**Residuum:** That which remains after any process of separation or deduction; a balance; that which remains of a decedent's estate after debts have been paid and gifts deducted.

**Resolution:** The official expression of the opinion or will of a legislative body.

**Respondeat superior:** *[Latin, Let the master answer.]* A common-law doctrine that makes an employer liable for the actions of an employee when the actions take place within the scope of employment.

**Respondent:** In EQUITY practice, the party who answers a bill or other proceeding in equity. The party against whom an appeal or motion, an application for a court order, is instituted and who is required to answer in order to protect his or her interests.

**Responsive pleading:** A formal declaration by a party in reply to a prior declaration by an opponent.

**Rest:** To cease motion, exertion, or labor.

**Restatement of law:** A series of volumes regarded as an authoritative work of legal scholarship prepared by the authors, scholars, and members of the judiciary who comprise the American Law Institute (ALI), which presents a survey of a general area of the law and the changes that have occurred therein.

**Restitution:** In the context of CRIMINAL LAW, state programs under which an offender is required, as a condition of his or her sentence, to repay money or donate services to the victim or society; with respect to maritime law, the restoration of articles lost by jettison, done when the remainder of the cargo has been saved, at the general charge of the owners of the cargo; in the law of TORTS, or civil wrongs, a measure of damages; in regard to contract law, the restoration of a party injured by a breach of contract to the position that party occupied before she or he entered the contract.

**Restorative justice:** A philosophical framework and a series of programs for the criminal justice system that emphasize the need to repair the harm done to crime victims through a process of negotiation, mediation, victim empowerment, and REPARATION.

**Restraining order:** A command of the court issued upon the filing of an application for an INJUNCTION, prohibiting the defendant from performing a threatened act until a hearing on the application can be held.

**Restraint of trade:** Contracts or combinations that tend, or are designed, to eliminate or stifle competition, create a MONOPOLY, artificially maintain prices, or otherwise hamper or obstruct the course of trade as it would be carried on if it were left to the control of natural economic forces.

**Restrictive covenant:** A provision in a deed limiting the use of the property and prohibiting certain uses. A clause in contracts of partnership and employment prohibiting a contracting party from engaging in similar employment for a specified period of time within a certain geographical area.

**Restrictive indorsement:** The act of a payee or other holder of an instrument, such as a check, that consists of signing his or her name upon the back of the instrument in order to transfer it to another and wording the signature in such a manner as to bar the further negotiability of the instrument.

**Resulting trust:** An arrangement whereby one person holds property for the benefit of another, which is implied by a court in certain cases where a person transfers property to another and gives him or her legal title to it but does not intend him or her to have an equitable or beneficial interest in the property.

**Retainer:** A contract between attorney and client specifying the nature of the services to be rendered and the cost of the services.

**Retaliatory eviction:** The act of a landlord in ejecting or attempting to eject a tenant from the rented premises, or in refusing to renew a lease, because of the tenant's complaints or participation in a tenant's union or in similar activities with which the landlord is not in accord.

**Retorsion:** A phrase used in INTERNATIONAL LAW to describe retaliatory action taken by one foreign government against another for the stringent or harsh regulation or treatment of its citizens who are within the geographical boundaries of the foreign country.

**Retraction:** In the law of DEFAMATION, a formal recanting of the libelous or slanderous material.

**Retro:** *[Latin, Back; backward; behind.]* A prefix used to designate a prior condition or time.

**Retroactive:** Having reference to things that happened in the past, prior to the occurrence of the act in question.

**Return:** To bring, carry, or send back; to restore, redeliver, or replace in the custody of someone. Merchandise brought back to a seller for credit or a refund. The profit made on a sale; the income from an investment. A schedule of information required by some governmental agencies, such as the tax return that must be submitted to the INTERNAL REVENUE SERVICE.

The official report made by a court, body of magistrates, or other official board charged with counting votes cast in an election. The redelivery of a writ, notice, or other form of legal process to the court after its proper service on the defendant or after it cannot be served.

**Return day:** The day on which votes are counted and the election results announced. The day named in a writ or other form of legal process as the date when the response to that paper must be made.

The day on which an officer, such as a U.S. marshal, must file proof with the court that he or she has served legal process on a defendant or that he or she cannot serve the papers. The statement is made under oath and is called the return or return of process.

**Revenue:** Return or profit such as the annual or periodic rents, profits, interest, or income from any type of real or PERSONAL PROPERTY, received by an individual, a corporation, or a government.

**Reverse:** To overthrow, invalidate, repeal, or revoke.

**Reversion:** Any future interest kept by a person who transfers property to another.

**Reverter, possibility of:** A contingent future interest in real property that a grantor of a determinable fee possesses after he or she has conveyed property.

**Review:** To reexamine judicially or administratively; a judicial reconsideration for purposes of correction, for example, the examination of a case by an appellate court.

**Revised statutes:** A body of statutes that have been revised, collected, arranged in order, and reenacted as a whole. The legal title of the collection of compiled laws of the United States, as well as some of the individual states.

**Revival of an action:** A mechanism of legal procedure that operates at the PLEADING stage of litigation to subsequently renew an action that has been abated, terminated, or suspended for reasons other than the merits of the claim.

**Revive:** To renew.

**Revocation:** The recall of some power or authority that has been granted.

**Revoke:** To annul or make void by recalling or taking back; to cancel, rescind, repeal, or reverse.

**Revolution:** A sudden, tumultuous, and radical transformation of an entire system of government, including its legal and political components.

**Revolving charge:** A type of credit arrangement that permits a buyer or a borrower to purchase merchandise or obtain loans on a continuing basis as long as the outstanding balance of the account does not exceed a certain limit.

**Reward:** A sum of money or other compensation offered to the public in general, or to a class of persons, for the performance of a special service.

**Rex:** *[Latin, The king.]* The phrase used to designate the king as the party prosecuting an accused in a criminal action, such as an action entitled *Rex v. Doe.*

**Rider:** A schedule or writing annexed to a document such as a legislative bill or insurance policy.

**Right:** In an abstract sense, justice, ethical correctness, or harmony with the RULES OF LAW or the principles of morals. In a concrete legal sense, a power, privilege, demand, or claim possessed by a particular person by virtue of law.

**Right of action:** The privilege of instituting a lawsuit arising from a particular transaction or state of facts, such as a suit that is based on a contract or a TORT, a civil wrong.

**Right of election:** The prerogative of a surviving spouse to accept the provision the dead spouse made in the will or to disregard the will and claim the share specified by statute.

**Right of reentry:** A right, retained by the grantor at the time land is conveyed, to reenter and take possession of the land if a certain condition occurs or fails to occur.

**Right of survivorship:** The power of the successor or successors of a deceased individual to acquire the property of that individual upon his or her death; a distinguishing feature of JOINT TENANCY.

**Right of way:** An EASEMENT, a privilege to pass over the land of another, whereby the holder of the easement acquires only a reasonable and usual enjoyment of the property, and the owner of the land retains the benefits and privileges of ownership consistent with the easement.

**Right to counsel:** The legal responsibility for the government to provide every defendant in a criminal action with LEGAL REPRESENTATION that also must be deemed *effective.*

**Right-to-work laws:** State laws permitted by section 14(b) of the TAFT-HARTLEY ACT that provide in general that employees are not required to join a union as a condition of getting or retaining a job.

**Riot:** A disturbance of the peace by several persons, assembled and acting with a common intent in executing a lawful or unlawful enterprise in a violent and turbulent manner.

**Riparian rights:** The rights, which belong to landowners through whose property a natural watercourse runs, to the benefit of such stream for all purposes to which it can be applied.

**Ripeness:** The mandate contained in Article III of the Constitution that requires an appellate court to consider whether a case has matured into a controversy worthy of adjudication before it can hear the case.

**Risk:** The potential danger that threatens to harm or destroy an object, event, or person.

**Risk arbitrage:** The purchase of stock in a corporation that appears to be the target of an imminent takeover in the hope of making large profits if the takeover occurs.

**Robbery:** The taking of money or goods in the possession of another, from his or her person or immediate presence, by force or intimidation.

**Roe:** A fictitious surname used for an unknown or anonymous person or for a hypothetical person in an illustration.

**Rogatory letters:** A commission from one judge to another judge requesting the latter to examine a witness in his or her court, with the testimony to be provided to the first judge.

**Roll:** To commit a ROBBERY by force. A record of the proceedings of a court or public office.

**Royalty:** Compensation for the use of property, usually copyrighted works, patented inventions, or natural resources, expressed as a percentage of receipts from using the property or as a payment for each unit produced.

**Rubric of a statute:** The title of a statute indicating the objective of the legislation and providing a means of interpreting the body of the act.

**Rule:** To command or require pursuant to a principle of the court, as to rule the sheriff to serve the summons.

To settle or decide a point of law at a trial or hearing.

An established standard, guide, or regulation governing conduct, procedure, or action.

**Rule against accumulations:** A principle that prohibits adding income or interest earned by a trust back into the principal of the fund beyond the time allowed by the RULE AGAINST PERPETUITIES.

**Rule against perpetuities:** Under the COMMON LAW, the principle that no interest in property is valid unless it vests not later than twenty-one years, plus the period of gestation, after some life or lives in being which exist at the time of the creation of the interest.

**Rule in Shelley's case:** An English common-law doctrine that provided that a conveyance that attempts to give a person a life estate, with a remainder to that person's heirs, will instead give both the life estate and the remainder to the person, thus giving that person the land in fee simple absolute (full ownership without restriction).

**Rule of law:** Rule according to law; rule under law; or rule according to a higher law.

**Rule of 78:** A method of computing refunds of unearned finance charges on early payment of a loan so that the refund is proportional to the monthly unpaid balance.

**Rules of war:** A body of customs, practices, usages, conventions, protocols, treaties, laws, and other norms that govern the commencement, conduct, and termination of hostilities between belligerent states or parties.

**Ruling:** A judicial or administrative interpretation of a provision of a statute, order, regulation, or ordinance. The judicial determination of matters before the court such as the admissibility of evidence or the granting of a motion, which is an application for an order.

**Run:** To have legal validity in a prescribed territory; as in, the writ (a court order) *runs* throughout the county. To have applicability or legal effect during a prescribed period of time; as in, the STATUTE OF LIMITATIONS has *run* against the claim. To follow or accompany; to be attached to another thing in pursuing a prescribed course or direction; as in, the COVENANT (a written promise or restriction) *runs* with the land.

**Running with the land:** Passing with a transfer of the property. A provision in a deed by which the person to whom the land is transferred agrees to maintain a fence is an example of a COVENANT that runs with the land.

**S corporation:** A type of corporation that is taxed under subchapter S of the INTERNAL REVENUE CODE (26 U.S.C.A. § 1 et seq.).

**Sabotage:** The willful destruction or impairment of, or defective production of, war material or national defense material, or harm to war premises or war utilities. During a labor dispute, the willful and malicious destruction of an employer's property or interference with his normal operations.

**Said:** Mentioned earlier. Frequently used in contracts and other legal documents, with the same force as *aforesaid.*

**Sailor:** Person who navigates ships or assists in the conduct, maintenance, or service of ships.

**Sales law:** The law relating to the transfer of ownership of property from one person to another for value, which is codified in Article 2 of the UNIFORM COMMERCIAL CODE (UCC), a body of law governing mercantile transactions adopted in whole or in part by the states.

**Sales tax:** A state or local-level tax on the retail sale of specified property or services. It is a percentage of the cost of such. Generally, the purchaser pays the tax but the seller collects it as an agent for the government. Various taxing jurisdictions allow exemptions for purchases of specified items, including certain foods, services, and manufacturing equipment. If the purchaser and seller are in different states, a use tax usually applies.

**Salvage:** The portion of goods or property that has been saved or remains after some type of casualty, such as a fire.

**Same evidence test:** A method used by courts to assess whether a criminal prosecution is barred by the DOUBLE JEOPARDY CLAUSE of the FIFTH AMENDMENT to the U.S Constitution, which guarantees that no individual shall "be subject for the same offense to be twice put in jeopardy of life or limb." Under this test, if the evidence required to support a conviction in one crime also would have supported a conviction in another, then double jeopardy exists.

**San Francisco Vigilance Committees of 1851 and 1856:** Self-appointed law enforcement committees that were organized to maintain order in San Francisco, California, during the mid-nineteenth century.

**Sanction:** To assent, concur, confirm, approve, or ratify. The part of a law that is designed to secure enforcement by imposing a penalty for violation of the law or offering a reward for its observance. A punitive act taken by one nation against another nation that has violated a treaty or INTERNATIONAL LAW.

**Sanity:** Reasonable understanding; sound mind; possessing mental faculties that are capable of distinguishing right from wrong so as to bear legal responsibility for one's actions.

**Satisfaction:** The discharge of an obligation by paying a party what is due—as on a mortgage, lien, or contract—or by paying what is awarded to a person by the judgment of a court or otherwise.

An entry made on the record, by which a party in whose favor a judgment was rendered declares that she has been satisfied and paid.

The fulfillment of a gift by will, whereby the testator—one who dies leaving a will— makes an inter vivos gift, one which is made while the testator is alive to take effect while the testator is living, to the beneficiary with the intent that it be in lieu of the gift by will. In EQUITY, something given either in whole or in part as a substitute or equivalent for something else.

**Save:** To except, reserve, or exempt; as where a statute *saves* vested—fixed—rights. To toll, or suspend the running or operation of; as, to *save* the STATUTE OF LIMITATIONS.

**Saving clause:** In a statute, an exception of a special item out of the general things mentioned in the statute. A restriction in a repealing act, which is intended to save rights, while proceedings are pending, from the obliteration that would result from an unrestricted repeal. The provision in a statute, sometimes referred to as the severability clause, that rescues the balance of the statute from a declaration of unconstitutionality if one or more parts are invalidated.

With respect to existing rights, a saving clause enables the repealed law to continue in force.

**Savings and loan association:** A financial institution owned by and operated for the benefit of those using its services. The savings and loan association's primary purpose is making loans to its members, usually for the purchase of real estate or homes.

**Scab:** A pejorative term used colloquially in reference to a nonunion worker who takes the place of a union employee on strike or who works for wages and other conditions that are inferior to those guaranteed to a union member by virtue of the union contract.

**School desegregation:** The attempt to end the practice of separating children of different races into distinct public schools.

**Scienter:** *[Latin, Knowingly.]* Guilty knowledge that is sufficient to charge a person with the consequences of his or her acts.

**Scientific evidence:** Evidence presented in court that is produced from scientific tests or studies.

**Scintilla:** A glimmer; a spark; the slightest particle or trace.

**Scire facias:** *[Latin, Made known.]* A judicial writ requiring a defendant to appear in court and prove why an existing judgment should not be executed against him or her.

**Scope of employment:** Activities of an employee that are in furtherance of duties that are owed to an employer and where the employer is, or could be, exercising some control, directly or indirectly, over the activities of the employee.

**Scorched-earth plan:** A slang expression for a defensive tactic used by an unwilling corporate takeover target to make itself less attractive to a buyer.

**Seal:** To close records by any type of fastening that must be broken before access can be obtained. An impression upon wax, wafer, or some other substance capable of being impressed.

**Seal of the United States:** The official die or signet, which has a raised emblem and is used by federal officials on documents of importance.

**Sealed verdict:** A decision reached by the jury when the court is not in session, which is placed in a closed envelope by the jurors, who then separate.

**Search and seizure:** A hunt by law enforcement officials for property or communications believed to be evidence of crime, and the act of taking possession of this property.

In INTERNATIONAL LAW, the right of ships of war, as regulated by treaties, to examine a merchant vessel during war in order to determine whether the ship or its cargo is liable to seizure.

**Search warrant:** A court order authorizing the examination of a place for the purpose of discovering contraband, stolen property, or evidence of guilt to be used in the prosecution of a criminal action.

**Seasonable:** Within a reasonable time; timely.

**Seat belts:** A restraining device used to secure passengers in motorized vehicles.

**SEC:** An abbreviation for the SECURITIES AND EXCHANGE COMMISSION.

**Secession:** The act of withdrawing from membership in a group.

**Second look doctrine:** In the law of future interests, a rule that provides that even though the validity of interests created by the exercise of a power of appointment is ordinarily measured from the date the power is created, not from its exercise, the facts existing on the date of its exercise can be considered in order to determine if the RULE AGAINST PERPETUITIES has been violated.

**Secondary authority:** Sources of information that describe or interpret the law, such as legal treatises, law review articles, and other scholarly legal writings, cited by lawyers to persuade a court to reach a particular decision in a case, but which the court is not obligated to follow.

**Secondary boycott:** A group's refusal to work for, purchase from, or handle the products of a business with which the group has no dispute.

**Secondary evidence:** A reproduction of, or substitute for, an original document or item of proof that is offered to establish a particular issue in a legal action.

**Secondary meaning:** A doctrine of TRADEMARK law that provides that protection is afforded to the user of an otherwise unprotectable mark when the mark, through advertising or other exposure, has come to signify that an item is produced or sponsored by that user.

**Section:** The distinct and numbered subdivisions in legal codes, statutes, and textbooks. In the law of real property, a parcel of land equal in area to one square mile, or 640 acres.

**Secure:** To assure the payment of a debt or the performance of an obligation; to provide security.

**Secured creditor:** One who holds some special monetary assurance of payment of a debt owed to him or her, such as a mortgage, collateral, or lien.

**Secured transactions:** Business dealings that grant a creditor a right in property owned or held by a debtor to assure the payment of a debt or the performance of some obligation.

**Securities:** Evidence of a corporation's debts or property.

**Security:** Protection; assurance; indemnification.

**Security deposit:** Money aside from the payment of rent that a landlord requires a tenant to pay to be kept separately in a fund for use should the tenant cause damage to the premises or otherwise violate terms of the lease.

**Sedition:** A revolt or an incitement to revolt against established authority, usually in the form of TREASON or DEFAMATION against government.

**Seditious libel:** Written or spoken words, pictures, signs, or other forms of communication that tend to defame, discredit, criticize, impugn, embarrass, challenge, or question the government, its policies, or its officials; speech that advocates the overthrow of the government by force or violence or that incites people to change the government by unlawful means.

**Seduction:** The act by which a man entices a woman to have unlawful sexual relations with him by means of persuasions, solicitations, promises, or bribes without the use of physical force or violence.

**Segregation:** The act or process of separating a race, class, or ethnic group from a society's general population.

**Seizure:** Forcible possession; a grasping, snatching, or putting in possession.

**Selective prosecution:** Criminal prosecution based on an unjustifiable standard such as race, religion, or other ARBITRARY classification.

**Selectman or selectwoman:** A municipal officer elected by a town in the New England states.

**Self-incrimination:** Giving testimony in a trial or other legal proceeding that could subject one to criminal prosecution.

**Self-dealing:** The conduct of a trustee, an attorney, or other fiduciary that consists of taking advantage of his or her position in a transaction and acting for his or her own interests rather than for the interests of the beneficiaries of the trust or the interests of his or her clients.

**Self-defense:** The protection of one's person or property against some injury attempted by another.

**Self-determination:** The political right of the majority to the exercise of power within the boundaries of a generally accepted political unit, area, or territory.

**Self-executing:** Anything (e.g., a document or legislation) that is effective immediately without the need of intervening court action, ancillary legislation, or other type of implementing action.

**Self-executing treaty:** A compact between two nations that is effective immediately without the need for ancillary legislation.

**Self-help:** Redressing or preventing wrongs by one's own action WITHOUT RECOURSE to legal proceedings.

**Senate:** The upper chamber, or smaller branch, of the U.S. Congress. The upper chamber of the legislature of most of the states.

**Senior citizens:** Elderly persons, usually more than sixty or sixty-five years of age.

**Senior interest:** A right that takes effect prior to others or has preference over others.

**Seniority:** Precedence or preference in position over others similarly situated. As used, for example, with reference to job seniority, the worker with the most years of service is first promoted within a range of jobs subject to seniority, and is the last laid off, proceeding so on down the line to the youngest in point of service. The term may also refer to the priority of a lien or encumbrance.

**Sentencing:** The post-conviction stage of the criminal justice process, in which the defendant is brought before the court for the imposition of a penalty.

**Separate but equal:** The doctrine first enunciated by the U.S. Supreme Court in PLESSY V. FERGUSON, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), to the effect that establishing different facilities for blacks and whites was valid under the EQUAL PROTECTION CLAUSE of the FOURTEENTH AMENDMENT as long as they were equal.

**Separate maintenance:** Money paid by one married person to the other for support if they are no longer living as HUSBAND AND WIFE. Commonly it is referred to as separate support and follows from a court order.

**Separation:** A termination of COHABITATION of HUSBAND AND WIFE either by mutual agreement or, in the case of *judicial separation,* under the decree of a court.

**Separation of powers:** The division of state and federal government into three independent branches.

**Sequestration:** In the context of trials, the isolation of a jury from the public, or the separation of witnesses to ensure the integrity of testimony. In other legal contexts the seizure of property or the freezing of assets by court order.

**Seriatim:** *[Latin, Severally; separately; individually; one by one.]*

**Serjeant at law:** In English LEGAL HISTORY, an elite order of attorneys who had the exclusive privilege of arguing before the Court of Common Pleas and also supplied the judges for both Common Pleas and the Court of the King's Bench.

**Service:** Any duty or labor performed for another person.

The delivery of a legal document that notifies the recipient of the commencement of a legal action or proceeding in which he or she is involved.

**Service mark:** A TRADEMARK that is used in connection with services.

**Service of process:** Delivery of a writ, summons, or other legal papers to the person required to respond to them.

**Servitude:** The state of a person who is subjected, voluntarily or involuntarily, to another person as a servant. A charge or burden resting upon one estate for the benefit or advantage of another.

**Session:** The sitting of a court, legislature, council, or commission for the transaction of its proper business.

**Set aside:** To cancel, annul, or revoke a judgment or order.

**Set down:** To list a case in a court calendar or docket for trial or hearing during a particular term.

**Set-off:** A demand made by the defendant against the plaintiff that is based on some transaction or occurrence other than the one that gave the plaintiff grounds to sue.

**Setback:** A distance from a curb, property line, or structure within which building is prohibited.

**Settle:** To agree, to approve, to arrange, to ascertain, to liquidate, or to reach an agreement.

**Settlement:** The act of adjusting or determining the dealings or disputes between persons without pursuing the matter through a trial.

**Settlement statement:** A breakdown of costs involved in a real estate sale.

**Settlor:** One who establishes a trust—a right of property, real or personal—held and administered by a trustee for the benefit of another.

**Severable:** That which is capable of being separated from other things to which it is joined and maintaining nonetheless a complete and independent existence.

**Several:** Separate; individual; independent.

**Severalty ownership:** Sole proprietorship of property; individual dominion.

**Severance:** The act of dividing, or the state of being divided.

**Sex discrimination:** Discrimination on the basis of gender.

**Sex offenses:** A class of sexual conduct prohibited by the law.

**Sexual abuse:** Illegal sex acts performed against a minor by a parent, guardian, relative, or acquaintance.

**Sexual harassment:** Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that tends to create a hostile or offensive work environment.

**Sham:** False; without substance.

**Share:** A portion or part of something that may be divided into components, such as a sum of money. A unit of stock that represents ownership in a corporation.

**Shelter:** A general term used in statutes that relates to the provision of food, clothing, and housing for specified individuals; a home with a proper environment that affords protection from the weather.

**Shepardizing:** A term used in the legal profession to describe the process of using a citator to discover the history of a case or statute to determine whether it is still good law.

**Shepard's® Citations:** A set of volumes published primarily for use by judges when they are in the process of writing judicial decisions and by lawyers when they are preparing briefs, or memoranda of law, that contain a record of the status of cases or statutes.

**Sheriff:** Usually the chief peace officer of a county.

**Sheriff's deed:** A document giving ownership rights in property to a buyer at a sheriff's sale (a sale held by a sheriff to pay a court judgment against the owner of the property). A deed given at a sheriff's sale in foreclosure of a mortgage. The giving of said deed begins a STATUTORY REDEMPTION period.

**Shifting the burden of proof:** The process of transferring the obligation to affirmatively prove a fact in controversy or an issue brought during a lawsuit from one party in a legal controversy to the other party.

**Shipping law:** The area of maritime law that is concerned with ships and the individuals employed in or around them, as well as the shipment of goods by merchant vessels.

**Shock-the-conscience test:** A determination of whether a state agent's actions fall outside the standards of civilized decency.

**Shop-book rule:** A doctrine that allows the admission into evidence of books that consist of original entries made in the normal course of a business, which are introduced to the court from proper custody upon general authentication.

**Shop steward:** A LABOR UNION official elected to represent members in a plant or particular department. The shop steward's duties include collection of dues, recruitment of new members, and initial negotiations for settlement of grievances.

**Shoplifting:** Theft of merchandise from a store or business establishment.

**Short cause:** A legal matter that will not take up a significant amount of the time of the court and may be entered on the list of short causes upon application of one of the parties, where it will be dealt with more expediently than it would be in its regular order.

**Short sale:** A method of gaining profit from an anticipated decline in the price of a stock.

**Show cause:** An order by a court that requires a party to appear and to provide reasons why a particular thing should not be performed or allowed and mandates such party to meet the PRIMA FACIE case set forth in the complaint or AFFIDAVIT of the applicant.

**Show cause order:** A court order, made upon the motion of an applicant, that requires a party to appear and provide reasons why the court should not perform or not allow a particular action and mandates this party to meet the PRIMA FACIE case set forth in the complaint or AFFIDAVIT of the applicant.

**Show-up:** The live presentation of a criminal suspect to a victim or witness of a crime.

**Sic:** *Latin, In such manner; so; thus.*

**Sight draft:** A COMMERCIAL PAPER that is payable upon presentment.

**Signature:** A mark or sign made by an individual on an instrument or document to signify knowledge, approval, acceptance, or obligation.

**Simple:** Unmixed; not aggravated or compounded.

**Simultaneous death:** Loss of life by two or more individuals concurrently or pursuant to circumstances that render it impossible to ascertain who predeceased whom.

**Sine die:** *[Latin, Without day.]* Without day; without assigning a day for a further meeting or hearing.

**Sine qua non:** *[Latin, Without which not.]* A description of a requisite or condition that is indispensable.

**Single name paper:** A type of COMMERCIAL PAPER, such as a check or promissory note that has only one original signer or more than one maker signing for the exact same purpose.

**Single name partnership:** A business arrangement whereby two or more individuals, the partners, unite their skill, capital, and work in exchange for a proportional allocation of the profits and losses incurred but who engage in business under one name rather than the names of all the partners.

**Sit:** To hold court or perform an act that is judicial in nature; to hold a session, such as of a court, GRAND JURY, or legislative body.

**Situs:** *[Latin, Situation; location.]* The place where a particular event occurs.

**S.J.D.:** An abbreviation for doctor of judicial science, a degree awarded to highly qualified individuals who have successfully completed a prescribed course of legal doctorate study after having earned J.D. and LL.M. degrees.

**Slating:** The procedure by which law enforcement officials record on the blotter information about an individual's arrest and charges, together with identification and facts about his or her background.

**Slavery:** A civil relationship in which one person has absolute power over the life, fortune, and liberty of another.

**Slip decision:** A copy of a judgment by the U.S. Supreme Court or other tribunal that is printed and distributed almost immediately subsequent to the time that it is handed down by the court.

**Slip law:** A copy of a bill that is passed by a state legislature and endorsed by the governor, or passed by Congress and signed by the president, and is printed and distributed almost immediately.

**Small business:** A type of enterprise that is independently owned and operated, has few employees, does a small amount of business, and is not predominant in its area of operation.

**Small claims court:** A special court, sometimes called conciliation court, that provides expeditious, informal, and inexpensive adjudication of small claims.

**Smart money:** Vindictive, punitive, or exemplary damages given by way of punishment and example, in cases of gross misconduct of a defendant.

**Smuggling:** The criminal offense of bringing into, or removing from, a country those items that are prohibited or upon which customs or excise duties have not been paid.

**Social security:** A federal program designed to provide benefits to employees and their dependants through income for retirement, disability, and other purposes. The social security program is funded through a federal tax levied on employers and employees equally.

**Socialism:** An economic and social theory that seeks to maximize wealth and opportunity for all people through public ownership and control of industries and social services.

**Sodomy:** Anal or oral intercourse between human beings, or any sexual relations between a human being and an animal, the act of which may be punishable as a criminal offense.

**Software:** Intangible PERSONAL PROPERTY consisting of mathematical codes, programs, routines, and other functions that controls the functioning and operation of a computer's hardware.

**Sole proprietorship:** A form of business in which one person owns all the assets of the business, in contrast to a partnership or a corporation.

**Solicitation:** Urgent request, plea, or entreaty; enticing, asking. The criminal offense of urging someone to commit an unlawful act.

**Solicitor:** A type of practicing lawyer in England who handles primarily office work.

The title of the chief law officer of a government body or department, such as a city, town, or MUNICIPAL CORPORATION.

**Solicitor general:** An officer of the U.S. DEPARTMENT OF JUSTICE who represents the U.S. government in cases before the U.S. Supreme Court.

**Solvency:** The ability of an individual to pay his or her debts as they mature in the normal and ordinary course of business, or the financial condition of owning property of sufficient value to discharge all of one's debts.

**Son of Sam laws:** Laws that enable a state to use the proceeds a criminal earns from recounting his or her crime in a book, movie, television show, or other depiction. The laws are named after David Berkowitz, a New York serial killer who left a note signed "Son of Sam" at the scene of one of his crimes.

**Sovereign immunity:** The legal protection that prevents a sovereign state or person from being sued without consent.

**Sovereignty:** The supreme, absolute, and uncontrollable power by which an independent state is governed and from which all specific political powers are derived; the intentional independence of a state, combined with the right and power of regulating its internal affairs without foreign interference.

**Special appearance:** The act of presenting oneself in a court and thereby submitting to the court's jurisdiction, but only for a specific purpose and not for all the purposes for which a lawsuit is brought.

**Special assessment:** A real property tax proportionately levied on homeowners and landowners to cover the costs of improvements that will be for the benefit of all upon whom it is imposed.

**Special courts:** Bodies within the judicial branch of government that generally address only one area of law or have specifically defined powers.

**Special damages:** Pecuniary compensation for injuries that follow the initial injury for which compensation is sought.

**Special master:** A representative of the court appointed to hear a case involving difficult or specialized issues.

**Special term:** In court practice in some jurisdictions, a branch of the court system held by a single judge for hearing and deciding motions and equitable actions in the first instance.

**Special warranty deed:** A written instrument that conveys real property in which the grantor (original owner) only covenants to warrant and defend the title against claims and demands by him or her and all persons claiming by, through, and under him or her.

**Specialization:** A career option pursued by some attorneys that entails the acquisition of detailed knowledge of, and proficiency in, a particular area of law.

**Specialty:** A contract under seal.

**Specific intent:** The mental purpose, aim, or design to accomplish a specific harm or result by acting in a manner prohibited by law.

**Specific legacy:** A gift by will of designated PERSONAL PROPERTY.

**Specific performance:** An extraordinary equitable remedy that compels a party to execute a contract according to the precise terms agreed upon or to execute it substantially so that, under the circumstances, justice will be done between the parties.

**Speculative damages:** Alleged injuries or losses that are uncertain or contingent and cannot be used as a basis of recovery for TORT or contract actions.

**Speech plus:** A form of expression in which behavior is used by itself or in coordination with written or spoken words to convey an idea or message.

**Spending power:** The power of legislatures to tax and spend.

**Spendthrift:** One who spends money profusely and improvidently, thereby wasting his or her estate.

**Spendthrift trust:** An arrangement whereby one person sets aside property for the benefit of another in which, either because of a direction of the settlor (one who creates a trust) or because of statute, the beneficiary (one who profits from the act of another) is unable to transfer his or her right to future payments of income or capital, and his or her creditors are unable to subject the beneficiary's interest to the payment of his or her debts.

**Spin-off:** The situation that arises when a parent corporation organizes a subsidiary corporation, to which it transfers a portion of its assets in exchange for all of the subsidiary's capital stock, which is subsequently transferred to the parent corporation's shareholders.

**Split decision:** A decision by an appellate court that is not unanimous.

**Split-off:** The process whereby a parent corporation organizes a subsidiary corporation to which it transfers part of its assets in exchange for all of the subsidiary's capital stock, which is subsequently transferred to the shareholders of the parent corporation in exchange for a portion of their parent stock.

**Split-up:** An arrangement whereby a parent corporation transfers all of its assets to two or more corporations and then winds up its affairs.

**Spoliation:** Any erasure, interlineation, or other alteration made to COMMERCIAL PAPER, such as a check or promissory note, by an individual who is not acting pursuant to the consent of the parties who have an interest in such instrument.

**Sports law:** The laws, regulations, and judicial decisions that govern sports and athletes.

**Spot zoning:** The granting to a particular parcel of land a classification concerning its use that differs from the classification of other land in the immediate area.

**Squatter:** An individual who settles on the land of another person without any legal authority to do so, or without acquiring a legal title.

**SS:** An abbreviation used in the portion of an AFFIDAVIT, PLEADING, or record known as the statement of venue.

**Stale check:** A document that is a promise to pay money that is held for too long a period of time before being presented for payment.

**Stalking:** Criminal activity consisting of the repeated following and harassing of another person.

**Stamp tax:** A pecuniary charge imposed upon certain transactions.

**Stand:** The location in a courtroom where the parties and witnesses offer their testimony. To appear in court; to submit to the jurisdiction of the court.

**Stand mute:** The state of affairs that arises when a defendant in a criminal action refuses to plead either guilty or not guilty.

**Standard deduction:** The name given to a fixed amount of money that may be subtracted from the adjusted gross income of a taxpayer who does not itemize certain living expenses for INCOME TAX purposes.

**Standing:** The legally protectible stake or interest that an individual has in a dispute that entitles him to bring the controversy before the court to obtain judicial relief.

**Star chamber:** An ancient high court of England, controlled by the monarch, which was abolished in 1641 by Parliament for abuses of power.

**Stare decisis:** *[Latin, Let the decision stand.]* The policy of courts to abide by or adhere to principles established by decisions in earlier cases.

**State:** As a noun, a people permanently occupying a fixed territory bound together by common habits and custom into one body politic exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace and of entering into international relations with other states. The section of territory occupied by one of the United States. The people of a state, in their collective capacity, considered as the party wronged by a criminal deed; the public; as in the title of a case, "The State v. A. B." The circumstances or condition of a being or thing at a given time.

As a verb, to express the particulars of a thing in writing or in words; to set down or set forth in detail; to aver, allege, or declare. To set down in gross; to mention in general terms, or by way of reference; to refer.

**State action:** A requirement for claims that arise under the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT and CIVIL RIGHTS legislation, for which a private citizen seeks relief in the form of damages or redress based on an improper intrusion by the government into his or her private life.

**State courts:** Judicial tribunals established by each of the fifty states.

**State interest:** A broad term for any matter of public concern that is addressed by a government in law or policy.

**State lottery:** A game of chance operated by a state government.

**Statement of affairs:** A document that must be filed in BANKRUPTCY, which sets forth answers to questions concerning the debtor's past and present financial situation.

**State's evidence:** A colloquial term for testimony given by an ACCOMPLICE or joint participant in the commission of a crime, subject to an agreement that the person will be granted IMMUNITY from prosecution if she voluntarily, completely, and fairly discloses her own guilt as well as that of the other participants.

**States' rights:** A doctrine and strategy in which the rights of the individual states are protected by the U.S. Constitution from interference by the federal government.

**Status:** The standing, state, or condition of an individual; the rights, obligations, capacities, and incapacities that assign an individual to a given class.

**Status offense:** A type of crime that is not based upon prohibited action or inaction but rests on the fact that the offender has a certain personal condition or is of a specified character.

**Status quo:** *[Latin, The existing state of things at any given date.] Status quo ante bellum* means the state of things before the war. The *status quo* to be preserved by a preliminary injunction is the last actual, peaceable, uncontested status which preceded the pending controversy.

**Statute:** An act of a legislature that declares, proscribes, or commands something; a specific law, expressed in writing.

**Statute of frauds:** A type of state law, modeled after an old ENGLISH LAW, that requires certain types of contracts to be in writing.

**Statute of limitations:** A type of federal or state law that restricts the time within which legal proceedings may be brought.

**Statute of uses:** An ENGLISH LAW enacted in 1535 to end the practice of creating uses in real property by changing the purely equitable title of those entitled to a use into absolute ownership with the right of possession.

**Statute of wills:** An early ENGLISH LAW that provided that all individuals who owned land were permitted to leave or devise two-thirds of their property to anyone by written will and testament, effective upon their death.

**Statute of York:** An ENGLISH LAW enacted in 1318 that required the consent of Parliament in all legislative matters.

**Statutes at large:** An official compilation of the acts and resolutions of each session of Congress published by the Office of the Federal Register in the National Archives and Record Service.

**Statutory:** Created, defined, or relating to a statute; required by statute; conforming to a statute.

**Statutory rape:** Sexual intercourse by an adult with a person below a statutorily designated age.

**Statutory redemption:** The right granted by legislation to a mortgagor, one who pledges property as security for a debt, as well as to certain others, to recover the mortgaged property after a foreclosure sale.

**Stay:** The act of temporarily stopping a judicial proceeding through the order of a court.

**Steering:** The process whereby builders, brokers, and rental property managers induce purchasers or lessees of real property to buy land or rent premises in neighborhoods composed of persons of the same race.

**Stenographer:** An individual who records court proceedings either in shorthand or through the use of a paper-punching device.

**Sterilization:** A medical procedure where the reproductive organs are removed or rendered ineffective.

**Stipulation:** An agreement between attorneys that concerns business before a court and is designed to simplify or shorten litigation and save costs.

**Stock:** A security issued by a corporation that represents an ownership right in the assets of the corporation and a right to a proportionate share of profits after payment of corporate liabilities and obligations.

**Stock dividend:** A corporate distribution to shareholders declared out of profits, at the discretion of the directors of the corporation, which is paid in the form of shares of stock, as opposed to money, and increases the number of shares.

**Stock market:** The various organized stock exchanges and over-the-counter markets.

**Stock warrant:** A certificate issued by a corporation that entitles the person holding it to buy a certain amount of stock in the corporation, usually at a specified time and price.

**Stockholder's derivative suit:** A legal action in which a shareholder of a corporation sues in the name of the corporation to enforce or defend a legal right because the corporation itself refuses to sue.

**Stop and frisk:** The situation in which a police officer who is suspicious of an individual detains the person and runs his hands lightly over the suspect's outer garments to determine if the person is carrying a concealed weapon.

**Stop order:** A direction by a customer to a stock BROKER, directing the broker to wait until a stock reaches a particular price and then to complete the transaction by purchasing or selling shares of that stock.

**Stop payment order:** Revocation of a check; a notice made by a depositor to his or her bank directing the bank to refuse payment on a specific check drawn by the depositor.

**Stoppage in transit:** The right of a seller to prevent the delivery of goods to a buyer after such goods have been delivered to a common carrier for shipment.

**Straddle:** In the stock and commodity markets, a strategy in options contracts consisting of an equal number of put options and call options on the same underlying share, index, or commodity future.

**Straight-line depreciation:** A method employed to calculate the decline in the value of income-producing property for the purposes of federal taxation.

**Stranger:** A third person; anyone who is not a party to a particular legal action or agreement.

**Strategic lawsuits against public participation:** Retaliatory lawsuits intended to silence, intimidate, or punish those who have used public forums to speak, petition, or otherwise move for government action on an issue.

**Straw man:** An individual who acts as a front for others who actually incur the expense and obtain the profit of a transaction.

**Street railroad:** A railway that is constructed upon a thoroughfare or highway to aid in the transportation of people or property along the roadway.

**Strict construction:** A close or narrow reading and interpretation of a statute or written document.

**Strict foreclosure:** A decree that orders the payment of a mortgage of real property.

**Strict liability:** Absolute legal responsibility for an injury that can be imposed on the wrongdoer without proof of carelessness or fault.

**Strict scrutiny:** A standard of JUDICIAL REVIEW for a challenged policy in which the court presumes the policy to be invalid unless the government can demonstrate a compelling interest to justify the policy.

**Strike:** A work stoppage; the concerted refusal of employees to perform work that their employer has assigned to them in order to force the employer to grant certain demanded concessions, such as increased wages or improved employment conditions.

**String citation:** A series of references to cases that establish legal precedents and to other authorities that appear one after another and are printed following a legal assertion or conclusion as supportive authority.

**Strong-arm provision:** The segment of the federal BANKRUPTCY law that grants the trustee the rights of the most secured creditor, so that he or she is able to seize all of the debtor's property for proper distribution.

**Struck jury:** A special jury chosen in a manner whereby an appropriate official prepares a panel containing the names of forty-eight potential jurors and the parties strike off names until the number of jurors is reduced to twelve.

**Sua sponte:** *[Latin, Of his or her or its own will; voluntarily.]*

**Sub nomine:** *[Latin, Under the name; in the name of; under the title of.]*

**Sub silentio:** *[Latin, Under silence; without any notice being taken.]*

**Subcontractor:** One who takes a portion of a contract from the principal contractor or from another subcontractor.

**Subject matter jurisdiction:** The power of a court to hear and determine cases of the general class to which the proceedings in question belong.

**Subletting:** The leasing of part or all of the property held by a tenant, as opposed to a landlord, during a portion of his or her unexpired balance of the term of occupancy.

**Submerged lands:** Soil lying beneath water or on the oceanside of the tideland.

**Submission of controversy:** A procedure by which the parties to a particular dispute place any matter of real controversy existing between them before a court for a final determination.

**Submit:** To offer for determination; commit to the judgment or discretion of another individual or authority.

**Subordination:** To put in an inferior class or order; to make subject to, or subservient. A legal status that refers to the establishment of priority between various existing liens or encumbrances on the same parcel of property.

**Subornation of perjury:** The criminal offense of procuring another to commit perjury, which is the crime of lying, in a material matter, while under oath.

**Subpoena:** *[Latin, Under penalty.]* A formal document that orders a named individual to appear before a duly authorized body at a fixed time to give testimony.

**Subpoena duces tecum:** The judicial process used to command the production before a court of papers, documents, or other tangible items of evidence.

**Subrogation:** The substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that he or she who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or SECURITIES.

**Subscribe:** To write underneath; to put a signature at the end of a printed or written instrument.

**Subscription:** The act of writing one's name under a written instrument; the affixing of one's signature to any document, whether for the purpose of authenticating or attesting it, of adopting its terms as one's own expressions, or of binding one's self by an engagement which it contains. A written contract by which one engages to take and pay for capital stock of a corporation, or to contribute a sum of money for a designated purpose, either gratuitously, as in the case of subscribing to a charity, or in consideration of an equivalent to be rendered, as a subscription to a periodical, a forthcoming book, a series of entertainments, or the like.

**Subsidiary:** Auxiliary; aiding or supporting in an inferior capacity or position. In the law of corporations, a corporation or company owned by another corporation that controls at least a majority of the shares.

**Substance:** Essence; the material or necessary component of something.

**Substantial:** Of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable.

**Substantiate:** To establish the existence or truth of a particular fact through the use of competent evidence; to verify.

**Substantive due process:** The substantive limitations placed on the content or subject matter of state and federal laws by the DUE PROCESS Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.

**Substantive law:** The part of the law that creates, defines, and regulates rights, including, for example, the law of contracts, TORTS, wills, and real property; the essential substance of rights under law.

**Substituted service:** Service of process upon a defendant in any manner, authorized by statute or rule, other than PERSONAL SERVICE within the jurisdiction; as by publication, by mailing a copy to his or her last known address, or by personal service in another state.

**Succession:** The transfer of title to property under the law of DESCENT AND DISTRIBUTION. The transfer of legal or official powers from an individual who formerly held them to another who undertakes current responsibilities to execute those powers.

**Sue:** To initiate a lawsuit or continue a legal proceeding for the recovery of a right; to prosecute, assert a legal claim, or bring action against a particular party.

**Suffer:** To admit, allow, or permit.

**Suffrage:** The right to vote at public elections.

**Sui generis:** *[Latin, Of its own kind or class.]* That which is the only one of its kind.

**Sui juris:** *[Latin, Of his or her own right.]*

Possessing full social and CIVIL RIGHTS; not under any legal disability, or the power of another, or guardianship. Having the capacity to manage one's own affairs; not under legal disability to act for one's self.

**Suicide:** The deliberate taking of one's own life.

**Suit:** A generic term, of comprehensive signification, referring to any proceeding by one person or persons against another or others in a court of law in which the plaintiff pursues the remedy that the law affords for the redress of an injury or the enforcement of a right, whether at law or in EQUITY.

**Summary:** As a noun, an abridgment; brief; compendium; digest; also a short application to a court or judge, without the formality of a full proceeding.

As an adjective, short; concise; immediate; peremptory; off-hand; without a jury; provisional; statutory. The term as used in connection with legal proceedings means a short, concise, and immediate proceeding.

**Summary judgment:** A procedural device used during civil litigation to promptly and expeditiously dispose of a case without a trial. It is used when there is no dispute as to the material facts of the case and a party is entitled to judgment as a MATTER OF LAW.

**Summary proceedings:** An alternative form of litigation for the prompt disposition of legal actions.

**Summary process:** A legal procedure used for enforcing a right that takes effect faster and more efficiently than ordinary methods. The legal papers—a court order, for example—used to achieve an expeditious resolution of the controversy.

**Summons:** The paper that tells a defendant that he or she is being sued and asserts the power of the court to hear and determine the case. A form of legal process that commands the defendant to appear before the court on a specific day and to answer the complaint made by the plaintiff.

**Sumptuary laws:** Rules made for the purpose of restraining luxury or extravagance.

**Sunset provision:** A statutory provision providing that a particular agency, benefit, or law will expire on a particular date, unless it is reauthorized by the legislature.

**Sunshine laws:** Statutes that mandate that meetings of governmental agencies and departments be open to the public at large.

**Superior:** One who has a right to give orders; belonging to a higher grade.

**Supersede:** To obliterate, replace, make void, or useless.

**Supersedeas:** The name given to a writ, a court order, from a higher court commanding a lower court to suspend a particular proceeding.

**Supervening:** Unforeseen, intervening, an additional event or cause.

**Supplementary proceedings:** A proceeding in which a JUDGMENT DEBTOR is summoned into court for questioning by a JUDGMENT CREDITOR who has not received payment.

**Support:** As a verb, furnishing funds or means for maintenance; to maintain; to provide for; to enable to continue; to carry on. To provide a means of livelihood. To vindicate, to maintain, to defend, to uphold with aid or countenance.

As a noun, that which furnishes a livelihood; a source or means of living; subsistence, sustenance, maintenance, or living.

**Suppress:** To stop something or someone; to prevent, prohibit, or subdue.

**Supra:** *[Latin, Above; beyond.]* A term used in legal research to indicate that the matter under current consideration has appeared in the preceding pages of the text in which the reference is made.

**Supreme court:** An appellate tribunal with high powers and broad authority within its jurisdiction.

**Surcharge:** An overcharge or additional cost.

**Surety:** An individual who undertakes an obligation to pay a sum of money or to perform some duty or promise for another in the event that person fails to act.

**Surplusage:** Extraneous matter; impertinent, superfluous, or unnecessary.

**Surprise:** An unexpected action, sudden confusion, or an unanticipated event.

**Surrebutter:** In COMMON-LAW PLEADING, the plaintiff's factual reply to the defendant's rebutter or answer.

**Surrejoinder:** In the second stage of COMMON-LAW PLEADING, the plaintiff's answer to the defendant's rejoinder.

**Surrender:** To give up, return, or yield.

**Surrogate court:** A tribunal in some states with SUBJECT MATTER JURISDICTION over actions and proceedings involving, among other things, the probate of wills, affairs of decedents, and the guardianship of the property of INFANTS.

**Surrogate motherhood:** A relationship in which one woman bears and gives birth to a child for a person or a couple who then adopts or takes legal custody of the child; also called mothering by proxy.

**Surtax:** An additional charge on an item that is already taxed.

**Suspect classification:** A presumptively unconstitutional distinction made between individuals on the basis of race, national origin, alienage, or religious affiliation, in a statute, ordinance, regulation, or policy.

**Suspended sentence:** A sentence given after the formal conviction of a crime that the convicted person is not required to serve.

**Suspicion:** The apprehension of something without proof to verify the belief.

**Sustain:** To carry on; to maintain. To affirm, uphold or approve, as when an appellate court sustains the decision of a lower court. To grant, as when a judge sustains an objection to testimony or evidence, he or she agrees with the objection and gives it effect.

**Syllabus:** A headnote; a short note preceding the text of a reported case that briefly summarizes the rulings of the court on the points decided in the case.

**Symbolic delivery:** The constructive conveyance of the subject matter of a gift or sale, when it is either inaccessible or cumbersome, through the offering of some substitute article that indicates the donative intent of the donor or seller and is accepted as the representative of the original item.

**Symbolic speech:** Nonverbal gestures and actions that are meant to communicate a message.

**Syndicate:** An association of individuals formed for the purpose of conducting a particular business; a JOINT VENTURE.

**Synopsis:** A summary; a brief statement, less than the whole.

**Table of cases:** An alphabetized list of the judicial decisions that are cited, referred to, or explained in a book with references to the sections, pages, or paragraphs where they are cited.

**Tacit:** Implied, inferred, understood without being expressly stated.

**Tacking:** The process whereby an individual who is in ADVERSE POSSESSION of real property adds his or her period of possession to that of a prior adverse possessor.

**Tail:** Limited, abridged, reduced, or curtailed.

**Takeover:** To assume control or management of a corporation without necessarily obtaining actual title to it.

**Talesman:** An individual called to act as a juror from among the bystanders in a court.

**Tamper:** To meddle, alter, or improperly interfere with something; to make changes or corrupt, as in tampering with the evidence.

**Tangible:** Possessing a physical form that can be touched or felt.

**Tariff:** The list of items upon which a duty is imposed when they are imported into the United States, together with the rates at which such articles are taxed.

**Tax avoidance:** The process whereby an individual plans his or her finances so as to apply all exemptions and deductions provided by tax laws to reduce taxable income.

**Tax court:** A specialized federal or state court that decides cases involving tax-related controversies.

**Tax deed:** A written instrument that provides proof of ownership of real property purchased from the government at a TAX SALE, conducted after the property has been taken from its owner by the government and sold for delinquent taxes.

**Tax evasion:** The process whereby a person, through commission of FRAUD, unlawfully pays less tax than the law mandates.

**Tax rate:** The amount of charges imposed by the government upon personal or corporate income, capital gains, gifts, estates, and sales that are within its statutory authority to regulate.

**Tax return:** The form that the government requires a taxpayer to file with the appropriate official by a designated date to disclose and detail income subject to taxation and eligibility for deductions and exemptions, along with a remittance of the tax due or a claim for a refund of taxes that were overpaid.

**Tax sale:** A transfer of real property in exchange for money to satisfy charges imposed thereupon by the government that have remained unpaid after the legal period for their payment has expired.

**Taxable income:** Under the federal tax law, gross income reduced by adjustments and allowable deductions. It is the income against which tax rates are applied to compute an individual or entity's tax liability. The essence of taxable income is the accrual of some gain, profit, or benefit to a taxpayer.

**Taxable situs:** The location where charges may be levied upon PERSONAL PROPERTY by a government, pursuant to provisions of its tax laws.

**Taxation:** The process whereby charges are imposed on individuals or property by the legislative branch of the federal government and by many state governments to raise funds for public purposes.

**Taxing costs:** The designation given to the process of determining and charging to the losing party in a legal action the expenses involved in initiating or defending the action, to which the successful side is lawfully entitled.

**Taxpayer bill of rights:** A federal or state law that gives taxpayers procedural and substantive protection when dealing with a revenue department concerning a tax collection dispute.

**Taxpayer's suit:** An action brought by an individual whose income is subjected to charges imposed by the state or federal government, for the benefit of that individual and others in order to prevent the unlawful diversion of public funds.

**Telecommunications:** The transmission of words, sounds, images, or data in the form of electronic or electromagnetic signals or impulses.

**Temperance movement:** A movement in the United States to moderate or eliminate the consumption of alcoholic beverages.

**Temporary restraining order:** A court order that lasts only until the court can hear further evidence.

**Tenancy:** A situation that arises when one individual conveys real property to another individual by way of a lease. The relation of an individual to the land he or she holds that designates the extent of that person's estate in real property.

**Tenancy by the entirety:** A type of concurrent estate in real property held by a HUSBAND AND WIFE whereby each owns the undivided whole of the property, coupled with the RIGHT OF SURVIVORSHIP, so that upon the death of one, the survivor is entitled to the decedent's share.

**Tenancy in common:** A form of concurrent ownership of real property in which two or more persons possess the property simultaneously; it can be created by deed, will, or operation of law.

**Tenancy in coparcenary:** A type of concurrent estate in real property by which property rights were acquired only through intestacy by the female heirs when there were no surviving male heirs.

**Tenant:** An individual who occupies or possesses land or premises by way of a grant of an estate of some type, such as in fee, for life, for years, or at will. A person who has the right to temporary use and possession of particular real property, which has been conveyed to that person by a landlord.

**Tender:** An offer of money; the act by which one individual offers someone who is holding a claim or demand against him or her the amount of money that the offeror regards and admits is due, in order to satisfy the claim or demand, in the absence of any contingency or stipulation attached to the offer.

**Tender offer:** A proposal to buy shares of stock from the stockholders of a corporation, made by a group or company that desires to obtain control of the corporation.

**Tender years doctrine:** A doctrine rarely employed in CHILD CUSTODY disputes that provides that, when all other factors are equal, custody of a child of tender years— generally under the age of thirteen years— should be awarded to the mother.

**Tenement:** A comprehensive legal term for any type of property of a permanent nature— including land, houses, and other buildings as well as rights attaching thereto, such as the right to collect rent.

**Tenor:** An exact replica of a legal document in words and figures.

**Tenure:** A right, term, or mode of holding or occupying something of value for a period of time.

In feudal law, the principal mode or system by which a person held land from a superior in exchange for the rendition of service and loyalty to the grantor.

The status given to an educator who has satisfactorily completed teaching for a trial period and is, therefore, protected against summary dismissal by the employer.

A length of time during which an individual has a right to occupy a public or private office.

**Term:** An expression, word, or phrase that has a fixed and known meaning in a particular art, science, or profession. A specified period of time.

**Term of art:** A word or phrase that has special meaning in a particular context.

**Termination:** Cessation; conclusion; end in time or existence.

**Territorial courts:** Federal tribunals that serve as both federal and state courts in possessions of the United States—such as Guam and the Virgin Islands—that are not within the limits of any state but are organized with separate legislatures and executive and judicial officers appointed by the president.

**Territorial waters:** The part of the ocean adjacent to the coast of a state that is considered to be part of the territory of that state and subject to its sovereignty.

**Territoriality:** A term that signifies a connection or limitation with reference to a particular geographic area or country.

**Territories of the United States:** Portions of the United States that are not within the limits of any state and have not been admitted as states.

**Territory:** A part of a country separated from the rest and subject to a particular jurisdiction.

**Terrorism:** The unlawful use of force or violence against persons or property in order to coerce or intimidate a government or the civilian population in furtherance of political or social objectives.

**Test case:** A suit brought specifically for the establishment of an important legal right or principle.

**Testacy:** The condition or state of leaving a valid will at one's death to direct the distribution of one's estate.

**Testament:** Another name for a will.

**Testamentary:** Relating to wills.

**Testate:** One who dies leaving a valid will, or the description of this status.

**Testator:** One who makes or has made a will; one who dies leaving a will.

**Testify:** To provide evidence as a witness, subject to an oath or affirmation, in order to establish a particular fact or set of facts.

**Testimony:** Oral evidence offered by a competent witness under oath, which is used to establish some fact or set of facts.

**Theaters and shows:** Comprehensive terms for places where all types of entertainment events can be viewed, including films, plays, and exhibitions.

**Theft:** A criminal act in which property belonging to another is taken without that person's consent.

**Theodosian Code:** The legal code of the Roman Empire promulgated in A.D. 438 by the emperor Theodosius II of the East and accepted by the emperor Valentinian III of the West.

**Third degree:** A colloquial term used to describe unlawful methods of coercing an individual to confess to a criminal offense by overcoming his or her free will through the use of psychological or physical violence.

The least serious grade of a specific crime— the grades being classified by the law according to the circumstances under which the crime is committed—for which the least punishment specified by statute will be imposed.

**Third party:** A generic legal term for any individual who does not have a direct connection with a legal transaction but who might be affected by it.

**Threats:** Spoken or written words tending to intimidate or menace others.

**Three strikes laws:** Criminal statutes that mandate increased sentences for repeat offenders, usually after three serious crimes.

**Time draft:** A written order to pay a certain sum in money that is payable at a particular future date.

**Time is of the essence:** A phrase in a contract that means that performance by one party at or within the period specified in the contract is necessary to enable that party to require performance by the other party.

**Time, place, and manner restrictions:** Limits that government can impose on the occasion, location, and type of individual expression in some circumstances.

**Time-price differential:** A method whereby a seller charges one amount for the immediate cash payment of merchandise and another amount for the same item or items when payment is rendered at a future date or in installments.

**Timely:** Existing or taking place within the designated period; seasonable.

**Timeshare:** A form of shared property ownership, commonly in vacation or recreation condominium property, in which rights vest in several owners to use property for a specified period each year.

**Tithing:** In Western ecclesiastical law, the act of paying a percentage of one's income to further religious purposes. One of the political subdivisions of England that was composed of ten families who held freehold estates.

**Title:** In PROPERTY LAW, a comprehensive term referring to the legal basis of the ownership of property, encompassing real and PERSONAL PROPERTY and intangible and tangible interests therein; also a document serving as evidence of ownership of property, such as the certificate of title to a motor vehicle.

In regard to legislation, the heading or preliminary part of a particular statute that designates the name by which that act is known.

In the law of TRADEMARKS, the name of an item that may be used exclusively by an individual for identification purposes to indicate the quality and origin of the item.

**Title insurance:** A contractual arrangement entered into to indemnify loss or damage resulting from defects or problems relating to the ownership of real property, or from the enforcement of liens that exist against it.

**Title search:** The process of examining official county records to determine whether an owner's rights in real property are good.

**To wit:** That is to say; namely.

**Toll:** A sum of money paid for the right to use a road, highway, or bridge. To postpone or suspend. For example, to toll a STATUTE OF LIMITATIONS means to postpone the running of the time period it specifies.

**Tontine:** An organization of individuals who enter into an agreement to pool sums of money or something of value other than money, permitting the last survivor of the group to take everything.

**Torrens title system:** A system for recording land titles under which a court may direct the issuance of a certificate of title upon application by the landowner.

**Tort law:** A body of rights, obligations, and remedies that is applied by courts in civil proceedings to provide relief for persons who have suffered harm from the wrongful acts of others. The person who sustains injury or suffers pecuniary damage as the result of tortious conduct is known as the plaintiff, and the person who is responsible for inflicting the injury and incurs liability for the damage is known as the defendant or tortfeasor.

**Tortfeasor:** A wrongdoer; an individual who commits a wrongful act that injures another and for which the law provides a legal right to seek relief; a defendant in a civil tort action.

**Tortious:** Wrongful; conduct of such character as to subject the actor to civil liability under TORT LAW.

**Totten trust:** An arrangement created by a person depositing his or her own money in his or her own name in a bank account for the benefit of another.

**Towage service:** An act by which one vessel, known as the tug, supplies power in order to draw another vessel, called the tow.

**Town:** A civil and political subdivision of a state, which varies in size and significance according to location but is ordinarily a division of a county.

**Township:** In a government survey, a square tract of land six miles on each side, constituting thirty-six square miles. In some states, the name given to the political subdivision of a county.

**Tracing:** An equitable remedy that allows persons to track their assets after they have been taken by FRAUD, misappropriation, or mistake. The remedy is also used in BANKRUPTCY, commercial transactions, and property disputes in marital dissolution cases.

**Trade dress:** A product's physical appearance, including its size, shape, color, design, and texture.

**Trade name:** Names or designations used by companies to identify themselves and distinguish their businesses from others in the same field.

**Trade secret:** Any valuable commercial information that provides a business with an advantage over competitors who do not have that information.

**Trade union:** An organization of workers in the same skilled occupation or related skilled occupations who act together to secure for all members favorable wages, hours, and other working conditions.

**Trade usage:** Any system, custom, or practice of doing business used so commonly in a vocation, field, or place that an expectation arises that it will be observed in a particular transaction.

**Trademarks:** Distinctive symbols of authenticity through which the products of particular manufacturers or the salable commodities of particular merchants can be distinguished from those of others.

**Trading stamps and coupons:** A comprehensive term for any type of tickets, certificates, or order blanks that can be offered in exchange for money or something of value, or for a reduction in price when a particular item is purchased.

**Transcript:** A generic term for any kind of copy, particularly an official or certified representation of the record of what took place in a court during a trial or other legal proceeding.

**Transfer:** To remove or convey from one place or person to another. The removal of a case from one court to another court within the same system where it might have been instituted. An act of the parties, or of the law, by which the title to property is conveyed from one person to another.

**Transfer of assets:** The conveyance of something of value from one person, place, or situation to another.

**Transfer tax:** The charge levied by the government on the sale of shares of stock. A charge imposed by the federal and state governments upon the passing of title to real property or a valuable interest in such property, or on the transfer of a decedent's estate by inheritance, devise, or bequest.

**Transitory action:** A lawsuit that can be commenced in any place where personal SERVICE OF PROCESS can be made on the defendant.

**Transnational corporation:** Any corporation that is registered and operates in more than one country at a time; also called a multinational corporation.

**Transnational law:** All the law— national, international, or mixed—that applies to all persons, businesses, and governments that perform or have influence across state lines.

**Traverse:** In COMMON-LAW PLEADING, a denial of the plaintiff's assertions.

**Treason:** The betrayal of one's own country by waging war against it or by consciously or purposely acting to aid its enemies.

**Treasury stock:** Corporate stock that is issued, completely paid for, and reacquired by the corporation at a later point in time.

**Treaties in force:** A publication compiled by the Treaty Affairs Staff, Office of the Legal Adviser, DEPARTMENT OF STATE, which lists treaties and other international agreements of the United States that are on record with the Department of State.

**Treatise:** A scholarly legal publication containing all the law relating to a particular area, such as CRIMINAL LAW or LAND-USE CONTROL.

**Treaty:** A compact made between two or more independent nations with a view to the public WELFARE.

**Treble damages:** A recovery of three times the amount of actual financial losses suffered which is provided by statute for certain kinds of cases.

**Trespass:** An unlawful intrusion that interferes with one's person or property.

**Trespass to try title:** Another name for an EJECTMENT action to recover possession of land wrongfully occupied by a defendant.

**Trial:** A judicial examination and determination of facts and legal issues arising between parties to a civil or criminal action.

**Tribunal:** A general term for a court, or the seat of a judge.

**Trover:** One of the old common-law FORMS OF ACTION; a legal remedy for conversion, or the wrongful appropriation of the plaintiff's PERSONAL PROPERTY.

**True bill:** A term endorsed on an indictment to indicate that a majority of GRAND JURY members found that the evidence presented to them was adequate to justify a prosecution.

**Trust:** A relationship created at the direction of an individual, in which one or more persons hold the individual's property subject to certain duties to use and protect it for the benefit of others.

**Trust company:** A corporation formed for the purpose of managing property set aside to be used for the benefit of individuals or organizations.

**Trust deed:** A legal document that evidences an agreement of a borrower to transfer legal title to real property to an impartial third party, a trustee, for the benefit of a lender, as security for the borrower's debt.

**Trust receipt:** A document by which one individual lends money to purchase something and the borrower promises to hold the item for the benefit of the lender until such time as the debt is paid.

**Trustee:** An individual or corporation named by an individual, who sets aside property to be used for the benefit of another person, to manage the property as provided by the terms of the document that created the arrangement.

**Trusties:** Prison inmates who through their good conduct earn a certain measure of freedom in and around the prison in exchange for assuming certain responsibilities.

**Try:** To litigate a legal controversy; to argue a lawsuit in court as an attorney; to sit in the role of a judge or jury to investigate and decide upon QUESTIONS OF LAW and fact presented in such an action.

**Turpitude:** Conduct that is unjust, depraved, or shameful; that which is contrary to justice, modesty, or good morals.

**Tying arrangement:** An agreement in which a vendor conditions the sale of a particular product on a vendee's promise to purchase an additional, unrelated product.

**UCC:** An abbreviation for the UNIFORM COMMERCIAL CODE.

**UCCC:** An abbreviation for the Uniform Consumer Credit Code.

**UCMJ:** An abbreviation for the Uniform Code of Military Justice (10 U.S.C.A. § 801 et seq.).

**Ultimate facts:** Information essential to a plaintiff's right of action or a defendant's assertion of a defense.

**Ultra vires:** *[Latin, Beyond the powers.]* The doctrine in the law of corporations that holds that if a corporation enters into a contract that is beyond the scope of its corporate powers, the contract is illegal.

**Umpire:** A person chosen to decide a question in a controversy that has been submitted to ARBITRATION but has not been resolved because the arbitrators cannot reach agreement, or one who has been chosen to be a permanent arbitrator for the duration of a collective bargaining agreement.

**Unauthorized practice:** The performance of professional services, such as the rendering of medical treatment or legal assistance, by a person who is not licensed by the state to do so.

**Unconscionable:** Unusually harsh and shocking to the conscience; that which is so grossly unfair that a court will proscribe it.

**Underinclusiveness:** A characteristic of a statute or administrative rule dealing with FIRST AMENDMENT rights and other fundamental liberty interests, whereby the statute prohibits some conduct but fails to prohibit other, similar conduct.

**Understanding:** A general term referring to an agreement, either express or implied, written or oral.

**Undertaking:** A written promise offered as security for the performance of a particular act required in a legal action.

**Underwrite:** To insure; to sell an issue of stocks and bonds or to guarantee the purchase of unsold stocks and bonds after a public issue.

**Undue influence:** A judicially created defense to transactions that have been imposed upon weak and vulnerable persons that allows the transactions to be set aside.

**Unemployment compensation:** Insurance benefits paid by the state or federal government to individuals who are involuntarily out of work in order to provide them with necessities, such as food, clothing, and shelter.

**Unenumerated rights:** Rights that are not expressly mentioned in the written text of a constitution but instead are inferred from the language, history, and structure of the constitution, or cases interpreting it.

**Unethical conduct:** Behavior that falls below or violates the professional standards in a particular field. In law, this can include ATTORNEY MISCONDUCT or ethics violations. The standards for conduct to be observed by attorneys can be found in the Code of Professional Responsibility; members of the judiciary adhere to those found in the Canons of Judicial Ethics.

**Unfair competition:** Any fraudulent, deceptive, or dishonest trade practice that is prohibited by statute, regulation, or the COMMON LAW.

**Unfair labor practice:** Conduct prohibited by federal law regulating relations between employers, employees, and labor organizations.

**Uniform acts:** Laws that are designed to be adopted generally by all the states so that the law in one jurisdiction is the same as in another jurisdiction.

**Uniform commercial code:** A general and inclusive group of laws adopted, at least partially, by all the states to further uniformity and fair dealing in business and commercial transactions.

**Uniform crime reports:** Annual publications containing criminological data compiled by the FEDERAL BUREAU OF INVESTIGATION (FBI) and intended to assist in identifying law enforcement problems, especially with regard to: murder and non-negligent MANSLAUGHTER, forcible rape, ROBBERY, aggravated assault, BURGLARY, larceny-theft, motor vehicle theft, and ARSON. These studies provide a nationwide view of crime because they are based on statistics submitted by law enforcement agencies across the United States.

**Unilateral contract:** A contract in which only one party makes an express promise, or undertakes a performance without first securing a reciprocal agreement from the other party.

**Union shop:** A type of business in which an employer is allowed to hire a nonunion worker, who, however, must subsequently join the union in order to be permitted to continue work.

**United States Government Manual:** A comprehensive directory, published annually, that contains general information about the federal government with emphasis on the EXECUTIVE BRANCH and regulatory agencies, and also information about Congress and the Judicial Branch.

**Unities:** In real property law, the four characteristics that are peculiar to property owned by several individuals as joint tenants.

**Unitrust:** A right of property, real or personal, held by one person, the trustee, for the benefit of another, the beneficiary, from which a fixed percentage of the net fair market value of the assets, valued annually, is paid each year to the beneficiary.

**Unjust enrichment:** A general equitable principle that no person should be allowed to profit at another's expense without making restitution for the reasonable value of any property, services, or other benefits that have been unfairly received and retained.

**Unlawful:** Contrary to or unauthorized by law; illegal.

**Unlawful assembly:** A meeting of three or more individuals to commit a crime or carry out a lawful or unlawful purpose in a manner likely to imperil the peace and tranquillity of the neighborhood.

**Unlawful communications:** Spoken or written words tending to intimidate, menace, or harm others.

**Unlawful detainer:** The act of retaining possession of property without legal right.

**Unliquidated:** Unassessed or settled; not ascertained in amount.

**Unwritten law:** Unwritten rules, principles, and norms that have the effect and force of law though they have not been formally enacted by the government.

**Upset price:** The dollar amount below which property, either real or personal, that is scheduled for sale at an auction is not to be sold.

**U.S. Code:** A multivolume publication of the text of statutes enacted by Congress.

**U.S. Code Annotated®:** A multivolume work published by West Group that contains the complete text of federal laws enacted by Congress that are included in the U.S. Code, together with case notes (known as annotations) of state and federal decisions that interpret and apply specific sections of federal statutes, plus the text of presidential proclamations and executive orders.

**U.S. commissioners:** The former designation for U.S. magistrates.

**Usage:** A reasonable and legal practice in a particular location, or among persons in a specific business or trade, that is either known to the individuals involved or is well established, general, and uniform to such an extent that a presumption may properly be made that the parties acted with reference to it in their transactions.

**USC:** An abbreviation for U.S. Code.

**USCA®:** An abbreviation for U.S. Code Annotated.

**USCCAN®:** An abbreviation for *United States Code Congressional and Administrative News,* a source of new federal public laws that is published by West Group every two weeks when Congress is in session and once a month when Congress is not in session.

**USDC:** An abbreviation for U.S. District Court.

**Use:** The fact of being habitually employed in a certain manner. In real property law, a right held by an individual (called a *cestui que use*) to take the profits arising from a particular parcel of land that was owned and possessed by another individual.

**Use and occupation:** A kind of action brought by a landlord against an individual who had occupancy of the landlord's land or premises under an express or implied agreement requiring payment, but not under a leasehold contract that would allow the landlord to initiate an action for rent.

**Use tax:** A charge imposed on the use or possession of PERSONAL PROPERTY.

**Usufruct:** A CIVIL LAW term referring to the right of one individual to use and enjoy the property of another, provided its substance is neither impaired nor altered.

**Usurpation:** The illegal encroachment or assumption of the use of authority, power, or property properly belonging to another; the interruption or disturbance of an individual in his or her right or possession.

**Usury:** The crime of charging higher interest on a loan than the law permits.

**Uti possidetis:** A term used in INTERNATIONAL LAW to indicate that the parties to a particular treaty are to retain possession of that which they forcibly seized during a war.

**Utilitarianism:** In JURISPRUDENCE, a philosophy whose adherents believe that law must be made to conform to its most socially useful purpose. Although utilitarians differ as to the meaning of the

word *useful,* most agree that a law's utility may be defined as its ability to increase happiness, wealth, or justice. Conversely, some utilitarians measure a law's usefulness by its ability to decrease unhappiness, poverty, or injustice.

**Utter:** To publish or offer; to send into circulation.

**Uxor:** *[Latin, Wife.]* A woman who is legally married.

## V

**Vacate:** To annul, set aside, or render void; to surrender possession or occupancy.

**Vagrancy:** The condition of an individual who is idle, has no visible means of support, and travels from place to place without working.

**Vague:** Imprecise; uncertain; indefinite.

**Valid:** Binding; possessing legal force or strength; legally sufficient.

**Valuable consideration:** In the formation of a valid and binding contract, something of worth or value that is either a detriment incurred by the person making the promise or a benefit received by the other person.

**Valuation:** The process of determining the value or worth of an asset. There are several methods professionals use to perform a valuation, often including both objective and subjective criteria. Valuation is often used as a synonym for appraisal.

**Value:** The estimated or appraised worth of any object or property, calculated in money.

**Vandalism:** The intentional and malicious destruction of or damage to the property of another.

**Variance:** The discrepancy between what a party to a lawsuit alleges will be proved in pleadings and what the party actually proves at trial.

In ZONING law, an official permit to use property in a manner that departs from the way in which other property in the same locality can be used.

**Vel non:** *[Latin, Or not.]* A term used by the courts in reference to the existence or nonexistence of an issue for determination; for example: "We come to the merits vel non of this appeal," means "we come to the merits, or not, of this appeal," and refers to the possibility that the appeal backs merit.

**Vendee:** Buyer or purchaser; an individual to whom anything is transferred by a sale.

**Vendor:** Seller; an individual who transfers property for sale; merchant; retail dealer; supplier.

**Vendor and purchaser:** The legal relationship between the buyer and the seller of land during the interim period between the execution of the contract and the date of its consummation.

**Venire facias:** *[Latin, Cause to come.]* A judicial order or writ addressed to the sheriff of a county where a legal action is to take place, commanding the sheriff to assemble a jury.

**Venireman:** A member of a jury which has been summoned by a writ of venire facias.

**Venue:** A place, such as the territory from which residents are selected to serve as jurors.

A proper place, such as the correct court to hear a case because it has authority over events that have occurred within a certain geographical area.

**Verba:** *[Latin, Words.]* A term used in many legal maxims, including *verba sunt indices animi,* which means "words are the indicators of the mind or thought"; and *verba accipienda ut sortiantur effectum,* or "words are to be taken so that they may have some effect."

**Verdict:** The formal decision or finding made by a jury concerning the questions submitted to it during a trial. The jury reports the verdict to the court, which generally accepts it.

**Verify:** To make certain, to substantiate, or to confirm by formal oath, affirmation, or AFFIDAVIT.

**Versus:** *[Latin, Against.]* A designation used in the caption of a lawsuit to indicate the opposite positions taken by the parties.

**Vertical merger:** A merger between two business firms that have a buyer-seller relationship.

**Vest:** To give an immediate, fixed right of present or future enjoyment.

**Veterans' rights:** Legal rights and benefits extended to those who served on active duty in and have been honorably discharged from one of the ARMED SERVICES of the United States.

**Veto:** The refusal of an executive officer to assent to a bill that has been created and approved by the legislature, thereby depriving the bill of any legally binding effect.

**Vexatious litigation:** A legal action or proceeding initiated maliciously and without PROBABLE CAUSE by an individual who is not acting in GOOD FAITH for the purpose of annoying or embarrassing an opponent.

**Vicarious liability:** The TORT doctrine that imposes responsibility upon one person for the failure of another, with whom the person has a special relationship (such as PARENT AND CHILD, employer and employee, or owner of vehicle and driver), to exercise such care as a reasonably prudent person would use under similar circumstances.

**Vice:** A fault, flaw, defect, or imperfection. Immoral conduct, practice, or habit.

**Vice crimes:** A generic legal term for offenses involving immorality, including prostitution, lewdness, lasciviousness, and OBSCENITY.

**Victim assistance program:** Government program that provides information and aid to persons who have suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime.

**Victimless crimes:** Crime where there is no apparent victim and no apparent pain or injury. This class of crime usually involves only consenting adults in activities such as prostitution, SODOMY, and gambling where the acts are not public, no one is harmed, and no one complains of the activities. Some groups advocate legalizing victimless crimes by removing these acts from the law books. Other critics complain that there is no such thing as a victimless crime; whenever one of these crimes is committed but goes unpunished, individual mores, societal values, and the RULE OF LAW are undermined or compromised, rendering society itself the victim.

**Victims' rights:** Generally, the rights of the victims of a criminal act, whether at trial or after conviction of the perpetrator.

**Vigilantism:** Taking the law into one's own hands and attempting to effect justice according to one's own understanding of right and wrong; action taken by a voluntary association of persons who organize themselves for the purpose of protecting a common interest, such as liberty, property, or personal security; action taken by an individual or group to protest existing law; action taken by an individual or group to enforce a higher law than that enacted by society's designated lawmaking institutions; private enforcement of legal norms in the absence of an established, reliable, and effective law enforcement body.

**Vill:** In old ENGLISH LAW, a division of a hundred or wapentake; a town or a city.

**Virginia and Kentucky Resolves:** Resolutions passed by the Virginia and Kentucky legislatures in 1798 and 1799 protesting the federal ALIEN AND SEDITION ACTS of 1798.

**Virginia Declaration of Rights:** Statement of rights adopted by the colony of Virginia in 1776, which served as the model for the U.S. Constitution's BILL OF RIGHTS.

**Vis:** *[Latin, Force or violence.]* A term employed in many legal phrases and maxims, such as *vis injuriosa,* "wrongful force."

**Visa:** An official endorsement on a passport or other document required to secure an alien's admission to a country.

**Visible means of support:** A term employed in VAGRANCY statutes to test whether an individual has any apparent ability to provide for himself or herself financially.

**Visitation rights:** In a DIVORCE or custody action, permission granted by the court to a noncustodial parent to visit his or her child or children. Custody may also refer to visitation rights extended to grandparents.

**Vitiate:** To impair or make void; to destroy or annul, either completely or partially, the force and effect of an act or instrument.

**Viva voce:** *[Latin, With the living voice; by word of mouth.]* Verbally; orally.

**Viz.:** *[Latin, A contraction of the term* videlicet, *to wit, namely, or that is to say.]* A term used to highlight or make more specific something previously indicated only in general terms.

**Void:** That which is null and completely without legal force or binding effect.

**Void for vagueness doctrine:** A doctrine derived from the DUE PROCESS Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution that requires criminal laws to be drafted in language that is clear enough for the average person to comprehend.

**Voidable:** That which is not absolutely void, but may be avoided.

**Voir dire:** *[Old French, To speak the truth.]* The preliminary examination of prospective jurors to determine their qualifications and suitability to serve on a jury, in order to ensure the selection of fair and impartial jury.

**Volenti non fit injuria:** *[Latin, To the consenting, no injury is done.]* In the law of NEGLIGENCE, the precept that denotes that a person who knows and comprehends the peril and voluntarily exposes himself or herself to it, although not negligent in doing so, is regarded as engaging in an ASSUMPTION OF THE RISK and is precluded from a recovery for an injury ensuing therefrom.

**Voluntary act:** A crime that is the product of conscious choice and independent will.

**Voting trust:** A type of agreement by which two or more individuals who own corporate stock that carries VOTING RIGHTS transfer their shares to another party for voting purposes, so as to control corporate affairs.

**Vouchee:** Under a procedure in common law, a person from whom a defendant will seek indemnity if a plaintiff is successful in his or her action against the defendant.

**Voucher:** A receipt or release which provides evidence of payment or other discharge of a debt, often for purposes of reimbursement, or attests to the accuracy of the accounts.

**Vouching-in:** A procedural device used in common law by which a defendant notifies another, not presently a party to a lawsuit, that if a plaintiff is successful, the defendant will seek indemnity from that individual.

**Wadset:** In Scotland, the ancient term for a mortgage. A right by which lands or other property are pledged by their owner to a creditor in security for a debt, usually in the form of a mutual contract, in which one party sells the land and the other grants the right of reversion.

**Wage assignment:** The voluntary transfer in advance of a debtor's pay, generally in connection with a particular debt or judgment.

**Wage earner's plan:** A form of BANKRUPTCY under a former federal law whereby an individual retained her property and paid off a debt over a period of time, as determined by a court and subject to supervision by the court.

**Wager of battel:** A type of trial by combat between accuser and accused that was introduced into England by William the Conqueror (King William I) and his Norman followers after the Norman Conquest of 1066.

**Wager of law:** A procedure for defending oneself that could be used in a trial before one of the ancient courts of England.

**Wait-and-see doctrine:** A rule that permits consideration of events occurring subsequent to the inception of an instrument that pertains to the vesting of a future interest. If the specified contingency on which the creation of the interest depends actually occurs within the period of the RULE AGAINST PERPETUITIES, the interest is legally enforceable.

**Waive:** To intentionally or voluntarily relinquish a known right or engage in conduct warranting an inference that a right has been surrendered.

**Waiver:** The voluntary surrender of a known right; conduct supporting an inference that a particular right has been relinquished.

**Waiving time:** The process whereby an individual permits a court to take longer than usual in trying him or her on a criminal charge.

**Want:** The absence or deficiency of what is needed or desired.

**Want of consideration:** A comprehensive term for all transactions or situations where no inducement to a contract was intended to pass between the parties thereto and, therefore, no legally enforceable contract is created.

**Wanton:** Grossly careless or negligent; reckless; malicious.

**Wapentake:** A local division of a shire or county in old ENGLISH LAW; the term used north of the Trent River for the territory called a hundred in other parts of England.

**War:** Open and declared conflict between the armed forces of two or more states or nations.

**War crimes:** Acts that violate the international laws, treaties, customs, and practices governing military conflict between belligerent states or parties.

**Ward:** A person, especially an infant or incompetent, placed by the court in the care of a guardian.

**Warehouse receipt:** A written document given by a warehouseman for items received for storage in his or her warehouse, which serves as evidence of title to the stored goods.

**Warehouseman:** An individual who is regularly engaged in the business of receiving and storing goods of others in exchange for compensation or profit.

**Warrant:** A written order issued by a judicial officer or other authorized person commanding a law enforcement officer to perform some act incident to the administration of justice.

**Warrant of attorney:** A written authorization that allows an attorney named in it to appear in court and admit the liability of the person giving the warrant in an action to collect a debt.

**Warranty:** An assurance, promise, or guaranty by one party that a particular statement of fact is true and may be relied upon by the other party.

**Warranty deed:** An instrument that transfers real property from one person to another and in which the grantor promises that title is good and clear of any claims.

**Wash sale:** The buying and selling of the same or a similar asset within a short period of time.

A fictitious type of arrangement whereby a BROKER, upon receiving an order from one individual to purchase and an order from another individual to sell a certain amount of a particular stock or commodity, transfers it from one principal to the other and retains the difference in value.

**Waste:** Harmful or destructive use of real property by one in rightful possession of the property.

**Water rights:** A group of rights designed to protect the use and enjoyment of water that travels in streams, rivers, lakes, and ponds, gathers on the surface of the earth, or collects underground.

**Weapons:** A comprehensive term for all instruments of offensive or defensive combat, including items used in injuring a person.

**Weight of evidence:** Measure of credible proof on one side of a dispute as compared with the credible proof on the other, particularly the PROBATIVE evidence considered by a judge or jury during a trial.

**Weights and measures:** A comprehensive legal term for uniform standards ascribed to the quantity, capacity, volume, or dimensions of anything.

**Welfare:** Government benefits distributed to impoverished persons to enable them to maintain a minimum standard of well-being.

**West saxon lage:** The laws of the West Saxons, who lived in the southern and western counties of England, from Kent to Devonshire, during the Anglo-Saxon period.

**Westminster, First Statute of:** A law enacted in 1275 to enforce some of the provisions of MAGNA CHARTA and to liberalize the law of England.

**Westminster, Second Statute of:** An ENGLISH LAW enacted in 1285 that converted estates in fee simple conditional into estates in fee entail and rendered them inalienable, thereby strengthening the power of the nobility.

**Whaling:** The hunting of whales for food, oil, or both.

**Wharves:** Structures erected on the margin of NAVIGABLE WATERS where vessels can stop to load and unload cargo.

**Whereas:** On the contrary, although, when in fact. An introductory statement of a formal document.

**Whereby:** By or through which; by the help of which; in accordance with which.

**Wherefore:** For which reason.

**Whig party:** An influential and sometimes dominant American political party that began rising to prominence following the 1832 presidential election, the Whig Party would eventually disband over the issue of SLAVERY, as bitterly divided sectional factions within the party materialized across the North and South.

**Whistleblowing:** The disclosure by a person, usually an employee in a government agency or private enterprise, to the public or to those in authority, of mismanagement, corruption, illegality, or some other wrongdoing.

**White-collar crime:** Financial, economic, or corporate crime, usually involving FRAUD and theft, that is often carried out by sophisticated means. The result is usually economic loss for businesses, investors, and those affected by the actions of the perpetrator.

**White primary:** A legal device once employed by some Southern states to prevent African Americans from exercising their right to vote in a meaningful way.

**White supremacy groups:** Organizations that believe the Caucasian race is superior to all other races and therefore seek either to separate the races in the United States or to remove all non-Caucasians from the nation.

**Whiteacre:** A fictitious designation used by legal writers to describe a parcel of land.

**Wildcat strike:** An employee work stoppage that is not authorized by the LABOR UNION to which the employees belong.

**Will:** A document in which a person specifies the method to be applied in the management and distribution of his estate after his death.

**Willful:** Intentional; not accidental; voluntary; designed.

**Wilmot Proviso:** An unsuccessful 1846 congressional amendment that sought to ban SLAVERY in territories newly acquired from Mexico.

**Wind up:** The last phase in the dissolution of a partnership or corporation, in which accounts are settled and assets are liquidated so that they may be distributed and the business may be terminated.

**Wiretapping:** A form of electronic eavesdropping accomplished by seizing or overhearing communications by means of a concealed recording or listening device connected to the transmission line.

**Witan:** An Anglo-Saxon term that meant wise men, persons learned in the law; in particular, the king's advisers or members of his council.

**Withholding tax:** The amount legally deducted from an employee's wages or salary by the employer, who uses it to prepay the charges imposed by the government on the employee's yearly earnings.

**Within the statute:** Encompassed by, or included under, the provisions and scope of a particular law.

**Without day:** A term used to describe a final ending or adjournment of a session of a legislature or a court; the English translation of the Latin phrase *sine die.*

**Without prejudice:** Without any loss or waiver of rights or privileges.

**Without recourse:** A phrase used by an endorser (a signer other than the original maker) of a negotiable instrument (for example, a check or promissory note) to mean that if payment of the instrument is refused, the endorser will not be responsible.

**Witnesses:** Individuals who provide evidence in legal proceedings before a tribunal. Persons who give testimony under oath in court, concerning what they have seen, heard, or otherwise observed.

**Women's rights:** The effort to secure equal rights for women and to remove gender discrimination from laws, institutions, and behavioral patterns.

**Woods and forests:** A comprehensive term for a large collection of trees in their natural setting and the property on which they stand.

**Words and Phrases®:** A multivolume set of law books published by West Group containing thousands of judicial definitions of words and phrases, arranged alphabetically, from 1658 to the present.

**Words of art:** The vocabulary or terminology of a particular art, science, or profession, particularly those expressions that are peculiar to it.

**Words of limitation:** The words in a deed or will that indicate what type of estate or rights the person being given land receives.

**Words of purchase:** Language used in connection with a transfer of real property that identifies the grantees or designees who take the interest being conveyed by deed or will.

**Work product rule:** A legal doctrine that provides that certain materials prepared by an attorney who is acting on behalf of his or her client during preparation for litigation are privileged from discovery by the attorney for the opposition party.

**Workers' compensation:** A system whereby an employer must pay, or provide insurance to pay, the lost wages and medical expenses of an employee who is injured on the job.

**Worthier title doctrine:** A COMMON LAW rule that provides that a conveyance of real property by a grantor to another person for life with a limitation to the grantor's heirs creates a reversion in the grantor by which his or her heirs acquire the property only upon the death of the grantor, not upon the death of the person who has been granted the property for life.

**Writ:** An order issued by a court requiring that something be done or giving authority to do a specified act.

**Wrong:** A violation, by one individual, of another individual's legal rights.

**Wrongful birth:** A MEDICAL MALPRACTICE claim brought by the parents of a child born with birth defects, alleging that negligent treatment or advice deprived them of the opportunity to avoid conception or terminate the pregnancy.

**Wrongful death:** The taking of the life of an individual resulting from the willful or negligent act of another person or persons.

**Wrongful discharge:** An at-will employee's CAUSE OF ACTION against his former employer, alleging that his discharge was in violation of state or federal antidiscrimination statutes, public policy, an implied contract, or an implied COVENANT of GOOD FAITH and fair dealing.

**Wrongful life:** A type of MEDICAL MALPRACTICE claim brought on behalf of a child born with birth defects, alleging that the child would not have been born but for negligent advice to, or treatment of, the parents.

**Wrongful pregnancy:** A claim by parents for damages arising from the negligent performance of a sterilization procedure or ABORTION, and the subsequent birth of a child.

**X rating:** A classification devised by the Motion Picture Association of America (MPAA) and the National Association of Theater Owners (NATO) in 1968 to designate certain films containing excessive violence or explicit sexuality. It was replaced in 1990 by the NC-17 rating (no one 17 and under admitted).

**XYY chromosomal abnormality defense:** A legal theory that holds that a defendant's XYY chromosomal abnormality is a condition that should relieve him or her of legal responsibility for his or her criminal act.

**XYZ affair:** A diplomatic scandal involving France and the United States in 1797– 1798.

**Yalta agreement:** A WORLD WAR II accord made in 1945 between Great Britain, the United States, and the Soviet Union.

**Year books:** Books of legal cases, or reporters, published annually in England from the thirteenth to the sixteenth century.

**Yellow dog contract:** An employment agreement whereby a worker promises not to join a LABOR UNION or promises to resign from a union if he or she is already a member.

**Yield:** Current return from an investment or expenditure as a percentage of the price of investment or expenditure.

**York-Antwerp rules:** A group of directives relating to uniform bills of lading and governing the settlement of maritime losses among the several interests, including ship and cargo owners.

**Zero bracket amount:** A lump-sum allowance of income that a taxpayer could receive without imposition of any federal INCOME TAX because it was considered equivalent to the standard amount of deductions usually taken by an average taxpayer. It was replaced by the standard deduction in the TAX REFORM ACT OF 1986. 100 Stat. 2085, 26 U.S.C.A. §§ 47, 1042.

**Zero tolerance:** The policy of applying laws or penalties to even minor infringements of a code in order to reinforce its overall importance and enhance deterrence.

**Zoning:** The separation or division of a municipality into districts, the regulation of buildings and structures in such districts in accordance with their construction and the nature and extent of their use, and the dedication of such districts to particular uses designed to serve the GENERAL WELFARE.

# CASES INDEX

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